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Entertainment, Arts and Sports Law Journal

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

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Remarks from the Chair

I am told that you will be reading this, my second letter from the Chair, at the end of the summer of my first year, which means, in EASL's case, giving you an update of programs past and taking a leap of faith that several programs, scheduled to occur after the submission deadline for this, will go as planned. By publication time, EASL will have produced a new variation of "Introduction to Entertainment Law" for all members of the NYSBA, and a seminar at Dorsey and Whitney introducing the legal and business considerations of "Native Advertising," with thanks to the Digital Media and the Literary Works and Related Rights Committees.

Throughout June and July, several committees held members-only non-CLE events, including one set up by Irina Tarsis for the International and the Fine Arts Committees, which offered the first of several in a special series of artist studio visits. The visits are intended to expose art attorneys to "behind the scenes of the creative process and spark a discussion of particular legal topic(s) of interest to the contemporary artists operating in an international art market." Judith Prowda and Carol Steinberg of the Fine Arts and Pro Bono Committees also offered a program titled "Legal Primer for Artists: Leasing Commercial and Residential Space and Dealing with Tax Issues" at NYFA. As usual, the Fine Arts Committee and its Co-Chairs continue to offer amazing programs that educate both lawyers and artists in many areas of law, including those that affect real day-to-day living issues.

As I write this, our annual music seminar, scheduled tentatively for October 14, is in full planning mode, with much momentum building from last year's successful and popular program. Our first-time partnership with the Rights Tech Summit took place on July 26, thanks to Joyce Dollinger, and planning for our CLE seminars at both Comic Con and BroadwayCon, as well as the rest of our fall/winter programming is currently in development.

Our Executive Committee meetings have been well attended, and very special thanks are owed to Jason Aylesworth and his great work with our law students (who are always interested in internships throughout the year); Steve Richman and Marc Jacobson for their ongoing and dedicated legislative work; Rosemarie Tully and Steve for working overtime with me, and my Executive Committee Officers for their very active and extremely helpful support at all times and hours of the day (literally).

Diane Krausz

Editor's Note

Happy Summer!

I hope that you enjoyed a beautiful summer, and are reading this *Journal* somewhere wonderful, while you can still relax.

I am happy to include the first of many *Hollywood Docket* columns by Neville L. Johnson and Douglas L. Johnson, esteemed entertainment and business litigators from California.

This issue contains an amalgam of articles concerning EASL-related subjects. I encourage all of you who read to contribute submissions as well. Please feel free to contact me directly with ideas for articles and blogs.

Hope to see you next at an EASL program.

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), former Co-Chair of CSUSA's National Chapter Coordinators, and Assistant Editor 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 eheckeresq@eheckeresq.com or through her website at www.eheckeresq.com.

The next *EASL Journal* deadline is Friday, September 30, 2016

Pro Bono Update

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

Speakers Bureau

The Pro Bono Steering Committee collaborated with EASL's Fine Arts Committee and our frequent partner NYFA to present a panel on business practices for artists on June 9th from 6:30 to 8:30 p.m. The idea for this panel was born at EASL's Annual Meeting, when each of our committees held a round table session with its members. Jill Ellman and Patricia Pernes attended, and spoke with Judith Prowda and Carol Steinberg about a panel in the Spring.

The panel was called "Legal Primer for Artists: Leasing Commercial and Residential Space and Dealing with Tax Issues". The panel was a legal primer geared to artists and entertainers in the New York Metropolitan area, of best practices and need-to-know legal basics in leasing commercial and residential space, as well as how to handle basic income and sales tax issues.

This excellent panel consisted of Jill Ellman, an associate at M. Ross & Associates, LLC, Patricia Pernes, Esq., and David Frazer, Esq. The panel was co-moderated by Judith Prowda and Carol Steinberg. The commercial leasing presentation addressed key provisions in commercial leases, and issues particular to artists in negotiating commercial or studio space, such as insurance, business considerations, liability, and customizing the space. In addition, Jill covered what happens when the landlord/tenant relationship deteriorates in the event of default, breach of lease terms, eviction and change in management. Patricia addressed potential tax issues for artists, how to deal with income tax and deductions, and sales and use tax in New York. David addressed critical issues in renting residential space, including rent stabilization, tenants' rights regarding repairs and renewal leases, dealing with new owners and buy-out offers, and how to negotiate with landlords in this difficult market.

The event was free and open to the public. It is expected that another panel will be held in the Fall in conjunction with Bushwick's Open Studio week-end.

* * *

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.

EASL Lawyers in Transition Job Bank

The EASL Lawyers in Transition (LIT) Job Bank has been updated! To view the Job Bank, please visit the EASL Lawyers in Transition group page on Linked In (www.linkedin.com).

The EASL LIT Job Bank on Linked In is an exclusive benefit for members of EASL. In order to view the Job Bank, you must request to join the EASL LIT group page on Linked In. To join, visit www.linkedin.com and search for NYSBA Entertainment Art and Sports Law Lawyers in Transition Committee under "Groups." After submitting your request to join the group, we will confirm that you are a member of EASL and your request will be granted.

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

Law Student Initiative Writing Contest

Congratulations to
Scotti Hill, of S.J. Quinney College of Law at the University of Utah, for the article entitled
"Building an Anthology from Ephemera: The Legal Issues of Constructing a Political Art Archive"

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, September 30, 2016.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

Topics

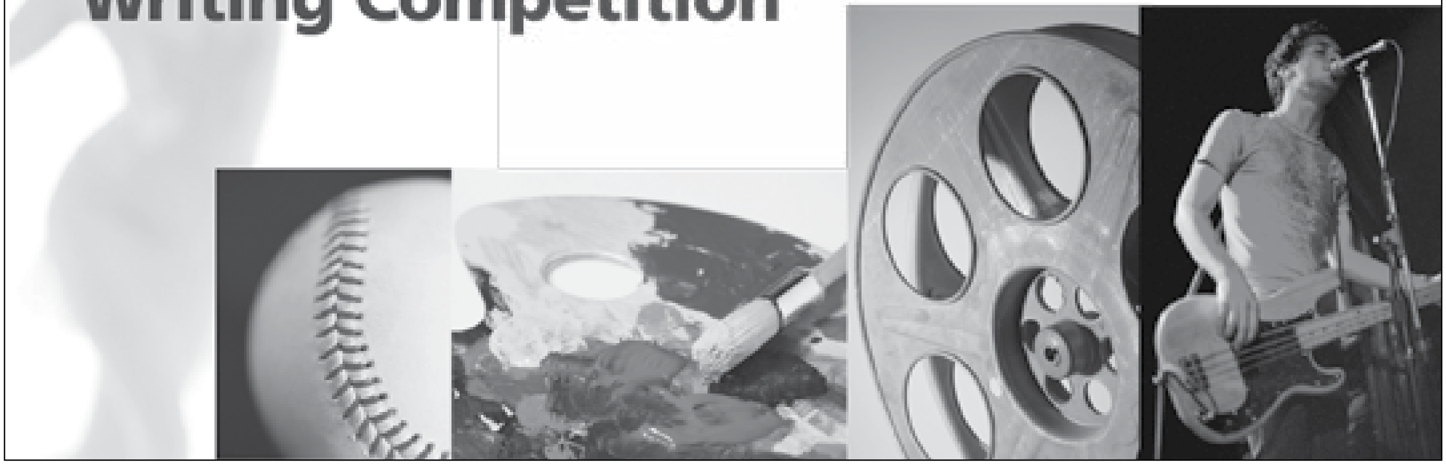
Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, art and sports law fields.

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*.

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.

Building an Anthology from Ephemera: The Legal Issues of Constructing a Political Art Archive

By Scotti Hill

Introduction[1]

Predating the advent of words, images have long served as an elemental tool of communication, working to describe and persuade. As the modern era's complex political systems galvanized and alienated large masses of the globe's population, the combination of image and text has forged a new path for the rapid dissemination of ideas. In response, political protest manifested into artistic expression, a form preferable to violence.

Attempts to preserve artifacts from political protests have been undertaken with renewed urgency. From the fight for democracy in East Asia to socio-economic and racial activism in the United States, urban areas are drowning in visual and textual evidence of dissatisfaction, reminders of the angst of political alienation. Over the past several years, political events and tragedies have also mobilized archivists hoping to preserve the emotional and historical potency of movements' artistic output.

Spontaneous graffiti, posters and artifacts accompanied large systematic protests, such as Occupy Wall Street and Black Lives Matter, raising concerns about the effectiveness of unauthorized artmaking. In Paris and New York, items gathered in the aftermath of terrorist attacks were collected with a sense of emotive resolution. The ephemera of political activism for these protests—posters, makeshift sculptures, graffiti and installations—have been cautiously assembled in archives. Building upon a recent *New York Times*[2] commentary that investigates the increasing frequency of artifact archives across the globe, this article explores the legal issues accompanying the preservation of political art, including how copyright, trademark, nuisance, First Amendment and vandalism claims can complicate the already murky notions of artistic authorship in political protest art.

Copyright: Is Political Protest Art Protected?

Copyright defines the possession of an exclusive legal right to literary, artistic or musical material. Normally, the creator retains copyright despite a change in ownership of the physical object. The government retains the copyright to public artworks it commissions, although under the Visual Artists Rights Act (VARA),[3] artists can still enjoy certain protections for state owned works, including preventing the work's destruction or removal from the site in which it is placed. As the first federal legislation of its kind, VARA effectively grants artists a moral right to protect their creations. VARA does, however establish criteria for what creations are protected, including original and exclusive works crafted from media such as paintings, photographs, sculptures and drawings[4]

The U.S. copyright law is designed to protect intellectual property from being improperly appropriated, exploited and disseminated by third parties.[5] U.S. copyright law's fair use exception allows for reproduction in cases of educational commentary, criticism, reporting or teaching. In determining fair use, the individual or organization seeking to reproduce the image must articulate the underlying philosophical purpose accompanying the image and take care to not impede upon the original work's potential marketability.

Generally, copyright protection for an artistic creation is broad, covering any work of original authorship crafted in a tangible medium that "possesses at least some minimal degree of creativity."[6] Do temporary or impermanent creations, like those used in political protests, retain the same protection?

Creators of political protest art frequently operate under the guise of anonymity, working to shape or build upon a dialogue. Such items are rarely crafted as art items, let alone designed to be exhibited after the event they are intended to address, shore up or put down. Instead of being cherished in a pristine exhibition space, works are created to be portable and destructible so that they may serve as instruments of a movement, rather than merely symbols of it. Such items include posters that loudly parade the epitaphs of the movement, sculptures symbolizing political ideals, and flyers and pamphlets that participants hand out to eager members of the public.[7] Most importantly, these items are intended to be shared, to elicit a desired reaction in furtherance of the larger philosophy for which they serve. The disposability of such items negates the care and attention paid to traditional artworks, decreasing the incentive to protect them through legal means. With the foregoing logic in mind, it is seemingly unlikely that creators of political protest art can assert robust copyright protection for works not intended to survive beyond a certain event. As it stands, the record is silent on the issue of artists seeking copyright protection for works used in political protests, yet the advent of protest artifact archives may bring this once ancillary issue front and center.

Ferguson, Street Art and the Politics of Anti-Institutional Artmaking

The 2014 death of Michael Brown rendered Ferguson, Missouri, a hotbed of political and social unrest. In turn, artists and intellectuals resisted a media firestorm that presented the city's extreme political unrest in a monolithic fashion. In his communal art project, *Push Forward*, artist Damon Davis pasted images of raised hands in various locations throughout Ferguson.[8] With the permission of local business owners, whose establishments had been boarded up and closed to the community, these stirring images served as visual symbols of collective solidarity. Davis' works, and many others like it, signal an increasing acceptance of graffiti as art, with more business owners allowing their structures to serve as "canvases" of expression.

In the 21st century, street artists have seized a growing spirit of dissatisfaction with cultural institutions—namely museums and galleries for which pioneering Land Artist Robert Smithson deemed "mausoleums of culture."[9] Now art forms, such as graffiti, bring art directly to the people, and while the last decade ushered in an unprecedented degree of cultural acceptance to the medium that was once dismissed as vandalism, this arena is still abound with legal issues, such as nuisance.[10]

As a common law tort, nuisance claims can be either public or private, and arise from unauthorized and inappropriate uses of one's property. Often, nuisance claims aim to reverse the tortfeasor's action, which has affected the property's value or the owner's reasonable use of land. The illegal placement of graffiti has served as a logical iteration of nuisance, with the art form existing as a literal defacement of property, regardless of aesthetic value or societal appreciation.

Still other forms of political artmaking evoke public nuisance claims, raising concerns about the viability of art rooted in illegality. VARA's protection of public artworks is contingent on whether or not the work is of "recognized stature."[11] In affirming a legal standard for unsolicited street artworks, *English v. BFC&R E. 11th St LLC* held that VARA fails to protect illegally placed graffiti.[12] While not all graffiti is protest art, its ongoing popularity attests to the viability of public avenues of expression. Like many of history's most daring and thought-provoking artworks, graffiti often dares to confront directly that which would have otherwise remained hidden.

Cataloguing Chaos: Preserving the Evidence of Terrorist Attacks in Paris, New York, and the Occupy Wall Street Movement

In the wake of major terrorist attacks in New York on September 11, 2001 and Paris on November 13, 2015, archivists began the arduous process of cataloguing thousands of items compiled in makeshift memorials throughout the cities.[13] In such events, archivists often struggle with determining the best procedure for both collecting the items and curating an overwhelming collection.

In Paris, archivists prioritize letters and drawings above other artifacts, as these items seem to harness most eloquently the human dimension of tragedy. Archivists aim to preserve these artifacts' emotional potency, what sociologists and intellectuals consider the most telling of the collective experience spurned by the event. The donative nature of these items negates legal concerns regarding ownership, however, preservation-determining the appropriate size of a state archive or who makes these determinations remains.

In contrast to the portable ephemera in Paris, New York's post-9/11 archivist practices were decidedly more ambitious, relying on both small tokens of grief and large sections of destroyed structures. After the city's terrorist attack, distorted masses of the World Trade Center were quickly isolated and stored with the intent to preserve. Their sublime presence in the 9/11 museum is emblematic of a cultural reluctance to let go, as if the fragments themselves carry with them a magnetic power to retell the trauma of that day's human loss.

In addition to terrorist attacks, socio-political insurgencies in the West have catalyzed ambitious archives and databases. From the outset, attempts to document and preserve the Occupy Wall Street Movement were undertaken by sociologists, students and organizers.[14] Archivists have to date thousands of items—posters, signs, photographs and messages—stored in physical and digital venues. The process has engendered a fascinating degree of debate from academics and movement insiders, many of whom question the legitimacy of the archives' underlying narratives

Starting in 2011, students at New York University's Moving Image Archive and Preservation Program (MIAP) began collecting items presenting the media coverage of the movement. With the help of MIAP director Howard Besser, the students dubbed themselves "Activist Archivists," uniting under the principal goal of preserving "the spirit, decentralization, self-organization, playfulness, and whimsy of this protest movement [which would otherwise] be lost to history if the media that documented this did not survive."[15] The archive's role as counter of 'real' history presents an empowering incentive for the process of collecting, and may well persuade other movements to make similar strides in the future.

Je Suis Charlie

According to the U.S. Patent and Trademark Office, two applications were filed for "Je Suis Charlie, Paris" iconic rallying cry following the 2015 Charlie Hebdo attack. Recently, the *Washington Post*[16] proffered a commentary on the increasing frequency by which private individuals and businesses have applied for trademarks in the wake of public tragedies.

As discussed in Dennis C. Abrams' article "Je Suis Public Domain," opportunists see great economic potential in creative output, such as slogans that encapsulate the essence of collective spirit following great tragedy.

Such attempts are rarely, if ever, legally recognized.[17] U.S. law dictates that a trademark must have some connection to a good or service that is being promoted and visually identified so as to distinguish it from other similar products.[18]

First Amendment and Vandalism: The Case of the Illuminator Art Collective

While material items such as posters, sculptures and pamphlets evoke the classic definition of a political artifact, performance remains an apt medium for the dissemination of socio-political critiques. Inherently uncommodifiable, performance art often prioritizes the immediate interaction of participants involved in political protests over secondary documentation in the form of photographs or videos. Groups like the Guerilla Girls, the famed feminists whose performances spurned valuable dialogue regarding institutional racism and sexism within the art world, have put art activism on the map in recent decades.[19]

Similarly, the New York City-based Illuminator Art Collective (IAC) stages political protests at famous sites such as the Metropolitan Museum of Art and the United Nations Building, where these iconic structures become the conceptual canvas upon which political critiques are projected.[20] Using a specially designed van that holds a projector on its roof, the group projects messages and symbols meant to provoke dialogue and reveal the secrets these institutions are inclined to keep hidden. The group's tactics reveal a curious relationship between art activism and the First Amendment, as well as how the seemingly universal definition of vandalism must be altered to adapt to new technologies and artistic visions.

The group's work highlights this fascinating intersection between art activism and law. On September 9, 2014, three members of the group, Kyle Depew, Grayson Earle and Yates McKee, were arrested for unlawful posting of advertisements, when they projected images on the façade of the Metropolitan Museum of Art.[21] The images were critical of billionaire businessman David Koch, who had recently donated $65 million to the museum in exchange for its public plaza being renamed after him. IAC's projections criticized Koch's environmental stances, namely his denial of climate change. While parked on a public street, the van was approached by a New York Police Department deputy, who later seized the group's projector equipment and arrested the three on the charge of unlawful posting of advertisements. Before these charges were formally dropped by a criminal court, the city of New York issued criminal summonses for the three members. NYPL §145.30 "forbids unauthorized individuals from posting, painting or otherwise affixing to the property of another person any advertisement, poster, notice or other matter designed to benefit a person other than the owner of the property." The law appears to be an adequate measure in protecting businesses from becoming hosts to unwanted advertisements from third parties. In instances of political protest, however, does the projection of commentary on the exterior public space fit this definition? While the City of New York seemed to think so, the charges were ultimately struck down in criminal court, with IAC's lawyer Sam Cohen rightly pointing out that a streaming projection fails to fit the standard definition of "affixing."[22]

It follows that if IAC's political projections fail to meet the definition of unlawful posting of advertisements, they similarly fail to match the legal requirements of vandalism. Vandalism is defined as the deliberate defacing or destruction of property. While it is clear that plastering a non-affixable projection to the façade of a building fails to constitute destruction, does it deface? Defacing implies the marking of a surface—though not in a severe a fashion as destruction. Therefore, IAC's unique brand of projector activism exists as a clever exercise of First Amendment free speech.[23]

Conclusion

As curators and archivists undertake the arduous process of compiling artifacts for physical and digital preservation, many questions remain about the legality and posterity of protest art. What is the optimal manner by which to preserve political or artistic ephemera? Who is best situated to protect artists' rights to create and capitalize on their art? What do keepers of protest art see when they preserve or trade in this kind of creative output? While political upheaval and tragedy prompt inflections from diverse global communities, museum archivists and administrators as well as art dealers and collectors look to preserve the artifacts for an entirely different reasons. Due to the changing and often unsettled landscape of political protest art, artists and collectors alike may find themselves in need of a legal advice to obtain information about available protections and defenses.

Endnotes

1. Inspired by the questions raised in a recent *New Yok Times* article about preserving mementos, this article aims to examine some legal questions arising out of creating, collecting, conserving and disseminating protest art.
2. Amy Quin, *Keeping Hong Kong Protest Art Alive Means Not Mothballing It*, New York Times, May 13, 2016, *available at* http://www.nytimes.com/2016/05/14/arts/international/in-hong-kong-preserving-mementos-ofaprotest-movement.html?_r=0.
3. 17 U.S.C. § 106A - Rights of certain authors to attribution and integrity.
4. In addition to the artistic media covered by VARA, the act grants artists the right to claim authorship, the right to prevent the use of one's name on any work the author did not create, the right to prevent use of one's name on any work that has been distorted, mutilated or modified in a way that would be prejudicial to the

artist's reputation and the right to prevent distortion, mutilation, or modification that would prejudice the author's honor or reputation.

5. Recently, debate has centered on what degree of control artists have regarding the location of artworks, with a 2006 U.S. decision from the First Circuit Court of Appeals, *Phillips v. Pembroke Real Estate, Inc.*, 459 F.3d 128 (2006), ruling that site-specific artworks do not warrant specific copyright protection. In this case, sculptor David Phillips brought suit against the manager of a public sculpture park for the improper modification of his site-specific works. The First Circuit Court of Appeals held that under the "public presentation exception" to VARA, the defendant sculpture park manager had the right to modify and alter plaintiff Phillips' sculptures within the park.

6. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).

7. China's *Goddess of Democracy* is an example of political protest art that was created to be ephemeral but has since amassed a more permanent reputation. Chris Buckley, *The Rise and Fall of the Goddess of Democracy*, New York Times, June 1, 2014, *available at* http://sinosphere.blogs.nytimes.com/2014/06/01/the-rise-and-fall-of-the-goddess-of-democracy/?_r=0.

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Three Cheers for Proper Benefits: The Improper Employment Classification of NFL Cheerleaders

By Robert Burney

Introduction

Professional football has been the most popular sport in America for over 30 years.[1] During this time, the National Football League (NFL, League) has had virtually autonomous control over football and all of its resulting official profits.[2] It has been estimated that the 32 clubs within the League collectively generate close to $6 billion in annual revenue.[3] The average NFL player salary in 2013 was $2 million, but singular players can receive annual salaries well over $20 million.[4] The clubs also pay their position coordinators and coaches quite well, with annual salaries ranging from six to seven figures, respectively.[5]

Over of the past few years, however, it has become apparent that one group on club payrolls may not be feeling the same financial love as everyone else. Multiple cheerleading units recently brought lawsuits against their respective clubs for wage theft and unfair employment practices.[6] Club cheerleaders are estimated to make less than $5 an hour.[7] In 2015, California law AB202 was enacted.[8] The aim of AB202 is to "explicitly require that professional sports teams provide cheerleaders with the same rights and benefits as other employees, protecting against the sort of financial and personal abuses that have been reported throughout the country."[9] Under AB202, professional sports organizations in California are required to label all cheerleaders as "employees" of their clubs, instead of their current designation as "independent contractors."[10]

AB202 is a step in the right direction for state legislation. In fact, if a cheerleader lawsuit were brought to federal court,[11] as such suits have alleged violations of both federal and state labor laws, cheerleaders would likely have a strong case. This article will attempt to establish that if such a cheerleading lawsuit was brought to court, the conditions of employment placed upon cheerleaders would likely lead to a holding that their proper classification would be as employees, as opposed to their current status as independent contractors.

Current Employment Situation

A. Classification of Cheerleaders as Independent Contractors

Under most club policies, cheerleaders in the NFL are currently classified as "independent contractors."[12] Multiple claims made by current and former cheerleaders verify this classification.[13] The typical definition of an independent contractor is "one who carries on an independent employment in pursuance of a contract by which he has entire control of the work and the manner of its performance."[14]

Classification as an independent contractor is important because, unlike workers classified as "employees," independent contractors may not enjoy appropriate and important protections, such as a minimum wage, overtime compensation, unemployment insurance and workmen's compensation.[15] In addition, if an independent contractor does not find his or her position satisfactory, there is little recourse beyond finding other employment.

