

Entertainment, Arts and Sports Law Journal



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

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 - The Fine Art of Protecting Intellectual Property
 - Obscenity Law in Cyberspace
 - Freelance Writing Is Not Free
 - Tales and Lessons Regarding the Right of Privacy
 - Autry, Angels, and the American League
-and more*



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Remarks from the Chair

I remain proud to serve as EASL Chair in 2018, our 30th anniversary, and to collaborate with colleagues seriously interested in growing the professional and personal value of membership.

To that end, we have planned and continue to plan affordable CLE programs and social events, which not only offer insights into the hottest legal and business topics affecting the fields of entertainment, arts, and sports, but also provide members with invaluable networking opportunities.

For example, on May 15th at Herrick Feinstein, EASL held its yearly Spring Meeting. First, Stan Soocher presented his annual review of top entertainment litigation cases. That was followed by two especially timely panels, plus a post-event cocktail reception with great finger

food (EASL members paid only \$50 for both the program and reception, earning five hours of CLE credit as well). More photographs of EASL's Spring Meeting follow these remarks.

The first panel addressed recent developments in the right of publicity, including then pending relevant but controversial legislation proposed in New York State. In key part, state legislators proposed to transform the existing statutory personal right of privacy into a new property right of publicity, which would also become a descendible and posthumous right for the first time in New York. Subsequently, the legislative Session ended without passage of the bill, although renewed efforts may be made in the next session.

The second panel focused on sports gambling in the United States. This panel took place literally the day after the Supreme Court declared unconstitutional the Professional and Amateur Sports Protection Act (PASPA), a federal statutory law that essentially limited sports betting to Nevada for the last 25 years. In anticipation, New York, New Jersey and several other states, among others, are moving forward to grab their slice of what undoubtedly will be a huge pie. (See Bennett Liebman's "What's the Status of New York Sports Gambling?" on the EASL Blog, at http://nysbar.com/blogs/EASL/2018/06/what_is_the_status_of_new_york.html, for more information about this topic.)

On May 17th, a non-CLE social event was held involving discounted tickets for EASL members and their guests to attend the Broadway play "Hello Dolly" with a pre-show happy hour. We plan to do more CLE and social events, including holding regular informal brown bag lunches and teleconferences among committee members. If you or your firm have any suggestions for CLE programs and/or social events, or can offer us space, please let me know.

In addition, Elissa D. Hecker, editor of our *EASL Journal* (and former Section Chair) is spearheading a special 30th

A Tale of Two Barrys: Barry Werbin and Barry Skidelsky celebrate EASL's 30th Anniversary

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anniversary issue of the *Journal*. *Inter alia*, it will include articles by committee chairs that look back over the last three decades, cover today's hot topics, and look ahead to what the reasonably foreseeable future holds in store for the various areas in which EASL members practice.

As always, we continue to encourage EASL members to contribute to the *Journal*, the EASL Blog, and online community, and to join a committee or two of particular

interest. A list of EASL's committees and more can be found on our website at www.nysba.org/easl.

In addition, I continue to ask that each of you please reach out to me directly (at (212) 832-4800 or bskidelsky@mindspring.com) in order to get acquainted and share ideas about how we might together do some good, have fun, and even maybe make some money. Nobody succeeds without a little help, and EASL is here to serve your needs and interests.

I look forward to hearing from you and to seeing you in person soon. Thanks again for being a member.

**Best Regards,
Barry Skidelsky**



Stan Soocher: presenting his annual review of entertainment litigation



**Sports Gambling Panel:
Anthony Dryer, Bennett Liebman, Daniel Etna, and Audrey Sheetz**



**Right of Publicity Panel:
Sandra Baron, Jeremy Feigelson, Elizabeth Seidlin-Bernstein, and Edward Rosenthal**

Editor's Note

We've reached the hot days of summer, hoping for cool beach breezes, and reading this slim issue of the *EASL Journal* stretched out on sandy blankets.

The next issue will celebrate EASL's 30th Anniversary. So much has happened in our practice areas over the past quarter-plus century. Our Committee Chairs and Past Section Chairs are feverishly writing articles about how it was three decades ago, what it means to practice law today, and forecasting for the future.

What can you contribute? Send me articles about what you have seen and experienced at any point over the past 30 years. What remains the same? What has changed? Certainly, the advent of the internet and technological advances have challenged the traditional practice of law. What does that mean to the entertainment, arts, and sports law industries? Tell us your stories!

Email me directly to ehckeresq@ehckeresq.com with your ideas by Friday, August 31st.

Happy Summer!

Elissa

**The next *EASL Journal* deadline
is Friday, August 31, 2018**

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 member and former Trustee of the Copyright Society of the U.S.A (CSUSA), former Co-Chair of CSUSA's National Chapter Coordinators, and Associate Editor and member of the Board of Editors for the *Journal* of the CSUSA. Elissa is a repeat Super Lawyer, Top 25 Westchester Lawyers, Trademark Lawyer of the Year, NY—2018 IP Excellence Award, and recipient of the CSUSA's inaugural Excellent Service Award. She can be reached at (914) 478-0457, via email at ehckeresq@ehckeresq.com or through her website at www.ehckeresq.com.

Have an IMPACT!

As the charitable arm of the New York State Bar Association, The Foundation seeks donations for its grant program which assists non-profit organizations across New York in providing legal services to those in need.

Why give to The Foundation

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"I champion the work of The NY Bar Foundation since its current programs support my interest in indigent legal services, youth courts, and human trafficking.

The Foundation's assistance is critical for these types of programs to help the underserved in our communities. I'm more supportive of the work of The Foundation than ever before."



Foundation Fellow, Patricia L.R. Rodriguez

Law Office of Patricia L.R. Rodriguez,
Schenectady, NY



DO THE PUBLIC GOOD

VOLUNTEER FOR PRO BONO

Pro Bono Update

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

Clinics

Thank you again to the wonderful Clinic volunteers from the Dance/NYC!
For photos of this event, please go to pages 24 and 25.

Brown Bag Lunches

This Spring, the Pro Bono Steering Committee, in conjunction with EASL's Fine Arts Committee, presented a Brown Bag Lunch entitled "Design Protection, Pitfalls, and Practice," held at Fross, Zelnick, Lehrman & Zissu, P.C.

Design is synonymous with change and innovation. It touches many industries, including fashion, jewelry, furnishings, art, and architecture. The panel of speakers was comprised of in-house and law firm professionals in the retail, fashion, and luxury goods sectors. The panelists represented a wide range of clients, artists, designers, creative companies, and fashion houses. During the luncheon, the speakers explored the complex legal issues confronting creative directors, designers, and corporations in the design landscape. They discussed artist collaborations, modes of design protection and design clearance, the marriage of creative personalities in the acquisition of luxury brand companies, and the business decisions that factor into the day-to-day creative process.

Nisa Ojalvo, vice president of legal affairs at LVMH Moët Hennessy Louis Vuitton Inc., moderated the panel, which consisted of John Margiotta of Fross, Zelnick, Lehrman & Zissu, P.C.; Lena Saltos of URBN of Urban Outfitters; Jill Ellman of M. Ross & Associates, LLC, and Betsy Pearce of Pearce LLP. A similar program was offered at ArtsWestchester—see page 11 for more information about this.

This is the fourth Brown Bag Lunch organized by EASL's Pro Bono Steering and Fine Arts committees. They are very well attended and much appreciated by the attendees.

Previous Brown Bag Lunches included speakers from the Artists Rights Society, the New York City Department of Cultural Affairs, and counsel from the top auction houses. These lunches are a terrific opportunity to meet the experts in their fields in an informal manner and to

hear top level presentations on a variety of issues from artists' right to high end art transactions. We encourage involvement from all Section members.

If you would like to speak, organize and/or work on a Brown Bag Lunch, please contact Co-chair Carol J. Steinberg at elizabethcjs@gmail.com.

Clinics

Elissa D. Hecker coordinates legal clinics with various organizations.

- heckeresq@heckeresq.com

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- elizabethcjs@gmail.com or www.carolsteinbergesq.com

Litigations

Irina Tarsis coordinates pro bono litigations.

- tarsis@gmail.com

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

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

Law Student Initiative Writing Contest

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL Web site. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section member practitioners.

Law school students who are interested in entertainment, art and/or sports law and who are members of the EASL Section are invited to submit articles. This Initiative is unique, as it grants students the opportunity to be ***published and gain exposure*** in these highly competitive areas of practice. The *EASL Journal* is among the profession's foremost law journals. Both it and the Web site have wide national distribution.

Requirements

- **Eligibility:** Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the EASL Journal must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form:** Include complete contact information, name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline:** Submissions must be received by **Friday, August 31, 2018**.
- **Submissions:** Articles must be submitted via a Word email attachment to heckeresq@heckeresq.com.

Topics

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

Judging

Submissions will be judged on the basis of quality of writing, originality and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our website.

Phil Cowan Memorial/BMI Scholarship Writing Competition



Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and 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 \$2,000 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 Sydney Joy at sjoy@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.

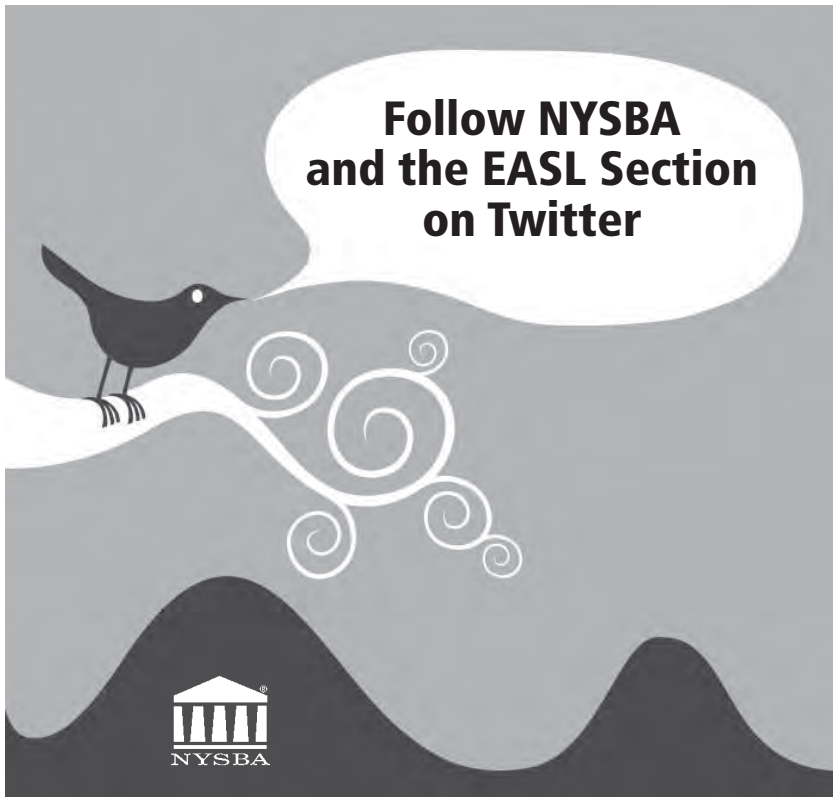
About BMI

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 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 140 years.

The more than 1,500 members of the Entertainment, Arts and Sports Law Section of the NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, pro bono opportunities, and access to unique resources including its popular publication, the *EASL Journal*.



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

NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

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

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

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

NEW YORK STATE BAR ASSOCIATION

Looking for past issues?

Entertainment, Arts and Sports Law Journal



www.nysba.org/EASLJournal



The Fine Art of Protecting Your Intellectual Property

ArtsWestchester, Wilson Elser and the EASL Section's Committee on Fine Arts Collaborate on Event for Artists

By Nisa Ojalvo, Olivera Medenica, Jill A. Ellman, and Jana S. Farmer

On May 1st, ArtsWestchester, the EASL Section's Fine Arts Committee, and the law firm Wilson Elser hosted an educational seminar on the topic of protection of artists' ownership, intellectual property and moral rights. The majority of the attendees were practicing artists, with gallerists, appraisers and other art market professionals in attendance. Jana S. Farmer of the Fine Arts Committee and Wilson Elser organized the program.



