

# Entertainment, Arts and Sports Law Journal



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

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- The "Protect and Preserve International Cultural Property Act"
- What You Do Not Know About Art Consignment Laws
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- Marking a Milestone for the Holocaust Claims Restitution Practicum
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  - Television Is Not Dying, It Is Evolving
  - Disqualification of a Relay: Potential Legal Issues
  - Charlie Chaplin, The Little Tramp, and Infringement

# In The Arena: A Sports Law Handbook

*Co-sponsored by the New York State Bar Association and the Entertainment, Arts and Sports Law Section*

As the world of professional athletics has become more competitive and the issues more complex, so has the need for more reliable representation in the field of sports law. Written by dozens of sports law attorneys and medical professionals, *In the Arena: A Sports Law Handbook* is a reflection of the multiple issues that face athletes and the attorneys who represent them. Included in this book are chapters on representing professional athletes, NCAA enforcement, advertising, sponsorship, intellectual property rights, doping, concussion-related issues, Title IX and dozens of useful appendices.

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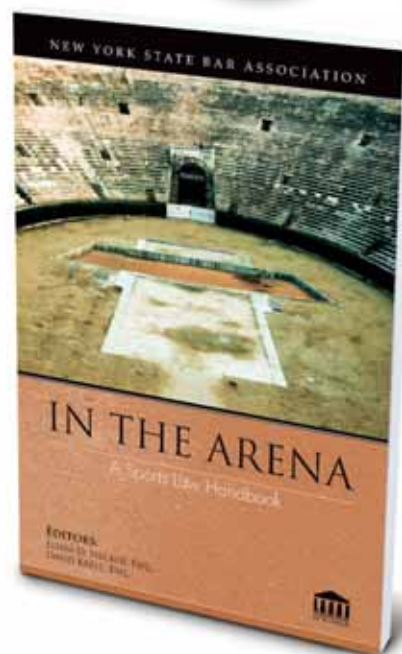
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## EDITORS

**Elissa D. Hecker, Esq.**  
**David Krell, Esq.**

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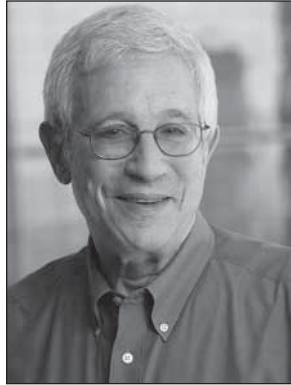


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# Remarks from the Chair

As I write this, summer is ending and as you read this, winter has begun. While many EASL members were on vacation enjoying the wonderful weather, it was by no means all downtime for the Section. We had two fun social events hosted by the Membership Committee, helmed by Joyce Dollinger and Rob Thony; a great evening in the theatre with Colin Quinn (thanks to Diane Krausz for arranging the tickets), and our annual outing at the Brooklyn Cyclones game. The June CLE on book publishing, put together by Literary Works Committee Co-Chairs Joan Faier and Judith Bass for the NYSBA CLE Department, was also a great success.



During the summer, Jason Aylesworth was very busy organizing EASL's Student Liaison program, which promises to be our most extensive to date. We have more law schools than ever involved, and I am looking forward to having a really wide student participation in EASL. The goal is to have a law school student liaison for each of the Section's committees.

Planning for the BMI/Phil Cowan Memorial Scholarship competition has started earlier this year than in the past. Judith Bresler and Rich Garza are arranging, along with many other members of the Executive Committee, to have more law schools submitting entries from their students.

Planning for EASL's fall events was also in full swing during the summer. Rosemarie Tully and her planning committee were meeting, along with our Albany liaison Beth Gould, organized the full day, 10-panel EASL CLE event that took place at the CMJ Music Marathon in October. The venue was changed to a very hip hotel in the Chelsea section of Manhattan, and was our most entertaining and informative CMJ seminar yet. We thank the new CMJ ownership for its cooperation. EASL also added an option of registering for the CLE seminar and for the entire week of music performances and CMJ events.

EASL's Fall Meeting CLE program was held at Dorsey & Whitney, which generously donated its wonderful space and hosted a reception. The Fall Meeting is one of our most interesting and fun CLE events. One of the panels, arranged by Carol Steinberg of the Pro Bono Committee and Judith Prowda of the Fine Arts Committee, was about street art. The other panel, organized in conjunction with the Food, Drug and Cosmetic Law Section, was about food law and legal issues confronting celebrity chefs.

EASL continues to be one of the most active Sections of NYSBA and provides extensive and varied benefits for its members. This is all accomplished through the tireless volunteer efforts of the Executive Committee, student members and many other EASL members.

**Steve Rodner**



**ENTERTAINMENT, ARTS AND SPORTS LAW SECTION**

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

## Editor's Note

So many stories related to art, entertainment and sports have made front pages this year. They run the gamut of matters, and this issue of the *Journal* compiles excellent analyses of some major items of note.

Please also visit the EASL Blog regularly to read timely reports of EASL-related subjects of interest.

I hope that you enjoy reading and learning from the articles herein. Have a wonderful end of 2015 and beginning of the New Year.



Elissa

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, Counseling Content Providers in the Digital Age*, and *In the Arena*, a member of the Board of Editors for the NYSBA *Journal*, Chair of the Board of Directors for Dance/ NYC, a Trustee and member of the Copyright Society of the U.S.A. (CSUSA), Co-Chair of the CSUSA National Chapter Coordinators, and a member of the Board of Editors for the *Journal of the CSUSA*. Elissa is a repeat Super Lawyer and the recipient of the CSUSA's inaugural Excellent Service Award. She can be reached at (914) 478-0457, via email at [ehckeresq@ehckeresq.com](mailto:ehckeresq@ehckeresq.com) or through her website at [www.ehckeresq.com](http://www.ehckeresq.com).

The next *EASL Journal* deadline is  
Friday, December 18, 2015.

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# Pro Bono Update

By Elissa D. Hecker, Carol Steinberg, Kathy Kim and Irina Tarsis  
Pro Bono Steering Committee

## Pro Bono Clinics

Thank you so much to the following attorneys who volunteered their services for what was to be the Pro Bono Clinic with Women in Music on August 3rd: Tiffany R. Almy, Erika Stallings, Anibal Luque, Barry Jay Reiss, John W. Rybicki, Claire Vinyard, Nyasha Foy, Merlyne Jean-Louis, Diane Krausz, Steve Gordon, Rosemarie Tully, La-Vaughnda Taylor, Irina Tarsis, Courtney N. Hargrove, Shannon Zhu, Monika Fidler, Ava Farshidi, Kashima A. Loney, and Pamela Schwartz. Unfortunately, due to lack of clients, the Clinic had to be rescheduled. Stay tuned for further information.

The EASL Section also co-sponsored a Clinic organized by the IP Section in late summer.

**The next Pro Bono Clinic will take place on Sunday, February 28, at the Dance/NYC Symposium.** It will be held at the same location as last year, Gibney Dance, 280 Broadway (across the street from City Hall, enter at 53 Chambers). Signup information will be forthcoming.

## Speakers Bureau

The New York Foundation for the Arts (NYFA) once again asked EASL to provide our excellent array of attorneys to provide legal education. This time it was for NYFA's Arts Business Incubator (ABI) grantees. NYFA's Peter Cobb (Program Officer, lawyer, and saxophone player) conceived and actualized a grant program for arts businesses that could use a professional boost. Seven arts businesses were chosen after a careful screening process, of which EASL Executive Committee members Innes Smolansky and Carol Steinberg participated. The grant moneys will be used by the ABIs for professional services.<sup>1</sup>

Pro Bono Steering Committee Co-chair Carol Steinberg put together a program of business law essentials for the ABIs. EASL Members Innes Smolansky, Jason Aylesworth, Steve Masur, Diane Krausz, and Rosemarie Tully were panelists in, and Carol Steinberg moderated for, the afternoon program. That program consisted of choice of business entities, contracts, employment law, and liability/insurance issues. It was held at the beautiful office of the Center for Italian Art in Soho. The participants were engaged, asked excellent questions, and commented that the panel was extremely helpful and informative.

Carol Steinberg commented that EASL members always respond to requests for panel participation to educate artists in all of the boroughs with great enthusiasm and generosity of spirit. The next program for the ABIs will consist of Intellectual Property issues.



## AMI Program Finalists

### The Caribbean Film Academy, Inc.

The academy is a non-profit organization dedicated to supporting the work of filmmakers of Caribbean heritage, both in the Caribbean Region and the Diaspora. Their work is focused on promoting and sharing the art of storytelling through film from the unique perspective of the Caribbean.

### Center for Italian Modern Art

The Center for Italian Modern Art is a non-for-profit dedicated to promoting new scholarship and dialogue around 20th century Italian art. This will be done through an annual exhibition installation, featuring artists often little known and rarely exhibited in the United States; a fellowship program, open to emerging art history scholars of any nationality; and a robust, varied schedule of public programming.

### BxArts Factory

The BxArts Factory is a non-for-profit organization whose mission is to promote and grow the Bronx arts community. The initiative will focus on providing space and resources to local, multimedia artists to work on projects, which will make art accessible to the community, with an educational component.

### Syncopated City Dance Company

Syncopated City Dance Company is a for-profit enterprise whose mission is to maintain and nourish Lindy Hop dancing in New York City through promoting its history, culture, music, and dance. They aim to push the boundaries of the genre by blending acrobatic Lindy hop, saucy blues, and folk jazz, updated to resonate with today's audiences.

### Musical Theatre Factory

Musical Theatre Factory is a volunteer-based organization dedicated to helping musical theatre artists develop and present new work. They are currently based in Times Square in donated blackbox theater space, and offer readings, workshops, classes, and some production to the theater community.

### Young Artists In Business

Bronx-based artist and founder of "Project YEAH," Roy Secord, seeks to establish a not-for-profit initiative that works with young offender populations, teaching them artisanal skills for vocational employment in the arts and arts-related fields. Participants will learn a variety of

techniques to create individualized, marketable art product (i.e. designer shoes, clothing, art furniture, fine art, designer trade objects, “artsy” utilitarian products, etc.), and will also receive financial and entrepreneurial training.

### Artwalk, LLC

Applicants will create an “app” that offers a walking guide to New York City from an art-lover’s perspective. The company has created a platform that can be used to map installations, public art, and other attractions and pair them with text and multimedia.

\*\*\*\*\*

### Clinics

Elissa D. Hecker and Kathy Kim coordinate legal clinics with various organizations.

- Elissa D. Hecker, [eheckeresq@eheckeresq.com](mailto:eheckeresq@eheckeresq.com)
- Kathy Kim, [kathy@productions101.com](mailto:kathy@productions101.com)

### Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- Carol Steinberg, [elizabethcjs@gmail.com](mailto:elizabethcjs@gmail.com)

### Litigations

Irina Tarsis coordinates pro bono litigations.

- Irina Tarsis, [tarsis@gmail.com](mailto:tarsis@gmail.com)

We look forward to working with all of you, and to making pro bono resources available to every EASL member.

### Endnote

1. Comprised of both for-profit and not-for-profit organizations, this cohort represents a diverse cross-section of New York City’s artistic and cultural communities. Over the next three years, participants will undergo rigorous training in the essentials of starting and running an arts-based enterprise. In addition to the group educational component, each enterprise will receive coaching, mentoring, and subsidized professional services to help achieve their respective institutional priorities.

Beyond the nuts and bolts of supporting the growth of these enterprises, ABI will explore the best practices associated with running a startup in the arts. “Entrepreneurship is but one definition of the artist life and owning that way of being is exciting and inspiring,” said NYFA’s Executive Director, Michael Royce. “The participants in this inaugural cohort are trailblazing that path. NYFA’s ABI program is more than providing tools for artists—it’s about helping them to use those tools in a way that brings the community together in creative and meaningful ways.” <https://www.nyfa.org/Content/Show/Arts%20Business%20Incubator>.

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# The New York State Bar Association Entertainment, Arts and Sports Law Section Law Student Initiative Writing Contest

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, 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, December 18, 2015**.
- **Submissions:** Articles must be submitted via a Word email attachment to [heckeresq@heckeresq.com](mailto:heckeresq@heckeresq.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.



# Phil Cowan Memorial/BMI Scholarship Writing Competition



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. Each designated faculty member shall forward all submissions to his/

her Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her to the three (3) Committee Co-Chairs for distribution. The Committee will read the papers submitted and will select the Scholarship recipient(s).

## Eligibility

The Competition is open to all students—*both J.D. candidates and L.L.M. candidates*—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, who are NYSBA members, will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member) for a one-year period, commencing January 1st of the year following submission of the paper.

## Yearly Deadlines

**December 12th:** Law School Faculty liaison submits all papers she/he receives 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.*

## Submission

All papers should be submitted via email to Beth Gould at [bgould@nysba.org](mailto:bgould@nysba.org) no later than December 12th.

## Prerogatives of EASL/BMI's Scholarship Committee

The Scholarship Committee is composed of the current Chair of EASL and, on a rotating basis, former EASL Chairs who are still active in the Section, 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 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

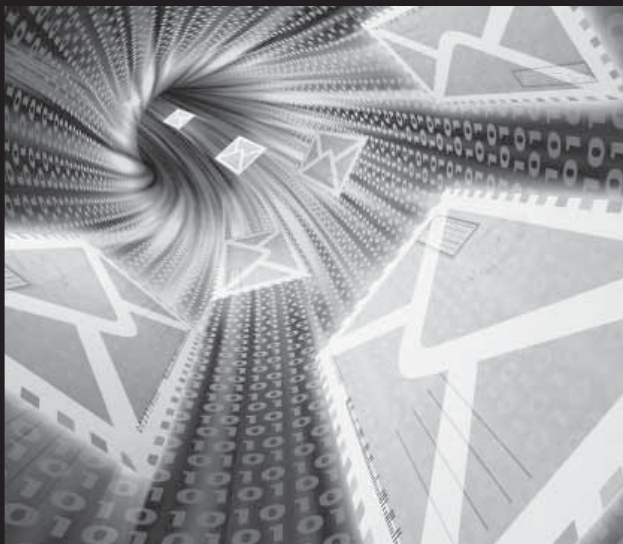
BMI is an American performing rights organization that represents approximately 700,000 songwriters, composers, and music publishers in all genres of music. The non-profit making company, founded in 1940 collects license fees on behalf of those American creators it represents, as well as thousands of 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 10.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

## About the New York State Bar Association/EASL

The 74,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 125 years.

The more than 1,500 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*.

## Request for Articles



If you have written an article you would like considered for publication, or have an idea for one, please contact *Entertainment, Arts and Sports Law Journal* Editor:

Elissa D. Hecker  
Editor, *EASL Journal*  
[heckeresq@heckeresq.com](mailto:heckeresq@heckeresq.com)

*Articles should be submitted in electronic document format (pdfs are NOT acceptable), along with biographical information.*

[www.nysba.org/EASLJournal](http://www.nysba.org/EASLJournal)

# 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](http://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.

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# Sports Immigration: Round 3— Executives and Professionals

By Michael Cataliotti

## Introduction

The last article focused on some of those non-immigrant visas (NIVs) as they relate to the various sports industries. Specifically, we took up the B1/B2—Business/Tourist visas, the F and OPT visas, and the H.

There are more visas, however, and so keeping in line with where we left off, we will now move on to take up these classifications:

- E...E1/E2—Treaty Trader/Investor<sup>1</sup> and
- L...L1A/B—Intracompany Transferee (Executive/Specialized Knowledge).<sup>2</sup>

For this installment, we will concentrate on the E- and L-classifications and leave the O and P for next time.

## E-1/2—Treaty Traders/Investors

As indicated in the title, these classifications are for those individuals who either engage in trade or are investors *from a country with which the U.S. has a treaty of commerce and navigation*.<sup>3</sup>

For our purposes, it is unlikely to encounter a “trader” in sports, so we will disregard it here in favor of looking at those investors, who may occasionally appear.

Taking up the first part: a “treaty” must be in place between the foreign national’s home country and the U.S. A list of treaty countries consists of some expected—the U.K., Italy, France, Chile—and some unexpected—China (Taiwan), Iran, and the Congo.<sup>4</sup>

Once we know that there is a treaty, we then look to the next two elements, that the Investor:

- Has invested, or is actively in the process of investing, a substantial amount of capital in a bona fide enterprise in the United States; and
- is seeking to enter the United States solely to develop and direct the investment enterprise. This is established by showing at least 50% ownership of the enterprise or possession of operational control through a managerial position or other corporate device.<sup>5</sup>

While these are relatively clear, the next important question would be “What is a substantial amount of capital?” We can look directly to the U.S. Citizenship and Immigration Service (USCIS or the Service) for guidance:

*A substantial amount of capital is:*

- Substantial in relationship to the total cost of either purchasing an established enterprise or establishing a new one;

- Sufficient to ensure the treaty investor’s financial commitment to the successful operation of the enterprise; or
- Of a magnitude to support the likelihood that the treaty investor will successfully develop and direct the enterprise. The lower the cost of the enterprise, the higher, proportionately, the investment must be to be considered substantial.<sup>6</sup>

Many people seem to trip themselves up over “substantial in relationship to the total cost” and believe that this must always be \$100,000.00 or more when starting a new business. However, that is not true.

Notice the language: “Substantial in relationship to the total cost of [...] establishing a new one.” In many instances, this can be hard to ascertain, especially if the entity in question is novel without much to compare, but a good rule of thumb is to look to the other two definitions for “substantial amount of capital” and draw from them. When we employ this, we see that so long as the amount invested or being invested can be demonstrated to support the development of the enterprise, then the investment shall be deemed substantial. If the investment is deemed substantial, then we are in a great position for an E-2 visa.

If you are wondering how this could ever be used under “sports immigration,” let’s look at an example:

*A foreign national is presently in the U.S. pursuing her MFA in graphic design. She is on her way to graduating and being awarded the prestigious degree from her educational institution when she gets the itch to start her own public relations firm. While this might seem like a stretch, Ms. F. National has had quite a bit of experience in her home country and around the world writing for various media outlets, designing logos for a variety of corporate entities, and redesigning a business’s packaging and advertising campaign. After doing all this and more for an array of athletic apparel retailers, sports teams, athletes, universities and their respective teams, as well as local sports clubs, she knows she wants to start her own business after she graduates and finishes her Optional Practical Training (OPT).<sup>7</sup> While under OPT, she has been working for an established agency, saving her money, and has accrued \$71,000. Towards the end of her OPT, she decides to invest this into developing her own PR firm. When she looks at the costs involved in starting this PR firm of hers, she realizes that it will only require \$6,200 for a new computer, some software, a printer, scanner, domain name registration, and a number of other relatively nominal expenses that add up.*

If start-up costs are so low, should she invest \$100,000 or be turned away from applying for E-2 status? She should not. Of course, \$6,200 is far too low to qualify

for E-2 status, but it would be reasonable to argue that by investing the \$71,000 into the enterprise, considering the financial barrier to entry is so low, she will be able to develop the enterprise into a successful agency that employs individuals. The additional funds could be used for networking events, specialized training, co-working office space, professional services, and should she need assistance, salaries.

*Practice Tip:* Do not simply turn away a prospective investor because you heard that \$100,000 is the magic number and the investor is unable to reach the six-figure bar. To the contrary, evaluate each scenario very closely and when in doubt, pursue another opinion from a business immigration attorney, rather than a more general immigration attorney.

### **L-1A/B—Executives, Managers, and Those With Specialized Knowledge**

The fundamental aspect of the L-visa is that it is for an enterprise to transfer an employee from one global office outside of the U.S. to one that is within.<sup>8</sup>

Taking up some of the fundamentals of the L-visa: (1) The relationship between the entity outside of the U.S. and one within the U.S. is that the U.S. entity can be the parent company, a branch, subsidiary or affiliate of the foreign entity;<sup>9</sup> and (2) the foreign entity must continue operating or “doing business” while the transferred executive, manager or individual with specialized knowledge is in the U.S.<sup>10</sup>

The L-visa is an interesting one in that it allows for a new U.S. enterprise, meaning if we were to take the same scenario we used for E-2 status and add in some additional nuances, we would have an L-1 scenario that looks like this:

*Ms. F. National understands the nature of these start-up costs. In addition to her experience above, she has also worked for her own thriving enterprise in her home country for many years, most recently spending a full 12 months outside of the U.S. some two years ago, just prior to starting her MFA studies. Ms. F. National now wants to open a U.S. base of operations that will expand her enterprise. Having worked with a number of soccer teams and Olympic competitors outside of the U.S., she knows that there is a good market for her unique services in the U.S.*

There are additional requirements placed on the transferee who seeks to open a new enterprise, but being that we discussed them at length in prior articles, I will avoid them here. For our purposes, know that there are additional nuances.

Most important here is to be aware of the fact that L-1A/B can be a viable option for a foreign national seeking to engage within the sports industries in the U.S.

### **E-2 and L-1A/B—A More Direct Link to Sports**

If these examples above are a bit too ancillary for the reader, I will provide you with one very clear scenario

that should bring these categories directly into the fold of about “sports immigration.”

Let us take Ms. F. National again, the impressively astute designer who has been engaged in sports for a variety of organizations. However, let us now look at her in this light:

*Ms. F. National has finished her MFA program and exits the U.S. to return to her home country and continue building her design entity. Having been an avid sports fan for many years and developing an array of successful campaigns and products for sports organizations, Ms. F. National decides to take her \$71,000, add it to her small fortune she has amassed having developed quite a thriving business for herself, and combined, purchases a racehorse, Entrepreneur’s Delight. Her horse is developing well, winning races, drawing attention, and so Ms. F. decides to enter the U.S. with Entrepreneur’s Delight. In order for her to begin racing competitively at the highest levels, she knows she needs to have a stable, trainers, workers, groomers, a veterinarian, and many more individuals overseeing the health and development of Entrepreneur’s Delight. Additionally, Ms. F. will need food, supplies, housing, and if she wants to capitalize on the horse’s reputation outside of the U.S., she will need to engage in marketing and employ her design skills to develop products and campaigns.*

*All in, Ms. F. National is going to need to engage in quite a bit of work and large sums of money. She can invest in her own enterprise that will own all of those assets listed above and pay out those employees, contractors, and the like. In addition to creating her own entity in which she invests, Ms. F. National also sets this holding company up as a subsidiary of her home-country enterprise that handles these same operations outside of the U.S. Due to how she has organized these entities, she might look to dive into the U.S. as an investor or perhaps be transferred into the U.S. entity as an executive.*

*Once she invests in this overarching entity, she wants to market and create a campaign surrounding Entrepreneur’s Delight. In order to do this, she creates a separate entity for the design and development of the horse’s image. Ms. F. National then realizes that she can officially take her design entity in her home country, that thriving enterprise, and make it a global operation: She creates the U.S. design entity and sets it up as a U.S. subsidiary of her home-country entity. Should she wish to enter the U.S. under this U.S. entity, she could potentially do so as an executive or person with specialized knowledge.*

### **Conclusion**

What is important to take away from this example is precisely *how* both the E and L visa classifications can be valuable within sports immigration in a direct format. We must remember that sports consist of more than athletes, coaches, and trainers; sports also encompass designers, developers, investors, and many more creative and non-traditional members of the sports industries.

With that, we conclude our brief overview of the E and L visas, and next time, will close our sports immigration discussion with the pinnacle of visa classifications



under the ambit of sports immigration, the O- and P-visa classes.

## Endnotes

1. E-1 Treaty Traders, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders>; E-2 Treaty Investors, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors>.
2. L-1A Intracompany Transferee Executive or Manager, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager>; L-1B Intracompany Transferee Specialized Knowledge, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge>.
3. E-1 Treaty Traders, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders>; E-2 Treaty Investors, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors>.
4. U.S. Department of State—Bureau of Consular Affairs, U.S. Visas, Treaty Countries, *available at* <http://travel.state.gov/content/visas/english/fees/treaty.html>.
5. E-2 Treaty Investors, General Qualifications of a Treaty Investor, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors>.
6. *Id.*
7. We referenced this in several other articles. Rather than go into much detail here, what should be understood for this scenario is that OPT is post-graduate employment authorization that, for Ms. F. National, would last for 12 months.
8. L-1 Visa, *available at* <http://www.uscis.gov/eir/visa-guide/l-1-intracompany-transferee/l-1-visa>.
9. L-1A Intracompany Transferee Executive or Manager, *available at* <http://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager>. Worth noting is that whether evaluating for L-1A or L-1B, the relationship between the corporate entities referenced here must still be present.
10. *Id.*

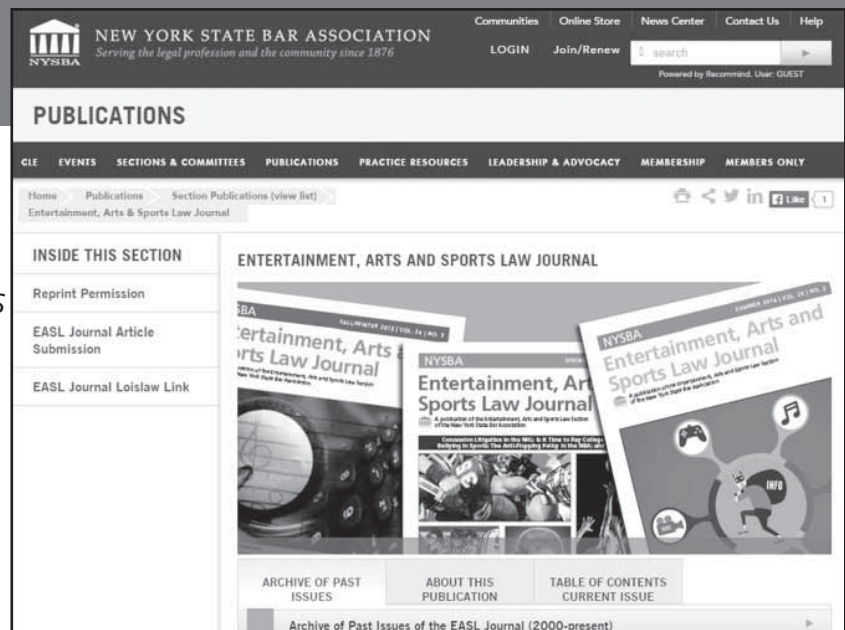
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# The “Protect and Preserve International Cultural Property Act” and Its Potential in the Current Political Context

By Sarah Shelburne

A prevalent issue in today’s sociopolitical climate is the continued danger of looting and destruction of art and antiquities in areas affected by conflict, political unrest, and natural disasters, typified by the ongoing chaotic and destructive conflict in Syria. This loss of cultural property affects not only the cultural fabric of the communities involved, but also has ramifications for international policy and market behaviors worldwide. In order to understand current U.S efforts to abate this loss of cultural property, analysis will be made of proposed and current legislation, the history of U.S. preservation efforts, and our ongoing involvement in international efforts.

