

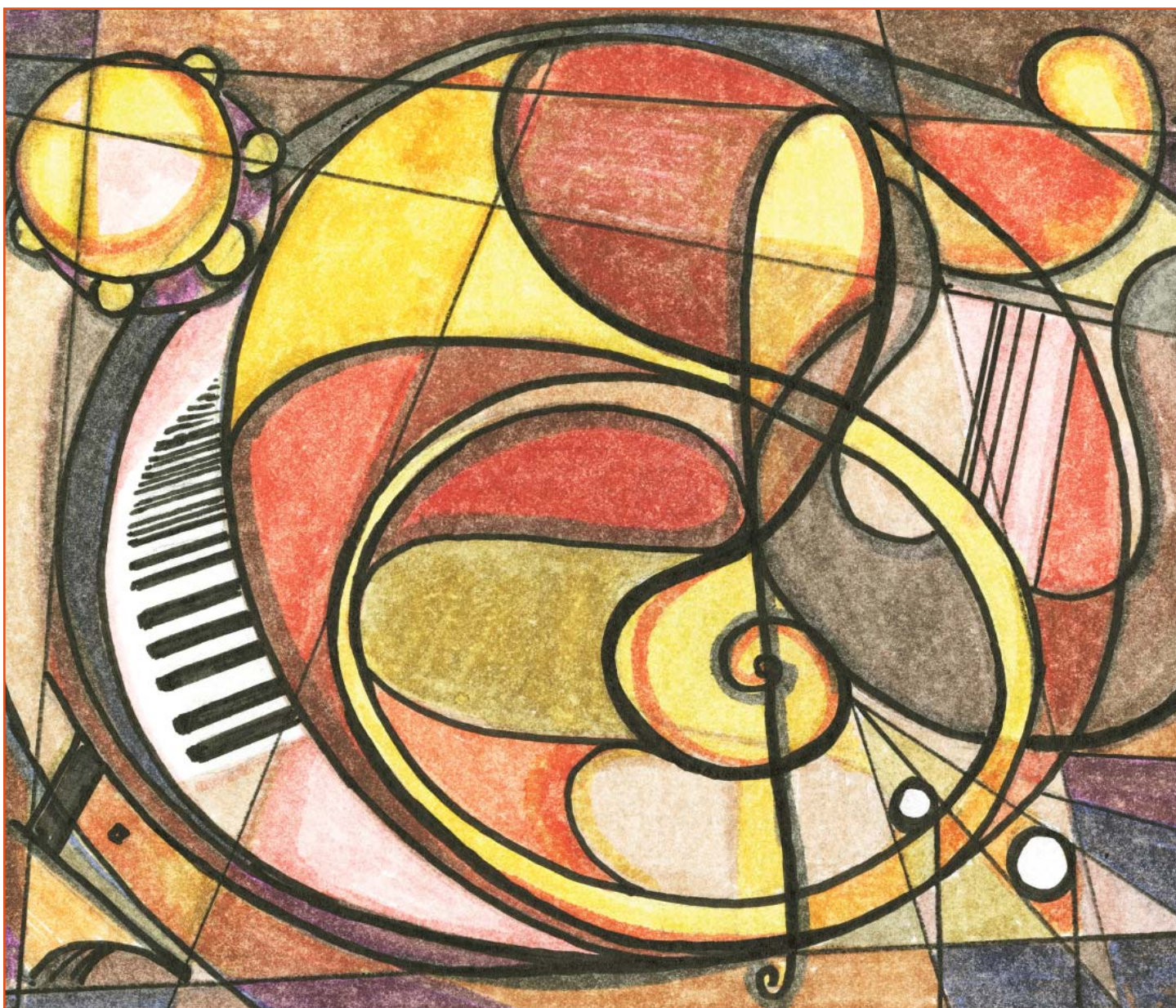
NYSBA

FALL/WINTER 2014 | VOL. 25 | NO. 3

# Entertainment, Arts and Sports Law Journal



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



[WWW.NYSBA.ORG/EASL](http://WWW.NYSBA.ORG/EASL)

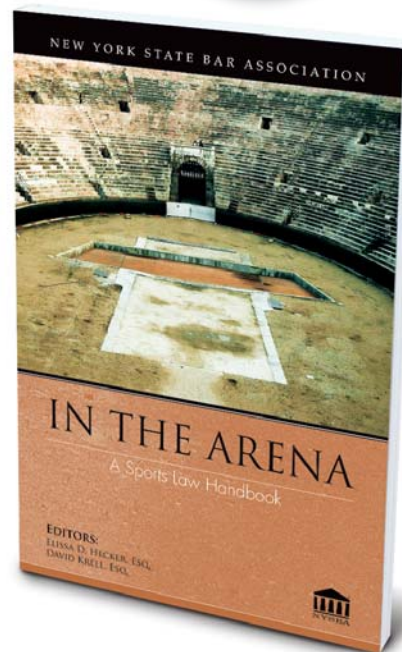
# In The Arena: A Sports Law Handbook

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

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

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Intellectual Property Rights and Endorsement Agreements  
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An Introduction to European Union Sports Law  
Dental and Orofacial Safety



## EDITORS

**Elissa D. Hecker, Esq.**  
**David Krell, Esq.**

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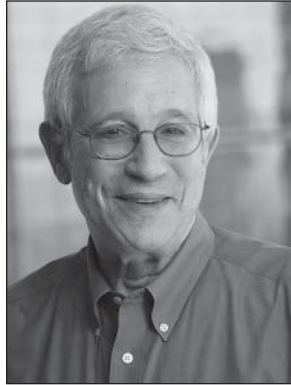
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# Remarks from the Chair

I am writing this column after Labor Day in anticipation of a great new year for EASL.

Our CMJ Music Marathon plans are moving forward with the new CMJ owners thanks to Rosemarie Tully and Diane Krausz, and, by the publication date of this edition, we should have another wonderful EASL event to remember. The CMJ panels will, as in the past, cover an extensive and varied list of subjects of interest to all attorneys and accountants who practice in the entertainment fields.



Over the summer I was privileged to attend my first NYSBA House of Delegates meeting in Cooperstown. I experienced first-hand the workings of NYSBA and, not being a baseball fan, was able to do so with few distractions. I participated as a delegate from EASL in the debates, discussions and votes on bar association issues and matters and obtained a real sense of how much EASL is an integral part of the NYSBA.

The wonderful *Journal* that you are now reading, edited by Elissa Hecker, is an EASL Section member benefit.

I look forward to the EASL presentation at the NYSBA Annual Meeting in January. We are currently planning our Fall Meeting CLE presentation on child labor laws and issues, together with the Labor and Employment Law Section, thanks to Diane Krausz and Mary Ann Zimmer. EASL also has liaisons with the Young Lawyers Section (who are members of the Executive Committees of both Sections). In addition, EASL events are reaching out to

the broader arts community as a result of Judith Prowda's Fine Arts and gallery-related programs. Our law school liaison program is expanding to several new law schools this year as well.

I am also looking forward to the fall event concerning structuring entertainment businesses, to be presented by the Membership Committee and spearheaded by Joyce Dollinger and Rob Thony. They are fresh off of the two fun comedy club and Minor League Baseball summer social events.

EASL has several new committee co-chairs and Executive Committee members whom I welcome: Joan Faier, Literary Works and Related Rights Committee; Jennifer Graham, Young Lawyers Committee; Karen Lent and Jessica Thaler, Sports Committee; Ethan Bordman, Motion Pictures Committee; and Brette Meyers, Young Lawyers Section Liaison.

I am very proud to be a part of the hard working (and fun) group of people constituting EASL's Executive Committee and EASL's volunteer members who are responsible for thinking up and planning all of our wonderful educational and social events. We just need to find the time to schedule everything we want to do, and keep our amazing Albany liaison, Beth Gould, from becoming too stressed.

I strongly urge all of you to encourage others who have not yet become members of EASL to do so. I guarantee your colleagues won't regret it.

Happy holidays, and I look forward to seeing you at our Annual Meeting in January.

**Steve Rodner**



**ENTERTAINMENT, ARTS AND SPORTS LAW SECTION**

**Visit us on the Web at [www.nysba.org/EASL](http://www.nysba.org/EASL)  
Check out our Blog at <http://nysbar.com/blogs/EASL>**

## Editor's Note

So many stories related to art, entertainment and sports have made front pages this year. They run the gamut of civil and criminal matters, and this issue of the *Journal* compiles excellent analyses of the major items of note. Please also visit the EASL Blog to see timely reports of EASL-related subjects of interest.

I hope that you enjoy reading and learning from the articles herein. Have a wonderful end of 2014 and beginning of the New Year.



Elissa

**The next *EASL Journal* deadline is  
Friday, December 19, 2014.**

Elissa D. Hecker practices in the fields of copyright, trademark and business law. Her clients encompass a large spectrum of the entertainment and corporate worlds. In addition to her private practice, Elissa is a Past Chair of the EASL Section. She is also Co-Chair and creator of EASL's Pro Bono Committee, Editor of the EASL Blog, Editor of *Entertainment Litigation, Counseling Content Providers in the Digital Age*, and *In the Arena*, is a frequent author, lecturer and panelist, a member of the Board of Editors for the *NYSBA Journal*, Chair of the Board of Directors for Dance/NYC, a Trustee and member of the Copyright Society of the U.S.A (CSUSA), Co-Chair of the National Chapter Coordinators, a member of the Board of Editors for the *Journal of the CSUSA* and Editor of the *CSUSA Newsletter*. Elissa is a Super Lawyer, repeat Super Lawyers Rising Star, the recipient of the CSUSA's inaugural Excellent Service Award and recipient of the New York State Bar Association's 2005 Outstanding Young Lawyer Award. She can be reached at (914) 478-0457, via email at [eheckeresq@eheckeresq.com](mailto:eheckeresq@eheckeresq.com) or through her website at [www.eheckeresq.com](http://www.eheckeresq.com).

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# Pro Bono Update

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

## Clinics

On October 25th, we hosted a Clinic at Gibney Dance, located across the street from City Hall in New York City. Special thanks to all of our wonderful volunteers who gave their Saturday afternoon to help many in the dance and arts community (photos from the Clinic to follow in the Spring issue of the *EASL Journal*).

**Our next Clinic will be held at the Dance/ NYC Annual Symposium on Sunday, February 22, 2015 from 10:00 a.m. to 1:00 p.m.** We will then follow with a Spring Clinic at New York Foundation for the Arts (NYFA), during the work week, from 4:00 to 7:00, the date to be determined.

## Speakers Bureau

### Legal Issues for Artists at the Brooklyn Arts Council

EASL's Fine Arts and Pro Bono Committees collaborated with the Brooklyn Arts Council (BAC) to present a wonderful panel called "Legal Basics for Artists" Professional Development workshop. It was held on September 9th from 6:30 to 8:30 at BAC's office in Dumbo. Judith Prowda, Chair of EASL's Fine Arts Committee and Carol Steinberg, Co-Chair of EASL's Pro Bono Committee, joined forces with BAC to plan the program. Julia Chu, BAC Board Member and Head of Philanthropy at Credit Suisse, moderated the panel. Carol Steinberg spoke about copyright basics, Paul Cossu spoke on fair use, Jason Aylesworth covered contracts, and Judith Prowda spoke about mediation and alternative dispute resolution. Artists of all persuasions attended the event and posed excellent questions during the extensive Q and A session. Vlada Monaenkova and Jacob Reiser, EASL's Law Student Liaisons, prepared a very thorough resources list, which is available to all on BAC's web site. The event was well-attended and was a great success.

### Legal Issues for the Chinese Arts Delegation at NYFA

Due to the successful program presented by EASL last year to NYFA's Chinese Arts Delegation, NYFA again invited EASL to present a program on legal issues to the Chinese, who visited in October of this year. Pursuant to an agreement with the Chinese government, NYFA hosts the Chinese Arts Delegation in New York City



and introduces it to arts institutions, business and legal practice in the U.S. The delegation this year consisted of curators, so the program focused on the visual arts. EASL members with expertise on issues in the visual arts spoke on the panel. Katherine Wilson-Milne moderated the panel. The presentations and materials were translated into Chinese. Carol Steinberg spoke about copyright and VARA issues with a focus

on the *Cariou* and 5 Pointz cases, Judith Bresler covered expert opinions and liabilities and the New York State bill concerning opinions on authenticity, attribution, and authorship of works of fine art, and Dean Nicyper spoke about artist-gallery relationships and the New York State Consignment Law.

**For your information, should you have any questions or wish to volunteer for our pro bono programs and initiatives, please contact the Pro Bono Steering Committee member who best fits your interests as follows:**

## Clinics

Elissa D. Hecker and Kathy Kim coordinate walk-in legal clinics with various arts and entertainment organizations.

- Elissa D. Hecker, [eheckeresq@eheckeresq.com](mailto:eheckeresq@eheckeresq.com)
- Kathy Kim, [kathykimesq@gmail.com](mailto:kathykimesq@gmail.com)

## Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- Carol Steinberg, [elizabethcjs@gmail.com](mailto:elizabethcjs@gmail.com)

## Litigations

Irina Tarsis coordinates pro bono litigations.

- Irina Tarsis, [tarsis@gmail.com](mailto:tarsis@gmail.com)

We are looking forward to working with all of you, and to making pro bono resources available to all EASL members.

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

## Law Student Initiative Writing Contest

**Congratulations to the Fall/Winter 2014 LSI winners:**

JOSEPH PERRY, of St. John's University School of Law, for his article entitled:  
*"HarperCollins Publishers, LLC v. Open Road Media"*

and

DAVID FOGEL, of the Benjamin N. Cardozo School of Law, for his article entitled:  
**"Removing the One and Done Policy: An Analysis of the Non-Statutory Labor Exemption  
and the NBA Draft Eligibility Requirements"**

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

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

### Requirements

- **Eligibility:** Open to all full-time and part-time J.D. candidates who are EASL Section members.
- **Form:** Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in Bluebook endnote form. An author's blurb must also be included.
- **Deadline:** Submissions must be received by **Friday, December 19, 2014**.
- **Submissions:** Articles must be submitted via a Word email attachment to [echeckeresq@echeckeresq.com](mailto:echeckeresq@echeckeresq.com).

### Topics

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

### Judging

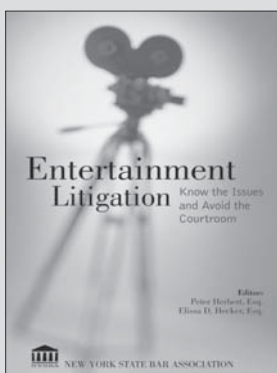
Submissions will be judged on the basis of quality of writing, originality and thoroughness.

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



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# Entertainment Litigation



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\*Discount good until December 15, 2014

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

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

### Contents

1. Contracts Without an Obligation
  2. Artist-Manager Conflicts
  3. Artist-Dealer Relations: Representing the Visual Artist
  4. Intellectual Property Overview: Right of Privacy / Publicity and the Lanham Act
  5. Anatomy of a Copyright Infringement Claim
  6. Digitalization of Libraries / Google Litigation
  7. Accrual of Copyright Infringement Claims
  8. The Safe Harbor Provisions of the Digital Millennium Copyright Act and "X.com"
  9. Trademarks for Artists and Entertainers
  10. Internet: A Business Owner's Checklist for Avoiding Web Site Pitfalls
  11. Internet Legal Issues
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# The Phil Cowan Memorial/BMI Scholarship

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts & Sports Law Section of the New York State Bar Association (EASL), in partnership with BMI, the world's largest music performing rights organization, has the Phil Cowan Memorial/BMI Scholarship! Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial/BMI Scholarship fund offers up to two awards of \$2,500 each on an annual basis in Phil Cowan's memory to a law student who is committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan Memorial/BMI Scholarship has been in effect since 2005. It is awarded each year at EASL's Annual Meeting in January in New York City.

## The Competition

Each Scholarship candidate must write an original paper on any legal issue of current interest in the area of entertainment, art or sports law.

The paper should be twelve to fifteen pages in length (including *Bluebook* form footnotes), double-spaced and submitted in Microsoft Word format. PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (*not* part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. *The name of the author or any other identifying information must not appear anywhere other than on the cover page.* All papers should be submitted to designated faculty members of each respective law school. Each designated faculty member shall forward all submissions to his/her Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her to the three (3) Committee Co-Chairs for distribution. The Committee will read the papers submitted and will select the Scholarship recipient(s).

## Eligibility

The Competition is open to all students—*both J.D. candidates and L.L.M. candidates*—attending eligible law schools. "Eligible" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to ten other accredited law schools throughout the country to be selected, at the Committee's discretion, on a rotating basis.

## Free Membership to EASL

All students *submitting* a paper for consideration will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member)

for a one-year period, *commencing January 1st of the year following submission of the paper.*

## Yearly Deadlines

**December 12th:** Law School Faculty liaison submits *all papers she/he receives* to the EASL/BMI Scholarship Committee.

**January 15th:** EASL/BMI Scholarship Committee will determine the winner(s).

*The winner will be announced, and the Scholarship(s) awarded at EASL's January Annual Meeting.*

## Prerogatives of EASL/BMI's Scholarship Committee

The Scholarship Committee is composed of the current Chair of EASL and, on a rotating basis, former EASL Chairs who are still active in the Section, Section District Representatives, and any other interested member of the EASL Executive Committee. *Each winning paper will be published in the EASL Journal and will be made available to EASL members on the EASL website.* BMI reserves the right to post each winning paper on the BMI website, and to distribute copies of each winning paper in all media. *The Scholarship Committee is willing to waive the right of first publication so that students may simultaneously submit their papers to law journals or other school publications. In addition, papers previously submitted and published in law journals or other school publications are also eligible for submission to The Scholarship Committee.* The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and the EASL Web site. The Scholarship Committee also reserves the right to award only one Scholarship or no Scholarship if it determines, in any given year that, respectively, only one paper, or no paper is sufficiently meritorious. All rights of dissemination of the papers by each of EASL and BMI are non-exclusive.

## Payment of Monies

Payment of Scholarship funds will be made by EASL/BMI directly to the law school of the winner, to be credited against the winner's account.

## About BMI

BMI is an American performing rights organization that represents approximately 600,000 songwriters, composers, and music publishers in all genres of music. The non-profit making company, founded in 1940 collects license fees on behalf of those American creators it represents, as well as thousands of creators from around the world who chose BMI for representation in the United States. The license fees BMI collects for the "public performances" of its repertoire of more than 7.5 million com-

positions are then distributed as royalties to BMI-member writers, composers and copyright holders.

#### About the New York State Bar Association/EASL

The 76,000-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 1976, NYSBA programs and activities have continuously served the public and improved the justice system for more than 125 years.

The more than 1,600 members of the Entertainment, Arts and Sports Law Section of the NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, pro bono opportunities, and access to unique resources including its popular publication, the *EASL Journal*.

## There are millions of reasons to do Pro Bono.

(Here are some.)



Each year in communities across New York State, indigent people face literally millions of civil legal matters without assistance. Women seek protection from an abusive spouse. Children are denied public benefits. Families lose their homes. All without benefit of legal counsel. They need your help.

If every attorney volunteered at least 20 hours a year and made a financial contribution to a legal aid or pro bono program, we could make a difference. Please give your time and share your talent.

Call the New York State Bar Association today at **518-487-5640** or go to **[www.nysba.org/probono](http://www.nysba.org/probono)** to learn about pro bono opportunities.



# NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

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

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

In order to receive credit, the applicant must send a copy of the writing to the New York State Continuing Legal Education Board, 25 Beaver Street, 8th Floor, New York, NY 10004. A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's Web site, at this address: [www.courts.state.ny.us/mcle.htm](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.

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# SAG-AFTRA Shifts to a New Residual Program: An Overview of the New Residuals in the 2014 SAG-AFTRA TV/Theatrical Contracts

By Marissa Crespo

On August 22, 2014, SAG-AFTRA members approved new three-year TV/Theatrical contracts negotiated between the union and AMPTP.<sup>1</sup> As the first negotiated agreement since the historical SAG-AFTRA merger, the new contracts provide advances in subscription ad-supported on-demand viewing (SVOD) coverage and new residual payments for on-demand viewing that are more attuned to the evolving landscape of the television industry.

## Old Residual Agreements

Under the old residual payment formula, the residual payment structure restricted the number of reruns cable companies and digital networks licensed to include within their programming.<sup>2</sup> For instance, under the old SAG-AFTRA basic agreements, cable companies and digital networks paid a fixed fee structure and license fees negotiated between the studios and cable companies.<sup>3</sup> For network prime time dramatic programs, cable companies had to pay generally 6% of the gross receipts in perpetuity, which also included health and retirement contributions.<sup>4</sup> SAG residuals were calculated for television shows in syndication using varying percentages of the minimum rate of compensation for the actor based upon the number of reruns.<sup>5</sup> For the first rerun, above-the-line actors were paid 40% of their minimum compensation rates, 30% for the second rerun, 25% for the third through sixth reruns, 15% for the seventh through tenth reruns, 10% for the eleventh through twelfth reruns, and 5% for the thirteenth rerun and thereafter.<sup>6</sup> These additional compensation payments on top of the licensed fee structures were presumably one of the reasons why cable companies and digital networks licensed classic game shows and classic television comedies in order to minimize their costs in content programming.

However, the old residual payments and the traditional business model of licensing shows to cable networks were threatened as the shift to digital and new media landscapes posed new challenges. The paradigmatic shift to new media viewing of television programming (e.g., Netflix, Amazon, Hulu), has resulted in fragmented viewership and a threat to cable companies whose business model is based primarily upon syndicated reruns of popular broadcast television shows.<sup>7</sup> Broadcasting networks struggle to maintain strong viewership to increase their revenue streams through advertising sales as consumers enjoy more “binge” watching of their favorite television shows through online media. It has become more difficult to produce a successful television

show that will attract viewers during the prime time slots, as fewer shows continue after the first season.<sup>8</sup> Since 2006, on average only 35% of shows were renewed for a second season.<sup>9</sup> In 2013 alone, only 29% of television shows were renewed for a second season.<sup>10</sup> An increase in cancelled shows has resulted in fewer shows entering the syndication market to attract licensing deals with cable companies.<sup>11</sup> The net effect means fewer opportunities for above-the-line actors to receive residual payments for the exploitation of their performances in supplemental markets.

## New Residual Agreements

The newly approved SAG-AFTRA TV/theatrical contracts, however, enable actors as principal performers to collect more residual payments. The new agreements replace the additional fixed-fee structure with residuals based upon a percentage of the rerun licensing deal.<sup>12</sup> This payment structure allows for more cable companies and digital networks to license more affordable content.<sup>13</sup> Yet the new agreements also enable actors to capitalize on the wave of new media productions and licensing deals for online viewing of television programming. The agreements now include new residual payments for SVOD and shorter free streaming window periods from 17 days to seven days to allow actors to collect more residual payments.<sup>14</sup>

Basing the new residual payment formulas upon a percentage of the licensing deal versus the fixed-fee payment structure will lucratively benefit actors, particularly in the SVOD realm, as the rerun exhibition windows in supplemental markets are shorter. In its recent annual report, Netflix disclosed that in the 2013 year, spending for streaming content online jumped up 30%, reaching \$7.3 billion.<sup>15</sup> Licensing deals between CBS and VOD/SVOD services like Amazon Hulu for shows such as *Under the Dome* and *Extant*, to be shown four days after an episode's initial run, satiate online subscription service companies' demand to provide content to consumers, while generating more opportunities for actors to collect higher residual payments in the performance of their works.<sup>16</sup>

Although it is premature to determine what overall benefits will result from the new residual payments for actors who are qualified for residuals in television shows, the new SAG-AFTRA TV/theatrical contracts are better aligned with the shifting landscape in viewing television shows across multiple media platforms than ever before.

## Endnotes

1. SAG-AFTRA Members Vote to Approve 2014 TV/Theatrical Contracts, SAG-AFTRA (Aug. 22, 2014, 8:11 PM), <http://www.sagaftra.org/sag-aftra-members-vote-approve-2014-tvtheatrical-contracts>.
2. Brooks Barnes, *Studio Deals unlock a Trove of Reruns*, THE NEW YORK TIMES (Aug. 25, 2014), available at [http://www.nytimes.com/2014/08/26/business/media/studio-deals-unlock-a-trove-of-reruns-from-shows-like-breaking-bad-and-sons-of-anarchy.html?\\_r=0](http://www.nytimes.com/2014/08/26/business/media/studio-deals-unlock-a-trove-of-reruns-from-shows-like-breaking-bad-and-sons-of-anarchy.html?_r=0).
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4. 2011-2014 AFTRA National Code of Fair Practice for Network Television Broadcasting, Exhibit D(3)(A)(2), SAG-AFTRA, [http://www.sagaftra.org/files/sag/2011-2014\\_aftranationalcode\\_of\\_fairpractice\\_for\\_networktelevisionbroadcasting.pdf](http://www.sagaftra.org/files/sag/2011-2014_aftranationalcode_of_fairpractice_for_networktelevisionbroadcasting.pdf).
5. Jeff Cohen, *Calculating SAG Residuals*, BACKSTAGE (Nov. 14, 2008 12:00 AM), <http://www.backstage.com/news/calculating-sag-residuals/>.
6. 2005 Screen Actors Guild Television Agreement, 230, SAG-AFTRA, <http://www.sagaftra.org/files/sag/2005TVAgreement.pdf>; see also Jeff Cohen, *Calculating SAG Residuals*, BACKSTAGE (Nov. 14, 2008 12:00 AM), <http://www.backstage.com/news/calculating-sag-residuals/>.
7. Amol Sharma, *For TV Reruns, an Existential Crisis*, THE WALL STREET JOURNAL (June 19, 2014, 7:02 PM ET), available at <http://online.wsj.com/articles/for-tv-reruns-an-existential-crisis-1403218969>.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* ("That is because buyers are generally looking for 90 to 100 episodes—threshold that allows them to air reruns for a long time without repeating any episodes.").
12. Brook Barnes, *Studio Deals Unlock a Trove of Reruns*, THE NEW YORK TIMES (Aug. 25, 2014), available at [http://www.nytimes.com/2014/08/26/business/media/studio-deals-unlock-a-trove-of-reruns-from-shows-like-breaking-bad-and-sons-of-anarchy.html?\\_r=0](http://www.nytimes.com/2014/08/26/business/media/studio-deals-unlock-a-trove-of-reruns-from-shows-like-breaking-bad-and-sons-of-anarchy.html?_r=0).
13. *Id.*
14. SAG-AFTRA Members Vote to Approve 2014 TV/Theatrical Contracts, SAG-AFTRA (Aug. 22, 2014, 8:11 PM), <http://www.sagaftra.org/sag-aftra-members-vote-approve-2014-tvtheatrical-contracts>; see also Jonathan Handel, *SAG-AFTRA Ratifies 2014 TV and Theatrical Contracts*, THE HOLLYWOOD REPORTER (Aug. 22, 2014 8:18 PM PST), <http://www.hollywoodreporter.com/news/sag-aftra-ratifies-2014-tv-727205>; Todd Cunningham, *SAG-AFTRA's New Deal Unifies TV Coverage, Broadens Basic Cable Agreement*, THE WRAP (July 4, 2014, 12:02 PM), <http://www.thewrap.com/sag-aftras-new-deal-unifies-tv-coverage-broadens-basic-cable-agreement/>.
15. Justin Bachman, *Netflix, Hulu, and the New Definition of Reruns*, BLOOMBERG (Feb. 11, 2014), available at <http://www.businessweek.com/articles/2014-02-11/tv-shows-sell-early-to-cable-and-streamers-in-a-sellers-market>.
16. *Id.*

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# Mortgaging the Mona Lisa<sup>1</sup>

By Beth H. Alter, Laurie R. Binder, Stacia C. Kroetz and David E. Stutzman

What is the value of art? Whose interests, if anyone's, should art be used to serve, and who ultimately should decide these issues? These are a few of the many compelling questions that were raised by the Chapter 9 bankruptcy plan (as subsequently amended, the Plan) proposed by the City of Detroit (the City).<sup>2</sup>

The Plan encompasses the so-called "Grand Bargain," an agreement reached among the City and the Detroit Institute of Arts (the DIA) and others, that purports to both preserve the City's renowned art collection (the DIA Collection) and to provide a distribution of approximately 90% of its pensions to the City's tens of thousands of pensioners. Pursuant to the Grand Bargain, \$816 million in contributions over 20 years has been pledged to the City for the joint purposes of creating a bankruptcy-proof charitable trust to hold the DIA Collection and to pay the pensioners. The DIA Collection itself would not be available in any manner for payment of any creditors, and no other unsecured creditors would receive any distributions pursuant to the Grand Bargain.

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*"What is the value of art? Whose interests, if anyone's, should art be used to serve, and who ultimately should decide these issues?"*

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Certain unsecured creditors, led by the entities that insured certain bonds issued by the City, had objected to the Plan, including vociferous objections to the Grand Bargain. Such creditors found it incomprehensible and in violation of the Bankruptcy Code that the City would keep the DIA Collection intact with the proceeds of the deal going solely to the pensioners. The objecting creditors insisted that under the Bankruptcy Code, the DIA Collection must be used to finance recoveries for all unsecured creditors and that, at the very least, it must be used as collateral for a loan, which the creditors claimed would result in a much larger recovery for creditors other than the pensioners.

The City and others who support the Grand Bargain countered that such arguments ignore § 904 of the Bankruptcy Code, which specifically allows municipalities to exclude certain assets from bankruptcy court jurisdiction. They argued that the City has no obligation to sell or transfer the DIA Collection to pay creditors under § 904. In fact, they claimed that the City may preserve the DIA Collection and protect it for the public's benefit as a significant cultural asset of the City in which the City and

its citizens have always taken civic pride, and which is essential to the City's identity.

Further, the Plan proponents argued that the City is prohibited from selling or transferring the DIA Collection under Michigan law, which law typically cannot be overridden by the Bankruptcy Code. On June 13, 2013, Michigan's Attorney General Bill Schuette released an opinion (the Attorney General's Opinion) recounting the history of the DIA, and concluding that it is held by the City in charitable trust for the public. As a result, "no piece in the collection may thus be sold, conveyed, or transferred to satisfy City debts or obligations."<sup>3</sup> The DIA itself had echoed the Attorney General's Opinion, noting that it was formed as a non-profit corporation under Michigan law in 1885 (DIA Corp.) under a statute that provided in part that the "character and purposes of such corporation shall not be changed, nor its general art collection be sold, encumbered, or disposed of, unless authorized by the legislature of this state...."<sup>4</sup> The articles of incorporation stated that the DIA Corp. was established for the purpose of the:

[F]ounding of a public art institute in the City of Detroit, which may acquire and hold such real estate as may be suitable for the site of such art buildings as it may erect or maintain thereon; receive and use such gifts, contributions, devises and bequests, as may be made it, for art purposes; receive, acquire, collect and own paintings, sculpture, engraving, drawings, pictures, coins and other works of art, and may institute, maintain or assist schools for the teaching of art, and may do all other things authorized by [the 1885 Act], and have and enjoy all the privileges and franchises given thereby.

After a transfer of title to the City in 1919, the City transferred responsibility for operations back to DIA Corp. in 1997, but retained legal title to the DIA Collection. Under the related operating agreement (which expires in 2018), the City relinquished the right to purchase and sell the DIA's works of art to DIA Corp., provided that "any funds it receives from any sale must be used solely to purchase other works of art for the art collection." The DIA noted in its Response that at the time of the transfer, the DIA Collection was understood as being held in trust, evidenced in part by the DIA's Collections Management Policy (as approved in the operating agree-



ment), which prohibits the use of proceeds acquired from deaccession as operating funds, and states that in the process of deaccessioning works from the collection, “the Museum must be ever aware of its role as trustee of the collection for the benefit of the public.” Both the Attorney General’s Opinion and the DIA’s Response concluded that the facts support a finding under Michigan law that the DIA Collection has been and continues to be held in charitable trust, or alternatively in an implied or constructive trust and, as a result, the sale or collateralization of the DIA Collection to pay off the City’s debts (which are unrelated to the DIA) was prohibited.

In addition to the questions presented under the Bankruptcy Code and Michigan law, there were significant other issues raised by the Plan as well. For example, do governments, museums and public institutions have an obligation to preserve cultural assets for the benefit of citizens, or can the financial needs of the citizens or other parties in any circumstances outweigh the cultural benefits? Each of the American Alliance of Museums (the AAM) and the Association of Art Museum Directors (the AAMD) has a code of ethics that prohibits the collateralization of collections.<sup>5</sup> The AAMD goes even further to say that “no funds established for future art acquisitions (endowment or otherwise) should be pledged as collateral for loans.” The International Council of Museums’ (the ICOM) Code of Ethics states that “[m]useum collections are held in public trust and may not be treated as a realisable asset.”<sup>6</sup> Yet the Plan does not provide a full recovery to the pensioners and provides even less of a recovery to the City’s other unsecured creditors. Should the DIA Collection be collateralized if the funds arguably would be used to serve a portion of the very public for whose benefit the DIA Collection is being held?

Further, what is the impact of donor intent? Many private donors have contributed works of art to the DIA over the years, as well as funds for the care, maintenance and exhibition of the DIA Collection. According to the DIA’s Response, such donors “have gone to great lengths to grow an endowment that will help ensure that the Museum and its collections and services will be available to the Public in perpetuity.” The DIA notes that “in most if not all cases,” donors have made such donations “with the express or implied restriction or understanding that those objects and funds would be used solely to benefit the ‘Detroit Institute of Arts’ and the Public the Museum serves.”<sup>7</sup> What role should donors’ wishes play in the disposition of the DIA Collection?

Finally, what role, if any, should valuation play in determining the use of the DIA Collection? According to an appraisal commissioned by the City from Artvest Partners, an art advisory firm, the value of the DIA Collection is between \$2.8 billion and \$4.6 billion. Artvest

Partners advised, however, that the City might not get much more than \$850 million in the event of liquidation because the DIA Collection would saturate the market and drive prices down.<sup>8</sup> In contrast, Art Capital Group, a lender specializing in fine arts, had offered to loan the City up to \$4 billion as long as the DIA Collection was pledged as collateral. The loan amount was based in part on an appraisal commissioned by Art Capital Group, which valued the DIA Collection at \$8.1 billion. Should these very disparate valuations have influenced the Bankruptcy Court’s decision concerning the reasonableness of the Plan? While pensioners might have recovered less if the City were to accept Art Capital Group’s offer, other unsecured creditors would most certainly have recovered more than under the Plan.

Although these issues will not be addressed in the City’s Chapter 9 case, the Grand Bargain and Art Capital Group’s offer nevertheless raised many interesting issues not only under the specifics of the Bankruptcy Code and Michigan law, but also concerning the role that art should play in society. The question remains: Would you mortgage the Mona Lisa?

## Endnotes

1. “If you told our French cousins you were mortgaging the ‘Mona Lisa,’ you’d have rioting in the streets.” Mark Stryker & John Gallagher, *The art of the DIA deal: Orr must get cash out of collection without selling it*, Detroit Free Press (Oct. 14, 2013, 1:53 PM), <http://www.freep.com/article/20131013/OPINION05/310130052/> (quoting Thomas Guastello, chairman of the Oakland County Art Institute Authority).
2. Although these issues were expected to be addressed by the Bankruptcy Court for the Eastern District of Michigan in the trial that began on September 2, 2014 concerning the confirmation of the Plan, the creditors that had raised those issues in their objections to the Plan subsequently settled with the City, thereby mooted these issues in this case. The significant issues they raised, however, have not been settled and will undoubtedly arise in other cases.
3. *Conveyance or transfer of Detroit Institute of Arts collection*, Mich. Att’y Gen. Op. No. 7272, at 22 (June 13, 2013).
4. Response of the Detroit Institute of Arts to Objections to the City’s Amended Plan of Confirmation, U.S. Bankruptcy Court Eastern District of Michigan, Southern Division, *In re: City of Detroit, Michigan*, Case No. 13-53846, May 27, 2014 (the “DIA Response”).
5. See American Alliance of Museums, Code of Ethics for Museums, available at <http://www.aam-us.org/resources/ethics-standards-and-best-practices/code-of-ethics> (“The distinctive character of museum ethics derives from the ownership, care and use of objects, specimens, and living collections representing the world’s natural and cultural common wealth. This stewardship of collections entails the highest public trust and carries with it the presumption of rightful ownership, permanence, care, documentation, accessibility and responsible disposal. Thus, the museum ensures that...collections in its custody are lawfully held, protected, secure, unencumbered, cared for and preserved...”); Association of Art Museum Directors 2011, Professional Practices in Art Museums, available at <https://aamd.org/sites/default/files/document/2011ProfessionalPracticesinArtMuseums.pdf> (“The collections the museum holds in public trust are not financial assets

and may not be converted to cash for operating or capital needs. No collection or portion thereof may be pledged as collateral for a loan, except that a museum may grant a security interest in a work that it is acquiring in order to secure the payment of the balance of the purchase price. To present fairly the museum's financial position, collections should not be capitalized.... Likewise, no funds established for future art acquisitions (endowment or otherwise) should be pledged as collateral for loans.”).

6. International Council of Museums' Code of Ethics, *available at* [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code\\_ethics2013\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code_ethics2013_eng.pdf).
7. Response, *supra*, at 9.
8. Mary Williams Walsh, *Detroit Mum on Proposal to Use Its Art as Collateral*, N.Y. TIMES (Aug. 26, 2014, 8:53 PM), [http://dealbook.nytimes.com/2014/08/26/detroit-mum-on-proposal-to-use-its-art-as-collateral/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2014/08/26/detroit-mum-on-proposal-to-use-its-art-as-collateral/?_php=true&_type=blogs&_r=0).

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# HarperCollins Publishers, LLC v. Open Road Media

By Joseph Perry

## Holding

On March 14, 2014, Judge Naomi Reice Buchwald granted HarperCollins Publishers' (HarperCollins) motion for summary judgment alleging that Open Road Media (Open Road) willfully infringed HarperCollins' exclusive right to license e-book publications of Jean George's children's novel, *Julie of the Wolves*.

## Facts

In 1971, Jean George and the publishing house Harper & Row (the plaintiff HarperCollins' predecessor-in-interest) entered into a contract to publish George's children's novel, *Julie of the Wolves*. George conveyed to Harper and Row publishing rights to sell hardcover and paperback editions of *Julie of the Wolves* in exchange for a \$2,000 advance, royalty payments between 10 and 15% for hardcover editions sold, and royalties for paperback editions "to be mutually agreed" upon.

In recent years, George and HarperCollins entered into agreements to allow third parties to use *Julie of the Wolves* in electronic formats. For example, the author had agreed to let HarperCollins use text from *Julie of the Wolves* in CD-ROMs, online teaching materials, online examination materials, and for a test of early e-book devices. In 2010, the defendant, Open Road, an e-book publisher, approached George's agent about publishing an e-book of *Julie of the Wolves* in exchange for a 50% royalty paid to George. The author's agent contacted HarperCollins to see if HarperCollins could match Open Road's offer, but HarperCollins only offered a 25% e-book royalty. Thus, George entered into an agreement with Open Road in April 2011 to publish an e-book edition of *Julie of the Wolves*.

