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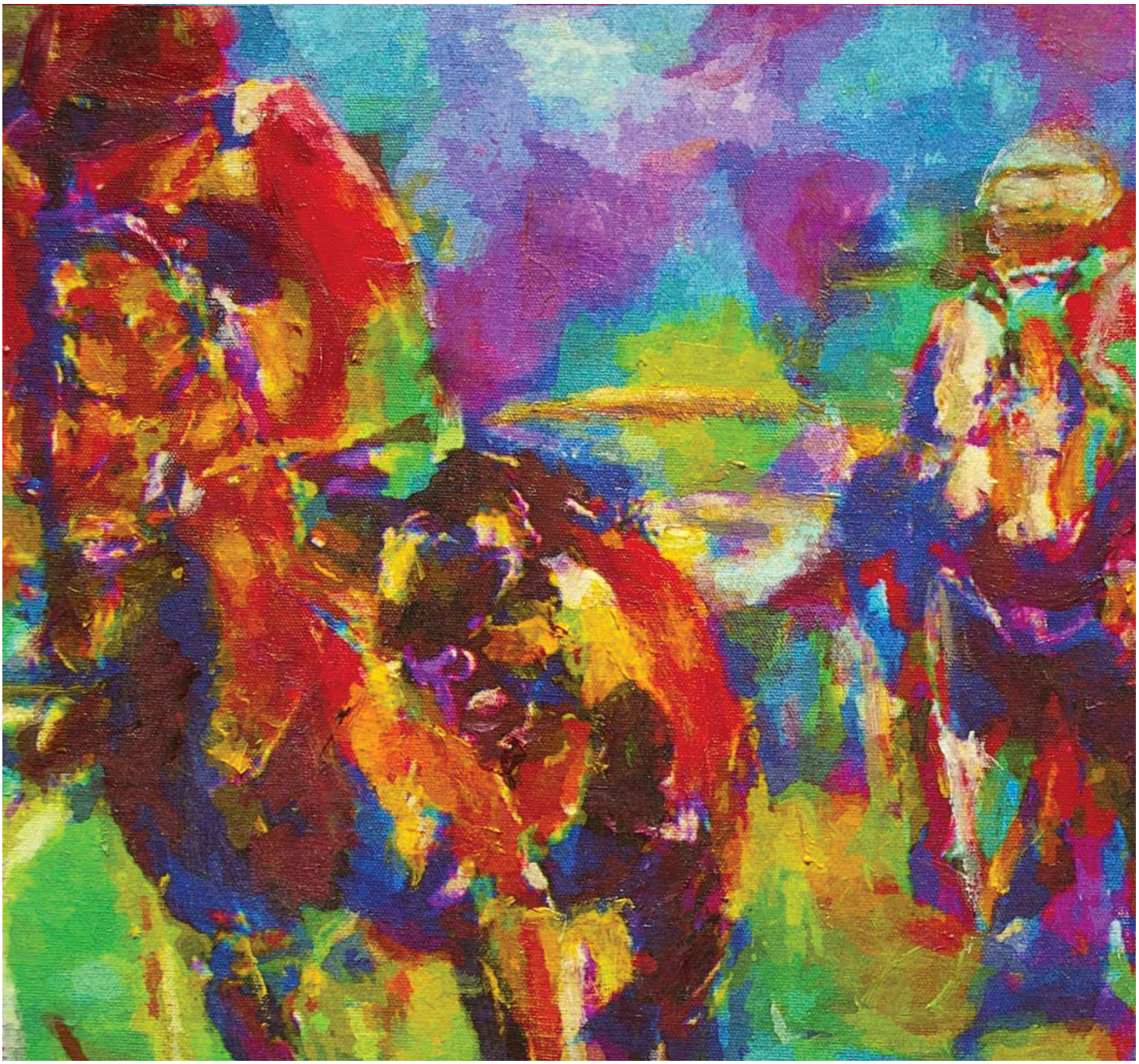
Entertainment, Arts and Sports Law Journal

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



www.nysba.org/EASL

Remarks from the Chair

EASL continues onward, or at least tries to, in the brave new world…the energy as a group comes from our diverse and terrific members, who regularly band together to ensure that the programs and advocacy efforts remain at their optimum, while still working each day on and in our different practice fields.

The Fine Arts and International Committees continue with their strong member outreach, with the Fine Arts Committee's Co-Chairs **Judith Prowda**, **Carol Steinberg** and **Elizabeth Conroy** presenting several excellent Brown Bag lunch presentations (see the Pro Bono Update), as well as contributing to one half of the programming for the annual Introduction to Entertainment Law program that was held on June 13th. The balance of programming that day focused on Visual Rights. Special thanks are due to the aforesaid Fine Arts Co-Chairs, as well as **Laura Godorecci**, for their invaluable assistance in organizing this event.

Our May 23rd Spring event was also excellent; much credit and gratitude goes to **MaryAnn Zimmer**, who chaired the event. There were three separate seminars: (1) Our usual "Litigation Update" by **Stan Soocher**, (2) a talk by **Ezra Doner** about "Film Revenue and Security Interests: A Case Study," as well as (3) **Barry Werbin's** observations about the "Impact of the Supreme Court's Extension of Copyright Protection to Cheerleader Uniform Applied Designs."

As we head toward the end of 2017, we hope to include a variety of non-CLE meetings from other committees, as well as another roundtable program from the Television and Film Committee that is similar to the inaugural one at last year's Annual Meeting (the transcript of that meeting is provided herein). Further, EASL, through its Legislation Committee, continues to promote and advocate for our members with regard to possible changes in laws and other governmental policies.

As I meet more attorneys who practice law, no matter the size of the firm or the area of focus, I am often inspired by the consistent level of awareness, interest and empathy that most of them demonstrate to their colleagues in different disciplines, and the way they remain interested in areas of law unfamiliar to them, such as ours, with openness and curiosity. Now that I am solidly in the mature part of my life and profession, I also really enjoy meeting with the "just minted" lawyers, and am constantly impressed by their focus and determination to succeed in a difficult field. My hope is that the EASL Section will continue to develop new ways for all attorneys to develop their professional skills and knowledge by providing support and a community in which to prosper.

Diane Krausz

Editor's Note

I am so pleased to offer a huge issue for your beach and travel reading pleasure. Included in this issue are articles from all EASL Section areas, as well as the *Memorandum in Support of Continued Funding in the Arts* that was sent on the Section's behalf to the Congressional New York Senators and Representatives regarding the National Endowments of the Arts and Humanities and the Corporation for Public Broadcasting. In addition, the Transcript from the Annual Meeting in January is published in full, along with citations to the cases referred to during the panels and which appeared in the CLE materials.

I look forward to hearing comments and to receiving submissions from you. Have a wonderful summer.

The next *EASL Journal* deadline is Friday, September 1, 2017

Elissa D. Hecker practices in the fields of copyright, trademark and business law. Her clients encompass a large spectrum of the entertainment and corporate worlds. In addition to her private practice, Elissa is also a Past Chair of the EASL Section, Co-Chair and creator of EASL's Pro Bono Committee, Editor of the EASL Blog, Editor of *Entertainment Litigation, Counseling Content Providers in the Digital Age*, and *In the Arena*, a member of the Board of Editors for the *NYSBA Bar Journal*, Chair of the Board of Directors for Dance/NYC, a Trustee and member of the Copyright Society of the U.S.A (CSUSA), former Co-Chair of CSUSA's National Chapter Coordinators, and Assistant Editor and member of the Board of Editors for the *Journal* of the CSUSA. Elissa is a repeat Super Lawyer, Top 25 Westchester Lawyers, and recipient of the CSUSA's inaugural Excellent Service Award. She can be reached at (914) 478-0457, via email at eheckeresq@eheckeresq.com or through her website at www.eheckeresq.com.

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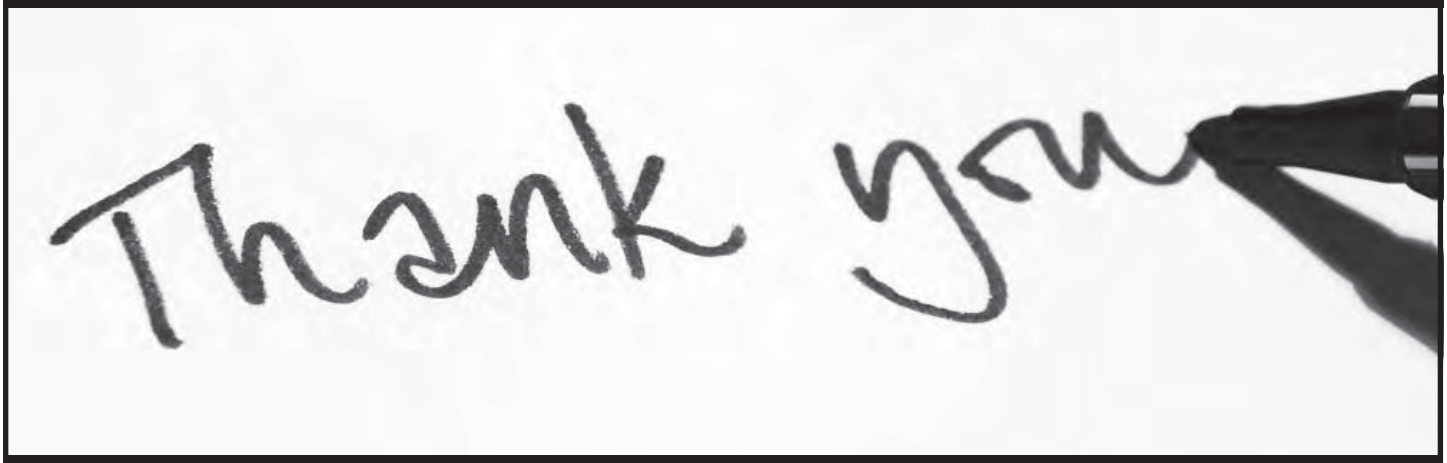
NEW YORK STATE BAR ASSOCIATION



As a New York State Bar Association member you recognize the value and relevance of NYSBA membership.

For that, we say thank you.

Your commitment as members has made NYSBA the largest voluntary state bar association in the country. You keep us vibrant and help make us a strong, effective voice for the profession.

Sharon Stern Gerstman
President

Pamela McDevitt
Executive Director

NYSBA

Memorandum in Support of Continued Federal Funding for the Arts

Entertainment, Arts and Sports Law Section

EASL #1 May 4, 2017

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW

The Entertainment, Arts and Sports Law Section Opposes the Fiscal Year 2018 Federal Budget Proposed by the President of the United States on March 16, 2017, to the Extent That It Would Eliminate Funding for the National Endowment for the Arts, the National Endowment for the Humanities and the Corporation for Public Broadcasting.

The arts and sciences, essential to the prosperity of the state and to the ornament and happiness of human life, have a primary claim to the encouragement of every lover of his country and mankind.

~ George Washington

Introduction

The Entertainment, Arts and Sports Law Section ("Section") of the New York State Bar Association ("NYSBA") opposes the proposed Fiscal Year 2018 federal budget (i.e., "America First—A Budget Blueprint to Make America Great Again"), submitted to Congress by the President on March 16, 2017, to the extent that it proposes eliminating all federal funds for the National Endowment for the Arts ("NEA") and the National Endowment for the Humanities ("NEH") (collectively the National Foundation on the Arts and the Humanities, "National Foundation"), and the Corporation for Public Broadcasting ("CPB"). The Section comprises more than 1,500 practicing lawyers who voluntarily joined the NYSBA and this Section.

"Although the budgets of the National Foundation and CPB are negligible as a percentage of the overall federal budget, these federal funds play a vital role in leveraging state, local and private sources of funding."

Our members represent individuals and businesses engaged in some segment of the entertainment, arts and sports industries within the Empire State. The Section provides a forum for education, interaction and development of best practices for lawyers who work in the television, motion picture, music, theater, visual arts, sports, publishing and related industries. It is the Section's mission to actively represent its members' best interests as well as "do the public good" by educating the public on critical issues of the day and providing our specialized knowledge and expertise to promote an intelligent and informed debate among our fellow citizens.

The Section strongly believes that the publicly funded initiatives and organizations that comprise significant components of these industries play an important role in (a) creating arts related projects—"content"—which can be seen, heard, and read the world over, (b) creating tax-paying jobs within the State of New York for residents, both lawyers and non-lawyers and (c) advancing the great diversity of American culture domestically and abroad. The Fiscal Year 2018 federal budget threatens to eliminate or significantly curtail advancement and dissemination of arts and sciences nationwide with substantial negative effect on the economy and culture of New York State. If adopted, this proposed budget eliminates an essential source of funding to nonprofit organizations in industries that already disproportionately rely on pro bono and reduced-rate legal services, further straining our profession's ability to meet the urgent demands of under-funded clients.

Although the budgets of the National Foundation and CPB are negligible as a percentage of the overall federal budget, these federal funds play a vital role in leveraging state, local and private sources of funding. Therefore, the Section respectfully urges Congress to categorically reject the proposed elimination of federal funds for the National Foundation and the CPB and keep the funding at the same level as the current fiscal year.

The NEA and the NEH

The National Foundation on the Arts and the Humanities Act of 1965 ("the Act") established the National Foundation to promote a broadly conceived policy of public support for the arts and humanities throughout the United States.[1] The NEA provides financial grants to individuals, nonprofit groups, and the states to support engagement in the creative and performing arts, while the NEH provides grants to support academic and scholarly humanistic teaching, learning, and research.

At the height of the Cold War, during February and March of 1965, and in contemplation of the benefits of allocating federal funds for such a foundation, Senate and House committees held hearings on the merits of the arts and humanities for the nation. Bills proposing the formation of the National Foundation were introduced in the House of Representatives and the Senate on March 10, 1965, and by September of 1965, a bill passed both chambers of Congress, which President Lyndon B. Johnson then signed into law.

Legislative history for the Act is robust. Congress heard over 50 witnesses during seven days of hearings discussing the proposed National Foundation. Three themes recur throughout deliberations of the Act: (1) the self-evident need to support the arts and humanities financially; (2) that such support is in the national interest; and, (3) that the federal government should accept the role and responsibility of providing this support.

"While congressional appropriations are the primary source of funding for both agencies, the NEA and NEH also accept tax-deductible donations including gifts of stock and other property."

One of the speakers, then President of Brown University Barnaby C. Keeney, a historian, a World War II veteran and the Chairman of the Commission on the Humanities at the American Academy of Arts and Sciences, the oldest learned society in the United States, stated:

> Only through the best ideas and the best teaching can we cope with the problems that surround us and the opportunities that lie beyond these problems. Our fulfillment as a Nation depends on the development of our minds; and our relations to one another depend upon our understanding of one another and of our society. The humanities and arts, therefore, are at the center of our lives and are of prime importance to the Nation and to ourselves. *Very simply stated, it is in the national interest that the humanities and arts develop exceedingly well* (emphasis added).

Members of Congress emphasized that the arts and humanities benefit the nation by facilitating understanding of other peoples and cultures and by cultivating a positive image of the United States throughout the world. Senator Edward Kennedy said that the arts and humanities "provide a vehicle for understanding and respect between men of all races and cultures."[2]

Congress did not intend the National Foundation to serve as the only or primary supporter of arts and humanities in the United States; instead, the Act was to serve as a catalyst that "stimulate[s] private philanthropy for cultural endeavors and State activities to benefit the arts." Congress noted that private financial support in the arts and humanities was "lagging," as the number of endowment and foundation gifts to arts and cultural institutions had been dropping. In order to encourage increased donations, Congress authorized the proposed agencies to match funds donated from private sources. Congress hoped that supporting the arts and humanities at the local level would permit a greater number of citizens to enjoy and appreciate the arts beyond those that resided in and around the nation's cultural centers.

While Congressional appropriations are the primary source of funding for both agencies, the NEA and NEH also accept tax-deductible donations including gifts of stock and other property. However, pursuant to ethics restrictions, these agencies may only accept donations from organizations that are eligible for an endowment grant, and thus any one donor could contribute "only if that organization confirms in writing that it has not received a grant in the past three years and does not intend to apply for a grant for the next three years." For Fiscal Year 2016, Congress appropriated $148 million (0.003 percent of the federal budget) to the NEA and the same amount to the NEH.

The CPB

The CPB was established by the Public Broadcasting Act of 1967, also signed into law by President Lyndon B. Johnson, in order to increase funding for public radio and television broadcasts. President Johnson noted at the signing of the Public Broadcasting Act that the country "wants more than just material wealth" and citizens "want most of all to enrich man's spirit." The CPB formed Public Broadcasting Service (PBS) in 1969 and National Public Radio (NPR) in 1970. The CPB aims to provide programs and services that "inform, educate, enlighten, and enrich the public and help inform civil discourse essential to American society."[3]

For many of our citizens, the first steps on the road to knowledge were provided by CPB aired television shows, such as *Thomas the Tank Engine*, *Sesame Street*, *Barney and Friends*, *Mr. Rogers' Neighborhood*, *The Electric Company* and *Reading Rainbow*. Eliminating those kinds of programs will likely reduce literacy, civic awareness, access to justice and could adversely affect the national security.

In fiscal year 2016, the annual budget for the CPB was $445 million, sourced nearly entirely from Congressional appropriations plus interest. Excluding administrative and other expenses, CPB's budget is allocated directly to grants for local public television stations, including support for PBS and NPR.

Upon release of the Fiscal Year 2018 budget proposal, the President and CEO of CPB released a statement

strongly opposing the cuts, stating that the CPB offers an "essential national service" in delivering fact-based, objective journalism nationwide, with tangible benefits including "increasing school readiness for kids 2-8, support for teachers and homeschoolers, lifelong learning, public safety communications and civil discourse."

This Section consistently supports civic engagement and education regarding our responsibilities in a representative democracy. These objectives are met by CPB funded programs, such as the acclaimed *Fred Friendly Seminars* on social and public policy (produced in New York City), which included the landmark series on *The Constitution: That Delicate Balance*. Such programming, unavailable elsewhere, promotes civic engagement, civic responsibility, and civic literacy. In a statement made on March 28, 2017 before the House Appropriations Committee, Patricia de Stacy Harrison, President and CEO of the CPB, informed the committee that:

> Education is the heart of our mission. Public media reaches 68 percent of all children age two to eight, providing educational content and services that are proven to prepare them for school, especially those low-income and underserved children who do not attend or cannot afford pre-school. An excellent example of how public media brings together high-quality educational content with on-the-ground work in local communities is CPB's work with the Department of Education's Ready To Learn program. More than 25 years ago, Congress recognized the reach and potential of public media to help disadvantaged children become better prepared to enter school. In 2015, Congress reaffirmed its support of Ready To Learn, furthering public media stations' and producers' work in coordinating and connecting STEM and literacy learning experiences for children across multiple platforms and outlets.

The Need for Continued Federal Funding of the NEA, the NEH and the CPB

When passing the enabling legislation creating the National Foundation, members of Congress and stakeholders discussed the role of arts and humanities in promoting education and ensuring employment—two areas of particular relevance today. Several witnesses, including the then-U.S. Commissioner of Education, mentioned the arts and humanities as necessary components of a well-rounded education program from grade school to university. Similarly, others considered how the arts and humanities provide opportunities for employment and encourage people to realize their potential in their chosen fields by allowing them to acquire and develop key skills, including expression and critical thinking. In short, many children in the United States and throughout the world benefited from programming made possible by the NEA and the NEH. To deny future generations the same opportunity is unconscionable.

"The range of the worthy projects funded by these federal agencies currently threatened with extinction is wide and diverse."

While the legislative history reveals that Congress generally agreed on the importance and the need for financial support of the arts and humanities, the hearings also addressed the federal government's role and responsibility in these areas. Congress concluded that the federal government's funding of the arts and humanities would set a national tone of interest and thus generate more visibility for the arts and humanities across the country. Considering the current overall $3.9 trillion federal budget, the National Foundation and CPB provide the basic fundamentals of an enlightened democracy at a combined *annual* cost of $2.29 per American. Cutting these agencies, while only a tiny fraction of the federal budget, would have a grossly disproportionate adverse impact on the cultural prosperity of the nation.

Organizations funded by the National Foundation and the CPB consistently create multitudes of jobs, and are consistently in need of lawyers to facilitate transactions, oversee board governance, and advise on myriad issues, including business transactions, real estate, employment, and financial matters. In addition, much of the work that lawyers in our Section do involves protecting and exploiting copyrighted works. Copyright intensive industries accounted for nearly 5.6 million jobs in 2014. In the same year, intellectual property related revenue in the U.S. was nearly $138 billion.

The range of the worthy projects funded by these federal agencies currently threatened with extinction is wide and diverse. While some of these have availed themselves of legal counsel purely in a transactional capacity, others have used funds from the NEA to conduct legal feasibility studies of their archival and multi-media Internet-based technology projects,[4] and some have gone so far as to offer legal counsel and necessary research tools to arts-related organizations to be able to preserve their intellectual and tangible properties.

Many cultural institutions, some based in New York, which are now part of "Main Street" America, owe their very existence to these federally funded grants; among them are the Martha Graham Dance Company, the American Ballet Theater, the American Choral Foundation, Children's Television Workshop and its principal television program *Sesame Street*. Each has influence throughout our

nation and around the world, and each needs lawyers to guide it through the process of fulfilling its mission.

Some of our nation's most prolific film directors owe their careers to federal funding of the arts as well: Quentin Tarantino (*Reservoir Dogs, Pulp Fiction, The Hateful Eight,* among others), Paul Thomas Anderson (*Hard Eight*, nominated for six Academy Awards), Wes Anderson (*Bottle Rocket, The Grand Budapest Hotel* (nominated for nine Academy Awards), Darren Aronofsky (*Pi, The Wrestler, Black Swan, et al.*).

Blockbuster and small esoteric exhibitions such as *The Open Road: Photography and the American Road Trip*, *Across Generations: Puerto Rican Identity and the Changing Self*, *Transatlantic Encounters: Latin American Artists in Paris between the Wars, 1918-39*, *Color as Field: American Painting, 1950-75*, or the exhibitions dedicated to the work of African American artist Lorna Simpson, and Russian and Hungarian Jewish immigrants Man Ray and Harry Houdini, have benefited immeasurably from the modest support of the NEA funds.

Such prominent organizations as the Volunteer Lawyers for the Arts ("VLA") and the International Foundation for Arts Research ("IFAR"), both based in New York, have been multiple-time recipients of NEA funding to further their missions. While the amounts of their annual grants range from $15,000 to $40,000, the reach of their work by far exceeds the funds received. One of VLA's funded projects is called *Artists Over Sixty*. It provides "legal services and education programs primarily for senior artists in need…through free legal clinics and in-house consultations, where artists receive advice on arts- and age-related legal issues from volunteer attorneys. Education programs, including classes, workshops, and lectures, [are] tailored to meet the individual needs of senior artists and the attorneys who serve them."

"Providing seed money for developing sophisticated arts endeavors is important to our culture and our heritage. For America to continue to be, as President Lincoln said, 'the last best hope for mankind,' we need to keep doing all the things we do well, including creating art and culture that is well received the world over."

IFAR publishes a critically acclaimed journal, which "discusses scholarly, legal, and ethical issues concerning the ownership, transfer, and authenticity of art objects." Published quarterly since 1998, the journal covers a range of art world issues, such as attribution/authenticity; ownership; theft; provenance; and other legal, ethical, and scholarly matters concerning art objects. Each issue also contains the *Stolen Art Alert*, which has enabled the recovery of scores of stolen art works. Development of a digital version will enable the journal to reach a larger audience.

Conclusion

According to the economic data that tracks arts and cultural jobs per state, the arts and cultural sector contributed $729.6 billion or 4.2 percent to the U.S. economy in 2014. Once we add the entertainment industries to this equation, New York State's keen interest in supporting the arts and humanities comes into great contrast with the proposal to gut the federal funding for the NEA, the NEH and the CPB. In the last two decades, the contribution of arts and culture to the nation's gross domestic product grew by 35.1 percent. New York State has almost half a million arts-related workers, their compensation totaling over $45 billion.[5] This sector is rigorously aided by the members of our legal community. This symbiotic relationship is but one of the reasons why this Section strongly supports continued federal funding the NEA, the NEH and the CPB. We have all been touched and enriched by the product of these entities.

Providing seed money for developing sophisticated arts endeavors is important to our culture and our heritage. For America to continue to be, as President Lincoln said, "the last best hope for mankind," we need to keep doing all the things we do well, including creating art and culture that is well received the world over. The modest funding (in the context of the entire budget of the U.S. government) that these three entities receive must not be erased, but should be embraced, allowing American culture to continue to flourish for all of its citizens.

On behalf of the 1,500 members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association, we endorse the continued support of the arts, we oppose the budget recommendations made in "America First—A Budget Blueprint to Make America Great Again," and urge Congress not to cut federal funding for the NEA, the NEH and the CPB.

Chair of the Section Diane F. Krausz, Esq.

Endnotes

1. 20 U.S.C. § 951 (1965).
2. S.REP.NO.89-300 (1965).
3. CPB Goals and Objectives as adopted by the Board of Directors on February 4, 2016, http://www.cpb.org/aboutcpb/goals/goalsandobjectives.
4. See for example, George Balanchine Foundation, Inc. project entitled "Media Text" created to enhance online history education in 2000-2001. Source: https://apps.nea.gov/grantsearch/SearchResults.aspx.
5. Arts and Cultural Production Satellite Account (ACPSA), 2014; U.S. Bureau of Economic Analysis, available at https://www.arts.gov/sites/all/modules/custom/nea_infographics/adp-13/.

What's Happening at EASL?

Upcoming Entertainment, Arts and Sports Law Section Event:

EASL's Annual Music Business and Law Conference

Friday, November 17, 2017 | Live CLE Program | 6.0 MCLE Credits/7.0 CPE Credits
New York Law School | 185 West Broadway | New York City

This conference will once again feature a variety of speakers from law, finance, business and technology. Join us as we bring you up to date on the latest trends and look ahead to opportunities and challenges in the music industry.

Panel Highlights Include:
Bankruptcy and Copyrights | Global Database Efforts | Licensing Music for Broadway | It's Still About the Money—Royalty and Licensing Audits | Trends in Branding and Merchandising | Annual Review of Copyright Law and Litigation | Music Publishing and Digital Media | Taking the Band on the Road—Tour Accounting | Music Business Basics—Publishing / Recording/Sampling | Ethics: Legal and Accounting

Luncheon Keynote Speaker: Willard Ahdritz, CEO of Kobalt:
Willard Ahdritz founded Kobalt in 2000 with a mission: Making the music industry more fair and rewarding for creators. He wanted to give artists, songwriters, musicians, labels and publishers the freedom and transparency they needed to build their careers.

Registration Includes:
Full day continuing education program (this program is not transitional and therefore does not qualify for newly admitted attorneys), continental breakfast, refreshments and luncheon.

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Entertainment, Arts and Sports Law Section Blog

The Blog provides a Forum and News Source on Issues of Interest. The Blog acts as a new informational resource on topics of interest, including the latest Section programs and initiatives, as well as provides a forum for debate and discussion to anyone in the world with access to the Internet. It is available through the New York State Bar Association website at http://nysbar.com/blogs/EASL

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

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EASL Member Community

What Are Member Communities?
The member communities are private, online professional networks, built on the concept of listserves that offer enhanced features such as collaboration tools and document libraries. They offer you a variety of tools to help you connect, network and work collaboratively with fellow NYSBA members.

To participate, each member has a profile based on their basic membership information. You can enhance your profile by adding your photo, professional affiliations, volunteer activities and other accomplishments. You have the option to pull information from your LinkedIn profile, or even link to your personal blog or other social media feeds.

How Can I Use It?
Seamlessly integrated with nysba.org, no additional login or password is needed to enter a community. You just need to be a NYSBA member.

Just like a listserv, members of a specific community can share information with one another using email. Documents are emailed among members using links as opposed to email attachments, as attachments can be problematic with spam filters or limits on file size. Members can receive community emails as the messages are posted, or in digest form. These resource libraries have no space limitations, accept all file types, and can be organized using folders. Any member of a community can contribute to the library.

If you are a member of a NYSBA Section, Committee or Task Force, and working to develop a report, white paper, policy change or recommendation, an online community is the perfect forum for you and your colleagues. You have a dedicated space designed to facilitate an efficient and collaborative work effort, find us at www.nysba.org/easlcommunity.

Pro Bono Update

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

Speakers Bureau

The Pro Bono Steering Committee, in collaboration with the Fine Arts Committee, has produced a series of wonderfully successful and well-attended Brown Bag lunches. During our last one, lawyers from the City's Department of Cultural Affairs (DCLA) discussed their new and ongoing initiatives. A dynamic and very extensive presentation was made by DCLA's General Counsel Kristin Sakoda. Deputy General Counsel Laura Wnek and Attorney Amanda Jacobsen also discussed current programs and issues. Carol Steinberg, Pro Bono Committee Steering Committee and Fine Arts Committee Co-Chair, organized the lunch in conjunction with EASL member Amanda Jacobson. Barry Werbin of Herrick, Feinstein generously provided space and comments for the program.

"Inside the Inner Workings of Auction Houses" is the next Brown Bag lunch, which will be held at Hughes Hubbard & Reed on July 11th. It is being organized by EASL members Lena Saltos and Elizabeth Urstadt, along with Carol Steinberg, and will consist of five esteemed attorneys, including Sherri North Cohen of Bonham's, Margaret J. Hoag of Christie's, Jonathan Illari of Phillips, Frank Lord of Herrick, and Daniel Weiner of Hughes Hubbard & Reed.

We welcome the involvement of EASL members in suggesting ideas for and planning more lunches. Please contact Carol Steinberg at elizabethcjs@gmail.com to discuss.

DO THE PUBLIC GOOD
VOLUNTEER FOR PRO BONO

Clinics

A very successful Pro Bono Clinic was held on Sunday March 5th, in conjunction with the IP Section, at Dance/NYC's Annual Symposium, held at the Gibney Dance Center.

Thank you to the following volunteers who worked their pro bono magic:

Cheryl L. Davis
Gregory Desantis
Carol S. Desmond
Andrew Fraser
Elissa D. Hecker
Kathy Kim
Anne LaBarbera
Merlyne Jean-Louis
Diane Krausz
Amy A. Lehman
Sonya Matejovic
Kimberly M. Maynard
Robert J. Reicher
Ashley Tan
Kamanta Kettle Villaman
Adam Weissman

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Clinics

Elissa D. Hecker and Kathy Kim coordinate legal clinics with various organizations.

- **Elissa D. Hecker, eheckeresq@eheckeresq.com**
- **Kathy Kim, kathy@productions101.com**

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- **Carol Steinberg, elizabethcjs@gmail.com**
  or **www.carolsteinbergesq.com**

Litigations

Irina Tarsis coordinates pro bono litigations.

- **Irina Tarsis, tarsis@itsartlaw.com**

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

Find details on programs, meetings and much more on our Website at www.nysba.org/EASL

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

Law Student Initiative Writing Contest

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

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

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the EASL Journal must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form**: Include complete contact information, name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **Friday, September 1, 2017.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

Topics

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

Judging

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

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

Phil Cowan Memorial/BMI Scholarship Writing Competition

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

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

The Competition

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

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

Eligibility

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

Free Membership to EASL

All students submitting a paper for consideration, who are NYSBA members, will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member) for a one-year period, commencing January 1st of the year following submission of the paper.

Yearly Deadlines

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

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

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

Submission

All papers should be submitted via email to Beth Gould at bgould@nysba.org no later than December 12th.

Prerogatives of EASL/BMI's Scholarship Committee

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

Payment of Monies

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

About BMI

BMI is an American performing rights organization that represents approximately 700,000 songwriters, composers, and music publishers in all genres of music. The non-profit making company, founded in 1940 collects license fees on behalf of those American creators it represents, as well as thousands of creators from around the world who chose BMI for representation in the United States. The license fees BMI collects for the "public performances" of its repertoire of approximately 10.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

About the New York State Bar Association/EASL

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

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

NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

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

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

Can Too Much Fictionalization in "BioPics" and "DocuDramas" Void "Newsworthiness" in Right of Privacy Cases?

By Pamela Jones, Television and Radio Committee Co-Chair, with the assistance of Lindsay Butler

On February 23, 2017, the New York State Supreme Court's Appellate Division for the Third Department revived convicted murderer Christopher Porco's right of privacy lawsuit against Lifetime Entertainment Services, LLC (Lifetime or Network) in a decision that compels television network and studio lawyers to undertake a careful risk assessment prior to green-lighting projects based on biographical stories.[1] The Appellate Division overturned the lower court's motion to dismiss in favor of Lifetime.

In 2013, Christopher Porco sought a temporary restraining order to enjoin Lifetime from airing a movie it had in production about the crime for which Christopher Porco had been convicted.[2] Although he had never seen the movie,[3] Porco had argued that the "movie is a knowing and substantially fictionalized account, inspired by a true story,"[4] and the unauthorized use of Porco's name, likeness and personality for purposes of profit violated Porco's statutory right of privacy under New York law.[5]

"Numerous media companies filed amicus briefs, noting that many well-known movies based on the lives of real people would never have been made had consents been required."

In its defense, the Network argued that the essential elements of the movie were "true and accurate…as were details of the crimes, criminal investigation and the conviction of Porco."[6] Furthermore, the Network argued that uses of Porco's name and likeness concerned a newsworthy matter of public interest, and were therefore exempt from liability under the state of New York's right of privacy statute.

To the surprise of many, New York State Supreme Court Justice Robert J. Muller ruled in favor Porco, forcing the Network to request an emergency hearing by the New York Supreme Court's Appellate Division for the Third Department.[7] The Appellate Division vacated the temporary restraining order; the movie aired on March 23, 2013, and the Supreme Court eventually granted Lifetime's motion to dismiss the cause of action.[8] These dramatic events captured the attention of the Hollywood press. Numerous media companies filed amicus briefs, noting that many well-known movies based on the lives of real people would never have been made had consents been required.[9]

After the injunction was vacated and the Network won its motion to dismiss,[10] Porco appealed, arguing once again that the movie script had been so fictionalized that it could not qualify as a newsworthy event or matter of public interest, and that once stripped of this privilege, the Network's movie violated Porco's right of publicity under New York Civil Rights Law §50.[11]

"The New York courts have not wanted to intrude upon 'constitutional values in the area of free speech' and the editorial freedom of the press."

A right of publicity cause of action in New York has three components: (1) the use of a living person's name, portrait or picture; (2) for advertising purposes or for purposes of trade; and (3) without prior written consent.[12] Courts have held that the statute is to be narrowly construed by creating "a broad privilege for the legitimate dissemination to the public of news and information (the newsworthy exception), which includes matters of the public interest not readily recognized as "hard news."[13] The New York courts have not wanted to intrude upon "constitutional values in the area of free speech" and the editorial freedom of the press.[14] Accordingly, they have viewed "newsworthy" articles as outside the parameters of trade or advertising. They have held "time and again" that there can be no liability for the use of a person's picture to illustrate a matter of public interest unless the name or likeness has "no real relationship to the article or the article is an advertisement in disguise."[15] A "real relationship" translates as "newsworthiness," and has been found as a "matter of law" in New York even where the "juxtaposition…could reasonably have been viewed

as falsifying or fictionalizing the plaintiff's relationship to the article."[16]

For the purposes of evaluating Lifetime's motion to dismiss the plaintiff's cause of action, the court reviewed the facts and circumstances in a light most favorable to the plaintiff. The issue, as formulated by the Appellate Division, was whether Porco's complaint had alleged facts sufficient to support his claim that Lifetime had knowingly produced a "materially and substantially fictitious biography."[17] If Porco were found to have met his burden, the possibility arises that the Network would be unable to avoid liability under the newsworthiness exception and Porco's right of privacy under §§ 50 and 51 may have been violated.[18]

In its analysis, the court identified a series of New York Second Circuit Court of Appeals right of privacy cases concerning "invented biographies of the plaintiffs' lives."[19] In these cases, the court found application of the newsworthy exception inapplicable, because gross fictionalization had eviscerated the newsworthiness of the event. Among this "older" line of cases were *Spahn v. Julian Messner, Inc. (Spahn)*[20] and *Binns v. Vitagraph Company of America (Binns).*[21, 22] These were the same cases used by the losing plaintiff in the *Messenger v. Gruner + Jahr* (*Messenger)* where the court upheld the newsworthiness exception using the "real relationship test."[23]

"The court summarized the letter as stating that it was the hope of the producer that the documentary film intended to accompany the movie would provide the mother's family with the opportunity to state its position in a non-factual program after the movie aired."

The Court of Appeals for the Second Circuit in *Messenger* saw so "no inherent tension" between the "*Finger-Arrington-Murray* line and the *Binns-Spahn* line," because neither *Binns* nor *Spahn* concerned the use of a photograph to illustrate a newsworthy article.[24] The court in *Messenger* cited the cases of *Binns* and *Spahn* as involving "substantially fictional biographies," which amounted to "invented biographies of plaintiffs' lives" that were "attempts to trade on the persona" of the plaintiffs.[25] In both of these cases, the court concluded that "a work may be so infected with fiction, dramatization or embellishment that it cannot be said to fulfill the purpose of the newsworthy exception."[26] In *Spahn*, the court held that while a truthful biography would be protected under the newsworthy exception, the doctrine could not be extended to a "substantially fictitious biography" whose protection was "unnecessary."[27] *Binns* involved a fictionalized story about the "true occurrence" of the "plaintiff's role in rescuing passengers of shipwrecked boat," which was held to be actionable under §§ 50 and 51.[28] The Second Circuit in *Messenger* held that the facts were "controlled by *Finger* and not by *Binns* nor *Spahn*."[29]

In support of his claim that the Lifetime movie was a "knowing and substantially fictionalized account about the plaintiff and the events that led to his incarceration," Porco presented the court with a letter written prior to the film's premiere, by a producer associated with the film, to Porco's mother.[30] The court summarized the letter as stating that it was the hope of the producer that the documentary film intended to accompany the movie would provide the mother's family with the opportunity to state its position in a non-factual program after the movie aired. Evaluating the letter in a light most favorable to the plaintiff, the court determined that the producer's letter served as an objective indication that the Lifetime movie was fictitious and, as a result, that the plaintiff had not failed to allege a sufficient degree of fictionalization or the defendant's knowledge of the fictionalization.[31]

"For media organizations, the outcome of this case has the potential of impacting the production of 'films and TV show about real-life people' and raises broader First Amendment questions."

Rather than apply the more familiar three step analysis used by the Second Circuit to evaluate liability, including whether (i) the subject falls under the "newsworthy exception", as a matter of law, (ii) if there is a "real relationship" between the movie and the actual events, and whether (iii) the movie is an advertisement in disguise, the Appellate Division relied upon a rarely applied line of much older case law as if there were a longstanding exception to newsworthiness for cases dealing with the "fictionalization" of biographical stories. However, by holding that Porco succeeded in stating "a cause of action cognizable under the law," because the Lifetime portrayal was a "material and substantial falsity or fictionalization," suggests that such a development might be possible.

On April 3, 2017, Lifetime submitted a bid for re-argument.[32] Amici curiae were submitted by HBO, NBCUniversal, The New York Times Company, The Reporters Committee for Freedom of the Press, and various news entities.[33] For media organizations, the outcome of this case has the potential of impacting the production of "films and TV show about real-life people" and raises broader First Amendment questions.[34]

Endnotes

1. *Porco v. Lifetime Entm't Servs., LLC*, 147 A.D.3d 1253, 1253 (3rd Dept. 2017).
2. *Id.*
3. Eriq Gardner, *Judge Bans Airing of Lifetime TV's Chris Porco Movie (Exclusive)*, The Hollywood Reporter (Mar. 20, 2013), *available at* http://www.hollywoodreporter.com/thr-esq/lifetimes-chris-porco-movie-banned-429988.
4. *Porco v. Lifetime Entm't Servs., LLC*, 9 N.Y.S.3d 567, 568 (Sup. Ct. Clinton County 2015)
5. New York Civil Right Law sections 50 and 51 are the only one of the four Prosser privacy torts recognized in the state of New York. *See* William L. Prosser, *Privacy*, 48 Cal. L. Rev 383 (1960).
6. Memorandum in Support of Emergency Motion by Defendant-Appellant to Vacate or Stay a Prior Restraint on Speech, *Porco v. Lifetime Entm't Servs*., LLC, 147 A.D.3d 1253 (No. 2013/90).
7. Gardner, *supra* note 3.
8. *Porco*, 9 N.Y.S.3d at 568.
9. Eriq Gardner, *MPAA: Films and TV Shows About Real-Life People Jeopardized by 'Porco' Ruling*, The Hollywood Reporter (Apr. 4, 2017), *available at* http://www.hollywoodreporter.com/thr-esq/mpaa-films-tv-shows-real-life-people-jeopardized-by-porco-ruling-991163.
10. *Porco v. Lifetime Entm't Servs.*, LLC, 116 A.D.3d 1264, 1265 (3rd Dept. 2014).
11. A person, firm or corporation that uses for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person without having first obtained the written consent of such person, or if a minor of his or her parent or guardian, is guilty of a misdemeanor.
12. *Roberson v. Rochester Folding Box Co*., 171 N.Y. 538, 554-57 (N.Y. 1902).
13. *Messenger v. Gruner + Jahr Printing & Publ'g*, 94 N.Y.2d 436, 445-46 (2000).
14. Kathleen Conkey, et al., Counseling Content Providers in the Digital Age: A Handbook for Lawyers 81-83 (2010).
15. *Id.*
16. *Messenger*, 94 N.Y.2d at 436.
17. *Porco*, 116 A.D.3d at 1265.
18. *Id.*
19. *Id.*
20. *Spahn v. Julian Messner, Inc*., 21 N.Y.2d 124, 126-29 (1967).
21. *Binns v. Vitagraph Co. of Am.*, 210 N.Y. 51, 58 (1913).
22. *See, e.g. Spahn v. Julian Messner, Inc.*, 18 N.Y.2d 324 (1966); Lerman v. Flynt Distrib. Co., 745 F.2d 123, 135 (2d Cir. 1984) (citing *Spahn*, noting that despite the involvement of a newsworthy matter of public interest, a plaintiff might be entitled to sanctions where (1) the use has no real relationship to the article and functions as "an advertisement in disguise" or (2) where defendant's use was "infected with material and substantial fiction or falsity and the work was published with knowledge of such falsification or with a reckless disregard for the truth.").
23. *Messenger*, 94 N.Y.2d at 436; *see also Int'l Finger v. Omni Publications Int'l, Ltd.*, 77 N.Y.2d 138 (1990); *Arrington v. N.Y. Times Co.*, 55 N.Y.2d 433, 440 (1982); *Murray v. New York Mag. Co.*, 318 N.Y.S.2d 474.
24. *Messenger*, 94 N.Y.2d at 436.
25. *Id.*
26. *Id.*
27. *Id.* (citing *Spahn*, 21 N.Y.2d at 126-29).
28. *Id.* (citing *Binns*, 210 N.Y. at 58).
29. *Id.*
30. *Porco*, 147 A.D.3d at 1253.
31. *Id.*
32. Motion for Leave to Reargue or, in the Alternative, for Leave to Appeal to the New York State Court of Appeals, *Porco*, 147 A.D.3d at 1254-55 (No. 522707).
33. *Id.*; Notice of Motion for Leave to File Brief as Amici Curiae in Support of Defendant-Respondent's Motion for Leave to Appeal.
34. Eriq Gardner, *MPAA: Films and TV Shows About Real-Life People Jeopardized by 'Porco' Ruling*, The Hollywood Reporter (Apr. 4, 2017), *available at* http://www.hollywoodreporter.com/thr-esq/mpaa-films-tv-shows-real-life-people-jeopardized-by-porco-ruling-991163.

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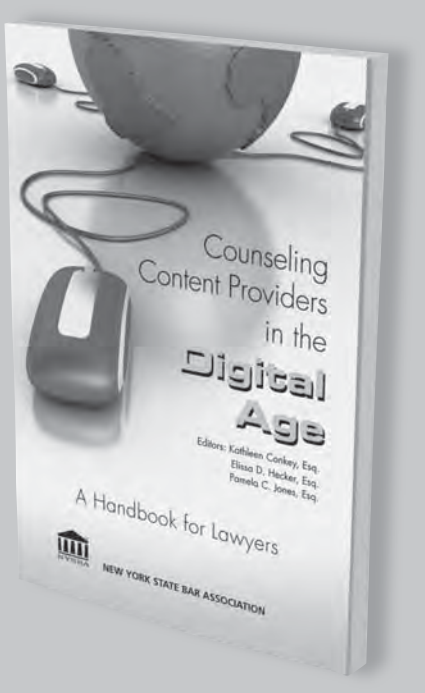

For as long as there have been printing presses, there have been accusations of libel, invasion of privacy, intellectual property infringements and a variety of other torts. Now that much of the content reaching the public is distributed over the Internet, television (including cable and satellite),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

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

Table of Contents:

Introduction; Defamation; The Invasion of Privacy Torts; Right of Publicity; Other News-gathering Torts; Copyright Infringement; Trademark Infringement; Rights and Clearances; Errors and Omissions Insurance; Contracting with Minors; Television Standards and Practices; Reality Television Pranks and Sensitive Subject Matter; Miscellaneous Steps in Pre-Broadcast Review.

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Sports and Entertainment Immigration:
Buy American and Hire American? It's Not That Simple.

By Michael Cataliotti

Previously, we discussed what we know, what we do not know, and how to answer the bevy of questions that were coming about from international artists, entertainers, athletes, and the like. We dove into the concerns that many folks have in light of the new administration and its ever-changing positions, specifically with respect to immigration.

In this installment of Sports and Entertainment Immigration, we take up a newly signed Executive Order titled, "Presidential Executive Order on Buy American and Hire American,"[1] and look at its potential impact, specifically as it could relate to entrepreneurs, as well as some other recent happenings in the world of sports and entertainment immigration. Fans of sports or those who represent athletes, trainers or the like will be most interested in this installment.

"These three paragraphs amount to little more than blustery language designed to be something more: They call for the issuance of reports, the coordination of brainstorming sessions, and the requirement for the heads of four departments to make reformatory suggestions to the H-1B visa program."

Executive Order: Buy American and Hire American

Between the two aspects—buying American and hiring American—we are more concerned with the latter, due to its direct and potentially immediate impact on those entering the U.S. from outside its borders. We have seen that the Trump administration (as well as many representatives in Congress) is not fond of the H-1B visa program. It has demonstrated this by terminating premium processing[2] for H-1B petitions that have been submitted as of April 1, 2017,[3] as well as the array of commentary about the program both before and after the election.[4] However, there are only three paragraphs in the Executive Order that pertain to hiring American, none of which are particularly worrisome. They read as follows:

> Sec. 2. Policy. It shall be the policy of the executive branch to buy American and hire American.
>
> […]
>
> (b) Hire American. In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(5)).
>
> […]
>
> Sec. 5. Ensuring the Integrity of the Immigration System in Order to "Hire American." (a) In order to advance the policy outlined in section 2(b) of this order, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse.
>
> (b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.

These three paragraphs amount to little more than blustery language designed to be something more: They call for the issuance of reports, the coordination of brainstorming sessions, and the requirement for the heads of four departments to make reformatory suggestions to the H-1B visa program. As described by Glenn Thrush, Nick Wingfield, and Vindu Goel in the *New York Times*, "The order was a means to end the 'theft of American prosperity,' which he said had been brought on by low-wage im-

migrant labor. Yet the order calls for a series of relatively modest steps."[5]

"We have a legitimate cause for concern with this based upon, once again, the historical precedent provided from our current President and Attorney General, as well as the Secretary of Homeland Security."

However, the one line from which we can attempt to draw a conclusion is that the goal of the H-1B visa program is to allow businesses to employ "the most-skilled or highest-paid" individuals available, which the *New York Times* article does not hesitate to do. By quoting a venture capitalist, the CEO of GoDaddy, and the CEO of a start-up in Silicon Valley, who conclude, respectively, that the Executive Order will maintain the status quo, enhance the workforce, or harm the workforce, the article drowns the words of Senator Schumer, who stated, "This does nothing. Like all the other executive orders, it's just words—he's calling for new studies. It's not going to fix the problem. It's not going to create a single job." On this point, I think that Senator Schumer is absolutely correct.

Nonetheless, the Executive Order is neither terrible, nor good. It does not move to terminate the H-1B visa program, but it also does not move to make any real change to the program, which needs significant reforms for it to be useful.

To the former, it is not terrible that the program is still around and that Mr. Trump is seeking input about how to modify the H-1B visa program from the heads of the divisions that have roles in administering and enforcing it. The concern, obviously, is that those individuals will make recommendations that will make the program less functional, rather than more so. We have a legitimate cause for concern with this based upon, once again, the historical precedent provided from our current President and Attorney General, as well as the Secretary of Homeland Security,[6] and to a far lesser extent than the others, the current Secretary of Labor.[7] It is also not terrible that those recommendations are intended to make the H-1B visa program more applicable to "the most-skilled or highest-paid petition beneficiaries," though this must be done so with great care, sincere consideration, and a real sensitivity for the needs of U.S. employers and value added by H-1B workers.

To the latter, it is not good that the Executive Order leaves both proponents and opponents of the visa program in limbo, wondering what to make of its future viability and functionality, and how the order may apply to other, non-H-1B programs.

The International Entrepreneur Rule and the Executive Order

For example, with respect to § 2(b), there is concern that this could cause harm to the International Entrepreneur Rule. Though presently suspended due to the Administration's freeze on any and all new or pending regulations,[8] the International Entrepreneur Rule has been pending implementation since it was published in the Federal Register in January 2017 and scheduled for enactment this July. As § 2(b) of the Order indicates that, "the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, and consistent with applicable law, propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate," there is cause for concern that those new rules could extinguish the International Entrepreneur Rule, which would be a potential alternative for the individual who might otherwise pursue an H-1B visa.

"The one area in which the H-2B is and has been of particular value is horse racing or, simply, at the track(s)."

Yet all of this is concerned with the H-1B visa or those who might otherwise benefit from the H-1B visa program. What about other issues in the world of sports and entertainment?

Other Developments in Immigration: H-2B and Horse Racing

This brings us to the H-2B. Though we touched upon it only once way back in our first installment of Sports and Entertainment Immigration,[9] wherein we indicated that it served no value for us (which was valid at that time and remains so for many in the sports and entertainment industries), since then, changes have been made with respect to its processing, thus making it more noticeable to an increasing number of areas or industries.

The one area in which the H-2B is and has been of particular value is horse racing or, simply, at the track(s). Taken directly from the United States Citizenship and Immigration Services (USCIS), the fundamentals of H-2B classification are that the entity seeking to employ the non-U.S. citizen demonstrates that:

- There are not enough U.S. workers who are able, willing, qualified, and available to do the temporary work;
- Employing H-2B workers will not adversely affect the wages and working conditions of similarly employed U.S. workers; and

- Its need for the prospective worker's services or labor is temporary, regardless of whether the underlying job can be described as temporary. The employer's need is considered temporary if it is a:

  » **Seasonal need**—A petitioner claiming a seasonal need must show that the service or labor for which it seeks workers is:

  - Traditionally tied to a season of the year by an event or pattern; and

  - Of a recurring nature.

  Note: You cannot claim a seasonal need if the time period when you do NOT need the service or labor is:

  Unpredictable;
  Subject to change; or
  Considered a vacation period for permanent employees;

OR

  » **Peakload need**—A petitioner claiming a peakload need must show that it:

  - Regularly employs permanent workers to perform the services or labor at the place of employ ment;

  - Needs to temporarily supplement its permanent staff at the place of employment due to a seasonal or short-term demand; and

  - The temporary additions to staff will not become part of the employer's regular operation.[10]

Dissecting these provisions is not pertinent to our brief discussion here, but what is pertinent is that we must take into consideration that a majority, if not nearly all, of the workers in the stables at the tracks are immigrants and that the visa classification they benefit most from is inextricably linked to the H-1B.

"It also does not help matters that the jobs at hand often consist of cleaning the stalls and catching urine, neither of which is glamorous, and both of which are often odious and not so enticing to most."

It is unsurprising then, that as with the H-1B, the H-2B requires a labor certification for approval and has a cap on the quantity of visas issued in any given fiscal year.[11] It is also similar to H-1B classification, in that those who had been granted H-2B status during a particular period of time and entered the U.S. under H-2B status thereafter were not counted against the cap; that is, until September 30, 2016, when Congress did not reauthorize the program. Of course, this action pre-dates the current administration, but taking its attitude toward immigrant labor, it is understandable that a considerable number of workers are concerned about their status within the U.S.

Primarily from South and Central America, these individuals "have become indispensable at Churchill Downs and other tracks, people in the industry say. Now, [however], fear is spreading that a Trump administration crackdown on immigration will be a calamity both for the tracks and for many of their workers."[12] Furthermore, while immigrant workers are concerned about their stability within the U.S., employers are also greatly concerned about the ability to obtain workers for the jobs that become available.

As indicated from the Associated Press's reporting, there is a significant staffing shortage due to a combination of fear and tightening of the program.[13] It also does not help matters that the jobs at hand often consist of cleaning the stalls and catching urine, neither of which is glamorous, and both of which are often odious and not so enticing to most. In the words of Gary Patrick, a veteran trainer, when he tries to hire locally, "[h]e rarely gets a response, and those that show interest do not last long. 'Two of them did show up and I got about three days out of them.'"

The real question from all of this is whether the administration will go after the H-2B program as it has vowed to go after the H-1B visa program. We do not know, and have no indication that it will, although considering that the H-2B program is rarely addressed due to its limited application and the array of problems with its processing over the years, it is possible that changes to the H-2B program could be made without many ever realizing it.

Conclusion

We are in a current state of fluctuation where it is important to read closely and stay objective. There are plenty of harmful actions that have been taken by the administration, but the Executive Order discussed above is not one; to the contrary, it is more puffery than anything else. Additionally, what happens to the H-2B program—whether it is overhauled, revised or simply terminated—remains to be seen, but it is important to stay mindful of its application, no matter how limited it may be. We can likely learn a good amount about the administration's future impact on immigration from its efforts with respect to either H-visa program.

Endnotes

1. https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american.
2. Premium Processing is expedited processing that is available for certain visas, and provides for a guaranteed initial response within 15 calendar days of United States Citizenship and Immigration Services' (USCIS) receipt of the paperwork. In the event that USCIS does not provide a response within 15 calendar days, then the premium processing fee ($1,225) will be refunded to whichever entity or individual made the payment. Worth noting is that the period of 15 calendar days is inclusive of weekends and holidays.
3. https://www.uscis.gov/news/alerts/uscis-will-temporarily-suspend-premium-processing-all-h-1b-petitions.
4. https://www.theverge.com/2016/11/11/13594172/donald-trump-immigration-silicon-valley-innovation-h1b-visas (Trump and Trump campaign statement); https://web.archive.org/web/20161109145149/http://www.sessions.senate.gov/public/index.cfm/news-releases?ID=CE7914BD-1F49-46A2-80E6-630EFF3449F1 (Sessions).
5. "Trump Signs Order That Could Lead to Curbs on Foreign Workers," NY Times, (April 18, 2017), *available at* https://www.nytimes.com/2017/04/18/us/politics/executive-order-hire-buy-american-h1b-visa-trump.html?_r=0.
6. https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/03/this-is-how-trumps-deportations-differ-from-obamas/?utm_term=.0cbe7f5360e3.
7. https://www.nytimes.com/2017/04/27/us/politics/r-alexander-acosta-labor-secretary-confirmed.html.
8. http://www.cnn.com/2017/01/20/politics/reince-priebus-regulations-memo/?iid=EL; http://money.cnn.com/2017/01/23/technology/startup-visa-regulatory-freeze/.
9. Cataliotti, Michael, *The Intersection of Immigration and Entertainment Law*, Volume 24, Number 2 of the Entertainment, Arts and Sports Law Journal (Summer, 2013), a publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association."
10. https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers. Worth noting here is that I have omitted two other categories—One-time occurrence and Intermittent need—which though applicable to a large number of stables or tracks, because we are considering the three tracks that make up the Triple Crown, demonstrating the temporary nature of the position by way of Seasonal or Peakload need is often the best fit.
11. https://www.uscis.gov/working-united-states/temporary-workers/h-2b-temporary-non-agricultural-workers.
12. Bruce Schreiner, Associated Press reproduced and available at http://abcnews.go.com/Sports/wireStory/immigrant-workers-fear-deportation-churchill-downs-47114339.
13. http://abcnews.go.com/Sports/wireStory/immigrant-workers-fear-deportation-churchill-downs-47114339.

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Resolution Alley
Maintaining Confidentiality in Arbitration

By Theodore K. Cheng

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

Proponents of arbitration as a dispute resolution process often cite that one of its advantages over conventional court litigation is the ability to maintain the confidentiality of the proceedings. Some even refer to arbitration as a "private" dispute resolution process. That aspect of arbitration has come under scrutiny in recent years, at least when it comes to consumer and employment disputes.

"One might expect that, if the arbitration is commenced with a recognized and reputable provider, such as the American Arbitration Association (AAA), the CPR Institute, JAMS, or Resolute Systems, the rules and procedures of those organizations would maintain the privacy of the proceedings."

First, there were the 2015 *New York Times* editorials that were critical of arbitration, denouncing companies who compel their customers and employees to sign arbitration agreements that waive their rights to proceed in court and have their disputes decided in an arbitral forum where, according to the editorials, the deck is stacked against them.[1] Then, among other high profile developments, last summer, former Fox News anchor Gretchen Carlson filed a sexual harassment lawsuit against Roger Ailes, the founder and former Chairman and CEO of Fox News and the Fox Television Stations Group. As reported in *The Hollywood Reporter*, Mr. Ailes contended that Ms. Carlson had "ignored an arbitration provision in her multi-million dollar contract in order to 'tar' [his] reputation," and that he would remove the case to federal court and the entirety of the "dispute to confidential arbitration, citing a provision in her contract that demands disputes be arbitrated by a three-member panel."[2] Yet the assumption that merely commencing an arbitration will ensure the confidentiality of the proceedings is both overbroad and misleading.

One might expect that, if the arbitration is commenced with a recognized and reputable provider, such as the American Arbitration Association (AAA), the CPR Institute, JAMS, or Resolute Systems, the rules and procedures of those organizations would maintain the privacy of the proceedings. Certainly, those rules and procedures would impose obligations on the provider's staff and the arbitrators to protect information about the proceedings. For example, in the AAA's Statement of Ethical Principles,[3] the AAA defines an arbitration proceeding as a "private process." Moreover, it states that "AAA staff and AAA neutrals have an ethical obligation to keep information confidential." Indeed, under Canon VI of the Commercial Code of Ethics for Arbitrators in Commercial Disputes, the AAA and the American Bar Association set forth an arbitrator's obligations to maintain the confidentiality of the proceedings. Additionally, in the Statement of Responsibilities and Understanding (Statement) that each AAA arbitrator must submit on an annual basis, the arbitrator confirms that he or she "agree[s] to serve in accordance with all applicable AAA-established procedures and the Code of Ethics for Arbitrators in Commercial Disputes and the Model Standards of Conduct for Mediators, as applicable, in effect now and as they may be amended."

What about the parties and their counsel? Notwithstanding the provisions governing the AAA staff and AAA arbitrators, the Statement also sets forth that "the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement." Arbitration has been described as a "creature of contract," and, in that regard, the parties to an arbitration clause are free to customize their dispute resolution process with a great degree of flexibility—far more than is available if the dispute were governed solely by court rules and procedures. In particular, if confidentiality is a concern, the parties may agree to maintain the privacy of any future dispute resolution proceedings, including arbitration.

Critically, absent such an agreement, as is the case in conventional court litigation, the parties would be theoretically free to engage in *any* disclosure of the proceedings, ranging from publicly speaking about the case to the media to actually revealing information or documents obtained during the proceeding itself. For example, in the case of Ms. Carlson, her employment contract with Fox News apparently specified in its arbitration clause that "all filings, evidence and testimony connected with the arbitration, and all relevant allegations and events leading up to the arbitration, shall be held in strict confidence."[4] Such a clause is much broader in maintaining the secrecy of the arbitration than is commonly found in typical arbitration proceedings, as it essentially prohibits disclosures

of any facts, evidence, and even allegations (proven or otherwise) pertaining to the dispute.

What about witnesses who participate in the arbitration hearing? Unless there is a separately applicable agreement in place between the witnesses and the parties to the arbitration (e.g., a non-disclosure agreement or a cooperation agreement), witnesses (and, in particular, third-party witnesses) are neither named parties to the arbitration proceeding, nor are they signatories or otherwise bound by the arbitration agreement. Thus, as a general matter, they have *no* obligation to maintain the privacy of any of the procedural or substantive information to which they are exposed or about which they learn as a result of their participation in the arbitration proceedings.

"Notwithstanding the limitations discussed in this column, arbitration remains one of the only adjudicative processes in the overall dispute resolution spectrum over which confidentiality can, for the most part, be maintained, particularly during the pendency of the proceedings."

Thus, it is little wonder that, much like in conventional court litigation, parties to arbitration proceedings have increasingly sought to enter into stipulated protective orders governing the confidentiality of the proceedings and/or the designation and use of materials produced by parties (and third-parties) to which access may be circumscribed. As in the case of a judge, these stipulations are presented to the arbitrator or panel for approval, or, alternatively, the parties may engage in motion practice before the arbitrator or panel on that issue.