Alternatively, workers classified as employees enjoy substantially more benefits. Under the Fair Labor Standards Act (FLSA), an "employee" is broadly defined as any individual allowed to "suffer or permit to work."[16] Employees, unlike independent contractors, are entitled to basic labor rights, such as minimum wage and overtime compensation, unemployment insurance and workmen's compensation.[17] Employees are also protected against termination under certain conditions.[18] Additionally, if an employee or group of employees feel that he, she or they is/are being treated poorly, he, she or they has/have the right to unionize and form a collective bargaining unit.[19]

The U.S. Department of Labor recognized that these definitions are rather broad and unclear, which led to a high level of workers being improperly classified as independent contractors, as opposed to proper classification as employees.[20] However, these definitions were intended to be broad so as to classify the vast majority of workers as employees in order to increase the protections afforded under statutory coverage.[21] In order to create a standard by which to determine whether a worker is an employee or an independent contractor under the broad terminology of the FLSA, courts have used the multi-factorial "economic realities" test.[22] Though they may vary by circuit, the Labor Department considers the relevant factors of the economic realities test to include: (1) the extent to which the work performed is an integral part of the employer's business; (2) the worker's opportunity for profit or loss depending on his or her managerial skills; (3) the extent of the relative investments of the employer and the worker; (4) whether the work performed requires special skills and initiative; (5) the permanency of the relationship; and (6) the degree of control exercised or retained by the employer.[23] When making such a determination under the economic realities test, the Department of Labor also specified that it must be done within the broad scope of the FLSA's statutory directive to classify most workers as employees.[24] Ultimately, the goal is to determine whether a worker is economically dependent on the employer, and thereby an employee, or if the worker is really in business for him or herself, and is therefore an independent contractor.[25]

B. Club Requirements and Work Environment of NFL Cheerleaders

Different NFL clubs maintain different policies towards their cheerleaders, and therefore there is no uniformity between the cheerleaders' working conditions other than being classified as independent contractors. However, one of the most common complaints against clubs is that they are paying cheerleaders well under the federal hourly minimum wage.[26] In fact, former cheerleaders have claimed to have only been making roughly between $2.50-$5 per hour.[27] Teams often contract to pay cheerleaders one lump sum based on the eight games in which they are required to attend and participate.[28] This lump sum, however, typically does not include pay for attendance at preseason games, public appearances, charity events, or practice sessions, all of which are mandatory requirements of employment.[29] This stipend, in effect, is in addition to receiving little to no overtime pay or sick leave.[30] One lawsuit alleged that even if only the lump sum was applied to actual game-time appearances, the cheerleaders involved were left unpaid for over 800 hours of work per woman, per year.[31]

The situation of underpayment is only further exacerbated by the fact that cheerleaders pay thousands of dollars in out-of-pocket expenses for travel and personal appearance costs in connection with their employment.[32] Many clubs contractually require that cheerleaders show up at a certain amount of community and corporate events, for which they are not compensated.[33] Some clubs enforce strict policies with such public appearances, retaining the right to fine cheerleaders who are late, forbidding them to find other cheerleaders to cover for them, or requiring them to submit to additional auditions the following season.[34] Some clubs do not compensate cheerleaders even when the clubs themselves profit off the cheerleaders' appearances. The Oakland Raiderettes, for example, are required to attend photo sessions for the annually published *Raiderettes Swimsuit Calendar*.[35] The club then sells this calendar on its website for $15 each, but allegedly does not share any of the revenues with the cheerleaders.[36]

Unfortunately, cheerleaders also often complain of the level of control the clubs exhibit over them. After filing suit against the Buffalo Bills, one former cheerleader released a copy of the "NFL Buffalo Jills Cheerleaders Agreement & Codes of Conduct 2013-2014."[37] The Code dictates how the Jills are allowed to wear their hair, groom their nails and eyebrows, and even requires that they "do not over-tan," because it is unattractive.[38] There are also weight checks, or, as some former cheerleaders allege, a "jiggle test," wherein the girls must meet and maintain a certain physique, or be cut from the squad.[39]

Club cheerleaders are told how they are allowed to communicate and behave in public pursuant to strict etiquette guidelines. They are warned not to be overly opinionated, as "no one likes a whiner."[40] They are told to never flirt with guests, refrain from nervous habits such as nail-biting, how to eat their meals in public (which they must refrain from doing so while in uniform, unless given permission), and to always say "excuse me" when leaving a table.[41]

Some cheerleaders are also told what types of outside employment opportunities they are allowed to take while working for certain clubs.[42] One former cheerleader alleged that her club retained the right to approve of all modeling gigs she was offered.[43] It was forbidden, however, to miss practice for any of these opportunities.[44] Nor were cheerleaders who were also students allowed to miss practice for classes and exams.[45]

Finally, the clubs maintain strict and direct control over what is arguably a cheerleader's most important job: the dance routines. These routines, from the moves to the cheers, are allegedly controlled directly by the clubs.[46] Some clubs also set the schedules and locations for all rehearsals.[47] In sum, it would seem that nothing is out of the control of the clubs once women contract to be cheerleaders in their service.

Cheerleaders Under the Economic Realities Test

In order to conclude whether club cheerleaders would properly qualify as employees, it must be determined whether they are economically dependent on the employer, or in business for themselves.[48] This is determined by the factors in the economic realities test.[49] For clarification, these factors are not meant to be a simple checklist; the outcome must be determined by a qualitative, rather than quantitative, analysis.[50]

A. It Is Arguable That the Work Performed by Cheerleaders Is an Integral Part of the Club's Business

If the work performed is integral to the employer's business, it is more likely that the worker is economically dependent on the employer.[51] However, the work performed does not have to be the final product of the employee. Work can be integral to a business even if it is simply one component of the overall business.[52] Additionally, a worker's performance does not even have to contribute to the employer's final product, just toward the general benefit of the employer's business.[53]

It is arguable that cheerleaders are an integral part of their clubs' businesses. Cheerleaders have been a part of the NFL since 1954, over 10 years before the development of the Super Bowl.[54] Additionally, 26 of 32 clubs employ cheerleading squads, which clearly highlights their popularity.[55] Cheerleaders also appear on screen during almost every football game broadcast.[56] Albeit, this screen time typically only lasts seven seconds per game, but the NFL's television deal is broken down by screen time that still represents $317,000 of profit per game for each club with a squad.[57]

Furthermore, within the stadiums themselves, cheerleaders are often used as incentives to boost ticket sales. In 2014, the Atlanta Falcons incentivized season ticket holders to return by granting them a chance to order a seat-side visit from two members of the cheerleading squad.[58] Other teams have even developed apps, wherein downloading ticket holders gain a chance to meet the cheerleaders.[59] These different services would arguably be enough to establish that cheerleaders' work qualifies as one integral component of employers overall business.

It is undeniable, however, that cheerleaders do not participate in or contribute to the actual game of football. Furthermore, while the cheerleaders undoubtedly contribute to the overall stadium experience, at least one club, the Buffalo Bills, suspended its cheerleaders in lieu of these recent lawsuits.[60] In the season after this suspension, the Bills did not see any significant change in its average stadium attendance during games.[61] However, even if the cheerleaders' presence cannot be directly tied to ticket sales, it is clear that clubs utilize them in many ways to try and sell the stadium experience. Therefore, it is at least arguable that they are integral to the employer's business, and therefore deserving of employment status under this factor.

B. The Cheerleaders' Opportunity for Profit or Loss Does Not Depend on Their Managerial Skills

This factor is meant to determine the degree within which a worker's opportunity for profit or loss is determined by his or her employer.[62] This factor has nothing to do with opportunities for increased pay through promotions or extra hours worked.[63] Instead, it is meant to determine if the worker is using his or her managerial skills to effect opportunities beyond the current job.[64] Managerial skills include the workers' ability to use initiative and skill to improve functionality, make independent decisions, hire others to assign tasks to, and to decide how much they wish to work.[65]

Cheerleaders have a minimal ability to affect profits and losses through their own managerial skill, and they are therefore more like employees. It is undeniable that cheerleaders use their time in the NFL to further their own careers as dancers and entertainers.[66] However, that is where the opportunities for profits and losses end. Cheerleaders are told what hairstyles to get and what types of beauty products to use, with little room allowed for alternatives that may be more cost-effective.[67] The clubs also make all decisions about practices, dance routines, or even other employment opportunities.[68] In sum, because the cheerleaders cannot use managerial skill to effect profit and loss, this factor likely weighs in favor of classification as employees.

C. The Relative Investments of the Clubs Far Exceed the Investment of Cheerleaders

This factor is meant to determine the relative extent and nature of the investments made into the business by both the employer and the worker.[69] An independent contractor should be in business for him or herself, and therefore should be contributing some of the investment as well as exposing him or herself to the vulnerability to any potential business losses.[70] However, if a worker's financial investment is relatively minor compared with that of the employer's investment, it suggests that the worker is economically dependent on the employer and is therefore an employee.[71]

Cheerleaders are economically dependent on their clubs, as their investments in club business are relatively minor. Cheerleaders are often required to personally purchase their equipment and transportation, sometimes costing them over $1,000 a season.[72] The clubs, however, invest hundreds of millions of dollars in their purchase and management of NFL teams.[73] Therefore, because club investments far exceed cheerleader investments, this factor likely weighs in favor of classification as employees.

D. The Work Performed by Cheerleaders Requires Special Skills and Initiative

A worker with technical or special skills can be indicative of independent contractor status.[74] However, the existence of special skills alone does not prove that one is an independent contractor.[75] Instead, a worker with specialized skills can only be classified as an independent contractor if he or she is able use judgment and business-like initiative in applying these skills.[76] This includes the ability to determine things, such as the sequence of work, what materials are necessary, and what orders to fill.[77]

Cheerleaders have specialized skills as professional dancers, but are also limited in applying their initiative or judgment to these skills. Most clubs employ supervisors who make most decisions regarding routines and practices.[78] Cheerleaders are often fined for bringing any materials, such as pom-poms and outfits, not approved by their clubs.[79] Therefore, because cheerleaders cannot apply judgment or initiative in applying their skills, this factor likely weighs in favor of classification as employees.

E. A Cheerleader's Relationship with the Club Is Sufficiently Permanent to Qualify for Employee Status

A permanent relationship between a worker and employer suggests that such a worker is an employee.[80] In contrast, an independent contractor is more likely to eschew permanent employment in favor of future business opportunities.[81] Permanency does not have a length requirement, as an employee can be permanent even if he or she only works for a few weeks out of the year.[82] The question is whether the worker is employed for singular projects, or works continuously or repeatedly for the employer.[83] In latter cases, permanency is determined by whether the lack of indefiniteness is due to the "operational characteristics intrinsic to the industry," or the worker's "own business initiative."[84] Therefore, with seasonal employees, such as cheerleaders, permanency is not determined by returning from season-to-season, but whether the worker has "worked for the entire operative period of a particular season."[85]

A court would likely find that cheerleaders are sufficiently permanent to be classified as employees. It is indisputable that professional football is a seasonal sport.[86] Thus, it follows that it is an operational characteristic of the industry that cheerleaders only be hired for a portion of the calendar year. Since all clubs employ their cheerleaders for the entire upcoming season, cheerleaders are typically employed for the entire respective operative period. Therefore, cheerleaders hold a position that is sufficiently permanent to satisfy this factor.

F. Clubs Retain and Exercise a Very High Degree of Control Over Cheerleaders

This factor is concerned with the economic control exercised by the employer over workers.[87] The imperative question is whether the worker has control over meaningful aspects of his or her performance in a way that benefits his or her own business.[88] Such control cannot simply be theoretical, it must actually be exercised by the worker to qualify as an independent contractor.[89] Conversely, if the employer retains control over the worker's performance, the worker is deemed to be an employee.[90]

Clubs exercise almost dictatorial control over cheerleaders.[91] Dance moves and routines are typically determined by or subject to the approval of the clubs.[92] The clubs also retain the right to control cheerleaders' schedules, performances, outside employment opportunities and communications.[93] Cheerleaders cannot even find another source of income to supplement their living expenses without club approval.[94] The clubs also control their cheerleaders' physical appearance, reserving the right to cut them without pay if they fail to meet weight limits.[95] Clubs decide what hair and nail styles cheerleaders sport, what they are allowed to say in public, and when they are allowed to eat or even when they can rest while on duty.[96]

The working conditions of NFL cheerleaders are actually quite similar to those of another group of dancers. In *Reich v. Circle C Investments*, the Fifth Circuit held that the plaintiff-nightclub dancers were employees instead of independent contractors.[97] The court's rationale was that the defendant nightclub had effective and meaningful control over the dancers' appearances, for how long they were allowed to break, the type of music to which they had to dance, and their ability to fine the dancers for tardiness or absences.[98] These conditions were enough to qualify the club dancers as employees under the FLSA.[99]

Similar to the club in *Reich*, NFL clubs control cheerleaders' appearances, breaks and attendance protocol. Unlike *Reich*, NFL clubs also control cheerleaders' dance routines and customer interactions. Therefore, since the clubs retain a level of control over cheerleaders that is even greater than that of dance clubs, it is likely that the cheerleaders are sufficiently economically dependent to qualify for classification as employees.

Conclusion

Under the economic realities factors, it would be extremely likely that a federal court would determine that cheerleaders in the NFL should be classified as employees under the FLSA. Clubs arguably exercise complete control under almost every factorial examination.

However, it would simply be ineffective to wait for the court system to settle such a dispute. A significantly more proactive solution would be for the NFL itself to step up and require that all clubs classify their cheerleaders as employees. The NFL's fan base is made up of 45% women, and showing support for the young women on cheerleading squads could provide the NFL with some much needed goodwill with its female fans.[100] The League cannot continue to ignore this issue, as growing public concern already led to a petition with over 150,000 signatures asking for the NFL to require that cheerleaders be paid a living wage by their clubs.[101] Former members of the Buffalo Jills were also recently granted class certification in a wage theft suit in New York State court, meaning that this is not an issue that is likely to leave any time soon.[102]

Ultimately, while the clubs may not want to reclassify their cheerleaders as employees, it would be to the benefit of both the cheerleaders and the NFL to enforce a League-wide policy similar to California's AB202. Other states have lawmakers who have already proposed similar bills.[103] However, the NFL should be the party to take a proactive stance and issue labor guidelines that require clubs to properly classify their cheerleaders as employees.

Endnotes

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13. *See California cheerleaders win right to be paid and treated like regular employees*, CNN Money (July 17, 2015), *available at* http://money.cnn.com/2015/07/16/news/companies/california-cheerleader-law/; Jon Campbell, *Buffalo Jills Lawsuit Inspires New Bill in Albany*, WGRZ (June 3, 2015), *available at* http://www.wgrz.com/story/news/2015/06/03/buffalo-jills-cheerleading-bill-albany/28412153/. Former Buffalo Jills alleged to also be independent contractors when employed by the Buffalo Bills.

14. *See generally* 5 Am. Jur. Proof of Facts 2d 219 (Originally published in 1975).

15. *See* U.S. Dep't of Labor, Administrator's Interpretation No. 2015-1, 2015 WL 4449086 (2015) (hereafter, "FLSA Guideline").

16. *See* 29 U.S.C. § 203.

17. *See* FLSA Guideline at 1.

18. *See* 29 U.S.C. § 218(c).

19. *See* 29 U.S.C. § 157.

20. *See supra* note 20, at 1.

21. *See id.* at 3.

22. *See id.* at 2; Godoy v. Rest. Opportunity Ctr. of New York, Inc., 615 F. Supp. 2d 186, 192 (S.D.N.Y. 2009).

23. *See* FLSA Guideline at 4; Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290 (1985).

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34. *See id*.

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43. *See id.*

44. *See id*.

45. *See id*.

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49. *See id*.

50. *See id*.

51. *See* Rutherford Food Corp. v. McComb, 331 U.S. 722, 729 (workers were employees in part because work was "part of the integrated unit of production"); FLSA Guideline at 6.

52. *See* FLSA Guideline at 6-7.

53. *See* Perez v. Oak Grove Cinemas, Inc., 68 F. Supp. 3d 1234, 1243 (D. Or. 2014).

54. *See* Tom McGowan, *NFL Cheerleaders: Gratuitous Sexism or All-American Fun?*, CNN (Oct. 25, 2013), *available at* http://www.cnn.com/2013/10/25/sport/nfl-cheerleaders-minnesota-vikings-mvc/.

55. *Id*.

56. *See* Howard Bloom, *NFL Cheerleaders Bring in Money, but Barely Paid Any*, SportingNews.com (Sep. 11, 2014), *available at* http://www.sportingnews.com/nfl-news/4608901-nfl-cheerleaders-treatment-pay-salary-lawsuits-jills-raiderettes-minimum-wage-women.

57. *See id*.

58. *Id*.

59. *See New App Will Allow NFL Fans to Order Cheerleaders to Their Seats at Stadium*, ThePostGame.com (Mar. 27, 2014), *available at* http://www.thepostgame.com/blog/futuresport/201403/new-app-will-allow-nfl-fans-order-cheerleaders-their-seats.

60. *See supra* note 56.

61. *See NFL Attendance—2014*, ESPN (2014), *available at* http://espn.go.com/nfl/attendance/_/year/2014. The Jills were suspended prior to the 2014 NFL season. In 2013, the Ralph Wilson Stadium had an average attendance of 66,257. In 2014, overall average attendance actually increased to 67,522.

62. *See* Herman v. Express Sixty-Minutes Delivery Serv., Inc., 161 F.3d 299, 303 (5th Cir. 1998).

63. *See* FLSA Guideline at 7.

64. *See id*.

65. *See id*.; Chao v. Mid-Atlantic Installation Servs., Inc., 16 Fed. App'x 104,106-07 (4th Cir. 2001).

66. *See* Regina Bailey, *Use Cheerleading as a Bridge to Other Careers*, N.Y. Times (May 1, 2014), *available at* http://www.nytimes.com/roomfordebate/2014/05/01/professional-cheerleaders-and-their-pompom-problems/use-cheerleading-as-a-bridge-to-other-careers.

67. *See supra* note 45.

68. *See id.*; *supra* note 50.

69. *See* FLSA Guideline at 9.

70. *See id*.

71. *See id*.

72. *See supra* note 36.

73. *See* Kevin Baumer et al. *What Every NFL Owner Paid for Their Team – And What It's Worth Today*, BusinessInsider.com (Nov. 16, 2010), *available at* http://www.businessinsider.com/how-much-did-nfl-owners-paid-for-their-teams-2010-10?op=1.

74. *See* FLSA Guideline at 11.

75. *See* Martin v. Selker Bros, Inc., 949 F.2d 1286, 1295 (holding that the use of special skills is not itself indicative of independent contractor status if these skills are not applied an independent way).

76. *See* Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988).

77. *See supra* note 78. If a worker is reliant on worksite instruction, he or she is an economically dependent employee.

78. *See supra* note 37.

79. *See supra* note 39.

80. *See* FLSA Guideline at 12.

81. *See id*.

82. *See* Donovan v. DialAmerica Mktg., Inc., 757 F.2d 1376, 1384-85 (3d Cir. 1985).

83. *See id*.; FLSA Guideline at 12.

84. *See Superior Care*, 840 F.2d at 1060-61.

85. *See* Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1054 (5th Cir. 1987).

86. *See NFL Season Schedule—2014*, ESPN (2014), *available at* http://espn.go.com/nfl/schedule/_/seasontype/3/year/2014/week/5. In 2014, the NFL's season lasted from August 3rd to February 1st.

87. *See* FLSA Guideline at 3.

88. *See id*.

89. *See Mr. W Fireworks*, 814 F.2d at 1047.

90. *See* FLSA Guideline at 13.

91. *See supra* note 37.

92. *See id.*

93. *See id*.

94. *See supra* note 39.

95. *See id*.

96. *See id*.

97. *See* Reich v. Circle C. Investments, Inc., 998 F.2d 324, 327 (5th Cir. 1993).

98. *See id*.

99. *See id*.

100. *See* Brent Schrotenboer, *NFL Crisis Could Hinder Growth of Female Fan Base*, USA Today (Sep. 16, 2014), *available at* http://www.usatoday.com/story/sports/nfl/2014/09/15/female-nfl-fans-c-keith-harrison-ann-bastianelli-marie-claire/15697247/.

101. *See* Josh Peter, *NFL Cheerleaders Scoring Victories in Labor Lawsuits*, CNBC.com (Feb. 5, 2016), *available at* http://www.cnbc.com/2016/02/05/nfl-cheerleaders-scoring-victories-in-labor-lawsuits.html

102. *See Court Certifies Class in Buffalo Bills Cheerleaders Wage Theft Lawsuit*, FightWageTheft.com (Jan. 3, 2016), *available at* http://fightwagetheft.com/news/buffalo-jills-class-certified.

103. *See* Rebecca Ruiz, *N.B.A Cheerleader's New Rallying Cry: Better Pay*, N.Y. Times (Oct. 25, 2015), *available at* http://www.nytimes.com/2015/10/26/sports/basketball/cheerleaders-in-nba-make-case-for-better-pay.html?_r=0.

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Balancing an Individual's Right of Publicity with Another's Right to Protected Speech for the Greater Good

By Lindsay Butler

The United States encourages innovation and independence within its culture by both protecting creativity and also by prohibiting the enactment of laws that limit free speech. These are powerful foundations of American society as a whole, yet they are quite regularly challenged against other individual rights claims, including actions brought for defamation and right of publicity These types of legal challenges require a very precise balancing test in order to determine which right is considered more valuable in the eyes of the law. Often, when this approach is used by a court of law, the right that impacts the greater good—that is, the right that is most connected with a greater public issue— will prevail over the right connected to a single individual. This is because if there is a greater public concern, the appropriation of another's rights is part of free expression rather than for commercial incentive. In fact, when there appears to be little injury associated with the violations of an individual's legal rights, the rights connected with a greater public concern will most likely prevail.

This is exactly the approach that the Ninth Circuit used in its recent decision in *Sarver v. Chartier* where an Iraqi war veteran, Sergeant Jeffrey S. Sarver (the Plaintiff or Sarver) brought a right of publicity claim against publisher Playboy Enterprises, Inc. and the makers of *The Hurt Locker* (collectively the Defendants) for using his story as the focal point of an article and subsequent movie.[1] Here, the Court evaluated the Defendants' Anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) motion by weighing Sarver's individual claim of his right to have control over his own personal life story, against the storytellers' right to speak about the war in Iraq. The Court found that the topic of war, as well as how it affects soldiers, is unquestionably an important matter of public concern. Further, the Court held that because Sarver was a private citizen who had not yet demonstrated the financial worth in the use of his identity, his right of publicity claim was therefore an unconstitutional restriction on speech rather than a commercial claim.[2] However, the issue still remains unclear as to how the Court determines whether an unauthorized use is done for the purpose of gaining an economic benefit rather than relating to a major public concern when there are clear indications that it is achieving both.

