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Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association

Inside

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Table of Contents

Remarks from the Chair

I am honored to be serving as Chair of the Entertainment, Arts and Sports Law Section for 2012–2014. Our membership now exceeds 2,000, a milestone for EASL, and I am confident that it will continue to grow in number and excellence in programming as we continue to break new ground in the areas of diversity, program integrity, and international initiatives.

Our year in EASL is off to a fabulous start. The EASL Program during the January 2012 NYSBA Annual Meeting in Manhattan had a record number of attendees, due in no small part to our stellar Program Co-Chairs Judith Bass, Ethan Bordman, Diane Krausz, and Carol Steinberg. The two-part program focused on Literary Publishing (E-books, and New Models of Publishing) and Trending Topics in Licensing and Branding. The programs were informative, timely, thought-provoking, ground-breaking and well received (see p. 52 for the full transcript of the Annual Meeting). Post program, many of us walked a short distance over to the EASL Cocktail Reception held at the exquisite offices of UBS, where we were entertained by the delightful music of Karl Kramer (keyboard and horn) and Larry Goldman (bass). We also enjoyed a tour of the UBS Art Collection, a unique opportunity arranged by our Immediate Past Chair Judith Prowda in concert with our Program Co-Chairs. To our UBS hosts, Richard Grassey, Kristine Flyntz and Nora Reitemeyer, we offer sincere thanks and appreciation for the memorable occasion. As if the evening could not get any better, on behalf of EASL, Judith Prowda presented the EASL Award for exemplary efforts in promoting the arts, entertainment, or sports in New York, to Mayor Michael R. Bloomberg (see p. 19 for Judith's speech). The Mayor has, among other things, greatly enhanced the ability to create in New York on many fronts, allowing New York to be fertile ground for innovation, art, and entertainment. Accepting on the Mayor's behalf was Corporation Counsel Michael Cardozo, who has many great achievements of his own. Gracious and heartwarming, Mr. Cardozo's words of acceptance were appreciated by all in attendance.

The business portion of the day began with the EASL Section Meeting where a by-laws amendment was passed expanding the number of officers by two, namely Second Vice-Chair and Assistant Treasurer, and adjusting language regarding election of delegates and alternate delegates to the NYSBA House of Delegates. With this adjustment in the by-laws, Section Officers were elected by the membership along with District Representatives, Delegates and one Alternate Delegate to the NYSBA House of Delegates.

In addition, the winners of the 2011 BMI/Phil Cowan Memorial Scholarship competition were announced. EASL holds this writing competition on a yearly basis, and it is open to law students of accredited laws schools within New York State and Rutgers University Law School, Seton Hall Law School, and up to 10 other selected accredited law schools throughout the country on a rotating basis. Each year this competition grows, and we are continuously impressed with law student submissions. This year the scholarship submissions were especially outstanding and contemporary, and the winners Patrick Siler, St. John's University School of Law ("The Gershwins' *Porgy and Bess*: A Case Study of Racial Discrimination in Theatrical Casting,"see p. 44) and Eric C. Schonberg, New York Law School ("One Continent, One Sport…One Channel? The *Premier League* Decision and the Future of Sports Broadcast Licensing in Europe,"see p. 97), each received a scholarship of $2,500. Both papers are published in this edition of the *EASL Journal*, and I am confident you will enjoy reading them. Many thanks go to our Scholarship Committee Co-Chairs, Judith Bresler, Hon. Barbara Jaffe, and Gary Roth for organizing this wonderful opportunity for law students, and to the members of the Committee for their participation in judging the papers.

In addition to the BMI/Phil Cowan Memorial Scholarship competition, our *EASL Journal* acknowledges law student articles on a regular basis through its Law Student Initiative (LSI). Law students who are EASL members may submit articles based on entertainment, arts and/or sport law topics. Please see page 16 for submission requirements.

The past two years have been years of brilliant expansion for our Section. Under the exemplary leadership of our Immediate Past Chair Judith Prowda, we have gained so much: our membership has been energized, our Diversity Committee endeavors have been recognized by NYSBA, and several new committees have been established, including an International Committee, giving EASL a global presence. There are just a few of the accomplishments of Judith's tenure, and, as a result, our outreach is broader and brighter than ever.

On the horizon, we have some fabulous programs in store for the coming months. Confirmed programs include a first-ever, two-day seminar in conjunction with the Commercial Theatre Institute. EASL's Theatre and Performing Arts Committee Co-Chairs Jason Baruch and Diane Krausz organized a program entitled *Legal Aspects*

of Producing: An Inside Approach to Navigating the Theatrical World, which took place over the evenings of April 11th and 12th in Manhattan. This innovative program started with the basics and evolved to mock negotiations on day two. In May, the Co-Chairs of the Motion Pictures Committee (Mary Ann Zimmer and Steve Rodner) and the Co-Chairs of the Television and Radio Committee (Pamela Cathlyn Jones and Barry Skidelsky) have teamed up once again for their annual CLE luncheon with Stan Soocher, who will be presenting recent developments in the law. In June, look for a repeat of our Membership Wine Tasting Dinner. Last June a number of our members gathered for an exceptional and informal evening of wine tasting, dining and lively conversation at a select restaurant in Manhattan, organized by Membership Co-Chair Jessica Thaler. We look forward to doing this again in June and hope you will join us. Also in June, three EASL Committees have combined their efforts to offer a program that spans several disciplines. On June 14th, the Music and Recording Industry Committee (Christine Pepe—Chair), Television and Radio Committee (Pamela Cathlyn Jones and Barry Skidelsky—Co-Chairs) and the Motion Pictures Committee (Mary Ann Zimmer and Steve Rodner—Co-Chairs) will be presenting *Licensing Music for Film and Television: A survey of existing and emerging business models, relevant statutory and case law, and the technology driving it all*.

By the time you read this, other outstanding EASL programs will have taken place, such as *On the Heels of the Week: Fashion Law Trends Debated*, on March 1st, another first-of-its-kind program examining fashion law and the industry organized by Fashion Law Committee Co-Chairs David H. Faux and Cathy A. Mitchell. EASL will also have co-sponsored the Fordham Law Symposium at Fordham Law School on March 31st, an annual event offering major-league perspectives on significant issues confronting major-league sports. This year EASL's Sports Committee Co-Chair Matthew Pace coordinated the program with Fordham Law School. With a myriad of programs scheduled and in the works, EASL members will have many interesting options from which to choose.

On the Diversity stage, EASL is again at the forefront. Our Diversity Committee, Co-Chaired by Anne Atkinson and Cheryl Davis, with integral systems assistance from Irina Tarsis, has created a Mentor/Mentee program which will offer seasoned and junior lawyers the opportunity to interact on a regular, one-to-one, volunteer basis. Created by Elissa Hecker and Cheryl Davis, this program will allow Mentees (junior lawyers, lawyers in transition and law students) to benefit from the knowledge and guidance of volunteer Mentors (seasoned attorneys) who have agreed to offer at least an hour of their time per month to guide their assigned Mentee throughout the year. Please consider signing up for this valuable opportunity by completing the EASL Diversity Mentor/Mentee Questionnaire available on our website and the EASL Blog. Additionally, our Diversity Committee continues to plan programs with other diverse bar associations, which are always of great interest to all of our members.

Finally, EASL has gone international! Our Immediate Past Chair, Judith Prowda, has had the foresight of establishing an International Committee within the EASL Section—our first with cross-border co-chairs. We welcome Co-Chair Eric J. Stenshoel, of Curtis Mallet-Prevost Colt & Mosle, LLP, who practices in Manhattan, and Co-Chair Brian D. Wynn, of Gardiner Roberts LLP, who practices in Toronto, Ontario, Canada. We are delighted to expand our horizons with this new Committee and look forward to some interesting, and perhaps international, events.

There is much ahead this year for EASL, and as we all know it could not happen without a dedicated team of inspiring officers. I am most pleased to report that we have assembled quite the cast for EASL: First Vice-Chair—Stephen B. Rodner, Second Vice-Chair—Diane F. Krausz, Secretary—Pamela Cathlyn Jones, Treasurer—Jason P. Baruch, Assistant Secretary—Jay Kogan, and Assistant Treasurer—Carol J. Steinberg. Each officer is an Executive Committee stalwart, active program co-chair and presenter, and genuine trooper. My sincere thanks and appreciation to each of them for agreeing to serve EASL in this important capacity.

Our Committee Chairs and Co-Chairs never cease to amaze us with their innovative programs and initiatives. Our sincere thanks to them for their continued creativity, forward-thinking, and generous giving of their time.

In Albany, EASL is fortunate to have select folks whose invaluable efforts and guidance allow us to realize our programs, events, publications, communications, and all the things that make EASL work. With great appreciation, I look forward to working with Beth Gould, our Section Liaison, Tiffany Bardwell, our immediate past Section Liaison, and past Section Liaison extraordinaire Dan McMahon in Publications.

Lastly, I wish to thank our Immediate Past Chair, Judith Prowda, for her wisdom, grace and candor. She is a leader who has broadened the scope of EASL through diversity of thought and person, which will endure. She has left quite the high pair of heels to fill. I treasure her friendship and guidance, and look forward to her continued contribution in shaping the evolution of EASL.

I am eager to meet with many of you at EASL events this spring. I hope that you will enjoy and contribute to our engaging and enlightening Blog and *Journal*, and I encourage each of you to be an active part of EASL.

Rosemarie Tully

Editor's Note

Happy Spring! I am pleased to provide you with an issue replete with interesting, timely and well written articles. In addition, for those of you who could not attend the Annual Meeting, the transcript is enclosed.

As always, I look forward to hearing from you, either via feedback to articles, or with submissions.

Elissa

The next EASL Journal deadline is Friday, May 25th.

Elissa D. Hecker practices in the fields of copyright, trademark and business law. Her clients encompass a large spectrum of the entertainment and corporate worlds. In addition to her private practice, Elissa is a Past Chair of the EASL Section. She is also Co-Chair and creator of EASL's Pro Bono Committee, Editor of the EASL Blog, Editor of *Entertainment Litigation* and *Counseling Content Providers in the Digital Age*, a frequent author, lecturer and panelist, a member of the Board of Editors for the NYSBA Bar *Journal*, Advisory Committee Member for Dance/NYC, a member of the Copyright Society of the U.S.A (CSUSA), a member of the Board of Editors for the *Journal of the CSUSA* and Editor of the CSUSA *Newsletter*. Elissa is a 2011 Super Lawyers Rising Star, the recipient of the CSUSA's first ever Excellent Service Award and recipient of the New York State Bar Association's 2005 Outstanding Young Lawyer Award. She can be reached at (914) 478-0457, via email at: EHeckerEsq@yahoo.com or through her website at EHECKERESQ.com.

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

> *Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.*

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, NY 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Pro Bono Update

Pro Bono Steering Committee:

Clinics:	Elissa D. Hecker, Kathy Kim
Speakers' Bureau:	Carol Steinberg
NYFA:	Elissa D. Hecker, Carol Steinberg
Litigations:	Irina Tarsis

Clinics

In November we had a highly successful Clinic with the New York Foundation for the Arts (NYFA), where many volunteers from the EASL and IP Sections helped a variety of clients.

Thank you to these volunteers:

Joana Aggrey
Nicole Baffi
Kellyn Bergstrand
Lisa Brandquist
Robert A. Celestin
Jennifer Chen Tran
Greg DePaul
Carol S. Desmond
Joe DiCioccio
Dana Hall
Elissa D. Hecker
Pippa Loengard
David Leyden
James R. Major

Erika Maurice
Melissa Morales
Madeleine M. Nichols
Jenna Norys
Henry Park
Bret Parker
Andrew Rausa
Maysa Razavi
Jennifer Newman Sharpe
Zak Shusterman
Brooke Smarsh
Innes Smolansky
Jo-Na A. Williams

The overwhelming feedback was positive, and we are planning another Clinic with NYFA May 15th. By the time you read this you will have already received information about how to volunteer, by e-mailing Elissa Hecker at eheckeresq@yahoo.com. As always, we were able to match newly admitted attorneys, attorneys in transition and law students with more senior attorneys for all of the clients, with great results. The Pro Bono Steering Committee also continues to work closely with the Mentor Program of the Diversity Committee.

NYFA BUILD Program

Last year EASL's Pro Bono Steering Committee partnered with NYFA to present a day-long program on "Legal Issues Facing the Dance Community" to recipients of NYFA's BUILD program (BUILD is a grant program to help dance companies become

more entrepreneurial and to strengthen their administrative capacities).

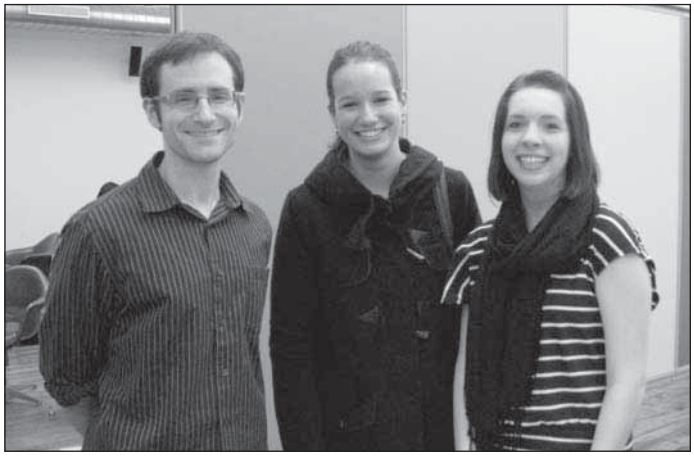
Our program was very well received, and the dancers wanted more. So this year we again partnered with NYFA to present a panel on legal issues, which spearheaded another day long program for the BUILD recipients. EASL's Carol Steinberg and NYFA's Peter Cobb created the panel, which was called "Dancing In Step with New York Law."

The panelists were Sheafe Walker, Esq. (an EASL member) and Emily Gray, an insurance expert and dancer from Fractured Atlas, and was moderated with great humor and wit by Diane Krausz, EASL's First Vice-President.

Since a common concern is dancers who get injured, the BUILD recipients wanted information about handling worker's compensation issues.

The panelists gave an overview of the law and how it affects the day to day operation of dance companies, such as paying dancers as "employees" or independent contractors, how to determine if someone is an employee or independent contractor, the consequences of treating someone as an independent contractor who is actually an employee, and what it costs to have a salaried employee.

The panel also addressed other insurance issues, such as liability insurance and renting rehearsal and performance space. In addition, the panelists discussed licensing music, the copyrights involved, licensing information, and contracts for commissioning music.



NEW YORK STATE BAR ASSOCIATION
NYSBA One Elk Street, Albany, New York 12207 • 518.463.3200 • www.nysba.org

January 6, 2012

Dear President Doyle,

The Entertainment, Arts and Sports Law (EASL) Section hopes to foster diversity in its many forms in both our Section and the legal profession in general, by, among other things, seeking to make our Section a welcoming, inclusive and collegial group for all of our members, and increasing opportunities for interaction among all persons. We enthusiastically support your Diversity Challenge.

I am thrilled to report on the efforts of EASL thus far. Summarized below are the goals we set for ourselves and their status. Our Diversity Challenge Committee, which has met nine times since last September, is comprised of our Diversity Committee co-chairs, Anne S. Atkinson and Cheryl L. Davis, along with Rakhi Bahadkar, Rich Boyd, Nyasha Foy, Elissa Hecker, Asia Sanders, Jessica Thaler, Rob Thony, Rosemarie Tully, and myself. We are very pleased that our Committee includes not only members of EASL's Executive Committee but also members of the Section.

1. **Holding at Least Two Joint CLE Events with Minority Bar Associations** followed by networking/member appreciation receptions, subject to budget. This effort is being led by Rich Boyd and Rob Thony.

Last November, we held a joint CLE program with the Black Entertainment and Sports Lawyers Association (BESLA) and the Entertainment and Sports Law Committee of the Metropolitan Black Bar Association (MBBA) at New York Law School, preceded (and briefly followed) by networking over cookies and coffee. The program, "From Pitch to Pilot," featured lively, informative industry panelists in a mock negotiation regarding a reality television program's development. The CLE program was fully subscribed, and engendered vigorous audience participation as well as wonderful feedback by all the attendees. We owe our sincere and hearty congratulations to Rich and Rob, as well as to our Law Student Liaison Nyasha Foy, who participated in the panel and helped with logistics.

We are in the early planning stages for a second CLE on a sports-labor topic, tentatively to be held in the first week of March 2012. We are investigating other diverse bar associations with existing sports law committees and potential speakers, in addition to BESLA and MBBA.

2. **Establishing a Mentoring Program** for diverse 2L law students, new lawyers, lawyers in transition and/or those who wish to shift areas of practice to entertainment, arts or sports law. This project is headed by Cheryl Davis and Elissa Hecker.

The mentoring program will be for one year and consist of career advice. This initiative will require (i) recruiting EASL members willing to mentor by providing a minimum of one hour per month to meet with mentees and be available for a reasonable number of telephone and email meetings, (ii) recruiting a manageable number of mentees, and (iii) tracking the progress of the program from time to time. The mentors will be requested to volunteer a minimum of one hour per month of contact with the mentee, which can be over coffee, e-mail, or telephone, whichever works best for the mentor/mentee. If the mentor/mentee wish to continue the relationship after one year, they may do so on an informal basis.

Potential mentors will be solicited from the Executive Committee, and the various Committee Chairs will be requested to reach out to their members as well. Elissa will also prepare an ad for the EASL Journal seeking mentors/mentees early this year, and we hope to have a similar one at the end of the year congratulating the participants.

Elissa and Cheryl have prepared a questionnaire to match mentors and mentees, and once the match has been made, will check on progress on a quarterly basis. At the end of the first year we will ask to participants evaluate the program and see how to improve it in the future. We also hope to have a celebratory cocktail party to mark this milestone.

3. **Establishing a Pro Bono Assistance/Mentoring Program.** This program, led by Rich Boyd and Rob Thony, will function much like the mentoring program, but for admitted attorneys. This initiative will require (i) coordinating with the EASL Pro Bono Committee (in particular, with Pro Bono Committee Co-Chair, Elissa Hecker), (ii) recruiting EASL members willing to act as a resource for the newer attorneys who are handling the pro bono matters (in conjunction with the Pro Bono Committee), (iii) recruiting the newer diverse attorneys, and (iv) coordinating the above. Each matter must be pre-approved by both attorneys handling it before it is taken on.

One of the features of this program is to allow new attorneys to sit in on the counseling sessions. We will also seek resource support from Practicing Attorneys for Law Students (PALS), Lynn Gonzales of the Black Women Entertainment Lawyers (BWEL), as well as MBBA and BESLA, which have resources that are already devoted to a program similar to ours. Rich and Rob will also coordinate with Jessica, who is Co-Chair of the Lawyers in Transition Committee. Because EASL's malpractice insurance policy covers only the pro-bono clinic format, these on-going matters will not be covered and the participants will be advised to have their own insurance policy.

4. **Working with the PGA East Veterans Initiative** by providing speakers, and representatives for roundtable discussions. This initiative is being led by Rosemarie Tully.

Rosemarie has reached out to PGA East Veterans Initiative to explore EASL's support and assistance with program speakers and roundtable events. Recently, Rosemarie met with Rachel Watanabe-Batton, Chair of the Diversity Committee of the Producers Guild of America East ("PGA East"), and it was agreed that Rosemarie and Rachel would explore opportunities for EASL and PGA East to work together on the initiative where appropriate. Since this initiative may take time to develop, we are exploring other options as well in the interim.

At the suggestion of Pat Wood, Rosemarie will explore how we might work with the NYSBA Committee on Veterans and plans to attend one of that committee's programs at the NYSBA Annual Meeting. One idea is to see if there is a fit for veterans with the mentorship programs.

I appreciate the opportunity to lead the EASL Section in the Diversity Challenge. I am proud of what we have accomplished in so short a time, thanks to our amazing Diversity Challenge Team. We look forward to continuing to work with you and everyone at NYSBA to build a more diverse community of leaders in the legal profession.

See you at the Annual Meeting.

All best wishes for the New Year,

Judith B. Prowda
Chair
Entertainment, Arts and Sports Law Section

cc.: Rosemarie Tully, Esq.
Anne S. Atkinson, Esq.
Cheryl L. Davis, Esq.
Ms. Tiffany Bardwell
Ms. Beth Gould

EASL Mentoring Program

As part of NYSBA's Diversity Initiative, the EASL Section has initiated a Mentoring Program, and is looking for members who are interested in either volunteering to be mentors or mentees. Mentors should have at least five years of practical experience in an EASL-related field, and mentees should be lawyers in transition, junior attorneys, law students, or members who feel they can benefit from a more senior attorney. Mentors and mentees must be EASL members.

The time commitment is a minimum of one hour per month for one year.

Attached are copies of the forms that you will be able to complete at:

https://docs.google.com/spreadsheet/viewform?formkey=dHhDWXViRFlBMko0eEUtMFJBQnpDOVE6MQ (for Mentors), and

https://docs.google.com/spreadsheet/viewform?formkey=dFFOUWUwQ0xOMnctMHoyaUtxWnBjUFE6MA (for Mentees).

If you have any questions, please feel free to contact Cheryl Davis at cdavis@mhjur or Elissa Hecker at eheckeresq@yahoo.com.

Please complete this form online:

https://docs.google.com/spreadsheet/viewform?formkey=dHhDWXViRFlBMko0eEUtMFJBQnpDOVE6MQ

EASL Diversity Mentor Questionnaire

EASL recognizes the need for forming mentor/mentee relationships to grow the field and to exchange experiences. The Diversity Initiative aims to bring together seasoned practitioners and young attorneys to learn from each other.

Top of Form

Last Name *

First Name *

Address *

Phone Number *

Email Address *

Personal Statement * Please provide additional information about your experiences, such as the number of years in your current position and skill sets, that may assist in matching mentors and mentees.

Affiliation *
- ¤ In-House Counsel
- ¤ Law Firm
- ¤ Law School
- ¤ Of Counsel
- ¤ Solo Practitioner

Category * Arts

Practice Area/Specialization *
- ¤ Alternative Dispute Resolution
- ¤ Art
- ¤ Bankruptcy
- ¤ Contracts
- ¤ Copyright
- ¤ Corporate
- ¤ Defamation
- ¤ Digital Media
- ¤ Ethics
- ¤ Entertainment
- ¤ Fashion Law
- ¤ Litigation
- ¤ Motion Pictures
- ¤ Music and Recording Industry
- ¤ Nonprofit
- ¤ Performing Arts
- ¤ Publicity, Privacy and Media
- ¤ Sports
- ¤ Television and Radio
- ¤ Theatre and Performing Arts
- ¤ Trademark
- ¤ Wills and Trusts

Meeting Location Preferences *

Meeting Times Preferences *
- ¤ Morning
- ¤ Afternoon
- ¤ Evening

Preferred Means of Communication * Initial voice communication is required to start building a meaningful relationship. Email

Submit

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Please complete this form online:

https://docs.google.com/spreadsheet/viewform?formkey=dFFOUWUwQ0xOMnctMHoyaUtxWnBjUFE6MA

EASL Diversity Mentee Questionnaire

Top of Form

Last Name *

First Name *

Address *

Phone Number *

Email Address *

Affiliation *

- ☐ Law Student (JD)
- ☐ Law Student (LLM)
- ☐ Recent Graduate
- ☐ Lawyer in Transition
- ☐ Other:

Category of Interest: EASL section of the New York State Bar Association is made up of attorneys and law students dedicated to Entertainment Law, Sports Law and Law and the Arts. Please indicate which general area(s) of this section fit your interests. Arts

Experience * Please provide some information about your current work experience (clerkships, internships, etc)

Practice Area/Specialization *

- ☐ Alternative Dispute Resolution
- ☐ Art
- ☐ Bankruptcy
- ☐ Contracts
- ☐ Copyright
- ☐ Corporate
- ☐ Defamation
- ☐ Digital Media
- ☐ Ethics
- ☐ Entertainment
- ☐ Fashion Law
- ☐ Litigation
- ☐ Motion Pictures
- ☐ Music and Recording Industry
- ☐ Nonprofit
- ☐ Performing Arts
- ☐ Publicity, Privacy and Media
- ☐ Sports
- ☐ Television and Radio
- ☐ Theatre and Performing Arts
- ☐ Trademark
- ☐ Wills and Trusts

Meeting Location Preferences *

Meeting Times Preferences *

- ☐ Morning
- ☐ Afternoon
- ☐ Evening
- ☐ Other:

Preferred Means of Communication * Some voice communication is required to create a meaningful mentor/mentee relationship. Email

Submit

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EASL Diversity Initiative—Reality TV CLE Recap

By Rob Thony

On Monday, November 7th, as part of the NYSBA Diversity initiative, the EASL Diversity Committee collaborated with the Metropolitan Black Bar Association and Black Entertainment and Sports Law Association to organize the CLE program entitled: "From Pitch to Pilot: A Legal and Practical Analysis of Reality TV."

It was a full house in New York Law School's Faculty Commons Room, where four esteemed and engaging panelists delivered their insights in law and business on negotiating a reality TV deal. The panel included Tiffany Bank (Co-star on the TLC reality show "Big Sexy"), Traci Wilkes Smith (Talent Agent, Wilmer Talent Agency), Stephen Harris (Director, Non-Fiction and Alternative Programming at A&E Television Networks), and Erika Munro Kennerly, Esq. (Senior Director of Business Affairs at TruTV/Turner Entertainment).

The panel was moderated by Nyasha Foy, EASL member and 3L at New York Law School. She kicked things off by introducing a hypothetical in which a creator tries to pitch the idea for a show where producers would document the lives of a group of first-year law students and their struggles to achieve top grades, en route to a summer associate position at a large law firm. Each of the panelists weighed in on the legal, business and ethical considerations involved in such an idea, evaluating its feasibility and offering solutions to workable problems.

The rest of the program was dedicated to addressing more overarching themes concerning creating a reality TV program, such as protecting an idea for a show, financing, talent representation and their contractual rights and obligations, and evaluating risk from the perspective of the production company and the network.

The packed audience was engaged throughout, and the panelists reciprocated their engagement by thoroughly addressing a broad range of questions. The night ended with brief reception, where attendees took a moment to connect with each other over light snacks and wine.

The New York State Bar Association
Entertainment, Arts and Sports Law Section

Law Student Initiative Writing Contest

Congratulations to LSI winners:

Jenna Bass Levy, of Columbia University School of Law, for her article entitled:
LEGAL ISSUES FOR EMPLOYERS FROM CELEBRITY TWEETING

Emily Schall, of St. John's University School of Law, for her article entitled:
THE FTC'S GREEN GUIDELINES AND THEIR IMPACT ON THE FUTURE OF FASHION AND SUSTAINABLE STYLE

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL Web site. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section member practitioners.

Law school students who are interested in entertainment, art and/or sports law and who are members of the EASL Section are invited to submit articles. This Initiative is unique, as it grants students the opportunity to be ***published and gain exposure*** in these highly competitive areas of practice. The *EASL Journal* is among the profession's foremost law journals. Both it and the Web site have wide national distribution.

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members.
- **Form**: Include complete contact information; name, mailing address, law school, law school club/organization (if applicable), phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **Friday, May 25, 2012**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@yahoo.com.

Topics

Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, art and sports law fields.

Judging

Submissions will be judged on the basis of quality of writing, originality and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our Web site.

The Phil Cowan Memorial/BMI Scholarship

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL), in partnership with BMI, the world's largest music performing rights organization, has established the Phil Cowan Memorial/BMI Scholarship! Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial/BMI Scholarship fund offers *up to two awards of $2,500 each on an annual basis* in Phil Cowan's memory to a law student who is committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan Memorial/BMI Scholarship has been in effect since 2005. It is awarded each year at EASL's Annual Meeting in January in New York City.

The Competition

Each Scholarship candidate must write an original paper on any legal issue of current interest in the area of entertainment, art or sports law.

The paper should be twelve to fifteen pages in length (including *Bluebook* form footnotes), double-spaced and submitted in Microsoft Word format. PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (*not* part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. **The name of the author or any other identifying information must not appear anywhere other than on the cover page.** All papers should be submitted to designated faculty members of each respective law school. All law schools will screen the papers and submit the three best to EASL's Phil Cowan Memorial/BMI Scholarship Committee. The Committee will read the papers submitted and will select the Scholarship recipient(s).

Eligibility

The Competition is open to all students attending eligible law schools. "Eligible" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to 10 other accredited law schools throughout the country to be selected, at the Committee's discretion, on a rotating basis.

Free Membership to EASL

***All students* submitting *a paper for consideration will immediately and automatically be offered a* free membership in EASL (with all the benefits of an EASL member) for a one-year period.**

Yearly Deadlines

December 12th: Law School Faculty liaison submits 3 best papers to the EASL/BMI Scholarship Committee.

January 15th: EASL/BMI Scholarship Committee will determine the winner(s).

The winner will be announced, and the Scholarship(s) awarded at EASL's January Annual Meeting.

Prerogatives of EASL/BMI's Scholarship Committee

The Scholarship Committee is composed of the current Chair of EASL, all former EASL Chairs who are still active in the Section, all Section District Representatives, and any other interested member of the EASL Executive Committee. *Each winning paper will be published in the* EASL Journal *and will be made available to EASL members on the EASL website*. BMI reserves the right to post each winning paper on the BMI website, and to distribute copies of each winning paper in all media. *The Scholarship Committee is willing to waive the right of first publication* so that students may simultaneously submit their papers to law journals or other school publications. *In addition, papers previously submitted and published in law journals or other school publications are also eligible for submission to The Scholarship Committee.* The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and to the EASL website. The Scholarship Committee also reserves the right to award only one Scholarship or no Scholarship if it determines, in any given year that, respectively, only one paper, or no paper, is sufficiently meritorious. All rights of dissemination of the papers by each of EASL and BMI are non-exclusive.

Payment of Monies

Payment of Scholarship funds will be made by EASL/BMI directly to the law school of the winner, to be credited against the winner's account.

About BMI

BMI is an American performing rights organization that represents approximately 350,000 songwriters, composers and music publishers in all genres of music. The non-profit-making company, founded in 1940, collects license fees on behalf of those American creators it represents, as well as thousands of creators from around the world who chose BMI for representation in the United

States. The license fees BMI collects for the "public performances" of its repertoire of approximately 4.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

About the New York State Bar Association / EASL

The 77,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 125 years.

The more than 1,600 members of the Entertainment, Arts and Sports Law Section of the NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, pro bono opportunities, and access to unique resources including its popular publication, the *EASL Journal.*

EASL Reception: Michael R. Bloomberg Award

January 23, 2012

Welcome to the EASL Reception! Thank you for braving the cold after our superb Annual Meeting this afternoon.

I would like to thank our gracious hosts at UBS Richard Grassey and Kristine Flyntz for offering this exquisite space and organizing tours of the UBS art collection.

I also want to acknowledge our musicians, Karl Kramer, keyboard and horn, and Larry Goldman, bass.

We decided this year to honor a special New Yorker, Mayor Michael R. Bloomberg, for his outstanding contribution to the arts.

We all appreciate how the Mayor has enriched our lives through his strong commitment to making New York a more livable and civilized city, not only by banning smoking in restaurants, but also by making art a part of our everyday lives.

Here are a few of Mayor Bloomberg's many contributions:

Under Mayor Bloomberg's leadership, NYC has:

- Funded the largest-ever cultural capital budget—$1.8 billion—for facility enhancement projects at cultural organizations.
- Reformed the granting process of NY's Cultural Development Fund, which provides over $30 million to nearly 900 arts organizations throughout the city.
- Aided the creation of cultural districts such as the Fourth Arts Block in East Village and the Downtown Brooklyn Cultural District.
- Supported artists through the development of affordable, permanent rehearsal and studio space.
- Supported major temporary public art projects such as Christo and Jeanne-Claude's "The Gates," Olafur Eliasson's "New York City Waterfalls," Paul Ramirez Jonas' "Key to the City," and Sing for Hope's "Pop Up Pianos," just to name a few.

And

- Ensured that cultural organizations play a key role in neighborhood revitalization projects in areas such as Coney Island, Harlem, St. George, Long Island City, and the South Bronx.

We honor Mayor Bloomberg for maintaining NYC's place as the nation's largest arts funder, and in recognizing culture's critical impact on our identity, economy, and quality of life.

Accepting this award on behalf of Mayor Bloomberg is Michael Cardozo, NYC's 77th and longest-serving Corporation Counsel since the title was formally created in the early 19th Century. He was appointed to this position in 2002.

Mr. Cardozo is himself the recipient of numerous awards during his illustrious career.

Working with Mayor Bloomberg, Mr. Cardozo has spearheaded several key municipal legal initiatives, and has personally argued several high-level cases on the City's behalf before the U.S. Supreme Court and the New York Court of Appeals.

He has also drafted groundbreaking legislation, including the City's historic smoking ban, and major redevelopment projects (including new stadiums for the Mets and the Yankees and the redevelopment of Ground Zero).

Prior to becoming Corporation Counsel, Mr. Cardozo practiced sports law.

As a partner at Proskauer Rose, he was an active trial lawyer and counsel to numerous sports leagues, including the National Hockey League, the National Basketball Association and Major League Soccer.

Thank you, Mr. Cardozo, for joining us this evening and accepting this award on behalf of Mayor Bloomberg.

Enjoy your evening!

Inscription on the Award:

AWARD FOR OUTSTANDING
CONTRIBUTION TO THE ARTS

Presented to
The Honorable Michael R. Bloomberg
Mayor of New York City

In Recognition of his Commitment
to the Creative Spirit of New Yorkers
Everywhere

Entertainment, Arts and Sports Law Section
New York State Bar Association

January 23, 2012

Getting in the Game: 2011 Report Shows Ups, Downs in Pro Sports Diversity

By Joseph M. Hanna and S. Philip Unwin

Each year, proponents of diversity and inclusion in the professional world look to the Racial and Gender Report Cards (RGRC) issued by the Institute for Diversity and Ethics in Sport (the Institute) for an indication of where progress is being made—and where work needs to be done—in the high-profile and high-profit domains of pro and college sports. The Institute issues annual grades for diversity hiring practices for the National Football League (NFL), Major League Baseball (MLB) and National Basketball Association (NBA), along with the Women's National Basketball Association, Major League Soccer and college sports, providing an inside look at developing trends in organizations that are often seen as trailblazers in diversity.[1]

The big question asked by the RGRC is: "Are we playing fair when it comes to sports? Does everyone, regardless of race or gender, have a chance to bat or to operate a team?" The Institute's methodology is to conduct an analysis of racial breakdowns of players and coaches in the previous year's playing seasons. This also includes a racial and gender breakdown in management in the various league offices, team-level top management, senior administration, professional administration, physicians, head trainers, broadcasters and league referees.

An analysis of the statistics and trends evident in the 2011 grades for the NFL, MLB, and NBA, along with an examination of each league's proactive, diversity-focused initiatives, shows that while progress is being made—especially in the NBA—we are a long way from answering the RGRC's question with a resounding "yes."

The NFL

The 2010 RGRC gave the NFL its first-ever A for racial hiring practices.[2] Overall, the 2011 NFL RGRC was nearly identical to its performance in 2010. The NFL managed its second consecutive A on racial hiring practice and its second consecutive C on gender hiring practices for a combined B grade. The NFL score for race decreased from 90.5 to 90.4 and the score for gender increased from 69.5 to 69.6.[3]

The NFL player base was 67 percent African American and the percentage of Caucasian players was 31 percent.[4] These are fairly steady from 2009. The NFL has, by far, the smallest percentage of international players, at one percent.[5]

The NFL deserved credit for moving ahead with diversity initiatives despite turmoil regarding labor issues that led to a lockout for a significant part of the off-season. The NFL created a women's network, diversity accountabilities and diversity training. The number of diverse employees at or above the vice-president level at the league office increased from 20 in 2010 to 26 in 2011, a 30 percent increase.[6] The number of female employees at that level increased from 11 to 15 in that time, a 36 percent increase.[7] The number of ethnically diverse employees increased from nine to 13, for a 44 percent increase.[8] The percentage of management positions for people of color in the league office increased to 25.2 percent from 24.7 percent.[9] The percentage of women in management positions increased from 27.5 to 27.6 percent.[10] The Institute took the dramatic increase for women at the vie-president level as an important sign that more women will be hired into professional positions at the league level in the immediate future.

> *"Are we playing fair when it comes to sports? Does everyone, regardless of race or gender, have a chance to bat or to operate a team?"*

At the team level, the NFL had seven African American head coaches at the start of the 2011 season, up one from 2010. Additionally, there was one Latino head coach. For this increase, the Institute credited the NFL's own Rooney Rule, which requires that people of color be interviewed as part of the search process for head coaches.[11] It noted that the Rooney Rule helped to triple the number of African American head coaches in the NFL from two in 2001 to six in 2005. There have been at least six African American head coaches each year since 2007.[12] It is particularly noteworthy that there has historically been virtually no college pipeline for African American head coaches. No former NFL head coach of African American descent has ever been hired as a major college head coach. Although there was a slight increase in head coaches of color, assistant coaches of color decreased from 36 percent in 2009 to 32 percent in 2010. Nine African Americans held coordinator positions and one Latino did as well. Seven African Americans held Assistant Head Coach positions.

With regard to team management, there is only one female president/CEO in the NFL and there has never been a president/CEO of color.[13] There has never been a primary owner of color in NFL history, but Serena and Venus Williams purchased small minority ownerships of

the Miami Dolphins, as did Gloria and Emelio Estefan and Marc Anthony. The NFL has two primary female owners: Denise Debartolo-York of the San Francisco 49ers and Virginia McCaskey of the Chicago Bears.

Caucasians held 84 percent of the general manager positions in the NFL, while African Americans held 16 percent.[14] That remained the same from 2010. There was a slight increase in the percentage of vice-presidents of color, and the percentage of female vice-presidents increased from 15 percent to 16 percent.[15]

People of color held 16 percent of all NFL senior administrative administration positions, down from 17 percent previously.[16]

The Institute defines senior administration as including, but not being limited to, the following titles: directors, assistant general managers, chief general counsel, salary cap manager, public relations director and director of community relations. Women occupied 21 percent of these positions, a four percent increase from the previous year.[17] People of color occupied 14 percent of professional administration positions and women occupied 29 percent, but it was the third consecutive year that women were below 30 percent.[18]

MLB

MLB received an overall A for race and B- for gender. This gave MLB an overall B+. The grade for race slipped from 92.5 to 91.6 and the grade for gender dropped from 82 to 79.3. MLB's overall score for 2011 was 85.5, down from its 2010 score of 87.3, its best ever.[19]

MLB saw a decrease in its grade for racial diversity, as there was a drop in people of color among players, league office officials, managers, coaches, general managers and team vice-presidents. Managers of color fell 11 percentage points and general managers fell five percentage points. The decrease in the grade for gender diversity was due to a drop in women in the league office, team vice-president and team professional positions. However, Richard Lapchick, the director of the Institute, stated that "the Commissioner and his team in the league office, led by Wendy Lewis, Sr., Vice-President for Diversity, have had a remarkably positive imprint on the diversity record for Major League Baseball. MLB continues to have an outstanding record for diversity initiatives which include the 5th Annual Civil Rights Game, Jackie Robinson Day and Roberto Clemente Day."[20]

At the start of 2011, players of color amounted to 38.3 percent of the league.[21] Opening-day rosters were 61.5 percent white, 27 percent Latino, 2.1 percent Asian, 0.4 percent Native American or Native Alaskan and 0.3 percent Native Hawaiian or Pacific Islander.[22] The percentage of African American players decreased to 8.5 percent from 10 percent.[23] This was the lowest since 2007 and the third lowest in decades. The percentage of Latino players decreased from 28.4 percent to 27 percent, one of the lowest percentages since 1999. The 2008 season was the first since 1995 in which there was an increase in African American players in MLB over the previous season. Yet after reaching the 10.2 percent level in 2008, African American players have steadily regressed as an overall share of all players. This decline in African American participation is a major source of concern in MLB.[24] The percentage of international players on MLB opening-day rosters was 27.7 percent.[25] This was down from 30.1percent.[26] However, minor league players were 47.4 percent international.[27]

In MLB's central office, 10 percent of the front-office employees are African American, 17 percent Latino, four percent Asian and two percent "other."[28] Women make up 38 percent of the total workforce while people of color make up 33 percent.[29] At the senior executive level, 20 percent of the 55 employees were people of color, while women occupied 22 percent of the positions.[30] At the director and managerial level, 22.5 percent of the 98 employees were people of color and women occupied 32 percent of the posts.[31]

At the team management level, Arturo Moreno continues to be the only Latino majority owner in baseball and the only person of color to own a major league baseball team. Jennifer Steinbrenner-Swindal, Jessica Steinbrenner and Joan Steinbrenner each hold vice-chairman positions with the New York Yankees and are the only women to hold any ownership interest.

MLB began the 2011 season with six managers of color, a decrease from nine the year before. There had been a steady increase from 2007 to 2009 until a small decrease in the 2010 season. This comprised 20 percent of MLB managers. People of color comprise 37 percent of the managerial positions within the major and minor leagues, however.[32] Among coaches, 29 percent of the positions are occupied by people of color.[33] African Americans hold 12 percent of those positions, Latinos 17 percent and Asians 0.4 percent.[34] Among major and minor leagues combined, 42 percent of the coaching positions are occupied by people of color.[35]

There are three African American general managers and one Latino general manager. MLB was thus five points below the historical best of 19 percent of general managers being people of color, established in 2010.[36] Team vice-presidents declined sharply to 9.8 percent, down 6.7 percent from the previous season.[37] Eleven vice-presidents were African American, 11 Latino and five Asian.[38] Similarly, the percentage of women vice-presidents fell from 18.6 percent to 18.2 percent, with 50 women acting in senior vice-president and vice-president positions.[39] Only one CEO is a female (Pam Gardner of the Houston Astros), and none are people of color.[40]

Among senior administrators,[41] 16 percent were people of color, the same as the previous year.[42] Five

percent were African American, eight percent Latino, two percent Asian, and people categorized as "other" remain one percent.[43] The percentage of women who were senior team administrators was 18 percent, a one-point decline.[44]

The NBA

The NBA, once again, led the way among the major sports leagues with an A+ for race, an A- for gender and a combined A. The NBA's total grade was a 92.2, its highest grade ever and up from its 91.5 in 2010.[45] The grade for race was 95.3, up significantly from a 93.8 in 2010.[46] The combined total and the total for race were the highest ever in the history of the RGRC for the major sports.[47]

The NBA has often been the diversity leader among the major sports. Eighty-three percent of NBA players are people of color, an increase of one percent from the previous year.[48] African Americans comprise 78 percent of NBA players, a one percent increase from the year before and the highest since 2000-2001.[49] The percentage of Asians remains constant at one percent and the percentage of Latinos increased from three percent to 4 percent.[50] International players comprised 17 percent of the NBA, one percent down from the year before and the lowest since 2003-2004.[51] Seventeen percent of the NBA players were Caucasian, the lowest percentage since the RGRC began reporting the composition of NBA teams.[52]

In the league office, 36 percent of the professional staff positions were held by people of color.[53] Of all professional employees, 64 percent were Caucasian, 20 percent African American, eight percent Latino, eight percent Asian and less than one percent American Indian/Alaskan Native.[54] This was nearly unchanged from the previous season. Women made up 42 percent of professional employees, a decrease of two percent.[55] There are 28 people of color and 33 women in NBA vice-president positions.[56]

Among NBA owners, there is only one owner of color, Michael Jordan, the owner of the Charlotte Bobcats. At the time of the report, there were four women who had ownership of NBA franchises: Coleen Maloof and Adrienne Maloof-Nassif of the Sacramento Kings; Karen Davidson, wife of the late William Davidson of the Detroit Pistons; and Gail Miller, wife of the late Larry Miller, owner of the Utah Jazz.[57] Since the date of the report, Davidson has sold the Pistons to Tom Gores.

Nine African Americans and one Asian held head coaching jobs at the start of the 2010-2011 NBA season, 33 percent of the league and an increase from the 30 percent of the year before.[58] Forty-five percent of assistant coaches are men of color, the largest since the RGRC began tracking that statistic.[59] The percentage of African Americans in assistant coaching positions increased one point to 42 percent and the percentage occupied by Caucasians decreased from 59 percent to 56 percent.[60] The percentage of Latinos was one percent, as was the percentage of Asian assistants.[61]

As of the beginning of the 2010-2011 season, there were six African Americans holding top management positions on an NBA team, two more than the previous year. Terdema Ussery was the only female among these.

The percentage of people of color who are principals in charge of day-to-day operations/general managers in the NBA doubled between 2009-2010 and 2010-2011 to 26 percent—the best of any sport.[62] There are seven African Americans and one Asian general manager. There has never been a Latino general manager, and Rich Cho of the Portland Trailblazers was the first Asian general manager in the history of the NBA.[63] However, Cho and the Blazers parted ways in May 2011.[64]

Ten percent of team vice-president positions were held by African Americans, a decrease of one point.[65] Three percent were held by Latinos, an increase of one point. Caucasians remain in 86 percent of team vice-president positions.[66] Women occupy 15 percent of the posts, down from 18 percent the year before.[67]

Among senior administrators,[68] 22 percent of those positions are occupied by people of color, up one percent from the year before.[69] Seventy-eight percent are Caucasian, 14 percent African American, six percent Latino, one percent Asian and slightly one percent "other."[70]

The percentage of women in senior administrative positions increased two percentage points to 27 percent, an all-time high in terms of numbers, with 155 women holding those positions.[71]

Diversity Initiatives

The NFL's most prominent diversity initiative is the aforementioned Rooney Rule.[72] This was adopted in 2003 and mandates that teams must interview at least one minority candidate when hiring for a head coaching position.[73] It was expanded in 2009 to include all senior football operations positions. From 2002, the last year before the implementation of the Rooney Rule, to today, the number of African American head coaches and personnel in management positions has increased significantly. The fact that African American head coaches have proven very successful in recent years has surely helped as well. Four of the last five Super Bowls have featured an African American head coach, with Super Bowl XLI featuring Indianapolis' Tony Dungy and Chicago's Lovie Smith. Additionally, five of the league's 32 general managers are African American, including Jerry Reese, General Manager of the New York Giants, the champions of Super Bowls XLII and XLIV. In all, seven of the last 10 Super Bowl teams have had an African American head coach or general manager.

In 2003, the NFL also introduced a formal mentoring program designed to support employee retention, career development and advancement initiatives.[74] This is a program in which experienced executives share their business insights and experiences with newer professionals. The NFL has instituted other programs designed to enhance employee learning and development, including NFL Special Teams, created by the Diversity Counsel to provide a unique opportunity for NFL employees to build their skills and advance their careers.[75] It has also instituted the Junior Careers and the Junior Rotational Program, designed to build a strong entry-level pipeline to attract top undergraduates into the NFL by allowing them to rotate through several business areas in a condensed period of time.[76] The NFL has an internship program for college seniors and also a talent review, where the league executives identify and review top-performing employees at the director level and above who have the potential for creating responsibilities, as well as an executive training program.[77] The NFL recently launched the league's first Women's Affinity Group, whose mission is to help accelerate the career advancement of women in the NFL while deepening the engagement of all employees of the league.[78]

MLB has sought commitment to diversity by not only including employment, but also supplier diversity, player development, community relations, education and philanthropic awards. MLB has aggressively addressed workplace diversity primarily through human resource practices in both the Commissioner's office and the individual teams.[79] It has hired professional human resource practitioners who contribute to MLB's benchmark reports that profile all levels of employment within the baseball organizations and use information for strategic planning and performance management.[80] MLB has recently instituted the Diversity Economic Impact Engagement Initiative to advance the level of MLB's current workforce and supplier diversity efforts and create methodologies for cultural assessments, diversity economic platforms and industry-wide diversity training.[81] This will be developed through MLB's central office and member teams, and eventually though the minor leagues as well. MLB's Diversity Business Partners Program, the leading supplier diversity program in sports, has produced significant economic opportunity for the Commissioner's Office, franchises and local communities and has resulted in well over $800 million being spent with thousands of minority and women owned businesses.[82] MLB also has numerous urban youth initiatives that seek to make the game more meaningful to communities of color, provide safe and organized recreational activities for urban youth, and prepare high school players of color for college and professional baseball and softball programs. One such example is MLB's Urban Youth Academy on the campus of Compton Community College in Los Angeles. The Urban Youth Academy has also opened a facility in Houston. Finally, MLB has a longstanding urban youth initiative called Reviving Baseball in Inner Cities (RBI). This is an outreach program for youth aged five to 18 to promote interest in baseball and softball, as well as encourage academic achievement. In 2010, the program had 51,000 participants.

The NBA has a variety of diversity initiatives impacting a number of areas, including employee training and development, employee recruitment, vendor diversity and community relations. The NBA conducts live and online training focused on diversity and respect in the workplace. This is completed by all league employees every two years, with a separate track for managers. Since 2006, the NBA has provided all league and team employees with access to GlobeSmart, a web-based tool that provides information on the countries and cultures from around the world.[83] In 2008, there was an effort for NBA teams to maintain and adhere to comprehensive policies and procedures in the areas of anti-discrimination and anti-harassment, and the league issued Respect in the Workplace Baseline Best Practices to all teams.[84] The NBA has continued to embrace a multi-faceted approach in maintaining a globally diverse workforce. Year after year, it has attained a high level of success in establishing a workforce balanced in terms of gender and broad in terms of ethnicity. The NBA seeks a globally diverse applicant pool in its hiring process and encourages teams to do the same. The NBA also has an associate and intern program as a feeder pool for applicants, and it actively seeks diversity in this group.[85]

Like the NFL and MLB, the NBA is trying to maximize vendor diversity and is trying to maximize contracting opportunities for women and minority business enterprises to participate in NBA business opportunities.

Challenges

While acknowledging that true diversity is the common goal, each league faces a unique set of challenges to getting there.

For the NFL, the biggest challenge from a diversity standpoint is increasing the number of women in the league workforce. The RGRC assigned the NFL a C for gender hiring practices. However, the NFL did receive an A+ for gender diversity initiatives, and the recent launch of the Women's Interactive Network is a step in the right direction. Yet, the NFL still received numerous poor grades in various gender diversity categories, most notably an F in the grade for team vice-president.

The biggest diversity challenge that MLB faces is in the steady decline in African American players. MLB is actively working to address this through the RBI program and the Urban Youth Academies. MLB received an A for its diversity initiatives—but the decline in African American player participation is not merely worrying from a short-term perspective, it is very troubling from a long-term perspective. Since managerial and coaching

positions are almost exclusively filled by former players, a decline in the number of African American players is highly likely to cause a decline in the number of managers and coaches in the future. Unfortunately, there does not appear to be any one particularly satisfactory explanation for the decline of African American participation in baseball.[86]

The NBA remains the diversity leader among the major sports by a fairly wide margin. Like the NFL, the NBA has some work to do in terms of increasing gender diversity in executive positions. The Institute notes this specifically as an area where NBA teams can improve and the NBA did receive an F for gender diversity for team vice presidents. In the long term, the NBA's diverse associate and intern programs should yield results in this area.

All in all, the leagues are showing improvement. The proactive initiatives outlined above have contributed greatly to the positive aspects of this year's RGRC—and more like them will be necessary to keep the diversity and inclusion stats in these professional leagues on an upward trajectory.

Endnotes

1. The Institute does not issue grades for the National Hockey League or Professional Golfers' Association. Both leagues are overwhelmingly white.
2. Richard Lapchick, *The Racial and Gender Report Card*, Institute for Diversity and Ethics in Sports, *available at*, http://www.tidesport.org/racialgenderreportcard.html.
4. Richard Lapchick, *The 2011 Racial and Gender Report Card: National Football League*, Institute for Diversity and Ethics in Sports, Sept. 15, 2011, *available at*, http://www.tidesport.org/ RGRC/2011/ RGRC_NFL_2011_FINAL.pdf.
5. *Id*.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *See generally*, Greg Garber, *Thanks to Rooney Rule, Doors Opened*, ESPN, Feb. 9. 2007, *available at*, http://sports.espn.go.com/nfl/playoffs06/news/story?id=2750645.
12. *See* Lapchick *supra* note 4 at 7-8.
13. Amy Trask of the Oakland Raiders is the lone female CEO. It would be remiss not to mention the role of the late Al Davis in advancing the cause of diversity in the NFL. Davis hired the league's first Latino head coach, Tom Flores, the first African American head coach, Art Shell, and the first and only female CEO. Davis deserves just as much credit as Dan Rooney as a diversity trailblazer.
14. *See* Lapchick, *supra* note 4.
15. *Id*.
16. *Id*.
17. This category is defined by the Institute as including, but not being limited to, the following titles: assistant directors, controllers, video coordinators, equipment managers, coordinators, supervisors and managers.
18. *See* Lapchick, *supra* note 4.
19. Richard Lapchick, *The 2011 Racial and Gender Report Card: Major League Baseball*, Institute for Diversity and Ethics in Sports, April 21, 2011, *available at*, http://www.tidesport.org/RGRC/2011/2011_MLB_RGRC_FINAL.pdf.
20. *Id* at 2.
21. *Id*. at 3.
22. *Id*.
23. *Id*.
24. *Id*.
25. *Id*. at 3.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*.
30. *Id*.
31. *Id*.
32. *Id*.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Id*.
38. *Id*.
39. *Id*.
40. *Id*. at 10.
41. The Institute defines this category as including, but not being restricted to, directors, assistant general managers, senior managers, general counsel, legal counsel, senior advisors, assistant vice-presidents, public relations directors and directors of community relations.
42. *See* Lapchick *supra* note 19.
43. *Id*.
44. *Id*.
45. Richard Lapchick, *The 2011 Racial and Gender Report Card: National Basketball Association*, Institute for Diversity and Ethics in Sports, June 16, 2011, *available at*, http://www.tidesport.org/RGRC/2011/2011_NBA_RGRC_FINALpercent20FINAL.pdf
46. *Id*.
47. *Id*.
48. *Id*. at 3.
49. *Id*.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*. at 5.
54. *Id*.
55. *Id*.
56. *Id*.
57. *Id*. at 8.
58. *Id*.
59. *Id*.
60. *Id*.

61. *Id*.
62. *Id*. at 10.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*.
67. *Id*.
68. The Institute defines senior administrators in the NBA as including the following titles, but not being limited to: director, assistant general manager, chief legal counsel, chief operating officer, chief financial officer, public relations director and director of community relations.
69. *See* LAPCHICK *supra* note 45 at 10.
70. *Id*.
71. *Id*.
72. *See* GARBER *supra* note 11.
73. *Id*.
74. *See* LAPCHICK *supra* note 4 at 37-40.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*.
79. *See* LAPCHICK *supra* note 19 at 35-37.
80. *Id*.
81. *Id*.
82. *Id*.
83. *See* LAPCHICK *supra* note 45 at 34-35.
84. *Id*.
85. *Id*.
86. JC Bradbury offers a very thorough discussion of some of the potential causes at http://www.sabernomics.com/sabernomics/index.php/2008/04/what-caused-the-decline-of-african-americans-in-baseball/.

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Talent on Twitter: Legal Issues for Employers from Celebrity Tweeting

By Jenna Bass Levy

In the age of social networks, when it is commonplace for people to share news, stories and photos instantaneously, the popularity or social status of any given individual is measured by the number of "followers" or "friends" he or she has. The ever-increasing growth of social networks such as Twitter, Facebook, YouTube and MySpace not only signals a move beyond traditional forms of media (e.g., television, radio, film and publishing), but also demonstrates the X-generation's predilection for self-promotion and publicly sharing personal facts and opinions.

For members of the entertainment industry dependent on popularity and ratings, the easy accessibility of social media has been a game-changer. In the days before the rise of social media, when a television network employed a big name talent for a series, or a studio employed such talent for a movie, the network or studio largely had control over that talent's public image and statements during the term of the talent's contract, especially when the talent was shooting or promoting a film or program. However, in the new digital age, celebrities are not only maintaining blogs and websites, but are self-branding, self-promoting, and sharing news, happenings and opinions directly with their fans at all hours from anywhere, using Twitter and other social media platforms without any input or control by media companies or public relations experts. As a result, entertainment companies have become a *de facto* laboratory for exploring questions surrounding the regulation of social media by employers as these companies find themselves with less and less control over the image and public persona of their celebrity talent. Since social media can greatly increase the popularity of a star and affords a celebrity the ability to release information quickly to countless people, entertainment companies and their products are also put at risk, as the usual chain of commands for releasing press statements and protecting and projecting a celebrity's image is no longer in their hands.

