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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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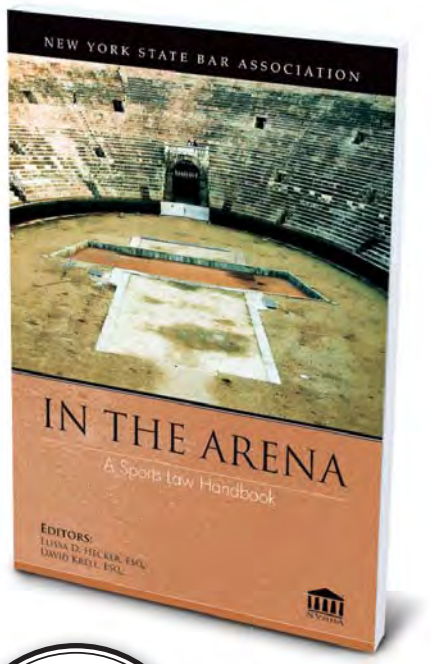
In The Arena:
A Sports Law Handbook

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

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



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Remarks from the Chair

As I write this in mid-October, I am hopeful that come publication time there will have been a solid resolution of our country's extraordinarily absurd social experiment, otherwise known as the 2016 Presidential election campaign. During a brief respite from the campaign, a number of EASL members enjoyed dinner and the comedy of Lewis Black on Broadway. Black summed up the current state of affairs by saying, "we are living in fictional times," and lamented that he has nothing left to do as a comedian, because "how do you satirize what is already satire?" Open to all members, those in attendance thoroughly enjoyed the company of colleagues and Black's much-needed humor. It was an outstanding evening.

Nonetheless, regardless of the political climate, our EASL members and Executive Committee remain committed to keeping current on the latest legal opinions, trends and general business and legal environment in the entertainment, arts and sports-related arenas.

Other diversions from the politically charged Fall season included:

- Two CLE panels at New York ComicCon, both led by Thomas Crowell, which focused on the comic book industry, basic legal issues, and the path from the comic book to the TV screen.
- A "brown bag" lunch program, which was coordinated by the Fine Arts Committee, and held at the offices of Herrick Feinstein LLP. Adrienne Fields, Director of Legal Affairs at the Artists Rights Society (ARS), led the discussion about the history of ARS and how works of art are used and/or licensed.
- Our Annual Music Business and Law Conference was held this year at New York Law School in November (both a new place and date for this program). We were pleased to have a complement of law and finance among the panels for this full-day seminar, which featured an interview with Richard Gotterher, CEO of The Orchard, as keynote speaker.
- Rounding out our Fall slate will be the Diversity Committee's presentation of a program about Virtual Reality.

During NYSBA's Annual Meeting week in January, EASL will offer the first of its kind Roundtable Discussion of In-House Television Counsel. Led by Eriq Gardner, Senior Editor of the *Hollywood Reporter*, some of the most illustrious in-house television counsel in the industry will discuss the issues they confront on a daily basis. Our second panel will provide a compelling analysis of the legal and public relations considerations of Celebrity Crisis Management, from a panel of experts led by Brian Caplan, EASL's Litigation Committee Co-Chair.

Annual Meeting week is always well-attended by our members, and we are looking forward to seeing members from our various committees once again meet with their committees' co-chairs and colleagues prior the CLE programs to network and brainstorm. This is the second year we are offering this opportunity, and expect it to be a great success. If you have not yet joined one or more EASL committees, please consider doing so.

Looking further into 2017, we will hold our next Pro Bono Clinic on March 5th, our sixth annual Theater CTI Seminar on March 29th-30th, as well as our annual Spring event, which is currently in its planning stages. There will also be many more CLE and networking events, in addition to our annual programs.

Stay tuned to your notices and community discussion group e-mails for updates.

Diane Krausz

Upcoming Entertainment, Arts and Sports Law Section Events and Co-Sponsored Events

Diversity Committee's Virtual and Augmented Reality Program
November 30, 2016 | Cardozo Law School | 6:00 p.m. – 9:00 p.m.

Annual Meeting Program
January 24, 2017
MCLE Program 1:00 p.m. -5:30 p.m.
• General Counsel Round-table moderated by Eriq Gardner, Senior Editor, THR Esq.
• Crisis Management for Entertainers: From Legal to Publicity Issues
Reception to Follow at Bill's Burger and Bar

Legal Aspects of Producing: An Inside Approach to Navigating the Theatrical World
March 29 - March 30, 2017 | 5:30PM – 9:15PM (each night) | Location TBD

Editor's Note

This issue is complete with practical articles and analyses of many EASL-related subjects, in addition to areas that are helpful to attorneys in all fields.

I look forward to hearing comments and to receiving submissions from you, and hope to see many of you at the Annual Meeting on January 24th in Manhattan.

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 ofthe Copyright Society of the U.S.A (CSUSA), former Co-Chair of CSUSA's National Chapter Coordinators, and Assistant Editor and member of the Board of Editors for the *Journal* of the CSUSA. Elissa is a repeat Super Lawyer, Top 25 Westchester Lawyers, 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, January 6, 2017

Entertainment, Arts and Sports Law Section Blog

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

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

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

Pro Bono Update

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

Speakers Bureau

There are two programs this season from the Pro Bono Steering Committee. On November 2nd, we presented art law basics to Chinese Curators, who were in the U.S. pursuant to a cultural exchange set up by NYFA. As we have done programs for the Chinese arts delegation in the past, NYFA again asked EASL to present basics of copyright law, fair use, and artist-gallery relations at NYFA to the Chinese curators, who spent about a month in the U.S. becoming familiar with our cultural institutions. Carol Steinberg moderated and spoke about copyright law, Irina Tarsis about fair use, and Amelia Brankov about artist-gallery relations.

The next program is on Estate Issues for Artists; it will be held at NYFA's offices in Dumbo on January 11th, from 6:30 to 8:00 p.m. NYFA will reach out to its constituents to find out their questions in advance. The panel will address various issues specific to artists in setting up wills and estates. EASL's Fine Arts and International Law Committees are collaborating with the Pro Bono Committee on this program. Carol Steinberg and Judith Prowda will co-moderate the panel, and Elisabeth Conroy will be one of the panelists discussing wills basics.

Clinics

The next Pro Bono Clinic will be held on Sunday March 5th, in conjunction with the IP Section, at Dance/NYC's Annual Symposium, held at the Gibney Dance Center near City Hall. Information will be forthcoming to all EASL and IP Section members.

Litigations

Pro bono litigation efforts have included two inquiries regarding copyright infringement and breach of contract related to documentary film making and distribution. One inquiry was referred to attorneys in California, and another was shared with the NYSBA/EASL community via EASL online resources.

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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 LinkedIn (www.linkedin.com).

The EASL LIT Job Bank on LinkedIn 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 LinkedIn. 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
Danielle Siegel, of the Benjamin N. Cardozo School of Law, for her article entitled
"Lights, Cameras, and FCPA Actions: The Problem of Foreign Corrupt Practices by Hollywood"

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, January 6, 2017.**
- **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.

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

By Pamela Jones and Barry Skidelsky, Television and Radio Committee Co-Chairs

EASL's Television and Radio Committee reports that Eriq Gardner, senior editor for the *Hollywood Reporter,* will moderate a panel discussion among several prominent cable TV network general counsel on January 24, 2017. Save the date!

This prestigious TV GC Roundtable will take place at the New York Hilton/Midtown Manhattan (1335 Avenue of the Americas, between 53rd and 54th Streets) as part of NYSBA's week-long Annual Meeting. CLE credit will be provided. A networking reception will follow off-site.

As this is the first edition of what is expected to become an annual luncheon/networking event organized by EASL's Television and Radio Committee, we are also planning now for next year with leading general counsel from traditional and online broadcasting.

Please contact Pam (pamela@pamelajonesesq.com) or Barry (bskidelsky@mindspring.com) for more information and/or future speaker opportunities, and help spread the growing buzz!

From the NYSBA Book Store >

Counseling Content Providers in the Digital Age

A Handbook for Lawyers

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

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

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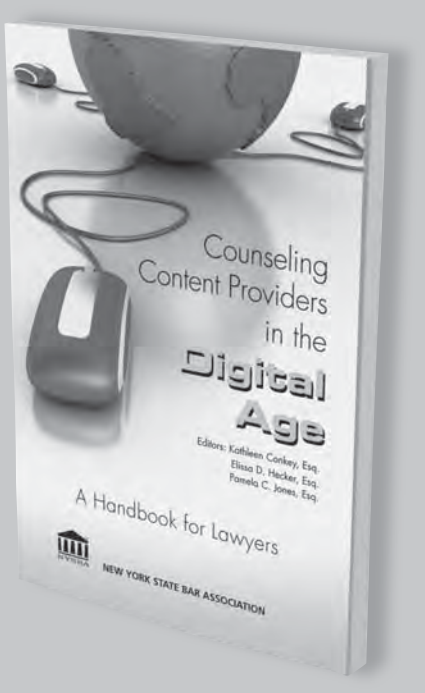

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Resolution Alley
Appellate Mediation: A Dispute Resolution Process Worth Considering

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 objective of a mediation is to engage a neutral, disinterested third-party's assistance in facilitating a discussion amongst the parties to assist them in arriving at a mutually consensual resolution. Many mediators and advocates have long advised that, in order to maximize savings in both time and cost, an early mediation is worth attempting.[1] Yet if the participants to a dispute ever come to the realization that they share the objective of informally resolving a dispute, there is hardly a wrong or bad time to try mediation as a dispute resolution mechanism. It can even be employed after a judgment has already been entered in the trial court in favor of one party.

Take, for example, the "Blurred Lines" case. In March 2015, after a two-week trial, an eight-person Los Angeles jury unanimously concluded that Pharrell Williams and Robin Thicke infringed upon Marvin Gaye's 1977 hit song "Got to Give It Up" when they penned their 2013 hit "Blurred Lines." The jury found that both men borrowed heavily from Gaye's song, and rejected their denials of copying and their contention that, while they had been influenced by the song, they had merely been inspired by a genre, a groove, or a feeling. The jury's damages award of nearly $7.4 million (which the court later reduced to $5.3 million in response to a post-trial motion) is one of the largest in music copyright history. Claiming that the verdict set "a horrible precedent for music and creativity" and stifles artists and musicians who are trying to recreate an era or genre of music,[2] Williams and Thicke filed an appeal in the Ninth Circuit Court of Appeals.

"An appellate court could also modify the judgment below in whole or in part based upon the issues raised in the appeal."

By this time, a trier of fact and a court have already designated the Gaye heirs as the "winners" and Williams and Thicke as the "losers" of this copyright infringement dispute. Moreover, generally, pursuing an appeal is much less costly than litigating a case through the trial process. So why would the parties even consider mediating now?

First, much can happen in an appeal. For example, prevailing on an appeal often means a remand back to the trial court where the parties will likely encounter additional motion practice, followed by another jury trial and/or post-trial motion practice, followed by perhaps yet another appeal. An appellate court could also modify the judgment below in whole or in part based upon the issues raised in the appeal. Only a pure affirmance upholds in full the Gaye heirs' multi-million dollar award, and then there may be some delay associated with ultimately collecting the monetary award, even if the appeal has been bonded. That is, the odds are that the parties will be afforded the opportunity to spend even more money and commit more time, perhaps to additional litigation, before achieving a final resolution. Thus, an appeal may not be the end of a dispute, but, rather, a new beginning.

"Resolving the appeal quickly and with certainty, facilitated by a properly trained mediator, may remove this risk for the parties."

Second, while the outcome of an appeal remains pending, it creates uncertainty for all of the parties as to whether the judgment will be upheld. Relinquishing the dispute to a third-party to resolve—in this case, a panel of judges who will opine about the state of music copyright law and the evidence adduced at the trial—often leads to unpredictable results. That uncertainty can be a key driver in encouraging the use of mediation at the appellate level.[3] Notwithstanding the finality of a jury verdict like the one obtained by the Gaye heirs, each party has a significant risk that it will be unsuccessful on appeal. This uncertainty militates in favor of trying a process that eliminates that uncertainty and puts control of the outcome in the parties' hands. Moreover, the unpredictability of results on appeal, and with litigation in general, creates additional uncertainty. For example, the pending appeal will undoubtedly serve as an impediment to continued exploitation of the "Blurred Lines" sound recording. Resolving the appeal quickly and with certainty, facilitated by a properly trained mediator, may remove this risk for the parties. In a mediation, the parties are in control and have the opportunity to develop a solution that may be a much better outcome than what the courts can and will provide.

Third, engaging in the appellate process usually involves a lengthy time commitment. In appellate practice, the parties have to account for the varying pace and workload of different authoring judges, as well as time for

concurrences, dissents, rehearing briefing and consideration, remand, and the possibility of an *en banc* rehearing. Thereafter, there is the possibility of one or more parties desiring to file a petition for a writ of *certiorari* in the U.S. Supreme Court. Even though the likelihood of any particular petition being granted is slim, the associated delay before the mandate is returned to the appellate court, and ultimately to the trial court, can be extensive. By contrast, a mediation process is comparatively much faster. After an initial pre-mediation call to discuss preliminary matters such as the content of any pre-mediation submissions and a mediation engagement agreement, the actual session itself can be scheduled. Some mediations can be completed in one session, ending with the parties entering into a binding term sheet with the help of the mediator; others may require additional meetings and/or communications over the phone, sometimes stretching out over several months, before either a resolution is reached or an impasse is declared. Mediation is a process, not an event, and it can take time for that process to bear fruit. That time, however, is largely in the control of the parties, unlike the time they spend pursuing the appeal, and is more than likely shorter than the time needed for an appeal to be completed.

Fourth, mediation at the appellate level may come at an opportune time. By a trial's conclusion, all of the parties have likely had a number of wins and losses before the trial court. For example, even though he successfully obtained a favorable verdict, the attorney for the Gaye heirs also publicly complained that the trial court prohibited him from playing the actual sound recording of "Got to Give It Up," while the jury was permitted to hear "Blurred Lines."[4] In such a case, the parties may welcome pursuing mediation on appeal, as they have little to lose in trying. As compared to briefing and arguing the appeal, the cost to mediate is also quite affordable. Although the parties will still incur certain costs associated with preparing for and participating in the mediation session, the possibility of achieving a resolution between them makes investing in this process worthwhile. Moreover, because the parties voluntarily undertake to enter into the process, no party can be compelled to reach a resolution that is not in its interest, unlike an appellate court's decision, which may be unfavorable to one or all of the parties.

"If a resolution is achieved, mediation offers peace and a return to a life without litigation and its attendant costs and distractions."

Fifth, simply engaging in a mediation process can be beneficial for the parties. Although they may have good reasons for pursuing an appeal and have optimistic views on ultimately prevailing, the parties in an appeal have also likely spent money, time, and other resources to get to this point. They have understandably become entrenched in their positions, particularly if one party has emerged as the "winner" following a trial (like the Gaye heirs here) or obtained a summary judgment determination in its favor. By its very nature, litigation is about taking (adverse) positions, and an appeal, by its nature, is a process in which a panel of judges will vindicate one or more of those positions through an adjudicatory process. A mediation, by contrast, eschews any validation of those prior positions, but, rather, attempts to facilitate a resolution of the parties' own making in a manner that makes business and emotional sense for them. As part of that process, mediators typically challenge the assumptions that the parties and their counsel may have made and, if asked, may provide evaluative feedback about the strengths and weaknesses of the case. If a resolution is achieved, mediation offers peace and a return to a life without litigation and its attendant costs and distractions. If not, at the very least, the counsel may leave the mediation session able to write a better, more focused brief or give a sharper appellate argument.

"These protections hopefully allow for frank, open, and candid discussions where the parties may speak freely with at least the mediator, if not with each other, always with an eye towards achieving a resolution."

Sixth, unlike litigation and, in particular, a jury trial, mediation is a confidential process designed to protect the party's motivations, fears, personal embarrassment, and other concerns from the public at large, the court system, and, to some extent, from the other involved parties. For example, under examination at trial, Thicke testified that he was high on vodka and Vicodin during interviews with the press when he and Williams stated that they were inspired by Marvin Gaye and wanted to channel "Got to Give It Up" in "Blurred Lines."[5] A mediation of the pending appeal would ensure that other, similar confessions would be spared public disclosure. The confidentiality afforded by the mediation process typically manifests itself in three ways: (1) the court, aside from any administration of the mediation, will not know anything about the substance of the mediation and may not even know the identity of the mediator; (2) nothing that takes place in the context of the mediation, including anything that is said, can be used prospectively outside the mediation itself; and (3) mediators will maintain the confidentiality of the proceedings, including any confidences shared by the parties, and, in most jurisdictions, cannot be compelled to testify as to what transpired during the mediation process. These protections hopefully allow for frank, open, and candid discussions where the parties may speak freely with at least the mediator, if not with each other, always with an eye towards achieving a resolution. There are no written transcripts or opinions,

and the terms and conditions of any resolution may also be cloaked in confidentiality, subject to any reporting or other legal requirements.

"Additionally, when the parties agree upon a resolution that best meets their interests, they are more likely to honor their agreement."

Finally, sometimes, even in the case of commercial disputes, money alone is not the best or only resolution of an appeal. Perhaps the products or services at issue are no longer of principal importance to the business. Maybe the company is looking for a graceful way to exit a long-running dispute that has been a drain on both time and resources. The Gaye heirs possibly value recognition and acknowledgment of Marvin Gaye's contribution to American music as much as they care about maximizing their monetary damages award. A mediated resolution could result in a creative and/or innovative solution that may be a "win-win" outcome or result in face-saving solutions for all concerned. In part, this is accomplished by spending time during the mediation exploring options for mutual gain and shared interests. The parties themselves may uncover and create these options, with or without the assistance of experienced and prepared mediators and advocates. Additionally, when the parties agree upon a resolution that best meets their interests, they are more likely to honor their agreement.