The Ninth Circuit Evaluated California's Anti-Slapp Statute in Order to Balance the Plaintiff's Claims Against the Defendants' Rights to Freedom of Speech

On February 17, 2016, the Ninth Circuit affirmed the district court's holding that the First Amendment protected the use of Sergeant Jeffrey Sarver's persona in the film.[3] The Court came to this decision when it evaluated the Defendants' anti-SLAPP motion as required by California law.[4] The application required a two-prong analysis, where the Court must first determine that the Defendants' actions were made in connection with a greater public issue in furtherance of their rights to freedom of speech, and second, whether the Plaintiff established a "reasonable probability" that he would prevail on his claim.[5] The Court held that because the film addresses matters of public concern, and as Sarver's right of publicity claim is strictly a restriction on content-based speech (as there is no commercial value to his story), his claim was unconstitutional and therefore would not prevail.

Under the first prong, the Court held that the Iraq War and the use of improvised explosive devises (IEDs) was a matter of "significant and sustained" public concern in accordance with California law[6]

In first determining whether the Defendants' work related to a matter of greater public concern, the Court evaluated the California Court of Appeal for the First District's categories of public issues.[7] These categories include (1) statements concerning a person or entity in the public eye, (2) conduct that could directly affect a large number of people beyond the direct participants, or (3) a topic of widespread, public interest.[8] Elaborated further, referencing *Weinberg v. Feisel*, the Ninth Circuit stated that public concern is beyond general curiosity, and is "something of concern to a substantial number of people."[9] In sum, the Court had to determine whether the Defendants' work qualified under one of these three categories for the first step in its analysis on the Defendants' anti-SLAPP motion to be satisfied.

Accordingly, it appears that the Ninth Circuit rightly sided with the Defendants in its agreement that the war in Iraq and the use of IEDs was a matter of great public concern. Not only did the war affect the entire country, but also more than half to two-thirds of American soldiers were wounded or killed by IEDs.[10] Although Sarver contended that the use of his private persona was not a matter of public concern, the Court held that because his persona is so ingrained with the war and use of IEDs, that it was not his persona alone that was being captured by the Defendants; but that it was only captured in the context of this greater issue of war. Not only did this subject directly affect a large number of people, but it also was a topic of widespread public interest.

Under the second prong, the Court held that Sarver's right of publicity claim would not prevail because it was an unconstitutional content-based restriction on speech, as there was no commercial value in his story under California law[11]

The second step in the Court's anti-SLAPP motion analysis required that Sarver establish a "reasonable probability" that he would succeed on his claim.[12] Sarver brought a right of publicity claim under California law. The elements of this claim required (1) the Defendants' use of his identity, (2) the use of his identity was for the Defendants' advantage, either commercially or otherwise, (3) no consent, and (4) resulting injury.[13] However, rather than evaluate each element of the claim, the Court first assessed the Defendants' argument that such a claim impacted their rights to free speech, regardless if the elements were met.

Again, the Court agreed with the Defendants in finding that California's right of publicity claim was unconstitutional, as it restricted speech based on content alone. Such restriction is permitted only if it is proven that the restriction is narrowly tailored to serve a compelling state interest.[14] The Court compared Sarver's case to the Supreme Court's ruling in *Zacchini v. Scripps-Howard Broadcasting Co.,* where the restriction was permitted, as no social purpose was served in the use of broadcasting the plaintiff's entire performance, and because it also directly impacted the plaintiff's finances.[15] The Court went into detail regarding how this ruling was used to decide other cases where the plaintiff had commercial value in his or her identity, resulting in financial harm because of an unauthorized use. The Court cited *In re NCAA Student-Athlete Name & Licensing Litig*. (*Keller*) as an example, where it found in favor of a college football player whose identity was used in a video game, because the game interfered with the athlete's ability "to capitalize on his athletic success."[16] To the contrary, because Sarver did not have any commercial value in his own personal life story, and as the use was related to a matter of public concern, the Court held that his claim was strictly preventing the content of the Defendants' speech. As a result, it was therefore deemed unconstitutional.

The Ninth Circuit's Distinction of a Constitutional Use of Another's Identity for The Sake of Public Concern Versus One Only for Commercial Purpose Establishes an Unclear Precedent

The Ninth Circuit's decision leads to a complicated precedent, as an unauthorized use can be both a matter of public concern and commercial purpose. Further, this ruling only protects celebrities with an already established commercial value in their identities. The Court notes that because Sarver has no commercial value in his story, he is not suffering any financial harm, which makes his right of publicity claim a restriction based on content alone. It is no question that protection of freedom of speech is vital to American culture, but when freedom of speech depends on whether the subject of the expression already has commercial value, it seems to be both an unclear and unfair distinction.

Although the Ninth Circuit makes no mistake in its analysis that *The Hurt Locker* demonstrates an issue of public concern, the distinction the Court makes regarding financial incentive is rather flawed. For example, the Court ruled for the plaintiff in *Keller* because Electronic Arts, Inc. capitalized off his identity.[17] Additionally, it ruled in favor of Paris Hilton in *Hilton v. Hallmark Cards* for capitalizing off her identity in the use of the defendant's greeting cards.[18] Here, the Court ruled in favor of the makers of *The Hurt Locker* because the Defendants' work was related to a public concern instead of aiming to capitalize off of Sarver's identity. However, this distinction remains unclear, as the Defendants' still gained a serious economic benefit from the use of Sarver's identity despite it subsequently relating to a matter of public significance. In fact, the film made almost $50 million from box office sales, and over $50 million in domestic video sales,[19] by allegedly using Sarver's persona in the movie. Therefore, Sarver's identity has the potential economic value of at least $100 million, but because he did not already establish this value on his own prior to its exploitation, this allowed for the unauthorized use of his story by others.

The ruling on this case leads to a confusing precedent for future Ninth Circuit cases, as the Defendants both gained substantial profits from their uses of the Plaintiff's identity, and because the uses were found to be related to a public issue, therefore they were protected by the First Amendment.[20] The Court did not take into consideration the potential profit that Sarver could make from the use of his story, such as if he were to write his own book or movie script. In addition, as film producers and studios often pay to license life rights (whether or not required legally), Sarver actually missed an opportunity to gain economic value from the use of his persona.[21] Despite this, the issue remains unclear for future rulings.

Conclusion

The Ninth Circuit's ruling that the First Amendment protects *The Hurt Locker* is one that is likely celebrated in Hollywood. However, in using California's anti-SLAPP statute analysis, the Court failed to distinguish when a work is considered made for commercial purpose or if it is related to a matter of public concern. In addition, it failed to fully recognize the rights of the individual who suffers in the process. The Court found that *The Hurt Locker* relates to a matter of public concern, as it portrays the war in Iraq and the impact of IEDs, topics that were unquestionably matters of importance to the public. When turning to Sarver's right of publicity claim, the Court found it to be a restriction on the Defendants' freedom of speech because it strictly regulates the content of the speech. Had it been allowed to proceed, the Court believed that it would have strictly regulated the content of the speech. In addition, the Court believed that there was no financial loss to Sarver as a result of the unauthorized use of his story. Unfortunately, the Court failed to consider that the publisher and film studio benefited economically from using Sarver's story, regardless of whether such story was of public concern. It also failed to mention when, if ever, a work would qualify as both. Additionally, because Sarver was not a celebrity, but rather a private individual, he had no right to make a claim for the use of his life story. As a result, this finding is very arbitrary and entirely up to the Court's discretion for determining when a work might be considered a protected use.

Endnotes

1. Sarver v. Chartier, 16 C.D.O.S. 1 (9th Cir. 2016).
2. *Id.*
3. *Id.*
4. Cal. Civ. Proc. Code § 425.16(b)(1).
5. In re NCAA Student-Athlete Name & Licensing Litig., 724 F.3d 1272, 1272-73 (9th Cir. 2013) ("Keller").
6. *Id*.
7. Hilton v. Hallmark Cards, 599 F.3d 894, 906 (9th Cir. 2009).
8. *Id.*
9. Weinberg v. Fesisel, 2 Cal. Rptr. 3d 385, 392 (Cal. Ct. App. 2003).
10. Gregg Zoroya, *How the IED Changed the U.S. Military,* USA TODAY (Dec. 19, 2013), *available at* http://www.usatoday.com/story/news/nation/2013/12/18/ied-10-years-blast-wounds-amputations/3803017/.
11. Downing v. Abercrombie & Fitch, 265 F.3d 994, 1001 (9th Cir. 2001).
12. *Keller,* 724 F.3d at 1272-73.
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14. Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226 (2015).
15. Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 563-64 (1977).
16. *Keller,* 724 F.3d at 1277, 1281.
17. *Id.*
18. *Hilton*, 599 F.3d at 903.
19. *The Hurt Locker (2009),* THE NUMBERS, *available at* http://www.the-numbers.com/movie/Hurt-Locker-The#tab=summary (last visited May 30, 2016).
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21. Jennifer E. Rothman, *Ninth Circuit Tosses Hurt Locker Case,* Rothman's Roadmap to the Right of Publicity (Feb. 17, 2016), *available at* http://www.rightofpublicityroadmap.com/news-commentary/ninth-circuit-tosses-hurt-locker-case.

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The Art of Taxing Capital Gains
By Giovanna Quattrone

In recent years, a popular tax deferral mechanism has been employed in transactions relating to art and collectibles. The 1031 Exchange, also known as a like-kind exchange,[1] was originally introduced into the tax code in the 1920s to lighten the financial burden of farmers who sought to trade property. Later, it became a popular tactic for real estate investors seeking to flip property, and quite significant within the sector of commercial real estate. Now, it has developed into a well-known tool for a new class of investors: buyers of expensive art who wish to defer federal taxes when upgrading their Stellas to Pollocks. The use of this mechanism has likely expanded in response to record high art prices and a growing number of discerning investors who believe art to be a tradable commodity. Accordingly, like-kind exchanges are a substantial function of the current marketplace, especially since the last economic downturn in 2009. [2] Section 1031 permits a delay of the lofty 28% capital gains tax on sales of art, as well as other collectibles, including stamps. As a result, the profits from the first sale can be put toward the purchase of a similar piece. This has become an attractive tool in estate planning, but only to those who are identified as investors.[3] In the world of stocks, bonds, and real estate, no one hesitates to announce that he or she is in the game for the money. However, this is what separates those markets from the art market.

The Internal Revenue Code § 1031 regulates like-kind exchanges, and states that in general, "no gain or loss shall be recognized on the exchange of property held for productive use in a trade or business or for investment if such property is exchanged solely for property of like-kind which is to be held either for productive use in a trade or business or for investment."[4] Some find the language of 1031 troubling, because this represents the singular differentiation between an investor and a collector. The word "investor" is inflammatory in the art world, and participants go to great lengths to avoid this title in great fear of being black-listed from artists and galleries; that is, of course, until the time comes to pay capital gains taxes. This is a sector in which buying is more highly prized than selling, and selling too quickly gets one into trouble. Buyers initially have two choices: they can self-identify as investors and risk dooming themselves to isolation and dislike among players in the art world, or they can buy what is available to them and sell at their leisure, effectively receiving a no interest loan from the government.[5]

Many critics believe that use of a like-kind exchange when purchasing art is a sophisticated scheme, and the tax code is being exploited just so the ultra-wealthy can further transfer their money.[6] If beauty of art is in the eye of the beholder, is the tax code as well? Apparently not, according to the way the issue of actual intent versus expressed intent[7] has been decided in an array of different cases. Courts place quite a heavy burden of proof on those collectors who realize that 1031 suits them much better financially, so long as they claim to be investing.

In *Wrightsman v. United States*,[8] the United States Court of Claims decided against the full court trial commissioner's satisfaction that the plaintiffs had demonstrated enough evidence to prove that the primary purpose was investment.[9] In this 1970 case, Plaintiffs Charles and Jayne Wrightsman sought to recover alleged overpayments of federal income tax. The couple conceded that they originally purchased some of their world famous nineteenth century French art collection as a hobby, and that they did derive enjoyment and satisfaction from keeping the collection in their home. They also claimed that the property was held primarily for investment, and the related expenses associated with maintaining their collection were thus deductible. Under the facts and circumstances, the court did acknowledge that "an investment purpose" existed. However, the court held that the evidence did not ascertain investment intent "as the most prominent purpose for acquiring and holding works of art."[10]

Two of the government's proposed theories on how the regulatory prerequisites should be met were analyzed.[11] The first theory was denial of recovery to the plaintiffs because they lacked demonstration of "any action on their part inconsistent with the holding of their collection for pleasure…."[12] The second theory was termed by the court "the physical segregation-pleasure preclusion standard."[13] This theory was the government's attempt at a fixed rule for determining the taxpayer's primary intent. Additionally, the decision to disallow the deductions was based on the application of whether the taxpayer acquired and held the works of art *primarily* for investment rather than for personal use and enjoyment.[14] Here, the court used the primary purpose test to identify whether the plaintiffs were collecting or investing. It was through the application of this test that the Wrightsmans were found to be collectors. The *Wrightsman*[15] standard places the burden of proof on the taxpayers to demonstrate that "as a factual matter, from an objective view of the operative circumstances in suit, they acquired and held works of art during the years here involved primarily for investment rather than for personal use and enjoyment."[16]

Similarly, in *Drummond v. Commissioner*,[17] the primary purpose test was used to decide whether the taxpayer's gain from the 1989 sale of Old Master drawings was ordinary income or long-term capital gain. Here, the same analysis was used to determine whether the plaintiff was a collector or a dealer. The taxpayer purchased an estimated six drawings at auction and from private sales during the 1970s. After conducting his own market research, the plaintiff determined that one drawing purchased for $1,300, titled "Three Feminine Heads," could be sold for approximately $100,000. Drummond subsequently sold this drawing to the National Gallery for $115,000 in 1989. No other sales during the 1980s and 1990s were conducted, but he reported the gain from the sole sale as ordinary business income on Form 1041 schedule C, and not as long-term capital gain on schedule D.[18]

The issue before the court was whether the gain from the sale of the drawings was from property held by the taxpayer *primarily* for sale to customers in the ordinary course of his trade or business within the meaning of § 1221(a)(1). As used in § 1221(a)(1), the statutory word "primarily" is defined as "of first importance" or "principally."[19] The court held that the gain on the sale of drawings was long-term capital gain because Drummond was determined to be a collector and not a dealer.

It is certainly no secret that tax law controls much of human activity, because people make decisions from which they will best benefit.[20] The court sent a message to participants in the art world to demonstrate that they cannot dial up their own tax remedy to best benefit past actions, and achieved this by establishing a very high burden of proof, as illustrated in the former cases.

Art collectors are gravitating toward use of this exchange, and as this happens, courts will continue to make the burden of proof more intense. Subsequently, as more of these § 1031 exchanges are challenged, another restraint is likely to be introduced. Instead of buyers and sellers playing fast and loose with the tax law, the government will set concrete numerical criteria for like-kind exchanges. There is pending legislation[21] on §1031 based on various motivations. [22]

As use of these transactions concerning artwork increase, and as the industry garners more attention, the tax code may become riddled with constraints. As this section of the tax code received greater attention from legislation (currently aimed at intent), it will eventually get more attention from the courts. There will likely be polarizing opinions over the concern of actual and expressed intent. Judge Learned Hand articulated the dilemma perfectly when he stated, "[W]hile I should be the last to say that the making of a profit was not in itself a pleasure, I hope I should also be one of those to agree there were other pleasures than making a profit."[23]

Endnotes

1. 26 I.R.C. § 1031
2. Graham Bowley, "Tax Break Used by Investors in Flipping Art Faces Scrutiny," New York Times, Apr. 26, 2015.
3. Andy Gustafson, "Investor or Collector Impacts 1031 Exchange Eligibility" The 1031 Exchange Blog, June 20, 2011, *available at* http://www.atlas1031.com/blog/1031-exchange/bid/55046/Investor-or-Collector-Impacts-1031-Exchange-Eligibility.
4. 26 I.R.C. § 1031(a)(1).
5. *Supra* note 2.
6. *Id.*
7. "Art Investment Expense Deductions And The Primary Purpose Requirement," Washington and Lee L. Rev., 1, No. 28 (1971): 234.
8. 428 F. 2d 1316 (Ct. Cl. 1970)
9. Wrightsman v. United States, 7 CCH 1969 Stand. Fed. Tax Rep. ¶ 7910.
10. *Id*. at 1322
11. Art Investment Expense Deductions and the Primary Purpose Requirement, 233.
12. 428 F. 2d at 1319.
13. *Id*. at 1320.
14. *Id*. at 1319.
15. *Id*. at 1316.
16. *Id*. at 1320.
17. Thomas B. Drummond v. Commissioner, 73 T.C.M. CCH 1959 (1997).
18. *Id.*
19. Malat v. Riddell, 383 U.S. 569, 572 (1966).
20. Christine Manolakas, "Mixed Use of a Personal Residence: Integration of Conflicting Holding Purposes under I.R.C. Sections 121, 280A, and 1031," Wake Forest J. of Bus. and Intellectual Property L. 14.1 (2013-2014): 62.
21. Section 1031 Repeal Issue Federation of Exchange Accommodators: The Voice of the 1031 Industry, 1031 Tax Reform, accessed February 5, 2016, *available at* http://www.1031taxreform.com/1031repealissue-2/.
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23. Thacher v. Lowe, 288 F. 995 (S.D.N.Y 1922).

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Street Art and VARA: The Intersection of Copyright and Real Estate

By Barry Werbin

When New York real estate developers finally demolished the crumbling "5Pointz" water meter factory building and its 20-year-old graffiti wall in Queens, New York, in mid-2014, it brought an end to what had become a popular stop for tourists and local art buffs alike. Having purchased the property with the intent to put up a high-rise residential development, eventual destruction of the old factory and its graffiti art wall by the developers was inevitable. Alteration of the graffiti art began in 2013, when the wall was whitewashed over by the developers on the eve of a preliminary injunction hearing before a New York federal district court in a case brought by a group of aerosol artists under the Visual Artists Rights Act (VARA).[1] Real estate owners and developers need to take heed of VARA and the artworks affixed to their property, lest they also find themselves in court.

5Pointz and Street Art

Over the course of nearly two decades, some 1,500 graffiti and street artists adorned the abandoned 5Pointz factory with colorful murals and "tag" flourishes that became a major tourist attraction. Known as the "Aerosol Art Center," the artists had long-time permission from the property owner to paint the abandoned building's façade, with only some restrictions on the type of street art so as to keep it in good taste. In 1993, developer Gerald Wolkoff gave the named plaintiff, Jonathan Cohen (a/k/a Meres One), authority to be curator of the art and the keys for access to spaces to work and store supplies on the 5Pointz property. However, plans to demolish the property to make room for the residential project later emerged, and the New York City Landmarks Commission denied preservation protection. Cohen and a group of the artists filed suit in the fall of 2013 seeking injunctive relief, alleging that the proposed destruction of the art would be a violation of VARA, which provides qualified protections to the author of a work of visual art to "prevent any destruction of a work of recognized stature…." A second prong of VARA under Section 106A prevents the "intentional distortion, mutilation, or other modification of that work which would be prejudicial to [an author's] honor or reputation…."

Apart from much of the art having been whitewashed over the night before, the court declined to grant a preliminary injunction. While characterizing the Aerosol Art Center as a "repository of the largest collection of exterior aerosol art (often also referred to as 'graffiti art') in the United States," the court ruled on November 20, 2013, that denial of relief under VARA was warranted because of the "transient nature" of the graffiti based on the artists' knowledge that the building eventually would be demolished, as well as the availability of monetary relief for damages (which generally precludes the right to injunctive relief). The case was still kept alive for ultimate trial, however, with the court noting that the issue of "recognized stature," which is not a defined term under VARA, was best determined at the trial stage.[2]

In June 2015, however, nine of these street artists filed a new lawsuit against the developer, this time only for money and punitive damages under the second prong of VARA that protects against "mutilation" of art. The new claim was tied to the whitewashing of the 5Pointz graffiti wall, which the artists alleged was "entirely gratuitous and unnecessary," "crude," "unprofessional," and designed to inflict "maximum indignity and shame to plaintiffs." Unlike the burden the artist-plaintiffs have in the earlier filed case, which requires proof of "recognized stature" and focuses on destruction of a protected work, the relevant provision of VARA in the 2015 case avoids that burden and instead requires proof that the distortion and mutilation of the art were prejudicial to the artists' "honor or reputation." The plaintiffs allege such harm, as well as "humiliation, mental anguish, embarrassment, stress and anxiety, loss of self-esteem, self- confidence, personal dignity, shock, emotional distress, inconvenience, emotion pain [sic] and suffering and any other physical and mental injuries Plaintiffs suffered due to Defendants improper conduct pursuant to VARA and the common law." [3] The case remains pending.

Despite its demise, 5Pointz has helped propel street art into the limelight as a true art form that deserves protection. Jean-Michel Basquiat, Keith Haring, and others cut their teeth on street art, and their works have skyrocketed in value, as have works by prominent street artists like Banksy. Still, most street artists earn meager livings and never see a dime from their art. Yet that too is changing. Recently, street artists have become more aggressive in bringing copyright infringement actions against companies that have co-opted their art for use in advertising campaigns and other commercial uses.

For example, in January 2016, a group of Miami street artists sued celebrity pastor Rich Wilkerson in Miami federal court for copyright infringement for using their street art murals without permission to advertise and promote his new church spinoff.[4] In 2014, famed Miami street artist David Anasagasti (a/k/a Ahol Sniffs Glue), whose murals were commissioned and thus legally created, sued American Eagle Outfitters in New York federal court for copyright infringement for using his iconic "droopy eyeball" motif in a global advertising program; the case settled fairly quickly.[5]

Recently, muralist Katherine Craig sued a real estate developer, Princeton Enterprises, after it allegedly threatened to destroy or mutilate an iconic 100-by-125 foot watercolor mural painted by Craig in 2009 on a nine-story building wall in Detroit and dubbed "The Illuminated Mural." The developer had been considering redevelopment of the building for multifamily housing. Craig's complaint, which was filed in January 2016 in Michigan federal court, alleged that the works are protected by VARA and sought to enjoin its destruction or mutilation during her lifetime. The work has become a notable landmark in downtown Detroit, and was cited by the *Detroit Free Press* as a "drop-dead gorgeous mural." Craig has received many accolades over the mural, including a grant by the JP Morgan Chase Foundation to create another mural in the same area, and Craig's reputation has grown significantly since.[6]

Craig had received permission to paint the mural from the building's prior owner, Boydell Development Co., which later sold the property in 2012 to an intermediate owner who then resold it in 2015 to Princeton Enterprises.[7] According to the complaint, Craig signed an agreement with Boydell that the mural would "remain on the building for no less than a 10 year time period," and Craig never agreed to waive her lifetime rights of attribution and integrity under VARA. She registered her copyright in the mural in 2012. How this case will play out is uncertain, and it may be entirely premature, because the developer, as of the time of this article, had not yet made a final decision on how the property would be developed.

VARA and the Copyright Laws

With all this attention and litigation, real estate owners and developers—particularly those in urban areas—need to understand the legal underpinnings of VARA and related copyright principles as applied to street art. Unlike traditional copyright protection, which guards against unauthorized copyright and exploitation without the copyright owner's consent, VARA is intended to protect the attribution of an artist and the integrity of a protected work, also known as the *droit moral*, or moral rights of the artist. Such moral rights, while long a part of European jurisprudence and culture, have not historically been a part of U.S. law.