On November 23, 2011, HarperCollins filed a lawsuit in federal district court against Open Road, claiming that the latter willfully infringed HarperCollins' rights to *Julie of the Wolves* in violation of 17 U.S.C. § 106 under federal copyright law. HarperCollins sought injunctive relief, actual damages or statutory damages, and the recovery of Open Road's profits and HarperCollins' costs.

## Analysis

Below are summaries of the standard of review the court used for interpreting contracts in copyright infringement cases and its application to the HarperCollins case, and the standard of review the court used for new use technology as it applies to the HarperCollins case.

## Standard of Review: Contract Interpretation in Copyright Infringement Cases

To prove copyright infringement, a plaintiff must establish (1) "ownership of a valid copyright and (2) copying of constituent elements of the work that are original."<sup>1</sup> When the only element at issue is ownership of a valid copyright, then "the scope of the alleged infringer's license presents the court with a question that essentially is one of contract: whether the parties' license agreement encompasses the [relevant] activities."<sup>2</sup> Thus, the court stated that the outcome of the HarperCollins' copyright infringement case depended on the construction of the language in the 1971 Harper & Row contract.

In its contractual language analysis, the court said that it would "look to all corners of the document rather than view sentences or clauses in isolation,"<sup>3</sup> and that it would "give effect to the intent of the parties as revealed by the language they chose to use."<sup>4</sup> The three main paragraphs at issue in the 1971 Harper & Row contract were paragraphs one, 20, and 14.

## Application: Paragraph 1

The court held that it must interpret the 1971 Harper and Row contract as a whole, so it did not need to determine whether Paragraph One standing alone was sufficient to grant e-book publication. Paragraph One granted HarperCollins "the exclusive right to publish" *Julie of the Wolves* "in book form" in the English language within the specified territory. Open Road and HarperCollins disputed whether the language in Paragraph One granted HarperCollins the exclusive right to license e-book publications of *Julie of the Wolves* to third parties.

In its analysis, the court looked at *Random House v. Rosetta Books LLC*.<sup>5</sup> In *Rosetta Books*, several authors who signed publishing agreements with Random House entered into agreements with Rosetta Books to publish electronic editions of their respective books. The *Rosetta Books* court held that Random House's contracts, which stated that Random House had the authority to "print, publish, and sell the work in book form," did not include e-book editions. In contrast, the 1971 Harper & Row contract stated that Harper & Row had "the exclusive right to publish [*Julie of the Wolves*]...in book form." The court noted the absence of the word "print" in the 1971 Harper & Row contract, so the court distinguished the Random House contracts in *Rosetta Books* from the 1971 Harper & Row contract. Nevertheless, the court said that it must interpret the contract as a whole and did not have to reach the issue



of whether Paragraph One standing alone granted HarperCollins the exclusive right to license e-book publications of *Julie of the Wolves* to third parties.

#### **Application: Paragraph 20**

The court held that Paragraph 20 allowed HarperCollins to issue licenses subject to the author's approval. Moreover, the language in Paragraph 20 was broad enough to encompass e-book publication. Paragraph 20 stated:

Anything to the contrary herein notwithstanding, the Publisher shall grant no license without the prior written consent of the Author with respect to the following rights in the work: use thereof in storage and retrieval and information systems, and/or whether through computer, computer-stored, mechanical or other electronic means now known or hereafter invented and ephemeral screen flashing or reproduction thereof, whether by print-out, phot[o] reproduction or photo copy, including punch cards, microfilm, magnetic tapes or like processes attaining similar results, and net proceeds thereof shall be divided 50% to the Author and 50% to the Publisher. However, such license shall not be deemed keeping the work in print once the work has gone out of print in all editions.

Open Road argued that the court should disregard the "and/or" language in Paragraph 20, and rewrite Paragraph 20 as follows: "...in storage and retrieval and information systems, [and/or] whether through computer, computer-stored, mechanical or other electronic means now known or hereafter invented." Open Road argued that the "and/or" language is "'syntactically awkward,' that it constitutes 'unnecessary insertion,' that it would create meaningless surplusage, and that it would lead to an 'absurd result.'"

The court disagreed with Open Road's argument to delete the "and/or" language for several reasons. First, it agreed with *Chimart Assocs v. Paul*,<sup>6</sup> which held that there is a "heavy presumption that a deliberately prepared and executed written instrument manifest[s] the true intention of the parties." Second, the court cited *Boosey*, which stated that "the burden of justifying a departure from the most reasonable reading of the contract should fall on the party advocating the departure,"<sup>7</sup> and Open Road failed to prove its burden. Third, the court held that Open Road's argument was "unwarranted in a new use context, where, given the age of the contract at issue, extrinsic evidence is scarce and thus 'the parties or assignees of the contract should be entitled to rely on the words of the

contract.'"<sup>8</sup> Finally, the court held that even if it adopted Open Road's revision of Paragraph 20, Paragraph 20's "storage and retrieval and information systems" language likely encompassed e-book technology according to new use precedent. Thus, the court denied Open Road's request to rewrite Paragraph 20.

Moreover, Open Road offered two more arguments about interpreting the contractual language in Paragraph 20: 1) Paragraph 20 did not grant HarperCollins the right to publish an e-book edition of *Julie of the Wolves*, which HarperCollins denied, and 2) Paragraph 20 was missing a royalty rate, which deemed Paragraph 20 "unenforceable for lack of the provision of the consideration to be paid under the contract." The court held in favor of HarperCollins in both instances, stating that Open Road tried to "redirect attention to the question of whether HarperCollins had the right to publish an e-book version of the work, a question not before this Court and not germane to this litigation." Rather, the question before the court was whether HarperCollins had exclusive rights to license the work's e-book publication and not whether HarperCollins could publish an e-book itself. In addition, the court stated that "Paragraph 20 explicitly includes a royalty provision for third-party licenses by which HarperCollins and the author evenly divide the net proceeds."

#### **Application: Paragraph 14**

The court held that the reservation of rights clause in Paragraph 14 did not provide evidence that George did not grant e-book publication rights to HarperCollins. Paragraph 14 stated that "[a]ll rights in the Work now existing, or which may hereafter come into existence, not specifically herein granted," are reserved to George. Open Road argued that Paragraph 14 was evidence that George did not intend to grant e-book rights to HarperCollins, and "to find otherwise would convert this provision to surplusage." The court agreed with *Boosey*, which stated that the "reservation clause stands for no more than the truism that [the author] retained whatever [s]he had not granted...[i]t contributes nothing to the definition of the boundaries of the license."<sup>9</sup> Thus, the court held that Paragraph 14 did not define the boundaries of the e-book license, and Paragraph 14 did not constitute evidence that George did not grant e-book rights to HarperCollins.

#### **Standard of Review: Foreseeability of New Uses**

As a guide to evaluate whether e-book technology in the 1971 Harper & Row contract was a foreseeable new use, the court looked to precedent, such as *Bartsch*, *Bourne*, and *Boosey*. The court stated that in a "new use" case it must determine whether the new use "may reasonably be said to fall within the medium as described in the license."<sup>10</sup> Further, the language of the contract governs.<sup>11</sup> Moreover, the court must use "neutral principles of contract interpretation," avoid using a "default rule in favor

of copyright licensees, or any default rule whatsoever,” and “if the contract is more reasonably read to convey one meaning, the party benefitted by that reading should be able to rely on it; the party seeking exception or deviation from the meaning reasonably conveyed by the words of the contract should bear the burden of negotiating for language that would express the limitation or deviation.”<sup>12</sup>

Moreover, the words of the contract have much significance in “new use” cases because the court may have trouble determining the parties’ intent. For example, parties may not remember contract negotiations, and documentary evidence may not be available. In addition, extrinsic evidence may not likely be “helpful when the subject of the inquiry is something the parties were not thinking about.”<sup>13</sup> Thus, *Bartsch, Bourne, and Boosey* emphasized contractual language rather than extrinsic evidence.

The court also said that it would consider “the ‘foreseeability’ of the new use at the time of contracting.” However, the court noted that case law “did not explicitly treat ‘foreseeability’ of the new use at the time of contract as a *sine qua non*. Instead whether foreseeability is required remains an open question.” Thus, Judge Reice Buchwald emphasized contractual language and the foreseeability of the new use at the time of contracting in determining whether e-book technology in the 1971 Harper & Row contract was a foreseeable new use.

### Application: Foreseeability of New Uses

The court held that the language in the 1971 contract provided that e-book technology was a foreseeable new use. Open Road argued that there should be a two step analysis in determining a new use standard: 1) the court must analyze the breadth of the grant language, and 2) determine the new use’s foreseeability. The court stated that *Bartsch, Bourne, and Boosey* did not indicate that there was a two step analysis, and that the Second Circuit left open whether foreseeability was even required.<sup>14</sup> Thus, the court held that Open Road’s argument that a “separate and specific showing of foreseeability” needs to be shown was “at best, an oversimplification and, at worst, a distortion of the explicit language of the relevant precedent.” Moreover, the court held that the contractual language, “now known or hereafter invented,” in the 1971 Harper & Row contract contemplated foreseeable new uses, such as e-book technology, at the time of the contract. The court also stated that it would come to the same conclusion even if foreseeability was not satisfied by the 1971 contractual language, because e-books were anticipated by publishing industry members just like members of the motion picture industry “contemplated television

broadcasts and videocassettes at the time of contracting in *Bartsch, Bourne, and Boosey*.” Thus, the court held that e-book technology was a foreseeable new use.

### Remedies

The parties did not brief issues about damages and the calculation of damages, so the court ordered the parties to either submit a briefing schedule regarding damages and the calculation of damages by March 28, 2014 or inform the court by the same date if they preferred a negotiated settlement.

### Conclusion

The court granted HarperCollins’s motion for summary judgment, and it held that Open Road willfully infringed HarperCollins’ exclusive right to license e-book publications of George’s children’s novel, *Julie of the Wolves*. Moreover, the court said that its holding may be limited to the 1971 Harper & Row contract because it is dependent on antiquated language specific to the 1971 Harper & Row contract.

### Endnotes

1. *Feist Publ’ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 361 (1991).
2. *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995).
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# State Film Incentives: Hollywood May Be Coming to a Town Near You

By Ethan Bordman

Hollywood, California may historically be known as “the Movie Capital of the World”;<sup>1</sup> however, the competition among states to offer lucrative production tax incentives means that this title is up for grabs. For several years, Michigan—the location of films such as *Up in the Air*, with George Clooney; *Gran Torino*, with Clint Eastwood; *Real Steel*, with Hugh Jackman; *You Don’t Know Jack*, with Al Pacino; and *Conviction* with Hilary Swank<sup>2</sup>—was dubbed “The Hollywood of the Midwest,”<sup>3</sup> thanks to a rebate credit of up to 42%.<sup>4</sup> Georgia, which offers up to a 30% transferrable credit (a 20% base incentive plus an additional 10% if the project features a state logo)<sup>5</sup> has been referred to as the “Hollywood of the South,”<sup>6</sup> serving as the location for *The Blind Side*, starring Sandra Bullock and *Flight*, starring Denzel Washington.<sup>7</sup> Louisiana is another contender for the title of southern movie capital; it is often referred to as “Hollywood South.”<sup>8</sup> It offers a tax credit of up to 35% and no annual cap.<sup>9</sup> Films such as *Side Effects*, with Channing Tatum and Catherine Zeta-Jones and *Django Unchained*, starring Jamie Foxx and Leonardo DiCaprio, have been filmed there.<sup>10</sup> Pittsburgh is another popular location. *Entertainment Weekly* called this city the “Hollywood of the East,” thanks to a 25% state tax credit and state cap increase from \$10 million to \$75 million in 2004.<sup>11</sup> However, this cap was reduced to \$60 million in 2013.<sup>12</sup> Film and television incentives and credits were offered by only a handful of states in the early 2000s. Currently, 39 states and Puerto Rico<sup>13</sup> offer financial incentives designed to attract motion picture, television, and interactive productions.

## Runaway Productions

When choosing a location for a shoot, producers consider factors such as the setting for the screenplay, availability of the crew, access to sound stages, and costs of travel and lodging. However, their first priority is to reduce the cost of production. According to Vans Stevenson, Senior Vice President State Legislative Affairs for the Motion Picture Association of America (MPAA), “Incentives are the number one item that film finance and production companies look at when they are trying to decide where to locate a production.”<sup>14</sup> Stevenson also pointed out that labor costs and location are important, although he noted that most places can be made to look like someplace else.<sup>15</sup> One example is *Battle: Los Angeles*. This film, about an alien invasion of Los Angeles, was not filmed in that city or even in the state of California; nearly all of it was filmed in Shreveport and Baton Rouge, Louisiana.<sup>16</sup>

The incentives in the United States have grown since Louisiana became the first state to create a program in

2002.<sup>17</sup> The creation and growth of incentives is a response to “runaway productions,” those that leave the U.S. to be produced elsewhere. A 2005 report by the Center for Entertainment Industry Data and Research attributed this trend to factors including financial incentives and exchange rates.<sup>18</sup> The Canadian Production Services Tax Credit, enacted in 1998, offered a rebate of 11% on qualified Canadian labor; individual provinces offered additional rebates on labor that ranged from 11% to 47%, along with other incentives.<sup>19</sup> This credit, coupled with a favorable exchange rate (in June 1998, \$1.00 U.S. was worth \$1.47 Canadian)<sup>20</sup> and the ability of Canadian cities, such as Toronto, to convincingly represent U.S. cities like New York, made Canada a popular draw for films and television.

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## Tax Incentives—Credits, Rebates and Refunds

Production incentives in different states vary on certain points. These include the type of incentive offered, qualifying expenditures, and whether a financial cap is allocated to the incentive. The typical forms of incentives are tax credits, tax rebates and refundable tax credits. A state can issue a tax credit to refund a portion of the tax incurred by a production in the state. A tax rebate pays cash, in the form of a check, to a production for certain expenditures made in the state. A refundable tax credit is paid by the state to the production for the balance in excess of taxes owed. The credits are based on qualified expenses, which vary from state to state.

Many states allow tax credits to be “tradable” or “transferrable,” meaning that they can be traded for cash, like stock options. For example: a film production spends \$1 million in a state that offers a 30% tax credit. After all the receipts and financials have been processed by a certified public accountant, proving the money was spent in the state and is a qualified expenditure, the production company files a request with the state for a tax credit certificate. Once approved, the state gives the production a tax credit certificate for \$300,000 (30% of \$1 million). This credit can then be used to lower the taxes accumulated on



the production—or the credit can be sold. If it is sold, the dollar value—for example, 90 cents on the dollar—is negotiated with a buyer. This allows the buyer, which could be any business located in the state, to buy a \$300,000 tax credit for \$270,000 and use it toward taxes owed to the state's government. The production company then has \$270,000 in cash to use at its discretion.

Cities, too, may offer additional enticements in the forms of tax credits, city services, and marketing credits. New York City's Office of Film, Theatre and Broadcasting's "Made in New York®" Marketing Credit Program offers media packages where at least 75% of the project is produced in New York City.<sup>21</sup> The credit, which varies based on the below-the-line budget of the film, allows promotion and advertising of the film through public transportation—at bus stops, on subway cards, and in 30-second commercials on taxicab video monitors.<sup>22</sup> The New York Police Department (NYPD) offers the services of the NYPD Movie/TV Unit, which assists productions in dealing with any filmed scenes that may impact public safety.<sup>23</sup> For the 2014 season, 24 television pilots were shot in New York City.<sup>24</sup>

The types of expenditures included in the incentive vary from state to state. "Qualified expenses" generally cover pre-production, production, and post-production expenditures such as salaries, facilities, props, travel, wardrobe, and set construction. "Qualified labor" includes those individuals whose salaries are covered by the incentive, but many states place a cap on an individual's salary. For example, Georgia has no restriction on salary<sup>25</sup> but Michigan has a \$2 million salary cap per individual per production.<sup>26</sup> "Qualified production" usually includes feature films, episodic television series, television pilots, television movies, and miniseries. Most incentives exclude documentaries, news programs, interview or talk shows, instructional videos, sports events, daytime soap operas, reality programs, commercials, and music videos.

Some states have approved projects and later reversed the decision. In 2011, New Jersey Governor Chris Christie blocked a \$420,000 tax credit, which was to be issued by the state's Economic Development Authority, to MTV's *Jersey Shore*.<sup>27</sup> New Jersey, which at the time included reality television as a qualified production, had approved the credit before filming the show's first season.<sup>28</sup> Governor Christie stated: "I am duty-bound to ensure that taxpayers are not footing a \$420,000 bill for a project which does nothing more than perpetuate misconceptions about the State and its citizens."<sup>29</sup> This action by Christie brought on a debate about "content neutral" issues in choosing which projects may qualify for a state's incentive.<sup>30</sup>

Some states also have guidelines in choosing which projects are approved based on the project's content. According to the Texas Moving Image Industry Incentive Program, the state may "deny an application or eventual payment on an application because of inappropriate con-

tent or content that portrays Texas or Texans in a negative fashion, as determined by the (Film) Commission, in a project."<sup>31</sup> In 2010, after it was produced, the Texas Film Commission denied the incentive for the film *Machete*, which stars Robert De Niro and Danny Trejo, stating that the film portrayed the state negatively.<sup>32</sup> The producers of the film filed a lawsuit against the Texas Film Commission, claiming that officials approved the credits before filming and later denied them.<sup>33</sup> The lawsuit stated that the Commission reviewed and approved the script in 2009—but after the movie trailer was released in May 2010, it ruled that the content was "'inappropriate' or portrayed Texas or its citizens 'in a negative fashion,'"<sup>34</sup> following complaints to the Texas Film Commission that the film contained inappropriate content.<sup>35</sup> The production spent \$8 million in the Lone Star State, employing 125 crew and 420 cast members.<sup>36</sup>

### Here Today May Not Mean Here Tomorrow

One key consideration in choosing a state based on its financial incentives is that programs can be changed or eliminated at any time. In May 2014, Florida announced that all of the \$296 million allocated to the state's incentive program had already been spent, well prior to the program's end date of 2016.<sup>37</sup> Before this announcement, the MPAA released an analysis, showing that Florida's Film and Entertainment Industry Financial Incentive Program—which offered a 20% to 30% transferrable credit—had supported 87,870 jobs, \$2.3 billion in wages, and \$7.2 billion in economic spending across the state since 2010.<sup>38</sup> Further, the analysis pointed out that—for nearly 20% of visitors—viewing a movie or television series filmed in Florida contributed to their decision to travel to the state.<sup>39</sup> Gus Corbella, chairman of the Florida Film and Entertainment Advisory Council, emphasized that the lack of additional funding by the legislature sends a negative message to producers: "[t]hat kind of roller-coaster ride of financing is detrimental to trying to bring and grow and maintain that kind of business here in Florida."<sup>40</sup> Graham Winick, the film coordinator for the city of Miami Beach and past president of Film Florida, explained that besides scaring off producers, not having a program in place undermines the infrastructure that took decades to build.<sup>41</sup> Staff and crew will move from the state and considerable effort will be required to attract qualified professionals to return when the incentive is reinstated.

In August 2014, North Carolina, which offered a 25% refundable credit and \$61 million in incentives in 2013, replaced the incentive with a \$10 million grant program starting on January 1, 2015.<sup>42</sup> The cap per production would be \$5 million, a quarter of what the state paid to productions such as 2012's *Iron Man 3*, which employed 2,377 people and generated \$81 million for the state on a \$20 million credit.<sup>43</sup> However, the new program may be a good source for television pilot season, which typically takes place between November and April; these projects

will be filmed in the first quarter of the year when grant funds are more likely to be available.<sup>44</sup> The availability of state funds is another concern for producers in utilizing the incentive. No production wants to start filming and find that by the time of completion, the state has spent all of the funds allocated to the program for the term or the year. However, pilot episodes are not usually tied to a specific filming location, so it is possible to begin filming in a state without a commitment to continue an entire series there.<sup>45</sup> *Revenge*, an ABC drama that takes place in New York, generated \$5.5 million in spending and received \$1.3 million in incentives, while *Hart of Dixie*, a CW comedy-drama that takes place in Alabama, spent \$3 million and received \$772,816 in incentives.<sup>46</sup> Both shows shot their pilot episodes in North Carolina, but moved to California once they were ordered as a series.<sup>47</sup> As a result of the new incentive, the MPAA stated that North Carolina could lose as many as 4,000 jobs in addition to the overall economic boost brought by a production.<sup>48</sup> According to the North Carolina General Assembly, the reduction in the incentive was intended to create an even economic playing field for all businesses and industries in the state.<sup>49</sup>

From 2008 to 2011, Michigan had one of the most lucrative film incentives in the country—a credit of up to 42%.<sup>50</sup> Clint Eastwood, who in 2008 directed and starred in *Gran Torino*—which takes place and was filmed in the state—proclaimed that Michigan “will be the new film capital of the world.”<sup>51</sup> However, when Governor Rick Snyder took office in January 2011, he soon announced that Michigan’s Film and Digital Media Production Assistance Program would incur significant cuts.<sup>52</sup> In the most drastic reduction, the previously unlimited incentive would now be subject to a cap of \$25 million; in addition, the incentive rebates would also be lowered.<sup>53</sup> In February 2011, Ernst and Young issued a report showing the economic effect of Michigan’s film credit in 2009 and 2010, prior to the cuts.<sup>54</sup> In each of these years, \$209.3 million with \$73 million in credit costs and \$322.6 million with \$117.2 million in credits costs, respectively, was spent on total production expenditures in Michigan.<sup>55</sup> As a result of this spending, each dollar of net film tax credit cost generated \$5.89 in economic output in 2009 and generated \$5.94 in 2010.<sup>56</sup>

Other states have taken measures to suspend incentives. Alabama State Senator Del Marsh, who was responsible for creating the state’s Entertainment Industry Incentive Act of 2009, proposed re-writing the language of the state’s incentive.<sup>57</sup> His proposal was based on a study conducted by the University of Alabama entitled “An Evolution of Alabama’s Entertainment Industry Incentives Program and the Economic Impact of the Program’s Productions.” This study focused on 24 films shot and produced in the state over the last three years; it showed that production companies received more money from the incentive than they should have.<sup>58</sup> Currently, the state has a \$15 million cap, which will increase to \$20 million in

2015.<sup>59</sup> The bill, which would have suspended the incentive from October 2014 until October 2016, never went for a vote.<sup>60</sup>

Federal film incentives also come and go. In 2004, as part of the American Jobs Creation Act of 2004, Congress enacted 26 U.S.C. §181: Treatment of certain qualified film and television productions, in an effort to stimulate the activity of productions in the United States. Section 181 encourages investment in U.S.-based productions by giving tax benefits to investors who can elect an immediate deduction for qualifying expenditures of the film in the year the expenditure occurs.<sup>61</sup> The incentive applies to productions whose budgets do not exceed \$15 million (\$20 million if a significant portion of the production is filmed in areas designated as distressed) as long as 75% or more of the total compensation earned occurred in the U.S.<sup>62</sup> The law expired in December 2011 but was renewed in January 2013 during “Fiscal Cliff” negotiations, as part of the American Taxpayer Relief Act of 2012, for productions that commenced in the 2013 calendar year.<sup>63</sup>

Some of the changes in incentives are not related to the incentive itself, but rather from illegal conduct associated with the incentives. In 2011, Iowa prosecutors charged Tom Wheeler, the state’s former film commissioner, with several felonies, including official misconduct, as a result of his handling of state film tax credits.<sup>64</sup> The allegations arose from an internal state audit that found irregularities in approved expenditures, including use of credit funds by filmmakers to purchase a Land Rover and other luxury vehicles for themselves.<sup>65</sup> The audit found that \$26 million of the nearly \$32 million in tax credits were improperly awarded, either because productions did not qualify for the credit or producers did not submit the required documentation.<sup>66</sup> Further, it was discovered that the film office allowed credits to be paid on estimates of production costs rather than actual expenses, and prosecutors claimed that producers set up shell companies with local addresses which actually purchased goods and services from out of state.<sup>67</sup> Producer Wendy Weiner Runge was sentenced to 10 years in prison after pleading guilty to first-degree fraudulent practices in the misuse of tax credits.<sup>68</sup> Runge’s company received \$1.8 million in incentives. Invoices showed she inflated prices of items, allegedly paying \$225 for a broom, \$900 for a step-ladder, and \$450 for two shovels; additionally, Runge double-billed several items.<sup>69</sup> Wheeler, the former Iowa Film Office manager, was found guilty of one felony count of misconduct in office, given a deferred judgment, placed on two years’ probation, and charged with paying a \$750 civil penalty, restitution, and other court costs.<sup>70</sup> In announcing his sentence, the judge noted that Wheeler had not benefited personally from his actions.<sup>71</sup>

In 2012, a Los Angeles movie director pled guilty in Suffolk Superior Court in Massachusetts on charges of making a false claim, larceny, false claims to the depart-

ment of revenue, and preparing a false tax return.<sup>72</sup> The director had filed inflated or fictitious expenses, falsely claimed withholding on taxes to lead actors' salaries, and inflated the salaries he had paid to the lead actors. This resulted in the director receiving a tax credit overpayment of more than \$4 million for the two Cape Cod-based films he was producing.<sup>73</sup> In one example, an actor who was paid \$400,000 was reportedly paid \$2.5 million in filings with the film office.<sup>74</sup> The director was sentenced to two to three years in prison with a 10-year probation, and ordered to pay more than \$4.3 million in restitution to the state.<sup>75</sup>

There is good news for some states. In 2014, the California Senate Appropriations Committee proposed bill AB1839, quadrupling the state's incentive to expand the allocation for tax credits to \$400 million a year.<sup>76</sup> It would be the second-highest yearly incentive allocation in the country, behind New York, which offers a \$420 million a year allocation.<sup>77</sup> The incentive was also expanded to include shows that air online and "big-budget blockbusters," along with additional incentives to productions that take place outside the Los Angeles area. According to the Bureau of Labor and Statistics, California lost more than 16,000 film and television jobs and more than \$1.5 billion in wages from 2004 to 2012.<sup>78</sup> In August 2014 the California Senate amended the proposed allocation, passing the incentive to provide \$330 million a year in tax credits for five years beginning in July 2015.<sup>79</sup> The bill is expected to pass the state Assembly and Governor Jerry Brown is expected to sign the bill soon thereafter.<sup>80</sup> With the increase in the cap on California's incentive, Hollywood may reclaim its title as the capital of the movie industry.

### More Than the Entertainment Industry

The Ernst and Young report on Michigan's film tax credit also showed that the impact of the incentive was felt far beyond the film and television industry. In 2009 and 2010, \$190.2 million and \$311.7 million, respectively, was spent on indirect economic activity that support the film industry, including lodging, building rentals, food services, equipment and material rentals, locations, travel services, other contracted services and insurance—a considerable indirect economic impact.<sup>81</sup> Moreover, a "ripple effect" occurred; some of these funds came directly from the production and some from the film crew, who spend part of the salaries they earn in the state by patronizing local retailers. Local tourism is also boosted when visitors come to the set to see the movie being filmed; they may also visit the shooting location after seeing the film. New York offers a "New York TV and Movie Sites Tour," "The Sopranos Sites Tour," and the "Central Park TV and Movie Sites Tour."<sup>82</sup> Each shows tourists where their favorite scenes from popular TV shows and movies were filmed.

Although it was not filmed in the U.S., the 2012 movie *Life of Pi* had an entire tourism campaign built around it by India's Ministry of Tourism.<sup>83</sup> The Leading Hotels of

the World offers visitors a chance to stay in famous hotel rooms featured in the movies.<sup>84</sup> There is also the satisfaction gained from recognizing your hometown in the movie and the excitement of spotting celebrities at local restaurants. Movies and television shows that feature the name of a state, city or town also help to increase the public opinion and tourism since the title and city are featured in every poster, movie trailer, and advertisement, such as *Chicago*, *Casablanca*, *Fargo*, *Elizabethtown* and *Nashville*.

In May 2013, a report entitled Economic Impacts of the Massachusetts Film Tax Incentive Program, prepared for the MPAA, stated that in 2011, this state generated \$375 million in total economic output through \$37.9 million in tax incentives awarded.<sup>85</sup> Massachusetts, which offers a 25% production credit and no annual or project cap, generated approximately \$10 in local spending for every \$1 awarded to moviemakers, leading to the creation of 2,200 full-time equivalent jobs across all industries in the state.<sup>86</sup>

There are some detractors of the incentives. In March 2013, the Massachusetts Commissioner of Revenue noted negative impacts, such as payments to non-residents, who choose to take their salaries and spend the funds back in their home state.<sup>87</sup> Further, although most states require a "qualified" purchase under the incentive to be made in the state, Massachusetts allows items to be purchased from out of state so long as they are used on the production—thus, state-based businesses lose out.<sup>88</sup> The report also measured *new* economic activity and did not include filming that occurred before the tax incentive was implemented, based on the presumption that the production would have continued had the incentive not been enacted.<sup>89</sup> Additionally, much of the incentive-related employment is short-term. The Ernst and Young study on Michigan stated that the average production lasts 90 days, and noted employees may not work every day during a single production.<sup>90</sup> Further, although individuals may work steadily for months on a film, they may not work for several months thereafter. A counterargument to short-term employment is that productions still create jobs for people who would otherwise be out of work; the pay for a few weeks of work on a movie may be enough to satisfy living expenses for several months. The average compensation on a production in Michigan for full-time equivalent employees was \$53,700 in 2009 and \$64,400 in 2010.<sup>91</sup> In 2013, film advocates in North Carolina invited skeptical lawmakers to the set of Showtime's *Homeland* set to meet a few of the 4,000 people statewide who work full-time in film in positions such as prop makers, carpenters, and camera operators.<sup>92</sup> Supporters stated that these individuals put in 15-hour days, earning at least \$20 an hour for months on end.<sup>93</sup> Local companies get a boost as well. H & S Lumber in Charlotte stated that Hollywood productions account for 25% of sales, including an order of 50 miles of wood to build sets for *The Hunger Games*.<sup>94</sup> This production spent more than \$55 million in the state,



employing 1,133 people and received \$13.7 million in tax credits.<sup>95</sup> Economist David Zin noted in a September 2010 report on Michigan's incentive that the benefits to private businesses usually outweigh those to the state (tax revenue).<sup>96</sup> The report concluded that the cost-benefit analysis is one for policy-makers.<sup>97</sup>

Though many residents enjoy the excitement of seeing a movie filmed in their neighborhood, many others dislike the disruption of closed streets and sidewalks. In 2010, during filming of a scene in New York City, a production assistant on *Premium Rush*, starring Joseph Gordon-Levitt, was head-butted by an angry neighborhood resident after requesting that the resident wait a few minutes to cross a street.<sup>98</sup> The resident was arrested for assault and the assistant was treated for a broken nose.

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*"State film incentives have brought not only financial benefits to the states, but publicity as well.... Watching the filming of a soon-to-be blockbuster movie, and seeing Samuel L. Jackson—an A-list star—walk down a neighborhood street, was incredibly exciting for Clevelanders. This type of publicity is difficult to match and even harder to quantify financially."*

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## The Next "Hollywood"

State film incentives have brought not only financial benefits to the states, but publicity as well. Last year, a Cleveland-area friend mentioned that *Captain America 2* was being filmed in front of his office. Days before filming began, in an effort to avoid unnecessary calls to 911, production staff posted signs in the lobby of his office building and surrounding streets warning that gunshots and explosions were being staged in the area. Watching the filming of a soon-to-be blockbuster movie, and seeing Samuel L. Jackson—an A-list star—walk down a neighborhood street, was incredibly exciting for Clevelanders. This type of publicity is difficult to match and even harder to quantify financially.

The competition for incentives will continue to increase through a combination of increasing tax incentives, allowing more qualified expenditures, and by raising or eliminating the cap on states' budgets for the incentives. The fact that changes to film incentives may occur at any time makes producers both excited and anxious, depending on whether the incentive improves or is reduced. Following the announcement of Michigan's reduced incentive cap in 2011, *The Dark Knight Rises* and *The Avengers*,<sup>99</sup> both scheduled to film in Michigan, relocated to Pittsburgh and Ohio respectively. The incentive in Pittsburgh has raised more than \$100 million for four consecutive

years<sup>100</sup> and Ohio, which offers up to a 35% refundable credit and a \$20 million cap, has had over \$300 million in economic output since 2009.<sup>101</sup> There is no end in sight to the competition among states to entice productions. Hollywood may be coming to a town near you!

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# Mixed Martial Arts: A Fighting Chance in New York

By Carla Varriale

Mixed Martial Arts (MMA) is a sport that inspires controversy, particularly in New York, which is the only state where professional MMA remains illegal. MMA was banned by the New York legislature in 1997.<sup>1</sup> At that time, the sport was notorious and markedly different than its current iteration. For example, many of the safety features that are now commonplace were lacking.<sup>2</sup> New York's legislature's initial concerns about the health and safety of the athletes and worries that the sport was too violent have faded as the sport has matured. However, MMA supporters have tried for five years to lift the ban through the legislative process, without success. Even seemingly innocuous proposed legislation that would have vested the New York State Athletic Commission with oversight power and established regulations for amateur MMA bouts (which, ironically, are not subject to the ban and remain unregulated and dangerous), floundered in the last legislative session and never reached a vote in New York's Assembly.

As the legislative process has stalled, a lawsuit in the Southern District of New York challenging the ban has progressed, which may overturn the 1997 legislation. In *Jones v. Schneiderman*,<sup>3</sup> the leading promoter of professional MMA and a group of professional and amateur MMA athletes, trainers and fans (the Plaintiffs) challenged the ban on constitutional grounds. The defendants in the *Jones* action are the New York State Attorney General (NYAG) and other New York state officials (the Defendants).

After years of motion practice, discovery and legal wrangling, the Plaintiffs have now moved for summary judgment on counts three and eight of their Second Amended Complaint. The District Court previously declined to dismiss those counts to the extent that they related to MMA sanctioned by exempt organizations, amateur MMA and professional MMA on Indian reservations.<sup>4</sup>

The District Court has held that the Plaintiffs sufficiently alleged an as-applied vagueness challenge to the ban, and declined to dismiss those counts. The court reasoned that a statute may be void for vagueness if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits and it authorizes or increases the likelihood of arbitrary or discriminatory enforcement. It observed, for example, that the ban failed to define the terms "professional" or "amateur," and that the legislative history was of little assistance. The District Court further held that given the failure to define the words "professional" or "amateur" within the ban and New York's admitted haphazard interpretation, it must determine whether the ban should be struck down based upon an as-applied vagueness challenge.

The second prong of the as-applied vagueness standard is potentially the most problematic for the Defendants. The court previously observed that the alleged erratic history of enforcement of the ban was relevant to the Plaintiffs' as-applied vagueness challenge, and noted that notwithstanding the Defendants' objections, it was relevant to the vagueness claims that the ban has been interpreted and applied in varied and conflicting ways.<sup>5</sup>

The Plaintiffs now posit that the *Jones* case is ripe for summary judgment and the ban must be struck down as unconstitutionally vague under both the notice and enforcement prongs. According to the Plaintiffs, the evidence adduced during the suit revealed that a person of ordinary intelligence would not have a reasonable opportunity to know precisely what sort of conduct is prohibited, given the plain language of the ban. In fact, the Plaintiffs observed that a person of ordinary intelligence would think that the ban says that exempt organizations can sanction MMA in New York, as some of the Defendants did during the *Jones* case. Likewise, a person of ordinary intelligence would not interpret the ban to permit only "long recognized," "traditions," or "single disciple" martial arts. The Plaintiffs further argued that the evidence proved that enforcement of the ban has been arbitrary or discriminatory, and contended that no one—especially the Defendants—knows what the "core" of the ban is, other than what the legislature said it was banning more than a decade ago: unsanctioned, "no holds barred" fighting. The evidence established that is not what the sport of MMA is, particularly when it is sanctioned by an exempt organization.

The Defendants have also moved, among other things, on the grounds that the Plaintiffs lack legal standing to challenge the ban, that the ban involves the interpretation of state law, and that the District Court should abstain from ruling until New York State has interpreted the ban. The Defendants also launched numerous evidentiary objections to the Plaintiffs' alleged facts and evidence in support of their motion.

As New York's 2015 legislative session opens, it is almost guaranteed that there will be another effort to lift the ban. It is not guaranteed whether the legislature will deliver the win that MMA supporters have been seeking for years. However, MMA still has a fighting chance. With the dispositive motions in *Jones* now fully submitted to the District Court and the chance that a favorable decision will be rendered, the sport of MMA may make a comeback.

## Endnotes

1. The full text of the Combative Sport Ban ("the Ban"), N.Y. Unconsol. Laws § 8905-a, is as follows:

1. A "combative sport" shall mean any professional match of exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents. For the purposes of this section, the term "martial arts" shall include any professional match or exhibition sanctioned by any of the following organizations: U.S. Judo Association, U.S. Judo, Inc., U.D. Judo Federation, U.S. Tae Kwon Do Union, North American Sport Karate Association, U.S.A. Karate Foundation, U.S. Karate, Inc., World Karate Association, Professional Karate Association, Karate International Kenpo Association, or World Wide Kenpo Association. The commission is authorized to promulgate regulations which would establish a process to allow for the inclusion or removal of martial arts organizations from the above list. Such process shall include but not limited to consideration of the following factors:

(a) Is the organization's primary purpose to provide instruction in self-defense techniques;

(b) Does the organization require the use of hand, feet, groin protection during any competition or bout; and

(c) Does the organization have an established set of rules that require the immediate termination of any competition or bout when any participant has received severe punishment or is in danger of suffering serious physical injuries.

2. No combative sport shall be conducted, held or given within the state of New York, an no licenses may be approved by the commission for such matches or exhibitions.

(a) A person who knowingly advances or profits from a combative sport activity shall be guilty of a class A misdemeanor, and shall be guilty of a class E felony if he or she has been convicted in the previous five years of violating this subdivision.

(b) A person advances a combative sport activity when, acting other than as a spectator, he or she engages in conduct which materially aids any combative sport. Such conduct includes but is not limited to conduct directed toward the creation, establishment or performance of a combative sport, toward the acquisition or maintenance of premises, paraphernalia, equipment or apparatus therefor, toward the solicitation or inducement of persons to attend or participate therein, toward the actual conduct of the performance thereof,

toward the arrangement of any of its financial or promotional phases, or toward any other phase of a combative sport. One advances a combative sport activity when, having substantial propriety or other authoritative control over premises being used with his or her knowledge for purposed of a combative sport activity, he or she permits such to occur or continue or makes no effort to prevent its occurrence or continuation.

(c) A person profits from a combative sport activity when he or she accepts or receives money or other property with intent to participate in the proceeds of a combative sport activity, or pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of a combative sport activity.