The reasons discussed above, among others, suggest that a mediation at the appellate level is worth considering. While the parties may be more entrenched from a positional bargaining perspective because some decision maker has already made a determination on the merits of the dispute, the uncertainties and risks involved on appeal are concomitantly more refined and better defined for the parties.

"The gist of their concern appears to be the view that this case may have arguably created a new legal precedent for music copyright infringement based upon having copied a feel or groove."

All that said, despite every good reason to believe that appellate mediation may be a worthwhile alternative for the parties in the "Blurred Lines" case, that dispute may present some unique issues of music copyright law that will drive the parties to continue pursuing the appeal. For example, in late August 2016, a group of over 200 composers, artists, and other musical groups filed an amicus brief in the Ninth Circuit, expressing concern that the proceedings in the trial court could have an "adverse impact on their own creativity, on the creativity of future artists, and on the music industry in general."[6] The gist of their concern appears to be the view that this case may have arguably created a new legal precedent for music copyright infringement based upon having copied a feel or groove.[7] However, unless one or all of the parties absolutely believes it is necessary to have an appellate court resolve the case in order to establish a precedent in the music industry, the appeal nonetheless presents an opportune moment in time to see if a mediation might lead to a mutually acceptable resolution. We will have to wait and see what happens next.

Endnotes

1. In such cases, participants (or, more likely, their counsel) often express that they know too little information about the other party's case for the mediation session to result in a resolution. That impediment can be overcome by enlisting the mediator's assistance to carefully craft a limited exchange of information and documents within the confines of the mediation process, thereby providing some disclosure of the strengths and weaknesses of each participant's case. Thereafter, the mediation session will likely be more meaningful and productive, perhaps even resulting in a satisfactory outcome.
2. Ann Oldenburg, '*Blurred Lines' Jury Finds for Marvin Gaye*, USA Today (Mar. 11, 2015) (quoting statement from Pharrell Williams and argument by his counsel), *available at* http://www.usatoday.com/story/life/music/2015/03/10/blurred-lines-trial-verdict/24492431/.
3. For a discussion on how uncertainty in the application of the copyright fair use doctrine can potentially be solved using mediation and early neutral evaluation, *see* Theodore K. Cheng, *Solving Fair Use Disputes Through Mediation and Early Neutral Evaluation*, NYSBA Entertainment, Arts and Sports Journal, Vol., 27, No. 1 (Spring 2016), at 76.
4. Pamela Chelin, '*Blurred Lines' Verdict: Robin Thicke, Pharrell Williams to Pay $7.4 Million in Copyright Case*, The Wrap (Mar. 10, 2015), *available at* http://www.thewrap.com/blurred-lines-verdict-robin-thicke-pharrell-williams-lose-copyright-case-to-marvin-gayes-family/.
5. *Id.*
6. Associated Press and Paul Schrodt, *Why Hundreds of Musicians Are Supporting Pharrell and Robin Thicke in 'Blurred Lines' Appeal*, Business Insider (Sept. 1, 2016) (quoting from amicus brief), *available at* http://www.businessinsider.com/ap-more-than-200-musicians-support-blurred-lines-appeal-2016-8.
7. *Id.; but see, e.g.*, Eriq Gardner, *Why the 'Blurred Lines' Verdict Is an Uphill Battle for Copycats*, Billboard (Mar. 13, 2015) (characterizing the jury's verdict as "hollow" and arguing that "[t]here's not much legal precedent from the jury's decision, and every reason to believe it will be a rare one"), *available at* http://www.billboard.com/articles/business/6502022/why-blurred-lines-verdict-uphill-battle-copycats.

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Hollywood Docket
Social Media, the Law, and You

By Neville L. Johnson and Douglas L. Johnson

Here in the digital age, the cyber-social scene is ripe with legal issues that have important implications for the unwary online traveler. Those of us who mingle in the digital scene are in extraordinarily vast company. Facebook boasts over 1.7 billion monthly users; Twitter, 313 million; LinkedIn, 100 million. Over 100 million use Snapchat on a daily basis, consisting of 30% of U.S. "millennials," sharing 9,000 snaps per second. Yet we do more than just socialize in the digital world: 81% of consumers search for online reviews before making a purchase, and 88% of consumers find online reviews to be helpful. What's more, over 80% of millennials are more inclined to hire lawyers who have online reviews, and more broadly, 59% of millennials use online reviews before hiring any professional. On top of this, our communications and "posts" on the Internet are unregulated and largely permanent. The result is a barrage of legal issues that practicing lawyers must be aware of before taking aspects of their practice into cyber-reality.

"The takeaway: though social media posting is easy and seems insignificant, rules of professional conduct with respect to solicitation apply just as forcefully."

Juror "Stalking"

Social media is an effective way to learn detailed personal information about total strangers. It is clear that "friend requesting" judges and represented parties during litigation is improper. As for jurors, however, many courts are not only aware of social media as a potential juror-research tool, but some have gone so far as to condone Internet investigations of jurors.[1] Yet it is certainly not a free-for-all, as New York and California alike restrict attorney research of jurors and potential jurors. A 2012 New York City Bar Association opinion[2] differentiated between passive and active review of jurors' social media posts, finding that certain methods of obtaining information, such as sending a direct "friend" or "follow" request, could be impermissible communications with jurors as prohibited by Rule 3.5 (prohibiting communications between attorneys and potential jurors during trial). Even *viewing* a juror's "profile" page where the social media site informs the profile owner of the viewing could amount to a prohibited communication. It is the attorney's responsibility, the opinion warned, to be up to date on the various and often complicated privacy settings of the social media research tools he or she is using to gain information about jurors.

Similarly, California Rule 5-320(E) restricts attorneys' juror investigations to methods that will not influence the juror's service, indicating that the California Bar may also restrict research which reveals to the juror that he or she is being investigated. Yet one California court went even further, requiring that the jurors be instructed on the extent of investigations that the parties and attorneys would conduct on them throughout trial. (Ultimately, the parties took the court's suggestion that they agree to a complete ban on juror investigation.)[3]

That being said, we recommend investigation of potential jurors prior to their selection and submit that it is the norm.

Social Media Solicitation

What else is social media for but to share our accomplishments, travels, meals, and career achievements with our virtual social circles? As satisfying as it may be to inform our social media "friends" about our latest favorable verdicts, settlement agreements, or scintillating academic pieces, attorneys need to be wary that their cyber self-promotion may constitute unlawful solicitation, prohibited under California and New York professional conduct rules. New York Rule of Professional conduct § 7.3 prohibits solicitation initiated by a lawyer that is directed at "a specific recipient or group of recipients," and California Rule of Professional Conduct § 1-400 similarly prohibits communications advertising the lawyer's availability for employment "regardless of medium" and "directed to the general public or any substantial portion thereof." Thus, an attorney's Facebook post announcing: "Won a million dollar verdict—Tell your friends and check out my website", could arguably be deemed an unlawful solicitation under either rule, while one simply stating "Case finally over—Unanimous verdict! Celebrating tonight!" will most likely be permissible.

The takeaway: though social media posting is easy and seems insignificant, rules of professional conduct with respect to solicitation apply just as forcefully.

Client Social Media Clean-Up

Social media accounts are a significant source of evidence at trial due to the magnitude of interactions that occur in the cyber-social scene on a daily basis. Indeed, one's Twitter posting history may provide circumstantial evidence of a crime, constitute an admission or a strong indication of liability, and provide detailed information as to a person's character, hobbies, and everyday whereabouts. Multiple jurisdictions have recognized the importance of social media content in litigation, and removing

certain posts, photos, or tags has been found to be generally permissible as long as such removal does not constitute spoliation of evidence.[4] In any event, a represented party should switch to a "private" setting, which hides all personal information, photos, posts, and tags from any non-"friend" of the user.

A Virginia State Bar decision is illustrative. In 2013, the Virginia State Bar issued a five-year suspension to

Matthew Murray, a lawyer who instructed his client to delete certain photos from his Facebook account, and later, his entire Facebook account, after receiving a Request for Documents from opposing counsel that asked for screenshots of the client's profile page, photos, and his message board.[5]

On a related matter, although some courts have begun to take judicial notice of the information on private websites, many remain reluctant to do so for screenshots of private websites that have changed since the screenshot was taken.[6]

Addressing "Unfair" Online Reviews

Not everyone likes his or her lawyer. Disgruntled clients unhappy with the results obtained by their lawyers despite hefty legal bills now have somewhere to turn to express their resentment of their attorneys, the legal system, and society in general. This presents a tricky situation for lawyers who wish to respond to their former clients' criticism, since we are bound by the rules of professional conduct preventing us from revealing any confidential information. The Los Angeles County Bar Association, applying a straightforward analysis of the rules of professional conduct, has stated that an attorney may respond to a former client's Internet posting if the attorney adheres to each of the following: (1) the response does not disclose confidential information; (2) the response does not injure the former client in a manner involving the former representation; and (3) the attorney's response is proportionate and restrained. Similarly, a 2014 New York State Bar Association Ethics Opinion[7] held that the "self-defense" exception to the attorney duty of confidentiality only applies to *official* accusations of wrongful conduct where an attorney may reasonably be subject to punishment by the State Bar. Where an "accusation" of incompetence is purely informal, posted on an Internet review site, the attorney must adhere to the traditional duty of confidentiality and all other professional rules of conduct.

Perhaps the New York Committee on Professional Ethics put it best:

> Unflattering but less formal comments on the skills of lawyers, whether in hallway chatter, a newspaper account, or a website, are an inevitable incident of the practice of a public profession, and may even contribute to the body of knowledge available about lawyers for prospective clients seeking legal advice.

Nonetheless, it may be necessary to respond to a negative post, on Yelp, for example. If so, it is important to be aware of and not cross the ethical boundaries.

"The provision passed into law without opposition in 1996 under the guise presented by powerful lobbyists that it would encourage self-regulation by these sites."

Internet Defamation and § 230 of the Communications Decency Act

Section 230 of the Communications Decency Act forecloses liability for "providers or users of an interactive computer service," such as review sites, for any defaming speech posted on their websites by third parties. The provision passed into law without opposition in 1996 under the guise presented by powerful lobbyists that it would encourage self-regulation by these sites. Of course, self-regulation never occurred. Courts have used § 230 to essentially erect an impenetrable shield around sites where users post reviews and defaming comments. A few examples are illustrative:

- *Reit v. Yelp* (2010): a New York court allowed Yelp! to selectively remove positive reviews about the plaintiff's dental practice, holding that § 230 protected Yelp's editorial powers;[8]
- *Asia Economic Institute v. Xcentric Ventures* (2011): a California court held that a website could not be held responsible for third-party consumer reports, even where the website mechanically altered them so that they would be more visible to Internet traffic;[9] and,
- *Jones v. Dirty World Entertainment Recordings* (2014): a 6th Circuit court refused to hold a website liable whose owners had contributed their own defaming comments directed at the plaintiff, on the grounds that the website had been exercising its "editorial powers" permitted under § 230.[10]

Moreover, even as plaintiffs attempt to pursue alternative remedies, such as injunctions and alternative tort claims (besides defamation) like negligence, interference with business expectancy, and contractual liability, courts rule that § 230 protects host sites from these claims. There are *very* few cases where courts have allowed plaintiffs to get around § 230 to hold the host sites liable.[11] Indeed, one court held that a particularly aggressive host site, "The Ripoff Report," was not required to abide by a takedown injunction that the plaintiff obtained against it,

because under § 230, Ripoff was not a party to the lawsuit and did not act in active concert with the poster accused of defamation.[12]

"Since Internet defamation is similarly widespread and arguably more harmful to its victims, there is a strong case for updating § 230 to reflect the DMCA structure."

However, the California Supreme Court is currently reviewing Yelp's appeal of a lower court order requiring the review site to take down a defamatory post by the former disgruntled client of an attorney.[13] The appellate court acknowledged that Yelp was not liable for defamation, but found as the administrator of the forum, it bears the responsibility of removal. Yelp, supported by briefs submitted by dozens of other review sites and news organizations, claims that § 230 shields it from having to take down the defamatory post. In light of California's recently enacted Court Rule 8.1105, however, the appellate court ruling is published and is now citable subject to a "prominent notation" that the Supreme Court has granted review.[14]

Aside from § 230 preventing defamation victims from obtaining recourse against host sites, these victims also face the legal hurdle that the "posters," the ones who *are* actually subject to liability for defamation, can remain anonymous and unreachable. Indeed, courts often deny requests to subpoena an anonymous poster's identity from a host site. Some courts have required that the plaintiff proves the cause of action before the host site would be required to turn over evidence pointing to the poster's identity.[15]

In our dealings with Google, Twitter and Facebook, they have been willing to communicate only by email, and we have been able to get them to take down defamatory posts when there is a judgment finding defamation. However, this is not part of their public policy. Thus, the best remedy for a defamation often is to sue the poster of the defamation, obtain a judgment, and then try and convince the Internet Service Provider to take it down.[16]

A Solution Found in Copyright Law

One potential solution to the lopsided aftermath of § 230 is to conform it to the structure of the Digital Millennium Copyright Act (DMCA), which dealt with the issue of widespread copyright infringement across the web. The DMCA developed a system of notice and takedown procedures to help minimize pervasive infringement, requiring host sites to respond to takedown notices and actually enforce them under the right circumstances. Since Internet defamation is similarly widespread and arguably more harmful to its victims, there is a strong case for updating § 230 to reflect the DMCA structure. At least victims could avoid some of the crippling harms stemming from unchecked defaming Internet posts that are otherwise mostly permanent.

Endnotes

1. *Johnson v. McCullough*, 306 S.W.3d 551 (Mo. 2010); *Carino v. Muenzen*, A-5491-08T1 (N.J. Sup. Ct. App. Div. Aug. 30, 2010).
2. NYCBA Formal Opinion 2012-2 (May 30, 2012).
3. *Oracle America, Inc. v. Google Inc.*, 10-03561 (N.D. Cal. Mar. 25, 2016).
4. Professional Ethics of the Florida Bar Opinion 14-1 (June 25, 2015).
5. *In the Matter of Matthew B. Murray* (July 9, 2013) VSB Nos. 11-070-088405, 11-070-088422, Disciplinary Board of the Virginia State Bar.
6. The following courts have taken judicial notice of private websites: *Doron Precision Systems, Inc. v. FAAC, Inc.*, 423 F. Supp. 2d 173, 178-79 (S.D.N.Y. 2006); *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d 1082, 1084 (C.D. Cal. 2001); *Pollstar v. Gigmania*, 170 F. Supp. 2d 974, 978 (E.D. Cal. 2000) (judicial notice taken of a screenshot of a webpage on a certain day). The following have refused to do so: *Mullinax v. United Marketing Group, LLC*, 2011 WL 4085933; *In re Easysaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1168 (S.D. Cal. 2010); *Ferrington v. McAfee, Inc.*, 2010 WL 3910169.
7. New York State Bar Association Committee on Professional Ethics Opinion 1032 (October 30, 2014).
8. *Reit v. Yelp*, 907 N.Y.S.2d 411 (2010).
9. *Asia Economic Institute v. Xcentric Ventures, LLC* , WL 2469822 (C.D. Cal. 2011).
10. *Jones v. Dirty World Entertainment Recordings LLC*, 755 F.3d 398 (6th Cir. 2014).
11. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008) (finding the host site, Roommates.com, liable for facilitating unlawful user content where the site solicited its users preferences on gender, race, and sexual orientation, and then provided options based on such choices and concealed listings that did not conform); *Doe v. Internet Brands, Inc.*, 824 F.3d 846 (9th Cir. 2016) (holding that § 230 did not bar the plaintiff's claim that the host site (Model Mayhem) was liable for failure to warn where two purported "employers" used the site to lure unsuspecting models to their homes and drug and rape them).
12. *Blockowicz v. Williams*, 630 F.3d 563 (7th Cir. 2010).
13. *Hassel v. Bird*, 247 Cal.App.4th 1336 (2016).
14. California Rules of Court § 8.1105.
15. *Dendrite International, Inc. v. Doe No. 3* (2001) 342 N.J.Super. 134 (requiring, among four other elements, that the plaintiff provide "sufficient evidence for each element of its claim" before granting the plaintiff's motion to compel); *Doe v. Cahill* (2005) 884 A.2d 451 (denying the plaintiff's request that the host site comply with a subpoena requesting information about the poster's identity because the plaintiff had not shown that the defamatory comments were capable of a defamatory meaning).
16. Consider also making a demand in countries outside the United States, as § 230 has no extrajudicial effect.

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Sports and Entertainment Immigration: Trump, Models, Money, and Visas; What Could Go Wrong?

By Michael Cataliotti

Previously, we discussed the merits of the H-1B classification for fashion models without belaboring the issue very much. However, then came along Donald and Melania Trump. The former, with his affinity for models and all things beautiful and "gorge," and the latter, having been a model who worked within the U.S., but may or may not have obtained an H-1B3 visa to do so.

Taking up a case study, let us dive into the dealings of a businessman and H-1B classification to see why the H-1B is not ideal for models or the entities that represent them, despite having a special carve-out for fashion models (H-1B3). This article will close with some thoughts for the practitioner curious about which visa options may be best for the model seeking to enter the U.S. temporarily to work.

