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Entertainment, Arts and Sports Law Journal

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

Remarks From the Chair/Editor's Note

The EASL Section will be holding its jam-packed **8-credit** CLE Fall Conference on October 29th and 30th at the Doral Arrowwood Resort in Rye Brook, New York, which is less than an hour from New York City.

The Conference will begin on Friday evening with a dinner featuring David Boies of Boies, Schiller & Flexner LLP. The first panel on Saturday will consist of speakers discussing cross-promotional deals and how such agreements relate to the future of the sports and entertainment industries. The late morning session will consist of breakout panels, which will include discussions regarding legal issues in the production of television programs, whether *DASTAR* spells disaster for artists' rights and an insider's guide to music publishing deals. The breakout panels will be followed by a luncheon. The first afternoon panel discussion will concern the file-sharing debate and how the filing of lawsuits against users affects laws and policies. The second afternoon panel will focus on blood doping and steroids, and the panelists will discuss professional ethics and issues that arise when representing athletes. The final panel of the day will consist of practitioners answering questions from new attorneys.

To register and for further program information, please contact Kim McHargue at the NYSBA at (518) 487-5630 or visit EASL's Web site at http://www.nysba.org/EASL2004FallProgram. **If you register prior to September 1st and mention the ad featured on page 7 of this issue of the *EASL Journal*, you will receive a**

Inside

NYSBA

$25 discount off your registration fee. I look forward to seeing you all at the Fall Conference.

This issue of the *Journal* publishes several articles that encompass the fields of entertainment, art and sports law. As always, there were a number of excellent Law Student Initiative submissions and the winning article was written by Holly Rich and Sarah Kutner of Hofstra University School of Law, entitled "Dirty Dancing: The Moral Right of Attribution, the Work for Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham."

Once more, please be advised that authors can obtain CLE credit from having an article published in the *EASL Journal*. Articles or Letters to the Editor may be submitted with biographical information either via e-mail to eheckeresq@yahoo.com or by mail on a disk along with a printed original to:

Elissa D. Hecker, Esq.
51 West 86th Street, Apt. 405
New York, NY 10024.

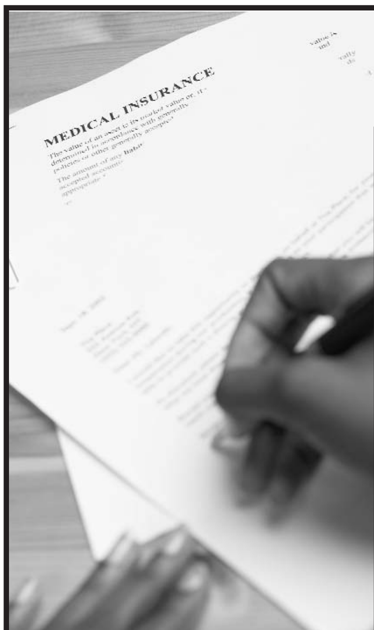
THE NEXT DEADLINE IS MONDAY, SEPTEMBER 20, 2004.

Elissa

Elissa D. Hecker works on legal, educational and policy matters concerning many aspects of copyright and corporate law. In addition to her activities in the EASL Section, Ms. Hecker is also a frequent lecturer and panelist, a member of the NYSBA's Committees on CLE and Publications and a member of the Copyright Society of the U.S.A. As part of her activities with the Copyright Society of the U.S.A., Ms. Hecker was one of a team that created and launched copyrightkids.org, an interactive website for copyright education.

Does EASL have your current e-mail address? If not, you are missing out on valuable information regarding programs, meetings, CLE, pro bono and other opportunities.

E-mail addresses will only be used for official NYSBA purposes (see the NYSBA's privacy policy at http://www.nysba.org/privacy.



Request for Articles

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

Elissa D. Hecker, Esq.
51 West 86th Street, Apt. 405
New York, NY 10024
eheckeresq@yahoo.com

Articles should be submitted on a 3½" floppy disk, preferably in Microsoft Word or WordPerfect, along with a printed original and biographical information.

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 non-lawyer 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 authorized 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, New York 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: http://www.courts.state.ny.us/mcle.htm (click on "Publication Credit Application" near the bottom of the page)). After review of the application and materials, the Board will notify the applicant by first-class mail of its decision and the number of credits earned.

Congratulations to the Law Student Initiative Selected Authors:

Holly Rich and Sarah Kutner of Hofstra University School of Law, for "Dirty Dancing: The Moral Right of Attribution, the Work for Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham"

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

Law Student Initiative

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association has 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 have interests in entertainment, arts 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.

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To foster an interest in entertainment, arts and sports law as a career path, the EASL Section invites law students who are Section members to participate in its Law Student Initiative:

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members.
- **Form**: Include complete contact information—name, mailing address, law school, law school club/organization (if applicable), phone number and e-mail 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 **September 20, 2004**.
- **Submissions**: Articles must be submitted via a Word e-mail attachment to eheckeresq @yahoo.com or accompanied by a hard copy and on a diskette in Word to:

  Elissa D. Hecker, Esq.
  51 West 86th Street, Apt. 405
  New York, NY 10024

Topics

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

Judging

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

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our Web site, and all winners will be announced at the EASL Section Annual Meeting.

EASL Pro Bono Update

By Elisabeth Wolfe

I have spoken with members involved with our pro bono work over the past year, and have learned a great deal. Perhaps the most important thing I have learned is that there are lots of ways that we can each make a difference! Whether it is by volunteering at one of Volunteer Lawyers for the Arts' ("VLA") clinics, making a financial contribution to a needy organization, taking on a pro bono case, or even volunteering at a soup kitchen, it is very clear that we can all make a positive impact. We just need to make ourselves aware of the various volunteer opportunities in our community.

In this issue of the Pro Bono Update, we are highlighting several New York-based non-profit organizations that impact the fields of entertainment, arts and sports law. It is our hope that reading about these wonderful organizations will inspire you to become more involved. Whether you contact one of the organizations below or volunteer for others—our hope is that you work to make a difference in your community through pro bono efforts.

We are also excited to announce that we will continue our collaborative relationship with VLA for 2004 and 2005, including legal clinic participation and program co-sponsorship. In addition, we have been making great strides in developing more and better pro bono opportunities to engage in as a Section. Along those lines, we will soon offer new opportunities for pro bono service, namely providing seminars on arts, entertainment and sports law to non-profit organizations. Stay tuned!

Thanks for all of your input to date, and please keep the suggestions coming.

Elisabeth K. Wolfe
Pro Bono Chair
EASL Section

IN THE SPOTLIGHT

Young Audiences New York

For over 50 years, Young Audiences New York ("YANY") has taken local artists in the New York City area and placed them in public schools in order to enhance or supplement arts education programs. With over 200 schools being served in all five boroughs and the surrounding communities, YANY not only brings community artists into local schools, but also provides an opportunity for students and their families (many in lower-income neighborhoods) to attend arts events throughout the city, resulting in exposure to such events as ballet, museums and ethnic dance recitals that they might not have otherwise experienced.

YANY's mission is to advance the artistic and educational development of New York City public school students by bringing the students together with professional artists of all disciplines to learn, create and participate in the arts. YANY's programs serve students of all grade levels and reflect the cultural diversity of New York City.

In April 2002, YANY marked its Jubilee Year**—50 years of partnering with New York City's public schools**. In its half-century of operation, YANY has grown from a small organization with a handful of programs into a major cultural and arts education institution with a wide range of award-winning programs. YANY believes that a high-quality arts education is vital to every child's development, and that experiences with professional teaching and performing artists are an invaluable component of an arts education.

YANY works closely with partner schools to tailor programs to meet their specific needs. Its programs engage students of all ages in educational experiences led by professional artists in the performing, visual and literary arts. These talented artists combine the highest level of artistic expertise with a proven ability to communicate and teach their art to young people.

- ***Artist Residencies*—**YANY artists work in classrooms with students and teachers, guiding them to be active participants in the creative process. Residencies address YANY's Learning Standards and integrate arts activities into the existing curricula.
- ***Educational Auditorium Performances*—**Ensembles visit schools to encourage student participation and introduce audiences to a wide range of cultural traditions and art forms.
- ***Arts for Learning (www.arts4learning.org)*—**An innovative arts-in-education resource for teachers in the form of a Web site and accompanying CD-ROM, AFL facilitates the use of the arts in the classroom and demonstrates the connections between the arts and learning in all subject areas.
- ***Professional Development Workshops for Teachers and Artists*—**Teachers, supervisors and/or parents explore teaching methods, curricular linkages and theoretical concepts. Sessions for

YANY's artists are led by noted experts and school-based practitioners in the arts-in-education field.

- ***Family Workshops and Performances***—Arts events for the whole family take place at schools in the evenings and on weekends. YANY's family programs are a highly effective means of involving parents in their children's education.

During the 2002-2003 school year, YANY reached 20,000 students through in-school arts residencies and an additional 217,000 students, teachers and families in some 240 New York City public schools and community organizations through educational performance programs, professional development workshops and family events. YANY is proud to report that last year its organizational scope of work consisted of close to 12,000 program services. ***For more information about YANY visit its Web site at http://www.yany.org or call (212) 319-9269.***

SupportMusic.com

SupportMusic.com is the cornerstone of a national campaign launched by the Music Education Coalition, an entity created by MENC, the National Association for Music Education and NAMM, the International Music Products Association, two of the largest organizations in music. This initiative was created to help parents, educators and communities fight to keep music education in their schools when budget cuts and other factors threaten music funding. The initiative is anchored by a Web site that contains all the statistics and tools necessary for fighting these cuts.

SupportMusic.com focuses on reaching parents and teachers who are facing massive cuts in school music programs. It provides them with the tools and information needed to take action on behalf of their children's education and future.

The SupportMusic.com Web site is an innovative system that simplifies the advocacy process for community members by allowing them to customize their campaigns in support of local music programs. This resource is offered to those who are interested in preserving music education for children, but who may not have the experience working with Boards of Education and other decision makers.

Specifically, the "Build Your Case" resource featured on SupportMusic.com presents users with tailored information that addresses the specific challenges faced by music education in specific communities. Visitors to the Web site can access information that will answer questions about the value of music in building intelligence, address the ways that budget cuts improperly target music programs and help combat the trend of eliminating music from schools' curricula.

SupportMusic.com allows Web site visitors to explore information sources, better understand the research that supports the case for music education and link to a variety of additional related sources and original materials. The Web site also features an interactive bulletin board where strategies can be shared and questions answered by advocacy advisors. Users can also secure information about how to model successful music advocacy efforts from around the nation. Additionally, SupportMusic.com provides tips for forming and registering local and regional music support groups and coalitions. Links to related associations providing other helpful resources are also available at the Web site.

In addition, SupportMusic.com unites music, arts and youth-serving organizations that contribute tools to the Web site. For example, with the participation of the American Music Therapy Association, the Web site expanded to include information for parents of children with disabilities seeking to ensure that music and/or music therapy is part of their children's education. ***For more information, visit www.supportmusic.com***.

Practicing Attorneys for Law Students Program, Inc.

Practicing Attorneys for Law Students Program, Inc. ("PALS") is a program designed to assist minorities entering the legal profession. PALS offers a mentoring program and career guidance services to minority law students attending 13 New York Metropolitan Area law schools. All PALS programs are offered free of charge to law students.

PALS began in 1984, when Patricia L. Irvin, then a senior associate at Milbank, Tweed, Hadley & McCloy, met with African-American law students at New York University ("NYU") to discuss how to improve their recruitment by New York City's major law firms. With the support of Milbank, David C. Siegfried, its hiring partner at the time, and Anne Waugh, then the firm's recruitment director, Ms. Irvin organized her friends to serve as mentors for law students from NYU. That was the genesis of PALS, first called the "Adopt-a-Law-Student Program."

PALS is best known for its one-on-one mentor program which matches minority law students with volunteer minority lawyers. Mentors provide support and advice on how to cope with the unique challenges confronting minority law students during their law school tenure and early career development. Generally, law students are matched with mentors at the beginning of the fall semester, but any student may apply for a mentor at any time during the school year. ***Attorneys who wish to serve as mentors should contact the PALS office at (212) 730-PALS.***

PALS has developed a series of programs designed to encourage the growth and career development of minority law students. In the fall, PALS offers an introductory lecture series for first-year students. Lectures are given on contracts, torts, civil procedure and criminal law. Throughout the school year, PALS holds a series of educational panel discussions, seminars and workshops on various topics of interest. These events, which are generally hosted by a law firm or other legal services organization, also include a variety of receptions during which students may meet other students and lawyers in a supportive environment.

The panel discussions are designed to introduce students to many different practice areas of law, such as bankruptcy, litigation, real estate and corporate law. Panel discussion topics include large and small law firm practice, judicial clerkships, academia and public-sector and public-interest employment. PALS also holds training sessions that focus on issues such as preparing for writing competitions, improving legal resumes, developing good interviewing skills and learning on-the-job research. In addition, since 1989, PALS has offered a supplemental preparation course for the New York State Bar Exam. All PALS programs are held at no cost to students and participants. ***For more information about PALS, visit its website at http://www.palsprogram.org or call (212) 730-PALS.***

The Entertainment, Arts and Sports Law Section and BMI to Offer Law School Scholarship

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association, in partnership with BMI, will fund up to two partial scholarships to law students committed to practicing in one or more areas of entertainment, arts or sports law.

The Phil Cowan/BMI Scholarship fund will provide up to two $2,500 awards on an annual basis in memory of Cowan, who chaired the EASL Section from 1992-94. He earned his law degree from Cornell Law School, and was a frequent lecturer on copyright and entertainment law issues. Each candidate must write an original paper on a legal issue of current interest in the area(s) of entertainment, arts or sports law. The competition is open to all students attending accredited law schools in New York State, along with Rutgers and Seton Hall law schools in New Jersey. In addition, up to ten other law schools at any one time throughout the United States will be selected to participate in the competition on a rotating basis. Students from other "qualified" law schools should direct questions to the deans of their respective schools.

The paper should be 12 to 15 pages in length, including footnotes, double-spaced, in *Bluebook* form. Papers should be submitted to each law school's designated faculty member. Each school will screen its candidates' work and submit no more than three papers to the Scholarship Committee. The Committee will select the scholarship recipient(s).

Submission deadlines are as follows: October 1st for student submissions to their respective law schools for initial screening; November 15th for law school submission of up to three papers to the Committee. The Committee will determine recipient(s) on January 15th. Scholarships will be awarded during the Section's Annual Meeting in late January.

Payment of scholarship funds will be made directly to the recipient's law school and credited to the student's account.

LAW SCHOOL SCHOLARSHIPS

The Committee reserves the right to award only one scholarship, or not to award a scholarship, in any given year.

The scholarship fund is also pleased to accept donations, which are tax-deductible. Donation checks should be made payable to The New York Bar Foundation, designating that the money is to be used for the Phil Cowan Memorial/BMI Scholarship, and sent to Kristin O'Brien, Director of Finance, New York State Bar Foundation, One Elk St., Albany, N.Y. 12207.

BMI

BMI is an American performing rights organization that represents approximately 300,000 songwriters, composers and music publishers in all genres of music. A non-profit-making company, founded in 1939, it collects license fees on behalf of the 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 collected for the "public performances" of its repertoire of approximately 4.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

NYSBA

The 72,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA's programs and activities have continuously served the public and improved the justice system for more than 125 years.

EASL Section

The more than 1,700 members of NYSBA's EASL Section represent varied interests, including issues making headlines, being debated in Congress and heard 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 *Entertainment, Arts and Sports Law Journal*.

Fan Violence II: Who Pays For It?

By Dan Messeloff

It is one of the most uplifting scenes in professional sports, when a mass of fans rushes the playing field to celebrate a team's victory.

Yet what if someone is injured amid the chaos, which many people consider part and parcel of sporting events? Should all fans be on notice that they are at risk of being injured, and therefore that they will be forced to bear the financial burden of any injuries they might suffer? Or should teams and stadium owners be responsible for ensuring the protection of their fans and compensate injured fans for their injuries when that protection fails?

In an earlier article, we discussed some of the legal issues that arise as a result of fan violence at sporting events, and particularly the legal measures available to prevent fan violence and punish violent fans.[1] In this article, we will examine the aftermath of fan violence, namely, who pays the price for violence and the extent to which stadium owners and teams may be held liable for fan violence.

Premises Liability

Whether or not the owner or occupant of a particular premises is liable for what occurs on the premises is governed by the tort doctrine of premises liability, as many lawyers may recall from law school. Premises liability is generally dependent upon a finding of negligence, which itself requires the existence of a duty on the part of the defendant to the plaintiff, a breach of that duty, and an injury suffered by the plaintiff resulting from the breach of duty.[2]

The duty at issue is generally one of "reasonable care," under which stadium owners are essentially obligated to make the sporting venue as safe as it appears to be in order to protect fans from harm.[3] While the owners are not "insurers of their patrons," they must exercise that degree of care exercised by persons of ordinary care engaged by other stadium owners and teams.[4] It is important to note that the benchmark of "reasonable care" is a relative standard, and, in light of the foreseeability requirement of reasonable care and the dependency of the foreseeability element of liability upon the conduct of other landowners, recent trends may have changed the landscape so as to increase liability against stadium owners for fan violence.

In general, and relating to one of the most commonly-cited causes for the recent increase in fan violence,[5] perhaps the most "foreseeable" instance of fan violence occurs as a result of inadequate security measures.

Inadequate Security Measures

As a general rule, the application of the "reasonable care" standard means that stadium owners and other landowners must "control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control."[6] With respect to the threat of potential violence in particular, New York courts have held that, where fan violence or other dangerous conditions may reasonably be foreseen, the owner's failure to prevent the violence through inadequate staffing of the facility may result in liability.[7] This duty arises when a landowner knows or has reason to know that there is a likelihood that third persons may endanger the safety of those on the premises.[8] It should be noted that, while a landowner must provide adequate security measures, the implemented measures must only be "reasonable," and do not have to be "optimal or the most advanced security system available."[9]

The fact that an injury to a spectator was due wholly or in part to the conduct of a crowd does not in and of itself make a stadium owner liable.[10] However, lack of supervision is often a factor in determining the liability of a stadium owner or team for injuries caused by fan violence.[11]

In *Paranzino v. Yonkers Raceway, Inc.*,[12] for example, the plaintiff was injured after she was inadvertently pushed by another spectator and slipped on a piece of garbage, falling down a set of stairs at the Yonkers Raceway. The court noted that it was "manifestly impossible" to control crowds at all times and under all circumstances. "[I]t is recognized the conditions at a race track induce contacts and some jostling between patrons and as the consequences cannot be provided against, they invoke no liability."[13] This characterization of racetracks applies with equal force to other sporting venues, and to most places where large crowds might be expected to gather. Still, landowners such as racetrack owners and other stadium owners must therefore do what is reasonable in light of the surrounding circumstances, and where a plaintiff can establish that reasonable security measures were available but were not employed, the court will find the stadium owner liable. In *Paranzino*, the plaintiff argued that not only would a security officer at every stairway have controlled the crowd and prevented the plaintiff's injury, but also would not have placed unreasonable demands on the owner of the racetrack. The court agreed:

> [S]tairways are strategic points in the movement of crowds and . . . a police officer stationed at the head of a stair-

> way induces a degree of caution in the users of the stairway especially in their regard for the rights of others. From the proof offered it was a reasonable conclusion that this usual and salutary precaution was not taken. From this it could well be concluded that Yonkers failed in its duty to plaintiff.[14]

As jostling among the crowd was foreseeable, and because the racetrack failed to implement certain reasonable measures to manage, if not completely control the crowd, the court found that the racetrack had breached its duty to the plaintiff, and that it was liable for her injuries.[15]

Where owners have fulfilled their duty by taking reasonable measures to protect fans, they will not be held accountable for unforeseeable fan violence. In *Napolitano v. Madison Square Garden Center, Inc.*,[16] for example, the owner of a hockey arena was held not responsible for injuries suffered by a fan during a fight with another fan during a hockey game. The court held that the arena implemented "reasonable" security measures by deploying over 80 security personnel throughout the arena, among other security measures, and thus, the circumstances in which the plaintiff was injured were not sufficiently foreseeable so as to be prevented. The court found that the fight was a "spontaneous" and "unexpected" event, and that there was no evidence that either the stadium owner or the individual security guards knew or should have known that the fight was imminent, or that the plaintiff had been faced with any foreseeable risk of danger. In contemplation of the "reasonableness" standard of care and the foreseeability element necessary to impute liability, the court held that "it is difficult to understand what measures could have been undertaken to prevent plaintiff's injury except presumably to have had a security officer posted at the precise location where the incident took place . . . surely an unreasonable burden."[17]

In another case, *Shtekla v. Topping*,[18] the plaintiff attended a baseball game at Yankee Stadium and was injured when a fight broke out in the stands. Although the plaintiff had argued that there were insufficient guards in the stands to protect the spectators, and that those who arrived to stop the fight were too slow in arriving, the court rejected her argument, ruling that teams and stadium operators will "not be liable for the ordinary rudeness and jostling that is the characteristic of crowds at sporting events, and it is only when something more than that can be expected that reasonable care requires intervention."[19]

Conclusion

As fan violence becomes an increasing concern to stadium owners, not to mention the general public, liability for the repercussions of fan violence has become a growing concern as well. Stadium owners and teams will be forced to assess the circumstances around each game or event to determine the foreseeability of any fan violence, and they must take reasonable measures to protect fans and to prevent violence. Where reasonable and prudent steps have been taken, it is unlikely that a court will impute liability to the stadium owner. Where violence was foreseeable, however, and where the stadium owner failed to properly anticipate the violence, the stadium owner will end up wounded by the violence, in the form of legal liability.

Endnotes

1. See Dan Messeloff, *Fan Violence: How to Prevent It, How to Punish It*, NYSBA Entm't, Arts and Sports Law J., Summer 2003, Vol. 14, No. 2.
2. *See Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928).
3. *See Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 441 N.Y.S.2d 644 (1981); *Giambrone v. New York Yankees*, 181 A.D.2d 547 (1st Dep't 1992); *Classen v. Izquierdo*, 137 Misc. 2d 489, 520 N.Y.S.2d 999 (N.Y. Sup. Ct. 1987) (where athletic or sports playing facility is in compliance with applicable safety regulations, the owner has satisfied its duty to avoid reckless or intentional acts).
4. *See Napolitano v. Madison Square Garden Center, Inc.*, 195 Misc. 2d 659, 760 N.Y.S.2d 807 (App. Term 2003) (owner of a sports arena not liable for injuries sustained by spectator, where the arena took appropriate safety measures to protect spectators).
5. *See Fan Violence*, *supra* note 1.
6. *Scotti v. W.M. Amusements, Inc.*, 226 A.D.2d 522, 522 (2d Dep't 1996).
7. *See Paranzino v. Yonkers Raceway, Inc.*, 9 Misc. 2d 378, 380, 170 N.Y.S.2d 280, 282–83 (App. Term. 1957) (raceway negligent for failing to place police officers at strategic points on stairwell to manage crowd).
8. *Florman v. City of New York*, 293 A.D.2d 120, 124 (1st Dep't 2002) (citations omitted).
9. *Id.*
10. *See Shtekla v. Topping*, 23 A.D.2d 750, 258 N.Y.S.2d 982 (1st Dep't 1965); *Burra v. Greater New York Ass'n, Inc.*, 11 A.D.2d 1015, 206 N.Y.S.2d 469 (1st Dep't 1960); *Futterer v. Saratoga Ass'n for Improvement of Breed of Horses*, 262 A.D. 675, 31 N.Y.S.2d 108 (3d Dep't 1941).
11. *Antinucci v. Hellman*, 5 A.D.2d 634, 174 N.Y.S.2d 343 (3d Dep't 1958); *Schwartz v. Madison Square Garden Corp.*, 307 N.Y. 924, 123 N.E.2d 573 (1954).
12. 9 Misc. 2d 378, 170 N.Y.S.2d 280 (App. Term 1957).
13. *Id*. at 380.
14. *Id.*
15. *Id.*
16. 195 Misc. 2d 659, 760 N.Y.S.2d 807 (App. Term 2003).
17. *Id.* at 660. *See Florman*, 293 A.D.2d at 126 (facility operator not responsible for injuries suffered by fan, as deliberate attack by automobile in parking lot not foreseeable).
18. 23 A.D.2d 750 (1st Dep't 1965).
19. *Id.* at 751.

Dan Messeloff is a former sportswriter and currently an associate with the labor and employment firm Grotta, Glassman & Hoffman, P.A. He may be reached at messeloffd@gghlaw.com.

Dirty Dancing: The Moral Right of Attribution, the Work-for-Hire Doctrine and the Usurping of the Ultimate Grand Dame and Founder of Modern Dance, Martha Graham

By Holly Rich and Sarah Kutner

When a person creates something, be it a painting, a computer program or a book, she often does so while employed by another person or entity. Suppose the creation is a successful one in its respective field. The copyright for that work then becomes valuable to the person who owns it. But who owns this copyright? Many might instinctively think that the painter, computer programmer or author would own it, since it was her talent and handiwork that created it. However, when the creator is in another's employ, and the creating both fell within her job description and was carried out during the time for which she was compensated, it is easy to see why the employer would claim that it is also entitled, at least partly, to ownership of the copyright of the creation. The employer would argue that but for the creator's status as employee, the creation might not have ever existed.

Congress' solution to the problem described above is the work-for-hire doctrine, codified in the U.S. Copyright Act.[1] Under the work-for-hire doctrine, the copyright to any work created in the scope of one's employment belongs to the employer. The copyright to commissioned works may also belong to the commissioner, with the creator then being classified as an independent contractor,[2] but only if the work falls within certain specified categories, and the contractor expressly agrees with the employer in writing to be governed by this rule. Technically, an employee is able to reserve copyright in any works created during employment in an employment contract, and should do so when possible. Realistically however, artists are not often in the position to negotiate for such provisions, and to require artists to affirmatively secure copyright to their own works would be to heavily burden an already politically and economically weak group in American society.

When it applied the work-for-hire doctrine to the work of Martha Graham, arguably the world's most renowned dancer and choreographer,[3] the Southern District of New York effectively placed this burden on creators who form nonprofit corporations in order to teach and share their artistic visions. The court awarded ownership of the copyright to her dances to the nonprofit center that she herself created in order to further her artistic vision. It rejected the claim of ownership of Ronald Protas, Martha Graham's protégé and companion during the last years of her life. In awarding ownership of the dances to the nonprofit center that Martha Graham founded, the court effectively invalidated Martha Graham's bequest of the dances to Protas, and the federal copyrights of the dances that Protas registered pursuant to this bequest. Under the Southern District's holding, therefore, creators are placed in an untenable position. They are effectively being forced to secure written instruments stating that they retain the copyright in their works, a task that requires both the knowledge that this potential copyright situation exists and the resources with which to obtain adequate legal representation. Ironically, the Southern District places this burden on creators in the not-for-profit sector, despite the fact that the reasoning behind allowing creators to found nonprofits in the first place is to unburden them financially in return for their cultural benefits to society.

With its decision to award ownership of Martha Graham's dances to the Center, the Southern District implicitly ignored the principle of moral rights,[4] which governs this type of situation under European civil law. Moral rights protect a creator's personal integrity in her work. They were codified in many European Community countries with the ratification of the Berne Convention, originally drafted in 1886 and last amended in 1971.[5] The United States refused to ratify the Berne Convention for many years due to Berne's conflict with the U.S. Copyright Act, and specifically the work-for-hire doctrine, over the increasingly louder objections of the other member countries.[6] In 1990, the United States did finally enact the Visual Artists Rights Act ("VARA"), which supposedly brought it into closer compliance with the terms of the Berne Convention.[7] However, although VARA's mission was purportedly to grant moral rights to artists, Congress removed its true protection for an artist by only extending her moral rights through the time of death and by completely excluding all works-for-hire.

In the Martha Graham case, the court's decision was flawed, as it misapplied the work-for-hire doctrines under both the Copyright Act of 1909 and the Copyright Act of 1976. However, the dispute between Protas and the nonprofit center would never have arisen had the United States been in full compliance with the

Berne Convention. If the U.S. legislators were more cognizant of moral rights theory, the unsavory precedent set by the district court in New York might never have been considered. The moral right of attribution must be integrated into courts' analyses in these cases, so that the U.S. may accept responsibility as one of the world's most artistically important and prolific countries.

The moral right of attribution is the right for one to have her name attached to her work.[8] Specifically, this article argues that the moral right of attribution, which is in direct conflict with the work-for-hire doctrine, must be applied to the narrow circumstances where the posterity of the work of a founder of a nonprofit center, created solely to further her own artistic vision, is in question. Such an application warrants a critical look at the theory behind the work-for-hire doctrine in relation to American copyright law. Ultimately, applying the moral right of attribution to the work-for-hire doctrine in such a narrow instance is not a radical proposition. Indeed, a ruling by the Ninth Circuit in 2000 indicates that a shift toward recognizing the fundamental rights of creator-founders of nonprofits is a move the courts in this country might be willing to make.[9] Although the moral right of attribution seems to be in direct conflict with the work-for-hire doctrine at first glance, it is not when applied narrowly to creator-founders of nonprofits.

The United States should carve out an exception to the work-for-hire doctrine of American copyright law for creators who found nonprofits in order to further artistic visions. Without this exception, such creators face burdens that run contrary to real life situations—they must treat the nonprofit entity as an adversary before it is even 'born,' and foresee the possibility that it might steal their works from them at some point in the future. The absence of this exception for creators also fundamentally defeats the purpose as to why a creator would choose the nonprofit form in the first place.

This article will first define and analyze the work-for-hire doctrine under American copyright law, first as it existed under the Copyright Act of 1909, and then as it currently exists under the revised Copyright Act of 1976. It will then trace the path taken by the courts in construing the work-for-hire doctrine, focusing on *Community for Creative Non-Violence v. Reid*,[10] *Brattleboro Publ'g Co. v. Winmill Publ'g Corp.*[11] and *Self-Realization Church v. Ananda Church of Self-Realization*.[12] Next, it will introduce Martha Graham and summarize the lawsuit between the nonprofit center she founded and her legal heir, Ronald Protas. This article will detail where the Southern District strayed from the precedent set forth by the Supreme Court and the Second Circuit. In arguing that the district court erred, the reader will see what is at stake on appeal in the Second Circuit. We will also outline the purposes and theories behind the concept of nonprofit organizations, and conclude that these purposes and theories will be defeated in relation to creator-founders of nonprofits if such creators are deemed to be employees of those nonprofits. Finally, this article will explain the theory of moral rights and ultimately argue that the United States should follow the lead of many European countries in taking responsibility for protecting the rights of its creators. Specifically, the United States should adopt the moral right of attribution to the narrow set of circumstances where the posterity of a creator-founder of a nonprofit created solely to further her artistic vision is in question.

The Work-for-Hire Doctrine Under the Copyright Acts of 1909 and 1976

Origin of the Work-for-Hire Doctrine

Congress derives the right to enact copyright legislation from the United States Constitution, which grants Congress the power "[t]o promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries."[13] The purpose of federal copyright legislation is to give the owner of copyrighted materials the exclusive right to reproduce a copyrighted work, to prepare derivative works based upon the copyrighted work, to distribute copies of the copyrighted work to the public by sale or transfer of ownership or by rental, lease or lending, to perform the copyrighted work publicly, or to display the copyrighted work publicly.[14] Further, the copyright in a work exists upon the creation of the work in a tangible form of expression; the work does not have to be published or performed publicly.[15]

Although the work-for-hire doctrine was first codified in the Copyright Act of 1909,[16] the common law courts had previously fleshed out the doctrine.[17] Six years before the codification of the 1909 Act, the Supreme Court laid the groundwork for the work-for-hire doctrine in *Bleistein v. Donaldson Lithographing Co*.[18] Writing for the Court, Justice Holmes surmised that the evidence at bar warranted the inference that the work in question belonged to the plaintiff-employer, as it was "produced by persons employed and paid by the plaintiffs in their establishment to make those very things."[19] The work-for-hire doctrine arose out of the common law under the rationale that when one employs another to produce a creative work, the fruits of that employee's endeavors properly belong to the employer.[20] There is a presumption implicit in this rationale that the work is not entirely the product of the employee's creativity, because the employer supplied the initial idea and motivation for the project and the means for executing it. In addition, the work-for-hire doctrine provides an efficient, bright-line rule that makes it easier for courts to resolve conflicts in this frequently occurring situation.

The 1909 Act added little to the then-existing common law work-for-hire doctrine.[21] The Act made the employer the "author" and initial copyright holder of "works made for hire."[22] However, no definition of a work-for-hire was given, nor did the Act provide a definition of "employer."[23] In addition, the legislative history of the Act did not provide any insight into these omissions.[24] Thus, Congress left wide gaps for the courts to fill, and the work-for-hire doctrine continued to develop accordingly.[25] Over the years the courts expanded on the doctrine by focusing on the intent of the parties.[26] The result of this focus was the creation of a "rebuttable presumption that a commissioned work would be considered a work for hire."[27] Roughly 30 years later, the doctrine was extended to presume statutory authorship for commissioning parties.[28] In 1955, a movement to reform copyright law commenced,[29] and ten years later the work-for-hire stipulations in the 1976 Act were practically accomplished.