This article will focus on the newest social media giant—Twitter—and recent issues regarding "tweeting" by celebrities to demonstrate that the unrestricted use of social media by talent creates a problem both for employers and for talent endorsement deals. It will then discuss the types of measures and social media policies that various entertainment companies have implemented to control the use and misuse of social media by both their employees in general and their celebrity talent. It will also review standard contract provisions currently included in various agreements that govern what employees and celebrity talent are traditionally allowed to discuss with the public, and assess whether these provisions should be read as applicable to social media, or whether Twitter and other social media should be addressed with specific provisions. Finally, it will recommend what entertainment companies should do to exercise control over the content of "tweets" released by talent.

I. Background

Internet entrepreneurs Jack Dorsey and Biz Stone created Twitter in early 2006 as a real-time information network and "micro-blog" meant to connect users, spread small bits of information and ease quick communication amongst friends through "tweets."[1] Once a user has created a "tweet" (typed the small amount of information the user wishes to send out), Twitter then distributes it to that user's list of people or organizations that have elected to receive the tweets (these people are called "followers"). Tweets must be no longer than 140 characters, and users can elect whether or not their locations are displayed on their websites' homepages. A person's Twitter can be linked to his or her Facebook account or blog so that all tweets can be further circulated.

Before revolutionizing media, news, and peer-to-peer communication, Twitter was meant simply as a way to answer the questions "where are you and what are you doing?"[2] The idea was to create a mobile real-time hybrid of AOL's chat service, Instant Messenger, and the then-popular blogging platform LiveJournal, a social media site known for bringing people with similar interests together.[3] Dorsey wanted to keep the barrier to entry for new users low and thus did not want to require users to own smartphones to tweet, so Twitter decided to make the service SMS compatible, while still distinguishing itself by reducing the number of permitted characters from the SMS standard 160 to 140. Thus, the creation of Twitter resulted in a combination of real-time citizen-reported news (such as "There's a fire on 16th Street"), mundane blasts of daily happenings (e.g., "I just ate a sandwich"), and worldwide sharing of articles and conversations between and among users responding to each other's tweets. All of this appeared in short, easily digestible bits received instantly via text message, or through mobile or web-based dashboards.

Twitter really became a player in the social media and Web 2.0 world following the South By Southwest (SXSW) Interactive Conference in March 2007. The conference, a multi-day panel, expo, and networking event attended by thousands of players in the new media sector, saw the

number of tweets increase from 20,000 to 60,000 per day as early adopters used the service to comminicate and let each other know their whereabouts.[4] The service steadily grew and gained popularity so that, by June 2009, news of Michael Jackson's death spread via Twitter, crashing servers as tweets containing his name were sent at a rate of 100,000 per hour.[5] Twitter quickly became fodder for pieces in mainstream media ranging from local news reports on its potential dangers when used by children to a think piece in *The New York Times* about what the service's focus on the individual means in a broader sense.[6] By 2011, articles were crediting Twitter with sparking and helping to organize the revolution in Egypt.[7]

Celebrities quickly began hopping on the Twitter bandwagon, including, most prominently at first, Ashton Kutcher, who became the first user to amass 1,000,000 followers in April 2009.[8] Kutcher demonstrated the ease with which one can use the service to further brand oneself, letting the public into the heads and private lives of celebrities. At the time of this writing , Lady Gaga and Justin Bieber have the most followers on Twitter, with 16,433,586 and 14,970,284 followers, respectively, followed by Katy Perry, Kim Kardashian, Britney Spears, and President Obama.[9] Twitter takes self-publishing to a whole new level, allowing a person to instantly share information right from a mobile phone. The moment country music phenomenon Taylor Swift has something to say, she can broadcast it to over 9,000,000 people immediately, and the circulation of that information does not stop there, as conventional media from broadcast news to tabloid magazines now regularly report on celebrity tweets.[10] Moreover, tweets are further circulated by Google's adding tweets to its search-engine results.[11]

Twitter has enormous potential for good and bad. The legal issues likely to arise run the gamut of topics from intellectual property ownership of content and privacy and publicity questions to more traditional issues relating to employment, defamation, and advertising, among others. As previously mentioned, one of the main reasons why employers working with star talent are worried about Twitter is that it allows the celebrity to reach fans instantly under any and all circumstances. A person may not pause, reflect and carefully choose what he or she tweets. Moreover, tweets are not usually vetted by a talent's manager, public relations executive, or publicist before being sent. Furthermore, because an individual tweet cannot exceed 140 characters, tweets often convey incomplete thoughts or opinions that can easily be taken out of context. Yet as discussed below, the informal 140-character tweets are *on the record,* and have the potential to reach far more people than any traditional form of publicity in much less time, potentially erupting in scandal minutes after the send button is hit—and leaving executives, PR managers and the like scrambling to mitigate the damages.

In addition, details of negotiations and deals are also leaking out via Twitter, as discontented celebrities are using it to voice their frustrations. Paula Abdul announced via her Twitter account that she would be leaving her role as a judge on Fox's *American Idol*, a move some believed to be a contract negotiation strategy, as it arrived before any official announcement of her departure was made by executives of the show or network.[12] Twitter is also being used as a means to speak out against those actually doing the leaking, as reigning Twitter queen Lady Gaga did when she railed against those leaking her videos prior to their release.[13] Additionally, Rapper 50 Cent used his Twitter account to threaten to not only stop making music, but also to leak a track from his mentor and fellow Interscope artist, Dr. Dre, while clashing with his label about its lackluster attitude towards his forthcoming record.[14]

Having a Twitter account and using it to vent cost Hole frontwoman Courtney Love over $400,000 after she was sued for defamation.[15] Her Twitter account and celebrity status meant that, according to the fashion designer Dawn Simorangkir who sued her, enough people were reading and believing her rant against the designer that it was "ruining her business."[16] This case, which was settled in March 2011, is believed to have been one of the first claiming defamation via Twitter, and raised the question: "Can the power of celebrity alone be enough to make opinions into defamation?"[17] In yet another development, Courtney Love's former attorneys are suing her for unspecified damages for tweets she posted suggesting that the attorneys were bribed.[18]

Another issue raised by celebrity Twitter accounts is the identification of the people who are doing the tweeting. Until Twitter introduced the ability to verify accounts for big name tweeters, many faced having their brands and images tarnished by fraudulent accounts. This issue led California to pass legislation in January 2011 making it illegal to impersonate "another individual online for the purposes of harming, intimidating, threatening, or defrauding a person."[19] Some less tech savvy stars are now handing their accounts over to their management teams or hiring professional social media managers to take care of their online profiles, such as rapper Lil Wayne, whose entire Internet presence is run by 21-year-old Mazy Kazerooni.[20]

What happens, however, if the person behind the account tweets something libelous, or posts information, intentionally or unintentionally, that negatively affects the celebrity's employer? Hypothetically, if a social media manager for a television star had a falling out with his employer, and sent one last tweet from his account bashing the television show on which his former boss stars, would the actor be held responsible?

II. Twitter and Celebrity Endorsement Deals

Many celebrities are paid by companies to act as spokespeople for their brands. These deals can require the celebrities to do on-camera scripted advertisements and appear in print or web ads, but they are also beginning to include social media ambassadorships. While it was always standard for celebrities who endorsed a product, such as Pepsi, to be seen holding, interacting with, or using, the product in their everyday lives in the hopes of those moments being captured by paparazzi, now celebrities are expected to tweet about these products as well. Furthermore, some companies are paying a significant amount of money to celebrities to be tweeted about. For example, Kim Kardashian reportedly collected $10,000 for tweeting about a shoe company.[21] The Federal Trade Commission revised its rules in December 2009 specifically to require celebrities to disclose any ties to companies that make products they promote using their Twitter accounts.[22] The United Kingdom's Office of Fair Trade has also launched an investigation into the practice of celebrity-sponsored tweets, and has declared that non-disclosure is a deceptive practice.[23]

Since a celebrity's public image is largely the reason why certain companies choose to endorse that star, advertisers and endorsers are increasingly concerned with what a celebrity tweets because of the ease with which the celebrity can compromise his or her image.[24] In fact, National Football League (NFL) star Rashard Mendenhall lost a lucrative deal as the spokesman for Champion sports apparel after he tweeted criticisms of the celebrations surrounding the death of Osama Bin Laden.[25] In a May 11, 2011 letter to Mendenhall, an attorney for Hanesbrands (Champion's parent company) relied on the morals clause of the athlete's contract as support for the company's decision.[26] Mendenhall retaliated with a $1,000,000 lawsuit against Hanesbrands, claiming that it violated his First Amendment rights and that his Twitter message was simply his opinion.[27] This was not the first time a morals clause was invoked in response to an athlete's questionable behavior. For example, Philadelphia Eagles quarterback Michael Vick reportedly lost endorsement deals following the controversy over his participation in a dogfighting ring, and Tiger Woods was dropped by at least six major endorsers following the collapse of his marriage and alleged infidelity.[28]

Most recently, perhaps fearing litigation or the loss of endorsement deals, the pioneer celebrity tweeter Ashton Kutcher turned control over of his Twitter account to his management company following controversial tweets regarding the Penn State sexual molestation case.[29] Kutcher recently became the star of CBS' *Two and a Half Men* and is an investor in over 40 technology companies.[30] His social media dominance reportedly won him spokesman roles at companies such as Popchips, Nikon and Pepsi, so he had much to lose from public backlash.[31] He wrote on his blog, "Up until today, I have posted virtually every one of my tweets on my own, but clearly the platform has become too big to be managed by a single individual."[32] Ashton Kutcher is not the only one by any means who will not be actually tweeting on "his" Twitter. According to *Vanity Fair*, both Britney Spears' and President Obama's tweets are the handiwork of a proxy, "a luxury known in the business as ghost-tweeting." In fact, President Obama admitted that he has never personally sent a tweet."[33]

Some celebrities are using the service after getting fired from lucrative jobs to build and maintain a fan base to use as leverage for future opportunities. Charlie Sheen, whose comments in interviews resulted in his firing from the CBS series *Two and a Half Men*, took to Twitter to extend and take advantage of the public interest in him and his new-found reputation as a loose cannon prone to crazy ranting. His Twitter account broke records as the fastest account to amass 1,000,000 followers—within 25 hours and 17 minutes of account creation.[34] He then used this platform to announce his "Charlie Sheen Live: My Violent Torpedo of Truth" tour.[35]

Celebrities may also fall victim to the terms of service of many Twitter-related sites, particularly those that allow the sharing of pictures. Twitpic, one of the more popular services to host and tweet photos, inked a deal with World Entertainment News Network in early 2011 for it to become its "exclusive photo agency partner," and to sell for publication the photos posted by its users, which, according to TwitPic's terms of service, are owned by TwitPic.[36] The chief executive of World Entertainment News Network, Lloyd Beiny, even said in an interview with *Amateur Photographer* magazine, regarding a similar, since-terminated deal, that the primary focus of the deal was celebrity users.[37] This means that celebrities who, for example, post photographs of themselves or their families to their personal accounts could then see those photographs sold to tabloids without their permission, and without their ever receiving any compensation. Twitpic is already involved in a lawsuit regarding its Terms of Service, though not celebrity related, from a photograph having been posted by a professional photographer being re-posted by two different photo agencies, each claiming that the site's Terms of Service allowed its users to "reproduce and distribute images uploaded by other Twitpic users."[38] Another issue involves the question of whether an employee or an employer owns a Twitter account after an employee has left the employer's company. In one pending case, *PhoneDog v. Kravitz*, Noah Kravitz began writing on Twitter as "PhoneDog_Noah" while working at the company PhoneDog Media LLC. Over four years, he amassed 17,000 followers.[39] When Kravitz decided to leave the company, he was told that he could keep his Twittter account and all of his followers, but post as "NoahKravitz" in exchange for posting occasionally for

PhoneDog.[40] Eight months later, however, PhoneDog filed suit against its former employee, claiming that the Twitter list was a customer list and property of the company and seeking damages of $2.50 a month per follower.[41] The outcome of this case will be instrumental in establishing precedent regarding ownership of social media accounts.

III. Implementation of Policy Guidelines

As Twitter grows, and more celebrities flock to it as a means to connect with their fans, it seems increasingly important for employers to issue specific guidelines as to policies for Twitter use. Discussed below are a number of instances that have led some companies to implement social media and Twitter-specific policies.[42]

The BBC is one company that adopted social media policies very early on for both editorial staff and other employees.[43] The BBC's overall message in doing so was to remind employees to be "mindful of the information they disclose on social networking sites."[44] At the time, the BBC was especially concerned with reminding editorial writers not to reveal political views in order to maintain the integrity of the network.[45] However, after singer Sophie Ellis-Bextor revealed that she would be appearing on the BBC's series *Life's Too Short* prior to the network's planned public announcement, it was reported that the company was considering banning its stars and other talent from using Twitter and other public forums to prevent leaks.[46] A BBC spokesperson explained that under the previously written guidelines, most talent tweeting was considered "personal usage," but due to the increasingly complicated relationship between the public and private space, it was no longer clearly effective to distinguish between personal and other use.[47]

Similarly, last spring an extra on the set of Fox's television series *Glee* let a plot point slip via her Twitter account.[48] According to a *Daily News* report, the production company behind the show, 20th Century Fox, then considered changing all of the show's talent deals——from series regulars to day players—to include strict punishments for blabbing online.[49] That same article revealed that ABC-owned ESPN "issued guidelines for tweeting while working on network shows" that applied to talent.[50] It also pointed out that the Screen Actors Guild's standard union contracts did not include confidentiality clauses or a non-disclosure agreement.[51] Interestingly enough, ABC also has a practice of encouraging its talent to tweet, albeit within its guidelines, and reserves the right to feature these tweets on the network's homepage.[52] Additionally, the NFL has a league-wide policy of banning the use of social media by a player "or anyone representing him on his personal Twitter, Facebook or any other social media account" for the 90 minutes before kickoff and after the game following the traditional media interviews.[53] The league also extended its traditional ban on play-by-play descriptions of games to social media platforms.[54]

NBC is one television network that recently created guidelines for "Social Media/Blogging/Online Publishing" that apply to all NBC News employees, including on-air talent.[55] The guidelines specifically encourage participation in social media, blogging, and other online publishing platforms.[56] They provide a list of "Do's and Don'ts" for employees for social media and other platforms. The list reminds employees to be responsive to and respectful of readers and fellow colleagues, and to use common sense when posting to a social media website.[57] The guidelines also state that an employee must have prior approval from NBC's Director of Social Media before creating a Twitter feed or blog relating to the employee's work at NBC News. In addition, there is a warning against "tweet[ing], retweet[ing], post[ing] or link[ing] to anything that NBC News is not prepared to report on air or on line" or that might be embarrassing or disparaging to NBCUniversal or its personnel. Furthermore, the guidelines forbid an employee from posting confidential or proprietary information and "NBC News reporting material (notes, stills, video, etc.) or any unpublished material that you record with your own camera while on an NBC News assignment without permission of the supervising producer of the segment."[58] This list ends by comparing social media outlets to broadcasting, and affirming: "Don't defame or disparage anyone. In spite of the informal style of blogs, we can be held legally accountable for what you publish, just as if it were broadcast."[59] Finally, the guidelines tell employees not to take positions on controversial or political issues without permission, and require NBC News and its personnel to "identify themselves when publishing content about, or commenting on, matters that pertain to their own reporting or any aspect of NBC News or NBCUniversal."[60] It is not apparent whether violation of these guidelines could lead to termination of an employee. It is certainly important for the employer to make these guidelines clear to talent, however, since the employer ultimately may not want to fire a leading signed talent due to inappropriate tweeting or blogging. Given the nature of talent on television, not only will it be hard for the company to disassociate itself with the talent who is terminated, but both viewers and the network will ultimately lose out if the show is cancelled.

IV. National Labor Relations Board Protections

In response to an abundance of recent lawsuits claiming wrongful termination of employees for comments made on social media sites, the National Labor Relations Board's (NLRB) Acting General Counsel released the first NLRB report on social media in August 2011.[61] In this report, which specifically mentioned 14 different social media cases, the NLRB essentially found that even non-unionized employees' use of social media could be considered protected "concerted activity" under Section 7 of the National Labor Relations Act.[62] However, the report outlined one case in particular that exclusively

concerned Twitter, where the NLRB determined that a newspaper employee's posting of "unprofessional and inappropriate tweets to a work-related Twitter account" was not concerted activity.[63] This determination is interesting because the employer (a newspaper) had encouraged its employees to open Twitter accounts and to use social media to get news stories out. In the spring of 2009, the employee opened a Twitter account, chose his own screen name, and controlled the content of his tweets. He disclosed in the biography section of his account that he was a reporter for the employer's newspaper and included a link to the newspaper's website. After he complained about another employee on Twitter, however, he was told that he was "prohibited from airing his grievances or commenting about the newspaper in any public forum."[64] Thereafter the employee continued to tweet about various matters, including homicides in the area, and made one tweet that criticized a local area television station. At that point, he was suspended and then terminated.

According to the NLRB's report, the termination letter asserted that the employee had "disregarded guidance to refrain from using derogatory comments in any social media forums that could damage the goodwill of the company and that the Employer had no confidence that he could sustain its expectation of professional courtesy and mutual respect."[65] The NLRB report went on to say that the termination did not violate the employee's Section 7 rights because the tweets "did not relate to the terms and conditions of his employment," did not "involve other employees in issues related to his employment," and he ignored his employer's warnings to stop.[66] This decision is somewhat at odds with a situation that arose early last year, in February 2011, where the NLRB filed a complaint against a nonprofit social services provider on behalf of employees who were allegedly fired for posting offensive remarks about a supervisor on Facebook. The case was decided by an administrative law judge, who concluded that the employees' posts were protected.[67] The NLRB's General Counsel report ultimately reached an even broader view of protected social media practices when it declared that it was unlawful for employers to issue social media policies with blanket prohibitions on employees making disparaging comments about supervisors, engaging in rude or discourteous conduct, using social media outlets for "inappropriate discussions," or posting photographs of themselves that depict a company logo.[68] The NLRB report, however, did concede that a policy requiring that all media contact be filtered through designated employees was acceptable.[69]

V. Contractual Limitations on the Use of Social Media by Talent

Specifically of interest here are the contracts television networks utilize when employing celebrity talent for specific projects. When companies employ talent, standard contract provisions outline the basic rights and remedies available to the employer against the employee as a result of various misfeasances. Traditionally, the morals clause is the paragraph of a contract that allows the employer to terminate the talent agreement based on alleged or actual immoral behavior by an employee.[70] Morals clauses have been standard to television talent agreements (as well as advertising and motion picture talent agreements) since the 1920s, when famous comedian Roscoe "Fatty" Arbuckle signed a three-year, $3,000,000 contract with Paramount Pictures, only to host a party that resulted in his guest Virginia Rappe falling fatally ill in one of his bedrooms, causing a scandal to erupt and turning public opinion against him.[71] During this time there was a lot of scrutiny over the morality of the entertainment industry—the Hollywood lifestyle of excess—resentment of which was so great that some states passed laws censoring films.[72] In order to stem the tide of censorship, many studios opted for self-regulation, and the morals clause was one of the outgrowths that allowed them to break with scandal-afflicted stars (like Arbuckle).[73]

Morals clauses are just as relevant today and still a clean way to break with a star talent after a scandal. A standard morals clause provides as follows:

> Artist will not behave in any manner that will subject Artist to public hatred, contempt, scorn, ridicule or disrepute, or shock or offend the community or any organized group therein or reflect unfavorably upon Producer or those claiming through Producer. If Artist is in breach of this paragraph or if any of the forgoing has occurred in the past and is given publicity, Producer will have the right to terminate this Agreement.…[74]

Accordingly, if a tweet by a talent resulted in public backlash or reflected poorly on the company, the morals clause might be able to be enforced by the company to terminate the talent's contract as it has been used to end celebrity endorsement deals such as those of Michael Vick and Tiger Woods referred to above.[75]

Examples of other contract provisions that could or explicitly do cover tweets by talent are confidentiality clauses. A confidentiality clause governing talent in a television series reads as follows:

> Confidentiality. Artist shall not disclose to any third party any information to which Artist has had or will have access to concerning the Series and/or any of Producer's or Television Network's operations or programming or other services or the terms (other than fee quotes) and conditions of this Agreement, except as required to fulfill Artist's obligations hereunder, as expressly permitted by

> Producer in writing or as required by law. Artist shall not make or authorize others to make any statement to any media service with respect to the Series, without Producer's prior written approval in each instance. Notwithstanding the foregoing, Artist may make incidental references in personal publicity following the broadcast of the final episode of the Series in which Artist appears. Except as specifically provided herein or as otherwise authorized by Producer, Artist shall not, on Artist's own behalf, and shall not authorize others to, publicize, advertise or promote Artist's appearance on the Series or use or disclose to any party any information or trade secrets obtained or learned as a result of Artist's services in the Series, including without limitation any information concerning or relating to the Series, the performers, participants, the events contained in the Series, the outcome of the Series or any of the other narrative details of the Series, for a period from the date of this Agreement until three (3) years after the initial broadcast of the last episode of the Series in which Artist appears. Artist shall keep confidential all the financial and other material terms of this Agreement and shall not disclose them except to the extent necessary to comply with law or the valid order of a court of competent jurisdiction, in which event the party making such disclosure shall so notify the other and shall seek confidential treatment of such information (if available).[76]

While standard morals and confidentiality clauses could arguably cover the act of tweeting, they do not seem to be the most effective way to balance the employer's and employee's interests. Thus, it becomes necessary to think about what type of clause or language would strike the balance between affording the appropriate level of personal expression, while also preserving the companies' legitimate desire for its star talent to refrain from generating controversy.

The example that follows is an updated confidentiality clause in an individual contract for a television reality show that prohibits all use of social media relating to the talent's involvement in the production:

> Except as otherwise required or permitted by Producer and the Network, I shall not advertise or promote my participation in the Series or receive or generate any monetary advantage from my participation in the Series, nor shall I authorize any others to do so. Without in any way limiting the foregoing, I shall not at any time prepare or assist in the preparation of any written, audio or visual work (including, without limitation, any book, blog, vlog, video on YouTube, or post or message on Facebook, Twitter, MySpace, Vimeo, etc.) or participate in any social media that depicts, concerns or relates in any way to my participation in or in connection with the Series. In addition, I shall consult with Producer and the Network regarding any and all publicity in connection with my involvement in or appearance on the series, and I shall not consent to any publicity without the prior written approval of Producer and the Network.[77]

Additionally, a General Manager of numerous Broadway shows has recently begun inserting the following language into actor contracts:

> Actor agrees not to disclose private information about rehearsals, performances or related information about the Play in any media (including but not limited to platforms such as Twitter, Facebook and other social networking platforms) without prior written consent of the Producer.[78]

The updated clauses above demonstrate the types of provisions that individual contracts should contain with respect to Twitter and other social media platforms. Since traditional morals clauses cover "acts" or active conduct, and not "speech," it seems prudent to specify the types of statements that the company employer does not want to be associated with over Twitter. As the traditional clauses demonstrate, however, there is a long-standing practice of media companies restricting what is said about their projects. As more and more networks or television series have Twitter accounts, including some in which characters also tweet, it is foreseeable that talent might negotiate for a similar promise from the company (something like an updated reverse-morals clause) that it will not use its own social media, and will instruct those posting to company Twitter accounts, not to defame or disparage, or make certain comments about the employed talent.[79]

Even with the tradition of confidentiality clauses and restrictions on what an employee may disclose to the public, there are still a variety of legal questions relating to contractual limitations on media postings that will likely need to be decided by the courts. Most notably is whether there is any First Amendment violation by placing such limitations on employees' speech.[80] For example, taking the last contract provision, what constitutes "private

information" seems to be an open question. If the effect of that clause in practice would be that a celebrity talent could not tweet at all, would a court consider that a blanket restriction on free speech? Surely the same principles that traditionally apply to confidentiality clauses would likely be applied to tweets. Since celebrities often use Twitter to convey otherwise mundane or seemingly unimportant information (i.e., perhaps something along the lines of what color costume the celebrity has to wear or the location of a particular shoot) or newsworthy information (such as tweeting something along the lines of "an actor was hurt on the set today, hope he gets better soon"), however, the lines about what constitutes "private information" may be increasingly blurred. Furthermore, what about after a story is picked up by the general media? Is a celebrity allowed to tweet a statement then? There is also a potential monitoring question for employers since, unlike use of email in the workplace, an employee or talent's use of Twitter does not necessarily use company resources.[81]

Ultimately, however, since the First Amendment only restricts government control of speech and does not apply to a private employer,[82] any litigation would likely be based on contract law and not constitutional principles. It is important to note that seven states, including New York, provide minimal protection for employees against termination for off-duty, off-site, leisure or recreational activities.[83] However, this rule would not be applicable to talent fired for tweeting since the rule contains a professional services contract exception.[84] Even so, however, it seems that the more limited the clause is the better, in order to prevent both the disclosure of information and the threat of a legal challenge by talent.

VI. Conclusion

Regardless of whether one considers the above-mentioned examples of the use and misuse of Twitter by various celebrities as scandals, tabloid stories, promotional ploys, or merely par for the course when reaching celebrity status in the Web 2.0 world, they highlight new legal concerns for all employers as well as fundamental questions about how to balance confidentiality, rights of privacy and First Amendment guarantees. Ultimately, it appears that the best way to combat both the legal and publicity problems arising from Twitter and other social media platforms is for entertainment companies to create and distribute detailed guidelines for both personal and work-related use of Twitter and other social media platforms by employees. The social media policies should be as specific as possible and ultimately serve as a reminder that while Twitter and other social media platforms lend themselves to informal tones, it is important to think about how the public-at-large could perceive the tweet and be sure that no confidential information is disclosed. The policies should also specifically explain how an individual should refer to the project he or she is working on (if at all), what company employees may say about other employees, what degrees of information can be shared, if anything, and the various consequences for violations of the policy, including the take-down rights of the company if something is posted with which it does not agree.

Entertainment companies should also include specific language in a celebrity talent's individual contract, either referring to the company's social media policy guidelines (and thus putting the talent on notice that such guidelines exist) or specifically articulating what the talent may or may not do or say on Twitter and other social media platforms. As troubling as leaks can be for a network or studio, banning use of Twitter and other social media platforms neither seems realistic nor prudent. As discussed, Twitter can have tremendous promotional benefits for both the talent and the employer, and has already become so ingrained in culture that it would be hard to stop it. Tweeting among celebrities is so commonplace that celebrities might not consider how their statements reflect on the companies or specific projects, or realize that tweeting can constitute inappropriate and actionable behavior in the absence of such contractual clauses and policy guidelines.

Endnotes

1. Twitter, www.twitter.com/about. *See Understanding Twitter*, McGrady on Social Media § 25.01 (LEXIS 2011).
2. *See* David Kirkpatrick, *Twitter was Act One*, Vanity Fair, April 2011, *available at* http://www.vanityfair.com/business/features/2011/04/jack-dorsey-201104. *See also U.S. v. Shelnutt*, No. 4:09-CR-14, 2010 WL 1223943 (M.D. Ga. 2009) (describing Twitter as "a social networking and micro-blogging service that invites its users to answer the question: 'What are you doing?' Twitter's users can send and read electronic messages known as 'tweets.' A tweet is a short text post (up to 140 characters) delivered through Internet or phone-based text systems to the author's subscribers. Users can send and receive tweets in several ways, including via the Twitter website.").
3. *See supra* note 2, Kirkpatrick, *Twitter Was Act One*.
4. Simon Dumenco, *What Matters More Than Obama, Health Care and Guinness Beer in Twitterland?*, Ad Age, March 17, 2010, http://adage.com/article/the-media-guy/matters-obama-health-care-guinness-beer-twitterland/142837/.
5. *See* Claire Bates, *How Michael Jackson's Death Shut Down Twitter, bought chaos to Google…and 'killed off' Jeff Goldblum*, Daily Mail Online, June 26, 2009, http://www.dailymail.co.uk/sciencetech/article-1195651/How-Michael-Jacksons-death-shut-Twitter-overwhelmed-Google--killed-Jeff-Goldblum.html; Maggie Shiels, *Web Slows after Jackson's death*, BBC News.com, June 26, 2009, http://news.bbc.co.uk/2/hi/technology/8120324.stm.
6. *See* Bill Keller, *The Twitter Trap*, N.Y. Times, May 18, 2011, http://www.nytimes.com/2011/05/22/magazine/the-twitter-trap.html.
7. *See* Sam Gustin, *Social Media Sparked, Accelerated Egypt's Fire*, Wired, Feb. 11, 2011, http://www.wired.com/epicenter/2011/02/egypts-revolutionary-fire/.
8. Daniel Terdiman, *Ashton outmaneuvers CNN to 1 million on Twitter*, CNET News, April 16, 2009, http://news.cnet.com/ashton-outmaneuvers-cnn-to-1-million-on-twitter/?tag=mncol;8n.
9. *See The Twitaholic.com Top 100 Twitterholics based on Followers*, Twitaholic.com, http://twitaholic.com.

10. *See* @taylorswift13, Twitter.com, http://twitter.com/#!/taylorswift13.

11. Vanessa Grigoriadis, *America's Tweethearts*, Vanity Fair, Feb. 2010, http://www.vanityfair.com/culture/features/2010/02/twitter-201002.

12. *Paula Abdul Quits 'American Idol*,' MSNBC.com, Aug. 5, 2009, http://today.msnbc.msn.com/id/32293116/ns/today-entertainment/t/paula-abdul-quits-american-idol/.

13. @ladygaga, *"Stop leaking my motherf***ing videos,"* Twitter.com, May 28, 2009, http://twitter.com/#!/ladygaga/status/1952768450 (last visited Dec. 2, 2011).

14. *50 Cent Threatens to Not Release Album, To Leak Dre's Song, Then Backtracks*, Huffington Post, July 28, 2011, http://www.huffingtonpost.com/2011/07/28/50-cent-twitter_n_911989.html.

15. *See* Matthew Belloni, *Courtney Love to Pay $430,000 to Settle Twitter Defamation Case*, Hollywood Reporter, March 3, 2011, http://www.hollywoodreporter.com/blogs/thr-esq/courtney-love-pay-430000-settle-163919.

16. John G. Browning, The Lawyer's Guide to Social Networking: Understanding Social Media's Impact on the Law, 98-99 (West, Aspatore Books 2010).

17. Donna Baldry, *Courtney's Love Lost: Twitter Defamation Suit Settles*, JETLaw: Vand. J. Ent. & Tech. L., March 9, 2011, http://www.jetlaw.org/?p=5842.

18. Eriq Gardner, *Courtney Love Twitter Defamation Case Moves Forward*, Hollywood Reporter, Sept. 23, 2011, http://www.hollywoodreporter.com/thr-esq/courtney-love-twitter-defamation-case-239702.

19. *See*, Adam Markovitz, *New law targets fake celebrity Twitter and Facebook pages. Phony Nick Noltes beware!*, EW.com, Jan. 6, 2011, http://popwatch.ew.com/2011/01/06/fake-celebrity-twitter-law/. The text of the bill can be found at http://e-lobbyist.com/gaits/text/60975.

20. Nishat Kurwa, *All Things Considered: The Tech Whiz Behind Lil Wayne's Curtain*, NPR.com, Aug. 29, 2011, http://www.npr.org/blogs/therecord/2011/08/29/140036532/the-tech-whiz-behind-lil-waynes-curtain.

21. *See* Jo Piazza, *How Much Can a Celebrity Make for Tweeting*, New York Magazine, February 6, 2012, http://nymag.com/daily/entertainment/2012/01/how-much-can-a-celebrity-make-for-tweeting.html (reporting that Kardashian received $10,000 for tweeting about ShoeDazzle.com). *See also* Alexandra Topping, *Twitter endorsements face OFT clampdown*, The Guardian, Jan. 9, 2011, http://www.guardian.co.uk/technology/2011/jan/09/oft-clampdown-covert-twitter-endorsements.

22. Tim Arango, *Soon, Bloggers Must Give Full Disclosure*, N.Y. Times, Oct. 6, 2009, http://www.nytimes.com/2009/10/06/business/media/06adco.html?adxnnl=1&adxnnlx=1322939606-WyKU4FArcBrwfmUMnAyh1g. *See* Browning, The Lawyer's Guide to Social Networking, 145-148.

23. Alexandra Topping, *Twitter endorsements face OFT clampdown*, The Guardian, Jan. 9, 2011, http://www.guardian.co.uk/technology/2011/jan/09/oft-clampdown-covert-twitter-endorsements.

24. *See* Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 Colum. J. L. & Arts 235, 240-41 (2005) (explaining the transference of a celebrity's image and reputation to a brand's product).

25. *Rashard Mendenhall sues Champion*, ESPN.com, July 19, 2011, http://espn.go.com/nfl/story/_/id/6783353/rashard-mendenhall-pittsburgh-steelers-sues-champion-1m?campaign=rss&source=ESPNHeadlines.

26. *Id.* ("The running back's contract included provisions barring Mendenhall from actions that would bring him 'into public disrepute, contempt, scandal or ridicule, or tending to shock, insult, or offend the majority of the consuming public,' along with other terms, Lynette Fuller-Andrews, a lawyer for Hanesbrands, wrote in a May 11 letter to Mendenhall's representatives.").

27. *Id*. See *infra* Part V for explanation of the morals clause and other contractual provisions.

28. *Id*. *See* Michael McCarthy, *Tiger Woods loses another corporate sponsor*, USATODAY.com, Aug. 6, 2011, http://content.usatoday.com/communities/gameon/post/2011/08/tiger-woods-losing-another-corporate-sponsor-tag-heuer-spilt-part-ways-amicable/1.

29. *See* Sarah Anne Hughes, "Ashton Kutcher turns Twitter over to pros after sending Joe Paterno tweet," Washington Post, Nov. 10, 2011, http://www.washingtonpost.com/blogs/celebritology/post/ashton-kutcher-turns-twitter-over-to-pros-after-sending-joe-paterno-tweet/2011/11/10/gIQARNlK9M_blog.html.

30. Adam Clark Estes, *Ashton Kutcher Knows What He Doesn't Know About Startups*, Atlantic Wire, May 26, 2011, http://www.theatlanticwire.com/technology/2011/05/ashton-kutcher-startups-ubermedia-aplus/38166/.

31. *Id*.

32. *Id*.

33. *Supra* note 11, Grigoriadis, *America's Tweethearts*.

34. Todd Wasserman, *Charlie Sheen Sets New Guinness World Record for Twitter*, Mashable.com, Mar. 3, 2011, http://mashable.com/2011/03/03/charlie-sheen-sets-new-guinness-twitter-record/.

35. Kimberly Nordyke, *Charlie Sheen Announces Live Tour Via Twitter*, Billboard.com, Mar. 11, 2011, http://www.billboard.com/events/charlie-sheen-announces-live-tour-via-twitter-1005070402.story#/events/charlie-sheen-announces-live-tour-via-twitter-1005070402.story.

36. Joshua Brustein, *Fine Print Blurs Who's in Control of Online Photos*, N.Y. Times, May 22, 2011, http://www.nytimes.com/2011/05/23/technology/23terms.html?_r=2.

37. *See id*.

38. *Time to Quit Using TwitPic?*, PDN Pulse, May 2011, http://pdnpulse.com/2011/05/time-to-quit-using-twitpic.html. Twitpic has since updated its Terms of Service to clarify that photographs and other content uploaded by users to Twitpic remains the property of the creator. *See* Lauren Dugan, *Twitpic Users Now Officially Own Copyright Of Their Uploads*, MediaBistro.com, May 11, 2011, http://www.mediabistro.com/alltwitter/twitpic-users-now-official-own-copyright-of-their-uploads_b8655.

39. PhoneDog v. Kravitz, No. C11-03474 MEJ., 2011 WL 5415612 (N.D. Cal. Nov. 8, 2011).

40. John Biggs, *A Dispute Over Who Owns a Twitter Account Goes to Court*, New York Times, Dec. 25, 2011, http://www.nytimes.com/2011/12/26/technology/lawsuit-may-determine-who-owns-a-twitter-account.html?_r=1.

41. *Id*.

42. For a list of some companies that have social media policies, see Social Media Governance, http://socialmediagovernance.com/policies.php.

43. BBC, *Editorial Policy Guidance Notes: Personal Use of Social Networking and Other Third Party Websites (Including Blogs, Microblogs and Personal Web-Space)*, BBC.com, October 2010, *available at* http://www.bbc.co.uk/guidelines/editorialguidelines/page/guidance-blogs-bbc-full.

44. *Id*. *See* BBC, *Social Media Guidance*, BBC.com, July 12, 2011, http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/14_07_11_news_social_media_guidance.pdf.

45. *Supra* note 43, BBC, *Editorial Policy Guidance Notes*.

46. Ben Dowell, *BBC acts to stop Twitter leaks by stars and writers*, The Guardian, July 3, 2011, http://www.guardian.co.uk/media/2011/jul/04/bbc-acts-to-stop-twitter-leaks?INTCMP=SRCH.

47. *Id*.

48. *'Glee' spoiler angers Fox; networks fired up over recent leaks and may draw up new contracts for cast*, N.Y. Daily News.com, April 21, 2011, http://www.nydailynews.com/entertainment/television/glee-spoiler-angers-fox-network-fired-leaks-draw-contracts-cast-article-1.113663.

49. *Id*.

50. *See* Jennifer Van Grove, *ESPN Responds to Criticism and Publishes Social Media Policy*, Mashable Social Media, Aug. 4, 2009, http://mashable.com/2009/08/04/espn-social-media/ ("This applies to all ESPN Talent, anchors, play by play, hosts, analysts, commentators, reporters and writers who participate in any form of personal social networking that contain sports related content.").

51. *Id*.

52. Cyril Washbrok, *ABC sets down social media guidelines*, Media Spy, Nov. 5, 2009, http://www.mediaspy.org/report/2009/11/05/abc-sets-down-social-media-guidelines/.

53. *Social media OK before, after games*, ESPN.com, Aug. 31, 2009, http://sports.espn.go.com/nfl/news/story?id=4435401.

54. *Id*.

55. NBC News, Guidelines for Social Media/Blogging/Online Publishing, December 15, 2011, *available at* http://msnbcmedia.msn.com/i/MSNBC/Sections/AboutUS/NBC/NBCNews_online_publishing_guidelines.pdf.

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Id*.

61. *See* Press Release, National Labor Relations Board, Acting General Counsel Releases Report on Social Media Cases, Aug. 18, 2011, https://www.nlrb.gov/news/acting-general-counsel-releases-report-social-media-cases; Memorandum from Anne Purcell, Office of General Counsel, to All Regional Directors, Officers-in-Charge, and Resident Officers, *Report of the Acting General Counsel Concerning Social Media Cases*, OM 11-74 (Aug. 18, 2011), [hereinafter *Report of the Acting General Counsel Concerning Social Media Cases*], *available at* https://www.nlrb.gov/publications/operations-management-memos.

62. *See* Randy Avram and Michael Rosenberg, *Texas Lawyer-Employee Facebook Comments as Protected Activity*, Law.com, Oct. 26, 2011, http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202520282600&slreturn=1. Section 7 of the NLRA outlines the Rights of Employees and declares: "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title]," *available at* https://www.nlrb.gov/national-labor-relations-act.

63. *See Report of the Acting General Counsel Concerning Social Media Cases,* "Employee Who Posted Offensive Tweets Was Not Engaged in Protected Concerted Activity," 12-14.

64. *See Report of the Acting General Counsel Concerning Social Media Cases*, 13.

65. *Id*.

66. *Id*.

67. *See supra* note 62, Avram and Rosenberg, *Texas Lawyer-Employee Facebook Comments as Protected Activity* ("The general counsel's report…concluded that the NLRA would even protect a Facebook post referring to a supervisor as a 'scumbag,' stating, 'The name-calling was not accompanied by verbal or physical threats, and the board has found more egregious name-calling protected.'").

68. *See id*.

69. *See Report of the Acting General Counsel Concerning Social Media Cases*.

70. *See* Robert Lind, Mel Simensky, Tom Selz, Patricia Acton, *History of Morals Clauses*, Entertainment Law 3d: Legal Concepts and Business Practices (May 2011), *available at* LEXIS.com.

71. *Supra* note 24, Kressler, 236.

72. *Id*. at 237.

73. *Id*.

74. Jay Shanker et al., Entertainment Law & Business, Form 9-3 (Juris Publishing 2d ed. 2005).

75. *See supra* Part II.

76. Counseling Content Providers in the Digital Age: A Handbook for Lawyers, Form 11 (Kathleen Conkey, Elissa D. Hecker & Pamela C. Jones eds., New York State Bar Association 2010).

77. Agreement for Contestant on Reality Show Series, 32-33 (on file with author).

78. Email conversation with executive at theatrical general manager (Dec. 2, 2011) (on file with author).

79. *See generally* Procher L. Taylor, Fernando M. Pinguelo, Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 Cardozo Arts & Ent. L. J. 65, 109-112 (2010).

80. The extent to which privacy laws extend to employees in the workplace remains unclear. *See e.g.,* Eadoin Wallera, *Social Networking and the Employment Relationship*, 57 No. 2 Prac. Law. 54 (April 2011).

81. It is well established that employees do not enjoy an expectation of privacy in the workplace when it comes to email and internet use. *See* Nancy Flynn, The E-Policy Handbook: Rules and Best Practices to Safely Manage Your Company's Email, Blogs, Social Networking and Other Electronic Communication Tools, 49-55 (AMACOM, 2d Ed. 2009).

82. *See id*. at 138.

83. Media Legal Resource Center, 1984 All Over Again? A Summary Guide to the Benefits and Potential Legal Pitfalls of GPS Surveillance in the Workplace, Oct. 2011, *available at* www.medialaw.org. *See* N.Y. Lab. Law § 201-d (McKinney 1992).

84. N.Y. Lab. Law § 201-d (McKinney 1992).

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Use of Art Images in Gallery and Auction Catalogues: Copyright Minefield and Practical Advice

By Barry Werbin

A prominent New York City art gallery is preparing for a show highlighting a new exhibition of known and upcoming artists, some of whom are alive and others recently deceased. In preparing the show's catalogue, which will not be sold publicly, the gallery intends, as is longstanding custom, to include high-quality photographs of all the works in the exhibition. Most photos are obtained from the living artists themselves, or from the estates or trusts that control the underlying copyrights and reproduction rights of the deceased artists' works. In a few cases, however, the gallery will need to take its own photos. As a courtesy gesture, it intends to ask for approvals to do so from these few artists or their representatives.

A problem arises, however, when a deceased artist's administering trust questions the provenance of one of that artist's pieces in the exhibition and refuses to grant permission for the gallery to photograph any of the works for use in the catalogue or for any other purpose in connection with the exhibition. Can the gallery nevertheless take photos of these works and use them in its catalogue, which will not be sold or posted online but only given to attendees at the exhibition? Does it a make a difference if the catalogues will be sold or made available digitally on the gallery's website?

As the issue revolves around copying and displaying images of the original pieces of art, the answer should lie in several provisions of the U.S. Copyright Act of 1976 (the Act). Yet while providing critical guidance, the Act may not entirely provide a clear-cut answer.

Copyright Protection of Artworks

Copyright protects original works of authorship from the moment of their creation. In the case of an individual artist, the artist owns the copyrights of his or her original artworks, and the copyright term lasts for the life of the artist (the "author") plus another 70 years after his or her death. Section 106 of the Act reserves to the copyright owner specifically enumerated "exclusive" rights, which include (as relates to art) the rights of reproduction (copying), public display and distribution (by sale/assignment, rental, lease/license or lending), and the right to prepare derivative works based on the original. Notwithstanding these exclusive rights granted to the copyright owner, the Act carves out two important exceptions related to what is referred to as the "first sale doctrine" and, particularly germane to artworks, a limited display right granted to an "owner" of an original work. Before discussing these exceptions, however, it is important to recognize the significant difference between ownership of legal title and ownership of copyright.

Legal Title vs. Copyright

The purchaser of an original work of art only acquires legal title to that one original work; the underlying copyright is not transferred. Instead, copyright remains with the artist or his or her successor in interest. Thus, a consignor seller who owns an original work of art cannot grant to a gallery or auction house any rights greater than what that owner has (bare legal title) with no right to exercise any of the exclusive rights reserved to the copyright owner under Section 106 of the Act.

First Sale Doctrine

Without the statutory exceptions, there could never be a legal art exhibition or sale, as either would invoke the exclusively reserved "display" and "distribution" rights of the copyright holder. In its wisdom, however, Congress included two key exceptions in the Act that facilitate the resale of copyrighted works and grant a limited "display" right. These two exceptions are largely responsible for the legal existence of galleries, auction houses, and museums that display and sell works still under copyright.

First, Section 109, or the "first sale doctrine," provides that:

> Notwithstanding the provisions of section 106(3) [the exclusive distribution right], the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

Thus, someone who owns an original work of authorship protected by copyright (referred to as a "particular copy" in Section 109) is free to sell it. That particular single work may then be resold innumerable times, without limitation, including by a gallery or auction house that is "authorized" by that owner to conduct a sale. The first sale doctrine is responsible for all aftermarket sales of copyrighted materials, including art, used records, music CDs, and books.

Yet what about the display right that also is exclusive to the copyright owner? Section 101 of the Act defines "display" as follows: "To 'display' a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process…."

While Section 106 reserves to the copyright owner the exclusive right to display a work publicly and the right of reproduction, Section 109(c) carves out a special limited exception (tied to the first sale doctrine) for the display of a copy of a work rightfully owned:

> (c) Notwithstanding the provisions of section 106(5) [the exclusive display right], the owner of a particular copy lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by the projection of no more than one image at a time, to viewers present at the place where the copy is located.

This Section is responsible for permitting all "displays" of copyright-protected art by galleries, auction houses, and museums. Yet Section 109(c) does not on its face permit any copying of a "particular" work, including the taking of any photographs and publishing them in a catalogue or on a website. This exception is further limited to a display only to "viewers present at the place where the copy is located."

The limited scope of the Section 109(c) exception seems pretty clear on its face. Nothing in Section 109(c) expressly permits our hypothetical gallery to take its own photos and use them in a catalogue in connection with an exhibition. Thus, the gallery's legal fallback becomes the complex and frequently litigated concept of "fair use" under Section 107 of the Act.

Fair Use Doctrine

The "fair use doctrine" has a long, complex, and tumultuous history in the courts that is beyond the scope of this article. In brief, the doctrine is intended to permit certain uses of copyright-protected materials as exceptions to what otherwise would be infringing activity. Section 107, which codifies the doctrine, provides a non-exclusive list of such permissible uses that are then subject to a non-exhaustive list of four specific criteria courts are required to address to determine whether "fair use" exists. The relevant text of Section 107 is rather brief:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

Taking photos of artworks for use in an exhibition or auction catalogue does not fall squarely within the above-enumerated fair use examples, as such copying and display do not facially qualify as criticism, comment, news, teaching, research, or parody. (Although catalogues ultimately may be used for reference and research that is typically not the original reason a catalogue is created.) Section 107 does not make express exception for making copies for "descriptive" or "display" uses (i.e., to simply describe and display images of what is in an exhibition). This contrasts with U.S. trademark law, which does accept a "descriptiveness" defense where a third party's trademark is used merely descriptively and not in a trademark sense. The delineated statutory examples, however, are just that—examples—as the statute's preamble refers to "the fair use of a copyrighted work, including such use by reproduction in copies…for purposes such as…." Thus, there is room for courts to find that copying for other purposes that are consistent with the policies underlying Sections 107 and 109(c) also qualifies as fair use. Arguably, such use is also commercial in nature if the catalogue will be sold or otherwise used to market an exhibition or auction at which the art will be offered for sale; but the existence of some commercial aspect of a work has not precluded a fair use finding in all cases because it is just one of the primary factors to be considered by a court.

The fourth fair use factor is particularly significant because taking photos of art for use in a catalogue will likely not have any negative effect "upon the potential market for or value of the copyrighted work." Yet the four listed factors also must be balanced by the courts. Even where one factor might win the day, the others may be more weighted either against or in favor of fair use, and courts must not lose sight of the fundamental principles underlying the fair use doctrine.

To complicate matters, in recent years courts have also read into the fair use statute a requirement that under the first factor ("purpose and character of the use"), to be "fair" and thus not infringing, a use must also be "transformative." This concept has become controversial as courts have disagreed over what that term means. Essentially, the "transformative" concept looks at the use made of the copy and whether it is for a purpose different from that of the original work. As the U.S. Supreme Court noted in *Campbell v. Acuff-Rose Music, Inc.*,[1] a work is generally deemed "transformative" when the new work does not "merely supersede the objects of the original creation," but rather "adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message." The non-exclusive permissible uses listed in Section 107, such as for commentary on or criticism of a copyrighted work (which includes parody), are themselves "transformative" uses.

As another example, Google has successfully defended its image search feature under a fair use argument. Google's image search results display digital thumbnail images, which are reduced, lower-resolution versions of full-sized images stored on third-party computers. The image search results are generated in response to end users' search queries for artwork, photos, and other graphical works on the Internet, thereby transforming the thumbnail copies displayed in the search results into a research tool. Google also generates advertising revenues by tying sponsored third-party ads to certain search results. The Ninth Circuit Court of Appeals ruled on this issue in a key 2007 decision, where it found that "the significantly transformative nature of Google's search engine, particularly in light of its public benefit, outweighs Google's superseding and commercial uses of the thumbnails in this case."[2]

Applying the Law

Back, then, to our hypothetical exhibition catalogue. Is photographing artwork to display in an exhibition or auction catalogue "transformative"? Does it satisfy the statutory fair use factors? Can an analogy be drawn to the Google image "search" service? Under a fair use paradigm, should the first sale doctrine and the "display" exception contained in Section 109 of the Act, by implication to carry out their intended purposes, permit a "descriptive" use of art photographs simply to describe the works in an auction or gallery exhibition catalogue? Denying such limited copying and display right arguably undermines the purpose of the display exception in Section 109(c), which facilitates auctions and exhibitions, because without it the ability to promote such sales and exhibitions is severely compromised. After all, this is visual art.

These are as of yet undecided legal questions, but there are cogent arguments that such use does not meet the fair use criteria under Section 107 as it is written, because such use is essentially "commercial," the entire image is copied (photographed), and the copy is not being used for a "transformative" purpose. On the other hand, an enticing argument can be made that, while it may not truly be "transformative," when a photo is being used solely to identify the art in an auction or exhibition (where such display is authorized by Section 109(c) of the Act), the use of the photo in a catalogue for such limited purpose is merely incidental to a permissible use, and only improves the potential market for the work. It should therefore be considered fair use, although being the test case in the courts would be protracted and expensive.

Galleries and auction houses have always printed beautiful high-resolution catalogues with images of art not in the public domain. However, the issue of seeking advance permissions rears its ugly head when an artist's representative objects to such photographic copying because, for example, the representative does not accept the provenance. Moreover, because the owner of an artwork seeking to sell it (unless it is the actual artist or his or her legal representative) owns only that "copy," and does not own the underlying copyright rights, the owner cannot legally grant a gallery or auction house permission to photograph the work from a copyright standpoint.

With all this in mind, the conservative approach would be to seek permission to photograph from the rights owner, his or her agent, or a clearinghouse, and to always do so if the image will be used on the cover of a catalogue or prominently in advertisements or marketing materials to promote an auction or exhibition. In most cases, this should not be an issue because, as a practical matter, most artists or their representatives are happy with this practice as it promotes the works and creates and maintains underlying markets for the art. Yet in the case of a deceased artist without an estate representative or non-U.S. works under copyright, for example, licensors or clearinghouses will need to be contacted for permission, which likely will require payment of some license fee tied to the notoriety of the artist, scope of use, and number of catalogues to be printed.

Real World Examples

Gagosian Gallery, for example, always asks living artists for permission to photograph works going into its exhibitions for use in its catalogues. Andrea Crane, a Director at Gagosian Gallery in New York, says that doing shows with living artists requires a "close collaboration with the artists," who are pleased to cooperate. "The catalogues tend to benefit the artist by complementing the artwork," notes Alison McDonald, Gagosian's Director of Publications.[3]

According to Ms. McDonald, Gagosian often deals with deceased artists' estates, which typically grant rights to photograph their artists' works for use in catalogues. In cases where estates cannot be contacted or do not exist, says Ms. McDonald, permissions are sought, typically for a fee, from artists' publishers and clearinghouses, such as Visual Artists and Galleries Association (VAGA), Artists Rights Society (ARS), and the Design and Artists Copyright Society (DACS). If consent cannot be obtained, an image of the artwork is not used.

Likewise, Christie's auction house "always obtains permissions or licenses to use art images on the covers of its catalogues and in advertising collateral," says Karen Gray, Christie's General Counsel.[4] Ms. Gray notes, however, that "there is a compelling fair use argument for using smaller photos of art tied to the applicable lot description within a particular catalogue, as this is consistent with the policy under Section 109(c), which permits display of the art without the copyright owner's permission, and principles of fair use." Catalogues retained for archival purposes (both in hard copy and digitally on Christie's website) serve a research and reference purpose, which falls more squarely within the traditional scope of fair use.

Conclusion

What guidance should gallery owners and auction house directors take away from all this? Apart from consulting with intellectual property legal counsel, prudence dictates taking a conservative and practical approach, especially in these litigious days in the art world. Some well-funded gallery or auction house may one day pick the fair use catalogue fight, but it will be expensive and protracted, and the outcome will be uncertain.

Endnotes

1. 510 U.S. 569, 579 (1994).
2. Perfect 10, Inc. v. Amazon.com and Google (amended opinion), 508 F.3d 1146 (9th Cir. 2007).
3. Interviews of Andrea Crane and Alison McDonald conducted on Nov. 2, 2011, and are on file with the author.
4. Interview of Karen Gray conducted on Nov. 16, 2011, and is on file with the author.

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Google, Richard Prince, and Gagosian: The Courts' 2011 View of "Borrowing" and What It Portends for the Arts[1]

By Carol J. Steinberg

Google's ambition to create the world's largest digital library and bookstore has run into a 300-year-old legal concept: Copyright. Richard Prince's appropriation of Patrick Cariou's photographs of Rastafarians and the millions made by him and the Gagosian Gallery met a formidable obstacle in Judge Deborah Batts. A class of authors (and publishers) sued to stop Google, and Cariou sued to stop Prince and Gagosian. Surprisingly, both resulted in decisions which favored the working author and fine artist over the powerful company and art world moguls.[2]

Both Google's Library Project and the fate of appropriation artist Richard Prince have stirred a great deal of controversy. Most expected Google to ultimately prevail—because it usually does—and expected Prince' use of Cariou's photographs to be deemed a fair use, and that Gagosian would also avoid liability. This article will describe the lawsuits against Google, Prince and Gagosian, their groundbreaking decisions, and what each portends for the literary, academic, and art worlds, and specifically for the working writer and artist.

Google

In 2004, Google announced that it had entered into agreements with four university libraries, Harvard, Stanford, Oxford, the University of Michigan, and the New York Public Library to "digitally scan the books from their collections so that users worldwide can search them.…" Google reproduced millions of protected books in their entirety without permission of the copyright owners (and also books in the public domain), through systematic scanning operations set up with large research libraries. Once scanned, the books were indexed electronically, allowing end-users to search by title and other bibliographical information. Google returned hits to its customers that included the option of browsing "snippets," except for public domain books, which could be viewed and downloaded in their entirety.