Background

Trump Model Management, LLC (Trump Model Management, TMM or the Entity) is a corporate entity that currently operates as Trump Models,[1] and describes itself as:

> …the brainstorm and vision of owner, Donald Trump. As one of the leading agencies in New York, Trump Models has been at the forefront of cultivating a wide range of innovative and vibrant talent which personify the trends of the fashion industry. Trump Models has achieved status recognition with the top magazines, designers, photographers and clients from around the world.[2]

Since at least 2011, as indicated by the Memorandum and Order of the Court for the Southern District of New York, TMM has been representing models from around the world.[3] A review of the TMM website lists a number of female models[4] who it represents, with nationalities from the U.S., Canada, France, and Kazakhstan, to New Zealand and Argentina.[5]

In 2011, Trump Model Management "submitted to the U.S. Department of Homeland Security a [petition] requesting an H-1B visa" for Alexia Palmer, seeking to retain her services in the U.S.[6] Part of the request included a labor condition application or an "LCA,"[7] which is a request by a prospective employer for U.S. Department of Labor (DOL) certification that the prospective employer will pay the prospective hire at or above the "prevailing wage"[8] rate for the position sought.[9] In this case, the prevailing wage was deemed to be $45,490, and the application indicated that TMM would pay Ms. Palmer $75,000 per year.[10]

The petition was approved and Ms. Palmer entered the U.S. under H-1B3 status. She asserted that for three years she "worked on 21 different projects arranged by Trump"[11] and that "[a]fter the deduction of all agency fees, expenses, and allowance[s]," that she "was paid $3,880.75 for her work from 2011 to 2013."[12] This would mean that Ms. Palmer was not paid at the prevailing wage rate and could cause TMM to have a problem with both the United States Citizenship and Immigration Services (USCIS) and the DOL.

In 2014, Ms. Palmer filed the "class action complaint […] seeking relief under the Fair Labor Standards Act (FLSA), the INA,[13] the Racketeer Influenced and Corrupt Organizations Act (RICO), and state law."[14]

The District Court Rejects the Claims for Relief

The FLSA Claim

The court evaluated Ms. Palmer's claim that TMM violated the FLSA by failing to pay her the minimum wage, as it requires. Ms. Palmer's claim failed because, "[t]he FLSA provides that every employer must pay each employee a minimum of $7.25 an hour,"[15] yet here, Ms. Palmer "allege[d] only that [TMM] paid her $3,880.75 for work she performed over a period of three years[, …] does not specify the number of hours worked[, …] and does not dispute [TMM's] claim that she was paid above the minimum wage."[16] The court went on to confirm that

> [b]ecause Plaintiff does not "allege facts about her salary and working hours, such that a simple arithmetical calculation [could] be used to determine the amount owed per pay period," [internal citations omitted], her conclusory minimum wage allegations are insufficient to raise "more than a mere possibility of a right to relief," [internal citation omitted], [and t]herefore, Plaintiff's FLSA claim cannot stand.[17]

The RICO Claim (and the INA)

The court evaluated Ms. Palmer's allegation that TMM "devised and carried out a fraudulent scheme to deprive her and other foreign models of a promised salary of $75,000 per year [… by] submitt[ing] to the federal government sham H-1B visa applications stating that Defendants would pay the models $75,000 'when Defendants had no intention of doing so.'"[18]

The court never reached Ms. Palmer's allegations because, as it detailed not-so-subtly, she failed to follow proper channels for redress. Ms. Palmer was obligated to begin by filing her complaint(s) with the Wage and Hour Division of the DOJ.[19] If she was not pleased with the outcome, she would then need to seek review by an administrative law judge. If she was not pleased with the decision of the administrative law judge,[20] she could then seek review of the matter by the Secretary of Labor. And finally, if she did not care for the opinion of the Secretary of Labor,[21] she could then appeal to the applicable federal district court.[22] As such, the Court wrote that Ms. Palmer, having "failed to exhaust the administrative procedures set forth in Section 1182(n) [of the INA], […] is barred from asserting an INA claim in this court."[23]

Additionally, the court disregarded the RICO claim, writing that Ms. Palmer, rather than follow the administrative complaint process, sought satisfaction from the court on the grounds that the alleged violation of the INA by Trump Model Management amounted to a violation of the RICO statute.[24] "The RICO statute, however, is not the proper avenue for relief."[25]

State Law Claims

Finally, Ms. Palmer asserted claims at common law for breach of contract, unjust enrichment, fraud, and conversion.[26] One sentence from the court settled this: "Having dismissed Plaintiff's federal law claims, the Court declines to exercise supplemental jurisdiction over these state law claims pursuant to 28 U.S.C. 1367(c). [internal citations omitted]."[27]

The Wage and Hour Division Denies Ms. Palmer's Request for Hearing

With the District Court issuing its Memorandum and Order on March 23, 2016,[28] Ms. Palmer wasted little time and filed an LCA complaint with the Wage and Hour Division (WHD) of the DOL on March 24, 2016.[29]

One week later, on April 1, 2016, the "WHD found a lack of reasonable cause to investigate because the alleged violations had not occurred within 12 months of the complaint, and the complaint did not present adequate grounds for equitable tolling."[30] Of course, she appealed to the Office of Administrative Law Judges (OALJ), which provided an Order to Show Cause, as to why the matter should not be dismissed.[31] Ms. Palmer failed to demonstrate a valid basis for equitable tolling.

Conclusion of Ms. Palmer's Actions

Ultimately, Ms. Palmer's complaints were rejected due to a failure to follow the statutory guidelines for redress and dismissed for lack of jurisdiction.

What, then, do we make of the fundamental issue alleged by Ms. Palmer: that her proposed employer certified that it would pay her at or above the prevailing wage rate for a fashion model and might not have done so?

As there was no definitive answer or guidance provided by either the court or the WHD, we are in a position where there is more attention being paid to the H-1B classification for fashion models and the requisite labor condition application filed by their employers, even though those labor condition applications are not readily applicable to the relationship between the petitioner who files an H-1B petition seeking to employ a fashion model, and the fashion model him- or herself. Neither are the terms "employ," "employer" or "employee" appropriate for the relationship between the parties to the H-1B submission. Such misnomers are only part of the basis for why the H-1B3 is not an ideal visa for either a model to desire or a manager to pursue.

Why the H-1B3 Is Not Ideal for a Model Coming to the U.S.

As the *Palmer v. Trump* decisions leave us without anything more than a "Hello"-and-"Goodbye," we turn now to the reasons why this visa is simply not so great for a model seeking to come to the U.S.

Lottery System

One of the main reasons we can list as a basis for not liking the H-1B classification is it is subject to certain caps or a maximum number of visas that can be granted and regimented periods for submission.[32] With each passing year, the number of petitions increased. The divide between the number of petitions and the number of visas available has increased significantly since 2014, when there were roughly three times as many petitions filed as there were available visas,[33] to 2015 and 2016, when there were roughly four times as many petitions filed for the same number of visas.[34] Since the competition is so fierce, USCIS implemented a lottery system that selects petitions at random for processing. Therefore, the likelihood of a model, or anyone else for that matter, getting selected is incredibly slim. Not getting selected would have multiple effects, because the model would not be able to enter the U.S. with this type of work authorization, and could potentially (1) throw off schedules for shoots and shows, (2) result in lost earnings, and (3) damage his or her reputation.

Compensation Issues

As we see with Ms. Palmer's claims and the other models who have come out after, as well as other individuals across industries, the H-1B has an opportunity for abuse by unscrupulous individuals and their entities. Of course, this can happen in any industry and with any visa, though it is difficult to ignore here, considering the industry's reputation.

Why the H-1B3 is Not Ideal for a Manager or Management Company Seeking to Represent a Model Coming to the U.S.

Lottery System

The lottery system is a bane to and stings both sides of the H-1B equation: Just as a model seeking the status might not be selected for the lottery and would not be able to enter the U.S., potentially losing earnings and damaging his or her reputation, it would also hinder the efforts of the manager or management company to demonstrate reliability and fill any openings in upcoming shoots or shows. It would also mean that the employer who pays an attorney has nothing to show for it.

The Open Question Regarding Compensation

Due to the door left open by Ms. Palmer's filings, this could entice other models to take a closer look at their compensation structures and potentially inspire them to file complaints against their managers. It could also intrigue the WHD to have a closer look at LCAs filed for the employment of the models, and potentially audit those employers. The hard part here is that the LCA does not properly represent the pay structure of a model; it only requires a standard type of compensation set as a salary or hourly rate.

Let us also not lose sight of the fact that the reviewing bodies here were very careful to point out where the claims failed (i.e., the FLSA requiring the federal minimum wage rate and the RICO statute being inappropriate to the allegations), and where there was either a lack of jurisdiction or an overripe filing that was outside of the statute of limitations.

Alternatives to the H-1B for a Model

The O Visa

The O visa presents a great alternative, though the standard for approval is significantly higher: Whereas a model under H-1B status must possess distinguished merit and ability, a model under O-1 status must possess extraordinary ability. However, if a successful argument can be made that the model is someone who possesses extraordinary ability, then the O comes with an array of benefits for both parties, such as: (1) no LCA requirement; (2) a model may benefit from O status, in no more than three-year cycles, for as long as necessary;[35] (3) the freedom to file a petition at any time of year and elect either regular or premium processing; and (4) the ability to demonstrate the accurate pay relationship, so that there is no confusion or misunderstanding between parties.

The P-3 Visa

Though lesser known, and narrower in scope than most others, the P-3 visa may be suitable for a model who is coming to the U.S. to engage in a "culturally unique program."[36] The standard for approval is closer to that of an H-1B visa, making it a great alternative to both the H-1B and O-1 visas. Similar to the O visa, the P-3 does not require an LCA, may be filed at any time of year with either regular or premium processing, and allows for an accurate demonstration of the compensation structure. However, it is only available in one-year increments.

Conclusion

The case of *Palmer v. Trump* has demonstrated publicly the flaws of using H-1B classification for "employing" a model and, as such, we should look to other options. Those flaws are not minor, but leave the door open for both parties to be exposed, though more so for the employer. Therefore, two alternative visa classifications that may prove beneficial to both the employer and the model are the O-1 and the P-3, both of which are better than the H-1B, but also have their own drawbacks. It is important to choose wisely, because depending upon the visa petition filed, clients could find themselves involved with an administrative complaint.

Endnotes

1. A search for "Trump Model Management" in Google's search engine brings up the Trump Models website with the following as its search engine description: "Founded in 1999, Trump Model Management is one of New York City's top modeling agencies. With a name that symbolizes success, the agency has risen to the top of the fashion market, producing models that appear on the pages of magazines such as Vogue, on designer runways, in advertising campaigns and blockbuster movies."
2. Trump Models, *About the Agency, available at* http://www.trumpmodels.com/contact/.
3. *Palmer v. Trump Model Management*, No. 14-cv-8307, 2016 U.S. Dist. LEXIS 51061 (S.D.N.Y. Mar. 23, 2016).
4. Only female models…
5. Trump Models, *Women, available at* http://www.trumpmodels.com/women/. Several of the women listed were selected randomly and their nationalities were reviewed through other media outlets, such as models.com, because the Trump Model website does not list their nationalities.
6. *Palmer*, supra at 3.
7. More information regarding LCAs is *available at* https://www.doleta.gov/.
8. *Palmer, supra*, at 3, (quoting 20 CFR § 655.731(a)(2)(ii). The "prevailing wage" is defined generally as the "arithmetic mean of the wages of workers similarly employed.").
9. See https://www.doleta.gov/; https://uscis.gov/.
10. *Palmer, supra.*
11. *Id.* at p 3, quoting the Complaint.
12. *Id.* at p 3. Note that the duration of time is January 2011 to December 2013.
13. Immigration Nationality Act.
14. *Palmer v. Trump Model Management*, United States Department of Labor, 2016 LCA 00022 (August 18, 2016).
15. *Palmer, supra* at paragraph II, p 4 (quoting 29 USC § 206(a)).
16. *Id.* (quoting Plaintiff's Complaint at paragraph 49 and Defendant's Memorandum at pages 5 and 6).
17. *Id.*

18. *Palmer, supra*, at III, p 3 (quoting the Plaintiff's Complaint at paragraphs 57-59, 62-64).
19. *Palmer, supra*, at III, p 7 (citing 8 USC § 1182(n)(2); 20 CFR §§ 655.805-655.806, 655.815).
20. *Palmer, supra*, at III, p 7 (citing 20 CFR §§ 655.815, 655.820, 655.840).
21. *Id.* at sections 655.840, 655.845.
22. *Id.* at sections 655.850.
23. *Palmer, supra*, at III, p 8.
24. *Id.*
25. *Id.*
26. *Id.* at IV, p 9.
27. *Id.* at pp 9-10.
28. *Id.* at p 1.
29. *Palmer v. Trump Model Management*, United States Department of Labor, 2016 LCA 00022 (August 18, 2016).
30. *Id.*
31. *Id.*
32. Filings for first-time beneficiaries of H-1B status may be submitted beginning April 1, only.
33. "USCIS received about 172,500 H-1B petitions during the filing period which began April 1, including petitions filed for the advanced degree exemption." See https://www.uscis.gov/news/uscis-reaches-fy-2015-h-1b-cap-0.
34. "USCIS received nearly 233,000 H-1B petitions during the filing period, which began April 1, including petitions filed for the advanced degree exemption." See https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016. "USCIS received over 236,000 H-1B petitions during the filing period, which began April 1, including petitions filed for the advanced degree exemption." See https://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2017.
35. The H-1B classification has a six-year maximum amount of time allowed in the U.S. before the beneficiary must remain outside the U.S. for one year. Though subject to some exceptions, such as time spent outside the U.S. while under H-1B status may be recaptured, this requirement simply does not exist with the O visa.
36. USCIS, P-3 Artist or Entertainer Coming to Be Part of a Culturally Unique Program, *available at* https://www.uscis.gov/working-united-states/temporary-workers/p-3-artist-or-entertainer-part-culturally-unique-program/p-3-artist-or-entertainer-coming-be-part-culturally-unique-program.

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Ali vs. the Army: The "Greatest" Goes to Court

By Cheryl L. Davis

2016 has been a year of great losses, especially in the entertainment industry – "Ziggy Stardust" and "The Artist Formerly Known As…", to name only two. We also lost another great who was better known by a name other than the one with which he was born: the original "Greatest of All Time," Muhammad Ali, formally known as Cassius Clay. It is hard to believe that a man who was universally beloved when he died was, at one point, one of the most controversial figures in this country. It is often forgotten that one of his greatest bouts was with the United States of America—one that he fought all the way to the U.S. Supreme Court.

Ali vs. the U.S. Army

On February 25, 1964, the young Cassius Clay won the heavyweight title from Sonny Liston. Up until that point, the young boxer had won most of his bouts outside the ring with a combination of brashness and charm. The day after he became the world heavyweight champ, however, he seemed to take on an unexpected weight, a sense of gravitas—at least to his audience. He announced his conversion to Islam, changed his name to "Cassius X" (only later to "Muhammad Ali"), and inadvertently became a target of J. Edgar Hoover, who then undertook an investigation of the champ's draft status.[1] This was only the preliminary bout for a fight that would take five years to come to a close.

"Ali was ultimately indicted for violating 50 U.S.C. App. 462, the Military Selective Service Act."

The champ had not simply ignored the draft. In April 1960, the then-Cassius Clay registered for selective service. While he was classified 1A on March 9, 1962, he was subsequently classified on March 26, 1964 to be 1Y, "as being not acceptable for induction in the armed forces."[2] It was another two years later, almost two years (practically to the day) after he became the heavyweight champion, when on February 17, 1966, he was reclassified to 1A and became eligible for the draft once again. When journalists asked his response to this development, the pugilistic poet recited:

> Keep asking me, no matter how long,
> On the war in Viet Nam, I sing this song
> I ain't got no quarrel with the Viet Cong.[3]

A Champion Convicted by His Convictions

Surprisingly (to no one), there was a largely negative response to Ali's remarks. He was condemned by many, and even branded "a national outlaw" by the *Dallas Morning News*.[4] On February 28, 1966, Ali applied for draft exemption as a conscientious objector, saying that as a minister in the Nation of Islam "to bear arms or kill is against my religion. And I conscientiously object to any combat military service that involved the participation in any war in which the lives of human beings are being taken."[5]

While the Hearing Officer found that Ali was sincere in his beliefs,[6] the Department of Justice (DOJ) nonetheless "recommended to the Kentucky Appeal Board that the request of the registrant for conscientious objector status be denied." [7]Ali's request was duly denied in January 1967. More appeals ensued, until Ali was ordered to report for induction on March 29, 1967. On April 28, 1967, Ali "reported for but declined to submit to induction on the grounds of his religious belief as a minister of the Islam Religion."[8] That same day, he was subsequently stripped of his championship title by the New York State Athletic Commission and the World Boxing Association.[9]

Ali was ultimately indicted for violating 50 U.S.C. App. 462, the Military Selective Service Act. After trial by a jury, he was convicted on June 20, 1967, and sentenced to five years' imprisonment and a fine of $10,000 – the maximum penalty under the statute.[10]

Punching Above His Judicial Weight?

The Fifth Circuit telegraphed its ultimate decision with the Judge's opening blow:

> It may not be doubted that the *very conception of a just government* and its duty to the citizen *includes the reciprocal obligation of the citizen to render military service* in case of need and the right to compel it.[11]

The Court went on as follows:

> There has been no administrative process which Clay (Ali) has not sought within the Selective Service System, its local and appeal boards, the Presidential Appeal Board and finally the federal courts in an *unsuccessful attempt to evade and escape from military service of his country*. Being entirely satisfied that he has been fairly accorded due process of law, *and without discrimination*, we affirm his conviction.[12]

The questions before the Fifth Circuit were:

> 1) Was the selective service induction order to appellant invalid because of

the alleged systematic exclusion of Negroes from draft boards?

2) Did the District Court err in refusing to grant appellant's request for the pro duction of certain documentary and other evidence?

3) Was there a basis in fact for the denial to appellant of a ministerial exemption?

4) Was there a basis in fact for the denial to appellant of conscientious objector status?[13, 14]

Addressing these points in order, the Court stated that "[n]o court has held, so far as we can determine, nor do we here, that a Negro registrant for selective service is entitled to be classified and inducted by a selective service board composed of a percentage of Negro members which the Negro population bears to the total population, or that a board lacks jurisdiction of a registrant unless so constituted."[15] While the Court "[did] not justify the failure to include substantial numbers of Negroes on such boards," saying "[t]he Selective Service System must not only be fair, it must likewise have the appearance of fairness," the Court drew a strong distinction between the impact of disproportionate representation on draft boards versus on juries.