Current Application: Works Made for Hire Under the Copyright Act of 1976

In its effort to rewrite the Act, Congress faced the formidable challenge of replacing a statute that covered a difficult and technical area, and one in which the lawmaking body had little expertise. This problem was somewhat alleviated by the legislature's decision to turn to authors, publishers and artists for assistance.[30] "Congress' 'paramount goal' in revising the Copyright Law [in 1976] was to enhance the 'predictability and certainty of copyright ownership.'"[31] The work-for-hire provisions "resulted from a running debate among industry representatives, lasting several years, culminating in an agreement reached in 1965."[32] The final product of this revisionary process resulted in the Copyright Act of 1976, Congress' effort to completely rewrite copyright law.[33] The work-for-hire provisions were included in this all-embracing revision.[34]

Since the legislative history behind the revisions to the Copyright Act was not significantly enlightening in terms of Congress' intent regarding the work-for-hire provisions, the courts were once again confronted with the task of interpreting the modifications. Indeed, Congress apparently gave little attention to the work-for-hire portion of the Act.[35] Rather, the Act only specified that works created after January 1, 1978 were to be governed by the Copyright Act of 1976,[36] and that if a copyrightable work was made for hire, the employer or commissioner was to be considered the author and thus owned the copyright.[37] In addition, the employer's ownership of copyright is presumed unless the parties have expressly agreed otherwise in writing.[38]

A work is considered made for hire if (1) it is prepared by an employee within the scope of his or her employment, or (2) is prepared by an independent contractor and falls within one of the varieties of specially ordered or commissioned works identified in the statute, under the proviso that the parties expressly agree in writing that the work is made for hire.[39] The Copyright Act of 1976 altered the doctrine as it was interpreted under the 1909 Act by specifying that only nine types of commissioned works[40] qualified as works-for-hire, and then only if the parties have agreed in writing to designate a work as such.[41] Accordingly, there are two different ways through which a work made for hire can develop: one involving employees, and the other involving independent contractors.[42]

The application of the work-for-hire doctrine first involves an inquiry as to the status of the party who prepared the work in question.[43] However, the 1976 Act does not define the terms "employee" or "scope of employment" in its definition section.[44] The Supreme Court was forced to resolve this glaring omission in *Community for Creative Non-Violence v. Reid*.[45]

The Supreme Court Weighs in on the Work-for-Hire Doctrine: *Community for Creative Non-Violence v. Reid*

In late 1985, the Community for Creative Non-Violence ("CCNV"), a Washington D.C. nonprofit organization committed to eradicating homelessness, and one of its trustees entered into a verbal contract with James Earl Reid, a local sculptor, for a sculpture to be featured in the annual Christmas Pageant of Peace in Washington, D.C. CCNV had elected to participate in the event "by sponsoring a display to dramatize the plight of the homeless."[46] The nonprofit visualized a sculpture of a modern nativity scene in which the traditionally Caucasian, Christian holy family was to be replaced by a black family, where "the two adult figures and the infant would appear as contemporary homeless people huddled on a street-side, steam grate."[47] In addition, CCNV specified that the figures were to be life-sized and that the steam grate would be set on top of a platform base, "within which special-effects equipment would be enclosed to emit simulated 'steam' through the grid to swirl about the figures."[48] Finally, CCNV indicated that the title of the work was to be "Third World America" and that the inscription on the base was to read "and still there is no room at the inn."[49] Reid agreed to sculpt the three human figures, while CCNV agreed to construct both the steam grate and the base for the sculpture.[50] The parties did not sign a written agreement and did not discuss copyright for the work.[51]

Reid worked exclusively on the statue throughout November and half of December in 1985, and was assisted periodically by several people who were paid in installments by CCNV.[52] On December 24, 1985, Reid delivered the completed sculpture to the CCNV premises in Washington, D.C. and was paid the final installment.[53] "Third World America" remained on display for one month, but in late January 1986, it was returned to Reid's studio for minor repairs.[54] A few weeks later CCNV planned a tour of several cities to raise money for the homeless and requested that Reid return the statue so that it could be the centerpiece of the nonprofit's initiative.[55] Reid objected on the ground that the casting material "was not strong enough to withstand the ambitious itinerary."[56] In March 1986, CCNV asked Reid to return the sculpture and Reid again refused.[57]

Reid subsequently filed a certificate of copyright registration in his name and proclaimed that he planned to take "Third World America" on a "more modest" tour than the one that CCNV had intended.[58] CCNV trustee Mitch Snyder, acting on behalf of the nonprofit, filed a competing certificate of copyright registration.[59] In addition, Snyder and CCNV commenced an action in federal district court seeking return of the sculpture and a determination of copyright ownership.[60] The district court declared that "Third World America" was a work made for hire under Section 101 of the Copyright Act of 1976 and that CCNV was "the exclusive owner of the copyright" in the sculpture.[61] The district court reasoned that Reid was CCNV's employee within the meaning of Section 101(1) of the Copyright Act, and CCNV was "the motivating factor" in the statue's production."[62] The Court of Appeals for the District of Columbia reversed and remanded, firmly holding that "Third World America" was not a work-for-hire and that therefore Reid owned the copyright.[63] The Court of Appeals concluded, in agreement with the Fifth Circuit in *Easter Seal Society for Crippled Children and Adults of Louisiana, Inc. v. Playboy Enterprises*,[64] that "the 1976 Act has greatly restricted the scope of the 'work for hire' doctrine," and that a literal interpretation of the 1976 Act is the most appropriate method of explication.[65] In applying a literal interpretation, the court held that Reid was an independent contractor and not an employee of CCNV and that "Third World America" did not fall within a category of commissioned work enumerated in Section 101(2) of the 1976 Act.[66] Thus, Reid owned the copyright in the sculpture.

The Supreme Court "granted certiorari to resolve a conflict among the Courts of Appeals over the proper construction of the 'work made for hire' provisions of the [1976 Act]."[67] In *Reid*, the Supreme Court provided working definitions for the terms "employee" and "scope of employment."[68] The Court resolved the disagreement among the circuit courts by firmly adopting the view that these terms should be construed in light of the general common law of agency,[69] concluding that Congress had intended to encompass the "conventional master-servant relationship."[70] The Court set forth several factors that may be considered when determining whether someone is to be considered an employee. These factors include the hiring party's right to control the manner and the means by which the product is accomplished, the skill required for execution, the source of the instrumentalities and tools, the location of the work, the duration of the relationship between the parties, whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work, the method of payment, the hired party's role in hiring and paying assistants, whether the work is part of the regular business of the hiring party, whether the hiring party is in the business, the provision of employee benefits, and the tax treatment of the hired party.[71] No single factor is determinative. Indeed, in some cases, some of the factors will be completely irrelevant.[72] In adopting this view, the Supreme Court rejected the "right to control" test applied by the Second and Tenth Circuits, the "actual control" test applied by the Second, Fourth and Seventh Circuits, and the "salaried employee" definition applied by the Ninth Circuit. In its attempt to clarify the meaning of "scope of employment," the Court instead followed the interpretations of the Fifth[73] and District of Columbia Circuits,[74] using the terms "employee" and "within the scope of employment" as defined in the Restatement (Second) of Agency. Section 228 of the Restatement provides that "an employee's work is within the scope of his or her employment if (1) it is the kind of work he or she is employed to perform, (2) it occurs substantially within authorized time and space limits, and (3) it is actuated, at least in part, by a purpose to serve the employer."[75] The employer must prove all three elements.

The Supreme Court affirmed the decision reached by the Court of Appeals that Reid was not an employee of CCNV, but rather an independent contractor.[76] The Court conceded that "CCNV members directed enough of Reid's work to ensure that he produced a sculpture that met their specifications,"[77] but stated that the extent of control a hiring party exercises over the particulars of a work is not dispositive.[78] The Court pointed out in its opinion that "all the other circumstances weigh heavily *against* finding an employment relationship."[79] Specifically, Reid procured his own tools and performed the work in his own studio in Baltimore, where supervision of his activities by CCNV operatives in Washington was "practically impossible."[80] Further, Reid was retained for roughly six weeks, a rather short amount of time, and throughout this time and afterwards, CCNV had no right to allocate additional projects to him.[81] In fact, except for the deadline set by CCNV for finishing "Third World America," Reid had "absolute freedom to decide when and how long to work."[82] Additionally, Reid was paid a fixed amount contingent on the satisfactory completion of the statue, and he had absolute discretion in his selection of assistants.[83] Finally, the Court reasoned, "CCNV did not pay payroll or Social Security taxes, provide any employee benefits, or contribute to unemployment insurance or workers' compensation funds."[84] Accordingly, the Court concluded, Reid was an independent contractor.[85]

Relevant Case Law in the Subsequent History of the Work-for-Hire Doctrine

The Second Circuit also considered the work-for-hire doctrine in *Brattleboro Publ'g Co. v. Winmill Publ'g Corp*.[86] The court in *Brattleboro*, analyzing work-for-hire under the 1909 Copyright Act, set forth the "instance and expense" test. The court's opinion stated that the work-made-for-hire doctrine was "applicable whenever an employee's work is produced at the instance and expense of his employer. In such circumstances, the employer has been presumed to have the copyright."[87] After *Brattleboro*, the Second Circuit held in *Picture Music, Inc. v. Bourne, Inc*. that "an essential element of the employer-employee relationship, [is] the right of the employer to direct and supervise the manner in which the writer performs his work."[88] The Second Circuit went on to stress that the "instance and expense test" is met "when the motivating factor in producing the work was the employer who induced the creation," in *Siegel v. Nat'l Periodical Publications, Inc*.[89]

The Ninth Circuit also had the occasion to apply the work-for-hire doctrine, in *Self-Realization Church v. Ananda Church of Self-Realization*.[90] The issue in *Self-Realization* was whether the written works of a monk who lived in a nonprofit church that he founded to teach and share his religious vision could be considered works-for-hire under the 1909 Act.[91] The monk, Yogananda, founded the Self-Realization Fellowship Church ("SRF"), and while living there wrote various books and articles and delivered religious lectures.[92] SRF obtained copyrights to most of Yogananda's published books in its own name, classifying them as works-for-hire.[93]

A decade after Yogananda's death, James Walters, a member of the church, left SRF to form Ananda, "a rival church dedicated to the teachings of Yogananda."[94] Ananda copied some of the copyrighted books, and SRF filed an infringement action.[95] SRF based its claim on the work-for-hire doctrine, and while Ananda admitted having published the works, it argued that the original church's copyrights were not valid since the works were not made for hire.[96] The court decided in favor of Ananda.[97] In acknowledging the Second Circuit's definition of the instance and expense test as reasoned in *Playboy Enterprises, Inc. v. Dumas*,[98] the Ninth Circuit unambiguously declared that "SRF has not introduced evidence that would demonstrate that it was at SRF's 'instance' that Yogananda decided to write, teach, and lecture."[99] The court firmly stated that Yogananda's "own desire" perpetuated his creations, and because those works were "motivated by [his own] desire for self-expression," they could not be considered to be works-for-hire.[100] The court relied on precedent in its description of the rationale underlying the work-for-hire doctrine, qualifying it as a presumption that "the parties expected the employer to own the copyright."[101] Because SRF's relationship with Yogananda apparently did not involve such a presumption, and even more importantly because "there was no evidence of supervision or control of Yogananda's work by SRF," the court decided that the works in question were patently not works-for-hire.[102]

Although the case law construing the work-for-hire doctrine with relation to creative works is by no means voluminous, the decisions of the Supreme Court and the Second and Ninth Circuits have certainly established clear, guiding precedents as to how to properly decide whether a person is an employee. The Southern District of New York misapplied the tests set forth by these precedents in its decision in the recent case involving the disposition of the copyrights of Martha Graham's dances.

Martha Graham's Chosen Heir v. Martha Graham's School and Center

Martha Graham is an icon of modern artistry.[103] Her glamorous presence and intriguing movements[104] were of mythic stature even up until her death in 1991 at age 96. At her death she left behind 181 works and a classroom technique that is still taught worldwide.[105] Her revolutionary dance technique,[106] now parlance of every modern dancer, is a theory of contraction and release,[107] a "method of muscle control [that] gave Graham's dances and dancers a hard, angular look, one that was very unfamiliar to dance audiences used to the smooth, lyrical bodily motions . . ." typical of early 1900's neoclassical ballet.[108]

Apart from her technique, Graham's *oeuvre* is important in the sense that it is a social documentary.[109] In the late 1920s, her pieces, such as *Immigrant*, *Vision of Apocalypse*, *Lamentation* and *Revolt*, were often expressive of social problems.[110] In 1931, after a trip through the American Southwest, Graham choreographed *Primitive Mysteries* and in 1935, *Frontier.* Both dances involved the theme of American history.[111] One of her most celebrated works was created in 1944 and entitled *Appalachian Spring.* That dance represents the pinnacle of her desire to embody Americanism.[112] Many of her epic ballets addressed achievements of historically iconic women,[113] notably Emily Dickinson[114] and Joan of Arc.[115] Her dance *Deaths and Entrances* is about the lives of the three Brontë sisters.[116]

Martha Graham's dance company, her sole proprietorship and labor of love, was often short of funding.

Even though her audience grew exceptionally over the 30 years she ran her dance school and company, overhead was always too great. In 1948, she incorporated the Martha Graham Foundation for Contemporary Dance.[117] In a further act of pragmatism, in 1956 Graham formed her sole proprietorship into a nonprofit, and named it the Martha Graham School of Contemporary Dance, Inc. ("the School").[118] The Martha Graham Center of Contemporary Dance operated as an umbrella organization and oversaw the School and the Dance Company; the Center and the School operated as one entity.[119] Thus the portentous seeds of a poisonous weed were planted, only recently to be unearthed by those who have survived the great diva of dance.

After a staggeringly incredible and much-lauded 50 years on the stage, in her 75th year, Graham reluctantly agreed to stop dancing.[120] In the wake of her decision, one of her friends advised her to think of herself not as a goddess but a mortal. Graham replied, "That's difficult when you see yourself as a goddess and behave like one."[121] She was subsequently hospitalized for a physical breakdown.[122] Ronald Protas, a close friend and confidant, dedicated himself to caring for her during this time.[123] When she regained her health, she sought to reorganize her company, with Protas still at her side, as he remained until her death.[124] Indeed, although his early background was in photography, Graham trained Protas in her technique and convinced him to discontinue seeking a law degree in order to help her run the company.[125] He worked closely with her during the final 22 years of her life and began serving as the company's General Director and Associate Artistic Director in the late 1970s.[126]

As Graham grew frail over the years, afflicted by arthritis, poor eyesight and failed hearing, Protas became "to a great extent her eyes, her ears and her public voice."[127] Even though he was not a dancer, Graham chose her close companion of over a quarter century to be the Artistic Director of the Martha Graham Center and School.[128] In 1988, in a signed, notarized statement, Graham specified to both the structure and future of her company and school: "It will be for Ron Protas . . . to make the final artistic decision as to the rightness of things artistically for my company and school."[129] Shortly before her death, she told Protas something to the effect of "[I]f things don't work out, not to worry. I'll settle for the legend."[130] Protas understood that Graham knew that he was "so steadfastly devoted to her that if things did fall below a certain standard, [he would] stop it all in the blink of an eye."[131] In her last will, executed on January 19, 1989, Graham named Protas as her sole executor and legatee.[132]

In her memoirs, Martha Graham recounts a collaboration with American Ballet Theatre, when Mikhail Baryshnikov was the head of the organization.[133] She recounts that Baryshnikov and she agreed that should ABT perform some of her company's dances they "would be monitored, and would be coached properly."[134] She goes on to say that other companies asked her to do "absolutely impossible" things, such as wanting to have one of her ballets and wanting "to be able to perform it within two weeks," which were refused because she became upset when "the technique [was] taught badly."[135] She viewed "technique as a science" and her memoirs make it clear that she was very exacting in whom she trusted to carry on her legacy.[136]

In May 2000, the Center suspended operations because of financial troubles.[137] That same year, Protas' relationship with the Board of Directors ("the Board") was strained, prompting the Board to vote to remove him from their ranks.[138] The primary cause for the deterioration of Protas' relationship with the Center may have been his non-dance background.[139] However, it is undisputed that preserving his inheritance from Martha Graham has been Protas' life work; even his critics "credit him for helping to keep Graham alive and steering the company through financial trauma."[140] One of Protas' crowning achievements during his tenure was to oversee a $6 million collaboration with the Library of Congress, whereby the Library secured the Graham archives and Protas secured a sizable amount of money for the Center, as well as subsidized rehearsal and performance time.[141] As Graham's legal heir, once removed from the Center, Protas disallowed the Graham company to either use her name or perform her repertory.[142] In July 2000, he applied to register copyright in 40 of Graham's choreographic works and secured registration for 30 of those works.[143]

The Center balked at Protas' copyright application and, in January 2001, Protas commenced an action in the Southern District of New York against the Center and the School, "seeking, *inter alia*, a declaration that he owned copyrights of the ballets choreographed by Graham during her lifetime and that he owned the costumes and sets used in connection with those ballets."[144] Protas based his claims on his status as both legatee under Graham's will and as trustee of the Martha Graham Trust, "a revocable trust of which he is the creator, trustee, and sole beneficiary."[145]

In August 2002, Judge Miriam Goldman Cedarbaum of the Southern District of New York wrote a lengthy opinion in which she essentially attempted to answer the question, "What property did Martha Graham, the great dancer, choreographer, and teacher, own at the time of her death in 1991?"[146] The court focused on the 35-year period (between 1956 and 1991) that the Center and the School, two nonprofits, operated as a combined entity.[147] The court held that the nonprofits proved ownership in 45 of the 70 dances in question.[148]

In addition, the court stipulated that Protas proved ownership in just one dance.[149] The court decided that 10 of the dances[150] in question are in the public domain, which essentially means that anyone may legally perform them. Finally, the court held that in regard to five commissioned dances (two published and three unpublished),[151] neither side had borne its burden of proving that the commissioning party intended for the copyright to be reserved to Graham.[152] Lastly, the court held that neither side had proven that the remaining nine published dances[153] were published with the required statutory copyright notice."[154]

Graham created 34 dances between the time of the formation of the nonprofits and her death in 1991.[155] The nonprofits argued in the Southern District that they own the copyrights in the dances because Graham was an employee and thus the dances were works made for hire under the Copyright Act.[156] Protas argued in rebuttal that as the dancer's heir he owns copyright in all of the dances because Graham was the creator of these works.[157] Although the court stated that there was "uniform credible testimony" at trial that Graham was employed by the defendants until her death, this is a source of contention on appeal, discussed *infra*.[158]

The court evaluated the dances separately. The 19 dances created before January 1, 1978 are governed by the Copyright Act of 1909, and the 15 dances created after that effective date are governed by the Copyright Act of 1976.[159] In interpreting the 1909 Act, the Southern District invoked the "instance and expense" test laid out by the Second Circuit in *Brattleboro*, in which an employer is presumed to own the copyright to an employee's creative work whenever that work is produced at the employer's "instance and expense." [160] In applying the "instance and expense" test developed by *Brattleboro* and its progeny, the court held that Graham's dances were indeed created at the instance and expense of the Center.[161]

The court held that the "expense prong" had been met because available audit reports revealed that the combined account of the School and Center paid salaries to Graham, and further, because a reading of the Center's Annual Report and payroll records tended to show that Graham was a full-time employee.[162] The court additionally stated that the Center paid Graham's personal and medical expenses, although this point is not explained or elaborated upon in the decision.[163] The court also stated that because it happened that some of the Center's employees, namely other principal dancers, occasionally aided Graham in her creative process, the dances were thus created at the expense of the Center.[164] Finally, the court rejected Protas' argument that Graham cannot be considered to have been an employee because of her receipt of royalties from the defendants for her ballets, by holding that "[a] preponderance of the credible evidence shows that Graham was not paid any royalties by the defendants."[165]

While the court's application of the expense prong is questionable, the Southern District's blatant misapplication of the instance prong of the *Brattleboro* test renders the entire test incorrect. While the court conceded that "Martha Graham was ultimately responsible for making all final artistic decisions relating to the dances," it nevertheless strangely held that the "instance prong" of the *Brattleboro* test had been satisfied.[166] The court argued, unpersuasively, that even though the Board had not interfered with her artistic decisions, the "[B]oard would try to assist her in her choreographic endeavors," and "made suggestions of an artistic nature to her" and thus contributed to the creative process.[167] The court's decision that the instance prong had been met is decisively incorrect. In fact, Graham completely dominated the Board of her nonprofit.[168] Although the Board made suggestions and offered assistance, "she alone decided what projects to undertake and when and where she would work."[169] The Board's offers of assistance were simply a natural consequence of its dependence on Graham as the lifeblood of the entire organization.

As a matter of law, under the 1909 Act, the "instance" prong of the work-for-hire doctrine was not fulfilled. The Second Circuit should reverse the district court's decision. In doing so, the court should follow the cogent and appropriate reasoning of the Ninth Circuit in *Self-Realization Church v. Ananda Church of Self-Realization*.[170]

Applying this reasoning to the case at bar, Graham's dances were motivated by her own "desire for self-expression" and thus cannot be deemed works-for-hire. The paradigm present in *Self-Realization* is exactly the same as that in *Martha Graham*: An artistic creator founded a nonprofit to promote and spread his or her own creative vision. The creator then died and a dispute arose regarding the ownership of copyrighted works governed by the 1909 Act. The nonprofit claimed ownership based on the work-for-hire doctrine. Therefore, the Second Circuit should adopt the Ninth Circuit's logical reasoning. The Center did not play any role in the creation of Martha Graham's dances. She was already an accomplished choreographer before the nonprofit was founded, with a reputation that made the Center possible and then successful. It is hard to imagine a scenario in which a creator could establish a successful nonprofit without already having established a reputation for herself in a certain artistic field. The compensation she received could hardly be called an adequate exchange for her unprecedented dances. Further, she created the dances independently, without direct supervision from anyone at the Center.

For the Second Circuit to follow the Ninth Circuit's reasoning in *Self-Realization* is logically consistent with the rationale behind the work-for-hire doctrine. The reason that the United States espouses the work-for-hire doctrine is because it provides a bright-line rule as to who owns a copyright to work in situations where an employer contributes substantially to an individual's creation through the terms and conditions set forth for her employment. Martha Graham was clearly not on the employee side of that bright-line rule.

The Second Circuit should reverse the district court's ruling because the Southern District did not accurately apply the body of law pertaining to the 1976 Act. The court concluded that the 15 dances created after the effective date of the 1976 Act were, within the meaning of the Act, prepared by Graham within the scope of her employment.[171] In its application of *Reid*, the court laid out the balancing test for determining whether an employment relationship exists.[172] While it acknowledged all 13 of the traditional *Reid* factors to be considered in applying the balancing test,[173] the court stressed that those factors "should not merely be tallied but should be weighted according to their significance in the case."[174] Indeed, the court applied only the five factors deemed to be the most significant by the Second Circuit in *Aymes v. Bonelli*.[175] However, the Southern District misapplied three of the five *Aymes* prongs. Therefore, Graham cannot be considered an employee of the Center.

First, the court misapplied the prong that examines the hiring party's right to control the manner and means of creation. Under this prong, the court incorrectly dismissed the fact that Graham possessed all artistic control of her work. The court unconvincingly argued that simply because the Board did not actually exercise its right to control the creation of Graham's dances does not mean that it did not still possess such a right.[176] However, the court overlooks the fact that the Board did not have the right to control the creation of Graham's work to begin with.

Second, the *Aymes* factor that examines whether the hiring party has the right to assign additional projects is also unfulfilled in this case. As discussed above, the Board made mere suggestions from time to time but never under any circumstances was it allowed to instruct Graham on how to create and perform.[177] The right-to-control and the right-to-assign-additional-projects prongs, when analyzed together, are reminiscent of the "instance prong" under the 1909 Act, which, as discussed *supra*, the court misapplied.

The third *Aymes* factor that the court misapplied is the skills factor. Graham's talent is undeniable; her place in history is legendary.[178] Her skills as a choreographer and dancer are arguably unparalleled.[179] If the Supreme Court in *Reid* found that sculpting is a "skilled occupation"[180] in its analysis of a local, relatively unknown artist, then there can be no question that under governing law, Graham's occupation is a skilled one as well. Instead of looking to the Supreme Court's interpretation for guidance, the court characterized Graham as a "senior employee" of the Center, one whose "high level of skill in choreography" does not render her of the "project-oriented status" associated with independent contractors.[181] The basis for the court's lackluster qualification of Graham as a mere hired hand, albeit a "senior" one, is preposterous. Further, the court's dismissal of the skill that choreography involves is insulting to anyone who appreciates art.

The Second Circuit should reverse the Southern District's decision because the court misapplied three of the five *Aymes* factors under the 1976 Act, and hold that Graham's repertoire cannot be considered works made for hire. Specifically, under both the 1909 and the 1976 Acts, it is obvious that Graham was not an employee of the Center and thus the work-for-hire doctrine is inapplicable.

At stake in the appeal pending at the Second Circuit is the body of work created after the formation of the nonprofit. The issue on appeal is whether Graham, as the creator-founder of the Center, was a mere employee of the nonprofit institution that was dedicated solely to promoting her artistic vision. In essence, the court is being asked to determine if the work-for-hire doctrine is applicable to the situation at bar.

According to his appellate brief, Protas "contend[s] only that artists who pursue their own genius (regardless of whether they win critical approbation) through a personal, nonprofit corporation should not lose ownership of their works by the mere act of establishing a structure to facilitate their artistic endeavors."[182] He stresses that no published decision has ever held a corporation (such as the Center) created to serve the creative endeavors of an artistic genius to be the "employer" of the artist for copyright purposes.[183] Further, "it is unnecessary for the court to engage . . . in the traditional analysis used in most 'work for hire' cases . . . as a corporate entity created to serve at her pleasure and artistic direction . . . [it is] . . . illogical and inappropriate to consider Graham as the Center's 'employee.'"[184]

As this article argues, both the unique nature of the nonprofit form and the theory of the moral right of attribution support the argument that the work-for-hire doctrine is inapplicable in situations such as the late Martha Graham's.

Nonprofits and Incentives for Creator-Founders Theory

Martha Graham's school and dance company are a part of American economic society known as the nonprofit sector, where most of the nation's artistic and cultural activity takes place.[185] Nonprofits have long been a major driving force behind American culture.[186] They represent our society's belief that one individual can improve the lives of those around her.[187] This belief stems from the fact that nonprofits, unlike any other type of American institution, are "dedicated to mobilizing *private initiative for the common good*."[188]

United States legislators do not play a major role in the country's arts and culture scene as do many first-world governments, such as those in France, Germany and Sweden.[189] However, Congress and state legislatures do recognize that certain types of organizations, simply by virtue of the fact that they bring their activities and experiences to many people, greatly benefit communities and society as a whole, but do not make enough revenue through their activities to support themselves financially.[190] This recognition leads to the conclusion that these enterprises ought to be able to conduct their activities without shouldering the burden of income taxes, as normal businesses do.[191] It is generally recognized that society should support and foster these organizations in return for the societal benefits they provide.[192]

Many Americans would likely agree that our government ought to give breaks to the types of organizations now recognized as nonprofit by our tax laws. Although there is no universal, tangible answer as to why such feelings exist, nonprofit organizations serve many important societal functions that would be absent otherwise. Specifically, arts and culture organizations have a "significant cumulative impact on Americans and their society."[193] The benefits that nonprofits provide include their distinction as America's main source of social capital, their contribution to the creation of interpersonal bonds of trust and cooperation, and their position to counteract the loneliness and isolation that is so prevalent in today's society.[194]

Nonprofits also provide important social welfare services, such as hospital care, higher education and community development, to name just a few.[195] Arts nonprofits provide vehicles for expression that "enrich human existence"[196] by providing our social and cultural communities with dynamic forums for healthy debate and the articulation of diverse sentiments. One leading civic and community behavioral expert pointed out that art is invaluable in "transcending conventional social barriers . . ."[197] In addition, art in America has a significant economic impact on society, proven, for example, by a study done by the National Endowment for the Arts that showed that in 1999, consumers spent $10.2 billion on admission to performing arts events, as compared with $8.2 billion on admission to spectator sports and $7.4 billion on admission to motion pictures.[198]

What Is a Nonprofit?

The fundamental difference between for-profit organizations and nonprofits is that nonprofits do not have owners or shareholders and cannot pass their earnings on to the individuals who control the organization, such as board members and officers."[199] Rather, any profit realized by a nonprofit must be "reinvested" in the stated public purpose which the nonprofit is engaged in furthering. In addition, the method by which a nonprofit earns profits must be reasonably related to the nonprofit's stated purpose.[200] In contrast, the major benefit of utilizing a for-profit organization is "to grow the business and thereby increase the value of the underlying equity (stock),"[201] in order for the owners or shareholders to sell the stock for a profit. "In other words, the tradeoff is between equity build-up and ownership with the ability to operate tax-free and perhaps attract funding in the form of gifts and grants."[202]

A nonprofit must be organized in a way that the law recognizes it as a separate legal entity, which is usually a corporation, unincorporated association, or a trust.[203] It is important to understand that "a nonprofit is *not* a way for ordinary businesses or business people to shield [their] assets or avoid paying income tax."[204] The organization's organizing document (articles of incorporation, trust documents, and articles of association) must limit the organization's purpose to those described in sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code, must not expressly permit activities that are unrelated to its stated purpose, and must permanently dedicate its assets to exempt purposes.[205] Nonprofits are restricted from engaging in certain types of activities that are not considered qualified for tax-exempt status. A nonprofit must refrain from participating in political campaigns, restrict lobbying to an insubstantial part of its total activities, ensure that its earnings do not inure to the benefit of any private shareholder or individual, ensure that no private interests benefit from its operations, and ensure that it does not engage in any trade or business that is not related to the exempt purpose.[206]

One major benefit of organizing a nonprofit as a corporation is that any liability that arises from the organization's activities will be limited to the corporation itself and will not spread to the members individually.[207] This is true of all corporations, not just nonprofits, although this quality is especially desirable to nonprofits since their "pockets" are not usually very deep. The concept of limited liability is recognition of the fact that if an organization had the potential to spread individual liability to its participants, members, or donors, there would be little or no desire to become involved with it.

Another major benefit that is unique to a nonprofit is its tax-exempt status.[208] As most nonprofits do not make enough revenue to support their operations, exemption from the payment of taxes helps to lift the financial burden off these organizations considerably. In addition, if an organization is tax-exempt, its donors' donations and grants are tax-deductible. This benefit is a powerful tool for nonprofits to solicit donations from wealthy donors and institutions, since a donation then offers a chance for one to simultaneously reduce one's taxes and to perform a philanthropic act. In an artistic context, a benefactor can make large tax-deductible donations in order to spread awareness about an art form that she feels is important.[209] This tax advantage is vital to the survival of nonprofits engaged in arts-related activities, since donations and grants are their single largest source of income.[210]

The Internal Organization of Nonprofits: Is the Executive Director an Employee?

While a nonprofit cannot have an owner or distribute any of its profits to those who control it, a nonprofit will certainly have a board of trustees and often an executive director who will make important decisions for and on behalf of the organization.[211] In the case of an artistic nonprofit corporation, if there is a person whose artistic vision drove the founding of the corporation and its agenda, then this person often is named the executive director. This is a logical course of action, since this person is the creative force behind the whole organization, and is often "uniquely qualified" to be its first executive.[212] In naming this creator-founder as the nonprofit's executive director, the board facilitates the creation of this person's work, its execution, and often the teaching of it to others.

Should a board of trustees name the nonprofit's founder to be the executive director, the board would then technically have to hire and contract with the nonprofit's founder, "based on a market analysis of reasonable compensation and with due regard for conflict of interest policies that should be part of the organizational framework. . . ."[213]

> In fact as well as in theory, [the founder] serve[s] at the pleasure of the Board of Directors and [is] subject to a contract. In practice, however, [her] job security would come from [her] status as the single entrepreneur. Without [her], the organization fails (or at least suffers tremendous artistic and financial crises). The founder is the organization's single largest asset.[214]

Should the founder's value decrease to the point where the work is threatened, it would then be the board of directors' responsibility to replace the founder in the interest of the survival of the nonprofit corporation.[215] On the other hand, the board could fail to recognize the value that the founder carries with her and how vital that value is to the corporation. In this case, the founder could leave and take her "asset value" with her.[216] This very often is not an attractive or even viable option for an individual who created a corporation in her own vision and nurtured it through its beginning stages to success. It is in this scenario that the issue arises of whether a creator-founder is an employee of her own corporation. It is, in fact, this exact scenario that the Second Circuit is being asked to decide in the Martha Graham case. It is unfortunate that these relationships, which begin with such lofty purposes, can end in such tedious contractual disputes. However, these disputes are a common by-product of the way in which our legal system treats these creator-founders and their lives' works.

If creators are categorized as employees of the nonprofits they founded, the entire purpose behind the scheme of nonprofit organizations will be defeated. Artists like Martha Graham found nonprofits in order to continue to create artworks, to execute them for the public, and to teach their techniques to others. If creators are considered mere hired hands of these infant nonprofits, then the founding of the organization becomes adversarial and against the weight of the benefits provided to society by the nonprofit form. Further, public policy should be conducted with an approving eye toward artists who create nonprofits. Indeed, if an artist has succeeded in building and maintaining a reputation of such prestige that she has the panache to found a corporation in her livelihood, society can only benefit from the spreading of her talent. To insult a person of such initiative by qualifying her as a hired hand is to effectively punish her for having a vision. The creator-founder of a nonprofit should be presumed to be its executive director.

Artistic geniuses such as Martha Graham have enormous contributions to make to society. Yet in order for such contributions to arrive at fruition, they have no choice but to create nonprofits to help them execute projects that, but for their tax-exempt status and tax-deductible grants and donations, would otherwise be too expensive and burdensome. For the court to take away their rights to own their creations simply because they created nonprofits in order to share those creations with others will likely allow for the Martha Grahams of the world to be unable to share their creations through nonprofits, or even to abandon their creative processes altogether.

Artists are often advised to make sure that they always secure the copyright to their works by insisting upon a written agreement with their employers in which they expressly retain the copyright. Most artists however, do not have the power or leverage to negotiate these types of provisions with an employer. Artists' contracts, when they exist, are mostly written on the employers' terms and offered on a "take it or leave it" basis, because there are huge numbers of artists and a very small number of 'artistic' jobs available. However, if the artists in question were not presumed to be mere employees of the nonprofits they created, then the unequal bargaining power conundrum would be a non-issue.

As a single entrepreneur, the founder of a creative nonprofit is the organization's prized asset. If this prized asset is treated as nothing more than an apprentice of the very structure she created, the organizational hierarchy and society benefits of the nonprofit form will be in whole disarray. This class of people should never be treated as mere employees. The theory of moral rights, and specifically the right of attribution, provides further credence for this argument.

The Theory of Moral Rights

The theory of moral rights, originating from the French term *droit moral*, arises from the European concept that an artist's creation is the direct product of her personality. Moral rights protect the creator's personal and spiritual expressions in her work.[217] Therefore, under this theory, the law recognizes a creator's inherent rights in works of art, revealing a societal belief that artists should be given a level of control over their creations that is not given to creators of other types of personal property. This difference in control is due to the deep connection of a piece of artwork to the very essence of the person who creates it.[218]

Historically, European civil law countries, most notably France,[219] have recognized the personal interests of a creator in her work separately from her copyright interests.[220] These interests originate in the notion that an author or artist's creative product is part and parcel of her personality and thus can never be severed from her.[221] The Berne Convention for the International Union for the Protection of Literary and Artistic Works, originally drafted in 1886, codified this notion by requiring that signatory countries provide protection for artists' moral rights.[222] The Berne Convention currently has more than 90 members.[223] Article 6b provides for the limited moral rights of attribution and integrity.[224] The right of attribution is the right to be credited as the author of a work.[225] The right of integrity is the right to object to the alteration or destruction of a work.[226] Other generally recognized moral rights that do not fall under the provisos of the Berne Convention include the right of disclosure, right of withdrawal, and *droit de suite*.[227] The right of disclosure is the right to withhold a work until the creator feels it is complete.[228] The right of withdrawal is the right of an artist to recall a work if he feels that it is no longer consistent with his artistic vision.[229] *Droit de suite* is the right to an interest in the resale profits of certain works.[230]

Although there is not complete agreement on this subject in foreign jurisdictions,[231] the Berne Convention was an attempt to provide a "broad provision for moral rights recognition" and move towards a uniform international body of law with respect to the rights of authors in the works they create.[232] The scope of the work that is covered by the Berne Convention is very broad, including "the rights of authors in their literary and artistic works."[233]

A creator's right of attribution entitles her to either attach, or not attach, her name to her work (anonymity), as well as to the right to publish or to display her work under a pseudonym or anonymously.[234] The right of integrity gives the creator the right to protect the physical integrity of her work, in order to prevent alteration, distortion, or mutilation, or any other derogatory action that affects the work and results in prejudice to the creator's honor or reputation.[235] A creator's moral rights in her work are separate from her economic rights in that she retains her moral rights in her work even after transferring her economic rights to another person.[236] This concept is embodied by the Berne Convention.[237]

The United States finally joined the Berne Convention in 1988 with the passage of the Berne Convention Implementation Act of 1988 ("BCIA"),[238] and formally adopted its provisions in 1990 with its passage of the Visual Artists Rights Act ("VARA").[239] "VARA was enacted . . . as an amendment to the Copyright Act, to provide for the protection of the so-called 'moral rights of certain artists,' "[240] and was the result of a long campaign initiated by Sen. Edward Kennedy (D-Mass.) and sponsored in the House of Representatives by Reps. Edward Markey (D-Mass.) and Robert Kastenmeier (D-Wis.).[241] The United States was initially reluctant to join the Berne Convention, because to do so would be to recognize a creator's rights over and above those of copyright law.[242] Indeed, moral rights are inconsistent with the views of the United States and of the United Kingdom, which stress that copyright is a part of *property* rights, as opposed to the view in European civil law countries that a person's copyright is part of her *human* rights.[243]

In fact, the decision by the United States to join the Berne Convention was due not to a concern for the rights of artists, but rather to the "insufficiency of existing international copyright protection, the desire to increase international negotiating leverage and the need to fight copyright piracy."[244] VARA, therefore, represents Congress' compromise between protecting the rights of attribution and integrity while still protecting the interests of the owner of copyright.[245] "The Berne Convention had been initially ratified by the United States in 1935, but Congressional support quickly vanished upon realizing that copyright laws would have to be changed to accommodate the inclusion of moral rights."[246] American copyright protection was recently expanded by the United States' affiliation with the Universal Copyright Convention in 1955, which strived to include the moral rights of artists in order to stimulate the economic growth of the nation (not out of public interest for artists' rights).[247] The government simply always places economic interests before artists' rights on its list of priorities.[248]

> No matter how diligently a state may try to protect moral rights, the failure of the federal copyright law to even address the issue creates a national standard of indifference toward artists' rights, and firmly establishes a legal notion of intellectual property which puts the rights of the copyright proprietor above the rights of the artistic creator. By ignoring moral rights, federal law creates a fundamentally 'amoral' copyright.[249]

Although the purpose of VARA is "to provide for the protection of the so-called 'moral rights' of certain artists,"[250] the protection it affords to American artists is considerably less than the protection afforded to their European counterparts under the Berne Convention.[251] This is mostly the result of strong political concerns voiced by those who opposed the introduction of the moral rights concept into the U.S. Copyright Act.[252] VARA's very limited scope only protects two of the several different facets of the European concept of moral rights, those of integrity and attribution.[253] In addition, these rights are only afforded to the artist for the duration of her life,[254] whereas French law allows a creator's moral rights in her creations to be perpetual, allowing those rights to be bequeathed upon the creator's death.[255] VARA does not provide the same scope of rights afforded by the Berne Convention, such as the rights of anonymity and pseudonymity, "nor does it provide the right of faithful reproduction."[256] Again, VARA only protects an artist's moral rights during her lifetime, whereas Article 6b of the Berne Convention requires that moral rights last the same length of time as does that of the economic copyright.[257]

The scarce case law[258] that has interpreted VARA since its 1990 inception has established that a claim by an artist for violation of her moral rights will only stand if the artist can prove that her reputation was, in fact, harmed.[259] The inclusion of this language in VARA, derived from the language of the Berne Convention, opens the door for the court to allow probing into the character or lifestyle of an artist who claims that her moral rights were infringed, in order to establish a rubric for deciding whether that individual's reputation was harmed.[260] Since there is not much in the way of guidance for federal judges to ascertain the threshold of harm to a person's reputation, they might be wise to look to European precedents for direction, especially those of France, whose body of law on the subject of moral rights is extensive.[261] Such an initiative by American judges would be amusingly ironic, since the United States judicial system, as well as the government in general, has been so reluctant to follow the lead of France and its "allies" in the moral rights crusade.