Based on the limited public information that exists, Ms. Carlson may have breached her employment agreement with Fox News by disclosing the facts, and possibly the evidence, pertaining to her sexual harassment complaint against Mr. Ailes. That dispute settled in September 2016, two months after she commenced the lawsuit, so we will never know how the merits of that issue would have been decided.[5] In any case, it is essential to know and understand how the default rules regarding confidentiality operate in an arbitration proceeding. It is also a best practice to engage opposing counsel early on in the process to address this issue and raise it at the preliminary hearing with the arbitrator or panel.[6]

Finally, the parties' bargained-for confidentiality may, in fact, turn out to be fleeting if, after the issuance of an award, one or both parties seek confirmation or vacatur of the award in either federal court under the Federal Arbitration Act or state court under Article 75 of the CPLR. In that circumstance, the contents of those petitions, which would undoubtedly include both the award itself and information derived from the arbitration proceeding, would generally be publicly disclosed. Federal courts have long espoused the presumption that judicial documents should generally be accessible to the public.[7] At least in the Second Circuit, such access is balanced against any privacy interests that are at stake. That said, the burden to overcome the presumption of public access is high and is not automatic even if all the parties seek to maintain the confidentiality of the arbitration award. As the court in *Century Indemnity Co. v. AXA Belgium*[8] noted:

> [T]he confidentiality agreement at issue in this case may be binding on the parties, but it is not binding upon the Court. And while parties to an arbitration are generally permitted to keep their private undertakings from the prying eyes of others, the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, *i.e.*, the arbitration award.

State law is not markedly different, in that New York state courts are reluctant to seal court records.[9] However, on October 12, 2016, the Office of Court Administration proposed new Rule 11-h for the Commercial Division (22 NYCRR § 202.70[g]), which addressed the sealing of court records by adding specific examples of "good cause" for sealing: "Good cause may include the protection of proprietary or commercially sensitive information, including without limitation, (i) trade secrets, (ii) current or future business strategies, or (iii) other information that, if disclosed, is likely to cause economic injury or would otherwise be detrimental to the business of a party or third-party."[10] If adopted, this rule appears promising for arbitration litigants, affording them some measure of hope in maintaining the confidentiality of arbitration awards in connection with petitions to confirm or vacate them. The public comment period for this proposed rule closed last December, and consideration of the rule is expected sometime this year.[11]

Notwithstanding the limitations discussed in this column, arbitration remains one of the only adjudicative processes in the overall dispute resolution spectrum over which confidentiality can, for the most part, be maintained, particularly during the pendency of the proceedings. The alternative—conventional court litigation—offers no similar advantage. Thus, although arbitration clauses are, in many instances, an afterthought, it would be prudent for both litigators and transactional attorneys to consider upfront whether and to what extent the parties wish to seek resolution in a private and confidential manner once a dispute should arise. The selection of the adversarial forum becomes far more difficult to realize once a dispute has already arisen.

Endnotes

1. *See, e.g.*, N.Y. Times Editorial Board, "Arbitrating Disputes, Denying Justice," N.Y. Times (Nov. 7, 2015), *available at* http://www.nytimes.com/2015/11/08/opinion/sunday/arbitrating-disputes-denying-justice.html?_r=0; N.Y. Times Editorial Board, "In Arbitration, a 'Privatization of the Justice System,'" N.Y. Times (Nov. 1, 2015), *available at* http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html; N.Y. Times Editorial Board, "Arbitration Everywhere, Stacking the Deck of Justice," N.Y. Times (Oct. 31, 2015), *available at* http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.
2. Ashley Cullins, "Roger Ailes Claims Gretchen Carlson Evading Contract, Confidentiality Obligations," *The Hollywood Reporter* (July 8, 2016), *available at* http://www.hollywoodreporter.com/thr-esq/roger-ailes-claims-gretchen-carlson-909450.
3. AAA Statement of Ethical Principles, *available at* https://www.adr.org/StatementofEthicalPrinciples.
4. Noam Scheiber and Jessica Silver-Greenberg, "Gretchen Carlson's Fox News Contract Could Shroud Her Case in Secrecy," N.Y. Times (July 13, 2016), *available at* https://www.nytimes.com/2016/07/14/business/media/gretchen-carlsons-contract-could-shroud-her-case-in-secrecy.html.
5. Eriq Gardner, "Gretchen Carlson Lawsuit Against Roger Ailes Ends in Settlement," *The Hollywood Reporter* (Sept. 6, 2016), *available at* http://www.hollywoodreporter.com/thr-esq/gretchen-carlson-lawsuit-roger-ailes-925881.
6. For a more thorough treatment of the confidentiality issues in arbitration proceedings, including a practical checklist to consider adopting, *see, e.g.*, Laura A. Kaster, *Confidentiality in U.S. Arbitration*, NYSBA New York Dispute Resolution Lawyer, Vol. 5, No. 1 (Spring 2012), at 23.
7. *See, e.g.*, *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-23 (2d Cir. 2006).
8. No. 11 Civ. 7263 (JMF), 2012 U.S. Dist. LEXIS 136472, at *43 (S.D.N.Y. Sept. 24, 2012) (internal citations and quotations omitted).
9. *See, e.g.*, *Applehead Pictures LLC v. Perelman*, 80 A.D.3d 181, 191-93 (1st Dep't 2010); *Mosallem v. Berenson*, 76 A.D.3d 345, 348-54 (1st Dep't 2010).
10. New York State Unified Court System, Office of Court Administration, Memorandum, "Request for Public Comment on Proposed Rule of the Commercial Division to Address the Sealing of Court Records" (Oct. 12, 2016), *available at* https://www.nycourts.gov/rules/comments/PDF/RequestPublicComment-Commercial%20Division-Sealing.pdf.
11. For a more detailed discussion of this proposed rule, *see, e.g.*, Robert Lewin and Andrew S. Lewner, *Proposed Rule for NY Supreme Court May Make Arbitration Truly Confidential*, N.Y.L.J. (Mar. 20, 2017), *available at* http://www.newyorklawjournal.com/id=1202781408449/Proposed-Rule-for-NY-Supreme-Court-May-Make-Arbitration-Truly-Confidential.

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Protecting Your Clients in the Film Industry

By Neville L. Johnson and Douglas L. Johnson

We litigate controversies on behalf of producers, distributors, writers, actors, directors, talent, and independent film companies. We frequently sue the major studios on behalf of talent and independent producers. Here are common issues arising in the industry which all transactional attorneys need to consider and advise their clients before they make that deal at Cannes, the American Film Market or elsewhere.

Get All Agreements in Writing

Film legend Samuel Goldwyn once said that: "A verbal contract isn't worth the paper it's written on." Although technically that is not true—oral contracts are just as enforceable—they are much more difficult to prove. It is important to get it in writing as best as possible, as soon as possible. We have had many cases based on handshake agreements that would not have arisen had there not been this barrier, especially in situations where one party is raising money for another, typically investment in a film. The investor is obtained, and thereafter, details of the deal become fuzzy between or among the parties because there is no clear documentation.

"We have seen situations where producers worked on a project but could not get it going and they stopped working on it."

A sound recording of the parties agreeing on an iPhone constitutes a writing. Voicemail can provide salient confirmation. One should always confirm details and understandings of any deal with relevant parties so there is a record. Sending follow-up emails and letters that state the deal agreed upon is prudent, as this can be relevant and important evidence that there was an agreement. As soon as possible, the parties should establish what the terms of the deal are: i.e., what will be the respective roles and credits of the parties? How will decisions be made? It is most important to lay a paper trail, by email and in writing. A contract will not be found if the essential terms of the contract have not been agreed upon. The more evidence in writing as to what these terms are, the better for the complaining person.

We have seen situations where producers worked on a project but could not get it going and they stopped working on it. What happens to the intellectual property of the same? Can one producer make the project without the other and if so, does the other producer get compensated? What if it is a similar project but brought separately and subsequently to one of the producers? Is a fiduciary duty implicated in such cases? It is good to make clear who will control rights and what the terms will be if a project dies or is abandoned but comes back to life.

"Under California and New York laws, there is no fiduciary duty violation for a failure to pay net profits, and the damages are purely contractual."

Establish a Fiduciary Duty

Owing a fiduciary duty means having a relationship that requires full disclosure and no secret dealings. Attorneys, doctors, and accountants owe this duty to their clients. Partners and those in a joint venture (which is a partnership for a particular purpose, such as to make a movie) thus owe a fiduciary duty to each other. Whether a fiduciary duty is owed is a question of fact if it is not clear from the paperwork or other evidence. If there is a fiduciary duty owed and a breach occurs, punitive damages can be paid, and individuals can also obtain emotional distress damages (for example, for anger, dismay, or frustration).

Under California and New York laws, there is no fiduciary duty violation for a failure to pay net profits, and the damages are purely contractual.[1] Thus, the shrewd payee will seek to have a fiduciary duty established when monies are to be collected and paid from future sales. If the producer's sales agent or distributor wants the deal badly enough, he or she may agree to this term. This will be tough to get for producers, but should be sought.

Define Terms and Penalties

There is much litigation with producer's sales organizations and foreign distributors. Typically, claims are made for failure to account and pay. What are the terms/penalties in such situations? Producers should consider termination rights of the distributor who fails to comply with the contract, and the elimination of future charges and fees.

Will there be minimum guarantees in foreign territories? Should the producer authorize and approve any deals? There are situations where the producer's sales agent does not comply, and makes deals below the standard. What are the penalties? Does the film revert to the producer? Is there a cure period, say 30 days?[2]

"In international agreements, contracting parties must consider in which country the dispute will be adjudicated."

A common complaint of producers is that the producer sales agents unfairly bill-up and charge costs for attending festivals and promotions for the film. The accounting usually does not delineate in detail the charges. Producers will want this to happen, as well to establish a cap on expenses and the ability to challenge the same, and preferably before they are incurred.

Likewise, if a slate of films is being sold in a package, a producer will want to ensure a fair allocation of the revenues and advance being paid for the same. Unfair allocation is a common claim in disputes. A producer will want to be informed, comment and participate in negotiations if this occurs.

What happens if there is a bankruptcy? The producer will want an immediate end to any agreement. This should apply to foreign distributors as well which go bankrupt. Furthermore, when the deal is over, it is important to ensure that the "materials"—everything needed for the delivery of the film—are promptly returned to the producers.

Establish the Venue

Another term that must be considered in the event of a dispute is venue, which means where the dispute will be adjudicated. It is always thought that the city or "home court" of the contracting party is best. Otherwise, there are travel costs associated, and the possibility of being "hometowned," that is, that the other side and its attorneys are more wired into the legal process. The parties need to specify where the venue will be, or else it will be in one of the jurisdictions where the parties reside—probably the jurisdiction of the party with greater leverage. In international agreements, contracting parties must consider in which country the dispute will be adjudicated. The smart attorney and businessperson has the contract delineate the venue for jurisdiction, the country, and the city.

What is the forum for dispute resolution—the courts of one of the parties or arbitration? Many contracts provide the forum, and this is an increasingly controversial problem. In foreign sales agreements governed by the Independent Film & Television Alliance (IFTA), an arbitration process is commonly required. This makes good sense for the parties, because arbitration is a relatively speedy process, inexpensive in comparison to full-blown court litigation, and arbitrators are knowledgeable about industry practices. However, in IFTA arbitration, punitive damages are not allowed. Therefore, if one party defrauds another, the only claim effectively can be for contract damages.

Contracts frequently require disputes to be heard in a confidential, binding arbitration before one provider, Judicial Arbitration and Mediation Service, which has offices in the United States and London (JAMS), thus preventing the establishment of precedent or publication of unfavorable information. The major movie studios are all requiring JAMS arbitration clauses and refuse to negotiate on this. Most attorneys for claimants say that because of this, there is at least a perception of repeat player/provider bias in requiring mandatory arbitration before one provider.[3]

Add to the forgoing the cost of arbitration, which can be enormous. Few qualified contingency fee attorneys (and this is if one can legally be allowed to work on this basis, which can be a factor affecting lawyers outside the United States) will take such cases, and studios habitually do not provide attorney fees clauses in their agreements.

Additionally, discovery is usually limited in arbitrations, sometimes with only one deposition per side permitted. This disfavors claimants, who may need to depose several witnesses from the other side to create a clear picture of events.

For these reasons, having a case in a court of law may be the best scenario if there is a dispute. Public trials provide unwanted "sunshine" on nefarious business practices and can intimidate wrongdoers and warn others by such exposure, and they may be much less expensive. Further, if the trial court or jury "gets it wrong", there is always the possibility of a winning appeal, which would otherwise be foreclosed in a binding arbitration. If the other side insists on arbitration, one should document the refusal to negotiate on this issue, as some courts of law may find this to be "unconscionable" and thus allow a court trial instead.

If it is not going to be an IFTA arbitration, or in a court of law, and arbitration will be the forum, a provision can be inserted that provides that the arbitrator will be selected by the parties. If they cannot agree, each shall designate a third person who would select the arbitrator. Finally, to be enforceable, the agreement must state that the arbitration is binding, final, and can be enforced by any court of competent jurisdiction.

Foreign Levy Monies and Music Publishing

Our firm brought class actions against the Writers Guild of America, the Dramatists Guild of America and the Screen Actors Guild for their failures to pay "foreign

levies" to performers that had been collected and not paid out. Over $250 million has since been released. These are monies paid pursuant to the national laws in countries such as France, Germany, Brazil and many others. It is important to ensure that these monies will be collected. The major studios collect such monies, and independent producers are entitled to be paid them as well.[4] A producer will want to seek to exclude these monies from any distribution deal; it's a point of negotiation.

"Producers will want the right to audit directly any licensee. Additionally, producers will want to see all relevant books of any producer sales agent relating to any transaction, as they may be relevant to monies due."

Likewise, the producer will want to own the music publishing rights to the soundtrack. The performance rights (collected by the foreign affiliates of ASCAP, BMI and SESAC), which are monies paid for television usage and from movie theatres, can be substantial. The wise producer will have an administration agreement with a music publisher to collect these monies throughout the world, and they will not be collected by any foreign distributor.

Collection Agents

Many deals involve a neutral third party, a collection agent, who will collect and disburse the funds in accordance with any deal. It is always good to consider including this third party to ensure proper accounting and payments.

Auditing

In any contingent compensation or distribution agreement, there must be an accounting and audit provision. One should ensure the right to audit or suffer the consequences, namely, the inability to know if there has been an underpayment. An agreement should include regular accountings and the right to see all relevant documents relating to any income and costs. Indeed, producers should see all agreements relating to their films when and as they are negotiated. Producers will want the right to audit directly any licensee. Additionally, producers will want to see all relevant books of any producer sales agent relating to any transaction, as they may be relevant to monies due. This would include the general ledger of the producer.[5] If the error discovered in any audit is more than, say, 10 percent of the amount paid, one should consider having the other party be responsible for the cost of the audit.

Can Attorneys' Fees and Costs of Litigation Be Obtained?

The general rule of the United States is that the prevailing party in litigation is not entitled to attorneys' fees and costs unless there is a requirement stating so in the contract. The rule in Europe is that attorneys' fees and costs are awarded to the prevailing party. The attorney fees can sometimes dwarf the amount at stake. Some lawyers work on contingency or partial contingency basis; they may be willing to do so when attorneys' fees are available, warranted, and collectable. It is a good suggestion to have an attorneys' fees provision, awarding them to the prevailing party, as part of the contract.

There is no substitute for conscientiousness in dealmaking, and being aware and making the client aware of the legal pitfalls and strategies if the deal goes sour—unfortunately, as so many do.

Endnotes

1. *Nolan v. Sam Fox Publishing Company, Inc.*, 499 F.2d 1394 (2d Cir. 1974); *Wolf v. Superior Court*, 107 Cal.App.4th 25 (2003).
2. These are typically found in agreements.
3. We previously wrote about issues relating to JAMS in *One Sided World*, Volume 27, Number 2 of the Entertainment, Arts and Sports Law Journal (Summer, 2016), p. 32.
4. IFTA will collect these monies, as well as entities such as Fintage House.
5. We have seen contracts that prohibit this, which may thwart a meaningful audit.

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The Horse Racing/Oxford English Dictionary Exacta

By Bennett Liebman

Who benefits from the sport of horse racing? Many would say that there are significant economic benefits; horse racing and breeding can create thousands of jobs. Others might say that the main benefits of horse racing are entertainment and amusement. For much of the Twentieth Century, horse racing was probably the leading spectator sport in the nation.

Yet, a look at the *Oxford English Dictionary* (OED) should tell us that the chief beneficiary of horse racing is the English language. The words, phrases and the idioms of horse racing are the language of America. The language of denizens are in Damon Runyon's short stories. It is not confined to the tracks and gamblers. It is everywhere.

Take a look at the words: There is "workout," which was "originally: a practice run for a racehorse." There is "dead heat," meaning a tie that was used for horse racing as early as 1796. There's a "dark horse" "of whom or which nothing is generally known," which derives from a description of a horse race in a novel by Benjamin Disraeli in 1831. There is "running mate," used in harness racing from the 1850s. There is "first string," which was originally "the best or fastest racehorse belonging to a specified owner or trainer." The term "hands down," meaning with little effort, derives from horse racing, "with reference to a jockey dropping the hands, and so relaxing his or her hold on the reins, when victory appears certain." A "turf war"—signifying a fight over territory—started as a dispute involving horse racing or horse racing organizations.

"While Donald Trump may have started off as a dark horse, he soon emerged as a first-string candidate. There were numerous Republican no hopers, such as Lindsey Graham, George Pataki, Rick Santorum, Bobby Jindal and Mike Huckabee."

There are also numerous gambling terms derived from horse racing that have made their way into general usage. These include morning line, pari-mutuel, parlay, trifecta, tipster, hot tip, daily double, quinella, triactor, across the board, exacta, out of the money,[1] form book, and off the board.[2]

There are words included in descriptions of races that have filtered their way into the language as well. They include: armchair ride, fast track, match race, homestretch, backstretch, wire-to-wire, at the wire, under the wire, no hoper, post time,[3] photo finish, rank outsider, mudders, walkover, in the running,[4] also ran, run for one's money, and Garrison finish.[5]

Terms involving weight also had their origin in horse racing. These ranged from heavyweight to featherweight and lightweight.

In addition, there are descriptions of racing, including steeplechase, turfdom and point-to point. There are also terms that originated with people associated with horse racing, like clockers, hot walkers, and tipsters.

Other terms of racing origin include hippodrome, now used as a name for theaters, which began life as a course for horse racing. The word ascot, signifying a specific tie, is derived from the clothing worn at the fashionable Ascot racing meet. The English Derby ended up the basis for the felt hat known as a derby. The phrase "all ages," meaning an event open to everyone, regardless of age, started off as a racing term referring to races that were open to all horses, no matter their ages.

Much of the most recent usage of horse racing terminology in America comes in journalistic coverage of political elections, when the media collectively has been faulted for so-called horse race coverage of elections. The media has been criticized for focusing on tactics, strategy, gaffes, appearances, and whoever is the leader in the polls. The horse race coverage avoids focus on important and actual substantive factual position on issues.

Media coverage tends to thrive on the use of horse racing terminology. The late political commentator Tim Russert loved calling any trio of states or issues a trifecta. During the 2000 presidential election, he regularly advised that Al Gore needed to win the trifecta of Pennsylvania, Michigan, and Florida.[6] Since then, American political commentary has been awash in trifectas.

While Donald Trump may have started off as a dark horse, he soon emerged as a first-string candidate. There were numerous Republican no hopers, such as Lindsey Graham, George Pataki, Rick Santorum, Bobby Jindal and Mike Huckabee. They all finished off the board and out of the money, while Hillary Clinton led wire to wire in the Democratic primaries. At one point political pundit Chris Matthews found that "Senator Bernie Sanders suddenly looks headed for the daily double in American politics in Iowa and New Hampshire."[7] By the spring, "the odds-on favorites won; the Trump-Clinton daily double finished double-digit lengths ahead of their rivals."[8] The candidates chose their running mates and engaged essentially in a match race, where they contended that their opponents were mudders, and Trump was the winner following a photo finish at the wire. Trump's win, along with the Republican majority in the House

and Senate, assured a Republican trifecta in the federal government.[9] There were similar trifectas in state governments, as a growing number of states elected Republican governors and majorities in both legislative houses.[10] The stock market even hit a superfecta after the Trump victory.[11]

"Other terms we associate with racing that did not have a racing origin include mount, pinhook, paddock, outrider, tout, and stayer."

Perhaps the start to ending horse race journalism would be to prevent journalists from using horse racing terms in describing elections.

Non-Racing Phrases

Oddly enough, there are some racing-style phrases that did not originate in racing. The sport of kings was not originally racing. It was hunting and war.

While the term "jockey" has been used for professional race riders since the Seventeenth Century, it started as a diminutive or familiar by-form of the name Jock or John. The term "ringers," signifying fraudulent substitutes, had its origin as a general term for counterfeits, well before being applied to horse racing. The *Phrase Finder*, however, suggests that the phrase "dead ringer," meaning an exact duplicate, does stem from horse racing.[12] The word "handicaps", while in use as a phrase in horse racing since 1751, was first applied as a type of general game in the seventeenth Century. A railbird was a tropical American cuckoo long well before it was used to describe a racing enthusiast. In addition, "at the gate," meaning close at hand, was in use before organized horse racing began.

"Simulcasting" started off as a term to describe shows aired both on television and radio. It later referred to shows aired on more than one television network, before it had any application to horse racing. A "teletheater" was not initially a location—other than the actual race track—that showed televised horse races. It was originally a television series consisting of several self-contained dramas.

"Long shot" initially referred to long-barrel guns, and the furthest distance at which a shot fired from a weapon can reach. "The triple crown" referred to the papal tiara, centuries before there was a potential triple crown in English or American racing.

Other terms we associate with racing that did not have a racing origin include mount, pinhook, paddock, outrider, tout, and stayer. The use of the word upset, for an unexpected or surprise winner (rather than for a revolt or tipping over), did not come as a result of the horse named Upset, who in 1919 became the only horse to defeat Man o' War.[13] There are numerous examples of the word upset signifying a surprise victory in the Nineteenth Century.

Possible Racing Terms

Finally, there are familiar phrases that may have come from horse racing. "Hat trick"—referring to a set of three successes in a match—probably had its origins in cricket.[14] It was, however, used in racing for a rider winning three races in a meet,[15] well before it was first utilized in ice hockey for a player scoring three goals in a game.

While the OED does not find that "charley horse," meaning stiffness or a cramp, comes from horse racing, the *Online Etymology Dictionary* suggests that the term derives "probably from somebody's long-forgotten lame racehorse."[16] The term "wild goose chase" may have its origins in racing. It was first used in 1602, as **"**a kind of horse-race or sport in which the second or any succeeding horse had to follow accurately the course of the leader (at a definite interval), like a flight of wild geese." The *Online Etymology Dictionary* finds that it was first used in "Romeo and Juliet" in the 1590s, "where it evidently is a figurative use of an earlier (but unrecorded) literal sense in reference to a kind of follow-the-leader steeplechase."[17]

"If not for horse racing, the English language would be far less rich and interesting."

The use of the term "Big Apple" as a reference to New York City arguably stems from horse racing. The *Online Etymology Dictionary* claims that it derives from jazz musicians calling any city, especially a Northern City, as the "Big Apple." Yet, it was also used as early as 1921, "to refer to [the] New York racing circuit, considered as the pre-eminent one." *Word Origins* states, "[t]his name for New York City was originally horse-racing slang that made its way into the vernacular."[18] The *Phrase Finder* writes: "Probably the strongest contender is that it was coined in the horse racing community in the southern USA."[19]

The *Online Etymology Dictionary* finds that the term "give and take," as of 1769, was "originally in horse-racing, referring to races in which bigger horses were given more weight to carry, lighter ones less."[20] The OED suggests, however, that the term was in use as early as the Sixteenth Century to denote exchanging repartee and blows.

If not for horse racing, the English language would be far less rich and interesting. Hands down, from the perspective of the dictionary, horse racing's linguistic contributions triumph over all other sports in a walkover.

Endnotes

1. The OED now uses "out of the money" principally for the pricing of puts and calls.
2. "Off the board" has the same general meaning as "out of the money," referring to contestants that do not finish in the top three. It is not referred to in the OED but is in general usage.
3. https://www.merriam-webster.com/dictionary/post%20time.
4. "10 Phrases That Come from Horse Racing" (May 1, 2014), *available at* http://blog.wordnik.com/10-phrases-that-come-from-horse-racing.
5. The term is not referred to in the OED but can be found at https://www.merriam-webster.com/dictionary/Garrison%20finish. It refers to a come-from-behind victory and is named after the Nineteenth Century American jockey Snapper Garrison, who was noted for his rallying finishes.
6. Peter Marks, "The 2000 Elections: The Media; A Flawed Call Adds to High Drama," New York Times (Nov. 8, 2000).
7. Chris Matthews, *Hardball with Chris Mathews* for January 21, 2016, MSNBC.
8. Joe Dowd, "A Political Circus, Come and Gone," Long Island Business News (April 25, 2016).
9. Steve Kornacki, *Hardball with Chris Matthews* for December 29, 2016, MSNBC.
10. Andrew Malcolm, "Hillary Clinton Wasn't the Only Big Election Loser," Chicago Tribune (Nov. 16, 2016).
11. Adam Shell, "Stocks Hit Superfecta Driven by Trump Win," Milwaukee Journal Sentinel (Nov. 22, 2016).
12. http://www.phrases.org.uk/meanings/dead-ringer.html.
13. *Sports Legend Revealed: Did the Term 'Upset' in Sports Derive from a Horse Named Upset Defeating Man o' War?* Los Angeles Times, (May 10, 2011), *available at* http://latimesblogs.latimes.com/sports_blog/2011/05/sports-legend-revealed-did-the-term-upset-in-sports-derive-from-a-horse-named-upset-defeating-man-o-.html.
14. Besides the OED, *see* http://www.wordorigins.org/index.php/site/hat_trick/.
15. Per the OED, it was utilized in racing as of 1893.
16. http://www.etymonline.com/index.php?term=charley+horse&allowed_in_frame=0; *see also* http://www.wordorigins.org/index.php/site/comments/charley_horse/ and "10 Phrases That Come from Horse Racing," *supra* note 4.
17. http://www.etymonline.com/index.php?allowed_in_frame=0&search=wild+goose+chase; *see also* http://www.phrases.org.uk/meanings/dead-ringer.html on the equine origins of the "wild goose chase."
18. http://www.wordorigins.org/index.php/site/big_apple/.
19. http://www.phrases.org.uk/meanings/64200.html.
20. http://www.etymonline.com/index.php?term=give-and-take&allowed_in_frame=0; *see also* "10 Phrases That Come from Horse Racing," *supra* note 4.

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A Balancing Act: Fair Use and Creative Content

By Richard Parke, Ben Natter and Jessica Sblendorio

Conventional wisdom, in the trademark arena, has been that a party who wishes to use another's trademark must first obtain a license. In recent years, a trend appears to be emerging in the entertainment industry where such use will occur without a party preliminarily seeking express consent. The same is true in the related area of life story rights. This new trend demonstrates that entertainment industry actors are taking a more aggressive approach to using other's intellectual property, putting them potentially at odds with the owners of those rights, whose objectives are to police and protect their brands with the public. The justification upon which industry actors rely is that using these rights falls under the fair use defense, which excuses the lack of express authorization to use an owner's trademarks or life story rights. The owners of these brands or rights, however, may employ their own aggressive measures to combat this trend, to control and protect these rights.

An example of this is illustrated by HBO's use of National Football League (NFL) trademarks and logos in the show *Ballers*, which stars Dwayne Johnson.[1] Many were surprised when news spread that HBO was not paying licensing fees to the NFL for depicting its logo and team uniforms.[2] The cable series began with Johnson's character, Spencer Strassmore, having flashbacks from his playing days for the Miami Dolphins.[3] He was wearing what clearly appeared to be a Dolphin's uniform, with the logo in plain view—and was chasing down the Buffalo Bills quarterback, whose helmet logo was also visible.[4]

Some industry insiders assumed that the NFL would take action against HBO, and that HBO would eventually have to pay the NFL for using the various team logos and uniforms; they were astonished to see a company taking on the NFL in such a way.[5] Previously, producers who used NFL team logos and uniforms in their vehicles first entered into licensing agreements with the NFL.[6] This, of course, required paying licensing fees.[7] HBO responded to the publicity surrounding its actions by stating: "HBO is always mindful of other intellectual property owners, but in this context there is no legal requirement to obtain their consent."[8] While there have already been analyses of HBO's decision, this article discusses instances (including *Ballers*) where the "fair use" defense could apply to similar conduct, and how arguments are being used in the conflict over clearing—or not—of life story rights.

I. Fair Use and Trademarks

The use of noteworthy brands or trademarks is commonplace in fictional realities, with television, film, advertising, and video games being exemplars. Owners of these "brands," or trademarks, have a bona fide and legally recognized interest in protecting their marks; the law allows them to stop others from using such marks to prevent the public from being confused about the source of corresponding goods or services. These rights, however, cannot halt non-infringing use of another's trademark; one such subset of permissible conduct is known as fair use. There are two types of "fair use": Descriptive and nominative. Descriptive fair use is a statutory protection, codified in the Lanham Act,[9] while nominative fair use is a judicially created defense. Either is relevant here, because this is a principal argument upon which filmmakers and producers rely to use these marks without "paying to play."

1. Descriptive Fair Use

Federal trademark law recognizes a defense to trademark infringement where the mark is used "fairly and in good faith…to describe the goods or services of such party, or their geographic origin."[10] Known as the descriptive fair use defense, it "in essence, forbids a trademark registrant to appropriate a descriptive term for his [her or its] exclusive use and so prevent others from accurately describing a characteristics of their goods."[11] This defense "is available only in actions involving descriptive terms and only when the term is used in its descriptive sense rather than its trademark sense."[12] For example, in *Zatarains, Inc. v. Oak Grove Smokehouse*, the United States Court of Appeals for the Fifth Circuit found that the term "Fish-Fri" was a descriptive term relating to the preparation and consumption of fried fish and could be used by a competitor as a descriptive term for similar products.[13]

2. Nominative Fair Use

Though not codified in the Lanham Act, the nominative fair use defense was recognized as a judicial carveout in *New Kids on the Block* and addresses circumstances where no descriptive term may exist:

> With many well-known trademarks, such as Jell-O, Scotch tape and Kleenex, there are equally informative non-trademark words describing the products (gelatin, cellophane tape and facial tissue). But sometimes there is no descriptive substitute…when many goods and services are effectively identifiable only by their trademarks. For example, one might refer to "the two-time world champions" or "the professional basketball team from Chicago," but it's far simpler (and more likely to be understood) to refer to the Chicago Bulls. In such cases, use of the trademark does not imply sponsorship or endorsement of the product because the

> mark is used only to describe the thing, rather than to identify its source.[14]

Circumstances involving nominative fair use generally occur when a defendant has intentionally used the plaintiff's mark to refer to the plaintiff but does not designate the source of the defendant's own products or services.[15] A defendant must satisfy three requirements to use the defense:

> 1) the plaintiff's product or service in question must be one not readily identifiable without use of the trademark; 2) only so much of the mark or marks may be used as is reasonably necessary to identify the plaintiff's product or service; and 3) the user must do nothing that would, in conjunction with the mark, suggest sponsorship or endorsement by the trademark holder.[16]

A 2004 Supreme Court decision, *KP Permanent Make-Up, Inc. v. Lasting Impression, Inc.*,[17] cast doubt on the continued availability of nominative fair use as a defense, even though the case involved a descriptive fair use defense, because the ruling "calls into question whether the nominative fair use defendant would have the burden of negating sponsorship or endorsement confusion with the trademark owner."[18] Yet even with that consideration in mind, the concept of nominative fair use allows for the comparative advertising, parody, and noncommercial use of trademarks.[19]

II. Trademarks and the First Amendment

At their core, trademarks are considered to be commercial speech.[20] As the First Amendment allows for significant regulation of commercial speech, constitutional issues do not typically arise in trademark disputes. However, this analysis changes for creative works, such as plays, televisions shows/series, films, books, video games, and songs, which are generally sold as commercial products.[21] When a mark is being employed as a creative use, rather than a descriptive or commercial one, First Amendment considerations become part of the analysis. Creative works are protected as free speech under the First Amendment, and because these types of works in the trademark context contain both artistic expression and commercial promotion, a different analysis applies.[22] Accordingly, a balance must be struck between the trademark owner's rights and the First Amendment rights tied to creative works.[23]

The leading judicial authority on balancing these interests is *Rogers v. Grimaldi*,[24] a case from the United States Court of Appeals for the Second Circuit, which involved a film about cabaret performers.[25] The *Rogers* test has two prongs: 1) whether the use of the third-party trademark has artistic relevance; and 2) if there is artist relevance, is the use of the mark deliberately misleading as to the content or source of the work?[26] As this article focuses on television series and movies using third-party trademarks, whether the use of these marks is legal or defensible also raises the tension inherent in First Amendment considerations and trademark protections for owners. In some cases, if litigation is pursued, the *Rogers* test could be an important part of whether the use of this mark by an alleged infringer has constitutional protections.

III. The Use of Professional Sports League Trademarks in Film and Television: A Fair Use?

A prominent example of an entity that resolutely protects its brand is the NFL. As just one illustration of this, during the 2017 Super Bowl, U.S. Immigrations and Customs Enforcement (ICE), U.S. Customs and Border Protection (CBP), and the NFL engaged in "Operation Team Player."[27] The ICE newswire stated that "enforcement actions led by Homeland Security Investigations (HSI) resulted in the seizure of over 260,000 counterfeit sports-related items worth an estimated $20 million, and joint investigative efforts led to 56 arrests with 50 convictions."[28] NFL Vice President of Legal Affairs, Delores DiBella, responded to questions about the seizure at a joint press conference by stating that "the NFL is proud to continue its work with ICE, the IPR Center, and law enforcement departments throughout the country to protect fans and consumers who are seeking an authentic NFL experience during the celebration of Super Bowl LI."[29]

The NFL's brand protection efforts go beyond apparel and merchandise, extending to how the NFL is portrayed in the media. The NFL persuaded ESPN to stop airing *Playmakers*, one of that cable network's most viewed shows. *Playmakers* depicted the lives of the Cougars, a fictional professional football team that was part of a larger organization only referred to as "the League."[30] In 2004, *New York Times* reporter Richard Sandomir wrote that then NFL commissioner Paul Tagliabue complained about ESPN's *Playmakers* series to Michael Eisner, chief officer of the Walt Disney Company.[31] Although the series had both high viewership and strong reviews, *Playmakers* was canceled after just 11 episodes because of pressure from the NFL, which disliked the portrayal of players' lives off the field.[32] The NFL made it clear to ESPN that NFL executives and team owners did not want (or appreciate) the negative depiction of players in *Playmakers*. Part of the calculus behind ESPN's decision over whether to challenge the NFL's demand to stop airing *Playmakers* was the fact that the network's most watched show was "Monday Night Football"—and the rights to broadcast those games emanated from the NFL.[33] ESPN's profits, from a pure number standpoint, have declined in the past few years,[34] which might have in fact raised the value of the NFL deal (which expires in 2021) and relationship for ESPN.[35]

HBO, on the other hand, has no such relationship with the NFL. In the episodes of *Ballers*, "NFL players"

are shown going to clubs and struggling with financial problems. The NFL likely would prefer that these sorts of experiences not be aired on a platform as popular as HBO because of the possible negative impact on the NFL brand.[36] Additionally, a spokesperson for HBO stated that in the context of the show *Ballers*, "there is no legal requirement to obtain [the NFL's] consent."[37] What, then, is HBO's argument to justify its use of the NFL's logos and trademark without a license? The answer is *fair use*. As set forth earlier, fair use provides an affirmative defense that a defendant can use in a trademark infringement or dilution case. The defense allows the general public to use the protected trademark as long as the primary meaning of the descriptive mark is being used in good faith.[38] HBO's position surely is that it is using the primary meaning of the marks, as *Ballers* depicts the NFL uniforms as they appear, and is acting in good faith and offering realistic portrayals, rather than disparaging or tarnishing the trademark and logos.

Ballers and *Playmakers* both provide examples of where the networks producing the shows did not seek or obtain a license from the NFL before using its logos and trademarks. In the case of *Playmakers*, while the team names were fictional and the overall organization was referred to "the League," the NFL appears to have viewed it as a thinly veiled version of the actual NFL. In any event, the NFL did not like the way players and the organization were being portrayed and wanted to protect its brand and control the associated rights.

However, in cases where a show or film finds it necessary to use trademarks—and opts to do so without first securing authorization—to tell a story, and the intent of that story is meant to be positive, that could well affect whether the intellectual property rights owner seeks legal action. For example, Sony did not seek permission from the NFL to use its logos or actual footage in the movie *Concussion.*[39] That film, which starred Will Smith, concerned a forensic pathologist who fought the NFL's efforts to suppress his research on chronic traumatic encephalopathy (CTE) brain degeneration suffered by professional football players. If challenged in a legal action, Sony's argument would almost certainly be that using of the NFL's trademarks was necessary to tell the story precisely and was protected by the fair use defense.[40] Additionally, Sony could argue that the movie only used the NFL's marks to identify the teams for which the main character played, and only used the mark enough for the audience to be able to identify the team or the NFL in the film, thus enhancing authenticity.[41] Lastly, Sony did not make it appear that the NFL endorsed the movie, nor did it "falsely misrepresent" the NFL.[42] Taken together, these arguments would form a fair use defense for Sony regarding the presence of the NFL's trademarks in *Concussion.*

An important difference between *Ballers* and *Concussion* is that the intellectual property rights utilized by the latter were meant to have a positive impact by drawing attention to what many have labeled a serious health and safety issue affecting many professional football players. Additionally, at the time of *Concussion*'s release, the NFL was involved in a class-action lawsuit with former NFL players concerning concussion and head-related injuries. If the NFL chose to sue Sony for trademark and copyright infringement, it might have risked further tarnishing of its brand with the public during a period when the NFL was already experiencing bad publicity from these lawsuits.

The fair use defense may also apply to the unsanctioned use of marks in documentaries. Two relatively recent documentaries relating to the National Hockey League (NHL) are *The Last Gladiators* (2011) and *Ice Guardians* (2016).[43] Both focus on the role of "enforcers," the hockey players whose job it is to fight anyone from an opposing team who tries to hurt one of their teammates. Each documentary uses actual footage from NHL games and portrays NHL logos throughout, and it is not evident that either documentarian had express permission from the NHL to use its logos or footage. In a video interview posted on the NHL's website, Kelly Chase explains that the creators of *Ice Guardians* were careful in how they portrayed the game and players so as to not antagonize the NHL, strongly suggesting that the people associated with the film did not officially seek the NHL's permission.[44] These filmmakers could make a similar argument as that available to Sony for *Concussion*, namely, that they had no obligation to obtain express authorization from the NHL insofar as their use of NHL intellectual property was both necessary to portray the story accurately and not misrepresentative of the NHL. These and like positions would most likely qualify as fair use defenses.

In response to this more aggressive approach of television producers and filmmakers using these materials, many sports leagues have created their own networks and are producing their own movies. If this "trend" continues, leagues such as the NFL and NHL may take more stringent measures to protect their marks and brands and make it more difficult for producers and filmmakers to use their marks.

IV. Life Story Rights: Are They Necessary?

The analysis for the life story rights is a similar one, where the issue of not having express authorization for using those rights can implicate a fair use defense. Before delving into what life story rights are, it is important to note the key issue here is the right to publicity.[45] What this encompasses is an individual's right to "control and profit from the commercial exploitation of his or her name and likeness, image, or persona."[46] This is not a federal right, and each state has its own view of what constitutes "infringement" and "fair use."[47] For example, New York classifies using "the name, portrait or picture of any living person" without the person's or his/her guardian's written consent as a misdemeanor[48] and also provides equitable relief.[49] A violation of a right to someone's publicity can also involve ancillary individuals if a depiction of

their names or likenesses was not previously recorded in a public manner and the filmmakers did not obtain permission to depict these characters in the film.[50]

The right to publicity comes into play for clearing life story rights. A life story is simply "the things that have happened to someone in life."[51] Typically, movie studios and producers purchase life story rights so that they can have the legal right to depict the events that happened in a person's life.[52] Without this permission, movie studios and authors can be sued for invading the respective individual's right to privacy.[53] In this context, there is a conflict between freedom of artistic expression (important to the movie studios and producers) versus freedom of privacy (important to the private citizen), and a tension within the First Amendment itself. In times past, the right to privacy prevailed, and clearing life story rights was a requirement.[54] Traditionally, the major studios always played it safe so that their profits would not decrease by paying for litigation.[55] The difficulty for indie artists—who are not as well-funded as their major studio counterparts—is that obtaining a life story license can be expensive, particularly depending on whose "life" is being purchased.[56] Furthermore, these agreements are not really about acquiring an underlying right, because the facts of the person's life are in the public domain, but rather serve to waive certain personal rights.[57] For these reasons, it is sometimes easier to proceed without obtaining a life story rights agreement.[58]

1. Case Study: Equinox Films and Winnie Mandela

In 2011, Equinox Films made a movie about Winnie Mandela, the wife of Nelson Mandela, starring Jennifer Hudson and Terrence Howard. Equinox Films based the film on the biography, *Winne Mandela: A Life*, by Anne Marie du Preez Bezrob, and obtained the rights to the book. The filmmakers did not, however, obtain Ms. Mandela's life story rights.[59] Ms. Mandela openly criticized the movie and filmmakers for not obtaining her permission and "delving only superficially into her life story."[60] She stated, "I was not consulted. I am still alive, and I think that it is a total disrespect to come South Africa, make a movie about my struggle, and call that movie some translation of a romantic life of Winnie Mandela."[61] While there was no litigation, Equinox Films arguably would not have needed to obtain the life story rights because Winne Mandela, as both Nelson Mandela's wife and a powerful individual in her own right, lived in the public arena. Furthermore, as the filmmakers based the film upon book rights they already had, and unless the film was based on works outside the book or a mischaracterization of Ms. Mandela's life, Equinox Films would likely have a defense of fair use for the film.

2. Case Study: *Narcos* and Roberto Escobar

As noted above, ancillary characters or subsequent owners of life story rights may also invoke issues with clearing life story rights. Netflix is currently airing *Narcos*, a series that IMDb describes as "[a] chronicled look at the criminal exploits of Colombian drug lord Pablo Escobar, as well as the many other drug dealers who plagued the country through the years."[62] On July 1, 2016, Roberto Escobar, Pablo Escobar's brother, sent a letter to Netflix requesting a review of the second season of *Narcos,* because he purported that there were "mistakes, lies and inaccuracies from the real story." [63] This letter raised two important issues with respect to life story rights, namely that Roberto Escobar not only had ownership of the successor-in-rights for his brother[64] and his family name, but he was also a part of the story.[65] Based on these ownership rights, Roberto Escobar sought $1 billion for the use of his brother's name and likeness on the show. Mr. Escobar argued that as one of the few survivors of the Medellín cartel and his brother's "closest ally," "nobody else in the world is alive to determine the validity of the materials, but me" regarding the allegations of the mistakes, lies, and discrepancies in season 1 of *Narcos*.[66] This is an example of a situation where a subsequent owner could try to influence the clearing of life story rights and potentially affect the airing of a show by raising issues of accuracy and the like.

Additionally, Roberto Escobar was both his brother's accountant in the Medellín cartel and the head of his hitmen; he wrote a book about Pablo Escobar's drug empire in 2009, entitled *The Accountant's Story: Inside the Violent World of the Medellín Cartel*.[67] Yet Roberto Escobar is neither directly depicted in the show—it portrays an accountant who is fired and claims to have been a CIA informant—nor ever appears in the show.[68] Had Roberto Escobar been portrayed in the series or the details regarding his "portrayed character" were based upon his book, then this would potentially raise issues as to whether Netflix would need to obtain the life story rights or the rights to Roberto's Escobar's book before using his name, likeness, and stories on *Narcos*.

3. Case Study: Chuck Wepner and *Rocky*

Even where years have passed since the alleged unsanctioned use of life story rights, the subject of another's creative efforts may still be able to interpose a cause of action for violating one's right to publicity. This is precisely what Charles "Chuck" Wepner did. Known as the "Bayonne Bleeder,"[69] Mr. Wepner was the heavyweight boxer who purportedly served as the inspiration for the iconic Rocky Balboa movie character.

Chuck Wepner fought some of boxing's biggest heavyweight names during his career, including Sonny Liston and George Foreman.[70] The Bleeder's most noteworthy fight was his 1975 title shot against Muhammad Ali, which a young Sylvester Stallone admittedly watched on television.[71] Don King, the fight promoter, had offered Mr. Wepner $100,000 to challenge Muhammad Ali for the heavyweight title; Wepner noted that "Ali said he need an easy fight after [George] Foreman…and figured he would

cut me up[.]…But I had a shot to win a title against the most famous man in the world."[72]

The fight was neither quick nor easy for Ali, shocking him and the sporting world. In the ninth round, Wepner unexpectedly knocked "The Champ" down[73] and, despite retaliatory pummeling from a roused Ali, made it to the fifteenth and final round before losing by a technical knockout with 19 seconds left.[74]

Rocky debuted the next year. Sylvester Stallone wrote, directed, and starred in the film, which spawned a seven-movie franchise[75] and achieved celluloid immortality by winning three Oscars, including Best Picture (it was also the highest grossing film of 1976).[76] After the movie's release, word seeped out that Mr. Wepner had supposedly been the inspiration for Rocky Balboa. In fact, Wepner himself admitted lying to others that he had been paid for life rights because he "was upset about [not being compensated] and had a lot of pride."[77] While Mr. Stallone offered Mr. Wepner a role in the sequel, Wepner admits that he was having personal issues, including heavy partying and drug issues, that precluded his involvement.[78]

After apparently ruminating for many years, in 2003 Mr. Wepner sued Mr. Stallone, alleging a continuous and ongoing violation of the former's rights of publicity—or life story rights.[79] The Complaint contended that Mr. Stallone had called Mr. Wepner several months after the Ali fight to inform him of a script that Mr. Stallone had written three days after being "inspired" by that fight.[80] The Complaint further alleged that Mr. Stallone had used Mr. Wepner's name to promote the *Rocky* movies and associated products.[81] Though Mr. Wepner sought $45 million in damages, the suit settled in 2006 for an undisclosed sum.[82]

The time gap between the initial act that purportedly formed the basis for the injury and the eventual suit was abnormally long here, occasioned in part by the decades-long success of the *Rocky* franchise. That notwithstanding, Mr. Wepner's story provides yet another example of how troublesome the failure to clear life story rights can be to the entertainment vehicle's maker.

V. Conclusion

Studios are increasingly relying on the fair use doctrine in connection with use of content in film to portray a story accurately, and are less inclined to seek licenses or consent to use trademarks in films, television series, or documentaries. This trend may force owners of intellectual property to be more creative in protecting their respective rights and brands. One solution may be for an affected entity, such as the NFL, to reach out and work directly with filmmakers to control the process of how its brand is used or depicted. This approach may also be applicable in the life story rights context, as having a source that can aid in correctly portraying a character will almost certainly provide a more powerful and "endorsed" message from the person upon whom the character is based or the successive owner of the life story rights.

It is also important to note what effect publicity could have on the film. If the production is portraying a message that is positive to a significant part of the viewing audience, arguably what the movie *Concussion* sought by highlighting a health and safety issue for professional football players, then the trademark owner may be reluctant to assert its rights and potentially draw more attention to the artistic vehicle. Yet in a different context, not having appropriate clearance can result in negative publicity. For example, Winnie Mandela's public criticisms about the film and its makers for not obtaining her permission and for "delving only superficially into her life story"[83] were less than optimal from the filmmaker's perspectiveb and may well have kept away patrons who might have purchased tickets at the box office but for her recriminations.

Although HBO is not the subject of a lawsuit from the NFL for not securing authorization for *Ballers*, its failure to obtain consent and licensing from the NFL carries some level of risk—which still exists as of the publication of this article. Even though obtaining express authorization to use trademarks, logos, and life story rights is not always necessary, it is likely a more pragmatic approach that may shield content creators from future complication and expense, allowing them to focus on what drove them in the first place—their creative endeavors.

Endnotes

1. Dwayne Johnson's rise to fame began in the professional wresting world, where he was known as "The Rock." He leveraged that to work in big-budget films, including *The Scorpion King*, *Hercules*, and *The Fast and the Furious* franchise. Johnson played football at the University of Miami until a back injury cost him a spot playing professionally in the NFL. Dwayne Johnson, http://www.biography.com/people/dwayne-johnson-11818916 (last visited on Apr. 28, 2017).
2. Mike Florio, *New HBO series uses NFL team names, logos without NFL consent*, NBC Sports: Pro Football Talk (June 7, 2015, 9:51 PM), *available at* http://profootballtalk.nbcsports.com/2015/06/07/new-hbo-series-uses-nfl-team-names-logos-without-nfl-consent/.
3. Jason Guerrasio, *Here's why The Rock's new HBO show, 'Ballers,' can legally use NFL logos without the league's consent*, Business Insider (June 19, 2015, 11:44 AM), *available at* http://www.businessinsider.com/why-the-rocks-ballers-can-use-nfl-logos-without-consent-2015-6.
4. *Id*.
5. *Id*.
6. Aaron Gordon, *PLAYMAKERS, THE SHOW THE NFL KILLED FOR BEING TOO REAL*, Vice Sports (April 22, 2015), *available at* https://sports.vice.com/en_us/article/playmakers-the-show-the-nfl-killed-for-being-too-real.
7. *Id*.
8. Oliver Herzfeld and Tal Benschar, *HBO's Ballers: Touchdown or Legal Fumble?*, Forbes (June 17, 2015, 9:56 AM), *available at* https://www.forbes.com/sites/oliverherzfeld/2015/06/17/hbos-ballers-touchdown-or-legal-fumble/#1b9e4ca45340.

9. The Lanham Act, also known as the Trademark Act of 1946, is the federal statute governing trademarks, service marks, and unfair competition. Congress passed it on July 5, 1946, and President Harry Truman signed it into law.
10. 15 U.S.C. § 1115(b)(4) (2012).
11. *New Kids on the Block v. News Am. Publ'g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (internal quotations and citation omitted).
12. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 791 (5th Cir. 1983), *overruled in part by KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111 (2004).
13. *Id.*
14. *New Kids on the Block*, 971 F.2d at 306.
15. J. David Mayberry, *Trademark Nominative Fair Use: Toward a Uniform Standard*, 102 The Trademark Rep. 820, 820 (May-Jun. 2012).
16. Tamera H. Bennett, *Is That Fair (Use)? Third Party Trademarks in Film, Print, Video Games and other Media*, Create Project Blog (Jan. 12, 2015), *available at* http://www.tbennettlaw.com/createprotect/2015/1/5/is-that-fair-use-third-party-trademarks-in-film-print-video-games-and-other-media (citing E.S.S. Entm't 2000, Inc. v. Rock Star Videos, Inc., 444 F. Supp.2d 1012, 1029 (C.D. Cal. 2006)).
17. 543 U.S. 111 (2004).
18. Mayberry, *supra* note 15, at, 820-21.
19. Bennett, *supra* note 16.
20. David M. Kelly and Lynn M. Jordan, *Twenty Years of* Rogers v. Grimaldi*: Balancing the Lanham Act with the First Amendments Rights of Creators of Artistic Works*, 99 The Trademark Rep. 1360, 1360 (Nov.-Dec. 2009).
21. *Id.* at 1360-61.
22. *Id.* at 1361; *see also* Bennett, *supra* note 16.
23. *See, e.g.*, Kelly and Jordan, *supra* note 20, at 1361.
24. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
25. Screen legend Ginger Rogers sued Alberto Grimaldi and MGM for producing and distributing Federico Fellini's film *Ginger and Fred*, which was about two Italian cabaret performers whose dance routine was modeled on the work of Fred Astaire and Ginger Rogers. Ms. Rogers alleged that the film infringed her Lanham Act rights, right of publicity, and was a "false light" defamation. *See generally Rogers*, 875 F.2d 994.
26. Bennett, *supra* note 16.
27. U.S. Immigrations and Customs Enforcement, 'Operation Team Player' nets $20 million in fake sports merchandise, (Feb. 2, 2017), *available at* https://www.ice.gov/news/releases/operation-team-player-nets-20-million-fake-sports-merchandise#wcm-survey-target-id.
28. *Id.*
29. *Id*.
30. Richard Sandomir, *PRO FOOTBALL; Citing N.F.L., ESPN Cancels 'Playmakers,'* N.Y. Times, (Feb. 5, 2004), *available at* http://www.nytimes.com/2004/02/05/sports/pro-football-citing-nfl-espn-cancels-playmakers.html?_r=0.
31. *Id.* Mr. Sandomir also reported: "Jeffrey Lurie, the owner of the Philadelphia Eagles, told The Philadelphia Inquirer last year, 'How would they like it if Minnie Mouse were portrayed as Pablo Escobar and the Magic Kingdom as a drug cartel?'" *Id*.
32. *Id*.
33. Gordon, *supra* note 6.
34. *See* Christopher Palmeri, *Disney Sales Fall as ESPN Troubles Drag Down Cable TV Profit*, Bloomberg, (Feb. 7, 2017, 4:36 PM), *available at* https://www.bloomberg.com/news/articles/2017-02-07/disney-sales-fall-as-espn-drags-down-cable-tv-profit ("A decline in profit at ESPN, which had fewer college bowl games and lower viewership, dragged down results in cable TV—which is by far Disney's largest business. With the highest subscriber rates in pay TV, Disney's sports network is especially at risk of losing revenue as cable audiences cancel subscriptions for online services or sign up for so-called skinny bundles that don't play up sports programming.").
35. Sandomir, *supra* note 30.
36. Mark Wahlberg, a well-known actor (e.g., *Lone Survivor, Boogie Nights, The Fighter*), is also an executive producer for *Ballers*. Wahlberg stated on a sports radio show that he had received complaints about the HBO series in calls from NFL Commissioner Roger Goodell and team owners. NFL Senior Vice President of Communications Natalie Ravitz has denied those allegations on Twitter. Interestingly, many NFL players have appeared on the show in celebrity cameos. Aurelie Corinthios, *Mark Wahlberg Claims the NFL and Various Team Owners Have Complained About HBO's* Ballers, People—TV Watch (Jul. 18, 2016, 1:05 PM), *available at* http://people.com/tv/mark-wahlberg-claims-nfl-complained-about-hbos-ballers/.
37. Herzfeld and Benschar, *supra* note 8.
38. *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 543 U.S. 111, 122 (2004). (The Supreme Court also noted that the risk of consumer confusion does not prevent the fair use defense from being used, as there will always be some degree of confusion. What is relevant is the extent of consumer confusion in assessing whether a defendant's use of the trademark is objectively fair.).
39. Will Brinson, *Sony didn't bother asking NFL for rights to use footage in 'Concussion,'* CBS Sports (Dec. 23, 2015), *available at* http://www.cbssports.com/nfl/news/sony-didnt-bother-asking-nfl-for-rights-to-use-footage-in-concussion/; *see also* Travis Stegemoller, *No I.P. Challenge Flag for "Concussion" Movie*, The Gutwein Blog, http://info.gutweinlaw.com/blog/ip-and-concussion-movie (noting that Sony President, Tom Rothsman, confirmed in a series of interviews on sports talk radio that Sony did not have express authorization from the NFL to use its marks).
40. Stegemoller, *supra* note 39.
41. *Id.*
42. *Id.*
43. Farran Smith Nehme, *'The Last Gladiators' review*, New York Post (Feb. 1, 2013, 5:00 AM), *available at* http://nypost.com/2013/02/01/the-last-gladiators-review/; Kevin Crust, *Documentary 'Ice Guardians' makes the case for hockey's enforcers*, Los Angeles Times (Nov. 10, 2016, 5:00 AM), *available at* http://www.latimes.com/entertainment/movies/la-et-mn-ice-guardians-review-20161107-story.html.
44. National Hockey League (NFL), *Chase on Ice Guardians* (Oct. 31, 2016), *available at* https://www.nhl.com/video/chase-on-ice-guardians/t-277350912/c-45866403.
45. Diane Krausz, *Whose Life Is It Anyway? Clearance of Life Story Rights in Film*, NYSBA: The Entertainment, Arts and Sports Law Blog (Sept. 8, 2012, 3:32 PM), *available at* http://nysbar.com/blogs/EASL/2010/09/whose_life_is_it_anyway_cleara.html.
46. *Id.*
47. *Id.*
48. N.Y. Civ. Rights Law § 50 (LexisNexis 2017).
49. N.Y. Civ. Rights Law § 51 (LexisNexis 2017).
50. Krausz, *supra* note 45.
51. *Life Story*, Merriam-Webster (online), *available at* https://www.merriam-webster.com/dictionary/life%20story.
52. Lisa Califf, *To Acquire or Not to Acquire Life Rights for a Movie*, Law360 (Jun. 22, 2015, 10:28 AM), *available at* https://www.law360.com/articles/665781/to-acquire-or-not-to-acquire-life-rights-for-a-movie.
53. Krausz, *supra* note 45.

54. Califf, *supra* note 52.

55. *Id*.

56. *Id*.

57. *Id.*

58. *Id*.

59. *Id.*

60. *Id.*

61. David Smith, *Winnie Madikizela-Mandela 'insulted' by movie about her life*, The Guardian (Jun. 14, 2011, 4:05 PM), *available at* https://www.theguardian.com/world/2011/jun/14/winnie-movie-insult-madikizela-mandela./. The producers of the film noted that Ms. Madikizela-Mandela's lawyers had written to them threatening legal action to stop the production, but the producers insisted they would continue with the film. *Id.* In contrast, Ms. Madikizela-Mandela did give "her blessing" to an opera based on her life, *Winnie the Opera*, in Pretoria. *Id.*

62. IMDB, *Narcos (TV Series 2015)*, *available at* http://www.imdb.com/title/tt2707408/?ref_=fn_al_tt_1 (last visited Apr. 28, 2017).

63. Tufayel Ahmed, *'Narcos': Pablo Escobar's Brother Wants $1 Billion From Netflix, Slams Actor Wagner Moura*, Newsweek (Jul. 7, 2016, 11:52 AM), *available at* http://www.newsweek.com/narcos-pablo-escobars-brother-wants-1-billion-netflix-slams-actor-wagner-moura-478451.

64. In 2015, Mr. Escobar registered for successor-in-rights for his brother and his family name in California, prior to the release of the first season of *Narcos*.

65. Ahmed, *supra* note 63.

66. *Id.*; *see also* Jamil Mustafa, *Pablo Escobar's son criticizes Netflix series Narcos for 'insulting the history of a whole nation,'* The Telegraph (Sept. 9, 2016, 5:25 PM), *available at* http://www.telegraph.co.uk/news/2016/09/09/pablo-escobar-son-criticises-netflix-series-narcos-for-insultin/ (Sebastián Marroquín, Pablo Escobar's son, posted on Facebook 28 points identifying what he alleged as "outright lies" regarding his father. The makers of the show said that while the series is based on Colombia's drug wars, some of the events and characters in the series have been fictionalized for dramatic purposes. This is a second example of where another member of the Escobar family took issue with the characterization of Pablo Escobar in *Narcos*.).

67. Ahmed, *supra* note 63.

68. *Id.*

69. Mr. Wepner earned this moniker after his blood splattered on a reporter sitting ringside during a fight. Michael Kaplan, *He went toe-to-toe with Muhammad Ali—and inspired 'Rocky,'* NY Post (Apr. 29, 2017, 4:00 PM), *available at* http://nypost.com/2017/04/29/he-went-toe-to-toe-with-muhammad-ali-and-inspired-rocky/.

70. *Id.*

71. *Id*.

72. *Id.*

73. In his storied career, Muhammad Ali had 61 professional fights and 56 wins, but was knocked down only four times. The first three—by Sonny Banks, Henry Cooper, and Joe Frazier—were when Ali was a contender. However, the only man to put Ali on the canvas when he held the title was Chuck Wepner.

74. *Id.* Ali himself later said, "There's not another human being that can go 15 rounds like that." *Id.* Complaint, *Wepner v. Stallone* (N.J. Super. Ct. Civ. Div. Nov. 11, 2003), *available at* https://www.mandilaw.com/files/complaint.pdf. The Complaint states that leading up to the fight "sportswriters and odds-makers . . . all predicted that Ali would win decisively. In fact, some odds-makers named Ali as a 30-1 favorite to win the bout in less than three rounds." *Id.* at ¶ 11.

75. The last film in the series (thus far) was 2015's *Creed*, starring Stallone and Michael B. Jordan as Apollo Creed's son. *Creed* is the only other *Rocky* film to earn an Oscar nomination, that time for Sylvester Stallone as Best Supporting Actor (he did not win). *See* IMDb, *Creed (2015)*, *available at* http://www.imdb.com/title/tt3076658/.

76. Kaplan, *supra* note 69.

77. *Id.*

78. *Id.*

79. *See* Complaint, *supra* note 74. The Complaint also included causes of action for unjust enrichment and detrimental reliance. The case was originally filed in state court and removed to the U.S. District Court for the District of New Jersey for the remainder of the proceedings. The federal court docket number was No. 2:03-cv-06166.

80. *Id*. at ¶ 16.

81. *Id.* at ¶¶ 1-4.