"The Fifth Circuit affirmed the lower court's decision on this issue, as on all the others."

> It is undeniable, as appellant contends, that conscription deprives an individual of his liberty and may even take his life. But we cannot properly compare the military draft to a criminal prosecution. There is no stigma attached to wearing the military uniform of the United States. To the contrary, it is a badge of the highest honor. Service under the flag of our country cannot properly be likened to imprisonment in a penitentiary. A proud nation with a long tradition of valor and bravery on the battlefield, with vivid memories in modern times of distant places some with unusual names, such as Chateau-Thierry, Normandy, Iwo Jima and Khe Sanh, where Americans have fought and died to preserve freedom, would never permit a comparison so odious.[16]

The Fifth Circuit upheld the District Court's dismissal of Ali's request for deposition and other discovery to prove the systematic exclusion of Negroes argument, saying, *inter alia:*

> Most of the evidence requested was immaterial to any defense which could be raised by appellant at his trial. The statistical information about the representation of Negroes on draft boards generally as well as in Kentucky and Texas was available from other sources and is in the record. *It would have been grossly improper* to place the members of the Presidential Appeal Board and the Texas Appeal Board on the witness stand to determine from them what their reasons were for the selective service classification which they gave to appellant in this case.[17]

Minister Ali

The Selective Services Act permits "ministers of religion" to be exempt from military service.[18] The Fifth Circuit stated that "[t]he test … is whether a registrant, as a vocation, regularly, not occasionally, teaches and preaches the principles of his religion. There must be regularity of religious activities, a ministerial vocation rather than an avocation, and a recognized standing as a minister to a congregation or leader of a group of lesser members of his faith."[19] The Fifth Circuit looked to the fact that Ali had made his living as a professional boxer for a number of years, and had represented himself as such before several draft boards; it viewed the timing of his claim to be a minister of Islam as highly suspicious.

Objecting to the Conscientious Objector

The DOJ opposed Ali's claim to be a conscientious objector, saying that his "objections to participation in war insofar as they are based upon the teachings of the Nation of Islam 'rest on grounds which are primarily political and racial. These constitute objections to only certain types of war in certain circumstances, rather than a general scruple against participation in war in any form.'"[20] The Fifth Circuit affirmed the lower court's decision on this issue, as on all the others.

SCOTUS TKO

In *Clay v. United States*,[21] the Supreme Court focused on the conscientious objector question. It started by referring to the hearing before the hearing officer, who "concluded that the registrant was sincere in his objection on religious grounds to participation in war in any form, and he recommended that the conscientious objector claim be sustained."[22]

Having laid this groundwork, the Court went on to state that

> In order to qualify for classification as a conscientious objector, a registrant must satisfy three basic tests. He must show that he is conscientiously opposed to war in any form. [citation omitted.] He must show that this opposition is based upon religious training and belief, as the term has been construed in our decisions. [citation omitted.] And he must show that this objection is sincere.[23]

"By the time the case arrived at the Supreme Court, however, the Government had apparently changed its mind."

Fortunately for Ali, the Court also said "[i]n applying these tests, the Selective Service system must be concerned with the registrant as an individual *not with its own interpretation of the dogma of the religious sect, if any to which he may belong*."[24] The DOJ had argued below that:

> It seems clear that the teachings of the Nation of Islam preclude fighting for the United States not because of objections to participation in war in any form but rather because of political and racial objections to policies of the United States as interpreted by Elijah Muhammad...It is therefore our conclusion that registrant's claimed objections to participation in war insofar as they are based upon the teachings of the Nation of Islam, *rest on grounds which primarily are political and racial*.[25]

"Although Ali returned the ring before the Supreme Court ruling, he still had to fight his way back to the heavyweight championship, through Joe Frazier and George Foreman."

By the time the case arrived at the Supreme Court, however, the Government had apparently changed its mind.

> In this Court the Government has now fully conceded that the petitioner's beliefs *are* based upon "religious training and belief" as defined in *United States v. Seeger, supra*: "There is no dispute the petitioner's professed beliefs were founded on basic tenets of the Muslim religion, as he understood them, and derived in substantial part from his devotion to Allah as the Supreme Being. Thus, under this Court's decision in *United States v. Seeger*, 380 U.S. 163, his claim unquestionably was within the 'religious training and belief' clause of the exemption provision."[quoting from the Brief for the United States.][26]

Not satisfied with that partial submission, the Court kept punching, stating "the Government's concession aside, it is indisputably clear, for the reasons stated that the Department [of Justice] was simply wrong as a matter of law in stating that the petitioner's beliefs were not religiously based and were not sincerely held."[27] Since the Appeal Board failed to state which of the three grounds it felt Ali failed to meet, and the Government conceded that two of the grounds were invalid, the Court found that it was possible that the decision had been based upon an invalid point, and therefore set aside the conviction.

The Winner and Still Champion

Although Ali returned the ring before the Supreme Court ruling, he still had to fight his way back to the heavyweight championship, through Joe Frazier and George Foreman. Champion once again, Ali regained his former popularity, and was even invited to the White House by President Gerald Ford.

Ali went on to bring, and be the subject of, other litigations.[28] However, it was winning before the Supreme Court in 1971 that put him back on track to becoming the "Greatest of All Time."

Endnotes

1. *See* Krishnadev Calamur, *Muhammad Ali and Vietnam*, The Atlantic, (June 4, 2016).
2. *Clay v. U.S.*, 397 F.2d 901, 905 (5th Cir. 1968).
3. Muhammad Ali, The Greatest: My Own Story, p. 124 (1975).
4. Bob St. John, *Ali's Long Shadow Extends from First Meeting to Today*, Dallas Morning News, at 13A (July 29, 1997).
5. Muhammad Ali, The Greatest: My Own Story, p. 160 (1975).
6. *Clay*, 397 F.2d at 906.
7. *Id.*
8. *Id.*
9. After a number of lawsuits (and a shift in the political climate), the Southern District, looking at the fact that the Commission had granted, renewed or reinstated boxing licenses to individuals who had been found guilty of assorted felonies, misdemeanors and military offenses, found that the Commission had violated Ali's rights under the Equal Protection clause, finding "deliberate and arbitrary discrimination or inequality in the exercise of [the Commission's] regulatory power, not based upon differences that are reasonably related to the lawful purposes of such regulation." *Ali v. Div. of State Athletic Comm'n of N.Y.*, 316 F. Supp. 1246, 1248 (S.D.N.Y. 1970).

10. The District Judge's rationale was: "Well, I am going to impose the maximum penalty because under the rules at the end of an appeal if it is reversed, why of course it is nil. If it is affirmed it is then subject to motion to reduce and I find that we get into problems when clemency is given at the time of sentencing and then following an affirmance there is another petition for clemency." 397 F.2d at 906, n. 1.
11. (quoting Chief Justice Edward Douglass White, *Selective Draft Law Cases*, 245 U.S. 366, 378 [1918]) (emphasis added).
12. *Clay*, 397 F.2d at 905 (emphasis added).
13. The last question the Fifth Circuit addressed was "Did the proceedings as a whole, selective service and judicial, constitute a prohibited bill of attainder?" The Court found that there was no merit to this argument. *Clay*, 397 F.2d at 924.
14. *Id*. at 908-909.
15. *Id*. at 911.
16. *Id*.
17. *Id*. at 915 (emphasis added).
18. 50 U.S.C. § 456(g).
19. *Clay*, 397 F.2d at 917.
20. *Id*. at 918-19.
21. 403 U.S. 698 (1971).
22. *Id*. at 699.
23. *Clay*, 403 U.S. at 700.
24. *Id*. (emphasis added).
25. *Id*. at 702 (emphasis added).
26. *Id*.
27. *Id*. at 704.
28. *Monster Communications, Inc. v. Turner Broadcasting Systems Inc*., 935 F. Supp. 490 (S.D.N.Y. 1996) (copyright infringement suit based upon the defendant incorporating nine to 14 film clips of the "Rumble in the Jungle" fight into a documentary entitled *Ali—The Whole Story*); *Ali v. Playgirl*, 447 F. Supp. 723 (S.D.N.Y. 1978) (suit against the magazine for commercial use of a drawing that evoked his identity; the magazine argued that "right of publicity" could not apply to an athlete "who chooses to bring himself to public notice," but the court disagreed).

Cheryl L. Davis is a litigator who concentrates in intellectual property matters (particularly copyright and trademark cases), employment, and real estate/construction related matters. She has counseled clients on how to protect their intellectual property and has also represented theater clients in connection with a variety of contract and corporate issues. She is a co-chair of the EASL's Section's Diversity Committee.

Internal Revenue Service's Night at the "Private" Museum

By David Honig

On November 20, 2015, Senator Orrin Hatch (R-Utah) launched a review of 11 U.S. private museums in response to a recent *New York Times* article that exposed a possibility for abuse of 501(c)(3) nonprofit status.[1] Every "domestic or foreign organization described in section 501(c)(3)" is considered a private foundation, unless it fits into one of four scenarios, dealing with where the organization's "support" is derived, set out in § 509(a).[2] Senator Hatch's investigation did not include all nongovernment-owned museums as the term "private museum" suggests—after all, many of the most renowned museums in the United States, such as the Metropolitan Museum of Art in New York and the National Gallery of Art in Chicago, are private museums, even if they are not thought of as such. Instead, Senator Hatch looked into a subset of museums that only have one donor and are designated as *private foundations* under 26 U.S.C. § 509.

"Logic suggests, that if these museums are not providing a public benefit, then they should not be given preferential treatment."

The investigation, which concluded in May of 2016, sought to determine whether, and how much, these museums benefit the public.[3] This inquiry was ignited by the fear that these private foundation museums were offering minimal benefit to the public, while affording the donors substantial benefits, including tax deductions.[4] For example, the *New York Times* article mentioned that at least two of these museums, Glenstone in Potomac, Maryland and the Brant Foundation Art Study Center in Greenwich, Connecticut, require reservations and "[are] open only a few days a week to small groups."[5] The reason this matters is the that tax advantages afforded to charities with 501(c)(3) nonprofit status are granted because of the public benefit that these organizations provide.[6] Logic suggests that if these museums are not providing a public benefit, then they should not be given preferential treatment. The real issue is not whether these museums provide a public benefit but whether the benefit provided can justify the private reward. In other words, should individuals capable of purchasing multi-million dollar artworks be afforded a discount on creating and maintaining private viewing salons? Before determining whether these museums provide enough or any public benefit, some background should be given, first on the museums themselves, then on the tax benefits associated with this setup.

I. The Private Museums

The United States has a long history of encouraging private enterprise. This can be seen in airlines, railroads, institutions of higher education and charitable organizations. The investment of private capital helps alleviate some of the financial strain felt by the state, while encouraging private organizations or individuals to provide public services. Seeking to reward private investment for the public good, "Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind."[7]

"On its face, the free admission scheme is detrimental to the founding donor. In addition to paying for the upkeep, although possibly at a subsidized rate, the founding donor must also relinquish control of the works to the nonprofit corporation for the corporation to be eligible for the tax benefits under the IRC."

One way Congress provided tax benefits to charitable organizations was by creating 26 U.S.C. § 501. Section 501(a) grants tax exempt status to certain organizations. Relevant here are corporations "organized and operated exclusively for…charitable…or educational purposes…"[8] Seeking to take advantage of this section of the Internal Revenue Code (IRC), collectors have created organizations and donated artworks to them in order to establish museums for their private collections.

II. The Tax Scheme

One benefit of creating a nonprofit organization and donating artworks to it is clear—if the museum charges an entry fee the revenues can be used to maintain the artworks and space without the donor having to pay taxes. By relinquishing ownership of these works, the donor no longer bears sole responsibility for upkeep. Since nine of the 11 museums surveyed by Senator Hatch do not charge an admission fee, most of the founding donors have to donate more funds to ensure that the works and premises do not deteriorate. On its face, the free admission scheme is detrimental to the founding donor. In addition to paying for the upkeep, although possibly at a subsidized rate, the founding donor must also relinquish control of the works to the nonprofit corporation for the corporation to be eligible for the tax benefits under the IRC.

Taking these issues in turn; the first, having to pay for upkeep, could actually be a benefit. The IRC, specifically § 170, allows a donor to deduct a "contribution or gift" made to, among other organizations, corporations that qualify for 501(c)(3) tax exempt status.[9] This means that besides possibly paying a reduced rate for the upkeep and maintenance of his or her art and a facility to house said art, the founding donor can deduct the amount donated to the museum to cover these costs.[10]

In addition to allowing deductions for contributions, § 170 also allows a donor to deduct gifts made to authorized organizations.[11] By converting a collection that was privately owned by an individual into one that is held by a museum for the "public's benefit," the founding donor can use money that would have been personally spent for upkeep of the art to reduce his or her taxes.[12] In addition, by combining tax exempt status granted by § 501 with the deductions afforded for charitable contributions in § 170, a founding donor is duly rewarded. It is important to note that the IRC places a limit, usually 50% of gross income, on the amount of deductions a person can take each year for charitable donations.

"The creation of more museums allows works to be displayed that otherwise would sit in a basement or storage facility and never be seen by the public."

Tax deductions are not the only reason for a founding donor to entertain creating this type of organization. Once the works are donated, the museum owns them and a donor no longer has control, or so it would seem. If the donor serves on the Board of Directors, acts as president or serves in some other executive position, the donor could execute control over the works of art. In fact, this is exactly what "many" of the founding donors are doing.[13] An example of this is the Broad Museum in downtown Los Angeles, whose founders Eli and Edythe Broad serve on the Board of Governors.[14]

A donor who serves on the Board or as an executive will be involved in not only how the artwork is managed, but more importantly, the operations of the museum. This includes determining hours of operations, admission price, and what works should be bought and sold, displayed, put into storage or on loan. It is easy to see why Senator Hatch was worried about abuse of these tax exemptions, since donors are able to reap huge tax benefits while seemingly giving up little in their enjoyment and control of art. In fact, some of the museums surveyed said that they are located on land completely or partially owned by the founding donor.[15] In other instances, museums are located on land adjacent to the donor's residence.[16] In order for this scheme to make sense and continue, the public must receive some benefit.

III. Public Benefits

"[C]harities [are] to be given preferential treatment because they provide a benefit to society."[17] It follows, then, that if there is no benefit to the public, the charity should not be given preferential treatment, and a donor should not be allowed to receive tax deductions for donations to that charity. However, the issue here is not one of existence of benefit; rather, it is one of degree of quality and quantity of benefit. The question ultimately boils down to whether or not these museums provide enough public benefit to be given preferential treatment and how that determination is made. In other words, what is the required level of public benefit that an organization must produce in order to receive preferential tax treatment under § 501, and how is it determined?

Unfortunately, it is hard to determine whether action actually benefits the public, and the Internal Revenue Service (IRS) guidelines are not very helpful on this front. Other than being open to the public for viewing and informing the public of access,[18] it really is not clear what is required of an organization to achieve tax exempt status.

There are clear benefits to founders of private museums, but the question remains whether those benefits are enough. For instance, of the 11 museums that received a letter from Senator Hatch, 10 of them responded that they engage in or have engaged in loan programs.[19] This means that a work of art that would normally be displayed in someone's home or in storage was put on display for a large number of people to see. The creation of more museums allows works to be displayed that otherwise would sit in a basement or storage facility and never be seen by the public.[20]

"Maybe the best example of this would again be the Broad Museum."

Not only does the creation of more museums allow for more works to be shown, it also allows different works to be shown and curated. Private museums allow the whims of one person to dictate how and what art is acquired and later displayed. This type of museum does not have to focus on what it thinks would be the most educational exhibit for its visitors, as do traditional public museums.[21] Instead the exhibits can focus on art or whatever emotion or reaction a curator wants to provoke. This too is "educational" in its own right, even though it is not designed with that purpose in mind.

Maybe the best example of this would again be the Broad Museum. The Broad is the poster child for what these types of private museums can be. It is open most days of the week and draws large crowds of young people.[22] In addition to its visitors having a lower average age than the national average of museum goers (32 compared to 45.8), as of March 2016, 70% of the Broad's visitors were younger than 34 years old.[23]

The Broad represents what these museums can be, but just because others do not do as much, does not mean that they are not benefiting the public. The limited hours and days of operation and reservations requirements can be justified: The founder wanted to create unique and more intimate experiences for visitors. Should it matter that this type of public benefit is intangible?

"His reasoning boiled down to the opinion that no one should denigrate the tastes of any portion of the public."

If we ignore the obvious benefit of public access to these artworks, and ignore the limited circumstances some of the museums allow the public access to these works, a reason for reduced access might be that these museums are new and the operating expenses associated with keeping more traditional matters currently do not make sense because of the number of guests expected. How is it determined whether the public receives enough or any benefit at all? Maybe the benefit is not clear or scientific; maybe it is indirect, or maybe it will take years to manifest, but once it does, it will be incalculable. Public benefit can be difficult to pinpoint.

This difficulty is reminiscent of a copyright issue raised over a century ago. When approached with the question of whether an advertisement could be protected under copyright law in *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes pointed out that judges should not determine the worth of "pictorial illustrations."[24] His reasoning boiled down to the opinion that no one should denigrate the tastes of any portion of the public.[25] Following that logic, maybe Congress, the IRS or a court adjudicating the issue of public benefit should determine that if any portion of the public benefits from an organization, then that organization should be allowed to keep its tax exempt status.