Google proclaimed the benefits of the book project. Books would become more accessible; libraries, schools, researchers, and disadvantaged populations would gain access to far more books. Digitization would facilitate the conversion of books to Braille and audio formats, increasing access for individuals with disabilities. Authors and publishers would benefit as well, as new audiences would generate new sources of income. Older books—particularly out-of-print books, "many of which are falling apart buried in library stacks—would be preserved and given new life."[3]

Many, however, argued that the cost was too high, violating copyright and antitrust laws. Google had proceeded to scan, digitize, and copy books….without any attempt to contact the rights holders beforehand. In so doing, Google reversed the default copyright scheme by shifting the burden to rights holders to assert their rights. In sum, millions of books scanned by Google were still under copyright, and Google had not obtained permission of the authors and publishers to scan the books.

Consequently, in 2004, certain authors and publishers brought a class action charging Google with copyright infringement. The authors sought damages and an order stopping the wholesale infringement. Google's defense was principally fair use—that although they infringed the copyrights, the use fit within the statutory exception to copyright infringement.

The parties engaged in document discovery, began settlement negotiations, and entered into a proposed settlement, which was preliminarily approved by the court in November of 2008. Notice of the proposed settlement triggered hundreds of objections, so the parties continued to negotiate, which resulted in an Amended Settlement Agreement (ASA). This ASA was the subject of a daylong fairness hearing, which resulted in the thoughtful decision discussed below.

Google could continue in perpetuity to digitize books, sell subscriptions to electronic databases, sell online access to individual books, and sell advertising in the display of online pages. It would pay rights holders 63 percent of revenues received and would fund the creation of a Book Rights Registry listing the works, rights holders, and revenues.

Rights holders could exclude their books from some or all of the uses and altogether remove their books from the database, but they would have to actively opt out of the settlement. The class consists of anyone with a copyright interest in any of the works digitized as of January 2009. Rights holders could also ask Google not to digitize any books not yet digitized, and Google would use "Reasonable Efforts" not to do so. In other words, authors would have to have knowledge of and opt out of the settlement.[4]

One can question as to how many authors with a copyright interest since 2009 and potential class members have registered their copyrights, know whether their works were digitized by Google, and know how to opt out of the settlement. Another major and controversial

aspect of the ASA is that Google would obtain and retain the rights to orphan books (where the copyright holders cannot be found) and out-of-print books. In other words, Google could digitize, sell, and license rights to out-of-print books and books whose authors cannot be found.

Hundreds of objections to the proposed settlement were filed with the court. Below is a summary of the concerns.

Notice Concerns

The class consists of anyone with a copyright interest as of January 2009.[5] If an artist's copyright was not registered, chances are that he or she did not receive notice of the settlement, and his or her interests may not have been represented.

Copyright Concerns

As aptly expressed by the Copyright Office (by Marybeth Peters, then the Register of Copyrights), the settlement is not a resolution of existing claims, nor a method for paying damages for unauthorized uses (as settlements usually are). Rather, the proposed settlement could affect the exclusive rights of millions of copyright owners, in the U.S. and abroad, with respect to their abilities to control new products and new markets, for years to come.[6]

Register Peters praised some aspects of the settlement—the creation of a rights registry which could allow the licensing of digital work and a mechanism for paying the authors, the promise to offer millions of titles through libraries in formats accessible to those who are blind or print-disabled (which should be the bottom line for anyone in digital publishing), and the increased ability of libraries to offer books in electronic formats.

Nonetheless, she argued, allowing Google to continue to scan millions of books into the future on a rolling schedule with no deadline is tantamount to creating a compulsory licensing system, which undermines the ability of a copyright holder to control his or her work. In addition, the proposed settlement drastically compromises the rights of owners of out-of-print books. Those authors continue to own copyright, whether or not the book is in print. To allow a commercial entity to sell such works without consent is an end run around copyright law. In addition, Congress is attempting to enact orphan works legislation, which would create a fair system of allowing users to use orphan works with many built-in protections to protect the actual copyright owners.[7]

Antitrust Concerns

Antitrust experts questioned whether a single commercial entity would own too much of the digital book market and inhibit potential competition. Small libraries feared they would face exorbitant prices for access to the database. The United States Department of Justice (DOJ) raised significant concerns about the proposed settlement. At the same time, it voiced support for a modified settlement that addressed its concerns and expressed strong support for a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and orphan works, but it still raised significant concerns about the settlement. The three main concerns of the DOJ were:

(1) To make large numbers of copyright works available to the public in electronic form while providing compensation to authors and publishers;

(2) To create a marketplace where consumers pay competitive prices for benefits received, with multiple outlets from which to obtain access to the work; and

(3) To fully protect the rights of absent class members.[8]

Judge Chin held a day-long fairness hearing where all could express their views and concluded that the settlement was not fair, not adequate, and not reasonable. He quoted one objector who said: "Google pursued its copyright project in calculated disregard of authors' rights. Its business plan was: 'So, sue me.'"[9] He also articulated the objection of academic authors to the settlement: "The Google Book Search initiative…is not a library. It is instead a complex and large-scale commercial enterprise in which Google—and Google alone—will obtain a license to sell millions of books for decades to come."[10] He aptly expressed the concerns of owners of orphan works in a letter from an author from Texas, who gave the example of her grandfather, who self-published a memoir called *Dust and Snow*, in 1988. He passed away in the 1990s and copyright passed to his daughters. She observed:

> From Google's point of view, *Dust and Snow* is an "orphaned" book. If and when Google scans it, the company is likely to be unsuccessful in trying to locate the publisher, since the book was self-published and my grandfather is now deceased. In essence, the way the settlement is written, such "orphaned" titles are automatically handed to Google free of charge to do with as it will. From my family's point of view, *Dust and Snow* is not orphaned at all. It is very clear who owns the copyright. So why is Google being granted the automatic right to take over the copyright of books like my grandfather's?[11]

Judge Chin expressed general support for a universal digital library and in his infinite wisdom rejected the settlement, stating that many of the concerns raised would be ameliorated if an opt-in, rather than opt-out settlement would be adopted. An author would have to know about the case, understand its ramifications, and decide

that he or she wanted to be governed by the settlement agreement.

The Google litigation is complex. Many do not fully understand it. Yet common sense and a general sense of fairness dictate that an opt-in approach is fairer. As the settlement would affect everyone with a copyright in a book since January 2009, and most copyright owners do not understand their rights, let alone the ins and outs of a complex settlement, Judge Chin's approach is a fair one and takes into account the reality of an author's, book consumer's, and the public's concerns, as opposed to just that of one of the most powerful corporations in the world.

Cariou

The story of the *Cariou v. Prince and Gagosian* lawsuit is just as important to the art world as the Google case is to the literary world. Patrick Cariou is a professional photographer who spent six years with Rastafarians in Jamaica, gaining their trust and taking their portraits. He published a book of photographs taken during this time called *Yes Rasta*. It contained compelling portraits of individual Rastafarians, as well as landscapes. Cariou testified at length about the creative choices he made in deciding which equipment to use in making the photos, staging choices when composing and taking individual photos, and the techniques and processes he used. He also was heavily involved in the editing, layout, and printing of *Yes Rasta*.[12]

Richard Prince is a well-known appropriation artist, who has shown at numerous museums and galleries, including a solo show at the Guggenheim. In December 2008, Prince showed artwork at the Eden Rock hotel in St. Barts. Among the work shown was a collage called "Canal Zone," named for the area in Panama where he was born. The "Canal Zone" collage consisted of 35 photographs torn from *Yes Rasta* and attached to wooden backer board. Prince painted over some of the five photos and used only portions of some, while others were used in their entirety. Portions of "Canal Zone" were published in a magazine article about Prince's "Canal Zone" show at the Gagosian gallery. Prince intended that it serve as an introduction to the characters he intended to use in a screenplay and in a planned series of artworks also to be called "Canal Zone."

Prince ultimately completed 29 paintings for his "Canal Zone" series, 28 of which included images from *Yes Rasta*. The work was inspired by a screenplay he was writing about a reggae band in a post-apocalyptic world set in St. Barts. The story is an account of survivors of a nuclear attack who create "gangs" or "tribes" that take over resort hotels. Some consisted almost entirely of images from *Yes Rasta*, collaged, enlarged, cropped, tinted and/or over-painted while others used just portions of *Yes Rasta* and photos appropriated from other sources and some original painting.

Gagosian showed 22 of the 29 paintings at its Manhattan gallery in the fall of 2008. The paintings were sold for prices ranging from $400,000 to $2,430,000. In December 2008, Cariou sued Prince and Gagosian for copyright infringement and sought a finding of copyright infringement, damages and an order stopping their sale, display, and reproduction. Prince and Gagosian argued that the paintings were protected under the fair use doctrine.[13]

Cariou claimed that he was financially damaged by the show. The Celle gallery in Manhattan had planned to exhibit 40 of the works at the gallery and to have the book re-printed for a book signing, also to be held at the gallery. However, when the gallery owner became aware of the "Canal Zone" show at Gagosian, she decided to cancel the show. She said that she did not want to capitalize on Prince's notoriety, and that the show had already been done.[14]

In her decision, Judge Batts reiterated that fair use is a case-by-case analysis and, as she must, analyzed the four factors outlined in the copyright law. The first factor is the purpose and character of the use. Was the use transformative is the central question? Does it create something new with a different purpose and character? She found that just using the raw ingredients of the original work does not make a work transformative. Prince's work could well be deemed a derivative work or adaptation, which is the legal right of the copyright owner. Judge Batts wrote that if every copyright infringement is claimed to be a higher or different artistic use, there would be no limit to the fair use defense.

Prince had testified that he had no interest in the meaning of the photographs he uses and that he does not really have a message in the art he makes. He did not intend to comment on the work or the broader culture. He intended to pay homage to other painters, including Warhol, de Kooning, Cezanne and Picasso, and to create beautiful artwork for a screenplay he was writing. The court found the work to be only minimally transformative.

In addition, in analyzing the first prong, the court must consider whether the work serves a commercial or nonprofit purpose and whether there was bad faith in the defendant's conduct. The paintings were sold for $10,480,000 and seven others exchanged for art valued at $8,000,000. Judge Batts recognized the public interest and cultural value of public exhibition but found that especially Gagosian's exploitation of the work was primarily commercial. As to bad faith, Prince stated that he does not consider whether work is protected by copyright or in the public domain. He appropriates work that he likes. Taking all this into account, she found that the first factor favored Cariou. (Recall when Jeff Koons appropriated

Art Rogers' photograph of a couple with a string of puppies. Koons tore off the copyright notice and sent it to his fabricator in Italy and told him to copy it. The Court also found bad faith in that case).[15]

The second factor is the nature of the copyrighted work. The more heavily creative the original work, the less justified is the secondary user. Since Cariou's work is heavily creative, this factor also favored Cariou.

The third factor is the amount and substantiality of the portion used and whether it was necessary to further the use. Since Prince appropriated the central figures depicted in Cariou's portraits and "those central figures are of overwhelming quality and importance to Cariou's photos, going to the heart of the work," she found that the amount of the taking was more than was necessary.

Finally, the fourth factor is the effect of the taking on the market for the original work. Since the gallery owner cancelled the exhibition of Cariou's photographs and the book signing because of the Gagosian show, the court concluded that the taking had a great effect on the market for the original work. Cariou also won on this factor.

In a scathing decision, Judge Batts denied Prince's and Gagosian's claim of fair use and ordered that all of the "infringing" work, including paintings and unsold copies of the "Canal Zone" book, be delivered to the court for impounding or destruction as Cariou determines. In addition, Prince and Gagosian had to notify all current or future owners of the paintings that they were infringing and could not be lawfully displayed.[16]

The decision is being appealed, so we will see how it turns out. There is certainly controversy about this decision. Some hail it as a courageous judge who stopped an artist who just went too far. Others predict that it will have a chilling effect on making art and on the art market.

Critics of the decision cry that it will de-stabilize the art market and chill the creation of new work. They complain that the judge failed to understand the long history of appropriation art, which began with Duchamp's appropriation of a common urinal, led to Warhol's appropriation of a Campbell's soup label, and Sherri Levine's re-photographing of a Walker Evans' work (to make a point about the dominance of men in contemporary art). These critics claim that the judge failed to understand that artists pluck images from the mass media and mass culture and re-contextualize those images in their own works to express their frustration with an image saturated culture.[17]Another writer claims that this decision threatens this well-established tradition and also undermines artists' "comfort zone" in what can be borrowed.[18]

Even those who fully understand that artists appropriate and that they are constantly being influenced by and work off of other people's work find Prince's appropriation unfair. Many artists hail this decision as confirmation that Richard Prince went too far. They agree with Judge Batts that to take someone's work, who put his heart and soul and all of his creative juices into it, and to add a few lines and paint here and there, and then sell the new work for millions, precluding the original artist's ability to monetize his art, is not a "fair use." They express concern that a well-known artist can appropriate a lesser-known artist's work "just because he likes it" and then justify it in the name of appropriation art.[19]

The case and decision raise complex and difficult issues. Is every taking ok so long as it is done in making new art? Would the result have been different if a lesser-known artist had appropriated another artist's work, or if the works were shown at a lesser-known gallery? Is any appropriation to make "art" ok? Is the borrowing in this case a bona fide creative process or exploitation of someone else's work? Is the appropriation of Cariou's photographs the same as appropriating a urinal, a soup can label, or a Marlboro man ad? Is it different when it is someone's heartfelt creative work? Is there a line that can be delineated? Did Prince cross it?

Since the question of whether a work is transformative lies at the heart of the fair use question, it is useful to look back at the definition articulated so brilliantly in Judge Pierre Leval's landmark law review article *Toward A Fair Use Standard*, which was the heart of the Supreme Court's decision defining the fair use standard:[20]

> Does the use fulfill the objective of copyright law to stimulate creativity for public illumination?...it isn't sufficient simply to conclude whether justification exists. The question remains how powerful, or persuasive, is the justification… **I believe the answer to the question of justification turns primarily on whether, and to what extent, the challenged use is transformative.… A quotation of copyrighted material that merely repackages or republishes the original is unlikely to pass the test…it would merely "supersede"… the original. If, on the other hand, the secondary use adds value to the original—if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings—this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society.**[21]

Prince's appropriation, in this author's opinion, does not meet this standard.

Artists are not going to perform legal analyses in their studios in order to determine if their borrowings are fair, so it is our responsibility as educators and lawyers to help

them simply understand the law and to develop their own "comfort zones."[22] The resolution of this case will help them determine where the line in the sand should be drawn.

What does all this legal wrangling mean for artists, academics, and writers? Two courageous judges wrote decisions that favor the working writer and the working artist. With respect to Google and the Gagosian gallery, those writers and artists are the "other 99 percent." What do the decisions portend? A limit has been set on the power of Google to usurp copyrights and the market for access to books. Photographers and illustrators have also filed suit against Google for its use of their work in the digital library, so we may see further clarification of this issue. A limit has been set on what can be taken from another artist. Neither case has reached finality, so stay tuned.

Endnotes

1. A version of this article was presented at the most recent National Conference on Liberal Arts and the Education of Artists called "Crossing Borders," sponsored by the School of Visual Arts' Humanities and Sciences Department. The conference participants were faculty members of art history, art, and humanities departments around the country. This is the call for papers:

   > Art does not acknowledge borders. Art was global centuries before Hellenistic design appeared on Han bronzes and "Cinderella" migrated from China to Europe. Borrowing and adapting have been the norm for millennia; art and ideas about making and using it are inherited through time and diffused through fluctuating borders. The Basel Art fair and Internet archives are some of the most recent examples of vast networks of exchange and influence. This conference invites participants to consider the ways in which the written and visual arts—as creative acts, objects and performances, art movements and as audience responses—have influenced one another, cross-pollinating madly. Whether this is due to an "art instinct" (Denis Dutton's theory) or to trade routes and diasporas, theories, images, materials, techniques are like soup--the recipes are flavored locally. 40,000 years of art affirm that we are all immigrants, spreading weeds and seeds, images and glyphs along with our DNA.
   >
   > Participants are invited to submit proposals for open session presentations in such areas as aesthetics, art criticism and history, literature, fine and applied arts, interdisciplinary studies, pedagogy and curriculum.
   >
   > www.sva.edu/department links/humanities/conference.

2. For further information about the Google case, please see Mary Rasenberger's blogs, available at http://nysbar.com/blogs/EASL/. For more information about *Cariou v. Prince,* please see Judith Bass, Joel L. Hecker and Monica Pa's articles in 25 Ent., Arts & Sports L.J., 23 (2011).
3. Authors Guild v. Google Inc., 770 F.Supp.2d 666 (S.D.N.Y. 2011).
4. *Id.* at 772.
5. Last fall, at a social event connected with the East Hampton Film Festival, I was sitting at a table of eight people. Five of the eight had copyrights as of 2009; yet the only person familiar with the Google case was an academic who had read about it in *The New York Review of Books* (from the Harvard librarian's point of view).
6. Dept. of Justice, Statement of Interest Regarding Google's Proposed Class Action Settlement, *Statement of Marybeth Peters, the Register of Copyrights before the Committee on the Judiciary*, 20 Ent., Arts & Sports L.J., 39-45 (2009).
7. *Id.* at 42.
8. Dept. of Justice, Statement of Interest Regarding Google's Proposed Class Action Settlement, *Summary, Joel. L. Hecker*, 20 Ent., Arts & Sports L.J., 24 (2009).
9. *See* Authors Guild, 770 F. Supp. 2d, *supra* note 3 at 679.
10. *Id.* at n.13 (quoting a letter from Pamela Samuelson to the Court).
11. *Id*. at 682.
12. Cariou v. Prince, 784 F.Supp. 2d 337, 343 (S.D.N.Y. 2011).
13. *See* Carol J. Steinberg, *Fair Use: A Regenerative Concept in the Law,* 22 Ent., Arts & Sports L.J., 18 (2011).
14. *See* Cariou *supra* note 12 at 344.
15. Rogers v. Koons, 960 F.2d 301 (2d Cir. 1991), cert. denied, 113 S. Ct. 365 (1992).
16. *See* Cariou *supra* note 12 at 355, 356.
17. Monica Pa. *Appropriation Art Under Attack,* 22 Ent., Arts & Sports L.J., 19 (2011).
18. Judith Bass, *Cariou v. Prince: Fair Use or Unfair?* 22 Ent., Arts & Sports L.J., 23 (2011).
19. In fact, in my class at School of Visual Arts of 26 students, after an introduction of the basics of fair use, I asked the students how many agreed with the decision, and most (even those who are appropriation artists) agreed that Prince went too far.
20. *See* Acuff v. Rose, 510 U.S. 569 (1994).
21. Pierre N. Leval, *Toward a Fair Use Standard,* 103 Harv. L. R. 1105 (1990).
22. *See* Bass *supra* note 18 at 23.

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The Gershwins' *Porgy and Bess*: A Case Study of Racial Discrimination in Theatrical Casting

By Patrick Siler

I. Introduction

The issue of whether a producer or director may legally consider a performer's race as a factor in employment is a question that has not been answered by U.S. courts. This is most likely due to a combination of the inherent subjectivity of the theatrical casting process and the typical performer's lack of resources. Even if an actor suspects that he or she may have been discriminated against, a struggling artist is more inclined to shrug off an unsuccessful audition than to spend time and money he or she probably cannot spare on a lawsuit. Yet the issue presents a series of important questions about the intersection of free speech and civil rights, artistic expression and equal opportunity. This article explores that intersection by examining the relevant law surrounding productions of a specific theatrical work: George Gershwin and DuBose Heyward's *Porgy and Bess*. It concludes that overt racial discrimination, when practiced in casting a show where a character's race is not essential to develop the story being told, is most likely permissible in a copyright context but not permissible in an employment context.

II. Background

A. Gershwin: The Composer

George Gershwin began his musical career at the age of 15 working as a song plugger, playing piano for a Tin Pan Alley music publisher to boost sheet music sales.[1] Gershwin soon began to write songs of his own. He quickly mastered the art of popular music, composing his first national hit, "Swanee," in 1919 at the age of 20.[2] Much of George Gershwin's popular success stemmed from his appropriation of African-American musical traditions, most notably the burgeoning style of music known as jazz.[3] Jazz, with its syncopated rhythms and inherently minor tonality, was at that time chiefly performed by black ragtime and Dixieland musicians.[4] Few white composers wrote within the style, and many—Gershwin included—considered vernacular jazz to be "crude" and "vulgar."[5] However, Gershwin believed that the style could be elevated, "heighten[ed] with the eternal flame of beauty," and that in such a form it was not the exclusive province of African-Americans, but rather "the spontaneous expression of the nervous energy of modern American life."[6]

In 1924, Gershwin demonstrated the result of this elevation of jazz to the classical symphonic level by composing his first masterpiece, *Rhapsody in Blue*, for orchestra and piano. The piece was a popular success incomparable in the world of American classical music, later described by another revered American composer as "inspired, God-given."[7] By the end of the year of its debut, *Rhapsody in Blue* had been performed 84 times and the original musicians had sold more than a million copies of their recording of the piece.[8]

B. A Brief History of *Porgy and Bess*

At the height of his new-found celebrity, George Gershwin publicized his intention to begin work on a "jazz opera" based on "Negro materials."[9] The composer had attempted such a feat once already. In 1922 Gershwin had written *Blue Monday*, a one-act opera set in Harlem and performed by white singers in blackface.[10] That work was a critical failure and was cut from the show in which it appeared after only one New York City performance.[11] Gershwin believed that the creation of a successful jazz opera faced two main challenges. The first was finding a "fantastic, colorful book…with the exotic quality of jazz in it."[12] The second was addressing the problem of authenticity in performance. According to Gershwin, singers "trained in the old tradition could not sing such music, but Negro singers could."[13]

Gershwin cleared the first of these hurdles in 1926 when he discovered the novel *Porgy*, written by DuBose Heyward. The story is set in Catfish Row, a dock-side slum in South Carolina, and details the struggles of that community's downtrodden residents.[14] The title character is a crippled beggar with an indomitable optimism who falls in love with Bess, "a 'loose' woman with a penchant for hard liquor, cocaine, and abusive men."[15] The piece proved its dramatic fitness when Heyward and his wife adapted *Porgy* as a non-musical stage play in 1927. That play was a success on Broadway, running for 367 performances.[16] Seeing the potential for both great jazz and great drama in this tragic love story, Gershwin immediately set out to adapt the book as an opera.[17]

The second hurdle—finding authentic performers—was not so simply overcome. Heyward had insisted that the non-musical version of *Porgy* be performed by an all-black cast to "permit the interpretation of the story by the race with which it was concerned."[18] Gershwin shared Heyward's desire for authenticity in the performances, and neither of the two wanted to create an opera that would be performed in blackface.[19] As a result, though the Metropolitan Opera had commissioned Gershwin to write a "distinctly American" opera from the libretto of his choice, he would not compose *Porgy and Bess* for the Met because it did not employ black performers. Instead, Gershwin and Heyward announced that their new "folk

opera," produced by the Theater Guild, would open on Broadway.[20]

So it was that in 1935, after years of research and careful collaboration, *Porgy and Bess* opened with a cast of black singers at the Alvin Theatre in New York City. George Gershwin was credited as the composer, with book and lyrics by DuBose Heyward, and additional lyrics by Ira Gershwin. The first production was neither a critical nor a commercial success—Broadway critics deemed it too operatic, while opera critics derided it as too popular. The show ran for 124 performances on Broadway and toured nationally for three months before closing.[21] George Gershwin did not live to see the opera flourish. In 1937, Gershwin died unexpectedly from a brain tumor. He was 38 years old.[22] Since his death, *Porgy and Bess* has become an international success with the public and critics alike.[23] It has helped to launch the careers of several generations of black opera singers,[24] and is now considered by many to be the premiere achievement in American opera.[25]

Despite its preeminence, a great many American singers are denied the opportunity even to audition for roles in modern productions of George Gershwin's masterpiece. Since Gershwin's death, the licensing of copyrights in his compositions has been administered by his estate.[26] For nearly 50 years, the "Gershwin Trust" was managed by George's brother Ira.[27] Although Gershwin died intestate,[28] Ira remained faithful to what he believed George's wishes for the opera were—namely, that it only be performed by black singers.[29] Since Ira's death, the Gershwin Trust has continued the tradition. Companies wishing to produce *Porgy and Bess* are required to exclude non-black performers from casting consideration. Any non-black singers under contract with the company must be paid *not* to appear in the production.[30]

The Gershwin Trust's imposition of a racial restriction on casting raises a number of legal issues. First and foremost, it raises the question of whether a race-based licensing restriction is a permissible exercise of a copyright holder's exclusive rights under the Copyright Act. Second, it presents the related issue of whether, in light of Title VII's prohibition against workplace discrimination by private employers, a producer may properly consider race as a factor when operating under such a restrictive license. Finally, it raises concerns about the speech and liberty interests of artists and producers who are prohibited from expressing the ideas contained in this great work of art because either their skin happens to be the wrong color or they refuse to discriminate on the basis of race. This article shall consider each of these interrelated issues in turn.

III. The Author's Freedom of Expression

The relationship between United States copyright law and the right to free speech guaranteed by the U.S. Constitution is a problematic one. The First Amendment guarantees that "Congress shall make no law…abridging the freedom of speech,"[31] and yet one of the first acts of the very first Congress did just that. The federal Copyright Act of 1790, like every one of its successors, was rooted in another Constitutional clause, granting Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times, to Authors and Inventors, the exclusive Right to their Respective Writings and Discoveries."[32] By granting "exclusive" rights in speech to certain parties, Congress necessarily abridged the freedom of any other parties to use that speech. The two Constitutional provisions thus form a delicate balance—by providing a monopoly for original writings and discoveries, Congress hoped to create an economic incentive for authors, ultimately encouraging the creation and dissemination of speech.[33]

Despite being at cross-purposes, copyright and free speech have come to coexist in relative harmony. This is due, in no small part, to judicially created doctrines such as the affirmative defense of "fair use."[34] Ultimately, the government protects the free speech rights of authors by granting them exclusive intellectual property rights in "original works of authorship fixed in any tangible medium of expression."[35] Among the exclusive rights granted to authors is the right to authorize public performances of the copyrighted work.[36] It is in exercising this right that the Gershwin Trust restricts the racial make-up of companies performing *Porgy and Bess*.

The case of *Porgy and Bess* presents an example of an author using his exclusive rights under copyright as a form of expression. By conditioning any issuance of a license on the promise that a licensee will hire only black singers, the Gershwin Trust is protecting what it believes to be an essential expressive element of the work. Is such a racially based restriction permissible? For the purpose of this analysis, it may be more helpful to consider the question from an inverse perspective—may the government restrict an author's speech by preventing him from imposing a race-based restriction on the license for his work?

Not all speech is protected by the First Amendment—the government may properly prevent certain types of speech by its citizens. These include obscenity, libel, and "fighting words," among others.[37] Offensive speech, though, is not prohibited. As the Supreme Court stated in *Street v. New York*, "it is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."[38] The Court reiterated this position in the more recent case of *Texas v. Johnson*, stating that the "bedrock principle underlying the First Amendment…is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[39]

Race-based speech has typically been seen to fall into the category of expression which, though offensive, is still protected. In *Carroll v. President & Commissioners of Princess Anne County*, a series of "aggressively and militantly racist" speeches amplified over a public address system were held to be protected.[40] Suppression of such speech, the Court noted, was proper only under those "special, limited circumstances in which speech is so interlaced with burgeoning violence that it is not protected by the broad guarantee of the First Amendment."[41] Even in those unique cases, any government-imposed restraint on speech must be "couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order."[42] The expression at issue in *Porgy and Bess*, though premised on the issue of race, does not begin to approach the level of aggressive and militant racist speech protected in *Carroll*, let alone the higher threshold of unprotected "fighting words."

Any government-imposed restraint on expression manifested in a racial restriction like the one employed by the Gershwin Trust for *Porgy and Bess* would not likely survive the heavy presumption against the constitutional validity of such restraints.[43] It seems, therefore, that an author may make the licensing to perform his or her work conditional upon the cast being restricted to a certain race. Whether a producer operating under such a conditional license may discriminate against employees on the basis of race without running afoul of the law is another question.

IV. The Producer's Hiring Practices

The Gershwin Trust licenses the grand performance rights for *Porgy and Bess* on a conditional basis, requiring producing companies to employ only black singers in the production.[44] Companies with non-black singers under contract must pay those singers not to perform.[45] Auditions for employment in the production are open only to black singers. This section will consider the issue of whether companies that discriminate on the basis of race because they are operating under this condition violate the law.

A. Title VII—Prima Facie Violation

Title VII of the Civil Rights Act of 1964 prohibits discrimination by private employers on the basis of race.[46] The statute makes it unlawful for an employer to "refuse to hire…or otherwise to discriminate against any individual…because of such individual's race [or] color."[47] Congress passed Title VII in accordance with power drawn from two sections of the Constitution—the Commerce Clause,[48] which grants the federal government the power to regulate even local activities and transactions in order "to foster and protect interstate commerce,"[49] and the Equal Protection Clause of the Fourteenth Amendment.[50]

A plaintiff bringing suit under Title VII must first establish a prima facie case of discrimination by a preponderance of the evidence.[51] The establishment of a prima facie case creates a presumption of discrimination that the employer may rebut.[52] The burden of proof shifts to the defendant who must "articulate some legitimate, nondiscriminatory reason for the employee's rejection."[53] The reason proffered by the defendant need not be the actual reason that motivated the defendant, but "raises a genuine issue of fact as to whether it discriminated against the plaintiff."[54] If the defendant meets this burden, the plaintiff must then prove that the defendant was not actually motivated by the legitimate reasons offered, but was using them as a "pretext for discrimination."[55]

Rarely in cases of employment discrimination does an employer openly discriminate on the basis of race. To assist plaintiffs in establishing a prima facie violation of Title VII, the Supreme Court fashioned a four-part test in the case of *McDonnell Douglas Corp. v. Green*.[56] The four factors of that test are (i) that the plaintiff belong to a protected class, (ii) that the plaintiff applied and was qualified for a job for which the employer was seeking applicants, (iii) that despite being qualified, the plaintiff was rejected, and (iv) that after the plaintiff was rejected the employer continued to seek applicants from persons of the plaintiff's qualifications.[57] *Jenkins v. Metropolitan Opera*[58] represents a case where the *McDonnell Douglas* standard was applied to the business of opera. In that case, the plaintiff claimed that he was denied a soloist position with the opera company because of his race.[59] He had sung in the company's chorus, but statements by the Met's auditors indicated that he lacked the vocal technique required of Met soloists.[60] His claim was summarily dismissed because he failed to establish that he was qualified for the position.[61]

In a case like that of *Porgy and Bess*, though, the *McDonnell Douglas* test of proof does not seem to be necessary—employers seeking to hire only black singers overtly and admittedly discriminate against singers of all other races. As in *Jenkins*, a singer would still most likely need to prove that he or she was qualified for the position, but that would probably satisfy his or her burden to establish a prima facie case. If, for example, the singer had regularly sung with a company as a chorus member or principal singer but been denied the opportunity to audition for the chorus or principal roles in *Porgy and Bess*, the company would have to show a legitimate reason for the discrimination.

B. Defenses

A defendant in a Title VII action may attempt to rebut a showing of discrimination by the plaintiff by asserting one of several defenses. This article shall consider the applicability of each to the hypothetical scenario of a Title VII action brought by a qualified performer against

a company producing a racially restricted play like *Porgy and Bess*.

i. Affirmative Action

One potential defense for the race-based casting in *Porgy and Bess* might be that it serves, in effect, as an affirmative action program for black singers. The Supreme Court has held that Title VII "does not condemn all private, voluntary, race-conscious affirmative action plans."[62] In the case of *United Steelworkers v. Weber*, for example, a program that gave preferential treatment to the promotion of black workers did not run afoul of the statute because it did not "unnecessarily trammel the interests" of white employees.[63] The Court implied that the practice would be prohibited, though, if it required that white employees be discharged and replaced with new black hirees or if it created an absolute bar to the advancement of white employees.[64] The Court found the plan to be permissible because it was a temporary measure intended to correct a manifest racial imbalance.[65]

The origins of the *Porgy and Bess* casting restriction in a time of segregated music halls and its success in launching the careers of numerous black singers may suggest that it has acted as an affirmative action plan of sorts.[66] Yet if subjected to the strict scrutiny applied in cases like *United Steelworkers*, the argument for race-based casting as affirmative action would almost certainly fail. Companies performing *Porgy and Bess* are required to discharge non-black singers and replace them with black hirees.[67] Nor does the casting restriction merely create a preference for hiring black singers—it represents an absolute bar for non-black singers wishing to perform in the work. Furthermore, unlike in *United Steelworkers*, where the defendant's plan was designed to remain in place until the percentage of black workers in the plant reflected the percentage in the local labor force,[68] nothing in the casting restriction indicates that it is a temporary provision set to expire when a racial imbalance is corrected. However much a producer may wish for race-based casting to help foster the advancement of black performers, if that producer denies non-black performers even the opportunity to be considered for positions, his or her actions will not likely qualify as a valid affirmative action program.

ii. Bona Fide Occupational Qualification

At least one defense to a prima facie case of discrimination under Title VII is built into the statute itself. Title VII provides that it shall not be unlawful for an employer to hire on the basis of an employee's religion, sex, or national origin where that discriminating factor is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[69] Thus, an employer of brassiere models, wet-nurses, or sperm donors may make a hiring decision based on the applicant's gender.[70] The regulations promulgated by the Equal Employment Opportunity Commission (EEOC) explicitly state that gender may be considered a bona fide occupational qualification (BFOQ) "where it is necessary for the purpose of authenticity or genuineness…e.g., an actor or actress."[71]

A producer engaged in casting discrimination might take heart from the EEOC regulation because the racial restriction on the casting of *Porgy and Bess* is in place, at least ostensibly, for the purpose of authenticity. However, although the regulation permits that producer to seek only female singers for the role of Bess and only male singers for that of Porgy, the statute deliberately omits race as a valid BFOQ factor.[72] Although the legislative history of the bill hints that there are cases where casting based on appearance may be valid,[73] it is difficult to reconcile such a hypothetical situation with the statute's blanket prohibition on discrimination based on color. In light of the conspicuous absence of race or color in the language of the BFOQ defense and the Court's interpretation of that defense's restrictive language as "an extremely narrow exception to the general prohibition of discrimination,"[74] it is unlikely that the defense would avail a producer engaged in race-based casting.

iii. Business Necessity Doctrine

A producer facing a Title VII claim may also attempt to assert the defense that race-based casting is justified as a business necessity. Unlike the statutory defense of bona fide occupational qualification, the business necessity doctrine is a judicial creation. It originated in the Supreme Court's opinion deciding the case of *Griggs v. Duke Power Company*.[75] In *Griggs*, the Court pointed out that Title VII prohibits both overt discriminatory practices and those "fair in form, but discriminatory in operation."[76] Where an otherwise facially neutral employment practice has a discriminatory effect that does not relate to job performance, the practice is prohibited—"[t]he touchstone is business necessity."[77] The standard for what qualifies as a "necessity" is quite high, connoting an "irresistible demand."[78] A discriminatory practice must be "essential" to "directly foster safety and efficiency."[79] If those goals can be met by a less discriminatory alternative, the practice falls short of the standard.[80]

Although the doctrine of business necessity first emerged as a tool for analysis of employment practices that were facially neutral but discriminatory in effect,[81] courts have since suggested that it should also apply to certain cases of overt discrimination. In the case of *Miller v. Texas State Board of Barber Examiners*,[82] the Fifth Circuit described the limitation of the doctrine to cases of covert discrimination as "questionable on logical and perhaps legal grounds."[83] The court pointed out that no language in the *Griggs* opinion requires the limitation, and that certain situations might warrant the doctrine's application to cases of intentional discrimination.[84] The doctrine might apply, for instance, to a police department using race as

a factor in selecting an undercover officer to infiltrate a homogenous criminal organization.[85] Such a case would meet the required standard because the discrimination would be essential to directly foster the officer's safety. For an example of a discriminatory practice essential to directly foster efficiency, the court offered "the selection of actors to play certain roles."[86] The court considered the hypothetical casting of several historical figures as an example, stating that, just as an actor weighing 110 pounds could not convincingly represent King Henry VIII, "it is likely that a black actor could not appropriately portray George Wallace, and a white actor could not appropriately portray Martin Luther King, Jr."[87]

Even if a court were to expand the business necessity doctrine to cases of overt discrimination, the racial preference in casting *Porgy and Bess* would most likely fail to meet the required legal standard. For the producer to avail him or herself of the defense, he or she would have to demonstrate that race-based casting was essential to directly foster safety or efficiency.[88] Race-based hiring is certainly not essential for the safety of an opera company's employees the way that it might be for an undercover police officer.[89] The remaining question, then, is whether the discriminatory practice is essential for efficiency—is casting the residents of Catfish Row similar to casting historical figures like Henry VIII and Martin Luther King?

Unlike the examples offered by the court in *Miller*, the characters in *Porgy and Bess* are not recognizable figures from history. The residents of Catfish Row are fictional creations, and their race is not germane to the development of the opera's story.[90] Unlike a character such as Shakespeare's Othello, whose race is both mentioned in the play's text and a driving factor in the plot, whether Porgy, Bess, or any other character in the opera has black skin has no bearing on the story whatsoever. At its heart, the story is concerned not with issues of race, but rather those of poverty and alienation. Some characters cope with hardship by turning to gambling, drug use, and physical violence. Others look to prayer, community, and hard work. In the final reckoning, the fate of these characters is determined by their moral and spiritual fortitude—their racial orientation is irrelevant.

An audience's acceptance of the actors playing the roles in *Porgy and Bess* is far more likely to hinge on the musical abilities of those actors than on the color of their skin. Opera audiences are accustomed to seeing middle-aged singers play fresh-faced youths and portly singers play trim soldiers and starving artists. In opera, the dramatic content of the story is manifested primarily in musical, not physical, expression.[91] As one critic has stated, "[it]'s not that appearance does not matter in opera. But voice, artistry and dramatic presence matter more."[92] Musical talent and technique, then, are factors essential to the efficient production of an opera. A singer's skin color is not.

iv. Protected Expression

A final defense that a discriminating producer might bring against a Title VII action is that race-based casting is protected by the First Amendment as a form of expressive speech. Whether such a defense would succeed is an issue similar to the one considered in the analysis of the author's rights of expression,[93] but which has not been addressed in the context of an employment claim. In this context, the issue presents a conflict of constitutionally protected interests, the ultimate outcome of which is uncertain.[94]

The Supreme Court has stated that the Constitution protects an organization's right of expressive association.[95] The freedom of association presupposes a right not to associate, allowing an organization to exclude members of a particular class if being forced to include members of that class would impair the organization's ability to express its viewpoint.[96] The freedom of expressive association, though, is "not absolute," and may be overridden by "regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[97] Thus in *Boy Scouts of America v. Dale*, a law requiring the Boy Scouts to include homosexuals among its members was seen to violate the organization's right to express its denouncement of homosexuality as "not morally straight,"[98] but in *Roberts v. United States Jaycees*, the government's interest in eradicating discrimination by passing a law requiring the Jaycees to include women among its members trumped the organization's right of "associational freedoms."[99]

At least one commentator has suggested that a theater engaged in race-based casting could justify the practice as an association organized for expressive purposes.[100] Although no court has ruled on the issue, in the case of *Redgrave v. Boston Symphony Orchestra*, the majority of a divided First Circuit indicated in dicta that "[w]e do not think it at all obvious, as do our dissenting brethren, that liability should attach if a performing group replaces a black performer with a white performer (or vice versa) in order to further its expressive interests."[101] The *Redgrave* court settled the claim before it on State law grounds, pointing out that a case of discrimination in theatrical casting would give rise to a conflict of protected interests, "present[ing] serious constitutional and statutory questions that we do not pretend to survey here."[102] This tenuous authority indicates that even if a court were explicitly to categorize race-based casting as expressive association, that expression might well not be protected when weighed against the government's compelling interest in preventing racial discrimination.

The government's interest in protecting the civil rights of its citizens to be free from racial discrimination in employment cuts deeply against an argument for race-

based casting as expressive speech. This interest alone should dispose of a producer's free expression defense. The Supreme Court's well-established test for challenges to anti-discrimination laws that incidentally infringe on free speech requires that such laws survive if they serve a compelling governmental interest unrelated to the suppression of ideas.[103] Title VII of the Civil Rights Act was not enacted to suppress ideas, but rather to eliminate discrimination by private employers on the basis of impermissible factors such as race.[104] As such, it is likely to pass the Court's test and outweigh an argument by a producer that his or her race-based casting is protected as expressive association.

C. Policy Concerns and the Public Interest

As a final consideration, this piece examines two policy concerns implicated by a potential Title VII claim against a producer of *Porgy and Bess*. First, even if the racial restriction imposed on the opera's casting process were to be upheld, it is probably too vague to enforce with any specificity. Second, allowing producers to limit the performance opportunities of an American masterpiece to one racial group does great disservice to public discourse and the arts in general.

The condition imposed on producers of *Porgy and Bess* restricts casting to so-called "black" singers.[105] Critics have noted that this standard is troubling, to say the least. As Gershwin biographer Walter Rimler points out:

> [It is] incongruous to contemplate auditions for *Porgy and Bess* where light skinned singers are asked for proof of their black forbears. Just what *is* the minimum threshold? One black parent? One black grandparent? Wouldn't it be a lot simpler to make talent the only qualification? Wouldn't it be fair to give singers of any race a chance at these roles? This opera is about people, after all—so *everyone* qualifies.[106]

If producers cannot even realistically enforce the restriction, it is counterintuitive to allow them an exception to one of the nation's most fundamental civil rights laws.

Rimler's quote touches on a series of related policy concerns: non-black singers should have the opportunity to perform Gershwin's masterpiece, producers who want to cast the best singer regardless of skin color should be permitted to do so, and audiences should have the opportunity to hear what singers of other races contribute to the music. The purpose of giving authors exclusive rights under the Copyright Act is to promote the progress of the arts,[107] and not to stifle artistic expression with outdated notions of racial stereotypes.[108] Many artists believe that the progress of the arts in general—and Gershwin's opera in particular—would be better served by doing away with the racial restriction.[109] The opera is only rarely produced, due in large part to the racial casting restriction.[110] Denying producers the right to discriminate against singers would force the Gershwin Trust to reevaluate its position. The Trust would have to remove the casting restriction if it wanted to derive any value from its control of performance licenses. If it did so, the end result would most likely be more productions of Gershwin's work by more companies, generating greater royalties for the Trust and a greatly enriched artistic landscape for the public. This result would seem to be in keeping with Gershwin's own feelings concerning his work. He was, after all, the original appropriator of a musical style that he believed did not belong only to one race of Americans, but was rather "the spontaneous expression of the nervous energy of modern American life."[111]

V. Conclusion

A copyright holder has the right to attach a race-based condition to the licensing of his or her work. That condition does not make it lawful for an employer acting under that condition to violate laws preventing workplace discrimination. In the context of theatrical productions where the race of a character is not essential to the development of the story, Title VII's prohibition on race-based discrimination applies. In the context of opera, the question of a performance's authenticity is based predominantly in musical, not physical, expression. Producers are free to use musical talent, technique, and stage presence as factors in determining who they hire for *Porgy and Bess*, but to turn singers away because of their race violates the anti-discrimination principles of Title VII. As Title VII's purpose is not to suppress ideas, but rather to ensure that citizens have fair access to employment opportunities, an incidental restriction of a producer's rights of free expression is permissible. Legal precedent strongly indicates that, as the law currently stands, a Title VII action brought by a qualified performer denied the opportunity to be considered for a role in *Porgy and Bess* because of his or her race would succeed. Policy considerations suggest that invalidating race-based casting limitations would produce an outcome ultimately beneficial to the copyright holder, the artistic community, and the public. If Congress did not intend for Title VII to prohibit such practices, the language of the statute should be amended to include race as a bona fide occupational qualification for the purpose of theatrical expression.

Endnotes

1. See Richard Crawford, Where Did Porgy and Bess Come From?, 36 J. Interdisciplinary Hist. 697, 699 (2006).
2. Robert Oberfirst, Al Jolson: You Ain't Heard Nothin' Yet 143–47 (1980).
3. See Olufunmilayo B. Arewa, Copyright on Catfish Row: Musical Borrowing, Porgy and Bess, and Unfair Use, 37 Rutgers L. J. 277, 303 04 (2006).

4. See Mervyn Cooke, Jazz 28 (1999).
5. See Ray Allen, An American Folk Opera? Triangulating Folkness, Blackness, and Americaness in Gershwin and Heyward's Porgy and Bess, 117 J. Am. Folklore 243, 245 (2004).
6. Id. Gershwin's quote actually comes from an interview with Henrietta Malkiel. Henrietta Malkiel, Our New National Anthem, Musical Am., Aug. 1925.
7. See Rodney Greenberg, George Gershwin 74–75 (1998) (quoting Leonard Bernstein writing in the Atlantic Monthly).
8. See Frederic D. Schwarz, The Time Machine, Am. Heritage, Feb. 1999.
9. Allen, supra note 5, at 245 (citing Henrietta Malkiel, Awaiting the Great American Opera: How Composers Are Paving the Way, Musical Am., Apr. 1925.
10. See Crawford, supra note 1, at 730.
11. Id. at 731. One critic called the piece "the most dismal, stupid and incredible black-faced sketch that has probably ever been perpetrated." James Standifer, The Tumltuous Life of Porgy and Bess, Human, Nov. – Dec. 1997, at 13. Still, Blue Monday's reception was not unanimously negative. One critic of the show's preview performances in Connecticut called the piece "the first real American opera." Crawford, supra note 1, at 730.
12. Crawford, supra note 1, at 731.
13. Malkiel, supra note 9.
14. See Allen, supra note 5, at 246.
15. Id.
16. See Standifer, supra note 11, at 12.
17. See Allen, supra note 5, at 246.
18. See id. (quoting Heyward).
19. See Standifer, supra note 11, at 12.
20. Id.
21. Id. at 51.
22. See William G. Hyland, George Gershwin: A New Biography 204 (2003).
23. See Standifer, supra note 11, at 51.
24. See Arewa, supra note 3, at 326.
25. See The Viking Opera Guide 353 (Amanda Holden, Nicolas Kenyon, & Stephen Walsh eds.,1993) (describing Porgy and Bess as "the most vital and completely successful of American operas").
26. See Gershwin v. Whole Thing Co., 1980 U.S. Dist. LEXIS 16465, at *1 (C.D. Cal. 1980); Arewa, supra note 3, at 324.
27. Since Ira's death in 1983, licensing of Gershwin's works has been administered by a group of Gershwin Family Trusts. See Arewa, supra note 3, at 324.
28. See Howard Pollack, George Gershwin: His Life and Work 7 (2006).
29. See Arewa, supra note 3, at 325. This licensing restriction applies only to so-called "grand" performance rights, i.e. full-scale productions of the opera. The Gershwin Trust has not exercised the restriction for "smaller" rights, such as the recording of a particular song. Thus, a white singer like Janis Joplin may record or perform a rock and roll version of "Summertime" in concert, but a white soprano like Renée Fleming may not play the role of Clara and sing the song in a staged performance.
30. See id. at 326.
31. U.S. Const. amend. I.
32. U.S. Const. art. I, § 8, cl. 8.
33. See Craig Joyce, Marshall Leaffer, Peter A. Jaszi, & Tyler Ochoa, Copyright Law 19 20 (8th ed. 2010).
34. See id. at 798 823.
35. 17 U.S.C. § 102 (2012).
36. Id. at § 106 (4).
37. See Chaplinksy v. New Hampshire, 315 U.S. 568, 571 72 (1942).
38. Street v. New York, 394 U.S. 576, 592 (1969).
39. Texas v. Johnson, 491 U.S. 397, 414 (1989).
40. Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 176 (1968).
41. Id. at 180.
42. Id. at 183.
43. See Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
44. See Arewa, supra note 3, at 325.
45. See id. at 326.
46. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).
47. 42 U.S.C. § 2000-e2(a)(1) (2012).
48. U.S. Const. art. I, § 8, cl. 3.
49. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 272 (1964) (Black, J., concurring). The power of the Commerce Clause is strengthened to allow regulation of intrastate commerce by the Necessary and Proper Clause. Id. at 271.
50. U.S. Const. amend. 14, § 1. The power to make laws enforcing this constitutional protection arises from § 5 of the Fourteenth Amendment, which states that "Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Id. at § 5. The Supreme Court has strongly suggested that § 5 empowers the Congress to enforce protection of an individual's Fourteenth Amendment rights against private citizens. See United States v. Guest, 383 U.S. 745, 762 (Clark, J., concurring) ("[T]here now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights.").
51. See Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252-53 (1981).
52. Id. at 254.
53. Id. at 253 (quoting Green, 411 U.S. at 802).
54. Burdine, 450 U.S. at 254.
55. Id. at 253.
56. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
57. Id. at 802. Although the first factor originally stated that plaintiffs must belong to a racial minority, courts have since recognized that members of a majority race may also be unlawfully discriminated against. See Bishopp v. District of Columbia, 788 F.2d 781, 786 (1986) ("No longer can it be questioned that whites as well as minorities are protected by Title VII.…The aim…is to determine whether the plaintiff was 'rejected under circumstances which give rise to an inference of unlawful discrimination.'").
58. 1999 U.S. Dist. LEXIS 3023 (S.D.N.Y. 1999).
59. See id. at *11.
60. Id. at *19 22.
61. Id. at *23 24.
62. United Steelworkers of Am. v. Weber, 443 U.S. 193, 208 (1979). See also Johnson v. Transp. Agency, 480 U.S. 616, 644 (1987) ("[S]ince 1978 the Court has unambiguously interpreted the statute to permit the voluntary adoption of special programs to benefit members of the minority groups for whose protection the statute was enacted.").
63. United Steelworkers, 443 U.S. at 208.

64. Id. (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

65. United Steelworkers, 443 U.S. at 208.

66. The subjective intentions of the opera's creators, though, are somewhat contradictory. George Gershwin's biographer notes that the composer's only desire was that the show not be performed by singers in blackface, whereas it was his brother Ira's wish that the opera allow African-American singers to "get a foothold in the world of opera." Porgy and Bess at 75 Years: An Interview With Gershwin Biographer Walter Rimler, Opera Warhorses, Oct. 15, 2010, http://www.operawarhorses.com/2010/10/15/porgy-and-bess-at-75-years-an-interview-with-gershwin-biographer-walter-rimler-part-i/.

67. See Arewa, supra note 3, at 326.

68. See United Steelworkers, 443 U.S. at 199.

69. 42 U.S.C. § 2000e-2(e)(1) (2012).

70. 110 Cong. Rec. 7213 (1964) (interpretive memorandum of Senators Joseph Clark and Clifford Case) [hereinafter Title VII Memorandum].

71. 29 C.F.R. § 1604.2(a)(2).

72. See 42 U.S.C. § 2000e-2(e)(1); Knight v. Nassau County Civil Service Comm'n, 649 F.2d 157, 162 (2d Cir. 1981) ("Congress specifically excluded race from the list of permissible [BFOQs]."); Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650, 652 (5th Cir. 1980) ("Race is conspicuously absent from the [BFOQ] exception.").

73. See Title VII Memorandum, supra note 70 ("[A] director of a play or movie who wished to cast an actor in the role of a Negro could specify that he wished to hire someone with the physical appearance of a Negro—but such a person might actually be non-Negro."); Lois L. Krieger, "Miss Saigon" and Missed Opportunity: Artistic Freedom, Employment Discrimination, and Casting for Cultural Identity in the Theater, 43 Syracuse L. Rev. 839, 855 56 (1992).

74. Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).

75. See Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

76. Id.

77. Id.

78. United States v. Bethlehem Steel Corp., 446 F.2d 652, 662 (2d Cir. 1971).

79. Id.

80. Id.

81. See Griggs, 401 U.S. at 430.

82. Miller v. Texas State Bd. of Barber Examiners, 615 F.2d 650 (5th Cir. 1980).

83. Id. at 653.

84. Id.

85. Id.

86. Id. at 654.

87. Id.

88. See Bethlehem Steel, 446 F.2d at 662.

89. See Miller, 615 F.2d at 653.

90. The notion of race being germane to a character is used by proponents of non-traditional casting. Actors Equity, for example, maintains an Equal Employment Opportunity Department that investigates allegations of discrimination in the casting of roles "where race, ethnicity, gender, age, and the presence or absence of a disability is not absolutely essential to the development of the play." See Actors Equity Association, EEO & Diversity, http://www.actorsequity.org/benefits/diversity.asp.

91. See Anthony Tommasini, Critic's Notebook; All-Black Casts for 'Porgy'? That Ain't Necessarily So, N.Y. Times, Mar. 20, 2002, available at http://www.nytimes.com/2002/03/20/arts/critic-s-notebook-all-black-casts-for-porgy-that-ain-t-necessarily-so.html?pagewanted=all&src=pm. Tommasini points out that audiences readily forgive great singers for being too old (a 60-year-old Placido Domingo playing Parsifal) or too heavy (Luciano Pavarotti playing Rodolfo) because their singing reaches "deep into the essence of the work." Id.

92. Id.

93. See infra, section III.

94. See Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888, 904 (1st Cir. 1988).

95. See Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

96. See Boy Scouts of Am. v. Dale, 530 U.S. 640, 647 48 (2000).

97. Id. at 648 (internal quotations omitted).

98. Id. at 651.

99. Roberts, 468 U.S. at 623.

100. See Jennifer L. Sheppard, Theatrical Casting: Discrimination or Artistic Freedom?, 15 Colum.-VLA J.L. & Arts, 267, 281 (1991).

101. Redgrave, 855 F.2d at 940 n.17.

102. Id.

103. See Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537 (1987); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984); Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 920 (1st Cir. 1988).

104. 42 U.S.C. § 2000-e2 (2012).

105. See Arewa, supra note 3, at 325.

106. See Porgy and Bess at 75 Years: An Interview With Gershwin Biographer Walter Rimler, Opera Warhorses, Oct. 15, 2010, http://www.operawarhorses.com/2010/10/15/porgy-and-bess-at-75-years-an-interview-with-gershwin-biographer-walter-rimler-part-i/.

107. See U.S. Const. art. I, § 8, cl. 8.

108. See Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 319 (1986) (Stevens, J., dissenting) (noting the invalidity of affirmative action programs based on habit or stereotype).

109. For example, Simon Estes, who played the role of Porgy to great acclaim, considers the restriction "a disservice both to [the opera] and the cause of integration." Tommasini, supra note 91. "People of color can sing 'Porgy' magnificently[.]…People who are not of color can sing it magnificently." Id.

110. Id.

111. Malkiel, supra note 6.

Patrick Siler is honored to be selected for the BMI/Phil Cowan Memorial Scholarship and would like to thank the members of the Entertainment, Arts and Sports Law Section for their important work. Patrick holds a bachelor of fine arts degree from the University of North Carolina School of the Arts and currently serves as the Executive Director of the Adirondack Shakespeare Company (www.adkshakes.org). He is a JD candidate at St. John's University School of Law in Queens, New York, scheduled to graduate in May.

New York State Bar Association
Entertainment, Arts and Sports Law Section

ANNUAL MEETING

January 23, 2012

Program Co-Chairs:

Judith B. Bass
Law Offices of Judith B. Bass
New York City

Ethan Bordman
New York City

Diane F. Krausz
D. Krausz & Associates
New York City

Carol J. Steinberg
School of Visual Arts
New York City

NEW MODELS OF PUBLISHING: E-BOOKS, APPS, SELF-PUBLISHING AND OTHER CHALLENGES

Moderators:

Judith B. Bass
Law Office of Judith B. Bass
New York City

Kenneth M. Swezey
Cowan, DeBaets, Abrahams & Sheppard LLP
New York City

Panelists:

Jane Friedman
CEO and Cofounder
Open Road Integrated Media
New York City

Jeff Kleinman
Folio Literary Management, LLC
New York City

Jonathan I. Lyons
Lyons Literary LLC
New York City

David Brown
Melcher Media
New York City

Jay L. Himes
Labaton Sucharow
New York City

CURRENT AND TRENDING TOPICS IN BRAND, FAMOUS PERSONALITY AND CHARACTER LICENSING: DEVELOPMENT TO BANKRUPTCY

Moderator:

Sarah Robertson
Dorsey & Whitney, LLP
New York City

Panelists:

Oliver Herzfeld
The Beanstalk Group
New York City

Miri Frankel
Activision Publishing
Minneapolis, MN

Rich Maluga
Viacom Media Networks
New York City

Eric Lopez Schnabel
Dorsey & Whitney LLP
New York City

JUDITH PROWDA: I welcome you to the Annual Meeting. Before we begin, I would like to invite Susan Lindenauer, who serves on the New York Bar Foundation's Board of Directors, to address this group. Thank you, Susan.