VARA codifies two distinct "moral" rights, protecting artists from (i) the intentional or "grossly negligent" destruction of a work of "recognized stature," and (ii) the intentional distortion, mutilation or other distortion of a work that would be prejudicial to the artist's "honor or reputation."[8] Changes due to the passage of time or decay of materials, however, as well as modifications for conservation or public presentation that are not done in a grossly negligent manner, are recognized exceptions to these protections.

VARA defines a covered "work of visual art" narrowly, as limited to a "painting, drawing, print, or sculpture" and a "still photographic image produced for exhibition purposes only." Whether a particular work falls within this definition "'should not depend on the medium or materials used,' since '[a]rtists may work in a variety of media, and use any number of materials in creating their work.'"[9] Excluded from VARA coverage is "any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work." This is a much narrower definition than the Copyright Act's general statutory protection for "original works of authorship," which broadly include "pictorial, graphic, and sculptural works."[10]

VARA applies to applicable works created after its June 1, 1991 effective date; however, it also applies to works created before that date if title to the works had not, as of that effective date, been transferred from the author. Unlike the copyright in other works of authorship, VARA rights end when the artist dies. Available remedies under VARA include injunctive relief, monetary damages, defendant's profits, statutory damages and, in the court's discretion, legal fees. A copyright registration is not required to bring a VARA action or to secure statutory damages and legal fees, whereas a registration is required to sue for infringement and to seek statutory damages and legal fees for copyright infringement generally.[11] Significantly for property owners, VARA rights can be waived by a written document that specifically identifies the work and the uses of that work to which the waiver applies. This waiver is most important to real estate owners and developers, especially where permission is granted to street artists, as it was initially in the 5Pointz case.

The artist must also be the "author" of the work to qualify for copyright, and therefore VARA, protection. Even if an artist creates an original work, the artist will not be deemed the "author," and therefore the owner of the copyright, if the work is a "work made for hire." A work made for hire is one specially commissioned "for use as a contribution to a collective work…," and the commissioning party, not the artist, is then deemed to be both the author from inception and the copyright claimant. Yet unless the specific art is intended to be part of a collective work comprised of multiple artists' work product, such as may be argued for 5Pointz, it cannot qualify as a work made for hire.[12]

To be covered by VARA, a work of visual art must also be protected by copyright. Thus, works must be original and "fixed in any tangible medium of expression … from which they can be perceived, reproduced, or otherwise communicated…."[13] Under the Copyright Act, a work is fixed "when its embodiment in a copy… by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration."[14]

While the bar for "originality" is quite low, the Copyright Act excludes from protection certain basic elements, including the following: "Words and short phrases such as names, titles, and slogans; familiar symbols or designs; mere variations of typographic ornamentation, lettering or coloring…."[15] It is therefore arguable that a graffiti artist's "tag" (*e.g.*, "Smithy 129") by itself is simply a "name" and number that does not have sufficient originality, even if it is displayed with an ornamental font or flourish. No reported decision has yet addressed that question.

What constitutes "transitory duration," however, is not always clear. With respect to works of visual art, the Copyright Office takes the general position that for registration purposes "the Office cannot register a work created in a medium that is not intended to exist for more than a transitory period, or in a medium that is constantly changing."[16] Unlike the broad scope of originality, the concept of "fixation" can get muddied when works are intended, either by their nature or by design, to be temporary. For example, Christo's open space wrappings and flag installations, while unquestionably works of art, are intended to be fleeting. Christo claims copyright in those designs, but also permanently "fixes" the image through numerous physical drawings and photographs.[17]

A highly publicized attempt by a landscape artist to obtain redress under VARA against the Chicago Park District for its reconfiguration of the open space "Wildflower Works" wildflower garden he had created floundered before the federal Seventh Circuit Court of Appeals. In a 2011 decision, the court held that the garden was not sufficiently "fixed" to warrant copyright protection, because the shape and design of the garden changed over time due to its organic nature.[18] After accepting the position of the arts community that the garden could be classified as a work of postmodern conceptual art, the court stated: "The real impediment to copyright here is not that Wildflower Works fails the test for originality (understood as 'not copied' and 'possessing some creativity'), but that a living garden lacks the kind of authorship and stable fixation normally required to support copyright…."[19]

For street art affixed to buildings, it would seem logical that the "fixation" requirement is met, but like the wildflower garden, this may depend on various factors. Is graffiti art merely temporary so as not to be "fixed" because it is affected by natural elements, as was the wildflower garden landscape? Or, because it can be sprayed over by others, is there an expectation that it will be destroyed? Despite a paucity of caselaw on the issue, it would seem that fixation arguably has occurred at least when the materials used are intended to be long-lasting or permanent (such as enamel-based aerosols) and there are no imminent plans for demolition of the property. This would contrast, for example, with pavement chalk art, which disappears with the first rain, despite some mind-blowing creations by renowned 3D chalk pavement artists like Julian Beever, who wisely photograph every step of their creations and publish books and websites so as to "fix" the works for copyright purposes.

In VARA cases involving destruction of a work of visual art, the key issue is what constitutes a "work of recognized stature," which is a required finding for protection. The term "recognized stature" is not defined in VARA. A leading case on this issue is *Carter v. Helmsley-Spear*, which involved VARA claims for both destruction and modification to artists' "walk-through sculpture" ceiling installations. After hearing art expert testimony (including from the president of the Municipal Art Society of New York), the federal district court held, in a case of first impression, that to establish "recognized stature," a work had to be meritorious" and have its merit recognized by "art experts, other members of the artistic community, or by some cross-section of society."[20] While the district court found the work to qualify as one of "recognized stature" and protected by VARA, the Second Circuit reversed, finding the work to be a work-made-for hire, thus depriving the artists of any claim of copyright authorship under VARA. The Second Circuit did not address the "recognized stature" issue.

As the court noted in the 5Pointz case, only a handful of cases since the district court's opinion in *Carter* have addressed the "recognized stature" issue. One New York case rejected "recognized stature" where the work, while meritorious, was created "solely as a display piece for a one-time event."[21] Another case refused protection because the work had been commissioned for placement in the defendants' private yard, which was obscured by hedges from public view, thus precluding recognition.[22] The 5Pointz court left open the question of "recognized stature" for trial, and cautioned that "defendants are exposed to potentially significant monetary damages if it is ultimately determined after trial that the plaintiffs' works were of 'recognized stature.'"[23]

In denying preliminary injunctive relief, which requires a showing of irreparable harm, the 5Pointz court cited "the transient nature of the plaintiffs' works" based on evidence that while the lead artist-plaintiff believed the "24 works in issue were to be permanently displayed on the buildings, he always knew that the buildings were coming down—and that his paintings, as well as the others which he allowed to be placed on the walls, would be destroyed." Nevertheless, with respect to the potential for money damages, the court held that "VARA protects even temporary works from destruction…," thus implicitly acknowledging they were sufficiently "fixed" for copyright purposes.[24] This sets up an inherent contradiction: If the works qualified for any VARA protection—including money damages—they must be copyrightable and thus meet the "fixation" test. By sending the case to trial, the court implied copyrightability, although defendants could still challenge that. A work cannot be "transient" for copyright purposes at the preliminary injunction stage but otherwise sufficiently fixed and not transitory for substantive copyright purposes.

Lurking underneath street art that is affixed to buildings, without permission of the property owner or lessee, is the illegality of the art itself under trespass and similar laws that protect property rights. For example, in New York graffiti is a Class "A" misdemeanor punishable by up to one year in jail. Illegal graffiti in New York is defined as any "etching, painting, covering, drawing upon or otherwise placing of a mark upon public or private property with intent to damage such property… without the express permission of the owner or operator of said property."[25]

Does illegality itself vitiate copyright protection? The Copyright Act does not condition copyrightability on the legality of the manner of its creation or "fixation." There is a compelling argument that copyright, and therefore

VARA, protections extend even to illegal street art because copyright focuses on the original work that is created and not the manner of its creation. However, even if a valid copyright claim is brought, courts have discretion in fashioning remedies that factor in equitable principles, and illegality would almost certainly be a factor. Indeed, because injunctive relief, such as to stop destruction of a building street art wall, is an equitable remedy, illegality would be an expected defense for a building owner, but may be insufficient to block an award for damages. At least one court has expressed the view, without deciding the issue, that graffiti art in a copyright case "would require a determination of the legality of the circumstances under which the mural was created."[26] As a practical matter, most illegal street artists, who typically use pseudonyms, will not risk revealing themselves and facing potential prosecution.

Another key element of VARA is an exception for works that were installed in a building either before 1990 with the author's consent, or after 1990 with an agreement between the author and building owner waiving the author's VARA rights.[27] In those cases, if the art can be removed without its destruction, distortion, mutilation, or other modification, and the owner notifies or makes a good-faith effort to provide written notice to the author—who has an implicit obligation to maintain a current address of record (the Copyright Office provides a special Visual Arts Registry for this purpose)—the author then has 90 days to remove the art or pay for its removal, in which case the artist also reclaims title to the work.[28] In addition, statements by building owners are recordable to establish a record of attempts to contact an author.

Pointers for Real Property Owners and Developers

From a property owner's perspective, here are some pointers to bear in mind:

- If one grants permission to an artist to affix art to a property, it is important to make sure that there is a written agreement under which the artist waives his or her VARA rights, perhaps with certain conditions, such as an incentive payment to the artist if the work needs to be destroyed or altered for development or renovation purposes, relocation of the art if possible without destruction (subject to the artist's statutory right to receive 90-days' advance notice), or preservation of the art with high-resolution photography that could be printed and displayed elsewhere on the property.
- If one is acquiring a property with affixed visual art that could be protected, it is important to make sure that all due diligence includes VARA-related issues. If the prior owner gave consent to the installation without any paperwork or waiver from the artist and a new project will require destruction or alteration, then a real property owner or developer should consider an escrow to cover a potential claim by the artist. Alternatively, if the work is high profile and garnered press, so as to potentially quality it as a work of "recognized stature," it may be better to try to cut a reasonable deal with the artist in advance of closing if the prospect of potential injunctive relief is real and any meaningful delay in construction would be costly.
- If a developer is acquiring property covered with street art that was illegally created, the likelihood of a VARA claim being made is more remote. As the issue of legality is not settled in the courts, however, owners should still assess whether the graffiti is protected by copyright as a work of visual art, which would likely require more originality than common street "tags," and if it is of "recognized stature." Indeed, if such art were a work by Banksy, it would raise these significant issues.
- Similarly, if legally created street art needs to be destroyed, a building owner should consider if it is a work of "recognized stature." Most street art will likely not meet this definition, although there are prominent potential examples, like 5Pointz and Katherine Craig's mural. Nevertheless, this remains a gray area in the law that can lead to protracted litigation and the need for experts, with an uncertain outcome. It is beneficial for the real property owner or developer to research and consult confidentially with experts to make this assessment.
- The building owner should manage the press and its public image, if it matters. Local communities can become vociferous opponents of a development project if they oppose it or do not like the developer, where special permits or zoning variances are required. If the community favors the artist, it could cause delays in any regulatory process if there are public hearings.
- In lieu of destruction or mutilation, the building owner should consider if the art can be preserved by moving it intact, encasing it, or building around it. In one early case, a New York court held there was no destruction or alteration where a brick wall obscured an exterior mural, as long as the mural remained intact.[29] VARA does not protect against obscuration.
- Although not the most honorable approach, a developer could demolish an art wall overnight, thus mooting any chance of interim injunctive relief (similar to the whitewashing in 5Pointz), but leaving the artist with a potential damage claim limited to the economic remedies specified in the Copyright Act.[30] Engaging in any demolition without a permit could, of course, run afoul of other regulations and lead to fines, and seeking a permit provides an opportunity for the artist to take quick action if placed on notice. Economic remedies for a VARA

violation include actual damages (difficult to prove), the defendant's profits (inapplicable where a work is destroyed or mutilated), or statutory damages, which can be as high as $150,000 for a willful violation. A successful VARA litigant may also apply to a court for an award of legal fees, in the court's discretion.[31] Yet such sums may be a pittance to a developer of a major project and be treated as another cost of doing business. This has to be balanced against potential public and community opposition to a project.

- Building owners commissioning an artist to create a new work for a project that consists of other elements as part of a "collective" work should try to obtain a written agreement from the artist designating the work as a "work made for hire," which makes the commissioning party both the "author" and the copyright claimant, thereby eliminating a potential future VARA claim by the artist.[32]
- If a VARA waiver agreement exists and a building owner wants to remove a covered work without destroying or damaging it, a record should be maintained and recorded with the Copyright Office of all attempts made to provide statutory notice to the artist-author.
- If a street artist of "recognized stature" (such as Banksy) paints a building wall without permission, while any copyright and VARA rights remain with the artist, the physical object on which the art was affixed—the wall itself—remains the property of the building owner. It could be argued that when the illegal art was created, an implied gift or grant was made to the property owner, who is then free to remove that section of painted wall and sell it, or put it on display, if it can be done without mutilating the art itself. Indeed, this has been attempted with Banksy pieces. [33] Here, too, there is still potential for litigation.

As is apparent, the subject of copyright and street art—legal or otherwise—is still evolving, particularly with respect to VARA claims. Newly filed and pending cases, such as 5Pointz and Katherine Craig's Detroit mural case, will hopefully result in clearer guidance if they do not settle before substantive rulings issue. Artists are also becoming more savvy regarding their potential rights and aggressive in enforcing them. In the interim, building owners facing issues involving street art should be cautious and consult with experts before taking any rash action.

Endnotes

1. Cohen v. G&M Realty L.P., 988 F. Supp. 2d 212 (E.D.N.Y. 2013). VARA falls under 17 U.S.C. § 106A.
2. *Id.* at 214, 224, 226-27.
3. Castillo v. G&M Realty L.P., No. 15-cv-3230 (FB) (RLM) (E.D.N.Y. filed June 3, 2015). The complaint can be viewed at www.docfoc.com/castillo-et-al-v-gm-realty-lp-et-al.
4. https://news.artnet.com/art-world/celebrity-pastor-sued-street-art-403997.
5. http://www.law360.com/articles/600542/american-eagle-street-artist-settle-copyright-suit.
6. Craig v. Princeton Enterprises LLC, No. 2:16-cv-10027 (E.D. Mich., filed Jan. 5, 2016). The complaint can be viewed at http://www.theatlantic.com/assets/media/files/craig_vara.pdf.
7. http://www.crainsdetroit.com/article/20160105/NEWS/160109914/detroit-artist-sues-princeton-enterprises-over-bleeding-rainbow.
8. 17 U.S.C. § 106A(a)(3).
9. *Cohen*, 988 F. Supp. 2d at 225 (citing VARA's legislative history in H.R. Rep. No. 514 at 11).
10. 17 U.S.C. § 102(a)(5).
11. 17 U.S.C. §§ 411(a), 412, 502, 504, 505; *see also Cohen*, 988 F. Supp. at 216.
12. *See* 17 U.S.C. §§ 101; 201(b).
13. 17 U.S.C. § 102(a).
14. *Id.* § 101.
15. 37 C.F.R. § 202.1(a).
16. "Copyright Office Compendium, Third Edition," Ch. 904 (Dec. 22, 2014), *available at* http://www.copyright.gov/comp3/chapter900.html.
17. *See, e.g.*, "The Gates," Central Park, (N.Y. 2005), *available at* http://christojeanneclaude.net/projects/the-gates#.VuBhcOZvD3Y.
18. Kelley v. Chicago Park District, 635 F. 3d 290 (7th Cir.), *cert. denied*, 132 S. Ct. 380 (2011).
19. *Id*. at 304.
20. 861 F. Supp. 303 (S.D.N.Y. 1994), *aff'd in part, vacated in part*, 71 F.3d 77 (2d Cir. 1995).
21. Pollara v. Seymour, 206 F. Supp. 2d 333, 336 (N.D.N.Y. 2002),
22. Scott v. Dixon, 309 F. Supp. 2d 395, 406 (E.D.N.Y. 2004).
23. *Cohen*, 988 F. Supp. 2d at 227.
24. *Id*.
25. *Id*.
26. Villa v. Pearson Educ., Inc., 2003 U.S. Dist. LEXIS 24686, *7 (N.D. Ill. Dec. 8, 2003).
27. 17 U.S.C. § 113(d).
28. *Id*. For details on the Visual Arts Registry, *see* 37 C.F.R. § 201.25.
29. English v. BFC & R East 11th Street LLC, 1997 WL 746444 (S.D.N.Y. 1997).
30. *See* 17 U.S.C. § 504. Penalties for criminal copyright infringement are expressly made inapplicable to VARA claims. 17 U.S.C. § 506(f).
31. 17 U.S.C. § 505.
32. *See* note 24 *supra*.
33. *See* "Banksy Murals Prove To Be An Attribution Minefield," *available at* http://www.museumethics.org/2012/02/banksy-murals-prove-to-be-an-attribution-minefield/.

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Hollywood Docket
One-Sided World

By Neville L. Johnson and Douglas L. Johnson

In the entertainment industry, highly desirable producers, directors, writers and actors are often able to negotiate for "back-end" profit participation on projects. These profit participants share either in the gross or net receipts of a given project or receive a deferment, i.e., a lump sum payment when the receipts of a film reach a pre-negotiated level. Deals based on "gross revenues," traditionally reserved for highly desirable talent, are increasingly uncommon, with the majority of profit participants receiving a share of "adjusted gross" or net receipts, where many deductions are made. It has been estimated that less than 5% of productions "earn out" and go into profits. Six studios—Disney, Sony/Columbia Pictures, Paramount/CBS, NBCUniversal, Warner Bros., and Twentieth Century Fox (the Studios)—control the entertainment industry and wield enormous power in negotiating contingent compensation contracts with talent. Yet for those players fortunate enough to obtain the right to receive contingent compensation, the Studios have created serious impediments to hinder profit participants from obtaining fair accounts for the fruits of their labors.

First, while contingent compensation contracts typically include accounting and audit provisions, the Studios make auditing as onerous as possible. The Studios always require forensic auditors to sign strict confidentiality agreements before commencing an audit. They claim they do this because the business is competitive, but auditors and the plaintiffs' bar believe it is done to ensure that other profit participants (sometimes ones on the same property) will not discover the Studios' unfair practices. This is underscored by the general practice that when "errors" are discovered and/or adjustments are made, the Studios do not necessarily correct the error retroactively or going forward for other profit participants on the same property or as to other properties where there may be similar wrongdoing. The confidentiality requirement allows this practice. An auditor may represent two clients on the same property but cannot tell either what he or she has learned from each respective audit. Consider this real situation: An auditor concluded an audit for a producer and later for an actor on the same television show. The auditor could not advise the actor what he learned in the first audit. Further, this may cause the audit to be cost prohibitive for the actor. Sometimes the Studios will permit joint audits.

Virtually all agreements restrict access to audit records covering an incontestable time period and incorporate artificial "contractual" statutes of limitation to make objections and file litigation. Agreements often contain clauses that waive punitive damages and/or injunctive relief to try and knock out otherwise legitimate claims. While these contractual limitations are usually upheld, some courts have found these provisions unenforceable where they are held to be unreasonable. At least one court has ruled that such a provision was barred because the talent could not possibly know an audit was warranted.[1]

The Studios have a reputation for refusing to provide documents to auditors on many types of data sought, including "overall deals" of various kinds, such as pay cable, Video On Demand (VOD), Subscription VOD (SVOD) and Electronic Sell-Through (EST) deals, for example, which could lead to the discovery of unfair allocations in connection with those agreements or other monetary hanky-panky. One studio, Universal, even has a "policy," where the studio refuses to provide talent with copies of their own contracts where the talent has misplaced or lost the originals, so that lawsuits must be brought to obtain the same.

The Studios sometimes prevent auditors from doing more than one audit at the same time and/or from working on a contingency basis (although they may allow auditors to audit for the same project, but require a "Chinese wall" to be erected between or among the talent). Some agreements provide that the auditor must be approved by the studio, and from a "nationally recognized firm." The problem with this is that there are only four major profit participation auditing companies, all based in Los Angeles. Moreover, one should be able to pick one's forensic accountant, just as one should be able to pick any other professional, such as a lawyer or a dentist. At least one studio has asserted that auditors who leave firms it previously allowed to audit because they are "nationally recognized" are not qualified when the auditors set up on their own. This egregious "rule" means that, as the other auditing companies "age out," the pool of authorized auditors will become even smaller, making auditing all the more difficult for talent.[2]

Auditors complain that the Studios intentionally under-staff the audit departments so that even when audits are granted, they can take three or more years just to be scheduled and take even longer to settle. Most audits settle because working talent is understandably fearful of being blackballed. Aging talent and heirs of talent are not so intimidated, except by the cost involved. It is not uncommon for audits to cost talent tens of thousands of dollars and talent-imposed attempts to limit the costs of a particular audit can expose talent to certain risks associated with failing to conduct a diligent audit.

For years, the biggest issue facing talent has been mandatory arbitration provisions. In nearly all agreements entered into during the last 15 years, the Studios have almost uniformly required that any controversies be heard in a confidential, binding arbitration, before one provider—JAMS—and thus preventing the establishment of precedent and any of the publication of information unfavorable to the Studios. These arbitration agreements are invariably "non-negotiable" when deals are made (even for top talent), because the Studios are fearful of juries, public judges and the public disclosure of any wrongdoing. Since *Buchwald v. Paramount Pictures Corp.*[3] when Eddie Murphy dubbed net profits "monkey points," and generally the public was advised that net profits were usually illusory, the Studios have since referred to them as "contingent compensation" in an attempt to limit any expectation or presumption such monies would be forthcoming.

A recent article, echoing what many representing talent believe—Nessim & Goldman, "Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement,"[4] (the Article)—suggests that there is at least a perception of repeat player/provider bias in the current reality of all of the Studios requiring mandatory arbitration before one provider. There are but 14 entertainment arbitrators working for JAMS in Los Angeles, and six studios that employ them. Moreover, in 26 contracts the authors reviewed from the six studios, 22 required mandatory arbitration and 21 required JAMS. Kaiser Permanente, which has a market share of 40% of the healthcare market, has long been criticized for a similar practice, as it has its own set of arbitrators and plaintiffs' attorneys practicing before them believe that any arbitrator who issues a big award against Kaiser will probably never be selected again by that company. Similarly, rule once for serious damages against the Studios, so the argument goes, and that arbitrator will not adjudicate another profit participation case. It is not just repeat business for arbitrations but also for highly lucrative mediations.[5]

JAMS refused to provide the authors of the Article with any information about arbitrations of talent versus studio disputes in JAMS' Los Angeles area offices, or involving any of the neutrals in JAMS' Entertainment Group where the Studios were a party. Thus, it cannot be ascertained as to how frequently a particular studio is involved in a dispute before JAMS, the nature of claims involving the Studios, how often JAMS ruled in favor of the Studios, and what, if any, monetary damages were awarded. There are other worrisome issues, including the methodology as to how neutrals are selected, and that at JAMS many of the neutrals have an ownership interest in JAMS and thus an economic incentive to keep the Studios satisfied.

Further, JAMS provides sample language as to how to effectuate a waiver of punitive damages in a contract. This smacks of bias.

