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Counseling Content Providers in the Digital Age

A Handbook for Lawyers

For as long as there have been printing presses, there have been accusations of libel, invasion of privacy, intellectual property infringements and a variety of other torts. Now that much of the content reaching the public is distributed over the Internet, television (including cable and satellite), radio and film as well as in print, the field of pre-publication review has become more complicated and more important. *Counseling Content Providers in the Digital Age* provides an overview of the issues content reviewers face repeatedly.

Counseling Content Providers in the Digital Age was written and edited by experienced media law attorneys from California and New York. This book is invaluable to anyone entering the field of pre-publication review as well as anyone responsible for vetting the content of their client's or their firm's Web site.

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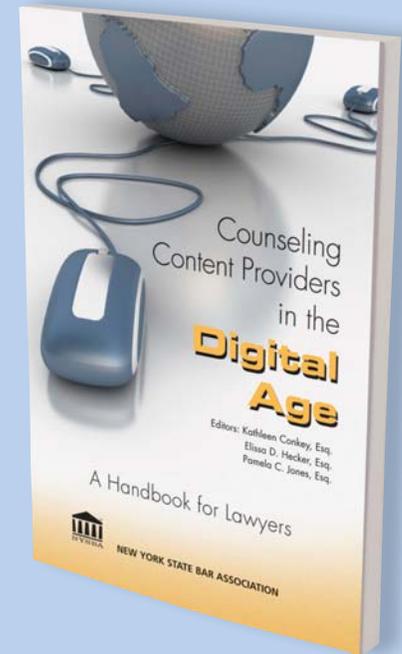
Introduction; Defamation; The Invasion of Privacy Torts; Right of Publicity; Other News-gathering Torts; Copyright Infringement; Trademark Infringement; Rights and Clearances; Errors and Omissions Insurance; Contracting with Minors; Television Standards and Practices; Reality Television Pranks and Sensitive Subject Matter; Miscellaneous Steps in Pre-Broadcast Review.

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Editor's Note and Tribute to Marybeth Peters

This issue is dedicated to the unparalleled and continuing career of Marybeth Peters, who is retiring from her position as Register of Copyrights on December 31st, after having devoted 45 years of service to the U.S. Copyright Office. Internationally known and respected, Marybeth became the 11th Register in 1994. She has worked with that institution to bring it into the 21st century, and has been the primary figure in working on streamlining the online registration system.



©Lori Hecker

As Marybeth has attested, working at the U.S. Copyright Office can be both enormously rewarding and trying. A large part of her job has constituted operating with varying interest groups, Congress and administrations. She has been involved with countless influential opinions, court cases, and testifying before Congress. Although it is impossible to please everyone all of the time, Marybeth is universally esteemed and admired.

During her time at the Copyright Office, Marybeth served as Music Examiner, Chief of the Information and Records Division, Chief of the Examining Division, Consultant on copyright law to WIPO, Senior Attorney, and acting General Counsel, all before she became Register. During her tenure as Register, among other awards and accolades, Marybeth was recognized for exceptional contributions in the field of intellectual property and computer law, distinguished service to technology lawyers throughout the world, for legislative contributions that brought significant benefit to those in music, for extreme fairness and contributions to photographers, and for overall excellence.

She is, and will continue to be, an attorney, author, lecturer and a member of Intellectual Property Advisory Committees of several law schools. Above all, her integrity is unquestioned, as is her strength, kindness and fierce and unrelenting intelligence.

I was first introduced to Marybeth well before I entered law school. She was so impressive in her credentials, yet warm and funny—and approachable. Since then she has been an inspiration to me and countless others.

Members of the copyright field look forward to more greats in Marybeth's career.

Thank you, Marybeth, for helping to show the international community the importance of copyright, and for making the Copyright Office what it is today.

Included in this issue are some letters and words attesting to Marybeth's tenure. After her retirement, the *Journal of the Copyright Society of the U.S.A.* will also be publishing an issue devoted to Marybeth and her legacy to date, which I encourage everyone in the copyright community to read.

* * *

I am pleased to introduce Nicole Baffi and Carl Mills, two students at Albany Law School, who have joined the *EASL Journal* as Citation Editors. Nicole is on the *Albany Law Review*, is active in the school's Pro Bono Society, and graduated from the University of Albany with a major in Political Science and minor in Art. Carl has worked with the Albany Law School Intellectual Property Society and clerked at an auspicious entertainment firm in New York City. He graduated from Syracuse University with a major in Political Science. Both are athletes.

—Elissa

The next *EASL Journal* deadline is Friday, January 21, 2011.

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*, 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 the 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.

Marybeth Peters

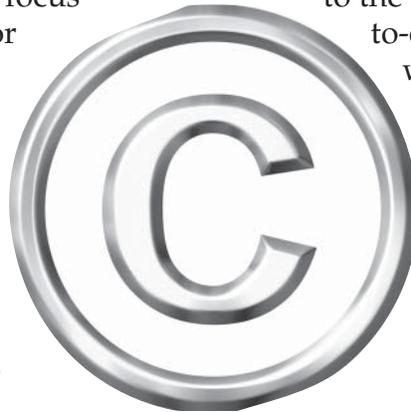
By Judith B. Prowda



Marybeth Peters

When I heard that Marybeth Peters was retiring as Register of Copyrights, my first reaction was disbelief and a tinge of sadness. After all, Marybeth had been the face of the U.S. Copyright Office since 1994, the year I received my LL.M. from New York University School of Law and began to focus

my law practice in copyright law. For many lawyers, including myself, Marybeth's annual updates were essential if you wanted to keep up with the latest developments in this dynamic field. During her tenure as Register, the world shifted rapidly to an online environment, raising copyright questions that were unimaginable only a few years earlier.



Marybeth's 45-year career at the Copyright Office is impressive and her achievements are well-known. She is the worthy recipient of numerous awards for her work as Register of Copyright. She delivered the 1996 Brace Memorial Lecture at Columbia University Law School and the Copyright Society's 2004 Horace Manges Memorial Lecture, both of which are memorialized in law review articles. She is a great teacher and friend to the Copyright bar. I will miss her down-to-earth manner and bright smile that welcomed me to the practice of copyright law.



Judith B. Prowda

Judith B. Prowda is the Chair of the Entertainment Arts and Sports Law Section, New York State Bar Association. She is also a Senior Lecturer at Sotheby's Institute of Art.

For more information about Marybeth and her tenure at the U.S. Copyright Office, visit www.uscopyright.gov



WILLIAM JEFFERSON CLINTON

October 8, 2010

Marybeth Peters
United States Register of Copyrights
United States Copyright Office
101 Independence Avenue, S.E.
Washington, D.C. 20559

Dear Marybeth:

I am pleased to join your family, friends, and colleagues in congratulating you on your retirement as United States Register of Copyrights.

With your tenure in this role coinciding with the rise of the Internet and the advent of the Information Age, you have truly forged a path into a vast new frontier. Your efforts to shape intellectual property policy during this incredibly dynamic and challenging era have not only upheld the American principle of ownership of one's work, but have also helped to lay the legal groundwork upon which the future of communications, the arts, and information technology will be built. You can take pride knowing that the contributions you made throughout your 45 years of service to our nation will continue to have great influence for decades to come. Your example is an inspiring one, and I thank you for a job well done.

As you settle into retirement and embark upon an exciting new phase of your life, Hillary and I wish you all the best.

Sincerely,

A handwritten signature in cursive script that reads "Bill Clinton". The signature is written in dark ink and includes a long, sweeping horizontal stroke at the end.



GEORGE BUSH

September 21, 2010

Dear Ms. Peters,

Word has reached me that you are retiring after four decades of service with the U.S. Copyright Office, and I write to convey my personal thanks to you for a job well done.

Civil servants uphold the public trust, and the American people deserve the best that Federal agencies can provide. You have been the best, and we Bushes salute you for your dedicated service.

All the best to you in whatever lies ahead. I hope your future is as rewarding and challenging as your distinguished past.

Warm regards,

**Ms. Marybeth Peters
Register of Copyrights
U.S. Copyright Office
Washington, D.C.**



JIMMY CARTER

December 31, 2010

To Marybeth Peters

Congratulations on your well deserved retirement! Rosalynn and I are pleased to join your family, friends and colleagues in recognizing your 45 years of service to the United States government. During your career in the Copyright Office, you have held a variety of positions at all levels while traveling and lecturing around the world. You have exemplified the loyalty, dedication, and expertise that should be the essence of all public servants.

Please accept our warm best wishes for happiness on this special day and in the years ahead.

Sincerely,

A handwritten signature in cursive script that reads "Jimmy Carter".

Ms. Marybeth Peters
Register of Copyrights
U.S. Copyright Office
101 Independence Avenue
Washington, D.C. 20559

Remarks from the Chair

Welcome to our fall/winter season. I hope everyone had a wonderful summer and early fall and is returning with renewed energy.

If you happened to be in New York City for part of the summer, you were in good company. EASL held several excellent programs, including a joint program on August 6th, which was organized by Saryn Elyse Leibowitz, Co-Chair of the Lawyers in Transition Committee, and Kimberley Ayers Shariff, Chair of the newly formed In-House Counsel Committee. This sold-out breakfast program on transitioning to in-house careers focused on how to get an in-house position, how to best prepare, and what one can expect in-house. The panel, which was expertly moderated by Kim Shariff, included Tracey Knuckles, General Counsel, New York City, Department of Cultural Affairs; Meg Louis, Director of Legal Affairs/Senior Counsel for NYC Media; and Jamaal Lesane, Vice President, Legal and Business Affairs—Teams, of Madison Square Garden. EASL also co-sponsored the New Music Seminar, a three-day program in New York City, which included several invitation-only summits that provided a high-level forum for dialogue about the challenges facing the music industry.

As the summer faded, EASL did not. Au contraire. On September 15th, the Pro Bono Committee (Carol Steinberg, Steering Committee member) and Fine Arts Committee (myself as Chair) sponsored a joint program with Cardozo's Intellectual Property Program and Cardozo's Art Law Society, on legal issues in producing and presenting public art. Our speakers, Katie Hollander, Deputy Director of Creative Time, and Judi Church, Counsel to Creative Time, engaged in a spirited discussion on recent commissions—always compelling and sometimes politically charged—in New York and around the globe. Carol and I moderated this exciting program, which was followed by a warm reception at Cardozo.

On the same day that the Creative Time program was taking place in New York, EASL's District Representative from the Third District and Member of the House of Delegates Bennett Liebman participated in the State Bar Association Career Week program at Albany Law School. EASL was one of 10 Sections that participated in the event, which began with comments from NYSBA President Steve Younger. The event provided Section leaders with an opportunity to speak on the merits of member-



ship, the importance of Section participation, obtaining a job, and other career-related advice and guidance. Students eagerly helped themselves to copies of our excellent *Journal* and learned from Bennett about the many advantages of being a student member. Students also learned that they may receive a one-year free EASL membership simply by submitting an article to the Phil Cowan Memorial/BMI Scholarship (described below). Students may also submit articles to the *Journal's* Law Student Initiative Writing Contest and the Blog. For more information about the writing competitions, please visit our website at <http://www.nysba.org/easlWritingContest>.

Another timely program entitled "Irreparable Harm: Copyright Infringement Actions After *Salinger*," was held on September 30th at Mitchell Silberberg & Knupp LLP. This program, which was organized by EASL's Litigation Committee, addressed the practical implications for copyright litigations following *Salinger v. Colting*, in which the Second Circuit did away with the presumption of irreparable harm which copyright plaintiffs had formerly enjoyed when seeking a preliminary injunction. *Salinger*, which was decided earlier this year, held that the standards enunciated in *eBay, Inc. v. Merc Exchange*, a patent case decided by the Supreme Court in 2006, will have to be met. The speakers included Dale Cendali, of Kirkland & Ellis LLP and Christine Lepera, of Mitchell Silberberg & Knupp LLP. Paul V. LiCalsi, Co-Chair of EASL's Litigation Committee, served as the Moderator. The panel discussed how pre-*Salinger* jurisprudence figures into future cases and how fair use and other defenses may affect the plaintiff's burden.

This year, for the first time, EASL held two fall programs in tandem. On October 12th, EASL's ADR Committee, co-chaired by Judith Bresler and myself, held a joint full-day CLE program with the NYSBA Dispute Resolution Section and was co-sponsored by Fordham Law School. The program offered six CLE credits, including one in Ethics. This was an interactive program with two panels—mediation in the morning and arbitration in the afternoon—each panel focused on commercial disputes involving fine art, intellectual property, or entertainment. Experienced professionals played the roles of mediator, arbitrator, commentator and attorneys for the parties. Volunteers from the audience participated as the parties. The mediation and arbitration was stopped (freeze-framed) at various teaching intervals to give the panel an opportunity to analyze what had occurred, and discuss strategy and practice pointers.

Another fall meeting was held on October 22nd, our fourth consecutive year partnering with the CMJ Music Marathon & Film Festival, organized by Joanne Abbot

Green, Founder & Executive Producer of CMJ Network, Inc. This collaboration would not be possible without EASL's newly appointed dynamic Programs Co-Chair Rachel DeLetto, and the skillful and knowledgeable EASL team, including Executive Committee members Ken Swezey, as Moderator of the "Mobile Apps" panel, and Pery D. Krinsky as Moderator of the "Ethics" panel. EASL's founding member and first Chairman, Marc Jacobson, served as Moderator of the panel on "Film Distribution and Digital Platforms." Other panels included "Right of Publicity," "Copyright Termination Rights," "International Issues in Digital Licensing Overseas and Distribution," and "Agreements with Minors." Breakout panels included the "Latest Developments in Mobile TV Issues" and "Film Deals." This highly successful program was held at New York University and offered 4 CLE credits in Traditional Areas of Practice, 1 CLE credit in Skills and 1 CLE credit in Ethics. I also wish to acknowledge and thank Rebecca Frank, who was instrumental in our partnering and planning with CMJ, and who has decided to step down from the Executive Committee after 3½ years of excellent and dedicated service to EASL (both as Co-Chair of Programs and Co-Chair of Young Entertainment Lawyers) in order to pursue new ventures in Boston.

An innovative event for young lawyers was also held on October 26th at the Village Pourhouse Bar in New York City. EASL's energetic Young Entertainment Committee Co-Chairs Kathy Kim and Stephanie Vaidya and Young Entertainment EASL Liaisons Ezgi Kaya and Jason Aylesworth organized a "speed networking" program, where young lawyers interested in breaking into the entertainment law area were given an opportunity to mingle with professionals in the industry for five minutes before moving to the next professional at the sound of the bell. Attention, young lawyers and business professionals, don't forget to bring your business cards to the next one!

Pro bono is as active as ever and remains one of the highest priorities of the NYSBA and EASL. The Pro Bono Committee is working hard on its fall and winter programs under the guidance of its Steering Committee (comprised of Elissa D. Hecker, Pippa Loengard, Carol Steinberg, Monica Pa and Kathy Kim). This fall, the Pro Bono Committee and the New York Foundation for the Arts (NYFA) will provide speakers from EASL's Speakers Bureau for three major NYFA programs: BUILD—a dance grant program to help dance companies expand their administrative capacities; MARK—an artist development program for upstate artists, and BOOT CAMP—an extensive business program specifically designed for artists. I encourage all EASL members who are interested in being on EASL Speakers Bureau to contact Carol Steinberg at cs9@hpd.nyc.gov. In another initiative, Kathy Kim is working with the American Federation of Musicians to identify speakers for its seminar program on legal issues for musicians. More information about these and future

EASL Pro Bono Committee programs and clinics can be found in the Pro Bono Update. Please mark your calendar for future events!

If you have been keeping up with our active EASL Blog, you already know that I have made several key appointments over the past few months. EASL is pleased to welcome new Executive Committee members and, for the first time, Law Student Liaisons. I have appointed the Honorable Barbara Jaffe to serve as Co-Chair with Judith Bresler, Esq. and Gary Roth, Esq. of the Phil Cowan Memorial Scholarship Committee. Justice Jaffe is an acting justice of the New York State Supreme Court and a longtime member of the NYSBA. The Phil Cowan Memorial/BMI Scholarship was created by EASL, in partnership with BMI, in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL. The 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. This year, for the first time, all students who submit a paper for consideration will automatically receive a free membership in EASL (with all the benefits of an EASL member) for one year. For information about the Scholarship, please visit http://www.nysba.org/AM/Template.cfm?Section=Law_Student_Writing_Competitions and <http://nysbar.com/blogs/EASL/>.

We also welcome Kathleen J. Wu, Esq. and Matthew Pace, Esq. as Co-Chairs, with Ayala Deutsch, Esq., of EASL's Sports Law Committee. Kathleen is a partner at Andrews Kurth and practices out of the firm's Dallas and New York offices. Kathleen's practice is concentrated in the areas of real estate, finance and general business transactions. She is also the General Counsel to the United States Tennis Association-Texas Section. Matthew is Counsel at Herrick Feinstein in the firm's Sports Law practice and has over 20 years of professional experience working for and representing some of the biggest players in the sports and entertainment industry. While Anthony Dreyer has decided to step down as Co-Chair of the Sports Law Committee after five years of service, we are fortunate that he will continue his outstanding leadership in the annual Fordham Sports Law Forum, which has been co-sponsored by EASL throughout his tenure.

EASL is also delighted to welcome Elisabeth Conroy, Eva Dickerman, Emily Miranda Galindo, and Jenna Bass Levy as the Section's first Law Student Liaisons. As Law Student Liaisons for the 2010-2011 academic year, they will attend EASL Executive Committee meetings, participate in the lively exchange of ideas with EASL colleagues, assist with EASL programs and serve as the voice for their fellow classmates. Elisabeth just began her first year at Syracuse University College of Law. Eva is a second year student at Columbia Law School, Miranda is a second

year student at Fordham Law School, and Jenna is a second year student at the New York University School of Law.

Additional appointments include the wonderful news that Diane Krausz will serve as EASL's first Representative to the NYSBA CLE Department. During her three-year term, Diane will attend meetings in Saratoga and New York to participate in discussions and make recommendations on NYSBA CLE programs and policies. The CLE Committee is one of the most important committees within the NYSBA, since its members advise and inform the content and direction of NYSBA CLE programs. This position is well-deserved—Diane is a longtime member of the EASL Executive Committee, and serves as EASL Treasurer as well as Co-Chair of the Theater and Performing Arts Committee.

EASL member Jason Aylesworth will also be doing double duty—not only as Liaison from the Young Lawyers Section to EASL, but also as EASL Liaison to the Dispute Resolution Section. Jason, an Associate at Sendroff & Baruch, LLP, served as President of Touro's Alternative Dispute Resolution Society during law school. We are grateful that Jason will keep us up to date on new developments in that area.

With our membership expanding, we welcome Jessica Thaler as Co-Chair of the Membership Committee with Rosemarie Tully (EASL's Vice-Chair and District Representative from the 10th District). Jessica's law practice includes counseling clients in connection with corporate and commercial transactions, such as including mergers and acquisitions, lending and finance, development and cooperation, services, real property and licensing. She is an active member of NYSBA and serves on the NYSBA Membership Committee and the Committee on Lawyers in Transition, and is a member of the Business Law and Corporate Counsel Sections. Jessica graduated *cum laude*

from UCLA and received her J.D. from Fordham University School of Law. We look forward to working together to build our membership.

Part of our membership outreach this year will be our Member-Get-A-Member Campaign, in which all EASL Section members may participate. As a member, you know the value that the EASL Section provides to your practice, and this year all you need to do is spread the word to win a free EASL CLE program! At the close of the campaign, the member who has referred the most recruits will win the grand prize of \$500. Please look for our e-mail for the Member-Get-A-Member program announcement.

On other fronts, our *Entertainment, Arts and Sports Law Journal* and Blog continue to thrive under the able and energetic leadership of leadership of our Editor, Elissa D. Hecker. We have instituted a "Blog for Free CLE" program, an exciting opportunity for EASL Section members, who may blog about a particular EASL CLE program and earn admission to that program free of charge in exchange for the entry on the EASL blog. The "Blog for Free CLE" guidelines can be found at http://nysbar.com/blogs/EASL/2010/08/easl_blog_for_cle_guidelines.html. In another new program, Elissa is also working with law student volunteers who cite-check *Journal* articles.

Looking forward to the future, I hope to see you at our Annual Meeting, which will be held on **Monday, January 24, 2011**, at Hilton New York. The CLE-accredited program, which is being organized by our Program Co-Chair Tracey Greco, will feature two panels.

I wish you a wonderful and productive season. See you at our upcoming meetings!

Judith B. Prowda

ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

Visit us on the Web at www.nysba.org/easl

Check out our Blog at <http://nysbar.com/blogs/EASL>

Pro Bono Update

The Pro Bono Committee collaborated with EASL's Fine Art Committee and Cardozo's IP Program and Art Law Society to present an exciting program called "Creative Time—Bringing Cutting Edge Art to the Public." Creative Time (www.creativetime.org) is considered to be one of the most innovative presenters of art in the public realm. From the stunning *Tribute in Light*, "the light installation which shines as an 'ethereal surrogate for the absent towers,'" to *Self-Roaming*, the immersive and interactive cityscape created at Art Basel Miami Beach, Creative Time presents ground-breaking and challenging art that pushes culture into fresh new directions. We were very pleased to have Katie Hollander, Creative Time's Deputy Director, who showed images of some of its unique projects, and Judith Church of Debevoise and Plimpton and pro bono counsel to Creative Time, who discussed legal issues raised by the projects. One example of a work shown and discussed was Jeremy Deller's *It Is What It Is: Conversations About Iraq*. This show began at The New Museum in New York City, where the artists invited journalists, soldiers and scholars to share their memories of the last decade in and out of Iraq. Deller then hit the road to conduct similar conversations at 10 sites from New York to California. Since he documented the trip, issues related to right of privacy and publicity arose. As Ms. Church pointed out, the laws on these issues vary from state to state, so drafting a release proved to be a complex task. The discussion was an interplay of description of the project with great visuals with comments by Ms. Church about the legal issues raised and how they were resolved. The Moot Court Room at Cardozo was filled with enthusiastic lawyers, law students, and arts professionals who were very engaged and expressed great appreciation that a program could show such interesting art and also show students how lawyers really work. We received great feedback from the audience and hope to hold similar programs in the future. We provided a real service, in that it gave students insight into the legal profession and hopefully encouraged more attorneys to do pro bono work for artists and arts organizations.

* * *

The Pro Bono Committee is most excited to collaborate with the New York Foundation for the Arts (www.nyfa.org) to provide speakers for NYFA's upcoming programs. We began by providing attorneys for individual consultations to participants of a five-week Boot Camp to help artists become more business savvy. The purpose of the intensive program was to teach creators how to become better business people. Large parts of the curriculum included areas where EASL members have expertise,



such as IP issues, contracts, tax, business and non-profit law. We will also be providing speakers and attorneys for individual consultations for the upcoming Boot Camp. In addition, we will be providing speakers for NYFA's BUILD program in February. BUILD is a dance grant program to help dance companies expand their

administrative capacities. NYFA has polled the dance company participants to find out about their pressing legal concerns and questions, and we will provide speakers in response to those concerns. Specifically, we will set up a full-day program to address these issues, which will probably relate to tax, setting up and running not-for-profits, IP estate issues and liabilities. Furthermore, we will be working with NYFA's MARK program to assist upstate visual artists. We will reach out to our District Representatives upstate and provide expertise and speakers on copyright law, setting up/running an art business, and artist/gallery relationships.

Working with NYFA and EASL's Speakers Bureau is a great opportunity to serve and connect to artist/entertainers who most definitely need legal assistance. Please contact Carol Steinberg at elizabethcjs@gmail.com or Elissa Hecker at echeckeresq@yahoo.com to join our illustrious panel of speakers.

For your information, should you have any questions or wish to volunteer for our pro bono programs and initiatives, please contact the Pro Bono Steering Committee member who best fits your interests as follows:

Clinics

Elissa D. Hecker and Philippa Loengard are coordinating walk-in legal clinics with various organizations.

- Elissa D. Hecker, echeckeresq@yahoo.com
- Philippa Loengard, loengard@law.columbia.edu

Litigations

Monica Pa is coordinating pro bono litigations.

- Monica Pa, monicapa@dwt.com

Speakers Bureau

Carol Steinberg is coordinating Speakers Bureau programs and events.

- Carol Steinberg, elizabethcjs@gmail.com
- Kathy Kim, kathykim2007@gmail.com

We are looking forward to working with all of you, and to making pro bono resources available to all EASL members.

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

Law Student Initiative Writing Contest

Congratulations to LSI winner:

Daniel Hauptman, of Loyola Law School, for his article entitled:
**“Major League Baseball Must Strike Out the National Origin Discrimination
in the First-Year Player Draft”**

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, January 21, 2011**.
- **Submissions:** Articles must be submitted via a Word email attachment to echeckeresq@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.

**Next *EASL Journal* Submission Deadline:
Friday, January 21, 2011**

The Phil Cowan Memorial/BMI Scholarship

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts & 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 ten 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 10th: 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 Web site. 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 1976, 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*.

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.

The Ethics of Digital Manipulation and Its Relation to Photojournalism

By Lauren Stanley

American photojournalist Lewis Hine once said, “If I could tell the story in words, I wouldn’t need to lug around a camera.”¹ Much like the words that fill the columns of our newspapers, photographs have held the long and important position of the visual bearers of truth in our society, especially when they are used in news reporting as proof that a particular event has in fact happened. However, today, with the explosion of the technological advancement of photography, photojournalism finds itself at a crossroad: will digital technologies and public skepticism lead to its demise, or will journalists rise to the challenge and practice a more credible form of visual truth? The issue of the ethical principles that govern photojournalism and the realization that the journalistic comfort that is had under the protection of the First Amendment is at great jeopardy when news photographs’ visual truths are knowingly manipulated.

“[T]oday, with the explosion of the technological advancement of photography, photojournalism finds itself at a crossroad: will digital technologies and public skepticism lead to its demise, or will journalists rise to the challenge and practice a more credible form of visual truth?”

While the blueprint for our personal freedoms and their protections lies within the First Amendment of the U.S. Constitution regarding speech, press, religion, assembly, and petition,² the Founding Fathers had no idea that such protection would extend to the visual sphere of the press, let alone visual speech that was intentionally falsified by digital manipulation. In fact, even from a legal standpoint until recently, visual speech, because of its greater immediate effect on the viewer and its less fundamental manner of expression, had been subjected to greater restriction than pure speech.³ However, courts are beginning to equate visuals with having equal power on par with that of the written or spoken word, and have thus begun affording constitutional protections as such.⁴ With these protections for both the written and visual truth, it is becoming increasingly critical that the media continue maintaining a transparency standard when informing the public as to the validity of their images, for “when the appearance of a photograph is changed by manipulation, its truth content must alter too.”⁵

With the inclusion of photographs into news publications early in the 20th century,⁶ our society has used this visual speech as the authenticity recorder to our written word. Since then, the ethical principles that govern the use of photographs in contextual relation to their news stories have been around for years. The National Press Photographers Association’s *Code of Ethics* clearly acknowledges that while “photographic and video images can reveal great truths...through the language of visual understanding, photographs can also cause great harm if they are callously intrusive or are manipulated.”⁷ Due to the public’s reliance on the accuracy of such photographs, digital manipulation infringements should be taken very seriously.⁸ Theorists have noted a “pictorial turn occurring through which we began to realize image dominant media had overtaken word dominated media,”⁹ and so where once we read the news we now watch the news. Yet this ideological theory of purism within the press and the news photograph as the unchallenged purveyor of the visual truth is facing extinction.¹⁰ For the first time in its history technological advancements are beginning to “threaten the fundamental premise on which photojournalism was based—the search for the visual truth.”¹¹

The Supreme Court ruling in favor of *The New York Times* in the 1964 case, *New York Times v. Sullivan*, deemed it possible for the press to print¹² incorrect facts under the protection of the First Amendment.¹³ This pivotal case allows the digital manipulation of news photographs to hide behind the protection of freedom of press/speech via the First Amendment, and the ideology of “let he with no sin cast the first stone.”¹⁴ *The New York Times* ran a fundraising advertisement signed by a number of Civil Rights leaders criticizing certain actions of the Montgomery, Alabama police department. While no specific names were mentioned, L.B. Sullivan, the town’s police commissioner, sued for libel.¹⁵ After Sullivan was awarded \$500,000 in damages by the Supreme Court of Alabama, *The New York Times* appealed to the Supreme Court, where it was decided that the First Amendment protection of free speech is not dependent on the truth, popularity, or usefulness of expressed ideas, and established the “Actual Malice” standard.¹⁶ This standard requires that the plaintiff must prove that the publisher of the statement in question knew that what was said was factually false with regard to libel or defamation cases against the press by a public official or public figure.¹⁷ However, since the definition of malice had been previously defined, and not by the court, Justice Black wrote in his opinion that: “Malice is an elusive, abstract concept hard to prove and hard to

disprove.”¹⁸ Since the proof of malicious intention is hard to provide, it is assumed that one who knowingly prints false facts has malicious intent and is generally accepted as a proof of malice.¹⁹ While he agreed with the Supreme Court’s reversal, Justice Black continued, “the requirement that malice be proved provides at best an evanescent protection for the right to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment.”²⁰ While the Supreme Court agreed that the “Federal Constitution has dealt with the...danger to the press in the only way possible without leaving the free press open to destruction—by granting the press an absolute immunity for criticism of the public officials...,”²¹ a slippery slope emerges.

The implication that known falsities are being printed in the press along with the truth, and that the First Amendment protects both, ultimately undermines the credibility and the public’s faith not only in just what it reads, but also now in what it sees. John Long, the Ethics Co-Chair at the National Press Photographers Association (NPPA), believes that the “credibility [of the press] is damaged every time a reputable news organization is caught lying to the public.”²² As our news publications continue to use photojournalism as an effective and important way of reporting the news “readers expect pictures to show things as they are, without elaboration, without artifice, and withholding nothing. No more than anyone would admit unprompted to lying [in written news] so no one will readily admit to changing an image to falsify facts.”²³

While the manipulation of photographs is not something that is new, digital manipulation can be virtually undetectable, and despite implements to curb such manipulation, breaches do occur.²⁴ One of the most blatant and widely recognized cases of photograph manipulation in the press is the June 1994 cover of *Time Magazine* of O.J. Simpson’s Los Angeles Police Department (LAPD) mug shot.²⁵ The photo had undergone a number of digital alterations, such as darkening Simpson’s skin and thus creating a more sinister look,²⁶ creating the appearance of facial hair stubble, the police identification card indicating his name and line up number were made significantly smaller, along with the headline: “An American Tragedy” emblazoned across the cover.²⁷ *Time* would not have been caught except *Newsweek* used the exact same photograph for its June 1994 edition, devoid, however, of *Time*’s modifications.²⁸ An editorial in the following edition of *Time* by its managing editor claimed that the LAPD’s mug shot had been blown out²⁹ by “the merciless bright light [by the LAPD’s photograph lighting] and the stubble on Simpson’s face, the cold specificity of the [LAPD] picture had been subtly smoothed and shaped into an icon of tragedy.”³⁰ *Time*’s art director, Joseph Kline, however, believed that, “If *Time* erred at all, it was failing to credit the LAPD mug shot, leaving readers to guess at the source of the original image.”³¹ When editors decide to manipu-

late images for the sake of aesthetic qualities and forgo the factual pieces in the photographs, they also “shift the belief in photographic truth as used in news media. Thus people respond with feelings of betrayal and cynicism to the revelation that visual news [can be manipulated and thus] manipulate their views of reality.”³² Journalist Peter Arnett believes that: “One of the stanchions of American Democracy is the notion that photojournalism provides viewers with a firm basis of facts by which to form their own judgment.”³³

Time knowingly printed false information by using the manipulated photograph and ran its editors’ opinion of Simpson’s apparent guilt, rather than the real objectivity that the public expected. The decision by *Time* to manipulate the photograph of Simpson not only damaged its credibility but also, in effect, eroded the credibility of all journalism, not just one publication.

With the reality being that the media is moving towards more technologically driven outlets, the issue of “truth and how we come to know anything about our world is becoming increasingly critical.”³⁴ *New York Times v. Sullivan* decided that the falsity of facts in our press is still protected by the First Amendment.³⁵ While the photographs that visually highlight our news have ultimately received the same protection, it does not mean that photojournalists have to take note and falsify the facts within their photographs. There are ways that they can continue recording the news, be trusted by the public, and still take part in the virtual age. First and foremost, photojournalists and their editors must resist falling prey to the allure of capitalism and notoriety that one can gain from having *the picture*.³⁶ Take the achievement of winning the Pulitzer Prize, for example. The prestige and the innumerable notes of accolades that go along with such an accomplishment would suddenly vanish just as quickly as they came if it was to be found that it had been won with deceit. The branding of fraud or charlatan is the Scarlet Letter of the journalistic world. As journalist Lou Hodges stated, it is “because of our new power to deceive through digital manipulation we must increase caution in our professional watchdog role... and become all the more creative in using new technology to improve our pictures to present reality all the more clearly, compellingly, and accurately.”³⁷ If the media are to continue the tradition of informing the public, then those in charge must be committed to building and carrying out a standard for visual truth and rid what photo editor Hal Buell has called the “occasion of sin”³⁸ provided by digital manipulation. The public must be aware of what it is seeing. The fact, however, remains: digital photography has taken the place of hard copy photography within the media and the ethical principles that govern must acknowledge the shift.

Many in the industry advocate the development of “sign posting” digitally manipulated photographs in the news.³⁹ Such postings would add image captions describ-

ing the photographs as “digital illustrations” rather than as photographs. Others believe that a permanent symbol should be electronically adhered to an altered image.⁴⁰ A number of publications already add some kind of image captioning to their own images in an attempt to curtail the issue; however, images that are shared or traded from one publication to another often lose the caption somewhere along the line and the image is no longer presented as such.⁴¹ The truth is lost in translation. John Long, former president of the NPPA and current Ethics Co-Chair, believes “a visual lie is a visual lie no matter how you caption it. There is not an editor alive who would write in italics at the end of story about a drug addicted kid in Washington D.C. that ‘the kid himself did not exist, but since we had to personalize a very real problem, we created a composite kid, so the story is valid because we told you it was fake.’ This is what we are doing when we try to caption away visual lies with disclaimers.”⁴²

Many journalists feel that even opening the door to minor manipulations can and will result in a floodgate effect of unacceptable interventions.⁴³ They believe that strict codes of practice should be implemented outlining the guidelines of conduct⁴⁴ and to which they would be strictly adhered. Each publication could in theory enact its own set of guidelines, but without some kind of unifying factor throughout, each set could and would vastly differ from another. Sherman Gessert, former director of photography at the *Milwaukee Sentinel*, admitted that he had been known to “cheat a bit in the past” when asked about digitally manipulating photographs, but he continued, “I’ve seen the light, witnessed the disaster electronics could bring if left unchecked....”⁴⁵ While the NPPA has created its Code of Ethics for photojournalists, it is touted as a list *promoting* the accuracy of published images and that such infringements *should* be taken seriously. The problem is that there is no regulating force. Herein lies photojournalism’s saving grace.

While the First Amendment provides the freedom of speech and of the press, and allows newspapers and magazines to publish information as they see fit,⁴⁶ the government cannot and does not regulate that content. There are a number of exceptions to the First Amendment and regulators of those exceptions. The Federal Communications Commission (FCC) is one such example.⁴⁷ In the case of *Federal Communications Commission v. Pacifica Foundation*, the Supreme Court upheld the power of the FCC to regulate radio broadcasting that was indecent.⁴⁸ The Court held that there were two distinctions between broadcasting and other media: “First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans...confront[ing] the citizen, not only in public, but also in the privacy of the home, and second, broadcasting is uniquely accessible to children.”⁴⁹

Photojournalism is unlike that of its written counterpart in relation to the defining points made by the Supreme Court in *Federal Communication Commission v.*

Pacifica Foundation. First, visuals like photography have made themselves a pervasive presence in the lives of all Americans. Photographs are not just printed, but are also used in television broadcast news.⁵⁰ Second, photography, unlike written text, is a visual language and an example of the validity we attach to the content of what we see.⁵¹ No matter an individual’s age, photography, like speech, is just as uniquely accessible to children.⁵² Press photography therefore would benefit from a regulating commission similar to the FCC, but to be clear, this would not hinder newspapers from printing the photographs, they would still have the ability to print whatever they like. Rather, such a regulator would only be the watchdog of making sure that the public knows what it is truthfully seeing when reading a news photograph: is it the actual, untouched image or has it been manipulated in some way? Such regulation over photographs would mandate that public publications note all content of a photograph that has been digitally manipulated in the news. If a particular publication failed to credit the manipulated photo as such, it would receive a notice of violation similar to that of the FCC’s.⁵³

The recommended Code of Ethics published by the NPPA⁵⁴ would stand as a strong base for such decision making, as to whether or not a photograph has been manipulated. The formation of such an organization that is solely interested in the ethical challenges posed in the digital era⁵⁵ is not only long overdue but desired by those within the profession. For those who disagree with the regulation of digital photojournalism, the best advice that can be given “about retouching a photograph intended for press reproduction is simply: Don’t.”⁵⁶

Endnotes

1. Astrid Böger, *People’s Lives Public Images: The New Deal Documentary Aesthetic*, 43.
2. See Brian Buchanan, *About the First Amendment*, FIRST AMENDMENT CENTER, http://www.firstamendmentcenter.org/about.aspx?item=about_firstamd (last visited Oct. 4, 2010).
3. See RALPH E. LERNER AND JUDITH BRESLER, *ART LAW: THE GUIDE FOR COLLECTORS, INVESTORS, DEALERS AND ARTISTS* Vol.2 888 (P.L.I., 2nd ed.) (2005).
4. *Id.*
5. TOM ANG, *PICTURE EDITING: AN INTRODUCTION (JOURNALISM MEDIA MANUAL)* 142 (Focal Press, 2nd ed.) (1997).
6. See DONA SCHWARTZ, *PROFESSIONAL OVERSIGHT: POLICING THE CREDIBILITY OF PHOTOJOURNALISM IN IMAGE ETHICS IN THE DIGITAL AGE* 27 (2003).
7. See generally, *Code of Ethics*, NAT’L PRESS PHOTOGRAPHERS ASS’N, available at http://www.nppa.org/professional_development/business_practices/ethics.html (last visited Oct. 4, 2010).
8. See *id.*
9. JULIANNE H. NEWTON, *THE BURDEN OF THE VISUAL TRUTH: THE ROLE OF PHOTOJOURNALISM IN MEDIATING REALITY* 83 (Lawrence Erlbaum Assocs., Inc. 2001).
10. See SCHWARTZ, *supra* note 6, at 29.
11. NEWTON, *supra* note 9, at 84.

12. At the time of the case, the falsity was held within the *written word*; however, as previously mentioned, *visual speech* (a/k/a news photographs) today is given equal protection under the First Amendment.
13. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).
14. *John* 8:7.
15. See *N.Y. Times Co.*, 376 U.S. at 56-57.
16. See *id.* at 280-81, 83-84.
17. *Id.* at 279-80.
18. *Id.* at 293.
19. See *id.*
20. *Id.*
21. *Id.* at 295.
22. John Long, *Ethics in the Age of Digital Photography*, NAT'L PRESS PHOTOGRAPHERS ASS'N, available at http://www.nppa.org/professional_development/self-training_resources/eadp_report/eadptxt.html (last visited Oct. 4, 2010).
23. ANG, *supra* note 5, at 143.
24. See SCHWARTZ, *supra* note 6, at 39.
25. See Tom Wheeler, Photo Truth or Photo Fiction: Ethics and Media Imagery in the Digital Age 105 (Linda Bathgate ed., Lawrence Erlbaum Assocs., Inc. 2002).
26. See Long, *supra* note 22 (The decision to darken Simpson's skin was not only met with ethical questions in regard to photojournalism but racial ones as well; bringing to light the question: does black mean guilty?).
27. *Id.*
28. *Id.*
29. A term commonly used in photography when a photograph has been overexposed and thus loses highlight detail.
30. Long, *supra* note 22 (quoting the managing editor of TIME).
31. WHEELER, *supra* note 25, at 165.
32. NEWTON, *supra* note 9, at 84.
33. WHEELER, *supra* note 25, at 113.
34. NEWTON, *supra* note 9, at 4.
35. See generally *N.Y. Times Co.*, *supra* note 13.
36. See NEWTON, *supra* note 9, at 50.
37. SCHWARTZ, *supra* note 6, at 47 (quoting Lou Hodges, Speech at the Annual Convention of the NPPA: The Moral Imperative for Photojournalists in NPPA Photojournalism Ethics: Protocol (July 1991)).
38. LARRY GROSS ET AL., *Image Ethics in the Digital Age in IMAGE ETHICS IN THE DIGITAL AGE* viii (2003).
39. See ANG, *supra* note 5, at 147.
40. *Id.*
41. *Id.*
42. WHEELER, *supra* note 25, at 166 (The article that Mr. Long is referencing is that of a story about child heroin use in Washington, DC which was published in *The Washington Post* in the 1980s entitled *Jimmy's World*. While the facts behind the story were true the newspaper fabricated the actual 8-year-old child "Jimmy" in order make it more authentic and real.).
43. See SCHWARTZ, *supra* note 6, at 40.
44. See *id.* at 148.
45. *Id.* at 33.
46. Information can be true or false, biased or unbiased.
47. See e.g., HENRY COHEN, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONGRESSIONAL RESEARCH SERVICE 24 (Oct. 16, 2009), available at <http://www.fas.org/sgp/crs/misc/95-815.pdf> (last viewed Oct. 4, 2010) (The FCC has more limited First Amendment protection than other media due to the "scarcity rationale." In *Red Lion Broadcasting v. Federal Communications Commission* [395 U.S. 367 (1969)] the Supreme Court "justif[ie]d that]... '[w]here there are substantially more individuals who wanted to broadcast than there are frequencies to allocate, it is idle to posit an unbridgeable First Amendment right to broadcast comparable to the right of every individual to speak, right or publish.'" (quoting *Red Lion Broadcasting*, 395 U.S. at 388.).
48. See *id.* (In *Fed. Comm'ns Comm'n v. Pacifica Foundation*, 438 U.S. 726 (1978), a father complained that his son had heard "filthy words" during a daytime radio show in New York City. Pacifica received a letter from the FCC stating that it had violated regulations by broadcasting indecent materials. *Fed. Comm'ns Comm'n*, 438 U.S. at 729.).
49. Henry Cohen, *Freedom of Speech and Press: Exceptions to the First Amendment*, 24, <http://www.fas.org/sgp/crs/misc/95-815.pdf> (accessed March 25, 2010).
50. See ANG, *supra* note 5, at 103.
51. See NEWTON, *supra* note 9, at 84.
52. It is a good possibility that while the father found the indecent language in question in *Pacifica* inappropriate, his son did not understand their meanings, but nonetheless heard them.
53. See generally, COHEN, *supra* note 49, at 24-25.
54. See *Code of Ethics supra*, note 7:
 1. Be accurate and comprehensive in the presentation of subjects.
 2. Resist being manipulated by staged photo ops.
 3. Be complete and provide context when photographing or recording subjects. Avoid stereotyping individuals and groups. Recognize and work to avoid presenting one's own biases in the work.
 4. Treat all subjects with respect and dignity. Give special consideration to venerable subjects and compassion to victims of crime or tragedy. Intrude on private moments of grief only when the public has an overriding and justifiable need to see.
 5. While photographing subjects do not intentionally contribute to, alter, or seek to alter or influence events.
 6. Editing should maintain the integrity of the photographic images' content and context. Do not manipulate images or add or alter sound in any way that can mislead viewers or misrepresent subjects. The four types of misleading journalism: Digitally manipulating images after photos have been taken, photographing scenes staged by others, photographing scenes staged by journalists, giving false or misleading captions to otherwise real photos.
 7. Do not pay sources or subjects or reward them materially for information or participation.
 8. Do not accept favors, or compensation from those who might seek to influence coverage.
 9. Do not intentionally sabotage the efforts of other journalists.
55. See, e.g., SCHWARTZ, *supra* note 6, at 47.
56. A.E. LOOSLEY, *THE BUS. OF PHOTOJOURNALISM* 226 (Focal Press, 1970).

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Golan v. Holder: The Long Road to Restoration

By Joan McGivern and Christine Pepe

In 1994, Congress amended our copyright laws to allow for the restoration of foreign copyrights, which had lapsed into the public domain, thereby placing the U.S. in compliance with our foreign treaty obligations under the Uruguay Round Agreement.¹ Foreign copyright owners rejoiced; many had lost valuable rights due to their inability or lack of knowledge of the arcane formality requirements imposed under the U.S.'s pre-1976 Copyright Act. U.S. copyright owners also stood to benefit because their copyrights, due to the U.S.'s failure to comply, were not being similarly protected through restoration abroad.

However, people in the U.S. who had built livelihoods in reliance on these works being in the public domain were not happy. They alleged that once a work was in the public domain, the work had become part of the common culture and could never be "restored." Some alleged that their First Amendment rights were encroached and that no action by Congress, even to comply with an international treaty obligation, could justify the "unconstitutional" action of trammeling their First Amendment rights. Congress had also enacted detailed provisions to address and balance the concerns of such users of public domain works with the rights of foreign copyright holders of restored works. Nonetheless, the users of these public domain works were not satisfied.

With these allegations, so began a long challenge. That finally ended this past summer with the Tenth Circuit, on its second review of *Golan v. Holder*, upholding Congress' authority to restore foreign copyrights.²

Nearly a Decade of Litigation...

The statute at issue is Section 514 of the Uruguay Round Agreements Act (URAA) (now codified in the Copyright Act at 17 U.S.C. §§ 104A, 109), an important copyright provision that restores copyright status to certain foreign works that had fallen into the public domain due to failure to comply with statutory formalities.³ Section 514 places the United States in compliance with Article 18 of the Berne Convention, which requires each signatory to provide the same copyright protections to authors in other member countries that it provides to its own members.⁴ The statute contains certain provisions to protect "reliance parties"—that is, people that had been using the formerly public domain work. For instance, in order to enforce the restored copyright, an owner must file a notice with the Copyright Office or otherwise place the reliance party on notice.⁵ Further, a reliance party has a 12-month grace period in which he or she may continue to sell or exploit the restored work (but not make additional copies of the work).⁶ Only after that period

had elapsed would a license fee be due to the copyright holder, or the reliance party has to cease using the work.

In 2001, the plaintiffs, consisting of educators, performers, publishers, film archivists, and motion picture distributors, each claiming to rely on the use of public domain works to support themselves, brought suit in the United States District Court for the District of Colorado against the government seeking to enjoin on constitutional grounds the enforcement of Section 514 and the Copyright Term Extension Act (CTEA).⁷ The plaintiffs included violinist and conductor Lawrence Golan and the Symphony of the Canyons, who had publicly performed restored works such as Prokofiev's *Classical Symphony* and *Peter and the Wolf* and Stravinsky's *Petrushka*. The plaintiffs also included film distributors who had invested significant resources identifying and restoring public domain films such as Hitchcock's 1932 film, *Number Seventeen*, and the 1940 British film, *Night Train to Munich*.⁸ These "reliance parties" claimed that Section 514 not only harmed their free speech, but also their economic interests, having spent time and money restoring or preparing the works on the expectation that the works would remain in the public domain.

The case was stayed briefly because the Supreme Court had agreed to hear the *Eldred v. Ashcroft* case, discussed below, which similarly involved First Amendment challenges to the Copyright Act.⁹ Upon the lift of the stay, the district court dismissed the plaintiffs' claims, concluding that Congress had the authority under the Copyright Clause of the Constitution to remove works from the public domain and there was a rational basis for enactment of Section 514, *i.e.*, the protection of American authors' copyrights abroad.¹⁰ The district court did not fully analyze the plaintiffs' First Amendment claims.

The plaintiffs appealed on the basis that the Supreme Court's *Eldred v. Ashcroft* decision required further First Amendment scrutiny of Section 514. The Tenth Circuit agreed and reversed, holding that although Congress has the authority under the Copyright Clause to enact Section 514 and restore protection to foreign works in compliance with the Berne Convention, the legislation "must still comport with other express limitations in the Constitution," notably the First Amendment.¹¹ The Circuit Court found that copyright works historically followed the same sequence: creation, copyright, then public domain. Since Section 514 presented a departure from this sequence (by restoring copyright to public domain works), the court, relying on Justice Ginsburg's language in *Eldred*, held that Section 514 "altered the traditional contours of copyright protection" and, on this basis, remanded the case to the district court for further First Amendment analysis.¹²

The district court, finding that Section 514 was content-neutral, applied an intermediate level of scrutiny, as opposed to a heightened scrutiny standard.¹³ Nonetheless, and even though the district court recognized that Section 514 advanced a significant governmental interest, it concluded that the Berne Convention did not require full restoration of copyrights because the reliance parties could have been completely exempted.¹⁴ In finding a First Amendment violation, the court concluded that Section 514 was substantially broader than necessary to achieve the government's interests.¹⁵ The government appealed to the Tenth Circuit.