## H.R. 5703 and 1493 / S. 1887

The past few years of the Syrian conflict saw incredible destruction and loss, which incited a global wave of criticism and call for action from world leaders. In light of ineffective countermeasures or deterrents for antiquities trafficking enterprises, there was rampant looting and international trade of items specifically originating from conflict zones. With the continued violence and destruction occurring at the hands of militant groups like the Islamic State of Iraq and Syria (ISIS), military forces, and rebels alike throughout the Middle East, supplementary legal action was proposed by several national governments, including the United States.

Proposed legislation was designed to discourage these acts of destruction and looting, and to curb their effects nationally. Representative Engel (D-NY) and Representative Smith (R-NJ) proposed bill H.R. 5703: “To protect and preserve international cultural property at risk of destruction due to political instability, armed conflict, or natural or other disasters, and for other purposes,” to the House of Representatives on November 13, 2014.<sup>1</sup> The House passed the amended version of the bill, reintroduced as H.R. 1493, on June 1, 2015.<sup>2</sup> Its companion bill, S.1887, featured the same text and was introduced to the Senate by Senator Casey (D-PA), Senator Grassley (R-IA), and Senator Perdue (R-GA) on July 29, 2015.<sup>3</sup> Referred to in short as the “Protect and Preserve International Cultural Property Act,” this bipartisan effort aims to build upon past legislation and solidify unity between departments working towards the preservation of art and artifacts at risk during times of international conflict. The proposal claims that this task is a “vital part of the United States cultural diplomacy, showing the respect of the United States for other cultures and the common heritage of humanity,” and is therefore integral to the United States’ position in the modern international context.<sup>4</sup>

In order to emphasize the bill’s importance, its findings section serves as a data set of destructive events and conflicts. These cases are cited as the basis of the proposed legislation and they outline three larger themes of destruction to be addressed by the bill’s policies, which are outlined later. The first of these is the issue of targeting artifacts and heritage sites in military operations, resulting in catastrophic losses of historical sites and artifacts.<sup>5</sup> The second theme describes how iconoclastic motivations in conflict lead to widespread destruction, looting and trafficking of art and artifacts.<sup>6</sup> The final theme of destruction referenced in the legislation is that of art and antiquities during natural disasters, such as in the 2010 earthquake in Haiti, and the 2004 Indian Ocean earthquake and tsunami that devastated the lives, heritage sites, and cultural antiquities of 11 countries.<sup>7</sup> This section of the bill concludes by listing the past successes of the United States’ efforts in cultural preservation, citing the 1943 formation and achievements of the American Commission for the Protection and Salvage of Artistic and Historic Monuments in War Areas, later referred to as the MFAA officers or Monuments Men, as well as the 2006 formation of the U.S. Committee of the Blue Shield, a nonprofit organization dedicated to the protection of cultural property that was later enlisted to support the implementation of the 1954 Hague Convention when it was ratified by the United States in 2009.<sup>8</sup>

The guiding principles set forth in this bill to combat the aforementioned themes of destruction are threefold, beginning with the protection and preservation of international cultural property at risk in accordance with its obligations under the 1954 Hague Convention.<sup>9</sup> Policies will include the prevention of importation of cultural property looted or trafficked during these situations, while ensuring that existing laws and regulations are implemented to prevent further trafficking of stolen or looted cultural property. The bill also proposes instituting a United States Coordinator for International Cultural Property Protection, known journalistically as the Cultural Properties Czar, who will be charged by the State Department with coordinating between multiple federal agencies to this end.<sup>10</sup> This responsibility would place the United States Coordinator at the pinnacle of a hierarchy including the Secretary of Homeland Security, The Administrator of the United States Agency for International Development (USAID), the Secretary of Defense, and the Attorney General, all of whom would be required to report to the United States Coordinator the efforts and diagnostics of their departments in relation to this bill.<sup>11</sup>

The proposed legislation takes on particular importance in the present political climate as its final section

focuses on the specific issue of Syrian cultural property. Section 8: "Emergency Protection for Syrian Cultural Property" calls upon the President of the United States to apply the import restrictions referred to in section 304 of the Convention of Cultural Property Implementation Act (19 U.S.C. 2603) "with respect to any archaeological or ethnological material of Syria."<sup>12</sup> This would apply to cultural property of Syria unlawfully removed from its country of origin on or after August 18, 2011, and would take effect no later than 60 days after the implementation of this Act.<sup>13</sup> Congressman Bob Casey stated that the primary goal of this bill is to dissuade the public of any involvement in the trade that is financially perpetuating terror-infused conflict.<sup>14</sup> Through this provision, executive power would be increased to supersede past legislative clauses, such as is present in the Convention on Cultural Property Implementation Act, allowing the President expedited power of import restrictions for conflict antiquities now and in the future.<sup>15</sup>

## U.S. Legislative Past

If this bill passes the 114th Congress and becomes law, it would serve as a consolidating enactment of past legislation and committee efforts for the protection of cultural property dating back to the Civil War. The first wartime code of conduct that specifically included provisions for the protection of cultural property was the Lieber Code of 1863. Drafted by Francis Lieber at the request of President Abraham Lincoln, this regulation had a prominent influence on the European consideration of similar issues, and eventually led to the inclusion of cultural property concerns in the Hague Conventions of 1899 and 1907.<sup>16</sup> These conventions, however, were largely disregarded during the violent and culturally devastating World Wars I and II, highlighting a need for more pertinent protective measures. The 1943 formation of the Monuments Men by President Franklin D. Roosevelt, in conjunction with the allied forces and under the advisement and support of military and institutional representatives, was the decisive effort of the United States in acknowledging the importance of preserving cultural heritage during times of armed conflict.<sup>17</sup> This organization is credited with procuring, cataloguing, and returning hundreds of thousands of works of art stolen by the Nazis during World War II; however, it was disbanded after the war, leaving a gap in international efforts of preservation.<sup>18</sup>

This vacancy led to the drafting and widespread international ratification of the Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention 1954, known widely as the 1954 Hague Convention.<sup>19</sup> The 1954 Hague Convention, ratified by more than 115 national governments, makes the protection of cultural property in conjunction with armed forces efforts obligatory; however it has yet to be enforced consistently and is considered by some to be outdated in the modern militaristic context.<sup>20</sup> Subsequent efforts, such as the addition of

the First and Second Protocols to the 1954 Hague Convention and the creation of the 1970 Hague Convention, have been primarily used as explanatory implements rather than effective measures to combat the ever growing issue of cultural property destruction and trafficking in times of conflict.<sup>21</sup>

## Independent Efforts

Separate organizations in the U.S. have also made efforts to further international efforts of preservation; however, at this point, specialty field and authoritarian distinctions have marginalized their impact. Nonprofit groups like the Committee of the Blue Shield, the International Council of Museums, and the Archaeological Institute of America have organized movements, written academic dissertations, and made emergency red lists of cultural goods, all in efforts to promote international education and cooperation in cultural preservation.<sup>22</sup> These actions are juxtaposed with the more formalized endeavors of Congressionally appointed committees such as the Cultural Antiquities Task Force and the Office of Foreign Asset Control, yet the decentralization of these efforts has rendered their impact somewhat inert.<sup>23</sup>

Similar organizations exist in independent nations and international organizations, all of whom share the interest of aiding in the protection of cultural property from destruction and trafficking. Research into this area of the art market grew over the past few decades, and it is commonly recognized that the most important element in fighting the continuation of the problem is national and international cooperation across disciplines in acknowledging and combating the spread of cultural property looting and destruction. This is difficult, as both the trade networks and structure of modern conflict are complex, and economic, political, and ethical boundaries have blurred, making a unified solution very elusive.

In his 2013 article in the *Journal of Eastern Mediterranean Archaeology and Heritage Studies*, Joris D. Kila, a senior researcher at the University of Vienna, argues that there are two overarching issues preventing cultural property protection during conflict. The first is a lack of funding for such efforts, and the second is the "bureaucratic, risk-avoiding attitudes of organizations and individuals that can block simple solutions."<sup>24</sup> Kila goes on to argue that in today's political climate, protection efforts are inherently multidisciplinary, and if progress is to be made, knowledge needs to be pooled from military, cultural, and political sources alike in order to facilitate effectively in these conflicts. The proposed bill would insist upon this collaboration at the highest level, creating a dialogue focused on cultural preservation and protection that has not before existed at such an echelon within the American government. Furthermore, the legislation would push the typically separate entities of militaristic and preservation motivations towards a diplomatic discourse that would idealistically result in newly effective practices and protocols in the context of conflict.



## Application to the Syrian Conflict

In the midst of the chaos and destruction that ensued from the Syrian conflict's inception in 2011, the culturally rich territory that is the setting for this bloody and destructive clash was ravaged for its utility militarily, monetarily, and as a means of culturally cleansing propaganda. Modern day Syria is home to remnants of civilizations dating back to prehistoric times, including Mesopotamia and the Ottoman Empire, making it one of the most culturally rich areas for artifacts of human development in the world. Prior to the outbreak of war in Syria between the government of President Bashar al-Assad and rebel forces, there were 138 active archaeological excavations in the area, and more than 10,000 unofficial archaeological mounds.<sup>25</sup> When all foreign archaeological missions were cancelled in 2012, insufficient protective measures left these sites vulnerable in the face of mounting danger from civil war engagements, leaving the antiquities of Syrian heritage vulnerable to looting and destruction from all parties, including ISIS.<sup>26</sup>

Opportunistic looting and strategic military casualties are, unfortunately, common in areas of conflict where the chaos in the present often deprioritizes the preservation of the past. What was systematically and uniquely implemented during the rise of ISIS became a highly lucrative organized looting and trafficking structure, which accounts for a large portion of the organization's revenue. Items or sites that cannot be used in this enterprise or are strategically iconic are often systematically destroyed on film, to maximize the impact of this action worldwide and assert its authority over the territory and cultures that preceded them. This occurred many times throughout ISIS's campaign; however, the most devastating example was the irreparable destruction of the ruins at Palmyra, including the nearly 2,000-year-old Temple of Baalshamin and the Temple of Bel, which were declared war crimes by UNESCO.<sup>27</sup>

This systematic looting and trafficking is an integral part of ISIS's money-making structure, and is therefore the main motivation for its forces to gain control over culturally significant sites. With an estimated 4,500 sites under its authority, ISIS has an essentially unlimited and untapped supply of artifacts that allow it to "steal everything that they [sic] can sell, and what they [sic] can't sell, they [sic] destroy" for maximum impact.<sup>28</sup> Through ISIS's propagandist methods of intimidation and destruction, its leaders are essentially "holding the site[s] hostage. It's the kidnap for ransom that [ISIS] specializes in. In this case, it's heritage they're [sic] holding, rather than people."<sup>29</sup> As a dually effective avenue for suppression and revenue, cultural heritage is increasingly important to ISIS strategy, and with other revenue streams targeted by foreign governments, it is a lynchpin in the organization's methodology for success.

The situation in Syria is dire in many ways; however, it is apparent that cultural property is critically endan-

gered from collateral damage, intentional destruction, and looting, all of which result in a tragic loss for the region and the global community at large. The involvement of ISIS in the Syrian conflict and the sophistication of its looting and trafficking practices clearly show a two-sided truth: Cultural antiquities are essential to ISIS's success in its empirical goal, which means that the protection of these antiquities is equally important to the disintegration of their trafficking on the open market.

Upon the enactment of the Protect and Preserve International Cultural Property Act, the embargo toward the importation of Syrian art and artifacts would set a precedent for western institutions and market agents in their interactions with materials of conflict infused provenance. Although experts disagree about the specific number of artifacts making their way through United States borders, there were a definite increase in Middle Eastern, and specifically Syrian, imports in the past few years. According to a report by cultural heritage lawyer Rick St. Hilaire, American imports of Syrian cultural property rose by 145% between 2011 and 2013, demonstrating the rampant market exploitation of vulnerable antiquities that this legislation could help to suppress.<sup>30</sup> In addition to the cultural loss iconoclastically being enacted through the destruction and looting of these artifacts, the revenue from black market sales of looted antiquities by ISIS and its subsidiaries account for the organization's second largest income stream, behind oil.<sup>31</sup> The United Nations called for an end to violence in Syria when the bill went before Congress in November 2014, but it was not until a February 12, 2015 meeting of UNESCO that the issue of antiquities was referenced in regard to the conflict.<sup>32</sup> As a result of this meeting, a resolution was unanimously adopted that "underlined the obligations of Member States to take steps to prevent terrorist groups in Iraq and Syria from benefiting from trade in oil, antiquities and hostages, and from receiving donations."<sup>33</sup>

At present, the national embargo proposed by the bill against trafficked cultural goods, in addition to this international pressure, has the potential to put a sizable dent in the financial affluence of ISIS based on the large market growth domestically in the last few years. Earlier drafts of the bill proposing import restrictions on Syrian antiquities were strongly opposed by such entities as the Association of Art Museum Directors (AAMD), who argued that the complete blocking of imports would prevent the ability to safeguard some of the items from destruction at militant hands.<sup>34</sup> In response, the Act as passed by the U.S. House of Representatives contains a safe harbor provision, allowing select importation for preservation purposes, and a sun-setting provision, which would annually assess the Syrian government's capability of adhering to international conventions as well as the United States' best interest in a possible agreement.<sup>35</sup>

While the embargo could impact the revenue streams that the endangered antiquities are supplying for ISIS and other militant forces, the fate of the antiquities after

this step is taken remains unclear. One concerning theory posed by Special Agent Brenton Easter of Homeland Security Investigations is that a marked lag may exist in imports from conflict zones, as the purveyors and middlemen wait a few years for scrutiny to subside before heavily marketing items. U.S. illicit imports from conflict zones increased between 2011 and 2014, with Syrian imports rising from \$6.3 million to \$60 million, Iraqi imports rising from \$2.8 million to \$12.9 million, and Egyptian imports skyrocketing from \$28.5 million to \$234.5 million.<sup>36</sup> The intensification of the Syrian and Iraqi markets are congruous with the increasing conflict experienced in those areas; however, the drastic uptick in Egyptian imports lends itself to S.A. Easter's theory that imports are more easily trafficked after a holding period post conflict, when scrutiny shifts to other locales. This would suggest that the bulk of Syrian and Iraqi antiquities, which are currently being excavated and trafficked, may not appear in Western markets for several years. The projection makes effective legislation even more pertinent to the future care of trafficked antiquities. Without enforceable Conventions and punitive national laws, there will remain a navigable and profitable global market for cultural heritage items and their role in sustaining conflict ventures.

## Conclusion

The Protect and Preserve International Cultural Property Act is currently in Congressional limbo, having been referred to nine committees and subcommittees for evaluation as of November 24, 2014, and subsequently passing the U.S. House of Representatives on June 1, 2015.<sup>37</sup> As of October 14, 2015, the proposal was read twice in the Senate and referred to the Committee on Foreign Relations.<sup>38</sup> The proposed Act builds upon past legislation and committee efforts and has the potential to join disparate governmental factions together towards a common goal. Its enactment would set a precedent for art market relations concerning conflict-tainted artifacts, while also strategically debilitating a key financial stream for many militant factions in varied conflicts.

I fear that the time required for the review and ratification of the Act, coupled with the extensive organizational overhaul necessary for its implementation, will limit the influence of this bill in relation to the current conflict in Syria, as antiquities and heritage sites continue to be looted and destroyed daily. It does, however, have the potential to obstruct facets of ISIS funding, and the precedent set by the Act's restructuring of America's cultural property protection efforts could affect future engagements of this nature. If enacted, the legislative foundation of the Protect and Preserve International Cultural Property Act would lay the groundwork for future advancements in protection and enforcement, and would globally signal the American government's prioritization of at-risk cultural properties in the modern sociopolitical context.

## Endnotes

1. H.R. 5703, § 3. A., (2014).
2. Preservation Action, "Transportation Reauthorization in the Senate; House Passes Bill Protecting International Cultural Property; HP Funding Restored in CT; stories from around the states," *LEGISLATIVE UPDATE*, Vol. 8, No. 22 (June 5, 2015), accessed August 5, 2015, available at <http://www.preservationaction.org/transportation-reauthorization-house-cultural-property-hp-ct-stories-states/>.
3. S. 1887, 114th Cong. (2015).
4. H.R. 1493, § 3. A. 15 (2015).
5. Recent political instability in Egypt in 2011 led to the ransacking and destruction of ancient artifacts, looting of the Iraqi Museum after the fall of Saddam Hussein, and the ongoing civil war in Syria has transformed archaeological and UNESCO World Heritage Sites into military targets.
6. Examples of this sect of cultural eradication include the militant group ISIS/ISIL's widespread devastation in Iraq and Syria, the Al-Qaeda affiliated terrorist group Ansar Dine's destruction of Timbuktu in Mali, the Taliban's demolition of the Bamiyan Buddhas in Afghanistan in 2001, the Khmer Rouge's systematic obliteration of Buddhist temples and relics in Cambodia in 1975, and the ruin of Old Beijing during the Cultural Revolution in China.
7. H.R. 1493, § 3. A. (2015).
8. *Id.*
9. The Convention, ratified by more than 115 national governments, makes the protection of cultural property in conjunction with armed forces efforts obligatory. The United Kingdom became the last member of the U.N. Security Council to sign the convention in June 2015, following pressure from Neil MacGregor, the outgoing director of the British Museum, and the worldwide attention brought to this issue in the preceding year regarding the destruction of cultural sites and artifacts in the Syrian conflict and the growing power of ISIS. This agreement remains the most important and widely ratified international convention with regard to cultural preservation.
10. Julia Halperin, "Congress Considers Cultural Property Protection Czar Post," *THE ART NEWSPAPER* (Nov. 18, 2014), accessed February 12, 2015, available at <http://www.theartnewspaper.com/articles/Congress-considers-cultural-property-protection-czar-post/36288>.
11. Additionally, the bill will authorize the temporary engagement and salary of personnel from the Smithsonian Institution for the expertise and connections of the institution in furthering the goals of the bill. Similarly, the Secretary of State would be authorized to make grants to individuals and organizations working towards the protection of international cultural properties that are at risk.
12. Except that subsection (c) of such section shall not apply.
13. HR 1493, § 8, A. (2014).
14. Mike Giglio, "Senate Bill Hopes to Stop Looted Syrian Artifacts from Reaching the US," *BUZZFEED NEWS WORLD*, (Aug. 7, 2015), available at <http://www.buzzfeed.com/mikegiglio/senate-bill-hopes-to-stop-looted-syrian-artifacts-from-reach#.qmOQ72Qd1>.
15. S. 1887, 114th Cong. (2015).
16. Zoe Howe, "Can the 1954 Hague Convention Apply to Non-state Actors?: A Study of Iraq and Libya," *Texas International Law Journal*, Vol. 47, Issue 2 (Spring 2012): 406.
17. Molly Bompane, "The Art of War and the War of Art," *ARMY.MIL, The Official Homepage of the United States Army* (June 16, 2010).
18. "The Monuments Men," *The Monuments Men Foundation for the Preservation of Art*, last modified 2015.
19. Despite being one of its original drafters, the United States did not ratify the Convention until March 13, 2009, and has yet to adopt the two additional protocols which were set forth on May 14, 1954 and March 26, 1999, respectively.
20. Joris D. Kila, "Inactive, Reactive, or Pro-active?: Cultural Property Crimes in the Context of Contemporary Armed Conflicts," *JOURNAL OF EASTERN MEDITERRANEAN ARCHAEOLOGY AND HERITAGE STUDIES*, Vol. 1, No. 4 (2013): 325.



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# What You Do Not Know About Art Consignment Laws Will Surprise You

By Dean R. Nicyper

Art consignments and consignment sales have inherent risks. Many consignors are not aware of those risks, or the obligations imposed, when they buy consigned art. This article addresses both the risks to consignors and the risks to art dealers who purchase consigned art.

Many consignors are not aware that when they consign art to a gallery, they can lose that art to the gallery's creditors in a bankruptcy proceeding. Similarly, consignors often are not aware that someone who buys a work of art from a gallery can have rights to the art that are superior to those of the selling owner, even if the gallery never pays the owner any of the sales proceeds. Art dealers may also not be aware that if they buy consigned art and aspects of the transaction should lead them to question the legitimacy of a sale, they may be required to return the art to an unpaid consignor without being compensated for the return.

Arts attorneys often face these issues. For example, one case involved an owner of many works of art who had consigned the works to the Salander O'Reilly Galleries. The gallery sold the works and never paid the owner. It allegedly obtained a total of \$100 million to \$200 million from all of its clients through similar practices. Anyone who bought art from the gallery who could establish that he or she paid a reasonable market price and was not aware of anything nefarious concerning the purchase was likely to have better title to that art than the seller who consigned it to the gallery, but who was never paid. Art dealers who bought, but could not satisfy those criteria, however, did not have title that was superior to that of the unpaid seller, and they had to return the art to the consignor.

Another series of cases involved an art dealer named Michel Cohen. He sold individual paintings to several purchasers, allegedly never paid the sellers for the paintings and allegedly never delivered the paintings to the purchasers, even though multiple purchasers for each of the paintings had paid Cohen the full purchase price.<sup>1</sup> Cohen's activities reportedly caused aggregate losses to his clients that totaled \$50 million or more.<sup>2</sup> The buyers and sellers asserted competing claims to the works of art, as did a lender to which certain of the works had been pledged as collateral. Resolution of the multiple legal actions that ensued required a careful analysis of several complex legal theories arising under the applicable consignment laws.

Any determination of who, among sellers, consignors, buyers and lenders, has superior rights in works of art begins with an analysis of various provisions of the

Uniform Commercial Code (UCC). The UCC contains different sections, respectively, covering sales of goods, rights of secured lenders, and rights arising out of consignments to dealers. Lenders accepting works of art as collateral may have rights under UCC §§ 9-319, 2-326 and 2-403. If a transfer from the owner to the dealer is a consignment, as defined by the UCC, § 9-319 may apply. If the transfer is a sale or for an intended sale, §§ 2-326 or 2-403 may apply. Section 2-326 applies to goods delivered to a dealer for sale or return. Section 2-403 addresses several types of transfers, such as where the transfer is a sale, for the purpose of a sale, or an entrustment. If a work of art is physically stolen, no rights will be transferred with the property, and no one subsequently in possession of it will have any ownership rights in it unless it is first returned to the owner.

The UCC sections discussed in this article set rules for determining the respective rights of buyers, sellers, dealers, and lenders when works of art have been transferred in each of the above circumstances. The UCC sections apply to sales and consignments of goods generally, not only to works of art. Some lawyers and commentators have questioned whether it is appropriate to apply these UCC rules to works of art. They argue that the UCC rules were designed to apply to commercial goods, such as ovens and hardware store wrenches, but, unlike ovens and wrenches, each work of art is unique, and the standard practices in the art markets may not be compatible with the UCC's rules that apply to consumer goods. Even as currently written, the UCC, at least in theory, does not apply to all art transactions, yet it has often been applied to resolve art disputes.

The UCC's provisions address situations in which an owner of a work of art who wants to sell it (Owner) transfers the art to an art dealer (Dealer), and the Dealer in turn either sells it to a buyer (Buyer) or borrows money from a bank (Lender) using the consigned art as collateral for the loan. The UCC rules were designed, among other things, to resolve whether the Buyer's right to the work of art is superior to those of the Owner, even if the Dealer has not paid the Owner for the art.