In light of what is at least a perceived bias, JAMS (and other providers) provide greater transparency than the minimum and limited requirements of state and federal law. California consumer arbitration rules, which require increased disclosures by the providers and all arbitrators affiliated with them, should apply. [6] Providers should also be required to furnish information about how its neutrals are selected, whether its neutrals have heard disputes involving the Studios and their affiliates, and how often its neutrals have ruled in favor of the Studios. Without greater transparency, talent selecting a neutral for arbitration has very little idea as to how a neutral has ruled in prior studio-talent cases, or as to the history of JAMS overall in ruling on profit participations. These facts must be unveiled if there is to be full disclosure.

Add to the foregoing the cost of arbitration, which ordinarily will be in the tens of thousands of dollars. The American Arbitration Association requires a filing fee based in part on the amount of the claim. The fees for a dispute of $500,000 to $1,000,000 is $6,300, and escalates thereafter. If a small amount is arguably owed, talent is priced out of the market on a risk/reward basis, given the administrative costs and the hourly fees charged by arbitrators, which range up to $900/hour. A recent engagement in an arbitration, where the fees were approaching six figures for an arbitrator who allowed the opposition to file multiple demurrers, demolished the idea of quick and economic justice, especially when costs of the arbitration are not part of the award. There is no way realistically to challenge the fees of arbitrators, some of whom can be accused of "churning" cases. There are few qualified contingency fee attorneys willing to take on these types of cases, made even more problematic because the Studios habitually do not provide attorneys' fees clauses in their agreements, which might otherwise be attractive if there was fee shifting.

As part of their policy of discouraging claims being filed against them, the Studios make it as difficult and expensive as possible for talent who do bring a claim. The Studios are prone to hiring firms where "scorched earth" are not dirty words. These tactics also discourage claims by other profit participants.

In arbitrations, discovery is usually limited, sometimes with one deposition per side permitted. This can be prejudicial to talent, as there may be many more witnesses on the studio side who need to be heard.

Recommendations

It would be beneficial to have neutrals selected randomly and not just from JAMS, thus limiting the "repeat business" issue, and ensuring a large enough pool and arbitrators who are less likely to be subject to repeat player bias. Moreover, the arbitration tribunal should be required to disclose information regarding all prior talent-versus-studio cases, no matter the studio.

A database should be maintained by talent-side counsel to share information about arbitrations and arbitrators. Here, the confidentiality requirement would have to be navigated as to what information could be disclosed, but a good start would be to identify the participants.

Another alternative is to litigate the forum issue, which would necessitate a claim that arbitration is procedurally and substantively unconscionable. As the Studios are intractable on this provision, the procedural half of the unconscionability argument might work. It would be helpful if all talent representatives from this point forward confirm in writing to Studio counsel when negotiating deals that the arbitration clause is non-negotiable.

As to substantive unconscionability, challenges should assert that inadequate training of the arbitrators, the "repeat player" effect, the restrictive discovery limitations, the refusal to make full disclosure by the provider and the arbitrator, and the confidentiality requirements so as to eliminate precedent, collectively mandate a courtroom proceeding. The problem for plaintiffs' counsel is whether and what type of discovery would be required (and allowed) to mount an effective assault, including a serious examination drilling into the repeat player/provider business. This would undoubtedly be expensive.

Furthermore, another problem is who would decide the issue, the trial court or the arbitrator? While the traditional rule is that the court determines the enforceability of an arbitration agreement unless the parties agree otherwise, most arbitration provisions utilized by the Studios (as well as the sample arbitration clauses suggested by JAMS) include a delegation clause that expressly ensures any disputes, including disputes over the formation, existence, validity, interpretation or scope of the arbitration agreement will be decided by the arbitral institution. While several California courts held that such delegation clauses create an inherent conflict of interest for an arbitrator, recent California case law suggests courts only have the ability to get involved when a party challenges the enforceability of the delegation clause itself, and not the arbitration clause as a whole. [7]

For now, profit participants are unfortunately forced to play by the Studios' rules in a game that is unfairly one-sided. Hopefully, the system can be changed for the better.

Endnotes

1. *See Davis v. Capitol Records*, 2013 WL 1701746 (N.D. Cal.).
2. Disclosure: the authors are currently litigating this issue with Disney.
3. *Buchwald v. Paramount Pictures Corp.*, 1990 WL 357611 (Cal. Supp. Ct.).
4. 22 UCLA Ent. L. Rev. 223 (2015).
5. Some mediators will not do arbitrations, so they will not confront this potential dilemma.
6. *See* Cal. Civ. Proc. Code §§ 1281(a)(3), (a)(4),(d).
7. *See Malone v. Superior Court*, 226 Cal. App. 4th 1551 (2014).

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TV's Secret Revenue Stream

By Pamela Jones

There may be no greater satisfaction in an in-house lawyer's career then to turn a department from a cost center into a profit center. This article will discuss the multi-million dollar secret this author learned while running the Business and Legal Affairs Department for BBC Worldwide Americas, which was later used to create a million-dollar profit center for a U.S. cable network with an internationally distributed catalogue of television programs.

I. Introduction

Every year, millions of dollars in royalties are collected by government entities around the world and paid out to the copyright holders of television content for what are known as "secondary rights." The initial exhibition of a program by means of a free-over-the-air broadcast triggers the possibility of derivative revenues from the exploitation of secondary rights. Secondary rights include cable and satellite retransmission revenues, private copying levies, educational copying royalties, public performance levies, public performance video levies, and rental and lending right fees.[1] Retransmission royalties are incurred when a cable operator or satellite distributor retransmits a program originally broadcast by a local television station.

In the United States, cable and satellite operators enjoy a statutory right to simultaneously retransmit copyrighted television programs exhibited by commercial television stations in exchange for which the operators pay a compulsory license fee or royalty. Although local broadcast television stations provide their programming free-over-the-air to the public, nearly 85% of U.S. households receive local broadcast television stations through a paid cable or satellite operator, such as Time-Warner Cable, Optimum or DISH Network.[2]

Unbeknownst to many in the television industry (including among producers, attorneys and even networks), in Europe, Australia, Canada and the United States, the amount of money triggered by this relatively obscure licensing scheme could be classified as titanic. In 2014, more than $313 million in retransmission royalties were collected by the Licensing Division of the U.S. Copyright Office.[3] In that year alone, $233 million in cable retransmission royalties and $80 million in satellite royalties were distributed.[4] The same year, roughly $159 million in retransmission royalties were collected by the Association de Gestion Internationale Collective des Oeuvres (AGICOA), from those European Union member states with a compulsory licensing scheme,[5] using AGICOA's "single point of contact" services, and distributed to the registered claimants holding the necessary secondary rights in the retransmitted audiovisual works.[6]

One of the reasons that retransmission royalties are rarely the subject of discussion in the television industry is that the pool of retransmission royalties is divided and shared *only* by the *registered* claimants and many prospective claimants are unaware of their prospective financial benefit. If all prospective claimants registered, each would receive a smaller allocation of the royalty pool.[7]

II. Compulsory Retransmission Licenses in the United States

Marybeth Peters, the former Register of Copyrights, provided a succinct overview of the compulsory retransmission license in the United States in her remarks before the Subcommittee on Courts and Intellectual Property Committee on the Judiciary in June of 2000, which included:

> Section 106 of the Copyright Act grants certain exclusive rights to the owner of a copyrighted work. In the case of television broadcast programming, among these exclusive rights is the right to publicly perform or authorize the performance of the copyrighted work. As a result, unless a compulsory license is available, anybody who wishes to retransmit copyrighted broadcast programming—whether over the Internet or by more established means of transmission such as cable or satellite—may do so only by obtaining the consent of the copyright owners.

She also stated that:

> Compulsory licenses are abrogations of one or more of these exclusive rights and permit certain parties to use the copyrighted work without the consent of the copyright owner provided that the terms of the compulsory license are satisfied. Most of the compulsory licenses in the Copyright Act affect only the performance right. This is true of the cable (§ 111) and satellite (§§ 119 and 122) compulsory licenses, which allow cable operators

and satellite carriers to retransmit (and consequently perform) the programming contained on television broadcast stations. Cable operators and satellite carriers are guaranteed access to broadcast programming; the copyright owners of these television programs cannot say no, nor can they bargain the price and terms of a license agreement.

The reasons offered for enactment of the cable and satellite licenses, and compulsory licenses in general, are essentially economic ones. For the cable license, Congress believed that the transaction costs associated with a cable operator and copyright owners bargaining for separate licenses to all television broadcast programs retransmitted by the cable operator were too high to make the operation of the cable system practical. Unlike a broadcast station which negotiates directly with the copyright owners for the programs it transmits over-the-air, cable systems carry multiple broadcast stations, raising substantially the number of copyright owners the cable operator would have to bargain with for retransmission rights. The transaction cost problem was exacerbated by the cable industry's lack of market power in 1976.

Congress also determined that cable operators must have guaranteed access to broadcast programming, which might not occur under a negotiation scenario. A cable operator might successfully bargain with the copyright owners of most of the programs contained on a broadcast signal, but be forced to pay exorbitant fees (or denied access to the programming) by copyright owners of certain categories of programming, or those copyright owners who realized that a cable operator's retransmission of an entire broadcast signal hinged on its ability to obtain a license from that program owner. A compulsory license for the cable operator eliminates any holdouts among copyright owners by guaranteeing access to the programming.

The concern over transaction costs that led to enactment of the cable compulsory license in 1976 also led to the enactment of the satellite license in 1988. Again, because the satellite business was a fledgling industry without market power, it was believed unlikely that satellite carriers could negotiate retransmission licenses with broadcast programming copyright owners. In addition, it was believed that the satellite industry needed a compulsory license in order to compete with the entrenched cable industry, which already enjoyed the benefits of a compulsory license. Consequently, Congress passed the Satellite Home Viewer Act of 1988 and created a compulsory license for satellite carriers' retransmission of distant television stations. This license was expanded in the Satellite Home Viewer Improvement Act of 1999 to include retransmissions of local television stations by satellite carriers.

Although the cable and satellite licenses operate differently in terms of their royalty calculation mechanisms, their purpose is the same: a limitation on copyright owners' performance right by guaranteeing cable operators and satellite carriers access to over-the-air television broadcast programming at fixed terms and prices.[8]

III. Payment and Distribution of Retransmission Royalties in the United States

Cable and satellite television systems in the United States pay royalties twice yearly to the Licensing Division of the U.S. Copyright Office based on percentages of their semi-annual gross receipts. Gross receipts include all charges received from subscribers for any and all tiers of service, which include only free over-the-air television broadcast stations. Based on the level of gross receipts, these systems are considered "small," "medium" and "large." The royalty amount paid by large systems varies with the number and type of television stations a system carries to subscribers located outside the stations' local markets. These "imported" stations are called "distant signals."[9]

There are eight "Claimant Groups" entitled to receive the retransmission royalties distributed by the Copyright Royalty Board (see chart on page 37). The distribution of cable and satellite royalties is accomplished in a two-step process. Phase 1 governs the "pre-controversy distribution" of royalties among the Claimant Groups. Phase 2 concerns the allocation of royalties within each Claimant Group.

In 2014, 60% of all royalties were distributed during Phase 1 in the percentages outlined in the chart. Only copyright holders of retransmission rights in programming content are entitled to submit a claim for retransmission royalties, which must be received before the annual July 1st deadline. Once the statutory deadline for filing claims passes, the Copyright Royalty Judges may make a distribution upon motion of one or more of the claimants and no reasonable objection to the partial distribution (following publication in the Federal Register requesting responses from interested claimants).

DISTRIBUTION OF 2014 PHASE 1 CABLE ROYALTIES[10]

The following are the percentage shares agreed to by the Phase I Parties for purposes of allocating any partial distribution of the 2014 cable funds ordered by the Copyright Royalty Board Judges

Claimant Group	
Program Suppliers (e.g., studios and television production companies)	33.7%
Joint Sports Claimants (Major League Baseball, National Basketball Association, National Football League, National Hockey League)	33.8%
U.S. Commercial Television (e.g., television stations)	16.1%
Public Television (e.g., Public Broadcasting Service)	7.3%
Music Claimants (ASCAP, BMI, SESAC)	3.8%
Devotional Claimants (e.g., religious broadcasters)	3.4%
Canadian Claimants (e.g., broadcasters)	1.9%

IV. The Collection and Distribution of Retransmissions Royalties Outside The United States

Governance of the retransmission of free-over-the-air broadcasts by cable and satellite operators in the European Union (EU) falls under the jurisdiction of Council Directive 93/83/EEC and the Berne Convention for the Protection of Literary and Artistic Works, implemented by means of WIPO Article 8 and TRIPS Article 9. European Directive 93/83/EEC expressly states that rights holders are prohibited from negotiating with cable and satellite operators directly, and must utilize the services of a collecting society.[11]

The threshold requirement for collection in the EU, as in the United States, is the registration by the copyright holder with the authorized collecting organization. Copyright holders must be able to prove title to any program for which royalties are claimed. The collection and distribution of pre-Brexit retransmission royalties across the 28 EU member states presents a complex scenario for the administrator of secondary rights in a catalog of copyrights with the possibility of multiple languages, rules, and registration requirements, among other issues. Since 1981, right holders that are also members of AGICOA have benefitted because AGICOA has the right to negotiate individually with cable and satellite operators and issue blanket licenses offering economies "beyond the reach of national operations."

In Australia, a collecting society known as Screenrights: The Audiovisual Copyright Society (Screenrights) implements the compulsory statutory licensing scheme set forth in the Australia Copyright Act, which provides for the retransmission of free-over-the-air broadcasts by cable and satellite services in exchange for payment of a license fee. Screenrights also collects other secondary copyright royalties, including educational copying royalties.[12]

In Canada, the Copyright Royalty Board of Canada is the federal agency with jurisdiction over retransmission royalties. The agency determines the rates paid by the retransmitting organizations and the applicable formulas used to allocate royalties among the various collecting societies in Canada.

V. Conclusion.

The retrieval of retransmission royalties and other revenues from secondary rights, internationally and in the United States, presents a potentially profitable global business for copyright holders, if properly managed. Success is dependent upon the popularity of the content and the experienced navigation of highly complex government regulations. However, it would be incorrect to assume that the worldwide value of retransmission royalties exceeds the value of the other secondary rights. In some countries outside the United States, the value of other secondary rights, such as educational copying by academic institutions or private lending levies paid by hardware manufacturers, may exceed the retransmission royalties paid out in connection with a television program. [13] The value of secondary rights in a television program underscores the importance of clearly delineating the ownership of such rights in production services agreements, as well as licensing and distribution agreements.

Endnotes

1. http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/responses/Compact_Media_Group.pdf.
2. http://www.gao.gov/assets/680/676935.pdf.
3. http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distirbution-2014-cable.pdf.
4. http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distribution-2014-srf.pdf.
5. European Union countries with a cable and satellite retransmission licensing scheme (and the year of implementation):
   - 1 Belgium (1952)
   - 2 France (1952)
   - 3 Germany (1952)
   - 4 Luxembourg (1952)
   - 5 Netherlands (1952)
   - 6 Ireland (1973)
   - 7 Denmark (1973)
   - 8 Austria (1995)

- 9 Finland (1995)
- 10 Sweden (1995)
- 11 Spain (1986)
- 12 Portugal (1986)
- 13 Poland (2004)
- 14 Slovenia (2004)
- 15 Hungary (2004)
- 16 Estonia (2004)
- 17 Romania (2007)
- 18 Croatia (2013).

6. http://www.agicoa.org/english/about/factsandfigures.html.
7. It should also be noted that there are additional licensing schemes and/or collection societies in Australia, New Zealand and the European Union, which pay millions of dollars in royalties in connection with the exploitation of other secondary rights beyond the scope of this article.
8. Statement of Marybeth Peters, The Register of Copyrights Before the Subcommittee on Courts and Intellectual Property, Committee on the Judiciary. United States House of Representatives, 106th Congress, 2nd Session. June 15, 2000. Copyrighted Broadcast Programming on the Internet. *Available at* http://www.copyright.gov/docs/regstat61500.html. *See also The Cable and Satellite Carrier Compulsory Licenses: An Overview and Analysis* (1992); *A Review of Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (1997).
9. http://stakeholders.ofcom.org.uk/binaries/consultations/psb-review-3/responses/Compact_Media_Group.pdf
10. http://www.loc.gov/crb/motions/2016/phaseI-parties-motion-partial-distirbution-2014-cable.pdf.
11. ur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:31993L0083.
12. https://www.screenrights.org/.
13. http://www.era.org.uk/the-licence/details-rates/licence-archive.

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Legal Issues Arising from Recent Doping Scandals

By Sergey Yurlov

Introduction

Russia has been accused of creating a long-running, state-sponsored drug use program. Although these allegations are yet to be verified completely, the International Association of Athletics Federations (IAAF) suspended the Russian National Athletics Federation from its membership. The IAAF also published on its official website a list of athletes prohibited from participating in international sporting competitions (List)[1]. The List contains more than 4,000 athletes, the majority of whom have never tested positive for illegal drug use.

Following the allegations made by Grigory Rodchenkov, the former head of Russia's anti-doping laboratory in Sochi, the International Olympic Committee (IOC) announced that the Russian Olympic Team might have been prohibited from participating in the 2016 Olympic Games in Rio.[2] On July 15th, 67 Russian track and field athletes and the Russian Olympic Committee filed an appeal with the Court of Arbitration for Sports (CAS), claiming that the IAAF had unreasonably denied their applications.

On June 17th, the 204th extraordinary Council Meeting of the IAAF decided not to reinstate the Russian Athletics Federation's membership, and allowed Russian athletes to take part in international sporting competitions, including the 2016 Rio Olympic Games. On June 21st, the IOC Summit adopted a declaration upholding the IAAF's decision. The IOC confirmed that most Russian track and field athletes were ineligible to take part in the 2016 Olympic Games.

Following these decisions, the IAAF then published on its official website special eligibility guidelines. Russian track and field athletes filed more than 150 applications seeking re-eligibility. However, only Darya Klishina was allowed to compete in the Olympics.

On July 21st, the CAS dismissed[3] the Russian Athletics Federation's appeal, upheld the IAAF's decisions, and confirmed the enforceability of the special eligibility guidelines. As of this writing, the decision is yet to be published, and it is unlikely that the CAS will publish it in full.

On July 24th, the IOC decided not to impose a blanket ban[4] (Decision) on the Russian Olympic team. Leaving the competition "door" half open, the IOC ruled that it would not accept any entry of any Russian athlete unless he or she met certain conditions. In actuality, the Decision imposed the following additional requirements/principles:

- The absence of a positive drug test would not prove the clearness of an athlete;
- each international sporting federation should conduct its own research to confirm that there are no adverse analytical findings relating to a particular athlete;
- no one mentioned in recent doping reports had the right to compete; and
- athletes who had ever tested positive were ineligible to compete.

Further, on August 8th, the International Paralympic Committee suspended[5] the Russian Paralympic Committee, following the latter's inability to fulfill its membership obligations regarding doping. This Decision was based on a July 18th Report. Russia's appeal to the CAS failed. Russian Paralympic athletes are therefore not allowed to compete in the 2016 Paralympic Games.

Questions to Ask

These doping scandals and decisions taken by international sports governing bodies trigger some legal issues, including, but not limited to:

- What are the grounds for retesting samples collected during previous European championships, World Championships, and Olympic Games?
- Can an international sports federation sanction a national sports federation and prohibit its athletes from participating in international sporting competitions pending results from an investigation?
- Can an international sports federation adopt a list of athletes ineligible for international sporting competitions without any finding that these athletes used prohibited substances and/or methods?
- When suspending a national sporting federation, what should an international sports federation do to protect the rights of clean athletes? The IOC, CAS and international sporting federations are keen to protect the rights of clean athletes. However, by adopting the Decision, the IOC imposes extreme requirements. Although the Olympic Charter and internal statutory acts of international sporting federations entitle them to do so, the question, which sometimes is left open, is whether such provisions are in line with the rule of law.
- Is it possible to prohibit an entire Olympic team from participating in international sporting competitions?
- What are the failures of the Russian anti-doping program and what should be done to stop the rot in the Russian anti-doping system?

An attempt will be made to try to answer each of these questions in order.

Grounds for Retesting Samples Collected During Previous Competitions

According to Article 6.5 of the World Anti-Doping Code6 (WADC), "any Sample may be subject to further analysis by the Anti-Doping Organization responsible for results management at any time **before both the A and B Sample analytical results have been communicated** by the Anti-Doping Organization to the Athlete as the asserted basis for an Article 2.1 anti-doping rule violation. Samples may be stored and subjected to further analyses for the purpose of Article 6.2 at any time exclusively at the direction of the Anti-Doping Organization that initiated and directed Sample collection or WADA […]."[7]

According to Article 17 of the WADC, "no anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, **within ten years** from the date the violation is asserted to have occurred".[8]

Therefore, WADA retests samples based on the Articles. However, on what grounds? When justifying new investigations, WADA points out that as science progresses, international sports governing bodies may test retroactively as a means for advancing clean sport. In such a case, WADA should act in accordance with Article 3.1 of the WADC, which provides "[…] shall have the burden of establishing that an anti-doping rule violation has occurred […]." More importantly, holding this burden of proof, WADA should demonstrate that a prohibited substance could not have been revealed in the course of the first testing and that science developed significantly over the years**.** However, WADA has not yet proved that it would have identified prohibited substances retroactively. Before retesting any samples, WADA should adduce evidence**.**

Sanctioning a National Sporting Federation

The WADC concedes that sports sanctions are applicable to both individuals and sport governing bodies. Many international sporting federations have included provisions into their internal statutory acts, whereby a national sporting federation may be suspended if it does not comply with the international federation's rules. Thus, according to Article 14 of the IAAF Constitution (in force as of November 1, 2015)[9] "the Congress shall have the following powers under this Article: **to suspend** a Member from Membership for a fixed period or until a specified set of circumstances changes or ceases to exist […] **to exclude a Member's athletes** from any one or more of the types of International Meeting defined in the Rules."[10] Internal statutory acts of Federation Internationale de Natation (Art.C12 of the Constitution), the International Ski Federation (Art.9 of the Statutes), United World Wrestling (Art.7.2 of the Constitution), and other international sporting federations contain the same provision.

From a Legal Perspective, International Sporting Federations Have the Right to Sanction a National Sporting Federation for Non-compliance With Its Own Internal Regulations

Certain international sporting federations have provisionally suspended the following national sporting federations:

- The Russian Athletics Federation following a steady stream of doping stories,[11]
- the Bulgarian weightlifting team, following a stream of anti-doping rules violations,[12]
- the Benin Football Federation, following a local court injunction that affects the election procedure in the Federation,[13] and
- the Kuwait Football Association, following governmental interference.[14]

When sanctioning a national sporting federation, international sporting federations may prohibit athletes from participating in international competitions, such as when the IAAF adopted the List of athletes who were ineligible to participate. However, the decision to suspend athletes for the actions committed by a sporting federation's officers may not be legal.

Can an International Sporting Federation Adopt a List of Athletes Ineligible for International Sporting Competitions? Is It Possible to Prohibit an Entire Olympic Team From Participating in International Competitions?

