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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

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In The Arena:
A Sports Law Handbook

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

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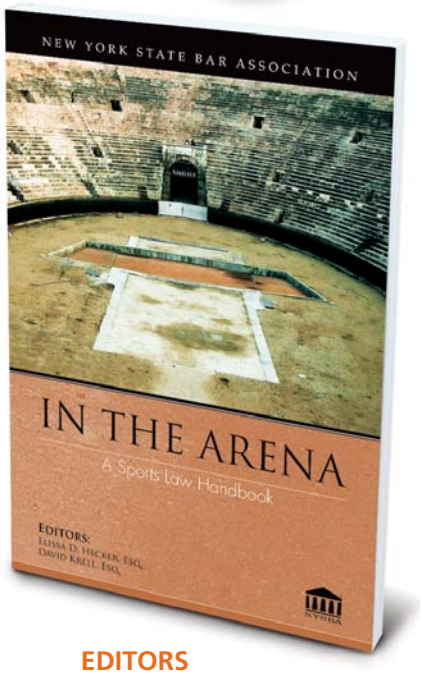

As the world of professional athletics has become more competitive and the issues more complex, so has the need for more reliable representation in the field of sports law. Written by dozens of sports law attorneys and medical professionals, *In the Arena: A Sports Law Handbook* is a reflection of the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

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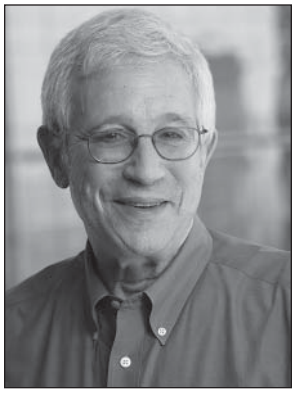
Remarks from the Chair



As of this writing, EASL is coming out of a very busy winter and spring after our successful CLE panels at the Annual Meeting in January. The winter weather certainly didn't deter us.

Included in our many events was the great CLE panel and reception at FIT, which were organized by our Fashion Law Committee under the leadership of Lisa Willis and Kathryne Badura. Our Diversity Committee, co-chaired by Anne Atkinson, Richard Boyd and Cheryl Davis, presented a CLE panel about low budget guild agreements. The Diversity Committee has also been very active in other areas, including its informal mentoring program.

The annual two night Theatre Law seminar co-sponsored with CTI and led by EASL's Jason Baruch and Diane Krausz was, as usual, a great success. It will be repeated next year.

We also expanded our events into other boroughs. The Fine Arts Committee, led by Judith Prowda, presented an informational panel on Legal Basics for Visual Artists, followed by a reception in Brooklyn.

EASL is happy to announce that Irina Tarsis is the new Chair of our International Committee. She is looking forward to serving, and is already actively planning events and activities. In addition, Teresa Lee will add her trademark expertise as new Co-Chair of our Copyright and Trademark Committee.

The Phil Cowan Memorial/BMI Scholarship is already working with over 20 law schools to solicit quality entries for the next scholarship awards. Thank you to Richard Garza and Judith Bresler for leading this effort.

EASL's Spring Meeting was a huge success. Once again, Herrick Feinstein generously hosted the CLE event and reception in its beautiful space. Professor Stan Soocher's annual presentation on cutting edge case developments, arranged by Mary Ann Zimmer, and the panel on use of trademarked and copyrighted works, led by Barry Werbin, were informative and entertaining.

None of this would have happened without the tireless efforts of our Section's Vice-Chair, Diane Krausz, and our awesome NYSBA liaison, Beth Gould.

Even with all of that behind us, EASL will not rest on its laurels. During the normally quiet warm months, we will be hosting a Young Lawyer Committee's networking reception and what has become our annual outing to watch the Brooklyn Cyclones. In addition, EASL's Literary Works Committee, chaired by Joan Faier and Judith Bass, has organized an EASL CLE panel about book publishing for the NYSBA CLE Department.

Planning for EASL's full day of CLE panels with CMJ Music Marathon in October is in full swing by Rosemarie Tully and the rest of the EASL-CMJ Committee. This again promises to be a really great event.

I am very proud to be a part of EASL and to be working with such a wonderful group of people. I hope that everyone has a wonderful summer.

Steve Rodner

Entertainment, Arts and Sports Law Section

Visit us on the Web at www.nysba.org/EASL

Check out our Blog at http://nysbar.com/blogs/EASL

Editor's Note

Hope you are having a wonderful summer. This issue of the *Journal* is full of good beach, golf, lakeside, camping, and traveling reading. It packs easily!

Relax, and read this wherever you most enjoy.

Elissa D. Hecker

The next *EASL Journal* deadline is Friday, September 4, 2015

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

Pro Bono Update

By Elissa D. Hecker, Carol Steinberg, Kathy Kim and Irina Tarsis

Pro Bono Steering Committee

As of this writing, EASL will be holding its next Pro Bono Clinic with Women in Music on August 3rd. Details have been sent to all EASL Section members.

On June 4th, EASL's Fine Arts and Pro Bono Steering Committees collaborated with the Brooklyn Arts Council (www.brooklynartscouncil.org) to present a panel on artists' rights called "Legal Rights for Visual Artists and Other Creatives." The event was held at Bat Haus Coworking and Event Space in Brooklyn. This was the second such panel presented by EASL to launch the Bushwick Open Studio Weekend. Each panel spoke before a full attendance of artists eager to hear about their rights and ask questions.

The panelists included Jason Aylesworth, of Sendroff and Baruch; Paul Cossu, of Cahill Partners; Judith B. Prowda, Senior Lecturer at Sotheby's Institute of Art; and Carol J. Steinberg, of the School of Visual Arts (all are EASL Section members and Jason, Judith, and Carol are EASL Executive Committee members). The panel began with a welcoming reception, followed by presentations about basic copyright, fair use, contracts, and an update on developments in new media. The panel was in a well-attended space that was teeming with creative energy and great exchanges, similar to the panel held previously.

Clinics

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

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

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

- **Carol Steinberg, elizabethcjs@gmail.com**

Litigations

Irina Tarsis coordinates pro bono litigations.

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

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

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

Law Student Initiative Writing Contest

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

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

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members.
- **Form**: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **Friday, September 4, 2015.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

Topics

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

Judging

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

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

Phil Cowan Memorial/BMI Scholarship Writing Competition

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

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

The Competition

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

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

Eligibility

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

Free Membership to EASL

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

Yearly Deadlines

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

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

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

Submission

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

Prerogatives of EASL/BMI's Scholarship Committee

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

Payment of Monies

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

About BMI

BMI is an American performing rights organization that represents approximately 650,000 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 7.5 million compositions are then distributed as royalties to BMI-member writers, composers and copyright holders.

About the New York State Bar Association / EASL

The 74,000-member New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 125 years.

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

NYSBA Guidelines for Obtaining MCLE Credit for Writing

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

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

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

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

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

Sports Immigration: Amateurs, College Athletes, and Administrative Staff

By Michael Cataliotti

This edition of Sports Immigration will focus on the different non-immigrant visa classifications (NIVs). We begin with a brief overview of where we left off in the previous column.

