

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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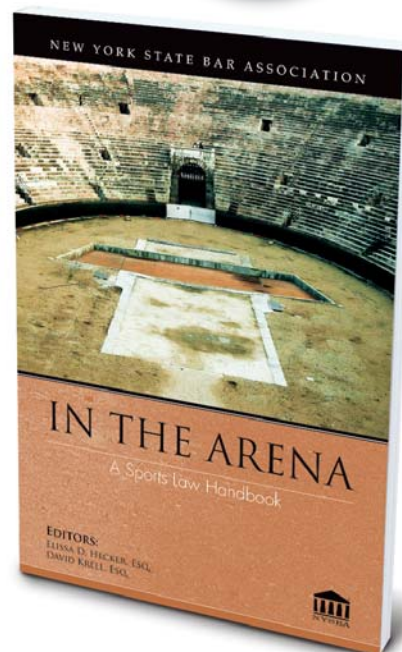
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Remarks from the Chair

I am very glad to continue on my EASL journey by making it to “Madame Chair,” as I am being called by some of my fellow Executive Committee members. At least I *think* I heard that correctly. At any rate, I am and remain extremely proud of the wonderful individuals who are the dedicated, innovative and brilliant EASL team.



Steve Rodner’s exemplary, and possibly historic, tenure ended with a fabulous Annual Meeting with a first-ever “Members” meeting for a few committees (Theatre and Performing Arts, Television and Radio, Publications, Fine Arts, and ADR) and two vastly different but incredible CLE panels. The first panel was about new licensing models for music rights, including “blockchains.” This topic brought together some of the top innovators in a discussion of a very complex and of-the-moment technology that seems to keep up with the needs of modern music licensing. The second panel was an in-depth and dramatic presentation of the destruction and plundering of World Heritage sites (including ancient artifacts, primarily in war-torn areas of the world) by terrorist organizations who use the illicit plunder to fund their activities. It was heartbreaking and terrifying. I again thank Joyce Dollinger and Robert Thony for their terrific work in programming the first panel, and Irina Tarsis, with her equally amazing work, with the second. All three of them worked independently after pitching their programs, and achieved superior results in finding panel members and topics. Our off-site reception followed the program at one of our regular hangouts, “Bill’s Bar and Burger” in Rockefeller Plaza, where the onion rings are large and the milkshakes are small, but fierce. There was an open bar as well.

February 28th brought our most recent Pro Bono Clinic, in conjunction with the IP Section, at Dance/NYC’s Annual Symposium, held at the Gibney Dance Center near City Hall. As a returning volunteer, I knew that it would be an instructive and interesting insight into

the dance world. The issues with which the lawyer volunteers are presented during our Pro Bono Clinics are often challenging, and provide a mutually satisfying experience for both counsel and client.

On March 8th, our ADR Committee Co-Chairs, Elayne Greenberg and Judith Prowda, presented a 50-minute CLE entitled “The Danger Of Falling In Love with Your Case.” The discussion included examples in the entertainment, arts and sports world where optimistic overconfidence prevented a lawyer from getting an optimal resolution for the client.

On March 23rd, the EASL Diversity Committee, another one of the hardest working and most active of our Section, held its first meeting of 2016 at Cardozo Law School. The topic of the meeting was “Writer or Biter: Sampling and Co-Authorship in Pop, Urban and Dance Music.”

On March 30th-31st, our now Annual CLE for Theater Lawyers (with the Commercial Theater Institute) was organized by Second Vice Chair Jason Baruch at a downtown rehearsal studio. The presenters and audience provided the theatrics.

On May 5th, we will be offering our fabulous EASL Spring Meeting, and on June 8th, we will be offering another NYSBA CLE-sponsored program to the entire NYSBA membership. The panel will be a new variation of the “Introduction to Entertainment Law,” combining hands-on experience/examples and case studies, with some basic concepts and principles, from some of the main disciplines of the practice. Former EASL Section Chairs Steve Rodner and Rosemarie Tully are organizing this event with me, and the day-long event will be an insightful and interesting experience for both practitioners and those interested in the field.

Of course, many more seminars are in the scheduling and planning phases, and I hope to have more information about those soon—so keep an eye out for future announcements. We will also have a variety of “non CLE” social and networking events planned for the second part of the year, as EASL has a reputation to live up to!

**Until next time,
Diane Krausz**

Editor's Note

The policy for law student submissions was recently amended to read:

A law student wishing to submit an article to be considered for publication in the *EASL Journal* must be a member of EASL and must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article.

In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.



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 also a Past Chair of the EASL Section, 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 Bar 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 CSUSA's National Chapter Coordinators, and a member of the Board of Editors

for the *Journal of the CSUSA*. Elissa is a repeat Super Lawyer and recipient of the CSUSA's inaugural Excellent Service Award. She can be reached at (914) 478-0457, via email at heckeresq@heckeresq.com or through her website at www.heckeresq.com.

The next *EASL Journal* deadline is
Friday, May 20, 2016



Entertainment, Arts and Sports Law Section Blog

The EASL Blog Provides a Forum and News Source on Issues of Interest

The EASL blog acts as an informational resource on topics of interest, including the latest Section programs and initiatives, as well as provides a forum for debate and discussion to anyone in the world with access to the Internet. It is available through the New York State Bar Association Web site at <http://nysbar.com/blogs/EASL>

To submit a Blog entry, email Elissa D. Hecker at heckeresq@heckeresq.com

Pro Bono Update

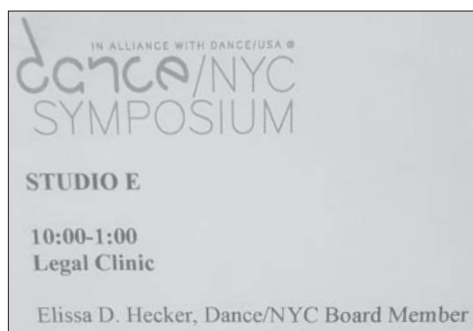
By Elissa D. Hecker, Carol Steinberg, Kathy Kim and Irina Tarsis
Pro Bono Steering Committee

Pro Bono Clinics

Our latest Pro Bono Clinic took place on Sunday, February 28th, at the Dance/NYC Symposium. Lane Harwell, Executive Director of Dance/NYC, thanked the volunteers: "The Legal Clinic has become a hallmark of the Dance/NYC's Symposium, connecting dance makers to much needed legal resources. On behalf of all of us at Dance/NYC, I thank you for lending your time and energy to move the art form forward."

Great appreciation to the following volunteers who helped many members of the dance community:

Cheryl Davis	Anne LaBarbera
Carol Spawn Desmond	Amy Lehman
Jill Ellman	Manish Mathur
Tim Fry	John Moore
Elissa D. Hecker	Zuli Nauzo
Eirini Ioannidi	Madeleine Nichols
Merlyne Jean-Louis	Ashley Tan
Alex Jiga	Jie Tan
Sara Katz	Rosemarie Tully
Kathy Kim	



Speakers Bureau

The Pro Bono and Fine Arts Committees have worked together on many scintillating programs. Previously, there was a program on Creative Time, where the Executive Director and Pro Bono Counsel discussed Creative Time's fascinating programs and concomitant legal issues. Last fall, we produced a panel on "Street Art" for EASL's Fall Meeting. We also collaborated on "Legal Basics for Artists" panels in Dumbo and the Bronx.

The Pro Bono Steering Committee is collaborating once again with the Fine Arts Committee to present a program on Legal Issues for Artists. We are planning our program for around the time of the Bushwick Open Studios weekend, which is usually in early June. Our program will focus on tax and real estate basics for artists. The program was conceived at the Fine Arts Committee meeting, which was held before EASL's Annual Meeting on January 26th (please note that registration for the Annual Meeting was not a prerequisite to attend the committee meeting).

Preliminarily, EASL member Patricia Pernes, a tax attorney at Deloitte Tax LLP, will speak about tax issues for artists, including when and how to deduct for materials, expenses, and donations. Another EASL Fine Arts Committee member, Jill A. Ellman, will speak about commercial leases. There will also be a Landlord-Tenant attorney on the panel, who focuses on housing issues, who will speak about residential leases and evictions. The program will focus on legal basics that artists need to know. As always, the speakers translate "legalese" into plain English so as to better reach the audience.





We hope to hold the panel at an arts organization in Dumbo. The program will be free and open to the public. Details will be provided via email, via the EASL discussion forum, and on the EASL Blog once the speakers and venue are in place.

* * *

Clinics

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

- Elissa D. Hecker, eheckeresq@eheckeresq.com
- Kathy Kim, kathy@productions101.com



Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- Carol Steinberg, elizabethcjs@gmail.com

Litigations

Irina Tarsis coordinates pro bono litigations.

- Irina Tarsis, tarsis@gmail.com

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



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. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **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, May 20, 2016**.
- **Submissions:** Articles must be submitted via a Word email attachment to 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(s) 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 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*.



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and click the link to follow us and stay
up-to-date on the latest news from the
Association and the
Entertainment, Arts and Sports Law Section

NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;

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

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



ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

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

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

Memorandum in Support

Proposed Legislation to Exempt Attorneys from the Licensing Requirements of Theatrical Employment Agencies

Introduction

The New York State Bar Association's Executive Committee approved the report and recommendation of the Entertainment Arts and Sports Law Section (Section) to propose legislation that would amend the definition of "Theatrical Employment Agency" to specifically exempt attorneys duly licensed and actively practicing in the State of New York from these licensure requirements of the General Business Law and the Arts and Cultural Affairs Law. This proposed legislation will protect attorneys from additional regulatory requirements as well as potential civil and criminal sanctions in performing legal services for clients who are artists as defined under the New York General Business Law §171.8-a. Such services may include procuring or attempting to procure employment or engagements for such artists. The current language of General Business Law §171.8 and Arts and Cultural Affairs Law §37.01.3 exempts personal managers from the license requirement if they only incidentally seek employment for their clients. This proposal would add a similar exemption for licensed attorneys at law.

Current Statutory Provisions

New York General Business Law, Art. 11, Section 171.8. defines "Theatrical Employment Agency" as "any person...who procures or attempts to procure employment or engagements for an artist, but such term does not include the business of managing...the artists...where such business only incidentally involves the seeking of employment therefor." The New York Arts and Cultural Affairs Law, Art. 37, §37.01.3 defines a "Theatrical Employment Agency" to include any person who procures or attempts to procure employment or engagements for an artist, except for those acting as a manager for artists "where such business only incidentally involves the seeking of employment therefor." New York General Business Law, Art. 11, §171.8-a defines "artist" as "actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers, lyricists, arrangers, models and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises."

Proposed New Legislation

The Section recommends that legislation be introduced and enacted that adds the following concluding sentence to both General Business Law §171.8 and Arts and Cultural Affairs Law §37.01.3:

AN ACT to amend the definitions of "Theatrical Employment Agency" under the New York State General Business Law, Article 11, §171.8 and the New York Arts and Cultural Affairs Law, Article 37, §37.01.3, to exempt attorneys duly licensed in the State of New York from the requirement of securing an employment agency license to negotiate or otherwise assist in obtaining employment contracts for Artists.

1. Section 171.8 of the General Business Law is amended by adding the following concluding sentence:

The provisions of this subdivision shall also not apply to persons duly engaged in and admitted to the practice of law in the State of New York, pursuant to the rules of the Court of Appeals of the State of New York and in good standing in accordance with the provisions of the New York State Judiciary Law, §468 and the rules of the Chief Administrator of the Courts.

2. Section 37.01.03 of the Arts and Cultural Affairs Law is amended by adding the following concluding sentence:

The provisions of this subdivision shall also not apply to persons duly engaged in and admitted to the practice of law in the State of New York, pursuant to the rules of the Court of Appeals of the State of New York and in good standing in accordance with the provisions of the New York State Judiciary Law, §468 and the rules of the Chief Administrator of the Courts.

Statement in Support

Current New York laws recognize the realities of the entertainment industry and that personal managers may procure employment opportunities for new artists on an ancillary basis, even though their primary role is to advise, counsel and manage the career development of artists. However, no such similar exemption exists for attorneys from the definition of a “Theatrical Employment Agency.”¹ Although there is no case law on point that expressly states that an attorney negotiating an employment agreement for an artist is a “theatrical employment agency” as defined in the statute, a representative of the New York City Department (DCA) of Consumer Affairs stated in response to a query at a recent New York City Bar Association program that it is possible that an attorney negotiating an employment agreement for an artist could be found to be an unlicensed talent agency.² The DCA representative also pointed out that there were various regulatory hurdles for attorneys who even wanted to try to comply with the licensing regulations, that make compliance virtually impossible. In California, an attorney was found to violate a talent agency license requirement for negotiating an employment contract for an artist without a talent agency license.³ Though not binding upon the New York courts or regulatory agencies, such a finding may be followed by the New York administrative agencies or courts to impose civil or criminal sanctions or both against attorneys who may be found to violate the New York theatrical employment agency statutes while negotiating employment agreements on behalf of their artist clients. Violation of the New York statute is a misdemeanor.⁴

Attorneys Are Licensed and Subject to Strict Discipline

Attorneys should be exempted from the theatrical employment agency license requirement in New York. Unlike personal managers, who are not licensed, not regulated and statutorily exempt when incidentally procuring employment for artists, attorneys are licensed, regulated and are also held to high ethical standards.

The original purpose of the statute was to protect artists from unscrupulous individuals and firms that may engage in illegal or unethical activity. General Business Law §187 prohibits agents from placing artists with work assignments that involve “bad character, prostitutes, gamblers, procurers or intoxicated persons,” or other illegal activities. This section also prohibits false or misleading advertisements and prevents agents from placing child artists with jobs that would violate compulsory education or labor laws. Sections 173 and 181 establish requirements for employment contracts and §177 establishes a bonding requirement for employment agencies. Other provisions provide further protections for artists by requiring that employment agencies undergo background checks, have sufficient experience in the employee placement business,

and maintain specific records. While this statute established a regulatory framework for what was initially an unregulated class of business, attorneys are already held to even higher standards.

Unlike personal managers who may operate freely and require no formal training or licensure to become qualified, each attorney must graduate from an accredited law school, pass a rigorous bar examination, undergo a character and fitness assessment, including the submission of supporting character and legal employer affidavits, all for an application to become a licensed member of the bar. Further, once admitted to the bar, attorneys are required to regularly take continuing legal education classes, are bound by ethical obligations to their clients and others, and are subject to disciplinary action by the Appellate Divisions for failure to act according to prescribed rules of conduct. Similar to personal managers, attorneys who represent artists provide guidance and representation (albeit from the legal perspective) in the development of an artist’s career, which occasionally may include navigation of career/business decisions and lead to employment. Legal services provided in negotiation of business and employment contracts on behalf of the artist typically result in the employment of the artist. In all instances, however, the licensed attorney is subject to stringent requirements to ensure protection of potential or actual clients and the intent of the employment agency licensing requirement is satisfied through the attorney licensing and regulatory process, obviating the need for further licensure as a talent agent.

Personal managers have been exempted from the licensing requirements since 1917.⁵ All the reasons for the personal manager exemption apply to attorneys. In addition, given that attorneys are already held to stringent requirements to ensure protection of potential or actual clients, the intent of the employment agency licensing requirement is already satisfied through the attorney licensing process. Therefore, there is no need for an additional and unnecessary licensing requirement for attorneys duly admitted in the State of New York.

Current Legal Interpretations

Although New York courts view procuring or attempting to procure employment as the critical element in defining a theatrical employment agency,⁶ they also examine the primary engagement between the artist and the person procuring the employment opportunity when determining whether such person acted in violation of the employment agency license requirement. For instance, in *Mandel v. Liebman*, the Court of Appeals found that the attorney-plaintiff “who devot[ed] himself to the business of acting as personal representative, advisor and manager for persons engaged in the entertainment world,” and acted primarily as the defendant’s personal manager was within the statutory exception of the em-

ployment agency license requirement.⁷ Licensed attorneys who are not personal managers should be afforded a similar exemption. The role of the entertainment attorney is particularly unique in that the attorney's primary role is to review and negotiate contracts in the best interest of the artist client. Entertainment attorneys generally understand the business and develop significant contacts in the entertainment industries that may prove beneficial for the artists they represent. Failure to exempt attorneys from the agency license requirement may prevent attorneys from fully advocating for or acting on behalf of their clients.

Other NYS Statutory Licensing Exemptions for Attorneys

Other provisions of New York State law exempt attorneys from licensure and commission requirements because of their license to practice law in the State of New York. For instance, under the Real Property Law, attorneys are exempted from the requirement of obtaining a real estate broker license.⁸ In addition, attorneys do not need to take an exam, establish their moral character or provide proof of their education in order to serve as notaries public, as non-attorneys must do.⁹ Attorneys who apply to serve as notaries public receive their commissions simply upon establishing their credentials as attorneys.

These attorney exemptions have applied to both of these forms of licenses for decades. There is little legislative history that provides a reason why attorneys have been excluded from these statutes, but it has been implied from these exemptions that attorneys' credentials and qualifications to practice law suffice to exclude them from additional licensing requirements when they are performing the regular and traditional duties and responsibilities of their profession. Even though the current statutes pertaining to theatrical employment agencies do not specifically exclude attorneys, we believe that the licensure obligations were meant for non-attorneys who, while not held to the same professional, regulatory, and ethical standards imposed upon attorneys, must comply with some measure of requirements designed to protect the public. Therefore, we propose that the definitions of a "theatrical employment agency" be amended to exclude attorneys licensed in the State of New York from the employment

agency license requirements, which would conform to other areas of New York law that exclude attorneys from licensure requirements.

Conclusion

The failure to explicitly exclude attorneys from the employment agency license requirements could expose attorneys practicing in the entertainment industries to civil and criminal sanctions in the course of their everyday work. This would negatively impact on the artists who rely on attorneys to negotiate their employment agreements and provide appropriate services within the context of the entertainment industry. To the extent that it limits what attorneys can do for their artist clients, the failure to exempt attorneys from the strict reading of the statutes is counterintuitive to the purpose for which the theatrical employment license requirement was first adopted.

Based on the foregoing, the Executive Committee of the New York State Bar Association approved the report and recommendation of the Section regarding a legislative proposal that would exclude attorneys from the definitions of a "Theatrical Employment Agency."

Endnotes

1. See General Business Law §171.8.; see also Arts and Cultural Affairs Law §37.01.3.
2. New York City Bar, Attorneys, Agents and Managers in the Entertainment Industry: Roles and Relationships, May 20, 2015 (Session 3).
3. *Solis v. Blancarte*, Ca. Lab. Comm. (Sept. 30, 2013).
4. See General Business Law §190.
5. Chapter 770, L. 1917.
6. See *People v. Davan Executive Services*, 97 Misc. 2d 437 (N.Y. City Crim. Ct., 1978).
7. *Mandel v. Liebman*, 303 N.Y. 88, 97 (1951); see also *Esther Creative Group, LLC v. Gabel*, 25 Misc. 3d 1219(A) ((N.Y. Sup. Ct. 2009), (dismissing defendant-artist's motion to dismiss, finding that the plaintiff acted primarily as a manager who even hired a booking agent for defendant).
8. Real Property Law §442-f.
9. Executive Law §130.

Our Bums

By David Krell

Editor's Note: This book is more than just a comprehensive and personal history of the Brooklyn Dodgers, Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture encompasses the history of Brooklyn, celebrities, politics, law, and family. David's passion for all things Brooklyn—and sweet testament to his own family tree—bring to life the relationships that were fostered through a general love of all things Dodgers. The foreword was written by Branch Barrett Rickey, grandson of Branch Rickey, and includes testimonials from countless Brooklynites over time. Our Bums received an Honorable Mention for the Ron Gabriel Award from the Society for American Baseball Research. David Krell is a regular contributor to the EASL Journal with his Krell's Korner series of articles. He also co-edited the NYSBA book In the Arena. David is an active member of the New York bar. He is also admitted in New Jersey and Pennsylvania.

Brooklyn, the borough that was a city until New York City annexed it in 1898, enjoys a foothold in American popular culture as strong as its iconic bridge. In the 1970s, for example, it welcomed back Kotter, showcased Flatbush's lords, sustained a fever on Saturday nights, and survived a bank heist on a dog day afternoon.

Ebbets Field, of course, anchored Brooklyn's sports wing of popular culture. From 1913 to 1957, Brooklynites gathered at the stadium bounded by Sullivan Place, McKeever Place, Bedford Avenue, and Montgomery Street, to cheer their beloved Dodgers.

I had the honor of having an article about the Dodgers published in the Spring 2011 edition of this *Journal*: "Stealing Home—Major League Baseball Properties, Inc. v. Sed Non Olet Denarius, Ltd. and the Glory, Heartbreak, and Nostalgia of the Brooklyn Dodgers."¹

Writing about this 1993 case combined my passions for intellectual property law and baseball history. Major League Baseball and the Los Angeles Dodgers targeted The Brooklyn Dodger Sports Bar and Restaurant for trademark infringement, but the judge ruled that the trademark rights expired long ago. When the Dodgers left Brooklyn for Los Angeles after the 1957 season, the term "Brooklyn Dodgers" faded. According to the court, the Dodgers organization had failed to use the "Brooklyn Dodgers" mark in commerce, at least not enough to sustain a trademark claim.

During my research, I realized that this case had not been explored in baseball scholarship. Consequently, I began to accumulate other stories that had not been fully examined, dating back to the team's origins in 1883. My research took me to the Library of Congress to look through three collections: Branch Rickey Papers, Jackie Robinson Papers, and Arthur Mann Papers. Mann was a writer who worked for Rickey, the baseball visionary who signed Robinson to a contract with the Brooklyn Dodgers, who broke baseball's color line.

I found jewels in these treasure troves, including a handwritten letter by Robinson to Rickey upon finding that the latter departed the Dodgers. Theirs was a relationship of mutual respect. Both felt that the other had the more difficult job—Rickey as the executive who spear-

headed the idea, and Robinson as the player who endured the abuse that came with the distinction of being the first black player in the modern era of the major leagues.

Technically, the Walker brothers—Moses Fleetwood and Weldy—hold the honor of being the first black players in the major leagues through their brief tenures with the Toledo Blue Stockings in 1884. Until Robinson, though, black players showcased their talents in the Negro Leagues.

The Baseball Hall of Fame's library proved invaluable. I pored through press clippings tucked away in hundreds of files. Golden nuggets of history emerged.

In addition to compiling research, I sought opportunities to speak and write about baseball history. I have spoken at the Cooperstown Symposium on Baseball and American Culture, the Mid-Atlantic Nostalgia Convention, and several Society for American Baseball Research conferences. I have also begun to write biographies for the Baseball Biography Project on the Society for American Baseball Research's website,² in addition to contributing more than 100 articles for The Sports Post website.

Last October, the end result appeared—*Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*, published by McFarland and Company.

It's a truly humbling experience to be associated with McFarland because of its outstanding library of baseball history books. In turn, I've had the opportunity to talk about the book on several media outlets, including Major League Baseball Network, WCBS-TV, and WFAN 660AM.

I'm particularly proud of the reviews in the *New York Post* and the *New York Times*. In the *Post*, Billy Heller wrote that *Our Bums* has "great tales of the team when it toiled in Brooklyn...well-researched remembrance." Samuel Roberts of the *Times* wrote that *Our Bums* is "a compilation of loving reminiscences and obscure facts."

Reading about the Brooklyn Dodgers is a pleasure. Writing about them was a privilege.

Endnotes

1. NYSBA *Entertainment, Arts and Sports Law Journal*, Spring 2011 (Vol. 22, No. 1).
2. <http://sabr.org/>.

The Google Book Project Is Here to Stay

By Joel L. Hecker

The long, long road to block the Google Library and Book Projects may finally have come to an end, as the projects are now formally entrenched fixtures of our digital landscape. The death knell for the opposition came in the form of a Second Circuit Court of Appeals decision upholding Southern District Court Judge Denny Chin's¹ grant of summary judgment to Google, Inc. on the grounds of fair use² and the Supreme Court's denial of the Authors Guild's petition for certiorari.

The Second Circuit opinion written by Judge Leval is an extensive analysis of the law.³

The Parties

The plaintiffs fell into two categories—three individual authors with a legal or beneficial copyright ownership for their books, and the Authors Guild, a membership organization of published authors, which was seeking injunctive and declaratory relief on behalf of its members.

In a separate closely related but not identical case, *Authors Guild v. Hathi Trust*,⁴ the Second Circuit previously ruled that the Authors Guild lacked standing to sue for copyright infringement on behalf of its members. However, since the individual plaintiffs did have standing, the suit and appeal were determined to be properly before the Court. The defendant was, of course, Google Inc. (Google).

The Google Library and Book Projects

Google's announced intent, in creating these projects, was to digitize the entire world's body of knowledge. Google's Library Project began in 2004 with bi-lateral agreements with a number of the world's major research libraries. Under these agreements, participating libraries selected books from their individual collections to submit to Google. Google then made a digital scan of each book, extracted a machine-readable text, and created an index of such text. Google retained the original scans.⁵

From 2004 until the appeal, Google had scanned, rendered machine-readable, and indexed more than 20 million books. This included both copyrighted works (some with consent and others without) and public domain works. This digital information is stored on Google servers and protected by the same security systems used to protect Google's own confidential information.

The resulting digital copies, available through the Google Books search engine, permit the public to search words or terms of their own choice, which results in receiving a list of all books in the database in which the searched terms appear, as well as the number of times the

term appears in each book. Additional useful information is also made available. It further permits a researcher to identify books that do, or do not, use the selected terms. Google maintains, probably correctly, that this identifying information instantaneously supplied would not otherwise be obtainable in lifetimes of searching.

In what turned out to be an important factor in the fair use analysis, there is neither advertising displayed to a search function user, nor does Google receive any payment as a result of any searcher's use of Google's link to purchase the books.

This project has resulted in new search forms, and added to the English language such terms as "text mining," "data mining" and "n-grams," and all that these concepts entail. Probably, in an attempt to fall within the fair use requirements, Google's search function was built to only allow the user to have a limited view of the text, called a "snippet." A maximum of these snippets—a horizontal segment comprising ordinarily an eighth of a page—is permitted. The result is that only a small portion of information is made available on a search, which would not be sufficient to constitute a substitute for purchasing the book. Where a single snippet might be likely to serve as a substitute, such as dictionaries, cookbooks, or short poems, the snippet function is disabled.

Google went one step further in 2005, by deciding to exclude any book from snippet view if the rights holder requested such deletion.

Procedural History

The underlying action was commenced on September 20, 2005 as a class action. Before the case was litigated in earnest, there were extensive negotiations held over several years, resulting in a proposed far reaching settlement that would have resolved the class action issues. This proposed settlement would have given Google substantially more usage rights than it would have obtained in the absence of the litigation. There was extensive discussion in the industry as to the merits and detriments of the proposed settlement, as well as numerous comments submitted to the court by interested parties. Ultimately, on March 22, 2011, Judge Chin rejected the proposed settlement as being unfair to the class members.⁶

On October 14, 2011, the plaintiffs filed a fourth amended complaint and the District Court certified the case as a class action on March 31, 2012.⁷ Google appealed this certification, arguing that its fair use defense should be decided prior to any class certification. The Second Circuit agreed, and provisionally vacated the class certification without addressing the merits, concluding that a resolution of Google's fair use would necessarily inform

and perhaps even moot the Second Circuit's analysis of many of the class certification issues.

The litigation then proceeded in the District Court, culminating in Google's Summary Judgment motion, which was granted by Judge Chin on the basis of fair use. Judge Chin held that Google's uses were transformative, its display was properly limited, and the program was not a market substitute for the original works. This was the decision that was affirmed by the Second Circuit.

Fair Use Analysis

The Circuit panel first analyzed the history of copyright going as far back as the birth of copyright in England in the 1710 Statute of Anne, and culminating in the U.S. Copyright Act of 1976, as well as the fair use defense. It concluded that "while authors are undoubtedly important intended beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship."⁸

The Search and Snippet View Functions Fair Use Defense

A. Factor One (Purpose and Character of Use)

This factor focuses on whether the new work merely supersedes the objects of the original creation or instead adds something new with a further purpose, the latter of which is called the transformative effect. A transformative use tends to favor a fair use finding because it communicates something new and different from the original or expands its utility, thus serving copyright's overall objective of contributing to public knowledge. However, it does not mean that any, or all, changes will necessarily support a finding of fair use.

The panel had no difficulty in concluding that Google's making digital copies of the plaintiffs' books for the stated (and actual) purpose of enabling a search for identification of books containing a term of interest to the searcher involved, was a highly transformative purpose.

The panel reasoned that this copying of original copyrighted books was for the purpose of making available this information, including significant information about those books, the identification or absence thereof and frequency of uses concerning a word or term of interest contained in the books. The panel buttressed its opinion by referring to Google's division of each book page into tiny snippets, designed to show the searcher just enough content surrounding the searched term to help evaluate whether the book fell within the scope of the searcher's interest without, however, revealing enough to threaten the author's copyright interests. The panel rejected the plaintiffs' contention that Google's commercial motivation in these projects should override their transformative aspects, because the Second Circuit has repeatedly

rejected such contention in the absence of significant substitutive competition with the original.⁹

Based upon the above, the panel had no difficulty in finding factor one to be in favor of Google.

B. Factor Two (Nature of the Copyrighted Work)

The courts have previously concluded that this factor has rarely played a significant role in the fair use analysis, and the panel concluded that the same was true in this case.

C. Factor Three (Amount and Substantiality of Use)

This factor concerns the combination of the amount taken and how substantial the taking is in relation to the work as a whole. The smaller the taking, and the less important the passages taken, the more likely it will be that the taking will be considered as a fair use. Inversely, the larger the amount or the more important the passages copied, the greater is the likelihood that the copy can serve as an effectively competing substitute for the original, resulting in the possible diminishing of the original rights holder's sales and profits.

Once again the panel had no trouble in finding in favor of Google. First of all, it concluded that, although Google makes a digital copy of the entire book, it does not reveal it to the public. To the contrary, only limited selected snippets are disclosed, thereby limiting the amount and substantiality made available to the public for which it could conceivably serve as a competing substitute.

The panel did qualify its finding in favor of Google on this factor to Google's actual current practice, stating it "conclude(s) that, at least as presently structured by Google, the snippet view does not reveal matter that offers the marketplace a significantly competing substitute for the copyrighted work."¹⁰

It is not difficult to read between the lines that the panel might very well reach a different conclusion in a new litigation if Google changes its snippet policies.

D. Factor Four (Effect Upon Market of the Original)

This factor focuses on whether the copy, or its derivative, would deprive the rights holder of significant revenues because the copy would become a significantly competing substitute.

The panel concluded that the snippets, with their transformative purpose, were not significantly competing substitutes. This finding was subject, again, to the caveat also found in factor three, that it was limited to the viewing of snippets as presently constructed by Google. The panel did recognize that the snippet function can cause *some* loss of sales, but that did not tilt the fourth factor in favor of the plaintiffs, because there must be a meaningful or significant effect upon the potential market for or value of the original work, and that just was not happening here.

Derivative Rights

The plaintiffs also contended that they had a derivative right under the Copyright Act in the application of the search and snippet functions and that Google has usurped the plaintiffs' exclusive market for these derivative uses. The panel made short shrift of this argument, holding that the plaintiffs' copyrights did not include an exclusive right to furnish the kind of information about the works provided to the public through Google's programs. In other words, the plaintiffs' copyrights did not include an exclusive derivative right to supply such information through query of a digitized copy.

The panel juxtaposed this with segments taken from copyrighted music, such as ringtones, where the most famous and beloved passages of a particular piece are taken. In that situation, the value of the ringtone to the purchaser, explained the panel, is not in providing information, but rather in providing a mini-performance of the most appealing segment of the expressive content. That would presumably constitute copyright infringement.

Risk of Hacking Exposure

The plaintiffs further argued that Google's storage of its digitized copies exposed the plaintiffs' books to hackers who could make the books widely available, thus destroying the value of their copyrights. While finding that the claims had a theoretically sound basis based upon prior judicial holdings, such as the *Arriba Soft*¹¹ and *Perfect 10*¹² Ninth Circuit decisions, the panel also found the claims not to be supported by the evidence. This was based in part because Google made a sufficient showing of protection, including its own security expert who praised its security systems and that Google had ample resources and top-notch technical talents that enabled Google to protect its own, as well as the Book Project, data. This evidentiary showing was sufficient to shift the burden of proof to the plaintiffs, whose efforts fell short, in part because they were unable to identify any thefts from the Google Projects.

Digital Copies Distributed to Participant Libraries

The plaintiffs' final contention was that distribution of digital copies to the participating libraries jeopardized their copyrights because such distribution exposed the books to risk of loss if any of the libraries used the digital copy in an infringing manner, or failed to maintain sufficient security that might lead to the books becoming freely available if hacked.

The panel rejected this argument as well, holding that each library could have created its own digital copy for fair use purposes, and that such digital copy would not have constituted copyright infringement. Therefore, the contractual arrangements with Google, which provided that each library committed to use the digital copy only in compliance with copyright law, and to take precautions to prevent unlawful dissemination of their digital copies

to the public at large, was sufficient protection. Accordingly, the panel concluded that on the present record, the possibility that libraries might misuse their digital copies was sheer speculation. This determination was, once again, based upon present record, with the panel leaving open the possibility of a different result if Google altered its current business model.

Summary

The Second Circuit panel affirmed Judge Chin's District Court opinion granting summary judgment to Google. It concluded that Google's unauthorized digitizing of copyright protected works, creation of a search functionality, and display of snippets from those works are non-infringing fair uses, since the purpose is highly transformative, and the public display is limited and does not provide a significant market substitute for the protected aspects of the originals. Since the Supreme Court denied certiorari in April, this decision is only binding in the Second Circuit, so we may not have heard the last of the fair hearing issue.

Given the now almost universal nature of the use of the Google Projects, as well as the advances in technology since the case was first commenced 12 years ago, the result was certainly not unexpected. However, perhaps as a warning to Google and others who might try to rely upon the Second Circuit's holding, the panel on several occasions very carefully limited itself to the specific facts of the case as contained in the record on appeal, and in particular, to the then current business practices employed by Google. Perhaps this very specific finding was critical to the Supreme Court's denial of certiorari.

This is yet another example of the problems inherent in applying the 1976 Copyright Act to the state of the art of copyrighted works some 40 years later.

Time does march on, except perhaps when Congress fails to take the hint!

Endnotes

1. Judge Chin was elevated to the Second Circuit but he retained this case through decision on the district court level.
2. District Court Opinion: *Authors Guild Inc. v. Google, Inc.*, 954 F. Supp. 2d 282 (S.D.N.Y. 2013).
3. Second Circuit Docket No. 13-4829-cv, decided Oct. 16, 2015, ("Opinion"). The Opinion may be found at www.unitedstatescourts.org/federal/ca2/13-4829/230-0.html. A petition for certiorari was filed by the plaintiffs with the Supreme Court on December 31, 2015.
4. 755 F. 3d 87, 94 (2d Cir. 2014).
5. Opinion, at 6.
6. *Authors Guild v. Google, Inc.*, 770 F. Supp. 2d 666, 670-80 (S.D.N.Y. 2011).
7. *Authors Guild v. Google, Inc.*, 282 F.R.D. 384 (S.D.N.Y. 2012).
8. Opinion, at 13.
9. See *Cariou v. Prince*, 714 F. 3d 694, 708 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 618 (2013).

10. Opinion, at 31.
11. *Kelly v. Arriba Soft Corp.*, 336 F.3d 811, 819 (9th Cir. 2003).
12. *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1165 (9th Cir. 2007).

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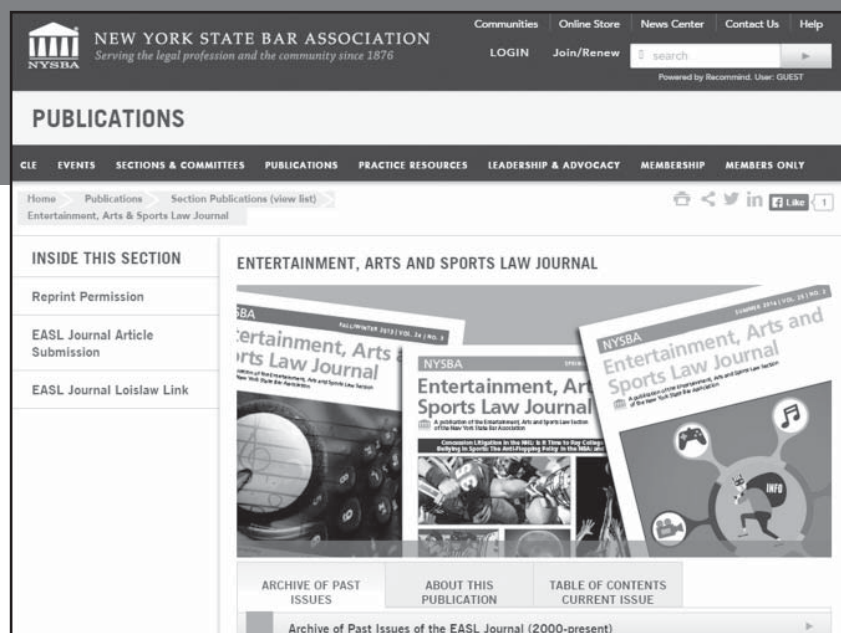
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Strike One...You're Out! An Analysis of Whether College Athletes Possess a First Amendment Right to Strike

By Eric D. Bentley

On December 14, 2015, Missouri Representative Rick Brattin proposed a bill that would revoke the scholarship of "...any college athlete who calls, incites, supports, or participates in any strike or concerted refusal to play a scheduled game..." and would fine "...any member of a coaching staff who encourages or enables a college athlete to engage in behavior prohibited [above]."¹

This proposed Missouri law is an obvious reaction (or as some might put it, overreaction) to a series of events that captivated the collective college athletic and academic world in November of 2015. With racial tensions at a boiling point at the University of Missouri, where protests and a highly publicized hunger strike were conducted by students in an effort to force the removal of then President Tim Wolfe, the college world took a collective gasp as some 30 Missouri football players did what no other college athletes have ever done—they refused to participate in any practice or game during the middle of the football season until President Wolfe was removed.²

The college world began asking, can the football players do that? Should they do that? What will the University do? What happens if the football team is forced to forfeit its upcoming game against Brigham Young University (BYU) where, at a minimum, the one million dollar guarantee³ to be paid to Missouri would be lost?

Almost immediately, Head Football Coach Gary Pinkel came out in support of his players by tweeting a photo of white and black Mizzou students who were standing arm in arm with the caption, "The Mizzou Family stands as one. We are united. We are behind our players."⁴ The very next day after Coach Pinkel demonstrated his support of his players, Missouri President Wolfe resigned, followed soon after by the resignation of Chancellor Loftin.⁵ Some praised the Missouri football players for taking a stand and having such leverage to set forth change. Others were not so impressed, which obviously included Representative Brattin, whose bill would take the decision making out of the hands of university officials and automatically revoke the scholarships of any athlete who boycotts a game, as well as fine the coaches who support the boycott.