## The UCC Article 9 Statutory Scheme

### Background

UCC § 9-319<sup>3</sup> sets forth the rights of a "consignee's creditors."<sup>4</sup> It expressly gives to a consignee rights that are identical to those of the consignor.<sup>5</sup> The consignee therefore can transfer those rights to Buyers or Lenders.

The consignment provisions in § 9-319 originally were in § 2-326. Many of the former § 2-326 provisions are now incorporated into the Article 9 criteria for a “consignment.”

## UCC Section 9-319 Consignment Provisions

The first step in a § 9-319 analysis is to determine whether the transfer from a Seller to a Dealer is a “consignment” as defined by the UCC. If not, then § 9-319 will not apply to the transaction, and it will be necessary for conflicting claimants to determine whether either of the Article 2 provisions, namely § 2-403 or § 2-326, applies. Those are discussed later in this article.

### a. The Nature of the Transaction

Most of the criteria for the application of the § 9-319 statutory scheme are contained in § 9-102(a)(20)’s definition of the term “consignment.” Notably, the definition does not require that the terms of the consignment be contained in a writing.

The first, and arguably most important, criterion for a § 9-319 consignment is that the transfer from the Owner to the consignee-Dealer must be “for the purpose of sale.” The effect of the clause is that the consignee-Dealer will obtain § 9-319 rights in the property only if the property is transferred to that Dealer with the understanding between the parties that the property will be sold by the Dealer. Transfers of artwork that are not “for sale,” such as the transfer of a painting for the purpose of restoration or framing, will not be a “consignment” for purposes of Article 9.

Another criterion is that the nature of the transaction must not “create a security interest that secures an obligation.” In other words, the transaction will not be an Article 9 “consignment” where the Owner transfers the art to the consignee-Dealer for the purpose of pledging the art to that Dealer as security for a loan or other obligation from the Dealer.

If in applying these first two criteria it is determined that the transfer from the Owner to the Dealer is a “for sale” transaction, then the following additional criteria in § 9-102(a)(20) must be considered.

### b. The “Merchant” Requirements

The next set of criteria focus on the consignee-Dealer receiving the art. First, the Dealer must be a “merchant,” which is defined as someone who deals in goods of the type being transferred. For our purposes, a “merchant” is someone who buys, sells, or otherwise deals in works of art.<sup>6</sup>

In addition, the Dealer must not be an “auctioneer” and must conduct his or her business “under a name other than the name of the person making the delivery” or transfer. The Owner and the Dealer therefore cannot be doing business under the same name.

The Article 9 rules contain the additional requirement that the merchant “is not generally known by its creditors to be substantially engaged in selling the goods of others.”<sup>7</sup> Essentially, therefore, Article 9 requires the Dealer to have acquired goods of others for the purpose of a sale, but creditors generally cannot know that the Dealer is substantially engaged in making sales of other people’s property. In construing this requirement, courts generally have applied what has been termed the “majority test” in weighing the proof offered by the Owner to attempt to show that the person to whom he or she transferred goods was “generally known by his [or her] creditors to be substantially engaged in selling the goods of others.”<sup>8</sup> In other words, courts hold that a consigning Owner must prove that a majority of the consignee Dealer’s creditors knew the consignee was substantially engaged in selling consigned goods.

Commenting on the type of evidence necessary to support this “generally known” standard, one court explained:

[Consignor] has submitted sworn statements from [affiant], the owner of a jewelry store that had consigned goods to [consignee] in the past and [another affiant], a former employee of [consignee]. Both men state that taking jewelry on consignment is a common practice in their business and that it was generally known among creditors that [consignee] was substantially engaged in such practice.... The problem with this evidence, however, is that neither [of the affiants] is a creditor of [consignee]. Nor does either offer any but conclusory statements to suggest that he knows any such creditors, or purport even in conclusory fashion to have any first-hand experience in the relevant lending market... In short, their statements shed no light on the operative question... namely, whether [consignee’s] creditors generally knew that it was substantially engaged in selling consigned goods.<sup>9</sup>

Another court, in concluding that a consignor failed to meet its burden of establishing that the debtor was generally known by his creditors to be substantially engaged in selling the goods of others, explained that:

[t]he only evidence presented at the hearing which bears some relevance to this issue was that approximately 250 of debtor’s suppliers (which numbered approximately 600) provided goods to debtor on a consignment basis. Although this may indicate that some (but not most) of debtor’s suppliers tendered goods to debtor on a consignment basis, and therefore perhaps one could infer that these con-



signment suppliers knew that debtor was substantially engaged in selling the goods of others, this does not prove that most of debtor's creditors knew that debtor was substantially engaged in selling the goods of others.<sup>10</sup>

As these cases demonstrate, the “generally known” standard is difficult for litigants to satisfy. The difficulty is appropriate, however, because if this criterion is satisfied it will prevent a Buyer from obtaining rights in the property on the premise when the Buyer should have realized that the property was not owned by the Dealer and instead was on consignment. In other words, where a majority of creditors knew the Dealer dealt in consigned property, this UCC criterion draws the conclusion that the Buyer similarly should have known that the property he or she received was consigned to, and not owned by, the Dealer. The criterion significantly narrows the applicability of § 9-319, and it should not be broadly construed.

### c. The Type of Goods Requirements

The definition of “consignment” under Article 9 further requires that the aggregate value of the property being transferred be at least \$1,000 and that “the goods [were] not consumer goods immediately before delivery.” Article 9 defines “consumer goods” as “goods that are used or bought for use primarily for personal, family, or household purposes.”<sup>11</sup> At least one court has held that where goods, such as automobiles, are held on the debtor's property as inventory for sale at a business, such goods are not held for a personal or household purpose and, therefore, they are not consumer goods for the purposes of Article 9.<sup>12</sup> Another court found that the paintings that were at issue in the case before the court had been purchased for use in a business. The court relied on that fact in ruling that the paintings in that case were not consumer goods.<sup>13</sup>

### d. Section 9-319

If the above criteria are satisfied, the transfer from the Owner to the consignee-Dealer is a “consignment” under UCC Article 9. If the transfer qualifies, the provisions of § 9-319 can be applied to determine whether the consigning Owner on the one hand, or the Lender to or Buyer from the consignee-Dealer, on the other hand, has the superior interest in the consigned property. We will now discuss the analysis for making that determination.

The determination of who has superior title under § 9-319 is dependent upon whether the consigning Owner “perfected” his or her security interest in the property. Perfection of a security interest is accomplished by either (i) possession of the goods or (ii) filing a UCC financing statement, which has the effect of giving public notice of the secured party's interest in the goods.<sup>14</sup> As a consignor-Owner generally relinquishes possession when consigning goods, it is incumbent upon consignor-Owners to file UCC financing statements to protect their interests upon con-

signing goods to Dealers. If the consignor-Owner has not filed a UCC financing statement with respect to the property,<sup>15</sup> and if a Lender has complied with the UCC rules for attaching a valid security interest—such as executing a signed security agreement with the Dealer who has power to transfer rights in the art—the Lender is likely to be deemed to have ownership and possessory rights superior to those of an Owner who was never paid for the sold art. The filing of a UCC financing statement therefore is the principal mechanism for a consignor-Owner to protect his or her interest in property transferred to a Dealer.<sup>16</sup>

In construing § 9-319, courts have rejected arguments that a consignor-Owner who has not been paid for property he or she transferred should prevail over a Lender with a perfected security interest in the property by merely claiming that the consignor-Owner is the true “owner” of the property.<sup>17</sup> Courts explain that an Owner transferring his or her property to another for sale “could always have availed itself of greater protection” by filing a UCC financing statement and thereby recording its interest.<sup>18</sup> Finding in favor of a Lender with a perfected security interest over a consignor-Owner who failed to file a UCC financing statement is “consistent with the overall plan of the UCC, which generally favors good faith purchasers and encourages notice filing of security interests.”<sup>19</sup> Similarly, because another purpose of § 9-319 is “to protect the debtor's [i.e., the consignee-Dealer's] creditors who may be misled by the secret reservation of title to the consigned goods,” it places the onus on the consignor-Owner to take certain steps to give notice to third-parties (namely, the Dealer's other creditors) if the consignor-Owner wishes to retain title in the goods after shipping them to the Dealer to be sold.<sup>20</sup>

Section 9-319 is the provision on which Lenders and Buyers most likely will rely for claims involving consigned goods because of its simplicity. If, however, the transfer to the Dealer cannot satisfy the Article 9 consignment definition, provisions of Article 2 might provide alternative legal theories for Lenders and Buyers seeking to demonstrate a superior interest in works of art. The following sections discuss the applicability of UCC §§ 2-326 and 2-403 to transactions involving works of art.

## The UCC Article 2 Statutory Scheme

Sections 2-326 and 2-403 of UCC Article 2 offer Lenders and Buyers with alternative legal arguments to assert against an Owner who transferred property to a Dealer and was never paid for the art.

### Section 2-326

UCC § 2-326 has been applied to transfers that have some consignment characteristics, but do not satisfy all elements of the very specific definition of “consignment” contained in Article 9. Section 2-326 applies to “sale” transfers where the goods may be returned. The UCC provision

has two categories: (1) transfers that are a “sale on approval” and (2) transfers that are a “sale or return” transaction.<sup>21</sup> Sales “on approval” occur in circumstances where goods are “delivered primarily for *use*” by the person receiving them. Under the “sale on approval” provision, the goods will not be subject to the claims by the receiver’s creditors until the receiver fully approves and accepts the goods.

“Sale or return” transactions are those in which the goods are “delivered primarily for resale” to another party. In other words, in these transactions, an Owner delivers goods to someone who will resell them to a third party. As such, a “sale or return” transaction is likely also to satisfy some or all of the criteria for a UCC Article 9 consignment. Under § 2-326, goods that are sold in a “sale or return” transaction will be subject to the claims of creditors while the goods are in the Dealer’s possession.

In one § 2-326 case,<sup>22</sup> the court found that “the goods consigned to the debtor clearly were delivered on a ‘sale or return’ basis” where the debtor owned a shop that was engaged in the business of selling to retail customers various expensive items such as jewelry, art, collectibles and furniture that it held on a consignment basis. The shop was authorized to sell the consigned pieces by private sales or, in its discretion, by auctions. The shop filed for bankruptcy protection. The bankruptcy court held that the shop’s bankruptcy trustee could include consignment goods in the debtor’s possession as property of the debtor’s estate, which would be subject to the claims of the debtor’s creditors. The court noted that “[t]his may strike the consignors as grossly unfair, but that is the balance that the State of New York reached among competing parties.”<sup>23</sup> The court further explained that the consignors were “under constructive notice of the provisions of the UCC that subordinated their rights to the return of any of their goods to the superseding claims of the creditors of the debtor.”<sup>24</sup> A consignor-Owner’s only recourse therefore is to perfect its security interest in property—*i.e.*, by filing a UCC financing statement—so that the claims of the consignee-Dealer’s Lenders will not prevail.

A court in another jurisdiction reached the same result, finding that “[w]ith regard to consigned goods, there is a presumption that goods are being held by the debtor ‘sale or return’; therefore, the goods are subject to the claims of the debtor’s creditors.”<sup>25</sup> The court relied on Florida’s version of § 2-326, although apparently the older version that included the consignment provisions have since been moved to § 9-319.

In certain circumstances, therefore, § 2-326 can serve as an alternative provision to give Lenders and other creditors rights in a Dealer’s consigned art even where the “consignment” may not satisfy all of the criteria for an Article 9 “consignment.”

## Section 2-403

Under UCC § 2-403, a person purchasing artwork from a Dealer acquires whatever title the Dealer has or whatever title the Dealer has the power to transfer. Subsections (1) and (2) of § 2-403 both may be applicable to resolve competing claims in circumstances in which a Dealer to whom works of art are transferred in turn transfers them to a third-party Buyer or Lender, but fails to pay the Owner who sold or transferred the artwork to that Dealer.<sup>26</sup> To determine whether the third party Buyer or Lender has acquired good title, the criteria that are applied to the transaction between the Owner and the consignee-Dealer are different from the criteria that are applied to the subsequent transaction between the Dealer and the Buyer or Lender. We therefore will analyze the two transactions separately.

Under § 2-403(1), if an Owner delivers the artwork to a Dealer in what is referred to as a “transaction of purchase” (the definition of which is discussed below), the Dealer has the power to transfer good title to a Buyer or Lender if the Buyer or Lender qualifies as a “good faith purchaser for value” (the definition of which also is discussed below). While subsection (1) will apply to transfers to a Dealer, the transferee does not need to be a Dealer for it to apply.

Section 2-403(1) permits a dealer even with “voidable title” to pass “good title” to another despite the Dealer’s fraud or payment for the artwork with bad checks. In other words, even if the Dealer does not pay the seller, or even if he or she defrauds the Seller, the Dealer can transfer good title to someone else, such as a Buyer or Lender.

If, however, a person steals the artwork from the Owner in an actual theft, as distinguished from a voluntary but fraudulent transfer, the thief only obtains what is referred to as “void” title, meaning no title at all, so that he or she cannot transfer any title or rights in the stolen property to a Buyer or Lender.<sup>27</sup> Even if an innocent buyer in a long chain of custody pays full value for a previously stolen work of art, and regardless of the number of innocent purchasers through whose hands the work of art already passed, the buyer does not receive good title to it. The owner from whom it was stolen, or the heir (or estate), generally is able to take back the stolen artwork without having to compensate the innocent purchasers.<sup>28</sup>

Section 2-403(2) covers additional circumstances in which good title can be transferred. Unlike subsection (1), subsection (2) requires that the transferee be a code-defined “merchant” to whom the artwork was “entrusted” and who, in turn, transfers the artwork to a code-defined “buyer in the ordinary course.” A Buyer may receive good title from the transferee based on either subsection (1) or subsection (2), or based on both if all criteria are met. The subsections are not mutually exclusive.<sup>29</sup>

The “entrustment” section, § 2-403(2), however, does not apply directly to a Lender who has a security inter-



est in the work of art because a Lender to which a work of art is pledged is not considered to be a “buyer in the ordinary course”—an essential element for application of § 2-403(2).<sup>30</sup> This accordingly is applicable only indirectly to Lenders (*i.e.*, if they lend to people who are deemed to be buyers in the ordinary course).

## **a. Application of UCC Section 2-403(2)**

### **(1) The “Entrustment” Criterion**

The “entrustment” requirement of § 2-403(2) is more encompassing than the parallel “transaction of purchase” requirement in § 2-403(1). “Entrusting” is defined to include “any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties....” The definition of entrustment is very broad. As one court stated, “entrusting” can include “everything short of armed robbery.”<sup>31</sup> A transfer can be an entrustment even if the tactics used to procure the entrustment could be deemed “larcenous under the criminal law.”<sup>32</sup> The definition may include a sale arrangement or a “transaction of purchase,” which is the type of transfer required for § 2-403(1) (discussed in greater detail later),<sup>33</sup> a consignment, which is the type of transaction addressed in § 9-319 (previously discussed) or even an owner’s leaving art with a dealer so that it can be framed, cleaned or repaired.<sup>34</sup>

### **(2) The “Buyer in the Ordinary Course” Criterion**

An “entrustment” under § 2-403(2) includes more types of transfers from an Owner to a Dealer than a “transaction of purchase” does under § 2-403(1). Therefore, § 2-403(2)’s criteria for Owner to Dealer transfers are broader than § 2-403(1)’s criteria. However, § 2-403(2)’s criteria for transfers from the Dealer to a Buyer are narrower than § 2-403(1)’s criteria for such Buyer transfers. Specifically, § 2-403(2) requires the Buyer to be a “buyer in the ordinary course of business,” which is a more difficult standard to meet than § 2-403(1)’s requirement that the Buyer be a “good faith purchaser.”<sup>35</sup> A “buyer in the ordinary course of business” is defined as a person who buys goods from a person who is in the business of selling goods of that kind.<sup>36</sup> In other words, the Buyer must buy from a Dealer. Furthermore, the Buyer must buy in good faith, without knowledge that the sale violates someone else’s rights in the goods.

Qualifying for either “good faith purchaser” status or “buyer in the ordinary course” status is more onerous for Buyers who also are Dealers than it is for non-merchant buyers. To qualify under either of these standards, Dealers who buy art must conduct a certain amount of due diligence by making inquiries into the ownership of the goods being sold. This distinction regarding Dealers is discussed in greater detail later in this article—in the section addressing the “good faith purchaser” criterion of § 2-403(1).

The definition of a “buyer in the ordinary course” excludes people who buy from pawnbrokers and excludes

buyers who acquire the goods in a bulk transfer.<sup>37</sup> The definition also expressly excludes buyers who acquire the goods as security for a money debt.<sup>38</sup> It is this last criterion that precludes Lenders accepting works of art pledged as collateral for a loan from qualifying as buyers in the ordinary course of business.

If these criteria are met, a Buyer can obtain title to the art he or she buys that is superior to that of an unpaid seller. In these circumstances, the Seller’s only option is to try to recover from the consignee-Dealer who failed to pay him or her. If the consignee-Dealer no longer has assets, the Seller is out of luck and loses the art without compensation.

## **b. Application of UCC Section 2-403(1)**

As with §§ 2-326 and 2-403(2), § 2-403(1) favors innocent Buyers over unpaid, selling Owners. As one court explained, the policy of favoring innocent purchasers,

rests on the premise that it is cheaper for an owner to take precautions against giving title to a defrauder than it is for a [third-party] purchaser to research the chain of title of every good he purchases...[because] the original owner has an opportunity to take precautions against fraud, bad credit, and related commercial problems. The buyer may be lying to the owner, or may be using a bad check to pay for the goods. These are things an owner can, at least in theory, take precautions against. If, on the other hand, the person who later becomes a seller breaks into the owner’s house and steals the good...the owner cannot take precautions as easily.<sup>39</sup>

For this reason, court decisions in this area generally follow the principle that a voluntary “[Owner-]transferor ought to run the risk of the [transferee’s] fraud as against innocent parties.”<sup>40</sup> As one court explained:

[A] good faith purchaser for value who acquires the goods from the dishonest middleman will acquire good title free of all claims [since] [t]his result “is predicated on the policy that where a transferor has voluntarily delivered the goods to a purchaser, he, the transferor, ought to run the risk of the purchaser’s fraud.”<sup>41</sup>

### **(1) The “Transaction of Purchase” Criterion**

Under § 2-403(1), “[w]hen goods have been delivered *under a transaction of purchase*,” the person receiving the goods in the transfer has “voidable title,” giving him or her the ability to transfer good title to a good faith purchaser. If a Dealer him or herself is buying artwork in a simple purchase and sale transaction, the transfer unques-

tionably constitutes a “transaction of purchase.”<sup>42</sup> Even where the Dealer gives the selling Owner a check and the Owner accepts that check as payment for the art but the check is later dishonored, there can still be a “transaction of purchase” under § 2-403(1).<sup>43</sup> Similarly, even if the Dealer acquires the works of art from the Owner by using false or fraudulent pretenses, the transaction still can qualify as a “transaction of purchase.”<sup>44</sup>

While a direct purchase and sale between the Owner and the Dealer will qualify as a “transaction of purchase,” the transaction need not be a direct purchase and sale to qualify. The extent to which other types of transfers might qualify as “transactions of purchase,” however, is unclear. The UCC defines “purchase” broadly to include any “taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.”<sup>45</sup> If the Dealer and selling Owner agree that the Dealer will sell the painting to a third person, but that the Owner will not be paid until after the Dealer is paid by the Buyer, the transaction will qualify as a “transaction of purchase.” As one court held, a transferee receives the requisite “interest” in the property to constitute a “transaction of purchase” under § 2-403(1) where the transferor “voluntarily delivered” the goods to the transferee “for conversion and sale,” notwithstanding that the transferee subsequently was to “sell [the goods] to its customers” and “[o]nly when the unit had been sold was [the transferee] obligated to remit the original purchase price to [the transferor].”<sup>46</sup> The fact that the Dealer will owe no money to the selling Owner until after the Dealer sells the goods to a third party therefore will not prevent the dealer from receiving “voidable title” under § 2-403(1) at the time the goods are delivered to him or her. By receiving “voidable title” from the Owner, the Dealer has the ability to transfer good title to a good faith purchaser.

What transfers do not qualify as “transactions of purchase?” Clearly, as explained earlier, an involuntary transfer, such as a theft, will not give the thief any rights in the property and therefore the thief will not have the ability to transfer any legal rights in the property to others. In addition, if goods are delivered for storage, framing, cleaning or repair, the transaction would not be considered a transaction of purchase. (As noted above, such transfers of property may qualify as “entrustments” under § 2-403(2).) Instead, the “transaction of purchase” requirement under the Article 2 statutory scheme requires that the transfer be associated with a purchase and sale. That requirement of § 2-403(1) is, therefore, similar to the requirement for either an Article 9 “consignment” or a § 2-326 “sale or return.” As discussed above, those sections require the transfer from the Owner to the Dealer to be “for the purpose of sale.”

The discussion in the preceding paragraphs focuses on the transaction between a selling Owner and a Dealer. If

the Owner-to-Dealer transaction is deemed to be a transaction of purchase, the next step in determining whether the rights of a Buyer or Lender under § 2-403(1) are superior to those of an unpaid Owner is to analyze the transaction between the Dealer and the Buyer or Lender. The following paragraphs address the criteria for that stage-two transaction.

## **(2) The “Good Faith Purchaser for Value” Standard Under UCC Section 2-403(1)**

For a Buyer or Lender to obtain good title from a Dealer who acquired a work of art in a transaction of purchase, the Buyer or Lender must qualify as a “good faith purchaser” and must have given “value” in exchange for acquiring the work or rights to it. The UCC does not specifically define “good faith purchaser,” but a definition can be derived from a combination of definitions therein.

“Good faith” is defined in the UCC as “honesty in fact in the conduct or transaction concerned.”<sup>47</sup> The UCC defines “purchaser” as “a person who takes by purchase,”<sup>48</sup> and defines “purchase” to include “taking by sale, discount, negotiation, mortgage, pledge, lien, security interest, issue or re-issue, gift or any other voluntary transaction creating an interest in property.”<sup>49</sup> Applying the UCC’s definition of “value,” courts have explained that “[a] binding commitment to extend credit or to extend a pre-existing indebtedness, accepting delivery under a pre-existing contract, or any other consideration sufficient to support a simple contract, all may constitute value.”<sup>50</sup> Accordingly, courts have held that a secured creditor generally can be a “purchaser” for purposes of being a “good faith purchaser for value” under § 2-403(1).<sup>51</sup>

### **i. Honesty in Fact in the Conduct or Transaction Concerned**

To be accorded “good faith purchaser” status, a Buyer or secured creditor (Lender) must be found to have been “honest[] in fact in the conduct or transaction concerned.”<sup>52</sup> This criterion, at the very least, should prevent a Buyer from colluding with a Dealer in a scheme to obtain a work of art from the selling Owner without paying for it. It is clear, therefore, that to qualify as a good faith purchaser, the Buyer cannot know of, or knowingly participate in, any improper scheme to obtain the work of art from the Owner. Even if the Buyer does not have direct knowledge, the Buyer will not be considered a good faith purchaser if the transaction raises obvious red flags so that the Buyer should have known the transaction involved dishonesty.

This is where the law enters a gray area. If the transaction raises flags that are not reasonably recognizable, a private Buyer generally will not have an obligation to make inquiries or conduct due diligence regarding the honesty and good faith of the transaction.<sup>53</sup> There is a different standard, however, for Buyers who are art merchants (*i.e.*, art Dealers), as is discussed in the next section.

## ii. Merchants Have a Duty to Inquire About Ownership of the Works Being Acquired

UCC § 2-103(1)(b) contains a separate definition of “good faith” that applies to people and entities deemed to be merchants under the UCC. The UCC broadly defines “merchant” as “[i] a person who deals in goods of the kind or [ii] otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or [iii] to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.”<sup>54</sup> The separate definition of “good faith” for merchants provides that in the case of merchants, “good faith...means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.”<sup>55</sup> That definition has been construed by certain courts to impose on merchants a duty to inquire into the legitimacy of the transaction and the parties’ rights in the property being sold.<sup>56</sup> Under such courts’ analyses, those who could be considered “art dealers” or “art merchants” must undertake such an inquiry when works of art are purchased.

There are several cases regarding buyers and sellers of works of art where the buyers were deemed merchants and, because of the higher standard for merchants, the courts evaluated whether the merchants made appropriate inquiries into title and ownership of the works of art they were buying. In New York, for example, the *Porter v. Wertz*<sup>57</sup> case is one of the early cases in which a court required an art merchant to conduct a due diligence inquiry into the transaction being contemplated. There, the court held that a gallery, which bought and resold a Maurice Utrillo painting, failed to make the sufficient inquiries required of a merchant to qualify as a “good faith purchaser.”<sup>58</sup>

The court determined that the gallery purchasing the painting was an art merchant and applied the “good faith” standard applicable to merchants. It admonished that the standard “should not and cannot be interpreted to permit, countenance or condone commercial standards of sharp trade practice or indifference as to the ‘provenance,’ i.e., history of ownership or the right to possess or sell an object d’art, such as is present in the case before us.”<sup>59</sup> The court found that the gallery had conducted no investigation regarding the status of an intermediary who was selling the painting.