The List is comprised of 73 pages and contains several thousand athletes. Its preamble reads as follows: "***following the suspension*** of the All Russian Athletics Federation (ARAF) from membership of the IAAF […] The list has been compiled from names received from ARAF **having an affiliation** to the Russian Athletics Federation and names included in the IAAF database. This list **is not exhaustive.**"[15] More importantly, the IOC announced*[16]* that Russia faced a risk of exclusion from participating in the 2016 Olympic Games in Rio. The IAAF relied on the following facts to support its announcement:

- The Russian Athletics Federation was previously suspended; and
- these athletes are members or have an affiliation to the Russian Athletics Federation.

However, the IAAF did not rely on test results and did not prove that all of the athletes used prohibited substances and/or methods. Therefore, the IAAF sanctioned innocent athletes for actions committed by third parties.

In accordance with its Constitution, the IAAF could adopt the List. However, that may not comply with the basic principles of law, international treaties and common sense. For instance, one of the basic principles of criminal law stipulates that the prosecution has the duty to prove the guilt of the person who is charged.[17] More importantly, no one should be held liable for the unknown actions of another.

What Should Be Done to Protect the Rights of Clean Athletes?

When sanctioning a national sporting federation, international sporting federations may violate the rights of clean athletes who have never tested positive for doping. International sporting federations should only sanction athletes who use illegal and/or unsanctioned substances. It is not fair to sanction innocent athletes. More importantly, international sporting federations should create additional participation opportunities for those who are innocent. Thus, internal statutory acts of international sporting federations should prescribe that:

- Regardless of the suspension of a national sporting federation, athletes who did not test positive retain the right to participate in international sporting competitions by filing entry forms to competition organizers directly; or
- upon suspending a national sporting federation, athletes who did not test positive are entitled to file their entry forms for international sporting competitions on their own.

Otherwise, such a decision will violate a clean athlete's rights, and it is likely that one or more may file a lawsuit, requesting the restoration of their competitive status.

What Are the Failures of the Russian Anti-Doping Program, and What Should Be Done to Stop the Rot?

Recent doping scandals, namely the Meldonium saga, highlighted certain failures of the Russian anti-doping system.These include, but are not limited to:

- A lack of communication among WADA, international sporting federations and the Russian anti-doping authorities;
- athletes do not have knowledge of sport medicines;
- Russian national sporting federations do not have their representatives in international sporting governing bodies;
- the Russian anti-doping authorities do not take educational measures; and
- the Russian preventing/sanctioning machine does not work properly.

The Russian anti-doping program is still in its infancy. Two draft laws were introduced into the State Duma. The first, on November 23rd, 2015, was Draft Law No. 936021-6: "On the amendment to the Criminal Code of the Russian Federation" (Bill No.1). Bill No.1 imposes criminal liability for inducing the commission of anti-doping rules violations and fraud of an athlete consisting in the transfer of prohibited substances or in the application of prohibited methods under the guise of permitted medicines or methods.[18] On March 14th, 2016, the author of Bill No.1 withdrew it from the State Duma's consideration. On March 21st, Draft Law No.1023705-6: "On the amendments to the Code of the Russian Federation on Administrative Violations and Federal Law on Physical Culture and Sport in the Russian Federation" (Law on Sport) (with regard to liability for anti-doping rules violations committed by athletes, coaches, physicians or other specialists)[19] (Bill No.2) was also introduced into the State Duma. Bill No.2 provides for administrative liability for the following:

- An athlete's violation of anti-doping requirements prescribed by sporting legislation, regarding the use or attempt to use a prohibited substance and/or method, if such actions do not constitute a criminal offense. These actions are punishable by a fine in the amount from 30,000 Rubles ($449) to 50,000 Rubles ($749);
- an athlete's, coach's, physician's or another specialist's violation of anti-doping requirements prescribed by sports legislation concerning tampering (or an attempt to tamper) with any part of the doping control process, if such actions do not constitute a criminal offense. Bill No.2 contains the same sanctions as with an athlete's violation above;
- an athlete's, coach's, physician's or another specialist's violation of anti-doping requirements prescribed by sporting legislation regarding the distribution of a prohibited substance and/or method, if such actions do not constitute a criminal offense. Bill No.2 contains the same sanctions as listed above.

Bill No.2 also amends the Law on Sport by inserting the words "anti-doping propaganda" in its first articles. Bill No.2 is being considered by the steering committee of the State Duma.

We must bear in mind that it is impossible to eradicate doping only by putting into force new laws. The problem should be resolved by taking both organizational and legal measures. The Russian government should take measures aimed at preventing anti-doping rules violations, and following the Decision, it announced the creation of an independent commission of Russian and foreign experts that will attempt to fix the Russian anti-doping system.

Every athlete should know what he or she ingests or injects into his or her body, the consequences of taking prohibited substances, what constitutes the doping control process, and what are the powers of modern anti-doping authorities. One would hope that an athlete with this knowledge would not use prohibited substances and/or methods.

Endnotes

1. The text is available at http://www.iaaf.org/about-iaaf/documents/member-federation-information.
2. *See* http://www.nytimes.com/2016/05/19/sports/olympics/doping-ioc-president-russia-could-be-barred.html?_r=0.
3. CAS's press release is available at: http://www.tas-cas.org/fileadmin/user_upload/Media_Release_4684_210716.pdf.
4. The text is available at: https://www.olympic.org/news/decision-of-the-ioc-executive-board-concerning-the-participation-of-russian-athletes-in-the-olympic-games-rio-2016.
5. The text is available at: https://www.paralympic.org/news/ipc-decision-membership-status-russian-paralympic-committee-0.
6. The text is available at https://wada-main-prod.s3.amazonaws.com/resources/files/wada-2015-world-anti-doping-code.pdf.
7. Emphasis added.
8. Emphasis added.
9. The text is available at http://www.iaaf.org/home.
10. Emphasis added.
11. *See* https://www.theguardian.com/sport/2015/nov/13/athletics-governing-bodies-suspend-russia-from-all-competitions.
12. *See* http://www.sportsintegrityinitiative.com/iwf-bans-bulgaria-from-rio-olympics/.
13. *See* http://www.ianslive.in/index.php?param=news/FIFA_suspends_Benin_Football_Federation-509692/SPORTS/9.
14. *See* http://www.dailymail.co.uk/sport/football/article-3276385/FIFA-suspends-Kuwait-football-association-dispute-sports-law-interference.html.
15. Emphasis added.
16. *See* http://www.nytimes.com/2016/05/19/sports/olympics/doping-ioc-president-russia-could-be-barred.html?_r=0.
17. *See* http://www.lawhandbook.sa.gov.au/ch12s02.php.
18. *See* Sergey Yurlov, *Russia Is Developing An Anti-Doping Program*, *available at* http://nysbar.com/blogs/EASL/2015/12/russia_is_developing_an_anti-d.html.
19. The text is available at http://asozd2.duma.gov.ru/main.nsf/%28SpravkaNew%29?OpenAgent&RN=1023705-6&02.

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New York's First Pari-Mutuel Law and Its Ramifications

By Bennett Liebman

After New York State voters amended the State Constitution to authorize pari-mutuel wagering on horse racing in 1939, it was reasonable to have assumed in 1940 that the hard work had been accomplished, and the major issues involving betting on horse racing had largely been resolved. That was hardly the case.

The battle over what would go into the law implementing pari-mutuel racing was as fierce as the Constitutional battle to authorize pari-mutuel racing. The battle was not concluded until two weeks before the racing season in New York actually started, on April 15, 1940. The pari-mutuel legislation, along with the State budget, appeared to be the two major issues facing the State government in 1940.

The Interested Parties

A host of interested parties and stakeholders made the enactment of the pari-mutuel law especially tricky. The law that emerged from this process can also be viewed as an example of the Marc Antony rule of legislation: "The evil that laws do live after them. The good is oft interred with their bones."[1] It contains provisions remaining on the books that have continued to vex all of New York racing.

These parties included the following:

1) The legislative sponsors of pari-mutuels. While both houses of the legislature had Republican majorities, both parties were actively involved in authoring the pari-mutuel bills. The two principal leaders were Democratic Senate Minority Leader John Dunnigan and Republican Assemblyman Norman Penny. Dunnigan had been the majority leader in the Senate when the Constitutional change authorizing pari-mutuels received first passage by the legislature in 1938. At the 1938 election, the Republicans regained control of the Senate, and Dunnigan was relegated to the position of Minority Leader. Nonetheless, Dunnigan remained far and away the most active and vocal legislator in support of pari-mutuels, and the Republicans in the State Senate suggested that they would be letting Dunnigan take the lead on advancing the bill.[2] Dunnigan had claimed that pari-mutuel racing would vastly increase the crowds at the racetracks and would bring in $10 million in revenue annually to the State.

   The State Assembly was controlled by the Republican Party, and Penny was the lead person on the pari-mutuel bill. Assembly Minority Leader Irwin Steingut was also very active in the Assembly on pari-mutuel issues.

   Looking back at these gentlemen with the benefit of 75 years of hindsight, it would be naïve not to question their motives. Within a few years of the passage of the legislation, all three of them held substantial interests in harness tracks in New York State. Dunnigan and his family ended up owning Buffalo Raceway. The Dunnigan family put up none of its own money when it started the track in 1942.[3] Steingut, by the summer of 1940, held major interests in Batavia Downs,[4] and Penny held shares in an organization running races at Roosevelt Raceway on Long Island.[5]

2) The State Racing Commission, led by its Chairman, Herbert Bayard Swope. Swope, a renowned former journalist, viewed himself as being in overall charge of New York thoroughbred racing. Swope had traditionally been friendly with many bookmakers.

3) The existing thoroughbred tracks: Belmont, Empire City, Aqueduct, Jamaica and Saratoga.

4) The City of Saratoga Springs, which was anxious to avoid downstate competition with its race meet.

5) The Republican leadership in the legislature in New York State.

6) The bookmakers at the tracks who had been the major losers when the State voted to authorize pari-mutuels.[6]

7) The Jockey Club, anxious to maintain its overall authority over thoroughbred racing in New York State.[7]

8) Democratic Governor Herbert Lehman, who seemed to want to avoid too many giveaways to the Republican legislative majority.

9) Those businesses and individuals who wanted to start up commercial harness racing ventures.[8]

The Issues Facing the Legislature

The main issues faced by Dunnigan and the other interested parties included the following:

1) Did you put an end to bookmaking, or could bookmaking coexist with pari-mutuels?

2) At what was the takeout rate to be set?[9] How much of the takeout would go to the State?[10]

3) How many tracks would there be?

4) Would downstate thoroughbred tracks be competing with the thoroughbred track at Saratoga?

5) Who would regulate the tracks?

6) Would there be harness racing?

7) What would be the breakage rate?[11]

8) At what would the minimum admission be set? Should there be free passes allowed? Who should get the free passes?

9) Would there be any demands placed on the existing tracks to revitalize their facilities?

10) What was the length of the racing season?

11) What effect would the State budget have on the negotiations over pari-mutuels?

The Initial Dunnigan Proposal

As soon as the legislature went into session in 1940, Dunnigan announced his plans.[12] Dunnigan was clearly motivated by a desire to maximize the amount of State revenue to achieve his $10 million revenue goal. He advocated an end to bookmaking, a 10% takeout rate split evenly between the State and the tracks, increasing the number of authorized thoroughbred tracks from five to nine, and forcing the existing thoroughbred tracks to vastly increase their capacity to handle the crowds that would come to the tracks due to the enactment of pari-mutuels. The downstate tracks would need to have 15,000 parking spots, 25,000 seats, and capacity for 50,000 fans.[13] The Racing Commission would be required to assign race dates to a downstate track while Saratoga was running in order to combat anticipated competition from horse racing during that time period in New Jersey.[14]

The minimum admission fee would be $1.50.[15] No provision was made for harness racing, as there would be some time to evaluate whether harness racing was feasible under the pari-mutuel laws. Breakage would be to the dime,[16] and breakage would be shared equally by the State and the racetracks. No change was made in The Jockey Club's powers over racing. On the State side, while the Racing Commission would oversee thoroughbred racing, the financial aspects of racing would be regulated by the State Tax Commission. There would be separate licenses for operating a track and for operating pari-mutuel racing at a track.

Dunnigan's original plan ran into immediate trouble. It was assailed by anti-gambling forces who either wanted a revote on the Constitutional authorization of pari-mutuel racing or a study of the overall pari-mutuel issue. Localities wanted their shares of the pari-mutuel tax. The existing tracks thought that their share of the takeout was too low, and the demands for added capital construction were too great. Potential harness racing interests wanted to be included in the legislation.

Perhaps the most significant criticism came from Herbert Swope. He thought that the takeout was set too high, and that there should be minimal to no breakage. There was no reason for the legislation to mandate an increase in the size of the tracks. The Commission alone—rather than with The Jockey Club—should be licensing jockeys and trainers. He further suggested a staggered system under which the share of the pari-mutuel takeout between the tracks and the State would depend on the size of the handle. The higher the handle, the greater the share would be to the State. Swope also suggested that some bookmakers—who would be required to pay a high licensing fee—be allowed at the tracks.[17]

The Effect of the State Budget

Overhanging the arguments over the pari-mutuel legislation was New York State's traditional arguments over the size of the State budget. 1940 was supposed to be the year of no controversy. In 1939, there had been a war over the budget between Governor Lehman and the Republican-controlled legislature. The legislature had in 1939 basically substituted its own budget for Governor Lehman's submitted budget. The legislature "struck out substantially every item…as submitted by the Governor, and substituted therefor a single item of appropriation to each of the various departments, or divisions of departments, combining expenses of maintenance and operation, personal service, travel outside the State, and the purchase or exchange of automobile."[18] The governor then sued the State Comptroller, arguing that the budget as enacted was unconstitutional. The Court of Appeals ruled unanimously in favor of the Governor, finding that "the Legislature may not alter an appropriation bill by striking out the Governor's items and replacing them for the same purpose in different form."[19]

In order to avoid a repeat of the budget battle of 1939, the legislative leaders and Governor Lehman entered into a truce, under which budgetary disputes would be negotiated privately in advance of the budget.[20] Based on this, the governor announced an agreement on the budget even before the budget was submitted formally to the legislature.[21] The budget submitted in January of 1940 raised State income taxes by $15 million in order to eliminate an accumulated deficit.[22] The State Republicans had cut state spending by $25 million in the 1939 budget, and the 1940 proposed budget increased spending by $5 million.

The tax increase proposal drew an almost unprecedented negative reaction from much of New York State. Eight thousand people representing 829 protest groups showed up in Albany at the State Assembly hearing to protest the tax increase.[23] Faced with this pressure, the legislative leaders retreated from their previous agreement with Governor Lehman and, pending Lehman's reaction, recommended a budget that included no new income taxes and a reduction of $5.6 million in Lehman's budget.[24]

The Public Hearing on Pari-Mutuels

Faced with the budget issues and all these competing interests, Dunnigan initially delayed taking any action to advance the pari-mutuel bill. Then, in mid-February, in advance of a public hearing on the bill, he added three significant amendments. He eliminated the minimum capacity requirements for the thoroughbred tracks, added a provision requiring that 80% of the pari-mutuel jobs at the tracks go to American citizens who had resided in New York for one year, and retained the State tax on racetrack admissions.[25] He also increased the support that the State would provide for non-pari-mutuel harness racing at county and town fair tracks. Dunnigan stated that the bill could not pass with the added requirements placed on racetracks. He also believed that the passage of a pari-mutuel bill was a necessity in 1940 in order to provide sufficient revenue for Governor Lehman's budget.

The public hearing on the racing legislation was held in Albany on February 26, 1940. The hearing largely turned into the Herbert Swope show. While religious groups and anti-gambling forces suggested a delay in the legislation, Swope recommended a series of changes in the Dunnigan bill. He recommended quick action on pari-mutuel legislation, suggested that there be no breakage at all in betting (or perhaps, as he called it, breakage to a penny), a lowered takeout of only 9%, limited bookmaking for large bets, a minimum $2 admission fee, and a ban on nighttime harness racing.[26]

No immediate changes were made in the legislation as a result of the hearing. Instead, overall action on racing legislation was delayed during the pendency of the battle over the budget between Governor Lehman and the Republican legislative leaders. While both sides agreed on the necessity of added revenues that would come from the enactment of a pari-mutuel racing law, the actual resolution of the pari-mutuel issue was put on hold as the budget was enacted.

The Pari-Mutuel Deals

In mid-March of 1940, after the Republican legislative leaders largely worked out their budgetary issues, they and Dunnigan began to make deals over the pari-mutuel legislation. The legislature—when supplemental appropriation are included—decided with Lehman on a budget that had no tax increases and decreased Lehman's original budget by $3.2 million.[27] Since Lehman had believed that a $15 million income tax increase was necessary to support his original slightly higher budget, the enacted budget made it imperative to obtain as much revenue as possible from sources other than the income tax.

This placed added pressure on the potential pari-mutuel tax to deliver enhanced revenue for New York State. The Lehman administration believed that $4 million could be raised in the next fiscal year from the pari-mutuel tax.[28] With the racing season set to start on April 15th and with no action taken on the racing bill past mid-March, it might have made sense to postpone pari-mutuels for another year. Yet the need for state revenue made it imperative that pari-mutuel wagering commence in 1940.

Accordingly, the general structure of the Dunnigan bill was largely supported,[29] but certain specific aspects of the bill were amended to enhance the upstate areas of New York that were controlled by the Republican leadership.[30] Harness racing—a non-commercial upstate county and municipality fair activity at the time—was authorized with a takeout of 15% at up to seven tracks to be regulated by a separate Harness Racing Commission. Additional State financial support was provided to the town and county fairs—again mostly upstate—that would continue to conduct non-pari-mutuel harness racing.

In theory, it might have made sense for the Democratic elected leaders to be opposed to harness racing. The principal proponent of harness racing was a Nassau County group headed by prominent attorney George Morton Levy. This group had previously run a greyhound track in Mineola in Nassau County. Governor Lehman had engaged in a prolonged and frequently bitter battle with Levy and his greyhound track. The battle ended in the late 1930s, with greyhound racing terminated in New York State.[31] Certainly, there should have been little reason for the Democrats to assist Levy in opening up a new racing venue. Yet, the need for upstate support for the pari-mutuel bill, coupled, in all likelihood, with the avarice and self-interest of some of the legislative supporters of pari-mutuels, was sufficient to obtain legislative approval of harness racing.[32]

The mandate in the original Dunnigan bill that there be downstate racing during the Saratoga meet was dropped. Instead, it would be up to the Racing Commission to determine whether there would be downstate racing during Saratoga.[33] A fourth member would be added to the thoroughbred Racing Commission to make sure that the political parties were equally represented.[34] The Harness Racing Commission would similarly be composed of four members, two from each party.

The major fight in the legislature was over whether to prevent bookmakers from operating at the tracks. The Assembly and the Senate initially seemed divided on the Swope proposal to allow bookmakers to take large wagers from bettors,[35] but, with Senator Dunnigan and Assemblyman Penny arguing against the bookmakers, both houses eventually agreed to ban all bookmaking from the New York tracks. If bookmakers had been able to operate and compete with pari-mutuels, it certainly could have reduced both the pari-mutuel handle and the taxes from pari-mutuels. In a year where the need to maximize state revenue from pari-mutuels was paramount, this factor had to militate against the continuation of bookmaking.

The legislative agreement was not the end of the matter. Governor Lehman weighed in against certain aspects of the bill. He disagreed with the requirement for four-member bipartisan commissions, the increase in the moneys to be distributed by the State to county and town fairs conducting non-pari-mutuel harness racing, and the fact that the takeout was higher for harness racing than for thoroughbred racing.[36]

Lehman's veto threat was only partially successful. The legislative leadership agreed to amend the bill to return to the three-member non-partisan commissions.[37] The leadership would not change the increase in funding to the fair tracks or the higher takeout for the harness tracks. With the Governor's concerns muted, the legislature gave final passage to the pari-mutuel bill—with the three-member commissions—on March 29th.[38] The Governor quickly signed the bill on April 1st,[39] only two weeks before pari-mutuel racing had its start at Jamaica on April 15th, 1940.

Contents of the Pari-Mutuel Legislation

The legislation divided up both harness racing and thoroughbred racing. The provisions of the law affecting one breed of racing were generally not applicable to the other.[40] Each breed of racing would be governed by separate three-member racing commissions appointed by the governor, subject to Senate confirmation.

On thoroughbred racing, the authority given to The Jockey Club was unchanged. It basically continued its joint regulatory jurisdiction over the actual racing and licensing of participants with the Racing Commission. Control over the financial administration of pari-mutuel betting was given to the State Tax Commission. The racing season was to start on April 1st and end on November 15th.[41] There was a separate license for the actual racing and for the pari-mutuel betting. The takeout at the thoroughbred tracks was 10% with breakage to the nickel. The State and the tracks would share equally in the breakage and the takeout. So-called "outs" moneys—moneys unclaimed by winning bettors—would be paid by the tracks to the State on April 1st of the following year.[42]

The minimum price for racetrack admission was set generally at $1.50, and free passes for patrons were restricted to a discrete and limited classes of individuals who generally had legitimate work-related reasons to be at the track.[43] Eighty-five percent of the track's pari-mutuel employees had to be citizens who had resided in New York State for at least two years. The Racing Commission could require tracks to run a race for horses bred in New York State. Certain specific pari-mutuel information had to be displayed to the public on the tote machine.[44]

Nine thoroughbred tracks could be authorized in the state. Six could operate downstate, and three upstate. There was no requirement that all the available dates had to be allocated.[45] The three potential upstate tracks had to be at least 100 miles apart.[46]

Authorization of Harness Racing

On the harness side, many of the provisions were the same as on the thoroughbred side. There were separate licenses for racing and for pari-mutuel operations. Breakage and "outs" moneys were the same. The citizenship and residency requirements for tote employees were the same. The public display requirements for pari-mutuels were the same as for the thoroughbred tracks. Free passes were restricted, and the Tax Commission would supervise the financial aspects of pari-mutuel racing.

The takeout rate was, however, set at 15%. The state tax was set at 5% of handle. Thus, the owners of the harness tracks retained 10% of the handle for their own uses.[47] Seven pari-mutuel harness licenses were authorized, and the Commission could consider the number of track licenses issued and the location of the tracks previously licensed in determining whether to grant any license to a new applicant.[48]

Unlike the situation at the thoroughbred tracks, the Harness Racing Commission appointed the racing officials and did not share authority with any group. All that was required was that the racing officials that it appointed had to be licensed by the United States Trotting Association, the non-profit membership organization which helped to establish uniform rules on harness racing. The minimum charge for admission to a harness track was set at fifty cents, and the racing season ran from April 15th to November 15th.

The amount of State support for promotion of county and town agricultural fair harness racing was increased from $250,000 to $400,000.[49]

The Pari-Mutuel Law at Age 76

In 2016, significant parts of the 1940 legislation remain on the books, and these provisions tend to have a disconcerting effect on the regulation and the operating of racetracks.[50] They remain on the books, even though they are at best antiquated, and at worst harmful. The problem is that provisions that might have been necessary when horse racing was popular are an obstruction at a time when horse racing may be nearing its final furlong.

For example, the 1940 law only authorized pari-mutuel racing for specific horse breeds. In 1940, this was limited to harness and thoroughbred horses. While quarter horses were subsequently authorized for racing, other horse breeds—including Arabians and Appaloosas—have never been permitted to race. Had the 1940 legislation not been breed specific, it would have been possible to authorize additional breeds to race. As it stands now, these breeds are not permitted to run in pari-mutuel races in New York.