82. Kaplan, *supra* note 69.

83. Califf, *supra* note 52.

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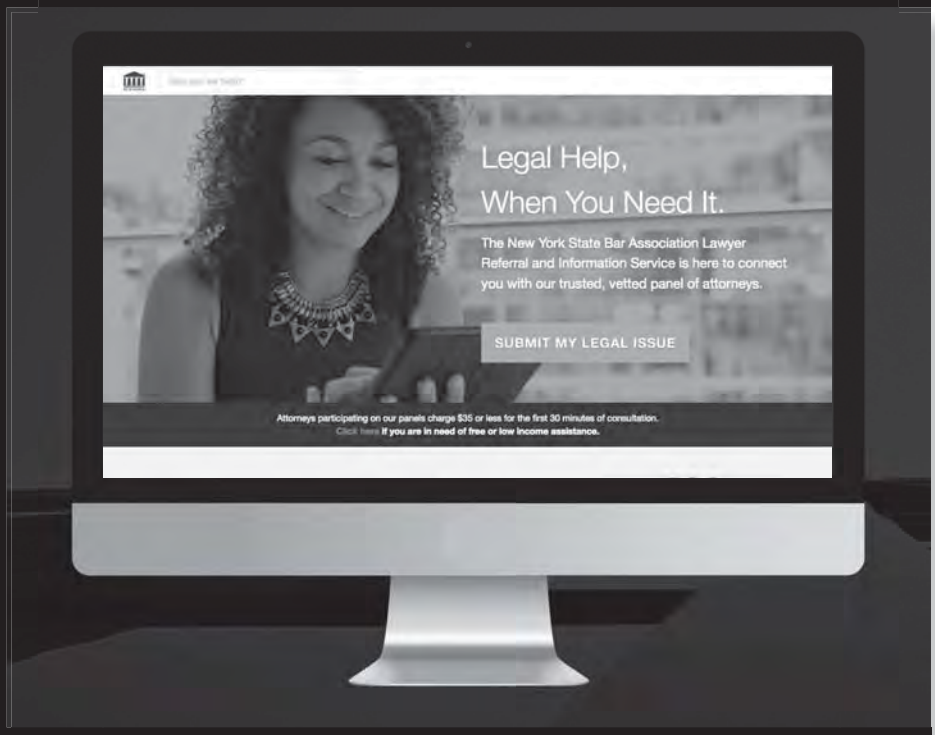

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Who Is Really "Winning"? The Tension of Morals Clauses in Film and Television

By Stephen M. Gallagher

I. Introduction

Everyone loves a good celebrity gossip story. In fact, the only thing that gets more attention than good news is the bad behavior of a fallen idol. We see bad celebrity behavior all the time, and revel in the gossip of the headlines, but very few take full stock of the situation in terms of what it means for a celebrity's career and for the image of his or her employer. Although many see these behaviors as private individual actions, production companies and studios are often able to terminate the employment of such film and television celebrities, using what is commonly called a morals clause. This is a heavily negotiated clause that lies deep within a talent agreement.[1]

The use of a morals clause is quite common in the entertainment sector and is generally upheld by the courts.[2] Morals clauses give the employer, typically, a studio or production company, the right to terminate a talent agreement if its hired "talent" (commonly an actor or producer) acts in way that does not uphold moral standards or does not fit within the employer's public image.[3] The key word here of course is moral standard. However, what exactly is the definition of a moral standard, and exactly what conduct is deemed to trigger a morals clause?[4] Herein lies the issue. Of course, talent seeks to have the most narrowly drawn morals clauses possible or even strike the clauses altogether, allowing for full freedom within their private personal lives, while studios and production companies seek broad clauses for purposes of full discretion.[5] This is where the tension begins, which is far from over if the talent actually partakes in behavior that the employer, in its sole discretion, believes to have breached an undefined moral standard.

"Although this article narrowly explores the clause's usage in film and television, morals clauses are also quite common in advertising endorsements, sports agreements, and even in C-level executive agreements."

Morals clauses date back to use by Universal Pictures (today Universal Studios) in September 1921, when Universal Pictures published a call in the *New York Times* to have these clauses be a new standard in all of its talent agreements.[6] Arguably, to studios, these clauses have become even more essential today, given the age of social media and the speed at which news travels; however, issues of talent control, unfairness, effectiveness and ambiguity all arise as well.[7]

This article addresses these issues and others that arise out of the use of morals clauses. In addition to both defining and describing the uses of morals clauses in film and television, it attempts to redefine their standard use by asserting that, as they stand today, the use of morals clauses in the film and television industries create tension between studio and talent. Therefore, the proposition of this article is that the studios or production companies who insert these overly broad morals clauses into talent agreements place an unfair burden on talent because of inevitable ambiguity in both the drafting of the clauses and evolving moral standards. Further, these clauses are ineffective, in that they fail to provide enough protection for the studio itself, since the employer's only remedy is termination, if that.

II. An Overview of Morals Clauses

A. Morals Clauses Defined: A First Look at the Issues

Morals clauses give the employer, in this case, a studio or production company, the right to terminate a talent agreement or otherwise sanction talent if he or she behaves in a way that negatively impacts his or her image in the public arena, and thereby also damages the image or reputation of the employer by association.[8] In short, the motive behind such clauses seeks to protect the contracting employer from the immoral or reckless behavior of talent that has become so commonly associated with the celebrity lifestyle.[9] Although this article narrowly explores the clause's usage in film and television, morals clauses are also quite common in advertising endorsements, sports agreements, and even in C-level[10] executive agreements.[11] As one can imagine, since they almost always result in termination, morals clauses are often heavily negotiated, and if invoked, often litigated.[12] The litigation often comes in the form of a suit for wrongful termination or in a breach of an employment contract because the talent believes that his or her behavior did not trigger the clause, either because of ambiguity in the clause itself or a lack of required notice.[13]

Litigation also occurs because there is, to this day, no single legal definition of a moral standard.[14] Moral standards seem to ebb and flow with the times; in many cases, what was thought to be improper in 1951 is deemed perfectly acceptable in 2016. For example, any viewer who watches today's popular sitcom, "The Big Bang Theory," to see the married characters Leonard and Penny sleeping in two separate twin beds would be utterly confused and likely annoyed by the disconnect with reality.[15] Community standards clearly change over time, whether gradually or immediately, and with that moral standards tend to

become quite subjective, thereby leaving broad discretion for studio employers.[16]

Although morals clauses may seem to bend to the whims of employers, their invocation should never be taken lightly.[17] Quite often there is a balancing test, a determination of whether or not the talent's conduct is so potentially damaging, that continuing the agreement and the association with that talent would be more detrimental than advantageous to the employer and advertisers.[18] To further complicate this balancing test, not only is there an absence of a single definition for a moral standard, but therein lies a further divide between what kind of action specifically breaches the clause.[19] What constitutes a breach? A mere allegation of illegal activity that turns out to be false? An action for which the police gave only a warning? A public display of outlandish behavior? The answer for the most part is, whatever the studio employer says.[20]

B. The History of Morals Clauses

Although the language of morals clauses has been only slightly altered over time, their purpose and application has greatly changed over the course of history. Originally, morals clauses, when applied, sought to serve the religious values of a pre-World War II era, then to serve to the political agenda of the United States during the communist era, and finally today, to serve the ethical standards set by large companies and their executives.[21] Regardless of the application, one commonly unexplored theme that remained consistent throughout the history of morals clauses is "control" of talent.

i. The Studio and Star Systems

The idea of controlling talent originally went further than just morals clauses. The years between the 1920s and the mid-1940s are often referred to as the era of the studio system, where all production, distribution, and exhibition was controlled by the eight big studios.[22] The main component of the studio system and its success was the "star system," in which studios would "breed" actors to fame, and control what films they were in and for whom they worked.[23] The star system was characterized by talent, who was often required to play any part so designated by the studio, seven-year contracts binding an actor to only one studio paid on a per-picture basis, and renewals of those contracts with the same studio throughout the actor's life.[24] It was not until Olivia de Haviland sued Warner Brothers in 1944, and won her case, so that it was determined that her contract for services could be no longer than seven calendar years, whether or not those years consisted of actual service.[25] After that, the studio system began to crumble, allowing for the freedom of talent movement in the entertainment industry.[26] Given this system, which exercised the most control over talent in entertainment history and lasted for about 20 years, it is no surprise that morals clauses developed as a result.

ii. The First Uses of Morals Clauses

In the early 1920s, it was almost proven that film ticket sales declined because of the perception that "stars" were leading "sinful" off-screen lives.[27] The stories in the press constantly surrounded the outlandish, "garish[,] and scandalous" behavior of film stars.[28] At this point in history, no story is more infamous than that of actor and comedian Roscoe "Fatty" Arbuckle, who worked for Paramount Pictures under a $3 million contract.[29] Fatty Arbuckle in 1921 was charged with the rape and murder of young actress Virginia Rappe at a Labor Day party that had "gotten out of hand."[30] Although acquitted of all charges, his public image could not recover from the original headlines printed and the court of public opinion.[31] Although Arbuckle's case was the most notable one, there were several other actors who also formed immoral patterns that the public found outrageous.[32] In an attempt to avoid the damage resulting from the scandals, studios turned to morals clauses.[33]

As a direct result of the Arbuckle case, Universal Film Manufacturing Company employed a new policy by adding morals clauses to all existing and new actor agreements. These clauses stated that talent could be terminated and salaries discontinued if they were brought into the disrespect of the public.[34] The main portion of the morals clause used and publicly printed stated: "The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult, or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry."[35]

This clause, printed so long ago in 1921, has remained largely unchanged today.[36] The addition of these clauses were attempts to further control talent within the studio system; to protect the investment made in "raising" talent, and also reassure the public that morality still held a place in Hollywood.[37] Due to the large degree of control that the studios exercised over their stars, the inclusion of morals clauses was effective, widespread, and required. Their use even spread to the sports industry, calling for New York Yankee Babe Ruth to abstain from alcohol and have a curfew as a result of his notoriety as a womanizer, smoker, heavy drinker, and law breaker.[38]

iii. Morals Clauses Fight Communism

As communism fell upon Russia, China, and Eastern Europe, and its threats shadowed the United States, morals clauses were applied in a new and different way. Rather than control the personal behaviors of talent, the focus turned on political views, activities, and loyalties.[39] A fear of pervasive communism in Hollywood culminated in 1947, when Congress, in an attempt to combat

this fear, used the House Un-American Activities Committee (HUAC) to subpoena several Hollywood figures in order to question their political beliefs and loyalties.[40] The famous "Hollywood Ten," as they would later be known, refused to testify and were held in contempt.[41] Three of the these 10, Ring Lardner Jr., Adrian Scott, and Lester Cole, were terminated under their morals clauses by their respective employer studios for refusing to testify to the HUAC. As a result, the three brought wrongful termination suits against their employers.[42] This was the first time that morals clauses were litigated in the courts.[43]

"At a bench trial, it was determined that Scott breached his contract; the Ninth Circuit affirmed based on the fact that a criminal conviction was seen as a breach of a morals clause."

In the first of three cases, *Loew's v. Cole*, screenwriter Lester Cole had been terminated under his morals clause by Loews (MGM) when he was determined to be an "unfriendly witness" before HUAC, and when asked about his membership in the communist party. In accordance with this action, MGM invoked Cole's morals clause[44] and suspended his employment for "shocking and offending the community and bringing himself into public scorn," by not declaring that he was not a communist.[45] The Ninth Circuit found that an employer was justified in terminating an employee who partook in notorious misconduct,[46] and although the trial court stated that Cole did not breach his contract, the Ninth Circuit reversed, allowing the studio to show evidence of harm to its public image as a result of Cole's failure to declare that he was not a communist.[47]

In the second case, *Twentieth Century-Fox Film Corp. v. Lardner*, screenwriter Ring Lardner Jr. also refused to tell HUAC whether or not he was a communist, and was also convicted of contempt. As a direct result, Twentieth Century-Fox terminated Lardner, invoking an almost identical (and even slightly stronger than Cole's) morals clause[48] in his contract.[49] Again, the trial court sided with Lardner, but the Ninth Circuit reversed, stating that being held in contempt was a breach of the decency and morality portion of the morals clause of Lardner's agreement; Fox, therefore, had the right to terminate based on Lardner's contempt conviction.[50]

Finally, in the third case, *Scott v. RKO*, screen director Adrian Scott was also convicted for contempt and terminated as a result of a similar morals clause.[51] At a bench trial, it was determined that Scott breached his contract; the Ninth Circuit affirmed based on the fact that a criminal conviction was seen as a breach of a morals clause.[52] Although it makes perfect sense that a criminal conviction would be considered a breach of a moral standard and a morals clause, these first instance cases surrounding the litigation of morals clauses more importantly illustrate that morals clauses are not only enforceable, but that studios have broad discretion to exercise them,[53] despite any political underpinning or motivation by the fear of communism.[54]

History shows that morals clauses had clear motivations behind them. Today, such clauses are widely upheld, but more so as a matter of economics and ethical company practices, rather than religious or political motivations.[55] For that reason, this article will now examine the scope of morals clauses in a modern day era, looking at their applied usage and effects, specifically in the film and television industries. It will show how the modern day use of the morals clause may actually be an attempt to effectuate some of the original practices of the studio system.

III. Morals Clauses Today

A. The Scope of a Morals Clause Applied in the Late 20th Century

As stated, morals clauses today are not all that different from the original one instituted by Universal Pictures in 1921. Under both New York and California laws, a talent agreement may be terminated if an actor violates a morals clause by showing a disregard for not only the law, but also for public decency.[56] A morals clause generally seeks to cover conduct that a) goes against social conventions and public morals or decency; b) shocks or offends the community; and/or c) places an employer, financier, advertiser, studio or distributor in a bad light due to the association.[57] If any past action (if not disclosed before signing a talent agreement that contains a morals clause) or future behavior falls into these categories, the clause can be triggered and the relationship terminated, possibly without any compensation or screen credit for the talent.[58] Today, morals clauses are still used, but commonly negotiated to a lesser standard or struck out of deals, especially if the talent or celebrity has clout in the industry.[59] If they remain, the language can be narrowed, thereby removing broad words, such as "may offend" or "likely to," or they are restricted as to only remove screen credit, rather than full termination.[60] In order to better understand a more modern view of how these clauses are applied and upheld, we turn to two important and more recent cases.

In the first instance, morals clauses were once again upheld in *Nader v. ABCTV*, when Michael Nader, an actor on the television soap opera, "All My Children," was terminated and written out of the show for violations of his morals clause.[61] Nader was arrested for one count of criminal sale of a controlled substance (cocaine) and one count of resisting arrest.[62] Nader claimed that he was fired for discrimination against him, for his addictive cocaine disability, and because the morals clause was ambiguous, overbroad and vague on its face.[63] The Second Circuit Court affirmed the decision that the

termination was not a pretext for a disability and that the morals clause was not ambiguous because his felony was a proper trigger for the clause.[64] The Second Circuit also agreed with the series of Ninth Circuit communist decisions, by once again stating that "morals clauses have long been held valid and enforceable."[65] Therefore, what was determined as an unambiguous clause allowed ABC to terminate any artist, if in its discretion the artist committed an action that was unfavorable to ABC's image.[66]

In the second case, *Galaviz v. Post-Newsweek Stations*, television news reporter Galaviz was terminated for breaching her morals clauses after a domestic dispute leading to her arrest.[67] Although the incident with the law was her third, she also claimed the clause to be ambiguous.[68] In this case, the Fifth Circuit decided that an arrest for domestic violence, and live news coverage of the event, with her in handcuffs, triggered a morals clause that called for her termination in wake of the employee "being brought into public disrepute, contempt or scandal."[69] Although it makes perfect sense that a third legal offense is something that would trigger a morals clause, the case shows how yet another circuit court upheld a morals clause as valid grounds for termination.

"While it is advantageous to both sides to relieve this tension through negotiation, the law requires a high degree of certainty, and a clear basis for determining when a contract has been breached and what remedies may be available to the damaged party."

As a result of the studio side success of both of these modern day cases, as well as the communism cases addressed earlier, it is not surprising that there is so little litigation over morals clauses, especially since they have often been upheld as valid. These clauses are consistently upheld, whether or not they appear somewhat broad, and therefore have a strong effect on the entertainment industry and on talent at large.[70]

B. The Purposes and Effects of Morals Clauses

Since 1921, the use of morals clauses expanded far beyond the entertainment industry.[71] Originally meant to boost ticket sales and faith in Hollywood morality in the 1920s, the morals clause is now a standard term in many types of agreements because of the protections it offers.[72] Morals clauses have thrived in endorsement, sponsorship, and advertising contracts where they often remain a part of the deal because of the strength of the association with a brand.[73] In the event of a celebrity's image becoming tarnished, these clauses allow for immediate termination before the brand can be harmed.[74] For this reason, morals clauses in the endorsement industry flourish and are even broadly expanded and upheld.[75] Additionally, morals clauses have become popular in employment agreements of certain C-level executives, calling for the termination of a CEO in the event of an act of moral turpitude, as executives are often the face and public image of the company.[76] Finally, morals clauses have great success in professional sports, not only in the aforementioned endorsement clauses, but in player contracts as well. In fact, morals clauses in the professional sports industry have greater success, because unlike the SAG-AFTRA actor's union,[77] the National Football League (NFL), National Basketball Association (NBA), National Hockey League (NHL) and Major League Baseball's (MLB) collective bargaining agreements expressly allow for the usage of a morals clause that cannot be negotiated away, except in the case of endorsement deals, to which collective bargaining agreements do not apply.[78] As a result of all of these uses, it may be said that morals clauses have become quite the norm.

No matter the industry, morals clauses are never bullet-proof, and when invoked, are often litigated or even arbitrated (if the talent agreement is subject to binding arbitration, as many are).[79] Although the clauses can be effective, they are not without their limits, and these limits breed the issues that were stated earlier, especially when used in film and television. After all, a morals clause is only considered effective to a studio if it allows for termination, which still may hurt the studio, and conversely, it is only effective for talent if the talent knows which specific behaviors trigger the clause.[80] The two needs of the parties, which co-exist, automatically create a push-pull tension in which a studio requires broad language to fulfill its need, while the talent requires narrow language to do the same.[81]

While it is advantageous to both sides to relieve this tension through negotiation, the law requires a high degree of certainty, and a clear basis for determining when a contract has been breached and what remedies may be available to the damaged party.[82] This certainty does not have to be absolute, but should refrain as much as possible from ambiguity that inevitably leads to two conflicting meanings, then litigation or arbitration, and finally a soured relationship.[83] Of course, negotiation over these clauses will depend on the bargaining power of the talent versus that of the studio;[84] however, the goal should remain to reach a fair and reasonable drafting of the clause that protects talent from termination for at least "unsubstantiated claims, false arrests, and wrongful accusations,"[85] while still protecting all aspects of a studio's investment. A common compromise between talent and studios has been changing the morals clause into a moral turpitude or felony clause that allows for termination only in the case of a conviction of a felonious crime of moral turpitude.[86] However, as it will become evident in Part IV, in the Charlie Sheen case study, a moral turpitude clause may be just as or even more ambiguous than a morals clause, especially when the definition of moral turpitude also remains legally undefined.[87]

In order to avoid ambiguity and encourage effectiveness, morals clauses should include two material terms: a) The prohibited conduct that would trigger the clause and b) the circumstances under which termination may be rightfully used.[88] In considering this, it helps to look at the underlying purpose of morals clauses.[89] It is specificity of language, rather than its broadness, that allows for increased protection for both interested parties and any judge who must later review an agreement.[90]

i. Effects in Television

Although Hollywood exists as a whole, it can easily be divided into film and television, each with its own separate and independent needs. The needs and effects of morals clauses in both film and television are somewhat different. It is important to note that television is influenced primarily through advertising; with the exception of network television (regulated by the Federal Communications Commission), advertisers control to what extent the shows on cable networks can become raunchy.[91] Therefore, networks brand their programs and associate their talent with programs in a certain way and with certain images in order to better sell their "brands" to advertisers.[92] The purpose, therefore, of a morals clause in television is to use the termination right in the event that the advertiser's investment has been put at risk.[93] For example, if a seemingly "pure character" is caught engaging in impure behaviors, these behaviors may taint the character and therefore the program brand, in which case the morals clause would be triggered and the talent terminated.[94] However, in the event of ambiguity, the termination could be delayed, thereby putting the brand and the investment at risk; this once again shows why specificity in the material terms of these clauses is so important.[95]

ii. Effects in Film

Branding a film is less about advertising, and more about ticket sales. Although advertising can be a part of the film profits through product placement, it is for ticket sales reasons that the brand of the film and the actual studio requires the most protection.[96] A film is quite costly, especially if part of a billion dollar franchise, like *Harry Potter.* Studios need protection for their investments.[97] A franchise itself is often even more important than the talent, because of large opportunities for future revenue, such as money from home video sale, merchandising, and ticket sales of sequels.[98] Therefore, specificity in morals clauses in film allows for the quick termination of talent, protecting the studio from the negative impact a star may have on its brand, film and/or franchise.[99]

iii. Effects on Talent

As already stated, morals clauses have a clear effect on talent, as they control the personal and private lives of individuals as well as their overall careers. Beyond financial issues, this control exerted by morals clauses affects the daily lives of talent, in that it might limit actions they may have otherwise taken if not under contract, including but not limited to, use of recreational drugs, alcohol, and public party scene that, even if legal, could be detrimental to the talent's image.[100] Therefore, talent should try to learn and understand exactly what kind of behavior will trigger these clauses.[101] Finally, in addition to knowing triggering behaviors, talent should be aware of the triggering effects, which most usually is termination, but in some cases there could be cause for fines or even repayment of past paid monies.[102] Therefore, in the event of the placement of a morals clause in a talent agreement, it is imperative that talent fully understands and learns from his or her agent or attorney all of the potential career effects, both long-and short-term.

iv. Remedying Post-Trigger Effects for Talent

Just as it is important to realize the effects of a morals clause and its triggers, it is also important to keep in mind what can be done if it is triggered. As stated, most talent agreements, similar to Nader's, allow a studio to terminate the talent if a morals clause is invoked. In remedying this termination, the option of litigation is not foreclosed, despite the losses that Nader, Galvanez, Scott, Lardner, and Cole faced in the courts. However, given these loses, and the constant affirmation of the validity of these clauses by several circuit courts, future cases are unlikely to be successful.[103] In using a different remedy to avoid termination, talent could make an attempt to first disprove the allegation of bad behavior, thereby negating the trigger of the morals clause.[104] Finally, there always exists the option of once again negotiating with the studio to prevent termination by asking for a second or third chance at a morals clause by the use of an oral agreement or an amendment to an existing agreement.[105]

C. The Implied Morals Clause

> An employee owes a well-established common law duty to refrain from activities that may be detrimental to the employer's interest or otherwise devalue the performance due.[106]

Although not nearly as strong as an explicit morals clause written in a talent agreement, an implied morals clauses in common law still exists today in entertainment employer-employee relationships.[107] Both New York and California recognize this implied duty of good conduct necessary for employment, if an employment relationship can be shown.[108] Of course, the studio and star system discussed earlier, where stars were contracted to certain studios for seven years at a time, sufficiently proved this employer-employee relationship; however, the industry now favors a "free agent" system, where many actors, directors, and screenwriters have the freedom to move from studio to studio, similarly to an independent-contractor relationship.[109] Nonetheless, and often because of actor inducement agreements that allow studios to hold actors responsible for misconduct,[110] actors are generally seen as common law employees who can be held to an implied

morals clause, especially since studios exercise a great deal of control over their work.[111] Although this implied morals clause exists, it is to the greater advantage of a studio to place an express morals clause in a talent agreement. Not only does it give the studio greater rights than are provided at common law, but also because it gives full disclosure and notice to the talent, thereby avoiding ambiguity.[112]

D. Why Morals Clauses Are Used

i. Clear-Cut Reasons for Use

Morals clauses are so widely used because they have been upheld, work to some extent, and provide additional corporate protection for entertainment investments, so long as they do not compromise constitutional rights to free speech or violate public policy.[113] They no longer exist for religious or political reasons, but now to safeguard companies, brands, and investments.[114] They also allow a company to immediately sever any and all connections with talent if the latter engages in conduct that can inevitably hurt the brand by association, causing a huge financial loss.[115] Further exploration provides that morals clauses have three major reasons for use: a) they are enforceable as a matter of contract and employment law; b) they provide remedies and protections against bad imaging in the entertainment industry; and c) they encourage socially responsible behavior by deterring unethical behavior.[116] Although sometimes these clauses over-control and over-restrict behaviors or even rights (as with the communist cases), they are generally effective, albeit not without issue.[117] The question remains: While the reasons for morals clauses are somewhat good, does that outweigh the tension they create during negotiations and the eventual litigation or arbitration that ensues if they are actually triggered?

ii. Possible Underlying Reasons for Use: Reverting to the Studio System

In addition to the underlying reasoning discussed above, there are also other reasons why morals clauses are used. Most notably, in today's immediate news cycle, morals clauses are important because of the way in which the public receives its information and news.[118] Celebrities are scrutinized by the public, and anything said or done by talent is often broadcast through social media to millions of people in a matter of seconds.[119] Technology drives studios to move fast to terminate talent;[120] the viral world of social media is now watching, thereby allowing for every single action to be recorded and for a studio to use leverage to terminate employment. Given this, studios are now able gain some control over the personal lives of their talent.

Arguments abound regarding how far morals clauses can reach. For example, a Pittsburgh Steelers running back, Rashard Mendenhall, lost his endorsement deal for tweeting controversial remarks on Twitter regarding the September 11 attacks on the World Trade Center. Those tweets were later considered "actions of public disrepute that shocked and offended the community."[121] Are morals clauses beginning to censor celebrities, and thereby withholding their rights to free speech? It is likely that, in such a case, a studio could be free to make any argument regarding how talent breached a morals clause, especially since these clauses have been so broadly enforced in the past.[122]

Looking toward film and television specifically, Hollywood has used morals clauses in an attempt to censor talent. For example, Paramount in 2006 ended its contract with Tom Cruise for his outspoken views on Scientology.[123] During the time of the studio system, the talent agreements indeed controlled every aspect of a celebrity's life, and it is very possible that we are slowly moving back in that direction.[124] It can be said that to this day the studio system still exists in some respects; after all, Lionsgate brought Jennifer Lawrence to stardom through *The Hunger Games*, and Shailene Woodley through the *Divergent* Series; the only difference is that Lawrence and Woodley are free to work for other studios and production companies at the conclusion of, and in between, these franchise movies.[125] Entertainment lawyer and author of the well-known entertainment law book, *The Biz*, Schuyler Moore asserts that film companies *should* revert back to the studio system in order to retain the value of the star power they built for certain individuals; after all, it would give the studios more control and financial security.[126] However, sometimes morals clauses can actually be quite ineffective and ambiguous when applied to real-life current day situations.

IV. Ineffectiveness and Ambiguity in Morals Clauses: A Brief Charlie Sheen Case Study

A. The Termination of Sheen

> After careful consideration, Warner Bros. Television has terminated Charlie Sheen's services on 'Two and a Half Men' effective immediately.[127]

In 2011, Warner Brothers Television (Warner Bros.), after eight seasons, exercised what it believed was its right to terminate actor Charlie Sheen from his talent agreement on the hit CBS show "Two and a Half Men."[128] After publicized drinking binges, anti-Semitic comments about the show's creator Chuck Lorre, open cocaine usage, and an inability to perform at work, Warner Bros. terminated him on the grounds of force majeure (incapacity to work) and for breach of his morals clause, or in this case, his moral turpitude clause.[129] His termination ended production for the season, causing financial damage to both Sheen and to his co-workers.[130] The claim made by Warner Bros. stated that Sheen had committed felony offenses involving moral turpitude, by furnishing cocaine to others, and that he was publicly engaging in a destructive lifestyle.[131] Conversely, Sheen's attorney argued that he was ready for work and completely rehabilitated.[132]

i. Notice of Termination

On March 7, 2011, counsel for Warner Bros sent a detailed notice of termination to Sheen's counsel.[133] The termination claimed that Sheen had engaged in destructive conduct involving outbursts to the entire world over the course of several weeks.[134] Rather than immediately terminate Sheen, Warner Bros. at first halted production in an attempt to help him get the rehabilitation he needed, but nonetheless he continued down a destructive path.[135] The termination in this case did not come lightly; however, Sheen was unable to deliver his lines and work with the cast and crew. Around the same time, he was also publicly exposed for destroying a New York hotel room[136] while under the influence of alcohol and cocaine.[137] Although Sheen claimed be a brilliant performer, Warner Bros. retained tapes that showed a lack of balance and very poor line delivery; additionally, Sheen partook in public tirades during several off-set interviews, calling Chuck Lorre, the show's creator, several profanities.[138] The termination letter claimed that Warner Bros. had the right to terminate Sheen because of his incapacity to deliver lines, and in being the star of the show.[139] Finally, the language of the moral turpitude clause in Sheen's contract read:

> If Producer in its reasonable but good faith opinion believes Performer has committed an act which constitutes a felony offense involving moral turpitude under federal, state, or local law or is indicted or convicted of any such offense, Producer shall have the right to delete the billing provided for in this agreement…and Producer shall have the right to treat such act as a default…[140]

As a result, Warner Bros. believed that it had the right to terminate him, given the overwhelming evidence of felony offenses.[141]

ii. Response: Complaint

Following the notice of termination, Sheen filed a complaint on March 10, 2011 that was eventually dismissed, and the case then settled.[142] The complaint claimed that Lorre and Warner Bros. had unilaterally decided to no longer pay Sheen in March, even though they were happy to continue working with him when he had destroyed a hotel room and was the subject of gossip months before.[143] Sheen also claimed that Warner Bros. made attempts to renegotiate the next season with Sheen while the felony offenses were pending, thereby making the "sudden" termination decision abrupt and unfair,[144] as well as discriminatory, given Sheen's cocaine addiction.[145] Although not discussed in the complaint, Sheen's attorney claimed that there was no morals clause in Sheen's contract. He stated that a moral turpitude clause was not a morals clause, and that the moral turpitude clause could not be invoked when negotiations for the next season of the show had already started despite Warner Bros. knowledge of pending felony offenses.[146] For purposes of this article, it is interesting to ask whether a moral turpitude clause is a form of a morals clause, and if so, is the usage of the morals clause in this case really all that effective?

B. The Use of Moral Turpitude Clauses as Morals Clauses

Given what we know now about what happened the Sheen case, it is safe to assume that Warner Bros. had grounds other than the moral turpitude clause to terminate the actor—mainly his incapacity and inability to perform, as shown on rehearsal tapes.[147] However, a main issue that arose was a question of whether or not the moral turpitude clause in Sheen's contract was the equivalent of a morals clause, and to what extent it was enforceable against Sheen.

Moral turpitude is an act or behavior that gravely violates the moral sentiment or the accepted moral standards of the community. However, those acts or behaviors are not legally defined.[148] Similar to a standard morals clause, a moral turpitude clause prohibits certain kinds of bad behavior by giving the employer the right to terminate employment.[149] Moral turpitude clauses are commonly used in two places other than the entertainment industry. The first is professional athlete agreements.[150] The second and most common place is in C-level executive agreements of corporations; in one study it was proven that over 70% of CEO agreements, including Martha Stewart's executive agreement, contained a moral turpitude clause calling for termination in the event of bad acts.[151]

Morals clauses are typically broad in scope; however, moral turpitude clauses when used in any industry can also be ambiguous, especially as community standards of morality are constantly changing.[152] In practice, defining moral turpitude has seem to take the "I know it when I see it" approach.[153] However, there is one notable way in which morals and moral turpitude clauses differ. It is often the case that moral turpitude clauses, as seen in Sheen's case, are more limited, in that they call for or are triggered not just by bad behavior, but by a criminal conviction of a felony or guilty plea.[154] This standard, if included in a moral turpitude clause, more narrowly defines what an actor can or cannot do.[155] For reasons of the narrowed standard of a required criminal conviction, one can assume that a moral turpitude clause might be the middle ground on which a studio and talent settles; it therefore may be possible that this is why Sheen had a moral turpitude clause in his agreement, rather than a traditional morals clause.[156]

However, we are still confronted with the issue as to whether Sheen's moral turpitude clause was actually effective. Warner Bros. claimed that the moral turpitude clause was a morals clause, but Sheen's attorney claimed that it was not.[157] Even though Warner Bros. was able to

terminate Sheen's talent agreement, it is possible that it was the circumstances surrounding the situation that allowed for his termination, rather than the use of the moral turpitude clause.[158] Additionally, there is no doubt that the moral turpitude clause used in Sheen's agreement is not standard.[159] The problem is not whether Sheen committed an act of moral turpitude, though, but whether Warner Bros., by ignoring those early on felonious actions while trying to negotiate the next season, created a waiver of the clause.[160] It was therefore widely believed in the industry that rather than using the moral turpitude clause, Warner Bros.'s strongest argument for termination lay in the force majeure clause, the argument that Sheen lacked the capacity to work.[161]

This most recent case shows how, unlike Nader, morals clauses or moral turpitude clauses can actually be ineffective. If not for Sheen's inability to actually perform, it is possible that Warner Bros. might not have had as strong a case for termination using just moral turpitude.[162] Further, the way these clauses are currently drafted leaves the studios quite vulnerable and without the right to any recovery, while also possibly removing their rights to terminate if they try to ignore, help, or give second and third chances to talent who have committed acts of moral turpitude that should trigger the clause. Of course, we cannot know for sure, but if the waiver argument is accepted by a future court,[163] this case shows that second chances may render these morals and moral turpitude clauses ineffective, thereby taking away the protections for studios. Given this, along with the other issues surrounding morals clauses as mentioned above, this article now seeks to put forward a series of solutions to address how improvements can be made.

V. Reconciling Morals Clauses: Solutions for Studios and Talent

A. The Elimination of Morals Clauses

Although we have seen several situations in which morals clauses do work, we have also seen several others in which they lead to litigation, and in Sheen's case, a costly falling out for both sides. Therefore, among the several solutions to the issues surrounding morals clauses, this article first suggests the elimination of the usage of morals clauses in film and television contracts. At this point it may be argued that morals clauses, especially in film, bring very little to the table. For example, when Mel Gibson was arrested for drunk driving and an anti-Semitic outburst, The Walt Disney Company (Disney) had little recourse when it came to distributing his upcoming film "Apocalyto."[164] The movie had been shot, there was no terminating Gibson, and Disney was under contract to distribute the film, regardless of any "moral actions" of any above the line[165] talent.[166] A similar situation occurred with Tom Cruise and his tirades; although Paramount could cancel its future deals with him, it had no choice but to release and distribute "Mission: Impossible: III," because of distribution agreements that were far stronger than any morals clause.[167] Therefore, there is essentially nothing a morals clause can do in cases like these to protect films.

Morals clauses are not integral to contracting in film and television. Although important for endorsement and sponsorship contracts, the film and television entertainment industries do not need to rely on them. For example, in reality television, participants are required to disclose their entire histories, including arrests, convictions, civil cases, performances, and marital status. Collection of this information serves in place of a morals clause, preparing the producers, shows and brands for anything disclosed.[168] To go one step further, in fact, some of the collective bargaining agreements for above the line unions in both film and television obtained prohibitions against morals clauses.[169] Most notably the screenwriter's guild (The Writers Guild of America or the WGA) and the director's guild (The Directors Guild of America or the DGA) have obtained prohibitions against any and all forms of a morals clause in their contracts.[170] These unions contain two out of the major four above the line positions (actors and producers excluded) that exist perfectly in film and television without morals clauses.

Members of the WGA and DGA include Steven Spielberg, JJ Abrams, and Dan Schneider, the creator of several hit Nickelodeon shows. As with above the line talent, they also represent the studios and networks in a very public way, and do so without morals clauses. While it is true that if a director or writer was to have endorsement agreements, he or she would be subject to a morals clause, that is not the case for his or her professional work.[171] Therefore, this proposal emphasizes the elimination of morals clauses for the remainder of above the line talent (most notably actors and producers) for purposes of their film and television work.

B. Narrowing the Morals Clause: More Drafting, Less Litigating

It is unlikely that morals clauses will be eliminated altogether, so this second solution argues that morals clauses should be drafted more narrowly than is the current norm. Although studios prefer broad clauses for more discretion, narrowing them may help reduce tension, confusion, and of course, ambiguity.[172]

First, in order to narrowly draft, it would help both studios and talent to list and address all major prohibited conduct. Studios should begin with criminal conduct and felonies according to state and federal law, while also making it clear that an allegation, indictment, or conviction will trigger the morals clause and allow for termination.[173] In addition, the clause should specifically address drugs and alcohol outright, listing whether or not possession, use, and/or sale of these items is grounds for termination.[174] Furthermore, included in the list of criminal categories should be actions of violence,

such as whether the violence is with a weapon, to what extent actual harm is done, and if authorities are involved.[175] Finally, given the age of technology and social media, as well as prior cases, these clauses might also make note to include prohibitions against certain public actions and public statements that cause harm to the company or brand.[176] These can include, but are not limited to, out of control parties and what is said in off-set interviews (like Charlie Sheen's), as well as social media statements.

Most of these aforementioned listed prohibitions have been the hotly contested issues and cover, for the most part, triggers to a morals clause. Therefore, if explicitly listed in the agreement and negotiated down to what both parties can agree upon, it would become more than clear as to which actions actually trigger the clause. A common mistake studios have made in regards to broad morals clauses has been the thought that narrowing specificity would decrease studio protections.[177] In actuality, however, more definitive language in morals clauses will decrease ambiguity and increase protections, thereby preventing not only tension, but if triggered, costly litigation for both sides.[178]

C. A Strike System: A Notice and Opportunity to Cure Clause

In conjunction with the proposed idea of drafting with specificity, this article also proposes adding on a sort of strike system that gives talent a second or third chance. Essentially, this creates a notice and opportunity to cure clause in the event that the studio believes, in its discretion, that a certain action triggers the morals clause. Such an additional clause that gives only two strikes total might read:

> In the event that talent engages in such an action that triggers the aforementioned morals clauses, which results in a first breach of this Agreement in Producer's sole discretion, he or she shall be given notice of such trigger and shall be given one and only one opportunity to cure said breach by means of a public apology via social media as well as traditional media and by any other means necessary that Producer sees fit in order to cure said breach for such action. A second breach of the morals clause shall result in immediate termination in accordance with the morals clause herein.[179]

A similar clause allows for a few things that will now be addressed. First, this system allows for a second chance for both talent and studios. Although a second chance could be beneficial for both sides, in some cases a studio may rather just cut ties with talent in the event of a certain egregious act, such as a murder or rape conviction. For this reason, it would not violate or take away from this solution if studios were to have a carve-out in which this notice and opportunity to cure clause would not apply in the event of a specifically listed and especially egregious morals clauses violation, such as murder and rape.[180]

Aside from egregious acts, this second chance notice and opportunity to cure provides a double benefit. On the talent side, the notice and opportunity to cure allows for talent to make better choices, regain their own good names through apologies, all while securing their employment and paychecks. On the studio side, while the studio itself may have to withstand some publicity, it may stand out as notable in the industry by showing that instead of writing someone off, it instead helps its employees get back on their feet when times are tough.[181] More important, the studio or production will not automatically lose its investment on a hit television show in the middle of a season because it had to fire an actor.

Another reason for this type of notice and opportunity to cure is that it creates a paper trail.[182] On the studio side, in the event that the actor fails to cure his or her behavior or re-engages in bad behavior, in the event of any morals clause litigation, the studio will be able to show the court that the talent had been put on notice for one instance of bad behavior, thereby making its argument for termination even stronger. On the talent side, this paper trail will at least let talent know where they stand with the studios, and what types of actions might trigger the clause, so that they know how to avert second mishaps.

Finally, this clause will help to cure a situation similar to what happened with Sheen.[183] A studio will be able to continue working with talent and negotiating new deals, despite previous morals clause breaches; it will not be penalized for continuing negotiations against claims that the studio has waived its right to terminate under a morals clause because of continued negotiations after past acts of moral turpitude.[184] The benefit of narrowing the morals clause, along with providing a notice and opportunity clause, may be a step toward learning from the past and helping to cure the issues for the future.

D. Using a Reverse Morals Clause: Making It a Two-Way Street

Morals clauses no doubt create tension between two parties who are trying to negotiate a deal with a favorable outcome for both sides. Perhaps morals clauses create tension because they seem so one-sided. Most often, when boiled down, and at least in the talent's eyes, the studio always wins because the talent will be terminated at studio discretion if the clause is triggered. What, then, protects the talent? This idea leads us to a reverse morals clause, or a moral reciprocity clause.[185] Using this clause,

an employee may terminate a relationship if its business negatively impacts upon his or her own image.[186] These types of clauses have become popular in the wake of corporate scandals and social media, considering that celebrities have become their own brands.[187] Therefore, this proposed solution calls for more common usage of the reverse morals clause in film and television talent agreements, in order to give the talent some protection for their own brands.

A reverse morals clause is a "reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from negative, unethical, immoral, and/or criminal behavior…" of the company to which it is contracted.[188] In 1968, because of his clean image and religious values (that later dissipated) singer and actor Pat Boone negotiated an oral agreement for a reverse-morals clause with his label DOT Records, which was the first reverse morals clause on record in the entertainment industry.[189] For this reason, the reverse morals clause is not a new concept; however, it regained the most attention in the wake of the infamous Enron scandal.[190] In 1999, Enron signed a contract with the Houston Astros to name its ballpark, naming it "Enron Field."[191] After Enron's bankruptcy filing and the determination of its Ponzi-scheme activity, the Astros spent both extensive time and money attempting to rename the field and disassociate itself from the scandalous company without having a reverse morals clause.[192]

The Enron scandal showed the world that companies can misbehave just as badly as public figures, or even worse. It showed that both parties to an entertainment contract have reason to be cognizant of each other, while also requiring certain protections.[193] So too is this protection required in film and television, where both parties are bringing something equally valuable to the table; the studio brings its money and crew, and the talent brings his or her reputation and fame, which are used to sell advertising or tickets. Therefore, as a result of this mutually beneficial relationship, each party should benefit from the mutual protections of a morals clause (and a reverse morals clause). Although reverse morals clauses are likely to be successfully negotiated only for major above the line talent, perhaps if started with them, then the clause could one day become an industry standard. However, it should be noted that in order for talent to negotiate for a reverse morals clause in the wake of studio resistance, these clauses should be narrow in scope, listing specific scandalous behaviors (like Ponzi-schemes or unfair dealings), while perhaps also allowing for opportunities to cure.[194]

E. Clawback Provisions: Giving Morals Clauses Bite

Unfortunately, as they stand now, morals clauses in film and television often allow for one remedy: termination.[195] Termination leaves both parties in a sort of financial ruin, as the studio loses its investment in the talent and the talent loses an expected salary. In the wake of an ideal world that includes narrowed morals and reverse morals clauses, with opportunities to cure in each talent agreement, this article now proposes clawback provisions be added for each side in the event that the morals clause is invoked by either party.

Often used in endorsement deals, in business and securities, clawback clauses give companies a way to protect their investments by recouping an employee's compensation in the event that he or she engages in an action that may be listed in the clause itself or in a separate morals clause.[196] The use of these clauses has even spread as far as MLB minor league contracts.[197] As applied to the film and television industry, it might be advantageous for studios to start to use clawback provisions in the event of a morals clause breach, in order to clawback additional contingent compensation[198] that is somewhat expected, but has not already been paid. Conversely, and in the event of a reverse morals clause, the talent should also be able to use a clawback provision in order to retain, from the studio, fixed compensation[199] that would have been earned, notwithstanding the employer's bad behavior.[200]

In general, clawback provisions are often appreciated by companies because they hold an executive or talent (in the case of endorsement deals today) accountable, while also securing the company's monetary investment. However, they are somewhat difficult to enforce.[201] Although theoretically a useful and powerful tool, further hesitation in their use comes from fear of the ability to recruit and retain talent who would not want to agree to these clauses.[202] Therefore, a clawback provision should be negotiated so that it allows for enough money to be litigated over if need be, but not so much as to deter talent to sign.[203] For this reason, if clawback clauses are enforceable in film and television agreements, it would be in the best interest of studios to allow for some form of reciprocity, as with the use of a reverse morals clause, which would then allow for talent to collect damages in the event that the studio or employer engages in immoral behavior.[204] Given this manner of use, clawback provisions, like the other solutions proposed throughout this section, can be mutually beneficial to both contracting sides in the film and television industries.

VI. Conclusion

"In Hollywood, top attorneys say a morals clause is the first thing they strike out of an actor's contract."[205] Upon first draft of a talent agreement, it is evident that morals clauses create immediate tension between the parties when used in film and television. As they stand today, the clauses seem to threaten talent by putting them under the microscope of the not so forgiving public eye, as well as the "big brother" studio eye, with grounds for termination. A termination would divide an otherwise amicable relationship, cut both parties off from streams of expected income, and be the next headline in *The Hollywood Reporter*. Given this, and as shown by the 2011 headlines of the

Charlie Sheen incident, the rewards of morals clauses do not outweigh their risks, because of the uncertainty that clouds them.

This article has not attempted to tout either side, studio or talent, but has instead called for a reconciling of morals clauses, and a way to balance the tension that surrounds this negotiating point. It is understandable that both parties have needs; however, if anything is to get done, they must find common ground on which to build, to see each other as a partner, rather than an adversary. Understanding the foundation, scope and use of morals clauses is extremely important. Equally as important is understanding the most recent history of how these clauses have actually played out in the film and television industries. History does not have to repeat itself, and the entertainment industry can learn from the confusion, tension, ambiguity, and one-sidedness of morals clauses. Therefore, the solutions proposed herein address several ways in which morals clauses can be improved and be useful in balancing out the tension between sides, and providing an additional layer of protection for the brands, companies or people associated with each other in the film and television industries.

Endnotes

1. Michael P. Zweig, Morals Clauses, 11 Bus. & Com. Litig. Fed. Cts. § 126:46, Westlaw (Database updated Dec. 2015).
2. *Id*.
3. *Id*.
4. *See id*.
5. *Id*.
6. *Morality Clause for Films*, N.Y. Times, Sep. 22, 1921, at 8, *available at* http://query.nytimes.com/mem/archive-free/pdf? (last visited Mar. 31, 2016).
7. *See* Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 Seton Hall J. Sports & Ent. L. 347, 349 (2009).
8. Zweig, *supra* note 1 (discussing why an employer would invoke a morals clause).
9. *See* Pinguelo & Cedrone, *supra* note 7, at 351 (discussing the motives behind the uses of morals clauses).
10. C-Level Executives are the top officers in a company, whose title often begins with a C, which stands for "chief"; the most common examples of this are the Chief Executive Officer and the Chief Operating Officer. *See* Pinguelo & Cedrone, *supra* note 7, at 364 (defining C-Level Executives).
11. Amanda Harmon Cooley, Marka B. Fleming & Gewndolyn McFadden, *Morality and Money: Contractual Morals Clauses as Fiscal and Reputational Safeguards*, 14 Journal of Legal Studies in Business, 1 (2008), *available at* https://journaloflegalstudiesinbusiness.files.wordpress.com/2015/08/mmcmcfrs_2008_1to29.pdf.
12. *See* Zweig, *supra* note 1 (describing the issues behind morals clauses).
13. *Id*.
14. Pinguelo & Cedrone, *supra* note 7, at 352-53 (discussing how moral standards change over time).
15. A reference to the 1950s sitcom *I Love Lucy*, where the fictionally married couple Lucy and Ricky Ricardo slept in two separate twin beds because moral standards at the time thought it was improper to show two unmarried actors sleeping in the same bed on television (despite their real life marriage). Yagana Shah, *How Separate Beds Are the Key To A Happy Relationship for Many Couples*, Huffington Post (Oct. 20, 2014, 8:17 AM), *available at* http://www.huffingtonpost.com/2014/10/20/couples-separate-beds-_n_5966132.html.
16. *See* Pinguelo & Cedrone, *supra* note 7, at 352-53.
17. *See* Zweig, *supra* note 1 (describing the effects of invoking morals clauses).
18. *See id*.
19. Pinguelo & Cedrone, *supra* note 7, at 353 (describing the complications of a morals clause breach).
20. *See id* at 354.
21. Cooley, Fleming & McFadden, *supra* note 11, at 2 (describing the origination of morals clauses).
22. Tom Schatz, *The Structure of the Industry*, 2-3 (2007), *available at* http://www.blackwellpublishing.com/content/bpl_images/content_store/sample_chapter/9781405133876/9781405133876_c01.pdf.
23. *See id* at 3.
24. *See The Star System in Place*, *available at* http://encyclopedia.jrank.org/articles/pages/2892/The-Star-System-in-Place.html.
25. *De Haviland v. Warner Bros. Pictures*, 153 P.2d 983, 988 (1944).
26. *See* Cooley, Fleming & McFadden, *supra* note 11, at 3 (describing the end of the studio system).
27. *See* Thomas D. Selz, Melvin Simensky, Patricia Acton & Robert Lind, 2 Entertainment Law 3d: Legal Concepts and Business Practices at § 9:106 Westlaw (database updated Dec. 2015).
28. Pinguelo & Cedrone, *supra* note 7, at 353 (describing the early reasons for morals clauses).
29. *Id*.
30. Cooley, Fleming & McFadden, *supra* note 11, at 3 (describing the origin of the morals clause).
31. *See* Selz, Simensky, Acton & Lind, *supra* note 27 (describing the origin of the morals clauses using Fatty Arbuckle as an example).
32. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 Colum. J.L. & Arts 235, 237 (2005).
33. *See id*.
34. *Morality Clause for Films*, *supra* note 6.
35. *Id*. (quoting the first actual morals clause used by Universal Pictures as printed in the *New York Times*).
36. A current day morals clause might read: "If at any time Employee fails to conduct himself or herself with due regard to public morals and decency, or if Employee commits any act or becomes involved in any situation or occurrence tending to degrade Employee in the community or which brings Employee into public disrepute, contempt, or scandal, or which materially and adversely affects the reputation or business of [the station] or the standing of [the station] as a broadcast licensee, whether or not information in regard thereto becomes public, [the station] shall have the right to terminate the Agreement on twenty-four (24) hours notice to employee." *Galaviz v. Post-Newsweek Stations*, 380 F. App'x 457, 459 (5th Cir. 2010).
37. *See* Pinguelo & Cedrone, *supra* note 7, at 355 (describing the purposes of morals clauses).
38. Porcher L. Taylor, III. et al., *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in A New Era of Corporate Crimes and Scandals*, 28 Cardozo Arts & Ent. L.J. 65, 75 (2010).

39. *See* Selz, Simensky, Acton & Lind, *supra* note 27 (discussing the political effects of the 1950s on morals clauses).

40. Cooley, Fleming & McFadden, *supra* note 11, at 4-5 (describing the effects of communism on morals clauses).

41. The "Hollywood Ten" were comprised of a group of 10 Hollywood workers who refused to testify in front of HUAC after asserting their First Amendment rights of freedom of association and freedom of speech. *Id*. at 5.

42. *Id*. at 4-5.

43. *Id*.

44. Cole's morals clause read as follows: "The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general." *Loew's, Inc. v. Cole*, 185 F.2d 641, 645 (9th Cir. 1950).

45. *See Loew's, Inc.*, 185 F.2d 641, 645.

46. *See id*. at 658.

47. *See id*.

48. Lardner's morals clause read as follows: "That the artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created." *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 848 (9th Cir. 1954).

49. *See Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 848.

50. *See id*. at 850.

51. Scott's morals clause read as follows: "At all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not willfully do any act which will tend to lessen his capacity fully to comply with this agreement, or which will injure him physically or mentally." *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 87-88 (9th Cir. 1957).

52. *See Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 88.

53. *See* Pinguelo & Cedrone, *supra* note 7, at 362 (discussing the power of studios in enforcing morals clauses).

54. Cooley, Fleming & McFadden, *supra* note 11, at 7.

55. *See id*. (describing the motivations behind using morals clauses).

56. *See* Kressler, *supra* note 32, at 244-45 (describing talent agreement terms as used in California and New York).

57. *See* Selz, Simensky, Acton & Lind, *supra* note 27, at § 9:107 (discussing what kind of conduct morals clauses cover).

58. *Id*.

59. *See* Sarah D. Katz, *"Reputations . . . A Lifetime to Build, Seconds to Destroy": Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 Cardozo J. Int'l & Comp. L. 185, 187 (2011).

60. Cooley, Fleming & McFadden, *supra* note 11, at 9 (describing the positive effects of narrowing morals clauses).

61. *See Nader v. ABC Television, Inc.*, 150 F. App'x 54, 55 (2d Cir. 2005).

62. *See Nader v. ABC Television, Inc.*, 330 F. Supp. 2d 345, 346 (S.D.N.Y. 2004).

63. *See id*. at 347.

64. *See Nader*, 150 F. App'x 54, 56.

65. *See id*. at 57.

66. Cooley, Fleming & McFadden, *supra* note 11, at 10 (addressing ABCTV's authority in the Nader case).

67. *See Galaviz v. Post-Newsweek Stations*, 380 F. App'x 457, 459 (W.D. Texas Jul. 13, 2009).

68. *See id*.

69. *See id*. at 460.

70. *See* Cooley, Fleming & McFadden, *supra* note 11, at 10 (describing how morals clauses affect the entertainment industry).

71. *See id*. at 12.

72. *See* Kressler, *supra* note 32, at 243 (describing morals clauses as a standard in talent agreements).

73. *See* Cooley, Fleming & McFadden, *supra* note 11, at 12 (describing the types of agreements where morals clauses thrive).

74. Pinguelo & Cedrone, *supra* note 7, at 364 (describing what calls for termination in an endorsement agreement with a morals clause).

75. *See* Cooley, Fleming & McFadden, *supra* note 11, at 12.

76. Pinguelo & Cedrone, *supra* note 7, at 364-65 (discussing how morals clauses work in CEO agreements).

77. SAG-AFTRA (the actor's union) has no provision regarding the banning or usage of morals clauses for talent in its collective bargaining agreements with any studios or production companies. *See* Selz, Simensky, Acton & Lind, *supra* note 27, at § 9:108.

78. *See* Pinguelo & Cedrone, *supra* note 7, at 364 (discussing how morals clauses work in sports agreements).

79. Katz, *supra* note 59, at 219 (discussing the inevitability of what happens when a morals clause is invoked).

80. *See id*. at 220.

81. *See* Pinguelo & Cedrone, *supra* note 7, at 368-69 (discussing how morals clauses work in sports agreements).

82. Katz, *supra* note 59, at 220 (explaining the effects of a breach in the morals clause).

83. *See id*.

84. It may be fair to say that a celebrity with clout, such as Leonardo DiCaprio, would have more bargaining power and leverage against a studio than another celebrity who may have only acted in one or two low budget films.

85. Pinguelo & Cedrone, *supra* note 7, at 370-71 (discussing the benefits of a narrowed morals clause).

86. *Id*. at 375.

87. *See id*.

88. Katz, *supra* note 59, at 220 (explaining how to avoid ambiguity in morals clause drafting).

89. *See* Katz, *supra* note 59, at 221 (describing how morals clauses protect corporate brands).

90. *See id*.

91. Katz, *supra* note 59, at 222-23 (describing the effects of morals clauses on the television industry).

92. *Id*.

93. *See id*.

94. *See* Kressler, *supra* note 32, at 243 (describing moral standards in television).

95. *See* Katz, *supra* note 59, at 222.

96. *Id*.

97. *See* Kressler, *supra* note 32, at 243 (describing the effects of morals clauses in film).

98. *Id*. at 244.

99. *See* Katz, *supra* note 59, at 223 (describing how morals clauses protect a film).

100. *See id*. at 376.

101. *See id*.

102. *See id*. at 378.

103. *See id*. at 379.

104. *See id*.

105. *See id*.

106. Kressler, *supra* note 32, at 246 (describing an implied morals clause in an employment or talent agreement).

107. *Id*.

108. *Id*. at 247.

109. *Id*. at 247-48.

110. A "Loan-Out" entity is a company (usually a LLC) often formed by talent that "loans out" or contracts its acting services to third parties, usually for purposes of declaring more tax deductions. *See* Schuyler M. Moore, The Biz: the basic business, legal and financial aspects of the film industry 7 (4th ed. 2011).

111. *See* Kressler, *supra* note 32, at 248.

112. *See id*.

113. *See* Cooley, Fleming & McFadden, *supra* note 11, at 24 (explaining why morals clauses are so commonly used).

114. *See id*. at 29.

115. *See* Pinguelo & Cedrone, *supra* note 7, at 368 (describing the remedies available to companies who invoke morals clauses).

116. Cooley, Fleming & McFadden, *supra* note 11, at 24.

117. It may be argued that in the "Hollywood Ten" communist cases, morals clauses actually went beyond their scope in restricting the First Amendment rights of freedom of speech and freedom of assembly. Cooley, Fleming & McFadden, *supra* note 40.

118. So much news and information is now received in an instant via social media websites such as Facebook, Twitter, and Instagram. News outlets like CNN can send also instant mobile notifications.

119. Pinguelo & Cedrone, *supra* note 7, at 367 (explaining how quickly the world receives its information).

120. *See id*.

121. Eriq Gardner, *Lawsuit Defends Celebrities' Rights to Say Controversial Things on Twitter*, The Hollywood Reporter (Jul. 25, 2011, 12:17 PM), *available at* http://www.hollywoodreporter.com/thr-esq/lawsuit-defends-celebrities-rights-say-214881.

122. As shown in all of the court cases discussed thus far, we can conclude that morals clauses are broadly used and upheld as enforceable.

123. *See* Merissa Marr, *When a Star Implodes—Studios Have Few Options When Celebrities Stumble; Return to Morals Clause?*, Wall St. J., Aug. 4, 2006, at W8.

124. *See id*. (discussing how studios are looking to control talent to a large degree using a morals clause).

125. *See* Schuyler Moore, *How the Studios Could Benefit by Putting Stars Under Contract*, Forbes (Apr. 15, 2014, 1:31 PM), *available at* http://www.forbes.com/sites/schuylermoore/2014/04/15/back-to-the-future-the-star-system/#6d65103223b8.

126. *See id*.

127. Sam Schechner, *Warner Bros. Fires Charlie Sheen*, Wall St. J., Mar. 8, 2011, *available at* http://www.wsj.com/articles/SB10001424052748703386704576186871957275788. (citing the one-sentence statement publicly issued by Warner Bros. Television regarding Charlie Sheen's termination).

128. Mark Kesten, *Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee*, Cornell HR Review, at 1, Nov. 23, 2012, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1062&context=chrr.

129. *Id*.

130. Schechner, *supra* note 127 (discussing the reasons why Sheen was terminated).

131. *Id*.

132. *Id*.

133. Email and Messenger from Partners, Munger Tolles & Olson LLP to Martin D. Singer, Lavely & Singer (Mar. 7, 2001) (on file with TMZ), at 1.

134. *Id*.

135. *Id* at 2.

136. In October 2010, Sheen "was involved in a highly publicized and disturbing rampage at the Plaza Hotel in New York…a paid escort in Mr. Sheen's hotel room called police after Mr. Sheen allegedly flew into a rage, trashed the hotel room and physically threatened her…Mr. Sheen denied any wrongdoing…." Munger Tolles & Olson LLP, *supra* note 133 (addressing specifically one of Sheen's actions).

137. Munger Tolles & Olson LLP, *supra* note 133, at 3.

138. *Id*. at 4.

139. *Id*. at 6.

140. *Id*. at 7.

141. *Id*. at 8.

142. *See* Complaint at 2, *Charlie Sheen v. Chuck Lorre, WB Studio Enterprises, Inc.*, No. SC111794 (Cal. Superior. Mar. 10, 2011).

143. *Id*.

144. This argument was rooted in an idea that Warner Bros. had essentially "waived" the morals clause since they had continued negotiations despite past actions that would have originally breached the morals clause. *See* Complaint, *supra* note 142, at 4.

145. Complaint, *supra* note 142, at 4.

146. Schechner, *supra* note 127 (explaining Sheen's argument stating that no morals clause existed).

147. Munger Tolles & Olson LLP, *supra* note 133, at 4.

148. *See* Kira N. Buono, *Athletes Sacked by Moral Turpitude Clauses: Presumed Guilty Unless Proven Innocent*, 41 New Eng. J. on Crim. & Civ. Confinement 367, 379 (2015).

149. *Id*.

150. *See id*.

151. *See* Pinguelo & Cedrone, *supra* note 7, at 365 (discussing the jobs in which morals clauses are most common).

152. Buono, *supra* note 148.

153. Buono, *supra* note 148, at 383.

154. *Id*.

155. *Id*. at 384.

156. We can likely assume that Sheen's agent negotiated Warner Bros. down from a morals clause to a less broad moral turpitude clause

or that Warner Bros.' policy was to use a moral turpitude clause instead of a morals clause, since the latter is so disfavored in the industry.

157. Schechner, *supra* note 127.

158. Eriq Gardner, *Charlie Sheen's Contract: Was There Actually a Morals Clause? (Analysis)*, The Hollywood Reporter (Mar. 8, 2011, 9:13 AM), *available at* http://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309.

159. *Id*.

160. *See id*.

161. *See id*.

162. *See id*.

163. Complaint, *supra*, note 142.

164. Marr, *supra* note 123 (discussing Mel Gibson's morals clause breach).

165. "Above the Line" talent refers to the names of the talent who appear before the title line at the end of a film; they are usually the highest paid talent. *See* Moore, *supra* note 110, at 3.

166. Marr, *supra* note 123.

167. Marr, *supra* note 123 (discussing Tom Cruise's morals clause breach).

168. Selz, Simensky, Acton & Lind, *supra* note 27, at §9:108 (describing how morals clauses are unnecessary in reality television).

169. *Id*.

170. *Id*.

171. *See id*.

172. Katz, *supra* note 59, at 223 (discussing how morals clauses should be drafted as narrowly as possible to prevent ambiguity).

173. *See id*.

174. *See id*.

175. *See id*. at 224.

176. *Id*.

177. *See id*. at 224.

178. *See id*.

179. This is a self-drafted notice and opportunity to cure clause that might work in conjunction with a morals clause.

180. Such a self drafted clause might be added to the already stated notice and opportunity to cure clause to read: *"This notice and opportunity provision to cure a prospective breach of the morals clause shall not apply to such egregious convictions of first degree felonies, such as murder, rape, and arson."*

181. In 2007, although not a morals clause violation, Jamie Lynn Spears (a Nickelodeon teen star) became pregnant at age 16 with her then-boyfriend Casey Aldridge, as filming on her Nickelodeon hit series *Zoey 101* was coming to an end. Although teen pregnancy was not ideal for Nickelodeon, it received accolades in the entertainment industry for its statement made in support of Spears, which read: "We respect Jamie Lynn's decision to take responsibility in this sensitive and personal situation. We know this is a very difficult time for her and her family, and our primary concern right now is for Jamie Lynn's well being." TMZ Staff, *16-Year-Old Jamie Lynn Spears Is Pregnant*, TMZ (Dec. 18, 2007, 9:17 PM), *available at* http://www.tmz.com/2007/12/18/jamie-lynn-spears-is-pregnant.