On appeal, the appellate court harshly criticized the gallery’s assertion that its failure to investigate the transaction was consistent with industry practice. The appellate court repeated an observation of the trial court, which had stated: “‘in an industry whose transactions cry out for verification of...title...it is deemed poor practice to probe....’” The court then admonished that “commercial indifference to ownership or the right to sell facilitates traffic in stolen works of art. Commercial indifference diminishes the integrity and increases the culpability of the apathetic

merchant. In such posture, [the gallery] cannot be heard to complain.”<sup>60</sup>

The *Porter v. Wertz* decision,<sup>61</sup> and other decisions in this area,<sup>62</sup> indicate that where art merchants are involved there is a shift away from the UCC’s policy favoring innocent purchasers and toward a policy of placing the onus on a the purchaser if he or she is an art dealer. The question that arises then, is how much investigation is enough? There are questions a gallery or dealer can ask and documents a gallery or dealer can demand, such as a bill of sale or a consignment agreement, to check the authority of a person selling a work of art. It is not clear that asking those questions or obtaining such documents, however, will expose someone else’s deception. For example, a person engaging in the deception may not answer the questions truthfully or may produce a fraudulent bill of sale.

In a California case titled *Morgold, Inc. v. Keeler*,<sup>63</sup> the court ruled that an art dealer who purchased a painting that was the subject of a title dispute qualified as a good faith purchaser for value. The court found that the dealer/purchaser conducted a sufficient investigation to satisfy any concerns it should have had based on the circumstances. The plaintiff contended that there were two red flags that should have raised concerns in the purchasing dealer’s mind. One was that the prior owner had obtained the painting in exchange for a debt forgiveness. The other was that the purchaser had negotiated a dramatic reduction in the seller’s asking price. In response, the dealer stated that it conducted an investigation that included discussions with a gallery that previously held the painting for sale, discussions with someone who was an expert concerning the artist created the painting, and research into the value of the painting by looking at publications of Sotheby’s, Christie’s and Butterfield & Butterfield. Through those investigations, the dealer did not discover the title dispute. The court ruled that the purchasing dealer’s investigations were adequate for it to qualify as a good faith purchaser.<sup>64</sup>

In *Lindholm v. Brant*,<sup>65</sup> another case in Connecticut Superior Court, the court found that the defendant, Peter Brant, who was the purchaser of a painting by Andy Warhol titled “Red Elvis,” satisfied the art merchant standard by taking all reasonable steps to investigate the title to the painting when Brant purchased it from an art dealer named Anders Malmberg.<sup>66</sup>

In *Lindholm*, K. Lindholm sued Brant for conversion of “Red Elvis.” Brant argued in defense that he was a buyer in the ordinary course of business under § 2-403(2) (the “entrustment” section). Finding that Brant was an art merchant, the court required Brant to satisfy the good faith standard for merchants, i.e., to prove that he was honest in fact and observed the reasonable commercial standards of fair dealing in the art trade. The court held that “[w]here doubts or questions are raised in the merchant’s mind regarding the seller’s authority to sell, it is incumbent upon the merchant to seek ‘further verification’ before consummating the deal.”<sup>67</sup>



The court found that there were several doubts and questions raised during Brant's extended acquisition of "Red Elvis." It, however, found that with respect to each of these doubts and questions, Brant or his counsel had taken reasonable steps to inquire into the title of the painting.<sup>68</sup> The court explained that Brant knew that the dealers involved were considered reputable; he retained counsel, which the court found to be an unusual step in art transactions; counsel engaged in due diligence including investigating UCC liens and checking with the Art Loss Registry; and Brant insisted on a formal contract rather than a simple invoice. The court further found that "it would have been an extraordinary measure for Brant to insist on seeing the signed invoice or letter from K. Lindholm to Malmberg," explaining: "As the experts, including plaintiff's expert Hoffeld testified, the vast majority of art transactions—worth millions of dollars—are completed on a handshake and an exchange of an invoice."<sup>69</sup> The court accordingly concluded that Brant "observed reasonable commercial standards of fair dealing in the art industry when he purchased Red Elvis from Malmberg."<sup>70</sup> The court also found no evidence that Brant in fact knew Malmberg did not own the painting.

The different approaches by the courts in *Porter v. Wertz* and *Lindholm v. Brant* demonstrate that different facts can yield significantly different results when courts apply the UCC standards. This principle is illustrated further in a few recent decisions.

### iii. The Recent Cases Involving Buyer Joseph P. Carroll

Three recent decisions arising out of the demise of Salander O'Reilly Galleries illustrate art merchants' due diligence obligations when buying works of art. All three decisions involved the same buyer, Joseph P. Carroll. All three also involved transactions between Carroll and Salander O'Reilly Galleries (SOG, the gallery). In these cases, the courts analyzed Carroll's acquisition of works of art from SOG not long before SOG was forced into bankruptcy and principal, Lawrence Salander, pled guilty to fraud charges and was sent to prison.

In one of the three cases, the court found that Carroll was a buyer in the ordinary course of business. In the other two cases, however, courts found that Carroll could not qualify as a buyer in the ordinary course. The courts reached these very different conclusions, even though all three cases concerned the same buyer acquiring art from the same dealer during the same period of time. With two courts having found that Carroll disregarded red flags indicating that SOG's sales of art during that period were not legitimate, how could the third court have found that there were no red flags raising questions concerning the legitimacy of SOG's sales of art during that same period? The following discussion of these three cases compares the courts' analyses.

## Background Concerning the Collapse of Salander O'Reilly Galleries

Laurence Salander opened a gallery in New York in 1974. In 2005, the gallery moved to an impressive five-floor location on 71st Street, between Madison and Fifth Avenue. By 2005, the SOG had created the appearance that it was one of the most successful, well-endowed galleries in the world. Behind the scenes, however, SOG was deeply in debt in 2004 and 2005. When the Gallery moved to its new facility in 2005, its debt problem became very serious.

In 2006 and 2007, lawsuits began to be filed against SOG. One of the early cases was filed by Earl Davis, the son of the well-known American artist Stuart Davis. Earl Davis had a long relationship with SOG and had consigned many of his father's works of art there. In 2007, he sued SOG alleging that the gallery had sold approximately 75 paintings and drawings created by his father without informing or paying Earl Davis any of the more than \$10 million the gallery had received in sales proceeds.<sup>71</sup> Many other similar suits began to be filed thereafter, claiming unpaid debts and unauthorized and undisclosed sales.

In October 2007, an entity named Renaissance Art Investors (RAI) filed a lawsuit. RAI had entered into a joint venture with SOG in the spring of 2006. The entity that was set up as the RAI/SOG joint venture purchased many Italian Renaissance works of art. In mid-2007, RAI discovered that SOG had sold some of the joint venture art without disclosing the sales and paying the proceeds to RAI. On October 9, 2007, RAI obtained an initial temporary restraining order (TRO) that restrained SOG from transferring any works of art that were assets of the joint venture. Three days later, arguing that SOG violated the first restraining order, RAI obtained a second TRO and a court order to padlock the gallery to prevent SOG employees from entering.

Then came bankruptcy. Initially, the gallery was placed in involuntary bankruptcy, which it then converted to a voluntary Chapter 11 bankruptcy. Eighteen months later, the Manhattan District Attorney indicted the gallery and its principal, Lawrence Salander. Lawrence Salander pled guilty and currently is serving a six-year jail term.

High profile lawsuits brought by celebrities such as John McEnroe and Robert De Niro were featured in the news. Numerous lawsuits were brought by SOG's long-time friends and long-standing business partners. Cases were filed by dealers, artists, the families of deceased artists, deceased artists' estates, and many other creditors. In many cases, consignors claimed that SOG sold or gave away their works of art and failed to remit the proceeds to the owners.

In the two year period prior to the bankruptcy, SOG and Salander had sold some of the art to dealer named Joseph P. Carroll. At least three lawsuits were brought against Carroll, alleging that he was not entitled to works

of art he purchased from Salander and SOG because he was not a buyer in the ordinary course of business. In each of those three cases, the court issued a decision detailing the standard applicable to dealers who purchase art. The three decisions taken together provide a useful roadmap for dealers who purchase art and for the extent to which they must engage in due diligence when doing so. Even though all three decisions concerned sales by SOG to Carroll at a time when SOG was in serious financial trouble and selling art at fire-sale prices to cover its own operating costs, one of the decisions finds that there were no warning signs to require Carroll to engage in a heightened due diligence inquiry, while the other two decisions find many red flags triggering the need for heightened due diligence. The following describes the three decisions addressing whether Carroll was a buyer in the ordinary course.

### ***Joseph P. Carroll Ltd. v. Baker***

The first of the three Carroll decisions was *Joseph P. Carroll Ltd. v. Baker*, filed in federal court in the Southern District of New York (*Carroll I*).<sup>72</sup> In that case, the court ruled that “Carroll Limited acted as a buyer in the ordinary course of business when purchasing” a single painting from SOG in 2007.<sup>73</sup> The facts were as follows: Craig Baker was the owner of a painting by John D. Graham;<sup>74</sup> Baker consigned the painting to SOG in 2000; the painting remained at SOG on consignment until the gallery sold it to Carroll in 2007,<sup>75</sup> and Baker never filed any UCC financing statements regarding his consignment of the painting.<sup>76</sup>

Based on the evidence before it, the court found that between 1998 and 2007, Carroll purchased 120 to 150 works of art from SOG.<sup>77</sup> Carroll first saw the Baker painting at issue at SOG in 2000.<sup>78</sup> It was on sale for \$175,000. Carroll testified that the price had been too high, and therefore he did not buy it.<sup>79</sup> At trial, Carroll testified that Salander called Carroll in 2007, asking Carroll to come to the gallery to look at some works of art.<sup>80</sup> Carroll further testified that he had bought art from SOG at a 40% discount in 2006 (in that same year, Carroll had noticed that a bank had placed three general asset liens on SOG). Carroll therefore told Salander in early 2007 that he would not buy any art in response to Salander’s 2007 phone call unless he received a 40% discount again.<sup>81</sup> Salander showed Carroll 50 works of art and said: “Make me an offer.”<sup>82</sup> Carroll considered buying 24 of the works, but wanted to research them first. He checked UCC filings, and there were none with respect to the 24 works. He also checked the provenance. He then agreed to buy the works, including the painting at issue. He paid SOG \$105,000 for the painting (*i.e.*, 40% off the original \$175,000 price).<sup>83</sup>

Carroll testified that prior to a July 2007 article referring to a lawsuit in which Salander and SOG were accused of fraud, he was not aware of the substance of any allegations against Salander and SOG.<sup>84</sup> Although it noted that in a 1994 case in New York State Supreme Court, a judge

had determined that Carroll’s testimony was not credible and that “Carroll ha[d] attempted to perpetrate a fraud on both the plaintiff and the court,”<sup>85</sup> the court in *Carroll I* found that “Carroll has testified credibly in this action.”<sup>86</sup>

In its legal analysis, the court first noted that both Carroll and SOG were art merchants as defined in the UCC.<sup>87</sup> The court also noted that the consignment to SOG by the owner of the painting, Craig Baker, constituted an “entrustment” under § 2-403. The sole issue in dispute, therefore, was “whether Carroll was a buyer in the ordinary course of business.”<sup>88</sup>

The court recognized the UCC standard for merchants, stating that “‘where there are warning signs about problems in a sale,’ merchants purchasing art have ‘an added duty of inquiry.’”<sup>89</sup> The court explained that:

Examples of circumstances that constitute “warning signs” sufficient to trigger “an added duty of inquiry” include (1) whether the sale price is “obviously below market,” (2) whether the “negotiations or procedure of the sale differ” from previous transactions between buyer and seller, (3) whether the buyer was aware of the seller’s “financial difficulties,” or (4) whether the buyer would have “reason to doubt the seller’s ownership of the artwork.”<sup>90</sup>

Applying these factors, the court concluded that although the pre-purchase relationship with Salander and SOG “contained some oddities,” the circumstances “did not present sufficient warning signs to warrant additional investigation by Carroll.”<sup>91</sup> The court found that the \$105,000 purchase price was not obviously below market because Carroll’s expert testified that the painting’s appraised value was \$75,000, although there was evidence that Baker had orally agreed with SOG that the gallery was not to sell the painting for less than \$250,000.<sup>92</sup> The court also found that Carroll had taken customary steps to investigate the painting: he inspected the painting in person; he looked at a prior auction catalogue from an exhibition in which the painting was exhibited; he looked at a written provenance statement; he had a restorer access the painting; and he checked the UCC filings.<sup>93</sup> The court concluded that Carroll had “no reason to doubt SOG’s ownership of the painting on the basis of its investigation into its provenance.”<sup>94</sup> It further ruled that “Carroll undertook the usual and customary inquiry into the title of the painting and found nothing suspicious.”<sup>95</sup>

The court therefore found an absence of warning signs, and, accordingly, it did not require Carroll to satisfy the heightened duty of inquiry when warning signs are present. Since Carroll satisfied the commercial standards applicable when no warning signs are present, the court found that he qualified as a buyer in the ordinary course of business. As the court held:



Carroll Limited (1) purchased the Painting in good faith, without knowledge that the sale violated the rights of another person in the Painting, and (2) the sale comported with the usual or customary practices in the art industry. The Court therefore finds that Carroll Limited acted as a buyer in the ordinary course of business when purchasing [the Painting]. As Carroll Limited was a buyer in the ordinary course of business, Salander transferred all of Baker's rights in the painting—*i.e.*, full title—to Carroll Limited when Carroll Limited purchased the artwork.<sup>96</sup>

In the two other Carroll decisions discussed below, the courts found that many warning signs were present when Carroll purchased other art from SOG. Although the following two cases were decided after *Carroll I*, they involved warning signs and purchases that existed prior to Carroll's purchasing the Baker painting at issue in *Carroll I*.

### **Davis v. Carroll**

Seven months after the decision in *Carroll I*, a different judge of the United States District Court for the Southern District of New York reached a very different conclusion than the court in *Carroll I*. In *Davis v. Carroll (Carroll II)*,<sup>97</sup> the court concluded that Carroll was *not* a buyer in the ordinary course of business when he purchased a series of paintings from SOG in 2006, several months prior to the purchase at issue in *Carroll I*.

In *Carroll II*, as in *Carroll I*, the parties agreed that § 2-403 governed the case. Unlike *Carroll I*, however, the court in *Carroll II* found that "a purchaser in Carroll's position *should* have been alerted to serious irregularities by the numerous red flags that riddled Carroll's course of dealing with SOG in early 2006. As a result, Carroll was actually or constructively on notice of the need for 'further verification.' ... Yet he took virtually none of the steps customary in the art market to confirm the deal's legitimacy."<sup>98</sup> The court continued: "Any reasonable juror would conclude that, at best, Carroll displayed the very 'commercial indifference' condemned by the U.C.C. and *Porter [v. Wertz]*."<sup>99</sup> Mirroring the castigations by the court in *Porter v. Wertz*, the court in *Carroll II* stated:

At worst, Carroll knowingly took advantage of SOG's sordid dealings to achieve an exorbitant profit and then sought to shield himself behind the unwarranted title of "buyer in the ordinary course." In the market for art, New York law does not tolerate such persistent indifference to questionable dealings. Intentional or reckless blindness to signs of foul play creates a fertile ground for fraud, facilitates a vast market in stolen works, and runs afoul

of both industry norms and legal obligations.<sup>100</sup>

The facts in *Carroll II* were as follows:

Plaintiff Earl Davis, the son of the well-known American Painter Stuart Davis, had a long-term relationship with SOG.<sup>101</sup> Over many years, Davis consigned more than 50 works of art created by his father to the gallery.<sup>102</sup>

As with the court in *Carroll I*, the court in *Carroll II* found that Carroll completed his first art transaction with SOG in 1998 and purchased approximately 120 works of art from SOG between 1998 and 2005.<sup>103</sup> The court in *Carroll II* also found that "Carroll knew in 2000 and remained aware in the fall of 2005 that SOG represented the Davis Estate."<sup>104</sup>

Between January 6, 2006 and May 22, 2006—after Davis had instructed Salander to suspend all SOG sales of Davis works—Salander continued to sell Davis artwork, and Carroll and Salander engaged in a series of art exchange and sale transactions. In those transactions, SOG sold 44 works by 12 artists to Carroll, including 16 Stuart Davis works.<sup>105</sup> Carroll received no documents showing that SOG owned the Davis works, even though he was given such documentation for other works he bought from SOG. Carroll never asked whether SOG owned the Davis works. As the court noted, Carroll explained at trial that he "assumed that the owner was actually probably, you know—actually, I assumed that the owner was probably—to the—was probably Salander."<sup>106</sup>

The court also pointed out that at the time when Carroll was buying the works from SOG, another dealer told Carroll that SOG Director Leigh Morse had informed the other dealer that the Stuart Davis works Carroll purchased from SOG had come from Earl Davis personally.<sup>107</sup> Despite having learned this information, Carroll did not ask why "SOG had prepared and signed documentation indicating that it 'owned' the Davis works."<sup>108</sup> Soon after acquiring the Davis works, Carroll consigned two of them to that other gallery. Although documents from SOG listed it as the owner, Carroll changed the provenance on the agreement consigning the two works to the other gallery to state that Earl Davis had been the owner and that Carroll had acquired them "through SOG."<sup>109</sup>

The other dealer also expressed surprise when Carroll showed him another Stuart Davis work Carroll had acquired from SOG, because SOG had told that other dealer that Earl Davis did not want that particular piece to be sold.<sup>110</sup> Despite this evidence, Carroll continued his contention that it was his assumption that SOG owned the Davis works. Carroll did not contact Davis to confirm his assumption.<sup>111</sup>

The court heard a significant amount of evidence pertaining to whether Carroll purchased the Davis works below market value. Carroll purchased two of the Davis works for \$600,000. He re-consigned one of those two

works back to SOG the same day for \$750,000, and subsequently consigned both to another gallery at a sale price of \$1.2 million.<sup>112</sup> A few months later, Carroll consigned the same two works for a price of \$2.75 million.<sup>113</sup>

Carroll acquired two other Davis works for \$150,000, and later exchanged those same two works back to SOG for \$400,000.<sup>114</sup> In May 2006, Carroll purchased a group of four Davis paintings from SOG for \$210,000 and resold them to SOG in October 2006 for \$650,000.<sup>115</sup> That May Carroll also purchased a Davis drawing from SOG for \$20,000 and sold it to a museum in 2007 for \$148,000.

In addition, Carroll bought a group of four paintings from SOG in May 2006 for \$210,000 and resold them to SOG in October 2006 for \$650,000. A drawing Carroll bought in May 2006 for \$20,000 he sold to a museum in 2007 for \$148,000. Another drawing Carroll bought in May 2006 he sold for \$250,000 in March 2008.<sup>116</sup>

Carroll purchased yet another Stuart Davis drawing in February 2006 for \$75,000 and sold it in January 2007 for \$225,000. Carroll said he sold it for \$175,000, but the person through whom Carroll sold it said the price was \$225,000.<sup>117</sup>

One additional Davis painting Carroll bought for \$100,000 was sold by him several months later for \$400,000.<sup>118</sup> Davis' expert concluded that Carroll had acquired the Davis works for 31.45% of their fair market value, *i.e.*, a 68.55% discount.<sup>119</sup> SOG never paid Davis any amount of the sales proceeds SOG had received from Carroll.<sup>120</sup>

In applying the law to these facts, the court began by noting the parties' agreement that UCC § 2-403 governed the case. The parties also had agreed that Salander, SOG, Carroll and Carroll Limited were "merchants" as defined in § 2-104(1).<sup>121</sup>

Pointing to the line of cases beginning with *Porter v. Wertz*, the court stated that "to prevent lackadaisical standards in the art business from affording a shield to either misconduct or fraud-conducive indifference, New York courts will not allow a buyer who conducts trivial due diligence to insist that 'failure to look into [a merchant's] authority to see [a] painting was consistent with the practice of the trade.'" Quoting *Porter v. Wertz*, the court further explained "it is precisely such 'commercial indifference to ownership or the right to sell [that] facilitates traffic in stolen works of art.'" <sup>122</sup>

Citing *Carroll I*,<sup>123</sup> the court said a "heightened duty of due diligence is triggered 'where there are signs about problems in a sale.'" <sup>124</sup> The court further explained that "*Porter* also mandates an escalating duty of inquiry when the purchaser faces warning signs of foul play—often described as red flags."<sup>125</sup> When describing the applicable standards, the court then explained that "*Porter* establishes a legal duty of due diligence pegged to a higher standard of inquiry than may be customary in the art business and

then creates an objective negligence standard as the test for whether a purchaser displayed 'good faith' under the 'buyer in the ordinary course' analysis."<sup>126</sup> It cautioned, however, that "New York law does not expressly identify the triggers of a duty of heightened inquiry in the art industry."<sup>127</sup> It instead referenced the examples of triggering flags listed by the court in *Carroll I*.

Although the *Carroll II* court found a factual dispute that precluded summary judgment with respect to whether Carroll was aware of SOG's financial difficulties at the time of the transactions, it ruled that "it is beyond dispute that Carroll should have been alerted by numerous signs to serious questions about SOG's authority to sell the Eight Disputed Works. Throughout his dealings with SOG, Carroll displayed the very commercial indifference that *Porter* prohibits. No reasonable juror could find to the contrary.... No reasonable juror could examine these provenance documents...and conclude that Carroll believed in 2006 that SOG had owned the Stuart Davis works."<sup>128</sup>

The court found particularly problematic the "tale" Carroll told about SOG's statements concerning ownership of the Davis works. He said SOG gave him conflicting documentation, and did not answer his question about ownership, but Carroll never made a further inquiry.<sup>129</sup> The court concluded that "even crediting Carroll and reading the facts in a light that flatters him, any reasonable juror would conclude that the 2006 [transactions] raised a significant red flag that should have placed Carroll on notice of the need for further inquiry."<sup>130</sup>

For example, the court stated that "New York law also identifies bargain basement prices as a critically important red flag in art transactions."<sup>131</sup> The court then noted that "the bargain basement prices offered by Salander, along with a battery of irregular and suspicious issues pertaining to SOG's ownership of and right to sell the [Davis] works, constituted red flags that triggered a duty of heightened inquiry on Carroll's part before any consummation of the 2006 [transactions]."<sup>132</sup>

Nor could Carroll demonstrate that his transactions comported with the usual and customary practices in the art industry. He could identify only one transaction that had some similar characteristics.<sup>133</sup>

After finding many red flags that placed Carroll on a heightened duty of inquiry, the court evaluated the inquiries Carroll made. It noted three: (1) Carroll inspected SOG's provenance and cataloguing of each work; (2) Carroll physically examined each work for labels or markings indicating ownership; and (3) Carroll conducted a search of UCC financing statement filings.<sup>134</sup> Carroll's expert testified that this was more due diligence than is common in art transactions.<sup>135</sup> The parties did "not dispute that Carroll conducted adequate due diligence in the absence of red flags," but noted that in these circumstances it had to consider what heightened inquiry was necessary where red flags were present.<sup>136</sup>

Carroll's expert did not testify about what such a heightened level of inquiry should entail. Davis' expert, however, did specify conduct that "Carroll would have been expected under art industry custom to take."<sup>137</sup> It consisted of: "(1) inquir[ing] directly of Salander and insist[ing] upon a clear answer or documentation regarding its ownership or rights of sale; (2) consult[ing] with the authors and preparers of the forthcoming, definitive Stuart Davis Catalogue Raisonné; (3) consult[ing] with Earl Davis 'as Stuart Davis scholar and publicly identified owner of many of the works'; (4) review[ing] the publications cited in the cataloguing materials *before* agreeing to purchase works in the 2006 [transactions], instead of reviewing them *after* striking the deal; and (5) examin[ing] SOG's list of retail prices for these works to more accurately ascertain whether the prices were so low as to provide cause of concern."<sup>138</sup>

Carroll's expert testified that it was not common in the art industry for a buyer to contact the owner directly when a dealer is involved. The court therefore found a genuine disputed issue of fact on that point. However, since Carroll's expert did not counter any of the other points specified by Davis' expert, the court accepted those as norms to be complied with, and concluded that "[b]ecause Carroll did not undertake any of the forms of heightened inquiry that [Davis' expert] describes as normal and customary in the industry, any reasonable juror would conclude that Carroll did not meet the duty of heightened inquiry imposed upon him under New York law by virtue of the numerous red flags that he knew, or should have known, about during the 2006 [transactions]."<sup>139</sup> The court explained:

Carroll consummated the 2006 Exchanges in the shadow of glaring and unmistakable signs of foul play. His conduct during those transactions evinced a subjective awareness of irregular dealings.... [A] purchaser in Carroll's position *should* have been alerted to serious irregularities by the numerous red flags that riddled Carroll's course of dealing with SOG in early 2006. As a result, Carroll was actually or constructively on notice of the need for "further verification".... Yet he took virtually none of the steps customary in the art market to confirm the deal's legitimacy.

...New York law does not tolerate such persistent indifference to questionable dealings. Intentional or reckless blindness to signs of foul play creates a fertile ground for fraud, facilitates a vast market in stolen works, and runs afoul of both industry norms and legal obligations.