VARA only protects specific types of visual art,[262] whereas Article 6b of the Berne Convention protects all literary and artistic works.[263] In fact, the congressional debate surrounding the passage of VARA reveals that there was "a consensus that the bill's scope should be limited to certain carefully defined types of works and artists, and that if claims arising in other contexts are to be considered, they must be considered separately."[264] The congressional debate reveals further that the limitation of VARA's application to certain works of visual art was considered by lawmakers to be the "'critical underpinning of the limited scope of the [Act].'"[265] The final version of the Act "was a negotiated solution that confines the application of moral rights to a narrow class of works in which copyright industries have little interest."[266]

The most important restriction in VARA for the purposes of this article is that it explicitly excludes any works made for hire.[267] This exclusion is very troubling in an employer-employee setting. When an artist creates a work, under United States copyright law, the employer owns the economic rights to that work. Even more troubling, however, is the fact that an artist-creator such as Martha Graham could be considered an employee under the Copyright Act, effectively removing any moral rights claims she might have to her work under VARA, even if VARA protected all types of art, rather than just the visual. Thus, although VARA purports to protect artists' rights, it limits that protection to only a very narrow niche of artists, excluding all those engaged in creation of non-visual work, including dance, among many others.[268] This exclusion is inconsistent with Congress' alleged reasoning behind the limitations on the types of works covered, namely to cover only those works which are one-of-a-kind in nature, and not those that are commonly reproduced.[269] Choreography of ballet surely is a one-of-a-kind creation that would not interfere with the objective of the copyright clause in the United States Constitution, which ensures "public availability of a broad array of intellectual and artistic works."[270] Indeed, the restrictive scope of VARA is perplexingly odd and vexatious.

Despite the employer's ownership of economic rights in copyright, most employers cannot claim moral rights in works if they did not physically create those works. This is so because, although the employer may have supplied some of the means for the work's creation, the work certainly cannot be considered part of the employer's "personality." Thus the work-for-hire doctrine and VARA, under United States copyright law, are fundamentally at odds with the concept of moral rights and the Berne Convention. VARA arbitrarily distinguishes between similarly situated artists, giving those who happen to create the "right kind" of visual art protection and rights in their works, while those who are excluded from the narrow visual-art category get neither protection nor rights in their works.[271] Further, if those excluded artists are popular and ingenious enough to have created a nonprofit in order to teach others their genre, then not only will they not have moral rights in their works, but the works will not even economically belong to them. An artist who is an employee does not possess any moral rights to her work, since the law does not recognize her as the author of the work. "More simply stated, moral rights in a work made for hire do not exist for either party under VARA," and thus the work-for-hire doctrine is fundamentally inconsistent with the theory of moral rights.[272]

In light of this conceptual inconsistency, the determination of whether one who creates a work of art is an employee becomes vitally important to the life and spirit of the work. Choreography is a unique art medium that is not easily expressed on paper. The argument could be made that dances, made up of a long series of complicated and intricate steps, are only accurately executed by the choreographer herself, or perhaps by someone who is carefully trained in her method. Pursuant to the law, Martha Graham's dances were copyrighted by way of notations on paper indicating the sequence in her dances.[273] In reality, however, the copyright was on the sequence of dance moves as she herself saw them and taught them. If Martha Graham is classified as an employee of the Center, then her dances are effectively legally separated from her. Under the Southern District's holding, the Center is legally permitted to publicly perform her dances, in her name and without her, her heir's, or even one of her students' supervision. To separate dances from the person who created them, whose vision inspired them, especially from a person as legendary in her field as Martha Graham, would be, in effect, to alter those dances beyond recognition. To separate them would be to violate the very essence of Martha Graham's moral rights in her masterpieces.

The integration of the work-for-hire doctrine with VARA and VARA's inconsistency with the purported purpose of the Berne Convention makes for the kind of conundrum that the courts have not entertained. We propose that this quagmire might be untangled through a series of steps that, together, synchronize the moral right of attribution with the work-for-hire doctrine, which must in turn be re-devised to preclude creator-founders of nonprofits.

First, as discussed *supra*, the work-for-hire doctrine is inapplicable to creator-founders of nonprofits. Thus, the fact that full application of the affirmative right of attribution seems to squarely conflict with the work-for-hire doctrine is a non-issue in these narrow circumstances.

Second, VARA's strict definition of "visual art" must be amended to include choreography. The purpose of copyright law, to disseminate creative works while respecting the precarious balance between an artist's rights and the public's need to access creative works, is not weakened by acknowledging choreography as visual art. We posit that choreography is one of the least-respected forms of art in this country because it is highly complicated and it often, when performed, tends to look effortless and undisciplined, unlike more mainstream types of visual art, such as film or painting. Including choreography in its definition of visual art could open the doors to other disenfranchised creators. If Congress initiated such an amendment, creator-founders of nonprofits like Martha Graham could take advantage of VARA's moral right provisions. This narrow subset of creators would be protected from the travesty of the usurping of their legacy. This is not a radical proposition. Again, such a proposal only affects the narrow category of people addressed above.

This article does not suggest that VARA be re-promulgated. While we are dismayed by its lackluster subscription to the Berne Convention and by its minimal usefulness to artists, we understand that a major overhaul of a concededly progressive piece of American legislation is not realistic. Instead, we propose to work with what Congress has passed. In respect to this country's devotion to economic rights in favor of human rights, one author proposes that full application of the right of attribution can be seen as an economic right.[274] Seen in this light, attributing the moral right of attribution to the creator-founders of nonprofits seems *even less* radical a proposition for this country's law to recognize.

However, there is one area of VARA that must be completely repealed. Up until the last minute of its passage, the term of protection provided by VARA was the author's life plus 50 years.[275] In practice, however, it was passed to protect the author's life only. We see no basis for this arbitrary reluctance to tack on a few more decades to a creator's protection. Again, our country unwaveringly prioritizes economic policy over artists' rights. Yet, if we look to the European models of moral rights legislation, there are no solid reasons for feeling threatened and for wholeheartedly and stubbornly clinging to monetary concern above the personal rights of artists.

The conventional justification for the law of copyright is that it transforms what would otherwise be a public good—the ability to copy an author's work—into a private good, and in so doing creates stronger incentives for authors to create new works.[276] Copyright law is also meant to allow innovators to profit from their works.[277] However, the precedent that the Second Circuit could set, that creator-founders like Martha Graham are employees of their own nonprofits, will defeat this purpose at its most basic level.

The United States is clearly violating the Berne Convention, which it only half-heartedly adopted, as well as the theory of moral rights, which it only lacklusterly subscribes to through VARA. The American legal system favors the economic rights of market participants over the intellectual and creative integrity of those who create works of art. The Berne Convention requires that its members meet a minimum standard of moral rights in their respective bodies of law.[278] Either the United States should withdraw from the Berne Convention because its support of the organization is completely paltry and embarrassing, or the legislature should bring the U.S. into full compliance with the terms of the Berne Convention by giving artists moral rights in their works and expanding the coverage of VARA to include all works of art.

Congress, as well as the courts, however, has been and continues to be extremely reluctant to expand artists' rights under VARA.[279] The exclusion of works made for hire from VARA reflects the fierce political loyalty of the United States to economic principles above all else. The House Judiciary Committee stated in no uncertain terms that "moral rights 'might conflict with the distribution and marketing of [works made for hire.]'" Artists' moral rights must be expanded under VARA in order to enable them to successfully negotiate contract provisions retaining the copyright in their works.[280] If an artist is given stronger moral rights claims in regard to her creations, an employer might be less reluctant to relinquish the copyright to the work.

If the Southern District of New York had applied the instance and expense test as well the *Aymes* factors correctly to Martha Graham's works after the inception of the Center, then the logical, correct result would have been that her dances were not works made for hire at all, but rightfully dances written, taught and performed by her at the Center that she herself founded specifically for such purposes. She would then have had the right, under Section 201 of the Copyright Act,[281] to bequeath her copyrights in her dances to Ronald Protas. Although Protas could allow the Center to use the dances if he wished, he could not assert any moral rights to the dances because VARA does not extend any moral rights in an artistic work past the life of the artist.

However, if the United States had fully complied with all of the terms of the Berne Convention, specifically giving artists perpetual moral rights in their works, then Martha Graham's wish that ownership of her dances pass to her protégé would have given Ronald Protas some control over the dances through Graham's transferred moral right.

Conclusion

It is a fundamental truth of human nature that people desire acknowledgment of their accomplishments. The practical manifestation of this axiom is that no people should receive recognition for works that are not their own. These corollaries provide the backbone for the theory behind American copyright law, as well as the moral right of attribution. While in language these two theories are in direct conflict, in practice they can be properly distinguished without great disruption to our legal system. Specifically, because the work-for-hire doctrine should be inapplicable to creator-founders of nonprofits, the moral right of attribution should be freely applicable to this narrow subset of people. Creators of nonprofits such as Martha Graham utilize the nonprofit form in order to relieve themselves of tax burdens that ordinarily would inhibit them from creating their art. To apply the work-for-hire doctrine to this group is to ironically thrust this burden back upon these creators by forcing them to treat the nonprofit as an adversary even before its birth. American copyright law is in need of a re-evaluation, especially as the work-for-hire doctrine, an integral component of American employment law, continues to evolve.

Endnotes

1. 17 U.S.C. § 101 (2003).
2. A work is deemed to have been made by an independent contractor if the work was "specially ordered or commissioned for use as a contribution to a collective work, as part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas," *and* "the parties expressly agree[d] in a written instrument signed by them that the work [would] be considered a work made for hire." *Id*.
3. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc*., 224 F. Supp. 2d 567 (S.D.N.Y. 2002).
4. The word "moral" used in this context does not have a direct translation to the modern English meaning of the word.
5. *See generally* William Belanger, *U.S. Compliance with the Berne Convention*, 3 Geo. Mason Independent L. Rev. 373 (1995); Natalie C. Suhl, Note, *Moral Rights Protection in the United States Under the Berne Convention: A Fictional Work?*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1203 (2002); Patrick G. Zabatta, Note, *Moral Rights and Musical Works: Are Composers Getting Berned?*, 43 Syracuse L. Rev. 1095 (1992).

6. European Commission, "*Intellectual Property: EU and US at Odds Over Authors' Moral Rights*," European Report: Brussels, Sept. 14, 1996, Vol. 14, Iss. 2157 at 1.

7. 17 U.S.C. § 101A.

8. *See generally* Benjamin S. Hayes, *Integrating Moral Rights Into U.S. Law and the Problem of the Works for Hire Doctrine*, 61 Ohio St. L.J. 1013, 1019 (2000).

9. *Self-Realization Church v. Ananda Church of Self-Realization*, 206 F.3d 1322 (9th Cir. 2000).

10. 490 U.S. 730 (1989).

11. 369 F.2d 565 (2d Cir. 1966).

12. 206 F.3d 1322 (9th Cir. 2000).

13. U.S. Const. art. I, § 8, cl. 8.

14. *See* Schools Legal Service, Orange County Department of Education, Copyright 1 (2002).

15. *Id.*

16. The Copyright Act of 1909 is applicable to works created and published before Jan. 1, 1978. Copyright Act of 1976, Pub. L. 94-553, § 102, 90 Stat. 2598, Oct. 19, 1976.

17. *See, e.g., Dielman v. White*, 102 F. 892 (D. Mass. 1900); *Schumacher v. Schwencke*, 25 F. 466 (S.D.N.Y. 1885); *Roberts v. Myers*, 20 F. Cas. 898 (D. Mass. 1860).

18. 188 U.S. 239 (1903).

19. *Id.* at 248.

20. Scott K. Zesch, Annotation, *Application of "Works for Hire" Doctrine under Copyright Act of 1976*, 132 A.L.R. Fed. 301 (1996).

21. Matthew R. Harris, *Copyright, Computer Software and Work Made for Hire*, 89 Mich. L. Rev. 661, 670 (1990).

22. *Id.*

23. *Id*.

24. *But see* Conference on Copyright, Memorandum Draft of a Bill to Amend and Consolidate the Acts Respecting Copyright 13 (1906), *reprinted in* Legislation History of the Copyright Act of 1909 pt. E, at xxxix–xxx (E. Brylawski & A. Goldman, eds. 1976). It is notable that an early draft of the bill did include the definition of "author" as an "employer, in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary." *Id*.

25. *See, e.g.*, *Nat'l Cloak & Suit Co. v. Kaufman*, 189 F. 215 (M.D. Pa. 1911) (construing the 1909 Act and holding that the employer was the author of a work produced by its employees within the meaning of the statute and was thus entitled to the copyright in the work).

26. Harris, *supra* note 21, at 669.

27. *Id*. at 672.

28. *See Brattleboro Publ'g Co. v. Winmill Publ'g Corp*., 369 F.2d 565, 567 (2d Cir. 1966) (holding that the author of the work is the employer in work-for-hire cases).

29. H.R. Rep. No. 1476, at 47, *reprinted in* 1976 U.S. Code Cong. & Admin. News 5659, 5660.

30. *See* Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 Cornell L. Rev. 857 (1987).

31. Alexandra Duran, Note, Community for Creative Non-Violence v. Reid: *The Supreme Court Reduces Predictability By Attributing an Agency Standard to the Work For Hire Doctrine of the 1976 Copyright Act*, 56 Brook. L. Rev. 1081, 1082 (1990).

32. Harris, *supra* note 21, at 673.

33. *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989) ("The Act, which almost completely revised existing copyright law . . ."); Litman, *supra* note 30, at 859.

34. For works made for hire, the duration of the copyright is 95 years from the publication of the work, or 120 years from its creation, whichever is shorter. 17 U.S.C. § 302.

35. *See* Litman, *supra* note 30, at 901. "Indeed, because the work made for hire definition was part of a settled compromise package, it received little mention." *Id.*

36. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2598, 17 U.S.C. §§ 101–702.

37. 17 U.S.C. § 201(b).

38. *Id*.

39. 17 U.S.C. § 101.

40. The nine types of commissioned works include a contribution to a collective work, part of a motion picture or other audiovisual work, a translation, a supplementary work, a compilation, an instructional text, a test, answer materials for a test and an atlas. 17 U.S.C. § 101.

41. 17 U.S.C. § 101 (defining "work made for hire").

42. *Id*. § 101(2).

43. *See, e.g.*, Zesch, *supra* note 20, at 2.

44. 17 U.S.C. § 101.

45. 490 U.S. 730 (1989).

46. *Id.* at 734.

47. *Cmty. for Creative Non-Violence v. Reid*, 652 F. Supp. 1453, 1454 (D.C. 1987).

48. *Id*.

49. *Id*.

50. *Reid*, 490 U.S. at 733.

51. *Id*. at 734.

52. *Id*.

53. *Id*. at 735.

54. *Id*.

55. *Id*.

56. *Id*.

57. *Id*.

58. *Id*.

59. *Id*.

60. *Cmty. for Creative Non-Violence v. Reid*, 652 F. Supp. 1453 (D.C. 1987).

61. *Id*. at 1457.

62. *Id*. at 1456.

63. *Cmty. for Creative Non-Violence v. Reid*, 846 F.2d 1485 (D.C. Cir. 1988).

64. 815 F.2d 323 (5th Cir. 1987).

65. *Reid*, 846 F.2d at 1487.

66. *Id*. at 1494.

67. *Reid*, 490 U.S. at 736.

68. *Id*. at 739–42.

69. *See also Aymes v. Bonelli*, 980 F.2d 857 (2d Cir. 1992); *Easter Seal Soc'y for Crippled Children and Adults of La., Inc. v. Playboy Enters*., 815 F.2d 322 (5th Cir. 1987); *Moore Publ'g, Inc. v. Big Sky Mktg., Inc*., 756 F. Supp. 1371 (D. Idaho 1999); *City of Newark v. Beasley*, 883 F. Supp. 3d (D.N.J. 1995); *Miller v. CP Chemicals, Inc*., 808 F. Supp. 1238 (D.S.C. 1992).

70. *Reid*, 490 U.S. at 740.

71. *Id*. at 751–52.

72. In *Aymes*, the Second Circuit noted that "the *Reid* test can be easily misapplied, since it consists merely of a list of possible considerations that may or may not be relevant in a given case." 980 F.2d at 860. Accordingly, the court stressed that only a few of the *Reid* factors will be "significant in virtually every situation." *Id*. The court classified those important factors as "the hiring party's right to control the manner and means of creation, the skill required, the provision of employee benefits, the tax treatment of the hired party, and whether the hiring party has the right to assign additional projects to the hired party." *Id.*

73. *See Easter Seal*, 815 F.2d. at 322.

74. *See Reid*, 846 F.2d at 1485.

75. *Reid*, 490 U.S. at 738.

76. *Id.* at 752.

77. *Id.*

78. *Id.*

79. *Id*. (emphasis added).

80. *Id.*

81. *Id.* at 752–53.

82. *Id.* at 753.

83. *Id.*

84. *Id.*

85. In remanding the authorship issue to the district court, the Supreme Court made clear that if the court determined that "CCNV and Reid prepared the work 'with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole,'" then CCNV and Reid would be co-owners of the copyright in the work. *Reid*, 480 U.S. at 753, citing 17 U.S.C. § 101.

86. 369 F.2d 565 (2d Cir. 1966). This case adopted the Ninth Circuit's holding in *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298, 300 (9th Cir. 1965) (reasoning under the Copyright Act of 1909 that "the title of the copyright shall be in the person at whose instance and expense the work is done").

87. *Brattleboro,* 369 F.2d at 567.

88. 457 F.2d 1213, 1216 (2d Cir. 1972).

89. 508 F.2d 909, 914 (2d Cir. 1974).

90. 206 F.3d 1322 (9th Cir. 2000).

91. *Id*. at 1324.

92. *Id*. at 1325.

93. *Id*.

94. *Id*.

95. *Id*.

96. *Id*.

97. *Id*. at 1326.

98. 53 F.3d 549 (2d Cir. 1995).

99. *Self-Realization*, 206 F.3d at 1326.

100. *Id*.

101. *May v. Morganelli-Heumann & Assocs*., 618 F.2d 1363, 1368 (9th Cir. 1980).

102. *Self-Realization*, 206 F.3d at 1327.

103. In 1979, The John F. Kennedy Center for the Performing Arts placed Martha Graham in the distinguished Kennedy Center Honoree category in its annual ceremony. The John F. Kennedy Center for the Performing Arts, *The Kennedy Center Honors*, *at* http://www.kennedy-center.org/programs/specialevents/honors/history/honoree. In 1998, Time magazine anointed Martha Graham as "Most Influential Dancer" in its "Time 100" series. Terry Teachout, *Time 100: Most Influential Dancer*, Time, June 8, 1998, at 200. *See also Dance World Loses a Pioneer*, Associated Press, Apr. 2, 1991, at A01 (comparing Graham's early work to Picasso's art and Stravinsky's music).

104. When Margot Fonteyn first witnessed the Martha Graham Company perform, she remarked to Martha how differently the Graham Company's dancers "fell" than those of the Royal Ballet. Martha Graham, Blood Memory 253 (1991). Fonteyn said, "Why, we fall like paper bags. You fall like silk." *Id*. In her memoirs, Graham wrote that "[M]y dancers never fall to simply fall. They fall to rise." *Id*.

105. Judith Mackrell, *Looking after Martha: After 20 years, the Martha Graham Dance Company is back in London but at a cost*, The Guardian, May 25, 1999, at 10.

106. "It is a way of doing things differently than anyone else. It is a certain use of the body. It is a freedom of the body and a love of the body. It is a love of the theatre as a vehicle through which a dancer can express himself." Graham, *supra* note 104, at 241.

107. *See* Graham, *supra* note 104, at 250–53 (describing the particulars of the Graham technique).

108. The University of Pittsburgh, *The Early Moderns*, *at* http://www.pitt.edu/~gillis/dance/martha.html.

109. Martha Graham often created politically charged pieces. In 1962, she created a dance called *Phaedra*. Graham, *supra* note 104, at 210. While she was performing the piece in Germany that year, two New York Congressional representatives protested that the piece was too racy to be exported overseas through a cultural exchange program. *Id*. Rep. Peter J. Freylinghuysen described *Phaedra* to the newspapers "as a dance with a lot of couches and young men in loincloths." *Id*. Graham recounts in her memoirs that she held a press conference in Brussels to "assure the United States government that I was not doing something to embarrass the country." *Id*. She reminisces that one Senator, who in fact walked out of the performance, asked her during the press conference "how it felt to be an ambassador representing my country through eroticism." With characteristic aplomb, Graham answered, "I have always thought 'eroticism' to be a beautiful word." *Id*.

110. *See generally* The John F. Kennedy Center for the Performing Arts, *supra* note 103.

111. *See* University of Pittsburgh, *supra* note 108.

112. Agnes De Mille, Martha: The Life and Work of Martha Graham 260–62 (1956); The Associated Press, *Dance World Loses A Pioneer; Martha Graham, 96, Dies In New York*, The Bergen Record, Apr. 2, 1991, at A01 (characterizing *Appalachian Spring* as "a bold challenge to puritanism and an assertion of the human spirit").

113. *See* Amanda Porterfield, Feminine Spirituality in America: From Sarah Edwards to Martha Graham 17, 189-201 (1980) (opining that Graham's dances are a reflection of feminine spirituality in America). Porterfield states that she understands Graham's work as "an exploration of relations among vividly feminine religious personalities. . . . Graham sought spiritual transformation and cultivated grace." *Id*. at 17. Porterfield relates "Graham's esthetic" to "a theology" and describes her early works as celebratory of "the divine powers associated with femininity." *Id*. at 194–95.

114. In 1940, Graham created *Letter to the World* in homage to Emily Dickinson. *Id*. at 196. Porterfield opines that "Dickinson's understanding of the relation between her own imagination and religious symbolism was similar to Graham's: both artists appropriated religious symbol-systems and imagery to inspire, structure, and represent their own souls." *Id*.

115. *Id*.

116. The title of the dance is from a Dylan Thomas poem. Graham, *supra* note 104, at 258.

117. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002).

118. *Id*. *See* discussion of nonprofits, *infra*.

119. *Martha Graham*, 224 F. Supp. 2d at 576.

120. *See* Laura Shapiro, *Is Martha Graham, 96, Being Done a Disservice by her Handpicked Successor?*, Newsweek, Oct. 15, 1990, at 70.

121. Martha Duffy, *The Deity of Modern Dance: Martha Graham: 1894-1991*, Time, Apr. 15, 1991, at 69.

122. *Id.*

123. *Id.*

124. *Id.*

125. Karen Campbell, *Here in Spirit: Ronald Protas Carries on the Tradition, Grace and Substance of Martha Graham*, The Boston Herald, Jan. 16, 1996, at 029.

126. Susan Reiter, *Graham Co.: Can Troupe Carry On?*, Los Angeles Times, June 3, 1991, at F1.

127. In 1990, Protas told Newsweek that he was "sorry people feel [he is] overprotective, but [he did not] think Miss Graham feels [that way]." *Id. See also Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002).

128. Clive Barnes, *Is This Crisis Critical?*, Dance Magazine, Feb. 1, 2001, at 162.

129. Reiter, *supra* note 126, at F1.

130. Campbell, *supra* note 125, at 029.

131. *Id.*

132. *Martha Graham*, 224 F. Supp. 2d at 576. *See also* Compl. ¶ 1. "After her death in 1991, Ms. Graham, through a duly probated—and wholly uncontested—last will and testament, left to plaintiff Ronald Protas her entire estate, including full ownership of the trademarks in and use of her name, copyrights in her choreography, and her physical property (among which were original sets and costumes for her ballets designed by such figures as Isamu Noguchi and Halston)."

133. Graham, *supra* note 104, at 247–49.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See* Jennifer Dunning, *Martha Graham Center Wins Rights to the Dances*, The New York Times, Aug. 24, 2002, at B7.

138. *See* Tresca Weinstein, *Body language Troupe sets the stage in the Martha Graham tradition for visit to The Egg*, The Times Union, Sept. 11, 2003, at 22.

139. *See* Susan Kraft, *Love Is Not Enough*, The Village Voice, Sept. 23, 1997, (observing that a layman, such as Protas, cannot think about dancing in the same way that a dancer can).

140. Mackrell, *supra* note 105, at 10.

141. *Id.*

142. *See* Sylviane Gold, *Modern Phoenix*, Newsday, Feb. 2, 2003, at D19.

143. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002).

144. Reply Br. of Pl.'s-Appellants at 6, *Martha Graham*, 224 F. Supp. 2d 567.

145. *Martha Graham*, 224 F. Supp. 2d at 570.

146. *Id.* at 569.

147. *Id.* at 570. Dances that Martha Graham created before the founding of the Center and the School are not the subject of this litigation.

148. The nonprofits were given ownership of *Tanagra, Three Gopi Maidens, Harlequinade, Primitive Mysteries, Serenade, Satyric Festival Song, Dream, Saraband, Imperial Gesture, Deep Song, Every Soul is a Circus, El Penitente, Letter to the World, Punch and the Judy, Salem Shore, Deaths and Entrances, Eye of Anguish, Ardent Song, Embattled Garden, Episodes: Part I, Acrobats of God, Phaedra, Secular Games, Legend of Judith, The Witch of Endor, Part Real-Part Dream, Cortege of Eagles, Plain of Prayer, Mendicants of Evening, Jacob's Ladder, Lucifer, The Scarlet Letter, O Thou Desire Who Art About to Sing, Shadows, The Owl and the Pussycat, Ecuatorial, Frescoes, Judith* (created in 1980), *Andromache's Lament, Phaedra's Dream, Song, Tangled Night, Persephone, Maple Leaf Rag*, and *The Eyes of the Goddess. Id.* at 612.

149. Protas was given ownership of *Seraphic Dialogue*. *Id*. at 612.

150. The ten dances found to be in the public domain include *Flute of Krishna, Heretic, Lamentation, Celebration, Frontier, Panorama, Chronicle/Steps in the Street, American Document, Appalachian Spring*, and *Night Journey. Id.* at 613.

151. These five dances are *Herodiade*, *Dark Meadow*, *Dave of the Heart*, *Judith*, and *Canticle for Innocent Comedians. Id.*

152. *Id*.

153. These nine dances are *Errand into the Maze, Diversion of Angels, Clytemnestra, Circe, Adorations, Acts of Light, The Rite of Spring, Temptations of The Mood*, and *Night Chant. Id.*

154. *Id*. at 570.

155. *Id*. at 587.

156. *Id*. 17 U.S.C. § 101.

157. *Id*.

158. *Id*. at 572.

159. *Id*.

160. 369 F.2d 565 (2d Cir. 1966). *See supra* notes 86–87 and accompanying text.

161. *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 224 F. Supp. 2d 567, 572 (S.D.N.Y. 2002). *See Playboy Enterprises v. Dumas*, 53 F.3d 549 (2d Cir. 1995); *Elec. Publ'g Co. v. Zalytron Tube Corp.*, 376 F.2d 592 (2d Cir. 1967); *Irving J. Dorfman Co. v. Borlan Indus. Inc.*, 309 F. Supp. 21 (S.D.N.Y. 1969).

162. *Id*. at 588–89.

163. *Id*. at 589.

164. *Id*.

165. *Id*. For this point, Protas relied on *Playboy*, which held that "where the creator of a work receives royalties as payment, that method of payment generally weighs against finding a work-for-hire relationship." 53 F.3d at 555.

166. *Martha Graham*, 224 F. Supp. 2d at 590.

167. *Id*.

168. *See* Tr. 726–28, *Martha Graham*, 224 F. Supp. 2d 567.

169. Br. of Pl.'s-Appellants at 15, *Martha Graham*, 224 F. Supp. 2d 567.

170. 206 F.3d 1322 (9th Cir. 2000).

171. *Martha Graham*, 224 F. Supp. 2d at 591.

172. *Id*.

173. *See supra* note 71 and accompanying text.

174. *Martha Graham*, 224 F. Supp. 2d at 591 (quoting *Aymes v. Bonelli*, 980 F.2d 857, 861–62 (2d Cir. 1992).

175. 980 F.2d 857 (2d Cir. 1992). *See supra* note 72.

176. *Martha Graham,* 224 F. Supp. 2d at 592.

177. *See supra* note 168–69 and accompanying text.

178. *See supra* notes 103–117 and accompanying text.

179. *Id*.

180. *Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 752 (1989).

181. *Martha Graham*, 224 F. Supp. 2d at 592.

182. Reply Br. of Pl.'s-Appellants at 13, *Martha Graham*, 224 F. Supp. 2d 567.

183. Extensive research by the authors of this article has not revealed any decision in which a court held that an individual who founded a nonprofit in order to further her creative vision was actually an employee of that organization, thus making the organization, and not the individual, the owner of works created by that individual after the organization was founded.

184. *Id*. at 24.

185. Michael O'Neill, Nonprofit Nation: A New Look at the Third America 151. "According to the IRS . . . there were 23,779 nonprofit arts, culture, and humanities organizations circa 1998, with $19.4 billion in revenue, $15.2 billion in expenses, and $46.5 billion in total assets. . . . " *Id*. *See* O'Neill 11, Table 1.2 (listing the dimensions of the U.S. nonprofit sector as of the late 1990s).

186. Lester M. Salamon, The Resilient Sector 1-2 (2003).

187. *Id*.

188. *Id*.

189. O'Neill, *supra* note 185, at 151; *see also* O'Neill 157, Table 8.4 (listing the sources of government and private gifts and grants for selected nonprofit arts organizations).

190. O'Neill, *supra* note 185, at 151.

191. The Nonprofit Resource Center, *What is a Nonprofit Corporation?*, *at* http://www.not-for-profit.org/page2.htm (last visited Mar. 29, 2004).

192. *Id*. *See also* Salamon, *supra* note 186, at 8. The largest and most conspicuous category of tax-exempt organizations are those that are eligible for exemption from federal income tax under § 501(c)(3) of the Internal Revenue Code, and the closely related "social welfare organizations" eligible for exemptions under § 501(c)(4) of the Internal Revenue Code. *Id*. Although there is no definitive data recording how many nonprofit organizations exist in the United States, "[a] conservative estimate would put the number of . . . § 501(c)(3) & (c)(4) at 1.2 million as of the mid-1990s . . ." *Id.*

193. O'Neill, *supra* note 185, at 158.

194. *Id.* at 42. "By establishing connections among individuals, involvement in associations teaches norms of cooperation that carry over into political and economic life, enlarging the nation's pool of social capital." Salamon, *supra* note 186, at 13.

195. *Id*. at 11.

196. *Id*. at 13.

197. O'Neill, *supra* note 185, at 159.

198. Nat'l Endowment for the Arts, Research Division Note No. 77, "The Arts in the GDP: Consumers Spend $10.2 Billion on Admission Receipts for Performing Arts Events in 1999" (Washington, D.C. 2001).

199. Bruce R. Hopkins, Bruce R. Hopkins Nonprofit Law Center, *Resource Center: Basic Concepts*, *at* http://www.nonprofitlawcenter.com/resources.jsp?docId=137 (last visited Mar. 29, 2004).

200. The Nonprofit Resource Center, *supra* note 191.

201. *Id*.

202. *Id*.

203. *Id*. Corporations created for or devoted to charitable purposes or those supported by charity are known as eleemosynary corporations. Anne Christine Haberle, et. al., 18 Am. Jur. 2D *Corporations* § 32 (2003). This Note will only consider the specifics of nonprofit corporations, to the exclusion of unincorporated associations or trusts.

204. The Nonprofit Resource Center, *supra* note 191.

205. Internal Revenue Service, *Who is Eligible for 501(c)(3)*, *available at* http://www.irs.gov/pub/irs-pdf/p4220.pdf.

206. *Id.* This list is not exhaustive. *See id.*

207. *Id.* Those who manage trusts and unincorporated associations are not protected in this manner. *Id.*

208. *See* I.R.C. § 501(c)(3) (2003). Internal Revenue Service Publication 4220 is instructive in the process of applying for federal tax-exempt status under this section of the Internal Revenue Code.

209. Most art organizations qualify for nonprofit status under I.R.C. § 501(c)(3). The IRS ruled that a nonprofit organization whose primary purpose was to encourage interest in art-*related* activities was exempt from taxation as a social welfare organization under I.R.C. § 501(c)(4). Rev. Rul. 78-131, 1978-1 C.B. 156.

210. O'Neill, *supra* note 185, at 20, Table 1.4.

211. Hopkins, *supra* note 199.

212. Michael L. Wyland, Sumption & Wyland, *Can the Founder of an Organization also be an Employee?*, Internet Nonprofit Center, *at* http://www.nonprofits.org/npofaq/19/43.html (Sept. 8, 2003).