Nine years after the initiation of the lawsuit and three U.S. attorneys general later, on June 21, 2010, the Tenth Circuit reversed the district court, holding that Section 514 did not violate the First Amendment.¹⁶ In *Golan v. Holder*, the court found that the statute satisfied intermediate scrutiny because it (1) advanced important governmental interests unrelated to the suppression of free speech and (2) did not burden substantially more speech than necessary to further those interests (or was "narrowly tailored").¹⁷

As to the first prong, the Circuit Court found important governmental interests on the basis that securing foreign copyrights for American works preserves the authors' economic and expressive interests.¹⁸ In assessing the government's asserted harm, the Circuit Court held that substantial deference, particularly in matters of foreign affairs, should be given to Congress in its judgments of potential harm: "Our sole obligation is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence."¹⁹ The court pointed to testimony before Congress at the time of Section 514's passing that the United States' historically lax position on copyright restoration had been harming our citizens' copyright interests abroad.²⁰ The theory adopted by the court was that if the U.S. was to pass restorative legislation for foreign works, other nations would be more likely to pass similar legislation.²¹

As to the second prong, the plaintiffs argued that there was a less restrictive way of implementing copyright restoration, specifically urging the adoption of the United Kingdom model, where the reliance party is allowed to continue making those uses of the work it had made, or incurred commitments to make, before the copyright is restored, but the reliance party can be bought out by the owner of the restored copyright.²² In rejecting this argument, the court held that even if there were other options available to Congress, the less restrictive analysis is never a part of the inquiry into the validity of a content-neutral statute, so long as the means chosen are not substantially broader than necessary to achieve the government's interest.²³ Moreover, the court noted that there was no real difference between Section 514's protections for

the reliance parties and the U.K.'s protections, stating that the difference between the "buy out" and "notice" is only that one is economic protection and the other expressive protection.²⁴

The Importance of International Treaty Compliance

The Tenth Circuit's decision in *Golan* represents significant progress in the United States' compliance with international treaties relating to the protection of intellectual property. In upholding Section 514, the court considered the evidence presented to Congress in support of Section 514's passing, such as evidence that foreign countries were willing to provide, at most, reciprocal copyright protections to American works.²⁵ Otherwise stated, foreign countries would restore American copyrights only if the U.S. restored copyrights of their citizens. The court also noted evidence in the legislative history that the U.S. often served as an example to other countries—U.S. restoration to foreign works in our public domain would induce other countries with whom the U.S. recently established copyright relations to follow suit.²⁶

While at first this appears to be a copyright protection quid pro quo, the facts presented to Congress indicated that the United States would continue to lose billions of dollars each year because foreign countries were not providing copyright protections to American works.²⁷ Projections from Recording Industry Association of America's Chairman and CEO Jason S. Berman supported this, stating "[t]here are vastly more U.S. works currently unprotected in foreign markets than foreign ones here, and the economic consequences of [granting retroactive copyright protection] are dramatically in favor of U.S. industries."²⁸ The U.S. has a strong economic incentive to comply with international treaties, particularly given the increasing importance of export revenue from U.S. intellectual property.

While much of the *Golan* analysis focused on the reliance parties, it is important to remember that a significant number of foreign copyright owners routinely lost their rights because of a failure to comply with U.S. formalities that were in place prior to the 1976 Copyright Act. Under the 1909 Copyright Act, in order to create a valid copyright under U.S. law—even if the work was already in published form—a creator or owner was required to post a notice of copyright on the work, *i.e.*, "©," and register the work with the United States Copyright Office.²⁹ The 1909 Act also required a renewal to be filed after the expiration of the first 28-year term of copyright (to extend protection for another 28-year term).³⁰

The 1976 Act abandoned these formalities as a prerequisite to a valid copyright, and instead, provided that copyright is created when expression is fixed in a tangible

form.³¹ Now, notice of copyright and registration are only required in order to bring a lawsuit for infringement and obtain statutory damages and attorneys' fees.³² Somewhat ironically in view of *Golan*, a primary goal of the 1976 Act (and its abandonment of formalities) was to harmonize U.S. copyright law with international treaties and practice, where formalities were not a requirement for copyright protection.

Authority over matters relating to international treaty obligations and the consequences of non-compliance lies exclusively with the Executive Branch. Yet as the Tenth Circuit ultimately acknowledged in its recent decision, when it comes to matters of foreign policy and international affairs, Congress should be afforded significant deference.

Heightened First Amendment Scrutiny of Copyright Legislation

In *Eldred v. Ashcroft*, the Supreme Court upheld the constitutionality of the Sonny Bono Copyright Term Extension Act and, in doing so, refused to apply anything beyond the rational basis review.³³ The Court noted that the Copyright Act's "built-in free speech safeguards" are generally adequate to address First Amendment concerns.³⁴ Only if Congress altered the "traditional contours of copyright protection," the Court stated, would further First Amendment scrutiny be necessary.³⁵ The "traditional contours of copyright protection" referred to by the *Eldred* Court comprise copyright law's "built-in free speech safeguards" of fair use and the idea/expression dichotomy (*i.e.*, that ideas are not copyrightable).

Given that the Tenth Circuit in *Golan* ultimately applied intermediate scrutiny (as opposed to rational basis review), it would follow that Section 514 was found to be outside the "traditional contours of copyright protection." In the Tenth Circuit's first *Golan* decision, the court interpreted *Eldred* quite broadly, finding that the "history of American copyright law" should inform its inquiry. The Circuit Court then performed a detailed analysis of the history of the Copyright Act and its treatment of the public domain (including the Framers' intent) and concluded that there simply was no history or tradition of removing works from the public domain. As such, the court found that the statute presented a departure from the traditional creation, copyright, and public domain sequence. The court did not specifically analyze the impact of the statute on fair use or the idea/expression dichotomy—if it did, it would see that those protections remained intact, regardless of whether a work was restored from the public domain.

If such a broad interpretation of *Eldred* was to persist, Congress' discretion would be hindered. It is important for the Copyright Act to continue to evolve—particularly

in view of new media and technology developments as well as the growing international landscape for intellectual property. For instance, the Digital Millennium Copyright Act was a game-changing addition to copyright laws, and certainly in many ways had no precedent.³⁶

In closing, although Section 514 appears to have survived First Amendment scrutiny, it would not be surprising if further attacks are brought against the Copyright Act on the basis that certain amendments exceed the Act's "traditional contours." Interestingly, none other than Lawrence Lessig represented the plaintiffs in both the *Eldred* and *Golan* cases. Given Lessig's zeal in challenging the Copyright Act, one would expect to see a petition for writ of certiorari filed with the Supreme Court on *Golan*.

Endnotes

1. Section 514 of the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809, 4976-80 (1994) (codified as 17 U.S.C. § 104A, 109) [hereinafter URAA]. As stated in *Golan v. Holder*, the Uruguay Round General Agreement on Tariffs and Trade included the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). The TRIPs agreement required, in part, that its signatories, which included the U.S., comply with Article 18 of the Berne Convention, and thus, extend copyright protection to all works of foreign origin whose term of protection had not expired. See *Golan v. Holder*, Nos. 09-1234, 09-1261, 2010 WL 2473217, at *1-3. (10th Cir. 2010) (*citing* Berne Convention for the Protection of Literary and Artistic Works, Art. 18, Sept. 9, 1886, revised at Paris July 24, 1971).
2. See generally *Golan*, 2010 WL 2473217 (analyzing the constitutionality of the URAA provision restoring copyright protection to foreign works that had fallen into the public domain).
3. URAA, *supra* note 1.
4. Berne Convention for the Protection of Literary and Artistic Works, Art. 18, Sept. 9, 1886, revised at Paris July 24, 1971.
5. 17 U.S.C. § 104A(d)(2) (2009).
6. *Id.* at § 104A(d)(2)(A)(ii), (B)(ii).
7. *Golan v. Ashcroft*, 310 F.Supp.2d 1215 (D. Colo. 2004).
8. *Golan v. Gonzales*, 501 F.3d 1179, 1182 (10th Cir. 2007).
9. *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
10. *Golan v. Gonzales*, No. 01-B-1854, 2005 U.S. Dist. LEXIS 6800, at *42, 43-47 (D. Colo. Apr. 20, 2005).
11. *Golan v. Gonzales*, 501 F.3d 1179, 1187 (10th Cir. 2007), *citing* *Eldred v. Ashcroft*, 537 U.S. 186 (2003).
12. *Id.*
13. *Golan v. Holder*, 611 F. Supp.2d 1165, 1170 (D. Colo. 2009).
14. *Id.* at 1174.
15. *Id.*
16. *Golan*, 2010 WL 2473217.
17. *Id.* at *4.
18. *Id.* at *5.
19. *Id.*
20. *Id.* at *7.
21. *Id.*
22. *Id.* at *12-13.
23. *Id.* at *13.
24. *Id.* at *14.

25. *Id.* at *7 citing *General Agreement on Tariffs and Trade (GATT): Intellectual Property Provisions: Joint Hearing on H.R. 4894 and S. 2368 Before the Subcomm. on Intellectual Property and Judicial Administration of the H. Comm. on the Judiciary and the Subcomm. on Patents, Copyrights, and Trademarks of the S. Comm. on the Judiciary, 103d Cong., 2d Sess. 249 (1994)* [hereinafter *Joint Hearings*] at n.2, statement of Eric Smith, Executive Director and General Counsel of the International Intellectual Property Alliance.
26. *Id.*, citing *Joint Hearings* at 225, statement of Irwin Karp, Counsel, Committee for Literary Studies.
27. *Id.* at *6, citing *Joint Hearings* at 225, statement of Eric Smith.
28. *Id.*, citing *Joint Hearings* at 262, statement of Jason S. Berman, Chairman and CEO of the Recording Industry Association of America.
29. Copyright Act of 1909, Pub. L. No. 60-349, 35 Stat. 1075.
30. *Id.*
31. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541.
32. 17 U.S.C. §§ 411, 412 (2009).
33. *Eldred*, 537 U.S. at 205.
34. *Id.*
35. *Id.* at 221.
36. Digital Millennium Copyright Act of 1998, Pub. L. No. 105-304, 112 Stat. 2860, 2887 (enacted Oct. 28, 1998) (codified as Title 17 in the United States Code).

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Harper as Unfair Precedent: Fair Use of Unpublished Works

By Bezalel Stern

I. Introduction

In 1985, the Supreme Court decided the seminal case of *Harper & Row v. Nation Enterprises*.¹ While the *Harper* decision seemed to concern itself with a very specific subset of fair use—that of unpublished works that were used with “bad faith”²—and while a 1992 amendment to the Copyright Act (the 1992 Amendment) seemed to expand the potential for a finding of fair use in unpublished works,³ the shadow of the *Harper* decision still continues to haunt both the publishing industry and individual authors and scholars who wish to write and publish material that would undoubtedly be bettered by the use of unpublished works. This article aims to follow the troubled history of *Harper*, focusing both on why the case serves as bad precedent and why future decisions should—and could—extricate themselves from *Harper*’s expanded dicta.

Since copyright-based cases are not decided in a vacuum, and publishing standards are often just as important as judicial doctrine with regard to fair use, this article will also examine some of the major American publishers’ responses to the *Harper* decision. While the *Harper* decision has been, at the very least, substantially modified by the 1992 Amendment and subsequent case law on the matter, it will be shown that the publishing industry has not modified its rules regarding the fair use of unpublished works since. Why this is the case today, and how it can be changed, will be the focus of the final portion of this article.

II. *Harper & Row v. Nation Enterprises*

The facts of *Harper* concerned the status of some “original language totaling between 300 and 400 words”⁴ that had been pilfered from one publishing house and then published by another magazine. Former President Gerald R. Ford had contracted with Harper & Row (Harper) “to publish his as yet unwritten memoirs.”⁵ The memoirs were considered something of a hot item, containing “‘significant hitherto unpublished material’ concerning the Watergate crisis, Mr. Ford’s pardon of former President Nixon and ‘Mr. Ford’s reflections on this period of history, and the morality and personalities involved.’”⁶ Soon before the memoirs were to be published, Harper reached an agreement with *Time*, allowing the magazine “the right to excerpt 7,500 words from Mr. Ford’s account of the Nixon pardon”⁷ in exchange for a consideration of “\$25,000, \$12,500 in advance and an additional \$12,500 at publication.”⁸

The agreement between Harper and *Time*, however, soon hit an unexpected snag, when thieves stole the Ford memoirs for a brief period and shared them with the offices of *The Nation*. The theft, occurring “[t]wo to three weeks before the *Time* article’s scheduled release,”⁹ effectively killed *Time*’s story. *Time* understandably withdrew from the Harper agreement and refused to pay the latter installment of \$12,500. Harper’s suit against *The Nation* ensued.

“[C]opyright-based cases are not decided in a vacuum, and publishing standards are often just as important as judicial doctrine with regard to fair use...”

Harper was the first major case since the Copyright Act was substantially revised in 1976 to deal with the vexing question of how the copyright law treats the issue of fair use of unpublished works. Under the 1909 Copyright Act, unpublished works were not protected under federal copyright,¹⁰ and the question of whether fair use was available for uncopyrighted works, on the federal level, at least, was therefore moot. The 1976 Act, however, attached federal copyright to all “original works of authorship fixed in any tangible medium of expression,”¹¹ regardless of whether the work itself remained unpublished. The 1976 Act, as well, codified for the first time what had been a longstanding common law rule of fair use. The fair use limitation of copyright allows, in limited circumstances outlined but by no means defined in §107 of the 1976 Copyright Act,¹² users who do not hold copyright in the work to nonetheless use the work in certain instances.

The fact that unpublished works were now strictly and safely within the confines of federal copyright protection, and that fair use was, after 1976, statutorily codified, would, one would think, necessitate at least the possibility of the finding of fair use in unpublished works.¹³ The legislative history of §107, however, belies this assumption. The House Report, in explaining the “General intention behind the provision,” states that “Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.”¹⁴ Allowing unpublished works to benefit from fair use would arguably “enlarge” the meaning of fair use as it stood before 1976. The Senate Report, as well, explicitly stated that “The applicability of the fair use doctrine to unpublished

works is narrowly limited since, although the work is unavailable, this is the result of a deliberate choice on the part of the copyright owner.¹⁵ Unpublished works before *Harper*, then, were situated in a veritable no man's land of questionability regarding their availability under fair use. The Supreme Court's decision regarding whether to find fair use of the uncopyrighted snippets of former President Ford's manuscript carried with it, therefore, the arguably more fundamental question as to the very nature of unpublished works.

As the case that was to decide the Supreme Court's position on unpublished works for at least the next three decades, *Harper* was a decidedly deficient choice.¹⁶ For one thing, it was a manifestly unusual case. The customary uses of unpublished works are for history, biography, and literary criticism. These types of works often necessitate the use of unpublished works for the public good (understanding more about the subject of the biography and/or his or her work). Furthermore, works such as these are arguably a perfect fit for the statutory fair use exception, which states, in part, that "the fair use of a copyrighted work...for purposes such as criticism, comment...scholarship, or research, is not an infringement of copyright."¹⁷ Both biography and literary criticism should fit neatly within to at least one, and possibly all, of these categories.

The case of *Harper*, on the other hand, revolved around the use of an unpublished work for the sole purpose of pecuniary gain. *The Nation*, when it scooped *Time*'s story, did so both nefariously (the *Harper* Court makes much of the "purloined manuscript"¹⁸) and without any of the fair use friendly clauses outlined in §107 of the Copyright Act. Nevertheless, the *Harper* decision is still taken as precedent for all subsequent cases involving the potential fair use of unpublished material.

The decision was written by Justice Sandra Day O'Connor, who found that fair use in this case was not achieved, and highlighted the unpublished nature of the work. "In using generous verbatim excerpts of Mr. Ford's unpublished expression to lend authenticity to its account of the forthcoming memoirs," O'Connor opined, "*The Nation* effectively arrogated to itself the right of first publication, an important marketable subsidiary right."¹⁹ With regard to a finding of fair use, while not discounting the other three factors present in the statutorily mandated four factor test, the opinion stated that "it has never been seriously disputed that 'the fact that the plaintiff's work is unpublished...is a factor tending to negate the defense of fair use."²⁰ Explaining the Court's position, O'Connor maintained that "[p]ublication of an author's expression before he has authorized its dissemination seriously infringes the author's right to decide when and whether it will be made public, a factor not present in fair use of published works."²¹ Even though *The Nation* had only published a relatively small section of the book—approximately 300 words of an approximately 200,000-word

memoir—the Supreme Court nevertheless found a lack of fair use, arguing that *The Nation* had published "essentially the heart of the book."²²

While it is never mentioned explicitly in the legal argument section of the opinion, the fact that a representative of *The Nation* had stolen Ford's unpublished manuscript was almost certainly a factor in the Court's conclusion.²³ Another factor, and one that is explicitly alluded to, is the fact that *The Nation*'s publication of the material adversely and clearly affected the profit margins of both *Time* and Harper.²⁴ Had *The Nation* not published the material, *Time* would have published substantially similar material only two to three weeks later. Neither of these factors are usually present in most scholarship-based cases—which more likely find a scholar viewing unpublished documents licitly,²⁵ using only small fragments of those documents, and doing his or her research at least as much for scholarly as for pecuniary gain.

Nevertheless, the holding in *Harper* was and is still taken as the Supreme Court's final word on conducting a fair use analysis unpublished works. When the Court wrote that "[t]he fact that a work is unpublished is a critical element of its 'nature,'"²⁶ it for all intents and purposes closed off unpublished works from an analysis of the second of the four fair use factors, and it possibly destroyed the chance of ever having a finding of fair use in an unpublished work.²⁷

III. The Fair Use Status of Unpublished Works After Harper

Commenting on the current fair use status of unpublished works, one scholar has noted that "[f]ollowing the decision in *Harper & Row, Publishers Inc. v. Nation Enterprises*, courts began to conscientiously inquire about the published or unpublished nature of the work."²⁸ However, whereas "the published nature of a work typically carried little weight, the fact that a work was unpublished tended to heavily weight this factor against fair use."²⁹

Indeed, the Second Circuit, in a series of highly publicized opinions written subsequent to *Harper*, extended the Supreme Court's dicta regarding unpublished works to the point where, barring a statutory change,³⁰ unpublished works were effectively barred from the fair use exception. Those cases, *Salinger v. Random House* and *New Era v. Henry Holt*,³¹ while following in *Harper*'s footsteps, served to chill publishers' relationships with fair use perhaps even more than the *Harper* decision itself did.

In October of 1982, Ian Hamilton began working on a biography of J.D. Salinger.³² Salinger—probably the world's most famous literary recluse—proved exceedingly elusive, however, and it was only in 1984, after discovering "a cache of Mr. Salinger's letters,"³³ that Hamilton began to develop a true understanding of the man. Before the book was published, however, Salinger got wind of it, and sued Random House to enjoin publica-

tion. Judge Pierre Leval, then a district court judge in the Southern District of New York, found that the material Hamilton used in the book—approximately 200 words taken from 44 letters³⁴—to be non-infringing fair use. Salinger appealed, and the Second Circuit, relying heavily on the holding and dicta of the Supreme Court in *Harper*, reversed.

In its opinion, the appellate court placed “special emphasis on the unpublished nature of Salinger’s letters.”³⁵ In so doing, the court claimed to be simply following “the Supreme Court’s approach in *Harper & Row*.”³⁶ The court went on to say that “the tenor of the [*Harper*] Court’s entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression.”³⁷ According to one commentator, the decision was “extraordinary,” being “the first time in American memory that a book had been enjoined prior to publication, and it sent shock waves throughout the academic and publishing communities.”³⁸ Perhaps even more shocking however, was the fact that, at least within the Second Circuit, with the *Salinger* holding the possibility of making fair use of unpublished works had been all but abolished.³⁹

New Era v. Henry Holt, decided two years after *Salinger*, concerned the publication of an unauthorized biography of L. Ron Hubbard. While allowing the continued publication of the manuscript in question, the court did so on a technicality (laches), and went on to state that “we made it clear in *Salinger* that unpublished works normally enjoy complete protection.... Where use is made of materials of an ‘unpublished nature,’ the second fair use factor has yet to be applied in favor of an infringer, and we do not do so here.”⁴⁰ The court in *New Era* emphasized what it took to be the fact that “*Salinger* creates a daunting obstacle to a fair use defense against the use of unpublished materials.”⁴¹

Both the *New Era* and the *Salinger* decisions served to further stifle the already chilled climate in the publishing world towards the possible fair use of unpublished works.⁴² Pierre Leval, who had written the lower court opinions in both *Salinger* and *New Era* (and had, in both cases, found fair use in the unpublished works), voiced an overarching concern of the time when he wrote, in 1990, that “[a]fter recent opinions of the Second Circuit casting serious doubt on any meaningful applicability of fair use to quotation from previously unpublished letters, publishers are understandably reluctant to pay advance royalties or to undertake commitments for biographical or historical works that call for use of such sources.”⁴³ As a consequence of these two decisions, resulting as they did from *Harper*, numerous authors, scholars, members of the publishing industry, and other public interest groups lobbied Congress for a change in the statutory wording to specifically allow unpublished works to be considered as potential candidates for fair use.

The 1992 Amendment, H.R. 4412, added the following phrase to the end of §107: “The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.”⁴⁴ This austere phrasing seems, on its face, to add little to the debate. In and of itself, the sentence can be interpreted to be following the holding of *Harper*,⁴⁵ or even that of *Salinger*.⁴⁶ The legislative history, however, sheds some light on the intention behind its minimal phraseology.

The legislative history, giving the reasons behind the 1992 Amendment, begins by explaining that “H.R. 4412 was introduced as a result of concerns by some biographers, historians, and publishers that their ability to use unpublished primary source material such as copyrighted letters and diaries had been limited to two decisions from the United States Court of Appeals for the Second Circuit, *Salinger*...and *New Era*.”⁴⁷ Already, it becomes clear, then, that the addition of the sentence at the end of §107 was meant to expand the possibility of fair use of copyrighted works beyond the severely limited avenues allowed by *Salinger* and *New Era*. The legislative history explains that the added sentence of §107 is meant “to reiterate Congress’s intention in codifying fair use that in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in §107, as well as any other factors deemed relevant in the court’s discretion.”⁴⁸ While the amended text of §107 is meant, then, according to the legislative history, to reject the *per se* rule against the finding of fair use in unpublished works that was articulated in *Salinger* and cemented in *New Era*, the holding of *Harper*, “that for purposes of the second statutory factor, the unpublished nature of the work is a ‘key, though not necessarily determinative factor tending to negate a defense of fair use,’ remains the law.”⁴⁹

As the legislative history strenuously overruled the Second Circuit’s decisions of *Salinger* and *New Era*,⁵⁰ but just as strenuously upheld the Supreme Court’s decision in *Harper*,⁵¹ the question of how much of a warming effect the 1992 Amendment would have on the use of unpublished works in biographies, histories, and works of criticism in the years immediately following passage of the legislation, was an open one.⁵² Indeed, cases over the years since the legislation was put in place have found both for and against fair use of unpublished material. At the same time, “[n]o subsequent court has confronted a case where the equitable considerations were as difficult as they were in *Harper & Row* or in *Salinger*, nor has any court engaged in a serious analysis of the type of expression that should be protected by copyright or the extent to which the author’s privacy should be relevant.”⁵³ The holding of *Harper*, with its focus of allowing the copyright holder of an unpublished work to retain the right of first publication, seems to have survived intact in the 1992 Amendment. Indeed, one standard treatise on entertain-

ment industry contracts states conclusively: “one cannot use 300 words from an unpublished work.”⁵⁴

Perhaps the most “representative” case “of the typical issues facing those who wish to make scholarly fair use of unpublished works”⁵⁵ since the passage of the 1992 Amendment was the case of *Sundeman v. Seajay Society, Inc.*⁵⁶ The facts of *Sundeman*, a Fourth Circuit case, concern an unpublished manuscript of the Pulitzer prize winning author Marjorie Kinnan Rawlings Baskin, entitled *Blood of My Blood*. Seajay Society, Inc. (Seajay), “a small, non-profit organization dedicated to enhancing public awareness of, and interest in, unduly neglected aspects of South Carolina and southern culture,”⁵⁷ legally obtained the manuscript, and made a copy of the novel. A member of Seajay later “orally presented her critical analysis of *Blood of My Blood* to a symposium of the Marjorie Kinnan Rawlings Society at the University of Florida.”⁵⁸ At the symposium, the Seajay member quoted from between four and six percent of the total text of the novel. The executor of Rawling’s estate sued for copyright infringement.

The court’s analysis of the defendant’s fair use claim is striking. While the court does assert, following the lead in *Harper*, that because “[c]reative works and unpublished works are closer to the core of works protected by the Copyright Act...the second enquiry weighs in favor of finding Seajay’s use unfair,”⁵⁹ it refuses to allow the unpublished nature of the work to affect its ultimate judgment for the defendants. The court, in doing so, seemed to imply that *Harper*, like *Salinger*, advocated a *per se* rule against the finding of fair use of unpublished works.⁶⁰ However, the *Sundeman* court, contrary to the explicit legislative history of the 1992 Amendment, read the §107 legislation as severely limiting both the *Harper* and *Salinger* courts.⁶¹ While following a narrowed, post-amendment version of *Harper* and still finding that “the nature of the copyrighted work weighs in favor of finding Seajay’s use to have been unfair under 17 U.S.C.A. § 107,”⁶² the court rightly rejects the *per se* against a finding of fair use.

Sundeman, from a legislative as well as a public policy perspective, makes sense. While the court found that the second legislative factor weighed in favor of the plaintiff, its finding that the first, third, and fourth factors weighed heavily in favor of the defendant led it to decide for an unqualified finding of fair use. However, it can be argued that *Sundeman*, which seems to be the prevailing view of the post-1992 amendment world, does not go far enough in allowing fair use for unpublished works—even though *Sundeman* could be read as a revolutionary decision in the field, allowing as it did the wholesale copying of an entire unpublished text.

The reason for this is simple. A large part of the impetus for the holding of *Sundeman* coming out the way it did was undoubtedly the fact that the defendants in *Sundeman* never tried to publish the unpublished materials they used.⁶³ *Sundeman* was decided in great part on the theory

that it did not disturb the right of first publication that the Court in *Harper* held sacrosanct. Indeed, in *Sundeman*, where the entire text of Rawling’s novel was at stake, it would certainly not have been fair use to publish the novel. Yet the issue becomes murkier when confronted with the article that the Seajay representative wrote about Rawling’s book. The court in *Sundeman* wrote of the paper, “[w]hile it does quote from and paraphrase substantially *Blood of My Blood*,” has its purposes in “criticiz[ing] and comment[ing] on Ms. Rawlings’ earliest work. Thus, [Seajay’s] transformative paper fits within several of the permissible uses enumerated in § 107; it has productive uses as criticism, comment, scholarship, and literary research.”⁶⁴

Nevertheless, it is questionable whether, had the defendant in *Sundeman* tried to publish her paper rather than simply present it at a conference, she would have been enjoined due to a non-finding of fair use. While *Sundeman* has often been seen as expanding the fair use doctrine regarding unpublished works, then, the holding in *Sundeman* is much less expansive than it appears to be at first glance.

IV. The Response of the Publishing Industry

The current state of the law is still problematic for those who have an interest in reading, producing, and publishing works of history, biography, and criticism, which can honestly and productively deal with primary sources. Since *Harper*, and continuing unabated after the 1992 Amendment, major publishing houses have refused to allow unpublished material to be used in biography, history, and literary criticism without explicit authorization from the copyright holders, even when those unpublished materials would arguably fall under the provisions of fair use.⁶⁵

According to Kate O’Neill, “even a conservative reading of precedent would authorize more than industry practice now permits.”⁶⁶ The publishing industry, naturally conservative in its risk-taking after *Harper*, and especially after *Salinger*, began to alter its contracts to formally disallow much of what should arguably be considered fair use. Among other things, “the standard contract bans use of unpublished material.”⁶⁷ The question asked by some, as to “whether the initial impact of the Harper & Row-Salinger-New Era cases was so forceful that it continues today to exert a chilling effect on those who would otherwise be users of unpublished writings,”⁶⁸ seems to have its answer in the affirmative.

Even more problematic, however, than the fact that this particular copyright norm is almost certainly over-enforced, is that the status quo does not seem at all likely to be changed anytime soon. One of the major reasons that there has not been a major case of unpublished works being quoted in a scholarly work since *Salinger* and *New Era* is simply because publishers have their own, “private” law of fair use. Since *Salinger*,⁶⁹ most of the major

publishing houses have simply not allowed the authors they work with to use unpublished material, in any form, in their works. "While recent cases and legal scholarship convey the impression that [the] fair use doctrine is in flux," O'Neill writes, "as it may well be in other contexts, the private law of trade publishing has cemented definitions of fair use, including a ban on published material, that is essentially unreviewable."⁷⁰

"Only with the ghost of Harper dead and gone can a truly reasonable and feasible fair use standard for unpublished works be set."

The in-house guidelines obtained by O'Neill are both informative and highly disturbing in this regard. One major publishing house's guidelines state, unambiguously, that "There is NO fair use of unpublished materials. (That's what blocked the Salinger bio; unpublished letters were quoted.)"⁷¹ Another major publishing house has similar rules: "What requires permission?...A personal letter. Permission must be obtained from the person who wrote the letter, no matter who may currently own the actual, tangible letter... No matter how innocuous the contents of a personal letter may seem, pursue the permission."⁷² There has been no decision and no change in the statutory guidelines that would make one think that the guidelines of major publishing houses have changed since 2001.⁷³

The case law on the matter has also not changed substantially in recent years. In 2006, in the Second Circuit case of *Blanch v. Koons*, the court opined,

We have said that when "the copyrighted [material is] unpublished, the second [fair-use] factor weighs heavily in favor" of the plaintiff. In 1992, however, Congress amended § 107 to state that: "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." We have not had occasion to address the published/unpublished distinction since that amendment.⁷⁴

While the "published/unpublished distinction" remains questionable, the benefit seems to be going towards the owners of the copyrighted works. Indeed, in the 2004 case of *NXIVM Corp. v. Ross Institute*,⁷⁵ both parties to the case did not dispute that because the copyrighted work was unpublished, the second of the fair use factors would favor the plaintiffs.⁷⁶ In 2006, a federal court in Illinois opined that "[f]air use has not been traditionally recognized as a defense to charges of copying from an author's as yet unpublished works."⁷⁷

V. Conclusion

Harper, then, has been setting what one could contend is bad precedent for over 20 years. The case was decided, arguably, with just as much of an importance given towards the "bad faith" of the defendant as the unpublished nature of the work. The case was dealing with what should have been seen as, and what indeed was, a far outlier from the normal situation of fair use of unpublished works. The fact that it has not been taken as such has led to the continued manufacture of bad law, and has caused untold loss to the public good, and to the creation of works of historical and literary value.

The onus, however, is not on the courts, but on the publishers of works of history, biography, and literary criticism, and on the authors of those works. The court in *Blanch v. Koons* was far from being facetious when it stated that it has not "had occasion to address the published/unpublished distinction since" the 1992 Amendment.⁷⁸ Courts only have the power to address cases that come before them, and the publishing industry, since *Salinger*, has been unwilling to risk the possibility of an injunction by taking another chance. This is understandable. Yet, for the public good and the long-term good of both publishers and authors, the chance needs to be taken. The situation of disallowing fair use of unpublished works in publications has long been upheld, with only, at best, *de minimis* exceptions offered.⁷⁹

At this point, the chances of a further statutory revision to §107 seem slim. Publishers should strive to distinguish *Harper*, a task which, to this author's knowledge, has never been adequately attempted, but which should be relatively easily done. Only with the ghost of *Harper* dead and gone can a truly reasonable and feasible fair use standard for unpublished works be set.

Endnotes

1. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).
2. *See infra*.
3. *See infra*.
4. *Id.* at 548.
5. *Id.* at 542.
6. *Id.* quoting App. to Pet. for Cert. C-14-C-15.
7. *Id.* at 543.
8. *Id.* at 542-43.
9. *Id.* at 543.
10. *See* Timothy Hill, *Entropy and Atrophy: The Still Uncertain Status of the Fair Use of Unpublished Works and the Implications for Scholarly Criticism*, 51 J. COPYRIGHT SOC'Y U.S.A. 79, 80 n.2 (2003) ("Prior to the enactment of the 1976 Copyright Act, unpublished works enjoyed a perpetual copyright under state common law.").
11. 17 U.S.C. §102(a) (2010).
12. 17 U.S.C. §107 (2010).

13. See *Harper*, 471 U.S. at 550-51 (This, despite the fact that, at least under common law, “the fair use doctrine was [arguably] predicated on the author’s implied consent to ‘reasonable and customary’ use when he released his work for public consumption, [and therefore] fair use traditionally was not recognized as a defense to charges of copying from an author’s as yet unpublished works.”)
14. H.R. Rep. No. 94-1476, at 66 (1976).
15. S.Rep. No. 94-473 at 64 (1975).
16. See, e.g., Robert Spoo, *Fair Use of Unpublished Works: Scholarly Research and Copyright Case Law Since 1992*, 34 TULSA L.J. 183, 189 (1998) (“The dramatic facts of *Harper & Row* make it something of an anomaly among cases involving the question of fair use of unpublished works...*Harper & Row*’s atypicality made it a particularly unfortunate precedent for scholars, biographers, and historians, whose use of unpublished materials is usually much less aggressive and piratical than was *The Nation*’s.”).
17. 17 U.S.C. §107.
18. *Harper* at 542.
19. *Id.* at 548-49.
20. *Id.* at 551.
21. *Id.*
22. *Id.* at 565.
23. See Kenneth D. Crews, *Fair Use of Unpublished Works: Burdens of Proof and The Integrity Of Copyright*, 31 ARIZ. ST. L.J. 1, 13 (1999) (As one critic of the decision puts it, “The apparent ‘bad faith’ on the part of the editor of *The Nation* magazine seemed to shape much of the legal doctrine that emerged from the ruling.”).
24. See *Harper*, 471 U.S. at 562 (“The *Nation*’s use had not merely the incidental effect but the *intended purpose* of supplanting the copyright holder’s commercially valuable right of first publication.”).
25. Indeed, this was arguably the case of *Salinger v. Random House*, 811 F.2d 90 (2nd Cir. 1987), a case that is probably much closer to the core of what fair use intends to cover than is *Harper*. “Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives.” *Id.* at 93. See also Judge Leval’s District Court decision in *Salinger v. Random House*, 650 F.Supp. 413 (S.D.N.Y. 1986), *rev’d*, 811 F.2d 90 (2nd Cir. 1987), where he writes: “Hamilton’s book cannot be dismissed as an act of commercial voyeurism or snooping into a private being’s private life for commercial gain. It is a serious, well-researched history of a man who through his own literary accomplishments has become a figure of enormous public interest.”).
26. *Harper*, 471 U.S. at 564.
27. See *id.* (It must be said that the Court in *Harper* was at least somewhat ambiguous as to whether the unpublished nature of a work has the function of *per se* closing off the possibility of fair use, writing that “the scope of fair use is narrower with respect to unpublished works,” the use of the term narrower implying that, while small, the possibility of a finding of fair use in an unpublished work did exist.) (emphasis added).
28. Robert Kasunic, *SYMPOSIUM: Is That All There Is? Reflections on the Nature of the Second Fair Use Factor*, 31 COLUM. J.L. & ARTS 529, 530 (2008).
29. *Id.*
30. Which, in fact, resulted.
31. *New Era v. Henry Holt*, 873 F.2d 576 (1989) [hereinafter *New Era*].
32. See David Margolic, *Whose Words are They, Anyway?*, N.Y. TIMES, Nov. 1, 1987.
33. *Id.*
34. See *Crews*, *supra* note 23, at 17.
35. *Salinger*, *supra* note 25, at 96.
36. *Id.*
37. *Id.* at 97.
38. See Margolic, *supra* note 32.
39. See *Crews*, *supra* note 23, at 21 (“For more than two years, the *Salinger* decision was the only standard for defining the fair use of unpublished works. Its narrow application of the law and its nearly impossible burden for demonstrating fair use led to the widespread revision and even cancellation of numerous other projects utilizing unpublished resources.”).
40. *New Era*, 873 F.2d at 583.
41. *Id.* at 582.
42. See, e.g., Paul J. Slevin, *Fair Use and Foul Play: Copyright Law Revised Debate About Unpublished Material Heats Up*, N.Y. L. J., Nov. 22, 1993 (“In *Salinger* and *New Era*, the Second Circuit construed Justice O’Connor’s *Harper & Row* majority opinion to mean that quotation of unpublished copyrighted material is almost never fair use and, therefore, as a general rule, ought to be enjoined. As a result of those decisions, the general understanding, or, at least, the widespread fear, within the publishing community was that unpublished material could never be quoted.”).
43. Pierre Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107 (1990).
44. 17 U.S.C. §107.
45. That is, that unpublished works, while not necessarily failing a fair use test, automatically fail the second of the four fair use factors, “the nature of the copyrighted work.” 17 U.S.C. §107(2).
46. See Slevin, *supra* note 42 (Which had claimed that unpublished works both fail the second of the four fair use factors, and additionally “substantially diminish...the overall likelihood that a use will be found fair.”).
47. H.R. Rep. 102-836, at 4.
48. *Id.* at 9.
49. *Id.* The legislative history is strenuous on this point, stating later in the text that “it is not the Committee’s intention to alter the weight currently given by the courts to the unpublished nature of a work under the second fair use factor. The general principles regarding fair use of unpublished works set forth by the Supreme Court in *Harper & Row v. Nation Enterprises* still apply.” *Id.*
50. The legislative history was adamant that “for unpublished works as for all other copyrighted works, the courts must consider all four statutory factors, but they may, at their discretion, consider any other factors they deem relevant.” *Id.* at 10.
51. See *supra* note 47.
52. See, e.g., Slevin, *supra* note 42.
53. Kate O’Neill, *Against Dicta: A Legal Method for Rescuing Fair Use From the Right of First Publication*, 89 CAL. L. REV. 369, 437 (2001).
54. 3-53 Entm’t Indus. Contracts FORM 53-2 (2010).
55. Hill, *supra* note 10, at 86.
56. *Sundeman v. Seajay Soc’y, Inc.*, 142 F.3d 194 (4th Cir. 1998).
57. *Id.* at 199.
58. *Id.*
59. *Id.* at 204.
60. *Id.* (“Indeed the Supreme Court stated that ‘[u]nder ordinary circumstances, the author’s right to control the first public appearance of his undissemated expression will outweigh a claim of fair use.’ *Harper & Row*, 471 U.S. at 555.”).
61. See *id.* at 204-05 (“In 1992, however, Congress amended §107 to state that: ‘The fact that a work is unpublished shall not itself bar a

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finding of fair use if such finding is made upon consideration of all the above factors.’ 17 U.S.C.A. § 107. Thus, while the fact that *Blood of My Blood* was unpublished militates against a finding of ‘fair use,’ it does not foreclose a finding that Seajay’s use was fair.”).

62. *Id.* at 205.
63. *See id.* at 204 (“Seajay’s uses did not have the effect of supplanting a potential publication of *Blood of My Blood* by the Foundation. Blythe’s copy was seen only by Dr. Blythe as she performed her scholarly review. The Library’s copy was seen only by a representative of Baskin and representatives of the University of Florida Press. Blythe’s paper was presented only to between 150 and 200 members of the Rawlings Society, the editor of the Society’s Symposium, and an editor for University of Florida Press. None of these disseminations of *Blood of My Blood* was sufficient to support a finding that Seajay supplanted the Foundations’s right of first publication.”).
64. *Id.* at 202-03.
65. *See O’Neill, supra* note 53, at 394.
66. *Id.* at 394.
67. *Id.* at 394-95.
68. Hill, *supra* note 10, at 84.
69. *New Era*, although decided later, deals with a work that was published before the *Salinger* decision was made.
70. O’Neill, *supra* note 53, at 395.
71. E-mail from Robert Bender, Editor, Simon & Schuster, to David Laskin, author (Nov. 13, 1998) (*quoted in O’Neill, supra* note 53, at 397 fn.98).
72. Random House, Inc., Text Permissions (undated) (*quoted in O’Neill, at* 397 fn.98).
73. Of course, publishing houses often have their own incentives for refusing to litigate these matters. *See, e.g.,* Gideon Parchomovsky and Kevin A. Goldman, *Essay: Fair Use Harbors*, 93 VA. L. REV. 1483, 1532 (2007) (“In addition to fear of costly litigation, there is a secondary element of self-interest, as...publishers profit when follow-on artists choose to pay licensing fees to use their works.”).
74. *Blanch v. Koons*, 467 F.3d 244, 256 fn.6 (2006) (internal citations omitted).
75. *NXIVM Corp. v. Ross Inst.*, 364 F.3d 471 (2004); *see also* *Bill Graham Archives, LLC v. Dorling Kindersley Ltd.* 386 F. Supp. 2d 324, 330 (S.D.N.Y. 2005) (“Previous publication is critical to [fair uses] nature under factor two, since fair use is narrowed for unpublished works.” (internal citations omitted)).
76. *See NVIXM Corp., supra* note 75, at 480.
77. *See Bosch v. Ball-Kell*, 2006 U.S. Dist. LEXIS 62351 (C.D. Ill. Aug. 31, 2006) (In making this point, the District Court cited *Harper*).
78. *See supra* note 74.
79. *See, e.g., Wright v. Warner Books, Inc.*, 953 F.2d 731 (1991).

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Major League Baseball Must Strike Out the National Origin Discrimination in the First-Year Player Draft

By Daniel Hauptman

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Under current Major League Baseball (MLB) rules, if an amateur player is a resident of the United States, Canada, Puerto Rico or other U.S. territory, he can sign with a major league team only after being selected by the team in the annual First-Year Player Draft (or sign with any team after not being selected in a draft in which the player is eligible).¹ Entry into the draft is not beneficial to these players, as it restricts their options and potentially limits their compensation. Conversely, international players who are residents of countries other than those listed above (*e.g.* Dominicans and Venezuelans) are not eligible for the draft and are free to negotiate and sign with any team when they reach the age of 16 or 17 years old, depending on the player's date of birth. As a result of this double standard, MLB is guilty of "reverse" national origin discrimination. The system needs to be overhauled, and a worldwide draft would level the playing field.

"Reverse" National Origin Discrimination in the Major League Baseball Draft

When applying federal (Title VII) and state employment discrimination laws to the baseball drafting process, it is evident that all draft-eligible players could successfully state a claim of "reverse" national origin discrimination inherent in the annual draft. "A professional sports organization's relationship with its players and potential players is, at base, an employer's relationship with its employees and, like other employer-employee relationships, is regulated under state and federal law."² All employers with at least 15 employees are regulated by Title VII,³ and "the law offers no distinction between the half-billion-dollar sports franchise to which millions of fans are devoted and the modest, fifteen-employee, convenience store of which only a few hundred patrons are aware. Both organizations must comply with Title VII."⁴

"Reverse" national origin discrimination against people born in the U.S. is strictly prohibited under Title VII and many state discrimination laws, and this unfair labor practice has been occurring in baseball since the inception of the amateur draft in 1965. Title VII explicitly states that an employer is not allowed to discriminate against any individual with respect to "compensation, terms, conditions, or privileges of employment."⁵ Courts have consistently held that disparate treatment is found when "an employer has 'treated [a] particular person less favorably than others because of' a protected trait."⁶ Base-

ball's drafting system results in less favorable treatment on the face of the MLB rules, and this disparate treatment is based on national origin, a "protected trait" targeted by the authors of Title VII of the Civil Rights Act of 1964.⁷

In addition to disparate-treatment discrimination, amateurs who are forced to enter professional baseball through the draft could also successfully state a claim for disparate-impact discrimination. Statistics detailing the declining percentage of U.S. major leaguers since the advent of the draft in 1965, coupled with the tremendous rise in the percentage of foreign-born players in baseball today, should sufficiently exhibit the disparate impact on draft-eligible players. Furthermore, evidence confirming the contention of baseball super-agent Scott Boras, that the current drafting system suppresses the incomes of U.S. players to "20 cents on the dollar,"⁸ would effectively prove that U.S. players are significantly devalued as a result of this disparate impact. In addition, an examination of the plight of Puerto Rican baseball since MLB added players from Puerto Rico and other U.S. territories to the draft pool in 1989 would certainly display the devastating impact that inclusion in the MLB draft has had on the game of baseball on the island.

National Labor Law Would Not Preempt an Employment Discrimination Claim

A successful claim of national origin discrimination would have to overcome potential preemption by section 301 of the Labor Management Relations Act (LMRA) of 1947. Current and future players are governed by the rules established in baseball's collective bargaining agreement (CBA), and the LMRA (and the National Labor Relations Act) encourages the formation of collective bargaining agreements in sports and other industries. Section 301(a) addresses the jurisdictional aspect of suits by and against labor organizations,⁹ and it is aimed at preventing inconsistent state laws from effectively nullifying the terms agreed upon during the collective bargaining process. It is important to note that section 301 only applies to state-law claims, not federal claims (*e.g.* a Title VII employment discrimination claim).

As established by the U.S. Supreme Court, section 301 of the LMRA preempts a state-law claim "only if such application requires the interpretation of a collective-bargaining agreement."¹⁰ Accordingly, a federal court would

only preempt a state-law discrimination claim where the CBA specifically prohibits national origin discrimination. That is not the case in the CBA between MLB and the Major League Baseball Players Association (MLBPA). MLB's drafting system inherently applies differently to players from varying countries of national origin, and there does not appear to be a right of action in the CBA upon which a state-law discrimination claim would be based. Furthermore, because baseball's CBA does not address a current or prospective player's right to bring a discrimination claim, there is no interpretation of the CBA that needs to be analyzed by a court. When applying a narrow approach to section 301 preemption—as favored by the Eighth Circuit in two recent cases¹¹—a potential state-law claim would not be preempted.

Major League Baseball Needs to Expand to a Worldwide Draft

While MLB has struggled with the unequal and unfair consequences of its regionalized draft, the National Basketball Association and the National Hockey League have conducted global drafts for many years. In those sports, the same draft-eligibility requirements apply to all prospects from all nations. Since the 1980s, baseball has discussed expanding to a worldwide draft,¹² but that has not happened, and the trend of teams spending more and more money cultivating prospects in Latin American countries—instead of in the U.S., Canada and Puerto Rico—continues.¹³

Nearly a decade ago, MLB and the MLBPA actually agreed to the concept of a worldwide draft during CBA negotiations for the labor deal of August 2002. Attachment 24 to the 2003–2006 CBA is a memorandum that was signed by officials from both parties, and it states “that the First-Year Player Draft should be expanded to cover all players who are first entering Major League or Minor League baseball, regardless of a player’s residence.”¹⁴ Both sides agreed that “[n]o later than October 15, 2002” a worldwide draft subcommittee would begin deliberations to “consider all issues relating to the acquisition of players through a worldwide draft system.”¹⁵ Although MLB officials believed that a global draft would be implemented by 2004 at the latest, the subcommittee scarcely met and in the subsequent—and current—CBA that expires in December 2011, there is no indication of any intention to alter the draft-eligibility rules.¹⁶

In recent years, there has been renewed discussion of expanding the draft pool, and leaders from both sides have been quoted expressing support for a worldwide draft.¹⁷ While those statements are encouraging, there have been 45 years of baseball entry drafts in which U.S. amateurs (and Canadians and Puerto Ricans) have been

treated worse than foreign players, and there would be no need for potential discrimination litigation if MLB were to finally institute a draft with uniform rules around the world.

Endnotes

1. See MAJOR LEAGUE BASEBALL OFFICE OF THE COMMISSIONER, FIRST-YEAR PLAYER DRAFT OFFICIAL RULES 4 (2009), available at <http://mlb.com/mlb/draftday/rules.jsp> (last visited Oct. 8, 2010).
2. N. Jeremi Duru, *Fielding a Team for the Fans: The Societal Consequences and Title VII Implications of Race-Considered Roster Construction in Professional Sport*, 84 WASH. U. L.Q. 375, 376–77 (2006).
3. See 42 U.S.C. § 2000e(b) (2009).
4. Duru, *supra* note 2, at 377.
5. 42 U.S.C. § 2000e–2(a) (2009).
6. *Ricci v. DeStefano*, Nos. 07-1428 and 08-328, slip op. at 17 (U.S. June 29, 2009), <http://www.supremecourt.gov/opinions/08pdf/07-1428.pdf> (quoting *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–86 (1988)) (last visited October 8, 2010).
7. See 42 U.S.C. § 2000e-2(a).
8. Dave Sheinin, *Boras May Explore Japan for Strasburg*, WASH. POST, July 3, 2009, at D1.
9. See 29 U.S.C. § 185(a) (2009).
10. *Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 413 (1988).
11. See *Bogan v. Gen. Motors Corp.*, 500 F.3d 828 (8th Cir. 2007); see also *Williams v. Nat'l Football League*, 582 F.3d 863 (8th Cir. 2009).
12. See Alan Schwarz, *Pressure Building for Draft of Players from Outside U.S.*, N.Y. TIMES, July 13, 2008, at SP4.
13. See Kevin Baxter, *The Shortcuts; Deeply Entwined MLB Investigates Steroid Use, Document Fraud and Skimming as Dominican Prospects Seek Rich U.S. Contracts*, L.A. TIMES, Sept. 22, 2009, at C1.
14. 2003–2006 Basic Agreement Between the Major League Clubs and the Major League Baseball Players Association, Attachment 24, 202–04 (effective Sept. 30, 2002), http://www2.bc.edu/~yen/Sports/mlbpa_cba.pdf.
15. *Id.* at 202–03.
16. See Schwarz, *supra* note 12, at SP4.
17. See Podcast: Interview by Mike Francesa with Michael Weiner, Executive Director, MLBPA, on WFAN Radio (Dec. 2, 2009), <http://podcast.wfan.com/wfan/2089981.mp3> (link not available) (expressing the players’ support of a global draft 8:00 into recording); see also Bill Shaikin, *Baseball Players Suggest Changes*, L.A. TIMES, Dec. 3, 2009, at C3 (stating that “owners would like to control spending on amateur players by subjecting international players to the draft”).

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The NFL's Shaky Concussion Policy Exposes the League to Potential Liability Headaches

By Joseph Hanna and Daniel Kain

Throughout the 2009 National Football League (NFL) season, fans found themselves asking why concussions garnered more attention than the games themselves. After all, NFL fans have long known that concussions represent an unfortunate and inevitable byproduct of professional football. When head injuries ended the careers of Hall of Fame quarterbacks Steve Young and Troy Aikman, sports writers treated their concussions like common career ending conditions. Why then in the fall of 2009, did media outlets like *GQ*,¹ *The New Yorker*,² *Forbes*,³ and *60 Minutes*⁴ suddenly treat NFL concussions as a novel topic? The answer to this question begins with a group of medical studies dating back to 2005, and ends with a Congressional hearing held on October 28, 2009. Policy decisions made by the NFL's internal Concussion Committee during this four-year span could potentially subject the league to Big Tobacco-like liability. However, player suits against the NFL might be of limited utility due to a number of defenses at the NFL's disposal.

Game Changing Independent Science

Beginning in 2005, a series of clinical and neuropathological studies performed by independent scientists demonstrated that multiple NFL concussions cause cognitive problems such as depression and early-onset dementia. In response to these studies, members of the NFL Concussion Committee (NFL Committee) denied knowledge of a link between concussions and cognitive decline and claimed that several more years of research were required to reach a definitive conclusion on the issue. When the NFL Committee anticipated studies that would implicate a causal link between concussions and cognitive degeneration, it promptly published articles producing contrary findings.