Endnotes

1. Letter from Sen. Orrin Hatch, Chairman, U.S. Senate Comm. on Fin. (Nov. 20, 2015) (on file with U.S. Senate Comm. on Fin.).
2. I.R.C. § 509.
3. Letter from Sen. Orrin Hatch, Chairman, U.S. Senate Comm. on Fin. (Nov. 20, 2015) (on file with U.S. Senate Comm. on Fin.).
4. *Id.*
5. Patricia Cohen, *Writing Off the Warhol Next Door: Art Collectors Gain Benefits From Private Museums*, N.Y. Times (Jan. 10, 2015), *available at* http://www.nytimes.com/2015/01/11/business/art-collectors-gain-tax-benefits-from-private-museums.html.
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Why Artists Like Prince Need a "Legacy Plan," Not an "Estate Plan"

By Daniel J. Scott

The recent death of Prince Rogers Nelson, known to the world simply as "Prince," has ignited a conversation around estate planning and the need for everyone to have estate planning documents prepared and in order. Prince died apparently never having made a will and, as a result, his estate is now subject to Minnesota's laws of intestacy and some fairly public court proceedings. Numerous articles have been written claiming that everyone can learn from Prince's estate planning mistakes, and warning readers that they do not want to end up like Prince and die without having made a will. While it is important for *everyone* to have a will, the conversation around Prince's estate planning highlights a common mistake made by too many estate planning lawyers and other professionals, namely, that artists like Prince (as well as other entertainers, athletes and celebrities—all of whom we will refer to in this article as "celebrities") are just like everyone else and have the same basic estate planning needs. The truth is, however, that celebrities are not like everyone else, and a traditional *estate* plan is just not sufficient to handle their needs. Celebrities like Prince need a *legacy* plan.

What Is The Difference Between an Estate Plan and a Legacy Plan?

Traditionally, an estate plan provides for what happens to an "estate" when one dies, while taking into consideration certain tax implications. The "estate" is basically everything owned by the deceased, including rights and interests one may have in various properties. The most common types of property individuals own are real estate, tangible personal property (such as furniture, clothing, automobiles, artwork, and jewelry), and intangible property (such as bank and brokerage accounts and copyrights). Celebrities typically own these types of assets too. Yet there is something extraordinarily unique about celebrities, something that in fact only applies to them: their celebrity.

"That legacy is going to live on well after his death and continue to inspire other artists, be celebrated by fans, and be discovered by new audiences."

A celebrity's fame derives from his or her *public persona*, which is different from who he or she is as a private individual. More importantly, a celebrity's public persona relates to the legacy left behind after death. As a public figure, Prince will be remembered mostly as a musician and songwriter, as well as a producer. He was unique—a quiet yet overtly sexual artist who rarely gave interviews and could tear through a guitar solo with the greatest of guitar gods. He will be forever associated with the color purple and flamingo-shaped guitars. There were also those ass-less chaps, that time he changed his name to a symbol and wrote the word "slave" on his face to protest his record contract, and, of course, the movie *Purple Rain*. Prince was a true icon, a music legend, and these are just some of moments in Prince's career that make up and define his legacy. That legacy is going to live on well after his death and continue to inspire other artists, be celebrated by fans, and be discovered by new audiences.

"In other words, a celebrity's legacy is never fully part of his or her estate alone."

Prince Rogers Nelson as an individual no doubt died owning many of the properties and rights that make up and define Prince as an artist (such as his sound recordings, publishing rights, copyrights and memorabilia). The legacy of Prince, however, supersedes who he was as an individual and is now a part of something much greater. Prince has a place in music and pop culture history, and his legacy belongs (at least in part) to the general public and his fans. In other words, a celebrity's legacy is never fully part of his or her estate alone. For that reason, a traditional "estate plan" is inadequate. Celebrities like Prince need a plan that not only disposes of their traditional assets (such as their houses, cars, and investments), but also provides for the protection, preservation, and continued celebration of the celebrity's legacy—a legacy plan.

Legacy Planning Basics—Who, What, Where, Why, How, and When

There are two general time periods for ***when*** a celebrity's legacy needs to be planned: (1) during the celebrity's life and (2) after the celebrity's death. There are also two very different planning considerations: (i) control and management and (ii) economic benefit. During a celebrity's lifetime, the celebrity is most likely going to want to both control and manage his or her legacy (either directly or indirectly), and to also benefit economically from the proceeds generated by the various rights and properties that define that legacy. That being said, putting a legacy plan in place during the celebrity's life provides a number of benefits, including (a) management and administra-

tion, (b) asset and liability protection, (c) privacy (and avoiding probate on death), (d) tax planning, (e) making sure the celebrity's wishes are carried out on death (as opposed to being subject to the laws of intestacy); and (f) ensuring a seamless transition of the management and control of the celebrity's legacy at death.

"Many aspects of a celebrity's legacy may be owned by other individuals or companies—for example, many record companies own the master recordings of their artists; actors often do not own the films or shows in which they appear."

The first step in legacy planning is understanding ***what*** properties and rights make up and define a celebrity's legacy, and who owns those rights and property. Many aspects of a celebrity's legacy may be owned by other individuals or companies—for example, many record companies own the master recordings of their artists; actors often do not own the films or shows in which they appear. Any assets that the celebrity does not own or control cannot be considered part of the celebrity's legacy plan, unless one can negotiate to gain control or ownership.

Next, the celebrity must decide ***who*** should control his or her legacy. As mentioned, during the celebrity's life the celebrity (either directly or indirectly through others hired) will be in charge of managing his or her own legacy. After the celebrity's death, however, someone will have to be put in charge of managing the legacy. This could be one or more companies or individuals, depending on the legal structure used. Who the celebrity initially appoints should have both (i) an expertise in the celebrity's field (such as music, film, entertainment or sports) and also (ii) an understanding of, and loyalty to, the celebrity's vision and what the celebrity's legacy means and represents. Very often, this could result in a "team" of individuals being appointed to represent and carry out the celebrity's legacy after his or her death.

"Almost inevitably, a legacy plan will involve one or more types of trusts, as well as various corporate or other business entities."

Once the celebrity has the initial "team" in place, a decision needs to be made about what happens when one or more members of the initial team ceases to act as a manager of the celebrity's legacy. In other words: How are successors to be chosen with respect to the control and management of a celebrity's legacy? It is important to keep in mind the concept of "checks and balances" when it comes to successors, since it could be problematic for a variety of reasons to give any one individual too much control. As a result, it is not uncommon to put in place complex voting mechanisms when it comes to the appointment of successor. For example, one or more individuals may be given a veto power with respect to the appointment of successors, or decisions could require unanimous consent.

The ***why*** of legacy planning seems obvious—a sound legacy plan is designed to protect, preserve and provide for the continued growth and celebration of a celebrity's legacy. That said, there is another purpose (or benefit) of a celebrity's legacy—money. While it may not be the primary reason behind what a celebrity does, money and the creation of wealth is an inevitable result of celebrity. As a result, the question of "why" when discussing legacy planning can be reinterpreted as a question of "for whom." While alive, a celebrity is most likely working to economically benefit him- or herself and family. After death, however, a celebrity could want his or her legacy to benefit any number of individuals, including family and friends, and/or charities. The important part of "why" is understanding that it is separate from the "who," mentioned earlier. That is, *who* manages and controls a celebrity's legacy is separate from *for whom* it is managed, or who economically benefits from the wealth created.

Once the who, what, why and when of a legacy plan have been decided—which really outline the celebrity's goals—the celebrity (working with advisors) must decide ***how*** to implement the plan. Almost inevitably, a legacy plan will involve one or more types of trusts, as well as various corporate or other business entities. At the very least, a revocable "living trust" could ensure privacy, the avoidance of probate, and a seamless transition of the management and control of the celebrity's legacy upon death.

Finally, there is the matter of selecting a jurisdiction, or ***where*** a celebrity's legacy should be administered. A number of factors come into play when choosing the jurisdiction for corporate and other entities such as trusts. Some of these include tax treatment, asset and liability protection, geographical preference and duration (for example, some states permit perpetual trusts that can ensure a celebrity's legacy plan remains intact forever).

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Freedom of the Press Issues in the 21st Century

By Lindsay Butler

Freedom of the Press Applied to Modern Technology

Despite the rapid technological developments of media and news in modern society, the principles of American journalism have remained unchanged for well over 200 years. Freedom of the press, which is established in the First Amendment, is imperative for maintaining democracy in the United States. Without knowledge and truth obtained from the news, American citizens have little control over the operations of their government. To ensure this protection, the United States Constitution's First Amendment states that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press."[1] Arguably, one of the most critical components of freedom of the press is the protection of a reporter's confidential sources that led him or her to obtain information.

"There, Boal claimed he was protected from releasing these recordings, as the subpoena would force him to release protected and confidential information that he obtained as a reporter."

The integrity of the press is maintained under this understanding, as a reporter would hardly be able to obtain any information from various sources due to informants' undeniable fear of exposure. For example, the protection of confidential sources was essential to exposing the criminal acts of the Watergate scandal.[2] However, in today's world where almost anyone can act as a reporter, it is difficult to determine how far this protection should extend. In fact, this constitutional issue is at the center of a legal debate in the entertainment sphere between the screenwriter, and producer of *The Hurt Locker* and *Zero Dark Thirty*, Mark Boal (Boal), and the United States Department of Justice for recorded interviews used in the acclaimed podcast *Serial.* The debate raises the issue of whether a filmmaker should be given the same protection as a reporter under the First Amendment.[3] The recent amicus brief (the Brief) filed in this dispute by 36 news organizations seems to indicate that there is a strong argument for protecting a filmmaker's information under the protection of a reporter. However, this has not yet been decided, and only time will tell how the Court will perceive Boal's role when he obtained information for use in *Serial* as well as a possible future film.[4]

Factual Background

In 2014, Boal recorded 25 hours of interview tapes with U.S. Army Sgt. Bowe Bergdahl (Bergdahl), the soldier who made headlines for being captured and eventually released five years later from the Taliban after deserting his post in Afghanistan in 2009. Excerpts of these interviews were featured on the popular podcast *Serial.* Bergdahl is facing prosecution for his desertion in a trial scheduled for early 2017 in U.S. military court. As part of its case, the prosecution indicated that it would be issuing a subpoena in order to obtain these 25 hours of recorded interviews. In response, Boal pre-emptively filed an application for a temporary restraining order and an order to show cause against the federal government under the protection of the First Amendment. There, Boal claimed he was protected from releasing these recordings, as the subpoena would force him to release protected and confidential information that he obtained as a reporter. This issue apparently struck a chord with the media, as 36 news organizations, including ABC, CNN, and NBC filed an amicus brief on July 29, 2016, supporting Boal's argument.[5]

Arguments for First Amendment Protection in the Amicus Brief

The Brief filed in response to Boal's protest against releasing his material analyzes the issue of who is considered a reporter protected under the First Amendment. The legal test for determining this is adopted by the Ninth Circuit in *Schoen v. Schoen*, in which it states that the First Amendment extends to any individual who gathers information with the "intent to disseminate it to the public."[6] As a result, the background of the individual and the medium used to release the information are not factors when considering whether an individual is safeguarded by the reporter's privilege.[7] In addition to this legal discussion, the Brief demonstrates that there is an abundance of news outlets as a result of technological advances. In fact, the Brief specifically describes the use of social media by news organizations and the impact of podcasts in today's society. It states that 98 million Americans have listened to a podcast at least once and that *Serial* has been downloaded by millions of listeners.[8]

The Brief then analyzes the question of whether Boal may specifically benefit from the reporter's privilege as a filmmaker under the First Amendment. According to his arguments, not only should the privilege extend to Boal as he has experience in journalism, but more importantly, to the overarching theme of the impact of technology as Boal meets the threshold necessary for such protection. He intended to disseminate the information about Berg-

dahl's desertion in Afghanistan to the public at the outset of his news gathering process and therefore, it is argued, he should receive protection as a reporter under the First Amendment.[9] Although it is unclear how Boal initially intended to release this information to the public, there appears to be no question that he intended to disseminate the information to the public in some fashion. In the past, Boal has released news through film as well as other formats, and here the information was first released in a podcast.

"The Brief filed by 36 news organizations in support of Boal's argument further analyzes legal opinions that state that the protection is extended to anyone who gathers information with the intent to disseminate it to the public."

Conclusion

The availability of information and news is more abundant than ever. Information may be disseminated to the public through social media, film, and even podcasts as done by Mark Boal in the case at issue. Just as with any other news medium, Boal gathered his information by building the trust of his sources. He argues that in order to maintain the integrity of the press and his own trustworthiness, he should not be forced into releasing his 25 hours of recorded material. The Brief filed by 36 news organizations in support of Boal's argument further analyzes legal opinions that state that the protection is extended to anyone who gathers information with the intent to disseminate it to the public. Simply because a reporter like Mark Boal chooses to broadcast his information through an unconventional medium, that should not prohibit him from benefiting from the protection of the First Amendment.

Modern society's access to information is rapidly increasing through the continuing advancement of technology. Despite this ever-changing news environment, the press still plays a vital role in maintaining American democracy.[10] Without informed citizens, the American people will never fully be able to run their own country in the way that a democracy is intended to operate. Although it is unclear how the Court will rule on this issue, there is a strong argument for extending First Amendment protection to individuals who share information through alternative methods of communication.

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Lights, Cameras, and FCPA Actions: The Problem of Foreign Corrupt Practices by Hollywood

By Danielle Siegel

I. Introduction

The film industry is one of the largest and most well-known industries in the world. Billions of dollars are spent and earned each year making and watching movies. Whether it is in Hollywood, Bollywood or somewhere in between, the global film industry is constantly growing and changing. With the most movie screens and the largest box office, the United States has one of the major film industries.[1] The Asian film industry is also large and growing.[2] India has the most admissions and produces more films annually than any other country.[3] China's movie market is second to the U.S. in box office size,[4] and many Asian countries, including Thailand and Japan, have very successful film festivals.[5]

The United States market is shrinking while the Asian market is growing.[6] Piracy in East Asia is extremely widespread.[7] As with many other industries, corruption of all kinds, such as purposefully keeping inaccurate books and bribing officials, is not unusual. It is made even more complicated by the lack of laws defining and outlawing corruption abroad and lack of consistency in enforcement. Anti-corruption law in the United States is primarily governed by the Foreign Corrupt Practices Act (FCPA).[8] As American companies continue to expand internationally, the media and entertainment industries are the focus of corruption investigations[9] under the FCPA. Hollywood film studios are the latest in the trend of investigations,[10] as China and other Asian countries have become crucial to Hollywood, not only for increased viewership, but also for additional sources of financing for movie production.[11]

"China, in addition to lacking transparency and clarity in its policies on corruption, has a number of state controlled and state dominated industries, including its film industry, which is dominated by the China Film Group."

There is a lack of regulation of corruption in both the domestic and international media and entertainment industries, as parties do not always know what constitutes corruption. Even when corruption is discovered, it is hard to mete out effective punishment. Under the FCPA, punishments, such as huge fines, may be given, but they are not always effective deterrents. Non-financial companies are not used to FCPA considerations. Just in terms of legal fees alone, FCPA investigations can cost millions of dollars.[12] When punishment or settlement, and intangibles like a decreased stock price are added, the cost can reach over $100 million.[13]

II. Background

A. Corruption

Corruption is a global phenomenon. Often, bribes are seen as a necessary expense of completing transactions abroad. The United States faces many problems in dealing with corruption. The first is prevention, the second is detection, and the third is punishment. Corruption, as defined by the FCPA, includes bribery of a foreign government official and/or accounting record issues.[14]

Asia, generally, and China, in particular, are considered a high risk territory for business purposes. A large percentage of the FCPA actions filed are based in China.[15] China, in addition to lacking transparency and clarity in its policies on corruption, has a number of state-controlled and state-dominated industries, including its film industry, which is dominated by the China Film Group. Custom also plays a role here, as Chinese custom often encourages gift giving, which triggers potential FCPA problems.

B. Industry Sweeps

In their eagerness to enforce the FCPA, the United States Securities and Exchange Commission (SEC) and the Department of Justice (DOJ) have initiated industry-wide sweeps, which are large scale investigations into the practices of media and entertainment companies, by investigating multiple companies in the same time period. In an industry sweep, the major industry leaders are required to submit documents, and anything suspicious can be investigated. The media and entertainment industries, specifically the major Hollywood film studios, are often hit by such sweeps. The SEC investigation was announced at the Beijing Film Festival in 2012.[16] Many major companies, including Disney, Sony Pictures Entertainment (Sony), News Corporation subsidiaries—Twentieth Century Fox Films and Twenty-First Century Fox—DreamWorks Animation SKG (DreamWorks), Warner Bros. Entertainment, Paramount Pictures, Universal Studios, and others were investigated for possible corruption.[17] A common theme in the investigations includes looking into the film studios' dealings with China. China is also investigating corruption in the film industry. The SEC sent inquiry letters to many of the major film studios and the Chinese Central Commission for Discipline Investigation concurrently started a widespread crackdown

on corruption.[18] Almost all of these investigations are still ongoing.[19]

"The Thai tourism official who allegedly accepted the bribes faces corruption charges in the US, but if the official is indicted by Thailand, then those charges will take precedence."