213. *Id*. "As Executive Director under contract to the nonprofit, you would be a "disqualified person" under IRS § 4958 'intermediate sanctions' (IS) regulations, just as board members are." *Id*. *See generally How to Comply with 'Intermediate Sanctions' Regulations*, Internet Nonprofit Center, *at* http://www.nonprofits.org/npofaq/18/13.html, for more information on intermediate sanctions.

214. Wyland, *supra* note 212.

215. *Id.*

216. *Id.*

217. Colleen Creamer Fielkow, *Clashing Rights Under United States Copyright Law: Harmonizing an Employer's Economic Right with the Artist-Employee's Moral Rights in a Work Made for Hire*, 7 DePaul-LCA J. Art & Ent. L. & Pol'y 218, 221 (1997).

218. Russ VerSteeg, *Federal Moral Rights for Visual Artists: Contract Theory and Analysis*, 67 Wash. L. Rev. 827, 828–29 (1992).

219. *See* Russel J. DaSilva, *Droit Moral and the Amoral Copyright: A Comparison of Artists' Rights in France and the United States*, 28 Bull. Copyright Soc'y U.S.A. 1, 7 (1980). The French *droit d'auteur* is much broader than American copyright law. *Id*. at 3. The *droit d'auteur* protects both the artist's monetary rights and her moral right. *Id*. In order for moral rights to attach to a creative work under French law, the creator must be a natural person and be, in fact, the actual creator of the work. *Id*. at 12.

220. Alicia M. Phidd, Law Office of Phidd & Associates, *Entertainment Law: Moral Rights & Fair Use—Striking a Balance*, *at* http://phiddlawfirm.tripod.com/phiddassociates/id4.html (1998). Even the United Kingdom, from which the United States inherited its common law tradition, including our modern concept of copyright, revised its copyright law to include express moral rights for artists. Copyright, Designs and Patents Act, 1988, c. 48, § 12(1) (Eng.).

221. *See* Phidd, *supra* note 220.

222. Henry Hansmann & Marina Santilli, *Authors' and Artists' Moral Rights: A Comparative Legal and Economic Analysis*, 26 J. Legal Stud. 95, 96 (1997).

223. *See* Hayes, *supra* note 8, at 1022.

224. *Id*. *See also* Roberta Rosenthal Kwall, *Copyright and the Moral Right: Is an American Marriage Possible?*, 38 Vand. L. Rev. 1 (1985).

225. *See* Hayes, *supra* note 8, at 1022.

226. *Id*.

227. *Id.* at 1019–22.

228. *Id*. at 1020.

229. This right is limited to published work and requires that the artist indemnify the work's owner for any damages caused by the recall. *Id*. at 1021.

230. *Id*.

231. For a summary of moral right protections in other countries, *see* Kwall, *supra* note 224, at 97.

232. Fielkow, *supra* note 217, at 222.

233. *See* The Berne Convention for the International Union for the Protection of Literary and Artistic Works, *reprinted in* Melville B. Nimmer & David Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, 27-2 (1996) (hereinafter "the Berne Convention").

234. Fielkow, *supra* note 217, at 222.

235. *Id.*

236. *Id.* at 221.

237. *See* the Berne Convention, *supra* note 233, at 26–27. Article 6b states: "Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation." *Id.*

238. Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853.

239. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128, 5128-33 (1990). The terms of the Berne Convention are not self-executing, thus it is the responsibility of the member country to execute its terms through its own legal system. Phidd, *supra* note 220.

240. *Carter v. Helmsley-Spear*, 861 F. Supp. 303, 313 (S.D.N.Y. 1994).

241. Charles Ossola, *Law for Art's Sake,* Legal Times, Dec. 10, 1990, at 27.

242. Belanger, *supra* note 5, at 375.

> In the U.S., a common law country, copyright law is primarily utilitarian. By granting an impersonal, negative property right (i.e. the right to prevent others from copying a protected work), Congress attempts to give a incentive for production of original works or authorship. In contrast, in civil law nations [which includes most of Europe], copyright was grounded in natural rights philosophy and developed as a means of protecting 'author's rights.'

Id. *See Helmsley-Spear*, 71 F.3d at 82 (listing different sources of legislative opposition to the ratification of the Berne Convention).

243. Belanger, *supra* note 5, at 390. It is thought that it may be unconstitutional for the United States to fully comply with all of the Berne Convention's provisions. *Id*. The U.S. Constitution, Article I, § 8, cl. 8, grants Congress the right to secure for authors and inventors the exclusive rights to their creations, but only for a limited time. *Id.* Some argue that Congress is permitted to provide this limited monopoly right as an incentive for the creation of artworks that are made available to the public. *Id*. Full compliance with the Berne Convention would expand the monopoly beyond that necessary to promote the dissemination of art works. *Id*.

244. Dana L. Burton, Note, *Artists' Moral Rights: Controversy and the Visual Artists' Rights Act,* 48 SMU L. Rev 639, 640 (1995).

245. Edward J. Damich, *A Comparison of State and Federal Moral Rights Protection: Are Artists Better Off After VARA?*, 15 Hastings Comm. & Ent. L. J. 953, 954 (1993).

246. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 Colum.-VLA J.L. & Arts 361, 383 (1998). Some argue that full compliance by the United States with the terms of the Berne Convention would be unconstitutional, because the Copyright Act represents the "outer bounds of constitutionally acceptable protection." Belanger, *supra* note 5, at 391. For a discussion of this constitutional debate, see *id.*; Hayes, *supra* note 8, at 1024–27.

247. European Commission, *supra* note 6, at 1. *See* Swack, *supra* note 246, 380:

> In 1955, in order to protect its economic interests abroad, the United States joined the Universal Copyright Convention, which neither mentioned nor required its signatories to include moral rights in their domestic laws. However in 1984, after the United States withdrew from the United Nations Educational, Scientific and Cultural Organization . . . , which administered the UCC, it lost a large degree of prestige within the treaty organization. This loss of influence, added to the need to protect its copyrighted intellectual property from extensive pirating in Asia, propelled the United States to finally accede to the Berne Convention. *Id*.

248. *Id*. at 381-82 (explaining the origin of the United States preference of economic efficiency over artists' rights).

249. DaSilva, *supra* note 219, at 6.

250. *Pollara v. Seymour*, 344 F.3d 265 (2d Cir. 2003).

251. Many European groups, including the International Association of Audiovisual Authors and the European Federation of Audiovisual Producers, have protested the United States' failure to fully comply with the terms of the Berne Convention agreement. European Commission, *supra* note 231. One of the main criticisms of the Berne Convention is that the "treaty failed to provide a legal means to compel a state failing to respect the provisions contained in the Convention." *Id.*

252. *See* VerSteeg, *supra* note 218, at 830–31 (describing the legislative process leading to the United States' accession to the Berne Convention).

253. Hansmann, *supra* note 222, at 97.

254. Matthew A. Goodin, *The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners*, 22 Golden Gate U. L. Rev. 567, 568 (1992) (citing 17 U.S.C. § 106A(b) (Scope and Exercise of Rights) and § 106A(d) (Duration of Rights)).

255. DaSilva, *supra* note 219, at 14.

256. Belanger, *supra* note 5, at 375.

257. Burton, *supra* note 244, at 642. It is uncertain whether VARA will preempt state laws that extend the moral right of an artist past the time of death. *See* Ossola, *supra* note 241, at 27.

258. *See English v. BFC & R East 11th Street LLC*, No. 97 Civ. 7446, 1997 WL 746444 (S.D.N.Y. Dec. 3, 1997), *aff'd*, 198 F.3d 233 (2d Cir. 1999); *Hanrahan v. Ramirez*, No. 97-CV-7470 (C.D. Cal. June 3, 1998); *Martin v. City of Indianapolis*, 982 F. Supp. 625 (S.D. Ind. 1997).

259. Ossola, *supra* note 241, at 27.

260. *Id*. Congress foresaw this problem and advised courts to "'focus on the artistic or professional honor or reputation of the individual *as embodied in the work protected*,'" as opposed to her personal reputation among her peers. *Id*.

261. *See* DaSilva, *supra* note 219.

262. 17 U.S.C. § 101. "A work of visual art does not include—(A)(i) any poster, map, globe, chart, technical drawing, diagram, model, applied art, motion picture or other audio-visual work, book, magazine, newspaper, periodical, database, electronic information service, electronic publication, or similar publication . . ." *Id*.

263. Edward J. Damich, *The Visual Artists' Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art*, 39 Cath. U. L. Rev. 945, 947 (1990). Fielkow, *supra* note 217, at 225–26. VARA also provides that moral rights are not transferable, although they may be waived by the creator, and that the duration of moral rights is limited to the life of the creator. *Id*.

264. *Pollara v. Seymour*, 344 F.3d 265, 269 (2d Cir. 2003) (citing H.R. Rep. No. 101-514 at 1990 U.S.C.C.A.N. 6919).

265. *Id*.

266. Ossola, *supra* note 241, at 27.

267. 17 U.S.C. § 101. "A work of visual art does not include . . . (B) any work made for hire; or (C) any work not subject to copyright protection under this title." *Id*.

268. Hayes, *supra* note 8, at 1023. VARA also limits very narrowly what constitutes visual art to those consisting of 200 copies or less, all of which must be signed and numbered. *Id.*

269. Michael R. Klipper & John B. Glicksman, *Berne Measure Doesn't Incorporate New Moral Rights into U.S. Law*, Legal Times, Dec. 24, 1990, at 19.

270. Burton, *supra* note 244, at 657.

271. In one of the few cases decided so far involving VARA, the Second Circuit noted that "Congress instructed courts to 'use common sense and generally accepted standards of the artistic community in determining whether a particular work falls within the scope of the definition [of a "work of visual art"],' and explicitly stated that 'whether a particular work falls within the definition should not depend on the medium or materials used.'" *Pollara*, 344 F.3d 265.

272. Fielkow, *supra* note 217, at 233.

273. *But see* Susan Kraft, *Love Is Not Enough*, Village Voice, Sept. 23, 1997 (stating that "choreography is notoriously difficult to preserve" and that "[n]ot even the best efforts, combining notation with visuals and employing the filter of a writer's selective memory and point of view, bring a work to life as forcefully as direct communication from body to body").

274. Hayes, *supra* note 8, at 1027–28 (arguing that applying the right of attribution to the work-for-hire doctrine "would tend to give employee-authors greater recognition in their field, and greater bargaining power over the terms of their employment").

275. *See* Robert J. Sherman, Note, *The Visual Artists Rights Act of 1990: American Artists Burned Again*, 17 Cardozo L. Rev. 373, 407 n.198 (1995).

276. Hansmann, *supra* note 222, at 112.

277. Hayes, *supra* note 8, at 1024, citing *Campbell v. Acuff-Rose*, 510 U.S. 569 (1994).

278. Ossola, *supra* note 241, at 27.

279. There have only been three cases in which a court construed the provisions of VARA. *See Gegenhuber v. Hystopolis Productions, Inc*., No. 92-C-1055, US Dist. LEXIS 10156 (N.D. Ill. July 13, 1992) (holding that the plaintiffs' contributions to a puppet show were not protected works under VARA); *Moncada v. Rubin-Spangle Gallery, Inc*., 835 F. Supp. 747 (S.D.N.Y. 1993) (dispute over destruction of a wall mural settled before the merits of the claim were addressed); *Carter v. Helmsley-Spear, Inc*., 861 F. Supp. 303 (S.D.N.Y. 1994) (holding that a work may not be distorted, mutilated or modified under VARA, if the work is proven to be of recognized stature by satisfaction of a two-pronged test). None of these cases is instructive in a situation like that of Martha Graham's work.

280. Burton, *supra* note 244, at 655.

281. 17 U.S.C. § 201.

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California vs. New York: For Sound-Alike Claims Rooted in the Right of Publicity, Do Three Thousand Little Miles Really Matter That Much Anymore?

By Lucia Graziano O'Connell

A person's reputation is everything in the law. The right to trade in on a good (or bad) name can at times vault the ordinary practitioner into superstardom. Think of the distinguished legal careers of Justice Benjamin Cardozo or the Honorable Learned Hand. Would either of them have been unperturbed to find impostors writing in their stead: Mrs. Palsgraf was *inside* the zone of duty; probability of harm be damned! Clearly this hyperbole is ridiculous in its suggestion. Yet it was from just such a concern for mistaken identity that the general idea for right to privacy was born. Even beyond merely mistaken identity, privacy guards against the concept that one would deliberately trade in on the legal (or otherwise) capital garnered by another through years of cultivation. Thus, the law protects a person's right to his or her identity.

Certainly the same concern of misappropriation seeps into other professions, especially those in which one's *persona* is his or her career. Celebrities (and others) can enjoin the use of their faces or names on products they do not endorse.[1] Such was the intent behind the codification of the common law right of privacy.[2] Although there is strict statutory protection from the unauthorized use of one's *actual* name, voice, photograph or likeness,[3] the law is not so clear when the misappropriation is deliberate but not exact. When an impostor, either visual or vocal, is used convincingly to endorse a product, the aggrieved potential for recourse depends upon many factors, not the least of which is his or her location.[4]

This article will compare New York and California standards for right of publicity as it may or may not protect a famous singer against voice-only imitators.[5] Unlike California, New York has no common law action for either claim, thus limiting its plaintiffs to the stricter statutory language. Part I will briefly define the claims and ruminate upon a possible remedy found in the federal Lanham Act.[6] Part II will focus on California law and the creation of the common law claim for voice imitators now known in California as the "*Midler* tort."[7] Part III will examine New York law, its statutory confinements, and the probable expansion into "sound-alike" territory made possible by New York cases holding actionable claims for "look-alikes."[8] Part IV will review the current state of the right of publicity law, including its intersection with the First Amendment, and conclude that a famous singer may be afforded the same protections against sound-alikes for commercial use in New York and California. As the word "voice" was added to the New York statute in 1995, a construction similar to the overall impression standard evinced by New York cases in reference to appearance is now possible for the New York plaintiff to protect against sound-alikes.[9]

I. Foundation Across the Nation

Right of Privacy

The "right of privacy" tort is quite distinct from the "right to privacy" as a constitutional concern. The tort version, at issue here, specifically addresses unwanted intrusion upon or use of another's *persona*, either for commercial or personal purposes.[10] Placed into four categories by the influential Prosser, it is only the fourth, "invasion of privacy by appropriation" with which this article is concerned.[11] Originally interpreted to protect the "dignitary interests" each person possesses, this initial thinking has expanded to include the sole right of the individual to exploit his or her own identity.[12] This right encompasses essentially the "misappropriation of another's name or likeness."[13] It is important to appreciate the potential commercial aspect of this tort, as it is from this area of study that the right of publicity evolved.[14] While right of privacy began as a way to protect against intrusion of the self, right of publicity began to develop to protect the celebrity or the public self.[15]

Right of Publicity

The right of publicity is an expansion of the privacy notion previously discussed. The main difference is the focus on the public and proprietary interests of the person being exploited. The right has been defined as that of "every human being to control the commercial use of his or her identity."[16] It incorporates the aspect of a person's "property interest . . . in his or her public identity" and its use for advertising or trade purposes.[17] While every person possess the "dignity interest" privacy protects, with right of publicity, the plaintiff must "cultivate a valuable property interest in his public image."[18] A non-celebrity does have a right to prohibit others from exploiting his or her image, but does not suffer the same kind of loss as one whose image alone has a monetary value. Right of publicity incorporates laws of property and unfair competition in addition to its origins under the privacy tort.[19]

This article focuses on the right of publicity, as it protects against misappropriation of a person's identity for commercial value. More specifically, the analysis will concern how that right serves a famous singer whose voice has been convincingly imitated for a commercial purpose. Please assume, *arguendo*, that all scenarios proffered in this discussion involve a person who has "cultivate[d] a valuable property interest in his public image."[20] "Imitation" is not meant to address impersonations or other types of parodies, but the specific use of a singer's style and sound that gives the overall impression that a famous singer is actually endorsing the product. Otherwise, the First Amendment, discussed *infra*, can serve as a defense to the right of publicity.[21] While that defense could arguably be shrinking the right of publicity tort, this article looks to misappropriation strictly for false endorsement.

Federal Lanham Act

The federal Lanham Act helps to guard against deception and false descriptions or endorsements put forth by an advertiser.[22] When a commercial depicts the image or likeness of a celebrity, his or her approval of the product is conveyed to the consumer. In addition, the company, not the celebrity, makes money off the use of the famed *persona*. Such incidents violate the Lanham Act.[23] The Act can also include "situations that would not qualify formally as trademark infringement, but that involve unfair competitive practices resulting in actual or potential deception," such as the use of a look-alike to portray celebrity approval.[24] The Act may help both New York and California plaintiffs who cannot otherwise establish an exact violation under common or statutory law. The standard required for a Lanham Act claim, "likelihood of consumer confusion" simply is not as difficult to satisfy as other standards seen in common or statutory law.[25] As discussed below, the claim may serve as a lifeline to plaintiffs whose state laws would leave them out of court.

II. California: Common Law + Civil Code § 3344 = Lucky Stars?

California recognizes a right of publicity claim both through its Civil Code § 3344 and the common law.[26] Section 3344 was created to address the "knowing use without consent" of identity,[27] and the California courts have interpreted the cumulative provision, section 3344(g), to sustain common law claims.[28] There are four common law tort components;[29] this article will discuss only "commercial appropriation" and only as it applies to a person's voice. The unauthorized, injurious use of a famous singer's *voice* without his or her permission is clearly actionable under section 3344.[30] The same may be true of an imitation so precise that it "pirate[s] [one's] identity," but here the plaintiff must reach for the common law.[31]

The *Midler* Tort

In California, the right of a famous singer to enjoin the use of sound-alikes is now known as the "*Midler* tort."[32] *Midler v. Ford Motor Company*[33] involved the "celebrated chanteuse" Bette Midler.[34] After Ms. Midler specifically said "no" to singing in a commercial, the defendants hired one of her back-up singers ("Hedwig") and instructed the stand-in to "sound as much as possible" like Ms. Midler.[35] Hedwig's adept imitation of Ms. Midler's voice, coupled with the Midler song used in the commercial, left the overall impression that it was actually Ms. Midler singing in the advertisement and endorsing the product.[36] Surprisingly, sustaining a claim based on these facts was a difficult task for the Ninth Circuit.

Despite the district court's indictment of the "defendant's conduct as 'that of the average thief,'" it was unable to pinpoint a "legal principle" that would grant adequate relief to Ms. Midler.[37] The Ninth Circuit addressed the problems encountered by the district court, beginning with the copyright issue.[38] Having already paid for the copyright of the song, enjoining its use by the defendants would be unfair.[39] The court avoided this conflict by finding that the plaintiff was not trying to stop the defendants from using the *song* itself, but something "more personal than any work of authorship," her *persona*.[40] It next addressed the California Civil Code § 3344 and determined that because the defendants used Hedwig's voice, and not Ms. Midler's, section 3344 was inapplicable.[41] The Court of Appeals finally hung its hat on the common law right of publicity.[42] Comparing the Midler facts to an earlier Ninth Circuit decision finding a look-alike actionable, the court designated that "California will recognize an injury from 'an appropriation of the attributes of one's identity.'"[43]

From that recognition, it was an easy step to protect against the "sound-alike" personal invasion at issue in *Midler*. The Court of Appeals found a valid property right protectable at common law.[44] It noted that Midler's voice had monetary value, and that the defendants essentially took it without asking by deliberately devising the circumstances for the imitator to sound so much like her.[45] The court elevated the importance of one's voice as an essential component of one's identity.[46] Equating voice with identity was a critical step toward insisting upon its protection. The court concluded by holding that, "when a distinctive voice of a professional singer is widely known and is deliberately imitated in order to sell a product, the sellers have appropriated what is not theirs, and have committed a tort in California."[47]

Sound-alike Lives on in California

The Ninth Circuit emphatically affirmed *Midler* in *Waits v. Frito-Lay, Inc.*[48] Rejecting claims that *Midler* had been "impliedly overruled" by the Supreme Court, *Waits* instead approved the common law right of publicity approach to protect against a voice imitator.[49] The Ninth Circuit explained that the "*Midler* tort is a species of the violation of the 'right of publicity.'"[50] Indeed, *Waits* is the perfect companion case for *Midler*, as the facts are almost identical. Tom Waits, a famous singer who refuses to do endorsements, nonetheless heard a Doritos commercial on the radio that matched his singing style and voice exactly.[51] The Ninth Circuit unequivocally recognized the "continuing viability of *Midler,*" and also helped to flesh out the ways in which a plaintiff may establish a voice misappropriation claim.[52]

Importantly, *Waits* insisted that voice misappropriation occurs when someone would actually think that the celebrity was singing the song. It is not enough that consumers are merely "reminded of plaintiff;" therefore imitating the famous singer's style would not be actionable.[53] *Waits* also confirmed that the plaintiff's voice must be "distinctly and widely known" before he gains a "protectable right in its use."[54] It further illustrated that serious damages can result from a defendant's deliberate misappropriation of a celebrity's identity. The court approved more than $2 million for Mr. Waits in the form of punitive and economic damages, as well as mental distress to cover the humiliation of the star being unsuspectingly associated with a product for commercial gain.[55]

Possible Lanham Act Implications

Even though it was able to afford relief under the *Midler* tort, the *Waits* court addressed a potential Lanham Act claim. Ultimately deciding that the Act was not needed to accord Mr. Waits full satisfaction, the court still approved of an approach for a sound-alike plaintiff under the Lanham Act prong of "false endorsement."[56] It found specific authorization in the language of the Act itself proscribing the misappropriation of another's identity for commercial endorsement.[57] Citing legislative acceptance of existing judicial authority as evidenced by recent Lanham Act amendments, the court "conclude[ed] that false endorsement claims, including those premised on *the unauthorized imitation of an entertainer's distinctive voice*, are cognizable under section 43(a)."[58] *Waits* further bolstered potential plaintiffs by determining that for standing under the Lanham Act, a celebrity need not be an actual competitor of the defendants; but only that the "wrongful use of his professional trademark, [here] his unique voice, would injury him commercially."[59] The Ninth Circuit's discussion and approval of a possible Lanham Act claim may aid plaintiffs where such relief is not otherwise forthcoming. The fact that it interpreted a federal statute to protect against unauthorized voice imitators can aid sound-alike plaintiffs across the country, where other jurisdictions may take cues from California.

III. New York: (Civil Rights Law § 51—Common Law) + (*Onassis* + *Allen*) = Relief?

Development of Publicity Law in New York

New York does not recognize a common law right of publicity.[60] This proscription dates back to 1902, when the Court of Appeals denied that claim to a young woman whose face was distributed on flour packages without her permission.[61] The legislative response was sections 50 and 51 of the Civil Rights Law, currently the sole method of recourse for the New York plaintiff for commercial misappropriation of image.[62] Section 51 guards against the same basic misuse of identity conceived by right of publicity previously discussed.[63] Providing equitable relief and damages to anyone injured by the use of his or her "name, portrait, picture or *voice*" for *advertising or trade purposes* "without written consent," New York's remedy restricts plaintiffs to the confines of the statute.[64]

Inherently, the statutory construction creates obstacles for a sound-alike plaintiff. It prohibits misappropriation of "voice," not "voice-imitator."[65] Still, there is enough evidence to suggest that were the proper plaintiff to come along, for instance, the exact same facts as seen in *Midler* or *Waits* discussed *supra*, that a New York court could reasonably find a way to grant relief to him or her. *Onassis v. Christian Dior-New York*[66] demonstrated that the statute is capable of being both strictly and liberally construed at the same time.[67] The idea of a literal interpretation may cause sound-alike plaintiffs consternation, yet the possible liberation afforded by *Onassis* may grant them some relief.

Establishing a way to gently flex the otherwise immutable statute, *Onassis* allowed an action for the unauthorized use of a "look-alike," not merely the use of a person's actual likeness, as described by the statute.[68] The case involved the former First Lady and an advertisement for Christian Dior ("Dior").[69] A woman was not only made up to look exactly like Mrs. Onassis, but was also photographed with other famous people, further cementing the image as that of the First Lady herself.[70] Had Dior used an actual picture of Mrs. Onassis, section 51 would have been easily satisfied. Similarly, a drawing, sketch, or cartoon could have been actionable.[71] Yet in *Onassis*, the use of a different person complicated the issue, causing the court to ask, "can one person enjoin the use of someone else's face?"[72] Building on prior cases concluding that the statutory phrase "'portrait or picture' . . . is not restricted to actual photographs" but rather encompasses "any representations which are recognizable as likenesses," the court determined that the picture was indeed a "recognizable likeness" of Mrs. Onassis. [73] It used this foundation to ultimately hold actionable the unauthorized use of Mrs. Onassis' likeness for "the purposes of trade and advertising."[74]

Protection of Identity—Beyond Section 51

While *Onassis* dealt strictly with look-alikes, it seized upon the necessity to "protect the *essence* of the person."[75] *Essence* encompasses more than the mere wording of section 51, "name, portrait, picture or voice."[76] *Allen v. National Video, Inc*. cited accord with this result[77]; it agreed with *Onassis* that under the right circumstances, a look-alike would be actionable under New York's right to publicity statute section 51.[78] "Essence" encapsulates a person's "identity," a trait which California has interpreted to include distinct voice.[79] Like *Midler* in California, the *Onassis* court was dismayed by the defendants' antics, and anxious to derail any potential for a "commercial hitchhiker."[80] True, *Onassis* explicitly stated that the statute could not be stretched to include "imitation of a distinctive voice."[81] However, at the time of the opinion, the word "voice" was not yet included in section 51. *Onassis* opined that the absence of any voice protection was most likely an "oversight" due to the technical limitations that existed in 1903 at the time of the law's origin.[82]

This "oversight," having since been corrected in the statute, may reflect the possibility of holding voice imitators for advertising or trade purposes accountable under the overall impression rhetoric evinced in *Onassis*.

This is true despite the existence of *Tin Pan Apple, Inc. v. Miller Brewing Co., Inc.*,[83] which specifically rejected an invitation to extend the statutory meaning to include "sound-alikes" on the theory of *Onassis*.[84] Yet that court declined to recognize claims for "sound-alikes" simply because the word "voice" was not in the statute.[85] The *Tin Pan Apple* court just could not find a way to ignore the "voice" omission. It did not follow the Ninth Circuit in *Midler*, yet suggested that relief was granted there because the California statute specifically protects the plaintiff celebrity against the misappropriation of "voice."[86] In New York, the current inclusion of the word "voice" in section 51 may allow for a similar construction.

Although no New York court has directly tackled the issue of sound-alikes since the addition of "voice," *Oliveira v. Frito Lay, Inc.*[87] does at least lend an air of optimism to the "sound-alike plaintiff." In that case, based on the unauthorized use of a singer's actual recording of her signature song, the Second Circuit determined that the plaintiff met the requirement of "voice" right to publicity in section 51.[88] It allowed the state law claims to go forward to determine if the plaintiff had "disposed of her artistic production."[89] Importantly, it cited with approval the California holding in *Waits,* where the court protected the *persona* of the singer by finding a "sound-alike" claim actionable.[90] However, falling short of finding this to be theft of her *persona*, the court did not allow the claim for "implied endorsement" under the Lanham Act line of analysis.[91] This interpretation could be helpful, as it seems to suggest if there was a theft of *persona*, including voice *persona*, a New York plaintiff may have recourse under the Lanham Act.

Lanham Act

As interpreted by New York courts, a Lanham Act claim may help to fill in gaps left open by the statute. While any Lanham Act analysis is distinct from the state law right of publicity, both approaches can be used to protect the right of a celebrity from false representations. *Allen v. National Video, Inc.*[92] laid the foundation in New York for look-alike claims under the Lanham Act. It involved an advertisement featuring a man who looked like Woody Allen in a video store surrounded by Woody Allen movies, projecting the image that Mr. Allen himself was endorsing membership to the store.[93] Unconvinced that the facts established that the look-alike was "indistinguishable from the real person" as a matter of law required by section 51, the court proceeded instead to a discussion of recourse under the Lanham Act.[94]

The Lanham Act, broad in its coverage, was created in part to address false advertising and dilution of trademark claims.[95] The Act is interpreted as protection for both the consumer and the holder of a famous mark. This is true not only in actual trademark situations, but also in cases for misappropriation of identity.[96] In the context of *Allen*, the consumer may be tricked into thinking that Mr. Allen actually endorsed the product, while the celebrity is injured by the decline in value of his "drawing power."[97] Satisfied that the "underlying purposes of the Lanham Act" are "implicated in cases of misrepresentations regarding endorsement[s]" by a "public figure,"[98] the court then explained the likelihood of confusion standard that defines Lanham Act claims.[99]

The "likelihood of confusion" does not require a finding that everyone viewing the advertisement would definitively conclude that the plaintiff was featured.[100] Rather one must merely conclude that there exists a potential for confusion as to the origin of the goods. Thus, the standard is "broader than the strict 'portrait or picture' standard under § 51."[101] According to the

Allen court, the defendant's promotion of Allen's "general persona" may not be enough under section 51, but it satisfies the broader "likelihood of confusion" test of the Act.[102] The court looked to factors used for trademark analysis to instruct the Lanham Act approach,[103] and ultimately reached the "inescapable conclusion . . . of consumer confusion over plaintiff's endorsement," entitling the plaintiff to relief.[104] Even lending credence to an assertion that the look-alike was only used to suggest that every customer would get "star treatment," the court nonetheless noted that the defendants "happily risked creating [a false] impression in an attempt to gain commercial advantage through reference to plaintiff's public image."[105] With such language, the court suggested an element of bad faith on the part of the defendants.

Although *Allen* makes no direct mention of voice or voice imitators, its willingness to afford relief on a look-alike claim is a boon to the sound-alike plaintiff. What is critical is its analysis of the likelihood of confusion. From the aspect of a sound-alike, one could argue that there is even more chance that the consumer would be confused when using only voice to determine one's identity. As in *Midler*, where someone sounding exactly like the plaintiff was singing a song that she made famous, it cannot be denied that a strong likelihood of confusion existed. While no New York court has yet to make this assertion, following a Lanham Act approach could be a way to get there. Admittedly, there are many elements that go into building such a claim; any construction of it would be complex. Still, the Lanham Act approach does suggest facility on the issue of deception.

IV. From California to New York ➛ Whatever Works

Relief for the Sound-Alike Plaintiff

New York courts will not expand Civil Rights Law § 51 to encompass a common law right and have decidedly rejected the *Midler* approach for the proverbial sound-alike claim.[106] Yet, previous rejections occurred before the addition of the word "voice" to the statute.[107] *Onassis* and *Allen* examine claims for look-alikes and demonstrate how it can be actionable to give the overall impression of celebrity endorsement. The obvious next step, now that *voice* is part of section 51, is to allow the definition of that word to include sound-alikes, as "photo or portrait" is now interpreted to include look-alikes.[108] If a person can be held accountable for *looking exactly* like a celebrity in a commercial context, surely the same can be said for one who *sounds exactly* like a famous singer in a commercial context, especially where the consumer is left with the overall impression that the celebrity was actually singing the song. True, the existence of essentially the same right of publicity in California was of no aid to the plaintiffs in *Midler* and *Waits*, where the courts distinctly denied the statutory sound-alike claims because actual voice was the only aspect covered by the statute.[109] However, those cases did not draw from the *Onassis* or *Allen* line of thinking available in New York. It seems clear from the language in the California cases that both courts were eager to afford the plaintiffs some relief, and it happens that relief could be granted through the common law.[110]

The Future of Right of Publicity Law—Intersection with the First Amendment

The right sort of plaintiff can still find solace in the commercial, false-endorsement aspect of the right of publicity. Still, there are some circumstances in which that right will lose a face-off with the First Amendment.[111] Essentially, if the user's actions are not motivated by some sort of false endorsement, but instead are indicative of artistic or other type of expression, the First Amendment protects them.[112] Such interest will necessarily clash with the celebrity's interest in preventing the unauthorized use of his or her *persona*.[113] In such an analysis, a court will balance the two concerns, and, when pressed, the right of publicity must yield to the stronger constitutional concern.[114] Artistic expression is fiercely protected by the ideals encompassed by the First Amendment; a celebrity has little hope to prevail against purely artistic speech.[115]

However, if the celebrity's image is used to create an "incorrect inference" of endorsement, then the First Amendment cannot save the user.[116]

Future sound-alike plaintiffs face an uphill battle. Beyond merely a defense of artistic speech, recent holdings indicate that, even if used for commercial gain, the First Amendment can still protect the reproduction of the celebrity image.[117] Even so, it is doubtful that a court would find that the First Amendment trumps in a situation where a celebrity's identity was misappropriated for the purpose of a false endorsement, as in *Midler* or *Waits*. Such users are stealing through imitation of the celebrity's *persona*, and, critically, trading on another's fame to deceive the public and make themselves money. While the successful First Amendment defense can include parties who are using the celebrities' images to make money, it is not the same thing as actively deceiving the public by creating the illusion that the famous person endorses the product.[118] Also, the celebrity can still be protected against a weakening of his or her fame as a commodity.[119] Although tenuous, the proverbial sound-alike plaintiff advanced in the above ruminations, remains, for now, able to defeat a First Amendment defense against a right to publicity claim.

Conclusion

A rock star or famous singer can reasonably expect protection of his or her vocal image in New York under circumstances similar to that of *Midler* or *Waits*. It is probable to surmise that the inclusion of voice protection in the current Civil Rights Law § 51 suggests an intention to protect not only actual voice infringements, but also the situation where the sound-alike is used to create a false image of celebrity endorsement. *Onassis* affirmed that the statute is meant to preserve the "essence of the person" and to prevent the "*persona* from being unwillingly . . . misappropriated. . . ."[120] Although *Onassis* dealt specifically with appearance, the "essence" or *persona* of a famous singer is his or her voice, and a New York court confronted with *Midler* facts would have to recognize that.

New York claimants are also aided by the *Allen* interpretation of Lanham Act false-endorsement claims. Again, the case advanced a theory for look-alikes only, but the sound-alike claim is bolstered by the Ninth Circuit's interpretation in *Waits*, approving a Lanham Act construction to guard against voice imitators. Application of a federal statute in New York courts could allow relief where the state statute presently cannot. Finally, the First Amendment defense to the right of publicity does not currently eviscerate the rights of the sound-alike plaintiff to guard against false endorsement.