Between 2005 and 2007, Dr. Bennet Omalu and Dr. Robert Cantu examined the brain tissue of various deceased NFL players (Mike Webster, Terry Long, and Andre Waters).⁵ All three subjects of Omalu and Cantu's studies suffered multiple concussions during their respective NFL careers.⁶ Before their premature deaths, Webster, Long, and Waters presented clinical symptoms of sharply deteriorated cognitive function and psychiatric symptoms such as paranoia, panic attacks, and major depression.⁷ Omalu concluded that Chronic Traumatic Encephalopathy (CTE), triggered by multiple NFL concussions, represented a partial cause of their deaths.⁸

CTE is a neurological disorder first discovered in boxers, jockeys, and wrestlers who sustained multiple blows to the head.⁹ The disease presents clinically as dementia or

Parkinsonism with symptoms including slight mental confusion, general slowing in muscular movement, hesitancy in speech, and tremors of the hands.¹⁰ The brain tissue of Webster, Long, and Waters demonstrated trademark neuropathological signs of CTE, including neurofibrillary tangles, neurotrophil threads, and cell dropout.¹¹

In response to Omalu's report of CTE in Mike Webster's brain tissue, NFL Committee members Ira Casson, Elliot Pellman, and David Viano wrote a letter in July 2005 to the editor of *Neurosurgery* asking that Omalu's article be retracted.¹² The subtext of the NFL's letter to *Neurosurgery* was clear: "We own this field. We are not going to bow to some no-name Nigerian with some bullshit theory."¹³ Omalu found delicious irony in the NFL's letter, given that neither Casson, Pellman, nor Viano are neuropathologists. After all, "[h]ow can doctors who are not neuropathologists interpret neuropathological findings better than neuropathologists?"¹⁴ Omalu questioned the integrity of the NFL Committee.¹⁵ Not only did the NFL neglect to place one neuropathologist on the Committee, it also appointed a rheumatologist (Pellman) to chair the Committee.¹⁶

In 2005, a clinical study performed by Dr. Kevin Guskiewicz found that retired players who sustained three or more concussions in the NFL had a fivefold prevalence of Mild Cognitive Impairment (MCI) diagnosis in comparison to NFL retirees without a history of concussions.¹⁷ In reaching this finding, Guskiewicz conducted a survey of over 2,550 former NFL athletes.¹⁸ NFL Committee member Dr. Mark Lovell attacked Dr. Guskiewicz's study by stating: "[w]e want to apply scientific rigor to this issue to make sure that we're really getting at the underlying cause of what's happening.... You cannot tell that from a survey."¹⁹

In 2007, Congressional scrutiny coupled with mounting media pressure (from, for example, Alan Schwarz of *The New York Times* and Chris Nowinski of *Sports Legacy Institute*) compelled the NFL to address the long-term effects of player concussions. Consequently, the league scheduled its first league-wide Concussion Summit in June 2007. Independent scientists were invited to present their findings to team medical staffs and National Football League Players Association (NFLPA) representatives. Scientists, fans, and players were hopeful that the summit indicated a newfound willingness on the part of the NFL to revise its antiquated concussion policies. Unfortunately, the NFL's concussion pamphlet to players issued on August 14, 2007, stated: "there is *no magic number* for how many concussions is *too many*."²⁰ This quote suggests that the research of independent scientists fell on unresponsive NFL ears.

In 2008, Boston University's Dr. Ann McKee studied the brain tissue of two more deceased NFL players: John Grimsley and Tom McHale. McKee found that Grimsley and McHale's brain tissue showed distinct signs of CTE.²¹ According to McKee, "the easiest way to decrease the incidence of CTE [in contact sport athletes] is to decrease the number of concussions."²² McKee emphasized that "[t]here is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma."²³

In response to Dr. McKee's studies, former NFL Committee co-chair, Dr. Ira Casson, characterized each study as an isolated incident from which no conclusion could be drawn. Dr. Casson stated that he would not react to McKee's studies until her findings appeared in a peer-reviewed scientific journal.²⁴ When McKee published her work in 2009, Dr. Casson maintained that "there is not enough valid, reliable or objective scientific evidence at present to determine whether...repeat head impacts in professional football result in long[-]term brain damage."²⁵

Watershed Congressional Hearing

The debate over the long-term effects of NFL concussions reached a boiling point in September of 2009. A University of Michigan study commissioned by the NFL found that NFL alumni are diagnosed with Alzheimer's disease or similar memory-related diseases vastly more often than the national population—including a rate of 19 times the normal rate for men ages 30 through 49.²⁶ Several weeks after the release of the Michigan study, Congress announced that it would hold a hearing to discuss "legal issues relating to football head injuries."²⁷

On October 28, 2009, several members of House Judiciary Committee sharply criticized the NFL's concussion policy. On at least two occasions, NFL Commissioner Roger Goodell was asked whether multiple NFL concussions contributed to the early-onset of cognitive decline.²⁸ Goodell justifiably deferred to medical judgment on this question. Unfortunately, the NFL's leading medical voice on the issue (Dr. Casson) was not present to answer this critical inquiry. However, the Judiciary Committee played an *HBO Real Sports* recording of Dr. Casson denying any and all potential links between multiple head injuries and later-life cognitive decline.²⁹

The most poignant moment of the hearing occurred when Representative Linda Sanchez (CA) analogized the NFL's denial of a causal link between NFL concussions and cognitive decline to the tobacco industry's denial of the link between cigarette consumption and ill health effects.³⁰ Extending this logic further, Rep. Sanchez encouraged Commissioner Goodell to get "ahead on this issue, if only to cover [the NFL] legally[.]"³¹ Sanchez seemed to suggest that the NFL might avoid tobacco-like liability if the NFL Committee simply issued adequate warning to NFL players.

Subsequent Remedial Measures—Sea Change in NFL Concussion Policy

The NFL enacted several notable remedial measures in the wake of the 2009 Congressional hearing. First, Dr. Ira Casson and Dr. David Viano resigned from their respective positions as NFL Committee co-chairmen.³² Given that Casson and Viano spearheaded the NFL Committee's medical studies between 2007 and 2009, the NFL suspended all work on the NFL Committee's research. Second, the NFL partnered with one of the leading independent medical experts on CTE, The Center for the Study of Traumatic Encephalopathy (CSTE), by pledging to donate \$1 million in support of its research.³³ Third, NFL spokesperson Greg Aiello made the following watershed admission: "[i]t's quite *obvious* from the medical research that's been done that concussions...lead to long-term problems[.]"³⁴ Fourth, it was decided that each team must make an independent local doctor available to examine players and determine whether a player should return to play after sustaining a concussion.³⁵ Finally, Commissioner Goodell replaced Casson and Viano with the following well-credentialed neurologists: (i) Dr. H. Hunt Batjer (chairman of neurological surgery—Northwestern Memorial Hospital); and (ii) Dr. Richard G. Ellenbogen (chief of neurological surgery—Harborview Medical Center).³⁶

Legal Implications of NFL Committee Policy (2005-2009)

Since at least 2005, the NFL Committee has been on notice of independent medical studies linking multiple NFL head injuries with later-life cognitive decline. In 2007, the NFL released the following statement two months after independent scientists delivered face-to-face presentations to NFL Committee members:

*Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems.... It is important to understand that there is no magic number for how many concussions is too many.*³⁷

"This inaccurate and arguably misrepresentative statement to players remained unchanged until July 26, 2010."³⁸ NFL alumni might argue that the league is subject to liability as a result of its failure to provide adequate warning about the causal link between multiple NFL concussions and later-life cognitive decline. However, the NFL might rebut these claims with potential duty, causation, assumption of risk, contributory negligence, indemnification, and statute of limitations defenses.

Failure to Warn

A duty to warn arises when one should realize through special facts within one's knowledge or a special relation-

ship that an act or omission exposes another to an unreasonable risk of harm through the conduct of a third party.³⁹ The NFL has been on constructive notice of medical studies linking multiple head injuries with later-life cognitive decline since at least 2005. By fostering a misconception in the minds of players that “there is *no magic number* for how many concussions is *too many*,”⁴⁰ the league arguably encouraged players to treat their concussive conditions with less than due care. The NFL Committee’s failure to warn players about studies linking concussions with cognitive decline exposed NFL players to an unreasonable risk of harm. Rather than considering retirement due to concussions sustained in 2005 and subsequent seasons, NFL athletes likely continued playing in reliance on the NFL’s assertion that multiple concussions cause no “permanent problems.”⁴¹ Thus, several players might have aggravated their concussive injuries by returning to play in reliance on the NFL’s arguably inadequate warning.

Duty

The NFL might argue that the NFL Committee’s mere awareness of independent studies did not by itself impose a legal duty to warn players about such studies.⁴² This argument is based on the legal distinction between action and inaction, or “misfeasance” and “non-feasance.”⁴³ Absent some special relationship or special duty, the NFL would argue that it is under no affirmative duty to warn league players about the cognitive consequences of concussions such as CTE, dementia, and depression.

Courts have suggested that NFL players are employees of their respective teams, not the league.⁴⁴ Consequently, the NFL might argue that there is no special relationship stemming from employment that would trigger an affirmative duty to warn NFL players about the long-term risks associated with NFL concussions.

Players might argue that the NFL’s voluntary creation of its internal Concussion Committee created a duty on the part of the NFL to exercise reasonable care. Once an actor begins to render voluntary assistance to a third party, the actor undertakes a duty to proceed with reasonable care when such third party relies on the actor’s assistance.⁴⁵ The NFL assumed a duty to proceed with reasonable care in its dealings with league players when it voluntarily created its internal committee on concussions. Players relied on the information contained in the NFL’s August 14, 2007 concussion pamphlet to represent a complete and accurate synopsis of “current research” on the topic: “[w]e want to make sure all NFL players...are *fully informed* and take advantage of the most up-to-date information and resources as we continue to study the long-term impact of concussions.”⁴⁶ If the NFL Committee wanted players to be “fully informed” about the “long-term impact of concussions,” why did it withhold from players the findings of Doctors Guskiewicz, Cantu, and Omalu indicating a causal link between multiple concussions and later-life cognitive decline?

Cause

An actor’s tortious conduct must be a factual cause of another’s physical harm in order for liability to be imposed.⁴⁷ Conduct is a factual cause of harm when such harm would not have occurred “but for” the tortious conduct.⁴⁸ The NFL might point to a number of causes that might have contributed to deceased NFL players’ cognitive decline. Pittsburgh Steelers’ trainer and NFL Committee member Dr. Joseph Maroon argues that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players Webster, Long, and Waters.⁴⁹ Similarly, when NFL Commissioner Roger Goodell was asked about the trademark signs of CTE found in (deceased NFL player) Justin Strzelczyk’s brain tissue, Goodell issued the following response: “[h]e may have had a concussion swimming.... A concussion happens in a variety of different activities.”⁵⁰

Players might rebut this causation defense by arguing that the NFL’s failure to warn must only be one cause of their cognitive injuries. Tortious conduct by an actor need only be *one* of the causes of another’s harm.⁵¹ When there are multiple sufficient causes, each of which is sufficient to cause the plaintiff’s harm, supplementation of the “but-for” standard is appropriate.⁵² NFL players may concede that they sustained concussions “swimming” or in a variety of other contexts (e.g., high school and college football). However, if players can prove that they aggravated their cognitive injuries as a result of the NFL’s failure to warn, supplementation of the “but-for” standard is appropriate. Again, by asserting that “there is *no magic number* for how many concussions is *too many*,”⁵³ players likely returned to play after sustaining two or more concussions in one NFL season. The NFL Committee’s concussion management likely caused players to aggravate their cognitive injuries.

Assumption of Risk

The NFL could argue that players assume the risk of all injuries inherent in professional football. Generally, participants in an athletic event are held to assume the risks of injury normally associated with the sport.⁵⁴ However, plaintiffs must have actual knowledge of the risk at issue in order to invoke the assumption of risk doctrine.⁵⁵ Logically, a plaintiff cannot make an intelligent choice to confront a risk if he or she lacks actual knowledge of the danger. The knowledge required in assumption of the risk analysis is actual knowledge, not constructive notice.⁵⁶

NFL alumni can freely concede that they had actual knowledge of risks normally associated with professional football, such as broken bones, torn ligaments, and even concussions. However, players like Brian Westbrook lacked actual knowledge of the long-term cognitive consequences of sustaining multiple NFL concussions. As Westbrook stated: “a lot of football players didn’t know, and I include myself, that if you have two-three-four concussions you’re at a higher risk of [incurring] dementia, early-onset of Alzheimer’s, [etc].”⁵⁷

The NFL Committee did everything within its power to deny any causal link between multiple concussions and later-life cognitive decline. DeMaurice Smith, Executive Director of the NFLPA, described this NFL Committee policy: “[u]nfortunately, the NFL...diminished [independent] studies, [and] urged the suppression of [independent] findings...for years.”⁵⁸ Thus, the NFL Committee arguably stripped each player of his right to make an intelligent choice about the long-term risks associated with NFL concussions.

Contributory Negligence

Contributory negligence is the strongest argument at the NFL’s disposal in this hypothetical litigation. This common-law defense rests on the rule that there can be no recovery of damages for negligence if the injured person, by his own negligence, proximately contributed to the injury.⁵⁹ While contributory negligence is similar to the assumption of risk doctrine, it is a separate and distinct defense.⁶⁰ Assumption of risk involves a plaintiff’s actual knowledge of danger and intelligent acquiescence in it; whereas contributory negligence is a matter of plaintiff’s fault or departure from the standard of reasonable conduct.⁶¹

The NFL could argue that players negligently contributed to their own injuries by: (i) failing to report their concussive conditions to team doctors; and (ii) returning to play before their concussion symptoms completely disappeared. The NFL’s August 14, 2007 informational pamphlet instructs players to self report their concussive symptoms: “[i]f you...have [concussion] symptoms, you should *immediately report* your symptoms to your team doctors and athletic trainers[.]”⁶² The 2007 pamphlet also contains the following return-to-play guidelines: “player[s] should be *completely asymptomatic*...before returning to play.”⁶³

Thirty of 160 NFL players surveyed by The Associated Press (AP) in November of 2009 replied that they either failed to report or underreported concussion symptoms.⁶⁴ In conducting the study, the AP spoke with “five players on each of the 32 teams—nearly 10 percent of the league—seeking out a mix of positions and NFL experience to get a cross-section of players.”⁶⁵ In the same AP study, players admitted that they returned to play while the following concussion symptoms persisted: “feeling ‘dazed’ or ‘woozy’ or having blurred vision.”⁶⁶ The NFL could argue that players negligently contributed to their own cognitive injuries by failing to report “feeling ‘dazed’ or ‘woozy’ or having blurred vision,” and returning to play before becoming “completely asymptomatic.”⁶⁷

Players will respond by arguing that the NFL’s contractual scheme incentivizes them to withhold their concussion symptoms from team management. NFL player contracts do not guarantee player payment beyond the season in which an injury occurs.⁶⁸ This contractual structure maximizes the risk of players incurring permanent cogni-

tive problems because it incentivizes players to withhold their concussion symptoms and play through multiple head injuries. Dan Morgan’s concussive injuries (at least five during his tenure with Panthers) serve as a prime example of this problem. Faced with the alternative of termination, Morgan “agreed to restructure his \$2-million roster bonus into payments of \$125,000 for each game played.... [This] contract gave Morgan [a] financial incentive not to reveal any concussion for treatment.”⁶⁹ Quarterback Derek Anderson articulates how player contracts incentivize NFL athletes to withhold injury symptoms: “[g]uys play with [injuries] they’ve got no business playing with.... [Y]our job security is not there to sit out...”⁷⁰

Even if players are found contributorily negligent, they could still recover damages in jurisdictions that adhere to comparative negligence principles. At common-law, a plaintiff’s contributory negligence served as a total bar to his or her recovery. However, modern-law jurisdictions find the complete-bar provision of contributory negligence to be incompatible with the more humanitarian comparative negligence mandate. Jurisdictions that adhere to a “pure comparative negligence” approach apportion damages between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party’s negligence contributed to the plaintiff’s harm. In other words, a plaintiff who is 60 percent to blame for an accident could recover 40 percent of his or her losses. Thus, a jury might find a player contributorily negligent for withholding symptoms and returning to play before becoming completely asymptomatic. However, if a jury finds that the NFL is at least one percent to blame for a player’s cognitive injuries, the player can recover damages in the amount of that one percent.

“Section 88” / Indemnification

The “Section 88” amendment to the 2006 NFL Collective Bargaining Agreement (CBA) provides that NFL alumni may receive payment of up to \$88,000 per year for their medical claims specifically “related to dementia.”⁷¹ “Section 88” is funded by the various NFL Clubs, and “jointly administer[ed]” by the NFLPA and the NFL.⁷² Defense attorneys might argue that a player’s acceptance of Section 88 funds indemnifies the league against any future civil liability. However, this defense is not persuasive, given that Section 88 contains no indemnification language.

Statute of Limitations—“Discovery Rule”

Football-related head trauma can be likened to asbestos exposure in that harm caused by both sets of dangers can take up to 20 to 40 years to manifest. Normally, a cause of action for personal injury will accrue at the time of injury, and a plaintiff will have only two to four years to file a claim based in Tort.⁷³ To be fair to people with latent injuries, most states have adopted what is known as the “discovery rule.” Under this rule, a cause of action does

not accrue until plaintiffs know or reasonably should have known that they were injured as a result of the defendant's conduct.⁷⁴ NFL alumni should certainly be able to invoke the discovery rule if they file failure to warn claims against the NFL. Cognitive illnesses caused by multiple concussions (e.g., CTE, dementia, Alzheimer's, and depression) represent exactly the type of latent injuries the discovery rule was intended to address.

The New NFL Committee

In March of 2010, the NFL selected prominent neurologists Dr. H. Hunt Batjer and Dr. Richard G. Ellenbogen as co-chairs of the new NFL Committee.⁷⁵ Unlike previous committee chairs, Batjer and Ellenbogen had no previous ties to NFL teams, and they receive no compensation beyond expenses.⁷⁶ This structure was intended to eliminate conflicts that previously jeopardized the integrity of NFL Committee findings.

Batjer spoke with brutal honesty when describing the substandard practices of former NFL Committee leaders:

We all had issues with some of the methodologies..., the inherent conflict of interest...that was *not acceptable* by any *modern standards* or not acceptable to us. I wouldn't put up with that, our universities wouldn't put up with that, and we don't want our professional reputations damaged by conflicts that were put upon us.⁷⁷

Batjer and Ellenbogen so wanted to distance themselves from the NFL Committee of old that they forbade Dr. Elliot Pellman (former NFL Committee chair—1994 to 2007) from delivering opening remarks at the 2010 Concussion Summit.⁷⁸

During a May 2010 Congressional hearing, Representative Anthony Weiner (NY) addressed Batjer and Ellenbogen with the following comment: “[y]ou have years of an *infected system* here, [and] your job is...to mop [it] up.”⁷⁹ A critical step in “mop[ping] up”⁸⁰ the NFL Committee's policy is to issue adequate warning to league players about the causal link between multiple NFL concussions and cognitive decline.

Recent Developments

On December 17, 2009, Cincinnati Bengals wide receiver Chris Henry, 26 years old, died in Charlotte, North Carolina after falling or jumping out of the back of a pickup truck driven by his fiancée.⁸¹ Doctors Bennet Omalu and Julian Bailes⁸² performed the postmortem study on Henry's brain.⁸³ Omalu and Bailes discovered trademark signs of CTE in Henry's brain tissue.⁸⁴ Bailes stated that the head injuries Henry sustained as a result of the December 17, 2009 crash were not related to Henry's CTE findings.

This is because trademark signs of CTE develop only over time.⁸⁵

Implications of the Chris Henry Findings

The significance of the Henry findings cannot be overstated. While Henry was the 22nd professional football player to be diagnosed with CTE, he represents the *first* player to have died with CTE while *still active in the NFL*.⁸⁶ The fact that Henry developed CTE by his mid-20s raises the question of how many current NFL players might have the condition without knowing it.⁸⁷ Bailes recalls his initial reaction to the Henry findings:

[a]s we got the results, my emotion was sad—it's so profound.... I was surprised in a way because of his age and because he was *not* known as a concussion sufferer or a big hitter. Is there some lower threshold when you become at risk for this disease? I'm struggling to see if something can come out positive out of this.⁸⁸

The NFL responded to the Henry findings through its newest voices on NFL brain injuries, Dr. Jon Weingart⁸⁹ and Dr. Constantine G. Lyketsos.⁹⁰ Weingart and Lyketsos were *not* members of the NFL Committee. However, as consultants to the NFL, they helped direct the NFL's 2010 Summit on Concussions held at Johns Hopkins.⁹¹ According to Weingart, extrapolating from a case like Henry's would be a “big leap.”⁹² Weingart added that “[t]here's not enough data...to think that [CTE] is something brewing in many players—there's *no data* to support that statement.”⁹³ Perhaps Weingart was not aware that 22 out of 23 professional football players tested for CTE were diagnosed with the condition.

Weingart's Johns Hopkins colleague, Dr. Lyketsos, also attempted to raise ambiguity about the link between NFL head injuries and CTE. Lyketsos authored the following statement in the NFL's 2010 Concussion Summit brochure: “[CTE is] now being reported in football players...with *unknown frequency*. These controversies have been picked up by the media with considerable hype around assertions of long-term harm to players from head injuries[.]”⁹⁴

NFL Committee co-chair, Dr. Ellenbogen, criticized the Johns Hopkins' promotional brochure for minimizing evidence of brain damage in NFL players.⁹⁵ Ellenbogen said that the frequency of reports of CTE in NFL players is not unknown: “[t]hey aren't assertions or hype—they are *facts*.”⁹⁶ CSTE diagnosed CTE in all 12 former college and NFL players tested for the condition.⁹⁷ Again, Boston University's Dr. Ann McKee emphasized that “[t]here is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma.”⁹⁸

NFL Finally Issues Strong Warning to League Players

On June 28, 2010, *The New York Times* hinted that the NFL was working with the NFLPA and Centers for Disease

Control and Prevention (CDC) on a concussion brochure worded far more strongly than the one given to players since 2007.⁹⁹ Almost one month later, the NFL shocked the concussion study community by publicly conceding for the first time that multiple NFL head injuries can cause illnesses like “depression” and “early onset dementia.”¹⁰⁰ The NFL’s new warning, made in the form of a poster, uses the following language in describing illnesses caused by multiple concussions:

“[T]raumatic brain injury can *cause* a wide range of short- or long term changes affecting thinking, sensation, language, or emotions.” These changes may lead to problems with memory and communication, personality changes, as well as *depression* and the *early onset of dementia*. Concussions and conditions resulting from repeated brain injury can change your life and your family’s life forever.¹⁰¹

While this warning is at least five years overdue, the NFL deserves credit for finally embracing the findings of independent scientists.¹⁰² It is important to note that the term “CTE” does *not* appear in the league’s new poster/warning.

The NFL’s sea change in concussion policy is not yet complete.¹⁰³ On April 30, 2010 an outside lawyer for the league, Lawrence L. Lamade, wrote a memo to the lead lawyer for the league’s and union’s joint disability plan, Douglas Ell, discrediting connections between football head trauma and cognitive decline.¹⁰⁴ The letter, obtained by *The New York Times*, explained, “We can point to the current state of uncertainty in scientific and medical understanding” on the subject to deny players’ claims that their neurological impairments are related to football.¹⁰⁵

By “scientific uncertainty,” Lamade is likely referring to the current debate between NFL Committee doctors (Batjer and Ellenbogen) and NFL consultants (Weingart and Lyketsos).¹⁰⁶ Weingart maintains that the relationship between multiple head impacts and CTE is not a proven cause and effect.¹⁰⁷ Rather, he defines the relationship as “a correlation.”¹⁰⁸ Weingart’s logic raises a statistical question of when a correlation is sufficiently significant to qualify as a cause and effect relationship. Given that CTE is incredibly rare in the general population, how many deceased NFL players presenting with CTE will qualify as definitive proof that multiple head impacts cause CTE: dozens—hundreds—thousands?

Conclusion

Professional football is referred to by many as America’s favorite sport. Unfortunately, cognitive illnesses are significantly more prevalent among NFL alumni in comparison to the national population. Studies performed by the nation’s foremost scientists confirm a causal link between multiple NFL concussions and later-life cognitive

decline. The NFL Committee has been aware of these studies since at least 2005. Despite being on constructive and actual notice of such studies, the NFL Committee failed to issue adequate warning to league players from 2005 to 2010. NFL alumni might target the league with tobacco-like failure to warn claims in order to recover for their cognitive injuries. However, the NFL has a number of persuasive defenses at its disposal.

At the October 2009 Congressional hearing, a Congressman asked Dr. Ann McKee (Boston University—CSTE) whether professional football was too dangerous in light of the cognitive injuries caused by multiple head impacts. McKee answered this billion dollar question without blinking an eye. She calmly stated that cigarette smokers did not stop smoking as a result of tobacco litigation. Rather, smokers were faced with a conspicuous warning every time they reached for a cigarette.

Sean Morey is a Brown University graduate, recently retired NFL player, and co-chairman of the NFLPA’s brain-injury committee. Morey’s sentiments succinctly summarize the central message of this article: “[w]e have to educate the players.... The players have to have the ability to have informed consent.”¹⁰⁹ The NFL’s recently issued poster does *not* specifically warn players against the risk of incurring CTE. However, the poster provides players with enough facts to make an informed decision about illnesses caused by multiple head injuries.

Endnotes

1. See Jeanne Marie Laskas, *Game Brain*, GQ, Oct. 2009, available at <http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions> (last visited Oct. 6, 2010).
2. See Malcolm Gladwell, *Offensive Play: How Different are Dogfighting and Football?*, THE NEW YORKER, Oct. 19, 2009, available at http://www.newyorker.com/reporting/2009/10/19/091019fa_fact_gladwell (last visited Oct. 6, 2010).
3. See Monte Burke, *Concussions: Inside NFL’s Head Games*, FORBES, Dec. 4, 2009, available at <http://www.forbes.com/2009/12/04/nfl-concussions-players-lifestyle-sports-roger-goodell-jamal-lewis.html> (last visited Oct. 6, 2010).
4. See *60 Minutes: A Blow to the Brain* (CBS television broadcast Oct. 11, 2009), available at <http://www.cbsnews.com/video/watch/?id=5377319n&tag=related;photovideo> (last visited Oct. 6, 2010).
5. See Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player*, 57 NEUROSURGERY 128 (2005) [hereinafter Omalu, *CTE Part I*] (examining the brain tissue of fifty-year-old Mike Webster); Bennet I. Omalu et al., *Chronic Traumatic Encephalopathy in a National Football League Player: Part II*, 59 NEUROSURGERY 1086 (2006) [hereinafter Omalu, *CTE Part II*] (examining the brain tissue of forty-two-year old Terry Long); Robert C. Cantu, *Chronic Traumatic Encephalopathy in the National Football League Player*, 61 NEUROSURGERY 223 (2007) (finding that Andre Waters exhibited the same type of neurological damage as Webster and Long).
6. See Cantu, *supra* note 5, at 223.
7. *Id.*
8. *Id.*
9. *Id.* at 223-24.
10. *Id.*

11. *Id.* at 223.
12. See Laskas, *supra* note 1.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. Kevin M. Guskiewicz et al., *Association between Recurrent Concussion and Late-Life Cognitive Impairment in Retired Professional Football Players*, 57 NEUROSURGERY 722 (2005).
18. *Id.* at 719-722.
19. Alan Schwarz, *Expert Ties Ex-Player's Suicide To Brain Damage From Football*, N.Y. TIMES, Jan. 18, 2007, at A1.
20. Press Release, National Football League, NFL Outlines For Players Steps Taken to Address Concussions (Aug. 14, 2007) (emphasis added), available at <http://www.nfl.com/news/story?id=09000d5d8017cc67&template=without-video&confirm=true> (last visited Oct. 6, 2010).
21. See Bob Hohler, *Major Breakthrough in Concussion Crisis: Researchers Find Signs of Degenerative Brain Disease in an 18-Year-Old High School Football Player*, BOSTON GLOBE, Jan. 27, 2009, available at http://www.boston.com/sports/other_sports/articles/2009/01/27/major_breakthrough_in_concussion_crisis/ (last visited Oct. 6, 2010).
22. See McKee et al., *Chronic Traumatic Encephalopathy in Athletes: Progressive Tauopathy After Repetitive Head Injury*, 68 J. NEUROPATHOL. EXP. NEUROL. 709, 732 (2009).
23. *Id.* (emphasis added).
24. See Hohler, *supra* note 21.
25. *Legal Issues Relating to Football Head Injuries (Part II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 334-336 (2010) (statement of Dr. Ira R. Casson).
26. See, e.g., Alan Schwarz, *Dementia Risk Seen in Players in N.F.L. Study*, N.Y. TIMES, Sept. 29, 2009, at A1.
27. See, e.g., Alan Schwarz, *Congress to Hold Hearing on N.F.L. Head Injuries*, N.Y. TIMES, Oct. 2, 2009, at D2. See also *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. (2010).
28. See, e.g., *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 86 (2010) (inquiry of Rep. Conyers, Chair, House Comm. on the Judiciary).
29. See, e.g., *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 113 (2010) (statement of Rep. Sanchez, Member, House Comm. on the Judiciary). See also Roger Goodell & Ted Johnson, *Concussions and Congress and the Future Game*, N.Y. TIMES N.F.L. BLOG: THE FIFTH DOWN, available at <http://fifthdown.blogs.nytimes.com/2009/11/01/concussions-and-congress-and-the-future-game/> (last visited Oct. 8, 2010) (video footage of Representative Linda Sanchez).
30. See *Legal Issues Relating to Football Head Injuries (Part I): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 113 (2010) (statement of Rep. Sanchez, Member, House Comm. on the Judiciary).
31. *Id.*
32. See, e.g., Alan Schwarz, *Concussion Expert's Removal is Sought*, N.Y. TIMES, Nov. 20, 2009 (explaining that the NFLPA called for the removal of Dr. Casson as co-chair of the NFL Committee due to his efforts to discredit independent and league-sponsored evidence linking N.F.L. careers with heightened risk for dementia and cognitive decline). See also Alan Schwarz, *N.F.L. Head Injury Study Leaders Quit*, N.Y. TIMES, Nov. 24, 2009, at B11.
33. See, e.g., Alan Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, N.Y. TIMES, Dec. 20, 2009, at D1 (noting that league spokesman Greg Aiello communicated that the NFL could donate \$1 million or more to CSTE). See also Alan Schwarz, *N.F.L. Gives \$1 Million to Brain Researchers*, N.Y. TIMES, Apr. 21, 2009, at B14 (confirming the league's official donation of \$1 million to further CSTE's research efforts).
34. See Schwarz, *N.F.L. Acknowledges Long-Term Concussion Effects*, *supra* note 33 (emphasis added).
35. See Bruce Klopffleisch, *NFL Announces New Concussion Policies*, http://national-football-league-nfl.suite101.com/article.cfm/nfl_and_concussions#ixzz0qkOJK2SJ (last visited Oct. 8, 2010) (listing seven remedial measures made to NFL concussion policy in the wake of the October 2009 Congressional hearing).
36. See, e.g., Alan Schwarz, *NFL Picks New Chairmen for Panel on Concussions*, N.Y. TIMES, Mar. 16, 2010, at B11.
37. See Press Release, National Football League, *supra* note 20 (emphasis added).
38. See *infra* note 102.
39. See RESTATEMENT (SECOND) OF TORTS § 302B (1965).
40. See Press Release, National Football League, *supra* note 20 (emphasis added).
41. *Id.*
42. See, e.g., RESTATEMENT (SECOND) OF TORTS § 314 (1965).
43. See *id.*, cmt. c.
44. See, e.g., N. Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982).
45. See, e.g., RESTATEMENT (THIRD) OF TORTS § 42 (2005).
46. See Press Release, National Football League, *supra* note 20 (emphasis added).
47. See RESTATEMENT (THIRD) OF TORTS § 26 (2002).
48. *Id.*
49. See Les Carpenter, *Compromise Reigns at Summit on Concussions*, WASH. POST, June 20, 2007, at E01.
50. See Alan Schwarz, *12 Athletes Leaving Brains to Concussion Study*, N.Y. TIMES, Sept. 24, 2008, at D1.
51. See RESTATEMENT (THIRD) OF TORTS § 26, cmt. c. (2002) (emphasis added). See, e.g., Alaska v. Abbott, 498 P.2d 712, 726 (Alaska 1972); Peterson v. Gray, 628 A.2d 244, 246 (N.H. 1993) (defendant's tortious conduct must be a cause of harm, not "the" cause); see also Dedes v. Asch, 521 N.W.2d 488, 490-492 (Mich. 1994) (rejecting argument that statutory language, "the proximate cause," meant that defendant's conduct must be the only cause of harm); David A. Fischer, *Causation in Fact in Omission Cases*, 1992 UTAH L. REV. 1335, 1338 (1992) ("Clearly, however, there can never be a single cause of an event. A very complex set of circumstances must be present for any effect to occur.").
52. See, e.g., RESTATEMENT (THIRD) OF TORTS § 27 (2005).
53. See Press Release, National Football League, *supra* note 20 (emphasis added).
54. See, e.g., Niemczyk v. Bursleson, 538 S.W.2d 737, 740 (Mo. Ct. App. 1976).
55. See, e.g., Prosser, *Law of Torts*, 3rd ed.; see also RESTATEMENT (SECOND) OF TORTS § 466 (1965).
56. See, e.g., Meulners v. Hawkes, 299 Minn. 76, 80 (1974).
57. See Dan Rather Interview with Brian Westbrook, *Brian Westbrook on Concussions and His Future in the NFL: Deleted Scenes*, available at http://www.youtube.com/watch?v=W3kyWD_LEIA (last visited Oct. 8, 2010).
58. *Legal Issues Relating to Football Head Injuries (Part II): Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 41 (2010) (statement of Mr. DeMaurice Smith, Executive Director, NFL Players Association).
59. See 38 Am. Jur. *Negligence* § 174.
60. See E.H. Schopler, Comment, *Distinction between Assumption of Risk and Contributory Negligence*, 82 A.L.R. 2d 1218 (1962).
61. *Id.*

62. See Press Release, National Football League, *supra* note 20 (emphasis added).
63. *Id.*
64. See Howard Fendrich, *AP Impact: NFL Players Hide, Fear Concussions*, ABC NEWS, available at <http://abcnews.go.com/Sports/wireStory?id=9123270> (last visited Oct. 8, 2010). See also Associated Press, *Survey: Concussions Inevitable*, <http://sports.espn.go.com/nfl/news/story?id=4668106> (last visited Oct. 8, 2010).
65. Associated Press, *supra* note 64.
66. *Id.*
67. *Id.*
68. See NFL Players Association, *N.F.L. Collective Bargaining Agreement 2006–2012*, app. c, § 9, available at <http://www.docstoc.com/docs/20343876/NFL-Collective-Bargaining-Agreement-2006-2012> (last visited Oct. 8, 2010) [hereinafter NFL CBA].
69. See Alan Schwarz, *For Jets, Silence on Concussions Signals Unease*, N.Y. TIMES, Dec. 22, 2007.
70. See Tony Grossi, *Concussion Ends Jamal Lewis' Career, as Cleveland Browns Running Back Goes on Injured Reserve*, http://www.cleveland.com/browns/index.ssf/2009/12/concussion_may_end_jamal_lewis.html (last visited Oct. 8, 2010).
71. See NFL CBA, *supra* note 68 art. XLVIII-D 88: Benefit.
72. *Id.*
73. See, e.g., PA (two year SOL for personal injury—42 PA Con. Stat. Section 5524).
74. See, e.g., *Cornell v. E.I. Du Pont de Nemours & Co.*, 841 F.2d 23, 24 (1st Cir. 1988).
75. See Schwarz, *supra* note 36.
76. *Id.*
77. See Alan Schwarz, *Concussion Committee Breaks With Predecessor*, N.Y. TIMES, June 1, 2010, at B12.
78. *Id.*
79. See Alan Schwarz, *House Panel Criticizes New N.F.L. Doctors*, N.Y. TIMES, May 24, 2010, at B10.
80. *Id.*
81. See Alan Schwarz, *Former Bengal Henry Found to Have Had Brain Damage*, N.Y. TIMES, June 28, 2010, at B10.
82. Dr. Bailes is the chairman of the department of neurosurgery at West Virginia University. *Id.*
83. *Id.*
84. *Id.* Henry's brain sample demonstrated brown discolorations, a tau protein buildup, inflammation, and white matter changes. See Madison Park, *Young Player Had Brain Damage More Often Seen in NFL Veterans*, <http://www.cnn.com/2010/HEALTH/07/02/brain.damage.henry/index.html>. In healthy brain tissue, virtually no protein tangles, which show up as brown spots, are visible. *Id.*
85. See Schwarz, *supra* note 81.
86. *Id.* Like many of the other players found to have had CTE after their deaths, Henry had behavioral problems in his final years that might have been at least partly a result of the disease, which is linked to depression, poor decision-making and substance abuse. *Id.* He was arrested five times in a 28-month stretch for incidents involving assault, driving under the influence of alcohol and marijuana possession. *Id.* The league suspended him several times for violating its personal-conduct policy. *Id.*
87. *Id.* CTE can only be detected by way of postmortem examination. *Id.*
88. *Id.*
89. Weingart is a professor of neurological surgery and oncology at Johns Hopkins University. See Park, *supra* note 84.
90. Lyketsos is a professor of psychiatry and behavioral sciences at Johns Hopkins University. See Schwarz, *supra* note 77.
91. *Id.*
92. See Park, *supra* note 84.
93. *Id.* (emphasis added).
94. Press Release, Johns Hopkins Medicine, *Traumatic Brain Injury in Professional Football: An Evidence Based Perspective* (June 2, 2010), available at <http://www.newswise.com/articles/traumatic-brain-injury-in-professional-football> (last visited Oct. 8, 2010).
95. See Schwarz, *supra* note 77.
96. *Id.* (emphasis added).
97. *Id.*
98. See McKee, *supra* note 22 (emphasis added).
99. See Schwarz, *supra* note 81.
100. See Alan Schwarz, *N.F.L. Asserts Greater Risks of Head Injury*, N.Y. TIMES, July 26, 2010, at A1.
101. Press Release, National Football League, *Concussion: A Must Read for NFL Players* (July 26, 2010) (emphasis added). The new poster will be displayed in all 32 NFL locker rooms, and its content will be used in the league's new brochure on head injuries. See Schwarz, *supra* note 100.
102. Dr. H. Hunt Batjer and Dr. Richard Ellenbogen directed the poster project in conjunction with the CDC. See Schwarz, *supra* note 100.
103. *Id.*
104. *Id.*
105. *Id.*
106. See *supra* notes 94–97 and accompanying text.
107. See Park, *supra* note 84.
108. *Id.*
109. See Schwarz, *supra* note 81.

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Have Some Standards: How the Sports Agent Profession Should Be Effectively Regulated

By Darren A. Heitner and Andrew B. Delaney

Introduction

Imagine making a phone call to a friend who is currently in college. You and your friend, an athlete, discuss his chances of playing professionally in his sport. Perhaps you end up talking a little too much. If your friend is in Alabama, you might face a felony charge and a hefty fine. If your friend is in Pennsylvania, a fine is the worst possible punishment. If your friend is in Virginia, it is likely that you will receive no penalty for your actions. How is this disparity in the law possible?

A majority of states have a law regulating sports agents, but in many of those states, that particular law is rarely enforced.¹ Of the states that have sports agent laws on the books, over half have taken little or no action to enforce the laws.² In a utopian world, this might mean that sports agents adhere to the laws intended to protect student-athletes and universities, and that there is no need for enforcement. In reality, a lack of resources, motivation to enforce the laws, or both, are behind this *laissez-faire* approach.³

Based on media portrayals, one might get the idea that sports agents are cutthroat, unscrupulous, take-advantage-of-their-own-mother-to-make-a-buck kind of people. Yet many sports agents are extremely ethical, scrupulous, and diligent; they will put their clients' needs above their own. Good agents already follow unwritten rules of conduct in all of their dealings. Of course, one will probably never see or hear about these sports agents on the nightly news program.

Thus, two distinct yet related problems emerge: (1) How can the profession encourage sports agents to practice their trade with high ethical standards and refrain from unethical behavior; and (2) how can the profession set forth standards that are actual standards—guidelines that are uniform across the board? We propose two solutions: (1) A federal licensing system for all sports agents; and (2) self-regulation of the profession, including a national board. By way of background, we will discuss the current state of the law and take a closer look at why these steps are necessary.

Current Legislation: UAAA and SPARTA

Over the past decade, lawmakers have taken two major steps toward athlete-agent regulation. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Athletes Agent Act (UAAA) in response to the National Collegiate Athletic Association

(NCAA) lobbying roughly a decade ago.⁴ Thirty-nine states have adopted the UAAA in some form; Illinois is slated to become the 40th state to adopt it in January 2011.⁵ Primarily, it addresses relations between student-athletes and sports agents.⁶ The UAAA includes a registration requirement, and fees vary widely among the states.⁷ Some states are particularly zealous in enforcing the provisions, while others seemingly ignore violations.⁸ Arguably, the "Uniform" Act has only exacerbated the lack of uniformity it intended to correct.

New York adopted the UAAA in 2003.⁹ Thus far, enforcement of it has been neither more nor less zealous than in other states; New York has taken a middle-of-the-road approach to enforcement.¹⁰

"Based on media portrayals, one might get the idea that sports agents are cutthroat, unscrupulous, take-advantage-of-their-own-mother-to-make-a-buck kind of people. Yet many sports agents are extremely ethical, scrupulous, and diligent; they will put their clients' needs above their own."

Congress passed the Sports Agent Responsibility and Trust Act (SPARTA) in 2004 to supplement existing state laws.¹¹ Nothing in SPARTA preempts state law; in fact, the last section of SPARTA encourages the states to adopt the UAAA. SPARTA attempts to address the specific problem of opportunistic sports agents preying on traveling student-athletes.¹² It may very well address this problem, by providing some basic protections to student-athletes, regardless of the wide variations in state law. These protections, however, "extend" only to student-athletes.¹³ More specifically—and indeed, more troubling—SPARTA provides express statutory causes of action for the Federal Trade Commission (FTC), states, and educational institutions harmed by an agent's violation of its provisions.¹⁴ Remarkably, the student-athlete—the purported beneficiary of the law—is given no cause of action.¹⁵ Some have noted that SPARTA appears to provide more protection for the NCAA's and universities'/colleges' interests than student-athletes' interests.¹⁶

People may find it ironic—as we do—that both UAAA and SPARTA purport to protect student-athletes, yet both fail to provide student-athletes with any cause of

action against deceitful and unethical agents. Nor does either piece of legislation address agents' conduct with segments of the population beyond student-athletes. Union rules in some professional sports provide some regulation of agents' conduct, but uniformity is a distant goal.¹⁷ The UAAA and SPARTA are well intentioned, but woefully inadequate and under-inclusive. These problems require a truly comprehensive and uniform solution.

A Discussion on the Merits

Recently, commentators have advocated various approaches to athlete-agent regulation. Some have argued that all sports agents should be required by federal law to be licensed attorneys.¹⁸ Others have claimed that a few changes to existing law and institutional action will solve the problem of agents ignoring the law.¹⁹ As noted above, we propose a federal licensing system, including regulations, which applies to all sports agents, as well as self-regulation of the industry. The federal regulation should specifically preempt inconsistent state law.

"The optimal solution for the sports agents' dilemma is a comprehensive federal licensing and regulatory scheme accompanied by true self-regulation by the sports agent profession."

In every jurisdiction in the United States, one must possess a license to practice law. For that matter, one must possess a license to drive a vehicle. Yet in eight U.S. jurisdictions, a person could theoretically become a "sports agent" without meeting any sort of minimum standard—without even registering as a sports agent. In order to protect athletes and the public—just as we seek to protect legal clients and other drivers on the road—every sports agent should be required to be licensed. The only way to accomplish this effectively is to require every sports agent to obtain a *federal license*. The licensing process could more or less follow the state bar admission model.²⁰

While a legal education is a desirable attribute of a sports agent, it should not be a requirement. A prospective sports agent, however, must show a minimum level of competency in his or her field. To this end, a test—similar to a bar exam—should be developed. One would have to pass the test and undergo a character and fitness investigation to become a licensed sports agent. The professional leagues could keep their current licensing requirements. The foremost purposes of a federal license would be to eliminate the inconsistencies among states and to ensure that all sports agents meet a minimum threshold before they are allowed to act as agents.

The disparities in state-specific fees and state-specific enforcement of existing law provide strong arguments for a federal licensing scheme. A federal licensing requirement will greatly clarify expectations, eliminate the inexplicable variations in state registration fees, and ensure that all sports agents meet certain minimum standards. The national licensing requirement would also make professional malpractice suits possible.²¹

Due to the mobile nature of today's society and the sports industry itself, uniformity—when achievable—should be vigorously pursued. In this area, there is certain need for uniformity. This is illustrated best by the disparity among the states' enforcement. Why should the same conduct be treated differently based on geographical location? How can a felony in Alabama be a friendly conversation in Virginia? Clear expectations are imperative. Enforcement that differs to the point of absurdity only frustrates the purpose. Uniform federal licensing and regulation eliminates uncertainty to a fair extent.

This is not a states' rights issue. Professional sports are the very essence of interstate commerce. Yet the only federal legislation—like current state regulation—on the issue is directed solely toward relations between agents and student-athletes. This under-inclusiveness renders SPARTA largely impotent. Comprehensive federal regulation is the most efficacious way of curing the defects in existing law.

Self-regulation is also desirable. Just as those who desire to improve the practice of law are drawn to bodies like the American Bar Association, the New York State Bar Association, and other state bar associations, agents who desire to improve the practice of sports agency will be drawn to self-regulatory bodies within the field. From 1978 to 1988, an organization called the Association of Representatives of Professional Sports Agents (ARPA) existed. If ARPA were restored in some form, that organization could work with a federal regulatory body to help promulgate clear expectations for the next generation of sports agents.

Conclusion

"Agents Behaving Badly" sounds like an interesting concept for a reality-television program. Unfortunately, however, there exists a real problem in the sports-agent industry that cannot be addressed with piecemeal legislation. The optimal solution for the sports agents' dilemma is a comprehensive federal licensing and regulatory scheme accompanied by true self-regulation by the sports agent profession.

Endnotes

1. Alan Scher Zagier, *Laws on Sports Agents Rarely Enforced*, MONTEREY CTY. HERALD (Ca.), Aug. 22, 2010, http://www.montereyherald.com/sports/ci_15857607?nclick_check=1. 42 state have laws regulating sports agents. *Id.* (no longer available Oct. 3, 2010).
2. *Id.*
3. *See id.* (describing the problems states have had with allocating resources to enforcement) (link no longer available).
4. *See* John A. Gray, *Sports Agent Liability After SPARTA?*, 6 VA. SPORTS & ENT. L.J. 141, 143–44 (2006) (describing the UAAA's provisions); *see also* Zagier, *supra*, note 1 (attributing passage of the Act to the NCAA's lobbying efforts).
5. Associated Press, *Ill. Agent Law is Like Ones States Don't Enforce*, BLOOMBERG BUS. WEEK, Aug. 17, 2010, <http://www.businessweek.com/ap/financialnews/D9HLDBU81.htm> (last visited Oct. 3, 2010); *see also* Zagier, *supra* note 1 (Beyond those states that have adopted the UAAA, California, Ohio, and Michigan have their own laws dealing with agent oversight).
6. Darren A. Heitner, *Duties of Sports Agents to Athletes and Statutory Regulation Thereof*, 7 DARTMOUTH L.J. 246, 252 (2009) ("The only type of athlete protected by the statute is a student-athlete.").
7. *Id.* at 253 (discussing state registration fees ranging from \$20 to \$2,500).
8. *See id.*; *see also* Zagier, *supra*, note 1 (no longer available Oct. 3, 2010).
9. *See* 2003 N.Y. Laws 642 (bill as passed).
10. We base this conclusion on various searches of news databases. There has been neither particularly zealous nor particularly lax enforcement of the UAAA in New York.
11. Brian Charles Lea, *Sports are Big Business, so Stop Playing Games: Why Federal Regulation Should Require Every Sports Agent to Possess a J.D.*, 1 J. ENT. & SPORTS LAW 20, 43 (2009).
12. *Id.*
13. *Id.*
14. 15 U.S.C. §§ 7803–7806 (2008).
15. Heitner, *supra* note 6, at 251.
16. Lea, *supra* note 11, at 44 (quoting Symposium, *Regulating the Athlete-Agent Industry: Intended and Unintended Consequences*, 41 WILLAMETTE L. REV. 781, 813 (2006)).
17. Zagier, *supra*, note 1; Heitner, *supra* note 6, at 250–55.
18. *See e.g.*, Lea, *supra* note 11, at 49.
19. *See e.g.*, Gray, *supra* note 4, at 155 (suggesting amendments to SPARTA and concerted action by professional players' associations and educational institutions to solve the athlete-agent-regulation quandary).
20. There are numerous valid criticisms of the bar exam. As recent examinees, we are acutely aware of the flaws—real or imagined—of the bar examination process. Nonetheless, the bar admission process does serve the purpose of ensuring that new attorneys meet a certain minimum standard of competency as well as character and fitness to practice law.
21. Additionally, the requirement would provide a discernible standard by which to measure the agent's conduct in the particular situation.

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Dissecting the Rights of Publicity and Anti-Competitive Behavior in *O'Bannon v. National Collegiate Athletic Association*

By Raymond A. Franklin

I. Introduction

When young men pursue careers in sports, they hope that they will rise through the amateur ranks, advance to lengthy careers at the professional level, and eventually retire with a collection of earnings sufficient to satisfy their needs for the rest of their days. For many athletes, those dreams do not translate to reality. While some earn exorbitant contracts for playing the game at the highest level, there are others who compete in college, perhaps attaining the adulation of millions on the amateur level, but are unable to maintain a career that garners great wealth. Many others never make it to the pros at all. These athletes leave college and the athletic achievements of the previous four years behind, and are faced with trying to create a new life and career off the field.

Many of these athletes retain their star power for collegiate accomplishments, with college sports permeating the American landscape as an industry with tremendous commercial power.¹ As the profile of college sports continues to increase, some former athletes are wondering whether they should be receiving a piece of the financial pie.² In particular, there are college athletes who feel that they are entitled to receive some compensation when their names, images or likenesses are used in profitable ventures by their institutions, the National Collegiate Athletic Association (NCAA), or third parties who benefit from the student-athletes' works.³

This article will delve into the issue of whether former student-athletes are to be compensated when their names, images and likenesses are used by the NCAA or third parties that profit from the successes of those athletes, and whether the NCAA is behaving properly in its use of those identities. Specifically addressed will be *O'Bannon v. National Collegiate Athletic Association*,⁴ as well as *Keller v. Electronic Arts*⁵ (which has recently been consolidated into the *O'Bannon* case),⁶ high-profile cases in which former student-athletes have brought lawsuits highlighting the fact that their identities and past achievements are being used by others for profit, without any compensation for them. This article will address how the student-athletes will likely win their right of publicity claim regarding the usage of their likeness in video games, but not regarding the airing and selling of newsworthy media. In addition, it will explain why the athletes will succeed in showing that the NCAA has been engaging in anti-competitive behavior to the detriment of the former student-athletes. Finally, despite that prediction of partial success for the

student-athletes, the article will discuss the strong public policy that exists in opposition to such a victory.