A warm introduction was offered by Jessica Cioffoletti, ArtsWestchester's Associate Director, Arts in Education. The panel presentation was opened by Nisa Ojalvo, vice president of legal affairs at LVMH Moët Hennessy Louis Vuitton Inc. Ojalvo focuses on intellectual property and corporate transactions for LVMH fashion, retail, travel, watch and jewelry, and perfumes and cosmetics divisions. She advises on Customs and regulatory issues, as well as data privacy, eCommerce, anti-counterfeiting and advertising for in-house clients that include Celine, Givenchy, Parfums Dior, Bulgari, TAG and Rimowa. Ojalvo is a founding member of the Women in Fashion Law affinity group of the National Association of Women Lawyers, and a member of the Fashion and Industry Group of INTA.

The first presenter, discussing copyright protection as it applies to visual arts, the benefits of copyright registration, and ways to protect valuable creative assets, was Olivera Medenica. Medenica is a partner at Dunnington Bartholow & Miller LLP and a member of its intellectual property, advertising, art and fashion law, international, and litigation and arbitration practice groups. She represents the National Endowment for the Arts on intellectual property matters and is the founder of an annual Fashion Law Conference hosted by the Federal Bar Association in New York and Paris.

Jill A. Ellman, an attorney at M. Ross & Associates LLC, built on Medenica's presentation by introducing the topic of licensing, which is relevant to artists working on collaborations and requiring protection of their intellectual property rights. She offered compelling reasons as to

why artists may benefit from licensing their artworks, explained the types of royalties available, and what contract terms artists should look for in their licensing contracts. Ellman's areas of practice at M. Ross & Associates LLC include commercial litigation and intellectual property. She represents small business owners and corporate clients in the retail, apparel and luxury good sectors on copyright and trademark issues.

Jana S. Farmer, of counsel to Wilson Elser, introduced the topic of artists' moral rights, including a right to prevent the destruction of one's artwork, and provided an overview of the protections offered by the Visual Artists Rights Act of 1990. She offered insight into why the recent federal court decision in the *5 Pointz* case was significant, and what cases should be followed in the future. Farmer is a member of Wilson Elser's art law team, representing art market participants in all stages of the creation, licensing, sale, lending, gifting, merchandising, and display of art. She also

handles complex intellectual property and commercial litigation, including copyright infringement, licensing disputes, counterfeit goods, defamation, right of publicity, breach of contract, tortious interference with contract, and deceptive business practice claims. Jana speaks and publishes articles on art law topics and provides *pro bono* services through Volunteer Lawyers for the Arts.



Following the presentations, the panel took questions from the audience, elaborating on topics ranging from strategic approaches, to copyright registration for multiple works, to the duties of building owners with respect to the art that they permit to be incorporated in the building, and possible contractual arrangements with the artists. The panel presentation was followed by a wine and cheese reception, during which the panelists continued to answer the attendees' questions pertaining to copyright, fair use and derivative works.

NEW YORK STATE BAR ASSOCIATION

☐ I am a Section member — please consider me for appointment to committees marked.

Name _____

Address _____

City _____ State _____ Zip _____

The above address is my ☐ Home ☐ Office ☐ Both

Please supply us with an additional address.

Name _____

Address _____

City _____ State _____ Zip _____

Office phone (_____) _____

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Fax number (_____) _____

E-mail address _____

Date of birth _____ / _____ / _____

Law school _____

Graduation date _____

States and dates of admission to Bar: _____

Please return this application to:

MEMBER RESOURCE CENTER,

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E-mail mrc@nysba.org • www.nysba.org

JOIN A COMMITTEE

Knowledge Enhancement via Committee Involvement

The **EASL Section's** committees address unique issues facing attorneys, the profession and the public. Committees allow you to network with other attorneys who practice in the entertainment, arts, and sports areas of the law. Committee membership gives you the opportunity to research issues and influence the laws that can affect your practice. Committees are also an outstanding way for you to achieve professional recognition and development.

The Section offers opportunities to serve on many committees.

Entertainment, Arts & Sports Law Section Committees

Please designate the committees in which you are interested. You are assured of at least one committee appointment, however, all appointments are made as space permits.

- ☐ Alternative Dispute Resolution (EASL3100)
- ☐ Copyright and Trademark (EASL1300)
- ☐ Digital Media (EASL3300)
- ☐ Diversity (EASL3800)
- ☐ Ethics (EASL3600)
- ☐ Fashion Law (EASL3200)
- ☐ Fine Arts (EASL1400)
- ☐ International (EASL3900)
- ☐ Law Student Liaisons (EASL4200)
- ☐ Legislation (EASL1030)
- ☐ Literary Works and Related Rights (EASL1500)
- ☐ Litigation (EASL2500)
- ☐ Motion Pictures (EASL1600)
- ☐ Music and Recording Industry (EASL1700)
- ☐ Not-for-Profit (EASL4100)
- ☐ Phil Cowan Memorial Scholarship (EASL3500)
- ☐ Pro Bono Steering (EASL3000)
- ☐ Publications (EASL2000)
- ☐ Publicity, Privacy and the Media (EASL1200)
- ☐ Sports (EASL1800)
- ☐ Television and Radio (EASL1100)
- ☐ Theatre and Performing Arts (EASL2200)
- ☐ Website (EASL4000)
- ☐ Young Entertainment Lawyers (EASL2300)



Best Practices for Hybrid Publishers: A Look at the New IBPA Hybrid Publisher Criteria

By Joan S. Faier and Judith B. Bass

Last year in this column, we wrote about a developing new business model in book publishing referred to as “hybrid publishing,” which had been gaining traction over the past several years.¹ As traditional book publishing becomes more and more competitive, with publishers less likely to take a chance on a new author or pay a meaningful advance to a mid-list writer, hybrid publishing has developed as another option for publication for some authors. The label of hybrid publisher, however, has been surrounded by murkiness. Even deciding which publishers fit within this category has been fraught with confusion. In fact, at present, a comprehensive list of hybrid publishers does not exist, although it is in the process of being produced.²



Judith B. Bass

“These criteria are coming at exactly the right moment. As hybrid publishing emerges as a legitimate business model, it’s essential that hybrids be held to the highest standard, and that we qualify and understand the difference between hybrid publishing models, service providers, and vanity presses.”⁷

As mentioned, the hybrid publishing model marries aspects of traditional publishing with those of self-publishing. In the traditional model, the publisher assumes the financial costs for publishing and distributing works that it has selected for publication, including generally paying an advance against royalties to the author. On the other end of the continuum is the self-publishing model, in which the author takes on the financial risk of publishing and distributing his or her own work, sometimes hiring publishing professionals or so-called “full service providers” to help with the various tasks of publishing, such as editing, cover and interior design, digital and print editions (if desired), and publicity.⁸

The middle ground is occupied by the hybrid publishing model, in which the parties share the costs and the risks. Like a traditional publishing company, the hybrid publisher decides on what it wants to publish. The author usually pays an upfront fee, and then the hybrid publishing company provides services equivalent to those provided by a traditional publishing company, including editorial, cover and interior design, and distribution services for what should be a professional-quality book, generally including distribution in print and electronic formats to retail and online stores. Since the hybrid model is “author-subsidized,” logically no advance is paid to the author. The two parties together work to recoup the costs of publication and distribution along with other preapproved costs and expenses. Royalties then are shared between the author and the publisher, generally on a 50-50 basis.

Since the author is essentially buying publishing services from the company, such as editing and design, as in the self-publishing model, there has been uncertainty in the marketplace as to what is a true hybrid publisher and what is really a self-publishing assisted services company, masquerading as a hybrid. In reacting to the release of the IBPA criteria, the founding editor of a hybrid publisher and IBPA member, stated on its company’s website: “Why is this commitment to national standards so important? As the publishing industry is rapidly evolving, the crowd

“The two parties together work to recoup the costs of publication and distribution along with other preapproved costs and expenses. Royalties then are shared between the author and the publisher, generally on a 50-50 basis.”

Due to the lack of clarity in this model and its increasing importance to the publishing landscape, some publishing experts and author advocates have called for the development of standards.³ In February 2018, the Independent Book Publishing Association (IBPA), the membership organization founded in 1983 to represent the interests of independent publishers, responded by releasing guidance entitled “IBPA Hybrid Publisher Criteria,” which include nine criteria and additional considerations that a “reputable” hybrid publisher should meet.⁴ These criteria, which are available in detail on the IBPA website, are meant to provide “best practices” for such publishers to adopt, as well as to provide guidance for authors to use when evaluating the professionalism of these companies.⁵ In the IBPA press release announcing the issuance of these standards, Maggie Langrick, CEO and Publisher at LifeTree Media Ltd. and a member of the 10-person IBPA Advocacy Committee that promulgated these factors, said: “Our hope is that this work helps hybrid publishers build better businesses based on clear and consistent best practices, thereby delivering excellence to author and reader communities.”⁶ In the same press release, Brooke Warner, chair of the IBPA Advocacy Committee, said:

of men and women drawn to this emerging business model includes not only top media professionals who have always adhered to well-established ethical standards in editing and publishing—but also predators designing websites to hawk dubious publishing services under a trendy banner. Even among well-meaning professionals, this Hybrid Publishing model can spark confusion... We thank the IBPA for establishing this new set of standards.”⁹

The IBPA criteria state that a hybrid publisher should do the following:

- (1) Define a mission and a vision for its publishing program;
- (2) Vet submissions;
- (3) Publish under its own imprint(s) and ISBN numbers;
- (4) Publish to industry standards;
- (5) Ensure editorial, design, and production quality;
- (6) Pursue and manage a range of publishing rights “in both print and digital formats”;
- (7) Provide distribution services;
- (8) Demonstrate respectable sales; and
- (9) Pay authors a higher than standard royalty.¹⁰

The IBPA list provides a link in the fourth criteria to its previously released guide entitled, “Industry Standards Checklist for a Professionally Published Book,” which illustrates its technical standards.¹¹ In discussing the seventh criteria, it states that providing distribution services may mean “traditional distribution, wherein a team of sales reps actively markets and sells books to retailers or it may mean publisher outreach to a network of specialty retailers, clubs, or other niche-interest organizations.”¹² With respect to the ninth criteria, it provides that in most cases “the author’s royalty should be greater than 50% of net on both print and digital books.”¹³

“According to an article in Publishers Weekly, at the April IBPA conference held in Austin, Texas shortly after the guidelines were released, the criteria were a hot topic of conversation, including at a panel featuring three women who lead established hybrid publishing companies.”

The “IBPA Hybrid Publishers Criteria” statement also earmarks five “additional considerations” to analyze when evaluating a hybrid publisher. One of these considerations is that “regardless of who pays for editorial, design, and production fees, it is always the publisher that

bears responsibility for producing, distribution, and ultimately selling professional-quality books.”¹⁴ Another consideration provides that “an author-subsidized business model in no way relieves a publisher of its editorial, design, marketing, sales, and distribution responsibilities.”¹⁵ Yet another says as follows: “In comparing hybrid publishers with vanity presses, it’s important to note that vanity presses are not selective in what they publish, nor are they set up to be. Therefore, it is better to think of vanity presses as self-publishing service providers, not publishers. In a self-publishing service provider/author relationship, it is the author who plays the publisher role.”¹⁶ The last consideration provides that although an author may be asked to subsidize or pay the full cost of his or her print runs, authors who do so “should own the physical copies outright, having paid the manufacturing fees, and should not be required to pay a ‘percent-off list price’ amount arbitrated by the publisher when they need to order copies.”¹⁷

The Authors Guild, the membership organization that provides valuable resources for authors, posted on its website soon after the criteria’s release an explanatory paragraph about both the “advantages” and “risks and uncertainty” inherent in any new business model such as hybrid publishing, along with a link to the press release announcing the criteria and an additional members-only resource.¹⁸ According to an article in *Publishers Weekly*, at the April IBPA conference held in Austin, Texas shortly after the guidelines were released, the criteria were a hot topic of conversation, including at a panel featuring three women who lead established hybrid publishing companies.¹⁹ In a press release from Canadian-based LifeTree Media, Publisher Maggie Langrick called for the Canadian publishing industry to also adopt this type of guidance. She said:

Hybrid publishing, as the IBPA defines it, is gaining ground on both sides of the US/Canada border, yet our own publishing community suffers from the same lack of consistency and clarity that the IBPA is seeking to address in publishing this list. Some business owners have adopted the label ‘hybrid publisher’ but are not operating in line with these standards. Others meet the criteria, but are not using the term to describe themselves. Canadian authors and publishers alike would benefit from having our industry get on the same page about hybrid publishing.²⁰

IBPA member publishers appear to have greeted these standards with enthusiasm. For example, the executive editor of one member company commented in a letter posted on its website: “The trade association has eloquently codified business practices we strive to achieve. The document provides authors a checklist of what to

look for in a publisher... who combines traditional and fee-based publishing."²¹ More recently, however, IBPA posted an open letter from its Board of Directors on its website responding to an email from an industry watchdog who claimed that despite the introduction of the new guidelines attempting to distinguish hybrid publishers from a vanity press, some IBPA members had a "terrible reputation for various practices" as detailed on other websites and blogs.²² In its letter, the IBPA stated: "We know there are predatory companies in the self-publishing industry and that without advocates these companies would continue to take money and time from unsuspecting writers under false pretenses. It is for this reason, in fact, that IBPA developed the Hybrid Publisher Criteria: to help prospective authors and others in the publishing industry determine the precise business model behind an organization they're considering."²³ It went on to say: "In the end, IBPA believes that an organization using an author-subsidized business model can only be called a 'publisher' if it follows publishing best practices, i.e., those practices outlined in our 9-point Hybrid Publisher Criteria."²⁴

"Authors should continue to do their research on a given company under consideration, including getting references from other authors."