182. Theoretically, a paper and email notice would be handed to the talent who breached the morals clause and then go on file with the studio, along with a report on what the talent did to remedy the situation, thereby creating a paper trail that can be presented as evidence to the courts in the event of later litigation.

183. Complaint, *supra* note 142, at 1.

184. Complaint, *supra* note 142, at 4.

185. *See* Cooley, Fleming & McFadden, *supra* note 11, at 27 (discussing the concept of why one should use a reverse morals clause).

186. Kesten, *supra* note 128, at 2.

187. *See* Cooley, Fleming & McFadden, *supra* note 11, at 27.

188. Taylor, et al., *supra* note 38, at 66-67 (defining a reverse morals clause).

189. Taylor, et al., *supra* note 38, at 79 (discussing the first real use of a reverse morals clause).

190. Kesten, *supra* note 128, at 7 (discussing the need for a reverse morals clause in the wake of the Enron scandal).

191. *Id*.

192. Taylor, et al., *supra* note 38, at 67 (discussing the reverse morals clause in the wake of the Enron scandal).

193. *See* Kesten, *supra* note, 128.

194. *See* Taylor, et al., *supra* note 38, at 105-06 (discussing ideas to narrow morals clauses).

195. *See* Andrew Zarriello, *A Call to the Bullpen: Alternatives to the Morality Clause As Endorsement Companies' Main Protection Against Athletic Scandal*, 56 B.C. L. Rev. 389, 394-95 (2015).

196. *Id*. at 392-93.

197. *Id*. at 407.

198. Contingent compensation includes additional compensation that talent may or may not receive, depending on how well a film does. *See* Moore, *supra* note 110, at 147. The proposal here is that this compensation depends both on how well a film does and whether or not the morals clause was breached.

199. Fixed compensation is the definite amount of compensation received for working on the film, absent a possible extenuating circumstance, like a default, disability or force majeure (act of God or some other action out of the production's control). Moore, *supra* note 110, at 199.

200. *See* Kesten, *supra* note 128, at 12 (explaining how monetary damages should also be available to talent when using reverse morals clauses).

201. *See* Bradley R. Smith, *Treating Professional Athletes Like Wall Street Executives: The Potential for Clawback Provisions in Sports Contracts*, 87 Temp. L. Rev. 371, 398 (2015).

202. *See* Zarriello, *supra* note 195, at 417-18.

203. *Id*.

204. *See* Kesten, *supra* note 128, at 12.

205. Marr, *supra* note 123.

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C.J.R. v. G.A.

By Tom Fugnitti

> [P]lay gives to the young a great deal more than physical exercise. It also teaches them patience, consideration, and discipline…Play encourages boldness, courage, and initiative…Of all the benefits conferred by play, perhaps the most important is the instilling in the child a sense of justice and fair play which will be retained in adult life.[1]

Physical injury is an inevitable component within the realm of youth sports, because these activities involve rambunctious children subsumed in fierce competition, which often includes a substantial degree of contact.[2] Statewide judiciaries have recognized a recent amplified public devotion towards youth safety, and the courts have been summoned to establish standards in determining tort liability between minors engaged in recreational sporting activities.[3] The most challenging segment the courts have faced is instituting a standard that properly balances our youth's free participation in organized sports with their development of adult-like virtues, such as teamwork and discipline.[4]

"Subsequent to the collision, the referees threw penalty flags and escorted G.A. off the playing field. An ambulance transferred C.J.R. to the emergency room, where he underwent open-reduction surgery to repair his left arm."

In *C.J.R. v. G.A.*, the New Jersey Superior Court, Appellate Division encountered a case of first impression and had to determine whether G.A., a minor, could be found liable for injuries he inflicted upon C.J.R. during an organized lacrosse game.[5] The court examined case law in other jurisdictions for guidance[6] and instituted its own two-prong test:[7] First, the court must determine whether the conduct would be actionable if committed by an adult, evaluating whether the conduct was intentional or reckless;[8] second, if the court determines that the conduct is either intentional or reckless, the court must then inquire whether it would be reasonable to expect the minor to refrain from the injurious physical contact.[9] The Appellate Division affirmed the Superior Court's granting of summary judgment in favor of the defendant, finding that there was insufficient evidence of intentional or reckless conduct.[10] The appellate court heavily relied on the particular circumstances of the game and the characteristics of the players in its dismissal of liability.[11]

C.J.R. and G.A.[15] were minors enrolled in a recreational lacrosse[16] league in New Jersey.[17] Children participating in the program are assigned to specific leagues according to their skill levels.[18] Both C.J.R. and G.A. were designated to the "5/6 combination" division, which was essentially a "B" level team found between the "A" teams of the fifth and sixth grades.[19] C.J.R., the plaintiff, was 12 years old at the time of the injury, while G.A., the defendant, was 11 years old.[20] C.J.R. was physically larger than G.A., standing two to four inches taller, and weighing around 14 pounds heavier.[21]

"Christopher Rees, C.J.R.'s father, filed personal injury actions on behalf of his son and himself against both G.A. and his father in New Jersey Superior Court."

The injury occurred at the end of a game between the Medford and Marlton teams on May 7, 2011.[22] Medford, C.J.R.'s team, was leading 5-4, with about 20 seconds remaining in the game.[23] C.J.R. was running with the ball towards the sideline to maintain the lead until time expired.[24] G.A. charged towards C.J.R. from across the field and checked[25] C.J.R. on the back of his torso and left arm.[26] According to C.J.R.'s coach, it was uncertain as to whether G.A. made the contact with his helmet or his stick.[27] Upon being struck, C.J.R. immediately fell and hit the ground, while G.A. also fell from the recoil.[28] C.J.R. knew he had been substantially injured as he removed his gloves and saw that his arm was broken.[29] There were no previous interactions between the two players prior to this play.[30]

Subsequent to the collision, the referees threw penalty flags and escorted G.A. off the playing field.[31] An ambulance transferred C.J.R. to the emergency room, where he underwent open-reduction surgery[32] to repair his left arm.[33] The referees called the game with about seven seconds left, presumably based on the "Warrior Lacrosse Rule."[34] According to this rule, "[o]fficials will have authority to terminate a boys' youth game in response to flagrant acts of unsportsmanlike behavior including excessively rough play…"[35] C.J.R. was required to wear a cast for a few months and missed a week and a half of school.[36] The surgery left C.J.R. with a slight scar, periodic aches in his forearm, and limited his wrestling ability.[37]

Christopher Rees, C.J.R.'s father, filed personal injury actions on behalf of his son and himself against both G.A. and his father in New Jersey Superior Court.[38] The complaint alleged that G.A. "acted negligently…so as to cause C.J.R.'s injury,"[39] and alleged a separate reckless conduct theory, asserting that G.A. acted recklessly by engaging

in a "take-out check,"[40] thus violating the rules of the league.[41] The defendant neither testified nor produced any witnesses or evidence to rebut,[42] but filed a motion for summary judgment under N.J. Court Rules, R. 4:46.[43]

The trial court granted the defendant's motion for summary judgment, stating that the plaintiff had failed to prove a genuine issue of material fact establishing that G.A. had acted recklessly or in a "nature sufficient to justify imposing liability upon a minor of his age in this sports-related setting."[44] The judge also revealed that the defendant's age was a critical component of his analysis.[45]

"First, the court should have only inquired as to whether the injurious conduct was intentional or reckless, because individuals engaged in sporting activities should be held to a universal standard."

The plaintiff moved for reconsideration under N.J. Court Rules, R. 1:13-1.[46] He was denied, and appealed the trial court's determination of summary judgment.[47] The New Jersey Superior Court, Appellate Division affirmed,[48] relying on state tort liability precedent in two distinct categories.[49] The court examined cases establishing tort liability for adults who injure one another in sporting activities and cases that limited tort liability for minors, in order to create an appropriate test for minors involved in sporting activities.[50] The court looked to these strands of law, because there were no reported opinions analyzing tort liability for minors inflicting injuries on others while participating in sporting activities.[51] First, the New Jersey Supreme Court decided that intentional or reckless conduct would be the only conduct in which liability attaches in organized and informal sporting activities between adults, thus removing negligent behavior from a possible form of recovery.[52] Second, the court restated its precedent that children under the age of seven are presumed to be incapable of negligence.[53]

The Appellate Division in *C.J.R.* instituted a new two-prong test in order to determine tort liability between minors in a recreational sports setting.[54] The new standard inquired: (1) whether the opposing player's injurious conduct would be actionable if it were committed by an adult, evaluating whether there is sufficient proof of the defendant player's intent to inflict bodily injury or recklessness; and if so, (2) whether it would be reasonable in the particular youth sports setting to expect a minor of the same age and characteristics as the defendant to refrain from the injurious physical contact.[55]

The court opined that even if there was a triable issue of recklessness, there was no reason to address the intentional or reckless conduct inquiry.[56] The court determined that "a reasonable jury could not find the facts of this particular case here rising to a level of recklessness that would or should make this 11 year old lacrosse novice monetarily liable for his misguided actions on the field."[57] Specifically, the court relied on the particular facts that the defendant was 11 years old, the league consisted of less adept players, the game was extremely close with time expiring, and there was no evidence of any pre-existing animosity.[58] The court also highlighted that its newly enacted standard was designed to promote a balance between child safety and virtues of teamwork and physical conditioning.[59] The court affirmed summary judgment for the defendant, relying on the particular circumstances of the game and the characteristics of the defendant.[60]

This article contends that the *C.J.R.* court incorrectly created its two-prong test in determining liability within youth sports by requiring an independent examination of the youth setting and minors' characteristics under its second prong. First, the court should have only inquired as to whether the injurious conduct was intentional or reckless, because individuals engaged in sporting activities should be held to a universal standard.[61] It should have considered all the relevant factors under a balancing approach in determining whether the conduct in question was intentional or reckless. Alternatively, the court should have only inquired as to whether the conduct was intentional or reckless, the adult standard for tort liability in sporting activities, because the body-check was inherently dangerous and occurred during an adult activity, thus falling under the exceptions that warrant holding minors to a reasonable adult standard.[62] The adult standard eliminates the age and other characteristics of the defendant minor, since this type of activity serves as an exception. The court acknowledged a strong necessity in promoting a healthy balance between free participation in sports and child safety;[63] however, it clearly failed by creating a broad standard, which practically excuses all conduct. The problematic reasoning will certainly lead to great judicial ambiguity, as the new standard does not adequately protect against the type of conduct the court claims it aims to shield.

First, the court erred by creating a two-step, broad inquiry rather than simply determining whether G.A.'s body-check was intentional or reckless, an inquiry adopted by a multitude of other states.[64] The Appellate Division should not have required an independent examination of the circumstances of the game and the characteristics of the minors involved under a separate analysis.[65] Although the conditions of the game and the individual characteristics of the players are undeniably relevant, these considerations should only be applied to classify the conduct as intentional or reckless in a balancing fashion, and not to serve as a separate platform in which the court may easily dismiss liability.

In *Nabozny v. Barnhill*, the Illinois Appellate Court held that "a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful, or with a reckless disregard for the safety of the other player so as

to cause injury to that player…."[66] This suit involved two high school players who were competing in an organized soccer league when the plaintiff was severely injured.[67] The defendant kicked the plaintiff in the head while the plaintiff was making a save on the ball in the penalty box, as goalies are permitted.[68] There was a well-documented rule protecting the goalie from any contact by another player while in possession of the ball in the penalty area.[69] The Illinois Appellate Court reversed, and remanded the trial court's directed verdict in favor of the defendant, calling for a new trial consistent with its opinion.[70]

The *Nabozny* court acknowledged that players owe a duty of care to other players when engaged in athletic competition and recognized urgency for courts to avoid placing "unreasonable burdens on the free and vigorous participation in sports by our youth."[71] The court specified that the importance of youth development of discipline and self-control required holding certain levels of conduct accountable.[72] Illinois attempted to confine the balance between free participation in sports and child safety by creating a narrow standard, holding that only intentional or reckless conduct attaches liability.[73] Its reasoning was that in limiting its review to only intentional or reckless conduct, the court could avoid judicial involvement in the operations of sporting activities to the greatest extent possible.[74] The court determined that some restraints must accompany *every* athlete engaged in sporting activities, thus finding it was sufficient to limit liability solely to intentional or reckless conduct, regardless of the player's age.[75] No distinction between adults and children was instituted; instead, the focus shifted solely to the nature of the defendant player's conduct.[76]

"Had the court conducted a balancing test of the relevant factors of the game and minor players to determine whether the conduct was intentional or reckless, it would have been plausible to find G.A. not liable."

The soccer game in *Nabozny* is strikingly similar to the lacrosse game in *C.J.R.*, as the injury occurred between two minors engaged in an organized sports league. The physical contact to C.J.R. and the plaintiff in *Nabozny* were both violations of a league rule fashioned to protect its players from unjustifiable injury. New Jersey, like Illinois, should have implemented a standard holding *all* conduct actionable, because players are charged with a duty to refrain from conduct that is prohibited by safety rules, and intentional or reckless conduct threatening another player's safety should not be tolerated.[77] Adopting this narrow standard would leave little room for any uncertainty as to how to assess injurious conduct within youth sports, as it gives less deference to defendant players solely in relation to their age. Had the court conducted a balancing test of the relevant factors of the game and minor players to determine whether the conduct was intentional or reckless, it would have been plausible to find G.A. not liable. In balancing these factors, the court maintains a narrow balance between free participation and liability in sports, and simultaneously eliminates the broad second inquiry, making it easy for defendants to escape liability.

"The Ohio Supreme Court found there was no showing of reckless or intentional conduct, and thus held that the defendant was not liable for any injuries."

In *Marchetti v. Kalish*, the Ohio Supreme Court held that "where individuals engage in recreational or sports activities, they assume the ordinary risks of the activity and cannot recover for any injury unless it can be shown that the other participant's actions were either reckless or intentional."[78] The court expressly noted that similar jurisdictions did not differentiate between adult and children, but applied a uniform standard of liability to all engaged in recreational activities, a common thread being adopted by many states.[79] It further commented on the difficulty of requiring courts "to delve into the minds of children," which would lead to anomalous results, and thus found no reason to distinguish between children and adults.[80] Ohio also stressed the judicial importance in conserving a balance between vigorous participation in sporting activities and player safety.[81]

In this case, teenage friends were playing a game known as "kick the can"[82] at the plaintiff's home when the plaintiff was severely injured.[83] The plaintiff, designated "it," spotted and called out the defendant's name, making her the next "it."[84] Instead of stopping to start a new round, the defendant continued running and collided with the plaintiff, which resulted in the plaintiff breaking her right leg.[85] The Ohio Supreme Court found there was no showing of reckless or intentional conduct, and thus held that the defendant was not liable for any injuries.[86]

The incident in *Marchetti* is very similar to that in *C.J.R.*, with the slight exception that the setting was unorganized and without an explicit set of league rules.[87] The defendant in *Marchetti*, like G.A., injured the plaintiff during the course of play in violation of a recognized rule, and the court established its standard to be applied to *all* individuals engaged in *any* recreational activity.[88] Ohio, like Illinois and many other states, implemented a standard that focuses its essential inquiry as to whether the conduct was intentional or reckless by examining the relevant facts. These courts are utilizing a balancing test, without explicitly stating so, by considering the setting and manner in which these activities were engaged to ultimately determine whether the minor acted recklessly or intentionally. The Ohio court found that the defendant

minor did not act recklessly or intentionally by applying the factors of the situation objectively, without giving unwarranted weight to the ages of the minors involved.[89]

Factors such as the nature of the game, the individual characteristics and skills of the players involved, and the rules of the activity are indisputably relevant in determining whether the defendant minor acted intentionally or recklessly at the time of the physical contact.[90] However, such factors should be examined in determining whether the conduct was intentional or reckless in a balancing method.[91] While the Appellate Division considered G.A.'s age, skill level, and disposition of the game, it completely ignored the fact that G.A. was considerably smaller than C.J.R. and still managed to inflict a substantial injury with his body-check.[92] This indicates the necessity to examine the particular factors of the game and characteristics of the players in totality, because that is the most effective way to determine whether the conduct was intentional or reckless.[93]

"The nature of the game, coupled with the minor's background and experience, satisfied the first exception that golf was an adult activity, as he had extensive knowledge of the sport and its integrities."

By considering these factors under a separate prong, the court unconsciously created an implied defense, since defendants could assert that similar minors would have acted the same way, and thus they should not be liable.[94] The court may have been justified in finding that G.A. did not act intentionally or recklessly, but failed to analyze all relevant factors under a single balancing inquiry.[95] The facts, that G.A. was 11 years old and was notably smaller than C.J.R., the league consisted of less-skilled players, the score was extremely close with time winding down, and there was no previous animosity between G.A. and C.J.R., may have been sufficient for finding a lack of intentional or reckless conduct.[96] This balancing method, rather than the two-step inquiry, better maintains the balance between free participation in youth sports and player safety by conducting a single analysis of all relevant factors under one centralized investigation.

Alternatively, the court could have only inquired as to whether G.A. acted intentionally or recklessly—the adult standard—because the body-check was inherently dangerous and occurred during an adult activity, thus falling under the exceptions that warrant holding minors to a reasonable adult standard.[97] This method would call for the complete disregard of the defendant minor's age, as various states have concluded certain types of activity require a necessity to hold children to adult standards.[98] If the minor engages in either an adult activity or something inherently dangerous,[99] he or she is held to a reasonable adult standard for fairness and public policy concerns.[100] An underlying reason for this shift in standard is to eliminate the injustice that would occur if defendant minors could defend themselves merely by asserting that other children similarly situated would have acted the same way.[101] Since this incident falls under both of the exceptions, G.A. could have been held to a reasonable adult standard. As the court should have applied the reasonable adult standard, its inquiry should have been limited exclusively to whether G.A.'s body check was intentional or reckless, without regard to his age.

In *Neumann v. Shlansky*, the New York trial court held that a minor negligently driving his golf ball was to be held to an adult standard of care because golf was considered an adult activity, and there was a potential inherently dangerous activity involved.[102] This suit involved an experienced 11 year old minor playing golf with his mother and two other adults.[103] The defendant minor drove his golf ball errantly, ultimately striking the plaintiff in the leg while he was walking to his next hole.[104] The defendant testified that he saw the plaintiff before striking the ball and yelled "fore" once he realized his ball was hooking in the plaintiff's direction.[105] The New York trial court found the defendant minor to be liable, determining it was proper in holding the minor to a reasonable adult standard.[106]

The *Neumann* court acknowledged that, generally, minors are held to a standard of a reasonable person of like age, experience, and circumstances; nonetheless there are two exceptions, which require a universal adult standard to apply to minors.[107] The first exception is when a child participates in an activity normally taken by adults, which then directs the minor to be "held to the standard of adult skill, knowledge and competence, and no allowance may be made for his immaturity."[108] The nature of the game, coupled with the minor's background and experience, satisfied the first exception that golf was an adult activity, as he had extensive knowledge of the sport and its integrities.[109] The second exception is that when the activity is inherently dangerous, the minor forfeits his right to be held to a reasonable person of his age because it would make little difference to the injured party as to the tortfeasor's age.[110] The court again examined the nature of the game and the experience of the minor and concluded he had acted in an inherently dangerous manner, knowing that hitting a golf ball under unsafe conditions created a dangerous probability of substantial injury.[111]

The golf drive in *Neumann* is analogous to the body-check in *C.J.R.*, as the contact originated from minors engaged in recreational activities, which ultimately inflicted bodily injury onto others. New York found that golf was an adult activity as of its historic nature and because its primary participants were adults.[112] The *Neumann* court also categorized the drive of the golf ball made under unsafe conditions as an inherently dangerous activity.[113]

The *C.J.R.* court should have applied the exceptions to G.A., thus holding him to an adult standard of intentional or reckless conduct. Lacrosse, based on its origin and the considerable degree of physicality involved, is primarily an adult activity.[114] Moreover, G.A.'s body-check would be considered inherently dangerous, since running across the field wildly and striking C.J.R. in the back with his stick or helmet is undoubtedly similar to driving a golf ball at an extreme rate during unsafe conditions.[115] The critical elements of these two exceptions are the manner of due care exercised by the defendant and the degree of risk involved, regardless of any other factors.[116] The *C.J.R.* court blatantly ignored these principles by failing to address the irrefutable risk of injury from an illegal check or the lack of due care exhibited by G.A. in his actions. A minor is not afforded the benefit to be held to a reasonable standard of a similar individual when he or she grossly violates a league rule and fails to conduct him or herself to the tolerable norms of the sport in which he or she plays, and in which he or she has been adequately mentored. When such exceptions are present, it is justifiable to implement a reasonable adult standard to minors to ensure that the injured party has adequate means to recover.[117]

Even if the leagues and rules have been adjusted appropriately, minors involved in this type of conduct should be held to a universal standard with adults because of the advanced nature of the activity and the degree of physicality involved. Lastly, while the *Neumann* court looked at the particular factors of the game and the experience of the minor involved, its analysis focused on the objective nature of golf and the inherent risks involved in concluding a universal adult standard applied,[118] just as the New Jersey court should have, instead of giving the defendant's age an unreasonable amount of weight, as required under its second prong.

The precedent set by the *C.J.R.* court poses a significant public policy issue. The Appellate Division instituted a broad standard that affords minors injured during recreational activities little opportunity to adequately recover.[119] As plaintiff minors must prove the defendant either acted intentionally or recklessly—and then—also prove that the particular defendant should have refrained from the conduct as a similar minor would,[120] the court provided too many possibilities for defendants to walk away unscathed, when the administration of justice would sometimes provide otherwise.

A multitude of other states have faced the dilemma of determining liability between minors and have overwhelmingly adopted a uniform standard applying to both children and adults.[121] The majority require a finding of intentional or reckless behavior in order for liability to attach.[122] These states understood the necessity in implementing a clear standard, so their trial courts are clear on the manner in which to apply the facts, as the higher courts intended.[123] New Jersey has encouraged its courts to play guessing games by requiring them to plunge into the minds of our youth in a case-by-case analysis and subjectively determine whether comparable minors would act similarly.[124] Such behavior will cause a lack of judicial uniformity and waste valuable time and resources of an already overworked judicial system.

It can be argued that holding children to the same standard as adults is unfair, since children are not as mature and may not fully understand the consequences of their actions.[125] However, holding children to an adult standard does not ignore these concerns, since the particular circumstances of the setting and the characteristics of the minors retain a critical role in determining whether the conduct was intentional or reckless. The suggested intentional or reckless standard is not aimed to punish, but rather to educate, our youth; to develop into responsible, productive members of society, through their participation of the great youth sports programs throughout the country.[126]

Conclusion

While the *C.J.R.* court may have reached a logical conclusion, its methodical approach was extremely problematic. The court incorrectly required a separate examination of the youth setting and minors' characteristics, rather than simply inquiring whether the injurious conduct was intentional or reckless.[127] The court failed to implement a universal standard accompanied under a balancing test in determining whether there was intentional or reckless behavior that would warrant judgment for the plaintiff. The *C.J.R.* decision sets a dangerous precedent for similar situations because of the very difficult burden plaintiff minors must sustain to receive just compensation. A universal standard focusing on whether the conduct was intentional or reckless, together with guidance from parents, coaches, and other influential persons, best promotes a healthy balance for the integrity of youth athletic competition and child safety.[128]

Endnotes

1. C. H. Tillhagen, *Foreword* to Paul G. Brewster, *American Nonsinging Games*, at vii–viii (University of Oklahoma Press ed., 1st ed. 1953).
2. *See* Terry A. Adirim & Tina L. Cheng, *Overview of Injuries in the Young Athlete,* Sports Med. Inj. Clinic (Jan. 2003), *available at* https://www.researchgate.net/publication/10995710_Overview_of_Injuries_in_the_Young_Athlete (discussing the statistics, causes, and increasing trend of youth injury within organized sports).
3. *C.J.R. v. G.A.*, 105 A.3d 628, 636 (N.J. Super. Ct. App. Div. 2014).
4. *Id.*
5. *Id.* at 632.
6. *Id.* at 635. The Appellate Division cites case decisions from Illinois, Iowa, New Mexico, and Ohio, and gives a brief summary of the holdings for each. *Id.* These states have implemented a reckless or intentional conduct theory for tort liability in youth sports settings, which will be discussed more in depth later in this article. *See id.*
7. *Id.* at 635-36.
8. *Id.*

9. *Id.* at 636.
10. *Id.*
11. *Id.* at 636-37.
12. *Marchetti v. Kalish*, 559 N.E.2d 699, 703 (Ohio 1990).
13. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632–33 (Sup. Ct. N.Y. County 1968).
14. *C.J.R.*, 105 A.3d at 636.
15. The court chose to use initials for the minors in this proceeding. *Id.* at 630 n.1.
16. *New World Encyclopedia*, "Lacrosse," *available at* http://www.newworldencyclopedia.org/entry/Lacrosse (last modified July 22, 2014). Lacrosse is a game consisting of two teams of 10 players with the ultimate objective to score more goals than the opposing team during the designated time period. *Id.* All players use a lacrosse stick with a small netted-basket to catch and transfer the hard rubber ball. *Id.* The objective is to advance the ball down the field to ultimately propel the ball through the opponent's goal. *Id.* This is a fairly physical game consisting of routine contact while the players advance the ball up and down the field. *Id.*
17. *C.J.R.*, 105 A.3d at 630. The facts are generated completely from the plaintiff and his witnesses, as the defendant did not offer any testimony at trial. *Id.* n.2.
18. *Id.* at 630.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.* at 630 n.3.
24. *Id.* at 630.
25. Check means "a sudden stoppage of a forward course or progress." "Check," Merriam-Webster's Dictionary (11th ed. 2015).
26. *C.J.R.*, 105 A.3d at 630-31.
27. *Id.* at 630.
28. *Id.* at 631.
29. *Id.*
30. *Id.*
31. *Id.*
32. Open reduction means "realignment of a fractured bone after incision into the fracture site." "Open reduction," Merriam-Webster's Dictionary (11th ed. 2015).
33. *C.J.R.*, 105 A.3d at 631.
34. C.J.R.'s coach stated that he believed the referees called the game based on this "Warrior Rule" in a sworn statement. *Id.* at 631 n.7.
35. U.S. Lacrosse, *2016 US Lacrosse Rules for Boys Youth Lacrosse*, *available at* http://www.uslacrosse.org/sites/default/files/public/documents/rules/2016-boys-youth-rules.pdf.
36. *C.J.R.*, 105 A.3d at 631.
37. *Id.*
38. *Id.*
39. The court dismissed the negligence claim, and this article will only be addressing the reckless conduct theory and the court's analysis. *Id.*
40. A "take out check" is a check involving the head or neck and excessive body-checks. U.S. Lacrosse, *2016 US Lacrosse Rules for Boys Youth Lacrosse*, http://www.uslacrosse.org/sites/default/files/public/documents/rules/2016-boys-youth-rules.pdf).
41. *C.J.R.*, 105 A.3d at 631-32; *see also* U.S. Lacrosse, *2016 US Lacrosse Rules for Boys Youth Lacrosse*, *available at* http://www.uslacrosse.org/sites/default/files/public/documents/rules/2016-boys-youth-rules.pdf (last visited Nov. 13, 2016) (Article 6 calls for an ejectment if there is an excessively violent violation of the US Lacrosse Boys Youth Rule 5, Section 3).
42. *C.J.R.*, 105 A.3d at 630 n.2.
43. *Id.* at 631. N.J. Ct. R. 4:46-2. A motion for summary judgment must be filed with a brief and separate statement of material facts in which the moving party includes a concise statement after each material fact that there is no dispute. *Id.* A party opposing the motion is given an opportunity to submit a response in opposition. *Id.* The judgment shall be granted if there is no genuine issue of material fact challenged that would entitle the moving party to a judgment as a matter of law. *Id.*
44. *C.J.R.*, 105 A.3d at 632. The court also granted the defendant's father's motion for summary judgment under a theory of negligent parental supervision. *Id.* The plaintiffs did not challenge this ruling and this article will only focus on the claim between minors, C.J.R. against G.A. *Id.*
45. *Id.*
46. *Id.* A party may move to correct a clerical mistake in judgment. N.J. Ct. R. 1:13-1.
47. *C.J.R.*, 105 A.3d at 632.
48. *Id.* at 636.
49. *Id.* at 632-34.
50. *Id.* at 632-33.
51. *Id.* at 634.
52. *See Schick v. Ferolito*, 764 A.2d 962, 970 (N.J. 2001) (holding a reckless or intentional conduct standard of care applied generally to recreational sporting contexts, including non-contact sports such as golf); *Crawn v. Campo*, 643 A.2d 600, 607 (N.J. 1994) (holding the duty of care in establishing liability from informal sporting activity is to be based on reckless or intentional conduct).
53. *See Bush v. N.J. & N.Y. Transit Co.*, 153 A.2d 28, 35 (N.J. 1959) (holding a child is rebuttably presumed to be incapable of being held liable for negligence because a child does not understand the danger or consequences involved).
54. *C.J.R.*, 105 A.3d at 635-36.
55. *Id.*
56. *Id.* at 637.
57. *Id.*
58. *Id.* at 636-37.
59. *Id.* at 636.
60. *Id.* at 636-37.
61. *Marchetti v. Kalish*, 559 N.E.2d 699, 703 (Ohio 1990).
62. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 632-33 (Sup. Ct. N.Y. County 1968).
63. *C.J.R.*, 105 A.3d at 636.
64. *Id.* at 635.
65. *Id.* at 636.
66. *Nabozny v. Barnhill*, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975).
67. *Id.* at 259-260.
68. *Id.* at 260.
69. *Id.*
70. *Id.* at 261.
71. *Id.* at 260-61.
72. *Id.* at 260.
73. *Id.* at 261.
74. *Id.* at 260.
75. *Id.*
76. *Id.* at 260-61.

77. *Id.*
78. *Marchetti v. Kalish*, 559 N.E.2d 699, 703-04 (Ohio 1990).
79. *Id.* at 702.
80. *Id.* at 703.
81. *Id.*
82. *Id.* at 699. "Kick the can" is a game in which the participants run and hide from the player designated "it." *Id.* The "it" player must find the other players and put them all in jail. *Id.* The "it" player must yell out another player's name when he or she finds someone and race back to the can. *Id.* If the "it" player gets to the can ("home base") first, the other player is stuck in jail. *Id.* If the other player makes it there first, he or she must kick the can away and run back into hiding while the "it" player retrieves the can and continues to seek the other players. *Id.* If the other player kicks the can while other players are already in jail, the others are set free and the "it" player must begin all over. *Id.* Once the "it" player finds all the hiders and places them in jail, the first player put in jail becomes the next "it" player and the game starts over. *Id.*
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 704.
87. *Id.* at 702.
88. *Id.* at 703-04.
89. *See id.* at 703.
90. *See generally* Teri Brummet, *Comment: Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases*, 34 U.C. Davis L. Rev. 1029, 1051-52 (2001) (discussing the importance for courts to examine both the objective and subjective components of a game when determining the degree of the contact in question).
91. *See* Patrick M. McFadden, *The Balancing Test*, 29 B.C. L. Rev. 585, 592, 597-98 (May 1988).
92. *C.J.R.*, 105 A.3d at 630.
93. *See generally* Robert F. Nagel, *Liberals and Balancing*, 63 U. Colo. L. Rev., 291, 319-24 (1992) (discussing how balancing tests generally provide for accurate, in-depth case-by-case analyses); Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. Colo. L. Rev., 291, 306–310 (1992) (discussing generally of the benefits and detriments of applying balancing tests in reaching judicial conclusions).
94. *See* Arthur Best & David W. Barnes, Basic Tort Law: Cases, Statutes, and Problems 113 (Vicki Been et al. eds., 2d ed. 2003).
95. *C.J.R.*, 105 A.3d at 636–37.
96. *Id.*
97. *Neumann v. Shlansky*, 294 N.Y.S.2d 628, 634-35 (Sup. Ct. N.Y. County 1968).
98. *Robinson v. Lindsay*, 579 P.2d 398, 399 (Wash. Ct. App. 1978).
99. *See Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961) (holding a minor operating a boat was an overly hazardous activity); *Robinson v. Lindsay*, 579 P.2d 398 (Wash. Ct. App. 1978) (holding a snowmobile being operated by a minor was a dangerous instrument).
100. *Robinson*, 579 P.2d at 401.
101. *See* Best & Barnes, *supra* note 94.
102. *Neumann*, 294 N.Y.S.2d at 633-35.
103. *Id.* at 630.
104. *Id.*
105. *Id.* Fore is a term used by golfers "to warn anyone within range of the probable line of the flight of the ball." "Fore," Merriam-Webster's Dictionary (11th ed. 2015).
106. *Neumann*, 294 N.Y.S.2d at 635.
107. *Id.* at 632-33.
108. *Id.* at 633.
109. *Id.* at 634-35. The court found the facts that the minor had taken weekly lessons and been playing golf for years were sufficient to prove he was to be considered an adult golfer engaged in an adult activity. *Id.* The court also briefly outlined the history of golf and how it was primarily intended for adults. *Id.*
110. *Id.* at 633; *See Dellwo v. Pearson*, 107 N.W.2d 859 (Minn. 1961) (holding a single standard of care in the operation of vehicles, regardless of the age of the operator, seemed to be required by fairness to hold a minor of care and conduct expected of all others); *Robinson v. Lindsay*, 579 P.2d 398 (Wash. Ct. App. 1978) (holding an adult standard was required for a minor operating a snowmobile in favor of public policy).
111. *Neumann*, 294 N.Y.S.2d at 635.
112. *Id.* at 631.
113. *Id.* at 635.
114. Jane Claydon, *Origin and History of Lacrosse,* Fed'n of Int'l Lacrosse, *available at* http://filacrosse.com/origin/ (discussing the history of lacrosse and its origin in Native American tribes, specifically within the adult male culture).
115. *C.J.R. v. G.A.*, 105 A.3d 628, 630 (N.J. Super. Ct. App. Div. 2014).
116. *Neumann*, 294 N.Y.S.2d at 634.
117. *Id.* at 635.
118. *Id.*
119. *C.J.R.*, 105 A.3d at 635-36.
120. *Id.*
121. *Marchetti v. Kalish*, 559 N.E.2d 699, 700 (Ohio 1990).
122. *Id.* at 702.
123. *See generally* U.S. Dep't of State, *Implementation and Impact of Judicial Policies*, IIP Digital (May 14, 2008), *available at* http://iipdigital.usembassy.gov/st/english/publication/2008/05/20080522225408eaifas0.2850305.html#axzz4OIh46ngn (outlining the various problems with unclear judicial opinions and their effects); Samuel I. Shuman, *Justification of Judicial Decisions*, 59 Calif. L. Rev. 715, 723–25 (May 1971) (discussing the implications of unclear rules and the potential policy problems).
124. *C.J.R.*, 105 A.3d at 636.
125. *Id.*
126. *See* David M. Hansen et al., *What Adolescents Learn in Organized Youth Activities: A Survey of Self-Reported Developmental Experiences* 13 J. of Res. on Adolescents 1, 25-28, 47-52 (2003) (discussing the various studies and analyses in connection with youth development in sporting activities and child development).
127. *C.J.R.*, 105 A.3d at 635–36.
128. Douglas E. Abrams, *Article: The Challenge Facing Parents and Coaches in Youth Sports: Assuring Children Fun and Equal Opportunity*, 8 Vill. Sports & Ent. L.J. 253, 291-92 (2002).

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Exploring an Individual's Right to Privacy When Using Voice Chat in Video Games in an Age of Heightened National Security Concerns in the United States

By Maraiya Hakeem

Introduction

Whether the game system was an Atari or an XBox Live,[1] many Americans have vivid memories of games and gaming systems rising, falling, and shifting in popularity over the years. The millennial generation grew up watching the 2-D antics of memorable faces like the Super Mario Brothers[2] and were enamored with handheld systems like the Gameboy and Gameboy Color[3] once they became more popular throughout the United States.

"Individuals can also generate 'intangible' property, such as personally identifiable data, and privacy rights associated with this type of property are most commonly regulated by statutes."

Since the 1980s, the capabilities of game consoles—and the gaming industry overall—have grown by leaps and bounds.[4] Today, video games can be played on desktop and laptop computers, smartphones (via applications or "apps"), on social media websites like Facebook, and on traditional game consoles. Modern video games can be as elementary as matching colored shapes in rows,[5] and as complex as allowing players to compete against and communicate with each other in real time while completing game missions.[6] With all of these new gaming developments, what would happen if the new capacities of gaming systems were utilized outside of their intended purpose of entertaining consumers? Furthermore, what if these uses—unintended and perhaps initially unforeseen by game manufacturers and developers—pose threats to the greater public and national security? This article examines these questions and more, by exploring (a) current trends in video gaming; (b) how the expanding capabilities of video games could facilitate national security risks in the United States if improperly utilized, and (c) how privacy laws may adapt in the foreseeable future to address these plausible scenarios.

I. The Right to Privacy

A. A Constitutional 'Right to Privacy' in the United States

The U.S. Constitution[7] (and case law stemming from Constitutional Amendments) provides a solid introductory framework for what an individual's right to privacy is in the United States. Although the Constitution spells out a number of individual rights, the right to "privacy" is not explicitly one of them.[8] It has been settled in jurisprudence, however, that an individual does have a right to privacy, though the right may be limited or superseded in some circumstances.[9]

One of the most recognized Amendments pertaining to the right to privacy is the Fourth Amendment, which protects people from "unreasonable searches and seizures."[10] Generally, warrantless searches and seizures are considered unreasonable "absent individualized suspicion" of wrongdoing.[11] Exceptions do exist, however.[12]

The First Amendment protects an individual's privacy to his or her religious beliefs, and freedom of speech and assembly,[13] and the Third Amendment protects the privacy of one's home against government use to house militia during times of war.[14] Lastly, the Fourteenth Amendment has been recognized by the Supreme Court as providing a substantive due process right to privacy,[15] through cases such as *Roe v. Wade* (extending reproductive privacy rights to women), [16] and *Lawrence v. Texas* (protecting one's private life).[17]

In sum, while the Constitution does not explicitly enumerate an individual's right to privacy, it has been interpreted over time to protect (among other things) the privacy of one's autonomy over his or her body, mind, and personal living space.[18] This last example (referencing privacy rights in the home) specifically relates to a person's tangible property. Individuals can also generate "intangible" property,[19] such as personally identifiable data, and privacy rights associated with this type of property are most commonly regulated by statutes.

B. A Statutory 'Right to Privacy' in the United States

Statutory bases for privacy rights primarily address the collecting and safeguarding of sensitive personal information (e.g., social security numbers). These statutes can be divided into those (a) protecting substantive privacy rights over the collection and use of personal data, and (b) regulating procedural systems associated with collecting and using individuals' personal data.

i. Statutes Protecting Substantive Privacy Rights Associated with One's Personal Data

Whether filling out forms on websites or using one's cell phone for personal business, data on individuals is routinely collected by public and private entities. Some of

the key statutes that operate to protect the use and collection of such personal data include the Privacy Act of 1974 (Privacy Act) and the Financial Services Modernization Act (FSM Act).

The Privacy Act prevents federal agencies from disclosing information that they have collected in a "system of records"[20] on an individual without his or her written consent.[21] Under the Privacy Act, agencies have to publish notice about their systems in the Federal Register, and allow an individual to review his or her personal information, among other requirements.[22]

"These functions now allow players to interact in real time and are vastly more advanced than the stationary arcade, single player, non-internet-based games of the not-so-distant past."

The FSM Act is another relevant law that governs how sensitive financial information is used and disclosed.[23] It applies to a broad range of financial institutions, from banks to any other businesses that offer financial services.[24] Under the FSM Act, such institutions are limited from disclosing customers' non-public personal information, must provide customers with the companies' privacy policies, and must protect the information that they collect.[25]

ii. Statutes Regulating Procedural Aspects of Personal Data Collection and Use

Additional statues protect procedural aspects of collecting personal data, such as the Federal Trade Commission Act (FTC Act) and the Electronic Communications Privacy Act (ECP Act). The FTC Act aims to protect consumers from unfair practices and policies concerning the disclosure of their personal data.[26] It addresses how companies provide consumers with information about their online privacy policies and explanations of the data security safeguards that are in place.[27] The ECP Act[28] regulates issues, such as, intercepting data that is transmitted between computers and Internet Service Providers (ISPs), for example.

iii. Self-Protection of Data

In conjunction with the statutory measures available to protect consumers' data online, internet users can make efforts themselves to protect their own data, such as editing their privacy settings on social media sites to disclose the least amount of personal information. While case law, statutes, and users' own actions can be used to protect their privacy rights, these means are not available in all situations, such as those where one's right to privacy may be unprotected or superseded due to compelling state or government interests.

C. When the Right to Privacy is Unprotected

One's right to privacy may be unprotected in instances where the particular issue in question has not been clearly addressed in case law or by statute.[29] These types of situations are likely to remain common ones over time, as new technologies will continue to be created and used by individuals. Any such privacy rights asserted will be decided on an ad hoc basis, based on any existing privacy law that may be analogous to the new legal questions at hand.

An example of where a person's rights are not unprotected, but instead overruled, includes issues concerning public/national security by state and federal governments. The Fourth Amendment, for example, permits warrantless searches in cases where the government shows that it has a special need.[30] In those circumstances, courts generally employ a balancing test to weigh the circumstances at hand in their totality.[31]

II. The Evolution of Video Game Systems[32]

A. Functionality

Gaming Systems and Consoles—A Short History

What may be surprising to some is that the first 'gaming' device dates back to as early as 1940, when the inventor Edward U. Condon debuted at the New York World's Fair an interactive computer[33] that played a match stick game against a human player.[34] The first blackjack card game was developed for the IBM-701 computer in 1954,[35] and in 1966, the inventor Ralph Baer began developing concepts[36] that he would later use in inventing the first television video games.[37]

In 1971, Nolan Bushnell and Ted Dabney created "Computer Space," the first commercially sold arcade game.[38] IN 1972, the Magnavox Odyssey was the first gaming device that plugged into a television for gameplay.[39] The Atari 2600 game system was released in 1977, and ushered in a new era of gaming consoles.[40] The Nintendo Entertainment System was released in 1985, and the Sega Genesis console was close behind it, being released in 1989.[41]

The 1990s and 2000s saw their share of developments to gaming consoles, with systems like the Super Nintendo (1991), Nintendo 64 (1996), Sony PlayStation 2 (2000), and Nintendo Wii (2006), for example, competing fiercely for business in the video game market.[42] Currently, some of the most popular game consoles include the Xbox One and the PlayStation 4, both of which come fully ready with television streaming, smartphone connectivity, and player group chat capabilities.[43] These functions now allow players to interact in real time and are vastly more advanced than the stationary arcade, single player, non-internet-based games of the not-so-distant past.

Voice Over Internet Protocol Technology

Voice Over Internet Protocol (VoIP) is technology that facilitates the real time transmission of voice signals, using the internet instead of traditional phone lines.[44] Service providers of the technology include Vonage and Skype,[45] and potential consumer benefits are lower utility bills and being able to make long distance calls without the extra costs usually charged by traditional phone companies.[46] Potential drawbacks of using the technology include difficulty contacting emergency services[47] and problems with internet connections during bad weather.[48] The Federal Communications Commission (FCC) governs VoIP phone services, and limits (among other things) "interconnected VoIP providers' use of customer proprietary network information such as your telephone calling records."[49]

Currently, VoIP technology is in widespread use,[50] especially in the gaming community, where "VoIP is [virtually] expected in every online game."[51] Consoles, such as the PlayStation 4 and the Xbox 360, even provide options for group chats, "which allows you and your friends to form a virtual 'party' and communicate, no matter how many different games [you're] playing. This is a huge improvement over game-based chat, which is cut off if you get disconnected from the match."[52]

"While countries around the world were scrambling to better understand the organization, one overlooked area related to the unusual ways in which the organization may recruit supporters, such as through the use of video games."

B. Consumer Appeal

The general framework for multiplayer gaming as it functions today originated in the 1970s, with chain restaurants investing in games for their establishments, and large universities having access to computer-based teaching systems such as Programmed Logic for Automatic Teaching Operation (PLATO), which allowed multi-screen play of the strategy game Empire.[53] The functionality of today's generation of games, however, is much more intricate than multiple players gaming together via one internet server, and the demographics of video gamers and statistics on the gaming industry have expanded as well. In 2009, the video game industry generated over $10 billion in U.S. revenue,[54] and by 2014, the computer and video game industries combined reached $15.4 billion. Additionally, in 2016:

- 63% of U.S. households had at least one member who played video games three or more hours per week,[55] and 65% of U.S. households contained video game devices.[56]
- 59% of game players were male and 41% were female,[57] and the average player was 35 years old.[58]
- The percentage of gamers per age group was: 27% (under 18 years); 29% (18-35 years); 18% (36-49 years); and 26% (50+ years).[59]
- Top genres of video game units sold [in 2015] were: Shooter (24.5%) and Action (22.9%).[60]
- Of the top 20 highest selling video games [in 2015], ones with a "Mature" rating included: Call of Duty: Black Ops III (#1) and Grand Theft Auto V (GTAV) (#6).[61]

These raw facts and figures illustrate that the gaming industry—and its appeal to the general masses—has continued to grow over time.[62]

III. The Convergence of Virtual Reality, the Real World, and the Law

The 2015 Paris Terrorist Attacks

On the evening of November 13, 2015, the city of Paris experienced a terrifying night of bloodshed, as a series of bombings and mass shootings killed over 130 people and injured hundreds of others.[63] The Islamic State of Iraq and Greater Syria (ISIS) soon took responsibility for the attacks, releasing a video and stating that: "As long as you [France] keep bombing you will not live in peace… You will even fear traveling to the market."[64] While countries around the world were scrambling to better understand the organization,[65] one overlooked area related to the unusual ways in which the organization may recruit supporters, such as through the use of video games.

The Guardian article titled *The Isis propaganda war: a hi-tech media jihad* details the many ways in which ISIS is using social media, and even video games, to incite fear in its adversaries and to recruit supporters around the globe.[66] In a propaganda video on YouTube, the organization utilized gameplay and scenes from the game GTAV, posting a message on the video that read, "Your games which are producing from you, we do the same actions in the battelfields (sic)!!"[67] Using this game was an effort to convince game players—some of whom are likely children—that playing GTA V was the equivalent of practicing the tasks that they would undertake if they joined ISIS.[68] The message was simply that "if you're playing Grand Theft Auto, you're already part way to being an Isis fighter."[69]

It should be noted that ISIS is not the first organization to use entertainment and video games as a recruitment tool, as the game "America's Army [for example] is a freely available PC game…that doubles as a [U.S.] military enlistment tool."[70] Nevertheless, if GTA V can be used by a militant organization[71] to recruit supporters, using other video games for recruitment—especially those utilizing VoIP technology—is a plausible next step for similar groups. Due to the growing number of video

game players in the U.S. and the growing game industry in general,[72] video games that use VoIP should be analyzed in a new light. The current strengths and weaknesses of U.S. privacy law should also be considered, in an effort to analyze the risks that VoIP-capable video game use could pose to the country's national security.

A. How Privacy Law Operates in Virtual Reality

Real People, Virtual Worlds

When trying to understand how the law works in virtual worlds, one important question is how virtual worlds should be compared to the real world. Some scholars argue that creating an entirely new legal system would be justified if the online world were completely different from reality.[73] Relatedly, other scholars have concluded that the virtual world and the real world differ enough to require *deviation* from already established legal frameworks to resolve legal issues.[74] Yet how much do we deviate? How do we know whether legally actionable conduct has occurred in virtual reality, before even deciding from what real world legal frameworks to deviate?

The article *Griefing, Massacres, Discrimination and Art: The Limits of Overlapping Rule Sets in Online Games*[75] examines how people view rules and real world norms as they are translated into virtual worlds.[76] Through various case studies, it ultimately concludes that there is no uniform consensus among gamers about what types of behavior are "wrong" or legally actionable, and that the boundaries of "good" or "bad" behavior are unclear.[77] The focus of this article, however, moves beyond that initial decision of what is accepted and unaccepted behavior within the game community. It instead focuses specifically on the utilization of VoIP technology, which may facilitate a government interest to infringe on an individual's privacy while he or she is playing the game.

With VoIP use, the personal data at issue are the conversations that take place between players while they are logged into a video game. Another way of understanding this link between a player and his or her conversation is to consider that: "In principle, three relations can be given, namely (1) an authorship relation between the individual and the information, (2) a descriptive relation with respect to the individual (referring to the status of and the actions taken by an individual), or (3) an instrumental mapping relation with respect to the individual for institutional identification. The major concerns regarding privacy protection in cyberspace are related to descriptive relations."[78]

VoIP use in video games aligns with this assertion (as group chat conversations are "actions taken by an individual"), and some deviation from current legal frameworks is necessary to analyze privacy rights in this information, as current privacy policies and terms of use agreements for most games reference general data collected on gamers, and not VoIP conversations specifically.[79]

Constitutional Privacy Rights in Operation

When considering how existing Constitutional rights to privacy operate in the virtual world, it is important to note that most privacy rights cases address an individual's right to protect his or her likeness against commercial use, and do not address issues relating to data collecting or monitoring. Cases such as *Harding v. Paramount Pictures*[80] (discussing one's right to privacy from having his or her likeness used in a video game), or *Neal v. Elec. Arts, Inc.* (a case between a football player and video game manufacturer with claims brought for invasion of privacy by both appropriation and false light),[81] for example, illustrate this reality.

These cases address the right to privacy as it relates to use of one's likeness that is usually either (1) in breach of an explicit contract defining the parameters of that use,[82] or (2) simultaneously infringing on a famous person's right to publicity. As it relates to considering how Constitutional privacy protections may operate in the virtual world, these cases deal with people who are physically in the real world and whose likenesses or images are being integrated into virtual reality. Our case of VoIP data being created within virtual reality and possibly accessed and transposed out of that environment[83] is the direct opposite. Therefore, if Constitutional arguments are to be used in favor of preserving VoIP rights, they will have to creatively interpret existing case law to apply it to the VoIP data.

Statutory Privacy Rights in Operation

While privacy is important as it relates to video games and virtual reality, the federal government does not statutorily require that video game manufacturers provide privacy policies to their users.[84] Such documents are generally used, however, as a preventative measure against potential legal liability.[85]

Additionally, while there are no specific statutes that address 'privacy' as it relates to VoIP use in video games, to the extent that a use of the VoIP data may overlap with other privacy statutes (such as the Children's Online Privacy Protection Act (COPPA), for example), current privacy statutes would certainly come into governance. Such statutes may likely be the most successful way to govern VoIP use in video games in the future.[86]

B. Potential Legal Responses to Video Game VoIP Use for Threatening Purposes

This article has addressed the use of VoIP technology in video games and has been concerned with the legal implications in a scenario where a group begins using the VoIP technology to disseminate information or plan activities that pose a public threat or national security risk. One possible response to such a scenario is that the gaming community itself will consider its own modes of self-regulation. This could mean updating privacy poli-

cies to, for example: (a) explicitly state that conversations that take place over VoIP during (or outside of) normal game play are not guaranteed to be private conversations, or; (b) explicitly state that in the event that the game system VoIP operator is compelled for information from the government (e.g., data about users of the chat functions, and/or lengths of time they used the service), the video game company will swiftly comply.

Another potential response is for legislation to be drafted that will require that (a) the conversations that take place over VoIP must be recorded by game system VoIP operators, or (b) the government can access—at any time, as long as it has a legitimate national security concern—the interfaces and internet connections over which the gaming VoIP conversations take place. A third response to this proposed scenario is to ignore the hypothetical situation as a viable possibility of the near future. Reasons for doing so may include the belief that creating game avatars and spending hours talking undercover with gamers worldwide using VoIP is time consuming, and an unlikely recruitment tactic. Another reason for holding this view could be that the time and resources of lawmakers, game developers, and manufacturers should not be used to address the scenario until there are clearer signs that nefarious VoIP use in games has become widespread among militant groups.

C. Potential Challenges to the Aforementioned Legal Responses

Self-regulation by the video game industry is a solution that may be a bit difficult to implement, because the gaming industry's infrastructure is supported by various (and numerous) constituents like ISPs, internet developers, hardware and software companies, and internet organizations.[87] While self-regulation may be effective in the context of the industry's game ratings system,[88] this is likely because the ratings are for the consumer's benefit, and such self-regulation does not fundamentally change the way video games are marketed, accessed, and consumed. With self-regulation over VoIP technology use, these parties are likely to have strong and potentially divergent opinions about what the self-regulation should (or should not) look like practically, and may therefore be uncomfortable or unwilling to police themselves.

Additionally, scholars on online regulation have posited that self-regulation can come in many forms, each one presenting its own challenges. Such self-regulation can occur by private groups, or within a framework suggested by the government.[89] Resulting problems may include collective agreements among gaming professionals that may run into antitrust law issues;[90] "gentlemen's agreements" that are only effective if they morally pressure someone into following them;[91] and Rules of etiquette (sometimes referred to as "netiquette") that people can (similar to gentlemen's agreements) choose to disobey.[92]

A challenge to using statutory and legislative measures to address VoIP misuse is that requiring game system VoIP operators to proactively record the conversations that take place over VoIP will place an undue burden on the game operators (not to mention that industry constituents could see it as an unwelcome government intrusion).[93] Secondly, allowing the government to have unlimited access to the interfaces and internet connections over which the gaming VoIP conversations take place could raise serious concerns about its accountability to gamers who are being surveyed.

Lastly, if the gaming industry (and all other interested constituents) were to simply ignore the possibility of VoIP misuse, it would be taking a reactive—instead of a proactive—approach to addressing how the wonderful capabilities of its games and gaming community could be easily misappropriated for negative (even illegal) ultimate purposes. Perhaps the creators of GTA V had never envisioned that their game could be used as an enlistment tool for a militant group, but it has happened, and the incident should place the gaming and legal industries on notice that VoIP misuse could become widespread in years to come.

IV. Future Outlook

Moving forward, whatever privacy law's response is to the potential problem of VoIP misuse in video games, courts must consider that enforcing real world law using traditional tactics will be difficult unless against "(1) persons with a presence or assets in a specific national territory, (2) persons over whom a nation can obtain personal jurisdiction and enforce a default judgment, and (3) persons who can be successfully extradited."[94]

In some respects, one of the simplest ways to begin considering VoIP privacy rights is to focus in on End User License Agreements (EULAs), as they are already common in the gaming world.[95] Most video game EULAs, for example, already inform users that if a court compels the game company to provide personal data about game users, it will comply.[96] Additionally, there are real world instances where companies accused of violating privacy laws made modifications to their EULAs to remedy the situations.[97] A drawback to this approach, however, is that EULAs are—at their core—contracts, and thereby limited by principles of unconscionability, among others.[98]

Conclusion

A U.S. citizen possesses certain privacy rights, which are outlined by the U.S. Constitution (as evidenced in case law) and through enacted statutory legislation. This framework protects, for example, rights to one's bodily autonomy, religious and sexual freedom, and how non-corporeal and non-tangible property—such as personal data—can be collected and used.

Virtual reality, in the form of video games and the VoIP that is becoming more widespread in use alongside those games, complicates existing privacy law boundaries. The gaming and legal fields should be proactive in crafting solutions to these complexities, in ways that give the government permission to infringe on some privacy rights while preserving an individual's overall right to privacy.

When thinking critically about the possibility of VoIP misuse, it is disappointing to consider the amazing gaming experience that most people often encounter when chatting in real time with friends and opponents. However, if this type of game misuse is possible, a "middle of the road approach" may be appropriate for the time being. In an effort to forge a clearer legal framework for analyzing VoIP misuse in video games, the gaming and legal communities should watch for developments in the closely related Augmented Reality[99] technology sector (which will likely face similar privacy legal issues in the near future),[100] and stand willing to quickly craft a viable privacy law framework in the event that it is needed.

Endnotes

1. *See* https://www.atari.com/; http://www.xbox.com/en-US/live.
2. *See* http://www.empireonline.com/movies/features/50-greatest-video-game-characters/ for an example of a pop culture list of favorite video game characters.
3. *See* http://www.nintendo.com/corp/history.jsp, for a general history of Nintendo's game systems.
4. *See* Chris Morris, *Video Game Industry Revenues 2015*, Fortune, (Feb. 16, 2016), *available at* http://fortune.com/2016/02/16/video-game-industry-revenues-2015/.
5. *See, e.g.*, http://candycrushsaga.com/.
6. *Seeb* e.g., https://www.callofduty.com/; see also https://www.youtube.com/watch?v=CIQYKtgj1kE, for an example of how voice chat can be set up in the Call of Duty 4: Modern Warfare game.
7. *See generally* U.S. Const. Amend. 1.
8. *See generally* https://www.aclu.org/your-right-privacy.
9. *Id.*
10. U.S. Const. Amend. 4.
11. Chandler v. Miller, 520 U.S. 305, 308 (1997).
12. *Id.* at 309.
13. U.S. Const. Amend. 1.
14. U.S. Const. Amend. 3.
15. *Griswold v. Connecticut*, 381 U.S. 479 (1965).
16. *Roe v. Wade*, 410 U.S. 113 (1973).
17. *Lawrence v. Texas*, 539 U.S. 558 (2003).
18. *See, e.g., Lawrence*, 539 U.S. 558 (2003).
19. *See, e.g.*, https://www.law.berkeley.edu/files/bclt_IPSC2010_Glancy2.pdf.
20. A system of records is "a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual." 5 U.S.C. § 552(a).
21. There are 12 exceptions where the disclosure can be made without a person's consent. *See* 5 U.S.C. § 552(b).
22. 5 U.S.C. §§ 552(c)-(e).
23. 5 U.S.C. §§ 6801-6827.
24. *Id.*
25. *Id.*
26. 15 U.S.C. §§ 41-58.
27. *Id.*; *see also* the Children's Online Privacy Protection Act (COPPA) (15 U.S.C. §§ 6501-6506), which protects the online collection of personal information from children. The Federal Trade Commission also enforces this Act.
28. 18 U.S.C. § 2510.
29. *See, e.g.*, http://www.eloisegratton.com/blog/2015/06/04/expectation-of-privacy-in-old-or-deleted-emails/, for an interesting discussion on privacy rights in one's deleted emails.
30. *Miller*, 520 U.S., at 309.
31. *Id.*
32. *See* http://www.pbs.org/kcts/videogamerevolution/history/ for more information.
33. http://pdfpiw.uspto.gov/.piw?Docid=02215544&homeurl=http%3A%2F%2Fpatft.uspto.gov%.
34. http://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/.
35. http://www.museumofplay.org/about/icheg/video-game-history/timeline.
36. http://patft.uspto.gov/netacgi/nph-Parser?Sect2=PTO1&Sect2=HITOFF&p=1&u=/netahtml/PTO/searchbool.html&r=1&f=G&l=50&d=PALL&RefSrch=yes&Query=PN/5531600.
37. http://www.museumofplay.org/about/icheg/video-game-history/timeline.
38. http://mashable.com/2015/01/08/gaming-tech-ces/#B1NmbOTVikqX.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *See generally* https://www.fcc.gov/general/voice-over-internet-protocol-voip. VoIP can also work in conjunction with traditional phone companies, if converter boxes are used and the analog phone signals are translated into digital signals for VoIP purposes.
45. http://www.pcmag.com/article2/0,2817,2483780,00.asp.
46. https://www.fcc.gov/general/voice-over-internet-protocol-voip.
47. This difficulty is not unique, as cellular phones often encounter the same trouble when 911 calls are made. *See, e.g.*, http://www.usatoday.com/story/news/2015/02/22/cellphone-911-lacklocation-data/23570499/.
48. https://www.fcc.gov/general/voice-over-internet-protocol-voip.
49. http://transition.fcc.gov/cgb/consumerfacts/voip.pdf.
50. *See* http://bebusinessed.com/history/voip-history/ for a brief synopsis of the history of VoIP technology.
51. http://blog.voipinnovations.com/blog/voip-and-video-games.
52. *Id.*
53. http://techcrunch.com/2015/10/31/the-history-of-gaming-an-evolving-community/.
54. Ross Dannenberg, The American Bar Association's Legal Guide to Video Game Development (American Bar Association: 2011), xiv.
55. http://essentialfacts.theesa.com/Essential-Facts-2016.pdf

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *See also* http://www.statista.com/statistics/273258/us-computer-and-video-game-sales/.
63. http://www.cnn.com/2015/12/08/europe/2015-paris-terror-attacks-fast-facts/.
64. http://time.com/4112884/paris-attacks-isis-isil-france-francois-hollande/.
65. *See e.g.* http://www.theatlantic.com/magazine/archive/2015/03/what-isis-reallywants/384980/; http://abcnews.go.com/International/simple-guide-understanding-conflictiraq/story?id=24113794; http://www.huffingtonpost.com/entry/isis-paris-attackexplainer_us_564cf073e4b00b7997f90b2f.
66. http://www.theguardian.com/world/2014/oct/07/isis-media-machine-propaganda-war.
67. http://www.dailymail.co.uk/news/article-2765414/Isis-use-video-game-Grand-Theft-Auto5-recruit-children-radicalise-vulnerable.html.
68. *Id.*
69. *Id.*
70. *Id.*
71. http://www.cnn.com/2015/01/14/world/isis-everything-you-need-to-know/.
72. *See* Part II (B) of this article, above.
73. Rolf H. Weber, Regulatory Models for the Online World, (Schulthess Jurische Medien AG, Zurich Basel Genf: 2002), 43-44.
74. *Id.*
75. Humphreys & deZwart, *Griefing, Massacres, Discrimination and Art: The Limits of Overlapping Rule Sets in Online Games*, 2 UC Irvine L. Rev. 507 (2012).
76. *Id.*
77. *Id.*
78. Weber, Regulatory Models for the Online World (Schulthess Jurische Medien AG, Zurich Basel Genf: 2002), 150-51.
79. *See* Ross Dannenberg, The American Bar Association's Legal Guide to Video Game Development (American Bar Association: 2011), 117-128, for sample Privacy Policy and Terms of Use agreements.
80. *Harding v. Paramount Pictures*, 2013 U.S. Dist. LEXIS 54217 (S.D.N.Y. Jan. 16, 2013).
81. *Neal v. Elec. Arts, Inc.*, 374 F. Supp. 2d 574 (W.D. Mich. 2005).
82. *See Harding v. Paramount Pictures*, 2013 U.S. Dist. LEXIS 54217 (S.D.N.Y. Jan. 16, 2013).
83. As a point of clarification, this example serves as a loose analogy only, since the actual VoIP technology and the resulting conversations do exist already in the real world, by virtue of the data being facilitated and stored by real world technology (e.g., internet infrastructure).
84. *See* Ross Dannenberg, The American Bar Association's Legal Guide to Video Game Development (American Bar Association: 2011), 117-20.
85. *Id.*
86. *See generally* http://www.house.gov/content/learn/legislative_process/.
87. Weber, Regulatory Models for the Online World (Schulthess Jurische Medien AG, Zurich Basel Genf: 2002), 43-44.
88. The Entertainment Software Rating Board (ESRB) provides age and content ratings for mobile applications and video games, enforces relevant guidelines for the gaming industry, and assists companies to create privacy practices. *See* https://www.esrb.org/ for more information.
89. Weber, Regulatory Models for the Online World (Schulthess Jurische Medien AG, Zurich Basel Genf: 2002), 80-81.
90. *Id.*
91. *Id.*
92. *Id.*
93. An illustration of an undue burden on a technology company can be found in the 2016 case, where the U.S. government filed suit against Apple, Inc., to compel the company to create a code that would unlock the San Bernadino shooter's iPhone. Apple, Inc. was concerned that if it created the code to circumvent the auto-lock feature of its phones, it would create an inherent security risk to its phones' technology. *See* http://techcrunch.com/2016/03/28/justice-departmentdrops-lawsuit-against-apple-over-iphone-unlocking-case/, for more information.
94. Weber, Regulatory Models for the Online World (Schulthess Jurische Medien AG, Zurich Basel Genf: 2002), 49-50.
95. *See* Ross Dannenberg, The American Bar Association's Legal Guide to Video Game Development (American Bar Association: 2011), 117-120.
96. Tal Zarsky, *Privacy and Data Collection in Virtual Worlds*, 217-223, in Jack M. Balkin and Beth Simone Noveck, The State of Play—Law, Games, and Virtual Worlds (New York University Press: 2006).
97. For example, EA Games was accused of violating German privacy laws through its use of Origin application which is required to play the games, and it ultimately updated its end user license agreement to clarify that spyware was not being distributed through the app. *See* http://www.escapistmagazine.com/news/view/113970-EA-Germany-Origin-Is-Not-Spyware.
98. *See* Brian D. Sites, et al., *End User License Agreements: The Private Law in Video Games and in Virtual Worlds*, 19-28, in Ross A. Danberg, et al., Computer Games and Virtual Worlds—A New Frontier in Intellectual Property Law (American Bar Association: 2010).
99. "Augmented Reality" describes when digital information exists in, and enhances, physical reality. *See* Brian D. Wassom, Augmented Reality Law, Privacy, and Ethics—Law, Society, and Emerging AR Technologies (Elsevier Inc.: 2015), 18-20.
100. *Id.* at 50-67.