Furthermore, by separating harness racing regulation from thoroughbred racing, the State allowed the rules of the two sports to develop separately. Generally speaking, all aspects of harness racing were prescribed under the harness rules, while much of thoroughbred racing regulation was left to the individual tracks. This difference was not technically fixed until the powers of the Racing Commission and the Harness Racing Commission were unified by the creation of the State Racing and Wagering Board in 1973.[51] Nonetheless, more than 40 years after the creation of the Racing and Wagering Board,[52] harness racing remains far more intensely regulated than thoroughbred racing.

A number of harness tracks have wanted to conduct wagering on mounted races where harness racing is conducted under saddle. The harness horses would arguably have been ridden by thoroughbred jockeys. Yet under Racing Pari-Mutuel Wagering and Breeding Law [Racing Law] § 301.3—which is derived directly from § 55 of Ch. 254, L. 1940—harness racing cannot "include any form of horse racing in which the horses participating are mounted by a jockey," therefore the New York harness tracks are barred from conducting wagering on harness horses racing under saddle.

The 85% requirement for citizenship and New York residency for pari-mutuel employees remains on the books.[53] Yet, this is not a provision that been regularly reviewed or enforced. Now with telephone and account wagering engaged in by the tracks, are these pari-mutuel employees dealing with patrons who are not physically on track subject to these 85% requirements? Beyond this, can these provisions possibly be constitutional under the constitutional Privileges and Immunities Clause, the Equal Protection Clause and the Commerce Clause? In New York State, how would they survive scrutiny under Salla v. County of Monroe,[54] which invalidated preferential employment for one year for New York residents on public works projects?

The current laws mirror the 1940 law in determining what pari-mutuel information needs to be shown to the public.[55] However, what might have been sensible in 1940 in terms of displaying information on how much is being bet in the place and show pools on particular horses may not be of particular significance today. Current bettors rarely make place and show wagers, and it may not make sense to force the racetracks to display this information, which may now be seen as irrelevant. Approximately 90% of all wagers are not made at the racetrack where the race is run; so the requirement of a tote display assists a minimum number of members.

The original 1940 law capped the number of pari-mutuel harness tracks at seven. This was increased to eight in the 1950s.[56] This number remains significant today since the grant of a harness racing license is basically a required element for a harness track to become a video lottery operator.[57]

The State Department of Taxation and Finance still technically retains the function as the financial administrator of racing.[58] Yet with the decline in the popularity of horse racing and the revenue derived therefrom, the Department of Taxation and Finance has limited interest and expertise in pari-mutuel wagering. It also has little reason to be motivated to be involved with pari-mutuel racing. It no longer is realistically in the position to regulate the financial aspects of horse racing. Yet the laws still require that certain pari-mutuel approvals must be obtained from the Department of Taxation and Finance.[59] This has made compliance with the approval process far more difficult than need be, especially at a time when the Gaming Commission is supposed to be the one stop center for all regulation of gambling. It now makes far more sense for the Gaming Commission to be in charge of all aspects of horse racing.

The decline in the popularity of racing also has played havoc with the original 1940 restriction in the law on free passes. It no longer made any sense to deny free passes to patrons when racing became unpopular, and anyone could enter a casino or a racino for free.[60] Yet, the ban on free passes still remains technically in the law.[61] A workaround of the ban on free passes was not achieved until 2012, when the law was changed to add language stating that, "free or reduced fee passes, cards or badges may be issued to the general public or segments of the general public in connection with any promotional campaign or marketing program sponsored by such corporation to increase attendance at live race meets."[62] It would simply have made more sense to eliminate any language in the law on free passes.

Other portions of the 1940 law that remain in the statute books are more annoying than harmful. There still remains a distinction between a license to conduct pari-mutuel wagering on races and a license to conduct the underlying racing itself. This is a distinction without any significance.

There is still the requirement that the Commission can require a thoroughbred racing association to conduct one race for New York-bred horses in a year.[63] The language remains largely unchanged since 1940. Yet, at the current time, the New York Racing Association runs hundreds of races for New York-breds. This is a provision which time has clearly passed.

Therefore, New York's first pari-mutuel racing law from 1940—a law, some of which origins involve self-dealing legislators and the need for enhanced pari-mutuel revenues—still affects New York racing in 2016 and remains, as it was in 1940, the cause of considerable tsuris.[64]

Endnotes

1. Adapted from Julius Caesar, Act III, Scene II.
2. "Racing Leaders Map Plans for Pari-Mutuels," New York Herald Tribune, Nov. 9, 1939.

3. Dick Aurelio, "Putnam GOP Boss Tells of 200-G Stock Profit," Newsday, Mar. 6, 1954; Emanuel Perlmutter, Putnam G.O.P. Chief Bares Ownership of Raceway Stock," New York Times, Mar. 6, 1954. Dunnigan even had a longtime bookmaker named Col. Abe L. Hallow on the legislative staff in 1940 and 1941. "Dunnigan, Steingut Face Race Betting Quiz," Albany Times Union, Nov. 22, 1944.
4. $15,000 from funds owed to Steingut by a deceased bookmaker named Max Kalik was lent to Batavia Downs to help finance the track. "More Leaders Tied to Trot Deals," Long Island Star Journal, Mar. 6, 1954. Republican Assemblyman Pat Provenzano, whose family ended up with complete control over Batavia Downs, was also involved with the operation of Batavia Downs.
5. Dick Aurelio, "Probers Didn't Ask the BIG Question," Newsday, Mar. 16, 1954; Emanuel Perlmutter, "Politics and Raceways: Fortunes for Insiders," New York Times, Mar. 14, 1954; Dick Aurelio, "The Big Payoff Was Trot Trademark," Newsday, Mar. 12, 1954.
6. Bookmakers operated at the tracks under a legal regime where taking wagers at the site of the tracks was not considered to be criminal activity.
7. The Jockey Club was the elite group of thoroughbred patricians who helped establish the rules and regulate thoroughbred racing in conjunction with the State Racing Commission.
8. Entering 1940, there were no commercial harness racing tracks in New York State.
9. Takeout refers to the percentage of the betting dollar that is not returned to the winning bettors. Instead, it is shared by the track, the State, and other interests. The higher the takeout, the less likely it is that individual bettors will make a profit or break even.
10. The portion of the takeout that goes to the State is the pari-mutuel tax.
11. Breakage refers to the rounding down of pari-mutuel payments to avoid paying out pennies to winning bettors. Thus, under dime breakage, a horse that should return $6.79—by actual odds for a $2 bet—would pay the winning bettor $6.60. Under nickel breakage, the return to bettors would be $6.70. Breakage has the effect of increasing the takeout on bettors.
12. "Pari-Mutuel Bill Calls for Building of 4 More Tracks," Nassau Daily Review, Jan. 2, 1940; "Here Are Main Points About New Racing Bill Outlined by Dunnigan," Saratogian, Jan. 2, 1940; John G. Rogers, "Legislature Opens Today," New York Herald Tribune, Jan. 3, 1940.
13. Obviously, this was opposed bitterly by the tracks, as it might have been impossible in 1940 for the smaller tracks, such as Empire City, Aqueduct and Jamaica, to comply with the Dunnigan requirements. See "Five Racetracks Brand Some Race Bill Sections 'Unfair, Impractical,'" Saratogian, Jan. 3, 1940.
14. Pari-mutuel racing was authorized by the voters in New Jersey in 1939.
15. The admission fee was a tricky issue for the Legislature. There was a desire to protect the poor from betting by having a fairly high admission fee. This arguably would have deterred the poor from patronizing the racetracks. On the other hand, under the bookmaking system, admission was set at a high level because the State received its money from racing from its share of the admissions tax. With the State receiving far greater money from the pari-mutuel tax, there was a need to lower the minimum admission fee to increase patronage, but not to make is so low that poorer people would bet on the races.
16. See note 11 supra.
17. The bookmakers would service high rolling bettors in the clubhouse. Swope was a huge bettor, and it would not be surprising if his many friendships with the bookmakers who had worked at the New York tracks influenced his opinion. See Steven R. Fox, Blood and Power, Morrow (1989) and Mike Dash, Satan's Circus: Murder, Vice, Police Corruption, and New York's Trial of the Century, Crown (2007) p. 107.
18. People v. Tremaine, 281 NY 1, 6 (1939).
19. Id. at 11.
20. "Accord on Budget Likely in Albany," New York Times, Dec. 24, 1939; see also "Lehman to Read Message Today in Legislature," New York Herald Tribune, Jan. 3, 1940.
21. Warren Moscow, "Accord Complete on State's Budget," New York Times, Jan. 16, 1940.
22. John C. Rogers, "Rise in State Income Tax Is Proposed by Lehman in $396,707,223 Budget," New York Herald Tribune, Jan. 23, 1940.
23. "8,000 Plead: 'Cut N. Y. Taxes,'" Chicago Tribune, Feb. 13, 1940.
24. Warren Moscow, "Republicans Adopt Own Budget Plan," New York Times, Feb. 29, 1940.
25. "Proposes Three Amendments to N.Y. Race Bill," Chicago Tribune, Feb. 19, 1940.
26. "Swope Calls on Legislators to Speed Race Bill," New York Herald Tribune, Feb. 27, 1940; "Mutuels Hearing Marked by Clash," New York Times, Feb. 27, 1940.
27. "Bill Increasing Total of State's Budget Offered," New York Herald Tribune, Mar. 28, 1940.
28. The Herald Tribune was dubious about the $4 million figure, suggesting that Lehman's number was a "gold brick." "Throwing Gold Bricks," New York Herald Tribune, Mar. 1, 1940. Revenue from pari-mutuel taxes and racing admissions in the 1940 calendar year exceeded $6 million. See Annual Report, Pari-Mutuel Revenue Unit, Miscellaneous Tax Bureau of the State Tax Commission (1963).
29. The main change in the Dunnigan pari-mutuel legislation was the move to nickel breakage from dime breakage.
30. John G. Rogers, "Pari-Mutuel Bill Reported," New York Herald Tribune, Mar. 22, 1940; "Pari-Mutuels Win in New York," Chicago Tribune, Mar. 22, 1940.
31. Lehman vetoed legislation which would officially have permitted greyhound racing in 1936, 1937 and 1938.

32. To paraphrase the words of the Tammany Hall politician, George Washington Plunkett, "They seen their opportunities, and they took 'em."

33. It was certainly known that Swope was opposed to a simultaneous downstate meeting conducted while Saratoga was racing.

34. Before the advent of pari-mutuels, Democratic Governor Lehman had appointed all three members of the racing commission, subject to Senate confirmation. Only two could be members of the same party.

35. "Sweeping Changes Put in Mutuel Bill," New York Times, Mar. 14, 1940.

36. "Relative to the Pari-Mutuel Bill Before the Legislature," Public Papers of Governor Herbert H. Lehman, pp. 187- 188 (1940); James G. Hagerty, "Governor Assails Pari-Mutuel Bill with Hint of Veto," New York Times, Mar. 26, 1940.

37. John G. Rogers, "4-Man Board Is Cut Out of Mutuels Bill," New York Herald Tribune, Mar. 27, 1940; see also Jimmy Wood, "Sportopics," Brooklyn Daily Eagle, Mar. 27, 1940.

38. John G. Rogers, "Teacher Pay Cut Balked," New York Herald Tribune, Mar. 30, 1940. Senate Majority Leader Joseph Hanley appeared to have harsh words for Herbert Swope saying during the course of the debate on the legislation, "I would absolutely refuse to confirm the appointment of any one who is a persistent bettor at the races."

39. Ch. 254, L. 1940. "Lehman Paves Way for Pari-Mutuels at Jamaica Opening," Associated Press, Nassau Daily Review Star, Apr. 2, 1940.

40. See Article 1, Section 1, Ch. 254, L. 1940.

41. The Herald-Tribune in an editorial had written, "And no one in his right mind could wish the racing season to start on April 1. April 15…is a far wiser opening day." "The Racing Bill," New York Herald Tribune, Mar. 23, 1940.

42. In the initial legislation, bettors could claim winning moneys after April 1st of the succeeding year, and the amounts paid to the bettors would be credited to the tracks' subsequent payments to the state. Article 1, Section 12, Ch. 254, L. 1940.

43. This group included "public officers engaged in the performance of their duties", which permitted state legislators to obtain free admission to the tracks. See Article 1, Section 17, Ch. 254, L. 1940.

44. The law required the track to display "in plain view of the public the total amount of sales separately for each straight, place and show on every race and on each horse in such race." Article 1, Section 6, Ch. 254, L. 1940. The legislation also required that the win odds on all horses be displayed.

45. This meant that there was no requirement that there would be downstate racing during the Saratoga meet.

46. This was similarly meant as a protection for Saratoga, guaranteeing that there would not be a competing track within 100 miles of Saratoga.

47. Thus, the future owners of the harness tracks –who would soon turn out to be largely politically connected—retained far more of the pari-mutuel handle than the owners of the thoroughbred tracks.

48. Article 2, Sections 39 and 40, Ch. 254, L. 1940.

49. Article 3, Section 57, Ch. 254, L. 1940. This increase in funding had helped prompt the complaints about the legislation from Governor Lehman. See note 36 supra.

50. See note 1 supra.

51. Ch. 346, L. 1973.

52. The Racing and Wagering Board is now the State Gaming Commission. Ch. 60, L. 2012.

53. Racing Law, Sections 249 and 326.

54. 48 N.Y.2d 514 (1979).

55. Racing Law, Sections 234 and 313.

56. See Racing Law, Section 305.

57. Tax Law, Section 1617-a.

58. Racing Law, Sections 108-a,112 and 235.3.

59. See Racing Law, Sections 108-a and 112.

60. This especially makes no sense in New York State, where all the harness tracks also operate racinos.

61. See Racing Law, Sections 243 and 324.

62. Ch. 370, L. 2012.

63. Racing Law, Section 242.

64. Yiddish for trouble and aggravation. You could replace it with the Italian expression "agita."

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Sports and Entertainment Immigration: Equity Crowdfunding by Immigrant Investors

By Michael Cataliotti

Introduction

The Employment-Based Fifth Preference: Immigrant Investor category of applications for lawful permanent residence, otherwise known as the "EB-5 program," or simply, "EB-5," allows an individual to invest $500,000 or $1,000,000 into an American entity to create 10 full-time jobs, and in return for doing so, obtain a green card for him or herself and his or her spouse and children.[1] Of course, it is far more nuanced and intricate than this, but because the EB-5 program is becoming increasingly popular, it is important to have a basic understanding of what it is.

This article provides a general overview of the EB-5 program and points to its application for the sports or entertainment practitioner, with a few points to keep in mind along the way. To accomplish this, the *New York Times* article, "Price for a Green Card: $500,000 Stadium Stake,"[2] will be referenced throughout.

The Beginning

The EB-5 program began more than two decades ago in 1990, as a way to "stimulate the U.S. economy through job creation and capital investment by foreign investors."[3] Those foreign investors would invest into a "new commercial enterprise."[4] In 1992, Congress expanded the reach of the EB-5 program, by allowing multiple foreign investors to pool their funds into certain new commercial enterprises that were designated by USCIS to undertake approved, job-creating projects in a particular area.[5] Those entities would be known as Regional Centers, which would become the primary source of investment through the EB-5 program. Regional Centers had their own unique benefits when compared with other investment vehicles, such as the ability to include *indirect* job creation to determine whether 10 positions were created.

The EB-5 program was also intended to not only revitalize the American economy as a whole but, more specifically, to revitalize and reinvigorate areas with high unemployment or rural areas.[6] The idea was that if individuals from outside of the U.S. would invest $500,000 into an entity that would create or save 10 full-time jobs in an area experiencing unemployment of at least 150% of the national average rate or a rural area,[7] this would have a lasting impact throughout a local region and, eventually, the rest of the country. As a sort of "thank you," the immigrant investor would receive a green card for his or her successful, job-creating investment.[8]

The Middle

There is not much of a middle, but rather a prolonged initial development stage. Therefore, this section is being included only to continue the chronological structure. Though there were precedent-setting opinions from the United States Citizenship and Immigration Services' (USCIS) Administrative Appeals Office, and attempts were made to make the program more appealing, those events provide more of an historical understanding than necessary for our purposes. As this article is concerned with how the EB-5 program may impact clients in this present global economy, we jump to 2008, when everything became interesting.

The Current State

Since the 2008 Recession, there has been a significant amount of regulation over lending, especially large-scale lending. If loans were difficult to obtain and rates not ideal, why not turn to other sources? Many did, and that is part of the reason that the number of Regional Centers approved by USCIS between 1994 and 2013 grew from a meager handful to approximately 25 in 2008, only to skyrocket to more than 200 in 2013.[9] Likewise, the number of EB-5 visas granted was very low until 2007/2008, with the exception of a brief period from 1996 to 1998.[10] Contrast this with today's figures and we see that the EB-5 program has exploded: As of May 2, 2016, USCIS approved 834 Regional Centers and received 6,277 applications as of the first quarter of FY2016 (October through December 2015).[11]

Worth noting, as well, is that the general public is becoming more comfortable with the notion of crowdfunding, as demonstrated by the success of Kickstarter, Indiegogo, and many other investor platforms, as well as the passing and enactment of the JOBS Act, which authorizes equity crowdfunding by unaccredited investors. With the significant growth of interest in alternative sources of funding, it is not surprising that many developers and executives are turning to foreign investors to complement, or supplement entirely, their other sources of financing. This brings us to how the foreign investments can intermingle with the worlds of sports and entertainment.

EB-5 Financing and the Sports and Entertainment Industries

Building an arena or stadium is incredibly expensive. The *New York Times* article opens with this fact: "For years, sports teams have tried to defray the multimillion-dollar costs of their new stadiums by asking fans to pay thousands for personal seat licenses that entitle them to buy season tickets."[12] This sounds like a perfect situation in which to introduce EB-5 funding.

For the developers of the stadium in Orlando, marketing to foreign investors is being done "not because lending is tight, but because lawmakers in Florida would not provide subsidies for the stadium […]."[13] Part of the reason for the lack of support from the local community is that "officials are under pressure from voters opposed to using public money to help wealthy owners."[14] Therefore in walks EB-5, having been used previously in the development of a stadium: "EB-5 financing helped pay for infrastructure work connected to [the] Barclays Center in Brooklyn, but not for the arena itself."[15]

Why then, do more people not use the program to defray the costs associated with developing a stadium? There is certainly enough interest in the EB-5 program to provide for some investors to use a stadium as an investment vehicle, and because of the size of the construction, it will likely create the requisite number of jobs to allow a foreign investor to obtain a permanent green card. It should also be noted that most foreign investors do not seek steep returns on their investments, making this even more of an attractive option.

Part of the reason that more developers do not use the EB-5 program is the lack of knowledge about it, as well as having to wait before the application is approved to use the funds. Therefore, developers may also need to spend significant sums of their own money while waiting for USCIS to approve those pending applications.[16] What is worse, however, is the negative stigma attached to the EB-5 program by lawmakers, who criticize it as "riddled with corruption and national security vulnerabilities."[17] Further, some programs have not developed as expected, "producing little or no economic benefit,"[18] some "foreign investors have accused developers of misspending their money and not paying promised returns,"[19] and a number of Regional Centers were terminated.[20] Add to these an ongoing Securities Exchange Commission (SEC) investigation that has touched upon a range of professionals,[21] and therein lies a program that has been under significant scrutiny over the last few years.

Conclusion

Despite all of its issues, developers should not be deterred from seeking foreign investor funds, because the EB-5 program is still viable and one of the areas that USCIS has undertaken to ensure that it continues in an optimal manner. The program is being cleaned up quite a bit, and although that means there will be an increased number of eyes on the transactions, it also means there will be more guidance about how to navigate the valuable, yet sometimes murky, area of EB-5 financing.

Endnotes

1. EB-5 Immigrant Investor Program, U.S. Citizenship & Immigration Service, *available at* https://www.uscis.gov/eb-5 (2016).
2. Ken Belson, "Price for a Green Card: $500,000 Stadium Stake," The New York Times (May 16, 2016), *available at* http://mobile.nytimes.com/2016/05/17/sports/soccer/orlando-soccer-stadium-foreign-investors-visas.html?referer=.
3. EB-5 Immigrant Investor Program, *supra* at 1.
4. Immigrant Investor Regional Centers, U.S. Citizenship & Immigration Service, *available at* https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/about-eb-5-visa (2016). "All EB-5 investors must invest in a **new commercial enterprise**, which is a commercial enterprise:
   - Established after Nov. 29, 1990, or
   - Established on or before Nov. 29, 1990, that is:
     1. Purchased and the existing business is restructured or reorganized in such a way that a new commercial enterprise results, or
     2. Expanded through the investment so that a 40-percent increase in the net worth or number of employees occurs

   Commercial enterprise means any for-profit activity formed for the ongoing conduct of lawful business including, but not limited to:
   - A sole proprietorship
   - Partnership (whether limited or general)
   - Holding company
   - Joint venture
   - Corporation
   - Business trust or other entity, which may be publicly or privately owned

   This definition includes a commercial enterprise consisting of a holding company and its wholly owned subsidiaries, provided that each such subsidiary is engaged in a for-profit activity formed for the ongoing conduct of a lawful business.

   Note: This definition does not include noncommercial activity such as owning and operating a personal residence."
5. EB-5 Frequently Asked Questions, Invest In the USA, *available at* https://iiusa.org/us/eb5-faq/. Worth noting here is that the size of the targeted employment area could be a few blocks, to an entire county, or more.
6. EB-5 Immigrant Investor Program, *supra* at 1.
7. Immigrant Investor Regional Centers, *supra* at 4.
8. The initial status afforded to an immigrant investor is that of "conditional permanent residence," meaning that he or she will have obtained a green card, but needs to demonstrate the actual creation of those 10 jobs.

9. Audrey Singer and Camille Galdes, "Improving the EB-5 Investor Visa Program: International Financing for U.S. Regional Economic Development," Brookings Institution and Rockefeller Foundation, at Figure 1, *available at* http://www.brookings.edu/~/media/research/files/reports/2014/02/05%20eb5/eb5_report.pdf.

10. *Id.* at Figure 2, *available at* http://www.brookings.edu/~/media/research/files/reports/2014/02/05%20eb5/eb5_report.pdf. Due to the sudden and sharp rise of applications in and around 1997, there were suspicions of fraud and the EB-5 program was suspended, leaving several hundred applications in limbo. When the EB-5 program reopened, the damage was done and the lasting effect was a drop in interest that would not show signs of recovering for years to follow.

11. EB-5 Blog, Lucid Professional Writing, *available at* https://blog.lucidtext.com/category/eb-5-statistics/ (2016). What is curious about this is that the second quarter of FY2016 (January–March 2016), saw the number of applications received fall to 849. This could have been caused by SEC investigations of attorneys, increased USCIS scrutiny of initial applications, concern over the future of the program due to the negative statements by Congress and consistent delay in renewing it, or a need to diversify the pool of countries from which investors hail (right now, mainland China makes up the bulk of the applicants).