Given that the IBPA standards are relatively new, it remains to be seen what their effect will be on encouraging best practices by hybrid publishers as well as what their impact will be on helping authors distinguish between legitimate and professional companies and those that are not. Hopefully, the IBPA guidelines will bring consistency to the marketplace. Even with these standards in place, however, authors and their representatives will need to continue to exhibit caution in this area and look closely at what services the company offers, potential hidden costs, sales records, physical quality of its books as compared to traditionally published books, and extent of distribution services provided. Authors should continue to do their research on a given company under consideration, including getting references from other authors. They and their representatives should also scrutinize their contracts and make sure that they can terminate and get their rights back if they are not satisfied with the process. Furthermore, in the future, the question of financial viability for individual hybrid publishers may remain as each seeks to secure its financial footing. Nevertheless, as the hybrid model continues to evolve, the IBPA standards are an important first step in helping authors and publishers understand how this new model should work so that it may continue to serve as a useful alternative for certain authors and projects.

Authors Note: If readers of this column have any experiences with hybrid publishers that they would like to share, please contact us at jbb@jbbasslaw.com, and if there is sufficient response, we will endeavor to publish them at a later date.

Endnotes

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REQUEST FOR ARTICLES



Obscenity Law in Cyberspace

By Akilah Chandler

Since 1942, in the case of *Chaplinsky v. New Hampshire*, the U.S. Supreme Court declared “obscenity” as a type of speech not protected by the First Amendment.¹ Prior to this ruling, obscenity law had emerged as a response to social and technological changes that permitted the wide dissemination of what was then considered sexually explicit material. In the British case of *Regina v. Hicklin*, 1868, where the test of literary morality was put as to what a father could read aloud in his own home, the court held that obscene material is marked by a tendency “to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall.” It was understood that this test could be applied to isolated passages of a work, and the ruling made it possible to label a work obscene not on the basis of the intended readership, but on how it might influence anyone in society.² For some time, this was the standard definition used in U.S. courts until it was abandoned in 1934 by the New York Circuit Court of Appeals.

Two decades later, the U.S. Supreme Court held that the standard of obscenity should be “whether, to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.”³ Over a decade later, in the 1970s, obscenity was materialized into a three-prong evaluation known as the *Miller* test. In order for a work to be considered obscene it must be tested against the following: (1) the average person, applying contemporary community standards, would judge that the work appeals primarily to prurient interests; (2) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (3) the work lacks serious literary, artistic, political, or scientific value. Its application today, almost 50 years later, has not been as seamless as what may have been intended.

Throughout obscenity law’s history, sexual morality has shifted, homosexuality has been decriminalized, and internet erotica made almost ubiquitous. Unlike pornography, obscenity covers more than sexually explicit and alluring representations: it also applies to unacceptable horrors of everyday life, such as war, poverty, wealth, racism, and murder.⁴ These connotations of excess, violence, and transgression have been used as muses by artists to push the boundaries of social norms. Artists, however, are no longer satisfied with exhibiting these vices through traditional media and platforms; hence the advent of “new media” and “digital media” artists. Although much of what is available on the internet already exists in other forms, such as magazines, videos, and literature, the internet offers convenient, anonymous, and discreet access to these vices. Despite efforts to expand the application of obscenity, it falls short in cyberspace. The three-prong test currently used to assess obscenity is both inappropriate and antiquated when applied online.

The requirement that the work be evaluated “as a whole” can be applied to traditional forms by looking from cover to cover of a book/magazine and at the individual pieces of an exhibition. However, this is more ambiguous in cyberspace, as it has no coherent, tangible boundaries.⁵ When an artist whose work subscribes to the pragmatics of erotica chooses to display his or her work via a website,⁶ is it just that⁷ that can be deemed obscene, or are all external and internally linked web pages subject to the *Miller* test as well? Take, for example, a living artist like Thomas Ruff (b. 1958), a German photographer whose works have been represented by David Zwirner, the Tate Britain, the Gagosian Gallery in London, and currently has works on display at the San Francisco Museum of Modern Art. For his series of nudes, he selected and downloaded images from internet sites that circulate pornographic material. If a website was dedicated to the sale or cataloguing of these explicit works along with his more “tasteful” material, would just the web pages displaying the images in question be evaluated, or the entire website? Therefore, what are the bounds of a website? Would the gallery and museum sites be considered because they link to the website in question and display the images on their respective pages? Additionally, who is the “average person” in cyberspace, and what are the boundaries for marking a community? *Miller* failed to define geographic boundaries for a “community” and its scope. Therefore, there is no “average person” or “local community” in cyberspace. One site alone could attract viewers from all over the world.

Not only does the *Miller* test create limitations on discerning the gatekeepers of a community in cyberspace, but the “prurient interest” and “patently offensive” language in the statute is too vague and archaic to be used as a basis to convict someone today. In *Reno v. ACLU*,⁸ the American Civil Liberties Union challenged the Communications Decency Act (CDA), which aimed at protecting children by restricting transmissions sent over the internet. The Supreme Court ruled that the CDA was “overly broad in its approach to regulating obscenity online.”⁹ Terms like “indecent” or “patently offensive” were held to be too vague to be used as a basis in criminal charges. In comparison, each term of Penal Law Section 235.22, “enacted to address the convergence of predatory pedophile activity with Internet technology, is either defined in the Penal Law or has a plain and ordinary meaning.”¹⁰



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Despite the vast difference in subject matter, this consideration should be taken when applying “prurient interest” and “patently offensive.” These terms are not used in everyday vernacular. Therefore, these words should be defined or replaced. It can even be argued that “a person of ordinary intelligence with a reasonable opportunity to know what is prohibited” would find these terms so broad that he or she would deem the statute “unconstitutionally vague” and “written in a manner that permits or encourages arbitrary or discriminatory enforcement.”¹¹

What is obscene is a value judgment and cultural category produced through processes of reification. Prior definitions of obscenity were informed by an assessment of its projected damaging effects on the recipients. Since then, images of erotica and adult material have become ubiquitous and easily accessible. With that, there have been significant changes in societal views toward erotic material. Like beauty, obscenity lies in the eye of the beholder, and the “average beholder” of today is often less prudish than in years past. Yet, even if the *Miller* test attempted to reflect today’s moral standards, is it meaningful and functional to enforce national standards on a global medium such as cyberspace? Only time will tell.

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SPORTS AND ENTERTAINMENT IMMIGRATION: Oversight, Scrutiny, and Inconsistency, “These Are a Few of My Favorite Things”

By Michael Cataliotti

Since our last installment there have been several developments in America’s immigration policy, including the Department of Homeland Security (DHS) broadly, increasingly, and expressly monitoring media outlets and the Department of State (DoS) requesting visa applicants to provide five years’ worth of social media handles and e-mail accounts. The Supreme Court of the United States (SCOTUS) heard oral arguments regarding the constitutionality of President Trump’s third iteration of the travel ban.¹ The United States Citizenship and Immigration Services (USCIS) has made requests for evidence a standard, and they have been getting stranger. We learned that Melania Trump obtained her green card through the EB-1A classification, arguably the most rigorous classification. We have also seen USCIS’s stated goals for 2018 (spoiler alert: they do not make it easier to get a visa).

All in, this has been a rather light few months! So without further ado, let us dive right in and cover some of the basics of each.

Immigration Policy

Media Monitoring

In April 2018, Bloomberg Law reported on a public solicitation by the DHS to “help [the DHS] monitor traditional news sources as well as social media and identify ‘any and all’ coverage related to the agency or a particular event.”² Yet, “what kind of coverage does this include?” The answer, Bloomberg reports, is “a publication’s ‘sentiment’ as well as geographical spread, top posters, languages, momentum, and circulation.”³ Therefore, “‘any and all’? That sounds a bit broad, no?” According to Bloomberg:

The DHS wants to track more than 290,000 global news sources, including online, print, broadcast, cable, and radio, as well as trade and industry publications, local, national and international outlets, and social media, according to the documents. It also wants the ability to track media coverage in more than 100 languages including Arabic, Chinese, and



Michael Cataliotti

Russian, with instant translation of articles into English.⁴

This seems concerning, and it is certainly not ideal or pleasant, but parsing through the description, it appears to be more of an aggregator of information in which most organizations would engage. Such is the argument of the DHS: Writing in *USA Today*, Tyler Q. Houlton, DHS spokesperson, states, “This type of media service, which has been in use by private and public sector public affairs teams for generations, allows DHS to respond better to noted public concerns, participate in informed public policy debates, monitor global security events in real time, and provide journalists follow-up comment on recently reported stories. The solicitation also required a database of reporters who cover our issues—basically a digital Rolodex of reporters—so policy makers can follow their reporting and contact them.”⁵ This seems logical enough and makes sense. He concludes his argument by indicating that “[a]ll we want to do is read news stories posted online and email reporters our press releases. That seems pretty harmless.” Yet things that seem harmless can often cause injury.

While many public and private sector organizations and entities do, in fact, maintain tabs on their public perceptions, we must look at this action as part of an overall picture of immigration policy and practice. In so doing, it seems that this could have something of a bite. After all, not every organization has the ability to impact an individual’s life like the DHS.

As Michelle Fabio writes in *Forbes*:

The real question, of course, is what the government plans to do with the information it compiles, and there’s been no comment on that beyond what is in the posting, which, by the way, has interest from at least seven companies. Will those on the DHS media database be questioned more harshly coming in and out of the country? Will they have trouble getting visas to go to certain countries for their own reporting or personal vacations?⁶

These are fair questions, which are worth keeping in mind when we note the DoS’s desire to have the majority

of visa applicants report their social media handles and identities.

The most ambiguous, and concerning for some, aspect of this practice is that the DHS wants to monitor the “sentiment” of the articles and, presumably, its authors. This certainly seems in line with what nearly every organization does—that is, it gauges whether articles about it have been positive or negative—but again, not every organization has the ability to impact an individual’s life like the DHS. Therefore, we must be cautious and keep a close watch on DHS’s activities.

Visa Applicants’ Social Media IDs

In March 2018, the DoS published its proposal to require nearly all non-immigrant visa applicants to submit five years of social media handles, e-mail addresses, and telephone numbers.⁷ Specifically: “The Department will collect this information from visa applicants for identity resolution and vetting purposes based on statutory visa eligibility standards; however, the Department intends not to routinely ask the question of applicants for specific visa classifications, such as most diplomatic and official visa applicants.”⁸

“If the DoS is going to start monitoring what those individuals wrote, when they wrote it, what their intentions were when they wrote it, or the like, then we will want to advise those individuals to be very careful about what they say.”

As with the DHS, this seems routine enough—certainly the DoS has an interest in identifying and “vetting” visa applicants—but it is unclear how the DoS will use or interpret this information. What does “vetting” consist of with respect to an applicant’s social media account? If a prospective applicant has made statements concerning national security or illegal activity within the United States, would not that information be already known to another department or bureau? The concern is that consular officers, who wield significant authority over approving or denying a visa, will use their authority to delay or deny issuance of a visa to an applicant, based upon a disagreement or dislike of what the applicant has posted.