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Copyright Considerations for Nail Artists

By Sonya Matejovic

Introduction to the World of Nail Art

A common misconception about manicurists is that they work only at nail salons. However, beyond salons, manicurists can also be found on the sets of major photo shoots, commercials, and in celebrity homes. Just like the models or entertainers with whom they work on set, professional manicurists may also have agency representation. These agencies often represent other artists as well, such as hair stylists and makeup artists. Agency websites feature artists' portfolios of work in advertisements and fashion editorials, as well as artist biographies. Furthermore, in addition to the basic manicure, there is also the world of nail art. Nails can be decorated so that they are resplendent with various colors, shapes, and jewels. Most nail art is completely painted by hand. Not all manicurists are capable of nail art, because it is such creative and arduous work. Nail artists devote their time to creating intricate designs requiring artistic skill and talent, and some nail artists even trademark their services. Successful nail artists are recognized and can become ambassadors for nail polish brands with a strong presence in social media, magazines, and stores, both nationally and throughout the world. Therefore, the creative work of nail artists is worthy of legal protection, especially as it is constantly exposed to various media outlets.

Why Nail Art Should be Copyrightable

Copyright infringement might arise when a nail artist creates art on a celebrity's nails, and those nails then appear in an advertisement without permission of the nail artist, or the nail art may be copied by another artist or entity for advertisement or entertainment purposes without authorization.

"On the day when Whitmill created the original tattoo, Mr. Tyson even signed a release form acknowledging that the rights to all artwork, sketches and drawings related to his tattoo and any photographs of his tattoo were Whitmill's intellectual property."

Although there are no precedential nail art cases, the closest comparison that can be made is to cases involving tattoo art. A tattoo is defined as: An indelible mark or figure fixed upon the body by insertion of pigment under the skin.[1] Although nail art on the natural nail is not indelible, it is fixed, and similar to tattoo art, where art is attached to the body.

> Endorsements fuel many modern-day advertising campaigns, and celebrity sponsors sometimes adorn their bodies with one or more tattoos. Such an advertisement might feature or otherwise innocently use the tattoo without realizing that United States copyright laws protect the tattoo artist's interest in the tattoo and the drawing, sketch, or design that became the tattoo.[2]

For example, in the case of *Whitmill v. Warner Brothers Entm't, Inc.*, tattoo artist Victor Whitmill sued Warner Brothers for the company's reproduction of the tattoo he originally created and applied to Mike Tyson's face, when the tattoo was featured on the face of another actor in the movie "The Hangover Part II." The tattoo was visible in the promotion and advertising of the movie. On the day when Whitmill created the original tattoo, Mr. Tyson even signed a release form acknowledging that the rights to all artwork, sketches and drawings related to his tattoo and any photographs of his tattoo were Whitmill's intellectual property. The parties ended up settling. Although Judge Perry denied Whitmill's motion to enjoin distribution of the movie, she stated that tattoos were copyrightable, and acknowledged that Whitmill had a strong possibility of prevailing on his copyright infringement claim.[3] Judge Perry disagreed with Warner Brothers' fair use parody claim. She stated that "there was no parody," and the use of "the entire tattoo in its original form, not in parody form" was a blatant copyright infringement.[4] The movie poster featuring the original art was used to advertise the movie in order to attract movie-going customers.

The art of nail artists and tattoo artists, like any other art on a canvas, is worthy of copyright protection. The Constitution grants Congress the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[5] Tattoos and nail art deserve recognition as "useful Arts" within the meaning of the Constitution. They are both historic art forms. "It appears that, given history and current social attitudes, courts would accept tattoos as a legitimate art form worthy of protection by the Constitution."[6] The same reasoning applies to nail art, as its use dates back thousands of years, including to the ancient Egyptians.[7]

How Copyright Could Arguably Apply to Nail Art

Nail art, like tattoos, could meet the requirements for copyright protection. "United States copyright laws protect the tattoo artist's interest in the tattoo and the drawing, sketch, or design that became the tattoo."[8] Whether

the tattoo is created initially separate from the skin or on it: "It is important to note that both procedures assume that the actual substance of the tattoo satisfies the foundational requirements of originality, fixation, and work of authorship."[9] In addition to the issue of the art on the human nail itself being copyrightable, nail art can also be created on a false nail and later attached to the real nail, or it can be sketched and later placed on either type of nail, just as a tattoo is often sketched beforehand.

"Based on such reasoning, art on a nail is fixed in a tangible medium."

The judge in the *Whitmill* case stated her opinion that:

> Of course tattoos can be copyrighted. I don't think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson's face, or restricting Mr. Tyson's use of his own face, as the defendant argues, or saying that someone who has a tattoo can't remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it's entirely consistent with the copyright law.[10]

Tattoos Meet All of the Requirements of the Copyright Act

The Copyright Act states that a valid copyright protection subsists "in original works of authorship fixed in any tangible medium of expression." Thus, to have a valid copyright the work must show that it is original, that one is the author of the work, that the work is fixed, and that it is fixed in a tangible medium.[11]

Scholars contend that tattoos are copyrightable. "It would appear that tattoos do meet all the requirements to fall under the protection of U.S. copyright law. Accordingly, artists should be allowed to register and defend their designs against infringement."[12] "The biggest argument in support of copyright in tattoos is that a tattoo meets all of the requirements of the basic definition of a work that is copyrightable."[13]

The work of art must be original in order to meet the first requirement for a valid copyright. "It is well established that original drawings that are turned into physical works of art are also protected by copyright."[14] When the law is applied to tattoos, an original sketch that an artist draws meets the originality requirement.[15] A nail artist can also certainly create his or her work authentically as a unique product of the imagination, and this holds true whether it is sketched or applied to an artificial nail.

The second requirement for a valid copyright is that the person asserting the copyright must be the author of the work created.[16] This requirement is met as long as the artist creates the design.

The third requirement for a valid copyright is fixation. In a situation where a tattoo is applied to paper or another comparable medium before it is applied to human skin, the fixation requirement is very easily met—it is undisputed that affixing a work to paper qualifies as fixation within the meaning of the Copyright Act.[17] However, the fixation requirement is significant to the analysis of tattoo art, because although it is understood that art on a canvas or sketch is fixed, art on a body is questionable as to whether it is as well. However, scholars have agreed that tattoos are permanent, and essentially cannot exist for a period of transitory duration by their very nature.[18, 19] The tattoo becomes a permanent fixture on the client's body and is perceptible until it is removed or fades.[20] With regard to nail art, besides sketching art on paper or on a false nail where the art is fixed, an argument can be made that on a natural nail, the design can be fixed for at least two weeks with a gel topcoat applied.[21]

"Furthermore, nail art can be protected through photography or other fixed media."

The fourth requirement for a valid copyright is that the work be fixed in any tangible medium. The human body would be sufficiently tangible to meet this requirement.[22] Nails are attached to the body. The medium of expression does not have to be permanent—the Copyright Act merely requires that the fixation exist "for a period of more than transitory duration."[23, 24] Thus, an ice sculpture, a computer hard drive, and even the icing on a birthday cake, are "fixed."[25] Based on such reasoning, art on a nail is fixed in a tangible medium. Yet because scholars speculate as to whether courts would be willing to recognize fixed art on people, the existence of the tattoo on paper, or some other comparable medium, could be crucial to securing copyright protection in the first place.[26] Therefore, nail art should be protected, because designs are often sketched beforehand on paper or painted on false nails. Thus, it would be wise for nail artists and tattoo artists to preserve their original sketched art.

Furthermore, nail art can be protected through photography or other fixed media. For example, the nail artist can photograph the nail art and register the image with the U.S. Copyright Office. In addition, nail art can be captured in film, graphic design, and other illustrations.

In *Escobedo v. THQ, Inc.*, tattoo artist Christopher Escobedo sued THQ, Inc., the manufacturer of the video game "UFC Undisputed 3," arguing that THQ copied the tattoo design that he inked on mixed martial arts fighter Carlos Condit. Escobedo tattooed the head of a lion on Condit's ribs and the tattoo appeared in the game. Escobedo claimed to be the sole creator. Subsequently, THQ

filed for bankruptcy, and the bankruptcy court awarded $22,500 to Escobedo. He appealed the award, and then the parties reached an undisclosed settlement.[27] This case is significant, because Mr. Escobedo was successful in obtaining a copyright registration in the first place. The tattoo was registered on February 24, 2012, and is titled "Lion tattoo."[28] "The registration does not detail whether it covers merely the design or the application of the tattoo itself, or both, but the fact that the U.S. Copyright Office granted the registration showed that it believed that the tattoo was sufficient enough to meet the requirements for protection."[29] A valid copyright registration affords an author a number of benefits, including the right to sue for copyright infringement.[30]

"In Reed v. Nike, Inc., *tattoo artist Matthew Reed sued NBA player Rasheed Wallace, Nike, and the advertising agency responsible for creating an infringing advertisement."*

Copyright Does Not Belong to the Artist in a Work for Hire Agreement or Joint Work

An exception where the intellectual property does not vest in the author of a work is works made for hire.[31] "In the case of a work made for hire, the employer is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, the employer owns all of the rights comprised in the copyright."[32] Thus, the work made for hire agreement treats the hiring party as both the owner and the author as a matter of law. For example, a standard photo shoot contract might state: "The product of my services hereunder shall be a 'work made for hire' for Client for copyright purposes, of if for any reason held not to be 'work made for hire,' I hereby assign to Client all right, title and interest in and to such product, and waive any moral rights I may have therein."

The Importance of Contracts

Although exposure is good for nail and tattoo artists, it is important that they are fairly compensated and receive credit for their works. It would be prudent for body artists to have agreements in place with the people on whom they apply their art. Since artists face the possibility of celebrity exploitation of a tattoo or nail art, those receiving the art should be prepared to create an agreement. "Before getting a tattoo, anyone with a reasonable expectation of fame should arm herself or himself with a work-made-for-hire contract, a joint work agreement specifying the customer's contributions and expressing intent to make the customer a joint author, or some other written document transferring ownership from the tattooist and the tattoo business to the customer."[33] If a tattoo is copyrightable, then the tattoo artist can seek a transfer of ownership under §204(a).[34] Tattoo artists have become aggressive in pursuing litigation, and nail artists might do the same, when their works are included in lucrative advertisements without their permission.

"Although Wallace and Reed worked together to develop the design to some extent, their mere collaboration was insufficient to establish intent to establish a joint work."

Nail and tattoo artists should properly prepare agreements with clients before the art is applied in order to protect their rights. "Celebrity clients can bring their own waivers stating that the tattoo art is a work for hire and the celebrity retains rights in the design."[35] The same can apply to nail art. The parties should include provisions stating that the artist maintains the right to the copyright in the design of the nail art, or that the art is a work for hire. In the world of sports, National Football League Players Association (NFLPA) officials began advising players to get copyright waivers or licenses from their tattoo artists."All we are doing is proactively telling players, 'Yes, we know you love your tattoo artists, but regardless of whether or not you trust them, regardless of whether or not there are legal merits to the lawsuits that we've seen, just protect yourself,'" says George Atallah, the NFLPA's assistant executive director of external affairs.[36] Even those in the entertainment and sports fields are realizing the risks of not drafting contracts with artists.

In *Reed v. Nike, Inc.*, tattoo artist Matthew Reed sued NBA player Rasheed Wallace, Nike, and the advertising agency responsible for creating an infringing advertisement. Reed designed and inked an Egyptian-style tattoo on National Basketball Association (NBA) player Wallace in 1998. In 2005, Wallace appeared in a Nike commercial that showed a digital recreation of the tattoo on his upper right arm, with his commentary explaining the significance of the tattoo. Reed promptly filed for copyright registrations in the design.[37] In the complaint, Reed alleged that Nike infringed his copyright by digitally recreating the tattoo in the commercial, which was the equivalent of copying it.[38, 39]

Reed was the author and owner of the copyrighted tattoo despite the fact that Wallace suggested some changes in the planning of the tattoo. "Before inking the tattoo, however, Wallace failed to ask Reed or Tiger Lily to execute any assignment, licensing agreement, or written contract transferring to Wallace ownership or other rights in the tattoo design that would become the tattoo on Wallace's upper right arm."[40] Although Wallace and Reed worked together to develop the design to some extent, their mere collaboration was insufficient to establish intent to establish a joint work. As Reed was the sole owner

of the copyrighted work and Nike and its advertising agency used it in a subsequent work without Reed's permission, the use infringed upon Reed's exclusive rights.[41]

The parties in *Reed v. Nike* settled out of court. "The lack of any further litigation is the first inkling that there may be some basis for believing that there is a valid copyright in a tattoo design and any person that infringes that right can be held liable."[42] "This case should sound a warning to companies and advertising agencies that feature celebrities (sporting tattoos and body art) in advertisements on television, billboards, and the Internet."[43] Such copyright cases have opened the door to the possibility of more body art cases. Celebrities, advertising agencies, and their clients should be aware of copyright issues relating to nail art and tattoos in order to avoid the possibility of litigation.

Conclusion

It is important to recognize the value of nail art and therefore encourage its legal protection. Based on the language of the Copyright Act and recent tattoo copyright cases, tattoo and nail art are ostensibly copyrightable. Those in the entertainment industries should be concerned about potentially infringing upon the copyright of tattoo and nail artists. Body artists should ensure that their works of art are protected through contractual language, and fix the art in the meantime through photography and other fixed media.

Endnotes

1. "Tattoo," *Merriam-Webster.com* Merriam-Webster, n.d. Web.
2. Christopher A. Harkins, *Tattoos and Copyright Infringement: Celebrities, Marketers, and Businesses Beware of the Ink*, 10 Lewis & Clark L. Rev. 313, 332 (2006).
3. Verified Complaint for Injunctive and Other Relief at 5, *Whitmill v. Warner Bros. Entm't, Inc.*, No. 4:11-CV-752 (E.D. Mo. Apr. 28, 2011), 2011 WL 2038147.
4. Hearing on Motion for Preliminary Injunction at 9, *Whitmill v. Warner Bros. Entm't*, No. 4:-11 Civ. 752, 2011 WL 11819138 (E.D. Mo. May 24, 2011).
5. U.S. Const. art. I, § 8, cl. 8.
6. David M. Cummings, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. Ill. L. Rev. 279, 280-81
7. http://www.beautyresource.org.uk/articles/nail-art.html.
8. Harkins, *supra* note 2, at 324-25.
9. Cummings, *supra* note 6, at 312.
10. Hearing on Motion for Preliminary Injunction at 9, *Whitmill v. Warner Bros. Entm't*, No. 4:-11 Civ. 752, 2011 WL 11819138 (E.D. Mo. May 24, 2011).
11. 17 U.S.C. § 102(a) (2012).
12. Grassi, Brayndi L., *Copyrighting Tattoos: Artist vs. Client in the Battle of the (Waiver) Forms*, Mitchell Hamline L. Rev., (2016), Vol. 42: Iss. 1, Art. 8, 57.
13. Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 Ore. L. Rev. 129, 132 (2013).
14. *Rogers v. Koons*, 960 F.2d 301, 307 (2d Cir. 1992).
15. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991).
16. Grassi, *supra* note 12, at 53.
17. Cummings, *supra* note 6, at 289.
18. King, *supra* note 13, at 154-55.
19. Grassi, *supra* note 12, at 53.
20. King, *supra* note 13, at 132.
21. https://cnd.com/pdf/Step%20by%20Steps%20(including%20Shellac)/ShellacSBSUpdate_REV.pdf.
22. Cummings, *supra* note 6, at 297.
23. 17 U.S.C. § 101.
24. Cummings, *supra* note 6, at 289.
25. *Id.* at 289.
26. *Id.* at 298.
27. Complaint at 2, 6, *Escobedo v. THQ, Inc.*, No. 2:12-CV-02470 (D. Ariz. Nov. 16, 2012), 2012 WL 5815742.
28. *Public Catalog: Lion Tattoo*, U.S. COPYRIGHT OFF., *available at* http://cocatalog.loc.gov (search in search bar under registration number for "VAu001094747").
29. Grassi, *supra* note 12, at 62.
30. 17 U.S.C. § 501 (2000). A copyright registration is not needed to prove the validity of the copyright, but it is prima facie evidence of a valid copyright. *Complaint, Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Feb. 10, 2005).
31. 17 U.S.C. § 201(a) (2000).
32. *Id.*
33. *Id.* at 328.
34. *Id.*
35. Grassi, *supra* note 12, at 45.
36. https://www.bloomberg.com/news/articles/2013-09-04/hey-pro-athletes-your-tattoo-is-going-to-get-you-sued.
37. P*ublic Catalog: Egyptian Family*, U.S. COPYRIGHT OFF., *available at* http:// cocatalog.loc.gov (search in search bar under registration number for "VA0001236392"; then follow "Egyptian Family" hyperlink under "Full Title").
38. *Complaint, Reed v. Nike, Inc.*, No. 05-CV-198 BR (D. Or. Feb. 10, 2005).
39. Grassi, *supra* note 12, at 47.
40. Harkins, supra note 2, at 315.
41. Meredith Hatic, *Who Owns Your Body Art? The Copyright and Constitutional Implications of Tattoos*, 23 Fordham Intell. Prop. Media & Ent. L.J., 420.
42. Grassi, *supra* note 12, at 47.
43. Harkins, *supra* note 2, at 318.

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JUDITH BRESLER: Good afternoon, everyone. We are here to present awards to the Annual Phil Cowan Memorial/BMI Scholarship. The Scholarship was formed by the New York State Bar Association's EASL Section, along with BMI, in 2005, and it's been thriving since 2005. It honors the memory of Phil Cowan, who was a Former Chair of the Entertainment, Arts, and Sports Law Section, who died precipitously of brain cancer. And so, in memory of Phil, we have created a scholarship competition—it's a writing competition—that's awarded to two students each year from an accredited law school in New York State, and on a rotating basis a number of law schools throughout the United States that are selected by BMI. The subject of the writing competition would be an article on any aspect of entertainment law, art law, sports law, or copyright law, which are all subjects that were dear to Phil's heart. We had an enormously wonderful selection of essays today that we had to really read and decide who the winners were. And without further ado, I am going to turn this over to Jared, and then Rich, who will give us the winners.

JARED LEIBOWITZ: Thank you, very much. One of the winner papers was submitted by Kelsey Hanson. The paper was entitled "The Case for Innocent Athletes: Why Olympic Relay Teammates Need a Private Right of Action to Sue a Doping Teammate for Resulting Damages."[1] Kelsey Hanson is a 3L at the University of Buffalo School of Law, and a law clerk at Harris Beech, PLLC. She currently serves as a Publications Editor of the *Buffalo Law Review*, the Executive Editor of the *Buffalo Environmental Law Journal*, and Co-President of the Federalist Society. Ms. Hanson graduated from the University at Albany, State University of New York, with a degree in Political Science. While at the University of Albany, Ms. Hanson was a scholarship athlete on the NCAA D1 Women's Track and Field team, where she competed in the pentathlon, hurdles, and high jump. She would like to sincerely thank Professor Helen Drew for her continued support and providing her with the opportunity to combine her lifelong passion for track and field with the law. Unfortunately, Kelsey could not make it today, but please join me in congratulating her on this great achievement. And now Rich Garza will announce the other winner.

RICH GARZA: Good morning. Thank you for joining us today. The title of the second paper is called "Calling the Tailor: Shaping Copyright Law to Protect Runway Fashion Designs."[2] It was written by Annick Banoun. Annick Banoun is in her third year at Georgetown Law. Last summer she worked in the Office of the General Counsel of CBS Television in Los Angeles, California where she worked on contracts, releases and production matters related to scripted and non-scripted programming and content, news clearances, and entertainment guild issues. She has also worked in the Office of the General Counsel of the Public Broadcasting Service and for Chief Judge Beryl A. Howell of the U.S. District Court for the District of Columbia. She has served for the past two years as the co-president of the Law Division of the Georgetown Entertainment & Media Alliance. She hopes to pursue a career in entertainment and media law.

She is here today, and it is my pleasure to call her up to present her with her certificate and take a picture.

DIANE KRAUSZ: I am introducing Barry Skidelsky and Pamela Jones, and they will be announcing themselves and the whole panel. I hope you have an enjoyable afternoon and thank you for all coming.

Section Chair Diane F. Krausz, Past Section Chair and Current Scholarship Committee Co-Chair Judith Bresler, Phil Cowan/BMI Scholarship Award Winner Annick Banoun, Section Vice-Chair Richard A. Garza and BMI's Jared Leibowitz

FIRST ANNUAL TELEVISION GENERAL COUNSEL ROUNDTABLE

Program Co-Chairs:

Pamela Jones, Esq.
Law Offices of Pamela Jones
New York City

Barry Skidelsky, Esq.
Law Offices of Barry Skidelsky
New York City

Moderator:
Eriq Gardner
Senior Editor
The Hollywood Reporter

Panelists:
Nadja Webb Cogsville, Esq., Senior Vice President and Deputy General Counsel, VH1, LOGO, BET, CENTRIC, Music Strategy
Michael Fricklas, Esq., Executive Vice president, General Counsel and Secretary, Viacom Networks
Cynthia Gibson, Esq., Executive President and Chief Legal Office, Scripps Networks Interactive
Jon Lutzky, Esq., General Counsel, Vice Media
Jeffrey Schneider, Esq., Executive Vice President, Business and Legal Affairs, National Geographic Partners

Panel 1: First Annual Television General Counsel Roundtable

PAMELA JONES: Thank you, Diane. And welcome to everyone to the Television and Radio Committee's first-ever General Counsel Roundtable program. I am happy to be here and see so many familiar faces. As some of you know, the idea for this program featuring a prominent journalist and several leading cable television network general counsels was so well received, that an executive decision was made for it to be part of our Section's Annual Meeting here today at the New York Hilton. My co-chair, Barry Skidelsky, and I, plan to make this an annual event, to take place each September. The second GC Roundtable will feature other prestigious legal and business professionals, also on the front lines of this evolving and influential field. Next time, we're hoping to focus on emerging online and mobile audio and video services. As always, we welcome any comments or suggestions that you may wish to share or communicate, and we hope you find today's program both informative and entertaining. So now, to help launch the Television and Radio Committee's First Annual General Counsel Roundtable, I am pleased to introduce our panel and Moderator, starting with Michael D. Fricklas. Michael is the Executive Vice President and General Counsel and Secretary of Viacom, Inc. Michael has served in the senior management of Viacom's legal department since 1993, and has been General Counsel and Secretary, Viacom's most senior legal position, since 1998. He is responsible for the legal affairs of Viacom, home to the world's premier entertainment brands, distributed across television, motion pictures, online, and on mobile platforms. Viacom's iconic brands include MTV, VH1, Nick-

elodeon, BET, Comedy Central, Spike, TV Land, CMT, Paramount Pictures, and many others.

Michael plays an integral role in guiding complex transactions and resolving disputes, in coordinating the company's legal and business affairs activities in corporate governance and in leading Viacom's Law Department. He received his undergraduate degree from the University of Colorado's College of Engineering and Applied Sciences and his J.D., magna cum laude, from Boston University School of Law. Michael is the past president of the Association of General Counsel and serves in a variety of other professional and community activities. He was named as one of "America's 50 Outstanding General Counsel" in 2016 by the *National Law Journal*, and the Viacom Law Department was named "Best Legal Department" in 2016 by *Corporate Counsel Magazine*. He has received numerous awards, including Raising the Bar Award from *The Hollywood Reporter*, Counsel of the Year Award from the Association of Media and Entertainment Counsel, and the top honor for general counsel, the "Excellence in Corporate Practice" award from the Association of Corporate Counsel.

Cynthia Gibson serves as Executive Vice President and Chief Legal Officer for Scripps Network Interactive, a leading developer of high-profile content from multiple lifestyle media platforms, including television, digital, mobile, and publishing, with well-known brands including the Food Network, HGTV, Travel Channel, Cooking Channel, DYI Network, Fine Living Italy, and Asian Food Channel. Cynthia is based in Knoxville and reports to Chairman, Chief Executive Officer, and President Ken Lowe. She manages the company's global and legal affairs, government affairs, external relations, and internal audit departments, with staff in Knoxville, New York, Chevy Chase, London, Warsaw, and Singapore. Cynthia is a member of the Supervisory Board of TVN S.A., a leading television and digital broadcasting company based in Warsaw, Poland. She is also a member of the Board of Directors for the Trust Company, and is a member of the National Association of Corporate Directors, Women Corporate Directors, Women in Cable Telecommunications, and the National Association for Multi-Ethinicty in Communications. She has been recognized as one of the "Most Powerful Women in Cable" by CableFax. She participated in the Women in Cable Telecommunications Senior Executive Summit at the Stanford University Graduate School of Business and at Harvard Business School's Cable Executive Management Program. She has been recognized as among "The Best Lawyers in America," the Top 50 Women Lawyers in Ohio, and the Top 25 Women Attorneys in Cincinnati. She is active in the philanthropic community nationally with the United Way of America, and in Tennessee with the Governor's Foundation for Health and Wellness and the Board of Complete Tennessee. She is a founding member of the Women of Tocqueville and serves as a member of the Board of Directors of the United Way of Greater Knoxville. She earned her juris doctor degree from the University of Virginia School of Law and has a Bachelor's Degree in History from Wake Forest University.

Nadja Webb Cogswell is Senior Vice President and Deputy General Counsel, Business and Legal Affairs, reporting to the General Counsel of Viacom Media Networks. Nadja oversees and manages a large Business and Legal Affairs team for VH1, Logo, Black Entertainment Strategy team, and music businesses across the Viacom Media Networks and BET. Nadja's extensive team is located in offices from Los Angeles to New York and Washington, D.C. Nadja supports a variety of business groups, including production and development, on-air and creative talent relations, marketing, integrated media, and new business development. As head of the Music Strategy group, she negotiates and drafts global music rights agreements across VMN—Viacom's Media Network—and BET's linear and digital platforms, and advises senior company executives. Prior to joining Viacom, Nadja was Senior Counsel at Atlantic Recording Corporation, Counsel at Sony Music Entertainment, and an associate at the law firm of Weil, Gotshal & Manges. She received her law degree from Harvard Law School, and a Bachelor of Arts from Wesleyan University.

Barry Skidelsky is a former broadcaster and musician who is based here in New York City. He is an attorney and consultant with a nationally prominent practice focused primarily on communications and entertainment. His background includes successes in these fields as in-house counsel, bankruptcy trustee, and arbitrator. Barry Co-Chairs the Television and Radio Committee, and is a former Chair of the New York chapter of the Federal Communications Bar Association.

Our distinguished Moderator today is Eriq Gardner. Eriq is a senior editor at *The Hollywood Reporter*, where he has been writing since 2007. He is responsible for the ESQ blog, breaking stories and providing influential analysis of media law. In 2015, the *American Bar Association Journal* added ESQ to its Hall of Fame of law blogs. A graduate of Medill School of Journalism at Northwestern University, Eriq has contributed to many other publications and has appeared extensively on radio and television to discuss the First Amendment, intellectual property, and other hot issues. In December, Eriq was honored by receiving the Journalist of the Year Award from the Los Angeles Press Club at the 2016 National Arts and Entertainment Journalism Awards. Please join me in welcoming our distinguished guests.

ERIQ GARDNER: Thanks for coming. It looks like we have some pretty good attendance here. I cover entertainment law for a living and I never have a

dull day, and I thank you all for that. For better or worse, I am pleased to be moderating this panel and we have a very good group. I just heard a lot about their backgrounds, but I want to go into a little bit more and just ask each of you how it is you got to be where you are at? Was it by design or happenstance? We'll start with Cynthia.

CYNTHIA GIBSON: Well, I guess it was sort of a combination of both. I was a trial lawyer, commercial litigator for 20 years, in a law firm in Cincinnati that really specialized in entrepreneurial startup-type businesses. After I had been doing that about 20 years, I just started thinking, well I wonder what else might be out there, and I happened to know the leadership at Scripps, both personally and professionally, and started talking to them about, I am thinking about, I am not sure what's next. Not even thinking that there would be an opportunity with them, but just several of them were people who I thought of as mentors and friends. They said, "Oh, you might be thinking about making a change," and so I was what they call an "opportunity hire." They were moving their corporate headquarters to Knoxville, TN, which was of interest to me because I grew up in that area. I made the move with my family there in 2010 and then several years later, my boss, who was General Counsel at the time, was leaving the company and they did a search for his replacement and through that process then I came in this role. Sort of a lot of different factors came together, but I tell people it's a lesson in making sure that whoever you meet along the way, think about how that might impact you many years later, because after I joined the company, my boss, our CEO at the time, reached out to a prior board member whose son I happened to have a case with. Fortunately, he had very nice things to say about me, and that had been a case that I had handled, you know, five years into my career. Fortunately, I got good marks from that and started my career off at Scripps on a positive note.

ERIQ GARDNER: Great. Barry. You have had time, both in-house and out-of-house, to tell us about your progression.

BARRY SKIDELSKY: I guess it's fair to say I entered this world by happenstance. I trace my origins in the field back to my days of college radio. Somebody heard me, said "Hey, kid you wanna…would you like to be on air on a commercial radio station on the weekends, vacation fill-in?" This was up in Vermont, and when everybody went home for Christmas break, I stayed and skied during the day, did radio at night, got a big break, wound up having a career in radio, thought I was going to go wind up as an owner of a radio station in Vermont and be a big fish in a little pond, and before I knew it, I knew so many people from working in radio, they knocked on my door and said "Can you help me buy this station?" "Can you help me sell?" "Can you help me do this copyright thing, this employment thing, this tower lease?" Next thing you know I was de facto General Counsel to several small-to-midsize companies, and my practice has evolved to where I not only straddle the worlds of communications and media, and technology, in effect, I am de facto General Counsel to several companies and individuals now, and that's my story, and I am sticking to it.

ERIQ GARDNER: I think that the one thing that most people might not know about the General Counsel at Viacom is that he is an engineer by training, worked at a mining company, so tell us how you got to where you are.

MICHAEL FRICKLAS: I'd have to say I came to this job out of a fairly random walk. I started out as an engineer; I wanted to work in the tech industry. Ended up deciding that a better path to the kinds of jobs I wanted was through getting a law degree, so I originally thought I would be a patent lawyer; ended up following an interest in business law after working for companies for a couple of summers, and ended up in the Silicon Valley, representing startup companies and mid-life, you know, later-stages of startup companies doing IPOs and finance and things like that. While doing that, across the table from me was a big New York firm, Sherman Sterling, and I went to Sherman Sterling to do corporate finance and M&A, which is a natural path to entertainment law. But in fact what happened is while I was at Sherman Sterling, I met a merger and acquisition lawyer named Philippe Dauman, who is also an M&A lawyer, and happened to be a lawyer to Sumner Redstone and represented him in his acquisition of Viacom in 1987. In 1990, the stock markets were still in the fall the Great Crash of 1987, and we were representing a lot of mining companies, that M&A group, and a mining company that I had represented in an acquisition offered me the opportunity to go start up a U.S. headquarters for them. It was an international company, in my home town of Denver. So I went back to Denver and I launched that company. Three years later, Dauman came over to Viacom as General Counsel and asked me if I wanted to be Deputy General Counsel. I had been in the mining business,

so I knew a lot about rock, so MTV seemed like a natural place to go, and that's how I ended up in the entertainment business. Now it will be 24 years this year, but one of the things that Cynthia said, it's funny how whatever you do, whatever those paths you take, you gain experience that is relevant to what you are doing. My very first week on the job at Viacom, we were in merger conversations with then Paramount Communications, Inc., which was a name change. They liked the name Paramount better than they liked the old name, which was Gulf and Western. Gulf and Western's biggest liabilities, which we started doing due diligence on, were from owning New Jersey Zinc. And so that first week I ended up on a plane to Colorado to look at an old zinc mine and could understand the environmentals related to it, which is exactly what you would expect to do on your first day on the job for an entertainment company. So everything has some relevance, and you can put anything you learn into good use.

NADJA WEBB COGSVILLE: My path wasn't quite as random as leap from rocks to entertainment, but it was not a linear path. I had no aspirations to go into entertainment law when I was in law school. In fact, I wanted to do some kind of like, impact ligation or test-case litigation for a women's rights organization, so I was the President of the Civil Liberties Union. Could not beg my way into a modestly paid job at, say, the now-Legal Defense Fund, or one of those types of organizations, and realized that most of the staff attorneys there had been refugees from large law firms, so I went to a law firm here in the city and was just practicing general commercial litigation. I ended up working with one partner in particular who tended to have a lot of media and entertainment clients, but once again, this was just general commercial litigation. I then ultimately ended up working on this one case, which was a really fascinating case that ended up taking up, you know, a tremendous amount of my time and was for Sony Pictures, and that's where I kind of got the bug. And the in-house lawyer at Sony Pictures knew of an opening at Sony Music, so I first made a transition into music and I practiced as a music lawyer for a few years at Sony Music and then ended up transitioning into TV. And I have been working at Viacom now for almost 13 years.

ERIQ GARDNER: Great. I also want to get a sense of, you know, what you do on a daily basis. Also maybe you can describe basically your day. Is it typical or is every day different, you never know what to expect?

CYNTHIA GIBSON: I would say for me every day is different, although my 14-year-old son said, "You know, mom, I think all you do is meetings and email all day long." I think the great thing about this role is you really never know what will end up on your desk. If it's a simple problem, it will usually get solved by someone on your team, because you have a lot of really smart people working for you, so you really get to confront new and different puzzles every day, which is what I really enjoy. You really kind of get the hard ones that are hard to tease apart and find an answer to, really almost every day. The other thing that's fun is just sitting at the leadership table and thinking about how the business is going to move forward. You know, particularly in our industry right now, there's a lot of change going on, a lot of thinking about what the future might bring, and so in addition to sort of the legal work that you get to do, having an opportunity to also discuss business issues is also, I think, a very fun part of this job.

BARRY SIDELSKY: I share that sentiment. I enjoy wearing the hat that's two sided—the business side and the legal side. As lawyers we have ethical obligations, obviously, but it's a lot of negotiations for me, whether it's in a transitional or litigation context. I am lucky enough to do all three—mostly transactions, some regulatory, primarily with the FCC and some FTC counseling, and occasionally litigation. The days are never the same and I think it's always exciting and challenging to learn new areas and help people protect and advance their interests. Close the deal, solve the problems as quickly and as cheaply as you can. Thank you. You'll come back. You'll send your friends. Next.

MICHAEL FRICKLAS: Yeah, my days are highly varied; there's Board work, there's litigation supervision, there's…at least half the day is crises that were not on my calendar that morning that somehow came up… there is some pressing issue that needs immediate attention or otherwise some development that no one was anticipating. There's a request from a CEO or a business manager or someone for something that has to be done right away. Since I have been at Viacom, I am now working for my seventh CEO, actually, and everybody has got a different style, everybody has a different rhythm. Every variation of the organization since I have been in with it is different in terms of you getting to know the people and how the people work together, and that is a part of the fun of it—is the fact that it's an ever-changing place.

NADJA WEBB COGSVILLE: I am going to echo what everybody else has said, which is, you know, there is absolutely no day that is identical to the next. We can't anticipate what is going to come up and I actually love the fact that my work really requires us to be nimble. You know, you just have to constantly switch gears and, whether it's one minute I am working on something that is the traditional bread and butter development work, and then some production crisis might erupt. Then there's all the litigation matters that we have to attend to, so it's really very varied and I think part of that is also the

nature of the channels that I service. They tend to push the boundaries and we're also always looking at new platforms and that always has lots of different rights implications.

ERIQ GARDNER: Before I touch on some hot issues I am sure everyone is thinking about, I also want to talk about your organizations. Can you identify for us what might be the most unique or interesting thing about the structure of your law department?

CYNTHIA GIBSON: When I came in as General Counsel, one of the things that we did was to reorient how we were organized. We had been organized in a very siloed way, by business unit, and we reorganized ourselves in a horizontal way, so that we can help the business talk to each other across all of the business units, because we found that we were seeing similar issues in similar contracts being done, similar business deals, and a lot of those learnings weren't flowing through across the entire organization. We really felt like we could be the glue that helped the company work across the silos, and in fact in the U.S., we have reorganized ourselves on the business side now to very much reflect the way that our department is organized, and our COO says that he learned a lot from us as we went through that process about just how different everyone was approaching things and helped him think through issues, and was sort of part of the evolution of his thinking to move things together. As we have now grown internationally, we really started growing internationally in earnest in 2009, we've tried to do the same thing. We're very much trying to connect our international business and our domestic business so that we can try to help the company achieve its goal of becoming a global company. That is a transitional process; if you have ever been though that with a company, how you go from being national to being global, and so our group is very much trying to make sure that we share learnings across the world, among the various business units so that we can fuel that global growth.

BARRY SKIDELSKY: My law firm's organization is very simple. It's me. The most interesting thing about it is, when I work from home I can be naked and no one knows.

ERIQ GARDNER: Now we know.

CYNTHIA GIBSON: Remind me not to call you.

MICHAEL FRICKLAS: Viacom's got about 250 lawyers in house, about 600 people in the global Law Department. We do everything from rights clearances to risk management to compliance, and the like. We're organized along the lines of the business. It's very important that different members of the business know who to call in the Law Department and, we'd be integrated into the business processes. The fundamental organization of the Law Department is to parallel the organization of the business units, so that changes from time to time, and so do we. At the same time, there's a lot of, to your point, communication—knowledge management is really key. So we have everything from a Law Department portal to a Business and Legal Affairs University, which brings in lawyers from all parts of the company to learn from both businesspeople and lawyers about various topics related to being a practicing business and legal affairs lawyer. We have a bunch of task forces across the company to focus on particular issues, from employment to standard forms to other sorts of things, so that different people from different parts of the company have real-world projects to work on. It's a combination of things, but with the fundamental orientation around the business units.

NADJA WEBB COGSVILLE: I would say the only thing I would add is that historically at Viacom, the attorneys were very closely associated with particular channels, and starting in 2015 we've kind of broken down those barriers so that attorneys are pooled and it allows folks to work for most often multiple channels, which I think is really exciting for the attorneys. As Mike mentioned, there's, you know, there was always informal information sharing across channels, but now it's much more formalized through the knowledge management or just by having these pools of attorneys. There's just greater communication, and we're able to better serve the clients.

ERIQ GARDNER: Actually Barry, I was going to ask you, having been both inside and outside, you must have a perspective about what kind of organizational structure works best.

BARRY SKIDELSKY: It depends on the size of the organization, obviously. I was General Counsel and managed staff. Also with a publicly traded company that did mobile marketing, SMS text messaging, and we had structured our legal departments by legal expertise. This guy was our employment maven; this guy did real estate leases for us, for wireless sites and things. I think it's a very smart move, what you guys have done to reorganize the way you have. I think that helps keep lawyers sharper, because if you wind up doing the same stuff over and over, I feel sorry for guys like, you know, great I do in rem tax. It's like, yuck. But every day we get to take on new challenges, new opportunities. I think it's very exciting and it's obviously a really evolving field that we're all in and that impacts everybody. I mean, you know, we're no longer a grey area, we're no longer industrial, we're now in the information age, and the internet is, or IT, more particularly, is impacting all of us.

MICHAEL FRICKLAS: Yeah, I mean, let me add to what you are saying. One of the things we do quite consciously at Viacom is move people around, somebody might be a mergers and acquisitions lawyer one day and a business affairs lawyer the next, and even within Barry's way, I have people that are real experts. I have a guy that runs litigation for us, for example. Former Supreme Court, great litigator. I have him, not the corpo-

rate lawyers, managing some of the aspects of corporate, because I want him stretching. I want him thinking about something that's fresh and new that he's not been doing all along. I am trying to develop people, because as you move up the ranks, you need to be more of a generalist. You know, you need to know a little bit about just about everything. And that's exactly how much I know about just about everything, is a little bit. As you move up in management, you need more areas of expertise, so one of the things we really encourage people to do is do that sideways move and learn something new, because those different skill sets make you more valuable as potentially a member of legal management, or even business management.

ERIQ GARDNER: I wanted to touch on some points, some issues that command your attention. In particularly, I want to start with something that Michael referenced, which is working for a public company. Cynthia, how much of your focus is devoted towards things your companies say to shareholders, to regulatory bodies, to even, people like me—members of the media.

CYNTHIA GIBSON: Well, obviously it's a public company. Along with that comes a whole host of things that you have think about. We do have a public Board that meets quarterly, so every quarter it rolls around it feels a little bit like Groundhog Day sometimes, but you have to get prepared and make sure that you are updating the Board so that they can fulfil their duties as Board members of a public company. We spend a fair amount of time doing that and we also are a closely held public company, meaning that we have a controlling shareholder, which is a group of family members. Our office actually manages all of the interrelationships with that family, so we have people who respond to individual questions from the family, we're involved in the communication rhythm with the family, handling the governance around the family's votes, around matters that are at issue on our proxies, so that's another issue that we deal with. I've worked with both private companies and public companies, and the public company layer just adds an additional level of complexity in disclosure, and you need to be careful about all of your governance issues. I would say that commands a fair amount of my time.

ERIQ GARDNER: Michael, you have become an expert on dealing with the grueling demands for working with the Board and the management and the shareholders. How do you keep your sanity?

MICHAEL FRICKLAS: I have to say, last year for Viacom was about the most interesting year in governance in the history of companies. We were a controlled company with a company, you know, National Amusement, the Redstone family owns 80% of our vote, 10% of our equity. Our management was litigating with them over control of the company, which seems a little haphazard, but there was some logic to it. It's really important as an in-house lawyer to understand at all times who your client is, and that's the company. That issue comes up with surprising frequency, I think particularly in controlled companies, but there are lots of times when even your nominal boss, your CEO, may have a different set of interests than the company does, or individual Board members may, and the like. One of the things we spent a lot of time working on last year was trying to make sure that people had appropriate representation for those separate interests, and understanding that even though it's your CEO who hired you, and your CEO who you work for every day, that it's your job to cabin off the particular issues that you have to address that are just going to be different. Last year there was a lot of that. There was a lot of being involved in the organization, in things. There's a lot of keeping the day-to-day lawyers separate from the issues going on in governance and control. They are not expert at it. When different people have different set of interests, people can get injured, and part of my job was keeping them away from the stress and the risk associated with those positions and keeping about their day-to-day work.

CYNTHIA GIBSON: I think that's a really good point, if I can just add one comment, is that when you are in-house, sometimes you can get very focused on your business partner that you should please them, and do what's best for that particular business person that you are working with, and so we do a lot of education of the entire group around, really think about, and step back. Our client really is the company and the overall shareholders, so if your individual client, maybe you're helping them do one thing, you always have to step back and think about the bigger picture and to really understand that that company is your client, not that particular business person that you are trying to make happy. We do a lot of things, like we make conference rooms available for them to listen to their earnings calls, we have summaries of our earnings distributed to the entire group, including, all the way down to admins, because I really want everyone to have that bigger picture of the entire business in their mind as they do their job every day.

ERIQ GARDNER: I am sure working in television is challenging. I am sure that a lot of viewers of VH1 or BET or Logo might not know who the lawyer involved is, but if something goes wrong, it's probably your head. Tell me about the pressures that you face, that just being public, in the sense of your work product is out there.

NADJA WEBB COGSVILLE: I'll add to that in a couple of ways. My first answer is going to dovetail a little bit on what both Cynthia and Mike were speaking to about who do you serve. I certainly architect deals and do things like that all day, but I also have to counsel my clients oftentimes on what we can and cannot do and there are certain instances where, clearly it's like a red alert, we absolutely cannot do something. Maybe it's unlawful or it's going to really cause the company to be put in an unfavorable light or what have you, but there are also many instances where it's not quite as clear cut,

and in those grey areas, you are doing a risk analysis. It's incumbent on us to really educate our clients as to what the risks are and where on the continuum the risk falls, and sometimes it's a business decision, but you have to help them appreciate what's involved in that. First of all, my name is oftentimes put in the credits; sometimes I would like for it to be stripped from certain shows, right? I get frequent calls on Monday nights when "Love and Hip Hop" is on, and my name is flashed across the screen. I tend to get sort of vested in the programming and I really want all of our programs to succeed. And I am not on the creative side and I can't always predict what's going to be a hit, but when it's out there, I think we're really proud of the work product and it's fun to see something come together.

BARRY SKIDELSKY: I think all of us as lawyers take those both sides of the equation; we're representatives and we're counselors. On the one hand, we're maybe trying to negotiate or advocate, but on the other side, we're trying to educate so that our clients can mitigate their risks or avoid them.

MICHAEL FRICKLAS: Right. A balance is really, really hard day to day. You talked about the big issues and when it comes to Viacom's governance last year, but it really is a day-to-day thing. All of you are sitting there with a client who really wants to do something and you have to help them find a way to do it that is appropriate in terms of risk, and it requires an understanding of the practical consequences of what you are doing, not just the legal answer. I always say that people that get into the right legal answers—the first 10% of the solid solution, the other 90% is figuring out how does that law apply in the real world? Who are the people involved? How do I operationalize the decision? How do I create systems that make sure that those decisions really function in the real world and that people understand what they are supposed to do and have an incentive to make it happen? There's a lot to do in order to make all those things happen. One thing we actually do, which is kind of fun at Viacom, a year ago, and Nadja really headed this group up for me, we talked a little bit about what our values were among our senior management team in terms of what kind of a law department we wanted to be. And Viacom has a program that identifies kind of Viacom's values, it's called Fans First, and we have television advertising around it, a lot of employee communications and the like. When we talked about the law department, we came up with a lot of things, and we talked to clients to find out what they liked about our legal function and about who we aspired to be and we came up with a short phrase that reminds people of that every day called: Solutions, Fans First, First World. We're not the people that you would get rolled over, we're not the people who just say yes, we're also not the lawyers that you go to or avoid because they are going to say no. We're the lawyers who help people figure out a path through it and it's that solutions orientation that really we've tried to make a key part of the legal culture. I think in a big function, like yours, and mine, a big part of what you do every day is try to create culture, because culture is actually how you govern a big organization. I can't tell 250 people what to do, if I did, they wouldn't listen. I can't talk to them every day and I can't look at the piece of paper that they are looking at or be involved in a conversation or negotiation they are involved with. If we can all think about things in similar fashion with similar objectives, and if people around them are also sharing those objectives, that helps kind of, to keep people wanting to be part of the team. It's that culture that we really spent most of our time focused on creating, as we think about the larger legal function, that solutions orientation, by definition, includes this balance that we have been talking about.

NADJA WEBB COGSVILLE: The only thing I would add to that is that the one thing that you never want, I think, as an in-house lawyer, is to be viewed as the obstructionist, right? If you are constantly the no people and your clients do not look at you as partners in helping to find a pathway forward, you're going to have a really difficult row to hoe, I think. The emphasis really needs to be on problem solving, because that's how I view us, right? We partner with our clients to find a way to accomplish their goals.

CYNTHIA GIBSON: I think that's right, and I think it's one step further to what Michael was saying, is that being solution oriented—I have retrained people, I don't like them to say, well here's the risks and you are the businesspersons and you decide, because then you have no ownership in it. You are their partner. Now, ultimately they will make the decision, but something I learned very early on growing up in a more entrepreneurial law firm environment was to say to the client, look, it's your decision, and here are the risks, but if I were you, here's what I would do. That gives skin in the game for me, as well. I mean, obviously the businessperson has to make the decision, but I can offer an opinion as to what that outcome might be and why my analysis is what it is. You really are taking more ownership of the solution rather than just pushing the risk-balancing decision across the table to your business partner, because they really do want to know your opinion.

ERIQ GARDNER: You know, one of the things that strikes me is that your organizations and the legal functions are dependent on basically what your company does. I had the pleasure of having lunch with these panelists the other day, and one of the more funny things I learned was standards and practices looked very different at Viacom versus Scripps. I mean, I suppose no one would ever expect cursing on the Food Network or HGTV, but that being said, you did say some things that command attention from an international standpoint. You want to give them those examples?

CYNTHIA GIBSON: No, it's interesting. We really don't have to watch any of our programming from a

standards and practices point of view before it airs in the U.S. because it's all pretty similar and pretty safe. They have a lot more hard judgement calls to make than we do. I will get a call maybe once or twice a year, but my guess is you get more than that on your networks. As we have grown internationally, it's been very interesting. There are some countries where, for example, you can't exhibit a pig. There are some countries where you can't eat certain foods. There are some countries where a certain amount of skin has to be covered, so compliance has become a little bit more challenging for us as we've grown globally.

MICHAEL FRICKLAS: Yeah, and you talk about risk management. I remember when I was first starting at Viacom, we were launching some channels in the Middle East, so we were launching MTV, Nickelodeon, on a satellite service that served much of the Middle East and someone told me that it's illegal for two people who are not married to be at a kitchen table together, so that was a bit of challenge, but we took the risk and it worked out. You talk about standards and practices; we have interesting standards and practices issues every day. Nadja and I were recently working on a show that's called "The High Court," and for those of you that know the initials, the initials of the high court are THC, and in fact people who are deciding the decisions smoke marijuana during the show and then render their decrees. It was an interesting set of issues. The show is going ahead.

ERIQ GARDNER: You have anything…any fun stories?

NADJA WEBB COGSVILLE: The only thing I would say is also you have to know we have a huge portfolio of channels within Viacom, so the standards vary from channel to channel, as well. I mean, clearly, the kids in Nickelodeon is a far extreme, but even, what might be appropriate for the CMT audience might not be deemed quite as appropriate for MTV.

MICHAEL FRICKLAS: It's a real challenge. That group, they have a lot of very carefully written standards that they apply to advertising, as well as to broadcasting. They have a very well-honed approach to where the envelope is being pushed and where it's being ripped open. It's a judgement kind of profession. What's remarkable is how much over the years MTV and Comedy Central and some of our other channels at Paramount have been able to operate at the edge of what's permissible with as little controversy as we have managed to maintain, and it's a testament to Nadja and the standards and practices people and the folks who kind of navigate this terrain every day.

ERIQ GARDNER: I wanted to ask you about expanding footprint, because you have negotiated a lot of deals to, you know, bring MTV and other networks overseas, launching it in different countries. Just finished a deal attracting investment for Paramount in China. How has that changed your perspective of law, of the business, of entertainment?

MICHAEL FRICKLAS: Yeah, I mean, international is, if you think it's just the same as the U.S., you are going to really screw it up. On the other hand, an awful lot of the fundamentals are the same. You know, business models travel around the world, the technologies are pretty similar. The individual market dynamics vary. We like to call our approach "glocal"—a combination of global and local. At one time, we were really trans-border and tried to create a trans-border advertising business. That was MTV's first foray into international, and it didn't work. The programing fundamentally needs to appeal to local tastes. Advertising also appeals to local tastes; it's really a market-by-market thing. On the other hand, from Viacom's perspective, we've been really successful with transporting formats. We like to talk about "Jordy Shore," which is, you know a version of "Jersey Shore" in the UK, which beats "Game of Thrones" on broadcast. We have "Shores" in a bunch of countries around the world, including "Warsaw Shore," where there isn't even a shore, and they are really successful. We even bring some formats back to the United States. You have one studio and it's all set up and all the people who come in who are native Italian speakers and they create the show and then they all leave and new people come in and they are native, you know, Mexicans or Poles, and they create a show for that market. So, there is this kind of balance. In terms of the legalities, it's also, a lot of relying on people who are really knowledgeable about their local markets. As a lawyer, it's understanding what contracts mean and what they don't mean, understanding there are a lot of places where you have rights that are simply not enforceable in court, and so you have to create a set of dynamics that makes a business relationship work notwithstanding that. You have to understand there are places where the courts are just corrupt and you have to protect yourself from those kinds of situations, too. So, we've seen the dynamics are different and they vary from market to market, and it's really hard to draw kind of specific pointers without getting into a lot of depth. You have a lot of international experience now, too.

CYNTHIA GIBSON: A little bit of trial by fire with the last two years, but I think it's been interesting as I have done business around the world, people ask you a lot about language and I really have found that English is really the language of business for the most part all over the world, except in my experience in Latin America—it was really hard to do, not being a Spanish speaker. So we actually ended up bringing on someone on board who had worked in that area for 20 years and understood the language, because there was just a language barrier. And it's been interesting also for me to learn that the law… there's not always an answer and you can get three different options from your local counsel. One of which may be right, but you know, in many countries the regulations are developing and it's not been tested or applied, and

so that's really when you end up having to make a lot of decisions on, well, what legal risks are you willing to take because not only is the law new, there's not a lot of jurisprudence around it. The regimes can change and they can make a different decision tomorrow, and you can get three reputable law firms to give you three different answers. So it really has given us all an opportunity to say, OK, well what do we think makes sense in the biggest picture here. But what probably has been, to me, the most different issue about doing business internationally than in the U.S. is just the lack of settled jurisprudence and the need to just make decisions without really knowing what might happen.

MICHAEL FRICKLAS: Yeah, I mean, obviously it happens here too, that I have three law firms that give me three different opinions.

CYNTHIA GIBSON: That's true.

MICHAEL FRICKLAS: But I do trust my judgement better here. You know, I'll hear three opinions and I will say "that one sounds right to me." Or at least I will be informed by all three and figure out our path forward. Internationally, you know, your gut feels a little less tested as you have to rely a little more on people who are really familiar with their markets.

ERIQ GARDNER: Speaking of regime change, we have had an election here and we're probably going to undergo a lot of changes in both regulation and law, new judges and all that. Barry, what do you think—what can we expect in the next few years?

BARRY SKIDELSKY: Er…well…

MICHAEL FRICKLAS: A lot of tweets.

BARRY SKIDELSKY: There's obviously an opportunity for a new policy mindset from the federal government down. You have not only a spot to fill in the Supreme Court, the FCC—as you guys are probably aware, that whole issue that we thought was going to be hot with set-top boxes is probably dead now, although it's interesting to do an autopsy, because it is relevant to those who create and sell or license content. You know, I can tell you that that word on the street is that the new FCC Chairman is going to be Ajit Pai. The issue of net neutrality, which really affects all of entertainment communications… is going to be tweaked. Obviously, the public's view was here goes Obamacare or the Affordable Care Act, that was the primary thing, but infrastructure in this country is a topic that came up during the debates. And to me the most important infrastructure—forget about roads or any of that, railroads or energy—I think is broadband. Broadband is really the driver of our economy now. It creates jobs, it fosters innovation, creates whole new business models and in the materials that I drafted—which I am sorry if they were just geared to the FCC, that's not all I do—I mentioned the fact that there's municipal broadband where people are trying to realize now that broadband access, or internet access at broadband speeds, is becoming, or if not already, a public good, like a utility. People talk about the digital divide, the haves and the have-nots. So, I am blabbing, but to me, the infrastructure related to telecommunications that affects entertainment and media and everything else we do, education. Just like there's a universal service fund to help people who are low income with telephones, you need to have that tweaked in order to be able to have everybody be able to get on line, because it's going to help them advance their lives. And that's my spiel. And also in the materials, I will just mention one other thing: Rulemaking, putting in comments to rulemaking, I think is really, really a valuable tool, where especially if the common interests align to make it economical to do so, you can help shape policy that affects your clients, your industries, blah, blah, blah. Anyway. That's all.

ERIQ GARDNER: Well, one thing I can confirm is that Ajit Pai is the Chairman of the FCC. That press release went out yesterday.

BARRY SKIDELSKY: I was right.

ERIQ GARDNER: Michael, do things like no net neutrality or backing-off of net neutrality of, you know, a backing-off of the set-top box proposal, privacy on broadband, do those things affect Viacom? Do you have to rip up the playbook?

MICHAEL FRICKLAS: They do affect us deeply. You know, I think certainly we're heading into some uncharted territory in terms of what regulations will come out. As a general rule, as a business, an environment that is more deregulatory is generally good for everybody. So, to the extent that's not biased, to the extent, for example, the FCC, some of the areas where there's duplication of the functions of the FCC and other government agencies, reduced duplication, you know, I think that ends up being a good thing for everybody.

BARRY SKIDELSKY: Merger review comes to mind immediately in the world of M&A.

MICHAEL FRICKLAS: Yeah, that's one, right, where the FCC hasn't been held to the same standard as the Justice Department and the Federal Trade Commission. So I think some of these things are interesting. You know, on broadband policy, I like that Ajit Pai has talked about making sure broadband is available nationally. That would be good for us. I think to the extent that, you know, we have an incentive for people to provide internet service to be able to, you know, recover their costs and invest and keep those things at the cutting edge, I think that's good for us. So, I think there's risks in net neutrality, to the extent that people might prefer, you know, affiliated program services to unaffiliated program services and the like, to the extent the economics are going to change. Net neutrality is a really complicated set of policies. And Title II regulation of net neutrality in particular, I think, caught

everybody as a surprise when it happened. So, I can't really, you know, make a prediction, other than saying there's factors on all sides of these issues. Obviously, this government is going to approach them in a very different way.

BARRY SKIDELSKY: And these changes can come from any corner of your civic structure—from judicial, legislative, or executive branch administrative law.

MICHAEL FRICKLAS: It's interesting, you start to see populism creep in. I mean, recently the Copyright Office decided they were going to make policy by doing a Survey Monkey and asking people what to do, which strikes me as not a particularly great way to do it. They did that initially in the UK recently about naming a new Antarctic survey boat that, you know, the public came up with the name, I think, "Boaty McBoaty," which the government decided to ignore and move on to something more dignified. You know, there has to be a limitation to populism where thoughtful deliberation and understanding what all the consequences and the second- and third-order effects are, is going to be important to making sure the regulation is made in a good way.

ERIQ GARDNER: I have a slightly related question for Nadja. I think of networks like Logo and BET, I see you, you know, handling legal affairs for some of the networks with viewership that is probably vastly opposed to the Trump Administration. Are there any areas where you feel that you are going to need to step up as a lawyer, you know, at those networks?

NADJA WEBB COGSVILLE: Well, keep in mind, I don't know if the networks, you know, necessarily hold themselves out as supporting or opposing a particular administration. I mean, I would say, in fact, you know, BET, if we take that as an example, they were down at the RNC, they were down at the DNC. They, you know, I am sure the creative execs and the senior leadership probably are very vocal about their support, but I think they hold themselves out as a network as covering all sides of the debate and all of the perspectives that were being surfaced during the election. So I don't really, I think the only time that it really comes into play from, as a lawyer, is in terms of, you know, there have been instances where we may have a particular politician appear on camera. And we have to be very mindful of making sure that, you know, the opposing candidate has access, as well. So for example, I remember Hillary Clinton did a small package for a tent pole, and it seemed really very innocuous and people didn't even, they didn't even think it was worth of mention to the lawyers, and we found out very much at the last minute and we had to, you know, make sure that our folks in Washington were aware and got their opinions on how we should handle that, and so that's really the only time that I find like I am sort of implicated in the process, but otherwise.

