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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

Inside

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Remarks from the Chair

EASL had a great slate of activities and events this fall, and we are looking forward to growing participation from all of our EASL members beyond attendance at Committee and Section events.

We were very excited to partner with the CMJ Network to once again host the CLE accredited Entertainment Business Law Seminar, which took place in October at NYU's Kimmel Center for University Life, as part of the CMJ Music Marathon & Film Festival. This year's event included discussions regarding future trends in the film and music industries, and how a new environment for film and television, one that features limited economic resources, has generated new and innovative ideas that will shape the future of these industries. A more detailed description written by Monica Pa can be found on our Blog. In addition to CMJ, November's CLE event, "Legal Implications of Social Networking," was a valuable tool for the 21st Century lawyer. While everyone understands the pitfalls that social networking can create, this event focused on, among other topics, the best practices for safe and effective social networking, and outlined and explored the implications of social networking as it relates to discovery and litigation.

Lastly, I would like to again draw your attention to the EASL Blog, which can be found at http://nysbar.com/blogs/EASL. The Blog is an excellent opportunity for lively discussion amongst EASL members in between CLE programs and the thrice yearly release of the *EASL Journal*. As a reminder, everyone has access to read Blog postings, but only an EASL Section member can create a topic. Elissa has really done an excellent job with the Blog, and I encourage you to take a look at it, and blog, when you have the opportunity.

I look forward to seeing all of you at one or more of our upcoming events.

Kenneth N. Swezey

Editor's Note

We are so excited to announce our upcoming book, co-sponsored by the Committee on Television and Radio and NYSBA's Committee on Legal Education. Entitled *Counseling Content Providers in the Digital Age: A Legal Handbook*, it is a comprehensive handbook on media law. Included in this issue of the *EASL Journal* is the Introduction to the book, written by Kathleen Conkey, the primary author and one of the editors, and Chapter One—Defamation, written by Kai Falkenberg and Toby Butterfield. These are but two examples of the quality of contributors and subject matters covered in the book. *Pre Broadcast Review* was also edited by Pamela C. Jones (Co-Chair, Committee on Television and Radio) and me. EASL hopes to continue this new tradition of offering interesting and user-friendly books to you.

The next *EASL Journal* deadline is Friday, January 22, 2010.

Clarification

The statements and opinions reflected in the article "Spendthrift Trust: An Alternative to the NBA Rule" that appeared in the Summer issue of the *EASL Journal* were those of the author, Susan McAleavey. The article did not express the views and opinions of Proskauer Rose LLP.

Elissa D. Hecker of the Law Office of Elissa D. Hecker, located at 90 Quail Close, Irvington, NY 10533, practices in the fields of copyright, trademark and business law. Her clients encompass a large spectrum of the entertainment and corporate worlds. In addition to her private practice, Elissa is a Past Chair of the EASL Section. She is also Co-Chair and creator of EASL's Pro Bono Committee, Editor of the EASL Blog, Editor of *Entertainment Litigation*, a frequent author, lecturer and panelist, a member of the Board of Editors for the NYSBA Journal, a member of the Copyright Society of the U.S.A (CSUSA) and a member of the Board of Editors for the *Journal of the CSUSA*. Elissa is the recipient of the New York State Bar Association's 2005 Outstanding Young Lawyer Award. She can be reached at (914) 478-0457 or via email at: EHeckerEsq@yahoo.com.

Update on PRO-IP Act

By Joel L. Hecker

On the October 13, 2008 President Bush signed into law the 25-page "Prioritizing Resources and Organization for Intellectual Property Act of 2008," which is more commonly known as PRO-IP. This law, among other things, created a new bureaucracy headed by an Intellectual Property Enforcement Coordinator (IPEC) to be appointed by the President with the advice and consent of the Senate. The position has informally been referred to as the "Copyright Czar" or "IP Czar."

On September 28, 2009 President Obama appointed Victoria Espinel to the position, subject to confirmation by the Senate.

Ms. Espinel is an expert on international copyright enforcement. She was the first Assistant United States Trade Representative for Intellectual Property and Innovation at the Office of the U.S. Trade Representative and served as the Chief U.S. Trade Negotiator on IP subjects. She has also served as an advisor on IP issues to various House of Representatives and Senate committees, taught IP law, and is the founder and president of Bridging the Innovation Divide, a not-for-profit entity.

The appointment has been praised by various rights holder groups representing the music, entertainment, photography and other affected industries.

Pro Bono Update

On September 14th, EASL co-sponsored a Pro Bono Clinic with the IP Section at Actors' Equity Association (AE). It was such a resounding success, according to both volunteer attorneys and AE staff and members that we look forward to a long and fruitful relationship with this organization. In addition, as there were so many AE members who were interested in taking advantage of the Clinic, but whose 2008 income was slightly above the pro bono income requirements, we were asked if there were any follow-up programs that could be coordinated to better service the larger number of AE members. As a result, Carol, Pippa and I will be working with AE and the Speakers Bureau to create a series of programs where speakers will address AE member concerns.

Our next Pro Bono Clinic will be with the Dramatists' Guild, another organization with which we have had great success in the past. Information regarding that Clinic will be emailed to all Section members and will appear on the EASL Blog.

EASL's Pro Bono Committee also co-sponsored a panel with The School of Visual Arts called "Legal Concerns for Designers, Illustrators, Cartoonists, and Artists—What You Need to Know" at the School of Visual Arts. The focus was to help artists "get the gig without losing the store," as in hard economic times, artists want gigs without having their work copied or used without payment and/or engagement. This panel of lawyers and designers covered topics including copyrights, trademarks, patents, contracts, and how to protect ideas. Panelists included Lucie Kim from MyORB Art + Design; Arlana Cohen, Esq., from Cowan, Liebowitz, and Latman; Monica Pa, Esq., from Davis Wright Tremaine; Lisa Marroni, General Counsel of Wicked Fashions and former General Counsel of Pokemon USA; and was co-moderated by Will Snyder, co-founder of J. Fold, and Carol Steinberg, Esq. Many thanks to Carol and Monica for organizing this program.

The Pro Bono Committee is planning a panel on fair use—what can be appropriated and at what risk, to be presented in the late winter or early spring. In addition, we are developing and expanding our Speakers Bureau. Members of our Section have extensive expertise in entertainment, art, and sports law and are generously volunteering their time, as was obvious in the above-mentioned panel. We are compiling a database of speakers, along with their expertise and specific topics they can present, and will approach art schools and artist/not-for-profit organizations that could benefit from what our members have to offer. We encourage participation of all who are interested and would be happy to speak more with you about it. For more information or to volunteer, please contact Carol Steinberg, Esq. at cs9@hpd.nyc.gov.

* * *

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

Clinics

Elissa D. Hecker and Philippa Loengard are coordinating walk-in legal clinics with various organizations.

- **Elissa D. Hecker, eheckeresq@yahoo.com**
- **Philippa Loengard, loengard@law.columbia.edu**

Litigations

Monica Pa is coordinating pro bono litigations.

- **Monica Pa, monicapa@dwt.com**

Speakers Bureau

The Pro Bono Committee's Speakers Bureau provides speakers on entertainment, art, and sports law issues for not-for-profit organizations, art schools, local high schools, and other groups that can benefit from the wide and enormous expertise of EASL's members. One of the most satisfying aspects of a successful career can be to speak to working artists to help them understand their rights and the critical issues that affect their careers.

Please think about volunteering for this wonderful opportunity to share your expertise with students, artists, and young entertainers who can benefit so much from your knowledge. We are also compiling a list of organizations/entities who may want to avail themselves of this great opportunity.

Please send your name, area of expertise, and contact information to Carol Steinberg and Christine Pepe. In addition, please also let them know about excellent speakers whom you have heard speak, so we may contact them, and of organizations who may be interested in having speakers.

- **Carol Steinberg, CS9@hpd.nyc.gov**
- **Christine Pepe, cpepe@mwe.com**

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

Entertainment, Arts and Sports Law Section 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 State Bar Web site at http://nysbar.com/blogs/EASL.

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

Law Student Initiative Writing Contest

Congratulations to LSI winner:

Tara Bhupathi, of the University of North Carolina School of Law, for her article entitled:

"How the Ninth Circuit's Rejection of U.S.A. Swimming's Motion to Dismiss Protects the Integrity of Sport and Stimulates Technological Development"

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

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

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members.
- **Form**: Include complete contact information; name, mailing address, law school, law school club/organization (if applicable), phone number and e-mail address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **Friday, January 22, 2010**.
- **Submissions**: Articles must be submitted via a Word e-mail attachment to eheckeresq@yahoo.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, and all winners will be announced at the EASL Section Annual Meeting.

Next *EASL Journal* Submission Deadline: Friday, January 22, 2010

The Phil Cowan Memorial/BMI Scholarship

2008 Scholarship Winners: Bryan Georgiady, Syracuse University College of Law and Ryan C. Steinman, New York Law School

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL), in partnership with BMI, the world's largest music performing rights organization, has established the Phil Cowan Memorial/BMI Scholarship. Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial/BMI Scholarship fund offers *up to two awards of $2,500 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 12 to 15 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 (which is not part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and e-mail 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. All law schools will screen the papers and submit the three best to EASL's Phil Cowan Memorial/BMI Scholarship Committee. The Committee will read the papers submitted and will select the Scholarship recipient(s).

Eligibility

The competition is open to all students 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 10 other accredited law schools throughout the country to be selected, at the Committee's discretion, on a rotating basis.

Yearly Deadlines

November 15th: Law School Faculty liaison submits three best papers to the EASL/BMI Scholarship Committee;

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

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

Prerogatives of EASL/BMI's Scholarship Committee

The Scholarship Committee is composed of the current Chair of EASL, all former EASL Chairs who are still active in the Section, all 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 Web site*. BMI reserves the right to post each winning paper on the BMI Web site, 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. The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and to 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.

Donations

The Phil Cowan Memorial/BMI Scholarship Fund is pleased to accept donations. The donations are tax-deductible. All donations should be made by check, and be payable to **The New York Bar Foundation.** Each donation should indicate that it is designated for the Phil Cowan Memorial/BMI Scholarship. **All donations should be forwarded to The New York Bar Foundation, One Elk Street, Albany, NY 12207, Attention: Director of Finance.**

About BMI

BMI is an American performing-rights organization that represents approximately 350,000 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 4.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

About the New York State Bar Association/EASL

The 76,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 125 years.

The more than 1,700 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, *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.

Counseling Content Providers in the Digital Age: A Legal Handbook

Introduction

By Kathleen Conkey

Welcome to the art and science of pre-publication review—a subset of media law encompassing print and audio-visual media in which the lawyer's goal is to review content for media companies before it reaches the public to avoid exposure to lawsuits. For as long as there have been printing presses, there have also been accusations of libel, invasion of privacy, intellectual property infringement and other torts stemming from what is published on those presses. Now that much of the content reaching the public is distributed over the Internet, broadcast/cable/satellite television or radio and film, in addition to print, the field has become more complicated and more important. In recognition of the ever-growing significance of the audio-visual media, this book uses the term "pre-broadcast review" as shorthand for the review before distribution of any kind of content.

Although the specialty is little known outside the worlds of entertainment and media, pre-publication review is an essential part of getting content of any kind—books, movies, blogs, television and radio shows—out to the public. In practical terms, insurance companies that write policies for such productions often insist that the material be reviewed by an attorney before publication or broadcast. Regardless of the need for insurance, most companies and individuals in the creative fields understand that a single lawsuit for defamation or copyright infringement will quickly dwarf the time and cost of hiring a lawyer to review content in an effort to avoid such suits.

Pre-broadcast review is both an art and a science. The science consists of methodically spotting every legal issue contained in a piece of content that might trigger a lawsuit against its creator or distributor. The art consists of working closely with the content creators to give them guidance on how to "say their piece" without violating the rights of others. It requires practitioners to balance a keen appreciation of the First Amendment with sensitivity to the damage that the media can unwittingly inflict on those caught in its spotlight. Finally, the art of the work is evident in the many judgment calls the reviewing lawyer must make—who are the potential plaintiffs? How likely are they to sue? Which party might be more sympathetic? The reviewing lawyer must stand ready to offer the client a detailed risk assessment and must stay abreast of the client's appetite for such risk.

Lawyers who review or "vet" content for a living are very lucky lawyers indeed. They get the pleasure of reading articles and books, watching television programs and movies and viewing websites and video, as well as the challenge of spotting legal issues, and finally the satisfaction of solving problems for creative individuals and companies. Sometimes, they even get their names in the credits. At the same time, the field can be nerve-wracking, as clients demand fast answers and creative solutions, all without too much interference with their creative and editorial goals. The vetting lawyer needs nerves of steel, a sense of humor, the ability to break bad news and a love of creative work—whether it be a high-culture documentary or a lowbrow reality television show. Most importantly, the vetting lawyer must understand that his or her job is not to tell a media client that it cannot publish something, but to work with the client to figure out how it *can* publish, with the least amount of risk.

Like any legal practice area, much of pre-broadcast review must be learned from experience, but this book will give media and entertainment lawyers a good grounding in the essential issues that reviewers face repeatedly. At the very least, it will help the casual practitioner know when he or she needs to call in an expert.

The first six chapters of the book set out the major torts that every vetting lawyer must know by heart—defamation, invasion of privacy, right of publicity, copyright infringement, trademark infringement and the newsgathering torts, including misrepresentation, fraud, trespass, and breach of contract by journalists.

The next four chapters of the book focus on some of the important practices the media industry, particularly the television and film industry, have created to tackle the legal challenges of creating and distributing content—rights and clearances, errors and omissions insurance, systems for contracting with minors in the entertainment business and television standards and practices.

The last two chapters offer advice on a panoply of issues that face television producers and journalists, with a focus on television's most legally problematic format—reality shows, including those that use hidden cameras and pranks or focus on sensitive subjects such as personal health or family dynamics.

Virtually every legal issue the media faces is covered—from well-known concepts like defamation and trademark infringement to lesser-known ones, like paparazzi statutes, veggie libel laws, federal indecency regulations, sweepstakes rules, torts in fictional works and idea theft. In addition to a thorough rundown of the problems, the book explores solutions—retractions, disclaimers, releases, licenses, fair use defenses, seven-second delays and privacy protections, among many others.

The point of this book is to act as handbook for practitioners—the lawyers representing media clients who need concise and fast answers to everyday problems. Thus, while each chapter defines the legal concepts in play and sets out the leading cases, it also provides real-life examples of the concepts and gives insider tips about what to embrace and what to avoid. Throughout the book, the authors have appended a variety of forms to help lawyers with the everyday practicalities of content review. A glossary at the end of the book helps the uninitiated understand some of the arcane language of media contracts.

Finally, the authors themselves are all daily practitioners (not theorists) of the art and science of pre-broadcast review. They represent in nearly even numbers the twin centers of the media and entertainment world—New York and California. With each chapter, they present the reader with the true practitioner's perspective, offering a sublime mix of down-to-earth suggestions and creative approaches befitting the subject matter.

Kathleen Conkey is a New York City media and entertainment lawyer with 17 years of experience. She received her J.D. with Highest Honors from Rutgers Law School-Newark and has a B.S. in Journalism and a B.G.S. in Theatre from the University of Kansas. Ms. Conkey can be reached at kathleen@conkeylaw.com.

Counseling Content Providers in the Digital Age: A Legal Handbook

Chapter One—Defamation

By Kai Falkenberg and Toby Butterfield

Libel and slander have evolved significantly from their origins in the common law, and now encompass Constitutional privileges, and specific rules concerning the meanings to be discerned from a statement, and when readers' knowledge and community values affect whether a statement is defamatory at all. In addition, many states have enacted statutory privileges and other protections to help media entities report on matters of public concern without risking defamation liability. Although both case law and statutory protections vary considerably by state and based on the specific situation, this chapter is designed to provide an overview of this legal patchwork and practical guidance for the occasional practitioner of defamation law.

"[M]any states have enacted statutory privileges and other protections to help media entities report on matters of public concern without risking defamation liability."

I. Definition and Elements

Defamation is the publication of a false statement that seriously harms someone's reputation.

The law of defamation encompasses both libel (written or visual defamation) and slander (oral defamation). Broadcasts are generally but not always treated as libel. Libel actions are easier for plaintiffs to maintain than slander actions on the theory that written words typically involve greater deliberation. Since slander actions are rarely brought against media entities, this chapter will focus on libel.

Elements:

The elements necessary for a libel claim are as follows—

- A statement of FACT,
- with DEFAMATORY MEANING,
- that is OF and CONCERNING a LIVING, IDENTIFIABLE PERSON,
- that is SUBSTANTIALLY FALSE,
- PUBLISHED WITH FAULT, and
- is NOT PRIVILEGED.

The principal objective in reviewing for potential libel claims is to determine whether the language under review satisfies these elements. If one or more elements are not present, the statements at issue will not be actionable.

II. Statement of Fact

Only statements of fact can be the basis of a libel claim.

> A defamation is actionable only if it is false; opinions cannot be proved false; therefore, opinions can never be actionable no matter how derogatory they may be.[1]

There are two categories of "opinion" protected by the First Amendment.[2] The first consists of statements that are not "provable as false."[3] The second involves "statements that cannot reasonably be interpreted as stating actual facts."[4]

The first category concerns language that cannot be proved true or false by objective evidence. For example, in *Seelig v. Infinity Broad.*,[5] the court held that describing a woman as a "skank" on a radio show was protected opinion because the term is "too vague to be capable of being proven true or false" and has "no generally accepted meaning of an actionable nature."[6]

This category also encompasses statements of opinion that are based on disclosed facts or facts that are common knowledge. Where "a statement of opinion either discloses the facts on which it is based or does not imply the existence of undisclosed facts, the opinion is not actionable."[7] For example, in *Cochran v. NYP Holdings, Inc.*,[8] attorney Johnny Cochran claimed a New York Post columnist defamed him by writing that "history reveals that [Cochran] will say or do just about anything to win, typically at the expense of the truth." The columnist identifies that history by writing that Cochran "dazzled a Los Angeles jury into buying his fantasy tale of a citywide police conspiracy, in order to set free a celebrity who slaughtered his ex-wife."[9] Since the facts underlying the subject of the alleged defamatory statement were disclosed and were not themselves defamatory, the court held that the challenged statements were non-actionable opinion.

The second category concerns "loose, figurative, or hyperbolic language which would negate the impression that the writer was seriously maintaining" an actual fact.

> Protection of such speech provides assurance "that public debate will not suffer

> for lack of 'imaginative expression' or the 'rhetorical hyperbole' which has traditionally added much to the discourse of" our nation.[10]

This category protects statements that are so outrageous that no reasonable person would believe them to be true. Statements that might otherwise be defamatory are held to be non-actionable hyperbole in contexts where readers or listeners expect that what is being read or heard is likely to be opinion, not fact.[11] Such loose exaggeration and hyperbole are often found in political campaigns, public debates, labor disputes, cartoons, reviews, and talk shows. For example, Geraldo Rivera's description of an anti-abortion activist who appeared on his show as an "accomplice" to an abortion doctor's murder was protected opinion because it was "clear" that Rivera and the activist "were engaged in an emotional debate concerning emotionally charged issues of significant public concern" and "no reasonable viewer would have concluded that Rivera was literally contending that [the activist] could be charged with a felony in connection with the [abortion doctor's] murder."[12]

> *"'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.'"*
> *—Justice Holmes*

III. Defamatory Meaning

To sustain a defamation claim, the challenged statement must be harmful to the plaintiff's reputation. It must lower the plaintiff's standing in the eyes of, at least, "a small and respectable minority" of people.

> A communication to be defamatory need not tend to prejudice the other in the eyes of everyone in the community or of all of his associates, nor even in the eyes of a majority of them. It is enough that the communication would tend to prejudice him in the eyes of a substantial and respectable minority of them, and that it is made to one or more of them or in a manner that makes it proper to assume that it will reach them.[13]

In deciding whether certain speech is defamatory, the court will consider the nature of the audience for the particular statement at issue. Lists of words that have been found to be defamatory are not helpful because the same word might not be defamatory in a different context. As Justice Holmes stated: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[14] So, for example, the word "murderer" would seem to be quintessentially libelous— but if used in an attack on a president's military policy it would clearly be non-defamatory political opinion.[15]

> Whether a statement is defamatory "depends, among other factors, upon the temper of the times, the current of contemporary public opinion, with the result that words, harmless in one age, in one community, may be highly damaging to reputation at another time or in a different place."[16]

In *Britney Spears v. US Weekly*, for example, the singer alleged that the magazine had falsely reported that she and her husband had made a sex tape and were trying to prevent its public release. Recognizing that the public's view of sex tapes by married couples has evolved and that Spears had "put her modern sexuality squarely and profitably before the public eye," the court ruled that the statements were not defamatory.[17] Similarly, in *Myra Belle Miller v. Philadelphia Newspapers LLC, et al*., a Pennsylvania trial court dismissed a libel suit brought over a newspaper article reporting that the plaintiff had posed for Playboy Magazine.[18] The trial court found that posing nude for Playboy was incapable of a defamatory meaning. In other contexts, however, a false statement that someone appeared nude could be considered defamatory. For example, the Ninth Circuit held the Baywatch actor Jose Solano stated a claim against Playgirl for using his image on its cover to falsely suggest he appeared nude inside.[19]

As indicated above, whether a particular word is defamatory depends upon the particular context in which it is used. Nevertheless, it may be useful to know that libel suits often concern statements relating to the following topics:

- Substance or Physical Abuse,
- Adultery,
- Criminal Conduct,
- Bankruptcy/Insolvency,
- Bribery/Corruption,
- Discharge/Firing of Employee for Misconduct,
- Fraud,
- Dishonesty/Perjury,
- Malpractice/Malfeasance,
- Mob Connections/Racketeering,

- Thievery/Embezzlement,
- Unethical/Unprofessional Conduct, and
- Having a Sexually Transmitted Disease.

Accordingly, special attention should be given to statements relating to any of these subjects—even if the language appears in a comedic context. Describing such statements as a "joke" will not insulate them from liability.

a. Defamatory Implication

Liability for defamation may arise not just from the literal meaning of a statement but from the unexpressed implication of that statement as well. Libel by implication occurs when a defendant (1) juxtaposes a series of facts so as to imply a defamatory connection between them, or (2) creates a defamatory implication even though the particular facts are correct.[20] Defamatory implications arise in a multitude of contexts. Here are some examples of topics in which plaintiffs sometimes allege a defamatory implication:

- Firing of an employee (implication of misconduct),
- questionable conduct (implication of illegality),
- man and woman together in hotel room/ private jet (implication of an affair), and
- grouping together individuals who have engaged in different levels of misconduct (implication that all have engaged in similar misconduct).

Given the steady increase in libel by implication cases, it is particularly important to watch for potential implications when reviewing scripts and copy.

b. Headlines—The Fair Index Rule

Headlines are intended to tease the reader into reading the full article. It is well understood that a headline cannot include all the details of the points made in the story. So long as the headline is a reasonable and fair indication of what is in the article— or put otherwise, is a "fair index" of the story— it will not be actionable if the story itself would not be actionable. This same principle applies to broadcast— that is, promos and teasers should be a fair indication of the broadcast to follow.

On occasion, editors get carried away and use headlines which mislead the reader as to the substance of the story. These "switch and bait" scenarios can be particularly problematic. For example, Kato Kaelin sued the National Examiner over its headline "Cops Think Kato Did It!" which ran a week after O.J. Simpson's acquittal.[21] The National Examiner argued that it never accused Kaelin of murder and the "it" in the headline referred to the allegation that Kaelin had committed perjury while on the witness stand. The Ninth Circuit rejected that argument and ruled in Kaelin's favor on summary judgment, prompting the publication to settle the case.

Similarly in *Eastwood v. National Enquirer*, the tabloid's front page had touted an "Exclusive Interview" with Clint Eastwood. Eastwood sued, claiming he never spoke with the Enquirer and that the interview was a fabrication.[22] The Ninth Circuit upheld a jury verdict in Eastwood's favor, finding that the publication had intended to convey the impression, known by it to be false, that Eastwood had willingly submitted to an interview.

These cases aside, courts do defer to editorial judgment concerning the drafting of headlines and will grant considerable leeway. For example, in *Kamalian v. Readers Digest Assoc*., a surgeon sued the magazine for including him in an article entitled "Doctors' Deadly Mistakes."[23] The surgeon claimed the headline was defamatory because the malpractice judgments against him did not involve fatalities. The appellate court nevertheless ruled that the headline was a "fair index" of the article, since the other physicians referenced in the article had been involved in "deadly mistakes."

Keep in Mind: Puns and cute language are fine in headlines so long as the headline is a "fair index" of the story.

c. Juxtaposition of Photos and Text

Defamatory implications can also arise from the juxtaposition of photos and text. For example, in *Stanton v. Metro Corp*., Boston Magazine published the plaintiff's photograph alongside an article about teenage promiscuity. Even though the magazine had included a disclaimer indicating that the "individuals pictured are unrelated to the story," an appellate court held that the disclaimer was insufficient, and found that the article was still susceptible to a defamatory meaning.

In *Franklin Prescriptions, Inc. v. The New York Times Co*., a pharmacy filed a libel action over an article about unscrupulous online pharmacies that take e-mail orders for controlled and other drugs without requiring a prescription. The article did not specifically reference the plaintiff but had included a screen grab of the plaintiff's website alongside the article. The plaintiff claimed that this juxtaposition of the website alongside the text falsely implied that it engaged in the type of conduct described in the article. The case went to trial and a jury found the article false and defamatory.

IV. Of and Concerning a Living, Identifiable Person or Entity

To prevail in a libel action, the plaintiff has to establish that the defamatory statement was "of and concerning" him or her. The article does not have to name a person in order for the challenged statement to be about that person.

> If it can be shown either that the implication of the article was the plaintiff was the person meant or that he or she was understood to be the person spoken about in light of the existence of extrinsic facts not stated in the article, then it is "of and concerning" the plaintiff as though the plaintiff was specifically named.[24]

The public at large does not have to understand that the statement is about the plaintiff. It is sufficient that those who know the plaintiff believed the statement was about him or her.

Libel claims can be brought by any living person or non-governmental entity that has a reputation and is legally competent to sue. Dead people, including their heirs, cannot sue for libel unless the survivors themselves are defamed. Governmental entities— even if they are acting in a non-governmental capacity—also cannot sue for libel, but entities like corporations, partnerships, labor unions and unincorporated corporations can sue for statements that harm their reputations. A particular class of people, however, for example, Jews or the morbidly obese, cannot sue for defamation because the publication would not be "of and concerning" a particular individual.

Generally, defamatory statements are not actionable if they refer to a group that is so large that "there is no likelihood that a reader would understand the article to refer to any particular member of the group."[25] To overcome what is known as the "group libel" doctrine, "a plaintiff must demonstrate that 'the circumstances of the publication reasonably give rise to the conclusion that there is a particular reference to the member.'"[26] Group libel cases in which individuals have successfully met the "of and concerning" standard usually involve groups with 25 or fewer members.[27] Accordingly, statements about the following groups have been found to be not defamatory as to members of those groups:

- Distributors of the doubtful cancer drug, laetrile,[28]
- all Oklahoma plaintiffs' trial lawyers,[29]
- individuals who had served on juries in Jefferson County, Mississippi,[30] and
- 400 present and former DEA agents who sued over the portrayal of corrupt federal agents in the film American Gangster.[31]

a. What Does Identifiable Mean?

For a statement to be "of and concerning" a plaintiff, it must lead the listener to conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or is misnamed. If statements are so vague that they could not have been intended to refer to any particular person then they are not actionable. Typically, defamatory statements about a company will not sustain a claim for defamation by those who work for the company.[32] However, if a plaintiff can establish that the defamatory comments about the company also targeted him or her personally, then he or she may have a claim for defamation.[33] For example, if a story discusses the former CFO of Home Depot or the mayor of Newark in the early 1980s, those individuals are still identifiable even if they are not named.[34]

b. Libel in Fiction

Since a plaintiff's name need not be included to satisfy the "of and concerning" requirement, plaintiffs have brought successful libel suits over works of fiction. In such suits, "the language used to describe such person must be such that those reading it, will, in the light of the surrounding circumstances, be able to identify the plaintiff as the person to whom the reference is made."[35] This can be a difficult standard to satisfy in libel in fiction claims.

For example, in *Carter-Clark v. Random House*, a librarian brought a libel action claiming that the librarian that is seduced by the presidential candidate in the first chapter of the book Primary Colors was based on her.[36] Among other things, the plaintiff claimed that she, like the character in the book, has legs that were "a gift from God." The court, nevertheless, rejected her claim and held that the similarities between the plaintiff and the character in the book were inadequate for a reader, even one who knew the plaintiff, to reasonably believe that the character was "of and concerning" the plaintiff.

Occasionally, libel in fiction plaintiffs have been able to satisfy this standard. For example, in *Batra v. Wolf*, attorney Ravi Batra claimed that the "bald Indian-American" lawyer who bribes a Brooklyn Supreme Court judge in an episode of Law & Order was based on him.[37] The judge denied a motion to dismiss, finding that viewers "would identify" the fictional "Ravi Patel" character with the plaintiff "because of the uniqueness of [Batra's] name, ethnicity and appearance."[38]

c. Photo Mistakes

Publishers and broadcasters also encounter "of and concerning" issues in cases arising from misidentifications of photographs. For example, in *Brown v. Tallahassee Democrat, Inc.*, an article entitled "Prosecution rests case in Madison murder trial" mistakenly contained the plaintiff's photograph.[39] An appellate court reversed the trial court's dismissal of the complaint on the ground that an ordinary reader may have believed that the plaintiff was guilty of or on trial for murder, given the juxtaposition of the photograph.

V. Falsity

To protect First Amendment principles, plaintiffs in libel cases bear the burden of proving the falsity of the statements they challenge.[40] True statements, no matter how disparaging, cannot be actionable.

a. Substantial Truth

Absolute truth, however, is not required. Defendants in libel actions need not prove the literal truth of the statement at issue. They only need to show "substantial truth"—that is, that the "gist" or "sting" of the matter is true.

Keep in Mind: Misquotes will not be actionable unless they render the quote both substantially false and defamatory. Concocted quotes or ones so telescoped as to quotes that distort the speaker's intent can be defamatory if they put words in his mouth that he never would have said and that are harmful to his reputation.

b. The "Gist" or "Sting" Test

Under the substantial truth standard, the statement in question is examined in its entirety to determine whether the gist or sting of the statement is true. A statement is false only if "it would have a different effect on the mind of the reader from that which the pleaded truth would have produced."[41] So, for example, the following statements have been found to be substantially true:

- Using the word "charge" to describe an arrest and booking even though no formal arraignment occurred;[42]
- Stating that an attorney "altered a client's will" without indicating that the modification was at the client's request;[43]
- Referring to a police officer as "the 'killer' of" suspect in a fatal shooting was deemed justifiable;[44]
- Reporting that an individual was convicted of "stalking," rather than the actual conviction for "harassment;"[45]
- Stating that a police officer was suspended when he was placed on "administrative leave," [46] and
- Saying that an ex-girlfriend was a "thief" when the ex-girlfriend had tortiously converted property but had not been accused of criminal conduct.[47]

VI. Fault

In general, many media defendants are protected by the standard of actual malice, which is a standard commonly misunderstood to mean that the writer had to have ill will or malice toward the subject of the article. That is not the case, however, and the standard does not apply to all challenged articles. The standard, which was established in the seminal Supreme Court case of *New York Times v. Sullivan*, means not ill will but recklessness as to the truth or falsity of a report. In other words, in the classic case, there is actual malice if a report is printed despite knowledge that it was false or with reckless disregard as to whether it was or not.

The standard originally only applied to media defendants accused of libel against a public official. This Constitutional privilege derives from the federal government's ability under the First Amendment to prohibit the states via their state court systems from punishing or restricting freedom of speech. Gradually, the Supreme Court expanded the standard to apply to public figures as well as public officials, and also to limited purpose public figures, namely those who are in the public eye generally or who have become embroiled in a public dispute or controversy. Like public officials, public figures are deemed capable of accessing the media for the purpose of clearing their own names, rather than needing to litigate libel claims. The Supreme Court has ruled that as a result, the First Amendment requires that media defendants be protected from the threat of libel liability for their statements about public figures which they reasonably believed to be true.

Absent the application of these general standards of protection mandated by the Constitution, different states have adopted differing standards of fault for proving libel liability. These fault standards vary according to whether a claim has been brought against a media defendant, and whether the matter or report complained of is about a matter of public concern. The standards vary, but their hallmark is that they focus on how knowledgeable a defendant was that a report was or might be inaccurate. Consequently, adopting and adhering to standards of good journalism and organized record keeping are the best routes to avoiding liability. Examples of how these various standards apply to different categories of plaintiffs and claims appear in Section X below.

VII. Privileges

At common law, anyone who republishes a defamatory statement is deemed to have "adopted" that statement as his or her own, and is therefore liable equally with the original publisher.[48] However, there are several narrow defenses and privileges of which practitioners should be aware when contemplating the republication of any statement or report that potentially lends itself to allegations of defamation: (1) the Wire/Republication Privilege; (2) the Fair Report Privilege; and (3) in more limited jurisdictions, the Neutral Report Privilege. Where available, these privileges can be either statutory or developed through case law. The specific requirements for each privilege and the manner in which the elements apply can vary from jurisdiction to jurisdiction, but the general requirements for each are set forth in the chart below:

PRIVILEGE/ DEFENSE	ELEMENTS	PRACTICE POINTS
Wire Service Defense	1. Republication of a news article containing an actually false statement; 2. Acquired from a reliable/reputable news organization or source of daily news; 3. The report republished is apparently accurate or there was no reason to doubt its veracity; and 4. The article was republished without substantial change and without actual knowledge of its falsity.[49]	• Who or What is Protected: Different jurisdictions extend the protection to different types of parties. For example, some jurisdictions arguably extend the privilege to anyone,[50] while others limit the privilege to daily newspapers and news periodicals.[51] • Who or What Can be Relied Upon: Jurisdictions also differ on whether the source of the news article or statement must be a wire service or can be a work from any original publisher as long as there was no substantial reason to question the accuracy of the material or the original reporter's reputation.[52]
Fair Report Privilege	1. Report of an official, judicial or legislative proceeding or action; 2. Report must be a fair and accurate; and 3. Clear attribution of the statement in question to the official proceeding or document.[53]	• Qualified or Absolute: One should identify whether the specific jurisdiction recognizes the Fair Report Privilege as (1) absolute[54] (and therefore door-closing); or (2) qualified[55] (where malice can overcome the privilege). • Scope: Vet out the extent of the Fair Report Privilege in your jurisdiction. In most instances it applies to most phases of judicial proceedings, and to public governmental agency or officer reports. Issues can arise around (1) statements of law enforcement officers in connection with arrests or investigations and (2) statements of public officials during public meetings, press conferences and interviews.[56]
Neutral Report Privilege (Right of Neutral Reportage)	1. The reported statement was made by a "responsible, prominent organization;" 2. The reported statements were about a "public figure;" 3. The reported statements were newsworthy; and 4. The report was "accurate and disinterested."[57]	• Outright Rejection in Some Jurisdictions: As to concerns with the possible breadth of protection, some courts have outright rejected the privilege entirely.[58] • Pre-Existing Controversy Requirement: Note: some courts have required that a pre-existing controversy exist in order for a statement to be "newsworthy."[59] • Neutrality: Jurisdictions recognizing the privilege often require that the re-publisher refrain from concurring or espousing in the statements reported.[60]

VIII. Assessing and Documenting Sources

Assessing and documenting sources so as to avoid claims for defamation is a fine art which publishers and authors hone over many years. There are also no iron clad rules which can prevent claims from arising. However, there are some general parameters which every publisher of potentially defamatory material should bear in mind:

How inflammatory is the allegation? If a claim or statement is particularly inflammatory, or would be perceived as such by the person about whom the allegation is made, obviously more backup is required and should be from more reputable sources, or at least sources which have no or little incentive to harm the person or entity who is the subject of the allegation. While no generalized rule can be applied to all types of publications, it is useful to adopt the standard journalistic practice of obtaining authorization or confirmation from at least two sources for any sensitive allegation. Those sources should be independent of each other, so as to provide credibility for the information or allegations contained within the ultimate publication.

Beware of the unreliable source. If a source is known to have provided unreliable information, or there is something inherently suspect about the manner in which the information has been received, consider whether counting this as a source at all. In the event of a claim, the fact that a source has been proven to be inaccurate previously will be used by any defamation plaintiff as evidence of actual malice. A very sound corroborating source may balance out use of the less reliable source despite knowledge of the second source's unreliability. For similar reasons, if the source seems to have an obvious grudge, a financial incentive or a political motive for reporting inaccurately about some detail in a published report, consider again whether to count this source as one of the two sources for any sensitive statements.

Keep notes and any supporting records. In the event of any claim, the first issue that defamation plaintiff lawyers raise is nearly always: "Where are the notes?" If the author of an allegedly defamatory article or report has his or her back-up notes from the time that the article was written, and any documents which were received from sources, it greatly increases the chances that a case will be dismissed, providing of course that the notes or the underlying materials do in fact support the statement in the allegedly defamatory article or report. It is now simple enough to scan and file notes and even business cards of informants such as police officers involved in the investigation of a crime, and file them or label the scan so as to be able to find them later. The fact that the business card of the source or the phone number or badge number of the arresting officer is contained within the notes helps corroborate the accuracy of aspects of a report, even if the witness or officer cannot be traced subsequently. Notes which are difficult to read are useful evidence of good faith, as they show the journalist had information when the article was written. Even misspelled names, unreadable e-mail addresses or inaccurate police badge numbers are useful evidence of good faith in the reporting of an article which turns out to be somewhat inaccurate.

Maintain records. In reporting on police activity, police officers usually do not to wish to create or sign documents confirming their oral statements to reporters or other members of the public. While police officers now frequently have e-mail addresses, they will rarely take the time to respond to e-mail inquiries or requests for additional written confirmation of statements they have made; they have enough internal reporting to do without responding to information requests from members of the public who have connection to a crime. It can be helpful, therefore, for reporters to send their own confirming e-mails to police officers or other public officials, simply confirming the statements which have been made to a reporter, and keeping copies of the e-mails as evidence of how the information was gathered. Even in the absence of an e-mail response from the public official concerned, such contemporaneous records are useful evidence in defense of a defamation claim.

Make use of any libel review to improve accuracy. In the event of a complicated article or a writing project which has taken time to come to fruition, the process of reviewing material for possible defamation liability can be a useful check to ensure that the author has not strayed too far from the original source material. There can be great temptation for an author to change the phrasing of a confession, the salaciousness of an account, or only to quote the consistent parts of otherwise inconsistent reports from different sources. When an author has embellished a story in this way, referring back to the notes of the original conversation can ensure that the ultimate article does not stray from its original basis.

Finally, there is nearly always a way to say the same thing a different and less inflammatory way. This, too, is an art that defamation practitioners work many years to perfect. When an article must be rephrased, consider how the article can say less explicitly, and disclaim any intent to imply more. Stick to the truth or the basic underlying facts which the reporter has gathered, and describe what is still unknown or still under investigation. Such an approach can result in stronger writing, and leaves the readers to draw their own conclusions, rather than overstating the evidence.

IX. Retraction Demands/Mitigation of Damages

Despite proper reporting and rigorous vetting, there are times when a story gets the facts wrong and issuing a retraction should be considered. In most jurisdictions, a retraction of a defamatory statement, under certain circumstances, can serve to significantly limit the damages available to a defamation plaintiff in litigation. Retractions, and a plaintiff's failure to appropriately demand a retraction prior to litigation, can be a useful tool for any defamation defendant.

The defendant's right to mitigate damages through retractions can be either statutory or derived through common law. It therefore is imperative that, when the publication of a defamatory statement has been alleged, one understands the applicable jurisdiction's treatment of retraction. The general framework is set forth below.

a. Retraction Statutes

Many states have enacted retraction statutes that require defamation plaintiffs to first request that the defendant retract an alleged defamatory statement prior to commencing litigation, or otherwise suffer the consequence of being limited to special or actual damages only.[61] This is often referred to as the "retraction demand."

Most retraction statutes require that the retraction demand be served on the defendant within a specified time after the plaintiff learns of the publication.[62] Conversely, for example, North Carolina's statute specifies a method and time-limit for retraction after a demand is made.[63] Timely and proper retraction, coupled with good faith and a reasonable belief of the truth of the statement, usually will limit the plaintiff to actual damages.[64]

Once one identifies whether a specific jurisdiction has a retraction statute, it is important to determine the appropriate scope of the statute's reach. In some instances, those defendants permitted to take advantage of retraction statutes are limited, e.g., media defendants[65] or newspapers.[66] Other retraction statutes can apply to all libel actions regardless of the defendant's status.[67]

b. Common Law

Some jurisdictions, including New York, that do not have a retraction statute per se, permit defendants to offer in a defamation case evidence of a retraction to mitigate punitive damages, but not compensatory damages.[68] In the event that a specific jurisdiction lacks a retraction statute, one should analyze case law to determine the evidentiary significance that courts afford to retractions in defamation actions.

X. Who Sues? People and Businesses Most Likely to Sue

There is of course no hard and fast rule about the type of person who will take action via a defamation case. However, some general categories have emerged.

a. Politicians and Judges

Politicians, particularly local ones, obviously have a significant interest in protecting their reputations, and consequently they constitute a significant category of libel plaintiffs. As explained above, reports of investigations of malfeasance by local officials have the advantage of being protected by the actual malice standard. Nevertheless, politicians have a short-term interest in trying to discredit a report that exposes misdeeds. Similarly, judges have a political persona, and have become increasingly willing to sue when they believe a report impugns them or accuses them of impropriety. In one recent well-publicized case, Chief Judge Thomas of the Supreme Court of Illinois obtained a $7 million jury verdict in a claim against the publisher of a political newsletter.

b. Celebrities

Famous performers, actors and models likewise have a significant interest in how they are perceived by the public and in trying to avoid the negative effects on their career of reports, particularly and ironically, the accurate ones. Once again, however, the standard of fault which applies is likely to be actual malice, as reports about the activities of a public figure are by definition likely to meet the standard of constituting a matter of public concern.

c. Private Professionals

In general, if a person's abilities or activities are implicated by a report, many defense lawyers have experienced that other professionals, who are used to dealing with lawyers in the course of their careers, are more likely to take action via litigation than other members of the public. Not only are people with lucrative careers more likely to have the money, time and resources to hire a lawyer, they are more likely to know one who will take a libel case on a contingency, feel comfortable instructing them, and may better articulate arguments to them. In addition, the more a plaintiff earns, or earned at the time of the report, the more likely that he or she will be able to make a credible argument as to damages in an amount that justifies legal action. This category of libel plaintiff—doctors, lawyers, coaches, teachers—poses perhaps the greatest risk, as these professionals are more likely able to establish themselves as private figures, and so the Constitutional protections will not apply.

Assuming the report is about a matter of public concern, the standard of fault will therefore be determined by state law. Most states provide some protection to media defendants by requiring that a media defendant reporting on a matter of public concern can only be held liable if the plaintiff meets a somewhat elevated standard. In New York, for example, the standard is gross irresponsibility according to the standards of information gathering and reporting in the community. Stricter standards of liability can apply when a court finds that a report is not on a matter of public concern. Therefore, reports about activities of private individuals should be among those which editors and writers scrutinize the most for unsubstantiated statements.

XI. False Light

Almost invariably connected with defamation claims is the invasion of privacy tort of false light. The Restatement (Second) of Torts § 652E defines the tort of false light as follows:

> One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

The primary distinction often drawn between defamation and the false-light tort is that of the harm against which each cause of action is meant to protect. Defamation involves an injury to one's reputation. The privacy tort of false-light, on the other hand, compensates plaintiffs for mental distress deriving from false public exposure.[69]

A majority of jurisdictions in the United States recognize a false-light tort, in some form, as an actionable tort.[70] Practitioners therefore should be aware generally of the existence of the tort and its distinctive characteristics whenever faced with potential defamation issues. Plaintiffs have attempted to use the false-light tort— sometimes successfully—where the specific facts of their cases do not meet the necessary requirements for a defamation claim. Courts have struggled to distinguish the false-light tort from defamation claims, and in some instances have abolished the privacy tort altogether.[71] As a result, practitioners face a cloud of varying applications throughout the United States that lends itself to several potential pitfalls:

1. Truth may not always be a complete defense to false-light. Even though the publication may be true, the plaintiff may still be able to recover under false-light claim if the information was presented in a way that generates a false implication about the plaintiff.[72]

2. The level of fault may vary depending on the jurisdiction. While the Restatement (Second) of Torts § 652E requires actual knowledge or reckless disregard of the falsity, it expressly leaves open the possibility of merely negligence being a sufficient level of culpability.[73]

3. Qualified or conditional privileges may not be a defense to false-light. Some courts have reasoned that to establish a false-light claim, in most instances, the plaintiff must show actual malice, therefore rendering these privileges moot.[74]

4. The publication requirement is more difficult to establish in most false-light claims. Specifically, unlike in defamation actions, the plaintiff in most false-light cases must demonstrate that the defendant disclosed the information to the public—disclosure to a single person or small group of persons may not suffice.[75]

5. The appropriate statute of limitations relevant to a false-light cause of action may be longer than that of defamation.

XII. Trade Libel and Product Disparagement

While most defamation actions involve statements made about individuals or businesses, practitioners should be aware that some jurisdictions recognize libel and/or slander actions for product disparagement, i.e., statements concerning goods or services created by or offered from competitors in their marketplace, and edible food disparagement.[76]

Product disparagement claims can arise from false claims made against goods or services. To recover for disparagement of goods (also known as "trade libel"), a plaintiff must show that the defendant published a defamatory statement denigrating the quality of the plaintiff's goods or services.[77] However, in most states, such as New York, California, and Massachusetts, a plaintiff must show that the defendant acted with actual malice.[78] Some jurisdictions, including New York, also require the plaintiff to prove special damages, which may be demonstrated only by proof of the defendant's intent to harm the plaintiff.[79]

Food disparagement laws (often referred to as "veggie libel laws") create civil (and, in at least one jurisdiction, criminal[80]) liability for defamatory statements made against perishable food. The most well-known is the Texas False Disparagement of Perishable Food Products Act, which has been a model for other states adopting this protection.[81] Veggie libel laws have been adopted by only 13 states,[82] not including New York. Under some statutes, plaintiffs must demonstrate the statement is not based on reliable scientific facts and data, and that the disseminator knows or should have known the falsity of the statement.[83] However, veggie libel laws vary on issues such as standing, the culpability standard triggering liability and the available recovery.[84]

XIII. Conclusion

As explained at the beginning of this chapter, defamation law, a creature of case law with an overlay of federal Constitutional and statutory protections, has evolved into a complex patchwork of protections for media entities. Publishers cannot be faulted for being concerned about whether their particular situation will be covered by those protections. While the general outlines and practice pointers above should point the way, the smart practitioner will recognize when a specific situation requires specialist advice.