There are various NIVs applicable to the sports industries, and they include, as stated in our last discussion:

- B…B1/B2—Business/Tourist;[1]
- E…E1/E2—Treaty Trader/Investor;[2]
- F (and OPT)…Student visa (and Optional Practical Training);[3]
- H…Specialty Occupations;[4]
- L…L1A/B—Intracompany Transferee (Executive/Specialized Knowledge);[5]
- O…O-1A/O-2—Extraordinary Ability/Essential Support Staff;[6] and
- P…P-1A/P-3—Internationally Recognized Athlete and Essential Support Personnel.[7]

Each one will be discussed briefly, with more emphasis on those that involve little to no work on the part of the practitioner for one reason or another (B and F), as well as the lesser utilized H. This will allow us to cover these valuable classifications and get them out of the way for lengthier discourse related to the E and L visas, both of which are useful, with the latter being more frequently utilized than the former. Finally, the most utilized and applicable classifications: O and P, will be addressed.

Athletes and Administrators

As we will be touching upon the B, F, and H classifications, it is worth understanding some of the different parties applicable. They are: (1) The athlete and (2) the administrator(s). For clarity and respectively, this to say that the athlete is the individual who employs his or her skills *directly before the crowd or judges* in the ring, on the field, the mat, the track, the court, or elsewhere, and the administrator is the individual who employs his or her skills *behind the scenes* or in a way that guides the athlete.

Of the athletes applicable here, we have the amateur and the collegiate, both of whom are accomplished in their own rights, but not yet at the professional level. They are competing in local or regional events that might not garner as much coverage in or out of the industry as those larger professional level events. While the argument could certainly be made that collegiate level sports are watched just as much as professional, as a generality, neither is this true nor can it be said typically that the level of play is the same—and for this, we can take the example of the transition from the National Collegiate Athletic Association (NCAA) Division I football to the National Football League (the NFL), which is often rife with developmental difficulties.[8]

As to the administrators, we are primarily concerned with trainers, coaches, and other like parties who guide the athletes, rather than perform as one. It is with the help of these individuals that the athletes reach their full potential. Administrators guide, challenge, and constantly shape the way the athlete develops and perfects his or her craft. This obviously takes a keen sense of the sport involved, the human body, and a degree of skill that is significantly different from that of the athlete, though no less important. As a result, it follows that these individuals, though possibly working with athletes at the amateur or collegiate level, are less likely to be performing in their own right at such a level when doing so. This means that we may be considering professional coaches, trainers, and the like, in addition to those at a lower skill level.

Having clarified those two sets of individuals, we can move on to the classifications available to each, in alphabetical order of visa classification, beginning with the B.

B-visa Classification–Brief Competitions

There exist two categories of B-status: B-1, which is for Business visitors to the U.S.; and B-2, which is for Tourists to the U.S.

Though most commonly utilized by individuals seeking to enter the U.S. for limited business purposes or merely to travel and sightsee, B-status is great for a young athlete or the "Amateur" who has made it to a competition and needs to enter this country for that purpose.

Though not necessarily either business or tourism, the statute allows an athlete to enter the U.S. in order to engage in the competition within his or her sport.[9] Now this may evoke a few questions, such as: *What if the competition is outside of the athlete's primary sport; can he or she still enter the U.S. with a B-visa to compete?*; and *What about the athlete's parents; would they be permitted to enter in order to observe, cheer on, or help out?* Good questions, and the answers are *Yes* and *Yes*. Taking the former, so long as it is demonstrated that the athlete is competing in a genuine competition, this will not be an issue. As to the latter, parents would fall under the "tourism" side of the B-visa, making them eligible for a B-2. No issues there either.

A last point about B-classification involves prize money. May an athlete accept prize money should he or she win the competition? *As an amateur,* ***no***, the athlete may not accept prize monies and awards from having won a competition. This is because the Department of Homeland Security (DHS) and U.S. Citizenship & Immigration Service's (USCIS) definition of "amateur" is someone who does not get paid for his or her performance, and so it does not allow for prize monies to be accepted.[10]

The reason this is one of the lesser valuable visa classifications to the private practitioner is that there is little work for him or her to do. In order to obtain a B visa, the athlete or his or her parents simply fill out online the questionnaire about their own information (e.g., their birth dates, with whom/where they will stay in the U.S. when they arrive, the purpose of their visits, their passport numbers, and so on), upload passport-sized photos, submit them to the Department of State, pay the necessary fees to the embassy or consulate at which they will be interviewing, and schedule their interviews. Then it is simply a matter of showing up to the interviews, being personable and honest, and obtaining approval. The athlete or his or her parents may desire some assistance here because they are simply too busy or find it overwhelming. However, keep in mind that it is less valuable to you in private practice, but can prove to be a gateway to a long-term relationship.

Now, we may move into the next level of the athlete's career: collegiate competition.

F-visa Classification—Students

The F-visa is intended for the foreign national who seeks to enter the U.S. to engage in an approved course of study at a university. Should athletics accompany that course of study, then the student may certainly play for that college team, and participate in those *collegiate level competitions or activities* on behalf of his or her university.

There is also an extension of that student status known as Optional Practical Training or "OPT," which allows the student to work in his or her field of study for one year (or a maximum of 29 months if he or she receives a degree in **S**cience, **T**echnology, **E**ngineering or **M**athematics, better known as "STEM") after graduation. Again, as with the F-visa, this is also processed by the degree-granting university, and so there is next to nothing for the practitioner to do.

The reason this is one of the lesser useful visas to a practitioner is that there is nothing for the private practitioner to do. Universities typically have their own departments in-house that process such visas and work authorizations. The visas are granted by the universities with authority from the DHS.

Worth noting here, though, is that many students and subsequent OPT holders may have questions about what they may or may not do while under F-status or while holding employment authorization under an OPT. As a result, it may come up in conversation or during a consultation with an athlete or parents, and so it is worth keeping in mind that it exists as an option.

Now, we transition to our last topic here, the H-visa and administrators.

H-visa Classification—Specialty Skill

The specific category of H-status that we will be discussing is known as H-1B.

With that, we have what is likely to be valuable to a coach, manager, statistician, trainer, medical professional, and many other off-the-field positions in athletics.

The reason for this is that in order for an individual to qualify for H-1B status, he or she must have a bachelor's degree or equivalent, or enough work experience to equate to a four-year degree, and the degree must relate to the position offered.

For a coach, this is not likely to come into play, because demonstrating that a coach *needs* a four-year degree to perform as such, though requiring significant skill, may prove quite difficult. Of course, this is not always the situation, so be mindful of this as an option for a coach.

For a statistician, however, an H-1B would be a perfect fit. A statistician may arise in the case of baseball—think *Moneyball*, or perhaps with respect to horse racing.

Additionally, a trainer or medical professional, who may serve similar functions depending on the sport, could very well qualify for an H-1B based upon the requirement of a bachelor's degree or equivalent. The key consideration here is that *the position must require someone with a bachelor's degree or equivalent*, which is quite possible for such a role.

Other aspects of the H-1B have been discussed at length and need not be re-evaluated here to avoid redundancies.[11]

For these reasons, the H-visa is not tremendously valuable to the practitioner working with athletes and other individuals in sports. However, the important point to take away from this overview is that there are some positions in the sports industries that may very well fall within the realm of H-status, but the key consideration at the outset is to evaluate if a bachelor's degree or equivalent is necessary for that potential position.