ERIQ GARDNER: You don't think that the programing might change to reflect some kind of opposition or resistance or?

NADJA WEBB COGSVILLE: I haven't heard that, although I do think that the current president of MTV has sort of said like, listen, "we need to be sort of back in the game." Like MTV used to have a lot of coverage, town halls, and things like that around elections. You might remember like when Puffy was doing the Get Out the Vote, which wasn't, you know, it wasn't supporting any one particular candidate, it was just all about a voter initiative. So you kind of felt like we need to get back into that game and so I think that there will be more conversation, but it hasn't been tilted as, or it hasn't been portrayed to be as it's going to be opposition; it's really just more we need to have more discussion around this.

ERIQ GARDNER: And at Scripps, I imagine things aren't quite as controversial, but there's still got to be impact based on trade policies or whatever. You know…

CYNTHIA GIBSON: Right. Now things aren't as controversial, and in fact we don't accept political advertising, so our networks tend to be a little bit of a refuge sometimes from the world of politics. But as you look at policy, I mean I think Chairman Pai, we're very happy with his appointment, because he's a very smart policymaker, man of high integrity, and certainly very thoughtful around issues involving our industry. And we have found them to be very receptive to some of our concerns that we had over some of the policies that were being advanced previously. We were very active on the Hill around the issues relating to the open set-top box, because there were just a lot of complexities around copyright holders and really the ability of that box to protect our interests, to protect our contractual protections, and so I think that is one positive development that we think that particular proposal is likely not to go any further. But, as Michael said, for most business, for there to be less regulation and to let sort of the free market govern tends to be more favorable for business. So, that's sort of how we're looking at it on a day-to-day basis, without getting into sort of broader social issues.

BARRY SKIDELSKY: I like the rhetoric of two-for-one. You know, for every new regulation we put in, let's take two out. And obviously apart from easing regulatory burdens across the board, the tax world has got to be reshaped to encourage investment and innovation. And my hope is that this new administration, new Congress, somehow does that. But I am not a tax man, but the idea is that we need—somebody needs to focus on how do we encourage more innovation and investment. Or investment that drives innovation.

ERIQ GARDNER: On a slightly different topic, I know being in media that all of you must have, you know, strong opinions, healthy appreciation of the First Amendment. And to borrow an old Nickelodeon title,

you know, "You Can't Do That on Television." I want to go on to some of the issues that you deal with. Nadja, we'll start with you, because I know you have done some work dealing with bio-pics of celebrities. Can you talk about how, you know, when you are doing programming, what sorts of issues you confront and how you solve…not solve them, but you know, how you analyze them.

NADJA WEBB COGSVILLE: Well, let me just start with bio-pics, since you mentioned that. We do a fair amount of bio-pics or docudramas. So, for example, BET has one premiering tonight—everybody watch it, "New Edition":— and we have four in development. So that's just to give you a sense. We do a fair amount of these. And bio-pics are complicated because, you know, first off, oftentimes if there are living members of the particular group or what have you, we will enter into, you know, people sometimes refer to them as life story rights agreements. It's really a misnomer, because you don't in fact need to secure life story rights from these celebrities. There's no IP that they are actually granting to you, but what you are getting is really one of three things: You are really getting cooperation, you're getting a release or a covenant not to sue, and then usually there's like an estoppel provision that prevents them from conveying the same rights to a third party. So, the cooperation is really just trying to get access to information that might not be otherwise known, or materials or what have you. And so we oftentimes will craft our agreements so that we're making sure that we have these folks on board, if it's possible. So that's one way to kind of help insulate us. And also, you know, we work very, very carefully with our pre-broadcast review attorneys to make sure that throughout the whole process—from the time that we are first given the script or looking at the rough cuts or the final cuts—that you are trying to make sure that things are framed as opinions. As many of you guys know, opinions, you know, or pure expressions of opinions are not actionable, but if you are implying undisclosed false facts, that can be actionable. So you really have to thread the needle very carefully to make sure that things are framed properly. So, for example, you know, we had—some people in the audience may be familiar with this litigation, the TLC litigation, where unfortunately our motion for summary judgment was denied in September, but in that film, you know, we were very—we tried to be very careful to make sure that it was in fact being… that many of the statements being made were expressed as opinions. So, in fact, within the first few minutes of the film, it starts off with, you know, one of the members of the group says something along the lines of "you know, this is what I recall" or "this is what I remember." Or "here's what I remember." In fact, that's the actual phrase. So those are the types of things, that's one of the other things that we try to do. We also work with, you know, sometimes we try to focus a lot on like the disclaimer language that we include in these bio-pics. That's not going to insulate you from an action at all, but it's helpful if it's clear that incidents and characters and timelines and things like that are being fictionalized. And so we will, you know, once again, in that, in the TLC litigation situation, we had a disclaimer that said "This is the TLC Story." We weren't trying to hold it out in the disclaimer as being based on the true story, but one of the areas where we have found there is a bit of exposure is that, you know, we the lawyers are looking at the bio-pics themselves. And we can be very careful about the disclaimers within those bio-pics. One thing is that some of the things that don't come by us, however, are things like advertisements and some of the marketing materials. And this is where you may, you know, run into some trouble because people who are not as well-versed in these issues can make statements like "this is the true story" or "this is based on the life of" and you are like, "you just blew it." We have been so careful about crafting this language and you've got folks who suddenly have kind of made some problems.

MICHAEL FRICKLAS: Nadja made a good point about promotional materials. And they really do need to be vetted or at least have guidelines to what can be said in the marketing materials. Some of the analyses are real world analyses. For all the careful law, the fact that you are going to win, you know, at the end on appeal, may not be sufficient, depending on what your budget and your appetite for risk is and the like. Watch your insurance premiums go up or your insurance availability go away after you spend $5 million defending one of these claims. So it is hard. One of the things we have been advocating for with the Motion Picture Association and other companies is the extension of SLAPP legislation.[3] There's now SLAPP legislation in Georgia, I believe Florida has passed a bill, New York has been considering a bill.[4] So folks in New York should really, in this community, should really help advocate for the legislature to pass SLAPP legislation. California has been a very powerful tool, because these kinds of, you know, kind of fake rights of publicity cases, various other things of what you have done is fairly protected, it's been carefully lawyered, and nevertheless you find yourself, you know, facing a hostile jury. Or defending a claim. Courts have been pretty willing, particularly in California, where they have the most experience with SLAPP, with SLAPP legislation, to get rid of these cases really.

ERIQ GARDNER: Mike, I mentioned that, I mean dealing with shows like "The Daily Show" or "South Park," you have some pretty fun stories about hard considerations you've made about, whether or not you can air something.

MICHAEL FRICKLAS: I do remember a "South Park" episode. When they wanted to send a message, they often would co-opt the characters from "Family Guy" and I do remember one where we told them—which is very, very rare—that there was something that we didn't think they could do. They have a tendency to deliver their episodes a few hours before the airing time

to make sure the lawyers have the least amount of time to review. And at one point, we did draw a line, and a few weeks later the episode appeared, where the "Family Guy" went up to the head of programing at what was supposed to be the Fox Network, complain about censorship, and proceed to shoot the executive in the head. So, I thought that might have been a message to us about censorship. You know, we do operate in a community that really cares about what they can say and an awful lot of times the "no" has to be very carefully negotiated so that people can understand that you are with them and you support them and you believe in their rights to speak freely and about matters of public importance and yet, you know, there are litigation risks associated with it that are real world, notwithstanding the legal analysis.

ERIQ GARDNER: Cynthia, your networks have a lot of unscripted programming. So I imagine that you are dealing a lot with right of publicity, privacy, defamation. What, in your mind, is the legal area where there's most confusion? Where you think that there's clarity needed, you know, especially when you are dealing with these contracts for talent and so forth. What keeps you up at night?

CYNTHIA GIBSON: Well, I would say that we don't have some of the issues that Michael was talking about, but nonetheless, we also feature a lot of people on our air who are just normal people, who aren't really in the business, and so I think sometimes that can require kind of a different slant on things sometimes. Because even though you might have some really incredibly complicated legal document, I have found over time that sometimes simpler is better and clearer is better, particularly when you are dealing with individuals who may or may not be represented. And so one of the things we've really tried to do is think about that as we deal with, you know, whether it's an individual homeowner or a person appearing on the air, is making sure that we're not sort of overlawyering it, so the people can't later say, "well this was just so complicated I didn't understand it." Because you can, I think, sometimes big word a legal document to death rather than trying to just make sure everyone understands what rights they are giving up. Because although it doesn't happen that often, we have had people who have been unhappy with how the show turned out and how they were portrayed at the end of the day. And then, of course, they don't remember or they don't like what they signed when they agreed to be on the air. So we really try to make sure that we're clear with people what they are signing.

BARRY SKIDELSKY: Is any of the cooking stuff live?

CYNTHIA GIBSON: Sometimes. Sometimes we do live shows.

ERIQ GARDNER: From a First Amendment standpoint, one of my curiosities is that usually Republicans, although they deregulate a lot, indecency is one of the things that they usually ramp up on. What do you expect on the indecency front on television coming from the FCC?

BARRY SKIDELSKY: Well, it's actually sort of two things. Obscenity and indecency. Obscenity is prohibited all the time; indecency, you have a safe harbor, you know, in the evening hours until the morning. And I am frequently amazed, I am watching a movie and you know if it's on at 8:00, you know, they bleep out stuff, but it you watch at 11:00, you'll hear what they say. Indecency enforcement at the FCC has been a big money maker for the government. And traditionally the problems have been on the radio side, not the television. Television, you have like "NYPD Blue," you know naked, or, you know, fleeting expletives and we don't really have, like shock jocks, like when Howard Stern was coming up. Terrestrial radio—what we call terrestrial radio—we don't have that problem. And frankly, I don't see this is a real issue for even hip hop shows or anything. It's just possible that the government decides to continue to enforce this because it draws money into the treasury. That's all.

MICHAEL FRICKLAS: Yeah, I mean, we have the good fortune of being in cable, so when we owned CBS we had, you know, the Janet Jackson "Nipplegate" controversy, and there was a lot of litigation among the different broadcasters. It was much better for lawyers than it was for the government. The fines were nothing compared to the costs of prosecuting the various First Amendment-related defenses to what was really messy indecency enforcement. It is very hard for the government to regulate indecency well. They have a hard time drawing lines. And the vagueness of those disturb the courts. So those will ultimately, you know, be court issues. So, I don't see the FCC, you know the FCC looks kind of deregulatory, so it's hard for me to imagine them spending a lot of time, you know, trying to draw those lines around indecency. On the other hand, you know, we have a regulation called the Pence Amendment, which if you guys are not familiar with, if you do anything that might involve children or people who appear to be children in programming, you should become familiar with.[5] It wouldn't surprise me to see more enforcement activity there.

BARRY SKIDELSKY: Yeah, obviously this is all COPA and other stuff about children…you know, protecting the children.[6] That's how the "Seven Dirty Words" with Carlin rose up to become, you want to make a federal case out of it? Yeah. This guy was driving with his teenage kid in the car and hey, just turn it off. What's the problem?[7]

ERIQ GARDNER: By this point, people who read my column are probably shocked that I haven't mentioned intellectual property yet, but I did want to spend at least a small amount of time on that. Michael, you have been a leader on this front ever since your company sued YouTube many years ago. Are you happy with the state

of, you know, where IP law is? Do there need to be new laws? What do you think?

MICHAEL FRICKLAS: Look, there is still way too much piracy, and that piracy is frequently encouraged, participated in, you know, by real companies. And, you know, people can go hide in Vanuatu or whatever and put up a server. People are advertising, people are, you know, getting paid to serve, you know, pirated facilities and the like are actively participating in that piracy and piracy, you look at the numbers, remains a large percentage of viewing of premium television and movie content. So not enough is there. I think, you know, politics being what it is, I think the industry is having more success in the courts looking at intermediaries, the so-called follow-the-money approach, which was actually the word first used in the piracy context by Google, which was trying to fight the Stop Online Piracy Act by saying "follow the money." And that meant going after ad brokers and people who placed their advertisement on pirate sites and the like. In Europe, over 1,500 sites have been blocked. The courts are finding…and that's actually expanded to Asia, as well. The courts are finding existing authority under the law to require Internet Service Providers to block pirate sites. It's been very successful in the UK and a number of other countries. And its use is expanding. In the United States, there have been blocks put in a trademark context, not necessarily by our industry. And the courts are beginning to come around to, you know, the tough issues, and sorting out the good guys and the bad guys. How much facilitation of piracy is kind of neutral? And you really have a neutral facility that is good, is useful for a lot of neutral things as well as, you know, just happens that pirates are using it. Like the telephone network. And then lots of bad sites where, you know, you go to the home page and they use search to help you find them, and it's clear that all they are about is piracy, and how do you get at those guys? So it's a combination. There's criminal enforcement around the world. A lot of education of local prosecutors about the need to deal with the issue. And it will continue to be a cat and mouse game; it will never go to zero. There will always be, you know, there's always a way around. You know for every site blocked, there is a tunnel. But you know, more will be done. The situation will continue to evolve. But I do think, you know, 15 years ago, 10 years ago, even five years ago, the courts were very concerned. They didn't understand the area very much and wanted to be very careful about adopting new rules or expanding rules of legal liability in an area that they were concerned would limit the growth of the internet. I remember being at the Supreme Court on the day of the *Grokster* argument and coming out to, you know, protestors with placards outside insisting that if the *Grokster* case came out the wrong way, it was going to be the end of the internet. The internet's doing just fine and the *Grokster* decision, you know, came out against everybody.[8]

ERIQ GARDNER: Then again, the Sony Betamax, the television industry warned that that would be doom.[9]

MICHAEL FRICKLAS: I hear that all the time. And I'll tell you why I think it's actually completely wrong. What Sony Betamax was about was not the playback of recorded videotape, which is what the business turned out to be about, right?[10] So, five years after Sony Betamax, lots of people had VCRs in their houses, most of them played 12.[11] Very few people were recording broadcast television, which is what people were concerned about. What happened was the big buildup of the sale and rental of pre-recorded videotapes, which is not what the Sony Betamax case was about.[12] The case was about the combination of a timer and a recorder with a VCR that allowed you to record over-the-air broadcasting, and a concern that that was going to be a problem. Turned out not to be a problem, just because the technology was just not powerful enough that people were really interested in doing that. So the people who say, "Oh, you know VHS cassettes were really great for the industry." Yes, but that had nothing to do with the Sony Betamax case was actually about. That's a canard.

CYNTHIA GIBSON: Well, I have a thought on that also, that's something that we're following closely and I think is going to be a very interesting development around copyright and trademark as the world goes more global, which is the internet delivery of content. So particularly if you look at all the new top-level domain spaces, which are global internet sites, that if you have a trademark in one country, you can file a top-level domain based on that trademark. It think it's going to become a lot trickier to understand how do you really protect your mark. Do you do it country by country, as the schematic that it is now. But you could have someone in some very small jurisdiction, you know, sit on your trademark and file in that country and then really try to make some inroads into the intellectual property value that you have built up. And we certainly, and I am sure Michael has spent a lot of time making sure you are protecting your marks globally, but that is a big undertaking. And the fact that the internet can be a global delivery platform in a way that's very different than traditional delivery of video, I think is going to make it increasingly complicated for how you protect against that. I mean, in Europe, "House of Cards" is available the next day on these fake set-top boxes. And so I think it's just, we're starting to think about how do we really make sure we have a global strategy to protect all of our content and how do you think about that in a different way, because the delivery system is very different than the traditional pay television model.

ERIQ GARDNER: You know, we talk a lot about intellectual property from a, you know, enforcement standpoint, but I also want to talk about it from a use standpoint. I also know that there are some attorneys here who do a lot of music law and, you know, there seem to be big, broad changes coming and big court cases in the music realm. Everything from the Department of Justice's, you know, consideration of whether to adjust the Consent

Decrees of Performing Rights Organizations, to all the issues surrounding pre-'72 songs, sound recordings. Does anyone on the panel have any strong feelings about the issues related to use of music?

BARRY SKIDELSKY: Music licensing is a vulcanized regulatory scheme. There's got to be some better way to go. I don't know what the answer is, but, you know, depending upon the use, the user, the same piece of music gets a different regulatory structure and rate-setting mechanism, and here in New York we have the Southern District enforcing these Consent Decrees with ASCAP and BMI, but you have two different judges. You know, one can say this, the other can say that, and…

ERIQ GARDNER: MTV, VH1, I mean, surely they have some issues with music licensing.

MICHAEL FRICKLAS: I mean, starting with the performing rights, you know, look: The history of it was some very clever people figured, you know, they could license a right, and they could figure out a way to license it again, and so they sliced the rights ever finer so they could continue, you know, to increase the amount of revenue they took out of the system. The problem with that, the ASCAP and BMI Consent Decrees, as you mentioned in the development of non-regulated Performing Rights Organizations, which is a separate and important issue, is that the embedded business of licensing performing rights is so much a part of the fabric of hundreds of thousands or millions of contracts that, you know, tearing it up and starting over or figuring out a way to glide from here to there is extremely difficult. You know, I can hypothesize a world where everybody licenses their performing right when they license the synch right, and it should be through the end user. That's the system that's used in theatrical motion pictures. It works pretty well. If a piece of music is too expensive, you go license some other piece of music. Or if you really need it, you license that. You know, in the performing rights system, of course we don't get to decide what kind of music is in the content we license from a movie studio or a broadcaster. And we have to clear it, and so the only way you can clear something when you have absolutely no choice, what you have to use is through a system like the ASCAP/BMI Consent Decrees. So the Justice Department hates that issue. They would much prefer to get out of the consent decree business. Those Consent Decrees have been in place, I guess, more than 60 years. And that's a very long time for a Consent Decree. But unfortunately they have built something that has, you know, that the roots of that tree are everywhere and they haven't really… every time they pick it up, which seems to be every 10 years or so, they can't figure out any way to extricate it without having all the buildings fall down. So, you know, I don't see any path to improving that system, even as crazy as the system, you know, looks when you look at it fresh.

BARRY SKIDELSKY: SESAC, obviously, is not subject to a Consent Decree, but there was antitrust litigation trying to bring it under one, like ASCAP and BMI, but that wound up settling to an arbitration model, and no sooner the ink is dry than boom, we're in arbitration. And the other company that you made come to mind is Irving Azoff's Global Music Rights, GMR, and there is currently litigation cooking around that in California and Pennsylvania or somewhere. There's an interim license agreement. It's just a giant mess.

MICHAEL FRICKLAS: It's kind of a nice business model, right. Because you pay a fee to ASCAP and you pay a fee to BMI and you assume you licensed everything. That's how the world worked for a very long time. And then someone comes along and said you licensed everything but this, so pay me, too. And so SESAC builds up and SESAC, they try to make those increases small enough that you say, "Eh, I can't really afford antitrust litigation, I'll just pay their increase." And then somebody else comes along, and then somebody else will come along. And there's been threats of withdrawals by the music publishers, and…all this time you don't know what you are licensing, there's no list of what the musical compositions are that are in that performance license. There's no change in your fee when the license compositions disappear from the portfolio. It's just, you know, it's a bizarre system, but it works…kind of.

BARRY SKIDELSKY: No transparency, either.

MICHAEL FRICKLAS: No transparency.

ERIQ GARDNER: Before I open it up for questions from the audience, I wanted again to get to some quick, short answers. Besides what I write, you know, what are your must-read legal sources? How do you stay on top of developments? You want to start?

NADJA WEBB COGSVILLE: Well, you know, I would say that I have lots of little trade magazines that have lots of summaries and things like that, and if something looks particularly interesting I'll sort of do a deeper dive. But I don't know if I have any one, aside from you, Eriq, of course.

MICHAEL FRICKLAS: *The Hollywood Reporter Esq*. comes first.

BARRY SKIDELSKY: I rely on *Soldier of Fortune* and *Cosmopolitan*. I have this funnel theory about information. There's so much out there, we take in whatever catches our eye and we try and distill it and put it into useful form to help our clients and companies.

MICHAEL FRICKLAS: Yeah, I mean there are a number of law firm memos that you can just go to their websites and sign up for. I find the ones that we pay for in addition to industry trades—which you have to read, you have to understand what's going on in the industry, so that means *The Hollywood Reporter*, and *Variety*—but Law 360, I find, is very good at synthesizing a lot of information and they are kind of a one-pager you can look at in

the morning and click through to things that you want to understand better. And they have this habit of, or part of their practice is the case is right there, so you read the article and if you see something that you really find interesting, you know who the lawyers are and you can read the underlying source material; you don't have to rely on the description.

CYNTHIA GIBSON: I think that's right. That's how I start my day, every day, is you get all the daily emails that are sort of summarizing everything that's happening all over the world, whether they are, you know, trade publications from various jurisdictions—you know, the ACC has a good daily update and briefings, if you are a member of that. But I do think that things are changing so much, I tend to rely a lot on those email blasts to sort of just give you the highlights at the top and then you can drill down if you need to.

ERIQ GARDNER: OK. Good. Next question, what is the most important quality you look for when filling a staff attorney position?

CYNTHIA GIBSON: I would say for me, what I say is if someone has high integrity and a great work ethic and is smart, I really can find something for them to do in our group. And to what Michael was saying earlier, a lot of times that may mean moving things around, but if you have someone with those three attributes, I think you can find a place for them.

ERIQ GARDNER: Michael.

MICHAEL FRICKLAS: Yeah, I…you hit on the right one. Somebody who really likes to…enjoys working hard, enjoys the industry, is inquisitive, wants to know more than they need to know about topics. Otherwise, integrity, all very important functions. An ability to fit in with the group. You know, in a large law department, the… I love superstars, but superstars have to get along with the group and the group dynamic is more important than the superstardom. And that may be a little counterintuitive, but you know, I have got to get 250 people working together, and one person can really throw that dynamic off. So that's very important. Diversity is very important. It's a high priority for us to make sure that we have good representation from lots of different groups. We need to be in the media business in particular, and it's not just the law department issue, it's important that we reflect the audiences that we serve.

Yeah…

NADJA WEBB COGSVILLE: I do. I mean, I certainly.

ERIQ GARDNER: What do you look for?

NADJA WEBB COGSVILLE: All of those attributes that have been mentioned, but certainly I would also say I'd like, you know, aside from just technical skills, I do want someone who is really pragmatic and can be the, you know, we talked about problem solving. There is, you know, if someone can demonstrate to me that they, you know, can bring that skill to bear, that's something that's really important.

ERIQ GARDNER: What's your best advice to someone who aspires to become a General Counsel at a television company?

BARRY SKIDELSKY: Turn back.

MICHAEL FRICKLAS: There is some truth in that. You know, the first advice I would give somebody would be really sure that's what you want. It is, these jobs are hard. They involve taking a lot of risk every day. They are long days, a lot of you work long days. But they are long, intense days where even one slip-up can mean your job or a major problem for the company. So, you have to like that. If you do like that, the advice I would say is to get frequently really good experience in more general practice than entertainment, and then find a good job where you can learn everything you can learn. So surround yourself with really smart people who work for really smart people and, you know, find good role models and figure out how they do what they do.

CYNTHIA GIBSON: And I would say, having gone through a national search to get the job, even though I was at the company, the things I heard that were positives were that I worked really hard to learn the business and really learn, kind of how the business works, but also that I had made an effort to really understand how all the different pieces of the company worked and made relationships all across the company. And it was really more I was new to the industry, I really needed to learn, so I looked at a list of all the STPs,[13] because I knew they had different areas of responsibility all over the company, and I had lunch with every one of them. I kind of made a list and said tell me about everything that happens in your area, because I am just trying to learn. So, I think understanding the business and understanding the importance of relationships within the business. Because at the end of the day, most businesses are filled with people, and the people dynamics can be a very important part of getting the job done and getting the job done well. And that's in addition to just sort of being a good lawyer and working hard and all of that sort of thing.

BARRY SKIDELSKY: I had an experience once when I was General Counsel. We hired a guy who was very smart, just wasn't a team player. He couldn't play nice with the other children, so we had to ditch him.

MICHAEL FRICKLAS: We've seen "The Drill."

ERIQ GARDNER: And finally, the one question that probably a lot of people are thinking and no one would dare ask except for me: What advice would you give those law firms and solo practitioners seeking to become outside counsel to a television network?

CYNTHIA GIBSON: Sure, I'll start this one. I mean, for me, it's really: Do you deliver business-based practical advice in the context of the law? I don't need a beautiful 20-page memo. What I really need is business-based legal advice. Pretend like you are sitting in my chair, don't just give me CLE legal advice, either. I find that very irritating. And charge me fairly. I mean, we don't do a lot of—because we don't do a lot of litigation, we don't have a lot of big dockets. We don't do a lot of flyspecking of legal bills, but I have been at this long enough that if you send me a bill that is not fair, I just walk with my feet. So, business-based advice and charge me fairly. That's really the two keys for me.

NADJA WEBB COGSVILLE: Well, and you are actually probably best suited to answer this question, but I do think that Viacom went through a bit of a process of identifying the firms that we work with most regularly, and decided to specifically, you know, kind of tell them that we're going to increase the volume of work, but in exchange for that, we expected some sort of, you know, volume pricing. And I think that that has actually worked very well for us.

MICHAEL FRICKLAS: Yeah, I mean, the idea of big relationships for us is several-fold. For a firm, we could be a more steady diet of business, which lets the firm staff appropriately, it lets them keep their costs down. And understand what's going on. It means that firms understand us, so, you know, I expect you to know not just the law about my business, but my business, the people in my business, who to talk to, develop relationships, just like in-house counsel. It's really important that people know how to work together. Sometimes outside counsel will love to call me up and tell me all kinds of things and not answer the phone for people who work for me. That tends to be a bad strategy. You know, when I am picking counsel, they are people who work throughout the organization are happy to work with, and not just me. We get all that feedback and, you know, it's my upside to make sure that my group is happy. We're smart lawyers, so we don't want to be talked down to. We want to be talked with as partners in solving a legal issue. All the legal advice, all the retentions come through the law department, so we instituted that control 20 years ago. We, you know, the way to come in is to be providing good, sound legal advice, not, you know, to know somebody on the business side or the like. I agree with you, you know, actionable legal advice is what we're looking for. Sometimes you do need the 50-page memo. It's really rare. So there just has to be a real clear understanding of what the expectations are up front. And that fault's not always with outside counsel. It's with us, too. There are plenty of times, you know, somebody's gone off and done a tremendous amount of work and it's real work and they come in, you know, on Monday after working all weekend and discover that's not what the in-house lawyer wanted. That could be because we didn't communicate well, either. But it's really incumbent on everybody to make sure the understandings are clear. So, you know, make sure that the scope of what the legal assignment is, is really well understood on all sides, so that there aren't misunderstandings. If you do that, you know, another one of the reasons I have big relationships is because I have relationships with the senior people at the firms. And that's for a lot of reasons. I want to be able to make a phone call every so often and ask your opinion, ask about how we're doing. I want to have a back channel if you really think that somebody who isn't me is going off the rails and we can figure out a way to solve the problem together. You know, it's often not the right answer to just burn somebody, you know, in the group. But it does let us collaborate in a way that can solve a problem before it becomes a problem. So I like to have those relationships, and it's efficient for me to have a smaller number of those relationships than a larger number, and it's better because they are, you know, they are frequent, you know, high-volume relationships than small one-offs. So if you want to get in, you know, be, you know…get to know the people in the organization somehow. Things like this—find something that you can uniquely bring to a particular situation. A pitch that I am a really good commercial litigator really rarely works. Guess what? We have lots of really good commercial litigators, and they all want to be competitive and frankly, you know, I am going to hang out with the ones that I have been through five trials with, not the person that comes in and says… you know, has a good resume, but I have never been to war with. So, you know, but to say I litigated this case or I know everything there is about one particular thing and I notice that your company has that problem, too… that can often be a good way into the door, and once you are in the door, those relationships can expand if you do a good job.

BARRY SKIDELSKY: I am curious about a lot of things, but I'd like to know if you guys have experience with fee arrangements with your outside lawyers other than hourly rate or discount for volume.

MICHAEL FRICKLAS: I would say every deal we do with outside counsel now has some attribute of an alternative-fee arrangement. So we have done everything from outsourcing the law department of a business unit on a fixed-fee basis to, you know, various kinds of bonuses and discounts, depending on how people come in around budgets. We budget every matter of any scale. So, we expect law firms to take the risk with us in the event that things exceed budgets. And that doesn't mean that we're expecting the law firm to take every risk, you know. If the motion to dismiss is not successful, all of a sudden that's the risk of the law firm, because they didn't budget that way. But it does mean that, you know, within a particular range of the activities, we expect the law firm to take some risk with us. I have been involved with, you have been involved with, lots of people who run up really very real legal bills at discounted rates over, you know, bullshit fights over discovery and various other sorts of things that really don't matter and they always blame the other

side. And you know, we've seen lots of that and we know what's going on, and you know we're not happy about it, and that results in a fight over a bill or, you know, parting ways over a relationship. So, you know, really good communication, but really good discussion about alterative fee arrangements upfront is… it's about sharing exposures in a fair way; it's not about… You know, we spent some time studying the Pfizer system. You'll remember a few years ago, Pfizer said: "We're only doing fixed fee for our outside counsel. We'll pay a certain amount of money, I don't care how big the lawsuit is, it's your responsibility to handle it." You know, first I don't think that works for a lot of companies that aren't Pfizer, and spending $300 million a year on legal bills, because, you know a law firm can't go from doing nothing to spending $10 million on a case and back in a year and assuming all that exposure. It's just not economical for a firm. So we look at it as a partnership, and if you guys can help us understand your business and you can understand ours, we can negotiate to a place that helps take some of your risk away, their risk away, and take, you know, be responsive to our needs, as well to predict what our expenses are going to be, and hit budgets, and deliver no surprises to our financial management.

CYNTHIA GIBSON: And what we try to do is be very clear with helping our outside counsel understand what our pressures are internally, so that I can have the conversation with them. You really need to treat this like it was your business and put yourself in my shoes, and whether that's sharing with me something that I need to know about a matter that's going on, all the way down to how you are billing the matter and how you are making decisions every day. On work that is fairly predictable and the same year over year, we almost always do flat-fee arrangements. But there have been times when it spiked, and it was no fault of the law firm, and then we will talk about it. Because I understand they need to get paid and we want to be fair with them, just like I want them to be fair with me. But I also need to be able to predict my expenses and come in on budget and not have to be answering to the CFO about why I have come in over from quarter to quarter. So, I think that communication with outside counsel is very important, and why the stability and predictability of fees is so important, particularly when you are working with a corporate client, because—and a public company, you know expenses, we get a little bit of a report card every quarter, so it's something that we need to be very mindful of and you really should put yourself in the shoes of your client. And if you understand that, and you understand sort of where they are coming from, I think you'll have a better chance of success for a long-term relationship. Particularly with a public company client.

ERIQ GARDNER: Great. Any questions out there? Anyone?

Q: You spoke earlier about the change in the U.S. administration. I am curious how you folks prepare for the uncertainty of Brexit.

ERIQ GARDNER: Yeah, I mean, go ahead.

CYNTHIA GIBSON: We have a whole sort of works team around Brexit, because the issue for media companies is what is the country of origin for your signal, and we operate all of our European business and our Ofcom license, which is, you know, regulated out of Britain, and if that changes, we're going to have to think about how does that impact all of our signals to the rest of Europe? Do you need a license in all of those different countries? So we do a lot of scenario playing and thinking through what that might look like. But, as you have seen around the world, elections these days are very difficult to predict. And so the polls don't always seem to get them right. So we've tended to focus more on: Is there something that could be of material harm to the business in any upcoming legislative or election issue? And focusing on those. If it's not as material, you sort of wait until the election happens. But that is another issue of doing business internationally, is things can happen to you, regime change can happen that can change your business overnight. Whether it's foreign ownership restrictions, or how they might affect your business certainly makes for lots of interesting conversations.

MICHAEL FRICKLAS: Yeah, I mean sometimes you get a lot of time, right, so, we spent a decent amount of time thinking about Brexit beforehand, looking at country of origin issues and the like, the trade issues. I think the thing we probably planned the least for is the amount of impact on the UK autonomy related to the perception that Brexit is coming, even though it is more than two years away. It's had an immediate impact on ad sales and the like, and on the exchange rate with the UK pound. So those aren't legal issues. But you do a first survey analysis, as soon as you have some information, you start to figure out what you know and what the risks might look like and then… and how much information you have, and then you try to, you know, work it as it gets closer. A good example of that is territorial copyright issues in Europe. We have been studying them for many years. You know, it looks like portability is likely to happen any day. At least the regulation will be adopted any day with effect a year out. That makes a big change on an industry that licenses on a territory-by-territory basis: All of a sudden you might be licensing on a Europe-wide basis. And, by the way, Brexit is a good thing for us in this particular regard, in the sense that our industry is very much set up on a territorial basis, and Europe is trying to chop that down. So, you know there's no one size fits all answer. You have to be alert. You have to have people around you who are alert to things in their markets and raise them up, and you have to have the conversation as early as you can about what the potential implications are and what planning you can do.

ERIQ GARDNER: I think I saw a question back there.

Q: Yeah. I was just wondering (inaudible).

MICHAEL FRICKLAS: Yeah, for us, I have, you know, I have a privacy group. So, I have to admit, I am at a little bit of a better place than a lot of people in terms of dealing with that issue. We operated under the Safe Harbor beforehand. I had a person who is very closely involved in tracking that and then implementing the new—we went through the entire process of setting up the model contracts, and then, we are now under the privacy shield regulation. I have that expertise, so that we rely on that person. When everybody is educated, when there is an issue to know to deal with the person who has expertise. So from our perspective, it did not actually require a lot of additional resources as compared to how we were already set up to deal with the privacy issues with the EU. I don't know how you were set up.

CYNTHIA GIBSON: Well, it's evolving in that our international business has been expanding fairly rapidly, so I wouldn't say that we're at as a mature point as Michael is. And what we will do and what we tend to do when you get these big projects is we will outsource and we are in the process of looking for some external resources to really help us sort out where we stand, sort of. We did a very large acquisition a year and a half ago of a European company, so where do they stand in getting our hands around how are they handling data now and then how will that intersect with our U.S. business—that's a big project on our list.

Q: (inaudible question).

MICHAEL FRICKLAS: A lot of Europeans in the audience. I would say at an intellectual level, yes, but I would say, you know, no one has built business models around what happens, so I think there's just so many variables to understand what the impact would be on our business.

Yeah, we mostly think, for example, in the EU, in the UK, that mostly EU law will be adopted by the UK. And that may change over time, but in that two-year period, the UK has imported so much European law that people are not going to start on a white sheet of paper and try to create new rules in all of those areas. If that's wrong, there'll be a rule-making process and we'll have some time to adapt to it. But all we can do now on issues like, you know, a French exit or otherwise, would be speculation.

CYNTHIA GIBSON: Now, I think the one thing we have done is develop relationships with some trade organizations and with policymakers, with the EU, and I am going to be in Brussels in a couple of weeks really just trying to understand and make sure that as much as you can, have a sense of what's happening ahead of time so that you can do some planning and predicting. That's really what our strategy has been.

BARRY SKIDELSKY: You had better be proactive than reactive, and that includes policymaking, so stuff around rule making or whatever, and want to try and help shape a policy, help advance your company's interest, your client's interest.

ERIQ GARDNER: Any other questions? No. Going once, going twice. OK. I suppose now would be a good time to break, and after the break there will be a panel on how to deal with people like me. Thank you.

Endnotes

1. Hanson, Kesey L., NYSBA *Entertainment, Arts and Sports Law Journal*, Spring 2017, Vol. 28, No.1, p. 58.
2. Banoun, Annick, NYSBA *Entertainment, Arts and Sports Law Journal*, Spring 2017, Vol. 28, No.1, p. 39.
3. Strategic lawsuits against public participation ('SLAPP').
4. See Ga. Code Ann. § 9-11-11.1, *et seq.*; 2015 Fla. Sess. Law Serv. Ch. 2015-70 (C.S.S.B. 1312) *et seq*.
5. *See* H. Amdt. 542 to H.R. 3132.
6. *See* 47 U.S.C. § 231, *et seq.* (Child Online Protection Act).
7. *See Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978).
8. *See MGM Studios, Inc. v. Grokster, Ltd.*, 544 U.S. 903 (2005).
9. *See Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).
10. *See id.*
11. *See id.*
12. *See id.*
13. Sustainability and transformation plans ('STPs').

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Brian Caplan, Esq.
Reitler Kailas & Rosenblatt LLC
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Panelists:
Susan Arons, Rubenstein Communications, New York City
Benjamin Brafman, Esq., Brafman & Associates, PC, New York City
Paul Rosenberg, Goliath Artists, New York City
Theodor K. Sedlmayr, II, Esq., Sedlmayr & Associates, PC, New York City

Panel 2: Music Business and Law Panel: Crisis Management for Celebrities

RICH GARZA: Hi, my name is Rich Garza. I am one of the Vice-Chairs this year and it is my pleasure to introduce the Moderator of this panel, someone who I work with on occasion, his name is Brian D. Caplan. He has been in the industry over—he's been, oh my goodness—

which I don't understand how you've been working for 30 years, because you only look like you're in your 40s, but, his 30 years' experience has a broad range, covering entertainment, intellectual property, and commercial matters. He's a partner at the New York City law firm of Reitler, Kailas, & Rosenblatt. His clients have included recording artists, producers, publishing companies, record labels, personal managers, business management, accounting firms, professional athletes, and dealers in fine art. In addition to contractual disputes, defamation cases and the prosecution and defense of copyright and trademark infringement, his clients have also included a broad range of disputes relating to partnerships and closely held corporations, as well as employment matters. He is an annual Lecturer before the North American Entertainment & Sports Law Symposium, and has lectured as an authority on United States copyright law before the International Association of Entertainment Lawyers annual Midem Conference in Cannes, as well as a constant speaker at the Copyright Society of the USA and the American Bar Association. His clients include the Estate of George Gershwin, Cirque Du Soleil, the Lumineers, the Allman Brothers Band, Blondie, and Victor Willis. Victor Willis is the lead singer of the famous band the Village People, and Mr. Caplan represented Mr. Willis in the precedent-setting copyright termination case involving the compositions "YMCA" and 22 other songs in which Mr. Willis terminated various copyright grants from the late 1970s.[1]

BRIAN CAPLAN: Good afternoon everybody. I'm going to be your master of ceremonies and moderator here for the next two hours. Our panel is on "Crisis Management for Celebrities", and we have an excellent panel giving different views from different perspectives—criminal defense perspective, a transactional attorney perspective, a manager/lawyer perspective, and a publicist perspective, as well as my own perspective as a litigator. First what we're going to do is we're going to have everybody spend a minute or two introducing themselves, starting to my left with Mr. Brafman.

BENJAMIN BRAFMAN: My name is Ben Brafman. I'm a criminal defense lawyer. I represented a lot of high profile people in the entertainment world, professional athletes, political figures, sort of heavy duty people from time to time, though I've had to deal with the media, judges, public relations people, management people, all of the above. So for crisis management, when someone gets indicted or arrested, it's no longer business as usual, and sometimes I have to butt heads with everybody else at this table in one form or another, but sort of that's what makes this discussion interesting. Nice to meet all of you.

BRIAN CAPLAN: Theo Sedlmayr is next.

THEODOR SEDLMAYR: Hi, my name is Theo Sedlmayer. I'm an entertainment transactional lawyer here in New York City. My practice primary revolves around representing rap music recording artists, so we certainly encounter a lot of crises throughout their careers, and a lot of what we deal with when crises happen with celebrities is kind of the nexus of their business transactions and their criminal career. I've worked with Ben and certain other artists and other defense attorneys around the country to coordinate. Usually the first call comes from either the manager or the artist to their primary transactional attorney and as kind of akin to a general practitioner doctor, I have to find specialists in certain jurisdictions, and that's when we start to interface with criminal defense attorneys, and publicists, and managers, and put together response to the crises.

BRIAN CAPLAN: Next we have Paul Rosenberg.

PAUL ROSENBERG: Hi, my name is Paul Rosenberg. I am an attorney. I am a licensed attorney, but I don't practice *per se* in a technical sense, day to day. In a practical sense, I practice every day, in a practical sense. But I'm primarily an artist manager, and I also have a record label. We represent artists also primarily in hip hop, I've never met Theo before—just kidding—we represent Eminem, among other people, and we also have a record label together. Been with him almost 20 years now since the early, early days. So as you can imagine, there have been many times where there has been crises to manage, for lack of a better term, so I'm here to talk about it from an artist manager perspective and, I guess, maybe illustrate how my legal background has helped me through those times.

SUSIE ARRONS: My name is Susie Arons, I am Managing Director at Rubenstein Communications, and I oversee the entertainment and lifestyle practice, a lot of transactional and corporate entertainment. I am not a

lawyer, but I work with a number of them. I have clients that range from studios like Paramount, we work with MGM from their bankruptcy through their most recent issues in the press, work with the Warner Music Group on copyright for the Page/Plant copyright case that was recently settled,[2] but then we also work on films and individuals, so I worked on the "Hunger Games" franchise, I worked on "Precious"; we do a lot of documentaries, often-times with a legal undertone—the documentary on Newtown and gun control, most recently worked on "West of Memphis," which was a very well-known Memphis Three documentary. So, I cross a lot of areas and their different crises that we get pulled into, and I work with Oliver Stone. He sometimes was a—he's a brilliant director and there could've been a crisis a day. So I get pulled into crises, depending on what the need is, and then I work as a team with the attorneys because we need to figure out who's speaking and what our goals are.

BRIAN CAPLAN: We're going to spend a minute or two having each one of us give our own opinion as to what is a crisis. Obviously, in a criminal defense scenario, we're talking about loss of liberty. It's easy to describe that as a crisis. In other scenarios it could be a case-by-case basis. If Kid Rock gets into a barroom brawl, that might not be a crisis for him, but when there's a $5 million lawsuit resulting from it, or whatever the numbers were, that could be a crisis. How do you describe a crisis, Ben?

BENJAMIN BRAFMAN: In my world, a crisis generally revolves around someone who has either been arrested, or they are under investigation and about to be arrested, and sometimes the best work we do is not what you read about, it's to keep people from being arrested in cases where the conduct is marginal. And when someone is arrested it's uniquely different process, not a run of the mill arrest, because when you represent someone who nobody knows, the issue is the case, and how well you represent them and try to resolve it favorably. When you represent a high profile celebrity, you're in a high profile case, you're dealing with a media that is rabid, you're dealing with sponsors and promotors and managers and entourages for whom the main payday for these people is the person I'm currently representing, and they have a lot of stake at well. So dealing with a lot of high-strung personalities and being arrested is different from anything else. You can renegotiate a contract, you can renegotiate a promotional deal, you can renegotiate a record deal. You get arrested and you're facing, 10, 15, 20 years in prison, if you lose the case you lose everything. So when I come into a case, if it's not someone I've ever represented before, I'm dealing with a lot of people who are in panic mode, in crisis mode, and some of them are part of a group that's worked together for five, 10, 15 years—suddenly this short Jewish guy shows up, and I need to take charge. It's a difficult balance. Sometimes it's not as easy as it may appear, and as you get older and more experienced, you get to pull rank easier, because most celebrities are recognized after some effort, but what I'm trying to do is for that moment more important than anything else in their life.

BRIAN CAPLAN: Theo, in your experience over the years, what has been a crisis?

THEODOR SEDLMAYR: A crisis is when your client pops up on TMZ in a bad light. And that's really I would say in the last five, six, eight years, where they're all initially reported, don't ask me how these guys always get the scoop, but it could be after a concert at 2:00 in the morning, and the client's bus is pulled over, and they toss the bus and whatever they find, TMZ is there. Guys on the way. They're getting tipped off by the police station while they're on the way there, or roadies that are on tour, and the minute you wake up in the morning or that night your phone is going off, "we're on TMZ," what do we do? The first thing is your client hurt? No? Yes? Is your client arrested? No, yes. Is your client's endorsement deals, recording deal, his business dealings, are they jeopardized? And even if they're not, how do you reassure those partners that they're not? That's a crisis in my business.

BRIAN CAPLAN: Paul, from your perspective?

PAUL ROSENBERG: A crisis for me is when you have to leave the Hamptons on your weekend vacation. That's happened. Theo was there. Really, I wrote something down when you asked what's the definition. For me, it's any unplanned impactful event or current that requires careful handling and monitoring in every aspect. You have to take care of the client first in their health and well-being, and then I think beyond that you start worrying about things like the media, their business dealings, and whatever other sort of secondary and tertiary things might be involved. But something you gotta brace for and think about and collaborate and respond and move carefully from the occurrence.

SUSIE ARONS: In my world, a crisis is anything that interrupts getting to the end goal, whether it's a movie opening or if it's a fundraiser, if it's an individual who has either done something or been misinterpreted and creates chaos or disruption in their pursuit of what their business goal is. And we get as a publicist, we get pulled in early. It doesn't necessarily mean it's to talk. It's to try to discern what was said, what happened, what is the truth, and the truth is important because it's going to lay the pattern for what happens, and it's not necessarily always going to be something that informs the legal strategy, will be a different type of strategy. But we kind of look at things, you do the right thing and then you worry about saying the right thing, so, but if it interrupts just the path of business, the

course of normal business, it's a crisis. A crisis could be a bankruptcy, a crisis could be somebody overdosing on a film set.

BENJAMIN BRAFMAN: Can I just make a note? It's interesting but we commented from different perspectives. In my world it's not what you say, it's what you don't say. Because very often in the beginning of a criminal defense crisis, what you say you are then stuck with as the facts unfold. And I've seen people go down the tube in cases where people who mean well say things on their behalf that aren't completely accurate, and then you have to walk them back, or you're faced with them. And very often I circle the wagons early, and what we say is nothing because it's not like, you know, a TV sitcom or pilot or "Law and Order" segment, where it's a script. I'm on a live stage and the script is being written, and the police are running around investigating. You talk to your client, you sometimes find out what happened, you sometimes don't. But a lot of people running around saying the sky is falling, we need to address this. And I'm sometimes pulling a lot of people back from talking until I figure out what can you say that's not disingenuous so you don't lose your credibility, and what can you say that doesn't end the ability to walk this person away from this crazy fast-moving crisis. So, it's, find out what happened. If it's an event and you want to save the fundraiser, I get it. You need to say something so that the guests don't go home. That's a different type of crisis management. My world is just, sometimes it's permanent, the crisis. I said to somebody, when you lose, you lose. When I lose, I get letters for 20 years.

BRIAN CAPLAN: From my perspective as a civil litigator who has been doing this for 32 years, loss of liberty would be the first and most major crisis. But then there are subsections of other crises that you have to jump into action and take control. Anything that can affect your family would be, in my mind, a potential crisis. Anything that affects your livelihood is a potential crisis. Anything that affects your general standing in public opinion can be a crisis. From paternity cases to palimony cases to divorce cases to copyright infringement cases, to bankruptcy, to band breakups, any of those can be a crisis, and the most important thing is grabbing control on Day One and creating a level of confidence with your client and hopefully your team, but the client is the most important.

What we're going to start off with is the dynamic of a criminal case and the intricacies, and I'm going to give the panel to Ben, and what we're going to talk about is what Ben has to do from the beginning of the case on, how he deals with the manager, how he deals with the transactional attorney, how he deals with the publicist, then we'll talk shortly about attorney/client privilege when it comes to the publicist as well. Then we'll turn it over to each of the other participants to say how they deal with the criminal defense lawyer to get the different perspectives. Ben.

BENJAMIN BRAFMAN: I deal with, I think, a unique set of problems, when I get called into what is a high profile case, and let's assume it involves a high powered celebrity. And the difference between me and everybody else who's on this panel is they have a history and a relationship with this person. They've been their manager, they've been their legal advisor, they've been their publicist, they've been their civil attorney for a long time. I have no prior relationship in most cases, and yet I come into the mix at the very early stages, I need to try and get control. Because it's sometimes very frightening and dizzying, and you know, there are a lot of people who are smart and very capable and who are talented at what they do, but they've never been in a criminal case before.

BRIAN CAPLAN: Do you use your pedigree of prior representations of high profile people when you meet somebody new?

BENJAMIN BRAFMAN: Well, that's generally why I get called, but it started out with no pedigree. So in the first high profile case you can't say, "By the way I've represented the following 30 people who you know." So when I came into the Puff Daddy case 20 years ago, and he was dating Jennifer Lopez, I mean, it's amazing how time passes and most of the people in this room probably don't even know this, but at the time it was the case of the decade. Jennifer Lopez and Puff Daddy had the number one video, the number one single, they both started fashion companies that weekend and then they were at Club New York, and people were shot. And there was a chase up Eighth Avenue, and guns were found in the car, and guns were found flying out the window, and I came into the case, I think, late in that case because there was a couple of days before I came in, and by then substantial damage had already been done, in my opinion, by a lawyer who wasn't, I think, geared for that kind of work, and he made some mistakes that I had to live with. But when I came into that case, all of the types of people on this stage, all professionals, all who had made this guy into a gazillionaire, had been with him for five, 10 years. They loved him. He loved them. He knew them. He trusted them. And I am thrown into the mix, and I think at one point we were in a room with 10 people, all screaming and yelling and I took him outside and I said, look, you don't know me, but you're having a heart attack, and I'm a cardiologist. You may not survive a heart attack, but your best shot at surviving a heart attack is by listening to an experienced cardiologist. We need to stop this and focus on the fact that you're facing 15 years in prison. You have the ability to be the most successful African American entrepreneur perhaps in the history of the world, or you could go to jail and lose it all. So my stuff is really important for you to focus on. And the reason he's successful, I think, is because we walked back into the room, and I'll never forget; he said, "Listen up." I'll leave out the expletives. He said, "Benny over here is my cardiologist. I'm having a heart attack. All of you guys stay away from

me until we figure out what to do." And it was an important moment. So, it's different in many ways, because I don't know the person. I know the business, I know the DA, I know the U.S. Attorney, I know the media, and scandal sells. You know, Theo was right. We had 150 reporters outside the courthouse in like three hours after the arrest. From where do these people?...How do they get this news? Where is their equipment? They just sleep with it in case a crisis develops? I mean, it was really an eye-opener to me.

BRIAN CAPLAN: How did you deal with the manager?

BENJAMIN BRAFMAN: I was lucky, because all of the people in his entourage were very professional, and I was brought in by his principal lawyer who had represented him from the beginning, and since he brought me in, it gave me some credibility.

BRIAN CAPLAN: This was a transactional lawyer?

BENJAMIN BRAFMAN: Yeah. He still is his transactional lawyer and he's very well respected in the industry. It's Kenny Meiselas, and he and I got along very well, and you know, Mr. Combs, Puffy, Ditty, whatever you call him, said: "I trust Kenny, and if Kenny says it's you then it's you." And Johnny Cochran was in the mix, and he vouched for me at the time, and it went from there and ended up very successful. But we had an eight week trial. And in an eight-week trial, after eight weeks he was found not guilty, and his career soared because, believe it or not, every day of the trial was a showcase for all of Sean's stuff that he wore to the courtroom, every day. And the company took off. So at the end of the day it was a good exposure because he won, but he would've rather have avoided the experience.

BRIAN CAPLAN: Was there a publicist as part of the team?

BENJAMIN BRAFMAN: There was everybody on this stage and multiples of everybody on this stage. And they all did well, and the publicists were brilliant, I think, but we were under a gag order. We had a very good judge who I respected and gave us a very fair trial and when you're getting a fair trial, from a good judge, the one thing you don't want to do is end up in the doghouse. And it doesn't accomplish anything, because jurors know if you're in the doghouse and I wanted the judge to be on a level playing field. So if you look at the clips from that case going in and out of the courtroom every day, I have a nonsubstantive comment that doesn't violate the gag order because I believe that showing confidence and walking in and saying we're trying this case in the courtroom, not in the media, we anticipate that we're going to be successful, doesn't violate the gag order. I'm not talking about the case. The judge allowed us to make that statement every morning. So you can make that statement every morning, and the reporters need it, because they need a live soundbite.

BRIAN CAPLAN: Did you get pre-approval from the judge?

BENJAMIN BRAFMAN: I did. But the client said nothing for eight weeks. And for a person like Mr. Combs who is not shy, and we explained to the judge that he's promoting a new clothing line, so there's going to be a fashion show at Bryant Park, and he has to run his business and be able to talk about his clothing, and we got permission for that, because it had nothing to do with the case. But in a way it translated very well, because under summation I was able to say to the jurors, who I think understood, "if you're going to determine this case, you have to be sure. Because this is a person with the potential of being one of the most successful African American entrepreneurs in history of the country, and you need to be sure." And he had testified and acquitted himself, I think. And that testimony may be one of the few cases a criminal defense lawyer has a client—he didn't have a gun, and everyone around him had guns and he didn't want to explain that, but he did not have a gun. So he could say, "I was not carrying a gun, I did not have a gun, I didn't use a gun," and tell the truth and there was nothing really effective to cross examine him with. Then I made the decision not to call Jennifer Lopez as a witness, and boy, you have that kind of star power in the bullpen and this goes sideways? You're going to be hearing about that for the rest of your professional career. So I made that decision, and you live with it or you die with it.

BRIAN CAPLAN: Theo, what has been your experience dealing with criminal defense lawyers over the years, and whether you're just going along for the ride, you're butting heads, you're giving strategic discussions with them?

THEODOR SEDLMAYR: It's interesting. I actually am involved in a situation right now—in some regards it depends on your familiarity with the criminal defense attorneys. So in cases in New York, Ben or Scott Lehman are attorneys that I've worked with closely over the last 10 years or so. So, we have a report, I trust their judgment, we've worked on matters in the past. But oftentimes the crisis will come up with the client and they'll be in a different state or jurisdiction, and you find yourself scrambling at 11:00 at night to find a referral to a defense attorney. You're on the phone with the defense attorney. They've got to get over to the jail. They've got to deal with bail. You've got to introduce them to whatever part of the artist management happens to be with them at the time, and that's even more difficult, because as the transactional attorney is someone they trust in doing their dealings, you've got to build that trust with the other attorney. So, often I've called Ben for referrals in Texas, South Carolina, California, Arizona—it depends. And a lot of that is because I represent music artists and they tour, and then you also have their shooting motion pic-

tures or television shows, a lot of times, in Michigan or in Louisiana, where there are tax credits, etc. And generally, the kind of crises we deal with, are: There's been a shooting, there's been an allegation of a sexual assault, there's been a stop and frisk situation, and there's been a weapon or drugs found. Those are primarily the categories that the crises fall in, and you've got to move quickly to find experienced counsel. A lot of time in some of these smaller towns, it's very important to have an attorney who's well respected by prosecutors there, who has a history in the old boy network, you may say, and some of those guys have never dealt with some of the clients we work with—and send them a rapper, 19-year-old rapper on a tour bus. And you're doing a lot of this remotely. Sometimes by the time you fly down there, they're already out on bail and they've got to catch up with the tour. So it's challenging, depending on where it happens.

BRIAN CAPLAN: Have you butted heads with an attorney ever? Defense attorney?

THEODOR SEDLMAYR: Oh yeah. I've fired criminal defense attorneys and gone in other directions. And as Ben points out, sometimes you are the new attorney saddled with some decisions they've made on how to steer the case. But you're generally the one who's going to be with the client long-term. You're also the one who has had a lot of the interaction with either the record label, the publishing company, the sneaker company that they have an endorsement deal with, or the beverage company, and people want to hear from you, and you have to translate where the case is. You're not going to necessarily put the local defense attorney on the phone. You're going to have to translate where the case stands, what the merits of the case are, what the defenses are, and that'll get to the category that I'm going to speak on next, which is the morals clauses.

BRIAN CAPLAN: Paul? How about yourself? Interaction with criminal defense attorneys in high profile cases?

PAUL ROSENBLATT: Yeah, I mean a lot of it echoes what Theo was saying, but from my perspective, since I am a lawyer, it's a little different. I never practiced criminal law, but I think that once you have a sort of general understanding of the court system and how things work, that you're able to help your client a little more perhaps. And I think also being a manager who is an attorney, you're, I think, handled in a different way by the criminal attorneys. They look at you differently. They obviously understand that you're not somebody without any training that doesn't know what they're talking about. So I think it's helpful for your client. But like Theo said, a lot of times you're taking a little bit of a risk. You're getting referrals from people that you trust, but they might be people that you've never worked with before, and all of a sudden your valuable client is in the hands of you know, this guy in Northern California that you've never met before. So it's important to have good referrals, and I think it's important to talk to the attorney and make sure that they have a good understanding of who your client is and what—obviously, if he was looking for the same result they want to be set free from all charges—but what kind of results you are looking for, and more specifically how available they're going to be. Are they going to continue to go on tour? Do they have to go back and make appearances? All those things factor into it.

BRIAN CAPLAN: I think it's our job as manager or the lawyers for the artist when we're not doing the criminal case ourselves, to assess who's been brought in to do it.

PAUL ROSENBLATT: Yeah. And one of the things I definitely agree with and respect is what Ben said about the gag orders, but that goes both ways, also. Sometimes I need the attorneys to shut up, because they look at it as their moment in the spotlight for them to, you know, it's an advertisement. You've got this high profile client. All of a sudden the whole network panel is in front of you with their cameras and you want to talk because you want to seem like you know what you're doing and get the attention. And that can be a real pain in the ass. And I've had several times to pull these guys aside and say, listen, you need to shut up. We don't need you out there talking about this. Just deal with the judge. Deal with the court. Let us work the court of public opinion.

BRIAN CAPLAN: You have a gag order to the attorney?

PAUL ROSENBLATT: Sometimes. Where it's necessary. And I've had to do that before. And usually you work it out and they understand, but some guys just can't help themselves.

BENJAMIN BRAFMAN: He's right. One of the issues I've dealt with over the years, as I've either been brought in as a consultant on a case or worked with co-counsel who really doesn't have any depth or experience in high profile cases, is, you're right. It's seductive. Suddenly you have Matt Lauer calling you on your cell phone saying, "Hi Ben, It's Matt." And I said, "I've never met you Matt. It's nice to meet you. What do you want?" "I'd love to interview one of your clients." "Well, you know, I'd like to be on the Knicks but it's not gonna happen." But it's seductive. You need to take a step back and realize this isn't about you. And you know, what happens in our business is sometimes a lawyer is in charge because of what they've done and their history and their experience and the credentials, and sometimes the lawyer is involved because they happen to be in the right place at the right time when everything hits the fan and they're a mouthpiece that's available. I've seen people destroy a case because of their willingness to use it as a platform. And they go on—years ago they don't have it as much now, because you don't need it because we have too many political talking heads, but years ago, if you were capable of breathing and talking, you could be an expert

on cable news, and I would watch at times people who I know don't know what they're doing and have never tried a case to verdict, giving opinions that are just flat out wrong, and nobody cares, but they're putting out a lot of misinformation, and yet they become themselves recognizable or household names. And I think part of the reasons that people have a low opinion of lawyers and criminal lawyers in particular is because many of my colleagues, I don't think, do a job sometimes well, and sometimes let seduction actually suck them in. And you need discipline.

PAUL ROSENBLATT: For sure. And then the other part of it I wanted to mention is it's not always criminal cases. There's plenty of civil activity that can be very high profile, and with very high stakes and it's not necessarily involving personal freedom, but certainly millions or tens or hundreds of millions of dollars, and when you have those, it's a different approach, but you have to handle it with the same care. And one of the things again, you're having to deal with is when should we talk to the press? What should we talk to the press about? And I think sometimes it's even more important to talk to the press the right way because you can sort of, if you get the public behind you on a certain issue, it can bleed over into what you're doing in the court. It's not like you have a sequestered jury panel like you do in criminal case. It's a different thing. So it's important to—go ahead.

BRIAN CAPLAN: We're going to get into domestic violence, paternity and divorce proceedings and then…

PAUL ROSENBLATT: Yeah. Family stuff too.

BRIAN CAPLAN: And then going to segue into moral clauses, but before that, Susie, I wanted to know a couple of things. You've been engaged, I presume, in criminal cases, pre-indictment and post-indictment and the post-indictment, let's assume that there's no gag order. Can you just tell us how you deal with the defense counsel and then how you deal with the media at large? Generally.

SUSIE ARONS: You know, we're not a celebrity PR firm. There are a lot of people that do that all day long, and it's a different type of PR. And oftentimes the personal rep will hire us if there's a crisis, if there's a criminal proceeding or another type of crisis. The lawyers will hire us, the record company managers, whomever. We have to be part of the team and oftentimes the work that we're doing is helping message what the criminal attorney is going to say, if they're going to talk, so that, because you can't try the case on the steps of the courtroom, but you also have to be able to do some background work with the press that you know is in the courtroom. So, sometimes what we're doing is off the record, but we're helping the press understand all of the issues, but we're not doing anything that would ever compromise the case itself. And it's really important that there is a mutual respect between the criminal attorney and the PR firm or the publicist, because you're both naturally spokespeople. Oftentimes the attorney really should be the spokesperson. If it's not the actual person who's at the center of it, it shouldn't be the publicist. But the publicist is helping to inform what's being said.

BRIAN CAPLAN: I assume you clear everything through the criminal defense attorney.

SUSIE ARONS: Always. You have to clear everything through the attorney.

BENJAMIN BRAFMAN: It's interesting as the point that Susie makes, because most criminal cases, most civil cases, high profile, are not worked under a gag order. It's a self-imposed discipline of what you intend to say, and I think you're all right about using the media, and sometimes an intelligent approach to speaking to a reporter either on the record or off the record to sort of try and level the playing field, and it works very effectively if everybody is working the same page. I just want to note one thing in cases where there's an active criminal case going on, sometimes the criminal defense lawyer has to retain the publicist so that they are under his or her privilege, so that we can be in a room talking to the client and if the publicist is an agent of mine, then it's a privileged conversation, and he or she can't just go out and disclose privileged information, which is kind of important in a criminal case if you're having an open dialog about what happened. Because what happened in a criminal case is not always what you want the public to know.