Endnotes

1. Robert D. Sack, Sack on Defamation (3d Ed. PLI) (2001), at 4-7.
2. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 19, 21 (1990).
3. *Id*. at 19.
4. *Id*. at 20.
5. 97 Cal. App. 4th 798, 799-800, 810-811
6. *See also Levinsky's, Inc. v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 130 (1st Cir. 1997) (finding that a statement describing a store as "trashy" was protected opinion because the word is "a chameleon that continuously changes colors and shades of meaning" and "no objective evidence…might conclusively prove or disprove it").
7. *Levin v. McPhee*, 199 F.3d 189, 197 (2d Cir. 1997).
8. 58 F. Supp. 2d 1113 (C.D. Cal. TK).
9. *Id*. at 1122.
10. Robert D. Sack, Sack on Defamation, 4-43, *citing Milkovich* 797 U.S. at 20.
11. *Ollman v. Evans*, 750 F.2d 970, 983 (D.C. Cir. 1984).
12. *Horsley v. Rivera*, 292 F.3d 695, 702 (11th Cir. 2002).
13. RESTATEMENT (SECOND) of TORTS § 559 comment e.
14. *Towne v. Eisner*, 245 U.S. 418, 425 (1918).
15. Robert D. Sack, Sack on Defamation, at 2-27.
16. *Id*. quoting *Beamer v. Nishiki*, 66 Haw. 572, 670 P.2d 1264 (1983).
17. *Britney Spears v. US Weekly, LLC*, Index No. SC087989, Cal. Super. Ct., Nov. 3, 2006.
18. *Myra Belle Miller v. Philadelphia Newspapers LLC, et al*., No. 4093 (Aug. 19, 2008).
19. *Solano v. Playgirl*, 292 F.3d 1078 (9th Cir. 2002) (involving claim for false light and misappropriation).
20. *Toney v. WCCO*, 85 F.3d 383 (8th Cir. 1996).
21. *Kaelin v. Globe Communications*, 162 F.3d 1036 (9th Cir. 1998). *See also Solano v. Playgirl*, 292 F.3d 1078 (9th Cir. 2002) (reversing summary judgment where plaintiff alleged magazine used his photo on cover creating false impression that he had posed nude).
22. *Eastwood v. National Enquirer, Inc*., 123 F.3d 1249 (9th Cir. 1997) (alleging claims under Lanham Act, invasion of privacy and misappropriation but applying reasoning similar to defamation).
23. *Kamalian v. Readers Digest Assoc*., 29 A.D.3d 527 (2d Dept. 2006).
24. Robert D. Sack, Sack on Defamation, at 2-118.
25. *Id.* at 2-135.
26. *Church of Scientology Intern v. Time Warner, Inc*., 806 F. Supp. 1157, 1160 (S.D.N.Y. 1992), quoting Restatement (Second) of Torts, § 564A Comment b.
27. Restatement (Second) of Torts § 564A Comment b. *But see Brady v. Ottaway Newspapers, Inc*., 84 A.D.2d 226 (2d Dep't 1981) (permitting 53 unindicted police offers to pursue a libel claim based upon a newspaper publication that stated that their "entire [police] department was under a cloud").
28. *Schuster v. U.S. News & World Report*, 459 F.Supp. 973 (D. Minn. 1978).
29. *Brock v. Thompson*, 948 P.2d 270 (Okla. 1997).
30. *Gales v. CBS Broadcasting, Inc*., 124 Fed. App. 275, 33 Media L. Rep. 1353 (5th Cir. 2005).
31. *Diaz v. NBC Universal, Inc*., 536 F. Supp. 2d 337 (S.D.N.Y. 2008).
32. *Kirch v. Liberty Media Corp*. 449 F.3d 388 (2d Cir. 2006) (finding allegedly defamatory statement by bank CEO about KirchGroup were not "of and concerning" KirchGroup's exclusive agent even though the agent was the "face" of the KirchGroup in North America; *Jankovic v. Int'l Crisis Group*, 429 F. Supp. 2d 165 (D.D.C. 2006) (finding allegedly defamatory statement about the bank owned by plaintiff was not defamatory as to plaintiff individually).
33. *Caudle v. Thomason*, 942 F.Supp. 635 (D.D.C. 1996) (finding CEO of charter airline could sue over allegations of wrongdoing by company because a listener might infer that plaintiff was responsible for any wrongdoing committed by the company).
34. While governmental agencies cannot sue for libel, government officials like, for example, the mayor of Newark, can sue if they are personally libeled.
35. 43A NY Jur. Defamation and Privacy § 77.
36. *Carter-Clark v. Random House, Inc*., 196 Misc.2d 1011 (App. Div. 2003), *aff'd*, 17 A.D.3d 241 (1st Dept. 2005).
37. 2008 N.Y. Misc. LEXIS 1933, 36 Media L. Rep. 1592 (2008).
38. *Id*.
39. *Brown v. Tallahassee Democrat, Inc.*, 440 So.2d 588 (Fla. App. 1983).
40. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986).
41. *Masson v. New Yorker Magazine, Inc*., 501 U.S. 496, 517 (1991). *See also Vachet v. Central Newspapers Inc*., 816 F.2d 313, 317 (7th Cir. 1987) (publication is deemed substantially true if plaintiff's reputation is no more damaged by publication that by the truth).
42. *Rouch v. Enquirer & News*, 440 Mich. 238, 487 N.W.2d 205 (1992).
43. *Proskin v. Hearst*, 14 A.D. 3d 782 (3d Dep't 2005).
44. *Smith v. United Church Ministry*, 212 A.2d 1038, 1039 (1995).
45. *Barnett v. Denver Publ'g. Co*., 36 P.3d 145, 148-9 (Colo. Ct. App. 2001).
46. *Miller v. Journal-News*, 211 A.D.2d 626, 620 (2d Dep't 1995).
47. *Russin v. Wesson*, 2008 VT 22, 949 A.2d 1019 (2008).
48. *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1298 (D.C. Cir. 1998).
49. *See, e.g., Winn v. Associated Press*, 903 F. Supp. 575, 579 (S.D.N.Y. 1995) (collecting cases). Note that some jurisdictions remain silent regarding the availability and application of the wire-service doctrine. It is imperative to know the specific jurisdiction in which liability may arise.
50. *See, e.g., Jewell v. NYP Holdings, Inc.*, 23 F. Supp. 2d 348, 370 (S.D.N.Y. 1998).
51. *See, e.g., Nelson v. Assoc. Press, Inc.*, 667 F. Supp. 1468, 1476 (S.D. Fla. 1987).
52. *See, e.g., Jewell*, 23 F. Supp. 2d at 370.
53. *See generally* Robert D. Sack, Sack on Defamation § 7.3.2.2.1, at 7-16 (3d ed. 2008).
54. *See, e.g., Divet v. Reinisch*, 169 A.D.2d 416, 564 N.Y.S.2d 142, 143 (1st Dep't 1991) (recognizing that New York's statutory fair report privilege–Civil Rights Law § 74–is absolute); *H & M Assoc. v. City of El Centro*, 109 Cal. App.3d 399, 408, 167 Cal.Rptr. 392, 398 (4th Dist. 1980) (recognizing that the California statutory fair report privilege–Cal. Civ. Code § 47–is absolute).
55. *See, e.g., Costello v. Ocean County Observer*, 136 N.J. 594, 607 (1994) (New Jersey fair-report privilege is qualified and can be overcome by proof of malice).
56. For a more detailed review of fair-report privilege, see, *supra*, Sack on Defamation § 7.3.2.2.4, at 7-22 to 7-32.
57. *Edwards v. Nat. Audubon Soc., Inc.*, 556 F.2d 113,120 (2d Cir. 1977).
58. *See, e.g., Dickey v. CBS Inc.*, 583 F.2d 1221, 1225 (3d Cir. 1978); *Tunney v. Am. Broad. Co.*, 109 Ill.App.3d 769, 777-78, 441 N.E.2d 86, 92 (Ill. App. Ct. 1982).
59. *See, e.g., Lasky v. Am. Broad. Co., Inc.*, 637 F. Supp. 962, 971 (S.D.N.Y. 1986) (requiring a "raging and newsworthy controversy" to exist).
60. *See, e.g., Edwards*, 556 F.2d at 120.

61. *See, e.g.*, Cal. Civ. Code § 48a (plaintiff required to serve retraction demand within 20 days after knowledge of publication or be limited to special damages in litigation).

62. *See, e.g.*, *id.*

63. *See, e.g.*, N.C. Gen. Stat. § 99-2.

64. *See, e.g.*, Fla. Stat. Ann. § 770.02.

65. *See, e.g.*, Fla. Stat Ann § 770.01.

66. *See, e.g.*, N.J. Stat Ann. 2A:43-2.

67. *See, e.g.*, N.D. Cent. Code § 32-43-02.

68. *Kehoe v. New York Tribune, Inc.*, 229 A.D. 220, 223, 241 N.Y.S. 676, 679-80 (1st Dep't 1930).

69. *See Time, Inc. v. Hill*, 385 U.S. 374, 384 n.9 (1967).

70. *See, e.g.*, *Phillips v. Smalley Maint. Serv., Inc.*, 435 So.2d 705, 708 (Ala. 1983) (recognized privacy tort for "putting the plaintiff in a false, but not necessarily defamatory, position in the public eye"); *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 788 (Ariz. 1989) (same); *Goodrich v. Waterbury Republican-American, Inc.*, 448 A.2d 1317, 1328 (Conn. 1982) (same); *Lovgren v. Citizens First Nat. Bank of Princeton*, 534 N.E.2d 987-99 (Ill. 1989); *Wyshock v. Malekzadeh*, No. 91C-09-22, 1992 WL 148002, at *2 (Del. Super. June 10, 1992).

71. *See, e.g.*, *Cain v. Hearst Corp.*, 878 S.W.2d 577, 579 (Tx. 579) (collecting cases). Still other jurisdictions only permit false-light actions where the claim is not substantially equivalent to a defamation action. *See, e.g.*, *Kapellas v. Kofman*, 1 Cal.3d 20, 35 n.16 (Cal. 1969). Also, as in New York, the right to privacy may be subject to statutory limitations and will necessarily restrict the right to false-light claims. *See generally*, *Howell v. New York Post Comp. Inc.*, 612 N.E.2d 699 (N.Y. 1993).

72. *See, e.g.*, *Godbehere v. Phoenix Newspapers, Inc.*, 783 P.2d 781, 787 (Ariz. 1989).

73. *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640, 648 (Tenn. 2001) ("when false light invasion of privacy claims are asserted by a private plaintiff regarding a matter of private concern, the plaintiff need only prove that the defendant publisher was negligent in placing the plaintiff in a false light").

74. *See, e.g.*, *Poulos v. Lutheran Soc. Serv. of Ill.*, 728 N.E.2d 547, 558 (Ill. App. 2000).

75. *See, e.g.*, *Curran v. Children's Serv. Ctr. of Wy. C'nty, Inc.*, 578 A.2d 8, 12 (Pa. Super. 1990) ("'publicity' differs from the 'publication' which is required in connection with liability for defamation"); *Martin v. Baehler*, No. 91C-11-008, 1993 WL 258843 at *2 (Del. Super. May 20, 1993) (disclosure to three family members of plaintiff insufficient).

76. It should also be noted that a suit for disparagement of goods or food will oftentimes include actions under the Lanham Act for false advertising and trademark dilution or tarnishment.

77. *Ruder & Finn, Inc. v. Seaboard Sur. Co.*, 52 N.Y.2d 663, 671 (N.Y. 1981).

78. *See, e.g.*, *id*; *Suzuki Motor Corp. v. Consumers Union of United States, Inc.*, 330 F.3d 1110 (9th Cir. Cal. 2003); *Flotech, Inc. v. E. I. Du Pont de Nemours & Co.*, 814 F.2d 775 (1st Cir. Mass. 1987); *see also Bose Corp. v. Consumers Union of United States*, 466 U.S. 485 (1984) (requiring proof of actual malice in product disparagement claims is not unconstitutional).

79. *See, e.g.*, *De Marco-Stone Funeral Home v. WRGB Broadcasting*, 203 A.D.2d 780 (N.Y. App. Div. 1994).

80. Colo. Rev. Stat. Ann § 35-31-101.

81. Tex. Civ. Prac. & Rem. § 96.001 (defining "perishable food" as "a food product of agriculture or aquaculture that is sold or distributed in a form that will perish or decay beyond marketability within a limited period of time").

82. Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Louisiana, Mississippi, North Dakota, Ohio, Oklahoma, South Dakota, and Texas.

83. Tex. Civ. Prac. & Rem. § 96.001. *See also Texas Beef Group v. Winfrey*, 201 F.3d 680, 687-89 (5th Cir. 2000) (finding no liability for false statements about plaintiff's beef products, where defendant had no knowledge of falsity).

84. *See, e.g.*, Alabama Code § 6-5-620; Ariz. Rev. Stat. Ann. 3-113; Fla. Stat. Ch. 865.065; Ga. Code Ann. 2-16-1; Idaho code § 6-2003(1) (1995); La. Rev. Stat. Ann. 3 :4501; Miss. Code Ann. 69-1-253(a); N.D. Cent. Code § 32-44-01; Ohio Rev. Code Ann. § 2307.81; O.C.G.A. § 2-16-1; S.D. Codified Laws Ann. 20-10A-2 (1995).

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Christopher Marino, an associate, and Russell Spiegel, a Brooklyn Law School intern, both at Cowan DeBaets, provided invaluable assistance towards writing this chapter.

Summary

By Joel L. Hecker

The Google Book Project proposed Class Action Settlement (Proposed Settlement) has certainly taken a beating. More than 400 submissions on the Proposed Settlement, both domestic and foreign, were submitted to the court. Most of these comments express disapproval of one or more aspects of the Proposed Settlement.

The final proverbial straw which doomed the initial draft of the Proposed Settlement was submitted by the U.S. Department of Justice (DOJ) in its Statement of Interest dated September 18, 2009 on behalf of the United States of America (reproduced in its entirety starting on page 27).

As a result of the DOJ's position as well as the other objections, the parties requested various adjournments of the Fairness Hearing on the Proposed Settlement, representing to the court that they and the DOJ were committed to constructive modifications.

On November 13, 2009 the parties filed with the court an Amended Proposed Settlement Agreement (Amended Proposed Settlement) and a motion to preliminary approve it, which the court granted as a procedural measure. The Amended Proposed Settlement was the result of extensive negotiations among parties and the DOJ. The court has scheduled a final Fairness Hearing for February 18, 2010. Opponents of the Amended Proposed Settlement have until January 28, 2010 to file objections with the court, and the DOJ has until February 14, 2010 to file its Statement of Interest with the court, both concerning only the amendments to the Amended Proposed Settlement.

This article will summarize the positions advanced or suggested by the DOJ and the effect they might have on the Amended Proposed Settlement, as well as how the Amended Proposed Settlement has actually addressed these and other previously raised concerns.

DOJ's STATEMENT OF INTEREST

DOJ's Positive Approval

The DOJ consistently voiced support for a modified settlement that successfully addresses its concerns. The DOJ's position is one of strong support for a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and orphan works. In particular, the DOJ's views are governed by three basic principles:

> First, that making large numbers of copyright works available to the public in electronic form while providing compensation to authors and publishers is a public benefit.
>
> Second, the end result should be a marketplace where consumers pay competitive prices for the benefits received, with multiple outlets from which to obtain access to the works.
>
> Third, rights of absent class members must be fully protected.

The DOJ could not, however, support the original Proposed Settlement because of issues falling into three basic categories: (1) failure to satisfy Federal Rules of Civil Procedure Rule 23 (relating to class action notice); (2) violation of copyright law; and (3) violation of antitrust law.

Rule 23 Issues

The DOJ objected to the settlement, as drafted, in that it did not satisfy the Rule 23 requirements that a class settlement be fair, reasonable and adequate.

The main reason is that the proposed class representatives, made up of known members from the publishers and the authors, would have conflicts of interest if they also represented absent class members who are owners of out-of-print works and orphan works.

While Google would be required to obtain the permission of copyright owners of in-print works before making use of them, no such permission is required for out-of-print works. Since owners of orphan works are by definition difficult or impossible to locate and thus difficult to notify, no amount of notice is, according to the DOJ, likely to protect those orphan rightsholders who are unaware of their rights or unclear how or whether they want to exploit them. Yet, under the initial Proposed Settlement, profits from the commercial use of an out-of-print work are to be distributed to pay the expenses of the independent transparency-operated Book Registry to be created, and then to its registered rightsholders if an out-of-print work copyright owner does not come forward within five years.

There is therefore a built-in conflict, since the Registry and its registered rightsholders have every economic incentive to discourage out-of-print rightsholders from coming forward to claim their shares of the revenue stream.

In addition, the known rightsholders can deny Google permission to use their works in ways they deem objectionable, a right effectively denied to owners of orphan works and out-of-print rights holders who are not aware of the settlement. In fact, the DOJ points out that the largest publisher plaintiffs have indicated that they are likely to enter into their own separate agreements with Google, opting out of the future oriented provisions of the Proposed Settlement.

Furthermore, as pointed out by Marybeth Peters, Register of Copyrights, the proposed system to exploit out-of-print works without the prior consent of the copyright owners alters the traditional understanding of copyright law, which allows the copyright owner to exclude others from using a copyrighted work without the express authorization of the copyright owner who, under the law, has no obligation to consent to any particular use, or to even respond to a request for such consent. (Ms. Peters' statement is also reproduced in its entirety starting on page 39.)

DOJ Remedial Suggestions

The DOJ has made suggestions to remedy these shortcomings. The primary change would be going to an opt-in, rather that an opt-out, approach. Under an opt-in settlement, only these rights holders who affirmatively agree to participate, or "opt-in," would be included in the class. Those who do not opt-in, which would include by definition the owners of orphan works, those who did not know of the settlement, and those who did know but choose not to participate, would not be covered and would retain their statutory copyright rights. This would give adequate protection to foreign rightsholders who have a different set of issues under international law.

Other suggestions made by the DOJ include having unclaimed profits devoted to a search for orphan works owners, having a separate guardian representative for orphan works owners, and authorizing the court, upon petition of the Registry, to authorize an alternative distribution based upon subsequent events.

The DOJ specifically states that it believes that the ongoing discussions between the parties should be able to address these concerns.

Copyright Law Issues

As addressed above, the proposed system would alter the traditional understanding of copyright law by depriving the copyright owner of the right to exploit copyrighted works though an opt-out settlement mechanism.

Antitrust Law Issues

The DOJ has already opened an investigation into the competitive impact of the Proposed Settlement, which is still ongoing. The DOJ points to two serious issues which it claims are not reasonably necessary to achieve the stated benefit of the Proposed Settlement—breathing new commercial life into long-forgotten commercially unavailable works.

A. Horizontal Agreements

First, through collective action, the Proposed Settlement appears to give book publishers the power to restrict completion by effectively precluding others from competing with Google in the sale of digital library products and other derivative products to come.

Price competition restrictions among authors and publishers appear to exist as the result of an industry-wide revenue sharing formula at the wholesale level, the setting of default prices and effective prohibition on discounting by Google at the retail level, and control of prices for orphan works by known publishers and authors whose own works would likely compete with the orphan works.

B. Foreclosure of Competition in Digital Distribution

The DOJ believes that the Proposed Settlement gives Google de facto exclusive rights for the digital distribution of orphan works. The Registry would negotiate with Google regarding new commercial uses of digital books, release Google from any copyright liability arising from the new uses, and while the Registry is not prohibited from licensing these works to others, it could not do so without the consent of the copyright owner. Accordingly, since such consent will not be available from orphan work owners, the Registry is effectively precluded from granting such licenses.

In addition, potential competitors of Google are unlikely to obtain rights comparable to what Google is getting. To do so, any such competitor would have to engage in an en masse unauthorized copying of copyrighted books in the hope that it would engender a class action lawsuit, which would then be settled on terms similar to Google's. Aside from the absurdity of such a scenario, Google has a "most favored nation" clause in the Proposed Settlement, which would in and of itself discourage potential competitors, because they could not ever obtain better terms than Google. This foreclosure of newcomers to a market, opines the DOJ, is exactly the kind of competition the Sherman Antitrust Act is designed to address.

To obviate this issue, the DOJ suggests that the Proposed Settlement be amended to provide some mechanism by which Google's competitors could gain comparable access to orphan works.

Positive Aspects

The DOJ strongly supports provisions committing Google to provide accessible formats and comparable user experience to individuals with print disabilities and the creation of data available in multiple, standard and open formats supported by a wide variety of different applications, devices and screens.

The heart of any settlement as modified by the parties, according to the DOJ, should continue Google's original premise for this entire project, which is that anyone, anywhere, anytime, should have the tools to explore the great works of history and culture.

SUMMARY OF PRINCIPAL CHANGES IN THE AMENDED PROPOSED SETTLEMENT

- The Amended Proposed Settlement has limited the definition of "books" to books published in the U.S. or by U.S. nationals, and books published in the U.K., Canada and Australia. This should effectively eliminate the concerns of foreign nationals, foreign governments, and others, which are addressed to over 300 of the 400 objections. In addition, comic books, calendars, microform and periodical compilations are expressly deleted from the class, as are books that contain more than 20 percent of musical notations or where children's book illustrations appear on more than 20 percent of the pages of a work.
- The definition of "commercially available" has been changed so that a book now will be deemed commercially available if copies are available for purchase in the U.S., the U.K., Canada or Australia. The Registry will now be given 60 days notice if Google declares any classification not to be commercially available.
- The "most favored nations" provision has been deleted. As a result, the Registry can now negotiate an arrangement with others that is better than that given to Google. The pricing algorithm provisions have also been modified to simulate the price by a rightsholder for a particular book without setting a standard for maximum prices. These prices will not be shared by the Registry.
- A provision was added to permit either Google or a rightsholder to request changes in revenue splits.
- The prior limit of "up to 40 [percent]" on discounts, which Google was able to offer, was eliminated to meet a DOJ anti-competitive concern.
- A provision was added to permit others to resell access to books.
- The potential future revenue models, which had been intentionally vague in the original Proposed Settlement, are now limited to the specific categories of print on demand, file download, and consumer subscriptions to the institutional database.
- A fiduciary is to be appointed for the Registry to represent the interests of rightsholders of unclaimed works. This is meant to address the competitive concerns arising out of conflicts of interest.
- Income from any unclaimed works will now, after the first five years, be spent only to try to locate the rightsholder and after 10 years is to be allocated for literacy-based charities in the U.S., U.K., Canada, and Australia.
- Google will not be permitted to reveal personally identifiable information about users in the absence of legal process.
- The deadlines for submitting claims for a cash payment will be extended from January 5, 2010 to March 31, 2011, and for removing a Book from the database from April 5, 2011 to March 9, 2012.

Undoubtedly, the filing of the Amended Proposed Settlement will start another round of analysis and comments on the modifications. Hopefully the final approved settlement, if that point is ever reached, will play out to the benefit of all concerned as well as to the public at large.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE AUTHORS GUILD, INC. *et al.*,
Plaintiffs, 05 Civ. 8136 (DC)
v.
GOOGLE INC., **ECF CASE**
Defendant.

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA REGARDING PROPOSED CLASS SETTLEMENT

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House Comm. on the Judiciary, 111th Cong., 1st Sess. (2009) (statement of Paul Aiken, Executive Director of the Authors Guild)

XI Herbert Hovenkamp, *Antitrust Law* ¶ 1907c at 246-48 (2d ed. 2005)

The United States of America, by and through counsel, submits this statement of its views concerning the proposed class action settlement (the "Proposed Settlement" or "Agreement") between the American Association of Publishers, *et al.* (the "Class Plaintiffs") and Google Inc. ("Google").

The United States has been informed by the parties that they are continuing to consider possible modifications of the Proposed Settlement to address the many concerns raised by various commenters and by the United States in its discussions with the parties. The Proposed Settlement is one of the most far-reaching class action settlements of which the United States is aware; it should not be a surprise that the parties did not anticipate all of the difficult legal issues such an ambitious undertaking might raise. Further, the parties have represented to the United States that they put this Court on notice of their ongoing discussions and that they may present a modified version of the Proposed Settlement in the future. The United States is committed to working with the parties constructively with respect to alterations the parties may propose.

The United States strongly supports a vibrant marketplace for the electronic distribution of copyrighted works, including in-print, out-of-print, and so-called "orphan" works. The Proposed Settlement has the potential to breathe life into millions of works that are now effectively off limits to the public. By allowing users to search the text of millions of books at no cost, the Proposed Settlement would open the door to new research opportunities. Users with print disabilities would also benefit from the accessibility elements of the Proposed Settlement, and, if the Proposed Settlement were approved, full text access to tens of millions of books would be provided through institutional subscriptions. Finally, the creation of an independent, transparently-operated Book Rights Registry (the "Registry") that would serve to clarify the copyright status and copyright ownership of out-of-print works would be a welcome development.

Nonetheless, the breadth of the Proposed Settlement—especially the forward-looking business arrangements it seeks to create—raises significant legal concerns. As a threshold matter, the central difficulty that the Proposed Settlement seeks to overcome—the inaccessibility of many works due to the lack of clarity about copyright ownership and copyright status—is a matter of public, not merely private, concern. A global disposition of the rights to millions of copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement. If such a significant (and potentially beneficial) policy change is to be made through the mechanism of a class action settlement (as opposed to legislation), the United States respectfully submits that this Court should undertake a particularly searching analysis to ensure that the requirements of Federal Rule of Civil Procedure 23 ("Rule 23") are met and that the settlement is consistent with copyright law and antitrust law. As presently drafted, the Proposed Settlement does not meet the legal standards this Court must apply.

This Memorandum sets forth the concerns of the United States with respect to the current version of the Proposed Settlement; these concerns may be obviated by the parties' subsequent changes to the agreement. Commenters' objections to the Proposed Settlement fall into three basic categories: (1) claims that the Proposed Settlement fails to satisfy Rule 23; (2) claims that the Proposed Settlement would violate copyright law; and (3) claims that the Proposed Settlement would violate antitrust law. In the view of the United States, each category of objection is serious in isolation, and, taken together, raise cause for concern. The Proposed Settlement seeks to implement a forward-looking business arrangement rather than a settlement of past conduct, using the mechanism of Rule 23 in a manner that implicates the principle that copyright owners generally control whether and how to exploit their own works during the term of copyright. At the same time, the Proposed Settlement would establish a marketplace in which only one competitor would have authority to use a vast array of works—especially so-called "orphan" works[1]—that may provide significant value both to Google and to the Registry, a collective which would control exploitation of those works. As the United States has previously advised the Court, the Antitrust Division of the Department of Justice is investigating the Proposed Settlement; although that investigation is still ongoing, the United States is providing in this Memorandum a preliminary explanation of its antitrust concerns.

The United States' views on the Proposed Settlement are informed by three basic principles. *First*, one goal of the settlement—making large numbers of copyrighted works available to the public in electronic form while providing compensation to authors and publishers—is a public benefit that, to date, has not come to pass due to certain realities of the copyright system, including, for example, the fact that copyright owners are not required to formally register or otherwise assert their ownership. In particular, the rediscovery of currently unused or inaccessible works and the digitization of those works in formats that are accessible to persons with disabilities are important public policy goals. The United States believes that, through the actions of private entities and Congress (if necessary), steps should be taken to advance these objectives.

Second, the end result should be a marketplace in which consumers can be assured that they are paying competitive prices for the benefit they receive—in a marketplace in which they have multiple outlets from which to obtain access to works. The benefits of this settlement should not be achieved through unjustified restrictions on competition.

Third, the structural safeguards of Rule 23 must be satisfied to ensure that the rights of absent class members are fully protected. This Court should engage in a careful and searching examination of the Proposed Settlement and any revised version that may be submitted.

The United States recognizes that the only question before the Court is whether to approve or disapprove the Proposed Settlement. Given the parties' express commitment to ongoing discussions to address concerns already raised and the possibility that such discussions could lead to a settlement agreement that could legally be approved by the Court, the public interest would best be served by direction from the Court encouraging the continuation of those discussions between the parties and, if the Court so chooses, by some direction as to those aspects of the Proposed Settlement that need to be improved. Because a properly structured settlement agreement in this case offers the potential for important societal benefits, the United States does not want the opportunity or momentum to be lost.

I. Aspects of the Proposed Settlement in Its Current Form Require Modification to Satisfy Rule 23

Rule 23 is designed to ensure that the settlement of a class action resolves disputes on behalf of plaintiffs who have aligned interests and protects the legal rights of absent class members whose interests may diverge from those of the named class representatives. To prevent abuses and to provide structural guarantees of fundamental fairness, Rule 23 requires that the class be defined in terms of commonality, typicality, and adequacy of representation, and that class settlements be fair, reasonable, and adequate. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620, 628-29 (1997); *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982); *E. Tex. Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977).

The United States submits that, as currently drafted, the Proposed Settlement does not satisfy these requirements. As discussed below, there are changes that the United States has identified that may reduce potential conflicts among class members and address concerns about the adequacy of representation for absent class members. Moreover, the most sweeping forward-looking licensing provisions of the current Proposed Settlement (which give open-ended control to the Registry and Google for the exploitation of the rights of absent class members unless those class members opt out of those provisions) both exacerbate potential conflicts between the interests of the class representatives and those of absent class members—especially rightsholders of out-of-print works and foreign rightsholders—and are difficult to square with the requirements of Rule 23. In addition, as discussed below, the record at this time does not establish that the class was afforded adequate notice, which is critical given the size and geographic scope of the class, and the alteration in copyright protection that the Proposed Settlement would effectuate.

The parties have indicated that they are renegotiating a number of aspects of the Proposed Settlement. Until the parties agree on new provisions, however, it is impossible to determine whether a modified settlement will satisfy Rule 23's strictures. Accordingly, the United States respectfully submits that, as identified below, there are various ways to address the foregoing concerns that the parties should consider in their future discussions. The United States looks forward to the opportunity to provide the Court with its comments regarding any modified version of the Proposed Settlement that the parties may negotiate.

A. The Most Forward-Looking Provisions of the Agreement Require Modification to Satisfy Rule 23

Various commenters have suggested that the Proposed Settlement must be limited to compensation for past conduct and should provide for little in the way of forward-looking relief (other than a prohibitory injunction going forward). Citing cases such as *Amchem*, 521 U.S. at 620, 628-29, *National Super Spuds, Inc. v. New York Mercantile Exch.*, 660 F.2d 9, 17 (2d Cir. 1981), and *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 106-13 (2d Cir. 2005), these objectors contend that Rule 23 precludes settlements of claims that go beyond the four corners of the complaint filed, or that address claims that have not arisen. The United States does not advocate such a categorical view here. As a theoretical matter, a properly defined and adequately represented class of copyright holders may be able to settle a lawsuit over past conduct by licensing a broader range of conduct to obtain global "copyright peace." At least one federal court of appeals has approved a class action settlement with a forward-looking licensing component covering claims that had not yet fully accrued. *See Uhl v. Thoroughbred Tech. & Telecomms., Inc.*, 309 F.3d 978, 982 (7th Cir. 2002) (affirming class settlement that resolved trespass and slander of title claims by granting easements in railroad rights-of-way).

That said, the concerns that animated the Supreme Court's decision in *Amchem*, which rejected a proposed class settlement of all present and future claims by workers exposed to asbestos because the currently-injured plaintiffs had different interests and goals from those workers that had been exposed but had not yet suffered any injury, 521 U.S. at 626-27, and those that led the Second Circuit in *Wal-Mart* to conclude that Rule 23 does not permit release of claims of absent class members unless those claims arise from the "identical factual predicate," 396 F.3d at 107, apply with significant force to the most forward-looking provisions of the Proposed Settlement. In *Amchem*, *Wal-Mart*, and other cases, the courts have cast doubt on the circumstances in which class representatives could adequately represent absent class members with respect to as-yet uncertain injuries or rights that were far removed from the facts underlying the complaint.

Against this backdrop, the United States has greater concerns about some provisions in the Proposed Settlement than it has about others. At one end of the spectrum are the provisions that settle the specific allegations of infringement in the Complaint—Google's scanning of millions of copyrighted works and making available small portions of such works in response to search requests. As to those claims, there are strong arguments that an appropriate set of publisher and author class representatives can adequately represent all members of the class with respect to reaching a settlement for payments to be made to publishers and authors for the use of their works. The claims are based on specific conduct and present facts, and, assuming representation of those with potentially different interests, adequate representation seems possible.

At the other extreme are the provisions of the Proposed Settlement that authorize the Registry to license Google to exploit the copyrighted works of absent class members for unspecified future uses (potentially derivative works or other uses)—essentially authorizing, upon agreement of the Registry, open-ended exploitation of the works of all those who do not opt out from such exploitations. *See* Proposed Settlement Agreement, dated Oct. 28, 2008 ("S.A.") § 4.7 (allowing the Registry to authorize future business models without any class notification). Such licensing is far afield from the facts alleged in the Complaint. And the rights conferred are so amorphous and malleable that it is difficult to see how any class representative could adequately represent the interests of all owners of out-of-print works (including orphan works). The parties appear willing to address this problem by limiting the future rights that may be controlled by the Registry and Google. The United States looks forward to working with the parties to address these concerns across the entire spectrum of provisions in the Proposed Settlement.

B. The Parties Have Not Demonstrated that the Class Representatives Adequately Represent Absent Class Members

The Proposed Settlement raises concerns about the adequacy of representation afforded to absent class members, especially owners of "orphan" out-of-print works and foreign rightsholders. We address each set of concerns separately.

First, the Proposed Settlement draws distinctions between in-print and out-of-print works. Google must obtain the permission of copyright owners of in-print works before making use of those works (beyond scanning). *See* S.A. §§ 3.2(b), 3.4(b). But Google can incorporate out-of-print works into new commercial products without the owner's permission, S.A. §§ 3.2(b), 4.7. Copyright owners of out-of-print works can deny Google permission to use their works in certain ways if they learn of the agreement and their rights under it. S.A. §§ 3.2(e)(i), 3.5, 4.7. But, copyright owners of out-of-print works provide a release to Google for any exploitation of their rights that occurred prior to those owners becoming aware of Google's use. S.A. §§ 10.1(f), 10.1(m)-(n), 10.2(a). And, because the owners of orphan works are an incredibly diverse group that includes not only living authors or active publishers, but heirs, assignees, creditors, and others who acquire the property interest by contract or operation of law, these rightsholders are difficult or impossible to locate, and thus difficult to notify. Moreover, no amount of notice is likely to protect those orphan rightsholders who are unaware of their rights or unclear how or whether they want to exploit them. Yet, if an out-of-print copyright owner does not come forward within five years, profits from the commercial use of the out-of-print work are distributed to pay the expenses of the Registry and then to the Registry's registered rightsholders. *See* S.A. § 6.3; S.A. Attachment C, Plan of Allocation §§ 1.1(e), 2.3.

The structure of the Proposed Settlement itself, therefore, pits the interests of one part of the class (known rightsholders) against the interests of another part of the class (orphan works rightsholders). Google's commercial use of orphan works will generate revenues, which will be deposited with the Registry. Any unclaimed revenues, however, will inure to the benefit of the Registry and its registered rightsholders. Thus, the Registry and its registered rightsholders will benefit at the expense of every rightsholder who fails to come forward to claim profits from Google's commercial use of his or her work. And, as noted above, the broad scope of the Proposed

Settlement's licensing provisions exacerbate this conflict. The greater the economic exploitation of the works of unknown rightsholders by Google and the Registry, the stronger the incentive for known rightsholders to retain the unclaimed revenues for themselves.

The provisions of the Agreement that allow Google to negotiate with the Registry to develop new derivative products create additional adequacy-of-representation concerns. The class representatives who negotiated these terms are all known rightsholders.[2] Thus, while these rightsholders are willing to authorize Google to develop future uses of copyrighted works, their own works are fully protected from unanticipated future uses: these owners can deny Google permission to use their works in ways they deem objectionable. Out-of-print rightsholders, however, will not enjoy such protections unless they learn of the Proposed Settlement and its terms (and in some cases their own ownership rights) before Google begins a new use of their works. It is noteworthy that the parties have indicated their belief that the largest publisher plaintiffs are likely to choose to negotiate their own separate agreements with Google (*i.e.*, they will not opt in to the future provisions of the settlement), while benefitting from the out-of-print works that will be exploited by Google due to the effect of the opt-out requirement for those works. There are serious reasons to doubt that class representatives who are fully protected from future uncertainties created by a settlement agreement and who will benefit in the future from the works of others can adequately represent the interests of those who are not fully protected, and whose rights may be compromised as a result.

The parties respond to these concerns by contending that these conflicts are more theoretical than real. They submit that the Proposed Settlement will breathe new economic life into out-of-print works, which will create incentives for their owners to self-identify so that they can benefit from copyrights currently lacking commercial value. This theory is certainly plausible. But where, as here, the structure of a settlement agreement creates a conflict among known and unknown class members, a court cannot ignore or excuse that conflict based on an untested hypothesis that economic incentives will operate to obviate the conflict. *See Amchem*, 521 U.S. at 627 (looking to "structural assurance of fair and adequate representation"). That out-of-print rightsholders might benefit from a fundamental alteration of their rights is insufficient to show that they were adequately represented by named plaintiffs whose rights will not be altered (or who can readily avoid such alteration), and who stand to gain if out-of-print rightsholders do not opt out.[3] The United States looks forward to reviewing modifications to the Proposed Settlement that will provide structural assurances to minimize this conflict.

Second, the Proposed Settlement raises concerns about the adequacy of representation with respect to foreign rightsholders. The Proposed Settlement operates to sweep in untold numbers of foreign works, whose authors, under current law, are not required to register in the same manner as U.S. rightsholders. Many of those authors have never published works in the United States and are not members of the Authors Guild or the Association of American Publishers, which exclude many foreign copyright owners from membership by virtue of their membership criteria. Moreover, the interests of these class members likely differ from those of the class representatives. As the filings of France and Germany make clear, some of the United States' trading partners have serious concerns about application of the Proposed Settlement to foreign authors[4] and, in any event, the parties have not demonstrated that the class included representation sufficient to protect the interests of these foreign rightsholders.

Thus, although the Proposed Settlement may well provide overall benefits to a wide range of authors and publishers and to the public, there are at present insufficient assurances that absent class members' interests were adequately represented. The parties should continue to work on modifications to the Proposed Settlement to address these concerns.

C. The Scope of the Proposed Settlement Requires Robust Notice, and the Record Requires Further Development of Whether Such Notice Has Been Provided

Sufficient notice is a distinct requirement of Rule 23. The notice requirement is designed to ensure that absent class members are provided with the opportunity to protect their interests. As the Supreme Court explained in *Amchem*, "[t]o alert class members to their right to 'opt out' of a (b)(3) class, Rule 23 instructs the court to 'direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.' Fed. R. Civ. P. 23(c)(2); *see Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 173-177 (1974) (individual notice to class members identifiable through reasonable effort is mandatory in (b)(3) actions; requirement may not be relaxed based on high cost)." 521 U.S. at 617.

The adequacy of notice is particularly important in this case because the Proposed Settlement seeks to certify a broad class, including individuals or entities who have not yet been injured in any fashion and whose rights may be exploited (without prior consent) in a form as-yet unknown based on future decisions by the Registry and Google. It is a difficult legal question whether notice could be formulated to be legally sufficient with respect to the many undefined and uncertain future uses the Proposed Settlement would authorize Google to make. *Amchem*, 521 U.S. at 628 (noting "the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous"). Once again, foreign rightsholders present special problems of notice, especially given the fact that some may not, to date, have sought to exploit their works in the United States, but may wish to in the future, and because the Proposed Settlement grants Google and the Registry broad rights to unclaimed works.

The record on the notice provided is, at this point, undeveloped. Some commenters have complained that they did not receive notice by any direct means. *See, e.g.*, Objection of Scott E. Gant to Proposed Settlement at 16 n.31 (D.E. 143). Although the United States is not in a position to opine on whether the notice provided by Google has met the strictures of Rule 23, it believes the Court should undertake a searching inquiry to ensure both that a sufficient number of class members will be reached and that the notice provided gives a complete picture of the broad scope of the Proposed Settlement. The Court should not hesitate to require the parties to undertake further efforts to notify the class.

D. The Parties Should Consider Modifications to Address the Requirements of Rule 23

The United States is heartened that the parties are actively considering modifications of the Proposed Settlement and believes the best result is a negotiated solution that can satisfy the dictates of Rule 23, the copyright law, and the antitrust laws. The United States is fully cognizant that this is *the parties'* agreement and that even small modifications to the Proposed Settlement may require significant renegotiation. Nevertheless, in an effort to assist the parties in their future discussions and to apprise the Court of the United States' views, the United States identifies below provisions that the parties could consider modifying to address concerns with the Proposed Settlement as currently drafted.

As a threshold matter, changing the forward-looking provisions of the current Proposed Settlement applicable to out-of-print rightsholders from an opt-out to an opt-in would address the bulk of the Rule 23 issues raised by the United States. This would put the out-of-print rightsholders and in-print rightsholders in the same situation and respond to a significant concern expressed by foreign rightsholders. Such a revision would, of course, not give Google immediate authorization to use all out-of-print works beyond the digitization and scanning which is the foundation of the plaintiffs' Complaint in this matter. Google has suggested that the vast majority of known authors and publishers of out-of-print works who have or will receive notice of the settlement will wish to be bound by it; if that is true, creating an opt-in mechanism would not seem to work a significant hardship for a broad category of affected works. Coupled with enhanced requirements of the Registry to search for rightsholders (who may then elect to opt in), such a change may achieve a significant portion of the benefit of the settlement as currently envisioned without running afoul of Rule 23. As noted in testimony by the Authors Guild before the House Judiciary Committee, "finding the rights owners of a book is not as daunting as many seem to believe."[5]

The United States does not mean to suggest, however, that such a modification is the only means to revise the Proposed Settlement to make it consistent with Rule 23. A combination of other revisions affecting the scope of the forward-looking license provisions and protecting the interests of absent class members could also alleviate at least some of the United States' concerns.

With respect to the interests of owners of out-of-print works (or any rightsholder that does not receive notice), extending the time for opting out of the class and for claiming escrowed profits owed to unknown rightsholders would minimize potential conflicts. Alternatively, the escrow provisions could be revised to eliminate the distribution of residual profits to registered rights owners. Instead, unclaimed profits could be devoted entirely to the search for rightsholders of orphan works, and the Registry could be authorized to petition the court for an alternative distribution based on a showing that search efforts had been fully exhausted. Another possibility would be to appoint persons to the Registry to serve as guardian representatives of orphan works owners. All of these steps could at least partially address the current conflict in the plaintiff class by moderating the incentive of known rightsholders to disadvantage unknown rightsholders or leverage their own economic interests on those of rightsholders who have not come forward.

The risk of such improper leveraging might also be reduced by narrowing the scope of the license. A settlement that simply authorized Google to engage in scanning and snippet displays in the future would limit the profits that others could potentially derive from out-of-print works whose owners fail to learn of their right to claim those profits. Other less significant limitations on the scope of the forward-looking license may be possible, and the United States looks forward to hearing from the parties on possible proposals.

The United States also believes progress can be made with respect to protecting the interests of foreign rightsholders. Google has already indicated that it will take steps to address the concerns of foreign rightsholders, though, to date, those actions do not appear to have addressed the concerns of the United States' trading partners, which believe that an opt-out regime for foreign rightsholders is prohibited. *See, e.g.,* Germany Opp'n at 9-11. In addition to consideration of an opt-in, as the parties continue discussions over modifications to the settlement, they should consider addressing the adequacy of representation of foreign rightsholders by adding foreign owners of in-print and out-of-print works to the class representatives, to provide some assurance that the interests of absent foreign rightsholders have been accommodated.

These are a few of many possible revisions that could be considered. The United States believes such future discussion between the parties is necessary and could be productive.

II. The Proposed Settlement May Be Inconsistent with Antitrust Law

The Department of Justice has opened an investigation into the competitive impact of the Proposed Settlement. That investigation is not yet complete, and future modifications of the Proposed Settlement in response to comments filed in the instant proceeding may bear on the conclusions of that investigation. For these reasons, the United States cannot now state with certainty whether the Proposed Settlement violates the antitrust laws in any respect. Nevertheless, the Department's views on certain core issues are sufficiently well developed that articulating them now may be beneficial to the Court in its consideration of the Proposed Settlement and to the parties in their continuing negotiations regarding possible modifications.[6]

In the view of the Department, the Proposed Settlement raises two serious issues. First, through collective action, the Proposed Settlement appears to give book publishers the power to restrict price competition. Second, as a result of the Proposed Settlement, other digital distributors may be effectively precluded from competing with Google in the sale of digital library products and other derivative products to come. These problems are evident on the face of the Proposed Settlement and the concerns they raise have not to this point been convincingly addressed by the parties. The parties have indicated, however, a willingness to consider modifications that would address at least some of the concerns set forth below.

A. Horizontal Agreements Among Authors and Publishers as to Terms of Sale

Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibits agreements in "unreasonable" restraint of trade. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). Some restraints are so manifestly anticompetitive and without redeeming value that they are deemed illegal per se under Section 1. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007). Other restraints are evaluated under the rule of reason, allowing consideration of the parties' market power and any procompetitive justifications, as well as the restraint's anticompetitive effects.

In at least three respects, the collectively negotiated provisions of the Proposed Settlement appear to restrict price competition among authors and publishers: (1) the creation of an industry-wide revenue-sharing formula at the wholesale level applicable to all works; (2) the setting of default prices and the effective prohibition on discounting by Google at the retail level; and (3) the control of prices for orphan books by known publishers and authors with whose books the orphan books likely compete. Although they arise in a unique context, these features of the Proposed Settlement bear an uncomfortably close resemblance to the kinds of horizontal agreements found to be quintessential per se violations of the Sherman Act. *See Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982); *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980) (per curiam). And, even if the provisions were considered under the rule of reason, a strong countervailing "procompetitive justification," *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 100 (1984), would be needed to avoid antitrust condemnation of what appear to be direct and unnecessary restraints on price competition.

As a threshold matter, the parties contend that the Proposed Settlement's pricing terms should be viewed not as a form of horizontal collective action by publishers and authors actionable under Section 1, but simply as a unilateral offer by Google to each individual rightsholder to contract on specified terms. The Department is not persuaded by this description. Class representatives—who compete with each other—collectively negotiated these pricing terms on behalf of all rightsholders. That some individual authors or publishers might opt out of those terms does not make them any less the product of collective action by competitors.

Alternatively, the parties contend that the Proposed Settlement should be considered a joint venture like the one at issue in *Broadcast Music, Inc. v. Columbia Broadcast.*

System, Inc., 441 U.S. 1 (1979). In *BMI*, the Supreme Court held that the blanket licenses issued and priced by the music performing rights organizations ASCAP and BMI were not subject to per se invalidation under Section 1 because: (1) they allowed for new, integrated products "entirely different from the product that any one composer was able to sell by himself," *see Maricopa*, 457 U.S. at 355;[7] (2) they generated substantial transaction-cost savings; (3) they were a practical necessity if songwriters were to be paid for the use of their compositions; and (4) ASCAP and BMI already operated under DOJ consent decrees.

The present situation is quite different. Wholly apart from whatever new integrated products Google might offer using the rights it obtains in the Proposed Settlement, Google will also act as a joint sales agent, offering each rightsholder's books for individual sale. *Contrast BMI*, 441 U.S. at 22 (approving only blanket license that was distinct from individually licensed compositions). Additionally, the Proposed Settlement's revenue-sharing provision reduces incentives for authors and publishers to compete at the wholesale level through bilateral negotiations with Google. In contrast, ASCAP and BMI have always negotiated separate bilateral agreements with rightsholders, preserving competition among the rightsholders for their share of the blanket license revenues—just as Google (through its Partner Program) and competitors such as Amazon.com and Sony have done with thousands of publishers. Moreover, unlike music rightsholders who need the ASCAP/BMI organizations to detect the "fleeting" uses of their compositions on the airwaves, *id.* at 19, book authors and publishers have not shown that they lack a practical means to be paid for uses of their works in the absence of collectively negotiated pricing mechanisms. Finally, unlike both ASCAP and BMI, *id.* at 10-15, 24, no actor here has its market power constrained by a consent decree with the Department of Justice, which, among other things, allows licensees to ask the court to set the price of a license.

Thus, the parties' threshold arguments do not justify forgoing a thorough inquiry into the anticompetitive potential of the Proposed Settlement's collectively negotiated pricing terms. As will be shown, absent modification by the parties, there is a significant possibility that the Department will conclude that those terms violate the federal antitrust laws.

1. Collective Agreement on Wholesale Terms

Currently, publishers compete with each other over the terms on which they will sell hard-copy and digital books to distributors, including Google. The pricing terms in the Proposed Settlement appear to restrict that competition. The parties have fixed the royalty rate at 63% of all revenues Google earns under the settlement. *See* § 2.1(a). This term operates as a price floor (even for those who elect not to use the Proposed Settlement's default pricing mechanisms), diminishing the incentives of individual authors or publishers to discount or offer other terms more favorable to the purchaser. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 781-82 (1975) (holding that price floor for legal services is illegal price fixing); *Maricopa*, 457 U.S. at 349 (agreement among doctors to set maximum fee they would accept for purposes of contracting with health insurers is per se illegal); *Catalano*, 446 U.S. at 646-50 (fixing price related terms in wholesale agreements is per se unlawful). Thus, for antitrust purposes, it is immaterial that authors and publishers can negotiate individually rather than accept the Proposed Settlement's terms. *Maricopa*, 457 U.S. at 341, 349-54.

The parties' contention that this kind of industry-wide pricing mechanism is necessary to create a vibrant market for digital books is difficult to reconcile with the facts on the ground. Millions of digital books are already available for purchase, including growing numbers of out-of-print books, as a result of bilateral negotiations between distributors and individual rightsholders. In the same vein, it is difficult to justify a uniform royalty rate on the theory that it will eliminate transaction costs between Google and publishers. The antitrust laws do not permit parties to justify their conduct on the ground that competition itself is undesirable. *See* XI Herbert Hovenkamp, *Antitrust Law* ¶ 1907c at 246-48 (2d ed. 2005) (reducing transaction "costs of operating the competitive market itself" is not a valid defense because "[o]ur entire market system is built on the premise that these costs are worth their price in the great majority of cases."); *see also, e.g.*, *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 687, 692-95 (1978).

2. Restrictions on Retail Price Competition

The Proposed Settlement also directs Google to develop a pricing algorithm to set default retail prices for individual books governed by the settlement.[8] In other contexts, courts have repeatedly rejected as per se illegal the establishment of a joint price-setting mechanism. *Citizen Publ'g, Co. v. United States*, 394 U.S. 131, 134-35 (1969); *Va. Excelsior Mills, Inc. v. FTC*, 256 F.2d 538, 540-41 (4th Cir. 1958); *New York v. St. Francis Hosp.*, 94 F. Supp. 2d 399, 412-14 (S.D.N.Y. 2000). Similarly, courts have held that the use of formulas agreed upon among competitors to set the price of competing goods is per se illegal. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 198-99, 222-23 (1940); *Va. Excelsior Mills*, 256 F.2d at 540. This feature of the Proposed Settlement warrants particularly close scrutiny.

The Proposed Settlement also restricts Google from discounting off a rightsholder's list price without authorization of the Registry and notification of the rightsholder, either of which may veto the discount. S.A. § 4.5(b)(ii). This term discourages Google from funding discounts and making the rightsholder whole, as any other retailer might.[9] And allowable discounts are limited to 40% off a book's list price. In other contexts, such collective restraints on discounting have been held to be per se violations of Section 1. *See Catalano*, 446 U.S. at 648 (ban on extending credit is "tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing"); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001) (volume discount ban per se illegal); *United States v. Aquafredda*, 834 F.2d 915, 917 (11th Cir. 1987) (criminal violation based on agreement to cease offering discounts).

3. Terms of Sale for Orphan Works

The Proposed Settlement also appears to limit price competition by giving publishers, through the mechanism of negotiations conducted by the Registry, the ability to control the future pricing of orphan works that may compete with the works of known rightsholders. The Registry is effectively controlled by large commercial publishers. Allowing it to set the prices of orphan works effectively allows known rightsholders to choose the price at which their competitors' books (those of unknown rightsholders) are offered for sale. *Citizen Publ'g*, 394 U.S. at 134-135 (joint sales of newspaper advertising and subscriptions by competing newspapers held to be "plain beyond peradventure" per se violations of § 1). Known rightsholders would appear to have every incentive to ensure that the orphan works will not offer effective competition.