If this all sounds familiar, it should: The current proposal would expand a previously enacted procedure by the DoS, which was discussed in an earlier column. The DoS’s then-new questionnaire for visa applicants was going to be applied “to visa applicants ‘who have been determined to warrant additional scrutiny in connection with terrorism or other national security-related visa ineligibilities.’”⁹ This seems logical enough and

made sense to many of us then. However, why is the DoS suddenly expanding this practice while also slashing its budget and keeping it woefully understaffed?

This is an important policy to watch, because social media use by individuals within the entertainment, arts, and sports industries is significant. If the DoS is going to start monitoring what those individuals wrote, when they wrote it, what their intentions were when they wrote it, or the like, then we will want to advise those individuals to be very careful about what they say. This has the unfortunate potential consequence of stifling communication and speech, as well as deterring individuals from applying for visas to enter the United States.¹⁰ Perhaps that is the intention of the DoS, or one of them.

USCIS and Requests for Evidence: A Love Affair Gone Mad

I indicated in our previous installment that requests for evidence (RFEs) were becoming increasingly common; since then, they have also been getting stranger and are now the norm for what we are advising clients to expect. In 2017, for instance: “Data provided by U.S. Citizenship and Immigration Services shows that between Jan. 1 and Aug. 31, the agency issued 85,000 challenges, or “requests for evidence” (RFEs), to H-1B visa petitions—a 45 percent increase over the same period last year.”¹¹ Likewise, as reported in *Inc.*, “Jason Gerlis, the North American regional director at global financial consulting firm TMF Group, says he has noticed the increase in requests for evidence. Although the company rarely applies for H-1B visas specifically, Gerlis often applies for L-1A and L-1B visas for intra-company transfers, which have similarly come under scrutiny as part of Trump’s executive order.”¹²

Although USCIS does not publish the number of RFEs it issues, conversations amongst practitioners and with USCIS Officers has made it clear that RFEs are here to stay. This seems to be, at least partially, due to USCIS’s increasingly harsh position regarding lawful immigration. One example of this is the new USCIS policy not to give deference to previously approved petitions, irrespective of whether the substance of the two petitions is the same.

A recent RFE for a scientist whose work has been featured by online outlets like Space.com, LiveScience.com, and *La Scienze*, took issue with the credibility of these outlets, specifically describing them as not being major media; such a contention is perfectly valid if there is no supporting evidence to demonstrate that they receive hundreds of thousands or millions of visitors per month and/or fall within one of the top 10 most-visited websites, worldwide, in the category of “Science.” Unfortunately, these do (LiveScience.com, in particular was the eighth most visited website, according to SimilarWeb, a web-analytics aggregator).

Nonetheless, the RFE states that:

To qualify as major media, the publication should have significant national or international distribution. A beneficiary would not earn acclaim at the national level from a local publication. Some newspapers, such as the New York Times, nominally serve a particular locality but would qualify as major media because of significant national distribution, unlike small local community papers and magazines, or limited foreign language print. And, USCIS is not persuaded that international accessibility via the internet by itself is a realistic indicator of whether a given publication is “major media” or whether this single article was even placed on the internet. The petitioner must still provide verifiable evidence, such as a verifiable widespread distribution, readership, or overall interest in the publication in order to demonstrate that the publication (or internet website) is a professional or major trade publication or major media in order for us to credit these articles.

Therefore, it is important to be cautious and prepare international clients or colleagues who seek to enter the U.S. with a work visa that they are likely to receive RFEs that may contain this type of fantastic language.

Melania Trump: Extraordinary Individual? Yes, Most Likely

More commonly understood and readily perceived professions have an easier time on review than more abstract or complicated areas. To wit, a model who appears on billboards and magazine covers, is featured in magazine spreads, and whose portfolio includes the likes of *Sports Illustrated*, is likely to have an easier time proving her credentials than a chemist, physicist, engineer, businessperson, songwriter, music producer, graphic artist, or the like.

In March 2018, we learned from an array of outlets, like the *Washington Post*, *Newsweek*, *Vanity Fair*, BBC, and *The New York Times* that Melania Trump was granted a green card through the EB-1A category for individuals of “extraordinary ability.”¹³ This is not surprising, because during that time Trump (née Knauss) was a model who was commissioned by Camel cigarettes, featured on one or more billboards in Slovenia, was on the cover of *British GQ*, and featured in *Sports Illustrated*. This is all easily perceived and falls in line with general assumptions about someone who has risen to the top of her profession. Though some may argue that Trump appears to have been undeserving of receiving an EB-1A,¹⁴ based upon

what is publicly available about her career and making assumptions from there, it would likely be a rather straightforward argument that would be readily received by USCIS.

It is also important to note that during the time that Trump filed her EB-1A petition, we did not have the *Kazarian v. USCIS* decision, which requires a two-step determination of whether an individual meets each element of the classification, followed by a “final merits determination” (i.e., whether she or he is more likely than not to be considered someone at the top of her or his field).¹⁵ Prior to *Kazarian*, there was the expectation that an individual would need to prove the extraordinariness of his or her evidence, in order to prove that he or she is extraordinary.¹⁶ However, this helps to clarify the type of evidence that was expected, and arguably, the type of evidence that may still be expected in many instances: magazine covers, glamorous spreads, and the like.

Ultimately, however, it is most important to be aware of the difficulties that can arise within the realm of EB-1A petitions, and, as above, prepare clients or colleagues. Models, movie stars, musicians, fashionistas, and socialites are all likely to be more readily understood by the immigration officer than someone who is a world-class researcher, scientist, engineer, or anyone else who might serve in a highly technical or complex industry.

USCIS in 2018: Fewer Immigrants, So We Can “Buy American and Hire American”

In his letter dated April 4, 2018, USCIS Director L. Francis Cissna wrote to Senator Grassley of Iowa stating, “USCIS is reviewing existing regulations, policies, and programs and developing a combination of rulemaking, policy memoranda, and operational changes to implement the ‘Buy American and Hire American’ Executive Order (E.O.).”¹⁷ The key aspects of the letter indicate that in 2018, USCIS is going to be:

- Seeking to remove work authorization for spouses of H-1B holders;¹⁸
- Creating an “electronic registration program for” cap-subject H-1B petitions, making it easier to manage the lottery;¹⁹
- Revising the definition of “specialty occupation [...] to increase focus on obtaining the best and the brightest foreign nationals”;²⁰
- Revising the definition of “employment and employer-employee relationship to better protect U.S. workers and wages”;²¹
- Proposing “additional requirements [...] to ensure” that employers pay the appropriate wage to H-1B visa holders;²² and

- Proposing a rule “to remove the International Entrepreneur Rule (IER),” despite it being in effect and not exercised (the letter notes, “We have not approved any parole requests under the International Entrepreneur Final Rule at this time.”).²³

Not all of these actions are negative—creating an e-registration program to manage the lottery would be greatly helpful and, hopefully, provide some transparency to the process, just as enforcing that H-1B employers pay the appropriate wage is sensible and more helpful than problematic. However, the majority of these actions are not likely to entice individuals to work within the U.S. This could in turn have a noticeably negative impact on the U.S.’s global competitiveness and productivity.

Conclusion

Whether any or all of this moves forward and becomes USCIS policy remains to be seen. For now, we must keep a close watch of these areas: Immigration in the U.S. is becoming increasingly chaotic, with heightened restrictiveness and terrible inconsistency across visa classifications and nationalities. The best we can do at this point is to stay apprised of the circumstances and prepare our clients for a more bruising and lengthier process.

Endnotes

1. Worth noting here is that we will not be discussing SCOTUS’s oral arguments in this article. At the time of this writing, there was nothing but conjecture and base assumptions about whether the justices would uphold or strike down Travel Ban 3.0. The Justices upheld the ban 5-4 on June 26, 2018.
2. Cary O’Reilly, Bloomberg Government, “Homeland Security to Compile Database of Journalists, Bloggers,” available at <https://biglawbusiness.com/homeland-security-to-compile-database-of-journalists-bloggers/> (April 5, 2018), quoting the Department of Homeland Security’s “Media Monitoring Services” solicitation. Unfortunately, the solicitation has since been removed from the website and is no longer available.
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4. *Id.*
5. Tyler Q. Houlton, USA TODAY, *DHS: All we want to do is read the news*, available at <https://www.usatoday.com/story/opinion/2018/04/18/dhs-news-service-editorials-debates/33962875/> (April 18, 2018).
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7. 83 FR 13807, 60-Day Notice of Proposed Nonimmigrant Visa, available at <https://www.federalregister.gov/d/2018-06496/p-35> (March 30, 2018).
8. *Id.*
9. Yeganeh Torbati, TechCrunch, *Trump administration approves tougher visa vetting, including social media checks*, available at <https://www.reuters.com/article/us-usa-immigration-visa/trump-administration-approves-tougher-visa-vetting-including-social->

media-checks-idUSKBN18R3F8 (May 31, 2017), quoting the U.S. Department of States.

10. Arwa Mahdawi, The Guardian, *Hand over my social media account to get a US visa? No thank you*, available at <https://www.theguardian.com/commentisfree/2018/mar/31/us-visa-social-media-tourism>, (March 31, 2018).
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13. https://www.washingtonpost.com/politics/questions-linger-about-how-melania-trump-a-slovenian-model-scored-the-einstein-visa/2018/02/28/d307ddb2-1b35-11e8-ae5a-16e60e4605f3_story.html?utm_term=.6ab33515a482; <http://www.newsweek.com/melania-trump-genius-visa-einstein-826431>; <https://www.vanityfair.com/style/2018/03/how-exactly-did-melania-trump-get-a-visa-for-extraordinary-abilities>; <http://www.bbc.com/news/world-us-canada-43256318>; <https://www.nytimes.com/2018/03/04/us/melania-trump-einstein-visa.html>.
14. Mary Jordan, The Washington Post, *Questions linger about how Melania Trump, a Slovenian model, scored ‘the Einstein visa,’* available at https://www.washingtonpost.com/politics/questions-linger-about-how-melania-trump-a-slovenian-model-scored-the-einstein-visa/2018/02/28/d307ddb2-1b35-11e8-ae5a-16e60e4605f3_story.html?utm_term=.ff54e20b3482, (March 1, 2018), referring to former-Congressman Bruce Morrison, who was “chairman of the House subcommittee that wrote the Immigration Act of 1990 defining EB-1,” “Morrison, the former congressman and immigration expert, said that Melania Trump’s résumé in 2001 seems ‘inconsistent’ with the requirements of the visa.”
15. *Kazarian v. USCIS*, 07-56774 CV-07-03522-R-E, 9 Circ of Appeals, available at <https://www.nafsa.org/uploadedFiles/kazariandecision.pdf>.
16. *Id.*
17. L. Francis Cissna, Director of USCIS, Letter to Senator Chuck Grassley (R-Iowa) 1, available at <https://www.judiciary.senate.gov/imo/media/doc/2018-04-04%20USCIS%20to%20CEG%20-%20Buy%20America,%20Hire%20America%20update.pdf> (April 4, 2018).
18. *Id.* at 2.
19. *Id.* at 3.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

Michael Cataliotti is the Principal of Cataliotti Law P.C., a law firm concentrating on business immigration and corporate transactions for individuals and entities from such industries as sports, music, fashion, film, television, art, and theatre. He is a faculty member at Lawline CLE, a frequent speaker on the topics of sports and entertainment immigration, entrepreneurship, and start-up transactions, an active member of the American Immigration Lawyers Association’s (AILA’s) New York Chapter, and an active supporter of immigration reform.

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Our most recent Clinic took place on Sunday, February 25th in conjunction with the IP Section, at Dance/NYC's Annual Symposium, held at the Gibney Dance Center.

In addition to the EASL and IP-related topics, our volunteer attorneys also dealt with questions pertaining to sexual harassment issues and policies, along with not-for-profit and other business issues.





In The Arena: A Sports Law Handbook

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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.