Conclusion

With that, the discussion closes of some of the less useful, but still important, visa classifications for the sports attorney. The next installment of "Sports Immigration" will take up some of those more common classifications ever so briefly, and cover the chief classifications: O and P.

Endnotes

1. United States Citizenship and Immigration Services, *Temporary Visitors for Business*, *available at* http://www.uscis.gov/working-united-states/temporary-visitors-business.
2. United States Citizenship and Immigration Services, *E-1 Treaty Traders*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/e-1-treaty-traders; E-2 Treaty Investors, http://www.uscis.gov/working-united-states/temporary-workers/e-2-treaty-investors.
3. United States Citizenship and Immigration Services, *Students and Exchange Visitors*, *available at* http://www.uscis.gov/working-united-states/students-and-exchange-visitors.
4. United States Citizenship and Immigration Services, *H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occupations-dod-cooperative-research-and-development-project-workers-and-fashion-models.
5. United States Citizenship and Immigration Services, *L-1A Intracompany Transferee Executive or Manager*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/l-1a-intracompany-transferee-executive-or-manager; L-1B Intracompany Transferee Specialized Knowledge, http://www.uscis.gov/working-united-states/temporary-workers/l-1b-intracompany-transferee-specialized-knowledge.
6. United States Citizenship and Immigration Services, *O-1 Visa: Individuals with Extraordinary Ability or Achievement*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-1-visa-individuals-extraordinary-ability-or-achievement.
7. United States Citizenship and Immigration Services, *P-1A Internationally Recognized Athlete*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/p-1a-internationally-recognized-athlete; United States Citizenship and Immigration Services, *P-3 Artist or Entertainer Coming to Be Part of a Culturally Unique Program*, *available at* http://www.uscis.gov/working-united-states/temporary-workers/p-3-artist-or-entertainer-part-culturally-unique-program/p-3-artist-or-entertainer-coming-be-part-culturally-unique-program.
8. Of course, there are always exceptions to the rule, as is the case with most anything other than a scientific proof. There will always be athletes who surpass their peers and rise to the professional level more swiftly, perhaps without much delay, but overall, *as a general rule*, to play at the collegiate level requires a lesser level of skill than required to play at the professional level.
9. 8 C.F.R. § 41.31(b)(2), with clarifying statements at 9 FAM 41.31 N13.7, *Amateur Entertainers and Athletes*, *available at* http://www.state.gov/documents/organization/87206.pdf. As printed in the U.S. Department of State's Foreign Affairs Manual: A person who is an amateur in an entertainment or athletic activity is, by definition, not a member of any of the profession associated with that activity. An amateur is someone who normally performs without remuneration (other than an allotment for expenses). A performer who is normally compensated for performing cannot qualify for a B-2 visa based on this note, even if the performer does not make a living at performing, or agrees to perform in the United States without compensation. Thus, an amateur (or group of amateurs) who will not be paid for performances and will perform in a social and/or charitable context or as a competitor in a talent show, contest, or athletic event is eligible for B-2 classification, even if the incidental expenses associated with the visit are reimbursed.
10. *Id.*
11. See our previous installments that covered the aspects of H-1B in more detail. EASL Journal, Spring 2014, Vol. 25, No. 1, pp. 13-15.

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FIFA World Cup™ Bribery Scandal: The United States Soccer Federation's Possible Challenge to FIFA's Decision

By David Katzman

I. Introduction

The Fédération Internationale de Football Association (FIFA) World Cup™ (WC) is the biggest and most viewed sporting event in the world,[1] even though soccer is in the process of gaining popularity among American television audiences.[2] The 2002 WC was watched by 28.8 billion viewers from over 200 countries.[3] It has the power to effect positive change all over the world.[4] European football (soccer in the United States) has the power to unite and inspire the emotions of hope, passion, and joy.[5] Now former FIFA President Joseph S. Blatter has said that "the importance of the FIFA World Cup™…[is] to help achieve positive change, in line with our claim: For the Game. For the World[.]"[6] However, behind all the smoke and mirrors, FIFA has a secret, scandalous underworld.[7]

As of this writing, there are allegations that two FIFA executives were paid $1.5 million each to vote for Qatar as the host country for the 2022 WC.[8] Prior to the these allegations, on December 2, 2011, the 2022 FIFA World Cup™ was awarded to Qatar after a secret ballot, where Qatar defeated the United States 14-to-8.[9]

Part I of this article will address the United States Soccer Federation's (USSF) potential course of action against FIFA for awarding the 2022 WC to Qatar instead of the United States; notwithstanding the allegations of the possible sale of FIFA Executive Committee members' WC votes. Part II will detail the respective backgrounds of the USSF, FIFA and the WC. Part III will follow with general information about the Court of Arbitration for Sport (CAS), including its history, rules, and process, and Part IV focuses on the corruption in FIFA, explaining the events of the 2022 WC Host Country bribery scandal. Part V will discuss the USSF's potential course of action against FIFA following its unsuccessful bid to host the 2022 WC awarded to Qatar, after it was revealed that members of the FIFA Executive Committee were bribed for their votes. This Part will first address the USSF's internal remedy procedure through FIFA and then follow with an evaluation of the USSF versus FIFA in a CAS hearing. Part VI will conclude by addressing the need for recourse and change to the WC Host Country selection process if Qatar is still allowed to host the 2022 WC despite confirmed proof that the voters were bribed. This Part will also state that the USSF should be awarded a remedy.

II. Background on FIFA, the USSF, and the WC

Before being able to understand the situation at hand, background information on the USSF is important regarding the USSF's jurisdiction for bringing a course of action against FIFA. An explanation about FIFA is also necessary. Lastly, in order to understand the events that led to the alleged bribery and the gravity of the matter, it is important to have a background about the WC and an explanation of the WC host country selection process.

A. USSF

The USSF, a New York-based corporation,[10] is the National Governing Body for soccer in the United States,[11] and controls all U.S. professional soccer exhibitions.[12] Some of the USSF's purposes are "to promote soccer in the United States, including national and international games and tournaments," and "to govern, coordinate, and administer the sport of soccer in the United States[.]"[13]

The United States is represented in FIFA by the USSF; the USSF is the national member association of FIFA for the United States.[14] The USSF is also a member of the Confederation of North, Central America and Caribbean Association Football (CONCACAF).[15] The USSF and its members are obliged to respect the statutes, regulations, directives, and decisions of FIFA and of CONCACAF.[16]

B. FIFA

FIFA[17] is an unincorporated association based in Zurich, Switzerland.[18] It was founded in 1904[19] and is the governing body of international soccer.[20] FIFA's membership consists of National Associations in over 200 different countries.[21] Each member association of FIFA is grouped into a Confederation,[22] each Confederation is a group of FIFA member associations that belong to the same continent or assimilable geographic region.[23] FIFA exercises "regulatory, supervisory and disciplinary functions over continental confederations, national associations, clubs, officials and players world-wide."[24]

FIFA recognizes the CAS "to resolve disputes between FIFA, Member[s] [Associations], Confederations, Leagues, clubs, Players, Officials and licensed match agents and player agents."[25] CAS arbitrates disputes for FIFA;[26] and FIFA gives CAS very broad jurisdiction in the FIFA Statutes.[27] One of FIFA's missions is to oversee the organizational, promotional and commercial aspects of major soccer events, including the WC.[28]