* * *

In each of the respects described above, the Proposed Settlement's pricing terms appear to constrain competition among authors and publishers. Moreover, none seems reasonably necessary to achieve the stated benefit of the Proposed Settlement—breathing new commercial life into millions of long-forgotten, commercially unavailable works. Accordingly, absent modification of those terms, there is a significant potential that the Department will conclude that they violate the Sherman Act.

B. Potential Foreclosure of Competition in Digital Distribution

Under the Proposed Settlement, competing authors and publishers grant Google de facto exclusive rights for the digital distribution of orphan works. Such "joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle" have significant anticompetitive potential and may violate the antitrust laws. *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 936 (7th Cir. 2000) (quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 294 (1985)).

The Proposed Settlement appoints the Registry to negotiate with Google on behalf of the entire class regarding new commercial uses of digital books, and releases Google from any copyright liability arising from those new uses. S.A. §§ 4.7, 10.1(f), 10.2(a). The Proposed Settlement does not forbid the Registry from licensing these works to others. But the Registry can only act "to the extent permitted by law." S.A. § 6.2(b). And the parties have represented to the United States that they believe the Registry would lack the power and ability to license copyrighted books without the consent of the copyright owner—which consent cannot be obtained from the owners of orphan works. If the parties are correct, the Registry will lack the ability to provide competitors with licenses that will allow them to offer to the public anything like the full set of books Google can offer if the Settlement Proposal is approved.

Google's competitors are unlikely to be able to obtain comparable rights independently. They would face the same problems—identifying and negotiating with millions of unknown individual rightsholders—that Google is seeking to surmount through the Settlement Proposal. Nor is it reasonable to think that a competitor could enter the market by copying books en masse without permission in the hope of prompting a class action suit that could then be settled on terms comparable to the Proposed Settlement. Even if there were reason to think history could repeat itself in this unlikely fashion, it would scarcely be sound policy to encourage deliberate copyright violations and additional litigation as a means of obtaining approval for licensing provisions that could not otherwise be negotiated lawfully. Moreover, the "most favored nation" clause in the Proposed Settlement, S.A. § 3.8(a), discourages potential competitors (including those sponsored by rightsholders) from attempting to follow Google into digital-book distribution because it could not obtain better terms than Google.

This de facto exclusivity (at least as to orphan works) appears to create a dangerous probability that only Google would have the ability to market to libraries and other institutions a comprehensive digital-book subscription. The seller of an incomplete database—*i.e.*, one that does not include the millions of orphan works—cannot compete effectively with the seller of a comprehensive product. Foreclosure of newcomers is precisely the kind of competitive effect the Sherman Act is designed to address. *See Assoc. Press v. United States*, 326 U.S. 1, 13-14 (1945). At this stage in the Department's investigation, it is not at all clear that this aspect of the Proposed Settlement can be "justified by plausible arguments that [it is] intended to enhance overall efficiency and make markets more competitive." *Nw. Wholesale Stationers*, 472 U.S. at 294. To the contrary, the Proposed Settlement appears to share features of collective agreements courts have rejected. *See Toys "R" Us, Inc.*, 221 F.3d at 936 (condemning agreements between Toys "R" Us and key suppliers "to disadvantage…competitors…by inducing the suppliers to collude [by selling only through Toys R Us], rather than to compete independently for shelf space in the different [] retail stores."); *United States v. Columbia Pictures Indus., Inc.*, 507 F. Supp. 412 (S.D.N.Y. 1980) (condemning agreement in which competing movie studios exclusively licensed their movies to a single cable channel formed by the studios through a joint venture, the profits of which were shared according to a profit-sharing agreement).

This risk of market foreclosure would be substantially ameliorated if the Proposed Settlement could be amended to provide some mechanism by which Google's competitors' could gain comparable access to orphan works (whatever such access turns out to be assuming the parties negotiate modifications to the settlement).[10] *See, e.g.*, *In re Literary Works in Elec. Databases Copyright Litig.*, MDL No. 1379 ("Order for Final Approval of Settlement and Final Judgment") (S.D.N.Y. Sept. 25, 2005) (numerous companies beyond the named defendants allowed to obtain benefits of settlement) (available at www.copyrightclassaction.com/ final_judge.pdf), *rev'd on other grounds*, 509 F.3d 116 (2d Cir. 2007), *cert. granted*, *Reed-Elsevier, Inc. v. Muchnick*, No. 08-103 (Mar. 2, 2009). Analysis of such provisions would have to take into account the limitations of Rule 23, but they would have an important impact on the antitrust analysis.

If Rule 23 permits the class to enter into an agreement with Google that extends well beyond the scope of the alleged violation, and to set up an industry-wide arrangement for the licensing of copyrighted works for digital distribution, that arrangement should conform to the procompetitive mandate of the federal antitrust laws. Consumers may benefit from the creation of digital libraries that would not otherwise be feasible, but they should not be required to pay the price of eliminating competition among authors and publishers on the one hand and de facto exclusive control of the library by Google on the other.

III. Additional Considerations

In addition to the issues discussed above, the United States offers two additional observations with respect to the Proposed Settlement.

First, the parties have sought to maximize accessibility in a way that will provide individuals with print disabilities with a substantially similar experience as users without print disabilities. In the Proposed Settlement, Google has committed to providing accessible formats and comparable user experience to individuals with print disabilities—and if these goals are not realized within five years of the agreement, Google will be required to locate an alternative provider who can accomplish these accommodations. Along with many in the disability community, the United States strongly supports such provisions.

Second, given the nature of the digital library the Proposed Settlement seeks to create, the United States believes that, if the settlement is ultimately approved, data provided should be available in multiple, standard, open formats supported by a wide variety of different applications, devices, and screens. Once these books are digitized, the format in which they are made available should not be a bottleneck for innovation. Google has made clear in the past that it started this project on the premise that anyone, anywhere, anytime should have the tools to explore the great works of history and culture. However the Proposed Settlement is modified by the parties, this approach should continue to be at its heart.

Conclusion

This Court should reject the Proposed Settlement in its current form and encourage the parties to continue negotiations to modify it so as to comply with Rule 23 and the copyright and antitrust laws.

Respectfully submitted,

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Dated: September 18, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of September, 2009, I caused a true and correct copy of the foregoing STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA REGARDING PROPOSED CLASS SETTLEMENT to be served electronically via the CM/ECF system on the lead attorneys to be noticed in this matter, including those counsel of record identified below.

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Endnotes

1. The United States notes that, as a general matter, "orphan works" refers to the subset of rightsholders who likely cannot be located after a diligent search. In the context of the settlement, some out-of-print works will be orphan works, while others may belong to copyright owners who may be locatable but will not come forward to join the Registry.

2. The parties have represented that all of the current class representatives have interests in both in-print and out-of-print works, with the exception of a single author representative whose works recently went out-of-print.

3. As the Register of Copyrights has explained, the Proposed Settlement's far-reaching authorization to the Registry and ultimately Google to exploit out-of-print works without prior consent of the rightsholders, alters the traditional understanding of copyright law that allows the owner to exclude others from using a copyrighted work absent authorization of the copyright owner. *Hearing on Competition and Commerce in Digital Books: The Proposed Google Book Settlement Before the House Comm. on the Judiciary*, 111th Cong., 1st Sess. at 3, 6-8 (2009) (statement of Marybeth Peters, Register of Copyrights), available at http:// judiciary.house.gov /hearings/pdf/Peters090910.pdf (accessed Sept. 18, 2009).

4. *See* Mem. of Law in Opp'n to the Settlement Proposal on Behalf of the French Republic at 1 (D.E. 179); Mem. of Law in Opp'n to the Settlement Proposal on Behalf of the Federal Republic of Germany, at 1 (D.E. 287) ("Germany Opp'n").

5. *See House Comm. on the Judiciary*, 111th Cong., 1st Sess. (2009) (statement of Paul Aiken, Executive Director of the Authors Guild at 8).

6. The parties have represented to the United States that, with regard to any potential challenge to the legality of the settlement, they will not raise a defense based on the *Noerr-Pennington* doctrine.

7. A legitimate joint venture may set the price for its own offering without incurring per se antitrust liability, *see Texaco Inc. v. Dagher*, 547 U.S. 1 (2006), but it must involve an efficiency-enhancing integration, and not a mere joint marketing of competitors' products. *See Maricopa*, 457 U.S. at 355-57.

8. *See* S.A. §§ 4.2(b)(i)(2), 4.2(c)(ii). The Proposed Settlement also establishes retail "pricing bins," which define the prices at which algorithm-priced books may actually be offered for sale. S.A. § 4.2(c). It identifies twelve initial pricing bins ranging from $1.99 to $29.99 and the initial percentage of books to be assigned to each bin, S.A. § 4.2(c)(ii)(1), but also states that Google and the Registry may add or modify the bins at any time, S.A. § 4.2(c)(i). Google will create a pricing algorithm to determine the retail price bin into which each book is placed, as a default option. This algorithm must: (1) "maximize revenue for each Rightsholder," S.A. § 4.2(b)(i)(2); and (2) determine the retail price for books based "upon the aggregate data collected with respect to Books that are similar to such Book," S.A. § 4.2(c)(ii)(2).

9. The Agreement authorizes Google to fund "temporary" discounts, without elaborating on such a discount's permissible duration. S.A. § 4.5(b)(i). This uncertainty reduces the ability of discounts under this Section to have any meaningful impact on consumer prices.

10. Authorizing the Registry to license the orphan works to third parties would appear to expand only the circumstances under which it could exercise the authority to act as continuing agent for the rightsholders with respect to orphan works already granted to it under the Agreement. *See* S.A. § 4.7 (empowering Registry to authorize Google to distribute books under new, unspecified business models); § 3.7 (c) (authorizing Registry to empower "one or more provider(s)" to sell the class's books if Google decides it no longer wants to sell the books as the Agreement envisions).

Statement of Marybeth Peters

The Register of Copyrights before the Committee on the Judiciary

United States House of Representatives 111th Congress 1st Session
September 10, 2009

Competition and Commerce in Digital Books: The Proposed Google Book Settlement

Chairman Conyers, Ranking Member Smith, and Members of the Subcommittee, I appreciate the opportunity to appear before you today to testify about the impact of the proposed Google Book Settlement Agreement on U.S. copyright law and policy as part of this hearing on Competition and Commerce in Digital Books.

Summary

The Copyright Office has been following the Google Library Project since 2003 with great interest. We first learned about it when Google approached the Library of Congress, seeking to scan all of the Library's books. At that time, we advised the Library on the copyright issues relevant to mass scanning, and the Library offered Google the more limited ability to scan books that are in the public domain. An agreement did not come to fruition because Google could not accept the terms.

> *"In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress."*

In 2005, we followed very closely the class action filed by The Authors Guild and its members and the infringement suit filed by book publishers shortly thereafter. The facts of the underlying lawsuits are simple. Google was reproducing millions of protected books in their entirety, without permission of the copyright owners, through systematic scanning operations set up with large research libraries. Once scanned, the books were indexed electronically, allowing end-users to search by title and other bibliographic information. Google returned hits to its customers that included the option of browsing "snippets" (e.g. several lines of the book), except for public domain books, which could be viewed and downloaded in their entirety. Google's search engine is free to users, but the company collects substantial revenue from the advertising that appears on web pages, including those pages on which images of, and information from, copyrighted books appear. The lawsuits raised complex and sometimes competing legal questions, including questions about intermediate copying, future markets, book digitization goals and fair use. Members of the legal community and the public debated the issues vigorously and anticipated what a Court decision on the merits might look like.

When the parties announced last fall that they had reached a settlement in what was becoming a long and protracted litigation, our initial reaction was that this was a positive development. But as we met with the parties, conversed with lawyers, scholars and other experts, and began to absorb the many terms and conditions of the settlement—a process that took several months due to the length and complexity of the documents—we grew increasingly concerned. We realized that the settlement was not really a settlement at all, in as much as settlements resolve acts that have happened in the past and were at issue in the underlying infringement suits. Instead, the so-called settlement would create mechanisms by which Google could continue to scan with impunity, well into the future, and to our great surprise, create yet additional commercial products without the prior consent of rights holders. For example, the settlement allows Google to reproduce, display and distribute the books of copyright owners without prior consent, provided Google and the plaintiffs deem the works to be "out-of-print" through a definition negotiated by them for purposes of the settlement documents. Although Google is a commercial entity, acting for a primary purpose of commercial gain, the settlement absolves Google of the need to search for the rights holders or obtain their prior consent and provides a complete release from liability. In contrast to the scanning and snippets originally at issue, none of these new acts could be reasonably alleged to be fair use.

In the view of the Copyright Office, the settlement proposed by the parties would encroach on responsibility for copyright policy that traditionally has been the domain of Congress. The settlement is not merely a compromise of existing claims, or an agreement to compensate past copying and snippet display. Rather, it could affect the exclusive rights of millions of copyright owners, in the United States and abroad, with respect to their abilities to control new products and new markets, for years and years to come. We are greatly concerned by the parties' end run around legislative process and prerogatives, and we submit that this Committee should be equally concerned.

As outlined below, the Copyright Office also believes that some of the settlement terms have merit and should be encouraged under separate circumstances. For example, the creation of a rights registry for book authors, publishers and potential licensees is a positive development that could offer the copyright community, the technology sector and the public a framework for licensing works in digital form and collecting micro-payments in an efficient and cost-effective manner. Likewise, the promise to offer millions of titles through libraries in formats accessible by persons who are blind and print disabled is not only responsible and laudable, but should be the baseline practice for those who venture into digital publishing. The ability of copyright owners and technology companies to share advertising revenue and other potential income streams is a worthy and symbiotic business goal that makes a lot of sense when the terms are mutually determined. And the increased abilities of libraries to offer on-line access to books and other copyrighted works is a development that is both necessary and possible in the digital age. However, none of these possibilities should require Google to have immediate, unfettered, and risk-free access to the copyrighted works of other people. They are not a reason to throw out fundamental copyright principles; they are a pretext to do so.

In the testimony below, we will address three specific points. First, we will explain why allowing Google to continue to scan millions of books into the future, on a rolling schedule with no deadline, is tantamount to creating a private compulsory license through the judiciary. This is not to say that a compulsory license or collective license for book digitization projects may or may not be an interesting idea. Rather, our point is that such decisions are the domain of Congress and must be weighed openly and deliberately, and with a clear sense of both the beneficiaries and the public objective.

Second, we will explain why certain provisions of the proposed settlement dramatically compromise the legal rights of authors, publishers and other persons who own out-of-print books. Under copyright law, out-of-print works enjoy the same legal protection as in-print works.[1] To allow a commercial entity to sell such works without consent is an end-run around copyright law as we know it. Moreover, the settlement would inappropriately interfere with the on-going efforts of Congress to enact orphan works legislation in a manner that takes into account the concerns of all stakeholders as well as the United States' international obligations.

Finally, we will explain that foreign rights holders and foreign governments have raised concerns about the potential impact of the proposed settlement on their exclusive rights and national, digitization projects. The settlement, in its present form, presents a possibility that the United States will be subjected to diplomatic stress.

Factual and Procedural Background

The proposed settlement, announced by the parties on October 28, 2008, would resolve claims that stem from Google's highly publicized Google Library Project. It is currently pending before the Honorable Denny Chin, United States District Court, Southern District of New York. Settlement Agreement, *The Authors Guild, Inc. et al. v. Google Inc.*, No. 06-CV-8136 (S.D.N.Y. Oct. 28, 2008). The proceeding combines the unresolved claims of authors and book publishers as initially filed in two underlying actions: *The Authors Guild, Inc. v. Google Inc.*, No. 05 Civ. 8136 (S.D.N.Y Sep. 20, 2005) (a class action filed by representative authors and the Guild) and *The McGraw-Hill Companies, Inc. v. Google Inc.*, No. 05 Civ. 8881 (S.D.N.Y Oct. 19, 2005) (an action filed on behalf of five publishing companies).

By way of background, as of 2008 Google had digitized about 7 million books and other materials obtained through agreements with library collections at the University of Michigan, Stanford University, Oxford University, Harvard University and the New York Public Library, among others.[2] At a hearing convened by the European Commission in Brussels on September 7, 2009, Google announced that it has now scanned approximately 10 million books. Of these, Google estimates that about 1.5 million of these works are in the public domain. Many more may be works that are protected by copyright but have no identifiable or locatable copyright owner.[3]

1. Judicial Compulsory License

Class action lawsuits typically seek compensation for a class of similarly-situated persons who have suffered harm, or will suffer harm imminently, due to the defendant's past acts. The proposed settlement in fact resolves Google's past conduct by requiring Google to pay at least $60 for each book and $15 for each insert that was digitized prior to the opt-out deadline.[4] Proposed Settlement Agreement at 61, ¶ 5.1(a). But the class is overbroad and the settlement terms do not stop here.

Under the proposed settlement, the parties have crafted a class that is not anchored to past or imminent scanning, but instead turns on the much broader question of whether a work was *published* by January 5, 2009. As defined, the class would allow Google to continue to scan entire libraries, for commercial gain, into the indefinite future. The settlement would bind authors, publishers, their heirs and successors to these rules, even though Google has not yet scanned, and may never scan, their works.

We do not know the parties' reasons for defining the class according to whether a book was or was not published by January 5, 2009, but the result is to give Google control of a body of works that is many times larger than the 7 million works that were originally at issue. As defined, the class would bring into the settlement tent not only works that were published in the United States, and are therefore directly subject to U.S. law, but works published in most other countries in the world that have treaty relations with the United States.[5] While no one really knows how many works would be affected, Dan Clancy, the Engineering Director for the Google Book Search project, has been quoted as estimating that there are between 80 and 100 million books in the world.[6] As a practical matter, this means that the settlement would create for Google a private structure that is very similar to a compulsory license, allowing it to continuously scan copyrighted books and "inserts."[7]

Compulsory licenses in the context of copyright law have traditionally been the domain of Congress.[8] They are scrutinized very strictly because by their nature they impinge upon the exclusive rights of copyright holders. A compulsory license (also known as a "statutory license") is "a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions." *Satellite Home Viewer Extension Act: Hearing before the S. Committee on the Judiciary*, 108th Cong. (2004) (statement of David O. Carson, General Counsel, U.S. Copyright Office) (May 12, 2004). "[C]ompulsory licensing…break[s] from the traditional copyright regime of individual contracts enforced in individual lawsuits." *See Cablevision Sys. Dev. Co. v. Motion Picture Ass'n of Am.,* Inc., 836 F.2d 599, 608 (D.C. Cir. 1988) (describing limited license for cable operators under 17 U.S.C. § 111). By its nature, a compulsory license "is a limited exception to the copyright holder's exclusive right.…As such, it must be construed narrowly.…" *Fame Publishing Co. v. Alabama Custom Tape, Inc.,* 507 F.2d 667, 670 (5th Cir. 1975) (referring to compulsory licenses in the Copyright Act of 1909). Congress is the proper forum to legislate compulsory licenses when they are found necessary. See Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 1.07 (2009) (Congress has authority to grant exclusivity and "may properly invoke . . . [n]onexclusivity under a compulsory license"); *cf. Cablevision* at 602 (citing *Teleprompter Corp. v. Columbia Broadcasting Sys.,* 415 U.S. 394, 414 (1974) (stating that it was Congress's role to address the issue of secondary transmissions if the Copyright Act of 1909 was inadequate). Compulsory licenses are generally adopted by Congress only reluctantly, in the face of a marketplace failure. For example, Congress adopted the Section 111 cable compulsory license "to address a market imperfection" due to "transaction costs accompanying the usual scheme of private negotiation.…" *Cablevision* at 602. "Congress' broad purpose was thus to approximate ideal market conditions more closely…the compulsory license would allow the retransmission of signals for which cable systems would not negotiate because of high transaction costs." *Id*. at 603.

As a matter of copyright policy, courts should be reluctant to create or endorse settlements that come so close to encroaching on the legislative function. Congress generally adopts compulsory licenses only reluctantly in the face of a failure of the marketplace, after open and public deliberations that involve all affected stakeholders, and after ensuring that they are appropriately tailored. Here, no factors have been demonstrated that would justify creating a system akin to a compulsory license for Google—and only Google—to digitize books for an indefinite period of time.

At very least, a compulsory license for the systematic scanning of books on a mass scale is an interesting proposition that might merit Congressional consideration. As stated above, various compulsory licenses have been carefully crafted over the years after extensive deliberation and consideration of the viewpoints of all affected stakeholders, though none apply to books or text. Among the issues Congress would want to consider are the pros and cons of allowing copyright users, rather than copyright owners, to initiate the digitization of copyrighted works; the rate of compensation that should be paid to copyright owners; and whether the same license terms should apply to mass digitization activities undertaken for the public interest by non profit organizations such as libraries, and for profit purposes by commercial actors. Congress also would want to consider whether all books merit the same attention, or whether differences can be drawn from the date of publication, the type of publication, or such facts as whether the rights holder is likely to be alive or deceased. Congress would need to consider the treaty obligations that may apply.

2. The Sale of Copyrighted Books without Consent of Rights Holders

The Copyright Office strongly objects to the treatment of out-of-print works under the proposed settlement. The question of whether a work is in-print (generally, in circulation commercially) or out-of-print (generally, no longer commercially available) is completely inconsequential as to whether the work is entitled to copyright protection under the law.

The Google Book Settlement gives Google carte blanche permission to use out-of-print works by operation of the default rules. If a work is out-of-print, Google need not obtain permission before incorporating it into new "book store" products. These include on-line displays (up to 20% of a work), full-text purchases, and subscription products for institutional subscribers and library patrons. There are mechanisms by which the rights holder may stop Google after the fact and prospectively collect royalties that are predetermined by the Book Rights Registry ("BRR"). In summary, the out-of-print default rules would allow Google to operate under reverse principles of copyright law, and enjoy immunity from lawsuits, statutory damages, and actual damages.

The activities that prompted the plaintiffs to file suit against Google—the wholesale scanning of books, electronic indexing and snippet display—are activities as to which reasonable minds might differ when considering whether such activities are acts of infringement or are, for example, fair use. However, the same cannot be said of the new uses that the settlement agreement permits Google to make of out-of-print works. We do not believe that even Google has asserted that, in the absence of this class action settlement, it would be fair use to undertake the new activities that Google would enjoy risk-free as a result of the settlement. In essence, the proposed settlement would give Google a license to infringe first and ask questions later, under the imprimatur of the court.

We are not experts on the proper scope of class action settlements, but we do wonder whether, as a constitutional matter, a class action settlement could decide issues that were not properly before the Court as part of the case and controversy presented during the litigation.[9] At the very least, within the context of copyright litigation, the class action mechanism has been used sparingly in recent years and has never resulted in the broad adoption of a settlement permitting extensive future uses of copyrighted products that were not the subject of the original infringement action.[10] A class action settlement that permits new activities for years to come, and removes the judicial remedies of millions of authors and publishers that are otherwise afforded by the Copyright Act, seems to us to be an excessive exercise of judicial power. The default rules for out-of-print books are not a small issue in the settlement because the substantial majority of books covered are out-of-print works—millions and millions of books. To be clear, the Office does not dispute the goal of creating new markets for out-of-print books—copyright duration has always been longer than the first print-run of a book and it has always been obvious that works will come in and out of favor, and in and out of print, during the term of protection. But copyright law has always left it to the copyright owner to determine whether and how an out-of-print work should be exploited.

Apart from its interest in ensuring the proper application of law and policy, Congress should be particularly concerned about the settlement since it would interfere with the longstanding efforts of Congress and many other parties to address the issue of orphan works. The broad scope of the out-of-print provisions and the large class of copyright owners they would affect will dramatically impinge on the exclusive rights of authors, publishers, their heirs and successors. Such alteration should be undertaken by Congress if it is undertaken at all. Indeed, this Committee has already invested significant time in evaluating the orphan works problem and weighing possible solutions. That process is not over. The Google Book Settlement would frustrate the Committee's efforts and make it exceedingly difficult for Congress to move forward. A much more productive path would be for Google to engage with this Committee and with other stakeholders to discuss whether and to what degree a diligent search for the rights holder should be a precondition of a user receiving the benefits of orphan works legislation, or whether a solution that is more like a compulsory license may make sense for those engaged in mass scanning. Whatever the outcome, Congress is much better situated than the judiciary to consider such important and far-reaching changes to the copyright system.

As a side note, the Copyright Office would like to underscore for the Committee that out-of-print works and orphan works are not coextensive. Orphan works are works that are protected by copyright but for which a potential user cannot identify or locate the copyright owner for the purpose of securing permission. They do not include works that are in the public domain; works for which a copyright owner is findable but refuses permission; or works for which no permission is necessary, i.e., the use is within the parameters of an exception or limitation such as fair use. Many out-of-print works have rights holders who are both identifiable and locatable through a search. In fact, the U.S. works covered by the proposed settlement would all be searchable, at a minimum, through Copyright Office records because the settlement includes U.S. works only *if* they are registered. Proposed Settlement at 3, 9, ¶¶ 1.16, 1.72. Certainly, rights information may not be current and there may be disputes about rights between publishers and authors. However, these are the realities of the copyright system and the reason that Congress, the EU and other foreign governments have been working on a solution, with all of the deliberation and fine tuning that is appropriate. Until there is a legislative solution, it is our strong view that Google should conduct itself according to the same options available to other users of copyrighted works: secure permission; forgo the use; use the work subject to risk of liability; or use the work in accordance with fair use or another limitation or exception.

The Office also notes that while the BRR might well provide a place for rights owners to come forward with contact information, it is also likely to have the unfortunate effect of creating a *false* database of orphan works, because in practice any work that is not claimed will be deemed an orphan. Many rights holders of out-of-print books may fail or refuse to register with the BRR for very good reasons, whether due to lack of notice, disagreement with the Registry's mission or operations, fear (e.g. privacy concerns) or confusion. The fact that the rights holder is missing from the BRR may also mean that he has no interest in licensing his work.

3. International Concerns

We are troubled by the fact that the proposed settlement implicates so many foreign works even when they have not taken steps to enter the United States market. While it would be appropriate to allow foreign nationals to participate voluntarily in licensing programs that may be developed by the BRR or other collectives, they should not be automatically included in the terms of the settlement. Moreover, we are aware that some foreign governments have noted the possible impact of the proposed settlement on the exclusive rights of their citizens. Indeed, many foreign works have been digitized by Google and swept into the settlement because one copy was in an academic research library in the United States. As a matter of policy, foreign rights holders should not be swept into a class action settlement unknowingly, and they should retain exclusive control of their U.S. markets.

The settlement imposes a requirement that all "U.S. works" be registered with the Copyright Office. U.S. works are, in relevant part, works that are first published on U.S. soil or published simultaneously in the United States and a treaty partner. See 17 U.S.C. § 101. That the parties would apply a registration requirement in this manner comes as no surprise in and of itself, especially since the issue is pending before the Supreme Court in another case. See *Muchnick v. Thomson (In re Literary Works in Elec. Databases Copyright Litig.*), 509 F.3d 116, 122 (2nd Cir. 2007), *cert. granted sub nom. Reed Elsevier Inc. v. Muchnick,* 129 S.Ct. 1523 (2009). But in our view, this rule should be applied to all works in the class, i.e., to the extent foreign works are implicated at all, they should have been published in the United States and registered with the U.S. Copyright Office.[11]

For the past few months, we have closely followed views of the proposed settlement as expressed by foreign governments, foreign authors and foreign publishers. We have read numerous press accounts[12] and spoken with foreign experts. We know that some foreign governments have suggested that the settlement could implicate certain international obligations of the United States.[13] As the Committee is aware, the governments of Germany and France have filed objections with the Court. Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany, *The Authors Guild, Inc., et al. v. Google Inc.*, No. 05 Civ. 8136 (DC) (S.D.N.Y. Aug. 31, 2009); Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the French Republic, *The Authors Guild, Inc., et al. v. Google Inc.*, 05 Civ. 8136 (DC) (S.D.N.Y. Sep. 8, 2009). Numerous foreign authors and publishers have raised concerns as well, including concerns about navigating the settlement from a distance. Indeed, the inherent difficulties of doing business internationally is one reason that typical collective management organizations work through counterparts in foreign countries, making it easier and more efficient for rights holders to protect their works on foreign soil, in foreign languages, under foreign laws, and using foreign currencies.

Some foreign governments have raised questions about the compatibility of the proposed settlement with Article 5 of the Berne convention, which requires that copyright be made available to foreign authors on a no less favorable basis than to domestic authors,[14] and that the "enjoyment and exercise of these rights shall not be subject to any formality."[15] For example, the Federal Republic of Germany has asserted that "[T]he proposed settlement is contrary to both the Berne Convention and WCT." Memorandum of Law in Opposition to the Settlement Proposal on Behalf of the Federal Republic of Germany at 4.

For purposes of this hearing, we are not suggesting that international obligations of the United States are at issue or necessarily would be compromised. However, it is a cause for concern when foreign governments and other foreign stakeholders make these types of assertions.

Conclusion

Mr. Chairman, thank you again for inviting me here today to present my observations and concerns. The Copyright Office welcomes any questions that the Committee has about the copyright implications of this unprecedented settlement agreement. To summarize, it is our view that the proposed settlement inappropriately creates something similar to a compulsory license for works, unfairly alters the property interests of millions of rights holders of out-of-print works without any Congressional oversight, and has the capacity to create diplomatic stress for the United States. As always, we stand ready to assist you as the Committee considers the issues that are the subject of this hearing.

Endnotes

1. Under certain narrow circumstances, libraries and archives may make use of works that are in their last 20 years of copyright protection, provided that the use is for purposes of preservation, scholarship, or research and that the library or archives has first determined, on the basis of a reasonable investigation, that certain conditions apply. *See* 17 U.S.C. §108(h)(i).
2. Google Books Settlement Agreement, http://books.google.com/googlebooks/agreement (last visited Sept. 4, 2009).
3. Google Books Settlement, orphan works, and foreign works, http://blog.librarylaw.com/ librarylaw/2009/04/google-book-settlement-orphan-works-and-foreign-works.html (last visited Sept. 4, 2009).
4. The settlement also addresses and resolves other issues such as the conduct of libraries, but the Office will not address those provisions for purposes of this preliminary assessment of issues with the Proposed Settlement Agreement.
5. The United States enjoys international copyright relations with all but a small number of countries. See U.S. Copyright Office, Circular 38a: International Copyright Relations of the United States (rev. July 2009) (*available at* http://www.copyright.gov/circs/circ38a.pdf (last visited Aug. 25, 2009)).
6. *See* "The Audacity of the Google Book Search Settlement," Pamela Samuelson, http://www.huffingtonpost.com/pamela-samuelson/the-audacity-of-the-googl_b_255490.html (last visited Aug. 12, 2009).
7. The term "insert" is broad. It includes (i) text, such as forewords, afterwords, prologues, epilogues, essays, poems, quotations, letters, song lyrics, or excerpts from other Books, Periodicals or other works; (ii) children's Book illustrations; (iii) music notation (*i.e.*, notes on a staff or tablature); and (iv) tables, charts and graphs. Proposed Settlement Agreement at 9, ¶ 1.72.
8. *See, e.g.*, 17 U.S.C §§ 111, 112, 114, 115, 118 and 119.
9. As Judge Friendly stated in *National Super Spuds, Inc. v. New York Mercantile Exchange*, 660 F.2d 9, 18 (2d Cir. 1981), "If a judgment after trial cannot extinguish claims not asserted in the class action complaint, a judgment approving a settlement in such an action ordinarily should not be able to do so either." In *National Super Spuds*, a settlement purported to release the claims of class members who held both liquidated and unliquidated contracts when the original complaint only concerned persons who held liquidated contracts during a specific period of time. The Court held that the harm done by the unclear release of parties outweighed the benefits of settlement and reversed the settlement approval. *Id*.
10. One of these class actions, *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1379 (S.D.N.Y.), is the remedies phase of an infringement suit brought by members of the National Writers Union, in which the writer-plaintiffs successfully challenged the sale of their newspaper and magazine articles in commercial databases. *See New York Times v. Tasini*, 533 U.S. 483 (2001). A settlement agreement has been proposed by the parties to the consolidated cases. However, the proposed settlement, if finally adopted, would speak only to the activities originally at issue in the suit: the reproduction, display and distribution of copyrighted articles in electronic databases. Settlement Agreement, *In re Literary Works* (2005), ¶ 1(f). In contrast with the proposed settlement agreement, the *In re Literary Works* settlement does not authorize the publisher and database defendants to further copy, package, and sell the copyrighted articles as part of new products such as subscriptions, books, or compilations, for example. Nor does it lock in licensing terms, including payment, for future kinds of activity.
11. Article 5.1 of the Berne Convention provides for national treatment of authors by requiring that authors enjoy, in other Union countries, the rights provided to nationals of such Union countries. Berne Convention, 102 Stat. 2853 (1988). TRIPS also provides for national treatment in article 3.1; it requires Members to "accord to nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property." TRIPS Agreement, art. 3.1, 33 I.L.M. 81 (1994).
12. *See, e.g.*, *Google Books Leaves Japan in Legal Limbo*, The Japan Times Online; *Germany Wants EU to Fight Google Books Project*, The Local, June 2, 2009 (quoting Foreign Minister Frank-Walter Steinmeiser); *Politicians Back Heidelberg Appeal: German Authors Outraged at Google Book Search*, Spiegel Online, Apr. 27, 2009 ("German politicians have voiced their support for an appeal by 1,300 German authors…known as the Heidelberg Appeal"—sent last week to German President Horst Kohler, Chancellor Angela Merkel and the heads of Germany's 16 federal states); Letter to the European Commission from the Federation of European Publishers and Presidents of National Publisher Associations, June 16, 2009 (*available at* http://www.danskeforlag.dk/download/pdf/323absb035.pdf (last visited Aug. 26, 2009)); Federal Ministry of Justice, *Zypries urges European action against Google Books, Press Release of the German Minister of Justice*; ("In Brussels today, Federal Minister Zypries stressed that…Brussels must take further steps that may be necessary to protect rights holders."); "*EU to study how Google Books impact authors,* Reuters, May 28, 2009 ("'The commission will carefully study the whole issue and, if need be, to take steps,'" Vladimir Tosovsky industry minister for the Czech EU presidency, told a news conference."); *Agreement concerning Google Book Search is a Trojan Horse*, Boersenverin des Deutschen Buchhandels, Nov. 11, 2008 ("[T]he American precedent model is out of the question for Europe…Germany and Europe have already implemented legal provisions and models which allow wide access to digital content while respecting the rules of copyright.").
13. By way of background, the United States is a party to important copyright treaties and bilateral agreements which impose minimum obligations for copyright protection and enforcement, on the one hand, and confine the scope of permissible exceptions and limitations on exclusive rights, on the other hand. These include the Berne Convention for the Protection of Literary and Artistic Works (Paris 1971), the World Trade Organization Agreement on the Trade-Related Aspects of Intellectual Property Rights ("TRIPS"), and the World Intellectual Property Organization Copyright Treaty, as well as many bilateral agreements that address copyright issues. *See, e.g.*, US-Peru Trade Promotion Agreement, Dec. 14, 2007, 121 Stat. 1454. Under Berne, copyright protection is afforded to works published in any country that is party to one of the copyright treaties and agreements to which the United States is a party or by any national of that country.
14. Berne Convention art. 5(1).
15. Berne Convention art. 5(2).

I Know It When I See It: How I Learned the Law by Hanging Out in the Locker Room

By Gerald Eskenazi

In a career of more than 40 years with The New York Times (The Times), I learned law by the seat of my pants. Once upon a time, we—especially sportswriters—rarely worried about libel and hardly ever dealt with lawyers. After all, why would an athlete back in the Fifties or Sixties need an attorney?

Boy, did things change. These days, so many in sports have legal problems, stadiums have real estate problems and players have contract disputes.

As money in sports became more significant with the rise of television, the affluent middle class, and the burgeoning leisure class, I found myself facing situations and stories they had not prepared me for in Journalism 101. Neither did my paper, The Times, whose copy editors had gently taught us the niceties of the legal profession in a tribal way. I never took a course in law or contracts, never attended a seminar at the paper regarding libel. In fact, when I did not understand something in the law I was writing about, I asked a news source or a friend what it meant.

Yet this law-by-osmosis worked in simpler times. Thus, I flew off to Washington one day in the Seventies to write about Title IX, which essentially mandated equal sports opportunity for women in schools and colleges. I was able to examine complex leasing arrangements between New York City and Shea and Yankee stadiums by calling my friend, Harry the lawyer.

It was not like that at the dawn of the new day in sports.

I was sitting at my desk at The Times one afternoon—only about 40 years ago—when I received a strange phone call.

It was from a fellow who identified himself as "Brad Park's agent." Agent? I had met only one agent during my early years as a sportswriter. That was the year before, when Bob Woolf of Boston called himself an "attorney" for a Red Sox player named Ken (Hawk) Harrelson and invited me into his office. "Please don't call me a lawyer," Woolf said. "Refer to me as 'Attorney Bob Woolf.'" He sounded as if he thought "lawyer" was a bad word.

Woolf could not even get his foot in the door to negotiate for the future Hall of Famer, John Havlicek, with the Celtics' general manager, Red Auerbach. That is how much disdain—and little respect—sports management had for lawyers who doubled as agents.

In fact, after I wrote a feature story about Woolf, he told me he received more than 300 queries from athletes, coaches and parents wanting to know more about this business of having someone represent them. Imagine, an advocate for athletes! Unheard of.

Then again, big-league sports can only blame themselves for the necessity of having one of their hired hands come in with a representative. Remember the legendary Vince Lombardi, the Green Bay Packers' head coach? One of his most important players, a perennial all-star named Jim Ringo—really, the heart and soul of the Packers' dynasty—went in to talk contract. The often-injured Ringo (who subsequently had both knees replaced and could be a poster boy for football trauma) told Lombardi that he now had an agent, and wanted Lombardi to talk money with the agent.

> *"These days, so many in sports have legal problems, stadiums have real estate problems and players have contract disputes."*

"Wait outside," Lombardi told Ringo.

A few minutes later, Lombardi came out of his office, called Ringo inside, and said, picking up the phone, "Here, talk to your new team. You've just been traded to Philadelphia."

Meanwhile, baseball still had its reserve clause, a remarkable insert in a contract that automatically "reserved" a player to his team for the following season—even after the contract was over. Thus, there was an incredible situation of players being fined for not reporting—after their contracts had expired. Why, even the Supreme Court had been in the owners' corner, ruling many years earlier that baseball was not an interstate sport.

In this milieu, Brad Park had tried to renegotiate his contract. He had produced an outstanding rookie year with hockey's New York Rangers, and since they were going to keep him, why, his salary was going to escalate all the way to $14,000 a year, up from $12,000. As a rookie, he had signed a three-year contract--$12,000, then $14,000, then $16,000, if he made the big club. The team's canny general manager was Emile (the Cat) Francis, one of the most fascinating characters I ever met in sports.

The trouble was, Brad was unhappy with $14,000 a year—he wanted something more generous, like $40,000. So he simply did not show up for training camp. He was, in the word we used to use once upon a sportstime, a "holdout."

"Emile's taken away his skates. He won't let him practice on his own," complained the agent. Well, since skates cost about $100 a pair, even back then, that was a considerable percentage of a year's salary. Brad did not go out and buy his own skates. So he did not practice, the season was looming, and both sides stiffened. Of course, all the advantages were with management. There was no arbitration, no recourse for an unhappy player. Yes, I know one could argue that a contract is sacred—even a contract signed by a 20-year-old kid without an agent, with his mother looking on.

Eventually, Park settled for $30,000. Not bad for 1970. Almost 30 years later, the Rangers signed a player named Jaromir Jagr for 966 times Park's salary. By then, free agency had become a standard in sports, and not a dirty word. Players' unions had proliferated. Indeed, one might even say that today management and labor are partners in the world of sports.

It has been that way for about 30 years, since athletes won their freedom. Their route to the promised land was greased by the expansion of sports, by rival leagues sprouting (or threatening to) in all the major leagues.

Many young athletes were taken for a ride or misled by agents and management. A favorite contract ploy, for example, was for a burgeoning league to entice players with projected contract values based on a faulty assumption—mutual funds. General managers would show the athletes how certain funds had performed historically, and they gave this value to the players' contracts. There also was one agent who took dozens of young hockey players into an abyss of debt by having them sign their earnings over to him.

Needless to say, I had no experience in writing about contracts as a sportswriter. Nor did I know much about libel law. I knew I had some First Amendment protections, and I knew that The Times was the most powerful force in newspaperdom, and that if you wanted to sue the paper for any reason…well, good luck.

Like those who preceded me, like my colleagues, and like those who followed me, I learned law in a hand-me-down way at the paper. Some kind-hearted editor might say to me, "Jerry, we can't write that," and that was the extent of my libel education. I knew that public figures were fair game, though, and that a different standard attached to writing about a player than, say, a fan.

Today's newspaper people—at least, at The Times—do get a minimum of instruction in First Amendment law. There is a new orientation program at the paper. It lasts an hour, given by The Times' in-house attorney. It is required for all new hires. As for the others on the paper, there is another session, on a voluntary basis (with a free lunch), in which the staff is updated on new trends in libel law.

Sports remains a slippery slope for writers trying to do the right thing, and to get something right. For example, if I suggest that a ballplayer might be putting cork in his bat in order to get some extra pop in his hits, I am essentially suggesting that he is cheating. Really, however, nothing will happen to me. Yet if I suggested that an accountant was cheating his clients (and could not prove it), I could expect legal troubles. How many times, I wonder, did I mention that this pitcher or that pitcher was throwing a spitball (illegal)?

Well, I suppose that since I never got served with papers for writing about an athlete, maybe I was on to something. Even sportswriters can be right some of the time.

Ironically, my one tangential brush with the legal system over something I wrote had to do with a book review. The Times (and not yours truly) was sued by a writer because I had written, in a Sunday Book Review piece, that he was guilty of "sloppy journalism." The case was *Moldea v. The New York Times Co.*[1] The United States Court of Appeals for the District of Columbia Circuit originally ruled that the plaintiff could take his case to trial. This worried newspaper people because it indicated the court believed that the legal rules governing claims of defamation should be the same for both opinion and news writing. The Times asked the court to reconsider, and in an unusual move, it did. It said critics must have "constitutional breathing space appropriate to the genre." The Supreme Court let the ruling stand.

I got more mileage out of that one little phrase than I ever did describing a Joe Namath touchdown.

Endnote

1. 22 F.3d 310, 62 USLW 2684, 306 U.S.App.D.C. 1, 22 Media L. Rep. 1673. The court stated: "In light of our reconsideration of this case, we hold that the challenged statements in the Times review are supportable interpretations of Interference, and that as a matter of law the review is substantially true. Accordingly, we affirm the District Court's grant of summary judgment in favor of the Times."

Gerald Eskenazi was a sportswriter with *The New York Times* for more than 40 years. His 8,000 bylines are the second-highest in the history of the newspaper. He has written 15 books, and lectures on pop culture, the news media, and sports.

"Who Do You Play For?"[1] How the Ninth Circuit's Rejection of U.S.A. Swimming's Motion to Dismiss Protects the Integrity of Sport and Stimulates Technological Development

By Tara Bhupathi

"I will beat you playing with a wooden racket and my non-dominant hand."[2]

Most people agree that equipment should not win championships, but that athletes should.[3] Periodically, an advancement in equipment technology makes headlines, overshadowing athletic performance and calling into question the legality of said item and its effect on the integrity of the game.[4] One example is the current controversy over polyurethane swimsuits.[5] Federation Internationale de Natation's (FINA)[6] recent rule revision, banning polyurethane and restricting suit dimensions,[7] was somewhat expected—the governing bodies of sports have interceded numerous times to ban technological developments for reasons ranging from safety of the athletes and fans to fear that the development will change the sport so drastically that it will become unrecognizable.[8]

Several scholars have addressed sport equipment regulation issues, questioning whether the governing bodies make the right decisions,[9] analyzing the effects of equipment standardization,[10] and examining how the ensuing disputes with manufacturers are resolved.[11] This article will highlight a lawsuit filed by swimsuit manufacturer, TYR, against Warnaco, Inc.; the manufacturer of Speedo; U.S.A. Swimming, swimming's national governing body, and Erik Vendt, a swimmer on the U.S. Olympic team, alleging conspiracy in violation of Sections One and Two of the Sherman Antitrust Act.[12] In May, the District Court allowed TYR's complaint to survive Warnaco and U.S.A. Swimming's motions to dismiss,[13] signaling a break from consistent precedent in federal courts to defer to sport's national governing bodies, and immediately dismissed all antitrust claims filed by injured manufacturers.[14] In its decision, the court acknowledged that governing bodies, each of which holds a monopoly over the rules and regulations of its sport,[15] could have a financial interest in combining with a sport equipment manufacturer to have an anticompetitive effect on the market.[16]

This article argues that the Ninth Circuit acknowledged the risk of financial interests influencing such decisions because of the broad economic scope of the sports industry,[17] governing bodies' unchecked authority over said market,[18] and the sentiment that, in light of each governing body's heavy reliance on sponsorships,[19] complete disregard of financial motives in governance is no longer appropriate.

Further, courts should continue to implement the Ninth Circuit's policy of increasing scrutiny of governing body financial interests in rule-making for two reasons. First, shedding light on the complex and competing financial interests among industry players, including fans, athletes, teams, leagues, communities, media, and sponsors,[20] should enhance confidence in the purity of a governing body's decisions. Second, abandoning complete deference to governing bodies could ease manufacturers' fears of investing in technology only to be subsequently banned due to collusion between market competitors and the governing bodies.[21] This in turn would mitigate the stifling effect the latter have had on technological developments in sports equipment.[22]

"Most people agree that equipment should not win championships, but that athletes should. Periodically, an advancement in equipment technology makes headlines, overshadowing athletic performance and calling into question the legality of said item and its effect on the integrity of the game."

Background

Equipment regulations are created by each sport's national governing body.[23] Generally, these rules are unchallenged because they have been a part of the game since inception or their purpose is clear and widely supported by all interested parties. However, when a manufacturer objects to a rule, remedy is typically sought through the Sherman Antitrust Act.[24]

The Ted Stevens Sports Act and the Sherman Antitrust Act

Codified in 1998, the Ted Stevens Sports Act (Sports Act)[25] created the United States Olympic Committee (USOC)[26] and empowered it to create a national governing body (NGB) for each Olympic sport.[27] For the purposes of eliminating friction between competing governing bodies within a single sport and standardizing the rules of each game, the Sports Act gave each NGB a monopoly over the rules and regulations of the sport it governed.[28]

Sports equipment manufacturers can utilize the Sherman Antitrust Act to challenge NGB policies, claiming that a certain rule or action prevents consumers from having free choice among market alternatives.[29] The focus of this article will be cases in which manufacturers allege that a governing body combined or conspired to restrain trade in violation of Section One of the Sherman Antitrust Act, or combined to monopolize trade in violation of Section Two.[30] In order to establish a *prima facie* case, manufacturers must identify a relevant geographic and product market in which the NGB has power and has conspired or combined to have an anticompetitive effect on trade.[31] Historically, these claims have been immediately dismissed.[32]

Case Law

Antitrust cases brought against NGBs regarding conspiracy or combination to restrict trade through equipment regulations generally fall into one of two categories: (1) complaints that a preexisting rule is arbitrarily enforced[33] and (2) complaints that a retroactive ban arbitrarily renders previously viable items obsolete.[34] Although manufacturers have had a few minor victories,[35] courts typically hesitate to expose NGBs to antitrust liability in either situation.[36]

Obstacles Facing Manufacturers

Manufacturer's claims are typically dismissed for two main reasons. First, courts require manufacturers to reach a high evidentiary threshold in order to successfully plead conspiracy or combination.[37] For example, Warrior, a lacrosse stick manufacturer, had its complaint against the NCAA dismissed despite specific evidence of motive for conspiracy to injure the company and restrict trade.[38] In its complaint, Warrior pointed to a timeline in which the NCAA's rule change, which rendered Warrior's entire product line obsolete, closely followed Warrior's refusal to share its patented technology with the NCAA and fellow lacrosse stick manufacturers.[39] Similarly, in *Brookins*, the Eighth Circuit granted summary judgment to the International Motor Contest Association (IMCA) which made two rule changes aimed solely and directly at the plaintiff's product, the Ernie Glide automatic transmission.[40] Here, the timeline began in 1994 when the engine was used to win the National Championship, prompting Bushore, Brookin's competitor and sponsor of the IMCA, to complain that the technology compromised the integrity of the game.[41] Soon after, the governing body's ruling rendered Brookin's product obsolete.[42]

In both examples, the courts overlooked NBG financial incentives to conspire with certain market players. Given the complex relationships at play in the sports industry, continuing this policy is problematic because it clouds the purity of sports and leaves questions of NGB motivation unanswered.[43]

The second hurdle for manufacturers is the courts' application of the "rule of reason" standard when analyzing sport equipment disputes.[44] In practice, this policy is one of strong deference to NGBs.[45] The Eighth Circuit in *Windage* was clear in adhering to this method of review when it noted: "So long as [the USGA] made game-defining rules decisions based upon its purposes as a sports organization, an antitrust court need not be concerned with the rationality or fairness of those decisions."[46] Also following this line of reasoning, the Sixth Circuit in *Warrior* credited the NCAA's purpose to "promote free dislodgement of the ball during play,"[47] despite failing to submit any data supporting a problem with free dislodgment of the ball from the head or that the rule adopted was the least drastic measure to solve the problem.[48]

While NGBs may be in the optimal position for protecting the integrity of a sport[49] or promoting athlete and fan safety,[50] maintaining this level of deference to NGBs promotes a policy of not holding the bodies accountable for the rules and regulations made, leaving their power unchecked.[51]

Previous Victories for Manufacturers

Despite the manufacturers' losing record against NGBs, there have been a number of crucial victories. First, courts consistently reject NGB blanket implied immunity from antitrust liability.[52] Second, the courts generally acknowledge NGB market power, despite not being a direct market player.[53]

A pivotal victory for manufacturers came when the court denied NGBs the ability to claim blanket immunity from antitrust claims due to their status as non-economic entities. In *Gunter-Harz*, the Eighth Circuit noted that: "Non-profit voluntary associations which sanction and regulate professional [and amateur] sport[s]…have been held subject to antitrust laws in the exercise of their rule making authority."[54] This reasoning guaranteed all manufacturers that they would have the opportunity to allege antitrust violations against governing bodies. However, once the Sports Act was enacted in 1998, NGBs began to claim that they had implied immunity from antitrust liability because holding them accountable would restrict their ability to fulfill responsibilities under the Sports Act.[55] Therefore, while NGBs are no longer completely free from antitrust law,[56] the scope of their liability is dependant upon the apparent conflicts with the Sports Act.[57]

Also essential to any manufacturer's case against an NGB is the acknowledgment of the governing body's inherent market power. This breakthrough was exhibited in *Glider*, when Karsten, PING golf club manufacturer, and several PGA Tour golfers were granted an injunction against the United States Golf Association's (USGA) implementation of a ban on "all clubs on which the crossection of the grooves on the face…is in the shape of a square or 'U'…."[58] The court reasoned that governing bodies can have a significant impact on the marketability of a product because a ban can harm a manufacturers' overall reputation.[59] Likewise, in *Weight-Rite*, the Eleventh Circuit noted that the plaintiff's expert sufficiently proved that the USGA was able to restrict trade through rules, thereby affecting the marketability of golf shoes.[60] The codification of the Sports Act served to strengthen a claim that NGBs exercise significant power over the marketability of equipment due to their authority as sole regulators of their respective sports.[61]

While the acknowledgement of potential antitrust liability and the inherent market power of NGBs give manufacturers a venue for recourse, the scope of NGB liability is limited by the court's use of a deferential rule of reason analysis and a rigorous pleading requirement for combination or conspiracy. Given the consistent case law dismissing claims against NGBs, the *TYR* decision discussed below was not anticipated.