(d) Any person who knowingly advances or profits from a combative sport activity shall also be subject to a civil penalty not to exceed for the first violation ten thousand dollars or twice the amount of gain derived therefrom whichever is greater, or for a subsequent violation twenty thousand dollars or twice the amount of gain derived therefrom whichever is greater. The attorney general is hereby empowered to commence judicial proceedings to recover such penalties and to obtain injunctive relief to enforce provisions of this section.

2. Some of the changes include the introduction of weight classes for fighters, the implementation of five-minute rounds and rules forbidding certain types of strikes to the body during MMA bouts.
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5. *Id.* at 340-341. The defendants in *Jones* were admittedly unclear on what constitutes prohibited conduct under the Ban. The District Court noted that the defendants inexplicably wavered on what conduct is banned and whether an exempt organization can sanction a professional MMA event under the Ban. *See* 974 F. Supp.2d at 341.

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# The Use of Rap Music Lyrics as Criminal Evidence

By Elizabeth Shumejda

## Introduction

Beginning in the 1990s, state and federal prosecutors introduced defendant-authored rap lyrics as evidence in criminal trials, either by reading the lyrics directly to jurors or by playing the defendants' music videos in open court.<sup>1</sup> Interestingly, the use of music lyrics as criminal evidence occurs almost exclusively in the context of the rap genre.<sup>2</sup> To illustrate, a Department of Justice newsletter, which provided examples of the types of lyrics used in criminal trials and investigations, solely included reference to rap lyrics.<sup>3</sup> Rap music "has been the focus of the vast majority of cases analyzing the use of fictional expressions as evidence of character or motive and intent in criminal proceedings."<sup>4</sup> Although prosecutors have used defendant-authored rap lyrics as criminal evidence for nearly two decades, a debate concerning the admissibility of these lyrics and the attendant constitutional concerns that arise therefrom has recently garnered national attention from both legal and political scholars alike.<sup>5</sup>

On May 9, 2014, Bloomberg Law broadcast a radio interview with June Grasso and Eugene Volokh, the latter a prominent law professor from the University of California at Los Angeles, concerning the use of rap lyrics in criminal trials.<sup>6</sup> They discussed a recent ruling issued by a U.S. district court judge in the Eastern District of New York authorizing prosecutors to admit a defendant's "gangsta rap" video as evidence against him in his three-count murder trial.<sup>7</sup> They also made reference to the oral arguments heard by the New Jersey Supreme Court in March of this year concerning a case that received national attention given the far-reaching impact it could have on this very issue; "[t]he Skinner case is a particularly egregious use of rap lyrics. All of these lyrics were written from months to years before the actual crime occurred. None of them mentioned the victim and none of them included details related to the crime."<sup>8</sup>

Despite frequent objections by defense counsel that defendant-authored rap lyrics should be excluded on the grounds of relevance and unfair prejudice, courts continually overrule such objections. In a brief submitted on July 29, 2013, the American Civil Liberties Union of New Jersey noted that there were 18 cases nationwide that have analyzed the admissibility of rap lyrics written by criminal defendants—lyrics were admitted into evidence in 14 of those.<sup>9</sup> While recent appellate decisions in New Jersey, Massachusetts and Maryland that have overturned convictions based upon prosecutors' improper use of defendant-authored rap lyrics as criminal evidence might seem to suggest that courts are reassessing the use of defendant-authored rap lyrics as criminal evidence,

most appeals in this context remain unsuccessful. Courts often refuse to reverse convictions due to the high standard of appellate review whereby convictions may only be reversed upon a finding that the lower court abused its discretion in admitting such evidence. As an abuse of discretion standard is hard to overcome, "even when an appellate court deems the evidence erroneously admitted, the error usually does not prompt reversal."<sup>10</sup>

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*"Although prosecutors have used defendant-authored rap lyrics as criminal evidence for nearly two decades, a debate concerning the admissibility of these lyrics and the attendant constitutional concerns that arise therefrom has recently garnered national attention from both legal and political scholars alike."*

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The outline of this article is as follows. Part I explores the evidentiary issues regarding the use of defendant-composed rap lyrics as criminal evidence, providing the relevant evidentiary standards governing their admissibility and explaining the various theories pursuant to which state and federal prosecutors introduce these lyrics into evidence, utilizing case examples to illustrate each approach. Part II identifies the various arguments against the admissibility of rap lyrics written by criminal defendants, including a discussion of the impact of juror bias in this context as well as the constitutional concern as to whether rap music lyrics are entitled to First Amendment protections. Part III provides a discussion of the various approaches that courts can adopt to address the evidentiary and constitutional concerns regarding use of defendants' rap lyrics as criminal evidence. The conclusion suggests that courts should adopt a two-part approach in order to shift the perspective from which judges and jurors assess defendant-composed rap lyrics, taking into account the social constraints and artistic norms that govern the composition of such lyrics.

## I. Rap Lyrics as Criminal Evidence

As a preliminary note, although rap music lyrics technically fall within the definition of hearsay evidence, their admission into evidence during a criminal trial has never been prohibited on such grounds. The Federal Rules of Evidence (FRE) define hearsay as a "statement, other than one made by the [defendant] while testifying at a trial or hearing, offered into evidence to prove the truth of the



matter asserted.”<sup>11</sup> Nevertheless, defendant-authored lyrics are characterized as non-hearsay evidence because they fall squarely within one of the statutorily prescribed exceptions to the rule against hearsay: admissions by party opponents—*i.e.*, statements made by the party against whom the statement is sought to be introduced. “A statement is not hearsay if...[t]he statement is offered against a party and is (A) the party’s own statement, in either an individual or a representative capacity.”<sup>12</sup>

Although the rules of evidence undoubtedly vary from state to state, there are essentially two primary prerequisites for the admissibility of evidence at criminal trials. First, the evidence must be relevant to the case at bar, a decision ultimately left to the discretion of the presiding judge. Second, the prejudicial impact of the evidence must not be substantially outweighed by its relevance.<sup>13</sup>

First, “[e]vidence which is not relevant is not admissible.”<sup>14</sup> The FRE define “relevant evidence” as “evidence having a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”<sup>15</sup> As such, the threshold for relevance is considered rather low. Whether the lyrics at issue describe specific events relating to the crime charged, or whether they only describe an event of a similar nature, courts generally find that they have a “tendency” to make a fact “more probable or less probable than it would be without the evidence.”<sup>16</sup> In practice, defendant-authored rap lyrics are often deemed relevant and, ultimately, are admitted into evidence by criminal court judges.<sup>17</sup>

Second, at the heart of the evidentiary issues regarding the admissibility of rap lyrics written by criminal defendants is the debate over whether their admission is more prejudicial than probative. Even if rap lyrics are deemed relevant to the prosecution’s case, the judge must next determine whether the probative value of the lyrical evidence outweighs the prejudicial impact that admission of such evidence will have on the jury. In short, unless admitting such evidence will be *unduly* prejudicial for the defendant, it will be admitted, thus creating a relatively high standard for the exclusion of evidence on the grounds of unfair prejudice. Specifically, FRE 403 provides that relevant evidence “may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice, confusion of the issues, or misleading the jury.”<sup>18</sup> Put simply, if there exists a great likelihood that evidence will be used for an improper purpose by the fact finder, the court may, in its discretion, exclude the evidence. See Part II.A for an in-depth analysis concerning the role that juror bias plays in assessing the probative value of lyrical evidence versus the prejudicial impact that its introduction may have on jurors.

Generally speaking, there are four ways in which prosecutors make use of defendant-authored rap lyrics as

evidence in criminal trials. First, defendant-authored lyrics have been admitted as inculpatory statements, or confessions to the crimes charged. Second, such lyrics have been offered as direct evidence of a material element to the charged crime, such as the defendant’s criminal intent or motive. Third, they have been admitted as evidence of “other acts” that circumstantially bear on the defendant’s criminal intent, identity, motive, or knowledge as to the crime. Lastly, rap lyrics have been deemed admissible in certain instances because they are viewed as a constituting a criminal act in and of themselves.<sup>19</sup>

#### A. Rap Lyrics as Confessions

In February 2014, a 22-year-old man from South Carolina was sentenced to life in prison for the 2011 shooting of a man in a restaurant parking lot.<sup>20</sup> The shooting allegedly ensued after the two men had an argument concerning a marijuana sale. Prosecutors were successful in admitting into evidence the defendant’s rap music lyrics as a confession.<sup>21</sup> The lyrics, which were discovered at the defendant’s home three weeks after the shooting, contained references to “hit ‘em in the chest” and “caught ‘em dead at da Olive Garden.”<sup>22</sup>

In *State of California v. Medina*, the defendant, 14 years old at the time of his arrest, was charged with first-degree murder for stabbing a 16-year-old 25 times while at a house party.<sup>23</sup> Prosecutors successfully admitted the defendant’s lyrics as evidence, lyrics written after his arrest, wherein he stated, “[n]ever did it for the fame ‘cuz that just ain’t right, Did it cause I had love for my homiez and the life.”<sup>24</sup> Prosecutors argued that these lyrics amounted to an admission of guilt, or a confession by the defendant to the crime charged. Meanwhile, defense counsel suggested that the defendant suffered from post-traumatic stress caused by years of physical and verbal abuse by his stepfather, ultimately arguing that the manner in which the victim continued to intimidate the defendant set off the attack at issue in this case. Despite the fact that the court did allow the defense to offer expert witness testimony about the composition of “gangsta rap” music, the defendant, who was tried as an adult, was found guilty and ultimately sentenced to a prison term of 26 years to life.<sup>25</sup>

#### B. Rap Lyrics Used to Establish Motive or Intent

In *Bryant v. State*, Indiana state prosecutors were able to introduce into evidence lyrics from two rap songs, written by the defendant, as evidence of the defendant’s intent to kill the victim.<sup>26</sup> Both sets of lyrics contained the following line: “Cuz the 5–0 won’t even know who you are when they pull yo ugly ass out the trunk of my car.”<sup>27</sup> Given that the victim was found dead in the trunk of her car, and given that the defendant had driven that same vehicle for several days, as corroborated by testimony from friends whom he visited during that time, the defendant’s lyrics, which directly referred to placing a body in

the trunk of a car, were deemed admissible.<sup>28</sup> The Indiana Court of Appeals affirmed the lower court's determination that the lyrics were relevant because they made it more probable that the defendant had killed the victim and placed her body in the trunk.<sup>29</sup>

### C. Rap Lyrics as Character Evidence

The most controversial approach to the admissibility of rap lyrics concerns their use as circumstantial evidence indicative of a defendant's state of mind regarding the crime charged—namely, his or her criminal intent, knowledge, or motive.<sup>30</sup> While evidentiary rules permit “evidence of other crimes, wrongs, or acts...as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident,”<sup>31</sup> criminal defendants maintain that such evidence constitutes the equivalent of character or propensity evidence, which is explicitly and universally made inadmissible pursuant to both federal and state evidentiary rules.<sup>32</sup> For instance, the FRE provide the following: “[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.”<sup>33</sup> Nevertheless, a recent survey of cases in which courts have ruled on this issue reveals a national trend suggesting that if the “other acts” evidence is admissible for a proper purpose, it will not be excluded as character evidence.<sup>34</sup>

For example, in a drug possession or distribution case, prosecutors may seek to introduce into evidence the defendant's rap lyrics in an effort to prove that the defendant is familiar with drug sales in general. Where such rap lyrics employ drug terminology, courts are likely to admit them into evidence. Such was the case in *United States v. Foster*, where the Seventh Circuit affirmed the defendant's conviction for possession with intent to distribute cocaine and phencyclidine (PCP).<sup>35</sup> There, the Seventh Circuit affirmed the use of the defendant's rap lyrics in the prosecution's case in chief, finding such evidence relevant because it helped establish the defendant's knowledge concerning drug transactions in general: “it is sufficient that the verse made it more probable that [defendant] had knowledge (and, therefore, more probable that he was guilty of the crime charged).”<sup>36</sup> The court continued by stating that the “verse indicated, at a minimum, that [defendant] was familiar with drug code words and, to a certain extent, narcotics trafficking, a familiarity that made it more probable that he knew that he was carrying illegal drugs.”<sup>37</sup>

A survey of cases, conducted for purposes of developing the analysis contained herein, in which prosecutors have sought to introduce defendant-written rap music lyrics as criminal evidence also suggests that courts uniformly adhere to the rule that evidence of the defendant's “other acts,” as revealed by the content of the proffered lyrics, is inadmissible on relevancy grounds if a defendant's motive, intent or knowledge is *not* at issue in the

case. If motive, intent or knowledge is at issue, such lyrics are circumstantial evidence that courts deem relevant in establishing the defendant's state of mind. Moreover, a defendant's state of mind is at issue when, for example, he or she denies having the requisite criminal intent to be found guilty of the charged crime by offering an innocent explanation for his or her actions. In *United States v. Foster*, the Seventh Circuit, in affirming use of the defendant's rap lyrics as evidence, cited to the fact that the defendant “offer[ed] an innocent explanation for his activities and maintain[ed] that he had no knowledge of the suitcases' contents.”<sup>38</sup> Therefore, the court determined that “the verse achieved heightened relevance by virtue of the fact that it also rebutted [defendant's] protestations of naiveté.”<sup>39</sup>

In contrast, in *People v. Skinner*, the defendant's attempted murder conviction was overturned by a New Jersey Appellate Court because “[t]he lyrics were read to establish defendant's motive and intent—material issues that were not ‘genuinely in dispute.’”<sup>40</sup> In finding that “there was no evidence that raised any questions as to the shooter's intent,” the New Jersey court explained that “jurors did not need rap lyrics...to understand that whoever fired seven bullets into [the victim's] head, neck and abdomen meant to cause his death.”<sup>41</sup> As to motive, the court noted that there was other evidence establishing the defendant's motive; specifically, the victim testified at trial that there was a conflict between him and the defendant, who were members of the same drug dealing gang, over “skimmed profits.”<sup>42</sup> As such, the appellate court reversed the conviction, finding that because there was no question as to the defendant's motive or intent regarding the crime charged, the rap lyrics were irrelevant and their introduction at trial therefore erroneous.<sup>43</sup>

### D. Rap Lyrics as Criminal Acts

The First Amendment protects freedom of speech and freedom of expression.<sup>44</sup> As described below, this is true regardless of whether the speech constitutes political advocacy, about speech on religion or social matters, or artistic expression.<sup>45</sup> As such, an individual cannot be placed in jail simply based on his or her creation of rap music alone. However, there are specific circumstances under which speech will fall outside of the protections offered by the First Amendment. One such narrow category includes speech that involves specific threats of violence against particular persons.<sup>46</sup>

In *Jones v. State of Arkansas*, for instance, Arkansas state prosecutors successfully used the defendant's rap lyrics to secure his conviction for making a terroristic threat.<sup>47</sup> The defendant, a 15-year-old high school student with a criminal history, began to write letters—which included rap songs—to a fellow classmate while he was in juvenile hall.<sup>48</sup> These rap lyrics, through which the defendant claimed he was “expressing himself through a poem,” often contained violent imagery.<sup>49</sup> Since the

classmate to whom the lyrics were addressed never responded, the defendant personally delivered the lyrics to her when he returned to school. Thereafter, the classmate reported the defendant to authorities and he was subsequently arrested for making terroristic threats. The court ultimately found the defendant guilty on the basis that the lyrics to his rap song constituted a criminal threat made with the intent of causing fear in his classmate.<sup>50</sup>

In contrast, in 2013 in the case of *People v. Oduwole*, an Illinois appellate court reversed the defendant's conviction for attempting to make a terroristic threat on the grounds that prosecutors failed to provide sufficient evidence indicating that he had targeted an individual or a specific group of persons in whom he intended to instill fear that some threatened violence would occur.<sup>51</sup> In 2007, the defendant was charged with attempting to make a terrorist threat after campus police at Southern Illinois University found handwritten lyrics in his locked, apparently abandoned car.<sup>52</sup> The lyrics found in the defendant's car stated the following: "if this account doesn't reach \$50,000 in the next 7 days then a murderous rampage similar to the VT shooting will occur at another highly populated university. THIS IS NOT A JOKE!"<sup>53</sup> It is important to note that the shooting massacre on the campus of Virginia Polytechnic Institute and State University had occurred only months earlier. Although the defendant received a five-year sentence in 2011, the appellate court threw out the conviction, reasoning that "[i]n the absence of sufficient evidence that the defendant had taken a substantial step towards making a terrorist threat, his writings, as abhorrent as they might be, amount to mere thoughts."<sup>54</sup>

## II. Juror Bias and Constitutional Concerns

Although gangsta rap music is actually defined by its use of violent themes—for instance, Merriam-Webster's Dictionary defines it as "rap music with lyrics explicitly portraying the violence and drug use of urban gang life and typically expressing hostility towards whites, women and civil authority"—failure to appreciate the artistic conventions of this genre of music can have a devastating impact on defendants, for it leads judges and jurors to conflate "the artist with character and fiction with fact."<sup>55</sup> The discussion that follows attempts to highlight the failure of courts to acknowledge the artistic conventions and the social influences at play when artists construct rap music by identifying the high potential for juror bias in this context and the constitutional concerns that arise therefrom.

### A. Juror Bias

Admitting a defendant's rap lyrics as criminal evidence has been characterized by many as a means by which to circumvent existing evidentiary rules that operate to bar the use of impermissible character or propensity evidence—evidence offered "for the purpose of proving action in conformity therewith."<sup>56</sup> Similar to the no-

tion that use of defendants' rap lyrics as evidence is the functional equivalent of using impermissible character or propensity evidence<sup>57</sup> is the idea that such lyrics are inadmissible on the grounds that they are unfairly prejudicial to the defendant. Unfair prejudice results when there is a risk that jurors will return a guilty verdict based on improper inferences, such as personal biases, and not according to the credibility or reliability of the evidence presented.

Juror bias in this context primarily arises from the negative connotations associated with rap music as a genre in general, as well as from the artistic conventions of rap music lyrics: the stereotypical image of rap artists as criminals, and the content of rap music as it typically portrays a life consumed by violence, drugs, and crime. Given the very nature of rap lyrics, where use of profanity and discriminatory and sexist remarks predominate, there is a legitimate concern that jurors may give undue weight to the information and messages conveyed in these lyrics, even if what these messages convey about certain events remains uncorroborated or even contradicted by the prosecution's other evidence.

To the extent that jurors associate rap music with criminal behavior, they are likely to perceive the same of a defendant who authors rap lyrics. As such, when rap lyrics are admitted into evidence, there remains the risk that jurors are likely to draw an impermissible link between defendants who write rap lyrics and their propensity to commit such crimes.<sup>58</sup> The fear is that this bias is so strong that the relevance of such lyrical evidence, if any, is significantly outweighed by the prejudicial nature of the evidence and that it should therefore be excluded pursuant to the rules of evidence.

A study conducted by psychologist Dr. Stuart Fischhoff is consistently cited in scholarly articles on this subject. Pursuant to this study, Dr. Fischhoff explored the impact that gangsta rap lyrics might have on potential jurors.<sup>59</sup> The results of the study "strongly indicated that the defendant was seen as more likely to have committed a murder than had he not been presented as authoring such lyrics."<sup>60</sup> Dr. Fischhoff concluded that there is a "strong possibility that when jurors are exposed to such defendant image-impairing lyrics, they might become more disposed to and confident in a guilty verdict what with the added weight of the negative personality trait associations conjured up by...inflammatory lyrics."<sup>61</sup> The findings made pursuant to this study confirm the validity of the statement made above: There exists a great likelihood that jurors will impermissibly draw a link between defendants who author rap music lyrics and their propensity to commit certain crimes.

Commentators suggest that courts are either underestimating the prejudicial impact that the admission into evidence of defendant-composed rap lyrics will have on



jurors, or that courts are overestimating the ability of jurors to disregard their biases and prevent such biases from impacting their decision-making process. This becomes of even greater concern when the prosecution plays a video of the defendant's rap music. Consider, for instance, a scenario where a defendant dresses professionally and maintains an appropriate courtroom demeanor throughout the duration of his or her criminal trial. When the prosecution plays the rap video, which makes use of profane, discriminatory, and vulgar language, any attempt on the part of the defendant to present a respectable image to the jury will undoubtedly be undone.

Even a cursory review of a newsletter published by the Gang Unit of the Federal Bureau of Investigation (FBI) reveals the negative perception that the rap music industry suffers from in contemporary society.<sup>62</sup> However, because the article is written with the aim to provide law enforcement officials and prosecutors with suggestions as to how to "anticipate behaviors of gang members" so that they have "opportunities to obtain inculpatory evidence in gang-related investigations and cases,"<sup>63</sup> it serves to highlight that not only do juror biases pose a significant threat to the treatment of defendant-rap artists whose lyrics are offered as evidence at criminal trials, but it also demonstrates that all actors within the criminal justice system base decisions as to the admissibility of defendant-authored rap lyrics on uniformed assumptions.

For instance, the first sentence of the article cites to the lyrics of a particular Washington, D.C. rap artist who is currently serving a life sentence, by stating that his lyrics "represent true-life proclamations of [a] prominent Washington, D.C. gang member[]." <sup>64</sup> The second sentence continues by explaining that such lyrics "verbalize the[] attitudes, motivations, and lifestyles" of rap artists.<sup>65</sup> Furthermore, the third paragraph begins by noting that "[i]n today's society, many gang members compose and put their true-life experiences into lyrical form. Many are able to record their lyrics...produce CDs, DVDs, and videos, and distribute these items to local lyrics stores by using the proceeds of illegal criminal activities."<sup>66</sup> These sweeping generalizations exemplify society's negative perception of rap artists.

## B. Constitutional Concerns

In addition to evidentiary constraints regarding the use of a defendant's rap lyrics as criminal evidence, there remains the question as to whether rap lyrics are entitled to First Amendment protections.<sup>67</sup> Many suggest that using a defendant's rap lyrics as evidence against him or her in a criminal trial mandates that courts must also engage in a constitutional analysis, notwithstanding the applicability of evidentiary rules.<sup>68</sup> The concern is that admitting these lyrics into evidence will have the impermissible, unconstitutional effect of chilling free speech.<sup>69</sup>

There are two primary arguments favoring the treatment of rap music lyrics as protected speech pursuant to

the Free Speech Clause of the First Amendment. First, rap music lyrics constitute artists' political and social commentaries concerning the realities of crime, drugs, and violence in inner city life, and the Supreme Court has consistently and unequivocally held that political advocacy and social commentary are protected forms of speech pursuant to the First Amendment.<sup>70</sup> Second, rap music lyrics are a form of art, or a form of artistic expression, which is similarly entitled to First Amendment protections pursuant to long-standing Supreme Court jurisprudence.

As early as 1948, the Supreme Court, in *Winters v. New York*, acknowledged that the First Amendment protects entertainment and art as much as it protects other types of speech such as political and social discourse.<sup>71</sup> In *Winters*, the Court reversed the conviction of a bookseller who sold magazines that contained fictional murder stories, rejecting the argument that "the constitutional protection for a free press applies only to the exposition of ideas."<sup>72</sup> The Court greatly expanded free speech protections by proclaiming the following:

The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.<sup>73</sup>

As to the first argument, one means by which to support the notion that courts, in addition to conducting an evidentiary analysis in this context, must also consider the constitutional implications inherent in any prosecutorial attempt to make use of lyrical evidence in a criminal proceeding, is to point to the fact that rap lyrics are comprised of the rap lyricists' social and political commentary. As the Supreme Court declared in *Connick v. Myers*, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values[] and is entitled to special protection."<sup>74</sup> Moreover, as offensive, vulgar, and unsavory as rap music lyrics may be—in light of their constant reference to drugs, crime, and violence—they are nonetheless deserving of constitutional protection pursuant to the First Amendment because "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>75</sup>

Secondly, rap lyrics written by criminal defendants are a form of speech protected by the Free Speech Clause of the First Amendment because they constitute a form of artistic expression. This is evidenced by the great many similarities that exist between rap lyrics and other forms of fictional writing, particularly in their common use of traditional artistic conventions like metaphors and figurative language. Many critics therefore ask why rap lyri-

cists are not afforded the same constitutional protections enjoyed by artists of more conventional works of fiction. For instance, the Supreme Court, in further extending free speech protections to various types of art, music and other forms of expressive conduct, held in its 1952 decision in *Burstyn, Inc. v. Wilson* that to restrict freedom of speech to political matters alone would only serve to narrow the scope of the fundamental right to freedom of expression.<sup>76</sup>

In making admissibility determinations regarding defendant-authored rap lyrics, courts continuously fail to acknowledge that rap music lyrics, like other forms of fictional writing, make use of the same traditional artistic devices such as exaggerated storylines, figurative language, metaphors, and fictional personas or alter egos. As a society, we intuitively, and perhaps even subconsciously, accept that traditional works of fiction like novels are created with the aim to provide entertainment and social or political commentary; generally speaking, we accept that fiction writers do not claim truth or accuracy in their prose. This begs the question as to why rap music lyrics are not afforded the same treatment as other forms of artistic expression entitled to First Amendment protections.

One potential explanation for this disparate treatment is that rap music employs its own poetic and artistic conventions, and these creative devices are not as commonly understood as those used in more traditional art forms, like poetry and fiction novels. For example, the use of metaphors plays a critical role in the composition of rap lyrics, particularly metaphors involving crime, violence, and weapons.<sup>77</sup> In regards to homicide metaphors, for instance, “violence stands in as a symbolic explication of skill, courage, or power.”<sup>78</sup> As to metaphors involving guns, knives and other weapons, oftentimes reference to these weapons metaphorically represents a microphone, which is essentially the means by which, or the “weapon” by which, rap artists compete with one another. Moreover, the use of role-play is a defining characteristic of the rap music industry, for artists frequently invent alter egos or fictional personas, as illustrated by their creation and use of stage names. One commentator even suggests that to accuse a rap artist of committing a crime simply because he or she wrote about it in a song would be akin to charging actors like Robert De Niro with homicide based on murders they committed in their capacities as fictional mobsters.<sup>79</sup>

Failure to acknowledge that rap music lyrics are more akin to fiction, as opposed to works of non-fiction, consequently means that when defendant-authored rap lyrics are admitted as evidence in criminal trials, they are subject to literal interpretation unlike lyrics from other musical genres, which have long been regarded as fictional writings.<sup>80</sup> This disparate treatment of rap music has led many to argue that it uniquely and disproportionately suffers from a problem of literalism because courts are treating rap lyrics as ordinary speech, not art, and are

allowing jurors to do the same.<sup>81</sup> As one critic recently commented, “[c]reative expression has a right to exist and to be judged without being taken literally, let alone being turned into a referendum on whether a person should be incarcerated.”<sup>82</sup> As such, it appears that rap music lyrics are not generally regarded as art, at least not in criminal courtrooms; therefore, rap lyrics are not being afforded the attendant constitutional protections as are other forms of art.<sup>83</sup>

For instance, other musical genres that are similarly regarded as promoting an “outlaw image,” such as reggae and country music, are not automatically linked to the negative aspects of their music; their lyrics are not presumed to be representative of the artists’ actual conduct or beliefs. The majority of the scholarly and newspaper articles examined for purposes of developing the analysis contained in this paper cited to country music legend Johnny Cash as an example of this potential literalism problem.<sup>84</sup> In “Folsom Prison Blues,” a famous song written by Cash, he states that he “shot a man in Reno just to watch him die.”<sup>85</sup> However, at the time, no one questioned whether Cash was actually involved in a murder in Reno.<sup>86</sup> Similarly, Bob Marley, a famous reggae musician, wrote, “I shot the sheriff, but I did not shoot the deputy.”<sup>87</sup> Yet, the argument goes that no one believes that Marley shot the sheriff, or that he shot the deputy but not the sheriff.

One danger in failing to recognize that rap lyrics are similar in nature to fictional writing is that jurors may be exposed to what essentially amounts to a false confession. Prosecutors often use a defendant’s rap lyrics as an inculpatory statement, *i.e.*, as a confession by the defendant to the crimes charged.<sup>88</sup> “[O]nce a jury is exposed to a confession of guilt it is difficult for jurors to put it aside, even when it is uncorroborated or flatly contradicted by other evidence.”<sup>89</sup>

Similarly, because rap music lyrics are written in first person narrative form, prosecutors often present a defendant’s rap lyrics as autobiographical in nature, thus promoting the idea that the proffered lyrics constitute a confession by the defendant to the crimes charged. In so doing, prosecutors, and courts, are thereby ignoring the creative nature of and the artistic conventions employed in the creation of rap music. This autobiographical treatment of rap lyrics further highlights the literalism problem that rap music is currently facing: like other forms of written literary works, the point of view of the narrator is not necessarily the point of view of the writer.

For example, in *United States v. Foster*, one of the first cases to address the issue of the admissibility of defendant-authored rap lyrics in a criminal prosecution, the Seventh Circuit went so far as to state that “rap music... describes the reality around its author.”<sup>90</sup> As such, the court concluded that it was the defendant’s “knowledge

of this reality, as evidenced by the verse that he has admittedly authored, that was relevant to the crimes for which he was charged.”<sup>91</sup> One critic makes a unique argument in support of the notion that rap lyrics are consciously crafted by the artist such that they are undeserving of a plain meaning interpretative approach, and points to the fact that the lyrics introduced in many of these criminal cases bear “cross-outs and writing in the margins.”<sup>92</sup> He suggests that this supports the notion that “the crafting and construction of the lyrics may make them unlikely to bear reliably on the truth of any fact in issue.”<sup>93</sup>

Perhaps rap music suffers from this problem of literalism because it “fits” within society’s image of rap artists as criminals; the idea that the content of a rap artist’s lyrics is a truthful account of his or her life comports with the societal image of rappers as criminals.<sup>94</sup> Moreover, one would not ordinarily expect an individual to falsely claim responsibility for a criminal act for which he or she did not commit, nor would one expect an artist to talk about violence or crime to such a great extent without having at least some personal knowledge of it.

Another potential rationale for why rap lyrics appear to be the only form of fictional, artistic expression that does not presently enjoy freedom of expression protections pursuant to the First Amendment rests in the notion that many rap artists remain in character even off-stage as part of an effort to convince their listeners that they actually live the lives about which they rap.<sup>95</sup> This is due to the highly commercialized nature of the rap music industry, which is evidenced by its presence not only in music, but also in television, movies, and fashion. The nature of the industry itself compels these artists to create fictional persona, which serve to capture audiences and consequently bring attention and money. Therefore, the image of the rap artist is now carefully constructed and marketed for entertainment purposes and, more specifically, for maximum financial profit. The consequence of this commercialization is that the image of the rap artist that now predominates the entertainment world is one of a criminal, a stereotypical gangster, and a thug. Authenticity and truthfulness in regards to a rap lyricist’s work have thus given way to monetary aims, which accordingly romanticizes and glorifies a life of violence and crime. Although, as one commentator states, “[t]hose familiar with the genre understand that this posturing is often nothing more than a marketing pose,” this is not yet commonly understood by the general public.<sup>96</sup> As such, this only further supports the argument that rap lyrics offered as criminal evidence must be afforded the same treatment as those in other genres of music for purposes of evaluating their admissibility and probative value; they must be understood in the context of the social constraints that define the genre of rap music.

Some argue against providing constitutional protection for defendant-authored rap lyrics on the grounds

that the First Amendment does not protect dangerous or offensive speech absolutely.<sup>97</sup> This is a valid argument, but it has its limits. While it is true that the First Amendment offers no unqualified freedom to intimidate others or to make threats to do another person bodily harm, it does protect one’s right to freedom of expression regardless of how vulgar the language or offensive the images conveyed therein. For instance, two Pennsylvania men were recently convicted of intimidating witnesses, making terroristic threats, and conspiracy after posting a rap video online that specifically referenced and threatened two police officers by name.<sup>98</sup> These officers were the same two policemen who were involved in the arrest of the two men on gun and drug-related charges only seven months earlier. In his decision, the judge reasoned that the defendants’ conduct in posting the rap video online is not speech protected by the First Amendment because “it far exceeds what the First Amendment allows...[t]hey did, in fact, attempt to intimidate and communicate a threat.”<sup>99</sup> However, this holding is limited because it implies that the First Amendment will only fail to protect defendant-authored rap lyrics when it is the lyrics themselves that constitute the wrongdoing. Thus, when lyrical evidence is used to establish a defendant’s motive or intent, or a defendant’s state of mind, this argument against the applicability of First Amendment protections to defendant-composed rap lyrics will likely fail.

It is evident that judges are basing admissibility decisions, and jurors are assessing the weight and credibility of such lyrical evidence, on uninformed assumptions about the composition of rap lyrics. For instance, as described in detail below in Part III.B, rap music is considered by courts as a subject of common knowledge not deserving of expert testimony to help jurors evaluate the probative value of lyrical evidence. Generally speaking, courts regard the interpretation and understanding of rap lyrics as not requiring specialized knowledge. This is evidenced by the fact that courts do not typically permit defendants to introduce expert witness testimony regarding the composition of such rap lyrics.<sup>100</sup>

### III. Potential Solutions

Assuming that rap music lyrics are entitled to constitutional protection under the Free Speech Clause of the First Amendment, there still remains a constitutional issue regarding the current judicial approach to the admissibility of defendant-authored rap lyrics in criminal trials. While traditional evidentiary standards and tests remain applicable in this context—that admissibility of evidence hinges on the two primary considerations of relevance and unfair prejudice—courts are presently failing to evaluate lyrical evidence in context. While context typically refers to the facts and circumstances of a given case, here, assuming that rap lyrics are a protected form of speech pursuant to the First Amendment, context must also refer to consideration of the context within which this form of



artistic expression is created—i.e., the artistic conventions employed in the creation of rap music lyrics—and the context within which this art form is received by society. The discussion below contains two approaches that courts should adopt to confront this issue.<sup>101</sup>

### A. Jury Instructions

In practice, perhaps the most common method by which courts have addressed the concerns regarding use of a defendant-rap artist's lyrics at criminal trials is to provide the jury with cautionary or limited instructions. For example, in affirming the defendant's conviction for possession with intent to distribute PCP in *United States v. Foster*, the Seventh Circuit noted that the limited jury "instruction illustrates the care with which the district court treated this issue, and in large part supports our conclusion that the decision to admit the verse did not constitute an abuse of discretion."<sup>102</sup>

However, the effectiveness of a judge issuing limiting instructions to the jury as the sole means by which to prevent unfair prejudice and address constitutional concerns in this context is highly questionable at best. As noted in the advisory committee notes for FRE 403, "[i]n reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction." In particular, employing this method alone likely will not be sufficient in light of the high potential for juror bias, as discussed above. Particularly, it is difficult for laypeople to remain cognizant of the prescribed and proscribed uses of certain evidence, even in light of jury instructions outlining this distinction. Thus, even if a defendant's rap lyrics are highly fantastical in nature, or relate to a violent act that may or may not have been committed by the defendant in the remote past, jurors will likely perceive that such lyrical evidence, despite being wholly irrelevant to the case at hand, indicates that the defendant has violent, criminal tendencies. As a consequence of either listening to or reading these lyrics, jurors may believe that the defendant is thus more likely to have committed the crime at hand. This will transform the use of lyrics as criminal evidence into impermissible propensity evidence. In sum, more is needed than simply issuing cautionary instructions to the jury in order to ensure that defendants are being afforded a fair trial.

### B. Expert Witness Testimony

The most practical solution to combat the inherent evidentiary and constitutional concerns regarding the use of defendant-composed rap music lyrics as evidence at criminal trials is for courts to permit defendants to offer expert witness testimony, in addition to issuing limited jury instructions. Such experts can offer testimony as to the composition of rap lyrics, the artistic conventions of this genre of music, and the societal backdrop and modern day attitudes towards rap music generally.<sup>103</sup> This

testimony should perhaps also include a discussion of the psychological biases that many individuals harbor against rap music. By providing the court with a context within which to understand this type of lyrical evidence, both judges and jurors alike will be able to more accurately assess the reliability of rap music lyrics as criminal evidence. Most importantly, this will help to alleviate the concern that rap music lyrics are not being evaluated by courts in an appropriate context, a contextual framework that is, in essence, constitutionally required given that rap music lyrics are a form of protected speech under the First Amendment.

Moreover, the use of such expert witness testimony is essential not only for jurors, but also for judges. As such, expert witness testimony should similarly be available when judges are determining whether to grant the prosecution's request to admit into evidence defendant-authored rap music lyrics. Ideally, this determination should be made at a pre-trial hearing, or at least at a hearing outside the presence of the jury. The factors that judges should consider during such a hearing include the following: (1) whether the lyrics were written before or after the occurrence of the charged crime; (2) "whether the lyrics provide detail or information about the charged crime that only the perpetrator or a participant in the crime would know"; (3) whether the content of the proffered lyrics relate to the charged crime in any capacity; and (4) "whether the statements of conduct or belief in the lyrics are corroborated by other evidence."<sup>104</sup>

Another benefit to this approach is that it is consistent with the rules of evidence.<sup>105</sup> Judges, as gatekeepers, and jurors, as fact-finders, will be able to continue in their existing roles—assessing the credibility and reliability of evidence. Circumstantial evidence may still be deemed admissible; however, allowing expert testimony will serve to better protect defendant-rap artists by allowing them the opportunity to explain to the court the creative value and artistic nature of their lyrics, thereby mitigating the possibility that the admission of such evidence will be unduly prejudicial to the defendant.

For example, defense counsel successfully offered expert testimony regarding the interpretation of rap music lyrics in *State v. Cheeseboro*.<sup>106</sup> In contrast, the Eastern District of New York appeared to question the use of expert testimony in this context in its 2006 decision in *United States v. Wilson*.<sup>107</sup> While the court denied the defendant's request to offer such expert testimony on the ground that defense counsel failed to provide proper notice, the court nonetheless noted that "if [defendant] wishes to argue that the lyrics are impressionistic and therefore carry little weight, he may do so."<sup>108</sup> As such, the court appeared to be suggesting that expert testimony regarding rap music lyrics is unnecessary because the defense has its opportunity, at closing argument, to articulate why the jury should not construe such lyrics literally, but instead

should consider and appreciate their artistic and fictional nature.

The court in *Wilson* concluded by stating that “[i]t is the jury’s job to determine whether to believe such an argument, however, it would be counterproductive to permit an expert to function as a ‘thirteenth juror’ in resolving this issue.”<sup>109</sup> However, one could argue that courts allow prosecutors to introduce expert witness testimony regarding the composition and interpretation of rap music lyrics while denying that same opportunity to defendants. For instance, prosecutors often introduce a defendant’s rap lyrics into evidence via the testimony of law enforcement officers. In *Greene v. Commonwealth*, for example, the court allowed the prosecutor to use the testimony of a law enforcement officer to explain that the word “sword” as it appeared in the defendant’s rap lyrics referred to the knife used to kill the victim.<sup>110</sup> This serves to undercut the argument made by the court in *Wilson* that a defendant has an equal opportunity to make an argument regarding the creation of his or her rap lyrics by means of a closing argument. Specifically, prosecutors will be able to point to expert testimony and evidentiary support when articulating their interpretation of the defendant’s rap lyrics to the jury during closing statements, while the defense will not be able to point to such support if it is not allowed to bring in its own expert witnesses. As such, merely permitting defendants the opportunity to argue against the use of rap lyrics during closing arguments will be unpersuasive and will carry little weight with a jury. This unfairly disadvantages defendants; if the court denies the defendant’s request to offer expert witness testimony on the subject, a defendant who merely makes this argument at closing will be at a disadvantage in that the argument will be lacking in evidentiary support due to the court’s denial to admit expert testimony on the subject.