II. Background

*O'Bannon v. National Collegiate Athletic Association*⁷ is a current case brought by a former college athlete attempting to unveil the NCAA's allegedly unfair use of the identities of student-athletes.⁸ This case centers on Edward O'Bannon, a men's college basketball star at the University of California, Los Angeles (UCLA), from 1991 to 1995.⁹ O'Bannon gained great fame during his time at UCLA, winning NCAA Tournament Outstanding Player honors, while leading the team to the 1995 NCAA Championship alongside his younger brother Charles.¹⁰ After excelling in college, Ed O'Bannon had a rather pedestrian professional career, spending only two seasons in the National Basketball Association (NBA).¹¹ O'Bannon argues that the NCAA and its licensing arms have continued to make money on him since his playing days ended, while he has not received anything in compensation.¹² O'Bannon argues that NCAA's bylaws regarding student-athletes' amateurism, and the requirement that those athletes sign a form forfeiting their licensing rights, are both unfair and allegedly create unreasonable restraints on trade.¹³

O'Bannon argues that the NCAA capitalizes on DVDs commemorating past college teams and seasons, while not paying those involved.¹⁴ For example, he points to the NCAA promoting the sale of multiple DVDs through its for-profit business partner, Thought Equity Motion, including one called "1995 Men's Basketball National Championship Box Set."¹⁵ According to O'Bannon, that DVD's promotion line alone, "Ed O'Bannon, earning MOP honors, led UCLA back to prominence by defeating Arkansas 89-78 for their 11th title in school history. The box set also includes the 1995 Final Four Highlights Video featuring UCLA, Arkansas, North Carolina, Oklahoma St.," shows his prominence in the DVD and claims that the sales pitch should garner him some of the profit.¹⁶ Along with further complaints about the use of his past interviews and game footage,¹⁷ O'Bannon argues that his likeness has been wrongfully used in video games created by Electronic Arts (EA) for profit without his consent and also with no payment to him.¹⁸ This type of use is being increasingly challenged; other former student-athletes have brought similar claims to resolve the use of images in video games, in cases such as *Keller v. Electronic Arts*.¹⁹ In that case, Sam Keller, a former quarterback at Arizona State University and the University of Nebraska,²⁰

argued that video game maker EA, in its product EA Sports, used his (and other players') likeness in the game *NCAA Football* without his consent, and that the National Collegiate Athletic Association (NCAA) and Collegiate Licensing Company (CLC) endorsed and allowed this usage to occur.²¹ Keller specifically claimed that in creating video game athletes nearly identical to real athletes, "EA, the NCAA, and CLC have conspired to permit the use of student athletes' names and likenesses in EA videogames for monetary gain without compensating the individual student-athletes."²²

Part of Keller's complaint was that EA Sports and the NCAA have tried to get around the rules which prohibit the use of the college athletes' names for profit, by making nearly identical video game images of the student-athletes, but leaving out their names.²³ Keller noted that the athletes in games such as *NCAA Football* have "the same jersey numbers, have similar physical characteristics and come from the same home state."²⁴ Since full rosters are available elsewhere for download, Keller noted that the consumers are able to easily circumvent the rules, allegedly with the NCAA's passive knowledge.²⁵ As previously mentioned, the *O'Bannon* and *Keller* cases were consolidated in an effort by the court to deal with them together.²⁶ The issues which face the court in the *O'Bannon* case include the student-athletes' right of publicity, and allegations of anti-competitive activity and unreasonable restraint of trade.

III. Discussion/Analysis

A. Right of Publicity

i. Right of Publicity Arguments

The right of publicity emerged from the right of privacy and torts law,²⁷ and has been explained in this fashion: "One who appropriates the commercial value of a person's identity by using without consent the person's name, likeness, or other indicia of identity for purposes of trade is subject to liability..."²⁸ Today, only about half of the states recognize some sort of right of publicity.²⁹ Some other states do not recognize the right of publicity at all³⁰ and there is no federal statute or federal common law right of publicity.³¹ The only Supreme Court decision to date on the right of publicity was *Zacchini v. Scripps-Howard Broadcasting Co.*³² In *Zacchini*, the Court stated that "[t]he rationale or (protecting the right of publicity) is the straightforward one of preventing unjust enrichment by the theft of goodwill."³³

The argument in the present case is that the athletes have a right of publicity for their own image and identity, and that the use of that image or identity by EA Sports and the NCAA violates that right.³⁴ Ultimately, *O'Bannon* (and the Class, including Keller) will succeed on only part of his right of publicity claim. *O'Bannon* will find success proving that the non-consented use of the Class's images in *video games* violates its rights of publicity, and that the plaintiffs' rights outweigh the defendants' First Amend-

ment rights to create the challenged works. However, *O'Bannon* will likely fail to prove that the broadcasting of old basketball footage and the sale of commemorative DVDs violate his publicity rights.

In seeking prominent cases regarding rights of publicity, one turns to *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*.³⁵ In this case, a company used the names and statistics of real Major League Baseball (MLB) players, without permission, for the purposes of its fantasy sports games.³⁶ In fantasy sports, consumers pay the company running the game for the right to participate in a league as "owners" of teams in which they draft real major league players.³⁷ The owners then compete against other owners in their league, based on the real-life performance of the players that they have "drafted."³⁸ Extra fees are often collected by the company (the defendant) if the owners want to trade players during the season.³⁹ Missouri law, applied in this case, lists the elements that must be met for a right of publicity action to include "(1) that defendant used plaintiff's name as a symbol of his identity (2) without consent (3) and with the intent to obtain a commercial advantage."⁴⁰

The *C.B.C. Distribution* court found that that the plaintiff had a cause of action about whether the players' rights of publicity were violated by inclusion in the game of the players' names and statistics. There was clearly no consent, there was intent to obtain commercial advantage, and the defendant's name was used as a symbol of his identity.⁴¹

In the present (*O'Bannon*) case, it is evident that the plaintiffs have a legitimate cause of action for a right of publicity claim. Ed *O'Bannon* and Sam Keller argued that their likenesses were used in EA's NCAA video games without their permission, and that the video game company and the NCAA have benefited from these uses.⁴² The *C.B.C. Distribution* court stated that the "commercial advantage" prong of the right of publicity cause of action is rooted in "the defendant's intent or purpose to obtain a commercial benefit from use of the plaintiff's identity."⁴³ It can certainly be argued that that prong is met in *O'Bannon*, as the student-athletes' images are being used to make the video game experience more realistic, and thus more appealing for a potential consumer.

Fulfilling the "symbol of his identity" element in *O'Bannon* is more difficult than in *C.B.C. Distribution*, as the company in the latter case actually used the names of the individuals, leaving no doubt that the players were referring to the real baseball players in question.⁴⁴ Yet in the current case, *O'Bannon* and Keller argued not that the video game maker used their names, but their likenesses.⁴⁵ The court in *C.B.C. Distribution* said that in fulfilling this element, "the name used by the defendant must be understood by the audience as referring to the plaintiff."⁴⁶ However, the court also stated that "the fact-finder may consider evidence including 'the nature and extent of the identifying characteristics used by the defendant, the

defendant's intent, the fame of the plaintiff, [and] evidence of actual identification made by third persons...."⁴⁷ While many will argue that the decision to not use the players' names calls into question whether EA is referring to actual players, others will present extensive evidence of the ease with which one can detect that EA is indeed using the image of the former student-athletes in its NCAA games.⁴⁸ In his complaint, O'Bannon detailed how undeniably identical the video-game athlete is to himself and the others in the class, noting the same size, jersey number, home state, and individual characteristics.⁴⁹ Keller made the same argument, even claiming that in an effort to enhance the accuracy of the player depictions, EA sends questionnaires to team equipment managers of college football teams.⁵⁰

One recent case on which O'Bannon and the Class can certainly rely involves another group of athletes combating the use of their images in video games without compensation—*Parrish v. National Football League Players Association*.⁵¹ In *Parrish*, a Class of National Football League retirees brought an action against its union in frustration over not receiving compensation for the licensing of the Class members' names and images, including in video game deals with EA.⁵² The retirees had signed group licensing agreements (GLAs), and alleged that the union deliberately withheld information about potential benefits to the retirees and failed to pursue licensing opportunities for the Class members.⁵³ In this case, the retirees were eventually awarded \$28.1 million in federal court.⁵⁴

The fact that the retirees in *Parrish* were suing their union⁵⁵ and had actually signed licensing agreements through which they were supposed to be paid,⁵⁶ distinguish *Parrish* from *O'Bannon*. However, the college players in *O'Bannon* were never given the option of signing licensing agreements or acquiring representation by a union;⁵⁷ thus, the cases certainly belong in the same discussion. In both cases, the defendants allowed the images (without names) of some former players to be used without player permission or compensation.⁵⁸ Most damning to the NFLPA in *Parrish* were emails that surfaced about scrambling of names specifically to avoid paying the players.⁵⁹ Even if no such "smoking gun" emerges regarding NCAA players, the similarities between the cases are noteworthy.⁶⁰

ii. Balancing First Amendment and Right of Publicity

To determine whether a right of publicity extends to deny the use of a name, image or likeness, a court must balance the party's right of publicity against the defendant's First Amendment right to use the challenged expression.⁶¹ The plaintiffs in *O'Bannon* have a viable argument for presenting a "right of publicity" claim regarding video games, and should prevail when that right is balanced against the NCAA and EA's First Amendment rights of speech and expression.⁶²

The Supreme Court has confirmed the essential need of performing a balancing test when encountering right of publicity claims.⁶³ The Eight Circuit has also spoken of the importance of balancing First Amendment rights with a famous athlete's right of publicity.⁶⁴ The primary element in a balancing test used in some jurisdictions is "whether a product containing a celebrity's likeness is so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."⁶⁵

The balancing test between publicity rights and First Amendment protection was applied in the Fourth Circuit case, *Comedy III Productions, Inc. v. Gary Saderup, Inc.*⁶⁶ The owner of the rights to the licensing of Three Stooges brought suit against an artist who sold lithographs and shirts bearing a likeness of the Three Stooges from the artist's drawings.⁶⁷ The court said of the defendant's artwork that it was able to "discern no significant transformative or creative contribution. His undeniable skill is manifestly subordinated to the overall goal of creating literal, conventional depictions of The Three Stooges so as to exploit their fame."⁶⁸ The artist's depiction was deemed to have added no new expressive value to the already existing identity of the Three Stooges, and thus did not garner First Amendment protection superior to the publicity rights of the plaintiff.⁶⁹

In *Winter v. DC Comics*, two famous musicians, brothers Edgar and Johnny Winter, sued DC Comics, claiming that the characters from one of the defendant's comic books appropriated their names and likeness,⁷⁰ and used them to create the despicable "Autumn brothers."⁷¹ The court held that there were clearly transformative qualities in the comic book artist's works, as "the Autumn brothers are but cartoon characters—half-human and half-worm—in a larger story which is itself quite expressive."⁷²

In performing the mandatory balancing test in the current class action, the right of publicity of the student-athletes will likely prevail over the First Amendment rights of NCAA and EA. Before the case merged with *O'Bannon*, the district court in *Keller* correctly rejected EA's attempt to use the transformative use defense.⁷³ That defense is applicable only if the celebrity's likeness is "so transformed that it has become primarily the defendant's own expression rather than the celebrity's likeness."⁷⁴ As described above, the players in the EA games are not transformed—they are nearly identical to their alleged real-life counterparts.⁷⁵ This usage is parallel to that of the artist in *Comedy III*, who simply used a celebrity image without permission, changing virtually nothing about the likeness in his work.⁷⁶ Conversely, the student-athlete case is certainly distinguishable from the situation in *Winter*. While the *Winter* defendant portrayed the famous rock musician plaintiffs as murderous half-worm creatures wreaking havoc in subterranean gunfights,⁷⁷ the current case consists of the portrayal of specific, albeit nameless, student-athletes as student-athletes in sports venues, playing their respective sports, and with the same

looks and characteristics as those real student-athletes.⁷⁸ Based on these comparisons, the defendants in the current case do not deserve the same transformative defense protection as the defendant in *Winter*.

In another case that is distinguishable from *O'Bannon, C.B.C. Distribution*, the court held that despite the basis for a valid right of publicity cause of action, the right of publicity was outweighed by the First Amendment rights of the fantasy baseball game's creator.⁷⁹ The expressive nature of video games had been protected in prior cases,⁸⁰ and the court stated, "[w]e have held that 'the pictures, graphic design, concept art, sounds, music stories, and narrative present in video games' is speech entitled to [F]irst [A]mendment protection."⁸¹ However, the court noted that the information in fantasy baseball games is protected, because the names and statistics presented are "readily available in the public domain to everyone."⁸²

The district court in Sam Keller's claim was (barely) correct in holding that the use of images and likenesses in EA's video games was distinguishable from the use of information in the fantasy baseball games of *C.B.C. Distribution*.⁸³ The court differentiated the fantasy baseball game from the video games because the crux of fantasy baseball is the on-field performance of the actual players.⁸⁴ It held that there was a difference, because these video games allowed the consumer to control the virtual players on the field, and provided a depiction of the student-athletes' behavior, whereas the information available in *C.B.C. Distribution* was based on the actual performance of the real players.⁸⁵ While video games allow users to manipulate the athletes, the *C.B.C. Distribution* court explained that fantasy baseball was merely a "recitation and discussion" of the players' information.⁸⁶

The plaintiffs will likely succeed in their right-of-publicity action regarding the defendants' use of their images and likenesses in video games.

iii. News/Reporting and Public Interest

Although the former student-athletes are likely to claim a right-of-publicity victory on the use of images and likenesses in video games, they are less likely to win in their quest for recognition or compensation for the usage of statistics, footage of old games or interviews and DVD sales. Ed O'Bannon argues that every time *ESPN Classic* plays an old UCLA game, or when the NCAA or UCLA sells a DVD on which he is featured, or photos and clips of his old athletic achievements are sold, he should have to consent to that use, or be compensated.⁸⁷ Legal precedent seems to work against him. Statutory basis and a strong public interest provide this type of expression with First Amendment protection. In California, where the Court of Appeal heard O'Bannon's case, there is a state public interest defense, which says that there will be no action against publication of material that the public has the right to know and the press has the freedom to express.⁸⁸ There is also a significant right-of-publicity

exemption, the Section 3344(d) exemption,⁸⁹ which allows certain leeway for news-related expression with a public interest.⁹⁰ Section 3344(d) "exempts from liability... 'a use of a name... or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign.'" ⁹¹ This rule and exemption provide much-needed flexibility for defendants' freedom of expression.

One case that dealt with the right of publicity in the context of sports news and history is *Gionfriddo v. Major League Baseball*.⁹² Several former major league players brought an action against MLB, claiming that the use of their names, voices, photos, statistics and likenesses on the MLB website and media guides violated the players' right of publicity.⁹³ The court found that the defendants were "simply making historical facts available to the public through game programs, web sites and video clips,"⁹⁴ and thus were "entitled to the public interest defense."⁹⁵

While O'Bannon might argue that he is fighting for command over his own historical image, the court will likely hold that old clips and games are allowed to be shown, as the court in *Gionfriddo* noted that public interest is not just limited to current events, but to history as well.⁹⁶ Providing the public with access to classic games is part of what keeps them interested in watching future games, and what helps them remember the individual players.⁹⁷ O'Bannon might encourage the court's consideration of prior cases where an athlete won a publicity rights claim when his image was used in an advertisement.⁹⁸ However, unlike cases that dealt with advertising for *unrelated* products,⁹⁹ the *Gionfriddo* case and the present *O'Bannon* case deal with the promotion of related products.¹⁰⁰ The DVDs, photos, video clips and classic games are all related to the actual NCAA games in which UCLA and Ed O'Bannon played.¹⁰¹ The NCAA should be able to promote its own history and games played by its member schools. The Eighth Circuit in *Gionfriddo* stated that "[t]he owner of a product is entitled to show that product to entice customers to buy it."¹⁰² The *Gionfriddo* court also maintained that "[a]n expressive activity does not lose its constitutional protection because it is undertaken for profit."¹⁰³

O'Bannon's fight against the showing of his old game footage and selling of game-action-related items is also hurt by the Fourth Circuit's decision in *Montana v. San Jose Mercury News*.¹⁰⁴ In *Montana*, the defendant newspaper sold promotional posters of San Francisco 49ers quarterback Joe Montana commemorating his four Super Bowl titles.¹⁰⁵ The posters, which were sold, were republications of previous *San Jose Mercury News* newspaper pages.¹⁰⁶ Montana fought the sale of these posters, claiming that the newspaper was misappropriating his likeness and name.¹⁰⁷ The court held that the sale of these posters was permitted.¹⁰⁸ One of the primary reasons that the court permitted the newspaper's sale of the posters is "because Montana's name and likeness appeared in the posters for precisely the same reason they appeared on

the original newspaper front pages: because Montana was a major player in contemporaneous newsworthy sports events."¹⁰⁹ The court in *Montana* summarized, "the First Amendment protects the posters complained about here for two distinct reasons: first, because the posters themselves report newsworthy items of public interest, and second, because a newspaper has a constitutional right to promote itself by reproducing its originally protected articles or photographs."¹¹⁰

Similarly, the NCAA and the schools' usage and sale of old footage, photos and game coverage of O'Bannon's college career should be permitted even if the NCAA did not consult with or compensate O'Bannon and the class. The DVDs, although being sold for profit, simply feature previous newsworthy events that the public has a great interest in obtaining or viewing. The games shown on *ESPN Classic* are shown for their newsworthiness, and to draw interest in those historical moments, college basketball generally, and ESPN itself. As in *Montana*, there is nothing wrong with the sale of this newsworthy material.¹¹¹ Like Joe Montana's name and likeness in the newspaper, O'Bannon's name and likeness was used on the DVD for the exact same reason that the games were initially shown by the NCAA and the networks—because O'Bannon and the college basketball teams were major players in "contemporaneous newsworthy sports events."¹¹² As the district court in *Keller* noted, video games would not receive this type of protection (because it is not public interest or news-based),¹¹³ but defenses will likely guard against a claim like O'Bannon's regarding these other news-related types of media.¹¹⁴ Thus, Ed O'Bannon will probably succeed in his right of publicity claim regarding video games, but likely will not succeed for the portion of the right of publicity claim regarding the sale of DVDs and photos and the broadcast of basketball footage in which he is featured.

B. Anti-competitive Activity and Restraint of Trade

In *O'Bannon*,¹¹⁵ the former college basketball star alleges anticompetitive activity by the NCAA and its partners.¹¹⁶ The former UCLA Bruin argues that the NCAA is in violation of Section 1 of the Sherman Act.¹¹⁷ To state a claim under Section 1 of the Sherman Act, a plaintiff "must demonstrate (1) that there was a contract, combination, or conspiracy; (2) that the agreement unreasonably restrained trade under either a per se rule of illegality or a rule of reason analysis; and (3) that the restraint affected interstate commerce."¹¹⁸ In the present case, it is not very hard to prove the first¹¹⁹ and third¹²⁰ prongs of stating such a claim. The second prong of part 1 of the Sherman Act is the more difficult to resolve. This prong, requiring the plaintiff to prove unreasonable restraints of trade, can be approached in two different ways by courts.¹²¹

The lower court determined that the "rule of reason" analysis is appropriate in the *O'Bannon* case.¹²² This analysis requires a plaintiff to prove that a restraint on trade "produces significant anti-competitive effects within a rel-

evant market."¹²³ O'Bannon has met his burden of proving that the NCAA and CLC have produced significant anti-competitive effects within the collegiate licensing market, by showing that Class members are disallowed from participating in that market, and that this results in fewer licenses in the market.¹²⁴

Much of O'Bannon's objection to NCAA policy results from the requirement of student-athletes to sign a document called Form 08-3a.¹²⁵ By signing Form 08-3a, all NCAA student-athletes authorize the NCAA to use their names or pictures to "generally promote NCAA championships or other NCAA events, activities or programs."¹²⁶ O'Bannon argues that students are forced to sign this form in order to participate in athletics, and that this requirement puts the athletes in the position of forfeiting any rights to the commercial use of their images, in perpetuity, thus disallowing student-athletes to receive payment even after they have left school and the NCAA.¹²⁷ In addition, O'Bannon points to NCAA Bylaw Article 12.5.1.1, which states:

A member institution or recognized entity thereof (e.g., fraternity, sorority or student organization), a member conference of a non-institutional charitable, educational or nonprofit agency may use a student-athlete's participation in intercollegiate athletics, providing the following conditions are met:

(e) All moneys derived from the activity or project go directly to the member institution, member conference or the charitable, educational or non-profit agency

(i) The student-athlete and an authorized representative of the charitable, educational or non-profit agency sign a release statement ensuring that the student-athlete's name, image or appearance is used in a manner consistent with the requirements of this section.¹²⁸

O'Bannon argues that forcing the athletes to agree to these rules allows the NCAA to enter into licensing agreements that use the student-athlete images, while not allowing the students to gain any profit.¹²⁹ He also argues that the agreements that the NCAA makes with licensing groups like CLC violate the Sherman Act by fixing prices and creating unreasonable restraint on trade.¹³⁰ In particular, O'Bannon states that the since the NCAA "has rights to images of him from his collegiate career, it...fix[es] the price for the use of his image at zero."¹³¹

O'Bannon basically claims that since the NCAA has exclusive right to his image, and former students cannot make money on the NCAA's usage, he and others are unable to make financial agreements regarding images from his collegiate days, and thus his image is worth "zero."¹³² O'Bannon alleges that this inability to license themselves leads to a lack of competition for the athletes' identities,

even years after they leave school.¹³³ O'Bannon argues (and some others agree) that if the NCAA did not have this authorization to license the images and likenesses of the players, the players would not be restricted from pursuing their own financial opportunities or licenses based on their identities once they have emerged from the amateurism rules that bind them in college.¹³⁴ There would be others in the business besides the NCAA, and thus prices would presumably decline.¹³⁵ The district court stated that "O'Bannon's allegations of anti-competitive conduct establish that the harm caused to him is of the type the antitrust laws were intended to prevent."¹³⁶ *The New York Times* referred to the NCAA's student-athlete arrangement regarding licensing as "the nation's greatest unofficial monopoly."¹³⁷

O'Bannon also criticizes the power that the NCAA has over the student-athletes and the fact that they are *forced* to sign these documents when they are young and without counsel.¹³⁸ The rules demand that the players sign the documents if they want to participate in NCAA football or basketball.¹³⁹ Some in the sports media agree with O'Bannon that the NCAA's command over the athletes is unfair.¹⁴⁰ The students should be permitted to have an attorney present to assure that no one is taking advantage of them.¹⁴¹ Recent case law might give O'Bannon and the Class some traction.¹⁴² Between the requirement that students sign the documents, the pressure that these teenagers face in doing so, and the distinct lack of competition that results from these rules, Ed O'Bannon has a strong chance to win his claim that the NCAA has engaged in anti-competitive activity and unreasonable restraints on trade.

C. Public Policy Against O'Bannon's Claim

It is undisputed that students such as Ed O'Bannon and Sam Keller exert great effort to perform athletically on the college level. There is certainly some public policy in favor of the payment to these individuals—the NCAA makes millions of dollars from the hard work of the students, prompting some to declare the no-compensation policy as unfair.¹⁴³ Why should everyone (the NCAA, the schools, video game companies) except the former student-athletes make money on the student-athletes?¹⁴⁴

However, despite this article's argument that the plaintiffs will be victorious in some of their claims, there is also great public policy *against* the idea of financially compensating those student-athletes for their efforts, even once they have left college.

A major issue that perhaps makes it unrealistic to pay former student-athletes for the use of their names, images, and likenesses is the question of logistics and application—primarily, which athletes should be paid, and at what rate? It is unclear whether a line should be drawn in which only star players should be entitled to these earnings, or whether everyone who was on the roster is eligible. If a DVD commemorating the 1995 UCLA cham-

pionship team primarily features significant contributors like the O'Bannon brothers and Tyus Edney,¹⁴⁵ should those players be paid more generously than the athletes who sat on the end of the bench or who are perhaps in the background of a video clip? It might seem unfair to pay all team members equally, but paying by minutes of screen time might not be feasible.¹⁴⁶ If this type of compensation system were created for basketball and football, some will push for its implementation in other college sports as well. Many questions would arise if a payment plan was instituted, and it might be too difficult to attempt to employ a plan that will satisfy everyone.

Furthermore, there is only a finite amount of money. Forcing the NCAA, or a school, to pay millions of dollars to former college players can hurt the NCAA and the school going forward, potentially hurting current athletes.¹⁴⁷ There might be fewer scholarships available to students; perhaps schools might have to field fewer sports teams in an effort to pay those whose careers are already over. Former student-athletes might feel that their accomplishments are part of their individual identities, but those accomplishments also become part of the history of the NCAA and the colleges and universities. While a school like UCLA would not be expected to have the same success without athletes like Ed O'Bannon, an athlete like O'Bannon would not likely have had his success without UCLA, the sports program, and the NCAA.¹⁴⁸ In fact, those who play sports in college might not have quite the marketability and earning potential that they think they have by themselves. In the *Gionfriddo* case, the court addressed this exact point: "It appears equally likely that plaintiffs' marketability is enhanced by Baseball's conduct challenged here."¹⁴⁹ Similarly, there is the real possibility that Ed O'Bannon's name has its current level of marketability greatly because of the promotion that the NCAA and its partners have provided.

Finally, there is the issue of amateurism. While displaying their athletic prowess, O'Bannon and Keller were not just athletes, but *student-athletes*. It may be considered naïve to still label college players as amateurs when the reality is that many are simply plotting a path towards a potentially large professional paycheck, but while in college, these individuals are not professionals. Late NCAA president Myles Brand said, "Our bottom line is educating students, whereas the bottom line for the pros is making profits."¹⁵⁰ One fear with starting to pay former athletes for NCAA achievement is a slippery slope leading to college students being paid for athletics.¹⁵¹ Many people feel that requiring student-athletes to sign amateurism documents is part of the contract created when the player accepts an entirely free college education via scholarship, a luxury not enjoyed by other students.¹⁵² If college athletes eventually get paid, we might someday have to confront the possibility that the slope could then lead to extending payment to high school students as well, as the profile grows for that level of athletics.¹⁵³

Student-athletes are not *required* to play NCAA sports, but if they do so, then amateurism forms are required. If students are unwilling to sign such forms, they are entitled to pursue careers in Europe. Basketball players can skip college by either sitting out a year after high school or going to Europe for one year before becoming eligible for the draft.¹⁵⁴ Another obvious option is to pursue another profession altogether, following the model of most of their college classmates who do not participate in college athletics. No one forces all students to sign these forms; students only have to sign them if they want the luxury of playing NCAA sports.

IV. Conclusion

Edward O'Bannon has brought forth a claim that could have earth-shattering repercussions throughout the world of college sports. In challenging the NCAA, he is partaking in a David and Goliath battle, and one in which he has the opportunity to prevail. There is strong public policy against former college athletes getting paid through an O'Bannon victory, partially because of whether that victory will hurt the landscape of amateurism and college sports. However, it appears that O'Bannon will win at least part of his lawsuit against the NCAA. His goal of policing the use of his likeness in video games (either through compensation or restrictions) could be attained, but he will not be victorious in his quest to control or be paid for the sale of DVDs and photos featuring him, or the broadcasting of games in which he played, as those are newsworthy matters, with great interest to the public and to the colleges. Perhaps most substantially, O'Bannon can succeed in his argument that by requiring students to sign forms that demand their amateurism and relinquish their licensing rights in perpetuity, and by limiting the market for the players' names and images, the NCAA is engaging in anticompetitive behavior and unreasonably restraining trade.

Endnotes

1. Christian Dennie, *Tebow Drops Back to Pass: Videogames Have Crossed the Line, But Does the Right of Publicity Protect a Student-Athlete's Likeness When Balanced Against the First Amendment?*, 62 ARK. L. REV. 645, 646 (2009) (noting that "the commercialization of the BCS and NCAA March Madness has grown" and that the "products displaying names, images, likenesses, statistics, numbers and characteristics of currently-enrolled student athletes have become commonplace in the stream of commerce.").
2. See generally *O'Bannon v. National Collegiate Athletic Ass'n*, 2010 WL 445190 (N.D.Cal., 2010); *Keller v. Electronic Arts*, 2010 WL 530108 (N.D.Cal., 2010).
3. See generally *O'Bannon*, *supra* note 2; *Keller*, *supra* note 2.
4. *O'Bannon*, 2010 WL 445190 (N.D.Cal., 2010).
5. *Keller*, 2010 WL 530108 (N.D.Cal., 2010).
6. See *O'Bannon*, 2010 WL 445190 at 2 (noting that *Keller's* case was consolidated with the *O'Bannon* case).
7. See *O'Bannon*, *supra* note 2.
8. See *id.* at 2 (pointing out that student-athletes are not compensated for the use of their images in the NCAA's licensing agreements).
9. See *id.* at 1.
10. Kurt Streeter, *Former UCLA Star Ed O'Bannon Leads Suit Against NCAA Over Use of Images*, L.A. TIMES, July 22, 2009, available at <http://articles.latimes.com/2009/jul/22/sports/sp-videogames-lawsuit22> (last visited Oct. 3, 2010); see Mark Blaudschun, *UCLA Proved It's Not a Thing of Past*, BOSTON GLOBE, Apr. 5, 1995, at 52.
11. See Edward O'Bannon's player profile, available at http://www.nba.com/playerfile/ed_obannon/index.html (last visited Oct. 3, 2010).
12. Michael McCann, *NCAA Faces Unspecified Damages, Changes in Latest Anti-Trust Case*, CNN/SI, July 21, 2009 http://sportsillustrated.cnn.com/2009/writers/michael_mccann/07/21/ncaa/index.html (last visited Oct. 3, 2010) (stating that the NCAA "bars current and former student-athletes from receiving compensation for NCAA-licensed products, which comprise part of a \$4 billion collegiate-licensed industry.").
13. See *id.*; *O'Bannon*, 2010 WL 445190 at 2.
14. See Complaint of Plaintiff at ¶¶ 26-28, *O'Bannon v. National Collegiate Athletic Association*, 2009 WL 2416720 (N.D.Cal., 2009).
15. *Id.* at ¶¶ 26-27.
16. *Id.* at ¶ 26.
17. *Id.* at ¶¶ 28-32.
18. *Id.* at ¶ 32.
19. 2010 WL 530108 (N.D.Cal., 2010).
20. *Keller*, 2010 WL 530108 at 1.
21. See *id.* at 1-2; see also Dennie, *supra* note 1, at 647-48 (indicating that EA allegedly used student-athlete likenesses to "increase sales and profits.").
22. Dennie, *supra* note 1, at 649-50.
23. See generally, *Keller*, *supra* note 2.
24. *Id.* at 1.
25. See *id.* ("In recent iterations, EA has included features that facilitate the upload of this information").
26. See *O'Bannon*, 2010 WL 445190 at 2 (noting the procedural history of the *O'Bannon* case). (NOTE: From hereon in, these two cases will be referred to collectively as *O'Bannon*.)
27. See Dennie, *supra* note 1, at 651-53 (discussing how Dean Prosser's writings on the rights of privacy led to the birth of the rights of publicity); see also Anastasios Kaburakis, et al., *NCAA Student-Athletes' Rights of Publicity, EA Sports, and the Video Game Industry*, 27-SUM ENT & SPORTS LAW 1, 21 (2009).
28. Restatement (Third) of Unfair Competition § 46 (1995); see Kaburakis, *supra* note 27, at 21; McCann, *supra* note 12 ("The right of publicity refers to the property interest of a person's name or likeness, i.e. one's image, voice or even signature.").
29. James A. Johnson, *Personal Images: the Professional Athlete's Right of Publicity*, NYSBA JOURNAL, March-April 2008, at 10, 12 ("Today, eighteen states have publicity statutes, which differ widely. At least a half dozen other states rely on common law....").
30. *Id.* at 12.
31. *Id.*
32. *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562 (1977) (holding that the right of publicity of daredevil plaintiff was protected over a news agency's right to show his signature jump).
33. *Id.* at 576 (1977); Dennie, *supra* note 1, at 655-56.
34. See *Keller* 2010 WL 530108, at 2; *O'Bannon*, 2009 WL 2416720 at ¶ 15.
35. *C.B.C. Distribution and Marketing v. Major League Baseball Advanced Media*, 505 F.3d 818 (8th Cir. 2007).
36. See *id.* at 820-21.
37. See *id.*

38. *See id.*
39. *Id.* at 821.
40. *Id.* at 822.
41. *See id.*, at 822-23 (holding that the symbol-of-identity element is met when the name used “in fact refers to the famous person asserting the violation.”).
42. *See e.g., supra* notes 7-25, and accompanying text.
43. *C.B.C. Distribution*, 505 F.3d at 822 (quoting *Doe v. TCI Cablevision*, 110 S.W.3d 363, 370-71 (Mo.2003)).
44. *See id.* at 823.
45. *O’Bannon*, 2009 WL 2416720 at ¶ 135-41 (“While not identifying them by name, EA Sports also uses likenesses of numerous specific former student-athletes in their games.”).
46. *C.B.C. Distribution*, 505 F.3d at 822.
47. *Id.* (quoting *Doe, supra* note 43, 110 S.W.3d at 370 (Mo.2003)).
48. *O’Bannon*, 2009 WL 2416720 at ¶ 135-41; *see* Andy Latack, *Quarterback Sneak*, LEGAL AFFAIRS, Jan./Feb. 2006, available at http://www.legalaffairs.org/issues/January-February-2006/review_latack_janfeb06.msp (last visited Oct. 7, 2010) (“[T]he omission of players’ names seems little more than a formality, done with a wink and a nudge in order to keep the NCAA satisfied.”).
49. *O’Bannon*, 2009 WL 2416720 at ¶ 141 (“The players on the virtual college teams in the games correspond exactly to their real-life counterparts in many characteristics, such as position, jersey number, race, size, height, weight and home state. Even uniquely identifiable idiosyncratic characteristics of real-life players appear in their video game virtual counterparts.”).
50. *Keller*, 2010 WL 530108 at 1 (“[Keller] claims that...virtual players are nearly identical to their real-life counterparts: they share the same jersey numbers, have similar physical characteristics and come from the same home state.”); *see also* *Dennie, supra* note 1, at 662 (“EA has carefully designed the virtual student-athlete’s appearance, ability, height, weight, and home state to mirror the real-life student-athlete.”).
51. *Parish v. Nat’l Football League Players Ass’n*, 2008 WL 3287030 (N.D.Cal. 2008).
52. *See id.*, 2008 WL 3287030 at 2-3.
53. *See id.* at 2 (accusing the NFLPA of “withholding information about benefits to which...members might have been entitled and by failing to pursue licensing opportunities on their behalf....”).
54. *See* Greg Johnson, *NFL Union Takes Hit in Court: Federal Jury Orders the players Group to Pay \$28.1 Million to Former Players For Violating Marketing Deals*, L.A. TIMES, Nov. 11, 2008, at D1; Alan Schwarz, *NFL Union and Retirees Reach Licensing Settlement*, N.Y. TIMES, June 5, 2009, at B14 (reporting that the NFLPA did not appeal the November 2008 judgment (of \$28.1 million) against it, and finally settled with retirees in 2009 for \$26 million).
55. *See Parrish*, 2008 WL 3287030 at 2 (“Plaintiffs allege that the NFLPA breached a fiduciary duty owed to its retired members...”).
56. *See id.* at 2 (“Many retired NFL players signed GLAs, but they have allegedly received no revenue from the licensing of their names, images, and biographies under those GLAs.”).
57. *See* William C. Rhoden, *A Lasting Image: Standing Up to the NCAA*, NY TIMES, July 23, 2009, at B12 (“In Major League Baseball and the NBA, unions look after the players’ interests. Not so in college.”).
58. *See Parrish*, 2008 WL 3287030 at 2-3; *See O’Bannon*, 2010 WL 445190 at 2.
59. *See Parish*, 2008 WL 3287030 at 5 (stating that plaintiff’s counsel submitted a letter, not allowed in at trial, which “provides evidence that EA on the advice of defendants, scrambled the identities of a number of retired players whose likenesses it used in the Madden NFL game, rather than paying for those players’ rights, even though those players had signed GLAs.”) (emphasis supplied).
60. Herb Adderley, one of the primary plaintiffs in the *Parrish* case has even given his support to the former student-athletes in their current class action suits. *See Keller*, 2010 WL 530108 at 1. “As amici curiae...Herbert Anthony Adderley filed a brief in opposition to EA’s motion to dismiss.” *See id.*
61. *See* *Dennie, supra* note 1, at 667-68.
62. *See id.* at 675-76 (“...student-athletes will likely have an uphill battle when asserting their rights under right-of-publicity law.”).
63. *See e.g., Zacchini*, 433 U.S. 562 (1977); *C.B.C. Distribution*, 505 F.3d at 823.
64. *See C.B.C. Distribution*, 505 F.3d at 24.
65. *See* *Winter v. DC Comics*, 30 Cal.4th 881, 888 (Cal., 2003) (citation omitted).
66. *Comedy III Prods., Inc. v. Gary Saderup*, 25 Cal.4th 387 (Cal. 2001).
67. *Id.* at 393.
68. *Id.* at 409.
69. *Id.* at 405 (“When artistic expression takes the form of a literal depiction or imitation of a celebrity for commercial gain, directly trespassing on the right of publicity without adding significant expression beyond that trespass, the state law interest in protecting the fruits of artistic labor outweighs the expressive interests of the imitative artist.”).
70. *See* *Winter*, 30 Cal.4th at 886 (listing the similarities, including the characters names, Johnny and Edgar Autumn, albino features and long white hair similar to the Winters, and a top hat similar to that worn by Johnny).
71. *See id.* (“They also alleged that the comics falsely portrayed them as ‘vile, depraved, stupid, cowardly, subhuman individuals who engage in wanton acts of violence, murder and bestiality for pleasure and who should be killed.’”).
72. *See id.* at 892 (“...defendants essentially sold...DC Comics depicting fanciful, creative characters, not pictures of the Winter brothers. This makes all the difference. The comic books here are entitled to First Amendment protection.”)
73. *Keller*, 2010 WL 530108 at 5; *see also id.* at 3 A challenged work is “protected by the First Amendment inasmuch as it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity’s fame.”
74. *Comedy III*, 25 Cal.4th at 406.
75. *See e.g., supra* notes 44-50, and accompanying text.
76. *See Comedy III*, 25 Cal.4th at 405.
77. *See* *Winter*, 30 Cal.4th at 886.
78. *See e.g., supra* notes 45-50, and accompanying text.
79. *C.B.C. Distribution*, 505 F.3d at 823 (“The Supreme Court has directed that state law rights of publicity must be balanced against first amendment considerations, and here we conclude that the former must give way to the latter.”) (internal citations omitted).
80. *See id.*
81. *Id.* (quoting *Interactive Digital Software Ass’n v. St. Louis County, Mo.*, 329 F.3d 954, 957 (8th Cir. 2003)).
82. *C.B.C. Distribution*, 505 F.3d at 823 (“...it would be a strange law that a person would not have a First Amendment right to use information that is available to everyone.”).
83. *Keller*, 2010 WL 530108 at 1 (“EA’s use of plaintiff’s likeness goes far beyond what the court considered in *C.B.C. Distribution*”).
84. *C.B.C. Distribution*, 505 F.3d at 820-21.
85. *See Keller*, 2010 WL 530108 at 6 (Despite the accuracy of the district court’s overall argument about the difference between video games and fantasy sports, fantasy baseball does have aspects which are actually quite comparable to the video game, regarding player manipulation. The fantasy baseball game allows the drafting of actual players onto fictional teams for which they do

- not really play. Furthermore, regardless of the actual performance by the actual major league players during a baseball season, the consumers have the ability to “trade” players to other teams during the season, transactions that clearly are not based in reality).
86. See *C.B.C. Distribution*, 505 F.3d 818 at 823-24; *Keller*, 2010 WL 530108 at 6.
 87. *O’Bannon*, 2009 WL 2416720 at ¶ 26-31, 33.
 88. See *Keller*, 2010 WL 530108 at 5 (“Under California law, ‘no cause of action will lie for the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.’” (citation omitted)).
 89. See *id.* at 7.
 90. See *id.* at 5-7.
 91. *Id.* at 7.
 92. *Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400 (2001).
 93. See *id.* at 405-07; *Johnson*, *supra* note 29, at 14; *Keller*, 2010 WL 530108 at 5.
 94. *Gionfriddo*, 94 Cal.App.4th at 411.
 95. *Id.* at 415; *Johnson*, *supra* note 29, at 12 (“...newsworthiness provides constitutional protection.”).
 96. *Gionfriddo*, 94 Cal.App.4th at 411 (“Moreover, the public interest is not limited to current events; the public is also entitled to be informed and entertained about our history.”).
 97. *Id.* ([t]he public interest is entitled to be informed and entertained about our history.”).
 98. See *e.g.*, *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 409-10 (9th Cir.1996) (Basketball star Kareem Abdul-Jabbar won a case where his name and statistics were mentioned in relation to a car ad, wrongfully making it appear that he endorsed that vehicle).
 99. See *Gionfriddo*, 94 Cal.App.4th at 413 (“A review of the cases finding that commercial speech violates the right of publicity strongly suggests that advertisements are actionable when the plaintiff’s identity is used, without consent, to promote an unrelated product.”) (citations omitted).
 100. *Id.* at 414 (“A celebrity likeness may be used, however, to advertise a related product”).
 101. *O’Bannon*, 2009 WL 2416720 at ¶ 26-31, 33.
 102. See *Gionfriddo*, 94 Cal.App.4th at 414 (“Thus, even if Baseball used depictions of players playing the game or recited statistics or historical facts about the game to advertise the game and promote attendance, the commercial speech cases relied on by plaintiffs would be inapposite.”).
 103. *Id.* at 411 (“The First Amendment is not limited to those who publish without charge...” (citations omitted)).
 104. *Montana v. San Jose Mercury News*, 34 Cal.App.4th 790 (1995).
 105. *Id.* at 792; see also *Johnson*, *supra* note 29, at 12.
 106. *Montana*, 34 Cal.App.4th at 792.
 107. See *id.* at 793-94.
 108. *Id.* at 794 (“The question [Montana] raises...is whether the relatively contemporaneous reproduction of these pages, in poster form, for resale, is...entitled to First Amendment protection. We conclude that it is.”).
 109. *Id.*
 110. *Id.* at 797.
 111. See *id.* at 797.
 112. See *id.* at 794.
 113. See *Keller*, 2010 WL 530108 at 7 (“Although ‘NCAA Football’ is based on subject matter considered ‘public affairs,’ EA is not entitled to the [public affairs] defense because its use of plaintiff’s image and likeness extends beyond reporting information about him.”).
 114. *O’Bannon*, 2009 WL 2416720 at ¶ 26-31, 33.
 115. See *O’Bannon*, *supra* note 2.
 116. See *id.* at 1 (“O’Bannon alleges that NCAA’s rules and regulations constitute anticompetitive conduct.”); see also *Dennie*, *supra* note 1, at 648-49.
 117. See *O’Bannon*, 2010 WL 445190 at 3; see also *McCann*, *supra* note 12 (indicating that “the NCAA has allegedly restrained trade in violation of the Sherman Act, a core source of federal antitrust law.”).
 118. See *O’Bannon*, 2010 WL 445190 at 3 (*quoting* *Tamaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1062 (9th Cir.2001)).
 119. See *id.* (explaining that the NCAA has agreements with its members to have student-athletes sign statements; also there are agreements between NCAA and licensing partner Collegiate Licensing Company (CLC) regarding usage of student-athletes’ images in the media).
 120. See *id.* at 5 (pointing out that the collegiate licensing market is nation-wide, thus constituting interstate commerce).
 121. See *id.* at 4 (“[A] court may employ a rule of reason analysis or a per se rule of illegality.”).
 122. See *id.* (“...the rule of reason, which presumptively applies...”).
 123. *Id.*
 124. See *id.* at 5; see also *McCann*, *supra* note 12 (indicating that if student-athletes did not have to sign away their licensing rights, “more licenses would be sold, which would theoretically produce a more competitive market for those licenses.”).
 125. See *O’Bannon*, 2010 WL 445190 at 1 (describing the form that student-athletes are required to sign annually).
 126. *Id.*
 127. See *id.* (NOTE: For space purposes, only clauses E & I from Bylaw 12.5.1.1 have been included here).
 128. *Id.* at 1-2 (listing two of the sections of the Bylaw which O’Bannon finds most troubling).
 129. See *id.* at 2.
 130. *Id.*
 131. *Id.*
 132. See *id.* (explaining that O’Bannon insists that the fact that NCAA has the rights to his collegiate image, the NCAA has “artificially limited supply and depressed prices paid by Defendants...to Plaintiff and members of the Class for use of their images after cessation of participation in collegiate sports”).
 133. See *id.*
 134. See *id.* at 5 (explaining that O’Bannon and the Class are excluded from the market by the Defendants’ actions and that “[t]his alleged exclusion decreases the number of competitors in the market”); see also *McCann*, *supra* note 12 (noting that if students could license their own images, “more licenses would be sold, which would theoretically produce a more competitive market for those licenses”).
 135. *McCann*, *supra* note 12 (“For example, if former student-athletes could negotiate their own licensing deals, multiple video game publishers could publish video games featuring ex-players. More games could enhance technological innovation and lower prices for video game consumers.”).
 136. *O’Bannon*, 2010 WL 445190 at 7.
 137. *Rhoden*, *supra* note 57, at 12.
 138. See *Complaint of Plaintiff at ¶ 70*, *O’Bannon v. National Collegiate Athletic Association*, 2009 WL 2416720 (N.D.Cal., 2009) (“The NCAA’s releases described herein are also notable for their failure

- to indicate that legal rights are being relinquished, and for their failure to counsel student-athletes, who are sometimes minors, that they may wish to seek legal advice in connection with the release of future compensation rights.”).
139. *Id.* at ¶ 73, *O’Bannon*, 2009 WL 2416720 (N.D.Cal., 2009) (“The NCAA, through its total control of intercollegiate athletics, and due to a gross disparity in bargaining power, requires student-athletes to sign nonnegotiable forms, as the terms are non-negotiable. Any Class member declining to do so is barred by the NCAA and the relevant member institution from all further intercollegiate athletic competition.”).
 140. See Rhoden, *supra* note 57 (stating that O’Bannon’s suit is “the latest suit challenging the NCAA’s unbridled arrogance and the iron-fisted control of its chief commodity: athletes.”).
 141. See *id.* (“[H]ow many recruits... have the nerve to tell Duke’s Mike Krzyzewski or Tennessee’s Pat Summitt that, based on a lawyer’s advice, they are not signing anything granting a release of their image?”); see also McCann, *supra* note 12 (“Particularly given the lack of “life experience” of most incoming student-athletes, such a policy may be viewed as arguably exploitative and also one that creates a disparity in bargaining power.”).
 142. See *Oliver v. NCAA*, 2009 Ohio 6587 (finding against an NCAA rule preventing attorney at negotiations between high school athlete and professional team); see also McCann, *supra* note 12.
 143. See Rhoden, *supra* note 57 (quoting Richard M. Southall of the College Sport Research Institute at the University of North Carolina, “You’ve left the plantation and now 15 years later you have a wife and children and the plantation still owns you, no matter what.”).
 144. See *id.*
 145. See Tom Friend, *UCLA Dash Knocks Wind Out of Missouri*, N.Y. TIMES, (March 20, 1995), available at <http://www.nytimes.com/1995/03/20/sports/ncaa-tournament-west-ucla-dash-knocks-wind-out-of-missouri.html?pagewanted=1> (last visited Oct. 3, 2010) (Tyus Edney hit one of the most famous shots in NCAA Tournament history, a game-winning buzzer beater against Missouri to send UCLA to the 1995 Sweet Sixteen.).
 146. What about players on all of the featured teams that UCLA played against that year—Do they get paid as well?
 147. Dan Wetzel, *O’Bannon Case Could be Game Changer*, YAHOO SPORTS, Feb. 8, 2010, <http://rivals.yahoo.com/ncaa/basketball/news?slug=dw-obannon020810> (last visited Oct. 3, 2010) (“College athletics is already dealing with the financial strain of surging costs, dwindling donations and a financially underperforming Division I-A football postseason. Fewer than two dozen athletic departments are financially self-sufficient. The rest need a combined \$800 million in subsidies from student fees and general university funds. Both an initial penalty payout and then having to share future revenue with former players would exacerbate those problems”).
 148. See Rhoden, *supra* note 57 (“The NCAA has had a sweetheart deal for years—using players’ likenesses, selling jerseys with popular players’ numbers and using athletes as uncompensated on-campus entertainment. Of course, athletes and their parents have had their own sweetheart deal, choosing colleges for sports and not for an academic fit.”).
 149. *Gionfriddo*, 94 Cal.App.4th at 415 (indicating that the individual athlete has sustained marketability partially because of the efforts of the league keeping that individual’s name and information in the public mind).
 150. See Latack, *supra* note 48.
 151. Frank Deford, *Lawsuit Against the NCAA Could Lead to the End of Amateurism*, CNN/SI, http://sportsillustrated.cnn.com/2010/writers/frank_deford/03/10/NCAA-amateurism-lawsuit/index.html, March 10, 2010 (last visited Oct. 3, 2010) (explaining that the O’Bannon case could lead to the “...express end of amateurism.”).
 152. See McCann, *supra* note 12 (noting that student-athletes “accept[] free tuition, room, board, and other benefits as part of their athletic scholarship.”).
 153. See Darren Rovell, *‘King’ James Proves a Ratings Bonanza for ESPN2* (Dec. 13, 2002), at <http://espn.go.com/sportsbusiness/s/2002/12/13/1476503.html> (last visited Oct. 3, 2010) (discussing how ESPN found ratings success when it aired then-high school star (now NBA superstar) LeBron James’s high school basketball games on its networks); see also Richard Obert, *Prep Sports Enjoy Limelight*, ARIZONA REPUBLIC, Feb. 10, 2008, at 1 (explaining the frenzy around high-school football in some areas: “[As] the nation’s top high-school football recruit was still weighing college offers, nine TV trucks were parked outside his small Pennsylvania school and 100 chairs were set out for the news conference he eventually delayed. Coverage of high-school stars feeds a nation’s appetite to find the next big thing. It attracts major sponsors and advertisers, draws financial benefits for high-school athletic programs and gives players valuable exposure to college recruiters. But parents worry about the pressure of the growing attention.”).
 154. Ray Glier, *Brandon Jennings Sends Home a Warning from Europe*, N.Y. TIMES, Jan. 23, 2009 (“[Brandon] Jennings...who was regarded as the nation’s best high school player at his position... signed a \$1.2 million deal in salary and endorsements to head to Europe... [instead of playing] college basketball]. Some analysts suggested that other elite players would follow the same path because of the rules requiring prospects to be a year removed from high school before becoming eligible for the N.B.A. draft.”).