With the large-scale civil unrest occurring in 2014 regarding the police shooting of Michael Brown in Ferguson (just a two-hour drive from the University of Missouri) still fresh in most everyone's minds, and the racial tensions that appeared to be present at the University of Missouri in the fall of 2015, it seems unfair to

play Monday morning quarterback and second guess the actions of Missouri's response to the football players' strike. However, the events at Missouri beg the question of whether student-athletes at public schools⁶ have a First Amendment right to strike, and whether a law such as Representative Brattin's proposal that would penalize a student-athlete and coach for participating in or supporting a strike is constitutional.

Long before social media provided an instant stage on which anyone could proclaim to millions the conditions and reasons for a student-athlete strike, students were forced to resort to "old school" methods of protest. For example, in the seminal case of *Tinker v. Des Moines Independent Community School District*, the U.S. Supreme Court decided a case in 1969 in which two high school students protested the Vietnam War by wearing anti-war armbands to school.⁷ Believing this was a disruption to the school, the school suspended the students who wore the anti-war armbands, and the students then sued the school, claiming that their First Amendment rights were violated. The Supreme Court held that the students possessed a First Amendment right to wear the anti-war armbands, their actions were not a substantial disruption to the school's activities, and in one of the Court's most often quoted opinions regarding First Amendment school cases, stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."⁸ However, the Court carved out a materially disruptive category of unprotected speech by noting that a school can discipline students for expressive activity "by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school."⁹

As a result, a student-athlete who tweets "Black lives matter" or wears a t-shirt with that caption on campus would clearly have the First Amendment right to do so, and that would likely not be considered a disruption under the standard set forth in *Tinker*. However, what standard would apply to student-athletes who wish to protest during a game, or who go on strike and refuse to practice or play in a game?

In 1972, the Tenth Circuit decided a case in which several black University of Wyoming football players indicated they would wear black armbands during an upcoming football game against BYU in protest of the religious school's apparent beliefs on racial matters.¹⁰ In response to only the proposed protest and potential for disruption during the upcoming game against BYU, the University of Wyoming dismissed the players from the

football team, and the football players sued. The Tenth Circuit upheld the actions by the University of Wyoming by stating that the actions "...denied only the request for the armband display by some members of the team, on the field and during the game [and that] [i]n these limited circumstances...the Trustees' decision was in conformity with the *Tinker* case and did not violate the First Amendment right of expression of the plaintiffs."¹¹

Subsequently, in 1987, a Kansas District Court decided a case in which several black football players at Washburn University of Topeka decided to boycott team practices in protest of how they believed they were being treated in a racially discriminatory manner by the coaching staff and administration.¹² The football players who boycotted practice were kicked off the team. They sued the university arguing, in part, that their First Amendment rights were violated. The university responded by claiming that the removal of the football players from the team was not a violation of the First Amendment because the football players' actions constituted a disruption to the school. The district court denied the university's motion for summary judgment on the First Amendment issue, due in large part to the admission of the coach during his deposition that the student-athletes were excused from practice during their protest. Due to this admission, the court held that the boycott of football practice could not be considered a disruption under the *Tinker* standard.¹³

However, "we're not in Kansas anymore," and this is not 1987. College football has become a multi-billion dollar industry, and the thought of forfeiting a college football game at the financial expense of the university because a group of student-athletes are protesting a social issue is hard for some athletic departments to stomach.¹⁴ Additionally, if the proposed 2015 Missouri state law passes, a coach would be fined for even supporting an athlete who boycotts a game, so it would not be an option for a coach in Missouri to excuse a player from missing games in protest, like the coach at Washburn University of Topeka did for practice. As a result and even without a state law like the proposed state law in Missouri, a coach may voluntarily decide that he or she will not excuse an athlete from practice or a game when the athlete is engaging in a protest. What would a court likely rule today if a football player refused to practice or participate in games and missing these team functions was not excused by the coach?

The Tenth Circuit's decision in *Williams* with regard to the University of Wyoming football players is instructive. If it was not a First Amendment violation for the University of Wyoming to remove its football players from the team who wanted to wear black armbands to a game to protest their opponent's racial viewpoints, a university would likely be found to possess the right to kick players off the football team who refuse to participate in practices or games. Under the *Tinker* disruption standard, it is hard to imagine how, for example, a starting quarterback who

refuses to show up for a week of practice and an upcoming game because he is protesting would not be a material disruption to the team or the university. Moreover, student-athletes are bound by their scholarship agreements, which in part, require attendance at team functions including practice and games. Refusing to attend classes as required by the scholarship agreement would result in the removal of a student-athlete's scholarship, even if the student was missing classes to engage in protests, and the refusal of a student-athlete to participate in required practice and games because of a protest could result in the removal of the student's scholarship. In such a case, the student-athlete's First Amendment claim against the university would likely fail.

In addition to applying the *Tinker* disruption standard, a court may apply a *Garcetti*-like analysis to student-athlete speech. In *Garcetti*, the U.S. Supreme Court held that a public employee who is speaking as an employee pursuant to his or her official job duties does not have First Amendment protection, but if the public employee is speaking as a private citizen on a matter of public concern, the employee may enjoy First Amendment protection.¹⁵ Similarly, a court applying the *Garcetti* framework could conclude that a student-athlete who speaks as a private citizen on a matter of public concern (e.g., engages in a protest on campus after practice) has First Amendment protection; however, a student-athlete who engages in speech as a student-athlete (e.g., boycotts team practice or games) is not entitled to First Amendment protection.

As for the right to strike as a unionized employee, the Northwestern football players' petition to be treated as employees and be allowed the right to unionize (and ultimately the right to strike) was dismissed in August of 2015 via a unanimous decision by the National Labor Relations Board (NLRB).¹⁶ It should be noted that even if the NLRB had determined that the Northwestern football players enjoyed the right to unionize, public colleges and universities would not be bound by such a decision, as the National Labor Relations Act does not apply to state agencies and the NLRB does not have jurisdiction over state entities.¹⁷ As a result, a student-athlete does not have the right under the NLRA to engage in a strike, as student-athletes are not considered employees for purposes of the NLRA.¹⁸

Although a university would likely be able to survive a First Amendment claim if it disciplined or removed a student-athlete's scholarship for refusal to practice or participate in a game, a university would be treading on thin First Amendment ice if it were to revoke the scholarship from a student-athlete who "supports...any strike or concerted refusal to play a scheduled game," as contemplated by the bill proposed by Missouri Representative Brattin. If the student-athlete does not refuse to participate in a practice or a game, it is hard to see how merely encouraging another student athlete to do so would meet the disruption standard set forth in *Tinker*. Additionally, under a

Garcetti-like analysis, the student-athlete would be speaking as a private citizen on a matter of public concern and would be entitled to First Amendment protection.

In summary, student-athletes do not possess the First Amendment right to engage in materially disruptive behavior that is in violation of their scholarship agreements, such as boycotting practices or games. A court would likely be hesitant to second guess the actions of an athletic department that in good faith believes an athlete who misses practice or a game is a material disruption to the program. As the Texas Supreme Court concluded in *NCAA v. Yeo*, “judicial intervention in [student athletic disputes] often does more harm than good.”¹⁹ The Fifth Circuit has also stated that judges are not “super referees” and the U.S. Supreme Court indicated that: “Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.”²⁰ As such, a coach could discipline a player up to and including the removal of the player’s scholarship for failure to participate in team practice or games, even if the absences are due to the student engaging in a protest. However, if a student-athlete is not missing practice or games in furtherance of the protest, but is expressing his or her political views via methods outside of his or her official responsibilities as an athlete (e.g., a demonstration or rally on campus that complies with reasonable campus rules or a social media posting), the student-athlete would have a First Amendment right to engage in this expressive activity. To that end, a coach should not discipline an athlete for merely “supporting” another player who wants to boycott a practice or a game, as such support would likely be considered protected speech under the First Amendment.

Endnotes

1. H.R. 1743, 98th Leg., 2nd Reg. Sess. (Mo. 2015), available at <http://www.house.mo.gov/billtracking/bills161/billpdf/intro/HB1743I.PDF>.
2. Michael Pearson and Joe Sutton, *Black Football Players at Missouri: We'll Sit out Until System President Resigns*, CNN, available at <http://www.cnn.com/2015/11/08/us/missouri-football-players-protest>.
3. For the game guarantee contract, see <http://www.kansascity.com/sports/college/sec/university-of-missouri/article6148809.ece/binary/Missouri-BYU%20FB%20Contract%202015%20&%202020.pdf>.
4. See *supra* note 3.
5. Susan Svrluga, *U. Missouri President, Chancellor Resign Over Handling of Racial Incidents*, available at <https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/>
6. It is well settled that in order for an individual to bring a valid First Amendment claim (or any other claim under the U.S. Constitution), there must be state action (in this case, action taken by an employee of a public university). See *Bryant v. Miss. Military Dep't.*, 519 F. Supp. 2d 622, 627 (S.D. Miss. 2007), *aff'd sub nom*, *Bryant v. Military Dep't of Miss.*, 597 F.3d 678 (5th Cir. 2010) (“A claim for violation of the First Amendment to the United States Constitution must be brought pursuant to 42 U.S.C. § 1983, which requires state action. To state a claim under § 1983, a plaintiff must allege facts showing a person acting under color of state law deprived the plaintiff of a right, privilege or immunity secured by the United States Constitution or the laws of the United States.”).
7. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).
8. *Id.* at 504.
9. *Id.* at 505.
10. *Williams v. Eaton*, 468 F.2d 1079, 1079-84 (10th Cir. 1972).
11. *Id.* at 1084.
12. *Hysaw v. Washburn Univ. of Topeka*, 690 F. Supp. 940, 942 (D. Kan. 1987).
13. *Id.* at 946.
14. Marcy Tracy and Tim Rohan, *What Made College Football More Like the Pros? \$7.3 Billion, for a Start*, N.Y. TIMES, (Dec. 31, 2014), available at http://www.nytimes.com/2014/12/31/sports/ncaaf/football/what-made-college-ball-more-like-the-pros-73-billion-for-a-start.html?_r=0.
15. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).
16. Ben Strauss, *N.L.R.B. Rejects Northwestern Football Players' Union Bid*, N.Y. TIMES, (Aug. 18, 2015), available at http://www.nytimes.com/2015/08/18/sports/ncaaf/football/nlrbsays-northwestern-football-players-cannot-unionize.html?_r=0.
17. See 29 U.S.C.A. § 152 (2) (“The term ‘employer’...shall not include...any State or political subdivision thereof...”); see also <https://www.nlr.gov/rights-we-protect/jurisdictional-standards> (indicating that the NLRB only has jurisdiction over private sector employers).
18. See *supra* note 16.
19. *NCAA v. Yeo*, 171 S.W.3d 863 (Tex. 2005).
20. *Hardy v. University Interscholastic League*, 759 F.2d 1233, 1235 (5th Cir. 1985); *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

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Flo & Eddie Strike Back: Public Performance Rights in Pre-1976 Sound Recordings

By Noah Drake

Introduction

The Federal Copyright Act of 1976 affords rights in musical works by way of the sound recording and the composition. While federal protection for musical compositions has existed since 1897, sound recordings have not had such favorable treatment. In fact, when Congress finally did decide to grant exclusive rights in sound recordings, it did so proactively, making these rights available to sound recordings made on or after February 15, 1972. Further, these sound recordings were limited to reproduction and distribution rights. Thus, no owner in a sound recording made prior to 1972 has a public performance right under federal law. Radio broadcasters have historically utilized this privilege to air recordings without having to pay the owners of such recordings. In return, artists and record labels have viewed radio broadcasting as free promotion, a significant benefit for rights holders.

This universally accepted norm was challenged recently, when former Turtles members Mark Volman and Howard Kaylan (Flo & Eddie) brought suit against satellite radio provider Sirius XM Radio, Inc. (Sirius XM) in California and New York. Though it is clear that federal law does not protect Flo & Eddie's pre-1972 recordings, Flo & Eddie argued that these recordings were protected by the state's patchwork array of civil statutes, common law, and criminal laws.

This article examines both results in Flo & Eddie's claims in California and New York, and argues that, while the courts in California and New York properly applied statutory interpretation and prior case law, they improperly overlooked important policy implications. The article goes on to propose that Congress lives up to its vision of creating uniformity in copyright law by imposing a federal standard for pre-1972 recordings, thereby preempting state laws, many of which were poorly construed and contain sparse legislative history from which to draw.

Factual and Procedural Background

Flo & Eddie owns the sound recordings of many of its musical works, all of which were recorded before February 15, 1972.¹ Sirius XM is a radio provider, transmitting multiple stations across the United States digitally, through satellite radio and Internet streaming.² Through these services, Sirius XM broadcasted multiple Flo & Eddie recordings, none of which were licensed by Flo & Eddie.³ Although Flo & Eddie actively licensed the right to reproduce and distribute copies of its sound recordings, it never licensed any of its works to or sued entities such as radio providers for publicly performing its sound recordings.⁴

Flo & Eddie filed a complaint in Los Angeles Superior Court on August 1, 2013, alleging violations of California state law.⁵ The case was removed to the United States District Court for the Central District of California on August 6, 2013.⁶ Flo & Eddie also filed a complaint on August 16, 2013 in the United States District Court for the Southern District of New York.⁷

Overview of Pre-1972 Copyright Protection

Federal Copyright Protection

Congress brought sound recordings into the scope of federal copyright protection on February 15, 1972.⁸ Protection applied prospectively, leaving only state law protection for pre-1972 recordings.⁹ In enacting the Copyright Act of 1976, Congress federalized protection for works protected by state law, but did not grant this protection to pre-1972 sound recordings.¹⁰ These recordings are protected by state law until February 16, 2067 (unless a state provides otherwise), when they will then enter the public domain.¹¹

Historically, Congress resisted federal copyright protection for sound recordings.¹² By the 1960s, it was clear that protection for sound recordings was needed to deter unauthorized duplication, or piracy.¹³ However, the question of sound recording performance rights was more controversial.¹⁴ Broadcasters argued that radio airplay was free promotion for the rights holder, a significant benefit to the rights holder, and that providing a public performance right would put an undue economic burden on broadcasters.¹⁵ In 1972, due to the need for protection from sound recording privacy and an inability to resolve the controversy over public performance rights, Congress granted only reproduction rights for sound recordings.¹⁶

The grant of reproduction rights was subsequently adopted into the 1976 Copyright Act, leaving out any public performance right for sound recordings. As a result, states provided protection of reproduction rights in pre-1972 sound recordings via unfair competition or state copyright law.¹⁷ Although Congress was well aware that it was leaving in place state law for pre-1972 sound recordings, it did not explain its motivation to do so, even in light of its goal of a unitary copyright system.¹⁸

With the onset of online digital music providers, Congress granted limited public performance rights for post-1972 recordings, due to the record industry's fear that digital broadcasting would be pirated onto individual hard drives on home computers, in turn supplanting the market for sound recordings.¹⁹ Thus, non-interactive

digital music providers such as Sirius XM are subject to compulsory licensing for post-1972 recordings.²⁰

State Law Protection in California

Section 980(a)(2) provides civil protection for the exclusive ownership of pre-1972 sound recordings, with the exception of sound-a-like recordings:

The author of an original work of authorship consisting of a sound recording initially fixed prior to February 15, 1972, has an exclusive ownership therein until February 15, 2047, as against all persons except one who independently makes or duplicates another sound recording that does not directly or indirectly recapture the actual sounds fixed in such prior sound recording, but consists entirely of an independent fixation of other sounds, even though such sounds imitate or simulate the sounds contained in the prior sound recording.²¹

In 1984, the Ninth Circuit recognized § 980(a)(2) as granting state law protection for copyright in the duplication and distribution of pre-1972 sound recordings.²² Though legislative history is sparse, it is clear that § 980 was amended in recognition of federal preemption in the 1976 Act to protect works not specifically protected under federal law.²³ Though § 980 exempts sound-a-like recordings, nowhere does it enumerate which exclusive rights belong to the author.

State Law Protection in New York

Pre-1972 sound recordings are protected under New York common law, with common law copyright in general protecting pre-publication rights.²⁴ Thus, a rights owner can bring a claim based on unauthorized use of a recording prior to its publication.²⁵ The Supreme Court, in *Goldstein v. California*, gave states broad discretion in defining what “publication” means, in terms of state law copyright protection.²⁶ In 2005, the New York Court of Appeals held that “in the absence of federal statutory protection, the public sale of a sound recording otherwise unprotected by statutory copyright does not constitute a publication sufficient to divest the owner of common-law copyright protection.”²⁷ Thus, pre-1972 sound recordings are deemed “unpublished,” despite the fact that they have been commercially available.

The Cases

California

On September 22, 2014, the United States District Court for the Central District of California granted summary judgment against Sirius XM for violation of Flo & Eddie’s exclusive right to publicly perform its recordings.²⁸ The court recognized that § 980 of the California

Civil Code indeed granted exclusive rights to public performances of pre-1972 sound recordings.²⁹ It first looked to the text of the statute, interpreting it as unambiguously granting exclusive ownership in pre-1972 sound recordings, including the public performance right.³⁰ As the court understood the text to be unambiguous, it relied heavily on the plain and ordinary meaning of the text, as opposed to legislative history.³¹

The court also noted that the California legislature had written into § 980 one exclusion for sound-a-like recordings, suggesting that the legislature enumerated all applicable exemptions.³² It was clear, then, that the legislature did not enumerate an exemption for public performances of pre-1972 sound recordings.³³ Therefore, it must have intended for § 980 to grant exclusive ownership over public performance rights of pre-1972 sound recordings.³⁴

The court then looked to case law, presenting two court rulings that implicitly suggested a public performance right in pre-1972 sound recordings.³⁵ In 2010, the United States District Court for the Central District of California found that, by allowing users to download and stream record companies’ pre-1972 recordings without authorization, a website had violated record companies’ exclusive rights granted by § 980(a)(2).³⁶ The court in *Flo & Eddie* interpreted *Bluebeat’s* outcome as an implicit grant of the public performance right under § 980 because the defendant there was found liable for streaming unauthorized recordings; streaming being the equivalent to a public performance.³⁷ The court also cited an unpublished California appellate court opinion from 2010, where that court briefly implied that public performance is one of the exclusive rights granted under § 980(a)(2).³⁸

New York

On November 14, 2014, the United States District Court for the Southern District of New York denied Sirius XM’s motion for summary judgment, holding that Flo & Eddie had a valid common law copyright in its recordings, and that common law copyright did provide exclusive rights to reproduce and publicly perform those recordings.³⁹ Citing judicial precedent, the court noted a tendency for New York courts to afford public performance rights in works such as plays, films, and compilations of film clips.⁴⁰ Thus, the court found it improper to hold that pre-1972 sound recordings should not also retain this right.

The court then discussed the issue of lack of precedent and judicial silence, asserting that just because no ruling existed concerning public performance rights in this context, that did not imply that it did not exist.⁴¹ Citing *Naxos*, the court noted there that judicial silence as to whether sound recordings were eligible for state common law protection did not imply that no protection existed.⁴² The court concluded that, like in *Naxos*, it could infer nothing from judicial silence.

Next, the court discussed acquiescence, acknowledging that not paying royalties for pre-1972 sound recordings was an “accepted fact of life” in the broadcasting industry, and that conspicuously, owners of pre-1972 sound recordings had never brought suit until now.⁴³ However, it reasoned that just because owners of sound recordings acquiesced did not infer that there was no enforceable right, rather they merely failed to act on a right they perhaps had.⁴⁴ Therefore, it would have been improper to assume that no public performance right existed based on acquiescence by the sound recording industry.⁴⁵

The court also noted that the Supreme Court disfavored reading too much into lack of precedent, though in a different context.⁴⁶ In *D.C. v. Heller*, the Court found that many fundamental constitutional questions had been left unanswered for the first 150 years of the Constitution’s existence, and that it was unsurprising that significant matters remain unresolved for so long.⁴⁷ Thus, the court here, too, found it understandable that New York courts had never addressed the issue of public performances in pre-1972 sound recordings.

The court next looked to the 1976 Copyright Act, reasoning that an express carve-out was necessary to circumscribe a rights holder’s exclusive ownership, and that because New York law had no carve-outs regarding public performance, it implied that there was a right.⁴⁸ The court understood New York state common law protection to be expansive, and that federal copyright was explicit in its circumscription of enumerated rights.⁴⁹ Thus, the court perceived copyright ownership as including all exclusive rights unless specifically exempted.⁵⁰

The court lastly looked to policy considerations, disagreeing with Sirius XM that the traditional incentive of copyright was to reward only future creativity.⁵¹ The court again cites *Naxos* as New York precedent to justify rewarding past creativity.⁵² In that case, the court granted common law copyright protection for recordings made in the 1930s.⁵³ The district court here inferred that allowing copyright protection to old recordings in *Naxos* did not create an incentive to reward future creativity.⁵⁴ Thus, New York common law did not support Sirius XM’s argument that copyright only rewards future creativity. It also looked to Congress, noting that Congress has repeatedly extended federal copyright protection for older works, impliedly rejecting the traditional view of copyright law only incentivizing the creation of new works.⁵⁵

The court concluded by suggesting that it would be appropriate to recognize a public performance right in pre-1972 sound recordings in order to harmonize it with federal protection of post-1972 sound recordings, which, since 1995, gave owners the right to publicly perform by means of digital audio transmission.⁵⁶ The court agreed with Congress’s public policy considerations in balancing competing interests of copyright owners and users, and found that it should extend this right to pre-1972 recordings based on those policy considerations.⁵⁷

Analysis of the Cases in California and New York Interpretation of Relevant Statutes and Preceding Case Law

The district court in California properly applied statutory interpretation in coming to its conclusion that § 980(a)(2) did not exclude the public performance right for pre-1972 sound recordings. Its most persuasive argument was that the state legislature included an explicit exemption for sound-a-like recordings, and would have included an exemption for public performance rights as well, had it intended the law to do so. As the legislature did not include one, the court infers that the legislature intended to afford pre-1972 recordings with public performance rights.

On the other hand, the court’s reluctance to rely on statutory construction is questionable. The court was hesitant to read into legislative history because the statutory language was clear and unambiguous. However, the statutory language was not clear. Section 980(a)(2) provided exclusive ownership in sound recordings, but nowhere did it explain what this entailed. This is especially significant, since it is clear that the state legislature was responding to change federal copyright law when amending § 980, and federal copyright *did* enumerate exclusive rights. Therefore, the court should have properly emphasized canons of statutory construction, instead of shying away from them, as the court did here.⁵⁸

The district court in New York was correct in following *Naxos*, especially in its proposition that a court can infer nothing from judicial acquiescence. Sirius XM’s argument was that sound recordings never had a public performance right, and that courts never weighing in signified their acceptance of this norm. However, the court here introduced many instances displaying New York affording broad rights in both sound recordings and the public performance right. In light of this, it would be difficult to reconcile these trends while holding that judicial silence implied no public performance right in sound recordings. The court in New York, similarly to the district court in California, was also persuasive in pointing out that the carve-out exception in federal copyright law inferred that sound recordings generally did have this right, unless specifically exempted (as was done in federal copyright).

Both Courts Overlooked the Vast Implications of Their Holdings

The most significant implication from these holdings, and a conflict that neither court properly addresses, is that now owners of pre-1972 recordings have an exclusive right to *all* public performances. Whereas federal copyright, since 1995, only grants a limited public performance right by means of digital audio transmission for post-1972 recordings, pre-1972 recordings presumably have a much broader right. For example, FM radio broadcasters do not need licenses to play sound recordings made after 1972. This small exemption for digital audio transmission was

a result of Congress' careful balancing of interests. Where the district court in New York found "good reason to harmonize" protection for pre-1972 recordings and post-1972 recordings, it instead did the opposite.

Read on its face, both court opinions would require FM broadcasters to acquire licenses to play pre-1972 recordings (even though they are exempt from acquiring licenses for post-1972 recordings). Not only would terrestrial radio be required to license, but so would television and cable broadcasters, bars, music venues, and night clubs. Even worse, there is no statutory licensing scheme for these recordings. Thus, in order for each entity to publicly perform a sound recording, it would have to negotiate a license with each individual rights holder, a seemingly herculean task. Neither court acknowledged this absurd result, nor did either try to solve the problem. In sum, when a court's opinion has such vast implications, it should at the very least recognize the problems at stake.

Another detrimental effect that the courts overlooked is that of the preservation of sound recordings.⁵⁹ As a result of providing owners of pre-1972 recordings public performance rights, many pre-1972 recordings that are unmarketable will never be licensed. This is particularly troubling with regard to much older recordings, which will never be restored or preserved, due to their unmarketability. Thus, the goal of copyright law to encourage dissemination will be unduly inhibited by granting a public performance right in pre-1972 sound recordings.⁶⁰

Proposal

Congress Should Preempt State Law

The existence of state law protection of pre-1972 sound recordings disrupts Congress's long held intent on creating certainty, consistency, and uniformity in copyright law.⁶¹ State law is a patchwork and inconsistent system. New businesses that publicly perform sound recordings, whether they be broadcasters, satellite radio providers, or nightclubs, will now be dissuaded from entering the market. Knowing that a business might be implicated in state law copyright infringement in every state in which it operates may prove it to be too much of a risk. Not only does this inhibit businesses that also provide great innovation on the technology front (such as Sirius XM's contribution to satellite technology), but it also prevents people from hearing much of this vast body of works recorded prior to 1972.

Congress Should Harmonize Rights for Pre-1972 and Post-1972 Sound Recordings

Congress should remove from § 301 the provision exempting the preemption of pre-1972 sound recordings. By doing this, state law will no longer apply to sound recordings, and companies will no longer be faced with the daunting task of anticipating implications of various state statutes. It is clear that companies like Sirius XM

willingly paid royalties for publicly performing post-1972 sound recordings.⁶² Thus, it would seem that had there been a royalty rate for pre-1972 recordings from the onset, companies such as Sirius XM would have been willing to conform.

It naturally follows that federalizing pre-1972 sound recordings on a prospective basis would be welcomed by the majority of interested parties. The uniformity, consistency, and predictability of federal copyright (as compared to state law) would allow companies going forward to adjust certain costs, expenses, and subscription prices for users in order to accommodate for the new pre-1972 royalties. What would be unjust would be to allow rights holders to bring suit in each state, claiming hundreds of millions of dollars in past damages for a right that was universally accepted to be non-existent. If Congress steps forward now, it might be able to prevent further injury to companies that contribute much wealth to innovation, such as Sirius XM.

Federalizing pre-1972 sound recordings will also solve the problem created by the recent decisions in California and New York, which afford much broader rights in public performance of sound recordings than does the Copyright Act. Federal copyright only grants an exclusive right to public performance by means of digital audio transmission, where now, state law in California and New York presumably give an unrestricted public performance right in sound recordings. Whatever Congress intended, it is clear that it did not want to grant any broader right than that which it affords in Section 106(6).

Conclusion

In sum, state law protection of public performance rights in pre-1972 sound recordings, as the courts in California and New York view it, produces a result that Congress never intended, and is against various policy goals behind U.S. copyright law. A simple example is that common law copyright ends upon publication, and therefore courts have had to create express carve-outs for sound recordings, deeming them "unpublished," even though they have been widely distributed. It is clear that state law protection of pre-1972 sound recordings does not fit into common law copyright protection. It is also clear that state law protection of pre-1972 sound recordings does not fit squarely within the overarching goals of federal copyright law. Punishing companies and rights holders for deficiencies in the law is unjust, and the only remedy would be for Congress to take action to prevent any further harm.

Recent developments in case law surrounding pre-1972 recordings are not only bad news for digital music providers such as Sirius XM, but also to local businesses, libraries, and entities focused on the archival of important (yet unmarketable) works of authorship. The impending effect on innovation and dissemination will have a lasting negative effect on the interest of the general public, and is

a result the courts failed to address. It is now the responsibility of Congress to finally acknowledge these setbacks and bring into effect a standardized system for dealing with all sound recordings, on a prospective basis.

Endnotes

1. Flo & Eddie Inc. v. Sirius XM Radio Inc., 2014 WL 4725382, at *1 (C.D. Cal. Sept. 22, 2014).
2. *Id.*
3. *Id.* at 2.
4. See DEFENDANT SIRIUS XM'S PARTIAL MOTION TO DISMISS PLAINTIFF'S COMPLAINT AND SUPPORTING MEMORANDUM OF LAW, Flo & Eddie Inc. v. Sirius XM Inc., (No. 1:13-cv-23182), 9.
5. Flo & Eddie Inc., (Flo & Eddie Inc. I), 2014 WL 4725382, at *2.
6. *Id.*
7. See Flo & Eddie, Inc. v. Sirius XM Radio, Inc., (Flo & Eddie Inc. II) 2014 WL 6670201, at *6 (S.D.N.Y. Nov. 14, 2014).
8. Pub. L. No. 92-140, 85 Stat. 391 (1971) ("Sound Recording Act").
9. *Id.*, see also 17 U.S.C. § 301(c).
10. See U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, at 5 (2011).
11. 17 U.S.C. § 301(c).
12. U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), at 8.
13. See *Performance Rights in Sound Recordings, Hearing Before the Committee on the Judiciary*, 95th Cong. 2d Sess. (1978), at 42.
14. See *id.* at 56-58.
15. *Id.* at 57.
16. See note 8.
17. *Id.*
18. U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings* (2011), at 17.
19. Kellen Myers, *The RIAA, the DMCA, and the Forgotten Few Webcasters: A Call for Change in Digital Copyright Royalties*, 61 FED. COMM. L.J. 431, 439 (2009).
20. *Id.*
21. Cal. Civ. Code § 980(a)(2) (West 2014).
22. See Lone Ranger Television, Inc. v. Program Radio Corp., 740 F.2d 718, 725 (9th Cir. 1984).
23. See *Property Review of 1982 Selected California Legislation*, 14 PAC. L.J. 694 (1982-83).
24. See *Protection for Pre-1972 Sound Recordings Under State Law and its Impact on Use by Nonprofit Institutions: a 10-State Analysis* (CLIR & Library of Congress 2009), at 15-16.
25. *Id.*
26. Goldstein v. California, 412 U.S. 546, 569-70 (1973).
27. Capitol Records, Inc. v. Naxos of Am., Inc., 4 N.Y.3d 540, 560 (2005).
28. Flo & Eddie Inc. I, at *8.
29. *Id.*
30. *Id.* at 4-5.
31. *Id.* at 5.
32. *Id.* at 5-6.
33. *Id.*
34. *Id.*
35. *Id.* at 6-8.
36. Capitol Records, LLC v. BlueBeat, Inc., 765 F. Supp. 2d 1198, 1206 (C.D. Cal. 2010).
37. See Flo & Eddie Inc. I, at *7.
38. See Bagdasarian Prods., LLC v. Capitol Records, Inc., No. B217960, 2010 WL 3245795, at 9 (Cal. Ct. App. Aug. 18, 2010).
39. Flo & Eddie, Inc. II, at *7-11.
40. *Id.* at 8.
41. *Id.* at 8-9.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* (citing D.C. v. Heller, 554 U.S. 570, 625 (2008)).
47. Flo & Eddie, Inc. II, at *8-9.
48. *Id.* at 9-10.
49. *Id.* at 10.
50. *Id.*
51. *Id.*
52. *Id.*
53. See Naxos, 4 N.Y.3d at 563.
54. *Id.*
55. *Id.*
56. *Id.* at 11.
57. *Id.*
58. The district court in California was also wrong in citing to Bagdasarian because it violated California Rules of Court. An opinion that is "not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action." (Cal. Rules of Court, rule 8.115(a)), See also Loftis v. Almager, 704 F.3d 645, 657 n.4 (9th Cir. 2012). Bagdasarian is an unpublished California Court of Appeal decision, thus rendering it unavailable for citation, and the court here was wrong in doing so. Seeing that the court only relies on one other case, Bluebeat, the Bagdasarian decision had a significant impact on the district court's analysis of the issue at hand, which may have come out differently were Bagdasarian not included in the opinion.
59. See Henry L. Mann, *As Our Heritage Crumbles into Dust: The Threat of State Law Protection for Pre-1972 Sound Recordings*, 6 WAKE FOREST INTELL. PROP. L.J. 45, 20-27 (2006).
60. See U.S. Copyright Office, *Federal Copyright Protection for Pre-1972 Sound Recordings*, at 90-105.
61. See *id.* at 82.
62. See Flo & Eddie, Inc. v. Sirius XM Radio Inc., 2013 WL 9662403, at *12 (S.D.Fla. 2013).

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Bits Better Have My Money: An Overview of the Challenges Concerning Music Rights Management, Metadata, Proper Payments and Emerging Innovations

Moderator:
George Howard, Esq.

Co-Founder of Music Audience Exchange, Associate Professor of Management at Berklee College of Music,
Columnist for *Forbes*, frequent contributor to *The New York Times*

Joe Conyers III
VP of Technology,
Downtown Music Publishing

Panelists:
Bruno Guez
Founder and CEO,
Revelator

Aaron Wright, Esq.
Associate Clinical Professor of Law,
Founder/Director,
Cardozo Tech Startup Clinic

Sarang (Sy) Damle, Esq.
Deputy General Counsel,
U.S. Copyright Office

Michael S. Simon, Esq.
President and CEO of Rumblefish and
The Harry Fox Agency, Inc.

The Destruction of World Heritage Sites as It Concerns Cultural Property and International Laws

Moderator:
Peter Herdrich, Esq.

Co-Founder of The Antiquities Coalition, established Cultural Capital

Colonel Matthew Bogdanos
New York County
District Attorney's Office,
Author, *Thieves of Baghdad*

Panelists:
Brenton Easter
Special Agent with the U.S.
Immigration and Customs
Enforcement's Homeland Security
Investigations in New York, Cultural
Property Group

Steven D. Feldman, Esq.
Murphy & McGonigle
Megan E. Noh, Esq.
Associate General Counsel, Bonhams

STEPHEN RODNER: I know you're all still getting settled in, so while you are doing that I just wanted to welcome you. I'm Steve Rodner, I'm Chair of EASL, The Entertainment, Arts and Sports Law Section for at least another couple of days, and then the ball's in Diane Krausz's court, and you'll get to meet her in a little bit.

We have a few meeting things, and since this is technically the meeting of the Section itself, so we have some things to do administratively before we get to our CLE panels.

The first thing is I want to introduce to you Marty Minkowitz, who is on the Board of the New York Bar Foundation, and he wants to talk to you a bit about the Foundation.

MARTIN MINKOWITZ: Thanks for your time. Thanks to the Section Chair for allowing me to spend a few minutes with you. We are doing this at all the Sections in an effort to try to promote the Bar Foundation.

I know that everybody in this room knows about the New York Bar Foundation, and most of you have probably been giving some donations to it; we just need to try to get those who haven't, and those who have in the past, to try to get them to do it again.

It's your charitable arm of the New York State Bar. And it is money well spent. We collect this money and we spend it on providing desperately needed legal services to a desperately needy community, people who can't afford counsel.

We spend hours and hours of our time where you might be doing other things. We have spent time figuring out which are appropriate organizations to give our money to. We screen them, we committee them, and then we have full Board votes on them. And we have been able to give away millions of dollars to hundreds of not for profit organizations across New York. So that we take your little bit of money, we make it big money, we make it count.

The program really does change lives, and we're going to launch this year's campaign next week to do hopefully more than we've ever done before.

So giving is easy, take out your phone. Go to www.givetnybf.swellgives.com.

So I'm going to implore you to try to give money this year. Help yourselves out, help the people of New York out. Thank you.

STEPHEN RODNER: Thanks, Marty. The next order of business is to vote on the report of the Nominating Committee for the slate of Officers, District Representatives and Delegates for the coming year. The Delegates don't take office, I believe, until June. But the rest take office February 1st.

The Officers—the slate of Officers are the Chair, will be Diane Krausz. Vice Chair, Richard Garza. Second Vice Chair, Jason Baruch. Treasurer, Jason Aylesworth. Assistant Treasurer, Carol Steinberg. Secretary, Anne Atkinson. Assistant Secretary, Jennifer Graham.

For District Representative, Second District, Innes Smolanski. Third District, Bennett Liebman. Fourth District, Edward Fink. Eighth District, Leslie Mark Greenbaum. Ninth District, Alan Barson. Eleventh District, David Faux. And Twelfth District, Jennifer Meredith Liebman.

And the Delegates up for election will be Diane Krausz and Steven Richman as the Principal Delegates, with me as an Alternate.

So let's take a vote, I guess we should do it by voice vote. All those in favor of accepting the report of the Nominating Committee and electing those persons say, Aye.

AUDIENCE: Aye.

STEPHEN RODNER: Anybody opposed? Any abstentions? Okay, you guys, you are officially elected.

Next thing we want to do is one of the programs that we are really very proud of is our BMI/Phil Cowan Memorial Scholarship competition. And every year at the Annual Meeting, we announce the winners, and present them with the awards.

So I'm going to call up Rich Garza, Jared Leibowitz, and Judith Bresler to make the presentation.

JUDITH BRESLER: Greetings everyone. The BMI/Phil Cowan Memorial Scholarship has been around for at least 10 years, and it was founded in memory of a Former Chair of the Entertainment, Arts and Sports Law Section, Phil Cowan, who had died precipitously of brain cancer.

What this is, is a writing competition that is open to law students in any accredited law school throughout New York State, plus Seton Hall and Rutgers, plus an additional number of law schools on a rotating basis chosen by BMI, up to 10. And they write essays that will have to be on the subject of entertainment, art, sports law or copyright law, and commit to practicing in one of those areas. And it is always a thrill to see the quality of papers that the students submit.

And we'd also like to thank the members of the Scholarship Committee who read all of these papers over the Christmas vacation. And with no further ado, I'd like to introduce Rich and Jared, who will announce the winners.

RICH GARZA: Good morning everybody, welcome. First I'd like to, on behalf of BMI, thank EASL for allowing BMI to be part of this great competition and to support it and to provide these students with an opportunity to write these papers in the arena that we work in every day.

The first winner that I get to tell you about is a paper called, "Flo and Eddie Strike Back: Public Performance Rights in Pre-1976 Sound Recordings."¹

It was written by a student named Noah Drake, who received his BA in music from the University of California Berkeley. He is now currently a third year at UC Berkeley Law. He is the current supervising editor for the *California Law Review*, and also the senior online content editor for the *Berkeley Technology Law Journal*.

He unfortunately couldn't make it here today, but I want to give an opportunity for us to give him a round of applause to congratulate him on his success. And we wish him much more successes in the future. And now I'll pass it on to Jared, who will tell you about the other paper.

JARED LEIBOWITZ: Thank you, Rich. The next winning paper is entitled, "Refereeing Injuries in Professional Contact Sports: Should Misconduct Be Officiated in the Court or On It?," by Eryhn Won.²

Eryhn is 4L at Rutgers Law School, with a concentration in intellectual property. She graduated from Rutgers State University of New Jersey, New Brunswick with a degree in English and Psychology, and has been a full time paralegal at Mound, Cotton, Wollan and Greengrass, LLP in downtown Manhattan for many years.