## Conclusion

Ideally, the best approach to address the evidentiary and constitutional concerns outlined above would be to shift the perspective from which judges and jurors view defendant-composed rap lyrics. However, there is no singular means by which to accomplish this objective. Employing the above two methods—issuing limited jury instructions and permitting defendants to offer expert witness testimony—is the most feasible way to refocus this analytical perspective. It will allow defendant-authored rap lyrics to be assessed from the same point of view as are other forms of constitutionally protected speech, in that it will provide both judges and jurors with an awareness and understanding as to the complexities of this particular art form, including the existing social constraints and artistic norms governing the composition of such lyrics. For instance, adopting this approach will enable judges and jurors to begin their assessment as to the credibility and reliability of lyrical evidence with an understanding that rap music lyrics are fictional and

metaphorical, not literal, and that they are created for the purpose of entertaining an audience.

Furthermore, commentators have suggested that courts impose more stringent requirements on prosecutors before admitting defendant-authored rap lyrics as evidence in criminal trials. To do so would be consistent with existing statutory schemes and rules of evidence in that it is the proponent of the evidence who bears the burden of demonstrating relevance, which, in this context, requires the prosecution to demonstrate the connection between the proffered lyrics and its theory of the case. “Failing to do so allows highly prejudicial evidence to be put before the jury even before persuading the court that the evidence will ultimately be relevant in the larger context of the case.”<sup>111</sup> In particular, when prosecutors seek to introduce a defendant’s rap lyrics into evidence as an inculpatory statement, the personal knowledge requirement of the rules of evidence suggest that courts should first determine whether the defendant’s lyrics are based on his or her personal knowledge and experience.<sup>112</sup> Specifically, FRE 602 states, “[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Importing this notion into the judicial determination regarding the admissibility of a defendant’s rap lyrics as evidence to be used against him in a criminal trial would ensure that such lyrics are reliable evidence. After all, judges have a “gate-keeping” function to perform—i.e., to ensure the reliability of statements offered as criminal evidence.

## Endnotes

1. One of the first cases to admit defendant-authored rap lyrics as substantive evidence in a criminal trial was the Seventh Circuit’s 1991 decision in *United States v. Foster*, 939 F.2d 445 (7th Cir. 1991) (upholding district court’s use of defendant’s rap lyrics as evidence on grounds that the lyrics were relevant in establishing defendant’s general knowledge regarding drug transactions).
2. “To date, research has identified only one case involving defendant-authored music lyrics admitted into evidence that did not appear to be rap music.” Andrew L. Dennis, *Poetic (In)justice? Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS \*1, \*3 n.6 (2007) (citing *State v. Koskovich*, 776 A.2d 144 (N.J. 2001)). See generally Sean-Patrick Wilson, *Rap Sheets: The Constitutional and Societal Complications Arising From the Use of Rap Lyrics as Evidence At Criminal Trials*, 12 UCLA ENT. L. REV. 345 (2005) (discussing the evolution of rap music and examining how hip-hop materialized into a culture synonymous with gang violence, drugs, and social unrest).
3. See Donald Lyddane, *Understanding Gangs and Mentality*, U.S. ATTY’S BULL. (U.S. Dep’t of Just., Wash., D.C.), May 2006, at 9–11.
4. Brief of Amicus Curiae American Civil Liberties Union of New Jersey In Support of Defendant-Respondent, *State v. Skinner*, 2012 WL 3762431, at 2 (No. A-2201-08T2).
5. “[I]n the past several years, the use of rap lyrics as evidence at trial has become an increasingly common practice, with most cases today involving amateur rappers who imitate the conventions of commercially successful gansta rap and find themselves behind bars as a result. Examples abound.” Charis E. Kubrin & Erik Neilson, *Rap on Trial*, RACE AND JUSTICE at 14 (forthcoming 2014).

6. *Volokh on Rap Lyrics in Criminal Trials*, BLOOMBERGNEWS (May 9, 2014) (downloaded using BloombergRadio) (discussing whether rap lyrics should be admitted into evidence against a defendant currently standing murder trial in Brooklyn, New York).
7. *See, e.g.*, Tom Hays, *Fight Over Rap Lyrics at New York Murder Trial*, ABC NEWS, May 8, 2014, <http://abcnews.go.com/Entertainment/print?id=23518161>.
8. Pat Loeb, *Rap Lyrics on Trial This Week at NJ Supreme Court*, CBS LOCAL NEWS, Mar. 2, 2014, <http://philadelphia.cbslocal.com/2014/03/02/rap-lyrics-on-trial-this-week> (quoting Erik Nielsen); *see State v. Skinner*, 2012 WL 3762431 (N.J. App. Ct. 2012). *See also* discussion *infra* Part I.C (discussing *State v. Skinner* and the appellate court's rationale for reversing the trial court's determination that introduction of defendant's rap lyrics as evidence constituted an abuse of discretion because defendant's motive and intent were not at issue).
9. *See supra* note 4, at 18 n.6.
10. *See DENNIS supra* note 2, at 30.
11. FED. R. EVID. 801(c).
12. *Id.* at 801(d)(2)(A).
13. *See id.* at 402 (explaining that if evidence is found to be relevant, material, and competent, it is admissible). For convenience purposes, the analysis that follows is based on the FRE, after which 42 states have modeled their own rules of evidence. *See DENNIS supra* note 2, at \*8 n. 34 ("As of 2002, 42 states have modeled their rules of evidence on the Federal Rules of Evidence.") (citing Christopher B. Mueller & Laird C. Kirkpatrick, *Evidence* § 1.2 n.2 (3d ed. 2003)).
14. FED. R. EVID. 402.
15. *Id.* at 401.
16. *See id.*
17. *See supra* note 9.
18. FED. R. EVID. 403 (emphasis added). Unfair prejudice is characterized as "an undue tendency to suggest decision on an improper basis, commonly...an emotional one." *Id.* at 403, advisory comm.'s note.
19. For instance, rap lyrics have been used to find a defendant guilty of making a terroristic threat and intimidating witnesses. *See, e.g.*, *Jones v. State*, 347 Ark. 409 (Ark. 2002) (finding defendant guilty of making a terroristic threat); *see also People v. Oduvole*, 985 N.E.2d 316, 326 (Il. App. Ct. 2013) (reversing conviction for attempted terrorist threat).
20. *See Prosecutors Hear Evidence in Songs*, N.Y. TIMES, Mar. 26, 2014, available at <http://www.nytimes.com/interactive/2014/03/27/arts/music/rap-lyrics> (discussing a collection of cases from across the country in which prosecutors introduced defendants' rap lyrics as evidence against them in criminal proceedings).
21. *See id.*
22. *Id.*
23. *See, e.g.*, Marjorie Hernandez, *Rap Expert Testifies in Ojai Valley Murder Trial*, VENTURA COUNTY STAR, Oct. 24, 2013, available at <http://www.vcstar.com/news/2013/oct/04/rap-expert>; *see also supra* note 20.
24. *See HERNANDEZ supra* note 23.
25. *See id.*
26. 802 N.E.2d 486, 491 (Ind. Ct. App. 20004).
27. *Id.* at 498.
28. *See id.*
29. *Id.*
30. "[E]rroneous admission of other acts of evidence is one of the largest causes of reversal of criminal convictions." *See* MUELLER & KIRKPATRICK *supra* note 13, at § 4:15.
31. FED. R. EVID. 404(b). *See, e.g.*, *Greene v. Commonwealth*, 197 S.W.3d 76, 86 (Ky. 2006) (affirming trial court's admission of defendant's rap music video into evidence, citing that "the video establishes premeditation and motive in Appellant's own words"); *Cook v. State*, 45 S.W.3d 820, 823 (Ark. 2001) (finding that defendant's rap lyrics "make the existence of his intent to commit aggravated robbery more probable").
32. "[C]haracter evidence is of slight value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man and to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened." FED. R. EVID. 404(a) advisory comm.'s note (citing Cal. L. Revision Comm'n, Rep., Rec. & Studies 615 (1964)).
33. FED. R. EVID. 404(a).
34. To alleviate concerns regarding the introduction of impermissible character evidence, judges throughout the country routinely issue limiting instructions to juries wherein they advise that the admission of the defendant's rap music lyrics is not permitted to establish his or her bad character or propensity to commit such related crimes. *See, e.g.*, *United States v. Foster*, 939 F.2d 445, 455 (7th Cir. 1991) ("This instruction illustrates the care with which the district court treated this issue, and in large part supports our conclusion that the decision to admit the verse did not constitute an abuse of discretion."). However, query whether these limiting instructions are sufficient, or even effective, in light of juror bias. *See* discussion *infra* Parts II.A & III.A.
35. *Id.*
36. *Id.*
37. *See id.* at 455–56.
38. *Id.*
39. *See id.*
40. 2012 WL 3762431, at \* 1 (N.J. App. Ct. 2012) (citing *State v. Darby*, 174 N.J. 509, 519 (2002)).
41. *Id.* at \*6.
42. *Id.* ("[T]his was not a case in which circumstantial evidence of defendant's writings were critical to show his motive.").
43. *See id.* at \*10. In so holding, the court pointed to the following facts: there was physical evidence connecting defendant to the crime, in that his cell phone was found at the scene; defendant admitted to being present at the time of the shooting; cell phone records confirmed that defendant and the victim spoke several times the day of the shooting; and defendant and the victim both gave statements admitting that they were members of the same drug dealing gang. *See id.*
44. U.S. CONST. amend. I.
45. *See* discussion *infra* Part II.B (identifying arguments for why rap music lyrics are entitled to First Amendment protections).
46. *See, e.g.*, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (articulating the "fighting words doctrine" as a limitation on the First Amendment's guarantee of free speech). "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words, those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. 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 truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Id.* at 571–72.
47. 347 Ark. 409 (Ark. 2002).
48. *Id.* at 412.



49. *Id.*
50. *Id.*
51. 985 N.E.2d 316, 326 (Ill. App. Ct. 2013).
52. *See id.* at 320.
53. *Id.* at 318.
54. *Id.*
55. *See supra* note 5, at 22.
56. FED. R. EVID. 404(a). *See* discussion *supra* Part I.C.
57. If lyrics are offered as evidence to prove the defendant's commission of a later crime as "action in conformity" with a character trait expressed in the content of the lyrics, such use is precisely what the FRE seek to bar.
58. "Put more generally, evidence of the prior crime tends to prove that a defendant's conduct was criminal in the case in issue because of the assumed continuity and dominance of a relevant trait of character." *See supra* note 2, at \*29 (quoting Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982)).
59. *See* Stuart Fischhoff, *Gansta Rap and a Murder in Bakersfield*, 294 J. OF APPLIED SOC. PSYCHOLOGY 795 (1999).
60. *See id.*
61. *Id.* at 797.
62. *See* LYDDANE *supra* note 3, at 1 (discussing how the lifestyle associated with gansta rap music artists represents a "lifestyle [that] is the antithesis of prevailing societal attitudes").
63. *See id.* "This article will explore gang mentality and the subsequent, anticipated behaviors of gang members that investigators and prosecutors may exploit to collect information and evidence in gang investigations."
64. *See id.*
65. *Id.*
66. *Id.*
67. U.S. CONST. AMEND. I, cl. 1.
68. *See, e.g., Dawson v. Delaware*, 503 U.S. 159, 165 (1992) (finding, however, that the "Constitution does not erect a *per se* barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment").
69. In particular, there is a concern that the current judicial trend whereby courts are admitting rap lyrics as evidence in criminal trials will have a chilling effect on free speech in that individual artists may now worry about whether their creative expressions might later be used against them in a criminal prosecution. This could have a significantly negative impact on the production of rap music in general.
70. "The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).
71. *Winters v. New York*, 333 U.S. 507 (1948).
72. *Id.* at 510.
73. *Id.*
74. 461 U.S. 138, 145 (1983).
75. *Texas v. Johnson*, 491 U.S. 397, 414 (1989). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).
76. 343 U.S. 495 (1952).
77. An artist's choice "to use metaphor over more literal language is to display his talent or with words, a sort of verbal athleticism." *See* DENNIS *supra* note 2, at \*3 n. 7.
78. *See id.* at \*22 n. 134 (quoting Imani Perry, *Prophets of the Hood* 112, Duke University Press, at 90 (2004)).
79. *See* WILSON *supra* note 2, at 357.
80. As one critic noted, "[t]reating music as documentary fact is certainly a travesty of justice, but it's also a grotesque failure of imagination and empathy. Art isn't real life, and that's the whole point: it's better." Jack Hamilton, *Rhyme and Punishment*, SLATE (Mar. 31, 2014), [www.slate.com/articles/arts/culturebox/2014/03/hip\\_hop\\_and\\_criminal\\_justice\\_the\\_absurd\\_literalism\\_of\\_prosecutors\\_using\\_single.html?](http://www.slate.com/articles/arts/culturebox/2014/03/hip_hop_and_criminal_justice_the_absurd_literalism_of_prosecutors_using_single.html?).
81. One critic pointed to the difference between the study of pragmatics and semantics to underscore this point. "Pragmatics is the study of intended meaning. This is distinct from semantics (the study of linguistic meaning) insofar as a given utterance is interpreted based on the intention of the speaker or writer, which may or may not be the same as the overt linguistic meaning of the sentence." *See* DENNIS *supra* note 2, at \*17 n. 97.
82. *See* HAMILTON *supra* note 80.
83. "Moreover, unlike poetry or fictional writing, it has not been until recently that rap music as an art form has been studied and taught in schools, colleges and universities." *See* DENNIS *supra* note 2, at \*13.
84. "That a rap artist wrote lyrics seemingly embracing the world of violence is no more reason to ascribe to him a motive and intent to commit violent acts than...to indict Johnny Cash for having 'shot a man in Reno just to watch him die.'" Brief of Amicus Curiae American Civil Liberties Union of New Jersey In Support of Defendant-Respondent, *State v. Skinner*, 2012 WL 3762431 (No. A-2201-08T2).
85. JOHNNY CASH, *Folsom Prison Blues* (Sun Records 1956) ("But I shot a man in Reno just to watch him die").
86. Some have raised a counter-argument to this proposition by raising the idea that if someone had actually died in Reno, and Cash was known to have been in Reno at the time, then perhaps it would have been suggested that Cash was involved in that murder.
87. BOB MARLEY AND THE WAILERS, *I Shot the Sherriff, on BURNIN'* (Island Records 1973).
88. *See* discussion *supra* Part I.A.
89. Sharon Davis, *The Reality of False Confessions*, 30 N.Y.U. REV. L. & SOC. CHANGE 209, 253 (2006).
90. 939 F.2d 445, 456 (7th Cir. 1991).
91. *Id.*
92. *See* DENNIS *supra* note 2, at \* 14.
93. *Id.*
94. The majority of cases that have addressed this issue concerning the admissibility of a defendant's rap lyrics as criminal evidence have arisen in the context of gang-related crimes. *See, e.g.,* LYDDANE, *supra* note 3, at 2-3.
95. "Admittedly, the complex and creative manipulation of identity in rap helps account for its treatment in court," Erik Neilson & Charles E. Kubrin, *Rap Lyrics on Trial*, N.Y. TIMES, Jan. 13, 2014, at A27.
96. *Id.* ("Jay Z's 'D'Evils' surely takes inspiration from his hustler past, but the song isn't really about selling drugs, it's about paranoia, guilt, moral uncertainty, crumbling relationships. It's a song about people.").
97. *See, e.g., Commonwealth v. Knox* (Cnty. Ct. Cm. Pl., Nov. 22, 2013).
98. Harold Hayes, *2 Sentenced In Threatening Rap Video Case*, CBS LOCAL NEWS, Feb. 6, 2014, available at <http://pittsburg.cbslocal.com/2014/02/06/2-sentenced-in-threatening-rap-video-case/>.
99. *Id.*
100. *See, e.g., United States v. Wilson*, 493 F. Supp. 2d 484 (E.D.N.Y. 2006) (rejecting testimony of the defendant's expert witness).

101. An absolute ban on the admissibility of defendant-authored rap music in criminal trials is another potential response that courts can adopt to address this issue. However, adopting such an approach will only shift the inquiry from a judicial assessment of the admissibility of such lyrics pursuant to existing evidentiary rules to an evaluation of whether certain writings constitute rap music lyrics. Therefore, this approach is not an adequate means by which to address the constitutional concerns outlined above.
102. 939 F.2d 445, 455 (7th Cir. 1991) ("The document is received for a limited purpose. It is not received to establish that the defendant is, in fact, the biggest dope dealer. It is not received that the defendant makes more dollars than the average businessman. It is not received for that purpose. It is received for a limited purpose.").
103. "An expert might offer testimony revealing that defendant-authored rap music lyrics are subject to interpretive ambiguity, are ubiquitous, constitute braggadocio, and are fantastical or fictional." See DENNIS *supra* note 2, at \*32.
104. See DENNIS *supra* note 2, at \*33 (arguing that consideration of these factors is consistent with existing rules of evidence in that it is the prosecution that bears the "burden of demonstrating pre-trial a substantial connection between defendant's rap music lyrics and its theory of the case"). *Id.* at \*34.
105. See FED. R. EVID. 702 ("If...specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise."). Moreover, expert testimony regarding the meaning and interpretation of rap music lyrics is routinely permitted in civil suits like trademark and copyright cases.

106. 552 S.E.2d 300 (S.C. 2001).
107. 493 F. Supp. 2d 484, 486-87 (E.D.N.Y. 2006).
108. *Id.* at 490.
109. *Id.*
110. 197 S.W.3d 76, 86-87 (Ky. 2006).
111. See FED. R. EVID. 404(b) advisory comm.'s note.
112. See DENNIS *supra* note 2, at \*34-35.

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# Losing Logos: Trending Towards Less Protection of Fashion Designs?

By Paul Anderson

The Chanel double “C.” The Nike swoosh. The Ralph Lauren polo player.

Logos have and will always play a prominent role in fashion. They are one of the more visible assets of a designer and often a defining element of brand DNA.<sup>1</sup> However, the use of logos as the focal point of ornamentation on apparel and accessories, particularly in the domestic mass market apparel space, appears to be a far more cyclical trend.

Recently, in the wake of its seventh consecutive quarterly loss, Abercrombie & Fitch announced that it will be phasing out its once-coveted logos from upcoming seasons in the United States in an effort to stimulate sales and revitalize the brand.<sup>2</sup> The company hopes that its somewhat radical decision will engage consumers who prefer to mix and match, rather than be associated with a single brand—a tendency that is encouraged by many of the wildly successful mass market retailers in today’s marketplace, including H&M and Forever 21 (whose products do not include logos, except on labels and hang tags).

The jury is out on whether this business strategy will resurrect the Abercrombie & Fitch brand; but regardless of the commercial outcome, if logo-adorned designs continue to fall from grace, the trend may have interesting and unexpected negative externalities on related legal protections for established and up-and-coming designers and fashion companies alike. These potential consequences underscore the importance of the three branches of intellectual property that can protect fashion designs.

This article will (a) review whether, and to what extent, fashion designs can be protected under United States copyright, patent, and trademark law; (b) examine why the implementation of logo-emblazoned designs can be a useful strategy from a legal perspective; and (c) discuss best practice suggestions for designers, fashion companies, and their counsel in a landscape where such designs may no longer be “on trend.”

## Protection of Fashion Designs Under Intellectual Property Law

As an industry that encourages its artists to borrow and find inspiration in elements created by their peers and predecessors, intellectual property law in the fashion space must strike a particularly complex and unique balance between the preservation of a designer’s work and the promotion of creativity and commerce. Accordingly, the determination of whether, and to what extent, a fashion design may be protectable under copyright,

patent, and/or trademark law requires a careful, tailored analysis.

## Design Protection under Copyright Law

A copyright extends several exclusive rights to the creator of an “original work of authorship” including, significantly, the right to (and authorize others to) make copies of the work, distribute copies of the work to the public, display the work to the public, and prepare derivative works based upon the work.<sup>3</sup> Although it is well-settled that these broad protections extend to most works of artists in the music, film, television, and print industries,<sup>4</sup> three-dimensional articles of clothing and accessories (as opposed to drawings or images of such items) are afforded very little protection under copyright law.

Instead, these items are often classified as “useful articles” due to the “intrinsic utilitarian function” of apparel and most accessories (e.g., to serve the purpose of that item of clothing or accessory).<sup>5</sup> Such articles are not copyrightable, except to the extent that their ornamental aspects can be physically or conceptually identified and separated from the utilitarian elements of the underlying products.<sup>6</sup> For example, an ornamental sculpture on a belt buckle may be so identified and separated from the belt buckle’s utilitarian purpose.<sup>7</sup> That said, it is important to note that courts have historically been very hesitant to conceptually separate creative elements from useful articles in this manner—thus, this strategy is not one on which a designer or fashion company should hang its hat.<sup>8</sup> However, many two-dimensional original elements which are placed on useful articles (such as prints and fabrics)<sup>9</sup> and certain ornamental three-dimensional original elements on accessories (such as jewelry, in particular)<sup>10</sup> are generally copyrightable.

Due to the ambiguity and relative dearth of fashion design protection in copyright, many legislators have strived for nearly a decade to adopt into law various iterations of a bill intended to amend the Copyright Act to clarify and strengthen the protection of fashion designs.<sup>11</sup> If passed, the latest version of the bill (titled the Innovative Design Protection Act of 2012)<sup>12</sup> would extend three years of copyright protection to designers and fashion companies for certain designs,<sup>13</sup> which could only be enforced against designs which are “substantially identical”<sup>14</sup> to the protected work. The Act has the support of major fashion houses and organizations (including, among others, the Council of Fashion Designers of America)<sup>15</sup> but has been criticized by manufacturers and retailers, who are concerned that this would unduly restrict commerce by increasing associated costs,<sup>16</sup> and



smaller designers, who may not have sufficient funds to effectively litigate valid claims against larger companies.

### **Design Protection Under Patent Law**

Design patents protect the original and ornamental designs contained in articles of manufacture.<sup>17</sup> Although standard utility patents are not often applicable to fashion designs (except to protect, for example, an innovative process or an advancement in functionality), design patents can be very helpful in protecting certain fashion designs, such as those for footwear, handbags, and eyeglass frames.<sup>18</sup> If successfully obtained, the owner of a design patent would enjoy protection for the quite substantial period of 15 years.<sup>19</sup>

While design patents offer extremely powerful protection for certain fashion designs, that protection comes at a steep cost in terms of time and money. The legal fees and other expenses involved in obtaining a design patent far exceed those required for a copyright or trademark and, most significantly, the duration of the process is approximately 18 months—more than enough time for a trend to come and go. These costs can make pursuing a design patent impracticable or even ill-advisable when taking into account the business objectives and budgetary constraints of a designer or fashion company. Thus, these patents are only recommended for items which are expected to be staples for many seasons to come.

### **Design Protection Under Trademark Law**

A designer or fashion company may be able to obtain trademarks for the various facets of its business which identify it as the unique source of its goods or services, such as its brand name, trade dress,<sup>20</sup> and/or logo.

Trademarks are commonly viewed as the area of intellectual property law that affords the most reliable protection to designers and fashion companies, and rightfully so. A registered trademark can provide substantial protection for its owner against the use by third parties of the same or a similar trademark in connection with comparable goods or services. For example, Ralph Lauren's "polo player" logo (a registered trademark) held such weight that the company was able to prevent the United States Polo Association from using a similar logo (also featuring a polo player) on fragrance products.<sup>21</sup>

Furthermore, unlike the protection supplied by a copyright or a patent, a registered trademark can theoretically protect its owner in perpetuity.<sup>22</sup>

### **How Can Logos-Adorned Designs Help?**

For the reasons discussed above, it is not always easy to protect fashion designs from infringement by third parties. However, the present legal landscape *does* convey considerable protection to most logos.

Owners may be able to register their logos as both trademarks (if sufficiently distinctive) and copyrights (if sufficiently original). Possessing a single asset that contains not one but two forms of intellectual property can be an extremely potent deterrent to would-be infringers, as each form of intellectual property carries with it its own independent and parallel set of damages and equitable remedies that would become available in the event of infringement.

Thus, the use of logos as the focal point of ornamentation is typically an easy recommendation to make to designers and fashion companies who are looking to increase the protectability of their designs and/or whose name may not be very distinctive from a trademark perspective. While the underlying fashion design would still be subject to the same analysis, as a practical matter, it becomes far more difficult for third parties to "knock off" designs without fear of reproach when those designs are covered with elements (logos) that contain legal protections which are well-established and far more predictable.

### **Best Practice Recommendations for Designers, Fashion Companies, and Their Counsel**

Should logo-emblazoned apparel and accessories continue to fall out of public favor (as Abercrombie & Fitch's announcement appears to have heralded), then the above recommendation may no longer be as easy to make—at least in the domestic mass market for apparel, where this trend presently appears to reside.

Lawyers in the fashion, entertainment, and retail industries must be particularly attuned to their clients' practical considerations, and in such a highly competitive and subjective marketplace, there is little benefit to designers and fashion companies fighting consumer demand and designing against trend. Quite simply, the value of a design that does not sell will never outweigh the value of a design that is flying off shelves, even if the former contains every available legal protection under the sun.

Accordingly, although there may be legal advantages to implementing certain design strategies (such as the logo ornamentation concept discussed in this article), designers and fashion companies should instead focus on what is most important: building their brands and designing the best products possible for their customers.

With that goal firmly in mind, designers and fashion companies should also consult with attorneys who are experts in the industry and related fields to evaluate this complex area of law and determine what, if any, actions should be taken to optimize brand and design protection in a cost-effective manner that will help advance (rather than impede) business goals.

## Endnotes

1. See *The Power of Branding*, DESIGN COUNCIL, June 22, 2013, available at <http://www.designcouncil.org.uk/news-opinion/power-branding>; see also Alex Hillsberg and Chris Sibbet, *Review of Famous Company Logos: How The Big Business Uses The Emotional Power of Logos*, FINANCES ONLINE, 2014, available at <http://business-applications.financesonline.com/review-of-famous-company-logos>.
2. Vicki M. Young, *A&F Changes Strategy as Logos Lose Allure*, WOMEN'S WEAR DAILY, Aug. 29, 2014, available at <http://www.wwd.com/retail-news/trends-analysis/af-logo-business-to-exit-na-stores-7854031>.
3. 17 U.S.C. § 106 (1976).
4. See 17 U.S.C. § 102(a) (1976), which explicitly names various works of authorship that can be protected under copyright law (including, among others, literary, musical, dramatic, pictorial, graphic, and sculptural works, motion pictures and other audiovisual works, and sound recordings) but does not list any categories which unambiguously include fashion designs.
5. 17 U.S.C. § 101 (1976).
6. *Pivot Point Int'l, Inc. v. Charlene Prods.*, 372 F.3d 913 (7th Cir. 2004); *Chosun International, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).
7. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).
8. See *Jovani Fashion, Ltd. v. Fiesta Fashions*, Docket No. 12-598-cv, 2012 WL 4856412 (2d Cir. 2012); see also *Galiano v. Harrah's Operating Co.*, 416 F.3d 411, 419 (5th Cir. 2005) ("clothing designs rarely pass the 'separability' test").
9. *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759 (2d Cir. 1991).
10. See, e.g., *Yurman Design, Inc. v. PAJ, Inc.*, 262 F.3d 101 (2d Cir. 2001).
11. See H.R. 5055, 109th Cong. (2006).
12. Innovative Design Protection Act of 2012, S. 3523, 112th Cong. (2012), available at <https://beta.congress.gov/bill/112th-congress/senate-bill/3523/text>.
13. The Act would extend protection to fashion designs which "are the result of a designer's own creative endeavor" and "provide a unique, distinguishable, non-trivial and non-utilitarian variation over prior designs for similar types of articles." *Id.*
14. Under the Act, a fashion design that is "substantially identical" must be "so similar in appearance as to be likely to be mistaken for the protected design, and contains only those differences in construction or design which are merely trivial." *Id.*
15. Council of Fashion Designers of America—Protecting Design, <http://cfda.com/programs/protecting-intellectual-property> (last visited Sept. 8, 2014).
16. See Staci Riordan, *Why IDPPPA is going to KO the Business of Fashion*, Aug. 30, 2010, available at <http://fashionlaw.foxrothschild.com/articles/design-piracy-prohibition-act-dppa>.
17. 35 U.S.C. § 171 (1952).
18. See e.g., *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117 (Fed. Cir. 1993).
19. Design patents which are filed on or after December 18, 2013 have a term of 15 years from issuance (design patents filed prior to such date have a term of 14 years from issuance). 35 U.S.C. § 173 (1952).
20. Trade dress comprises design elements of a product's overall appearance or presentation to consumers. Examples of trade dress registered with the United States Patent and Trademark Office include the Hermès Birkin bag and the Adidas three-stripe shoe design.
21. *U.S. Polo Ass'n, Inc. v. PRL USA Holdings, Inc.*, No. 12-1346-cv (2d Cir. 2013).
22. In the United States, an owner can renew its trademark registration in perpetuity, provided that continued usage is duly demonstrated as periodically required by the United States Patent and Trademark Office.

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# Employing Child Performers in Film; Judicial Approval of a Minor's Contract in New York

By Michael Massmann

For a filmmaker, employing a child actor may be a way to add authenticity to a coming of age film and hold the promise of working with an undiscovered talent. Films such as the recently released *Boyhood* evince the opportunity for commercial and critical success of such endeavors. For the lawyer, representing a filmmaker who employs child actors presents a number of responsibilities. First, the lawyer will need to advise the filmmaker on compliance with the general New York rules regarding child labor. Further, special laws regarding the employment of child performers require that the filmmaker obtain the proper certificates, look to the child's education, and, if the child is being compensated, arrange to make deposits in a child trust account. For a filmmaker actually looking to distribute the film—the successful professional we all hope to counsel—there is another consideration. A filmmaker must ensure sole ownership of the film's copyright to obtain the economic rewards and artistic renown for which he or she has labored.

The copyright to the finished film in its entirety, encompassing all the individual creative contributions made by the cast and crew, is obtained by virtue of the labor contracts. Such contracts include work-for-hire clauses wherein the performer cedes the copyright to his or her individual contributions to the filmmaker. In the case of child performers, locking up these rights is not as simple as it is with an adult performer. This is because, as any 1L student can tell you, a minor's contract is voidable unless it is for essentials. Thus the filmmaker can lose his or her rights to the finished picture upon a minor's voiding of the labor contract. Without establishing the copyright to the finished film and all the component parts that comprise it, a filmmaker will not be able to obtain E&O insurance, let alone distribute the film. To protect against this, the filmmaker will need to judicially affirm the contracts of any minors that contributed to the film.<sup>1</sup>

## I. Complying with New York Law for the Employment of Minors

New York mandates a minimum wage, which is scheduled to change twice over the next two years. The current minimum wage is \$8 per hour.<sup>2</sup> On December 31st, it will jump to \$8.75 per hour and then again on December 31, 2015 to \$9 per hour.<sup>3</sup> Generally, minors under 14 years of age may not be employed in New York.<sup>4</sup> Exceptions are made for child performers, among others—notably caddies, farmers, and newspaper carriers.<sup>5</sup> Additionally, New York places caps on the number of hours a child may work.<sup>6</sup> A chart of permissible work hours for child performers, which varies according to age

and whether school is in session, is available on the Department of Labor's website.<sup>7</sup> These hours must be posted and include stopping times for meals.<sup>8</sup> Clients should be warned that workers' compensation awards for injuries or deaths are doubled where a minor is employed in violation of any law.<sup>9</sup> Notable among these laws is the requirement that the filmmaker obtain workers' compensation insurance.<sup>10</sup>

## II. Special Requirements for Child Performers

A child performer is any child under the age of 18 who resides in New York and agrees to provide creative services or any child who agrees to provide creative services in New York.<sup>11</sup>

A filmmaker wishing to employ a child performer must obtain a copy of the Child Performer Employment Permit (the Permit) from the parents and a Certificate of Eligibility to Employ Child Performers (the Certificate).<sup>12</sup> The Certificate costs \$350 and is good for three years.<sup>13</sup> The Certificate and Permit must be kept on file and available for inspection by school officials, the state Board of Education, and the Department of Labor.<sup>14</sup> Failure to produce either constitutes prima facie evidence of illegal employment of a minor.<sup>15</sup> Additionally, the filmmaker must obtain emergency contact information and authorization from the parent or guardian for emergency medical service.<sup>16</sup> Application for permits and certifications, along with other forms, can be found on the Department of Labor's Web site.<sup>17</sup>

Parents must apply for the Permit in writing. If pressed for time, parents can apply online for a one-time permit that is valid for only 15 days.<sup>18</sup> The permit is free and must be renewed 30 days before it expires.<sup>19</sup> The application also requires parents to attach documentation regarding the child's physical fitness for the work, academic status, and the required trust fund.<sup>20</sup> While an initial work permit may be granted prior to setting up a trust, no renewal will be issued unless the parent or guardian has demonstrated that a child performer trust account has been established.<sup>21</sup> At the initial application, the commissioner is only required to inform parents of the requirement that a trust account be established in the child's name.<sup>22</sup> The trust itself must be established within 15 days of the beginning of employment.<sup>23</sup>

A child performer must meet all educational requirements mandated by the education laws of the state of New York.<sup>24</sup> Filmmakers should ensure that parents are filing the required Academic Verification forms, also available on the Department of Labor's website.<sup>25</sup> Evidence



that demonstrates that the child performer is maintaining satisfactory academic work is required every semester.<sup>26</sup> If the child performer is unable to meet such educational requirements due to the engagement then the filmmaker must provide a teacher who is either certified or has a credential recognized by New York.<sup>27</sup> A child required by law to be enrolled and attend school may not go without educational instruction and remain unemployed for more than 10 consecutive days.<sup>28</sup>

Similar to California's Coogan's Law, New York's Child Performer Education Trust Act (CPET), which took effect in 2004, requires that 15% of the child's earnings be placed in the child's trust account.<sup>29</sup> California's Coogan's law, enacted in 1939 and amended in 2000, was named for child actor Jackie Coogan who, after being discovered by Charlie Chaplin and enjoying a successful career as a child performer, learned on his 21st birthday that his parents had spent the majority of his earnings.<sup>30</sup>

Assuming the child performer is being compensated, the trust account must be established in accordance with Article 7 of the Estates, Powers, and Trusts Law.<sup>31</sup> New York requires parents to open a UTMA or UGMA compliant trust account, which, like a Coogan Account, is a blocked trust fund.<sup>32</sup> The account may be opened in any state.<sup>33</sup> If the child performer already has a Coogan Trust established, then there is no need to open a new account, because a Coogan Trust complies with New York law.<sup>34</sup>

It is the filmmaker's duty to ensure that the money is transferred to the child's trust account.<sup>35</sup> Therefore, filmmakers must obtain information from parents that enable them to transfer any children's earnings to the trust accounts.<sup>36</sup> Where no such trust has been established, the filmmaker must transfer the earnings to the state comptroller, along with the child's name and last known address for placement in a holding fund.<sup>37</sup> If the employment is for 30 days or fewer, then the required amount must be transferred within 30 days of the last day of the child's employment.<sup>38</sup> If the employment is for longer than 30 days, then the transfer must be made at every payroll period.<sup>39</sup> Additional information about the child performer trust requirements is available on the Department of Labor's website.<sup>40</sup>

### III. Affirming the Minor's Contract

If the child performer lives in Manhattan, one can begin the process to affirm the contract at Miscellaneous Department of N.Y. City Surrogate's Court at 31 Chambers Street, Room 507.<sup>41</sup> The staff in Room 507 will review the documents and send the applicant to the clerk to file. Any interested person may file the petition.<sup>42</sup> Depending on the value of the contract, the filing fee will be between \$45 and \$1,250.<sup>43</sup> After the petition is filed and no less than eight days before the scheduled hearing, the court will serve an order to show cause why the petition should

not be granted on the following individuals: all the parties to the contract; the child, if over 14 years of age; the guardian; the parents if they are not the guardians; and any living person having care of the child.<sup>44</sup> The entire process generally takes at least two to three months, but one may ask the court to expedite the process by stating that it is an emergency in an affidavit.<sup>45</sup>

Parents must supply written acquiescence to the terms of the contract for it to be judicially approved.<sup>46</sup> The parents' written approval should be obtained when negotiating the contract and attached thereto as a rider. For judicial approval to be granted, the term of employment must not exceed three years, unless the child is represented by a "qualified counsel experienced with entertainment industry law and practices," in which case the term may extend to seven years.<sup>47</sup> The court may revoke its approval at any time if it finds that the "well-being of the infant is being impaired."<sup>48</sup> The child performer, parents, guardians, limited guardians, or ones having "care and custody" may apply to have the court revoke its approval.<sup>49</sup>

The petition should include a copy of the contract with parental riders; the full name, residence, and date of birth of the infant; name and residence of the parents or guardians and the name and residence of the person with whom the infant resides; state whether the child has ever had a guardian appointed by will, deed, or court; a statement that the child is a resident of New York or, if not, the place in the state where the child's work is to take place; a brief statement as to the child's employment compensation; state that the contract is not to extend beyond three years and enumerate any covenants or conditions in the contract—such as merchandising, confidentiality, and work made for hire clauses, and the rights to use of the child performer's name and likeness; a statement identifying who is entitled to the child's earnings and explain the financial circumstances of the parents so entitled; state the facts regarding any previous application to affirm a child performer's contract; include a schedule showing the child's estimated gross earnings, estimated outlays and estimated net earnings; state the interest of the petitioner in the contract; and any other relevant facts that show the contract to be "reasonable and provident and for the best interests of the child."<sup>50</sup>

At the hearing, the child's parent or custodian may ask the court set aside more than 15% of the child's gross earnings.<sup>51</sup> Further, the court has discretion to set aside up to 50% of the child's net earnings—whatever is in the best interest of the child while considering the financial circumstances of the parents and the needs of their other children.<sup>52</sup> The parent or legal guardian can be appointed the custodian of the account; however, if the balance in the account reaches \$250,000, a trust company will be appointed custodian.<sup>53</sup>

The child must appear personally before the court.<sup>54</sup> The filmmaker need not appear and, if incorporated, may not appear without counsel. The court will determine whether to grant its approval by considering the best interests of the child.<sup>55</sup> At any time after the petition has been filed, the court may appoint a guardian to represent the interests of the child.<sup>56</sup> If the child performer does not have an attorney, the court will appoint a *guardian ad litem*, whose purpose it is to represent the child in court.<sup>57</sup> However, the infant, his or her parent, or his or her guardian may petition the court for the appointment of a specific attorney.<sup>58</sup>

#### IV. Conclusion

Ensuring judicial approval for a child performer's contract is an important part of providing a filmmaker with adequate representation. Filmmakers need to understand that the process, while not extremely difficult, will cost money and take time. Costs include the permit, added legal work on labor contracts for parental riders, and, depending on the professional sophistication and circumstances of the child performer, may include legal fees for the representation of the minor, either for the minor's attorney or the court fees for a *guardian ad litem*. Further, state rules regulating the hours a child performer may work could result in delays in production. Provided the filmmaker can work with these limitations and contingencies, hiring a child performer may be a great way to add authenticity to a film and give a young person an introduction to the entertainment business.