SUSAN LINDENAUER: Thank you to Judith and to all the people at EASL for giving us the opportunity to speak to you briefly.

I really am here for a brief conversation about the New York Bar Foundation and the good deeds that the Foundation and all of us as lawyers are doing. The Foundation is a charitable organization, the charitable arm of the New York State Bar Association. It raises money mostly from individual lawyers, judges, law firms and others to provide financial support for law-related projects in the form of grants, to nonprofit organizations, legal services agencies, and bar associations engaged in pro bono or legal services projects.

The majority of our grants go to programs that provide legal services to the poor, civil legal services to the poor, and the working poor. The Foundation also administers fellowships, scholarships, and other special funds for sections, law firms and other donors.

This coming Saturday, the Foundation Board will consider grant proposals from organizations seeking more than $1,000,000 to fund 91 projects this year. Some of the projects will provide legal services to individuals and families, education about law to teachers at secondary and intermediate school levels, and to students at both levels as well, and advice and counsel to victims of domestic violence, to immigrants, and homeowners facing foreclosure, and tenants facing eviction.

It should be clear to all of you that our work is far from finished. We must continue to help bring access to justice to those who would otherwise not obtain it.

Now, in addition to our regular grant-making program, the Foundation has been entrusted by a number of judges in the federal courts to receive distribution of cy pres or residual funds in class action cases. On behalf of the courts, the Foundation uses the distributions to support specific charitable and educational projects and provide monitoring and accountability. And that's why the funds are going through the Foundation, because the Foundation provides oversight and monitoring.

The Foundation has received more than $2,000,000 from distribution of residual funds in class action cases thus far. More than $1,000,000 of that sum has been used for programs in New York City to educate tenants, landlords and attorneys about improper tenant record screening. Another $250,000 has been directed to the Syracuse University Entrepreneurship Boot Camp for veterans with disabilities. This program is designed to leverage the skills, resources and infrastructure of higher education to offer cutting edge experiential training and entrepreneurship and small business management to post 9/11 military veterans with disabilities resulting from their military service.

We of the Foundation would be grateful if you would please contact us if you are involved or aware of a class action so that we can discuss the opportunity for the Foundation to administer any cy pres funds that may result and put them to good use for the public.

Additionally, we should all feel good about the work of the New York State Bar Foundation. Lawyers do care about those who are in need of legal services or education about the law. And we are all willing to do everything possible to ensure people have access to justice.

In closing, I would like to do two things. One to recognize—I don't know whether they're here, but there are Fellows of the Bar Foundation, and at least three of them are members of your Executive Committee, Alan Barson, Gary Roth, and Eric Roper. If you are here, thank you for the work that you do and the support that you provide to the Foundation.

I would also like to ask for your personal support to the Foundation. Contributions from individual lawyers like you, no matter how small or large, are the lifeblood of the foundation. When you renew your membership in the State Bar there's a voluntary checkoff, and I ask that each of you, at a minimum, consider making that checkoff and making that contribution to the Bar Foundation.

We would be very happy to receive additional contributions as well. We are at One Elk Street in Albany, the same address at the State Bar. And we are happy to receive the funds. A check from each of you would be wonderful. I invite you to speak to Rosanne M. Van Heertum,[1] our Director of Fundraising, to learn more about the types of programs we fund, and how you can help support. Thank you very much.

JUDITH PROWDA: Thank you, Susan. This is my farewell as Chair. It has been an honor and a privilege to Chair this Section for the past two years. We've accomplished a great deal in a very short time.

Moments ago I learned that this Section has 2,136 members. This is the highest membership that we've ever experienced in EASL, and I'm very grateful to all of you for being part of this.

So thank you very much. This is truly a record and it also means that we will have more voice in the Association. We are now eligible to appoint three delegates to the House of Delegates. And this is really breaking news, so thank you very much for being a part of this wonderful Section and Association.

For the first time in EASL history we have had a District Representative for each of the 13 Judicial Districts in New York State. We have formed eight new standing committees, including Digital Media, Social Media, Diversity, Ethics, Lawyers In Transition, In House Counsel, International, Not-For-Profit, which we just formed moments ago, and Scholarship.

Our diversity efforts have been exceptional honoring our pledge to President Vince Doyle, to build a more diverse community of leaders in the legal profession. Our Diversity Committee, chaired by Anne Atkinson and Cheryl Davis, has planned important pro bono initiatives, as well as CLE programs in entertainment, arts and sports, several of which are co-sponsored by minority bar associations.

One of our newest initiatives is the Diversity Mentoring Program. Thanks to the efforts of Cheryl Davis and Pro Bono Steering Committee member Elissa Hecker, we'll be pairing junior lawyers, lawyers in transition and law students with more seasoned lawyers. Please let us know if you are interested in participating either as a mentor or a mentee (see http://nysbar.com/blogs/EASL/diversity/ and page 13 for the forms).

Another recent initiative has been to foster the leadership of young lawyers by co-sponsoring events with the Young Lawyers Section and also having members of the Young Lawyers Section serve as liaisons to EASL.

Our law students also continue to inspire us with their excellent writing. In addition to congratulating this year's winners of the BMI/Phil Cowan Memorial Scholarship award whose names will be announced momentarily, I congratulate the following winners of the Law Student Initiative, whose articles have been published in the *EASL Journal*.

These are the 2011 winners of the Law Student Initiative. Megan Bright, Alix Claps, Jason Steiner, Thomas Grove, Tracy Keeton, Timothy Poydenis, Jacklyn Serpico, and Brian Walton.

In just a few moments, we will begin our Annual Meeting comprised of two excellent panels. Carol Steinberg will introduce the first panel, New Models of Publishing, which was organized by Judy Bass and Ken Swezey. Diane Krausz will introduce our second panel, Trending Topics and Licensing and Branding, which was organized by Diane Krausz and Ethan Bordman.

I would like to thank our Program Co-Chairs Diane Krausz, Carol Steinberg, Judy Bass and Ethan Bordman, and our trusted liaison in the meetings department in Albany, for their dedicated work in making this program such a success.

This evening at our reception we have revived an old EASL tradition by honoring a person who has had an important impact in entertainment, arts or sports. This year's honoree is Mayor Michael R. Bloomberg, for his outstanding contribution to the arts. Corporation Counsel Michael Cardozo will be accepting the award on behalf of the Mayor (see p. 19 for Judith's award speech).

The reception will be held at UBS only two blocks away. And we will be given a private tour of its art collection and enjoy live jazz and cocktails. Thank you to UBS for graciously hosting our reception this evening.

Before I depart, I extend my heartfelt gratitude to my most remarkable dream team, Rosemarie Tully, Vice Chair, Diane Krausz, Treasurer, Pamela Jones, Secretary for 2011 until the present, Monica Pa, Secretary for 2010, Jason Baruch, Assistant Secretary, and the entire EASL Executive Committee.

I also thank my dedicated Albany colleagues, Beth Gould, Tiffany Bardwell, Dan McMahon, Leslie Scully, among others whose tireless support has been invaluable throughout my term.

Although I leave you as Chair, I will not be sailing off into the sunset, but will remain as member of the House of Delegates through the end of my term in June. And I will also remain as Chair of the Committee on Fine Arts, and Co-Chair with Judith Bresler of the Committee on Alternative Dispute Resolution, which we co-founded several years ago.

Now, a word about my successor, Rosemarie Tully. I could not leave you in better hands than with my dear colleague and friend, Rosemarie Tully, whose vision for EASL has been far reaching-and innovative.

For many years Rosemarie has demonstrated her impressive talents and leadership skills within EASL and the greater Bar. I am confident that Rosemarie will be an effective and forward-thinking Chair, and will serve EASL with distinction and with her sparkling presence and style that is her signature.

I now turn the podium over to Judith Bresler, Co-Chair of the BMI/Phil Cowan Memorial Scholarship Committee, who will announce the winners of this year's Scholarship. Judith, Gary Roth, and Barbara Jaffe, Co-Chairs.

JUDITH BRESLER: Thank you, Judith. Before we announce the winners I would really be remiss if I didn't

just once again reiterate what an extraordinary Section Chair that Judith was. And I ask for another round of applause. She has created an unprecedented number of very successful initiatives that have made our vital Section even more vital. So thank you again.

JUDITH PROWDA: Thank you very much. I must say that I had some very high heels to follow with Judith Bresler as Former Chair—

JUDITH BRESLER: And Elissa Hecker.

JUDITH PROWDA: Also as Former Chair, and that will be succeeded also by a woman Chair. So wonderful, thank you very much.

JUDITH BRESLER: All right, thank you. The BMI/Phil Cowan Memorial Scholarship was created seven years ago in memory of Phil Cowan, who was an early Section Chair who died precipitously of brain cancer. And we wanted to keep his wonderful memory alive and we thought the best way of doing that would be to sponsor two scholarships. BMI generously joined in with us, which are based on writing competitions, which are open to all accredited law schools in New York State, two in New Jersey, plus other schools on a national basis that are selected on a rotating basis by BMI.

And so it is our pleasure today to announce the winners of the Scholarship. The essays had to be devoted to an issue of entertainment, art, sports or copyright law, all areas that were dear to Phil's heart.

So the first winner I'd like to announce is Eric Schonberg; Eric please come on up here. Eric's winning essay was entitled, "One Continent, One Sport…One Channel? The *Premier League* decision and the Future of Sports Broadcast Licensing in Europe" (see page 97).

Eric is a current third year student at New York Law School where he has a passion for sports, entertainment and copyright issues. He spent the past fall as the legal intern at IMG at its corporate headquarters in Midtown. Eric is a 2009 graduate of Allegheny College in Meadville, Pennsylvania, where he was both the President of the Phi Beta Psi Fraternity and Captain of the Alleghany men's rugby team.

While in college he was a finalist for several national leadership awards as the result of contributions he made to his fraternity and to his school. While he's not working on breaking into the sports industry, Eric's interests include golfing, writing comedy screenplays, and playing chess. He credits his great uncle, former *New York Times* Music Critic Harold Schonberg, for fostering his love in the arts. And he hopes to continue contributing to the EASL community as an attorney. Eric.

MR. GARY ROTH: Thank you, Judith. Before I introduce our other winner I just want to say on behalf of BMI that we are always thrilled to partner with EASL in this competition. This is the fifth or sixth year that we've done it. We get a wide variety of very well written papers and the members of the Scholarship Committee are year after year duly impressed with the writing talent of our competitors, and this year is no exception.

And the other winner this year, and I couldn't find him before so I hope he's here, Patrick Siler, are you here? Come on up.

Well, first let me tell you that Patrick's paper was entitled very timely, "The Gershwins' *Porgy and Bess*: A Case Study of Racial Discrimination in Theatrical Casting."

Patrick holds a Bachelor of Fine Arts degree in Directing from the University of North Carolina, School of the Arts, School of Filmmaking. He is an actor, singer, director and producer who has worked with the Delaware Shakespeare Festival, and the Texas Shakespeare Festival among others. He currently serves as the Executive Director of the Adirondack Shakespeare Company. He's scheduled to graduate from St. John's University School of Law in spring 2012, and he would like us all to know that his heroes include Peter O'Toole, Stanley Kubrick, Jim Henson and Muhammad Ali.

Patrick, I just want to let you know that your paper, as Eric's, and all the others are read by many members

of our Executive Committee in many different disciplines of entertainment, arts and sports law. And this year particularly there was across the board consensus that your paper was very worthy of an award. So congratulations.

JUDITH PROWDA: Thank you and congratulations to the winners. Next I would like to invite Rosemarie Tully, our current Vice Chair and incoming Chair, to announce an amendment to the bylaws and her slate of officers. Rosemarie.

ROSEMARIE TULLY: Thank you, Judith. Good afternoon, I am Rosemarie Tully, Vice Chair of the Entertainment, Arts and Sports Law Section.

As Judith mentioned earlier, we have some Section business to attend to today involving an amendment to the bylaws and the election of officers.

First to be addressed is the bylaws amendment. You should have in your materials book, a green handout. This includes a marked version of the bylaws which reflects the amending language.

The past two years have been years of wonderful expansion for our Section. Under the exemplary leadership of our Chair Judith Prowda, we have gained so very much.

Membership continues to increase, our Diversity Committee's endeavors have been recognized by the Association, and several new committees have been established, including an International Committee, giving EASL a global presence. Our outreach is broader and brighter than ever.

In view of the evolution of our Section, this past November the Executive Committee voted to amend the bylaws to expand the number of officers of the Section by two, namely Second Vice Chair and Assistant Treasurer.

They also voted to amend the bylaws to adjust some language regarding the election of Delegates to the House of Delegates. The addition of these two officer positions will help round out and enhance Section leadership. And the corrective language regarding Delegates and Alternate Delegates will perfect our bylaws with regard to filling those positions.

I now ask for a motion to amend the bylaws as approved by the Executive Committee at its November 2011 meeting. Thank you, Mr. Richmond. Is there a second? Second. Alan Barson, thank you very much. Is there any discussion? All in favor of the amendment please say aye.

AUDIENCE: Aye.

ROSEMARIE TULLY: Any opposed? Oh, I like that. Okay, good. That motion is carried. Thank you very much.

Now we move onto the election of officers. Not only the election of officers, it's also the election of District Representatives and Delegates to the House of Delegates. In your materials you have a pink handout. This handout states the recommendations of the Nominating Committee for the positions of officers of the Section, District Representatives and Delegates to the House of Delegates, including an Alternate. We will refer to this handout as the report of the Nominating Committee, dated January 13, 2012.

The Executive Committee, at its meeting earlier today recommended the adoption of the slate of officers, the Delegates to the House of Delegates, an Alternate, and the District Representatives as reflected in the Nominating Committee report. Are there any further nominations from the floor? Hearing none, is there a motion to elect the slate of officers, the Delegates, and the House of Delegates, and the District Representatives. So moved, Alan Barson. A second? Elissa Hecker, we'll take as a second. Thank you very much. So then I ask, all in favor?

AUDIENCE: Aye.

ROSEMARIE TULLY: You're so good at this. Any nays? Good, okay. So our officers now and our Delegates, and Alternate Delegates, and District Representatives are all in place. I thank you for the vote, and I thank you all who have offered to serve this amazing Section. And one more thank you before we move on, and that's a thank you to Judith for her outstanding tenure as Chair.

The Section as a whole has been energized incredibly, and we are very, very appreciative. We are so appreciative that on behalf of the Section, we present to you a Tiffany & Co. chronometer, which is inscribed to show our appreciation for your tireless service to EASL. And we look forward to your continued enthusiasm and wisdom as Past Chair.

JUDITH PROWDA: Thank you very much. Thank you. Well, thank you very much. I congratulate the new officers and I look forward to continuing to work with all of you, and to this afternoon's proceedings. I would like to ask Steve Richmond to the podium to make an important announcement about a vote on Friday.

STEVE RICHMOND: As you all know, EASL is just part of the State Bar Association. We are one of 25 active Sections in the Association. The Section Delegates have proposed with the overwhelming support of the House of Delegates, an amendment to the Association's bylaws to allow the Sections to have two members on the Executive Committee. The Executive Committee of the Association is key to the success of the Sections, because they're the ones who prepare the budget, decide how much money we get to operate, and how do we divide the CLE revenues between the Association and the sections.

There is some opposition to giving the Sections that representation. So therefore, the EASL Executive Committee urges all of our members to join us here back at the Hilton this Friday at 8:45 a.m. in the Petite and Trion Ballrooms here on the third floor. Because at the Association's Annual Meeting, all members of the Association have the right to vote, and we're going to ask you to vote in favor of the amendment suggested by the bylaws committee, and that you attend to oppose any attempt to either divide the question or substitute that.

For the well-being of EASL over the next several years, we ask for your support, we ask that you join us on Friday morning, here at the Hilton at 8:45. Thank you.[2]

JUDITH PROWDA: Thank you very much, Steve. I hope to see you on Friday. Well, thank you very much for your attention. I hope that you enjoy today's very full program, and look forward to seeing you this afternoon at the break and this evening at the reception. Thank you again for the honor of serving as Chair of EASL. It's been a wonderful two years. Thank you very much.

I would like to now turn the podium over to Carol Steinberg, who will be introducing the moderators and the panel. Thank you very much.

NEW MODELS OF PUBLISHING: E-BOOKS, APPS, SELF-PUBLISHING AND OTHER CHALLENGES

CAROL STEINBERG: I'm pleased to introduce the moderators of our excellent panel on New Models of Publishing. Judy Bass is a media and entertainment attorney and former business affairs executive with over 25 years of experience at a major law firm and at several media and entertainment companies, including Time Inc., CBS, and Marvel Enterprises.

She currently has her own practice dedicated to addressing the needs of clients in the creative community. She concentrates on production and distribution deals, talent and author agreements, rights licensing, and intellectual property matters for a variety of corporations, companies, and individuals. Judy is a member of the Executive Committee of this Section, and serves as Co-Chair of EASL's Literary Works Committee. She and Ken, who I am going to introduce in a moment, have worked very hard to plan today's panel. And you can find out more—her full bio is in the materials.

Ken Swezey represents clients ranging from well-known authors, entertainers, literary estates, publishers, digital media, and transmedia companies and visual art licensing companies, as well as not-for-profit companies. He's a partner at Cowan, DeBaets, Abrahams & Sheppard. He was schooled in California, where he got his BA, MBA, and JD, and is a Past Chair of this Section and currently is Co-Chair of the Literary Works Committee. So I now leave the panel to you.

KEN SWEZEY: Thank you.

JUDITH BASS: Thank you all for being here. We think this will really be a terrific panel. We thank all our panelists. I'd like to introduce the people who are here. Let me start with Jane Friedman, who is CEO and Co-Founder of Open Road Integrated Media, a digital publisher, and multi-media content company.

Open Road has published eBooks from legendary authors including William Styron, Pat Conroy, Jack Higgins, Alice Walker, James Jones and Virginia Hamilton, and has launched new e-stars like Mary Glickman. And her launching of Open Road was named one of the 10 best publishing stories of 2010 by *Publisher's Weekly*.

She previously served as President and Chief Executive Officer of HarperCollins from 1997 through June 2008. Her decision to create a global digital warehouse, including digital files of its core backlist and future books, positioned the company as a leader in the industry and propelled HarperCollins into the 21st century of publishing.

In 2011, Friedman was named one of *Fortune Magazine's* "Ten Most Powerful Women Entrepreneurs." She was appointed *Publisher's Weekly* 2006 "Person of the Year," named one of the *Wall Street Journal's* "50 Women to Watch," selected as one of Fast Companies, Fast 50 and was featured in *New York Magazine's* The Influentials. And she has a host of other honors, serves on various boards, and her full bio, which is even more extensive, is in the materials. So if there is anyone who can tell us about the brave new world of eBook publishing, it is certainly Jane Friedman, and we appreciate her being here.

KEN SWEZEY: We had hoped that Charlie Melcher of Melcher Media would be with us, he is listed in your program, but he has an able person, executive from Melcher Media, which is David Brown, who is here.

And David, on behalf of Melcher Media, is going to be talking to us about the business and new emerging issues around the App, the book-related App in particular. David was instrumental in working with Melcher Media on Al Gore's *Our Choice* App, which won an Apple Design award, and was named best App of 2011. And so we're looking very much to hear from David about how books, books as translation into companion Apps, and how that fits into our landscape of eBook Apps and the emerging world of digital publishing.

JUDITH BASS: And then the next two people that you see up there on the podium are Jeff Kleinman and then Jonathan Lyons. They are going to have sort of a conversation of sorts or a discussion about contract issues and digital rights. Jeff Kleinman is a literary agent, intellectual property attorney and the Founding Partner of Folio Literary Management. He is a graduate of Case

Western University, where he got his JD. He has a master's from the University of Chicago and he graduated from the University of Virginia.

As an agent he represents both fiction and nonfiction. Some of his authors include Garth Stein, Robert Hicks, and Charles Shields. He is a member of the Association of Author Representatives (AAR) and of the Digital Rights Committee there. He has moderated several sessions at the AAR and at the Author's Guild about digital and multimedia rights.

Jonathan Lyons is a publishing attorney and literary agent based in New York. His clients include authors, publishers, literary agents, distributors and artists, among other publishing industry businesses and professionals. He focuses on the negotiation and drafting of publishing, licensing and distribution agreements and copyright counseling. He founded Lyon's Literary in 2007 and the agency represents both fiction and nonfiction authors.

Previously he worked at Curtis Brown and McIntosh and Otis. He has completed deals on behalf of numerous estates, including John Steinbeck, Upton Sinclair and W.H. Auden, and sold books on everything from vampires and the apocalypse, to jet packs and Jim Henson.

He delivers regular lectures on publishing agreements and conferences across the country and serves on the content and legal acquisition and legal advisory for Speakaboos, a startup children's digital publisher.

Last, we have a special appearance by Jay Himes, who is going to talk to us about some of the antitrust issues that have been raised in the actions that have been brought against Apple and the publishers that some of you may have read about. We thought this would be an interesting addition to the panel, since it's not an area that most of us try to get involved in.

So we will hear from Jay, he is Co-Chair of the firm's Antitrust Practice Group at Labaton Sucharow. He has a very extensive background in antitrust, which you can look at in your materials. He was also the Antitrust Bureau Chief in the New York Attorney General's Office and has more than 30 years' experience in complex litigation.

During his eight year tenure as New York's Chief Antitrust Official he led significant high profile antitrust investigations and enforcement actions. You can read more about them in the materials.

While he headed the New York Antitrust Bureau, he was also the State's principal representative in the 2001 negotiations that led to a settlement of the government's landmark monopolization case against Microsoft. Before he served in the attorney general's office, he practiced complex litigation for 25 years at Paul Weiss. So again, we are very grateful to have him talk to us about what is happening with the lawsuits.

So I just wanted to give a very short background before we start speaking about some of the topics in depth. Some of you may have seen an article in *The New Yorker* back in April of 2010 which talked about the book business. And in that article Steve Jobs was quoted as saying that the book business was unsalvageable as recently as 2008.

Between 2002 and 2008, annual sales in the book business had grown just 1.6 percent, profit margins were languishing. Since then of course, there have been various game changers. Now the very definition of "a book" is in flux, as we have versions ranging from traditional print versions to what are really now more multimedia entertainment, including audio, video, pop up graphics, etc. The introduction of the iPad and the Kindle have, of course, transformed the ability to read eBooks.

In 2010, I'll just give you a few figures that I found—17,000,000 of those tablets were sold. In 2011, 65,000,000 were sold. In 2010 eBooks represented just four percent of all books sold. In an article that you may have seen in this past Friday's *Wall Street Journal* that was called, "Blowing Up The Book," that I recommend to you all, figures were quoted that 14 percent of all books sold in the second and third quarters of 2011 were eBooks. And it is projected that this figure will reach like 25 to 50 percent of all books sold.

In revenues, eBook sales were $878,000,000 in 2010. They are projected to pass even more in 2013. Of course, some of the new models of publishing eliminate the publisher entirely. Over the last five years the number of self-published titles have gone from 51,000 to over 133,000 per year, some of which have sold more than 1,000,000 copies on the Kindle.

Just this past Thursday, in another huge new development, Apple has announced that it's going to partner with learning institutions and universities to do digital text books.

So we are clearly at the forefront of a revolution in publishing, some of which publishers are optimistic about and some of which they are not. So to give us some background on the history of eBooks, and how we got to where we are, and who's doing it right now, Jane.

JANE FRIEDMAN: One thing about Steve Jobs is that it has been proven that anytime he decided to talk against something it was because he was building the equipment to make it happen. So when we heard that he said the books are dead, we knew that something was going on over at Apple, and yes indeed it was. And God bless him. I wish he was still here to invent another thing, but he's not.

So there we go, Open Road Integrated Media, my company. So I'm delighted to be here today. I have always had an affinity for lawyers, and actually have a son at

Skadden Arps and a daughter-in-law formerly at Cleary Gottlieb, and now Associate Dean of Academic Affairs at New York Law School. And Jordan Greenberger of Moses and Singer, raise your hand Jordan. I've known him absolutely all of his life, and I'm delighted to see him here.

And then there is Ellis Levine, the former Chief Counsel of Random House and a colleague of Ken's. There's James Fox, the former Chief Counsel of HarperCollins, now retired. And Robert Levine and Kim Shepler, who is in the back of the audience who are our colleagues and the protectors of Open Road. So I'm very happy to be surrounded by some wonderful lawyers.

I am what is kindly called a veteran publisher. I spent 29 years at Random House where I was known, among other things, as the "Queen of the Backlist," which fits into what I'm doing today. And then 11 years at HarperCollins as the Global CEO, where I started to look at the digital space and take it seriously. That was in about 2003, about 10 years after the notion of electronic publishing entered our consciousness and our contracts, and three years after the *Rosetta* case[3] which focused on who had what rights, also very important to us.

When I left HarperCollins in June 2008 it was clear to me that the future of the publishing industry, which had been based on a broken model, large advances, few if any ancillary rights, return-ability of all books, was going to be digital. And so the story of Open Road and the story of digital publishing began concurrently.

It all started in the year 2000, 12 years ago, that a man named Henry Yuen turned up on the scene with an oversized clumsy electronic device called the Rocket eBook. Do any of you remember the Rocket eBook? Very few. If you have one, it'll probably go to the Smithsonian.

I responded favorably, as I have always embraced the new. But some of my colleagues responded with too much zeal, in particular Larry Kirshbaum, who was then CEO of Warner Books. He launched an imprint called iPublish, and he was going to set the world on fire. Unfortunately, one year after this launch, after many costs have been incurred and the only game in town was still the Rocket Book, iPublish was shuttered.

Now 12 years later, electronic publishing has arrived, and with it a secular change in the publishing industry. We are seeing a similar change happening. And the rapidity of the change is mind boggling. Why is this happening now? Why is Larry Kirshbaum, who could have been seen as the visionary of i or e-Publishing and then left now the head of publishing for Amazon in New York. All things change.

The emergence of major e-tailing sites, where eBooks are available instantaneously, devices that are inexpensive, attractive and portable, authors, agents and publishers who are making their lists available for the first time, and most importantly, the consumer, who has decided in favor of portability and lower cost. Those are the four reasons why eBooks are really happening.

What you're seeing here, and I'm going to repeat a couple of things Judith said, but very quickly. What you're seeing here is a Pew slide that just came out. It shows where we are now and how quickly things have changed in 12 years. This is truly a revolution, it's not evolution, it's a revolution, and it shows no signs of slowing down.

The actual Pew report came out and it actually said, and you can read it on the top there, big jump in gadget ownership over the holidays. Well, what a big jump from December 11, 2011, 10 percent gadgets. January 12th, 19 percent. So where are we going—I think you're going to see this exponentially increase.

So the sale of eBooks, what happened with them? I mean in 2009 it was when the Kindle eBooks took off. In 2010, iBooks from Apple began. In 2011, iTunes integration for books. And in 2011, as I said before, the tablets explode onto the scene with the iPad, with Kobo Vox, which I am very high on, with Kindle Fire, and who knows what else.

My partner was at the CES Show these week in Las Vegas, and he was talking very seriously with a friend of ours named David Eun who had been at Google, and then at AOL, and now is at Samsung. And we want the Galaxy to be one of those devices that can also view our books and have our books seen very well.

So what is this slide? This slide is very interesting because it is really what relates to my business, but to the business in general. And this is the middle of the tail, the importance of the backlist. As I said before, I've been known as the queen of the backlist, which is the backbone of any publishing endeavor, and I'm afraid the part of the publishing list that many of the legacy publishers have lost sight of.

So you see that centerpiece. That is the backlist, that is what Open Road is going after. That is our commitment to publishing catalogs and having the author be the brand. Because if someone tries one Jack Higgins, who is one of our authors, they may very likely try another. And I have always felt that that was the way to publish books. Get your authors, publish all their books, and have this deep backlist.

So here we have slide of all the eReaders, and I'm sure you all recognize them. But what I will say is that it is absolutely significant for an ePublisher to have an amazing relationship, a very close relationship with all of the device makers. And in our case that has worked out brilliantly, because since we are not a print publisher, we are an e-focused, e-only publisher, with a little print on demand, but we are really an ePublisher. We work with

the groups at Kindle, not at Amazon. The people at Nook, not at B & N. We are the ones that they come to look for, for digital content, and we want to work with them.

So very briefly, this is Open Road. It was based on this layer cake, and "Author Brands" is our major backlist catalogs. "Publisher Partners" are where we do marketing, because we are really a marketing behemoth, and marketing is where it's at because there's a lot of noise on the net. And if you don't market, and distinguish, and differentiate your titles, you're not going to sell them.

So we have relationships with publishing partners. And we also do e-riginals, which are books that are born digital. And we also do—you've probably all have heard about Amazon shorts and Barnes & Noble something or other. Well, we have our short shots, which really is short version fiction and nonfiction. Everything is supported by our video, our film and digital entertainment division.

Our video is really our special sauce. And we have 10 crews going around the country to talk to authors, estates, other authors about authors, really compiling what we call mini documentaries. Our videos are not trailers, they are literally mini docs that are full of information. And everything is supported by a proprietary digital marketing platform. We are a BC-based company, a BC-owned company. And we've spent most of our money going into building this digital marketing platform which works with the social media.

Here you see actually Open Road in its entirety. You see Pat Conroy, that's our Authored Brands, you see *Home in the Morning*, which is an e-original, a very interesting situation. No advances on any of these books. This book has sold, it's a debut novel that we like to call, *The Chosen* Meets *The Help*, because it's about Jews, and blacks, and civil rights south. We have sold more than 35,000 downloads of this book. The author has now written another book, *One More River*, that has just won an honor book of the Jewish Book Awards. And we have optioned the movie rights. So we can do a lot at our little company and make e-bestsellers.

And then we have our publishing partnerships, the one that we represent there is Mysterious Press, Otto Penzler is probably the leading man in mysteries around—at least in America, maybe around the world. And we have a relationship to do backlist catalogs of great mystery writers. And we will do about 750 books in the next three years with Otto Penzler.

I see someone's eyebrows going up. Yes, indeed. We started in May 2010 and we have published more than 2,000 books, about 150 authors, and we expect to have just about doubled that by the end of this year. And then everything as you see is supported by the digital marketing—by the proprietary marketing platform.

So that's really who we are. And I'm just going to tell you a little bit about the marketing and what we do. So that circle is our database, our digital marketing platform. And the intention is to bring the author and the reader closer together.

What we do is we compile all this marketing content. We are a content company. All rich marketing content like archival videos, conversations, photographs, anything at all. And we build stories around that content. Everything is tagged in our back end so that we can build on marketing milestones, and we can really get to people with what they want to know about.

So you see at the bottom we have a whole list of verticals of content communities, of blogs, of video sites, of book sites, and we work with every one of them. They can grab content from our site and we can push out content to them. And the intention is, obviously, to bring the author and the reader closer together. And this is working very well in us bringing the greats back to life, and also in supporting niche authors who have big audiences out there, and we want to reach them.

So very briefly, these are examples of the kind of marketing we do where you see that video far over on your left. If you look on the top right, if you click on the video where it says, "buy this book," there's a dropdown and you can go directly to e-tailers. All of the e-tailers can be reached directly from our site. And we have all kinds of analytics that tell us what we are seeing in terms of click through, etc.

We also show you here we do a lot of photo albums that can also be distributed. We are a syndicator, that's what this is all about. We are a syndicator of content, of marketing content. And this is something that has not been done in traditional publishing, is being done by Open Road. We have very few competitors now, we will have more, but this is really what we do.

And I am just going to end—oh, and this is also a Banned Books Week slide, because what we do is we do mashups of video and mashups of text where we—in fact, today is the announcement of the Newbury winners, and we have a video of our Newbury winners, and it's being picked up by blogs around the country. So an older book by a Virginia Hamilton or a Jean Craighead George will be viewed today on many, many blogs, and we will sell many, many copies.

So that's really it. Judith spoke about the *Wall Street Journal*, there it is. I'm quoted in the *Journal*, and I'm quoted a little bit backwards, but what I really said was that the consumer is not asking for enhanced books as yet, but as an experimenting company, we feel we have to do some of this. So you see there, Bob Marley, we are doing a Bob Marley book. We just did a Mohammad Ali enhanced book. We are doing a Y.A. enhanced book.

Do I think this is the future? I think this is a piece of the future. What I think is the real future is that a great majority of people will be reading on devices going forward, and that's what we have to do, is give them that content.

KEN SWEZEY: Thank you. I just have one question for you, Jane. Thinking about the midlist and the long tail of both the existence of a midlist and a long tail sort of imply some sort of massive success at the beginning, that then gives rise to this long future interest and great readership. Do you see anything happening differently in the digital world that's going to make new author stars emerge so that they'll be beginning points of new long tails that will then have midlists and move on from there?

JANE FRIEDMAN: Absolutely, because the legacy publishers are not going to be able to continue paying the huge advances that they have to the stars that they have today, so you have to start making new stars. And the intention is to make new stars up front that then backlist. That's the whole goal. The goal—you can backlist fiction, you can backlist non-fiction, not quite as well, but there certainly are areas of non-fiction that backlist well. But we must be making new stars who are going to be the stars of the future.

JUDITH BASS: I just want to ask you, Jane. What you are not doing, though, is Apps, through the iTunes store, is that correct? Because we're transitioning into that. And maybe if you can just make a statement about that, and then we can get David to talk about that, because we're talking about two different things here.

JANE FRIEDMAN: Okay, so I can be—since my friend Charlie Melcher isn't here, I can say exactly what I think about Apps. Apps are not books, we are not in the App business. I'll never say never, because I never say never about anything. Well, I will say this, Apps do not represent what Open Road is or what I am. We have full books. I think that marketing Apps is plausible. I think that Apps cost too much money. I think they are very difficult to find on the iTunes store, and I would much rather put my money into the full reading experience.

KEN SWEZEY: With that introduction, David of Melcher Media is going to both present us with what Melcher has been doing over the last several years since the introduction by Apple and Steve Jobs of the iPad, and where they're headed in the future. And David, of course, if you want to respond to what Jane just said in the midst of yours, and we'll have a few questions for you at the end of your presentation. I think you're going to work off of an iPad, and I hope technology is going to bless us and allow you to do your thing. Yes? You think so? We hope so?

DAVID BROWN: My name is David Brown, I'm a Senior Editor at Melcher Media. Melcher Media is a content producer. We make Apps and we've make books for about the past 20 years. For most of those 20 years we've been known as a book packager, and we've been happily making the transition to digital products.

I want to talk about our experience in making an interactive book, in particular this one we made with Vice President Al Gore last year, and from our experience as a producer and a publisher.

Melcher Media has always produced very illustrated design intense books, kind of handcrafted one-offs. So as we follow the rise of eBooks and the Kindle, we are interested in digital publishing, but it wasn't a fit for the work we've been doing for a couple of decades. Then the iPhone came out and the App store, and we started to get more interested in doing digital books.

In 2009, we worked with Al Gore to create the print edition of *Our Choice*, which was published by Rodale. We had produced the book *An Inconvenient Truth* in 2006. This was Mr. Gore's follow-up focusing more on solutions and more detailed coverage of energy and other issues.

The book came out in October of 2009, and about that time we approached Mr. Gore and proposed doing an interactive version of his book. We started working on an iPhone version, and a few months later the iPad came out, and we quickly changed tact to focus on both devices. And this actually exists on the iPhone as well.

So I want to show you what we made, which is *Our Choice*. It's a fully interactive multimedia App. We developed it in partnership with two young developers in San Francisco named Push Pop Press, and with Mr. Gore, and in conjunction with Rodale, again, who is the publisher of the book. Came out in April of 2011. It was featured as App of the week. It's done very well, and has outsold the print edition of the book.

I want to show you a few things. We tried to integrate as many different kinds of media that were appropriate for the book, starting with the 3-D image of the book. The iPad really gave us a blank slate and we thought about what a book could be on the iPad. So we focused a lot on interaction design. We were blessed with having the content in place already so we weren't doing two things at the same time. And the book itself was fully illustrated. We added photographs to the digital edition. We added some nice transitions. We added maps that tell us where you are, which is all sort of a basic level of interactivity.

Where we started to have more interesting things happen was when we brought in new original media. We commissioned 3-D animations. In the App you'll hear Al Gore's voice for all of these, which continue to play on the page.

Most interestingly, we also got into real programming and did some interactive pieces custom to the App. So in

this interactive graphic about passive solar, we can reposition the sun and see how the house works in different seasons.

From the beginning we wanted to integrate documentary footage, and that led us into doing a lot of licensing deals with documentary makers and news sources. There's more than an hour of footage throughout the App. A lot of it came from a documentary series called E2. A lot of it also came from BBC and CBS sources.

This is a crowd pleaser. In this case we have an infographic showing how windmills and battery power are linked for home power. And in this case, as you blow into the iPad, you are powering the windmill and storing your energy.

So as book producers, this was a new effort, and involved creating a lot of new teams. We have programmers, we have an interactive designer, a video editor, a video producer, audio producer, animator, as well as a usual editorial team.

In the process we learned a lot about working with developers for one thing, about potential business models for App sales. And we also learned about dealing with rights, which historically we had been doing just for print. There were a number of novel rights issues that came up. For instance, several of the sources we were licensing still images from had never worked with Apps. Even getting AP on board, they didn't quite know what to do with us. Some photographers assume that the economics of eBook are better for the publisher, since we don't have to print books, so they reserved more money for their pictures, which was very hard to disabuse them of.

Video was a particular problem; we discovered that video was historically cleared for a period of time, three or five years. And of course, books should last forever. I think that's one of the big unresolved issues around licensing video for eBooks.

And then mostly interestingly, it turned out that the most difficult thing to secure rights for in this case was the font. The font is a piece of software, and licensing software to embed in an App is not always easy. The font foundry's asking terms would have given them a royalty close to Mr. Gore's, and we were negotiating until a few hours before the App came out, happily ever after.

And again, the reception to *Our Choice* has been amazing. I don't know if anyone has played with the new iBooks 2 and iBook Creator, but there's a clear lineage between the work that Push Pop did for *Our Choice* and where Apple took iBooks.

When we were developing *Our Choice*, I worried that we would be late to the party. As it turned out, the idea of interactive books for adults was just beginning. Since then, we've been exploring different platforms for making our products and different business models. It's an exciting time in the sense that things change every week. In particular, Apple's iBooks announcement last week certainly puts our work on *Our Choice* in a different perspective as those tools become more democratic and the bar is raised in general for what an App book can be.

So we've been thinking about what's next. Our focus remains on how we can bring serious content to interactive books, whether that's an App or an eBook or for the iPad, or the Amazon Fire, or other Android tablets. We worked with Larry Kirshbaum's imprint at Amazon and the author Tim Ferriss to make Amazon's Fire version of a small App for Timothy Ferriss, as well as other Android tablets, and found that each platform, as I'm sure Jane knows too, presents a bunch of different challenges. The Fire itself was a difficult device to design for.

Some of the things we are thinking about and exploring in our next projects include: In App purchases, how to extend the readers experience, and we are also exploring ways to make interactive books more social, connecting people while they're using them.

There have been some magazines that have done that. And I think that integrating people's intimate relationships with books while they're reading them is ripe for exploration, and we have some projects underway.

KEN SWEZEY: David, one of the questions around App development, because of the long lead time in terms of putting together a book App, and also because of the number of players involved; is the approval process for the Apps, since all of the business partners are going to want to say to each other, well, Al Gore should have approval, publishers should have approval, possibly software developers, certainly packager. Can you just sort of speak generally to what are some approaches you guys at Melcher take, on a practical level, dealing with that question?

DAVID BROWN: *Our Choice* did have a lot of cooks in the kitchen. It turned out that the one that everyone worries about, which was Apple, turned out to be very easy. And everything we've submitted has actually been approved within 10 days or so. I'll knock on wood for that.

In terms of approval, in the case of *Our Choice*, everyone was very involved from day one. Al Gore was seeing builds and in the end approval on the author side was very easy. In my experience so far approvals haven't been more difficult with Apps. I mean, there's only the logistics to handle.

KEN SWEZEY: Another question too, you were saying that *Our Choice*, the App version outsold the print version. My question was, in the eBook arena a lot of the high sales numbers have come from deeply, deeply discounted prices or even giveaways in some cases. Were you selling the App—I know you're not selling it directly,

but was your team selling the App generally at full App price, or was there a discounting process that went into that big distribution?

DAVID BROWN: The discussion about pricing happened mostly before we released. And in the end we released at $4.99, whereas, the paperback sold for I think $26.95. So clearly volume is important in making any money off of these.

JUDITH BASS: One other question. What about the free-mium model of having free Apps that are coming out at the same time as the print books to defray some of the concerns, and the conflicts, and competitiveness between? Do you consider those apps to be competitive with the print versions?

DAVID BROWN: I'm not sure of any fully interactive full length books that have a free version. I think that Kindle's free chapter and iBooks free chapter is a great sales tool. And I know that there's been some pressure on Apple to figure out how to do trial runs for Apps. Because in the App world, people think $5.00 is a lot of money. This is a bit of a tangent, but I also wanted to add one surprising thing from our experience with *Our Choice*, is that only half of the sales were North American.

JUDITH BASS: Okay, so we've now gotten, I think, a great overview of the landscape that we're dealing with. We're now going to turn to some of the more concrete legal issues that obviously are being faced as a result of this new world.

I remember in the early '80s, looking at a publishing contract that came on 8½ by 14 inch paper, and they were pretty standard what those contracts were. I think now we are looking at new definitions, new—all kinds—what is an enhanced book, what's an eBook, all of that.

Some of that information we have shared with you in our materials. You'll see there's a section that we've just gathered together a bunch of definitions; grants of rights, some other competition work clauses that may be helpful to you when you are negotiating these deals. But we are now going to let Jeff and Jonathan talk about some of the issues that they face on behalf of authors and in dealing with publishers in negotiating these deals.

JONATHAN LYONS: So you've seen a couple of great examples of an App, and I guess enhanced eBook is to some degree what Open Road is doing. So now we have to get to the legal details of how that all works in publishing agreements. So we'll try to cover some of that here.

The reality is I think I negotiated over 300 contracts this past year in publishing, and I'm sure Jeff has done a number, I can't begin to say how many deals Jeff has done. No publisher has the same definition of what an eBook is, what an enhanced eBook is, what an App is. Sometimes it's all one definition, sometimes it's two, sometimes three.

So what we've done here is try to present a couple of definitions that we think are claimed to use as a framework for talking, but when you actually get a contract in, it's not going to look like what we have when Jeff gets it up. But we're hoping it's a framework for you to use in your conversations, whether you're representing an author, publisher or otherwise.

JEFF KLEINMAN: While it's coming up, you know the thing that's so cool from where I sit, I went to law school because my dad made me. But the thing that's so cool about this whole world, I was on the subway a couple of years ago and a publisher gave me this book from FSG, so it's a very literary, beautiful literary novel. And I was reading it, and sitting next to me was this guy playing his PSP. And it was playing "Grand Theft Auto 3," and I don't know if you play that a lot? I didn't, but basically what happens is there's this kid running around the streets of a city beating the crap out of people. And I was like, oh this is appalling, oh dear, oh God, I didn't want to look at this. And then the thing was I was sucked in. And I kept thinking as I got off the subway really bummed, I wouldn't know what happened to that woman's teeth, you know. I was so thinking like, what's going to happen to the book. What will happen to our business and my daughter wanting to read, my daughter is 12, and I want her read. And I keep thinking, this is now why she's going to read. And isn't it so cool, like books are not just part of a conversation, they are the conversation.

JONATHAN LYONS: So what we're going to do is talk about contracts now that you would get from major publishers, independent publishers, small publishers. There's obviously a big conversation going on between what are in contracts now relating to electronic rights and what were in contracts in years past. I think in the book there's a case called *Rosetta*,[4] which if you are not familiar with, you should become familiar with. And it really is one of the more interesting things going on right now, in the conversation of older publishing agreements. But Jeff and I will focus on current ones.

So the first definition we have up there is just something we kind of came up with, "Electronic Book Rights, which shall mean the exclusive right to publish, and to authorize others to publish, the verbatim text of the work in whole or in part, such abridgements and condensations subject to author's prior approval, not to be unreasonably withheld or delayed, in visual form for reading, by any electronic, electromagnetic or other means of storage, retrieval, distribution or transmission now known or hereafter devised," etc. It's confusing.

I guess some of the key points that we look for in electronic book language as attorneys, and when you're

representing authors, the first thing I note is, "verbatim," in the second line. You want to make sure that the text itself, the integrity of the text is maintained, so if it's changed, that the author has approval over whether it's abridged or condensed.

The next part I would point out is that at the end, nothing is going to be added to the eBook, it's just the text, there's no images unless you deliver a book that has images in it already. There's no enhancements, animations, any of the great things that you saw that Open Road can do, none of that is in a basic eBook definition. Jeff, anything?

I guess the other thing I'd add too, going forward, is just basic eBooks, just text and maybe whatever pictures are included in the book. Something that we're seeing in publishing agreements that publishers are requiring is that audio rights be included. For an eBook to sell today, the argument is that it needs to include audio component in it.

Whether that's the case or not, I'm not sure, I probably would think that that's true, but certainly it's all supposition, so we'll see, but that's certainly a talking point. And especially with one publisher in particular, it's a very contentious talking point, and it's been a deal breaker.

JEFF KLEINMAN: Yes, publishers really feel—it feels from my side of the desk that publishers are—Jane, would the word terrified be not appropriate? It really feels like they're so scared about where things are going, that rather than carve up rights, they're going to try to get every right possible even though they're maybe not going to exercise any of them, or just a very few.

KEN SWEZEY: Can you just explain the sticking point around the audio, is it that you want a separate audio book, downloadable audio as a separate right? Is that where you are sticking?

JONATHAN LYONS: Yeah, what this publisher and other publishers are asking now is that they be able to sell audio rights bundled with the eBook edition. So when you buy the eBook you can listen to the audio version as well. And it's not just—I mean, in the past it was just text to speech, which is something I was part of. Now they're trying to expand that beyond that too. What would you imagine to be an audio book, a downloadable audio book, because that's where they see the market going. What they'll say is, "Oh, we won't separate the audio from the eBook." So you can still retain traditional audio rights, standalone audio rights, and sell it to third party audio publisher. But the reality is that once there's a downloadable audio edition out there, even if it's bundled with an eBook edition, it's going to affect the value of the standalone audio edition.

So as a representative of authors, it's a concern when you were doing a deal in the past, maybe it's $500, maybe it's $5,000, maybe if it's Patti Smith it's a lot more, you know. It's money that you were getting before. And then now when you bundle audio with eBooks there's no additional advance being talked about here to recognize the potential decrease in money you would be receiving from the audio standalone edition.

JANE FRIEDMAN: Can I just say one thing on this? You have to recognize that these two men are talking about new contracts for new books. Because I have been in the audio books business for a long time. I was the Founder and President of Random House Audio Publishing, which was 1985. A lot of what's happening today is that with backlists, there already are outstanding audio deals, and a lot of that now is coming into the mix. But they're talking about new books, and audio and the digital download business, which is a growing business since there is no more business, basically, for CDs at all.

JONATHAN LYONS: And some of these authors have had relationships with their audio publishers, signing book, after book, after book, and this audio publisher has been publishing for 15 or 20 years, and now their primary print publisher has said, "We now need audio download rights at least bundled with your eBook." That totally changes the nature of the relationship with their traditional audio publisher that they've had in place for many, many years.

JEFF KLEINMAN: So now on to enhanced eBooks. We got very confused when I was trying to figure this out a couple of years ago for a panel between the difference between enhanced eBooks and multi-media rights, because it gets very muddled. So what we got were a few definitions. "Enhanced eBooks" means the exclusive right to adapt and publish the work for any enhanced eBooks. And that means that's all the rest of the stuff that gets included. The photographs, illustrations, all the stuff that Charlie Melcher's company is doing. It's really putting all the bells and whistles in place.

JONATHAN LYONS: The question is, you hear people talking about enhanced eBooks, and then you hear people talking about Apps. And how do you distinguish them, and why would you distinguish them in the first place, is part of the talking point.

With enhanced eBooks, typically what's happening is you're seeing just additional content being added on. There's not a heavy level of interactivity, maybe light animation, just little things like that. But it's photos, videos being added on to help sell the work. Some of it is marketing. Some of it is successful, and some of publishers like Open Road have been successful. Other publishers who have done it have not been.

Taking it to the next step would be going to the App, I think, of high levels of interactivity like what you're seeing with the Al Gore book, where it's almost a completely different thing. Again, it all depends on how it's defined

in the contract. But for me it's kind of an eye test, you can see the difference. It's a step up in interactivity, and animation and just general level of contents.

JEFF KLEINMAN: See, I get confused on this. Have you all ever seen "How To Cook Everything"? Part of the Mark Bittman App, "How To Cook Anything"? I know the people that did it and they defined that as an App, but that was all the verbatim text that they took, and they lifted literally chunks and put it together. But then they put it in a blender and totally mix it up and add all sorts of other stuff. So what is it? It's the full text, but it's also this wholly very interactive product.

JANE FRIEDMAN: I want to say one thing on this too. All the marketing that I showed you from Open Road, that is not included in the book. We do not interrupt the text, that's all marketing material. The only enhanced books that we have done, that we are doing are about four. One was, and you'll understand why, *Chaos*, the great iconic book by James Glick from many, many years ago. He always wanted to see a pendulum go like this when he talked about pendulum theory. So we put in four or five what are called info-graphics. But basically, I have to go on record as saying, I do not believe in the enhanced book as a book. I think it's another experience. And I think that sometimes it can make—there's added value. If we're doing Bob Marley, you want to be able to hear his music. But that's taking you out of the book into something else. And that's why I think there is a distinction.

Now, you guys know that enhancements used to be stricken from contracts because of dramatic rights. It used to be that if you did any enhancements, you would risk not being able to make a movie deal. So I mean, it's all changed. The vernacular has changed dramatically.

JONATHAN LYONS: And that's like one of the factors in here. If you look at this multimedia App slide you'll see this line at the end that we have: "Provided, however, that if motion picture and television rights are not granted to the Publisher in this agreement, multimedia App rights do not include the right to create and use dramatic versions of the work in electronic media." I'm not 100 percent sure.

KEN SWEZEY: Have you encountered sort of the realm of clearing the publisher's release at the studio and with this kind of a clause? I mean generally speaking, a book publishing contract would say that a publisher would give a release, because generally speaking, if the publisher didn't take motion picture rights, they would cooperate and it would be in their benefit to see the motion picture come out. But here where the publisher might have multimedia rights, and even might agree that they haven't taken the dramatic, is the studio going to say "that's not enough," or "we need a more full release from the publisher"?

JONATHAN LYONS: We're seeing it unfolding right now. I'm not sure of any App deal that's died, that they couldn't work it out between the two parties, between a film studio, but I'm sure it's happened. It's certainly part of the concern, and it's part of the reason why you have to be so concerned that everything is defined.

There are—we're going to get to later on, a number of factors to consider, and some specific language that you can try to get in to address concerns that would relate to if you do grant multimedia rights in a publishing agreement and whether or not that would conflict with dramatic rights.

JEFF KLEINMAN: Key contract issues. We just highlighted a few of the biggest contract issues that we see that we end up negotiating. The first one is, of course, the money. So the standard has become 25 percent of net received—

JONATHAN LYONS: For traditional publishers.

JEFF KLEINMAN: Right, the standard for traditional publishers.

JONATHAN LYONS: The issue—I don't want to get too much into this, but the issue is there's certainly contention between authors, and agents, and publishers as to whether that is the proper amount. And it's part of the reason, probably there's a number of reasons, but that's one reason I'm sure that many authors are going directly to eBook publishers, or directly to Amazon, whoever it may be, because they're getting a far better revenue share.

What's happened, and I think this will be talked about by someone else in more detail, but recently there's a new sales model in place between publishers and Amazon and Apple called the Agency Model. And in years past there was a model called Wholesale Model. Under the Wholesale Model, I think the royalty that we typically saw—sometimes—I mean, years ago Random House had 50 percent of net, but right before this big change happened we're seeing 15 percent of list price about under a Wholesale Model. You break that down as compared to 25 percent of net under this Agency Model. And depending on what type of book it is and what the price point is, it's actually less to the author under the agency model. There are some benefits, and agents support the big publishers' efforts to convince Amazon to start using the Agency Model, which go far beyond this conversation. But 25 percent of net is low, I think, in most authors' and agents' minds.

And I think I can say fairly that Open Road pays far more as do all eBook publishers. And if you go with Kindle, if you go with Amazon directly, it's 70 percent, B & N it's like 62 to 70 percent. It all depends on what price point you put the book at. So currently 25 percent of net is the industry standard though.

So the issue is if you're going to do these deals with these publishers, hopefully the royalty will improve at some time in the future. And so you have to re-negotiate the language. And this is another source of contention between authors, agents and publishers. The language we presented here is kind of the horrible language, which is the bare minimum that I would expect in a contract.

At a certain period of time, post publication, you can renegotiate the rate at the author's request. Certainly, there are far better things out there. Some more objective standards, which a couple of publishers add, which one, if three of six, or two of six, or four of six of comparable size publishers change their eBook royalty and improve it, then you will get that eBook royalty as well. It's a most favored nations language which, if any big publisher of comparable quality or size improves their eBook royalty, you'll get it as well.

There's also this great language, which has now disappeared from one publisher, that you could renegotiate your language at any time after two years, I think, from publication. And if you fail to come to terms, they had to stop publishing the eBook edition, which was beautiful. But as of four months ago, they stopped doing that.

JUDITH BASS: Yes, I just want to point out also, in the materials there are three articles from the Authors Guild, one of them is called "The eBook Royalty Mess and the eBook Royalty Math."[5] And that will take you through the different calculations, they're really very helpful. They're also on the Authors Guild website. But I think if there is any confusion about any of this, it's really an excellent presentation. Of course, the Authors Guild is very much at the forefront of trying to push for a greater share of the royalties than 25 percent to the authors.

JANE FRIEDMAN: I just want to say something on this, because having been the CEO of a Big Six, and having had a royalty of 25 percent of net, it is not—I think it's very low, but it's not because it doesn't cost any money to do the eBooks, it does.

When I started Open Road we came out, at that point it was really revolutionary, we were a 50/50 partner with the authors, 50 percent. Shortly thereafter, Amazon went to 70 percent, and there's also Barnes & Noble that's at 60. I say that the 50/50 is in my opinion, the fairest of them all. And the 50/50 means that we get content for marketing.

What the publishers like Amazon and B & N, when they put on their publisher's hat, are saying is they can give higher rates, but they really don't market. Now you can all say, "Oh, what do you mean, Amazon markets a lot." Amazon does not market a lot, Amazon uses algorithms. Amazon is completely brilliant. But Amazon uses science, and publishing is a combination of art and science, and you can't rely only on the algorithms to do your marketing for you.

So we work in partnership with Amazon, not in the legal sense of partnership, but we work with them very closely, and they love our marketing, because our marketing helps to sell more books from their website, as well as others.

So we always talk to our friendly agents and lawyers and say, it may be 50 percent, or 60 percent or 70 percent, but if you don't get the marketing, you're really losing out.

JEFF KLEINMAN: We'll touch a little bit on that and kind of break that all down for you in a minute.

JONATHAN LYONS: Just one other quick point, too, is there are obviously other ways to pay for eBooks in something called the Subscription Model of Sales. If books are being bundled together for a certain price, let's say you pay $10 and you can access 30 titles a month. The question is, how does that break down for individual authors?

Certainly if you have a Jonathan Franzen in there with 29 other authors of far lower sales and maybe brand, it's arguable that Jonathan Franzen should be getting a higher percentage. That's not worked out at all in contracts either. If you see the second language, this is what most publishers are suggesting now. So that's a point of contention. And whether or not you should have approval as an author—certain authors, at least, of being even involved in the Subscription Model of Sales, is something that's also a point of contention as well.