TYR Sport Inc. v. Warnaco Swimwear Inc., et al.[62]

The Ninth Circuit's rejection of U.S.A. Swimming's motion to dismiss[63] marks a significant development for sport equipment manufacturers.

In 2008, TYR filed suit against Warnaco, Inc., U.S.A. Swimming, and Erik Vendt.[64] In its complaint, TYR alleged that U.S.A. Swimming combined with Speedo and coerced National and Olympic team swimmers to exclusively wear Speedo's LZR, violating Sections One and Two of the Sherman Antitrust Act.[65] TYR further complained that Vendt breached his exclusive sponsorship contract with TYR when he wore the Speedo LZR during Olympic trials.[66]

In May, the Ninth Circuit rejected both Speedo and U.S.A. Swimming's motions to dismiss, holding that TYR succeeded in identifying a relevant product and geographic market, [67] as well as proving that the combination of both U.S.A. Swimming and Speedo established significant power within the market to have an anticompetitive effect on trade.[68] This opinion is relevant to the issue of equipment standardization for two main reasons.

Developments

First, the court dismissed the claim that the Sports Act provides NGBs with implied immunity from antitrust liability in order to conspire or combine with a corporate sponsor.[69] In response to U.S.A. Swimming's defense that it is immune to antitrust liability when exercising its authority to inform athletes on policies, "provide…technical information on…equipment design," or "actively seek…to generate revenue through sponsorships," the Ninth Circuit held that TYR is not disputing U.S.A. Swimming's ability to perform these duties.[70] Instead, the issue disputed concerns the nature of Speedo and U.S.A. Swimming's actions within the sponsorship, and the alleged unlawful use of the authority.[71] The court further noted that antitrust immunity is strongly disfavored in national economic policy[72] and that it has only been found if immunity is necessary to make an Act work in specific situations.[73] This holding delineates an innovative policy of introducing NGBs to liability for misuse of the power given through the Sports Act.

Second, the court did not dismiss TYR's allegation that Speedo and U.S.A. Swimming combined for the purpose of coercing the National and Olympic team swimmers to exclusively wear Speedo's LZR.[74] This required two separate breaks from precedent: (1) finding that U.S.A. Swimming had the motive to effect the market without being a direct market participant, and (2) finding the combination of U.S.A. Swimming and Speedo was sufficient to coerce the National and Olympic team swimmers to have an anticompetitive effect on the market, despite U.S.A. Swimming not being a market participant.

The Ninth Circuit held that TYR sufficiently pleaded U.S.A. Swimming's financial incentive to combine with Speedo in an anticompetitive scheme, due to Speedo's "substantial financial contributions."[75] This was contrary to previous case law that found the existence of sponsorships insufficient for pleading financial incentive.[76] Further, the court found that the instant case "closely parallels" *Hydrolevel*,[77] in which the Supreme Court found that a market participant can conspire with a non-market participant to violate antitrust laws.[78] Therefore, the Court held that TYR sufficiently alleged, "a combination between Speedo and U.S.A. Swimming to exert coercive pressure on consumers in the relevant market to choose Speedo's product, the LZR."[79]

Once motive to combine and ability to coerce were established, the court addressed the issue of whether or not TYR sufficiently pleaded coercion in fact. Noting that facts alleging "no more than an unfair vilification of TYR's products" would have led to TYR's dismissal, the Ninth Circuit held that TYR sufficiently pleaded "manipulation…carried out by dissemination of seemingly technical but allegedly false information in the marketplace suggesting that competitive products were inferior or unsuitable."[80] This was possible through U.S.A. Swimming's hiring of Mark Schubert, a paid spokesperson for Speedo, as the National and Olympic Team head coach. TYR alleged that Schubert used his position to go "beyond criticism and threatened athletes who chose to wear the TYR product.…"[81] The court found that these claims created an "anticompetitive effect on TYR [which] directly parallels the effect…in *Hydrolevel*."[82] In fact, co-defendant Erik Vendt, who breached his contract with TYR in order to wear the LZR, was noted as strong evidence of *de facto* coercion.[83]

These two developments significantly increase the potential for NGB antitrust liability. First, limiting the possibility of implied immunity from antitrust law exposes NGBs to potential liability that was previously unrecognized. Second, acknowledging that NGBs could have a financial interest in promulgating certain rules signals a movement toward stricter scrutiny of NGB motivations and stated purposes.

Notable Aftermath

Shortly after TYR initiated this lawsuit, Speedo's LZR was worn by 94 percent of the gold medal winners at the Beijing Olympics.[84] Introduced in February 2008, the LZR has been credited with most of the 108 world records broken last year, far more than any other Olympic year in which the average number of records broken has been 22.[85] The suit was even displayed in New York's Museum of Modern Art in an exhibit titled, "Superheros: Fashion and Fantasy,"[86] and named one of Time Magazine's Best Inventions of 2008.[87] This year, other swimsuit manufacturers came out with their own version of the LZR, which led to records continuing to fall.[88] Then, on August 1, FINA issued a statement that the suit technology will be banned starting January 1, 2010.[89] This news spurred a fury of debate among manufacturers,[90] athletes[91] and fans.[92] Interestingly, TYR was the first and only manufacturer to file suit against FINA thus far, citing arbitrary rule enforcement.[93]

Why Now?

The Ninth Circuit's break from precedent could be a reaction to governing body's increased use of sponsorships, recent scandals, and the overall complex and interconnected relationships that make up the sports world.

Sponsorships

Between 2004 and 2008, the USOC generated $690 million in revenue, with $318 million coming from marks rights income.[94] As of January 1, 2009, the USOC was sponsored by, partnered with, or entered into a licensing agreement with 38 entities.[95] Moreover, the USOC strongly encourages the NGBs to raise money through sponsorships.[96] With almost half of the USOC's revenue coming from a relatively small number of corporations, and the NGBs relationship with both USOC and their own sponsors, questions have arisen relating to each Committee's independent decision-making capabilities.[97]

Michael Phelps's quest for eight gold medals in the 2008 Summer Olympics serves as a powerful example of overlapping interests in the sports industry. After winning his seventh gold medal by one one-hundredth of a second, controversy erupted when Omega, the official timekeeper of the Olympics since 1932, and sponsor of Phelps, refused to release underwater pictures of the flash-finish.[98] When the International Olympic Committee (IOC) quickly backed its sponsor, questions immediately arose concerning the organizations' financial interest in Phelps winning.[99] A few weeks later, the pictures were released showing Phelps to be the winner.[100]

The *TYR* opinion could be a reaction to sponsor control over NGBs. As previously noted, the Ninth Circuit pointedly stated that the dispute concerns the collusive nature of the actions of the parties within a sponsorship, while acknowledging U.S.A. Swimming's financial interest in such a combination.[101] This signals the court's appreciation of the inherent dangers in exclusive sponsorship agreements and the recognition that NGBs may not always represent the best interests of the industry they govern.

Scandal in the USOC

TYR could also be a reaction to the scandals that have recently injured the USOC's reputation, including allegations of bribing the IOC in order to secure the bid for the 2002 Winter Olympic Games[102] and reports of USOC's President attempting to secure a multi-million dollar contract with his brother.[103] More recently, the USOC decreased the number of decision makers on the Board of Directors from 125 to 11,[104] and replaced the sitting CEO and President with two individuals with little or no Olympic experience, respectively.[105] The reason for the change in leadership has been attributed to the USOC's inability to adapt to the "altered sports marketing landscape in the wake of the financial crisis."[106] These developments not only concentrated the decision-making power to a limited number of people with varying levels of expertise in sports, but also signaled that the USOC is more focused on finances than athletics.[107] Even if this can be attributed to the USOC's need to fundraise in order to be successful in supporting the athletes,[108] the underlying idea exists that the Committee is supposed to govern athletics, but is made up of few people with profound knowledge of the topic.

In light of this, *TYR* could be a reaction to wavering confidence in the integrity and knowledge of the overarching U.S. sport governing body, and the sentiment that complete deference is no longer appropriate.

Complexity of the Sports World

The "unique" nature of the sports industry has long been the reasoning behind courts' idiosyncratic treatment of antitrust cases against NGBs.[109] However, the increasing commercialization of sports could have been the change leading courts to increase scrutiny of NGB financial interests in equipment regulations.[110] "The sports business industry is one of the largest and fastest growing industries in the United States…estimated…last year at $213 billion…more than twice the size of the U.S. auto industry."[111] Of that total, $25.62 billion (13.2 percent) was realized from athletic equipment sales, the second largest percentage next to advertising (14.1 percent).[112]

In *TYR*, the court could have simply recognized the tremendous impact sport equipment has on the economy in conjunction with the NGBs' ability to unilaterally sanction, ban or collusively injure the market or a market player.[113] Given the size of the industry and the power granted to the NGBs through the Sports Act,[114] the *TYR* court may have decided it was time to update current policy and take NGB financial interests into consideration.

For the Love of the Game

The Ninth Circuit's increased scrutiny of NGB financial incentives when promulgating rules should be continued because it enhances confidence in the NGBs' independence from outside forces. Further, it allows manufacturers to invest in technological developments without the fear of arbitrary rule enforcement or anticompetitive schemes directed at their products.

The Integrity of Sports

As discussed in the previous section, the sports industry continues to grow in size and complexity.[115] The Sports Act requires that each NGB demonstrate that "it is autonomous in the governance of its sport… independently decides and controls all matters central to governance."[116] This entrusts each NGB with considerable power over an entire subsection of the sports industry, which indirectly gives it the ability to have an impact on a significant portion of the economy.[117] Given the increasing use of sponsorships, perhaps compromising the independence of the governing bodies' decision-making, and the prevalence of scandal in the ranks of the principal governing body, the Ninth Circuit's break from policy was perfectly timed.

Few dispute the necessity of an NGB that standardizes rules, protects the integrity of sports,[118] maintains a level playing field,[119] promotes meaningful competition,[120] and encourages excellence on the international stage. However, the policy of immediate deference is no longer appropriate. The courts should instead follow the Ninth Circuit's precedent and continue to analyze the possible financial interests NGBs may have when creating these rules, specifically the existence of a sponsorship with a market competitor. While some manufacturers' claims of conspiracy lack merit,[121] and opening the NGBs up to significant liability is not recommended,[122] manufacturers with substantial claims should not be unceremoniously dismissed.[123] This change would force the NGBs to be more accountable for their rules, and give the athletes and fans more confidence in the propriety and independence of the rule making bodies.

Technology

For better or worse, technology has a major impact on sports.[124] From training techniques, nutrition, venue maintenance, to, of course, equipment, technology affects the overall state of the modern athlete.[125] In terms of equipment standardization, the debate of where the line should be drawn is ever present.[126] Whether the issue is the lack of a ban,[127] or the implementation of one,[128] technology's place in sports is at the heart of the debate. As with any dispute over regulations, there are liberals[129] and conservatives[130]—but the point of this article is not to give value to one position over another.[131]

Instead, looking at the current policy adopted by the courts from the standpoint of manufacturers, increased scrutiny of NGB financial interests to protect against arbitrary and anticompetitive rule enforcement should continue. Deference discourages technological advancements,[132] stifles innovation, and restricts the market for every consumer.[133] Following the Ninth Circuit's enhanced examination of NGBs' motives will allow manufacturers to invest in new technology secure in their knowledge that the existing rules will be applied rationally and subsequent revisions made for legitimate purposes.[134] Further, it will give the governing bodies incentive to establish clear regulations outlining the types of equipment that will be sanctioned.[135] This in turn would lead to a clear representation of the sports the NGBs are intending to protect, providing the manufacturers with lines within which to focus their creative energy.

Conclusion

The next court to hear an equipment regulation antitrust lawsuit should follow the Ninth Circuit's revised policy and acknowledge the financial interests potentially influencing the governing body's rule making. This examination of the economic factors surrounding the rule would increase confidence in the governing body's decision-making integrity, while legitimizing the necessity of the ban for injured manufacturers, and clearly defining how the technology went outside the confines of accepted performance enhancement in the sport.

Endnotes

1. Herb Brooks, coach of the 1980 USA Olympic Ice Hockey Team, exclaimed this during a practice with his team en route to winning the gold medal in the Lake Placid Olympics.
2. Mark Bhupathi, stated sometime in the 1990s.
3. *E.g., Room for Debate, A New York Times Blog: Is It the Athlete or the Equipment* (2009), http://roomfordebate.blogs.nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (blogging, Gary Hall, three time Olympian, Frank Thomas, former USGA official, and Eric Hjertberg, bike component technologist, all agree that equipment should not be the determining factor).
4. *See* Brian M. Cooper, *Spira v. USATF/IAAF: Will Spira Finish this Antitrust Marathon with a Spring in its Step?* (2007), http://www.hackneypublications.com/sla/archive/000495.php (noting that, "For years, sporting goods manufacturers marketing technologically-advanced sports equipment have clashed with athletic organizations charged with maintaining the competitive integrity of their respective sports").
5. *See, e.g.,* Barry Svrluga, *2008 Summer Olympic Games/Controversial Swimsuit Dominates Talk at Games*, WASH. POST, August 13, 2008.
6. Swimming's international governing body.
7. Press Release, Federation Internationale de Natation, PR 59—FINA Bureau Meeting (Aug. 1, 2009).
8. *See* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 138-139 (1999). For example, the NCAA limited, "the speed at which a baseball leaves a bat at 97 miles per hour," for safety reasons and to protect the integrity of the game. *Id*. at 143-147.
9. *See, e.g.,* Darryl C. Wilson, *"Let Them Do Drugs"—A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game*, 8 FLCLR 53 (2006) (questioning lines drawn, or not drawn, in anti-doping, technology, surgery, and genetic alteration in sports).

10. *See, e.g.,* Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 UMIABLR 585 (2002).

11. *See, e.g.,* Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975 (2009).

12. *TYR Sport Inc. v. Warnaco Swimwear Inc., et al.,* 2009 WL 1769444 (C.D. Cal. 2009).

13. *Id.*

14. *See supra* note 10.

15. 36 U.S.C. § 220522 (a) (5) (A) (1998) (stating, "(a) An amateur sports organization is eligible to be recognized…as a national governing body only if it—(5) demonstrates that it is autonomous in the governance of its sport, in that it—(A) independently decides and controls all matters central to governance…).

16. *Supra* note 12 at *4.

17. *See infra* notes 109-114 and accompanying text.

18. *See infra* notes 46-52 and accompanying text.

19. *See infra* notes 95-102 and accompanying text.

20. Debbie Thorne, et al., *The Impact of Sports Marketing Relationships and Antitrust Issues in the United States*, 20 J. Pub. Pol'y & Marketing (Special Issue) 1, 4-6 (2001).

21. *See, e.g., Warrior Sports Inc. v. NCAA*, 2009 WL 646633 (E.D. Mich. 2009).

22. *See* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 161 (1999) (noting, "Manufacturers for aluminum baseball bats have alleged that the NCAA's rules…substantially inhibit research and development and innovation.").

23. 36 U.S.C. 220522 (a) (5) (A).

24. *See infra* note 30.

25. 36 U.S.C. §§ 220501-29 (1998) (revision of original Amateur Sports Act of 1978).

26. *Id*. at 220501-12.

27. *Id.* at 220521 (a). The Sports Act only creates a national governing body for each Olympic sport. However, each sport discussed *infra*, regardless of its Olympic status, has a governing body with almost identical attributes.

28. *Id.* at 220522 (a) (5) (A).

29. 15 U.S.C. § 1 (2002) (stating, "Every contract, combination…or conspiracy, in restraint of trade or commerce…is declared to be illegal"); 15 U.S.C. § 2 (2002) (stating, "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person…to monopolize any part of the trade or commerce…shall be deemed guilty of a felony.…").

30. *See, e.g., TYR Sport Inc. v. Warnaco Swimwear Inc., et al.,* 2009 WL 1769444 (C.D. Cal. 2009) (alleging Section One and Two violations).

31. *Id.* at *3.; *see also Weight-Rite Golf Co., et al. v. USGA*, 766 F. Supp. 1104, 1108 (M.D. Fl. 1991). For excellent reviews of antitrust law's interaction with sports, see generally Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975 (2009); Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 UMIABLR 585 (2002); Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 138-139 (1999).

32. *See* Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975, 977 (2009) (noting, "Courts generally defer to league's discretion in promulgating rules of its own—the most common justification for which are the unique nature of sports and the need for rules to establish meaningful competition…").

33. *See, e.g., Windage, LLC v. USGA*, 2008 WL 2622965, *4 (D. Minn. 2008) (pleading that it is "arbitrary, inconsistent, unfair, and unjustified for the USGA to make an exception to the Rule… for distance devices," while banning the manufacturer's wind-direction predictor).

34. *See, e.g., Warrior Sports Inc. v. NCAA*, 2009 WL 646633 (E.D. Mich. 2009).

35. *See Gunter Harz Sports, Inc. v. USTA, Inc.*, 511 F. Supp. 1103 (D. Neb. 1981); *Weight-Rite Golf Co.*, 766 F. Supp. 1104.

36. *See supra* note 22 at 138 (noting, "…defendant will almost always win under the rule of reason, especially when sports equipment restrictions are at issue…").

37. *See Bell Atlantic Corp., et al. v. Twombly et al.*, 550 U.S. 1 (2007).

38. *Warrior*, 2009 WL 646633.

39. *Id.* at *1-2. For 30 years the NCAA maintained the same lacrosse stick dimensions, and Warrior had its sticks approved in 2000. The NCAA made proposed rule changes in 2006, 2007, and 2008. Before the third revision, the NCAA "asked Warrior Sports whether it would be willing to license its intellectual property rights to other lacrosse manufacturers." *Id.* Warrior refused, and the NCAA submitted the 2008 rule which renders all Warrior sticks obsolete. *Id. But see* Press Release, U.S. Lacrosse, 2010 NCAA Men's Lacrosse Stick Specification Changes (December 18, 2008) (noting that, "In recent years, manufacturers have evolved men's lacrosse stick head designs within the rules to become narrower… mak[ing] it more difficult to dislodge the ball and changed the nature of the college game."); Brett Theron, *New Lacrosse Stick Regulations for 2010* (2009), http://www.associatedcontent.com/article/1795688/new_lacrosse_stick_regulations_for.html?cat=14 (writing that the change, "…will provide a good balance between defense and offense, which will make lacrosse more fun to play and more fun to watch").

40. *Brookins v. IMCA, et al.*, 219 F.3d 849, 854 (8th Cir. 2000) (noting that IMCA's purpose was to "keep technology out of racing").

41. *Id.* at 855 (responding that, "It is well expected that…competing suppliers will complain, or…question whether a new technology complies with "the rules of the game").

42. *Id.* (holding that, "There is no evidence that IMCA had a financial incentive to accede to the wishes of the…competitor sponsors of IMCA…there is no evidence that IMCA's rulings were made for reasons other than its overall purpose to define a set of rules for a popular game").

43. *Warrior Responds: Statement on NCAA Lawsuit*, LACROSSE MAG., September 23, 2008 (quoting David Morrow, President of Warrior Sports, "This is a concern of the entire sporting goods industry… if the NCAA can, on a whim or as part of a secret deal, with no supporting scientific or technical data, render an entire product line illegal for play.").

44. For a great discussion of the rule of reason, see generally Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate,* 18 WIDLJ 975, 1012 (2009).

45. *See* Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975, 1012 (2009) (noting that the rule of reason is a "euphemism for nonliability"); Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 160-165 (1999).

46. *Windage, LLC v. USGA*, 2008 WL 2622965, *6 (D. Minn. 2008) (quoting *Brookins*); *but see Glider v. PGA Tour, Inc.*, 727 F. Supp. 1333, 1336-7 (D. Az. 1989) (holding that, "The court…does not substitute its independent judgment for the judgment of the sports governing body as long as the rule adopted is reasonable, without self interest or self-dealing among decision makers . . .").

47. *Warrior Sports Inc. v. NCAA*, 2009 WL 646633, *1 (E.D. Mich. 2009).

48. *See Warrior Responds: Statement on NCAA Lawsuit*, LACROSSE MAG., September 23, 2008 (quoting David Morrow, president of Warrior Sports, "The NCAA has failed to provide any studies or any conclusive data that indicates the sport has a problem with free dislodgement of the ball…nor has it articulated how

this new rule will, in the least drastic method, solve this claimed problem.").

49. *See, e.g., Gunter Harz Sports, Inc. v. USTA, Inc.*, 511 F. Supp. 1103, 1117 (D. Neb. 1981) (quoting, "[N]o court has the right to step in and dictate to a sophisticated group of officials, duly elected, in a sanctioning organization which sanctions sports. . ." (cite omitted)).

50. *See* Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975, 1011-1015 (2009).

51. *See supra* note 24.

52. *See, e.g., Gunter Harz Sports, Inc. v. USTA, Inc.*, 511 F. Supp. 1103 (D. Neb. 1981).

53. *See, e.g., Weight-Rite Golf Co., et al. v. USGA*, 766 F. Supp. 1104, 1108 (M.D. Fl. 1991).

54. *Gunter*, 511 F. Supp. at 1114 (cites omitted) (dismissing claim of manufacturer of double-string tennis rackets while noting that, "…while each sanctioning organization has the primary noncommercial purpose…its subsequent actions…could trigger the application of the Sherman Act.…" *Id.* at 1115 (cite omitted).

55. *See JES Props., Inc. v. USEF, Inc.*, 458 F.3d 1224, 1230-31 (11th Cir. 2006) (looking to see if the "application of antitrust laws to the facts of the case would "unduly interfere with the operations of the ASA [now Sports Act]").

56. Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975 (2009) (arguing for the end of baseball's immunity, the last sport still held immune).

57. *See JES*, 458 F.3d at 1232 (noting, "Because the ASA [now Sports Act] requires an NGB to promulgate rules to minimize conflicts in schedules, the imposition of antitrust liability for the promulgation of such a rule is plainly repugnant to the ASA" (internal quotes omitted)). *But see infra* notes 69-73 and text accompanying.

58. *Glider v. PGA Tour, Inc.*, 936 F.2d 417, 418 (9th Cir. 1991); *see also* Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 UMIABLR 585 (2002) (noting that this case eventually settled and U-shaped clubs are permitted).

59. *Id.* at 423 (writing that, "Whether amateur golfers like to use the same equipment as professional golfers…is a serious question that should be resolved at a hearing.…"); *see also* Keith Naughton, *Making a Splash: Speedos New and Controversial High-Tech LZR Suit ...*, NEWSWEEK, 2008 WLNR 11813909 (2008) (noting that the "Speedo uses [Olympians]…as show horses" to get credibility in the market).

60. *Weight-Rite Golf Co., et al. v. USGA*, 766 F. Supp. 1104, 1110 (M.D. Fl. 1991) (accepting plaintiff's creation of an issue of fact concerning USGA's ability to injure competition).

61. 36 U.S.C. § 220522 (a) (5) (A) (1998); *see also supra* note 15.

62. *TYR Sport Inc. v. Warnaco Swimwear Inc., et al.,* 2009 WL 1769444 (C.D. Cal. 2009).

63. *Id.* at *18.

64. *Id.* at *1.

65. *Id.*

66. *Id*.

67. *Id*. at *4 (holding that the relevant market of "high-end competitive swimwear," and purchasers being "competitive swimmers in the professional, collegiate, high school and club ranks," was "facially plausible under *Twombly* and *Iqbal*").

68. *Id*. (noting, "The Court is…persuaded that the complaint can be construed to allege an anticompetitive combination…between a market participant and an ostensibly neutral party").

69. *Id.* at *9.

70. *Id.* at *8-9.

71. *Id.*

72. *Id.* at *8 (quoting *United States v. Borden Co.,* 308 U.S. 188, 198 (1938)).

73. *Id.* (quoting *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963)).

74. *Id.* at *4.

75. *Id.* at *10.

76. *See, e.g., Brookins v. IMCA, et al.*, 219 F.3d 849, 854 (8th Cir. 2000).

77. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982).

78. *Id.* at *4.

79. *Id.* at *4-6 (holding that U.S.A. Swimming was in a position to "greatly influence the relevant market as an NGB," allowing the possibility for Speedo to combine to "manipulate the relevant market").

80. *Id.* at *5.

81. *Id.* (quoting TYR's Complaint which alleges that Coach Schubert "would strongly advise them to wear the [Speedo] at trials, or they may end up at home watching [the Olympics] on NBC").

82. *Id.* at *6; *See also* Elai Katz, *Monopoly Leveraging Theory Rejected by Ninth Circuit*, 242 N.Y.L.J. 3, (2009) (noting that the Ninth Circuit in *TYR* found "a claim of a combination to exert coercive pressure on consumers beyond mere disparagement of a competitors product, which does not generally rise to the level of antitrust claims").

83. *Id; See also* Matt Hartley, *Beijing's Real Swimming Star*, GLOBE AND MAIL, 2008 WLNR 14305301 (2008) (noting that Nike allowed all of its sponsored athletes to breach their contracts in order to wear the LZR in the Olympics).

84. Time Magazine, *TIME's Best Inventions of 2008*, (2009). *See also* Carl Mortished, *Meet the Real Star of the Olympics…and It Isn't Phelps, Ainslie or the Lightning Bolt*, TIMES (U.K.), 2008 WLNR 15678245, (August 8, 2008) (noting that Speedo, "arrived in Beijing with hundreds of suits, offering them to any competitor who wanted one").

85. Gary Hall, *Room for Debate, A New York Times Blog: Is It the Athlete or the Equipment?* (2009), http://roomfordebate.blogs.nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (stating further that the top five 400M men's relay teams in Beijing, each of which broke the world record, were wearing the LZR).

86. *See supra* note 83.

87. Time Magazine, *TIME's Best Inventions of 2008* (2009).

88. *See, e.g., Speedo Blasts FINA's Move to Ban Fast Bodysuits*, Sports Executive Weekly, August 3, 2009 (noting that since the LZR, "companies such as Jaked and Arena have surpassed the LZR—with nearly 30 more records falling this year").

89. Press Release, Federation Internationale de Natation, PR 59—FINA Bureau Meeting (Aug. 1, 2009). U.S.A. Swimming announced its early implementation of the ban, which commenced on October 1. Associated Press, *USA Swimming votes to ban high-tech suits*, September 19, 2009. For an excellent discussion of Speedo's NASA-created suit technology see Ron Schneiderman, *The 2008 TechnOlympics*, Electronic Design, 2008 WLNR 25827033 (2008).

90. *See, e.g., Speedo Blasts FINA's Move to Ban Fast Bodysuits*, Sports Executive Weekly, August 3, 2009 (reporting Speedo's reaction to the ban calling the line drawn by the governing body "retrograde" and harmful to the sport).

91. *See, e.g.,* Allen Barra, *The Suit's the Thing,* WALL STREET JOURNAL, August 3, 2009 (quoting Michael Phelps's reaction to the ban as saying, "I think it's going to be good."); *but see FINA May Delay Implementation of Swimsuit Ban, Upsetting Some*, Sports Business Daily, July 29, 2009 (quoting Paul Biedermann, who beat Michael Phelps in the Rome National Championships, "I hope there will be a time when I can beat Michael Phelps without the

suit… not my problem, it's not the problem of Arena, my sponsor. It's the problem of FINA.").

92. *See, e.g.,* Patrick Smith, *Why Athletes must embrace technology*, Weekend Australian (August 1, 2009) (noting that the ban is a mistake because, "It is fascinating to see how fast men and women can swim. It makes a rather dull sport exciting…change should be embraced.").

93. *US Firm TYR takes FINA to Court over rejected swimsuits*, Bangkok Post (2009), http://www.bangkokpost.com/news/sports/148506/us-firm-tyr-takes-fina-to-court-over-rejected-swimsuits.

94. United States Olympic Committee, 2008 Annual Report 24-25, 28 (2009) (explaining that the USOC earns revenue from IOC and USOC sponsorship programs, with the USOC usually receiving payments in "the form of goods and services"); *see generally* Katie Thomas, *Wrenching Shake-Up of the U.S. Olympic Committee*, New York Times, June 27, 2009 (noting that unlike other national Olympic Committees, "the committee does not receive federal money and relies nearly entirely on corporate sponsors…[and] broadcast rights revenue"); *but see* Philip Hersh, *Olympics Blog: USOC thinking about asking Uncle Sam for a handout*, Los Angeles Times (2009), http://latimesblogs.latimes.com/olympics_blog/2009/09/usoc-thinking-about-asking-uncle-sam-for-a-handout.html (quoting USOC Chairman Larry Probst, "Potential government funding is one of the things we will examine as part of a longer term strategy plan.").

95. *Id.* at 21.

96. § 8.7 (k), United States Olympic Committee Bylaws (2008).

97. *See* Robert Weissman, *The Commercialism Games: How Commercialism is Overrunning the Olympics*, CorpWatch, (2008), http://www.corpwatch.org/article.php?id=15164 (calling for "safeguards to ensure apparel and equipment sponsorships do not compromise sports governing bodies' decisions").

98. Jere Longman, *By Witholding Photos, Olympic Timekeeper Draws Attention to Relationship with Phelps*, New York Times, August 20, 2008.

99. *Id.* (pointing out other examples of questionable sponsor relationships including ,"James Easton, an I.O.C. member … runs a sporting goods manufacturing company that has provided equipment for…Olympic Sports").

100. *See* Associated Press, *Omega finally releases Phelps' photo sequence*, August 23, 2008.

101. *TYR Sport Inc. v. Warnaco Swimwear Inc., et al.,* 2009 WL 1769444, *9 (C.D. Cal. 2009).

102. *See* Linda Robertson, *Can successful Games squash SLOC scandal?*, The Miami Herald, February 2, 2002 (noting that two Salt Lake City Organizing Committee (SLOC) members were, "indicted for bribery, accused of buying [IOC] votes with $1 million in cash, travel perks, scholarships, cosmetic surgery, shotguns …").

103. *See* John Crumpaker, *Turf battles could draw USOC shakeup; Internal problems promote Senate hearings*, The San Francisco Chronicle, January 21, 2003 (noting that "The dysfunctional family known as the [USOC]" has had a lot of "internal problems" requiring a Senate hearing to sort them all out).

104. *See* Katie Thomas, *Wrenching Shake-Up of the U.S. Olympic Committee*, New York Times, June 27, 2009.

105. *Id.* (noting that the replacement of the CEO and President came after "six years of stability" and success in Beijing).

106. *Id.*

107. *Id.*

108. *See* United States Olympic Committee, 2008 Annual Report 24 (2009).

109. *See, e.g.,* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 149-152 (1999).

110. For a great discussion and analysis of sports marking, see generally Debbie Thorne, et al., *The Impact of Sports Marketing Relationships and Antitrust Issues in the United States*, 20 J. Pub. Pol'y & Marketing (Special Issue) 1, 4-6 (2001).

111. *The Sports Industry*, Street & Smith's SportsBusiness Journal, http://www.sportsbusinessjournal.com/index.cfm?fuseaction=page.feature&featureId=43.

112. *Id*.

113. *See, e.g.,* Carl Mortished, *Meet the Real Star of the Olympics…and It Isn't Phelps, Ainslie or the Lightning Bolt*, TIMES (U.K.), 2008 WLNR 15678245, (August 8, 2008) (reporting that the domination of Speedo's LZR at the Beijing Games led to Nike reneging all contracts with Olympic Swimmers so that they could wear the LZR).

114. *See, e.g.,* Frank Thomas, *Room for Debate, A New York Times Blog: Is It the Athlete or the Equipment?*, (2009), http://roomfordebate.blogs.nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (noting that the proposed USGA rule will affect 35 million golfers, while the purpose is to make the game more difficult for the tiny subset of professional golfers). Frank Thomas was a former USGA official in the research and test center for equipment conformity.

115. *See* Debbie Thorne, et al., *The Impact of Sports Marketing Relationships and Antitrust Issues in the United States*, 20 J. Pub. Pol'y & Marketing (Special Issue) 1 (2001).

116. 36 U.S.C. 220522 (a) (5) (A) (2006) (stating that the body must also be "free from outside restraint").

117. *See supra* note 111 and accompanying text.

118. Press Release, U.S. Lacrosse, 2010 NCAA Men's Lacrosse Stick Specification Changes (December 18, 2008) (noting the purpose of the NCAA's stick dimension rule change is to "result in a greater balance between offense and defense, as well as preservation of the traditions of the game").

119. *See, e.g.,* Mike Pignataro, *High-tech suits banned for high school swimmers,* Connecticut Post Online (August 19, 2009) (reporting that the National Federation of State High School Associations followed the FINA ban on swimsuits. Coaches applauded the ban because the "suit could have created a significant imbalance between affluent teams and those from inner cities or smaller programs").

120. *See* Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 UMIABLR 585, 586 (2002) (writing, "Without standard rules of play, no meaningful competition on the playing field can occur.").

121. *E.g.,* Spira Footwear developed WaveSpring Technology that has not been approved by either the International or U.S. governing body of track and field. The company filed suit, stating that it was aware the technology was illegal under the rules. Comparing its plight to that of "oversized metal tennis racquet and the oversized metal golf club driver" which were "initially banned…but eventually came to be accepted by the governing bodies," the company believed it could get the rule overturned. Complaint at 3, *Spira Footwear Inc. v. USA Track & Field, Inc.,* 2007 WL 1621699 (W.D. Tx. 2007). *See also* Andrew B. Krafsur, *From the desk of Andrew B. Krafsur Founder, Spira Inc.*, http://spirafootwear.com/about_spira.php; Shlomi Feiner, *Regulation of Playing Equipment by Sports Associations: The Antitrust Implications*, 10 UMIABLR 585, 603 (2002) (noting that the unique nature of sports requires "collective action" that is tolerated because it is necessary for the "administration of organized sport").

122. *Concur* Stephen J. Matzura, *Will Maple Bats Splinter Baseball's Antitrust Exemptions?: The Rule of Reason Steps to the Plate*, 18 WIDLJ 975, 1010 (2009) (writing that, "In sports equipment context…the benefits to the quality of on-field competition and safety in sports can outweigh anticompetitive effects.").

123. Frank Thomas, *Room for Debate, A New York Times Blog: Is it the Athlete or the Equipment?*, (2009), http://roomfordebate.blogs.

nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (writing, "Every sport needs a strong and respected governing body but it must be transparent in its rule making process and provide evidence that the changes will be in that sports best interests."). Frank Thomas is a former USGA official in the research and test center for equipment conformity. *But see* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 189 (1999) (arguing there is "no solid evidence that groups like the NCAA or USGA seek to favor any marketplace rivals of equipment manufacturers").

124. *See* Darryl C. Wilson, *"Let Them Do Drugs"—A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game*, 8 FLCLR 53, 95-96 (2006) (writing that, "…it is undeniable that science and technology are poised to become a major focal point in the future regarding the level playing field." The article goes on to point to previous Olympic focal points such as clap skates in 1998, sharkskin full body swimsuits in 2000 and swift skin for speed skaters in 2006. *Id.* at 96); *see also* Russ VerSteeg, *Arresting Vaulting Pole Technology*, 8 Vand. J. Ent. & Tech. L. 93, 96 (2005) (noting, "technology has been responsible for a great deal of improvement in performance and safety in many sports").

125. *See* Patrick Smith, *Why Athletes must embrace technology*, Weekend Australian (August 1, 2009) (writing, "Athletes are a product of their time. Of training techniques, sport science advances, of improved equipment.").

126. *See* Darryl C. Wilson, *"Let Them Do Drugs"—A Commentary on Random Efforts at Shot Blocking in the Sports Drug Game*, 8 FLCLR 53 (2006); Erin Floyd, *The Modern Athlete; Natural Athletic Ability or Technology at Its Best?*, 9 VLSELJ 155 (2002).

127. *See, e.g.,* Russ VerSteeg, *Arresting Vaulting Pole Technology*, 8 Vand. J. Ent. & Tech. L. 93 (2005) (calling for ban on fiberglass pole vaults); George Chesterton, *Sports Active: No Turning Back: Clap Skates*, Independent (London), November 7, 2004 (quoting Bill Cushman, president of the US Speed Skating Association, on why the U.S. team was the only team not wearing clap skates: "We want to keep the sport pure…to our thinking, this is no different than doping or corking a baseball bat.").

128. *See, e.g.,* Amy Shipley, *Masters Swimmers Are Split on Full-Body Suits*, Washington Post, August 26, 2009 (reporting, "The masters population includes older folks who appreciate full-body coverage for reasons that have nothing to do with speed" and, "[a zipper] allows one not to worry about dislocating your shoulder or hips when getting into a suit").

129. *See, e.g., supra* note 92.

130. *See, e.g.,* Amy Cortese, *Wiggling Their Toes at the Shoe Giants*, New York Times, August 30, 2009 (tracking trend of returning to running barefoot).

131. I'm a purist.

132. *See, e.g.,* Scott Nichol, *Room for Debate, A New York Times Blog: Is It the Athlete or the Equipment?*, (2009), http://roomfordebate.blogs.nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (writing that, "…advancements in cycling are propelled by competition and are made better by feedback from athletes"). Scott Nichol is a bicycle manufacturer and a member of the Mountain Bike Hall of Fame.

133. *See* Daniel E. Lazaroff, *Sports Equipment Standardization: An Antitrust Analysis*, 34 GALR 137, 137 (1999) (writing, "concerted efforts to determine specifications for goods may well constitute a serious antitrust problem…prevent competitors' products from reaching the marketplace…thwart innovation and technological improvements").

134. Scot Nichol, *Room for Debate, A New York Times Blog: Is it the Athlete or the Equipment?* (2009), http://roomfordebate.blogs.nytimes.com/2009/05/08/is-it-the-athlete-or-the-equipment/ (questioning the expertise of governing bodies to determine what equipment should be used). Scott Nichol is a bicycle manufacturer and a member of the Mountain Bike Hall of Fame.

135. *See, e.g., supra* note 44 (noting the effect of a vague rule was manufacturers making the heads more narrow each year, leading to the NCAA revising the rule).

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Sorry, We're Closed

By Omar Gonzalez

The recent threat of a strike by the Screen Actors Guild (SAG) invites an examination of the union's membership policies, especially one it implemented when it last went on strike. During its dispute with television commercial producers in the summer of 2000, SAG found itself in need of clerical assistance and bodies at the picket lines. It therefore advertised, offering to sell membership cards at 80 hours a pop, regardless of the actor's level of experience or training. That much time volunteering in support of the strike, plus the usual initiation fee, would buy one the right to emblazon "SAG" atop one's resume. So forceful and swift was the ensuing flood of volunteers that, long before the strike was over, SAG turned many away. Yet each who had already registered was permitted to complete the 80 hours, tender the initiation fee, and finally become a SAG actor.

"In order to join…[the two major unions, SAG and Equity]…an actor must first obtain work under a union contract, such work generally being available only to union members. This catch-22 is well known throughout the film and television industries."

SAG's actions seem to have obscenely constituted an unfair labor practice, as a union is allowed to determine its own membership requirements, but forbidden from discriminating against those it excludes for any reason other than non-tender of initiation fees or dues. Through its basic agreement with the producers for whom SAG permits its actors to work, the union provides members with significant employment opportunities that it withholds from non-members. Perhaps, as a hiring hall, it retains the right to determine the competence of the workers it refers by requiring certain credentials. However, the 80 hours of unpaid labor it required of each "volunteer" had nothing to do with talent.

It is generally acknowledged in the acting community that regardless of an actor's talent, diligence and formal training, one will be unable to make a living as an actor, and usually forbidden to even *audition* for the types of work that would enable one to support oneself, if one is not a member of the two major unions, SAG and Actors' Equity Association (Equity). In order to join either, however, an actor must first obtain work under a union contract, such work generally being available only to union members. This catch-22 is well known throughout the film and television industries.

The SAG basic agreement requires signatory producers to hire at least a certain percentage or number of SAG performers for each production. The penalty for failing to do so is a fine paid by the producer to SAG for each union slot filled with a non-union actor. There are no comparable quotas for non-SAG artists, who, if and after they are fortunate enough to get a SAG job, cannot get another without first joining SAG. In *Backstage*, a weekly newspaper containing casting advertisements, the screen acting jobs are not divided merely into "Film" and "TV," but also into "Film/SAG" and "Film/Non-SAG." Jobs under the former heading are open only to union members, and almost always pay much better than those in the latter.

Further, via their longstanding contacts in show business, talent agents frequently are the only ones who find out about principal acting jobs, i.e., speaking roles. Furthermore, in order to represent SAG actors, agents must be franchised by the union. SAG defines the credentials that the agent must have in order to be franchised, and periodically inspects agents' offices to ensure union members' protection. *Ross Reports* was a periodical for which every issue contained a listing of talent agencies. Many of the entries used to read, "All SAG talent welcome," while mentioning nothing of non-union talent. That phrase has since disappeared (and the new title is *Call Sheet*). This might be because it is now commonplace for actors to pay for the opportunity to audition for agents, who would be discouraging potential revenue by publicizing that they work exclusively with union artists.

In 1935 the original National Labor Relations Act (NLRA) was passed in the form of the Wagner Act, whose Section 8(a)(3) prevented anything in the statute from precluding "an employer from making an agreement with a labor organization…to require as a condition of employment membership therein." This was an express approval of the closed shop, a type of agreement under which the employer could hire only workers who were members of the union prior to the time of hiring. However, since the 1947 passage of the Taft-Hartley Act, Section 8(a)(3) of the current NLRA has made it an unfair labor practice for an employer to encourage or discourage membership in a union through discrimination in hiring. Section 8(b)(2) makes it an unfair labor practice for a union to cause an employer to discriminate against an employee in violation of Section 8(a)(3). Section 8(b)(1)(A) prohibits a union from restraining or coercing employees in the exercise of their Section 7 right to refrain from union membership. Employers are equally prohibited by Section 8(a)(1).

SAG's paradoxical membership requirements, the fact that it withholds the more lucrative jobs for its members while franchising talent agents who might still refuse to represent non-SAG performers, and the refusal by SAG signatory producers to even audition non-members seem to be in direct violation of the Taft-Hartley Act. Yet a proviso to Section 8(a)(3) expressly legalizes the union shop, a system under which an employee must become a member of the union within 30 days (or more if the union so permits) after beginning employment. Though officially a member, a union shop employee need not attend any union meetings or maintain good standing with the union, which nonetheless may not breach its duty to provide the member with the fair representation to which he or she is entitled, as an employee in the bargaining unit represented by the union. Furthermore, the proviso states that, "no employer shall justify any discrimination against an employee for non-membership in a labor organization…if…membership was terminated for reasons other than failure to tender the…dues and…fees uniformly required." In 1963's *NLRB v. General Motors Corp.*,[1] the Supreme Court validated the agency shop, under which non-union employees are not required to join the union, but must, in exchange for the union's negotiation and administration of the collective bargaining agreement, pay the same initiation fees and dues that members pay. In 1988 that amount was simmered down to its "financial core," in *Communications Workers v. Beck*,[2] as the Court held that under *General Motors*, a worker cannot be required to pay more than that portion of such dues and fees that is allocable to collective bargaining, grievance adjustment and administration of the collective agreement.

Non-SAG actors might have done well to file a complaint with the National Labor Relations Board (NLRB) before the strike of 2000. The NLRB very well might have found an unfair labor practice, as some writers have described the actors' unions as de facto closed shops.[3] However, the one reason why it might not have done so is that Section 8(f) of the NLRA states that it is not an unfair labor practice for an employer and a union in the construction industry to make a pre-hire agreement, pursuant to which the union operates a hiring hall. Such agreements are also utilized in the maritime business because, as in both construction and acting, the jobs tend to be short-term, with workers going from one project to another for different employers. The union tends to be the workers' only permanent link to the business. The referral service of the union is frequently the most efficient way for an employer to find and screen employees, especially without risking labor troubles.[4] Within such a framework, the union may participate in the process of determining the minimum training or experience that one must have to qualify for referral by the hiring hall. Employees sign up through the hiring hall, announcing that they are available for hire. The hall refers such workers to an employer when it receives the latter's request for laborers.[5] Likewise, the agreement may provide that a hiring hall is exclusive, in which case it is the only source of labor for the jobs it covers.

Noting the efficiency of hiring halls, the Supreme Court held in *Teamsters Local 357 (Los Angeles-Seattle Motor Express)*[6] that they are lawful as long as they do not create closed shops by treating non-members and members differently. Even an exclusive hiring hall does not violate Section 8(a)(3) unless it is used to encourage union membership through discrimination.[7] Therefore, in making referrals, an exclusive hiring hall may not treat employees differently based on their union status or activity; and if a hiring hall does discriminate against non-members, it does not necessarily create a closed shop unless it is exclusive. Therefore, a hiring hall is lawful as long as it is either non-discriminatory or non-exclusive.

Plumbers & Pipe Fitters Local 81 (Morrison Construction Co.)[8] was a case in which an exclusive hiring hall lacked enough personnel for a particular employer, who, therefore, agreed with the union that other workers could be hired. These workers were not union members. Nor were they adequately skilled and experienced to join. The court ruled that as an agency shop, the union could demand that all non-union workers pay initiation fees and dues, but not more than it uniformly required of its members. Additionally, pursuant to *J.J. Hagerty, Inc.*,[9] a union operating an exclusive hiring hall may charge non-members a participation fee if the fee is not excessive and reflects a proper allocation of the hall's expenses. Therefore the exclusive hiring hall and the union shop or agency shop are by no means mutually exclusive.

Prior to the 2000 strike, SAG may have been able to withstand the NLRB's scrutiny as a hiring hall for actors. Its preferential treatment of members may have been viewed as an approximation of the hall's seniority advantage coupled with the hall's determination of the minimum experience one must have to be referred by it, since it is only very difficult, rather than impossible, for an actor to get that elusive first SAG job. Further, its requirement of membership before one's second SAG job is legal in the union shop.

However, with its strike volunteer program, SAG seems to have brazenly crossed the line between mere de facto closed shop and explicit closed shop. The 80 hours of strike support that it required of the volunteers had absolutely nothing to do with acting, performing or artistry of any type. As mentioned above, as long as one promptly pays all the union fees and dues on time, one may refuse to engage in all other union activity, and the union may not take any action in retaliation, such as by expulsion, having the member fired or otherwise disqualifying him or her from employment. Actors who refused to donate 80 hours of labor to the strike were denied the membership that the volunteers received, which was blatantly predicated on participation in union activities, such predication being discriminatory. Now, Section 8(b)(1)(A) of the NLRA specifically precludes itself from impairing the right of a union "to prescribe its own rules with respect to the acquisition or retention of membership therein;" so if membership had been the only thing kept from non-volunteers, that would have been fine, since SAG, as an agency shop, could still have accepted the financial cores of their initiation fees. Denying them official membership but giving them full access to all of the employment opportunities it makes available to its members would have been discriminatory but non-exclusive. Alternatively, SAG could have granted them union shop membership while maintaining its exclusivity as a hiring hall. That too would have been fine; exclusive but non-discriminatory. Instead, however, the union withheld the entire package, discriminatorily denying them both membership and the significant job opportunities that are exclusive to SAG membership. SAG thereby committed an unfair labor practice in direct violation of the Taft-Hartley Act.

It would seem that if an actor had complained to the NLRB, one risk would have been unofficial blacklisting from any future participation in show business. Additionally, despite the merits and the law, the NLRB might simply continue the courts' lack of willingness to muster aggression against the two unions; in 1997 it approved a modification to a 1988 settlement by which a window was opened into the closed shop of Equity, as non-members with certain qualifications were permitted to participate in union auditions for a small fee. The members disliked the competitive draft, however, and the modification slammed the window shut.[10] Then, in the 1998 case of *Marquez v. Screen Actors' Guild, Inc.*,[11] the Supreme Court held against an actress in her suit against SAG when she claimed that the union did not inform her that representation had been made less expensive by *General Motors* and *Beck*. Furthermore, even at least one of the writers who describe Equity as a de facto closed shop believes that it needs to remain as such, due to what would otherwise be an unmanageable number of bodies at truly open auditions. [12] The NLRB might think the same way about SAG.