If she's not studying, working or traipsing about with her rescue dog, Eryhn is an avid spectator of, and sometimes participator in, all things sports. And for several years she was a marketing director, race engineer, and crew chief for a national cart racing team.

Eryhn is extremely grateful to Professor John R. Kettle and Professor Steve C. Gold for providing her with the opportunity to combine her passion for sports and law through her article. Everyone please join me in welcoming Eryhn up to the stage.

STEPHEN RODNER: The last thing I want to do other than say it's been fun being your Chair for two years, is to introduce the new Chair as of Monday, Diane Krausz, who is going to just say hello to you and tell you a little bit about EASL and the stuff we do.

DIANE KRAUSZ: Before I speak about anything else I just wanted to thank Steve. I did this at the Executive Committee meeting, but I also want to say this publicly. Steve is one of the most terrific people and lawyers I know. And he's been a—as I said in the meeting before, time has just flown since he's been Chair. It was really a fun time, a learning time, and he's a great guy. And I'm not letting him go, so he's still going to be around for the next two years. And I just wanted to thank you.

I thought the best way to do it, Rosemarie and I came up with what to get you, I remembered a couple of years ago, we were at Bill's Bar, and we were having our reception later, and you told somebody you wanted a "big boy

drink," so we got you some big boy drink equipment, and this is what it is. We love you and we'll see you later.

STEPHEN RODNER: Thank you so much.

DIANE KRAUSZ: For those of you who know me, I'm not known as a shy person, but I'm a very bad public speaker, so I'll try to improve on that. And I just want to welcome you.

There's a terrific group of people on the Executive Committee that all have wonderful ideas, and we have a lot of programs planned, both CLE and non that will be interesting. And I just hope that for the next two years, I can continue the momentum that is EASL. And just keep in touch and let us know what we're doing right and wrong, and let us know what interests you have, and we hopefully keep you informed as we are now, of what's going on in the industry.

I think of entertainment as part of the life of any city, especially New York, so hopefully we'll be sharing that with the people who have interest. So thank you very much.

Bits Better Have My Money: An Overview of the Challenges Concerning Music Rights Management, Metadata, Proper Payments and Emerging Innovations

JOYCE DOLLINGER: My name is Joyce Dollinger, and I'm on the EASL Executive Committee. I'm Co-Chair of Membership with my cohort, Rob Thony. We thank you so much for coming. We know some people came from far away. And we had another blizzard this time last year, our meeting was actually cancelled, so it's good that we came here, we got here today.

Because I'm Co-Chair of Membership, we do a lot of different events. If you have any ideas or want to join in the fun you can email me. My email is on the membership page of EASL.³

Through Membership, we deliver a really amazing *Journal* that's edited by Elissa Hecker. If anybody's interested in writing for the *Journal*, please see her. So you get a subscription to the *Journal*. We have different networking opportunities, different meetings, such as these. You get to meet other entertainment lawyers in your practice area and others.

We have a great Blog going, and we have different committees that you guys can join. So if you're interested in learning more just talk to me.

So now regarding the panel, I just really, really, really want to thank all these panelists for coming. It was difficult, one of them was stuck in Florida and we have a pinch hitter here, Aaron Wright, so thank you. That was just yesterday and he's here now. And Sy, who came in

from Washington D.C., who got the worst snow there. So I just want to thank you. I want to thank Rob. I want to thank Lori Nicoll at the Bar for helping me with everything, putting this whole thing together and getting everything done.

So Rob is now going to introduce the Moderator of the panel.

ROBERT THONY: Good afternoon everyone. And by the way, Joyce has been a rock star, and I don't use that lightly, I don't use that ever—and I'm using it for her, she's amazing. She really is and most of you probably know that already.

So I was at a panel a year ago about what was wrong with the music industry. And it was a bunch of lawyers and business people and artists. And they were all pontificating back and forth, it was kind of a round table. I can't remember exactly where it was, it was at a firm somewhere in midtown. It all came down to, we got to fix the metadata, we got to fix the metadata. I'm like okay, sure, all right.

I didn't know that much about metadata and its importance, but I was really curious. And I started paying a lot of attention, starting reading. And one name kept coming up, an author, George Howard, George Howard, George Howard, and I started reading a lot of his stuff.

When the talk started about what we were going to do for the Annual Meeting, I was like, how about we do stuff on metadata, specifically the blockchain, but we'll get to that in a bit.

Let me just give you a little bit about who George Howard is, and where he comes from. He is the co-founder of Music Audience Exchange. Prior to this he was the President of Rykodisc, manager of Carly Simon, and original Co-Founder of TuneCore.

Via his consulting firm, Mr. Howard advises a wide range of clients on how to integrate technology, including blockchain, with strategy in order to increase awareness in revenue.

Mr. Howard is an associate professor of management at Berklee College of Music, where he teaches courses in entrepreneurship, marketing, copyright law, and leadership.

Mr. Howard is a columnist at *Forbes*, for which he is offered numerous pieces on blockchain technology, and a frequent contributor to *The New York Times* and numerous other publications.



Mr. Howard holds an MA, MBA and a JD. Ladies and Gentlemen, Mr. George Howard.

GEORGE HOWARD:

Thank you very much, Rob and Joyce. As Rob said, Joyce has been a rock star, and so has Rob. As anybody who has put these panels together knows there's an awful lot of work that goes into them. So thank you both and thank you for having me here. I'm actually really honored to be

here. I do a lot of these sort of talks and panels and you all are my people, so I'm happy to be here.

I hopefully won't talk too much, but I am going to talk a little bit at the beginning and then hopefully shut up as much as I can because—this is an amazing panel up here, I really am—never understand when people say they're humbled—but I sort of am humbled right now amongst the presence of these guys. And I did want to affirmatively state that both Joyce, Rob and I did make good faith efforts to not make it be all guys, we really did. The whole male panel thing is something that bothers me. And it was not for lack of effort, obviously we failed. But we are cognizant of it and it's something that we and I personally need to do more to obviate in the future.

So with that said, I want to present an actual real world scenario right now to sort of frame this up. There is an institution that all of us know and many of us love. And they are struggling right now with revenue and everything else. And about two years ago they hit upon something somewhat inadvertently and it was a podcast called "Serial." Everybody is familiar with "Serial," I assume, the first season of "Serial," right?

So "Serial" did that thing that all successful technologies have to do, which is the right thing at the right moment. The confluence of technological innovation, market demand, everything sort of coming together. And it was really—the first season at least, I haven't listened to the second one yet. But the first season really was remarkable. It was like once you started listening to it you kind of couldn't put it down. And it did that thing that people told each other about.

So NPR watched this and partook in this and they've decided that podcasts are a big part, and sort of a key to their future success. And I do some work with NPR. And they said to me, George, we really want to go all in on podcasts. And they were sort of asking me from more of a business strategy side. But they said, but we have a problem. I said, I know. And they said, really? I said, yea. And they said, what? And I said, music. And they said, yes.

And their problem of course is that—or at least they perceive the problem to be—that they have enjoyed rights granted through public performance licenses that have allowed them to broadcast whatever they want in an ephemeral way by paying the blanket license fees at a reasonable rate.

Not diving any deeper than that of course, they decided they were going to now take some of these programs that they were broadcasting ephemerally, convert them into downloadable podcasts. At that point, they fall outside of the performance rights license.

So they come to me, what should we do? We want to do more podcasts, music is a key component to this podcast, but we don't know how to handle it. Can you help us? And as I always say, yes I can.

What should we do? I say, well you can pay me or somebody else to go out to find all the rights and everything else. Well, we certainly can't afford to do that, we don't have the time or the money. And I say, well then your options become somewhat limited. And you guys are all lawyers, you know where this goes.

Eventually, it sort of devolves down into the place where they're saying, well I guess we're going to have to use some sort of pre-cleared library music for our podcast and strip them out.

Now, I view this dynamic right now, the best way I can put it is it is a crime looking for a villain, right. Because unlike so many other issues in the music industry where there is a real or perceived villain, oh the labels are evil, the publishers are evil, the artists are greedy. Right, there's always these sort of adverse parties. Here, there's not one. Here there is an institution that has a business objective, and they want to put music into their podcasts and they want to pay for this. They've got limited means, but they want to pay. And they're certainly not going to just do this and broadcast it and risk lawsuits.

Labels, publishers and artists, many of them would be more than willing to grant the licenses needed, maybe gratis or just for exposure, but there's no transactional method to do that in an efficient way.

So who gets hurt in this? NPR gets hurt because they have to do a suboptimal product. The listener gets hurt, because they're listening to a suboptimal product. The labels get hurt, because even if they wanted to license the music into this they can't. The publishers get hurt for the same reasons. Everybody's hurt.

Who's at fault? Who's the villain in this particular dynamic?

AUDIENCE: Congress.

GEORGE HOWARD: Maybe. So your point there, I assume, is that the laws are somehow at fault, right.

Somehow the laws have not kept up with the technological advances. I violently disagree, right. I believe that the laws are just fine. We just can't figure out how to enforce them.

But I think that this podcast situation, a very real situation in which, aside from shifting blame to Congress, which I'm perfectly willing to do—and so aside from that, there's no obvious victim.

So what I'm hoping we can discuss here is situations like this rather than sort of pointing fingers at who's wrong or who's right. How do we obviate a problem like this where there are willing parties that want to transact, and yet whether it's Congress or otherwise, the systems are breaking down somewhere along the way. And that's really the theme of this.

So yes, as Rob very nicely said, I am fascinated by blockchain, it tickles my brain. It's a complicated sort of mechanism. It's like a Rubik's Cube that I get to play around with. Do I think it's the be all? Absolutely not, there are lots of problems. So this is not just a blockchain panel.

It's been interesting to watch the trajectory of blockchain over the last two years from block-what, right, to now you could throw a rock in any institution and somebody's talking about blockchain. It's very strange, and I don't know if that's a good sign or a bad sign.

So that's the framework for this. And what I'd like to do now is rather than just do the general introduction type routine, I'm going to have each of the panelists not just talk about who they are and a bit of their background, but also sort of address some of the more specific verticals that they're focusing on.

So starting with Michael, if you don't mind from HFA. I'd like you, in the midst of your introduction if you wouldn't mind, to talk a little bit sort of about the landscape with regard to these efficiencies that I'm mentioning and the challenges that you're facing and then we'll sort of go down. Sorry to put you on the spot, Michael.

MICHAEL SIMON: My entire career is on the spot. I'm in the music business.

So I will not—in line with what I was just asked—I will not give a five-minute introduction to my resume, which is available on LinkedIn and anywhere else. You can look at it. I've been all over the music industry, whether performing in a band, playing drums in a band that toured around the Midwest, ska band in the early 80s. I just picked up a jazz bass—

GEORGE HOWARD: I gotta know, what was the band?

MICHAEL SIMON: I'm never going to tell you.

GEORGE HOWARD: Was it Bim Skala Bim?

MICHAEL SIMON: It was never a band that you've heard of, which is why I'm on this panel.

GEORGE HOWARD: And not a successful ska artist.

MICHAEL SIMON: Among the many successful ska artists, you are not speaking to one of them—creatively successful. I still play.

The reason why I raised that, and I picked up a jazz bass a few weeks ago, the reason why I raise that is because I come to the industry from the perspective of an unmitigated, unrestrained, unshackled music fanatic. I keep 30 feet of vinyl in my living room. I still have an ADAT player because I have tapes from studios that people gave me that are only on ADAT.

I own an independent label, which shows you just how ill-informed I am. I make vinyl, I have digital distribution through one of the aggregators and it's handled on a global basis.

I also spend \$50 to \$100 a week—I have historically and now more than ever in my role at HFA, SESAC, Rumblefish, am charged with building a multi-rights global service organization. And we think about problems like the podcast problem and we step a layer above it and we don't say it's a podcast problem, we say it's really a mass clearance of a micro-right problem. We've seen it before, we've seen it many times. Podcast is one of them. User-posted video is one of them. Ringtones for a long time were one of them.

There are many circumstances in which there's consumer demand, artistic interest, business interest, but on a per transaction basis there's no justification for building infrastructure.

So what we have had to do, and what the industry continues to struggle with, is to create solutions for mass clearance for transactions that on an individual basis are micro-transactions.

So people will say, I'm not going to hire a lawyer for—if you have the good fortune and say, \$1,000 an hour to do two licenses for a podcast that will generate no revenue for other than who delivers the service.

So we look at—I'm in between the two comments about it's the law, it's not the law. There is §118, which affords public broadcasters an amount of rights on relatively easy terms. It may not go far enough.

I wouldn't say the law is completely defective. I wouldn't say it's perfect and can be enforced and the challenge is enforcement. What I would say is that there was a time when, for example, another conundrum, if we weren't going down the podcast road, we would say, well there was a time when radio stations relied on public performance and record sellers relied on mechanical and those roads never crossed, never crossed except for that

one record that the radio station needed. But these days a stream is a performance, and it's a mechanical reproduction in the United States. Yet the Copyright Act, which I will defer to those who spend all of their time thinking about it, which is at least two of us up here, or a significant portion based on their professional backgrounds, there is a distinction in the law between a performance and a mechanical. And an industry has built up that there are performance people, there are mechanical people, and then there are micro-transaction people where the revenue doesn't justify. Put those together and now—you've got a fragmented market with where we started, fragmented data. And when data replicates and fragments, it collides and becomes either duplicative at best, and inconsistent most of the time.

So that's the environment we're facing. And my professional mandate is to, for the next year, focus on bringing performance and mechanical together and continuing to create market solutions that will power the mass clearance of individually micro-transactions, but that form up not only in the aggregate and meaningful economic market, but a very meaningful creative market, which is where George started.

GEORGE HOWARD: That was great. Thank you. Rather than interjecting here I've got lots of notes already, but let's just keep rolling.

AARON WRIGHT: Hey everybody, my name is Aaron Wright. I'm an Associate Clinical Professor at Cardozo Law School, where I run a technology clinic. And I focus primarily on blockchain technology, so I've been studying this for the past two-and-a-half years. And the reason I'm studying it is because the Internet's entering a new phase. It's entering kind of the 3.0 phase, where we're going to be moving from a world where there's lots of central control to a more decentralized Internet. And an Internet that's going to look a little bit different than what we have today.

One area where it has a profound impact on blockchain technology is on the content media and creative endeavors. And that's a large part of what I study. It's a large part of some of the work that we do. At Cardozo, we've been counseling a number of the companies that I'm sure we're going to be talking about today.

It's really an exciting time, much like how in the early and mid-90s, we began to see an explosion of Internet technology and we began to see new intermediaries and new businesses that are built on top. We're going to see a similar explosion over the next five to 10 years. And the reason that we're going to begin to see that, is much like how the Internet is a decentralized communication layer where it's easy to send information between parties without passing through an intermediary, we now have a new mechanism to store data and to transact in a way that doesn't require intermediaries.

Online, most of the content that's online, it's frankly diluted, the value of it is diluted. Most content is worth a fraction of a penny.

You can look at how Spotify denominates each stream, it's a fraction of a penny. But there's no real comprehensive way to monetize that entire universe of content. And what a blockchain can do, is begin to organize and serve as a common reference point to begin to do that.

I don't know if you want me to go into—

GEORGE HOWARD: What I'd like you to do if you don't mind, I think it might be beneficial, blockchain is one of those tickle the brain subjects and rather than me having to sort of lay it out at a top level just so that we have a basis of understanding, there likely are people in the crowd that are maybe not as well versed as they'd like to be on blockchain. Can you give just three minutes sort of describing what you mean by blockchain?

AARON WRIGHT: Yes, sure. So what's a blockchain? A blockchain is a database, but it's not a database that's owned by one party. So right now if you're going to access what's in Spotify, Spotify, for the most part, controls the data and all the transactions that occur on its service. But a blockchain, the entire database is managed collectively by a predefined protocol.

So instead of hitting a server that's owned by one party, you basically just hit the cloud just like you hit the Internet.

GEORGE HOWARD: So when people say distributed or decentralized, that's what you mean by that.

AARON WRIGHT: Exactly. So it means that there's bunch of different computers. If you talk about the bitcoin blockchain, which is one example, it's about 9,000, there are other blockchains that have thousands of different computers around the globe that are basically processing transactions. And those transactions can be things like a virtually currency, like bitcoin, which can be denominated in fractions of pennies. But it can also do and transact different things, it can store data.

So we talked about metadata to begin with. So one bit of information that you can store in a blockchain is metadata, metadata about certain files.

So let's say that you create an MP3, you can register that MP3 on a blockchain, include any relevant metadata, and it's there for anybody to access. So it's no longer controlled by any one party, it's just publicly available. And on top of that, you can add things like licensing information, to the extent that that's relevant, but say it's not something that's licensed under traditional copyright law, but under Creative Commons license or some other open license, that information can be available.

And on top of that, you can do this magical thing, it's a concept called a Smart Contract. So pretty much for the first time since, I don't know, the age of Mesopotamia, and we were like literally stamping contracts with rubber stamps, you have the ability to enter into contracts, legally binding agreements using source code, using code instead of written word. And what that enables you to do is that it dramatically decreases the cost of contracting.

So for example, right now there's a lot of friction in the music industry because it's laden down with contracts. There's a lot of people that need to get paid. And there's a lot of different payment streams that may depend on if you're U.S., if you're global, etc.

You can now begin to encode that using source code. And the moment that an activity occurs online, let's say you stream something, you download something, it fires off on this decentralized database a bunch of code and all those payments happen instantaneously. There's no Royalty Department that's processing it. There's no need for royalty checks. You literally have a permanent persistent auditable trail of the entire transaction from start to finish, and you get quicker payments.

So that's one of the reasons why I think a lot of people in the music industry have been like, wait, that's great. That means that all of the back end that has a lot of costs can be rendered more efficient. And we can begin to actually imagine a world that isn't one that's necessarily mediated solely through intermediaries, although they'll still persist, but one that's really more peer to peer. And one that enables people to self-publish, and get paid, and to have all of these interactions mediated in an easier way.

GEORGE HOWARD: And I sort of want to move away from this. I do want to make the point, because this comes up a lot in these conversations, is that nothing that you said or nothing about the blockchain obviates anything to do with rule of law. In fact, arguably, rule of law becomes dramatically more relevant through this because of just the vast amount of transactions.

Okay. Sy, if you wouldn't mind.

SARANG DAMLE: First of all, thank you for having me at this. It's always good to get out of Washington D.C., especially when Washington D.C. is snowed under. The streets are much better plowed here in New York.

So I am Sy Damle, I am Deputy General Counsel of the U.S. Copyright Office. And I wanted to just start briefly, by just explaining what the Copyright Office is, what our place is in government, and kind of what we've been up to in the last couple of years.

So the United States Copyright Office is the principal advisor to Congress on copyright matters. We also advise

the Executive Branch, but our first and foremost role is advising Congress. And there's sort of an odd historical reason for that. The U.S. Copyright Office is part of the Library of Congress and it was placed there from the moment of its inception in 1897. And because of that, it's given us this sort of unique place in government. We are a nonpartisan agency. We're not the Register of Copyrights, who serves fairly long terms. This is not a political appointment. No one in the Copyright Office is a political appointee of the Administration. The Register is appointed by the Librarian of Congress.

Our goal is to give independent non-partisan advice to Congress on copyright matters. We also advise the Executive Branch on copyright issues as they come up in the Executive Branch.

So in the last couple of years, it's been a hot time for a copyright lawyer. I don't know how many of you are copyright lawyers. It's been a very big time in copyright law, because Congress, the House Judiciary Committee in particular, has been engaged in what they call the Copyright Review Process.

About two years ago the—Bob Goodlatte, the Chairman of the House Judiciary Committee, kicked off a series of hearings going through the Copyright Act, having hearings on what parts could be updated, what parts have not kept up with the times, and starting thinking about ways of updating the laws for the modern digital age. And we, the Copyright Office, has been feeding into that process.

The Register of Copyrights, Maria Pallante, was the first witness at the first hearing and then was the hundredth witness at the closing of the Congressional hearing phase of the Copyright Review Process.

We've started to give some recommendations about what Congress can start thinking about legislating on.

We have a number of reports coming out in the next year or two as well.

The one that I worked on a lot with the General Counsel is this one here, this very thick Report on Copyright in the Music Marketplace, which we issued last February. And we had a very extensive series of hearings. We've had lots of hearings, we had lots of comments, thousands of pages of comments looking at the music industry. And two takeaways I want to talk about are, one thing I think going to Michael's point, one of the things that has happened in the music industry with the development of digital services is it throws into relief these artificial distinctions that the law draws between different types of rights—between mechanical rights and performance rights.

It used to be that you could treat them separately and everything worked out fine. But with digital services,

those two rights are, often a company like Spotify needs to clear both of those rights in order to get started and to perform their works, but the law treats them still as different. You've got the PRO system,⁴ and PROs are not permitted to license mechanical rights, and you've got your mechanical licensing system. And so the law still does not allow you to go to one place to clear both of them.

So one of the big recommendations was in that area, and lots of other areas, where the law had sort of grown up in this piecemeal fashion in a way that doesn't really make sense in the digital age. What we recommended is, look, you should just sort of start over, treat like uses alike, and make sure that there is at least a common approach too. If you're going to regulate the music industry, and the music industry among copyright industries is really one of the most heavily regulated industries—if you're going to maintain some level of government regulation, at least be consistent in your approach, and that the government isn't playing favorites. The government is drawing artificial barriers between different kinds of rights. And by doing that, the idea is you can allow the private market to sort of take over and develop more efficient ways of clearing rights and for paying copyright owners.

So that was one of our overarching things. The other overarching finding was about the data issue, in particular, the transaction cost issue we were most focused on was figuring out who owns what rights. That's a huge problem in the music industry.

The GRD project was something that was started and failed in sort of the span of our study. And so we came up with some recommendations for making the data for incentivizing private industry to bring together their data or their ownership data into some centralized location that would be public. Leveraging the existing sort of statutory licensing system to essentially force people to share data and make that data more readily available. And again, the thought is once the government can play a good role in incentivizing private industry to develop that kind of centralized database, industry can then take over. And using things like blockchain or other types of technologies, make the payment of royalties much more efficient.

So those are the two overarching findings in our study. In terms of where Congress is in their review, I'll talk a little bit about that.

They've started a series of listening tours around the country at the House Judiciary Committee level. I think they're still having meetings with many of the stakeholders to figure out—music is just one piece of this broader copyright review process. It's still not clear whether they want to try to do a big Copyright Act that touches on everything, or if they want to break off pieces and do them and pass bills in a piecemeal fashion, I think that's still

being worked out. I think this is still going to be a long process. The Register likes to talk about how the 1976 Copyright Act was a 30, 40-year process. Hopefully it's not going to be quite as long as that this time around. But I think it is not going to be a very quick process. I think there's still a lot of deliberations ahead.

I think we're hopeful that we'll start to see movement in at least some areas, bills being introduced at least in the next couple of years.

GEORGE HOWARD: That's good background, Sy. And to sort of bring to the other side of that, Joe. When you talk about how you're on the data side yourself, but in a different context.

JOE CONYERS: I'm Joe Conyers. I'm the Vice President of Technology for Downtown Music Publishing. We represent songwriters and artists like Imogen Heap, John Lennon, Bruce Springsteen, Nikki Sixx from Motley Crew, and a whole host of other great composers and so on and so forth.

I oversee our portfolio of products and all of our technical operations. I also work with a lot of the digital service providers doing licensing. And I would actually say there are even more issues with going to one source. We now have a whole lot of synchronization combo licenses coming down the pipe, and obviously YouTube has been a big kind of intro to that.

So I spend a lot of time thinking about metadata, how to improve our metadata, how to enrich our metadata, how to get that data out to our partners, the PROs, the mechanical licensing, societies around the world, and also the digital service providers themselves, and their agents like Michael over here.

So I spent a lot of time thinking about how we can create a single place—a single repertoire to our database. There are certainly a lot of cooks in the kitchen, and a lot of older institutional doubt there that I think has to be flushed through. And I think in the coming years, with blockchain and other exciting technologies, it doesn't have to be that technology, but I think we'll see a more open source style, maybe a foundation, or some other way.

GEORGE HOWARD: That's good background and I think it's a good counterpoint. So all the way from Israel, my friend from 20 years, Bruno, how are you?

BRUNO GUEZ: Happy to be here with you guys, and it's nice to see a lot of like-minded people sharing a similar conversation.

My name is Bruno Guez. I founded a record label about 25 years ago called Quango Music Group. Today I'm the founder and CEO of a music tech platform called Revelator. We provide rights management and contact distribution, monetization, and with integration and recording analytics and payments, basically.

I started in the music career—started when my label was signed to Island Records by a guy named Chris Blackwell. I was 23 at the time, and my job was to find the next artist and create amazing compellation records. And in the process of creating compellation records, before playlists were the new compellations, licensing rights for compellations, that's what I did. I did that 25 times, 25 albums in two years. And at the time we were a division of Island and Polygram before Universal purchased Polygram.

So I got my start in music licensing at the age of 23 and learned all about metadata management and I built at the time, this was pre-Internet era, a file maker database so we can keep track of all our artists' metadata and songwriter and publisher metadata, and back then it was complex. And today it's even more complex.

But that kind of gave me a unique insight into the world of metadata and how to manage all the rights information associated to both master and publishing.

During the next 10 years, or 15 years, as we moved more towards digital, and we saw the whole transfer from business models based on ownership to business models based on access. And the whole world of rights management really transformed.

So when I moved to Israel five years ago, my family lived here for 20-plus years, and during the first year I just kind of took a sabbatical and just kind of thought about what do I want to do with my label. Do I want to continue the same old school music label and manage rights and manage sales and distribution the old way and still have to employ a lot of people, even though all the unit economics were compressed and there was a lot less money than there used to be at the time in the era of CDs?

And what I wanted to do was kind of transform my business. And coming from the record label side there were a lot of challenges around managing the back office and reporting and accounting to rights holders. And my vision was really to build an open and transparent platform where I could collaborate in the cloud with my rights holders in a more modern way. And it could be used by anyone anywhere, and enable them to have autonomy, control and ownership of their music rights and data. Those are the three big themes that kind of govern what we do and drive me still today.

So over the course of the last three years, it's taken that long to build out our infrastructure, and we've built a pretty amazing platform that manages all the rights information at the asset level, and we're able to distribute that and report back on the data and the revenue, and payout to rights holders, in a seamless and automated process.

Obviously today we see that streaming media, and digital royalties, and micropayments, those are today's challenges for content owners.

So part of what we try to do is make all that process easier. And coming from the label side, I don't want to manage everything manually anymore. I just want things to be more automated. Part of that means I want the payments and the recording to different rights holders, whether they were on the master or the publishing side, to just be automated. I just don't want to run the back office of a label anymore. It's just not interesting.

Things have to move faster and we have to process a lot more data today. Sometimes a YouTube file can be four million lines, or a Spotify file could be 4 gigabytes. How do you deal with that today, when you have 500 of those reports each month that you have to process, consolidate, parse, segment, and report back to rights holder? How do you do that efficiently so that it doesn't bog you down and add more back office burden?

So this is essentially what I tried to do with the platform and provide those services to anybody that runs a digital business today.

GEORGE HOWARD: Thanks Bruno. So once again, Joyce and Rob did an amazing job with this panel, as you guys can see.

About a week ago or two weeks ago, one of the original bitcoin developer team members declared it a failure. The bitcoin experiment, as you call it, declared it a failure. And it was amazing for me to watch the way people responded to that.

There were decidedly two camps. One camp was, see, told you, right, you idiots. And then the other side was, oh this guy doesn't—so the camps broke apart. And when I listen to these people talk, one thing that keeps going through my mind is Aaron talks about smart contracts, and I think he did a beautiful job of explaining what that was and how that can—he didn't use this word, but I'll use it, sort of dis-intermediate, take people out of the middle.

Bruno is essentially the same thing. I don't want to deal with that back end stuff, right. All these things are inefficient, etc.

At the far side of our table here we've got someone who, at least, and this is a question not a statement, it will be phrased as a statement: Whose business is built upon the idea of profiting from managing those transactions.

So when I wrote, a million years ago, my first blockchain article, it was from this very seat of sort of enthusiastic naiveté, which is well,



this can solve the problems for the music business. And then people smarter than I said, no George, because the companies that will most be harmed by transparency will resist this technological change the most, and that would be institutions that profit from their own proprietary database and/or the rights clearing.

So if I can put you on the spot. HFA is—and again, a question not a statement, is a rights clearing agency, so to speak, right, or a facilitation.

Blockchain or some other public ledger in which people could transact without this intermediary could on the surface obviate you. So you're here, you're talking, again, I don't want to put you on the spot, but that seems to be the tension, right?

We talk about why the GRD failed and nobody really wants to say it, but one theory would be because the parties really don't want a public open database. So as somebody that has a private database, could you speak to that?

MICHAEL SIMON: Sure. And I don't feel like that's being put on the spot really at all.

GEORGE HOWARD: Good.

MICHAEL SIMON: As long as your perspective is less than six years, everything in the music industry is threatening to the current status quo and will destroy whatever comes before it.

GEORGE HOWARD: Wait, let me unpack that. So it reminds me of—somebody said the music industry innovates just faster than the Amish. Is that what you mean?

MICHAEL SIMON: Well, yeah. Again, if we had a three-year perspective, and we believed in bitcoin and blockchain, then it would be completely terrifying, but if you have a 110-year perspective, the music industry—music rights management, music publishing and representing rights holders—has gone through the transformation of sheet music, into piano rolls, into Edison cylinders, into flat discs, into CDs, into cassettes, into 8-track tapes, into radio, and into online distribution, and every single one of those was absolutely going to destroy the industry and the incumbents.

GEORGE HOWARD: Right.

MICHAEL SIMON: Absolutely 100%. What we see consistently in the music industry above the current one, and I came from a digital media company where we would say, everything that can be digital will be, and digital will destroy the industry, whatever industry we're talking about. And it

did, and it created other problems, equal and opposing problems. Fewer people, higher price, same net result. Ten people for \$10, five people for \$20, more sophisticated, same economic outcome. What we've seen in the music industry is a recurring cycle that goes from massive disruption to a period of stabilization to a period of revenue.

Disruption is destroying the sheet music business because pianos will play themselves, or why would I buy sheet music if I can put the record—I don't need to buy sheet music to play the piano for personal enjoyment, I can play a record. That's a threat to the sheet music business.

And usually what happens, historically, and we will see this again I'm sure, is when the disruptive event occurs way ahead of the law and the incumbents in the industry, the next thing that happens is we can't figure out what the law is.

So although we talk about streaming now as a mechanical, that was not a foregone conclusion and it was a five to 10 year fight about whether or not a stream is a mechanical reproduction, or a performance, or both or neither.

So when we go from a disruptive moment to sorting out what the rights actually are and then figuring out which business models really work, and then where the revenue is—we go from disruption, to stabilization, to revenue.

So radio is going to destroy the industry. Radio puts up more money than mechanicals. The next notion that without perspective can be terrifying is, wait, any incumbent is going to be dis-intermediated and destroyed and how are you going to pay your mortgage? If that's what business asks for and it actually works, then so be it.

Our business doesn't exist to exist, our business exists to provide service, and if we can't actually provide a service that's viable to rights holders, then so be it. But I'm very interested in and enthusiastic about the entire bitcoin transaction, from mining all the way down to the ledger, but I start a level below that and say well, if I was a print shop and I printed really great and there was no such thing as a ledger in 1700 and I printed a really great ledger, then if I'm in the business of printing the ledger, it's a good business for me, but if no accountant actually knows how to put data in it in the way that it works, or resolve and create gap or whatever we create, then the ledger doesn't have independent value.

We've struggled as an industry with data for several decades. And the broad-based disclosure of data without levels of intelligence on top of it has never really destroyed a business other than created more confusion—meaning the publication of the dictionary, someone who was sitting here a week ago when I said this, the publication of the dictionary, is not a competitive threat to novel-

ists, although every word that they use is in there. Every single word that a novelist uses is in that dictionary so any one of us can buy it, but there is a skill to select those words in the correct order to produce a book.

Celebrity chefs, why do they publish cookbooks that allow you to make everything that they sell in their restaurants? There's probably something different between making the skeletal structure available, which we're not opposed to, and actually applying the business rules on top of it that would allow the business to run.

So we're interested in seeing how the ledger of blockchain can actually aggregate accurate information and cause money to go in the right direction if it can aggregate the correct information more quickly and make more money go to the writers who create music we want to listen to, you'd have to be a knucklehead to stand up and say, well you know, because that's a threat to my ability to pay my business—that's just stupid. Figure out how to use it or figure out how—we're not running around saying we believe in the phone booth, whether there should be more phone booths, the world went cellular. If you can't figure out how to make it work.

GEORGE HOWARD: And certainly in my point of view, I think that there is sort of the devil's advocate to that would be the other piano roll, the other analogies you used, those were iterative rather than disruptive.

Another analogy might be what Uber has done to the taxi industry.

MICHAEL SIMON: I may or may not agree that it was. So if you have, then I could be proven wrong, but the work that I've done to look at the literature of the time and to speak to some of the publishing companies that have been around for 105 years and went through it, they didn't find the migration away from sheet music and into recorded music to be an iterative and smooth transaction.

I read the Board minutes of companies that were writing them in the 1920s, and they were completely freaked out that the family businesses were going to go away.

Absolutely unconditional—ASCAP, which had other agendas besides what is written on the piece of paper, but ASCAP did publish—ASCAP, who collects a substantial majority of their revenue from radio, put out a publication in the mid 1930s saying that radio will kill the music industry.

GEORGE HOWARD: Oh sure. The record industry has a long history of resisting—

MICHAEL SIMON: Skull and cross bones on cassettes.

GEORGE HOWARD: Yeah, that will save it.

MICHAEL SIMON: Cassettes kill, all of that stuff.

GEORGE HOWARD: I was the beneficiary of this. We were the first CD-only label at the time when the labels believed that—

MICHAEL SIMON: Yeah, with the cool green boxes.

GEORGE HOWARD: You got it. So what I think you're saying is we're in currently an era of unstructured data, and those who can structure the data better, whether it's cookbook authors or authors with a dictionary, or music services like HFA structuring the data, can profit from it.

Joe, sort of the same question to you. You at Downtown have a proprietary database, why are you here at blockchain, which on the surface, *prima facie* could be a threat to your very business? Do you agree with what Michael said or do you have a different—

JOE CONYERS: I see it as a way to obviate five to 20% of the staff or at least put them on doing more creative things.

GEORGE HOWARD: Bet they're psyched.

JOE CONYERS: Well, I have plenty of other things they can work on, so.

GEORGE HOWARD: Did you tell them that?

JOE CONYERS: Well, they just did the same job. They all do the same job in two years, or three years, or however long this takes. But I see it as a lot of the licensors, have just staff dealing with repertoire, and that is an unnecessary activity, and in a sense where you have a distributed ledger, ideally.

It's basically taking—we deal with about 150 counter parties, taking that down to one, changing the way we structure our data. And then I see it as a way we can actually build our business two, three four X, maybe 10 X, because we're going to be able to do so many more licenses. And the data will be out there. And the licenses, I actually just think of them as applications. There's going to be so many more YouTubes, there's going to be so many more random genius-like sites or apps literally on your iPhone or otherwise, that will have a much much easier time licensing.

It is a year-long process minimum, to get licenses done with 1,000 publishers. And you have to go to HFA, you have to go to NMPA to get the top 50, to get their attention. I deal with this all the time, I can't respond to everyone.

So if there are exchanges and there are other providers, like HFA could be one of those exchanges, they kind of are already with NMPA. That's kind of how I see that world growing. And as a publisher it just makes my life so much easier, because we have a database we can rely

on and instead of having to rely on sending a letter of direction to get someone to pay me, I'm going to be able to flip a switch and they'll get an email or they'll see it in their system, and it says, do you approve of this change in ownership?

The letter of direction system is archaic. It's a piece of paper with a signature on it, and it doesn't have any real—there's no authentication. People can just send them to HFA. I'm sure you deal with fraud all the time.

People are saying, look, I am now Michael Jackson's estate, you should pay me. I love that check. Using real authentication—whether it be proof of life, putting your face up there with the daily newspaper, and other forms of authentication, social, whether it be Facebook, LinkedIn and so on, or you have additional forms of proof, is going to make all sorts of transactions easier. It's going to make fraud go down. Having audit trails is going to have fraud go down.

So I see it making more money, making it more efficiently, and making my life easier.

GEORGE HOWARD: So Aaron, chime in a little bit and talk about—you mentioned something, I thought it was interesting, I never heard anybody else doing it. You talked specifically about the bitcoin blockchain, and I think you did an awesome job of sort of explaining blockchain generally.

When people say the blockchain generically they're talking about the bitcoin blockchain. In other words, the ledger that keeps track of bitcoin transactions.

You mentioned it might be the bitcoin blockchain, it might be other blockchain, and sometimes these are referred to as side chains. I'd like you to comment on what both Michael and Joe said, generally speaking, but also think about it in terms of what if anything—two things, what is stopping Michael or Joe from creating their own blockchain, and would that be a good/bad thing, and then second to that, if you could talk a little bit about the sort of proof of work. I believe that their proof of life is chosen—I believe that—one of the big—

AARON WRIGHT: Two separate things.

GEORGE HOWARD: I know there is, and that's why I correct myself. Proof of work—and I don't want to go down that route. Proof of life means I actually created this thing. Proof of work is a hash, I won't go down that—but the proof of life meaning to obviate the garbage in. Me putting something up on the blockchain that is not mine, and then exacerbating the current situation.

AARON WRIGHT: Sure. So first point, because you mentioned that article in the *Times*, just so you know, bitcoin has been declared dead 97 times at this point.

GEORGE HOWARD: I know.

AARON WRIGHT: That article was *The New York Times* at its best, kind of drumming up stories. But I think that this technology is just slightly different. It enters the end points of automation. It's a system when you start beginning to aggregate these smart contracts where you don't necessarily just have a shared database, but you actually have autonomous agents running on top of it.

This is kind of—I want to push it to the end just so you see where it's going, but there's already people who are developing decentralized Napsters, decentralized file sharing systems, and they can't really be shut down. Once they start running on a blockchain, it's there. If people want to use it, it's there.

It's not as obvious to me that there are legitimate intermediaries to stop. They don't need necessarily to run through search engines like Google, so it's going to be hard for the RIAA or another industry group to try to pressure Google to censor things.

The data's resistant to DMCA takedown notices. It can facilitate micro-transactions, so it can actually have built-in incentive systems to encourage people to upload things to decentralize file sharing systems and enable people to access them. Those are pretty concerning. And I think that those are coming quick and furious. And I've talked to a number of developers who are doing that.