KEN SWEZEY: So just to stop on that, so that the notion is that if the A-level content, bestselling author or whoever it might be is being put out on a subscription platform with all the content of a publisher, thousands of authors, let's say, you run a risk of some kind of bean counter analysis saying "Well, there's 1,000 authors, each one gets one, one thousandth, even though you're A-content is driving 80 percent of the traffic or something."

JONATHAN LYONS: Yes, unfortunately what should happen and what could happen is that they can keep track of the page views for each piece of content. And then you can see, oh, Jonathan Franzen's work has generated 80 percent of it, and so he gets 80 percent of the revenue share. But some of the people who are proposing Subscription Models of Sales don't offer that detail. And if they don't, is that fair to the high profile author that you might be representing?

The other last revenue possibility, I guess, is just licensing. Under the Agency Model of sales it's not being called technically a license, but there are still plenty of situations where there is a license between a publisher and a third party. And in such instances, the split that you see is 50/50 between author and publisher. Considering the unknown future and very strong potential future as a representative of authors, I always encourage authors to

have approval over any such licenses, just because you don't know what it's going to be.

JEFF KLEINMAN: Competing works. To me, one of the bigger issues that we're kind of facing these days is when you have the book come out in hard cover or print and then you want to do something else. Mostly it's some type of App or enhanced eBook that somehow you've wrestled away from the publisher.

So I'll just give you an example. I have a very well-known cookbook author who published her first book back in the '70s, and we wanted to do a big App around her cookbooks, there's a dozen of them. So we went to the publishers Hyperion and Random House, and a couple of others, and said, "Okay, can we use X percent and we'll give you credit, and we'll make sure that there's links, and we'll do all this stuff." And the publishers said, "No." They would let us use, I think—we pushed them, we got up to 10 percent, and that meant there was going to be five recipes in this App. That's an exaggeration, there would probably be seven.

So one of the biggest issues these days, and the reason they said this, is because they would be competing against the original sales of the book. When is something competing and when is it enhancing sales?

One of the things—before we go into the contract stuff, one of the things that seems really clear and it would be interesting to have Jane's take on it. When books come out as eBooks only, they may sell 10 copies, but if there's a print component and they come out the same time, they would sell 40, 50 copies, the numbers are vastly higher when it's eBook plus print at this stage.

JANE FRIEDMAN: I don't know where you have that idea. I mean, I think that it depends on whether you're talking about front list.

JEFF KLEINMAN: Front list books.

JANE FRIEDMAN: Front list, okay. Front list I think you're right. But in backlist, e-only with POD both seem to sell. My good friend Richard Curtis at E-Reads, which is another eBook publishing company, says his sales of POD, Print On Demand, and his sale sof eBooks are just about 50/50. Now E is starting to get a little bit bigger.

JEFF KLEINMAN: But driving sales, it seems like that hard cover—

JANE FRIEDMAN: Driving sales, yes. Absolutely.

JEFF KLEINMAN: It seems like that hardcover, having that copy standing there and somebody sees it on the bus, that will allow you to go sit there with your Kindle and download it, and it sells more copies.

JANE FRIEDMAN: That's the discoverability. That is the one thing that we don't have on the e-front, and we're trying to figure out what to do about that.

JUDITH BASS: It's also the gift-ability, right? It's hard to give people a gift of an eBook, or is it?

JANE FRIEDMAN: No, no. Please check on giftof.com, which comes from Open Road. It is a video, a short video that tells you how to gift from each of the e-tailers. So if you look at giftof, we got a lot of play around the holiday time.

JONATHAN LYONS: Obviously, something here is if you even reserve some of these rights, can you exploit them, which in today's contracts it's very hard to do so. To certainly exploit the entire text, very few publishers would agree to that. What they're mostly doing is allowing for carve out exceptions which you negotiate at deal time.

JEFF KLEINMAN: So a couple of other factors to consider now in publishing contracts, it's sort of amazing, when you're dealing with publishing contracts you really need to specify, whether it's going to be a hardcover original or a paperback original in print, like a real live book. And it's getting harder and harder to get even that kind of clause because the publisher will say, "Gosh, I'm publishing a year from now, who knows if they're going to have paper. There may not be trees a year from now."

JANE FRIEDMAN: You have to call them physical, not real life. eBooks are also real life.

JEFF KLEINMAN: You're right. Physical.

JONATHAN LYONS: And that's actually surprisingly again, with two of the major publishers, that's a very serious source of contention right now. That's even getting them to print on paper, not even hardcover, print on paper. And it's a big, big fight, especially if you're not a name brand author.

So the other factor with eBooks, and the rise of eBooks and eBook sales is, out of print. This has been going on for a little while now, and I think the Authors Guild probably—I'm pretty sure they have some good information on here as well—as it relates to a big fight they had with one of the publishers a few years ago. But in years past, before eBooks were a factor, it was like, if the book is in print, meaning available for sale, book stores, order online, order through regular trade channels and order through the publisher's catalog, and print books. But now for an eBook, as soon as you create an eBook, that means an eBook is already available. And there's no effort anymore on the publishers' end, they're not pushing it to get it in the book stores, they're not pushing it in the catalog, they're not doing anything.

So now the argument is, if you're going to include eBooks, whether or not a book is in print or not, because—let's back up. Typically the term of contract for a publishing agreement now is life of copyright, term of copyright, and you can terminate if the book goes out of print or for certain other reasons. So if the book is no

longer available as a print edition, there should be some kind of sales threshold for eBooks. What that threshold is, is a matter of debate. But its question is, have you sold at least 150 copies in the last accounting period, 300 copies, 500 copies, because it all depends on the author. But it's certainly a big discussion.

JEFF KLEINMAN: So now we're in the multimedia/App factors to consider. There's lots of these in teenie weenie print. But one of the issues is, whenever you're dealing with Apps, they become so expensive, as you can see from just the examples we saw. Who pays for these and then how does this stuff get divided, and it becomes a real problem. You have something that may be worth a lot of money just because you have all the video, you have all the stuff done, but then you still have to assemble it.

One of the interesting things, we represent Discovery Channel. And Discovery Channel has lots, and lots, and lots of footage, that's great. But just because they have millions of hours of footage doesn't mean any of it is applicable for an App or a multimedia book, because that has to be a minute to three minutes maximum. It has to be so tight, and so clear, that they think have all these assets, Discovery, but it turns out they may not, or it may cost so much money to edit it down, it wouldn't be worthwhile.

So you have these types of issues. You have the revenue share, how are the revenues going to be shared. A lot of the times what it is, is the App developers will incur the costs and then after their costs have been recouped then they're going to split it in some way.

A lot of times other people will ask the author or the publisher to create all the assets themselves, the video, the audio, the whatever. And then they split it that way, they figure out what the percentage is. It becomes very complicated, but it's also kind of workable. The nice thing is it feels like this is such brand new territory that everybody's ready to kind of work it out and figure out what works.

And the other nice thing is, the App developers will say, "Dude, this is way too expensive, we can't do it, we don't see it's going to sell that much." Which is like regular publishing, but for some reason it seems easier to deal with App people, because it's much more of a clear cut decision.

KEN SWEZEY: Are you getting significant royalties on Apps for authors? Either one of you, that you sold?

JONATHAN LYONS: No.

JEFF KLEINMAN: I think the proper word is "bupkis," but that doesn't mean it won't be there.

JONATHAN LYONS: So we just mentioned a few, there's tons and tons of factors, but you know, anytime there's additional material or content being added, you have to consider approvals, costs, liability, all the different things that go in there. And also when you're granting this multimedia App right, you've got to make sure that it's limited, as we kind of hit on briefly, that it doesn't dive into the world of film, that it doesn't dive in to the world of gaming even though some Apps do have games surrounding them. So it's all new ground. And I don't think there's any settled language with any publishers that I know of. It's every single time it's a new conversation to sort all this out.

Certainly, the film dramatic rights issue is probably one of the most important, and there's no real easy answer here. From the point of view of representing an author, you try to add some qualifiers in there, but what I try to get in there is that if a film producer has an issue and you can't work it out, between the publisher and the film producer, then you're going to pull the App.

So at the end of the day a produced film at this point is going to be far more lucrative to the overall sales of the book than a produced App. That's my change, that's again, another hard, very difficult clause to get in there.

JUDITH BASS: It's also the case that even some of the studios, there's an animation studio that I'm dealing with up in Canada that is actually instead of doing a television series, they want to get the rights and do really more what are really enhanced eBooks.

So it's coming at it from both sides. Everybody is sort of in the business of producing multimedia content now. And the way we're trying to resolve this is have the publisher meet with this animation producer and studio actually, and see what they can work out together in some sort of joint venture of some sort.

JANE FRIEDMAN: I don't know whether you all just heard, but today NBC, the last network, has now announced that they're going to have a books division.

JEFF KLEINMAN: NBC to cover books, oh my God.

JANE FRIEDMAN: NBC, they'll be doing print books, but basically what they are going to be doing is combos that are probably closer to enhanced. But they were the last one who didn't have a book publishing component. ABC has Hyperion, CBS has Simon and Schuster, and NBC will now have its own books, hiring someone who started out actually at HarperCollins with me.

JEFF KLEINMAN: So the two other issues to kind of flag is any kind of reversion, you always want to make sure you get all the rights back for your author once contracts are over. And then try to set some kind of time limit on it, two years ideally after publication, to have the rights revert back if the publisher has indeed grabbed the rights. So if the publisher doesn't do something with them, then the author hopefully can.

KEN SWEZEY: So that notion is the use or lose it?

JEFF KLEINMAN: That's the hope.

KEN SWEZEY: They should use it or you can revert it?

JONATHAN LYONS: Yes. It's the same type of thing you can try to get in and sometimes successfully get into audio or foreign. The idea is you're getting a certain number of rights, but after publication unless the book does exceptionally well, after a couple of years it's—

JEFF KLEINMAN: Everybody's moved on. And it's really frustrating when you've talked to those publishers and they're like, Dude, do you know this isn't tops on the list anymore. Then give us the rights and let us do something, but no, it might compete. You want to stab yourself.

I was going to talk very briefly, just because I want to make sure everybody kind of understood the way this whole eBook stuff works. And so this is just very, very brief to kind of understand it, because I kept getting confused.

There are these things, as Jane calls them, the e-tailers, the people like the Barnes & Nobles, the Amazons, they're the actual companies online that will sell you the book. That you go on there and you click, and you spend $9.99 or $4.99 and it magically appears on your iPhone or your iPad. Those are the direct e-tailers.

The other part is there are distributors, because it's not just these Big Six or Sevens, the Kobos and Sonys, there's all sorts of other smaller entities out there that are also selling directly. And so one of the big questions is, well, if you're an author and you want to be doing this, do you just want to be on Amazon, do you just want to be on Apple?

Did you all hear about Apple, is they're starting a whole new division for self-publishing with text books and with self-published authors, but again, it's stuff that's just supposed to be on the iTunes store or iBooks. So one of the big questions is, how do you want to be distributed? And it may be okay that you're just going to be on Amazon or just on B & N. Your author may say, "I really want to be everywhere, and I want to be international, and it's more important to me that I'm all over the place." And to have the author do it directly can be a nightmare. You have to go to every place, you have to do agreements with everybody, you have to keep track of it.

So one of the things that people were doing is things called distributors. So Percy has Argo Navis, Mint Right, Book Baby, these entities I listed here. And what they do is they have agreements in place with all these different companies, and they usually yank out 10 percent, sometimes a lot more. But they will distribute the books and make sure that the Amazons, and Sonys, and Kobos and the various other e-retailers can actually sell the book.

So there's the direct and then there's the distributors. And then there are the people like Jane, which are the eBook publishers. So the way you can distinguish it and to find an eBook publisher is, which makes it different, we think of them as curated versus non-curated. So the curated publishers are a lot of ways to me, very much the traditional publishers. They are the people that edit the books, they're the people that market the books, they're actually doing something. And for that they get a percentage, as opposed to the distributors who are doing a real mechanical service of putting that content up on the e-retailer. Does that make sense?

JANE FRIEDMAN: Absolutely.

JEFF KLEINMAN: So when Jane was talking about marketing, that is a really valuable component that some people are doing. Some other authors feel that all the Seth Godin people of the world, the program that they were doing, "I'm so tapped in, I have 12,000,000,000 Twitter followers, I don't need you, Jane, I can do it myself." That's what some authors think, and the question is, sometimes they're successful, but very often they're not.

So it's one of the things I think to really kind of be aware of is, when you keep hearing about all these self-published successes, they are very few and far between. There are a lot of books being published and it's really, really hard to find them, so that the marketing component really can be critical.

JANE FRIEDMAN: I couldn't have said it better. No. I just want to say something about self-publishing. Growing up in this business, we call it Vanity Publishing, and it really had a stigma of you know, you couldn't get a publisher. I have always said that anyone who wants to write a book and publish a book, in my opinion, should be able to do it. So I'm for self-publishing. What I am not for, a lot of the distributors who just who promise something and don't deliver.

I think that I go back to the marketing element of this business. We are curatorial, we do only 12 new books a year, but we're even curatorial with the backlists, it's very important for us to stand by the books we publish, the authors we publish, the brands that we publish, and the marketing is the differentiator.

So there is no reason not to be with an Open Road, an eReads, and OR Books, all of these small publishers that have now come up that do what they say they're going to do.

And it's an interesting quandary, because the Big Six are very good publishers in certain ways, and I would never denigrate them, I've been there, done that. But I will say that on this e-front, it is very hard to be both a physical publisher and an electronic publisher. And the one who loses in that case is the author. And being an

author-centric publisher, I think that's the most important person.

JONATHAN LYONS: I would just add one thing about all this stuff. As representative of authors, you have to think about exactly that, and for that specific client it doesn't make sense to go with the traditional publisher. You would look at their eBook sales, if there's a certain tipping point, a threshold that they meet, or in their eBook sales it might make much more sense to go with an eBook publisher as compared to a traditional publisher because of the amount of money you are receiving.

There are other things, too, which we didn't even hit on. Lots of times some of these options are viable for out of print, not typically for eBook publishers but obviously distributors and for going to direct, if you have a novella that you couldn't get anybody to pick up, not even Book publishers pick that up, so it all just depends on the author and their career, and each of these things might work depending on the situation.

JEFF KLEINMAN: I think from our standpoint as agents, I think there's a lot of agents who are also scared, but it really feels like we're becoming rights managers, because these are not simple issues that you're dealing with. And just parceling out these rights as you all know, you want to pull your hair out. I can't even imagine a truck driver in Michigan trying to do this. Not that there's anything wrong with truck drivers in Michigan.

JANE FRIEDMAN: You mean you're talking about distributors? You're referring to a distributor?

JEFF KLEINMAN: No, I'm talking about the authors. You know the truck drivers—my family comes from truck drivers, I don't know why I do this, but it's really hard to figure this stuff out. And I think there's always going to be a place for especially people like you guys and me, because we really have to figure out which rights we should keep and how to hold them.

JUDITH BASS: Thank you very much Jonathan and Jeff for what was a really fabulous, very high level discussion of really the key issues that many of us I'm sure are facing.

Now, one of the things that was mentioned was certainly about the eBook pricing, and the change from when Amazon started coming out with pricing books at $9.99 and then the Agency Model came in, and the issues with publishers. There are some articles in our materials talking about how that all happened. But we're very privileged to have Jay Himes here to talk to us about what has now turned into a series of class action lawsuits and other investigations going against these very practices. And here's Jay.

JAY HIMES: I'm assuming that most of you don't know a lot of antitrust, and that means—

JEFF KLEINMAN: Safe assumption.

JAY HIMES: And we will get along fine, because neither do I. (Laughter) As Judy mentioned, I spent most of my career doing a wide variety of commercial litigation, including entertainment law.

I'll give you a very quick overview of the antitrust laws that matter in this particular context, and then I want to talk about the facts that have been sort of eluded to, and a couple of the cases that shed some light on the issues that are presented by these cases.

You may have heard of something called the Sherman Act. The Sherman Act is the oldest and probably most important antitrust law. If you could copyright the law, Senator Sherman would not have gotten one on this particular statute, parenthetically. He had literally nothing to do with writing what was eventually passed by Congress, and in fact, criticized and argued against what his fellow senators had in fact written, but he nevertheless got his name to it, and he's remembered for it ever since.

The Sherman Act in its principal section prohibits all contracts, combinations or conspiracies in restraint of trade. And you can think of all of those terms; contracts, combinations or conspiracies as synonymous with agreements, they require at least two people. A single person acting alone doesn't violate that particular part of the antitrust laws.

So what antitrust lawyers who are trying to bring these cases look for, obviously, are therefore a combination of two or more people involved in some kind of restraint on trade. And of course, the best restraints are the ones by competitors, because those typically limit output, or they may limit marketing areas, and those are really, really bad. People go to jail for doing those sorts of things.

In the particular context we're talking about, eBooks, you will mostly I think remember back in 2007, 2008, Amazon came out with its Kindle Reader and the associated application, and that was your first really big development of the eBook. In a rather short period of time Amazon had a very commanding position if you want to call, sales of eBooks marketplace, I'm not sure you can for antitrust purposes, but forget that for the moment. Certainly, they had on the order of 80 percent of the sales of eBooks in the sense of actually downloadable digital text, not just purchases of books online.

Amazon, as part of its practice, adopted discount pricing. You remember the $9.99 price point that Amazon chose for new introductions, books that sold in hard copy form for considerably more than that. Amazon was losing money on each of those particular sales. And I'm using sales liberally here, they're technically licenses, but for our purposes it really doesn't matter. Those $9.99 transactions were costing Amazon money. Why were they doing that? They were making it up selling Kindles. And

the Kindles had a much bigger profit margin, so Amazon could afford that $9.99 to draw people in to buy the hardware.

The publishers were of course concerned about that discount price. Their own hardcover volumes sold for considerably more. At the time, digital eBooks were a very small percentage of book revenue, I think we heard the number five percent as of 2010. Of course, that's a small number, but the publishers saw that as growing, and they saw the $9.99 or $10 price point as one that was resonating with readers. And there was an expressed concerned that those readers would come to think of books in the marketplace, hardcover books, as overpriced. They would come to believe that digital books, eBooks, should be priced at much lower levels and not without some justification inasmuch as the distribution costs associated with delivering a digital copy are quite different from those that are associated with delivering a hard copy. You don't print, you don't bind, you don't get the physical product to stores, you don't have the issue of returns, and all that sort of stuff with digital books.

So this state of affairs with Amazon seemed to be putting downward pressure on book pricing in general and eBooks in particular. And the publishers were concerned that that sort of situation would be felt most significantly in the independent book stores. If this kind of pricing took hold in the hardcover marketplace and the independent book stores as you all probably know, are a dying breed, so for that matter, are some of the chains, but that's a different story.

Now Apple comes to the rescue here of the publishers. Apple was and still is primarily a hardware company. They make computers, iPods, they made iPhones, and they had of course in the wings the device that for some years now people in the industry had been dreaming of, an easily usable computer that was sensitive to the touch. And there had been talk of tablet computers for a number of years, but nobody had ever been able to make one that captured any particular consumer attraction. But Apple had the iPad in the works and in development, that we have come to know, but in addition, it also had something else, it had a good distribution model for e-content. It had the iTunes Store, through which it was selling movies, and CD tracks, and full CDs, music. As a result of iTunes, it had a large customer base, and equally importantly, a lot of credit information that could easily be transferred to a book store. It had names, it had the associated credit information, and it had the experience with the infrastructure to be able to distribute content over the Internet. That made Apple an interesting option to Amazon as a potential distributor of eBooks.

So in January of 2010, Steve Jobs announced the iPad at one of his California conferences. And he described all of the neat and cool features that it had at that time. A number of the leading publishers lent their logos to the product launch. There was a lot of buzz in the industry. But there was also at that very time that the iPad was introduced, talk about price. And Walter Mossberg of the *Wall Street Journal* was, in fact, captured on a crude video of a conversation he had with Jobs right after the product launch. And he asked Jobs why customers would want to purchase books for the iPad when they were rumored to cost between $13 and $15, and that was the price that was being bandied about at the time, while Amazon charges $9.99. Jobs responded by saying, "The prices will be the same. Publishers are actually withholding their books from Amazon because they're not happy with it."

If you are an antitrust person, "the prices will be the same" starts you thinking a little bit. And when you hear someone talk about competitors withholding product from someone in the plural, your antenna go up even further.

How would this sort of arrangement come about? You heard some discussion earlier about this change from the Wholesale Model to the Agency Model. You probably know what this is, but let me try to walk through it anyway.

Under the Wholesale Model, the publisher sells to the customer, it's either typically a Barnes & Noble, at the time, a Borders, not anymore, independent book stores, even Amazon, to sell the hardcover book online. And it did those kinds of transactions typically at 50 percent of list, half of list price. That was a pricing convention that had existed for many years in the publishing industry. So in round terms, if you have a $30 book, someone like a Barnes & Noble or even an Amazon selling the book bought it at $15, and so everyone understood Amazon was also buying the eBooks at the same price. And as I said, selling them for roughly $10 taking a big loss, but making it up on Kindles.

Under the new Agency Model that came to be adopted, the person doing the distribution, the Apple, the Amazon, the whoever was not, in fact, buying the book or licensing the book for sublicense, rather the distributor, the Amazon, or the Apple would become simply a distribution agent. The publisher would sell the book. The publisher would offer the book at a price that it determined, not that the distributor determined under the Wholesale Model, and it could choose any price that it wanted. You might ask, does that make a difference for antitrust purposes? It's kind of iffy.

For a long time it was a very, very bad thing for a publisher to try to impose the resale price on one of its customers. That law's kind of changed in recent years, but it's still not what I would call a place where bright lines are really very evident. So it made some difference from a legal point of view, whether a publisher adopted an Agency Model, because then it clearly could set its own price to the ultimate reader. And that was the idea here.

The distributor, be it an Apple or an Amazon, would then get a percentage for providing the distribution services. Apple typically took 30 percent from music and movies that were sold through its iTunes store and that became the percentage, apparently, that it agreed to take from the publishers—30 percent of the publisher-determined price of the eBook to the reader or ultimate consumer.

In addition, Apple insisted on, according to public reports, a most favored nations clause. It insisted that no publisher give better terms to any other eBook distributor, Amazon or anyone. And of course, from Apple's point of view, that kind of arrangement made very good sense if Amazon or anyone else had better terms. And so the publisher was able to sell at less than the price being sold on Apple, users would simply navigate away from iTunes and buy from whoever had a better price, that's really easy to do. You don't even have to walk the way you do for the brick and mortar sales that otherwise permit price competition like that.

So Apple insisted on an MFN, and that indeed has a certain price stabilizing effect. Now, look at the economics that you have here under an Agency Model compared to under the Wholesale Model. Remember that $30 book the publisher sold it to Amazon at $15, and therefore of course, that's what it made. Amazon priced it at whatever level it wanted to. Apple decided that it was only going to take 30%, but the publisher could decide whatever price it wanted to sell at.

Well, on that $30 book Apple's taking something like $4.50 right? No, that's wrong. I can't do the math in my head. Thirty percent of $30 is $9. The publisher got whatever was the difference between $9 and the retail price that it sold at. It couldn't sell at $10, it had to increase the price considerably to the retail customer in order to come out anywhere close to what it was getting under a Wholesale Model with Amazon. And in fact, if you do the math, the publisher has to actually sell the book at something near $21, a little above that to the end user compared to the $9 or $10 that Amazon was charging just to come out at the same $15 level that it was getting at Amazon. And even the publishers didn't want to increase prices by that much.

Indeed, you heard me mention the $13 to $15 price level. At that level the publisher is taking $9 or $10 compared to the $15 that Amazon was paying. It's worse off for sure on the individual sales of eBooks than it was before enlisting Apple and before shifting to an Agency Model.

Why would it do that? Why would it take less money? And the answer is, because in the short term the publishers were willing to give up that additional money, that additional revenue in exchange for what they perceived to be better control of pricing, and to try elevate price levels above those that Amazon was offering in the marketplace.

Higher prices tend to be the sort of thing that antitrust lawyers wonder about. And higher prices, when they come about from a combination of individual companies, is something that is certainly on the antitrust radar screen.

So that's sort of the basic background of the facts. And you might ask, well, what law is there on this? And the answer kind of is, what goes around, comes around.

There is an old case, it's pre-World War II, in the United States Supreme Court, it's called *Interstate Circuit*.[6] And this was the case that the United States government brought against the motion picture distributors, you know, the Paramounts, the Foxs, those particular companies that distribute motion pictures and have for years. And also against a major theatre chain in Texas called Interstate.

And the basic facts were that Interstate sent a letter to all of the eight then distributors asking for new licensing terms for the films that the theatre chain licensed. And essentially what the Interstate company asked for was an assurance by the distributors that retail ticket prices would be hiked, and not simply of course to Interstate, but to Interstate's few competitors in the Texas marketplace. And Interstate also asked the distributors to prohibit double features. Some of you may actually remember double features, I can.

And just to give you some sense of the age of this case, the ticket prices that they were worried about were $.25 and $.40, there are probably few of us that can remember those. But the idea of course was that this was going to inhibit competition in the few areas where Interstate did, in fact, face competition from other companies. And Interstate could subsidize any limitations in revenue by its monopoly operations and, particularly, its concessions, and things like that.

So there was this letter sent to the distributors. All of them subsequently adopted these particular terms. There was evidence of discussion between the individual distributors, the motion picture companies. There were simply a series of discussions between Interstate and each of the individual companies to get the new licensing terms.

The Department of Justice argued that that was sufficient evidence to show an agreement for the purposes of the antitrust laws. And the Supreme Court agreed. The Supreme Court said the nature of the proposals made on behalf of Interstate, the manner in which they were made, the substantial unanimity taken by the distributors, were facts from which an agreement could be inferred. It doesn't have to be in writing, it doesn't have to be formal, it can be solely the result of conduct, and solely the result of inference.

In particular, the new licensing terms were different than those that had existed in the past and they were not the sort of terms that any individual motion picture company would likely adopt, if left to their own devices. There was risk if any individual company adopted them, but if all of them did, and indeed if they all knew that each was expected to do so, then that could indeed result in an agreement.

There was no need to prove that everybody joined an agreement at any particular point in time. You don't need simultaneous action. The fact that the product involved was motion picture, and copyrighted, and a copyright owner has certain rights to set prices was not a matter of consequence in this particular circumstance, because you had, by the evidence, an agreement among a series of competitors in motion picture licensing to adopt the same licensing terms and pricing terms.

So that's a case that's somewhat old, never overruled, but it shows you the kind of conduct that can result in an unlawful agreement.

More recently, the same sort of circumstance arose with ToysRUs, where ToysRUs enlisted a series of sale terms that acted negatively towards warehouse clubs like Costco that were offering prices in real competition with ToysRUs. And again, in that case, the FTC found an unlawful agreement where there was a series of individual negotiations between ToysRUs and its toy suppliers like Mattel, and Hasbro, and people like that. There was no particular evidence of communication between Mattel, Hasbro and the suppliers, but they all knew that each of them was being asked to do the same thing and to disadvantage Costco and the other warehouse clubs. Some of them even testified that it was important to them to know that their competitive suppliers were being asked to do the same thing by ToysRUs.

And that was another circumstance in which the Seventh Circuit upheld a finding of an agreement. The key consideration in both cases being that suppliers changed their course of business dealings in a new and different way. And in fact, the business change would have been contrary to the individual self-interest of any particular supplier were it acting independently. That can be an unlawful antitrust conspiracy.

That's really the kind of case that's presented by the Apple situation, the eBook situation with the publishers. That is a primary theory of the case where you could also talk about fashioning an antitrust violation from the individual negotiations between Apple and the publishers. That's a little harder case typically, but it's an alternative theory.

And those are the essential kinds of issues that the case presents. Can you, in fact, show that the publishers understood what the others were doing? And it's pretty clear that what they were doing didn't make short term economic sense.

I thank you very much. And I appreciate very much the invitation and the opportunity to talk here.

JUDITH BASS: And we thank you very much, Jay. I think we started a few minutes late, but perhaps we have a few minutes for questions from the audience. You can address it to any of the speakers.

KEN SWEZEY: I think there's a mic in the center if you want to go up and ask a question.

AUDIENCE: How is it that eBooks can be published around the world with the click of a button, first of all, how do you determine what their territory is? And secondly, what do you about digital rights management so that somebody doesn't steal something?

KEN SWEZEY: Do you want to try, Jane, or agents?

JANE FRIEDMAN: I mean, good question. The world has become global. The rights, once you market online you're everywhere in the world. The e-tailers try to watch it and try not to sell outside of the territories, and try not to have product that they shouldn't have, but it's very, very complicated. And I think what's happening is that boundaries are certainly being blurred. And it's something that everybody has to deal with. There's no answer yet.

JONATHAN LYONS: There's already been some contention relating to print rights even in territories, especially between the United States and the U.K. And Jane said some great things a couple of years ago about that. So at least as from an agent point of view, I've seen more and more world/English deals to avoid those issues.

JANE FRIEDMAN: Yes, I think that's what we're all trying to do. More world/English rights would help everybody.

JEFF KLEINMAN: And DRM, everybody keeps going down the fence on this. It feels very much like DRM is going to be a thing of the past on some level, or they're come up with some kind of other way of handling it.

Interestingly enough, when you're dealing with enhanced eBooks or Apps, it's not the same kind of problem, because the text is actually so embedded and encoded into the actual piece of software, you can't just lift it up, and print it out, and use it in your daughter's book report.

JANE FRIEDMAN: The thing that is interesting about piracy, which is not what you asked, but piracy, is that we're seeing less piracy of digital books than of physical books. That seems counterintuitive, but that's the way it is right now.

KEN SWEZEY: Give them time.

CURRENT AND TRENDING TOPICS IN BRAND, FAMOUS PERSONALITY AND CHARACTER LICENSING: DEVELOPMENT TO BANKRUPTCY

DIANE KRAUSZ: I'm really, really thrilled that Ethan Bordman and I now present the second program of the afternoon. And now to introduce my colleague and friend, Sarah Robertson of Dorsey & Whitney, she's a partner there. And she's a partner in the Trademark and Creative Industry's Practice Group where she advises—you can read all about her on pages 219 and 221 in your book.

The interesting thing is that she advises clients in all different areas in fashion, music, new media, start-up companies. She's originally from Toronto, Canada, and is also the Secretary and Treasurer of the Canadian American Bar Association. And because she's fluent in French, that's how she's going to conduct her moderating today. (Laughter) And I'll let her introduce the rest of our panel. Thank you.

SARAH ROBERTSON: We have a very interesting panel for you today, and I'm proud of the speakers that we have on board. We're speaking about current and trending topics in brand related issues. And we're speaking about some somewhat less often discussed areas which is licensing, and in particular, celebrity character and interactive property licensing.

And we are going to be speaking from an agreement negotiation standpoint, current trends, some drafting points. But we're also going to come at the topic from a distressed brand and bankruptcy perspective, as well with the recent economic downturn, we've been more involved with brand sales, and fire sales, deterioration of brands, and the resuscitation of brands. So we're going to cover that aspect today as well.

I'd like to introduce my panelists today. The little known secret is that this is really a Beanstalk Group alumni event of some sort when you see who's here today. But we have Oliver Herzfeld, who is Senior V.P. and Chief Legal officer at the Beanstalk Group. Prior to Beanstalk, Oliver was at his own firm, Joseph and Herzfeld, where he specialized in corporate IP and employment matters. And he also had in-house positions at a leading wireless software firm, a technology solutions firm, as well as at J.P. Morgan, where he handled IP technology and licensing matters. A very diverse work history.

To his left is Rich Maluga, who is Senior Counsel at Viacom Media Networks. At Viacom, Rich specializes in toy and publishing matters on behalf of Nickelodeon's animated and live action properties, including Dora, Sponge Bob, iCarly and Victorious. In addition to his Nickelodeon properties, he also handles what he calls properties on Viacom's grownup networks, which include "Jersey Shore" and "South Park." Rich began his career at Focus Features, and was also at one point Associate General Counsel at the Beanstalk Group. So welcome to Rich.

To Rich's left is Miri Frankel, who has come to us all the way from Minneapolis, and we're very pleased to have her. Miri is with Activision Blizzard, where she manages and overseas what she calls top to bottom legal support for their Activision publishing Minneapolis business unit, which includes software development, publishing content, technology licensing for such interactive properties, such as video games "Call of Duty," "Guitar Hero," which I'm sure we all played at one point, and "Tony Hawk." Welcome to Miri, and thank you for traveling to New York today. I did need to point out that Miri is a former Associate General Counsel at the Beanstalk Group, and former New Yorker, and so I'm sure that was part of the incentive to come back here today.

And to Miri's left is my partner, Eric Schnabel, who is at Dorsey & Whitney with me. He is a partner and Co-Chair of the firm's Financial Structuring, Restructuring and Bankruptcy Group. And I'd like you to give a warm welcome to all of our panelists today.

So we are going to start with Oliver Herzfeld, who will speak about celebrity licensing. To encourage a lively discussion and some interactivity, we do encourage questions or comments throughout the presentation rather than holding them to the end of everybody's talk. We do ask that maybe you wait until the end of the slide presentation, unless you have a question you just can't wait to ask. So without further ado, Oliver. Thank you.

OLIVER HERZFELD: Hi everyone. Thank you, Sarah, for that beautiful introduction, and Diane Krausz for inviting us all here today and setting us all up. Thank you to my colleagues for joining me here.

Celebrity licensing has really exploded in the last few years. So I guess the first most foundational question is, why are retailers interested in celebrity licensing, and the answer is that they want to differentiate themselves from their competitors. They want to leverage the appeal of the celebrities. And they want to attract and drive consumer traffic.

Some of the most recent examples are that you open the paper in the morning you'll see that Martha Stewart is at JC Penney now, and Vera Wang at Men's Warehouse, the Kardashian Collection at Sears, Jennifer Lopez and Marc Anthony at Kohl's, Madonna at Macy's, and the list goes on and on. Kathy Ireland at Fur Vault at Macy's, and Salma Hayek gets CVS, so there's no shortage of examples. And if you start looking at fragrances, it's just without number.

I mentioned that the retailers want to drive consumer traffic, but what do the celebrities want out of it? The celebrities of course want additional revenue, but what

they also want is added touch points to maintain their relevance and authenticities amongst consumers.

Celebrities are not only looking for another paycheck, but they also want to extend their fame, and they're looking to build out their personal brands.

Here are some of the challenges that the industry is facing now. You know, one of the major challenges is that the market is becoming oversaturated. Just two slides ago I showed you how many of the most recent ones are, and I mentioned in the first slide that it's exploding. Well, that creates a challenge that there are just so many famous personalities, A-listers, B-listers, C-listers, even D-listers trying to get into licensing. And the marketplace has a finite amount of shelf space. So that presents a challenge.

And it's hard to keep up with the musical chairs, remembering whose branded products are sold where. Again, as I mentioned before, retailers are getting into the licensing of celebrities, because they want to drive traffic, but if you don't know how many—let's do a wake up call, it's 4:00 o'clock in the afternoon, so let's see who is still awake. Who here knows where Gwen Stefani's new Harajuku Mini's line is being sold? Does anyone know where it's being sold? Ah, got a couple people here, but certainly not a majority of this audience. It's being sold at—does anyone even know what it is? Let's see how many people know what it is. It's a children's line, and it's being sold at Target.

So the point is that if Target is entering into a license agreement with Gwen Stefani because it wants to drive consumer traffic, and there's just so many celebrity licenses out there that people don't even know where it is. Some people here did, I give you full faith and credit, but a lot of people didn't, then that presents a challenge for the industry.

And celebrities want to stretch beyond becoming solely an inspirational model. They want to achieve the status of being truly a brand.

I don't know how many people here watch "Entourage," but there's this famous scene a couple of seasons back where Vince was looking for alternative talent agencies, and he was thinking about leaving Ari Gold. And he went to one talent agency, and they say, "We're going to make you a brand." And he goes to the other talent agency, "We're really different, we're going to make you into a brand."

And so the question in my mind is, what's the difference between just being an aspirational model and a brand? And again, my opinion, but the way I see it kind of split out is when consumers go and buy Jennifer Lopez apparel at Kohl's, it's because they want to aspire to be a little bit more like *People's* Most Beautiful Woman of 2011.

Whereas, when consumers go and buy Jaclyn Smith apparel at K-Mart, it's not because they want to be more like Jaclyn Smith, it's because they value the design, the quality, and the price of the good. Jaclyn Smith in my mind is a brand.

Other examples of people that really have arisen to the level of being true brands are like Paul Newman, Martha Stewart, Elizabeth Taylor. But a lot of other celebrity licenses are kind of, in my mind, more aspirational. So that's a challenge.

Next steps, I mentioned the oversaturation of products chasing limited retail shelf space, so that compels celebrities to venture into non-traditional retail outlets, and new retail frontiers.

The trend is already under way. You can go into a CVS right outside the Hilton and you'll see Salma Hayek's skin care and beauty line, it's like over 200 skews. You can go into Payless, I can't recall another similar celebrity license before that at Payless or a similar shoe retailer, but now they've entered into a license agreement with Project Runway's Christian Siriano.

So you start to see celebrity licenses in places you didn't see them before. And in my opinion, I expect to see that in even more places as we move forward from here. So if we come back a year from now, I think that you're going to see more celebrity licenses in places that in the past you haven't seen so much. Grocery stores, Family Discount, and Value Outlets, specialty stores, direct response TV like QVC, and HSN and online retailers.

But even as the channels for distribution expand, the elements for success remain the same, and those are again, in my opinion, the celebrities' passion for the product, a strong relevant connection between his or her name and the product category, and an emphasis on innovation and quality.

So some legal issues. When you're negotiating a representation agreement, many times it's with a licensing agency like Beanstalk, but increasingly talent agencies and other entities, managers sometimes try to represent celebrities for licensing. And so I wanted to focus on some of the issues that you are going to confront that are unique when you are representing celebrities. The first thing is the definition of the property that you are representing. When you are representing, for example, a corporate brand like Ford, it's mostly the property is about the trademarks. Whereas, when you are representing a celebrity, you're going to want to think about expanding the definition of property to include things like their image, their personal likeness, their voice sometimes, their facial expressions, photographs, copyrights, and other things. So you're going to want to think about how you want to expand the definition of property.

The next thing is, what is the scope of your representation? Again, when you're repping a corporate brand like Ford, it's basically straight for licensing, but when you're representing a famous personality, you want to consider whether that scope includes endorsements and promotions.

What's the difference between licensing, and endorsements and promotions? Licensing is when you're putting the celebrities' name, or slogan or mark on the brand, so that it's a celebrity branded product itself, whereas endorse and promotion is when the celebrity is endorsing or promoting products and services that are branded with some third parties' name or trademark.

One thing you're going to definitely want to consider is past and future TV and film roles. When celebrities enter into agreements with the studios, you'll very frequently see the studios carve out licensing, at a minimum, for the name and the character that the celebrity is portraying. And sometimes broader licensing rights than that.

So you want to gracefully work your way around what prior rights the celebrity has granted and what future rights the celebrity may want to grant to the studios.

The next issue that is a little bit unique among celebrities is the expenses. And that is when you are representing Procter & Gamble, a good example, Ford, having them cover your expenses, which is typical for an agency type relationship, is not as big a hurdle, but when you are representing an individual, even if they have a loan out company, when you are representing a famous personality, in my experience you'll see that they're much more concerned about having to cover your expenses in addition to your other compensation, which can be a retainer, and it can be very frequently a percentage compensation as a commission.

So you'll see things like either the celebrity trying to carve out expenses and have them shifted completely to the agency, or you'll find some compromise in the middle. Many times you'll see that the expenses are deducted from royalties when they're actually received. So if they're never earning royalties for whatever reason, then the agency doesn't receive compensation. But if and when there are royalties, they come out from the celebrities. And there's a million different ways you can dice and slice it, but those are kind of three of the main ones, either you can be compensated, carved out, or have it come out of royalties.

Non-withholding U.S. withholding taxes is an issue that comes up in many representations. Basically, when you represent a property, again, like Procter & Gamble brands, and you're doing an agreement with a licensee that's outside the United States, there's sometimes non-U.S. taxes that are withheld. Fortunately, for Procter & Gamble, or other large brands they can, if they're doing business in those other countries, they can seek a tax credit, or a tax refund or some other benefit. And the agency will argue that they're not kind of following up and looking into the books of their client to see if and when they received that tax benefit or credit. So they'll argue that they should receive their commissions on the gross and not net of non-U.S. withholding taxes.

When you're representing celebrities, you're going to get more pushback, because they're going to say, "Well, I don't really have operations outside the U.S. where I'm likely to get a credit, or a benefit or a refund." And there were ways to compromise there as well, but I wanted to flag that as an issue.

One major issue that's not on this list that should have been is an asset library, when you're representing a famous personality or you are taking any representation, you're going to want to have some kind of library—it's a fancy name, but basically, you want to have what it is that you're going to present to the potential licensees as the subject of the license, whether it's a collection of trademarks, or other assets. And when you're representing famous personalities, the first thing is you're going to want to make sure that they've registered their name. You might think that is an obvious one, but it doesn't always happen, or it doesn't always happen as you would like. And then you would want to think about what other assets you would want to include that are subject to licensing, whether it's photographs of them and other things. So that's something that you want to keep your finger on the pulse of.

And then the next is representations and warranties. And that is kind of linked to the asset library, and to your registration of your name. You want to make sure that you have ownership of your IP worldwide, or at least wherever the scope and the territory of the representation is. Many times famous personalities will find out that they go to China, and someone else has already registered their name in China, or in order to get compensation from a licensee in China, you have to present a registration. It's one of the requirements and it takes six months or more to achieve that. So that's things that you want to consider.

And finally, inducement, it's—you might again, and this audience might think it's obvious, but I've seen representation agreements where people kind of overlook that issue. The famous personality enters into an agreement through a loan out company, and the loan out company may be thinly capitalized, and your contractual compensation, everything is based on the agreement with this loan out company, and the loan out company could go poof, and what happens to the obligations of the celebrities?

So of course, you want to have inducement language at the back where it says that the celebrity agrees to be bound by the terms of the agreement, is going to perform all of the obligations that are incumbent upon the celeb-

rity. So that's an important issue to make sure you don't miss.

On the license agreement side, some important issues are the approval procedure. In every well drafted license agreement you're going to, of course, want to start with square one. You're going to want to have an approval section to avoid granting a naked license and exposing the trademark to the risk of being invalidated. So you want to have an approval section.

Then within the approval section you're going to normally want to have it to be sufficiently robust that you have approvals at different points in the process. So you're going to want to have approvals at the concept stage, at the prototype stage, at the final stage. And then if you're representing the famous personality or the owner of the property in general you're going to want to say that after a certain period of time after products or services are submitted for approval, the default is deemed disapproved. If you're representing the licensee, you're going to want to say after 10 days it's deemed approved. So it depends on which side of the table you are.

And if you're representing the famous personality, you may want to go even further and have protective language that says that if it's not approved within 10 days, but you want to have an exclusive provision that says, by the way, it's not a material breach if they don't approve. Don't even—you know, don't cry for me Argentina, don't try to come after me if it's not approved for any reason. Both parties are agreeing up front that that's not a material breach.

And more nuance than that is starting to think about what it means to have a celebrity license and have them involved in the approval process, because when you're dealing with again, a Procter & Gamble or a Ford, you have a department or at least individuals that may be tasked with having the responsibility to manage the approval process and make sure that things run smoothly, and things don't fall through the cracks.

When you're dealing with a famous personality who may be jet-setting around the world, and appearing in films, and doesn't have full time and attention all the time to attend to responding to approvals, you want to think about delegation or alternative means of addressing this such that you can address the needs of both parties. Sometimes you'll have delegation, but then the famous personality has approval of the final. But of course, the licensee is not going to be too pleased that they go through the concept and prototype stages and have the famous personality, in the final stage, all of sudden say, "You know what, I really don't like that color, we have to change it, and break the molds, and let's go back to square one." That's something to be considerate about.

The next thing that you'll find unique to celebrity license agreements is the morals clause. You want to make sure that you're not going to get into a situation of Tiger Woods, and I can bring up 20 other examples of people who misbehave, and it's going to reflect badly on the licensee, and the licensee is going to want to have an opportunity to get out.

If you are representing the celebrity, there's ways that you can protect them. One thing that you can consider is putting in a provision that says, number one, they have to misbehave, well, let's define what the misbehavior is. And let's do that with particularity, not just that they're accused of a crime, that they have to be convicted of a crime, things like that. You can bolster the provision. And then a second trigger is they're convicted of a crime and it has to have a material adverse impact on the sales at Walmart. You know Walmart's got tons of sales, and not every misdeed of every famous celebrity has a material adverse impact on the actual sale, sometimes it bolsters the sale. So that shouldn't give them an opportunity to get out of the agreement. So that's something to consider in these types of agreements.

Another thing that's unique to famous personalities is appearances. Many times the licensee is going to say, "I'm entering into this agreement and a key component of this is that I need you to show up at X number of my doors, at the openings, and the launches, and at this other inflection point, and you have to make an appearance and show up." And that presents a problem if it's a famous personality that's very busy, and they have to actually make those appearances, and show up at the right places at the right time. So that's something that you have to consider.

And hand in hand with that is covered expenses, so you don't find this in your average corporate brand license agreement when you're dealing with the expenses for a famous personality, especially in the context of appearances, you're going to talk about first class flights, and five star hotels, first class transportation, and stretch limousines, and security details, and hair and makeup, and all these other wonderful things that you want to consider as the covered expenses.

The territories are not as important as some of the others, but just something to keep in mind. The famous personality may be willing—John Travolta may be willing to do that alcohol license in Tokyo, but it may not reflect well in the United States. So you have to consider where they're willing to do it and how it's going to impact on their reputation and their career.

The channels of distribution are a little bit more nuanced. The most obvious thing is a famous personality is not going to want to see their products showing up at dollar stores, so that's the easy one. But a little bit more than that is a little bit the sequencing. So if you're representing a famous personality, and you start out doing a t-shirt and jeans line at Walmart, it's going to be a lot harder to go

upstairs later. So you have to think about where you want to start and where you're going to go from there. So that's the issue of channels of distribution.

And not on this list, but equally important to the representation, as I mentioned earlier, is the inducement. You're entering into an agreement with many times a loan out company. If you want to have the famous personality, and it may be thinly capitalized, so you may not really have an effective remedy to go after the loan out company. So you want to have an inducement language that says that the famous personality does personally agree to do the things that he or she says that she's going to do. And that's it for me.

SARAH ROBERTSON: Thank you, Oliver. I think we'll open it up to a few questions. I had one question touching on the morals clause issue. My guess is that as part of a celebrity licensing program, that you have to account for bad behavior but also for changed circumstances.

And I was thinking in particular of the Jennifer Lopez and Marc Anthony situation, where it was a jointly branded line, and as their marriage fell apart and they split, that there had to be some flexibility as part of the licensing program to accommodate, I guess, what I call changed circumstances.

OLIVER HERZFELD: Absolutely. That's absolutely correct. And Beanstalk represented Mary Kate and Ashley Olsen, we did their seminal line at Walmart, it was something brand new. It was a tween line, such a thing didn't exist before Mary Kate and Ashley. The clients would go to Europe and be inspired by cutting edge fashion, and then come back and translate their inspiration from Europe, to these articles of clothing, and many, many other categories that were very unique and very fashion forward, but very inexpensive at Walmart. And there were morals clauses as the girls were young and as they grew older and they're becoming 18 years old, and the program's getting a little older too, but you know, it's a little bit harder for us to agree to some of the things that we agreed beforehand, because as the girls are now entering into their late teens and 20s, they want to have a life, and they want to maybe go to a bar and have some alcohol, and things that were strictly prohibited when they were seven.

So absolutely, there's always an issue of change in circumstances. And you know, its motherhood and apple pie, its contract drafting 101, not limited to celebrity licensing. Whenever you're drafting any agreement to the best of your ability you try to kind of foresee the future events. You're not always able to do so, but to the extent that you can, and have a little bit of foresight, you end up doing a whole lot better. That's an excellent question. Thank you.

SARAH ROBERTSON: That's okay. Well, I think Rich will probably go on to tell us why character licensing is so attractive because of the complete control you have over the sort of celebrity and issues.

RICH MALUGA: Sometimes, complete control. Just a show of hands, how many people in the room have done some kind of licensing? Oh, very good. Character licensing anybody? Okay. So I don't know if those who raised their hands for character licensing will agree with me, but I kind of see characters at least kind of kid's animated characters as corporate owned celebrities. Just to do a segue from Oliver's presentation.

Basically you have a lot of the same concerns in your license agreement, so I'm not going to go into those points that Oliver presented so eloquently. Except you don't get a morals clause, you don't get some of these very specific types of provisions that you have with a personality. And by and large, as you might guess, a lot of characters are corporate owned. They're broadcast by corporations. And a lot of time goes into developing them. And when you have a hit, there's nothing better. You can have something that kind of goes on for 10 years or more. Just looking at Dora the Explorer, SpongeBob, and of course, Mickey Mouse, has had a million iterations in the past many decades. And it was actually interesting, I have three kids, and as much as I do to kind of get them from watching too much TV, ultimately, a lot of the kind of characters on kids' channels are the first celebrities that they basically meet, especially the animated ones. They tend to be the kind of bread and butter of entertainment—kids entertainment licensing. Because you're not worried about anyone getting older, you're not worried about voices changing, you're not worried about actors getting into scandals.

So it's a pretty safe bet, and so as a good example, my daughter, who is three years old, suddenly has just decided that she is obsessed with Scooby Doo. And Scooby Doo is something that the 1968, the 1970 Scooby Doo, basically these days you have characters from kind of the full gamut of when all of us were kids, on TV, very accessible, and lots of iterations of them. Scooby has been reinvented many times. And if you go to ToysRUs now four or five decades later, you still have at least five or six Scooby Doo kind of toys, which she's not that crazy about. But it just goes to show staying power. I know there was a movie a few years ago, but there's still kind of a staying power.

Now, Kim Kardashian in four decades, whether she'll have the same demographic, whether she'll have people still buying them, that's kind of the plus of character licensing is that you just don't have to take a lot of consideration. You can just focus on the content, where it's best to feature your product, and how to build the brand.

And just as many characters fail as celebrities, so not to say that characters are the best or anything like that. But when it's going well, it can have a franchise because basically you just have—and using my kids again as an example—my oldest son liked Thomas the Tank Engine a year ago, now his brother, who is a few years younger, is kind of getting into Thomas the Tank Engine. So the demographic just keeps going on and on as long as the corporations and the networks can keep them vital, and believe that they're vital.

And so we're asked to talk about trends and licensing. And one trend that I'm seeing—that everyone is really seeing lately, and Oliver eluded to it a little bit in his presentation, is the kind of movement to dollar channels, value discount channels, and by dollar and value discount, I mean just that. Things that cost a dollar. I don't mean liquidators or kind of stores that don't have their own unique skews of product and are just selling off what higher tiers have been unable to sell, or product that's out of season, just basically these discount channels. And for a long time it was taboo to be in these channels regardless of what sort of brand you're in. Obviously, for celebrities and for corporate brands, they have their own visions of where they see each other.

A luxury brand obviously is going to be in a department store or higher, will tend not to be in mass market like Walmart. But as far as animated properties go, the lowest they tended to go was mass market. And the reason it was taboo to go into these lower channels was part of it was consumer perception. Because when you go into a dollar store you think, okay, there's a lower value because it cost a dollar or whatever it is, they don't stick to the dollar amount. Or maybe, maybe the product wasn't really licensed and it's just some kind of knockoff, and maybe it hasn't been tested, all sorts of different perceptions about these channels in the past.

Basically, these channels have been around, obviously, for decades. Dollar General, which is a good example, has been around in some iterations since 1934, and now has become this behemoth for selling a great amount of product because they have started competing with mass market in kind of an indirect way—they don't open up stores right next to a Walmart, but what you see now are cities, or towns that have never had a Walmart, whose citizens used to drive 10, 15, 20, whatever minutes it was to Walmart, now they have Dollar General stores everywhere, it seems.

And I believe Warren Buffett is buying shares in them. And they have this big profile, and of course, the economy is also the big reason why brands and kind of animated characters are starting to emerge in these channels.

Now, from a licensor perspective, the reason that you didn't want to be in these channels, just putting aside all of the consumer concerns are finding someone who can make your product at such a low amount and really adhere to all of the safeguards that Oliver mentioned as far as manufacturing and just taking the license agreement to the full letter of the law.

Another thing is you don't want to upset your licensees who are selling to mass market or to department stores, depending on what the case may be in their eyes, taking away their business. Maybe lowering the perception of the brand. But now that the economy is not so great and there are players now to operate in these channels that licensors are more comfortable in, we're seeing that as a more viable channel.

Oliver went through sort of the contractual provisions. You want to have approvals and things like that, and it's great to have all of those, but some of what I wanted to talk about is how do you counsel your clients when they want to get into these channels if it's something that they haven't been in, in the past? If you're an in-house attorney sometimes you have to be an activist and talk to all the business people and say, hey, you can't just give this blank agreement to let someone do whatever they want in this channel we haven't been in, in the past.

And as many credit checks as you do on companies that want to sell in these channels, it's not going to tell you—those checks won't tell you, whether they are used to dealing with licenses or approvals, are they used to paying on time, do they know how to do royalty reports?

And so these are the types of things that you try to screen licensees for, and you want to try to set up—if you're in-house, set up some sort of a system for this to happen in your company. And if you're at a law firm, it's part of the value that you want to be able to bring to your clients that may be kind of unique. Because having worked on both sides in the past, a lot of times there's this hesitancy to challenge your business clients as far as what they're doing because it's very easy to assume that it will all work out. That's a business concern, that's really something that—being in a value discount store, is just not my call. But basically the way you screen and the way you set up a system other than the credit check and D & B's, all of those things, is to make sure that they're finding partners who have a proven track record working with licensors, if possible.

And on the flip side, if you're representing a licensee, you want to make sure before they sign their license agreement that they have systems in place to really follow the license agreement, because I've seen that just as many times as I've seen licensors who have not been so happy with their licensees' performance.

And so basically, you want to find, if you're a licensor, you want to find someone who's either worked with a competitor, with a similar brand in this channel. It's not always possible; sometimes you want to see if one of

your licensees who is working in mass market wants to branch out into dollar value channels, because you know that they get it, and you have a track record, maybe you bought it in the past. Many of the licensors have audit programs now.

So you at least have some comfort that your brand is in reasonably safe hands, that you can communicate with these people in that they will look out for your brand. Because as many safeguards as we put in our license agreements, you really don't want to be faced with having to deal with any of those issues in the first place. And so the screening is one of the big things that I would emphasize.

Another kind of mechanism that perhaps you can advise clients on if they want to enter into these lower channels is to limit the sales of product at first to some percentage of all of their net sales for the year, or for the quarter, or some percentage of units sold, so that you're kind of testing the waters to see both impact on the brand and performance of the licensee. And there are plenty of—and again, if you choose a licensee whose able to perform in multiple channels then it's something that they will totally accept.

And finally, you want to start with product, this is kind of obvious. You want to start with product that can easily be scaled down in price. Obviously, you don't really want to be scaling down food if you possibly can, and you kind of want a roll out of—just as your clients roll out what sorts of products they want when they first start out licensing a property, they want to have a plan of what types of products are in these dollar and value channels. And examples are pens, pencils, stationery.

Really, the reason that parents go to these dollar stores and go to these value discount channels is that a lot of these products are kind of disposable. If anyone has kids, you know your kids get bored with them within a day or two, so just the idea of paying more than a dollar, more than $2.50, whatever the price may be, is just not a good proposition in this economy.

And you can really see now the Walmarts, the Targets are setting up dollar isles now. I think Target has "See, Spot, Save," I think it's called. So they're really feeling the competition from these dollar stores. If you can make it work, obviously, what I've spelled out are kind of the best practices, the best things you can do. It's not always kind of possible to 100 percent vet who you are dealing with, but these are some good first steps.