BRIAN CAPLAN: And we've put in the written materials three cases that basically analyze when there is such a privilege and it's actually a fairly heavy burden.[3] It's not simply if the lawyer engages the publicist it's blanket privilege, there's nuances there. But it's certainly clear from the cases that have a chance at maintaining the privilege that it has to be the lawyer that engages the publicist, and not the client, and that the communications should be as few communications between the publicist and the client alone as possible, because there's some case law that says that that's not going to ever be privileged.

SUSIE ARONS: Well, we do that even in civil—it's not just in criminal cases and civil cases. We get hired by the attorneys. And privilege is very gray in a number of those areas, but you just have a better chance on the publicity side, if you're hired by the attorney.

BRIAN CAPLAN: Has privilege ever been challenged in any case that you've engaged a publicist?

BENJAMIN BRAFMAN: It's been questioned but it hasn't been successfully challenged, though they have to have a written agreement. It's essentially called a Kovel agreement,[4] which applies to an investigator, an accountant, a forensic accountant and a publicist, they become agents of the lawyer and they report their findings to the lawyer. Sometimes it means hiring a new publicist, not the publicist who already represents the client, because

they represent them during a period of time where it's not privileged. So same thing with the forensic accountant. You can't use the same accountant.

BRIAN CAPLAN: The Kovel case is cited in the three cases that are in the written materials, and it's where the publicist is helping form legal, make legal decisions. In other words, you're not just using them for a media purposes, they're bringing a greater asset to the table in those discussions. So it's very interesting, actually if you look at the three cases, because they're not always consistent.

BENJAMIN BRAFMAN: And I think it's case specific, fact specific. We could talk for the next two days here and not cover all of the types of circumstances I think each of us has had to deal with. And it's not always a criminal case. Sometimes it's investigation that could result in a criminal case, and yet the stakes can be very, very high. I mean, Dominique Strauss-Kahn is not a sports person, and he's not a celebrity in terms of record industry, but he probably would be the president of France today if not for this episode with the hotel chamber maid in New York, and his wife was Anne Sinclair, who is the Barbara Walters of Europe, trying to keep her from holding a press conference. I probably worked harder in that case at not saying anything and not letting anybody say anything until the case was over because we were playing not just to the opinion of the Manhattan District Attorney's office, but there was world press that was uniquely interested in this case, and we were successful in getting the criminal case dismissed, but his life was never the same after that.

BRIAN CAPLAN: Let's turn for a second to domestic violence, paternity and divorce proceedings, and with respect to domestic violence—is there anything different, how do you handle those cases? Other criminal cases?

BENJAMIN BRAFMAN: Yes, I think domestic violence cases, by nature of the crime, are the most difficult to defend, and you have to be more careful about what you say because there are sensitivities involved, and what you don't want to do is alienate a whole segment of the jury pool by something flippant or something inappropriate. So I think in a domestic violence case, until you find out what really happened and what you're out is, and what your approach is, I think the less you say, the better. Now, these people have other issues. You have an endorsement deal that has a morals clause. You have a domestic violence, you have a contract being signed, negotiated—there are tensions between and among all of the people on this table—what's good for the client may be different, depending on where you fit into the process. I deal with that all the time, and you have to find a path that seems to make sense from everyone's perspective, and if it doesn't make sense from everyone's perspective, I think freedom trumps money. And I think if you ask a high profile person: "Would you rather have five years in prison or this $15 million deal?" they would say "I can make another $15 million once this criminal case is over, but if I lose the criminal case, I'll never get another deal." So I think there are priorities and sometimes think it's easier than not to convince the people you're working with as to where the focus should be. But I respect the issues that confront all of the people in this case, because I've worked with people in similar roles, and I don't dismiss their concerns and neither does the client, and you're doing your job but you can't do everybody's job.

BRIAN CAPLAN: Before we get to Theo on this issue, have you engaged publicists on domestic violence cases?

BENJAMIN BRAFMAN: I've engaged publicists where appropriate, but I've often found that they generally have a publicist that I work with trying not to rock the boat, and in terms of the case, I want to be the publicist for the case. Because I want to not promote myself—thank God I don't need to do that—but I know what works in a criminal case and I know what doesn't work in a criminal case because I've done it for 40 years. So, in a criminal case a publicist, in my experience, usually is there and he usually is very capable and has a history with the client. If a high profile celebrity falls into your lap who doesn't have a publicist, it's very, very unusual in my experience, and having a lawyer as it was spoken a moment ago, having a lawyer as the manager, having a lawyer in the mix is very, very helpful, because they get it easier than someone who doesn't have any legal training. But my instincts in a criminal case is no news is good news, and if it's going to be news we can't really worry about every news cycle. It's impossible to let the media dictate how you function as a criminal defense lawyer, because they change their tone every 20 minutes depending on what piece of evidence comes out or who their sources are, and they have really good sources, especially in law enforcement. Don't forget, my adversary is generally not another lawyer. It's the New York City Police Department, it's the FBI, it's enormous resources, and these resources build up sources in the media over a lifetime that you're never going to be able to plug those leaks.

BRIAN CAPLAN: Susie, have you been engaged in domestic violence cases? How to do damage control?

SUSIE ARONS: I've been engaged by the individuals, by the attorneys for the individuals but we've also been involved in domestic violence cases representing either the corporate entity or the sports league on the entertainment side. And then that's a whole other complicated set of facts, because they're looking at who their customer base is, and do they stand up for their person innocent before proven guilty? Do they cut bait early? You know, from a corporate side what's the impact for them? So, having done both, on the corporate side I still believe you do have to listen, find your facts, do the right thing, and doing the right thing rarely hurts you in the long run. When you're representing an individual, if you're representing the victim, again, you're working closely with

the attorney and we're just not going to say anything. It's guided by the attorney. It's a discipline to remain silent.

BRIAN CAPLAN: Calling on Theo on domestic violence cases. Do you deal with the criminal defense attorney any differently because of the morals clauses and some of the impacts that could happen as a result of a conviction?

THEODOR SEDLMAYR: Yeah, absolutely. A lot of my experience with domestic violence, which is obviously very serious crime and terrible situation—unfortunately I've been involved where allegations of it have been used as pressure tactics within a relationship between the celebrity and the girlfriend or the wife to try to extract money from them. And that's, you know, it's sad that it's used sometimes, but the threat—and sometimes the girlfriend or the spouse knows about the morals clause, knows if there's an allegation of violence, a long-term deal could be terminated or just that it could cause bad publicity—and there's a threat of it because maybe the entertainer is traveling on tour, they're not together, and the relationship can take the tone where, hey, I'm going to threaten this in the press and threaten this with a trial unless I get something I want, whether that's money or you staying with me and not leaving for another woman, or whatever. Seen a lot of those situations where it's been used in the wrong way. Obviously if someone's a wife beater or whatever, they shouldn't have an endorsement deal, and that serves problems and they may end up getting convicted, but I've seen it used in the wrong way several times, and you have to protect your client from that. The same with paternity. Been in situations where very quickly you just want to get into a very ironclad non-disclosure agreement, submit to the testing, and find out what you're dealing with. Because sometimes it's just a threat and it's unbelievable. You'll have the opposing counsel who wrote you a letter that a lawsuit hasn't been filed, they wrote a letter to you, and in the letter they're looking for millions of dollars without the test, without anything, and it's just opening up a bidding, "Hey, you don't want this out there." And those are some of the situations you deal with and you have to counsel your client, and obviously clients are very upset. "I wasn't with this woman, I don't know this woman," and it's, there are a lot of shakedowns that go on. A lot with sports athletes. There are women who prey on these guys, who go out to the clubs that they know they're going to be in afterwards, and it's not across the board, but it's something that you really have to protect your client from and be aware of and know how to navigate. And they know the pressure point of the bad publicity of your client, and sometimes you find yourself cutting a check.

BRIAN CAPLAN: The reality TV setting has also created an environment where you're getting more lawsuits based upon the interaction between people on those shows and—some false claims, some real claims, but having so much interaction with people that don't know each other generally, some of them stars, some of them not, creates an environment—

THEODOR SEDLMAYR: And the producer puts them right in the middle of the situations, for them to be volatile and hope that someone strikes somebody and gives them liquor and it makes for better reality television, but it's a volatile mix.

BRIAN CAPLAN: Paul, what's been your experience with respect to domestic violence, if any?

PAUL ROSENBLATT: That's one of those scenarios where I think that, whether it's true or not for a client, it becomes a bit of a witch hunt, and when I say that I mean that you're kind of in a no-win situation. If you respond or if you don't respond, I mean obviously if you're going to respond, it's, your client's not guilty, that's fine. But once you start talking too much, then what does it become? You know? Are you protesting too much? And then maybe you're not taken seriously. So that you know, depending upon the circumstances, one of those scenarios where I might think that less is more, and when you're responding to these really volatile things, sometimes your client, because that's where the celebrity lies, that can just fan the flames and make it worse, and make it a bigger story. So you've got to weigh those things out. And that's generally how I would approach it.

BRIAN CAPLAN: I'll just give 30-second anecdotes, I'll give anecdotes at the end, but since we're talking about this, I had a client years ago who…had a famous client, he had a paternity case filed against him. The day after the paternity case, a criminal case was filed against him, and he got arrested, and I went to jail with him because he got arrested when I was in court with him. I convinced the prosecutor and the police department to basically rip up the arrest warrant and let him go, and my adversary had a media truck waiting outside the precinct to take pictures of him coming out. And I said to the client, put your arm around me and put the biggest smile on you've ever had in your entire life, and it will be non-newsworthy. We walked out, he had the big smile and the arm around me, we were in there for maybe four and a half, maybe five hours, it was a long day, and nothing made the news because of that. So it was a potential crisis that we were able to avert. I mean, we were lucky to be able to convince both the D.A.'s office and the police to basically say we made a mistake in arresting you. They didn't even ask for a release going back. But I'm just saying, you have to be quick on your feet and try to neutralize these things whenever you can.

BENJAMIN BRAFMAN: I think high profile people in general, whether they're celebrities or titans of industry, male and female, are very vulnerable today, and I've been in half a dozen cases in the last five years that were flat out shakedowns and people were very blunt about it. And sometimes I was more blunt. And sometimes the lawyer in the mix really crosses the line. And I've had

conversations with lawyers where I said to them right to their face, "Here's how this is going to end; it's either going to end in this room or you're not going to go to the U.S. Attorney's office or the D.A.'s office, I am. Because what you've just done by writing this letter demanding money in return for silence is a crime in New York. And it's certainly an ethical dilemma for you if I also stop off at the Grievance Committee. So lick your wounds. This is not your payday, and be happy that you're going home tonight." And most of the people who engage in this type of lawyering, I call them shysters, call them whatever you want, but they see a quick score and you have a vulnerable person who is happily married and doesn't want the aggravation, or is on a Board in a public company and doesn't want to lose everything, and they are being taken advantage of and there's some measure of truth to the fact that they had some interaction, but it suddenly becomes a whole blown-up crisis and sometimes you need to be very, very firm and not give in, and sometimes you see a client write a check for silence. And it sticks in your craw, but sometimes that is in their view the cheapest way out, given the unpleasant choices they're facing.

BRIAN CAPLAN: I'm going to give an anecdote at the end, and Ben may tell me I gave the wrong advice, but sometimes you have to decide what to keep private versus what may become public. So, if the client's livelihood could be affected by what goes public, you sometimes have to pay what's called blood money. But anyway, we'll get there later on.

Let's turn to morals clauses, and Theo has been extremely generous and in the written materials we've included moral clauses from eight to 10 different types of contracts showing strong provisions for the companies against the artist and sports figures and vice-versa. So why don't you take a moment or two to walk us through some of those provisions, and how those factor into crisis management in general, to try to avoid violating them.

THEODOR SEDLMAYR: So, in a lot of endorsement deals and also performance agreements, we'll have a morals clause, and we call them shorthand, "granny" clauses. As we like to say it's actions that could offend the sensibilities of a granny, grandmother. And I always approach them when I'm representing talent or the celebrity to try to protect the client from this clause being used as a sword, and not a shield, to protect the brand. And what you'll find is sometimes you're doing a long-term endorsement deal where yearly payments are given out over a term of years, or there's products produced with a royalty that flows back for the licensing of the celebrity's brand identifiers, and certain activations, and that celebrity, you know, when he signs the deal, has a certain place in pop culture and leverage in getting the deal, and then over the course of maybe a four-or five-year deal, maybe that wanes. Or maybe there's a new CMO brought into the company that doesn't want to work with the celebrity in promoting the brand, and they're looking at how much money they owe. And they're looking for a way to get out of the deal. And so I always approach them as you've got to protect your client from anything that is going to be just a judgment of that brand as to whether that client has offended the sensibilities of the public. And especially working as I do primarily with hip hop music artists who the brand approaches because they're somewhat edgy, and they're looking to get an edgy, younger audience and these guys, many of them live a lifestyle that's like their lyrics or put a lifestyle out there through their lyrics that talks about and involves discussing drugs, crime, guns, sexual themes—you have to get an acknowledgement from the brand that they understand that. So, a lot of times when you look through some of these provisions—I have some that are before they're negotiated and some after—but what we try to do is if it's an allegation of the criminal charge, we try to peg it to—depends on what the forum selection clause is of the contract you're doing. It may be California, and you want to identify maybe Class A felonies for New York, Class B, sometimes Class C, most of these—murder, attempted murder, but when we get down to C, which may be able to plea out at a D or as a misdemeanor, then we're talking about, maybe a battery. So we're talking about maybe a fist fight, or it could be a small drug charge, a limited amount of drugs for personal use. So these are some of the things—or a gun charge as well. Depends. New York has very stringent gun laws, but that's another category.

BRIAN CAPLAN: There used to be a phrase, "acts of moral turpitude." I assume that's never in yours?

THEODOR SEDLMAYR: Yeah, that would be the granny clause. So, the other thing to note is you don't want it just to be an allegation, and the brand is in turmoil when the celebrity they represent is hauled off and doing a perp walk coming out of the police station. That's when we call Ben or another defense attorney and they have to get to work. And it could be very well that all the charges get dropped and it could've been a false allegation, a confusion, whatever it is, you have to give yourself time for the defense attorney to work to either get the charges dropped completely or plea it out, maybe to a misdemeanor or a lesser felony—that, rather than give the brand the ability to opt out of the deal. So that's important. Another thing I want to point out too is if some clients have a lot of criminal history that you deal with, you want to make sure, if you have local counsel dealing with that, they know the client's complete criminal history because if they are looking to take a plea in one case, it could affect a probation that's going on in another case. And sometimes when these things happen…I have a client right now, his case is in Florida and South Carolina, and the two attorneys didn't know what the other charges were, and had to make sure those guys got on a call very quickly together to understand their parameters.

BRIAN CAPLAN: If the artist has a history of domestic violence or gun possession or other convictions, so it's

almost like a negative brand already, do you cover that in an agreement?

THEODOR SEDLMAYR: Yes. One of the things, again, dealing with rap artists, but it also could be an actor who chooses very edgy roles, you know, maybe NC-17 material, you want to protect them and you want the acknowledgement by the brand that the artist is protected. So, when they're having a lyric that involves talking about shooting a gun, or an actor, just as an actor in a motion picture shooting a gun, that's not the reality. Right? And I will give an anecdote at the end where that came into play.

BRIAN CAPLAN: Probably depends on the rapper, though.

THEODOR SEDLMAYR: Yes.

BRIAN CAPLAN: I assume that the Facebook and Twitter following of whoever the artist is is one of the driving forces behind these deals in the first instance, no?

THEODOR SEDLMAYR: Yes. I would say so. One of my long-term clients now for over 10 years has really had a renaissance recently with social media, DJ Khaled. Just through Snapchat, they've been calling him the King of Snapchat, but it's very much about how many followers he has, and some of his Snaps right now are getting seven, eight million views. Advertisers look at that, you know, in the target demographic that you're trying to reach, that's better than the number one television show. So those type of things as well come into play in this.

BRIAN CAPLAN: Paul, your history in connection with domestic violence cases and moral clauses.

PAUL ROSENBLATT: Well, I think you know, like you said, there's a little bit of *caveat emptor* when you're getting into a deal with somebody, and we used to have 50 Cent on our record label, and if you were doing a deal with him you know, you weren't expecting a choir boy, right? So you go into it with your eyes open, but I think that importantly what Theo pointed out is to the best of your ability, I think, you have to make it a morality clause that is contingent upon an actual conviction, right? Or I guess maybe a plea, which is the same thing as a conviction. So, you don't have a company all of a sudden saying, "Oh no, we don't want you selling KitKats anymore"—just using that as an example—"because you got pulled over last night and they said you had a kilo of cocaine in your car," and you know, maybe you didn't or whatever the case may be. So, I think that's an important distinction, but you know, at the end of the day, the reality is if a company, or whoever you're in business with, wants to stop being in business with you because they don't like how you're behaving, or how they think you're behaving, you're going to figure it out and get out of the deal one way or the other. It's just you can't force those fits and nobody wants to work with each other if they don't like and respect what they're doing.

BENJAMIN BRAFMAN: Can I just make an observation, because all of the people on this stage, I think, have some history in the hip hop world or pop culture world that's recent and ongoing and yet we're talking to 150 people who may have no connection to that world whatsoever. And even if your kids are going to these clubs, let me just make an observation; you know, many of the people in this world are very talented and very capable, and really interesting young professionals who have a product to sell and an enormous market. In the last 20, 25 years, as a result of people like Russell Simmons and people like him, the hip hop market has become one of the most thriving, successful markets in the world. And you know, with the market share in many of the countries, that's extraordinary. So you suddenly have a kid who has no formal education to speak of, and can sing or do something well, and they are a rock star. And you go into a club the size of this room, and there are 3,000 people in the room—I'm not exaggerating, if you want to turn around, everybody in the room needs to turn at the same time. And then a heavy duty celebrity walks in, they have an entourage with 20 people and everybody's pushed out of the way to make room for them. And stuff happens. People have drinks spilled and people have friends insulted and disrespected, and suddenly a fight breaks out. And I will tell you, speaking of morals clauses with the celebrity not being named, I spent three days with my client, basically hiding so that he wouldn't be arrested, trying to convince the police department and the Manhattan District Attorney's office not to authorize an arrest in a bullshit case that would've been dismissed three weeks later, but the morals clause in his contract had in it in clear block letters that even an arrest would give him the right to pull the endorsement. The endorsement was worth $100 million over a period of time. $100 million, and it was that amount of money and the nature of the circumstances—it was somebody walking up to a high profile celebrity in a club and trying to pass them. So instead of saying excuse me like you would, they were drunk and they pushed them out of the way, and then my client pushed them back and he fell over two other people and then he filed an assault complaint. And this was worth $100 million. Nobody was hurt. But New York City, if you go to a police station you say, Theo punched me in the face. I want to prosecute him for assault, unless they can conclusively prove that you didn't do this and that it's a lie, they have to arrest Theo. Now, the case will be dismissed but Theo is on the front page of the *Post* and whatever he's going on in his life gets affected and we did an extraordinary quick investigation, we've got 35 people in the club who saw what happened, none of them had an agenda, we have security footage and we were able to get the police department to pass on the case, probably the biggest victory I've ever had. Nobody knows about it, but sometimes the morals clause, and I've looked at that, who the hell wrote this? You lose $100 million if you get arrested? I can get anybody arrested. For nothing. Especially, I say this, if I walked into a precinct and I said, and

it's a terrible thing to say but it's 2017, it's still the way it is, if a woman walks into a precinct and said, "Ben Brafman touched me inappropriately," they would arrest Ben Brafman. The law says they have to go out and make an arrest because they're concerned that if they don't arrest you, then you rape someone or kill someone, and they had you and they didn't arrest you. But if I walked into a precinct and said, "I was in a bar and a woman touched me inappropriately," the cops would say, "Did you get her number?" So, we are in a very still vulnerable place in these types of offenses, unfortunately, and many, many arrests that take place are washed out of the system four, six, eight weeks later, and in the interim marriages are destroyed, relationships with children are destroyed, employers never look at you the same, and today it's worse than ever because if you make any piece of media, it's in Google for the rest of your life. You might have a post saying charges were dismissed, but if you're a prospective employer and you run their name, would you hire someone who was arrested for sexual assault and the charges were dismissed, or would you take the next applicant who's never been arrested? So, serious stuff.

BRIAN CAPLAN: Susie, turning to you for a second, have you ever been engaged where the target was public opinion with respect to the existence of a morals clause? In other words, where somebody comes to you and says, we have this morals clause, we have this claim against us right now, whether it be civil or criminal and we'd like you to help us deal with the media at large so that our name stays positive?

SUSIE ARONS: Yes, but it doesn't mean that I've necessarily taken the client.

BRIAN CAPLAN: Have you ever taken a client under those circumstances?

SUSIE ARONS: No.

BRIAN CAPLAN: OK. So that would be something that you would shy away from.

SUSIE ARONS: There's certain times when you look, you have to look at both sides of it, and you have to make the decision on what you comfortably do for that client. And there is somebody out there that will be the right spokesperson for that client, and I make that decision, I use my own compass on what I'm comfortable with.

BRIAN CAPLAN: Would there be a difference, though, if you had video footage of a man hitting a woman?

SUSIE ARONS: Oh, yeah, if it's something that's clear cut, but again, I don't know that I would take—I don't know that I would say yes, I will take the gig for the guy that did the hitting, you know. And I've turned those down.

BRIAN CAPLAN: So next we're going to go to other forms of situations that could be crises. Copyright infringement cases, band breakups, defamation, sex and race discrimination. Paul, would you put any of those in the category of a crisis for the clients that you've had over the years?

PAUL ROSENBERG: Yeah. I mean, potentially all of them. It depends, obviously, on the circumstances, but any of those could be an unplanned impactful event or occurrence that requires careful handling and monitoring, right?

THEODOR SEDLMAYR: He's trying out for Black's Law Dictionary.

PAUL ROSENBERG: That's right. So I would think that something like that would certainly have the potential to be a crisis. You want to talk about any of them specifically?

BRIAN CAPLAN: Well, let's do band breakups, for example.

PAUL ROSENBERG: Yeah, so I mean a band is like a company, but it's also like a marriage. So it's like a company in a sense that sometimes very quite literally they're formed together under an LLC or some other type of entity, and everybody in the band has certain rights and obligations to the band. And if there's a breakup event, then certain things are supposed to happen. And it's like a marriage because, you know, you're with people that you chose at one point to be with and later on maybe it's not such a good idea, or maybe it doesn't work out, or maybe you argue, maybe you hate each other, maybe you cheat on each other, which I've seen done in a band. People go and do side projects, things like that. That's cheating. So that's all very complicated too. But the crisis in a band breakup, aside from the legal details and the marriage, is how is this going to affect your career moving forward, and how is it going to affect your fan base, and what about these fans who essentially you sold them a dream a little bit of, "Hey, believe in us, we're together?" And then you're saying, "Well, maybe not together. He's going to go over there, and I'm going to go over here, but still believe in me." It could be challenging. And I have dealt with it, and it's tough. And it's also a crisis, because you're dealing with intellectual property that's going to be either not valuable or have a sort of different value. So who gets to keep the band name, and what about the guy who's going solo whose name you don't know? That can be a challenge too. So, all of that can be a bit of a crisis. It's more of a business crisis, I think, than any sort of impending real danger, but it certainly can be impactful, nonetheless.

BRIAN CAPLAN: Litigation over band names, though, is a crisis for all of the participants, because of the amount of money they have to pay on attorney's fees. It's sort of as if their baby is up for auction and they're now fighting for their baby and it's always nasty, involves a

lot of emotion. Theo, have you been involved in any band breakup situations?

THEODOR SEDLMAYR: Yeah, but I want to speak to the copyright infringement, because that's, you know, it's become really a constant these days in the business from when I started out 25 years ago to now. I would say that maybe 25% to 50% of the songs you see in the Top 10 get a copyright infringement claim against them these days. That was not the case even five or six years ago, and that creates a crisis because there's a concern that like the group, hey, are these guys not the original creators? Are they a rip-off of someone else? Did they not credit this person? Did they hear this song on the Internet and copy it? And it creates a crisis of conscience with the fans and their connection with the artist. That's a problem. It also creates a crisis with the record label and the music publisher, because suddenly they're invoking their indemnity provisions and looking to hold back reserves of royalties that are owed from the song, and that, the litigants, the plaintiff's attorneys know that and use that as, to try to work a quick settlement and get a cash payout because they know they're holding up royalties. So, it's something that you have to deal with. And what's interesting is a way to deal with this now, is your pleadings privilege and what you'll find when we're engineering defense of these, we know that reporters are just going to go right to the lawsuits. Reporters that report on copyright infringements are very sophisticated. And they understand copyright law. So what happens is because you have a privilege in your pleadings, you can put a very forceful response, something that could be considered even defamation if it were not in your pleadings, and we write our responses to these lawsuits in a very deliberate way to provide quotes for these reporters.

BRIAN CAPLAN: Do you use a publicist at all when you're doing this?

THEODOR SEDLMAYER: No, I use top IP litigators.

BRIAN CAPLAN: So, basically when you're doing your answer you may not have a counter claim, but you're making affirmative statements to diminish the sense in the public of the viability of the case.

THEODOR SEDLMAYR: And you have to write it in a way to provide that it's going to be quotable.

BRIAN CAPLANP: Right. Understood. So there are many situations in which sex and race discrimination can be crises. Defamation cases can be crises if you bring them or respond to them. Sometimes, the best case is to not bring a case. I'll give you an example; I had a manager come to me, and a wife of a famous musician was quoted as saying the manager was incompetent, and I said, "Well, we can bring a case for defamation. But if most of the people out there don't believe anything that this particular woman says is true, why would we bring attention to this by bringing a defamation case?" And he had a crisis. This was a crisis, but it was a crisis that I said, "When you look back three weeks from now, the fact that she said it in one media, it's now gone. So, you're going to make it more of a crisis if we bring a defamation case, because now you're going to bring attention to the fact that this woman said something negative about you, where probably not that many people read it in the one periodical it was—not that many people believed in her veracity, and it's going to go away." So you can avoid crises by taking certain steps, also not necessarily just jumping at your client's whim.

We should talk just a second about bankruptcy. Susie, you've been engaged in bankruptcy cases?

SUSIE ARONS: Yeah, I have. And –

BRIAN CAPLAN: What's the word you want to get out there?

SUSIE ARONS: You have to be smart and you have to be disciplined, and you have to protect your entity, and sometimes as much as an outlet may call and say "I heard this, I know this, I have a source that told me this, and it's irrefutable," and I'm saying, "You're wrong, I cannot tell you what is right. I cannot talk about it, but I can tell you that if you write that, you're wrong." And we worked with a studio through bankruptcy. There was an outlet that three different times printed wrong information and just waited until the next day when there was a filing. And the filing completely negated what the outlet said. And what's frustrating is there's no accountability. There's no retraction. So the next time it happened, it's like, do you want me to remind you the—so you wait for the filing, but the other thing that in a bankruptcy that is complicated when it comes to the media, is a lot of times the media is not well versed in the beat they're covering. They don't know the film industry. They don't know the music industry. They don't know the TV industry, and they don't really know finance, and that's their beat, so if you don't know finance and you're covering a bankruptcy, your reporting is going to be a disaster, and it's unfortunate with just the way that the media has been squeezed so badly that they just don't have the reporters oftentimes that they used to have that did know the area, and so you have people reporting on bankruptcy that don't know finance, and you have to explain mezzanine debt to a business reporter. And I would like to know that they know that. So it makes it very difficult. We've done it a number of times.

BRIAN CAPLAN: I think the most important point to get across if you have a client going to a bankruptcy, especially if it's a preplanned bankruptcy, is to get the word out that we're not dead—that it's going to be business as usual to the extent you can get that out, and that if it's a small company or a recording artist, their career is not done, the company is not done. Theo, have you been involved in any bankruptcies?

THEODOR SEDLMAYR: No, none of my clients have gone bankrupt while I was looking after them.

SUSIE ARONS: We also, I've represented the financing institution or the private equity side, and oftentimes they don't want their names out there, they don't want people to know where their investments are, so they would rather suffer a hit in the press with an inference that they were involved, or they had a bigger stake. It's better for their business to be quiet. So, again, it's working really closely with the entity to find out what's best for them in the long term.

BENJAMIN BRAFMAN: You know, the point you made Brian, I'm not a bankruptcy lawyer but I've been in a number of criminal cases that come out of bankruptcy filings, which is quite common, but the point you made, I think the general public doesn't understand that sometimes bankruptcy, the filing of bankruptcy, is the best thing that you can do under the circumstances.

BRIAN CAPLAN: Just ask Trump.

BENJAMIN BRAFMAN: You're right. But sometimes it's a reorganization. Gets you out of debt and gives you a fresh start. And if it's a recording artist who is doing it, or a company that's associated with the recording artist, I think you're right. I think the word that has to come out of these proceedings is that this person is going to be alive and well and still making music. And the perception that bankruptcy is the end of a career, it's not exactly pleasant but I know many, many successful people today who have several dozen bankruptcies in their commercial history. Bottom line.

THEODOR SEDLMAYR: Well, there is one thing I'd point out, in representing clients who are working, be very careful there. Sometimes some attorneys, bankruptcy attorneys want to get involved in the recording business and they'll tell an artist, a young artist in the beginning of a career, "you're looking to get out of this bad recording contract that you're in with the production company that's furnishing you to a record label," and they'll recommend to the client to file bankruptcy to include the obligations of the recording agreement to have them discharged. And they'll ruin the client's credit for a number of years. It's using a sledgehammer where you need a scalpel, and just be very cautious of that.

BRIAN CAPLAN: I will tell you that I had somebody who went into bankruptcy, a client, a recording artist, and the judge said, "Well, I may let him out of his recording agreement, but there's a clause in there that says he's unique and extraordinary and I may not let him perform for a competitor." And we had to litigate whether the artist was "unique and extraordinary," and I had to tell the judge that if he signed a recording agreement it would have the clause in there that said his performance is unique and extraordinary. So then he sort of understood that it was a standard clause, but that became an issue. So it wasn't a slam dunk that the artist got to move on. But again, there was damage control with the fact that he went into bankruptcy in the first instance.

Balancing the court of law versus the court of public opinion. I throw that to you, Ben, first.

BENJAMIN BRAFMAN: Well, it's hard. And you know, it's hard. I spoke at a Bar Association event a few years ago, and Tom Moore, who many of you have heard of, who is probably the single most successful medical malpractice lawyer, in the world and his specialty is brain injured infants who are either born prematurely and suffer permanent brain damage, and every day if you read the *Law Journal,* you'll see him getting $20, $30 million judgments or settlements or verdicts, and he's really quite impressive man with an impressive practice. So we were on the panel. He was the medical malpractice person and I was criminal defense lawyer, and he got up and he said, "I have the hardest job of anybody up here with all due respect, because I have to ask a jury of people who make $60,000, $70,000 a year to give me $30 million, and they can't wrap their arms around that kind of money and it's overwhelming, and I have to bring them back and explain why I'm entitled to that kind of money." And then I got up and I said, "Tom, you have a baby in a coma. I have a much harder job. I have a person who looks like a killer, who is a killer, and I have to get normal people to say they haven't proved the case beyond a reasonable doubt. I don't have a baby strapped up to a heart/lung machine that is to most human beings sympathetic." And in the world of public opinion, I think people understand that if a child needs care for the next 30, 40 years, that the parent and the baby are entitled to substantial compensation. In the world of public opinion, people charged with crimes have no constituency. And the criminal defense lawyers have no constituency. Nobody likes me unless they need me. And I'm just making an observation. When you watch someone coming down a perp walk your reaction is not, "Oh, I feel sorry for that guy." Your reaction is, "I'm glad they caught him and I hope he gets or she gets what they deserve." And I have to go into a courtroom where there's a presumption of innocence whereas really, people I think believe that you don't get picked out of the yellow pages to get indicted, chances are you did something that gets you arrested and indicted. So it's a tremendous uphill climb, and public opinion sometimes is as important as the evidence, and how you change public opinion, depending on the case, is very fact-specific, and sometimes it requires a soft touch and you have to humanize the client in a way that is different than what people perceive them to be. And sometimes you have to humanize the defense. If you have a defense of entrapment you're essentially admitting that the person committed a crime by telling a jury that they have to find them not guilty. In many many cases, public opinion is very very important, and how you balance that and how you decide when to speak and what to say, I think it's complicated, in my opinion, and everyone on this panel

has had to, I think, look at the balancing factors and make a decision. Do I speak? Do I keep quiet? Do I speak? What do I say? If I say it, do I need to live with that for the rest of the case or my career or the person's life? So I think public opinion and the law are not always on the same page. Very rarely.

BRIAN CAPLAN: Theo, have you ever done a press conference or hired a publicist with respect to an existing lawsuit for one of your clients?

THEODOR SEDLMAYR: Yes.

BRIAN CAPLAN: And without identifying who the client was, what was the subject matter of the case that you thought you needed to do that?

THEODOR SEDLMAYR: It involved a shooting.

BRIAN CAPLAN: And so you hired a publicist or you did a press conference?

THEODOR SEDLMAYR: I hired a publicist, and one of the things, you know, that fortunately with this celebrity, we started early on with this celebrity in forming a foundation and a charity, and we created a partnership with a couple of brands where percentages of royalties on certain products he endorsed were donated to the foundation. And he had a pretty consistent record of having scholarships sponsored, kids that came from his neighborhood, you know, not just the traditional Thanksgiving turkey giveaways, but hundreds of thousands of dollars. We had a consultant for the charity that really helped him to put that money in great ways. So when this incident actually happened, this shooting, it wasn't like we formed this charity and we were—actually at the time he was going to sponsor and help save a choir—and those discussions were already under way, and there was a lot of pressure from the media and around the shooting and investigation around it. But we actually were planning to give a very large amount to save this choir.

BRIAN CAPLAN: So the publicist helped tell the story?

THEODOR SEDLMAYR: We created a press conference and we actually brought that celebrity together with the other artists that he supposedly had shot at and they both, he matched the check through the record label, and we were able to pivot and create a different situation where they gave over $300,000.

BRIAN CAPLAN: So you turned a negative into a positive.

THEODOR SEDLMAYR: Yes. And the two artists shook hands and the investigation went away.

BRIAN CAPLAN: That's right. He became a choir boy.

BRIAN CAPLAN: With respect to a lawsuit or criminal case, in which you have engaged a publicist to assist in the process without identifying specifics…

PAUL ROSENBERG: Generally speaking, we tend to keep people with their team. So unless there's something that is really outside of our realm of understanding or experience at all, we'll keep the team in place that's there. But there has been a time where a client was involved in something that was a bit of a scandal. There's some private information leaked on him and none of us had any experience on how to sort of protect their reputations, so we hired the publicist to help us with that, and to help make sure that we got out in front of it the best way that we could in the press.

BRIAN CAPLAN: Next question. Is responding to a media inquiry with no comment a viable option? Start with you Ben.

BENJAMIN BRAFMAN: Sometimes. Sometimes it's your only option because you can't talk about facts. But I think there is a way to respond with a substantive "no comment" that sounds better than just saying "no comment." For example, "Look, we are still investigating the allegation. We are comfortable that when the case is resolved, the allegation will be shown to be false, but you've gotta give us a chance to get our arms around the facts." I haven't told you anything. And it sounds much better than saying "no comment," because "no comment" implies that you're not commenting because there's nothing good that you can say. A substantive "no comment" is something, you have your definition, which I think is a good one, and I'm going to use it, but a substantive "no comment" is sort of like, I think, something that I've learned over the years is a good way to respond to the media so that the article is not all bad, and so that, how is your client feeling now that he's been accused of rape? And you can say "no comment," or you could say, "I think he's feeling the way anybody who is innocent would feel having been accused of a crime that they did not commit." I haven't told you anything about the facts. I haven't really gone into our investigation. I haven't criticized anybody, but I've said something which I think resonates with people saying, "Wow, must be terrible to be accused of a crime he didn't commit." And maybe there's a softness that comes into play when the people cover, I tell you the truth, you see it now, and we see it in so many ways now, because CNN and FOX news need a plane crash in order to make themselves viable for the next couple of months, or now they need a tweet or some crisis in government or some pro—they need scandal. Scandal sells. Scandal is a big deal. People like scandal. It's like you're the voyeur at the beach when someone is drowning. There's 300 people trying to see the person who's gasping to breathe. Why? Because we have a morbid curiosity. So I'm in the tent and I know what happened, and sometimes what happened is good, and sometimes what happened is not great, but I'm not

supposed to show fear and I'm not supposed to show negativity and I'm not supposed to get in trouble with the judge or the D.A. and I've gotta leave my options open. So you learn to make substantive "no comments" that get you to the next day. But I will tell you something, because we talk about using a publicist, sometimes a publicist is used to dealing with the media, because otherwise your office would be overwhelmed with the number of inquiries. The Dominique Strauss-Kahn case, my office, which is a 15-person, but seven-lawyer firm, we have a couple of support people, we were getting 3,000 media inquiries a day, emails, phone calls, people just showing up in the lobby. So we had a public relations firm, and their basic job was to run interference. And every day we would prepare the same statement: "We do not believe that there was any forcible compulsion, and as a result no crime was committed." Now, that's it. That was the mantra for three months. Because even if no force was used, it's not pleasant to discuss what really happened in that room. And at the end of the day, it saved us. And the temptation was great, you have a high powered political figure who's one of the smartest men I've ever met, whose life is just down the drain. He goes from being President of France to a plane to Rikers Island. And even think about that, in 20 minutes, you're on your way to being the President of France and the next day you're in a jumpsuit in Rikers Island, and your life and your wife is in France flying in to meet me to figure out what the hell happened. Let's not discuss this.

BRIAN CAPLAN: Susie, I've sued a lot of major record companies and publishing companies, and they always give a "no comment" when asked about the recently filed lawsuit. What do you think is the best approach? And is there a difference between a corporation versus an individual?

SUSIE ARONS: Yes, and you have to judge it based on what the individual, what the merits are at that moment. Oftentimes we will not say "no comment." We'll either do a substantive "no comment" or we'll decline comment, but what we will do, is we will on background give information that the media outlet can use, so that you are able to shape some of the facts. Because the facts sometimes get lost in the shuffle. But you don't want to be quoted and on the record. So, we will decline comment. And this is always in, it's a strategy, it's a strategy that you agree upon with your client, and again, it depends on if it's an individual or corporation, there are always going to be different needs. And then sometimes we'll go off the record. We will decline comment: "We are going to go off the record. You cannot use this other than I am educating you." So, there are different ways of doing it. But oftentimes if we are in litigation, we decline comment because we're in an active case.

BRIAN CAPLAN: Theo, in civil lawsuits what do you do?

THEODOR SEDLMAYR: Well, I would just point out that if you do choose to go "no comment" or not give substantive comment on to the press, it's important for you as a counselor, or your client's management team, to reach out to the business partners and let them know how seriously your client is taking this matter, and that they're putting together their team, they've hired investigators, whatever it is, you've gotta let those brand partners who are investing in your client that may have certain marketing campaigns keyed and activations lined up for that client, that it's not just not being handled—you are taking it very seriously, you don't want to, don't have any privilege with them, so you don't want to say too much, but you have to assure them that you're putting together the best possible team to defeat the allegations.

BENJAMIN BRAFMAN: And we're talking about hip hop and those types of cases, but in many of the white collar cases that I've been in, sometimes with the public company you have a legal obligation to make a disclosure. You have a Board that wants to know. You have shareholders who are going to be affected, you have disclosure filings that you're going to make that may be, they require some type of a disclosure, may require a leave of absence, may require a person to step down so that these disclosures no longer are compelled, but it's very very complicated when you think about affirmative disclosure that you may be required to make.

BRIAN CAPLAN: Do you and Paul, have either of you had to pass post-press releases by your clients and then get debates with them as to what's going to be in the content?

PAUL ROSENBERG: Oh yeah, I mean, especially sometimes a quote from the client is required in the statement so you, if you're doing your job right, you should definitely run it by your client, especially if you're releasing a statement that's supposed to be his, you have to run it by them and make sure that it is what they want to say. That being said, do we draft things for them and run it by them and say, what do you think? Do you want to put this in your own words? Of course, but you work as a team to get there and just going back to the "no comment" thing, I think sometimes being unavailable for comment is ok. It's better than saying no comment. So sometimes that's a strategy too.

BRIAN CAPLAN: But sometimes also the media will say "he's unavailable for comment" and they never even called you.

PAUL ROSENBERG: Yeah. That's true.

BRIAN CAPLAN: OK. Let's go to what a publicist can do for you. Susie, you have the floor for three or four minutes, in a civil context and a criminal context.

SUSIE ARONS: You know, I think that when you're hiring a publicist, you always, in the same way when you're hiring an attorney, when you're hiring an accoun-

tant, when you're hiring a manager, the publicist is an important part of a team and you have to all work together, and I have an expertise that is very different than the other people on the panel. So I'm bringing that expertise. I'm bringing an understanding of what the industry landscape is, I have to understand what your landscape is, what your goals are. So I think that what a publicist can do best is have a strategy, move your business goals forward, not harm you, and not put the optics—the optics don't always match the words. You have to decide what is the right strategy. What are the optics? What is the messaging? And you have to work together. And if the client, and I've had this happen, where you know that what you're recommending is the right way to go, and the client isn't there yet, you have to be patient. And you have to be able to explain your "why." If you don't have a "why" if you don't have an understanding of social media, the new media, and the industry, you're not going to be able to serve your client well. And right now we are in a really, really difficult time and it's in my business, but it's for everyone, because social media oftentimes creates the reality, and it's wrong. And it's not verified. And it isn't substantiated. But that's what people believe is the truth. Now you're defending against something that shouldn't even be a part of the conversation. So you really have to understand what all the entry points are, and you also have to understand your audience. So, if there's somebody that is tweeting or taking you down on social media and it really isn't your audience, let it—you sometimes just let it die. Let it play out. You have to know your audience. And the audience can be your partners, your audience can be your real audience, your consumers, it can be a judge. You know, you have to know all of those elements and you are not serving your client well if you don't come prepared. And you can say, "I don't know, but I will find out." But if you don't find out, if you don't know what the goal and what the audiences are, you should not be part of the team. So it's not a three minute commercial.

BRIAN CAPLAN: It's an infomercial.

SUSIE ARONS: No, I feel very strongly about the role of what strategic communications can do, and I think that the world that we're living in right now has tremendous opportunity and it has tremendous challenge, and you cannot put your head in the sand and just go forward the way you used to. It is very different. And I'm not talking about Donald Trump and tweeting, the tweets from the President. I'm talking about the rest of the world and the entertainment space, and the corporate entertainment space that I live in.

BRAIN CAPLAN: Ben, would you like to say something?

BENJAMIN BRAFMAN: I just think you make a good point about, sometimes the best thing a public relations person can do is plant a positive story unrelated to the case that gets the people's mind off of what the case is about, and yet because that person is a hot topic right now, it's easier to plant a good story, focus them into something, like Theo said about the foundation doing charity, so you move the dial a little bit. The one thing that Susie mentioned, which is really true today, is first, the media has really no accountability, because they're never challenged and you can't sue, and if you want to sue it's going to take you 10 years, and you'll spend $10 million, and the *Gawker* cases are few and far in between.[5] That was unique. You sue the *New York Times* and you lose, or you spend a lot of money and then you lose. Because they'll have a source and then you'll debate whether they have to disclose the source, and then so long as they're not acting with malice you're a public figure, and it makes no sense to try to win. But what I observed more recently, and I'm not a tech savvy person, there are people in my firm who are, but you know, I can understand its power. I remember being in a courtroom during a proceeding of the Dominique Strauss-Kahn case waiting for the judge and standing over the shoulder of a reporter from the United Kingdom, and he's typing on an iPad and I'm able to read it. And I know the guy. And I said, "You know, if you wait about five minutes, you will understand that what you've just written is patently inaccurate." He says, "Doesn't matter. I have to post." I said, "Why?" He says, "Because they're posting." And he points to another reporter in a room and everybody's posting. And what they're posting is patently inaccurate; then 10 minutes later the judge issues a ruling and they just post the new ruling. So for 10 minutes, it's all over the world. You're in different time cycles, different deadlines, because Europe is going to sleep, America's waking up. I mean, it's crazy land. But you know, today it's instantaneous. Used to be you issued a press release, paper had an 8:00, 6:00 deadline, you had hours to tinker with it. You had times that you could call people and persuade them not to run something negative. Now you got a minute. You got a minute. And it hits a billion people instead of the people who decide the buy the paper the next day.

BRIAN CAPLAN: And with that minute, we each have two minutes to give a quick anecdote. Starting with you, Susie.

SUSIE ARONS: One anecdote. So I represented a well known controversial director, who at the very, very beginning of our fast-breaking film campaign was unsupervised in London working on another project, and made a very casual comment to a reporter about that "Jews control the media." And the next day I had already set up an editorial board meeting with the *Wall Street Journal* and an editorial board meeting with the *New York Times*, and we had a studio and a film coming out. So we needed to make some decisions. There wasn't a morals clause and there wasn't a legal issue, but we were in crisis. And so we made the decision—he apologized and we explained to him that for the next five years you are going to be apologizing, and you were wrong and you cannot get angry when you get asked in five years, "What

about when you said the Jews control the media?" And we went ahead with the *New York Times* board meeting, and we went ahead with the *Wall Street Journal* board meeting, because he had to own his actions. And then we were able to move on, and in every single interview for the next three weeks it came up, in every interview, and then we dealt with it, he apologized 800,000 times. Did it affect business? I think it did. Has it affected a career? I don't think it has. Because he had to face it and he didn't apologize for—there's nothing worse than apology on an apology—"I'm sorry if I offended somebody." You either are sorry or you're not sorry. Because you did offend somebody. So, we made it very clear that this had to be a real apology and work needed to be done, and it did. And his career has flourished. But that's a crisis.

PAUL ROSENBERG: I guess for me, I mean, one of the things going back to one of the themes I touched on earlier about me being able to use my legal background in what I do, in the early 2000s, I can't remember the year exactly, I probably blacked it out, but Eminem caught two felony cases in one day, from separate incidents. So one in the afternoon, and one at night. Needless to say, he was a little bit out of his mind at the time, and they were both gun charges. So, they were both in Michigan, I'm licensed in New York, but I'm not licensed in Michigan, and of course we hired criminal defense attorneys in Michigan, but during the course of the trial, he wanted me to be very close and physically there and able to be involved in decision making in the process, to the point where he wanted me in court. So, at one point I got in *pro hac vice* to be able to be there for the trial, and I didn't stand up in front of the judge and argue or do any of that stuff, but I was there and was able to be there for my client, and it was just another example of how the sort of preparation and legal background was able to benefit a client.

BRIAN CAPLAN: Good. Theo.

THEODOR SEDLMAYR: I had occasion once, with a client of mine for over 10 years who we had defended in many crises—I won't mention was—you'll figure it out—very major fast food chain decided in a cheap publicity stunt that they were going to send out a press release, asking my celebrity client to change his name for a week for a promotion to 99 Cent in order to help them to sell lots of fast food. And they tried to leverage him into doing it by also saying that they would donate $100,000 to a charity of their choice, if he agreed to it. After being on the defense with him so many times, I saw this as an opportunity where we could go on the offense. So we put together a press release with our publicist and came after the brand, which worked. It was the early days of social media, but you could see that the fans—this particular client was known for many battles in battling this big fast food chain—his fans really liked it. So we quickly filed a lawsuit against them, which got even more publicity for trademark infringement, right of publicity, privacy claims, and very quickly found ourselves in a settlement meeting with this company, and probably 10 to 15 of their executives who came to the meeting and posturing and started talking to them about how we were going to line up the trial date to coincide with his next album release. This brand, I mean, needless to say the rest is confidential.

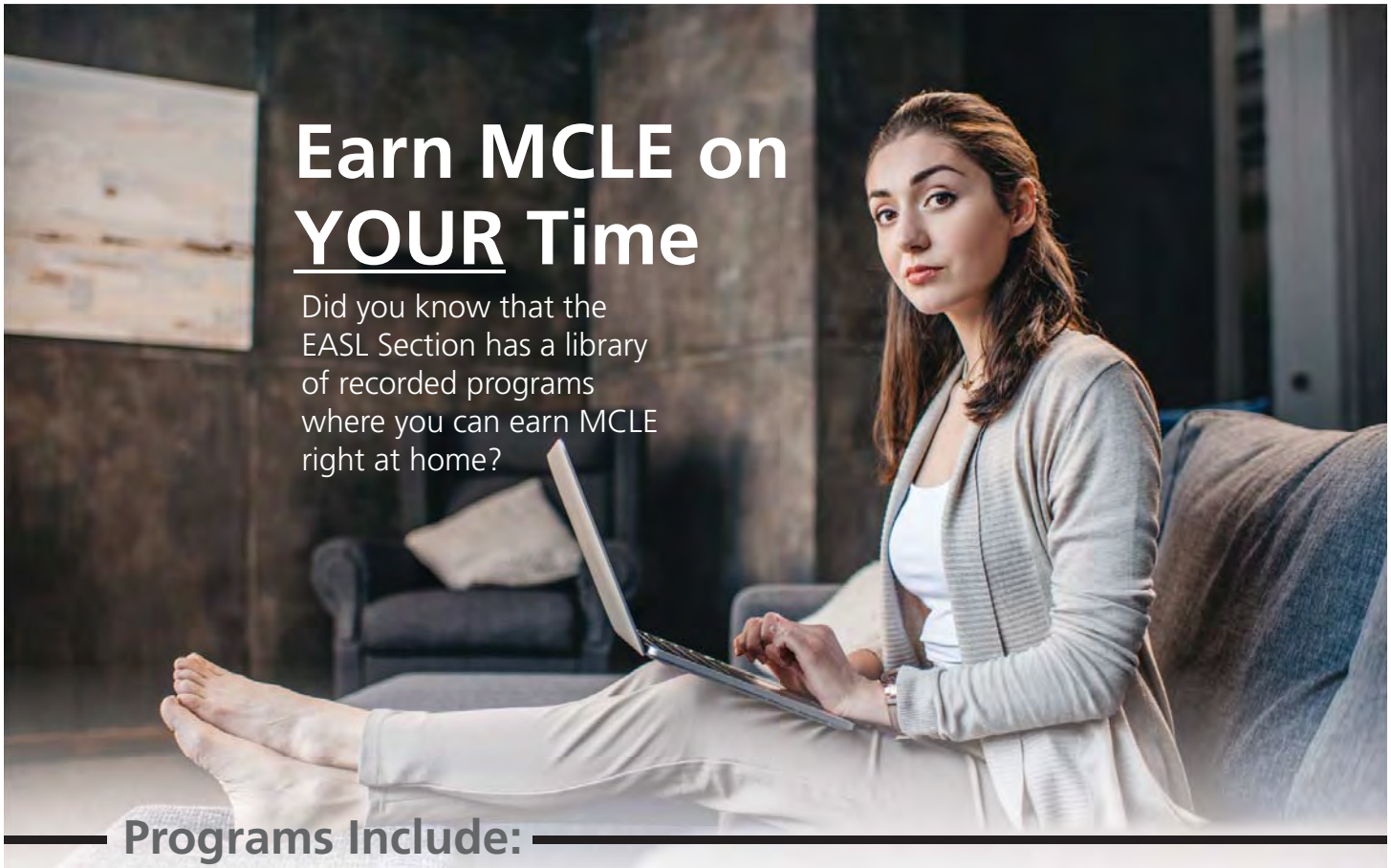
BENJAMIN BRAFMAN: So I learned a lesson early on in my life about the media, and that I'll never forget it. I was representing a very notorious landlord, and he was being hounded by every major city official because he owned a number of buildings in states of terrible disrepair, and they kept hounding him to fix them and he didn't, and eventually they brought him to trial. And it turns out that the case they chose to bring to trial was very defensible. We had a trial in housing court—I'm embarrassed to say I actually tried a case in housing court. I was the only lawyer in the building whose coat matched his pants, the suit jacket matched his pants. But I tried this case in housing court to a judge, not a jury, and after a one-day trial, he was found not guilty. And it was thrown out. And then next day, that night the 11:00 news channel, NBC news had a reporter in the courtroom for the whole day, and the story was "Dracula Landlord Brought to Trial Again for Disrepair in his Buildings." And then they show a group of angry tenants pointing to rusted toilets and broken ceilings and elevators not working. And then the story ended with, "his trial was held before Judge Margaret Cameron in Housing Court." This was the 11:00 news. And they didn't report the verdict. He was completely cleared. The violations were not sustained. And he won. And I called Bob Teague, who I knew well, and I said, "Just explain this to me; I don't care, just explain this to me…" "My editors believe that there are 20 million tenants in the viewing audience and only 250 landlords. It's not news when a landlord gets acquitted. It's news when they get arrested." Thank you very much. And I was a kid, and I grew up knowing that you have to be very, very careful.

BRIAN CAPLAN: So my anecdote is, a recording artist is performing in the Midwest, he sees an attractive young lady in the first or second row, and he ends up having consensual sex with this young lady who shows him a phony ID. Five months later, a Bronx-based negligence law firm sends a letter with a draft complaint to the manager of the artist, saying that there was underage, non-permitted sexual contact. So it's a sexual assault in a civil context. They know—well I don't know if they knew at the time, but it turns out the law for statutory rape is different than the law for civil unpermitted bodily contact, and in most states you can give consent civilly to have the bodily contact, but you can't give the consent criminally. So I did my research in the state where the incident took place. The young lady, who was 17, could give consent, so there was no civil case, and I then approached the client and we discussed where do we go from here. And the question was, well, if they file this case, it could create a criminal case in the other jurisdiction. If they file this case, the people that see the artist

on a regular basis, his fan base, could be significantly impacted, and there was a holdup. I brought it to the attention of the opposing lawyers and they said, "We'll take our chances." So when we're talking about what is or isn't extortion, there's certainly roads close to that, and I had to make the decision with the client whether to go to the bar, but they could still file the case. I mean, I'm going to go to the bar before they filed and say they're threatening to file? They haven't filed yet, and if they file, the cat's out of the bag, and it could have a huge impact upon the persons livelihood and life. So clearly a crisis. And we went through the whole process of actually having the blood test to show that we weren't denying that the encounter took place, and we ended up paying blood money to keep the case from making the media, because that was the only way to avoid and take care of this crisis under the totality of the circumstances, and I hated that we were paying a penny to these vultures or Draculas. But anyway, so, these are all different crises. We all handle them different ways. We bring our years of experience to the table. But I think the key thing that came across from listening to everybody here is calm, confidence, control, in other words, that nobody here is easily swayed, that we take control of the situations, we bring confidence to our clients, and we have to teach the clients no matter what the crisis, and you said it best about that, you need to be the surgeon. And I think that each of us in our own respects has to be the surgeon. Thank you all for your time.

Endnotes

1. *See Scorpio Music S.A. v. Willis*, No. 3:2011-CV-01557 (S.D. Cal. 2012).
2. *See Skidmore v. Led Zeppelin*, No. 15-CV-03462 (D.C. Cal. 2016).
3. *See Egiazarya v. Zalmayev*, 290 F.R.D. 421 (S.D.N.Y. Mar. 8, 2013); *Bloomingburg Jewish Education Center v. Village of Bloomingburg*, 171 F. Supp. 3d 135 (S.D.N.Y. Mar. 18, 2016); *In re Grand Jury Subpoenas Dated March 24, 2003 Directed to (A) Grand Jury Witness Firm and (B) Grand Jury Witness*, 265 F. Supp. 2d 321 (S.D.N.Y. June 2, 2003).
4. *See United States v. Adelman*, 107 F. 2d 497—Circuit Court of Appeals, 2nd Circuit 1939.
5. *See Bollea v. Gawker Media LLC*, No. 12-012447-CI (6th Cir. Ct., FL 2016).



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Review of Interscholastic Court Cases and Current Issues Facing the Virginia High School League and Other State Athletic Associations

By Scott L. Jefferies, Ed. D.

This article derived from a dissertation titled *An Analysis of the Performance, Governance, and Authority of the Virginia High School League, Inc.*

Abstract

The Virginia High School League (VHSL) is a private, non-profit organization whose member schools include public high schools and one private school in the Commonwealth of Virginia.[1] This organization manages and supervises athletics and other extracurricular activities such as forensics, debate, drama and publications.[2] The mission statement of the Virginia High School League is: "The Virginia High School League is an alliance of Virginia's public and approved non-boarding, non-public high schools that promotes education, leadership, sportsmanship, character and citizenship for students by establishing and maintaining high standards for school activities and competitions."[3]

"Each state has established a system of supervision and oversight in regard to regulating interscholastic athletics and activities."

Since each state is responsible for establishing a system of supervision and oversight for regulating interscholastic athletics and activities, differences in the administrative structures among each state's athletic associations are inevitable. This article contains court cases regarding interscholastic athletics and their impact on state athletic associations. Current issues facing not only the Virginia High School League, but all state athletic associations, are also examined.

Review of Interscholastic Court Cases and Current Issues Facing the Virginia High School League and Other State Athletic Associations

Athletics and extracurricular activities are major components in the lives of many high school students. In 2013, an estimated 7.7 million students participated on high school sports teams, according to the National Federation of State High School Associations.[4] Students participating in athletics and activities date back to the Nineteenth Century, with the commencement of mandatory school attendance in Massachusetts in 1852. Concurrent with the enactment of compulsory school attendance across the nation came increased amounts of leisure time in public schools, which led to the development of competitive sports. In 1903, the first public school athletic association, the Public School Athletic League for Boys, was established in New York City, and formal athletic contests emerged as a primary strategy to maintain school enrollment of boys.[5] By 1910, a total of 17 other cities in the United States had formed their own competitive athletic associations, or leagues. These leagues formed by cities served as a foundation for states to form their own athletic associations.

In 1920, the National Federation of State High School Associations (NFHS) was founded, leading to the development of education-based interscholastic sports and activities.[6] By 1930, 28 athletic leagues were members of the NFHS, and by 1940, the membership had increased to 35. Finally in 1969, all 50 state athletic leagues plus the District of Columbia had joined the NFHS.[7] The NFHS establishes standards and rules for competition and provides guidance and assistance to the administrators who oversee high school sports and activities. The NFHS, from its home office in Indianapolis, serves its member state high school athletic/activity associations and leagues. Specifically, the mission of the NFHS is to "serve its members, related professional organizations and students by providing leadership for the administration of education-based interscholastic activities, which support academic achievement, good citizenship and equitable opportunity."[8] The NFHS publishes rules for 16 sports and actively administers fine arts programs in speech, theater, debate and music. It also provides a variety of program initiatives that reach the 18,500 high schools and over 11 million students involved in athletic and activity programs.[9]

Each state has established a system of supervision and oversight in regard to regulating interscholastic athletics and activities. Consequently, inevitable differences in the administrative structures exist among the state athletic associations. For example, three state associations, Maryland Public Secondary Schools Athletic Association, North Carolina High School Athletic Association, and Texas University Interscholastic League, and the District of Columbia allow only public school membership.[10] Gender is another example of how individual state associations differ. The State of Iowa has two separate state athletic associations, with the Iowa High School Athletic Association responsible for the supervision of boys' athletics only and the Iowa Girls High School Athletic Union responsible for the supervision of girls' sports.[11] Still

another example is provided by the number of state associations within individual states. Texas, Iowa, New York, Alabama, Mississippi and Georgia all have more than one athletic association that govern interscholastic activities.[12]

Litigation

From 1938 to 1960, only four cases across the nation involved state athletic associations.[13] From 1960 to the present, the number involving state athletic associations increased significantly.[14] A main issue surrounding some of these cases is student-athlete eligibility concerns.

Student-Athlete Eligibility

Every state is responsible for providing governance and establishing policies regarding high school athletics and activities. A major policy on which every state athletic association must provide clear expectations is student-athlete eligibility. This article will explore court cases relating to student-athlete eligibility based on residency, undue influence, special education, and transfer rules. The results of some of these cases helped to shape policies regarding student-athlete eligibility across the nation.

"While the academic eligibility policies across states continued to develop, eligibility in interscholastic athletics has also evolved to take into consideration residency, transfers, and age limits."

The term student-athlete implies that the student involved with athletics and education is both a good student and an active participant in athletics.[15] Efforts to reform academic eligibility for student-athletes has been a task for state and local athletic associations for decades. Charles E. Forsythe identified six reasons why student-athlete eligibility rules were necessary for state athletic associations:

1. They provide standards for all schools to meet.
2. The rules will be clearly known to all involved.
3. They relieve individual schools from potential criticism.
4. Individual administrators will not make rules.
5. They establish minimum academic standards.
6. They aid in maintaining positive relationships among schools.[16]

In the 1930s, almost all states had a minimal rule for the academic eligibility of athletes.[17] In the 1950s, a total of 46 states had policies in place that required student-athletes to pass three major academic subjects in order to be eligible.[18] As the eligibility standards were becoming more prevalent, so was corresponding litigation.

In *Mitchell v. Louisiana High School Athletic Association*, the court held that Louisiana had a legitimate interest in the regulation of high school sports, and that policies can be established in order to promote fair and level competition between schools.[19] In *Dallam v. Cumberland Valley School District*, the rules surrounding the eligibility of transfer rules established in Pennsylvania were found not to violate the due process and equal protection rights of student-athletes. In *Moreland v. Western Pennsylvania Interscholastic Athletic League*, the appeals court ruled that Pennsylvania had an interest in establishing minimum standards for student-athletes. Results from cases like these established that state athletic associations have the authority to establish rules and policies regarding student-athlete eligibility.