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Play It Again Bud: Baseball and Instant Replays

By Bennett Liebman

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The major sporting upset in this country 70 years ago, according to the Associated Press, was a football game between Dartmouth and Cornell.¹ Cornell's football team had been undefeated for over two years. This unbeaten streak stood at 18 games. In 1940, going into the Dartmouth game, Cornell had outscored opponents 18 to 13, and was ranked second in the nation.² On the field, the Big Red had seemed to beat Dartmouth as well. The score at the end of the game was 7-3 Cornell, according to the referee: But that score would not stand.

The Fifth Down Game

As the game reached the final seconds with Dartmouth leading 3-0, Cornell had a first and goal at the Dartmouth six-yard line. Three plays later, Cornell approached the goal line. On fourth down, Cornell was called for delay of game after calling an improper timeout. The ball was brought back to the six. An incomplete pass into the end zone should have been the end of the game. However, the referee, Red Friesell, did not see it that way. He still called it fourth down, and Cornell scored with six seconds left to seemingly win the game 7-3.

The National Collegiate Athletic Association barely held any power then, and the issue initially went to the Eastern Intercollegiate Football Association (EIFA).³ The head of EIFA, Asa Bushnell, said that he had no power to change the result⁴—that would be up to the athletic departments of the colleges. With films and charts of the game made available, the referee admitted error. Cornell conceded the game, and the fifth down game went down in the record books as a 3-0 Dartmouth victory.⁵

Asa Bushnell after the Cornell concession stated, "Only when an official reverses his decision on the last play of the game is it possible to accept such a reversal and permit it to change the score."⁶ Bushnell wrote, "In any sport...where the game unfolds in a consecutive series of inter-related and inter-dependent plays, it is manifestly impossible to alter any of these plays without affecting and altering perhaps every one of them which follow."⁷ The Dartmouth-Cornell game was what Bushnell called the "one game in a million," where a change could be made without establishing a dangerous precedent.

Joe Williams, the syndicated columnist for Scripps Howard, wrote that the "photo finish had come to football... Now you can't follow it without a camera."⁸ But 70 years later, it remains controversial. It was not a one in a

million game. Similar cases have been rare, but they have occurred. There have been other college football games where the on-field result was not changed. There have been two fifth down situations in college football where games turned in the last seconds on the award of an extra down.⁹ One fifth down decision eventually led to Colorado being the national champion in 1990.¹⁰ The erroneous referee decisions were not overturned. Similarly, in 1961, the referees made a mistake on a rules interpretation on a field goal on the final play between Syracuse and Notre Dame.¹¹ The referees mistakenly let Notre Dame retry the field goal, and Notre Dame won. Again, the referees erred on the last play, but the result was not changed. Even the precedent established by the Cornell-Dartmouth decision has not been followed.

It should be noted that fans really cannot sue to overturn the decision of the referee. The few court decisions in this field show no such creature as referee malpractice. Either the issue is not justiciable,¹² or there is no legal duty—except for some possible safety concerns—that a referee has for fans.¹³ This is probably best established in the area of horse racing. Where fans have sued to recover for their bets when the stewards made an incorrect call, they lost.¹⁴ The finding was that the bettors are bound by the stewards' decisions as part of the rules of the game and cannot contest them.

The Baseball Issue

In the last year, we have seen this umpire or referee mistake issue turn up repeatedly in baseball, and we have seen that baseball has hardly had any answers to these mistake questions.

Without any need to view the videotapes, baseball has seen Detroit Tiger pitcher Armando Galarraga lose a perfect game on an admittedly mistaken call with two out in the bottom of the ninth inning by umpire Jim Joyce. During the American League playoffs in 2009, we witnessed umpire Phil Cuzzi call a ball hit down the left field line by Minnesota Twin catcher Joe Mauer foul that was obviously fair.¹⁵ In the American League Championship Series, the umpires missed three calls in one inning. Two of the missed calls were made by umpire Tim McClelland, who in 1983 had made the overturned call that George Brett's use of a bat with more than 18 inches of pine tar on it from the bat handle was enough to declare him out.¹⁶ The mistakes were reminiscent of Don Denkinger's missed call in the ninth inning of the sixth game of the 1985 World Series, which may have led to the St. Luis Cardinals losing the World Series.¹⁷

In the absence of Leslie Nielsen (as Frank Drebin or Enrico Pallazzo, or whatever his name may have been) in the 1988 movie *The Naked Gun*,¹⁸ Major League Baseball (MLB) is not doing much to correct umpire errors. All that the MLB is doing is reviewing certain potential home runs. This system has been in place since late in 2008. One can resort to instant replay for a home run to see if the batted ball is fair or foul, whether it left the playing field, and whether or not there was fan interference on a home run.¹⁹

Replays in Other Sports

That is far less of a replay rule than in other major sports.

Professional basketball can determine whether a shot was a two-pointer or a three-pointer, and whether a shot was taken before or after the buzzer. The replay rule is also used to figure out who exactly was involved in a fight.²⁰

Professional hockey uses replays to review goals, whether a puck crossed the goal line, whether the puck crossed the goal line before a period ended, whether it was directed in by a foot or hand, or deflected off the high stick of an attacking player, or whether the goal was scored before the net became dislodged.²¹

Professional football has a rule for a host of calls, although generally not including fouls. These include scoring plays, pass completions or interceptions, going out of bounds, passes or fumbles, forward progress, placements of footballs, and whether there were a legal number of players on the field. In theory, this is not supposed to include judgment calls, such as holding or pass interference, but some calls, such as forward progress or certain catches, can involve exercises of judgment.²²

Tennis now has the Hawk-Eye simulation system, which has been in place for the past four years, to govern out-of-bounds calls. While there have been a few problems, most everybody seems to think that the system has been excellent in establishing quick straightforward reviews of out-of bounds calls.²³ The system basically makes a decision in 10 seconds.

The absence of instant replay was a major deal in the recent World Cup where a number of referee errors were made on goals that could not be corrected.

If baseball does move towards instant replay, what does it do, and what are the concerns?

Levels of Review

In most sports, there are three levels of review of umpire decisions.

First, there are the umpires/referees themselves conferencing after a play. In baseball, after a completed

play, one will see the officials occasionally huddling to try to get the initial call and its applicable rule correct. That occurs repeatedly in football as well, to coordinate the actual decision. In baseball, sometimes different umpires might have better angles on certain plays such as whether or not a ball was caught or trapped. Umpires will huddle to make sure that the rules have been interpreted properly.

Second, there is the video replay, where an official views the instant replay of an event to determine whether a call was correct, and whether it should be overturned.

Finally, there is the review by the Commissioner/off-playing field authority after the entire event has been run. This is the Galarraga perfect game review or the George Brett pine tar bat review.

The question for baseball is what should be looked at for each respective level, and what should be the proper parameters of a review system. There is little criticism of the existing umpire conferencing system. Obviously, there can only be one decision emanating from the game officials, and if a conference places all the officials on the same page, that certainly makes sense.

Instant Replay Issues for Baseball

The instant replay question raises the most concern for baseball. As compared with football, one of the instant replay concerns is that it takes too long to make a decision. Baseball prides itself on the fact that time is never of the essence in a baseball game, but how much is too much?

In addition, who initiates the review? Does it go to the teams, giving them a limited number of challenges? Such a system might seem akin to establishing a review system based on our legal notions of harmless errors on appeal. If there are a limited a number of appeals, teams will rationally only use them for errors that cause real harm. Would it become a self-policing harmless error process, or should the initiator of the challenge be the crew chief of the umpires? Would there be a separate instant replay official making a sua sponte challenge? In theory, the replay rules in the National Basketball Association (NBA) are automatically triggered. Or, is it better to turn to a mixed system, like the National Football League (NFL), where the teams make most of the challenges, but the instant replay official makes the challenges in the last two minutes? Perhaps all ninth inning and extra-inning decisions to go to replay will be determined by the instant replay official.

Who would make the instant replay decision? Would it be the crew chief, an instant replay official, the on-field officials jointly (which is the way the NBA is supposed to work), or perhaps a system like tennis, where for some decisions the replay system itself makes the call?

What respect is accorded the initial call on the field? How strong is the presumption that the initial call is the correct one?²⁴ In the NFL, one needs “incontrovertible visual evidence” to overturn a call. In the NBA, the standard is “clear and conclusive visual evidence.” Looking at the National Hockey League rules, there does not appear to be any presumption. Should one even have a presumption, and just make the call *de novo* from the replay? Why should a traditional legal appellate deferential standard apply when the whole idea of instant replay is to get the facts right? After all, the basis of deference to the trier of facts is that the trier of facts is more familiar with the evidence than the appellate court.²⁵ In the instant replay system, the replay official is likely to know more about the evidence than the on-field official. Should lawyers use this as a teachable moment, as some have claimed, about the nature of appellate review and error correction?²⁶

Who does the deciding official talk to before reaching the decision? Does he or she talk to other on-field officials? Should the official allow the managers to have an opportunity for a brief oral argument to assuage due process concerns? There is actually a horse racing case from the Montana Supreme Court where the decision of the racing stewards to disqualify a horse was overturned because the stewards had failed to give the trainer of the horse that was disqualified an opportunity to plead his case.²⁷

How would the notion of the field of play decisions integrate with instant replay? Under numerous decisions of the world-wide arbitration panel, the Court of Arbitration for Sport, field of play decisions should not be altered. Most notable is the Court of Arbitration’s 2004 decision involving the award of the overall men’s Olympic gymnastic gold medal to American Paul Hamm. The court found that a mistake in the calculation of a score could not be remedied after the overall competition because the mistake occurred in the course of the competition.²⁸ All of the competitors took actions relying on this mistaken decision, and “no one can be certain how the competition in question would have turned out had the official’s decision been different, for a court to change the result would on this basis still involve interfering with a field of play decision.”²⁹ Therefore, that means at a minimum, one has to make the replay decision before the next event in the game occurs. It also should mean that umpires should not regularly make speculative judgments on what would have happened if a different decision had been made. For example, in a fair ball down the left field line example with runners on base, if the decision is overturned and the ball ruled fair, how would the runners be replaced? Would one look at the subjective base running attributes in question, or make the decision based on the speed of a reasonable professional baseball runner? Does the arm of the leftfielder become a factor? To what extent should umpires be allowed to make these types of field of play decisions?

Most importantly, for baseball, there is the issue of which decisions should be subject to instant replay. There are a few obvious candidates. There is the Phil Cuzzi fair or foul decision on the line. That is an easy one for baseball. It is not too different from the in-court decision in tennis or the out-of-bounds decision in football. It would probably be best to make the calls at first base decision (whether the Denkinger/Galarraga decision) subject to replay. Did the first baseman or the pitcher catch the ball at first before the batter reached the bag? What about the sacrifice fly ball play? Would not an instant replay be especially useful in determining whether a player tagged up before the ball was caught? Recently cases involving whether or not a thrown pitch hit a batter have been in the news.³⁰ In fact, there have been a number of famous World Series games that might have been determined based on the issue of whether a batter was hit by a pitch.³¹ That ought to be subject to review. What about catcher’s interference calls, and whether or not a batted ball struck the batter in foul territory? Did the runner reach home plate before a third out on the base paths was recorded? Was the fielder making the catch properly inside the playing field at the time of the catch? These rules would be good ones for review.

Baseball presents many issues that, while objective on their face, are as a practical matter subjective. Ball and strike calls are theoretically objective, but that is actually not the case and would be terrible issues for replay. Over the years, players have been forced out when the infielder making a catch by the base was generally in the area of the base (but not necessarily on the base) when the ball was caught. Should this type of on the base decision be subject to review? One might assume, given baseball custom, that the answer would be no for any base other than first base. The same would be true for the balk rules or the check swing question. The MLB, in fact, has no rules about what is a check swing. Custom has it always as a judgment call. Baseball rules call for a pitch to be thrown within 12 seconds after a pitcher receives the ball when the bases are unoccupied. That is certainly objective. It would actually work under replay, but since the rule is barely enforced now, one can assume it would not be a great candidate for replay.

Then, there are a host of other questionable issues. Was a player tagged out properly on the base paths? Did the catcher catch strike three or properly catch a foul tip? Was a ball trapped or caught? Did a ball that hit before first or third base go over the bag in fair or foul play? Did a player run out of the base lines? These are certainly dicey situations and might explain a lot of the reluctance that baseball has had for instant replay rules.

Finally, baseball has to concern itself with the effect of instant replay on the umpires. Will it make them better because their judgments will be subject to peer review? Will it make them somewhat more gun-shy to make a

controversial call? Why bother to make a call that a runner tagged up too soon? If they really think he tagged up before the catch was made, let them appeal it to the instant replay official. Maybe this hesitancy to make controversial calls will lead to a general decline in the quality of umpiring. One could assume that the evidence from other sports is that instant replay will not have a significant effect on the overall quality of the judging.

Role of the Commissioner

The final subject is what should be the role of the baseball commissioner in reviewing decisions of umpires. In June, Baseball Commissioner Bud Selig refused to overrule the on-field decision that Cleveland Indian Jason Donald was safe at first, thereby denying Detroit pitcher Armando Galarraga a perfect game. Selig feared setting a bad precedent and opening a “Pandora’s box.”³² Yet should not this be the job of a commissioner—that of getting things right? Is not that the precedent that should be set? What should the role of a commissioner be?

It would be reasonable to assume that one thing that a commissioner should not do is become involved in the field of play decisions. That again is the lesson of the 2004 Court of Arbitration for Sport case involving Paul Hamm and Yang Tae Yang. Yang’s performance on the parallel bars was given an incorrect start value.³³ If it had been given the correct start value—and nothing else had changed in the competition—Yang would have finished first in the competition and not third. The court found that this had been a field of play decision in the midst of the competition, and it might have changed Yang’s future performance. He still had to compete in the high bars event, and if he had been scored properly in the parallel bars, it could have affected his mental and physical attitude and changed his performance. As the court said, “While the error may have cost Yang a gold medal, it did not necessarily do so.”³⁴ This is much like what Asa Bushnell said in 1940. A competition unfolds in a consecutive series of interrelated and inter-dependent plays. A sports contest is like Humpty Dumpty—it cannot be played with and then put back together again. Sports are not scripted; they are not connect-the-dots contests. As Yogi Berra supposedly said, “It’s tough to make predictions, especially about the future.”

Therefore, it would probably be best to limit commissioner review to those cases where the referee decision has no effect on the subsequent play in the competition. As a practical matter, we are now focusing on decisions at the end of the game.

The sport of horse racing might again have some relevance here. Horse racing has no direct referees. It has stewards who function largely as instant replay officials, and the racing commissions or boards serve the function of commissioners. In those circumstances, most racing commissions have no problems in reversing not only the

results of the race but also the decisions of the stewards.³⁵ New York State has been far more judicious than most other jurisdictions. The Racing Board does not interfere with stewards’ judgment calls, but even in New York, where there has been incontrovertible visual evidence of a mistake, or a mistake in an interpretation of a rule, the result was changed by the commission.³⁶

In 1986, at Saratoga, when the stewards misidentified and disqualified a horse for interference when that horse was nowhere near the interference, the Racing Board reversed the result.³⁷ While it may be a rare occurrence, it is hardly unprecedented in racing for placing judges to get the order of finish wrong.³⁸ When that happens, and the stewards do not correct it, the racing commission invariably changes the result. So if racing commissions can correct through incontrovertible visual evidence mistakes that do not implicate any field of play decisions, why not Bud Selig?

After all, what is the George Brett example? In the Brett pine tar case, the American League Commissioner Lee McPhail overruled the decision of the umpires that excess pine tar—more than 18 inches from the bat handle—was a cause for ruling the batter out. That decision ended the game. The reason for the pine tar rule was not to give a batter an advantage; it was simply to keep more baseballs in play so that they might not be damaged by contact with pine tar. The penalty was to take the bat out of play, and McPhail had previously ruled on a protest that a violation of the pine tar rule was not a proper basis for finding a batter out. McPhail reinstated Brett’s home run and ordered the game to be replayed from the time after the incident.

The Brett incident was a rules misinterpretation by the umpire. Why could that be reviewed while the Galarraga incident involving “incontrovertible visual evidence” could not? What is the possible distinction? The Galarraga incident, since it would have simply ended the game, would seem to be an easier case for the commissioner to reverse than the Brett case which involved a game to continue three weeks after it had been played.

What would Bud Selig have done if after the mistaken call on Jason Donald, the Indians had come back and won the game? They were only down 3-0. Would that have made him change the call?

It is not that simple to say that Commissioner Selig totally blew it. What would have happened if Donald had been improperly declared out when he was safe? What would Selig have done? Would he have ordered the game to continue? Would he have added an asterisk to the Galarraga perfect game?

New York Giants fans might remember the unfortunate 2003 playoff loss to the San Francisco 49ers, who came back to win from a 24-point 3rd quarter deficit. On the last play of the game, the Giants lined up for a 42-yard

field goal that would have won the game. The snap was low and hit the dirt. The holder had to throw a desperation pass. The pass was incomplete. There was, however, pass interference by the 49ers. Nonetheless, the potential receiver was deemed to be ineligible, and the game was ruled over, with the Giants the losers.

It turned out there was a mistake by the officials.³⁹ The potential receiver was eligible, and another Giant downfield who was not involved in the play was ineligible. Legally, there should have been offsetting penalties, and the play should have been returned to the original line of scrimmage with the Giants given another play. If he had followed the George Brett formulation, should Paul Tagliabue have required this one down to be replayed a day or two later?⁴⁰

Conclusion

This author still believes that the Galarraga decision should have been reversed, but perhaps it is the Brett decision that should be reconsidered. Maybe there should only be a commissioner's review of umpire decisions where the umpire's decision was (1) either a mistake in the rules or wrong based on incontrovertible visual evidence, (2) where the decision involved the last play of the game so that there was no subsequent field of play decisions, and (3) where the commissioner's decision to reverse the call would end the game. The Brett decision would not have qualified on the third aspect.

My own subjective field of play decision is that Commissioner Selig was wrong to deny Galarraga a perfect game. The similarities between the Galarraga case and the Cornell-Dartmouth game 70 years ago are remarkable—an objectively incorrect call on the last play of the game where the blown call could not possibly affect any subsequent field of play decisions, and where there would be no need to continue further play of the game. The fact that cases like Galarraga and Brett turn up so infrequently indicates that there is no need to worry about opening up Pandora's box or about a domino effect. Galarraga was the one case (perhaps not one in a million but one in 25,000) that Asa Bushnell was talking about 70 years ago.⁴¹ There's little risk of establishing a dangerous precedent. If there ever was a case for a baseball commissioner reversal, the Galarraga case was it.

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From the 360 Deal to 180 Business: A Brief Look at the Deal and How Shifting the Record Label Paradigm Could Save the Industry

By Jo-Na Williams

While it is true that the mediums for storing and distributing music have evolved over the past 30 years, it is also equally true that record labels have not drastically changed their mode of business. Record companies are desperately trying to preserve their current infrastructure while the profitability of their primary product (recorded music) plummets.¹ Since the advent of digital downloads and piracy, CD sales have declined significantly in value, turning the consumer into one who no longer purchases entire albums but prefers to select and pay only for the songs that he or she likes and downloads them onto computers or other listening devices. With established artists like Radiohead making their albums available for free download on the Internet and artists recording their albums with a few computer mouse clicks, it may be hard for new artists to see why record labels are necessary to their careers.² Although the costs to record an album have declined in recent years, most artists find it relatively difficult to achieve the commercial success they desire without the involvement of record labels. With hungry artists desperate to “break-into” the business and record companies trying to remain competitive and viable, many artists enter into contracts known in the industry as 360 deals. The following article will define the 360 deal, contrast it with the traditional recording contract, and propose a viable solution that allows autonomy for the artist and more concentrated profits for the record company.

The 360 Defined

When a record company seeks to sign an artist to a recording contract, usually it will contain a provision allowing the company to derive income from other revenues obtained by the artist. While the artist has an exclusive recording contract with the label, any endorsement contracts, films, and fashion ventures entered into by the artist must distribute a percentage of the revenue therefrom derived to the record company. This is known in the entertainment industry as the 360 deal.³ Based on the provisions contained in the deal, a record label could obtain money from touring, merchandising, and other sources the artist receives in order to recoup the advances already paid to the artist. This is known as the Recording Fund.⁴ These other more lucrative parts of an artist’s career are usually a major source of his or her income, and therefore record company participation decreases the artist’s profit. Depending on the artist’s bargaining power, these 360 deals can teeter between fair and nearly uncon-

scionable. While such deals are increasing in popularity among recording companies, artist advocates remain unimpressed.

Some new artists are happy with the terms of their 360 agreements and see them as confirmation of the record labels’ long-term investments in their successes and viabilities.⁵ In theory, if the record label invests in other revenue streams it is devoted to the success of that artist in order to increase its own return on its initial investment. However, some deals contain a specific percentage of revenue allotted to the label with little or no effort on the part of the label to increase those streams of revenue for the artist.⁶ Therefore, the label’s participation can appear like a “land grab” to support a crumbling business model.

“Depending on the artist’s bargaining power, ...360 deals can teeter between fair and nearly unconscionable. While such deals are increasing in popularity among recording companies, artist advocates remain unimpressed.”

The Traditional Record Deal

Typically, the traditional recording agreement signed by a new artist allows the recording company to commit to one album with the artist.⁷ Based on the success of that album, the label has several renewal options for additional albums.⁸ The label advances the money to the artist in the Recording Fund to record the album and generally recoups those initial advances through the album sales.⁹ Once the label recoups the advance and its return, all other profits, if any, are forwarded to the artist.¹⁰ A royalty rate is defined as the artist’s portion of the revenue derived from the sale of records.¹¹ Since the royalty rate for new artists is typically between 13 and 16 percent, artists do not rely on album sales to achieve an income stream, which is usually derived from touring.¹² If the album is unsuccessful, the label has the option of releasing the artist from his or her contract without any further commitment.¹³ This leaves most (if not all) of the bargaining power in the hands of the label while the artist is bound to an unfavorable contract as his or her popularity increases.

Furthermore, if an artist is still indebted to the label for advances on previously recorded albums, the artist may owe the label the balance for the remainder of his or her career, even if the preceding album is materially successful. The issue remains that the artist's contract contains no options to renegotiate as he or she achieves greater success and is left with debt if sales are slow. While it is true that record labels take the initial gamble on the success rate of a new artist, the artist also assumes a risk if the record label does not invest money into developing his or her career, and as a result, the album is a commercial failure. Although for years the traditional model was the standard, the 360 model's recent popularity has labels vying for a bigger piece of the artist's pie.

Who Holds the Cards in a 360? Bargaining Power of New and Established Artists

Established artists have more bargaining power and therefore can negotiate for more favorable terms, including non-recoupable advances and a larger share of their touring and merchandise revenues. When the Hip-Hop metal band Korn signed its 360 deal with EMI, its proven success rate and longstanding fan base allowed it to negotiate for a base income of \$15 million while the recording company assumed the risk that Korn would deliver a future profit.¹⁴

New artists differ, however, because their limited bargaining position allows the record label to negotiate more stringent terms. For the cost of a record label's investment and participation in a new artist's career, the latter potentially receives less autonomy over tour logistics, other deals, and income. In essence it depends on how much an artist wants to sign a recording contract, even though a contract will not guarantee commercial or material success.

Works for Me: Support for the 360 Model

When the Pop band Paramore signed its 360 deal with Atlantic Records in 2005, it publicized its satisfaction with the terms of the agreement.¹⁵ The new band lacked a previous tangible success rate and therefore was in a less than viable bargaining position when Atlantic offered the deal. Paramore's front woman, Haley Williams, mentioned if the band did not sign the 360 deal, the label may not have been as patient with recouping its advances and developing the band's slow, albeit sustained, success.¹⁶

Madonna's 360 deal with Live Nation, a tour promotional company, gave increasing validity to these agreements within the industry. Her deal allowed Live Nation to take a portion of her touring and merchandising revenues along with some of the licensing rights.¹⁷ In exchange, Live Nation would promote her tours, give access to its established fan base and marketing avenues,

exclusively coordinate all her touring logistics, and provide access to Live Nation venues all over the country.¹⁸ Madonna's *Confessions* tour grossed over \$260 million while she exclusively toured with Live Nation, which appeared to be a lucrative outcome for both parties.¹⁹ Given the fairly new nature of these deals, however, one is not able to prove success of the 360 model based on major tours, as the future rate of return on an established artist is a safer investment for a record label or touring company.

It Is Not Fair: Opposition to the 360

While artists like Madonna, Korn, and Paramore are open to the 360, most of the industry remains unsettled in the idea that recording companies can take a portion of the artist's profits from other revenue streams to support their failing business model. Many artists, artist advocates, and even record label executives agree that if record companies want to share in the profits, they should also share in the work to develop an artist's career. Artist and label CEO Sean Carter (Jay-Z) agrees: "I believe that 360 becomes a bad deal unless you're doing artist development... You can't take someone's rights, profess to be an expert in that field and then not do anything for it. If you're sharing and partnering with an artist, you better build an artist"²⁰

However, many record companies have not taken the initiative to develop artists beyond the initial investment they would generally offer in their traditional recording contracts. Some label executives and other industry professionals agree that record labels should take a more comprehensive approach to the development of an artist and not narrowly focus on the dividends from CD sales. Craig Kallan, chairman of Atlantic Records agrees: "If we weren't so mono-focused on the selling of recorded music, we could actually take a really holistic approach to the development of an artist brand..."²¹ This would maximize the labels' initial costs and profit and allow them the opportunity to capitalize on artists' successes for a longer term.

So How Do We Deal With This? A Flexible Solution

Most would agree that record companies are in a financial crisis and need to evolve in order to be sustainable. However, the 360 deal cannot save years of bad investments, failure to find a profitable commercial avenue for the distribution of music, and regain the consumers' trust. An overhaul of the record company business model might address the issue. If labels shifted their focus to become more like an artist development company, they may have a chance of regaining their status and viability in the entertainment industry.

With this new business model, an artist looking to enter into a contract with the company will be given contract package options depending on the level of development he or she desires. These options would provide the artist with autonomy over how involved he or she wants the company to be in building his or her career, and allow the company to either invest minimal funds and assume a lower risk of return, or invest more for a higher risk and potentially yield a higher return. The company could then determine the level it wants to commit to the artist, by choosing which package it would want to present, and negotiate up or down through traditional contract negotiations.

For example:

Artist #1: New Artist

The executives at the company believe that this artist will be a commercial success, and want to offer her a “full package deal.” She does not have fan base yet and just finished school. The company proposes to offer her:

1. A lucrative recording fund for the production of her first release;
2. supply her with a business team consisting of a manager, lawyer, and accountant;
3. supply a team of experts to develop her brand and marketing; and
4. facilitate the establishment of endorsement deals, merchandising, and all media outlet appearances over the course of the promotion of the first album.

The company’s conditions would be:

1. It receives dividends from all deals it fosters directly, and
2. the artist will reimburse all advanced monies to the company.

In this scenario, if the artist agrees, she is bound to the contract for the time stipulated therein which would be through the recording, promotion, and touring for the first album. However, she can negotiate a more favorable contract once the initial term ends. This benefits the artist, because she is not locked into an unfair contract for the length of her career. This is also a benefit to the company, because it is justified in taking its share of the profits derived from the deals it facilitated. If the artist decides to contract with another company after the initial term, either the new company or the artist would pay the previous company the remaining balance owed on the contract, so that it would not operate at a loss after developing the artist. This model builds trust between the label and the artist because “the right hand knows what the left

hand is doing,” and if either party wants to abandon its obligations to the contract, it is free to walk away from the deal. This puts the label and the artist on an equal footing.

Artist #2: Independent Established Artist

The executives of the company also believe in the profitability of this artist, because he has a small, dedicated, fan base and is moderately successful on the underground circuit. This artist has an established team of promoters, a manager, and has generated some buzz on Facebook, Twitter, and YouTube. The artist would like to be more commercially successful, but lacks the funding and promotional backing to reach the larger audiences. The company would offer this artist a “half-package,” which includes:

1. A smaller recording fund for subsequent albums;
2. a smaller amount of endorsement deals over a period of time or guaranteed participation in negotiating deals from other revenue streams; and
3. it would set financial limits for the artist and allow him to make the ultimate decisions on the direction of his career. The company would advise him in these ventures.
4. The company would also negotiate a lesser percentage of the profits gained from other deals.

The company’s conditions would be:

1. The artist would guarantee the company reimbursement for touring revenues to cover the advancement.
2. The company would also receive a percentage of the revenue on all albums recorded under the agreement.

In this scenario, the artist has the freedom to manage his career with the help of the company, while the company minimizes its involvement and risk. This model works because the company still participates in the development of the artist but in a more limited capacity. If the efforts are successful on both ends, both parties can renegotiate for a more invested contract in the future.

These examples favor the consumer, because better quality artists will enter the mainstream, whether independent or commercial. Additionally, consumers will know they are not supporting unfair business practices and can feel good about their purchases. Although the artist development company would potentially be forced to reduce its artist roster, it would place more concentrated attention on developing and sustaining artists. This presents a win/win situation for all parties involved, the artist, company, and consumer.

Conclusion

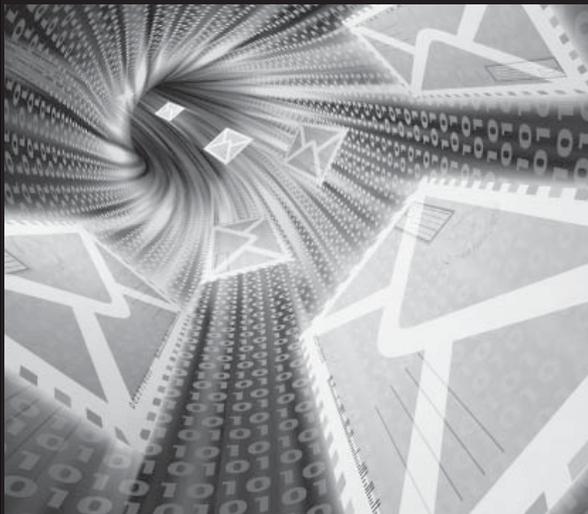
Fear has paralyzed the recording industry for a number of years and time has run out on creating solutions that rest on the backs of struggling talent trying to make their marks in a failing industry. If the record companies would use their resources to develop artists' careers, they would be justified in their participation in the 360 deal. The focus can no longer be on the bottom line of CD sales but on the individual attention placed with the artist. Guy Hands, CEO of the investment firm that bought EMI Music agrees, "[w]e need a relationship with our artists based on a true partnership, in which we jointly share both the risks and the benefits."²² It is true that in any business, the more a person is invested financially, the more he or she wants to see that investment yield dividends. Although music is a business, it is time for these companies to stop looking for a 360 and bring it to an entirely different arena...time to start looking for the 180.

Endnotes

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360 Deals: The Wave of the Future or Has the Future Come and Gone?

By Brian A. Bloom, Jordan Fensterman and Alex Leibson

There is an undeniable air of uncertainty in the entertainment field today and its relationship with Intellectual Property law, which, for example, is often exhibited in the music and poker industries. Historically the output of the music industry was described by the catchall phrase “content.”¹ Content includes productions like “motion pictures, television programs, and music, as well as the output of related industries such as radio, newspapers, magazines, books, and, of course, online materials.”² The power struggle between the music’s content based industry and the developing technology based industry has steered the trade into unfamiliar territory. Another area of uncertainty in entertainment industries concerns Tiger Woods’ fall from grace. Tiger’s precipitous fall has left a vacancy at the top of the branding chain. Consequently, this has caused people in varying entertainment fields to explore new avenues in search of the wave of the future. As an up and coming industry, poker is primed to fill that void.

360 Deals

The music industry is struggling to attain the revenues it once produced. In particular, content’s value today is being driven into the ground.³ The industry’s inability to adapt the new technologies to their advantage preceded a drop in profits. Album sales in 2008 (CDs and downloads combined) fell 14 percent from 2007, and about 30 percent from 2006.⁴ Furthermore, CD sales were down for the seventh time in eight years.⁵ In addition, the increased popularity of downloads has not offset the revenue lost from declining CD sales.⁶ Some of the factors that have lead to this decline are supply and demand, the decline of tangible media, reduced transaction costs, the rise of free content, market forces in the technology industry and a culture of piracy.⁷

The new age rock band Radiohead responded to this problem by releasing the album “In Rainbows” without a record label. Radiohead made the album available online and instructed fans to “pay-what-you-want” for the download.⁸ However, this is not an approach that should be emulated by bands all over the globe. Thom Yorke, front man for Radiohead, stated that the only reason this strategy worked for the band “is the fact that [Radiohead has] gone through the whole mill of the business in the first place.... It was simply a response to a situation. We’re out of contract. We have our own studio. We have this new server. What the hell else would we do?”⁹ The music industry might have found an answer to that rhetorical

question through “the emergence of the ‘360’ model as a basis for artists’ contracts with record labels and with promoters.”¹⁰ A 360 deal is “is a legal contract between a musical artist and one company.”¹¹ Further, it brings together under one contract the various aspects of an artist’s career that “have traditionally been handled by separate contracts with different companies” like merchandising, publishing, endorsements, and touring.¹² 360 deals essentially expand the scope of areas in which record labels can earn revenue from their clients.¹³ The deals encompass non-traditional as well as traditional areas of revenue for the bands.¹⁴ In exchange, the record companies provide the bands with more money up front.¹⁵

This new model as a basis for artists’ contracts with record labels and promoters has the advantage of creating a new revenue stream for the music industry.¹⁶ In addition, 360 deals “will also benefit artists by allowing record labels to invest more patiently in an artist’s career by freeing the labels from the ‘tyranny of megahits.’”¹⁷ What is more, new artists will almost certainly enjoy the receipt of more money earlier.¹⁸ Consequently, the 360 deals will be enjoyed by bands and artists that need to tour to develop their images and fan bases because of the support in the form of compensation and patience given by the record companies and promoters.¹⁹

Some, however, are questioning the viability of a 360 deal. The all encompassing nature of the 360 deal raises the question of unconscionability. The basic test for unconscionability is “whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the term or contract involved is so one-sided as to be unconscionable under the circumstances existing at the time of making the contract.”²⁰ This test applies to both the procedural and substantive part of the contract. Procedural unconscionability refers to the bargaining process leading up to the contract formation.²¹ There are several ways a contract could be procedurally unconscionable, such as duress and other “steep bargaining practices,” incomprehensible language, or undue influence.²² Substantive unconscionability refers to the unfairness of the provisions of the deal.²³ Further, substantive unconscionability is generally upheld when the terms of the contract unreasonably favor the stronger bargaining side.²⁴ The issues that will inevitably be argued over in court with regard to substantive unconscionability are: 1) whether the bargaining process in a music contract lacks a realistic alternative for the artist despite the fact that there are a plethora of labels and/or representation

available; and 2) whether the terms of the deal unreasonably favor the music recording labels despite the fact that no one side is significantly stronger than the other.

Many music industry experts are questioning the viability of the 360 deal. As more and more artists are remaining (or reinventing themselves as “indy”), releasing new music via iTunes, newly launched Songza, or other social networking media outlets, experts are questioning whether the 360 deal and even the major labels will soon become the dinosaurs of the past. The Internet has changed the face of the music business, to the discontent of the major labels. Distribution through indy channels used to be via street teams, but recently has come a long way to compete with the major labels. Adventurous younger artists and creative artist management are trending away from the 360 deal in an effort to maximize the bottom line.

Notwithstanding a critical inquiry regarding 360 deals is whether the concept will make its way into other areas of entertainment. This prospect seems likely for the game of poker. The 360 provision was born out of desperation on both sides of the table. The record labels were becoming stale and needed a new source of revenue. Musicians were losing money as well due to the new technologies being employed. As such, the musicians were more willing to sign away rights and revenues that they would not normally give up in times of prosperity. On the other hand, poker is an industry that could use the 360 deals in order to bring the publicity of the game to more viewers and fans. The rise in popularity of poker has brought wealth and recognition to the players. However, the game seems to have more room for growth. New businesses could be established that book tournaments for players as well as mainstream advertising deals. Moreover, these businesses could establish merchandising markets and fan clubs. In exchange for bringing the players into new areas of wealth, the players might also be willing to give to the promoters a percentage of all of their revenues. The negative connotation of 360 deals would not sting as much in these circumstances. Rather, the concept here would be to bring the players into a new market. Consequently, new doors would be opened up for the players and a new revenue stream would be created for both parties.

Branding

Branding is the process by which a company will try to associate a particular image, design, face or personality with a particular product or the company in general. It is a very effective way for a company to reach out to consumers and form a positive and memorable relationship. Indeed, the concept of branding is no stranger to the entertainment industry. In fact, the use of athlete spokespersons has proven to be a very effective means of branding as an advertising tool. Thus, the critical inquiry

is not about the topic of branding itself, but rather, what is the next step in this area?

Since the days of Michael Jordan, athletes have been at the forefront of endorsement deals. In the generations that have followed, athletes like George Foreman, Lance Armstrong, and LeBron James have lent their images to grills, revolutionary movements, and sports apparel respectively. This generation’s top brand name was Tiger Woods. Seemingly perfect in every way, Tiger established a front that gave anything associated with his name a lift. However, in the shadow of Kobe Bryant’s similar fall from grace, Tiger’s front came tumbling down. As such, a void has been left at the top. It would be easy to say that this generation’s next most popular athlete, LeBron James, will step in and fill that void. Yet, the idea of newer “niche” sport personalities as a source of brand names is a novel one.

The game of poker has increased in popularity over the past decade. The increase in popularity corresponds with the realization of poker as a spectator sport. Poker tournaments can be viewed on networks like NBC, ESPN, the Travel Channel, GSN, and Fox Sports Net. Moreover, the World Poker Tour and the World Series of Poker, two rival tours, are flourishing. Notably, ESPN has customized its World Series of Poker “Main Event” broadcast into condensed versions that follow star players throughout the tournament. Accordingly, the increasing coverage of poker events has caused poker pros to become celebrities. The resulting celebrity status, however, has not produced mainstream branding opportunities for these athletes. They are ostensibly stuck in the poker niche. Thus, there could be an avenue to have a popular poker playing celebrity as a brand name similar to the major sports stars, like the aforementioned LeBron James.

The branding prospects are numerous. There is an opportunity for a poker player to come out with his or her own line of clothing-related items or market an already existing line. For example, a star poker player could potentially obtain a sponsorship contract with Adidas for agreeing to exclusively wear its hats and sweatshirts at live events. Additionally, food and drink are items that are overtly apparent with a poker player. The most common item that is aligned with poker players is the energy drink. However, it is also not unusual for a poker player to have something like an alcoholic beverage in hand while playing. Major soft drink, alcoholic beverage, and energy drink brands could be potential candidates for sponsorship agreements with the players. Further, poker tournaments are usually played in casinos within hotels that feature top restaurants. One concept would connect a player with one of those restaurants. Jewelry is also an item that is not as obvious a match with poker players. However, since a lot of the action is focused around the players’ hands, an opportunity might exist for rings, bracelets, and watches to be marketed. Furthermore, a

very popular item that accompanies a poker player is a set of headphones. In fact, most of the pictures on the Internet of poker players are with the player at a table donning headphones. Consequently, all a player would have to do is wear his or her usual attire (i.e. contract with Sony or Bose) and get paid for it. Furthermore, a marketing staple involves an athlete marketing his or her sport's equipment. Why should poker be any different? An opportunity exists to connect poker players with poker sets, card protectors, decks of cards, trading cards, and video games, to name a few. All of these opportunities would enhance the company's brand by bringing the player closer to the target audience.

Conclusion

It is difficult to stay in front of the perpetually changing technologies. However, new opportunities are being born as a result. Instead of looking at 360 deals as an evil that needs to be addressed, the entertainment industry could see who will be benefited most by these provisions. Poker is one such potential benefactor. In addition, the lack of a marquee front person for advertising purposes has created the need for new faces. Poker players, backed by their huge following and cool lifestyles, can fill the void. Necessity is, after all, the mother of invention.

Endnotes

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**Upcoming EASL Journal Deadline:
Friday, January 21, 2011**

Nonprofit Education: An Historical Basis for Tax Exemption in the Arts

By David Munkittrick

“One of the distinguishing characteristics of U.S. arts policy is its heavy reliance on tax-based mechanisms to provide indirect aid to the arts.... In no other Western country is tax-based indirect aid as important to the arts.”¹

A Status Quo Under Stress

The nonprofit sector is vast, and expanding. Currently, over 1.5 million tax-exempt organizations are registered with the Internal Revenue Service (IRS).² In 2006, these organizations provided over eight percent of the wages and salaries paid in the United States.³ Indeed, tax-exempt organizations reported \$1.4 trillion in revenue and \$2.6 trillion in total assets for 2007.⁴ These numbers represent rapid growth in the nonprofit sector over the past few decades: the nonprofit sector has grown four times faster than the economy since 1970.⁵ Most nonprofit revenues and assets enjoy exemption from a variety of state and federal taxes—no small exemption, representing a potential \$8 billion to \$13 billion in tax revenue annually.⁶

Exacerbated by the difficult economic environment of the past few years, the bubble of tax exemption may be reaching a breaking point. In December 2007, the Minnesota Supreme Court shook the nonprofit status quo in holding that a daycare facility had to pay property taxes.⁷ Employing a narrow definition of “charity,” the court found the daycare center, by charging fees, essentially gave nothing away and could not be considered a charity.⁸ State legislatures are also beginning to experiment with rolling back certain tax exemptions.⁹ A bill proposed before the Hawaii Legislature, for example, would repeal tax exemptions for all nonprofits other than religious organizations.¹⁰

The exemption may have become unwieldy in its size as well as its definition. For example, the National Football League is a charitable organization exempt from taxes, though it spends less than one percent of its budget on aiding the less fortunate of society “thanks to...an ever-expanding definition of charity.”¹¹ Professor Henry Hansmann uses the performing arts to illustrate a “repeated and unreflective” accommodation of new nonprofit activity:

The performing arts are not covered clearly—or, one might reasonably conclude, even remotely—by any of the various exempt purposes set forth in I.R.C. § 501(c). Nevertheless, rather than deny exemption to such a large and growing

class of non-profits, the Service chose to engage in another act of imaginative re-interpretation, ruling that the performing arts come within the category of “educational” institutions.¹²

Yet if the nonprofit sector is to be trimmed, the performing arts are not the place to begin. Indeed, it is the mistaken perception of the arts at the fringe of nonprofit tax exemption that threatens their current tax treatment. Instead, the performing arts are at the historical core of tax exemption for “educational” institutions. This article examines this historical core: traditional ideas of education and the performing arts that imbued the origins of tax exemption.

The breadth of the nonprofit sector does not lend itself to a single underlying rationale. The tax exemption of symphony orchestras and other arts organizations finds its basis in the foundational defenses of tax exemption in the late 19th century. While the nonprofit sector and the performing arts have changed drastically since then, the role of the arts in a democratic society has not. The arts form an integral component of a liberal arts educational ideal that expands beyond the classroom to develop engaged and thinking citizens. As Professor Martha Nussbaum argues, this notion of education is losing sway in today’s profit and statistic-driven world.¹³ Challenges to the classical liberal arts education also challenge the current scope of tax exemption, making historical inquiry a crucial component of tax exemption in the arts.

With a long history of tax exemption comes a long history of underlying ideas and rationales. The linear story of one tax provision following another has been outlined,¹⁴ but there is no account of the historical rationales and ideas behind tax exemption. Such an historical account helps link taxation and revenue issues of the 19th century to the economic problems governments face today, and refocuses the role of the arts and education in a democratic society.

This is not to say there is a paucity of historical work on tax exemption. Some historical inquiries have focused on particular aspects of nonprofit tax law, such as the Unrelated Business Income Tax¹⁵ and the organizational forms of nonprofit institutions.¹⁶ Others specifically assess

the historical definitions of “charity”—Professor Thomas Kelley, in his article *Rediscovering Vulgar Charity*, explores early English history to trace the disjunct between legal and societal conceptions of charity.¹⁷ Professor Kelley recounts an important narrative of how ideas develop over time through societal and cultural changes, while foundational principles remain constant. Still, he calls for a redefinition of the term “charity” to bring the legal concept in line with modern usage.¹⁸ Similarly, Professor Lars Gustafsson inquires into whether the historical definition of charitable trusts is appropriate to define “charity” for tax exemption purposes.¹⁹ Like Professor Kelley, Professor Gustafsson concludes that Congress should rethink its definition of charity.²⁰

Yet neither Professor Kelley nor Professor Gustafsson address the history of tax exemption for educational institutions. In place of wholesale redefinition, this article advocates reviving traditional ideas and values that underlay education in a democratic society. A complete account of tax exemption is well beyond the limitations of a single piece, so the focus here will be on addressing the place of performing arts, not as a fringe exemption, but as essential to the tax exemption regime. After a brief summary of the current law of tax exemption and a foray through modern theories of the exemption, the article will recount the historical development of tax exemption through debates at the local, state, and federal levels in the late 19th and early 20th century. These debates have continuity today and inform recent calls to lift tax exemptions.

I. Nonprofit Exemption Today

A. Current Law

Essentially, a nonprofit organization is one that does not (and cannot) distribute net earnings to individuals who exercise control over the organization. Not all nonprofit organizations are exempt from federal income tax, only those that are exclusively dedicated to particular purposes. Federal tax exemption is codified in I.R.C. § 501(c), which provides exemption for charitable and educational organizations, among others. The Code does not define charitable or educational, but under Treasury Regulations, “the term charitable is used...in its generally accepted legal sense,” which includes:

Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human

and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency.²¹

This definition of charity alone encompasses nearly the entire swath of exempt organizations, and it clearly expands beyond the ordinary sense of giving aid to the poor. Indeed, the United States Supreme Court has intimated “charitable” may encompass any benefit to society so long as it does not violate established public policy.²²

While educational is subsumed in the definition of charity, it has been listed separately since the first federal tax exemption.²³ The Tariff Act of 1894 stated, “Nothing herein contained shall apply...to corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes.”²⁴ Today, educational is defined as, “The instruction or training of the individual for the purpose of improving or developing his capabilities; or the instruction of the public on subjects useful to the individual and beneficial to the community.”²⁵ Along with schools, colleges, and other traditional education institutions, this definition includes “museums, zoos, planetariums, symphony orchestras, and other similar organizations.”²⁶ “Educational” did not always explicitly encompass such organizations; the “symphony orchestras” example was added in 1959.²⁷ Nonetheless, symphony orchestras have been found exempt since at least 1919,²⁸ and the rationales for doing so predate the federal income tax.

Today’s definitions of charity and education are but the current iteration of a long history of ideas. Indeed, the concept of charity traces to antiquity,²⁹ and the legal norms of charity descend from 17th century England. Like provisions today, the English Statute of Charitable Uses in 1601 provided a nonexclusive list of charitable purposes instead of a precise definition:

Some for relief of aged, impotent and poor people, some for maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, some for repair of bridges, ports, havens, causeways, churches, sea-banks and highways, some for education and preferment of orphans, some for or towards relief, stock or maintenance for houses of correction, some for marriages of poor maids, some for supportation, aid and help of young tradesmen, handicraftsmen...and others for relief or redemption of prisoners or captives, and for aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes.³⁰

While the nonprofit sector has expanded, the foundation of broadly defined categories has remained relatively constant. Consequently, the founding ideas behind these categories are an essential component of tax exemption today. Modern rationales for tax exemption too often ignore historical ideas in favor of crafting theoretical bases for the modern world of nonprofit organizations. In addition to illuminating the current legal landscape, it is important to understand how that landscape came to be as it is and that despite its ostensible entrenchment in modern society, tax exemption is not a foregone conclusion.

B. Modern Rationales for the Nonprofit Exemption

There is no single rationale for charitable tax exemption.³¹ While economic, political, and philosophical theories abound, none completely explain the exemption afforded to charitable organizations.³² Some pay homage to the history of tax exemption, and others simply dismiss the history as “unremarkable.”³³ Still, one theory of tax exemption, the public subsidy theory, has persisted since the first days of the nonprofit tax exemption and is crucial to understanding tax exemption in the performing arts.

The public subsidy theory is premised on the notion that charitable organizations relieve the government of burdens by providing goods and services that the government would otherwise be responsible for delivering. A 1938 House Report referenced the rationale:

The exemption from taxation of money or property devoted to charitable and other purposes is based upon the theory that the Government is compensated for the loss of revenue by its relief from financial burden which would otherwise have to be met by appropriations from public funds, and by the benefits resulting from the promotion of the general welfare.³⁴

Under this reasoning, the tax exemption is essentially an alternative to government services that would otherwise be required to address society’s needs.³⁵ By providing tax exemption, the government subsidizes these activities and their donors through “tax expenditures” rather than funding them directly.³⁶

The public subsidy theory is frequently referenced in modern parlance as well. In 2005, for example, the Joint Committee on Taxation reported that “charitable activities or activities that provide a public benefit may be viewed as governmental in nature and therefore not appropriate subjects of taxation.”³⁷

Still, even traditional rationales are subject to criticism. Indeed, the subsidy theory alone is an incomplete explanation, doing little towards defining appropriate public benefits.³⁸ This absence leaves the theory somewhat circular. While it has provided the flexibility to expand tax exemption with the nonprofit sector, the public

subsidy theory should be applied carefully, not by narrowing the definition of education, but by identifying the specific purpose and its relation to government services.