And finally, what I would say about value channels is that if your client does not want to license in the value discount channel, then you should really specifically exclude it from the channels in the license agreement, particularly if you are licensing out, let's say mass market as a channel, because then later you get kind of stupid responses from someone saying, "Oh well, I sent this huge shipment to Dollar General even though I only had mass market because I figure it's kind of like a mass market channel."

And in the past, I know one specific instance where someone tried to argue that Century 21 was a department store like Macy's. Now as great as Century 21 is, it just did not fill that description. In my supplement I have a few examples of ways you can draft it, pretty self-explanatory. But since we are pressed for time I will just skim through my next two points.

My third point, which regards product definitions and the effect of advancements in technology on what your clients may be licensing, receiving as a license, or giving out as a license.

And it's very important these days to really get a good handle on the exact description of what it is if your clients are licensed or what they want this licensee to be making. And just to give you an example, let's say that you have this huge master toy licensee that is going to be paying you tons of money for an exclusive license. And in the product definition it says just "toy cars." And there's not a lot of detail on what's going on in this agreement, but they're your biggest licensee, they're exclusive. Someone approaches you and says, "Well, I want to do an App with you that's going to work on the iPad, and we're going to have a little toy car that you just roll around, it's got a sensor on it, and it can live in this App world."

Now, obviously you haven't licensed the App out to your master toy licensee, but you've got toy cars. And you can make the same example with toy figures, because those seem to be two things that seem to be big for iPads and mobile devices for years. As soon as you go back to your master licensee with the exclusive deal, and you ask them, hey, you didn't think we were giving you—or we're going to be giving this licensee this electronic car with the App. Just so you know, as soon as you have that conversation, they'll immediately say, ah, you're not sure whether you gave it to us or not. And that just kind of—it may not kill your deal, but it just prolongs any sort of arguments they have against you and say, well maybe we wanted the right to do this, maybe we need to get some relief, or maybe we need to get some more products, or maybe we don't want cars that work with Apps, but now we want figures, and add them in there because we think that we more or less have them.

Regardless of where everything would play out in reality, you want to kind of avoid those types of conversations as much as possible.

I think one example I might have also put in the materials is, let's say you put "remote control car." Most of us know what a remote control car is, but what if you've licensed it out exclusively, and now someone shows up and says they want a car that's controlled remotely by an iPhone. You start getting into these types of questions which they seem obvious to us today, saying there's no

way that remote control means iPhone. The whole idea of getting into these types of situations with licensees who are your biggest partners so that you can give this App license to someone who is smaller, and in all likelihood, you want to avoid that as much as possible.

And finally, what I'll go through very briefly, and this is not really a current trend, but just something that I've seen in the past and so I figured I would bring it up—license property definitions. Both whether you are representing a licensor or a licensee, there could be confusion over what exactly has been licensed, particularly with a character that shows up on all sorts of media. There is a film, there is a cartoon. And you want to make sure that these rights have been properly isolated, and given if they need to be, or withheld if they're not intended to be granted.

And it seems kind of obvious to us. I'm sure each of us here has a definition, if we do licensing, has a definition of exactly what things are limited to. But then what happens when you have this client, they have a literary children's property, it's basically never been exploited outside of books. Maybe there was not a lot of interest or maybe it was exploited 20 years ago.

All of a sudden you dropped a license and the licensee comes back—you're representing the licensor and the licensee comes back and says, "Well, I want all iterations of this raccoon," let's just say. Not a lot of popular animated raccoons, but maybe someone can tell me of one. But let's say a raccoon—

OLIVER HERZFELD: Rocky Raccoon.

RICH MALUGA: Rocky Raccoon, okay. This analogy has nothing to do with Rocky Raccoon, but let's just say it was a raccoon. "And all iterations, because you guys have done past books, and you've done lots of different versions of this, and we want to make sure we add everything. And in case you do future books, we want to those too, anything that happens during the term."

So you draft it that way, any iteration within the literary works. And then they come back and say, "Well, maybe you won't just feature it in the book, maybe they'll be a pamphlet. Can we just make it all iterations of this property during the term?"

And eventually your client or your business contact is just itching to get this deal done. This raccoon has not been used anywhere except these books and they want to make some money. And so they press you and try to use language of all iterations then.

So you include it against your better judgment, and this deal has maybe a three or four year term. In a year you get interest from a broadcast network. And they say, "Hey, I want to make your raccoon." All of a sudden every iteration is now tied up with this one licensee that you had back when you weren't doing so well. And so although production takes a while on this raccoon, licensing could potentially be stalled depending on the terms of this license, exclusive or not. And although it sounds pretty farfetched, I've had friends who it's happened to in the past where there's just no interest and the business people just kind of push. And I guess that pretty much sums it up for me.

SARAH ROBERTSON: And just so you know, you should find Rich's speaking points and materials in the book that you received today.

Just something I wanted to point out, this sort of dollar and value discount chain seems to tie into what Oliver mentioned, which was the saturation of the retail markets. So this desire or a need to find other specialty niche channels.

One thing which I noticed among animated properties was that there were generally the restaurant and supermarket categories seeming to be getting bigger, and that there was a trend with these cookbooks. In fact, I think Nickelodeon did a deal—

RICH MALUGA: There's a SpongeBob cookbook.

SARAH ROBERTSON: Yeah, it was just something interesting in terms of trends which is our overarching topic. I thought the food trend was an interesting one.

RICH MALUGA: There's an Angry Birds cookbook too.

SARAH ROBERTSON: Is there?

RICH MALUGA: I'm pretty sure.

SARAH ROBERTSON: And a Dora too. Okay, well thank you very much, Rich. We'll turn it over to Miri now who will speak about interactive properties and licensing issues, including video games.

MIRI FRANKEL: Hi everyone. I thought I'd start with just a couple of comments; I won't reiterate the important license negotiation points that Oliver and Rich spoke about so well. But I will note that for the most part I'm operating as a licensee. So if you are as well, like me, you can take a lot of what they said, and flip it around.

You want to have as broad rights as you can. And we like worldwide rights and all distribution channels where we can possibly go. So if you're in the licensee side, it's something to think about. What are your needs and what are the most important ones?

In addition to territory and distribution, approvals is important to us also as far as understanding that it's a multi-million dollar development process and it's extremely technical.

So we do want to find a happy medium between something that would borderline as a naked license, and something that has the licensor having so many approval

stages and rights that just aren't understandable to a licensor anyway.

If you have a brand manager reviewing a prototype of a game, they're not going to see much and may think, this game really stinks. And it doesn't have the aesthetics that we look for, but it's not supposed to at that stage. So we try to find some balance between having the right input from the licensor at the right time, and having their trust in us to understand where the brand is going and really knowing the brand.

Which really brings me to my first point, which is, know the brand and the consumer, which seems pretty obvious I think. But for video games, it's an industry in the infancy pretty much compared to most other forms of entertainment and media.

So I think in the past where there wasn't great technology to make high level graphics and interesting game play, you might find the same game with different labels and brands on them with minimal differentiation. But with the technology leaps that have been made over the past years, you really can make something that's an immersive brand experience, and also a fun game play.

As far as looking into what the consumer wants, we have an example here where we took consumer feedback of what a consumer of the Monster Jam Brand, and who goes to the events by Monster Jam, what do they want to see in a game? And then how do you translate that into a game that's an immersive experience that both benefits the licensor, Monster Jam, and helps them reach their consumers in a new way, and helps us bring a new version of video games and new game play to a different market that maybe didn't have any games representing them before.

So some of the feedback that we had gotten was that the people who were fans of Monster Jam, they fantasize about driving these big monster trucks. And they wanted to be able to build their own truck and drive it as if they were really there.

And when you have a great partnership with your licensor, you have the ability to do that. So we were able to work with not just the IP licensors for Monster Jam, but their licensees from other categories.

For example, Ford, where we were able to build the Ford brand of trucks and the other vehicles from their other vehicle licensors, and also stadiums that we were able to build in realistic fashion so that you actually felt like you were there driving the truck in the stadiums where the series takes place.

There was also sort of a leveling up, which is a concept for the interactive world, where you are starting with easy game play, and you need to learn how the game play works. And then as you get better, it gets harder, and so it levels you up. So you started as a rookie, and you worked your way all the way to be a champ of the Monster Jam series.

So a very in-depth experience with the licensor helps you create an in-depth experience with your consumers.

Another point that Rich was talking about was knowing the consumer as far as where is this demographic going to be. So for the approvals process and even for the rights in general, what's going to be included in the game. There are some companies and some licensors that want to say, you can't have a game that does this, you can't have a game that does that. There's this level of violence that is not allowed, and you want to except it out. And we understand that of course, and that is important to figure out. But you also have to keep in mind that with the ESRB and with your knowing who your demographic is, we're in line. Licensors and licensees are usually in line in that, because you want to reach the biggest consumer market as possible. And if you're going to do a SpongeBob SquarePants game and you end up with an ESRB descriptor of violence, you're not going to sell very many games.

So if you understand what your demographic is, it's easy to find the right medium between what the licensor wants and what the licensee wants.

We also—for especially with retailers that are specifically in your industry, like GameStop, but more and more frequently, you have interactive sections within Target, within Walmart, promotional cooperation is a big part of that too.

And that is something that you want to discuss between the licensor and the licensee, what retailers are you going to be working with? Are you going to offer anything as an exclusive? We might have a special edition of a game that's exclusive to Walmart. And as a licensee, that's something that needs to be discussed with the licensor in advance, but it's something that can really help promote both the brand and the product itself.

In developing different relationships with licensors, we have different strategies that we've always followed. On the one hand as I mentioned, you want to build a long-term relationship with the licensor, and have an in-depth knowledge of that brand and build it in a long term way.

So for example, with Cabela's, it's a hunting and sporting goods retailer. They're very well known within the niche of customer that is into outdoor sports and hunting. It wasn't really well known outside of that. And the same goes for in the video game industry. That was missing from the space. There were no—other than maybe "Duck Hunt" early on, there was nothing really in that space. And so building a franchise around Cabela's, we were able to really build out a core following among hunting enthusiasts, and outdoor enthusiasts.

And you can see from this advertising image, the tag line, "Play, Hunt, Survive," that's part of the licensing strategy. That really sums up what the licensing strategy was with that. To take the Cabela's name and build games that are about all three. So we have some games, which is where we started in order to build the credibility with the consumer and with the Cabela's fans that were purely hunting games.

"Big Game Hunter," you know what you're going to get, you see Big Game on the box. You have your choice of rifles and weaponry, and you are out in, say, Africa or in Alaska, and that's what the game play focuses on. And it's a real experience. You can't—the game will never let you shoot other humans. You get points if you follow the right hunting etiquette and you lose points if you don't.

So that's where we started with this franchise. And then the strategy was to grow it beyond that into the play side, where it was more about the outdoor sports, kind of leading up to hunting, but not really going into the hunting side, not crossing over to where the main market for the hunting games were.

And then on the survival side, it was kind of a crossover into the adventure series to grow the brand, and that was something new that we did this year to expand. And from the start of Cabela's until now, it's now 80 percent market share of that type of game. And that's something that was built in little steps over a long time.

So taking something that seems really niche, and being able to grow it into something a lot bigger, that foresight of, will this be a great partner for you? Will this licensor be willing to have some flexibility with you and understand that as a licensee you have the expertise in your particular field to grow it and really build a consumer recognition? That was key.

I'm going to skip through some of these because of the time, but you can see how we've—and these are also in your book. Here, how we've kind of differentiated the three, the play, hunt and survive in order to build three different types of game that still resonate with a consumer of Cabela's, and that still appeals to a video game player.

So long-term partnerships, that's one major strategy for us, and we've done that both with Cabela's, with "Tony Hawk," which also goes into celebrity licensing, and that presents its own challenges. How do you bridge a celebrity license that has the challenges that Oliver mentioned with something that crosses over into a brand? And with that franchise, what we've done is use innovation.

For example, a skateboarding peripheral where you are actually on a skateboard, and that's the controller of the game. But again, like Cabela's, it was filling a niche where there were just no products in that area. And having a partner that likes video games, frankly, and really wanted to work with us to make an immersive experience, that was a great way to build a long-term franchise. That is still in existence today having even been on the market for years and years.

But the other side of the coin on this is having the ability to go after those hot properties and act really fast. And it's not necessarily something that's going to be your long term investment. But if you see a property like Moshi Monsters, is one example from this year. To be able to be nimble enough to jump on it and negotiate the points with the licensor quickly, and get to development quickly to release a game in a short amount of time as possible, while still capitalizing on the popularity of the brand.

To give you a little bit of perspective on how we do that, at Activision, when you think of Activision Blizzard, you think of one of the biggest video game companies in the world. It has about 6,000 employees globally, and about $4,000,000,000 in revenues.

Our Minneapolis division, we've got about 100 employees. And we're pretty lean and nimble, we act really fast. And most of our properties that we handle in Minneapolis, the vast majority of them are licensed properties where we are working with licensors. And from that we've built a $600,000,000 business that comes from a mix of both these long term license partnerships and these act fast, do it now, partnerships that help grow a brand, but are getting them on the upswing, and helping them build them from the beginning.

I mentioned that there's a duel view of knowing your brand and knowing your consumer. On the brand side we expect a dual investment. It's something that I think has been more and more important in a market that isn't as strong.

I think in some cases there are many licensors that had always been looking for the check. And yes, that they had some investment in wanting the licensed program to succeed, but it was also a revenue stream.

For us, and especially with our bigger partners, we expect an investment from the licensor as well. You're not going to find the same success if you don't have some input beyond just approvals, and getting the assets, and approval, and licensed logos from the licensor.

So what we look for would be right sizing risks, so on that side that would be negotiating different terms, maybe lower upfront guarantees, but more importantly, would be cross promotional support. If it's an entertainment brand, we would look for co-promotions with their different properties.

For example, with "Wipeout," we have a great partnership with ABC where we've had in-show integrations, and that's something that we looked for upfront when we

were creating the relationship. We wanted to make sure that we're not just investing in them, they're investing in us.

So you can see in some of these pictures that we had in a particular show or a couple of show's obstacles. If you've seen "Wipeout," it's people kind of running through an obstacle course, most of the time falling off and being laughed at. And so we built a video game that really mimics that experience, and lets you kind of run the obstacle course without getting physically hurt, but getting the same laughs and the same replays, where you can see your character getting hit in the nose 15 times, the same way the show does it.

And so with the in-show integration idea, it was an obstacle that was branded with imagery from the video game. We had the hosts of the show, they had provided their likeness rights and voiceover for the video games. So you can see in the bottom picture their character versions on those blocks there. So the show really promoted us that way, and then spoke a little bit about the game at the same time during the episode.

They talked about it on some of the other ABC shows. We've done several promotions with "Jimmy Kimmel Live." And that's something that we don't have a license with Jimmy Kimmel, but because it's on ABC, ABC as partner really went out of their way to have other productions airing on ABC work with us to promote the show and our version within the video game.

And we just have been running this $50,000 challenge where the video game player can win the chance to compete against a former "Wipeout" player to win $50,000. And this tournament will be aired on "Jimmy Kimmel Live" in kind of different segments.

So again, ABC really worked with us to do a sweepstakes and to make sure that it was promoted on the "Wipeout" TV show, and on "Jimmy Kimmel Live." And on their website they had tabs. And that's something that we really look for with all of our licensors that we're working with, where it's appropriate. So if Rich and I were to be doing a video game together, we would want the same thing from ABC and from their properties, and for any other licensors that had that ability.

So I think those are the main points that we look for. I would also just remind people, I think it gets overlooked that girls play video games also. Another thing we look for are properties that really appeal to girls and make sure that we're covering the entire consumer market.

We did a Games for Girls Summit recently, where we took a traveling road show of games that we did that appeal to girls, and kind of highlighted the fact that girls are gamers as well.

We did to be fair, also have a Boys World suite of games, but I think it gets overlooked a lot that girls are part of this market too, and should be marketed to as well.

SARAH ROBERTSON: Thank you very much, Miri. It was very interesting. The gaming licensing probably is the most complex layering of rights there is.

So we are just going to move now to Eric's talk on bankruptcy. We're going to move from sort of the development licensing aspect of our brand topics today to what happens when our brand goes bad, so to speak, when there's financial difficulty, when the demand for a brand drops, whether through its life span or through outside economic circumstances, and bankruptcy protection is sought. That is one area of my practice that really blossomed with the downturn.

And I think currently we are all reading about the Hostess and Twinkie bankruptcy, which is striking a lot of nostalgic chords for people right now.

AUDIENCE: Miri, when you have one of these people like Cabela's or Monster Jam invest in the game, you set the game up as a separate entity, and have they invested in the entity, or do you have them give the main company money to then to supply to the advertising? Or what sort of mechanism do you use for managing and keeping track of these funds that you're expecting?

MIRI FRANKEL: We don't usually end up getting a direct monetary investment. What we look for is a quid pro quo. We're putting in all this risk, developing a game could be several million dollars. At minimum, $1,000,000, a million and a half; for the big franchises it could be in the tens of millions of dollars to develop a game.

So if we're putting in that much to develop a game, we want some marketing assistance and commitment. And quid pro quo promotional activity from the licensor. So we don't usually take—or as far as I know we've never actually gotten a check from a licensor. But what we'll look for is if they are a network like ABC or if we're working with Disney, we'd like their help with their media connections and their media resources to help promote, and advertise and market.

If they have, say, celebrity endorsers that are on their roster already, does it make sense to have them do something with us? Especially with a game, when we do "Transformers," and "Spider Man" and "James Bond" games. So with those we may look for some help, and we'll have to negotiate separately with the actors like Daniel Craig and Judi Dench for "Bond." But to have some help on a licensor's side reach out to those people and make it a priority for them to help understand why it's important for us to have their support, that's invaluable.

ERIC SCHNABEL: So my name is Eric Lopez Schnabel, I'm partner at Dorsey, and I am not an IP lawyer, I'm actually a restructuring bankruptcy lawyer, which is

usually the best way to buzz kill a conversation at any cocktail party. (Laughter)

But I think one of the interesting things about bankruptcy, of course I think this, is we've heard in the talk today about all these interesting deals and things you have to put in your agreement, and these hard negotiations, and partnering with people, and having substantial investments. And then all of a sudden, somebody goes insolvent and decides to mess it all up.

And so what do you do if you're in bankruptcy? And there's a couple of things that you have to try to keep in mind in this framework. So what this presentation is trying to do is give you more of a general overview, because I don't think, if I'm at the right panel, there's a lot of restructuring lawyers in the audience, is that correct? Any restructuring bankruptcy people here. Oh, kind of one hand, half a hand.

So one of the interesting things about bankruptcy is that it has its own terminology.

But we are going to go through four things in our presentation today quickly. And it's just some basic terminology. Some issues of when the debtor, whether it's a licensor or licensee, and with IP there's a big distinction between trademark and other types of IP, which we'll get into in a second.

We're going to more substantially talk about bankruptcy sales, because I think what we've see right now, and Sarah and I have worked on a number of these deals, is IP, including trademarks, have become the crown jewels of corporate America. And now when they're in bankruptcy you're seeing a lot of interesting liquidations, or sales, or restructurings around the IP portion when it used to just be inventory and bricks and mortar stuff.

So you kind of have a new nuance in bankruptcy. And then we're going to try to have a couple of just high level drafting stuff.

One of the most important things probably if you have a bankruptcy, and either of the licensor or licensee, you should talk to a specialist. It's a unique area, it's kind of a dangerous place to tread by yourself, just like I would never draft a license agreement. Hence, in some scenarios where we've been dealing with clients in bankruptcies, I grab one of my IP partners, trademark partners to help me out on that aspect of the deal.

So what are a couple of basic concepts that we have here. We have 362, which is the automatic stay, which I think most people have heard of. Essentially, when a debtor files for bankruptcy by operation of federal law, you have an injunction. And that injunction just prevents you being the counterparty of an agreement, from taking any action that's going to interfere or try to exercise control of property of the estate. And property of the estate includes contracts. So when you have someone who files for bankruptcy, and you go, oh my God, they violated their covenant not to file bankruptcy, I'm going to send a termination notice, you can't do that. That would be violating the stay, it would not be effective.

Same thing if there's other things such as a nonpayment, there's a payment default on account of the bankruptcy filing, as opposed to a payment default that might happen while they're operating under Chapter 11. The default on account of the filing, you can't take action on that. The stay is going to prevent you from basically trying to collect your claim or kill the contract because of the bankruptcy filing.

Post-petition, different issue, they have to comply with the agreement. And therefore, if they're supposed to pay for—and they're using your mark or what have you, they need to keep paying you. If they don't, you can talk to the judge and try to terminate the agreement at that point in time.

Another concept that you hear about with regards to, I think licenses as I said, is 363 sales. And 363 is a Section of Title 11 in which the debtor can ask the court to dispose of assets outside the ordinary course. Hence, the sale of substantially all the assets or of all the IP would be a transaction outside the ordinary course.

And probably in the last couple of decades, in the '90s and '80s especially, you would have a lot of reorganizations where you would have a plan and a disclosure statement, you would get creditors who would vote on things to whether to accept the plan. Chapter 11 has—some people have termed it—become Chapter 363, it has become a sale process.

People file bankruptcy and they sell their assets either to a strategic or financial buyer typically. The standalone reorganization is more of a rarity.

So the sale things are something that I think people who have clients who have licenses should be somewhat aware of.

Another important section is Section 365, which deals with executory contracts, which is basically an agreement, a contract in which there are still unperformed obligations on both sides. So the debtor has an unperformed obligation and the non-debtor, counterparty, has an unperformed obligation.

SARAH ROBERTSON: Yeah, I guess it's worth mentioning that a trademark license typically falls in this category, because of usually the ongoing royalty obligations and from a licensor's prospective, the quality control obligation.

ERIC SCHNABEL: Right, you can even have things such as indemnity agreements or different kind of odd clauses to keep things going. Question.

AUDIENCE: Going back to the automatic stay for a moment. Would a clause in a contract that makes the filing for bankruptcy itself of license or termination of license, would that violate the automatic stay or not?

ERIC SCHNABEL: General rule is that the act of filing for bankruptcy cannot be enforced, ipso facto clause, and it can't be enforced against the debtor. So you can't terminate that agreement against the debtor.

Now, where licensing gets—and we'll touch on this in a second—where licensing gets a little bit interesting here, is that certain types of IP licenses are not assumable, or assumable and assignable, a bankruptcy without the licensor's consent. And so there you have a situation where there's—if you will, there's a veto power by the licensor in terms of the debtor to do anything with it, the licensor has to agree. And in those aspects you can actually use those provisions to go to the court and say, hey, I'm not consenting, I want out, and they can't cure this, and they can't force me to move forward with them, so let me out of it. And whether you're successful or not kind of depends on the judge, and the facts, and the circumstances.

So 365 in essence deals with executory contracts. And one of the basic things about—and it's any kind of contract, so whether it's landlord, tenant lease, or personal services, whatever it is, and license agreements obviously.

And the basic thing, usually the debtor has a right to assume, which would be a reorganization, or assume and assign, which would be he assumes it and then the debtor signs it to a purchaser of the assets. The contract, even if notwithstanding if it has an anti-assignment clause in that agreement. So even though you sit there and say, you cannot assign this without my consent, bankruptcy courts just say, or I'll cross that out, because federal law lets me do it.

One point, the same thing with the ipso facto terminate this agreement if you file for bankruptcy, if they're not enforceable, why do people keep putting them in, right? Like what's the point. Because what happens if the law changes tomorrow, and you have a 10-year agreement, and all of a sudden for some reason the Supreme Court comes down and says, this kind of trademark, if it's got the Kardashians in it is assumable assignable, because it's so important for our economy, or national security, or something like that.

And so you don't—even though someone says, is that enforceable, you say, no, but you still stick it in there because you just don't know what's going to happen in the life of the license.

AUDIENCE: 365 relates to executor of contracts. What about a trademark license where they pay you upfront and they're not going to pay you any more royalties going forward, and it's a perpetual royalty free license. Is that considered non-executory?

ERIC SCHNABEL: Well, it depends on whether it's a true sale, that's kind of the issue, right? Is that a true sale or not. And that sometimes you get into a factual question. What does the agreement say, what are the real underlying obligations? I mean, bankruptcy judges tend to be debtor friendly in some ways, especially in New York and Delaware where most of—a lot of—filings happen. And part of that reason is they want to help the company, they have an inclination to try to help things get recycled and move on.

So I've seen asset purchase agreements on sales that were 10 years closed, and the judge found there was still an executory agreement because of an non-compete clause and an indemnity clause. Which you kind of look at that and you say, are you kidding me, then what couldn't be executor?

And part of that issue is actually what you get down here at the bottom point here is, a lot of times just because it's one contract doesn't mean it's one agreement. Or just because you have two separate agreements, doesn't mean you have two contracts. Courts will literally—bankruptcy courts will look at the agreement and they can bifurcate a contract and say these are really two separate agreements even though they're in one integrated document. Or can look at two agreements that even though they're separate and they might relate to each other, merge them together and say, one is not worth anything with the other.

And that has some interesting play, especially if you have a trademark agreement that's bundled with some other IP.

SARAH ROBERTSON: A copyright, I guess in the case of character licensing or rights of publicity.

ERIC SCHNABEL: Right. And I guess one thing, absolute sales or not, are not subject to—because they're not executory.

I was going to—hang on. Kind of jumping at a slide, but I do want to talk about this point. 365(n) of the Bankruptcy Code, which is not this slide, talks about IP licenses, and gives a licensor and a licensee, a licensee to a debtor licensor, special protections. When you've built your entire business based on a license from—I don't want to use an example—and then everyone starts shorting the company.

Microsoft, which is clearly not going to file as far as—I have no knowledge. And Microsoft ends up filing for bankruptcy, let's say for whatever reason. You know, Bill Gates has been siphoning money out left and right, I don't know, whatever, the Ponzi scheme, whatever the thing is. They file and you've built your entire business off a license for Microsoft. So 365(n) gives a licensee special protections that you can basically, notwithstanding the debtor's usual right to throw away a contract, reject it, or assume it, it lets the licensee retain the benefits of

that agreement through any extensions as long as it keeps paying the royalty. But that doesn't include trademark.

So you have an interesting situation here when we talk about two agreements or one agreement. If you have a bundling of copyright, which is included in that IP special protection versus the mark, which is not. So do you have two agreements? Do you have a copyright license and a trademark license in that one contract, or is it one agreement or is it two agreements? If it's one agreement, well then maybe the mark does get that protection of 365(n) because the copyright piece is in there. But maybe the court cuts it in half because it says, "No, the mark's a separate part of the contract and the copyright is a different piece." So you basically get the benefits of the copyright, go forward, but not the mark, which would be very confusing actually.

One thing about IP licenses, which does apply for trademarks, is this consent of whether the contract is assumable or not. Contracts are assumable unless applicable law excuses the party from accepting performance to the debtor.

So for instance, an employment agreement. If an employment agreement says, this isn't assignable without my consent, the debtor can't assume that employment agreement and force somebody to work for them. You know, the 13th Amendment of the Constitution kind of outlawed that kind of indentured servitude. So you really can't force somebody, personal services, you can't force somebody to work for you.

And what the courts have viewed is applicable law includes patent, copyright and trademark, which basically means that you can't assume and assign those contracts unless the licensor consents. So the licensee, the debtor, can't force that agreement to go to somebody else unless you want it.

And there's an interesting issue that's arisen in the courts, a split which is are we in the hypothetical or the actual test for this provision of the bankruptcy code, and what the issue is if the debtor files for bankruptcy and then reorganizes, does that person require the licensor to consent or not, because is the debtor and the reorganized debtor two different people or is it really the same person?

Kmart files for bankruptcy, reorganizes. Is reorganized Kmart the same entity as Kmart, the debtor in possession? And if you're in the hypothetical test jurisdiction, they say no, those are hypothetically really two different people, right. It's not the same legal entity, which means that the Martha Stewart license—no, no, doing it the wrong way. The Kmart licenses couldn't be assumed and be part of the reorganized plan unless you had consent. Other jurisdictions say, no, that's not reality. The debtor and the reorganized debtor are the same thing. It only works if you're going to assume and assign it to some third party buyer.

A reorganization assumption is really to the same entity. So since the debtor has the right to license in bankruptcy, the reorganized debtor has that right too. And so on the assumption area, if you're not in a hypothetical jurisdiction you could be forced to continue on with a reorganized debtor. Hypothetical jurisdiction you don't. So you have to kind of figure out where you are. But either way, on a sale scenario, which is much more common now than with reorganizations, you've got basically veto right in terms of moving forward.

The one thing I do want to—this is the 365(n), and the last slide which says, not trademarks. This is why you're going to see a lot more and why you do see a lot more sales than reorganizations in bankruptcy, and why it's important, I think, to get the right people involved quickly.

In order to sell assets, which includes the IP bundle of assets, which is now more common to see in bankruptcy, you literally can get out of Dodge from start to finish in about a month. So you basically—the debtor will file a sale motion saying to the court, I'd like to sell all of Fortunoff's or all of Borders IP, customer lists, trademark, I guess—I don't know if Borders really had patents, they must have had something, but the designs for Fortunoff Jewelry, take your pick of your bankruptcy. And they set up a procedure for how to do the sale. Bids are due on X date. You have to put out a deposit of Y amount of money. You hear the auction rules for the bankruptcy. And there's going to be a hearing within a couple of weeks of the filing for those procedures. Then you've got a little bit of a due diligence period. They'll have a banker, they'll have shipped this for months, and months, and months, so they can make that due diligence period very quick, because all the players are in.

There will be a deadline for the bids. If bidders show up, they'll have an auction, which is conducted typically at a law office. And most auctions never end by dinnertime. They start at 9:00 and they go all night, and they last three weeks, and they really age you. You know, pizza at 4:00 in the morning is not very good for you. And then after the auction, somebody wins, and then you have a hearing to approve the bidder, and then you can have a closing however long or quickly a closing takes, because you may have antitrust issues or other types of things that might delay closing.

I think the most interesting thing with IP, and this includes trademarks, obviously auctions, is that you have a lot—it's many moving parts. You just don't have an asset like a warehouse full of widgets that someone wants to buy, and you have a couple of people bidding on that, and like the one who puts the most money down wins. Here you've got agreements. What is a mark, you've got the mark in Australia.

Well, maybe you have a buyer who wants the mark everywhere, but has no use for it in Australia, but you have somebody from Australia who wants to buy the mark and has a use for it. So you end up having these complicated auctions in which you have some people bidding for everything and some people bidding for parts. And then the debtor starts trying to put the partial bids together with the whole platform bids, if you will. And you start doing stuff that Sarah and I have done on numerous occasions, you start ending up winning the part auction or the whole auction, and then you end up negotiating these new licensing agreements between the bidder who won the whole auction, who is willing to sublicense or license out the mark or the IP for Australia, because they don't care about that, and that helps reduce their overall purchase price. You know, they can get a revenue stream right away. Hence, why these things never end by dinnertime and they tend to drag on for a bit.

There's a great opportunity, I think, for people to scoop up assets at a decent deal or to—if you happen to be in bankruptcy, to kind of sell assets and try to generate some dollars.

And since I'd like to go to the cocktail party as well, I think I'll close with that.

SARAH ROBERTSON: So thank you everyone for sticking with us, and for your great questions, and to our panelists. It was a great panel, so thank you very much.

Endnotes

1. rvanh@tnybf.org.
2. The amendment passed.
3. Random House, Inc. v. Rosetta Books LLC, 150 F.Supp.2d 613 (S.D.N.Y. 2001).
4. Random House, Inc. v. Rosetta Books LLC, 283 F.3d 490 (2d Cir. 2002).
5. http://authorsguild.org/index. search?q=the+ ebook+royalty+mess+and+the+ebook+royalty+math&submit...x=0&submit.y=0.
6. Interstate Circuit. Inc., et al. v. United States Paramount Pictures Distributing Co., Inc., et al. v. SAME. 304 U.S. 55 (58 S.Ct. 768, 82 L.Ed. 1146).

Reasonably Foreseeable Mayhem: The Law of Venue Safety and Security

By Steven A. Adelman

Most journal articles are based on important new developments such as controversial appellate decisions or innovative statutes. However, when dealing with the live presentation of entertainment, arts, and sporting events, the legal landscape has not changed much since *Palsgraf*.[1] Indeed, the concepts used every day were neatly set forth on a pencil my Torts professor handed out in law school, on which she engraved "Duty ❖ Breach ❖ Causation ❖ Harm."

In a practice devoted to liability and risk management in live entertainment venues, there are very few hot legal developments. Instead, the vibrancy of this area is based on the amazing fact patterns reported in the news every day, the creative and dangerous ways people shed their inhibitions in public spaces with the help of adult beverages and a few thousand new best friends.

"From brutal parking lot beatings to people falling over railings, to outdoor stage systems blowing over, closer examination makes the mayhem of 2011 look more reasonably foreseeable than initial exclamations of shock and disbelief would suggest."

For the purpose of determining liability in any large premises liability claim, the key disputed issue usually is reasonable foreseeability: were the actions of patrons so likely based on past experience that a reasonably attentive venue manager should have taken steps to prevent them or reduce the harm that might result?[2] From brutal parking lot beatings to people falling over railings, to outdoor stage systems blowing over, closer examination makes the mayhem of 2011 look more reasonably foreseeable than initial exclamations of shock and disbelief would suggest.

Violence Outside the Stadium

The tragic story of Bryan Stow is familiar by now. After the Los Angeles Dodgers hosted the San Francisco Giants on Opening Night at Dodger Stadium, two fans wearing Dodgers gear beat Mr. Stow, who was wearing a Giants jersey, into a coma in the stadium parking lot. The next day, Dodgers owner Frank McCourt stated, "I'm quite confident that all of our measures were in place. You could have 2,000 policemen there, and it's just not going to change that random act of violence.... There's 56,000 people. That's a lot of people. The incidents we had relative to that were very few."[3] Perhaps, but a Los Angeles County Supervisor told the local media that a "lack of security" in the parking lots contributed to the beating,[4] and the team subsequently hired former Los Angeles Police Chief Bill Bratton as a consultant to develop a "security blueprint" for the stadium and its parking lots.[5]

On May 24, 2011, Bryan Stow and his family filed suit against the Los Angeles Dodgers, among others, arising from the March 31, 2011 attack. The Complaint stated that: "The lack of security and inadequate lighting presented a perfect opportunity to commit a variety of crimes."[6] "Unfortunately, for Bryan Stow, this is exactly what happened."[7] Presumably the plaintiffs will inquire as to why the Dodgers lacked a security blueprint for the stadium and its parking lots on the night in question.

The issue of foreseeability of an attack in the parking lot in 2011 is likely to run headlong into a 1985 decision from another Dodger Stadium post-game parking lot beating. In *Noble v. Los Angeles Dodgers, Inc.*, the California Court of Appeals threw out a decision against the Dodgers, finding instead that there was no evidence that management could have foreseen this sort of altercation.[8]

This is where *Palsgraf* comes in. Recall that poor Mrs. Palsgraf lost her case on appeal when Judge Cardozo held that the actions of the train station guard that caused the passenger to drop his package of fireworks were not the proximate cause of the lady's injuries.[9] The majority held that the guard could not reasonably have foreseen that helping this passenger onto his train could lead to passengers at the other end of the platform being injured by flying debris.[10]

Applying the lessons of *Palsgraf*, the legal issues regarding Bryan Stow are (1) whether his beating in the Dodger Stadium parking lot was proximately caused by the team's security deficiencies, and (2) whether the actions of the two assailants should have been reasonably foreseeable to a professional venue manager. Regarding this second issue, "reasonableness" does not exist in a vacuum, but rather in historical context. With this in mind, consider the tragic case of David Sale of Landsale, Pennsylvania.

In July 2009, David Sale was one of eight people celebrating a friend's impending wedding at the Phillies game at Citizens Bank Park in Philadelphia. Later that afternoon, Mr. Sale's group went to McFadden's Restaurant & Saloon, which is built into the ballpark but has a separate entrance. There they got into a fight over a spilled drink with members of a 60-person group from

a South Philadelphia neighborhood bar. The bar ejected both groups at the same time from the same entrance. The fight continued, and escalated, as the combatants walked to a distant parking lot. Ultimately, three men pled guilty for the fatal beating they gave to David Sale.[11]

One would imagine the Stows' lawyers will argue that after the David Sale beating, incidents of this sort should have been foreseeable to reasonable ballpark operations and security staff. The plaintiffs could also assert that the Dodgers might have had a better handle on foreseeable parking lot incidents if they had filled the head of security position that had been vacant since December 2010.[12] Even if *Noble* again saves the Dodgers by assigning causation entirely to the aggressors rather than the team, venue managers would still do well to consider where the reasonable foreseeability tipping point might be.

Another California incident helps push that envelope. On August 20, 2011, the night of the annual 49ers-Raiders preseason "Battle of the Bay" game, a man was severely beaten inside a Candlestick Park men's room and two other men were shot in separate incidents in the parking lot. The media covered these incidents while showing video of other patrons brawling in the stands and parking lots. Since the rivalry game had a history of violence, should the crowd managers at Candlestick Park have been more prepared to deal with these patrons? Does the fact that serious incidents took place necessarily mean that the arrangements were insufficient? What about the apparent frequency of less serious fan altercations? Does the presence of more police officers at this game than other 49ers preseason games change any of the previous answers?[13]

Note that there is virtually no legal authority to help guide the analysis. For many good reasons, few of these cases reach trial, much less turn into reported decisions following appeal. Instead, each new venue safety incident is like a fact pattern in law school in which the torts professor keeps tweaking the hypothetical, pushing the student further and further out on a limb. Surely, however, there must be some standard for reasonable conduct at live entertainment events, right?

Cracking the Code

When searching for an authoritative measure for reasonableness, we often look to codes and regulations as safe harbors. Liability problems can arise, however, where venues rely on what purports to be an authoritative code for their entire risk analyses. Another highly publicized tragedy at a ballpark shows the limits of code compliance as evidence of reasonable conduct.

On July 7, 2011, Shannon Stone and his son were sitting in the first row of the outfield bleachers at Rangers Ballpark at Arlington. At the end of an inning, Rangers outfielder Josh Hamilton tossed a ball up towards the boy, a common practice in professional baseball. Mr. Stone, who was six feet three inches tall, extended his arms and leaned over the 33-inch high rail at the bottom of the grandstand, straining to reach the ball. He lost his balance and fell forward, down 20 feet to the ground. He died from head injuries that night.[14]

Like the Bryan Stow beating, Shannon Stone's fall over the railing is now etched into the public's consciousness. By virtue of the Rangers organization's compassionate response[15] and the remarkable big-heartedness of Mr. Stone's family, litigation seems to have been avoided. For the purpose of identifying the teachable moment, however, this tragedy still merits review.

The day after Mr. Stone's death, team president Nolan Ryan said at a news conference, "We're going to look into anything we can do to make our stands safe for our fans."[16] Team and city officials promptly confirmed that the railings met the applicable provisions of the International Building Code, which is widely relied on regarding railing heights in public venues throughout North America. After completing its review, the Rangers nonetheless decided on a series of safety measures that included raising railing heights throughout the stadium.[17]

The legally significant question raised by the Shannon Stone tragedy is the extent to which code compliance serves as a proxy for reasonable physical safety at a stadium. In premises liability law, code compliance is *evidence* of reasonableness—it is not dispositive of the question whether the venue was reasonable.[18] In order to know whether code compliance equates to reasonable conduct under the circumstances, we must know (1) for what uses was the current railing height standard intended, and (2) for what are railings actually used now? We begin with the International Building Code.

It turns out that the 26-inch minimum height for front-row railings dates back to 1929, when it was included in the National Fire Protection Association's new *Building Exits Code*.[19] That code was created in response to the infamous Triangle Shirtwaist Factory disaster of 1911, in which 146 seamstresses died in a New York tenement fire. Regarding railings, a spokesman for the NFPA Building Fire Protection and Life Safety division, Robert Solomon, has said that the 26-inch standard was designed mainly for theaters and symphony halls, and focused on preserving patrons' views of the stage. At that time nearly a century ago, spectator sports in large stadiums were a new and largely unfamiliar phenomenon.[20]

It is undisputed that the 33-inch railing in front of Shannon Stone exceeded the International Building Code's 26-inch requirement. Yet that still begs the ques-

tion whether code compliance is a *minimum* standard or *the* standard. More information about the way railings are used now is needed.

According to the grim statistics compiled in "Death at the Ballpark," 22 people have fallen to their deaths at major league ballparks since 1969.[21] Of those, only one was a fan pursuing a baseball, the unfortunate Stuart Springstube of Wisconsin.

On April 25, 2010, Stuart Springstube's favorite team, the Chicago Cubs, was taking batting practice before a game against the Brewers at Miller Park in Milwaukee. When he reached over an outfield railing to catch a ball, he fell 15 feet to the field below. The 30-inch high railing met Code.[22]

There have been other non-fatal injuries to fans who fell over stadium railings. In April, 2009, a man attending a game at Busch Stadium in St. Louis fell 18 feet from the front row of a party porch and landed on a woman below.[23] Two months later, another man at the same ballpark fainted before a game on a hot day and went over a front-row railing in the fourth deck, falling 12 feet to the concourse. As in Milwaukee, both of those railings were 30 inches high.[24]

Even before Shannon Stone, the Rangers had its own experience with fans falling over railings. On April 11, 1994, the current ballpark's first Opening Day, a woman fell backwards over a 30 inch railing at the Home Run Porch while posing for a picture. She fell 35 feet, fortunately landing on an empty row of seats.[25] Shortly thereafter, the team raised the railings in that section to 46 inches, but left other railings unchanged. The woman filed suit, settling before trial.[26] Then in 2010, nearly a year to the day before Shannon Stone's fall, another man fell over a 30-inch railing trying to catch a foul ball. He fell 30 feet and sustained significant injuries.[27] He took full responsibility for himself and did not sue.[28] The Rangers made no changes after his fall.

Following the Shannon Stone incident, however, the team has tried to recalibrate fan safety with the ballpark experience, including hiring engineers to design 42-inch railings that would block relatively little of most fans' view.[29] Other parts of the ballpark, such as the Home Run Porch, now have railings as high as 46 inches. The plan is that by Opening Day, 2012, all railings at Rangers Ballpark at Arlington will be at least 42 inches high.[30] This would have been just above Shannon Stone's hips.[31]

Other Major League Baseball teams, following the Rangers' lead, took a renewed look at their own railing heights. Even the Miami Marlins' new stadium that opened this April, whose presumably comprehensive safety evaluation approved 30-inch railings that exceeded Code, is raising its railing heights.[32]

What Lies Ahead

The beauty of practicing in an area full of questions of fact rather than questions of law is that there is always something to discuss. Except in the most extreme instances, liability remains a jury question. Summary judgment may narrow the claim, but rarely will it completely extinguish a cause of action. I think this is as it should be.

Tort law is a window into society's own behavior, and misbehavior, and the outcomes of lawsuits are a reflection of the way people feel about that conduct at any given moment. The Shannon Stone tragedy in particular reminds us not to be cynical: even in our litigious society, the team took responsibility and the family did not sue; and the mere chance of litigation led to safety improvements faster than any cajoling risk manager or head of operations could accomplish. With a nudge from the law, people of conscience did the right thing. So shine a few good deeds in a weary world.

Endnotes

1. Palsgraf v. Long Island Railroad Co., 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928).
2. This article leaves for another day a discussion of the patron's own comparative fault.
3. *McCourt Satisfied with Dodger Stadium Security Despite 'Tragic' Beating of Giants Fan*, La Times, Apr. 2, 2011, *available at,* http://latimesblogs.latimes.com/dodgers/2011/04/frank-mccourt-dodgers-giants.html.
4. *L.A. County Supervisor Wants Curbs on Alcohol Sales, More Security at Dodger Stadium*, La Times, Apr. 4, 2011, *available at,* http://latimesblogs.latimes.com/lanow/2011/04/official-wants-curbs-on-alcohol-sales-more-security-at-dodger-stadium.html.
5. *Dodgers Hire Former Police Chief Bratton to Come Up with Security Plan*, La Times, Apr. 6, 2011, *available at,* http://articles.latimes.com/print/2011/apr/06/sports/la-sp-0407-dodgers-security-20110407.
6. *Bryan Stow's Family Sues the Dodgers*, La Times, May 24, 2011, *available at,* http://documents.latimes.com/bryan-stow-lawsuit-dodgers.
7. *Id.*
8. 168 Cal. App. 3d 912, 214 Cal. Rep. 395 (1985).
9. *See* Palsgraf *supra* note 1.
10. *Id.*
11. *Cops: Fan Killed Over Spilled Drink*, Myfoxphilly.com, July 27, 2009, *available at,* http://www.myfoxphilly.com/dpp/news/local_news/072709_Phillies_Fan_Beating_Death; *see also, Men in Fatal Ballpark Attack Sentenced*, Espn.com, Dec. 21, 2011, *available at*, http://espn.go.com/mlb/story/_/id/7375088/three-men-sentenced-fatal-attack-philadelphia-phillies-citizens-bank-park.
12. *Dodgers Hire Former Police Chief Bratton to Come Up with Security Plan*, La Times, Apr. 6, 2011, *available at*, http://articles.latimes.com/print/2011/apr/06/sports/la-sp-0407-dodgers-security-20110407.
13. *49ers to Ban Tailgating After Kickoff*, Espn.com, Aug. 22, 2011, *available at*, http://espn.go.com/nfl/story/_/id/6884942/san-francisco-49ers-curb-tailgating-seek-indefinite-end-oakland-raiders-series.

14. *Fans Split on Stadium Safety Changes*, ESPN.COM, Aug. 26, 2011, *available at,* http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes.

15. *Texas Rangers Lower Flags, Create Fund for Fan Who Fell to Death*, ABC NEWS, July 8, 2011, *available at*, http://abcnews.go.com/US/texas-rangers-fan-dies-fall-reaching-ball/story?id=14025751.

16. *Id.*

17. *Rangers to Raise Ballpark Railings to 42 Inches*, ATHLETICBUSINESS.COM, July 20, 2011, *available at,* http://athleticbusiness.com/editors/blog/default.aspx?id=584.

18. Restatement (Second) of Torts § 288C (1965) ("Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."); *see also,* W. Keeton et al., *Prosser and Keeton on the Law of Torts* 233 (5th ed. 1984) ("While compliance with a statutory standard is evidence of due care, it is not conclusive on the issue."), cited in Hernandez-Gomez v. Leonardo, 185 Ariz. 509, 519, 917 P.2d 238, 248 (1996).

19. *Fans Split on Stadium Safety Changes* (Aug. 26, 2011), at http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes (last visited Jan. 2, 2012).

20. *Fans Split on Stadium Safety Changes*, ESPN.COM, Aug. 26, 2011, *available at*, http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes.

21. *Death at the Ballpark: A Comprehensive Study of Game-Related Fatalities, 1862-2007*, *available at*, http://www.deathattheballpark.com/fatalities.html.

22. *Fans Split on Stadium Safety Changes*, ESPN.COM, Aug. 26, 2011, *available at,* http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes.

23. *Should Building Codes be Changed to Keep Fans from Falling Out of Their Seats?*, ATHLETICBUSINESS.COM,Sept. 2009, *available at,* http://athleticbusiness.com/articles/article.aspx?articleid=2570&zoneid=2.

24. *Id.*

25. *Survivor Recalls 1994 Fall at the Ballpark*, WFAA.COM, July 7, 2010, *available at*, http://www.wfaa.com/news/local/Survivor-recalls-1994-Ballpark-fall-97987974.html#; *see also, Will Anything Be Done About Falling Fans?,* NY TIMES, July 13, 2011, *available at,* http://bats.blogs.nytimes.com/2011/07/13/will-anything-be-done-about-falling-fans/.

26. *Fans Split on Stadium Safety Changes*, ESPN.COM, Aug. 26, 2011, *available at*, http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes.

27. *Are Texas Rangers Liable for Fan's Death?*, CHICAGONOW.COM, July 8, 2011, *available at*, http://www.chicagonow.com/ex-posts-facto/2011/07/are-texas-rangers-liable-for-fans-death.

28. *Rangers Fan Dies After 20-Foot Fall*, ESPN.COM, July 8, 2011, *available at*, http://sports.espn.go.com/dallas/mlb/news/story?id=6747510.

29. *Of Rangers and Railings,* DEADSPIN.COM, July 8, 2011, *available at,* http://deadspin.com/5819404/of-rangers-and-railings.

30. *Fans Split on Stadium Safety Changes,* ESPN.COM, Aug. 26, 2011, *available at*, http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes.

31. *Texas Rangers to Raise Railing Heights,* ESPN.COM, July 20, 2011, *available at*, http://espn.go.com/dallas/mlb/story/_/id/6783926/texas-rangers-announce-safety-initiatives-ballpark-arlington.

32. *New Park's Roof to Allow More Day Baseball*, MLB.COM, July 25, 2011, *available at*, http://mlb.mlb.com/news/article.jsp?ymd=20110725&content_id=22267786&vkey=news_mlb&c_id=mlb.

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Antitrust in the Realm of Sports:
Major League Soccer and the Single Entity Defense

By Bryan A. Green

Major League Soccer (MLS), the top U.S. professional soccer league, survived the first and only antitrust challenge against it, *Fraser v. Major League Soccer, LLC.*,[1] thanks to its unique management and operational structure, which allowed it to receive single entity treatment. As a result of *Fraser*, MLS relies on the unity of interests of its investors to shelter itself from antitrust challenges while continuing to wield significant control over central parts of league business operations and transactions. However, many of the advances, changes, and improvements that the league has made in the last few years are chipping away at this single entity defense.

The Sherman Act

The Sherman Act,[2] a U.S. antitrust statute, "prohibits unreasonable restraints on trade and monopolization" and seeks to keep industries from gaining too much power over their competition and the general citizens.[3] Due to effects on salary negotiations, salary caps, player-team contracting, free agency, and revenue sharing agreements, the antitrust implications in the realm of sports are staggering, particularly when it comes to the relationship between leagues and their players. Antitrust touches the core of professional sports leagues by dictating and affecting how they create and enforce league rules and policies.

Section One of the Sherman Act, which prohibits and makes illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations," formed the basis of the antitrust challenge faced by MLS.[4] Succeeding on a §1 claim requires proof of concerted action between the defendant and a third party, unreasonable restraint on trade, and an effect on interstate or foreign commerce.[5] Generally, the alleged concerted action in the sports setting occurs between the league and the teams, which often leads to assertions of the single entity defense by the former.

While §1 prohibits collusion and concerted action between two entities that decreases competition, it does not prohibit single economic actors from acting unilaterally in ways that may diminish competition. If a league and its teams are deemed to be a single entity acting as one, then it can escape liability under §1 because concerted action cannot be shown.[6] In *Copperweld Corporation v. Independence Tube Corporation*, the Supreme Court held that a corporation and its wholly owned subsidiary or unincorporated divisions are incapable of conspiring or colluding together within the meaning of the Sherman Act.[7] Instead, they have a "unity of interests" that renders any restraints on trade mere lawful advancements of the single entity's competitive interests, as opposed to monopolizing competition.[8]

MLS Structure

MLS, which was formed as a limited liability company under Delaware law in 1995, has a unique structure and was organized in a manner that would allow it to maintain a "unity of interests" among its investors and teams. Investors in the league fall into two categories—investor-operators and passive investors. The investor-operators are those who have the right to control a specific team.[9] Passive investors contribute capital to the league, but do not have any operating or management rights.

The league enjoys significant centralized power and owns all of the teams. It also maintains ownership over all of the intellectual property rights, tickets, and broadcast rights. Additionally, the league controls all the revenues and is responsible for paying the salaries of league personnel, referees, and players. Unlike other professional sports leagues, MLS maintains a significant amount of control over player negotiations. Players must negotiate with the league instead of contract directly with teams.[10]

Some of the managing power and authority, however, has been granted to the investor-operators, such as the hiring and firing of the team's coaching staff and front office personnel.[11] Additionally, teams are also responsible for paying for costs of local promotion or working out broadcasting and sponsorship deals in the local community.[12] In order to compensate the investor-operators for taking a bigger risk than the passive investors and assuming the duties and liabilities of managing a team, MLS pays them a management fee.[13] After distribution of the management fee, the residual revenues are divided uniformly among all investors.[14]

The structure of the league is critical to the analysis of whether MLS should enjoy single entity treatment or whether it should be subject to §1 liability. With the goal of protection from antitrust challenges in mind, MLS managed to centralize power, control, revenue, and liabilities in an attempt to create a unity of interests among its investors.

Fraser v. MLS

Soon after the establishment of MLS, a small group of players filed suit against the league alleging various antitrust violations.[15] The players claimed that MLS and its investors unlawfully combined to restrain trade or commerce in violation of §1 of the Sherman Act.[16] They also alleged that by contracting for player services directly through the league, it effectively eliminated competition for those services and skills that would have otherwise taken place, thereby creating artificially low salaries.[17]

The league responded by asserting the single entity defense.[18] MLS emphasized the shared interests of its investors, particularly the revenue and liability sharing provisions, and also distinguished itself from other professional sports leagues by highlighting the greater and more centralized power maintained by MLS.[19] It also emphasized its control over ticket prices and player movement, transactions, and contract negotiations.[20] Based on all these factors, the league believed that MLS and its teams operated as a single economic entity with common interests.

The District Court accepted the league's argument that it could not violate §1 as a matter of law and issued a partial summary judgment in the league's favor.[21] The players' other claims went to a jury, which ultimately decided in favor of MLS. The jury concluded that the formation of MLS created a market for first division soccer players.[22] This prevented success on the merits for their other alleged violations of antitrust laws due to the lack of a relevant market. Afterwards, the players appealed on all counts.

The First Circuit Court of Appeals upheld the jury finding that the players had failed to prove a relevant market, thereby justifying the judgment for the defendants, but did not go so far as to hold that MLS actually constituted a single entity.[23] Conversely, it also did not hold that MLS should *not* receive single entity treatment.

As part of its assessment of the structure of the league, the Court noted that internal competition within a company occurs frequently.[24] The Court compared the interaction between MLS and its teams to when multiple railroad routes exist between the same cities or when grocery stores have two locations so close together that they do in fact compete for customers.[25] These situations are similar to the competition that arises between teams within a professional sports league that has independent owners or managers.[26] However, the Court also noted that MLS was "more than an arrangement for individual operator/investors by which they can cap player salaries."[27] The league does resemble an ordinary company, but the investor-operators of MLS have a unique role that is different from ordinary stockholders. As a result, there exists a "diversity of entrepreneurial interests in MLS that goes well beyond the ordinary company." This led the Court to the supposition that the same unity of interests that was controlling in the *Copperweld* case does not exist for the MLS investor-operators.[28]

Accordingly, the Court concluded that MLS's structure was a hybrid entity more similar to a collaborative joint venture than a single entity. Though the Court acknowledged that two possible approaches existed for dealing with such hybrid entities in the realm of §1 claims and the single entity treatment, it ultimately decided that it did not have to decide the issue in light of the jury's previous fact findings.[29]

While MLS escaped antitrust liability in *Fraser*, the First Circuit did not decide one way or the other whether the single entity defense was available or applicable to MLS. Therefore, the reality is that the availability of the single entity defense is not guaranteed for a future §1 antitrust lawsuit against the league.[30] With the door to future antitrust challenges essentially left open by the First Circuit, the league's continual development and changes to its structure, rules, and policies would likely bear even more on the possibility of single entity treatment.

Breakdown of Single Entity Treatment

As MLS continues to change its rules and move towards uniformity with most of the large leagues around the world (particularly the major European leagues), the interests of the various investors and parties also change. Depending on how a court interprets the impacts of all the changes, they potentially derail the league's ability to survive another antitrust challenge.

Designated Player Rule

The introduction of the "designated player rule" in MLS provides a loophole to the salary cap and permits the signing of players who will make a salary in excess of the league maximum. The salary of such a player is covered by the league up to that maximum level and then the team for which he plays must cover the excess.[31] The underlying purpose of the rule is to allow teams the freedom to pursue and sign star international talent, which can excite the fan base and reach previously uninterested fans through considerable positive publicity. Upgrading the talent also raises the level of play on the field.