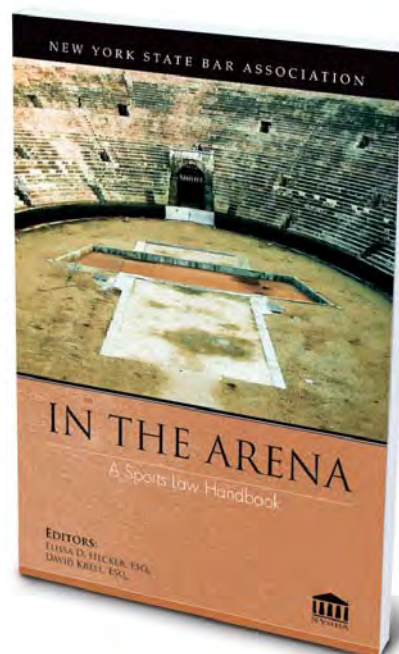


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Freelance Writing Is Not Free—but Sometimes Payment Takes Time

By Cheryl Davis

The mills of the copyright courts may grind slowly, but 17 years after filing a class action suit (and four years after entering into a settlement), approximately \$9,000,000 in damages is finally being paid to nearly 3,000 freelance journalists for works that were infringed by publishers such as Dow Jones and the *New York Times*.¹ The suit was brought by the Authors Guild along with the American Society of Journalists and Authors, the National Writers Union, and 21 freelance writers named as class representatives, and was part of the transition of the publishing industry from print to digital media—a transition which is still underway.

Rights, Rights, Who's Got the Rights?

The copyright law provides that if the author of a work is writing as an employee, then the employer owns the copyright in the employee's work as a "work made for hire."² Therefore, the copyrights in works created by journalists and other writers who are employees of newspapers and other publications are held by the employer, which can then license all rights in the work—for example, for digitization purposes.

The hurdle for the publishing industry here are the freelance writers, who retain their copyrights unless they are expressly transferred. While many freelance writing agreements now include this express transfer of rights, that was not always the case, and especially not back in the 1990s, when newspapers and periodicals were starting to be digitized on a wholesale basis. What, then, happens when a newspaper or magazine publisher licenses digital rights in publications that include the works of freelancers?

Since newspapers and magazine are often considered "collective works," they would seem to be covered by the "Contributions to Collective Works" section of the copyright law, which gives the publisher certain rights as follows:

Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.³

Does a publisher always have "the privilege of reproducing and distributing" the articles contained in collective works, regardless of whether it has obtained the contributing freelancer's consent?

Tasini, Anyone?

No (just like I bet you guessed). In 1993, Jonathan Tasini and five other named plaintiffs brought a lawsuit against the *New York Times* and other publications claiming that the defendants had infringed their copyrights in articles they had sold for publication between 1990 and 1993. As described in the Supreme Court opinion:

Under agreements with the periodicals' publishers, *but without the freelancers' consent*, two computer database companies placed copies of the freelancers' articles—along with all other articles from the periodicals in which the freelancers' work appeared—into three databases.⁴

The publishers argued (you guessed it) that as the owners of "collective works," they had "merely exercised 'the privilege § 201(c) accords them to 'reproduce and distribute' the author's discretely copyrighted contribution."⁵

The Supreme Court disagreed, holding:

[T]hat § 201(c) does not authorize the copying at issue here. The publishers are not sheltered by § 201(c), we conclude, because the databases reproduce and distribute articles standing alone and not in context, not "as part of that particular collective work" to which the author contributed, "as part of Any revision" thereof, or "as part or ... any later collective work in the same series." Both the print publisher and the electronic publishers, we rule, have infringed the copyrights of the freelance authors.⁶

The Supreme Court interpreted one of the great appeals of digitization—the ability to search for and use specific items—against the publishers' "collective works" copyright, and in favor of the freelancers' individual copyrights: "Whether written by a freelancer or staff



Cheryl Davis

member, each article is presented to, and retrievable by, the user *in isolation, clear of the context the original print publication presented.*⁷

“Notwithstanding the dire predictions from some quarters,” the *Tasini* Court said that its ruling need not enjoin including plaintiffs’ articles in the databases:

The parties (Authors and Publishers) may enter into an agreement allowing continued electronic reproduction of the Authors’ works; they, and if necessary the courts and Congress, may draw on numerous models for distributing copyrighted works and remunerating authors for their distribution.⁸

Post *Tasini*, Pre-Updated Form Agreements

Due to a coincidence in timing (no doubt related to the fact that at that time digitization was rapidly increasing in the publishing marketplace, affecting thousands of authors), the freelance authors in *In re Literary Works in Electronic Databases Copyright Litigation* were able to benefit from the Court’s ruling in *Tasini*. As the Second Circuit wrote in its 2011 decision:

In June 2001, the Supreme Court endorsed authors’ theory of liability, holding in another case that publishers violate the Copyright Act when they reproduce freelance works electronically without first securing the copyright owners’ permission. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 488, 121 S. Ct. 2381, 150 L. Ed. 2d 500 (2001). Authors’ three lawsuits, which had been suspended pending *Tasini*, were consolidated and coordinated with a fourth action in the Southern District of New York. The consolidated class action is brought by 21 named plaintiffs—each of whom owns at least one copyright in a freelance article—and three associational plaintiffs: the National Writers Union, The Authors Guild, Inc., and the American Society of Journalists and Authors.⁹

Thus, the *In Literary Works* class action was able to be settled to the benefit of almost 3,000 freelancers.¹⁰

One of the causes of delay in distributing the settlement sum was the fact that groups of claimants had failed to register the copyrights in their works in a timely manner.¹¹ As a result, the district court’s acceptance of the initial settlement was vacated by the Second Circuit.¹² After appeals up to the U.S. Supreme Court (with respect to the question “Does 17 U.S.C. 411(a) restrict the subject matter jurisdiction of the federal courts over copyright infringement actions?”¹³), the settlement was finally deemed judicially acceptable.

Now What?

Now that the freelancer’s copyright has been clarified by *Tasini*, and the writers in *In re Literary Works* have received their payments, should other writers gather together to bring similar class actions? While *Tasini* and *In re Literary Works* ended up benefiting thousands of writers, freelancers writing after these decisions will, more often than not, be asked to expressly sign away their rights.¹⁴ In any event, the success of these litigations goes to show that freelancers banding together are a force with which to be reckoned.

Endnotes

1. *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1379 (S.D.N.Y.).
2. 17 U.S.C. § 201(b).
3. 17 U.S.C. § 201(c).
4. *N.Y. Times Co. v. Tasini*, 533 U.S. 483, 487 (2001) (emphasis added).
5. *Id.* at 488.
6. *Id.*
7. *Id.* at 487 (emphasis added).
8. *Id.* at 505.
9. *Literary Works in Elec. Databases Copyright Litig. v. Thomson Corp.*, 654 F.3d 242, 245 (2d Cir. 2011).
10. While more writers filed claims, through the years-long claim resolution process, a number of authors and claims were eliminated from the action.
11. This is yet another reason to encourage clients to register their copyrights.
12. *Id.*
13. *Reed Elsevier v. Muchnick*, 555 U.S. 1211 (2009).
14. See, e.g., https://archives.cjr.org/cloud_control/work_for_hire_digital_copyrigh.php.

Cheryl L. Davis is General Counsel of the Author’s Guild, where she oversees the organization’s legal affairs, including its in-house corporate affairs, government relations and policy initiatives, and legal services program. In addition, she is responsible for developing a wide variety of the organization’s written positions, policies, statements, submissions to government agencies, and legal briefs, as well as participating in domestic and international public speaking engagements and conferences. She is a former partner at the firm of Menaker & Herrmann LLP, where her practice focused on counseling clients on intellectual property issues and litigating copyright and trademark cases. An award-winning playwright, she has long combined her creative passion with her legal work, representing theater clients in connection with a variety of contract and corporate issues (including both intellectual property and employment matters). She has made numerous presentations and written on intellectual property for the commercial arena, as well as for theater artists and other creatives.

RESOLUTION ALLEY

Revisiting the Benefits of Appellate Mediation

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.

A *Resolution Alley* column from two years ago¹ extolled the virtues of appellate mediation and used the now famous “Blurred Lines” case to illustrate that participants to a dispute can, at times, come to the realize that they share the underlying objective of informally resolving their dispute, thereby staving off the continuing hemorrhaging of legal fees and finally bringing peace to what is usually a hard-fought, lengthy, and emotionally draining battle through the court system. At that moment in time, resorting to mediation as a dispute resolution mechanism can make perfect sense and is more than worth the effort and time. That point has been underscored by the continuing saga of the “Blurred Lines” case as it has continued its way on appeal.

Just a few months ago, on March 21, 2018, in a 2-1 decision, the U.S. Court of Appeals for the Ninth Circuit issued its long-awaited ruling on Pharrell Williams and Robin Thicke’s appeal, generally finding in favor of Marvin Gaye’s estate and his heirs and upholding most of the district’s decision and its \$5.3 million damages award.² To recap, on March 10, 2015, after a seven-day trial and two days of deliberation, a jury unanimously concluded that the 2013 hit “Blurred Lines” infringed the copyright in the 1977 hit song “Got to Give It Up.” Specifically, the jury found that both Williams and Thicke had 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,³ Williams and Thicke then filed their appeal in the Ninth Circuit.

Although there is much to be gleaned and debated about the state of copyright law in light of this decision—the majority opinion alone was 49 pages, spending the last 10 pages rebutting the arguments made in a 28-page dissent—the more important point, for purposes of this column, is that it took *over three years* from the time of the jury verdict for this dispute to be resolved in an appellate decision in the estate’s and heirs’ favor, after having expended thousands upon thousands of dollars in legal fees and depleted immeasurable emotional capital as the parties awaited the decision. Moreover, because there was a significant dissenting opinion in this appeal, as Williams

and Thicke’s lawyer, Howard E. King, was quoted as saying, the decision “enhances the prospects for success in a further review by the court of appeals,”⁴ by which he presumably is referring to a rehearing or rehearing *en banc* before the full appellate court, as well as a potential petition for review by the U.S. Supreme Court. Given the importance of the copyright law issues, these are not only possible, but likely, next steps for Williams and Thicke.⁵ Notwithstanding the foregoing, and even though a trier of fact and two courts have now denominated the estate and the heirs as the “winners” and Williams and Thicke as the “losers” of this copyright infringement dispute, mediation of this dispute still has certain benefits worth considering.

First, many unknowns plague a case that is on appeal. While the Ninth Circuit’s decision here is not at all what Williams and Thicke were seeking when they filed their notice of appeal, it also is not an entirely exactly clear “win” for the estate and the heirs. Who would have anticipated that the appellate court would issue an over 80-page decision on the various issues raised by the parties? Who would have known that the dissenting opinion would span more than 50% of the length of the majority opinion and address significant issues at the frontiers of the copyright law, thereby greatly increasing the likelihood of further proceedings in the Ninth Circuit, let alone in the Supreme Court?⁶ Numerous questions are raised by the majority’s opinion, such as this one: “Barring outright theft, if the music even hints at someone else’s original composition, is it a good idea or even possible for an artist to be 1000% sure they didn’t inadvertently borrow someone’s groove?”⁷

Moreover, “[o]nly 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.”⁸ Thus, the reversal in part by the Ninth Circuit of portions of the district court’s decision, along with further enforcement proceedings, may now have to be addressed down at the trial court level. The parties will



Theodore K. Cheng

then have to incur additional legal fees and perhaps even more motion practice, which itself could be followed by yet another appeal. That just means that the parties will now spend more money and commit more time, perhaps to additional litigation, before achieving a final resolution. In that regard, this appeal did not end their dispute, but, rather, spawned a new beginning.

Second, while the outcome of an appeal remains pending, it creates uncertainty for all of the parties as to whether the trial court's 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, like the 2-1 decision here. That uncertainty is a key driver in encouraging the use of mediation at the appellate level.⁹ Notwithstanding a jury verdict, 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 concern and puts control of the outcome in the parties' hands. Moreover, the unpredictability of results on appeal, and with litigation in general, creates additional guesswork. Resolving the appeal quickly and with certainty—facilitated by a properly trained mediator, perhaps with either industry expertise or knowledge of (or at least familiarity with) the copyright laws—may allow the parties to develop a solution that may be a much better outcome than what the courts can and will provide.