Incentives for corruption are not hard to find. In Asia, audiences are large, locations are scenic, and production is less expensive than in the U.S.[20] As the movie market in the United States decreases, the movie market in China increases. In addition, India's Bollywood is now as active as Hollywood. In order to compete, many Hollywood studios are trying to get their movies released into China, India, Thailand, and all over Asia, and many countries there have very tight restrictions on what films can be shown in their countries and how many international films can be shown in their theaters.[21]

Corruption is not limited to the United States, and is a problem for all parts of the media and entertainment industries, not just film studios. Newspapers, professional sports, casinos and theme parks are all the subjects of corruption investigations.[22] For example, News Corp. in Britain and the United States, Sony in India and the United States, and FIFA in Europe and South America are being investigated over corruption allegations. News Corp. is being investigated for corrupt practices related to paying police for access to wiretappings.[23] Sony is being investigated for potential FCPA violations, including some that were exposed through internal investigations in 2013 and when its servers were hacked in 2014.[24] The U.S. government found Sony to be guilty of fraud, kickbacks and other FCPA violations in India.[25] FIFA officials, including its then-President Sepp Blatter, are being investigated for corruption regarding money laundering and fraud.[26] FIFA's corruption issues also showcase the jurisdictional issue inherent in an entertainment industry. FIFA has dealings in the United States and the U.K. Therefore, the DOJ or the SEC, the FBI, the U.K. Serious Fraud Office, and the international branch of the London Police, can have jurisdiction under the FCPA or the U.K. Bribery Act.[27]

The media and entertainment industries are very competitive. Companies compete for distribution and viewers. Disney and other American film studios are building theme parks, movie studios, animation centers and other major attractions all over the world. DreamWorks paired with China Media Capital to create Oriental DreamWorks Film studios. Many entities are courting Asian government officials to get increased quotas, real estate deals for theme parks, increased distribution and tax breaks.[28] Much of the international business occurs in countries like China, Thailand and India, which have low levels of government control and high rates of bribery.[29]

Protocol for dealing with other countries can be complicated and intricate, as every country has its own customs, laws, and procedures relating to international business transactions. As a result, United States companies have to walk a fine line between appropriate and inappropriate activity. Companies directly and indirectly (via agents) can violate the FCPA.[30] For example, paying for a foreign official's business trip is allowed, but if it is too lavish, can be considered a bribe.

C. Examples of Corruption

1. Criminal Corruption

The most prominent case of criminal corruption and criminal FCPA violation in film involves Gerald and Patricia Green, who were movie producers. Both were convicted of bribery and money laundering while getting the rights to and running a prominent film festival in Thailand. In addition to each account of bribery and money laundering, they were also charged with conspiracy to violate the FCPA. The Greens paid a high-ranking Thai tourism official an estimated $1.8 million to obtain profitable contracts.[31] Ultimately, the Greens were convicted and sentenced to six months in jail.[32] The prosecutor rescinded his appeal for a harsher prison sentence.[33] The Thai tourism official who allegedly accepted the bribes faces corruption charges in the U.S., but if the official is indicted by Thailand, then those charges will take precedence.[34]

2. Civil Corruption

Movie studios have to be very careful about what goes on while "on location" abroad. Under the FCPA, studios are no longer able to:

> …condone or ignore practices such as making payments for expedited film permits, the use of a favorable shooting location, smoothing things over with local film crews, ensuring the safe transit of equipment, and preventing the many possible costly delays that can easily derail a project. Further, production companies cannot allow such payments to be hidden as petty cash or "operating" expenditures in a film's budget under the FCPA's accounting provisions.[35]

In addition to the case against the Greens, the SEC turned its attention to the movie studios' relationship with China, due to the easing of stringent box office and quota restrictions in China shortly after Xi Jinping[36] visited the United States and met with Hollywood businesses and senior government officials.[37] Until recently, China's state-controlled film industry only allowed up to 20 American movies per year to be shown in theaters.[38]

The deal negotiated between China and the United States "increased the number of 3-D, IMAX, and other enhanced-format American films" allowed into China.[39] It also exempted 14 "enhanced-format films from China's continuing 20-film import quota."[40] Hollywood film companies are at high risk for corruption claims because they all have representatives in China. They compete with each other and lobby the Chinese government's China Film Group Corporation, which is responsible for importing films, as well as with the government body that controls censorship requirements for all scripts in production and before release of finished movies.[41]

i. Sony

In 2013, Sony was investigated for corruption.[42] Sony used a company called the Dynamic Marketing Group (DMG), based in Beijing, to circumvent Chinese quotas and censorship restrictions.[43] The SEC is now investigating DMG's methods of distributing Sony's films, particularly the 2010 film *Resident Evil: Afterlife*. The movie made $21.6 million in China. An email by a Sony employee stated that DMG had used "special influence" to secure distribution in China.[44] The emails and other indicators of bribery, along with some of the FCPA investigation details, were leaked in the 2014 hack of Sony's servers.[45] Sony also conducted an internal investigation, with help from Ernst & Young, LLP, of its Indian Entertainment Group, to check whether there had been fraud or excessive kickbacks to government officials in India. The investigation found potential Sony corruption in relation to a joint venture between a local company called Discovery Communications, Inc. and Sony's Multi-Screen Media Pvt. (the joint venture is known as MSM Discovery).[46]

"Disney was accused of bribing foreign government officials to get exclusive film distribution rights and of bribing to get permits and privileges in connection with building its theme park in Shanghai, which opened this past summer."

Possible evidence of FCPA violations was found in an email by a Sony company official, which outlined "areas of concern" in the MSM Discovery relationship, including kickbacks related to "carriage fees," which are paid to the broadcaster by the distributor, gifts in excess of MSM Discovery policy, including very expensive sports tickets, and customs payments by the Indian Marketing group.[47] Further evidence of these potential FCPA violations was found contained in an October 6, 2015 letter between Sony officials, which accused the head of MSM Discovery's motion-pictures unit of colluding with an agent to raise the cost of movies that Sony purchased to air on TV by as much as 35%, in return for kickbacks.[48] The letter further accused an MSM Discovery deputy president of routing the company's movie purchases through a contact at Goldmines Telefilms, which increased the film prices, and told producers, who offered to sell their films to MSM Discovery, to direct their proposals to Goldmines Telefilms.[49] These actions would violate the anti-bribery provisions of the FCPA[50] and were in contravention of MSM Discovery's company policies.[51]

These allegations could have a major effect on Sony, as the Indian market is its largest foreign market. The potential harm to its reputation, both in India and in the United States, could affect its stock prices and goodwill. More immediately, Ernst & Young, LLC's investigation for Sony alone cost approximately $176 million, which is an expensive liability.[52]

ii. Dreamworks

The SEC began investigating DreamWorks for potential FCPA violations by sending it a letter of inquiry in 2012.[53] *Kung Fu Panda* 2 made $100 million in China,[54] which resulted in a focus on China by both film studios and regulators, because it focused attention on the earning potential, and therefore the high risk of corruption, inherent in the movie industry. DreamWorks was accused of paying money to open the Chinese market for films and for bringing Chinese officials to the United States in an attempt to secure exclusive distribution rights.[55] DreamWorks also teamed up with Chinese partners to create Oriental DreamWorks, which makes and distributes films, the first of which was *Kung Fu Panda 3*, and Oriental DreamWorks will also build an entertainment complex.[56] The animation studio and joint venture were announced after Jinping's visit to the United States.[57]

DreamWorks has very close relations with China, which helps it gain distribution. Jiang Mianheng, an industrial mogul, runs the Shanghai Alliance Investment Ltd., which is a partner of DreamWorks. Jiang's father is Jiang Zemin, the former General Secretary of the Communist Party, and former President of China.[58] Although these relationships are not *per se* improper, they are material facts and ought to be disclosed to the proper regulatory authorities. They also justify an increase in caution to ensure that these close ties are not being used in way that violates the FCPA.

iii. Disney

Disney was one of the major film studios investigated in the SEC's FCPA industry sweep. Disney was accused of bribing foreign government officials to get exclusive film distribution rights and of bribing to get permits and privileges in connection with building its theme park in Shanghai, which opened this past summer.[59] With DreamWorks and Vice President Biden, Disney was also involved in negotiating the deal that opened more of China's box office.[60] In addition, Disney, Marvel and Disney's China counterpart DMG coproduced *Iron Man 3*. This, while not an indicator of corruption, is a potential red flag. As coproducing this movie in China necessitated

close relations and constant communication with Chinese companies and government officials, Disney needed to be careful about whom it hired (i.e., hiring someone recommended by a government official could potentially violate the FCPA).[61]

iv. News Corporation

News Corp. and its Executive Chairman Rupert Murdoch were investigated by the DOJ for bribery.[62] Several companies owned by Murdoch, including newspapers and both Twentieth Century Fox and 21st Century Films, were being investigated.[63] The British tabloid, *News of the World*, was accused of bribing police, phone hacking and wiretapping, all potential violations of both the FCPA and the U.K. Bribery Act. News Corp. is an American-based company, so both it and its subsidiaries fall under FCPA jurisdiction, even though the violation occurred outside the United States. At the end of the U.S. investigations, the wiretapping was found to be illegal, as were the payments to the British police department, which constituted "giving money to a foreign official," an explicit violation of the FCPA anti-bribery provision. Additionally, the undisclosed payments also triggered the accounting fraud provisions of the FCPA. The News Corp. settlement, even after the corporation split, was hundreds of millions of dollars for both the News entity and Twentieth Century Fox. Although according to the Company's Form 8-K SEC report, the DOJ's investigation of 21st Century Fox was formally concluded with no formal charges brought,[64] Twentieth Century Fox continued to be part of an ongoing investigation of film studios.[65]

v. International Corrupt Acts

The international entertainment industries are not immune to corruption. In Britain, producers allegedly created the film *A Landscape of Lies*, in order to cover up tax fraud.[66] In China, the *21st Century Business Herald* was alleged to have extorted and bribed in order to get access to phone records.[67] In 2011, the media alleged that Czech Republic police officers were arrested for illegally helping movie productions, including by working for the production companies, shutting down streets or giving access to streets, and moving cars.[68] In Morocco, the *Los Angeles Times* reported that the 2005 Hollywood film *Sahara* was made with hundreds of thousands of dollars that were recorded as "local bribes."[69]

III. Existing Measures Against Corruption

A. Domestic Measures Against Corruption

1. Foreign Corrupt Practices Act

The FCPA was passed in 1977 and amended in 1988. It increases accounting transparency and reporting requirements for individuals and corporations.[70] The FCPA is also aimed at stopping bribery of foreign officials. It applies to any person or business with a certain amount of connections to the United States, whether in the United States or abroad. The FCPA bans payment of money or gifts to foreign government officials, parties, by United States citizens, businesses, or foreigners in companies with American Securities.[71] The FCPA is divided into two parts, anti-bribery and accounting.

The first part bans payment of money or anything of value to a foreign official, who is defined by the FCPA as being "any officer or employee of a foreign government or any department, agency, or instrumentality thereof, or of a public international organization, or any person acting in an official capacity for or on behalf of any such government or department, agency, or instrumentality, or for or on behalf of any such public international organization."[72] The payment in question must be to "obtain or retain business."[73]

"As a result, companies have begun to take extra precautions. Ideally, internal controls and training should prevent corruption."

The second part requires that companies "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets"[74] and to "devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances."[75] The FCPA accounting provisions can be widely applied, covering everything a company does, without a materiality threshold and regardless of whether there is bribery.[76] Both falsified and inaccurate books can violate these provisions.[77] The provisions also require internal controls.[78]

The FCPA is enforced by the SEC and the DOJ. The federal government can charge people with actual FCPA violations, or conspiracy to violate the FCPA. The SEC can impose civil fines, both through administrative and judicial proceedings,[79] and the DOJ can prosecute and impose criminal punishments and fines. The punishments for bribery violations for companies can be millions of dollars, in addition to fees and negative publicity.[80]

The FCPA got off to a weak start. For many years, it was not really enforced.[81] However, once other countries began enforcing anti-corruption measures (encouraged by the passage of the United Nations Convention Against Corruption (UNCAC)),[82] the United States began to actively enforce the FCPA. As a result, companies have begun to take extra precautions. Ideally, internal controls and training should prevent corruption. Regulators detect discrepancies when corruption occurs, or companies self-report it. The SEC and DOJ can punish corruption, or impose huge settlements to deter corruption.

When it passed the FCPA, and years later when it began to enforce it against Hollywood, the government had the stated goal to:

> (i) prosecute company executives, not just their corporate employers, for knowingly participating in a bribe scheme; (ii) hold companies and their executives accountable for failing to implement systems that permit accounting snafus and potential subterfuges, even absent their knowledge of corrupt dealings; and (iii) ensure that companies doing business abroad will conduct proper due diligence and implement adequate controls to prevent and detect bribing foreign officials.[83]

The government enforces the FCPA by investigating both individual companies and entire industries. It targets major players and requisitions their books and documents. The government looks for possible markers of corruption. Some of these markers include: the heavy use of third parties, use of government-recommended specialists or locals, dummy entities, inflated invoices, and misnamed entries in the financial records.[84] When the government begins an FCPA enforcement proceeding, it begins by looking for red flags. For example, the government began investigating Hollywood after the conviction of Gerald and Patricia Green, whose conviction for bribery focused attention on what film companies and executives were doing abroad.

"The burden is on the government, not only to prove that the alleged conduct occurred, but also that the defendant knew when it acted that it was violating United States law."

In order to prove an FCPA violation, the government must show eight factors. It must prove that the defendant was a "domestic concern" or an officer, director, employee, or agent of a "domestic concern" or an "issuer" or an officer, director, employee, or agent of such issuer or any stockholder thereof acting on behalf of such issuer.[85] The defendant must have specifically intended that the alleged problematic act was going to involve mail or interstate commerce.[86] The defendant must have acted corruptly and willfully.[87] The defendant must have specifically intended to act in order to receive a payment, a gift, or anything else of a certain value.[88] The payments must have been made to "foreign officials."[89] The defendant must have known that at least some part of the payment was offered, given, or promised, directly or indirectly, to a foreign official.[90]

> The payment must have been explicitly intended to be for one of three purposes: (1) to influence an act or decision of the foreign public official in his or her official capacity; (2) to induce the foreign public official to do or omit to do any act in violation of that official's lawful duty; or (3) to induce that foreign official to use his or her influence with a foreign government or instrumentality thereof to affect or influence any act or decision of such government or instrumentality.[91] Lastly, the payment was specifically intended to get or keep business for or with, or directing business to, any person.[92, 93]

The burden is on the government, not only to prove that the alleged conduct occurred, but also that the defendant knew when it acted that it was violating United States law.[94] The DOJ will often use the business purpose test to determine whether the payment violates the "obtaining or retaining business"[95] provision in the FCPA.[96]

The FCPA imposes a duty on companies and individuals to have the proper procedures in place to know what constitutes corruption and legitimate accounting, and to conduct reasonable due diligence to ensure that no bribes are being paid when they work with foreign governments or other third parties.[97] There is one exception, two affirmative defenses, and several partial defenses to alleged violations of the FCPA. There is a "facilitating or expediting"[98] exception to prosecution for FCPA violations, which is also known as the "grease payment" exception,[99] defined as money paid to ensure the "performance of a routine governmental action."[100] The first affirmative defense is the "local laws" defense, which is that the payment must be explicitly legal[101] under the laws of the country where it occurred.[102] The other affirmative defense is the "bona fide business expenditure defense" that the payment or gift was a "reasonable" and "bona fide" business expense.[103] Other defenses include negating relevant factors such as showing that the payment was not "willful" or that the company did not have "knowledge." A more successful, but not complete, defense is that the company has good procedures for FCPA compliance.

2. Dodd-Frank

In addition to the FCPA, the SEC and the DOJ have power to investigate corruption under the Dodd-Frank Wall Street Reform and Consumer Protection Act Pub. L. 111-203 (Dodd-Frank).[104] Section 1504 of Dodd-Frank also requires disclosure of legitimate payments to foreign governments.[105] Section 922 of Dodd-Frank includes an incentive program for whistleblowers to report FCPA violations.[106] Whistleblowers can receive up to 30% of the rewards and sanctions gathered by the government, if the whistleblower's information was voluntarily given in a successful FCPA enforcement action, and the total money recovered is worth more than $1 million.[107] Whistleblowers under Dodd-Frank are also protected from retaliation.[108]

3. Cases

Although there are very few FCPA cases specifically relating to the entertainment industries, other FCPA

cases, where they define relevant terms, apply relevant tests, or invoke defenses, have impacted how the FCPA is applied to the entertainment industry. For example, some cases try to define terms such as "corrupt" and "willful." In *United States v. Kay*, the Fifth Circuit Court of Appeals explains the common-law definitions of "willfully" and determined the degree of knowledge necessary to establish a willful violation of the FCPA.[109] This case is important because it provides a standard and because it holds that the defendant does not need to know the terms of the FCPA in order to willfully violate it.[110] *United States v. Kozeny*, discusses attempts to invoke affirmative defenses.[111]

"Film studios sometimes conduct business in ways that raise multiple red flags with respect to possible FCPA violations."

In United States v. Aguilar, the court denied a motion to dismiss because the electric utility involved was wholly owned by the Mexican government and may be considered an "instrumentality" of a foreign government within the definitions of the FCPA.[112] This holding could potentially be applied to the China Film Group, which could be considered an "instrumentality" of a foreign government within the meaning of the FCPA.

B. International Measures Against Corruption

1. The United Nations Convention Against Corruption

The UNCAC was the first legally binding, international anti-corruption policy. The goal of UNCAC was to decrease corruption, specifically bribery and accounting fraud, by increasing international enforcement via judicial policies and a more uniform set of international enforcement guidelines.[113] UNCAC divided the problem of corruption into four parts: prevention, criminalization, international cooperation, and technical assistance. As of October 2016, 180 parties were involved, including 140 signatories to the agreement.[114] However, the UNCAC came with a host of problems. It has been difficult to general an agreeable system that discovers corruption, determines who has jurisdiction, and sets up workable enforcement policies.

2. The U.K. Bribery Act

The U.K. Bribery Act (the Act) functions very similarly to the FCPA. Under the Act, previous laws about bribery were replaced with criminal laws governing bribery. The law governing bribery of foreign officials is in §6.[115] Punishment for violating the Act can include an unlimited fine and up to 10 years in prison. [116] Ernst & Young, LLC partner Jonathan Middup said:

> Film and TV making is particularly exposed to bribery and corruption risk. Films are shot all over the world and in some cases they are in countries where corruption is commonplace. There is a lot of cash being used and there is a need to get access to areas closed to the public, creating a lot of potential touch points with local governments or even the military. In some countries, how one accesses those things can run afoul of UK law even though they might be accepted practices in the country in question.[117]

3. The China Anti-Bribery Law

The Chinese Anti-Bribery Law applies to corruption within China, and has two sections. One section concerns bribing government officials, and the other is for commercial bribery between private parties.[118] There are special concerns that particularly affect film studios when doing business in China. For example, for FCPA purposes, is the Chinese Film Group considered a foreign official for both the SEC and the DOJ? It is likely yes for the latter, as the DOJ adopted rules saying that state-owned entities are foreign officials.[119] If so, what is the possibility of enforcement? The government has internal procedures for handling bribes and is likely to prosecute internally. In addition, the recipients of the bribes are not likely to voluntarily come to the United States to testify at a FCPA proceeding. China's anti- bribery laws do, however, include a long-arm provision,[120] and commercial bribery cases can often lead to supplementary FCPA cases.[121]

In addition, China passed a 2011 amendment to its anti-bribery laws that prohibits bribing a foreign official. This amendment functions similarly to the U.K. Bribery Act and the FCPA.[122] Violations of this amendment are often also FCPA violations. In these cases, it is unclear as to who would have the first right to prosecute.