The court therefore concluded that Carroll was not a buyer in the ordinary course of business with respect to his acquiring the Davis works of art. As a result, the con-

signor, Earl Davis, had superior title and right to possession of the Davis art, and Carroll had to return it to him.

### ***The Dorothy G. Bender Foundation, Inc. v. Joseph P. Carroll***

The third case in the series of three Joseph Carroll cases is *The Dorothy G. Bender Foundation, Inc. v. Joseph P. Carroll* (Carroll III).<sup>140</sup> The facts are as follows: In 2004, Salander entered into a deal with tennis celebrity John McEnroe; McEnroe had known Salander for years, having worked with Salander as an intern in 1992;<sup>141</sup> in their deal in 2004, Salander and McEnroe agreed that each would be equal partners in jointly acquiring two paintings by Arshile Gorky known as "Pirate I" and "Pirate II;"<sup>142</sup> Salander purchased the two paintings at a Paris auction for approximately \$4 million, and McEnroe wired half the purchase price to SOG;<sup>143</sup> Salander and McEnroe further agreed that neither painting would be sold for less than \$5 million and, upon any sale, 50% of the proceeds would go to McEnroe.<sup>144</sup>

What McEnroe did not know, however, was that Salander agreed on nearly identical terms with another individual named Morton Bender for the purchase and resale of "Pirate I" and "Pirate II." Unaware that Salander had a deal with McEnroe for the same two paintings, Bender delivered \$4 million to Salander, half of which was to be Bender's equity investment in the two paintings and the other half of which he loaned to Salander to cover Salander's share of the purchase.<sup>145</sup> Salander therefore obtained \$6 million to purchase the two paintings for \$4 million, and upon resale he was to keep 50%, give 50% to McEnroe and give another 50% to Bender. The 150% split was destined to result in problems.

McEnroe took possession of "Pirate I." Without telling McEnroe or Bender, however, Salander sold "Pirate II" to Carroll. In that sale, Salander transferred "Pirate II" to Carroll in exchange for two paintings from Carroll—one of which was a Stuart Davis painting known as "Pochade," and the other a painting known as "Kabuki Tetrad," by John Covert. Carroll had acquired "Kabuki Tetrad" from Salander seven years earlier for \$400,000 and had acquired "Pochade" from Salander, together with 11 other works of art, by paying Salander \$665,000 and giving Salander one other work.<sup>146</sup>

Salander did not tell Carroll about the duplicate deals he had entered into with John McEnroe and Morton Bender, but instead told Carroll that the "Pirate II" painting was owned by an entity called "The Seven Salander Children Group." Although Carroll had done business with Salander for years, Carroll had never heard of this group.<sup>147</sup> Carroll attended the Paris auction when Salander purchased the two Pirate paintings, but never asked to see documents showing who actually bought them.<sup>148</sup>

Shortly after purchasing it, Carroll consigned "Pirate II" to art dealer Asher Adelman, and word of Carroll's



claimed ownership reached McEnroe. To avoid litigation, McEnroe agreed with Salander to forgo his claim to "Pirate II" in exchange for Salander's share of "Pirate I."<sup>149</sup> McEnroe then consigned "Pirate I" to a gallery owned by Christie's, but Bender learned of the consignment and placed a lien on the painting. Bender and McEnroe then negotiated to become equal partners in "Pirate I" and brought suit against Carroll to gain control of "Pirate II."<sup>150</sup>

The court analyzed the case under the UCC "entrustment" section, § 2-403(2).<sup>151</sup> It also noted that the standard of good faith for merchants requires "the observance of reasonable standards of fair dealing in the trade."<sup>152</sup> The court cited *Porter v. Wertz*, *Davis v. Carroll* and *Carroll v. Baker*, among other cases, for the duty of inquiry standard that is applied when art merchants purchase works of art and "red flags" or "warning signs" indicate problems with the sale.<sup>153</sup> The court stated that such warning signs include "a purchase price which is obviously below market, a sales procedure that differed from previous transactions between the two parties, or any other 'reason to doubt the seller's ownership of the artwork.'"<sup>154</sup> The court explained that "[a]n art dealer who proceeds to purchase artwork from another dealer in the presence of such red flags, without making a diligent inquiry as to the provenance of the work in question, will therefore not qualify as a 'buyer in the ordinary course' whose title is protected by UCC 2-403(2)."<sup>155</sup>

In its analysis of the facts under these standards, the court found that the discrepancies and anomalies regarding the values of the works of art Salander and Carroll traded should have alerted Carroll to the fact that the "Pirate II" transaction was not commercially reasonable.<sup>156</sup> In addition, the court found that Carroll's testimony about whether Salander's statement that an entity called the "Seven Salander Children Group" was the owner of the painting was not credible.<sup>157</sup> Had Carroll investigated the Group's purported existence, he would have found it did not exist.

The court concluded: "Carroll acquired 'Pirate II' in a grossly undervalued transaction in which he chose to make no inquiry as to Salander's authority to sell the work, despite behavior on Salander's part which marked a departure of their normal course of dealings. By going forward with the transaction despite these red flags, Carroll did not observe the reasonable commercial standards of the art trade, and therefore, as an art dealer himself, failed to qualify as a buyer in the ordinary course of business within the meaning of UCC 2-403(2)."<sup>158</sup>

Therefore, the court ruled that Morton Bender and John McEnroe were entitled to recover the painting from Joseph Carroll. It further ruled that Bender and McEnroe were entitled to a declaration that their legal title to *Pirate II* was superior to title claimed by Carroll.<sup>159</sup>

\* \* \*

It is difficult to reconcile the decision in *Carroll I* with the decisions in *Carroll II* and *III*. The art at issue in *Carroll II* and *III* was acquired by Carroll from Salander prior to Carroll's acquisition of the John D. Graham painting at issue in *Carroll I*. If, as the courts in *Carroll II* and *III* determined, Carroll knew of red flags raising questions about the legitimacy of those earlier sales, how could Carroll have lost that awareness when he subsequently purchased Craig Baker's Graham painting from Salander? At the very least, these cases demonstrate that whether or not an art merchant can qualify as a buyer in the ordinary course of business will vary from case to case. Courts do require art dealers to demonstrate that they took commercially reasonable steps to investigate the title and ownership of the works of art they purchase where the sellers/consignors have not been paid and challenge the sales.

Although the results in the three cases are difficult to reconcile, they provide the best elucidation to date of the standard to be applied to art merchants claiming to be buyers in the ordinary course. First, the courts articulated several circumstances that serve as warning signs requiring the buying art merchant to conduct further due diligence. The warning signs include:

1. Whether the price of the art being sold is below market;
2. Whether the negotiations or procedure for the sale of the work of art at issue differ from previous transactions between the buyer and seller;
3. Whether the buyer was aware of the seller's financial difficulties; or
4. Whether the buyer would have reason to doubt the seller's ownership of the work of art.

The court in *Carroll I* ruled that in the absence of red flag warning signs, it is sufficient for an art merchant buying art to do the following:

1. Inspect the work of art in person;
2. Review provenance concerning the work of art, such as prior auction catalogues describing the work of art;
3. Review the seller's provenance statement;
4. Have a restorer inspect the work of art; and
5. Check UCC filings to see whether anyone has a security interest in the work of art.

Although the court in *Carroll I* did not rule that all of the above tasks must be undertaken, it did rule that the above inquiry in the *Baker* case was a sufficient inquiry by an art merchant where red flag warning signs were not present.

Where red flag warning signs were present, the courts in *Carroll II* and *Carroll III* found that the following steps

(unique to the circumstances in these cases) should have been undertaken by the buying art merchants:

1. Ask the seller about, and insist on a clear answer or documentation regarding the seller's ownership of the work of art or his or her right to sell it;
2. Consult the authors of the catalogue raisonné regarding the artist;
3. Consult scholars specializing in the artist;
4. Review publications cited in cataloguing materials and provenance statements;
5. Review the selling dealer's list of retail prices for the work of art at issue and other similar works; and
6. Review available references for the prices at which similar works of art had sold on the market.

These three cases therefore help to clarify the standard for art merchants seeking to establish themselves as buyers in the ordinary course of business. The cases make clear, however, that the specific details of what is required will depend upon the facts and circumstances of each particular case.

## Endnotes

1. A. Haden-Guest, *The Double Dealer*, NEW YORK MAGAZINE (Aug. 6, 2001), pp. 28-33.
2. *Id.* at 30; A. Haden-Guest, *The Great \$50 Million Art Swindle*, FORBES (Feb. 6, 2001), available at [www.forbes.com/2001/02/06/0206artfraud.html](http://www.forbes.com/2001/02/06/0206artfraud.html).
3. See N.Y.U.C.C. § 9-319 and Official Comment. "[I]nsofar as creditors of the consignee are concerned, this Article to a considerable extent reformulates the former law, which appeared in former Sections 2-326 and 9-114, without changing the results." *Id.* Former § 9-114 entitled "consignment" has been repealed in light of the newer § 9-319 statutory scheme.
4. See *In re Valley Media, Inc.*, 279 B.R. 105 (Bankr. D. Del. 2002) (purpose of new § 9-319 is to protect consignee's creditors from claims of consignors that have undisclosed consignment arrangements with consignee).
5. N.Y.U.C.C. § 9-319 provides:
  - (a) Consignee has consignor's rights. Except as otherwise provided in subsection (b), for purposes of determining the rights of creditors of, and purchasers for value of goods from, a consignee, while the goods are in the possession of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consignor had or had power to transfer.
  - (b) Applicability of other law. For purposes of determining the rights of a creditor of a consignee, law other than this article determines the rights and title of a consignee while goods are in the consignee's possession if, under this part, a perfected interest held by the consignor would have priority over the rights of the creditor.
6. The Article 9 definitions section (see U.C.C. § 9-102(b)) refers to the Article 2 definitions sections for the definition of merchant. See U.C.C. § 2-104(1) ("Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill

may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.").

7. U.C.C. § 9-102(a)(20)(A)(iii).
8. *Valley Media*, 279 B.R. at 125 ("To satisfy the 'generally known' prong of the test, the [consignors] must prove that a majority of the [consignee's] creditors were aware that the consignee was substantially engaged in selling the goods of others, i.e., consignment sales...[and] [t]hat majority is determined by the number of creditors not by the amount of creditor claims.") (citing, *inter alia*, *In re BRI Corp.*, 88 B.R. 71, 75 (Bankr. E.D. Pa. 1988).
9. *Berk v. State Bank of India*, 1998 WL 567853, at \*5 (S.D.N.Y. Aug. 28, 1998) (finding also the fact that the consignee was found to "have a substantial amount of consigned jewelry in its possession... reveals little about whether its creditors generally knew that it was engaged in selling consigned goods"). See also *Steege v. Affiliated Bank/North Shore Nat'l (In re Alper-Richman Furs, Ltd.)*, 147 B.R. 140, 150 (N.D. Ill. 1992) (finding majority of creditors test not met by evidence from consignor and employees of consignee (together representing 79% of creditor claims) that they "generally knew consignee to be substantially engaged in selling goods of others" because test requires evidence from "outside" and "unrelated creditors," i.e., not consignor itself and employees of consignee).
10. *In re BRI Corp.*, 88 B.R. 71, 75 (Bankr. E.D. Pa. 1988) (citations omitted); see also *In re Tristar Automotive Group, Inc.*, 141 B.R. 41, 43 (Bankr. S.D.N.Y. 1992) (consignor could not meet burden of showing that the "generally known by his creditors" exception applied).
11. See N.Y.U.C.C. § 9-102(23).
12. See *Automotive Finance Corp. v. Humberto Cornejo*, 2005 WL 1349904, at \*7 (Cal. App. June 8, 2005).
13. See *Estate of Silver v. Wilson*, 2003 WL 21362809, \*2 (Mich. App. June 12, 2003) (holding that "trial court clearly erred in finding that the four paintings at issue were used by [purchaser] 'primarily' for person, family, or household purposes [under the U.C.C. Article 9 definition of consumer good]").
14. See U.C.C. §§ 9-310, 9-313.
15. See U.C.C. § 9-203.
16. One counterbalancing rule is U.C.C. § 9-320, which provides that even if the security interest is perfected and even if the Buyer knows of its existence, the Buyer can be a buyer in the ordinary course and take title free of the Owner's security interest.
17. See, e.g., *Automotive Finance*, 2005 WL 1349904, at \*6.
18. *Mitsubishi Consumer Elecs. Am., Inc. v. Steinberg's, Inc. (In re Steinberg's, Inc.)*, 226 B.R. 8, 11 (Bankr. S.D. Ohio 1998).
19. *Automotive Finance*, 2005 WL 1349904, at \*11.
20. *W.N. Provenzano v. Monahan & Co. (In re Monahan & Co.)*, 29 B.R. 579, 583 (Bankr. D. Mass. 1983), *aff'd*, 1983 WL 160557 (D. Mass. Sept. 12, 1983) (construing former § 2-326, which was moved to become § 9-319).
21. N.Y.U.C.C. § 2-326 entitled "Sale on Approval and Sale or Return; Rights of Creditors" provides in relevant part:
  - (1) Unless otherwise agreed, if delivered goods may be returned by the buyer even though they conform to the contract, the transaction is:
    - (a) a "sale on approval" if the goods are delivered primarily for use, and
    - (b) a "sale or return" if the goods are delivered primarily for resale.
  - (2) Goods held on approval are not subject to the claims of the buyer's creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer's possession.
22. *In re Morgansen's Ltd.*, 302 B.R. 784, 788 (Bankr. E.D.N.Y. 2003).
23. *Id.* at 789-90.

24. *Id.*
25. *Furr v. Corvette Experience, Inc. (In re Corvette Collection of Boston, Inc.)*, 294 B.R. 409, 414 (Bankr. S.D. Fla. 2003).
26. Subsections (1) and (2) of U.C.C. § 2-403 provide:
  - (1) A purchaser of goods acquires all title which his transferor had or had power to transfer...A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
    - (a) the transferor was deceived as to the identity of the purchaser, or
    - (b) the delivery was in exchange for a check which is later dishonored, or
    - (c) it was agreed that the transaction was to be a "cash sale," or
    - (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
  - (2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him or her power to transfer all rights of the entruster to a buyer in the ordinary course.
  - (3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.
  - (4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7).
27. *See Kenyon v. Abel*, 36 P.3d 1161, 1166 (Wyo. 2001) ("It should be noted that Section 2-403(1) does not create a voidable title where the goods have been wrongfully taken, as by theft or robbery. If the goods have been stolen, the thief acquires no ownership and has no power, except in rare cases of estoppel, to pass a good title to a bona fide purchaser.").
28. *O'Keeffe v. Snyder*, 83 N.J. 478, 488, 416 A.2d 862, 867 (N.J. 1980); *Erisoty v. Rizik*, 1995 WL 91406, at \*9 (E.D. Pa. Feb. 23, 1995).
29. *See, e.g., Heinrich v. Titus-Will Sales, Inc.*, 73 Wash. App. 147, 160, 868 P.2d 169, 176 (Wash. Ct. App. 1994) ("Notwithstanding our affirmation of the trial court's decision based on the [Section 2-403(2)] entrustment doctrine, we also consider the voidable title doctrine [Section 2-403(1)]...as an additional basis for recovery."); *English v. Gateway Nat'l Bank*, 17 Cal. App. 3d 1038, 95 Cal. Rptr. 501 (Ct. App. Div. 3 Cal. 1971) ("[Transferor] either sold the car to [transferee under Section 2-403(1)] or it entrusted [transferee under Section 2-403(2)], a merchant of cars, with possession of the vehicle. In either event, [transferor's] claim...in the vehicle could not prevail against the [plaintiffs] who were either [Section 403(1)] good faith purchasers for value in the vehicle or [Section 403(2)] buyers in the ordinary course of business.").
30. *See* N.Y.U.C.C. § 1-201(9) and Annotations.
31. *Executive Coach Builders v. Bush & Cook Leasing, Inc.*, 81 Ohio App. 3d 808, 813, 612 N.E.2d 408, 411 (Ct. App. Ohio 1992).
32. U.C.C. § 2-403(3).
33. *Heinrich*, 73 Wash. App. at 154, 868 P.2d at 173.
34. James J. White & Robert S. Summers, *UNIFORM COMMERCIAL CODE*, pp. 190-92 (4th ed. 1995).
35. *See* comments to UCC § 2-403.
36. U.C.C. § 1-201(9).
37. *Id.*
38. *Id.*; *see also Stellan Holm, Inc. v. Malmberg Int'l Art A.B.*, 2002 WL 392294, at \*4 (S.D.N.Y. March 13, 2002).
39. *Welch v. Cayton*, 183 W. Va. 252, 257, 395 S.E.2d 496, 501 (1990).
40. *Kenyon*, 36 P.3d at 1166; *see also* *Mid-Tenn. Ford Truck Sales, Inc. v. Lease Plan USA, Inc.*, 1993 WL 266865, at \*2 (Tenn. Ct. App. July 16, 1993) (Under UCC § 2-403, "a good faith purchaser for value who acquires the goods from the dishonest middleman will acquire good title free of all claims [since] [t]his result 'is predicated on the policy that where a transferor has voluntarily delivered the goods to a purchaser, he, the transferor, ought to run the risk of the purchaser's fraud.'").
41. *Mid-Tenn. Ford Truck Sales, Inc. v. Lease Plan USA, Inc.*, 1993 WL 266865 at \*2; *see also Kenyon*, 36 P.3d at 1166.
42. *Sitkin Smelting & Ref., Inc. v. Wesgo Div. of GTE Prods. Corp.*, 648 F.2d 252, 254 (5th Cir. 1981).
43. *Heinrich*, 73 Wash. App. at 160, 868 P.2d at 176-77.
44. *See* U.C.C. § 2-403(1)(d).
45. U.C.C. § 1-201(32).
46. *Mid-Tenn.*, 1993 WL 266865, \*1-3 (court affirmed summary judgment because there was no "dispute of material fact on whether [transferee] acquired the goods in a transaction of purchase" under U.C.C. § 2-403(1)).
47. U.C.C. § 1-201(19).
48. U.C.C. § 1-201(33).
49. U.C.C. § 1-201(32).
50. *Harris Trust & Sav. Bank v. Wathen's Elevators, Inc. (In re Wathen's Elevators, Inc.)*, 32 B.R. 912, 919 (Bankr. W.D. Ky. 1983); U.C.C. § 1-201(44).
51. *See, e.g., Quaker Oats Co. v. Affiliated of Florida, Inc. (In re Affiliated of Florida, Inc.)*, 237 B.R. 495, 497 (Bankr. M.D. Fla. 1998) ("It appears well-established that a secured creditor is a 'purchaser' for purposes of [U.C.C. §] 403.").
52. *See* U.C.C. § 1-201(19) (defining "good faith" as meaning "honesty in fact in the conduct or transaction concerned"); *see also Sandoz Pharmaceuticals Corp. v. Blinn Wholesale Drug Co. (In re Blinn Wholesale Drug Co.)*, 164 B.R. 440, 443 (Bankr. E.D.N.Y. 1994).
53. *Graffman v. Espel*, 1998 WL 55371, at \*6 (S.D.N.Y. 1998) (holding "[a]s a matter of law, [non-art dealers] had no obligation to investigate the provenance of the Painting...[because they] are not art dealers").
54. U.C.C. § 2-104(1).
55. U.C.C. § 2-103(1)(b).
56. *See, e.g., Porter v. Wertz*, 68 A.D.2d 141, 146, 416 N.Y.S.2d 254 (1st Dep't 1979), *aff'd on other grounds*, 53 N.Y.2d 696, 439 N.Y.S.2d 105 (1981); *see also Lindhom v. Brant*, 2005 WL 2364884 (Conn. Super. Aug. 29, 2005); *but see Interested Lloyd's Underwriters v. Ross*, 2005 WL 2840330 (S.D.N.Y. Oct. 28, 2005) (ruling that New York law is unclear with respect to whether an art dealer has a duty to investigate the provenance of a work of art being purchased).
57. *Porter*, 68 A.D.2d at 141.
58. *See generally* D. Nicyper and L. Gipson, *Rights of Lenders Accepting Works of Art as Collateral*, N.Y. STATE BAR ASSOC. ENTMT, ARTS, AND SPORTS L. J., Vol. 17, No. 1 (Spring 2006) (discussing the *Porter v. Wertz* decision in detail).
59. *Id.*, 68 A.D.2d at 146, 416 N.Y.S.2d at 257.
60. *Id.*
61. The *Porter v. Wertz* opinion, which is often cited regarding the good faith status of art merchant purchasers, was issued by an intermediate New York appellate court. That decision, with its very strong language concerning art dealers' duties to inquire into a seller's title, was appealed to the New York Court of Appeals. Although the Court of Appeals affirmed the intermediate appellate court's decision, it did so on grounds other than the grounds relied on by the lower courts, which had focused on whether the purchasing art dealers had made sufficient inquiries regarding title



- and ownership of the painting at issue. With respect to the issue of whether art dealers have a duty to inquire into ownership and title of artwork being acquired, the New York Court of Appeals expressly did not “reach the good faith question.” *Porter v. Wertz*, 53 N.Y.2d 696, 701, 439 N.Y.S.2d 105, 107 (1981).
62. See *Cantor v. Anderson*, 639 F. Supp. 364, 367 (S.D.N.Y. 1986) (although the court did not expressly apply the standard of good faith applicable to art dealers, the court’s analysis appears to be heavily influenced by a concern that is reflected in its statement that the “circumstances surrounding the Renoir placed a duty upon [the dealer acquiring the painting as payment for an antecedent debt] to inquire into the painting’s ownership”).
63. *Morgold, Inc. v. Keeler*, 891 F. Supp 1361 (N.D. Cal. 1995).
64. *Id.*, 891 F. Supp. at 1368-69.
65. *Lindholm v. Brant*, 2005 WL 2364884 (Conn. Super. Ct. Aug. 29, 2005).
66. See generally D. Nicyper and L. Gipson, *Rights of Lenders Accepting Works of Art as Collateral*, N.Y. STATE BAR ASSOC. ENTMT, ARTS, AND SPORTS L. J., Vol. 17, No. 1 (Spring 2006) (discussing the *Lindholm v. Brant* decision in detail).
67. *Id.* at \*12.
68. *Id.* at \*13-15.
69. *Id.* at \*13.
70. *Id.* at \*15.
71. Author Dean R. Nicyper served as counsel for Earl Davis in that action.
72. *Joseph P. Carroll Ltd. v. Baker*, 889 F. Supp. 2d 593 (S.D.N.Y. 2012).
73. *Id.* at 605.
74. *Id.* at 595.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.* at 596.
79. *Id.*
80. The court noted that at his deposition in the case *Carroll* had not disclosed the early 2007 call from Salander—*Carroll* instead first testified about it at trial. *Id.* at 597.
81. *Id.* at 597.
82. *Id.*
83. *Id.* at 597-98.
84. *Id.* at 598.
85. *Id.* at 599, citing *Birch v. Carroll*, 210 A.D.2d 119 (1st Dep’t 1994).
86. *Id.* at 599.
87. *Id.* at 603.
88. *Id.*
89. *Id.* at 604 (citing *Brown v. Mitchell Innes*; *Morgold v. Keeler*; *Porter v. Wertz* and other cases).
90. *Id.* at 604 (citations omitted).
91. *Id.*
92. *Id.* at 595.
93. *Id.* at 602.
94. *Id.* at 605.
95. *Id.*
96. *Id.*
97. *Davis v. Carroll*, 937 F. Supp. 2d 390 (S.D.N.Y. 2013).
98. *Id.* at 437.
99. *Id.*
100. *Carroll II* at 437.
101. Author Dean R. Nicyper represented Earl Davis in his lawsuit against SOG and its principal Lawrence Salander, but not in Davis’ case against *Carroll*.
102. *Carroll II* at 396.
103. *Id.*
104. *Id.* at 397.
105. *Id.* at 398.
106. *Id.* at 400.
107. *Id.*
108. *Id.* at 401.
109. *Id.*
110. *Id.*
111. *Id.* at 402.
112. *Id.* at 403.
113. *Id.* at 404.
114. *Id.*
115. *Id.* at 405.
116. *Carroll II*, at 405.
117. *Id.* at 405-06.
118. *Id.* at 406.
119. *Id.*
120. *Id.* at 410.
121. *Id.* at 422.
122. *Id.* at 423 (quoting *Porter*, 416 N.Y.S.2d at 259).
123. *Joseph P. Carroll Ltd v. Baker*, 889 F. Supp. 2d 593, 604 (S.D.N.Y. 2012).
124. *Id.* at 423.
125. *Id.* at 425.
126. *Id.*
127. *Id.* at 425-26.
128. *Id.* at 428-29.
129. *Id.* at 430.
130. *Id.* at 431.
131. *Id.* at 432.
132. *Id.* at 434.
133. *Id.* at 434-35.
134. *Id.* at 435.
135. *Id.*
136. *Id.* at 436.
137. *Id.*
138. *Id.*
139. *Id.*
140. *The Dorothy G. Bender Foundation, Inc. v. Joseph P. Carroll*, 2013 N.Y. Misc. LEXIS 3711 (Aug. 20, 2013) (Shirley Werner Kornreich, J.).
141. *Id.* at \*3.
142. *Id.*
143. *Id.* at \*4.
144. *Id.*
145. *Id.* at \*1-2.
146. *Id.* at \*7-8.
147. *Id.* at \*8.