On the facts, however, and under applicable labor law, the strike "volunteer" program appears to have unmistakably been an unfair labor practice.

Endnotes

1. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).
2. *Communications Workers v. Beck*, 487 U.S. 735 (1988).
3. See generally Emily C. Chi, *Star Quality and Job Security: The Role of the Performers' Unions in Controlling Access to the Acting Profession*, 18 Cardozo Arts & Entertainment Law Journal 1 (2000) and Mark D. Meredith, *From Dancing Halls to Hiring Halls: Actors' Equity and the Closed Shop Dilemma*, 96 Colum. L. Rev. 178 (1996).
4. Julius G. Getman, Bertrand B. Pogrebin and David L. Gregory, Labor Management Relations and the Law, 2nd Edition (Los Angeles: West Group, 1999) 365.
5. Michael C. Harper and Samuel Estreicher, Labor Law Cases, Materials and Problems, 4th Edition (New York: Aspen, 1996) 180-1.
6. Teamsters Local 357 (Los Angeles-Seattle Motor Express), 365 U.S. 667 (1961).
7. See generally Bricklayers Local 1 (Denton's Truckpointing, Inc., 308 NLRB 350 (1992).
8. *Plumbers & Pipe Fitters Local 81 (Morrison Construction Co.)*, 237 NLRB 207 (1978).
9. *J.J. Hagerty, Inc.*, 153 NLRB 1375 (1965).
10. Chi 8.
11. *Marquez v. Screen Actors' Guild, Inc*. 525 U.S. 33 (1988).
12. Meredith 180.

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Un-Fair Use: Appropriation Art and Copyright Law

By Matthew Bloomgarden

Does Copyright Law Hurt Art?

U.S. copyright law "protects original works of authorship" and restricts art that uses original works without permission.[1] However, copyright professor and author Lawrence Lessig points out that: "No artist works in a vacuum. Every artist reflects— consciously or not— on what has come before and what is happening parallel to his or her practice."[2] Lessig suggests that all artists incorporate some level of appropriation into their works.

Appropriation art is a form of art where "an artist incorporates a pre-existing work, in part or whole, into a new work of expression."[3] Appropriation artists can "collect images from magazines, newspapers, TV, film, advertising or packaging" or from other works of art.[4] By taking these images out of context, the "rapid scan to which such images are normally subjected is replaced by a more intense scrutiny, which reveals them as void of the promise they offered or resonant with unintended meanings. These found, stilled images, already mediated and consumed, are the starting points for works of art."[5] According to the French philosopher Baudrillard, artists must be allowed to refer to the real world through images and signs of the real world, which he referred to as simulacra.[6]

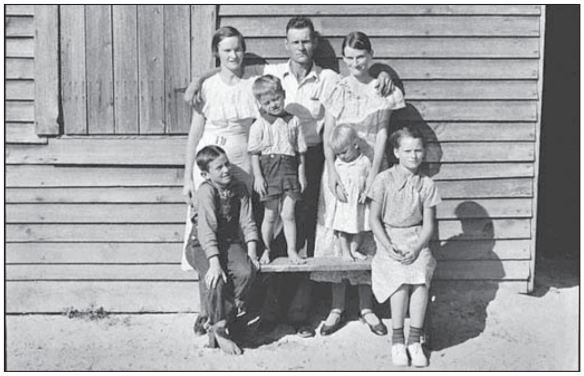

Exhibit 1 Walker Evans, Photograph

Exhibit 2: Sherry Levine, After Walker Evans

Exhibit 3: Walker Evans, Photograph

Exhibit 4: Sherry Levine, After Walker Evans

Professor Lessig gives a similar explanation of why artists appropriate pre-existing works. In his book *Remix,* he writes:

> Why, as I'm asked over and over again, can't the remixer simply make his own content? Why is it important to select a drumbeat from a certain Beatles recording? Or a Warhol image? Why not simply record your own drumbeat? Or paint your own painting? The answer to these questions is not hard if we focus again upon why these tokens have meaning. Their meaning comes not from the content of what they say; it comes from the reference, which is expressible only if it is the original that gets used. Images or sounds collected from real-world examples become "paint on a palette."[7]

Lessig believes that the ability to appropriate media and culture is necessary for artists to comment on and reference the real world. A riff from a Beatles song is instantly recognizable to millions and can be used to communicate a feeling, connection, satire or joke. Just as an artist is allowed to paint a tree that is outside his or her house, so too should the artist be able to paint a famous Coca-Cola billboard, a Starbucks down the street and a Volvo car parked on the corner. Artists should be able to represent the world as they see it, which includes brands, logos, copyrighted images and other works of art just as much as it includes people, buildings and nature.

Why Artists Appropriate

Sherry Levine is a well-known appropriation artist. "In the early 1980's Levine's art consisted of taking famous art photographs and simply rephotographing them as a means of deconstructing the Modernist belief in originality." (See exhibits 1-4).[8] Levine's work challenges the importance placed on originality by modernist art theory. Her works have been exhibited at galleries and museums and have been acquired by important museum permanent collections.[9] Despite her renown in the art world, Levine's work has been threatened with copyright lawsuits. When she chose Edward Weston photographs for a rephotography project, Weston's estate "complained and threatened to sue, [until] she agreed to stop using his work."[10]

Sherry Levine "said that when she showed her photographs to a friend, he remarked that they only made him want to see the originals. 'Of course,' she replied, 'and the originals make you want to see that little boy, but when you see the boy, the art is gone.'"[11] This exchange reveals that Levine regards her rephotography as distinct from the original photograph and similarly, the original photograph as being different and distinct from the little boy who was the subject. One can never be a substitute or a replacement for the other.

Sherry Levine's artist statement provides an interesting insight into her reasons for appropriating art. Her statement reads:

> The world is filled to suffocating. Man has placed his token on every stone. Every word, every image, is leased and mortgaged. We know that a picture is but a space in which a variety of images, none of them original, blend and clash. A picture is a tissue of quotations drawn from the innumerable centers of culture. Similar to those eternal copyists Bouvard and Pechuchet, we indicate the profound ridiculousness that is precisely the truth of painting. We can only imitate a gesture that is always anterior, never original. Succeeding the painter, the plagiarist no longer bears within him passions, humors, feelings, impressions, but rather this immense encyclopedia from which he draws. The viewer is the tablet on which all the quotations that make a painting are inscribed without any of them being lost. A painting's meaning lies not in its origin, but in its destination. The birth of the viewer must be at the cost of the painter.[12]

Levine copies works of art to comment on the "profound ridiculousness" of earlier pictures or paintings.[13] She says that words and images in new artwork cannot truly be original, that earlier works are themselves "never original," and that the collective public has already seen it all.[14] This focus on creating new works of art through appropriation adds value to the art world by reinterpreting art from a new perspective. Additionally, there are very few spaces that exist without copyrighted images. It is for reasons such as these that Levine insists appropriation is necessary for artists to create art in modern society.

Preventing Appropriation

Art production can be stopped when artists' estates strictly limit uses of copyrighted works. "Estates often engage in copyright misuse by threatening legal action to prevent what might actually be a fair use of the materials in question…Facing this uphill legal battle and the associated fees, many creatives opt out of making derivative works, which ultimately results in censorship of ideas and expression."[15] "This reality leaves scholars and artists in a difficult position when they attempt to use a copyrighted work in a form that seems like fair use."[16] While artists may be able to create without appropriation, restricting an artist's ability to appropriate interferes with artistic freedom and limits the public's access to new art. If copyright law prevents appropriation artists from creating art, then the public will only be shown the limited number of works of contemporary art that comply with copyright law.

Copyright Law and Art See Appropriation Differently

The author Rosemary Coombe writes about the restrictions that copyright law places on appropriation art. Coombe sees a problem in using intellectual property laws to establish ownership over logos and product imagery that carry a great deal of modern social meaning. In the following quote, Coombe describes the ubiquitous nature of copyright restrictions in today's modern world:

> Our children sleep in Barney® sheets, eat off Aladdin placemats, drink liquids they know only by brand name from plastic cups encircled by Disney characters (protected by Copyright laws and character merchandising agreements). "All over the world, more and more of what children eat, drink, wear, ride, play with, and sleep on are…the fruits of corporate licensing departments of Time Warner or Sony or Nintendo and the manufacturers of food, beverages, and toys."[17]

Copyright restrictions may keep future artists from commenting on the brand images that litter the world. If those with intellectual property rights can prevent artists from using their pre-existing imagery then art and the global marketplace of ideas will suffer.

Art created from appropriated work risks infringing the copyright in the underlying material. Copyright infringement claims give little, if any, deference to contemporary notions of artistic value. However, the transformative nature of a work is an important inquiry in the fair use analysis. To assess whether an appropriation constitutes fair use, courts must look at the transformative character of the appropriation art. Jeff Koons, Richard Prince and Barbara Kruger are important artists, yet they have all been sued for appropriating copyrighted photos in their art. This reveals a "conflict between postmodern culture and copyright law—a conflict that severely limits the postmodern artist from freely creating and disseminating works of art."[18]

If It Is Part of Popular Culture It Is at Risk of Appropriation

Judge Kozinski from the Ninth Circuit has stated that public dissemination of words, symbols and images should bring about a corresponding loss of intellectual property protection. He also recognizes the importance of public access to the communicative properties of words and images, despite intellectual property laws to the contrary. Kozinski wrote that:

> [A]ny doctrine which gives people property rights in words, symbols, and images that have worked their way into our popular culture must carefully consider the communicative functions those marks serve. The originator of a trademark or logo cannot simply assert, "It's mine, I own it, and you have to pay for it any time you use it." Words and images do not worm their way into our discourse by accident; they're generally thrust there by well-orchestrated campaigns intended to burn them into our collective consciousness. Having embarked upon that endeavor, the originator of the symbol necessarily—and justly—must give up some measure of control. The originator must understand that the mark or symbol or image is no longer entirely its own, and that in some sense it also belongs to all those other minds who have received and integrated it. This does not imply a total loss of control, however, only that the public's right to make use of the word or image must be considered in the balance as we decide what rights the owner is entitled to assert.[19]

Modern people live under a barrage of constant and aggressive marketing, yet are prohibited from expressing themselves by using the imagery and sounds forced upon them. There is a risk that the collective impact of copyright law may result in the silencing and repression of art. To combat this risk, Judge Kozinski expresses support for the right to appropriate images and sounds that become part of modern culture. Artists should understand that appropriation has legal consequences, but that it should not be impossible for artists to legally create appropriation art. The problem of copyright as a potential censor of such art is more important when it is considered that appropriation art plays a very substantial role in the contemporary art world.

The appropriation artist Richard Prince was given a full Guggenheim retrospective from September 28, 2007 through January 9, 2008. The Guggenheim's chief curator, Nancy Spector, described Prince's work, saying he "pilfers freely from the vast image bank of popular culture to create works that simultaneously embrace and critique a quintessentially American sensibility."[20] Spector also wrote that "Prince's work has been among the most innovative art produced in the United States during the past 30 years."[21] If some of the most innovative contemporary American art is potentially infringing copyrights, than perhaps copyright law needs amendment.

U.S. Supreme Court Support for Appropriation

The Supreme Court decided that in order to comply with the Constitutional purpose of copyright law works of art must be allowed the leeway to appropriate earlier works.[22] The Supreme Court in *Campbell v. Acuff-Rose Music, Inc.* states:

> From the infancy of Copyright protection, some opportunity for fair use of Copyrighted materials has been thought necessary to fulfill Copyright's very purpose, "[t]o promote the Progress of Science and useful Arts.…" U.S. Const., Art. I, § 8, cl. 8. For as Justice Story explained, "in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much which was well known and used before."[23]

Acuff-Rose is important to the arts because it is the most recent Supreme Court decision on the issue of fair use protection of art appropriation in a copyright infringement claim.

Supreme Court Justices have expressed support for artistic freedom before *Acuff-Rose*. In the *Sony Betamax* decision, the dissent recognized, "obviously, no author could create a new work if he were first required to repeat the research of every author who had gone before him."[24] This quote is significant when considered in light of the importance of appropriation throughout the history of literature. In a recent Harper's article, the author Jonathan Lethem asks his readers to:

> [C]onsider the remarkable series of "plagiarisms" that links Ovid's "Pyramus and Thisbe" with Shakespeare's *Romeo and Juliet* and Leonard Bernstein's *West Side Story*, or Shakespeare's description of Cleopatra, copied nearly verbatim from Plutarch's life of Mark Antony and also later nicked by T. S. Eliot for *The Waste Land*. If these are examples of plagiarism, then we want more plagiarism.[25]

The importance of artists' access to earlier works is indeed magnified when considered in light of the appropriation history behind these great works. There cannot be any doubt that our culture would be incalculably poorer if T.S. Eliot's *The Waste Land* was kept from the public because of copyright infringement litigations.

Appropriation Promotes Cultural Growth

Education, literature and art have a history of building on prior knowledge. There are different views about how significant appropriation is to the history and future of art. One law review author expresses her views on the importance of appropriation, saying that all "education involves a form of free riding on…predecessors' efforts, as does every form of scholarship and scientific progress.…Culture is interdependence, and requiring each act of deliberate dependency to render an accounting would destroy the synergy on which cultural life rests."[26]

Judge Leval of the Second Circuit has similarly written that "every advance in knowledge or art builds on previous advances. An author's exclusive control must not be so stringent as to prevent those who come after from using the prior work for further advancement."[27] The above quotes suggest that appropriation art needs freedom to build on images and text from prior works to further artistic advancements. One way that copyright law recognizes the need for appropriation is via the fair use defense.

The Copyright Act of 1976, 17 U.S.C. § 106 (the 1976 Act), is a statutory law establishing that copyright is a "property right…[that] gives an artist several exclusive rights regarding his or her work…[including] the rights to prevent the unauthorized copying, distribution, display and preparation of derivative works."[28] The 1976 Act also codified the fair use doctrine. Fair use is an "affirmative defense…[that] comes into play only after the plaintiff has made a prima facie case."[29] If the fair use doctrine is successfully raised as a defense to an alleged infringement claim, then the unauthorized copying is excused.

The Need for Fair Use

The fair use doctrine uses at least four factors to analyze whether a use is fair. The following four factors are set forth in § 107 as follows:

> In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use…(2) the nature of the Copyrighted work; (3) the amount and substantiality of the portion used in relation to the Copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the Copyrighted work.[30]

Despite its codification, fair use has been applied in an irregular fashion, prompting one author to write that: "The fair-use doctrine of American copyright law has been derided as among the most hopelessly vague of legal standards, requiring complex and often subjective interpretation."[31]

Fair use defends "Copyright's purpose [which] is to stimulate creativity. To fulfill this purpose, Copyright law grants artists limited monopolies over their works.… However, Copyright law specifically limits this monopoly so that artistic works may be disseminated quickly into the public domain and recycled to inspire and create new works of art."[32] Fair use protects copyright by providing artists with the ability to access and use prior artistic works in their own artistic creations, subject to limits and a careful balancing of interests.

The primary policy behind copyright in general and fair use specifically is ultimately intended to stimulate creativity for the public's benefit. In *Acuff-Rose,* the Supreme Court introduced fair use as follows. "From the infancy of Copyright protection, some opportunity for fair use of Copyrighted materials has been thought necessary to fulfill Copyright's very purpose, 'To promote the Progress of Science and useful Arts.'"[33]

It is worth noting that copyright's protection of artistic freedom is not meant primarily to benefit the artists. Instead, "the focus of American Copyright law is primarily on the benefits derived by the public from the labors of authors, and only secondarily on the desirability, in the abstract, of providing a reward to the author."[34] In *Harper and Row v. Nation*, the United States Supreme Court wrote that the "Framers intended Copyright itself to be the engine of free expression."[35] To protect free expression, copyright law must balance the interests of intellectual property rights holders against artists' right to appropriate protected material. Of course copyright protection should be in place for certain works. The question, however, is where to draw the line. Bootlegging copyrighted movies is not transformative and should be prohibited. If a mash-up video is comprised of several films, it does not replace the original. Viewers will still want to see the original. There is a difference between a knock-off and a transformative work. Although intellectual property holders should be protected from bootleggers, artists should be able to use it to make new and creative statements.

The Supreme Court interprets copyright law as balancing the interests of protecting authors' rights in prior works and artists' rights to create new works as part of a broader interest in promoting social benefit from stimulating artistic growth. The Court writes:

> The immediate effect of our Copyright law is to secure a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. "The sole interest of the United States and the primary object in conferring the monopoly," this Court has said, "lie in the general benefits derived by the public from the labors of authors."… When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose.[36]

Can Fair Use Fix Overly Restrictive Copyright Law?

The fair use doctrine is a tool designed to ensure that copyright stays true to the Constitutional purpose of promoting the arts. However, copyright monopolies may have a negative effect within the art world. Rosemary Coombe warns that "intellectual property laws often operate to stifle dialogic practice in the public sphere, preventing us from using the most powerful, prevalent, and accessible cultural forms to express alternative visions of social worlds."[37] If Thomas Jefferson and the current Supreme Court discussed appropriation art, they would likely agree on the importance of supporting an artist's ability to appropriate in their work within limits and with a careful balancing of interests.

Supreme Court Justices have explained that the fair use doctrine protects the public's access to knowledge. In the *Sony Betamax* decision, the dissent wrote that:

> When the scholar forgoes the use of a prior work, not only does his own work suffer, but the public is deprived of his contribution to knowledge. The scholar's work, in other words, produces external benefits from which everyone profits. In such a case, the fair use doctrine acts as a form of subsidy—albeit at the first author's expense—to permit the second author to make limited use of the first author's work for the public good.[38]

Fair use is a statutory defense that can protect artists who may be liable for copyright infringement for artistic appropriation. In *Acuff-Rose*, the Supreme Court referred to the statutory definition that "the fair use of a Copyrighted work...for purposes such as criticism [or] comment...is not an infringement of Copyright"[39] The Court has also said the fair use doctrine requires "courts to avoid rigid application of the Copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."[40] This appears show Supreme Court support for the notion that courts should avoid an overly restrictive application of copyright law as they balance copyright owner's rights against the need to foster creativity. In Justice Kennedy's concurring opinion to the *Acuff-Rose* decision, he stated that "underprotection of Copyright disserves the goals of Copyright just as much as overprotection."[41] This reinforces the notion of balancing copyright law so that it neither gives too much protection to copyrighted works, nor too little.

The Inconsistent Application of Fair Use

Judge Leval also recognized the uncertainty in the fair use doctrine by pointing out that this area of the law has conflicting decisions and a large number of reversals by appellate courts. This uncertainty makes it difficult for artists and lawyers to predict the legality of using copyrighted works. Leval has been influential in the development of the transformative use test adopted by the Supreme Court in *Acuff-Rose*. One recent posting on the Art Law Blog reveals Judge Leval's take on the state of fair use protection of art. The blog says:

> after giving some general remarks on Copyright and fair use, [Judge Leval] asked, "So what's it all mean for appropriation art," then paused…and kind of threw up his hands and said: "I don't know." He went on to say the law in this area is "astonishingly unpredictable" and that it's "very hard to know what the law is." He said "almost any question" in this area is "very difficult to answer" and added that he doesn't know of any area of law where there are so many reversals by the appellate courts.[42]

As previously mentioned, *Acuff-Rose* is the most recent Supreme Court decision on fair use. In *Acuff-Rose*, the Court emphasized the importance of the "transformative character" of the new work.[43] This plays into part of the first fair use factor, the "purpose and character of the use."[44] The Supreme Court explained that transformative works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of Copyright…and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use."[45] While this transformative inquiry is a crucial part of the fair use analysis, the true transformative nature of a work of appropriation art has the potential to be misunderstood.

Appropriation as Commentary Can Be Transformative

Appropriation is important because of its ability to apply secondary meanings to earlier works. Baudrillard wrote that a "transformation" occurs where "art redoubled itself as a manipulation of the signs of art…. Thus art entered the phase of its own indefinite *reproduction*; everything that redoubles in itself, even ordinary, everyday reality, falls in the same stroke under the sign of art, and becomes aesthetic."[46] If fair use is indeed going to reflect the transformative nature of appropriation art, it is important for courts to understand the transformative character of the art in question. Baudrillard suggests that when earlier works of art are appropriated it is done to use that art as a signifier. To be aware of the transformative nature of contemporary appropriation art, courts must learn to recognize when appropriation uses a preexisting work as a signifier. Rosemary Coombe explained this notion further, writing that:

> the texts protected by intellectual property laws *signify*: they are cultural forms that assume local meanings in the lifeworlds of those who incorporate them

> into their daily lives. Circulating widely in contemporary public spheres, they provide symbolic resources for the construction of identity and community, subaltern appropriations, parodic interventions, and counterhegemonic narratives.[47]

These secondary uses of appropriation add new meaning to the original (or previous) context. In this way, new works comment on the earlier works. The following quote is from the 1989 Whitney Museum exhibition, Image World: Art and Media Culture:

> This morning 260,000 billboards will line the roads to work. This afternoon, 11,520 newspapers and 11,556 periodicals will be available for sale. And when the sun sets again, 21,689 theaters and 1,548 drive-ins will project movies; 27,000 video outlets will rent tapes; 162 million television sets will each play for 7 hours; and 41 million photographs will have been taken. Tomorrow, there will be more.[48]

It is important for artists to have access to appropriate images from this massive collection of media images as part of a larger commentary on modern life. If fair use cannot provide this access, the "holders of intellectual property rights are socially and juridicially endowed with monopolies over public meaning and the ability to control the cultural connotations of their corporate insignias."[49] Jeff Koons made this point in *Blanch v. Koons* (see below). He said, "in order to make a statement about contemporary society and in order for the artwork to be valid, I must use images from the real world. I must present real things that are actually in our mass consciousness."[50]

The Fair Use Factors

The second fair use factor is the "nature of the Copyrighted work."[51] This part of the analysis addresses the creative or factual nature of the original work. Creative works are given more copyright protection than factual compilations such that "fair use is more difficult to establish when…[creative] works are copied."[52] However, even though the original work in *Acuff-Rose* was a creative song, the Supreme Court explained that "this fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works."[53] The Supreme Court therefore does not see artistic appropriation of a creative work as a complete impediment to a fair use defense, but merely as a factor to be considered in the overall analysis.

The third fair use factor is the "amount and substantiality of the work used in relation to the Copyrighted work as a whole"[54] This factor has been described as comprising both a qualitative and quantitative analysis. In *Acuff-Rose*, some confusion was dispelled when the Court held that a parody appropriating a prior work's "heart" can qualify for fair use,[55] by stating, "copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart."[56] This part of the decision is helpful to appropriation artists who employ "verbatim" copies in their works.[57]

Evolution of Copyright Law

Before *Acuff-Rose*, the Supreme Court had "unanimously agreed that 'the effect...upon the potential market for...the Copyrighted work' is 'undoubtedly the single most important element of fair use.'"[58] After *Acuff-Rose*, the inquiry for transformative use had become the most significant part of the fair use analysis. While potential market harm was no longer the most important role in the fair use analysis, it was still significant.[59]

The Supreme Court explained that it would not find transformative character if it perceives a "verbatim" copy of a work with a "little added or changed."[60] The Court further explained that if "transformative character" is found in a new use, that will suggest there is less likelihood of market harm.[61] However, the Court will be more apt to find market harm if the use is a direct copy, rather than a new work.[62] Explaining this distinction, the Court wrote:

> Whether "a substantial portion of the infringing work was copied verbatim" from the Copyrighted work…may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.[63]

To accurately gauge the transformative character of a work of appropriation art, courts should be sensitive to appropriation's use of signifiers and the social value in different art forms, such as rephotography, despite appearing to be a "verbatim" copy of the original.[64]

When applying the market substitution test to appropriation art, it is unclear to what extent the markets for the two works would conflict. Educated art buyers would surely not mistake an appropriated work for an original. The following examples provide evidence that appropriation art is not a market substitute:

> Dorothea Lange's widely reproduced 1930s vintage photograph known as "Migrant Mother" recently sold at a Sotheby's photography auction October 7, 1998, for $244,500. See Peter Lennon, Whatever Happened to All These Heroes?, The

Guardian, Dec. 30, 1998. An exhibition quality print of "Migrant Mother" from the original or a copy negative can be obtained for less than $50 from the Library of Congress Photoduplication Service at http://www.loc.gov/rr/print/guide/price.html. An Edward Weston's photograph from 1929 entitled "Pepper" sold at a Christie's photography auction on October 6, 1997, for $ 74,000. A print from the same negative printed later by the photographer's son, Cole Weston, sold at an auction at Swann Galleries (Apr. 24, 1996) for $ 1,840, see http://artprice.com.searchartprice.com.[65]

This reveals the large difference in sales price that may exist between an original photograph and a reproduction. This in turn suggests that appropriation art does not necessarily risk cutting into the market of the original. Regardless of the price, the original and the copy are completely different works. Despite this unlikelihood, the importance of the market substitution factor to the fair use analysis makes it just as important that courts look at whether an appropriated work would be seen as a replacement for the original.

Exhibit 5: Rogers, Photograph

Exhibit 6: Jeff Koons, Sculpture of Rogers' Photograph

Exhibit 7: Koons, Niagara

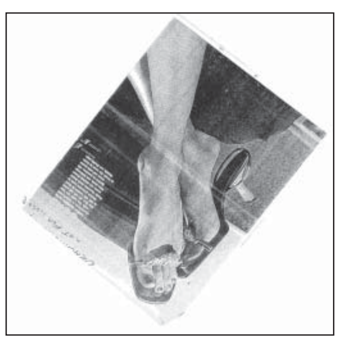

Exhibit 8: Blanch, Silk Sandals

From *Rogers v. Koons* to *Blanch v. Koons*

The artist Jeff Koons has been sued for copyright infringement four times. Two of these suits, *Rogers v. Koons* and *Blanch v. Koons*, provide valuable examples of the fair use doctrine as applied to appropriation art.[66] In *Rogers*, Jeff Koons appropriated one of the plaintiff's photographs as the model of a sculpture. Koons commissioned his "String of Puppies" sculpture to be made in the exact style of the photograph, undisputedly expressing his desire that the sculpture be made to look as much like the photograph as possible (See exhibits 5 and 6).[67] The court decided that Koons' use of the work was not a "comment on or criticism of the photograph."[68]

Koons defended his work, asserting that he incorporates "the mass production of commodities and media images…into works of art to comment critically both on the incorporated object and the political and economic system that created it."[69] The court held against Koons because it did not see his sculpture as a parody of the photograph, and stated that it was "difficult to discern any parody of the photograph 'Puppies' itself."[70] Koons' sculpture did not qualify for the fair use defense and his use of Rogers' copyrighted photograph as the model for his sculpture was found to be infringing.

In *Blanch*, Jeff Koons "copied, but altered the appearance of, part of a Copyrighted photograph," entitled "Silk Sandals," from a Gucci advertisement in Allure magazine (See exhibits 7 and 8).[71] In this case, Koons defended his appropriation by saying it "'represented for me a particular type of woman frequently presented in advertising.' He considered this typicality to further his purpose of commenting on the 'commercial images… in our consumer culture.'"[72] The *Blanch* court found Koons' use of this photograph in a collage as transformative and his appropriation fair use. While Koons' appropriations were factually different in these two cases, it is also important to note that the *Acuff-Rose* decision came down in between *Rogers* and *Blanch*.

Acuff-Rose Changed Appropriation Art Law

The *Acuff-Rose* decision may be part of the explanation of the different outcomes in the two cases. The *Blanch* court cites to *Acuff-Rose* throughout its decision, at one point describing fair use as "the post-Campbell fair use inquiry."[73] One commentator on the cases has proposed that when "Comparing the rationales in the opinions of *Rogers* and *Blanch*,…it is not difficult to discern a move of the fair use application in postmodern art from stringent to more liberal."[74] It is unclear whether the *Blanch* court was consciously applying a more liberal policy to appropriation art. There were certainly factual differences between the two cases, such as Koons' efforts to directly copy Rogers' photograph versus the alteration and use of the Blanch photograph. These differences, combined with the impact of the *Acuff-Rose* decision, produced two opposite outcomes. The *Blanch* court was more receptive than the *Rogers* court to Koons' argument that he was commenting on the underlying photograph.

In *Blanch*, the court gave a "post-Campbell" explanation of the transformative use aspect of the first factor.[75] Indeed, the *Rogers'* court, which came before *Acuff-Rose,* did not apply the transformative use inquiry at all. The *Blanch* court stated that the transformative use test was now the "heart of the fair use inquiry."[76] It explained this inquiry as being the part of the fair use analysis, where the assessment is made as to whether "the secondary use adds value to the original."[77] The court found that the "sharply different objectives that Koons had in using, and Blanch had in creating, 'Silk Sandals,' confirms the transformative nature of the use."[78] Koons wanted "the viewer to think about his/her personal experience with these objects, products, and images and at the same time gain new insight into how these affect our lives…[On the other hand] Blanch wanted to show some sort of erotic sense…to get…more of a sexuality to the photographs."[79]

Transformative Appropriation

The *Blanch* decision was sensitive to the transformative nature of appropriation art. One commentator pointed this fact out, saying, "the court did not stick to the rigid interpretation of parody, as the *Rogers* court did [13] years before, but instead concurred with Koons' artistic intent by profusely quoting his words in the opinion."[80] The court found both that Koons was successful in his intent to transform the underlying work and that his appropriation had sufficient transformative character to qualify for the fair use defense. The court seemed to grant fair use at least partially based on Koons' "commentary on the social and aesthetic consequences of mass media."[81] The *Blanch* court explained that when "as here, the Copyrighted work is used as 'raw material,'…in the furtherance of distinct creative or communicative objectives, the use is transformative."[82]

These different outcomes on Koons' works reflect the ambiguity of fair use. However there were several important factors that weighed against Koons in the *Rogers* case. The court felt that Koons acted in bad faith in removing the copyright logo from Rogers' photograph.[83] It also thought poorly of the fact that when Koons asked his foundry to copy the photograph into a sculpture, he repeatedly asked for the sculpture to be an exact copy of the plaintiff's photograph.[84] Additionally the court gave no weight to the transformative nature of remaking the photograph as a sculpture. However, in allowing the fair use defense to protect Koons' work in *Blanch*, the Ninth Circuit gave insight into how a court may apply a fair use analysis to appropriation art after *Acuff-Rose*.

Appropriation of Barbie Found Transformative

In 2003, two years before its decision in *Blanch*, the U.S. Court of Appeals for the Ninth Circuit judged another important appropriation art decision. In *Mattel Inc. v. Walking Mountain Productions*, the court held that artist Tom Forsythe's series "Food Chain Barbie," which parodied the Barbie Doll, was a fair use of the copyright in Barbie.[85] Mattel sued the artist Thomas Forsythe for his photographic series on Barbie dolls (See exhibit 9). The court described Forsythe's work, saying that he:

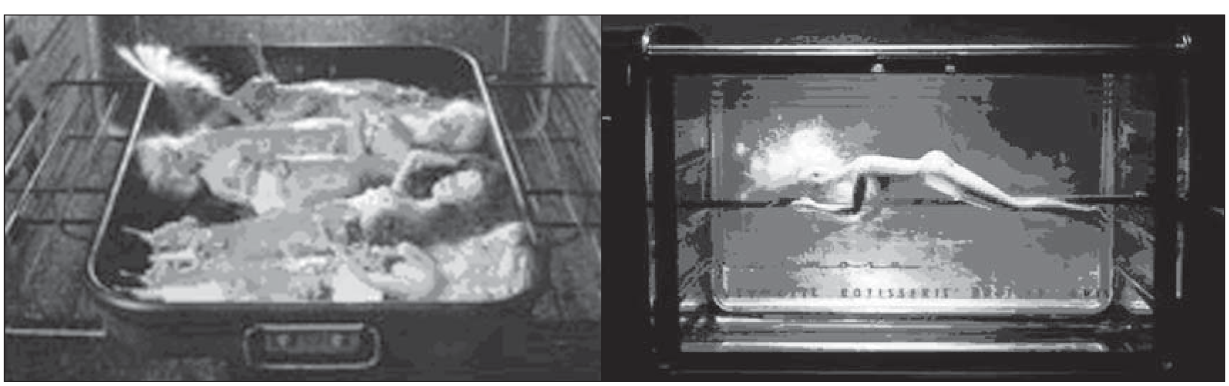

Exhibit 9: Tom Forsythe, 4 images from Food Chain Barbie

> generally depicts one or more nude Barbie dolls juxtaposed with vintage kitchen appliances. For example, "Malted Barbie" features a nude Barbie placed on a vintage Hamilton Beach malt machine. "Fondue a la Barbie" depicts Barbie heads in a fondue pot. "Barbie Enchiladas" depicts four Barbie dolls wrapped in tortillas and covered with salsa in a casserole dish in a lit oven.[86]

The court found that because "his photographs parody Barbie and everything Mattel's doll has come to signify…it is highly unlikely that it will substitute for products in Mattel's markets or the markets of Mattel's licensees."[87] This evaluation of the appropriation art as a parody with little risk of market substitution supported Forsythe's fair use defense. The finding of fair use was also based on the fact that the "lighting, background, props, and camera angles all serve to create a context for Mattel's Copyrighted work that transform Barbie's meaning. Forsythe presents the viewer with a different set of associations and a different context for this plastic figure."[88]

Furthermore, the court interpreted the commercial nature of the work as being consistent with the fair use defense. It cited the Supreme Court, to acknowledge that artists generally create art with a commercial expectation. The *Mattel* court found, "On balance, Forsythe's commercial expectation does not weigh much against him. Given the extremely transformative nature and parodic quality of Forsythe's work, its commercial qualities become less important."[89] This post-*Acuff-Rose* decision protects the appropriation artists' fair use defense. It also shows that the fair use defense is not precluded by an artist's hope to profit from selling his or her art.

In addition, the *Mattel* court supported Forsythe's work for First Amendment reasons. The court explained, "by developing and transforming associations with Mattel's Barbie doll, Forsythe has created the sort of social criticism and parodic speech protected by the First Amendment and promoted by the Copyright Act. We find that this factor weighs heavily in favor of Forsythe."[90] The court also emphasized that "the benefits to the public in…allowing artistic freedom and expression and criticism of a cultural icon—are great."[91] The court went on to explain that as a parody, Forsythe's work was "a form of social and literary criticism."[92] It further found that "First Amendment concerns in free expression are particularly present in the realm of artistic works" and that as a parody this work has "socially significant value as free speech under the First Amendment."[93]

The First Amendment to the Constitution states that "Congress shall make no law…abridging the freedom of speech."[94] Additionally, the U.S. Supreme Court has recognized a broad "First Amendment policy of providing the fullest possible access to information."[95] Additionally, the Supreme Court has explained that the Copyright Clause was intended "to be the engine of free expression."[96] Lower courts have perceived a tension between copyright law and the First Amendment, finding that: "While the First Amendment disallows laws that abridge the freedom of speech, the Copyright Clause calls specifically for such a law."[97] This tension is addressed in copyright law through both the fair use defense and through "the idea/expression dichotomy…embodied in the Copyright Act's distinction between Copyrightable expression and unCopyrightable facts and ideas."[98]

Copyright Collaborates with the First Amendment

While there is a conflict between copyright law and First Amendment policy, the two also have similarities. "The Copyright Clause and the First Amendment, while intuitively in conflict, were drafted to work together to prevent censorship; Copyright laws were enacted in part to prevent private censorship and the First Amendment was enacted to prevent public censorship."[99] Both copyright and First Amendment policy favor public access to freely disseminated information. This is part of the reason why some "have argued that the Copyright Clause embodies free speech values. Therefore, free speech protection is inherently a part of Copyright law."[100] This overlap has led courts to generally handle a "secondary user's attempts to invoke the First Amendment as a defense to infringement claims by finding that the copyright law provides sufficient protection to First Amendment values."[101]

There are several different ways that copyright law protects First Amendment values. Here is one author's brief overview of copyright as a First Amendment guardian:

> One method, perhaps the most crucial, by which Copyright law guarantees access to and dissemination of Copyrighted works is the fair use doctrine. Another is the fundamental distinction in Copyright law between unprotectable ideas and protectable expression. Yet another is inherent in the structure of incentives created by Copyright law: the creator of a work usually cannot reap the economic rewards to which Copyright entitles her without making the work available to the public for sale, thus guaranteeing at least a modicum of dissemination.[102]

Once a work has been disseminated, it loses some protection under copyright law. "Since free speech values are arguably subsumed in existing Copyright doctrine, the need for a First Amendment defense to infringement seems less compelling than the need to fine-tune the existing protections."[103] From this vantage, courts should not require any additional "First Amendment defense in the context" of the arts.[104]

Barbara Kruger's Appropriation Lawsuit

In *Dabney v. Kruger*, the court explained how both First Amendment and the fair use doctrine protect Barbara Kruger's artwork.[105] In this case, Kruger used the plaintiff's photograph in her artwork during a period when the photograph had fallen into the public domain (See exhibit 10). The Sonny Bono Copyright Term Extension Act subsequently restored the copyright in the photograph. The court decided in Kruger's favor because her appropriation took place while the photograph had no copyright protection.

It is interesting to look at a statement on appropriation that Barbara Kruger published 20 years prior to this lawsuit, in 1982. Discussing the conflict between modernist art's attachment to originality and the post-modern rebellion against it, she wrote:

Exhibit 10:
Barbara Kruger, It's a small world but not if you have to clean it

> There can be said to exist today a kind of oppositional situation in the arts…an appropriation or "taking" of a picture, the value of which might already be safely ensconced within the proven marketability of media imagery. Using, and or informed by fashion and journalistic photography, advertising, film, television, and even other artworks (photos, painting and sculpture), [artist's] quotations suggest a consideration of a work's "original" use and exchange values, thus straining the appearance of naturalism. Their alterations might consist of cropping, reposing, captioning, and redoing, and proceed to question ideas of competence, originality, authorship and property.[106]

While *Kruger* was decided because there was no copyright protection during the time period in question, it would be interesting to see a post-*Acuff-Rose* court apply the fair use doctrine to Kruger's work.

If a court were applying the four fair use factors to Kruger's piece of art, "It's a small world but not if you have to clean it," it would likely take note of the visual distinctions between the original photograph and the appropriation art. Kruger added large blocks of text over the image, added color and drastically altered its size, thereby changing the overall appearance. It seems as if new meaning was added to the original photograph and that Kruger's use was transformative. As a transformative work, it would be less likely to cause market harm. Overall, a court would likely find that the four factors would weigh in favor of finding a fair use.

The plaintiff in *Kruger* was also the subject of the photograph and brought a right of privacy claim, which was unsuccessful in light of the artwork's First Amendment protection. When assessing the application of the First Amendment to art, the court said, "Visual art is as wide ranging in its depiction of ideas, concepts and emotions as any book, treatise, pamphlet or other writing, and is similarly entitled to a full First Amendment protection."[107] The court further made a point of mentioning that First Amendment protection of art "does not disfavor nontraditional media of expression."[108] This implies that appropriation art receives the same First Amendment protection as other art forms.

The court elaborated on judicial application of First Amendment protection to artwork. "Courts should not be asked to draw arbitrary lines between what may be art and what may be prosaic as the touchstone of First Amendment protection."[109] This suggests that courts should not judge artwork qualitatively to determine if it should receive First Amendment protection. Works will therefore receive First Amendment protection regardless of whether they are artistic or mundane, as such distinctions are subjective in nature.

The Supreme Court addressed this issue as well, saying that "First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed."[110] The *Kruger* court added that courts should judge the transformative character of the work to see if it should receive extra protection. When a work of art "contains significantly transformative elements…[it is] especially worthy of First Amendment protection."[111] Recognition of a transformative use is therefore significant to both copyright and First Amendment protection.

Appropriating Works of Art Depicting Nature

In a post-*Acuff-Rose* decision, *Dyer v. Napier*, the plaintiff was a photographer who "took, and later copyrighted, a photograph titled, 'Mother Mountain Lion with Baby in Mouth.'"[112] The defendant Napier was a sculptor who had access to a copy of Dyer's photograph, and made a bronze sculpture that showed a mother mountain lion holding a cub with her mouth (See exhibit 11).[113] The sculpture looked remarkably similar to the photograph and Dyer sued Napier, claiming that the latter infringed his copyright.

The court found no infringement and stated, "Nature gives us ideas of animals in their natural surroundings…These ideas, first expressed by nature, are the common heritage of humankind, and no artist may use copyright law to prevent others from depicting them."[114] This is an important point for appropriation artists. Artwork depicting nature is easier to appropriate than artwork depicting cultural imagery. If the original work being appropriated is based on "naturally occurring poses created and displayed by nature," then artists may appropriate the work without risk of copyright infringement.[115]

Top, "Precious Cargo" by Jason Napier; bottom, photograph by Kent Dyer

Exhibit 11: Mountain lion photograph and sculpture

The court also rejected "Plaintiffs' reliance on *Rogers v. Koons.*"[116] The court distinguished *Rogers* by saying, "First, *Rogers* presented 'the rare scenario' where there was direct evidence of copying by the defendant…[Second,] the idea of a couple with eight small puppies seated on a bench was not protected…[and if Koons] had 'simply used the idea presented by the photo, there would not have been infringing copying."[117] It is interesting to note the court's suggestion that Koons' appropriation in *Rogers* could have qualified as fair use if there had been less evidence of direct copying.

Exhibit 12: Hula dancer photograph and stained glass

Copyright and Scenes à Faire

In *Reece v. Island Treasures,* there was a copyright suit over a photograph and a stained glass work (See exhibit 12).[118] Both "artworks [portray] a woman performing a hula on the beach."[119] The court explained that "Hula movements have standard forms…[and under] the doctrine of scenes à faire, when similar features are indispensable and naturally associated with, or at least standard, in the treatment of given idea, they are treated like ideas and are therefore not protected by copyright."[120] After applying the scenes à faire doctrine, the court found no infringement of the underlying photograph. Although both artworks depicted the same pose, the court found that it was dictated by the hula dance and was therefore seen as natural to depictions of hula and not as a copy of the earlier artwork.

This holding, which is similar to the holding in *Napier*, says "not all elements of Plaintiff's photograph are copyrightable. Copyright protection does not extend to the idea underlying the work; only the expression of the idea by the artist is protected."[121] The court used the scenes à faire doctrine to find that certain elements of the work are not protected because they were mandated by the hula. The court explained, "Hula movements have standard forms and to perform a [Hula]…motion correctly requires the dancer in each instance to have similar features and positions."[122] *Id*. Building on *Napier, Reece* shows that appropriation is less likely to infringe the copyright of a work that depicts common movements or gestures made according to standard rules in a given practice area, such as dancing.

Shepard Fairey v. The Associated Press

There is another important fair use dispute currently under way over appropriation art based on a photograph of President Obama. The artist Shepard ("Shep") Fairey has "created various posters and other merchandise depicting President Obama…based on a photograph" for which The Associated Press claims to own the copyright.[123] Fairey claimed that the artwork constituted fair use and therefore he did not obtain a license (See exhibit 13). The work of art at issue in this case is "a screen-print poster that came to be known as *Obama Progress*. It is an abstracted graphic rendition of Obama gazing up and to the viewer's right, colored in a palette of red, white, and blue with the word 'progress' in capital letters beneath the image of Obama."[124] When in comparison with the original photograph of Obama, Fairey's work appears transformative.

The AP's Obama Photo Fairey's Work

Exhibit 13: Obama photograph and Hope poster

Fairey's Protect Orr's Protect Yourself

Exhibit 14: Shep Fairey's art and Baxter Orr's appropriation art for which Fairey sent Orr a cease and desist letter

Whether the print will be found a transformative fair use depends on numerous factors. However in this case, the court may take notice of the great deal of attention *Obama Progress* has been given outside of this lawsuit. "In a February 22, 2008 letter to Fairey, Obama thanked Fairey for his contribution to Obama's campaign. In that letter, Obama remarked that 'the political messages involved in your work have encouraged Americans to believe they can help change the status quo.… Your images have a profound effect on people, whether seen in a gallery or on a stop sign.'"[125]

The court may also find it relevant that *Obama Progress* is "hanging in the Smithsonian."[126] Additionally, in 2008 Fairey was given a 20-year retrospective exhibition at the ICA museum in Boston. The Web site for this exhibition describes the Hope poster as "the now iconic Obama poster."[127] The artwork should be recognized as transformative for a variety of reasons, including the not insignificant fact that the President, the Smithsonian and a major museum have all recognized the value of the work.

It is also interesting to note the hypocrisies that have been brought up by and about both parties to this case. The Associated Press (The AP) details numerous instances where Fairey has appropriated images from other artists without licensing the works or attributing proper credit. The AP also discusses how Fairey sends other artists cease and desist letters demanding that they do not use his copyrighted works without licensing them from him.

The AP points out that:

> In keeping with Plaintiffs' hypocritical approach to intellectual property rights, notwithstanding their misappropriation and commercialization of other creators' works for their own gain, they are quick to hunt down artists who they believe unlawfully use Fairey's intellectual property, without apparent regard to the principles of fair use that Plaintiffs conveniently espouse in this case. For example, upon information and belief, in March and April 2008 Fairey and his related enterprises sent Texas-based artist Baxter Orr a series of cease-and-desist letters in connection with Orr's creation of a work that borrows from Fairey's Obey® image. (See exhibit 14).[128]

Fairey has sent out cease and desist letters arguing that appropriation art based on his works are not fair use. At the same time, many of Fairey's works are themselves appropriations of other original works of art. It is hypocritical of Fairey to claim his use of the AP photograph in *Obama Progress* is a fair use, thereby excusing his need to license the photograph, while simultaneously pursuing other artists that use his works without obtaining a license from him.

Fairey points out that The AP applies a double standard. The AP's online database contains numerous photographs that depict copyrighted artwork for which it has not obtained licenses from the artists who created the underlying works.[129] For example, photographs of Jeff Koons' sculpture *Ushering In Banality,* George Segal's sculpture *The Diner* and Kerry James Marshall's painting *Den Mother* are all for sale on The AP's Web site, yet The AP did not license any of these artworks.[130] The AP shows a pattern of selling photographs of art that it has not licensed, yet it demands that Fairey have a license to use its photograph in his art. Both parties involved are hypocritical in their positions on fair use and their practices in licensing artwork.

Patrick Cariou v. Richard Prince

The appropriation artist Richard Prince is also being sued over a series of paintings in which he appropriated images from another artist's photographs. Patrick Cariou spent 10 years photographing Rastafarian culture and published his photos in the book *Yes Rasta*.[131] Richard Prince created a series of 22 paintings, "at least [20] of which reproduce and are derived from" *Yes Rasta*.[132] Cariou "filed a lawsuit against artist Richard Prince, Larry Gagosian, Gagosian Gallery, and Rizzoli books 'for using a number of his photographs [in 20 of the paintings featured] in Prince's *'Canal Zone'* exhibition without his consent."[133] The issues in the lawsuit have not yet been adjudicated, making it unclear whether Prince's use of these photographs in his paintings will qualify as fair use.

The Art Law Blog discusses this case, with a view expressing that there are those who think "Prince 'almost certainly' will win: [and that] 'Prince's process means his paintings will almost certainly be declared transformative, not derivative works, and as such, they're fair use, not infringing.'"[134] The author of the blog, Donn Zaretsky, writes that he himself is not so certain of the outcome of the case because "litigation is always uncertain, and never more so than when it comes to appropriation art. As Judge Leval has said, the law in this area is 'astonishingly unpredictable.' "[135] Richard Prince is a well-respected artist, but art world renown does not mean that a court will find his use of Cariou's photographs transformative.

Unauthorized *Catcher in the Rye* Sequel Was Not Fair Use

The Judge hearing the *Cariou* case is the same one who decided the recent controversy over the unauthorized *Catcher in the Rye* sequel, entitled *60 Years Later: Coming Through the Rye*. In finding that the unauthorized sequel to *Catcher in the Rye* was an infringing use that did not qualify for fair use, Judge Batts went through each of the four factors of the fair-use test. In her discussion of whether the sequel was a transformative use, Batts wrote that the "facts that Holden Caulfield's character is 60 years older, and the novel takes place in the present day [do not] make *60 Years* 'transformative.'"[136]

Judge Batts also noted, "*60 Years* borrows quite extensively from *Catcher*, both substantively and stylistically, such that…the ratio of the borrowed to the novel elements is quite high, and its transformative character is diminished."[137] While the judge did find "limited transformative character," she felt it was not enough to overcome "the obvious commercial nature of the work, the likely injury to the potential market for derivative works...and especially the substantial and pervasive extent to which [the sequel] borrows from *Catcher*."[138] This case is currently on appeal.

Judge Batts also quoted *Acuff-Rose* when explaining that the fourth factor "requires courts 'to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market for the original'" and derivative works.[139] The defendants argued that that there was "no evidence that *60 Years* will undermine the market for *Catcher* or any authorized sequel," but Judge Batts countered that "it is quite likely that the publishing of *60 Years* and similar widespread works could substantially harm the market for a *Catcher* sequel or other derivative works."[140] Judge Batts' quote revealed that the court's fair use inquiry looked beyond the one specific act of appropriation, and also at the potential impact of similar and widespread appropriation on the original copyrighted work.

Conclusion

Appropriation has historically played an important role in major artistic development. It is also well established that many artists believe they must be able to appropriate in order to create their art. It is important that artists are given the freedom to appropriate film stills, photographs, paintings, logos, advertisements, billboards, posters and any images or sounds that are readily found in their world.