GEORGE HOWARD: I'm sorry to interrupt you, I just want to be very clear. You just listed an array of things and you view these things as concerning, why? Just to be very clear.

AARON WRIGHT: I mean, I think they're concerning because they are really end points of dis-intermediation. And I think it can reduce any media company to its core.

GEORGE HOWARD: So who is it concerning for? Are you following my thesis or my question to Michael that this goes, there's no reason for an HFA, is that what you're saying?

AARON WRIGHT: No, so I'm going to get to that. So I think it goes down to some of the core aspects. If you are aggregating content online, if you are an access based service, there may be just a bit of autonomous code that's operating on the Internet that will perform your function. It will enable access to any content that you want in the world. And that can be concerning, but that's a bit far off.

In the short term at the same time, a lot like the Internet, it both supports and dis-intermediates things. And it can support things, because it enables a common reference point for title and other information, right.

We've already seen some open source initiatives to try to standardize title, and they've all kind of failed. And the reason that they—like GRD, other things, like

MusicBrainz was like an open source initiative. They're all incomplete. You need perfect title.

Before I joined Cardozo's faculty, I worked with Jenner & Block, I had to do title clearance, it was miserable, it was miserable for our clients. And if you don't have perfect title, it just creates a scramble. And unless you have the buy-in from industry, you're not going to get that clean title that you need.

I think it's unlikely that everybody is going to perfectly represent title online. That being said, there are initiatives that already started to try to do that, to try to basically look around the existing system and try to start building canonical title systems in a decentralized way.

There's a company in New York that's backed by Union Square Ventures, which is privately the premier venture capital firm in New York, if not in the whole United States. And that's what they're trying to do. They can hash a file and track it across the Internet so you can see every single usage of that. And that's pretty exciting, because when you can imagine that once you have a canonical reference point, if you remix that, if you incorporate that in any way, you can begin to track that too. And you can begin to view files not just as in symbol of bits, but as a symbol of title of rights through various different creative works. And that can help enable when you begin to imagine where all the frictionless payments, to begin to see higher volumes and more opportunities to develop it.

So I think that there's certain frictions that you can't get around, and that's where you're going to see intermediaries emerge to try to solve those problems. But some of the baseline technology, these layers of technology would be developed to make those processes easier, to make it easier for parties that do have access to title records and the various other things that are necessary to begin to onboard them in a neutral way that everybody can use collectively, to begin to build a repository necessary to build these higher level functionality.

I think what you're going to see is, you're going to see much like what the labels have continued to do, they've continued to curate music, right. They still select the winners; there's not that many independent musicians that have really broken through. There's still a huge opportunity for curation. There's still a huge opportunity to basically manage this process. And that's going to compete at the same time with more robust, essentially lawless systems.

So that's kind of the world that we're moving to. And for better or worse, the copyright industry has always been at the forefront of the Internet. It's kind of—the Internet's kind of buzz sawed its way through the music industry before it has begun to buzz saw its way through the taxi industry—

GEORGE HOWARD: The canary in the coal mine.

AARON WRIGHT: Yeah, it's the canary in the economic coal mine. But at the same time, there's always some recalibration of value that's emerged.

I just want—this is all happening. This is not like a fictional academic thought exercise. So on terms of ownership, a lot of this is happening here in New York, which is great.

There's a company called Monograph, which is enabling you to basically register a piece of digital art work and then manage rights to it and sell it and transfer it. In one aspect that's pretty amazing about a blockchain is not only that it can serve as a common reference point, but it can actually make excludable, non-rivalrous digital property.

So just like we have a book, which is excludable and non-rivalrous, or excludable rivalrous digital property. So just like a book is excludable and rivalries—I can pass it to you and then I no longer own it—you do the same thing with digital property.

So there may be a lot of experimentation that we need to see just in managing MP3s or other things like that so that you can actually ensure that a party has title to it.

An example of that is already emerging with, I guess one of your clients, Imogen Heap. She's released an MP3 on the blockchain, she transfers title to it and also allocates payments to herself and anybody else who was involved in the creation network.

There's also—I think that's about it.

GEORGE HOWARD: Thank you, and just disclosure, Monograph is a client of mine, and I work with Imogen. So there are people out there doing it and I want to talk to Bruno, because he's doing this. But before I go there.

Sy, to you for a second. You were sort of called out on the Copyright Office's being sort of something that's blocking this progress generally, but you're the problem, right, for progress.

I thought your description of some of the things that the Copyright Office is wrestling with, and I'm dying to read that report, where is your head and where is—is it really—you said the 72 Act took 40 years or something. Can the copyright—well, two questions.

One of the things that I'm working on with Monograph is a white paper to say, you know Monograph may make the Copyright Office obsolete, right, and you know, that's sort of a strong answer.

What is the role of the Copyright Office through this, and can the Copyright Office keep up with this, and is the Copyright Office a problem or are they pushing this forward?

SARANG DAMLE: So thanks for that, I'd like to think we're not a problem. I like to think we're thinking about—

GEORGE HOWARD: Again, questions not statements.

SARANG DAMLE: We're a solution. And I think we think a lot about, what is the proper role of government in this industry?

Before I was at the Copyright Office I was at the Department of Justice and I dealt with a lot of regulations and lots of different industries. And one of the remarkable things about music is that it has a very very heavy government involvement, unusually heavy government involvement in regulating prices. I mean, that's a fairly aggressive form of regulation. And setting the basic rules of how—who can license what.

So I think one of the things that we think about a lot is how can government—I don't want to talk just about the Copyright Office, the Copyright Office in and of itself doesn't have all that much power. We have very limited regulatory authority. To the extent we have any sort of say, it's in advising Congress on approaches to take to these problems that I think everyone has identified.

Our general approach and our approach in this in our music report as well was, what can we do. Where are there essentially market failures, and how can government create incentives so that we can overcome those market failures.

I think one of the things I mentioned before was this idea of sharing and transparency of music data and music ownership. And I think that's—we've seen repeated efforts to try and solve that problem about who owns what.

The Copyright Office has some records, they're not that very good. Copyright registration of course is not a pre-requisite to copyright protection, so.

GEORGE HOWARD: Did you just say that Copyright Office records are not very good?

SARANG DAMLE: They're not, they're not complete by any means, because copyright registration is not a pre-requisite, so we don't have complete records. And our systems are—the Register's talked about this a lot, our current systems are not very good.

Certainly we are interested in getting to the next generation of Copyright Office records. But I think what we recognize in this report is that ultimately what we think government's proper role is, is not to collect all the data ourselves, but to create the incentive so that industry—

GEORGE HOWARD: How do we do that, Sy?

SARANG DAMLE: So I think part of it is that it all comes down to giving people economic incentives. Under

current law, we have this statutory licensing mechanism and we can use that as sort of a hook to get people to collaborate in providing data.

Our recommendation—the problem is it’s a bigger problem on the musical work side, because of the issue of split ownership of musical works.

On the sound recording side the data is much better, there are fewer owners of individual works. Sound Exchange actually has fairly good data these days.

On the musical work side it’s much more of a mess. And so looking at that musical works problem and the problem of split ownership where you have a single composition that was written by 10 different people, each of them have various different shares of that work. And then you have transfers of various shares, it’s messy.

So the idea is well, let’s create a system where we’re leveraging the statutory license and saying, if you want to participate in the statutory licensing scheme, you have to share your data, you have to provide your data to some central location, and make that available to licensees. And licensees are paying a fee as part of the statutory licensing fee, the government set rate. They’re paying a portion of the government set rate is to fund the creation of this centralized music database.

I think the idea is to take sort of what we’ve got now. I mean I think some of the things like blockchain are really interesting ideas, but we’ve got a system we have now. And we are looking in this short-to-medium term about things we can do to help the system in a shorter time frame.

So we have all of these different databases, and they’re proprietary. How do we make them more public. So that’s what we think a lot about and what rules can government put into place to incentivize the sharing of that database.

GEORGE HOWARD: Sure. And you’re in a tough spot sitting here in this room about that, but I think it’s fascinating what you’re suggesting. My own two cents would be, do that for derivative works and you might get somewhere.

I’d like to turn to Bruno for a second and I know, Aaron, you want to chime in, so please hold that thought, because I do want to get you.

Bruno, my sense of it is that you may be trying to do exactly what Sy is doing but sort of in the private sector. Is that a fair assessment?

Are you addressing the same problem but in a for profit manner, non-governmental manner? In other words, trying to facilitate these transactions through Revelator and create this database.

BRUNO GUEZ: I do think so, yes. I mean the reality is, the modern entertainment industry was never built with the Internet in mind or ready for the scale of digital, right.

So we all have the same infrastructure problem. We all have today databases with lots of metadata, and none of our systems speak to each other in a seamless and transparent way.

So the blockchain, in a sense, the promise of the blockchain, is to offer this music API⁵ for everybody to connect to and share data, right. Until then we’re all going to be segregated in our own systems and saying that we all have the best system, but we’re not sharing it with each other, so we’re not making the whole trustless exchange more efficient, faster speed, and more trusted across the whole industry.

The problem is much bigger. It’s that record labels on the recorded side of the business, they don’t have the technology to have a global supply chain for managing rights, and metadata, and monetizing content.

So you’ve got a lot of rights owners that are just in an inopportune situation where they can’t participate in modernizing their stock, their infrastructure.

The leaders, the music publishers, are in a similar position. There’s not a lot of music publishing platforms like Songtrust today, right, where a lot of music publishers are still dealing with outdated technology, inefficient processes, which lacks accessibility and transparency. And part of the problem as we know it is a lack of good metadata results in poor monetization.

So how do we bring all of this together, right? I think that’s why we’re all here together. How do we all come together and create a system that provides a trust exchange?

I started kind of doing that, and going down this rabbit hole of the blockchain, there’s some technology obstacles. And part of what I discovered is it’s all around identity and ownership and validation of assets, and dispute, and resolution management of assets.

So at the same time we built this centralized system for managing the asset and embedding rights information and pushing it out into the world and bringing back the revenue and the data and sharing all of that with portals across rights value chain.

Now what’s interesting, is what we haven’t done is the asset registration yet, which is actually what we’re working on in Tier 1. What that means is, let’s also register that digital asset on the blockchain so we can actually authenticate the identity and the ownership of that. Well, that raises more problems. How do you validate the identity and ownership of that asset? Do we need to map

against other databases? Do we need to call up a work ID from the PRO or MR society⁶ and say, yep, that exists somewhere else, so that is a valid proof that person does exist. And that person does own that asset according to other systems.

So we then get into verified services. Identity layer, can I verify who I am with Facebook, and Twitter, and Google? And once I've done that I can say, all these systems know who I am and there's a certain level of trust.

So I think identity is the first step, prove that you are who you say you are. And the next step is, prove that you own what you say you own. Because it's easy to register digital assets, that's not so complicated. Monograph does a fantastic job, but how do I know that asset belongs to you. How do I know that you're not taking somebody else's photograph and claiming it and then getting into more claims, and disputes and conflict resolution?

Part of the resolution, YouTube makes a lot of money, because there are so many claims that are stuff in conflicts that don't get validated. So what do we do about that? How do we improve the conflict resolution and the dispute management? And a lot of majors own claims to my work, my recordings. How do I go back retroactively and get paid back for the work that they say that they claim but that really belongs to me?

So transferring, assigning ownership is definitely part of what we can do, with smart contracts and multi-signature work flows, where different parties have to sign off. A good example of that is when multiple songwriters work together on a composition, then they can say, I'm going to invite so and so to share 33% and the other party to share 33%. Now they need to validate that and that creates a multi-signature contract. And once all the parties have agreed to it, that's locked, that's locked in, we all agree to those terms.

So now as we start to go and monetize that, the transactions should be more automated, because we already know how to split the money. So the blockchain is exciting to me in that way. How do we make everything faster, safer, more efficient, and split the rights, simplify the back office. And make sure that all the parties get paid—whether it be the societies, the publishers, the songwriters, in a more automated way.

So right now we've got that at the centralized level, you know, the Revelator provides all those services, from artists' statements and mechanical statements, to publishers, and managing all that. And now we're trying to push forward to registering those assets and learn how to authenticate the identity and ownership of those assets and then be able to validate, make sure that those transactions are properly paying the rights owners.

There's still some issues, and the issue is the whole industry embracing it. If we do it, that's great. But we're only going to be as great as our catalog. And it won't

really solve a bigger picture, which is how do we get the whole industry to embrace it.

Even if we had a million songs on the system, how do we get everybody involved? And that's part of a challenge.

GEORGE HOWARD: These incentives that keep coming up are part of it.

JOE CONYERS: I just want to pick up on that, because I think again, this is something that government can play a role in, is in being sort of picking standards. I mean even just when you talk about Internet standards or any sort of technological standards, it's oftentimes if you trace it back—if the government is involved at some level in selecting the standard that everybody ends up using, and so that's I think something that we're also thinking about. How do we, the government at large, play a role in ensuring that everybody is speaking the same language in the world of data and music data.

So that's I think, again, another role for government to play in this.

SARANG DAMLE: I think there's some really good incentives today, with 100% licensing, that could be applied within a blockchain that could incentivize people to do it. If I go out there and, I'm coining this to the clear box instead of black box, when you have payments that are due to someone, instead of it going to another publisher and ending up in a black hole in their database, it would be public, and say, okay, we receive money from this person. We don't actually own it, here it is in the ether, anyone can come by and authenticate themselves and say, I am this person. Or if it were a 100% licensing situation, we would license the other half of the song or whatever other percentage of the song, and someone can come by and authenticate themselves, prove who they are and we would pay them on our behalf. And then they can go and do the rest of the license with that person if they so choose.

GEORGE HOWARD: Thank you for chiming in on that. Sy, obviously, they run into consequences to legislation, which I'm sure you wrestle with constantly. Aaron, you've been trying to interject here very patiently.

AARON WRIGHT: Yes, I think what Sy and Bruno said is exactly on point. You need government at private partnerships.

What's exciting—at a core level exciting about this technology—is that if you have a bunch of centralized databases that you need to interoperate, the solution is not more centralization, the solution is actually decentralization. It's using a blockchain to coordinate all these activities.

This is not unique to the music or the copyright industry in general, this is something that a lot of people face.

I've had conversations with the Federal Reserve Bank. How do we build a completely global interoperable paying-in system. And you know what they're looking at, one of the core solutions for that, it's a blockchain.

GEORGE HOWARD: Sure.

AARON WRIGHT: And they looked at it deeply. So if the inquiry is how do we move from these bordered ownership registries that are controlled by one national government, you can imagine a world where you have a global copyright registry that's not interoperable just with the U.S., but with every country. And once you have all that data in an interoperable layer, everything just gets easier. The friction goes down dramatically.

It's not just with copyright, you can do the same thing for patents. You can do the same thing for trademark.

GEORGE HOWARD: You see a lot of work being done on real estate title. I contributed to a Harvard study this summer, that was funded by Fidelity, on the blockchain and how it can obviate some title problems.

I'd like to pull back for a second. Michael said something really interesting in terms of, I think he said it was six years away, I don't know—it's certainly my job as an investor to look at a future that I would like to see three to five years from now and put my money where my mouth is.

With that said, you've got sharks that are closer to your boat right now. I want to put blockchain to the side a little bit. What's day to day like right now at HFA? What are the sharks that are close to your boat on the data side, taking blockchain off the table for a moment, if you don't mind?

MICHAEL SIMON: Maybe I've been doing it too long, so I don't feel like I have more sharks now than we've ever had. The music—

GEORGE HOWARD: I didn't mean to imply that, I just meant, what are the challenges facing you?

MICHAEL SIMON: The challenges, blockchain—even if we're going away from blockchain, the challenge is the same. The challenge is a data issue. We have authentication and validation—we were talking about on the context of blockchain. We have it in the context of sending pieces of paper in.

I agree with Joe that as new technologies, software, hardware are implemented, companies migrate, staff migrate. We used to have a bunch of people who were in the Index Department, who actually had an index and went through note cards, and we have the note cards, that does migrate. But the challenges we face are the challenges we've been talking about for the last hour. And if we didn't have blockchain as a possibility, we would still have those challenges. The challenges are exactly the same.

Authentication and validation, whether it's someone faxing to me a piece of paper or we're dealing with a public ledger, or the need to have a whole community participate in a solution, or you end up with a Betamax—you end up with a pretty elegant bit of audio visual replication technology that probably was cooler than what was out there, but no one used it.

GEORGE HOWARD: Well, because there was no porn.

MICHAEL SIMON: I don't know that, but I'd be shocked. You invent a printing press, you print the Bible, and then you print pornography.

GEORGE HOWARD: VHS allowed for porn and Beta did not.

MICHAEL SIMON: I'm going to have to trust you on that one.

GEORGE HOWARD: We could Google it.

MICHAEL SIMON: And the third point was that a degree of automation is needed. HFA has currently about 7.3 million compositions in a database. It's growing at about 10% a year. We represent 48,000 music publishers. We update about 24,000 compositions a month, meaning update, who owns it, who thinks they own it, who now does legitimately own it, what was bought, what was sold, modifications to catalogs, all of that moving around. And if we have real authentication and validation, which doesn't exist on a lot of the data and ISRC, the data standard for recordings, has no validation on it. If you make a mistake and then commit it to the world—it's forever. It's garbage in and permanently garbage out. There's no central place to correct it.

So without authentication, validation, the community participating and a degree of automation so that you can focus your staff, as Joe described, on better, harder problems than stacking index cards, you have the same problem.

So I might be the jaded person, but when I hear blockchain and I sit in front of a panel and I hear, here's the problem and here's what it will solve. Those are not new problems, it might be a new solution.

So when someone says, what problems do you face, I face those problems. I face the problems that the blockchain is intended to, or at least those certain folks who are working on it are intending to solve, and if they don't solve it, we have those problems.

GEORGE HOWARD: Yes, but isn't that what makes it interesting, right? That this technology could potentially solve those problems. May not, might.

MICHAEL SIMON: Sure. May or may not, but I can tell you that there are an awful lot of smart people who are truly committed to working on it.

So probably if you had to bet, if someone created a problem statement and said blockchain is going to solve it, they will probably be wrong, that it will not solve that problem, but it will probably solve many problems that we have yet to apply it to.

GEORGE HOWARD:

Exactly the article I just published. So what we don't have on this panel is an artist, and that is somewhat troubling. Joe, speak for the artist.

How is the artist doing out there? You are talking to them a lot. You guys to various degrees are painting a rosier picture of transactions happening all the time and in a blooming of transactions and micropayments that sort of makes up in volume what is lost in margin. How are the artists feeling today?

JOE CONYERS: Confused.

GEORGE HOWARD: Yes.

JOE CONYERS: There's too much out there, more than ever. Publishing in and of itself is a black hole. Getting yourself on Spotify is still confusing to a lot of people, let alone recording all your metadata and getting an ISRC, and all these things.

So I think everything has to get simpler, and I think there's a lot of ways to do that over the next 50 years. I do feel like we're kind of at a pretty good juncture in terms of format. You don't think about a CD, just have music in the cloud. And I think you're still going to be able listen to things, but I think we're kind of at the point where we're like, I can get music if I want it. So there's that simplicity that's happened.

I think there's a lot of existing issues that are still really kind of sad, particularly in America with general licensing. We talk about the future a lot, but there's so many other confusing and scary things which I think technology can help there with identifying public performances. Using Shazam-like technology, and that technology's been around for 40 years and now it's finally getting used, I think the costs have gone down.

So I think the artist is still scared that—if you were lucky enough, and I guess that's the kind of irony is that our business was started after CDs were already dead. So I think we started in 2007, so we really didn't see a lot of that mechanical income, neither did our clients. So there's a different thinking there.

We obviously do a lot of work on getting our writers and artists creative opportunities and that's still going to



be a huge thing. And that is where I see a lot more opportunity. There's still a lot of confusion in that. I hope there's going to be a lot more willingness to do remixes. Certainly the artists want that, but the industry has to catch up to that. And derivative works are really interesting there, so on and so forth.

BRUNO GUEZ: Did you say CDs were dead?

JOE CONYERS: I did.

Do you have a CD player in your new computer?

BRUNO GUEZ: They make great coasters.

GEORGE HOWARD: So I'd like to pause here. Typically at panels you wait for like the last five minutes you ask a question, nobody gets a chance. I certainly have more to talk about, but I'd like to pause and make sure I'm doing my job in addressing some of the questions and concerns you have. Is there anyone out there that would like to—yes, please.

AUDIENCE: (Inaudible).

GEORGE HOWARD: What a great question regarding fraud.

JOE CONYERS: Same thing in my mind.

GEORGE HOWARD: But there are different legal—do you see them as different things or one. Okay, who would like to take that?

JOE CONYERS: I can't speak to the centralized databases, but I think you know from the news, the security of centralized databases, they're horrendous, right. Every day we hear about a hack of some sort compromising the data. That's the real technical innovation of a blockchain. It crowd sources security and it does it using a computer protocol. There's a bunch of computers and they're basically converting electricity and running through a bunch of really complex math problems called proof of work in order to secure the database.

Just to give you a scale of what's getting invented here, it's a decentralized network that's so powerful that if Google and all of its—I think they've estimated they have like 100,000 massive servers—if let's say they just pointed all of their computational power and tried to knock down the bitcoin blockchain, they would not be able to do so. They couldn't take over the network.

So these systems appear to be pretty robust and very secure. They incorporate public/private key encryption from the beginning, so they're actually built with security in mind.

So when you're thinking about building auditable, secure records and trails with permanency, a blockchain is looking like it's the best solution for that, for those problems.

GEORGE HOWARD: They're resistant to hacking, sure. When you said fraud though, I wonder if you meant, I don't mean to put words in your mouth, so correct me—I wonder if you meant the garbage in problem of somebody putting something on this in theory un-hackable ledger, and then, so can we talk a little bit about—this is the bugaboo in my opinion, in the blockchain. Does anybody want to talk about that, address that issue, the garbage-in problem?

UNIDENTIFIED PANELIST: I think that their scale will be bigger, but you'll have a lot more ways to truly authenticate people. That proof of life thing—people email Michael, I'm sure all the time, randomly—I'm using this as a strawman, but I'm now the executor of so-and-so's estate, and they can only do so much to authenticate that. At least in this instance they would have a way to track and see what steps we're taking to validate.

I always go back to the Silk Road⁷ when I look at this stuff, that was a really easy case for the FBI, other than the fact that they had agents that stole a bunch a money. They could track exactly where the money went. And if it were, say a drug cartel in South America, you just wouldn't have that kind of trackability other than marking bills, and sequential, and spy stuff, right.

GEORGE HOWARD: It's a great point. A lot of people have sort of a mis-idea about blockchain. Blockchain, from everyone that I've talked to, is like, the FBI loves that, it's like wow, this is so much easier to track than laundered money or paper money.

Other questions, comments from the crowd here that we haven't addressed yet?

AUDIENCE MEMBER: I have a question. I've been reading a fair amount about blockchain. I think one of the—you mentioned this *New York Times* article about the developer of blockchain who—

GEORGE HOWARD: I think it was a media article that may have been picked up, but just so we're all clear. Go ahead.

AUDIENCE MEMBER: And so I'm curious, Aaron, if you want to talk about the scalability issue. I take it that was the fundamental tension right now in bitcoin anyway, in the bitcoin network about the ability to scale up to a certain number of transactions. I think it's only a couple thousand per hour. Visa does millions in transactions per hour. Where do you see that issue going? And it's sort of related also to the computational effort needed, which of course is not free. It costs electricity and money and has obviously environmental impact, so where do you—I'm

sort of curious. Not speaking personally, I'm sort of curious, where you see that going?

AARON WRIGHT: So there's, just like with the early Internet, there's a lot of technical problems and hurdles that people need to deal with.

So when the Internet first launched, it was impossible to stream one video on Netflix across it for a variety of technical reasons. And scalability is an issue that these decentralized databases face. But there's indication that these are solvable issues.

So there's alternative blockchains. One notable one is called Ethereum. A lot of the projects that may have been referenced during the panel, they're usually built on this Ethereum platform. It's what 42 of the largest banks are using, to experiment and explore this technology, and it's much more scalable.

The bitcoin blockchain was really launched in 2009, and so it's taken six years of learning and experimentation and apply that, and it's beginning to see if you can scale things quicker and they've been able to do that.

So it takes seven minutes to process a transaction on a bitcoin network. It takes 12 seconds on Ethereum. So that's in six years.

If there's any type of Moore's Law effect that may happen and some people argue that there is, you can—scale-ability will be a solvable problem. But these are things that people are going to have to work on. It's not a perfect solution, but I think there's a lot of people who are committed to it and that are going to try to solve these problems.

UNIDENTIFIED PANELIST: I'll add that the Australian security exchange has just engaged this company called Digital Asset Holding that has raised about \$50 million last week, on top of another 20 to 30 to create an agenda-only distributed ledger for an exchange. So that is an incredibly dangerous thing. You have to keep it up all the time, it has to be immune and it has to be incredibly secure.

You see NASDAQ doing some activities, this is going to replace a lot of financial based transaction things. This is a huge, huge category.

BRUNO GUEZ: Something we haven't talked about today beyond the rights information and the workflows and automation that we can provide around metadata and standards—is part of the promise of the blockchain is real time payments. So the idea is that somebody could get paid for content consumption at the time of consumption, not 30 days, 60 days, or a semi-annual recording period with a 90-day grace period on top of that.

So the idea that Joe just listened to my song and I just collected 60 cents or a dollar, whatever I wanted to charge for that asset. And to me that's really interesting.

There are some companies that are doing interesting things around real time financial infrastructure. And like you were saying earlier, the syntek sector has really embraced, the banks have embraced all this financial technology because they really want to reduce the costs of transactions.

Imagine today it costs you \$20 to \$35 to send a wire transfer. Blockchain, it's going to be near real-time, and it's going to cost you a fraction of pennies.

So they have a huge incentive to make all the transactions faster and cheaper. And I imagine that will have a ripple effect onto the rights owners being able to collect money much faster and much more direct from peer to peer.

GEORGE HOWARD: Thank you. So Sy, just as we start a hurdle to the end here. The Copyright Office, where are you pushing it? Where would you like to see it go over the next year or so, vis à vis some of the topics that we've talked about here? What should the lawyers in the room be focused on with respect to legislation and the thoughts around that?

SARANG DAMLE: Well, if you could write your Congressman and tell them you'd really like to see some legislation that would be—

GEORGE HOWARD: Yes, I don't see that happening, Sy, but—

AARON WRIGHT: Funding increase for the Copyright Office.

SARANG DAMLE: Funding increase too, yes, so there's legislation to spin us out from the Library of Congress and make us a free-standing agency within the Legislative Branch. We've maintained our historic role. Yes, so I think the Register's come out in strong support of that move.

So I think it's a sort of stay tuned. There's a lot of—we've had a lot of companies come in, like Revelator, or companies like this that are working in this space to try to fix this issue at a grassroots level.

There's the going forward issue, can you fix it all now, going forward? But then you've got this huge backlog of songs, millions of songs that you have to figure out how to bring into any new system.

So I think there's going to be a lot of—even if they have a solution tomorrow that can work for people creating music now, how do you bring in all these old songs that people still love to listen to, all the Beatles catalog, on Spotify, how do you bring in those songs?

So I think it'll be interesting to see what Congress does. Stay tuned. I imagine you'll start to see bills dropping soon. And there's—to the extent you represent clients that are working in this space, there's a lot of public process around music.

We've completed our study, but I know Congress is still interested in hearing from people that are on the ground and looking to hear about solutions.

GEORGE HOWARD: How does one access that, Sy? Just from the horse's mouth, like if you're—

SARANG DAMLE: Sure. So our processes are very public. We publish notices in the Federal Register. We take comments on our website from the public. It's a very open process. I think Congress is less so, but I still think that there is, I generally think that the people that are working on, particularly the music issues on the Hill, the staff that are working on the Hill, are really interested in hearing from people—particularly on the technical side to help them to work through some of these issues.

If you just think about the House Judiciary Committee, right. It has a huge jurisdiction, copyright is one piece of it. It's all of IP, it's all of the issues involving immigration, the judiciary, on and on. These staffers are quite taxed. And so they really value—and I think they value our advice in terms of the legal advice, but they really appreciate hearing from people who are dealing with these issues on the ground. And seriously a letter to the Congressman addressing some of these issues, I think it gets attention. They pay attention to that sort of thing.

So I don't think it's as a closed process as many people seem to think it is. I think they're looking for all the help they can get on some of these very, very complicated and cutting edge issues. Mostly, it's just the function of time. They're very busy, they don't have nearly the staff. Government is very—especially after years of budget issues, we're all running on very shoestring budgets. So it's helpful to get views from the public who are, like I said, dealing with these issues day to day.

GEORGE HOWARD: I appreciate your transparency on that. So Michael, with the acquisition of HFA by SESAC, in some respects it strikes me as almost a metaphor for the industry, larger. We talked at the beginning of this panel about the arbitrary distinctions in some respects of mechanicals versus performance.

Where is this combined effort going, and does it represent a tip of the spear for the larger industry? And subsequent point, whatever other points you wanted to make as we roll up. I'd like to do this all at once. So if that question doesn't suit you, then answer whatever you'd like.

MICHAEL SIMON: I do think it is. I think it is a harbinger for the direction the industry is going. We need to defrag the rights. We've got groups of people—it's where I began. There are groups of people who handle performance, groups who handle mechanical, groups who handle lyrics, tabs, audio only, audio/visual, they handle them for the United States, or North America, or Central America, or we think that foreign countries are really far away because we have oceans that separate us.

But if you're sitting in any number of European territories you're an hour away from another European territory and possibly a completely different regulatory scheme.

So in the same sense that we talked about blockchain or the whole bitcoin universe as creating a decentralized but centralized, because it is a thing, it might be several things, but it is a different version of a thing.

What we are going to do is we are going to represent multiple rights, not just mechanical, and not just performance. And you don't have to call three people if you have a question about mechanical performance in synch, there will be one customer service focus across multiple rights.

We are almost done—our deal closed on September 10th, and we are most of the way done for a unified database, which means we'll have a database of performance and mechanical. That not just is a database of the compositions, but a transaction platform that can handle mechanical, and performance, and lyrics, and tabs, and micro-synch, and mass-synch, because the market needs, the creative community needs, the writers, the bands, they need a reduction of the friction. They need a reduction of the infrastructure. A reduction of the number of people. If could end up, as we discussed, reducing me out of a business, but that's Darwinism. And if we can build a platform that goes across rights and goes across territories and creates value at the right price for rights holders and those they serve, then you have a business.

My comments for practitioners who represent folks in the creative community is that if they control rights, not everyone may agree with this, you may want it in one place. But I would recommend that those who control rights, register those rights in any database that will recognize them.

HFA doesn't just store data on compositions it represents, it stores data on any composition it can identify. Get them registered anywhere that will recognize them, and be very careful about hiring third parties who, no matter what they say principally for a substantial portion of the gross revenue, will do exactly what I just described, which is cause your band client, because the law firm doesn't want to do it, to go hire somebody to claim the compositions. And then the first thing they do is register those compositions in my database and then have me redirect payment to them and take off 25% and then pay it through, when in fact, I would have taken those compositions at no charge. You can call me up and I'll take the compositions.

So there are services that are valuable that get in the middle, but I would caution practitioners to evaluate them carefully before you send a rights holder to someone if mostly what they're going to do is get it into my database, or whatever Joe may ultimately build or other folks. That's not worth 20% of revenue to call up one of

the people in my office and get your song in my database. If it was, I would leave and create that business myself.

GEORGE HOWARD: Of course, and that goes to the confusion.

MICHAEL SIMON: Yes.

GEORGE HOWARD: There is an education component here that many of us on this panel and in this room are doing our parts on, but we've got a long bridge to gap. Thank you.

Aaron, blockchain tech in the next year or two years, and your final statements.

AARON WRIGHT: I think that blockchain tech is really here to stay. I think it's just part of a broader trend of decentralization of the Internet. I think we're just entering a new phase. We've been in the black and white phase of the Internet, now we're moving to the color phase, right, where you can do a lot more powerful things in a decentralized way.

I think the music industry is going to be an area where there's a lot of experimentation. I think because it has always been set at the forefront, just dealing with technology for hundreds of years. It's always kind of sat in the middle of the buzz saw, whereas, technology kind of runs through society.

I think we're also going to see a lot of learnings in the financial services industry that's going to form things here. Fundamentally, it's dealing with things that touch on commerce in general.

So from assigning things, to authentication, to automating things, and commercial arrangements, to payments. And these things just don't hit the music industry, but they hit everybody.

That's why the venture capitalists are there. That's why venture capitalists are amending their thesis of what they invest in to invest in these types of companies. And I think we're going to continue to see that over the next five, to 10, to 20 years.

GEORGE HOWARD: Thank you. Joe, your final thoughts and what specifically Downtown Songtrust will be doing over the next short period of time.

JOE CONYERS: I think there's obviously a big business as usual component. Until we do have a solution, there is going to be lot of work still to be done. I think as a publisher, I've spent a lot of time bettering our metadata. We're going to continue to do that.

A lot of publishers do not have their house in order. There's certain parts of the catalog that you just can't get your house in order because your client is never getting their house in order. So we spend a lot of time in trying to make that easier for our clients. I think that's what publishers are going to have to do. And really think about

how do you make it easier for your clients to give them the information you need in a timely manner. And I think publishing is going to be much more of a client services business again, once we do get rid of this kind of opaque, scary, well I'll just let them handle all the rights, and they'll do it. It will be the same way, but it will be done more—you'll win deals based on creative and financing rather than, well, they're the best technology person and whatever.

GEORGE HOWARD: I love that in an era in which all participants have access to the same tools, he who uses them most creatively wins.

So someone who uses his tools very creatively, Bruno, where does Revelator go next year?

BRUNO GUEZ: Asset registration, building a search engine for intellectual property so the information is more accessible and more transparent to people who are looking for that.

A lot of our customers are in the emerging market across America and Africa. So you could imagine there that the infrastructure is even less, and everyone is on mobile, not even on computers. So the whole idea of being able to capture metadata at the moment of creation on a mobile device and making that an asset registered on the blockchain so that it can be searched and accessible to people. That's something that excites me.

The whole idea of blockchain over the last couple of years, all the conversations and panels, and articles, and all the articles you've written, George, we've read them all. I think it's about educating and aligning people on interest, knowing there are a lot more awareness around this now than there was a year or two ago when the D.A. wrote a genesis article about the Genesis Block, and I think what's exciting is once we start to see the first artist doing a million transactions using blockchain tech, and selling direct through mobile application, I think people will take notice and it will start to change people's behaviors towards the technology. And we'll soon see that adoption towards those kind of solutions more aggressively.

I think Imogen Heap started something interesting with that. We haven't seen a million sales yet, but I'm sure wherever there's money, there will be an industry.

GEORGE HOWARD: Wonderful, Bruno. Good luck with that. So before I sum up a little bit, are there questions from anyone? Joyce, sorry.

AUDIENCE: (Inaudible).

JOE CONYERS: Imogen has this thing called Mycelia,⁸ and you can go in and you can download her track, you can ask to remix her track. She's publicly shown where all the monies are going to go in terms of her splits with her composers, and co-writers, and other artists that she's decided to share some money with. And she's also

described how derivative uses would be posted so she can see the entire chain of, someone made a use, of a use, of a use, you'd be able to track that all back. And she has what her share should be of that fifth derivative use. So if it were streamed, you'd have to pay some percentage of that and that would go to that person, and so on and so forth. It's a multi-level marketing pyramid.

JOE CONYERS: Lots of lots, and lots of micro, micro pennies.

GEORGE HOWARD: And just before, Aaron, I'd like you to address the ability to see the transactions on the ledger. One of the other things that Imogen's done, it's so interesting that we haven't really talked about, it does give incentive to people to share her music and promote her music, which has again, been sort of a bugaboo in the industry.

You get these sort of early adoptors, and influencers, or what have you. And they really have had no incentive beyond the being a maven or some sort of ego boost. This technology does allow those people to be rewarded, either financially through credit or through access to other things. And to me that's a very exciting prospect.

But Aaron, in terms of actually seeing the actual record of the transaction. Talk a little bit about that.

AARON WRIGHT: Sure. So a blockchain is a public database. So you could download the client that supports one of the blockchains and run it and view it in a very technical way.

There's also services that are built on top of a blockchain. They're called blockchain explorers, where you can search for actual transactions. So let's say you knew the account number for Imogen Heap was storing all of the revenue that she made generated from sales, you can put that in and see what that account balance is at that moment. And once you do that, since it's a traceable database, you can see all the transactions that have flowed to and from that account. So all the distributions, all the payments, everything like that.

In terms of the smart contract code, it's source code. So if you don't read source code, then it's going to be very cryptic, but if that's built on the Ethereum blockchain, that source code is actually stored on the blockchain and you can view it and put certain technical manipulations. You can actually render out the actual contractual language.

But there's still like a veil of secrecy, it's synonymous, and it's not completely transparent to the actual code that's written. But I think I've seen the—I've worked with some of the people from UGO Music, I saw the contract, it's a handful of lines of code. It looks like any other piece of software.

It's conceivable that at some point lawyers will need to learn how to code.

AARON WRIGHT: I will say, or they'll have languages to code into these things in legalese and keep it with what they kind of know already.

GEORGE HOWARD: That's a good point.

AUDIENCE: (Inaudible).

AARON WRIGHT: You can think of it as a bank account, right. They call them virtual currency wallets, addresses, it's a bank account. So to the extent that you want to transfer it, there's already lawyers who have begun to work through those problems in the trusts and estates context. It's like a bank account that has a password, like an email password. So if somebody has access to that password, then they can access that account. So the personal relationships where there's a lot of trusts, let's say it's a spouse or an heir, that password can get passed down and they can access it.

So the government can compel the—

GEORGE HOWARD: It's still rule of law. Again, it's very important to realize, none of this obviates a) conflict or b) rule of law.

AARON WRIGHT: And it's the beauty of the common law. We have lots of systems that are flexible and adaptable to it. But on the point of stopping transactions, this is the core and probably the most exciting, this is like the web to the blockchain, it's autonomous. So you can't stop a transaction, there's nobody sitting in the middle checking to make sure this transaction is valid. As long as it abides by the underlying code, it will get processed by the system.

So there's deep and concerning—this is what I focus on, these questions of autonomy and how you stop it.

SARANG DAMLE: And I think Ethereum and smart contracts will have significant finance repercussions in the future. We will see a derivative waterfall effect or something, and bad things will happen and we'll learn, and we'll get through it. Especially when people are moving their futures contracts for whether, or other things, or insurance products, you're going to have situations where the bank will break just like in real life, and the regulators are coming in saying you can't do that.

So it's the regulators and the law will catch up with the way that people are going to do this. But people are doing this offline through paper derivatives already.

AARON WRIGHT: And all these problems are opportunities for intermediaries, right. So people can manage this or make this easier. And if there's enough scale and there's small fees that can get extracted from it, I think that's a business too.

GEORGE HOWARD: Yes.