#### Endnotes

1. N.Y. ARTS & CULT. AFF. LAW §35.03 (Consol. 2014) ("If the contract is so approved the infant may not, either during his minority or upon reaching his majority, disaffirm the contract on the ground of infancy or assert that the parent or guardian lacked authority to make the contract.").
2. *Minimum Wages*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.state.ny.us/workerprotection/laborstandards/workprot/minwage.shtm>.
3. *Id.*
4. N.Y. LAB. LAW ART. 4 §130(1) (Consol. 2014).
5. *Id.* at §130(2).
6. *Id.* at §§142-143.
7. *Child Performer Permitted Working Hours*, NEW YORK DEPARTMENT OF LABOR, <http://labor.ny.gov/formsdocs/wp/LS559.pdf>; see also N.Y. LAB. LAW ART. 4 §14.
8. N.Y. LAB. LAW ART. IV, §144.
9. N.Y. WORKERS' COMP. LAW §14-A(1) (Consol. 2014).
10. *Id.* at §10(1).
11. N.Y. LAB. LAW ART. 4-A §150(2) (CONSOL. 2014); see also N.Y. ARTS & CULT. AFF. LAW §35.01(a) (explicitly extending the definition to a child performer involved in the making of a motion picture).
12. N.Y. LAB. LAW, ART. 4-A §151.1(a) and §151.2.
13. *Application for a Certificate of Eligibility to Employ Child Performers*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.ny.gov/formsdocs/wp/LS550.pdf>.
14. N.Y. LAB. LAW, ART. 4-A §151(3).
15. *Id.*
16. *Child Performer*, NEW YORK DEPARTMENT OF LABOR, [http://labor.ny.gov/workerprotection/laborstandards/secure/child\\_index.shtm](http://labor.ny.gov/workerprotection/laborstandards/secure/child_index.shtm).
17. *Id.*
18. *Child Performer Online Application*, NEW YORK DEPARTMENT OF LABOR, <https://www.labor.ny.gov/secure/welcome.asp>.
19. *Child Performer Permit Combined Application*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.ny.gov/formsdocs/wp/LS561.pdf>; see also *Child Performer Frequently Asked Questions*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.ny.gov/workerprotection/laborstandards/secure/ChildPerformerFAQ.shtm>.
20. *Id.*
21. N.Y. LAB. LAW, ART. 4-A §151(4)(a).
22. N.Y. LAB. LAW, ART. 4-A §151(1)(d).
23. N.Y. EST., POWERS & TRUSTS LAW §7-7.1(2)(b) (Consol. 2014).
24. N.Y. LAB. LAW, ART. 4-A §152(1).
25. DEPARTMENT OF LABOR, *supra* note 16.
26. N.Y. LAB. LAW, ART. 4-A §151(1)(c)(iii).
27. N.Y. LAB. LAW, ART. 4-A §152(2).
28. N.Y. LAB. LAW, ART. 4-A §152(3).
29. N.Y. EST., POWERS & TRUSTS LAW §7-7.1(2)(a).
30. *Coogan's Law*, SAG-AFTRA, <http://www.sagaftra.org/content/coogan-law>. (Louisiana and New Mexico also require blocked accounts for child performers; however, the latter only requires a blocked account if the child earns more than \$1,000 per employment contract.).
31. N.Y. LAB. LAW, ART. 4-A §151(4)(a).
32. SAG-AFTRA, *supra* note 30.
33. *Id.*
34. *Child Performer Frequently Asked Questions*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.ny.gov/workerprotection/laborstandards/secure/ChildPerformerFAQ.shtm>.
35. N.Y. EST., POWERS & TRUSTS LAW §7-7.1(2)(a).
36. *Child Performer Trust Accounts*, NEW YORK DEPARTMENT OF LABOR, <http://www.labor.ny.gov/workerprotection/laborstandards/secure/ChildPerformerFAQ.shtm>.
37. N.Y. EST., POWERS & TRUSTS LAW §7-7.1(2)(a).
38. *Id.*
39. *Id.*
40. DEPARTMENT OF LABOR, *supra* note 36.
41. The petition must be filed in the county where the child performer resides. See N.Y. SCPA 211.
42. N.Y. ARTS & CULT. AFF. LAW §35.03(4)(a).
43. N.Y. SURR. CT. PROC. ACT §2402 (Consol. 2014).
44. N.Y. ARTS & CULT. AFF. LAW §35.03(4)(b) (Consol. 2014).
45. Based on conversation with employee at N.Y. Surrogate's Court on or about May 2013.
46. N.Y. ARTS & CULT. AFF. LAW §35.03(2)(c).
47. N.Y. ARTS & CULT. AFF. LAW §35.03(2)(d).
48. N.Y. ARTS & CULT. AFF. LAW §35.03(2)(e).
49. *Id.*
50. N.Y. ARTS & CULT. AFF. LAW §35.03(5)(a)-(k).

51. N.Y. EST., POWERS & TRUSTS LAW §7-7.1(2)(b).
52. N.Y. ARTS & CULT. AFF. LAW §35.03(3)(b) (Consol. 2014) (defining net earnings as “the gross earnings received for services performed or rendered by the infant during the term of the contract, less (i) all sums required by law to be paid as taxes to any government or subdivision thereof with respect to or by reason of such earnings; (ii) reasonable sums to be expended for the support, care, education, training and professional management of the infant; and (iii) reasonable fees and expenses paid or to be paid in connection with the proceeding, the contract and its performance.”).
53. N.Y. EST., POWERS, AND TRUSTS LAW §7-7.1(2)(b).
54. N.Y. ARTS & CULT. AFF. LAW §35.03(8)(a).
55. *Id.*

56. N.Y. ARTS & CULT. AFF. LAW §35.03(6).
57. N.Y. SURR. CT. PROC. ACT. §403(2).
58. N.Y. SURR. CT. PROC. ACT. §403(1).

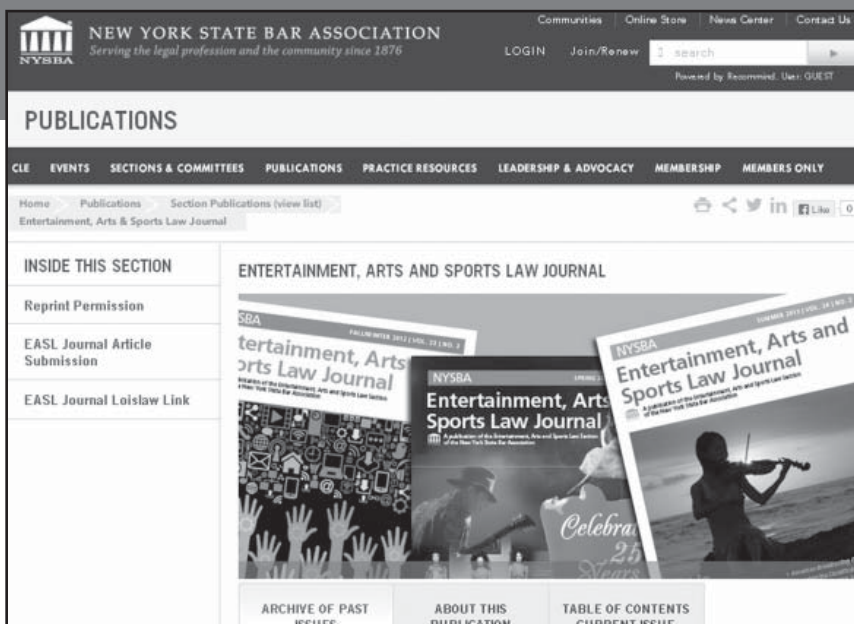
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# “Put ‘Em Up”: Why the Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players’ Association Won’t Let Fighting Go Down for the Count

By Max L. Horowitz

## I. Introduction<sup>1</sup>

Fashion yourself a professional ice hockey player for a moment. You have grown up playing hockey all your life, ever since you were a small child. Your parents drove you a few times per week to the local rink, sometimes at ungodly hours of the morning, to do what you loved most: lace up those skates, slap on those pads, and shoot some pucks around the ice. The love of the game in you has not changed, but as you have grown, your entrance into minor and major-junior hockey leagues has educated you to a simple fact of the hockey world: not every hockey player is equal. There are the skill players: those with silky stick handling skills, with incredibly quick foot speed and agility, and with perfectly soft passes from unfathomable angles. Then, there are the tough ones: the big bulky players who stand in front of the net and screen the goaltender’s view of the puck, the brute enforcers whose body checks can sweep opponents from their feet in a moment, and the “goons” who are there to fistfight their way to a momentum change in their team’s favor. Therefore, when considering your draft position into the National Hockey League (NHL, league), one question stands alone: do you have enough skill to earn the big dollars, or are you going to have to succeed with your physicality?

The role one plays on a team at the professional hockey level is not as simple as a mere choice to be either a “skill” or a “tough” player, however. Not every hockey player has the natural motor nuances to be a skill player. Granted, to play at the professional level, every player needs to have the requisite skating and shooting ability that separates one who is drafted by the NHL or who stays in the Minor League. However, what separates 2012-2013 Art Ross Trophy winner (given to the NHL’s top points scorer at the end of every regular season) Martin St. Louis<sup>2</sup> from his Tampa Bay Lightning teammate Radko Gudas is not merely that the two are 15 years apart in age (St. Louis is 38, Gudas is 23).<sup>3</sup> They are also different sizes: St. Louis stands 5’8” and weighs 180 pounds, while Gudas is 6’0” and weighs 204 pounds.<sup>4</sup> Further, looking at just the 2013-2014 NHL season to date,<sup>5</sup> Gudas’s 70 penalty minutes in 24 games with the Lightning ranks sixth in the entire NHL, although he has only one goal and seven assists in that time.<sup>6</sup> Of those 70 penalty minutes, 20 of them are for five-minute fighting penalties (four fights).<sup>7</sup> On the other hand, St. Louis has scored 27 points in 29 games (12 goals, 15 assists) during the 2013-2014 season, which

places him at seventeenth in the NHL in scoring, while he only has a minuscule four penalty minutes, none of which were for fighting.<sup>8</sup> The profiles and statistics speak for themselves: St. Louis is a skill guy, whereas Gudas is a tough guy.

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*“[I]t is in the best interest of NHL teams to sign employment contracts with both skill and tough players if they ever want to win the NHL championship and hoist the Stanley Cup, the most coveted trophy in all of hockey.”*

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This is not to say that skill players cannot fight, or that tough players cannot score. However, it is clear that the two subsets of players have different jobs to perform on the ice, and the performance of those duties translates into a well-oiled skating and shooting machine.<sup>9</sup> Therefore, it is in the best interest of NHL teams to sign employment contracts with both skill and tough players if they ever want to win the NHL championship and hoist the Stanley Cup, the most coveted trophy in all of hockey.

However, most team general managers and owners would agree that skill players are valuable to a team’s success, and therefore are worth more when signing on the dotted line, because they simply put the most pucks in the back of the net.<sup>10</sup> Points equal wins in the NHL, so the market for skill players has much higher demand than for tough players, and therefore results in more lucrative contracts.<sup>11</sup> Sticking with the Tampa Bay example, Martin St. Louis’ contract with the Lightning was signed in 2011, lasts four years, and provides an annual salary of \$5,625,000 per year, for a total of \$22,500,000.<sup>12</sup> Radko Gudas’s contract, on the other hand, was new for 2013, will last three years, and is worth just under \$1,000,000 for each year, for a total of \$3,000,000.<sup>13</sup> As St. Louis has shown his skill and ability to score points throughout his NHL career, he has become a sought-after player, and the Tampa Bay Lightning has recognized his value through his sizable contract.

This necessarily presents a question about tough guys: what are they worth? Specifically, looking at fighters in the NHL, how much value does a team put on a fighter

to fight other NHL players for the sake of team success? “Fighters” are a subdivision of the “enforcers” category: whereas all enforcers will body check or be physical in some manner during gameplay on a regular basis, fighters are specific players each team has who will get into fistfights with other teams’ players (often also fighters) in order to give their own teams momentum, to spark their teams into playing with more edge or grit, or to simply rile up the fans in the building and allow teammates to feed off the resulting energy.<sup>14</sup> Although both enforcers and fighters have generally less monetary value than skill players, the NHL contains the most physical level of ice hockey, and teams need enforcers to body check opponents and gain control of the puck, and therefore the game. However, do teams really need fighters? Or, simply put, does the NHL need fighting at all? It is the purpose of this article to show that fighting has a legally protected place in the NHL pursuant to the Collective Bargaining Agreement (CBA) between the NHL and the National Hockey League Players’ Association (NHLPA), and that fighters therefore are entitled to sustain employment in the NHL under that protection.

## II. Overview of Fighting in the NHL

### A. History of Fighting in the NHL

Fighting in ice hockey has been a part of the sport for a long time, most notably taking shape in 19th century Canada, when the sport became more popular within that country.<sup>15</sup> There are many theories explaining why fighting emerged in hockey, but the most common one stems from the lack of formalized rules in the early history of the game, which encouraged physical intimidation and control during gameplay.<sup>16</sup> In fact, certain rule changes, such as the implementation of the “blue lines” in 1918, actually encouraged fighting.<sup>17</sup> The new zone distribution produced an increase in forward passing in the neutral zone, but the “offside” rule<sup>18</sup> prevented passing across the lines themselves. This resulted in players handling the puck in close quarters, which subjected them to less space on the ice, and thereby an increase in physical play. However, to protect these puck handlers (i.e., skill players) from injury, enforcers and fighters emerged to fight opposing players who posed a threat.<sup>19</sup>

In 1922, the NHL introduced Rule 56 that formally regulated fighting, or “fisticuffs” as it was called back then, in the official NHL rulebook. Rather than ejecting players from the game, as was the practice in amateur and college hockey, players would be given a five-minute major penalty.<sup>20</sup> At the time, team management and promoters sought to benefit financially from fighting. Nightly game advertisements were often based on the projected on-ice battles between the opposing teams’ enforcers.<sup>21</sup>

Although fighting was rare from the 1920s through the 1960s, it was more brutal than it is today. Skill players were also known to fight at that time, since fewer professional teams existed and roster spot selection was

more scrutinized. Therefore, enforcers or fighters did not typically make it onto professional teams. However, in 1967 the NHL expanded its number of franchises from six to 12.<sup>22</sup> This allowed for more players to vie for roster spots, in addition to more “star” players like Hall of Famer Wayne Gretzky, needing more protection during the game, which increased the need for enforcers. Further, the rise of certain teams specializing in physical play and fighting, such as the “Broad Street Bullies” (the nickname of the 1973-1974 Philadelphia Flyers), popularized fighting in the NHL. The average number of fights per game rose above 1.0 during the 1980s.<sup>23</sup> As a result, many teams signed enforcers to protect and fight for smaller offensive stars.<sup>24</sup>

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*“The rules clearly state the different penalties for starting, participating in, and joining in a fight. However, it is clear that the NHL Rulebook does not outlaw the occurrence of a fight during an NHL game.”*

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### B. Fighting in Today’s NHL: Rule 46

Section 30.2 of the CBA, entitled “League Playing Rules,” specifically mentions that “Each player shall be bound by the League’s Playing Rules...”<sup>25</sup> The NHL Rulebook contains all the playing rules that govern the way that current NHL games are played. The current NHL Rulebook prescribes the rules for fighting in an NHL game in Rule 46. The rules clearly state the different penalties for starting, participating in, and joining in a fight. However, it is clear that the NHL Rulebook does *not* outlaw the occurrence of a fight during an NHL game.

Rule 46.1, entitled “Fighting,” defines the occurrence of a fight as when “at least one player (or goalkeeper) punches or attempts to punch an opponent repeatedly or when two players wrestle in such a manner as to make it difficult for the Linesmen to intervene and separate the combatants.”<sup>26</sup> The Referees<sup>27</sup> are given wide discretion in imposing penalties under the rule because the NHL seeks to allow them to “differentiate between the obvious degrees of responsibility of the participants either for starting the fighting or persisting in continuing the fighting.”<sup>28</sup> Therefore, even though the NHL will allow a fight to occur, it does not mean that participants in the fight can disregard all concern for their opponents. For example, if during a fight a player falls to the ice, it would be within the referee’s discretion to administer additional penalty minutes in the event the winning fighter kept beating his opponent while the latter was down on the ice. The Rulebook has specific consequences for such an offender, outlining the rules for Aggressors in Rule 48.2.

A fighting penalty is classified as a major penalty under Rule 46.14. Under Rule 20.1, major penalties are

five-minute penalties, where the offending player is ruled off the ice for that duration, during which offenders are typically asked to sit in the Penalty Box, an enclosed bench located on the opposite side of the playing surface from the player/team benches.<sup>29</sup>

### C. The Recent Debate: Does the NHL Still Need Fighting?

There has always been disagreement over whether fighting is necessary in the NHL, but the current debate reinvigorated itself on October 1, 2013. That night, long-time tough guy and consensus fan-favorite George Parros of the Montreal Canadiens entered into his second fight of the evening in a game against the Toronto Maple Leafs.<sup>30</sup> He faced the Leafs' Colton Orr, another known fighter. While holding onto Parros's jersey, Orr attempted to punch Parros, but slipped backwards and landed on his back. Orr, still holding on, unintentionally tugged Parros's jersey downwards, forcing Parros to fall over Orr's body, and resulting in Parros falling jaw-first into the ice. Parros lay unconscious for a moment, blood dripping from his chin. Although it did not come directly as a result of a punch, Parros had to be stretchered off the ice, and it was later determined that he suffered a concussion.<sup>31</sup> The media outrage that followed centered on a single question, sparking a newfound intensity in the old debate: did the NHL really need fighting in the modern game?

Despite the irony that the act of fighting itself did not actually cause an injury, the proximate cause of that injury was Parros's entry into a fight. Many critics of fighting used the Parros incident as a springboard for a discussion of the relative benefits and disadvantages of fighting in the NHL, only to conclude that fighting adds no practical value to the game of hockey. Some, like Jeff MacGregor of ESPN.com, maintain that fighting in hockey has more to do with the "authenticity" of the game, rather than any practical addition. Specifically, they argue that in order to keep older and/or more traditional hockey fans interested in today's speed-and-skill-based NHL, the league needs to use fighting as a marketing tool to keep those fans invested in the game with which they grew up.<sup>32</sup> However, these opponents argue that the result of removing fighting from the game would be no different than a portion of the game that already exists: the NHL Playoffs. During the Playoffs, a time when penalties of any kind can cost teams goals, and ultimately chances to advance to the Stanley Cup Finals, playoff-contending teams typically will give their enforcers or fighters little to no playing time in order to curb unpredictability. These opponents conclude that reducing the ice time of these players forces the entire team to perform honestly, which results in the most pure, and therefore desirable, form of hockey: offense, defense, and goaltending, all without fighting.<sup>33</sup>

On the other side of the debate, however, are current and former NHL players, as well as other traditionalists of the game, who believe that fighting is present in order to

deter players from using their sticks to hurt other players in worse ways than a simple punch to the head. For example, Boston Bruins' forward Shawn Thornton, a player known to be a fighter but who also has gained notoriety as a "dual-threat" scorer, claims that getting punched in the face is a deterrent to dirty play.<sup>34</sup> In addition, Montreal Canadiens' forward Daniel Briere, a smaller, quicker, and skilled forward at 5'9,"<sup>35</sup> values the protection that his enforcer teammates provide in the event an opposing enforcer attempts to body check him: "As a skill player, I always preferred having some tougher guys around me in case something happened out there."<sup>36</sup> In the same vein, most players feel the camaraderie and chemistry that they have with their teammates are key to the cohesiveness of an NHL team, and some argue that without their enforcer teammates and (more importantly) friends by their side, their teams would not perform as well as they could with them in the lineup.<sup>37</sup>

Regardless of the opinions of retired players, hockey reporters, and analysts, there still remains an unheard voice: the enforcers themselves. Lost in the debate is what would happen to enforcers who, despite recent criticism and negative exposure in light of the Parros incident, still are being signed every year to contracts to do what they are trained to do: body check and fight for a chance to win an NHL championship. If the game were to suddenly phase out the need for fighters in the NHL, what would happen to those players? In order to attempt to give a voice to the suppressed in this instance, it is critical to first understand how labor law plays a role in professional sports, and as a result, controls the presence of fighting in the NHL. Once understood, it will be apparent that modern labor law and the related constructs of the employer-employee relationship apply directly to the NHL-NHLPA CBA, such that protection for fighters and their jobs would be available to them if the status of fighting in the NHL was put in jeopardy.

### III. Labor Law and Professional Sports

Professional sports are governed by the National Labor Relations Act (NLRA, the Act) of 1935, amended by the Labor Management Relations Act of 1947.<sup>38</sup> Though specifically applied to Major League Baseball in 1969<sup>39</sup> and to the National Football League in 1973,<sup>40</sup> it is well-settled today that the NLRA and its protections apply to all professional sports.<sup>41</sup> Additionally, the National Labor Relations Board (NLRB) has jurisdiction over professional sports under the same precedent.<sup>42</sup> This is due to the fact that sports are commonly viewed today as a business, and therefore sports' impact on interstate commerce is sufficient to subject it to the NLRA.<sup>43</sup> Therefore, the NHL and the NHLPA are subject to the rules of collective bargaining under the NLRA.

According to the Preamble of the current CBA, the NHL is "a joint venture organized as a not-for profit unincorporated organization...which is recognized as



the sole and exclusive bargaining representative of the present and future [Member] Clubs of the NHL.”<sup>44</sup> Each Member Club of the NHL is considered an “employer” under §2(2) of the NLRA.<sup>45</sup> Under §2(2), an “employer” includes: “any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.”<sup>46</sup> Further, a “person” under NLRA §2(1) is defined as including “one or more individuals, labor organizations, partnerships, *associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.*”<sup>47</sup> It is undisputed that, because Member Clubs sign employment contracts with player-employees, the Clubs are “employers” under the Act. In addition, the NHL consists of a Commissioner, a Board of Trustees, and multiple Committees, all of which are representatives and thereby fiduciaries of the NHL as a whole. However, because the NHL represents the Member Clubs as their agent, the NHL is also a representative and a fiduciary of each individual Member Club. Therefore, as contemplated by its provisions through its corporate and managerial structure, as well as the CBA’s Preamble, both the NHL and its constituent Member Clubs are employers under the NLRA.

The members of the NHLPA, or the individual players as members of each individual NHL Member Club, are employees under §2(3) of the NLRA. Under §2(3), an employee is defined as “*any employee, and shall not be limited to the employees of a particular employer, unless the Act [this subchapter] explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice...*”<sup>48</sup> Each individual NHL player signs a contract with his respective NHL Member Club, and as such, becomes an employee of the Member Club, and therefore an employee of the NHL itself. This falls within the definition of “any employee” under the Act, and also shows how players are “not limited” to being employees of either the Member Clubs or the NHL itself, but rather employees of both. Further, in the event of an NHL-NHLPA labor dispute regarding the structuring of a new CBA, this would subject players to a possible “lockout” by the NHL in which NHL games would be cancelled. This would therefore subject such NHL players to the provision regarding “those whose work has ceased as a consequence of...a labor dispute.” Therefore, based on the above definitions, NHL players are employees under the NLRA.

Finally, as it is related to collective bargaining, the NHLPA is a labor organization under §2(5) of the NLRA.<sup>49</sup> The NLRA defines a “labor organization” as “any organi-

zation of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.”<sup>50</sup> The NHLPA works with players during CBA negotiations, as well as other periods, and acts as the official union representative of all NHL players. Therefore, the NHLPA is a labor organization under the NLRA.

Considering the above definitions, an understanding of the NHL-NHLPA labor relationship begins to take shape: the NHL represents the interests of the Member Clubs, as well as its own interests as a joint-venture organization, while the NHLPA represents the interests of the individual player-employees of each Member Club. However, the difficult task of striking mutual labor agreements is more than just a simple discussion and handshake when it comes to these parties. To comprehend the issue of fighting’s place in the current NHL game, it is imperative to further understand the documents and written agreements that govern the multiple relationships between the NHL and its players, namely, the CBA, the NHL Constitution, and the NHLPA Constitution. Once understood, these documents will set the platform for the legal protection of fighting against commissioner interference.

#### **IV. The Governing Documents of the NHL and NHLPA**

##### **A. 2012-2013 Collective Bargaining Agreement**

##### **1. Term and Effect**

The NHL and NHLPA are governed by a CBA that they have mutually bargained for and agreed upon. As such, they are bound by its terms and conditions until its expiration. In this case, the effective term of the current CBA is from September 16, 2012 until September 15, 2022.<sup>51</sup> Each side has the option, however, to terminate the agreement in 2019: the NHL can choose to terminate (with notice to the NHLPA) on September 1, 2019, and if it does not, the NHLPA can choose to terminate (with notice to the NHL) on September 15, 2019.<sup>52</sup>

As previously discussed, the Preamble of the CBA states that the NHL is the sole and exclusive bargaining representative of its Member Clubs.<sup>53</sup> Conversely, Article 2 of the CBA (as well as the Preamble) entitled “Recognition,” states that the NHL recognizes the NHLPA as “the exclusive bargaining representative of all present and future Players employed as such in the League by the Clubs.”<sup>54</sup> However, as to individual player contracts and salaries, Article 2 allows, “Players, acting individually or through Certified Agents, and Clubs...[on an] individual basis, [to] bargain with respect to and agree upon an individual Player Salary and Bonuses.”<sup>55</sup>

The effect of this language is simply to state that the NHLPA is the sole and exclusive bargaining representative of all NHL players, and that all subjects of collective bargaining under the CBA and the NLRA will be dealt with by the NHL on behalf of the Member Clubs, and the NHLPA on behalf of all players. This is supported by the NHLPA Constitution, which details its rules and expectations as the players' union and bargaining representative. Specifically, Part I of the NHLPA Code of Professional Conduct (found in Appendix A) states that a member shall at all times act in a manner that is consistent with the objectives and purposes of the NHLPA, and shall not conduct himself in a manner that is detrimental to the NHLPA.<sup>56</sup> In particular, the Code requires a member to recognize that the NHLPA is the official voice of its member-players, and that members should support all collective bargaining initiatives, including a strike authorized by the NHLPA.<sup>57</sup> Finally, the code asks members to refrain from undertaking or supporting actions that undermine established bargaining procedures, standards, and objectives.<sup>58</sup>

However, when it comes to individual player compensation and bonuses (i.e., employment contracts between players and Member Clubs), to the extent it does not conflict with the CBA, individual players can negotiate at arm's length with Member Clubs without restriction. In fact, Article 4 of the CBA, entitled "Union Security and Check-Off," specifically mentions that NHL players do not have to join the NHLPA while playing in the league.<sup>59</sup> Nevertheless, the CBA spells out clearly in Article 2 that whatever occurs between the NHL and NHLPA in collective bargaining, and whatever ends up in the CBA, will apply to all NHL players, regardless of whether or not they are official members of the NHLPA.

## 2 Rights of Parties

### i. Management and NHL Rights

CBA Article 5, entitled "Management Rights," enumerates the rights of each individual Member Club of the NHL, as well as certain rights of the NHL itself. The CBA states: "Each Club, and, where appropriate, the League, in the exercise of its functions of management, *shall* in addition to its other inherent and legal rights to manage its business, including the direction and control of its team, *have the right at any time and from time to time to determine when, where, how and under what circumstances it wishes to operate, suspend, discontinue, sell or move and to determine the manner and the rules by which its team shall play hockey.* Nothing in this Article shall, however, authorize a Club or the League to violate any provision of this Agreement or of any SPC."<sup>60</sup> The effect of this provision is somewhat stifling to League and Club Management in that it is constrained by the provisions of the CBA. The language of Article 5 merely allows independent management action by a Club or the NHL with regard to "*its team*," meaning an individual Club's rules regarding how it chooses to

manage its team and players (e.g., expectations for dress code, rules for road trips, how to manage equipment, etc.). In practical effect, this Article does not affect the status of certain League-wide game rules, because certain parts of the game, like fighting, are collectively bargained for and contemplated under the CBA, specifically with the creation of the Competition Committee in Article 22. As Article 5 does not contemplate either the Clubs or the League altering subjects of NHL-NHLPA collective bargaining, the League and its Member Clubs are restrained from touching fighting in such a sweeping unilateral manner.

### ii. Player and NHLPA Rights

Article 7 of the CBA is entitled "No Strike, No Discrimination, and Other Undertakings," and is a very important piece of the relationship between the NHL and its players. Section 7.1(a) states that "Neither the NHLPA nor any Player shall authorize, encourage, or engage in any strike, work stoppage, slowdown or other concerted interference with the activities of any Club or of the League during the term of this Agreement. Nor shall any Player decline to play or practice or in concert with any other person otherwise interfere with the activities of any Club or the League, or individually or in concert encourage any other Player to do so because of picketing or a labor dispute involving any other labor organization. The NHLPA shall not support or condone any action of any Player which is not in accordance with this Section 7.1 and the NHLPA shall exert reasonable efforts to induce compliance therewith."<sup>61</sup> In addition, Section 7.1(b) flips the other side of the coin and holds that "*Neither the League nor any Club shall engage in a lockout during the term of this Agreement.*"<sup>62</sup>

The combined effect of these two provisions shines daylight on the public policy in favor of collective bargaining. The policy holds that collective bargaining between parties covered by the NLRA is the desired directive, and that terms collectively bargained for will always control. NLRA §7 specifically contemplates such an outcome.<sup>63</sup> If there is no CBA in place, employees can engage in all of the activities listed in §7. However, once the CBA takes effect, the CBA determines the rules of that workplace as to both parties.

In this CBA, the NHLPA has agreed through collective bargaining with the NHL to refrain from any concerted activity while the CBA is in place, and the NHL has similarly agreed to not lock the players out during that time. While the NHL has locked the players out three times in its lengthy labor history (1994-95, 2004-05, and 2012-2013),<sup>64</sup> it is critical to note that none of these instances took place while the CBA was *in effect*; the CBA terms had expired each time, and that allowed the NHL to engage in the activities afforded it under the NLRA. Therefore, it would be a moot point for either the NHL or its players to attempt to engage in concerted activity over

fighting, which cannot be altered without the approval of the CBA-created Competition Committee, or without a CBA in place.

## **B. NHL Constitution—Powers of the NHL Commissioner**

The NHL Constitution, the governing body of the NHL and its Member Clubs, has many controlling provisions that have been included in the current CBA pursuant to Article 30, entitled “NHL Constitution and By-Laws, League and Club Rules.” Section 30.1, entitled “League Rules,” states, “...the NHL, each Player, and for purposes of this Agreement, each Club shall be bound by the provisions of the League Rules (Constitution) that affect any terms or conditions of any Player.”<sup>65</sup> One of the most important pieces of the Constitution is the granting of powers to the NHL Commissioner (currently Gary Bettman). According to Constitution Article VI, entitled “Commissioner,” the Commissioner “shall serve as the Chief Executive Officer of the League and shall be charged with *protecting the integrity of the game of professional hockey and preserving public confidence in the League.*”<sup>66</sup> Specifically, the Commissioner has three key functions relative to the issue of fighting: dispute resolution, interpretation of league rules, and use of disciplinary powers. These functions, however, are not unchecked, as certain provisions of the CBA control their applicability.

### **1. Dispute Resolution**

#### **i. Rules**

Section 6.3(b) of the NHL Constitution states that the Commissioner has the power to arbitrate disputes between and among Member Clubs, league officials, players, or any combination thereof, including those disputes implicating the “bests interests of the League or professional hockey or involves or affects League policy.”<sup>67</sup> The section enumerates that such arbitration and any decision by the Commissioner is binding as if the parties entered into a formal arbitration agreement. Finally, the section states that the Commissioner’s decision in such cases is final and not subject to review.<sup>68</sup>

#### **ii. Applicability to CBA**

Despite the potential for broad arbitration power, the CBA has limited the specific issues that the Commissioner may oversee and decide. For example, Article 17 of the CBA allows a Grievance Committee and an Impartial Arbitrator to decide any “grievance” arising under the CBA. Section 17.1 defines a “grievance” as “any dispute involving the interpretation or application of, or compliance with, any provision of this Agreement....”<sup>69</sup> Not only does this substantial limit to the Commissioner’s powers show how important dispute resolution is to the NHL-NHLPA workplace, it also highlights how the parties (especially the NHLPA) did not want unilateral Commissioner review to sit atop the dispute resolution hierarchy. This was

also apparent in the context of player compensation and team payroll issues, as the CBA also imposes a System Arbitrator to arbitrate grievances in those areas as well.<sup>70</sup> In fact, the only place that the Commissioner has unchecked power to arbitrate is in the area of Supplemental Discipline for On-Ice Conduct, located in Article 18. However, it will later be apparent that even that power is hampered when it comes to the issue of fighting.

## **2. Disciplinary Powers**

### **i. Rules**

The Commissioner’s second power under the NHL Constitution is the ability to discipline players who violate the league rules. Section 6.3(j) of the Constitution states that whenever the Commissioner determines that “any person connected with the League or a Member Club has violated the Constitution, the By-Laws, or any other governing rule or regulation of the League, or has been or is guilty of conduct detrimental to the League or the game of hockey,” then the Commissioner can impose multiple types of discipline on the offender.<sup>71</sup> For example, when a player falls to the ice during a fight, typically the fight is seen to be finished and the referees will intervene. However, were the opposing fighter to continually punch the player on the ice in a manner the Commissioner deems to be “detrimental to the League or game of hockey,” he or she would therefore have power to impose discipline on the fighter. This too is a power that is final and not subject to review.

### **ii. Applicability to CBA**

The CBA gives the Commissioner unilateral power to impose such discipline in Article 18. However, this Article deals with individual player misconduct, such that the Commissioner can only impose discipline on a case-by-case basis to a *player*; he or she does not have the power to change league rules.<sup>72</sup> Though a more detailed discussion on Article 18 will be necessary in order to truly expose the difference between Commissioner disciplinary actions versus unilateral rule change, it is important to know now that the Commissioner cannot alter the fighting rules or its existence through either CBA Article 18 or through Constitution Article 6.3(j).

## **3. Interpretation of League Rules**

### **i. Rules**

Finally, one of the most important powers of the Commissioner, as it relates to fighting, is codified in Section 6.3(d). In this section, the NHL Constitution bestows upon the Commissioner the power to “interpret, and from time to time establish policies and procedures regarding, the provisions of the Constitution, By-Laws, and League rules and resolutions, and their application and enforcement.”<sup>73</sup> Any determination by the Commissioner under this power is final and not subject to review.



## ii. Applicability to CBA

This section establishes the unilateral power of the Commissioner to make rules he or she sees to be in the “best interests of the game of hockey.” There is an addendum to this power, however, found in CBA Article 30. Section 30.3, entitled “Amendments,” which states that “*The NHL and its Clubs shall not, during the term of this Agreement or any extension thereof, amend or modify the provisions (or portions thereof) of the League Rules or any of the League’s Playing Rules in existence on the date of this Agreement that affect any terms or conditions of employment of any Player, without the prior written consent of the NHLPA which shall not be unreasonably withheld.*” Under that provision, the Commissioner (as the NHL’s head official) cannot alter any league rules that have to do with the terms or conditions of employment of players. Though a discussion of whether fighting is considered a “term of condition of employment” would be necessary, the Commissioner could not touch it if the CBA was in place. However, the CBA says nothing regarding whether the CBA has expired and an impasse is reached. Such a situation could have dire practical consequences to the status of fighting, and the employment of fighters, in the NHL, were the Commissioner to choose to implement his or her power at such a time.

## V. CBA Articles 18, 22, and the Problem of Unilateral Commissioner Power

The two single most important provisions of the CBA relative to fighting are Articles 18 and 22. They have direct bearing on the place of fighting in the NHL as it stands today, so a detailed analysis of each provision is critical to determining fighting’s future role in the NHL.

### A. Article 18—Supplementary Discipline for On-Ice Conduct

Article 18 of the CBA, entitled “Supplementary Discipline for On-Ice Conduct,” describes the NHL Commissioner’s power to impose additional<sup>74</sup> punishment to those NHL players who violate the league’s Playing Rules. Section 18.2 states the purpose of giving the Commissioner the power to impose such additional punishment: “It is the parties’ intention to impose Supplementary Discipline for On-Ice Conduct in a swift, effective and consistent manner with respect to conduct proscribed by League Playing Rules, *including the use of excessive and unnecessary force and reckless acts resulting in injury. In doing so, however, the parties do not intend to alter the basic fabric of our game.*”<sup>75</sup> This provision allows the league, and as a necessary subset the Commissioner, to unilaterally deter players from acting in reckless or unnecessary ways on the ice. Whether “reckless or unnecessary” includes the sole act of fighting is, however, *not* for the Commissioner or the disciplinarians to decide under this Section. It is plain in the language of the CBA that the purpose of Article 18 is to discipline *individual players* for engaging in

actions and events that the league wants to eradicate from the game. Examples would include reckless body checks into the boards while players are not looking, shoulder or elbow hits to the head in open ice, or continually punching a player after a recognized fight has ended. Nevertheless, because the NHL Rulebook specifically allows the act of fighting in Rule 46, it is unlikely that the drafters of the CBA intended that fighting be included in “reckless or unnecessary.” Still, that is an issue for the player/club Competition Committee, not the unilateral hand of the league or Commissioner.

In addition, this provision seeks to not alter the “basic fabric” of the game. It is evident at this point that the “basic fabric” necessarily includes fighting. Even Commissioner Gary Bettman said in a 2013 interview that he felt that fighting is “part of the fabric of the game and it constantly evolves....”<sup>76</sup> Structurally speaking, the “basic fabric” sentence follows the sentence defining what types of conduct the NHL is seeking to eradicate. In fact, the “basic fabric” specifically refers to those actions that are typically excessive or reckless, but are still part of the game, i.e., fighting. So, how does one figure out this startling discrepancy in the CBA? With Article 22’s fulfilling closure.