Third, as illustrated by the time between the jury's verdict and the issuance of the Ninth Circuit's decision, 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, in this case, a significant dissenting opinion. Further proceedings in the Ninth Circuit would involve at least rehearing briefing and the possibility of an *en banc* rehearing. Thereafter, as Williams and Thicke's attorney seems to have suggested, there is the possibility of one or more parties desiring to file a petition for a writ of *certiorari* in the Supreme Court. Of course, although the likelihood of any particular petition for rehearing or *certiorari* being granted is slim, the associated delay before the mandate is ultimately returned to the trial court can be extensive. By contrast, a mediation process is comparatively much faster. After an initial pre-mediation call to discuss logistical and housekeeping matters, the actual session itself can be scheduled. Some mediations can be completed in a single 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. It can take some time for the mediation process to bear fruit, but that time is largely in the control of the parties, unlike the time they spend in the court sys-

tem, 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. As compared to briefing and arguing further appellate proceedings, the cost to mediate is 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 the parties 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, in this case, all of the parties.

Fifth, simply engaging in a mediation process can be beneficial. Although the parties may have good reasons for pursuing an appeal and have optimistic views on ultimately prevailing, the parties in an appeal have also likely spent a large sum of 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 estate and the heirs here) or obtained a summary judgment determination in its favor. By its 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, 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 may provide evaluative feedback about the strengths and weaknesses of the case. Achieving a resolution means returning to life without litigation and its attendant costs and distractions. At the very least, the participants may leave the mediation session able to write a more focused brief or give a sharper appellate argument.

Sixth, unlike litigation and, in particular, a jury trial, as was the case here, 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. This confidentiality protection hopefully allows 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.

Finally, sometimes, even in the case of commercial disputes, money alone is not the best or only resolution of an appeal. 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 ultimate agreement.

The appellate courts long ago recognized the value that mediation can bring to the bench, the bar, and the public. For example, the U.S. Court of Appeals for the Second Circuit has a long-standing mediation and settlement program (now called the Civil Appeals and Mediation Program or CAMP) in place to assist litigants in resolving their appeals. Established in 1974 as a pilot program under the name “Civil Appeals Management Plan,” it was the first program of its kind in the country. By 1980, the CAMP became a normal part of the Circuit’s proceedings, and the bar was accustomed to being requested to participate in conferences with court personnel in hopes of simplifying or narrowing the issues, streamlining the briefing, identifying premature appeals (*i.e.*, those that do not meet the appellate jurisdictional requirements), or even resolving the entire appeal. The court’s initiative was followed by all of the other 12 federal circuits, which (except for the Eighth Circuit) now have established mediation programs.

Today, the CAMP is authorized under the Second Circuit’s Local Rule 33.1(d), which provides that “[t]he court may direct counsel for the parties to participate in a conference to explore the possibility of settlement, narrow the issues, and discuss any matters that may expedite disposition of the appeal.” A pair of highly experienced and skilled full-time circuit mediators, Kathleen M. Scanlon and Dean Leslie, help parties and their counsel explore options for ending the dispute and finally finding peace. Since 2015, under a pilot program of the court, a panel of experienced and trained court-appointed mediators have also assisted the court on a pro bono basis in increasing the capacity of the CAMP to hold mediations.¹⁰ Although all counseled, civil appeals are generally eligible (except for a limited category), the CAMP employs a screening process to determine whether a particular civil appeal is suitable for mediation. Numerous factors are taken into consideration, including the likelihood of achieving a resolution, the costs and potential outcome on appeal, the relationship between the parties in dispute (if any), and the type of relief being sought. Over its nearly 45-year history, the CAMP has facilitated the resolution of thousands of appeals.¹¹

Why not give appellate mediation a try?

Endnotes

1. See Theodore K. Cheng, *Appellate Mediation: A Dispute Resolution Process Worth Considering*, NYSBA Entertainment, Arts and Sports Law J., Vol. 27, No. 3, at 13 (Fall 2016).
2. See *Williams v. Gaye*, No. 15-56880, Slip Op. (9th Cir. Mar. 21, 2018), available at <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/03/21/15-56880.pdf>.

3. 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/>.
4. See Ben Sisario, ‘*Blurred Lines*’ Verdict Upheld by Appeals Court, N.Y. Times (Mar. 21, 2018), available at <https://www.nytimes.com/2018/03/21/business/media/blurred-lines-marvin-gaye-copyright.html>.
5. See *supra*, note 4 (“A victory, opponents of the case warned, could lead [to] more litigation and have a chilling effect on creativity.”); see also *supra* note 1, at 15 (“[D]espite 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.”).
6. Compare *Williams*, No. 15-56880 at 56 (“Far from heralding the end of musical creativity as we know it, our decision, even construed broadly, reads more accurately as a cautionary tale for future trial counsel wishing to maximize their odds of success”) with *id.* at 57 (“The majority allows the Gayes to accomplish what no one has before: copyright a musical style. ‘Blurred Lines’ and ‘Got to Give It Up’ are not objectively similar. They differ in melody, harmony, and rhythm. Yet by refusing to compare the two works, the majority establishes a dangerous precedent that strikes a devastating blow to future musicians and composers everywhere.”) (Nguyen, J., dissenting).
7. Adrienne Gibbs, *Marvin Gaye’s Family Wins ‘Blurred Lines’ Appeal; Pharrell, Robin Thicke Must Pay*, Forbes (Mar. 21, 2018), available at <https://www.forbes.com/sites/adriennegibbs/2018/03/21/marvin-gaye-wins-blurred-lines-lawsuit-pharrell-robin-thicke-t-i-off-hook/#28a90b32689b>.
8. *Supra* note 1, at 13.
9. For example, uncertainty in the application of the copyright fair use doctrine can potentially be solved using techniques such as 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.
10. The Second Circuit’s volunteer panel of mediators is diverse in gender, race, and background and includes full-time mediators, partners in law firms, solo practitioners, a retired judge, and law school faculty. The author is proud to be a member of this distinguished panel.
11. See *Mediation in the United States Court of Appeals for the Second Circuit* (on file with the author and available at the court).

Theodore K. Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and labor/employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, FINRA, Resolute Systems, the Silicon Valley Arbitration & Mediation Center’s List of the World’s Leading Technology Neutrals, and several federal and state courts, including the U.S. Court of Appeals for the Second Circuit. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at tcheng@theocheng.com.

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Tales and Lessons Regarding the Right of Publicity

By Neville L. Johnson and Douglas L. Johnson

The use of images of individuals to sell products has gone on since the birth of advertising. Actors, models, celebrities, and common folk must consent to the use of their names and likenesses in a commercial setting. Many cases have been litigated where violations of the “right of publicity” have occurred. Below are some tips and war stories for anyone engaged in producing intellectual property of this nature or advising those who do.

First, it is important to be aware that a wronged victim must proceed under the New York Civil Rights Law §§ 50-51. There is no common law right of publicity existing apart from these statutory rights.¹

Section 51 provides that a plaintiff may “sue and recover damages for any injuries sustained by reason of such use.” Damages in a right of publicity claim include “mental strain, humiliation, distress associated with the traditional notion of privacy.” The statute also protects “the privacy interest of a public figure” “whose economic interests are affected by the wrongful exploitation of his or her name or likeness.”²

Section 51 provides for equitable relief in the form of an injunction.³ In fact, once a violation is established, “the plaintiff may have an absolute right to injunction, regardless of the relative damage to the parties.”⁴

California Civil Code § 3344 enables a plaintiff to recover from the defendant “any profits from the unauthorized use that are attributable to the use” as well as prevailing party attorney’s fees.⁵ There are no analogous



provisions in § 51. In *Zoll v. Ruder Finn, Inc.*,⁶ the court held that evidence of the defendant’s sales of a videotape using the plaintiff’s image without consent were not relevant to the plaintiff’s damages under §§ 50-51, as such damages “will, in all likelihood, be limited to a nominal

amount ... ‘since they are designed primarily to compensate for injury to feelings.’”⁷ However, like the California right of publicity statute, New York Civil Rights Law § 51 permits a plaintiff to recover punitive damages where the defendant “knowingly” used the plaintiff’s name, image or voice unlawfully.⁸

“Conversely, talent needs to be aware and mindful not to sign any releases without a full understanding, and to keep the copyright in all images for which they pay.”

What these cases teach is the value of tickler systems for those who hire models or license images. Many cases involve contracts where the image was legitimately licensed for a period of time, but the license expired. That is when the tort begins. If the wrongdoer continues to utilize the image after notice, punitive damages then become available. If the wrongdoer has an option to use the image, the plaintiff may demand payment for the entire option period, even if the defendant only used the image for a portion of the option period.

Another problem for those who advertise is whether the chain of license is bona-fide. Many times a photographer licenses an image that was taken without the consent of the person depicted therein to be used for commercial purposes. The advertiser will still be liable and left with an indemnity claim against its licensor.

One variation on this is the photographer who is hired to do a “head shot” for a model or actor and has the talent sign a “standard release,” which effectively says that the photographer can use the image for any purpose. This is not a valid consent, as there is no consideration given by the photographer to the person posing. Conversely, talent needs to be aware and mindful not to sign any releases without a full understanding, and to keep the copyright in all images for which they pay.



Neville L. Johnson



Douglas L. Johnson

The best defense to a §§ 50-51 claim is the newsworthiness exception. The newsworthiness exception permits the unauthorized use of a person's name or likeness in advertising matters of "public interest" if the person's likeness bears a "real relationship" to the subject matter of the publication and is not an "advertisement in disguise."⁹

"The court observed that the dispute over the exploitation of Marilyn Monroe's persona ended the way Monroe herself predicted over 50 years ago: 'I knew I belonged to the public and to the world, not because I was talented or even beautiful but because I had never belonged to anything or anyone else.'"

The newsworthiness exception "is both a matter of legislative intent and a reflection of constitutional values in the area of free speech and free press."¹⁰ Therefore, courts define "public interest" broadly. "Newsworthiness" and "public interest" in this context have been construed "in most liberal and far-reaching terms" to encompass "all types of factual, educational and historical data, or even entertainment and amusement, concerning interesting phases of human activity in general."¹¹

Finally, California law provides protection against the unauthorized use of a deceased personality's name, voice, signature, photograph or likeness.¹² To bring an action under § 3344.1, the deceased person's name, voice, signature, photograph, or likeness must have had commercial value at the time of his or her death; and any person claiming to be a successor in interest to the rights of the deceased personality must register a claim to those rights with the California Secretary of State.

However, there is no such right in New York, making a deceased celebrity's domicile at time of death an important consideration.¹³ In the Marilyn Monroe case, Monroe died in 1962 at a house she owned in Brentwood, California. Monroe also maintained her prior residence in New York City. The issue before the court was that if Monroe was a California resident at her death, the Monroe estate would have inherited control of her name and likeness; if she was a New York resident, then those rights would have expired when Monroe died.

After Monroe's death, her lawyer and executor asserted to both the New York courts and the California tax authorities that Monroe died a domiciliary of New York. In 2005, Marilyn Monroe LLC sued Milton Greene Archives, Inc., claiming ownership of Monroe's right of publicity under the California Civil Code and alleging that the defendant unlawfully used Monroe's image and likeness.