SARANG DAMLE: I don't have up-to-date information about that, I know it's progressing. I know they've got virtually all of the card catalogs scanned in and now they're testing handwriting OCR solutions to try to convert—particularly very old ones are all handwritten, and fortunately the people that wrote them had very good penmanship, so it makes the OCR project a little easier, so that's still in progress. And I know that we've had a few contractors in and a few academic institutions in to look at various solutions to actually not just put up the images, but to actually digitize the cards themselves, so that way—it's not very useful to have a bunch of images that aren't searchable, but to actually have a searchable database of those older records which are literally cards. So that's—I mean that's the next big step.

I think everything has been scanned. I think there's some manual work that's being done working backwards, but I think we're looking into try to make that go much more quickly and start getting some sort of automated process in place.

It's actually very fascinating. A handwriting OCR technology is really incredible. It's really advancing at an incredible pace, and so we're trying to look at the cutting edge of that, bringing in people, either private sector, or from academia, to put in place some system to get through it.

I think particularly the academic folks are really interested, because we have this very huge, it's this big data set that they can play with. So I think that's progressing. I can't give you a time frame when that project will be completed, but it's something that a lot of effort is being put in to.

GEORGE HOWARD: Thank you. So we need to wrap. So first I want to thank EASL, I want to thank Rob and Joyce. I want to thank my panelists, you guys were amazing. Thank you all very much.

Just to sort of sum up, there is a calibration that needs to take place with any technology where there's the tension between, well this isn't going to solve every problem in the world, and, oh boy, this is just a lot of pie in the sky hot air.

The most recent article that I wrote was entitled, "Haters Gonna Hate: Why Those Celebrating the 'Death' of the Blockchain Are Missing the Point." And I summed up the article with saying, so sure, the blockchain may go the way of the Diamond Rio, the MP3 player, but very clear, the technological innovations and the general shift in mindset that have been developed and occurred because of the bitcoin blockchain cannot and will not ever die. In fact, it's just getting started and ignore it at your peril.

I think our panelists here really articulated that well. So thank you all very much.

The Destruction of World Heritage Sites as It Concerns Cultural Property and International Laws

[Due to a personal request and technical difficulties, the presentations from Brenton Easter were not transcribed].

IRINA TARSIS: We've converted from new technology to old technology and we're going back in time, so just bear with us.



So thank you all again. My remarks will be very short because you have a fantastic panel following.

First of all, thank you to EASL for recognizing Cultural Heritage as an important topic for us to address this year. And special thanks to Lori Nicoll for helping with all the prepara-

tions for this panel.

Where did the idea come from? So, ISIS smashes, bombs, and bulldozes irreplaceable cultural heritage to send a message that it will not tolerate any opposing view, no matter how ancient, to its bleak and monolithic vision of the world.

This is the premise for an exhibition that is happening at John Jay College right now called, "The Missing: Rebuilding the Past." And that exhibition is actually a response from the artistic and scholarly community to actions of ISIS, vis à vis cultural property.

We're here today, and the question posed to us is: how do we attorneys, and soon-to-be attorneys, respond and react, and maybe help resolve some of these issues, where culturally rich regions like Syria and Iraq, under control of ISIS being mined for antiquities, and illicit trade is coming towards New York, and other areas?

So we have a group of attorneys, all but one. Our Moderator is not an attorney, so we have some diversity, who will help us think about stages where an object comes from the source country, either the soil or above ground, and how does it make its way into our world, and how can we react, and how can we be armed, vis à vis this problem that has been ongoing for a really long time.

So thank you for your attention. And I turn your attention to our Moderator, Peter Herdrich. He is the co-founder of Antiquities Coalition, and he has done a lot of work to try and strongarm and raise the subject to different audiences' attention. Peter.

PETER HERDRICH: Thank you, Irina. Welcome, ladies and gentlemen, here on this afternoon.

Welcome to the New York State Bar Association's Entertainment, Arts and Sports Law special Section panel called, "The Destruction of World Heritage Sites as It Concerns Cultural Property and International Laws."

I want to start by thanking Irina, of course, Irina Tarsis for the Center for Art Law, our extremely capable Program Chair.

I'm Peter Herdrich, as Irina said. I'm with the Antiquities Coalition. We combat looting, the illicit trade in antiquities, and now we find ourselves in the antiterrorism business. That's a big change in the course of the last year and a half or so. And we'll talk more about that during the course of our panel.



We're looking for implementable solutions, and that is why we work very closely with attorneys across the board in international and local law. And if you'd like to know more about us, have a look at our website; it's the antiquitiescoalition.org.

We have a really cool map that we just put up today, which shows destruction, and is an interactive map on our site about destruction across the MENA area.⁹

It's my pleasure to be here. We have a group of experts today who really are first rate and who are going to share practical tips on engaging with the antiquities market in this perilous time.

Among the topics we're going to discuss are how looting and illicit trade is funding terrorism, how objects get from the ground in supply countries to markets in demand countries, and illegal exposure that accompanies the possession of looted antiquities. And I'm sure we'll have lots of other topics we'll touch on along the way.

We have a world class group here. I'll start by introducing them. From your left to the right, Colonel Matthew Bogdanos, of the New York County District Attorney's office and the U.S. Marine Reserves. Brenton Easter, a Special Agent with the Homeland Security Department's Immigration and Customs Enforcement Agency. Megan Noh, who is the Associate General Counsel at the auction house Bonhams. And Steven D. Feldman, who is in practice here in New York at Murphy & McGonigle.

Let's return to our title for a minute, and get started with a brief overview of the destruction of World Heritage Sites.

It's an ongoing problem; many of you know that just this past week we lost St. Elijah's Monastery in Northern Iraq. It's been razed by the so-called Caliphate of

Daesh, or ISIS. It's 1,400 years old, it was one of the oldest Christian sites in the country. You can see from this slide that on the left is St. Elijah's before and on the right is the evidence of St. Elijah's today.

The use of satellite photos is critically important for what we do, because we don't have on the ground reports, and we see into these areas, which are in this case behind ISIS lines, principally from overhead.

This is a slide which shows you actual looted pits, those are what looted pits look like. There, in Egypt—I took this photo myself just after the Arab Spring uprising. This was May of 2011. You may know—if you know the site of Abu Sir, it's not far from the famous Temple of Djoser in just a half a mile away from here.

What happens here is in times of insecurity and uncertainty, that's when looting takes off, and you'll understand that at this time you'll remember that five years ago, the security was not what it was before then. And in this case, opportunistic looters and organized cultural racketeers took advantage to try to see what they could find in the ground, and take it and put it into the illicit market. This is a well-known example, it's the Mosul Museum of March of last year; we've all seen the video.

The remarkable thing here is that many of the large objects were destroyed, many of the small objects went away and are presumed to have been entered into the illicit antiquities market.

This is a satellite view of Dura Europos in Syria, that's the Euphrates River on the upper right. Dura Europos is a Greek Parthian and Roman city. And you could expect objects from those three civilizations to come out of the archaeological sites, and provide information about that great history. This is 2012. And here is Dura Europos in 2014, after ISIS had taken over the area.

You'll see—you can see from the grid pattern and the close up, those dark spots are looters' pits. And you can see, actually, how close they are and what a proliferation they are.

Now, none of the material that was in that, which would have been scientifically excavated, and which would have aided in our understanding of our shared cultural heritage, is going to be available to us. It's gone, it's wiped from the record, and we're never going to know how that material might affect our understanding of who we are as a people.

So it's evidence of just how thorough and just how complete this approach is and how it's done that way, because it is a resource, it's a financial resource for the terrorists.

You can see that a little bit closer. It's not only, of course, ancient scientists, it's also multiple cultures that are affected by all of this. So here is the Umayyad Mosque

in Aleppo, Syria. Aleppo, you know, is the capital of the so-called caliphate, that is before, and here is the picture after.

The heartbreaking part of this is this destruction really does cover so many sites, and so many areas, and so much material. For millennia there have been tombs, and for millennia there have been tomb raiders, but this is really of a different magnitude, what we're facing today. And it's for a truly despicable end.

And make no mistake, the looted objects are trafficked into the market and the receipts are used to fund terrorism, to purchase the knives that are used to behead aid workers, and journalists, and are used to effect the denigration of women. That's not made up, that's a fact, that's beyond question.

So it's this change in the last couple of years that really has galvanized a lot of people, caused a lot of people to get involved in this and generated a lot of interest. And it's time for us to realize that and try to get that. What we try to do with the Antiquities Coalition, especially, is to try to get that message out so people do understand that we are facing a crisis.

MEGAN NOH: So we know that the stuff is being looted. And I think all of the auction houses and other members of the trade in New York recognize that that's a significant problem, and it's a real tragedy of epic proportions.

The question is, once it comes here, where is it going and what can auction houses do in terms of vetting that property? And what can collectors do, to the extent that there are attorneys in this room who advise those collectors? How do we all need to work together to kind of flush out this material?

So just a little background on my organization, my position. Bonhams Group is an international network of auction sale rooms trading in, among other categories, antiquities.

I sit in the New York office and I deal with a variety of cultural property issues, most of which we're not talking about today. So including pre-Columbian property, African, Oceanic, Tribal, Native American.

Today we're talking specifically about things from this Middle Eastern conflict region. And those items are sold by Bonhams's Antiquities Department which is based in London. And we have found that this specific market is more active in London than in New York, which is why the department is situated there.



I think that there's kind of a Hollywood and a popular media version of where these antiquities are surfacing. And it's not really in keeping with the facts.

Since we aren't getting sound, I'll talk you through what's happening here. This is a clip from a new show that's on an online TV network called Crackle, it's called "The Art of More," and it's a totally sensationalized sexy drama about the auction world.

What we're seeing now is a U.S. soldier who is supposedly stationed in Baghdad in 2009 and patrolling the museum, and he's about to intercept this group of thieves who are taking museum inventory, specifically a hoard of weapons and golden jewelry, that looks like it's maybe loosely based on the Treasure of Nimrud, actually.

So gold stuff, nice nice. Precious antiquities, theft in progress. And then it's going to cut to the crown being sold at auction with the soldier now working for the auction house and narrating the action. So that crown is actually what makes me think it's loosely based on Nimrud. There aren't a lot of Iraqi antiquities like that.

So the point here is that we see it going straight from being stolen to being sold in a prominent way, prominent advertising in a posh luxury sales venue in New York. And the soldier who is now an auction house representative, they explain that later in the season, he's also magically an expert for both impressionist modern in antiquities, which we don't see a lot of.

So his voiceover notes that every item we sell has a unique history, and you'd be surprised how many reek of blood and dirty money. The big collectors are more than willing to look the other way.

So later in the show we find out that this narrator, the formerly intrepid soldier, was in fact moonlighting as a smuggler and funneling these illicit objects to the very auction house for whom he now works as a business getter. This, ladies and gentleman, is classic Hollywood fiction.

So in addition to Hollywood's misinterpretation of what goes on in the auction world with respect to antiquities, we're also seeing a lot of media confusion. It seems like anything that is described as Assyrian is automatically assumed to have been recently taken from modern day Syria. And then that kind of snowballs into an assumption that this must have been looted by ISIS. In reality there are much finer distinctions at work here.

As we've talked about with some of the other panelists, we're seeing looted material that spans a range of cultures and historic eras, and we're also dealing with things that may have been taken from the very region in question, but taken before the modern day Daesh was active there.

So on this slide, you'll see an example of a press report that's linking an Assyrian stele to ISIS. The title of the

article is about ISIS looting. The caption of the photo mentions the tax imposed by ISIS on looted antiquities, but nowhere does the article actually link this specific object to ISIS. And you'll see this object later in the presentation.

So as an initial matter in terms of how this matter works, it's worth noting that the looting and illicit trade of antiquities and objects of cultural properties is of course nothing new. And we've talked about this earlier. It's been observed for decades, if not centuries, in the fields of classical antiquities and pre-Columbian artifacts, among others. But what is new is the scale on which this looting is taking place, and the level of organization where it's being used to systematically fund terrorism.

However, all of the reports from the ground have indicated that the material in question is not being directed to mainstream auction venues; rather, it's being traded through online chat rooms, and peer-to-peer web boards, and other digital gray market or black market means.

So this makes sense, unlike the suggestion posited by that clip from that show, "The Art of More." A mainstream auction house would not likely be a smuggler's first target or first candidate to approach for sale of this material. Because of the scrutiny employed by the houses themselves and their discerning purchasers who, contrary to the narrator's statement, are generally not looking to look the other way. It's much more likely that smugglers would target a naïve individual collector who simply isn't aware of what's going on or isn't aware of the right ways to vet this material.

So you see on this slide, auction is one end of the commerce spectrum and we get things after they've changed hands a number of times. And those periods of intermediate ownership may span decades or longer. Some of these materials that we sell in an antiquities public auction have been in private collections, and on exhibition or display for many years, and have been published.

So once we do take in an object for consignment, we research an object thoroughly, and we'll talk about that more. And assuming it passes that hurdle, we then photograph it and formally describe it for an auction catalog, which takes months. So none of this is a quick turnaround. We're not getting a digital photo of a looted object and then selling it the next day. Generally, the auction time frame is about six months.

So far it's worth noting that the major auction houses in New York, as far as I'm aware, we have not seen ISIL-looted objects surfacing in our market, that is to say, the market comprised of international larger auction houses. Nor have we received solicitations for consignment of this material.

The fear is that in the primary auction market we're going to start seeing it in about five years, so as Brenton mentioned, there's generally a period of sitting on this stuff for a little while. And we'll start to see it surface

when people are looking to flip something that maybe they realized it was wrong and they sat on it, or maybe they hold onto it for a little while and start to realize, hey, I don't think this thing is kosher. So what's going to happen then?

So the next really critical concept to grasp is that again, auction houses undertake significant due diligence prior to offering an antiquity for sale. In addition to vetting quality and authenticity, we investigate title in order to be offered for sale, something has to have both good and unencumbered title.

On this slide are a number of the factors that auction specialists take into consideration when evaluating this important issue. And with respect to provenance, which for those of you who may not be familiar with the term, references an object's ownership history, auction houses inquire as to whether a potential consignor has paperwork from his or her original purchase of the item, and fleshes out where the item has been purchased. And sometimes these things have been at auction before and so the auction houses are fairly open to providing each other with information about past sales and that kind of thing.

We also ask about any paperwork that an owner may have from a previous import or export. And sometimes we contact previous owners in the provenance chain. If somebody says, hey, this was part of this known collection, we may look into that. If there are catalogs associated with that collection, we may try to confirm that.

So practical challenges do exist, in that sometimes those prior owners are deceased or records were not maintained. It's typical that 40 or 50 years ago, somebody just wouldn't have realized how important it would be to retain that invoice. But there's a lot that we can do to try confirm licit status.

Ultimately, auction houses, though, have to kind of make a judgment call about each object. And much of the judgment has to do with previous owners and whether they're recognized collections. It's always preferable to source objects from long-established private collections and pieces which have been publicly displayed or have a well-documented purchase history.

We also work with partners. So we use some of the main databases who record claims that insource data from international law enforcement agencies for recorded theft and other property title claims. And certainly we want something to clear that database in order for it to be offered.

Bonhams enjoys a collaborate relationship with the British museums. Sometimes their research capabilities simply exceed ours, and we've had great success with them identifying specific items and what site they may have come from.

In several instances, this has resulted in identification of a potential claim, which we then report it to the Metropolitan Police in London, which led to the object's surrender or seizure.

So although auction houses conduct their diligence in cooperation with partners, we're still unfortunately operating in a world of inherently imperfect information.

A good example is the archives of convicted antiquities dealers Giacomo Medici, and Gianfranco Becchina. Medici is linked to the subsequent sale of the looted Euphronios Krater to the Metropolitan Museum of Art. That's the middle object on this slide, as well as the investigation that led to the Getty Museum's repatriation of antiquities and the indictment and resignation of its curator, Marion True, that was big news awhile back.

In the 1995 raid of the Geneva Freeport that led to Medici's own prosecution by the Italian government, the Carabinieri seized thousands of documents, binders and binders of photographs, and lists of objects that were part of his illegal smuggling trade.

Becchina is the gentleman—so Becchina is on the right, he's the guy who sold the Getty the fake marble kouros, and he also archived his transactions in 100 binders comprising over 10,000 documents, which were seized by the Swiss authorities in 2001.

Unfortunately, neither the Becchina or the Medici archive is currently publicly available. Their contents are selectively disclosed to particular law enforcement agencies, government officials, and scholars on a case-by-case basis.

In March of 2015, the Association of Art Museum Directors, AAMD here in the U.S., issued a statement on the occasion of the renewal of the memorandum of understanding between the U.S. and Italy. And the AAMD took that opportunity to say, hey look, if we're going to renew this bilateral agreement, we should really be looking at more transparency for information, and sharing information. How can you expect U.S. institutions to vet property if we don't have access to all the information about what's been looted?

So that's something that hopefully we'll see continue to develop in the next couple of years. But in the meantime, unfortunately despite all of the proactive measures that museums take, and auction houses take, there are sometimes gaps in title, which we can't strongly link to a suspected theft or a looting incident. So it can be a malignant gap, or it might just be the case that in the life of an object created in 500 B.C., understandably, there are going to be some gaps in knowing where it was at every moment over the last 2,500 years.

So accordingly, where appropriate, sometimes auctions will explore title insurance. And you see the Eris

logo on the bottom. I think there's some text missing there. But Eris sometimes will be able to underwrite title risk on behalf of a client who is looking to sell something with incomplete provenance.

So I'll breeze through this because I'm running out of time, but in terms of rules and cutoffs, obviously we talked about UNESCO 1970 in one of the previous presentations I believe. There is U.N. Security Resolution 2199, and we've included that in your materials. There's also U.N. General Assembly Resolution 69281, and there's the Antiquities Dealers Association Code of Conduct.

Bonhams, as far as I'm aware, is the only auction house member of that trade alliance, and the guidelines for that are currently under review. Previously, the Antiquities Dealers Association did not require documentary evidence. And we are looking to implement a documentary evidence requirement for anything that's showing that things are pre-Arab Spring.

For Egypt, we generally look at 1983. And for Iraq, we look at 1990. We can get more into those dates and the specifics, if you want to, during the questions.

So at the end of the day, no diligence is foolproof. So I'm not here to say that Bonhams has anymore pristine a record than anyone else. Everyone in this field makes mistakes, and this is an example of a lot that was pulled from the sale. The same consignor had also consigned items to Christie's, which were pulled. This was a guy—the consigner was a British guy who worked for BBC on a docudrama about Egypt, and bought fishy things while he was living in the country, and unfortunately gave false provenance to all of the auction houses. He said this stuff was owned by his uncle, who was stationed in Egypt for World War II. And that's the kind of thing that, however robust our diligence, auction houses and museums can't control when somebody willfully gives them false information.

So the great thing about auction though, as opposed to the private transactions, which we believe comprise the substantial portion of this market at present, the great thing about auction is that we do have an opportunity to flush these things out. We're putting the catalog out a month in advance of the sale, it's online. All the people who are looking to find things that may be missing have an opportunity to bring these claims to our attention before the item is sold. Ultimately, this consignor pleaded guilty to fraud charges, so that was resolved.

You may remember this stele from one of my beginning slides. This was an Assyrian item. And it's the lower portion of a royal Assyrian stele. It's part of an ongoing investigation so I can't say too much about it, but it's received a great deal of press coverage, so we can certainly cover what's public.

The item was previously offered by Christie's in 2000, so it's been on the market for over 13 years. It was

consigned to Bonhams in 2013. So we're talking about pre-ISIS, right. However, members of the scholarly community raised questions about exactly when it was taken out of Syria. We don't just care if ISIS stole something, we care if it was legally exported from the country under any regime or political takeover or conflict issue.

So the consignor had indicated his belief that the item had left Syria in the '30s and was in his family's possession by the '60s.

We also obtained an archeologist's report, which showed that this portion of the stele had been missing from an archeological site as early as the late 1870s; however, there were also reports of an illicit excavation from the relevant site in 1999, which is exactly one year before it was first offered by Christie's, so that I suppose could look a little bit fishy.

In light of those questions which arose, Bonhams cooperated with Interpol and the Metropolitan Police, and withdrew the item from auction, but then that led to press about this having been ISIS looted.

So we all have to work together to draw these distinctions and make sure we're looking at what is the accurate information, and not blowing things out of proportion, or causing alarm, or drawing focus away from the real issue.

So again, collaboration, communication. Among the materials that we've included in the course book are the ICOM¹⁰ Red List for Iraq and Syria, to the extent that you have collectors who are active in this area within your client base. That's a great resource for them to be aware of what objects are the most likely to have been part of an illicit trade. And we all have to work together, because by the time something gets to auction, it's already been a part of one or more illicit transactions. And we do the best that we can to vet this property, but we need people who are earlier in the stream of commerce where this material flows to be just as active. Thank you so much.

PETER HERDRICH: Thanks, Megan. So Steve, we've got the material here in New York, and you're in your office one afternoon, and you get a call and it's from a client who says, Steve, I've got a couple of questions for you about this thing that I've just purchased, I've just acquired, and I'm not so sure about maybe where it came from. Do you want to take it from there.

STEVEN FELDMAN: Thank you, Peter. My name is Steven Feldman, I'm with the law firm of Murphy & McGonigle. I get to bat clean-up to this great team. I think probably we're out of order, given that I'm sitting in this role, but let me do my best to add.

So I get to play the role of the everyman lawyer. The spot that private attorneys play in this crazy whirlwind in this path that we've seen of these items coming from across the world, and how we can help our clients, whom—ever those might be, deal with these kind of situations.



So by way of background, I'm a former Assistant United States Attorney from the U.S. Attorney's Office in Manhattan. I was a prosecutor in the criminal division there for six-and-a-half years. And then I left the U.S. attorney's office in May of '08 and became a defense attorney, so switching sides, to help pay for my kids to go to pre-school in Manhattan and have a life, which was

unfortunate, because watching Matthew, it's one of the greatest jobs in the world, but whatever, life goes on, kids are happy.

So there's three roles that I've played as a criminal defense attorney in the side of dealing with antiquities and art, and thinking about looting and where we fit in.

So we've played the role of representing the victim—that is, the country or the institution that comes to you saying, we think there's some of our items that have been stolen and ended up in the United States, what do we do, do we sue these people, how do we get the stuff back; we don't know your system, we don't know your laws, we're a foreign nation. What is it that we do to try to get our property back?

Second, I've represented galleries, institutions as witnesses. They get subpoenas to come testify in the Grand Jury, they get Special Agents showing up in their offices wanting to ask questions, people demanding documents, and for them that creates a host of problems. This is a world that likes to keep things confidential. They don't want to reveal who their clients are. They don't want to reveal their transactions. They are hesitant, to say the least, to want to just open their files to law enforcement agents coming into their office. And they don't want to necessarily be the one on the stand testifying at the next trial of whoever that might be.

Third, I represented the individuals in these criminal investigations. So where there's somebody who is accused of either having acquired a piece of property that the government now wants to forfeit, which is a huge money problem for that person, and potentially becomes, as we've seen in some of these cases, becomes a criminal problem as well, because depending on the situation it may not just be that there's the basis for a civil forfeiture action, but depending on how that plays out there may be basis for an actual criminal prosecution. So it's an area that is fraught with peril that we have to walk through carefully.

So I want to talk about those three scenarios and how we as private attorneys can play a role and assist the clients in those scenarios.

So one of the big challenges if you're the—I'll start going back to the first example I gave. The country, the institution recovering this property here in the United States, is one of economics, and there's one of knowledge; that these countries and these institutions often don't know how our systems work. They don't have the money of a large corporation to bring lawsuits in the United States. Their witnesses are abroad, their information is abroad. And the property sometimes, while it has huge cultural significance, may not be expensive enough to warrant a big bang out lawsuit here in the United States.

So a \$60,000 piece, while important to the institution to get back, is really a tough number as all of us know, to litigate over.

So if it turns out that it's in a dealer here in the United States and they've identified it off the Internet, it's still difficult for them to say, look, we want to bring that case in court, because even if they win, how much are they going to spend on me, or you, or somebody else to get that piece of property back.

So this was the situation we faced in one of my representations where I was part of a team that represented the National Library of Sweden in an effort to obtain books that were stolen from the libraries. The National Library of Sweden is an institution similar to our Library of Congress. The books in the National Library of Sweden went all the way back to the Kings castle from the 1500s, 1600s.

In that case, a dirty librarian working within the National Library stole books, stealing at least 60, probably more. He would secret these books out of the Library. He would rub out the markings that showed that they went back to the Library for decades and centuries. He would then take them by train to an auction house in Germany, where he would sell them for cash under a fake name.

Lots of red flags there, auction house buying things for cash, using a fake name, so the guy certainly didn't have identification. Coming back repeatedly with these books that were one of a kind, yet those sales went through.

Those books were then sold by this auction house and ended up all over the world, including here in the United States. And we were approached to help by the National Library when they located books on the Internet now being sold from various book dealers here in New York and other places in the United States.

So we face the problem, we could try to sue each one of these book dealers for a \$25,000 book or a \$60,000 book, a very difficult amount of money to sue for. And what we ended up doing in that case was the strategy of turning back to these good fellows in the government.

So we turned to the U.S. Attorney's Office, to my old bosses, and my old colleagues. And on behalf of the Li-

brary, asked them to help us track down these books and try to get them back.

The Library had no idea that this was an available route for it. So there's a knowledge problem here. And it's useful as a private attorney then to be able to represent them, because they don't know how the U.S. legal system works.

So we were able to present this case to the U.S. Attorney's Office. They were very interested in taking on the case in part because they want to have good relations with foreign governments. They want to help foreign government institutions get their property back.

In that case, the U.S. Attorney's Office recruited the FBI. And so working together with an FBI agent who was involved with art cases and cultural property cases, they took the lead. And so we were able to sit back, not spend the clients' money, and the U.S. Attorney's Office then tracked down these books, the FBI tracked down these books all over the United States. And eventually over time, they were able to recover about six of the books that had been stolen from the National Library of Sweden. And so that was a big chunk of what we had located here in the United States. They were all turned over without litigation, without the Library paying anybody any money for the book, because the Library believed, as the victim of the crime, that they did not want to be purchasing these books back, that that was the wrong thing for it to be doing. And that was a successful situation.

So it was a case where the U.S. government was able to help a foreign government and be able to return the stolen property to them.

Secondly, as I said, there's opportunities where we represent the galleries or institutions that get wrapped up in these investigations.

As I mentioned before, the galleries are often concerned with the situation when the subpoena shows up at the door or when the government comes knocking, because of course what's important to them, among other things, is confidentiality. They don't want to reveal who their clients are to anybody. The clients don't want to be known in their transactions.

So there's a balance here in wanting to be a good corporate citizen and assist the government in an investigation, and at the same time, wanting to do right by your clients because they expect these things to remain confidential.

The one good message from that is my experience is the law enforcement has often been willing to accommodate us in these kind of situations. They'll allow details to be redacted from documents as long as it's not absolutely essential to the case.

So we have had situations where we had to turn over—where the gallery or the institution is not the target of the investigation, is a collateral witness to it, and is able to turn over documents and information and redact them sufficiently to protect the anonymity of the client.

Now, there are no promises that as the investigation goes on, that they won't come back and ask for more information, but as a starting place, it's a comfort to the client.

So part of the overarching advice I give to the clients in these situations, to the galleries, to the institutions, is that they do want to take steps to be the good corporate citizen. That potentially when they're wrapped up in an investigation, you don't know whether you are the witness, the subject or the target, you don't know where you fit in.

It's important to have policies and procedures in place so that the government regards you as the good corporate citizens and not as the bad guy.

So we've heard particularly from Megan in her presentation about steps, the compliance steps that institutions need to be taking. And we've heard about those steps really in the idea that this is just the right way to be doing business. But there's another important reason to do business that way. And that's because in determining whether to prosecute an entity for dealing in property like this, for getting involved in the transaction that otherwise has some criminal nature to it, the government has great discretion.

Part of the way the government determines whether and how to exercise its discretion is whether it sees somebody as the good corporate citizen who's done the right things, or whether it sees somebody as a bad actor.

On the federal side, the Department of Justice has set out things called the Corporate Charging Guidelines and that's their guidelines on what prosecutors should consider and when to charge businesses.

Matthew's office, the Manhattan District Attorney's Office, has adopted a set of Corporate Charging Guidelines very similar to the federal ones.

So those guidelines are important because they give us ideas that the prosecutors use those guidelines to decide who we're going to prosecute and who we're going to use our discretion to do something different, not prosecute. But they help be the good corporate citizen.

So our clients, our institutions, if they get wrapped up in an investigation, can show that they've done the right things.

So what are those right things that the government wants you to do? It's many of the same things you've

heard today. Among the things the government wants to know is, did the company have an effective, existing, pre-existing compliance program in place at the time that whatever it got involved in went bad?

So you want to have a real compliance program, the type that Megan's talked about, where you're looking into the history of these objects, where you are looking into the past. You want to do that not just because it's the right thing, but because it allows your entity to fit one of these factors of what the government uses in determining who to charge.

If something does come up, one of the other important factors is timely and voluntary disclosure. So we advise the clients, and you should be doing the same thing, if you discover that you are involved with a transaction that's a problem, you need to figure that out. You need to investigate whether something happened in that transaction, you need to figure out what happened, and then you need to report that quickly to the right authorities. So that's another factor, timely reporting.

Next are the remedial actions. If the entity gets involved in one of these things the government thinks about the remedial actions. Did the entity try to make this right? Did it give money back to the victims? Did it reverse the transaction, or is it requiring these people to go to court and try to sue it because of the situation?

So where a company has taken remedial actions, that's another factor that the government will use in considering whether to treat the company as the good corporate citizen or as the bad guy it wants to prosecute.

The willingness to cooperate—is the entity willing to open its door, is the entity willing to figure out what went on, is it willing to, if there's a bad actor in the company, turn that person's name and activities over to the government and let the government know what it's discovered in the investigation?

So these are factors, they're not all of them. There's a list of 10 factors that the federal prosecutors use, but in terms of thinking about them for building a compliance policy and program, these factors are ones that we should use to help our own entities, our clients, build programs so that if they end up getting mixed up in something, they've done the right steps to try to prevent having gotten mixed up in it. So that's an important second set of advice and goals that we give our clients to help them in these situations.

The third group that I had talked about, and this is really the most difficult, is when you represent individuals in these forfeiture actions or in criminal proceedings running out of these kind of cases.

So there are going to be cases where somebody intentionally does something wrong—and those aren't terribly

hard, I guess where the client is a known smuggler trying to do something wrong—they understand exactly what they have and they bring it into the country. Of course you still have an important role there, and we would help the client try to show what the mitigating circumstances are and get the right result.

But there are other types of situations I've faced were of course more gray areas. And so those come up often times in the forfeiture proceedings and where the forfeiture proceedings potentially turn criminal.

So what we see here is that we have clients who will acquire property thinking they're doing the right thing, or have having some questions about what they are doing, and then they get involved in a forfeiture investigation.

So, for example, we represented a small art dealer who brought a piece of art into the country. When that art was put for sale in the United States, the U.S. Attorney's Office came calling, wanting to forfeit that piece of property.

The client, of course, as a first matter doesn't want to tell you they did wrong, that they knew that this was a troublesome piece. They have all their stories about why this looked perfectly right to them.

The prosecutors will use their tools to try to bring a forfeiture action. They have a lot of power to do those cases. Those cases can be expensive, particularly when it's a piece that is not particularly valuable. And again, litigating that on behalf of a private defendant can be very hard.

We've seen cases where individuals will fight the government on these forfeiture cases, particularly where the items are more valuable. The risk there is that the government turns that matter from a civil forfeiture case, where you're simply fighting over property, to a criminal matter where the property's on the hook, but now also is the person's liberty and whether they're going to have a felony prosecution.

So often where the government can get their hooks into the person is in the issue of importation, as Brent mentioned before. And so when the government produces documents that show that your client imported the product, the piece of art, or whatever that might be, but didn't describe it in the way that was fully truthful, there's no indications that your client knew they were up to no good.

So what do we mean by that? They have to identify the country of origin. So they may have bought the piece in Switzerland, but the country of origin might be wherever that is, somewhere else, and they don't want to list that place. They might want to minimize the value of what they paid for it, hoping that that's going to give

less exposure to what they're doing, and they may not describe the item or its age properly. All of those now give a real hook for the prosecutors to say that this is criminal action. And so your client has taken, by fighting this in these cases perhaps, what was just a forfeiture action that they could have walked away from, and turned it by having the government continue its focus on them into a criminal prosecution that can end up with a life changing event for that client.

So there's a value—back up one moment. There are some gray areas, of course. Country of origin is easy perhaps when you know that the thing was made in a particular country, lost, buried in that particular country, found in that particular country and then taken out of that country.

It can be more complicated where, for example, there's a painting that's by an Italian artist of a scene in France that was stolen from a French museum and sold in Switzerland. So is the country of origin that he painted, the artist in his workshop, in Italy? It was a scene in France, did he start it in France and bring it back to Italy? Do you as the buyer need to know those details? It ended up in Switzerland many years later, that's where you bought it. Is that the country of origin for you?

So they would argue that that's not a hard question, but there's some gray area there, at least as to some of these objects. So again, a painting by an Italian artist of a French scene stolen from a French museum in World War I, where is that actually from for country of origin purposes?

So let me wrap up. So the point on this I want to say is, there is value in cutting these investigations off quickly. There is value from allowing some of these cases, the forfeiture to occur, because being under the focus of Matthew and his colleagues, or my former colleagues from the U.S. Attorney's Office, can only be very dangerous for the client.

So in that way, hopefully I've summed up some of the ways we as private attorneys have roles in these, and can advise the clients in ways that help them step off the ledge. Thank you.

PETER HERDRICH: Thank you all, our great experts here. We have a couple of minutes left for questions, and perhaps we want to concentrate, this is the New York State Bar Association, maybe we want to concentrate on the things that do happen here and have to do with New York State law.

One of the things that we find, in looking at this, is that there are a lot of questions about just this, about due diligence, about compliance, and those questions, and how those might affect clients here. So Matt, you did want to say something about due diligence?



MATTHEW BOGDANOS: Yes, please, because having listened to Megan and Steve, I agree with much, if not all, of what they said. Let me see if I can just put this really quickly into context.

I did focus primarily on ISIS, Irina asked me to, so, but let me give you our underlying assumptions as law enforcement. What does due diligence mean? What are we looking for?

First, we're not looking for ISIS in every corner. We recognize that looting's been going on for generations, ISIS is one particular area for a very brief period of time. If it's ISIS, it just gets more funding, but we're not looking for it. Megan, you're absolutely right, put it aside, that's not what our focus is.

Second, there is a legal trade, it's fair, it's legitimate, it's above board. We support the legal trade in antiquities. Nobody wants to do away with the legal trade, it would make our jobs impossibly hard.

Three, prior to 1970, paperwork wasn't really universally accepted as required. Post-1970, the entire world was on notice that we're going to start requiring documentation. You want to start trading antiquities post-1970, where's your documentation? As each day passes from 1970, it becomes less and less likely that a previously unpublished piece on the market for the first time is legal. It's just pure statistics.

Four, we believe the majority of sales are lawful, we do, vast majority. We believe the vast majority of dealers deal properly. We feel that the vast majority of auction houses exercise exceptional diligence on every single piece. We just don't think it's every single one; whether it's a dealer, whether it's an auction house, whether it's a museum, whether it's a curator, doesn't matter, it's just not 100%.

Finally, there are two kinds of material. Material that's been stolen from a published collection and material that came out of the ground.

The vast majority of the illegal material being sold is material that did not get stolen from a published collection. So if that's the case—and it's vast majority, if that's the case, what are we looking for in terms of due diligence? Well, telling me you went to the Art Loss Register, but if it came out of the ground, it's not going to be reported to the Art Loss Register.

So I like that you did it, necessary, not sufficient. Telling me you went to Interpol Red List, Interpol Red List on the websites, ICOM, same thing. Less than 1% of all stolen pieces are on their website, it's actually a representative sample, just these kinds of pieces.

So again, if you tell me your client went to the ICOM Red List, I say, that's great. Necessary, not sufficient. If you tell me the piece was in a catalog, again, it doesn't mean a whole lot to law enforcement, because what are you expecting, are you expecting the archaeologist outside Palmyra to go through every single catalog in the world? How does he or she know where it's going to surface? Are you talking about 15 catalogs that come out every quarter in Geneva, or Bonn, or Paris, or Lyon, or New York, or on the West Coast?

So if you tell me that your client says to me, well I saw it in the catalog, honestly, white noise. It's just nothing was laundered. That tells me, okay, whoever is looking for it didn't know where to look.

So again, what are we looking for? We call it diligence with honor, diligence with sanity. You tell me the piece has been in your client's collection since 1965 so it pre-dates 1970, I got it, that's great. Has it ever been insured? Is there an insurance that lists it? Did that person originally die? Can I see that person's will? Was it listed in the will? Did you ever take a photograph, ever in the last 45 years, a Christmas card, holiday card, anyone take a photograph of it? Was it ever appraised? Did you move? Did you move to one apartment house to another? Is there a shipping document that says, this is what was in that—anything. We're not asking for the world, we're asking for something that pre-dates today, whatever it is.

Truly, if your client has valuable material in this day and age, and they haven't photographed it at some point, for us, please forgive me, I told you I'm not subtle, doesn't pass the laugh test. It just doesn't. Doesn't pass the laugh test for us.

So in that case, now we're going to investigate. I'd like to not have investigations. We'd like to be out of a job. We're not looking for investigations, but if something's re-



ported to us and then we see this, and we see one letter of provenance.

When my—and I'll just read one that we've seen photocopied at least a hundred times. When my father was on Embassy duty in—pick a country, Guyana, Egypt, South India, he brought it home. Dad's dead, so you can't ask him. Are you kidding me?

We see this so often, and so all we're asking for is show me something, anything that shows good faith.

PETER HERDRICH: Any of you guys want to follow up on that?

MEGAN NOH: I don't disagree. I don't think I stood there claiming that any of the steps we take are perfect or sufficient, certainly, necessary. I don't think it's a perfect world of information as I said, unfortunately.

PETER HERDRICH: Okay. Questions from the floor.

AUDIENCE: (Inaudible).

MATTHEW BOGDANOS: Well, if you're asking for numbers, I'm sorry, we're not going to give you numbers. But what I can say is the way it comes to our attention, in as many ways as you can possibly imagine. Sometimes sheer luck, a great stop at a border, some terrific CBP, Customs and Border Protection Officer. Sometimes it's one of Brent's informants, and between the two of us, we must have informants, I don't know, it's got to be a dozen different countries. So the next time you're emailing someone, I'm telling you right now, you might be emailing one of our informants, hey, I can't show this picture, I can't show this piece, but take a look at the photo, I'll get you good provenance. I'm not kidding, that's frequently how the investigation starts.