A definition of charitable and educational organizations alone does not explain their exemption from taxes.³⁹ As Bruce Hopkins notes, “The law of tax-exempt organizations has very little to do with any underlying tax policy. Rather, this aspect of the tax law is grounded in a body of thought far distant from tax policy: political philosophy as to the proper construct of a democratic society.”⁴⁰ Though Hopkins perhaps goes too far in divorcing tax policy from political philosophy (the two are necessarily intertwined), tax policy often springs from political philosophy. Indeed, the battleground of tax exemption formed around the role of charity, education, and taxation in a democratic society.

The Code today does not explain itself—its language is nearly identical to the federal tax exemption of 1894. The public subsidy theory had little competition until 1976, when scholars began deriving alternative theories. Professors Bittker and Rahdert recognized that “Congress enunciated no developed theory for this practice [of nonprofit tax exemption]” and that “commentators have been almost equally silent.”⁴¹ Seeking a workable rationale, Professors Bittker and Rahdert developed the “income measurement theory.” Under this theory, tax exemption is not a “special privilege” or a “hidden subsidy”; it is simply the appropriate result when tax principles are applied to organizations that do not seek a profit.⁴² Taxation of charitable institutions was inappropriate because “computing their ‘net income’ would be a conceptually difficult, if not self-contradictory task.”⁴³

In a way, income measurement theory is steeped in history. From the advent of the federal income tax, lawmakers made clear that “an income tax could appropriately be imposed only on activities conducted for profit, and that crucial statutory notions like ‘net income’ and ‘business expenses’ do not ring true when applied to nonprofit organizations.”⁴⁴ Still, income measurement theory is essentially derived from the definition of nonprofit organizations and has little explanatory power.

The income measurement theory has garnered criticism, most notably from Professor Hansmann. As a replacement, Professor Hansmann developed the capital subsidy theory, explaining tax exemption as compensation for nonprofit organizations’ inability to effectively earn capital due to the nondistribution constraint.⁴⁵ He argues that nonprofit corporations generally exist to promote market efficiency by solving the problem of “contract failure.”⁴⁶ Specifically, contract failure occurs when “ordinary market competition may be insufficient to police the performance of for-profit firms, thus leaving them free to charge excessive prices for inferior service.”⁴⁷ Accordingly, consumers turn to nonprofit corporations,

which are generally thought to be less profit driven and more trustworthy.⁴⁸ Professor Hansmann's theory is premised on the desirability of economic efficiency,⁴⁹ and this economic justification does not explain the inclusion of symphony orchestras as "educational."

Other theories have built upon Professor Hansmann's foundation. For example, Professor Rob Atkinson developed an "altruism theory," which "rests on the premise that the favorable tax treatment of altruistic nonprofit organizations demonstrates an affirmative preference for something" that those entities provide, including both direct primary benefits to consumers and "metabenefits."⁵⁰ Metabenefits are "benefits that derive not from what product is produced or to whom it is distributed, but rather from how it is produced or distributed."⁵¹ For Atkinson, altruism is one such metabenefit produced by nonprofits that deserves tax subsidization.⁵² As applied to the performing arts, this theory would focus on benefits to society, such as developing a conscientious and thoughtful citizenry. Yet to complete the rationale, the benefits should be understood in terms of the legal text, which derives meaning in part from its history.⁵³

Professors Mark Hall and John Colombo created a similar post-Hansmann theory: the "donative theory." Like Professor Atkinson, they premise their theory on deservedness of tax subsidization.⁵⁴ The donative theory suggests "that the primary rationale for the charitable exemption is to subsidize those organizations capable of attracting a substantial level of donative support from the public."⁵⁵ Essentially, Professors Hall and Colombo argue that "donative institutions deserve a tax subsidy because the willingness of the public to contribute demonstrates both worthiness and neediness."⁵⁶ Due to the free rider problem, donations will never reflect the actual financial value of the organization's services.⁵⁷ Consequently, an organization with substantial donative support is worthy of a subsidy to fill that gap.⁵⁸ However, public demand does not necessarily translate into the need for government subsidy. Instead, government support flows from the meaning of education in a democracy.

These theories look at the nonprofit sector today and rationalize its current status. However, none constitute a complete rationale for nonprofit tax exemption. History helps fill in some blanks. Specifically, Professor Hansmann explicates the economic efficiencies of nonprofit enterprise in the performing arts but leaves the historical and textual rationales of tax exemption unexplained. Subsequent theories similarly leave the roots of exemption untouched. At least for the performing arts, the original idea holds true that nonprofit institutions replace government services and thus deserve tax exemption. This conclusion flows from the interrelated role of education, taxation, government, and the arts in democracy. The following outlines the basic historical contours of the nonprofit tax exemption before focusing on the tax exemption afforded symphony orchestras.

III. Towards Federal Tax Exemption

A. English and Colonial Law

The law of charity proper began in 1601 with the enactment of the Statute of Charitable Uses. The statute specified activities deemed charitable, but it was never considered an exclusive list. Instead, it listed the types of philanthropic activity the government wished to encourage.⁵⁹ Charity has retained its open-ended definition, allowing flexibility in the scope of tax exemption. It has been a history of expansion. At first, favorable tax treatment coincided with the realities of establishing new schools, hospitals, and churches in a fledgling country,⁶⁰ but as the nation expanded, the role of philanthropy grew with it.⁶¹

After American Independence, many states repealed English statutes. Still, the colonists retained the English tradition of conferring special status and benefits on institutions dedicated to charitable causes.

[The colonists] did not debate the question of public versus private responsibility...public and private philanthropy were so completely intertwined as to become almost indistinguishable. The law itself reflected a pragmatic approach to the solving of social problems through philanthropy. Colonial assemblies went out of their way to remove obstacles in the way of charities.⁶²

These colonial attitudes and the practical realities of establishing a new country formed the foundation of tax exemption. Early state legislatures passed statutes permitting incorporation of charitable organizations,⁶³ and the federal income tax of 1894 exempted "corporations, companies, or associations organized and conducted solely for charitable, religious or educational purposes."⁶⁴ The exemption came with little to no debate, possibly because nonprofit corporations were so small in number at the time. In any case, federal exemption was no surprise, given the preexisting state exemptions from property taxes afforded to charitable corporations.

B. State and Local Tax Exemption

Property tax exemption for religious, educational, and charitable institutions "has existed from 'time out of mind.'"⁶⁵

Exemptions probably are as old as taxes. For it is venerable logic that a king does not tax himself or submit to taxation without his consent. Thus governmental immunity began. Church-property exemptions, too, date to the earliest tax systems, for the ancient priesthood in effect was part of incipient governmental forms.⁶⁶

Early American tax exemption for charitable organizations is linked to treatment of churches.⁶⁷ After all, Harvard and Yale originated as divinity schools.⁶⁸

While property tax exemption for charitable organizations has been a near constant in the states, it has not been so without debate. The Panic of 1873 and the following depression sparked a particularly concerted movement against tax exemptions.⁶⁹ For example, an 1873 article in the *Cincinnati Daily Gazette* argued that only institutions that provide services for free should be exempt from taxes.⁷⁰ The article called for the abolition of all tax exemptions except those for cemeteries and property owned by the federal government.⁷¹ The motivation behind the argument was to prevent abuses: "If the present system is continued, it will not stop short of all educational institutions, whether public or private, and under cover of religion, education, charity, and public institutions much property will be kept off the duplicate that, in justice to tax payers, should be regularly assessed."⁷² This was the argument for uniform taxes, to include all property in the tax base as the only way to fairly and evenly distribute the tax burden.

Concern over nonprofit tax exemption was not confined to Ohio. A letter to the *Boston Journal* stated, "Doubtless one of the questions of the future, a question sure to awaken an active controversy, and one which may possibly be made a feature of political platforms, is the justice or injustice of exempting the property of churches and charitable and educational institutions from taxation."⁷³ While perhaps not reaching the level of political platforms, the issue instigated impassioned defenses of exemption, particularly when Massachusetts formally considered revoking its tax exemption laws in 1874.

Pioneering many of the arguments and rationales that continue today,⁷⁴ Charles W. Eliot, then President of Harvard, wrote in defense of property tax exemption. The state was concerned with the financial burden the exemption imposed, but Eliot argued, "The indirect gain to [the state's] treasury which results from the establishment of the exempted institutions is greater than the loss which the exemption involves."⁷⁵ Constituting the first comprehensive rationale for the American nonprofit tax exemption, Eliot's impassioned defense is the root of the public subsidy theory today. For Eliot, charitable property "is like property of a city or state which is essential for carrying on the work of the city or state, and so cannot be reckoned among the public assets."⁷⁶

Yet capital was not Eliot's primary concern. Rather, he emphasized the role of education in a democratic society, drawing from the republican tradition of democratic theory.⁷⁷ Indeed, the promotion of learning and virtue was "the highest public use."⁷⁸

[Colleges] are necessary to the existence of a free State. They form and mold the

public character; and that public character is the foundation of everything which is precious in the State, including even its material prosperity. To develop noble human character is the end for which States themselves exist...the work of churches and institutions of education is a direct work upon human character.⁷⁹

A prosperous and functioning state requires educated citizens; the very purpose of the state is to develop "active, competent, and thoughtfully critical" citizenry.⁸⁰ Thus, charitable organizations carry out the most basic functions of the state, creating a democratic society steeped in learning and able to accommodate diverse backgrounds, ideas, and goals.⁸¹

Eliot also hinted at a broad definition of educational. Naturally, he focused on institutions of higher education, but he also included art collections and museums.⁸² While not explicitly reaching the scope of today's Regulations, Eliot's concept of education easily spanned beyond traditional notions of classroom instruction. Art collections are educational, for "they gather in and preserve the intellectual capital of the race,...they enlarge the boundaries of knowledge; they maintain the standards of honor, public duty and public spirit, and diffuse the refinement, culture and spirituality without which added wealth would only added grossness and corruption."⁸³ Here, Eliot touched upon 19th century notions of art that continued well into the 20th century.⁸⁴ These concepts form the intellectual basis for an expansive definition of education.

Eliot proposed a second rationale that presaged modern theories of income valuation and deservedness. Charitable organizations should not be taxed because they are not motivated by profit.⁸⁵ "Orators, poets, artists, physicians, architects, preachers and statesmen do not exercise their trained faculties simply for their own pleasure and advantage, but for the improvement and delight, or the consolation and relief of the community. In short, they do not live for themselves."⁸⁶ Even after repeal of the Civil War income taxes, Eliot premised taxation on profit motivation. Property held for profit was properly taxed, while property held for the community should not be hindered by tax burdens.⁸⁷ It was also a comment on human nature: "People may be relied on to make themselves comfortable or wealthy, if they can; but they need every possible aid in making themselves good, or learned."⁸⁸

After Eliot's appeal, Massachusetts did not alter its tax exemptions, but Washington D.C. saw the opposite outcome. In 1874, Congress passed a law imposing property taxes on churches in D.C.⁸⁹ The measure was necessarily experimental as it overturned a century-old practice, and many churches refused to pay the tax. Some churches were seized in the aftermath, but Congress quickly repealed the law after four years and returned the sums collected.⁹⁰ California had a similar experience in

1878, when its supreme court held that the exemption of any but government property was constitutionally prohibited.⁹¹ Despite the prohibition, tax collectors continued to pass over churches. Exemption in California simply existed in practice until it was constitutionalized in 1900.⁹²

The debate over property tax exemption was national in scale, and President Grant joined the fray during his 1875 state of the union address. Focusing on the religious exemption, Grant stressed “correcting an evil that, if permitted to continue, will probably lead to great trouble in our land before the close of the nineteenth century...the accumulation of vast amounts of untaxed church property.”⁹³ Estimating the value of church property would reach \$3 billion by 1900 from \$1 billion in 1875, Grant predicted that “so vast a sum, receiving all the protection and benefits of Government without bearing its proportion of the burdens and expenses of the same, will not be looked upon acquiescently by those who have to pay taxes.”⁹⁴ While the tax exemption emerged from the 1870s unscathed, Grant was correct that opposition to exemption would continue.

Despite the gradual upturn in the national economy towards the end of the 1870s, opponents of tax exemption remained vocal. The issue was not necessarily tethered to economic need, but included deep-seated notions of the government’s power to tax and citizens’ duty to financially support the state. By 1881, the argument in Ohio had focused, calling for an amendment to the state constitution “requiring all property, including that owned by ecclesiastical bodies, to be taxed excepting only public property.”⁹⁵ Opponents of tax exemption not only saw exemption as unfair to those who diligently paid taxes, but also as a slippery slope. If religious societies were exempt, exemption for all other corporate bodies would follow.⁹⁶ To prevent a complete abrogation of the tax base, “the State cannot afford to support with public money any institutions but those that carry out its own secular ends,” which included protection of borders and property, of morals, personal liberty, and life, the administration of its laws and economy, and “education of its people in accordance with the necessities of the secular State.” This last argument, perhaps unwittingly, reinforced broad definitions of charity and education that underpinned tax exemptions.

Opponents of tax exemption broadly defined proper functions of the state, so those like Eliot defending tax exemption needed only articulate the public subsidy theory to fit a wide range of institutions into tax exemption. For example, Judge Charles J. Tobin defended New York’s tax exemptions in a 1934 study presented to the state senate. He placed education within the core state function of safety.⁹⁷ “Nations and states, today, hold education to be the best guarantor of the safety of the state—let the medium be what it may—either public or private.”⁹⁸ Tobin also addressed the argument that any institution

charging a fee should be taxed. “It can hardly be maintained that because its services are not ‘free,’ it is any less a public service.”⁹⁹ Like Eliot, Tobin based entitlement to tax exemption on relief of government services. “Since schools...relieve the government, and hence the taxpayer, of a tremendous burden in its educational budget, such limitations are clearly entitled to the traditional public contribution that tax exemption provides.”¹⁰⁰

Between 1874 and 1934, then, the arguments over property tax exemption changed little, and Tobin discerned a pattern:

The matter of exemption from taxation of real property of institutions privately owned but serving the public by providing important and necessary facilities, services, care and relief, has long been the cause of divided public opinion. The discussion becomes acute in times of financial instability or deflation, when the demand for public services, both governmentally and privately administered, is most pressing. Then, the local governing body, looking for some feasible way to increase the tax income without unduly burdening the source, unwisely picks on the tax-exempt real property as an easy way out of its difficulties.¹⁰¹

Tobin was likely referring to campaigns against exemptions like the one launched in Westchester County, New York in 1922. Westchester described itself as a haven from nearby New York City, providing open land to those unable to afford the city.¹⁰² As population increased, so did the number and size of tax exemptions. Greater population also meant greater county obligations, but the tax exemption was all but eliminating the county’s tax rolls.¹⁰³ The county manipulated assessments to buttress its revenue, and tax bills grew each year.¹⁰⁴ Eventually, the county was fielding complaints from residents, and it looked to eliminating tax exemptions as a potential solution. To make its case, the county commissioned Professor Philip Adler of Columbia University to research the history of tax exemption.

Professor Adler did his job—concluding there was no historical support for the breadth of tax exemptions in 1922. Perhaps the first comprehensive study on the history of tax exemption, he traced the history back to Roman law, through English common law, to the colonies, and the new United States of America. Adler acknowledged the recent history of expanding the exemption, but argued that as state functions multiplied, the rationale for exempting charitable institutions weakened. “As the State progressively takes on social duties by way of workmen compensation laws, health insurance, and social insurance generally, there is a corresponding weakening of the

historical sanction for the exemption of charitable institutions.”¹⁰⁵ Yet Adler’s argument was confined to religious institutions: “there is sufficient historical sanction for the exemption of educational institutions, but not for parochial or religious schools.”¹⁰⁶ Similar to the arguments in the 1870s, Adler concluded that the tax exemption was proper for displaced state activities, and he supported Westchester’s position that counties should be “free to tax all property save those that are performing for them local functions.”¹⁰⁷ Also mirroring the 1870s debate, Adler utilized public subsidy theory to limit the scope of the nonprofit tax exemption.

Both proponents and opponents of property tax exemptions have historically turned to a public subsidy theory. The difference was in conceiving the role of tax in society. Opponents of exemption viewed taxes as a vehicle for revenue, not regulation, so exemptions should be revenue neutral. Thus, organizations that charged fees or did not perform functions that the state would otherwise pay for should share the tax burden. This was a narrow public subsidy theory focused on dollars and designed to provide an apolitical platform that was kinder to state and local budgets.¹⁰⁸

Proponents, however, argued for tax policy as part of structuring democratic society: a broad public subsidy theory. Education, from art museums to elite universities, was conceived as an element of public wellbeing and of developing an engaged citizenry. Institutions that fostered democratic ideals and culture fostered the state itself, they argued, so they should not be taxed. Government requires citizens, and tax-exempt organizations claimed to cultivate those citizens.

The Utah Supreme Court aptly summarized the roots of an expansive public subsidy theory:

In earlier times in this state, and in all New England states, the church—commonly called the meeting house—was constantly used for town meetings, lectures, concerts, temperance meetings, political addresses, and for other like special occasions; and no one ever supposed that such use made the meeting house liable to taxation.¹⁰⁹

While the narrow public subsidy theory had its advocates, it was Eliot’s broad public subsidy theory that held sway through the development of the federal income tax.

C. Federal Income Tax of 1894

Like the challenges to state tax exemption, the first peacetime federal income tax was heralded by economic depression. Yet the Act of 1894 exempted charitable, religious, and educational organizations without contest,¹¹⁰ excluding “corporations, companies, or associations organized and conducted solely for charitable, religious, or

educational purposes.”¹¹¹ Similar terms were included in the corporate income tax of the Payne Aldrich Tariff Act of 1909,¹¹² and nearly identical language has found voice in every income tax act since the adoption of the 16th Amendment, beginning with the Revenue Act of 1913.¹¹³

The exemption was passed with little debate, presumably incorporating the long tradition of exemption from state property taxes.¹¹⁴ Unsurprisingly, the drafters of the 1894 exemption also relied on English concepts of taxation.¹¹⁵ Yet in utilizing traditional language, the 1894 Act continued the confusion and dispute over the scope of charitable exemptions.

The first treatise on the 1894 Act recognized that “the provisions for the exemption of charitable...societies are new;...therefore, there are no decisions with respect to them arising thereunder.”¹¹⁶ Foster and Abbot, authors of the treatise, looked to English precedent and the 1601 Statute of Charitable Uses for guidance. They recognized that the common law notion of charity extended beyond aid to the poor, but it was still unclear whether the new American exemption would extend to “public libraries, or hospitals, or corporations of like character,...unless the element of profit were entirely absent.”¹¹⁷ The interpretive question was between a particular statutory construction (taxing all organizations creating “income”) or incorporating the traditionally broad definitions of charity and education. Despite the state debates of the 1870s, it was unsettled whether the terms “charitable, religious, or educational” would be interpreted broadly or narrowly in the federal context.¹¹⁸

It was soon apparent, however, that the federal tax exemptions would follow the tradition of broad definitions established in English common law and the states. Evidence of this is found in early IRS memoranda, determination letters, case law, and congressional debates.

Congressional debates over the scope of the tax exemption began with the Corporate Income Tax Act of 1909. Specifically, there was concern some exempt institutions were becoming too large to justify exempting them from tax—they certainly had the financial ability to pay taxes. The Trinity Church Corporation in New York City was singled out because it had lucrative rental properties in Manhattan and substantial revenue.¹¹⁹ Senator Chauncey M. Depew (R-NY) explained the continued exemption: “It is not organized for profit, nor in the usual acceptance of the meaning of that word does it receive any profits.... There is not a single penny that goes to any individual in the way of profit or distribution of dividends.”¹²⁰ This notion became known as the destination-of-income test, which held that an organization was tax exempt so long as its profits funded charitable goals.¹²¹

However, the destination-of-income test was more the high water mark of tax exemption than an enduring concept. It was corralled with the implementation of

the Unrelated Business Income Tax in 1950, and concern was present in 1909 as well. Senator Weldon B. Heyburn (R-ID) worried that such a broad exemption would completely swallow the income tax itself: "Will some Senator tell me what remains and who there is remaining to pay this tax?... There cannot be very much remaining."¹²²

The debate continued with the Revenue Act of 1913, and Massachusetts was once again the focal point of exemption law. Representative John J. Rogers (R-MA) introduced an amendment based on the Massachusetts exemption statute to include exemptions for "benevolent" or "scientific" corporations, but Representative Cordell Hull (D-TN) responded with the familiar slippery slope concern of unchecked expansion.¹²³ "We could find innumerable kinds of these charitable or educational or other organizations called by different names, and there would be no end to it."¹²⁴

Despite these concerns, the IRS in a 1919 memorandum had little trouble finding "an association organized and operated exclusively for the purpose of giving musical concerts" exempt from taxation as an educational institution.¹²⁵ Relying on New York state property tax determinations, the IRS summarily explained that:

"Educational" is not used in its meaning of instruction by school, college, or university, which is a narrower or more limited meaning of the word but in its broader signification as the act of developing and cultivating the various physical, intellectual, and moral faculties toward the improvement of the body, mind, and the heart.¹²⁶

This memorandum demonstrates that performing arts organizations were considered tax-exempt as educational institutions well before symphony orchestras were explicitly included in the 1959 Regulations. The IRS in 1919 also elaborated:

Music is recognized as one of the liberal arts and sciences and the importance of education in this subject is receiving constantly increasing recognition. Instruction in music is now part of the regular curriculum in every public school and it has come to be generally recognized that not only education in the actual production of music, but also education of the taste for music of the better class, form a part of a liberal education. That the instruction in music given by a musical association is conveyed in such a manner as to be pleasurable does not negative the fact that such instruction is educational.¹²⁷

This is perhaps the clearest statement of the concepts behind exempting symphony orchestras from taxation, but these ideas were soon overshadowed by disagreement.

IRS Commissioner David Blair tried to close the doors on the expanding tax exemption in 1923 by limiting the definition of "charitable" to relief for the poor.¹²⁸ In the Congressional debate that followed, Senator Frank B. Willis (R-OH) argued, "This was not the accepted meaning of the word at the time of the passage of the act of 1918 and 1921, nor is it the accepted meaning of the word today."¹²⁹ Sounding much like Eliot, Senator Willis suggested an alternative definition "including preventive and constructive service for relief, rehabilitation, health, character building, and citizenship."¹³⁰ Again plagued by general terms, Senator David Walsh (D-MA) worried that "the words 'character building' and 'citizenship' and 'health' and 'rehabilitation' are pretty elastic."¹³¹ Others called for a stop to expanding the definitional terms:

We have properly limited the exemptions that ought to be allowed...for religious, charitable, scientific, literary, or educational purposes. Now, if we are going to use the word "welfare"—and that is what the Senator says his amendment means... and all the other objects mentioned in the amendment, no human being can tell where it is going to end.¹³²

Still, the IRS resumed broad definitions of "charity" or "educational" by 1924.¹³³

The Supreme Court continued this trend in a 1924 case presenting the question as to whether a religious organization that derived income from sources such as rental properties and investments satisfied the tax exemption statutes.¹³⁴ Looking to English common law, the Court fashioned a definition derived from but more nebulous than the public subsidy theory: "Evidently the exemption is made in recognition of the benefit which the public derives from corporate activities of the class named, and is intended to aid them when not conducted for private gain."¹³⁵ In this way, the Court put its weight behind the destination-of-income test. However, the quoted language should be understood as confined to the issue of permissible sources of income for exempt organizations. As a definition for "charitable," it would not only be devoid of boundaries but would be historically inaccurate. While Eliot's broad theory of public subsidy certainly hints at a general notion of benefit to society, Eliot's idea was of particular benefits—those that have a core relationship to state functions.

Still, the Supreme Court has cited the benefit-to-society rationale as recently as 1983, though not without disagreement. Justice Burger, writing for the majority in *Bob Jones University* and referring to the original 1894 Act,

settled on the public benefit definition of tax exemption: “Charities were to be given preferential treatment because they provide a benefit to society.”¹³⁶ This definition has some support in English common law, but it does not take full account of the public subsidy theory developed through the late 18th and early 19th centuries. Justice Rehnquist correctly identified the historical fallacy in the “benefit to society” concept.¹³⁷ The earliest defenses of and rationales for tax exemption flowed not solely from the common law definition of charity but also from notions of education, taxation, and government in a democratic society.

The broad meanings of charitable and educational, while rooted in history, have resulted in continued uncertainty. Yet the meanings behind the term “educational” can, at least, be delineated to a degree through linking the public subsidy theory to early notions of education. Specifically, this inquiry reveals that the performing arts and symphony orchestras are not a “reimagining” of “educational,” but are a foundational part of education in democratic society. As music performances shifted from the realm of churches to concert halls, they remained tax exempt under a broad conception of education. Part of the rationale is found in Eliot’s defense of Harvard’s tax exemption in the 1870s, and the following section provides a starting point in connecting Eliot’s ideas with current Regulations.

IV. The Symphony Orchestra as Educational

The Tax Court has noted without explanation that the promotion of the arts has consistently been recognized as both charitable and educational.¹³⁸ While music and the performing arts have historically been considered educational, the performing arts were not always the realm of nonprofits. There are some elements that remain staunchly for profit, particularly Broadway theater, but in the past, such profit-seeking institutions were the rule in the performing arts rather than the exception. Both theater and symphony orchestras were proprietary through the 19th century and into the 20th.¹³⁹ Indeed, symphony orchestras and performance groups were rarely distinct institutions until “urban elites” began to distinguish between “high” and “popular” culture.¹⁴⁰ Institutional development facilitated the distinction—the New York Philharmonic was founded in 1842, the Boston Symphony Orchestra in 1881, the Chicago Symphony Orchestra in 1891, the Philadelphia Orchestra in 1900, and the Cleveland Orchestra in 1918. For its part, the New York Philharmonic has been a tax-exempt nonprofit since at least 1928.¹⁴¹

When Eliot was writing in 1874, there was little notion of the symphony orchestra as an institution, but “by 1910, high and popular culture were encountered far less frequently in the same settings.”¹⁴² Gradually,

“the distinction between true art, distributed by not-for-profit corporations managed by artistic professionals and governed closely by prosperous and influential trustees, and popular entertainment, sponsored by entrepreneurs and distributed via the market to whomever would buy it, had taken a form that has persisted to the present.”¹⁴³ As Hansmann recounts, the Treasury eventually explicitly exempted this burgeoning class of nonprofits, but it is not so incredulous that such organizations are classified as educational.

As the IRS recognized in 1919, music is among the seven liberal arts, and a free society requires maintaining the liberal arts.¹⁴⁴ Eliot easily integrated art museums in his rationale for exempting Harvard University from tax, and music was included after it obtained more institutional presence. To illustrate, Central Hanover Bank commissioned a study on philanthropy and the arts in 1937. If it had been written in the 1870s, it likely would have focused on the visual arts, but music was given equal treatment. Much of the discussion mirrored Eliot’s pronouncements on art:

The influence of the fine arts on man’s life cannot be definitely limited.... The fine arts act and react upon the individual in many ways—through his own creation of an object of beauty; through his rendition of the works of others, as in music; through the purely receptive enjoyment of beauty.... Naturally, the fine arts thus closely integrated in man’s life rank high in the social values.¹⁴⁵

The study also discussed the place of the arts and of music in education:

[They] have permeated the whole fabric of our national life and have taken a recognized and correspondingly important place in our educational processes. Beginning in the nursery or kindergarten school with work or play, in color, in design, in rhythmic movement and in music, they extend on and up through the grades and the secondary schools to the technical and professional art training of the college, the university and the special school.¹⁴⁶

Like universities for Eliot, the music and arts were seen as integral to a free state. Karl Gehrkins, a pioneer in the music education movement of the early 20th century, saw music education as a tool to create thinking and active citizens of a democracy: “Through music as a satisfying aesthetic experience, children and adults are to be educated to the point where they are more deeply

sensitive, not only to music, but to all beauty, thus making life itself richer, nobler, more dignified."¹⁴⁷ This function mirrors Eliot's public subsidy theory, in which "public character is the foundation of everything which is precious in the State."¹⁴⁸ As John D. Rockefeller said, "Democratic government and the arts are, in my opinion, in league with one another, for they both center on the individual and the fullest development of his capacities and talents. To free men, the arts are not incidental to life but central to it."¹⁴⁹

By 1937, music was included in the curriculum at three-fourths of the liberal arts colleges in the United States.¹⁵⁰ Yet formal education was not the only way in which music and the arts played an educational role. Municipal authorities, particularly the larger cities, often organized concerts with free admission or nominal charges;¹⁵¹ thus, music concerts are more than theoretical functions of the state but were a regular element of local government. The director of the Brooklyn Botanic Garden wrote in 1934, "While music and art, literature and science, cannot appease hunger, they do minister to fundamental human needs."¹⁵² This aspect of local government continues today through such bodies as the Arizona Commission on the Arts and the New York City Department of Cultural Affairs.

Indeed, the establishment of the National Endowment for the Arts (NEA) is a clear example of the arts as a government activity, further supporting tax exemption for arts institutions under the traditional public subsidy theory. The mobilizing rationale behind organized federal funding for the arts was to bolster national prestige and command the respect of other nations, certainly an important government function.¹⁵³ Such motivations apply equally to indirect aid to the arts through tax exemption.

The inclusion of music in traditional notions of education was also evidenced in the 1954 Congressional Hearings on tax-exempt foundations. In its statement, the Council of Learned Societies recounted its history: founded shortly after World War I to represent academic societies in the humanities, the Council included the American Musicological Society, the American Society for Aesthetics, and the College Art Association of America.¹⁵⁴ The Council defined the humanities to include "the things that are specifically human about man—his language, his history, his attempts to reach beyond knowledge of the tangible world through philosophy and religion, and his realization of beauty through literature, music, and the arts."¹⁵⁵ The Council defended its tax exemption by describing its activities: "It has done whatever it could to develop Americans trained to participate fully in the pursuit of communication of all humanistic knowledge and to provide the tools of study, teaching, and research with which such trained Americans have to work."¹⁵⁶

By 1954, then, music had taken a firm position in the conception of education, for "to develop noble human character is the end for which States themselves exist."¹⁵⁷ Educating citizens for democratic participation is threatened by profit-driven subjects and statistical progress.¹⁵⁸ This trend in education also threatens the scope of tax-exempt educational institutions, particularly those in the performing arts. Instead, the performing arts are an integral component of culture and education in democratic life. In Professor Nussbaum's words, "If we do not insist on the crucial importance of the humanities and the arts, they will drop away, because they do not make money. They only do what is much more precious than that, make a world that is worth living in."¹⁵⁹

Conclusion

There are many possible rationales for nonprofit tax exemption, and each has its utility. Professor Hansmann, for example, eloquently provides an economic efficiency rationale, but his theory does not encompass the foundational ideas behind tax exemption, leading him to the mistaken assertion that exemption for symphony orchestras was a creative re-imagining of "education." To the contrary, education, as understood well before the first tax exemptions, included the performing arts. It was and is an essential component of educating citizens in a democracy, a core government function, and consequently exempt from taxes under the traditional public subsidy theory.

This article has outlined the historical development of the tax exemption debates both as a way to understand the current scope of the tax exemption and as a way to explain the inclusion of symphony orchestras as educational institutions. The longstanding public subsidy theory, coupled with a specific inquiry into the historical role of the performing arts in society and in government, provides an explanation. Symphony orchestras are exempt from taxes not simply because they provide a public benefit, but because they constitute a key ingredient of education in a democratic society and have roots in traditional government functions.

The public subsidy theory continues to support the current tax exemption regime, though, like the destination-of-income test of the early 20th century, the public subsidy theory is susceptible to unchecked expansion. Consequently, the approach under the public subsidy theory must include careful consideration of ideas behind taxation and government in democratic society. At times, historical inquiry will shed light, while other areas may be more amenable to economic analysis. In any case, tax exemption for education should always be understood in the context of its historical development and rationale—as foundational to the state itself.

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19. Lars G. Gustafsson, *The Definition of "Charitable" for Federal Income Tax Purposes: Defrocking the Old and Suggesting Some New Fundamental Assumptions*, 33 HOUS. L. REV. 587 (1996).
20. *Id.* at 649.
21. Treas. Reg. § 1.501(c)(3)-1(d)(2) (1960).
22. *Bob Jones Univ. v. United States*, 461 U.S. 574, 591-92 (1983).
23. Tariff Act of 1894, sec. 32. While this was not the first federal income tax, it was the first to use the exemption language found today in I.R.C. § 501(c)(3).
24. *Id.*
25. Treas. Reg. § 1.501(c)(3)-1(d)(3) (1960).
26. *Id.*
27. See Hansmann, *Rationale*, *supra* note 12, at 57 n.16.
28. I.R.S. Solicitor's Mem., 1919-1 C.B. 147, 1919 WL 49784 (1919) (finding an organization dedicated to producing musical concerts an educational institution exempt from income tax).
29. Kelley, *supra* note 17, at 2466.
30. Charitable Uses Act, 1601, 43 Eliz. c. 4 (Eng.); see also Kelley, *supra* note 17, at 2444–50.
31. See Tiffany Keb, Comment, *Redefining What It Means to Be Charitable: Raising the Bar with a Public Benefit Requirement*, 86 OR. L. REV. 865, 870 (2007) (surveying the various theories).
32. *Id.*
33. See, e.g., Gaul & Borowski, *supra* note 5, at 61.
34. H.R. REP. NO. 75-1860, at 19 (3d Sess. 1938). The Supreme Court also articulated the public subsidy theory in *Bob Jones Univ.*, 461 U.S. at 591 (“Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.”).
35. BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 12 (9th ed. 2007) (quoting JOHN STUART MILL, *ON LIBERTY* (1859)).
36. JAMES J. FISHMAN & STEPHEN SCHWARZ, *NONPROFIT ORGANIZATIONS* 328–29 (1995).
37. *Supra* note 14, at 3.
38. See Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STETSON L. REV. 395, 404–06 (1997).
39. See Hopkins, *supra* note 35, at 9.
40. *Id.*
41. Boris I. Bittker & George K. Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299, 301–02 (1976).
42. *Id.* at 357–58.
43. *Id.* at 307.
44. *Id.* at 302.
45. Hansmann, *Rationale*, *supra* note 12, at 72.
46. *Id.* at 69.
47. *Id.*
48. *Id.*
49. See Hansmann, *Nonprofit Enterprise*, *supra* note 12.
50. Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 618 (1990).
51. *Id.* at 605.
52. *Id.* at 628–29.
53. For example, Professors Sanford Levinson and J.M. Balkin argue, “Just as the music of the *Eroica* is not identical with its score, but needs a performer to realize it, so too the social practice of law is not fully identical with its written texts, but needs the activity of those entrusted with its performance to be realized.” *Law, Music, and other Performing Arts*, 139 U. PA. L. REV. 1597 (1991). Yet while interpretation may involve more than just text, there is no question any interpretive approach must be grounded in fidelity to the text. See HERMAN BELZ, *A LIVING CONSTITUTION OR FUNDAMENTAL LAW?: AMERICAN CONSTITUTIONALISM IN HISTORICAL PERSPECTIVE* 172 (1998). Judge Learned Hand perhaps put it best in 1934: “The meaning of a sentence may be more than that of the separate words, as a melody is more than the notes, and no degree of particularity can

- ever obviate recourse to the setting which all appear, and which all collectively create." *Helvering v. Gregory*, 69 F.2d 809, 810–11 (2d. Cir. 1934).
54. Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379, 1384, 90 (1991).
 55. *Id.* at 1390.
 56. *Id.* at 1385.
 57. *Id.*
 58. *Id.*
 59. See Gaul & Borowski, *supra* note 5, at 28.
 60. See HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY 1776–1844* xi (1961).
 61. *Tax-Exempt Foundations, Hearings Before the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations*, 83d Cong. 1019 (1954) (statement of H. Rowan Gaither, Jr., President and Trustee, The Ford Foundation).
 62. *Id.*
 63. See *State Dep't of Assessments & Taxation v. N. Baltimore Ctr.*, 129 A.2d 759, 766 (2000) (citing J. BLANDI, *MARYLAND BUSINESS CORPORATIONS 1783-1852* 11 (1934)).
 64. *Tariff Act of 1894*, ch. 349, § 32, 28 Stat. 509, 556 (1894).
 65. L. Richard Gabler & John F. Shannon, *The Exemption of Religious, Educational, and Charitable Institutions from Property Taxation, in IV RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 2025, 2535, 2536* (1977).
 66. ALFRED BALK, *THE FREE LIST: PROPERTY WITHOUT TAXES* 20 (1971).
 67. See Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585, 588 (1998).
 68. *Id.*
 69. Stephen Diamond, *Efficiency and Benevolence: Philanthropic Tax Exemptions in 19th-Century America, in PROPERTY-TAX EXEMPTION FOR CHARITIES: MAPPING THE BATTLEFIELD* 115, 124 (Evelyn Brody ed., 2002) ("As measured by the amount of pamphlet warfare and proposed legislation, the intensity of debate over tax exemptions increased markedly in the 1870s.").
 70. *Tax Exemptions*, CINCINNATI DAILY GAZETTE, May 29, 1873, at 4. This criticism was recently revived in *Minnesota. See Under the Rainbow Child Care Center*, 741 N.W.2d 880.
 71. *Tax Exemptions, supra* note 70, at 4.
 72. *Id.*
 73. *Tax Exemption*, BOSTON J., Sept. 2, 1874, at 2. As demonstrated by the recent attempt to tax college tuition in Pittsburgh, this "question of the future" is no closer to resolution. See Strom, *States Move to Revoke, supra* note 9; see also Josh Goodman, *Reaching for a Tuition Tax?*, GOVERNING, Feb. 1, 2010, available at <http://www.governing.com/topics/education/Reaching-for-a-Tuition.html> (last visited Oct. 8, 2010).
 74. Diamond, *supra* note 69, at 131 ("With the 1870s came the articulation of nearly all the positions, pro and con, with respect to exemptions that are still asserted today.").
 75. Charles W. Eliot, *The Exemption from Taxation of Church Property, and the Property of Educational, Literary and Charitable Institutions*, REPORT OF THE COMMISSIONERS APPOINTED TO INQUIRE INTO THE EXPEDIENCY OF REVISING OR AMENDING THE LAWS RELATED TO TAXATION AND EXEMPTION THEREFROM app. 367, 370 (1875).
 76. *Id.* at 369.
 77. In the classical republican tradition, government's purpose is seen as the pursuit of the common good—possible only if people are virtuous. James Bohman & William Rehg, *Introduction to DELIBERATIVE DEMOCRACY: ESSAYS ON REASON AND POLITICS* ix, xiv (1997). Such civic virtue is learned through participation in social institutions. See ROBERT D. PUTNAM, *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 86–87, 116 (1993). Thus, fostering virtue through education is a primary goal of government.
 78. Eliot, *supra* note 75, at 371.
 79. *Id.* at 371–72.
 80. See NUSSBAUM, *supra* note 13, at 18, 72.
 81. *Id.* at 36, 52, 108.
 82. Eliot, *supra* note 75, at 372.
 83. *Id.*
 84. For example, the philosopher George Thomson (1903–1987) wrote, "Art changes the emotional content of man's consciousness so that he can react more subtly and deeply to the world. This penetration of inner reality, because it is achieved by men in association and has a complexity beyond the power of one man to achieve, also exposes the hearts of his fellow men and raises the whole communal feeling of society to a new plane of complexity. It makes possible new levels of conscious sympathy, understanding and affection between men." George Thomson, *The Sources and Function of Art, in MARXISM AND ART: ESSAYS CLASSIC AND CONTEMPORARY* 353 (Maynard Solomon ed., 1973); see also *DEMOCRACY AND THE ARTS* 1 (Arthur M. Melzer et al., eds., 1999). Professor Martha Nussbaum has offered an impassioned call for renewed emphasis of the arts in education: "Artistic instruction can and should be linked to the citizen-of-the-world instruction, since works of art are frequently an invaluable way of beginning to understand the achievements and sufferings of a culture different from one's own." NUSSBAUM, *supra* note 13, at 108.
 85. Eliot, *supra* note 75, at 375. This also coincides with the Minnesota Supreme Court's most recent definition of charity: "Charity is broadly defined as a gift." *Under the Rainbow Child Care Center, supra* note 7, at 886 (quoting *Junior Achievement of Greater Minneapolis, Inc. v. State*, 135 N.W.2d 881, 885 (1965)) (emphasis in original).
 86. Eliot, *supra* note 75, at 375.
 87. Bittker and Rahdert echoed this notion in their income measurement theory. See *supra*, note 41.
 88. Eliot, *supra* note 75, at 375.
 89. Diamond, *supra* note 69, at 125.
 90. *Id.*
 91. *People v. McCreery*, 34 Cal. 432 (1878).
 92. Diamond, *supra* note 69, at 120.
 93. President's State of the Union Address to Congress (Dec. 7, 1895), available at <http://www.infoplease.com/t/hist/state-of-the-union/87.html> (last visited Oct. 8, 2010).
 94. *Id.*
 95. The American Union, *None but Public Property Should Be Exempt from Taxation*, CINCINNATI DAILY GAZETTE, Apr. 2, 1881, at 6.
 96. *Id.*
 97. CHARLES J. TOBIN, *THE EXEMPTION FROM TAXATION OF PRIVATELY OWNED REAL PROPERTY USED FOR RELIGIOUS, CHARITABLE AND EDUCATIONAL PURPOSES IN NEW YORK STATE* 27 (1934).
 98. *Id.*
 99. *Id.*
 100. *Id.*
 101. *Id.* at 13.
 102. THE WESTCHESTER COUNTY CHAMBER OF COMMERCE, *TAX EXEMPTIONS ON REAL ESTATE: AN INCREASING MENACE* II (1922).
 103. *Id.*
 104. *Id.* at III.
 105. *Id.* at 80.

106. *Id.*
107. *Id.* at 87.
108. Today, the Minnesota Supreme Court has come close to this narrow public subsidy theory. See *Under the Rainbow Child Care Center*, *supra* note 7.
109. Salt Lake Lodge No. 85 v. Groesbeck, 120 P. 192, 196 (Utah 1911).
110. See Diamond, *supra* note 69, at 133.
111. Act of August 28, 1894, ch. 349, § 32, 28 Stat. 509, 556-557 (1894).
112. Payne Aldrich Tariff Act of 1909, ch. 6, § 38, 36 Stat. 11, 112 (1909).
113. Revenue Act of 1913, ch. 16, § II (G), 38 Stat. 114, 172 (1913).
114. In a 1934 pamphlet against the charitable exemption, Farwell Knapp wrote, "The weight of tradition, which is chiefly another case name for the avoidance of the necessity of thinking, cannot easily be shaken off." Diamond, *supra* note 69, at 138.
115. See *Bob Jones Univ.*, 461 U.S. at 589 n.13 (citing 26 CONG. REC. 584-588, 6612-6615 (1894)).
116. ROGER FOSTER & EVERETT V. ABBOT, A TREATISE ON THE FEDERAL INCOME TAX UNDER THE ACT OF 1894, 106 (1895).
117. *Id.* at 110.
118. *Id.* at 111.
119. This predated the Unrelated Business Income Tax.
120. 44 CONG. REC. 4150 (1909).
121. See Bradley Meyers, *Revisiting the Commerciality Doctrine*, 10 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 134, 136 (2001).
122. 44 CONG. REC. 4156 (1909).
123. 50 CONG. REC. 1306 (1913).
124. *Id.*
125. See Solicitor's Memorandum, *supra* note 28.
126. *Id.*
127. *Id.*
128. See 65 CONG. REC. 8171 (1924).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. See Sol. Op. 159, III-1 C.B. 480, 482 (1924) (construing the charitable deduction for estate tax purposes, and stating, "Generally bequests for the benefit and advantage of the general public are valid as charities."), cited in *Bob Jones Univ.*, 461 U.S. at 589-90 n.15.
134. *Trinidad v. Sagrada Orden de Predicadores*, 263 U.S. 578 (1924).
135. *Id.* at 581.
136. *Bob Jones Univ.*, 461 U.S. at 589 n.14.
137. *Id.* at 593 (Rehnquist, J., dissenting).
138. *Goldsboro Art League, Inc. v. Commissioner*, 75 T.C. 337, 343-44 (1980).
139. Hansmann, *Nonprofit Enterprise*, *supra* note 12.
140. Paul J. DiMaggio, *Cultural Entrepreneurship in Nineteenth-Century Boston*, in NONPROFIT ENTERPRISE IN THE ARTS: STUDIES IN MISSION AND CONSTRAINT 41 (1986).
141. Letter from Cindy Westcott, Manager of Exempt Corporation Determinations, to New York Philharmonic (July 22, 2008), available at http://nyphil.org/pdfs/support/irs_letter.pdf (last visited Oct. 8, 2010) (citing original determination letter recognizing tax exemption in 1928).
142. DiMaggio, *supra* note 140, at 43.
143. *Id.*
144. Eliot, *supra* note 75, at 373; see also NUSSBAUM *supra* note 13, at 29, 102.
145. DEPARTMENT OF PHILANTHROPIC INFORMATION, CENTRAL HANOVER BANK AND TRUST COMPANY, THE FINE ARTS IN PHILANTHROPY 5-9 (1937).
146. *Id.* at 11.
147. Karl W. Gehrken, *The Dawn of Philosophy in Music Education*, 24 MUSIC EDUCATORS J. 24 (1937).
148. Eliot, *supra* note 75, at 371-72.
149. RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 172 (1992).
150. FINE ARTS IN PHILANTHROPY, *supra* note 145, at 13.
151. *Id.* at 40.
152. *Id.* at 43 (quoting C. Stuart Gager, Director, Brooklyn Botanic Garden, *Brooklyn Botanic Garden Record*, April 1934, at 15).
153. MEDIA AND THE FIRST AMENDMENT IN A FREE SOCIETY 172 (University of Massachusetts Press: Amherst 1973).
154. *Tax-Exempt Foundations, Hearings Before the Special Committee to Investigate Tax-Exempt Foundations and Comparable Organizations*, 83d Cong. 1019 (1954) (statement of the American Council of Learned Societies).
155. *Id.* at 999-1000.
156. *Id.* at 1009.
157. Eliot, *supra* note 75, at 372.
158. Professor Nussbaum described the problem this way:
 Thirsty for national profit, nations, and their systems of education, are heedlessly discarding skills that are needed to keep democracies alive. If this trend continues, nations all over the world will soon be producing generations of useful machines, rather than complete citizens who can think for themselves, criticize tradition, and understand the significance of another person's sufferings and achievements. The future of the world's democracies hangs in the balance.
 NUSSBAUM, *supra* note 13, at 2.
159. *Id.* at 143.

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A Landmark Case: *Penn Central Transportation Company et al. v. New York City et al.*

By David Krell

Grand Central Terminal is more than a gateway for travelers, commuters, and tourists. It is, of course, a New York City landmark that stands at the heart of a lawsuit that changed the face of midtown Manhattan, reflected shifting attitudes regarding landmarks, and exemplifies the consequence of irresistible forces of business meeting immovable visions of historic preservation.

In 1978, the consequence manifested in the United States Supreme Court—*Penn Central Transportation Company et al. v. New York City et al.*¹ Behind this landmark case lies the rich history of Grand Central Terminal, a Beaux-Arts² landmark once steeped on a deep, perilous, and seemingly unyielding slope of declination ultimately restored to its rightful majestic status.

Kurt Schlichting, author of *Grand Central Terminal: Railroads, Engineering, and Architecture in New York City*, describes the Terminal as “monumental, awe-inspiring, and a work of genius.”³

Paul Goldberger, Architecture Critic for *The New Yorker*, confirms the Terminal’s stature in *Grand Central*, a 2008 PBS documentary. “Grand Central is both grand and part of everyday life. Incredibly practical. Incredibly functional. And yet overpoweringly exciting at the same time. Grand Central is so much more than just a train station. In many ways, it’s the heart of New York.”⁴

Former New York City Mayor Edward I. Koch, a key figure in the events that saved Grand Central Terminal from destruction, calls the Terminal “unique and breathtaking.”⁵ His favorite part of the Terminal—“The ceiling in the main public area with its extraordinary astrological symbols. The reason—astonishment on every occasion no matter how many times your eyes meet the ceiling.”⁶

At the heart of Grand Central Terminal’s history stand three prominent players—a robber baron who owned it, a genius engineer who designed it, and a presidential widow who brought grace, power, and publicity to its restoration.

All aboard!

The Commodore

Cornelius Vanderbilt’s distinction in the transportation industry earned him an appropriate nickname—“Commodore.”⁷ His reach, influence, and power were far, wide, and deep. Vanderbilt biographer T.J. Stiles summarizes the Commodore’s achievements in *The First Tycoon: The Epic Life of Cornelius Vanderbilt*.

By the time he had turned fifty, he had dominated railroad and steamboat transportation between New York and New England (thus earning the nickname “Commodore”). In the 1850s, he had launched a transatlantic steamship line and pioneered a transit route to California across Nicaragua. In the 1860s, he had systematically seized control of the railroads that connected Manhattan with the rest of the world, building the mighty New York Central Railroad system between New York and Chicago.⁸

Cornelius Vanderbilt was named for his father, a man of Dutch heritage. Dutch lineage ran throughout a highly significant portion of settlers in the American colonies.

His name was Cornelius. It was a solid Dutch name, as was Vanderbilt, and both were common around New York Bay. The first of his family had arrived in America in 1650, when Jan Aersten Van Der Bilt settled in the Dutch Colony of New Netherlands.⁹

Cornelius was the fourth child of Cornelius and Phebe Vanderbilt. He was born on May 27, 1794.¹⁰ Perhaps Cornelius’s upbringing triggered his penchant for the transportation industry. The elder Cornelius chose Staten Island for the Vanderbilt home, succeeded in farming, and expanded his business interests. “In an act that spoke volumes about [the father’s] commitment to accumulation, he built or bought his own periauger and began to sell his services, ferrying his neighbors and their produce across the bay. As other work for the boat presented itself, he began to attend to the water as much as the farm.”¹¹

Whether indirectly by osmosis or directly by paternal education, Vanderbilt developed a concrete prowess in the transportation industry that eventually led to massive stature, if not sheer domination. By carefully constructing a group of diverse holdings, Vanderbilt enjoyed a power base sought by many, enjoyed by few, and respected by competitors, customers, and opponents.

He guided the Atlantic & Pacific Steamship Company, and managed its strategic relations with Pacific Mail. His engine works and shipyard produced pistons, boilers, and steamers. He purchased half a million dollars in Connecticut state bonds. He served on the boards of the Harlem, Erie, New Jersey Central, and Hartford & New Haven railroads.¹²

The Harlem began because of legislative fiat with a wide geographic opportunity.