Copyright policy is geared toward providing the public with new creative works, which can be hurt by overly rigid copyright restrictions. There is also a plethora of Constitutional and judicial support for protecting artistic freedom. Additionally, Congress recognized the importance of mitigating copyright law, as shown by the codification of the fair use doctrine. Fair use is made even more important, as "copyright notices are everywhere, even on works that are in the public domain. Furthermore, professional sports leagues, book publishers, and other media companies systematically overstate their copyrights to the public in an attempt to scare people away from any potential fair use of copyrighted works."[141]

Between aggressive copyright holders and the uncertain application of fair use, it is unclear to what extent artists can appropriate without risk of litigation. Despite the limitations of fair use, some level of appropriation should be allowed. Professor Lessig is an advocate for the right to appropriate. He describes the copyright strategy of the Warhol Foundation, which sets an interesting example for copyright holders. Lessig writes:

> According to Joel Wachs, president of the Warhol Foundation, artists who wish to use Warhol's imagery for any purpose can do so "without charge and without challenge." Similarly, scholars can use Warhol imagery "for just a nominal fee to cover the cost of administering the rights." Artists and scholars have open access to Warhol's work in the interest of free expression. When it comes to commercial use, like t-shirts, calendars, and consumer items, however, the Foundation vigorously enforces its copyright for financial gain and protection of the original works.

> In this estate's model, the economic vision of copyright coexists with the promotion of creative expression through transformative use.[142]

The Warhol Foundation uses copyright law in such a way that it supports appropriation art while simultaneously protecting itself against strictly commercial uses. Policies like this should be considered for more widespread use to encourage progress in the arts in this age where media, appropriation art and copyright law collide.

Endnotes

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4. David Evans, Appropriation, page 82.
5. *Id.*
6. Calvin Tomkins, Post-To Neo-: the art world of the 1980s, pages 237-238, 2d ed., Penguin Books, 1989.
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8. Amy Adler, 1990, "Post-Modern Art and the Death of Obscenity Law," 99 Yale L.J. 1359-1378, page 1367.
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20. http://www.guggenheim.org/exhibitions /exhibition_pages/prince.html (last visited May 5, 2008).
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26. Wendy Gordon, "On Owning Information: Intellectual Property and the Restitutionary Impulse," 78 Va. L. Rev. 149, February, 1992.
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28. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, Blackmun Dissenting at 477 (1984).
29. Joyce, Leaffer, Jaszi, Ochoa, "Copyright Law," page 773, 7d ed., Lexis Nexis, 2006.
30. 17 U.S.C. § 107 (1988 ed. and Supp. IV).
31. Kenneth D. Crews, 2001, "The Law of Fair Use and the Illusion of Fair-Use Guidelines," 62 Ohio St. L.J. 599 at 606.
32. Eric Shimanoff, 2002, "The Odd Couple: Postmodern Culture and Copyright Law," 11 Media L. & Pol'y 12-49, page 18.
33. *Campbell v. Acuff-Rose Music, Inc*. 510 U.S. 569 (1994) at 575 (quoting U.S. Const., Art. I, § 8, cl. 8).
34. Joyce, Leaffer, Jaszi, Ochoa, "Copyright Law," page 3, 7d ed., Lexis Nexis, 2006.
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38. *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 at 478 (1984).
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42. Donn Zaretsky, Art Law Blog post dated December 6, 2007, "Oh, Richard Prince has a photograph just like that!" See the Art Law Blog: http://theartlawblog.blogspot.com/2007/12/oh-richard-prince-has-photograph-just.html (last visited October 9, 2009).
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54. *See* 17 U.S.C. § 107(3).
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100. E. Kenly Ames, 1993, "Beyond *Rogers v. Koons*: A Fair Use Standard for Appropriation," Columbia Law Review, Vol. 93, No. 6, pp. 1473-1526, at 1508.
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Is Your Fantasy Criminal? An Update on the Legal Status of Fantasy Sports Gambling

By Kenneth A. Wind

Just two years ago, the tremendously profitable and popular fantasy sports industry was almost upended when pay-to-play fantasy sports games were challenged as illegal gambling activities.[1] While the industry emerged unscathed, ambiguity in federal law has opened the door for state legislatures to take action. In those states that have chosen to address the issue directly, some have placed complete bans, while others generate revenue by allowing pay-to-play fantasy sports to be considered authorized gambling activities. In the states that have yet to address the legality of pay-to-play fantasy sport games, residents and fantasy game operators are left in a precarious situation. As the federal government is being pushed to clarify that pay-to-play fantasy sports games are not illegal under federal law,[2] the heavy deficits in many states are causing state lawmakers to look toward sports betting to boost their economies.

Background of Fantasy Sports

Fantasy sports operators provide customers access to computer games where participants create and manage their own sports teams by selecting players from a list of real life professional sports athletes.[3] A participant becomes the "coach" or "manager" of the team and is charged with carrying out many of the duties a professional coach would have to undertake.[4] A fantasy coach votes on a commissioner for his or her league, drafts players, decides which players will start in each game, and conduct trades.[5] While every fantasy game has its own rules and methods for scoring, most select categories of performances by athletes and assign a predetermined score for each performance.[6] For example, each "blocked shot" by an NBA player might be worth two fantasy points in a given fantasy game. Most fantasy games will track the performances of real athletes over the course of one or several games and tally how many fantasy points each athlete scored.[7] As in real professional sports, fantasy teams are grouped into leagues and compete to have the most points in their respective leagues.[8] The team with the most points in each league is the winner.[9]

Before the actual start of any fantasy game, many operators establish prizes to be awarded to winning participants.[10] Usually, the winner of a league is given a prize with a nominal value.[11] Some fantasy sports games, however, require participants to pay a fee to play and offer prizes with significant monetary value. With the average participant spending $500 per fantasy game, participating comes at a cost.[12]

Ambiguity Across the Country

The legal treatment of fantasy sports games varies across the country. The Arizona state legislature has determined that fantasy sports games are "illegal if the host of the event receives a fee for services provided or if all the pooled money doesn't go back to the participants."[13] According to the Arizona Department of Gaming, "if the host takes a percentage of the pooled money, the Fantasy Sports Team contest is illegal."[14] Therefore, unlike in New Jersey,[15] a fantasy sport game where the operator is not eligible to win the prize but still makes a profit off participants' entry fees would be illegal in Arizona.

In August, state-licensed gambling businesses in Montana were allowed to operate fantasy football games even though the fantasy sport operator will receive a percentage of the revenue.[16] Under the Montana gambling law, 74 percent of the sales of fantasy football slips must be paid to the top four participants, while the State, fantasy sport operator, and the licensed gambling facility share the remaining 26 percent of sales.[17] However, states such as Arkansas, Florida, Iowa, Louisiana, Maryland, North Dakota, and Vermont have yet to come to a clear decision as to whether pay-to-play fantasy sports is considered gambling.[18] Such ambiguity prevents residents of those states from participating in such fantasy sports games or accepting any prizes should they win.[19] According to Maryland Delegate John Olszewski Jr., "several national organizations offering fantasy gaming opportunities have limited Maryland residents from fully participating due to concerns over the ambiguity of state law."[20]

Fantasy Sports Gambling Litigation

One of the milestone cases in this legal battle was *Humphrey v. Viacom*. Charles Humphrey Jr. sought to use New Jersey common law to recover monies lost by participants in fantasy sports games, claiming that the entry fees paid by participants were really illegal bets.[21] New Jersey Statute § 2A:40-1 provides: "All wagers, bets or stakes made to depend upon any race or game…or upon any lot, chance, casualty or unknown or contingent event, shall be unlawful."[22] Mr. Humphrey contended that the fantasy sports game in which he participated was gambling because participants wagered entry fees for the opportunity to win a prize, and winning such prizes was determined by chance.[23]

Focusing on the eligible winners of fantasy games, the United States District Court of New Jersey distinguished between bona fide entry fees and illegal bets.[24]

The former is "paid unconditionally for the privilege of participating in a contest and the prize is for an amount certain that is guaranteed to be won by one of the contestants," while the latter allows each interested party, including the fantasy game operator, the opportunity to win the prize.[25] Thus, when fantasy sport operators have no chance to win their own prize, entry fees paid will not be viewed as betting. Since the defendant fantasy sports operators established prizes prior to the beginning of the fantasy game and only participants were eligible for the prizes, the N.J. District Court dismissed Mr. Humphrey's *qui tam* gambling claims.[26]

In addition, the N.J. District Court held that the issue of luck or chance is not relevant in determining a bona fide entry fee.[27] To support its finding that fantasy sports games are not illegal forms of gambling, the N.J. District Court looked to the Unlawful Internet Gambling Enforcement Act of 2006 (Gambling Act).[28] The Gambling Act expressly excluded fantasy sports from its scope when "all winning outcomes reflect the relative knowledge and skill of the participants and are determined predominately by accumulated statistical results of the performance of individuals (athletes in the case of sports events) in multiple real-world sporting or other events."[29] The court broadly concluded that the fantasy sports operators in *Humphrey*, which included Sportsline.Com, CBS Corporation, ESPN Inc., and The Sporting News, satisfied the exemption requirement.[30]

Although Mr. Humphrey has chosen not to appeal the decision, it is not at all clear that the N.J District Court's application of the Gambling Act will be followed by other courts. It is debatable whether winning a fantasy sport game reflects the relative knowledge and skill of the participant. In fact, the Center for Regulatory Effectiveness has noted that reliance on the current language of the Gambling Act "is insufficient for determining whether a transaction should be identified and blocked under the Act."[31] Based on the ambiguity of the statute, the fact that Mr. Humphrey's argument has merit and the fact that the United States Department of Justice has not weighed in on *Humphrey*, The Center for Regulatory Effectiveness wrote to the U.S Department of Treasury to inquire if the federal government would establish a list of restricted transactions under the Gambling Act.[32]

Moreover, *Humphrey* did not address fantasy sports liability under the Interstate Wire Act (Wire Act), which places liability on a person who transmits information that assists in the placing of an illegal bet.[33] While the Wire Act does not expressly provide that the Internet is a form of wire communication (in fact the statute was written before the advent of the Internet), the New York Supreme Court has held that the Internet is a wire communication under the Wire Act.[34] As online fantasy sports operators provide statistics, analysis and instructions on how to play, it would be hard to argue that fantasy sports operators do not transmit information in interstate commerce. Liability would therefore be determined by how a court defines "bet." Unfortunately, there is no express statutory or judicial definition of betting to be applied to the Wire Act.[35]

In 1998, the Deputy Assistant Attorney General for the United States testified before the United States House of Representatives that determining the hypothetical liability of fantasy sports operators under the Wire Act is "impracticable and inappropriate. That being said, the breath of the Senate's current proposal to prohibit Internet gambling…would make it more likely that participating in fantasy sports…would be deemed to violate federal law."[36] While the Internet Gambling Prohibition Act (which would amend the Wire Act to exclude fantasy sports from the definition of gambling) was proposed in 2006, Congress has not yet officially weighed in as to whether pay-to-play fantasy sports would be considered betting under the Wire Act.[37]

Budget Deficits to Decide

The growing shortfalls in state budgets have made some lawmakers across the country consider legalizing pay-to-play fantasy sports games. For example, in Maryland, the legislature is considering a bill to allow pay-to-play fantasy sports games because "it's hoped that passage may also serve in some ways as a stimulus to the Maryland's economy."[38] In Delaware, faced with a $600 million deficit, the governor signed a bill in May 2009 that legalized betting on the outcomes of sporting events.[39] Moreover, in New Jersey, State Sen. Raymond Lesniak has called for a change in federal law to allow for sports gambling in New Jersey, because "[t]his federal law deprives the State of New Jersey of over $100 million of yearly revenues."[40]

The federal law State Senator Lesniak wants to amend is the Professional and Amateur Sports Protection Act (PAPSA), which prohibits most states from legalizing gambling on sporting events[41] and, according to Senator Lesniak, "represents a substantial intrusion into States' rights and restricts the fundamental right of States to raise revenue to fund critical State programs."[42] Senator Lesniak has sued the U.S. Justice Department to overturn PAPSA based on constitutional grounds.[43]

However, any momentum to legalize sports gambling may be derailed by several professional sports leagues, including the National Football League (NFL), NBA, NHL, MLB, and NCAA, which sued the governor of Delaware in July 2009, claiming that provisions in the Delaware Sports Act were preempted by PAPSA.[44] In August 2009, the Third Circuit agreed that the Delaware law exceeded the scope of the PAPSA exception because the Delaware Sports Act allowed for single-game betting on all sports, an activity which was not conducted in Delaware prior to the passage of PAPSA.[45] After an examination of the types of legal sports betting actually conducted in Delaware prior to PAPSA, the Third Circuit held: "Under federal law, Delaware may, however, institute multi-game (parlay) betting on at least three NFL games, because such betting is consistent with the scheme to the extent it was conducted in 1976."[46]

Whether fantasy football games based on the NFL would qualify as a "multi-games" and whether Delaware would consider legalizing fantasy football gambling is not yet known. What is clear, though, is that as state legislators increasingly look for ways to boost their states' economies, the debate over whether pay-to-play fantasy sports games are a form of gambling is going to continue. Montana law appears to side with those, like Mr. Humphrey, who believe that there is no amount of knowledge or skill that can determine which players will perform the best in actual games. Rather, luck is the determining factor since participants are unable to control which athletes will actually be able to play in each real game because of game-related injuries, family emergencies, off-field injuries, incarceration, and suspension.[47] In addition, participants cannot control the weather or other off-field events that can impact a player's real performance. By ignoring the luck needed to win in fantasy sports, Mr. Humphrey believes that

> the operation of the fantasy sports leagues is an example of league promoters getting rich from telling a big lie and telling it often. They say the leagues are skill games. That position is not supportable in view of the variable, unpredictable human element that always is the basis for determining outcome from game to game and week to week.[48]

With as much as 60 percent of paid entry fees being retained by some fantasy sport operators,[49] it is undeniable that fantasy sports operators are getting rich from participants' entry fees.

The 27 million[50] participants in fantasy sports games would likely agree with the N.J. District Court. While a participant cannot, as Mr. Humphrey notes, control whether a specific player actually plays in a game or for how long, participants who make themselves aware of a player's health before the start of each game can choose to play different members.[51] In fact, a real-life coaching experience would arguably not be complete without allowing a participant to make substitution determinations. Further, many participants anticipate having to substitute players when they form their teams in the fantasy draft and will select players accordingly.[52] Indeed, if a participant does not research players and make informed decisions, but rather picks a team according to computer-generated rankings, he or she is less likely to be able to compensate for injured or otherwise inactive members of the team.

Summary

Whether pay-to-play fantasy sports games are considered gambling depends on how one weighs skills versus chance: Does a participant's choice based on personal knowledge of statistics have more of an impact on the eventual outcome of the fantasy game than pure luck? Regardless of one's view on the matter, it is undeniable that the legal status of pay-to-play fantasy sport games varies from state to state. The effect is to block many Americans from participating in a popular activity and to limit the marketplace for fantasy sports games. Moreover, legislators who want to use fantasy sports games to pump desperately needed money into their state economies are frustrated with the ambiguous language of current federal laws and the flexibility which is limited to a few states. Perhaps this Congress and current administration will realize the hopes of lawmakers and millions of average citizens and finally reach a uniform federal law that will address the issues of fantasy sports gambling.

Endnotes

1. *Humphrey v. Viacom*, No. 06-2768. 2007 U.S. Dist. LEXIS 44679 at 1-32, 6 (D. N.J).
2. Letter from Jim Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness, to Charles Klingman, Deputy Director, Office of Critical Infrastructure Protection and Compliance Policy, US Department of Treasury (Dec. 12, 2007) (on file with author), *available at* http://www.thecre.com/pdf/CRE_UIGEA_Comments.pdf) (last visited Sep. 6, 2009).
3. Zachery C. Bolitho, *When Fantasy Meets the Courtroom: An Examination of the Intellectual Property Issues Surrounding the Burgeoning Fantasy Sports Industry*, 67 Ohio St. L.J. 911, 917 (2006) (discussing the history and mechanics behind fantasy sports).
4. Eric J. Schall, *Infringing A Fantasy: Future Obstacles Arise The United States Patent Office and Software Manufacturers Utilizing Artificial Intelligence*, 11 Vill. Sports & Ent. L.J. 173, 173-174 (2004) (noting the significance of technology on the popularity of fantasy sports games).
5. *Id*.
6. Bolitho, *supra* 917.
7. *Id*.
8. Jon Boswell, *Fantasy Sports: A Game Of Skill That Is Implicitly Legal Under State Law, And Now Explicitly Legal Under Federal Law*, 25 Cardozo Arts & Ent. LJ 1257, 1258 (discussing the competition that develops among participants in the same fantasy league).
9. Eric Sinrod, *Fantasy Sports Leagues Participation Is Not Illegal Gambling, Judge Rules*, July 03, 2007, http://technology.findlaw.com/articles/00006/010896.html (last visited Nov. 14, 2008).
10. *Id*.
11. *Id*.
12. Letter from Jim Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness, to Charles Klingman, Deputy Director, Office of Critical Infrastructure Protection and Compliance Policy, U.S. Department of Treasury, at *4 (Dec. 12, 2007) (on file with author), *available at* http://www.thecre.com/pdf/CRE_UIGEA_Comments.pdf).
13. *Arizona Department of Gaming Guide to Off-Reservation Gambling*, *available at* http://www.gm.state.az.us/misc-pdf/TopGamingViolations.pdf (last visited Sep. 16, 2009).

14. *Id*.

15. *Humphrey*, 2007 U.S. Dist. LEXIS 44679 at 1-32 (holding that when fantasy sport operators have no chance to win their own prize, entry fees paid will not be viewed as betting even if the operator makes a profit off the entry fees).

16. *Fantasy Football Now Available*, http://www.montanalottery.com/article.xsp?aid=395 (last visited Sep. 16, 2009).

17. *FAQ*, http://www.montanalottery.com/article.xsp?aid=408 (last visited Sep. 16, 2009).

18. http://fantasynews.cbssports.com/fantasyfootball (last visited on Sep. 16, 2009) (Fantasy football Platinum and Diamond games not available to residents of Arizona, Iowa, Louisiana, Maryland, and Vermont); Letter from Robert Butterworth, Attorney General, Florida, to Hon. Lawson Lamar, State Attorney (Jan. 8, 1991) (on file with author), *available at* http://myfloridalegal.com/ago.nsf/printview/9ADEF3B402960199852562A6006FB71E (last visited Sep. 6, 2009); *Fantasy Game Rules*, http://www.fantazzle.com/fantasy-site/game-rules.php (last visited Sep. 6, 2009) (if one enters any Fantazzle Game in which one must pay to play and a prize is awarded, the player cannot be a resident of any of the following states: Arizona, Arkansas, Iowa, Louisiana, Maryland, Montana, North Dakota, Vermont).

19. *Id.*

20. Dylan Waugh, *Maryland Lawmaker Seeks to Ensure Legality of Fantasy Sports Gambling*, FOXNews.com, Feb. 26, 2009, *available at* http://www.foxnews.com/politics/2009/02/26/maryland-lawmaker-seeks-ensure-legality-fantasy-sports-gambling/ (last visited Sep. 6, 2009).

21. *Humphrey*, 2007 U.S. Dist. LEXIS 44679 at 6.

22. N.J. Stat. § 2A:40-1 (2008).

23. Charles Humphrey, *Lawsuit Seeks to Recover Fantasy Sports Gambling Losses*, Gambling-Law-US.com, July 9, 2007, http://www.gambling-law-us.com/articles-notes/fantasy-sports-lawsuit.htm (last visited Sep. 17, 2009).

24. *Humphrey*, 2007 U.S. Dist. LEXIS 44679 at 20.

25. *Id*.

26. *Id.* at 18-25.

27. *Id.* at 22.

28. *Id.* at 30.

29. Unlawful Internet Gambling Enforcement Act, 31 U.S.C. § 5362(1)(E)(ix) (2006).

30. *Humphrey,* 2007 U.S. Dist. LEXIS 44679 at 30 (after citing the language of the Gambling Act exemption for fantasy sports games, the court did not analyze the elements of the Gambling Act, but simply stated that "[f]ederal law thus confirms that Plaintiff's case must be dismissed").

31. Letter from Jim Tozzi, Member, Board of Advisors, Center for Regulatory Effectiveness, to Charles Klingman, Deputy Director, Office of Critical Infrastructure Protection and Compliance Policy, U.S. Department of Treasury, at 5 (Dec. 12, 2007) (on file with author), *available at* http://www.thecre.com/pdf/CRE_UIGEA_Comments.pdf).

32. *Id.*

33. Interstate Wire Act, 18 U.S.C § 1084 ("whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate commerce or bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined").

34. Nicole Davidson, *Internet Gambling: Should Fantasy Sports Leagues Be Prohibited?*, 39 San Diego L. Rev. 201, 205 (citing *People ex rel. Vacco v. World Interactive Gaming Corp.*, 714 N.Y.S.2d 844 (Sup. Ct. 1999).

35. *Id.* at 206 (stating that the "[w]ire Act does not define 'betting' or 'wagering' nor have the courts explained the legal significance of these terms").

36. *Gambling on the Internet: Hearing Before the Subcomm. on Crime Comm. On the Judiciary,* 105th Cong. 22-23 (1998) (on file with author) (Statement of Kevin V. Di Gregory, Deputy Asst. Attorney General, Criminal Division).

37. *Id*.

38. Waugh, *supra.*

39. Denis Cummings, *Delaware to Legalize Form of Sports Betting*, FindingDulcinea, May 13, 2009, *available at* http://www.findingdulcinea.com/news/sports/2009/may/Delaware-to-Legalize-Sports-Betting.html.

40. *Id.*

41. *OFC COMM BASEBALL v. Markell*, No. 09-3297, 2009 U.S. App. LEXIS 19460, at *6 (3d Cir. Aug 31, 2009) (Although PASPA has broadly prohibited state-sponsored sports gambling since it took effect on January 1, 1993, the statute also "grandfathered" gambling schemes in individual states "to the extent that the scheme was conducted by that State" between 1976 and 1990).

42. Cummings, *supra*.

43. *Id*.

44. *OFC COMM BASEBALL*, 2009 U.S. App. LEXIS 19460, at *1-29 (The National Football League, the National Basketball Association, the National Hockey League, the Office of the Commissioner of Baseball, and the National Collegiate Athletic Association sought to enjoin Delaware state officials from implementing certain elements of its Sports Lottery Act).

45. *Id.* at 28 (As single-game betting was not "conducted" by Delaware between 1976 and 1990, such betting is beyond the scope of the exception in §3704(a)(1) of PASPA and thus prohibited under the statute's plain language.).

46. *Id.* at 28-29.

47. *Humphrey*, *supra.*

48. *Id*.

49. *Id*.

50. *Welcome to the Official Site of the FSTA*, http://fsta.org/ (last visited on Sep. 16, 2009).

51. Boswell, *supra* at 1257 (discussing why skill predominates in fantasy sports games).

52. *Id*.

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The Looting of the Iraq Museum: Curbing the Trade in Illicit Iraqi Patrimony

By Simmy Swinder

The Iraq Museum in Baghdad was the world's most extensive collection of Mesopotamian art and provided invaluable insight into the very first human civilizations, which is why many considered it an international travesty that it was extensively looted in early April 2003, at the inception of the Iraq War.[1] Some blamed the U.S. military, which was occupying Iraq while removing Saddam Hussein from power, while others blamed the resulting illicit trade of Iraqi antiquities on the unethical practices of art professionals and collectors. The continued smuggling and slow rate of return of these antiquities can be partially attributed to Iraq's inadequate infrastructure for protecting its cultural property and the ineffectiveness of existing international policies. Above all, the lack of cooperation between the United States, Iraq, and those art professionals who operate with veiled motivations are causing and exacerbating the circulation of looted works.

In March 2003, the Multi-National Forces, led by the United States, invaded Iraq. Before the war commenced, members of the Archaeological Institute of America, museum directors and art professionals feared that invaluable Mesopotamian artifacts stored in museums and archaeological sites throughout Iraq would be destroyed. In particular, they alerted the U.S. government of the Iraq Museum's value and stressed the need to protect its holdings upon invasion.[2] The Pentagon heeded their warnings and ordered "the Iraq Museum [be] placed on the coalition's no-strike list."[3] However, this precaution was inadequate and the Iraq Museum was ransacked from the inside by local and foreign looters.[4]

According to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, during wartime the occupying power is responsible for safeguarding the cultural property of the occupied nation, even when the occupied nation fails to do so.[5] Many archeologists and journalists held the U.S. military responsible for the looting, claiming that the U.S. Task Force I-64 stationed four tanks within the Iraq Museum compound and "could have moved […] just five hundred yards closer to protect the museum."[6] If the Task Force did indeed deliberately fail to take action, or made unjustifiably insufficient effort to do so, the U.S. government would have violated the 1954 Hague Convention.

Some accounts suggest that the United States' ability to protect the Iraqi Museum was compromised when the Iraqi Army militarily fortified it. Nearby residents stated that on April 9, 2003, when the lootings commenced, "two Iraqi Army vehicles drove up to the back of the museum […] and spent several hours loading boxes from the museum onto the vehicles."[7] The next day, the Task Force I-64 commander, Lieutenant Colonel Eric Schwartz, was alerted of the looting and ordered Second Lieutenant Erik Balascik's platoon to move in closer to investigate, upon which they "began receiving intense fire from the compound; […] the museum was filled with Republican guards shooting at Americans with automatic weapons and tank-killer rocket-propelled grenades […but] there was no way they were going to bomb the museum or no way they could secure it, as the museum consists of an eleven-acre complex of interconnecting and overlapping buildings and courtyards."[8]

> *"[T]he lack of cooperation between the United States, Iraq, and those art professionals who operate with veiled motivations are causing and exacerbating the circulation of looted works."*

The U.S. military was stuck in a difficult position: By deciding not to attack the museum, they ostensibly violated the 1954 Hague Convention's provisions, which require the occupying party to stop the plundering of the occupied party's cultural heritage; however, if they chose to attack the Iraq Museum, the U.S. military would have endangered their own lives and risked destroying the museum building, causing irrevocable damage to the priceless objects inside. Moreover, the 1954 Hague Convention states that cultural sites are protected until they are used for military purposes—"when you take direct fire, under anyone's rule of engagement you fire back. Second Lieutenant Balascik […] would have been entirely justified in taking any steps necessary to eliminate the threat […] they could have called in air support, dropped a two-thousand-pound bomb, and turned the entire compound and its contents to rubble. But even if they simply stood their ground and fought back with ground-based supporting fire, there would have been nothing left of the museum either to save or to loot."[9] What critics fail to realize is that the U.S. military in fact made a "tactically wrong but culturally brilliant" choice to stay put and hold their fire.[10]

The Pentagon and U.S. military were shortsighted in predicting the Iraq Museum's looting in part because they did not comprehend the resentment the Iraqi people felt from having been denied access to their own cultural heritage.[11] In 1980, Saddam Hussein began the "Haussmannization" of Baghdad, a full-scale attempt to transform the city into a symbol of his overarching power. This included closing the Iraq Museum to the public and using it as his private gallery, where he felt free to give and trade objects. This might have motivated opportunistic locals to loot and profit from the cultural heritage, because they viewed the objects as those of their oppressor, and not as their own. It was understandable that during a change in government, when the chances of being caught were low and punitive ordinances were less clear, a petty amount of money was enough to convince anyone to commit illegal acts out of economic desperation. In addition, many local looters believed that their actions, though illegal, were morally acceptable because they were "exploiting their own cultural heritage," and their communities viewed it as a way of producing income during economically dire periods.[12] Yet what of those art professionals who should have been able to avoid dealing in possibly looted antiquities? What of the wealthy collectors who hoarded these antiquities in order to gain cultural capital or the academics who authenticated the works and supplied the collectors with scholarly substantiation and yet did not question the provenance of the items? What codes of ethics, if any, guided their actions?

Archaeologists and art market participants work using different agendas. Archaeologists are most concerned with preserving historical contexts and often work to limit the trade in antiquities because they believe that an illegitimate antiquities market motivates looting, which destroys excavation sites and the objects themselves. Art dealers and collectors are most interested in the physical object and are working toward a less regulated market. Conversely, they argue that a rigidly regulated market is what causes looting. Their respective codes of ethics reflect these aims.

While the Archaeological Institute of America and the Society for American Archaeology prohibit "the publication of objects with unknown provenance, as such objects are thought to be immediately suspect as being recently looted and illegally traded," the Art Dealers Association of America, the Antique Dealers League of America, and the London Association of Art & Antiquities Dealers do not provide a code of ethics.[13] This dissonance between the respective groups' professional approaches to ethically questionable business impedes cooperation. Only the British Art Market Federation provides some ethical guidance and states that its members should, "to the best of their ability, not […] import, export or transfer the ownership […] where they have reason to believe" an object has been stolen or exported in violation of the originating country's laws.[14] These conditions, however, are far less nuanced and more forgiving than the code of ethics for archaeological associations, auction houses, and museums. Two conclusions can therefore be drawn: First, due to the lack of dealer codes of ethics, they can easily turn a blind eye to the fact that an object is not provenanced. Second, archaeologists work with U.S. policymakers and foreign governments against the antiquities trade, while dealers and collectors are working towards more free trade in antiquities.[15]

One excuse given by the antiquities trade when presented with an object of questionable provenance is that such antiquities are "chance-finds." This justification is dubious, as "chance-find" antiquities are often of worse quality and condition than those that are taken from museums (and thus, make them less valuable to collectors).[16] Second, almost all source nations that are rich in cultural artifacts have laws that require "chance-finds" to be turned over or at least reported to government authorities.[17] Many dealers are still under the impression that works that lack provenance are legal until proven otherwise, and hope the antiquities they trade never have to be stringently examined.[18]

"[M]any local looters believed that their actions, though illegal, were morally acceptable because they were 'exploiting their own cultural heritage,' and their communities viewed it as a way of producing income during economically dire periods."

Dealers and collectors seek a less regulated market, where source nations do not control the market for their cultural property and international trade laws are lenient. They adopt an internationalist approach to cultural heritage, which states that such objects "are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species."[19] John Merryman claims that UNESCO's approach to the protection of cultural artifacts supports this view. For example, the preamble of the 1954 Hague Convention mentions the need to "protect cultural heritage because it belongs to all of humankind and every individual contributes to the cultural production of the world."[20] Dealers who trade in stolen Iraqi objects might argue that collectors in wealthier market nations are better custodians of ancient culture than the people who now occupy source nations; not only is a source nation like Iraq politically volatile, but also modern day Iraqis are ethnically disconnected from those of ancient Mesopotamia.[21] Hence, the cultural artifact belongs to all people as much as it does to the Iraqis.

Antiquities trade constituents also insist that if the market continues to be strictly regulated, further looting may occur, as "many nations that are rich in cultural artifacts have small gross domestic products and fragile economies" and they would sell off their less valuable and more commonplace objects while holding on to the more rare, valuable pieces. [22] These artifacts would not satisfy foreign collectors and museums, which in turn would stimulate looting for museum-quality works. Moreover, as at least two scholars have proposed, if nations were to sell their mediocre-quality, less expensive works, more buyers would enter the market, and looting would increase to meet rising demand.[23] These dealers and collectors also make the case that archaeologically-rich nations have a superabundance of antiquities. If such objects were to have legitimate provenances and were sold legally, then buyers would prefer to acquire these over looted objects, and the impetus to loot would subside. The source nations would generate a financial profit from this, which could be used to guard sites, sponsor research, build museums, and galvanize an international public.

"The cooperation of looters, dealers, scholars, collectors, and terrorists needs to be matched by cooperation between art professionals and international governing bodies."

Conversely, source nations and many archeologists criticize dealers and collectors for providing a market in the first place.[24] They adopt a cultural nationalist approach, maintaining that cultural artifacts are inherently tied to the current *situs*, the nation from which the come, and their corresponding identity and history, and thus should be viewed *in situ*. They call upon "all nations [to] enforce national and international legal measures […] in order to restrict 'illicit' acquisition of and trade in antiquities" because "in the absence of restrictions, cultural objects would be exploited as an economic resource," and exemplary objects would make their way to collectors with their contexts sacrificed.[25] Rather than encourage legal trade in cultural objects, however, source nations generally prohibit or restrict it altogether.

Since the Iraq Museum looting, the world community has attempted to enforce measures to prevent further looting and retrieve stolen works. International Criminal Police Organization (INTERPOL), UNESCO, the U.S. government, and many other market nations took immediate action to ban trade in illegally excavated and exported cultural materials from Iraq and to prevent further looting. The plan included placing embargoes on sales of Iraqi artifacts, encouraging their return through amnesty programs, creating an inventory of lost artifacts, and locating and repairing lost and stolen objects.[26] All goods including cultural objects from Iraq had been barred from entry into the United States since August 1990 under the general United Nations Security Council (UNSC) Resolution 661.[27] Yet in May 2003, the UNSC passed Resolution 1483 recalling these earlier sanctions and reaffirming the sovereignty and territorial integrity of Iraq. As part of assisting the Iraqi state in rehabilitating its nation, all member states need to ensure the safe return of illegally removed Iraqi cultural property to their original Iraqi institutions.[28] The resolution claims that member nations should also take care to prohibit the trade in or transferring of objects they suspect to have been illegally removed.[29] To aid this process, UNESCO created the International Coordination Committee for Safeguarding of the Cultural Heritage in Iraq (ICC). The ICC recommended that international bodies "coordinate […] [and] channel international aid—both bilateral and multilateral—with a view to ensure the implementation of the strategy for the safeguarding of the cultural heritage in Iraq and assess its overall monitoring."[30] INTERPOL created its Tracking Task Force to Fight Illicit Trafficking in Cultural Property Stolen in Iraq (ITFF) through "the dissemination and centralization of information relating to the Iraqi cultural property crisis in order to more effectively pursue law enforcement."[31] Another more permanent means of preventing the importation of stolen antiquities is the Emergency Protection for Iraqi Cultural Antiquities Act, enacted in 2004.[32] This legislation gives the U.S. president the ability to exercise his authority under the Convention on Cultural Property Implementation Act (CCPIA) to prohibit importation of designated archaeological and ethnological materials from Iraq.[33]

Some progress has been made based on these concerted efforts. Donny George, former Director of Research at the Iraq Museum, stated at a conference in June 2004 that through the combined efforts of law enforcement and governments, 5,200 of the 13,000 looted works had been recovered in the 16 months following the looting.[34] However, two scenarios of these recoveries demonstrate grim realities. Joseph Braude, a scholar of Islamic studies, was found at New York's John F. Kennedy international airport on June 11, 2003 with three cuneiform cylinder seals in his shaving kit.[35] In August 2004, Braude was tried at the Brooklyn Federal Court on account of trying to smuggle in the looted seals. He claimed that he was bringing them to the U.S. for safeguarding, finding it too dangerous to turn them in through the amnesty program in Iraq. Matthew Bogdanos, the Marine colonel in charge of leading the investigation of the Iraq Museum looting, points out that his defense attorney was Benjamin Brafman, an expensive, high-profile lawyer whom a scholar of mediocre stature could not possibly have afforded. Bogdanos notes that there were many recognizable and well-heeled collectors and dealers in the courtroom who clearly had a stake in the outcome of the case: If Braude were convicted, precedent would be set, the risks for traffickers would be greater and consequently the price of these works would rise. Bogdanos concludes that the trading of stolen antiquities "could not exist without the active complicity of otherwise respectable society."[36]

Smuggling antiquities is also intrinsically tied to terrorism and is funding the Iraqi insurgency.[37] The following scenario has been frequently repeated: "In June 2005, U.S. Marines in Northwest Iraq arrested five insurgents holed up in underground bunkers filled with automatic weapons, ammunition stockpiles, black uniforms, ski masks, and night-vision goggles. Along with these tools of their trade were thirty vases, cylinder seals, and statuettes that had been stolen from the Iraq Museum."[38]

The cooperation of looters, dealers, scholars, collectors, and terrorists needs to be matched by cooperation between art professionals and international governing bodies. Art professionals must turn in smugglers to law enforcement, as the academic John Russell did when presented an Assyrian relief by a London businessman. By participating in researching and publishing objects that have not been provenanced, antiquities experts increase the objects' market value for collectors and legitimate their acquisitions, but this must be restrained.[39] Collectors must realize that buying looted works is not an act of stewardship, but rather of criminality. Looters bulldoze over archaeological sites and destroy strata just to meet the collector's demand for cultural superiority. Finally, national governments need to respect each other's export laws; works are often allowed to enter nations because governments believe they will benefit their economies. However, as globalization continues to cause nations to merge into an increasingly global community, the need for cooperation is now required more than ever to combat the threat of a global crisis.

"Collectors must realize that buying looted works is not an act of stewardship, but rather of criminality."

Endnotes

1. During the war, the National Archives, the Awqaf Library, other government buildings were also looted. Today, there are over 12,000 poorly guarded archeological sites. These include ancient Sumeria in Southern Iraq, Babylon in central Iraq, and Nimrud in the North. Helena Smith, *Trade in stolen Iraqi treasures "fuels al-Qaida,"* The Guardian, March 19, 2008, Culture Section, U.K. Edition; Matthew Bogdanos and William Patrick, *Thieves of Baghdad* (New York: Bloomsbury, 2005), 203-6.
2. Preemptively, before the war commenced in March 2003, the Archaeological Institute of America, museum directors and dealers expressed their fears to the Pentagon about the potential damages to museums and called upon "'all governments' to protect cultural sites in the event of an invasion. McGuire Gibson of the University of Chicago's Oriental Institute went back [to the Pentagon] twice more, and he and his colleagues continued to barrage DoD officials with e-mail reminders. They could not have done more." Bogdanos, 201.
3. CENTCOM, the United States Central Command, is responsible for U.S. security interests in 20 nations, stretching through the Arabian Gulf region into central Asia. CENTCOM obliged to the Pentagon's orders and listed the Iraq Museum as number three on its no-strike list. This precaution is similar to the one the U.S. military took during WWII when it invaded Florence, bombing the city's railroad station and missing Brunelleschi's Duomo and other important architectural monuments by mere feet. *The Rape of Europa,* DVD, directed by Richard Berge, Nicole Newnham and Bonni Cohen (Venice, CA: Menemsha Films, 2008); Bogdanos, 202.
4. According to Zainab Mohammed, shortly after the looting commenced—April 11, 2003—opportunists from countries bordering Iraq received word and, since Iraq's borders were unsecured, entered and looted the Iraq Museum for select and marketable antiquities. Patty Gerstenblith, *Art, Cultural Heritage, and the Law* (Durham: Carolina Academic Press, 2008), 536.
5. 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict*. art. 2-5*.
6. Bogdanos, 201.
7. *Id*., 205.
8. *Id*., 202.
9. *Id*., 205-6; *1954 Hague Convention*, art.9.
10. Bogdanos, 206.
11. Bogdanos, 202
12. John Henry Merryman, Albert E. Elsen and Stephen K. Urice, *Law, Ethics and the Visual Arts* (Alphen aan den Rijn: Kluwer Law International, 2007), 229.
13. Alexander A. Bauer, *New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates*, Fordham International Law Journal 31 (2008): 2.
14. Merryman, 245-6
15. Museums are guided by codes of ethics provided by International Council of Museums (ICOM), the American Association of Museums (AAM), and the Association of Art Museum Directors (AAMD). ICOM's Code of Ethics is meant to provide international museums with rules by which they can self-regulate their professional behavior with regard to ethically questionable issues. *Section 2.4* provides that "Museums should not acquire objects where there is reasonable cause to believe their recovery involved the unauthorized, unscientific, or intentional destruction or damage of monuments, archaeological sites…In the same way, acquisition should not occur if there has been a failure to disclose the finds to the owner or occupier of the land, or to the proper legal or governmental authorities." It emphasizes the importance of exercising due diligence in establishing the provenance of the objects, and that they were not "illegally obtained or exported from its country of origin." [For more information, *see* http://icom.museums/ethics.html.] The AAM gives a vaguer account of this, stating that the "collections in its custody are accounted for and documented" while the AAMD states that its director should employ his or her best efforts in determining provenance. [For more information, *see* http://www.aam-us.org/museumresources/ethics/coe.cfm and http://www.aamd.org/about/]; *Sotheby's Worldwide Rules of Business Conduct* (2001) state: "It is Sotheby's policy not to sell property if Sotheby's knows that the property was illegally exported or imported…If an employee suspects or has knowledge of an illegal export or import, he or she must report his or her concerns to the Legal Department…Relevant catalogues are routinely circulated to appropriate international governmental and law enforcement agencies." Merryman, 246.
16. The Portable Antiquities Scheme Annual Report 2004-05, p. 88 and Table 8, http://www.finds.org.uk/documents/PAS_2004_05.pdf. According to the numbers reported here, only 10% of actually finds are by "chance." Gerstenblith, 615
17. Patrick J. O'Keefe and Lyndel Prott, Law and the Cultural Heritage, Vol. I: Discovery and Excavation (1984); UNESCO, Handbook of National Regulations Concerning the Export of Cultural Property (1988); International Foundation for Art Research (IFAR), International Regulations Concerning the Export of Cultural Property: An Update (200). Merryman, 229.
18. Gerstenblith, 526.
19. *Id*.
20. "Annual Report 2004-05." Portable Antiquities Scheme. http://portal.unesco.org/culture/en/ev.php-URL_ID=35744&URL_DO=DO_TOPIC&URL_SECTION=201.html.

21. Merryman, 114.

22. *Id*., 113.

23. Gerstenblith, 616; Patrick J. O'Keefe, *Trade in Antiquities: Reducing Destruction and Theft* (London: Archetype Publications & Paris: UNESCO, 1997).

24. Merryman, 114; The Archaeological Institute of America and scholars from Iraq have blamed the looting of their archaeological sites on the trade in its objects. Greece, also a major source nation, has openly criticized the antiquities trade. For more visit: Mark Rose, *Taking Stock in Baghdad*, The Archaeological Institute of America, http://www.archaeology.org/; Michele A. Miller, *Looting and the Antiquities Market*, Athena Review, http://www.athenapub.com/15-intro-looting.htm, and Arifa Akbar, "Iraqi expert accuses West over antiquities trade," The Independent, http://www.independent.co.uk/news/world/middle-east/iraqi-expert-accuses-west-over-antiquities-trade-818775.html.

25. Merryman, 114.

26. As many of the works housed at the Iraq Museum were not catalogued, creating a definitive inventory is improbable. Joshua M. Zelig, *Recovering Iraq's Cultural Property: What Can Be Done to Prevent Illicit Trafficking,* Brooklyn Journal of International Law 289 (2005), 7.

27. The Security Council Resolution 661 of August 1990 "decides that all States shall prevent the import into their territories of all commodities and products originating in Iraq or Kuwait […]." In implementing this resolution, U.S. President George H.W. Bush imposed sanctions against Iraq under the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701-07, pursuant to Executive Orders 12722 and 12744, which in part stated that the "United States has taken and will continue to establish a multinational economic embargo and to initiate financial asset seizure […] of any foreign sources of trade or revenue that directly or indirectly support the ability of the adversarial government to sustain a military conflict against the United States." The Office of Foreign Assets Control of the Department of the Treasury administers such sanctions.

28. United Nations Security Council, 22 May 2003, Resolution 1483 (2003).

29. *Id.*

30. Zelig, 7.

31. *Id*., 7-8.

32. *Emergency Protection for Iraqi Cultural Antiquities Act Passes*, Archaeological Institute of America (Sections 3001-03, P.L., 108-429), *available at* http://www.archaeological.org/webinfo.php?page=10263 .

33. The UNESCO 1954 Hague Convention on the Means of Prohibiting and Preventing the Illicit Transport, Export and Transfer of Ownership of Cultural Property (the "Convention") was formally implemented in the United States with the Cultural Property Implementation Act (CCPIA) in 1983. The CCPIA, 19 U.S.C. §§ 2601-2613, focuses primarily on implementing Articles 7(b) and 9 of the 1970 UNESCO Convention, which "call for concerted action among nations to prevent trade in specific items of cultural property in emergency situations. The CPIA addresses primarily the question of import controls and grants authority to the United States government to seize the stolen property. *Id*. At 296-97. This Act provides in relevant part that "Any designated archaeological or ethnological material or article of cultural property, as the cause may be, which is imported into the United States in violation of the § 2606 of this title or § 2607 of this title shall be subject to seizure and forfeiture." 19 U.S.C. § 2609 (a). Merryman, 326-7.

34. Over 3,000 of these were recovered in Iraq and about 600 probably or definitely from Iraq were recovered in United States airports. Zelig, 9.

35. Sandee Brawarsky, *Nitzan Pelman and Joseph Braude*, New York Times, April 1, 2007.

36. Bogdanos, 248.

37. Helena Smith, *Trade in stolen Iraqi treasures "fuels al-Qaida*," The Guardian, March 19 2008, Culture Section, U.K. Edition.

38. Matthew Bogdanos. *Combatting Global Traffic in Stolen Iraqi Antiquities*, Fordham International Law Journal 725 (February, 2008).

39. Alexander A. Bauer, New Ways of Thinking about Cultural Property: A Critical Appraisal of the Antiquities Trade Debates, Fordham International Law Journal 31 (2008): 2.

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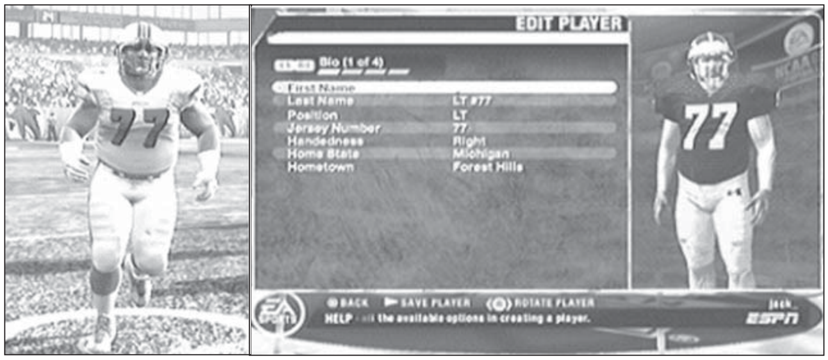
NCAA's Use of Student Likenesses for Commercial Purposes

By Mitchell Kessler



"America's Pastime" used to mean baseball. What is America's pastime now? Video games. The National Collegiate Athletics Association (NCAA) and college sports have been forced to face facts. On New Years Day, kids are just as likely to watch their Wii's and play their PS3's as they are to sit by the family room television and watch the Bowl Parades segue into the Bowl games.Further, on cold winter nights, what keeps sports fans warm? The squeak of college basketball players' sneakers on NCAA schools' courts, or the power of pressing a controller button?

The NCAA saw the light, fantasy sports entered the video age. The NCAA, through Collegiate Licensing Company (CLC), granted a license to Electronic Arts, Inc. Electronic Arts, an interactive software company, then created the NCAA Football, NCAA Basketball and NCAA March Madness videogames. What began with players' names and numbers blended with imaginary plays that harkened back to the old days of radio, developed into that most modern form of home entertainment: a video game, complete with visualized stadiums, teams, uniforms, and of course, players. Yet who are the players? None of the NCAA students' names appear on the games, but according to the young NCAA stars, everything about them, including height, weight, build, features, skin tone and eye color, does.

The NCAA and its joint venturers allegedly used student sports players' likenesses in these commercially distributed video games. This sparked a class action suit by the students. Although the suit was filed in California, as this article appears in the NYSBA *EASL Journal*, it will address this case as though it arose under New York law.

New York's Privacy Statute

Section 50 of the New York State Civil Rights Law creates a Right of Privacy. It bars a person, firm or corporation from using a living person's portrait or picture for commercial purposes, without written consent.[1] Violation of this creates a cause of action under Section 51 of the law, for injunctive relief and compensatory damages. Further, if the use of the image was made knowingly, exemplary damages may also be awarded.[2]

This 100-year old New York statute was the legislature's response to a Court of Appeals decision. The Court of Appeals recognizes no common law right of privacy, or what is elsewhere termed, the "right to publicity." Over a century ago, a girl's face began adorning bags of flour. The manufacturer never asked or paid her for this privilege. Even if the girl was secretly delighted, her parents saw this as an invasion of her privacy, and they sued in New York. However, the Court of Appeals disallowed their cause of action on behalf of the infant so depicted, though the depiction was without her consent and for commercial purposes. The court held that only the Legislature could address such privacy concerns, and the Legislature answered the call. Sections 50 and 51 of the Civil Rights Law resulted.[3]

In the pending NCAA case, animated images of college players, allegedly bearing a striking resemblance to the actual plaintiffs, make up the cast of characters populating the games. Are these animated figures the same as the players' portraits or pictures under Section 50 of the Civil Rights Law?

New York has a body of case law establishing that an image bearing a strong similarity to an actual likeness of a person is appropriation of that likeness under the Civil Rights Law. A number of these cases involve sports figures. It appears from these cases that the New York courts have evolved a sliding scale rule, where crossing the line into portraiture is out of bounds, but veering into vague caricature yields no penalty.

Boxers' Images

In *Ali v. Playgirl*,[4] the defendant magazine published a hand-drawn portrait of Muhammed Ali without his consent. Was it journalism, or pure commerce? Since this was not part of a news story, it did not receive a First Amendment exemption from the statute. Rather, the court held, it was published for commercial purposes. As in the NCAA video games, Ali's name was omitted. Yet, there was little question whom the drawing depicted, the court held, since the image was clearly Ali's (the caption also included the label, "The Greatest"). The court further that held Ali's right to commercially exploit his own image had been violated.[5]

In *Davis v. High Society Magazine, Inc.*,[6] Cathy Davis, the first female licensed boxer, found herself depicted boxing topless in Celebrity Skin magazine. The photo was not of her, but the caption bore her name. This was apparently the flip side of *Ali v. Playgirl,* where the image was unmistakable, but the name was omitted. Here, the name and the suggestion were enough. The court held that a cause of action would lie if the defendants published this likeness with knowledge that it was not an actual photo of the plaintiff used for newsworthy purposes.[7]

A photo of a dead ringer look-alike is as much as a photo of the actual person, so far as New York's privacy law is concerned. In *Onassis v. Christian Dior,*[8] Jacqueline Kennedy Onassis was portrayed in an advertisement by a look-alike model, in a photo of her together with other celebrities. The image was clearly intended to look as much like the plaintiff as possible. The court held this a violation of the Act.