The Ninth Circuit held that judicial estoppel prevented Marilyn Monroe LLC from taking the position that Monroe died domiciled in California, when it had prevailed in earlier suits on the premise that Monroe was a domiciliary of New York: "This is a textbook case for applying judicial estoppel. Monroe's representatives took one position on Monroe's domicile at death for 40 years, and then changed their position when it was to their great financial advantage."¹⁴

The court observed that the dispute over the exploitation of Marilyn Monroe's persona ended the way Monroe herself predicted over 50 years ago: "I knew I belonged to the public and to the world, not because I was talented or even beautiful but because I had never belonged to anything or anyone else."¹⁵

Endnotes

1. *Messenger v. Gruner + Jahr Printing and Publishing*, 94 N.Y.2d 436, 441 (2000).
2. *Kamakazi Music Corp. v. Robbins Music Corp.*, 534 F. Supp. 69, 77 (1982) (citing *Brinkley v. Casablancas*, 438 N.Y.S.2d 1004, 1012 (1981)).
3. N.Y. Civ. Rights Law § 51 (the person wronged "may maintain an equitable action in the supreme court of this state against the person, firm or corporation so using his name, portrait, picture or voice, to prevent and restrain the use thereof").
4. *Onassis v. Christian Dior-New York, Inc.*, 472 N.Y.S.2d 254, 258 (1984).
5. Cal. Civ. Code § 3344(a).
6. *Zoll v. Ruder Finn, Inc.*, 2004 WL 527056 (S.D.N.Y. March 16, 2004).
7. *Id.* at *2-*3 (quoting *Lerman v. Flynt Distributing Co.*, 745 F.2d 123, 141 (2d Cir. 1984)).
8. N.Y. Civ. Rights Law §§ 50, 51; *Beverly v. Choices Women's Medical Center, Inc.*, 78 N.Y.2d 745, 753 (1991).
9. *Finger v. Omni Publications Intern., Ltd.*, 77 N.Y.2d 138, 141-42 (1990); see *Messenger*, 94 N.Y.2d at 440.
10. *Howell v. New York Post Co.*, 81 N.Y.2d 115, 123 (1993).
11. *Myskina v. Conde Nast Publications, Inc.*, 386 F. Supp. 2d 409, 417 (S.D.N.Y. 2005).
12. Cal. Civ. Code § 3344.1.
13. See *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC*, 692 F.3d 983 (9th Cir. 2012).
14. *Id.* at 1000.
15. *Id.*

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The Legality of the Retesting Procedure Applied by World Anti-Doping Agency—a Legal Review of Certain Awards Rendered by Court of Arbitration for Sport

By Sergey Yurlov

I. Introduction

Article 17 of the World Anti-Doping Code (WADC) reads as follows: “No anti-doping rule violation proceeding may be commenced against an Athlete or other Person unless he or she has been notified of the anti-doping rule violation as provided in Article 7, or notification has been reasonably attempted, within ten years from the date the violation is asserted to have occurred.”¹ The previous version of the WADC provided for a reduced statute of limitations—eight years.

In its “Significant Changes Between the 2009 Code And the 2015 Code, Version 4.0,” the World Anti-Doping Agency (WADA) points out that: “The statute of limitations has been extended to ten years from the eight-year statute found in the current Code. Recent events demonstrate that sometimes it takes a long time before sophisticated doping schemes can be uncovered.”² The apparent reasoning behind amending Article 17 of the WADC and extending the statute of limitations for revealing anti-doping rules violations is to “uncover sophisticated doping schemes.”

From a practical perspective, these provisions empower WADA and other sporting organizations to analyze doping samples an infinite number of times within the prescribed 10-year period. WADA often applies for the re-analysis procedure in order to determine positive doping tests by re-analyzing doping samples collected during past sporting competitions.³

This article reviews this and focuses on the following legal issues:

- 1) What is the legal basis for conducting retesting of doping samples collected during previous sporting competitions?
- 2) Are there any violations of athletes’ rights and legitimate interests?
- 3) What is the opinion of Court of Arbitration for Sport (CAS) and/or other sporting arbitral tribunals/courts of law on the legality of the retesting procedure?
- 4) Should the WADC be amended to shorten the statute of limitations for revealing doping?

In reviewing these questions, this article will (i) provide a legal overview of the WADC’s provisions as to the re-

testing procedure, (ii) discuss an analysis of court practice relating to disputing adverse analytical findings obtained as a result of the retesting procedure, and (iii) draw conclusions as to the need for amending the effective version of the WADC to actually protect the rights and legitimate interests of athletes.



Sergey Yurlov

II. Legal Framework for the Retesting Procedure

The WADC does not define the terms “further analysis,” “retesting” or “retrospective testing.” According to Article 6.5,

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

Given the above, we can draw the following conclusions:

- The WADC does not prescribe the legal notions “further analysis,” “retesting” or “retrospective testing”;
- Conducting further analysis of doping samples is a right of a respective anti-doping organization (Anti-Doping Organization); and
- The Anti-Doping Organization has the right to retest doping samples at any time within the 10-year period starting from the date when a doping offense should have occurred.

III. The Retesting Procedure and Rights of Athletes

On its face, the Anti-Doping Organization appears to act with the best interests of clean athletes. However, does it really protect them?

When justifying new investigations, the Anti-Doping Organization usually points out that scientific developments provide the ability to identify more drugs and develop new identifying tests. The Anti-Doping Organization should first demonstrate that a prohibited substance could not have been revealed during the course of the first testing and that science then developed significantly after, thereby later enabling testing of such a substance.

In analyzing the retesting procedure, the following observations can be made:

- Each athlete takes part in a sporting event once. Generally, as soon as it is over, its participants cannot request that it be repeated.
- Medal ceremonies for different sporting events are usually conducted during or immediately after the competition. It is understood that all required tests for prohibited substances are done prior to competition. It is never stated that results are only preliminary.
- Doping disputes are competition disputes, which should be resolved in the shortest term per Article 21 of the Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games. That is why CAS has established special ad hoc divisions to deal with the resolution of urgent sports-related matters. CAS's decisions are binding and final.

Thus, when it comes to the participation of athletes in sports and sport dispute resolutions, the "principle of one attempt" is applied. However, it is not applicable to an athlete's liability. Therefore, the Anti-Doping Organization can sanction athletes and strip them of their medals, prizes and sporting titles *ex post facto*.

From legal and practical perspectives, it would be more logical and lawful to test each athlete once and comprehensively for the full range of possible performance enhancing drugs, which can be revealed as of the date of a particular sporting competition. If the Anti-Doping Organization fails to establish that an athlete has committed an anti-doping rules violation, and based on these results distributes medals, prizes and titles, then there should not be any grounds for conducting further tests. Alternatively, the Anti-Doping Organization should specify that such results are preliminary and subject to change in the forthcoming 10 years.

Most importantly, athletes and their representatives cannot control the retesting procedure. Therefore, it is entirely possible that someone could manipulate the process, resulting in positive samples.

As discussed above, the retesting procedure is an out-of-competition proceeding. However, the Anti-Doping Organization can continue, after a certain time period, to "dig" into these certain athletes' test results.

IV. Legal Stance of CAS

Two cases that were adjudicated by CAS address the issues surrounding retesting. The first is *CAS 2017/A/4973 Chunhong Liu v. International Olympic Committee*⁴ and the second is *CAS 2017/A/4974 Lei Cao v. International Olympic Committee*.⁵

The focus of both is the legality of the retesting procedure. The cases' similar circumstances are summarized as follows:

- Having participated in certain sporting competitions, the athletes underwent required doping tests. There were no adverse analytical findings. The athletes' doping samples were sent to storage for possible later re-analysis by a WADA laboratory.
- On the eve of the 2016 Summer Olympic Games in Rio, the International Olympic Committee decided to submit certain doping samples to a re-analysis by an empowered laboratory.
- Retested doping samples revealed the presence of prohibited substances.
- The athletes were sanctioned by sporting governing bodies.
- The athletes appealed the respective decisions with CAS.

The parties raised the following important questions.

Question No.1: "What should be done with inconsistencies between results found in two different laboratories? Is it possible to use the contradiction between WADA accredited laboratories to an athlete's disadvantage?"

Although CAS believes that both laboratories' findings are the results of the analytical instruments and methodologies available as of the date of respective testing, and that there is no contradiction between them, the instruments and methodologies available as of the dates of testing may have changed. It appears that the onus of proof rests on the Anti-Doping Organization, as that body initiates such re-analysis. One of the fundamental standards is that a party alleging something is responsible for putting forth evidence of such. Therefore, the Anti-Doping Organization should prove that (i) a method to detect the presence of a prohibited substance was not implemented during the first testing as it simply was not available and (ii) it was not possible at all to detect the presence of a particular prohibited substance.

"Both the WADC and the Anti-Doping Organization's regulations are based on the long-treasured principle of autonomy of sport. This autonomy should not, however, lead to violating athletes' rights and legitimate interests."

CAS in its ruling points out that "the mere fact that prohibited substances were not detectable at the time of the sample collection and, hence, the athletes were not sanctioned at that time, does not entail any kind of legitimate expectation not to be sanctioned at a later stage." In reviewing this, it should be noted that when an Anti-Doping Organization conducts retesting of previously collected samples, it may be inconsistent with sporting competition regulations. As mentioned above, the retesting procedure is an out-of-competition procedure. Therefore, medals are awarded based on the clean results of doping tests that had been made immediately prior to the competition. If the Anti-Doping Organization is going to conduct retesting, it should clearly notify the athletes. Sporting competition regulations should contain a provision prescribing that any competition's results are preliminary and subject to WADA's approval. Therefore, athletes will understand that there may be future repercussions. More importantly, they will be able to review the retesting procedure's documents and materials. It would mean that both athletes and the Anti-Doping Organization have the same procedural rights when it comes to challenging another's party allegations and/or evidence.

Question No.2: "Is it lawful to apply the 10-year period for retesting?"

CAS in its ruling points out that:

...the Sole Arbitrator does not find any reason to conclude that the 8-year limitation would be in violation of legal principles or Swiss public policy. Article 127 of the Swiss Code of Obligations provides for a regular statute of limitation of 10 years for contractual obligations. According to Article 97 of the Swiss Criminal Code, the regular statute of limitation is 10 years, for minor criminal offences 7 years. The 8-year limitation stipulated in Article 6.5 IOC ADR follows the 4-year rhythm of the Olympic Games over which the IOC has jurisdiction. The aim of having the option for re-analysis, i.e. to make use of the improvements of the analytical devices and methods, requires sufficient time which is needed for making new methods operational.

Sanctioning athletes ex-post facto may be unlawful. The retesting procedure could be theoretically accepted by athletes if it was clear and transparent, if there was strong evidence of "improvements of the analytical devices and methods," and if the Anti-Doping Organization could describe and prove what is actually done with previously collected samples.

Any CAS reference to the above-mentioned statute of limitations is irrelevant, since WADA applies new methods to early collected samples. This is similar to applying a law to particular relationships retrospectively.

Question No.3: "In retesting collected doping samples, who bears the burden of proof to establish that those samples have been properly transferred, transported, and stored in temperatures in strict compliance with WADA regulations?"

CAS points out the following: "...contrary to Appellant's view and according to Article 3.2.1 IOC ADR, it is not the IOC's but the Athlete's burden to establish 'that a departure from the International Standard occurred, which could reasonably have caused' the AAF."

Article 3.2.1 of the International Olympic Committee Anti-Doping Rules applicable to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016 stated the following:

Analytical methods or decision limits approved by WADA after consultation within the relevant scientific community and which have 9 IOC Anti-Doping Rules applicable to the Games of the XXXI Olympiad, in Rio de Janeiro, in 2016—08.06.2015(F) been the subject of peer review are presumed to be scientifically valid. Any Athlete or other Person seeking to rebut this presumption of scientific validity shall, as a condition precedent to any such challenge, first notify WADA of the challenge and the basis of the challenge. CAS on its own initiative may also inform WADA of any such challenge [...].

Both the WADC and the Anti-Doping Organization's regulations are based on the long-treasured principle of autonomy of sport. This autonomy should not, however, lead to violating athletes' rights and legitimate interests. There is a growing need to define to what extent sporting organizations can regulate their sports. It appears that they do not have the right to deprive athletes of their fundamental rights prescribed by the Universal Declaration of Human Rights 1948 and other international conventions.

V. Conclusions

Anti-Doping Organizations can sanction athletes and strip them of their medals, prizes, and sporting titles *ex post facto*, when a sporting competition is already over. From legal and practical perspectives, it would be more logical and lawful to test athletes once and comprehensively for the full range of possible performance enhancing drugs that can be revealed as of the date of any competition.

It is one of the fundamental standards of proof that an alleging party is responsible for putting forth evidence of such allegation. Therefore, the Anti-Doping Organization should prove that (i) a method to detect the presence of a prohibited substance was not implemented during the first testing, as it simply was not available and (ii) it was not possible at all to detect the presence of a particular prohibited substance.

Sporting competition regulations should contain a provision prescribing that any competition's results are preliminary and subject to WADA approval. Therefore, athletes will be on notice. More importantly, both athletes and the Anti-Doping Organization will have the same procedural rights when it comes to challenging another party's allegations and/or evidence. This is especially so, as the WADC's provisions cannot contradict the basic principles of law and should be in strict compliance with the provisions of well-known international treaties, declarations, and conventions containing a set of human rights.