All of a sudden there are 1,000 pieces coming from the Middle East, the market will get flooded. There's so many different ways it comes to our attention.

To answer your question on numbers, we have more suspect pieces than we have resources to prosecute them. And I'll let—this is where I'll let Brent come in.

AUDIENCE: (Inaudible).

MATTHEW BOGDANOS: Great question, and the short answer is, that's not our place. A sovereign nation has ownership of the property and it is not our place as Officers of the Court to say, oh, you're not worthy of the piece.

I'll tell you flat out, I live in lower Manhattan, nice area, not a great area, but a decent area. I have a nice flat screen television, nothing special, but I'm 100% certain my flat screen television is much safer on the Upper East Side, I guarantee it. Much safer on Sutton Place, I guarantee it. Does that mean that someone living on Sutton Place gets to come and take my television and hold it for me? I get to watch it whenever I want, no. It's the same thing, it's a sovereign nation. Once we return—and we have to repatriate it, and we keep our fingers crossed, and we hope it doesn't appear on the market again a year later. You don't like that answer, but it's the answer. And have I ever returned an item to the Iraqi Museum that I saw on the market years later? Yes. Thank you.

PETER HERDRICH: Brent, did you want to say something about resources?



BRENTON EASTER: Yes.

I can just speak a little bit about what our office in New York is doing, and in terms of stuff that's coming out of Syria, and Iraq, and other countries as well, Pakistan, Afghanistan, India, just about any country you can imagine. We are creating a database of illicit pieces that are for the most part straight out of the ground. And with that database we wait to see

what we can screen at the port and try to intercept what we can there. And then at the same time we do try to review what publicly comes on the market. But like Matt was eluding to, it's so much that it's just very difficult and time consuming. So it might be years later that we end up knocking at the door of the gallery, or the auction house, or the museum, and showing the evidence that we've got.

PETER HERDRICH: Question? Irina, you had one.

IRINA TARSIS: Statute of limitations, is there one?

MATTHEW BOGDANOS: There is a statute of limitations on theft. Possession of stolen property is a continuing crime as long as you possess it. So yeah, it's a five-year statute of limitations on most non-homicide, non-rape, kidnapping felonies. But if you're possessing the property, you're committing the crime today.

The great point earlier about the stockpiling that Megan talked about, that's absolutely true. We can't talk much about Kapoor other than to say it just confirmed what we already knew in some cases, Kapoor had the material, the stolen material for decades, that's not uncommon. They will stock pile material, so I wouldn't expect to see Daesh material anytime soon in New York.

AUDIENCE: (Inaudible).

MEGAN NOH: I think that's where the ICOM Red Lists are helpful, because they are not comprehensive, they do not show every object that's been looted, but they show the types, the forms, the styles, the specific types of objects that are most likely to have been looted, and those are obviously the types of objects and the forms of objects that collectors need to be on high alert for.

I think that also it's about developing relationships with people who do have that expertise. Bonhams is not in the business of advising every single collector in the world, should I or should I not buy this. But when people send us a photograph of something and say is this something you'd accept for sale, we give an answer to that, and that might be informative.

I think the British Library and other institutions receive inquiries all the time from the public. And it's just better to be safe than sorry. You don't need the thing so badly in that moment that you can't take the information that's being given to you by the dealer and flesh it out and see if it's kosher before you make that transaction.

STEVEN FELDMAN: Of course that client needs to be doing everything exactly the right way in the locality where they're purchasing this. So if they're hiding from the authorities that they're exporting, already you're down the wrong road. So they need to make sure that the country where they are purchasing this thing has approved the sales of these items at this point, and that there is no shenanigans going on with the purchase, and bringing that back to the United States, because already, just stepping down that road of, oh, I'm buying from somebody in the back lot and it might be okay, it's a small thing. You're already stepping down a road that the documents are going to show that—

PETER HERDRICH: Yes, if it looks like the deal of the century, it's probably not. And if you're in Diyarbakir in southern Turkey and somebody's got something and you're seeing it in their apartment or in the back of their car, that's probably another indication.

MATTHEW BOGDANOS: If you're talking about people who are in downtown Damascus or Amman and they're in an antique shop and they buy some piece for \$100, I promise you nobody here is coming to your client's door, that's not happening. If you're buying 50 pieces in the first watering hole outside of an archeological site in Egypt, yes, and you're not declaring it when you leave Egypt, and you're not declaring it on your blue Customs Declaration Form when you arrive, yes, that's a different issue. I'm with Peter. Just use your internal gyroscope.

MEGAN NOH: It actually calls attention, though, to one of the issues that the U.N. Security Council has focused on, which is that we do as a community, as an international antiquities community, need to be beefing up border controls and information distribution between

the national law enforcement networks who examine this material and the customs officials who examine this material on its way out of the country.

There are some countries, not the countries we are talking about right now, but for example, Mexico is very aggressive about patrolling what is exported. So there are some countries where a client may just not be able to get it out of the country. They might have purchased something innocently and it might be seized at the border. I don't doubt your perspective, gentlemen, but from mine, better for it to be seized outgoing than for it to not be declared outgoing and be also illegally imported into the U.S.

BRENTON EASTER: In regards to that, we are doing a lot of training with these other countries abroad. We partner with the Department of State and other law enforcement, we partner with Matt. And we go to these countries and we try to show them how to try and protect their own cultural property.

The same thing that Peter said and these other guys said, is if it's an exceptionally great deal, that's an indicator, it's bad. And then like we just had in the last presentation, if there's a false description, a false country of origin, false value, those are all indicators of smuggling, right then and there. So yes, we will be looking at a criminal case.

There's no way you're not going to know when you walk into some of these dealers if the stuff in there is bad, if you're getting the deal of the century. If you walk back and they take you to the back room and it's all stuff covered in dirt, use common sense, it's not very hard. It's

not very hard. And if they're traveling to countries where those things are, well, maybe they should be going to more reputable dealers.

It's not hard to find an established dealer where you can still find an okay deal, but if you're going to the source countries and to dealers in those source countries that have these hoards of stuff, walk out.

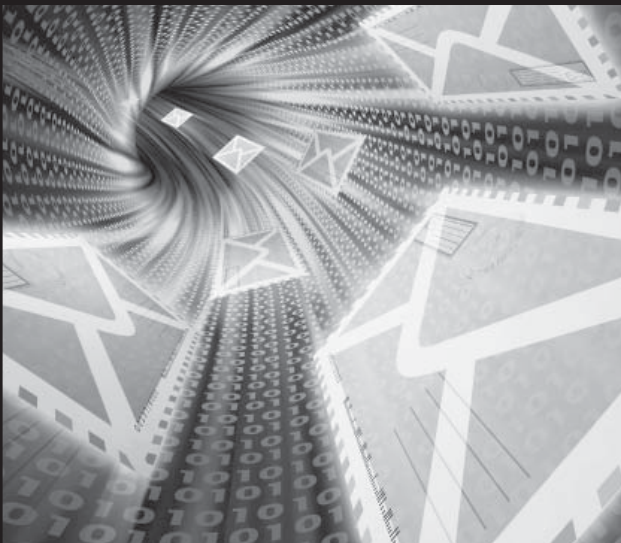
MATTHEW BOGDANOS: And tell your clients to ignore eBay, they're all fakes. Just ignore eBay, they're all fakes.

PETER HERDRICH: Unfortunately, we've run long, as probably would be expected on such a fascinating topic. I'd like to thank all the members of the panel for their time. I'd like to thank Irina Tarsis for putting this together.

Endnotes

1. See p. 23.
2. See p. 70.
3. <http://www.nysba.org/EASLJoin.aspx>.
4. Performance Rights Organizations (PROs).
5. Application Program Interface (API).
6. Mechanical Rights Society (MRS).
7. Silk Road was the largest black market website on the Darknet, offering illegal wares and services.
8. <http://imogenheap.com/home.php?article=2354>.
9. Middle East and North Africa region.
10. International Council of Museums.

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Regulation of Bute and Lasix in New York State

By Bennett Liebman

The horse racing industry in the United States has been fighting over issues relating to phenylbutazone or butazolidin (Bute) for more than 55 years and furosemide/salix (Lasix) for more than 40 years. Over this period of time, the same questions have been asked by both supporters and opponents of administration of these drugs, yet they are largely unanswered. After decades, the United States racing industry has been unable to come up with a clear and consistent position as to the proper utilization of these drugs.

The purpose of this article is to supply an overview of New York State's involvement with drug-testing issues, and more specifically, with the history of New York's regulation of the two drugs most often associated with permissive medication: Bute and Lasix. While much of the focus of this article is on thoroughbred racing, it is important to understand that this analysis and the issues also must be applied to harness racing, which constitutes the vast majority of the pari-mutuel racing conducted in New York State. While some of the statements herein may be controversial, this article is primarily intended to be historical and not an advocacy piece.

Historical New York Drug Testing Questions and Issues

New York State, like most North American racing jurisdictions, uses the trainer responsibility rule.¹ Under the New York version of this rule, a trainer is responsible for a drug positive unless the trainer is able to demonstrate by substantial evidence that he or she was not responsible for the administration of the drug.² While New York State allows trainers to assert non-responsibility as an affirmative defense, other states have an even tougher version of the rule. In these states, there is strict liability for trainers. A trainer cannot and is unable to escape responsibility for a drug positive. Thus, in these states, a trainer is generally liable for a drug violation even if the trainer did not intend, did not know of, or was not negligent about the drug administration. Even in states like New York, which allow trainers to assert non-responsibility as an affirmative defense, in recent years there have been minimal occasions when a trainer has escaped responsibility for a drug violation.³

Drug testing was introduced to the United States in 1934,⁴ and began in New York that Spring.⁵ North American racing was overspread by the utilization of narcotics in that decade—including cocaine and heroin⁶—to stimulate horses. There were federal indictments of major racing licensees in 1933 in Chicago (including Ivan Parke, Hal Price Headley and A.A. Baroni. The Federal Bureau of Narcotics claimed that 250 horses were injected) and in Detroit for using narcotics.⁷ Saliva testing, which had been

used in Europe to combat drug use, was soon introduced in the United States to detect and prevent the stimulation of horses. While questions always existed over the efficacy of saliva testing, it appears that the widespread use of narcotics in United States racing declined after the introduction of these tests.⁸ Again, however, in the 1940s and 1950s, given the rudimentary nature of the saliva test (and the initial urine testing that was added several years later⁹), it is likely that many drugs that were administered to racehorses during those years eluded official detection. Saliva testing was not phased out in New York until the early 1970s, and was then replaced by blood testing.

Besides the limitations of drug testing, for many years from the 1940s through the early 1970s, trainers at the New York Racing Association (NYRA) tracks whose horses tested positive for drugs generally escaped penalties.¹⁰ The three stewards at the NYRA tracks who effectively controlled the drug penalties up until 1975 regularly found that the trainers were not responsible for the drugs found in their horses. While the purse money for the race was redistributed, these trainers received no penalties.¹¹ Those who escaped penalties included some of the major trainers in the history of Twentieth Century American horse racing, including: Hirsch Jacobs, Eddie Neloy, Allen Jerkens, and Bill Winfrey. Other than certain Bute penalties, little significant action was ever taken by the stewards against drug violators at the NYRA tracks for many years. Of the 13 drug positives reported at NYRA from 1971 to 1975, the stewards at NYRA imposed a total of only one suspension and one fine.¹²

Compounding these problems in New York State were issues with the quality of its drug testing laboratory. Numerous questions were raised as to the ability of the state's lab in Jamaica, Queens. The harness tracks even put in a provision in the law so that their drug testing, starting in the early 1970s, would be undertaken by Cornell University and not at Jamaica. NYRA started using Cornell in the early 1970s as well, so that for a time, NYRA samples were tested both at Cornell and Jamaica. In the mid-1970s, the State Commission of Investigation¹³ and an internal report of the State Racing and Wagering Board criticized the Jamaica laboratory. This led to all drug testing taking place at Cornell. One state veterinarian in the early 1970s commented that the NYRA tracks seemed to average about one drug positive a year. After Cornell took over for the Jamaica laboratory, more drug positives were called in New York State. This increase in positives also seemed to occur when blood testing replaced the saliva test, and most especially when urinalysis became more sophisticated.

Starting approximately six years ago, the former Cornell laboratory began running under the aegis of SUNY Morrisville. The lab remains in Ithaca. The Cornell/Mor-

risville laboratory has been run for decades by veterinarian and chemist Dr. George Maylin. While Dr. Maylin was for many years acknowledged as the leading drug tester in America,¹⁴ he has increasingly been subject to recent criticism by other racing chemists, the media, and equine veterinary practitioners. It should also be noted that the budget for equine drug testing is subject to the vicissitudes of the overall State budget process. The State Division of the Budget has often regarded the State's spending on equine drug testing to be excessive, and the laboratory has seen its funding reduced in recessionary times.

The other regular issue facing the current Gaming Commission¹⁵ is what kind of penalty can be effective when any attorney can significantly delay the imposition of sanctions taken by the Commission/stewards against a trainer. These cases can and do go on for a lengthy duration; for example, the Commission's case with harness trainer Luis Pena is likely to consume many years.¹⁶ A wealthy trainer can tie up the system, while a poorer trainer is forced to take the assigned penalty. How, then, can a penalty system exist that treats all trainers and participants fairly? Should suspensions and/or fines be the basis for most penalties? How should the decision be made on how to compromise a case that has been appealed, and how can a process be sped up that has been mired in delays? Who makes the initial penalty determination—the Commission, which is in the best position to assure uniformity among tracks, or the stewards/judges who should theoretically have the best knowledge of the accused parties?

Bute

Bute was first synthesized in 1948 and was readied for human use in 1949. It was an analgesic intended to prevent inflammation, and generally used in humans to combat arthritis and gout. It was a nonsteroidal anti-inflammatory drug (NSAID), like aspirin and ibuprofen. For many years, Bute was frequently used by athletes to control arthritis and inflammation. Baseball pitchers Sandy Koufax, Whitey Ford and Bert Blyleven were regular users. It was similarly used regularly in the National Football League. It is now banned for human use in the U.S. due to its side effects in contributing to the causation of anemia, ulcers and liver damage.

In 1957, Bute became available for horse racing. By all accounts, its acceptance and usage in horse racing was almost immediate. It has been regularly been stated that Hall of Fame trainer Sunny Jim Fitzsimmons used Bute in 1957 on Wheatley Stable's horse of the year, Bold Ruler. (Not only was Fitzsimmons among the most beloved people in American racing,¹⁷ but Bold Ruler was a tremendously successful race horse and sire, producing 11 champion horses, including Secretariat.) It was used more or less freely throughout 1959, although a urine test for Bute was developed in some states (including New York), in 1960.

Horsemen liked Bute. Hall of Fame trainer Eddie Neloy¹⁸ from the 1960s commented: "It is probably the

greatest drugs [sic] that we've ever encountered... It's a wonder drug, a panacea. It has dramatic anti-inflammatory properties. While almost all horsemen use it, we also know that it can remain in the horse's system for a number of days."¹⁹ Sunny Jim Fitzsimmons said, "I favor the use of Butazolidin because it is up to the trainer to send a horse out in the best condition he can. He'll be more likely to run to form if he is given Butazolidin."²⁰ Lucien Laurin, the trainer of Secretariat, said, "I like Bute, always did...It doesn't hurt a horse and you'd be surprised how much it helps him, if used the right way. It's a lot of help to a horse that's a little stiff or rheumatic or track-sore."²¹

In 1960, Kentucky had no prohibition against Bute use. The Kentucky Derby that year was won by Venetian Way, and there was little question that Venetian Way was using Bute.²² When Venetian Way finished fifth in the Preakness without using Bute, questions were raised about the validity of the horse's Derby performance.

Similarly in 1961, questions were raised as to whether the Derby and Preakness winner Carry Back was administered Bute before those races. At the time, Bute had been legalized in both Kentucky and Maryland. The question arose after Carry Back without Bute finished seventh as the even money favorite in the Belmont Stakes.

Before the racing season began in 1960, the New York Racing Commission announced that there was a general ban against Bute use. In the first race conducted in 1960, a horse trained by Frank Cundall tested positive for Bute. The stewards at NYRA suspended Cundall for 60 days. That suspension was upheld by the Racing Commission. Later that year, trainer Danny Perlsweig received a 60 day suspension from the NYRA stewards for the use of Bute, as well.

While New York was enforcing a ban against Bute, other states were loosening their prohibitions. Colorado legalized Bute in 1959, followed by Kentucky and Indiana in 1960. Maryland, Florida and Louisiana legalized Bute in 1961. The New York Racing Commission even terminated its veterinarian who had taken a stand in support of allowing veterinarians to determine whether to use Bute.

Bute came on the scene at a time when drug testing in racing was focused almost exclusively on preventing depressants and stimulants. The stimulants had generally been narcotics. The sport was uncertain as to how to deal with a medication that was not a stimulant or a depressant, and seemed to provide a restorative health benefit to horses. The argument was made that Bute did not improve equine performance, but simply enabled a horse to run up to his or her capacity.

By the mid-1960s, most states had either instituted or reinstituted a ban on Bute.²³ This prohibition came to a head when in the 1968 Kentucky Derby, Dancer's Image, who finished first, tested positive. The stewards disqualified Dancer's Image, and after nearly a five-year period of

appeal, the disqualification was upheld by the Kentucky Supreme Court.²⁴

After the Dancer's Image incident, states began easing up on Bute restrictions. California authorized Bute in 1972, as did Kentucky in 1974 before the Kentucky Derby. By 1975, 22 states had allowed Bute usage. While there was a movement in the late 1970s to limit Bute and other permissive medication, by the early 1980s, that had ended.

Many states allowed Bute to be administered the day before race day. Kentucky for many years went further and allowed Bute—and other NSAIDs—to be given on race day. The Kentucky policy was tightened to allow administration the day before a race. In New York, Bute usage had traditionally been banned within 48 hours before a race. In 2006, the New York requirement was changed to a 24-hour requirement, but then changed back to 48 hours.

Since a time-based administration of Bute is difficult to regulate, it is generally enforced through blood testing, which can quantify the amount of Bute present in a horse. Currently in New York, the threshold for Bute positive is at the two micrograms per milliliter of blood plasma level. Bute amounts above this level are called positives.

The Bute positives came into issue in New York in 1974 with the improvement of testing procedures, including the introduction of blood testing²⁵ and the replacement of the Thoroughbred Racing Commission by the State Racing and Wagering Board. The NYRA stewards gave New Jersey-based trainer Wilfred Lewis a 30-day suspension in November of 1974 for a Bute positive. The next month, the stewards at NYRA gave Frank Martin—who was the leading trainer in New York—a 60 day suspension for a Bute and a Lasix positive (30 days for each violation).²⁶ Martin claimed that he had followed veterinary guidelines in his administration of drugs. He eventually settled by paying a fine of \$6,000. In early 1975, trainer David Vance received a Bute positive and was given a 30 day suspension. This was reduced to a \$5,000 fine.

The 30-day suspension policy was generally applied by the stewards at NYRA for Bute positives in the mid-1970s. However, in the case of trainer Jim Maloney in 1976, no penalty was given.²⁷ Trainer John Veitch was given a 30-day penalty for a Bute positive on championship filly Our Mims, but the penalty was reduced to a seven-day suspension after a hearing before the Racing and Wagering Board.

The 30 day penalty policy was replaced in the late 1970s by the Racing and Wagering Board issuing 60-day suspensions for Bute positives. If the trainer did not appeal the penalty, the penalty was reduced to a 45-day suspension. This was part of an overall effort by the Racing and Wagering Board to promote uniformity throughout the New York racing industry. Almost all non-narcotic drug violators were given 60-day suspensions with the penalty reduced to 45 days if the violator did not appeal. Furthermore, Bute was one of the very limited number of drugs

that could be detected by the pre-race blood drug tests employed at the New York tracks from the late 1970s to the early 1990s. (These pre-race tests had a superficial appeal but were not at all efficacious. They cost a considerable amount of money, identified few drugs and gave the illusion that drugs in racing were under control. They were eliminated by State budgets adopted in the early 1990s due to the recession.) A horse found to have a Bute positive in a pre-race test was scratched from the race, but the trainer was not penalized.

New York's penalties for Bute positives were considerably higher than those imposed by other states. Starting in 1995, the 60-day penalty was replaced by penalties to be determined by the severity of the offense and the overall record of the trainer. Generally, this has amounted to a combination of a fine and a suspension of less than 20 days. This general penalty has similarly been applied to other NSAID violations.

Bute Questions

These questions have not really changed since 1960, and now apply to other NSAIDs as well. The drug most frequently used with the same effect as Bute is flunixin/banamine. In addition, many of the questions posed here are also applicable to the questions surrounding the use of Lasix:

- Is Bute needed to keep horses in racing during a time when racing has become a year-round sport?
- Does Bute improve horse performance or just allow horses to perform to the best of their abilities? Is there a way to determine what "performance to the best of their abilities" means?
- Why is Bute use banned in horses while human athletes can compete using analogous products, like aspirin or Advil?
- Does Bute use increase the frequency of horse breakdowns?
- Does the use of Bute impede the ability of racetrack veterinarians to determine whether a horse is sore or physically fit to be able to compete in a race?
- Does Bute use harm overall horse health? Is Bute use contributing to horses having shorter racing careers?
- How should the public be informed about horses using Bute?
- How accurate is the quantification of the amount of Bute found in a horse's blood? Do laboratories make allowances when their analyses establish Bute levels that are slightly above the permissible levels?
- Is a legalized, regulated Bute program better than horses using NSAIDs, or other analgesics, without any government regulation?

- Does Bute use interfere with other drug detection in horses?
- Should not veterinarians be able to determine what treatments are the most efficacious for horses without government interference?
- How should penalties be determined to be imposed on trainers using NSAIDs?
- Should Bute be used in combination with other NSAIDs?
- How can there be assurances that trainers and veterinarians are consistent in their administration of Bute so that the performance of a horse is not affected or manipulated by changes in the administration of the drug?
- Does regular use of Bute weaken the overall future breed of thoroughbred horses? What effect has Bute use had on harness horses? On quarter horses?
- Should the same regimen that governs Bute usage in thoroughbred racing also apply to harness racing and to quarter horse racing?
- What effect does the legalization of Bute have on the public perception of horse racing as a sport?
- Are there any statistics on the percentage of thoroughbred races horses that use NSAIDs in training? Are there any statistics on the percentage of thoroughbreds that race in Europe and Asia using NSAIDs in training? Are there numbers on the use of NSAIDs in training for harness horses and quarter horses?
- Does the use of Bute contribute to the need for horses to use Lasix?
- Does the use of Bute in training make it more difficult for regulatory veterinarians to assess the physical condition of a horse?
- What can be learned from the European and Asian experience with NSAIDs? Are horses in these jurisdictions making fewer starts? Are they using NSAIDs for training? Are there de facto threshold levels for calling NSAID positives in these jurisdictions?

Lasix

Lasix is a powerful diuretic. It has traditionally been the principal drug utilized to combat heart failure in humans and is often used to control high blood pressure. Based on the dates of early medical studies, it appears that 1964 was the first year that Lasix came into regular medical usage in humans.²⁸

Controversial Kentucky veterinarian Alex Harthill claimed that before the Kentucky Derby in 1964 he treated race winner Northern Dancer with Lasix.²⁹ Northern

Dancer also won the Preakness, is a member of the Thoroughbred Hall of Fame, and was one of the most successful thoroughbred sires of all time.

Despite this claim of 1964 usage, Lasix did not appear to make its general entry into horse racing until 1973. The point of Lasix use was that in thoroughbreds, Lasix served to prevent or lessen the incidence of bleeding (exercise-induced pulmonary hemorrhage) in horses. Horses seemed to bleed less after receiving Lasix.

Maryland set the stage for the Lasix issue by allowing Lasix to be used in 1973 if the trainer could demonstrate to the state veterinarian that a horse had bled. This reputedly led to major form reversals in Maryland, as certain trainers were sufficiently skilled to get their horses on Lasix. In 1974, the Maryland Racing Commission allowed the general use of Lasix. The public was not advised as to which horses were using Lasix, and many commentators were convinced that Lasix significantly improved horse performance. Eventually, Maryland found a way to advise the public of Lasix administrations.

In New York State, Lasix was forbidden, but no positives were called on the drug until September of 1974, with trainer John Lipari at Belmont. As was the custom of the time, Lipari denied any involvement, and the stewards at Belmont exonerated him from any punishment. One racing columnist mentioned that trainers at NYRA had regularly been using Lasix, but they all stopped after the Lipari positive.³⁰

The New York trainer who was penalized for a Lasix positive was Frank Martin. In December of 1974, he received a combined 60-day suspension, which also included a penalty for a Bute positive (basically, this was 30 days for Bute and 30 days for Lasix). Trainer Frank Tufariello received a 30-day suspension for a Lasix violation in 1977.

Eventually, the 30-day suspensions for Lasix in New York morphed into New York's 60-day penalty, which would be reduced to 45 days in the event that no appeal was undertaken. The most significant Lasix penalty was issued in 1987, to trainer Peter Ferriola, who was suspended for 120 days for four Lasix positives. The penalty was upheld unanimously by an appellate court.³¹

In other states, the Lasix policy in many ways followed the arc of the Bute debate. Most states initially allowed Lasix, and tried to work through issues concerning public disclosure of Lasix use, how to determine whether a horse was in fact a bleeder who would be eligible for Lasix administration, at what times Lasix could be administered, how much Lasix could be administered, and how would a horse get off the Lasix list.

In the late 1970s, after a number of well-publicized horse injuries, an adverse story on racehorse drug use on CBS's *60 Minutes* and the threat of Congressional action, there was a significant movement towards severely restricting Lasix use. A number of states, such as Maryland,

New Jersey, and Pennsylvania, imposed restrictions on Lasix use. For example, Maryland in 1980 limited Lasix use to horses seen bleeding on the track after a race by the State veterinarian. These State restrictions on Lasix use did not last for a long period of time, and by the early 1980s most states, after lobbying by horsemen, had begun to re-permit Lasix under differing sets of rules.

The differences among states that had legalized Lasix culminated in the 1983 Preakness, when the owner of the horse Desert Wine—who had finished second in the Kentucky Derby—went to court to successfully gain the right to use Lasix in the Preakness. Both Desert Wine and the horse Marfa had raced on Lasix in California and in the Kentucky Derby, but Maryland employed a different Lasix certification system under which the track veterinarian had to be present to observe the bleeding. A court ruled against the Maryland certification system and allowed the horses to race on Lasix.

By 1985, in the United States, only New York and Arkansas prohibited Lasix. Arkansas legalized Lasix in 1986, and by 1990, the only significant holdouts against Lasix legalization in North America were New York State and the province of Ontario.

In addition, in 1990, a Jockey Club study found that Lasix improved race horse performance but was not effective in controlling bleeding. The study had no effect on any regulations in any jurisdiction. In 1991, Ontario legalized Lasix, leaving New York as the last non-Lasix jurisdiction standing. In New York, the case against legalized Lasix was weakened by the fact that several significant horses, such as the 1990 Preakness winner Summer Squall, the 1992 Derby winner Lil. E. Tee and the 1992 Preakness runner-up, Alydeed, would not race in New York, and by a disastrous winter racing season in 1995 where it became difficult to find sufficient horses to support a credible racing program.

With New York State Senate Majority Leader Joseph Bruno and incoming NYRA President Kenny Noe advocating in support of Lasix, the Racing Board voted to authorize Lasix effective with the Belmont fall meet in 1995. Opposition to Lasix legalization was largely muted.³² Almost no organized racing group in 1995 vigorously supported the continuation of New York's ban.³³ In 1996, the Racing Board informally asked the Governor's Office of Regulatory Reform whether it could ban two-year-olds from racing with Lasix. The Office advised that it would not support a change. The Office suggested that all the arguments in support of authorizing Lasix similarly applied to two-year-old horses.

Lasix eligibility in New York can be obtained through a practicing veterinarian finding blood in a horse's lungs after a workout or race. The Lasix must be administered through an intravenous injection given between four and four and one-half hours before post time. A range was established by the Commission governing the size of the permissible dosage of Lasix.

In recent years proposals have been floated—especially by the Jockey Club—suggesting limiting Lasix use in the United States. They have largely been unsuccessful, especially with most horsemen's groups fervently opposed to any Lasix limitations. These proposals have included phasing in Lasix limitation in stakes races over a period of time. While the Jockey Club had in the past been reluctant to support federal legislation to govern race day medication, in recent years, it has begun to push for greater federal control over drugs in racing. Thus far, hearings have occasionally been held in Congress but no action has been taken.

On the study front, there are dozens, if not hundreds, of studies that have been undertaken on Lasix in racing. Each side can point to a number of studies that support its respective position. The likelihood of establishing a definitive study on Lasix use is close to zero. This is an issue where further research is not about to create any consensus.

Lasix Questions

- Is Lasix needed to keep horses in racing during a time when racing has become a year-round sport?
- Does Lasix increase the length of time that horses are able to race?
- Does Lasix improve horse performance or just allow horses to perform to the best of their abilities? As with Bute, what does "performance to the best of their abilities" mean?
- Is Lasix effective in controlling and/or limiting bleeding in race horses?
- Are there any treatments or medications that would be equally as effective as Lasix in controlling and/or limiting bleeding in race horses?
- Is Lasix use contributing to the weakening of the breed of thoroughbred racehorses?
- Can racing be conducted in the United States without Lasix?
- How can racing be held in other countries without race day Lasix? What do trainers in these non-Lasix jurisdictions do to limit or control bleeding?
- If nearly all horses bleed, and Lasix is a humanitarian drug that supports horse health, is there any reason to ban it?
- Do horses need extra time off between starts because of the use of Lasix? Why do horses seem to generally need more time between races than they did several decades ago?
- How has Lasix use affected the running and breeding of harness horses? Of quarter horses?
- Should the same regimen govern Lasix usage in harness racing and in quarter horse racing?

- Why have horses made fewer starts since North American racing began to authorize Lasix?
- Does Lasix improve the performance of horses that do not bleed?
- Does Lasix administration interfere with the testing of other drugs? Please note that this question has been raised about Lasix since Lasix made its first appearance in racing, and Lasix opponents have regularly stated that Lasix use would flush out the ability to detect other drugs.
- What percentage of horses bleed so badly that race-horse performance is affected without the use of Lasix?
- Is a legalized regulated Lasix program better than horses using other methods to avoid bleeding? Are these other “legal” methods more or less humane than the use of Lasix? (During the time period that New York was alone in banning Lasix use, there was constant criticism that New York’s rule was hypocritical and that New York trainers employed techniques—far less humanitarian than Lasix administration—to control equine bleeding. It was also pointed out that despite the Lasix ban, many of the trainers most often accused by fans and racing writers of drug use were regularly working in New York.)
- Does Lasix contribute to horse breakdowns? Have any breakdowns ever been attributed to bone weaknesses, muscular deficiencies, or mineral deficiencies caused by Lasix administrations?
- What effect has the legalization race day of Lasix had on the public perception of horse racing as a competitive sport? Given the fact that Lasix has largely been legalized in most of the United States for over 30 years, is the public concerned about legalized race day Lasix?
- What do informed handicappers think about the general usage of Lasix?³⁴
- Who should be administering the Lasix injection?
- Are foreign buyers less interested in American-bred horses because of the regular use of Lasix in America? Are prices for American-bred horses reduced because of the American use of Lasix?
- Are there any statistics on the percentage of thoroughbred races horses that use Lasix in training? Are there any statistics on the percentage of thoroughbreds that race in Europe and Asia using Lasix in training? Are there numbers on the use of Lasix in training for harness horses and quarter horses?
- Should stricter standards be put in place to determine which horses should be eligible for Lasix administration?
- Is there any need for two-year-olds to be given Lasix? Conversely, is there any reason to deny two-year-olds that bleed the right to utilize Lasix?
- Can a Lasix program that allows Lasix usage in general, but not for certain major stakes races, be effective?
- How might a program restricting Lasix usage be phased in?
- How effective would a single state’s actions be in changing national Lasix policy? Would a state’s unilateral action simply add to the overall confusion governing the nation’s regulation of Lasix use?

Conclusion

If past performances are any kind of guide in the world of horse racing, the likelihood is that this battle over race day medication is unlikely to be resolved in the near future. We can expect fighting over these drugs—and perhaps newer more powerful drugs—to continue for many years to come. Problems in horse racing never die, but unlike General Douglas MacArthur’s³⁵ old soldiers, neither do they fade away.

Endnotes

1. See, e.g., Bennett Liebman, “The Trainer Responsibility Rule in Horse Racing,” 7 VA. SPORTS & ENT. L.J. 1 (2007).
2. See 9 NYCRR §§ 4043.4, 4120.4 and 4236.4.
3. This, however, was generally not the case at the principal New York thoroughbred tracks from approximately 1945-1975, where the stewards rarely imposed sanctions on trainers with drug positives. As longtime State steward Francis Dunne said, “We have more leeway here.... We would have to find that a trainer was negligent or a party to the wrongdoing before we would suspend him.” Steve Cady, “Justice in the Paddock,” N.Y. TIMES, April 11, 1969.
4. Wilf P. Pond, “Turf, Field and Show Ring,” THE SPUR, January 1, 1934; “Florida Adopts Salivary Test,” CHICAGO TRIBUNE, October 12, 1933.
5. W.J. Macbeth, “Belmont Field Today Headed By High Quest,” N.Y. HERALD TRIBUNE, June 9, 1934.
6. One rumor is that the name “horse” as slang for heroin comes from the frequency with which heroin was administered to racehorses. The first widescale drug/doping issues appeared in England at the turn of the 20th Century, as a number of American trainers who had come to England apparently regularly administered cocaine to their racehorses. These trainers became known collectively as the “Yankee alchemists.”
7. After a finding that evidence in the Chicago cases had been obtained impermissibly, the indictments were eventually dismissed. For a partial explanation of what occurred, see *Headley v. Commissioner*, 37 B.T.A. 738 (B.T.A. 1938).
8. See, e.g., “The Horse and the Bluegrass,” LEXINGTON HERALD, January 30, 1936, citing “the virtual elimination of doping,” “Doping Stopped at Race Tracks,” ASSOCIATED PRESS, AUSTIN STATESMAN, April 2, 1936. The Federal Bureau of Narcotics would occasionally state that federal congressional action would be sought if the individual states failed to take appropriate action against drug offenders. Federal Commissioner of Narcotics Harry Anslinger stated, “I can say that the treasury department has considered and is considering legislation to perfect the crusade against narcotics

- in connection with racing. "Lagging States Face Whip in Horse Doping," ASSOCIATED PRESS, CHICAGO TRIBUNE, January 17, 1935.
9. "New Illinois Drugging Test," DAILY RACING FORM, May 4, 1939.
 10. The one major exception to that was Tom Smith, who had been the trainer of Seabiscuit. Smith's license was suspended upon a finding that his stable had administered the drug ephedrine to one of his horses. Smith served a year's suspension and resumed training in 1947. *See* Smith v. Cole, 270 A.D. 675 (1st Dept. 1946). Smith was eventually inducted into the Racing Hall of Fame in 2001.
 11. The State Commission on Investigation criticized the State steward at NYRA for his lack of action on drug violations. *See* State of New York, Commission of Investigation, The State Racing and Wagering Board and Related Matters Including a Review of the Financial Condition of the New York Racing Association, 2nd Report (1976).
 12. *Id.* at 23.
 13. *Id.* at 29-30. Racing and Wagering Board member Joseph Boyd once wrote to the State Division of the Budget, "For years positive drug medication results were either not found in the testing process used by the State lab, or if reported were swept under the rug by various commissions." Boyd in a 1976 report wrote that the Jamaica State lab was "largely discredited in the eyes of the racing industry in this state." William H. Rudy, "More Research," BLOOD-HORSE, August 10, 1976.
 14. *See, e.g.,* Sherry Ross, "NYRA Pulls 'Net' Plug Drops Betting Sites in Wake of Shake," N.Y. DAILY NEWS, January 29, 2005. Maylin is "known as one of the world's leading experts in equine drug testing and pharmacology." In 1981, Newsday wrote that the Cornell lab was "generally considered to be the best in the country." Ed Comerford, "Big Row over Three Little Words," NEWSDAY, October 13, 1981; *see also* Manny Topol, "A Drug Scandal in Racing," NEWSDAY, November 13, 1983.
 15. The New York State Gaming Commission replaced the former New York State Racing and Wagering Board as the regulator of horse racing in 2013.
 16. *See* Matter of Pena v. New York State Gaming Commn., 127 A.D.3d 1287 (3rd Dept. 2015).
 17. Fitzsimmons trained Triple Crown winners Gallant Fox and Omaha. *See, e.g.,* "Sunny Jim Fitzsimmons Is Dead; Racing's Grand Old Man Was 91," N.Y. TIMES, March 12, 1966.
 18. Neloy trained Buckpasser and Gun Bow in the 1960s.
 19. Stan Isaacs, "Derby Really Wasn't All That Stimulating," NEWSDAY, May 8, 1968.
 20. Art Grace, "The Commission Said No," BLOOD-HORSE, December 7, 1961.
 21. Ed Comerford, "State Is Waiting for More Research on Horse Drugs," NEWSDAY, October 10, 1976.
 22. *See* Red Smith, "Prescription Counter," N.Y. HERALD TRIBUNE, May 23, 1960. Over the years, there have been regular allegations that Sir Barton, America's first Triple Crown winner in 1919, raced on drugs. "It is accepted as gospel today that Sir Barton was a giggling hophead, carrying a charge big enough to blow up the Pentagon." Red Smith, "Red Smith's Views of Sport," BALTIMORE SUN, December 4, 1960. *See also* Ed Comerford, "Triple Crown: Information, Please," NEWSDAY, June 9, 1973.
 23. *See* J.A. Estes, "The Triumph Over Butazolidin," BLOOD-HORSE, March 17, 1962.
 24. Kentucky State Racing Com. v. Fuller, 481 S.W.2d 298 (Ky. 1972). Prior to the 1968 Kentucky Derby, the major Bute incident in a stakes race came when Crimson Satan, the first place finisher in the Leonard Richards Stakes at Delaware Park in 1962, was disqualified.
 25. While the initial blood tests did not find the presence of many other drugs, they could generally detect Bute.
 26. Turf writer Bill Nack termed the 60-day Martin penalty "one of the stiffest of its kind given out in the post-World War II era of racing in New York." William Nack, "Rules vs. Rights," THOROUGHBRED RECORD, December 14, 1974.
 27. The absence of a penalty for Maloney may have largely been due to the composition of the board of stewards at NYRA which made the decision on the penalty question. *See* Bill Nack, "Shotgun Justice at the Track," NEWSDAY, February 22, 1977. Technically, under the State's rules, only the State steward can make the decision on suspensions, since the other thoroughbred stewards are not State officers and cannot take any official action against a State license. *See* 9 NYCRR §§ 4022.12 and 4022.13. In practice, however, the stewards tend to act as a body, and the State steward rarely exercises plenary power.
 28. Wilfred Stokes and L. C. A. Nunn, "A New Effective Diuretic—Lasix," BR MED J. 1964 OCT 10; 2(5414): 910-14.
 29. "Readers' Forum," Louisville Courier-Journal, October 10, 2003; *see also* Jennie Rees, "Dr. Alex Harthill 1925-2005," LOUISVILLE COURIER-JOURNAL, July 17, 2005.
 30. Bill Nack, "Strict Drug Rules Worrying Trainers," NEWSDAY, October 1, 1974.
 31. Ferriola v. Corbisiero, 148 A.D.2d 1015 (1st Dept. 1989). Interestingly, almost no decided equine case in a New York State court mentions the term "Lasix." It is only mentioned in the case of Matter of Czermann v. New York State Racing & Wagering Bd., 68 A.D.3d 1580, 1583 (3d Dept. 2009) in a footnote which states, "Lasix is a permitted, therapeutic alkalizing agent."
 32. One of the few consistent opponents of Lasix use was racing writer Bill Finley, then writing for the Daily News. *See* Bill Finley, "Just Say Neigh to These Drugs," N.Y. DAILY NEWS, March 30, 1995.
 33. Some racing writers who had initially opposed Lasix legalization had also altered their views. Newsday racing writer Paul Moran wrote, "Unfortunately, the sport is choking on New York's regulatory nobility." Paul Moran, "Surrender, NY: Fall Into Line and Allow Lasix," NEWSDAY, May 28, 1992. Newsday's John Pricci had previously noted his support for Lasix, writing, "I'm not pro Lasix. Just pro reality. I want to see the best horses race live in New York. So does the public. With the exception of a handful of breeders and elitists who are more interested in causes than effects, no one gets bent out of shape when Bute and Lasix appear on the track program next to the names of their favorite horses." John Pricci, "Preakness May Be Wild," NEWSDAY, May 15, 1988. Steven Crist stated about the Racing and Wagering Board's decision: "This was progress toward reality. There is a national horse shortage in this country, and it's more important for us to put on a respectable product than cling to a philosophical position. Besides, this is no longer a debatable point in the rest of the country, and it's important to have some uniformity." Andrew Beyer, "Legalization of Lasix Is an Ethical Band-Aid," WASHINGTON POST, May 27, 1995.
 34. *See, e.g.,* Jerry Brown, "An Immodest Proposal," THOROUGHBRED DAILY NEWS, October 3, 2014. "I can tell you for a fact that we make it our business to understand Lasix as it applies to handicapping, and that not a single horseplayer I have talked to will bet MORE if Lasix is banned. It would add an extra unhandicappable variable to each horse in every race, and more confusion. In contrast, *see* Barry Irwin, "Racing: Sport or Business?," THOROUGHBRED DAILY NEWS, October 4, 2014. "Jerry's singular focus has blinded him to the fact that all evidence points to the introduction and proliferation of so-called therapeutic or permissible medication as the cause for the demise of the American racehorse and the downward spiral of the gambling dollar."
 35. General MacArthur was a fan of horse racing, and for a number of years, ran a General Douglas MacArthur Handicap.