12. Belson, *supra* at 2.

13. *Id.*

14. *Id.*

15. Belson, *supra* at 3.

16. *Id.*

17. *Id.*

18. Belson, *supra* at 6.

19. *Id.*

20. Regional Center Terminations, U.S. Citizenship & Immigration Service, *available at* https://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-fifth-preference-eb-5/eb-5-immigrant-investor-process/regional-center-terminations (2016).

21. SEC: Lawyers Offered EB-5 Investments as Unregistered Brokers, U.S. Securities and Exchange Commission, *available at* https://www.sec.gov/news/pressrelease/2015-274.html (2016).

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Resolution Alley
Making an Appearance: Being Present and Engaged at the Mediation Session

By Theodore K. Cheng

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

The mediation process involves a neutral, disinterested third party who facilitates discussion amongst the parties to assist them in arriving at a mutually consensual resolution. One key objective is to see if, with the mediator's assistance, communications between the parties can be improved and possible alternatives for a resolution can be explored. Yet that can only work if each party is committed to participating in the process in good faith, and, in particular, attending the mediation session in person.[1]

For example, in *Binoin v. O'Neal*,[2] the plaintiff allegedly suffered from a rare condition called ectodermal dysplasia, a group of inherited disorders that involve defects in the hair, nails, sweat glands, and teeth. He commenced an action against professional basketball player Shaquille O'Neal for apparently mocking and ridiculing him by publishing photos of the plaintiff on Instagram and Twitter, along with photos of himself (O'Neal) attempting to make a face similar to the plaintiff. Two months into the lawsuit, the court ordered the parties to mediate, directing that "Pursuant to Local Rule 16.2E, the appearance of counsel and each party or a representative of each party with full authority to enter into a full and complete compromise and settlement is mandatory."[3] However, apparently upon the advice of his attorneys, O'Neal chose not to personally and physically appear at the mediation session. Instead, he merely spoke with the mediator on two occasions via Skype and sent a representative to participate at the mediation session on this behalf.[4] Not surprisingly, the case did not settle, and the court later imposed monetary sanctions against O'Neal's attorneys for contravening both the mediation referral order and the local rule, further ordering the parties to mediate the case again.[5] Five days later, this time with O'Neal's personal participation, the case settled. [6] Although O'Neal avoided being personally sanctioned, the court treated him the same as any other party-litigant, irrespective of his fame and status in the professional sports arena.

Critical to the success of any mediation process is whether the necessary decision makers are in attendance at the mediation. First and foremost, the integrity of the process requires that there be proper authority represented at the mediation in order for the parties to enter into authentic representations of their bargaining positions and interests, as well as ultimately enter into a binding resolution. Aside from the issue of actual party authority, the entire dynamics of the mediation session can easily become skewed when either the wrong party (or party representative) attends or when no party (or party representative) attends. For example, sometimes companies will send a lower level in-house attorney to attend the session. This individual may have an arbitrarily low level of settlement authority, a limited understanding of the background facts, or a lack of appreciation of the company's true flexibilities when entering into acceptable resolutions. Such a situation is likely to result in the discussions and negotiations prematurely reaching an impasse at some point, and both the other party and the mediator recognizing that the company sent the wrong individual to the mediation session.[7]

A different kind of dynamic problem arises when principals of the same or similar perceived level do not attend. This can often be the case when the parties are of different sizes or resources, such as when the plaintiff is an individual or small business and the defendant is a large, multi-national corporation. That imbalance (real or perceived) can lead to offending one side or the other. Similarly, the failure to even appear at all, as in O'Neal's case, can communicate the entirely wrong (and, presumably, inadvertent) message to the other side about how seriously the absent party is taking the mediation. So much of a mediation session entails listening, hearing, and recognizing the verbal and non-verbal cues (the tone of voice, the words spoken, and the body language) between and amongst the parties, as well as with the mediator. Hence, someone who is not physically present is not able to build the kind of trust, credibility, and rapport—let alone assess the temperature in the room and engage in dialogue—that is essential to maintaining productive negotiations and generating creative solutions. The absent party who does not participate actively in the mediation process simply does not have the frame of reference or context for understanding the various offers and demands made at the session, thereby potentially undermining the hard work and progress made by those actually in the room.

For all of these reasons and more, all New York courts require the parties to personally participate in court-annexed mediations.[8] For example, the Southern District of New York's mediation program procedures succinctly state that "[e]ach party must attend mediation." Similarly, the rules and procedures of the New York County Commercial Division's ADR program sets forth that "[a]ttendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one." In explaining this personal attendance requirement, the Eastern District of New York offers this rationale: "This requirement reflects the Court's view that the principal values of mediation include affording litigants with an opportunity to articulate their positions and interests directly to the other parties and to a mediator and to hear, first hand, the other party's version of the matters in dispute. Mediation also enables parties to search directly with the other party for mutually agreeable solutions."[9]

At the same time, mediation participants should be mindful that there may be legitimate exceptions to personal and physical attendance at the mediation. Such exceptions could include situations where the higher level executives simply do not have the time or are so remotely connected to the events comprising the dispute that they cannot add any value at the mediation. Another instance might be when scheduling, travel, or financial constraints make in-person mediation impracticable, or where the true decision maker is a third-party (like an insurance carrier) whose physical attendance at the mediation is not absolutely critical, although being available at least by telephone would be an absolute requirement. Sometimes, the legal merits of the dispute are so one-sided that participation by one party (or even both parties) through teleconferencing or videoconferencing may be adequate. Today's advances in technology may also yield other acceptable substitutes.

All that said, more often than not, the actual personal and physical attendance by the parties (or their appropriate representatives) at the mediation session will be a critical factor in whether a resolution can be achieved. The focus of the pre-mediation preparation, then, should be on ascertaining whether the right individual (or individuals) will be present at the mediation, or at least assist in the pre-mediation work. These are the people who possess the requisite interest, knowledge, background, skills, temperament, and authority to enable the party-litigant to meaningfully participate in the mediation process. For example, in entertainment-related disputes, individuals who understand the business and industry customs and practices are often vital to exploring possibilities for a resolution, including licensing and other artist arrangements, that may be "outside the box." Additionally, and oftentimes, individuals specifically adept in the finance side of the business can provide the foundation necessary to arrive at a solution that will meet the economic needs and constraints of all the parties. On the legal front, both outside trial counsel and in-house intellectual property (or entertainment law) counsel can be particularly helpful. The former can reinforce the legal positions taken by the party, while also tacitly convey a willingness and ability to try the case if a resolution is not achieved; the latter can reiterate the concerns of the internal business unit, as well as help execute the company's overall approach to settling disputes. Moreover, the pre-mediation conference calls that most mediators hold are the perfect time to raise any of the foregoing issues and concerns—jointly or in individual caucus with the mediator— thereby enlisting the mediator's assistance in ensuring that the appropriate individuals are both assisting in the pre-mediation preparation and attending the mediation session itself, and that everyone understands and appreciates the reasons.

In the end, it is always a better course of action to have the parties personally and physically attend and participate in the mediation process. As O'Neal and his attorneys learned the hard way, there really is no substitute for being present and engaged at the session if the prospect of a resolution is something that is a real objective. Anything less than that ideal may mean that the process is being unnecessarily put at risk of failure.

Endnotes

1. *See generally* David C. Singer and Cecile Howard, "Outside Counsel: The Duty of Good Faith in Mediation Proceedings," N.Y.L.J. (Aug. 25, 2010) ("Good faith is integral to the process of mediation – it would be difficult if not impossible for mediation to succeed without it.").
2. Binion v. O'Neal, No. 15-cv-60869-JIC (S.D. Fla.).
3. *Id.*, 2016 U.S. Dist. LEXIS 18387, at *2 (S.D. Fla. Feb. 16, 2016) (quoting June 30, 2015 order referring case to mediation) (emphasis omitted).
4. *Id.*, Report of Mediator (S.D. Fla., Feb. 3, 2015).
5. *Id.*, 2016 U.S. Dist. LEXIS 18387, at *6.
6. *Id.*, Report of Mediator (S.D. Fla. Feb. 23, 2016). Other courts have also levied sanctions against parties for failing to appear in person at mediation sessions. *See, e.g.*, Negron v. Woodhull Hosp., 173 Fed. Appx. 77, 79 (2d Cir. 2006) (upholding sanctions where the party representative failed to attend a mediation as ordered because such conduct "impaired the usefulness of the mediation conference"); Seidel v. Bradberry, No. 3:94-CV-0147-G, 1998 U.S. Dist. LEXIS 10310, at *9 (N.D. Tex. July 8, 1998) (sanctioning the defendant for, among other things, failing to attend the mediation because his conduct was "evidence that [he was] intentionally thwarting the authority of the court and hampering the judicial process"); *cf.* Kerestan v. Merck & Co. Long Term Disability Plan, 05 Civ. 3469 (BSJ) (AJP), 2008 U.S. Dist. LEXIS 50166 (S.D.N.Y. July 2, 2008) (sanctioning the plaintiff for failing to appear in person at the settlement conference as ordered).
7. *See, e.g.*, Nick v. Morgan's Foods, Inc., 270 F.3d 590, 596 & n.4 (8th Cir. 2001) (affirming the district court's order denying a motion for reconsideration and imposing additional sanctions where the appellant's corporate representative at the ADR conference had settlement authority limited to $500 and any settlement offer over $500 could only be considered by another individual who was not present and only available by telephone, thereby hampering "the corporate representative's ability to meaningfully participate in

the ADR conference and to reconsider the company's position on settlement at that conference").

8. *See, e.g.*, E.D.N.Y. L.R. 83.8(c)(2) (rev. Sept. 28, 2015) ("[T]he Court may require, and if it does not, the mediator may require the attendance at the mediation session of a party or its representative in the case of a business or governmental entity or a minor, with authority to settle the matter and to bind the party."); N.D.N.Y. L.R. 83.11-5(b) (eff. Jan. 1, 2016) ("The attorneys who are expected to try the case for the parties shall appear and shall be accompanied by an individual with authority to settle the lawsuit. Those latter individuals shall be the parties (if the parties are natural persons) or representatives of parties that are not natural persons. These latter individuals may not be counsel (except in-house counsel)."); S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) (Dec. 9, 2013) ("Each party must attend mediation."); W.D.N.Y. ADR Plan §§ 5.8(A), (E) (rev. June 24, 2011) ("All named parties and their counsel are required to attend the mediation session(s) in person unless excused under 5.8(E) below," which requires a showing "that personal attendance would impose an extraordinary or otherwise unjustifiable hardship."); N.Y. Supr. Ct., N.Y. Co., Comm. Div. Rules and Procedures of the Alternative Dispute Resolution Program Rule 10(b) (eff. Feb. 10, 2016) ("Attendance of the parties is required at the first four hours of the mediation proceeding, whether at a single session or more than one. Unless exempted by the Neutral for good cause, every party must appear at each ADR session in person or, in the case of a corporation or other business entity, by an official (or more than one if necessary) who is both fully familiar with all pertinent facts and empowered on his or her own to settle the matter.").

9. E.D.N.Y. L.R. 83.8(c)(2). *Accord* S.D.N.Y. Procedures of the Mediation Program ¶ 6(a) ("This requirement is critical to the effectiveness of the mediation process as it enables parties to articulate their positions and interests, to hear firsthand the positions and interests of the other parties, and to participate in discussions with the mediator both in joint session and individually.").

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Krell's Korner

Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.

Milton Berle's Lifetime Contract

By David Krell

Thief of Bad Gags. Mr. Television. Uncle Miltie.When Milton Berle entered NBC's Studio 6B in 30 Rockefeller Center on September 21, 1948, he walked into history as television's first star.

After World War II ended in 1945, the television networks—ABC, CBS, NBC, and Dumont—stepped up their investment, focus, and risk on producing shows. There was not yet a television performer who was a household name before Milton Berle arrived with a dossier bursting from credits—films, vaudeville, nightclubs, and radio. A radio show called *Texaco Star Theatre* was the launching pad for the eponymous television show that starred Berle.

"Maybe nobody today remembers the *Texaco Star Theatre* on radio, but it was the best radio show I ever did," explained Berle in his 1974 autobiography *Milton Berle*, written with Haskel Frankel. "It went on Wednesday nights from 9 to 10 over the ABC network. The genius behind the show was its head writer, Nat Hiken, not to mention Aaron Rubin [sic] and two bright young brothers, Danny and Neil Simon. Working with me were seasoned pros like Pert Kelton, Arnold Stang, Charles Irving, Kay Armen, Frank Gallop, and Al Kelly, the master of doubletalk. It was a hell of a funny variety show. Its weekly highlight was 'The Berles at Home,' a family situation-comedy."[1]

Texaco's radio success led to an offer for Berle's talents to be showcased in television, a medium that had not yet reached the masses, because most people could not afford a television set. Berle acceded to doing test shows with two other stars; he decided to stick with his skills honed since he was a child performer. "So I suggested to the powers at Texaco a show in which I would serve as host, do some of my routines and introduce guest stars, who would do their specialties, and then I would mix it up with them for some comedy—in other words, what I had been doing for years in vaudeville and nightclubs,"[2] wrote Berle.

NBC's *Texaco Star Theatre* dominated television, to say the least. On Tuesday nights at 8:00 p.m., people gathered in their living rooms to see Berle's latest antics, highlighted by some outlandish costume, for example, dressing like a pilgrim for Thanksgiving. Berle's success helped to transition television sets from luxurious to affordable commodities. Volume of sales brought prices down, considerably.

Berle was hands-on during the rehearsal process for his comedy-variety show, a trait that could be injurious rather than valuable. "As much as I talked about wanting peace and hating the tensions that were always part of our rehearsals, that's how much I know now that I was one of the creators of the tensions and the fights,"[3] revealed Berle.

On May 3, 1951, Berle signed a "lifetime contract" binding him to NBC for 30 years at a salary of $200,000 per annum.[4] Television had fewer outlets for Berle by the end of the 1950s—his variety show changed sponsors to Buick in 1953, sitcoms offered increased competition for laughs, and the comedy-variety format suffered a decrease in appeal.

Exclusivity to NBC forced Berle to turn down offers even if the network did not have anything substantive for the comedian responsible, in no small way, for igniting the boom in television sales during the early 1950s. On May 21, 1965, Berle and NBC renegotiated the contract to be non-exclusive for $140,000 per annum.[5] It also allowed him to be the Special Guest Villain—Louie the Lilac—on an episode of the ABC television show *Batman*, among other performing opportunities.

When *Saturday Night Live* (*SNL*) icon John Belushi died on March 5, 1982, Milton Berle was a guest on that night's installment of ABC's *Nightline*, hosted by Ted Koppel, where he contrasted his outlandish persona with a thoughtful, analytical, and praiseworthy discussion of Belushi. "I had a feeling that he was a throwback to the comedy of two decades ago like Lucille Ball or Jackie Gleason or Red Skelton," said Berle. "Where he learned it, I suppose it was Second City. But he was so knowledgeable. And I became one of his biggest fans."[6]

In 1979, Berle had met Belushi while guest hosting on *SNL*. It was an epic performance that stands in the annals of NBC's Studio 8H as a low point in *SNL* history. Berle tore through the show's preparation like the flame from a blowtorch through tissue paper. It was not, in any way, a pleasant experience for the cast, crew, or Lorne Michaels—*SNL*'s creator and Executive Producer.

"I knew we were heading for disaster from minute one,"[7] stated Michaels.

Berle's *SNL* show began with Garrett Morris, John Belushi, Bill Murray, and Dan Aykroyd paying homage to the comedian by singing *The Texaco Song*, which opened *Texaco Star Theatre* with four men dressed as Texaco gas station attendants singing about how they service cars. Naturally, the *SNL* quartet of males followed suit. Morris, the show's sole black performer, however, sang lyrics serving as a comedic warning that he would steal the car—politically incorrect by 21st century standards against stereotypes.

Berle closed the show with a sentimental monologue sprinkled with jokes that had reached their prime a generation or two ago while Buddy Freed played the piano. A pre-planned response from Berle allies to stand and applaud triggered a standing ovation that swept through the studio. "Lorne, standing by his monitor, was so mortified during Berle's *September Song* that he started downing more than his usual glass or two of white wine," wrote Doug Hill and Jeff Weingrad in their 1986 book *Saturday Night: A Backstage History of "Saturday Night Live*." His face grew steadily grayer just the same. As Berle basked in his ovation, Lorne walked into the control room and muttered to director Dave Wilson, 'That was the worst show, ever.'"[8]

Hill and Weingrad noted Belushi's adoration of Berle, which the veteran comedian humbly noted in his *Nightline* interview. "Berle's chief defender during the week was John Belushi, no mean mugger himself. Belushi worshipped Berle and repeatedly berated the writers for letting his idol down. 'What a great man he is,' Belushi said, 'and you guys are writing shit for this great man!'"[9]

Throughout his career, Berle played himself in several comedy shows, including *Here's Lucy*, *The Lucy Show*, *The Joey Bishop Show*, *The Jack Benny Program*, *Make Room for Daddy*, and *The Critic*. Additionally, there was no shortage of comedies for Berle to make guest appearances as other characters, including *The Love Boat*, *Get Smart*, *I Dream of Jeannie*, and *The Fresh Prince of Bel-Air*.

Following the paradigm of comedians being terrific dramatic actors—Jackie Gleason in *The Hustler*, for example—Berle did a 180-degree turn in performances showing a darker side of comedy.

In an episode of *The Mod Squad*, Berle played Robert Harris, a/k/a Uncle Bobo, a children's television star with an audience of 20 million. Belying his zaniness on stage when he's dressed in his clown costume, Bobo listens to Chopin at home, drinks to excess, and loathes what he does for a living despite the material benefits.

After Bobo faints during a performance while popping a balloon, he claims "there was this burning, like a gas." Further concerns of a plot to harm or kill Bobo arise when a broken step on a ladder injures his sidekick, Paulie, during a show.

Bobo conceived the scheme to keep his ex-wife, Ellie, in Los Angeles rather than leave with her husband for a job in London; Ellie had custody of their son, Joey, who was about 10 years old. Knowing that Ellie would stay if he were in trouble, regardless of their previous marital conflicts caused by his belligerence, Bobo moved forward with his plan.

After confessing to the Mod Squad detectives, he repairs his relationship with Ellie and Joey through the courtesy of Ellie's husband, an off-screen character who turned down the London job for the reconciliation to occur. Berle's real-life son Billy played Joey.[10]

Berle also took dramatic turns as a comedian in *The Defenders*, *Fantasy Island* and *Burke's Law*—the 1990s successor to the eponymous 1960s show. Both versions of *Burke's Law* starred Gene Barry in the title role.

Where others saw television shows as disposable, Berle had foresight; in 2000, he sued NBC for more than $30 million, alleging that the network reneged on its deal concerning his shows' physical elements. "Before there was videotape or VCRs, Berle insisted that NBC preserve his shows through kinescopes, which involved recording the goings-on by focusing a motion picture on a studio monitor," recounted Ann O'Neill in the *Los Angeles Times*. "Berle and NBC signed a contract splitting ownership of the kinescopes. And, Berle charges, NBC was entrusted with storing, maintaining and protecting them."[11]

To capitalize on the content, Berle wanted to package the shows and sell them through infomercials. They were, apparently, missing—84 of the 180 *Texaco Star Theatre* shows, 32 of the 37 Buick shows, and Berle's 12 television specials. NBC countered that Berle did not have rights to the kinescopes.[12]

During the summer of 2000, NBC located most of the shows.

"Milton was given a firm budget to do what he wanted and he was paid a flat fee for his services. He lined up talent, wrote music, directed, produced, and performed," said Beverly Hills attorney Paul Sigelman, who represented Berle.

> The question was whether he owned the shows. What about NBC? What about Texaco? After the broadcasts on the East Coast, NBC sent the kinescopes by train to Los Angeles, where it broadcast the

shows a week later. They were shot on nitrate film, which can deteriorate, so NBC kept the films in oxygen-free storage to prevent that from happening.

Milton wanted to package the shows from home video, so he called up Grant Tinker, then the president of NBC. Milton claimed that he owned the films. He wanted to resolve the matter, so Grant responded, "It's simple. We each own an undivided half." Milton said, "Deal."

They drew up a small agreement and that's where it languished. Milton was concerned about his legacy, so he wanted to see the visual quality of the films. NBC said that it didn't have them. I brought the lawsuit and NBC found them within three weeks. I sent somebody to NBC with Milton. He said that the shows were awesome and in perfect shape. They looked just like when they were originally broadcast.

We struck a deal with NBC to renegotiate the contract. They weren't doing anything with the films. We also considered some tax implications for donating them to the Library of Congress.

The contract was never signed. Under the renegotiated contract, Milton's estate had the rights to use them after his death for a period of time. Today, the films are controlled by NBC.

We dropped the lawsuit. There was a settlement conference with a retired federal judge. When we walked into the room, Milton took off his ring and jokingly said, "You're not going to get that, too." We were ready for signing and it never happened.[13]

Separately, in 2012, Kling Corporation, the copyright owner of *The Texaco Song*, settled a lawsuit with CBS Studios and Paramount Home Entertainment concerning a licensing deal. Kling claimed that the agreement's term ended in March 2000, but the song appeared in broadcasts of a 1985 two-part *Family Ties* episode after that date. Additionally, Kling argued, the agreement did not address other media—home video, pay television, and the Internet. Ubu Productions, the show's producer, had been dismissed from the lawsuit in 2011.[14]

Today, *The Tonight Show Starring Jimmy Fallon* occupies Studio 6B—a National Broadcasting Company cornerstone laid by television's first star.

1. Milton Berle with Haskel Frankel, *Milton Berle: An Autobiography* 267 (1974).
2. *Id*. at 268.
3. *Id*. at 275.
4. *Id*. at 294-95.
5. *Id*. at 322.
6. *Nightline* (ABC television broadcast Mar. 5, 1982).
7. Tom Shales & James Andrew Miller, *Live From New York: An Uncensored History of "Saturday Night Live,"* 154 (2002).
8. Doug Hill and Jeff Weingrad, *Saturday Night: A Backstage History of "Saturday Night Live,"* 155 (1986).
9. *Id*. at 154.
10. *The Mod Squad: And a Little Child Shall Bleed* (ABC television broadcast Nov. 23, 1971).
11. Ann O'Neill, *Uncle Miltie Sues NBC for His Old Kinescopes*, Los Angeles Times, May 21, 2000.
12. *Id*.
13. Telephone interview with Paul Sigelman, Mar. 23, 2016.
14. Zach Winnick, *CBS, Paramount Settle "Family Ties" Copyright Feud*, Law360.com, Oct. 26, 2012.

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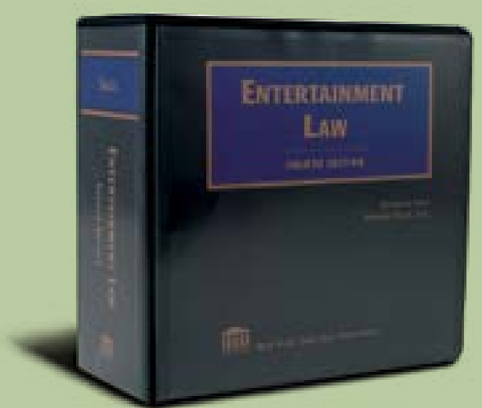

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