Legislation passed by New York State on April 25, 1831, gave the Harlem broad discretion as to the location of the rail line, giving it “power to construct a single or double railroad or way from any point on the north bounds of Twenty-third Street to any point on the Harlem River between the east bounds of Third Avenue and the west bounds of the Eighth Avenue with a branch to the Hudson River between One Hundred and Twenty-fourth Street and the north bounds of One Hundred and Twenty-ninth Street, to transport, take and carry property and persons upon the same by the power and force of steam, or animals or any other mechanical or other power, or any combination of them which the said company may choose to employ.”¹³

The Harlem Railroad presented an additional asset for Vanderbilt. It owned valuable real estate in the middle of the island that Vanderbilt’s Dutch cousins bought from the Indians for \$24 in beads, according to legend, lore, and teachings—Manhattan.

When the Harlem introduced steam locomotives to New York in 1837, it had required a facility in Manhattan to service the steam engines. The company chose 42nd Street as the location for a maintenance barn and fuel lot. The earliest accounts of the Harlem Railroad record a number of property transactions, totaling \$56,262, for the land between 42nd and 43rd streets on the west side of Fourth Avenue. As the Harlem’s steam operations in New York expanded, the railroad acquired additional land around its

original 42nd Street property, purchased during the 1830s and 1840s. In 1859, it bought the land between 42nd and 43rd streets east of Park where Grand Central Terminal now stands. In May of 1860, the Harlem paid \$5,957 for “an engine house, filling up lots, laying tracks etc.” on the site. Later expenses involved construction of a new facility to service wood-burning steam locomotives and cars as they replaced horse-drawn rail cars. The Harlem’s books showed the value of the real estate where Grand Central now stands as \$2,379,414.95. Ultimately the railroad bought eleven parcels of land in the area from 42nd to 48th streets between Lexington and Madison avenues. This land comprised the Harlem’s second precious asset: property in midtown Manhattan that eventually became among the most valuable real estate in the world.¹⁴

Vanderbilt’s business acumen proved worthy of Hamlet as the railroad mogul chose to “take arms against a sea of troubles and, by opposing, end them” instead of “suffer[ing] the slings and arrows of outrageous fortune.”¹⁵ In turn, he increased his own outrageous fortune.

Vanderbilt bought 55,000 Harlem Railroad shares in 1862. Because of his keen business insight, Vanderbilt saw around corners where others did not even see the corners. Consequently, he brought a dimension of strategy to his acquisitions. His purchases fit into a scheme that reinforced his strength as a transportation titan.

The Harlem’s fixed strength was its penetration of the center of New York, down Fourth Avenue and through its streetcar line. This was something that no other railroad possessed—not even the only other steam railway to enter Manhattan, the Hudson River, which was restricted to the far west side. The Harlem provided the only portal for direct rail traffic with industrial New England, a rich trade that Vanderbilt knew well from his directorship of the Hartford & New Haven.¹⁶

The Harlem Railroad expanded further into New York:

- Service to White Plains began on June 1, 1844.¹⁷
- Service to Dover Plains began in December 1848.¹⁸
- Service to Chatham began in January 1852.¹⁹

The expansion triggered a cost. In sum, the Harlem Railroad needed money as it expanded its services, balanced increasing revenue streams against declining ones, and solidified its power base.

The Harlem Railroad's rapid expansion up Manhattan Island into the Bronx and beyond to Westchester County and north Chatham required significant expenditure and the company's debts mounted. While passenger traffic in Manhattan grew substantially, the railroad's freight business north of the city languished; the Hudson River steamboats continued to transport the bulk of the freight traffic between New York and Albany. In 1863, the Harlem could not afford to pay any dividends and its stock declined to a low of \$9 a share before recovering somewhat as summer approached.²⁰

Cornelius Vanderbilt saw an investment opportunity in the Harlem. His complex, demanding, and potentially lucrative plan required patience, deftness, and psychological strength—familiar yet intangible traits for a mogul with the risk-taking stamina necessary to create, refine, and execute the plan.

Vanderbilt's vision provided a possible solution to the Harlem Railroad's balance sheet problems. Theoretically, a streetcar line franchise up Broadway would stanch the financial bleeding. Vanderbilt helped the railroad petition the Common Council of the City of New York for a franchise so he could realize his vision.²¹

On April 23, 1863, at his behest, the aldermen of the common council of the city of New York authorized the Harlem to construct a line along Broadway to the Battery. The day after the granting of this franchise, which would make the Harlem not only the one railroad entering New York City but also the only line running the length of Manhattan Island, the stock jumped from 50 to 75, moving within days to 100.²²

Nothing succeeds like success.²³ Nothing breeds enemies like it, either. While Vanderbilt saw an opportunity, he had a blind spot—Daniel Drew.

Vanderbilt did not account for the deviousness of the members of the Common Council and his numerous enemies, who included Daniel Drew. An illiterate former cattleman, Drew had held a deep-seated animosity toward Vanderbilt from the time he started his own Hudson River steamboat line in 1834 in direct competition to Vanderbilt's steamboats. Their relationship worsened after Drew became a director of the Erie Railroad in 1857. As the vote of the Common Council on the Harlem's street franchise neared, in the hot summer of 1863, Drew and his

allies planned to sell their Harlem stock short as the stock rose in anticipation of the new franchise. With the Common Council suitably bribed, Drew eagerly awaited a sharp drop in Harlem stock once the council voted to deny the railroad its franchise for a street railway on Broadway.²⁴

Drew also had a blind spot—Cornelius Vanderbilt. Drew's plan reached execution. The stock dropped from \$110 from \$72.²⁵ Vanderbilt and his circle of influence, however, did not sway, yield, or submit.

They did not suffer the slings and arrows of outrageous misfortune. They did not go gently into the good night.

They bought more shares.

The Commodore, along with family, friends and stockbrokers, continued to buy Harlem stock and, as Drew and the astounded councilmen looked on, Harlem stock leveled off and then began, slowly, to rise. Vanderbilt committed a major part of his fortune to the Harlem, and soon the price moved past par and quickly spurted to \$125 and then \$150, to the dismay of the short sellers who had guaranteed to deliver—at \$110. Vanderbilt held the stock in his safe and demanded a king's ransom—\$180 per share. Drew and his greedy friends on the council lost \$70 on each share they sold short. Vanderbilt made yet another fortune from the "Harlem corner," and he gained control of his first railroad.²⁶

Vanderbilt continually reached for power in the railroad industry, then expertly grasped it to complement his holdings. "Since the 1840s, Vanderbilt had been peripherally involved, on and off, with several railroads, including the Stonington Railroad, the Long Island Railroad, and the Hartford & New Haven Railroad, all of which dove-tailed with and fed his various steamboat enterprises."²⁷

Three years before the Harlem Railroad plan, Vanderbilt and Drew crossed paths as the former executed a financial strategy concerning the New York & Erie Railroad that ran from the Buffalo area on Lake Erie to Jersey City. Drew's position as a director provided a front-row seat to Vanderbilt's financial intelligence.²⁸

The company was experiencing a financial crisis. Vanderbilt personally endorsed notes for the firm to the tune of \$400,000, taking a lien on all Erie rolling stock as surety. Two years later, in 1856, Vanderbilt acquired a significant interest in the stock of the Delaware, Lackawanna &

Western, which extended through central New York into Pennsylvania and Ohio. Then, in 1859, Vanderbilt joined Drew on the board of Erie.²⁹

Vanderbilt increased his influence, stature, and wealth as a railroad magnate by buying shares in the Hudson River Railroad. Hudson River incorporated in 1846 when the New York State legislature passed a law “[g]ranting it a franchise to construct a rail line along the east bank of the Hudson River, entering Manhattan at Spuyten Duyvil, at the northern tip of the island, and then running along the west side to lower Manhattan.”³⁰

Cost proved to be a crucial factor for the Hudson River Railroad’s plans. “The original backers of the Hudson River Railroad encountered much higher construction costs than they anticipated when building the line from Poughkeepsie to New York City, and the tracks did not reach Canal Street, in lower Manhattan, until 1847.”³¹

The railroad’s decision makers moved full steam ahead regardless of financial signals to retreat, reassess, and refine a plan to viability. Their strategy proved financially fatal.

Despite the fact that traffic remained below projections, the Hudson River Railroad kept extending its line, north of Poughkeepsie, until in 1851 it reached East Albany, directly across the Hudson River from Albany. With the expansion to the Albany area, the railroad ran for 155 miles along the east side of the Hudson River, from Chambers Street in lower Manhattan to East Albany. By that time, construction costs had consumed all of the original capital and the railroad slid into debt. Despite the income from its freight business, during the 1850s, the company fell into poor financial condition, ripe for a takeover.³²

Again, a railroad’s financial vulnerability presented an opportunity for Vanderbilt to leverage his financial strength. “He used profits made from leasing his steamships to the Union navy during the Civil War to buy additional shares of the Hudson; by the winter of 1863 he controlled the railroad.”³³

Vanderbilt continued his quest to acquire railroads by targeting the New York Central. “[B]y 1866, [Vanderbilt] owned more than \$2,500,000 worth of Central stock.”³⁴

The New York Central formed by joining 10 railroads in upstate New York and incorporating on July 6, 1853.³⁵ In this entity, a singular railroad provided service from Niagara Falls through Lockport, Buffalo, Attica, Batavia, Rochester, Canandaigua, Geneva, Cayuga, Auburn, Syracuse, Utica, Schenectady, Albany, and Troy.³⁶ The chain lacked a major link—New York City. “At Albany,

passengers and freight transferred to the Hudson River steamboat lines for the 90-mile trip down the river to New York.”³⁷

Again, Vanderbilt saw a strategic opportunity rather than a mere target of acquisition. A connection between the Hudson River and New York Central rail lines would open the door to a new vista of revenue. Presently, the New York Central used steamboats to move passengers and freight down the Hudson River.

Only in the winter, when the Hudson River froze, did the Central use the Hudson River Railroad to get its passengers and freight to New York City. To increase Vanderbilt’s anger further, the Central favored the steamships of the People’s Line, owned by his archrival Daniel Drew. If, instead, the Central were to construct a bridge across the Hudson to connect with Vanderbilt’s line, his Hudson River railroad would enjoy a dramatic increase in year-round traffic.³⁸

With a merger between the New York Central and Hudson River railroads looming, Drew saw a potential massive drain of dollars affecting his steamboat empire. Better railroad access equaled less use of steamboat lines. In response, Drew constructed another strategy to defeat his foe.

Drew designed a short-selling plan with William Fargo—a co-founder of Wells Fargo, New York Central board member, and a major stockholder of the railroad. Drew also included two “legendary Wall Street manipulators”—Henry Keep and LeGrand Lockwood. Drew, Keep, and Lockwood suffered previous losses in railroad deals because “[t]he crafty Commodore had gotten the best of them.”³⁹

The plan called for a manipulation of the stock price. “Fargo would use his power on the Central board to kill the merger with the Hudson River Railroad. Before the news became public Fargo, Keep, Lockwood, and Drew would sell Central stock short and garner a fortune as the stock declined.”⁴⁰

Vanderbilt countered. He used the advantage of weather, advertising, and stock market know-how to outfox Drew and his cohorts.

First, Vanderbilt sold 60,000 shares of his stock in New York Central before Drew’s plan triggered a price plummet. Then, he utilized the bitter cold weather of January 15, 1867 that froze the Hudson River. Vanderbilt replaced Drew as a transportation service provider to New York City because the frozen river prevented steamboats from traveling. Then he locked out Drew’s New York Central customers. “Vanderbilt placed advertisements in the major Albany and New York City newspapers announcing that the Hudson River Railroad would

no longer accept transfer passengers or freight from the New York Central."⁴¹

Vanderbilt waited while the New York Central tried to rearrange, recalculate, and renew routes for its customers. The plan of Drew et al. backfired massively. Vanderbilt's patience yielded rewards.

Desperately, the Central attempted to organize another route for its traffic to New York via the Boston and Albany, Stockbridge, Housatonic, and New Haven railroads. For three days passengers and freight piled up at Albany; the alternative route proved much too complicated. In the state legislature calls rang out for action to force Vanderbilt to reopen the link between the two railroads. The stock of the Central plummeted before Drew, Fargo, Keep, and Lockwood could sell, and they all lost a great deal of money. As soon as the stock bottomed out, Vanderbilt bought back the original 60,000 shares he had sold earlier.

Public outcry, as well as pressure from the Central's own stockholders, forced the directors of the Central to deal with Vanderbilt. The Commodore agreed to restore the free flow of traffic between the Central and the Hudson railroads, Central stock shot back up, and Vanderbilt collected yet another fortune. By 1867, he completed his conquest of the Central by assuming the office of president. Fargo, Keep, and their supporters departed, replaced on the board of directors by Vanderbilt family members and close associates.⁴²

As planned, Vanderbilt merged the two railroads into one entity—New York Central and Hudson River Railroad. "With track stretching from New York City to Buffalo, it became the second largest railroad in the country; only the Pennsylvania rivaled the Central."⁴³

The Depot

Vanderbilt's next step reflected his concept of a central passenger terminal grand enough to satisfy the demands of his railroads' customers. "He envisioned a terminal with style and panache, proclaiming to all New York the power and might of his vast rail empire."⁴⁴

Vanderbilt's new project would be another notch on his proverbial championship belt for the transportation industry. Vanderbilt's location selection, however, did not initially jive with the popular mood, sentiment, and analysis.

Vanderbilt selected the Harlem Railroad's property on 42nd Street for the site. He stood fast against conventional wisdom deeming the location improper.⁴⁵ Vanderbilt's choice reflected a keen analysis of the New York City railroad system's efficacy, an analysis missed by Vanderbilt's competitors, critics, and passengers. To better serve a new terminal paradigm at the 42nd Street location, Vanderbilt conceived a rearranging of current railroad lines.

He realized that his Hudson River Railroad's passenger terminal on the west side of lower Manhattan at St. John's Park occupied the wrong location. The west side of Manhattan had evolved as a more commercial than residential area and the Hudson's tracks on the west side primarily served the growing volume of freight carried to the businesses and piers lining the Hudson River.

Since the Hudson River Railroad's tracks crossed the Harlem River onto the west side of Manhattan at Spuyten Duyvil, Vanderbilt needed a link from Spuyten Duyvil to the Harlem line at Mott Haven. In 1869, he incorporated the Spuyten Duyvil and Port Morris Railroad and constructed a rail line along the north bank of the Harlem River to Mott Haven, where the Port Morris tracks joined the Harlem's. Once Vanderbilt completed the new line, passenger trains of the New York Central and Hudson River Railroad could switch at Spuyten Duyvil, travel the five miles to Mott Haven, and then continue down the tracks of the Harlem to Midtown.⁴⁶

To execute his plan for a new terminal, Vanderbilt selected architect John Snook and engineer Isaac Buckhout. Their design needed to match Vanderbilt's vision of a structure combining practicality with power.

Forming an L shape, the classical terminal building, bearing a striking resemblance to the Louvre in Paris, ran along 42nd Street for 370 feet, and then turned up Vanderbilt Avenue on the west side of the Harlem's property for a depth of almost 700 feet. The three railroads using the facility occupied separate sections of the building, each with its own ticket, baggage, and waiting rooms. Railroad offices occupied the second and third stories.⁴⁷

Grand Central Depot debuted on October 7, 1871. “[T]he first train departed from the new terminal and the facility proved to be an immediate success. During the first year of operation, the three railroads ran an average of 88 scheduled trains a day and more than 4,000,000 passengers passed through the gates.”⁴⁸

The execution of Vanderbilt’s vision resulted in a structure that met the project’s goals.

The design they produced set out to awe the traveler and the casual visitor with the power and glory of the Vanderbilt railroad empire. Formally called Grand Central Depot, the structure included an imposing station building at the front and an arched train shed in the rear. When completed in 1871, Grand Central Depot was the largest rail facility in the world, larger even than London’s St. Pancras Station. Like the present Grand Central, it served as more than a terminal; it symbolized the power of Vanderbilt’s railroads and the role they played in the life of New York City, the state, and the country.⁴⁹

Grand Central Depot also enhanced metropolitan pride while increasing travel opportunities. Stiles cites a testament in the June 30, 1871 issue of the *New York World*.

The great railroad depot erected by Commodore Vanderbilt at Forty-second Street is at last completed and ready for its occupants. This building...is a magnificent ornament to the city, and will doubtless prove a lasting monument to its builder. New York can now boast of the largest railroad in the country.⁵⁰

To bring his idea to realization, Vanderbilt needed to pay for its construction. He did it alone. No partners. No alliances. No investors. It was, in effect, a family affair. Vanderbilt’s eldest son, William, enjoyed the heir apparent position. “Vanderbilt paid for the construction out of his own bank accounts. Grand Central belonged to the Harlem Railroad, in which he, William, and William’s sons now owned almost all the stock, and which had *not* been consolidated into the New York Central & Hudson River.”⁵¹

In *Grand Central*, Stiles describes the terminal. “It had these enormous domes and it was this huge expanse stretching north from 42nd Street crowned with this grand glass and steel train shed and it really was a remarkable piece of infrastructure unlike any that existed in the world.”⁵²

Despite its grandiose presence, initial practicality, and unquestionable symbolism of power, Grand Central De-

pot began to outlive its usefulness faster than anticipated by its conceivers. Simply, it could not meet the needs of a growing metropolis dependent on fluid transportation for freight and passengers. Vanderbilt’s vision of grandeur became an illusion of utility. Grand Central Depot needed to adapt for its survival. Despite a considerable financial investment dedicated to improvements, the adaptation proved unsuccessful.

With only fifteen tracks, the arched train shed became inadequate as long-haul and commuter traffic grew at a rate far exceeding all projections. Envisioned to serve the needs of the railroads for twenty-five to thirty-five years, the terminal reached capacity much more quickly. In 1886, just fourteen years after Grand Central first opened its doors for business, an annex with seven additional tracks was added on the east side of the train shed, along Depew Place. Even these additional tracks provided only short-term relief as passenger volume increased relentlessly.

In 1898, the railroads once again improved Grand Central, with a three-story addition to the terminal building and a major reconfiguration of the waiting rooms. The most important change involved the construction of an enlarged concourse across the head of the tracks in the train shed. Prior to this alteration, each railroad had provided a separate waiting room and access to the train platforms. A passenger arriving on a New York Central train and departing on a New Haven train had to walk through the New York Central waiting room, out onto the street, proceed to the entrance of the New Haven waiting room, and walk through it to board the New Haven train. The new concourse cost \$2,500,000, but it dramatically improved the flow of people through the station and among the three railroads’ platforms. However, it failed to solve the underlying problem: too few platforms to serve the growing volume of passenger traffic.⁵³

Stiles theorizes the necessity for passengers to leave the building stemmed from oversight but also mirrored Vanderbilt’s approach to management. In turn, practicality, service, and common sense suffered.

In part, this was a design issue that the architects simply had not considered. But it also reflected the decentralized nature of Vanderbilt’s empire. Rather like Spain

under the Hapsburg kinds, the Commodore's realm consisted of various railroad principalities united only by his own private estate. This reflected his often-overlooked sensitivity to public opinion, but the Harlem was also a property of great personal meaning to him. After rescuing the long-scorned company and raising it up to glory, he may well have resisted its consolidation into the Central out of purely sentimental motives.⁵⁴

Grand Central Depot, once the palatial fulcrum of Vanderbilt's railroad empire, suffered the indignity of an aging powerhouse with diminished appeal, value, and utility. While its structure remained imposing, its life as a terminal faced a finish line because it outlived its usefulness. Schlichting outlines the pressures bearing down on the terminal in *Grand Central*. "Train traffic to the city grows exponentially and more and more people are using the depot. There just aren't enough tracks [or] train sheds for passengers to depart and it's really reaching the saturation point. It's clearly not working."⁵⁵

Inconvenience to customers can lead to a massive abyss of oblivion for any service provider. Grand Central Depot faced that abyss, but complaints from the residents in the Grand Central area and the press forced Vanderbilt to change if he didn't want the abyss to win.

On January 12, 1872, for example, the Commodore received a delegation of the residents of Fourth Avenue, come to complain about the Harlem Railroad's new Grand Central Depot—or, rather, the increase in rail traffic down the surface of the avenue upon Grand Central's completion. More than a dozen trains a day ran in each direction, leading to fatal accidents. The noise, smoke, and danger of the trains had long been a grievance of uptown residents. Now the *New York Times* had turned their cause into a crusade. Backed by the *Times*'s daily editorials, they wanted the tracks buried in a tunnel and the train shed of the depot itself sunk below the surface of the avenue.⁵⁶

Grand Central Depot slid from summit to base, endured press attacks, and echoed failure during a turning point in time. "As the century drew to a close, critics labeled Grand Central the worst rail facility in the country and New Yorkers increasingly complained about the crowded terminal and open train yard to the north."⁵⁷

The Old Gray Lady—*The New York Times*—editorialized about Grand Central's decline from symbol of success to emblem of embarrassment.

It is known to travelers as one of the most inconvenient and unpleasant railroad stations in the whole country. The statement errs on the side of moderation. When our pretentiously named station was new it aroused a considerable amount of local pride...but that day passed long ago and for many a humiliating year the ugly structure has been a cruel disgrace to the metropolis and its inhabitants. At present the odors that permeate its waiting rooms...reach every would-be passenger, disgust him with plain hints of gross uncleanness, and threaten him with typhoid and diphtheria.⁵⁸

Vanderbilt took action. "Vanderbilt's reluctant response was to sink the railroad tracks just below street level from 45th to 56th Street. The New York Central built footbridges across the exposed tracks so that pedestrians could now cross the rail yard without risking life and limb. North of 56th Street, tracks were covered, creating the Park Avenue tunnel. Vents were placed periodically along the tunnel to allow steam that the locomotives still belched to vent on to Fourth [Park] Avenue. It was no solution."⁵⁹

Cornelius Vanderbilt passed away on January 4, 1877. William K. Vanderbilt assumed the responsibility of leading the family's railroad empire into a new era.

William responded to the problems of Grand Central Depot by ordering a razing of the site followed by construction of a glorious new terminal. His actions reflected a call in *Scientific American*—"[R]adical change must be made in this terminal or the traffic within the next few years will be thrown into a condition approaching deadlock."⁶⁰

Schlichting concludes that Vanderbilt faced a narrow window of opportunity to remedy the situation, answer critics, and protect a precious jewel in the Vanderbilt railroad crown. "Only one real solution remained: replace Grand Central Depot with a completely new facility, a new terminal with vastly increased capacity. This is precisely what the New York Central Railroad set out to do."⁶¹

William K. Vanderbilt found new challenges beyond the construction of a new terminal, though. Two tragic train accidents triggered investigations, forced changes, and inspired a genius engineer.

The Accidents

While Grand Central Depot opened new avenues of travel for people entering and leaving New York City, it left a visible, sustaining, and hazardous mark. "But as New York City rushed past 42nd Street, Grand Central's

tangled maze of track all running at street level became an open wound for the city. In the words of *The New York Times*, 'Vanderbilt's depot had become a cruel disgrace to the metropolis and its inhabitants.'⁶²

The railroad could not handle the increasing demand of passengers because of the lack of trains, the limits of technology, and the resistance to change. Further, the trains' collective presence left visible, audible, and olfactory marks on Midtown Manhattan. "You now have hundreds of huge trains coming back and forth through the northern part of the island and remember, these are coal locomotives spewing great amounts of smoke and cinders and noise."⁶³

Vanderbilt suffered critics in the press, protests by organized groups, and, seemingly, the word-of-mouth complaints by everyday users of Grand Central Depot. His decision to put the tracks under ground created new problems of pollution, safety, and common sense. Criticism, whether exaggerated, manufactured, or steeped in dangerous reality, gave way to the industry technology of the day. "Someone said that it was like a volcano going off every two minutes as the trains come through and that is something that the technology simply doesn't allow them to fix."⁶⁴

The Vanderbilt family's relentless, rigid, and effective grasp of the railroad industry, however, created a figurative moat around Grand Central Terminal—it enjoyed protection because of the lack of competition. Customers did not have an alternative mode of transportation to compete with the railroad's speed. They also had no recourse of significance to effect substantive change in the railroad's conducting of business. Schlichting describes the circumstances frustrating passengers: "It's filled with steam. People are like sardines in a can. There's no relief from the heat. And we have to endure it because the railroad has this monopoly."⁶⁵

In addition, the trains' operations flirted with danger. "Once the trains were in what was essentially a tunnel, the steam that they generated was far too much to allow for visibility. The tunnel is dark. The tunnel is smoky."⁶⁶

The customers endured; the Vanderbilt family profited. On January 8, 1902, however, the endurance reached a breaking point. A train from White Plains, New York collided with the rear of the commuter train 223 from Danbury, Connecticut in the Park Avenue tunnel at 58th Street at 8:20 a.m. 15 passengers died. 35 were injured.⁶⁷ The incident revealed the true danger of an ineffective response to the overwhelming demand for more train service.

"It's rush hour. The trains are packed like cattle and because there aren't enough tracks to handle the number of trains, the number of suburban commuters that are now entering the city in the morning, there are regularly backups in the tunnel."⁶⁸

The conductor of the White Plains train, John Wisker, sped the train towards its Grand Central destination but missed or ignored warnings. "He missed two sets of signals. He missed a flare. He missed a gong. And the train never slowed down."⁶⁹

Where resistance to change once dominated the railroad industry, sobriety now ruled. The 1902 collision sparked a change in the railroad industry's approach to service. What was once suffered became dangerous, perhaps fatal.

In May of 1903, in response to the tragedy, New York City and the State of New York outlawed the operation of steam locomotives south of the Harlem River (in effect, all of Manhattan Island), including the Park Avenue tunnel, after July 1, 1908. The New York Central desperately needed to solve the tunnel problem. They also needed to deal with their antiquated passenger facilities at Grand Central Depot or relocate passenger operations from 42nd Street, an unthinkable alternative.⁷⁰

Stripped of its once glorious hardware with the needs of its customers outgrowing its once glorious terminal, the New York Central faced a prospect it previously avoided because of its influence—no more steam engines. The accident did more than cause an outcry for change, though. It triggered a revolution requiring the Vanderbilt family, New York Central power brokers, and railroad engineers to design a new plan. The goal—service customers with a new terminal adequate to service a metropolis rapidly increasing its population.

There would be no more iron horses running up and down Park Avenue. No more smoke-filled tunnels beneath the heart of the city. To stay in Midtown, the New York Central would be forced to be a pioneer in a new technology. One that had never been used on such an enormous scale before. Electricity.⁷¹

Even if the New York Central wanted to battle the government mandates of electricity usage with its deep war chests, powerful influence, and a public relations spin, it faced a tangible challenge in its rival, the Pennsylvania Railroad. "The New York Central did not fight the mandate to electrify. It couldn't. Any resistance would have been futile. For not only was Grand Central beyond redemption, but the Pennsylvania Railroad had just announced a new, glorious electric rail station in Manhattan."⁷²

Every revolution needs a designer. The desegregation of baseball had Branch Rickey. The independence of America had John Adams. Electrification of the New York Central had William Wilgus.

Wilgus lacked a college education but possessed insight, drive, and passion for solving complex railroad problems.

[H]is brilliance propelled him to a distinguished career as a self-taught railway engineer. In 1883, after completing high school, Wilgus began his railroad career working with the Minnesota and Northwestern Railroad and the Duluth and Winnipeg Railroad. He joined the New York Central in 1893 and, in less than a decade, rose to the position of chief engineer.⁷³

Wilgus resolved the electrification problem with a design scheme that bolstered the terminal's ability to service its passengers while eliminating an eyesore.

Wilgus proposed a radical solution. Build down 60 feet into the Manhattan bedrock. He imagined a new Grand Central where electric trains would still run through the Park Avenue tunnel. But, at 53rd Street, the tracks would separate. The upper level would be for long-distance travel. Trains from Buffalo, Boston, Chicago, St. Louis would enter the new Grand Central on these electrified tracks. Below them, suburban commuters effortlessly would glide into the terminal. It was an elegant solution that not only rid New York City of the hated train yard, it increased Grand Central's capacity threefold.⁷⁴

Surely, electricity beckoned the railroads to submit to its power, practicality, and necessity. Wilgus, however, saw another advantageous opportunity requiring creative thinking in a city-planning paradigm—air rights. He created a legal theory giving the owner of the Grand Central property the right to build above it. Wilgus put his ambitious idea to paper in a December 22, 1902 letter to W.H. Newman, President of New York Central & Hudson River Railroad Company:

In giving consideration to the Grand Central Station improvements it appears wise to bear in mind that after incurring a large expense for depression of tracks, modifications of trainsheds and office building on the site of the Annex, we will still have left a shell now used as an office building, that is unattractive, inconvenient and which prevents the use of valuable "air" rights.

Furthermore, the use of electricity dispenses with the necessity for old style trainsheds, and therefore with the use of

the new motive power there is no reason why we should not utilize all of the valuable "air" rights now covered by trainsheds, aggregating over 200,000 square feet of surface.

Therefore the following scheme is submitted for your consideration, and embodies the construction of an entire new building fifteen stories in height, bounded by 42nd and 45th Streets, Vanderbilt Ave. and Depew Place, with projecting wings on 43rd and 44th Streets extending to Madison Ave.⁷⁵

Wilgus's missive secures his place as the first known proponent of air rights. If successful, Wilgus's plan would create a new source of revenue for the New York Central, enhance the railroad's bottom line, and provide an investment source for a new terminal. The plan was simple in its approach, ambitious in its novelty, and integral in the ongoing quest to keep the New York Central train business financially afloat.

By March 1903 Wilgus had a solid plan for a 57-track, all-electric, double-level terminal on the desk of New York Central President William H. Newman. An entirely new terminal and office building would replace the old Grand Central Station, and hotels and other revenue-producing structures would be constructed on air rights above the terminal tracks. Starting at 56th Street, the four tracks that led down Park Avenue would be widened to ten tracks. A "throat" was formed to feed a double level of tracks submerged below street level. Loop tracks at both levels permitted trains to turn and quickly reassemble on outgoing tracks.

Steam locomotives had required open-air, vaulted spaces, but now, with electrified trams on underground tracks, Wilgus wrote that "from the air would be taken wealth with which to finance obligatory vast changes otherwise non-productive." Wilgus estimated that revenue-producing income from structures above the terminal tracks would produce an annual return of more than 3 percent, or \$1,290,000 on the entire cost of the project. He was correct in his assessment. Ultimately the city blocks situated on top of this vast transportation complex were developed through Wilgus's air-rights concept and did have the kind of financial return he had hoped for.⁷⁶

Wilgus's analytical abilities as an engineer transcended mathematics, physics, and chemistry. He saw deep, unrealized, and practical value in his plans. In a subsequent letter to Newman dated March 19, 1903, he discusses "a portfolio of suggested preliminary plans" with an insight regarding the financial benefit of his vision:

These plans have been prepared with the object as outlined in my letter to you of December 22, 1902, of affording the Railroad Company a suitable terminal and also to so utilize our valuable real estate as to earn an income sufficient to pay the interest, not only on the cost of the terminal itself, but also on the other improvements in New York City and vicinity, including our electrification schemes.⁷⁷

On September 30, 1906, Wilgus led a train with the new electric engine that he hoped would be the model for electric train service. The test run occurred after a battery of tests to prove that electric traction was safe. "Prior to the electrification of Grand Central, no railroad had used electric traction to power heavy trains at high speeds for long distances."⁷⁸

Wilgus's test run occurred from Woodlawn in the Bronx to Grand Central. New York Central officials, General Electric officials, and observers from other railroads joined.⁷⁹ Wilgus accelerated over a 1,000-foot gap in the third rail that began at 56th Street.⁸⁰

On February 15, 1907, the New York Central debuted a new electric train for passengers in the Harlem Division. It was an express train to White Plains with a daily departure at 6:15 p.m. On February 16th, New York Central faced its second deadly accident in five years, when the new train "[r]ounded a curve at 205th Street and flew off the tracks. At least twenty people died instantly and more than 150 more received injuries, many serious. Rescue workers desperately searched for survivors as hundreds of onlookers gathered to stare at the wreckage, which stretched along the tracks for over a mile."⁸¹

The accident created a question mark concerning the fault of the accident. Despite tests with successful results, the Woodlawn accident caused an immediate reaction of investigation. "When the electric engine was being tested, the engineers reported a problem called nosing and that was the tendency of a very heavy locomotive to push the rails apart. The train literally goes off the tracks because the tracks are being destroyed by the weight of the engine. General Electric and the railroad felt that they had solved the problem."⁸²

A month before the Woodlawn disaster, Wilgus took a break. In January 1907, he asked the New York Central powers that be for a one-month vacation for "health reasons." The board of directors granted the request. It also acknowledged his deep value to the railroad by in-

creasing his salary to \$40,000 from \$35,000. With financial recognition from the boardroom, an extended vacation request granted, and a seemingly successful future in sight, "Wilgus left for the southwestern United States for a much needed rest, as the Central steadily and rapidly added electric service."⁸³

The Woodlawn accident instantly transformed Wilgus from valuable asset to extraordinary liability, genius to ignorant, savior to target.

The Engineer

The powers that be sacrificed Wilgus after Assistant District Attorney Smyth targeted him publicly. "To make matters worse, William Newman, president of the New York Central, and vice president and general manager A. H. Smith, appearing before the State Railroad Commission the very next day after District Attorney Smyth's damning statement, both placed blame on Wilgus."⁸⁴

With his vision, reputation, and design at stake, Wilgus took a proactive stance matched by an unyielding passion to enlighten doubters, critics, and naysayers about his engineering strategy.

Wilgus finally testified before the coroner's jury and mounted a vigorous defense. In his testimony Wilgus defended the design of the new electric engines and the exhaustive testing that had been undertaken by the railroad and the manufacturer before the first electric engines entered service [to replace steam engines].⁸⁵

Wilgus found his defensive effort rewarded. "[S]uspicion shifted to other possible causes for the wreck."⁸⁶ He wanted clarity on the record. "Angry, Wilgus wrote a ten-page defense of his actions and sent it to the New York Central's Senior Vice President [W.C. Brown]."⁸⁷ Wilgus's ace in the hole distressed the powers that be at the New York Central & Hudson River Railroad.

The problem is the District Attorney is investigating this rail accident. Documents will be subpoenaed and if this particular memo gets out in the public, it's gonna cause an uproar. And so Wilgus gets a visit from the Chief Legal Counsel of the railroad and the legal counsel says to Wilgus, "You have to destroy this memo. This is too dangerous. This is the smoking gun."⁸⁸

Wilgus succumbs. "Under pressure from the railroad, Wilgus reluctantly destroyed his memo."⁸⁹ Despite Wilgus's testimony, doubt remained concerning the cause of the wreck. The railroad redesigned its train engine, "putting four-wheel trucks on the front and rear to evenly

distribute weight [and] they didn't even bother to tell their chief engineer."⁹⁰

Wilgus faced the reality that his former employer did not place high value on his testimony, account of events, or design. His frustration led to action.

The redesign is an admission that the original design of the electric engine with all the weight on the driving wheels was the original cause of the Woodlawn wreck. Wilgus takes that personally and, in retaliation, what Wilgus does is he goes back and he reconstructs all of his notes and files about all of this controversy surrounding the design of the electric engines. It's his guarantee that the Central won't go after his reputation and the Central knows that he has those materials.⁹¹

Decades later, Wilgus meticulously documented his landmark achievement further.

Almost thirty years after the Woodlawn wreck, Wilgus assembled an exhaustive file of material (more than five hundred typed pages) concerning the accident and the ensuing conflict among the railroad's executives. He placed the file among his papers, given to the New York Public Library, and left instructions that, until his death, no one could examine the file without permission.⁹²

Wilgus resigned on July 11, 1907, with the resignation being effective on September 30, 1907. "A proud individual at the height of his professional career, Wilgus could not stay on after the challenge to his professional competence and authority as an engineer. Rather than continuing to work for the New York Central and have his integrity questioned further, he resigned."⁹³

Wilgus's decision to leave the company after the Woodlawn disaster inspired W.C. Brown, Senior Vice President in charge of all departments, to write a heartfelt letter.

I am nearly fifty-four years of age, and within three years at the outside of retiring permanently from railroad work—too old to say anything I do not mean, or mean anything I do not say.

I regret more than I can express the chain of circumstances which has led up to your determination to sever your connection with the company, and yet I know you are wise in your decision.

The great work undertaken and practically completed by you, of changing the power within the so-called electric zone and the reconstruction of the Grand Central Station, was the most stupendous work of engineering I have ever known;

and it has gone forward practically without a halt, certainly without a failure in any essential feature, and such imperfections as experience has developed have been corrected without material change in your original plans.

In my experience of nearly forty years, I have known of no other engineer whom I feel could have accomplished what you have, or to whom I would have felt justified in recommending entrusting this great work.⁹⁴

W.H. Newman also recognized Wilgus's transcendent efforts to build Grand Central Terminal. In 1912, as the terminal approached completion, Newman responded to a letter from Wilgus. "I am greatly pleased to receive your letter this morning. I have regretted many times that I haven't had opportunity to see more of you and tell you what is being done here with what you started; and, in laying the foundation, did so much to make it come out even better than we anticipated."⁹⁵

In addition, the press noted Wilgus's achievement. On March 6, 1913, *The Wall Street Journal* highlighted Wilgus invaluable contribution.

Ninety-nine out of every hundred persons who throng into and out of the new Grand Central Terminal marvel at its size and at its architectural beauties, but to men of technical knowledge it is neither size nor appearance that make it marvelous. To them the terminal is remarkable as the place where a new economic era in the handling of great passenger traffic began, through the discovery of a "by-product of electrification" beside which the direct operating advantages of electric propulsion on trunk lines are insignificant. As long as the railroads were compelled to preserve free air spaces over the entire train platform areas, for the dissipation of smoke and gases. The moment that electric power was, for other reasons, substituted for steam, the whole space in a terminal above the roofs of the entering and departing cars became available for all manner of other uses.

From this simple principle was evolved the revolutionary plan of the New York Central management to make the great New York terminal earn its own living. And the man who first pointed out to Mr. Vanderbilt and his fellow directors the economic transformation of terminals worked by electrification was W.J. Wilgus, the former vice-president of

the Central, under whose direction the engineering problems were worked out to solution.⁹⁶

Wilgus received accolades from the railroad industry in later decades. Railroad executive Charles Hine noted Wilgus's achievement in a letter to Wilgus:

The clipping from the New York Times of November 17, 1926, "The Grand Central, The Real Originator of the Idea of the Terminal," both Mr. Edward J. Pearson and I have read with keen and appreciative interest.

The Grand Central Terminal is but one of numerous outstanding evidences of the rare vision, steadfast courage, practical common sense, and fine integrity of purpose which have made so noteworthy your professional career as a great engineer. This is monumental. Your conception of the organization, correlation and construction of the Railway Transport of the American Expeditionary Forces in France during the World War was epoch making.

I shall miss no proper opportunity either during or after your life to register and record appreciation of your great achievements and high standards of ethics.⁹⁷

Wilgus's peers in the railroad community also corrected the record that initially overlooked Wilgus's place in Grand Central Terminal's conception. One example occurred in Webb Waldron's article *Grand Central* in the November issue of *Century*.

On December 10, 1926, Lewis B. Stillwell, a consulting engineer, wrote a letter to the *Engineering News-Record* to clarify Waldron's misstatements. Stillwell cites Waldron's statement, "Whose idea was this, this gorgeous idea of renting out the roof of a railroad yard? 'It was Bill Newman's idea! one New York Central man told me. Another said, 'Ira Place thought it out.', but nothing is clearer than it was no one man's idea; it just grew."

Stillwell's passion to credit Wilgus is evident, if not overpowering.

Obviously, the man who had the imagination to conceive and the courage and skill to accomplish the great engineering work which has produced the terminal as it now stands, converted many blocks of waste space North of Park Avenue into sites for scores of splendid apartment houses and other buildings to the enormous [sic] increase of suburban residence territory should receive due credit, and

when careless writers, either for the press or for more dignified periodicals, deprive him of that credit by ascribing it to others, great injustice is done.⁹⁸

In at least one instance, Wilgus reached out to a friend in the railroad industry for support. He wrote to Percy R. Todd, President, Bangor & Aroostook Railroad Company about Waldron's article. "This author, on having his errors called to his attention, responded that there is no practical means by which the "Century" can be brought to make a correction."⁹⁹

Wilgus requested that Todd go on the record to establish the proper credit for Grand Central Terminal.

You and I have been friends for considerably over a quarter of a century, during which you have personally known of my work, and in particular of what I went through from 1899 nearly to 1908, in the inception of the Grand Central development, the key-note of which is the utilization of the "air-rights" as a financial justification for the revolutionary change, and in the execution of the work until its success was demonstrated.

I know that it is asking a great deal, but nevertheless I am going so far as to say that I would indeed be appreciative if you can see your way clear to writing a letter to the *Railway Age*, through which the railroad world will learn the facts. It would be painful to me to have anything there appear of a fulsome nature, but something that will state the bare facts would make my records straight. If, however, for any reason you would not care to do this, please be assured that I will understand and in no way feel badly because of it.¹⁰⁰

In a letter published in the December 11, 1926 issue of *Railway Age*, Todd explains his source of authority as working in an "official position with the West Shore, part of the New York Central System" when Wilgus first conceived the new Grand Central Terminal.

I know that the original thought of what might be termed "building in the air" came from Col. W.J. Wilgus, at present a consulting engineer in New York City, but at that time chief engineer of both the New York Central and West Shore Railroads and later vice-president of the former.

Naturally I knew intimately W. H. Newman, who at that time was president of

the New York Central and West Shore, and I know that he was rather startled by the extent of Mr. Wilgus's conceptions for the future and inclined rather strongly to oppose them but was brought around by Mr. Wilgus's views, which have been so amply justified in the nearly quarter of a century that has elapsed since he first conceived what the future results would be if his ideas were followed.

I am writing this to you because I remember some time ago there was an article in the *Railway Age* which as I recall it not only failed to mention Col. Wilgus as the originator of this plan but also rather intimated that no one conceived in 1901 or imagined the growth that would follow the building of the Grand Central Terminal or the great results that would follow therefrom and because I feel that unintentionally credit has not been placed for this conception where it belongs.¹⁰¹

The Terminal

Grand Central Terminal debuted on February 2, 1913. "By day's end, over 150,000 New Yorkers from every corner of the city had come to gaze at their newest monument."¹⁰²

Wilgus's contribution, though legendary in engineering circles, remained restricted to engineering. "He never claimed any credit for the architectural design of the terminal building itself; a brilliant engineer, Wilgus had no training or expertise as an architect. In turn, Wilgus attributed to Reed and Stem the idea for the elevated roadway around the building and the arched bridge carrying Park Avenue over 42nd Street."¹⁰³

Grand Central Terminal stood as an emblem of artistic excellence, an example of engineering breakthroughs, and a memorial to the financial lifeblood of American industry.

[It was] an attempt to offer a tribute to the glory of commerce as exemplified by [the New York Central]...the whole to stand as a monument to the glory of commerce as typified by Mercury, supported by moral and mental energy—Hercules and Minerva. All to attest that this great enterprise has grown and exists, not merely from the wealth expended, nor by the revenue derived, but by the brain and brawn constantly concentrated upon its development for nearly a century.¹⁰⁴

An architectural competition decided the Terminal's design team. Four entrants vied for the coveted slot—

Daniel H. Burnham & Company of Chicago, McKim, Mead & White of New York City, Samuel Huckle, Jr. of Philadelphia, and Reed & Stem from St. Paul, Minnesota. Burnham designed the Flatiron Building in New York City and Union Station in Washington, D.C. McKim, Mead & White designed Pennsylvania Station. Huckle knew Grand Central Terminal from his experience working with Wilgus on renovating the terminal's interior in 1900. Reed & Stem had experience designing stations with another connection to Wilgus—Wilgus was married to Charles Reed's sister, May.¹⁰⁵

Reed & Stem won.

Charles Reed's scheme created a design that expounded upon Wilgus's vision. It was an ambitious approach that combined a number of radical ideas into one package. Reed proposed an elevated roadway that ran around the circumference of the Terminal with sloping ramps seamlessly connecting its various levels. On the north side of the building he designed a vast "Court of Honor" above Park Avenue that would house the National Academy of Design and the Metropolitan Opera. The design's classical architecture and uniform building heights clearly showed the powerful influence of both Burnham and the Beaux Arts principles. Reed's plan also responded to Wilgus's remarkable concept of the full electrification of the trains and station operations. In its scheme Reed & Stem designed a brilliant way of moving vast numbers of people through the Terminal by means of broad, sloping ramps, a design feature unlike any of the other competition entries. This system of ramps effortlessly moved people to and from platforms, a motion that was focused around Reed's central space, the Main Concourse.¹⁰⁶

Reed & Stem did not fully realize its vision because of influence enjoyed by a Vanderbilt family connection. William K. Vanderbilt added Whitney Warren of the Warren & Wetmore firm to the architectural design team in 1904.

Whitney Warren is credited as Chief Architect of Grand Central Terminal. "Whitney Warren was a classicist. An aesthete. Someone who traveled within the highest rungs of New York society. He was also the kind of man that had no problem pushing aside the other architects originally hired to design Grand Central."¹⁰⁷

Artistic differences created conflict. "The two firms had no alternative but to find a way to work more closely together and they set about revising the designs. By 1910,

their jointly prepared drawings represented the building as it was built over the next few years."¹⁰⁸

When Charles Reed died in 1911, Warren & Wetmore saw a window of opportunity.

Shortly after the funeral, Whitney Warren and his partner Charles Wetmore began legal proceedings for their firm to take over the entire project. Allen Stem was totally unaware of these proceedings, which nullified the Associated Architects agreement. The remainder of the project was solely in the hands of Warren & Wetmore. When the building was complete, a decade after it began construction, only one firm's name, Warren & Wetmore, was publicly recognized as the building's architect. Reed's surviving partner, Allen Stem, sued for Reed & Stem's fair share of the fees jointly earned by both firms. Years passed before the legal case was settled; Warren & Wetmore eventually paid Stem & Reed's estate close to half a million dollars.¹⁰⁹

Despite the conflict, the joining of battling architectural forces resulted in a unified design for the ages. "As historians of Grand Central have noted on numerous occasions, it would not have become such a fine building if it had come from the hand of only one of these two very talented, strong-willed architects."¹¹⁰

Consequently, Grand Central Terminal stands as more than a transportation hub. It is a shining example of artistic achievement meeting practical yet massive needs. Its utility is invaluable. Its design, awe-inspiring. "It is a place that's perfect balance. A kind of dance of space, a dance of structure. Architecture reflects a level of intuition. It reflects a level of culture, of grace and stamina and beauty and confidence. That's quite a remarkable thing to have a building accomplish."¹¹¹

In proximity to Grand Central Terminal stood concrete examples of the air rights exploitation envisioned by William Wilgus in 1902.

Over the underground tracks rose world-class hotels—the Biltmore, the Commodore, the Roosevelt—and office buildings—the Graybar and the New York Central building. In addition the air rights included special-purpose buildings—Grand Central Palace, the Yale Club, and the U.S. Post Office—and stately rows of apartment buildings of the highest class along Park and Lexington avenues as far north as 50th Street and along Madison Avenue and Vander-

bilt Avenue as far north as 48th Street and 49th Street, respectively.¹¹²

Development thrived in Grand Central Terminal's immediate environs. It established the Terminal as a focal point for this area named in honor of the Terminal itself.

The term "Grand Central" no longer designates a mere railroad station, but a large and impressive civic center. The story of its development in the last twenty years is a romance.... The terminal area itself, because of its attractiveness, has become the heart of still greater development, radiating from it in every direction. In fact the whole surrounding neighborhood now goes by the name of the Grand Central District, and is one of the chief business centers of the metropolis.¹¹³

Grand Central Terminal instantly impacted travelers, vacationers, and commuters. It captured their imagination. It matched the city's magnificence. And it met the massive travel demands imposed by a city increasing in population, power, and stature.

[T]he new Grand Central completely transformed the experience of entering New York. A traveler who arrived at the Incoming Station and the Grand Concourse entered a secular cathedral; passengers knew, without any doubt, that they had arrived in a special place. The Grand Concourse enclosed the largest interior space in the country and served as the focal point of the railroad's magnificent contribution to the newly vitalized midtown business district. The daily commuters from the city's northern suburbs enjoyed their own concourse on the suburban level. While not as monumental as the space directly above, the suburban concourse provided a vast improvement over the facilities it replaced.¹¹⁴

The focus of Grand Central Terminal is the main concourse. It is a meeting place, an information center, and a pedestrian thoroughfare for passengers departing trains or walking to platforms for their respective train arrivals. "The main concourse, with its jewel-encrusted clock, is Grand Central's Town Square."¹¹⁵

As decades passed, technology breakthroughs threatened the railroad industry. Automobile travel became accessible because of President Eisenhower's Interstate Highway System linking states together.¹¹⁶ Airplane travel proved faster than railroad travel. And Grand Central Terminal suffered along with other once dominant forces of the railroad industry.

In 1968, two railroad Goliaths confronted their ongoing financial struggle with a transaction bringing them together—the Pennsylvania and New York Central railroads. The new entity created by the merger—Penn Central Transportation Company—also suffered. It filed for bankruptcy on June 22, 1970.¹¹⁷

The Case

Laws protecting landmarks honor historical, artistic, or environmental value with concrete, viable, and regulatory strength. Pennsylvania Central Transportation Company tested this strength in the United States Supreme Court—*Penn Central Transportation Company et al. v. New York City et al.*¹¹⁸

Pennsylvania Central owned Grand Central Terminal during a time of economic challenge, hardship, and despair—the 1970s. It developed plans to build on top of the Terminal, and it consequently argued that New York City’s application of its Landmarks Preservation Law amounted to an unconstitutional taking.