Endnotes

1. *See*, *e.g.*, N.Y. Civ. Rights Law §§ 50–51 (McKinney 2004); Cal. Civ. Code § 3344 (Deering 2004).
2. This is especially true in New York, where the legislature created a statutory right of privacy claim specifically in response to the denial of the common law claim by the New York Court of Appeals. *See Allen v. National Video, Inc.*, 610 F. Supp. 612, 620 (S.D.N.Y. 1985) (explaining the origins of Civil Rights Law §§ 50–51, and the earlier court's rejection of the common law in *Roberson v. Rochester Folding Box Co.*, 64 N.E. 442 (N.Y. 1902)).
3. *See*, *e.g.*, N.Y. Civ. Rights Law §§ 50–51 (McKinney 2004); Cal. Civ. Code § 3344 (Deering 2004).
4. Although New York and California have similar statutory protections for these claims, the former denies an additional common law claim that the latter allows. *Compare Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (1988) (allowing common law claim for right of publicity) with *Allen*, 610 F. Supp. at 620 (denying New York common law right of publicity).
5. The disparity between the two states' treatment of voice (as opposed to visual) imitators makes it the main candidate for discussion.
6. 15 U.S.C. § 1125(a) (2004).
7. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (defining *Midler* tort as common law right of publicity for a sound-alike claim).
8. *See Onassis v. Christian Dior-N.Y., Inc.*, 472 N.Y.S.2d 254, 263 (Sup. Ct., N.Y. Co. 1984), *aff'd without opinion*, 488 N.Y.S.2d 945 (1st Dep't 1985) (interpreting statute to include a right of [publicity] claim for a convincing look-alike, even though such specific language is not in the Civil Rights Law).
9. *See Allen v. National Video, Inc.*, 610 F. Supp. 612, 623–24 (S.D.N.Y. 1985) (approving *Onassis* holding that use of convincing look-alike was enough to make a claim even though specific language not found in statute); *Onassis*, 472 N.Y.S.2d at 263 (interpreting statute to include look-alike claim).
10. *See* J. Thomas McCarthy, The Rights of Publicity and Privacy, section 1.6 (2d ed. 2003) (describing the distinction and advancing origins of the tort theory).
11. *Id*. at sections 1:20–1:23 (explaining the four torts of "(i) invasion of privacy by intrusion, (ii) public disclosure of public facts, (iii) false light privacy, (iv) invasion of privacy by appropriation").
12. *Id*. at section 1:23 (noting that Prosser intended for the "appropriation" privacy to incorporate both the "commercial" and "dignity interest[s]").
13. *Allen*, 610 F. Supp. at 620.
14. *See* McCarthy, *supra* note 10 at section 1.26.
15. *Id*. at section 1.7.
16. *Id*. at section 1.3; *see also*, *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093, 1098 (9th Cir. 1992) (describing the right as that of "a person whose identity has commercial value . . . to control the commercial use of that identity").
17. *Allen*, 610 F. Supp. at 621; *see also* McCarthy, *supra* note 10 at section 1.7 (explaining that the complaint of the celebrity was "damage to their 'pocketbook,' not to their 'psyche'").
18. *Allen*, 610 F. Supp. at 621–22.
19. *See* McCarthy, *supra* note 10 at section 1:26.
20. *See Allen*, 610 F. Supp. at 622.
21. *See*, *e.g.*, *ETW Corp.*, *v. Jireh Publishing, Inc.*, 332 F.3d 915, 926 (6th Cir. 2003) (holding that right of publicity claims must yield to artistic expression protected by the First Amendment).
22. 15 U.S.C. § 1125 (2004) (titled "false designations of origin and false descriptions forbidden").
23. *Id*. at § 1125(a) ("any person who shall . . . use, in connection with any goods or services . . . any false description or representation . . . shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or designation"); *see also Allen*, 610 F. Supp. at 625–26 (explaining that celebrities have a "commercial investment in the 'drawing power' of [their] name and face" and that an unauthorized use of their likeness also "implicates the public's interest in being free from deception").
24. *Allen*, 610 F. Supp. at 625. The court goes on to define the Act as containing three basic elements: "1) involvement of goods or services, 2) effect on interstate commerce, and 3) a false designation of origin or false description of the goods or services." *Id*. (citation omitted).
25. *See White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1401 (9th Cir. 1992) (holding that a robot look-alike of Vanna White survived a summary judgment motion because there was a possibility of "likelihood of confusion as to [White's] endorsement."); *Allen*, 610 F. Supp. at 630 (holding that Woody Allen look-alike surrounded by Woody Allen movies in a video store was enough to create a "likelihood of consumer confusion" even though it may not have been enough under N.Y. Civil Rights Law § 51).
26. *See*, *e.g.*, *Waits v. Frito-Lay, Inc*. 978 F.2d 1093 (9th Cir. 1992); *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988); *Eastwood v. Superior Court*, 149 Cal. App. 3d 409 (Cal. App. 2nd Dist. 1983).
27. *See Eastwood*, 149 Cal. App. 3d at 417.
28. *See Midler*, 849 F.2d at 463; *Eastwood*, 149 Cal. App. 3d at 416–17, n.6.

29. *See Eastwood*, 149 Cal. App. 3d at 416–17 (identifying the four elements: intrusion, disclosure, false light and appropriation).

30. Cal. Civ. Code §3344(a) (Deering 2004) ("Any person who knowingly uses another's name, *voice*, signature, photograph, or likeness . . . for purposes of advertising or selling . . . products . . . without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.") (emphasis added).

31. *See Midler*, 849 F.2d at 463.

32. *See Waits v. Frito-Lay, Inc*., 978 F.2d 1093, 1098 (9th Cir. 1992).

33. 849 F.2d 460 (9th Cir. 1988).

34. *Id*. at 461.

35. *Id*. at 462.

36. *Id*. at 462. The court notes that the overall impression is that of Ms. Midler, despite the absence of a visual image suggesting her. *Id*.

37. *Midler*, 849 F.2d at 462 (quoting the district court).

38. *Id*.

39. *Midler*, 849 F.2d at 462 (citing with approval *Sinatra v. Goodyear Tire & Rubber Co*., 435 F.2d 711, 717–18 (9th Cir. 1970).

40. *Id*. at 462.

41. *Id*. at 463.

42. *Id*.

43. *Id*. (quoting *Motschenbacker v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821, 824 (9th Cir. 1974)).

44. *Id*. (observing that "[a]ppropriation of such common law right is a tort in California").

45. *Id*.

46. *Id*. (noting that "[t]he singer manifests herself in the song" and that "[t]o impersonate her voice is to manifest her identity").

47. *Id*. Subsequently, this holding became known as "the *Midler* tort." *See Waits v. Frito-Lay*, 978 F.2d 1093, 1098 (9th Cir. 1992).

48. 978 F. 2d 1093, 1099.

49. *See id*. at 1098–99 (accepting *Midler* and rejecting *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141 (1989) as requiring a parallel construction of pre-emption in California). The Ninth Circuit does not find a conflict between the California state law and the federal Copyright Act, thus, no pre-emption results. *Id*. at 1100.

50. *Id*. at 1098.

51. *Id*. While the defendants did not use one of his actual songs, they did write a commercial that "echoed the rhyming word play of the Waits song" and hired a singer based on his substantial ability to imitate Mr. Waits. *Id*.

52. *Id*. at 1099.

53. *Id*. at 1101.

54. *Id*. at 1100.

55. *Id*. at 1103.

56. *Id*. at 1106–07 (citing with approval other jurisdictions that have taken the same path). The court notably included *Allen v. National Video, Inc*., 610 F. Supp. 612 (S.D.N.Y. 1985) in its list of instructive courts. *Id*. *Allen* will be discussed *infra* as a possible tool for the New York plaintiff.

57. *Id*. at 1107 (explaining that the "use of any symbol or device which is likely to deceive consumers as to the association, sponsorship, or approval of goods or services by another person" is "expressly prohibit[ed]").

58. *Id*. (emphasis added).

59. *Id*. at 1110.

60. *See*, *e.g.*, *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348 (S.D.N.Y. 2002); *Allen v. National Video, Inc*., 610 F. Supp. 612, 620 (S.D.N.Y. 1985); *Onassis v. Christian Dior-N.Y., Inc*., 472 N.Y.S.2d 254, 263 (Sup. Ct., N.Y. Co. 1984), *aff'd without opinion*, 488 N.Y.S.2d 945 (1st Dep't 1985).

61. *See Roberson v. Rochester Folding Box Co*., 64 N.E. 422 (N.Y. 1902) (first denying the claim to common law right to privacy).

62. *See Allen*, 610 F. Supp. at 620 (explaining that since there is no common law right to publicity claim in New York, plaintiffs must proceed under Civil Rights Law §§ 50–51).

63. N.Y. Civil Rights Law § 50 (McKinney 2004) addresses a misdemeanor for publicity infringement that is not at issue here. This article is primarily concerned with the tort established by N.Y. Civil Rights Law § 51 (McKinney 2004).

64. N.Y. Civ. Rights Law § 51 (McKinney 2004) (emphasis added). The statute does not prohibit the lawful sale of that image, nor disposal of copyright licenses. *Id*. Importantly, the word "voice" was added to the statute in 1995. *Id*.

65. *Id*.

66. 472 N.Y.S.2d 254 (Sup. Ct., N.Y. Co. 1984), *aff'd*, 488 N.Y.S.2d 945 (1st Dep't 1985).

67. *See Onassis*, 472 N.Y.S.2d at 258 (explaining that although section 51 is in "derogation of common law" and thus must "receive a strict . . . construction," it was also designed to be "remedial" to address the "'newly expounded right of'" publicity and thus "'has been liberally construed over the ensuing years.'") (citations omitted).

68. *See id*. at 263 (holding that use of look-alike "impermissibly misappropriated [plaintiff's identity] for the purposes of trade and advertising").

69. *Id*. at 257.

70. *See id.* at 256–58 (describing the ad and the unmistakable impression that Mrs. Onassis was featured in it).

71. *See id*. at 258–60 (surveying New York case law). Such non-photo images have met the definition of "portrait or picture" in other New York cases. *Id*.

72. *Id*. at 256.

73. Notably, the *Onassis* court likens its facts to an old Court of Appeals case of impersonation finding that "the photographic portrayal by one person to simulate another without consent was forbidden by statute." *Id*. at 259 (citing *Binns v. Vitagraph Co. of America*, 103 N.E. 1108 (N.Y. 1913)).

74. *Id*. at 263. The import of this caveat is to clarify that the defendants are only enjoined from using the impostor's face for *commercial* gain, not for other sorts of appearances. *Id*. at 261–63.

75. *Id*. at 260 (emphasis added).

76. N.Y. Civ. Rights Law § 51 (McKinney 2004).

77. 610 F. Supp. 612 (S.D.N.Y. 1985).

78. *See id*. 610 F. Supp. at 623 (agreeing that when the "look-alike seems indistinguishable from the real person . . . a court may hold as a matter of law that the look-alike's face" rises to the statutory requirement). *Allen* was ultimately decided under the Lanham Act. *Id*.

79. *See*, *e.g.*, *Waits v. Frito-Lay, Inc*., 978 F.2d 1093, 1098 (9th Cir. 1992); *Midler v. Ford Motor Co*., 849 F.2d 460 (9th Cir. 1988).

80. *Compare Onassis*, 472 N.Y.S.2d at 261 (suggesting that one "seeking to travel on the fame of another will have to learn to pay the fare") *with Midler*, 849 F.2d at 462 (describing the defendant's behavior as "that of the average thief").

81. *Onassis*, 472 N.Y.S.2d at 259 (holding that a person can enjoin the use of another's face where such use would cause confusion).

82. *Id*.

83. 737 F. Supp. 826 (S.D.N.Y. 1990).

84. *See id*. at 837–38 (allowing the look-alike claim for "physical similarity and resemblance" to move forward on *Onassis* grounds, but granting summary judgment to the defendants on the issue of "sound-alike").

85. *See id*. at 837–38 (explaining that it will not "bring the sense of sound within the statute").

86. *Id*. at 838 (suggesting that the common law publicity right sculpted in *Midler* was derived from the California statutes).

87. 251 F.3d 56 (2d Cir. 2001).

88. *See id.* at 63–64 (explaining that section 51 unauthorized use of voice was easily satisfied, and that the real issue was one of public domain).

89. *Id*. at 63–64.

90. *See id.* at 62 (noting that other courts have chosen to protect an artist's "persona" from "sound-alikes").

91. *Id*. at 62 (denying the claim under the Lanham Act).

92. 610 F. Supp. 612 (S.D.N.Y. 1985).

93. *See Allen*, 610 F.Supp. at 617–18 (relaying the facts of the case).

94. *See id.* at 623–24 (interpreting *Onassis* to require a conclusion that the "photograph is, as a matter of law, plaintiff's portrait or picture," not merely that it "makes reference" to him). Because the defense argued that the imitator was there to suggest that an ordinary person could be treated like a star at the video store, the court determined that there was a reasonable, if not believable, explanation for why the defendant was in the picture, other than specifically to represent Mr. Allen. *Id*.

95. *Id*. at 625. "Dilution" refers to the right of a trademark holder to be free from others cashing in on "the value of his distinctive mark." *Id*.

96. *Id*. at 625–26 (explaining that for these cases, "no finding of an actual trademark is required").

97. *Id*. (explaining that the public has an interest in being "free from deception when it relies on a public figure's endorsement" while the celebrity has a "commercial investment" in the power of his "name and face . . . in marketing a career").

98. *Id*.

99. *Id*. at 627 (describing the standard as the "heart of a successful claim") (citations omitted).

100. *Id*.

101. *Id*. at 628.

102. *Id*.

103. *Id*. at 627 (identifying six factors, including "strength of plaintiff's marks and name . . . evidence of actual confusion as to source or sponsorship . . . and defendant's good or bad faith").

104. *Id*. at 628.

105. *Id*.

106. *See Tin Pan Apple, Inc., v. Miller Brewing Co*., 737 F. Supp. 826, 838 (S.D.N.Y. 1990).

107. N.Y. Civ. Rights Law § 51 (McKinney's 2004) (amending earlier versions in 1995 to include protection against unauthorized use of "name, portrait, picture or *voice*") (emphasis added).

108. *See*, *e.g.*, *Allen v. National Video, Inc*., 610 F. Supp. 612 (S.D.N.Y. 1985); *Onassis v. Christian Dior-N.Y., Inc*., 472 N.Y.S.2d 254 (Sup. Ct., N.Y. Co. 1984), *aff'd without opinion*, 488 N.Y.S.2d 945 (1st Dep't 1985).

109. *See Waits v. Frito-Lay, Inc*., 978 F.2d 1093, 1098–99 (9th Cir. 1992) (recognizing sound-alike claim based on common law right of publicity, not Civil Code § 3344); *Midler v. Ford Motor Company*, 849 F.2d 460, 463 (denying claim based on § 3344 but allowing action at common law).

110. *See Waits*, 978 F.2d at 1105 (indicating disapproval for the defendant's "conscious disregard of rights recognized in California"); *Midler*, 849 F.2d at 462 (comparing the defendants to "average thie[ves]").

111. *See ETW Corp., v. Jireh Publishing, Inc*., 332 F.3d 915, 926 (6th Cir. 2003) (explaining that if the defendant advances a valid First Amendment defense, the "likelihood of confusion test" is no longer applicable).

112. *Id*. at 936–38 (approving First Amendment defense for artist whose rendition of Tiger Woods at Augusta was printed without the athlete's authorization); *Hoepker v. Kruger*, 200 F. Supp. 2d 340, 348–49 (explaining that privacy interests must yield to free speech for "'newsworthy events or matters of public interest'" and further that they will often yield to artistic speech) (citations omitted).

113. *See id*. at 927 (showing that with "expressive speech . . . the likelihood of confusion test 'fails to account for the full weight of the public's interest in free expression'"); s*ee Hoepker*, 200 F. Supp. 2d at 348 (indicating that the "advertising and trade limitation" in New York's Civil Codes §§ 50–51 was included with "the First Amendment in mind").

114. *See ETW*, 332 F.3d at 926.

115. *See id*. at 932–37 (surveying recent cases relating to First Amendment defense and ultimately advancing the strength of artistic speech).

116. *See id*. at 937–38.

117. *Id*. at 934.

118. *See ETW*, 332 F.3d 915 at 937 (endorsing a Lanham Act approach to "artistic works only where the public interest in avoiding confusion outweighs the public interest in free expression").

119. *Id*. at 938 (indicating a concern for a "reduc[tion of] the commercial value of [celebrity's] likeness," even though the facts at issue do not amount to such a claim).

120. *Onassis v. Christian Dior-N.Y., Inc.* 472 N.Y.S.2d 254, 260 (Sup. Ct., N.Y. Co. 1984), *aff'd*, 488 N.Y.S.2d 945 (1st Dep't 1985) (emphasis in original). The court further emphasized that the "essence of what is prohibited . . . is the exploitation of one's identity." *Id*. at 261.

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The Sweet Science, Legally Speaking (Professional Boxing)

By Jeffrey Fried

I will never forget the time in 1988 when I first became involved in representing interests in the professional boxing industry, and the question from one well-established boxing promoter and attorney, "What could a lawyer from Washington, D.C. possibly know about boxing . . .?"

During these subsequent 16 years, I have concluded that professional boxing, like any business industry, requires an extensive commercial and legal knowledge of the industry, a familiarity with the applicable rules and regulations of the governing bodies and an understanding of, and relationship with, the key players. This applies whether you are involved in the transactional aspects of the boxing industry, the legislative and regulatory process or the all-too-frequent litigation end.

While the significance and contributions of the various parties involved in a boxing event are plentiful, ultimately it is the professional athlete that possesses (or does not possess) the status to attract a paying audience and, as discussed below, the unique marquee status to garner a large "pay-per-view" television audience and the corresponding revenue. The single largest revenue item in a boxing promotion is customarily derived from the domestic television broadcast. The two most prominent broadcast outlets are Showtime (owned by Viacom) and HBO (owned by Time Warner). Therefore, separate and apart from the eccentric dynamics associated with every professional boxing transaction and the equally eccentric personalities, at the core remains the epitome of corporate America, namely super media giants like Time Warner and Viacom. Contracts involving these media conglomerates, the professional boxers, venues, international broadcast networks, sponsors and the ancillary matters associated with a boxing promotion involve a variety of legal considerations.

Unlike many other sports industries and, in part, attributable to the lack of a single governing body, professional boxing is as rich in the courtroom as the action that transpires within the 20x20-foot ring!

Practical Contractual Safeguards

During the course of their careers, professional boxers become party to numerous contracts. In addition, there are commercial arrangements involving third parties (i.e., promoters, television networks, venues and event sponsors) that directly affect a boxer's career development and corresponding financial considerations. Quite frankly, these basic matters apply to any professional athlete or entertainer and, more broadly, to any individual that is a party to a personal services or similar contractual arrangement.

Before addressing specific forms of contractual understandings within the boxing industry, certain practical safeguards should apply as follows:

Professional Representation. Each boxer should be represented by an attorney or advisor representing solely the interests of the boxer, clear of conflicts with the other contractual party and third parties associated with the commercial dealings of the boxer. Conflicts of interest in the boxing industry could be the subject of its own separate law school class. In this regard, note the following proposed language for inclusion in a law firm's engagement letter addressing a potential conflict of interest:

> *It is understood that this Firm represents other boxing interests, including _________. Accordingly, any matters that may be undertaken by this Firm on your behalf must be clear of any conflict (or even the appearance thereof) with such clients. Accordingly, issues may arise whereby this Firm may not be able to represent you and we will promptly notify you in writing of any conflict (or appearance thereof) that might exist with regard to a matter you desire to be undertaken by this Firm. At this time there does not appear to be either an actual conflict or the appearance of a perceived conflict of interest in undertaking this representation.*

Understanding of Contractual Relations. The boxer and his representative must have copies of all agreements to which the boxer is a party (or third party agreements applicable to the boxer's career) to ensure that all parties are in full compliance with their respective obligations. This sounds obvious, but is not always the case, and all too often it becomes necessary to formally communicate with (and legally threaten) third parties to simply furnish an executed copy of an agreement to which the professional boxer is contractually bound.

Communication. It is imperative that a professional boxer, through his representative or on his own behalf, have ongoing communication with the other contractual parties to ensure that issues are addressed in a timely manner and on a continuous basis (and in writing, where appropriate). As with many businesses, professional sports in particular operates in an international marketplace. Therefore, it is commonplace for there to be translators and for all relevant agreements and communications to be translated into the native language(s) of the applicable parties. When, in February 2004, Sharmba Mitchell agreed to challenge undisputed Junior Welterweight Champion Kostya Tzyu in Mr. Tzyu's hometown of Moscow, the travel, accommodations, customs and other logistical aspects associated with such an international event seemingly required as substantial time and attention as the training camp undertaken by Mr. Mitchell in preparation for the championship bout. A complete team was established in Moscow to facilitate matters for the traveling U.S. "entourage," including chefs, translators, security and embassy officials to ensure that all matters were properly in order for a mere boxing event (although the logistics, advance teams and other international commercial and treaty considerations would have been more properly associated with a multi-national economic conference!).

Term of Relationship. A professional boxer must be mindful of the length of the term of his contractual relationships. Circumstances in life, let alone boxing, constantly change, and the boxer must be aware of the timeframe he is obligating himself to another party in furtherance of his professional career.

Compliance Requirements. Professional boxers, managers and promoters (and possibly, in the future, television networks) are licensees of a governing athletic or boxing commission (i.e., the Nevada State Athletic Commission) and therefore have regulatory responsibilities to ensure that they are in compliance with such licenses. All parties should be fully informed of the applicable athletic commission requirements with regard to maintaining their licenses.[1]

Muhammad Ali Boxing Reform Act—In a Nutshell

The Muhammad Ali Boxing Reform Act ("Ali Act")[2] was the first federal law passed to reform perceived anti-competitive and corruptive business practices in the professional boxing industry. The Ali Act (Public Law No. 106-210) was introduced by Senator John McCain on June 29, 1998 and signed into law on May 26, 2000. The Act requires a promoter to disclose all revenue sources from a particular boxing event, the expenses being deducted from a boxer's remuneration for participation in such boxing event and mandates other commercial, regulatory and health-related safeguards intended to prevent perceived corruptive business practices within the boxing industry. Certain significant requirements of the Ali Act include:

a. A one-year limit on promotional rights that a promoter may require a boxer (or the boxer's current promoter) to provide in those situations where the boxer would otherwise be denied the opportunity to compete in a boxing match, i.e., "unless you give me options to promote your future bouts, you do not get to participate in this bout against my fighter!"

b. Promoters must disclose such pertinent information to the supervising athletic commission: copies of their contracts with the boxers; fees and charges they impose on the boxers; payments made to sanctioning organizations (discussed below); any proposed reduction in the contractual purse remitted to the boxers, as well as revenues derived by the promoter from the event. While not addressed in the Ali Act, certain non-direct financial items should also be considered; for example, barter arrangements, multi-bout site and/or domestic and international broadcast arrangements incorporating other boxing events involving the promoter (but not necessarily that particular boxer). Attached as Annex A (p. 52) are examples of disclosure forms that may be provided to the athletic commission and boxers pursuant to the provisions of the Ali Act.

c. Promoters are generally barred from having a financial interest with the manager of a boxer.[3]

d. For the safety of the boxers, each state athletic commission must reciprocally enforce the suspension of boxers by other state athletic commissions due to injuries or misconduct.

e. Individuals knowingly violating the Ali Act can face up to one year in jail or fines up to $100,000 (larger fines for major events). State Attorneys General can initiate civil actions and injunctions under the Ali Act, while boxers can initiate civil actions.

f. Sanctioning organizations (the entities that generally issue ratings of boxers and approve world championship boxing matches) must timely respond to protests from boxers regarding their rankings and provide justification for changes the sanctioning organization makes in its rankings. On an annual basis, sanctioning organizations must disclose their ratings policies and bylaws, the fees they charge boxers and the names of their members who decide the rankings. These rankings established by the sanctioning organizations are historically important in determining which boxer receives an opportunity to challenge for a World Championship and, in certain instances, the compensation the boxer receives for participating in the World Championship bout (and potentially subsequent World Championship defense bouts).

The actions of sanctioning organizations have been the subject of enhanced scrutiny, and apparently rightfully so, due to recent acknowledged abuses. For example, due to the corrupt business practices within the International Boxing Federation ("IBF"), which is generally recognized as one of the top four sanctioning organizations, a Receiver was appointed by Judge William Bissell of the United States District Court (Newark, N.J.) to oversee IBF operations. The former President of the IBF, Robert W. Lee, was sentenced to a prison term of 22 months for accepting payoffs from promoters in exchange for higher rankings for certain boxers and other illegal actions.[4]

Another major sanctioning organization, the World Boxing Council ("WBC"), filed for bankruptcy protection following a judgment ordering the WBC to pay $30 million in damages to a professional boxer. In *Graciano Rocchigiani v. WBC, Inc.*,[5] the Court ruled that boxer Rocchigiani should have been declared the WBC Light Heavyweight Champion based upon defeating Michael Nunn in what was characterized as a Light Heavyweight Championship Bout for the vacant WBC title. However, the WBC declared Rocchigiani the so-called "Interim" Light Heavyweight Champion and designated the previous title holder and marquee athlete (Roy Jones, Jr.) as a "Champion in Recess," adversely affecting the Championship status (and earning power) of Rocchigiani. Mr. Jones did not defend his title against the mandatory number one contender because the "vacant" vs. "champion in recess" controversy ensued. The Court found that there was a breach of contract by the WBC in the application and enforcement of its rules, and awarded damages of $30 million to Rocchigiani.

The consequence is that such authority within a sanctioning organization has a material (and potentially irreparable) impact upon a boxer and his ability to become a World Champion and to receive the corresponding financial benefits associated with World Championship status.

Types of Agreements

There are a variety of agreements inherent in the boxing industry, and generally applicable to a professional boxer throughout his professional boxing career, including:

1. Promotional Agreement
2. Bout Agreement
3. Television License Agreement
4. Site Agreement
5. Management/Consulting/Advisory Agreement
6. Trainer Agreement
7. Sponsorship Agreement
8. Closed-circuit Agreement

1. Promotional Agreement

In many instances, the promotional agreement represents the most significant contractual arrangement for a boxer. It is the responsibility of the promoter to provide the boxer with an opportunity to participate in a minimum number of bouts during the term of the promotional agreement and to remit, generally, a minimum level of compensation for the boxer's participation in each bout. The boxer's performance in the ring, the manner in which he conducts himself outside of the ring and the efforts of his promotional and (if applicable) management team are important components in enhancing the marketability of the boxer and, correspondingly, the level of the boxer's purses (i.e., the characterization of a boxer's compensation for participating in boxing matches).

Important items to be considered by a boxer (and the promoter) when entering into a promotional agreement include the following:

Term. The length of the term of the promotional agreement is important for both parties in connection with their respective obligations. Many jurisdictions provide limitations on the maximum term permissible in personal service agreements and certain athletic commissions likewise impose maximum terms for promotional agreements. For example, California Labor Code § 2855(a) provides that a contract to render personal services may not be enforced against the employee beyond seven years from the commencement of service. On the other hand, New York does not impose a limit on the length of personal service agreements, as contracts providing for perpetual performance have been upheld.[6]

In *Oscar De La Hoya v. Top Rank, Inc.*,[7] the Court held that the Top Rank promotional agreement was void and unenforceable for noncompliance with statutory and regulatory provisions governing arrangements between boxers and their promoters and for exceeding California's statutory seven-year time limit on contracts for personal services. The Court found that the amendments to the original five-year-and-one-month term of the Top Rank/De La Hoya Agreement did not create a "break in privity," and therefore De La Hoya had been continuously obligated to provide services to Top Rank for more than seven years.[8]

Moreover, the California Boxing Commission promulgated a form entitled "Addendum to Promotional Contract," which states that no promotional contract "may exceed three years nor is valid and enforceable until it is submitted to, approved by, and filed with the

California Boxing Commission with such Addendum attached." Since the procedural requirements of filing the agreement and the amendments with the California Boxing Commission were not followed by Top Rank, the contract with De La Hoya was ruled void and unenforceable. Ironically, and somewhat commonplace in professional boxing, is that following such contentious litigation and substantial media and public relations tactics utilized by each of Top Rank and Mr. De La Hoya, the parties entered into a new agreement and millions of dollars were made by each in the promotion of Mr. De La Hoya's boxing events following such reconciliation, and only one year after the Court decision in Mr. De La Hoya's favor.

The accomplishments, current professional status and age of a boxer are significant considerations in determining whether the promotional term is reasonable. For example, a promoter would generally need more time to assist in promoting and developing a young, less-developed boxer and, from a commercial viewpoint, the promoter would need sufficient time to receive a reasonable return on its investment for such efforts and expense.

Note the following material provisions customarily included within a promotional agreement relating to the term:

> *The Term of this Agreement ("Term") shall commence on the date of full execution and continue for four (4) years, unless terminated sooner or extended further pursuant to this Agreement. In the event Promoter secures a television contract on behalf of Boxer with a Network (as defined), then it is agreed that the Term of this Agreement shall be automatically extended to correspond to the expiration of such Network contract, assuming such Network contract term extends beyond the original Term of this Agreement, and subject to the applicable rules and regulations regarding the maximum duration of promotional agreements.*
>
> *In the event that Boxer at any time during the Term shall have been declared the loser of any Bout by the athletic commission then, in Promoter's sole discretion, Promoter shall have the right, but not the obligation, to terminate this Agreement. Further, the Promoter shall have the right to terminate this Agreement without further obligation to Boxer in the event of the following: (i) Boxer shall fail to honor any material obligation under this Agreement, or pursuant to rules of the athletic commission; (ii) Boxer becomes unable to compete at a professional level by reason of age, single or cumulative injury, or any career ending injury; (iii) Boxer tests positive for any controlled substance, and/or unlawful drugs or substances and is suspended by the athletic commission or (iv) Boxer fails any physical examination or test required for eligibility to participate in any Bout pursuant to this Agreement, or the rules of the athletic commission.*

Number of Bouts. The promoter generally has an obligation to provide/offer a minimum number of bouts during each year of the term. For an up-and-coming boxer, it is important to remain active and receive television exposure in his developing stages as an "undercard" participant, which is comparable to an opening act in a musical concert. Once a boxer reaches main-event status (comparable to the headliner in a concert), the number of bouts will likely decrease based on economic realities, such as broadcast budgets, suitable high-level opponents and the necessary lead time to promote each event.

Purses. Promotional agreements customarily include minimum purses that the boxer will receive for participation in bouts. For developing professional boxers the purses usually escalate, depending upon the number of rounds in the bout and the television medium broadcasting the bout. For well-established boxers, world champions and/or popular boxers with large fan bases, the purses are generally determined by the television medium and, in certain circumstances, the financial arrangements may include an allocation of net event promotional revenues between the promoters and the boxers. Each of these items, nevertheless, should be fully negotiated between the parties. The bout agreement is required to specifically set forth the procedure for any deductions from the boxer's purse (including training, purse advances, sanction fees and family travel), and such deductions must be in compliance with the Ali Act and the rules of the applicable athletic commission. It is quite common for the few select marquee boxers to include in their compensation arrangements a formula whereby they either receive a financial upside based upon pay-per-view home sales or an overall allocation of net event promotional revenues between the promoter and the boxer, e.g., an 80%/20% split of net event promotional revenues (in favor of the boxer).

> ***Grant of Exclusive Promotional Rights**. Boxer hereby grants to Promoter the exclusive[9] right to promote the professional boxing matches ("Bouts") to be engaged in by Boxer and to be promoted by Promoter or its designee during the Term. The promotional rights shall include, without limita-*

tion of the foregoing grant, all rights in perpetuity required to stage and sell tickets of admission to the Bouts, to commercialize and market all ancillary rights (including, but not limited to, worldwide rights to broadcast, telecast, record and film the Bouts for exhibition in any and all media including, but not limited to, motion picture, radio, television—whether live or delayed, interactive, home or theater, pay-per-view, satellite, closed circuit, cable or subscription—telephone, computer, internet, CD-Rom, video and audiocassette, photograph whether currently existing or subsequently developed). Promoter shall have the exclusive right to obtain in its name copyright or similar protection in the United States and all other countries of the World where such protection is available. Promoter shall market and commercialize all such rights in the Bouts in a commercially reasonable manner.

Bouts and Purses. (a) Promoter shall provide the following Bouts and cause Boxer to be paid the following minimum amounts:

Contract Year	***Minimum # of Bouts***	***Guaranteed Annual Compensation***
1/1/04-12/31/04	*4*	*$500,000*
1/1/05-12/31/05	*3*	*$750,000*
1/1/06-12/31/06	*2*	*$1,000,000*
1/1/07-12/31/07	*2*	*$1,500,000*

(b) Concurrently with execution of this Agreement, Promoter shall remit to

Boxer a non-refundable signing bonus of $50,000.

(c) In addition to the above compensation, Promoter shall remit the following training allowances to Boxer in connection with the Bout(s):

Purse	***Training Allowance***
Up to $150,000	*$20,000*
Between $150,001 and $750,000	*$40,000*
In excess of $750,000	*To be negotiated in good faith*

Promotional Plan. The boxer and his representative should insist that the promoter attach to the agreement a promotional plan intended to further the professional boxer's career (which should be updated periodically). As with a recording label, the promoter should undertake an overall marketing plan to enhance public and media awareness of the boxer to complement opportunities and accomplishments within the boxing ring. In too many instances the understandings between the parties regarding the plans for the boxer are based upon informal oral discussions, and it is important for both parties to have a clear understanding of the promotional plan to be implemented by the promoter and the boxer. The language in the agreement regarding the minimum number of bouts and minimum compensation during the term are simply contractual requirements of the promoter. The development plan involving particular opponents, television exposure and participation as an undercard boxer on an otherwise significant event (e.g., a major heavyweight championship bout) are all important aspects in maximizing the commercial opportunities for the boxer and the development of the boxer's career. These are matters that are not customarily included within a promotional agreement; however, there should be a complete understanding before the boxer commits to a promoter for a stated period of years as to their mutually agreed upon development plan for the boxer.

Both parties must have specifically delineated responsibilities (e.g., the boxer shall fully cooperate in reasonable promotional and media events, be properly prepared for and give his best efforts in the boxing event) to provide the greatest likelihood of successfully implementing a promotional plan and enhancing the boxer's career. There are obviously no assurances as to the boxer's development and success based upon circumstances outside of everyone's control; however, it is important that there be a collective written agreement as to the direction of the professional boxer's career. This is critical inasmuch as a professional boxer has a limited time frame in which to earn a livelihood. Conversely, the promoter has a limited time frame in which to receive a commercial benefit through its promotional services and (in many instances) funding in support of the professional boxer's career development.

Publicity and Promotion. *Boxer agrees he will cooperate and assist in publicizing, advertising and promoting the Bout(s), and he will appear at and participate in a reasonable number of joint and/or separate press conferences, interviews (before and after a Bout) and other publicity or other appearances (all of which may be telecast and recorded) at times and places designated by Promoter. Boxer further agrees to cooperate with any sponsors of the Bout(s) and to post advertising materials at the training camp of Boxer used in connection with publicity or advertising of such sponsors and to participate in reasonable adver-*

> *tising requests of such sponsors (such advertising shall apply only to the Bout). Boxer further agrees that the training sessions of the Boxer at the site of each Bout shall be open to the public if Promoter reasonably so requests.*

Courts have been faced with the issue of determining the validity of promotional agreements between promoters and boxers. For example, in *Lewis vs. Rahman*,[10] promoter Cedric Kushner Productions, Ltd. asserted that it had a continuing contractual right to promote the boxing matches of Hasim Rahman following his victory against World Heavyweight Champion Lennox Lewis in South Africa. The Kushner/Rahman Promotional Agreement had a two-year term, which had otherwise expired. The agreement granted Kushner an irrevocable option to extend the term of the agreement for two years upon a payment of $75,000. Following the April 19, 2001 Championship Bout in which Rahman defeated Lewis, Kushner exercised the option to extend the term of the agreement for two years and remitted by check, in South Africa, the required $75,000 payment. Despite such actions by Kushner and the language of the promotional agreement, on May 9, 2001 Rahman entered into an exclusive promotional agreement with Don King Productions, Inc. (and to add to the drama associated with professional boxing, it was publicly reported that Don King remitted a $500,000 signing bonus to Rahman in a New York hotel room, consisting of cash in a duffel bag). Kushner filed suit to have the Court uphold its promotional agreement with Rahman and for damages against Don King Productions for tortiously interfering with its promotional agreement with Rahman. Unfortunately for Kushner, the Court ruled that following the expiration of the promotional agreement, something more than the mere receipt of a check was necessary to revive and extend the agreement, despite the option language. An expressive waiver of timeliness and a clear intention to extend the promotional agreement was required.[11] Nevertheless, under a separate Addendum to the original Lewis/Rahman Bout Agreement, Kushner possessed the right to promote Rahman in the rematch with Lewis and the Court determined that Kushner's exclusive right to promote Rahman extended only to that single subsequent rematch bout. The end result of such litigation was a settlement between Don King Productions and Kushner whereby King promoted the professional boxing career of Rahman and remitted a payment to Kushner of $2 million.[12]

In *Don King Productions, Inc. v. Douglas*,[13] the enforceability of a promotional agreement was again before the Court. When James "Buster" Douglas attempted to be released from his contract with Don King Productions (following his victory against Mike Tyson on February 11, 1990 in Tokyo, Japan) in order to negotiate a more favorable agreement, King brought a breach of contract claim. In his defense, among other claims, Douglas asserted that his promotional contract with King was unconscionable. The Court found that a determination of unconscionability requires a showing that a contract was both procedurally and substantively unconscionable when made.[14] The Court ruled against Douglas in part, since competent counsel represented Douglas at the time of the contract formation.