C. FIFA World Cup™

FIFA is the organizer of the World Cup soccer tournament, which is held every four years.[29] The first competition was held in 1930, and ever since then, the WC has continued to grow in popularity and prestige.[30] The WC competition consists of 32 teams; the host country's team

and the other 31 teams that qualify.[31] The winner of the final match in the tournament is crowned the WC Champion.[32]

The host country for the WC is decided by the Executive Committee of FIFA after a long bidding process.[33] Article 76 in the General Provisions of the FIFA Statutes states: "[t]he Executive Committee shall decide the venue for the final competitions organised[sic] by FIFA."[34] At a post-Congress press conference of the 58th FIFA Congress, a new method of awarding the 2018 and 2022 WCs was announced.[35] The Executive Committee was going to decide the host countries for the 2018 and 2022 WCs at the same time.[36]

For the 2018 and 2022 WCs, FIFA opened a simultaneous bidding process for the hosting of the two WC tournaments.[37] The 24-month process to select the hosts of the 2018 and 2022 WCs began when FIFA sent out invitations to all member associations eligible to bid to host the WC, asking them to express their interest to bid for either or both of the tournaments and submitting an Expression of Interest form to FIFA.[38] After the deadline to submit that form passed, FIFA then sent out the Bid Registration form to all member associations that had returned the Expression of Interest form.[39] Following the expiration of the deadline to submit the Bid Registration form, FIFA sent out the Bidding Agreement, the Hosting Agreement and other required documents to the interested member associations.[40] Seven months after FIFA's deadline for all documents to be submitted passed, the FIFA Executive Committee appointed the host member associations of the 2018 and 2022 WCs.[41]

The WC host is determined by a voting process of FIFA Executive Committee members.[42] The voting for the host country (member association) for the WC occurs in rounds until a candidate receives an absolute majority of votes,[43] which occurs when one receives an absolute majority.[44] If no candidate reaches more than half of the votes in Round One of the voting, then the candidate with the fewest number of votes is eliminated, and the FIFA Executive Committee members re-vote in the next round for one of the remaining candidates.[45] If a candidate receives absolute majority in this round, it is awarded the WC.[46] However, if no absolute majority is reached again, then the candidate with the least amount of votes is eliminated, and the same procedure follows until a candidate receives absolute majority.[47] USSF may have a claim with the CAS against FIFA because this process was corrupted by the alleged bribery by Qatar, which resulted in Qatar being awarded to host the 2022 WC.

III. Background on the Court of Arbitration for Sport (CAS)

The CAS was created by the International Olympic Committee (IOC) in March of 1983,[48] and was formed "in response to the increasing need to create a specialized body that could settle international sporting disputes, while offering a rapid and flexible procedure that was inexpensive for the parties involved."[49] The CAS was founded in Lausanne, Switzerland, which is also the location of the main headquarters[50] and subject to Swiss law.[51] The CAS has since expanded by opening decentralized offices in New York and Sydney.[52] It also operates an ad hoc tribunal at major sporting events, such as the Olympic Games and FIFA WC™.[53]

The CAS only has jurisdiction to hear cases if two conditions are satisfied.[54] The first condition is that the parties must agree in writing to arbitrate their dispute, which can be met by writing the requirement into the bylaws or statutes of a sports association.[55] Article 62, Section 1 of the FIFA Statutes says, "FIFA recognises[sic] the independent Court of Arbitration for Sport (CAS)… to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents."[56] Article 64, Section 1 of the FIFA Statutes further states that "The Confederations, Members and Leagues shall agree to recognise[sic] CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS."[57] The second jurisdictional condition for the CAS is that the dispute must relate to sports in some way.[58] Overall, the CAS can hear any and all disputes that "involve matters of principle relating to sport or matters of pecuniary or other interests brought into play in the practice or the development of sport and, generally speaking, any activity related or connected to sport."[59]

The CAS has three distinct procedures and responsibilities for resolving sports-related disputes;[60] however, this article will be limited to the appeals arbitration procedures because the USSF will be appealing FIFA's decision to award the 2022 WC to Qatar. The appeals arbitration procedure is used for sports-related disputes that arise from an appeal of a final decision of a sport's governing body.[61] It is also used to resolve appeals from final decisions of sports federations, where the appealing party is required to exhaust all available internal administrative remedies before appealing to the CAS.[62]

In order to bring a dispute before the CAS, the claimants must first file a request with the court,[63] along with a document of the complaint containing a brief statement of the facts and legal argument, a copy of the contract or other documents that demonstrate that the CAS has jurisdiction over the dispute, and the claimant's request for relief.[64] At the CAS hearing, the Panel hears testimony from experts and witnesses.[65] It has the full power to review the facts of the case and the law,[66] and decides the dispute according to the applicable regulations and the rules of law chosen by the parties.[67] The Panel then issues its final decision,[68] which is final and binding.[69] As an award, the Panel can issue a new decision that replaces the decision originally challenged, or annul the decision and remand the case.[70]

If the USSF appeals FIFA's decision to grant Qatar the 2022 WC to the CAS, the USSF can request the CAS Panel to issue a new decision and award the USSF the 2022 WC instead. Or, the more likely result, the USSF can request the CAS Panel to annul the awarding of the 2022 WC™ to Qatar and grant a re-vote, due to the alleged bribery scandal by Qatar, which resulted in Qatar receiving the 2022 FIFA WC™.

IV. 2022 FIFA World Cup™ Bribery Scandal

Corruption in professional soccer began with the illegal Asian gambling industry, which has organized some of the biggest match fixes in soccer history.[71] There were also matches fixed during the 2006 WC.[72] Now there are allegations of bribery in the awarding of the 2022 WC to Qatar.[73]

On January 15, 2009, FIFA sent out invitations to its member associations requesting any interest in hosting either/or both the 2018 and 2022 WCs.[74] The countries of the member associations that confirmed their interests in hosting included: Australia, Belgium, the Netherlands, England, Indonesia, Japan, Korea Republic, Mexico, Qatar, Russia, Spain and Portugal, and the United States.[75] FIFA then sent out the Bid Registration form to all the member associations that expressed interest, and all Bid Registration forms were completed and sent back to FIFA by the deadline.[76]

In order to ensure fairness in the bidding process, then-FIFA President Joseph S. Blatter said, "[t]he bidding process for the 2018 and 2022 World Cups will be keenly contested and FIFA is eager to ensure that fair play prevails. For that reason, the FIFA Ethics Committee will be involved in the proceedings."[77]

On May 17, 2010, FIFA released a statement confirming that FIFA Secretary General Jerome Valcke had requested the FIFA Ethics Committee to examine the alleged statements made by Lord Triesman regarding the corruption and bribery in relation to the 2018 and 2022 WC bidding process.[78] Lord David Triesman, the former chairman of The Football Association (FA) and the head of England's failed 2018 FIFA WC,[79] accused four leading FIFA Executive Committee members of soliciting bribes from potential host countries in exchange for their WC votes.[80] Lord Triesman specifically named FIFA executives Jack Warner of Trinidad and Tobago and Worawi Makudi of Thailand, claiming that they sought monetary bribes as payment for their votes.[81] Triesman also claimed that Nicolas Leoz of Paraguay, instead of money, requested a knighthood from the United Kingdom, and that Ricardo Teixeira from Brazil told Triesman to "'come and tell me what you have for me.'"[82]