Endnotes

1. The effective version of the WADC is available at: <https://www.wada-ama.org/sites/default/files/resources/files/wada-2015-world-anti-doping-code.pdf>.
2. Significant Changes Between the 2009 Code and the 2015 Code, Version 4.0 // <https://www.wada-ama.org/sites/default/files/wadc-2015-draft-version-4.0-significant-changes-to-2009-en.pdf>.
3. See <https://www.wada-ama.org/en/media/news/2016-05/wada-statement-regarding-reanalysis-of-2012-london-olympic-samples>; <https://www.olympic.org/news/second-wave-of-reanalysis-reveals-banned-substances-in-45-athletes-from-beijing-and-london>.
4. See http://www.tas-cas.org/fileadmin/user_upload/Award_4973_FINAL_.pdf.
5. See http://www.tas-cas.org/fileadmin/user_upload/Award_4974_FINAL_.pdf.

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Autry, Angels, and the American League

By David Krell

Southern California's transition from the minor to the major leagues began when Brooklyn Dodgers owner Walter O'Malley bought the Los Angeles Angels of the Pacific Coast League and, in turn, the team's territorial rights to the region before the 1957 season. Included in the purchase was Wrigley Field, the sister ballpark to the eponymous structure on Chicago's North Side. The minor league Angels moved to the northwest and became the Spokane Indians, a Dodgers farm club; the Hollywood Stars, another Pacific Coast League team in Los Angeles, moved to Salt Lake City and adopted the Bees moniker.

O'Malley's maneuver pried open the door for his exodus from Brooklyn. Angels owner P. K. Wrigley said:

Mr. O'Malley sold his ball park in Brooklyn, and he has to get a place to play sooner or later. All the evidence points to a move to Los Angeles. The tendency in the majors is toward one-team cities, and New York is pretty crowded with the Dodgers, Giants and the Yankees. I know that Mr. O'Malley is keenly interested in Los Angeles.¹

Getting a major league team—especially the legendary Dodgers—would be a boon to southern California's status. However, a deal with O'Malley needed creativity to sway him. There had been an idea for a domed stadium in Brooklyn that never left the drawing board. Political headbutting with New York City Triborough Bridge and Tunnel Authority Chairman Robert Moses resulted in frustration for the Dodgers' owner, as Moses refused to use his legal power to condemn land so that O'Malley could buy it inexpensively.

"The Senators left Washington for Texas and became the Rangers after the 1971 season; it was the second incarnation of a major league team using the Senators label—the first moved to Minneapolis and became the Twins after the 1960 season."

Moses did not believe that a ballpark served a public purpose, which was his benchmark for making condemnation decisions. It was an example of private enterprise,

not something with a public benefit, like a highway.

Therefore, a new ballpark for the Dodgers would likely be crucial for O'Malley to voyage 3,000 miles westward. Indeed, part of the deal with Los Angeles gave him Chavez Ravine, which he used to build Dodger Stadium. O'Malley's consideration included parting with Wrigley Field; it instead went to the city.

With the Dodgers exiting Brooklyn for Los Angeles and the Giants leaving Manhattan for San Francisco after the 1957 season, the newly formed Continental League aimed to assuage the emotional wounds of their fans by installing a team, lest the Yankees be the sole Major League Baseball team in the Big Apple. Yet the Continental League folded before any games were played, despite a yeoman's job by New York City attorney William Shea and baseball executive Branch Rickey, who signed Jackie Robinson to the Brooklyn Dodgers and won four World Series titles as the Cardinals general manager—in building the league's eight-team structure.

From the Continental League's ashes, Major League Baseball agreed to expand with two teams in the American League and two teams in the National League: the Los Angeles Angels and the Washington Senators in the American League in 1961, and the New York Mets and Houston Colt .45s in the National League in 1962.

The Colt .45s changed monikers to Astros, beginning in 1965. The Senators left Washington for Texas and became the Rangers after the 1971 season; it was the second incarnation of a major league team using the Senators label—the first moved to Minneapolis and became the Twins after the 1960 season.

In the expansion excitement, Gene Autry, a savvy-minded entertainer with the theme song "Back in the Saddle Again," vaulted to the owner's suite for the Los Angeles franchise. To date, Autry, an Oklahoma native who went from a poverty-filled childhood in Oklahoma to western-themed stardom in Hollywood, is the only person with five stars on the Hollywood Walk of Fame for Motion Pictures, Television, Radio, Recording, and Live Theater/Performance. He built a portfolio that included the Monogram Movie Ranch (later called Melody Ranch),



David Krell

a popular shooting location for western-themed television shows and films; recordings of iconic Christmas songs—"Rudolph the Red-Nosed Reindeer", "Here Comes Santa Claus", and "Frosty the Snowman"; and broadcasting assets.

When the Los Angeles Dodgers left Autry's radio station KMPC in 1959, station KFI became the new destination for fans to learn about the latest adventures of their chums from Chavez Ravine. In turn, a void of sports programming existed for Autry; the American League's expansion supplied the fodder to fill it. American League president Joe Cronin, inducted into the Baseball Hall of Fame in 1956, saw Autry as a potential owner for the Los Angeles franchise in addition to being a broadcaster of the team's games. On December 7, 1960, Autry added baseball to his investments by purchasing the nascent Angels ball club, sparking ownership that lasted about 35 years. Autry's broadcasting properties later included television station KTLA, which, naturally, telecast Angel games.

It was O'Malley who held the power to add or deny an American League squad to the region. "Without Mr. O'Malley's co-operation, we would have been in the damndest baseball hassle you ever saw,"² declared Major League Baseball Commissioner Ford Frick.

In its first season, the Angels ball club played at Los Angeles's Wrigley Field, compiling a 71-91 record. From 1962-1965, the Angels and the Dodgers shared Dodger Stadium, which debuted in 1962; payments to the Dodgers for stadium rental fees and territorial rights were not disclosed.³ Angel Stadium began operations in 1966.

By the mid-1990s, Autry had sold Golden West Broadcasters, the corporate entity housing his several radio stations and KTLA. When Autry died in 1998, he left behind a legacy of 95 films, a television show in the 1950s, more than 600 records, and four radio stations; he sold the Angels to the Disney Company two years before his death.

Where some owners are anonymous, or at least quiet, Autry enjoyed a special bond with the fans that led to a rallying cry for Angel fans: "Win One for the Cowboy."

Endnotes

1. Frank Finch, *Sale Of Angels Spurs L.A. Big League Hopes*, Los Angeles Times (Feb. 22, 1957).
2. Frank Finch, *It's Official! Angels to Play in 1961*, Los Angeles Times (Dec. 8, 1960).
3. *Id.*

David Krell is the author of the forthcoming book *1962: Baseball, Hollywood, JFK, and the Beginning of America's Future*, which is scheduled to be published by University of Nebraska Press in 2019. David is also the co-editor of the NYSBA book *In the Arena*. He is an active member of the bar in New York, and an inactive member in New Jersey and Pennsylvania.

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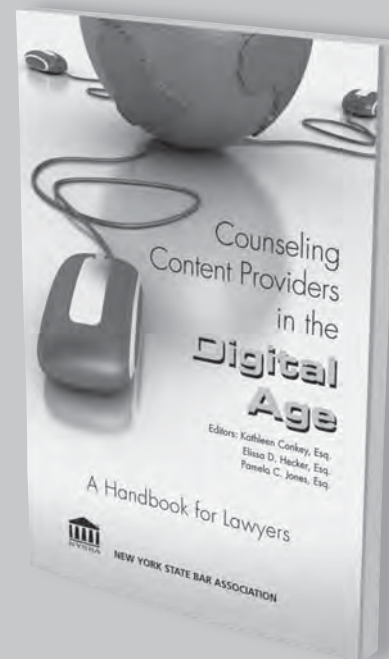
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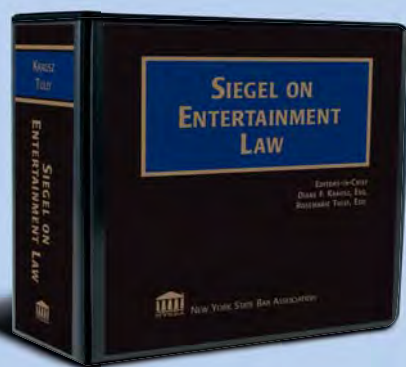
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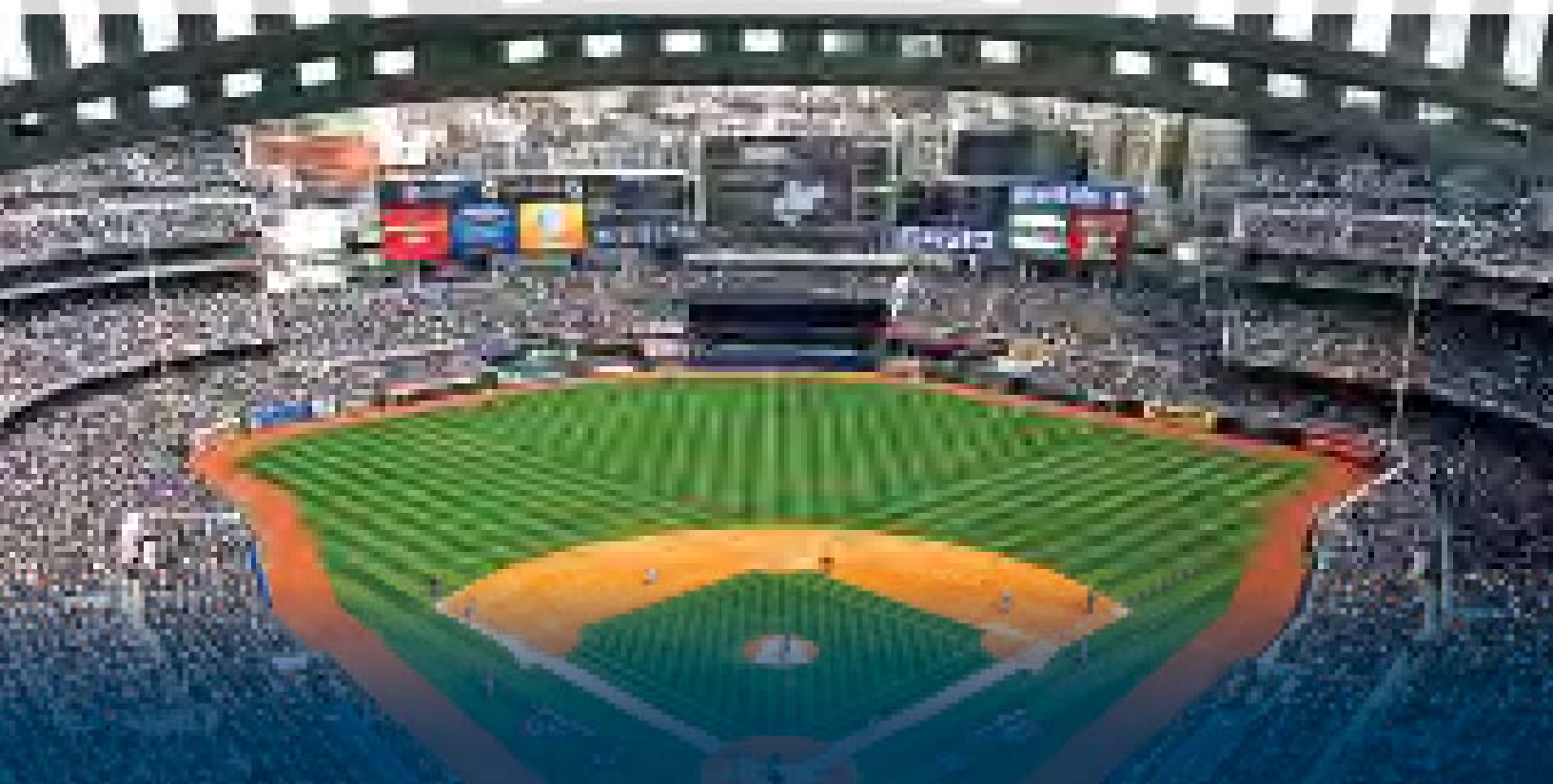


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