While this rule has its benefits, particularly in its ability to help attract top talent to the league, it also damages the league's argument for single entity treatment. By enacting the designated player rule, MLS created an opportunity for teams to directly compete for player services with each other, as well as teams abroad. Under free market principles, the signing of designated players is limited only by competition and the price a team is willing to pay. With diverging interests, MLS certainly benefits from designated player signings, but investor-operators receive varying payoffs and liabilities.

Discovery Player Classifications

Most MLS players arrive at their respective teams via the draft or the allocation system, which determines the order in which teams can obtain new and important players signed by the league in hopes of fairly distributing talent and maintaining competitive balance in the league. The team at the top of the allocation list gets essentially a right of first refusal for recently signed players. The "discovery player" classification bypasses the allocation system by permitting teams to independently scout and locate players and then claim their rights when they sign with MLS via the filing of a discovery player form. This allows teams to acquire players without having to draft them or let them flow through the allocation system.

By having the "first to file" rule for discovery players, MLS has given teams the motivation to scout and compete for potential discovery player signings. In this way, teams and investor-operators are competing for the same players' services with directly conflicting interests. As a result, the league's unity of interests is necessarily split even further.

Stadium Development

The league's argument for single entity treatment faces another significant threat from its policy of promoting and encouraging the concept of MLS teams developing and owning soccer-specific stadiums.[32] Ownership of stadiums has many advantages, such as a steady stream of revenue in combination with doing away with long-term stadium leases and other rental expenses.[33] Eventually, in order to continue attracting new investors, the league must show that MLS is a profitable and sound financial investment. With the number of teams that own a soccer-specific stadium continuing to grow, the prospect of turning a profit becomes more and more likely as well. At the same time, however, stadium ownership by the investor-operators does not come without its drawbacks.

Stadium ownership further partitions the interests of the investor-operators. Lamar Hunt, the investor-operator of the Columbus, Ohio MLS franchise, built the league's first soccer-specific stadium and did so through private financing.[34] In an investment such as a privately funded stadium, the investor-operator takes significant risk and develops an interest in that stadium, which is also a division from the league and fellow investor-operator interests. Though the ultimate result is generally beneficial to all, the level of risk assumed varies considerably, as one would expect considering the magnitude of building a new stadium. Still, when such disparity of risks exists and investor-operators are putting their own interests before the league's, the result is a reduction in the unity of interests.

Player Transfer and Loan System

In soccer around the world, teams often buy, sell, and loan out players that they have under contract. The new team will negotiate and reach a deal with the player, but then a deal must also be reached with the current team. Usually this means the payment of a transfer fee, but in rare instances, it could be in the form of offering and agreeing to a trade of players.[35] Loaning a player under contract to another team is another common transaction amongst soccer teams around the world. This international transfer and loan system in soccer works between teams and leagues, even when they are on completely different continents.[36] MLS has gradually increased its involvement in this important system, which presents special opportunities for the league to cash in on its young stars by selling or loaning them to foreign teams.

Participation by MLS and its teams in the international transfer and loan system creates another threat to the league's single entity treatment, as the transfer of MLS players out of the league can result in non-uniform or consistently positive benefits. The league can certainly profit financially by selling or transferring players abroad, but it can also hurt the player's former team, especially when the player sold was a star or team leader. In addition, because the league is never under an obligation not to sell or loan out players abroad, the chance of the league making such transactions against the wishes and interests of the investor-operators is plausible. Again, this constitutes yet another assault on the unity of interests that is so vital to receiving single entity treatment.

Conclusion

As MLS continues to evolve and alter its business model and rules, these collective changes present a serious threat to the league's ability to use the single entity defense as a shield from antitrust liability. As a result, the league is shifting away from its unity of interests with each new relinquishment of control to investor-operators. Over time, as profits increase and investors spend and individually invest in their respective teams with greater disparity, the greater the share of the profits each will want. The consequence is a gradual breakdown of the factors that supported league's argument for single entity treatment. With the viability of the defense in doubt following *Fraser*, the chances that the next antitrust challenge to the league will succeed increases as new threats and complications further divide the interests of MLS from those of its investors.

Endnotes

1. 284 F.3d 47, 54 (2002).
2. 15 U.S.C. § 1.
3. Mark C. Anderson, *Self-Regulation and League Rules Under the Sherman Act*, 30 Cap. U. L. Rev. 125, 126-27 (2002).
4. Phillip Lawrence Wright, Jr., *Major League Soccer: Antitrust, the Single Entity, and the Heightened Demand for a Labor Movement in the New Professional Soccer League*, 10 Seton Hall J. Sports L. 357, 364 (2000).
5. *See* Anderson, *supra* note 3, at 128.
6. *Id*. at 131.
7. 467 U.S. 752, 770-71 (1984).
8. *See* Mark D. Mako, *Rules Restricting Player Movement Under the Federation Internationale de Football: Do They Violate U.S. Antitrust Law?*, 18 N.Y.L. Sch. J. Int'l & Comp. L. 407, 413-414 (1999).
9. Thomas D. Stuck, *Facility Issues in Major League Soccer: What Do Soccer Stadiums Have to Do with Antitrust Liability?*, 14 Marq. Sports L. Rev. 551, 553 (2004).
10. *See* Wright, *supra* note 4, at 360.
11. *See* Fraser *supra* note 1, at 54.
12. Fraser v. Major League Soccer, LLC., 97 F. Supp.2d 130, 133 (2000).
13. *See* Fraser *supra* note 1, at 54.
14. Clifford Mendelsohn, *Fraser v. Major League Soccer: A New Window of Opportunity for the Single Entity Defense in Professional Sports*, 10 Sports Law J. 69, 73 (Spring 2003).
15. *See* Wright, *supra* note 4, at 359.
16. *See* Fraser *supra* note 12, at 131.
17. *Id*.
18. Heike K. Sullivan, *Fraser v. Major League Soccer: The MLS's Single Entity Structure is a "Sham,"* 73 Temp. L. Rev. 865, 893 (Summer 2000).
19. *Id*. at 894.
20. *Id*.
21. *See* Fraser, *supra* note 12, at 137.
22. *See* Fraser, *supra* note 1, at 55.
23. *Id*. at 67.
24. *Id*. at 56.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*.
29. *Id*. at 58-59.
30. *See* Matt Link, *MLS Scores Against Its Players: Fraser v. Major League Soccer, LLC*, 1 DePaul J. Sports L. & Contemp. Probs. 76, 76 (Spring 2003).
31. *See* Robert M. Bernhard, *MLS' Designated Player Rule: Has David Beckham Single-Handedly Destroyed Major League Soccer's Single-Entity Antitrust Defense?*, 18 Marq. Sports L. Rev. 413, 426 (Spring 2008).
32. Stuck, *supra* note 9, at 551.
33. *Id*. at 555.
34. *Id*. at 557.
35. *See* Amikam Omer Kranz, *The Bosman Case: The Relationship Between European Union Law and the Transfer System in European Football*, 5 Colum. J. Eur. L. 431, 432 (Fall 1999).
36. *See generally* Blair Downey, *The Bosman Ruling: European Soccer—Above the Law?*, 1 Asper. Rev. Int'l Bus. & Trade L. 187, 193 (2001).

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One Continent, One Sport…One Channel? The *Premier League* Decision and the Future of Sports Broadcast Licensing in Europe

By Eric C. Schonberg

It is no secret that soccer permeates almost all aspects of European life. Every four years, the World Cup brings out the best in the game and showcases not only the talent on the field, but also the madness and devotion of the fans as well. However, after a recent ruling handed down by the European Court of Justice (ECJ), perhaps the only people on the entire continent crazier than the soccer hooligans are the European broadcast executives. The case, *Football Association Premier League Limited & others v. QC Leisure & Others*, was first heard in 2008 by the High Court of Justice of England and Wales, which decided to stay the proceedings and refer it to the ECJ.[1] Upon reading the Court's decision, it appears that the implications for the future of sports broadcast licensing agreements in Europe could be monumental. This article will begin with an overview of the case and the Court's decision, followed by the possible future implications for the broadcasting industry as it relates to soccer matches across Europe.

I. Background Information on Broadcast Licenses for Premier League Games

The Football Association Premier League (FAPL) is an umbrella group owned and controlled by all of the clubs that form the English Premier League. FAPL represents the clubs and acts as their commercial arm in the licensing of television broadcasting and other media rights in the matches.[2] FAPL grants these broadcasting licenses on an exclusive territory-by-territory basis, which is normally defined by the boundaries of individual countries. This exclusivity provision is extremely important to the broadcasting companies, because being the only carrier to show the matches differentiates each network from the other by allowing it to advertise its services as being live and exclusive, which is why each is willing to pay a substantial amount of money to be the only one in a given country that is allowed to do so. In order to ensure this territorial exclusivity, FAPL mandates that broadcasters attempt to prevent members of the public from receiving the broadcasts outside of the territory for which they hold the license. For example, if network A is licensed to show the matches in France, it is contractually obligated by FAPL to ensure that no one outside of France can receive the signal from its broadcast of the matches. This is known in the industry as "geo-blocking" the signal, which maintains the value of broadcast rights in all other territories.[3] The way broadcasters achieve this is by encrypting the satellite signal so that the only way for anyone to view it is with the use of a special decoding device, provided by the broadcasters themselves to subscribers. The broadcasters are contractually prohibited from supplying these decoding devices to anyone outside of the territory for which they hold the broadcasting license.

It is worth noting here that when the live matches are broadcast, the transmission is sent to a production facility that adds the league logo, pre-game and post-game video sequences, on-screen graphics, music, and other bits that are not part of the actual match itself, but are nonetheless part of the broadcast seen by the viewer watching the telecast of a live sporting event. The signal is then sent by satellite to the broadcaster, which adds its own logo as well as the commentary from the network's sportscasters. The signal is then compressed and encrypted, and transmitted to the station's subscribers, who use a satellite dish to receive the signal and the decoding device provided by the broadcasting company to watch the matches.

In 2005, British pub owner Karen Murphy began showing Premier League matches at her pub on Saturdays. However, she was not paying for a subscription to the U.K.'s exclusive broadcaster of the matches, BSkyB Ltd. Instead, Ms. Murphy had purchased a card, decoder box, and a subscription to the Greek broadcaster NetMed Hellas, which was much cheaper than subscribing to BSkyB. When the FAPL discovered this, it brought suit against both Ms. Murphy and NetMed Hellas. After being heard by the High Court, these two cases were combined into one action that was heard before the ECJ.[4] FAPL argued that activities such as Ms. Murphy's undermined the exclusivity of the rights that the FAPL grants in its licenses to the broadcasters, and therefore decreased the value of the licensing agreements. If a broadcaster could not be assured that it will be the only one showing the matches in a particular country, why would it pay for exclusive rights? FAPL further maintained that if the Court were to allow this practice to continue, then whichever broadcaster was willing to offer subscriptions for the lowest price would potentially dominate the market across all of Europe. This would be detrimental to every other broadcaster on the continent, as well as the FAPL itself, because broadcasters would have to start acquiring licenses for all the national territories where potential customers reside. Finally, FAPL alleged that pub owners infringed its copyrights by showing the matches in public. The defendants argued that they were doing nothing illegal, because they were not using pirate decoder cards; all of the cards in question had been issued and placed

upon the market legally in another state by another satellite broadcaster.

II. The Decision

The ECJ's decision here was essentially twofold. The first part of the decision dealt with anti-competition concerns and the sale of decoding devices outside of each individual country, while the second part concerned FAPL's copyright infringement allegations. The Court essentially labeled FAPL's first set of demands as restraints on trade.[5] The ECJ cited to Article 56 of the Treaty of the Functioning of the European Union (TFEU), which requires "the abolition of all restrictions on the freedom to provide services, even if those restrictions apply without distinction to national providers of services and to those from other Member states, when they are liable to prohibit, impede, or render less advantageous the activities of a service provider established in another Member State where it lawfully provides similar services."[6] The partitioning of the Union into individual territories for the purpose of broadcast licenses, resulting in an artificial price difference between the national markets, runs contrary to the purpose of the Treaty. In other words, the goal of the Treaty is the completion of one national market across the European Union for the sale of all goods and services, and FAPL's attempts to break the Union down into individual countries where broadcasters have exclusive rights, while at the same time preventing customers located in one country from having access to the services in another country, cannot be allowed.

The ECJ responded to an additional interesting, but flawed, argument presented by the plaintiffs. FAPL maintained, in the alternative, that the exclusivity provisions are necessary in order to ensure compliance with Union of European Football Associations' (UEFA) Rule 48 "closed rule" period, which prohibits the Saturday afternoon round of soccer matches from being broadcast live in the United Kingdom.[7] UEFA is the body that governs all professional European soccer leagues, and broadcasters must comply with its regulations. The rationale for Rule 48 is to encourage soccer fans to attend stadiums in person to watch the matches, particularly those in the divisions below the Premier League that do not benefit from the higher rates of attendance that Premier League teams enjoy. According to FAPL, this goal would be impossible to meet if television viewers in the U.K. were free to watch the Premier League matches that other broadcasters were transmitting in from other Member states. In FAPL's view, if members of the public were free to sit at home on Saturday afternoons and watch its matches on TV due to their subscriptions to foreign broadcasters (since the U.K. broadcaster, BSkyB, is not allowed to show the matches so anyone with a BSkyB subscription would not be able to watch them), then people will stop going to the matches themselves and the clubs will lose money from the downturn in attendance numbers at the matches.[8] Regardless of the defects in this argument—for starters, Premier League soccer is as popular, if not more so, than professional football is in the United States, but simultaneous live broadcasting of National Football League (NFL) games has done nothing to hurt attendance at the stadiums—the Court avoided the chance to tear down FAPL's line of reasoning and instead offered a simple solution; FAPL is free to incorporate a contractual limitation in the contract with the broadcasters, by which broadcasters would be required to refrain from broadcasting matches during certain periods (namely, Saturday afternoons).

In sum, the ECJ stated that TFEU Article 56 prevents FAPL from denying citizens of Member States the right to purchase foreign decoding devices from another State. Any type of agreement whose goal is to partition the market according to national borders or make it more difficult to break into national markets must be regarded as a restriction on competition. Put another way, where a license agreement is designed to prohibit the provision of broadcasting services between members of two separate countries, it will be deemed a restriction on competition and therefore illegal. The Court here is concerned for the welfare of the public; a restraint on competition that allows one broadcaster to have the exclusive right to show the matches in a country would allow that broadcaster to charge virtually any price it wants for a subscription to its services. Residents of that particular country or territory would have no choice but to either pay that fee or forgo watching the matches on television. However, if broadcasters are forced to compete with those of other countries, the prices will go down and residents will therefore benefit. This bedrock principle of anti-competition law is heavily relied upon by the ECJ in justifying its conclusions.

The Court then addressed FAPL's copyright infringement allegations. It announced that FAPL cannot claim copyright in the matches themselves because the matches are not "works." In order to be considered a work, the subject matter would have to be original in the sense that it is the author's own intellectual creation. The Court said that sporting events, including soccer matches, cannot be regarded as intellectual creations classifiable as works within the meaning of the copyright statutes. Soccer matches in particular cannot meet this standard, since they are subject to concrete rules of the game and leave no room for creative freedom for the purposes of copyright. However, the Court went on to say that FAPL could assert copyright protection in various "works" contained in the broadcasts themselves, such as the opening video sequence (the introduction before the matches), the Premier League anthem, pre-recorded films showing highlights of recent matches, and various League graphics that are displayed on the screen. Therefore, as long as the broadcasts of the game contain these copyrighted elements, anyone who is impermissibly viewing the broadcast is technically infringing a copyrighted work.

The focus then turned to FAPL's case against pub owners showing the matches. The Court first had to determine the intended audience that FAPL had in mind when licensing the broadcasts. Ultimately, it found that the patrons of the pub who go there to watch the matches are a "new public" that was not originally conceived of by FAPL. In other words, FAPL intended that the broadcasts be viewed in private by people in their own homes, who would presumably pay for subscriptions to watch the games. Yet when people start patronizing pubs to watch the games and the pub owners are benefiting financially from them, the owners are essentially taking money that FAPL and broadcasters would otherwise be making if those same patrons had instead paid for subscriptions and watched the games at home. In the Court's own words:

> When those authors authorize a broadcast of their works, they consider, in principle, only the owners of television sets who, either personally or within their own private or family circles, receive the signal and follow the broadcasts. Where a broadcast work is transmitted, in a place accessible to the public, for a public which is permitted by the owner of the television set to hear or see the work, an intentional intervention of that kind must be regarded as an act by which the work in question is communicated to a new public.… That is so when the works broadcast are transmitted by the proprietor of a public house [pub] to the customers present in that establishment, because those customers constitute an additional public which was not considered by the authors when they authorized the broadcasting of their works.[9]

As pub patrons are not members of the original "public" contemplated by the rights holders, showing the matches to these patrons is an unlawful, profit-making communication of the copyrighted works to the public, and therefore a violation of the copyright laws.

III. The Implications

Anti-Competition

The implications of this case for the future of live soccer broadcasting rights are both clear and significant. For one, it is apparent that although the clubs can continue to exploit matches commercially through their ability to charge admission to the matches, FAPL cannot rely on copyright protection to limit the subsequent broadcast of the games by those entities that have lawfully acquired the rights to show those matches on their television stations. This applies even if those rights have been acquired on an exclusive basis limiting the broadcast to one country or territory. Even if FAPL enters into a contract with a broadcaster that gives the broadcaster the exclusive right to the matches in a given country, but prevents it from broadcasting outside of that territory, FAPL has essentially no legal recourse if residents of another country/territory decide to legally subscribe to that broadcaster and receive the transmission from somewhere outside of the contractually defined territory. In Ms. Murphy's case, the Court basically said that since the goal of the relevant European legislation is to ensure the transition from national markets to one single market, FAPL cannot prevent U.K. residents from subscribing to a Greek (or any other country) broadcaster. Any kind of contractual restrictions to enforce an exclusivity clause is simply going to be unenforceable.

So what does all of this mean in practical terms? For one, it is possible that future broadcasting licenses are going to be made on a pan-European basis. Instead of competing for the exclusive right to broadcast matches in a given country, some of the biggest, wealthiest broadcasters in Europe may instead attempt to negotiate for the exclusive right to show the matches anywhere on the continent, period. While this tactic would probably be unimaginably expensive for the network with the winning bid (for the sake of comparison in the United States, ESPN recently signed a deal with the NFL for almost $2 billion per year for the right to continue showing Monday Night Football[10] (which is only 17 Mondays per year)), it could also potentially be unbelievably lucrative, given the population's unquestionable infatuation with soccer. This steadfast loyalty to the sport could certainly bring in huge revenues for the broadcaster willing to shell out the most cash for the exclusive right to show the matches across Europe. The biggest potential downside to this approach is that while most European citizens are certainly crazy about soccer, not all of them are fanatical about the English Premier League in particular. Practically every major country in Europe has its own top league, and while the Premier League is, by the numbers, the most financially successful league in the world,[11] some of the other top money earners (Serie A in Italy, La Liga in Spain, Bundesliga in Germany, and France's Ligue 1, to name a few) will certainly compete for their share of the fans, especially in their own countries. However, it is important to keep in mind that after the ECJ's ruling, every league in Europe is going to be faced with the same problem that the Premier League now faces with regard to broadcasting licenses. Therefore, a creative (albeit highly unlikely) solution to this collective problem would be for the leagues to create some sort of super rights deal that would give one broadcaster the exclusive rights to show all of the matches of all the top leagues in Europe. No network would normally even consider a deal like this, but broadcasters may find the slightest bit of temptation in knowing that earning such a rights package would all but ensure that every sport-loving citizen of the continent would subscribe to their networks because they would almost certainly be carrying the matches of any league a prospective custom-

er would want to see. One other potential shortcoming is that in order to maximize the number of potential subscribers, the broadcaster acquiring such exclusive rights would need to be able to offer the matches in multiple languages with multiple different feeds for each country, since obviously not everyone in a given country speaks the same language. This could end up being extremely expensive for the network and a logistical nightmare. While still a plausible option, broadcasters will be hesitant to take such a risk on a highly ambitious endeavor.

However, this very same problem could ultimately lead to an option that is most practical in terms of solving many of the problems posed by the ECJ's decision. FAPL could decide to license the rights *by language*. While any broadcaster would be free to bid on the rights to any language, they would most likely be interested in only the native languages of whatever countries in which they actually operate. For example, Company X in France would probably not have much interest in the rights to the broadcast in Italian. The rights to the broadcast in French would obviously be a different story. This could potentially be an appealing solution, because on the one hand, many broadcasters that currently have the exclusive rights in a given country may not really be affected because the natives of those countries will still subscribe to the networks. Countries such as Slovakia, Romania, and the Czech Republic, which do not have enormous overall populations but nevertheless almost everyone in each country speaks the same language, will presumably have roughly the same number of subscribers under this new approach as they did before the ECJ's decision. On the other hand, broadcasters desiring to hold the rights to broadcasts in languages such as English, French, German, Italian, and Spanish will most likely have to pay much more for those rights simply because there are more people speaking those languages. This artificial partitioning of the market occurs not on a map, but instead according to the social constructs of society determined not by where people live, but by what language they speak.

Ultimately, both the Premier League and the individual broadcasters with which it does business may want to minimize the effects of this decision and change the current territory-by-territory marketing regime as little as possible. Assuming that neither side wants to completely turn the industry on its head and start all over from scratch, what are some possible clauses that FAPL could add to its licensing agreements to try to combat the effects of this ruling? One option may be to stipulate that the broadcaster shall not engage in "active" marketing and selling of its subscriptions outside of the licensed territory, yet at the same time acknowledging that FAPL cannot prevent "passive" selling, which would essentially mean residents of other countries taking the initiative and signing up for the service on their own. In other words, broadcasters would not be allowed to solicit residents of other European countries and advertise their subscriptions, but if those residents choose to sign up on their own, FAPL cannot stop them.

Copyright Protection

Although the first half of the decision appears to deliver a devastating blow to the Premier League in that it emphatically prevents FAPL from having the ability to deny residents of one country from subscribing to foreign broadcasters' transmissions, the second part of the decision dealing with copyright seems to give FAPL the right to prevent pubs from broadcasting unauthorized matches. There was certainly a misconception in the media reports when news of the Court's decision first broke, claiming to give pub owners an enormous victory. In reality, pubs and other commercial premises will not be permitted to show the matches, because doing so would communicate *to the public* certain copyrighted works incorporated into the broadcast. Recall that the Court, in its decision, rejected the notion that live matches can be copyrighted. The Court did, however, recognize that FAPL has copyright in the elements of the broadcasts that it has itself created, such as the league logo on the screen during the game, the selection of pre-game material, and post-game highlights. Therefore, it appears that private viewing in one's home does not constitute infringement, thereby allowing individual households to shop around across the continent to find the best deal. However, showing the matches in a public place such as a pub would still constitute copyright infringement and would be actionable.

The Court ruled that pubs and other commercial premises will not be permitted to show the matches because so showing communicates *to the public* certain copyrighted works incorporated into the broadcast. So the Court seems to rule that pub owners cannot show the copyrighted broadcasts to their customers, but since use in one's own home does not involve communication the public, this will be allowed. However, imagine for a second that a skillful broadcaster could somehow remove all of the copyrightable elements of the broadcast, including the pre-recorded highlights, the Premier League anthem, and even the Premier League logo on the screen. Then, in theory, since it is not violating any of the League's copyrighted material, it should be allowed to show the games. If this in fact holds true, the League may begin including additional copyrightable elements throughout the broadcast to make it practically impossible for foreign broadcasts to be made publicly without infringing the copyright.

Conclusion

At first glance, this decision seems to be a potential deathblow to the current licensing model. Yet upon closer analysis, the impact may not be as devastating to FAPL as first anticipated. Given that the unauthorized viewing in pubs can be dealt with on copyright grounds, and that for private viewers the prices of subscriptions are more

or less the same throughout Europe, it does not seem very likely that private viewers will want to go through the ordeal of purchasing a subscription through another country when in all likelihood they will then have to watch the matches in the language of whatever country's broadcaster they subscribe to. If that is the case, the current revenues that broadcasters enjoy may not be entirely affected, because most subscribers will continue with the same networks. The answer will be known soon enough, as the real test is likely to come this year when the current licensing agreements end and FAPL begins to tender bids for the next licensing period for Premier League matches throughout Europe. Ironically, pub owners like Ms. Murphy, who at first glance appear to be winners in this case, may end up losing more in this judgment than do FAPL or the broadcasters.

Endotes

1. *Premier League Limited & others v. QC Leisure & Others*, C-403/08 E.C.R. (Grand Chamber, 4 October 2011).
2. Kemp Little LLP., *European Union: European Court Rules Against FA Premier League Ban on Foreign Decoders. Mondaq* (Nov. 22, 2011).
3. *Geoblocking*, Web Glossary, http://webglossary.co.uk/g/geoblocking/.
4. While it is not England's highest Court, decisions of the ECJ take precedence over the Supreme Court, and English law has to be compatible with EU law, which is why the High Court referred this matter to the ECJ. The ECJ gives its judgment, which the U.K. court must then interpret. The formal High Court heard this matter on December 16, 2011. The hearing appeared to confirm what was already posited by the lower courts; mainly that territorial exclusivity agreements relating to the transmission of football matches are contrary to European Union law.
5. *Premier League Limited & others v. QC Leisure & Others*, C-403/08 E.C.R. (Grand Chamber, 4 October 2011) at 252.
6. Article 56, Treaty of the Functioning of the European Union.
7. *Premier League Limited & others v. QC Leisure & Others*, C-403/08 E.C.R. (Grand Chamber, 4 October 2011) at 203.
8. *Id*. at 206.
9. *Id*. at 195.
10. http://www.nypost.com/p/news/business/pn_foes_grow_YIO92AxAE3kOE66mobOoUI.
11. http://bleacherreport.com/articles/786046-power-ranking-the-top-30-leagues-in-europe/page/27.

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On the Legality of Online Sports Betting

By Ryan M. Rodenberg and Jordan R. Bass

Shockwaves rippled through the online betting industry on two separate occasions in 2011. First, on April 15th, federal authorities based in New York shut down the three most prominent online poker websites—Full Tilt Poker, PokerStars, and Absolute Poker/Ultimate Bet. The enforcement action was quickly dubbed "Black Friday" for the online poker industry in the United States. Shortly after the crackdown, all three websites featured prominent messages notifying visitors that the portals had been seized. Logos from the Department of Justice (DOJ) and the Federal Bureau of Investigation (FBI) were included. A recently filed amended complaint alleges that Full Tilt Poker, one of the three sites that was seized, operated as a Ponzi scheme. In December, Absolute Poker co-founder Brent Beckley pleaded guilty to, among other charges, conspiracy to violate the federal law pertaining to the processing of payments derived from Internet gambling.[1] In the second incident, the U.S. Attorney's Office in Maryland charged several individuals with running an illegal online sports gambling business and money laundering. Ten separate domain names were seized, with Bookmaker.com the most prominent. The enforcement action was popularly known as "Blue Monday" in the online sports betting industry. Both stories made international headlines and brought the legality of online sports betting to the forefront of public discussion. The purpose of this article is to provide an overview of online sports betting and the legality thereof.

The prevalence of gambling (sports-related and otherwise) in the United States has grown exponentially over the last 30 years. In 1976, there were 13 states with legal lotteries, two states with legal off-track wagering, and one state with casinos.[2] In 2012, all but two states have some form of legal gambling.[3] The rise in gambling along with the increased popularity and portability of the Internet has caused state and federal governments to have to make tough political and policy-driven decisions on the legality of online gambling. One of the most popular forms of online gambling, and the focus of this article, is wagering on sporting events.

Sports Betting Basics

Gamblers can wager on sporting events in a multitude of different ways online. At the simplest level, gamblers can wager on who they believe will win an athletic contest. This is commonly referred to as gambling on the "money line." To account for the varying skill levels of the teams involved, bookmakers set money lines to make the payoff less if a gambler wagers on the team that is considered the better team. For example, if Team A is considered to be significantly better than Team B, then the bookmakers may set the money line at -500. In that scenario, gamblers must bet $500 on Team A in order to win $100 if Team A prevails. On the flip side, gamblers would have to wager $20 on underdog Team B to win $100 dollars if Team B prevails. Another popular way people can gamble on sports is through betting on the point spread. In most cases, bookmakers set the point spread to try and get equal money bets on each side of the spread. If that happens, the bookmakers can pay the winners with the losers' money and collect the vigorish, the fee the bookmakers charge for their services. Point spreads can be as low as 0 (a "pick em" game) and as high as 50 for basketball contests. If a gambler bets on the favorite, then that team has to win the game by more than the point spread for the gambler to win. If the bettor elects to bet on the underdog, the team must win the game outright or lose the game by less than the point spread.[4] For example, if Team C is a seven point favorite over Team D, then gamblers who bet on the favorite would prevail if Team C wins by more than seven points and bettors who wagered on the underdog would win if Team C lost or won by less than seven points. If Team C wins by exactly seven points, the bet is called a "push" and all bets are refunded to both sides.[5]

"The rise in gambling along with the increased popularity and portability of the Internet has caused state and federal governments to have to make tough political and policy-driven decisions on the legality of online gambling."

Two other popular sports betting formats are parlays and proposition bets. Parlays involve multiple bets on one ticket. In order for the gambler to win his or her parlay, every bet made on the ticket must be successful. The more games the gambler includes in his or her parlay, the larger the potential payout. For example, a gambler may choose to bet on two money lines and two point spreads on the same ticket. If he or she is correct on all four bets, a larger payout will be received than if all four games were bet individually. However, the entire ticket loses if even one of the four bets is incorrect. Proposition bets are wagers on specific occurrences during a game. There are endless possibilities for so-called "prop" bets. Gamblers can wager on what the final score will be, who will win the coin toss, or if a specific player will score a certain amount of points. For popular events like the Super Bowl, bookmakers often choose to offer a vast array of proposition bets. However, bookmakers often will not take large wagers

on proposition bets due to the unpredictability of their outcomes and the greater potential for manipulation.

Finally, due to technological advances allowing for the rapid transmission of data, "in-game" betting where bettors are able to make micro-level wagers on game outcomes and individual events within the game (such as the completion of a third down conversion in football or consecutive free throws in basketball) in near-real time from a handheld device or personal computer has become increasingly popular. Such live betting allows gamblers to bet instantly as the game they are watching progress. Using complicated algorithms, computers calculate how the odds change instantly after each play and allow gamblers to place smaller bets that are designed to keep them engaged (and wagering) throughout the game, as opposed to traditional betting methods where wagers are placed before the game, with winnings collected after the game is over. In addition to established online sports book websites like BetUS.com, land-based casinos such as the M Resort in Las Vegas have begun offering in-game sports betting to patrons who are on-site.[6]

As evidenced above, there is a plethora of options when it comes to sports gambling. However, outside of the state of Nevada,[7] gambling on sporting contests is a tricky proposition. Individuals who do not live in or travel to Nevada, but who wish to gamble on sporting events have been forced to find alternative methods. One option that has been popular for decades is the use of an illegal neighborhood bookie. However, with the proliferation of the Internet, online sports gambling has become increasingly popular over the last decade, even though gamblers are often left to wonder if gambling on sporting contests online is legal at the state and federal level given the lack of any recently enacted legislation directly on point.

Regulation of Online Sports Betting

Joseph M. Kelly, in an important article published last year in *Gambling Law Review and Economics*, posited that "it is undisputed that up to 99% of all United States sports wagering is illegal."[8] While the exact amount of money that is gambled illegally is difficult to measure accurately, it has been estimated that there are anywhere between $80 and $400 billion worth of illicit sports-related bets made each year in the United States.[9] A leading expert opined that the online sports gambling explosion "has caught officials in the United States off guard and forced courts to improvise and cobble together precedent based on statutes and case law, neither of which are on point."[10] The patchwork of statutes and case law falling under the sports gambling umbrella are varied.

The most often mentioned federal law when discussing the legality of online sports gaming is the Wire Act of 1961. The Wire Act, enacted as a tool to fight organized crime tool during the Kennedy administration, prohibits the use of wire communications to transmit wagers or information that can aid in the placement of wagers. In relevant part, the Wire Act states:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[11]

In a legal opinion dated September 20, 2011 but not released publicly until December 23, 2011,[12] the DOJ posited that the Wire Act only applies to sports betting. This conclusion reverses the DOJ's previously held position that the Wire Act attached to all forms of Internet gambling, including online poker.[13]

A number of cases prosecuted under the Wire Act have been related to sports gambling. The New York-based case of *United States v. Cohen*[14] is likely the most prominent example. Jay Cohen was convicted of violating the Wire Act while operating an online sports book called World Sports Exchange (WSEX) in Antigua, a small island nation in the Caribbean. After being indicted, Cohen voluntarily returned to the United States to defend himself in federal court.[15] Following a full trial, Cohen was found guilty of operating an online sports book that illegally accepted wagers from the United States over the phone and through the Internet. The Manhattan-based U.S. Attorney, Mary Jo White, stated that the case showed that sports book owners who accepted wagers from Americans could not avoid prosecution in the United States by simply taking their business operations overseas. Relatedly, in the appellate decision, the judge stated there was no dispute that such gambling was illegal under state law in New York. During trial, prosecutors provided evidence that Cohen and WSEX solicited customers from the United States through its website and a toll-free telephone number. Additionally, WSEX set up advertisements in American newspapers and magazines promoting its online sports book. Undercover FBI agents opened gambling accounts on the website, transferred money to their account, and then placed online and telephone bets from New York. The *Cohen* case evidences how the Wire Act, even though it was enacted decades before the Internet was in use, can attach to online sports gambling operations. However, legislative history and subsequent analysis indicate that the Wire Act cannot be used to convict the individual person placing wagers:

> As a general matter, the Wire Act has been more sparingly used than some of the other federal gambling statutes, and as a consequence it lacks some of interpretative benefits which a more extensive case law might bring. The Act is addressed to those "engaged in the business of betting or wagering" and therefore apparently cannot be used to prosecute simple bettors.[16]

Other statutes that have been used to combat sports gambling include the Travel Act, the Illegal Gambling Business Act, and the Racketeer Influenced and Corrupt Organizations (RICO) provision. The Travel Act was enacted in 1961 and applies to anyone who travels interstate or uses an interstate facility to promote, attempt, or perform an unlawful activity. However, much like the Wire Act, the Travel Act is likely only relevant in the sports gambling context when business enterprises are involved. In other words, individuals involved in casual gambling activities could probably not be prosecuted under the Travel Act. However, business organizations that solicit customers are eligible to be prosecuted under this.

The Illegal Gambling Business Act was enacted in 1970 and was part of larger organized crime-related legislation.[17] It was specifically aimed to curtail large-scale, illegal gambling operations that were being used to fund organized crime organizations. In order to prevail in a case under the statute, it must be proved that the gambling ring is: (i) violating a state or local law; (ii) includes five or more people who finance, manage, supervise, direct, or own all or part of the business; and (iii) active for more than 30 days or has gross revenue of $2,000 or more in any one day.[18] The Illegal Gambling Business Act was most recently used by prosecutors in connection with the "Blue Monday" online sports gambling website indictments.

RICO can potentially be used for gambling-related prosecutions as well. To establish the elements of a substantive RICO offense, the prosecution must first prove that an enterprise existed and that it affected interstate or foreign commerce. Next, it must be shown that the person involved was associated with the enterprise, participated in the affairs of the enterprise, and participated in the enterprise through a pattern of racketeering activity. Lastly, the prosecution must prove the individual agreed to participate in the enterprise on his or her own free volition.[19]

Another major statute that pertains to sports gambling is the Professional and Amateur Sports Protection Act (PASPA) of 1992, a bill strongly supported by former New Jersey Senator and New York Knicks player Bill Bradley. PASPA states that:

> It shall be unlawful for—
>
> (1) a governmental entity to sponsor, operate, advertise, promote, license, or authorize by law or compact, or
>
> (2) a person to sponsor, operate, advertise, or promote, pursuant to the law or compact of a governmental entity, a lottery, sweepstakes, or other betting, gambling, or wagering scheme based, directly or indirectly (through the use of geographical references or otherwise), on one or more competitive games in which amateur or professional athletes participate, or are intended to participate, or on one or more performances of such athletes in such games.[20]

Restated, PASPA is a general ban on state-sponsored sports wagering. However, the statute included a litany of exceptions for states that already had some form of sports gambling. The statute allowed Nevada to continue operating and controlling sports books under state-level regulation. In Oregon, the sports lottery game "Sports Action" was grandfathered in under the statute, but later eliminated by the state when the NCAA threatened to withhold college basketball tournament games in the state. Delaware was allowed to continue parlay-based football wagering, but the state discontinued the operation after just one year following a legal battle with the NFL.[21] Finally, Montana was allowed to continue operating numerous types of sports wagering that included Calcutta pools and sports tab games.[22] A one-year exception was granted to allow New Jersey to enact sports gambling legislation, but the state failed to do so by the January 1, 1994 deadline.

The Unlawful Internet Gambling Enforcement Act (UIGEA) of 2006 is another important statute that pertains to the legality of online sports gambling. It states that no person or entity may knowingly accept or help process an online bet or wager through debit card, credit card, check, electronic draft, or similar instrument. As such, the UIGEA has had its greatest impact on banks, credit card companies, and other payment processors that may deal with gambling-related funds. Although certain types of fantasy sports were exempted from the statute's purview, the far-reaching language included in the statute includes multiple types of potential wagering activity, defining "bet or wager" as:

> The staking or risking by any person of something of value upon the outcome of a contest of others, a sporting event, or a game subject to chance, upon an agreement or understanding that the person or another person will receive something of value in the event of a certain outcome[.][23]

The first UIGEA-related conviction was secured December 5, 2011, when two individuals were found to have violated multiple federal statutes in connection with an offshore sports book in Antigua that also included vast ground operations on the East Coast. Massachusetts U.S. Attorney Carmen M. Ortiz said: "Today's convictions should serve as a message to those involved with illegal gambling schemes that the government will apply the full weight of its resources to identify, investigate and prosecute individuals who seek to profit from offshore gambling."[24]

Conclusion

As evidenced above, there is no specific or consistently used statute to regulate online sports gambling. Prosecutors are forced to use statutes that were created pre-Internet or attempt to prosecute the banks and payment processors that online sports bookmakers use to collect payments and distribute winnings to gamblers in the United States. Additionally, the lack of any specific federal law that prohibits casual bettors from placing wagers on sporting events continues to limit prosecutions for online sports gambling to the individuals or organizations that receive the bets or are in the business of sports gambling.

Endnotes

1. Chad Bray, *Busted! Online Poker Co-Founder Pleads Guilty*, Wall St. J. Blogs, Dec. 20, 2011, http://blogs.wsj.com/law/2011/12/20/busted-online-poker-co-founder-pleads-guilty.
2. Lori Miller & Cathryn Claussen, *Online Sports Gambling—Regulation or Prohibition?*, 11 J. Legal Aspects Sport 99, 100 (2001).
3. Utah, Tennessee, and Hawaii are the only three jurisdictions with no state-sponsored gambling whatsoever. *Id.*
4. Point spread betting is most commonly found in football and basketball. Point spreads are rarely set for baseball, hockey, or individual sports such as golf or tennis.
5. Bookmakers often use lines that end in a half point (0.5) to avoid such push bets.
6. Legislation is pending that would allow for remote sports gambling using pre-approved technology anywhere within the state of Nevada, obviating the current requirement that patrons be on-site at the casino. *See* Les Carpenter, *Betting Revolution Sweeps Vegas' Gaming Industry*, Yahoo! Sports, Jan. 31, 2011, http://sports.yahoo.com/nfl/news?slug=lc-ingamebetting013111.
7. Limited parlay card betting on NFL football is offered in Delaware. Sports wagering is also permitted in Oregon and Montana, but neither state is currently offering any type of sports-related betting options.
8. Joseph M. Kelly, *Sports Wagering Prohibition in the United States: An Exercise in Futility and the Best Development for Organized Crime*, 15 Gaming L. Rev. & Econ. 257, 257 (2011).
9. Nat'l Gambling Impact Study Comm'n, Final Rep. (1999), *available at* http://govinfo.library.unt.edu/ngisc/reports/2.pdf.
10. Joseph McBurney, *To Regulate Or To Prohibit: An Analysis of the Internet Gambling Industry and the Need For a Decision on the Industry's Future in the United States*, 21 Conn. J. Int'l L. 337, 337 (2006).
11. 18 U.S.C. § 1084(a) (2011).
12. The December 23, 2011 release date has, somewhat affectionately, been called "White Friday" in Internet gambling circles.
13. Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violates the Wire Act, 35 Op. Off. Legal Counsel (2011), *available at* http://www.justice.gov/olc/2011/state-lotteries-opinionn.pdf. *See also* Nathan Vardi, *Department of Justice Flip-Flops on Internet Gambling*, Forbes, Dec. 23, 2011, http://www.forbes.com/sites/nathanvardi/2011/12/23/department-of-justice-flip-flops-on-internet-gambling/.
14. United States v. Cohen, 260 F.3d 68 (2d Cir. 2001).
15. Other individuals indicted in the case did not return to the United States and have yet to be prosecuted.
16. Charles Doyle, CRS Report for Congress, *Internet Gambling: Overview of Federal Criminal Law*, CRS 5-6 (2004), *available at* http://ipmall.info/hosted_resources/crs/97-619_041129.pdf.
17. Illegal Gambling Business Act, Pub. L. No. 91-452, § 803(a), 84 Stat. 937 (1970) (prior to 1994 amendment).
18. United States v. Sacco, 491 F.2d 995, 998 (9th Cir. 1974).
19. *See* United States v. Darden, 70 F.3d 1507, 1518 (8th Cir. 1995) ([T]he government must prove…that the defendant objectively manifested an agreement to participate…in the affairs of [the] enterprise.") (quotation marks omitted).
20. 28 U.S.C. § 3702 (2012).
21. *See* NFL v. Delaware, 435 F. Supp. 1372 (D. Del. 1977). Delaware moved to re-start sports gambling three decades later, aiming to offer Nevada-style gambling on single NFL games. Delaware's efforts failed following a joint legal challenge by each of the four major professional American sports leagues (NFL, NBA, MLB, and NHL) and the NCAA. *See* OFC Comm. Baseball v. Markell, 579 F.3d 293 (3d. Cir. 2009). As a result of the latter case, Delaware is restricted to offering football betting using parlay cards only. *See id.*
22. David Waddell & Douglas Minke, *An Overview of the Professional and Amateur Sports Protection Act*, Global Gaming Bus. (2008).
23. 31 U.S.C. § 5362(1)(A) (2012).
24. Press Release, U.S. Attorney's Office - Dist. Mass., Defendants Convicted of Racketeering in Connection with Offshore Gambling Business (Dec. 5, 2011), *available at* http://www.justice.gov/usao/ma/news/2011/December/EremianVerdictPR.html.

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The FTC's Green Guidelines and Their Impact on the Future of Fashion and Sustainable Style

By Emily Schall

Introduction

Consumers across the globe are becoming increasingly more ethical about the purchases they make and the clothes on their backs as the green lifestyle has trickled its way into the world of fashion. September 2010 marked the launch of "The Green Shows" in New York City, featuring designers who combined unique designs with social and environmental awareness. Enter the green zone, where designers are creating 100% sustainable garments through environmentally friendly processes…or are they?

In January 2010 the Federal Trade Commission (FTC) enacted a series of "Green Guidelines"[1] regulating the claims manufacturers may make in marketing their lines to the environmentally aware consumer.[2] Many of the Guidelines are particularly relevant to designers and manufacturers in the fashion industry because of the current progression to go green. In addition to the Guidelines, the FTC issued 78 cease and desist letters to retailers who failed to provide consumers with full disclosure of the complete fabric content in their garments, and posted a consumer tip sheet on its website detailing how to identify false green advertising.[3] Ideally, the Green Guidelines will enhance the credibility of green marketing, including claims of being "green," "biodegradable," and "recyclable," as well as requiring information verifying the authenticity of these terms.[4] Thus far, the FTC has filed suit against four corporations that claim their products to be 100 percent ecofriendly, made from the renewable resource of bamboo, when they actually consisted of rayon and not bamboo fibers.[5]

Due to the lengthier and more costly processes needed to create environmentally friendly garments, consumers are willing to pay top dollar for eco-chic items. The FTC's aim behind the new regulation is to insure that the consumer is receiving the added value for the increased cost, and is not misled by deceptive advertising.

At first glance the FTC's efforts appear both necessary and equitable. They prevent consumers from being misled, eliminate unfair competition by corporations, and enforce an organized and efficient framework to be followed by those wishing to profit from the green movement. There are however, a number of drawbacks accompanying the increased regulation affecting the eco-chic revolution. Some of these include issues with U.S. Customs, increased economic cost, and extended production time in an industry where time is money.

These issues are best explained through an example involving a luxurious lotus flower sewn jacket, retailing for $5,600.[6] Woven by hand from the fibers of a lotus plant, the fabric is soft and supple to the touch and resembles a blend of linen and silk, ideal for the environmentally conscious consumer.[7] The sponge-like quality of the yarn creates a porous fabric that is both wrinkle and stain resistant.[8] Cultivated in Mynamar, Southeast Asia, where it is custom to cultivate lotus flowers in floating orchards, the process is long and tedious.[9] 32,000 handpicked lotus stems are needed to produce just one meter of fabric.[10] An average consumer is unable to spend almost $6,000 on a jacket despite its environmentally friendly properties.[11] However, because of the skill demanded to create the fabric, in addition to the extensive development process, manufacturers must maintain the high cost in order to ensure a profit.[12] Additionally, until recently, the U.S .had trade sanctions against Mynamar, because of its military's consistent violations of human rights including forced labor, human trafficking, and child labor.[13] As a result, all of its products were banned from being sold in the U.S.[14] Although designers may be able to circumvent this issue by first importing the fabric to Europe, assembling the garments there, and then bringing them into the U.S., this also does not come without increased cost.[15]

Eco-chic has opened up another opportunity for profit in the fashion industry, but the introduction of the FTC Green Guidelines generates many questions as to what effect the Guidelines will have on the green opportunist. Will the rigid restrictions require designers to substantiate all environmental claims, and demand that modifications be made in marketing schemes, production processes, and product development? If so, will this produce too much of a financial burden for new designers and fail to be a worthy investment? Finally, will this increase in cost of eco-chic couture create yet another genre of fashion out of reach to the average American?

The FTC has policed the fashion industry to prevent misrepresentations by manufacturers long before the development of the green movement. In *Mary Muffett, Inc. v. FTC*, charges were brought against Mary Muffett Inc. for the sewing of labels into rayon dresses and claiming the dresses to be silk, at a time when women were unable to distinguish between the fabrics.[16] In the 1970s, the FTC found Tayor-Friedsam Co., Inc. to have used deceptive marketing tactics by failing to advertise its product's true fabric content, the percentage of each fiber contained in the product, and the generic name for the fibers present, as required by the Textile Fiber Products Identification Act.[17] In 2010, the FTC continued its couture crusade and filed suit against "Sami Designs LLC," "CSE Inc., Mad

Mod," "Pure Bamboo LLC," and "The M Group, Inc. dba Bamboosa," for their false claims of eco-friendliness.[18] As a result, all have since agreed to stop making false claims and abide by the new Green Guidelines.

This article begins by putting forth the FTC Green Guidelines likely to have an effect on the fashion industry. Accompanying each of the relevant guidelines are examples showing how the regulation would apply and whether or not the green marketing claim would likely pass muster with the FTC. The second section deliberates over the likely burdensome and favorable effects the Green Guidelines will have on consumers, the fashion industry, and designers. This is followed by a consideration of other nations' attempts to regulate green marketing claims made by manufacturers in the fashion industry and their results. Finally, the conclusion predicts the likelihood of green fashion as an industry-wide change or a short-lived trend, and specifically emphasizes the impact conscious consumerism and ethical preservation will have on the future of fashion.

Federal Trade Commission Revised Green Guidelines

Manufacturers and their marketing executives have quickly recognized the development of the environmentally aware consumer. As a result, they have become very crafty in their green advertising claims, often making broad statements with little substantiation. This section presents the FTC Green Guidelines and correlating examples from both the FTC website and the fashion industry and predicts the latter's compliance with the Green Guidelines.

The Guidelines apply to all forms of marketing, including symbols, logos, slogans, and product brand names.[19] For a designer, this would also include the name of any lines of clothing or seasonal specials.[20] Names like "EarthWear," "Green Fibres," "SeaSalt," "ecoSneaks" and Levi's line of "eco-jeans" would all be examples of product brand names and clothing lines subject to the Green Guidelines.[21] Although the FTC may take action under the Guidelines, if a manufacturer makes an environmental claim inconsistent with them, it does not operate to bind the FTC or the public.[22] Further, in bringing a claim for violation of the Guidelines, the FTC must prove the marketing tactic was unfair, deceptive, and likely to impact a material aspect of the buyer's purchasing decision.[23] The inquiry is based on what a reasonable consumer would interpret the advertising to mean.[24]

Manufacturers are required to provide support for their environmental claims through tests, analyses, expert knowledge, and research.[25] Substantiation of the claims must then be clearly and prominently displayed on the product or packaging, identifying what part of the product the claim applies to, absent any distracting language.[26] As an example, consider a tote advertised as recyclable and biodegradable. To avoid deceptive marketing, the manufacturer would have to clearly specify whether the biodegradable and recyclable qualities advertised applied to the entire bag or just a part of the bag, including the attached hang tag and the packaging.[27] If the claim applies to all aspects of the product except a minor part, disclosure need not specify the minute disparity.[28] This may include a small ribbon or sticker used to fasten the wrapping paper in place, and unlikely to be assumed biodegradable or recyclable. Levi Strauss & Co.'s advertisements for its line of eco-jeans directly discloses to the purchaser that all aspects of the jeans are "eco."[29] This includes the denim being dyed in natural indigo and made of 100 percent organic fabric, all zippers and buttons made of recycled materials, and the packaging made from organic fabric or recycled paper labeled with soy-based ink.[30] The disclosure informs the consumer of exactly what makes the jeans "eco" and substantiates its claim by detailing each green quality to its purchaser, thereby sufficiently satisfying the Guidelines.[31]

Often a manufacturer will make an environmental claim that is technically true but conveys an impression to the consumer overstating the actual environmental benefits of the product.[32] This concern follows closely with the Guideline requiring substantiation of each claim.[33] In doing so, the manufacturer is prevented from making a general claim of being "environmentally friendly" or "green" without specifying why and how.[34] Often manufacturers will make one of these broad claims while using a blend of environmentally safe fibers and synthetic materials.[35] This enables them to claim green friendliness while improving the feel or performance of the product with cheaper synthetic fabrics, to cut down on costs. Advertising of this nature is viewed as a misrepresentation to the consumer and in violation of the Green Guidelines.[36]

Advertisers are also likely to run into trouble by making general environmental benefit claims suggesting that their products have no negative environmental impact.[37] Due to the broad nature of these claims, the marketer is unlikely to be able to satisfactorily substantiate all reasonable interpretations.[38] Asserting that a sneaker is "eco-friendly because it is made with all recyclable materials" is likely not deceptive, because the broad claim is followed by a specific reference to what makes the shoe eco-friendly. This is assuming that the manufacturer is able to substantiate its claim regarding what are the recyclable materials used. For example, "eco-sneaks," by Simple Shoes®, are clearly described as being made of recycled car tires, certified organic cotton, recycled plastic bottles, and hemp.[39] In contrast, asserting that a garment is 100 percent eco-friendly because it is made with organic bamboo is likely to encounter difficulty. In the aforementioned cases, the FTC brought issue against several corporations making this claim because of the environmentally unfriendly process of turning bamboo into rayon.[40] A claim asserting "100% eco friendliness" because of its bamboo

fiber content was held to be misleading because of the harmful effects on the environment through the discharge of toxic air pollutants.[41]

Although some bamboo fabric can be created through an environmentally safe process, oftentimes it is not.[42] More commonly, what is advertised as bamboo is actually rayon, the generic term for any manmade fiber.[43] Rayon is made from cellulose, the chief component in the walls of plants like wood or bamboo.[44] The FTC's environmental concerns arise after the process of converting the cellulose into rayon strands through a technique called the viscose process.[45] This process requires the cellulose to be treated with sodium hydroxide and carbon disulfide before being placed in a chemical bath of sulfuric acid.[46] The viscose matter is then filtered through a series of small holes forming strands that eventually harden into rayon yarn.[47] As a result of the viscose process, any antimicrobial properties the bamboo retained prior to the chemical bath submersion have dissolved.[48] The residue of these harmful chemicals is frequently dumped into rivers and results in serious damage to the environment.[49] Consequently, it is not the environmentally friendly process so that many retailers claim it to be. If manufacturers opt for the environmentally safe development process, bamboo's series of textile benefits make it an ideal raw material in the fashion industry. As mentioned in the *New York Times*, "Bamboo is a workhorse at sequestering carbon dioxide and pumping out oxygen."[50] "It is a tough plant that manufactures its own antibacterial compounds and can thrive without pesticides."[51] "And its porous fibers make a cloth that breathes and is as soft as silk."[52] "In fact, there is such a stampede of fabric designers in China and Japan, where it is farmed and processed—no such industry exists in the U.S .—that in its May issue, *National Geographic* predicted that this upstart fabric may someday compete with King Cotton."[53]

Bamboo fabric and its questionably green manufacturing process is a predominant source of concern for the FTC.[54] The FTC is taking issue with these retailers and their misleading marketing claims, in particular to assertions including: that products are manufactured using an environmentally friendly process, the products retain natural antimicrobial properties of the bamboo plant, and the products are biodegradable.[55] A reasonable consumer would unlikely interpret a general claim of "eco-friendly" as including such a hazardous effect on the environment. Similarly, an example from the FTC website stated that a claim of "environmentally friendly" because a product's wrapper was not bleached in chlorine would likely be deceptive if the production process released harmful chemicals into the environment.[56]

The key to making a comparative environmental marketing claim without violating the Green Guidelines is sufficient substantiation.[57] Advertising a product as "environmentally preferable" to other leading products must be followed by a specification of what makes it environmentally superior to other brands.[58] For example, specifying that a product contains 75 percent more recycled content then the other 50 percent for leading brands would not be deceptive, because it narrows the claim to only what can be substantiated. Simple Shoes® successfully advertises its line of biodegradable flip flops manufactured with an organic compound that eventually eats away at the bonds holding the shoe's materials together.[59] The site advertises the time for the flip flops to fully degrade to be a mere 20 years, compared to the average of 1,000 years of other brands.[60]

Often a manufacturer utilizes third party certifications verifying its garment's green attributes in its advertising. If so, the certification must first satisfy the criteria required by the FTC's Endorsement Guides.[61] Velvet Leaf, a sustainable clothing company, advertises itself as certified by the "Peterson Control Union Group."[62] This corporation issues certifications for eco-friendly textiles including a "Global Organic Textile Standard," the "Organic Exchange Certification," and the "Supply of Dyes and Processing Aids."[63] To ensure that the certification is not interpreted as a general environmental benefit claim, the user must clearly disclose to the consumer to what environmental properties the certification applies.[64] This Guideline is of particular relevance in the fashion industry because of the movement towards the use of organic cotton over ordinary cotton. Unlike ordinary cotton, organic cotton is not produced with pesticides, synthetic fertilizers, or genetically modified seeds.[65] Further, organic cotton is farmer-friendly, providing the manufacturers with increased income, because they no longer need to purchase pesticides and health risks associated with such hazardous chemicals are no longer an issue.[66]

A marketer may only claim that a product is degradable (i.e., biodegradable, oxo-degradable, or photodegradable) if the product is capable of degrading in the environment where it is customarily disposed, and it must state the rate and extent of degradation.[67] The validity of this test must be supported by scientific research showing that the entire item will break down and return to nature within a reasonable time, which is one year.[68] The Guideline further states that because disposal in landfills, recycling facilities, and incinerators generally does not result in deterioration within a year, use of such disposal to support a degradable claim would be deceptive.[69] OAT's biodegradable sneakers are designed with canvas exterior and seed embedded cork soles, allowing consumers to plant the shoes in their backyards, compost piles, or gardens upon disposal, and watch flowers sprout from the soles.[70] Although OAT's website gives a thorough explanation of the intent behind the biodegradable qualities in the sneakers, there is no mention of how long it takes for the shoes to begin the decomposing process.[71] Manufacturers in general are likely to have an issue with this Guideline because of their failure to substantiate the degradable claim.[72]

As previously mentioned, the FTC has brought suit against several corporations for making deceptive green marketing claims. In *Sami Designs LLC v. FTC*, the following slogan was found to be deceptive because it conveyed to consumers an exaggerated environmental benefit that could not be supported by the manufacturer.[73] "Healthier for you and the environment, pesticide free and chemical-free, ecoKashmere® bamboo clothes are the new earth's cashmere."[74] Sami claimed that its products were chemical-free, despite knowing the process used to manufacture the bamboo involved a wide range of hazardous chemicals being released into the environment.[75] Since a "free-of" or "non-toxic" claim is generally interpreted to mean harmless to both humans and the environment, the Green Guidelines require manufacturers to provide reliable scientific evidence supporting that both their product and the production process are non-toxic.[76] "Bleached with a process that substantially reduces harmful substances associated with chlorine" would not be a deceptive claim with regard to a t-shirt, as long as such a claim is corroborated. Corroboration must be clearly and prominently displayed for the consumer.[77]

American Apparel is one of the retailers at the forefront of sustainable fashion. It has created a strictly sustainable edition of clothing and is slowly integrating 100 percent USDA-certified organic cotton into all of its widely known jersey knit tees.[78] One such example is the "Ozone Friendly, CFC Free" t-shirt.[79] The tee is free of chlorofluorocarbons, or "CFCs," compounds made from chlorine that catalyze the breakdown of the ozone, letting in more dangerous UV rays.[80] Despite its product's proven environmental benefit, American Apparel should tread carefully when claiming its shirt to be "ozone friendly." The broad nature of the claim is likely to be interpreted as a general environmental benefit claim and requires prominently displayed evidence to corroborate all reasonable interpretations of consumers. Claims made by a manufacturer that a product is "ozone-free" or "ozone-friendly" must prove to be safe for both the ozone layer and the atmosphere.[81] Additionally, in order to be truthful, the product must be free of other ozone depleting substances, including halons, carbon tetrachloride, and methyl bromide, among others.[82]

The Recycled Content Claims Guideline governs the use of raw, reconditioned, and remanufactured materials.[83] It allows manufacturers to represent their products as containing recycled content only if the products are composed of materials that have been recovered or diverted from a solid waste stream, either during the manufacturing process (pre-consumer) or after consumer use (post-consumer).[84] At ecoist.com, the company encourages an eco-minded lifestyle by creating fashion accessories out of gum wrappers, chip bags, subway maps, and soda labels.[85] Since 2004, Ecoist.com has saved more than 40 million wrappers from landfills by combining raw materials with an eye for fashion.[86] The Recycled Content Claims Guideline further requires that if items are only partially made of recycled material, such disclosure must be displayed to the consumer.[87] Furthermore, if manufacturers seek to market a product as "recyclable," it must be capable of being collected, separated, or recovered from a solid waste stream through an established recycling program for reuse.[88] Ecoist.com has collaborated with Coca-Cola, M&Ms, Cliff Bar, Frito-Lay, Disney, and Aveda to recover their misprinted or unused packing materials and recycle them to create products. This is an example of an established recycling program, which verifies ecoist.com's claims of using recycled merchandise. Vintage and consignment stores are an example of reconditioned items.[89] In that case, advertisers need not verify claims that their garments and accessories are "recycled" because a reasonable consumer would understand that they are previously used items and not made from raw materials.