Following these initial allegations, four other members of FIFA's Executive Committee were accused of similar behavior, including accusations that two FIFA Executive Committee members, Issa Hayatou and Jacques Amouma, were each paid $1.5 million to vote for Qatar.[83] Overall, eight of the 24 FIFA Executive Committee members have allegedly engaged in "'improper and unethical behavior.'"[84]

On October 17, 2010, now former FIFA President Joseph S. Blatter wrote a letter to the FIFA Executive Committee addressing an article published in *The Sunday Times* entitled "World Cup Votes for Sale."[85] In the letter, Blatter said that "information in the article has created a very negative impact on FIFA and on the bidding process for the 2018 and 2022 FIFA World Cups™. Some current and former members of the Executive Committee are mentioned in the article."[86] The letter included FIFA's statement to the media in reaction to the article, which said that FIFA and the FIFA Ethics Committee had closely monitored the bidding process and would continue to do so. FIFA's statement to the media further stated that FIFA had requested to receive all of the documents and information related to this matter, and upon receipt of the materials FIFA would analyze it and only then determine its future steps with regard to the situation.[87] Blatter told the Executive Committee in the letter that "FIFA…will open an in-depth investigation, which will start immediately…."[88]

Three days later, on October 20, 2010, the FIFA Ethics Committee decided to provisionally suspend FIFA Executive Committee members Amos Adamu and Reynald Temarii from taking part in any football-related activity.[89] The Committee reached this decision after examining the now suspended members' cases in relation to the bidding process for the 2018 and 2022 WCs and determining the likelihood that a breach of the FIFA Statutes, the FIFA Code of Ethics, and the FIFA Disciplinary Code had been committed.[90] The FIFA Ethics Committee also decided to provisionally suspend four officials, due to alleged breaches of the FIFA Statutes, Code of Ethics, and the Disciplinary Code.[91]

On December 2, 2010, the FIFA Executive Committee chose Qatar to host the 2022 WC.[92] The official candidates at that point to host the 2022 WC were Australia, Japan, Korea Republic, Qatar, and the U.S.[93] The voting process consisted of 22 total voters, since two members were suspended, and thus 12 votes were needed for an absolute majority to be awarded to host the 2022 WC. In Round One of the voting, Australia received one vote, Japan three votes, Korea Republic four votes, Qatar 11 votes, and the U.S. three votes, thus eliminating Australia.[94] In Round Two of the voting, Japan received two votes, Korea Republic five votes, Qatar 10 votes, and the U.S. five votes, thus eliminating Japan.[95] In Round Three of the voting, Korea Republic received five votes, Qatar 11 votes, and the U.S. six votes, thus eliminating Korea Republic.[96] In the final round, Qatar received 14 votes and the U.S. received eight votes, giving Qatar absolute majority and the right to host the 2022 WC.[97]

Besides the allegations made by Lord Triesman regarding all of the corruption and bribery from FIFA Executive Committee members to potential host countries in exchange for their votes,[98] the awarding of the 2022 FIFA World Cup™ to Qatar was also compromised by allegations of corruption based on information obtained from a whistleblower who was involved in the Qatar bid.[99] However, the whistleblower has since retracted her allegations.[100]

In order for the USSF's claim against FIFA to be successful in the CAS, the USSF must prove that Qatar bribed FIFA Executive Committee members for their votes. Some of the USSF's strongest evidence to prove this appears in an email sent by FIFA Secretary General Jerome Valcke.[101] Further allegations of corruption and possible reliable and credible proof of the bribery scandal came when FIFA Secretary General Valcke confirmed that he sent suspended FIFA Vice-President Jack Warner an email stating that the 2022 WC in Qatar had been "bought."[102] Suspended FIFA Vice-President Warner made public an email from FIFA Secretary General Valcke that claimed Mohamed Bin Hammam had bought the 2022 WC.[103]

Mohamed Bin Hammam of Qatar, who is now a former FIFA Executive Committee member and the former President of the Asian Football Confederation (AFC), was banned for life from all football-related activity by the FIFA Ethics Committee on July 23, 2011, after he was found guilty by the Ethics Committee of bribery.[104] Hammam was found guilty of charges that he attempted to bribe Caribbean Football Union members in May 2011 while in Trinidad for their votes in the upcoming FIFA Presidential elections.[105] After the email was made public, Hammam responded by denying that Qatar bought the WC.[106] Additionally, Qatar's WC organizers responded by releasing a statement denying any wrongdoing over the 2022 WC bid.[107]

Further proof that corruption and bribery exists and is a big problem in FIFA was shown in an investigative video report in *The Sunday Times*.[108] The investigation revealed Amos Adamu, a Nigerian FIFA Executive Committee member and President of the Western African Football Union, agreeing to sell his vote on the 2018 WC host country.[109] In the investigation, two undercover reporters met Adamu in London, acted as U.S. lobbyists, and offered to pay him $800,000 for his vote.[110] Adamu specifically responded by saying, "it [the money] will have an effect [on the vote]."[111]

Besides the bribery and corruption with which Qatar was involved to win the vote to host the 2022 WC, the country also participated in "technically" legal conduct that provided it with an unfair advantage over the other host country candidates. FIFA's bid rules contain loopholes that allow a country to win bids in an unconventional way and deviate from open and fair competition.[112] During the bidding process, Qatar was completely within FIFA rules when it paid $50,000 to a South African hospital in seeking Archbishop Tutu's support.[113] Qatar was also within FIFA rules when it spent $1.6 million to host a soccer congress of African nations in Angola, consequently preventing Japan, Korea Republic, Australia, and the U.S. from presenting their own bids for the 2022 FIFA WC™ at the conference.[114] Even though Qatar did not violate any FIFA Statutes or rules by these two actions, it was able to have an unfair influence over the voters.

V. USSF's Course of Action: *USSF v. FIFA*

If the USSF is to bring a course of action against FIFA, it must first go through FIFA's internal remedy procedure.[115] If the USSF exhausts all of FIFA's internal remedies to no avail, then it can subsequently bring its appeal before the CAS.[116]

A. USSF's Internal Remedy Procedure Through FIFA

FIFA recognizes the CAS "to resolve disputes between FIFA, Member[s] [Associations], Confederations,…[and] Officials."[117] According to the FIFA Statutes, the USSF must recognize the CAS as the only available judicial authority and cannot bring a suit in an ordinary court of law.[118] Additionally, the FIFA Statutes say that a party can appeal to the CAS final decisions made by FIFA only after all internal channels are exhausted.[119] FIFA's governing documents addresses all of FIFA's rules and the internal remedy procedures for a party to challenge a decision by FIFA.[120]