148. *Id.* at \*25.

149. *Id.* at \*11.

150. *Id.* at \*2, 12.

151. *Id.* at \*21.

152. *Id.* at \*17 (citing U.C.C. § 2-103(1)(b)).

153. *Id.* at \*18-20.

154. *Id.* at \*20.

155. *Id.*

156. *Id.* at \*24.

157. *Id.* at \*24-27.

158. *Id.* at \*27-28.

159. *Id.* at \*28.

Dean R. Nicyper co-chairs the U.S. litigation group at Withers Bergman LLP. This article updates and supplements an article that he wrote with Lissa C. Gipson, a partner at Flemming Zulack Williamson Zauderer LLP. The article was titled *Rights of Lenders Accepting Works of Art as Collateral*, and was published in the Spring 2006, Volume 17, No. 1 edition of the *EASL Journal*. Special thanks to Anne Boken at Flemming Zulack Williamson Zauderer LLP for her work in assisting with this new article.

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# Gibson v. PRS—Trademark Rights in Guitar Body Shapes

By David S. Ma

Copyright protection and design patent registrations are of limited durations, while trademark registration may be renewed perpetually, as long as the mark continues to be in use in commerce. Over the years, music merchants have tried to immortalize protection of the product shape of guitars by filing for trademark registration. This article examines a few of these cases and provides some advice for instrument manufacturers.<sup>1</sup>

## Registrability of a Guitar Shape as a Trademark

While trademark, copyright and design may co-exist,<sup>2</sup> not all product shapes are registrable as a trademark. The shape of a guitar body is a trade dress, and more particularly, a product design. In order to obtain trademark registration for a product design, the design must satisfy all of the below criteria:

- (1) Non-Functional: The shape of the guitar body as a whole must not be functional, i.e., being essential to the use or purpose of the article or affects the cost or quality of the article.<sup>3</sup> This is because the exclusive use of a functional feature would put competitors at a significant non-reputation-related disadvantage.<sup>4</sup>
- (2) Distinctive: As a product design trade dress, the shape of the guitar body is never inherently distinctive.<sup>5</sup> Therefore the applicant must show that the trade dress has acquired distinctiveness through use. This may be shown by evidence of exclusive and continuous use in commerce, substantial sales, and advertising educating the public about the source-significance of the shape. The applicant must show that consumers associate the shape to the manufacturer, and that the shape serves as an identifier of origin of the product.
- (3) Not Generic: The product design must not have become generic through use by third parties.<sup>6</sup>

## Gibson v. PRS<sup>7</sup>

In 1989, Gibson filed for trademark registration of the Les Paul (LP) body shape for guitars (LPTM),<sup>8</sup> which was successfully registered in 1993 on the ground of acquired distinctiveness and became incontestable in 1999.<sup>9</sup>



*The LPTM, the Gibson LP and the PRS Singlecut*

In 2000, Gibson sued PRS for its sale of the single cut model (PRS Singlecut) for trademark infringement, counterfeiting, false designation of origin and dilution under the Lanham Act, as well as unfair competition, fraud and deceptive business practices under state laws. PRS counterclaimed the following: (a) that the LPTM was invalid and unenforceable; (b) any trade dress associated with the LP was not protected or was unenforceable; and (c) the PRS Singlecut did not infringe the LPTM or any trade dress.

### 1. The District Court Decision

The federal district court in Nashville, Tennessee granted summary judgment in favor of Gibson on the trademark infringement claim and denied all of PRS's counterclaims. For unknown reasons, the parties then jointly requested to dismiss all trade dress claims. Subsequently, a permanent injunction was issued, preventing PRS from manufacturing or trading the PRS Singlecut.

### 2. The Sixth Circuit Decision

On appeal, the majority commented that the district court erred by confusing trademark and trade dress. The scope of the LPTM, as a two-dimensional silhouette, did not include the other design features of the LP guitar (i.e., location and style of knobs, switches, and hardware). As the parties voluntarily dismissed the trade dress claims, the Court of Appeals only needed to consider trademark infringement.

In order to succeed in its action in trademark infringement, Gibson tried to show that the PRS Singlecut would likely cause confusion among consumers as to its source.<sup>10</sup> The Court disagreed with the district court's finding of initial confusion. Instead, it found that no theory of confusion could be established, especially when Gibson conceded that there was no point-of-sale confusion. The Sixth Circuit thus reversed the district court's decision, vacated the permanent injunction, denied all other claims and motions as moot, and remanded the case with instructions that summary judgment be entered in favor of PRS on Gibson's trademark infringement claim.

#### 2.1 Initial Interest Confusion

The appellate court refused to accept Gibson's argument that consumers at the far side of a showroom might be confused as to the source of a PRS Singlecut until they examined the guitar in proximity. Such application of the initial interest confusion doctrine would be too broad, because *at a distance* products of dissimilar shapes may appear similar to a trademarked product shape. In addition, any attempt to decide on the "*vantage point*" (where the confusion is alleged to have occurred) would be a "*needlessly complicated and unworkable inquiry.*"<sup>11</sup> The Court also expressed reservations as to whether initial interest



confusion could appropriately be applied to a product shape trademark.

## 2.2 Post-Sale Confusion

The Court referred to a Sixth Circuit trade dress case in which post-sale confusion was applied.<sup>12</sup> In that case, the defendant manufactured a fiberglass kit mountable on an automobile to make the car look virtually identical to a Ferrari. Although point-of-sale confusion was not in issue, it was found that the sale of the inferior kits would damage the reputation of Ferrari.

The Court distinguished the case on Gibson's concession that the PRS Singlecut was of comparable quality to the Gibson LP. In addition, no theory of post-sale confusion was applicable, as the facts showed that Gibson's reputation would not be diminished by the sale of the PRS Singlecut.

## 2.3 Smoky-Bar Theory of Confusion

Gibson argued that musicians, when seeing a PRS Singlecut on a "distant stage" in a "smoky bar," might mistake it for a Gibson LP. The Sixth Circuit concluded that if a musician mistook the high quality (as Gibson conceded) PRS Singlecut as a Gibson LP and desired such a guitar, he or she would, as a result of that confusion, purchase a Gibson LP. Such confusion would not harm Gibson; rather, it would rather boost its business.<sup>13</sup>

## 2.4 Validity of the LPTM

As the Court decided that PRS did not infringe the LPTM, it was not required to determine the validity of the LPTM. The Sixth Circuit accordingly denied as moot PRS's counterclaims that the LPTM was invalid as functional or generic.

## Observations

### 3. "Shape Depletion Theory" and Initial Interest Confusion

The majority proposed that applying initial interest confusion in the case (and most other product shape trademark cases)<sup>14</sup> would be too broad and would prevent legitimate competition from products of dissimilar shapes. The concern was that "there are only a limited number of shapes in which many products can be made."<sup>15</sup> This, however, seems to be contrary in spirit to the Supreme Court's rejection of the color depletion theory in *Qualitex*.<sup>16</sup> If a source-identifying color can be registered and enforced as a trademark, there is no reason why a source-identifying product shape should be excluded from the initial interest confusion doctrine.

### 4. Validity of the LPTM

The appellate court did not have to examine PRS's counterclaim that the LPTM was invalid and should be cancelled notwithstanding its incontestable status. This author believes that the LPTM may be considered functional and generic.

## 4.1 Non-Functional

To qualify for trademark registration, the shape of a guitar body must be non-functional pursuant to the *Morton-Norwich* factors, meaning that (a) no related utility or design patents are applied for the shape; (b) advertising or promotional materials do not tout the utilitarian aspect of the shape; and (c) the shape does not contribute to ease or economy of manufacture.<sup>17</sup> Availability of alternative designs may be relevant, but is not a governing consideration. While the LPTM does not fit squarely into these factors, there is still a plausible argument, in that the LPTM is a utilitarian or functional design.

- **Playability:** The parties agreed that the LPTM was based on a traditional shaped guitar, and the cut-away served a function for the player to access the higher frets. The district court was of the view that the horn shape was not essential to the function of the guitar. However, the horn shape was a result of the combined functional needs of upper fret access and for the guitar to sit on a player's lap.
- **Tonal quality:** It is subject to debate whether a single or a double-cutaway guitar produces better sound. For example, in the case of *In re Gibson*,<sup>18</sup> the Trademark Trial and Appeal Board affirmed a refusal to registration of Gibson's round-shouldered dreadnought acoustic guitar body (RDTM) on the basis that it was functional, as Gibson's advertising claimed that the shape produced a better musical sound. There may be an argument that the shape of the LPTM is essential for its tonal quality.



**The RDTM and the Gibson Round-shouldered Dreadnought Acoustic Guitar**

- Examples of body styles which are arguably less functional would be Gibson's Explorer, Flying V, Firebird and Thunderbird, which have been registered as trademarks by Gibson.<sup>19</sup>



**74570078 Explorer; 74570030 Flying V and 85218173 Firebird/Thunderbird**

## 4.2 Distinctive

In registering the LPTM, Gibson produced evidence showing that the mark acquired distinctiveness through use.

### 4.3 Not Generic

A product design is generic if it: (1) is overbroad or too generalized; (2) is the basic form of the type of product; and (3) is so common in the industry that it does not identify a particular source.<sup>20</sup> Evidence of the failure of a company to police a trade dress for decades would show that the trade dress is weak and has not acquired distinctiveness.<sup>21</sup> A showing of secondary meaning does not save a generic mark,<sup>22</sup> and an incontestable mark that is a product design may be cancelled if the mark is generic.<sup>23</sup>

It may be arguable that the LPTM is or has become generic through public use and should be cancelled. For example, Fender was unable to register the body shapes of Stratocaster, Telecaster and Precision Bass as trademarks as a result of failure to police numerous third parties' uses; therefore those body shapes are generic.<sup>24</sup> The inability for Gibson to enforce the LPTM trademark right against PRS may be a sign that the LPTM is losing distinctiveness as well, and is approaching generic status.



**76516126 Stratocaster; 76515928 Telecaster  
and 76516127 Precision Bass**

### Conclusion: Lessons for Instrument Manufacturers

Instrument manufacturers should note that:

- A trademark application for a guitar shape would only be successful if the shape is non-functional and the application is filed at a time after the shape has acquired distinctiveness but before third party uses make the shape generic.
- Emphasis on the functional advantages resulting from the shape may render the shape functional and thus ineligible for registration. Advertising should focus on educating the consumers to identify the brand with the shape and always include prominent trademark notices in relation to the body shape.
- Continual policing of the market to stop other manufacturers from using a similar shape is crucial to prevent the shape becoming generic. A generic trademark is unregistrable, and a registered trademark that became generic is subject to cancellation.

### Endnotes

1. Trademarks in the shape of guitar headstocks have also been registered and considered in cases, e.g., *Yamaha Int'l Corp. v. Hoshino Gakki Co.*, 840 F.2d 1572 (Fed. Cir. 1988).

2. See 1512 Relationship Between Design Patent, Copyright, and Trademark [R-08.2012], Manual of Patent Examining Procedure.
3. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 165, 34 USPQ2d 1161, 1163-64 (1995) as per 1202.02(a) *Trademark Manual of Examining Procedure* ("TMEP"), 8th Edition (2012).
4. *Qualitex Co.*, 514 U.S. at 159.
5. *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 215, 54 USPQ2d 1065, 1069 (2000) as per TMEP § 1202.02(b).
6. TMEP § 1202.02(b)(i).
7. *Gibson Guitar Corp. v. Paul Reed Smith Guitars, LP*, 423 F.3d 539 (6th Cir. 2005).
8. Serial No. 73675665 filed on July 31, 1987 and registered on July 20, 1993 on acquired distinctiveness.
9. *Supra* n. 7, at paragraph I(A). For how a trademark owner may file a declaration to claim incontestability of a trademark between its fifth and sixth year of continuous use in commerce, see, e.g., <http://teas.uspto.gov/postreg/sect15> and <http://www.uspto.gov/learning-and-resources/trademark-faqs>.
10. Likelihood of confusion is determined by considering the eight *Frisch* factors: (1) "strength of the plaintiff's mark," (2) "relatedness of the goods or services," (3) "similarity of the marks," (4) "evidence of actual confusion," (5) "marketing channels used," (6) "likely degree of purchaser care," (7) "the defendant's intent in selecting its mark," and (8) "likelihood of expansion of the product lines." *Jet*, 165 F.3d at 422 (citing *Frisch's Rests., Inc. v. Elby's Big Boy of Steubenville, Inc.*, 670 F.2d 642, 648 (6th Cir. 1982), *cert. denied*, 459 U.S. 916 (1982)).
11. *Supra* n. 7, at paragraph II(D)(1)(a).
12. *Ferrari S.P.A. Esercizio Fabrice Automobili E Corse v. Carl Roberts*, 944 F.2d 1235 (6th Cir. 1991).
13. *Supra* n. 7, at paragraph II(D)(1)(c).
14. "...[W]e do not go so far as to hold that there is never a circumstance in which it would be appropriate to apply the initial-interest-confusion doctrine to a product-shape trademark. However, we are unable to imagine such a situation at this juncture, and we do hold that the doctrine cannot apply on the facts of this case." *Id.* at footnote 10.
15. *Id.*
16. *Qualitex Co.*, 514 U.S. at 159.
17. *In re Morton-Norwich Prods., Inc.*, 671 F.2d 1332, 213 USPQ 9 (CCPA 1982).
18. *In re Gibson Guitar Corp.*, 61 USPQ2d 1948 (TTAB 2001).
19. Serial No. 74570078 filed on September 6, 1994 and registered on April 22, 1997 (Explorer); Serial No. 74570030 filed on September 6, 1994 and registered on April 15, 1997 (Flying V); Serial No. 85218173 filed on January 14, 2011 and registered on March 6, 2012 on acquired distinctiveness (Firebird/Thunderbird).
20. *Walker & Zanger Inc v. Paragon Indus. Inc.*, 465 F. Supp. 2d 956, 84 USPQ2d 1981, 1985 (N.D. Cal. 2006).
21. *Abercrombie & Fitch Stores Inc. v. Am. Eagle Outfitters Inc.*, 280 F.3d 619, 61 USPQ2d 1769, 1781 (6th Cir. 2002).
22. *Id.*
23. *Sunrise Jewelry Mfr. Corp. v. Fred S.A.*, 175 F.3d 1322, 50 USPQ2d 1532, 1533 (Fed. Cir. 1999).
24. *Stuart Spector Designs, Ltd. v. Fender Musical Instruments Corp.*, 94 USPQ2d 1549 (TTAB 2009).

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# Independent Filmmaking

By James Johnson

## Introduction

Section 181 of the Internal Revenue Code (IRC), amended every year, provides, in pertinent part, that investment in a motion picture or television series shot in the United States is 100% tax deductible for the investor in the same year invested.<sup>1</sup> The purpose of this article is to set out basic information and guidance for general practitioners, intellectual property lawyers, entertainment attorneys, filmmakers in general and independent filmmakers in particular, to avoid potential minefields.

Independent filmmaking, where producers work outside the Hollywood studio system, requires a detailed plan, a bevy of contracts and creativity to attract financing and successful production. Finding money for a film can take years and the filmmaker's goal is to shorten this time period. Filmmaking and financing involve many different areas of law, such as intellectual property, contracts, employment and insurance. Failure to consult with an experienced attorney at the very beginning the process can prove disastrous.

There are a plethora of legal concerns in making an independent film. For example, has the filmmaker cleared location rights and secured the rights or official chain of title to the book that a writer has adapted into a screenplay? Have all the actors and extras signed releases? Whenever a distributor buys a film, the money is not disbursed until the producers have established, in writing, that they have secured all the underlying rights, clearances, releases and licenses. Therefore, attorneys are a crucial part of the production team from the very beginning. Filmmakers regularly need legal advice and protection, particularly in the form of written contracts.

One of the first things a lawyer should do to protect the independent filmmaker from personal liability is to form a production company as a Limited Liability Company (LLC). An LLC combines aspects of corporate and partnership forms relating to personal liability and income tax. As part of the production team, the attorney can conduct background checks on investors, actors and crew, keep records of important documents, secure permits, errors and omissions insurance, perform copyright and trademark clearances (including music and artwork), and several other technical matters.<sup>2</sup>

## Financing

A well-structured business plan demonstrates to banks and potential investors the filmmaker's credibility, and how and when they might see a return on their investments. An independent filmmaker may have little or no history of success in filmmaking, and therefore a business plan should include the story line, start date, credits

of the producer and director, marketing information, risk factors and other important key information, all in concise and short paragraphs.

Banks and other sophisticated film financiers will require a formal document called a "package," which may include information regarding the screenplay, potential cast members, a budget summary setting out above and below-the-line costs and a synopsis of the script. The film that gets financed will have a compelling financing presentation with a clear and concise business plan setting out costs and how the film will be marketed.

## New York State Film Tax Credit Program

The New York State Film Tax Credit Program (the Program) provides incentives to qualified production companies that produce feature films, television series, relocated television series, and television pilots. The Program has two separate components: the Film Production Credit and the Post-Production Credit.

*The following are some of the highlights of the Program's Benefits:*

1. 30% fully refundable credit on most below-the-line expenses;
2. 40% on qualified labor for certain Upstate counties;
3. 35% post production credit if done outside the Metro region; and
4. 45% post-production credit on labor for certain Upstate counties.<sup>3</sup>

## Federal Tax Benefits

Section 181 of the IRC sets out the eligibility requirements for early deduction and three key limitations for film production costs. Section 181 allows for tax deduction within the taxable year of filming for film, television and animated programs. Moreover, with a succession of films, §181 may permit additional recovery from revenues generated by earlier films without the payment of tax until a later time when costs are deducted in the year incurred, before the production company recognizes any income and when there will be a tax loss for the year. This loss may be utilized by an investor immediately to offset other federal qualifying income. Congress extended § 181 to include productions commencing before January 2015, and along with individual state incentives, these tax credits are keeping production costs lower and permitting jobs to stay in the United States. Congress has extended § 181 every year, and it appears that production in 2016 will be covered as well.



## Financing

The primary document that a bank will require is usually the facility letter, which is the document that contains the main contractual terms and governs the relationship between the bank and the borrower. A chain of title opinion letter is a condition precedent for closing the financing on a film production. The facility letter prepared by the borrower's (producer's) attorney ensures that the underlying rights are in order and that there is no likelihood of potential litigation or a claim. The Sample Chain of Title Documents may include:

1. Certificate of Authorship
2. Option Agreement
3. Option and Purchase Agreement
4. Assignment Agreement
5. Notice of Ownership of Copyright and Other Rights

## Contracts

A literary purchase contract is an agreement to acquire all or some rights in a literary property, such as a novel or a play. Buyers (producers) require owners (writers) to warrant that they own all the rights they are selling, free and clear of encumbrances. The agreement should define the extent of the rights being sold, such as the entire copyright or limited rights, an exclusive or non-exclusive license. For example, the writer may desire to retain stage rights, publication rights, and radio or Internet rights. The buyer may require the unlimited right to make changes to the work, such as dialogue and other changes. Buyers also want sellers to make certain warranties and indemnifications of liability and costs. The acquisition of literary rights can be structured as an outright purchase, or more typically as an option to purchase. There is an abbreviated sample Option and Literary Purchase Agreement included at the end of this article.

Producers sometimes use intermediaries or finders to assist them in raising money for the films. The producer and finder will enter into an agreement to allow the latter to secure third parties who are interested in lending, investing in all or a portion of the development, production or distribution of the motion picture. There are many ways to finance independent films; one such example is by bank loans collateralized by distributor pre-sale agreements. If a buyer's commitment to purchase is sufficiently firm and the buyer is financially solid, then a bank may be willing to lend the producer money to make the film based on the strength of the paper—the value of the contract.

Another method used to fund production is through individual investors, such as a general partnership or joint venture. Interests in a general partnership or joint venture are generally not considered securities. Thus, it is

not necessary to provide investors with a detailed securities disclosure document or otherwise comply with the burdensome federal and state securities laws. Investors who limit their liability to the amount of their investments and do not manage the enterprises may have their interests characterized as equity.

## Marketing a Film

Selecting the right festivals in which to submit a film is an important decision, because it will give a film the best chance to be sold to a distributor and act as a career launch for a filmmaker. Further, the filmmaker must make contacts with acquisition executives, agents, attorneys, investors, and others in the industry. Moreover, once a film plays one festival, others may extend invitations.

The *Sundance* and *Cannes Film Festivals* are the leading festivals worldwide. They are where independent films are picked up for distribution. However, the competition is fierce. The film must tell a story to a targeted audience, which will determine in large part to what festivals one can apply. One of the advantages of attending a festival is appearing in and obtaining a copy of the Market Guide, the official book containing contact details of all the attendees. The one at Cannes is over 1,000 pages.

The *New York International Film & Video Festival* was founded in 1963 and is known as the voice for independent film. Its organizers are passionate about exposing films and documentaries of independent filmmakers. Moreover, it is fostering emerging filmmakers and screenwriters.<sup>4</sup>

It is also important for a filmmaker to establish a website. The website is where potential audiences will know about the film before a festival debut and before its release. Providing and sending posters, flyers, pens, buttons and a press kit to newspaper writers and independent journalists are also excellent marketing tools. However, the Internet is the most powerful tool for the independent filmmaker because of the potential to reach more people than any other mass medium. It is good business sense to include the filmmaker's website and e-mail address on everything that is distributed with the film, such as posters, pens and business cards. An effective website can increase the value of a film.

## Conclusion

The benefit of New York Tax Credits, together with § 181 of the IRC, make filmmaking in the Empire State very attractive. Moreover, it creates a bevy of jobs and enhances state and national economies.

Lawyers are a crucial part of the production team, and it is important for a filmmaker to choose one with experience. As an attorney, one should be available to discuss day-to-day questions and problems that are certain

to occur. Financing agreements and other contracts must be addressed and in place every step of the way. With the proper legal help and financing in place, the filmmaker can concentrate on what he or she does best—filmmaking.

## Endnotes

1. For a detailed discussion of music licensing and publishing see James A. Johnson, *Thou Shalt Not Steal: A Primer on Music Licensing*, N.Y. STATE BAR ASSOC. ENTMT ARTS & SPORTS L. J., Vol. 80. No. 5 (June 2008), at 23; *Music Publishing—What the Songwriter and Practitioner Need to Know*, N.Y. STATE BAR ASSOC. ENTMT ARTS & SPORTS L. J., Vol. 22 No. 3 at 114; *The Changing Face & Sound of Music, Bench & Bar of Minnesota*, Vol. 70 No. 1 (Jan. 2013), at 28.

2. Two of the requirements include that 75% of the motion picture must be shot in the United States with a budget cap of \$15 million. See also 26 CFR 1.181-2 Election to deduct production costs.
3. See <http://www.nylovesfilm.com>.
4. See <http://nyfilmvideo.net>.

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## (Abbreviated Sample)

# OPTION AND LITERARY PURCHASE AGREEMENT

This contract between \_\_\_\_\_ (“PURCHASER”) and “WRITER”) is for the acquisition of that original screenplay entitled “\_\_\_\_\_” (hereinafter called “the Literary Property”). The reference to “PURCHASER” includes PURCHASER’S assignees.