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Refereeing Injuries in Professional Contact Sports: Should Misconduct Be Officiated in the Court or On It?

By Eryhn Won

I. Introduction

Contact sports involve physical impact against opponents or inanimate objects with measurable force.¹ Professional organizations, such as the National Football League (NFL) and the National Hockey League (NHL), are composed of top athletes from around the world competing in exciting games where the competitors intentionally collide with one another in order to gain an advantage during play. This type of extreme activity inevitably results in some level of physical injury. Athletes may experience severe injuries that negatively impact their sporting careers—possibly even prematurely ending them. Some players attempt to recover for their harms by seeking redress through the civil torts system. However, in the context of professional sports, it is not where the demarcation is between contact that is an acceptable (and often required) part of the game and contact that is actionable. Is the judicially created “contact sports exception” an adequate method for the courts to determine a defendant’s liability,² or is there another means of review that could be implemented?

II. Recklessness and the Contact Sports Exception

Ordinarily, a person can be held liable for injuring others when that person’s conduct is careless or negligent.³ However, this standard does not apply when the behavior in question is a fundamental part of the sport.⁴ “As a general rule, persons have a duty to use due care to avoid injury to others, and may be held liable if their careless conduct injures another person.... In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.”⁵ Courts have found that negligence is not a sufficient basis for tort liability in contact sports. This approach was highlighted in *Knight v. Jewett*, where the plaintiff was injured during an informal game of touch football.⁶ The court found that the defendant’s misconduct would be actionable only if his act was reckless:

It is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport—for example, for an injury resulting from a carelessly thrown ball or bat during a baseball game—and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.⁷

This recklessness standard in the contact sports context may be traced to a 1975 Illinois case, *Nabozny v. Barnhill*.⁸ In *Nabozny*, the plaintiff was a goalkeeper and the defendant was a forward on the opposing team in a high school soccer game. The plaintiff had possession of the soccer ball after it was passed to him by his teammate. In soccer, an opponent cannot challenge the goalkeeper when a goalkeeper has gained possession of the ball.⁹ The defendant ignored this rule and continued to charge the net. He attempted to kick the ball out of the plaintiff’s hands, but instead kicked the plaintiff in the head. As a result, the plaintiff sustained permanent brain and skull damage. The *Nabozny* court explained that “a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause injury to that player...”¹⁰ While contact in soccer is expected, the defendant’s act was beyond flagrant and well outside the norm. Thus, the defendant was found to have recklessly disregarded the plaintiff’s safety.

The recklessness standard applied in *Nabozny* has come to be known as the “contact sports exception” to the ordinary tort standard of reasonable care. In *Pfister v. Shusta*, the Illinois Supreme Court ratified the recklessness standard that the state’s Court of Appeals had articulated in *Nabozny*: “Under the contact sports exception, participants in contact sports may be held liable for injuries to co-participants caused by willful and wanton or intentional misconduct, but are not liable for injuries caused by ordinary negligence.”¹¹ During an impromptu game kicking a crushed soda can like a soccer ball, the plaintiff was injured when the defendant allegedly pushed him. The court found that contact was to be expected during the can-kicking game due to the similarity of the game to soccer or hockey. Accordingly, the court applied the contact sports exception and held that the plaintiff would only be able to seek recovery under the recklessness standard. The court determined that the defendant’s conduct was not willful or intentional, thus, he was not liable.

Subsequent Illinois cases firmly established the contact sports exception, which was then later adopted by other states.¹² These cases expounded upon what constitutes a contact sport for the exception to be applicable. The courts placed more of an emphasis on the structure and the inherent characteristics of the sport, rather than what the players subjectively believed would happen. In essence, “the court must consider the objective factors surrounding the game itself and not the subjective expectations of the parties.”¹³

For example, in *Keller v. Mols* the plaintiff was injured during a floor hockey game with his neighbors.¹⁴ The plaintiff argued that negligence should be the standard applied, because the plaintiff subjectively believed that the floor hockey game was not structured and organized like a typical sporting event. Yet, both the plaintiff and defendant acknowledged that they had adapted and implemented ordinary hockey rules, which aligned with “the common conception of hockey as a contact sport.”¹⁵ Even though both parties were playing an informal game, the fact that they used traditional hockey rules meant that their game was a contact sport. Therefore, the contact sport exception was applicable and the defendant could not be held liable under the negligence approach.

Conversely, the court in *Novak v. Virene* held that downhill skiing was not a contact sport.¹⁶ The plaintiff was an advanced intermediate skier who was hit from behind by an inexperienced skier while on a run. The defendant argued that downhill skiing should be considered a contact sport because it “had inherent obvious and necessary dangers, including contact between skiers.”¹⁷ The court reasoned that “by one’s participation in the sport, one does not voluntarily submit to bodily contact with other skiers, and such contact is not inevitable.... There is no reason to expand the limited contact sports exception to exempt downhill skiers from negligence liability if they negligently collide with other skiers.”¹⁸ The court concluded that there is always some level of risk in downhill skiing, but bodily contact is not an unavoidable aspect, and while “many activities in life are fraught with danger,” the contact sports exception cannot be used as a pass to exempt a participant from liability—especially when collisions are not a fundamental element of the sport.¹⁹

III. Assumption of Risk

One of the reasons that jurisdictions have adopted the heightened recklessness standard involves assumption of risk, whether express or implied.²⁰ Express assumption of risk is recognized in waivers and releases, which involve the “intentional and voluntary act of relinquishing something, such as a known right to sue a person...or organization for an injury.”²¹ A waiver and release indicate that the participant is assuming the risk of injuries or damages that may occur during normal gameplay. Before being allowed to participate, players are often required to sign waivers and releases. In *Fischer v. Rivest*, USA Hockey’s (USAH) policy mandated that the plaintiff and his father sign a waiver and release for the plaintiff’s (a minor) eligibility.²² The signed documents relinquished liability for any injuries that arose out of competing in USAH events.²³ During a game, the plaintiff was pushed from behind by an opposing player and was seriously injured. The waiver and release barred negligence claims, not reckless conduct.²⁴ The court stated that “[t]he normal expectation of the participants in a contact sport such as hockey is that there will be injuries which result from

playing the game.”²⁵ As the defendant did not play in a reckless manner, the waiver and release signed by the plaintiff’s father was valid and enforceable.²⁶

Similarly, when players voluntarily participate in a contact sport with known hazards, they are impliedly acquiescing to conduct by a defendant that is an expected part of the sport. However, implied assumption of risk does not necessarily mean that these participants are discharging defendants of all culpability:

It may be accurate to suggest that an individual who voluntarily engages in a potentially dangerous activity or sport “consents to” or “agrees to assume” the risks inherent in the activity or sport itself.... But it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur.²⁷

This increased risk is beyond the realm of ordinary negligence. Thus, the recklessness standard of the contact sports exception is appropriate because it “allows recovery for injuries resulting from willful and wanton and intentional misconduct while taking into account the voluntary nature of participation in games where physical contact is anticipated and where the risk of injury caused by this contact is inherent.”²⁸

IV. Public Policy Concerns

Another reason, and perhaps a more compelling one, that courts have relied upon to justify the recklessness principle is the public policy concern that a higher standard would promote the benefits of participation in contact sports while preventing a flood of litigation.²⁹ The *Nabozny* court stated “that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth.”³⁰ The court believed that the threat of a lawsuit from an injury received during gameplay would make participants reluctant to play in the manner that the game normally requires. This same sentiment was expressed in *Pfister*, where the court explained that physical contact and injuries among participants is a basic part of contact sports and unwarranted judicial intervention might negatively affect the game itself.³¹

Moreover, a lower threshold of negligence may make it too easy for participants to bring suit over any type of injury. Due to the physical nature of sports, there is an ever-present risk of bodily injury. This concern was expressed in *Jaworski v. Kiernan*, where the plaintiff was injured during an adult coed recreational soccer match:

If simple negligence were adopted as the standard of care, every punter with whom contact is made, every midfielder high stuck, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted. When the number of athletic events taking place...over the course of a year is considered, there exists the potential for a surfeit of lawsuits when it becomes known that simple negligence, based on an inadvertent violation of a contest rule, will suffice as a ground for recovery for an athletic injury. This should not be encouraged.³²

As a matter of policy, the court held that it is a normal expectation that participants of a contact sport might be injured and that a recklessness standard of care is the appropriate one.

V. Application in Professional Sports

Since *Nabozny*, the recklessness standard of the contact sports exception has also been employed in professional sports injury litigation. "The prevailing view in the U.S. is that recovery will be limited to injuries incurred as a result of intentional or reckless conduct; simple negligence is generally regarded as an inappropriate basis for recovery."³³ It could be reasoned that because the recklessness standard has been applied to high school contact sports and even to informal games, therefore, recklessness would apply to professional contact sports as well. The higher level of vigorous play in a professional contact sport would entail an even greater risk of bodily contact.

For example, the higher tort standard was first applied to a professional sport in *McKichan v. St. Louis Hockey Club*.³⁴ During an International Hockey League (IHL)³⁵ game in 1990, the defendant hit the opponent plaintiff in the back after two whistles had stopped play.³⁶ The plaintiff was slammed against the boards, fell on the ice, and was immediately knocked unconscious. The appellate court reversed the trial court's decision for the plaintiff, stating that "[p]ursuant to the contact sports exception, the applicable standard for examining opposing player's conduct was that of reckless or wanton negligence, not ordinary negligence."³⁷ In determining whether the player's injury-causing conduct was actionable under the recklessness standard, the court applied factors from *Niemczyk v. Burleson*, which include:

the specific game involved, the ages and physical attributes of the participants, their respective skills at the game and their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which inhere in the game

and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, the degree of zest with which the game is being played, and doubtless others.³⁸

The court used these concepts to highlight the fact that this incident occurred in a professional hockey game where rough, and often brutal, play is customary and oftentimes preferred. Violent actions, such as being checked from behind into the boards even after stoppage of play, are inherent to the sport and can be reasonably anticipated during the normal course of the game. Therefore, as a matter of law, the court found that the defendant's conduct was not willful and wanton in the context of a professional hockey game.

Another application of the recklessness principle in professional sports resulted from a 1973 NFL game between the Cincinnati Bengals and the Denver Broncos.³⁹ Charles Clark of the Bengals intentionally hit Dale Hackbart of the Broncos on the back of the head out of frustration after an interception. As a result, Hackbart suffered three broken vertebrae and severe muscular injuries. Hackbart brought suit against the Bengals for damages, alleging reckless misconduct and, alternatively, negligence. The district court ruled against Hackbart, stating that, "[t]he violence of professional football is carefully orchestrated. Both offensive and defensive players must be extremely aggressive in their actions, and they must play with reckless abandonment of self-protective instincts."⁴⁰ The Tenth Circuit returned the case for retrial, holding that a professional football player may be held liable for inflicting injuries upon an opponent only if the player acted in a manner that falls under the reckless misconduct standard.⁴¹ The court believed that the kind of risk involved in this case is not an accepted part of the game of football, stating, "there are no principles of law which allow a court to rule out certain tortious conduct by reason of general roughness of the game or difficulty of administering it."⁴² As such, the Tenth Circuit concluded that Hackbart's claim was actionable under the recklessness standard.

VI. Comment

As noted earlier, many jurisdictions have applied the recklessness standard of the contact sports exception when reviewing tortious acts committed by participants in a contact sporting event.⁴³ Courts rely on the notion that because bodily contact is an inherent aspect of contact sports and players assume the risk of injury, negligence would be too low a threshold for actionable claims. Arguably, the line between what type of conduct is acceptable in a professional game and what kind is actionable is unclear. For example, the defendant's violent conduct in *McKichan* was considered to be a fundamental

part of hockey, yet the defendant's infraction in *Hackbart* was found to be actionable. The ultimate question is how the judiciary clarifies this line in order to regulate the violence that is inevitable in professional contact sports. Outside of creating a standard of care that is between reckless misconduct and negligence that is only applicable to the contact sports arena, it seems to be a daunting task. Another question asked is whether the courts should be where these issues are resolved, or should they take a step back while another establishment, namely the leagues themselves, undertakes this responsibility?

Interestingly, legislation attempting to regulate injuries that occur in contact sports has been stymied. On July 31, 1980, Ohio Representative Ronald M. Mottl proposed the Sports Violence Act of 1980 (H.R. 7903) in the United States House of Representatives.⁴⁴ H.R. 7903 would "[a]mend the Federal criminal code to establish a maximum penalty of one year's imprisonment and/or a \$5,000 fine for any player in a professional sports event who knowingly uses excessive physical force and causes risk of significant bodily injury to another person involved in such event."⁴⁵ Supporters of H.R. 7903 argued that sports leagues are ineffectual in curtailing the level of violence that takes place during games, and maintained that federal regulation was imperative.⁴⁶ Furthermore, proponents claimed that current league regulations did not do enough to discourage inordinately reckless play by the athletes. H.R. 7903 ultimately failed, primarily due to the ambiguity in defining "excessive physical force."⁴⁷

Similarly, on November 18, 1983, South Dakota Representative Thomas A. Daschle introduced the Sports Violence Arbitration Act of 1983 (H.R. 4495).⁴⁸ This Act imposed civil penalties on players and "proposed the formation of an arbitration board, or 'sports court,' to settle grievances produced by 'conduct found to be inconsistent with the competitive goals of the sport.' Under H.R. 4495, players and management would have had to set up the arbitration board and initiate its procedures via collective bargaining."⁴⁹ This proposal went the way of 1980 Act H.R. 7903 due to a plethora of issues, including assigning too much responsibility to management and the players, which was seen as a burden by the organizations.

It is apparent from these failed legislative acts and others that attempts by the federal government to manage sports violence were ineffective.⁵⁰ Professional sports organizations are usually opposed to any outside efforts to supervise and regulate incidents that occur during the game and choose to handle matters internally. "[A]thletes would prefer to settle it physically on the court, rather than in the court."⁵¹ In the same manner, the Tenth Circuit in *Hackbart* described the NFL as a business that is inherently violent in nature.⁵² Therefore, any infractions on the field "should not be a subject for the business of the courts,"⁵³ since there are penalties and sanctions available to deal with violations. This style of enforcement is

supposed to enable teams to appropriately rein in their players and handle matters accordingly. The concern is that once the courts get involved, athletes will check their usual style of play out of fear that any physical contact during the game may lead to litigation.

An example of a professional organization exercising its own penalties after a particularly egregious infraction occurred in 2000, when Marty McSorley of the Boston Bruins sought revenge on Donald Brashear of the Vancouver Canucks. With only three seconds left in the game, McSorley skated behind Brashear and used his hockey stick to slash at Brashear's head.⁵⁴ The impact Brashear's head made with the ice caused him to suffer convulsions. The NHL fined McSorley \$72,000 and suspended him for the rest of the season—the longest suspension in NHL history at the time.⁵⁵ The league reacted quickly and efficiently to the incident in a way to which the courts are unable.

A potential compromise between courts reviewing every tort suit brought regarding professional contact sports injuries and having the organizations police their athletes may be to "divvy up the work," so to speak. When injurious actions or violations occur during the ordinary course of a game, such as in the McSorley incident, internal league control should effectuate its own sanctions.⁵⁶ On the other hand, if the potentially actionable conduct transpires outside of gameplay (which would include acts that occur after stoppage of play or an episode that has no elemental value to the game),⁵⁷ the courts could then step in to analyze the matter.

League officials are well versed in the customs and rules of their sports, and know their sports better than any court. They are on the "firing line" and immersed in procedures and guidelines. Therefore, these officials are better suited to make the appropriate determinations regarding conduct that is acceptable during gameplay. This will help minimize potential judicial oversight, since judges and jurors are not well versed in what actions would be considered uncustomary gameplay violence. Furthermore, outcomes would be decided much more swiftly than civil litigation. This would help minimize the use of scarce legal resources to adjudicate tort claims that would be more readily handled by internal league control.

Incidents clearly "outside of gameplay" would be better suited to judicial review. This was evident in *Hackbart*, where the defendant's unreasonable act was more of a personal vendetta rather than an expected part of the sport. Courts could apply the factors found in *Niemczyk* to reasonably determine what and how much liability players may have regarding their misconduct.⁵⁸ In this manner, courts would not have the burden of correctly resolving what defines conduct that is an inherent aspect of a professional sport and, thus, would be able to avoid inadvertently coming to a decision at the expense of players.

For example, if the *McKichan* court had approached the incident with the “outside of gameplay” application, the outcome would have been different. In *McKichan*, the defendant’s actions were found to be an inherent aspect of professional ice hockey and not reckless, while in *Hackbart*, the defendant’s conduct was regarded as far outside the boundaries of a professional football game and thus reckless. It can be argued that the courts correctly determined the level of accepted play due to each sport’s customs. Traditionally, ice hockey involves much more intense violence that is widely established and preferred. In fact, the NHL is the only professional league in the United States that does not automatically eject players for fighting.⁵⁹ However, professional football and professional hockey are contact sports that similarly entail hard hits and fierce physical action. In both of these cases, the hits made by the defendants were in severe violation of each sport’s rules. The *McKichan* court should have found the defendant’s transgression to be reckless as well. This illustrates the fact that the courts should only be asked to make the call on whether an out-of-gameplay infraction spawns liability, and not on whether or not the infraction was in fact out of gameplay.

A split arrangement of review between the courts and the leagues regarding injuries in professional contact sports would be ideal. There would be consistency with regard to predictable sanctions and contact sports injury case holdings. Analogous court findings will enable athletes to use these suits as a baseline for expected conduct. Possible judicial oversight in close cases would be minimized, and athletes would be able to participate within the expectations and customs of the games without constant concern about potential liability. The number of tortious lawsuits regarding contact sports would be reduced, while simultaneously diminishing the threat that gameplay would be adversely affected. In essence, a win-win compromise in a field where winning is the be-all and end-all goal.

Endnotes

1. Definition of contact sport, *DICTIONARY.COM*, available at <http://dictionary.reference.com/browse/contact-sport>.
2. Richard E. Kaye, *Construction and Application of Contact Sports Exception to Negligence*, 75 A.L.R.6th 109 (1978).
3. *Id.*
4. Survey, *2010 Annual Survey: Recent Developments in Sports Law*, 21 MARQ. SPORTS L. REV. 667, 765.
5. *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992).
6. *Id.* at 697.
7. *Id.* at 716.
8. *Nabozny v. Barnhill*, 334 N.E.2d 258, 215 (Ill. App. Ct. 1975).
9. FIFA: Law 12 Fouls and Misconduct, available at http://www.fifa.com/mm/document/afdeveloping/refereeing/law_12_fouls_misconduct_en_47379.pdf.
10. *Nabozny*, 334 N.E.2d at 215.
11. *Pfister v. Shusta*, 167 Ill. 2d 417, 420 (1995).
12. *Archibald v. Kemble*, 971 A.2d 513, 517-18 (2009) (discussing the recklessness standard where the plaintiff was injured during a hockey game in a no-checking league: “Several other jurisdictions have applied the standard of recklessness in factually similar sports situations. Of those jurisdictions that have decided cases of this nature, a majority apply the standard of recklessness.”).
13. *Weisberg v. Chi. Steel*, 397 Ill. App. 3d 310, 314 (2009).
14. *Keller v. Mols*, 156 Ill. App. 3d 235, 236 (1987).
15. *Id.* at 237.
16. *Novak v. Virene*, 224 Ill. App. 3d 317, 321 (1991).
17. *Id.* at 319.
18. *Id.* at 321.
19. *Id.*
20. Erica K. Rosenthal, Note: *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 *FORDHAM L. REV.* 2631 (2004).
21. Definition of Waivers and Releases, *USLEGAL*, available at <http://sportslaw.uslegal.com/tort-law/waivers-and-releases/>.
22. *Fischer v. Rivest*, 2002 Conn. Super. LEXIS 2778, at *7 (Conn. Super. Ct. Aug. 15, 2002).
23. *Id.* (The signed waiver and release stated in part: “For and in consideration of participant’s registration with USA Hockey, Inc... and being allowed to participate in USAH events and member team activities, the parent(s) or legal guardian(s) of participants relinquish any and all liability for and cause of action for personal injury, property damage or wrongful death occurring to participant arising out of participation in USAH events, member team activities, the sport of ice hockey, and/or activities incidental thereto, whenever or however they occur...and by this agreement any such claims, rights, and causes of action that participant may have are hereby relinquished....”).
24. *Id.* at 32.
25. *Id.* at 30.
26. *Id.*
27. *Knight*, 834 P.2d at 705.
28. *Pfister*, 167 Ill. 2d at 427.
29. Joshua Winneker and Lindsay Demery, *Article: Protecting the Unprotected: Creating an Anti-Retaliation Policy for Professional Athletes That Exercise Their Legal Rights in Participant vs. Participant Liability Contact Sports*, 12 V.A. SPORTS & ENT. L.J. 315 (2013).
30. *Nabozny*, 334 N.E.2d at 260.
31. *Pfister*, 167 Ill. 2d at 426.
32. *Jaworski v. Kiernan*, 241 Conn. 399 (1997).
33. Jeffrey A. Citron and Mark Ableman, *Article: Civil Liability in the Arena of Professional Sports*, 36 U.B.C. L. REV. 193 (2003).
34. *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209, 210 (Mo. Ct. App. 1998).
35. Daniel S. Mason, *International Hockey League and the Professionalization of Ice Hockey, 1904-1907* (1998), available at <http://www.cchockeyhistory.org/HockeyPro1904-1907byDanMason.pdf>.
36. *McKichan*, 967 S.W.2d at 210.
37. *Id.*
38. *Niemczyk v. Burleson*, 538 S.W.2d 737, 741 (Mo. Ct. App. 1976).
39. *Hackbart in Settlement with Bengals on Injury* (July 5, 1981), N.Y. TIMES, available at <http://www.nytimes.com/1981/07/05/sports/hackbart-in-settlement-with-bengals-on-injury.html>.
40. *Hackbart v. Cincinnati Bengals, Inc.*, 435 F. Supp. 352, 355 (D. Colo. 1977).

41. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 525 (10th Cir. 1979).
42. *Id.* at 520.
43. *Citron*, *supra* note 33.
44. H.R. 7903—Sports Violence Act of 1980, LIBRARY OF CONGRESS, available at <https://www.congress.gov/bill/96th-congress/house-bill/7903>.
45. *Id.*
46. Kevin A. Fritz, Note: *Going to the Bullpen: Using Uncle Sam to Strike Out Professional Sports Violence*, 20 CARDOZO ARTS & ENT LJ 189 (2002) (“Section 115. Excessive violence during professional sports events (a) Whoever, as a player in a professional sports event, knowingly uses excessive physical force and thereby causes a risk of significant bodily injury to another person involved in that event shall be fined not more than \$ 5,000 or imprisoned not more than one year.”).
47. *Id.*
48. H.R. 4495 - Sports Violence Arbitration Act of 1983, LIBRARY OF CONGRESS, available at <https://www.congress.gov/bill/98th-congress/house-bill/4495>.
49. Fritz, *supra* note 46.
50. See *id.* (“[I]n 1991, Massachusetts unsuccessfully attempted to enact a sports violence bill that would have created penalties for assault and battery committed by athletes in professional sporting events.”)
51. Jonathan H. Katz, *Symposium: Federalism after Alden: Note: From the Penalty Box to the Penitentiary—The People Versus Jesse Boulerice* (2000).
52. *Hackbart*, 601 F.2d 516 at 519.
53. *Hackbart*, 435 F. Supp. 352 at 357.
54. *Marty McSorley Slashes Donald Brashear Full NHL Classic*, YOUTUBE (April 23, 2014), available at <https://www.youtube.com/watch?v=eTOfoJAij4>.
55. Hellen Elliott, *NHL Acts Swiftly and Hands McSorley the Longest Suspension in History as Baseball Prepares to Take Action Against Strawberry That Could Cost Him the Season*, L.A. TIMES (Feb. 24, 2000), available at <http://articles.latimes.com/2000/feb/24/sports/sp-2120>; see also Chris Nichols, *Metta World Peace and the Salaries Lost to Suspensions*, YAHOO (Apr. 25, 2010), available at <http://finance.yahoo.com/blogs/the-exchange/metta-world-peace-salaries-lost-suspensions-143853151.html> (discussing McSorley never playing in the NHL again and losing his \$600,000 per year contract).
56. In the case of McSorley, the courts eventually became involved. McSorley was subsequently brought up on criminal charges, was found guilty of assault and given an 18-month conditional discharge by the court. Criminal application to liability is beyond the scope of this article, but for a better understanding see USLEGAL, *Sports Violence*, available at <http://sportslaw.uslegal.com/sports-violence/> (last visited Nov. 2, 2015) (“Criminal assault occurs when one unjustifiably and intentionally uses force upon another with intent to cause injury. The crime usually involves a threat of harm, coupled with improper contact with the other person.”); see also *NHL Player Found Guilty of Assault*, ABCNEWS, available at <http://abcnews.go.com/Sports/story?id=100318&page=1>.
57. Examples of actions with no elemental value to a professional game could include the following: a Major League Baseball player who intentionally throws his bat at the pitcher after being hit by a wild pitch; an NFL lineman who, while coming off the field during gameplay, deliberately trips an opponent who was running to the line; a Major League Soccer player willfully kicking a goalie in the head after the goalie has already gained possession of the ball.
58. *Niemczyk*, 538 S.W.2d at 741.
59. Nadav Goldschmied & Samantha Espindola, “I Went to a Fight the Other Night and a Hockey Game Broke Out”: is Professional Hockey Fighting Calculated or Impulsive?, 5 SPORTS HEALTH 458, 458 (2013), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3752193/>.

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RESOLUTION ALLEY

Solving Fair Use Disputes Through Mediation and Early Neutral Evaluation

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.

It has been said that uncertainty—about the facts, the law, or both—is a key driver in the voluntary resolution of disputes. There is perhaps no greater legal uncertainty facing the arts and entertainment fields today than the application of the fair use doctrine to claims of copyright infringement.

For those new to that doctrine, here is a brief introduction: The doctrine of fair use is intended to balance the interests of, on the one hand, those who possess the exclusive rights to reproduce and make derivative works of their copyrighted materials (among other rights) and, on the other hand, those who desire to exercise their First Amendment right to engage in free expression, including limited use of works that otherwise would be deemed infringement under the copyright laws. That is, the fair use doctrine essentially permits limited uses of otherwise copyrighted works without first having to obtain permission or consent from the copyright holder. Common examples of fair use include criticism, commentary, news reporting, research, teaching, and parody.

Historically, the doctrine was rooted in the common law until it was formally codified in the Copyright Act of 1976 at 17 U.S.C. § 107. Under that statute, in determining whether a particular use of an otherwise copyrighted work is a fair use, a court will look to the following factors:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

Although seemingly helpful, the application of these fair use factors to any particular circumstance, from a practical point of view, is highly subjective and fact-dependent.

For example, in *SOFA Entertainment, Inc. v. Dodger Productions, Inc.*,¹ the defendant used a seven-second clip from *The Ed Sullivan Show* in connection with the performance of the award-winning Broadway musical *Jersey Boys*. The clip featured Ed Sullivan introducing the

popular 1960s musical group The Four Seasons on his show, but not the group's actual performance, which was presented after the showing of the clip by the actors in the musical. In response to the claim of copyright infringement, the defendant moved for summary judgment based upon a fair use defense. In analyzing the factors, the court found, among other things, that (a) the parties had agreed that the musical was an entertaining dramatization of actual events, thus weighing in favor of fair use; (b) the use of the clip was "transformative" because it was being used as a historical reference point, and not just a re-broadcast of the original, thus again weighing in favor of fair use; (c) the defendant's use was commercial in nature, and, thus, weighed against fair use, but was not accorded great weight based upon the transformative nature of the use, the fact that the clip was only seven seconds long, and the lack of any evidence that the clip was used in the marketing of *Jersey Boys*; (d) the clip was creative, but also newsworthy, thereby weighing slightly in favor of fair use; (e) the clip was not the "heart" of either the television episode or the musical, thus weighing in favor of fair use; and (f) the plaintiff had presented no evidence of any plans to license the clip, and the use of the clip in the musical was not a substitute for the original, thus again weighing in favor of fair use. On balance, the court concluded that the use here was fair and, thus, did not infringe the plaintiff's copyright.

As *SOFA Entertainment* illustrates, a fair use analysis is difficult to conduct without the benefit of full discovery, which is both time-consuming and expensive. Moreover, with respect to the fourth factor ("the effect of the use upon the potential market for or value of the copyrighted work"), expert testimony will likely be required in order to present evidence of the relevant marketplace. All of this makes summary judgment unlikely except in the clearest of circumstances. At bottom, the application of the fair use factors is a subjective, case-by-case analysis, with no bright-line rules and little in the way of helpful guideposts.

Recently, the legal parameters of this doctrine have also been undergoing some upheaval, particularly with respect to the first fair use factor ("the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes"). For example, in *Prince v. Cariou*,² the Second Circuit held that Richard Prince's "appropriation art" of Patrick

Cariou's copyrighted photographs could constitute fair use. Specifically, the Court held that 25 of the art works were fair use because they were "new and different" and, thus, "transformative," in that they "alter[ed] the original with new expression, meaning, or message." The Court also clarified that a work need not comment on the original to qualify as a fair use, finding instead that the critical inquiry was how the work in question appeared to the reasonable observer, not what the artist might say about his or her work. With respect to five other art works, the Court remanded the case to the trial court for reconsideration of whether Prince had sufficiently "transformed" the original photographs to constitute fair use. The case thereafter settled.

The *Cariou* Court's focus on the "transformative" use of the allegedly infringing work under the fair use doctrine may not be limited solely to art and photographs. In *Author's Guild, Inc. v. HathiTrust*,³ the Second Circuit held that the HathiTrust Digital Library's creation of a full-text search database providing access for the print-disabled (those who cannot effectively read print because of some disability) constituted fair use, "conclud[ing] that the creation of a full-text searchable database is a quintessentially transformative use...[as] the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn." While on remand to determine whether the plaintiffs had standing to bring a claim on another aspect of the digitization project, the parties settled the litigation. Most recently, in *Author's Guild, Inc. v. Google, Inc.*,⁴ the Second Circuit held that the Google Books Library Project constituted fair use, concluding that "Google's making of a digital copy to provide a search function is a transformative use, which augments public knowledge by making available information about Plaintiffs' books without providing the public with a substantial substitute for matter protected by the Plaintiffs' copyright interests in the original works or derivatives of them." These pair of cases illustrate that the predominance of the transformative use view—nestled principally in the first fair use factor—may, at least in the Second Circuit, be grabbing a foothold in publishing and technology as well, expanding the acceptance of fair use in those fields.

However, in *Kienitz v. Sconnie Nation, LLC*,⁵ the Seventh Circuit, while ruling that an alleged infringer's use of a copyrighted photograph constituted fair use, expressed skepticism of the Second Circuit's fair use analysis in *Cariou*, characterizing the approach of "asking exclusively whether something is 'transformative'" as "not only replac[ing]" the four statutory fair use factors, but also extinguishing an author's right to create derivative works.⁶ Others have also similarly criticized the Second Circuit's interpretation and application of the fair use doctrine.⁷ Moreover, although the Supreme Court denied certiorari on December 31, 2015, the Author's Guild had filed a petition for a writ of certiorari, arguing, in part, that "the Second Circuit's approach to fair use improperly makes

'transformative purpose' the decisive factor, replacing the statutory four-factor test, as the Seventh Circuit has charged."⁸ Thus, the precise legal contours of the fair use doctrine remain indeterminate, leaving practitioners, in-house attorneys, and business decision makers on both sides of a dispute with ample room for debate. With a legal framework in flux, coupled with a highly subjective, fact-specific, and case-by-case inquiry, entrusting the application of the fair use factors to either a jury or a judge at trial creates grave uncertainty and doubt as to the outcome of any fair use dispute.

This is where mediation and early neutral evaluation—two forms of non-binding alternative dispute resolution—can be of great assistance. A voluntary resolution thrives on uncertainty. Considerations about how a trial court will rule on summary judgment or evidentiary issues at trial; how a jury will assess the credibility of the witnesses who testify; the state of the law at the time when the jury is charged; and what an appellate court will do in reviewing the trial court record all create sufficient uncertainty about the litigation process to serve as strong motivators for a resolution of a dispute of the parties' own making, as opposed to having one imposed upon them.⁹ Moreover, direct party-to-party negotiations are difficult to conduct when the factual and legal positions of the parties are subject to a high level of uncertainty, as is the case with the application of the fair use factors.

By providing impartial and realistic feedback on the fair use debate, from both factual and legal perspectives, a mediator can help parties evaluate their best interests while uncovering areas of mutual gain. By the time parties (and their counsel) have formulated their fair use positions, they are usually entrenched and enamored by them.¹⁰ A mediator can try to improve communications between the parties, explore possible alternatives, and address the underlying interests and needs of the parties in hopes of moving them towards a negotiated settlement or other resolution. More specifically, a mediator can help identify the weaknesses in the factual record and the barriers presented by the legal framework relative to the parties' respective arguments on how to apply the various fair use factors. In addition, a mediator with expertise in the copyright laws would minimize the need to have the parties educate the neutral on basic, fundamental fair use principles and case law, thereby further reducing costs. Doing so can help the parties realize the value in an early resolution before enormous time and costs are spent in a protracted litigation or drawn-out negotiations, which are frequently accompanied by the great risk of impasse in the absence of a disinterested, third-party neutral who has no personal or financial stake in the outcome.¹¹

Another option is for the parties to jointly retain a third party trained to conduct an early neutral evaluation of the fair use dispute. Generally, such an evaluation occurs early in the pre-trial stage. A disinterested third party neutral engages in an independent fact investigation, in-

interviewing the parties, gathering additional information, and then presenting non-binding findings and recommendations to the parties. As the neutral has the appropriate subject matter expertise and experience in the field of the dispute, whatever recommendations he or she provides are likely influential on the parties and are meant to help place them on a path to a negotiated agreement. A later step in the process could include having each party (preferably accompanied by its decision-makers) present its claims and defenses to the neutral, describing the principal evidence on which those claims and defenses are based. (This step would usually take place after some exchange of information has taken place, and the neutral can assist the parties in that exchange so that the process is mutually beneficial and productive. Such information exchange would typically cost substantially less than full-blown discovery.) During the presentations, the role of the neutral is to assess the strengths and weaknesses of the dispute, clarifying and probing the key issues to help the parties assess their respective positions and improve their analyses of the dispute. In doing so, the process encourages direct communication between adversarial parties about their contentions and supporting evidence. Ultimately, the neutral will prepare and submit to the parties a non-binding, written evaluation that outlines what the likely outcome of the dispute will be. This can be particularly significant in situations like a dispute over the application of the fair use factors where the parties may be far apart in their views on how the law may apply or what the dispute is worth. The neutral thereafter can provide assistance to the parties' decision-makers in finding some common ground.¹²

In today's legal landscape, uncertainty and fair use seem to go hand in hand. For parties contending with a dispute over the applicability of the fair use doctrine, mediation and early neutral evaluation offer a pair of concrete ways to eliminate the cloud of uncertainty that comes from relying solely on the formal legal process, while reducing both time and expense and finding a mutually acceptable solution.

Endnotes

1. 782 F. Supp. 2d 898 (C.D. Cal. 2010), *aff'd*, 709 F.3d 1273 (9th Cir. 2013).
2. 714 F.3d 694 (2d Cir. 2013).
3. 755 F.3d 87 (2d Cir. 2014).
4. No. 13-4829 (2d Cir. Oct. 16, 2015) *cert. denied*, available at <https://www.unitedstatescourts.org/federal/ca2/13-4829/230-0.html>.
5. 766 F.3d 756 (7th Cir. 2014).
6. See also *id.* at 758 ("To say that a new use transforms the work is precisely to say that it is derivative and thus, one might suppose, protected under § 106(2). *Cariou* and its predecessors in the Second Circuit do not explain how every 'transformative use' can be 'fair use' without extinguishing the author's rights under § 106(2).").