It is important to note that a promoter generally does not have a fiduciary responsibility to a boxer. In *Don King Productions, Inc. v. Douglas*[15] however, the Court noted that while a fiduciary duty would not customarily arise from a straightforward contractual promotional arrangement, a fiduciary relationship could exist under certain contractual circumstances. For example, a fiduciary relationship might exist between a promoter and the boxer if the boxer could demonstrate that the promoter had violated "the very limited issue of trust a boxer reasonably reposes in a promoter."[16] The existence of a fiduciary relationship would depend on whether the parties, through the past history of the relationship and their conduct, had extended the relationship beyond the limits of the contractual obligations.[17]

2. Bout Agreement

The bout agreement is entered into between the promoter of a particular boxing event and an individual boxer participating in a bout included within the overall event (generally comprised of between six and eight bouts). Each athletic commission has its own form of bout agreement which must be signed by the promoter and the boxer and filed with the athletic commission prior to the bout, inasmuch as it is the bout agreement that governs the commercial understanding for such boxer's participation in the boxing event. Attached as Annex B (p. 54) is the form of Bout Agreement required to be filed with the Nevada State Athletic Commission.

The bout agreement will contain the purse and other remuneration being remitted to the boxer, and the deductions to be applied against the purse. The following are certain of the material provisions contained within a customary bout agreement:

> *Boxer will engage in a boxing contest with [opponent] scheduled for twelve (12) rounds to a decision ("Bout") to be broadcast domestically on Network and internationally. The maximum weight for such Bout shall be 140 pounds. The Bout is scheduled to be held on March 6, 2004 at __________ in Las Vegas, NV. The Bout will be conducted and the officials shall be designated in conformity with the rules and*

regulations of the athletic commission and of such international governing body that may sanction the Bout.

As base compensation for the rights granted to Promoter and for the services and the performances required of and to be rendered by Boxer, Boxer shall receive, upon completion of the Bout, the purse of One Million Dollars ($1,000,000.00), together with a training allowance of $50,000, ($25,000 of such training allowance payable concurrently with execution of this Agreement and the balance thirty days thereafter). Promoter may deduct and withhold from the purse only such sums as are necessary for payment of Boxer's share of the applicable athletic commission fees, sanction fees and preauthorized expenses and in compliance with the rules of the athletic commission and the Ali Act.

(Assuming pay-per-view event). In addition to the above base compensation, Boxer shall receive an upside based upon pay-per-view home sales ("Upside"). The Upside for the Boxer shall be $3 for each pay-per-view home sale in excess of 200,000 homes. The pay-per-view home sale reports generated by Network shall be deemed controlling with regard to determining the number of pay-per-view home sales.

3. Television License Agreement

The television license agreement is entered into between the broadcaster (such as HBO, Showtime, Fox, ESPN and Telemundo) and the promoter. The broadcaster remits a license fee to the promoter in exchange for the rights to the exclusive domestic live broadcast of the event. The domestic license fee generally comprises the most substantial element of the overall event revenues received by the promoter, becomes the basis for determining the purses to the boxers, and is used to satisfy various other event and promotional expenses (e.g., marketing, insurance and travel). In addition to the domestic television license fees, many events generate revenues from the broadcast on international networks, depending on the marketability (and nationality) of the boxers and the particular event. As noted above, all event revenues must, nevertheless, be disclosed to the boxer consistent with the requirements of the Ali Act.

The premium domestic cable networks (HBO and Showtime) have historically entered into multi-bout agreements with select popular boxers (e.g., Roy Jones, Shane Mosley and Mike Tyson), whereby the boxer engages in boxing matches solely on a network in consideration for guaranteed bouts and license fees during the term of the agreement (e.g., a minimum of two bouts per year for four years at escalating license fees, customarily including extension provisions or matching rights upon expiration and termination rights in the event of a loss). These multi-bout agreements are becoming somewhat less common due to reduced boxing budgets at the premium cable networks and issues relating to the level of opponents for such contractually committed boxers.

4. Site Agreement

A site agreement is entered into between the venue for the event (e.g., a Las Vegas casino hotel) and the promoter. The promoter agrees to promote a boxing event, or a series of boxing events, and the site provides the venue and may remit a guaranteed fee ("site fee") for the staging of the event, as well as other mutual obligations between the parties. In addition to the site fee, customarily included within a site agreement is an allocation of complimentary rooms and meals (for the promotion team, the boxers and their "entourages"), complimentary tickets for the promoter and the boxers, an agreed-upon budget to market the boxing event within the region and media and promotional appearances by the boxer.

Promoter shall promote the Event at the Site on Saturday, March 6, 2004. The Event shall be telecast live on the Network. The live telecast shall commence at or about 7:00 pm, PST. The Event shall consist of the Main Event (as defined) and a sufficient number of undercard bouts to comply with the requirements of the athletic commission.

Promoter shall provide at its expense the following: the services and participation of the Boxers; purse and expense payments (including travel) due to the Boxers; insurance for all Boxers and other ring personnel as may be required by the athletic commission; officials' fees and expenses, transportation and lodging, including officials, referees, judges and attending physicians.

Site shall provide at its expense the following: use of the Arena commencing not later than 8:00 am on the day preceding the Event and terminating at midnight on the day of the Event; building staff and facilities as customarily provided by Site for events of this type, including security, ushers, set-up, break-down, clean-up, restoration, electricity and public address system.

As full compensation for the rights granted to Site and services to be performed by Pro-

moter under this Agreement, Site shall pay Promoter a guaranteed amount of Two Million Dollars ($2,000,000) (the "Guaranteed Amount") plus a share of Net Receipts (as defined). The Guaranteed Amount shall be paid to Promoter by certified check on the first banking day following the conclusion of the Event.

In addition to the above compensation, Site shall pay Promoter a share of Net Receipts as follows: Site shall retain the first $2,500,000 of Net Receipts; and Promoter and Site shall share all remaining Net Receipts on a 75%/25% basis. Site shall pay Promoter eighty percent (80%) of Promoter's share of Net Receipts as reasonably estimated by Site within five (5) business days following the Event and the remainder of Promoter's share of Net Receipts within fifteen (15) business days after the Event and completion of the accounting for the Event.

5. Management/Consulting/Advisory Agreements

In many circumstances a boxer will retain a manager or other advisor to represent his professional interests. As discussed above, a promoter generally does not have a fiduciary responsibility to a boxer. It is generally the promoter's responsibility to promote the boxer's career through the staging of boxing events and to enhance the awareness of the professional boxer so that substantial purses can be earned by the boxer and commensurate event profits realized by the promoter. It is generally not the promoter's responsibility, however, to ensure that the boxer is protected in all aspects of agreements among the promoter, the boxer and various third parties. Therefore, there is usually the need for an attorney and/or manager to represent the boxer's interest.

A customary management/advisory agreement provides for a percentage (customarily ranging from 10%-33%) of the boxer's purses to be remitted to the manager. In these types of agreements, there should be an absolute understanding as to the expense responsibilities in connection with training, marketing and public relations, and which expenses are the responsibility of the boxer (for example, the trainer and other corner persons' fees). Too many management agreements in the personal services area provide vague financial-expense responsibilities resulting in misunderstandings among the parties.

Various jurisdictions have requirements pertaining to such management agreements, including the length of the term and the maximum percentage that can be received by the manager. For example, pursuant to NAC 467.102(1), the Nevada State Athletic Commission will not honor a contract between a manager and a boxer if the term of the contract is for a period of more than four years. In addition, NAC 467.102(6) prohibits a manager from participating separately or collectively in more than 33 1/3 percent of the earnings of a boxer. Moreover, the Ali Act and rules of many athletic commissions provide for certain "firewalls" to be established between managers and promoters to ensure that there is no conflict of interest between such parties. For example, NAC § 467.104, Unarmed Combat, provides that promoters are prohibited from acting as managers of boxers and from holding certain financial interests.[18] An unarmed combatant may not have a promoter or any of its members, stockholders, officials, matchmakers or assistant matchmakers: (a) act directly or indirectly as his manager or (b) hold any financial interest in his management or his earnings from contests or exhibitions.

A boxer should also consider whether his finances should be handled by his manager or an independent party. In either situation there should be complete accountability (and periodic written reports) to the boxer. It is naturally preferable for all concerned that the boxer's finances be administered by an independent party from a "checks and balances" perspective. In particular, it is not in the manager's best interest to be responsible for the finances of the professional boxer, or any individual client performing such form of personal services. An independent accountant and/or financial advisor should ideally serve in such capacity to avoid even the appearance of a potential conflict of interest or other impropriety related to the boxer's finances, investments and tax considerations.

6. Trainer Agreement

Written agreements between boxers and their trainers are not common within the boxing industry, except for the more renowned boxers and where the purse amounts are generally quite substantial. In certain instances, a promoter may enter into a contract with a trainer whereby such trainer agrees to undertake training responsibilities on behalf of various boxers that have entered into promotional agreements with such promoter.

Unfortunately, litigation in the boxing industry is becoming a relatively frequent occurrence (and, in many circumstances, a commercial weapon), including disputes between a trainer and boxer.[19] In *Rooney v. Tyson*,[20] the jury rendered a $4,415,615 verdict to trainer Kevin Rooney for breach of an oral agreement between Rooney and Mike Tyson. An oral personal services contract between a trainer and a boxer to last "for as long as the boxer fights professionally" was found to provide a definite legally cognizable duration.[21] The *Rooney* Court found that only an employment term of an indefinite or undefined duration would trigger the at-will employment presumption. It reasoned that the at-will presumption was inapplicable because the durational period was "capable of being determined."[22] Conceding that Tyson's boxing career was not precisely predictable and calculable, the Court nevertheless held that the duration of the commercial relationship was reasonably ascertainable.

Depending upon their credentials and experience, trainers generally receive between 5%-10% of the boxer's purse. Nevertheless, there should be a written agreement between the boxer and trainer regarding such fees and the specific services to be rendered by the trainer, including responsibilities of the trainer during training camp leading up to the bout, and what amounts received by the boxer are subject to the percentage compensation to be received by the trainer. For example, training expenses and certain fees received by the boxer associated with international television broadcasts that are separate and apart from his stated purse may not be included in calculating the trainer's compensation. Naturally, it is prudent to confirm the manner in which such payments are being characterized so that the trainer or any other party entitled to a percentage compensation receives his equitable amount.

7. Sponsorship Agreement

Sponsorship support is important both from financial and marketing perspectives. Boxing has generally not been accepted within the mainstream sponsorship categories. For the most part, beer sponsors such as Anheuser Busch, Miller and Corona have sponsored professional boxing. On occasion, large-scale pay-per-view events (depending upon the marquee status of the main event participants) have created ancillary sponsorship opportunities. The reasons for the lack of broad-based sponsorship interest is the perception that the professional boxing fan is within a limited demographic group and, for better or worse, non consumer-friendly controversy continues to be an integral part of professional boxing. While such controversy may enhance the live gate and television ratings for a particular boxing event, this controversy does not necessarily reconcile with the marketing objectives of potential sponsors.

> *Promoter shall conduct the Event on Saturday, March 6, 2004 at ___________ in Las Vegas, Nevada. Sponsor shall be the principal sponsor of the Event. Promoter may grant supporting sponsorship rights to third parties, provided that no such third party manufactures, distributes or sells alcoholic or non-alcoholic malt beverages, bakery products or snack foods.*
>
> *Sponsor shall remit to Promoter a fee of $150,000, payable within seven days following the Event.*
>
> *The Sponsor trademarks, label designs, product identification and related artwork shall remain the property of Sponsor. All rights in the Trademarks under trademark or copyright law or other property rights shall inure to the benefit of and be the exclusive property of Sponsor. Sponsor grants to Promoter, the Site and Network the right to use the Sponsor Trademarks in connection with the Event; provided, however, that said right is nonexclusive, nonassignable and nontransferable. All proposed uses of the Sponsor Trademarks shall be subject to Sponsor's review and prior written approval.*

8. Closed-circuit Agreement

Prior to pay-per-view broadcast events, the premier boxing events (i.e., Ali vs. Frazier in 1971 and Leonard vs. Hearns in 1981) were sold to the public via closed-circuit broadcast. The consumer would attend a movie theater or other public assembly location to view the live broadcast. In such circumstances, a closed-circuit operator contracts with the promoter to receive the live broadcast rights in consideration for a license fee, and then charges an admission fee to the public to view the live broadcast. Pay-per view broadcast actually began in the 1970's in Ohio; however, the large-scale marquee pay-per-view broadcast available for purchase from a consumer's home was introduced on April 12, 1991 when Evander Holyfield and George Foreman engaged in a world Heavyweight Championship Bout from Atlantic City. The Holyfield-Foreman pay-per-view broadcast recorded in excess of one million home buys. Pay-per-view broadcasts are now somewhat commonplace with regard to a variety of entertainment events, although the levels of commercial success (i.e., profits and losses) certainly vary.

Even today, and for live pay-per-view broadcasts, closed-circuit rights exist (creating additional sources of revenue for the promoter), whereby licensees acquire the right to broadcast the pay-per-view event live at designated locations within a territory, such as bars, movie theaters and restaurants. As with pay-per-view events (discussed in detail below), accounting and record keeping become important in confirming the accuracy of, and maximizing, the amounts realized under these commercial arrangements. Moreover, a reality for promoters is that a larger percentage of the population is illegally acquiring so-called "black boxes" or "rate cards," whereby a pay-per-view event is otherwise able to be viewed without cost, which is starting to have a substantial adverse effect on revenues associated with pay-per-view and closed-circuit broadcast arrangements. This is similar to the pirate situation in the music industry, whereby songs are illegally downloaded from the Internet for free, thereby adversely affecting record label, artist, music publisher and songwriter revenues. Many promoters are now undertaking aggressive forms of surveillance activities in order to police, and potentially prevent, such pirating.

> *Promoter grants the right and license for the live exhibition of the Event solely on a closed circuit basis. The term "closed circuit basis" shall mean exhibition of the event at places of public assembly such as theaters, bars, clubs, lounges, restaurants and the like (capacity not to exceed 500 persons) whereby admission or other consideration may be charged or received, solely within the premises located within the Territory.*
>
> *Promoter shall be responsible for delivery of the broadcast quality video and audio signal of the telecast of the Event. Licensee will provide at its expense a television satellite reception facility for each outlet and a signal decoder necessary to receive the video and audio signal of the Event telecast from the delivery point to the outlet.*
>
> *Licensee shall remit to Promoter a fee of $125,000, plus 15% of gross admission fees received by Licensee in connection with the closed circuit broadcast of the Event.*

Pay-Per-View Events

It is widely acknowledged that in order for a professional boxer to reach marquee status he must become a pay-per-view broadcast attraction, requiring the boxing and (hopefully) general sports fan to actually pay to view the live televised boxing match. For most pay-per-view events, commercial success is achieved by attracting not only the avid boxing fan but also the casual sports fan. For those events that have the good fortune to attract the boxing fan, the casual sports fan and the non-sports fan, rest assured that everyone involved will be smiling Monday morning as domestic pay-per-view revenues from the event are tabulated.

There is a distinction between a marquee superstar boxer and a professional boxer who possesses superstar talent. There are quite a few superstar talented professional boxers, yet only very few marquee boxers can attract a pay-per-view audience sufficient to warrant the time, expense and financial risk associated with the promotion of a pay-per-view broadcast.

The gurus in the pay-per-view broadcast industry are Jay Larkin of Viacom's Showtime PPV and Mark Taffet of Time Warner's HBO PPV, the respective pay-per-view arms of these media entities. This section provides general background information on the mechanics of a pay-per-view promotion as well as pro forma financial information on a pay-per-view event based on the assumptions illustrated below.

The Deal. Depending on the particular event, the promoter either assumes financial risk in staging a pay-per-view event or (preferably) secures guaranteed sources of revenue to cover the projected expenses, including purses of the main event participants (generally the largest pay-per-view expense item). The risk arises because there is generally no guaranteed domestic live television revenues (such as a broadcast license fee from HBO or Showtime), rather, domestic television revenues are contingent upon pay-per-view home sales.

The promoter serves as the quarterback of the pay-per-view promotion and enters into various commercial arrangements. The promoter also undertakes promotional, marketing, compliance, administrative and logistical responsibilities in promoting the event.

Distribution Agreement. The promoter enters into a distribution agreement with the distributor of the event, such as Showtime PPV or HBO PPV. While not minimizing the comprehensive and sophisticated technical, marketing and production efforts undertaken by these distribution entities, they are contractually charged with production responsibilities and marketing and distributing the event to cable operators throughout the United States and its territories. Such distribution by either Showtime PPV or HBO PPV is undertaken through pay-per-view affiliates and conduits (most notably, In Demand), enabling local cable operators such as Cablevision in New York City, Cox Cable in Las Vegas or Comcast in Chicago to have the event available for purchase by its regional subscribers. Accounting and record-keeping issues are quite significant and certain promoters have retained accounting firms to audit the records provided by the cable operators and, ultimately, the distributor of the event to confirm the accuracy of the pay-per-view home sales report.

> *(1) Promoter hereby engages Distributor as:*
>
> *(a) the sole and exclusive distributor of the PPV TV telecast of the Event throughout the Territory during the term of this Agreement, and*
>
> *(b) as the sole and exclusive distributor of the delayed telecast(s) ("Delay") of the Event during the period of time commencing as of March 13, 2004 and concluding upon the expiration of sixty (60) days following the conclusion of the Event.*

(2) Distributor shall receive a Distribution Fee based on pay-per-view revenues (cash revenues received from pay-per-view territories and delayed telecasts) in an amount equal to:

(a) 7.5% of the first $8.3 million of pay-per-view revenues, plus

(b) 100% of pay-per-view revenues from $8.3-8.4 million, plus

(c) 0% of pay-per-view revenues from $8.4-8.55 million, plus

(d) 5% of pay-per-view revenues in excess of $8.55 million.

Other Agreements. As with any boxing promotion, the promoter enters into a site agreement with a venue, broadcast license agreements with international networks and cable stations throughout the world, sponsorship agreements, bout agreements with the boxers for their participation in the event, among a plethora of other insurance, travel, production and related vendor and consultancy agreements. Of particular note in a pay-per-view event is that the bout agreement for a main event participant may provide for the boxer to receive a base purse plus a variable financial upside based upon the number of pay-per-view home sales and corresponding domestic live television revenues to the promotion (e.g., $3/per home in excess of 200,000 pay-per-view home sales).

Sponsorship and Marketing. Many sponsors prefer to support a pay-per-view event as opposed to a cable or network televised event because there is a greater promotional and marketing effort put forward by the promoter, the distribution company and the boxers to "hype" the event. As noted above, domestic television revenues are variable as opposed to fixed and an aggressive marketing plan is created and implemented to enhance such event domestic broadcast revenues. Increased hype and marketing dollars means greater exposure to the public for the sponsor. When a boxing event is a pay-per-view broadcast and revenues are contingent upon consumers dialing up their regional cable operator and spending discretionary dollars, it is commonplace for the distributor and the promoter to also retain a public relations and marketing team specifically to create awareness for the event.

The promoter and distributor jointly develop a marketing plan to enhance public and media awareness through the (hopeful) creation of compelling boxing matches and utilizing the demographic following of the event participants. For example, if one of the main event participants is a Latin boxer, there will generally be a focused marketing plan in California, Texas and New York, areas in which pay-per-view data reflects an historic large Latin population supporting pay-per-view boxing. Promoters also endeavor to supplement the main event with undercard bouts that add diverse elements to attract a broader demographic following and the widest viewing fan base.

Scheduling. Most large pay-per-view broadcasts are undertaken in the Spring and Fall for scheduling reasons and broadcast competition at that time (e.g., January Super Bowl, October World Series and March NCAA Basketball Tournament), the holiday season (the consumer is less likely to have discretionary dollars beginning in late November) and the vacation and social calendars of the average consumer (i.e., the summer months).

The Economics of a Pay-Per-View Broadcast

The following sets forth a theoretical example of the manner in which a pay-per-view promotion operates from a financial viewpoint. The principal variable is, of course, the number of homes that purchase the live broadcast of the event generating revenues available for distribution/allocation to the promoter and the boxers.

The following example assumes a pay-per-view broadcast that is estimated to generate between 150,000 to 200,000 homes (reasonably successful by current standards). To provide a framework of these pay-per-view home sale estimates, note the following pay-per-view event results:

- September 29, 2001, Bernard Hopkins vs. Felix Trinidad: 450,000 homes
- June 8, 2002, Lennox Lewis vs. Mike Tyson: 1,900,000 homes
- September 13, 2003, Oscar De La Hoya vs. Shane Mosley: 900,000 homes
- October 4, 2003, Evander Holyfield vs. James Toney: 130,000 homes

While there can be no assurances what a particular event will generate in terms of pay-per-view home sales, there is precedent regarding particular boxers, the compelling nature of certain match-ups and other factors which the promoters, television executives, boxers and their representatives utilize in projecting the contemplated pay-per-view sales and retail pricing. Certain aspects however, cannot be forecasted, such as current events at the time, the economy and the weather.

The following is a broad-based budget for a pay-per-view event, which is not inclusive of all categories inherent in a pay-per-view broadcast but does address the general revenue and expense categories associated with the promotion of a pay-per-view event:

Revenues:

Live Gate[23]	$850,000
Delayed Broadcast	750,000
Net PPV (based on 200,000 homes—see below)	3,700,000
Closed-circuit	100,000
Sponsorship	75,000
Net International Sales[24]	300,000
Total Revenues	**$5,775,000**
Expenses:	
Main Event Purses[25]	$3,500,000
Undercard Purses	600,000
Marketing Budget	800,000
Other Expenses	250,000
[Event Hotels and Meals, Staff and Production, Press Tours and Related Travel, Insurance, Bank Fees, Production Budget, Public Relations, Live Gate Promotion, Consultants, Domestic/International Production, TV Taxes/Athletic Commission, Promoter License Fees, Sanction Fees, Ring Announcer and Miscellaneous]	
Total Expenses	$5,150,000
Net Profit (Loss)	$625,000

The following provides explanatory information on the above budget:

Revenues

Live Gate. $850,000. While not always symmetrical, for a pay-per-view broadcast expecting approximately 200,000 home buys, $850,000 is a reasonable assessment of the live gate. In comparison, the June 8, 2002 Lewis vs. Tyson bout (1.9 million PPV) and the October 4, 2003 Holyfield vs. Toney bout (130,000 PPV) generated gross live gate revenues of approximately $13 million and $2.5 million, respectively. The Holyfield vs. Toney bout reflects that pay-per-view home sales and the live gate revenues do not always have an economic correlation.

Delayed Broadcast. $750,000. This is what a premium cable network such as HBO or Showtime may pay to the promoter to broadcast the event on a delayed basis, commencing generally one week following the date of the live pay-per-view event on its pay-per-view affiliate. Secondary delay broadcasts on television outlets such as ESPN, FOX SportsNet or Univision may also be available in exchange for substantially lower delay broadcast fees, or more likely as a barter arrangement to promote and/or market the pay-per-view event on their cable networks leading up to the event.

Closed-circuit. $100,000. This represents the closed-circuit rights within the United States, such as movie theaters, bars and other closed-circuit outlets, and are typically consolidated by the promoter through one closed-circuit operator who guarantees the promoter a fixed fee and then sells the event throughout the country to its cable network of bars and theaters, among other locations.

International Sales. $300,000. This is an area where there are tremendous variables and, as noted above, many agents and subagents involved. Many promoters "package" international sales. The promoter would sell a fixed number of events to networks within various countries on an annual basis and allocate the gross license fees over a number of events staged by that promoter. It is necessary to review the revenues for the particular event on a country-by-county basis, so that the boxer does not get penalized from such a packaging arrangement.

Sponsorship. $75,000. This is generally based upon a beer company and selling of the ring mat and the ring posts together with corresponding signage. Many sponsorship arrangements in a pay-per-view broadcast include a combination of a cash component paid by the sponsor and a barter arrangement, whereby the sponsor includes the pay-per-view event in its own product advertising.

Domestic Television. As noted above, the domestic broadcast fee is a variable based upon the number of pay-per-view homes for the particular event. Assuming a pay-per-view retail price of $39.95, and following deduction of (a) the percentage of such pay-per-view price to the cable operator (the local cable operator generally gets 50% of the retail price, although such percentage differs based upon the marketability of the event and the desire of the cable company to possess the ability to sell the event to its local cable subscribers) and (b) the approximate 7.5% distribution fee remitted to the distributor (Showtime PPV or HBO PPV as discussed above), the promoter receives approximately $18.50 from each home purchase comprising the domestic television fee.

The following chart is based upon the number of pay-per-view home sales and the corresponding net $18.50 per home pay-per-view revenues realized by the promoter in this example:

Number of Pay-Per-View Home Sales	Net Pay-Per-View Revenues to Promoter (rounded)
75,000 Homes	$1.4 million (@ $18.50/per home)
100,000 Homes	$1.85 million
150,000 Homes	$2.8 million
200,000 Homes	$3.7 million
250,000 Homes	$4.6 million
300,000 Homes	$5.5 million

There are various aspects of a pay-per-view promotion which require a knowledge of boxing industry personnel, legal and commercial considerations and sophisticated assessments of the results that can be reasonably expected from a pay-per-view broadcast, justifying the enhanced expense, time and commercial risk necessary to stage and promote such an event. The above does not cover all of the intricacies of a pay-per-view broadcast and is not intended in any manner to minimize the enormous effort that is undertaken by literally hundreds of people in order to achieve a successful pay-per-view event.

Conclusion

Professional boxing has been around for centuries, and is likely to continue for many years to come. While not considered within the mainstream of sports, the substantial dollars, glorified history and the "electricity" that is generated at a major World Championship Boxing event is arguably unparalleled by any other sporting event. It is also acknowledged that the economics associated with professional boxing are being adversely affected by many factors, including the saturation of pay-per-view broadcasts, reduced budgets at the premium cable networks and a fan base that is being affected by the controversy and perceived abuses within the boxing industry (e.g., mismatches within the ring or corrupt activities outside of the ring). Despite these many challenges, professional boxing is a sport that will endure.

This article sought to address in a broad overview manner various legal and commercial considerations inherent within the boxing industry. While legislation has been enacted to try and prevent certain of the abuses referenced above, federal governance may not be the answer and the sport needs some form of overhaul in order for those involved in the industry to prosper, let alone to financially survive. Currently, very few gain financially in boxing at each and every level of the industry. As mentioned earlier, efforts are being undertaken with regard to the potential establishment of a governing body, similar to the Office of the Commissioner in Major League Baseball. Whether boxing is too splintered in order to achieve such uniformity of rules, regulations and legal considerations is to be determined, but is likely essential.

Endnotes

1. For example, during 2002, the licensing of Mike Tyson within the State of Nevada became both a media circus and a political quagmire. While receiving a boxing license from an athletic commission is a relatively standard procedure (subject, of course, to issues of health, age and other safety considerations as well as the approval process inherent in the matchmaking), the reissuance of Mr. Tyson's boxing license became critical in the efforts to promote future bouts for Mr. Tyson in the State of Nevada and the corresponding substantial revenues that would be derived therefrom.
2. 15 U.S.C. § 6301 *et seq.* (2000).
3. Relating to this particular issue, New York court documents reflect numerous relationships whereby Don King was the promoter of a particular boxer and Carl King (Don's son) was the manager of that same boxer. It is generally the responsibility of the manager to negotiate, on behalf of the boxer, with the promoter in order to maximize the boxer's financial arrangements for bouts in which he participates. In certain of these circumstances, the Court documents further disclose that Carl King had borrowed hundreds of thousands of dollars from his father which remained outstanding during the timeframe of such promotional/managerial relationship with the boxer, which counsel argued created a conflict of interest and, at a minimum, clouded the ability of Carl King to negotiate at arm's length with his father on terms that would otherwise have been in the best interests of the boxer. In December 2003, in a separate case with similar conflict of interest considerations, Don King settled a lawsuit filed by retired professional boxer Terry Norris by agreeing to remit $7.5 million to Mr. Norris, who alleged that due to a conflict of interest between Mr. King and Mr. Norris' manager between the period June 1994 through April 1997 the purse amounts remitted to Mr. Norris were substantially less than fair market value, and what would otherwise have been remitted in an arm's length transaction. It was a stipulated fact in that case that Mr. King had "loaned" Joseph Sayatovich, the manager of Mr. Norris, approximately $300,000 during the same timeframe in which Mr. King was the promoter of Mr. Norris. One of the apparent triggering events resulting in the financial settlement by Mr. King was the request to the Court from the jury foreman, during jury deliberations, for a calculator (presumably, to calculate the substantial damages incurred by Mr. Norris based, at least in part, upon the aforementioned conflict of interest).
4. *United States v. Robert W. Lee*, CR 99-640 (D. N.J. Feb. 14, 2001).
5. *Graciano Rocchigiani v. WBC, Inc.*, 131 F. Supp. 2d 527 (S.D.N.Y. 2001).
6. *See Ketcham v. Hall Syndicate,* 37 Misc. 2d 693 (1962).
7. *Oscar De La Hoya v. Top Rank, Inc*., CV 00-9230-WMB, at 1 (C.D. Cal. Feb. 6, 2001).
8. *Id*. at 23.
9. In certain jurisdictions (e.g., Nevada) "exclusive" promotional agreements are not permissible. For example, Section 467.112(2) of the Nevada Administrative Code states that "[an] agreement which provides that an unarmed combatant must fight exclusively for one promoter or at the option of the promoter is pro-

hibited." In these circumstances, to avoid "exclusivity," a provision is generally included within the promotional agreement permitting the boxer to engage in so-called "other bouts" for other promoters; provided, however, that such other bouts may not occur within a stated timeframe associated with a bout otherwise contemplated to be promoted for the boxer, and in certain circumstances prohibits such "other bout" to be televised.

10. *Lewis v. Rahman*, 147 F. Supp. 2d 225 (S.D.N.Y. 2001).
11. *Id.* at 235.
12. Lennox Lewis knocked out Hasim Rahman in the fourth round of their Nov. 17, 2001 rematch and regained the World Heavyweight Championship.
13. *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 778 (S.D.N.Y. 1990).
14. *Id*. at 780.
15. *Don King Productions, Inc. v. Douglas,* 742 F. Supp. 741 (S.D.N.Y. 1990).
16. *Id*. at 769.
17. *Id*. at 770.
18. NRS 467.030.
19. Substantial efforts have been made to establish a governing body whereby disputes would be the subject of arbitration, similar to proceedings in other professional sports, as with Major League Baseball and the National Basketball Association. Such efforts continue and generally are perceived to be a positive development due to the substantial costs associated with litigation and the inability of most individuals and entities within the professional boxing industry to fairly compete and participate in such litigation despite their legal positions.
20. *Rooney v. Tyson*, 91 N.Y.2d 685 (1998).
21. *Id*. at 694.
22. *Id*. at 697 (quoting *Weiner v. McGraw Hill*, 57 N.Y.2d 458, 465 (1982)).
23. Such amount reflects the gross live gate, and the promoter would be responsible for athletic commission and related state and/or city taxes associated with the live gate revenue. A promoter upside based on net receipts from gate revenues may be incorporated into the site agreement.
24. There are many agents and subagents in various territories throughout the world to whom commissions are paid in generating international sales. Generally a commission in the range of 10%-20% is paid to such agents in order to secure the license fee from networks within the various international territories. In certain instances, one consolidator is granted the license to sell throughout the world, and in other instances a promoter may farm out the international sales through more than one agent based upon the agents' relative strengths within select territories.
25. Base purse, and does not include potential upside for the main event participants relating to pay-per-view home sales.

Jeffrey S. Fried, an attorney and certified public accountant, has practiced for 18 years in the areas of corporate finance and sports and entertainment law. In 1994, he established Fried & Company, P.C., a Washington, D.C.-based law firm comprised of attorneys, management personnel and other professionals concentrating in the representation of corporate interests, athletes, entertainers, media interests and the commercial and legal aspects of sports and entertainment events. Jeff is involved in community activities and children's charities such as The Foundation for Exceptional Children, Special Olympics, The Mickey Mantle School and The Starlight Foundation. He is establishing the Coney Island College Scholarship Fund for deserving children from that area of Brooklyn. A graduate of the City University of New York-Brooklyn College (B.S.-Accounting) and the American University School of Law, Jeff is a member of the New York State and District of Columbia Bars. Prior to practicing law, Jeff served as a CPA with one of the "Big 8" accounting firms, Deloitte Haskins & Sells, concentrating in tax and international corporate planning.

ANNEX A

Required Disclosures by Promoter to Boxer
(as required by Section 13 of the Muhammad Ali Boxing Reform Act)

Name of Boxer:

Date of the Event:

Location of the Event:

As the Promoter for the above named event ___________ has received the following compensation or consideration resulting from your match:

ITEM	AMOUNT RECEIVED	RECEIVED FROM
Site Fee	$	
Domestic Television Revenue	$	
Sponsorship	$	
International Television Broadcast	$	
Other (describe)		

______________________ ________________________ ______________

Boxer Promoter Date

Required Disclosures by Promoter to Boxing Commission
(as required by Section 13 of the Muhammad Ali Boxing Reform Act)

Name of the Promoter:

Date of Event:

Location of the Event:

As the Promoter of the above event, _________ affirms that the following has been provided to the applicable Athletic Commission:

A copy of any and all Agreements in writing that ____________, as the Promoter, has with any Boxer participating in the match, and that there are no other agreements written or oral, between ____________ or the Boxer with respect to the above named event. This shall include any reduction in a Boxer's purse that is contrary to any previous agreement between the Boxer and ____________. Also, set forth below is a listing/description of any active and binding agreements with the Boxer other than those attached for this particular bout.

As the Promoter of the above event, ____________ also hereby affirms that the following represents all charges, fees and expenses that ____________ will assess, including any training expenses, on the following Boxers and any portion of the Boxers' purse that ____________ will receive. This list includes only Boxers that ____________ is assessing costs to and/or whereby ____________ is taking a share of the Boxer's purse.

Name of Boxer	All costs that will be assessed on this Boxer	Promoter's share of this purse
1.	See Attached	N/A
2.	Payment Breakdown	N/A
3.		N/A
4.		N/A
5.		N/A

____________ also hereby affirms that the following monies represents all payments, gifts or benefits that ____________, as the Promoter, are providing to any Sanctioning Organization affiliated with the above named event.

Name of Sanctioning Organization	$$ Amount of payment and/or type of gift or benefit that was provided
1. World Boxing Council	
2. International Boxing Federation	
3. World Boxing Association	
4. World Boxing Organization	

The undersigned hereby affirms that the statements made herein are true and correct to the best of ____________ information, knowledge and belief, and are made subject to the penalties prescribed for perjury set forth in (the applicable ________ codes).