1. **OPTION.** In consideration of PURCHASER’S effort to produce the literary property, Writer grants to PURCHASER a \_\_\_\_\_ (Duration of Option) exclusive and irrevocable option to acquire any and all motion picture, allied and ancillary rights in order to develop and produce an original motion picture based on the Literary Property (“the Picture”) and exploit the Picture and all rights acquired herein. The initial option period shall commence on the date of \_\_\_\_\_.
2. **ACQUISITION AND COMPENSATION:** If PURCHASER timely exercises its option and pays the Purchase Price during the option period, including any extension, the following terms shall apply:
3. **REPRESENTATIONS AND WARRANTIES:** WRITER represents and warrants that: WRITER has the sole, exclusive and unencumbered ownership of all rights of every kind and character throughout the world in and to the Literary Property and (a) the Literary Property was written solely by and is original with WRITER; (b) \_\_\_\_\_.
4. **RIGHTS ACQUIRED/RESERVED:** \_\_\_\_\_.
5. **ASSIGNMENT:** PURCHASER has the right to assign this agreement or any part hereof to a third party motion picture company or motion picture production company upon the terms and conditions set forth in this agreement, and \_\_\_\_\_.
6. **EXECUTION OF ADDITIONAL DOCUMENTS:** WRITER agrees to execute any and all additional documents or instruments, including \_\_\_\_\_.
7. **FORCE MAJEURE:**
8. **ARBITRATION:** Any controversy \_\_\_\_\_ The venue for arbitration shall be New York, New York.
9. **NOTICES:**

## ACCEPTED:

\_\_\_\_\_  
PURCHASER

\_\_\_\_\_  
WRITER

## HELPFUL INTERNET WEBSITES for FILMMAKERS

U. S. Copyright Office	<a href="http://www.loc.gov/copyright">www.loc.gov/copyright</a>
U. S. Patent and Trademark Office	<a href="http://www.uspto.gov">www.uspto.gov</a>
SESAC	<a href="http://www.sesac.com">www.sesac.com</a>
Broadcast Music International	<a href="http://www.bmi.com">www.bmi.com</a>
SoundExchange	<a href="http://www.soundexchange.com">www.soundexchange.com</a>
New York Film Office	<a href="http://www.nylovesfilm.com">www.nylovesfilm.com</a>
Screen Actors Guild	<a href="http://www.sag.org">www.sag.org</a>
Writers Guild of America	<a href="http://www.wga.org">www.wga.org</a>
Film Distributors Assoc.	<a href="http://www.launchingfilms.com">www.launchingfilms.com</a>
American Society of Composers, Authors & Publishers	<a href="http://www.ascap.com">www.ascap.com</a>
National Music Publishers Assoc.	<a href="http://www.nmpa.org">www.nmpa.org</a>
Film Finances Inc.	<a href="http://www.ffi.com">www.ffi.com</a>
International Film Guarantors Inc.	<a href="http://www.ifgbonds.com">www.ifgbonds.com</a>
Sundance Film Festival	<a href="http://www.sundance.org">www.sundance.org</a>
Toronto International Film Festival	<a href="http://www.e.bell.ca/filmfest">www.e.bell.ca/filmfest</a>
Cannes Film Festival	<a href="http://www.festival-cannes.fr">www.festival-cannes.fr</a>
Telluride Film Festival	<a href="http://www.telluridefilmfestival.com">www.telluridefilmfestival.com</a>
Assoc. of Film Commissioners International	<a href="http://www.afci.org">www.afci.org</a>
Motion Picture Assoc. of America	<a href="http://www.mpa.org">www.mpa.org</a>

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# 15 Years Later: Marking a Milestone for the Holocaust Claims Restitution Practicum

By Irina Tarsis

2015 marked the fifteenth Anniversary of the Holocaust Claims Restitution Practicum (HCRP, the Practicum) at Benjamin N. Cardozo School of Law (Cardozo). The program was inaugurated in the spring of 2000, less than two years after the 1998 Washington Conference on Holocaust Era Assets, which brought together representatives from over 40 nations to address the issue of stolen and hidden property suffered by the Nazi victims. Founded by a Ph.D. in art history and archeology and a lawyer, Lucille A. Roussin (a Cardozo alumna), the Practicum graduated over 100 students who lent their time and efforts to helping victims and families of Holocaust survivors address asset restitution issues. The HCRP is a unique program. It is dedicated to offering students immediate experience working with specialized agencies and legal practitioners on investigation and recovery of property stolen from Holocaust victims.

Formerly an associate with Herrick, Feinstein LLP, Roussin is a solo practitioner and an educator. She has also testified as an expert witness in a number of Nazi-era looted art cases. When she served as a member of the U.S. Presidential Advisory Commission on Holocaust Assets, Roussin envisioned offering legal training to law students through law firms and various nonprofit and government organizations, which would create a personalized experience working on the Holocaust-related issues.

At the time, supporters of the visionary proposal recognized that it could only be implemented in the United States, and more specifically New York, because the jurisdiction offers a unique forum for bringing property claims decades after an injustice was perpetrated. One of the most powerful New York procedural tools available to the victims of Nazi-era looting is the favorable statute of limitations rule that allows claims for restitution to be brought only after the current possessor refuses to return the property to the rightful owner, the so called “demand and refusal” rule, as set forth in the 1991 *Guggenheim v. Lubell* case.<sup>1</sup> Elsewhere, and in most of the countries where lootings took place, legal title vested after a certain period of time lapsed, regardless of the physical inability to locate the property by the victims or their heirs.

By design, the HCRP is made up of two components—a weekly seminar in a course titled “Remedies for Wartime Confiscation” open to qualified upper class students, and a field placement with an entity (a large to small law firm, solo practitioner’s office, nonprofit organization or a governmental agency involved in restitution claims). In the classroom, students learn about the socio-economic situation and legal history dating back to the

years prior to World War II and the imminent looting and restitution that followed. Over the years, the Practicum has hosted guest lectures delivered by restitution experts, such as Professor Richard Weisberg, a member of the Cardozo faculty who serves on the Presidential Commission for the Preservation of America’s Heritage Abroad; Professor Eric Freedman, the European Advisor and visiting professor for the Program in Holocaust and Human Rights Studies; and attorneys from the Herrick, Feinstein LLC art law department. Students are evaluated on class participation, feedback from the Practicum supervisors, and a final paper.

A prerequisite for the students to be enrolled in the course and qualify for the Practicum is passing the International Law course. While knowledge of foreign languages and art history is not mandatory, they are highly preferred. Students seeking admission to the Practicum are interviewed both by Professor Roussin and the would-be employers.

Each year, students are provided with the opportunity to work on unique and diverse case files. When asked which case seems to resonate with the Practicum alumni, Roussin cites the famous *U.S. v. Portrait of Wally*,<sup>2</sup> a case that involved a painting by Egon Schiele on international loan to the Museum of Modern Art in New York. That case was subject to 12 years of litigation, which resulted in a multi-million dollar settlement in favor of the heirs of the original pre-war owner of the painting. However, just as the claims by the Holocaust victims are diverse, the work performed by the Practicum students is not limited to cases involving art and cultural property. Over the years, work placement for the Practicum students has ranged from complicated class action lawsuits involving banking and railroad industries, to matters pertaining to securing pensions for the elderly and restitution of real property.

One student who enrolled in the inaugural session of the Practicum wrote a letter to the then Dean of Cardozo, Paul Verkuil, expressing that his most important experience at Cardozo was earned through the HCRP, both because the subject matter was “extraordinarily interesting and relevant,” and because the practical experience was “invaluable” and “unparalleled.”<sup>3</sup> That student was placed with a practitioner working on a case involving the French National Railway’s involvement in transporting Jews to concentration and death camps.<sup>4</sup> Others have gone to work with New York-based organizations and firms, such as the Holocaust Claims Processing Office in the New York State Department of Financial Services; Claims Conference; New York Legal Assistance Group; Herrick,

Feinstein, LLP; Squire, Sanders & Dempsey; Law Offices of Mel Urbach; as well as the Washington D.C.-based Holocaust Art Restitution Project and Byrn, Goldenberg & Hamilton; practitioners in Florida; and even organizations beyond the U.S. borders. Indeed, in 2005, three students worked with a member of the Knesset (the Israeli Parliament) on the first Global Report on Restitution of Jewish Property in the State of Israel. Many alumni fondly remember the Practicum as a highlight of their law school experiences.

Another alumna who worked with the New York State Banking Department as part of her experience in the Practicum remembers poring “over auction records and exhibition catalogues in the hopes of finding stolen art.” The stories about “people signing bills of ‘sale’ for their art while Nazi soldiers held guns to their heads, apartments being raided and paintings torn from the walls, etc.” filled her with compassion for the victims and inspired her to “increase [her] own efforts to always be kind and tolerant towards others.”<sup>5</sup>

Given the extent of the property disputes and human rights violations that continue to occur in the world, a restitution Practicum may be expected to continue with new cases and reparations efforts. For now there is no lack of Nazi-era related claims being reported, such as the recent stories of the Rosenberg and Gutmann families who lost property during the Holocaust, as well as reports and studies of the art found in the Gurlitt Art Trove (a.k.a. the Schwabing Art Trove) in Germany.

When asked how long the Practicum may remain relevant and in existence, Professor Roussin hedged her response, stating that “[t]he program cannot last indefinitely.”<sup>6</sup> No other law school offers such a Practicum, which may, to some degree, be explained by the fact that there is only one Lucille Roussin, and New York is the logical jurisdiction to offer a training program for the Holocaust restitution cases. One of the best aspects of the Practicum is that through the lectures and readings, students are able to appreciate that restitution is not only about litigating cases in courts but “it is equally a matter of gaining the political and financial support of key influencers.”

Despite the attention restitution has received through programs like HCRP, the problem of doing right by those displaced and dispossessed of their valuables as a result of an armed conflict or a genocide has not been eradicated. At least one HCRP student had worked on the first restitution case brought before a U.S. Court involving cultural property taken during the Armenian Genocide (1915-1917). *W. Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum*<sup>7</sup> was ultimately settled this September, whereby the title to the contested illuminated Bible pages passed to the claimants while pages would remain on a permanent loan with the Getty Museum. Perhaps in time the Practicum will grow to include more restitution questions related to political and social unrest in South America, Asia, the Middle East, and elsewhere in the world that affected lives and livelihood of other victims. By then the HCRP will have established a precedent of helping people reconstitute their valuables and getting some measure of justice through well-established legal channels.

## Endnotes

1. *Guggenheim Found. v. Lubell*, 77 N.Y.2d 311, 567 N.Y.S.2d 623, 569 N.E.2d 426 (1991).
2. *United States v. Portrait of Wally*, Docket No. 99-CV-9940 (LAP) (S.D.N.Y. Apr. 2, 2010).
3. Letter dated May 25, 2000, on file with the author.
4. *Freund v. Republic of France*, 592 F. Supp. 2d 540 (S.D.N.Y. 2008).
5. Email correspondence with the author dated September 28, 2015.
6. Email correspondence with the author, dated September 28, 2015.
7. *W. Prelacy of the Armenian Apostolic Church v. J. Paul Getty Museum*, No. BC438824 (L.A. Cnty. Super. Ct., Aug. 1, 2011).

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## RESOLUTION ALLEY

# In Search of the Fair and Impartial Neutral

By Theodore K. Cheng

*Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.*

The last *Resolution Alley* column told the story of how George Takei intervened to help prevent the public auction of valuable artifacts from World War II Japanese-American internees.<sup>1</sup> It engendered a number of wonderful and warm reactions regarding Takei's role in securing a home for those artifacts at the Japanese American National Museum (JANM) in Los Angeles. Most relevant for this column, some of those comments addressed the issue of whether Takei was truly acting in the capacity of a fair and impartial mediator. For example, one reader noted that Takei's actions were more akin to being an "outstanding advocate and negotiator." Another reader viewed Takei as "being meaningfully invested in the dispute himself" and, thus, was "a thoughtful and empowered representative of one of the constituent groups who was able to negotiate an effective resolution."

These insightful comments raise a salient point about how ADR processes are designed and implemented, namely, that the mediator (or arbitrator, as the case may be) is presumed to be neutral in outlook, and having no personal, financial, or other stake in the outcome. The American Heritage® Dictionary of the English Language defines being "neutral" as "[n]ot aligned with, supporting, or favoring either side, in a war, dispute, or contest"; as a noun, it defines it as "[o]ne who take no side in a controversy."<sup>2</sup> Under these definitions, was Takei truly "neutral"? That is, was he acting in the classic role of a neutral in an ADR proceeding, or was he, at least in part, an interested party who ended up being able to successfully broker a deal?

It is possible to view Takei's conduct here as a little ambiguous. He appeared to have no personal stake in the outcome, in the sense that the press reports do not mention that any of his or his family's artifacts were on the auction block. At the same time, because he and his family had spent time in the internment camps, he must have been influenced by his own life experiences.<sup>3</sup> Moreover, he served on the board of the JANM, which ultimately took possession of the artifacts. Thus, perhaps he had more of a personal interest in the dispute itself than the archetypal mediator. Could Takei's actions be analogized to how George Mitchell successfully brokered the Northern Ireland peace process, a dispute in which the U.S. was arguably invested? That accomplishment has often been referred to as a "mediation."<sup>4</sup> Or perhaps Takei was engaged in "facilitation," a separate kind of dispute resolution process, in which a third party helps others work together more successfully, identify and minimize problems, and increase effectiveness, usually

before a concrete conflict arises, but also to help parties prepare to negotiate or mediate.<sup>5</sup> For the purposes of the lessons imparted by that story, Takei was cast as a "neutral," reflecting the *Sacramento Bee's* characterization of him as an "intermediary," as well as CNN's description of what he did as a "mediation."<sup>6</sup>

With respect to arbitration, as discussed in a recent article by Robert E. Wallace, Jr. in *Law360*, the ability of the commissioners of Major League Baseball (MLB), the National Basketball Association (NBA), the National Football League (NFL), and the National Hockey League (NHL) to serve as arbitrators over disciplinary matters relating to the players also raises questions regarding the concept of neutrality and the rendering of fair and impartial decisions in professional sports.<sup>7</sup> As the author relates, all of the leagues employ outside, third-party arbitrators to handle disputes. These arbitrators are typically attorneys who are jointly agreed upon by the players' associations and their respective leagues. However, under the collective bargaining agreements governing the players, each commissioner generally retains broad discretion to designate him or herself as the arbitrator to hear, for example, the players' disciplinary and personal conduct matters. As the commissioners are hired and employed by the team owners, they could arguably be predisposed to rule in the interests of the owners and against the interests of the players (or other employees who have contractually agreed to let their Commissioner be the arbiter of certain disputes). The author goes on to relate that "[t]he NFL system has come under the most severe criticism because of the perception that [Commissioner Roger] Goodell acts as judge and jury on personal conduct matters, and, until recently, on drug cases. They also charge that he is responsible for hearing any appeal from the discipline he issues."<sup>8</sup>

The most recent example concerned Goodell's service as an arbitrator over Tom Brady's suspension relating to the "Deflategate" controversy, which involved alleged tampering with footballs by the New England Patriots during the AFC Championship Game this past January. An independent investigation had concluded that "it is more probable than not that Brady was at least generally aware of the inappropriate activities of [certain New England Patriots personnel who participated in rules violations] involving the release of air from Patriots game balls."<sup>9</sup> Thereafter, in May 2015, NFL Executive Vice President Troy Vincent sent a letter to Brady, stating:

The Commissioner has authorized me to inform you of the discipline that, pursu-



ant to his authority under Article 46 of the CBA [Collective Bargaining Agreement], has been imposed on you for your role in the use of under-inflated footballs by the Patriots in this year's AFC Championship Game.... [P]ursuant to the authority of the Commissioner under Article 46 of the Collective Bargaining Agreement and [the] NFL Player Contract, you are suspended without pay for the your club's first four games of the 2015 regular season.<sup>10</sup>

A mere three days later, Brady, through the NFL Players Association, appealed the suspension. Goodell then designated himself as the arbitrator to hear Brady's appeal pursuant to CBA Article 46 § 2(a), which provides that "the Commissioner may serve as hearing officer in any appeal under Section 1(a) of this Article at his discretion."<sup>11</sup> Thereafter, he rendered several decisions, including ruling on a motion for recusal and several discovery motions, and ultimately held a hearing, after which he upheld the four-game suspension in a written award on July 28, 2015.<sup>12</sup> Ruling on the parties' cross-motions to confirm and vacate the award, on September 3, 2015, a Manhattan federal court vacated the award, thereby vacating the suspension.<sup>13</sup>

Judicial scrutiny over arbitration awards is severely limited,<sup>14</sup> and the court's reasoning for its decision rested on what it perceived as three specific legal deficiencies: (a) inadequate notice to Brady of both his potential discipline and his alleged misconduct; (b) denial of the opportunity for Brady to examine one of the two lead investigators; and (c) denial of equal access to the investigative files. Brady had also argued (as he had similarly maintained on his unsuccessful recusal motion) that Goodell was "evidently partial"—one of the statutory grounds for vacatur of an arbitration award under the Federal Arbitration Act (FAA). Specifically, he contended, among other things, that Goodell had improperly delegated to Vincent his exclusive authority to discipline players for conduct detrimental to the NFL, and that, before serving as the arbitrator, Goodell had publicly lauded the reliability of the investigative report, which according to Brady had locked Goodell into supporting that report and rendering him incapable of reaching a contrary conclusion in the arbitration, as doing so would undermine Goodell's own competency as the commissioner. However, the court chose not to address these arguments in view of its determination to vacate the award on other grounds.<sup>15</sup>

In the absence of a review of the underlying collective bargaining agreement at issue, and without at least some empirical data on the outcomes of NFL player arbitration proceedings when the commissioner sits as the arbitrator, it is difficult to reach any definitive conclusions.<sup>16</sup> However, two things seem clear:

First, maintaining the neutrality of the third-parties who conduct the proceedings should be a goal in design-

ing and implementing any ADR process, because it is one of the core foundations for having an outside individual fairly and impartially assist in resolving disputes. Such an arbitrator or mediator is an integral and presumed component of the classic understandings of those particular processes.<sup>17</sup> In a mediation, the mediator is a disinterested third party who facilitates communication amongst the parties to assist them in arriving at a mutually consensual resolution. Even though no decision maker makes a determination on the merits of the dispute, in order to be effective, the mediator needs to be fair and impartial so that he or she can give as unbiased a perspective as possible on the dispute to help the parties satisfy their best interests while uncovering areas of mutual gain. The mediator's neutrality also helps encourage honest, candid, and confidential communications between the mediator and the parties. In short, the mediator is the "honest broker" who is "neutral" in the dictionary sense of the word. In an arbitration, the neutrality of the arbitrator should be even more paramount because, like judges in the court systems, he or she is being asked to determine the merits of the dispute, usually in a final and binding manner. Indeed, the arbitrator needs to demonstrate his or her ability to be fair and impartial, otherwise, under the FAA (and other state arbitration statutes), the award can be vacated for, among other things, a showing of evident partiality.

Second, and relatedly, arbitrators and other neutrals should act at all times in a manner that promotes confidence in the integrity of the proceedings. Impartiality of the neutrals who conduct these proceedings can easily be compromised simply by the appearance of impropriety. Recognizing this danger, the Code of Ethics for Arbitrators in Commercial Disputes and the Model Standards of Conduct for Mediators, for example, contain admonitions on this very subject.<sup>18</sup> Notwithstanding these conduct rules, the perception of neutrality will always be an issue, especially in arbitrations where "there is a winner or loser and the arbitrator can be replaced if one of the parties does not like his [or her] decision."<sup>19</sup>

Of course, much more can be said about neutrality in ADR, both in professional sports leagues and in other contexts, and how neutrals, like all human beings, can be affected by a host of different factors—conscious or unconscious—that can influence or alter their perspectives on being "neutral." Perhaps all that can be expected is that they be honest with themselves about whether they have made full and accurate disclosures to the parties regarding their interests, if any, in the individuals and the disputes before them and are truly in a position to conduct themselves in a fair and impartial manner.

As for Takei, he may not have been acting strictly as a mediator under the classic view of that dispute resolution mechanism. However, there is no question that he played a quintessential role in achieving a satisfying resolution for all concerned, and any actual or perceived conflict of interest or bias appears to have not been an issue. As

some readers noted, he “was the ideal individual to be involved in this matter to deliver such a positive result,” and that “[g]iven his status and eloquence and activism I imagine that Takei was more effective because he was not neutral but was a strong voice for a community that was otherwise being ignored.” Labels and categories aside, a job well done is a job well done.

However, the same probably cannot be said for Goodell. A system that is designed in such a manner as to permit the person who meted out the original discipline to then serve as the arbiter on an appeal of that decision naturally calls into question the neutrality of that individual.<sup>20</sup> Moreover, although presumably the product of an arm’s-length negotiation memorialized in a collective bargaining agreement, the system perpetuates the appearance of impropriety by allowing the individual to serve as the arbiter “at his discretion.” These foregoing aspects of the NFL arbitration system cast doubt on the fair and impartial nature of the decisions that are issued, especially when the Commissioner sits as the arbitrator. As for Goodell, he has consistently rejected all calls and demands to step aside as the arbitrator in personal conduct matters.<sup>21</sup> That decision will be the source of constant criticism and debate on the issue of neutrality.

## Endnotes

1. See Theodore K. Cheng, “Auction, Artifacts, and George Takei: How ADR Helped Preserve a Part of Japanese-American History,” N.Y. State Bar Assoc. Entm’t & Sports L., Vol. 26, No. 2 (Summer 2015), at 56.
2. See The American Heritage® Dictionary of the English Language (5th ed. 2015), available at <https://www.ahdictionary.com/word/search.html?q=neutral>.
3. Indeed, a new musical entitled “Allegiance” opened on Broadway this October inspired by Takei’s own experience in the internment camps. See generally <http://allegiancemusical.com/>.
4. See, e.g., Geoffrey Corry, “George Mitchell: Role Model for Mediation,” Mediate.com Blog, available at <http://www.mediate.com/articles/corry.cfm>.
5. See, e.g., Janice M. Fleischer & Zena D. Zumeta, “Preventing Conflict through Facilitation,” Mediate.com Blog (December 1999), available at <http://www.mediate.com/articles/zenandflei.cfm>.
6. See *supra* n.1 at 57 & nn.7-8.
7. Robert E. Wallace, Jr., “Neutral Arbitrators in Sports: What Makes it Fair?,” *Law360* (July 23, 2015), available at <http://www.law360.com/articles/680682/neutral-arbitrators-in-sports-what-makes-it-fair>.
8. *Id.*
9. *Nat’l Football League Mgmt Council v. Nat’l Football League Players Ass’n*, Nos. 15 Civ. 5916 (RMB) (JCF), 15 Civ. 5982 (RMB) (JCF), slip op. at 5 (S.D.N.Y. Sept. 3, 2015), available at <http://www.nytimes.com/interactive/2015/09/03/sports/football/document-judge-dismisses-tom-bradys-four-game-suspension.html>. (An amended decision was issued later that same day, which appears to have only corrected some typographical errors.).
10. *Id.* at 9-10.
11. *Id.* at 10-11.
12. See *id.* at 11-18.
13. See *id.* at 18-40. Mere hours after the decision was entered, the National Football League Management Council filed a notice of appeal to the Second Circuit.

14. For example, under the Federal Arbitration Act (FAA), a court may generally vacate an award only under the four grounds set forth in 9 U.S.C. § 10. See also Theodore K. Cheng, “Developments on Judicial Review Under the FAA After *Hall Street*,” ABA Alternative Dispute Resolution, Vol. 19, No. 2 (July 30, 2015) (discussing whether *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008), left open the question of whether parties could increase the level of judicial review or, alternatively, limit the scope of judicial review or even waive or eliminate it altogether), available at <http://apps.americanbar.org/litigation/committees/adr/articles/summer2015-0715-developments-judicial-review-under-faa-hall-st.html>.
15. See *Nat’l Football League Mgmt Council*, *supra* n.9, at 38-39.
16. Lawyers representing team employees also recently challenged Goodell’s power to decide disputes involving the interest of a team and a non-player. See generally *Hewitt v. Kerr*, No. SC 93846, slip. op. (Mo. Supr. April 28, 2015) (*en banc*) (holding, in a plurality opinion, that Goodell, as the sole arbitrator with unfettered discretion and as an employee of the team owners, was not sufficiently neutral to protect Hewitt’s right to have a fair hearing and directing the trial court to issue a new order compelling arbitration with a neutral arbitrator, not Goodell), available at <http://www.courts.mo.gov/file.jsp?id=86195>. See *supra* n.7 for discussion of the decision.
17. See, e.g., Theodore K. Cheng, “Using Alternative Dispute Resolution to Address Your Entertainment Disputes,” NYSBA EASL Journal, Vol. 26, No. 1 (Spring 2015), at 17-18.
18. See Canon I.C., Code of Ethics for Arbitrators in Commercial Disputes (2004) (“After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality.”), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/commercial\\_disputes.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/commercial_disputes.authcheckdam.pdf); Standard II.B., Model Standards of Conduct for Mediators (2005) (“A mediator shall conduct a mediation in an impartial manner and avoid conduct that gives the appearance of partiality.”), available at [http://www.americanbar.org/content/dam/aba/migrated/2011\\_build/dispute\\_resolution/model\\_standards\\_conduct\\_april2007.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf). See also Canon 2, Code of Conduct for United States Judges (“A Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities”) (2014), available at <http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>.
19. See *supra* n.7.
20. Even outside, third-party “neutrals” are under some influence or pressure because “an arbitrator who is hired by both sides but can be fired by either side,” see *id.*, or at least not hired again (presumably by the losing or less favorably treated party) for a future matter.
21. See, e.g., Darin Gantt, “Roger Goodell officially tells NFLPA he will not recuse himself,” NBCSports.com (June 2, 2015), available at <http://profootballtalk.nbcsports.com/2015/06/02/roger-goodell-officially-tells-nflpa-he-will-not-recuse-himself/>.

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# Television Is Not Dying, It Is Evolving

By Nima Daivari

What is digital media? Is it:

- *House of Cards* on Netflix and *Transparent* on Amazon Prime, streamed on laptops and viewed via Chromecasts;
- playing Sam Tsui with Fullscreen and PewDiePie with Maker Studios via YouTube on an iPad and using AirPlay and AppleTV to watch it on a television;
- BuzzFeed and Vice; and/or
- videosnapping a story on Snapchat?

It is so easy to get lost in the sea of digital media, because unlike more traditional forms, this sea is limitless. Music, books, magazines, movies, and traditional television all required access to physical objects, ranging from printing presses to edit bays. Today, however, the only barriers to entry are a smartphone, an Internet connection, and battery life.

Many more people than ever are creating various and myriad types of content, assisted with the ease of the digital space. There is more content than there is time to view or hear.