The FIFA Code of Ethics specifically prohibits bribery.[121] It says "[o]fficials may not accept bribes;…any gifts or other advantages that are offered, promised or sent to them to incite breach of duty or dishonest conduct."[122] Additionally, "[o]fficials are forbidden from bribing third parties or from urging or inciting others to do so in order to gain an advantage for themselves or third parties."[123] The FIFA Code of Ethics also says that officials are prohibited from *accepting* gifts of cash of any amount or any form, but officials are permitted to *give* gifts as long as no dishonest advantages are gained.[124] "Officials" are defined as "all board members, committee members,…and any other persons responsible for technical, medical and administrative matters in FIFA, a confederation, association…."[125]

The WC Bid Registration form also addresses the necessity for ethical behavior during the bidding process.[126] In the WC Bid Registration form, Chapter 11 on the Rules of Conduct says that "[i]t is essential to the integrity, image and reputation of FIFA…that the conduct of the Member Association and the Bid Committee during their bid preparations complies with the highest standards of ethical behavior."[127] The Bid Registration form binds the Member Association and Bid Committee to the FIFA Code of Ethics and requires both parties to sign and provide to FIFA a declaration of compliance with Chapter 11 of the Bid Registration form.[128]

Chapter 11 says that the Member Association and Bid Committee must act in accordance with basic ethical principles for any activities relating to the Bidding Process, and says that the "Member Association and the Bid Committee shall refrain from attempting to influence members of the FIFA Executive Committee or any other FIFA officials, in particular by offering benefits for specific behavior."[129] Chapter 11 also prohibits the Member Association and the Bid Committee from "entering into any kind of agreement with any other member association or bid committee as regards to the behavior during the Bidding Process, and the manner in which and when a member association or bid committee bid for the Competitions or which may otherwise influence the Bidding Process."[130]

Since the USSF has not chosen to bring any cause of action, this cause of action by the USSF is merely a hypothetical possibility. The USSF would argue to FIFA that Qatar violated the FIFA Code of Ethics and breached its Bid Registration form by bribing FIFA Executive Committee members for their votes. Thus, the USSF would first have to exhaust all of FIFA's internal remedies before appealing to the CAS FIFA's decision to award Qatar the 2022 WC.

One of the internal remedies is filing a complaint to the FIFA Ethics Committee regarding the bribery of FIFA Executive Committee members, because FIFA accepts ethics complaints from the Executive Committee of a member association,[131] and sometimes through other channels not stipulated in the FIFA Code of Ethics.[132] The other internal remedy that the USSF could attempt to use is filing a complaint to FIFA's Disciplinary Committee for the corruption of the FIFA Executive Committee members.[133] However, USSF might not be able to bring a complaint to the Disciplinary Committee because it agreed to fully comply with any decisions passed by FIFA bodies, which are final and not subject to appeal.[134]

Ultimately, if the USSF and the U.S. WC Bid Committee file a complaint to the FIFA Ethics Committee, and even if the USSF is permitted under the FIFA Statutes to file a complaint to the Disciplinary Committee, the only possible result is that FIFA will punish Qatar and the FIFA Executive Committee members who took the bribes. The USSF and the U.S. WC Bid Committee will not be remedied for Qatar's corruption during the bidding process, and so after exhausting all internal remedies to no avail, the USSF could then seek to appeal to the CAS.

B. *USSF v. FIFA* in the CAS

If FIFA does not internally grant USSF's remedies due to the bribery and selling of 2022 WC votes, the USSF could appeal to the CAS in an appeals arbitration procedure. The USSF could request the CAS to: (1) Vacate the award of the 2022 WC to Qatar and instead award it to the U.S. (as the U.S. finished second place in the vote); (2) vacate the award to Qatar and have a re-vote; or (3) leave the 2022 WC in Qatar and award the USSF damages for economic loss, and loss of intangible benefits, among other damages, to the U.S.

In the CAS appeals arbitration procedure, the CAS Code, FIFA regulations, and Swiss law will all apply to the proceedings.[135] The CAS arbitration panel has the power of de novo review.[136] It "may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance."[137]

In the CAS proceedings, the USSF would first need to prove that illegal bribery and corruption was involved in the 2022 WC voting, resulting in Qatar winning the bid. The USSF would then have to attempt to demonstrate why the U.S. should have and would have been awarded the 2022 WC if the voting was fair and free of corruption.

1. USSF Must Prove to the CAS That Illegal Bribery Corrupted the 2022 WC Voting Process

The USSF can argue fraud and breach of contract by FIFA, because all members of FIFA and FIFA itself must follow the FIFA Statutes and Code of Ethics. The illegal bribery and corruption for votes in violation of the FIFA Code of Ethics and FIFA Statutes is a breach of those contracts between the member association USSF and FIFA as the governing body.

The USSF can also attempt to argue that the illegal bribery and corruption for votes by Qatar of FIFA Executive Committee members is a breach of the Bid Registration form contract between Qatar and FIFA. Thus, Qatar's Bid Registration form should automatically be found void and unenforceable, thereby prohibiting Qatar from being awarded the 2022 WC. This is a very strong argument.

The issue for the CAS Panel to determine is if sufficient proof exists to show that illegal bribery and corruption was involved in the 2022 WC host country voting, which resulted in Qatar winning the bid. The main issue for the Panel to decide is whether there is enough evidence to find Qatar guilty of bribery and corruption and thus guilty of violating the FIFA Statutes and Code of Ethics.

The USSF should be able to provide enough evidence to the CAS Panel to find Qatar guilty of bribery and corruption. The combination of Qatar obtaining votes through loopholes in FIFA's bid rules; the accusations by Lord Triesman of the solicitation of bribes and corruption by a total of eight FIFA Executive Committee members, including specific allegations that two FIFA Executive Committee members were paid $1.5 million each to vote for Qatar; the corruption and bribery allegations and subsequent retraction of those allegations by a whistleblower part of the Qatar bid; *The Sunday Times* investigative report showing the selling of Amos Adamu's vote in the 2018 WC; the suspension of Adamu, Temarii and the four officials for rules and ethics violations in relation to the 2018 and 2022 WC bidding process; and especially FIFA Secretary General Valcke confirming that he sent an email

to suspended FIFA Vice-President Warner stating that the 2022 WC in Qatar was bought by Mohamed Bin Hammam, who was banned for life by FIFA after he was found guilty of charges for attempted bribery of Caribbean Football Union members for their vote in the upcoming FIFA Presidential elections—is valid and substantial proof that corruption and bribery existed in the 2022 WC host selection. Taking all of these circumstances together, it is reasonable to believe that the CAS arbitration panel can find Qatar guilty of illegal bribery and corruption of the 2022 WC voting.

2. Comparing the U.S. Bid Against Qatar's Bid—Why the U.S. Bid Is Better

After proving that Qatar is guilty of corruption and bribery, USSF would attempt to demonstrate to the CAS why the U.S. bid is better than Qatar's bid, and why the U.S. should have and would have been awarded the 2022 WC if the voting was fair and Qatar did not bribe FIFA Executive Committee members. The USSF will demonstrate this by examining and comparing the U.S. and Qatar bids and FIFA's evaluation reports with regard to the U.S and Qatar bids.