4. Indian Anti-Corruption Laws

India recently passed anti-corruption laws, which include more effective implementation of UNCAC.[123] They also include improvements on the Prevention of Corruption Act of 1988, India's current anti-corruption law.[124]

C. FCPA and Hollywood

Film studios sometimes conduct business in ways that raise multiple red flags with respect to possible FCPA violations. They operate in high risk territories, often use third parties, and interact with government officials for various reasons, including seeking permits, distribution, and other related purposes.[125]

The movie industry has been suspected by the United States government of bribing government officials across Asia for distribution or for arranging kickbacks.[126] Some argue that it is an accepted practice in Hollywood. However, as the Asian market expands, film studios are also being accused of shelling out bribes for many other proj-

ects, including online distribution, facilitating IMAX and other premium movie formats, and land use permits for studios and theme parks. In addition, even if a payment is not classified as a bribe under the FCPA, it can sometimes still be illegal if it was improperly recorded.[127]

Film studios' reliance on third party contracts pose additional problems when the third party company is recommended by a foreign official. Often, American film companies will enter into business contracts with third party companies for everything from securing locations to full production partnerships, without conducting full and proper due diligence.[128] A number of FCPA problems can be avoided by parties taking the time to learn about the people and companies with whom they are working.

"Cameos of politicians, which count as political appearances, can definitely meet the threshold value requirement that triggers the FCPA."

Travel and entertainment expenses are part and parcel of the film industry and provide huge areas of potential corruption. Companies, including film studios, sometimes gift government officials or clients with free hotels, meals, travel expenses, entertainment, and holiday gifts. While reasonably priced gifts are acceptable under the FCPA,[129] the FCPA limits the amounts that companies can spend on government officials and clients.[130] For example, it is not an FCPA violation to send Christmas cookie baskets to foreign officials. It is also permissible for companies to pay for dinner, as long as there is a receipt, and it is not overly lavish in relation to normal business practice, the status of the individual, and the country's standards. However, frequent dinners raise suspicion, and the aggregate value is compared.[131] Proper documentation and disclosure are instrumental in ensuring that these expenses are legitimate in order to rebut an allegation of corruption.[132] Trips, sports cars, and charitable donations allegedly have been used as "gifts" to local officials.[133] These would not meet FCPA standards. Some film studios, which in the past often sent expensive gifts to foreign officials, are now trying to avoid FCPA problems by sending gifts with the studio's logo, making the objects unique, yet rendering them inexpensive. They would still satisfy the cultural gift requirements, but would fall under the allowance for promotional gifts.[134]

Another new possible area of corruption is giving politicians cameos in movies.[135] The act of giving a politician a cameo is not a *per se* violation of the FCPA. Cameos can fall under the "anything of value" category in the FCPA. However, cameos can be effective bribes; they can induce government officials to speed up a government process and are hard to track and prevent. Cameos of politicians, which count as political appearances, can definitely meet the threshold value requirement that triggers the FCPA.[136] Politicians may be willing to pay big money for appearances, with the politician deriving intangible benefits. FCPA enforcers must ask about the length of the cameo, the possible royalties or other benefits (such as publicity) derived from the cameo, and the motivation for giving the cameo. Once granted, even a showing of a reasonable motivation can be a sufficient defense to corrupt intent. A business purpose test is then applied to the cameo to test the studio's motivation. Bribing people with cameos is very complicated. The enforcer must prove corrupt intent in order for a cameo to be an FCPA violation.[137] Filmmakers can be held liable just for inviting a foreign official to make a cameo appearance.[138]

"The deal raised a number of potential FCPA concerns, including jurisdictional issues and the fact that the deal might better enable Legendary to avoid Chinese quota limits, as some of the films will be made in cooperation with or in close connection to the China Film Group."

In addition, product placement has become a potential new way to incentivize, potentially problematically, for foreign companies to help film studios with their needs in China. For example, some companies will require that their brand products be placed in the movie when it is shown in their target market countries.

D. China in the United States

Corruption does not only affect United States businesses abroad, it also affects foreign businesses with United States interests and securities. Chinese companies have been collaborating with United States companies in order to become involved and to learn how to compete in every stage of the movie making process.[139] A new trend has been for large Chinese companies, such as the Dalian Wanda Group and Alibaba, to meet with companies in Hollywood, or even buy large stakes in entertainment companies and help Hollywood film studios expand into China.[140] For example, the Dalian Wanda Group paid $3.5 billion to acquire the controlling stake in Legendary Entertainment, a prominent Hollywood company,[141] with the stated goal of the acquisition to help Legendary "increase its market opportunities, especially in the fast-growing Chinese market."[142] The deal raised a number of potential FCPA concerns, including jurisdictional issues and the fact that the deal might better enable Legendary to avoid Chinese quota limits, as some of the films will be made in cooperation with or in close connection to the China Film Group. Alibaba, which is China's e-commerce giant, has met with various Hollywood companies.[143] Using Alibaba, film studios could have a tremendous increase in their ability to reach a wider Chinese audience.[144] Other Chinese businesses have also started

investing in and collaborating with Hollywood entertainment companies.[145]

E. The Fallout

The cost of corruption charges under the FCPA is tremendous. Charges of FCPA violations require independent audit fees and outside counsel fees just in the investigative stage. If a company is found guilty, it can receive heavy fines. News Corp. ended up paying $191 million in settlement fees to close its FCPA matter, not to mention $179 million in professional and legal fees, which mostly consisted of investigative fees.[146] Sony's reputation and stock price plummeted after the FCPA violations were disclosed. Sony also paid an estimated $176 million to Ernst & Young, LLC just for the investigation.[147]

The proceedings also take up a great deal of the companies' time and resources. In addition, FCPA investigations sometimes result in shareholder litigation[148] and harm to a company's goodwill.[149]

Another major consequence of corruption is in tax treatment. How does a company report an improper payment in its taxes? Can tax records be used in investigations and as evidence? Furthermore, certain methods of reporting can lead not only to FCPA violations, but also to criminal fraud allegations as well. An example of this is Patricia Green, who according to the judge's opinion, "well knew, that figure [on her tax returns] was a false and overstated amount including bribes to a foreign official for obtaining and retaining business with SASO that were not commissions or costs of goods sold."[150] The tax allegations were worth up to 10 years in jail per count, in addition to any potential jail time from the FCPA violation.[151]

F. The Process

Film studios and related business have to constantly deal with regulators, both in the United States, including FCPA regulation and abroad, wherever they are filming. Companies should endeavor to determine which regulatory agencies are involved, and how to best utilize the regulators to minimize and mitigate FCPA liability. Once a company is in a potential FCPA situation, it has to undergo investigations. First, the company can investigate internally, and then it might have to defend against a government investigation.[152]

"Government investigations can be brought by the DOJ, the SEC, both agencies together, or both agencies separately."

Internal investigations are almost always the first step. It is a way for a company's general counsel to show its efforts to management, for management to show necessary actions taken to the Board of Directors, and for the board and management to be able to show to the government that they are taking the necessary steps to avoid or to remedy any violations. Internal investigations give outside counsel the knowledge and ability to best advise the Board and management, particularly if there is a subsequent government investigation. The internal investigation determines the nature of the issue, gather facts by interviews and may use forensic accounting, in order to best advise the company.[153]

Once the internal procedures are complete, the company can choose to self-report to the government or wait for the inquiry. Both options are risky. By self-reporting, a company should get lighter punishments because of compliance, but it would most definitely be investigated, which is expensive. By not reporting, a company runs the risk of the government seeking and having a harsher punishment for noncompliance. Business entities rarely publicly challenge the DOJ or the SEC in FCPA enforcement actions.[154] The most popular recourse for corporations is to agree to plea, deferred prosecution, or non-prosecution agreements.[155]

As FCPA investigations encompass a wide array of diverse issues, once the government begins a formal investigation, a company will spend much of personnel time, money, and resources. The procedure is often complex and challenging, as investigations require outside counsel, auditors, business intelligence experts, forensic accounting and technology experts, and locals from each relevant international location.[156] The government usually comes out on top in FCPA cases, collecting large fines.[157] A company's best hope is often convincing the federal prosecutor not to indict anyone.

Government investigations can be brought by the DOJ, the SEC, both agencies together, or both agencies separately. The standard of proof for bribery is minimal intent and knowledge, and the anti-accounting fraud provisions require no intent.[158] Criminal investigations, which are brought by the DOJ, are usually initiated by a grand jury, which subpoenas records and witnesses. The United States Attorney's Office advises whether the company is a "subject or a target."[159]

Civil actions are more common. For a civil case, the standard is only a preponderance of the evidence. The SEC's Division of Enforcement will investigate informally through its own initiative, or formally through the SEC's subpoena power.[160] The SEC has experts who look at relevant documents, including financial statements, statements by employees, and results of the internal investigations. Initially, the investigations are private; however, any formal charges can be published on the SEC's website.[161] The SEC can then bring an action either in federal court or before an administrative law judge. Currently, for reasons of efficiency, the SEC is moving towards administrative actions in FCPA enforcement cases.[162]

G. Settlement

FCPA investigations often conclude in court-mandated fines or settlements. The payments can be in the millions of dollars, separate from fees and potential stock price losses. Settlements can be extremely detailed, and in exchange for reduced fines and non-prosecution, agreements can include other conditions, such as periodic FCPA audits, mandatory compliance trainings, and access to documents. Both the company and the government also agree to conditions, such as monitoring terms and what will be disclosed to the public.[163]

"Some companies also choose to seek advisory opinions from the Department of Commerce or the DOJ before engaging in questionable trade or behavior."

IV. Current Solutions

A. Current Methods in Use

Legislation has become a trending method of fighting corruption. Beyond the national laws mentioned above, some companies have also begun inserting specific FCPA-related provisions into representations and warranties, termination, breach, and indemnity provisions of international contracts. In addition, most companies have internal compliance procedures that allow them to deal with their corruption-related problems without outside interference and enables them to develop internal mechanisms that can be used consistently in different locations.[164] Some companies also choose to seek advisory opinions from the Department of Commerce or the DOJ before engaging in questionable trade or behavior.[165] Companies can submit Wells Submissions[166] to the SEC or Position Papers to the DOJ for advice. However, the opinion process is underdeveloped and underutilized. Many companies use mediation in large lawsuits that include FCPA settlements. Companies can also settle FCPA claims.[167] This has the advantage of being faster and less expensive.

"One possible way of changing this would be to require or encourage countries to formally pass laws that standardize UNCAC's provisions and add on to them, including on how to deal with extraterritoriality and jurisdictional issues."

B. Disclosures

Full and complete disclosure can alleviate or mitigate many of the potential FCPA problems. Disclosure is crucial to ensuring prevention of accounting fraud. In addition, disclosure of any payments or gifts to foreign officials is necessary to avoid the appearance of corruption and to mitigate the government investigation if corruption allegations are made. Disclosure is also one of the factors that the government considers when determining whether to take action with regard to prosecuting a corporation.[168]

V. Potential Solutions[169]

Anti-corruption compliance programs, legislation and contract provisions are some of the methods currently used to handle corruption problems. Corruption can be extremely difficult to detect and anti- corruption measures can be equally difficult to enforce. In order for corruption to be effectively dealt with, all solutions must encourage safe reporting by both internal and external whistleblowers. It is vital that solutions also encourage international cooperation.

A. Government-Based Solutions

1. Legislation

Legislation by other countries can help stamp out corruption by giving the United States, local governments, and international authorities legal justifications for enforcing anti-corruption measures. In addition, if other countries pass new laws or enforce their existing anti-corruption laws, then they can limit or eliminate the "local law" affirmative defense.[170] However, there is no mechanism in place to compel governments to enforce anti-corruption laws and policies. In addition, it is further complicated by the fact that anti- corruption legislation is not consistent from country to country. Countries define corruption, who can be bribed, and penalties differently. For example, in the United States., the penalties for bribery range from fines, to jail, to losing the right to operate a business,[171] whereas in Thailand, bribery is punished by jail time, or even the death penalty.[172] One possible way of changing this would be to require or encourage countries to formally pass laws that standardize UNCAC's provisions and add on to them, including on how to deal with extraterritoriality and jurisdictional issues. Another solution would be to have WIPO or another multi-national organization promulgate uniform standards and procedures for countries to formally adopt.

2. Centralization of Government Authority

Another potential solution could be to centralize all things to do with the FCPA into one government authority. For example, a party could go to one FCPA government entity to ask questions, get advisory opinions, self-report, cooperate with investigations, discuss settlements, and if necessary, to participate in some form of alternate dispute resolutions or litigation preparation. This will decrease confusion and increase efficiency—both financially and judicially—by decreasing burdens on the courts and on different governmental agencies involved.

B. Company-Based Solutions

1. Compliance Programs

Anti-corruption training and compliance programs are essential to preventing FCPA violations or mitigating liability. Companies should train their employees as to what constitutes corruption. Employees should also be given a clear path to management with any questions about or reports of alleged FCPA violations. A good compliance program complies with the *In re Caremark Derivative Litigation* requirements for good procedures, as set out by the KPMG report at issue in *Stone v. Ritter*.[173]

"As part of FCPA compliance programs, there should be mandatory education for employees at all levels and types, from CEOs to directors, officers, and employees."

The cases, which were primarily about corporate governance and the failure to monitor, set out criteria for best practices that included a compliance department, which should be headed by a single director, a corporate security department, audit, and suspicious activity oversight committees.

As part of FCPA compliance programs, there should be mandatory education for employees at all levels and types, from CEOs to directors, officers, and employees. Employees should be educated in what the FCPA is, what constitutes corruption, how to ask questions before they become problems and how to report problems once they occur. Companies should also include education on global compliance, other countries' anti-corruption definitions, statutes and enforcements. In addition, compliance programs should include general FCPA education for international third parties with whom the companies work.

A good compliance program should include annual reports to the Board, quarterly reports to a Board committee, a system for employees to report problems up through the hierarchy,[174] access to advice from outside advisors (such as lawyers and accountants), and an independent committee to investigate claims.

"The provisions could outline what constitutes potential corruption and what is simply negotiation protocol."

2. Contract Provisions

Many companies have begun including FCPA provisions in their contracts. Use of specific FCPA-related provisions should be required. For example, a company could insert a provision stipulating that no party to the contract will knowingly violate the FCPA. The provision could be structured similarly to the one below, which was recommended by the Association for Corporate Counsel, and which states:

> Notwithstanding any other provision in this Agreement, neither any Party nor Company shall be obligated to take any action or omit to take any action under this Agreement or in connection with the business of this Company that it believes, in good faith, would cause it to be in violation of any applicable laws, including the FCPA.[175]

The provisions could outline what constitutes potential corruption and what is simply negotiation protocol. Additional provisions could require the foreign companies to agree to cooperate with any FCPA investigations, including allowing audits of relevant documents,[176] detail penalties for violation, and indicate who has the authority to enforce the penalty. Contracts could require a provision in which a party agrees "not to do anything that will violate the FCPA"[177] in addition to FCPA provisions relating to termination, breach and indemnity. Other provisions could require that in international contracts, all parties to agree to submit to FCPA jurisdiction first, and the jurisdiction where it occurred second, or specifying that bribery of any type would constitute a *per se* violation of the FCPA, even if it is legal in the country where the bribery occurred.

"The investigations, and their potential ramifications for relations with Asia, are an issue of concern for film studios, industry leaders and other countries."

VI. Quick Recommendations for Hollywood

As of early 2016, all the major film studios had been under investigation for roughly four years.[178] The investigations, and their potential ramifications for relations with Asia, are an issue of concern for film studios, industry leaders and other countries. Presumably, the studios have already conducted internal investigations, with appropriate outside advisors. They should determine what needs to be disclosed. Meanwhile, as a preventative measure, they should ensure that they conduct proper due diligence when taking on third party business partners; increase their compliance programs; educate their employees and third parties with which they do business; and update their contracts to include FCPA enforcement provisions. Once a company has good controls and policies, and is able and willing "to investigate, remediate and properly document,"[179] then it has significantly protected itself by minimizing risks and does not have to report every little thing.[180]

VII. Conclusions

As the United States and Asian governments increase their enforcement of anti-corruption measures, it is important for media and entertainment companies to ensure compliance with the FCPA, both by their own employees and by relevant third parties. Strict company controls, internal investigative and dispute resolution procedures, and regular training as part of anti-corruption corporate compliance programs can help media and entertainment companies prevent costly and intensive corruption investigations. Companies should also add highly specific negotiated contractual provisions stating that the parties will not violate anti-corruption laws, and which specify binding enforcement procedures. Meanwhile, the government should centralize FCPA authority in one entity, to ensure clarity, facilitate enforcement, and increase efficiency.

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The Grey Area: The Effects and Implications of Successful Fan-Fiction on Intellectual Property Rights

By Sean G. Shirali

Introduction

By now, most people may know that *50 Shades of Grey* was written as fan-fiction of the *Twilight* franchise.[1] However, the proliferation and success of the *50 Shades of Grey* phenomenon is just one high profile example of the ever-blurring line between fan-fiction and professional media.