The taking clause falls under the Fifth Amendment, codifies the protection of private property, and forbids the United States government from taking private property without “just compensation.”¹¹⁹

New York City’s Landmarks Preservation Law¹²⁰ had the strength of public policy. The New York General Municipal Law giving rise to the landmarks statute explained the reasoning. “It declares that it is the public policy of the State of New York to preserve structures and areas with special historical or aesthetic interest or value and authorizes local governments to impose reasonable restrictions to perpetuate such structures and areas.”¹²¹

The Landmarks Preservation Commission granted landmark status to Grand Central Terminal on August 2, 1967 after a public hearing.¹²² It also gave “landmark site” status to the “city tax block” occupied by Grand Central Terminal.¹²³ “The Board of Estimate confirmed this action on September 21, 1967. Although appellant Penn Central had opposed the designation before the Commission, it did not seek judicial review of the final designation decision.”¹²⁴

Almost exactly four months later, Penn Central negotiated its rights to Grand Central Terminal in a real estate deal. On January 22, 1968, it “entered into a renewable 50-year lease and sublease agreement with appellant UGP Properties, Inc. (UGP), a wholly owned subsidiary of Union General Properties, Ltd., a United Kingdom corporation.”¹²⁵

The deal called for UGP to build a multistory office building above Grand Central Terminal and pay Penn Central \$1 million per year during construction and \$3 million per year after construction finished. The new construction would remove some concessionaires and trigger a loss of \$700,000 to \$1 million in net rentals.¹²⁶

Marcel Breuer designed two plans. Breuer I was a “55-story office building, to be cantilevered above the existing facade and to rest on the roof of the Terminal.”¹²⁷ Breuer II required “[t]earing down a portion of the Terminal that included the 42d Street facade, stripping off some of the remaining features of the Terminal’s facade, and constructing a 53-story office building.”¹²⁸

The Landmarks Preservation Commission rejected both Breuer proposals. “To protect a Landmark, one does not tear it down. To perpetuate its architectural features, one does not strip them off.”¹²⁹

UGP and Penn Central argued that its plan for a 55-story office building would have a minimal impact on Grand Central Terminal.

[T]he Pan-American Building had already destroyed the silhouette of the south facade and that one additional tower could do no further damage and might even provide a better background for the facade, the Commission disagreed, stating that it found the majestic approach from the south to be still unique in the city and that a 55-story tower atop the Terminal would be far more detrimental to its south facade than the Pan-American Building 375 feet away.

Moreover, the Commission found that from closer vantage points the Pan-American Building and the other towers were largely cut off from view, which would not be the case of the mass on top of the Terminal planned under Breuer I.¹³⁰

The Landmarks Preservation Commission acknowledged the vagaries of a landmark analysis but applied a simple calculus rooted in artistic instinct to figure the impact of allowing either of the Breuer plans to succeed.

[We have] no fixed rule against making additions to designated buildings—it all depends on how they are done.... But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The “addition” would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.

Landmarks cannot be divorced from their settings—particularly when the setting is a dramatic and integral part of the original concept. The Terminal, in its setting, is a great example of urban design. Such examples are not so plentiful in New

York City that we can afford to lose any of the few we have. And we must preserve them in a meaningful way—with alterations and additions of such character, scale, materials and mass as will protect, enhance and perpetuate the original design rather than overwhelm it.¹³¹

The genesis of *Penn Central Transportation Company v. New York City* began when Penn Central requested a declaratory judgment and an injunction in New York Supreme Court to stop New York City and the Landmarks Preservation Commission from enforcing the Landmarks Preservation Law.

Justice Irving H. Saypol granted Penn Central's request. He favored economic reality over architectural heritage and dismissed the power, protection, and notoriety consistent with a landmark status.

When Justice Saypol handed down his opinion in January 1975, he invalidated the landmark designation of Grand Central. Though he did not question the constitutionality of the city's landmark law, he did question New York City's preventing a now-bankrupt Penn Central from earning income from the office tower addition. He determined that the landmark designation of this "long neglected faded beauty" had placed an economic hardship on the owner, who went bankrupt in 1970 but had begun the process to build in 1968 when there was a favorable office market in the Grand Central area. He also stated that the transfer of development rights of the amended zoning did not provide the railroad and the developer with commensurate compensation or minimize harm to them. The ground rent required of UGP Properties by Penn Central for a lease of the Biltmore site was \$2 million more a year than the Terminal lease. Rents from an office building there would be significantly lower than at the Terminal site, which Saypol noted as a "superior location." Saypol's ruling that there was an unconstitutional taking of private property for public use without just compensation to the plaintiffs gave Penn Central the right to build either of Breuer's schemes or to demolish the Terminal in its entirety. The question of damages was severed, pending the appeal.¹³²

UGP and Penn Central argued, "[i]nter alia, that the application of the Landmarks Preservation Law had 'taken' their property without just compensation in violation

of the Fifth and Fourteenth Amendments and arbitrarily deprived them of their property without due process of law in violation of the Fourteenth Amendment."¹³³ UGP and Penn Central obtained the injunction and declaratory judgments but the trial court "severed the question of damages for a temporary taking."¹³⁴

New York City appealed. The New York Supreme Court, Appellate Division, ruled in favor of New York City because landmark status did not prevent appellants from leveraging the property in other ways than the Breuer plans.¹³⁵ "The Appellate Division held that the restrictions on the development of the Terminal site were necessary to promote the legitimate public purpose of protecting landmarks and therefore that appellants could sustain their constitutional claims only by proof that the regulation deprived them of all reasonable beneficial use of the property."¹³⁶

UGP and Penn Central appealed to the New York Court of Appeals,¹³⁷ which agreed with the lower court. The Court of Appeals analysis relied on the cornerstone of due process and, consequently, dismissed the taking argument "[s]ince the law had not transferred control of the property to the city, but only restricted appellants' exploitation of it."¹³⁸

The Court of Appeals provided a four-prong reasoned analysis.

[T]he landmark regulation permitted the same use as had been made of the Terminal for more than half a century;

[T]he appellants had failed to show that they could not earn a reasonable return on their investment in the Terminal itself;

[E]ven if the Terminal proper could never operate at a reasonable profit, some of the income from Penn Central's extensive real estate holdings in the area, which include hotels and office buildings, must realistically be imputed to the Terminal; and

[T]he development rights above the Terminal, which had been made transferable to numerous sites in the vicinity of the Terminal, one or two of which were suitable for the construction of office buildings, were valuable to appellants and provided significant, perhaps "fair" compensation for the loss of rights above the terminal itself.¹³⁹

UGP and Penn Central appealed to the United States Supreme Court. The Court admitted that cases centering on Fifth Amendment taking arguments rely on the circumstances of each case while clarifying common

threads. “In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations.”¹⁴⁰

The Supreme Court also identified the type, extent, and character of the government action involved as an important factor. “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government,¹⁴¹ than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.”¹⁴²

The Court also acknowledged the necessary inconvenience, nuisance, and value decrease caused by government action. “Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,¹⁴³ and this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.”¹⁴⁴

The Court endorsed the view that a taking can occur even though the government does not physically take control over a site. From the viewpoint of UGP and Penn Central, the Landmarks Preservation Law “took” property by preventing development on top of Grand Central Terminal. Under this argument, the government need not take physical possession of property to take property without just compensation and, consequently, violate the taking clause of the United States Constitution.

Ultimately, however, the Court decided that New York City’s actions did not constitute a taking.

The Court also followed its precedential tradition of acknowledging intangible benefits created upon the selection of certain sites as off-limits: “More importantly for the present case, in instances in which a state tribunal reasonably concluded that ‘the health, safety, morals, or general welfare’ would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected real property interests.”¹⁴⁵

UGP and Penn Central acknowledged the purpose of New York City’s Landmark Preservation Law. The Court stated that, “[p]reserving structures and areas with special historic, architectural, or cultural significance is an entirely permissible goal. [UGP and Penn Central] also do not dispute that the restrictions imposed on its parcel are appropriate means of securing the purposes of the New York City law.”¹⁴⁶

The Court summarized its paradigm for analyzing the actions at issue. “In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the ‘landmark site.’”¹⁴⁷

UGP and Penn Central failed in its argument that New York City’s Landmark Preservation Law deserves special treatment.

Appellants, moreover, also do not dispute that a showing of diminution in property value would not establish a “taking” if the restriction had been imposed as a result of historic-district legislation,¹⁴⁸ but appellants argue that New York City’s regulation of individual landmarks is fundamentally different from zoning or from historic-district legislation because the controls imposed by New York City’s law apply only to individuals who own selected properties.

Stated baldly, appellants’ position appears to be that the only means of ensuring that selected owners are not singled out to endure financial hardship for no reason is to hold that any restriction imposed on individual landmarks pursuant to the New York City scheme is a “taking” requiring the payment of “just compensation.” Agreement with this argument would, of course, invalidate not just New York City’s law, but all comparable landmark legislation in the Nation. We find no merit in it.¹⁴⁹

Indeed, the United States Supreme Court refused to obliterate New York City’s legal mechanism to protect architectural heritage. The challenge to Grand Central Terminal’s visible place in the history of the metropolis risked reducing the Terminal to an underdeveloped site instead of an overpowering symbol of engineering excellence. The Court’s decision favored history over expansion while emphasizing a multi-pronged benefit.

Unless we are to reject the judgment of the New York City Council that the preservation of landmarks benefits all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole—which we are unwilling to do—we cannot conclude that the owners of the Terminal have in no sense been benefited by the Landmarks Law.¹⁵⁰

The Court then analyzed the taking argument presented by UGP and Penn Central. Surely, a taking requires governmental interference. But UGP and Penn Central did not suffer an abrogation of use.

[T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel. More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a "reasonable return" on its investment.¹⁵¹

The Court also pointed out the fallacy of the appellants' all-or-nothing argument regarding air rights: "The Commission's report emphasized that whether any construction would be allowed depended upon whether the proposed addition 'would harmonize in scale, material, and character with the Terminal.'"¹⁵²

Additionally, UGP and Penn Central could transfer their air rights to other properties in the vicinity of Grand Central Terminal.¹⁵³ "The restrictions imposed are substantially related to the promotion of the general welfare and not only permit reasonable beneficial use of the landmark site but also afford appellants opportunities further to enhance not only the Terminal site proper but also other properties."¹⁵⁴

The United States Supreme Court's decision in the *Penn Central* case saved an architectural, urban, and transportation icon. Edward Koch, Mayor of New York City at the time of the decision, emphasizes the case's consequence. "It established the validity of the landmark law and made certain that we would, for the most part, keep our architectural inheritance intact."¹⁵⁵

The Restoration

While Grand Central Terminal balanced for survival on a steep decline in the mid-1970s, it stood in the dark shadow of its gloried, storied, and increasingly distant past. While the *Penn Central* case put an end to revisionist plans, the Terminal's fading artistic elegance compounded a romantic ideal of railroad travel existing only in memory.

Previously, the New York Central Railroad considered options to replace the midtown Manhattan gateway. Ar-

chitect Alfred Fellheimer advocated destruction in favor of progress.

We carefully weighed our own pride in the present building and its emotional and esthetic significance to people all over the world. Our reluctant but firm conclusion is that neither pride nor reverence should be permitted to clot the vitality of a great metropolis. In turn, that very vitality may guarantee that if one expression of human aspirations must be destroyed in the process of growth, it will be replaced by an even greater one.¹⁵⁶

The Fellheimer and Wagner firm designed a 55-story skyscraper to replace the Terminal. It included a heliport, 2,400-car garage, restaurants, and retail space. I.M. Pei designed a 108-story skyscraper named "Hyperboloid" with 4.8 million square feet.¹⁵⁷

Developer Erwin Wolfson changed gears after promoting the plans of Fellheimer and Wagner. He selected Emery Roth & Sons for a new approach. The firm designed Grand Central City. Wolfson added new members to the team—Walter Gropius and Pietro Belluschi. Ultimately, the finished project replaced the six-story Grand Central office and baggage building. Initially known as the Pan Am building, today it is the Met Life building.¹⁵⁸

The building blocked the vista of Park Avenue facing north. On the west side of Manhattan, Grand Central's fraternal railroad twin—Pennsylvania Station—faced its own decline, obsolescence, and consequent destruction, figuratively if not veritably. Once upon an era dominated by railroad travel, Pennsylvania Station enjoyed a paragon status. It symbolized New York City's vitality, energy, and romance. Its vaulted position ended with a new development for a 33-story skyscraper and the fourth incarnation of Madison Square Garden.¹⁵⁹ They replaced Penn Station along with a "cramped and architecturally bland station" to service travelers.¹⁶⁰ "Designed by McKim, Mead & White, this nine-acre site composed of travertine and granite, 84 Doric columns, and a vaulted concourse was breathless in its monumentality."¹⁶¹

Penn Station's demise as an architectural icon and the announcement of the new Madison Square Garden preceded legislation created to protect historic works. On April 19, 1965, Mayor Robert Wagner gave the city's architectural and artistic heritage a legal backing when he signed the New York City Landmarks Preservation Law.

The fate of Penn Station threatened Grand Central Terminal when UGP and Penn Central challenged the Landmarks Preservation Law in New York Supreme Court by requesting an injunction.

Grand Central Terminal received a boost when the Municipal Art Society, an organization dating back to before the turn of the 20th century, formed the Committee to Save Grand Central Station. A rescue to bring Grand Central Terminal from the shadows to the sunshine required a larger-than-life figure to represent the magnitude of a restoration. Enter a heroine—Jacqueline Kennedy Onassis, the model of elegance, grace, and cosmopolitan living.

A story in *The New York Times* the day after Judge Saypol's ruling inspired Onassis. She did not merely use her name for the letterhead, though—she became involved at the grass-roots level. A presidential widow whose image of grace, fashion, and worldliness drew attention to, prevent extinction of, and restore distinction to Grand Central Terminal.

There we were, just the two of us in this small office answering the phones when a soft spoken voice at the other end of the line said she'd like to speak with Kent Barwick. She said she had read the article in the *Times* and wanted to get involved. I asked her for her name and she replied, "Jacqueline Kennedy Onassis." I thought it was a joke. I told Kent there was a woman on the phone who claimed to be Jackie Onassis and should I take a message, to which he replied "no, I'll take the call." And it really was Jackie. Kent told her that if she wanted to get involved she should join our citizens' committee. Not only did she join the committee but she called and wrote Mayor Beame to convince him to file the city's appeal. She went to the press conferences, breakfasts, whatever the event, she was there, and when she spoke it made a difference.¹⁶²

Onassis attempted to soothe those who thought Grand Central Terminal's destiny prevented its rescue. "If we don't care about our past we can't have very much hope for our future. And we've all heard that it's too late or that it has to happen or that it's inevitable. But I don't think that's true."¹⁶³

Former New York City Mayor Edward I. Koch, then a Congressman from the 18th District of New York, joined the fight to save Grand Central Terminal. He put the Terminal on equal artistic ground with creations by a legendary artist. "This had to be saved from the wrecker's ball. There were people who wanted to destroy it. You know, when you think of it, it's like destroying a work of art by Michelangelo."¹⁶⁴

The passion to save Grand Central Terminal poised the landmark for a restoration. Once admired, this transportation colossus needed creative, political, and architectural forces to ignore the naysayers, avert the critics,

and dismiss the seemingly inevitable destruction. Onassis placed the artistic wonder of Grand Central Terminal in a societal perspective.

Great civilizations of the past recognized that their citizens had aesthetic needs, that great architecture gave nobility and respite to their daily lives. They built fine buildings, spacious parks, beautiful markets. Their places of assembly, worship, ceremony, or arrival and departure were not merely functional but spoke to the dignity of man.¹⁶⁵

The United States Supreme Court's ruling in the *Penn Central* case gave legal credence to the supporters of Grand Central Terminal. A judicial ruling could not alone restore the Terminal, however. A restoration required a massive investment of time, effort, and financial resources. In 1978, Grand Central Terminal found a new manager willing to make that investment—New York State's Metropolitan Transportation Authority (MTA). On January 1, 1983, the MTA began operations of the Metro-North Commuter Railroad. Metro-North operated the Terminal's three regional lines.¹⁶⁶

While Metro-North desired a restoration, it required a master plan. "The purpose of the master plan would be to describe a vision for the building's future—a road map describing the problems, how to solve them, what the costs would be, how to use funding as it became available, and what potential strategies could be explored for securing the Terminal's future."¹⁶⁷

Every battle plan needs a general to manage, master, and execute it. Here, the task fell to the architectural firm Beyer Blinder Belle. It designed the master plan and built a restoration team to participate in the extensive restoration. "Carefully assembled to represent all of the restoration, design, and engineering skills needed, the consortium consisted of fourteen professional firms."¹⁶⁸

Beyer Blinder Belle took a highly visible first step in announcing a change. It was not in the form of a press release, press conference, or public service announcement. Rather, it was a bold move, simple yet symbolic of the revolution about to happen. Beyer Blinder Belle let the sun shine in by removing a lucrative billboard blocking the windows.

Metro-North (as the client) and the restoration team knew that in order to capture public support something needed to be visible to the Terminal's everyday users as soon as possible. We needed something that would have a big impact but not cost big construction dollars. Preparing and implementing the master plan would be very time-consuming with no

immediately visible signs of change until the process was well under way.

We concluded that with one preemptive strike, it would be relatively simple and inexpensive to show the public something of the real Grand Central by dismantling the Kodak sign. The challenge from Stangl's point of view was that Kodak paid about \$450,000 to Metro-North Railroad for the privilege of beaming down the larger-than-life images of sailboats and family gatherings. So when the sign's dismantling was discussed as a strategy Stangl knew this would be more than a symbolic gesture. Relinquishing such large advertising dollars, the railroad would signal a real commitment to the citizens who had fought so hard to save the building. Stangl gave his consent and the dismantling began.¹⁶⁹

Restoring Grand Central Terminal, or any landmark, to its previous state of grandeur, respect, and glory demands education about the site's history. Fortunately, the architects, engineers, and restoration experts involved in the project found a terrific treasure trove in Manhattan.

Through searching the archives in the Plan Room and other sources such as Columbia University's Avery Library, the New York Historical Society, the New York Public Library, and the files and records of the railroad companies, a great deal of information was revealed. In the Plan Room we discovered approximately 18,000 drawings, including the original Warren & Wetmore ink-on-linen drawings. We inspected this vast collection and selected about 2,000 drawings with sufficiently useful information that we copied and placed into our computer files.¹⁷⁰

While the research revealed invaluable information, it also presented a challenge. The restoration team strived to restore a magnum opus of urban architecture according to the ideas of the original creators, designers, and builders while remaining sensitive to the needs of modernity.

The more research we did, the more apparent it became that in order to bring the building back to its original glory we would have to combine the architects' original vision with the needs of a railroad for the twenty-first century. What made Grand Central such an extraordinary building originally still held true. It was and is a "mixing valve" of receiving

and dispersing huge numbers of people every day in a pattern of clear circulation paths in all directions—both horizontally and vertically. Because of this clear circulation system of ramps, stairs, and elevated roadways there were no collisions and no confusion.¹⁷¹

The restoration team not only restored Grand Central Terminal's allure, grandeur, and elegance, it also completed a vision of the original architect.

At Grand Central, our careful researching of all available sources uncovered an original drawing by Warren & Wetmore showing a plan view of the stair originally designed for the East Balcony. With it we could demonstrate to our colleagues on the city and state historic commissions that the idea of such a staircase was not an ego-driven ploy to have our personal imprint on the building, but that in fact our goal was to complete the original design. Why would we turn away from giving the building back the one missing element to Warren's intended symmetry?¹⁷²

To meet its underlying challenge of restoring Grand Central Terminal to its former greatness, the restoration team approached its formidable task with the heart of the Terminal's glory in mind—the public. Grand Central Terminal reflected ambition, ego, and success, but it still fell under a quasi-democratized ownership.

It encourages movement and yet has a sort of stately dignity at the same time. It's sublime. It reminds of you of the greatness of human ambition. When we build so much beyond what we have to and we do it not to glorify a king, say with, as in a palace or something like that, but to glorify everybody. This is a building of extraordinary glory but is public in the deepest sense of the word and belongs to everybody.¹⁷³

Decades of dirt, grime, and pollution presented a massive cleanup job for the restoration team in the cavernous concourse of Grand Central Terminal. "We came up with the idea of using a latex rubber solution which we painted on to the walls and we peeled it off the surface rather like giving a person a facial. And as you peel the rubber latex material off, it took with it all of the grime, and all of the pollution, and all of the dirt that was in the pores of the actual material."¹⁷⁴

The restoration team had the benefit of technology unavailable to the original architects combined with the

challenge of staying true to the original vision. “When the east staircase was unveiled to the public in October 1998, people saw Warren’s original design with a few small changes to the balustrades that in their simple modern details would signal to future visitors that the stair was built eighty-six years after first being designed and using late-twentieth-century technology.”¹⁷⁵

Grand Central Terminal’s restoration stands as an architectural testament to the art of the possible. Deep respect for architectural history resulted in a return to icon status for Grand Central Terminal as it approaches its 100th anniversary in 2013. The rich history of the Terminal reveals more than a monument to architectural, engineering, and transportation excellence—it shows a common thread of passion running strongly through Cornelius Vanderbilt, William Wilgus, Jackie Onassis, and the thousands of workers, power brokers, and advocates who made Grand Central Terminal a reality by building, restoring, and protecting it.

Passion fed Grand Central Terminal through its success, decline, and revival—Vanderbilt’s passion for building a transportation empire, Wilgus’s passion for setting new standards in railroad engineering, and Onassis’s passion for protecting America’s artistic and architectural heritage.

Indeed, passion fuels the continuing endurance of Grand Central Terminal. Its endurance is its triumph.

Endnotes

1. Penn Cent. Transp. Co. et al. v. City of New York et al., 438 U.S. 104 (1978).
2. “The term Beaux-Arts is French for ‘Fine Arts’ and has come to define the architecture that emerged roughly between 1880 and 1930. The advent of Beaux-Arts coincided with similar movements of the time, such as the Progressive Era, the City Beautiful Movement, the Edwardian Era, and the Belle Epoque. Though Beaux-Arts may often be recognized as an architectural style imitating the classic forms of the Ancient and Renaissance worlds, many would argue that it is more of a manner of architectural execution and finish. (Due to this confusion over nomenclature, the word style will be placed in quotations.)
 “One often hears the ‘style’ dubbed the ‘Ecole des Beaux-Arts.’ This denotation actually refers to a school in Paris called the ‘Ecole Nationale Supérieure Des Beaux-Arts.’ This school, formed in 1819, was nothing more than a government-run school of the arts. However, its significance reached far beyond the walls of the school, as the architects trained there would be responsible for the creation of an architectural style/era/manner of execution named after the school.
 “Historically, New York City has always shared connections with Paris. The Huguenots immigrated in the early 17th century, and later, with the French Revolution and rise to power of Napoleon, great Roman Catholic families would also become New Yorkers. As such, French style and culture have always been the aspirations of the upper and middle class city dwellers. And so, what more appropriate architecture could have dominated New York other than Beaux-Arts?
 “Also, during the Beaux-Arts era, New York City was aiming to elevate itself to the same level as other great cities in the world,

such as London and Paris; however, it was competing with cities that had hundreds of years more of established history. Beaux-Arts provided the perfect means to demonstrate that New York was as important as any other city. Great Beaux-Arts banks and skyscrapers would attract investors by showing their stability, while museums, libraries, theaters, and other buildings would validate New York’s established culture.”

Introduction to Beaux-Arts Architecture, New York Architecture—Historic and Contemporary, <http://www.nyc-architecture.com/STYLES/STY-BeauxArts.htm> (last visited Oct. 2, 2010).

3. Telephone Interview with Kurt Schlichting (Sep. 17, 2010). Schlichting holds the E. Gerald Corrigan Endowed Chair at Fairfield University. “It still overwhelms people because of the scale. Whenever you exit a train, you’ve been inside a tunnel. It’s dark in the tunnel. It’s dark around the platform. And then you enter a space that’s monumental. It’s a public space in the midst of the canyons of private real estate. It’s technically private, but it really is a public space. In addition, you cannot see the underground train yard. When people think of Grand Central Terminal, they think of the concourse. They’re not going to the think of the complex that stretches up to 56th Street. You can sometimes get a sense of scale on the upper and lower level. But you still don’t see the train yard.” *Id.*
4. DVD: *American Experience: Grand Central* (PBS television broadcast Feb. 4, 2008) (Paul Goldberger) (on file with author).
 Goldberger is an architecture scholar, historian, and author. He has written several books about architecture in addition to his duties at *The New Yorker*. “[S]ince 1997 he has written the magazine’s celebrated “Sky Line” column. He also holds the Joseph Urban Chair in Design and Architecture at The New School in New York City. He was formerly Dean of the Parsons school of design, a division of The New School. He began his career at *The New York Times*, where in 1984 his architecture criticism was awarded the Pulitzer Prize for Distinguished Criticism, the highest award in journalism.” Paul Goldberger—Biography, [available at http://www.paulgoldberger.com/front/bio](http://www.paulgoldberger.com/front/bio) (last visited Oct. 2, 2010).
5. E-mail from The Honorable Edward I. Koch, Former Mayor of New York City, to author (Sept. 2, 2010) (on file with author). Koch was New York City’s Mayor from 1977 to 1989.
6. *Id.*
7. See T.J. STILES, *THE FIRST TYCOON: THE EPIC LIFE OF CORNELIUS VANDERBILT 118* (Alfred A. Knopf 2009) (citations omitted) (“*The Norfolk Herald* was the first newspaper to give him the honorific title of ‘Commodore.’ At the time, it was the highest rank in the United States Navy, and had been given before to notable steamboat men. The nickname made little impact at the time; though reprinted in New York’s *Journal of Commerce*, it came and went, a passing tribute to Vanderbilt’s aggressiveness. Yet it was also a sign of a change in his disposition.”).
8. *Id.* at 4.
9. *Id.* at 8; see also ADRIEN VAN DER DONCK, *A Description of the New Netherlands*, AM. JOURNEYS, [available at http://www.americanjourneys.org/aj-096/summary/index.asp](http://www.americanjourneys.org/aj-096/summary/index.asp) (last visited Oct. 2, 2010) (“In 1614, Dutch merchants and investors set up the New Netherland Company to exploit riches of the Americas. In 1621, the Dutch government granted its successor, the West India Company, a monopoly on the fur-trade in the area. In 1624, the first permanent settlement was established at Fort Orange. Later, the principal settlement was New Amsterdam (later New York City) at the southern end of Manhattan island, which was purchased from Native Americans in 1626. In 1664, as the result of an Anglo-Dutch war, the Dutch ceded their colony to the English and New Amsterdam became New York.”).
10. STILES, *supra* note 7, at 9.
11. *Id.* at 11.
12. *Id.* at 366.

13. KURT C. SCHLICHTING, *GRAND CENTRAL TERMINAL: RAILROADS, ENGINEERING, AND ARCHITECTURE IN NEW YORK CITY* 11 (The Johns Hopkins U. Press 2001) (quoting 1831 N.Y. Laws p. 323, ch. 263).
14. *Id.* at 12-13 (citing *Detail of Real Estate in the City as of December 31, 1934*, New York Central and Hudson River Railroad Papers, Manuscripts and Archives Division, N.Y. PUB. LIBR., Astor, Lenox and Tilden Foundations, box 74. *Id.* at ch. 1, n.2).
15. WILLIAM SHAKESPEARE, *HAMLET* act 3 sc. 1.
16. STILES, *supra* note 7, at 371.
17. SCHLICHTING, *supra* note 13, at 12.
18. *Id.*
19. *Id.*
20. *Id.* at 13.
21. *Id.*
22. ARTHUR T. VANDERBILT, *FORTUNE'S CHILDREN: THE FALL OF THE HOUSE OF VANDERBILT* 30 (Harper 2001) (1989).
23. Sir Arthur Helps originated the phrase in *Realmah* in 1868, THE PHRASE FINDER, available at <http://www.phrases.org.uk/meanings/261100.html> (last visited Oct. 2, 2010).
24. SCHLICHTING, *supra* note 13, at 13-14.
25. EDWARD J. RENEHAN, JR., *COMMODORE: THE LIFE OF CORNELIUS VANDERBILT* 249 (Basic Books 2007).
26. SCHLICHTING, *supra* note 13, at 14.
27. RENEHAN, *supra* note 25, at 243.
28. *Id.*
29. *Id.* at 243-244.
30. SCHLICHTING, *supra* note 13, at 15.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.* at 23.
35. *Id.* at 20.
36. *Id.* at 21; see also *id.* at 20 (citing AARON E. KLEIN, *N.Y. CENTRAL* 23 (Bonanza Books 1985)) (The ten railroads were: Albany and Schenectady, Schenectady and Troy, Utica and Schenectady, Mohawk Valley, Syracuse and Utica, Syracuse and Utica Direct, Rochester and Syracuse, Buffalo and Rochester, Buffalo and Lockport, and Rochester, Lockport and Niagara Falls)).
37. *Id.* at 23.
38. *Id.*
39. *Id.* at 24.
40. *Id.* at 24-25.
41. *Id.* at 25.
42. *Id.*
43. *Id.* at 26.
44. *Id.* at 30.
45. *Id.*
46. *Id.*
47. *Id.* at 31.
48. *Id.* at 38.
49. *Id.* at 31.
50. STILES, *supra* note 7, at 515 (quoting N.Y. WORLD, June 30, 1871).
51. *Id.*
52. *American Experience: Grand Central*, *supra* note 4.
53. SCHLICHTING, *supra* note 13, at 50-51, 53.
54. STILES, *supra* note 7, at 516..
55. *American Experience: Grand Central*, *supra* note 4.
56. STILES, *supra* note 7, at 518.
57. SCHLICHTING, *supra* note 13, at 53.
58. *Id.* (quoting N. Y. TIMES, Sep. 20, 1899 (Editorial) at 6).
59. *American Experience: Grand Central*, *supra* note 4.
60. SCHLICHTING, *supra* note 13, at 54 (quoting *Congestion of the Traffic at the Grand Central Station*, SCIENTIFIC AM., Dec. 1, 1900, at 338).
61. *Id.*
62. *American Experience: Grand Central*, *supra* note 4.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *15 Killed, 35 Injured in N.Y. Central Tunnel Crash*, THE WORLD, Jan. 9, 1902, at 1.
68. *American Experience: Grand Central*, *supra* note 4.
69. *Id.*
70. SCHLICHTING, *supra* note 13, at 55-56.
71. *American Experience: Grand Central*, *supra* note 4.
72. *Id.*
73. SCHLICHTING, *supra* note 13, at 56; see also Telephone Interview with Kurt Schlichting, *supra* note 3 ("I grew up in the suburbs of New York City. I had a grandmother who worked for the New York, New Haven, and Hartford Railroad which became the New Haven branch of Metro North. My grandfather would take me to Yankee games and my grandmother would take me to New York City. Those were the first times that I went to Grand Central. When I went to graduate school at NYU, my focus was urban sociology. I've always been interested in the city of New York, how it grew, and the factors leading to its dominance. That's what got me interested in the William Wilgus papers. I was writing an academic article and I came across a reference to Wilgus. I saw the papers in the collection and realized that there was a story in those papers. From there, the book about Grand Central Terminal unfolded").
74. *American Experience: Grand Central*, *supra* note 4.
75. Letter from William Wilgus (W.J. Wilgus), Chief Engineer, New York Central & Hudson River Railroad Company, to W.H. Newman, President, New York Central & Hudson River Railroad Company (Dec. 22, 1902) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
76. JOHN BELLE AND MAXINNE R. LEIGHTON, *GRAND CENTRAL: GATEWAY TO A MILLION LIVES* 47 (W.W. Norton & Company 2000).
77. Letter From William Wilgus (W.J. Wilgus), Fifth Vice President, New York Central & Hudson River Railroad Company, to W.H. Newman, President, New York Central & Hudson River Railroad Company (Mar. 19, 1903) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
78. SCHLICHTING, *supra* note 13, at 96.
79. See *id.* at 97.
80. *Id.*
81. *Id.* at 99.
82. *American Experience: Grand Central*, *supra* note 4.
83. SCHLICHTING, *supra* note 13, at 99.
84. *Id.* at 101.
85. *Id.*; see also *id.* ("There had never been a feature of the system installed that had not been approved by every member of the

- commission and every outside authority consulted on it.” (quoting *Wilgus Shifts Blame For Wreck*, N.Y. TIMES, Feb. 28, 1907 at 11)).
86. *Id.*
 87. *American Experience: Grand Central*, *supra* note 4.
 88. *Id.* (Kurt Schlichting).
 89. *Id.* (Joe Morton, Narrator).
 90. *Id.*
 91. *Id.* (Kurt Schlichting).
 92. SCHLICHTING, *supra* note 13, at 101-02. “A five-page introduction signed and dated by Wilgus on July 6, 1936 began the secret file: ‘much ill feeling within the ranks of the railroad company [New York Central] resulted from inquiries that followed the accident.’” *Id.* at 102 quoting William J. Wilgus Papers, 1895-1947, Box 7, page v, New York Public Library, Manuscripts and Archives Division. Wilgus chronicles the inspiration for the reconstruction in the introduction. “Wilgus then explained the stunning events that compelled him to assemble the file: on April 4, 1907, the senior vice president of the company, Mr. W. C. Brown, stated to Wilgus his belief that responsibility for the accident rested on the flawed design of the new electric engines. Despite what the officers of the Central said publicly or under oath to the coroner’s jury, grand jury, or the New York State Railroad Commission, at least Brown believed the design of the new engines to be the cause of the Woodlawn wreck.” *Id.*
 93. *Id.* at 105.
 94. Letter from W.C. Brown, Senior Vice President of All Departments, New York Central & Hudson River Railroad Company, to William Wilgus (W.J. Wilgus), Vice President, New York Central & Hudson River Railroad Company (Jul. 5, 1907) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author). William C. Brown became President of the New York Central Lines—New York Central, Lake Shore, Michigan Central, and Big Four in February 1909. He resigned on November 18, 1913. The resignation became effective on January 1, 1914. Brown worked for more than 44 years in the railroad industry. *W.C. Brown To Quit the Central Lines*, N.Y. TIMES, Nov. 19, 1913, at A13, N.Y. TIMES ARTICLE ARCHIVE, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9F0CEEDC1730E233A2575AC1A9679D946296D6CF (last visited Oct. 2, 2010).
 95. Letter from W.H. Newman to W.J. Wilgus (Jun. 14, 1912) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 96. *By-Products of Electrification*, THE WALL ST. J. (THURSDAY EVENING), Mar. 6, 1913 (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 97. Letter from Charles Hine to Colonel William J. Wilgus (Dec. 21, 1926) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 98. Letter from Lewis B. Stillwell, Consulting Engineer, to Editor of the *Engineering News-Record* (Dec. 10, 1926) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 99. Letter from W.J. Wilgus to Percy R. Todd, President, Bangor & Aroostook Railroad Company, Bangor, Maine (Nov. 17, 1926) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 100. *Id.*
 101. Published Letter from Percy R. Todd, President, Bangor & Aroostook Railroad Company, Bangor, Maine to Editor of *Railway Age* (Dec. 21, 1926) (William J. Wilgus Papers, 1895-1947, Box 1, N.Y. PUB. LIBR., Manuscripts and Archives Division) (copy on file with author).
 102. *American Experience: Grand Central*, *supra* note 4.
 103. SCHLICHTING, *supra* note 13, at 123.
 104. *Id.* at 144-45 (quoting *Facade of the Terminal the Keynote to the Structure*, N.Y. TIMES, Feb. 2, 1913 at 2 (Sect. 9)).
 105. Belle and Leighton, *supra* note 76, at 48.
 106. *Id.* at 50, 52.
 107. *American Experience: Grand Central*, *supra* note 4.
 108. Belle and Leighton, *supra* note 76, at 54.
 109. *Id.* at 55-56.
 110. *Id.*
 111. *American Experience: Grand Central*, *supra* note 4.
 112. SCHLICHTING, *supra* note 13, at 159; see also Christopher Gray, *Covering Its Tracks Paid Off Handsomely*, N.Y. TIMES (SUNDAY), Aug. 22, 2010, (Real Estate) at 8 (The area is also known as Terminal City. “Terminal City began to dissolve after World War II, when commerce swept the avenue almost clean of residential buildings. The construction along Lexington has survived, except for the old Commodore at 42nd Street, refaced around 1980 for a new Hyatt. But its original gritty black smokestack juts up from its back corner.”)
 113. SCHLICHTING, *supra* note 13, at 164-65 (quoting *The Grand Central Terminal: A Great Civic Improvement*, ENG’G NEWS-RECORD, Sep. 9, 1920, at 484).
 114. *Id.* at 173.
 115. *Inside Grand Central* (National Geographic 2005) (on file with author).
 116. President Eisenhower signed the Federal-Aid Highway Act of 1956 on June 29, 1956. “While created in part to help defend the nation in the event of an emergency, the interstates, with limited access and many lanes, have also spurred and speeded the development of commerce throughout the country and abroad. Trucks move quickly from one region to another, transporting everything from durable goods and mail to fresh produce and the latest fashions. “And they have increased the mobility of all Americans, allowing them to move out of the cities and establish homes in a growing suburbia even farther from their workplaces and to travel quickly from one region to another for vacation and business. “But the interstates have also increased congestion, smog, and automobile dependency. The shift to the increasingly outward bound suburbs has caused a drop in population densities of urban areas, and the ease of long-distance travel on high-speed, limited-access highways has contributed to the decline of mass transit, such as rail and bus.” David A. Pfeiffer, *Ike’s Interstates at 50 Anniversary of the Highway System Recalls Eisenhower’s Role as Catalyst*, THE NAT’L ARCHIVES, PROLOGUE, Vol. 38, No. 2 (Summer 2006), available at <http://www.archives.gov/publications/prologue/2006/summer/interstates.html> (last visited Oct. 2, 2010).
 117. See SCHLICHTING *supra* note 13, at 200-01.
 118. See *supra* note 1.
 119. The Fifth Amendment of the United States Constitution reads in full, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V.
 120. N.Y.C. Admin. Code, ch. 8-A, § 205-1.0 *et seq.* (1976).
 121. *Penn Cent. Transp. Co. et al.*, 438 U.S. 109, n.5 citing N.Y. Gen. Mun. Law § 96-a (McKinney 1977). “The ordinance creating the Commission requires that it include at least three architects, one historian qualified in the field, one city planner or landscape

- architect, one realtor, and at least one resident of each of the city's five boroughs. N.Y.C. Charter § 534 (1976). In addition to the ordinance's requirements concerning the composition of the Commission, there is, according to a former chairman, a 'prudent tradition' that the Commission include one or two lawyers, preferably with experience in municipal government, and several laymen with no specialized qualifications other than concern for the good of the city." *Id.* at 110, n.8 citing Harmon Goldstone, *Aesthetics in Historic Districts*, 36 LAW & CONTEMP. PROB. 379, 384-385 (1971).
122. *Id.* at 115. The Commission's report explained the basis for its decision: "Grand Central Station, one of the great buildings of America, evokes a spirit that is unique in this City. It combines distinguished architecture with a brilliant engineering solution, wedded to one of the most fabulous railroad terminals of our time. Monumental in scale, this great building functions as well today as it did when built. In style, it represents the best of the French Beaux Arts." *Id.* at 116, n.16 quoting Record 2240.
 123. *Id.* at 116.
 124. *Id.*
 125. *Id.*
 126. *Id.*
 127. *Id.*
 128. *Id.* at 116-17.
 129. *Id.* at 117, citing Record 2255.
 130. *Id.* at 117.
 131. *Id.* at 117-118 quoting Record 2251.
 132. Belle and Leighton, *supra* note 76, at 14-15.
 133. *Penn Cent. Transp. Co. et al.*, 438 U.S. at 119.
 134. *Id.*
 135. *See Penn Cent. Transp. Co. v. City of New York*, 50 A.D.2d 265 (1975).
 136. *Penn Cent. Transp. Co. et al.*, 438 U.S. at 119.
 137. *See Penn Cent. Transp. Co. v. City of New York*, 42 N.Y.2d 324 (1977).
 138. *Penn Cent. Transp. Co. et al.*, 438 U.S. at 121.
 139. *Id.* at 121-22 (citing *Penn Cent. Transp. Co.*, 366 N.E.2d at 1276-78).
 140. *Id.* at 124 (citing *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962)).
 141. *Id.* (citing *United States v. Causby*, 328 U.S. 256 (1946)).
 142. *Id.*
 143. *Id.* (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)).
 144. *Id.*
 145. *Id.* at 125 (citing *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928)).
 146. *Id.* at 129.
 147. *Id.* at 130-131.
 148. *Id.* at 131 (citing *Maier v. New Orleans*, 516 F.2d 1051 (5th Cir. 1975)).
 149. *Id.* at 131.
 150. *Id.* at 134-35.
 151. *Id.* at 136.
 152. *Id.* at 137 quoting Record 2251.
 153. *Id.*
 154. *Id.* at 138.
 155. E-mail from The Honorable Edward I. Koch to author, *supra* note 5.
 156. Belle and Leighton, *supra* note 76, at 5-6.
 157. *Id.* at 4.
 158. *Id.* at 6.
 159. The current incarnation of Madison Square Garden, Garden IV, opened on February 11, 1968, "[w]ith a superstar-studded 'Salute to the USO' concert with "Chicken Delight," otherwise known as Bob Hope 'battling' former heavyweight champion Rocky Marciano. Others making guest appearances included New York City Mayor John V. Lindsay, Bing Crosby, Phyllis Diller, Pearl Bailey, Jack Dempsey, Gene Tunney and General of the Army Omar N. Bradley. *Madison Square Garden*, <http://hockey.ballparks.com/NHL/NewYorkRangers/index.htm> (last visited Oct. 4, 2010). Coincidentally, the first Madison Square Garden located between Madison Avenue and Fifth Avenue and 25th Street and 26th Street in Manhattan enjoys a connection to Grand Central Terminal. "The Original Garden, now known as Madison Square Garden I, was the former passenger depot of the New York and Harlem Railroad on Madison Street. Celebrated circus mogul P.T. Barnum bought and converted the terminal when the railroad depot was moved to Grand Central Terminal in 1871. Barnum transformed the place into a hippodrome called 'Barnum's Monster Classical and Geological Hippodrome.' Later, it was renamed 'Gilmore's Garden' after America's famous bandleader of the time, Patrick S. Gilmore. At this point the Garden was an uncovered venue. Millionaire William Henry Vanderbilt named Gilmore's Garden 'Madison Square Garden' and threw open the doors once again, in 1879." *Madison Square Garden History, Madison Square Garden Tickets & Information*, <http://www.madisonsquaregardentickets.net/history> (last visited August 25, 2010). The second Madison Square Garden on the same site. *Id.* Its tenure was 1890 to 1925. New York Architecture Images, <http://www.nyc-architecture.com/GON/GON016.htm> (last visited Oct. 4, 2010). The third Madison Square Garden stood at the corner of Eighth Avenue and 50th Street from 1926 to 1968. *Madison Square Garden History, Madison Square Garden Tickets & Information*, <http://www.madisonsquaregardentickets.net/history> (last visited August 25, 2010).
 160. Belle and Leighton, *supra* note 76, at 7.
 161. *Id.*
 162. *Id.* at 16 quoting Laurie Beckelman. Beckelman joined the Municipal Art Staff in 1973. *Id.*
 163. *Inside Grand Central*, *supra* note 115.
 164. *Id.* (Ed Koch).
 165. Belle and Leighton, *supra* note 76, at 3, quoting Jacqueline Kennedy Onassis.
 166. *Id.* at 109.
 167. *Id.* at 111.
 168. *Id.*
 169. *Id.* at 112-113.
 170. *Id.* at 130.
 171. *Id.* at 130-131.
 172. *Id.* at 145, 147.
 173. *American Experience: Grand Central*, *supra* note 4.
 174. *Inside Grand Central*, *supra* note 115.
 175. *Id.* at 148.

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Legal Issues in Film (1 Prof. Practice, 1 Skills + .5 Ethics Credits)

This class will provide an overview of the legal issues and common business arrangements used in film and television projects. In addition, option agreements for the acquisition of literary properties; distribution agreements and a comprehensive release for reality based television program will be discussed.

Legal Issues in Contemporary Art: Copyright (1 Prof. Practice + 1 Ethics Credits)

This class will focus on copyright law, with a primer on some of the more pressing legal concerns for artists today, such as digital media, the use of appropriated logos and images, fair use, as well as moral rights.

Social & Legal Issues in Fashion Series: The Role of Social Media and Virtual Reality (1 Prof. Practice + 1 Skills Credits)

This third workshop in a four-part series points its lens at the role of new media in shaping and redefining fashion. New media—fashion blogs; street fashion; social media like Twitter and Facebook; virtual worlds like Second Life; online luxury from the Gilt Group—are radically transforming what constitutes fashion and who has access to it. Anna E. Akbari, Ph.D, explores the possibilities and politics of mediated style in the 21st century. Elena M. Paul, Esq., will approach the subject from a legal perspective, including issues related to property ownership in a virtual world as well as copyright, trademark, and right of privacy and publicity issues.

Social & Legal Issues in Fashion Series: Outfitting Success: Sex, Dress, and Professionalism (1 Prof. Practice + 1 Skills Credits)

This fourth workshop in a four-part series explores the relationship between fashion and power in the workplace. What does success look like? Is fashion friend or foe to the career businesswoman? From power suits to casual Friday, office dress is complex and confusing. Anna E. Akbari, Ph.D, examines the role that fashion plays in the negotiation for power and distinction, as well as the delicate balance between femininity, sexuality, and professionalism. Elena M. Paul, Esq., addresses the topic from a legal perspective, including labor and employment law, civil rights and discrimination issues as well as the First Amendment.

Starting Your Culinary Business

This workshop provides valuable information about starting a culinary business, including restaurants, bakeries, bars, and catering companies. This class will cover important issues that every start-up business person needs to know including: the selection of a business entity, incorporation; financing, branding, licensing (including liquor licenses, cabaret permits, outdoor seating permits), taxes and regulatory compliance. Proceeds will benefit the Friends of the French Culinary Institute (FCI).

*mediate***Art**

Art & Law Residency Program: 2011

The core of the Program will be semi-monthly Seminars directed at the theoretical and critical examination of current art and law issues. Faculty as well as leading legal scholars and visiting artists will lead these Seminars. During the course of the Program, artists and writers will develop new projects and papers and receive support from Faculty on a regular basis to discuss and address the aesthetic, practical, philosophical, legal and judicial aspects of their work. The Residency will culminate in a public Exhibition and Symposium held at the Maccarone Gallery in New York City where the participants will exhibit their projects and present papers.

MediateArt provides low-cost alternative dispute resolution, contract negotiation, and negotiation counseling services to artists with conflicts that can be addressed outside of the traditional legal framework. In Spring 2011 (dates to be announced), VLA is offering our intensive two-day Mediation Training Program for attorneys, artists, arts administrators, and other professionals with an interest or background in the arts or in intellectual property, the completion of which is a prerequisite to volunteering through MediateArt. For more information please contact Benjamin J. Brandow, Esq. at (212) 319-2787 ext.14 or bbrandow@vlany.org.

VLA Legal and Business Bootcamp for Arts Professionals™

VLA Legal and Business Bootcamp for Arts Professionals,™ taking place in March 2011 (date to be announced), is a comprehensive program about the legal and business issues that affect individual artists and individuals within organizations and cultural institutions. This program is for professionals within organizations, individual artists, and art students at all stages of professional development. Lawyers, other professionals who represent artists and arts organizations, and law students will also benefit from the course. For registration or additional information, please see <http://www.vlany.org/bootcamp>.

Private Legal Clinics & Private CLE Classes

VLA's Legal Clinic, a forum for VLA members to meet privately with volunteer attorneys to discuss their arts-related legal issues, is now primarily offered privately through our law firm and corporate sponsors (with occasional clinics open to the public), generally on Wednesday afternoons. The clinic is a rewarding opportunity for attorneys to volunteer without a large time commitment. If you are interested in volunteering at our clinic, or in arranging a private clinic or private CLE event for your law firm or organization, please contact Benjamin J. Brandow, Esq. at (212) 319-2787 ext.14 or bbrandow@vlany.org.



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Attorney Escrow Accounts—Rules, Regulations and Related Topics, Third Edition, comprehensively covers what a lawyer is ethically required to do in receiving, administering and disbursing monies of clients. This edition covers the most common situations where attorneys handle clients' funds and provides sample escrow agreements. It also explains and includes excerpts from relevant statutes, regulations, formal rules, court decisions and ethics opinions.

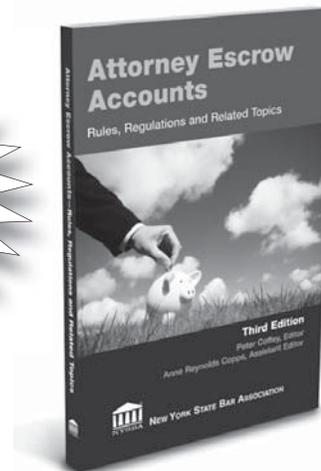
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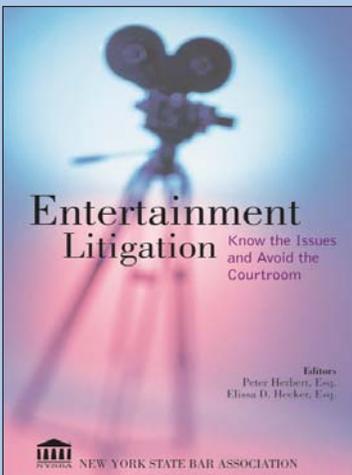
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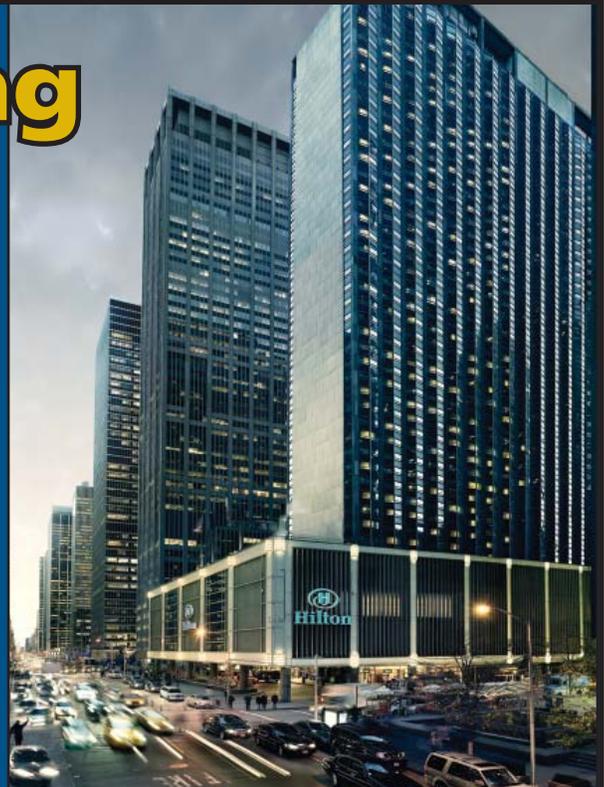
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