7. See, e.g., Case Comment, "Second Circuit Holds that Appropriate Artwork Need Not Comment on the Original to be Transformative," 127 Harv. L. Rev. 1228, 1232 (2014) ("The *Cariou* court's rule was not precluded by precedent, but the definition the court adopted is still the broadest of any circuit court yet—and is in direct tension with the statutory definition of derivative works."); Br. of Amicus Curiae N.Y. Intellectual Prop. L. Ass'n, *Cariou v. Prince*, No. 13-261 (U.S. Sept. 25, 2013) (arguing on petition for a writ of certiorari that *Cariou*'s fair use analysis did not comport with the fair use statute's preamble), available at <http://www.nyipla.org/images/nyipla/Documents/Amicus%20Briefs/PatrickCariou%20vRichardPrince13-261.pdf>.
8. *Author's Guild v. Google, Inc.*, No. 15-849 (U.S. Dec. 31, 2015) *cert. denied*.
9. Take, for example, the case brought by the North Jersey Media Group, publisher of *The Record* and the *Herald News*, over the Facebook posting by Fox News of a now-iconic photograph taken by Thomas Franklin of three firefighters raising the American flag at the ruins of the World Trade Center site on the 12-year anniversary of 9/11. Last February, the trial court denied Fox News' motion for summary judgment, rejecting its fair use argument that the posting of the photo was a transformative use. The two companies then apparently reached a tentative settlement, but that deal unraveled, slating the case for a jury trial in January 2016. See, e.g., Bill Donahue, "Fox News Heads To Fair Use Trial Over 9/11 Photo," *Law360* (Jan. 8, 2016), available at <http://www.law360.com/articles/744599/fox-news-heads-to-fair-use-trial-over-9-11-photo>; Eriq Gardner, "Fox News Heads to a Jury Trial to Defend Its Use of 9/11 Photos on Facebook," *The Hollywood Reporter* (Dec. 22, 2015), available at <http://www.hollywoodreporter.com/thr-esq/fox-news-heads-a-jury-850674>.
10. This entrenchment impairs the judgment and decision-making process, a phenomenon known as "client-think." See Laura A. Kaster, "Improving Lawyer Judgment By Reducing the Impact of 'Client-Think,'" *DISPUTE RESOLUTION J.*, Vol. 67, No. 1 (Feb.-Apr. 2012), available at <http://www.nadn.org/articles/LauraKaster-Sep2012-CLIENTTHINK.pdf>.
11. See Theodore K. Cheng, "Using Alternative Dispute Resolution to Address Your Entertainment Disputes," *N.Y. ST. B.A. ENTMT, ARTS, AND SPORTS L. J.*, Vol. 26, No. 1 (Spring 2015), at 17-18.
12. Wayne D. Brazil, "Early Neutral Evaluation or Mediation? When Might ENE Deliver More Value," *Dispute Resolution Magazine* (Fall 2007), at 10, available at <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1164&context=facpubs>; Erica Garay, "What is Early Neutral Evaluation and How Can it Help Counsel and Clients?," Meyer, Suozzi, English & Klein, P.C. (Mar. 6, 2012), available at <http://www.msek.com/publications-media/what-is-early-neutral-evaluation-ENE-alternative-dispute-resolution-ADR.php>; Hon. Allan van Gestel, "The Alternative Dispute Resolution Case Evaluator's Role in Contemplated and Pending Litigation," *Corporate Law & Accountability Report* (Jan. 30, 2015).

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Entertainment Immigration: A Questionable Use of H-1B Visas Is Both a Distraction and an Offense

By Michael Cataliotti

From the *New York Times* to *Breitbart News*, the headlines pointed to misfeasance in big corporations regarding high-skilled immigration: *Toys 'R Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*;¹ *Lawyer for Displaced Disney Workers: 1,200 American Workers in N.Y. are Training Their Foreign Replacements*;² *HP Dumps 30,000 Jobs, But Still Cranking Up H1B Guest-Workers*.³

In this installment of Entertainment Immigration, we will dissect the events described in these headlines. While neither comprehensive nor high-skilled immigration reform is likely to happen while President Obama is in office,⁴ the topic of immigration reform is here to stay for the foreseeable future. As a result, it is useful to understand how this all works and why these stories are only a small aspect of the problem with the H-1B program.

H-1B Visa Classification

Though there are several sub-classes under H-1B classification, the public discourse surrounding “H-1B visas” is focused on those foreign-born individuals who (1) have Bachelor’s degrees or higher; (2) work in an occupation that typically requires a Bachelor’s degree or higher; and (3) will work in a position that requires a Bachelor’s degree or higher.⁵ Those occupations most frequently fall within the technological industries or departments for large corporate entities, and have position titles such as Programmer, Software Engineer, and Analyst (e.g., Systems Analyst, Business Analyst, and the like).⁶

While the majority of the positions within those occupations require a significant amount of skill, there are some instances of positions that fall under those occupational titles requiring less skill but more understanding of mechanical operations. It is from the latter that we find many of our articles about the H-1B visa program.

The Stories

In September 2015, there was a story about Toys ‘R Us firing its U.S. employees, insourcing the fired employees’ replacements from overseas with the H-1B visa program, and making the fired employees train their replacements.⁷ That same month, *Breitbart* published an article about Hewlett Packard laying off 30,000 employees in the U.S., while having “filed 2668 labor condition applications for H1-B (sic) visa and 815 labor certifications for green card (sic) from fiscal year 2011 to 2014. Hewlett-Packard Company (HP) was ranked 30 among all visa sponsors.”⁸ It is important to note that *Breitbart* was getting its information from MyVisaJobs.com, a reputable website that compiles the numbers of filings

made with the U.S. Department of Labor as they relate to H-1B visa petitions.⁹ Those filings are known as Labor Condition Applications (LCAs), and they are affirmations made by the petitioning employer that the employer will pay the foreign national a wage that is either at or above the prevailing wage rate for an individual working in his or her position, with his or her experience, and in his or her metropolitan area.

In November 2015, *Breitbart* published another article, in which it referenced an instance whereby Disney laid off 23 of its U.S. workers and replaced them with foreign nationals under H-1B status. One item worth noting is that the headline was based upon this information: “Sara Blackwell, the Florida attorney representing the former Disney workers that were replaced by foreign workers told Breitbart News Daily that there are 1,200 Americans in New York who will suffer the same fate as the Disney workers. ‘Right there in New York, 1,200 Americans are training their replacements’ Blackwell said. Adding that it’s also, ‘happening at AT&T right now.’”¹⁰ I cannot say whether or not Ms. Blackwell’s statement is accurate. A search for any other indication that AT&T laid off 1,200 employees yielded nothing in line with her assertion, and so because of this, we leave it aside and turn back to Toys ‘R Us, HP, and Disney.

How the Foreign Nationals Are Brought Into the U.S.

Method 1

What we do know is that Toys ‘R Us, HP, and Disney each used the H-1B program so as to cut costs. The common thought would be that the transaction occurs like this: Big Company A has 400 employees in the U.S. Big Company A wants to save money. In an effort to do so, Big Company A picks some top earners in the IT, tech or finance divisions of its enterprise, and fires them with upwards of 90 days’ notice. Unbeknownst to those top earners who were just fired, months earlier, Big Company A filed its approved LCAs and H-1B petitions with the U.S. Citizenship and Immigration Service (USCIS). Those petitions were subsequently approved and now those individuals are going to enter the U.S.

Method 2

Another method is that Big Company A has 400 employees in America. Big Company A wants to save money. In an effort to do so, Big Company A picks some top earners in the IT, tech or finance divisions of its enterprise, and fires them with upwards of 90 days’ notice. Unlike Method 1, however, in Method 2, Big Company A con-

tracts with Big Company B to retain new hires. These new hires, however, are frequently less experienced and enter the U.S. under H-1B visa status. Big Company B will be paid the necessary wage rate plus a percentage or flat-rate markup. Big Company A will cut its salary expense and, in some cases, will eventually outsource those U.S. positions to the H-1B employee's home country by having the H-1B employee return home at the end of his or her employment to train his or her colleagues in his or her home country.

This sounds a bit odd and out of line with what we would generally assume was or is the spirit of the law.

If the Visas Are Available, However, What's the Problem?

Problem 1: The visas are not available...

According to MyVisaJobs.com's 2016 H1B Visa Reports: Top 100 H1B Visa Sponsors, four of the top five sponsors are real Big Company Bs, which filed a combined 71,648 LCAs in fiscal year 2016.¹¹ However, in fiscal year 2016, the maximum number of H-1B visas that were available was 85,000, comprised of an initial 20,000 for Master's Degree holders, and a remaining 65,000 for all other Master's Degree holders and Bachelor's Degree holders.

This means that these entities are pushing the odds in their favor of obtaining these visas by flooding the applicant pool with their own petitions: In 2015, there were 233,000 H-1B petitions filed,¹² a 35% increase from the number of petitions filed in 2014 (172,500), and an 88% increase from the number of petitions filed in 2013 (124,000).¹³ As indicated in the *New York Times* article referenced above, "In the last five years, federal records show, most of the companies that received the largest share of H-1B visas have been global outsourcing firms, including TCS; Infosys, another large Indian company; Cognizant, which is based in the United States; and Accenture, a consulting operation incorporated in Ireland."¹⁴

Problem 2: Many talented folks are being kicked out or left out of the U.S...

One consequence of those entities filing so many petitions and receiving the largest share of available H-1B visas is that many foreign-born students or trainees who have spent many months or years in the U.S. are not able to obtain H-1B visas. As a result, those students or trainees will have to rethink their futures in the U.S. and decide between (1) leaving the country, and (2) determining whether there is another visa classification available to them.

This loss of talent is commonly referred to as "brain drain," and though the U.S. has been and continues to be a magnet for other countries' great minds, this misuse of the H-1B visa program puts at a disadvantage many individuals who are forced to go elsewhere to study and grow professionally.

Those students and trainees are individuals who have devoted significant time and energy into the American education system, culture, and economy throughout their presence in the U.S. They have also devoted significant time and energy into their communities and relationships. Similarly, a significant amount of time and energy has also been invested in those students and trainees by American educational institutions, organizations, entities, and individuals.

Problem 3: Employers who have petitioned for those foreign-born students and trainees will lose prospective employees...

In addition to the student or trainee losing out on the opportunity to stay and work in the U.S., the prospective H-1B employer loses out on a prospective hire.

In many instances, the student or trainee has worked with the H-1B employer for a period of time prior to seeking H-1B status. It follows then that the H-1B employer has, in many instances, invested time, energy, and money into training, educating, and nurturing the student's or trainee's growth.

This amounts to wasted resources, leaving the H-1B employer to try and find another candidate to fill the position. While many have argued that the H-1B employer should be hiring American students and trainees, there are very few American workers who are qualified for these positions, have reasonable expectations, and are interested in growing with the H-1B employer.

When these staffing agencies take away visas from the limited quota of 85,000, they harm other employers who seek to hire individuals for positions with complicated duties that include architects, engineers, and interior designers.

Problem 4: The use of the H-1B visa program by these staffing agencies and consultancy firms is offensive...

The essence of the H-1B visa program is the expansion of the American workforce, while enhancing the competitiveness of American entities and individuals. Replacing American workers with individuals who are less qualified offends the spirit of the H-1B visa program. Additionally, preventing those who contribute to our society from continuing to do so offends the spirit of the program.

Problem 5: Actions like these, when brought to the public's attention, garner more focus than the larger issues within immigration...

While the actions of these staffing agencies and consultancy firms are problematic and offensive to the spirit of our immigration system, what is worse is the diversion they cause from the more problematic aspects of our immigration system. The topic of these actions consumes the discourse surrounding immigration and immigration reform, thereby stymying any growth that may be made.

Equally frustrating is that there are relatively straightforward and seemingly easy methods by which we can solve the issue of entities using the H-1B visa program in, at best, a questionable manner that ultimately harms the American workforce and American competitiveness.

Possible Solutions to This Issue

Several remedies exist to the problem of using H-1B visas to insource and eventually outsource, thereby displacing workers in the U.S. Here are three: (1) increase the number of available H-1B visas; (2) reevaluate the criteria for H-1B classification; and (3) police the affirmations made by the employers.

The option that is quickest to implement and least harmful to the parties involved is to increase the number of available H-1B visas. This would allow for a better likelihood that more of the students, trainees, and other workers who are to be employed directly with smaller firms would be able to enter or stay within the U.S. This would also provide for more of those smaller employers who seek out the most qualified and best fitting employee, as opposed to the cheapest, to be able to fill their ranks with the individuals they so desire, many of whom they have already trained. Increasing the number of H-1B visas would also allow for these agencies and firms to obtain more H-1B visas, this being the obvious problem with the solution. Therefore, we must look to the next option in addition to increasing the number of H-1B visas.

Reevaluating and revising the criteria for H-1B employers—perhaps to prevent staffing agencies or consultancy firms from using the program—could prove beneficial, but would be more punitive rather than reformative if limited to strictly those agencies or firms. Such a revision could be to prevent employers that have the majority of their employees in the U.S. under H-1B status from filing any additional petitions for more H-1B visas. In addition to increasing the number of H-1B visas available and the limitation on the quantity of H-1B visas an employer can have, there would need to be oversight compliance with these changes, as well as the spirit of the visa program.

Policing the affirmations made by employers when they file their LCA with the Department of Labor and file the H-1B petition with the (USCIS) could prove beneficial, but would likely cause smaller H-1B employers to shy away from using the program due to increased scrutiny. However, flagging for further scrutiny the petitions filed by employers who seek to hire hundreds or thousands of individuals under H-1B status would be more likely to strike at the heart of the undesired actions.

Where Do We Go From Here?

The Senate's Border Security, Economic Opportunity, and Immigration Modernization Act, S.744,¹⁵ would have solved many of these problems. It included provisions

for increasing the number of H-1B visas and limiting the number of employees under H-1B status at any one employer. It also created classifications for entrepreneurs.

The Senate Bill increased the maximum number of available visas to 115,000 in the first year of its enactment.¹⁶ Thereafter, it would have also allowed for a "minimum of 115,000 visas and a maximum of 180,000 visas in subsequent years based upon market conditions."¹⁷

S.744 also "[p]rovide[d] that an employer (other than an educational or research employer) that employs 50 or more employees in the United States may not hire additional H-1B employees if the number of such employees exceeds: (1) 75% of the total number of employees for FY2015, (2) 65% of the total number of employees for FY2016, and (3) 50% of the total number of employees for each subsequent fiscal year."¹⁸

Although it did not provide for the type of inspection referenced above, it did include a revision of provisions "regarding complaints against H-1B employers [that included]: (1) extending the statute of limitations on complaint investigations to 24 months, (2) increasing fines for specified violations, (3) enhancing whistle-blower protections, and (4) authorizing the Department of Labor to initiate investigations."¹⁹ Additionally, S.744 created new visas and classes of permanent residency for entrepreneurs and other workers who are not readily categorized under the present immigration system.

Changes as of February 1, 2016

Increased Filing Fees for H-1B Petitions by Certain Employers

President Obama signed into effect the Consolidated Appropriations Act (CAA)²⁰ on December 18, 2015, which requires that employers "who employ 50 or more employees in the United States, with more than 50 percent of those employees in H-1B [...] nonimmigrant status," submit an additional fee of \$4,000 if filing (1) an initial petition for H-1B status; or (2) to obtain authorization for a nonimmigrant in H-1B status to change employers, on or after December 18, 2015.²¹ It would seem that the increased fee under this Act is unlikely to deter many of the actors discussed above from engaging in the activities discussed herein. Though \$4,000 per petition will add up quickly, it may also be treated as a cost of doing business, and is slight in comparison to the savings made through insourcing and outsourcing. Ultimately, the CAA appears to be more of a money maker for USCIS than a way to reinvigorate the integrity and essence of the H-1B (and L) visa program.

However, when newly enacted laws do not seem to have much practical value to diminish bad acts and Congress has put the brakes on enacting measures that would, in practice, diminish bad acts or offensive behavior, what else can we do but turn to the courts?

Lawsuit Filed Against Disney

In January 2016, two individuals who were laid off by Disney, and presumably as a condition of their severance packages, were required to train their replacements from overseas, filed lawsuits against Disney and consultancy firms HCL and Cognizant. "They claim the companies colluded to break the law by using temporary H-1B visas to bring in immigrant workers, knowing that Americans would be displaced."²²

Both individuals are seeking class-action status for their matters. Although it is too early to know the merits of the claims or how the court will treat them, these cases will be worth watching, as they present, jointly, what appears to be an issue of first instance before the courts: Whether an insourcing/outsourcing company and a U.S. employer that contracted with that insourcing/outsourcing company "collaborated intentionally to supplant Americans with H-1B workers."²³

In the End...

Whether either of these cases is meritorious remains to be seen, but in my estimation it is not likely. The amount of wiggle room afforded entities to engage in this type of offensive behavior, thereby tainting the H-1B visa program, is vast. While it also remains to be seen whether any of these proposed modifications to the H-1B visa program will be passed into law, in the meantime and until we have immigration reform with an eye towards enhancing American competitiveness, it would seem the present acts of Toys 'R Us, Disney, Tata Consultancy, Infosys, Accenture, HCL, and others will continue unabated.

Endnotes

1. Julia Preston, *Toys 'R' Us Brings Temporary Foreign Workers to U.S. to Move Jobs Overseas*, N.Y. TIMES, Sept. 30, 2015, at A1 (available at <http://www.nytimes.com/2015/09/30/us/toys-r-us-brings-temporary-foreign-workers-to-us-to-move-jobs-overseas.html>).
2. Michelle Fields, *Lawyer For Displaced Disney Workers: 1,200 American Workers In N.Y. Are Training Their Foreign Replacements*, BREITBART, <http://www.breitbart.com/big-government/2015/11/26/lawyer-displaced-disney-workers-1200-american-workers-n-y-training-foreign-replacements/>.
3. Chriss W. Street, *HP Dumps 30,000 Jobs, But Still Cranking Up H1B Guest-Workers*, <http://www.breitbart.com/california/2015/09/16/hp-dumps-30000-jobs-still-cranking-h1b-immigrants/>.
4. Speaker of the House Paul Ryan (R-Wis.) stated in his op-ed piece in *USA Today* from November 3, 2015 that he will not take up immigration reform with President Obama in office. "The House of Representatives will not vote on comprehensive immigration legislation as long as President Obama is in office," USA TODAY, (Nov. 3, 2015), available at <http://www.usatoday.com/story/opinion/2015/11/03/immigration-reform-house-speaker-paul-ryan-editorials-debates/75107720/?Source=GovD>.
5. U.S. Citizenship & Immigration Service, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, available at <https://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models>.
6. 2016 H1B Visa Report: Top H1B Visa Job Title, available at <http://www.myvisajobs.com/Reports/2016-H1B-Visa-Category.aspx?T=JT>.
7. Preston, *supra*.
8. Street, *supra*.
9. The U.S. Department of Labor requires employers to submit their Labor Condition Applications (LCAs) through its "iCERIS Visa Portal System," available at <https://icert.doleta.gov/>.
10. Ms. Blackwell's statement has not been verified here and that headline does not appear elsewhere. A review of MyVisaJobs.com's chart reveals that AT&T, through AT&T Services, Inc. (<http://www.myvisajobs.com/Visa-Sponsor/Services/50306.htm>) and AT&T Mobility Services, LLC (<http://www.myvisajobs.com/Visa-Sponsor/Mobility/858616.htm>), filed 221 LCAs in FY 2015.
11. It should be noted that there are other entities listed here with additional agencies and firms: IBM, Deloitte, Ernst & Young, Google, Microsoft, Tech Mahindra (Americas), and Cognizant. 2016 H1B Visa Reports: Top 100 H1B Visa Sponsors, available at <http://www.myvisajobs.com/Reports/2016-H1B-Visa-Sponsor.aspx>.
12. Sara Ashley O'Brien, *High-skilled visa applications hit record high*, CNN MONEY, available at <http://money.cnn.com/2015/04/13/technology/h1b-cap-visa/>.
13. *Id.*
14. Preston, *supra* (emphasis added).
15. Border Security, Economic Opportunity, and Immigration Modernization Act (as Amended), S. 744, 113th Cong. – 1st Sess., available at <https://www.congress.gov/bill/113th-congress/senate-bill/744>.
16. *Id.* at Sec. 4101.
17. *Id.*
18. *Id.* at Sec. 4213.
19. *Id.* at Sec. 4221.
20. Consolidated Appropriations Act, 2016 (Pub. L. No. 114-113) (2015).
21. U.S. Citizenship & Immigration Services, *New Law Increases H-1B and L-1 Petition Fees*, available at <https://www.uscis.gov/news/alerts/new-law-increases-h-1b-and-l-1-petition-fees>.
22. Julia Preston, *Suits Claim that Disney Broke Law on Visa Use*, N.Y. TIMES, Jan. 26, at A1 (and online as, *Lawsuits Claim Disney Colluded to Replace U.S. Workers With Immigrants*).
23. *Id.*

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Should the Russian Federation Control Its National Sports Federations?

By Sergey Yurlov

Introduction

According to Paragraph 3 of Article 3 of the Federal Law on Physical Culture and Sport in the Russian Federation¹ (Law on Sport), legislation governing Russian sports is based on *the principle of combining state with self-regulation of sports relationships*. In actuality, it means that the government enacts laws relating to sports, and sport federations adopt their own internal rules and regulations in line with those laws.

Sport federations are integral in their fields. They organize sporting competitions, adopt internal rules and regulations, and, when necessary, disqualify athletes, coaches and other officials.

Some national and international sports federations are now being accused of poor governance, corruption and anti-doping programs, such as:

- Federation Internationale de Football Association (FIFA) (a corruption scandal);²
- International Association of Athletics Federations (IAAF) and its members (a doping scandal);³ and
- Federation Internationale de Natation (FINA) (accused of not doing enough to protect the rights of athletes competing at the 2016 Summer Olympics in Rio).⁴

At the national level in Russia, most sport federations concerning individual sports (such as swimming and amateur boxing) may impose unreasonable restrictions prohibiting athletes from practicing those sports, depending on the circumstances.

Therefore, many athletes ask why the government does not protect their rights against the federations. This shows a lack of the government control over national sports federations. Should the government exercise such control? If so, how?

It must be noted that the Law on Sport enshrines a principle that it does not enforce. Russian federal legislation should draw a line between its laws and sport federations' internal policies and enforcement mechanisms.

It appears that the Russian government should control its national sport federations for the following reasons and in the following manner:

- **Since the government finances national sport federations, it should control their expenditures.** The Ministry of Sport of the Russian Federation (Sports Ministry) would appoint special officials who

would review monthly financial statements of the federations. In case a sports federation siphons off government funds, its officers should be subjected to administrative and/or criminal liability.

- **Many national sport federations cannot effectively monitor and handle the issue of doping.** The Sports Ministry should adopt a doping policy that will require each sport federation to adopt its own policy developing and particularizing the measures with regard to a particular sport.
- **Many national sport federations cannot effectively monitor and handle the issue of match-fixing.** Unfortunately, sport federations cannot resolve this issue by themselves. It appears that legal gambling entities and sport federations should create a data system to control all books made by individuals connected with a particular sporting competition.
- **Many national sports federations fail to protect the rights of athletes and in some cases violate them.** The government should create a framework for effective protection of athletes' rights. The Law on Sport should impose the eligibility test,⁵ which would have to be satisfied by all athletes planning to compete in sporting competitions. The Sports Ministry should adopt guidelines on how competition organizers will accept and reject competition entry forms. More importantly, the Sports Ministry's officials will conduct inspections to define whether a competition organizer (including a sport federation) has violated the Law on Sport and its guidelines when rejecting a particular entry form.
- **Many national sport federations prohibit athletes from using state courts of general jurisdiction.** It must be noted that this issue contradicts the Constitution of the Russian Federation, according to which *everyone must be guaranteed judicial protection of his rights and freedoms*.⁶ The government should create effective dispute resolution opportunities and prohibit sports federations from violating the rights of athletes.

The Line Between Federal Legislation and Sport Federations' Internal Policies and Practices

In order to develop a sport and protect the rights of athletes, the government should draw the line between state and sport subjects' authorities. There are some issues that must be governed solely by federal legislation. These issues include, but are not limited to:

- the eligibility test;
- the sports disputes resolution procedure;
- a list of the rights of athletes; and
- rights and obligations of the Russian national sport federations.

Issues to be governed both by federal legislation and sport subjects include, but are not limited to:

- financial issues (remuneration, compensations, awards, etc.);
- labor relationships;
- civil law contracts; and
- sports sanctions.

A Supervisory Body

As to structural changes, some professionals⁷ believe that a new supervisory body should be created—the Federal Service for Supervision in Sport (the Rossportnadzor). The Rossportnadzor should supervise compliance with the Law on Sport, other federal laws and statutory acts of the Russian Ministry of Sport. It is anticipated that the Rossportnadzor would be entitled to impose sanctions on sport federations, clubs, and other organizations, and conduct inspections. As there are currently no mechanisms for imposing sanctions on the federations that violate athletes' rights, there is a need for the creation of a body to supervise, and if necessary, sanction, those organizations. Both legal and organizational instruments are required in order to adequately supervise sport federations.

Endnotes

1. No.329 – FZ, December 4, 2007.
2. A brief description of the scandal is available at: https://en.wikipedia.org/wiki/2015_FIFA_corruption_case.
3. A brief description of the scandal is available at: <http://www.bbc.com/sport/athletics/35318764>.
4. See <http://www.swimvortex.com/fina-future-part-5-house-of-representatives-instead-of-swimmings-game-of-thrones>; see also Sergey Yurlov, *Busy sporting competition program—Are there any restrictions of Athletes' rights?* in N.Y. ST. B.A. ENTMT, ARTS, AND SPORTS L. J., Spring 2015, Vol. 26, No. 1, p. 84.
5. See Sergey Yurlov, *The "Eligibility" Concept in Modern Sports Law*, N.Y. ST. B.A. ENTMT, ARTS, AND SPORTS L. J., Fall/Winter 2014, Vol. 25, No. 3, p. 71-76.
6. Article 46 of the Constitution of the Russian Federation of December 12, 1993 (as amended) (emphasis added). The text of the Russian Constitution is available at: <http://www.constitution.ru/10003000/10003000-4.htm> and https://www.constituteproject.org/constitution/Russia_2008.pdf.
7. See <http://www.sportdiplom.ru/blogs/sergey-altuhov/rossportnadzor-pn-04092012-1011>.

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A Copyright Battle

By David Krell

Under constitutional fiat, a copyright gives an author "the exclusive Right" to writings.¹ It is an intellectual property concept easier to comprehend than enforce. It is also, certainly, a necessary legal device to encourage writers and artists to develop

new works that provoke, enlighten, and inspire. An additional benefit of copyright is the protection of an author's first-hand account of historical events, for example, *Crusade of Europe*, General Dwight David Eisenhower's chronicle of World War II. Without these literary contributions, interpretations, and scholarship, our understanding of history would have innumerable voids.

Crusade of Europe became the focus of courtroom combat in the 2003 case *Dastar Corp. v. Twentieth Century Fox*.²

Primarily an administrator, Eisenhower never saw combat, but his ability to manage fueled his escalation of Army's leadership hierarchy during World War II. Eisenhower's relationship with his superior, Army Chief of Staff General George C. Marshall, boosted the psychic arsenal required for leaders to transform plans from theory to completion. Eisenhower's leadership manifested after World War II in a stint as Columbia University's president, and then on January 20, 1953, Eisenhower took the Oath of Office to become the 34th President of the United States.

Leading Supreme Headquarters Allied Expeditionary Force (SHAEP) from its inception in 1943 to the end of the war two years later, Eisenhower commanded the Allies in the European Theatre, uniting strategies executed by Omar Bradley, Matthew Ridgway, George Patton, and other Allied military leaders. D-Day, Battle of the Bulge, and the liberation of Paris took place in 1944. On December 20, 1944, Eisenhower received the rank of five-star general.

On V-E Day—May 8, 1945—Eisenhower wrote to Marshall:

Since the day I first went to England, indeed since I first reported to you in the War Department, the strongest weapon that I have always had in my hand was a confident feeling that you trusted my judgment, believed in the objectivity of my approach to any problem and were

ready to sustain to the full limit of your resources and your tremendous moral support, anything that we found necessary to undertake to accomplish the defeat of the enemy. This has had a tremendous effect on my staffs and principal subordinate commanders. This conviction that you had basic faith in this Headquarters and would invariably resist interference from any outside sources, has done far more to strengthen my personal position throughout the war than is realized even by those people who were affected by this circumstance."³

Ego clashes, personality conflicts, and arguments about authority compounded the difficulties in managing a strategy dependent on teamwork between British and American military leaders. When Eisenhower settled with SHAEF forces in a London suburb to conceive the D-Day invasion plan, these obstacles confronted him: The name of the suburb was Kingston—its code name was Widewing.

In *Eisenhower at War: 1943-1945*, Eisenhower's grandson David Eisenhower wrote: "The circumstances were ideal for organizing a staff capable of concentrating on the problems of invasion. The order of the day was routine, predictability, collegiality, loyalty to the principle of Allied unity and loyalty to SHAEF, which, in time, would become an entity capable of weathering the twists and turns of mood and emotion in the Allied camp and make its weight felt in Allied councils. In March 1944, SHAEF powers remained a subject of sharp debate and delegations of authority would come gradually and sparingly."⁴

D-Day took place on June 6, 1944; Eisenhower's Herculean efforts in military management culminated in a turning point for the Allies, stirred enthusiasm for breaking through the Germans' stronghold in France, and reflected Marshall's intuition about leadership. *Washington Post* columnist Marquis Childs wrote: "One reason for his choice of Eisenhower may have been his knowledge of the supreme commander's ability to cooperate, to put down jealousies and rivalries. Eisenhower has gone to great lengths to achieve a good relationship with the British. Beginning in North Africa, he has insisted that all men serving on his staff put aside petty resentments and prejudices."⁵

Eisenhower's burden revolved around balancing between achieving the military objective—realistic battle strategies—and unifying the Allies. "Coalition politics was a full-time job," wrote Eisenhower. "At the day-to-day command level, coalition politics meant that decisions were collegial, arrived at after extended consultations with both sides, often at the cost of satisfying clear-cut results to the dismay of both camps. But the diffusion of authority in the Allied high command was a reality, and Eisenhower suspected that categorical assertions of his authority would only expose how tenuous it was. For better or worse, policy-making would involve surmounting American and British vetoes at every step, in addition to the usual problems inherent in running a large military organization."⁶

Germany surrendered in 1945, as did Japan, which capitulated in the Pacific Theatre after the atomic bomb attacks on Hiroshima and Nagasaki. About a month after the German Army surrendered, Eisenhower addressed Congress. Towards the end of his speech, Eisenhower focused on the soldier's hope of creating a lasting peace in the wake of war. "He passionately believes that, with the same determination, the same optimistic resolution and the same mutual consideration among Allies that marshaled in Europe forces capable of crushing what had been the greatest war machine of history, the problems of peace can and must be met."⁷

On January 10, 1946, Eisenhower echoed his distaste for war. "I hate war as only a soldier who has lived it can, only as one who has seen its brutality, its stupidity,"⁸ he stated.

* * *

Published by Doubleday, *Crusade in Europe* caught the attention of Twentieth Century Fox (Fox), which arranged for an eponymous television show produced by Time.⁹ First broadcast in 1949, *Crusade in Europe's* copyright protection expired in 1977, when Fox neglected to renew the copyright to the 26-episode television series; Doubleday renewed the copyright to the book.¹⁰

Dastar acquired videotapes of the series, then edited them to fit its *Campaigns in Europe* series for home video distribution. "Dastar's *Campaigns* series is slightly more than half as long as the original *Crusade* television series. Dastar substituted a new opening sequence, credit page, and final closing for those of the *Crusade* television series; inserted new chapter-title sequences and narrated chapter introductions; moved the 'recap' in the *Crusade* television series to the beginning and retitled it as a 'preview'; and removed references to and images of the book."¹¹ Additionally, *Campaigns in Europe* had custom-designed packaging.¹²

Nothing on screen indicated the genesis of the *Crusade in Europe* television series; neither the book nor the original series receives a mention. Dastar had a credit, as did its subsidiary Entertainment Distributing. Further, Dastar employees had the titles of Executive Producer, Producer, and Associate Producer.¹³ FOX, SFM, and New Line sued Dastar on the theory of copyright infringement of the original work—Eisenhower's book—and, therefore, infringement of exclusive television rights; an amendment suggested that a lack of credit amounted to reverse passing off, a Lanham Act violation.¹⁴

The Supreme Court underscored the Lanham Act's foundation of ensuring consumers' confidence in the origin of products. A false designation of origin gives an unauthorized manufacturer the benefit of goodwill earned by the original source. The consumer need not know the origin, only that the products come from a rightful entity, thereby ensuring uniformity. For example, Coca-Cola may have bottling plants in several cities, but a purchaser knows that a Coca-Cola product will taste exactly the same in Seattle as Miami.

In *Dastar*, the Supreme Court distinguished the Lanham Act's power from the copyright arena. It dismissed SFM and New Line as having "anything to do with the production of the *Crusade* television series—they merely were licensed to distribute the video version."¹⁵

Although the Court gave some weight to the Fox claim, it acknowledged that a nexus to "the creation of the television series was limited at best," because Time created the series through an agreement with Fox.¹⁶ Further, the series' footage created complications regarding the "origin" of the *Crusade in Europe* television series. The Court noted: "And of course it was neither Fox nor Time, Inc., that shot the film used in the *Crusade* television series. Rather, that footage came from the United States Army, Navy, and Coast Guard, the British Ministry of Information and War Office, the National Film Board of Canada, and unidentified 'Newsreel Pool Cameramen.' If anyone has a claim to being the *original* creator of the material used in both the *Crusade* television series and the *Campaigns* videotapes, it would be those groups, rather than Fox. We do not think the Lanham Act requires this search for the source of the Nile and all its tributaries."¹⁷

In an 8-0 decision, the Supreme Court ruled for Dastar, concluding that the video company "was the 'origin' of the products it sold as its own."¹⁸ Justice Breyer did not take part in considering or deciding the case.

Eisenhower might have seen the case as an analogy to war. Indeed, courtrooms, those legislated battlefields where gladiators engage in verbal parries, thrusts, and rhetoric based on jurisprudential concepts, separate order from chaos to ensure a fair but flawed justice system.

Endnotes

1. U.S. Const. art. I, § 8, cl. 8.
2. 539 U.S. 23 (2003).
3. Forrest C. Pogue, *GEORGE C. MARSHALL: ORGANIZER OF VICTORY* 584, quoting Letter from Dwight David Eisenhower to George C. Marshall, FWD 20926, (May 8, 1945) (George C. Marshall Library Files) (1973).
4. David Eisenhower, *EISENHOWER AT WAR: 1943-1945*, 157 (1986).
5. Marquis Childs, *Washington Calling: Marshall and Eisenhower*, *THE WASHINGTON POST*, June 10, 1944, at 5.
6. *Id.*
7. General Dwight David Eisenhower, Address to Congress (Jun. 18, 1945), reprinted in *THE WASHINGTON POST* (Jun. 18, 1945).
8. General Dwight David Eisenhower, Address to the Canadian Club (January 10, 1946), citing Dwight D. Eisenhower Presidential Library, Museum and Boyhood Home, available at http://www.eisenhower.archives.gov/all_about_ike/quotes.html.
9. *Dastar Corp. v. Twentieth Century Fox Film Corp. et al.*, 539 U.S. 23, 25 (2003).
10. *Id.* at 26.
11. *Id.*
12. *Id.* at 27.
13. *Id.* at 26.
14. *Id.*
15. *Id.* at 35.
16. *Id.*
17. *Id.* at 35-36.
18. *Id.* at 38.

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. He is also admitted in New Jersey and Pennsylvania.

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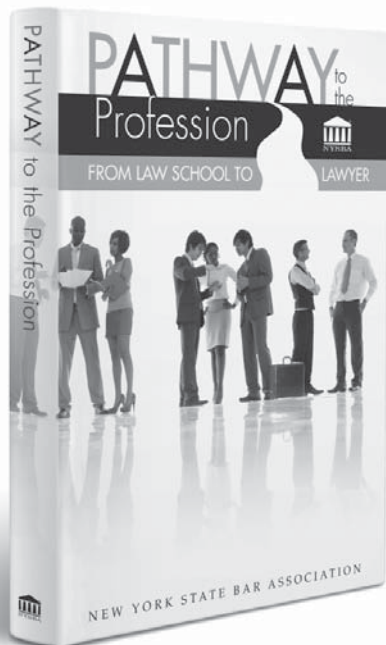
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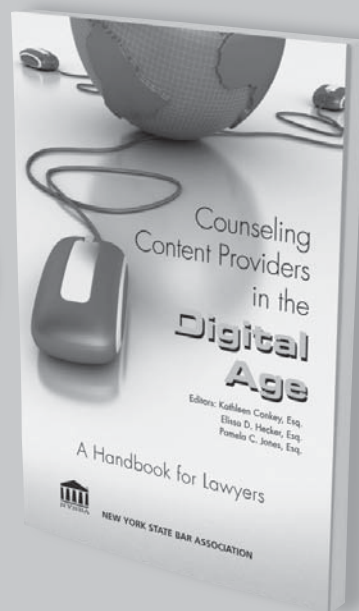
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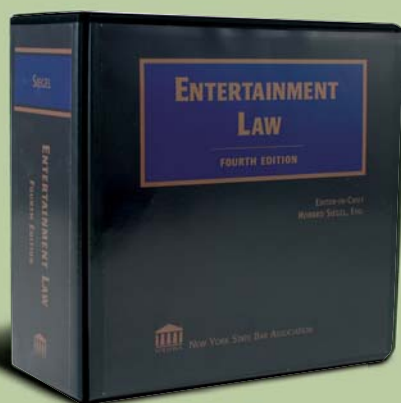
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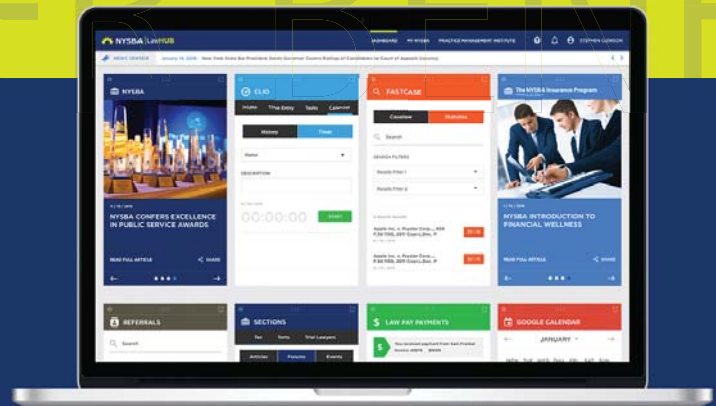


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