Thus, an accurate drawing of, or a photo purporting to represent, a celebrity will create liability under the statute.

Team Members' Collective Civil Rights

An accurate though otherwise poor quality depiction may also create statutory liability. A case applying the Civil Rights Law again to sports figures bears similarities to the NCAA players' case. It involves a sports team near and dear to many New Yorkers' hearts, the 1969 Amazin' Mets. In *Shamsky v. Garan, Inc.*,[9] the defendant sold a shirt displaying the entire 1969 World Series winning Mets team. Invoking Sections 50 and 51 of the Civil Rights Law, members of the team sued. Though the plaintiffs had contractually authorized the Mets to sell their images, the Mets never licensed this shirt. Notably, the defendant argued that the quality of each player's individual portrait on the team picture was so poor that the separate players' rights were not violated. The court held that the plaintiffs' right to commercially exploit their own images inhered in their status as members of the World Series winning team, whether as individuals alone, or collectively as members of the team that won. Good quality individual portraits or not, one could see by just looking that these were The Amazins, and thus a cause of action would lie for each one of them. The defendant had violated the statute.

This case is instructive as to the NCAA case. The NCAA defendants may argue that the separate players' images are not precise portraits. However, if the video game teams as a group look like the real team group portraits, then their collective use arguably exploits their status as members of a unique, commercially valuable "club" of NCAA players. Thus, in the NCAA case, minor dissimilarities between the video game players and the actual players they resemble would not shield the defendants in New York. If the video teams' images as a whole match the actual NCAA teams, that whole may exceed the sum of its parts.

A Depiction May Not Be a Likeness: Close, but No Nebbish?

The finder of fact could potentially conclude that dissimilarities between the features of imaginary players compared to the real ones become so numerous or substantive that the privacy claim would fail. The proof will of course be in looking at the video game images and comparing them with photos of the players. While the courts have indicated that recreating a celebrity's likeness is as much an appropriation of that image as an actual photograph, a possible defense in the NCAA players' case is suggested by this question: How close does the image have to look to the real thing to violate the privacy statute? If it moves far away enough from a replication of the actual subject, it may escape liability in New York. In *Allen v. National Video, Inc.*,[10] Woody Allen sued his look-alike and the advertiser using the look-alike's image. The look-alike posed in a print ad for a video club, wearing horn-rimmed glasses, leaning on a counter covered with Woody Allen films. The defendants admitted that they were evoking the plaintiff's persona, but argued they should not be liable because they did not imply that the advertisement depicted the plaintiff himself. The look-alike in the photo strongly suggested Woody Allen, but did not depict his features precisely. The look-alike did not look that alike. He might have been a Woody Allen emulator, more than a look-alike.

In deciding the plaintiff's summary judgment motion, the court noted the right of privacy created by Sections 50 and 51 of the Civil Rights Law, and held that a recognizable likeness, not just an actual photograph, constitutes a "portrait or picture." The court held that there was no question that such a rendering would be an appropriation of another's likeness for commercial purposes, giving rise to a cause of action not only under the Civil Rights Law, but also under the Lanham Act.[11] The Lanham Act would be violated if the use of the image might falsely imply the celebrity's personal endorsement of the product. However, for purposes of the New York privacy statute cause of action, the court also held that if the image contained enough dissimilarities from the plaintiff's current appearance, the jury would have to decide whether or not it was an appropriation of his likeness. If it was not, then the privacy act claim would fall. However, the court held that the Lanham Act claim would therefore suffice for the plaintiff's purposes under these facts, and the application of the New York Privacy Act was not needed for him to seek a remedy.[12] Thus, it may be a jury question as to whether the NCAA players' images in the video game look enough like them to warrant a Privacy Act suit.

A Colorful Character Is Not a Likeness

Moving further down the spectrum, a mere suggestion of a person without a resemblance will not create a cause of action. Simply suggesting the players' personas will not create liability. Rather, there must be some copying of their features. This is what New York's "Naked Cowboy" learned in *Burck v. Mars, Inc*.[13] Burck, the now nationally known "Naked Cowboy," was a street performer working in and around Times Square, in New York City. He wore only his underwear, boots, and a cowboy hat. He carried a guitar. In this case, M & Ms (Mars) advertised with an animated cartoon picture of an underwear, cowboy boot, glove and Stetson-wearing candy character portrayed on Times Square "video billboards." This round candy man practically stared down at the original Naked Cowboy in his own haunt. There was an obvious commercial purpose, and Burke did not consent to the depiction. However, the court held that the costumed M & M was not his likeness. The defendant only copied a character he had created. Thus, there was no liability under the Civil Rights Act.[14]

The NCAA Case

Keller v. Electronic Arts, Inc., National Collegiate Athletics Association and Collegiate Licensing Company,[15] is a pending class action suit by NCAA players against the NCAA and its video game licensees. The defendant Electronic Arts produces the NCAA Football, Basketball and March Madness franchises. The complaint alleges that video game titles within these franchises simulate basketball and football matches between NCAA member schools. It claims that Electronic Arts replicates team logos, uniforms, mascots, and even member school stadiums with almost photographic realism. Most pertinently, it alleges "blatant misappropriation" of player likenesses. It is claimed that each team is replicated, and every real life player has an animated counterpart. One by one, the complaint names the players and lists the similarities to the video game counterpart, including the same jersey number, height, weight, build, home state, skin tone and hair color. Photographic comparisons are built into the body of the complaint. Each NCAA video game player's photo stands side by side with a photo of the particular player it allegedly depicts. One enhancement of the game allegedly enables the user to switch the fictional players' names for the real ones, thus allegedly ending any veiled pretence that the characters are truly fictional.

The complaint further alleges that the NCAA bylaw 12.5 prohibits the commercial licensing of NCAA players' names, pictures or likenesses. It avers that NCAA athletes and NCAA member institutions, through Collegiate Licensing Company, contractually agree to prohibitions on the commercial use of the players' likenesses.

The complaint seeks the following remedies:

- Compensatory damages,
- Statutory damages,
- Punitive damages,
- Disgorgement of profits, and
- Equitable and injunctive relief.

Based upon the foregoing, the first question for the finder of fact will be whether the college players' likenesses were copied. If the figures in the game are determined to be mere caricatures, they likely would be found not to be an appropriation of the students' likenesses under New York law. If, on the other hand, they appear to be sophisticated computer generated portraits, then they will be found to be copies of their likenesses. The complaint[16] shows copies of the electronic game figures, compared with photos of the real students in uniform. They do appear quite similar. The likely finding would therefore be that they are copies of the students' likenesses. For the New York jury in this case, a picture will be worth a thousand words.

Art vs. Commerce

If the two required elements of the Act are proved, namely that the game figures are copies of the students' likenesses, and that they were made without their consent, there is another substantive defense: free expression. The defendants in the NCAA case do assert a First Amendment right to report what is newsworthy, and to artistic free expression.[17]

The "newsworthiness" defense would not likely stand in New York. NCAA sports are news, but is this video game really part of news dissemination? Exploitation of these images might be protected under the First Amendment if they are sold in "reasonable connection" to a "matter of public interest." However, to be privileged, such "speech" must be legitimately part of information dissemination, and "may not be a mere disguised commercialization of a person's personality."[18] One can think of many more straightforward ways for the NCAA to familiarize the public with its players and teams than through the sale of a video game. It will be difficult for the NCAA defendants to argue that their primary purpose is news dissemination, and not commercialization.

On the other hand, does the game get First Amendment protection as art? The New York courts have exempted some uses of persons' likenesses from Privacy Act penalty, on the ground that they are First Amendment-protected artistic expression. While California, where the NCAA case is pending, grants protection to what it terms "transformative" art, New York has not expressly adopted this construct. Transformative art is art that takes a person's image as its starting point, but "transforms" that image into the artist's original creation.[19] New York, on the other hand, has adopted a different standard for the "art" exception, though not articulated by the courts with precision. The "transformative art" concept, though not adopted, is implied by the New York courts' recognition of the First Amendment right to artistic expression. The First Amendment of course trumps any state's statute. If the "art" containing a portrait without consent is a very limited edition and is the expression of an artistic vision, New York tends to allow it. It appears that for the New

York courts, limited edition art may have the hand-crafted feel of a non-mass market product. This seems to give it a certain artistic integrity worthy of protection. The courts seem to be implicitly making a policy decision to encourage non-mass market artists as a rare breed, for which the First Amendment was intended. Further, the limited distribution of such hand crafted work implicitly suggests that the potential harm to the person depicted is *de minimus*.[20] A mass market video game would not fall into this New York exception. In New York, liability would likely be imposed.

Damages

As any trial lawyer will tell you, damage awards rest as much on jury identification with one client versus another, as with logic. If the case is tried, each side will battle for the hearts and minds of the jury, and the right to frame the issues in their minds. Underpinning this case is an essential emotional question that will demand the best advocacy skills of both sides: Are the NCAA players the exploited servants of a highly profitable business where they do the grunt work and everyone else profits? Has their time come for fair treatment, and is this the case to do it? Or, is the NCAA an institution which gives college players the chance of a lifetime to reach national fame and wax rich as pro players after a few years of dues paying and a draft pick? Is commercialism the price we all must pay to keep college sports regulated and relatively clean from scandal?

If successful on liability, the plaintiffs may be entitled to recover the fair market value of the use of their faces, names and reputations,[21] and if they can show that the defendants knowingly used their faces or likenesses, the plaintiffs will be entitled to punitive damages in New York.[22] However, as the NCAA defendants argue in their motions to dismiss the complaint, how can amateurs with no endorsements claim any value to their likenesses? The plaintiffs respond in opposition that the defendants themselves supply the answer: How much money are the defendants making from this game, and what value are they themselves placing on the ability to use these likenesses? On the other hand, the defendants argue, if the athletes all agreed by contract not to profit from their college sports activities, how can they now recover the profits others have made from just these activities? The plaintiffs' response to this is an unjust enrichment claim in the complaint. However, opposing that part of the defendants' motions to dismiss that highlight the players' contract promise not to profit, the plaintiffs have cited little authority. They seem to beg the question by arguing that the contract is with NCAA only, but not the codefendants.[23] Yet a profit is a profit, no matter who pays it.

The student plaintiffs might be able to recover compensatory and/or punitive damages,[24] but if their NCAA contract is held to bar them from reaping profits in the form of monetary damages, they may be limited to merely injunctive relief. In such an ironic twist, the players would win a moral victory alone but no cash, while the defendants' lucrative commercial activity would cease. The fans would be disappointed, too, because they would lose what by all reports is a good game. In blunt terms, everybody loses.

Settlement, anyone?

Endnotes

1. NYS Civil Rights Law Sec. 50 Right of Privacy.
2. NYS Civil Rights Law Sec. 51 Action for injunction and for damages.
3. *Davis v. High Society Magazine, Inc.*, 90 AD 2d 374, 457 NYS 2d 308 (2d Dep't 1982), citing *Robertson v. Rochester Folding Box Co.*, 171 NY 538, 64 NE 442 and *Arrington v. New York Times Co.*, 55 NY 2d 433, 449 NYS 2d 941, 434 NE 2d 1319.
4. *Ali v. Playgirl*, 447 Fed. Supp. 723 (1978).
5. *Id.*
6. *Davis v. High Society Magazine, Inc.*, 90 AD 2d 374, 457 NYS 2d 308 (2d Dep't 1982).
7. *Davis v. High Society Magazine, Inc., supra.*
8. *Onassis v. Christian Dior N.Y., Inc.*, 122 Misc. 2d 603, 472 NYS 2d 254 (N.Y. Co. 1983).
9. *Shamsky v. Garan, Inc.*, 167 Misc. 2d 149, 632 NYS 2d 632 (1995).
10. *Allen v. National Video, Inc.*, 610 F. Supp 612 (S.D.N.Y. 1985).
11. 15 USCA 1125 (a).
12. *Allen v. National Video, Inc.*, 610 F. Supp 612 (S.D.N.Y. 1985).
13. *Burck v. Mars, Inc.*, 571 Supp. 2d 446 (S.D.N.Y 2008).
14. *Id.*
15. *Keller v. Electronic Arts, Inc., National Collegiate Athletics Association and Collegiate Licensing Company,* U.S. District Court, Northern Dist. Cal., Ind. No. CV09-1967.
16. *Id.*
17. *Hoepker v. Kruger*, 200 F. Supp 340 (S.D.N.Y. 2002).
18. *Barrows v. Rozansky*, 111 A.D. 2d 489 NYS 2d 105, 108, 481, 485 (1st Dep't 1985), citing *Gautier v. Pro Football*, 304 NY 354, 359, 107 NE 2d 485.
19. *Comedy II Publications, Inc. v. Gary Saederup, Inc.*, 25 Cal 4th 387 (2001).
20. *Nussenweig v. Dicorcia*, 11 Misc. 3rd 814, NYS 2d 891 (N.Y. Co. 2006), *Siemonov v. Tiegs*, 159 Misc. 2d 54, 602 NYS 2d 1014 (N.Y.C. Civ. Ct. 1993).
21. NYS Civil Rights Law Sec. 51 Action for injunction and for damages. *Grant v. Esquire,* Inc., 367 F. Supp. 876 (D.C.N.Y. 1973).
22. NYS Civil Rights Law Sec. 51 Action for injunction and for damages. *Hernandez v. Wyeth Ayesrst Laboratories*, 291 A.D. 2d 66, 738 NYS 2d 336 (1st Dep't 2002).
23. *Keller v. Electronic Arts, Inc., National Collegiate Athletics Association and Collegiate Licensing Company,* U.S. District Court, Northern Dist. Cal., Ind. No. CV09-1967.
24. NYS Civil Rights Law Sec. 51 Action for injunction and for damages.

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The Rich Keep Getting Richer and the Poor, Poorer… *in the Bowl Championship Series*

By Joseph M. Hanna and Matthew V. Bruno

In the current economic climate, the financial well-being of colleges and universities that do not participate in the Bowl Championship Series (BCS) is likely not a primary concern for most Americans. Yet for collegiate football enthusiasts, many universities, Congress, and even President Obama,[1] the issue of whether nearly half of all collegiate football teams are left at a competitive disadvantage when it comes to qualifying for millions of dollars paid out every year, is generating heated debate. In fact, fans and politicians alike even argue that the current BCS system violates federal antitrust laws. This article examines the latter claim.

Collegiate Football and the Antitrust Laws

Any discussion dealing with the issue of whether the current BCS system violates federal antitrust laws must invariably start with an analysis the Sherman Antitrust Act (Sherman Act)[2] and its companion legislation, the Clayton Act of 1914 (Clayton Act). The text of the Sherman Act provides that "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States…is declared to be illegal."[3] It also holds that "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States…shall be deemed guilty[…]."[4]

The Clayton Act extended the right to sue under the antitrust laws to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws."[5] The purpose of the Sherman Act is to prevent or suppress practices that create monopolies or restrain trade[6] and seeks to prohibit conduct that unfairly tends to destroy economic competition.[7]

As a practical matter, any plaintiff bringing suit under the Sherman Act must not only argue that the scope of the Sherman Act will apply, but also that it has standing to bring suit.[8] In effect, the aggrieved party must prove that the restraint of trade affects interstate commerce. In *Standard Oil Co. v. United States*, the Supreme Court determined that the language of § 1 of the Sherman Act was not intended to bar *all contracts* that restrain trade, but was instead designed only to bar those contracts that illustrated restraints of trade deemed "unreasonable."[9] Section 2 of the Sherman Act seeks to prevent monopolization, attempts and conspiracies to monopolize the market.[10] In *United States v. E.I. du Pont de Nemours & Co.*, the Supreme Court defined monopoly power as the power to control prices or exclude competition.[11]

Once it is determined that standing exists, courts will analyze a potential antitrust claim based on one of three levels of review: "*per se*," "quick look," or "rule of reason."[12] *Per se* analysis is used for restraints that have "such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit, that they are deemed unlawful '*per se.*'"[13]

Alternatively, the rule of reason analysis is the standard most commonly used by courts when analyzing the antitrust implications of amateur athletics.[14] Under this test, as outlined in the Supreme Court case of *NCAA v. Board of Regents of the Univ. of Okla*.,[15] the Court held that "it would be inappropriate to apply a *per se* rule" for collegiate athletics[16] and instead relied on the rule of reason analysis.

The rule of reason uses a three-prong test, which incorporates a burden shifting analysis.[17] First, a plaintiff must show that the alleged restraint creates actual "anticompetitive effects."[18] Evidence of these effects includes higher than competitive prices, lower than competitive quality or quantity of goods (or product),[19] or both. After a plaintiff has made his or her *prima facie* case, the burden shifts to the defendant to show that the anticompetitive effects create pro-competitive benefits.[20] If the defendant can prove pro-competitive benefits, the burden shifts back to the plaintiff to show that the benefits could not be obtained through a less restrictive means.[21] Finally, the court will determine whether the pro-competitive aspects of the conduct justify the anticompetitive effects.[22] Before the rule of reason test is applied to the current BCS scheme, an overview of the BCS's history is necessary.

The Evolution of Disparity

While the BCS officially began in 1998, bowl games had already been played for over a century. In 1894, for example, the University of Notre Dame played the University of Chicago.[23] Eight years after Chicago beat Notre Dame 8-0, Michigan and Stanford played each other in the Rose Bowl.[24] As the economic benefits of bowl games were realized by local officials and universities, additional games were organized.[25] Since the 1930s, the number of bowl games has increased to 28,[26] allowing 56 Division I-A schools the opportunity to participate in post-season play. To ensure that the champions of certain conferences would experience increased post-season play, several conferences developed relationships with specific bowls.[27]

The first of these involved the Big Ten Conference and the Rose Bowl.[28] Beginning after the 1946 season, the Big Ten sent its conference champion to Pasadena every January 1st to play against the Pacific-10 conference (PAC-10) champion.[29] Similar relationships developed over the years between other conferences and other bowl games.[30] With the growth of these relationships, it became increasingly difficult to match champions from each of these conferences in bowl games.[31] As a result, the top two teams each year met only occasionally, and when they did, it was by happenstance.[32]

Consequently, a system of voting by members of the football community was developed to determine a "national" Division I-A collegiate football champion. This system of polling is not without controversy[33] and highlights the unconventional way in which Division I-A collegiate football postseason play is organized. For instance, "March Madness," collegiate basketball's post season championship series, allows for relatively fair and open competition among different Division I-A schools while the BCS, it is argued, essentially predetermines its Elite Eight and Final Four.[34]

Over the years, despite several attempts to organize a national championship system in college football, Division I-A universities have failed to adopt any such proposal.[35] In fact, as late as 1994, a special committee selected to study whether a collegiate football championship system was possible, decided not to recommend any legislation to the NCAA President's Commission.[36]

In an attempt to reconcile the opponents of a traditional playoff scheme[37] and to attempt to give collegiate football fans a national championship game, the BCS was formed. This was not the first time that attempts were made to allow the bowl game structure to pair top teams for a national championship team—the Bowl Coalition and Bowl Alliance previously tried to accomplish this during the 1990s without success.

The Cotton, Fiesta, Orange and Sugar Bowls and their affiliated conferences[38] formed the Bowl Coalition with the intention of pairing conference champions against one another and to match other highly regarded teams.[39] However, the Bowl Coalition did not abolish the traditional relationships between certain bowls and certain conferences, therefore creating several flaws.[40] For example, the Big Eight champion continued to play in the Orange Bowl, the Southwest Conference champion continued to play in the Cotton Bowl, and the Southeastern Conference (SEC) champion continued to play in the Sugar Bowl, effectively preventing two top-ranked teams in each conference from playing each other.[41] In addition, the Bowl Coalition consisted of only four conferences and the University of Notre Dame, preventing the possibility of match-ups between all Division I-A conference champions.[42]

Subsequently, the Bowl Alliance formed in 1995 as an agreement between the Fiesta, Orange, and Sugar Bowls with the Atlantic Coast Conference (ACC), Big East, Big 12 and SEC conferences, attempting to pair conference champions. In fact, the Bowl Alliance did allow for Nebraska and Florida (the two top teams ranked first and second, respectively) to play for a national title in the Fiesta Bowl.[43] This result was short-lived, however, because over the course of the next few years, several schools were excluded from receiving an invitation to any bowl game, despite a better regular season record than schools who received an automatic bowl bid. For example, in 1996, Brigham Young University (BYU) failed to receive a bid to the Fiesta, Orange, or Sugar bowls despite having a regular season record of 13 wins and one loss. In addition, Wyoming failed to receive an invitation to any bowl despite out-ranking the University of Texas, which received an automatic Fiesta Bowl bid. Moreover, certain conferences refused to send their teams to certain bowls and other schools were simply excluded altogether.[44] In 1997, the Bowl Alliance was dissolved and the latest incarnation in the attempt to name an undisputed national collegiate Division I-A football champion was born: *The Bowl Championship Series*.

The BCS consists of four bowl games[45] that rotate annually as the host venue of the BCS Championship game.[46] The University of Notre Dame and the member universities of six conferences comprise the BCS.[47] The BCS standings are currently composed using the Harris,[48] Coaches[49] and computer ranking systems.[50] Under the Harris Interactive College Football Poll, a team's score will be divided by 2,850, which is the maximum number of points any team can receive if all 114 voting members rank the same team as Number One.[51] A team's score in the USA Today Coaches Poll will be divided by 1,500, which is the maximum number of points any team can receive if all 60 voting members rank the same team as Number One.[52] Finally, in the computer ranking system, points are assigned in inverse order of ranking from one to 25. A team's highest and lowest computer ranking will be discarded in calculating its computer rankings average. The four remaining computer scores will be averaged and the total will be calculated as a percentage of 100.[53]

Under the current system, six of the eight slots in the BCS bowl games are reserved for the winners in each respective BCS conference.[54] As a result, the winners in each conference are guaranteed berths. While teams in the non-BCS conferences are not precluded from playing in the BCS Championship game, it is much more difficult for them to obtain a coveted spot. For instance, from 2008 until the 2013 regular season, the champions of the ACC, Big East, Big Ten, Big 12, Pac-10 and SEC conferences will have automatic berths in one of the participating bowls. The champion of Conference USA, the Mid-American Conference, the Mountain West Conference, the Sun Belt Conference or the Western Athletic Conference will earn an automatic berth in a BCS bowl game if either: (a) such team is ranked in the top 12 of the final BCS standings, or (b) such team is ranked in the top 16 of the final BCS standings *and* its ranking in the final BCS standings is higher than that of a champion of a conference that has an annual automatic berth in one of the BCS bowls. In addition to the automatic berths, any Division I-A school can technically receive a spot in a BCS bowl game if it has won at least nine regular season games and is ranked among the top 14 teams in the final BCS standings.[55] On its face, this system appears to favor BCS schools; in its application, the system supports this assumption.

Take for example, BYU and Marshall in 2001, and Miami of Ohio, Boise State, and Texas Christian University in 2003. In 2001, BYU had a 12-1 regular season record and a better win-loss percentage than nearly all of the top 10 ranked BCS teams.[56] Marshall University had a record of 11 wins and two losses in 2001 and 2002.[57] However, both Marshall and BYU were excluded from participating in a major bowl game because they were not members of the BCS and were not ranked in the top six in the final BCS standings.[58] Recently, the University of Utah Utes were left out of the BCS championship game for the second time in five years, despite going undefeated during their regular season.[59] Recently, Senator Orrin Hatch of Utah, the top Republican on the Senate Judiciary's Committee on Antitrust, Competition Policy and Consumer Rights, pushed for hearings on the antitrust effects of the BCS and vowed to "rectify the situation" with legislation.[60]

Of course, just because the current BCS bowl system is unfair does not necessarily mean that it violates federal antitrust law. There is much evidence to support the conclusion, however, that economic competition between BCS and non-BCS schools is restrained, if not completely stymied under the current regime.

The Anti- and Pro-Competitive Effects of the BCS

In its current form, the BCS system substantially reduces competition among BCS schools at the expense of non-BCS schools.[61] First, non-BCS schools suffer when they do not receive the exposure that BCS conference teams receive under the current system. Consistently, recruiting suffers at non-BCS schools, as there is unequal opportunity for participation in the BCS.[62] Second, as BCS conference teams earn guaranteed exposure, they are able to attract higher caliber athletes who seek the automatic exposure of a high profile BCS bowl game.[63] Athletes may decide not to attend a non-BCS school based purely on the fact that the school will not be eligible for BCS bowls.

In addition, the BCS creates financial injury to non-BCS schools. Anyone who has ever watched the Tostitos-sponsored "Fiesta Bowl" or the FedEx-sponsored BCS National Championship can attest to the fact that college football is inextricably linked to commerce.[64] Modern amateur football has many aspects that commercialize the non-profit aspects of the game, and more specifically interstate commerce, as players, teams, and fans move from state to state in order to participate in the different bowl games and support their favorite teams. Revenue from bowl games can produce millions of dollars for universities each year.[65]

The financial spoils are not split evenly between BCS and non-BCS schools. In fact, in its limited existence, the BCS has helped distribute nearly half a billion dollars to its member institutions.[66] Under the BCS, about $9.5 million is distributed among Conference USA, the Mid-American, Mountain West, Sun Belt and Western Athletic Conferences for making their teams available to play in BCS games.[67] If a school receives an at-large invitation to play in a BCS bowl or championship game, its conference receives an additional nine percent of BCS revenue to share, which comes from television rights and the bowls.[68] By contrast, the share to each BCS conference is automatically about $18 million each, and when a second team from one of the conferences qualifies, the conference receives an additional $4.5 million.[69]

With this extra money, BCS schools are able to provide better facilities, can afford to purchase better equipment, and can attract better coaches.[70] Moreover, non-BCS schools often *lose* money by attending non-BCS bowl games, as the money they receive through conference sharing rarely covers the costs of participation in the non-BCS games.[71]

The main product derived from Division I-A collegiate football is the National Championship Game, and to a lesser extent, the regular football season. Under the current BCS regime, the quality of both products is lowered as the financial disparity between BCS and non-BCS schools continues. On a fundamental level, as collegiate football programs are forced to lose money, a self-fulfilling prophecy emerges when teams with less money to spend are deemed "worse" teams that cannot attract the best athletes and coaches. Moreover, the product of the regular season is undermined in terms of its overall quality as fans and players realize from before the very first kickoff that the odds of appearing at a prestigious BCS Bowl game are stacked against them. Fewer potential fans mean fewer ticket sales which, in turn, could mean the loss of football programs altogether.[72]

Clearly, the major product produced as a result of the BCS system is the national title game. This game produces the Division I-A National Champion which represents the best football program in the United States. Any argument that non-BCS conferences are free to establish their own "national champion" is without merit and unconvincing.[73] Of course, the current BCS system does not prevent the non-BCS schools from creating their own bowl champion, but in effect, the BCS holds the exclusive rights to crown a true "national champion."[74] Any attempt to name a national champion outside the current BCS system (and through a different championship game) would belie the idea that one true national champion exists. Moreover, acceptance by the NCAA, the national media, and most importantly, the fans, would be difficult if not impossible.[75]

House member Joe Barton of Texas, the top Republican on the Energy and Commerce Committee, has taken this sentiment to the logical next step, and sponsored legislation that would prevent the NCAA from calling a football game a "national championship" unless the game culminates from a playoff system.[76] In the same vein, Representative Gregory Miller of California has introduced legislation to "prohibit the receipt of Federal funds by any institution of higher education that participates in the NCAA Division I Football Subdivision, unless the national championship game of such Subdivision is the culmination of a playoff system."[77]

Finally, the argument that BCS teams are not legally obligated to "share" with non-BCS universities is flawed.[78] While it is obvious that the BCS does not have to give non-BCS universities equal access to the fortunes made in sponsorships, contracts, and ticket sales, it must allow non-BCS the unfettered opportunity to *freely* compete without any barriers,[79] which it currently does not.

There are clearly sufficient anticompetitive effects to cause the burden to shift to the BCS to argue the pro-competitive effects. The pro-competitive arguments include, *inter alia*, that *any* national champion is better than no national champion (which would decrease interest and revenues for BCS and non-BCS alike),[80] and that the National Championship, in addition to the other BCS bowls, provide consumers (the fans) of collegiate football with a product not otherwise available through other bowl formats.[81] Assuming that the strength of this argument is sufficient enough to once again shift the burden to the plaintiff, less restrictive alternatives are available without losing fan interest or revenue.

A Less Restrictive Means

The most realistic and practical way to ensure that the ability of all Division I-A collegiate football squads to compete is not controlled or diminished is to create an entirely new system that reduces the anticompetitive restrictions caused by the BCS.

The first step would be to create a modified regular season and eliminate the current tripartite ranking system.[82] The new regular season would run from the last weekend in August through the last weekend in November, with a maximum of 11 games per school, including conference championship games. On the final Sunday in November, an NCAA selection committee would meet to organize 24 teams for post-season play, just as is done for the NCAA basketball tournament in March. The 11 Division I-A conference champions will receive automatic berths to a champion game and the selection committee will choose 13 at-large teams and will seed them in a single-elimination bracket. The top eight seeds will receive first-round byes and the next eight seeds must play in the first round but get home games. The only rule for bracketing would be to avoid conference match-ups in the first two rounds.

For travel, ticketing and academic purposes, a week could be added between the end of the regular season and the start of the tournament. Teams with first-round byes would have three weeks to prepare for their games and sell tickets. That also gives players more time to study for final exams, which generally fall in the first half of December at most schools.

The quarterfinals, semifinals and final would all be played at neutral sites and the current BCS bowls would be in the mix, along with the other non-BCS bowls. The venues could rotate hosting the various rounds, getting the championship game once every seven years. Games would be played on Friday nights and Saturdays in the first four rounds and the championship game would be in January.[83]

One of the arguments against a playoff system, particularly one defined by a 13-team tournament, is that it would extend the season too long. The system outlined above eliminates this concern, as the most any team could play under this system is 16 games; 11 games in the regular season and five in the playoffs if it did not get a first-round bye.

While it would be difficult to determine what revenue a collegiate football playoff system could generate, it could very well be significantly more than under the current system.[84] For instance, in the playoff system, not only would fans be concerned with their particular team's records, but fans would be interested in the games of each team that their team played. As a result, this would lead to higher television viewership and potentially more ticket sales throughout the season, which would in turn increase revenues for advertisers.

Half of the revenue could be divided among all Division I-A schools. The other half could be distributed based on how far a conference's teams progress in the tournament.[85] Universities and advertisers would undoubtedly benefit, but the biggest winners of all, of course, would be collegiate football fans.

Conclusion

The BCS generates revenue for participating schools at a level that is unmatched in the history of collegiate sports. Even teams that never play in a BCS game are able to reap the financial benefits simply by virtue of their membership in one of the six original BCS conferences. While the BCS claims to represent all of college football, the current system leaves nearly half of all the teams in college football at a competitive disadvantage when it comes to qualifying for the millions of dollars paid out every year.

At present, it is still unclear as to how the courts would rule on an antitrust challenge to the current BCS system. Nevertheless with the surge of press releases, legislative proposals and hearings, and fan commentary, there is no doubt that the system currently in place will not be tolerated much longer. Importantly, the non-BCS schools have a strong and convincing argument that the current system is not only inherently unfair, but that it violates federal antitrust law.

Endnotes

1. In an interview on the television show *60 Minutes* in November of 2008, then President-elect Barack Obama gave his own take on the current BCS scheme, noting: "If you've got a bunch of teams who play throughout the season and many of them have one loss or two losses, there's no clear, decisive winner…we should be creating a playoff system." http://www.washingtontimes.com/news/2008/nov/18/obamas-options-on-bcs-limited (last visited February 22, 2009).
2. *See* 15 U.S.C. §§ 1-7 (2000).
3. *Id*. at § 1.
4. *Id*. at § 2.
5. *Id*.
6. *See United States v. U.S. Steel Corp.*, 251 U.S. 417, 463 (1920) (Day, J., dissenting).
7. 54 Am. Jur. 2D Monopolies and Restraints of Trade § 1. Its reference to trusts today is an anachronism. At the time of its passage, the trust was synonymous with monopolistic practice, because the trust was a popular way for monopolists to hold their businesses, and a way for cartel participants to create enforceable agreements (*See* Letwin, W. L. (1956) *Congress and the Sherman Antitrust Law*: 1887-1890, 23 U.Chi.L.Rev 221).
8. Non-BCS schools and individual universities would likely have standing, as this group could easily argue that its ability to conduct business as a school/university is hindered when it receives less financial gain as compared to BCS schools. *See also Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series*: Hearing Before the House Comm. on the Judiciary, 108th Cong. 17 (2003) (testimony of Scott S. Cowen, President, Tulane University, and Chairman, Presidential Coalition for Athletics Reform) [hereinafter *Cowen Statement*].
9. 221 U.S. 1 (1911) emphasis added (Harlan, J. concurring and dissenting).
10. 15 U.S.C. § 2. *See also* Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* § 2.1 2d ed. (1999).
11. 351 U.S. 377, 391 (1956).
12. Lafcadio Darling, *The College Bowl Alliance and the Sherman Act*, 21 Hastings Comm. & Ent. L.J. 433, 437 (1999) [hereinafter *Darling*].
13. See *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997). The Supreme Court usually applies this approach for instances so obvious on their face including price-fixing, group boycotts, and division of markets (See *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207). The "quick look" analysis will not be explored in this article as this intermediate level of scrutiny is used where "the adverse impact of a restraint…is obvious on its face, but the *per se* prohibition is deemed inappropriate" (*See United States v. Brown Univ*., 5 F.3d 658, 669 (3d Cir. 1993)).
14. *See* Kristin R. Muenzen, Comment, *Weakening Its Own Defense? The NCAA's Version of Amateurism*, 13 Marq. Sports L. Rev. 257, 262 (2003).
15. 468 U.S. 85, 109 (1984) [hereinafter *Board of Regents*].
16. *Id*. at 100.
17. *See United States v. Brown Univ*., 5 F. 3d 658, 668 (3rd Circuit).
18. *See Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998). *See also N. Pac. Ry. Co. v. United States*, 356 U.S. 1,8 (1958). *See also Board of Regents*, *supra*, note 15.
19. *See* K. Todd Wallace, *Elite Domination of College Football: An Analysis of the Antitrust Implications of the Bowl Alliance*, 6 Sports Law J. (1999) [herein after *Wallace*].
20. *Id*.
21. *See Darling*, *supra*, note 12.
22. *See Law v. NCAA*, *supra*, note 18.
23. *See* Robert Ours, *College Football Encyclopedia: The Authoritative Guide to 124 Years of College Football* 243 (1994). *See also Antitrust Implications of the College Bowl Alliance*: *Hearing Before the Subcomm. on Antitrust, Business Rights and Competition, S*. Comm. on *the Judiciary*, 105th Cong. 41 (1997) (Statement of Roy F. Kramer Commissioner of the Southwestern Conference, 1997 WL 105721125).
24. *Id*.
25. *See* Jodi M. Warmbrod, *Antitrust in Amateur Athletics: Fourth and Long: Why Non-BCS Universities Should Punt Rather Than Go for an Anti-Trust Challenge to the Bowl Championship Series*, 57 Oklahoma L.R. 336 [hereinafter *Warmbrod*].
26. *See Bowl Championship Series: Bowl Background*, http://www.bcsfootball.org/bcsfb/background (last visited February 28, 2009).
27. *See Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series*: *Hearing Before the House Comm. on the Judiciary*, 108th Cong. 10 (2003) (testimony of Jim Delany, Commissioner, Big Ten Conference) [hereinafter *Delany House Statement*].
28. *Id*.
29. *Id*. The Pacific-10 is also commonly referred to as the "Pac 10."
30. *Id*. Commissioner Delany noted, for example, that the Southeastern Conference has a long relationship with the Sugar Bowl. In addition, the Big 12 Conference (once known as the Big Eight Conference), for many years had a close relationship with the Orange Bowl in Miami and sent its champion there every year. The former Southwest Conference for many years sent its champion to the Cotton Bowl in Dallas. The Atlantic Coast Conference developed a close relationship with the Citrus Bowl in Orlando in the 1980s and sent its champion to that game until the early 1990s. Even the Big East Football Conference, which was created in the early 1990s, had a lucrative offer from what was then known as the Blockbuster Bowl to send its champion to that game each year.
31. *Id*.
32. *Id*. Commissioner Delany noted that, under the bowl system as it existed in the early 1990s, there was very little chance that the national championship would be decided on the field.
33. *See* Wallace, *supra*, note 19 (noting that polls, rather than on-field result determine the National Championship).
34. *See Antitrust Implications of the College Bowl Alliance: Hearing Before the Subcomm. On Antitrust, Business Rights* and Competition, S. *Comm. on the Judiciary*, 105th Cong. 9-10 (1997) (statement of Senator Mitch McConnell).
35. *See Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series*: *Hearing Before the House Comm. on the Judiciary*, 108th Cong. 10 (2003) (testimony of Jim Myles Brand, NCAA President).
36. *Id*.
37. Opponents of a traditional playoff system argue, *inter alia*, that the number of student-athletes would be reduced in a 16-team playoff system, it would interfere with student athletes' academic studies and examinations, and it would harm the communities hosting the bowl games. *See BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series on and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Harvey S. Perlman, Chancellor, University of Nebraska-Lincoln).
38. The Bowl Conference consisted of the ACC, Big East, Big 12, SEC and Notre Dame.
39. *See Delany House Statement*, *supra*, note 27.
40. *Id*.
41. *Id*.
42. *Id*.
43. *Id*.
44. *See Delany House Statement*, *supra*, note 27, at 13.
45. These include the Fiesta, Orange, Rose, and Sugar Bowls. There is also a fifth BCS National Championship Game played each year at one of the bowl sites. *See CollegeFootballPoll.com, BCS Explained*, http://www.collegefootballpoll.com/bcs_explained.html (last visited March 1, 2009).
46. *Id*.

47. *Id*. The conferences include the Atlantic Coast Conference, Big East, Big Ten, Big 12, Pac-10, and SEC. However, while there are other conferences and independent schools who can participate in BCS bowls, they do not receive automatic bids for their champions. These conferences include Conference USA, Mid-American Conference, Mountain West Conference, Sun Belt Conference, and Western Athletic Conference.

48. *Id*. For example: 2,850/2,850=1.0. If a team receives a total of 114 voting points, an average of 25th place, its BCS quotient of this component would be .04 (1.0/25).

49. *Id*. For example: 1,500/1,500 = 1.0. If a team receives a total of 60 voting points, an average of 25th place, its BCS quotient of this component would be .04 (1.0/25=0.04).

50. *See Bowl Championship Series, BCS Computer Rankings*, http://www.bcsfootball.org/bcsfb/rankings (last visited March 1, 2009). The current computer rankings are calculated by Jeff Sagarin, Anderson & Hester, Richard Billingsley, the Colley Matrix, Kenneth Massey and Dr. Peter Wolfe.

51. *Id*.

52. *Id*.

53. *Id*.

54. The champions of the ACC, Big East, Big Ten, Big 12, Pac-10 and SEC conferences have automatic berths in one of the participating bowls. *See CollegeFootballPoll.com*, *supra*, note 45.

55. *See Bowl Championship Series*, *supra*, note 50.

56. *See Cowen Statement*, *supra*, note 8.

57. *Id*.

58. *Id*.

59. *See Theeagle.com: Utah AG Says BCS May Violate Antitrust Laws*, http://www.theeagle.com/sports/Utah-AG-says-BCS-may-violate-antitrust-laws (last visited March 2, 2009) [hereinafter *The Eagle*].

60. *See ESPN.com: Congress to Probe BCS Antitrust Issues*, http://sports.espn.go.com/ncf/news/story?id=4015667 (last visited May 26, 2009) [hereinafter *Congress to Probe BCS Antitrust Issues*].

61. *See Wallace*, *supra*, note 19.

62. *See* Mark Hales, *The Antitrust Issues of NCAA College Football Within the Bowl Championship Series*, Sports Lawyers Journal (Spring 2003) [hereinafter *Hales*].

63. *Id*.

64. *See Hennessey v. NCAA*, 564 F.2d 1136, 1150 (5th Cir. 1977).

65. *BCS or Bust: Competitive and Economic Effects of the Bowl Championship Series On and Off the Field: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 67-68 (2003)(statement of Harvey S. Perlman, Chancellor, University of Nebraska-Lincoln). While Mr. Perlman stated that his University received $1.2 million each year from BCS distributions, he also noted that Nebraska-Lincoln earned double that in home game revenue.

66. *See Cowen Statement*, *supra*, note 8.

67. *See The Eagle*, *supra*, note 59.

68. *Id*. If more than only one school from those conferences make the BCS bowls or championship game, the conferences get an additional $4.5 million for each additional game.

69. *Id*. *See also ESPN.com: House Committee Quizzes Swofford*, http://sports.espn.go.com/ /ncf/news/story?id=4121294 (last visited May 26, 2009) [hereinafter *House Committee Quizes Swofford*].

70. *Competition in College Athletic Conferences and Antitrust Aspects of the Bowl Championship Series*: Hearing Before the House Comm. on the Judiciary, 108th Cong. 29 (2003) (testimony of Steve Young).

71. During the 2001 season, BYU participated in the Liberty Bowl in Tennessee. BYU was required to sell a certain number of tickets just to break even. It failed to sell the 571 tickets and owed nearly $100,000 to the Liberty Bowl just to play the game.

72. See *Hales*, *supra*, note 62, at 121-122. Hales takes this argument to its logical next step and contends that if Division I-A football programs lose revenue, the school's very financial well-being may be in jeopardy, as collegiate football accounts for two-thirds of schools' athletic revenues in the NCAA Division I-A (citing *Steve Weinberg, Questions Rise About Commissioners' Roles Chiefs of Six Major Conferences See as "De Facto Leaders' of NCAA*, USA Today, Nov. 1, 2000, at 8C). Although your authors do not necessarily believe that this scenario is probable, it is nonetheless a possible result.

73. *See Warmbrod*, *supra*, note 25 at 372.

74. *Id*. at 373, noting that in 2003, the A.P. named U.S.C. national champion and the Coaches Poll named the winner of the BCS title game, L.S.U., national champion.

75. *See Hales*, *supra*, note 62 at 122.

76. *See Congress to Probe BCS Antitrust Issues*, *supra*, note 60. *See also*, *College Football Playoff Act of 2009*, H.R. 390, 111th Cong. (2009).

77. See *Championship Fairness Act of 2009*, H.R. 599, 111th Cong. (2009).

78. *See Warmbrod*, *supra*, note 25, at 374, arguing that antitrust laws will not force the BCS to give the non-BCS complete access to the BCS arrangement (citing *Philip Areeda, Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 844 (1989).

79. The opportunity for an at-large invitation, for example, will not suffice.

80. However, *see Hales*, *supra*, note 62 at 122, noting that in 2002 BCS bowl games rating dropped 22% from the previous year and giving his explanation that ratings have decreased precisely because the two best teams in Division I-A football have not consistently been matched.

81. *See* Wallace, *supra*, note 19.

82. Although there are conceivably better ranking systems that can be explored to work in lieu of or in conjunction with a modified season, they will not be addressed here, as your authors think that any ranking system is inherently biased and easily corruptible. However, see Hales, *supra*, note 62 at 128, for an example of a modified ranking system.

83. Under this system, since there would be only one bowl game, no one team would be jockeying for exposure on New Year's Day, as there would be only one game.

84. CBS' eleven-year deal for the NCAA basketball tournament is worth $6 billion. *See College Basketball CBS Will Pay $6 Billion for Men's NCAA Tournament*, New York Times, November 19, 1999, http://query.nytimes.com/gst/fullpage.html?res=9A01E6D6173CF93AA25752C1A96F958260 (last visited March 3, 2009).

85. If the BCS conferences are as good as they often contend, they would still be able to take home most of the money and perhaps as much as they do under the current system.

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The New York State Legislature and EASL Legislation in 2009: The Stick with the Status Quo Year

By Bennett Liebman

The combination of a massive State deficit and a State Senate which found itself in deadlock for much of the legislative session helped to combine for a legislative session that produced few major actions on the entertainment, art, and sports law front. As a result, the status quo seemed to govern the actions of the State Legislature in 2009.

The status quo could be seen in the main piece of art and entertainment legislation that did emerge in 2009. This was the continuation of the Empire State film production tax credit in 2009.[1] The film production tax credit had been enacted originally in 2004,[2] and in 2008, it had been extended significantly to increase the New York State credit from 10 percent to 30 percent of qualified costs.[3] In 2009, the film industry was attempting to make sure that the 30 percent credit rate was made permanent[4] and that the credit be fully funded. The industry's position was bolstered significantly by a February 2009 Ernst and Young study which claimed that the 30 percent credit was responsible for the creation and/or retention of 19,512 jobs and that the State and New York City[5] return on investment from the credit was 1.90, meaning that for each dollar supplied as a credit by New York State and New York City yielded $1.90 in government revenue.[6] "Based on the estimated taxes and credits claimed from fiscal year 2005 through fiscal year 2010, tax collections exceed credits claimed by $2,000 million."[7]

Faced with a very popular program and a fiscal crisis, the legislature stuck with the status quo. It provided an additional $350 million in funding for the film credit in 2009. It also slowed the payment of the credit to much of the industry, so that most credits will be claimed over the course of two or three years.[8] It did not commit to fully funding the film tax credit, and it did not make the film production credit permanent. The Governor's Office of Motion Picture and Television Development is required to file quarterly reports on the film projects allocated a tax credit, the cost of the credits, and the anticipated employees and costs of each film project that has been allocated a credit.[9] Thus, the legislature kept the program going for a year while waiting to see whether the State's financial situation changes over the next fiscal year.

Scalping

The status quo also prevailed on the issue of scalpers. In 2007, the State had passed legislation that largely ended the restrictions in place governing the resale of tickets.[10] The deregulation of ticket resales was due to expire on June 1, 2009.[11] The legislature was required to take some action on this issue, or the pre-2007 law would come back into effect. The situation was further complicated by revelations that Ticketmaster (the largest seller of tickets in the world) had been downloading tickets to TicketsNow (a resale agent owned by Ticketmaster) for a Bruce Springsteen concert in New Jersey while face value tickets were still available.[12] This brought about a flurry of activity from legislators[13] and from the New Jersey Attorney General.[14] As a result, the legislature passed a bill basically extending the ticket resales deregulation law until May 15, 2010.[15] The substantive changes in the legislation are that the ticket seller must disclose whether the seat(s) to be sold have an obstructed view[16] and that a ticket operator's agent may not sell or convey tickets to a reseller that is owned or controlled by the operator's agent.[17] Additionally, the Secretary of State is required to issue a report by February 1, 2010 on the overall topic of the resale of tickets.[18]

Entertainment Issues Not Addressed

The main entertainment issue from 2008 that seemed certain to resurface in 2009 barely made an appearance. At the conclusion of the 2008 legislative session, an all-star assemblage of lobbyists appeared on the scene to debate the issue of whether New York State should enact "dead celebrities" legislation. This would prohibit the use for advertising purposes the name, voice, picture of deceased persons without having obtained the permission of such person's estate.[19] "Dead celebrities legislation was enacted in California in 2007,[20]and an attempt to pass similar legislation in 2008 in New York failed at the last minute. A reprise of the 2008 fight was expected in 2009, but never began. Dead celebrities legislation was introduced in the Senate by Member Schneiderman, but no action was taken on the bill. Dead celebrities legislation was not reintroduced in the Assembly by Member Weinstein in 2009, and in fact, no dead celebrities legislation was introduced in the Assembly in 2009.

Earlier in 2009, when it appeared that the Broadway theaters were anticipating a poor season, there was speculation that an argument would be made to advance a theater production tax credit based loosely on the film production credit. Broadway did not perform poorly in the first half of 2009, and no legislation was introduced to specifically help it. The one major Broadway victory in 2009 was a defeat of Governor Paterson's attempt in his budget to impose a sales tax on tickets. This sales tax proposal was quickly shelved after massive complaints about how it might threaten Broadway and tourism in New

York City.[21] Even on this issue, the status quo won. Given the financial questions involving the extension of the film production credit and the deadline in the law governing the resales of tickets, we should reasonably expect more legislation in the entertainment area in 2010.

Sports Legislation

It is fair to say that no sports legislation was enacted in 2009. The closest a bill came to an enactment was a measure that would have required the chairman of the three-member State Athletic Commission to be present in order for the body to have a quorum. That requirement was vetoed by Governor Paterson, who found that the chair could unilaterally prevent action by the Commission simply by choosing not to attend a meeting. In short, the bill would codify into the law an effective veto right for the chair.[22]

Other interesting bills involving sports simply did not get through either house of the legislature in 2009. Perhaps the most interesting of these bills was the measure to license and regulate mixed martial arts in New York State.[23] This bill made it through two committees in the Assembly before being stopped in the Assembly Ways and Means Committee.[24] Other sports bills that were not enacted in either house included those exempting white collar boxing from regulation,[25] limiting the use of metal bats,[26] imposing penalties for assaulting a sports official,[27] and bills on steroids and performance-enhancing substances.[28] There was even legislation which banned sporting events in New York that had been sponsored by organizations that had permitted or sanctioned discriminatory behavior based on race, religion, sexual orientation, ethnicity, citizenship or national origin.[29]

Horse Racing

It also was a somewhat slow year in the area of horse racing. The most important bill to pass was legislation easing up on the requirements that had been placed for the reconstructed and relocated Monticello Raceway. In 2008, the owners of Monticello had been given significant tax benefits based on their intention to relocate and rebuild an enhanced facility at the site of the former Concord Hotel.[30] In light of the economic downturn, the requirements imposed on the racetrack to qualify for these tax benefits were lowered.[31] Additional significant legislation passed included measures that prevented a takeout increase on New York wagers placed on out-of-State facilities from coming into effect, and a provision enabling the horsemen at the New York Racing Association to continue to receive an additional one percent from purses to pay for benevolence and the costs of steroid testing equipment at Cornell.