## "Television"

When discussing "television," it is important to no longer think of it as a distribution mechanism (i.e., 30-to-60 minute content that comes through a television set) and instead consider it as a form of content (i.e., five to 60ish minutes of episodic or serialized audio-video content). For instance, *House of Cards* is a serialized, scripted 60 minute drama series that has been awarded Primetime Emmy Awards, even though it has never been made available through a traditional television network. Depending on a viewer's home setup, the series may appear on a television through a device that is Netflix enabled, but it would not be "broadcast" over the air or through a coaxial cable. Yet it is still considered to be "television" by the Academy of Television Arts and Sciences.

The first step to consuming television digitally is to acquire a device that is enabled to stream content. Such devices include smartphones, tablets, computers, gaming consoles, Internet-ready televisions, and Blu-ray players. With a smartphone or tablet, one can download the content provider's app and start streaming on the device. With a computer, one can use a web browser and stream from a content provider's website. Streaming content on

a home television can be done in several ways, such as through an Internet-ready device or gaming console, and one of the more prominent methods is connecting a receiver to the television. Some of the more popular receivers on the market are Roku, Amazon Fire, Apple TV, and Google Chromecast. These receivers enable a user to cast (i.e., electronically and wirelessly send) one's content from a smartphone, tablet, or computer to the receiver, which in turn displays the content on a television. The receiver will also have its own apps, and the content can be accessed directly through those.

## Content and Content Providers

The next step is determining which content provider to use. The bigger players in the market include Netflix, Amazon Prime, Hulu, YouTube, HBO Now, Crackle, iTunes, and Google Play. Content is generally accessed through three methods: advertising supported video on demand (AVOD), subscription on demand (SVOD), and electronic see-through (EST). AVOD most closely mirrors a traditional television model. Content is streamed with one or more advertising break(s). Sometimes the advertising is at the beginning of a clip, show, or movie, sometimes throughout the running time of the content, and sometimes at the end; it depends upon the length of the content and the service provider. Hulu, YouTube, and Crackle all offer at least some content on an AVOD basis. AVOD is usually free to the consumer, since the ads subsidize the license fees and production costs of the content. It thereby permits the content provider to grant free access to the viewer.

SVOD requires a membership fee from its users. Netflix and HBO Now are two examples of such services. Hulu is a hybrid in that it offers some content on an AVOD basis and other content on an SVOD basis. The monthly subscription fee for SVOD services is generally in the \$4.99 to \$19.99 range per month, depending on the provider.

The final common method of content consumption is through EST. Generally via iTunes or Google Play, a user will download a piece of content, like a television show or a movie, for a per download price ranging from 99 cents to \$19.99. Depending on the content and the price point, content that is acquired through EST will either be permanently downloaded onto a device for unlimited playback or it will be a rental and the download will "expire" after a certain amount of time. When content expires, it is no longer viewable on the device.



As the democratization of content creation rises, players that started as informational websites like HuffingtonPost, BuzzFeed, and Vice have ramped up their video production efforts in order to attract more viewers (and the more lucrative advertising money that comes from commercials), as have social media services like Facebook and Snapchat. According to Google, there are 300 hours of video uploaded to YouTube every minute.<sup>1</sup>

None of this is to say that traditional television is dead. Quite the contrary actually. The 2015 Super Bowl saw 114.4 million viewers and last year's breakaway hit, *Empire* on FOX, had 23.1 million viewers tune in for the season finale. The reality is that digital media is simply evolving traditional media. Kelly Clarkson and Kanye West co-exist, Emily Bronte and Dan Brown co-exist, *Casablanca* and *The Avengers* co-exist, and digital and linear coexist without the former usurping the latter.

## Conclusion

Most of us grew up watching linear broadcast television. My household did not get cable television until I was a teenager. Even to an older Millennial, this proliferation of content is new, foreign, and overwhelming at times. As such, I know it is easy to dismiss the recent crop of content as nothing more than watching Swedish bloggers play video games for three hours, flashmob wedding proposal videos, and lists of the 37 things you must read right now, with the occasional *Orange Is the New Black* rising to the top. This is a business that is forecasted to generate \$15.5 billion in revenue in the U.S. and \$51.1 billion globally by the year 2020<sup>2</sup>...and that is only counting content from 64 countries. The day of the cat video has arrived.<sup>3</sup>

## Endnotes

1. <https://www.youtube.com/yt/press/statistics.html>.
2. Digital TV Research, June 2015 <https://www.digitaltvresearch.com/products/product?id=122>.
3. For additional reading, two prominent trade websites that cover the online video industry are Tubefilter and VideoInk.

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# Disqualification of a Relay: Potential Legal Issues

By Sergey Yurlov

## Introduction

There are many cases where a doping governing body disqualifies a team event, such as a relay, due to a positive doping test of one of the participants. For instance, a U.S.A. relay team at the Olympic Games in 2012 was disqualified because one of its participants had tested positive.<sup>1</sup> Having one athlete test positive has serious consequences for others. Why should the other team members bear liability for the doper's actions?

According to the Federation Internationale de Natation (FINA) regulations, if an athlete is disqualified for a doping offense, prizes, medals and money of other athletes should be forfeited. Thus, according to Article DC 11.2 of the FINA Doping Control Rules *"where any Anti-Doping Rule has been violated by a member of a relay in swimming, or team in open water swimming, or a duet or team in synchronized swimming or diving, the relay, duet or team shall be Disqualified from the Competition, with all resulting Consequences including forfeiture of any medals, points and prizes."*<sup>2</sup> (Regulations). According to the Regulations *"Team Sport"* is a sport in which the substitution of Athletes is permitted during an Event.

## Are There Any Grounds for the Disqualification of Relay Participants?

The World Anti-Doping Agency (WADA) should recommend changing the appropriate provisions to provide that team sport participants should not be punished for a teammate's doping offense.

Such a disqualification may be illegal. In many countries, one cannot be subjected to criminal liability for a crime committed by another. In Russia, according to Article 5 of the Russian Criminal Code of June 13, 1996 No.63-FZ, "an individual is criminally liable only for those socially dangerous actions/inactions and their consequences in respect of which his guilt has been established." Therefore, in order to hold non-doping team members liable, it should have to be proven that those individuals i) have committed socially dangerous actions/inactions, ii) such actions caused socially dangerous consequences, and iii) those athletes have committed those actions/inactions.

Why, then, is such a principle used in sports? Every adult athlete is responsible for his or her actions. If an athlete violates anti-doping rules, he or she is subjected to liability by a special body, and the penalty depends on that athlete's circumstances.

It appears, therefore, that there are no legal grounds for the disqualification of Team Sport members who are

not in violation of anti-doping rules. WADA could push for the rule that Team Sport athletes should be not be subjected to disqualification for an offense committed by another Team Sport athlete, regardless of the fact that both athletes participated together. This will protect the rights of athletes who never test positive, yet face the risk of disqualification due to positive doping results from their teammates.

The argument put forth in favor of disqualification says it should occur because the "doped" athlete helped the Team Sport members achieve medals, prizes, and money, and therefore such awards should be forfeited. However, this author argues that the only athlete who should be subjected to penalty should be one who commits a doping offense. According to Article 2 of the WADA World Anti-Doping Code 2015 (the Code), a doping offense is a violation, which includes:

- Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample;
- Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method;
- Evading, Refusing or Failing to Submit to Sample Collection;
- Whereabouts Failures;
- Tampering or Attempted Tampering with any part of Doping Control;
- Possession of a Prohibited Substance or a Prohibited Method;
- Trafficking or Attempted Trafficking in any Prohibited Substance or Prohibited Method;
- Administration or Attempted Administration to any Athlete In-Competition of any Prohibited Substance or Prohibited Method, or Administration or Attempted Administration to any Athlete Out-of-Competition of any Prohibited Substance or any Prohibited Method that is prohibited Out-of-Competition;
- Complicity involving an anti-doping rule violation; and
- Participation in Prohibited Associations.

According to Article 10.1 of the Code, "an anti-doping rule violation occurring during or in connection with an Event may, upon the decision of the ruling body of the Event, **lead to Disqualification of all of the Athlete's individual results** obtained in that Event with all Con-

sequences, including forfeiture of all medals, points and prizes.” (Emphasis added.)

In the meantime, Article 11.2 of the Code reads as follows: “if more than two members of a team in a Team Sport are found to have committed an anti-doping rule violation during an Event Period, the ruling body of the Event **shall impose an appropriate sanction on the team** (e.g., loss of points, Disqualification from a Competition or Event, or other sanction).” (Emphasis added.)

According to Appendix 1 of the Code, a “Fault is any breach of duty or any lack of care appropriate to a particular situation,” and as discussed earlier, a Team Sport allows the substitution of players during a competition. How can penalties then be imposed on those athletes who have not committed an anti-doping rules violation?

For example: A team whose members swam a relay took the first place in a competition. Doping officers conducted an analysis of the athletes’ samples, and found that one of the athletes had used a prohibited substance. The other relay team members were not aware of the fact that this athlete was doping. Regardless, Article 11.2 of the WADA Code disqualifies the relay. Yet that is not fair to the teammates.

First, the other athletes did not commit actions that were prohibited by the Code. These athletes followed the principles of “fair play” and acted in good faith. Second, the other athletes were not aware of the doping. Therefore, they did not participate in using of a prohibited substance, and they committed no fault or violation. Third, there is no causal connection between their lawful actions the individual athlete’s violation.

Therefore, as the other relay participants did not use or traffic in prohibited substances, they should not be disqualified and required to forfeit their winnings. It must be noted that relay participants could be disqualified if they participated in the use of prohibited substances or in their trafficking.

### Recommended Changes

It appears that Article 11.2 of the Code and Article 11.2 of the Regulations should be amended to the following: “Team participants can be subjected to liability only when they use and/or encourage use of Prohibited substances.” FINA and other sports federations that develop individual sports should also introduce similar changes to their internal anti-doping regulations.

### Endnotes

1. See <http://www.abc.net.au/news/2015-05-14/us-relay-team-stripped-of-2012-olympic-silver-medals/6468282>.
2. FINA Doping Control Rules, *available at* [http://www.fina.org/H2O/docs/rules/2015/FINA\\_DC\\_rules.pdf](http://www.fina.org/H2O/docs/rules/2015/FINA_DC_rules.pdf) (emphasis added).

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## BOOK REVIEW

# ***Baby You're a Rich Man: Suing the Beatles for Fun and Profit***

By Stan Soocher

Reviewed by Elissa D. Hecker

The press release for *Baby You're a Rich Man* states: "Don't blame Yoko Ono for the Beatles' breakup, blame the lawyers." This statement is not entirely accurate (or fair to the lawyers), but speaks to the real reasons as to why the group disbanded, which include legal issues among the members of the band, their managers, and both the U.S. and U.K. governments, among many other external factors.

This book chronicles the history of the Beatles before, during and after, through solo careers and other pursuits. Topics covered include management (and mismanagement) issues, merchandizing, U.S. and U.K. companies, collection societies, the Internal Revenue Service, the Immigration and Naturalization Service, drugs, copyrights, licensing and royalties, accountings, a not-for-profit concert, infringements/sampling, Nixon and the FBI's secret files, government red tape, the Freedom of Information Act (FOIA), violations of fiduciary duty, due process, freedom of expression, and right of publicity—to name a few.

The book is written with a storyteller's touch and a wry sense of humor. Through his in-depth research, FOIA requests and unearthing of documents from court archives, Soocher incorporates direct quotations from court and deposition records "from thirty-five years or more ago still in their original staples, apparently unbent by prior copying. Original inked signatures of John Lennon, George Harrison, Yoko Ono, Brian Epstein, Allen Klein, and many of the judges on court orders popped up on these primary sources." He also collected personal recollections from many of the key players in various negotiations, including industry greats M. William Krasilovsky and Barry Slotnick. Additionally, *Baby You're a Rich Man* includes a voluminous appendix of the court documents, comprehensive notes and a bibliography for those who wish to read further.

*Baby You're a Rich Man* is organized for the most part chronologically by issue, with clever headings. It includes information never before seen by the public detailing how the artists felt about the various lawsuits in which they were involved. This book provides insight into the clash of cultures in the courtroom during the 1960s and 70s, when judges and juries did not necessarily understand the music, Beatlemania, and the anti-government counterculture.

Part I, "Can't Buy Me Love," focuses on the Brian Epstein management years (1962-7), when he brought the Beatles into the international limelight. Epstein was responsible for the height of the Beatles' international fame. "...Epstein's management of the Beatles had made

pioneers both out of him and the band, as they laid the groundwork for what would become the modern music industry, one that operated on an international level." However, after the band stopped touring in 1966, Epstein's involvement with drugs, alcohol, and other personal and business problems led to his decline, significant errors in judgement and negotiations in licensing and merchandizing agreements, and eventually his death of an overdose in 1967.

In addition, Part I discusses Epstein's background, history with the Beatles, and the agreements and arrangements that he made regarding signing with labels, introducing them to Abbey Road Studios, television appearances (including the famous *The Ed Sullivan Show*), promotional tours, high appearance fees, and the buzz that became Beatlemania. It also delves into the trials and tribulations faced by a manager of an international brand, and his debacle in dealing with merchandizing rights of licensed goods, from bubble gum to dolls, and collections of royalties therefrom. "Paul McCartney lamented about the Beatles' early merchandise deals, 'We got screwed for millions.'"

Toward the end of the term of their management agreement with Epstein, the Beatles established their own company, Apple Corps, signaling their intent to move ahead without him. A few months after negotiating and securing the Beatles' recording contract with EMI (and enabling his company to take a 25% management commission from the record royalties), Epstein died, and an opening arrived for Allen Klein to step in as manager.

Part II, "For the Benefit of Mr. K," focuses on the reign of Allen Klein, who was already representing other major music talents, and negotiating previously unheard of deals for artist compensation. Soocher paints the picture of a whirlwind of drive, ambition and self-interest. Klein entered the Beatles' lives and never quite left, leaving a typhoon of lawsuits in his wake. The most action happens during this Part, with well-detailed descriptions of behind-the-scenes deal makings, lawsuits and personalities.

This Part also shows how three of the Beatles—John, George, and to a smaller extent, Ringo—did not grasp the importance of the business aspects as much as they did songwriting and performing, whereas Paul (working with his father-in-law and attorney Lee Eastman) learned quickly how crucial it was to comprehend what was in the agreements that they were signing, and not just to trust the promise of a manager that good things will come. McCartney never trusted Klein, and when McCartney sued to

disband the group in 1970, Klein continued to represent the other three members in their solo careers until they ended their relationships with him in 1973.

The Beatles learned the hard way (as did Billy Joel and many other artists) that managers can operate with greed and self-interest. The band members lost millions of dollars of potential revenues to Klein that would have been theirs, had they the wherewithal to review and challenge agreements that his team drafted, as well as to conduct proper accountings. Klein became so enmeshed in self-dealing that he continued to immerse himself in lawsuits against the members of the Beatles for years after the termination of the band's partnership. The situation was so dire that in 1971 McCartney was able to have a receiver appointed by a court in the U.K. to oversee the Beatles' accountings after the dissolution of the band, so that he could be sure of the accuracy of statements and accountings.

Part III, "Nowhere Man," details John and Yoko's attempts to return to the U.S. after John was convicted of a drug possession charge in England (which was the result of a corrupt police act), in order to track and wage a custody battle over Yoko's daughter from a previous marriage. John Lennon eventually did get his green card, but a protracted battle over several years preceded that event. The holding of that legal fight opened the door for other British artists to acquire theirs as well. As Soocher writes,

...after the Second Circuit ruled, George Harrison called John Lennon to say that John winning his case had made it easier, at least for a Beatles applicant like George who had his own English drug conviction, to get into the United States. George, who claimed he had also been set up by Scotland Yard detectives, told John, "I don't need to get one of those entry waivers anymore. They said it was based on the 'Lennon doctrine.'"

Although many interesting facts are shared regarding maneuverings of the FBI, President Nixon (and his relationship with Elvis Presley), the Immigration and Naturalization Service, federal judges, and police corruption in Scotland Yard, unfortunately this part of the book does not flow as well as earlier sections. Too much time is spent on the minutiae of John and Yoko coming and going to and from the U.S., or trying to, and tracking her daughter. Although important in the grand scheme, it detracts from the rhythm and flow of the book.

Part IV "Got to Be a Joker, He Just Do What He Please," concerns gangster Morris Levy's wooing of John Lennon and their courtroom battle over a recording and distribution agreement. As a result of a 1973 settlement from litigation regarding the claim that "Come Together" infringed on Chuck Berry's "You Can't Catch Me," Levy arranged for Lennon to record tracks that were owned by Levy for an album, *Roots*. (Soocher uncovered some fascinating quotes from testimony regarding songwriting.) Levy then wanted

to distribute the album through television sales. Lennon was never satisfied with the recordings that he made for *Roots*, which was produced by an erratic Phil Spector. Issues relating to contracts, right of publicity and copyright were raised in the litigation, including Lennon's recording of tracks from in the album *Rock n' Roll*. This was a major push-pull between Levy and Lennon. "Looking back, Dave Marsh said that Morris Levy's litigation against John Lennon had an overriding goal, to 'send a message to the rest of the music industry about Levy's power and ruthlessness. He sued John Lennon to show that even a Beatle could not be Levy's Mafioso ass. He put *Roots* out so he could say John Lennon was his punk.'"

Part V, "All Things Must Pass," is the weakest chapter. Allen Klein reappears, with a lawsuit against George Harrison for "My Sweet Lord," where Klein claimed that the song infringed upon "He's So Fine" (recorded by the Belmonds and owned by Klein). The court found that there was strong similarity, but not willful copyright infringement, in a decision that brings to mind some of the quotes from the recent "Blurred Lines" case.

This Part also covers Harrison's "The Concert for Bangladesh," which was the first major fundraising concert held by an artist to benefit an international crisis. It was "the largest contribution from a single event of this nature" at that time, according to UNICEF's Children's Fund. This concert paved the way for so many others who have since held benefit concerts—yet the mismanagement and tax issues that occurred served as warning signs for future similar events. This Part of the book reads as a primer for the artists who may be producing fundraising concerts for the Syrian and Afghani refugee crises.

Overall, *Baby You're a Rich Man* is a satisfying read for anyone who appreciates both a good story and insight into real music history. It is also a valuable book to have in any collection about the Beatles; it is a behind-the-scenes look at the personalities involved with one of the world's most famous bands.

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## Charlie Chaplin, The Little Tramp, and Infringement

By David Krell

Charlie Chaplin once said: "I went into the business for the money, and the art grew out of it. If people are disillusioned by that remark, I can't help it. It's the truth."<sup>1</sup>

Chaplin was a businessman as well as a groundbreaking comedy icon in silent films.

In addition to his dominance of movie screens during the heyday of silent movies, Chaplin forged the way for talent to become more powerful in Hollywood—he formed United Artists (UA) in 1919 with film director D. W. Griffith and movie stars Douglas Fairbanks and Mary Pickford. As studio owners, Chaplin and his partners had more control over producing and distributing their films.

Artists taking control of the business side of creativity seemed laudable. "But in its first few years, UA led a precarious existence," wrote David Thomson in a 2008 article for *theguardian.com*. "It sometimes had only a handful of films, and it didn't break into reliable profits until the late 1920s. One reason for that was the 'reticence' of Chaplin to commit to the new idea."<sup>2</sup> Chaplin made *A Woman of Paris* for United Artists, but his breakout UA film was the 1925 film *The Gold Rush*.<sup>3</sup>

With a derby, cane, baggy pants, shuffling gait, and short mustache, Chaplin debuted The Little Tramp, his signature character, in the 1914 silent film comedy *Kid Auto Races at Venice*. It captured the fascination of America's audience. In his 1977 obituary of Chaplin for *The New York Times*, Bosley Crowther wrote, "His harassed but gallant Everyman was the Little Tramp, part clown, part social outcast, part philosopher. He was 'forever seeking romance, but his feet won't let him,' Chaplin once explained, indicating that romance connoted not so much courtship as the fulfillment of fancy. "Stumble Chaplin's Everyman might, but he always managed to maintain his dignity and self-respect. Moreover, he sometimes felled a Goliath through superb agility, a little bit of luck and a touch of pluck. There was pathos to the Little Tramp, yet he really did not want to be pitied."<sup>4</sup>

Chaplin's creation became the center of the 1928 case *Chaplin vs. Amador* revolving around a Chaplin imitator using the name Charles Aplin.<sup>5</sup> The court acknowledged Chaplin's fame in The Little Tramp character: "This character, and the manner of dress, has been used and portrayed by Charles Chaplin for so long and with such artistry, that he has become well known all over the

world in this character to such an extent that a display of his picture with the word 'Charlie,' or even with no name at all, has come to mean the plaintiff."<sup>6</sup>

Charles Amador, along with producers F.M. Sanford and G.B. Sanford, planned "a series of twelve motion pictures" starring himself with the stage name of Charlie Aplin.<sup>7</sup> Their film *The Race Track* caught the attention of Chaplin, who obtained a preliminary injunction preventing the film's exhibition. At trial, the court found that Chaplin "originated, combined and perfected the manner of acting and mannerisms" connected to the Little Tramp character.<sup>8</sup> On appeal to the California Court of Appeal, Amador argued, unsuccessfully, that Chaplin lacked evidence to prove the Little Tramp's genesis began with him. "The finding that plaintiff originated and combined the role is supported by evidence of manager of theaters, motion picture houses, actors and motion picture producers."<sup>9</sup>

Amador also argued that Chaplin sought a monopoly. This argument failed, too: "The question of monopoly is in no way involved in this action. Plaintiff is not seeking to prevent the appellant, Charles Amador, from appearing in motion pictures, but only seeks to prevent him from imitating the plaintiff in such a way as to deceive the public and work a fraud upon the public and plaintiff. The case of plaintiff does not depend on his right to the exclusive use of the role, garb, and mannerisms, etc.; it is based upon *fraud and deception*."<sup>10</sup>

Further, Amador attempted to categorize the injunction as too broad, therefore, invalid. Again, the court ruled in Chaplin's favor, emphasizing that the injunction "simply enjoins [Amador] from *imitating the plaintiff in such a way as will deceive and defraud the public*."<sup>11</sup>

The right of publicity has Charlie Chaplin in its DNA, providing a history lesson on the importance of protecting personas. Comedy can be a serious business, after all.

### Endnotes

1. <http://www.brainyquote.com/quotes/quotes/c/charliecha109988.html>.
2. David Thomson, "Dream Factory" (Feb. 22, 2008), *available at* <http://www.theguardian.com/film/2008/feb/23/film>.
3. *Id.*
4. Bosley Crowther, "Charlie Chaplin Dead at 88; Made the Film an Art Form," *N.Y. TIMES* (Dec. 26, 1977).



5. 93 Cal. App. 358 (1928).
6. *Id.* at 360.
7. *Id.*
8. *Id.* at 362.
9. *Id.*
10. *Id.* at 362-63.

11. *Id.* at 364 (emphasis added).

David Krell is the author of the book *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*. He is also the co-editor of the NYSBA book *In the Arena*. David is a member of the bar in New York, New Jersey, and Pennsylvania.



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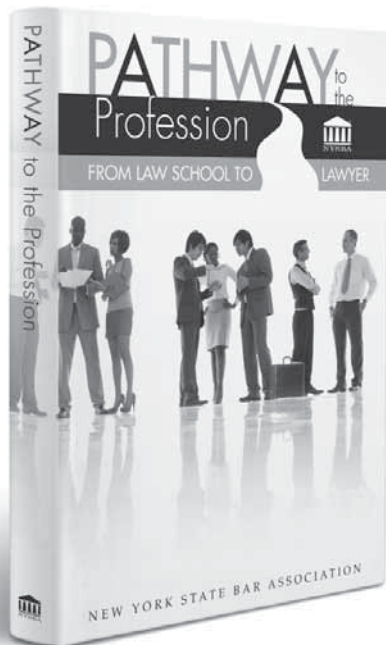
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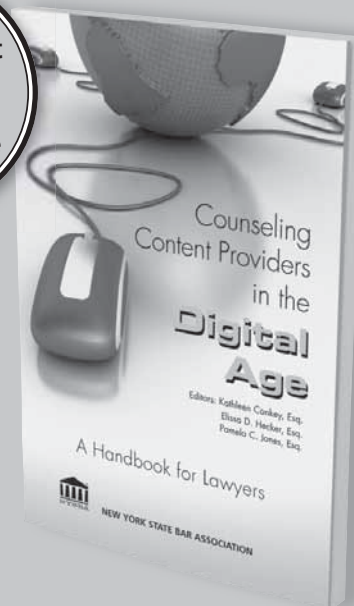
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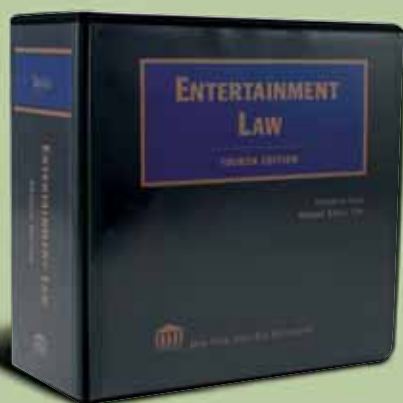
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