Defining Fan-Fiction

Fan-fiction is more than a group of teenagers gathered in a basement and filming goofy fight scenes on an old camcorder. Anyone with a pen and an idea for a story can create fan-fiction. In fact, a quick search will likely turn up any number of such works. However, what happens when fan-fiction goes beyond the online message boards devoted to a particular show, comic, movie, book, or other source material, and becomes a professionally produced and commercially viable work? This is a question that courts and copyright owners seek to answer. Moreover, what are the rights owners to do when fan-fiction threatens to impinge upon the rights of the work upon which it is based?

"The derivative right is important to every copyright owner. It plays a dual role, both protecting a creator's expression from those who would appropriate it as their own, and enabling the owner to tap into that expression and build upon it."

As with most questions in the legal world, the answer depends upon the facts and circumstances. However, it is possible to better understand how high quality fan-fiction fits into the puzzle of intellectual property rights.

The Statutory Landscape of Copyright and Trademark Infringement

I. Copyright

The Copyright Act provides us with a term that neatly categorizes works of fan-fiction: derivative works. A derivative work is defined as a work based upon one or more preexisting works,[2] as per Title 17 of the United States Code, §106.[3] That allows a copyright owner to take an ember from the proverbial fire lit by the initial creative spark, set that stick alight, and start a whole new fire, one with the potential to create a serious windfall.

The derivative right is important to every copyright owner. It plays a dual role, both protecting a creator's expression from those who would appropriate it as their own, and enabling the owner to tap into that expression and build upon it.

II. Trademark

Fan-fiction is certainly not limited to any one medium. A fan's drawing, comic, short film, story, book, or feature length movie can incorporate any number of trademarked elements that could be confusingly similar to a given audience.

"Whether a fan-fiction work involves trademark, copyright, or some mixture of the two, the point is that every such work may be infringing by borrowing characters, plot points, settings, and even story lines."

The Lanham Act, codified under Title 15 of the United States Code, provides for the registration and maintenance of trademarks in relation with goods and services used in commerce.[4] The Circuit courts have confronted the issue of infringement and established varied tests for the likelihood of confusion between two marks to determine whether one mark infringes another by being confusingly similar.[5] In addition to infringement, another concern in the realm of trademark is possible dilution or tarnishment that can occur when a registered mark is used without permission, resulting in degradation of the mark itself, and the materials to which it is attached.

Whom To Pursue, and Why: Profit, Power, and Reputation

Whether a fan-fiction work involves trademark, copyright, or some mixture of the two, the point is that every such work may be infringing by borrowing characters, plot points, settings, and even story lines. Why then can fans continue to create new fan-fiction without facing the consequences of impinging upon the owner's legal rights? To answer this, it is important to consider that many rights owners are large-scale entertainment companies and the would-be infringers are often individuals or small groups. A lawsuit between one of these companies and an enchanted fan may not play out well in the court of public opinion. Even for those owners who are not media conglomerates, but perhaps prolific visual artists or authors, the risk of alienating fans and supporters may outweigh any benefit that a lawsuit would bring.

Pursuing each and every fan-fiction writer who infringes upon a work could be prohibitively time-consuming and expensive, if not completely impossible. Such a tactic could also stifle creativity and thin out the fan bases upon which many commercially successful creative works thrive. With all of this in mind, it becomes clearer how a move against the fan-fiction writer who just wants to be included in the story that he or she loves may ultimately be starting a losing battle.

"As discussed, some rights owners walk a thin line between preserving their intellectual property rights and potentially alienating fans, leading to a fan-centric approach in the realm of fan-fiction."

When *is* it, what makes that venture worthwhile? The answer to this boils down to three main concerns, involving: significant loss of profits, exclusive licenses, and degradation or tarnishment of creative works and trademarks.

I. Loss of Profits

With regard to loss of profits, an owner of intellectual property rights is more likely to pursue an entity who stands to make a substantial profit from its derivative work of fan-fiction and divert that profit away from the owner. While a part of an entertainment company's mission is to produce entertaining material, its continued success and longevity are dependent upon its ability to turn a profit from the entertainment it provides. Therefore, when that profit and success is threatened by an infringer, the copyright owner needs to protect itself.

II. Exclusivity

Unauthorized works pose the risk of undermining or interfering with existing licenses between the rights owner and a third party. When this occurs, a copyright owner's work suffers serious damage, because the ability to use that work through licensing is impaired.[6] A work or trademark could become virtually useless in the context of exclusive licensing if an unauthorized fan-fiction work exists to pre-empt a licensed work, by interfering with exclusivity and by providing an alternative to consumers.

III. Reputational Concerns

Finally, at times a copyright owner must confront degradation or tarnishment of its intellectual property. This presents a unique situation, separate from preservation of profits and rights. This issue deals with preservation of *reputation* and integrity of a creative work or mark.[7] For example, a rights owner has a substantial interest in preventing distasteful or even pornographic uses of its copyrighted and trademarked materials.

While it may be clearer as to *why* a rights owner needs to contend with high-quality forms of fan-fiction, the question of *how* it can and should go about this remains. As discussed, some rights owners walk a thin line between preserving their intellectual property rights and potentially alienating fans, leading to a fan-centric approach in the realm of fan-fiction.

Saving the Day: Lawsuits, Licensing and Alternative Resolutions

Of course, rights owners certainly are not stymied. Owners have a number of avenues of recourse available to them to solve their fan-fiction dilemmas, and not all of them involve a courtroom.

I. Harry Potter and the Lexicon

At first glance, the most obvious solution is for the rights owner to simply sue the fan-fiction writer whose work is infringing. However, this solution is not as simple as it may seem on its face. Aside from the usual downsides of litigation—high costs and extended timelines—there are the added concerns of bad publicity and alienation of fans that come with attacking a fan-made work. Nevertheless, litigation may be the best or only option available, as it was for Warner Brothers when it, with author J.K. Rowling, sued book publisher RDR Books for infringing upon *Harry Potter.*[8]

"Warner Brothers and Rowling to pursued litigation to protect their rights."

In that case, Warner Brothers and Rowling sprung into action to prevent the publication of a printed *Harry Potter* encyclopedia called *The Lexicon*. The encyclopedia was the magnum opus of a dedicated *Harry Potter* fan who had meticulously combed through each of the novels in the series and compiled an online encyclopedia of the numerous characters, creatures, spells and terms contained within the series. Rowling did not at first take issue with this work. However, problems arose when RDR Books became involved and sought to publish and sell the encyclopedia.[9]

While the encyclopedia was not fan-fiction *per se*, in that no new plots were created using Rowling's original work, the underlying issue that fan-fiction presents was still present. The free online version of the encyclopedia was comparable to a fan-made film or story, but the print version to be sold crossed the line from a fan's work created from an interest and love for the novels into a venture for profit. Warner Brothers and Rowling to pursued litigation to protect their rights.

II. Licensing

Litigation is often an aggressive means of resolution. Rather than taking that approach, a rights owner can in-

stead attempt to negotiate with its would-be infringer. An effective solution can be something as easy as negotiating a license for the fan-fiction. By doing this, a copyright owner avoids the pitfalls of litigation and quells many of the concerns that a professional level, commercially viable work of fan-fiction presents. Through a license owners can preserve some amount of the profit they otherwise would have received had they produced the work themselves, solve issues of exclusivity by crafting licenses to preserve the licensed rights they have provided to others, and exert a modicum of control over how their original materials are used in the fan-fiction works. Indeed, although a negotiated license sounds like a perfect plan for a rights owner, the fan-fiction creator also has to agree to the terms.

III. Fan-Fiction Guidelines

Nevertheless, sometimes the best move for rights owners is to forgo litigation or negotiation, and instead work with fans of their works on a broader scale to preserve the integrity and continuity of protected works, while still ensuring that fans have the ability and freedom to engage with the stories they love. This is the approach Paramount recently chose to pursue in contending with the *Star Trek* fan fiction film *Axanar*. Following a legal battle the parties ultimately settled the suit out of court, with Paramount opting to put in place a set of fan-fiction guidelines to avert any concerns of misuse or misappropriation.[10]

"Of these guidelines, a few are particularly notable for the protection they offer Paramount's intellectual property."

In this instance, trouble began when what started as a fan-fiction film raised $1 million dollars in crowd-funding and began to evolve into something that resembled a professional (and potentially profitable) derivative work, rather than a piece of fiction created merely for fun and enjoyment.[11] *Axanar* was meant to be a film set on an obscure planet that was once mentioned, but never fleshed out, in the *Star Trek* series. However, although fans started the process, it grew into something more than the fan-fiction that many original creators allow to move forward. Instead, it forced Paramount, the owner of the rights to *Star Trek*, to take action.

Ultimately, this ended up with the parties settling, but in the wake of the suit came a set of stringent fan-fiction guidelines to ensure that in the future, *Star Trek* fans will be more restrained in building upon the *Star Trek* universe itself. Of these guidelines, a few are particularly notable for the protection they offer Paramount's intellectual property. In fact, each of the guidelines seems to serve the overarching concerns discussed above.

For example, the first guideline states that, "[t]he fan production must be less than 15 minutes for a single self-contained story, or no more than 2 segments, episodes or parts, not to exceed 30 minutes total, with no additional seasons, episodes, parts, sequels or remakes."[12] In effect, this guideline discourages a future feature length film, like *Axanar*, from being created. It also prevents other professional level productions in other media, such as on television or in a web series, thereby directly serving Paramount's interest of maintaining profits from its original work.

"To increase the likelihood that these guidelines are adhered to, Paramount offered to remove the threat of litigation."

Additionally, the guidelines go on to require that a "production uses commercially-available Star Trek uniforms, accessories, toys and props, these items must be official merchandise and not bootleg items or imitations of such commercially available products."[13] By putting this requirement in place, Paramount addresses the concerns of licensing and exclusivity as well as those of reputation. Requiring fans to use official merchandise rather than bootlegs protects not only the licensee's rights to create and sell the *Star Trek* products, but also the quality of items associated with the *Star Trek* brand.

Further, the guidelines state:

> [t]he fan production must be family friendly and suitable for public presentation. Videos must not include profanity, nudity, obscenity, pornography, depictions of drugs, alcohol, tobacco, or any harmful or illegal activity, or any material that is offensive, fraudulent, defamatory, libelous, disparaging, sexually explicit, threatening, hateful, or any other inappropriate content.[14]

This further serves the preservation of *Star Trek* and Paramount's reputation by preventing the tarnishment or dilution of both the works and brand that make up the *Star Trek* franchise.

The set of guidelines serve to protect as much of Paramount's intellectual property interests in *Star Trek* as possible. However, as their name suggests, these are only recommendations for creating *Star Trek* fan-fiction, not binding rules. To increase the likelihood that these guidelines are adhered to, Paramount offered to remove the threat of litigation. A preamble to the guidelines states, "CBS and Paramount Pictures are big believers in reasonable fan fiction and fan creativity, and, in particular, want amateur fan filmmakers to showcase their passion for Star Trek. Therefore, CBS and Paramount Pictures will not ob-

ject to, or take legal action against, Star Trek fan productions that are non-professional and amateur and meet the following guidelines."[15] This statement, in combination with the guidelines, sums up the issue well. Paramount and similarly situated rights owners are not looking to take on fans of their works. Instead, they are seeking to prevent the "fan" element from leaving fan-fiction, and instead crossing the line into unauthorized, professional-level, commercial work.

IV. Alternative Routes to Resolution

As an alternative to pre-emptive guidelines, a copyright owner may take a page out of Lucas Films's book, and choose to label works of fan-fiction as non-canon after they have been created. Lucas Films did this in 2014, rebranding all extended universe *Star Wars* material—outside of the primary films and cartoon series—as "Star Wars Legends."[16]

"Understanding the practical motivations and legal implications that fan-fiction has upon rights owners makes the issues less opaque, but the realm of intellectual property rights and fan-fiction is far from well settled."

J.K. Rowling took a similar approach to online *Harry Potter* fan-fiction. While stopping short of formal guidelines, Rowling made it clear that she expects any fan-fiction publications to remain online, not sold, and not contain any racism or pornography, as well as to make it clear that she was not involved in the creation of the fan-fiction work.[17]

No matter what approach a copyright owner takes, a unity of purpose begins to emerge; protecting and enforcing those rights owned and the benefits that come along with them. Therefore, as implied above, fan-fiction seems to exist in a gray area where the law and practicality intersect. Understanding the practical motivations and legal implications that fan-fiction has upon rights owners makes the issues less opaque, but the realm of intellectual property rights and fan-fiction is far from well settled. Perhaps fan-fiction producers and rights owners endeavor for a state of homeostasis. The two strive to co-exist, but when fan-fiction crosses the line into unauthorized, commercially viable, professional-grade alternatives, copyright owners should take action and restore balance.

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EASL Executive Committee member Britton Payne reviewed this article.

Krell's Korner

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

The Genesis of *L.A. Law*

By David Krell

To be a lawyer is to do battle—in the courtroom, at the negotiating table, and with office politics. *L.A. Law*, an NBC television series that aired from 1986 to 1994, showcased legal practice by exposing the professional and personal lives of attorneys and clients at the fictional Los Angeles law firm McKenzie Brackman Cheney & Kuzak; the firm underwent several name changes during the show's run.

NBC broadcast the two-hour pilot on September 15, 1986 in the network's *Monday Night at the Movies* slot, from 9:00 p.m. to 11:00 p.m., rather than giving the show a traditional début in its time slot for the season, at 10:00 p.m. on Friday nights. NBC programming chief Brandon Tartikoff promoted the new addition to the prime time lineup through a press release on August 27, 1986: "*L.A. Law* is a very special show. We think this is an innovative and unprecedented way to get maximum sampling of an extremely attractive program."[1]

"Kuzak decides to fight fire with fire, wearing a gorilla costume during his closing argument."

To give *L.A. Law* a boost, NBC re-aired the pilot in the *Saturday Night Live* time slot on September 27, 1986, from 11:30 p.m. to 1:00 a.m. When *Hill Street Blues* went off the air after the 1986-87 television season, NBC moved *L.A. Law* to Thursdays, where it remained.

L.A. Law combined drama and comedy with a flourish rarely seen in prime time. *Los Angeles Times* television critic Howard Rosenberg wrote, "There should be a law requiring more series like NBC's new 'L.A. Law.'"[2] Each episode brought humor, pathos, and intricacies of the law.

In *I'm in the Nude for Love*, a nudist colony faces off against its neighbors in a nuisance suit and parents sue a hospital to remove their comatose daughter from life support.[3] In *Belle of the Bald*, a member of a golf club faces accusations of killing a swan.[4] In *Beef Jerky*, a theft case revolves around bull semen.[5] In *The Accidental Jurist*, an Olympic champion loses an endorsement after revealing he is gay.[6] An AIDS mercy killing is at the heart of *The Venus Butterfly*, an episode more remembered for a polygamist's sexual secret that is never revealed; the episode title is the name of the maneuver.[7]

"It wasn't until Hamlin sat through the second act that he remembered that Kuzak had, in fact, lost the case in question."

In *His Suit Is Hirsute*, McKenzie Brackman litigator Michael Kuzak squares off against a clever attorney in a case involving a heating system—Kuzak's client sues for damages caused by the heater blowing up. Kuzak bases his argument on faulty installation. Defense attorney Frank Pastorini, in contrast, relies on humor to distract the jury. His repertoire includes tap dancing, one-liners, and other exhibitions indicating a "devil may care" attitude inspiring the jury to laugh, thereby forgetting about the seriousness of the case.

Kuzak decides to fight fire with fire, wearing a gorilla costume during his closing argument. He makes the point that Pastorini's humor strategy is a distraction from the facts of the case. It is a successful gambit, and Kuzak wins the case.[8]

Harry Hamlin played Michael Kuzak. He, perhaps more than any cast member, has the most unique fan story. A 1987 *Newsweek* article recounted Hamlin's tale: "During intermission at a Broadway play, Harry Hamlin was approached by a lawyer who praised the actor for his 'brilliant summation' in a trial scene involving malpractice. 'I taped it,' he went on, 'and am going to use your arguments.' It wasn't until Hamlin sat through the second act that he remembered that Kuzak had, in fact, lost the case in question."[9]

Steven Bochco, co-creator of *Hill Street Blues*, the 1980s NBC show that set the template for story arcs lasting several episodes, joined with a former assistant district attorney, Terry Louise Fisher, to create *L.A. Law*.[10] Fisher contrasted the show with its legal ancestors who successfully represented clients. "It's always been, how does the lawyer solve the problem? On our show, it's how does the problem affect the lawyer. It's about what the practice of law does to people."[11]

During a decade when NBC's prominence resulted from high quality television featuring Baby Boomers—

also known as Yuppies (young urban professionals)—*L.A. Law* challenged the audience theretofore used to seeing a case wrapped up by the end of the hour. It was an evolution in prime time storytelling. On *Hill Street Blues*, the criminals were not always found guilty. On *St. Elsewhere*, the patients did not always survive. On *L.A. Law*, the lawyers did not always win their cases.

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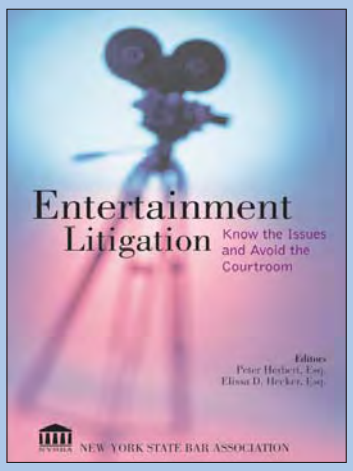

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Entertainment Litigation is a thorough exposition of the basics that manages to address in a simple, accessible way the pitfalls and the complexities of the field, so that artists, armed with that knowledge, and their representatives can best minimize the risk of litigation and avoid the courtroom.

Written by experts in the field, *Entertainment Litigation* is the manual for anyone practicing in this fast-paced, ever-changing area of law.

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