____

By: Authorized Representative

ANNEX B

NEVADA ATHLETIC COMMISSION
OFFICIAL BOUT AGREEMENT

THIS AGREEMENT, Made this ____ day of _______________, ___________, by and between ___________________________ of (city) ____________, (state)__________, a promoter of unarmed combat, duly licensed under the laws of the State of Nevada (whether one or more, individually, or as an association, hereinafter referred to as the "Promoter"), and ______________________ of (city) _______________, (state) ___________, professional unarmed combatant ("Contestant"), and _______________________ of (city), ________________, (state) _______________, a duly license manager under the laws of the State of Nevada (whether one or more, hereinafter referred to as the "Manager").

WITNESSETH: In consideration of the mutual covenants and agreements hereinafter contained, the parties hereto agree to and with each other as follows:

1. **Definitions.** In this agreement, the words and terms used herein, unless the context otherwise requires, shall have the meanings ascribed to them in Nevada Revised Statutes ("NRS") and Nevada Administrative Code ("NAC") Chapter 467.

2. **Appearance of Contestant.** The Contestant will appear and enter into a contest of unarmed combat at the site location of _________________, Nevada on the ____ day of _________, ______, or on a date to be hereafter agreed upon, for ____ rounds to a decision with ______________________ of _______________ as his or her opponent, at a weight not over ____ pounds, said weight to be taken on the certified scales of the Promoter (this contest is hereinafter referred to as the "Bout").

3. **Compensation of Contestant.** The Promoter will pay the Contestant for the Bout, and the Contestant agrees to accept in full of all claims and demands for his services and the performance by him or her of the Bout, the sum of ______________________ Dollars ($_________) (the "Compensation").

4. **The Bout.** The Bout shall be conducted in all respects in conformity with the laws of the State of Nevada, and the rules and regulations of the Nevada Athletic Commission (the "Commission"), which are hereby made a part of this agreement. The referee of the Bout shall be licensed to act as such by the State of Nevada, and selected and assigned to act as a referee of the Bout by the Commission.

5. **Reporting Time.** The Contestant shall personally report at the above-named site location for weighing and medical examination, in accordance with the rules and regulations of the Commission, and shall report at the site to the Executive Director two (2) hours before the time set for the contest.

6. **Publicity.** The Contestant agrees to appear when and as directed by the Promoter at all reasonable times for publicity purposes.

7. **Payment of Manager's Share.** Should the Contestant desire the Manager to be paid directly by the Promoter, deducting such amount from the Contestant's share of the purse (a) the Manager must be licensed by the Commission, (b) a valid contract between the Contestant and the Manager must be on file with the Commission, (c) the amount to be paid to the Manager must not exceed one-third of the compensation, and (d) the contestant must specify and initial any such amount below.

MANAGER'S SHARE $__________/___% INITIALS OF CONTESTANT _____

8. **Breaches of this Agreement.** The following acts or omissions constitute a breach of this agreement if the Commission shall decide that (a) The Contestant and the Manager, or either of them, did not enter into this agreement in good faith; (b) The Contestant and the Manager, or either of them, had any collusive understanding or agreement regarding the termination of the Bout other than that the same should be on an honest exhibition of skill on the part of the contestants; (c) The Contestant is not honestly competing or did not give an honest exhibition of his or her skill; or (d) The Contestant, the Manager and the Promoter, or any of them, is guilty of an act detrimental to the interest of unarmed combat or is guilty of violating any provision of NRS/NAC Chapter 467.

9. **Agreements in the Event of a Breach.** The parties agree that if the Commission or its Executive Director determines that the possibility of a breach of this agreement exists, as set forth in Section 8 of this agreement, the Commission or its Executive Director, in their discretion, may order that the Promoter or any person holding the Compensation, to pay the Compensation directly to the Commission. The parties hereby waive any right or claim to a

hearing on this matter. The Commission shall thereupon, in its sole discretion, make such a disposition of the Compensation as it deems to be in the best interest of unarmed combat, subject to the provisions of NRS/NAC Chapter 467. The parties agree and understand that if the Commission or its Executive Director determines that the possibility of a breach exists, as set forth in Section 5 of this agreement, that no part of the Compensation shall be distributed unless so ordered by the Commission after a hearing held in accordance with NRS/NAC Chapter 467.

INITIALS OF PARTIES (P) __________ (M)__________ (C)__________

10. **Applicable Law.** It is understood and agreed that the rights and obligations of the parties hereto shall be governed by, and construed according to the laws of the State of Nevada. The terms of this agreement shall in all respects be in conformity with the laws of the State of Nevada, and the rules and Regulations now or hereafter adopted by the Commission, which laws and rules are hereby made a part of and incorporated into this agreement. It is agreed by all of the parties that any action arising out of this agreement, shall be commenced in the State of Nevada.

11. **Assumption of the Risk.** The Contestant understands that by participating in a contest of exhibition of unarmed combat, that the Contestant is engaging in an abnormally dangerous activity. The Contestant further understands that his participation subjects the Contestant to a risk of severe injury or death. The Contestant, with full knowledge of this risk, nonetheless, agrees to enter into this agreement and hereby waives any claim that the Contestant or Contestant's heirs may have against the Commission and/or the State of Nevada as the result of any injury the Contestant may suffer as a result of Contestant's participation in any contest of exhibition of unarmed combat in the State of Nevada.

INITIALS OF CONTESTANT _________

12. **Release.** The parties, for themselves, their heirs, executives, administration, successors, and assigns, hereby release and forever discharge the State of Nevada and the Commission, and each of their members, agents, and employees in their individual, personal and representative capacities, from any and all action, causes of action, suits, debts, judgments, execution, claims and demands whatsoever known or unknown, in law or equity, that the parties ever had, now have, may have, or claim to have against any and all of the persons or entities named in this paragraph arising out of, or by reason of this agreement, or any other matter.

13. **Indemnification.** The parties, jointly and severally hereby indemnify and hold harmless the State of Nevada and the Commission, and each of their members, agents, and employees in their individual, personal and representative capacities against any and all claims, suits and actions, brought against the persons named in this paragraph by reason of this agreement and all other matters relating thereto, and against any and all expenses, damages, charges and costs, including court costs and attorney fees which may be incurred by the persons and entities named in this paragraph at a result of said claims, suits and actions.

14. **Entire Agreement and Modification.** This agreement constitutes the entire agreement of the parties and as such is intended as a complete and exclusive statement of the promises, representations, negotiations, discussions, and other agreements that may have been made in connection with the subject matter hereof. All prior agreements are superseded and excluded. Unless expressly authorized by the terms of this agreement, no modification or amendment to this agreement shall be binding upon the parties unless the same is in writing signed by the respective parties hereto, and filed with the Commission.

15. **Proper Authority.** The parties hereto represent and warrant that the person executing this agreement on behalf of another party, if applicable, has the full power and authority to enter into this agreement.

16. **Severability.** If any provision in this agreement is held to be unenforceable by a court of law or equity, this agreement shall be construed as if such provision did not exist and the nonenforceability of such provision shall not be held to render any other provision or provisions of this agreement unenforceable.

17. **Notices.** All notices or other communications required or permitted to be given under this agreement shall be in writing and shall be deemed to have been duly given if delivered personally in hand, by telephonic facsimile or mailed regular or certified mail to the appropriate party at the last known address on record with the Commission. It is understood by the parties that it is the responsibility of each party to notify the Commission of any change of address.

18. **Waiver of Breach.** Failure to declare a breach or the actual waiver of any particular breach of the agreement or its material or nonmaterial terms by either party shall not operate as a waiver by such party of any of its rights or remedies as to any other breach.

19. **Assignment.** Neither party shall assign, transfer nor delegate any rights, obligations or duties under this agreement without the prior verbal or written consent of the Commission or the Executive Director of the Commission.

IN WITNESSETH WHEREOF, the parties hereto affix their signatures on the date indicated.

PROMOTER ____________________________

By (Signature) ___________________________ Date: ______________

CONTESTANT __________________________ Date: ______________

MANAGER _____________________________ Date: ______________

NOTICE TO MATCHMAKER: Each contestant MUST BE SIGNED on this Official Bout Agreement. The original Bout Agreement MUST be submitted by weigh in time to the Commission.

Managers handling contestants under so-called "verbal agreements" cannot sign contracts for contestant's appearance as verbal agreements are not recognized by the Commission. If a contestant has no written agreement with a licensed manager, the contestant must sign his or her own Bout Agreement.

WHITE COPY-Commission YELLOW COPY-Promoter BLUE COPY-Contestant

Clearing the Airwaves: Will the FCC's Crackdown on Indecent Broadcasts Put a Chill on Protected Speech?

By Eleanor Lackman

A New Focus on Indecent Broadcasts

In recent months, broadcasters and the public alike have learned that freedom of speech is not really free. From Janet Jackson's Super Bowl halftime incident, to Bono's use of the "F-word" at the Golden Globe awards, to the elimination of the Howard Stern show from Clear Channel radio stations, the Federal Communications Commission's ("FCC") crackdown on broadcast indecency has sent shockwaves through the airwaves. Whereas historically the FCC rarely reacted to indecent broadcasts, in the first four months of 2004, the FCC had assessed over $1.6 million in indecency fines. As the definition of "indecent" speech becomes increasingly amorphous and the fines for such speech hit new heights, media companies and on-air talent are watching their words more closely than ever.

The FCC's regulations for broadcast indecency, rooted in standards for obscenity, were modified to fit the public forums of radio and broadcast television. However, as a consequence of limited judicial rulings and policies of non-censorship, broadcasters are often unaware that they have violated indecency regulations until days to months after the offending material is sent over the air. The rising fines and chill on speech have led broadcasters and listeners to query whether, in the absence of any proof of harm to children or adults, the FCC regulations and the corresponding fines are justified at all.

"No" Does Not Mean "No": The First Amendment's Rejection of Obscenity

The *Roth* Standard

Although the First Amendment provides that "Congress shall make no law . . . abridging freedom of speech . . . or of the press,"[1] this rule has never been followed to the letter, especially when sexually-explicit speech is involved. *Roth v. United States*[2] marked the first time that a majority of the Supreme Court addressed and agreed upon a standard of obscenity. In writing for the Court, Justice Brennan promptly noted that in 1792 every state that had ratified the Constitution gave "no absolute protection for every utterance," and that these states had all outlawed libel, with some outlawing blasphemy and profanity as well.[3] Therefore, unless ideas had any slightly redeeming social importance, the First Amendment would not protect them. Thus obscenity, because it is "utterly without redeeming social importance,"[4] would not be considered protected speech and would also therefore not implicate any tests of "clear and present danger."[5]

Having decided that obscenity was outside the scope of the First Amendment, the Court set out to delineate exactly what did and did not fall into the category of obscenity. Justice Brennan defined obscene material as "material which deals with sex in a manner appealing to prurient interest," noting that the portrayal of sex in art, literature or scientific works is not sufficient to deny the material First Amendment protection.[6] Ultimately, the Court decided to reject an earlier test, which focused on the effect on "susceptible persons,"[7] in favor of a test that asked "whether to the *average person*, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[8]

A New Standard: *Miller v. California*

In the years following *Roth*, although the Supreme Court frequently affirmed the *Roth* standard, by the mid-1960's, the majority of the Court had begun to splinter. In 1973, when a new, more conservative Supreme Court reviewed *Miller v. California*,[9] it would dramatically change the *Roth* standard for obscenity. The test the Court set forth remains as the current obscenity test today.

Miller v. California marked the first time in years that a five-Justice majority would agree on a dominant standard, although this standard would be quite different from the *Roth* test. In the case, Miller had been convicted of violating a California law after he distributed brochures containing sexually explicit pictures as part of an unsolicited mail advertising campaign.[10] In an opinion written by Chief Justice Burger, the Court recognized that "the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles."[11]

After the *Miller* decision, what remained from the Court's previous holdings was that obscenity was not protected by the First Amendment and that "prurient interest" would continue to be an element of the law. Almost everything else from *Roth* and its successors changed.[12] For example, the Court set forth a new test for obscenity:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . .;
>
> (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
>
> (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[13]

Burger also dismissed the national community standard test, calling it "an exercise in futility," and stating that "[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas or New York City."[14]

The Supreme Court, at least under the obscenity standard, has rejected the argument that obscenity cannot be regulated in the absence of proof of harm to society. For example, in *Paris Adult Theatre v. Slaton*,[15] handed down the same day as *Miller*, the Court wrote, "[w]e do not demand of legislatures 'scientifically certain criteria of legislation,'"[16] and legislatures may act on conclusions in the interest of protecting "the social interest in order and morality:"[17]

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.[18]

It is unclear whether this rationale applies to broadcasting. As will be discussed *infra*, at least one court has held that some proof of harm is necessary to justify the FCC's restrictions on broadcast speech.

The Edge of the First Amendment: Limits on Broadcast Speech

Keeping It Clean: The FCC Lays the Foundation

Curtailment of speech has been quite controversial in the area of radio broadcasting, although generally the sanctions do not relate to content that is considered "obscene," but rather to content that the FCC calls "indecent." Three statutes have been at the center of the controversy that has arisen from this specialized limit on First Amendment protection. The first, 47 U.S.C. § 303(g), states that the FCC must "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[19] The second, 47 U.S.C. § 326, which is part of the Communications Act of 1934, provides that:

> Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[20]

Finally, 18 U.S.C. § 1464 sets forth that "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both."[21] The latter two provisions are those that have raised conflict, while the former provision, along with the rationales raised in *Miller* and other obscenity cases, has provided the courts' justification for restricting the First Amendment when broadcasting is involved. These justifications have been used even when broadcasts are merely "indecent" and not obscene.

The FCC addressed the issue of radio indecency for the first time in *In re WUHY-FM*.[22] WUHY was a noncommercial educational radio station located in Philadelphia, Pennsylvania, which aired a variety of programming, including "Cycle II," a "one-hour weekly broadcast which is 'underground' in its orientation and 'is concerned with the avant-garde movement in music, publications, art, film, personalities, and other firms of social and artistic experimentation,'" from 10 p.m. to 11 p.m.[23] On January 4, 1970, the FCC was monitoring the radio station after it had received some complaints about other broadcasts during that timeslot, when WUHY broadcast a tape-recorded interview with Jerry Garcia of "The Grateful Dead."[24] The volunteer broadcasters and the volunteer producer who edited the tape did not seek clearance from the station manager to broadcast the interview.[25] The interview featured Garcia's thoughts on the environment, music and philosophy, but his comments were dotted with the words "f—" and "s—."[26] Soon after the broadcast, the FCC sent WUHY a letter charging the station with making an indecent broadcast.[27]

In reviewing the case, the FCC noted that in accordance with 47 U.S.C. § 326, "The issue in this case is not whether WUHY-FM may present the views of Mr. Garcia . . . on ecology, society, computers, and so on. Clearly that decision is a matter solely within the judgment of the licensee."[28] Referring to 47 U.S.C. § 303(g), the FCC explained that "It would markedly disserve the public interest, were the airwaves restricted only to inoffensive, bland material."[29] However, the FCC, referencing both *Miller* and section 303(g), stated that this speech in particular "has no redeeming social value, and is patently offensive by contemporary community standards, with very serious consequences to the 'public interest in the larger and more effective use of radio.'"[30] The FCC claimed that nobody has the right to use such language in a public forum.[31]

Continuing with the concern about the public interest, the FCC argued that if interviewees were allowed to use such language, then newscasters and disc jockeys might use the same expressions, "on the ground that this is the way they talk and it adds flavor to the emphasis of their speech."[32] The consequences of this, the FCC argued, would offend millions of listeners and undermine the usefulness of radio to them.[33] The FCC held that this restriction would not run counter to the Supreme Court's obscenity decisions because the nature of radio is different; reading a book or seeing a film requires the active opening of the book or going to the movies, whereas listening to the radio is a passive activity and might have an effect on unwilling listeners or children.[34]

Under 18 U.S.C. § 1464, the FCC held that it has authority to regulate speech that is not obscene—which it agreed the interview was not, under the Supreme Court's test for obscenity—but is indecent.[35] The FCC defined "indecent" as referring to broadcast material that is "(a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value."[36] In applying this standard, broadcasts were not to be considered as a whole.[37] Thus, under the new standard, the FCC found that the broadcast of the interview was a willful violation of the Communications Act of 1934.[38]

Two of the commissioners dissented from the ruling. Commissioner Cox, dissenting in part, took issue with the majority's prediction that if the FCC did not act against the Garcia broadcast, offensive language on the radio would become an endemic problem.[39] Cox believed a worse alternative might result: That radio stations might not carry programming that they might have otherwise broadcast, due to fear that a listener might be offended and complain to the FCC, which would fine the station, as it did WUHY.[40] As possible proof, the "Cycle II" program was suspended in its entirety after the FCC fined WUHY, depriving its audience of the value the majority recognized it had.[41]

In addition, Cox noted that although the words were offensive to some, the series was directed at a college-aged group and not at children or middle-aged adults, broadcast late at night, and WUHY received no actual complaints about the Garcia broadcast.[42] Cox observed, "So far as I can tell, my colleagues are the only people who have encountered this program who are greatly disturbed by it."[43] In fact, most complaints to the FCC at the time involved matters outside the scope of the ruling, including claims

> that certain records contain cryptic references to the use of drugs, that others are sexually suggestive, that the skits and blackouts on the Rowan and Martin Laugh-In are similarly suggestive, that the costumes on many variety programs are indecent . . . . But I think I could count on the fingers of both hands the complaints that have come to my notice which involve the gratuitous use of four letter words in situations comparable to the one in this case.[44]

Cox warned of a likely chilling effect because he believed that the definition of "indecent," according to Cox, was not defined well enough to provide clear notice to broadcasters.[45]

In his dissent, Commissioner Johnson suggested that the FCC was punishing a culture "it fears because it does not understand" and agreed that the FCC did not create a constitutionally satisfactory definition of the term "indecent."[46] He also took issue with the FCC's failure to identify, survey or define the "community" in "contemporary community standards."[47] Johnson noted that WUHY had received several awards for programming, including the Corporation for Public Broadcasting's "Public Criteria" award—the only such award given to a station in the Philadelphia area.[48] He noted that the ruling could cause managers to limit this award-winning programming to avoid crossing the FCC's line of "indecency," a truly unfortunate consequence, especially if the FCC "once again proves itself to be more interested in profitable speech than free speech."[49]

Pacifica: A Test Made for Radio

The Supreme Court first addressed the issue of broadcast indecency eight years later in another case involving a noncommercial radio station, *FCC v. Pacifica Foundation*.[50] In *Pacifica*, a New York radio station, WBAI-FM, broadcast at around 2 p.m. a George Carlin 12-minute monologue entitled "Filthy Words" as part of a program addressing society's attitude about language, which was preceded by a warning that the language "might be regarded as offensive to some."[51] While the station received no complaints about the broadcast, the

FCC did receive one complaint from a man who said he heard the broadcast while driving in his car with his young son.[52] Although Pacifica argued that Carlin was not using obscenities and was instead satirizing society's attitudes about speech, the FCC nonetheless decided to issue an order granting the complaint and warning that the FCC could take away Pacifica's license or impose a fine.[53]

As in *WUHY-FM*, the FCC used 18 U.S.C. § 1464 and 47 U.S.C. § 303(g) to justify its action, finding the language of the broadcast "patently offensive," though not obscene.[54] This time, however, the definition of indecency that it used had changed to reflect the 1973 *Miller* decision, omitting the "utterly without redeeming social value" component and instead making references to subject matter and the existence of children in the audience:

> [The] concept of 'indecent' is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[55]

Thus, the Court would have to review the following issues:

> (1) whether the scope of judicial review encompasses more than the Commission's determination that the monologue was indecent 'as broadcast';
>
> (2) whether the Commission's order was a form of censorship forbidden by § 326;
>
> (3) whether the broadcast was indecent within the meaning of § 1464; and
>
> (4) whether the order violates the First Amendment of the United States Constitution.[56]

The Court, in an opinion by Justice Stevens, quickly decided that this situation did not involve a "rule," and therefore the FCC's decision would be confined to its facts.[57] Proceeding to the issue of censorship, the Court clarified that section 326 never allowed prior restraint, but it also did not forbid the FCC the power to review completed broadcasts.[58] In addition, the Court affirmed the FCC's authority to "cancel[ ] the license of a broadcaster who persists in a course of improper programming," although this could be considered the ultimate form of prior restraint and may create a significant chilling effect on broadcasters.[59]

The Court then proceeded to review whether the monologue was "indecent" within the limits of section 1464; however, because the Court since *Miller* had declined to use *de novo* review in questions of obscenity, it would only decide whether the FCC's definition of "indecency" was improper. On the FCC's side, it set out several words that were "patently offensive"; Pacifica said the broadcast was not indecent because there was no prurient appeal.[60] The majority rejected Pacifica's argument on a textual basis:

> The words 'obscene, indecent or profane' are written in the disjunctive, implying that each has a separate meaning. Prurient appeal is an element of the obscene, but the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality.[61]

In response, Pacifica argued that the Court had previously defined "indecent" as "obscene."[62] The Court rejected Pacifica's reliance on an opinion by Justice Harlan that said that "the phrase 'obscene, lewd, lascivious, indecent, filthy or vile,' taken as a whole, was clearly limited to the obscene,"[63] stating that "the Commission has long interpreted section 1464 as encompassing more than the obscene."[64] Noting the differences between printed material and broadcast matter, the Court decided that the FCC's interpretation would control.[65] Thus, the Court held that the element of prurient appeal would not be an essential component of "indecency," and thus there would be no reason to disagree with the FCC's finding that the monologue was indecent.[66]

Finally, the Court addressed whether the FCC's order was overbroad, even if the monologue was not protected, and whether the Constitution allowed the FCC to restrict speech outside of obscenity. The Court dismissed the first argument because the question was limited only to the particular broadcast; "indecency is largely a function of context—it cannot be adequately judged in the abstract," and the FCC has no authority to issue broad regulations.[67] However, the Court explained that the FCC must not impose sanctions without warning where the law is unclear.[68] Despite the ambiguity in the law, the majority found that the balances weighed in the interest of the public:

> It is true that the Commission's order may lead some broadcasters to censor themselves. At most, however, the Commission's definition of indecency will deter only the broadcasting of patently offensive references to excreto-

> ry and sexual organs and activities. While some of these references may be protected, they surely lie at the periphery of First Amendment concern. . . . There are few, if any, thoughts that cannot be expressed by the use of less offensive language.[69]

The Court then returned to an area it had ignored in the definition of obscenity: clear and present danger. "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."[70] Here, the nature of the medium may expose children, even those too young to read, to broadcasts that are "vulgar," "offensive," and "shocking," as the Court found the Carlin broadcast to be, and thus the FCC can regulate such programming even if it is not obscene.[71]

Justice Blackmun in his concurrence wrote that the words in the monologue were chosen for their shock value and were thus patently offensive.[72] However, Blackmun opposed the Court's valuation of speech as more or less valuable: "This is a judgment for each person to make, not one for the judges to impose upon him."[73]

Justice Brennan, the author of the *Roth* obscenity opinion, wrote for the four-member dissent, arguing that "indecent" must prohibit only "obscene" speech—thus the Carlin monologue must be protected—and that protected speech should not vary with the judgment of five members of the Court.[74] The Court's conclusion, Brennan argued, was based on a "time, place and manner" argument, but this argument did not justify the possible homogenization of radio that could result from the decision.[75] He further argued that listeners' interests in hearing non-obscene broadcasts should be protected, even if the members of the Court find them offensive.[76] Brennan finally observed that privacy interests are not affected by indecent broadcasts, explaining that a person who makes the active choice of turning on the radio may also turn it off if he is offended.[77]

Time, Place and Manner: Creating the Safest Harbor

Although the Supreme Court has not considered the issue of broadcast indecency since *Pacifica*, the United States Court of Appeals for the District of Columbia Circuit, in an opinion written by future Supreme Court Justice Ginsburg, set forth an important ruling concerning the FCC's regulation of broadcast indecency in *Action for Children's Television v. FCC*.[78] *Action* involved three separate orders from April 1987 given to three broadcasts, two of which aired after 10 p.m. and the other between 6 a.m. and 10 a.m.[79] In December 1987, the FCC set forth a new standard for administering the limits on the use of broadcasted indecent language and also adjusted the "safe harbor" times when indecent language could be broadcast from between 10 p.m. and 6 a.m. to between 12 a.m. and 6 a.m., reflecting "the FCC's 'current thinking' on 'a reasonable delineation point.'"[80]

As in *Pacifica*, the broadcasters again argued that the FCC's definition of obscenity was unconstitutionally vague and overbroad.[81] As the new, shorter safe harbor only covered "the hours most listeners are asleep," the broadcasters argued that the FCC's regulation would "effectively [deny] adults access to constitutionally-protected material."[82] In its ruling, the court deferred to the *Pacifica* decision in holding that the FCC explained its reasons for changing its enforcement standard well enough, and that: "Consideration of petitioners' vagueness challenge . . . is not open to lower courts" in light of that decision.[83] Thus, the plea on overbreadth would not be an effective argument because "it attacks the FCC's generic definition of indecent material."[84]

In *Pacifica*, the Court restricted the holding to the facts that "indecent" words were repeated over and over, and the FCC said it would follow the holding strictly.[85] In fact, the FCC used the repetitious broadcast of the "seven dirty words" as the standard for "indecency" and would not send orders to broadcasters who restricted indecent programming to hours between 10 p.m. and 6 a.m.[86] As a result, the FCC found no broadcasts actionable from 1976 until the three broadcasts in *Action*.[87]

However, in *Action,* while the broadcasters asked the court to rule on whether the broadcasts were indecent, the court declined to do so, stating that the FCC's action was distinct enough from the facts in *Pacifica* and thus required a different response from the court.[88] Although the FCC order in *Pacifica* related specifically to the facts of the case, by the time the D.C. Circuit considered *Action*, the FCC set forth a generic standard to apply to all broadcasts and notified all broadcasters of this new standard.[89] Thus, the FCC's order read "more nearly like the result of a notice-and-comment rulemaking than of an ad hoc adjudicatory proceeding."[90] Because the FCC may choose how to conduct itself, the court found the FCC's "informal adjudication format to promulgate a rule of general applicability" as acceptable.[91]

Despite this finding, the court warned that the FCC "may not resort to adjudication as a means of insulating a generic standard from judicial review," and therefore the court decided to examine the broadcasters' challenges to the generic definition and the limits of safe harbor.[92] The FCC had broadened its definition of indecency, finding the Carlin repeated-use standard too narrow, as broadcasters were getting away with airing of offensive material that included portrayals of sexual or excretory activities or organs, merely by avoiding the specific seven words.[93] The court accepted this rationale and said that the switch from the Carlin standard to the "indecency" standard was not "so vague that persons 'of common intelligence must necessarily guess at its meaning and differ as to its application.'"[94] The court reasoned that if "indecency" could survive a vagueness challenge in *Pacifica*, it could also do so in this case.[95]

The court also decided to address the issue of overbreadth, even though only two Justices in the five-member *Pacifica* majority did so.[96] It held that "serious merit" would not always save a broadcast from the realm of indecency, mainly due to the FCC's goal in helping parents to monitor what their children hear:[97]

> Since the overall value of a work will not necessarily alter the impact of certain words or phrases on children, the FCC's approach is permissible under controlling case law: merit is properly treated as a factor in determining whether material is patently offensive, but it does not render such material *per se* indecent.[98]

The court expressed that in making this judgment the court was relying on the FCC's assurances that it would consider the judgments of broadcasters when deciding whether to impose sanctions, and this would therefore minimize the chilling effect.[99]

Despite the court's upholding of the FCC's definition of obscenity, it did so in consideration of the FCC's channeling of the indecent material into time slots where children would be protected from such material. On consideration of the FCC's channeling, the court found that the FCC did not produce sufficient evidence to support its new limitation on safe harbor, and it remanded the case for further review.[100] However, because the court could find little difference in youth listenership between the 2 p.m. Carlin broadcast and the 6 a.m. to 10 a.m. broadcast here, it affirmed the FCC's order as to that broadcast only.[101]

The court questioned the FCC's safe harbor limits as they were set forth in the first place. For example, "[i]n each instance under inspection the cited population figures appear to estimate the number of teens in the *total* radio audience. There is no indication of the size of the predicted audience for the specific radio stations in question."[102] In addition, the FCC studies calculated the number of children aged 12 to 17 in the audience; while in the *Pacifica* briefs, the FCC urged the Court to compel broadcasters to minimize the risk of indecent broadcasts to children *under* the age of 12. The court held that therefore the FCC should provide statistics relating to that particular age group.[103] In concluding its opinion, the D.C. Circuit directed that once this new "safe harbor" is determined, the FCC must give broadcasters some reasonable notice as to when they may air "indecent" material without the risk of children being harmed.[104]

Harmful Speech on a New Wavelength

A Harbor Safe from Harm

Despite the warning to the FCC in *Action* to provide some justification for its time restrictions, the FCC has not conducted the surveys required to assess contemporary community standards, nor has it changed the 10 p.m. to 6 a.m. safe harbor time block. This sits uncomfortably with many who support the *Action* court's ruling, that if the FCC is to "act[ ] with the utmost fidelity to the first amendment," it should "reexamine, and invite comment on, its daytime, as well as evening, channeling prescriptions."[105]

Action held that time, place and manner restrictions on protected speech done by channeling are not content-neutral, and therefore the restrictions "may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest."[106] "Here, the precision necessary to allow scope for the [F]irst [A]mendment shielded freedom and choice of broadcasters and their audiences cannot be accomplished . . . unless the FCC adopts a reasonable safe harbor rule."[107]

First, then, if we are to choose the rule of *Action*, in requiring proof of harm over the rule of *Paris Adult Theatre*, which required no proof of harm, the FCC must determine what kind of broadcasts create a clear and present danger to children under 12 years of age, such that they damage the social interest in order and morality. Of course, it may be the case that children under 12 years are too young to understand discussions about sex and therefore will not be damaged by such discussions. Alternatively, the FCC might find that material making obvious references to drug use or violence has greater damage on children.[108] This finding, however, would create entirely new problems, as broadcasters, who before *Action* had to rely only on the "seven dirty words" to channel their material into the safe harbor, would face a more ambiguous definition of indecency. Although the *Action* court held that the new "indecent" standard was inherently vague, it was not constitutionally vague, and therefore broadcasters were to be bound by it.[109] The more vague a standard, however, the greater the chilling effect on broadcasters that do not want to be hit with fines, and adding drug use and violence to the realm will likely broaden the chilling effect.

Say What? The Problem of Vagueness

The past 50 years of court decisions have set forth some basic concrete principles. It is clear from the Supreme Court's decisions that not all speech is protected: Some kinds not at all, and other kinds only at certain times, places or manners, depending on the medium in which they appear. When it comes to broadcasting, obscenity is never allowed, and indecency is restricted to certain times. However, beyond these general principles, to many broadcasters, the courts' guidance is little more than static.

As the events of this year have proven, where standards are vague, a chill on speech will follow. In the wake of the Janet Jackson Super Bowl episode and a staggering increase in FCC fines, media companies have begun to censor themselves and even silence their on-air talent. For example, Clear Channel ousted Howard Stern, the self-proclaimed "King of All Media," from six Florida stations after the FCC fined Clear Channel $495,000 for indecency violations on a Stern show,[110] while NPR fired one of its commentators for using the "F-word."[111] Clear Channel also fired radio host Bubba the Love Sponge following a $755,000 indecency fine, and Infinity Broadcasting canned the hosts of the "Opie & Anthony Show" after Infinity received a $357,000 fine.[112] (See page 65 for an Addendum regarding the Clear Channel settlement with the FCC.)

Those who have remained on the air and tried to clean up their acts have erred on the side of caution. The new rule for some as to the threshold for indecency has become "[i]f you have to ask, the answer is no."[113] In the meantime, new approaches taken by media companies are also likely to ensure that on-air talent becomes squeaky-clean. Clear Channel, the largest radio station operator in the country, announced in February that it would change on-air talent's contracts to hold them personally liable for any FCC indecency fines.[114]

If They Can't Say Something Nice . . .

The twenty-first century has marked a notable shift in the balance between free speech and the regulation of indecency. With Congressional support, the FCC's crackdown on broadcasters has left media companies with hundreds of thousands of dollars in fines and legal bills, and dozens of wildly successful radio personalities without jobs. However, despite the rising financial consequences of broadcasting indecent material, it is still unclear whether the FCC's crackdown has any benefit on society. Furthermore, until some clearer standards are set forth, those who are still on the air must remember that if they cannot say something nice, they should not say it at all. Their chillier broadcasts serve as a warning: Until the boundaries stop moving, broadcasters can only guess where to draw the line and hope not to cross it.

Endnotes

1. U.S. Const. amend. I.
2. *Roth v. U.S.*, 354 U.S. 476, 77 S. Ct. 1304 (1957).
3. *Id.* at 482.
4. *Id.* at 484.
5. *Id.* at 485–86; *see Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, in which the Court observed that classes of speech that do not raise any constitutional problem "include the lewd and obscene. . . . It has been well-observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ."
6. *Roth,* 354 U.S. at 487. (The Court defined "prurient" as "lascivious desire or thought.")
7. *Regina v. Hicklin*, L.R. 3 Q.B. 360 (1868).
8. *Roth,* 354 U.S. at 489 (emphasis added).
9. 413 U.S. 15, 93 S. Ct. 2607 (1973).
10. *Id.* at 16.
11. *Id.* at 19.
12. *Id.* at 23.
13. *Id.* at 24. The "applicable state law" that regulates obscene material must also be limited to the standard set forth in *Miller*. *See id.*
14. *Id.* at 30, 32.
15. 413 U.S. 49, 50–51, 93 S. Ct. 2628 (1973).
16. *Id.* at 60 (citations omitted).
17. *Id.* at 61 (emphasis and citations omitted).
18. *Id.* at 63.
19. 47 U.S.C. § 303(g) (2002).
20. 47 U.S.C. § 326 (2002).
21. 18 U.S.C. § 1464 (2002).
22. *In re WUHY-FM*, 24 F.C.C.2d 408, 18 Rad. Reg. 2d 860 (1970).
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 409.
27. *Id.*
28. *Id.*
29. *Id.* at 410.
30. *Id.*
31. This argument possibly runs counter to *Cohen v. California*, 403 U.S. 15, 91 S. Ct. 1780 (1971), in which the Supreme Court held that a man who walked into a California courthouse with the words "F— the Draft" emblazoned on his jacket could not be punished under a California decency law.
32. *In re WUHY-FM*, 24 F.C.C.2d at 410.
33. *Id.* at 410-11.
34. *Id.* at 411.
35. *Id.* at 412.
36. *Id.*

37. *Id.* at 413.
38. *Id.* at 415.
39. *Id.* at 417.
40. *Id.*
41. *Id.*
42. *Id.* at 418.
43. *Id.*
44. *Id.* at 421.
45. *Id.* at 419.
46. *Id.* at 422.
47. *Id.* at 423.
48. *Id.* at 424.
49. *Id.* at 424–25.
50. 438 U.S. 726, 98 S. Ct. 3026 (1978).
51. *Id.* at 729–30.
52. *Id.* at 730. The nature of the singular complaint is quite notable: The man who complained lived in Florida, well outside the New York station's range, and was also a member of Morality in the Media. His only son, the alleged "young son," was 15 years old at the time, well beyond the "under twelve" definition for children that the Supreme Court would use in *Pacifica*. *See* Jeremy H. Lipschultz, Broadcast Indecency 42 (1997). Had it not been for the one complaint, the FCC would probably have not pursued the case, as it will act on indecent broadcasts only where a complaint is filed. *Crackdown: the FCC's Battle Against Indecency*, Wall St. J. Online, May 13, 2004, at 1.
53. *Pacifica*, 438 U.S. at 730.
54. *Id.* at 731.
55. *Id.* at 731–32.
56. *Id.* at 734.
57. *Id.*
58. *Id.* at 735.
59. *Id.* at 737.
60. *Id.* at 739.
61. *Id.* at 739–40.
62. *Id.* at 740.
63. *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 483, 82 S. Ct. 1432 (1962).
64. *Pacifica*, 438 U.S. at 741.
65. *Id.*
66. *Id.*
67. *Id.* at 742.
68. *Id.* at 743.
69. *Id.*
70. *Id.* at 744 (quoting *Schenck v. U.S.*, 249 U.S. 47, 52).
71. *See id.* at 747–51.
72. *Id.* at 757.
73. *Id.* at 761.
74. *Id.* at 763.
75. *Id.* at 763–64.
76. *Id.*
77. *Id.* at 765–66.
78. 852 F.2d 1332, 271 U.S. App. D.C. 365 (D.C. Cir. 1988).
79. *Id.* at 1334.
80. *Id.*
81. *Id.*
82. *Id.* at 1335.
83. *Id.*
84. *Id.*
85. *Id.* at 1336.
86. *Id.*
87. *Id.*
88. Id. at 1337.
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 1338.
94. *Id.* at 1339 (citations omitted).
95. *Id.*
96. *Id.*
97. *Id.* at 1334, 1339.
98. *Id.* at 1340.
99. *Id.*
100. *Id.* at 1335.
101. *Id.* at 1341.
102. *Id.* (emphasis in original).
103. *Id.* at 1341–42.
104. *Id.* at 1343.
105. *Id.* at 1341.
106. *Action for Children's Television*, 852 F.2d at 1343.
107. *Id.*
108. Senator Fritz Hollings has proposed extending FCC authority to restrict violent programming. *See* Jeff Jarvis, *Can the FCC Shut Howard Up?*, The Nation, May 17, 2004, at 13.
109. *Id.* at 1344.
110. *Crackdown: The FCC's Battle Against Indecency*, Wall St. J. Online, May 13, 2004, at 1.
111. Jeff Jarvis, *Can the FCC Shut Howard Up?*, The Nation, May 17, 2004, at 11. The Howard Stern fine was the first the shock jock had been slapped with in six years. *Id.*
112. *Crackdown: the FCC's Battle Against Indecency*, Wall St. J. Online, May 13, 2004, at 1.
113. Sarah McBride, *One Man's Campaign to Rid Radio of Smut Is Finally Paying Off*, Wall St. J., May 13, 2004, at 1.
114. *Clear Channel Addresses Decency After Firing DJ*, Reuters, Feb. 25, 2004.