### B. Article 22—Competition Committee

CBA Article 22, entitled “Competition Committee,” helps solve the discrepancy found in Article 18 (i.e., seeking to eradicate “reckless or unnecessary” acts vs. not disrupting the “fabric of the game”). Under Article 22, “The NHL and NHLPA will establish a Player/Club Competition Committee (the Competition Committee) for the purpose of *examining and making recommendations associated with issues affecting the game and the way the game is played.* The issues to be considered by the Competition Committee will include: (1) *the development, change, and enforcement of Playing Rules...*”<sup>77</sup> In addition, Section 22.4 explicitly mentions that the Competition Committee is the governing body for all rules of the game: “*It will be the role and purpose of the Competition Committee to evaluate and make recommendations on matters relating to the game and the way the game is played, including with respect to all matters detailed in Section 22.1 above, and any other matter that may be brought to the Competition Committee’s attention with the consent of the NHL and the NHLPA.*”<sup>78</sup>

The effect of these provisions is that, while the CBA is in force (through 2022), all changes in the way the game is played *must* go through the 12-member Competition Committee (five active NHL players, five current Club officials, one NHL representative, and one NHLPA representative).<sup>79</sup> Therefore, during the term of the CBA, fighting can only be removed from the game of hockey at the professional level if the Competition Committee agrees to do so. The purpose of Article 22 is to address broad and overall game rules, such as what infractions during

the game shall be allowed, prohibited, and what kinds of penalties for each shall be enforced. Note, however, that this is *not* the purpose of Article 18, which only allows unilateral league or Commissioner action on a case-by-case basis to discipline *individual players* for the actions committed *which go over the standards and rules set by the Committee*. Article 18 does *not* allow sweeping rule reform to fall into the hands of the league or Commissioner. Additionally, it is common knowledge in the NHL that most active players do not want to eliminate fighting; in fact, a 2013 poll shows that 98% of current NHL players want to keep it in the game for as long as possible.<sup>80</sup> Therefore, while the CBA is in effect until 2020 or 2022, fighting will probably not go away anytime soon, because the Competition Committee members representing the NHLPA and players will make sure that it stays in the game. This will therefore secure those fighters and tough guys with their jobs for the next eight to 10 years, i.e., during the term of the current CBA.

### C. The NHL Commissioner's Unilateral "Protection" Power

Despite these two provisions of the CBA, there are two very real, very serious counters that can directly affect the status of fighting in the NHL. First, that the natural progression of the NHL game will phase out fighting on its own, resulting in the Competition Committee voting to eliminate fighting either during the term of the current CBA (though a rare possibility) or during a subsequent CBA term. In all reality, fighters in the NHL might lose their jobs if such a decision occurred, because of the fact that both parties would have bargained collectively to allow the Competition Committee to have the power to reach the conclusion that fighting needed to be eradicated. With such a drastic decision, it would be unlikely that enforcers or fighters could regain their employment once their active contract terms expired simply because they would no longer be needed in the workforce. However, considering how fighting is still very much a part of the "fabric" of the current NHL game, this option is probably a ways away from being a prevalent threat.

Second, however, is the possibility that the NHL Commissioner might invoke his or her powers under the NHL Constitution of interpretation of league rules to unilaterally remove fighting from the game "in the best interests of the game of hockey." This is likely the most credible threat to the employment of NHL fighters. However, the Commissioner will have to meet certain criteria in order to impose such a change, such as passing through another round of collective bargaining, and reaching impasse. However, were he or she able at that point to achieve the ability to use his or her unilateral power, the players would have a proper response in using concerted activity to fight for their right to keep fighting in the game, and therefore keep their jobs under their respective NHL Member Clubs. So, to fully understand the protection that

fighting would get in such an instance, a full discussion and detailed analysis of the stages of labor events that would lead up to such a conclusion must be addressed.

## VI. Overcoming the Commissioner's Unilateral Power

### A. History of Commissioner Use of Unilateral Power

A professional sports league's figurehead and CEO, the Commissioner, has historically been granted unilateral power to make decisions that are "in the best interests of the game" pursuant to a league Constitution or a provision in a Standard Player's Contract.<sup>81</sup> Courts have held that as long as the Commissioner does not act arbitrarily or capriciously, his or her decisions will be final and rarely subject to revocation by the judicial system.<sup>82</sup> However, a Commissioner must be careful not to violate any federal laws, considering that professional sports has been determined to be subject to the Interstate Commerce Clause of the U.S. Constitution.<sup>83</sup> Under that power, certain laws such as the Sherman Antitrust Act or the National Labor Relations Act, will override the actions of professional sports and can thereby overrule certain violative actions of the Commissioner.<sup>84</sup>

### B. The NLRA and Federal Case Law on Unilateral Commissioner Change

The NLRA clarifies the obligations and duties of parties that engage in collective bargaining. Section 8 of the NLRA defines what an "unfair labor practice" is in the context of collective bargaining. Specifically, it mentions that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."<sup>85</sup> Those §7 rights are many, including the rights of an employee to self-organize, strike and bargain collectively.<sup>86</sup> In addition, §8 states that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...."<sup>87</sup> Under the direction of that section, an employer must bargain collectively with a union or other representative over "terms and conditions of employment" because it is a covered subject of collective bargaining.<sup>88</sup> However, there is the possibility that the parties, though bargaining in good faith, might not be able to agree on certain subjects. In that case, an "impasse" is reached, which basically means that the parties are deadlocked.<sup>89</sup> As it relates to the parties, a union does not have to wait for impasse before it decides to engage in the concerted activities in NLRA §7, such as striking.<sup>90</sup> However, the employer *must* wait for an impasse in the event it, or its agents, wishes to engage in unilateral workplace change.<sup>91</sup>

When it comes to professional sports, Federal case law is very clear as to what a Commissioner can and cannot do with regard to those subjects of employment governed by a CBA. In *Norelli v. HTH Corp.*, the United States District Court for the District of Hawaii held that an

employer commits an unfair labor practice if it makes unilateral changes in mandatory subjects of bargaining without first bargaining over the relevant term. "Mandatory subjects of bargaining" include wages, hours, and other terms and conditions of employment.<sup>92</sup> It is important to clarify that this unilateral change policy applies to situations where a CBA has already expired and a new agreement must be reached, since if a CBA is in place, unilateral change is prohibited as a matter of law. The obligation to collectively bargain, then, continues after the expiration of a CBA.<sup>93</sup> Therefore, if a Commissioner were to make unilateral changes after the expiration of the CBA, but before collectively bargaining and reaching impasse over what is to be changed, he or she would violate the NLRA.

In the specific context of the NHL and professional hockey, the United States District Court for the District of Minnesota held that under the "unilateral change doctrine," if the existing CBA has expired and negotiations for a new contract have yet to be completed, an employer must bargain to an impasse before it may unilaterally change an existing term or condition of employment.<sup>94</sup> Without the presence of an impasse, however, it would be a violation of the statutory duty to bargain in good faith were a Commissioner to make unilateral changes to mandatory subjects of collective bargaining like "terms and conditions of employment."<sup>95</sup>

Therefore, in the event the NHL Commissioner were to attempt to change or eradicate a provision of the CBA, or anything relative thereto, the CBA would be violated in two ways. First, where the Commissioner were to change a rule or provision governed by the CBA *during* the term of the CBA, it would be a violation of the terms collectively bargained for in the CBA in that it would be deemed a refusal to collectively bargain on that subject.<sup>96</sup> Second, where the Commissioner changes a CBA rule or provision *after* the expiration of the old CBA *but before* a new CBA is collectively agreed to and/or before an impasse is reached, it would violate the rules of collective bargaining under the NLRA and would therefore be subject to an action by the NLRB on the NHLPA's behalf.

### C. Fighting Is a "Term and/or Condition of Employment" Under the CBA

As discussed previously, certain NHL players are employed by Member Clubs for the sole purpose of being enforcers or fighters. These players sign Standard Player Contracts like any other NHL players. Due to the fact that both the player and the Member Club come to a mutual understanding that the player is being employed for his services of enforcement and fighting (though it may not say so in the language of the contracts), and because the player expects to be compensated for such services to the team, it can be reasonably understood that one of the terms and conditions of employment for enforcers and fighters is to be expected to do just that: enforce and fight.

In addition, it has already been established that fighting, as of now, is a part of the fabric of the game of professional hockey. It is an aspect of the game that most players will come face-to-fist with at some point in their careers, some more than others, and it can reasonably be concluded that players assume the risk of having fighting in the game when they sign their Standard Playing Contracts. Therefore, all considerations taken into account, it can be implied that fighting is a term and condition of employment of being a player-employee in the NHL.

Since terms and conditions of employment are one of the covered subjects of collective bargaining under a labor dispute in the NLRA<sup>97</sup> and pertinent case law,<sup>98</sup> a Commissioner cannot unilaterally implement or remove rules or regulations relative to such terms and conditions without collectively bargaining for them or without reaching an impasse. Therefore, as it relates to fighting, the NHL Commissioner cannot unilaterally remove fighting from the game without causing several labor law violations. First, if the Commissioner were to implement a rule removing fighting during the term of the CBA, it would necessarily encroach on the powers and functions of the Competition Committee. That Committee, under §22 of the CBA, has the sole power to "examine and make recommendations associated with issues affecting the game and the way it is played," including the "development, change, and enforcement of playing rules," such as fighting.<sup>99</sup> Second, if the Commissioner was to implement a rule removing fighting during the term of the CBA, it would overstep his or her allotted unilateral power in the CBA. Article 18 gives the Commissioner the unilateral power to impose supplementary discipline only to *individual players for individual actions* that the league deems to be unnecessary or reckless relative to an isolated event on the ice. That is *not* the same as allowing the Commissioner to eradicate fighting altogether. Finally, were the Commissioner to remove fighting unilaterally after the expiration of the current CBA term but before the imposition of a new CBA and/or the mutual reach of an impasse, it would constitute an unfair labor practice, in that he or she would not be collectively bargaining with the NHLPA for a term and condition of employment under the CBA.

As a practical matter, if the Commissioner were to unilaterally remove fighting in the third manner (removal of fighting after CBA but before new CBA/impasse), the aggrieved party in such a case would be the NHLPA, on behalf of the player who signed a contract with his Member Club to be an enforcer and fight. Removing fighting from the game would not only deprive the employee from practicing his profession, but would also effectively act as a termination of employment. Were fighting to be eradicated, the need for the enforcer and fighter would dwindle. As a result, Member Clubs would either send these players to the minor leagues until the expiration of their contracts, at which point the teams would not re-sign the



players, or the teams would buy out the contracts of these players, simply by paying and sending them away. Either way, a fighter or enforcer could prevent such a course of events by having the NHLPA file a grievance on his behalf, citing either NLRA §8(a)(1)<sup>100</sup> or §8(a)(5),<sup>101</sup> which would likely result in the prevention of the removal of fighting from the NHL game by the Commissioner. Therefore, fighting would be kept in the game until a new CBA could be reached, and the player would be able to retain value in the eyes of the Member Club that employs him.

## VII. Conclusion

Though there is conflicting evidence as to whether injuries that occur during NHL fights are actually caused by the punches themselves, it does not change the fact that fighting does increase the risk of harm to the participants. However, there are current NHL players, like George Parros and Daniel Briere, as well as members of Member Club management teams, who want to let the game “govern itself” through the natural selection of fighting. Yet the NHL, its Member Clubs, and the NHLPA have critics of fighting who want to see it eradicated from the game altogether. The debate will continue to ebb and flow over the next decade. However, once the current term of the CBA expires in either 2020 or 2022, fighting’s critics will continue to strategize.

Once the term of the CBA expires, typical collective bargaining over salaries, revenue sharing, and the like will take place, but the new CBA negotiations will also probably take on a more symbolic movement in the game of hockey. It may result in a discussion of what the precise roles of both the NHL Commissioner and the Competition Committee are, relative to their abilities to change the NHL Rulebook, and ultimately, the image of the game of hockey altogether. While there is no telling what the Competition Committee will decide in the future when it comes to fighting’s place in hockey, one thing is for certain: when the current CBA expires in 2022 (or is terminated in 2019), the Commissioner, on behalf of the Member Clubs of the NHL, will not be able to alter the status of fighting in the game without an impasse in collective bargaining as to the subject of the terms and conditions of employment of NHL players. Were that impasse to arise, a situation not that far-fetched considering the recent debate between both parties, unilateral change by the Commissioner could happen. However, a strike by NHL players has previously occurred (in 1992), and it would almost inevitably repeat in the event the league decides to unilaterally remove fighting from professional hockey. This is a course of action that the NHL would not want to happen, considering that the stain of three previous lock-outs and labor battles in recent history has already tainted its reputation in the modern professional sports community. Therefore, it would be a wise decision for the NHL and its Member Clubs to keep fighting in the professional game for as long as they possibly can.

## Endnotes

1. Special thanks to Jeff Monahan for the inspiration for this article, as well as special thanks and appreciation to Professor Robert Rabin for his insight and feedback.
2. *Art Ross Trophy Winners*, Official Site of the Hockey Hall of Fame, <http://www.legendsofhockey.net/LegendsOfHockey/jsp/SilverwareTrophyWinners.jsp?tro=ART>.
3. *Roster*, Tampa Bay Lightning Website, <http://lightning.nhl.com/club/roster.htm>.
4. *Id.*
5. 29 games played, as of December 8, 2013. *Schedule*, Tampa Bay Lightning Website, <http://lightning.nhl.com/club/schedule.htm>.
6. *Team*, Tampa Bay Lightning Website, <http://lightning.nhl.com/club/player.htm?id=8475462>.
7. *NHL Fighting Majors Leaders, 2013-2014 Regular Season*, HockeyFights.com, <http://www.hockeyfights.com/leaders/players/1/reg2014/2/t>.
8. *Team*, Tampa Bay Lightning Website, <http://lightning.nhl.com/club/player.htm?id=8466378>.
9. NHL teams are comprised of a league-mandated roster maximum of 23 players. Typically, there are four lines of three forwards each: a center and two wingers, left and right wing, making 12 forwards. There are also three lines of two defensemen each, making six defensemen. There are two goaltenders, a starter and backup each game. Other forwards or defensemen typically fill the other three spots on the roster, but they will not play (or “dress”) for a specific game or sit on the bench (these players are known as “healthy scratches”). The 23-player maximum does not count players listed on Injured Reserve; these players can be listed on the active roster, but can be replaced on the 23-player list by a healthy player. Once the injured player becomes active again, the team must cut the roster back down to 23. *Hockey Operations Guidelines*, NHL Website, <http://www.nhl.com/ice/page.htm?id=26377>.
10. The old adage that “defense wins championships” is not necessarily wrong, but the fact remains that scoring goals in today’s NHL, a quick and more scoring-friendly league, will keep teams in the hunt for a Stanley Cup. This is why lucrative contracts are synonymous with offensive stars and defensemen with scoring know-how.
11. Goaltenders are skill players, but not in the sense that they derive their value from the pool of “skaters,” i.e., forwards and defensemen. Goaltenders are a separate animal; they have a separate set of skills that puts them in a category of their own. NHL general managers and owners look at the goaltending pool of players and compare goaltenders with other goaltenders; forwards and defensemen rarely enter the comparison. Therefore, for the purpose of this article, goaltenders will not make an appearance as part of the skill player category.
12. *Martin St. Louis, Contract History*, CapGeek.com, <http://capgeek.com/player/883>.
13. *Radko Gudas, Contract History*, CapGeek.com, <http://capgeek.com/player/1865>.
14. *Enforcer (Ice Hockey)*, Wikipedia, [http://en.wikipedia.org/wiki/Enforcer\\_\(ice\\_hockey\)](http://en.wikipedia.org/wiki/Enforcer_(ice_hockey)).
15. Ross Bernstein, *The Code: The Unwritten Rules of Fighting and Retaliation in the NHL 3* (Triumph Books, 2006).
16. *Id.*
17. Modern ice hockey rinks are split into three zones by two blue lines: the offensive zone, the defensive zone, and the neutral zone. The offensive and defensive zones change each period, and they are determined relative to the direction of the goal against which each team is attempting to score. Team 1 will always be trying to score a goal in its “offensive zone” and will always trying to defend the opposing team’s offense in its “defensive zone,” and

vice versa with Team 2. The “offensive zone” is the area of the ice between one end of the rink and the first blue line in which a team attempts to score a goal against the opposition’s defense and goaltender. The “neutral zone” is the area of the ice between the first blue line and second blue line in which both teams have unrestricted access to the entire space. This zone never changes. The neutral zone can be the most important zone of the ice, considering that many puck possession battles are fought in this zone, and will translate in the possessing team taking the puck into its offensive zone to try and score a goal, while the other team will attempt to regain the puck in its own defensive zone. The “defensive zone” is the area of the ice between the second blue line and the other end of the rink in which a team’s goaltender is playing, and in which a team attempts to defend its net from the opposition’s offense. Therefore, the creation of the zone system by the implementation of the blue lines on the ice translated into a need to be more physical, to the point of fisticuffs, in the neutral zone.

18. Offside, codified in the NHL Rulebook in Rule 83, is designed to ensure that the team attacking the offensive zone enters the zone fairly. The rule states that a team carrying the puck into the offensive zone must ensure that the puck completely crosses the offensive zone blue line *before* both skates of any player on the carrying/attacking crosses that same blue line. A player can “straddle” the blue line, i.e., skate with one skate in front of, and one skate behind, the blue line, and allow the puck to cross the blue line before he moves his trailing skate over the blue line. However, if a player on the attacking team skates both feet over the blue line before the puck crosses the blue completely, an off-side penalty will be called, and the play will resume on a neutral zone “face-off” (a face-off occurs when gameplay is stopped and needs to be restarted; a linesman will drop the puck in a “face-off circle” in the proper zone, and the two teams will battle for puck possession thereafter).
19. Bernstein, *supra* note 15, at 4.
20. *Id.*
21. *Id.* at 5.
22. Dan Diamond, *Total Hockey* (Andrews McMeel Publishing, 1998).
23. Michael Morrison, *To Protect and Serve: Is Vigilante Justice Necessary in Hockey?*, <http://www.infoplease.com/spot/hockeyfighting1.html> (2007).
24. *Id.*
25. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* 170, [http://cdn.agilitycms.com/nhlpacom/PDF/NHL\\_NHLPa\\_2013\\_CBA.pdf](http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPa_2013_CBA.pdf).
26. *Rule 46.1 – Fighting*, NHL.com, <http://www.nhl.com/ice/page.htm?id=26336>.
27. There are four on-ice officials who preside over an NHL game. Two are “Referees,” and are distinguished by orange armbands worn on their jerseys. These officials have the power to call and administer all penalties (with the exceptions of offside and icing calls) pursuant to their discretion throughout a game. They also signify when a goal is scored. The other two officials are Linesmen, and they do not wear any armbands over their jerseys. These officials have the power to call offsides and icing penalties, but cannot administer penalties that will result in a player being forced off the ice surface for a period of time during the game. These officials also conduct face-offs throughout the game.
28. *Rule 46.1 – Fighting*, NHL.com, <http://www.nhl.com/ice/page.htm?id=26336>.
29. *Rule 20.1 – Major Penalty*, NHL.com, <http://www.nhl.com/ice/page.htm?id=26301>.
30. Seth Wickersham, *Fighting the Goon Fight: Why the NHL enforcer isn’t pulling his punches*, ESPN.com (Dec. 4, 2013, 2:32 PM), [http://espn.go.com/nhl/story/\\_/id/10074206/george-parros-fighting-goon-fight](http://espn.go.com/nhl/story/_/id/10074206/george-parros-fighting-goon-fight).
31. Pat Leonard, *George Parros’ concussion leads NHL GMs to express need for stricter fighting penalties*, New York Daily News (Oct. 5, 2013, 7:31 PM), <http://www.nydailynews.com/sports/hockey/fighting-rages-nhl-article-1.1477334>.
32. Jeff MacGregor, *Players fight because we let ‘em*, ESPN.com (Dec. 4, 2013, 3:30 PM), [http://espn.go.com/nhl/story/\\_/id/10073724/nhl-players-fight-let-fight](http://espn.go.com/nhl/story/_/id/10073724/nhl-players-fight-let-fight).
33. *Id.*
34. Katie Strang, *Paying the price*, ESPN.com (Dec. 3, 2013, 9:47 PM), [http://espn.go.com/nhl/story/\\_/id/10070612/nhl-skill-players-value-protection-character-fighters](http://espn.go.com/nhl/story/_/id/10070612/nhl-skill-players-value-protection-character-fighters).
35. *Team*, Montreal Canadiens Website, <http://canadiens.nhl.com/club/roster.htm>.
36. *Id.*
37. *Id.*
38. Patrick Thornton, *Sports Law* 194 (Jones and Bartlett Publishers, 2011).
39. *American League of Professional Baseball Clubs*, 180 N.L.R.B. 190 (1969) (enumerating that nowhere in Congress’s deliberations regarding NLRA protections is there any indication that rights covered under NLRA are not to be extended to employees in professional baseball or any other sport).
40. *National Football League Management Council*, 203 N.L.R.B. 165 (1973).
41. Thornton, *supra* note 38, at 194.
42. *American League*, 180 N.L.R.B. at 190.
43. *Id.*
44. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 1.
45. National Labor Relations Act, 29 U.S.C. §§151-69 (1947).
46. 29 U.S.C. §152(2) (1947).
47. 29 U.S.C. §152(1) (1947) (emphasis added).
48. 29 U.S.C. §152(3) (1947) (emphasis added).
49. *Nat’l Hockey League and its Constituent Member Clubs*, No. 2-CA-29510, 1999 WL 33454755 (N.L.R.B. Div. of Judges Jun. 8, 1999).
50. 29 U.S.C. §152(5) (1947).
51. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 11.
52. *Id.*
53. *Id.* at 1.
54. *Id.* at 10.
55. *Id.*
56. *Constitution of the National Hockey League Players’ Association* 13, <http://origin.agilitycms.com/nhlpacom/PDF/nhlpac-constitution.pdf>.
57. *Id.*
58. *Id.*
59. *Id.* at 12.
60. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 13 (emphasis added).
61. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 15.
62. *Id.* (emphasis added).
63. 29 U.S.C. §157.
64. Jamie Fitzpatrick, *NHL Lockouts and Strikes: A History*, About.com, <http://procehockey.about.com/od/history/a/Nhl-Lockouts-And-Strikes-A-History.htm>.

65. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 170.
66. *Constitution of the National Hockey League* 15, <http://www.bizofhockey.com/docs/NHLConstitution.pdf> (emphasis added).
67. *Constitution of the National Hockey League* at 15-16.
68. *Id.*
69. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 109.
70. *Id.* at 195.
71. *Constitution of the National Hockey League* at 17-18.
72. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 116.
73. *Constitution of the National Hockey League* at 16 (emphasis added).
74. The NHL Rulebook, although it allows fighting to occur in an NHL game, imposes standard in-game penalties for fighting in Rule 46, namely a five-minute major penalty. However, in the event that a particular on-ice event conducted by a player (which encompasses more events than those incident to fighting) meets the criteria listed in the factors of CBA §18.2 (type of conduct involved, type and severity of injury to opposing player, disciplinary history of offender, relative situations of the game (late in game, lopsided score, etc.), other factors), the league will conduct an investigation and hold a hearing to determine whether the particular conduct warrants the imposition of Supplemental Discipline. If such added discipline is assessed, the player may appeal to the Commissioner to review the decision (under CBA §18.12). The Commissioner's review and further decision may be appealed by the player, and a Neutral Discipline Arbitrator can be appointed to review the Commissioner's decision (under CBA §18.14).
75. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 116 (emphasis added).
76. CBC Sports, *The National: Bettman describes his love for hockey*, CBC.ca (Oct. 1, 2013, 12:48 AM), <http://www.cbc.ca/sports/hockey/nhl/the-national-bettman-describes-his-love-for-hockey-1.1874134>.
77. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 146 (emphasis added).
78. *Id.* (emphasis added).
79. *Id.*
80. Mark Spector, *Don't like NHL fights, don't hold your breath*, Sportsnet.ca (Oct. 3, 2013, 3:15 PM), <http://www.sportsnet.ca/hockey/nhl/dont-like-nhl-fights-dont-hold-your-breath/>.
81. *Milwaukee American Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill., East. Div. 1931). Standard Player Contracts (SPC or SPCs) are signed employment agreements between a professional athlete and a professional sports club/team that detail a player's salary and wages, work requirements, bonuses and pensions, and other minute details that outline a player's employment with a team. The SPC is different in each league, but within the respective league they are the same in that they comport to the standards defined in the league's CBA. Historically, SPCs had clauses included within them that stated that the player (by signing the contract) acknowledged that the Commissioner had unilateral power to make decisions in the "best interests of the game" and that a player would submit to those decisions under that power. However, these clauses and provisions have declined as of late because of the use of the CBA in defining exact Commissioner powers and limitations that apply to all league transactions.
82. *Finley v. Kuhn*, 569 F.2d 527 (7th Cir. 1978).
83. *Flood v. Kuhn*, 407 U.S. 258 (1972).
84. *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).
85. 29 U.S.C. §158(a)(1).
86. 29 U.S.C. §157.
87. 29 U.S.C. §158(a)(5).
88. 29 U.S.C. §152(9).
89. David G. Epstein, *Impasse in Collective Bargaining*, 44 Tex. L. Rev. 769 (1965-1966).
90. *Id.*
91. *Id.*
92. See *Norelli v. HTH Corp.*, 699 F. Supp. 2d 1176 (D. Haw. 2010); see also *Powell v. National Football League*, 930 F.2d 1293 (8th Cir. 1989).
93. *Powell*, 930 F.2d at 1300-01.
94. *Nat'l Hockey League v. Nat'l Hockey League Players' Ass'n*, 789 F.Supp. 288 (D. Minn. 1992).
95. *N.L.R.B. v. Katz*, 369 U.S. 736 (1962).
96. 29 U.S.C. §158(a)(5).
97. 29 U.S.C. §152(9).
98. *Norelli*, 699 F.Supp. 2d at 1200.
99. *Collective Bargaining Agreement Between the National Hockey League and National Hockey League Players Association* at 146.
100. 29 U.S.C. §158(a)(1).
101. 29 U.S.C. §158(a)(5).

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# Removing the One and Done Policy: An Analysis of the Non-Statutory Labor Exemption and the NBA Draft Eligibility Requirements

By David Fogel

## I. Introduction

With the first pick in the 2014 National Basketball Association (NBA, league) Draft, the Cleveland Cavaliers selected Andrew Wiggins, freshman from the University of Kansas.<sup>1</sup> With the second pick, the Milwaukee Bucks selected Jabari Parker, freshman from Duke University.<sup>2</sup> With the third pick, the Philadelphia 76ers selected Joel Embiid, freshman from the University of Kansas.<sup>3</sup> In fact, seven of the first 10 picks in the 2014 NBA Draft were freshmen who were drafted into the NBA with only one year of college basketball experience.<sup>4</sup> However, NBA Commissioner Adam Silver recently announced that raising the draft eligibility age limit from 19 to 20 years of age would be one of his first priorities as league commissioner. If Commissioner Silver's proposal is accepted, the 2014 draftees might historically be the last group of freshmen eligible for the NBA draft.<sup>5</sup>

Professional athletes often find themselves confronted with restriction barriers regarding their eligibility to enter their respective leagues. In the four major American sports leagues, the National Football League (NFL), Major League Baseball (MLB), National Hockey League (NHL) and NBA, Collective Bargaining Agreements (CBAs) between players and owners govern league conduct.<sup>6</sup> The CBAs outline the procedures through which the draft is conducted and player eligibility restrictions are imposed. Player eligibility restrictions vary among the four major leagues. However, in each, specific player eligibility restrictions have been imposed. In the NFL, players are not eligible for the draft until they are 21 years of age and three years removed from graduation from high school.<sup>7</sup> In MLB, players are eligible for the draft upon turning 18, following their graduation from high school. Players who are not drafted immediately following their graduation from high school are not eligible for the draft until they are 21 years of age and three years removed from graduating from high school.<sup>8</sup> In the NHL, players are eligible to be drafted at age 18, following their graduation from high school. However, NHL draftees retain the right to remain in college without losing their NHL eligibility.<sup>9</sup>

The NBA CBA<sup>10</sup> governs the NBA player eligibility restrictions. The NBA restrictions require that a player be at least 19 years of age and at least one year removed from high school graduation.<sup>11</sup> This policy, commonly referred to as the "One and Done Rule,"<sup>12</sup> has met with both heavy support and opposition.

## II. History of the NBA's One and Done Rule

In 1995, Kevin Garnett became the first player in over 20 years<sup>13</sup> to be selected in the NBA draft right out of high school. Since that time, 42 players have been selected in the NBA draft straight from high school.<sup>14</sup> Three of the 42 draftees were selected first overall<sup>15</sup> and three went on to win the NBA's Most Valuable Player Award.<sup>16</sup> During the 2005 collective bargaining, the NBA and the National Basketball Players Association (NBPA) reached an agreement prohibiting players from entering the draft immediately upon graduation from high school.<sup>17</sup> Article X (1) (b) of the NBA CBA provides that:

A player shall be eligible for the selection in the NBA Draft [if] the player (A) is or will be at least nineteen (19) years of age during the calendar year in which the Draft is held, and (B) with respect to a player who is not an international player, at least one (1) NBA Season has elapsed since the player's graduation from high school (or, if the player did not graduate from high school, since the graduation of the class with which the player would have graduated had he graduated from high school).

Since the 2005 collective bargaining restrictions were imposed, 50 college freshmen were selected in the NBA draft. Seven college freshmen draftees were selected first overall,<sup>18</sup> and two went on to win the NBA's Most Valuable Player Award.<sup>19</sup> Analysts have since debated the pros and cons of the NBA's age restriction policy. Some believe that the best interests of the players are not being protected because the eligibility restrictions deny them the ability to earn a living. Others believe that providing an additional year of college experience benefits both the player and the league.

The One and Done Rule was designed to both protect unprepared high school players from the difficult transition to professional basketball and to allow NBA teams a better opportunity to evaluate potential draftees on the college stage.<sup>20</sup> Former NBA Commissioner David Stern stated that the One and Done Rule was a business decision that had nothing to do with denying a player an opportunity to earn a living by playing in the league.<sup>21</sup> Former Commissioner Stern stated that "for our business purposes, the longer we can get to look at young men

playing against first-rate competition, that's a good thing, because draft picks are a very valuable thing."<sup>22</sup>

In theory, the One and Done Rule was a win-win for everyone. However, close to a decade after the inception of the policy, it remains unclear whether it has truly benefited all parties. According to Tom Ziller, writer for SB Nation, data from the past few years do not support the contention that an additional year of scouting dramatically improves NBA drafting performance.<sup>23</sup> In his assessment of how NBA general managers performed both prior to and following the institution of the One and Done eligibility restriction limit, Ziller found that teams were equally likely to select a "disappointment" as they were to select a "success."<sup>24</sup> During the four years prior to the enactment of the One and Done Rule, Ziller calculated nine "disappointments" and 21 "successes" among NBA top-10 draft picks. By comparison, during the four years following the enactment of the One and Done Rule, Ziller calculated seven "disappointments" and 22 "successes" among NBA top-10 draft picks. The similarities highlight the point that the NBA's current age restriction policy has not benefited general managers to the extent originally thought.

NBA Commissioner Silver has echoed former Commissioner Stern's desire to raise the draft eligibility age limit. Currently, players are required to wait one year from the date of their high school graduation before becoming eligible for the draft. For most players, this means that they will not become eligible for the NBA draft until after their freshman year of college. Commissioner Silver's proposal would require players to wait two years before declaring for the draft, essentially making them eligible to enter the draft after their sophomore seasons.<sup>25</sup> Commissioner Silver believes that the second year of collegiate basketball experience would significantly enhance the draft evaluation process. According to him, "it has been our belief that we have a better chance to grow the financial pie that gets divided 50-50 if we increase the age and create, in essence, a more competitive league. And it has been our sense for a long time that our draft would be more competitive if our teams had an opportunity to see these players play an additional year, whether it be college or professionally in the Development League<sup>26</sup> or overseas."<sup>27</sup> However, before any rule goes into effect, the NBA would have to negotiate with the NBPA. The current NBA age restriction is part of the NBA CBA and, as such, cannot be changed without consent from both parties.

During the 2011 collective bargaining negotiations, the NBA met with stiff resistance from the NBPA over its desire to increase the draft age eligibility requirements.<sup>28</sup> The NBPA argued that the additional year restriction would not only delay a player's ability to earn a living, but would also subject a player to the possibility of suffering a career ending injury prior to securing an NBA contract.<sup>29</sup> No formal agreement was reached and the status quo was memorialized into the 2011 NBA CBA.

Legal developments in this area may also affect Commissioner Silver's decision to amend the NBA's draft eligibility age limit. As of this current date, there have been no legal challenges to the NBA's One and Done Rule. However, in a 2004 Second Circuit case discussed below, the NFL successfully defended an antitrust challenge to its draft eligibility rule brought by Maurice Clarett. The Second Circuit's decision is likely to strengthen Commissioner Silver's resolve to pursue a similar draft eligibility age restriction provision in the upcoming CBA.<sup>30</sup>

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*"In theory, the One and Done Rule was a win-win for everyone. However, close to a decade after the inception of the policy, it remains unclear whether it has truly benefited all parties."*

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This article will analyze the legal ramifications of Commissioner Silver's proposed age restriction requirement and the likely outcome of any legal challenge to the provision.<sup>31</sup> It will examine: A) the history and application of antitrust law as applied to professional sports leagues; B) the relevant non-statutory labor exemption that courts might apply to player eligibility challenges; C) prior court rulings in similar player eligibility age restriction cases that have applied both antitrust scrutiny and the non-statutory labor exemption; and D) the legal analysis of Commissioner Silver's proposed draft eligibility restriction. Following this review, the article will propose a simple reform to Commissioner Silver's proposal that could benefit the NBA, the NBPA, and potential high school draftees.

### III. Legal Analysis of the NBA's Draft Eligibility

#### A. Application of Antitrust Law as Applied to Professional Sports Leagues

The Sherman Antitrust Act (the Sherman Act) governs employee-employer relationships concerning restraints of trade or commerce. In determining whether eligibility restrictions are legal, one must consider whether these restrictions violate the Sherman Act. Section 1 of the Sherman Act makes "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States"<sup>32</sup> illegal. Despite the fact that the literal language of §1 declares *every* combination in restraint of trade to be illegal, the Supreme Court has traditionally held that *not every* act that is a restraint on trade will violate the Sherman Act.<sup>33</sup> Rather, the Sherman Act "only prohibits those contracts or combinations in trade that amount to unreasonable restraints on trade or commerce."<sup>34</sup> The Supreme Court has long held that group boycotts, in which two or more competitors in a relevant market engage in concerted refusals to conduct business with a firm or employees, violate §1.<sup>35</sup> Although most concerted refusals to conduct business involve product boycotts, concerted refusals to conduct business may

also involve “group boycotts in labor markets, such as the market for professional athletic services.”<sup>36</sup>

In assessing whether the allegedly anticompetitive boycott violates the Sherman Act, a court will apply one of two sanctioned Supreme Court tests. The first test, the Per Se Rule, determines whether a restraint of trade is illegal on its face.<sup>37</sup> In order to prevail on a group boycott claim, a plaintiff must show that the defendant’s purpose was to exclude a person or group from the market or accomplish some other anti-competitive objective.<sup>38</sup> The second test, the Rule of Reason, applies if the allegedly anticompetitive boycott, while not illegal on its face, potentially yields a more “ambiguous effect.”<sup>39</sup> Under the Rule of Reason test, a court will conduct a full economic investigation to determine whether the defendant’s conduct violates the Sherman Act.<sup>40</sup> In *Silver v. New York Stock Exchange*, the Supreme Court held that the Rule of Reason test applies if the following conditions are present: (1) a legislative mandate for self-regulation exists; (2) if a legislative mandate for self-regulation does not exist, the collective action is intended to accomplish an end consistent with the policy to justify self-regulation, is reasonably related to that goal, and is no more extensive than necessary; and (3) the association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for review.<sup>41</sup> When applying the Rule of Reason, a court is “limited to analyzing an agreement’s effects on economic competition and should not consider alternative effects.”<sup>42</sup>

### 1. *Denver Rockets v. All-Pro Management*

An example of how the courts have applied antitrust analysis to entry restrictions in the NBA is illustrated in *Denver Rockets v. All-Pro Management*.<sup>43</sup> In *Denver Rockets*, the court invalidated two NBA player eligibility provisions that required players to be four years removed from graduating from high school.<sup>44</sup> Stated simply, the two provisions of the NBA by-laws provided that no person shall be eligible for the draft, under any circumstances, until four years after his high school graduation.<sup>45</sup> Spencer Haywood, an exceptional professional basketball player<sup>46</sup> from the American Basketball Association (ABA), brought the claim against the NBA. Haywood, who played two years of college basketball at Detroit University, was able to enter the ABA through a “hardship” exemption to the league’s four-year college requirement rule.<sup>47</sup> Following his first ABA season, Haywood left the ABA and signed a contract with the NBA’s Seattle Supersonics. Walter Kennedy, the Commissioner of the NBA, invalidated Haywood’s contract because Haywood was not yet eligible under the four-year college rule.

Haywood alleged that the NBA’s four-year college rule was a group boycott on the part of the league and its teams against himself and other qualified players who came within those terms.<sup>48</sup> The court ruled in favor of

Haywood and found the eligibility requirements to be per se illegal concerted refusals to deal.<sup>49</sup> The court noted that the provisions of the NBA by-laws violated the Sherman Act. The age eligibility restrictions affected trade and commerce in the several states and constituted an agreement on the part of league members to boycott persons who were not yet four years removed from high school graduation.<sup>50</sup> The court refused to apply the Rule of Reason analysis because the provisions of the NBA by-laws were “so overly broad, absolute, and arbitrary.”<sup>51</sup> As a result, the provisions were illegal on their face, because there was “no provision for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player.”<sup>52</sup>

It is interesting to note that the NBA player eligibility provisions were not collectively bargained, nor were they memorialized into a CBA. Had these provisions been so memorialized, the court in *Denver Rockets* might have ruled differently in accordance with applicable labor law.