In addition to regulating green marketing claims regarding the raw materials used to create garments, the FTC Green Guidelines also regulate the production processes behind the materials.[90] For example, the Green Guidelines monitor claims made by manufacturers asserting their use of renewable energy, which is energy emanating from natural resources such as sunlight, wind, rain, tides, and geothermal heat that naturally replenish themselves.[91] Manufacturers are prohibited from advertising the use of renewable energy if power derived from fossil fuels is also used to manufacture any part of the advertised item.[92] All significant manufacturing processes used for the product must be powered with renewable energy in order to make this claim.[93] In an effort to be more environmentally conscious, many corporations are now using windmills and solar panels to manifest the energy to run their factories. The claim must then be substantiated for the consumer. If a manufacturer uses solar power to run one aspect of its production process, it may not make a broad claim of using renewable energy to the consumer.[94] Coldwater Creek, a women's apparel and fashion accessories corporation, has been recognized by the U.S. Environmental Protection Agency as the largest purchaser of renewable energy in the apparel industry.[95] As reported on its website, "The company will offset 100% of its energy usage through wind power purchased through renewable energy certificates totaling 45,000 Megawatts this year alone."[96] Due to its recognition and vast implementation of renewable resourced energy, Coldwater Creek may advertise to consumers notice of its eco-friendly operation.

A claim stating "made with 100% renewable materials" likely conveys to consumers that the product is also recyclable, made with recycled content, and biodegradable.[97] The FTC has offered this example to illustrate to manufacturers a potentially deceptive renewable materials claim.[98] Unless the statement and each suggested interpretation could be substantiated for the consumer, it would likely be misleading.[99] For the claim to be within

the Guidelines, the entire product must be made with renewable materials, except for some minor component.[100] "Dragon" is a sunglass manufacturer that advertises its line of Environmentally Conscious Optics (ECO) as made from 100 percent renewable materials, including the ink and packaging materials used.[101] Following its claim, Dragon specifies that the materials used are replenished at the same rate they are consumed.[102] This is likely to be sufficient substantiation in support of its claim.

Possible Burdensome Effects of the Green Guidelines

On the Consumer

For those fortunate enough to afford couture eco-friendly garments like the $5,600 lotus flower jacket, it is a tremendous contribution to environmental preservation and the notion of green fashion. However, such extravagance is not required to make a valuable contribution. One of the greatest qualities of green fashion is the lack of a scientific formula delegating what is and is not sustainable style. Sarah Scaturro, of the Cooper Hewitt National Design Museum, recently mentioned at the Fordham Fashion Law Symposium, "Sustainable style is best described as each consumer doing what they [sic] can to make more environmentally aware purchasing decisions, and the culmination of each of these decisions will lead to a more environmentally sound fashion industry."[103]

Livia Firth, an advocate for green fashion in London and co-founder of the green boutique Eco-Age, similarly believes that: "There are two main misconceptions about sustainability in the fashion world. The first is that you have to be an eco-warrior to be involved in sustainable fashion. And the second is that it is only for the rich. Actually, sustainable fashion can be simply buying less, buying better, and not buying from those companies which mass produce at the expense of the earth or through sweatshops."[104] Despite this, the transition to green fashion still raises valid concerns; predominantly, the increased costs and increased manufacturing development, research, and time. Enactment of the Green Guidelines requires designers and those who manufacture their clothes to provide scientific evidence collected by experts to corroborate each environmental claim they make with regard to their products. Research and innovation at this heightened demand will no doubt come at an increased cost in development and in turn an even higher price for the consumer. The objective of the Guidelines was to offer protection to consumers by insuring that they receive the environmental benefits being advertised. However, there is the possibility that the Guidelines will demand so much from the manufacturers that green fashion will be pushed out of reach for the average American and cater only to a wealthier clientele. An important consideration is whether enhanced legal protections developing in fashion are going to bring the U.S. market back to when only the rich could enjoy the latest trends. If a pair of SimpleShoes® biodegradable flip flops retails for $34.99 and a pair of rubber synthetic flip flops at Old Navy retails for $2.99, there is going to be a large percentage of Americans who have to opt for the rubber flops, and no amount of environmentally friendly claims will change their minds.

Due to the consequent increase in costs, designers may struggle to maintain consumer interest until green fashion becomes more mainstream and may demand them to become more creative in their marketing while staying within the lines of the Green Guidelines. Lines with philanthropic involvement and celebrity endorsements have consistently maintained consumer interest. For example, TOMs shoes are environmentally friendly, stylish, provide an opportunity for purchasers to contribute to a great cause, and have shown to be hugely successful.[105] The shoes are made out of recyclable materials, and for every pair purchased, another pair is given to a shoeless child in Argentina.[106] The success of the shoes has even attracted celebrity endorsement by the Dave Matthews Band, whose members were so impressed with TOMs that they helped design a limited edition "Dave" shoe.[107] From a business perspective, the "philanthropic capitalism" model has proven very well-liked for other causes including Gap's RED campaign for Aids in Africa and Ralph Lauren's Pink Pony for Breast Cancer campaign. Like TOMs, they show one way to maintain a competitive price without sacrificing consumer interest. In addition to receiving an environmentally conscious shoe, the consumer is making a charitable donation, thereby justifying the increased price. This is an alternative method for designers and manufacturers looking to launch a green line but trying to offset some of the increased production costs.

Acknowledging that most consumers will not pay exorbitant rates for organic or biodegradable garments and fashion accessories, there are still numerous ways to become a part of the green movement in fashion without donning a $5,600 lotus suit. One of the simplest ways is to participate in post-consumer recycling and donating clothes to the textile recycling industry.[108] This industry has companies conveniently set up all across North America near major cities, such as New York, Los Angeles, Toronto, and Dallas, who collaborate with GoodWill and The Salvation Army to cut down on textile waste.[109] In the U.S., we consume 83.9 pounds of textiles per person per year.[110] It would be much better removing it from the waste stream and instead recycling it into new products or donate what is no longer used. The textile recycling industry also works with various disaster relief efforts supplying textile demands all over the world, from Africa, to Japan, to Sri Lanka.[111] Consumers may even be able to prosper from the green movement while facilitating its growth by selling their out of season clothes to consign-

ment and vintage stores. Being an eco-warrior demands only making more earth conscious fashion choices, a practice unaffected by any amount of government regulation.

On the Industry

Many large apparel corporations have shown interest in green fashion but have been hesitant to make the complete transition. The extent of their investments includes no more than an environmentally friendly line or a few sustainable items sold exclusively over the Internet. However, their hesitation to fully commit to the green movement is not unfounded. There are a number of legitimate concerns corporations are facing relevant to their involvement, including financial issues, business relations, and whether or not entering the green market is a worthy investment.

Sarah Rayne Oakes, a Sustainability Innovation Consultant, proposed several of her own thoughts regarding the hesitation of corporations, in an essay on the "Likelihood of Eco-Fashion Going Main Stream."[112] She suggests the relationships between retailers and their chemical and manufacturing companies as a likely source of retailers reluctance to fully commit to the green fashion movement.[113] Collaboratively deciding to sever all business relationships and blacklist the chemical manufacturers with which these corporations have been dealing to develop their textiles for years could lead to accusations of collusion, violations of antitrust law, and a number of lawsuits.[114] This would not be unlike *The Fashion Originator's Guild of America* v. *FTC* in 1941, where it was held that blacklisting retailers who sold knockoffs of the designers' works was an unfair method of competition tending to create a monopoly.[115] Further, the FTC's new regulations will police with increased scrutiny, maintaining a close watch on companies who decide to make environmental claims. Corporations making an attempt to steer clear of government regulation and public attention may choose not to go green for this reason. One such example is Christian Dior, after one of its celebrated designers, John Galliano, acted violently and made anti-Semitic remarks in a Paris bar.[116] The accusations led to a stream of bad press for the both the designer and the Christian Dior brand,[117] which was only recently revamped 15 years ago and has since become Louis Vuitton Moët Hennessy's second leading brand.[118] In an attempt to avoid any additional scrutiny or risk damage to a brand it has spent millions of dollars on rebuilding, executives of Christian Dior may opt not to enter the green market. Other corporations may be facing financial issues from the faulty economy and simply cannot afford to hire the additional researchers and marketing personnel, and invest in expensive environmentally safe equipment. If green fashion is going to become an integral part of the fashion industry, manufacturers need to be convinced that these changes are not part of a mere trend, but rather the evolution of the industry and worth the increased regulation and scrutiny by the FTC. They have to know that two years down the road consumers will still care whether or not their jeans are made with organic denim before fully committing their corporations. Like labor and employment changes made in the early 1900s, where the industry as a whole was revolutionized, today's manufacturers must be persuaded that environmental awareness is a necessary change and they will be left behind absent their involvement.[119]

To ease the transition of retail giants into green fashion, it is key to ensure that they are well informed of the long-term financial and environmental benefits resulting from their involvement. Eco-chic information workshops would provide an opportunity to discuss the FTC's Guidelines, the reasons for increased regulation, and why eco-friendly fashion is worth the extra time, money, and monitoring. This would reduce the likelihood of the manufacturers viewing the Guidelines as a deterrent to green involvement. Since big retailers reach considerably more consumers than small boutiques, where the bulk of sustainable style is currently sold, they could potentially contribute to an industry-wide transformation, allowing sustainable style to plant long-lasting roots into the fashion industry. As Stella McCartney, a longtime sustainable fashion designer, has said, "The important thing is that everyone keeps an interest in it, and there is a vested interest because we live on this planet and we need to look after it, as without it, we have nothing. So it's just not the fashion industry, it's every single industry."[120]

In addition to the FTC, several large apparel corporations have taken a keen interest in encouraging the green movement in fashion and regulating the industry's impact on the environment. Gap, H&M, Levi Strauss, Walmart, Nike, Patagonia, Addidas, Target, the U.S. Environmental Protection Agency (EPA), and others have joined forces as the Sustainable Apparel Coalition.[121] The group will issue an industry-wide guide, gauging the environmental and social impact of clothing and footwear in an effort to bring about a lasting change in the industry's environmental cognizance.[122] Involvement of this caliber from giant retailers could go two ways. First, it could minimize some of the concerns of manufacturers and designers in making the transition to sustainable style, because it will show that green fashion is worth the investment. Second, the inter-industry monitoring, in addition to policing by the FTC, could deter manufacturers completely and interest in sustainable style will wane. As designers do not like to be left behind when a new genre of fashion has shown to be as influential as the green movement and the universal dedication to sustainability, the former is more likely. The development of this coalition and the new Green Guidelines are corroboration of the evolving American market towards environmental awareness and the promotion of higher standards of living.

On the Designer

Larger corporations like those forming the Sustainable Apparel Coalition have the manpower, support, and lawyers to make dramatic changes in their companies. They can afford risking a profit loss to keep up with the evolving industry, while many new designers cannot. One look at the FTC Guidelines demanding substantiation, research, evidence, and satisfaction of all reasonable interpretations is enough to deter the involvement of many. The possibility of having to reconfigure a business model to effectively substantiate all environmental claims and benefits by making modifications in marketing schemes, production processes, and product development may be too much of a burden for new designers. While designers are known for their creativity and fine art in the fashion industry, they also have a reputation for neglecting the business aspects of being an entrepreneur. In the first few years of development, a designer is often battling to stay afloat, failing to make a profit, and not looking to add any additional difficulties. Despite the added impediments, the sustainable style challenge can be looked at as an opportunity for young designers to explore new fabrics, textiles, and materials. As Lucy Lethbridge notes, "The ingenuity and imagination of the new generation of designers is dazzling. They have taken recycling out of the thrift shops and converted them into marvels of one-off chic."[123] Fashion is so often an industry of recycling ideas and styles, the green movement opens up a window to an entirely different domain of fashion, opportune for new designers looking to distinguish themselves.[124]

Possible Favorable Effects of Green Guidelines

While recognizing that there are some valid concerns accompanying the FTC's Green Guidelines, it is also understood that the FTC is not seeking to increase purchasing costs for consumers or subject designers to overwhelming scrutiny, but rather is interested in protecting the public and creators, while encouraging the advancement of sustainable style in the industry. Before enactment of these guidelines, manufacturers were taking advantage of the public by strategically dropping buzz words like "natural," "organic," "recyclable," and "100% Certified Green." Manufacturers used these suggestive words knowing how consumers interpreted them and knowing these interpretations were not entirely sound, a practice characterized by the FTC as "greenwashing." The public saw these words, and trusting that they were making an environmentally conscious purchasing decision, would not later research any of the claims made by the manufacturer. Now, as a result of the revised Guidelines, consumers no longer need to worry about the validity of these claims. The FTC has done the work of constructing a set of regulations demanding the manufacturers to research the validity of their own claims, and provide the consumers with this information. Additionally, the Guidelines have brought a great deal of exposure and attention to green fashion as a global issue. Many people are not aware that cotton, advertised as "the fabric of our lives," is one of the world's most chemically dependent crops, or that it requires an average of 17 teaspoons of synthetic fertilizers per t-shirt.[125] There are serious environmentally hazardous issues like this throughout many of the manufacturing and production processes in fashion, and society has been shielded from them for far too long. The Guidelines have instilled awareness in consumers about not only the importance of sustainable style, but also the need to look beyond the clothes on our back and shoes on our feet and consider the impact of their creation.

In addition to the ornamental aspects of fashion, clothing has been used as a means of protection for the body since the dawn of humankind. Fashion that harms people as they wear it or harms the environment we live in goes against this original utilitarian purpose of clothing. Horst Rechelbacher, the founder of "Intelligent Nutrients," an award winning organic health and beauty brand, believes that fashion is about non-toxicity and, "If fashion pollutes, it should no longer be called fashion, it should be called pollution. It's wise to only put on your body something that wouldn't harm you if you swallowed it."[126] The FTC Green Guidelines hand back to consumers the ability to choose clothing that not only looks good but also protects them and the environment in which they live.

Historically, when governmental regulation in fashion became too stiff for designers, they moved their businesses offshore where regulation was much more flexible or nonexistent. Leather craftsmen in the late 20th century did just this when the toxicity involved with leather making became a great concern for the EPA, when it began issuing environmental oversight penalties.[127] Like the EPA's concerns regarding tanneries, the FTC's concerns about green fashion have led to warning the industry of penalties. However, even if manufacturers were to bring their pseudo-green merchandise overseas to the U.K., regulation there would not be any less rigid; quite the contrary, regulation and monitoring in eco-fashion first developed in the U.K. is even more stringent than in the U.S.

Comparative Foreign Regulation

In predicting the likely impact the FTC Green Guidelines will have on the United States' fashion industry, the U.K.'s efforts to regulate green marketing claims are indicative of success. This section considers the FTC's initiatives with those of the U.K., and other countries, including Canada and Japan, and emphasizes the current worldwide effort to encourage environmentally aware consumerism.

The U.K.'s government has made a significant commitment to encouraging sustainable style by creating guidelines and standards to regulate the industry.[128]

Specifically, in 2003, the Department of the Environment, Food, and Rural Affairs (DEFRA) was formed as a means of enforcing clear and accurate environmental claims to prevent consumer confusion.[129] The DEFRA enforces its regulations on U.K. apparel brands, manufacturers, and retailers.[130] In 2010, the government and fashion industry collaborated to reduce the environmental and ethical impact of clothing on the environment through the "Sustainable Clothing Roadmap."[131] The project is divided into five different areas of improvement within sustainable fashion that address consumer trends and behavior, media and education, market drivers, and traceability along the supply chain.[132] Specifically, the Roadmap conducts studies to identify the largest environmental problem areas in the industry and develops both long- and short-term action that could be taken to rectify them.[133] Most recently, Levi Strauss & Co. worked with DEFRA to proactively develop "Fashion Futures," a layout of five challenges sustainable fashion will be facing in 2025, and some possible solutions.[134] John Anderson, president and chief executive officer of Levi Strauss & Co. comments, "For the fashion industry to be sustainable economically, it must be sustainable socially and environmentally too. These provocative scenarios challenge all of us to look beyond the short term and use our collective power to work to create the kind of positive world we'd like to see in 2025."[135]

One effort already made and proven successful by the U.K. is its issuing of Marks & Spencer (M&S) clothing vouchers, as part of its Sustainable Clothing Action Plan (SCAP).[136] The vouchers are given to customers who bring their old M&S purchases back to the store to be distributed to families in need.[137] Since the launch of the project in 2008, over 2,500 tons of clothing have been reused instead of deposited into landfills.[138] Another successful venture is the U.K.'s "Responsible and Accountable Garment Sector" fund (RAGS), which provides manufacturers who agree to maintain production in a more ethical manner and contribute to the underprivileged with a £3.5 million endowment.[139] The idea behind the initiative is to make "ethically produced clothing the norm in the U.K."[140] Additionally, the British Fashion Council is currently lobbying to provide fashion businesses with tax incentives as motivation to become more environmentally and ethically conscious.[141] Other countries, including Japan and Canada (although not as progressive as the U.K.), have implemented similar governmental regulations in their apparel industries to prevent consumer confusion and hold manufacturers to their eco-claims.[142] Canada began policing the mislabeling of sustainable clothing in August 2009, specifically addressing the issue of manufacturers labeling clothing as bamboo instead of rayon.[143] In Japan, the primary concern was over mislabeling organic cotton.[144] Manufacturers must now specify what percentage of organic cotton the garment comprises to prevent misleading the consumer.[145] Enforcement of the FTC guidelines followed shortly after Canada in 2009 and has since developed as the market for green fashion has continued to grow.[146] Judging from the common concerns across the world and the vast amount of time and money governments are investing into regulating the green market, it does not appear that sustainable style is just another passing trend.[147] In fact, in January 2010 over 500 distinguished figures, both governmental and business related, gathered in Geneva to discuss the issue of sustainable style.[148] Governments, fashion businesses, luxury retailers, and consumers all play roles in continuing to preserve natural resources and continue the growth of the green market.[149]

Conclusion

All of the issues discussed above stem from the modern consumers' demand for "fast fashion," more garments rather than better garments, and the manufacturers' frenzied attempts to keep up with others by sacrificing quality fabrics and craftsmanship. The fashion industry in the U.S. is currently undergoing many changes. There is significant legislative involvement in extending the rights of designers to protect their works and prevent piracy, in addition to efforts being made to bring back the garment district and American manufacturing.[150] The FTC Green Guidelines add to the attempted changes in the industry by demanding that manufacturers provide consumers with the environmentally conscious qualities promised in their advertising. In order for green fabrics like organic cotton, organic wool, hemp, and bamboo to find a lasting home in fashion, manufacturers have to slow down and consumers have to buy less.[151] Despite the poor economy, consumers are still spending money, but spending in the least environmentally sound way. Instead of purchasing three Forever 21 100% Cotton Wide Stripe Cardigans for $19.80, a consumer could purchase one Patagonia blended organic cotton and Tencel Women's Versatiliti Cardigan for $55. Due to the environmentally safe fabrics used by Patagonia and the quality of its garments as compared to Forever 21, the consumer would benefit by receiving a quality lasting product and the environment would benefit from the consolidation of purchases and eco-friendly materials. Fashion historian Jane Mulvagh emphasizes, "If it means paying more it also means that you take care of the clothes because you respect the craftsmanship that goes into them."[152] Manufacturers would have to increase production costs and time by tracking down sustainable materials rather than using the easily attainable, yet equally as hazardous, cotton. Instead of producing 10,000 cotton cardigans, manufacturers may only be able to produce 5,000 organic cotton cardigans. Changes in volume and manner of production and purchasing are challenging obstacles likely to improve slowly in the evolvement of the industry. With the significant attention currently being paid, meaningful consumption may be the future of fashion, but not without great persuasion. Additionally, the introduction of the Green Guidelines, with even greater demands from designers and manufacturers looking to

"live green," will further prolong the changes by adding new issues to be resolved.

The phrase, "you are what you wear" surfaces new meaning as the demand for ethical consumerism and environmental preservation increases and the world continues to move into a more eco-friendly lifestyle. Long time fashion designer Rebecca Moses said it best when she declared, "Style is not skin deep. It is soul deep. It is our most significant form of expression. It is how we communicate who we are to the world around us. It is our voice."[153] Consumers are becoming more conscious of what their clothing communicates about them both ethically and environmentally. Regulation like the FTC Green Guidelines force manufacturers to slow down and ensure quality in their products and use only narrowly tailored advertising to promote them. Consumers are also forced to slow down, read labels, and research their purchases. As green fashion continues to become more mainstream, and made available in stores like Walmart, H&M, and Gap, opportunities for the average consumer to take part in the green fashion movement will increase. Additionally, markets for more expensive green fabrics like organic wool and organic leather, dependent on the popularity of the organic meat market, will become more conventional as the green industry expands.[154] In the meantime consumers can trust the FTC Green Guidelines to ensure that they are receiving the green qualities promised in affordable green purchases.

Endnotes

1. 15 U.S.C. §§ 41-58, §5, which prevents unfair or deceptive acts or practices.
2. *Bamboo and The FTC*, O Ecotextiles (2009), http://oecotextiles.wordpress.com/.
3. *Id.* (Appendix 1, 2, & 3).
4. *Id.*
5. *Id.*
6. Christina Binkley, *New Luxury Frontier: A $5,600 Lotus Jacket: Why Loro Piana Is Selling a $5,600 Jacket Painstakingly Woven From a Plant in Myanmar*, Wall St. J., Nov. 3, 2010.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Mary Muffet, Inc. v. F.T.C.*, 194 F.2d 504, (2nd Cir. 1952).
17. *Taylor-Friedsam Co., Inc. v. F.T.C.*, 69 F.T.C. 483 (1966); Textile Fibers Identification Act, 15 U.S.C. § 70 (2006).
18. CSE Inc., Mad Mod, WL 2584868 F.T.C. (2009): Pure Bamboo LLC, WL 2584869 F.T.C. (2009); The M Group, Inc., WL 2584879 F.T.C. (2009); Sami Designs, LLC, WL 2584870 F.T.C. (2009). This corporation issues certifications for Eco-friendly textiles, including a "Global Organic Textile Standard," verifying the production, processing, manufacturing, packaging, labeling, exportation, importation and distribution of all natural fibers, the "Organic Exchange Certification," confirming the use of sustainable organic cotton, and the "Supply of Dyes and Processing Aids," accessing the producers of dyes and the production process. Yuka Yoneda, *Velvet Leaf*, Inhabitat Design Will Save the World (2006), http://inhabitat.com/velvet-leaf-classically-tailored-organic-dresses-for-fall/.
19. FTC Proposed Revisions To The Green Guides, 16 CFR § 260 (2010).
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. Collin Dunn, *Levi Jeans Go Organic For 2006*, Tree Hugger (July 5, 2006), http://www.treehugger.com/files/.
30. *Id.*
31. *Id.*
32. Guides for the use of Environmental Marketing Claims, 16 CFR § 260 (2012).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Simple: Shoes for a Happy Plant*, Green Girls Global (Jan. 17, 2010), http://www.simpleshoes.com/ProductDetails.
40. *FTC Charges Clothing Firms With 'Bamboo-zling' The Public*, Environmental Leader (2009), http://www.environmentalleader.com/2009/08/12/ftc-charges-clothing-firms-with-bamboo-zling-the-public/.
41. *Id.*
42. *Id.*
43. *Bamboo and The FTC*, O Ecotextiles (2009), http://oecotextiles.wordpress.com/?s=bamboo+fabric.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. Ann River, *A Cane the World Can Lean On*, N.Y. Times, July 5, 2007.
51. *Id.*
52. *Id.*
53. *Id.*
54. Countries where cotton is a major export are among the 15 poorest in the world. Damien Sanfilippo, *A Fair Deal For Farmers*, in Future Fashion White Pages, 137 (Earthpledge, 2007). Many cotton

farmers are in debt to their pesticide suppliers because of the high price of the products and delay in payments from manufacturers and retailers for cotton. *Id.* As a result, it is not uncommon for a considerable number of cotton farmers to commit suicide. *Id.* The cutbacks of pesticides provided organic cotton farmers with reliable payments and an opportunity for females to participate in the cultivation process now that exposure to harmful chemicals and the risks to miscarriages were no longer present. *Id.*

55. *FTC Charges Clothing Firms With 'Bamboo-zling' The Public*, Environmental Leader (2009), http://www.environmentalleader.com/2009/08/12/ftc-charges-clothing-firms.
56. *See supra* note 19.
57. *Id.*
58. *Id.*
59. *See supra* note 39.
60. *Id.*
61. *Id.*
62. Yuka Yoneda, *Velvet Leaf Classically Tailored Organic Dresses for Fall*, Velvet Leaf, (2006), http://inhabitat.com/velvet-leaf-classically-tailored-organic-dresses-for-fall/.
63. Biodegradable material is capable of decaying through the action of living organisms., *What Is Biodegradable?*, U.S. Geological Survey 3 (2008), http://www.usgs.gov/. Oxo-degradable material is material that degrades by light, heat, mechanical stress, and moisture. *Id.* Photodegradable material is capable of being chemically broken down by light. *Id.*
64. *See supra* note 19.
65. Damien Sanfilippo, *A Fair Deal For Farmers*, in Future Fashion White Papers, 137 (Earthpledge, 2007).
66. *Id.*
67. *See supra* note 19.
68. *Id.*
69. *Id.*
70. Kirin Rinehart, *Plant OAT's Biodegradable Sneaker*, Watch It Bloom into Flowers, (2010), http://www.ecouterre.com/plant-oats-biodegradable-sneaker-watch-it-bloom-into-flowers/.
71. *Id.*
72. *Id.*
73. Sami Designs, LLC, WL 2584870 F.T.C. (2009).
74. *Id.*
75. *Id.*
76. *See supra* note 19.
77. *Id.*
78. *American Apparel Sustainable Edition*, American Apparel (2010), http://www.americanapparelorganics.com/buy.html.
79. *Id.*
80. *Id.*
81. *See supra* note 19.
82. *Id.*
83. *Id.*
84. *Id.*
85. *Ecoist Newspaper Collection Handbags & Recycled Purses*, Ecoist (2010) http://www.ecoist.com/pc/.
86. *Id.*
87. *See supra* note 19.
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. Coldwater Creek, (2010) http://www.coldwatercreek.com.
96. *Id.*
97. *See supra* note 19.
98. *Id.*
99. *Id.*
100. *Id.*
101. *About Dragon*, Dragon Alliance (2007), http://www.dragonalliance.com/en-us/about-Dragon.
102. *Id.*
103. Fashion Law Symposium, Sarah Scaturro, Textile Conservator, Cooper Hewitt National Design Museum (April 15, 2011).
104. *Fashion Flies The Eco Flag in London*, Women's Wear Daily, Sept. 18, 2010.
105. TOMS (2011), www.toms.com.
106. *Id.*
107. *Id.*
108. Jana Hawley, *From My Closet to Africa: The Dirt on Post Consumer Recycling*, in Future Fashion White Pages, 108 (Earthpledge, 2007).
109. *Id.*
110. *Id.*
111. *Id.*
112. Summer Rayne Oakes, *Selling Eco-Fashion on Main Street*, in Future Fashion White Pages, 229 (Earthpledge, 2007).
113. *Id.*
114. *Id.*
115. *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 462 (1941).
116. Matthew Saltmarsh, *Dior Fires John Galliano After Bigotry Complaints*, N.Y. Times, March 1, 2011.
117. *Id.*
118. *Id.*
119. After the 1911 Triangle Shirtwaist Fire in New York City, where 146 young factory workers were killed after finding themselves trapped within the building as it burned to the ground. Clyde Haberman, *Choosing Not To Forget What Is Difficult To Recall,* N.Y. Times, March 25, 2010. To provide safer working conditions in America's factories, changes were made requiring proper ventilation, restrooms, sprinklers, mandated fire drills, stronger work unions, and fair wages. *Id.* The disaster led to increased regulation and monitoring by the government to insure that factories were abiding by the new regulations and U.S. labor laws and the fashion industry were changed forever. *Id.*
120. *Fashion Flies The Eco Flag in London,* Women's Wear Daily, Sept. 18, 2010.
121. *Tom Zeller Jr., Clothes Makers Join to Set 'Green Score',* N.Y. Times, March 1, 2010.
122. *Id.*
123. *See supra* note 119.
124. Lucy Lethbridge, *As the Craft Council's exhibition 'Well Fashioned: Eco Style in the UK' begins its nationwide tour, Lucy Lethbridge tells*

us more about 'green' couture in Europe, EUROPE IN THE UK: CULTURE (2006), http://www.europe.org.uk/index/-/id/137/.

125. Coral Rose, *Good for Business, Good for the Environment*, in Future Fashion White Pages, 250 (Earthpledge, 2007).

126. *Supra* note 119.

127. Prior to this time, leather goods were treated with all natural materials, including benign wood smoke and natural oils. Matt Richards, Rowan Gabrielle, & Stacie Shepp, *Organic Leather*, in Future Fashion White Pages, 54 (Earthpledge, 2007). It was not until 1870 when the chemical industry expanded and developed a faster and much more toxic method of tanning to keep up with consumer demand that environmental worries developed. *Id.*

128. Bethan Harris, *Sustainable Development In Government*, DEFRA, (2010), http://sd.defra.gov.uk/2010/03/sustainable-future-for-fashion/.

129. *Id.*

130. *Id.*

131. *Product Roadmaps: Clothing*, DEFRA (2010), http://www.defra.gov.uk/environment/business/.

132. *Id.*

133. *Id.*

134. Forum For The Future, Fashion Futures 2025: Global Scenarios for a Sustainable Fashion Industry, FORUM FOR THE FUTURE (2010), http://www.forumforthefuture.org/projects/fashion-futures. "Fashion Futures" is a combined effort between Levi Strauss & Co. and Forum for the Future, a corporation that works with industries towards a more sustainable world. Bethany Harris, *A More Sustainable Future for Fashion*, DEFRA, (March 9 2010), http://sd.defra.gov.uk/2010/03/sustainable-future-for-fashion/. Fashion Futures considers issues like climate change, population growth, and resource shortages, and how they will impact the development of a sustainable fashion industry.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Supra* note 127.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Eco-Chic Business Seminar*, ECO CHIC FASHIONS (2010), http://www.ecochicfashions.com/business_seminar_geneva.html.

149. *Id.*

150. Cheap manufacturing prices overseas and expensive NYC rents have forced many designers out of the garment district and what used to be an industry employing hundreds of thousands of people continues to dwindle. Charles Bagli, *New York Seeks to Shore Up Shrinking Garment District*, N.Y. TIMES, August 19, 2009. Legislative efforts over the past few years look to address the issue by re-zoning the district to both protect the garment district and allow for business expansion. *Id.*

151. Julie Gilhart, *The New Cool*, in Future Fashion White Pages 1. 2 (Earthpledge, 2007).

152. *Supra* note 103.

153. Rebecca Moses, A Life of Style: Fashion, Home, Entertaining, 27 (The Monacelli Press, 2010).

154. Matthew Mole, *Dreaming of Organic Sheep*, Future Fashion White Pages, 150 (Earthpledge, 2007).

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Social Networking

By Mark Grossman

It is time for officers, directors and managers of companies to remove their blinders. Social networking is here to stay. Companies should choose to use the technology, regardless of the legal risks involved.

Although most activities carry legal risks, our job as lawyers is to help our clients manage those risks. Moreover, the risks that come from social networking are manageable. This article will help you accomplish this.

The "risk" issue is reminiscent of when email was first introduced to corporate desktops in the 1990s. Companies engaged in what today seem like nonsensical debates about whether employees needed email. Of course, they did. Similarly, they worried about legal risk in the face of unknown law. Sound familiar?

Within two years, virtually every company will be using social media like LinkedIn, Facebook, Google+, and Twitter to promote itself. Does your company or do your clients really want to be last in?

Reining in Risk for the Enterprise

Most commentators would acknowledge that social networking for the enterprise is not without risks. In fact, it is like any other public forum and carries most of the same risks. Issues that a company needs to consider include copyright infringement, trademark violations, litigation related issues, advertising and employment law, and privacy.

The starting point of any legal analysis of any issue involving the Internet is that the Internet is *not* the Wild West. Rather, it is a forum that is at least as regulated as any newspaper.

The problem is that as with any new technological advancement, the law trails the development of the technology. After all, nobody regulates technology that is yet to arrive.

"New" is where we are with social media in that the law is still developing. Thus, as we had to do with the Internet generally in the 1990s when "Internet Law" was still in its infancy, we must look to current law and use common sense to apply it by analogy to social networking. (The problem is the concept of "common sense," since "law" has been described as "common sense as modified by the legislature and courts.")

Some of the analogies are easier than others. For example, it is certainly clear that a company cannot use material created by others in violation of general copyright law. The Digital Millennium Copyright Act (DMCA) is yet another federal statute that is relevant to social networking. The DMCA could require that a company promptly take down material from a social networking site it controls, regardless of whether an employee or third party posted the infringing content.[1]

Likewise, a company's social networking posts must be sensitive to trademark law. If a trademark analysis says that a company could not use "Coke's®" logo in a company brochure, then it cannot also be used on that company's blog. This is the common sense part.

Another easy one is in the area of litigation. There can be no doubt that if a company has a litigation hold in place for whatever reason, this hold would also apply to all social media. Thus, a company may not erase a blog post that is relevant to litigation, even though common sense says that it would be wise to remove public access to a problematic post.

Another area of concern is advertising law. It is certainly common sense to assume that the Federal Trade Commission Act, which bans unfair and deceptive trade practice[2] and the CAN-SPAM Act,[3] which regulates "spam," are relevant to the world of social media.

Using copyright and trademark concerns, litigation holds, and advertising and employment law as mere examples, one can begin to see the importance of training employees. It goes without saying that they are the actors for a company and that a lack of training and sensitivity to these issues can cause serious trouble for a company.

However, it is also important to dispel the myths about the "Wild West." In an online environment where the entire world might see a social networking post, companies certainly do not want employees posting such statements as, "Our only competitor is a thief," because defamation law applies to social networking activities.

Employees' Personal Social Networking

Another area of concern is how employees use social networking outside the office. Most or many have personal accounts on Facebook, LinkedIn, Twitter, Google+, and others. They may not understand that what they say on their personal Facebook accounts could haunt both their employers and themselves.

A company should have a solid social media policy in place. A great example of a personal blog policy is one developed by Yahoo![4]

Among the most important concepts in the Yahoo! policy is that any employees who identify themselves as Yahoo! employees "should notify their manager of the existence of their blog just to avoid any surprises."[5]

Knowledge is power, and a company can mitigate the risk employees create online by merely knowing the post is there. While many companies may want their employees promoting their business in their personal LinkedIn and Facebook accounts, it is important to sensitize employees to the fact that when they speak on behalf of their employers on a personal social networking page, they are putting their employers at legal risk, just as if they were posting on the employers' "official" LinkedIn pages. This may not be obvious to the employee, who may think that different rules apply on a personal social networking page. That is why it is crucial for a company to have a social media policy, and to train all employees as to the policy's rules and consequences.

Monitoring Employees' Online Activities

Many companies have started to monitor their potential and current employees' online activities. The fact is that people will post "remarkable" stuff online for all to see. Many companies will look at that "remarkable" stuff and choose to pass on a potential hire or consider terminating an employee over online posts.

It can be hard to feel sorry for someone who "friends" his or her boss on Facebook and posts, "My boss is an incompetent fool." ("Oops. I forgot he was among my friends.") Still, it is important for your company to have a written policy in place that clearly states that the company does and will continue to monitor social networking activities for posts the company reasonably deems inappropriate. Further, this policy should make it clear that termination is among the possible consequences for inappropriate activities.

A bit of caution is in order when monitoring personal activities online, however, because some states (including New York) have laws that prohibit an employer from punishing an employee due to legal leisure time conduct.[6] Nonetheless, many think that it is a best practice to monitor employees' online activities while being aware of the parameters for action set by statutes or otherwise.

Embrace but Understand

If a company has not yet jumped headfirst into using social networking to its advantage, it is time to do it. This should be about as obvious as the need for a corporate website should have been in 1996.

While it is true that the law can be murky with social networks, with some education, training and supervision, one could and should minimize those risks. Do not permit yourself to be a nay-saying lawyer fearful of new technologies. If that is you, hire an outsider to assist. Do whatever it takes. Just do it.

Endnotes

1. 17 U.S.C. § 512 (2012).
2. Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2012).
3. Controlling the Assault of Non-Solicited Pornography and Marketing Act, 15 U.S.C. §§ 7701-7713 (2012).
4. Yahoo! Personal Blog Guidelines 1.0, *available at* http://jeremy.zawodny.com/yahoo/yahoo-blog-guidelines.pdf.
5. *Id.*
6. N.Y. Labor § 201(d) (2012).

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See "EASL Mentoring Program" article on page 13 in this issue.

Krell's Korner

Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.

Salvaging Titanic

By David Krell

On April 15, 2012, an oceanic grave in the North Atlantic marked its 100th anniversary as the final resting place for RMS *Titanic*. Clive Cussler summarized the ship's magical quality in his best-selling novel *Raise the Titanic!*

> [S]he's the wreck that puts all the others to shame. She's modern history's most legendary yet elusive treasure. A simple photograph of her is enough to pump the adrenaline. Knowing her story, the crew who sailed her, the people who walked her decks in the few short days she lived, that's what fires the imagination, Silverstein. The *Titanic* is a vast archive of an era we'll never see again.[1]

Indeed, Titanic fires the imagination for storytellers. Its allure, evergreen.

In popular culture, we have seen *Titanic* glorified by a Broadway musical,[2] raised by Dirk Pitt and his band of oceanic adventurers at the National Underwater Marine Agency in the aforementioned novel,[3] and cinematically romanticized by a centenarian tossing an invaluable necklace—"Heart of the Ocean"—into the North Atlantic as a gesture honoring a long-lost romance that died in the icy waters.[4]

The "wreck that puts all the others to shame" became the basis of a board game produced by Ideal Toy Corporation in 1976—*The Sinking of the Titanic*. Ideal produced the game for players of ages eight to adult. The game's instructions ramp up the adventure: "Rising water forces you to head for a lifeboat…so put to sea with whatever you've managed to save. Now, a whole new game begins when you enter the sea…shipmates become enemies… friendly islands aren't always paradise and it's every man for himself."[5]

The inside of the game's cover furthers the game's commanding principle of individual survival. "The roll of the dice or the pick of a card could plunge you into a violent storm, or land you on a cannibal island. And you have to be ready to repel your fellow players' attempts to board your lifeboat and take your food and water."[6]

Tragedy begets entertainment, even if it is in the form of a board game encouraging players to live through the *Titanic* disaster vicariously with passengers whose names are sourced in parody, including Razor Sharp and Sigfried Fraud.

The actual sinking of *Titanic* was a catastrophic event.

Number of passengers:	2,223
Number of crew:	899
Number of people killed:	1,517
Number of men killed:	1,347
Number of women killed:	103
Number of children killed:	53
Number of crew killed:	685

It was the "largest peacetime maritime disaster in history."[7]

Titanic's fatal encounter with an iceberg came with a warning, however. *Mesaba*, a nearby steamer ship, wired all eastbound ships, "Ice report. In latitude 42 north to 41.25 north, longitude 49 west to longitude 50.3 west. Saw much heavy pack ice and great number large icebergs, also field ice. Weather good, clear."[8]

John George Phillips of Godalming, Surrey (England), *Titanic*'s senior Marconi wireless operator, ignored it.

Phillips acknowledged receipt to the *Mesaba*, but he never brought the message to the *Titanic* officers on the bridge. As he had delivered previous ice messages to the bridge, he seemed to have deemed the *Mesaba* missive unimportant. Plus, he was focused on his Marconi duties in transmitting messages for the passengers. It was a perilous decision. "Unlike the previous ice messages, which had simply reported random icebergs, the *Mesaba* had identified a huge rectangular ice field into which the *Titanic* was directly steaming."[9]

Californian, a steamship near *Titanic*, also warned Phillips about icebergs on *Titanic*'s course. Phillips ignored operator Cyril Evans' warning—"Say, old man, we are stopped and surrounded by ice."—and continued focusing on a backlog of passenger messages and communicating with the station at Cape Race, Newfoundland. "Shut up! Shut up! I am busy working Cape Race."[10]

Within an hour, *Titanic* struck the iceberg.

After the irresistible force of *Titanic* met the immovable objects of the ice field, Phillips and his assistant, Har-

old Bride, sent out distress messages. CQD had long been accepted as the standard distress call, its initials standing for "Come quickly, danger." The official call changed in 1908 to SOS. "The 'CQD' signal was abandoned because it was possible to confuse it with others. Thus, the Postmaster General decided to substitute 'SOS,' which in the Morse code is three dots, two [sic] dashes and three dots. There is nothing else like that in all the Morse language."[11]

Bride recounted his experience for *The New York Times* after his rescue.

> "Send the call for assistance," ordered the Captain, barely putting his head in the door.
>
> "What call should I send?" Phillips asked.
>
> "The regulation international call for help. Just that."
>
> Then the Captain was gone. Phillips began to send "C. Q. D." He flashed away at it and we joked while he did so. All of us made light of the disaster.
>
> We joked that way while he flashed signals for about five minutes. Then the Captain came back.
>
> "What are you sending" he asked.
>
> "C. Q. D.," Phillips replied.
>
> The humor of the situation appealed to me. I cut in with a little remark that made us all laugh, including the Captain.
>
> "Send 'S. O. S.' I said. "It's the new call, and it may be your last chance to send it."
>
> Phillips with a laugh changed the signal to "S. O. S."[12]

Bride recalled the moment when he and Phillips received the order to surrender the wireless and pursue survival.

> Then came the Captain's voice: "Men, you have done your full duty. You can do no more. Abandon your cabin. Now it's every man for himself. You look out for yourselves. I release you. That's the way of it at this kind of a time. Every man for himself."
>
> I looked out. The boat deck was awash. Phillips clung on sending and sending. He clung on for about ten minutes or maybe fifteen minutes after the Captain had released him. The water was then coming into our cabin.[13]

Bride continued his wireless career for a few years, married, had three children, moved to Scotland, and died in 1956.[14] Phillips died in the life raft. The Marconi company praised Phillips after the disaster.

> He has been six years in our employment and he is twenty-six years old. He has operated the wireless all over the world and on many vessels. His installation on the Titanic possessed a range of about 500 miles under all conditions. Usually, however, it would convey messages to a much greater distance.
>
> Phillips took day and night turns with his assistant at the apparatus, so that it was never for a moment left unwatched.
>
> The equipment of the wireless cabin on the Titanic included all the latest improvements and was the best of its kind in existence.[15]

The New York Times reported on the wireless operators' steadiness in the face of disaster.

> The Titanic struck at 10:25 o'clock Sunday night in latitude 41.16 north and longitude 50.14 west. The huge iceberg with which she collided stove in her bow plates, and just half an hour later the big ship flashed out over the sea the news that she was sinking by the head. From then until 12:27 o'clock yesterday morning the Titanic's wireless flashed news of her condition and appeals for immediate help out over the water. Then the last crash of the instrument died out in an indistinguishable blur.
>
> Did the Titanic sink then? It is just possible she did, for until that instant the sending of the operator aboard the big steamer had been clean cut and deliberate. His touch was as sure and steady as though his ship was in no danger, and his brother operators at Cape Race are certain that while the ship rode the waves and his instruments were intact the Titanic's operator would have kept up his messages to the world.[16]

The sinking actually occurred around 2:20 a.m.

In 1985, a joint American-French expedition investigated *Titanic*'s possible site. *Le Suroit* spent 10 days in the summer with sonar sweeps of the ocean floor. On August 7th, *Le Suroit* departed for another mission and the American crew joined a few French scientists in transferring to *Knorr*, a Woods Hole research ship. *Knorr* continued the

search for *Titanic* after arriving in the ship's area on August 22nd. It struck paydirt on September 1st.[17]

> Early in the morning of 1st September 1985, the bottom of the seabed looked to be a little different from usual—instead of the usual curves and ripples of the never-ending mud and sand, unusual marks, coupled with small chunks of what were obviously man-made debris began to appear before the amazed scientists glued to the screens. Before long, larger items hove into view, including a massive ship's boiler. The *Titanic*, elusive for so long, and considered to be always a part of the past, was now a part of the present.[18]

Dr. Bob Ballard led the team that discovered *Titanic*, but his mission was actually two-fold. The United States Navy called on Ballard to find two U.S. submarines lost at sea during the Cold War. "Officials feared at least one of them had been sunk by the USSR. When Dr. Ballard approached the Navy for funding to find the Titanic using his robotic submarine craft, they asked him to discover the submarines first."[19]

After finding the subs, Ballard and his team had 12 days on their timeline to find *Titanic*. They found it in two pieces.[20]

Although the ship's lack of physical integrity prevented it from being raised as a whole, artifacts from the ship and the debris area presented potential salvage opportunities. R.M.S. Titanic (RMST) took a position as the *Titanic*'s salvor because of its salvage activities. Its position conflicted with another party's desire to photograph the *Titanic* wreck. In 1999, the Fourth Circuit considered these elements in *R.M.S. Titanic v. Haver.*[21]

> Two years [after the discovery of *Titanic*], in the summer of 1987, Titanic Ventures, a Connecticut limited partnership, in conjunction with the Institute of France for the Research and Exploration of the Sea, the French government's oceanographic institution, voluntarily undertook efforts to salvage the wreck. Titanic Ventures conducted 32 dives over 60 days, recovering approximately 1,800 artifacts. It thereafter sold both its interest in the salvage operation and the artifacts it recovered to RMST. RMST recovered another 800 artifacts during a second expedition to the *Titanic*'s wreck site in 1993.[22]

Christopher Haver paid for a trip to witness the *Titanic,* which was scheduled for August 1998 and sponsored by Deep Ocean Expeditions. (DOE) The cost of the trip was $32,500. RMST sought a preliminary injunction in the Eastern District of Virginia preventing DOE from conducting trips to the *Titanic*. The district court granted the injunction.[23]

Haver sought a declaratory judgment in a separate action against RMST, stating that "he had a right to enter the wrecksite [sic] to observe, video, and photograph the *Titanic*."[24] The court denied his motion. RMST responded with a counterclaim and a motion for a preliminary injunction preventing Haver from going to the *Titanic* site.

The district court's rationale for jurisdiction concerning *Titanic* involved the impact on long-accepted international admiralty principles.

> It is in the interest of the whole world to have salvage claims decided in a single forum so that multiple, conflicting litigation is avoided. The whole world is placed on notice of the action in this Court by the publication of notice of the *in rem* arrest. Moreover, the recognized international rights at stake are minimally infringed upon. Restricting freedom of navigation over a few square miles of the vast North Atlantic Ocean is hardly a significant intrusion.[25]

Haver challenged the court's *in personam* jurisdiction concerning him and claimed that RMST needed to file and serve a new complaint for a preliminary injunction on him. Haver's filing of a declaratory judgment boomeranged. The district court ruled that Haver's filing amounted to consent of the court's jurisdiction.[26]

The court's rationale sourced in safety, RMST's prior investment, orderly salvage, and the possibility of viewing the Titanic on video rather than personally. "In justifying the entry of the injunction, the court relied upon general safety concerns caused by the depth and darkness of the North Atlantic waters around the wreck site, the need to protect RMST's substantial investment to date in salvaging the *Titanic*, and the public's interest in preventing unorganized, piecemeal salvaging of the *Titanic*, a shipwreck of great historical significance."[27]

While DOE offered underwater voyages to the wreck site and debris field, the district court offered the option of video as a viable substitute in its justification for the injunction. "The court also observed that those enjoined by its order from personally viewing the *Titanic* could enjoy future television broadcasts of RMST's salvage efforts."[28]

In turn, the district court's injunction set a barrier for people who wanted to document the *Titanic* wreck—defined by the court as a 168 square mile area of the North Atlantic—by "entering or causing anyone or anything to enter the wreck or the wreck site with the intention of performing any of the foregoing enjoined acts."[29]

The Fourth Circuit affirmed the district court's injunction preventing Haver from activities that might interfere

with RMST's ongoing salvage of the *Titanic*. It did not however, affirm RMST's exclusivity concerning photographing, recording, or otherwise visually documenting the *Titanic* site.

> The district court's expansion of salvage rights to include the right exclusively to photograph or otherwise record images of the wreck for the purpose of compensating salvors for their effort is both creative and novel. We are aware of no case in the United States or in the body of *jus gentium*, however, that has expanded salvage rights to include this type of a right. More importantly, we are not satisfied that the law of salvage would be properly extended to give salvors exclusive image recording rights in yet to be saved property. The underlying policy of salvage law is to encourage the voluntary assistance to ships and their cargo in distress.[30]

The Fourth Circuit also incorporated the impact on salvage law.

> In addition if we were now to recognize, as part of the salvage law, the right to exclude others from viewing and photographing a shipwreck in international waters, we might so alter the law of salvage as to risk its uniformity and international comity, putting at risk the benefits that all nations enjoy in a well-understood and consistently-applied body of law. This risk is heightened when it is understood that such an expansion of salvage rights might not encourage salvage and might, additionally, discourage free movement and navigation in international waters.[31]

Admiral Sandecker was right. Titanic pumps the adrenaline, fires the imagination, and puts all other wrecks to shame.

She will likely do the same for the next 100 years.

Endnotes

1. Clive Cussler, Raise the Titanic! 167 (Pocket Books edition, 1976).
2. Titanic (Lunt-Fontanne Theatre April 23, 1997) *available at* http://broadwaymusicalhome.com/shows/titanic.htm. The play ran for 804 performances.
3. *See supra* note 1.
4. James Cameron, Titanic (Paramount Pictures and 20th Century Fox, 1997).
5. The Sinking of The Titanic (Ideal, 1976).
6. *Id*.
7. *How Many People Died on the Titanic?* Titanic Universe, http://www.titanicuniverse.com/how-many-people-died-on-the-titanic/1223.
8. Don Lynch, Titanic: An Illustrated History 80 (Hyperion Books, 1995).
9. *Id*.
10. *Id*. at 83.
11. *"Save Our Souls" was Titanic's Last Appeal*, New-York Tribune, April 16, 1912 at 2.
12. *Thrilling Story By Titanic's Surviving Wireless Man*, The New York Times, April 19, 1912, at 1. An introduction to the article states, "This statement was dictated by Mr. Bride to a reporter for THE NEW YORK TIMES, who visited him with Mr. Marconi in the wireless cabin of the Carpathia a few minutes after the steamship touched her pier." Guglielmo Marconi is the father of long distance radio transmission.
13. *Id*.
14. *Mr. Harold Sydney Bride*, encyclopedia titanica, http://www.encyclopedia-titanica.org/titanic-biography/harold-sydney-bride.html.
15. *See supra* note 11.
16. *Col. Astor and Bride, Isidor Straus and Wife, and Maj. Butt Aboard*, The New York Times, April 16, 1912, at 2.
17. Titanic-Titanic.com, http://www.titanic-titanic.com/discovery_of_titanic.shtml.
18. *Id*.
19. Claire Bates, *Titanic Search was Cold War cover story for secret mission to find nuclear subs*, Mail Online (May 27, 2008), http://www.dailymail.co.uk/sciencetech/article-1021640/Titanic-search-Cold-War-cover-story-secret-mission-nuclear-subs.html. The USS Thresher (SSN-593) was the lead ship of her class of nuclear-powered attack submarines. She was lost during deep-sea diving tests in 1963 after a high-pressure pipe blew causing the vessel to lose power and implode as it sank. However, the USS Scorpion disappeared in 1968 amid speculation that it was sunk by Soviet forces. Dr Ballard mapped both submarine wrecks using his newly developed underwater robot craft. He concluded that it fired a rogue torpedo and caused its own destruction.
20. *Id.*
21. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943 (4th Cir. 1999).
22. *See supra* note 21, at 952.
23. *See supra* note 21, at 953.
24. *See supra* note 21, at 953.
25. *See supra* note 21, at 954 (R.M.S. Titanic, Inc. v. The Wrecked and Abandoned Vessel, 9 F.Supp. 2d 624, 634-35 (4th Cir. 1998).
26. *See supra* note 21, citing 9 F.Supp.2d at 635.
27. *See supra* note 21 citing 9 F.Supp.2d at 635-36.
28. *See supra* note 21 citing 9 F.Supp.2d at 638.
29. *See supra* note 21 quoting 9 F.Supp. 2d at 640.
30. *See supra* note 21, at 969.
31. *See supra* note 21 at 970.

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