In 1983, the Los Angeles Unified School District created a rule that stated "to be eligible for participation in extracurricular activities, students must maintain a C average in four subjects and have no failures."[20] In June, 1984, the state of Texas passed House Bill 72, which would later be named "no pass/no play."[21] This House Bill stated that if a student-athlete was failing any class, he or she was ineligible to participate in sports for a period of six weeks. While the academic eligibility policies across states continued to develop, eligibility in interscholastic athletics has also evolved to take into consideration residency, transfers, and age limits. Court cases across the United States have shown that student-athlete eligibility has its complexities.

Rules that are put into place by state athletic associations, such as four-year rules, eight-semester rules, or age rules, are enacted to restrict eligibility for a certain time period. In most cases, plaintiffs who challenge age rules put in place by state athletic associations are usually not successful. Courts have consistently held that a student-athlete does not have a constitutional right to participate in interscholastic athletics and activities.[22]

Residency

In *H. R. v. The Minnesota State High School League* (MSHSL), a student was found ineligible for varsity competition for the 2012-2013 school year due to residency.[23] During his middle school years, this student attended Hutchinson Middle School in Hutchinson, Minnesota.[24] He alleged that during his time there, he experienced harassment and was threatened and assaulted.[25] After middle school, the student moved in with his grandparents and attended Woodbury High School in Woodbury, Minnesota.[26] The student entered Woodbury as a freshman and did not participate in sports that year.[27] At the conclusion of his freshman year, as a result of his grandmother's failing health, the student moved back with his parents in Hutchinson; however, he did not enroll in Hutchinson High School.[28] Rather, he enrolled at Holy Family Catholic High in Victoria, Minnesota.[29] While there during his sophomore year, he tried out and earned a spot on its varsity hockey team.[30] After checking his

eligibility, Holy Family Catholic High ruled the student ineligible because of MSHSL Bylaw 111.00.[31] This bylaw states that a student is ineligible for a period of one calendar year unless the student meets one of the following criteria:

A. The student is enrolling in the ninth grade for the first time.

B. The student's family has a change of residency and occupancy in Minnesota.

C. The student's residence is changed pursuant a child protection order, placement in a foster home, or a juvenile court disposition order.

D. The student's parents are divorced and student moves from one custodial parent to the other cus todial parent.

E. The student's parents moved to Minnesota from a state or country outside of Minnesota and establish residency in a Minnesota public school district.

Holy Family Catholic High determined that this student did not meet any of the criteria described in MSHSL Bylaw 111.00, so it deemed him ineligible for competition for the 2012-2013 school year. The student appealed to the MSHSL, but was not granted a waiver. The student then requested an eligibility hearing before an Independent Hearing Officer, retired Judge Michael T. DeCourcy, Sr.,[32] who affirmed the ineligible decision. Following that, the student filed suit, alleging due process and equal protection violations, and sought a preliminary injunction, which was ultimately denied. Additionally, the MSHSL suffered no violations of due process or equal protection rights.

Undue Influence

The Seventh Circuit Court of Appeals determined that the Indiana High School Athletic Association (IHSAA) acted arbitrarily and capriciously when it determined a high school basketball player ineligible based on alleged violations of the IHSAA's undue influence rule.[33] The court examined evidence showing that coaches from a new school, alleged to be recruiting this student, did not offer bribes or any inducements. In contrast, evidence was produced to show the student's coaching staff at his current high school offered the student's family a home with a reduced rent, living quarters at an assistant coach's home, and transportation. The appeals court stated that, while the IHSAA determined the coach at the new school to be in violation of the undue influence rule, it was ignoring the far more egregious conduct of the coaches at the current school.[34]

Another case, *Brentwood v. Tennessee Secondary Schools Athletic Association*, also involved accusations of a school using undue influence to recruit student-athletes.[35] Brentwood Academy, a private high school, was fined and placed on probation by the Tennessee Secondary Schools Athletic Association (TSSAA) for violating the TSSAA's recruitment rule. The TSSAA claimed that Brentwood provided game tickets to a middle school team, held impermissible off-season practices, and urged students who enrolled at Brentwood to attend its spring football practice.[36] The TSSAA also placed Brentwood on a postseason ban and declared some students ineligible. Brentwood appealed on the grounds the TSSAA violated its First Amendment rights and its right for substantive and procedural due process. This case went all the way to the Supreme Court, which determined that the TSSAA is allowed to impose limitations on the free speech of its members, as long as these restrictions are necessary for its purposes as an athletic league, and Brentwood would not be excused from abiding by them.[37]

"In 1994, the Eighth Circuit ruled in another case involving a student declared ineligible and who challenged the decision under the ADA."

Special Education

A high school student diagnosed with Attention Deficit Disorder in Oregon sought injunctive relief against the Oregon School Activities Association (OSAA) pursuant to the Americans with Disabilities Act (ADA).[38] The student was ruled ineligible during his senior year under the OSAA's Eight Semester Rule, as the student needed to repeat his sophomore year of high school. The student claimed that his disability caused him to repeat his sophomore year, so he filed for a hardship waiver. The OSAA denied the waiver request, and the matter went to court. The court granted the student injunctive relief and even awarded the plaintiff attorney's fees and costs, stating that the student was a "qualified individual" under the ADA, and a hardship waiver would be a reasonable modification.

In 1994, the Eighth Circuit ruled in another case involving a student declared ineligible and who challenged the decision under the ADA.[39] The Missouri State High School Athletic Association (MSHSAA) declared the student in this case, who had learning disabilities, ineligible because of age. The court concluded that a change to the MSHSAA's age rule decision would not be reasonable based on the student's condition, and the court denied the student's claim.[40]

In *Starego v. New Jersey State Interscholastic Athletic Association*, Anthony Starego, an autistic student at Brick Township High School, sought a fifth year of eligibility,[41] and was denied a waiver to participate in the fall of 2013 because of the New Jersey State Interscholastic Athletic Association's (NJSIAA) age and eight-semester rules. The NJSIAA age rule stated that an athlete becomes ineligible for high school athletics if he or she reached the age of

19 prior to September 1st of the current school year, and the NJSIAA eight-semester rule stated that starting with the ninth grade, a student shall have eligibility for four consecutive years.[42]

Starego was hoping to participate in the fall of 2013, but as that would have been his fifth year of eligibility, and he would also be over the age limit. However, Starego brought this case under the ADA, challenging the decision to deny him the opportunity to play. The judge ruled that the NJSIAA provided the student with equal access and opportunity, and denied the plaintiff's motion for a preliminary injunction, which would have allowed him to play the season.[43]

The West Virginia Secondary Schools Activities Commission (WVSSAC) petitioned the Supreme Court of Appeals of West Virginia for a ruling that prohibited it from enforcing an age rule against a 19-year-old who wished to play high school football.[44] The judge stated that while the age rule may be waived for students whose disabilities have delayed their progression through the education process and are able to show that their participation would not alter the quality of the competition, it would not be waived as an accommodation for a high school student whose disability resulted in repeating two years of education and who sought to play high school sports.[45]

Two students who were diagnosed with learning disabilities spent additional time in elementary school as a result of their disabilities. Subsequently, they were found to be ineligible for participation their last year in high school by the Michigan High School Athletic Association (MHSAA).[46] Both students turned 19 before September 1st of their school year, and were found to be ineligible under the MHSAA's age rule. The students appealed. The District Court for the Eastern District of Michigan held that the plaintiffs were disabled and discriminated against solely on the basis of their disabilities under the Rehabilitation Act and the ADA. However, the Sixth Circuit ended up reversing the district court's decision, concluding that the age regulation did not violate the Rehabilitation Act, because the regulation disqualified all overage students, both non-disabled and disabled students.[47] Further, the Sixth Circuit held that the age regulation did not violate the ADA, as the age rule did not prevent the students from accessing their interscholastic sports program.[48]

The Sixth Circuit also heard another case involving a student who was declared ineligible under the eight-semester rule of the MHSAA.[49] The student in this case was repeating his junior year, and played basketball during what were his seventh and eighth semesters of eligibility. At the conclusion of his repeated junior year, the student was diagnosed with Attention Deficit Hyperactivity Disorder and a seizure disorder. While the lower court granted the student a preliminary injunction, the Sixth Circuit reversed the preliminary injunction and supported the MHSAA's ruling of ineligibility. The court based its decision to support the ruling of ineligibility because of his age, and not disability.[50]

In *Mann v. Louisiana High School Athletic Association*, a student transferred to a different school that could better accommodate the student's anxiety disorder.[51] After the Louisiana High School Athletic Association (LHSAA) denied the student's request for an exemption to its transfer rule, the student appealed to the District Court of Louisiana, seeking declaratory and injunctive relief alleging a violation of the ADA.[52] As a result, the court granted a preliminary injunction, which prevented the LHSAA from declaring the student ineligible, and allowed the student to participate in the upcoming football season. When the Fifth Circuit received the case, it reversed and vacated the grant of the preliminary injunction, stating that the student would not likely have succeeded on the merits of his claim of being disabled under the ADA.[53]

Transfer Rule

State athletic associations develop transfer rules to govern the regulations of interscholastic sports.[54] While they vary from state to state, transfer rules essentially prohibit students from participating in certain sports and activities unless they fall under certain exemptions after transferring. The state athletic associations establish uniform procedures and regulations for interscholastic activities to protect the welfare of the students, and to establish sensible and educationally sound controls.[55] Transfer rules often place students and their families in the position of having to decide between participation in interscholastic sports and choosing a school for other personal or academic reasons.[56] Students, parents, and even schools have challenged transfer rules on grounds ranging from freedom of religion violations to procedural and substantive due process violations.[57]

The case of *Barnhorst v. Missouri State High School Activities Association* involved a student with an outstanding academic record who had transferred from one private high school to another.[58] The family chose to transfer the student to the new school to improve the student's chances of attending a better college or university. The student had participated in track, volleyball and basketball at her former school. The Missouri State High School Activities Association (MSHAA) ruled the student ineligible for a period of 365 days, because she transferred from one MSHAA member school to another. After appeals to the MSHAA, the case ultimately went to litigation. While the court acknowledged that the receiving school in this case was not an athletic power and was better known for its academic program, and the student was not recruited for athletic purposes, the student's appeal was denied just the same.[59]

Another case, *Indiana High School Athletic Association v. Carlberg*, involved a student transferring to another school for academic reasons.[60] As the student did not transfer because of a change of residency, the Indiana

High School Athletic Association (IHSAA) declared the student ineligible for a period of 365 days. While the IHSAA conceded that the student did not transfer for athletic reasons, the Indiana Supreme Court held that the IHSAA's transfer rule was rationally related to a legitimate interest.[61]

In *Robbins v. Indiana High School Athletic Association*, a student who played volleyball transferred from a public school to a parochial school.[62] The student provided the district court with evidence that she recently converted to Catholicism, and therefore had a desire to take courses not available to her in public schools. Nonetheless, the district court upheld the IHSAA's decision to declare the student ineligible. The court acknowledged that the transfer rule in question was imperfect, but noted that the rule should be changed through the IHSAA and not through the courts.[63]

The case of *Mancuso v. Massachusetts Interscholastic Athletic Association, Inc*. also examined the topic of students transferring schools.[64] In the fall of 1999, Elizabeth Mancuso entered Austin Preparatory School, a private school, as a freshman. While at Austin, she did not participate on its swim team; rather she participated as a member of a private swimming club. After her freshman year, Mancuso transferred to Andover High School, repeated her freshman year, and joined the swim team. She competed over her next three years and helped Andover earn three state championships.[65] Shortly before her senior year, the Massachusetts Interscholastic Athletic Association (MIAA) deemed her ineligible to compete because of its fifth-year student rule. The school appealed, and requested a waiver on the grounds that she had not competed in her sport for a school for five years. The appeal went through the MIAA's internal review process, and was heard before a three-member subcommittee of the MIAA's Eligibility Review Board.[66] The appeal for a waiver was denied. Subsequently, the family appealed to the Massachusetts Interscholastic Athletic Council, which was the final reviewing entity in the MIAA's waiver appeals process. This final appeal for a waiver was also denied, and on October 10, 2003, the student commenced an action in State Court, where she filed a motion for a temporary restraining order to allow her to compete during her senior year.[67]

Her complaint was to seek relief from the MIAA's ineligibility decision and claim a civil rights violation. On October 23, 2003, a Superior Court judge granted a preliminary injunction, and she was allowed to swim her senior year.[68] The Superior Court also heard Mancuso's argument that the MIAA's decision not to grant the waiver infringed on her property interest in participating in interscholastic athletics, and that the MIAA deprived her of that property interest without due process.[69] The judge submitted the issue to the jury, and it returned a verdict in favor of Mancuso. The jury decided that the MIAA did not provide her with due process, and ultimately awarded her compensatory damages in the amount of $10,000.[70]

The MIAA then appealed to the Supreme Judicial Court of Massachusetts. Mancuso needed to prove to the court that the MIAA deprived her of a right provided to her by the Constitution in order to recover any damages. The court ruled that while all children in Massachusetts have a Constitutional right to a public education, that right is not synonymous with the right to participate in extracurricular activities.[71] This decision reconfirms that unless states are willing to enact laws or regulations that specifically grant students the right to participate in extracurricular activities, those activities will continue to be deemed a privilege and not protected under federal or state law.[72]

Virginia Court Cases

For approximately 30 years, the VHSL has been involved in court cases that helped reshape prior policies and procedures and established new policies that are being utilized today. Cases involving the VHSL regarding student-athlete eligibility, VHSL Age Rule, player ejection, VHSL classification, Title IX, and liability will be discussed in this section.

Student-Athlete Eligibility

The Circuit Court of Loudoun County heard a case regarding student eligibility, *Loudoun County High School v. Virginia High School League, Inc.*, in November of 1994. This case involved a football player who was found ineligible initially. Subsequently, the student appealed on the basis of a hardship but was required to demonstrate exceptional reasons for such a waiver to be granted. Through the VHSL appeals process, he was later found eligible by the Appeals Committee, and was granted a waiver on September 20, 1994.[73]

However, the waiver was granted 18 days after the first football game against Park View High School, a game in which the student in question participated. Loudoun County High School was looking for the waiver to be retroactive, thus reversing the forfeiture that resulted in playing an ineligible player. The reversal of the forfeiture would have allowed Loudoun County High School to participate in post-season playoffs.[74]

The decision to grant the student a waiver was still subject to more levels of appeal, and eventually made its way to the Executive Appeals Subcommittee of the Executive Committee of the VHSL on September 30, 1994. The Executive Appeals Subcommittee denied the appeal, concluding that the student participated as a result of a failure on the part of the principal and the athletic director to notice a violation of the Semester Rule of the VHSL.[75] The Semester Rule stated that student participation in VHSL activities was limited to eight consecutive semesters beginning when a student first entered the ninth grade.

The student's eligibility was not retroactive; rather, it was effective on September 20, 1994. The judge in the case agreed with the Executive Appeals Subcommittee in its conclusion, that while it did indeed find a hardship to exist, the waiver should not have been retroactive, because of the school's actions of allowing the violation to occur in the first place.[76] The judge concluded by stating: "The Committee was not required to make the waiver retroactive. It was submitted after a game was played and the automatic forfeiture provisions become operative. However, the Committee having acted upon the request for retroactive application must do so within the rules and the powers granted to the committee and may not substitute a sanction for a ruling on a hardship waiver."[77]

The case of *Chesterfield County School Board v. Virginia High School League* was heard in November of 1994 and involved the eligibility of a foreign exchange student who was attending Thomas Dale High School.[78] At the time of this case, the Council on Standards for International Educational Travel (CSIET) set the policies and procedures for foreign exchange students in the Commonwealth of Virginia. If a student was enrolled in a public school in Virginia through any program other than CSIET, he or she was not eligible to participate in VHSL-sanctioned activities. The organization that was responsible for bringing the aforementioned student to the United States was not the CSIET. The student ended up playing for a short time in one football game that year. As a result, Thomas Dale High School had to forfeit the game, which unfortunately cost it a playoff berth that year. The school system sought a petition for injunction, but the court denied the request.

The Transfer Rule of the VHSL applied whenever a student enrolled in one school transfers to another school without a corresponding change in the residence of the student's parents or guardians.[79] The parents of students in the Big Stone Gap Division, whose school was closed under a school consolidation plan, challenged the applicability of Transfer Rule to their children. The plaintiffs claimed that it violated substantive and procedural due process, equal protection, and the Virginia Constitution. The case was heard in 2011.[80]

St. Paul High School in Wise County was one of the closed schools. Residents from Russell County, who had been attending St. Paul High School, had the option to attend their home school in Russell County or remain in Wise County, in the newly designed school. Either way, the Russell County students would not lose a year of eligibility under the Transfer Rule of the VHSL. However, residents of Wise County who attended the school in Wise County but wished to attend school in Russell County would have to sit out a year under the Transfer Rule. Some Wise County families sued the VHSL, arguing that they had the right as parents to choose a school for their children, and the Transfer Rule denied them of this right. Additionally, they claimed that they were denied equal protection when compared to the students in Russell County. The judge added:

> Again, the fact that there are obvious consequences to the choice of school does not implicate a Constitutional issue. Moreover, VHSL is a voluntary association, and such associations are traditionally granted significant deference as to their internal affairs, rules, and bylaws unless enforcement would be arbitrary, capricious, or an abuse of discretion. For these reasons, I find that the plaintiffs have not demonstrated a likelihood of success on the merits. Apart from this deficiency, the plaintiffs have also failed to show irreparable harm.[81]

Although the VHSL persevered in the *McGee* case, it did, in fact, amend its handbook to allow for a Transfer Rule exception. The updated handbook stated the following:

> For the start of the 2011-12 school year only, a one-time transfer eligibility exception applies only to those students attending a Wise County school that closes due to consolidation and the student wishes to return to the school serving his/her parents' out-of-county residence. Students whose parents live in Wise County but who choose to transfer out of county without a corresponding move by their parents, or those who fail to meet the prescribed VHSL Transfer Rule or one of its Exceptions, would not be eligible and would need to file an application for VHSL Transfer Rule Waiver with the appropriate district committee. All necessary forms, appeals procedures and criteria for considering appeals are available on the VHSL website. No appeal will be heard in advance on a presumptive basis but only after a student becomes ineligible.[82]

In *Bailey v. Virginia High School League, Inc.*, the plaintiffs also challenged the VHSL's Transfer Rule. The parents claimed that the Transfer Rule interfered with their fundamental rights to make decisions in the best interest of their son. Prior to the appeal, the United States District Court for the Western District of Virginia granted the VHSL's motion to dismiss this claim, and this ruling was ultimately affirmed.[83] The parents' right to control individual components of their son's education, including his participation in interscholastic sports and other activities, was not protected. The court ruled in favor of the VHSL, ascertaining that the Transfer Rule had a legitimate state interest in discouraging athletic and academic

recruiting and encouraging students to attend school in their parents' resident district.[84]

VHSL Age Rule

The case of *Thompson v. Virginia High School League, Inc*. involved a student who was attending Granby High School in Norfolk, Virginia, and was found ineligible by the Age Rule established by the VHSL.[85] The Age Rule stated that no student could reach his or her nineteenth birthday on or before the first day of August of the current school year.[86] The family of the student, who wanted to play football, filed a suit claiming that the VHSL requirement deprived the student of privileges and rights secured by the United States Constitution. The basis of the claim was that other students were granted eligibility waivers in similar circumstances, and therefore the school's denial of a waiver was unjustified. The court concluded that the rule did not follow any standard and was not equal to all students. The court also ruled that there was no supporting reasoning behind VHSL's decisions, and any rules or decisions made by the VHSL were not known to the public.

This was an important outcome, as the court informed the VHSL that it had the ability to grant waivers to students as long as they came to conclusions according to a standard that was not going to take away a benefit from students in Virginia. The result of this case prompted the VHSL to adopt processes regarding Age, Scholarship, Transfer Rule and Semester appeals.

An additional case involving the Age Rule of the VHSL was heard in 1997, in the Circuit Court for the City of Hampton, and eventually in the United States District Court for the Eastern District of Virginia.[87] This case involved a student who had a learning disability. The student claimed that his learning disability caused him to be over age, but failed to show that he experienced a delayed start or interruption in his educational progression due to an identified profound disability. The student was found to be treated fairly and afforded due process by the VHSL as it went through the waiver process. The court found that the VHSL made a good faith effort to apply the criteria for appeals evenly across the board, adding that the plaintiff not only received due process, but received more than he was technically entitled to receive throughout the appeals process.[88]

Another case, *Sisson v. Virginia High School League, Inc*., dealing with the VHSL Age Rule, was heard by a U.S. District Court in Roanoke, Virginia in 2010. In this case, the plaintiff, a senior in high school, was one day too old to participate in VHSL League-sponsored athletic activities because he turned 19 on July 31, 2010.[89] The student suffered from a mild learning disability, but was behind in school because of repeating a grade in elementary school, due to his parents' voluntary decision. The student did not fail the grade, although the school did recommend that the grade be repeated. The court denied the motion for a temporary injunction and concluded that:

> In closing, the court is not unsympathetic to Sisson's plight and likely would have granted him a waiver if it had been responsible for making the decision. However, in light of the legal standards governing Sisson's federal claims and the instant motion, the court is unable to conclude that he is entitled to the extraordinary remedy of preliminary injunctive relief. Accordingly, his motion for temporary restraining order and preliminary injunction must be denied.[90]

As a result of the injunction being denied, the student voluntarily dropped the case, and it never went to trial.

In 2011, a Circuit Court in Norfolk, Virginia heard the case of *Dean v. Virginia High School League, Inc.* In this case, the plaintiff questioned the VHSL's use of its Age Rule in terms of student-athlete eligibility. A 19-year-old senior was seeking a waiver to the Age Rule, alleging a disability related to lead poisoning as a child. While being able to show documentation of lead poisoning as a 4-year-old, the family was unable to show that his medical condition was the reason why the child repeated two grades. As such, the judge ruled in favor of the VHSL and stated that the VHSL provided a more than adequate appeals process. The judge added that: "The VHSL establishes rules that govern eligibility for thousands of high school athletes across Virginia. In the absence of the violation of a Constitutional, statutory, or common law right, it ought to be allowed to adopt, interpret, and apply its own rules without interference from the courts."[91]

Player Ejection

A case involving a student who was ejected from a football game was heard in November of 1994. The case, *Harris v. Virginia High School League, Inc*., involved a student who was a football player at Thomas Walker High School. The student was ejected from a football game after an official on the field witnessed the student punch an opposing player. Under the Sportsmanship Rule established by the VHSL, the student would have to sit out the game immediately following the one-game suspension for ejections. After learning of the suspension, the student sought and received an injunction against the one-game suspension from being enforced.[92] Thereafter, the student filed a lawsuit that challenged the constitutionality of the VHSL's procedures for appeals.

The principal of Thomas Walker High School conducted an investigation, and provided the student his appropriate procedural rights. Interviews were conducted with the student and relevant witnesses. As a result of the investigation, the principal determined that the ejection and one-game suspension would stand. The court ruled

in favor of the VHSL, concluding that the VHSL appeals process was constitutional and the one-game suspension would be upheld.[93]

VHSL Classification

A case regarding reclassifying and redistricting of schools was heard in the Circuit Court of Wise County, Virginia in November of 1996.[94] The issue centered on J. J. Kelly High School, Wise County Public Schools, that was reclassified from Group A to Group AA. In March of 1995, the Redistricting and Reclassification Committee of the VHSL was appointed to gather data and devise a plan for redistricting and reclassifying. On July 29, 1995, the committee submitted tentative redistricting and reclassification plans to member school principals in anticipation of the plan going into effect in 1996.[95]

Classification sizes were determined as follows: Schools with 500 or fewer students were placed in Group A, schools with student populations between 501 and 1,000 were placed in Group AA, and schools with over 1,001 students were placed in Group AAA. However, instead of determining school membership using attendance figures of tenth through twelfth graders in the September 30, 1995 report as stated in its bylaws, the committee used attendance figures of ninth through twelfth graders from the March 31, 1995 report.[96] This resulted in J. J. Kelly High School having a total school membership of 512 students, and thus moved it from Group A to Group AA.

The court ruled that the VHSL did not follow its own process to amend bylaws. The VHSL appealed, and the case was heard in the Virginia Supreme Court, which ruled that the VHSL acted in violation of its bylaws. The judge in the case determined that the language of the bylaws instructed VHSL exactly how the student membership of each member high school must be determined, and its action was in violation.[97] As a result of this case, the VHSL amended its bylaws to prevent such a situation from occurring again.

Title IX

The United States District Court for the Western District of Virginia heard the case of *Alston vs. Virginia High School League, Inc*., in September of 1997.[98] This case involved the season of play for girls' basketball, girls' volleyball and girls' tennis. The plaintiffs claimed that the defendant, the VHSL, denied certain female athletes in the Commonwealth of Virginia's public high schools equal treatment, opportunities and benefits based on their sex in violation of Title IX and the Equal Protection Clause of Amendment XIV of the United States Constitution.[99]

Specifically, the plaintiffs claimed that the scheduling practices of the VHSL treated boys' sports differently than girls' sports, thus forcing some girls to stop playing sports they previously were able to play, while no boys were forced to stop playing any sports.[100] Historically, the VHSL had been scheduling boys' sports in a way that each sport was played in the same season for all classification levels in Groups A, AA and AAA. However, the scheduling of girls' sports varied depending on the classification level. For example, girls' basketball was played in the fall for Groups A and AA, but in the winter for Group AAA.[101] The plaintiffs alleged that the combined effects of VHSL's scheduling of girls' and boys' sports were discriminatory.

The VHSL was found to be in violation of Title IX and the Equal Protection Clause under the U. S. Constitution. It was ordered to align girls' basketball, girls' volleyball and girls' tennis with the boys' teams in the same seasons in all group classifications, and to have the aforementioned alignment completed by the beginning of the 2004-2005 school year.

Liability

In November of 1996, the Circuit Court of the County of Madison, Virginia, heard the case of *Breeden, et al. v. Virginia High School League, Inc*. This case involved a state football game between Sussex Central High School and Madison County High School. It was a semifinal playoff game, in which the support rail on a back row of bleachers collapsed during the game, resulting in injuries to four spectators in attendance. While the jury reached a verdict to award the injured spectators $215,000, the judge decided that no evidence was presented showing that the VHSL had breached any duty or responsibility.[102] Consequently, the judge set aside the verdicts and ruled in favor of the VHSL. Although Breeden, et al. attempted to appeal to the Virginia Supreme Court, they were denied their petition.

Current Issues

The VHSL has been involved in litigation regarding policies and procedures for decades. It and other state associations face new issues regularly in new policies. Current issues that have emerged, and potential litigated topics, such as private school participation, home-schooled students, concussions, and transgender students, will be discussed in this section.

Private School Participation

A court case involving Liberty Christian Academy (LCA) and the VHSL over an antitrust claim was settled in May of 2015. The agreement resulted in action taken by the VHSL Executive Committee on May 7th.[103] Similar action was then taken by the full membership of the VHSL and the LCA Board of Trustees to approve the agreement.[104]

The resulting agreement allowed all non-boarding private schools in Virginia to apply for membership to the VHSL. Any private school that desired to join the VHSL must meet the same participant eligibility requirements and regulations as public school students. New regula-

tions were approved by the VHSL Executive Committee in May of 2015 that provided updated language and guidelines in the VHSL Handbook to accommodate for the inclusion of private schools.[105]

As a result of the inclusion of private schools to the VHSL, a policy was established to create public and private school division? The policy, entitled Formation of Private and Public School Divisions, states that the

> VHSL will seek from the Virginia Independent Schools Athletic Association ("VISAA") an agreement to incorporate and include VISAA in VHSL as a private school division, which will have its own autonomous rules, governance, finances, and management, but will have VHSL member status (hereafter, the "private school division"). The private school division will exist alongside the current VHSL membership (hereafter, the "public school division"). In interscholastic sports, the private school division may have regular season and post-season playoff schedules that are separate from those of the public school division, but shall be treated equally for competitive purposes as provided in the VHSL Football Rating Scale.[106]

For the 2015-2016 school year, the only private school to obtain VHSL membership was Liberty Christian Academy (LCA).[107] Prior to joining the VHSL, LCA was a part of the Virginia Independent Schools Athletic Association (VISAA). The VISAA was established in 1997, has over 90 member schools, and provides information, advocacy, professional development, and state championship tournaments for the independent schools in Virginia.[108]

Some states have implemented policies to address the competitive balance of private school participation, while others are weighing options or have not yet implemented a system.[109] The Indiana High School Athletic Association is in its third year of competition, which classifies schools based on their previous year's tournament successes. The Georgia High School Association passed a play-up penalty for all public or private member schools, which advances schools one level of classification if that school takes more than three percent of its students from outside the county in which the school is physically located.[110] The Illinois High School Association uses a multiplier (1.65) for private schools to determine their postseason classes.[111]

Home-schooled Students

The VHSL continues to prevail in the highly contested battle to allow home-schooled students the ability to participate in VHSL sanctioned activities at the school nearest to the home-schooled student resides. The "Tebow Bill," named after for University of Florida quarterback Tim Tebow, has already been enacted in 29 states, allowing home-schooled students to play sports.[112] In April 2015, the Virginia House of Delegates failed to override a veto by Virginia Governor Terry McAuliffe. The bill required a two-thirds majority vote to override, but the vote was only 60-39, thus allowing the veto of House Bill 1626 by Gov. McAuliffe. Originally, the bill passed the Virginia House of Delegates by a vote of 57-41 and the Virginia Senate by a 22-13 vote.[113] Similarly, Gov. McAuliffe vetoed legislation that would have allowed home-schooled students to participate in VHSL-sanctioned activities on February 20, 2017.[114]

According to an article on the National Federation of State High School Associations' website, approximately 1.7 million students are home-schooled in the United States.[115] This number has more than doubled since a home-school study was first conducted by the U. S. Department of Education's National Center for Education in 1999. During the 2015-2016 school year, an estimated 33,000 students in Virginia, aged five to 17, were home-schooled.[116]

Two other states that do not allow home-school participation are New York and West Virginia. The New York State Public High School Athletic Association (NYSPHAA) requires student-athletes to be bona-fide students at the public schools it represents.[117] Additionally, the West Virginia Secondary School Activities Commission (WVSSAC) does not permit home-schooled students to participate on school teams. However, the WVSSAC does allow for home-schooled students who attend at least half of every school day at their schools to participate in athletics.[118]

Iowa allows home-school participation. The Iowa High School Athletic Association (IHSAA) has permitted home-schooled students to participate on interscholastic sports teams since 1997.[119] The IHSAA requires all home-schooled athletes to meet eligibility requirements set by the state association as well as any additional requirements the schools have where they will be playing.[120]

Tennessee and Ohio do as well. In Tennessee, the Tennessee Secondary School Athletic Association passed a policy in 2011 that requires home-schooled students to meet 10 eligibility requirements in order to participate in extracurricular activities.[121] In Ohio, the Ohio High School Athletic Association established a policy in 2013 that home-schooled students were held to the same eligibility requirements as regular students, except for being enrolled in their local school.[122]

Parents who decided to have their children home-schooled have not been successful in litigation over whether their children can participate in extracurricular activities.[123] Rather than litigation, the focus has now shifted to legislative action.

A rule prohibiting home-schooled students from participating in interscholastic athletics in West Virginia did not violate equal protection under the West Virginia State Constitution.[124] When families made the voluntary decision not to have their children enroll in the public school system, they were not entitled to the privileges incidental to public education. This rule was determined to support the state's interest in promoting academics over athletics, as students enrolled in public schools were required to maintain a minimum grade point average to participate.[125]

A family in Pennsylvania sued the Midd-West School District for its refusal to permit its daughter to participate in interscholastic basketball.[126] The student was home-schooled from the third grade through the eighth grade, and had never been enrolled in the Midd-West School District, which is where the family resided. In 2001, she stopped home-schooling and began attending Western Pennsylvania Cyber Charter School (WPCCS) as a ninth grade student.[127] The WPCCS was an independent public school and not associated with the Midd-West School District. When the student attempted to play basketball for Midd-West at the beginning of the 2001 school year, she was not permitted to play, because she was not enrolled in the Midd-West School District. The court determined that the student did not have the right to participate in interscholastic basketball because she failed to establish the claim of a property interest to play.[128]

"This task force developed a list of fundamentals for reducing the risk of concussions in high school football, which the National Federation of State High Schools (NFHS) Board of Directors and the NFHS Sports Medicine Advisory Committee approved."

Similarly, the parents of home-schooled students in Michigan failed in their challenge to allow their children to participate in interscholastic athletics.[129] The appellate court in this case affirmed that the students lacked a right to participate because interscholastic athletics are not required of students in Kenowa Hills Public Schools.[130]

Concussions

Among individuals 15 to 24 years of age, an estimated 300,000 sports-related concussions occur annually.[131] While interest in sports-related concussions is usually focused on full-contact sports, like football and ice hockey, concussions occur across a wide variety of high school sports. This study captured data from 20 sports during the 2008-2010 academic years.[132] During this study, 1,936 concussions were reported in total. The majority (47.1%) of the reported concussions occurred in football, followed by girls' soccer (8.2%), boys' wrestling (5.8%), and then girls' basketball (5.5%).[133]

A concussion suit in Tampa, Florida was settled in October of 2015.[134] A former football player for Wharton High School received a $2 million settlement from the Hillsborough County School Board. In this unusual situation, the plaintiff was playing catch before practice and hit his head on a paint machine that was used to line the football field. He was not wearing a helmet, and both the trainer and coaches evaluated him after the incident. They allowed him to drive home after, even though he lived more than five miles away from the school.[135] His father recognized the seriousness of his condition upon his arrival home and rushed him to the hospital. He was found to have a fracture in his skull. In addition to providing the family with the largest settlement in the school district's history, the school district will also provide $1 million in insurance coverage for every high school athlete beginning in the 2015-2016 school year.[136] Furthermore, a policy created in the school district for staff members to follow if they suspect that a student sustained a head injury.

In California, former high school football player John Enloe III filed a lawsuit against the San Diego Unified School District, claiming that he suffered "traumatic and catastrophic brain injuries from which he is still recovering, and from which he may never recover" as a result of multiple hits during a football game in 2014 that resulted in a "serious concussion."[137] According to the lawsuit, the teen attempted to leave the field after the first hit left him confused and feeling nauseous. However, an assistant coach told the teen to re-enter the game, whereupon he was hit again.[138]

In July 2014, a 24-member task force of medical doctors, high school coaches, athletic trainers, and key national leaders in high school sports met to create recommendations for minimizing head-impact exposure and concussion risk in football.[139] This task force developed a list of fundamentals for reducing the risk of concussions in high school football, which the National Federation of State High Schools (NFHS) Board of Directors and the NFHS Sports Medicine Advisory Committee approved.[140] The recommendations and guidelines presented by the task force are as follows:

1. Full-contact should be limited during the regular season, as well as during activity outside of the traditional fall football season. For purposes of these recommendations and guidelines, full-contact consists of both "Thud" and "Live Action" using the USA Football definitions of Levels of Contact.

2. Member state associations should consider a variety of options for limiting contact in practices. The task force strongly recommends full-contact be allowed in no more than 2-3 practices per week. Consideration should also be given to limiting full-contact on consecutive days and limiting full-con-

tact time to no more than 30 minutes per day and no more than 60-90 minutes per week.

3. Pre-season practices may require more full-contact time than practices occurring later in the regular season, to allow for teaching fundamentals with sufficient repetition.
4. During pre-season twice-daily practices, only one session per day should include full contact.
5. Each member state association should review its current policies regarding total quarters or games played during a one-week time frame.
6. Consistent with efforts to minimize total exposure to full-contact, head impact exposure, and concussion risk, member state associations with jurisdiction over football outside of the traditional fall football season should review their current policies to assess if those policies stand in alignment with the Fundamentals discussed within this report and, if needed, modify the policies accordingly.
7. Each member state association should reach out to its respective state coaches' association on designing and implementing a coach education program that appropriately integrates youth, middle school, and high school football programs in every community. USA Football and the NFHS Fundamentals of Coaching courses should be the primary education resources for all coaches. Education for coaches should also include the proper fitting and care of helmets.
8. Each member state association should regularly educate its schools on current state concussion law and policies and encourage schools to have a written Concussion Management Protocol. Schools should also be encouraged to share this information with coaches, parents, and students annually.
9. An Emergency Action Plan (EAP) with clearly defined written and practiced protocols should be developed and in place at every high school. When possible, an athletic trainer should be present at all practices and games.[141]

"In South Dakota, a policy adopted by the state association allowing students to play on sports teams based on the gender with which they identified faced numerous attempts by state legislators to overturn the policy."

The recommendations were designed to allow flexibility for state associations that collectively oversee the more than 15,000 high schools across the country that have football programs. As a result, each state association was tasked with developing its own policies and procedures for implementation.[142]

In 2011, the Virginia Board of Education passed guidelines that directed each school division to develop policies and procedures regarding the identification and handling of suspected concussions in student-athletes.[143] Additionally, the guidelines suggested that consideration should also be given to addressing the academic needs and gradual reintroduction of cognitive demands for students with diagnosed concussions.[144]

"At least 38 states have policies addressing transgender students, with policies ranging from those that allow students to participate according to their identified gender, to those that require students to provide evidence that they have had hormone treatments or surgery."

Transgender Students

State athletic associations are also addressing policies regarding transgender students and athletic participation. The U.S. Department of Education's Office for Civil Rights (OCR) found that Township High School District 211 in Palatine, Illinois, unfairly denied a transgender teenager, who was undergoing hormone therapy but had not undergone gender reassignment surgery, access to school facilities in violation of Title IX, which bars discrimination in federally funded education programs.[145] The Nebraska State Activities Association (NSAA), which governs high school sports in Nebraska, was planning to draft a policy on participation of transgender students following a previous failed policy attempt.[146] Current NSAA policy requires student-athletes to participate in activities according to their biological genders.

In South Dakota, a policy adopted by the state association allowing students to play on sports teams based on the gender with which they identified faced numerous attempts by state legislators to overturn the policy.[147] Recently, one state legislator planned to introduce a bill that would eliminate that choice, relying instead on birth certificates and "visual inspections."[148] At least 38 states have policies addressing transgender students, with policies ranging from those that allow students to participate according to their identified gender, to those that require students to provide evidence that they have had hormone treatments or surgery.[149]

The VHSL adopted a new transgender policy in an Executive Committee Meeting in February of 2014. The organization approved the measure to allow students who have undergone sex re-assignment surgery or

hormone therapy to participate in athletics and activities with their identified genders. The new policy stated:

> When a school identifies a transgender student who seeks to participate in VHSL sports or activities, the school should submit a letter requesting an appeal to the district chairman and the VHSL executive director. The letter should be responsive to the conditions in the policy below.
>
> Privacy Statement: All discussions and documents at all levels of the process either by a member school, appeals panel, and/or the VHSL shall be kept confidential unless specifically requested by the student and family.
>
> VHSL rules and regulations allow transgender student-athlete participation under the following conditions:
>
> A. A student-athlete will compete in the gender of their birth certificate unless they have undergone sex reassignment.
>
> B. A student-athlete who has undergone sex reassignment is eligible to compete in the reassigned gender when:
>
> 1. The student-athlete has undergone sex reassignment before puberty, OR
>
> 2. The student-athlete has undergone sex reassignment after puberty under all of the following conditions:
>
> a. Surgical anatomical changes have been completed, including external genitalia changes and gonadectomy.
>
> b. Hormonal therapy appropriate for the assigned sex has been administered in a verifiable manner and for a sufficient length of time to minimize gender-related advantages in sports competition.
>
> c. If a student-athlete stops taking hormonal treatment, they will be required to participate in the sport consistent with their birth gender.
>
> C. A student-athlete seeking to participate as a result of sex reassignment must access the VHSL eligibility appeals process.
>
> Note: VHSL honors and respects all individuals based on gender, race, sexual orientation and creed while striving to provide safe and equitable competition.[150]

Conclusion

The court cases and current issues discussed in this article have either impacted the policies and practices of state high school athletic associations, or they will more than likely have an impact in the near future. It is imperative for state high school athletic associations to stay current on the policies detailed in their respective handbooks or manuals, and regularly update or amend policies to ensure relativity. Additionally, it is important for state high school athletic associations to monitor recent court rulings, particularly on matters pertaining to topics such as student safety and transgender students. This will ensure that each state high school athletic association fulfills its responsibility for establishing a system of supervision and oversight for regulating interscholastic athletics and activities efficiently and effectively.

Endnotes

1. Virginia High School League, Inc. v. J. J. Kelly High School, 493 S.E.2d 362, 254 VA. 528 (1997).
2. Polakiewicz, F., *A legal and descriptive analysis of the authority, governance and performance of the VHSL, Inc.* (1985).
3. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA, at 13.
4. Friedman, H., *When did competitive sports take over American childhood?* The Atlantic, (1989), *available at* www.theatlantic.com.
5. *Id.*
6. National Federation of State High School Associations, Annual Report 2013-2014 (2014), *available at* www.nfhs.org.
7. National Federation of State High School Associations Brochure (2015), *available at* www.nfhs.org.
8. *Id.*
9. National Federation of State High School Associations, Annual Report 2013-2014 (2014), *available at* www.nfhs.org.
10. Howard, B. (2015) & Hunt, D., *If variety is the spice of life, each state association is its own herb garden*, NFHS News, (January 1999).
11. *Id.*
12. *Id.*
13. Polakiewicz, F., *A legal and descriptive analysis of the authority, governance and performance of the VHSL, Inc.* (1985).
14. *Id.* at 4.
15. Bukowski, B., *A comparison of academic athletic eligibility in interscholastic sports in American high schools,* U.S. Sports Academy (2008) *available at* www.thesportsjournal.org.
16. Forsythe, C., Administration of high school athletics (1954) New York: Prentice-Hall.
17. *Id.*
18. *Id.*
19. Mitchell v. Louisiana High School Athletic Association, 430 F. 2d 1155 (5th Cir. 1970).

20. Eitzen, D., & Sage, G. Sociology of North American sport (4th ed.), (1989) Dubuque, Iowa: W.C. Brown.
21. Flygare, Thomas J., *Texas Supreme Court Upholds 'No Pass/No Play' Rule*, Phi Delta Kappan, vol. 67, n. 1 at 71 (Sept. 1985).
22. Champion, W. T., 12:6 Rules restricting eligibility. *Fundamentals of sports law* (2015), Thomson/West.
23. *See* H. R. v. The Minnesota State High School League, 2013 WL 147416 (2013).
24. *See id.*
25. *See id.*
26. *See id.*
27. *See id.*
28. *See id.*
29. *See id.*
30. *See id.*
31. Minnesota State High School League Official Handbook (2015), Minnesota State High School League, Inc., Brooklyn Center, MN.
32. *H.R.*, 2013 WL 147416.
33. Indiana High School Athletic Association, Inc. v. Watson, 913 N.E.2d 741 (Ind. Ct. App. 2009).
34. *Id.*
35. Brentwood v. Tennessee Secondary Schools Athletic Association, 531 U.S. 288 (2001).
36. *Id.*
37. *Id.*
38. Bingham v. Ediger, 20 F. App'x 720 (9th Cir. 2001).
39. Pottgen v. Missouri State High School Athletic Association, 40 F. 3d 926, 930 (8th Cir. 1994).
40. *Id.*
41. Starego v. New Jersey State Interscholastic Athletic Association, 970 F. Supp. 2d 303 (2013).
42. New Jersey State Interscholastic Athletic Association Constitution, Bylaws, Rules and Regulations (2015), New Jersey State Interscholastic Athletic Association, Robbinsville, NJ.
43. *Starego*, 970 F. Supp. 2d at 303.
44. Baisden v. West Virginia Secondary Schools Activities Commission, 211 W. Va. 725 (2002).
45. *Id.*
46. Sandison v. Michigan High School Athletic Association, Inc., 64 F. 3d 1026 (1995).
47. *Id.*
48. *Id.*
49. McPherson v. Michigan High School Athletic Association, 119 F. 3d 453, 456 (6th Cir. 1997).
50. *Id.*
51. Mann v. Louisiana High School Athletic Association, 535 F. App. 405, 407 (5th Cir. 2013).
52. *Id.*
53. *Id.*
54. Bui, V. A., *Varsity Blues: A Call to Reconfigure the Judicial Standard for High School Athletic Association Transfer Rules*, Colum. J. L. & Arts, (2010), 34, 231.
55. Trichka, R. & Sawyer, T., State High School Athletic Association's Limited Participation Rules: Transfer, 8J. Legal Aspects Sport, 158, 158-59 (1998).
56. Bui, V. A., Varsity Blues, supra note 54.
57. *Id.*
58. Barnhorst v. Missouri State High School Activities Association, 504 F. Supp. 449 (1980).
59. *Id.*
60. Indiana High School Athletic Association v. Carlberg, 694 N. E. 2d 222, 226 (Ind. 1997).
61. *Id.*
62. Robbins v. Indiana High School Athletic Association, 941 F. Supp. 786 (S. D. Ind. 1996).
63. Bui, V. A., Varsity Blues, supra note 54.
64. Mancuso v. Massachusetts Interscholastic Athletic Association, Inc., 453 Mass. 116, 900 N.E.2d 518 (2009).
65. Wolohan, J., *Court determines that interscholastic sports participation is privilege, not right*, Athletic Business, (2009), *available at* www.athleticbusiness.com.
66. *Mancuso*, 900 N.E.2d at 518.
67. *Id.*
68. *Id.*
69. Wolohan, J., supra note 65.
70. *Id.*
71. *Id.*
72. *Id.*
73. Loudoun County High School v. Virginia High School League, Inc., 35 Va. Cir. 203 (VA Cir. Ct., 1994).
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 3.
78. Chesterfield County School Board v. Virginia High School League, Inc., Circuit Court of Chesterfield County, Case No. CH94001537-00 (1994).
79. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA.
80. McGee v. Virginia High School League, Inc., 2011 WL 45010 35 (W. D. VA, 2011).
81. *Id.* at *3.
82. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA, p. 83.
83. Bailey v. Virginia High School League, 488 Fed. Appx. 714 (4th Cir. 2012).
84. *Id.*
85. Thompson v. Virginia High School League, Inc., Virginia Eastern District Court, Case No. 2:94-cv-00782-RGD (1994).
86. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA.
87. William Perry v. Virginia High School League, Inc., Circuit Court for the City of Hampton, Case No. CL97036652-00 (1997).
88. *Id.*
89. Sisson v. VHSL, 2010 WL 5173264 (W.D. VA, 2010).
90. *Id.* at *8.
91. Dean v. Virginia High School League, Inc., 83 Va. Cir. 333, 8 (VA Cir. Ct., 2011).
92. Harris v. Virginia High School League, Inc., Circuit Court of Lee County, Case No. CH9410-175-00 (1994).
93. *Id.*

94. Virginia High School League, Inc. v. J. J. Kelly High School, 493 S.E.2d 362, 254 VA. 528 (1997).

95. *Id.*

96. *Id.*

97. *Id.*

98. Alston v. Virginia High School League, Inc., 176 F.R.D. 220 (W.D. VA. 1997).

99. *Id.*

100. *Id.*

101. Alston v. Virginia High School League, Inc., 184 F.R.D. 574 (W.D. VA. 1999).

102. Breeden v. Virginia High School League, Inc., Circuit Court of Madison County, Case No. CL94001417-00 (1996).

103. Virginia High School League Settlement News Release, *Virginia High School and Liberty Christian Academy Jointly Announce Settlement* (2015), *available at* http://www.vhsl.org/news.rel-2015-vhsl-lca-settlement-announcement.

104. *Id.*

105. *Id.*

106. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA, p. 13.

107. Virginia High School League Master Football Schedule (2015), *available at* www.vhsl.org.

108. Virginia Independent Schools Athletic Association: Who We Are (2015), *available at* www.visaa.org.

109. Dyer, M., State associations continue quest for competitive balance of schools, (Oct. 13, 2015), *available at* www.nfhs.org.

110. *Id.*

111. *Id.*

112. Staff, *Tebow bill' veto overrides fails in House of Delegates*, The Daily Progress (April 15, 2015), *available at* www.dailyprogress.com.

113. *Id.*

114. Freeman, V., *McAuliffe vetoes legislation on concealed handgun permits, switchblades, 'Tebow bill,'"* (Feb. 21, 2017), *available at* www.wtvr.com.

115. Sieck, B., *A house divided: Homeschool students on school sports teams*, (2015), *available at* www.nfhs.org.

116. Ziese, A., *Number of Homeschoolers in US 2015-2016* (Aug. 31, 2015), *available at* www.a2zhomeschooling.com.

117. Sieck, B., supra note 115.

118. West Virginia Secondary School Activities Commission Handbook, 2016.

119. Sieck, B., supra note 115.

120. *Id.*

121. *Id.*

122. *Id.*

123. Osborne, A. & Russo, C., *Sports Participation and Home Schooling: A Game Changer?"* Education Law Into Practice (2014), Thomson/West.

124. Jones v. West Virginia State Board of Education, 622 S.E.2d 289 (W. Va. 2005).

125. *Id.*

126. Angstadt v. Midd-West School District, 377 F.3d 338 (3rd Cir. 2004).

127. *Id.*

128. Osborne, A. & Russo, C., supra note 123.

129. Reid v. Kenowa Hills Public Schools, 680 N.W.2d 62, 261 Mich. App. 17 (Ct. App. 2004).

130. Osborne, A. & Russo, C., supra note 123.

131. Marar, M., McIlvain, N. M., Fields, S. K., & Comstock, R. D. (2012). *Epidemiology of concussions among United States high school athletes in 20 sports*, American J. of Sports Medicine, (2012), 40(4), 747-55.

132. *Id.*

133. *Id.*

134. Dawson, A., & Williams, N., *Hillsborough OKs record $2 million settlement for injured prep football player*, The Tampa Tribune, (Oct. 27, 2015), *available at* www.thetbo.com.

135. *Id.*

136. *Id.*

137. Mohney, G., *Multiple concussions of student athletes in spotlight after high-profile cases* (Oct. 15, 2015), *available at* www.abcnew.go.com.

138. *Id.*

139. National Federation of State High School Associations, Annual Report 2013-2014 (2014), *available at* www.nfhs.org.

140. *Id.*

141. National Federation of State High School Associations, *Recommendations and Guidelines for Minimizing Head Impact Exposure and Concussion Risk in Football* (2014), p. 1-4, *available at* www.nfhs.org.

142. National Federation of State High School Associations, Annual Report 2013-2014 (2014), *available at* www.nfhs.org.

143. Student-Athlete Protection Act (SB 652) § 22.1-271.5 (2011), *available at* http://www.doe.virginia.gov/boe/guidance/health/concussions_in_student_athletes.pdf.

144. *Id.*

145. Miller, M., *Feds say Illinois school district broke law by banning transgender student from girls' locker room*, The Washington Post, (Nov. 3, 2015), *available at* www.washingtonpost.com.

146. Reist, M., *NSAA drafting policy on participation of transgender students in sports"* The Lincoln Journal Star (Sept. 21, 2015), *available at* www.journalstar.com.

147. *Id.*

148. *Id.*

149. *Id.*

150. Virginia High School League Handbook (2016), Virginia High School League, Inc., Charlottesville, VA, p. 115-17.

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What Do Sports Arbitration Courts Usually Apply When Resolving Sports Disputes?

By Sergey Yurlov

Article 6 of European Convention on Human Rights prescribes that "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[1] Article 11 of the Universal Declaration of Human Rights 1948 states that "everyone charged with a penal offense has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defense."[2]

The recent doping scandal involving many Russian high-level athletes showed that sports arbitration courts are reluctant to apply basic principles of law, including a presumption of innocence; individual liability; and not punishing one for actions committed by another. Unfortunately, they also do not want to recognize the basic essential right of a fair and public hearing.

"From an athlete's perspective, Article 17's regulations protect an athlete's rights and legitimate interests better than those prescribed in Article R45."

In discussing this issue, we should review particular procedural rules according to which sports arbitration courts resolve sporting disputes. We should understand to what they actually apply:

- Article R45 of the Procedural Rules of the Court of Arbitration for Sport (CAS) prescribe that "the Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide *ex aequo et bono*."[3]
- Article 17 of CAS's Arbitration Rules applicable to the CAS ad hoc division for the Olympic Games stipulates that "the Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate."[4]

There is an apparent contradiction between the general rules applicable to "ordinary" sport-related cases and special rules applicable to competition disputes resolved by an ad hoc panel. From an athlete's perspective, Article 17's regulations protect an athlete's rights and legitimate interests better than those prescribed in Article R45.

- Article 15 of the Arbitration Rules of Sport Resolutions (UK) reads as follows: "[P]rocedurally, arbitrations under these Rules shall be governed by the Arbitration Act 1996 ("the Act") unless otherwise determined by the Tribunal, and shall incorporate all the provisions of the Act (save for non-mandatory provisions expressly excluded or modified by these Rules or by the agreement of the parties). Substantively, arbitrations under these Rules shall be decided in accordance with the law of England and Wales unless otherwise agreed in writing by the parties or unless otherwise directed by the Tribunal."[5]

"More important, CAS turns them inside out, thereby depriving athletes of their fundamental rights and legitimate interests."

- Article 27 of the Draft Rules of the Sports Disputes Tribunal of Kenya provides that "the Tribunal shall hear and determine all Proceedings according to the laws of Kenya."[6]
- Finally, Article 26 of the Rules of the Sports Tribunal of New Zealand prescribes that "the Tribunal shall hear and determine all Proceedings according to the laws of New Zealand."[7]

On one hand, parties to a sports dispute can choose the law applicable to the merits of the dispute. On the other, sports arbitration courts, or tribunals, reserve the right to adjudicate the dispute in accordance with national law. However, the regulations do not refer to the basic legal principles mentioned above.

The recent CAS decisions regarding certain Russian high-level athletes[8] confirm that CAS (and other sports disputes resolution bodies) does not usually apply basic legal principles of presumption of innocence, individual liability for illegal actions, and no one can be held liable and punished twice for the same action. More important, CAS turns them inside out, thereby depriving athletes of their fundamental rights and legitimate interests.

It appears that CAS, other sports arbitration courts, and internal jurisdictional bodies of sporting organizations should always apply the above-mentioned principles, since such principles protect the rights and legitimate interests of all involved parties. If there is a

contradiction between internal statutory acts of a sporting organization and those principles, the latter should prevail and have greater legal force. Otherwise, a particular body will resolve sports disputes based on internal regulations that initially treat athletes less favorably than sports organizations.

The protection of athletes' rights and legitimate interests should be the primary concern of sports arbitration courts and sporting organizations. Such entities should create environments in which athletes enjoy legal protection from any unreasonable restrictions and violations of their rights.

Endnotes

1. http://www.echr.coe.int/Documents/Convention_ENG.pdf.
2. http://www.un.org/en/universal-declaration-human-rights/.
3. http://www.tas-cas.org/en/arbitration/code-procedural-rules.html.
4. http://www.tas-cas.org/en/arbitration/ad-hoc-division.html.
5. https://www.sportresolutions.co.uk/uploads/related-documents/sport-resolutions-arbitration-rules-2008.pdf.
6. http://www.judiciary.go.ke/portal/assets/filemanager_uploads/FINAL%20RULES%20OF%20THE%20SPORTS%20DISPUTES%20TRIBUNAL.pdf.
7. http://www.sportstribunal.org.nz/assets/Uploads/Rules-sports-tribunal-2012.pdf.
8. Anastasia Karabelshikova and Ivan Podshivalov v. World Rowing Federation and International Olympic Committee, Russian Rowing Federation, Russian Olympic Committee, CAS Ad Hoc Division—Games of the XXXI Olympiad in Rio de Janeiro CAS OG 16/13, August 4, 2016; Yulia Efimova v. Russian Olympic Committee, CAS Ad Hoc Division-Games of the XXXI Olympiad in Rio de Janeiro CAS OG 16/04; Russian Weightlifting Federation v. International Weightlifting Federation, CAS Ad Hoc Division—Games of the XXXI Olympiad in Rio de Janeiro CAS OG 16/09, August 5, 2016.

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Krell's Korner

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

JFK, Presidential Libraries, and the Cuban Missile Crisis

By David Krell

Abutting Dorchester Bay stands a gateway to John Fitzgerald Kennedy's presidency—bookended by an inaugural address delivered with the steadiness of a glider and a moment of horror in a Dallas motorcade. Kennedy's words of challenge, optimism, and vision on January 20, 1961 emerged, before too long, as the gold standard of rhetoric; not just for presidents, but for speakers of every stripe, from PTA presidents, to high school debate teams, and C-level executives.

The John F. Kennedy Presidential Library and Museum (JFK Library) in Columbia Point, on a peninsula poking into the bay, houses the archives, papers, and memorabilia of the 35th President of the United States. Dedicated in 1979, the JFK library falls under the auspices of the Presidential Libraries Act of 1955 (PLA); signed by President Eisenhower on August 12, 1955, the PLA creates a framework for the federal government to obtain "land, buildings, and equipment on behalf of the United States, and maintain, operate, and protect them, as a Presidential archival depository, and as part of the national archives system."[1] The land, buildings, and equipment must be donated to the federal government "for the purposes of creating" a depository.[2]

"Bobby Kennedy, the president's Attorney General—and his brother—noted the psychological impact in the president's strategic discussions with his diplomats, cabinet members, and military advisers."

The PLA also allows for agreements with entities—including states, political subdivisions, foundations, or universities—to take on these responsibilities. Under this arrangement, the entities use their own property, but they are not required to transfer ownership to the federal government.[3]

Born on May 29, 1917, Kennedy was a World War II naval hero, Congressman, and Senator before being the youngest-ever elected president; at age 43, Kennedy defeated Vice President Richard Nixon to win the 1960 presidential election. With his beautiful wife, Jackie, he projected energy, youth, and inspiration. It was, however, not a flawless presidency. Perhaps the biggest failure of the Kennedy presidency was the Bay of Pigs—a botched invasion of Cuba to take out Fidel Castro's revolutionaries. Scandals emerged, posthumously, concerning affairs with interns, office staff, and a mafia don's mistress.

Balancing the scale is Kennedy's handling of the Cuban Missile Crisis, which the world suffered for 13 days—Russia armed Cuba with nuclear weapons, less than 100 miles from southern Florida.

Air Force Chief of Staff Curtis LeMay advocated against Kennedy's naval blockade of Cuba and for using nuclear weapons to attack missile sites in Cuba. In a televised speech to the nation on October 22, 1962, Kennedy warned: "It shall be the policy of this nation to regard any nuclear missile launched from Cuba against any nation in the Western Hemisphere as an attack of the United States, requiring a full retaliatory response upon the Soviet Union."[4]

On October 28th, after back channel diplomacy tempered the crisis, Russia agreed to take its missiles out of Cuba; the U.S. ended the blockade, also called "quarantine," on November 20th; and removal of the U.S. Jupiter missiles from Turkey began a few months later.[5] In his book *Thirteen Days*: *A Memoir of the Cuban Missile Crisis*, Robert F. "Bobby" Kennedy, the president's Attorney General—and his brother—noted the psychological impact in the president's strategic discussions with his diplomats, cabinet members, and military advisers. "What guided all his deliberations was an effort not to disgrace Khrushchev, not to humiliate the Soviet Union, not to have them feel they would have to escalate their response because their national security or national interests so committed them,"[6] wrote Kennedy.

The Cuban Missile Crisis has been terrific fodder for Hollywood storytellers poring through declassified files at the JFK library to recreate the conversations, arguments, and moments that led to the resolution of the crisis. Two offerings focus on it exclusively: *The Missiles of October* and *Thirteen Days*.

The Missiles of October, a 1974 ABC television movie, stars William Devane as President Kennedy and Martin Sheen as Bobby Kennedy; the source material is the aforementioned *Thirteen Days*. Sheen stars as President Kennedy in the 1983 NBC miniseries *Kennedy*—he amplified his presidential body of work with Aaron Sorkin's White House tales:

- *The American President*
  - 1995 film
  - Role: White House Chief of Staff A.J. MacInerney
  - Production Company: Castle Rock
- *The West Wing*
  - 1999-2006 television series
  - Role: President Josiah "Jed" Bartlet
  - Production Company: Warner Brothers

Based on the 1997 book *The Kennedy Tapes: Inside the White House During the Cuban Missile Crisis* by Ernest May and Philip Zelikow, the 1999 film *Thirteen Days* stars Bruce Greenwood as President Kennedy in what is arguably the finest presidential portrayal in look, sound, and manner. Steven Culp, who later played Republican Speaker of the House Jeff Hafley in a recurring role on *The West Wing*, plays Bobby Kennedy with similar aplomb. Kevin Costner plays Kenny O'Donnell, a Kennedy friend and adviser who has a fraternal bond, bordering on bloodline, with the Kennedy brothers.

Film critic Roger Ebert praised, "The movie's taut, flat style is appropriate for a story that is more about facts and speculation than about action. Kennedy and his advisers study high-altitude photos and intelligence reports, and wonder if Khrushchev's word can be trusted. Everything depends on what they decide. The movie shows men in unknotted ties and shirt-sleeves, grasping coffee cups or whiskey glasses and trying to sound rational while they are at some level terrified."[7]

The JFK library website has a day-by-day breakdown of the crisis, including the President's schedule of meetings, in addition to memoranda outlining the advisers' positions, conversations with Soviet counterparts, and potential solutions and consequences.

Endnotes

1. Presidential Libraries Act of 1955, 44 U.S.C. §§ 2112, 2108.
2. *Id.*
3. *Id.*
4. President John F. Kennedy's speech to the nation, October 22, 1962.
5. "The Cuban Missile Crisis, October 1962," Office of the Historian, Department of State, *available at* https://history.state.gov/milestones/1961-1968/cuban-missile-crisis.
6. Robert F. Kennedy, *Thirteen Days: A Memoir of the Cuban Missile Crisis* (New York: W. W. Norton & Company, 1999, reprint of 1968 version, published by McCall Corporation) 95.
7. Roger Ebert, "Thirteen Days," (Jan. 12, 2001), *available at* http://www.rogerebert.com/reviews/thirteen-days-2001.

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