### B. Non-Statutory Labor Exemption to Player Eligibility Challenges

Assuming a court finds that a specific boycott violates either the Per Se Rule or the Rule of Reason, a court will next look into the relevant goals of labor law. The National Labor Relations Act (NLRA) governs employer-employee relations and gives employees the right to form labor organizations to collectively bargain with their employers.<sup>53</sup> As players in professional sports leagues have formed unions to collectively bargain with their respective leagues, the NLRA governs the conduct between the two negotiating parties.<sup>54</sup> Disputes between player unions and leagues often involve conflicting legal issues of both antitrust and labor law. Due to this apparent struggle between the two bodies of law, the Supreme Court has found certain antitrust exemptions for claims arising under federal labor law.<sup>55</sup>

The first antitrust exemption for claims arising under federal labor law is the “statutory” labor exemption. The statutory labor exemption derives from federal labor legislation such as the NLRA, the Clayton Act, the Norris-La Guardia Act, and the Taft-Harley Act. The statutory labor exemption “allows workers to organize to eliminate competition among themselves regarding working conditions.”<sup>56</sup> The second antitrust exemption for claims arising under federal labor law is the “non-statutory labor exemption.” The non-statutory labor exemption is the most frequently applied antitrust exemption in professional sports leagues.<sup>57</sup> It expands on the statutory labor exemption and is designed to protect agreements reached through collective bargaining from antitrust scrutiny. The non-statutory labor exemption reflects a public policy rationale that employees “are better off negotiating together rather than individually, and therefore labor law (rather than antitrust law) should apply to situations where col-



lective bargaining occurs.”<sup>58</sup> It follows that certain provisions that violate the Sherman Act may be valid if they are collectively bargained.<sup>59</sup>

## 1. Analysis of Non-Statutory Labor Exemption Case Law

The Supreme Court has never precisely delineated the boundaries of the non-statutory labor exemption<sup>60</sup> and, as a result, it is important to analyze relevant case law that has shaped this exemption. The Supreme Court introduced the non-statutory labor exemption in two cases decided on the same day: *United Mine Workers of America v. Pennington* and *Local Union No. 189, Amalgamated Meat Cutters v. Jewel Tea Co.*

In *Pennington*, the Court announced that a union may enter into an agreement on behalf of a multi-employer bargaining unit without violating the Sherman Act.<sup>61</sup> Section 158 (d) of the NLRA provides that wages, hours and other terms and conditions of employment are considered mandatory subjects of bargaining that must, at the insistence of either party, be bargained for between the employer and the union.<sup>62</sup> The Court noted, “we think it beyond question that a union may conclude a wage agreement with the multi-employer bargaining unit without violating the antitrust laws.”<sup>63</sup> However, the Court refused to apply the non-statutory labor exemption to the agreement, which sought to prescribe labor standards on a separate bargaining entity not represented by the union.<sup>64</sup> Specifically, the union entered into a conspiracy with major union operators to impose an agreed-upon wage scale upon smaller, nonunion operators.<sup>65</sup> The Court held that the union forfeited its exemption from the antitrust laws because it agreed with one set of employers to impose a certain wage scale on another set of employers not represented by this bargaining unit.<sup>66</sup> It follows that a union and its employers in one bargaining unit are not free to bargain about the wages, hours and working conditions of other bargaining units or to attempt to settle these matters for the entire industry.<sup>67</sup>

In *Jewel Tea*, the Court applied the non-statutory labor exemption and held that the agreed-upon CBA was exempt from the Sherman Act. The Court held that the decision not to sell meat between 6 p.m. and 9 a.m., which was agreed to in the multi-employer CBA, was valid. The union sought this restriction to limit member workday hours and diminish job security threats through the nighttime use of unskilled labor.<sup>68</sup> The Court applied a balancing test weighing the respective “interests of union members” served by the restraint against “its relevant impact on the product market.”<sup>69</sup> The Court noted that although the effect on competition was apparent and real, perhaps more so than in *Pennington*, the concern of the union members was “immediate and direct”<sup>70</sup> and thus “not illegal under the Sherman Antitrust Act.”<sup>71</sup> It follows that an agreed-upon provision, “so intimately related to wages, hours and working conditions that the union

obtains through bona fide, arms’-length bargaining in pursuit of their own policies, and not at the behest of or in combination with non-labor groups, falls within the protection of the national labor policy and is therefore exempt from the Sherman Antitrust Act.”<sup>72</sup>

## C. Analyzing the Non-Statutory Labor Exemption as Applied to Player Eligibility Restriction Cases

A split exists among the Circuits regarding how broadly the non-statutory labor exemption law applies.<sup>73</sup> A look at how the Circuits have applied the non-statutory labor exemption to entry restrictions in professional sports leagues will help illustrate the current body of law.<sup>74</sup>

### 1. *Wood v. National Basketball Association*

In *Wood v. National Basketball Association*, the Second Circuit Court of Appeals held that the college draft provisions in the CBA could not be challenged on antitrust grounds because the provisions were part of a CBA that fell under the non-statutory labor exemption. Specifically, Leon Wood argued that the college draft was an agreement among horizontal competitors (i.e., NBA teams) to eliminate competition for the services of college basketball players. Wood claimed that the college draft constituted a per se violation of §1 of the Sherman Act.<sup>75</sup> The court rejected this view and noted that the draft provisions were not “the product of an agreement among horizontal competitors but are embodied in a collective bargaining agreement between employers and a labor organization reached through procedures mandated by federal labor legislation.”<sup>76</sup> The court denied Wood’s argument, stating that “no one seriously contends that the antitrust laws may be used to subvert fundamental principles of federal labor policy as set out in the National Labor Relations Act.”<sup>77</sup> The court ruled that whether the draft provisions were per se violations of the antitrust laws or subject to the rule of reason analysis was irrelevant because the provisions were memorialized in the NBA CBA.

Wood further argued that the draft provisions represented a disadvantage to both newly drafted employees and potential draftees who might fall outside the bargaining unit because of the current age eligibility restrictions. However, the court noted that new employees often find themselves disadvantaged in relation to those already hired. The court stated that “a collective agreement may thus provide that salaries, layoffs, and promotions be governed by seniority, even though some individuals with less seniority would fare better if allowed to negotiate individually.”<sup>78</sup> Further, the NLRA explicitly defines a potential employee in a way that includes such individuals in the bargaining unit. Section 152 of the NLRA defines the term *employee* to connote “the initial act of employing as well as the consequent state of being employed.”<sup>79</sup> It follows that a player who wishes to be declared eligible for the NBA draft is considered an employee whose interests are being represented by the NBPA. In seeking the best deal for NBA players, the NBPA representative has

the ability to advantage certain categories of players over others;<sup>80</sup> for example, it can favor veteran players over rookies<sup>81</sup> and can seek to preserve jobs for current players through the exclusion of outsiders.<sup>82</sup>

Issues of draft entry restrictions are at the center of collective bargaining in much of the professional sports industry.<sup>83</sup> Draft provisions reflect the interest of the employers in stabilizing costs and spreading talent among the various teams.<sup>84</sup> If a court were to intervene and hold the draft provisions illegal, the entire CBA could “unravel.”<sup>85</sup> A court cannot “hope to fashion contract terms more efficient than those arrived at by the parties who are to be governed by them.”<sup>86</sup>

## 2. *Mackey v. National Football League*

In *Mackey v. National Football League*, the Eighth Circuit Court of Appeals held that the NFL’s “Rozelle Rule” could not be shielded by the non-statutory labor exemption. The “Rozelle Rule,” named after former NFL Commissioner Pete Rozelle, limited players’ mobility in free agency by authorizing compensation to any team that lost a player to another team.<sup>87</sup> The district court initially found that the rule constituted a group boycott and was thus deemed per se illegal. However, the Eighth Circuit found that while the rule was not a per se violation, it did in fact constitute an antitrust violation under the Rule of Reason analysis.

In reaching its decision, the Eighth Circuit announced a three-part test (Mackey Test) to determine whether a collectively bargained provision would be shielded from antitrust law by the non-statutory labor exemption. The three factors are: (1) the restraint on trade primarily affects only parties to the collective bargaining relationship; (2) the agreement sought to be exempted concerns a mandatory subject of collective bargaining; and (3) the agreement sought to be exempted is the subject of bona fide arm’s-length bargaining.<sup>88</sup> If all three factors are present, the non-statutory labor exemption would apply. However, if any one of the three factors were not present, the provision could be subject to antitrust liability.<sup>89</sup>

The Eighth Circuit found that the first two factors were present, but that the third factor was absent. (1) The Rozelle Rule affected only the parties to the collective bargaining relationship because it affected “league owners as employers and the players as employees.”<sup>90</sup> (2) The Rozelle Rule constituted a mandatory subject of bargaining because it “operated to restrict a player’s ability to move from one team to another and depresses player salaries.”<sup>91</sup> As such, the Rozelle Rule affected employees’ “wages, hours or other terms and conditions of employment” and constituted a mandatory subject of bargaining under the NLRA.<sup>92</sup> (3) It was not the subject of bona fide arm’s-length bargaining, because the Rozelle Rule was unilaterally implemented by owners and subsequently memorialized into the current CBA.<sup>93</sup> As the provision did not contain all three factors, it did not qualify for the non-

statutory labor exemption and was therefore not exempt from the Sherman Act.

Subsequent to the *Mackey* decision, the owners and the players’ union negotiated a new, more limited compensation for free agents as part of their new CBA. Since this provision was memorialized under the new CBA, it fell under the non-statutory labor exemption to antitrust law.

## 3. *Clarett v. National Football League*

In *Clarett v. National Football League*, the Second Circuit Court of Appeals held that the NFL player eligibility restrictions could not be challenged on antitrust grounds as a result of the non-statutory labor exemption. Maurice Clarett, a sophomore football player at Ohio State University, was a year shy of the NFL’s three-year draft eligibility requirement. The Second Circuit held the rule requiring players to be three years out of high school before they may become eligible for the NFL draft to be valid. The rule applied despite the fact that the provision was not reached through bona-fide arm’s-length bargaining, since the provisions were not codified in the CBA. Relying on *Mackey*, the district court initially invalidated the eligibility rule because none of the three factors of the Mackey Test were present. Specifically, the district court found that (1) the rules excluded strangers to the bargaining relationship from entering the draft, (2) did not concern wages, hours or other terms and conditions of current NFL players and (3) were not the product of bona-fide arm’s-length bargaining because the applicable provision appeared in the NFL Constitution and By-laws rather than being codified in the CBA.<sup>94</sup> In its appeal, the Second Circuit announced that the Eighth Circuit Mackey Test was not appropriate in defining the contours of the non-statutory labor exemption.

In dismissing the Mackey Test, the Second Circuit recognized that *Mackey* is “not consistent with our decision in *Wood v. National Basketball Association*.”<sup>95</sup> It further distinguished *Mackey* in favor of *Wood*, stating that the Mackey Test, which relied heavily on *Pennington* and *Jewel Tea*, involved “cases in which an employer was injured by the anti-competitive effect of a challenged restraint.”<sup>96</sup> The court stated that *Mackey*, *Pennington*, and *Jewel Tea* are of “limited assistance in determining whether an employee can challenge restraints”<sup>97</sup> on eligibility restrictions that are collectively bargained.

Relying on *Wood*, the Second Circuit rejected all of Clarett’s claims. First, the court noted that the player eligibility rules were mandatory subjects of bargaining because the “eligibility rules for the draft represent a quite literal condition for initial employment and for that reason alone might constitute a mandatory bargaining subject.”<sup>98</sup> Further, the eligibility rules constituted a mandatory bargaining subject because they had “tangible effects on the wages and working conditions of current NFL players.”<sup>99</sup>

Second, the court noted that potential draftees are considered employees for purposes of collective bargaining, “despite the fact that it concerns prospective rather than current employees.”<sup>100</sup> As mentioned earlier, the NLRB construes a player who wishes to be declared eligible for the NFL draft an employee whose interests are being represented by the National Football League Players Association (NFLPA).<sup>101</sup>

Last, the court noted that it is entirely irrelevant that the eligibility rules were not bargained over during the negotiations that preceded the current CBA. The eligibility rules were well known to the NFLPA, and a copy of the NFL Constitution and By-laws were presented to the union during negotiations.<sup>102</sup> In the CBA, the NFLPA agreed to “waive any challenge to the [NFL] Constitution and [NFL] By-laws and thereby acquiesced in the continuing operation of the eligibility rules contained therein.”<sup>103</sup> It follows that so long as there is no “threat to the operation of federal labor law,”<sup>104</sup> it is patently immaterial whether or not the applicable provisions are collectively bargained.

#### **D. Legal Analysis of Commissioner Silver’s Proposed Draft Eligibility Restriction**

In determining whether an antitrust challenge will be successful, one must apply the relevant antitrust and labor laws to Commissioner Silver’s proposed draft eligibility restriction. Commissioner Silver’s age requirement rule will first be analyzed against antitrust scrutiny by following the Per Se Rule and the Rule of Reason. Following this analysis, a determination will be made as to whether the non-statutory labor exemption will shield the commissioner’s proposal from antitrust liability.

##### **1. Antitrust Analysis**

If Commissioner Silver’s proposal is implemented by the NBA, a player who is deemed ineligible will likely challenge the provision as a group boycott that violates the Sherman Act. The first issue a court will determine is whether to apply the Per Se Rule or the Rule of Reason in analyzing the potential antitrust violation.

To apply the Per Se Rule, the court must determine whether a restraint of trade is illegal on its face.<sup>105</sup> An ineligible draftee must successfully argue that the league’s purpose was to exclude a person or group from the market or accomplish some other anti-competitive objective. A court may rely on the holding in *Denver Rockets*, where the age eligibility restriction violated the Per Se Rule due to its failure to provide for “even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player.”<sup>106</sup> In this instance, it is likely that a court will find that Commissioner Silver’s draft eligibility restriction is a per se violation of the Sherman Act. The proposal does not provide any means “whereby an individual player might petition for consideration of his specific case.”<sup>107</sup> It follows, then, that Commissioner

Silver’s draft eligibility restriction will be a per se illegal group boycott.

Assuming, arguendo, that the court finds the group boycott to yield a “more ambiguous effect,”<sup>108</sup> it will then apply the Rule of Reason. Under the Rule of Reason analysis, a court will conduct a full economic investigation to determine whether the Commissioner’s provision violates the Sherman Act. Under the Supreme Court’s ruling in *Silver*, the NBA must convince a court that the eligibility provision is “justified by a legitimate business purpose and is no more restrictive than necessary.”<sup>109</sup> The NBA could potentially argue that this type of regulation is necessary to guarantee that each prospective player has an opportunity to attend college. However, such an argument was emphatically rejected in *Denver Rockets*. In *Denver Rockets*, the court concluded that “however commendable this desire may be, a court is not in a position to say that this consideration should override the objective of fostering economic competition which is embodied in the antitrust laws.”<sup>110</sup> Further, only “factors that affect economic competition may be considered in determining the legality of a restrictive practice under the antitrust laws.”<sup>111</sup>

Alternatively, the NBA may argue that the provision is strictly a business decision and that the league’s financial product would be damaged if the provision were not implemented. Commissioner Silver and former Commissioner Stern have echoed this sentiment in the past. However, the court in *Denver Rockets* rejected a similar claim, and held that the age eligibility restriction violated the Rule of Reason. In this instance, a court may be hard pressed to find that the NBA product would be damaged by allowing players with fewer than two years of college experience to play in the league given the “financial gains the NBA has experienced as a result of LeBron James (18-years old) and Carmelo Anthony (19-years old) entering the league.”<sup>112</sup> According to John Dempsey of *Daily Variety*, one of the major reasons the NBA received a \$106.5 million increase in its television contracts with ESPN and TNT is because of the “star power of LeBron James and Carmelo Anthony.”<sup>113</sup>

Commissioner Silver’s draft eligibility restriction would appear to violate both the Per Se Rule and the Rule of Reason. Ultimately, an evidentiary hearing may need to be conducted to determine whether a valid economic business justification exists to satisfy the Rule of Reason Analysis.

##### **2. Non-Statutory Labor Exemption Analysis**

Assuming, arguendo, that an ineligible draftee is able to successfully argue that Commissioner Silver’s proposal is an antitrust violation, a court will next consider whether the draft eligibility provision is shielded from the Sherman Act by the non-statutory labor exemption. In determining whether the non-statutory labor exemption exists, a court would apply either the Mackey Test



or the principles laid out in *Clarett*. The determination of which test applies depends entirely on where the claim is brought.<sup>114</sup> If an ineligible draftee brings this suit in the Eighth Circuit Court of Appeals, or any court that decides to follow the Eighth Circuit's reasoning, that court will apply the Mackey Test. If an ineligible draftee brings this suit in the Second Circuit Court of Appeals, or any court that decides to follow the Second Circuit's reasoning, that court will apply the legal principles laid out in *Clarett*. The Supreme Court has not clarified which of the two analyses is more appropriate and has failed to grant certiorari on this issue.<sup>115</sup>

#### a. Mackey Test

Under the Mackey Test, the draft eligibility provision must (1) affect only parties to the collective bargaining relationship; (2) concern a mandatory subject of collective bargaining; and (3) be the subject of bona fide arm's-length bargaining.<sup>116</sup>

The first factor of the Mackey Test addresses whether the eligibility provision primarily affects the parties involved. An ineligible draftee will argue that he is not yet a member of the collective bargaining relationship.<sup>117</sup> However, a prospective NBA player who is excluded from the NBA draft is "no different from the typical worker who is confident that he or she has the skills to fill a job vacancy but does not possess the qualifications or meet the requisite criteria that has been set by the employer."<sup>118</sup> Further, it is "incontrovertible that all future players in a professional sports league are considered parties to the collective bargaining relationship."<sup>119</sup> It follows, then, that Commissioner Silver's eligibility provision will pass the first prong of the Mackey Test.

The second factor of the Mackey Test addresses whether the eligibility provision is a mandatory subject of bargaining. Draft eligibility provisions are consistently held to be mandatory subjects of bargaining because they have a direct impact on the wages of excluded potential players and have a direct effect on a player's condition of employment.<sup>120</sup> Commissioner Silver's eligibility provision will therefore likely satisfy the second factor of the Mackey Test.

The third factor of the Mackey Test addresses whether the eligibility provision was reached through bona-fide arm's-length bargaining. Any provision that is "present in a collective bargaining relationship is presumed to be the product of good faith bargaining absent a showing that the rule was somehow incorporated after being unilaterally implemented."<sup>121</sup> Whether the provision will satisfy the final factor of the Mackey Test depends on whether the condition is bargained over in good faith or unilaterally implemented by Commissioner Silver. If the Commissioner was to unilaterally implement the draft eligibility restriction, the provision would fail to satisfy the third factor of the Mackey Test and the non-statutory

labor exemption would not apply. However, Commissioner Silver could decide to wait until 2017 when the current CBA can be amended, and collectively bargain over the eligibility provision. If he chooses the latter path, his proposal will satisfy the third factor of the Mackey Test and the non-statutory labor exemption will apply.

#### b. Clarett Analysis

Under on a *Clarett* analysis, a court would determine whether the draft eligibility restriction involves a mandatory subject of bargaining and whether the provision subverts fundamental principles of federal labor policy.<sup>122</sup>

As mentioned earlier, the NBA eligibility provision is clearly a subject of mandatory bargaining. The same rationales that applied above (i.e. direct effect on wages and condition of initial employment) will lead a court to determine that Commissioner Silver's eligibility provision is a mandatory subject of bargaining.

Next, a court must decide whether subjecting Commissioner Silver's proposal to antitrust liability would subvert fundamental principles of federal labor policy. A court would argue that a potential ineligible draftee suit simply reflects a "prospective employee's disagreement with the criteria, established by the employer and the labor union, that he must meet in order to be considered for employment."<sup>123</sup> Granting an ineligible draftee remedies under the Sherman Antitrust Act would subvert principles "that have been familiar to and accepted by, the nation's workers for all of the NLRA's sixty years in every industry."<sup>124</sup> It follows that if an agreed-upon proposal memorialized in a CBA is subjected to antitrust law, it will subvert fundamental principles of federal labor policy.

Although *Clarett* held that the eligibility provision does not have to be codified in a CBA, the Second Circuit noted that the non-statutory labor exemption "extends as far as is necessary to ensure the successful operation of the collective bargaining process."<sup>125</sup> It follows that a potential unilateral implementation of the draft eligibility provision would violate the collective bargaining process. The player eligibility provision constitutes a mandatory subject of bargaining. Therefore, if Commissioner Silver unilaterally implements a mandatory subject of bargaining without consulting with the union, it will be deemed an unfair labor practice and a violation of the Sherman Act.

### IV. Proposal for a New Player Eligibility Restriction

The NBA has long contended that increasing the minimum age requirement for players to enter the league would be beneficial to general managers because it would allow for an extra year of scouting at the college level.<sup>126</sup> However, as previously noted, the current extra year of scouting has not "succeeded in saving general managers from making mistakes in the draft."<sup>127</sup> This is problem-

atic, because “saving millions of dollars on draft picks” is one of the main reasons why Commissioner Silver is pursuing a 20-year old age requirement. Additionally, many of the “disappointments” at the top of the NBA draft have not been freshman or sophomores, but rather juniors and seniors whom general managers “might have overvalued because of familiarity.”<sup>128</sup> Hasheem Thabeet (junior), Adam Morrison (junior), Evan Turner (junior), and Rafael Araujo (senior) were all top-10 draft picks who never justified their selections. NBA executives had years of data on these players, yet their selections still cost their franchises millions of dollars in unsuccessful draft picks.

NBA executives have also argued that potential draftees need additional years in college to develop their skills in order to play against bigger, faster and better competition.<sup>129</sup> However, the same argument can be made to justify the fact that top level “NBA ready” talent be given the opportunity to compete against bigger, faster and better *NBA talent*, not dominate college competition for an additional year. LeBron James and Kevin Durant did not need an extra year “to beat up on college kids”<sup>130</sup> to make them NBA-ready. At some point, an individual’s talent stagnates unless he is being challenged. In essence, requiring top NBA-ready talent to remain in college actually performs a disservice in developing their skills.

This article proposes a simple reform to Commissioner Silver’s current proposal that could satisfactorily resolve the issues for all parties involved. One of the main reasons why Commissioner Silver’s proposal should be reformed is that the policy does not achieve the goals it set out to correct. This simple reform would allow the NBA to achieve its draft evaluation goals, while also benefiting the NBPA and younger NBA-ready talent.

The provision for a new player eligibility restriction would be as follows: (A) A player shall be eligible for the selection in the NBA Draft [if] the player is or will be at least 21 years of age during the calendar year in which the Draft is held and at least three (3) NBA Seasons has elapsed since the player’s graduation from high school; or (B) A player shall be eligible for the selection in the NBA Draft [if] the player is or will be at least eighteen (18) years of age during the calendar year in which the Draft is held and has graduated from high school. However, players drafted immediately upon their graduation from high school would be required to enter and play in the D-League for at least one (1) NBA Season, after which they would be eligible to play in the NBA.

An additional component of the proposed reform would be the establishment of an NBA Scholarship Plan. Any player who wishes to commence or resume his collegiate studies may do so at any time within two years after his last day of NBA service. The scholarship will continue unless the player fails to attend college for more than two consecutive years following his last date of service without proper reason or notification.

NBPA Executive Director Ron Klempner favors a player eligibility rule that allows high school graduates who are deemed NBA-ready to be drafted.<sup>131</sup> Klempner said there is a strong possibility that the NBPA would be willing to raise the player eligibility age limit as long as the agreement gives “younger players who are ready a chance to play in the NBA.”<sup>132</sup>

The NBA stands to benefit by having an additional two years of evaluation time for college prospects. The NBA can also benefit by having more in-depth evaluation for high school draftees who will now be required to play in the D-League under NBA rules and conditions. NBA Senior Vice President and General Counsel Daniel Rube noted that “some say more experience doesn’t make a difference, we think it will make a difference, and we think it will lead to better decision making.”<sup>133</sup> The NBA knows what is best for its bottom line, and will actively pursue the opportunity to allow general managers more time to evaluate top prospects. Additionally, the NBA can further monetize the D-League by having an influx of marketable talent that can help raise its profile. This will lead to an increase in ticket sales, which will presumably attract more sponsorship dollars.<sup>134</sup> Currently, only 17 of the 30 NBA teams own a D-League affiliate. Although the D-League has been in existence for 14 years, it continues to operate at a loss.<sup>135</sup> By getting every franchise to own a D-League team and enhancing the marketability of its players, the NBA can create a more profitable minor league system and better prepare players to play in the NBA.

The NBPA, in turn, stands to benefit because the proposed eligibility reform will diminish a veteran player’s risk of being replaced by freshman or sophomore draftees. By reducing the number of players entering the draft, current NBA players need not fear an influx of younger and cheaper talent competing for a very finite number of jobs. Additionally, because this issue is of central importance to Commissioner Silver and the NBA, the NBPA can negotiate significant concessions to the benefit of current and future union members. Examples of such concessions might include increased rookie salary scales and reduction in the required number of years players need to wait before declaring for initial free agency. The proposed reform will inhibit younger players from entering the league. However, the reform and the potential extracted concessions stand to benefit a much larger group of players in the long run.

High school graduates could benefit because they will no longer be forced to risk losing NCAA eligibility by declaring for the NBA draft directly from high school. Top-level NBA-ready high school graduates can be immediately drafted into the NBA’s D-League. This exemption for top-level talent will allow the LeBron Jameses and Kobe Bryants of the world to earn immediate income playing professional basketball. After proving themselves for a year in the D-League, drafted high school graduates would be eligible to play in the NBA.

High school graduates who have not been selected in the NBA draft may elect to pursue college careers. Under current NBA rules, high school players not selected to play in the NBA may also elect to play in the D-League. However, under the proposed reform, those who are not drafted after their high school graduations will need to remain in the D-League for three years. Requiring players who have not been drafted to remain in the D-League for three seasons will hopefully incentivize them to attend college and earn undergraduate degrees. Approximately 21% of current NBA players have earned undergraduate degrees.<sup>136</sup> This is a stark comparison to the NBA's companion league, the Women's National Basketball Association, where over 90% of current players have earned undergraduate degrees.<sup>137</sup> Requiring student-athletes to complete three years of college before entering the NBA will surely increase the number of NBA players who successfully complete their undergraduate studies.

Additionally, the NBA Scholarship Plan will help offset the trend of former NBA players filing for bankruptcy. According to Jonathan Abrams of the *New York Times*, an estimated 60% of NBA players are financially insolvent within five years of retiring from the league.<sup>138</sup> In the 1960s, MLB adopted a similar scholarship program. According to Pat Courtney, a spokesman for MLB, 69.2% of baseball players made use of the scholarship program and returned to college at the conclusion of their playing careers.<sup>139</sup> Having the ability to begin or return to college can be a tremendous benefit to retired NBA players.

## V. Conclusion

Any agreement reached between the NBA and the NBPA on player eligibility reform in upcoming CBA negotiations will be legally exempt from antitrust scrutiny based on the non-statutory labor exemption. Playing in the NBA is a privilege, not a right. In the context of the collective bargaining relationship, the NBA and the NBPA can agree that an employee will not be considered for employment for nearly any reason so long as the parties do not violate federal labor and employment laws. Employers are usually free to pick and choose their employees and hire those they think will best serve their business interests. Commissioner Silver believes that raising the draft eligibility restriction to two years removed from high school graduation will best serve the NBA's business interests. However, that proposal might be met with stiff resistance from the NBPA because it would compromise a player's potential earning capacity.

The proposed player eligibility reform would be far more advantageous than Commissioner Silver's proposal. Under the current reform, drafted players would be eligible to enter and play in the NBA D-League immediately upon graduating from high school. Players who are not drafted into the D-League would be required to wait three NBA seasons before they would be eligible to enter the NBA draft. The NBA will benefit from having addi-

tional years of data to scout prospects, while also having the ability to expand and capitalize on its D-League. The NBPA will benefit by limiting an influx of younger players into the NBA, while also garnering concessions in the upcoming CBA negotiations. High school graduates who are deemed NBA-ready will benefit by having the ability to immediately earn money playing professional basketball. High school graduates not deemed NBA-ready will benefit by having the opportunity to spend three years developing their skills while earning an undergraduate degree. Current NBA players will benefit from the newly proposed NBA Scholarship Plan, which will allow them to return to college following their retirement from the NBA. After all, is it not time that the NBA and the NBPA make sure that players' lives are not simply one and done?

## Endnotes

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8. See MLB Draft Rules <http://www.draftsite.com/mlb/rules/> (last visited July 10, 2014).
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10. See generally NBA Collective Bargaining Agreement, Art. X (2011). [hereinafter *NBA CBA*], available at [http://www.ipmall.info/hosted\\_resources/SportsEntLaw\\_Institute/NBA\\_CBA\\_\(2011\)\\_newversion\\_reflectsJeremyLinRuling\\_May30\\_2013.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA_(2011)_newversion_reflectsJeremyLinRuling_May30_2013.pdf).
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13. See generally Basketball Reference, <http://www.basketball-reference.com/draft>. With the fifth pick in the 1975 NBA Draft, the Philadelphia 76ers selected Darryl Dawkins, a high school senior from Maynard Evans High School.
14. See generally Basketball Reference, <http://www.basketball-reference.com/draft>.
15. *Id.*
16. *Id.* Since 1995, Kevin Garnett (2003-2004), Kobe Bryant (2007-2008) and LeBron James (2008-2009, 2009-2010, 2011-2012 and 2012-2013) have won the NBA's Most Valuable Player Award.



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18. *Id.* Since 2005, Greg Oden (2007), Derrick Rose (2008), John Wall (2010), Kyrie Irving (2011), Anthony Davis (2012), Anthony Bennett (2013), and Andrew Wiggins (2014) have been selected first overall in the NBA draft.
19. Since 2005, Derrick Rose (2010-2011) and Kevin Durant (2013-2014) have won the NBA's Most Valuable Player Award.
20. Hughes, *supra* note 12.
21. Zillgitt, *supra* note 17.
22. *Id.*
23. Hughes, *supra* note 12.
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26. See [http://www.nba.com/dleague/news/nba\\_dleague\\_101.html](http://www.nba.com/dleague/news/nba_dleague_101.html). The NBA Developmental League (D-League) is the NBA's official minor league basketball organization.
27. Rob Mahoney, *NBA Commissioner Adam Silver to Push for Higher Age Limit*, SPORTS ILLUSTRATED (FEB. 14, 2014) [http://www.si.com/nba/point-forward/2014/02/14/nba-higher-age-limit-adam-silver?xid=si\\_nba](http://www.si.com/nba/point-forward/2014/02/14/nba-higher-age-limit-adam-silver?xid=si_nba).
28. Zillgitt, *supra* note 17.
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30. Nicholas E. Wurth, *The Legality of an Age-Requirement in the National Basketball League After the Second Circuit's Decision in Claret v. NFL*, DEPAUL J. OF SPORTS L. & CONTEMPORARY PROBLEMS, at 106 (2006).
31. *Id.*
32. Sherman Antitrust Act 15 U.S.C. §1 (1997).
33. Wurth, *supra* note 30, at 105.
34. Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 60 (1911).
35. Eastern State Retail Lumber Dealer's Ass'n. v. U.S., 234 U.S. 600, 614 (1914).
36. Marc Edelman, *Analyzing the WNBA's Mandatory Age/Education Policy from a Legal, Cultural, and Ethical Perspective: Women, Men and the Professional Sports Landscape*, 3 NW J. L. & Soc. POL'Y 1, 7 (2008).
37. Wurth, *supra* note 30, at 107.
38. Jones v. Nat'l Collegiate Athletic Ass'n, 392 F. Supp. 295, 304 (D. Mass. 1975).
39. Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 689 (1978).
40. Edelman, *supra* note 36, at 8.
41. Silver v. N.Y. Stock Exch., 373 U.S. 341, 348-49 (1963).
42. Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 690 (1978).
43. Denver Rockets v. All-Pro Mgmt., Inc., 325 F. Supp. 1049, 1063 (1971).
44. The first invalidated provision was § 6.03, which provides in relevant part as follows: "*Persons Eligible for the Draft*. The following classes of persons shall be eligible for the annual draft: (a) Students in four year colleges whose classes are to be graduated during the June following the draft; (b) Students in four year colleges whose original classes have already been graduated, and who do not choose to exercise remaining collegiate basketball eligibility; (c) Students in four year colleges whose original classes have already been graduated if such students have no remaining collegiate basketball eligibility; (d) Persons who become eligible pursuant to provisions of Section 2.05 of these By-laws." The second invalidated provision was § 2.05, which stated in relevant part that any person could not be eligible for the draft until "four years after he has been graduated or four years after his original high school class has been graduated." *Denver Rockets*, 325 F. Supp. 1049, 1059 (1971).
45. *Id.* at 1060.
46. Spencer Haywood was an "All-American" during the two years he played college basketball at Detroit University, helped the United States Olympic basketball team win a gold medal at the 1968 games, and was named both the ABA Rookie of the Year and ABA Most Valuable Player during the 1969-1970 season. *Denver Rockets v. All-Pro Mgmt., Inc.*, 325 F. Supp. 1049, 1060 (1971).
47. See Wurth, *supra* note 30, at 103, 110 footnote 39 (2006). Haywood qualified for the hardship exemption due in large part to the fact that he was one of 10 children from a very poor family living in Mississippi.
48. *Denver Rockets*, 325 F. Supp. 1049, 1060.
49. *Id.* at 1066.
50. Wurth, *supra* note 30, at 110.
51. *Denver Rockets*, 325 F. Supp. 1049, 1066.
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53. Brent D. Showalter, *Technical Foul: David Stern's Excessive Use of Rule-Making Authority*, 18 MARQ. SPORTS. L. REV. 205, 217 (2007).
54. Nat'l Labor Relations Act, 29 U.S.C. §158(d) (1994).
55. Wurth, *supra* note 30, at 112.
56. *Why the NFL Says There's No Crying "Antitrust!" in Football*, PEPPER HAMILTON LLP (MAY 16, 2011) [http://www.pepperlaw.com/publications\\_update.aspx?ArticleKey=2108](http://www.pepperlaw.com/publications_update.aspx?ArticleKey=2108)).
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59. Wurth, *supra* note 30, at 113.
60. *Claret v. Nat'l Football League*, 369 F.3d 124, 131 (2004).
61. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 664 (1965).
62. Nat'l Labor Relations Act §158 (d).
63. *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 666 (1965).
64. *Pennington*, 381 U.S. at 667.
65. *Id.* at 665.
66. *Id.*
67. *Id.* at 666.
68. *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North Am. v. Jewel Tea Co.*, 381 U.S. 676, 682 (1965).
69. *Jewel Tea*, 381 U.S. at 691.
70. *Id.*
71. *Id.*
72. *Id.* at 689-90.
73. Edelman, *supra* note 36, at 8.
74. Wurth, *supra* note 30, at 109.
75. *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 958 (1987).
76. *Wood*, 809 F.2d 954 at 959.
77. *Id.*
78. *Id.* at 961.
79. *Associated Gen. Contractors of Am., Houston Chapter*, 143 N.L.R.B. 409, 412 (1965).
80. *Claret v. Nat'l Football League* 369 F.3d 124, 139 (2004) (citing *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

81. *Clarett*, 369 F.3d at 139 (citing *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39 (1953)).
82. *Clarett*, 369 F.3d at 139 (citing *Fiberboard Paper Prods. Corp. v. N.L.R.B.*, 379 U.S. 203, 210-15 (1964)).
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84. *Wood*, 809 F.2d 954 at 961.
85. *Id.*
86. *Id.*
87. *Mackey v. Nat'l Football League*, 543 F.2d 606, 610 (1976).
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89. Robert D. Koch, *4th and Goal: Maurice Clarett Tackles the NFL Eligibility Rule*, 24 LOY. L.A. ENT. L. REV. 291, 297 (2004).
90. *Mackey*, 543 F.2d at 615.
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92. Nat'l Labor Relations Act, 29 U.S.C. §158(d) (1994).
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94. *Clarett*, 369 F.3d at 133.
95. *Id.*
96. *Wurth*, *supra* note 30, at 119.
97. *Clarett*, 369 F.3d at 134.
98. *Id.* at 139.
99. *Id.* at 140.
100. *Id.* at 141.
101. See *Wood v. Nat'l Basketball Ass'n*, 809 F.2d 954, 959 (1987).
102. *Clarett*, 369 F.3d at 142.
103. *Id.*
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105. *Wurth*, *supra* note 30, at 107.
106. *Denver Rockets*, *supra* note 43, at 1066.
107. *Id.*
108. *Nat'l Soc'y of Prof'l Eng'rs*, *supra* note 39, at 689.
109. *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 361 (1963).
110. *Denver Rockets*, 325 F. Supp. at 1066.
111. *Wurth*, *supra* note 30, at 125.
112. *Id.*
113. See John Dempsey, *Hoops Droop at ABC*, VARIETY (APR. 12, 2004, 4:40 PM PT), available at <http://www.variety.com/2004/scene/news/hoops-droop-at-abc-1117903143/>.
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115. *Id.*
116. See generally *Mackey*, *supra* note 87.
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121. *Wurth*, *supra* note 30, at 127.
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# The “Eligibility” Concept in Modern Sports Law

By Sergey Yurlov

## The “Eligibility” Concept

The “eligibility” concept is one of the most important in sports law theory and practice. Eligibility is connected with the opportunity to practice sport, train and take part in sporting competitions.

This article will consider the concept, “eligibility” from theoretical and practical perspectives. It will highlight the most important legal issues connected with it, and describe some recent significant rulings.

The concept of eligibility refers to competition, irrespective of its level and legal status. Therefore, each body that holds competition should impose requirements for entry.<sup>1</sup> At all levels of sports competition, monolithic sports leagues and governing bodies establish eligibility requirements and conditions that must be satisfied for an individual to participate.<sup>2</sup> This article posits that those requirements for athletes’ participation may be established on the International, European and National levels.

It is to be noted that some kind of athletes (i.e., student-athletes) face legal restrictions on the right to participate in professional sport competitions, and often are ineligible. For example, in Russia, Sport Federation’s statutory acts put restrictions on student-athletes’ participation in competitions that are not held among the students. According to Par.4 of the *Regulations of the ‘Moscow Swimming Cup’*,<sup>3</sup> the participants are the strongest men, women and boys born in 1995 or 1996 and girls born in 1997 or 1998 who are members of physical culture schools, sports schools and associations. Nothing about students or student teams is stated. This means that students not registered in any schools or clubs before entering a university cannot take part in the Moscow Swimming Cup, even if they meet the requirements.<sup>4</sup> Note that 80% of Russian universities have no sport clubs, and if they have, they are only sport clubs “on paper.”

For example, in the United States, at both the high school and collegiate levels, athlete eligibility rules are adopted, interpreted, and enforced by a state governing body for interscholastic athletics or a national association for intercollegiate athletics, both of which are comprised of their respective member educational institutions.<sup>5</sup>

## II. Eligibility Requirements and Legal Framework for Eligibility Issues

Eligibility means the right to participate in sport competition if an athlete complies with all rules and regulations. However, who can impose such requirements?

### A. International and European Levels

The International Olympic Committee (IOC) is the supreme authority of the Olympics.<sup>6</sup> On the international level, the IOC has an exclusive authority to entrench the basic principles for athletes’ participation. Therefore, according to the fourth principle of Olympism, “the practice of a sport is a human right. Every individual must have the possibility of practicing sport, without discrimination of any kind in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.”