Addendum

Clearing the Airwaves: Will the FCC's Crackdown on Indecent Broadcasts Put a Chill on Protected Speech?

On June 9, 2004, the FCC announced that it had reached a settlement with Clear Channel as to the broadcaster's alleged violations of 18 U.S.C. § 1464 restrictions on the broadcast of obscene, indecent, or profane material.[1] The Order and Consent Decree provided for Clear Channel's "voluntary contribution" of $1.75 million to the U.S. Treasury. The agreement also included the broadcaster's admission that some of the material was indecent as well as a waiver of judicial or administrative review of the decree and order. Thus, the settlement eliminates the potential availability of judicial review and precedent that could provide broadcasters with guidance as to what is, and what is not, indecent.

Clear Channel's adopted compliance plan, known as the "Responsible Broadcasting Initiative," includes a provision that could also have a significant effect on the potential chilling of broadcast speech. Under section two, Clear Channel will, upon receiving a Notice of Apparent Liability from the FCC, suspend and investigate any employee accused of "airing, or materially participating in the decision to air," obscene or indecent material. After remedial training, the employee that returns to the air will have her broadcasts subjected to a "significant time delay" of up to five minutes, so that the program monitor has time to interrupt the broadcast if needed. Under section three of the initiative, if the Notice of Apparent Liability is finally reviewed and adjudicated, and Clear Channel is found to have broadcast an obscene or indecent program, Clear Channel agrees to immediately terminate the offending employee(s).

With no new guidelines on indecency and the threat of suspension and termination, on-air hosts that do not want to lose their jobs will likely back farther away from the indecency line, possibly refraining from speaking about issues that would not be ruled indecent. The more successful hosts may move to satellite or Internet radio, but the majority may refrain from speaking about topics such as rape or incest, for fear of ending up in the unemployment line. Furthermore, due to a reference in the Initiative to both indecency *and* violence, DJs may think twice before putting on the latest Eminem track.

The possibly most potentially dangerous aspect of the settlement is revealed in Chairman Michael K. Powell's statement in *Clear Channel Communications, Inc.* Chairman Powell, in discussing the often difficult balance the government must make between protecting the First Amendment and protecting children, noted that "[t]his task is made easier when our licensees wrestle the difficult decisions away from the government and take the responsibility for what they broadcast over our nation's airwaves." In this author's opinion, the FCC and the courts are better equipped to interpret the First Amendment and make those difficult decisions in construing the Constitution's applicability to broadcast speech. Instead of referring to *Pacifica*, there is a danger that other broadcasters, searching in the dark for some kind of stable guidepost, may feel obligated to follow standards that Clear Channel sets pursuant to the settlement. To prevent the entry of broadcasting into an Ice Age, it would benefit the public at large for the FCC to work with the industry to help it understand the proper limits of broadcast speech, instead of merely entering into one settlement at a time.

Endnote

1. *In re Clear Channel Communications, Inc.*, Order, June 9, 2004, *available at* http://www.fcc.gov.

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The “Redskins”—Can It Still Be Used?

By Alan J. Hartnick

Copyright law seems to take in stride immoral or obscene content.[1] Trademark law cannot because under Section 2(a) of the Lanham Act, no trademark may be registered if it “consists of or comprises immoral . . . or scandalous matters.”

What about a trademark using the terrible word “nigger”? What about “Little Black Sambo”? What about hebes, dagos, and all the rest of the adjectives that have been used by one part of the population to describe other parts of the population?

What about the word “Redskins,” which was registered in 1967 for a football team? The word “Redskins” not only identifies the football team, but also is utilized in its logos, mascots, nicknames, uniforms and various paraphernalia sold or used in connection with its entertainment services. Is that word politically incorrect?

In 1999, an administrative trademark judge held that the mark “The Redskins” may disparage Native Americans[2] and bring them into contempt or disrepute.[3] The judge denied the petition to cancel for scandalous matter but held that the mark did disparage. The standards articulated by the Trademark Trial and Appeal Board (“TTAB”) differed from whether a mark was disparaging or scandalous. For the disparaging standard, it required reference only to the group being disparaged. For the scandalous standard, it required reference to the general public.

The decision did not focus on the period when the registration issued; it focused on the present. Just like generic marks, the meaning had changed over time.

Then came the appeal. The District Court in the District of Columbia overruled the administrative decision to cancel the mark.[4]

Ruling on a motion for summary judgment, Judge Colleen Kollar-Kotelly found that the TTAB had insufficient evidence for it to find the trademarks disparaging. The TTAB had concluded that “it is only logical that in deciding whether the matter may be disparaging we look, not to American society as a whole, . . . but to the views of the referenced group.” The TTAB had accepted a 1996 survey as evidence that the term “Redskins” was disparaging to Native Americans. The participants in the survey included about equal numbers of Native Americans and others. The survey was conducted in just 12 states.

The judge agreed with the team that the survey was flawed in its sample size, selection process and geographical distribution. She found that its results (which included many participants who were not Native Americans) could not be extrapolated to show the feelings of the Native American population as a whole.

Judge Kollar-Kotelly agreed with the TTAB that whether a trademark is disparaging or not must be judged by the meaning of the mark as used by the owner and whether that meaning is one that may disparage Native Americans. Both these determinations must be answered not in the present, but as of the date of registration of the mark being challenged.

The judge disagreed with the TTAB that the evidence presented showed that the mark was disparaging—either in 1967, when the first mark was registered, or in 1990, when the last one was registered. The judge noted that the survey merely measured attitudes in 1996, when it was conducted. According to the judge, “the TTAB reached its decision to cancel the trademarks inferentially, by piecing together bits of limited, undisputed evidence from the record the inferences are predicated on assumptions that are not contained anywhere in the record.”

Judge Kollar-Kotelly said that the TTAB had improperly pointed to the images of Redskins fans dressed in mock Native American garb and the press discussing the team and using terms such as “on the warpath” to show that the word “Redskins” had retained its derogatory character. The judge dismissed reliance on these actions, writing:

> Under the broad sweep of the TTAB’s logic, no professional sports team that uses Native American imagery would be permitted to keep their trademarks if the team’s fans or the media took any action or made any remark that could be construed as insulting to Native Americans. The Court cannot accept such an expansive doctrine; particularly when premised on a finding that is not supported by any substantial evidence.

In addition to reversing the TTAB due to lack of evidence that the trademarks were disparaging to Native Americans, the judge also agreed with the team that the cancellation action should be barred by the doctrine of *laches*. Judge Kollar-Kotelly noted that if the cancellation action had been brought in 1967, it would have been easy for the Native Americans to collect evidence on whether the marks were disparaging. Today, such an undertaking is much more problematic.

The court found undue delay in bringing the cancellation action and resulting prejudice to the team, which might have been more receptive to changing its name 35 years ago than it is today. According to the judge, the team is justified in relying on the failure of anyone to challenge its trademark registrations for all those years as evidence of their validity. The security that the lack of challenge created resulted in an investment of millions of dollars in marketing the name over the years. Cancellation of the marks at this late date would be unduly prejudicial to the team's rights, according to the judge, particularly since the Native Americans conceded that they had been aware of these trademarks for practically their entire lives.

The judge made it clear that she was not ruling on whether the "Redskins" mark was disparaging to Native Americans. Her ruling was only that there was insufficient evidence before the TTAB for it to find that it was. That failure of evidence, coupled with a very late filing, added up to a denial of the Native Americans' request to cancel the Redskins trademark registrations. Having ruled against cancellation, the court did not consider the team's constitutional challenges to the cancellation.

The Washington Redskins case involves federal registration. Nothing would prevent the Washington Redskins to continue to use the mark without a federal registration. It is for this reason that Section 2(a) of the Lanham Act does not violate the First Amendment. The Federal Circuit has held:

> ['Applicant'] contends that the application of section 1052(a) [Section 2(a)] to refuse the registration of marks on grounds of vulgarity violates the First Amendment. Previous decisions of this court and our predecessor court, however, have rejected First Amendment challenges to refusals to register marks under section 1052(a), holding that the refusal to register a mark does not proscribe any conduct or suppress any form of expression because it does not affect the applicant's right to use the mark in question. *See Mavety*, 33 F.3d at 1374; *McGinley*, 660 F.2d at 484. We adhere to the reasoning set forth in those cases and reject [Applicant's] First Amendment challenge.[5]

Counsel to Harjo has stated that "Nationwide, reference[s] to Native Americans in sports programs are being eliminated. Where there were 3,000 entities using Native American references in 1970, there are a mere 1,100 today." There is a difference between a voluntary change and a court-ordered cancellation. Susan Shown Harjo and the Native Americans are continuing their efforts to stop the use of "Redskins" as a trademark by filing an appeal in the U.S. Court of Appeals of the District of Columbia, which is pending.

We are dealing with racial politics. The clear inspiration for Politically Correct is to prevent minorities from being offended. Essentially, the set of social values that are being protested are those of the previous generation.

A different approach is essentially to turn the other cheek. This is being done by homosexuals in "Queer Theory," which is being taught under that name in various colleges. "Queer" was a politically incorrect name which has now become a mark of honor. Perhaps the use of the name "Redskins" could also be a mark of honor. Every U.S. military helicopter model is named after a Native American tribe to express the bravery and valor of the Native American warriors. The children's game "Cowboys and Indians" would not be played unless Native Americans were as brave as cowboys.

To call a football team "Redskins" was intended to refer to an attribute of bravery, not disrepute. This was true in 1967, at the time of registration, and is still true today. The Native Americans were brave warriors, and the football team, by such designation, admires their bravery. In such manner, the investment in the good will of the trademark and the team's freedom of expression are preserved.

I suggest that there should be a laissez-faire attitude for political correctness in trademarks. The "Redskins" designation cannot be compared to the vulgarity of the term "jack-off."[6] Notwithstanding, my bet is that the D.C. Appellate Court will ban "Redskins."

If the term "Indians" is politically incorrect, the same intolerance applies to "Redskins," which the general public, in my opinion, would not regard as either scandalous or disparaging. Perhaps the trademark standard for evaluating "disparagement" should be clarified so that a particular group's thin-skinned sensitivities should not rule out essentially neutral or favorable use of marks. Would any Jewish group complain about the motion picture *The Hebrew Hammer*, about a Jewish superhero detective?[7]

Endnotes

1. *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir. 1982), *cert. denied*, 459 U.S. 879 (1982); *Mitchell Bros. Film Group v. Adult Cinema Theater*, 604 F.2d 852 (5th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980).
2. The term "Indians" is politically incorrect. At the least, it is a misnomer because Columbus did not reach the Indies. The New York Times continues to use Indians rather than Native Americans.
3. *Harjo v. Pro-Football, Inc.,* 50 U.S.P.Q. 2d 1205 (Trademark Trial and Appeal Board, 1999).
4. *Pro-Football, Inc. v. Harjo, et al*. 284 F. Supp. 2d 96, 68 U.S.P.Q. 2d 1225 (Dist. Ct. of D.C., 2003).
5. *In re Boulevard Entertainment, Inc.*, 334 F.3d 1336, 67 U.S.P.Q. 1475 (Ct. of App. Fed. Cir., 2003).
6. *Id.*
7. I thank Frank Terranella of Abelman, Frayne & Schwab for his assistance in this article.

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Artists vs. Record Companies: What's The Deal? *A Look at Changes in Recording Contracts*

By Stacey Lager

Imagine that you are a singer/songwriter who has been playing small clubs in New York, Philadelphia and Boston for five years. You have recorded three albums on your own, you play to packed crowds who know all the words to your songs, and your Web site is always flooded with praise from adoring fans from all over the world. Yet when the show is over, you pack up and head back home to your day job, which you need so that you can pursue your ultimate goal of a recording contract. If you had a recording contract with a record company, your album would be distributed worldwide, you would tour non-stop and reach millions of people. Most of all, your songs would be on the radio. A recording contract with a record company might even guarantee that your music will reach the masses and give you fame and fortune. Once upon a time, however, that might have been a sure thing, but not now.

In the past seven years, the music business has suffered from poor record sales, which were compounded by the industry's lack of productive movement in the digital download game. The business model of record companies spending millions of dollars to promote artists, which worked so well for so long, no longer makes sense. The recording contracts have boilerplate clauses that should have been revised years ago, and record companies continue to use an antiquated system to compute royalties. The record companies have attempted to try to save themselves by consolidating their assets and laying off thousands of executives. This has left artists to fend for themselves. Their interests are not being protected, because record companies are concerned only about their bottom lines and not about cultivating careers for their artists.

Music will always be available for the public to listen to and experience. Before the Internet existed, live shows were the way for audiences to connect with their favorite artists or bands, and radio brought the music into their homes and cars. Yet now, music in the digital download era is at the public's fingertips. Just by clicking on a button, your favorite song can simultaneously be on your computer, on your MP3 or ipod player, and on your cell phone (as a ringtone). Where do the record companies fit into this new business model and how will they make any money? How will an artist receive the proper royalties? The question really becomes whether an aspiring musician needs a record company at all in order to be successful. The answer is not yet a simple yes or no.

From a record company's perspective, the answer *is* a simple yes—artists do need what the companies can offer in order to be successful. From the majors to the independents, the same business model applies. Each has the essential departments that play their roles in creating a product (*A&R*—artist, *Image and Touring*—radio promotions, sales, and marketing and *Digital and Internet*—publicity, video promotion, and media). Both majors and independents would agree that all of these departments and elements are crucial to the launching of a new artist or veteran act. The record company is a machine working to recoup on an investment made in the artist, and from which it will hopefully profit. In order for that to happen, the album must sell. If album sales continue to fall, the record company must look to other ways to make a profit.

In October 2002, Robbie Williams and EMI signed a groundbreaking 80 million euros ($120 million) deal.[1] The agreement specified that Williams would continue to record for EMI, but in addition, EMI would work closely with him in his non-recording activities, including touring, publishing, and merchandising.[2] This was the first publicized deal in the music industry to focus on an integrated relationship that provided a multi-platform approach to the elements of recording, live performances, film, and television licensing.[3] It would seem that this new business model would allow EMI to make up for lost revenue due to illegal downloading, low album sales, and the fact that, although Williams is a huge success in Europe, EMI has not been able to produce similar results in the United States.

No deal of this kind has yet been made in the U.S., as an integrated relationship has not been a prevalent issue in the music business as a whole. Michael Reinert, Senior Vice President of Business Affairs at Universal Motown Records Group ("Universal"), said that: "It is hard without knowing the intricate details of the deal whether or not EMI has benefited from this new arrangement. But without the corresponding success in the U.S. that Williams has had in the U.K., this has probably not been a great deal for them." Mr. Reinert has looked over deals at a smaller level, where small management/production/record companies have brought the concept where the smaller companies will supply the artist and Universal would do their marketing and promotion for development. However, Reinert feels that:

> They are interesting deals, but it becomes the issue of whether we want

> to invest in these companies or be active players; becoming active players is not a realistic option because we don't have the resources for it, but if the right combination comes along, then we could make the jump and make the investment in these enterprises, if the primary reason for it would be to bring us (record company) recording artists.

Thus, if the recording contracts are not expanding and taking profits from these non-recording activities, then the record companies need to find another source from which to make a profit.

Rock bands or musicians that are capable of touring and playing live shows can create their own names or brands without needing someone else, like a record company, to do it for them. Touring is the best marketing tool for the creation of a brand that the public can relate to and connect with. Studio artists, who are mostly branded by the term "pop star," need the marketing and promotions machine of a record label to get their names out and to create connections with the public. For example, Jive spent millions of dollars marketing and promoting Britney Spears' first album. The question then arises that, if the label had not yet recouped on its investment prior to her inking a multi-million deal with Pepsi, should it not have received a percentage of that deal because it was responsible for creating her image or brand? Mr. Reinert does not believe so, because:

> The record company initially creates the brand, but if an artist at a pop-star level is successful, then the record company has already made a lot of money on that artist. The music business is not just about selling records, it's about writing songs, going out on tour, merchandising and brand building—there are so many people involved in that brand building from agents, managers, publicists, etc. It is not really fair to say that a pop artist who achieves stardom at a national level is indebted to only [its] record company for achieving that success. It is really about all the people who surround the artist.

Therefore, it seems that, for the moment, the record companies will stay in the business of making records and not really focus on the non-recording activities of artists, but at the same time they will try to figure out how to get the public to buy records instead of making illegal downloads.

From the artist's perspective, asking whether the assistance of a record company is necessary, the answer is both no and yes—the artist is capable of doing most of what the record company has to offer on his or her own, but definitely needs the muscle of a record label for very specific things. There are so many available avenues for an indie artist to get his or her name out to the public. The Internet has made the dream of being accessible to millions of people a reality. For an artist to do what a record company can do takes passion, discipline, and most important, money that may not be so readily available. Many artists can arrange free studio time, have friends produce their albums, or create Web sites. However, an artist is an artist, and putting out the best material possible is the priority, so the artist will need to spend money to ensure that what is offered to the public is quality. Unfortunately, that money is not always available. Artists can promote themselves at clubs where they live, build a following, and also capitalize on their popularity on the Internet by streaming live performances for their fans in other locations. Artists can also distribute their own albums via the Internet, either through their own sites or through one of the thousands of other sites, like CD Baby, that sell independent artists' music and provide an outlet for the music to be legally downloaded as well. In this respect, artists do not need record labels' services, because the Internet creates a worldwide distribution forum for their music.

What artists really cannot access without record label support is radio play. This is an extremely difficult feat to accomplish these days, as there is so much competition for airplay. The relationships that the record labels have with the radio stations really have an impact on whether an artist will be added to a station's playlist. However, no matter how well the artist is doing on the Internet, radio is still the means to bring music to people who otherwise would not hear it.

There is a way for artists to maintain their indie-level successes while still signing record contracts and benefiting from what the record companies have to offer. Rose Meade Hart, partner at the firm of Hart Rayner LLP, has represented a range of artists from multi-platinum acts, such as Mary J. Blige and New Kids on the Block, to Grammy-winning record producer Teddy Riley and small independent recording companies, like Cash Money Records and Tommy Boy Records. Ms. Hart believes that artists should now be looking for recording deals with a small record company or a independent record company that will create a joint venture with them and help cultivate them as career artists and not just "one hit wonders." Ms. Hart suggests that:

> Having a record company as a partner limits [an artist's] control and participa-

> tion. If an artist can record an album and continue to own the master, merchandising, licensing, and publishing, then the investment the record company makes is in the distribution and promotion of the album. If it is successful, everyone benefits because is it shared equally.

Ms. Hart also added, that with

> . . . the overspending and poor accounting of the major record companies, it is getting harder and harder for an artist to get paid. It usually takes auditing the record company for an artist to receive the proper album royalties. A joint venture with an independent record company would probably prevent an artist from having to do that to see [his or her] profits.

It seems that an artist would clearly benefit from this kind of scenario, both artistically and economically.

The music business is at a stage where it really needs to evolve as a whole to survive in the marketplace today. It will be hard for the major record companies to try new ways of doing business by creating different types of recording contracts that give the artists more flexibility, while the record companies profit in other facets of artists' careers. Yet it may be necessary in order for the companies to maintain an existence. More and more artists are making waves on their own, seeking out ways for the public to hear their music, and establishing their own successes. The major record companies will have to pay more attention to how these artists achieve success so that they can grow in the direction that the music business is moving.

Endnotes

1. "Robbie Williams and EMI sign ground breaking deal," EMI Records Press Release, October 2, 2002 at http://www.emigroup.com/news/pr180.html.
2. *Id.*
3. *Id.*

Stacey Lager, a staff attorney at Paul, Weiss, Rifkind, Wharton, & Garrison LLP, recently passed the Bar exam and is awaiting admission to the New York State Bar. Prior to law school, Stacey spent five years in the music business working in marketing and artist development for Epic Records, Arista Records, and Capitol Records. Working with a wide range of artists, from Beth Orton and Dido to Radiohead and Sade, Stacey was involved in the grassroots process of establishing artists, as well as working with veteran acts to maintain their achieved levels of success. She may be reached via e-mail at slager@paulweiss.com.

New Louisiana State Tax Incentives for Film Production

By Bianca Bezdek

After years of observing the effects of successful foreign film and television production tax incentives, the United States may finally be amending its views and tax policy to counteract the effects of runaway production (i.e., U.S. film production in Canada attracted by Canadian tax incentives and the benefits of Canada's many bi-lateral co-production treaties). This change of position is evidenced on a state level with such legislation as Hawaii's Investment Tax Credit (Act 221, Session Laws of Hawaii 2001), New Mexico's Film Production Tax Credit and its Filmmaker Gross Receipts Tax Reduction, and Missouri's Film Production Tax Credit—as well as Louisiana's Sales and Use Tax Exclusion, Employment/Labor Tax Credit, and Investor Tax Credit. In total, some 30 states now offer different forms of soft money, while only Hawaii and Louisiana provide investment tax credits patterned after renowned foreign investment credits found in Germany, Luxembourg and Australia. This article will focus on the audiovisual investment incentives arising from Louisiana.

Use of U.S. Tax Incentives by U.S. Film Industry

While Hawaii's tax incentives may have lured the production of such films as Universal's "Blue Crush," Warner Bros.' "The Big Bounce" and Sony Pictures' "50 First Dates," and New Mexico's tax incentives may have wooed Paramount's "Suspect Zero," Louisiana has enticed Twentieth Century Fox's "Runaway Jury," and Crusader Entertainment's "Unchain My Heart: The Ray Charles Story," which was originally committed to a Georgia location, with its own audiovisual tax incentives. Moreover, Walt Disney Pictures has committed to filming "Mr. 3000," a baseball-themed feature film, while New Line Cinema has agreed to a first-look deal with HSI Productions, Louisiana's leading production company. Hollywood insiders are certainly taking note of Louisiana's progressive efforts at generating its own indigenous filmmaking industry.

Since Louisiana's implementation of three distinct tax incentives that may be applied to nationally distributed feature-length films, videos, television programs/pilots or commercials made in Louisiana at least in part, the state has become the most aggressive contender for chasing those pictures that are not tied to one specific location. Qualifying productions are now eligible for tax credits equivalent to 15% of production expenditure in the state. That is topped off by a further 20% credit for resident payroll reduction and exemptions from state sales tax. The credits can be combined and, in some cases, can cut total costs by 20%. With no upper limit on the credit, Louisiana hopes to attract an extra $100 million of film expenditure annually.

The incentives have spurred new film spending since lawmakers approved them in July 2002. According to the state, production companies spent an average of $44 million each year between 1992 and 2002. Since May 2002, the amount has jumped to $248.3 million. Louisiana is also seeing an increase in smaller projects, including a $16.1 million thriller starring Jessica Lange under development by Seven Arts Pictures. Other projects in the works include a $1.5 million feature film by Crescent City Pictures Inc. of New Orleans and a $3.7 million project by Soundesign Studios of Studio City, California.

Louisiana's Implemented State Tax Incentives

Louisiana's legislators aspire to metamorphose Louisiana into the lightning rod for production ahead of the other U.S. states implementing their own incentives programs. Louisiana's Governor, Mike Foster, has made it a priority via said incentives to boost the state's economy. Under new legislation authored by Representative Steve Scalise, there is an Investor Tax Credit, which is salable to taxpayers who are most often Louisiana-based companies and who can use the credit on their own expenditures, an Employment/Labor Tax Credit and a Sales and Use Tax Exclusion.

Investor Tax Credit

The investment tax credit grants a tax credit against state income tax for taxpayers domiciled and headquartered in Louisiana until January 1, 2007. The objective of this tax credit is to encourage development in Louisiana of a strong capital base for motion pictures, in order to achieve a more independent and economically sustainable film and video industry. The purpose is to attract private investment for the production of motion pictures and develop a Louisiana-indigenous entertainment industry utilizing tax credits that encourage investments in Louisiana-produced films.

The tax credit was introduced on July 1, 2002, and if a qualified taxpaying investor's total base investment is greater than $300,000 and less or equal to $1 million, each investor shall be allowed a tax credit of 10% of the actual investment made by that taxpayer. If the total base investment is greater than $1 million, each taxpayer shall be allowed a tax credit of 15% of the investment made by that taxpayer. Currently, if a production company comes to Louisiana looking for rebates, it must set up a limited liability company along with its Louisiana-based investor, through which a transferring of credits can be achieved.

Procedures for Credit Claimants

(1) Entities taxed as corporations shall claim their credit on their corporation income tax return.

(2) Individuals shall claim their credit on their individual income tax return.

(3) Entities not taxed as corporations shall claim the credit on the returns of the partners or members as follows:

(a) Corporate partners or members shall claim their shares of the credit on their corporation income or corporation franchise tax returns.

(b) Individual partners or members shall claim their shares on their individual income tax returns.

(c) Partners or members that are estates or trusts shall claim their share of the credit on their fiduciary income tax returns.

Fundamentally, the Louisiana government gives a transferable tax credit to production companies for shooting in the state. Taxpayers often are able to buy the credit at a discount.

Application for State Certification

The Louisiana Film and Video Commission provides an application (at http://www.lafilm.org/images/docs/applicationforcertification_2004.pdf) that applicants must complete as a precedent for state certification and return to the Commission for evaluation. The application requires detailed descriptions of the following:

1. Name of the production company;
2. Phone number of the production company;
3. Name and phone number of a company contact person;
4. List the first pre-production date through last production date in Louisiana;
5. Louisiana production office address;
6. Louisiana production office phone number;
7. Total budget of the film;
8. Total expenditures in Louisiana;
9. Total percentage of film being shot in Louisiana;
10. The level of employment of Louisiana cast and crew;
11. Completion bond;
12. Script (including a synopsis); and principal creative elements list (principal cast, producer and director);
13. Distribution plan, including
    - Domestic distribution
    - International distribution
    - Sales estimates; and
14. A final cast and crew list for the project.

Employment/Labor Tax Credit

The new law provides that, until July 1, 2006, a motion picture production company is entitled to a tax credit for the employment of Louisiana residents in connection with production of a nationally distributed motion picture, video, television series or commercial made in Louisiana.

The credit is equal to 10% of the total aggregate payroll for residents employed in connection with such a production when total production costs in Louisiana equal or exceed $300,000 but are less than $1 million during the taxable year. The credit shall be equal to 20% of the total aggregate payroll for residents employed in connection with such a production when total production costs in Louisiana equal or exceed $1 million during the taxable year. The total aggregate payroll is construed, however, not to include the pay of any employee whose salary is equal to or greater than $1 million.

The credit may be applied to any income tax or corporation franchise tax liability applicable to the motion picture production company. Provided that the motion picture production company is an entity not subject to income or franchise tax, the credit shall flow through its partners or members as follows:

(1) Corporate partners or members shall claim their shares of the credit on their corporation income or corporation franchise tax returns.

(2) Individual partners or members shall claim their shares on their individual income tax returns.

(3) Partners or members that are estates or trusts shall claim their shares of the credit on their fiduciary income tax returns.

Application Procedure

The Commission will provide a standard form that applicants will use to apply for an employment/labor tax credit. The application will contain, but not be limited to, detailed descriptions of the following:

1. Name of the production company;

2. Phone number of the production company;
3. Name and phone number of a company contact person;
4. List the first pre-production date through last production date in Louisiana;
5. Louisiana production office address;
6. Louisiana production office phone number;
7. Total budget of the project;
8. Total expenditures in Louisiana;
9. The level of employment of Louisiana cast and crew;
10. The script (including a synopsis) and principal creative elements list (principal cast, producer, and director); and
11. A final cast and crew list for the project.

Sales and Use Tax Exclusion

The new law grants an exclusion from state sales and use tax (4%) until January 1, 2007.

The production company will be granted the "exclusion" if it reports anticipated expenditures of $250,000 or more from a checking account in a financial institution in Louisiana in connection with filming or production of one or more nationally distributed motion pictures, videos, television series or commercials in the state of Louisiana within any consecutive 12-month period. An eligible applicant's expenditures must be made from a checking account at any financial institution in Louisiana.

Application Procedure

The Office of Film and Television Development will provide a standard form that applicants will use to apply for a sales and use tax credit. The application will contain, but not be limited to, detailed descriptions of the following:

1. Name of the production company;
2. Phone number of the production company;
3. Name of the producer;
4. Name and phone number of a company contact person;
5. List the first pre-production date through production date in Louisiana;
6. Louisiana production office address;
7. Louisiana production office phone number;
8. Total budget of the project;
9. Total expenditures in Louisiana; and
10. Short synopsis of the project.

Upon the determination that an application for any of the aforementioned three types of Louisiana tax incentives meets the respective criteria, the director of the Commission will send a certification letter to the production company and/or investors and the secretary of the Department of Revenue. In the event the entire credit cannot be used in the year earned, then any remaining credit may be carried forward and applied against income tax liabilities for the subsequent ten years.

The Future of U.S. and Louisiana's Tax Incentives

Even though Louisiana's tax incentives are yet in their infancy, one need only look to the past to predict that history has a fair chance of repeating itself and reinventing Louisiana as the "new Australia" in terms of being a vibrant and durable haven for tax-motivated media investment giving rise to long-term sector benefit. Even though the current process for incentive qualification remains somewhat cumbersome by virtue of requiring that non-Louisiana production companies seeking rebates establish intra-Louisiana limited liability companies with Louisiana-based investors to whom credits can be transferred, Louisiana film commissioner Mark Smith reports that a bill is currently in legislation allowing for the direct transfer of tax credits without intra-state incorporation. He also expects tax brokers to become part of the process, whereby they would work with the production companies or studios directly in order to simplify the process. In light of the foregoing, one may anticipate that so long as accredited investors remain on board in terms of cost benefit, the quest for and provision of credit will continue to evolve the local production industry. As a result, it is highly likely that states such as Louisiana have only just begun to make waves in the traditionally European turf of tax-motivated film finance and stand a strong chance at repatriating runaway production.

Bianca Bezdek is a New York attorney and EU advocate concentrating in film finance, IP and entertainment law. Formerly of Weil, Gotshal & Manges, and Linklaters in Berlin, Prague and London, Ms. Bezdek has established Bezdek & Associates, based in New York, through which she currently advises independent producers, studios and mini-majors such as Miramax. Her focus remains on soft funding feature film finance solutions. She may be reached at Bezdek & Associates, 25 West 54th Street, Suite 11D, New York, N.Y. 10019, or by telephone at (917) 699-8026.

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Since 1969, VLA has been the leading provider of pro bono legal services, mediation services, educational programs and publications, and advocacy to the arts community in the New York area. Through public advocacy, VLA frequently acts on issues vitally important to the arts community in New York and beyond. We serve over 8,500 clients each year. You can get involved and help in the following ways:

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Pro Bono Case Placements

By placing cases with Volunteer Attorneys, VLA delivers pro bono legal services to low-income (per VLA guidelines) individuals and nonprofit arts organizations. The VLA Case List is e-mailed twice a month to our volunteer attorneys and pro bono coordinators. Cases are available on a variety of issues ranging from trademark, copyright and other intellectual property issues to nonprofit incorporation and 501(c)(3) status, corporate formation, contracts and licensing agreements. Artists from every discipline utilize our services, including filmmakers, visual artists, playwrights, poets, directors, musicians, multimedia artists, graphic designers, independent curators, dancers, and actors. VLA requires that all of its volunteer attorneys be covered by legal malpractice insurance, and advises its clients that the attorneys must check for conflicts of interest on each case before agreeing to accept it. VLA also holds a monthly New Volunteer Orientation. Please find upcoming dates posted on http://www.probono.net.

Bi-monthly Legal Clinic

The VLA Legal Clinic is a bi-monthly forum for any VLA member to meet privately with an attorney to discuss arts-related legal issues. The Clinic provides an opportunity for attorneys to advise clients in a direct and effective manner. Held from 4:00 p.m. to 7:00 p.m. on the second and fourth Wednesdays of each month, the Clinic also provides volunteer attorneys with a low time commitment option.

CLE Accredited Seminars

VLA provides CLE credit for the following transitional classes. If you have questions or would like to register for a workshop, please call (212) 319-ARTS, ext. 10. All workshops are held in the auditorium of The Paley Building, 1 East 53rd Street, Ground Level.

Instructors Wanted for these classes—Please Contact Alexei Auld, Director of Education, at (212) 319-2787, Ext.12

CLE Credit: Areas of Professional Practice: 3 CLE credit hours

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- Contract Basics for Arts and Entertainment Professionals
- Copyright Basics
- LLC, "C" Corp, or "S" Corp: Choosing the Right Corporate Structure for Your Arts Business

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- Managers in the Arts and Entertainment Industries
- Talent Contract Basics for the Film Industry
- Legal Issues in the Sports Industry
- Legal Issues in the Music Industry

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VLA offers Mediation Training to arts professionals and attorneys for New York State Certification and pairs artists with mediators to resolve arts-related disputes outside the traditional legal framework. For more information, contact Allison Mattera, MediateArt Program Director, at (212) 319-2787, ext. 16.

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VLA's Executive Director and senior staff attorneys are available by private appointment for career counseling and to review attorney resumes in the context of charting desired career paths. Please call Alexei Auld, Esq., Director of Education, at (212) 319-ARTS, ext. 12, to arrange an appointment.

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