In the Bid Invitation sent out to all eligible FIFA member associations, FIFA emphasized that the facilities and infrastructure in the host country are required to be of the highest quality.[138] The Bid Invitation specified that "approximately 12 stadiums with minimum capacities of between 40,000 for group matches and 80,000 for the opening match and final" are required to host the FIFA World Cup™.[139] FIFA also said that to host the WC, "the very highest standards of TV broadcasting, information and telecommunications technology, transport and accommodation are an absolute must."[140]

When the USSF argues its case to the CAS by examining and comparing the U.S. bid against Qatar's bid, and examining FIFA's evaluation reports with regard to the U.S. and Qatar bids, it is likely that the CAS Panel will find that the U.S. bid was better, and that the U.S. was more suited to host when applying FIFA standards and criteria. The CAS Panel will first look at the FIFA Statutes and apply the continent rule, which says, "[a]s a rule, tournaments may not be held on the same continent on two successive occasions."[141] When applying the continent rule to the U.S. and Qatar, neither country is prohibited from hosting the 2022 WC. The last time the FIFA World Cup™ was held in North America was the first and only time, specifically when the U.S. hosted in 1994. The last time it was held in an Asian zone was in 2002, when Korea and Japan hosted it; Qatar has never hosted the WC.

FIFA requires a host country to have at least 12 stadiums.[142] The U.S. has 18 proposed stadiums, none of which needs renovations or is a new construction project.[143] On the other hand, Qatar has 12 proposed stadiums, three of which need to be renovated, and the other nine are completely new construction projects budgeted at costing Qatar $3 billion.[144] FIFA also requires a country to have accommodations of at least 60,000 available hotel rooms in order to host.[145] The U.S. has 170,000 contracted hotel rooms with FIFA, compared to Qatar's 84,000.[146] Additionally, the U.S. projects to sell 4,957,000 tickets based on the number of sellable tickets with 100% stadium capacity, compared to Qatar projecting to sell 2,869,000.[147]

FIFA determined in the executive summaries of the two countries' bid evaluation reports that the overall operational risk in Qatar hosting the WC is not even a "medium risk," but in fact a "high risk"—while the overall operational risk in the U.S. hosting the WC is a "low risk."[148] This overall operational risk includes competition factors, such as stadium construction, stadium operation, and team facilities; transport factors, such as airports, ground transportation, and host city transportation; accommodation factors; and TV broadcasting factors.[149] FIFA determined Qatar to be a "medium risk" in all three transport factors, and the U.S. a "low risk" in all except ground transportation, where a "medium risk" was present.[150] FIFA found Qatar to be a "medium risk" with regard to accommodation factors, and the U.S. was found to be a "low risk."[151] FIFA also found Qatar to be a "medium risk" in TV broadcasting factors, while the U.S. was a "low risk."[152]

All of the overall operational risk factors are of the upmost importance to FIFA in determining the host country.[153] Applying FIFA's determinations that the overall operational risk of Qatar hosting the WC is classified as a "high risk," compared to the overall operational risk of the U.S. hosting the WC as a "low risk," it is ridiculous and completely irrational that the FIFA Executive Committee would choose Qatar to host the 2022 WC instead of the U.S.

Qatar may attempt to argue that FIFA's determination that the overall legal risk of its hosting is a "low risk," compared to the U.S. being a "medium risk."[154] However, this argument is not strong enough to justify Qatar being selected to host. The USSF can demonstrate, as FIFA pointed out in the executive summaries of the evaluation reports, that the "US Government has considerable experience in supporting the hosting and staging of major sports events and has proven its willingness to make material concessions, accommodate the concerns of event organisers[sic], and has expressed its intention to enact the necessary legislation" by June 1, 2013.[155] This is also another reason why the U.S. is a better choice to host the 2022 WC over Qatar, since the U.S. has extensive experience in hosting large-scale national and international sporting events.[156]

Additionally, FIFA noted that awarding the U.S. the WC is a key step in further development of the U.S. as a soccer-friendly country.[157] FIFA's interests of helping gain the popularity of its stars would be best achieved if soccer

gained popularity in the U.S., and FIFA's interests could have been achieved by awarding the U.S. the 2022 WC, especially as it is the number one market in the world for sports sponsorships, and it also has an increasing market for soccer sponsorships.[158] If the U.S. hosted, the TV ratings and media rights income in the Americas are likely to increase, which will consequently lead to soccer gaining popularity in North America.[159]

Another reason why the U.S. was a better and more logical choice to host the 2022 WC instead of Qatar is because of the latter's desert climate. Qatar has very hot and long humid summers with scarce precipitation.[160] The WC is played in June and July, which are Qatar's two hottest months.[161] FIFA considers these conditions as a potential health risk for players, officials, and spectators, and requires that precautions be taken.[162] Notably, before Qatar won its bid to host, FIFA officials were warned prior to the vote about the potentially dangerous heat there during June and July, where daytime temperatures regularly reach 124 degrees Fahrenheit.[163]

In fact, on March 19, 2015, the FIFA Executive Committee confirmed that it was changing the months in which the 2022 WC would be held to November/December, due to Qatar's unbearable climate and soaring temperatures in June/July.[164] However, moving from summer to winter conflicts with the European club season.[165] The FIFA Executive Committee also agreed to play the 2022 WC hosted by Qatar over a reduced time frame.[166] The U.S. does not pose or face any of these potential health risks due to climate and temperature in June and July, and the dates of the 2022 WC would not have to change. All of the aforementioned troubles and concerns were clearly ignored when the final vote was rendered.

Taking into account all evidence, facts, allegations, arguments, and comparing the U.S. bid with Qatar's bid, and then examining and applying FIFA's executive summaries of the evaluation reports, the CAS Panel can reasonably conclude the presence of corruption in the 2022 WC host country voting. It can also determine that Qatar is guilty of illegal bribery and buying the votes of FIFA Executive Committee members. Therefore, the CAS Panel can reasonably conclude that the U.S. had a better bid than Qatar, and was the more suitable choice by FIFA to host the 2022 WC.

VI. Conclusion

The USSF has a valid claim against FIFA and should challenge the decision awarding Qatar the 2022 WC. FIFA and Qatar both breached their contract with the USSF to abide by and follow the Statutes, Code of Ethics, and the Bid Registration form. Consequently, Qatar was unfairly awarded the right to host, which in the absence of corruption would have been awarded to the USSF and the U.S. instead. Moreover, the USSF suffered economic loss and the loss of intangible benefits because of FIFA and Qatar's breaches of contract.

As previously provided, subsequent to the vote, allegations surfaced that some FIFA members were bribed to vote for Qatar as host. FIFA responded by launching an internal investigation of the matter.[167] In December 2014, FIFA's Ethics Committee ceased its investigation into the alleged corruption of the bidding process[168] and ultimately found that Qatar did not commit any major violations.[169] Clearly, FIFA does not have any adequate effective procedures or reforms in place to prevent this type of corruption of the WC bidding process, so it is up to a country and a member association to take some effective action.