The IOC has adopted the Olympic Charter<sup>7</sup> (OC), according to which: “to be eligible for participation in the Olympic Games, a competitor, coach, trainer or other team official must comply with the Olympic Charter, including the conditions of eligibility established by the IOC, as well as with the rules of the International Federation concerned as approved by the IOC, and the competitor, coach, trainer or other team official must be entered by his National Olympic Committee.” According to By-Law 40, each International Federation establishes its sport’s own eligibility criteria in accordance with the Olympic Charter. Such criteria must be submitted to the IOC Executive Board for approval. For example, Federation Internationale de Natation<sup>8</sup> (FINA) is the world governing body for Aquatics, and establishes requirements for swimmers. On the European level, Ligue Européenne de Natation<sup>9</sup> (LEN) is entitled to adopt its own Rules and Regulations. According to the LEN Constitutional Rules<sup>10</sup> (Clause 2.4), LEN is recognized as a Continental Organisation by the FINA. Therefore, LEN’s governing bodies should draft Rules and Regulations, and conduct European competitions, in line with the FINA’s Rules and Regulations.

Based on the above-mentioned provisions, it is apparent that the OC’s eligibility provisions prevail and the IOC is the final decision-maker in eligibility issues. Each eligibility statutory act adopted by a Sport Federation (or National Olympic Committee) is subject to the IOC’s approval. That is an international (European) legal framework.

### B. National Level

Each kind of sport is governed by a national sport federation. Therefore, each sport federation, based on the international (European) regulations, is empowered to enact internal statutory acts imposing special requirements for participants. These requirements differ depending on level of competition and organizer, among other factors. Neither the U.S.<sup>11</sup> nor Russia has a federal constitutional



right to participate in the Olympic Games and other sport competitions.

There is no absolute right to participate, but athletes may participate in official<sup>12</sup> sport competitions if they satisfy eligibility requirements specified in rules and regulations devoted to certain sport competitions. Recent court practice confirms these statements.

### III. Relevant Court Practice

#### A. Venue

The main question arising out of eligibility issues is the venue of eligibility disputes and selection of a good forum for dispute resolution. Clause 61 of the OC prescribes that “any dispute relating to application of the IOC decisions or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the CAS. Any dispute arising on the occasion of/ in connection with the Olympic Games shall be submitted exclusively to the CAS.” Thus, the CAS is a proper forum for disputes arising out of Olympic Games—i.e., certain competitions.

The FINA Constitution<sup>13</sup> stipulates that all disputes shall be submitted to its jurisdictional bodies, which are Committees or Bureaus. However, Clause C27 of the FINA Constitution provides that “disputes between FINA and any of its Members and if between members that are not resolved by a FINA Bureau decision may be referred for arbitration by either of the involved parties to the CAS, Lausanne. Any decision made by the Arbitration Court shall be final and binding on the parties concerned.” The CAS appears to be the final stage of sport dispute resolution. LEN Constitutional Rules contain the same venue provisions.

It is to be noted that within the international legal framework, there is no general legal right to participate in athletic competition protected by international law or human rights agreements, even though the OC expressly states that the “practice of sport is a human right.”<sup>14</sup> However, there is no individual legal right to engage in sport under international human rights agreements or other international laws.<sup>15</sup>

Nevertheless, sport arbitration courts and other dispute resolution bodies exist to consider conflicts, including disputes relating to eligibility. Such courts provide an official interpretation of sports rules and regulations. Decisions of the CAS could be used by athletes, coaches and sport federations in order to solve their disputes. The CAS is the highest instance of sport justice. More importantly, legal practitioners and sports lawyers should keep in mind those decisions while advising their clients on different issues. Courts in the U.S. have only a limited role in resolving eligibility disputes, but the CAS and the American Arbitration Association are both independent and encourage fair processes that effectively protect athletes’ participation rights.<sup>16</sup>

The CAS has considered many disputes regarding eligibility clauses. Such disputes have arisen out of Olympic Games, World Championships, and other different sport competitions.

#### B. CAS’s Court Practice

The CAS has not construed the OC as creating an absolute right to participate in a sport.<sup>17</sup> Instead, it considers a wide range of eligibility sport disputes arising out of the Olympic Games and other international sport competitions. For example, the CAS rendered many decisions both at the 2014 Olympic Winter Games in Sochi and other Olympic Games.

In *Toby Olubi v. British Bobsleigh*, the CAS was asked to review a decision of British Bobsleigh, dated January 20, 2014, according to which appellant Toby Olubi was not elected for Great Britain’s National Team at the 2014 Winter Olympic Games. Olubi stated that British Bobsleigh had not followed the selection procedures since the objective measures of his performance demonstrated that he moved the sled faster than those who were selected.<sup>18</sup> Selection standards stated that “the selection process was an exercise of judgment and was guided by, but not determined by, results in competitions and statistical data.” British Bobsleigh conducted a selection procedure based on athletic performance, experience, and attitude, among other factors. The CAS rejected the appeal, and held that British Bobsleigh had not violated the election standards because it had the discretion as to how much weight to give to each factor in the consideration process.

In *Andrew Mewing v. Swimming Australia Limited*,<sup>19</sup> the CAS addressed selection issues. On March 23, 2008, Australian swimmer Andrew Mewing competed in the heat and semi-final of the Men’s 200-meters freestyle event at the selection trials for the Beijing Olympic Games. Mewing qualified for the final of the event. On March 24, 2008 Mewing competed in the final, finishing in eighth place in an Olympic “A” qualifying time of 1:48.13. All eight finalists posted times comfortably within the Olympic “A” qualifying time. Later, the first seven swimmers (except Mewing) from the Men’s 200-metres freestyle final were nominated for selection, while all eight swimmers in the final of the Women’s 200-metres freestyle were nominated for selection. Mewing disagreed with such a decision, and on April 2, 2008, he lodged his appeal with Swimming Australia Limited (Australian Federation). The Australian Federation established an Appeals Tribunal in order to hear his appeal. On April 8, 2008, the Appeal Tribunal dismissed the petition, and Mewing appealed to the CAS. Mewing asked the CAS to set aside the Appeal Tribunal’s decision, and to include him as a member of the Men’s 4X200 Meters Relay Squad for the 2008 Olympics.

The CAS referred to the applicable provisions in order to address the dispute. In accordance with Clause 3 (7)(B) of the Nomination Criteria for selection as a relay swimmer, all individual event athletes selected as part of the

2008 Australian Olympic Team were eligible to participate in relay events where Australia had a qualified team. However, meeting the relay performance requirements did not guarantee nomination for selection. There is a difference between being entitled to consideration and being eligible for nomination.

Mewing pointed to the closeness of the result of the 200-meters final and the fact that his best time was only 0.05 seconds slower than that of the seventh-placed swimmer. The main questions were whether the National Head Coach had implemented the Nomination Criteria properly and whether he had recognized the overall needs of the team.

The National Head Coach stated that there was no need for Mewing because there were four other swimmers who had all qualified faster than he, and who had significantly superior qualifications for selection. The CAS concluded that the National Head Coach had fulfilled his obligations by carefully paying attention to all of the criteria set out in Nomination Criteria for selection of a relay swimmer. There was no evidence of bad faith. Therefore, the CAS dismissed Mewing's appeal.<sup>20</sup>

In CAS OG 14/03 *Maria Birkner v. Argentinian Olympic Committee*,<sup>21</sup> the CAS ad Hoc Division considered an appeal of the decision of the Argentinian Ski Federation not to elect Maria Birkner to compete in the Sochi Winter Games. The grounds of the decision were based on current and potential athletic performances. Athletes could begin qualifying for participation in the 2014 Olympic Games in July 2012. In 2012, 2013 and 2014, Birkner participated in a great number of sport events conducted by the International Ski Federation. However, in January 2014, the Argentinian Ski Federation issued a letter stating that Birkner was not selected for participation in Sochi, citing that the evolution and projection in the future was the main criterion for the evaluation of the merits of the athletes. The Argentinian Ski Federation worked with a special Technical Committee that had prepared a report regarding the selection procedure of the women. This Committee provided a report stating that it had analyzed the performance, training and results of the qualified athletes.

The report also stated that although the women were all on the same technical level, the first- and the second-ranked athletes were national champions in some disciplines, which was a *defining advantage*. This fact was also considered as the projection views for the next Olympic cycle. However, Birkner stated that there was a bias on the part of the National Olympic Committee and the Argentinian Ski Federation against her and her family. Considering this appeal on the merits, the CAS ruled that Birkner had not established that the challenged decision was discriminatory. The CAS also found that the Technical Committee's discretion was neither unreasonable nor unfair.

However, because the claim had been filed outside of the 10-day period before the Olympic Games' Opening Ceremony, there was a problem with the CAS's jurisdiction.<sup>22</sup> Thereafter the CAS agreed that it did not have jurisdiction to hear the appeal, and stated that it would have rejected the appeal if it had.

In *Bassani-Antivari v. International Olympic Committee*,<sup>23</sup> 02/003 12 February 2002, the CAS ad Hoc division considered legal issues relating the right to enter an athlete in the Olympic Games. In this case, the applicant was a 23-year-old Grenada national who had represented her country in international ski competitions since 1998. She had competed under the auspices of the Grenada International Sports Foundation (GISF). GISF was accepted and recognized by the Federation Internationale de Ski in 1998. Bassani-Antivari had a good reputation (ranking and no disciplinary sanctions) and was ready to file an application for Olympic participation.

In August 2001, the President of the GISF filed with the Grenada Olympic Association a set of documents necessary to compete in Salt Lake City in 2002. However, the Grenada Olympic Association did not send an entry form in favor of Bassani-Antivari to the 2002 Games' Organization Committee. Then something strange occurred.

On January 25, 2002 the Grenada Olympic Association informed the GISF that it was unable to sanction the participation of Bassani-Antivari because the GISF was not an affiliate of the Grenada Olympic Association (the latter of which had not accepted the GISF's application for affiliation). Therefore, Bassani-Antivari had filed her and her coach's entry forms directly to the 2002 Games' Organization Committee. Bassani-Antivari arrived in the U.S. in order to participate, but was informed that no one had filed an Entry form on her behalf.

Bassani-Antivari first brought an appeal before the IOC. On February 10, 2002, the IOC considered the appeal and rejected it on the grounds that it was undesirable for individual competitors to be allowed to participate in the Olympic Games in the absence of a National Olympic Committee. Then she filed an appeal to the CAS ad Hoc Division. She stated that she was improperly denied entry to the 2002 Games by the decision of Grenada Olympic Association. She claimed that she had proceeded in good faith, believing that she would participate in the Games. However, the Panel was of the view that an Entry Form which was not endorsed by the competitor's National Olympic Committee was a unilateral document which had no binding legal effect. More importantly, the CAS referred to OC's relevant provisions (Clause 49.1):

Only NOCs recognized by the IOC may enter competitions in the Olympic Games. The right of final acceptance of entries rests with the IOC Executive Board. The National Olympic Committee

shall only exercise such attributions upon the recommendations for entries given by national federations. The National Olympic Committee shall send to the Olympic Games only those competitors adequately prepared for high level international competition....

The CAS confirmed that it was within the National Olympic Committee's exclusive authority to enter competitors in the 2002 Olympic Games, and rejected Bassami-Anti-vary's appeal.

#### IV. Key Findings

- i. Eligibility means the right to take part in a competition if an athlete complies with all rules and regulations. The concept of "eligibility" refers to each competition, irrespective of its level and status.
- ii. Eligibility requirements are imposed on the International, European and National levels, depending on the competition's legal status. However, those requirements should be established in accordance with the OC's and IOC's provisions. More importantly, such requirements are subjects to special IOC's confirmation.
- iii. There are many sport disputes relating to eligibility issues, including but not limited to:
  - Filing of an Entry Form;
  - Establishing requirements for participants;
  - Special time frame for entries and approval;
  - Bodies empowered for approval; and
  - Dispute resolution.
- iv. Constitutional legislation in Russia and the U.S. does not establish the right to participate in the Olympic Games and other sport competitions. The OC stipulates that the practice of a sport is a human right, but there is no human right to participate in sport competitions that is protected by international law.
- v. Each international sport federation determines the venue of selection disputes.
- vi. There are many CAS decisions relating to selection (eligibility) issues. The majority of those disputes arise out of the Olympic Games. The decisions help to eliminate ambiguity of certain legal provisions. In addition, the CAS tries to interpret vague wordings of different rules and regulations and internal statutory acts. Further, the National Olympic Committees and Sport Federation empowered bodies (empowered bodies) are allowed discretion when choosing athletes. The main principle confirmed by the CAS's practice is that *meeting the relay performance requirements does not guarantee nomination for*

*selection*. For example, as described above, eight athletes posted closed results and all eight swimmers were eligible to take part in individual race and relay. However, the Sport Federation, in its discretion, had decided that only seven swimmers should be eligible. Empowered bodies have to consider not only athletic performance and qualifications, but also other circumstances, such as last changes in results, forecasting future results, and the number of individual races in which an athlete can take participate.

- vii. The problem of "individual participation" is very important nowadays. The CAS's court rulings state that an entry form that is not endorsed by the competitor's National Olympic Committee is a unilateral document which has no binding legal effect. However, the OC provides that the practice of a sport is a human right (Par.4 of the Fundamental Principles of Olympism). In fact, there is no right to participate in Olympic Games and other sport competitions individually, i.e. without approval and without any membership in Sport Federations or National Olympic Committees. Thus, an athlete cannot sign an entry form and send it to the organizing committee directly. He or she has to receive a Federation's and the Olympic Committee's approval.

#### Conclusion

It appears that there is a controversy between the OC's legal provisions and real practice. This author believes that the right to participate in sport competitions is an absolute right, and an athlete should have an opportunity to exercise this right. In other words, if an athlete meets the requirements and has a medical statement of good health, then he or she should have the right and the real opportunity to participate.

#### Endnotes

1. An entry means an application filed by a sport governing body in order to register sportsman on a specific event.
2. See Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, Faculty Publications, Paper 546 (2008).
3. Held March 11-15, 2013; see also <http://www.mosswim.ru/node/63>.
4. These requirements include sportsman's qualification or athletic performance (sport degree); presence of certain medical documents; qualifying time.
5. Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, Faculty Publications, Paper 546 (2008).
6. See International Olympic Committee, *The Organisation*, available at <http://www.olympic.org/about-ioc-institution>.
7. See International Olympic Committee, *The Olympic Charter*, available at [http://www.olympic.org/Documents/olympic\\_charter\\_en.pdf](http://www.olympic.org/Documents/olympic_charter_en.pdf).
8. See Federation Internationale de Natation, *Official Website*, available at [www.fina.org](http://www.fina.org).



9. See Ligue Europeenne de Natation, *LEN European Aquatics*, available at <http://www.len.eu>.
10. See Ligue Europeenne de Natation, *Constitutional Rules*, available at <http://www.len.eu/rules/01%20CONSTITUTIONAL%20RULES.aspx>.
11. See Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, Faculty Publications, Paper 546 (2008).
12. Official means organized and/or conducted by special sport federation.
13. Federation Internationale de Natation, *FINA Constitution*, available at [http://www.fina.org/H2O/docs/rules/FINAconstitution\\_20132017.pdf](http://www.fina.org/H2O/docs/rules/FINAconstitution_20132017.pdf).
14. Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, Faculty Publications, Paper 546 (2008); see also John M. Barron, *The Effects of High School Athletic Participation on Education and Labor Market Outcomes*, 82 REV. ECON. & STAT. 409, 409 (2000).
15. James A. R. Nafziger, *INTERNATIONAL SPORTS LAW* at 126-27, Second Edition, Transnational Publishers, Inc. (2004).
16. *Id.*
17. Matthew J. Mitten and Timothy Davis, *Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities*, Faculty Publications, Paper 546 (2008); see also Arbitration CAS Ad Hoc Division (O.G. Sydney 2000) 001, *USOC and USA Canoe/Kayak v. IOC*, (Sept. 13, 2000).
18. See Jeffrey Benz, Jennifer K. Yuen, Navid Nazer, *Disputes Arising Out of or Relating to the 2014 Olympic Winter Games in Sochi Part 1*, available at <http://www.lawinsport.com/articles/anti-doping/item/disputes-arising-out-of-or-relating-to-the-2014-olympic-winter-games-in-sochi-part-1#references>.
19. Court of Arbitration for Sport, CAS 2008/A/1540 Andrew Mewing v. Swimming Australia Limited, available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1540.pdf>.
20. See S. Yurlov, *Court of Arbitration for Sports Relevant Practice: An Analysis of the Most Important Swimming-Related Cases*, ENTERTAINMENT, ARTS AND SPORTS LAW JOURNAL, Summer 2014, Vol. 25, No. 2, pp. 82-84.
21. Court of Arbitration for Sport, CAS OG 14/03, available at <http://www.tas-cas.org/d2wfiles/document/7354/5048/0/DOC.pdf>.
22. See Ross Wenzel, *Case law of the CAS Ad Hoc Division at the 2014 Sochi Olympic Winter Games: What Did We Learn?*, available at <http://www.lawinsport.com/articles/regulation-a-governance/item/case-law-of-the-cas-ad-hoc-division-at-the-2014-sochi-olympic-winter-games-what-did-we-learn>.
23. Court of Arbitration for Sport, CAS Ad Hoc Division 02/003 Bassani-Antivari, available at <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/OG%2002-003.pdf>.

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# Entertainment Immigration: The Employment-Based Immigrant Visa for Individuals of Extraordinary Ability

By Michael Cataliotti

In the last issue, we began our discussion of immigrant visas, those high-ranking immigration classifications more commonly known as green cards. As a refresher, those immigrant visa classifications are divided up into several employment-based (EB) categories: EB-1, EB-2, EB-3, EB-4, and EB-5. Each number denotes a “preference,” and within some of those preferences, there exist a handful of more precise occupational categories.

In this installment, we will be taking up the EB-1, as it is the most important of the immigrant classifications for the entertainment, arts, or sports law attorney to be aware. We move on, for we have *so much time and so little to do.... Strike that. Reverse it. Thank you.*<sup>1</sup>

## Employment-Based Immigration: First Preference

EB-1 classification is intended for individuals who possess extraordinary ability in one of a variety of broad disciplines; are an outstanding professor or researcher; or are a multinational executive or manager.<sup>2</sup> For our purposes here, the most important category is commonly referred to as “EB-1A”: individuals of extraordinary ability; however, we will touch upon those others as well.

It is important to note that regardless of the occupational category, the bar is set quite high for the applicant or beneficiary to achieve an immigrant visa. It is not nearly as attainable as one of our non-immigrant visas (e.g., O, L), and the reason for this is policy driven: By conferring immigrant status on an individual, that person is entitled to live, work, and play freely. These being significant benefits, it is understandable that the Department of Homeland Security and the U.S. Customs & Immigration Service (the Service) want to be careful about upon whom they confer such authorizations. Those agencies do take the scrutiny to the next level at times, though, and in particular, this impacts our individuals of extraordinary ability quite often.

## Individuals of Extraordinary Ability

For those who have been read previous articles in this series, this should look like the O-1 visa, and that is for good reason: It is essentially the permanent (immigrant) version of that temporary (nonimmigrant) classification. Being that it looks like the O-1 visa, it should not be surprising that the fundamental requirements are:

1. That the applicant must be able to demonstrate extraordinary ability in the sciences, arts, education,

business, or athletics through sustained national or international acclaim; and

2. That must be recognized in the applicant’s field through extensive documentation.<sup>3</sup>

In order to extensively document his or her extraordinary abilities, the applicant must demonstrate either a one-time achievement or at a minimum, three of 10 of the list below.<sup>4</sup> Absent a Nobel Prize, Olympic medal, Pulitzer Prize, Oscar, or an award of that magnitude, a “one-time achievement” is not going to be demonstrated.<sup>5</sup> For the vast majority of applicants, however, the likely course of action is the three of 10 categories, reproduced here with comments where necessary:

1. Evidence of receipt of lesser nationally or internationally recognized prizes or awards for excellence;
  - Comment below.
2. Evidence of the applicant’s membership in associations in the field which demand outstanding achievement of their members;
  - Comment below.
3. Evidence of published material about the applicant in professional or major trade publications or other major media;
  - Pay particular attention to the fact that this is published material *about* the applicant, rather than *by* the applicant. This is one of those instances where the reviewing agents are usually dogmatic. You might question why this is stressed, as; “about the applicant” certainly sounds clear enough, but that plenty of practitioners will try to sneak one by the Service.
4. Evidence that the applicant has been asked to judge the work of others, either individually or on a panel;
  - These should be large-scale or quite exclusive. For example: Should an applicant have been a judge at the Queens County Farm Museum’s Fall Fest Craft Fair, this judging should certainly be submitted, but with several other examples that are objectively more exclusive.
5. Evidence of the applicant’s original scientific, scholarly, artistic, athletic, or business-related contributions of major significance to the field;

- Comment below.
6. Evidence of the applicant's authorship of scholarly articles in professional or major trade publications or other major media;
  7. Evidence that the applicant's work has been displayed at artistic exhibitions or showcases;
  8. Evidence of the applicant's performance of a leading or critical role in distinguished organizations;
  9. Evidence that the applicant commands a high salary or other significantly high remuneration in relation to others in the field; or
    - This should be evaluated with both anecdotal and objective evidence from primary sources. Worth noting is that the federal Department of Labor standards will not suffice to demonstrate this.
  10. Evidence of the applicant's commercial successes in the performing arts.
    - The vagueness of this category makes it very dangerous and what will constitute evidence of success will vary significantly, but a general benchmark to look at could be gross sales of an applicant's album, single, film(s), concert(s), or like information.<sup>6</sup>

In practice, the arts attorney should disregard Numbers 1, 2, and 5 as the dominant bodies of evidence, and pay closer attention to the others. In the case of 1, I have yet to find out what the Service is looking for with this, but will be so very excited when I do. For body of evidence 2, there are few, if any, associations that will satisfy the Service. In the case of bullet 5, if your client has achieved this and it can be documented, then by all means it should absolutely be pursued; in most instances, however, this will not be the case and what will be alleged to be "original scientific or scholarly research contributions" will be downplayed by the Service. As a brief practice pointer, basing the strength of the application on any of these three, individually, together, or as one third of a combination, will set up your client for a bit of heartache when a difficult request for evidence (an RFE) is sent back from the Service.

Additionally, whether the individual can achieve immigrant status under this basis is not always in line with

whether receipt of that status is logical. Once an individual receives immigrant status, a green card, he or she is deemed a "lawful permanent resident," or LPR. Once an individual is an LPR, there are other issues that can arise, the most important of which is tax implications.<sup>7</sup> This will need to be addressed separately and individually.

With that, we have wrapped up our initial foray into the EB-1A, also known as "The Extraordinary Ability Green Card," or O-1 on PCP. There will certainly be more about this, as it is quite a dense area that pops up frequently in discussions with non-U.S. citizen clients. (And I know what you are all thinking, "The suspense is terrible... I hope it'll last."<sup>8</sup>)

## Endnotes

1. WILLY WONKA & THE CHOCOLATE FACTORY (Wolper Pictures, Ltd. 1971), available at <http://www.imdb.com/title/tt0067992/quotes>.
2. *Employment-Based Immigration: First Preference EB-1*, USCIS (Sep. 10, 2013), <http://www.uscis.gov/working-united-states/permanent-workers/employment-based-immigration-first-preference-eb-1>.
3. *Id.*
4. *Id.*
5. It is worth noting that the Service has indicated as acceptable examples of a "one-time achievement" the following: "Pulitzer, Oscar, Olympic Medal." Though not exhaustive, you can see the caliber of what the Service is looking for to satisfy the criterion.
6. See USCIS, *supra* note 2. The comments are mine, and mine alone. The elements, however, belong to the Service.
7. If you are wondering what I am referencing about taxes, the short version is that once an individual becomes an LPR, he or she becomes a bona fide green card holder, designated as a U.S. resident, which makes that individual's *worldwide income* subject to U.S. taxes. There are, of course, exceptions and the like, but that is the overarching concern regarding taxes.
8. WILLY WONKA & THE CHOCOLATE FACTORY (Wolper Pictures, Ltd. 1971) available at <http://www.imdb.com/title/tt0067992/quotes>.

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# (I Can't Get No) Participation

By Nima Daivari

Contingent compensation, back end deals, points, and profit participation are just some of the synonymous terms used to describe what most talent want, but what many entertainment attorneys know are usually worth very little...unless properly negotiated and defined.

Contingent compensation is an expression used to describe monies that a party is contractually entitled to so long as a television series shows a profit. There are many ways that a television series can generate revenue, including through license fees, advertising, product integrations, DVD sales or electronic sell throughs (ESTs, which are purchased downloads via iTunes and Amazon), ancillary merchandise, and other revenue streams. Once a television series recoups all expenses that went into the production, distribution, marketing, and exhibition of the television series, then the series begins to make a profit, and the different participants receive their respective percentages from those profits.

At the end of an episode of a television series is a long list of people involved in each and every production. Those people working on the series and all of those services that were rendered while producing the series need to be paid to and accounted for. Therefore, before profits can be declared on a television series, the monies that were expended on the project need to be reimbursed to the company that paid for the costs associated therewith.

Two terms that are thrown around in connection with profit participation are "Gross Revenue" and "Net Revenue," with the general presumption being that Gross is better than Net. Generally speaking, Gross Revenue refers to the money that came in through the television series via all different revenue streams, whereas Net Revenue refers to the monies that are left over after all agreed upon deductions were made. As such, most people will state that they want their profit participation to be based on the Gross instead of the Net, since the number for the former will be higher. Let's look at an example.

- **Actress is entitled to 10% of the Gross Revenue and Actor is entitled to 10% of the Net Revenue.**

**Example 1:** A television show generates \$100 in revenue. However, it costs the production company/studio \$50 to make, so after those costs are recouped, there is only \$50 remaining. \$100 is the Gross Revenue and \$50 is the Net Revenue. In her contract, Actress is entitled to 10% of

the Gross Revenue, so in this instance she would get \$10. Actor, however, had a deal where he is entitled to Net Revenue proceeds. So in this instance, Actor would get \$5, which is 10% of the \$50 Net Revenue. Therefore, even though they were both getting 10% of the backend of the television show, Actress got \$10 and Actor got \$5. As such, Gross Revenue is better than Net Revenue, right?

Not exactly. In this simplified example it is easy to say that Gross is better than Net, but what actually matters is the negotiated definition of the contingent compensation. In Actor's contract, Gross Revenue is defined as "...all money received by Producer as consideration for the right to broadcast, exhibit, or distribute the Series in any manner, but not including (i) refunds, credits, discounts, and adjustments; (ii) advance payments which have not been earned unless they are non-returnable advances; and (iii) money held as deposits and subject to a refund." Net Revenue is defined as: "...all monies remaining, if any, after deducting from Gross Revenue the aggregate of the following in the following order: Distribution Fees, Distribution Expenses, and Production Costs."

It is defined that the television series is not deemed profitable until after the fees, expenses, and costs associated with the series are deducted and those fees, expenses, and costs can (and often do) eat up a large portion of the Gross Revenue generated, thereby leaving a project with very small profits. Let's look at another example.

**Example 2:** If a television series generates \$100 in revenue but costs the production company/studio \$30 in Distribution Fees (the money the distributor of the series charges in order to provide the service of distributing it), \$30 in Distribution Expenses (such as print costs, duplicating, shipping, advertising, taxes, and other costs associated with distributing the project), and \$30 in Production Costs (like the costs for building sets, licensing music, paying for an attorney, and the production company fee), that only leaves \$10 in Net Revenue (defined as Gross Revenue minus Distribution Fees, Distribution Expenses, and Production Costs). Our Actor receives 10% of the Net Revenue, or in this case, one dollar.

When amplifying those numbers it is easy to see why an actor might only make \$100,000, even when a project makes, \$100,000,000. The \$100 in revenue from the example above (\$100,000,000 when amplified) minus costs (in Example 2 90% of the Gross Revenue was deducted for costs, so the \$100,000,000 becomes \$1,000,000 in Net Revenue) and of that Net Revenue, Actor is entitled to 10%, or \$100,000. This is how a series that makes \$100,000,000 in Gross Revenue can result in a \$100,000 backend payout.

Now, see what happens when a lawyer negotiates the definition.

**Example 3:** What if, in the definition of Actor's contingent compensation, the Distribution Fee was negotiated to be capped at 15% of the Gross Revenue, the Distribution Expenses were negotiated to be capped at 10% of the Gross Revenue, and the Production Fee was negotiated to be capped at 10% of the Gross Revenue? That means of the \$100 in Gross Revenue, \$15 would be for Distribution Fees, leaving \$85 in Gross Revenue. Since deductions are made in order, we then take 10% of that \$85 (i.e., \$8.50) for the costs of the Distribution Expenses, leaving \$76.50. We then take 10% of the \$76.50 (i.e., \$7.70) in Production Costs away from the remaining amount, resulting in a total Net Revenue of \$68.80. Since Actor gets 10% of the Net Revenue, Actor receives \$6.80. Much better than the \$1 Actor got in Example 2 above.

One method that profit participants use to protect themselves from too many deductions is a Most Favored Nations (MFN) clause. In the realm of profit participant definitions an MFN states that no individual involved with the television series shall receive a better definition than Actor. Since Actor is up and coming but Director is well established, Actor's attorney might try to negotiate an MFN provision in Actor's agreement so that Actor is

on the same footing as Director, who by the mere fact of being well established, might have a better definition.

In addition to the MFN, a good attorney will try to ensure a beneficial audit rights provision. Audit rights are a contractual right given to a party to inspect the accounting records of the production company/studio behind the television series. These provisions usually include the right to examine the production company's accounting records (at the participant's expense) by a pre-approved accounting firm (usually one that has experience in the television industry), during normal business hours, and only for a set period of time (maybe over the course of 30 days). The production companies/studios do not want to go through a 10-month audit, so they try to set a cap as to how long the audit can continue. Lastly, a good lawyer will try to include language stating that costs of the audit will be reimbursed to the participant if the audit reveals a discrepancy in favor of the participant, plus interest.

Contingent compensation definitions (which can be upwards of 20 pages long) are some of the most complicated agreements in television. When confronted with one, it is important to consult with an experienced attorney practicing in the area.

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## Bill Veeck: Baseball's Barnum

By David Krell

Bill Veeck was to baseball what P.T. Barnum was to the circus—a promotional genius.

Barnum had Tom Thumb; Veeck had Eddie Gaedel.

Barnum had panache that elevated the circus to a spectacle; Veeck had panache that elevated a baseball game to a spectacle.

Barnum lived to entertain those who came under the big top to watch the circus; Veeck lived to entertain those who came to the ballpark to watch the baseball game.

This year marks the 100th anniversary of Bill Veeck's birth. A Chicago native born on February 9, 1914, Veeck had baseball in his bloodline—his father, William Veeck, Sr., was the president of the Chicago Cubs. In his autobiography *Veeck As In Wreck*, Veeck declared his father to be a baseball foreseer capable of ideas based in solidity rather than frivolity. "Unlike me, my father was far too dignified a man to pull any promotional stunts," Veeck wrote.

He was a man of imagination, though, and easily the greatest innovator of his time. It was my father who first brought Ladies' Day to the big leagues. He was also the first to broadcast his ball games, and he did it in the face of furious protests from every other team in the league. In 1922, he formally proposed a round robin of inter-league games at the halfway point of the season, an idea so progressive that when I next suggested it, in 1949, it was still considered visionary by the forward-looking fossils who run the game.<sup>1</sup>

Veeck furthered the family's imprint in baseball promotion, albeit with flashy gimmicks rather than revolutionary innovations. When Veeck owned the Chicago White Sox from 1959 to 1981, he installed publicity stunts that baseball observed, ridiculed, and sometimes adopted. Today, stadium scoreboards inspire fans through cheers, animation, and visual puns. Some teams have an attraction accompanying the scoreboard activities. For example, a big red apple—the Home Run Apple—rises behind the outfield fence at Citi Field every time a New York Mets player hits a home run. It symbolizes New York City's nickname, the Big Apple.

The genesis of these scoreboard traditions ignited in April 1960, when Veeck unveiled an exploding scoreboard at Comiskey Park. Veeck biographer Paul Dickson wrote:

[It] feature[d] a dazzling array of flashing strobe lights, fireworks, and explosions after every White Sox home run. Loaded with ten mortars that fired Roman candles, it was a theatrical set piece lasting thirty-two seconds with sounds galore—fog-horns, fire engine sirens, a cavalry-charge bugle, crashing trains, a steam calliope, the *William Tell* overture, and a woman screaming, "Fireman, save my child." The board promised an element of surprise, as the tape controlling all the sights and sounds was designed never to repeat itself.<sup>2</sup>

Veeck kept fans entertained with imaginative ideas to complement the White Sox' performance—or distract them from it. His was a mission of mesmerizing those who gave time, money, and energy to the White Sox in exchange for an escape from banality. Dickson wrote, "In addition to the usual giveaways, there was a Salute to Mexico Day, complete with caballeros, a parade, and a bullfight in which the bull was spared. There was also a rain-dampened Greek Night with scantily clad belly dancers shimmering in unison. These antics did not sit well with his fellow owners, who criticized his carnival approach as outmoded."<sup>3</sup>

In 1979, Veeck mandated new uniforms for the White Sox. Instead of baseball pants, the players wore Bermuda shorts. This fashion statement lasted three games. Harry Caray's singing of *Take Me Out to the Ball Game* with the fans germinated as a Veeck idea. Showers in the bleachers for fans to cool off during hot summer days sourced in a primal human element identified by Veeck:

The worst thing we've done is sell the idea that you have to have a winning team. That dooms 20 of our 24 clubs to failure before the season even starts. What we have to create is an atmosphere of enjoyment. Take an example—I put a shower in the bleachers. It had a utilitarian function—it gets hot out there and people like to cool off. But it also attracts a certain number of young girls in bathing suits, and a certain number of young men who like to look at young girls in bathing suits. People in the



suburbs aren't going to say, "Let's go to the game today because there's a shower in the bleacher," but we create the impression that we are going to have some fun.<sup>4</sup>

While helming the White Sox organization, Veeck endured a promotion that took an ugly turn. Conceived by his son, Mike Veeck, Disco Demolition Night holds a place in the annals of sports promotions as an unmitigated calamity. Disco's transition from musical genre to mainstream phenomenon occurred when John Travolta mesmerized movie audiences in 1977 with his portrayal of Tony Manero in *Saturday Night Fever*. After Travolta's bravura performance, disco pervaded nightclubs, Top 40 radio, and parties. Its dominance in popular culture was confirmed by prominence in movies, television shows, and song catalogs.

On July 12, 1979, the Chicago White Sox attempted to kill disco. Sort of.

Disco Demolition Night was a promotional stunt that went awry. Inspired by WLUP's anti-disco disc jockey Steve Dahl, Mike Veeck had a brainstorm to have Dahl emphasize his dislike for disco with an explosion of a wooden crate filled with disco records. He chose center-field as the location. The period between games of a twinight doubleheader against the Detroit Tigers provided an opportunity to showcase Dahl's efforts while keeping the fans energized.

"Dahl's followers were told they could get into the game for 98 cents if they brought a record to be destroyed. Mike was in charge of the event and hired security for an expected crowd of 35,000,"<sup>5</sup> Dixon wrote. It was an underestimation that caused severe consequences. With Bill Veeck in the hospital for tests, Mike oversaw the promotion. Then, a surprise occurred. Bill Veeck showed up. "I'm worried about this promotion. It could be catastrophic,"<sup>6</sup> Veeck said.

Catastrophic, indeed.

Dahl's fans stormed the field like an army invading enemy territory. Attempts at stemming the overflow were for naught. Approximately 50,000 fans overwhelmed the stadium. It had a capacity of 41,000. When Dahl exploded the records, the energy magnified to a riotous level at Comiskey Park. The anti-disco protestors tore up the field, requiring police to disperse the crowd. Police dispersed the crowd, but the damage had been done. Because the field's conditions were not playable, the White Sox forfeited the second game of the doubleheader.<sup>7</sup>

Disco Demolition Night was a Disco Demolition Disaster.

During his ownership tenure with the St. Louis Browns, Veeck created his most memorable stunt, perhaps, when he sent Eddie Gaedel, a midget, to bat in a 1951 game. Veeck hired Gaedel to a one-day contract, insured

him for \$1,000,000, and paid him \$100. Gaedel's payment was decreed by the American Guild of Variety Artists—it was the minimum payment for a midget. Veeck said, "Still, if he was going to play in an official game he had to be signed to a standard player's contract, with a salary set on an annual basis and a guaranteed 30-day payment upon termination. That was no real problem, either. We computed the salary on the basis of \$100 a game and typed in an additional clause in which Eddie agreed to waive the 30-day notice."<sup>8</sup> Gaedel walked on four pitches, then retired to the bench as a pinch runner took his place.

Veeck accepted that his imagination cost him respectability in some corners of sports. About the Gaedel game, Veeck wrote, "It is not the identification I would have chosen for myself when I came into baseball. My ambitions were grander than that. And yet I cannot deny that it is an accurate one. I have always found humor in the incongruous, I have always tried to entertain. And I have always found a stuffed-shirt the most irresistible of all targets.

"I'm Bill Veeck, the guy who sent a midget up to bat?

"Fair enough."<sup>9</sup>

Certainly, Bill Veeck set new standards for promotional stunts in sports. His contributions to baseball went beyond eye-popping events rooted in entertaining fans, however. Three months after Jackie Robinson broke baseball's color line in April 1947 with the Brooklyn Dodgers, Larry Doby took the field for the Cleveland Indians, then owned by Veeck. Selected to expand racial integration in baseball, Doby was the first black player in the American League. It happened because Bill Veeck mandated it to happen. It was not a promotional stunt, either. It was, simply, a good move for the Indians.

An artillery accident during World War II required a leg amputation for Veeck. By signing Doby, Veeck proved his courage in baseball. By serving his country, Veeck proved his courage as an American patriot.

## Endnotes

1. Bill Veeck with Ed Linn, *Veeck As In Wreck* 25 (University of Chicago Press ed., 2001).
2. Paul Dickson, *Bill Veeck: Baseball's Greatest Maverick* 240 (Paperback ed., Walker Publishing Company, 2013).
3. *Id.* at 299.
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6. *Id.*
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8. Veeck at 14.
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David Krell is a freelance journalist, popular culture historian, and speaker. David's book about the Brooklyn Dodgers will be published in 2015 by McFarland. David is a member of the bar in New York, New Jersey, and Pennsylvania. His web site is [www.davidkrell.com](http://www.davidkrell.com).

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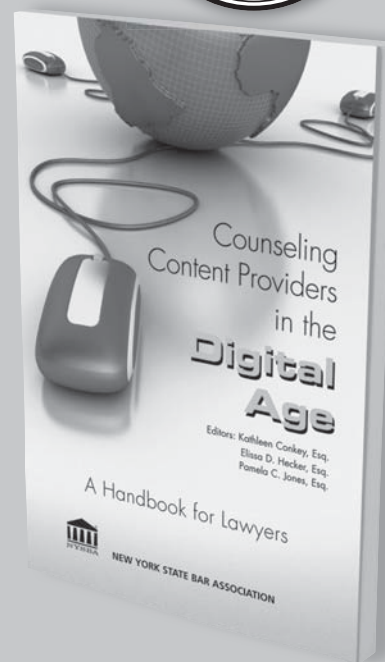
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