The budget passed by the legislature also affected the laws governing horse racing. Chapter 57 of the laws of 2009 extended many of the provisions of the law governing simulcasting of horse races into 2010,[32] and made a number of technical changes in the laws governing video lotteries at racetracks.[33] Chapter 59 of the laws of 2009 imposed a $10 fee on each horse entered in a pari-mutuel race to help provide funding for the Racing and Wagering Board and its drug testing program.[34]

Among the more interesting bills that did not pass the legislature was a bill to allow racetracks to offer electronic table games of poker, roulette, baccarat, and blackjack as part of the State's video lottery offerings[35] and a bill to allow off-track betting corporations to have video lottery terminals.[36]

Just as in the fields of art, entertainment, and sports, it appears that more significant horse racing legislation is likely to be enacted in 2010. This is especially true in horse racing given the very weak financial condition of the off-track betting corporations, most specifically the New York City Off-Track Betting Corporation, which is threatening to enter into bankruptcy.

Below is a list that shows the status of the major bills introduced in the entertainment, art, and sports law fields in 2009.

Entertainment and Arts Legislation Enacted in 2009

Assembly Passage Only

A954—Bing; Same as S3441—Serrano
Establishes an arts fund to receive contributions for the support of the New York State Council on the Arts.

A4358—Morelle; Same as S3078—Valesky
Establishes the Arts and Artifacts Domestic Indemnity Act.

A7885—McEneny
Authorizes appointment of local government historians.

A8395—McEneny; Same as S5811—Serrano
Changes the composition of the board of directors of the Executive Mansion Trust.

A8623-A—Englebright; Same as S5715-A—Johnson C
Establishes a study commission to report on the effectiveness of regulation of the sale of tickets; repealer.

A8698-A—Englebright; Same as S5804-A—Johnson C
Revives, until May 15, 2010, the repealed provisions of Article 25 of the Arts and Cultural Affairs Law, relating to tickets to places of entertainment.

Senate Passage Only

S6105—Serrano; Same as A9134—Bing
Establishes an arts advisory committee for the New York City public school district.

Arts and Entertainment Legislation Not Passed by Either House

A229—Gianaris
Increases to 15 percent the amount of the Empire State Film Production Credit that can be taken against taxes administered by New York City.

A694-A—Hoyt; Same as S3496-A—Valesky
Provides an optional pilot program to establish arts-based districts in the cities of Buffalo, Rochester, Syracuse and Troy.

A1045—Destito; Same as S1490—DeFrancisco
Allows open meetings to be photographed, broadcast and recorded by audio or video means subject to reasonable rules.

A1949—Morelle
Establishes distinctive license plates for the Support New York State entertainment program.

A2629 Ortiz; Same as S5371—Hassell-Thompson
Mandates that every owner of a cabaret establishment that is not a restaurant shall install security cameras.

A3184—Galef; Same as S3660—Oppenheimer
Protects book publishers under the shield law of a journalist's right to withhold the identity of confidential sources or notes or elements of professional work.

A4309—Canestrari
Authorizes a Digital Media Production Credit.

A4837—Morelle
Creates the New York State Culture Areas Program.

A4971—Brodsky
Provides for withholding a portion (five percent) of the resale price of certain works of fine art to provide royalties for artists.

A5062—Brodsky; Same as S5123—Parker
Authorizes the power authority of the State of New York to provide low-cost electric power to Broadway and off-Broadway theaters.

A5071—Brodsky
Prohibits service charges in sales of theater tickets in certain cases and exclusive contracts with ticket agents by operators of certain entertainment venues.

A5784—Englebright; Same as S4943—Serrano
Establishes an Empire State Film Post Production Tax Credit.

A6078—Rosenthal; Same as S4642—Duane
Expands the exemption provided to professional journalists and newscasters from contempt to include employment or association with a Web log.

A6666—Weisenberg
Requires all music teachers to be certified.

A8144—Englebright; Same as S6101—Schneiderman
Includes writer salaries and fees within production costs eligible for the Empire State Film Production Credit.

A8732—Ortiz
Establishes the violation of unlawful downloading of intellectual property, and enables the Attorney General to prosecute people who engage in the unlawful downloading of intellectual property by means of a shared computer network.

A8761—Englebright; Same as S5674—Schneiderman
Relates to the Empire State Film Production Tax Credit.

A8805—Lentol; Same as S5842—Golden
Authorizes additional tax credits for certain costs incurred in film and television productions in New York City.

A9044—John; Same as S5890—Duane
Enacts the Broadcast Employees' Freedom Act.

S5066—Schneiderman
Right to privacy and publicity for deceased persons.

Sports Legislation Vetoed

Veto 4—A1511 Wright; Same as S3116—Huntley
Requires that the chairman of the State Athletic Commission be present to constitute a quorum or to conduct business.

Sports Legislation Passed by One House Only

Assembly Passage Only

A6090—Englebright
Creates the New York State Amateur Sports Development Advisory Council.

Sports Law Legislation Not Passed by Either House

A829—DelMonte; Same as S1052—Maziarz
Increases the penalty for assaults involving a sports official.

A847—McDonough
Prohibits the use of non-wood bats in certain organized baseball and softball games in which minors are participants.

A1131—Dinowitz; Same as S3609—Lavalle
Authorizes the Commissioner of Education to restrict the sale and advertisement of alcoholic beverages at certain sporting events.

A1831—Calhoun
Provides civil immunity from damages for volunteers assisting in sports programs of non-profit organizations.

A2009-C—Englebright; Same as S2165-B—Parker
Establishes protocols for combative sports; authorizes mixed martial arts events in New York State to allow the very popular and professional sport of mixed martial arts.

A3021—Benjamin
Places a moratorium on professional boxing and licensing pending an investigation on the safety and health of boxers by a temporary taskforce.

A3388—Clark; Same as S2306—Padavan
This legislation would allow cities of one million or more to assess tickets for professional sporting events in order to raise funds to support extracurricular high school athletics and related entities.

A3433—Camara; Same as S2793—Adams
Establishes the requirement for the instruction of students, teachers and coaches regarding the use of anabolic steroids and human growth hormones.

A3439—Crouch
Relates to the regulation of mixed martial arts.

A4340—Perry; Same as S2468—Lavalle
Requires athletes who perform where spectators pay an admission fee to certify that they have not used performance enhancing substances in the preceding six months.

A4385—Morelle
Promotes interscholastic athletic programs and competition that provides equal opportunities to all students on the basis of athleticism, sportsmanship and performance.

A4489—Espaillat
Creates the crime of sports rage in the presence of a minor.

A4918-A—Towns; Same as S5265—Montgomery
Exempts white collar boxing from regulation by the State Boxing Commission.

A5294—Morelle; Same as S3077—Valesky
Establishes the class A misdemeanor of disruption of a sports contest.

A5871—Nolan; Same as S619—Lanza
Provides for random testing for anabolic steroids in athletes in public and private schools; appropriation.

A5966—Titone; Same as S620—Lanza
Requires utilities to charge not-for-profit organized sports programs for youth residential rates.

A6460—Peralta; Same as S3449—Monserrate
Repeals certain provisions of a law relating to real property used for professional major league sports to require payment of taxes by the owners of Madison Square Garden.

A6984—Saladino
Establishes the crime of assault on a sports official or sports team coach; class A misdemeanor.

A7020—Lancman; Same as S3932—Stavisky
To prohibit discrimination by banning sporting events in New York sponsored by organizations that sanction discriminatory behavior.

A7619—Ortiz
Requires operators of sports arenas or facilities to equip all arenas or facilities used for collegiate or professional hockey with protective netting for spectators.

A8677—Rivera P
Requires governing body of a school district, which eliminates certain teaching positions, to eliminate funding for interscholastic sports programs.

A9012—Jeffries Same as S6008—Montgomery
Enacts the Atlantic Yards Governance Act.

S610—Lanza
Creates "Arielle's law"; provides that any sport or muscle cream sold or given away must have a warning label if it contains methyl salicylate.

S612-A—Lanza
Prohibits any little league from allowing its participants to use any bat other than one made from wood.

S1596—Golden
Exempts white collar boxing from regulation by the State Boxing Commission.

S2621—DeFrancisco
Creates the New York State Governor's Council on Physical Fitness, Sports and Health; establishes a fund for the Council.

S4417—Johnson O
Establishes the Empire State Baseball Trails Program.

Horse Racing Legislation Enacted in 2009

Chapter 6 A4750-A Pretlow; Same as S2363—Adams
Ended provision calling for an added surcharge on wagers placed in New York State on out-of-State thoroughbred tracks.

Chapter 57 Budget Bill
Extended simulcasting laws and made technical corrections in video lottery law.

Chapter 59 Budget Bill
Added a $10 per start fee to help pay for drug testing and the costs of horse racing regulation.

Chapter 342 A8767-A—Gunther; Same as S5828-A—Bonacic
Relates to qualified capital investments at relocated vendor tracks in Sullivan County.

Chapter 365 A4749—Pretlow; Same as S3352—Stachowski
Technical correction authorizing surcharge payments to be made to Buffalo Raceway.

Chapter 392 A8017—Pretlow; Same as S5405—Valesky
Extends the life of the task force on the utilization of retired race horses.

Chapter 400 A8310-A—Pretlow; Same as S2860-C—Stachowski
Continues the payment of an additional one percent from all purses paid to horse owners to be allocated to the horsemen's organization at NYRA in order for it to continue to support benevolent activities for backstretch employees, including medical and mental health services.

Horse Racing Legislation Passed by One House Only

Assembly Passage Only

A3322—Pretlow; Same as S 2717—Adams
Requires off-track betting corporations to submit copy of annual budget to racing and wagering board and allows board to direct audits of the OTBs.

A8181—DelMonte; Same as S3023—Adams

This bill increases from $5,000 to $25,000 the maximum amount of fine that can be imposed for violation of the Racing Law.

A8182—Spano; Same as S3021—Adams
Empowers the Racing and Wagering Board to impose monetary fines upon any person, corporation or association participating in any way in off-track betting.

Senate Passage Only

S644—Larkin; Same as A932—DelMonte
Provides for the issuance of free passes for racetracks to any qualified person, as deemed appropriate by the operator, subject to rules of the Racing Board.

S706-C—Klein
Allows VLT facilities to increase their hours and increase the types of games offered to include electronic table games of roulette, baccarat, poker and "twenty-one."

Other Interesting Horse Racing Legislation Not Passed by Either House

A8183—Pretlow; Same as S3022—Adams
Relates to authorizing participation in an interstate compact for occupational horse race licenses.

A8211—Fields; Same as S4588—Foley
Authorizes off-track betting corporations to host video lottery terminals.

S6082—Adams
Implements a wide number provisions of law relating to racing, pari-mutuel wagering and breeding.

Endnotes

1. Chapter 57, L. 2009, Part Y-1.
2. Chapter 60, L. 2004, Part P.
3. Chapter 57, L. 2008, Part WW-1. For a more detailed discussion of the NYS production tax credit, *see* pages 59-77 of the *EASL Journal*, Spring 2009, Vol. 20, No. 1.
4. It expires on January 1, 2014. *See id*. § 9.
5. New York City provides a credit similar to that of New York State offering 5% of qualifying New York City production expenses.
6. Ernst &Young, "Estimated Impacts of the New York State Film Credit," February 2009, pg. 1. The report can be viewed at http://blog.sceneclips.com/wp-content/uploads/2009/04/EY%20NY%20State%20Film%20Credit%20Study.pdf.
7. *Id*. at 4-5.
8. Tax Law § 24(a)(2).
9. Note 1, *supra* § 3.
10. *See* Ch. 61, L. 2007. The former restrictions can be found in Title G of the Arts and Cultural Affairs Law.
11. Ch. 61 § 4, L. 2007.
12. *See* Ben Sisario, "Pssst! Want a Ticket? Hey, I'm Legit. Really," *The New York Times*, August 30, 2009.
13. John Seabrook, "The Price of the Ticket; What Does It Take to Get to See Your Favorite Band?," *New Yorker*, August 10, 2009; Maury Thompson, "Lawmakers-Look-To-Regulate-Ticket-Reselling," *Glens Falls Post-Star*, May 20, 2009 H.R. 2669. The Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2009, by Mr. Pascrell.
14. Elise Young and James M. O'Neill, "Springsteen Fans Will Get 2nd Chance For Tickets," *Bergen Record*, February 24, 2009.
15. Ch. 68, L. 2009.
16. Arts and Cultural Affairs Law § 25.13.3.
17. Arts and Cultural Affairs Law § 25.13.2.
18. Note 15 *supra* at § 3. While the sponsor's memorandum for the legislation calls on the Attorney General to issue the report, the statutory language clearly makes the Secretary of State responsible for the report. What expertise the Secretary of State might have in determining the public costs and benefits of resale ticket deregulation is not disclosed.
19. *See* Assembly Bill 8836-A, 2008.
20. Jordana Lewis, "Long-Dead Celebrities Can Now Breathe Easier," *The New York Times*, October 24, 2007; Cal. Stats 2007, Ch. 4239.

21. *See* "The Taxing of Broadway, "*The New York Times*, February 6, 2009.
22. Veto 4 2009 of Assembly Bill No. 1511.
23. For a more detailed description of Mixed Martial Arts in NYS, *see* Paul Stuart Haberman, "Some of the Parts, but Not the Sum of the Parts," *EASL Journal*, Summer 2009, Vol. 20 No. 2, p. 44.
24. Assembly Bill No. 2009-C; same as Senate Bill No. 2165-B.
25. Senate Bill No. 1596; Senate Bill No. 5265; same as Assembly Bill No. 4918-A.
26. Assembly Bill No. 847; Senate Bill No. 612-A.
27. Assembly Bill No. 6984; Senate Bill No. 1052.
28. Assembly Bill No. 5871; same as Senate Bill No. 619; Assembly Bill No. 3433; same as Senate Bill No. 2783; Assembly Bill No. 4340; same as Senate Bill No. 2468.
29. Assembly Bill No. 7020; same as Senate Bill No. 3932. This bill was based on the United Arab Emirate's decision not to allow Israeli nationals to play at its tennis championship.
30. Ch. 286, L. 2008.
31. Ch. 342, L. 2009.
32. Ch. 57 Part L-1, L. 2009.
33. Ch. 57 Part O-1L, 2009.
34. Ch. 59 Part V, L. 2009.
35. Senate Bill No. 706-C which passed the Senate.
36. Assembly Bill No. 8211; same as Senate Bill No. 4588.

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Krell's Korner

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

A Funny Thing Happened on the Way to Disneyland

By David Krell

Necessity is the mother of deal making.

In 1954, two men inspired by necessity joined forces to make a landmark deal that shattered the entertainment industry's status quo.

One man was a visionary who simply wanted to entertain families with his creations. That man was Walter Elias Disney.

One man was a visionary who simply wanted to entertain families with the creations of others. That man was Leonard Harry Goldenson.

Leonard H. Goldenson

Goldenson was a Harvard Law School graduate from the coal town of Scottdale, Pennsylvania. After graduating from Harvard Law in 1930,[1] Goldenson returned to Pennsylvania and found a job at a small firm through a connection with one of the firm's clients—Charles McKenna Lynch, high school classmate of Goldenson's father and partner in Pittsburgh's largest stock brokerage house—Moore, Leonard and Lynch. Goldenson worked for Lynch in the summers before he went to law school.[2]

Goldenson quickly assessed the situation.

"[S]oon after starting I learned that they had also just hired two other young men, each the son of a sitting federal judge. I don't mind competition—I thrive on it—but it occurred to me that I might be starting behind the eight ball."[3]

Goldenson quit and moved to New York City for brighter prospects. Armed with a letter of introduction from Lynch to the city's leading lawyers, Goldenson carved out a network of contacts. In 1931, the Depression's bleak economy yielded no prospects, but a highly significant job search experience that formed Goldenson's professional goals—he foresaw a career beyond law.

"Eventually I met virtually the entire elite of New York City's legal Establishment.

"In this unexpected way, pounding the New York City pavements provided me with a unique education. I gained a wide circle of personal contacts and an insider's perspective of the legal profession. I never stopped looking for a job, but after a time I began to perceive that whatever my future held, I probably would not find the practice of law very interesting. It seemed a boring, often pointless business, long on details and short on excitement and drama."[4]

With the big law firm names saying "thanks but no thanks," Goldenson found work as the law clerk for solo practitioner Charles Franklin, former general counsel of the Southern Pacific Railroad.[5]

After a year of helping Franklin bring claims against railroad companies, Goldenson learned of an opportunity through a Harvard Law classmate, Sam Rudner. "Sam told me Root, Clark, Buckner, and Ballantine [forerunner of Dewey LeBoeuf] was hiring lawyers on behalf of its client, the trustees of Paramount Pictures, which was in reorganization under the bankruptcy code. These lawyers were needed to help the trustees straighten things out."[6]

In July 1933, Goldenson became an in-house attorney at Paramount. His first assignment was to help reorganize Paramount theaters and circuits in New England.[7] In the days when men wore fedoras, Goldenson the attorney transitioned to Goldenson the businessman. He escaped from the "boring, often pointless business" of law to become an entertainment executive with a primary role in the business side of show business. Ultimately, Goldenson got the nod for a paramount position at Paramount—he headed the theaters. However, Paramount soon faced a massive challenge.

The Department of Justice (DOJ) believed that the major movie studios violated the Sherman Antitrust Act of 1890 by owning production and distribution businesses—studios and theatres. The DOJ position resulted in a lawsuit that reached the United States Supreme Court on appeal from the District Court for the Southern District of New York. In *United States vs. Paramount Pictures, Inc.*,[8] the Court ruled that movie studios could no longer own movie theaters and mandated a divorce of production and distribution.

Paramount's split became official on January 1, 1950. Leonard Goldenson headed the new theater entity formed because of the divestment—United Paramount Theaters. "Under the decree, Paramount would be split into a 'theater company' and a 'picture company.' I was the only member of Paramount's board who went to the theater company. The theater company's new board voted to make me president."[9]

The Dawn of a New Medium

As America entered the 1950s, Goldenson saw the entertainment vista expanding to the next horizon—television. Television had existed since the late 1920s, but not as a mass medium. "The first radio stations began broadcasting in 1920, and the first TV station was broadcasting in 1927. But most television experiments were conducted in secret, because the companies involved in TV already had a big investment in radio, and they were afraid that the boom in radio sales would be dampened as the public waited for 'radio with pictures.' Then the Great Depression ruined the sales of everything. After 1933, RCA could not have sold very many TV sets even if they had them. The nation's financial crisis put everything on hold, and during this television delay, radio became the major social influence of the 1930s and 1940s."[10]

The paradigm changed drastically in 1948 as Milton Berle became television's first superstar.

"On 8 June 1948 Berle reprised his role from radio, serving as host for the premiere episode of the TV version of *The Texaco Star Theater.* But the show as yet had no set format, and rotated several emcees during the summer of 1948. Originally signed to a 4-week contract, Berle was finally named permanent host for the season premiere that fall. He and the show were an immediate smash, with ratings as high as 80 the first season."[11]

1948 became the unofficial year that television became a mass medium. "Most pioneers have been interviewed so often about TV post-1948 that, when questioned about pre-1947, they skip haphazardly into post-1948 anecdotes."[12]

Watching Berle's antics on Tuesday nights at 8:00 p.m. became a national habit. The infant medium of television and the variety format of *Texaco Star Theatre* were perfectly suited for Berle, a comedian who knew how to capture, maintain, and further an audience's attention because of his deep experience as a nightclub Master of Ceremonies.

Berle's popularity triggered a wave of stars to the new medium. 1950 was a landmark year when America met future television icons.

Jackie Gleason introduced Ralph Kramden in sketches on Dumont's *Cavalcade of Stars*.[13] The husband-wife comedy team of George Burns and Gracie Allen transitioned their radio sitcom to television in *The George Burns and Gracie Allen Show* on CBS.[14] Burns' best friend Jack Benny made the same transition in CBS' *The Jack Benny Program*. Sid Caesar starred in NBC's *Your Show of Shows*, a sketch comedy show also starring Carl Reiner, Imogene Coca, and Howard Morris.[15] NBC's *Colgate Comedy Hour* starred hosts who rotated their positions—Eddie Cantor, Bobby Clark, Fred Allen, and the comedy team of Dean Martin and Jerry Lewis.[16]

The momentum continued. In 1951, *I Love Lucy* premiered on CBS starring the husband and wife team of Desi Arnaz and Lucille Ball. Arnaz and Ball, more commonly known as Desi and Lucy, followed their peers to the new medium after their firm success as a touring act in the summer of 1950 convinced CBS to finance a pilot.[17]

ABC

ABC had a smaller audience share, fewer stations, and less notable talent than its competitors. Where others saw a weak company trailing the three dominant networks—CBS, NBC, and Dumont—Goldenson saw a lucrative opportunity in a growing industry, and ABC just happened to be available.

"American Broadcasting was created in 1927 by RCA as the NBC Blue Radio Network. Gen. David Sarnoff, head of RCA, used the Blue Network to try out new programs and to serve some of the smaller markets. NBC also had a Red Network, which included more powerful stations in the larger cities. The best programming went to the Red Network.

"In 1941, the FCC ruled that no single entity could simultaneously broadcast on more than one network. RCA could operate either the Red or the Blue, but not both. The Blue Network went on the market."[18]

Business mogul Ed Noble wanted to add the Blue Network to his business portfolio. Noble's business resume included the Life Savers brand that he grew from a $1,900 investment with a partner in a small candy company into a sale of $22 million to Drug, Inc. in 1928.[19]

Sarnoff's asking price for the Blue Network was $8 million dollars. He stood firm on the figure. Initially, 42 entities submitted bids. As Sarnoff remained inflexible on the price, every entity withdrew its bid. The bidders included Paramount Pictures, the Mellon family, Marshall Field, Dillon, Read & Co., and American Type Founders. Although Noble also believed the $8 million dollar demand was too high, he wanted the network, and so he met the price. The year was 1943.[20]

The network consisted of 116 affiliates in a radio network and television stations WJZ in New York City, KGO in San Francisco, and WENR in Chicago. WENR shared a frequency with WLS—WENR broadcast at night and WLS broadcast during the day. Noble renamed the network—American Broadcasting Company (ABC).[21]

Noble found that ABC could well have stood for "All But Cash," given the company's consistent drain of money. Even his personal loan to the company did not brighten prospects. Yet where Noble saw an asset rapidly depleting in value, Goldenson saw an asset with growth potential.

However, in his quest to enter the exclusive club of television network owners, Goldenson had experienced the same firmness of price demand with Noble that Noble experienced with Sarnoff.

"He had loaned ABC $5 million that went so fast he didn't know what happened. And so, word got out. I had a call from Lehman Brothers that if we were interested, we had a shot to go after that. And I made up my mind I would. I did. I got a hold of Noble, traded things out with him.

"He at first said he wanted $25 million. I said, 'For what? For a company that's losing its shirt? I mean, you're out of your mind.' And he said, 'Well, that's what I'm going to get.' And so, I walked away from it. Then I kept hearing that CBS was going to try and acquire it. CBS at that time only had two television stations and they could use the stations that Noble had at ABC.

"So, basically, after I don't know how many weeks, I kept hearing who was negotiating with Noble. But nothing was coming out of it, so I called Ed Noble when I heard he was negotiating with CBS. And I said, 'Ed, I think you're out of your mind. You're trying to make a deal with CBS. I mean, the commission is trying to avoid a company having more than one network. And if you're going to collapse ABC, you're not going to get the approval of the FCC.'

"He said, 'Well, you run your business and I'll run my business. Thank you very much.' And so, I passed him up for awhile. And Bob O'Brien who was with me kept saying, 'Leonard, I think you're going to lose it.' I said, 'I can't lose it if I pay an exorbitant amount of money for something that's losing money.' He said, 'It's worth it.' So finally, I got a call from Ed Noble and he said, 'Leonard, I've been thinking about that.' He said, 'Let's sit down and discuss the possibility of a merger.' Which I did. And paid him what was the equivalent of $25 million, the figure he wanted all along. Half in stock and half in cash."[22]

In 1953, Noble struck his deal with Goldenson after a flirtation with CBS. Goldenson now had a network consisting of five stations and nine primary affiliates that reached 35 percent of American homes with at least one television. NBC and CBS surpassed ABC with 60 primary affiliates each. Their coverage virtually blanketed American homes with at least one television. A third television network, Dumont, could boast "slightly more coverage than ABC."[23]

Goldenson's main challenge was developing program content to attract viewers. "Goldenson recognized content was a primary part of the pipeline, whether in theatres or on television."[24]

In the commercial television paradigm, the viewers are the network's products and advertisers are the network's customers. A network makes money by selling air time on a program to an advertiser. The advertiser sees the viewers as potential customers of its products. A larger audience delivers more potential customers and allows the network to charge a larger rate.

When Goldenson engineered the purchase of ABC, Dumont was fading into history. By 1955, it was finished.

CBS and NBC enjoyed a virtual duopoly. They increased their respective Goliath statures because of their locks on available talent. From ABC's vantage point, the television horizon appeared unreachable.

The times were dire for a much smaller network looking to develop competing programming. Yet out of dire times come moments of opportunity. An opportunity occurred that would require thinking and acting out of the television box. The opportunity countered the unwritten paradigm that movie studios did not strike deals with television networks. The opportunity was Disneyland.

Walt Disney

Walt Disney envisioned Disneyland as a place for families that would be "[n]ot just a park that could provide fun and diversion but a kind of full imaginative universe that could provide a unified experience. It was truly a *land* rather than an amusement park. At least that was how the planners and Walt had come to think of it. Disneyland would be something for which there was no antecedent."[25]

The reasons behind Disneyland went beyond entertainment. Collaboration bred community. Community bred creativity. The unseen but tangible creative force that dominated Walt Disney Studio in its early days had given way to unseen but tangible business forces, including an animators strike in 1941. "[Walt Disney] knew the studio was unwieldy. He knew the level of talent was not as high as in its heyday and that the spirit had never recovered from the strike, much less from the drudgery of the war. He knew that the heady days of collaboration were long since gone and that, as far as the animations were concerned, they would never return."[26]

Gone were the glory days that began when Walt and Roy Disney set up The Walt Disney Company in 1923 "in the rear of a small office occupied by Holly-Vermont Realty in Los Angeles."[27]

From this humble beginning in 1923, Walt Disney produced his series of Alice comedies. Along with animator Ub Iwerks, Disney showed his pioneer spirit. "Silent like all other films of the time, these short films were noteworthy for mixing animation with live-action in a way that was different from the norm, by placing Alice, a real human girl, into an animated universe instead of the more common method of cartoon character in real life setting."[28]

Winkler Pictures distributed the Alice comedies. Founded in 1921 by Margaret Winkler, a former Warner Brothers secretary, Winkler Pictures soon had another player calling the shots. Winkler married Charles Mintz in November 1923, "shortly after making her deal with Disney, and within a few months, it was Mintz, rather than Winkler, who was corresponding with Disney, usually in a harsh, hectoring tone."[29]

In 1927, the Disney studio debuted its next contribution—Oswald the Rabbit. Mickey Mouse debuted the following year in *Plane Crazy*. Indeed, Mickey's creation occurred because Walt Disney's association with Oswald ended.

Although Disney produced Oswald cartoons for Universal Pictures, it did not deal with Universal directly. "Winkler Pictures was still the middleman, however: it was not Walt Disney but Charles Mintz who signed a contract with Universal on 4 March 1927, for twenty-six cartoons with a new character to be called Oswald the Lucky Rabbit."[30]A clash between Mintz and Disney ensued. It was steeply based in money issues, talent raiding, and control of the Oswald property.

"Then in a bit of double-dealing that is typically portrayed as crippling and malicious, Walt Disney's request for a bigger budget led Universal's Charles B. Mintz to instead demand Walt take a major pay cut. While Walt and Iwerks would drop out of the series after fulfilling their commitment, most of the other animators and all rights to the character would stay with Mintz at Universal. Oswald shorts continued to be produced in mass quantities, eventually under Woody Woodpecker creator Walter Lantz, who took the character into the sound age and, on three occasions, Technicolor."[31]

Mickey Mouse debuted in 1928 in *Plane Crazy* and a series of Mickey short films followed. The character became the company's cornerstone. Disney built upon that cornerstone with full-length feature films—*Snow White and the Seven Dwarfs* (1937), *Fantasia* (1940), *Pinocchio* (1940), and *Dumbo* (1941).

Innovation earned the Disney studio accolades, acclaim, and attention. *Snow White* won a special Academy Award. *Fantasia* used classical music rather than dialogue. Disney became a household name. Yet the sense of internal wonder that once accompanied the studio's new animation characters, ventures, and techniques began to fade from Walt Disney's grasp as America enjoyed peace and prosperity in Eisenhower era.

Disneyland

Disneyland could return the studio from a pedestrian path back to the pioneer trail of creativity it clearly blazed since the 1920s. The next stop on that trail was the site for the park—Anaheim, California.

"Now, finally, the park had restored that sense of doing something epoch-making. But it wasn't only the fact of the park that had reenergized him. He also cherished the idea of the process of planning the park, of returning once again to the old days, the days before the big studio and the strike and the relentless financial strains, when the employees were locked in brotherhood. Walt Disney, the utopian who had spent a lifetime trying to re-create the communal spirit of Marceline [Kansas], wanted the park in part because he thought the planning of it would allow him to reestablish the creative community he had lost. "He knew that it couldn't be done within the bureaucratic studio structure. The process had to be fresh and distinct—new."[32]

The "bureaucratic studio structure" fell under the domain of Walt Disney's brother, Roy, who ran the business side of the Disney studio. He saw value in the name "Walt Disney" and designed a plan where Walt would sell his name to the company, engage in a 10-year personal services contract (the last contract expired in 1947), and create a corporate entity separate from the studio. Walt and his family would own the new company that would enter into contract with the studio.

After more than a year, WED Enterprises was formed in December 1952, the initials reflecting the first letters in the name Walter Elias Disney.

What Walt Disney Got

- A personal services contract of seven years
- Walt Disney Productions licensed Walt Disney's name for 40 years
- The right to make one live-action film per year without the studio
- The right to purchase up to 25 percent ownership in any live-action film if he contributed a similar percentage to film's budget
- The option to buy up to $50,000 of the $1.5 million life insurance policy that the company had on him and guaranteed a royalty of $50,000 annually for 10 years

What WED Got

- $3,000 a week
- Five to 10 percent on money generated by use of Walt's name outside production[33]

The business side of the deal was straightforward, practical, and common sense. Essentially, the terms protected Walt Disney and the company financially. Walt was not only the inspiration behind the studio's success, he was also an invaluable asset. The deal detailed Walt Disney's value in concrete terms. It also paid creative dividends for Walt Disney.

"[I]f Roy had encouraged WED to protect Walt Disney's interests and to maintain the company's claim on his name and services, Walt himself had something very different in mind for his new organization. WED would be the place where Disneyland could germinate and grow—an intimate place that was physically inside the studio but not really of the studio."[34]

Like all great ideas, Disneyland needed funding. Otherwise, it would remain on the drawing board. Literally.

The Deal That Made Disneyland Happen

ABC needed programming. Otherwise, it would remain a distant, weak, and non-threatening nuisance rather than a strong, vibrant, and effective competitor to CBS and NBC.

The circumstances were ripe for a partnership between the legendary animation studio and the fledgling television network. However, Goldenson wanted more than just a profitable investment opportunity. A consummate dealmaker, he saw hidden value in a Disney-ABC alliance.

"Out of nowhere, Walt and Roy Disney came to see me. I checked it out and found out they'd been to CBS, NBC, and had been turned down. They had been to the banks and the insurance companies and they were turned down there because their idea of Disneyland sounded like Coney Island to the bankers which was not successful.

"So I said to Walt and Roy Disney, what do you have in mind? And they said, we would like you to finance the park in Anaheim, and I said, well what do I get out of it? And they said, well, we'll give you a 35 percent interest in the park.

"I said, that's not enough. I said I've got to get a commitment that you will put programming on television on a regular weekly basis and the second year have a second program and the third year a third program. And they said okay. And when I made that deal, that's the first crack in all the motion picture companies. Disney was going into television."[35]

Goldenson knew that Disney would need deep pockets to finance Disneyland. His cost projection was more than the Disney brothers' projection but less than the eventual figure.

"I asked Walt how much they thought it would cost to build Disneyland. He said, 'About four million dollars, maybe five million at the most.'

"That wasn't going to be nearly enough, I said. Probably it would take more like $10 million or $15 million. After construction they would have to staff it, train people, and operate at a loss for some time. (As it turned out, it cost $17 million, the first year alone.)

"I offered to take the Disneys in to see our board. But as a condition, I said, I want a one-hour program, every week. And of course I wanted access to their 600 animated-feature film library. In exchange, I offered one minute each week, free, to promote Disney's latest film. With hundreds of UPT theaters to show these movies, that wasn't a bad deal for us.

"At first my board opposed the deal. After all, they said, CBS had turned Disney down. NBC had turned him down. And the banks had said no. More to the point, where were *we* going to get financing?"[36]

The money hurdle was a massive obstacle. Goldenson needed a backer of his own to finance his confidence in the Disneyland deal. Otherwise, the entertainment vista he saw could turn rapidly into a cliff over which ABC would likely fall.

This worked to Goldenson's advantage because of the gentlemanly manner with which he conducted business, earned respect, likability, and friendship. He could rely on his relationships. "I talked to some of the New York banks. They were reluctant to lend us $10 or $15 million for Disneyland. Then Sid Markley, my Harvard Law roommate, who was in charge of UPT's southern theaters, suggested we talk to Karl Hoblitzelle."[37]

Goldenson knew Hoblitzelle from their days as theater businessmen, but Hoblitzelle's business acumen reached beyond theaters. "RKO and Paramount went into receivership in January 1933, and Hoblitzelle reorganized the Texas holdings of these two companies as the Interstate Circuit and the Texas Consolidated Theatres. By 1935 he was president of both corporations, and he remained active as president of Interstate until his death. In addition to his theater holdings, he established Hoblitzelle Properties, which bought real estate throughout the Dallas area. He was a director of the Republic National Gas Company and Southwestern Life Insurance Company, and he served as chairman of the board and chairman emeritus of Republic National Bank."[38]

Hoblitzelle backed Goldenson's confidence in the Disneyland deal with $5 million from Republic.[39] Roy Disney and ABC President Robert Kintner negotiated the terms for a three-year contract and both boards approved the deal on April 2, 1954.[40]

What Walt Disney Productions Got From ABC[41]

Year 1 Fee:	$50,000 per show $25,000 per repeat
Year 2 Fee:	$60,000 per show $30,000 per repeat
Year 3 Fee:	$70,000 per show $35,000 per repeat
Investment:	$2 million for ten-year bonds; guaranteed loans up to $4.5 million plus a $500,000 direct investment into Disneyland (reflecting Hoblitzelle's involvement)

What ABC Got From Disney[42]

- 26 one-hour programs each year
- 34.48 percent interest, equal to Walt Disney Productions' share
- Walt Disney got 16.55 percent interest in Disneyland as compensation for contributions[43]

The Disneyland deal sparked new avenues of finance. Bank of America boosted Disney's credit line to $8 million dollars. Western Printing and Lithographing Company (Wisconsin) reflected its confidence by purchasing $500,000 of 10-year bonds and using its Disney royalties to secure a local bank loan of $500,000 secured by Western's Disney royalties. In return, Western received a 13.8 percent interest in Disneyland.[44]

The Disneyland deal also opened up new avenues of programming. As Goldenson's quid pro quo incorporated programming into the Disneyland deal, the networks broke a seemingly impenetrable barrier that once protected the movie studios from the nascent but growing medium of television. Yet the barrier was also shading the studios from golden opportunities that Goldenson and the Disney brothers recognized.

Walt Disney got his amusement park. Leonard Goldenson got his programming.

Disneyland premiered on ABC on October 27, 1954. It triggered merchandising mania with a three-part story based on frontiersman Davy Crockett and the corresponding theme song *The Ballad of Davy Crockett*.[45]

On July 17, 1955, Walt Disney's vision of an amusement park became a reality. Disneyland opened for a press preview, and it opened to the public the next day.[46]"In agreeing to provide a program for ABC, the Disney studio had broken ranks with its motion picture brethren who had, much to ABC's consternation, held firm against television. Though Columbia and Republic Pictures had produced television programs, they did so through subsidiaries so as to keep the lines of demarcation between movies and television clear. Walt Disney, in putting his production company directly in the service of television without any subterfuges, had made what the New York Times called 'the first move by a leading studio into the home entertainment field,' and the Times predicted that 'if it turns out to be successful, it may very well lead to more such working alliances among the major studios and the networks.' The Times concluded, the end result could, indeed, change the complexion of the entertainment business. That was exactly what would happen."[47]

Studios recognized that television provided valuable opportunities beyond telecasting films in the studios' respective libraries. The new medium of television would need content and the studios responded.

Warner Brothers added television production to its entertainment output in 1955 with *Warner Brothers Presents*. Airing Tuesday nights at 7:30 p.m. on ABC, *Warner Brothers Presents* rotated the shows *Cheyenne*, *Casablanca*, and *Kings Row*. It lasted one season.[48]

ABC and Warner Brothers continued their alliance with a series of private detective shows featuring casts of young handsome men and young beautiful women—*77 Sunset Strip* (1958-1964),[49] *Hawaiian Eye* (1959-1963),[50] *Bourbon Street Beat* (1959-1960),[51] and *Surfside Six* (1960-1962).[52] As the shows were similar in format, they existed in the same "televerse" and enjoyed character crossovers.

Why the Disneyland Deal Matters Today

Analyzing the impact of the Disneyland deal reveals the timeless value of strategic thinking.

"Lessons don't change with time. Leonard Goldenson was not in the television business. He was in the information business. He was in the entertainment business. He thought expansively about ABC. The Disneyland deal wasn't about being in the theme park business but about being in the entertainment business. When evaluating alliances to this day, the importance of shared interests remains. Here we are in a digital age. Technology is great. Distribution is great. But content, idea, and vision remain paramount.

"Looking for the appropriate strategic alliances is incredibly important, especially in challenging revolutionary times like 1954 and today. Where are those alliances where everyone in the equation wins? The ones who succeed are the ones who are alert today to opportunities. Goldenson had an expansive enough view to seize on the opportunity."[53]

In 1996, Disney and ABC allied with each other again. Forty years after the landmark Disneyland deal, Disney merged with Capital Cities, Inc., then the parent company of ABC.

Endnotes

1. Leonard Goldenson received a Bachelors of Science from Harvard University on February 28, 1927. E-mail from Jayme Brown, Office Manager, Loreen Arbus Productions (September 8, 2009, 01:48 pm EDT). He received an LL.B. from Harvard Law School in 1930. E-mail from Emily Dupraz, News Coordinator, Harvard Law School (September 24, 2009, 05:14 pm EDT). On January 30, 1933, Leonard H. Goldenson, esquire on Motion of Simon Lenson, became an esquire sworn and admitted to practice as attorney and counselor of the Supreme Court of Pennsylvania. E-mail from Brown (September 8, 2009, 01:48 pm EDT).
2. Leonard H. Goldenson with Marvin J. Wolf, Beating the Odds—The Untold Story Behind the Rise of ABC: The Stars, Struggles and Egos that Transformed Network Television 17-20 (Charles Scribner's Sons 1991).
3. *Id*. at 20-21.
4. *Id*. at 22.
5. *Id*. at 23.
6. *Id*. at 24.
7. *Id*. at 25.

8. 334 US 131 (1948),
9. Goldenson at 73.
10. MICHAEL RITCHIE, PLEASE STAND BY: A PREHISTORY OF TELEVISION 4 (The Overlook Press 1994).
11. B.R. Smith, *Milton Berle*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/B/htmlB/berlemilton/berlemilton.htm.
12. Ritchie at 4.
13. David Marc, *Jackie Gleason*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/G/htmlG/gleasonjack/gleasonjack.htm.
14. Susan Gibberman, *The George Burns and Gracie Allen Show*, http://www.museum.tv/archives/etv/G/htmlG/georgeburns/gerogeburns.htm.
15. Mark Williams, *Sid Caesar*, Museum of Broadcast Communications, http://www.museum.tv/eotvsection.php?entrycode=caesarsid.
16. Joel Sternberg, *The Colgate Comedy Hour*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/C/htmlC/colgatecomed/colgatecomed.htm.
17. Christopher Anderson, *I Love Lucy*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/I/htmlI/ilovelucy/ilovelucy.htm.
18. Goldenson at 96.
19. Goldenson at 97.
20. *Id*.
21. *Id*.
22. Interview by Marvin Jules Wolf with Leonard Goldenson in Longboat Key, Florida for the Archive of American Television, a division of the Academy of Television Arts and Sciences (May 14, 1996). In his autobiography, Goldenson breaks down the terms of the deal with Noble as $25 million, half in United Paramount Theaters preferred stock and half in United Paramount Theaters common stock. Goldenson at 100.
23. Goldenson at 104.
24. Telephone Interview with Andrew Goldman, Vice President, Program Planning and Scheduling, Home Box Office / Cinemax and Adjunct Professor, Film and Television, Tisch School of the Arts, New York University (Sept. 9, 2009).
25. NEAL GABLER, WALT DISNEY: THE TRIUMPH OF THE AMERICAN IMAGINATION 496 (ALFRED A. KNOPF 2006).
26. *Id*. at 492.
27. THE WALT DISNEY STUDIOS HISTORY, http://studioservices.go.com/disneystudios/history.html.
28. THE ADVENTURES OF OSWALD THE LUCKY RABBIT DVD Review, http://www.ultimatedisney.com/oswald.html.
29. MICHAEL BARRIER, HOLLYWOOD CARTOONS: AMERICAN ANIMATION IN ITS GOLDEN AGE 42 (Oxford University Press 1999).
30. *Id*. at 45.
31. While an important character for animation historians studying the development of Walt Disney's vision, business, and animation style, Oswald merits scant attention otherwise. "So it was more an issue of principle and morale than good business sense that drove Robert Iger, current CEO of the Walt Disney Company, to acquire the rights to the character and the 26 Disney-produced shorts of Oswald the Lucky Rabbit. The deal between two media giants occurred in February 2006, and required Disney to allow NFL sportscaster Al Michaels to break his ABC/ESPN contract to join the NBC Universal family as part of NBC Sports' Sunday Night Football commentary staff."

    In 2010, Disney will integrate Oswald into a strategy designed to reinvent Mickey Mouse –Disney's corporate symbol and cornerstone character.

    "The first glimmer of this will be the introduction next year of a new video game, Epic Mickey, in which the formerly squeaky clean character can be cantankerous and cunning, as well as heroic, as he traverses a forbidding wasteland." Brooks Barnes, *After Mickey's Makeover, Less Mr. Nice Guy* (November 4, 2009), http://www.ultimatedisney.com/oswald.html.

    Oswald's presence reflects Disney's appreciation of its history. "Epic Mickey, designed for Nintendo's Wii console, is set in 'cartoon wasteland' where Disney's forgotten and retired creations live. The chief inhabitant is Oswald the Lucky Rabbit, a cartoon character Walt Disney created in 1927 as a precursor to Mickey but ultimately abandoned in a dispute with Universal Studios." *Id*.
32. Gabler at 492.
33. *Id*. at 492-493.
34. *Id*.
35. Interview by Marvin Jules Wolf with Leonard Goldenson in Longboat Key, Florida for the Archive of American Television, a division of the Academy of Television Arts and Sciences (May 14, 1996).
36. Goldenson at 123.
37. *Id*.
38. *Karl St. John Hoblitzelle*, The Handbook of Texas Online (a project of the Texas State Historical Association), http://www.tshaonline.org/handbook/online/articles/HH/fho5.html.
39. Goldenson at 124.
40. Gabler at 508.
41. *Id*. at 508-509. "Fifteen percent of those funds [the show fees] was then to be funneled from Walt Disney Productions to Disneyland, Inc., a new corporate entity, as a location fee, out of which the latter was to pay off its mortgage bonds." *Id*.
42. *Id*. at 509. Goldenson also negotiated for all food concession profits for 10 years. "I knew that could be a gold mine." Goldenson at 124.
43. *Id*.
44. *Id*.
45. Tinky "Dakota" Weisblat, *Walt Disney*, Museum of Broadcast Communications, http://www.museum.tv/archives/etv/D/htmlD/disneywalt/disneywalt.htm.
46. The Grand Opening of Disneyland, http://thisdayindisneyhistory.homestead.com/DisneylandGrandOpening.html.
47. Gabler at 510.
48. TIM BROOKS AND EARLE MARSH, THE COMPLETE DIRECTORY TO PRIME TIME NETWORK AND CABLE TV SHOWS: 1946-PRESENT 1486-1487 (9TH ed., Ballantine Books) (2007).
49. *Id*. at 1220.
50. *Id*. at 592.
51. *Id*. at 172.
52. *Id*. at 1337.
53. Telephone Interview with Max Robins, Vice President / Executive Director, Industry Programs, Paley Center for Media (Sept. 11, 2009).

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MCLE-Accredited Recordings* of Recent Section Programs Available from the Association's CLE Department

(For more information or to order, call toll-free, 1-800-582-2452, or click on"Recorded Programs" under "CLE" at www.nysba.org)

Entertainment, Arts and Sports Law 2009 Annual Meeting (2009)
(www.nysba.org/aveasl)

The January 2009 presentation of the Entertainment, Arts and Sports Law Section features entertaining and informative discussion by an expert panel on two relevant and interesting topics: 1) "Running Away with Runway Designs: Should Knock-Offs Be Knocked Out? Debating the Design Piracy Prohibition Act" and 2) "Film Tax Credits: The Reel Way to Lure Hollywood out of Hollywood." (*4.5 total MCLE Credits; available in DVD format*)

Twelfth Annual Sports Law Symposium (2008)
(www.nysba.org/aveasl)

Presented by The Fordham University Sports Law Forum and our EASL Section, this spring 2008 program features three panel discussions on major substantive legal issues in sports: Financing and Structuring Acquisitions of Sports Teams and Stadiums • Sports Merchandising and Memorabilia • Amateurism and the NCAA. The keynote address is delivered by President and CEO of the New York Giants, John K. Mara. (*5.5 total MCLE Credits; available in audio CD and audiocassette formats*)

Entertainment, Arts & Sports Law Section Annual Meeting (2008)
(www.nysba.org/aveasl)

This lively program from EASL's January 2008 annual meeting focuses on two current and highly interesting topics: 1) post mortem right of publicity: "return of the living dead," and 2) "real deals in virtual worlds": business affairs and legal issues in the new massively multi-user universes. (*3.5 total MCLE Credits; available in DVD format*)

Entertainment Law in Review (2007)
(www.nysba.org/aveasl)

Recorded at EASL's spring 2007 meeting, the program covers recent court rulings impacting transactions and litigation in the entertainment industry. The program speaker, Stan Soocher, Editor-in-Chief of *Entertainment Law and Finance*, discusses court decisions on claims against entertainment attorneys, digital and Internet rights, film-distribution agreements, management agreements, music copyrights, music publishing, profit-participation and royalty claims, recording contacts, right of publicity, television-series trademarks and video games. (*2.5 total MCLE Credits; available in audio CD and audiocassette formats*)

Eleventh Annual Symposium on Current Legal Issues in Sports (2007)
(www.nysba.org/aveasl)

Presented by The Fordham University Sports Law Forum and our EASL Section, this recording of the spring 2007 symposium features detailed discussion from high-profile panelists on several of the current and emerging legal issues in the world of sports: Sports Re-Broadcasting and Exclusivity Rights in the Changing Media Landscape • International Player Transfer Systems and Related Immigration Issues • Potential Criminal and Civil Liability for Athletes' Conduct During the Ordinary Course of Game Play • MLB's "Extra Innings Package." (*6.0 total MCLE Credits; available in audio CD and audiocassette formats*)

The Impact of Digital Technologies on the Entertainment Business (2007)
(www.nysba.org/aveasl)

The 2007 Annual Meeting of the Section addresses two cutting-edge and highly publicized topics: "Digital Distribution of Audio and Video Content to Mobile Devices" and "YouTube and Myspace.com—Internet Socializing Communities or a Breeding Ground for Litigation?" (*4.0 total MCLE Credits; available in DVD and videocassette formats*)

Practical Aspects of the LLC and LLP (2006)
(www.nysba.org/avbuscorp)

From a spring 2006 program presented by the Section, LLCs and LLPs are explored in depth by Alan E. Weiner, a well-regarded speaker on this topic. In addition to tax and practical issues related to forming such entities, Mr. Weiner discusses the multi-uses of the LLC, administrative issues, tax issues (simplified), the controversial New York State publication requirements, self-employment tax issues, and the use of the professional LLC or LLP. (*2.5 total MCLE Credits; available in audio CD and audiocassette formats*)

* *MCLE credit not available for "newly admitted" attorneys.*

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The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted with biographical information via e-mail in Microsoft Word format. Please submit articles to:

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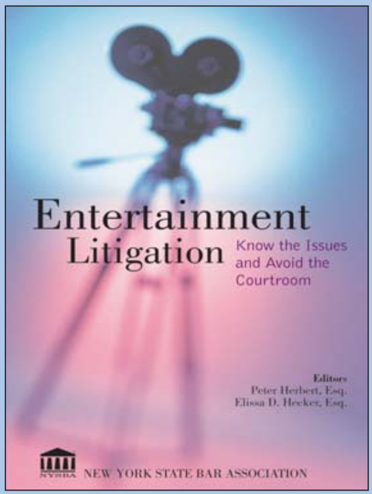

Entertainment Litigation is a thorough exposition of the basics that manages to address in a simple, accessible way the pitfalls and the complexities of the field, so that artists, armed with that knowledge, and their representatives can best minimize the risk of litigation and avoid the courtroom.

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

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