As of this writing, the USSF has not taken any action to challenge the awarding to Qatar, but there is evidence that some might be taken. An action must eventually be initiated by an unfairly affected country to prevent future corruption and bribery of the bidding process. On Wednesday, May 27, 2015, the United States Department of Justice (DOJ) began to take such action against FIFA, which has been so desperately needed over the past two decades.[170]

"Allegations of corruption at FIFA are nothing new to those who follow international soccer. But what was surprising to some Wednesday [May 27, 2015] was the sense that someone was finally doing something about them."[171] The United States Department of Justice unsealed a 47-count indictment in federal court in Brooklyn, New York, which charged 14 defendants with racketeering, wire fraud and money laundering conspiracies, among other offenses, in connection with the defendants' participation in corruption of international soccer.[172] The defendants charged in the indictment include high-ranking officials of the FIFA, as well as leading officials of other soccer governing bodies that operate under the FIFA umbrella.[173] At a press conference, U.S. Attorney General Loretta E. Lynch stated: "In short, these individuals, through these organizations, engaged in bribery to decide who would televise games, where the games would be held and who would run the organization overseeing organized soccer worldwide."[174]

Furthermore, Attorney General Lynch said at the press conference that: "Today's action makes clear that this Department of Justice intends to end any such corrupt practices, to root out misconduct, and to bring wrongdoers to justice—and we look forward to continuing to work with other countries in this effort."[175] Earlier that morning, at the request of the United States, Swiss authorities in Zurich arrested seven of the defendants charged in the indictment.[176] On that same day, Swiss authorities invaded FIFA's headquarters in Zurich and announced that they would be conducting an investigation into the last two FIFA World Cup™ bids, Russia in 2018 and Qatar in 2022, which have been the center of controversy since the announcement in 2010.[177]

Notably, on June 2nd, FIFA President Sepp Blatter announced his resignation as FIFA President in the wake of the corruption investigations and as the scandal grew.[178] Later that day, it was announced that Blatter was being investigated by United States prosecutors and the FBI to determine his involvement with FIFA's corruption.[179]

Similarly, according to three senior U.S. law enforcement officials, the investigation of FIFA by the DOJ commenced due to the allegations of payoffs and bribes to FIFA Executive Committee members who decided where to hold the next two WCs.[180] Former prosecutor and sports analyst Christopher Fusco explained, "This organization has been lawless, doing whatever they want for years. This is the way they do business.… Selecting Qatar was the straw that broke the camel's back."[181]

Richard Weber, IRS Chief Criminal Investigator, called FIFA's scandal and corruption the "World Cup of Fraud," and that the DOJ was "issuing FIFA a red card."[182] Acting U.S. Attorney Kelly Currie said "today's announcement [of the indictments] should send a message that enough is enough" and that "this indictment is not the final chapter in our investigation"[183] but rather, "is the beginning of our work, not the end."[184]

Following the news conference on May 27th, former FIFA head of security Chris Eaton explained that the DOJ has done "something that no other police organization or other region has done so far on FIFA."[185] Now it is up to the DOJ and the USSF to take the next step and challenge the award to Qatar as host nation of the 2022 FIFA World Cup™. Qatar was unfairly awarded the right to host the 2022 WC, which in the absence of corruption, would have instead been awarded to the USSF and the United States.

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Fighting for Online Privacy with Digital Weaponry: Combating Revenge Pornography

By Elisa D'Amico and Luke Steinberger

The Cyber Civil Rights Legal Project offers pro bono help to victims whose sexually explicit images have been disseminated online without consent. The speed at which information spreads is unfathomably rapid, and in just moments, a person's most intimate moments can be exposed—displayed online for more than three billion Internet users around the globe to view, download, and share.

I. Introduction and Background on Revenge Porn

"This has undoubtedly been the darkest chapter of my life." Those words were spoken by one individual whose private, intimate photographs were distributed online without her consent for countless strangers to see. Yet they might as well be the motto for all those who fall prey to abusers who use the Internet as their playground, sharing the most intimate details of their victims' bodies and lives online at high speeds and at low costs,[1] enabling what so many perpetrators and perpetuators crave: Instant gratification.

Revenge porn, also known as nonconsensual pornography, refers to the distribution of sexually explicit images without the consent of the pictured individual.[2] Thousands of victims struggle every day with the reality that, against their wishes, their private, intimate photographs and videos are available for viewing online and download.

These images surface online on many websites that exist solely for the purpose of allowing individuals to share nonconsensual pornography. For example, one site touts itself as a "moral free file host where anything legal is hosted forever!"[3] Another allows individuals to upload photographs of ex-lovers for the purpose of humiliating and shaming, boasting the tagline "Get Revenge! Naked Pics of Your Ex."[4] Other websites that are not solely dedicated to revenge porn have subsections dedicated to hosting revenge porn material.[5] Revenge porn also has permeated social media platforms, where individuals may fall victim to public shaming by way of "imposter profiles" that utilize their name and likeness, and display their intimate media.[6] This intimate material also is transmitted regularly via e-mail and text message.

While men can and do find themselves as targets of revenge porn, the overwhelming majority of victims are women.[7] The explicit images tend to target the victims' gender in ways that are sexually threatening and degrading,[8] and the comments that accompany the images can be as degrading—if not more—than the images themselves.[9] The images are not simply posted and forgotten, but they are often downloaded, traded, and collected, much like baseball cards.[10] As Professor Danielle Citron notes, the accompanying comments shame victims for their sexuality; commentary often falsely suggest victims' availability for sex.

As if the unauthorized distribution of intimate images online with degrading and defamatory comments was not bad enough, revenge porn victims are also "doxed": their full names and other identifying information—such as their addresses, phone numbers, and links to social media accounts—are posted online along with their nude images.[11] This harassment and abuse typically extends beyond the initial posting of intimate and personal information. Certain individuals and groups make it their mission to terrorize revenge porn victims further, repeatedly publishing lies about them, doctoring photographs online, and even threatening rape or physical violence.[12]

The harm suffered by revenge porn victims is not limited to cyberspace. What begins as cyber exploitation increases victims' risk of exposure to offline stalking and physical attack. For starters, threats of sexual and physical violence cause profound fear, anxiety, and even panic attacks in revenge porn victims. According to a study conducted by the Cyber Civil Rights Initiative, more than 80% of victims of revenge porn suffer from severe emotional distress and anxiety.[13] In rare cases, revenge porn can result in physical harm. According to Citron, such posts and comments "raise victims' risk of physical attack, instill in them the fear of being harassed offline, damage their online reputations, and instill a deep sense of embarrassment."

Revenge porn also causes victims to suffer economic harm. For example, victims often see their careers suffer. If a victim is seeking employment, the interview process alone is an enormous challenge. Revenge porn perpetrators often manipulate search engines to increase the likelihood that employers and clients will see the defamatory statements.[14] Since most employers conduct online searches before hiring new employees, if the first page of search results for the potential employee is packed with nude images and videos of the candidate, there is a good chance the employer will move on to the next interviewee.[15]

> *For the first several years of my non-consensual exposure online, all I wanted was for my name to no longer render humiliating and shocking search results so that I could secure a job that would allow me to become finan-*

cially secure enough to hire lawyers, SEO professionals, a bodyguard...whatever would allow me to protect myself and my loved ones from any further injury or harm at the hand of my perpetrator.

—Nikki Rettelle, victim

Revenge porn may threaten victims' existing jobs if their bosses discover their employees' intimate media on the Internet. If they do, employers often blame the victim for the appearance of the explicit images and/or video online, sometimes even going so far as terminating the victim-employee.[16]

What begins as online harassment sometimes—thankfully this tends to be a rarer occasion—manifests as physical harassment. The horror of revenge porn is exacerbated exponentially when victims are physically assaulted as a result of online postings.

Think about finding your nude images on over 300 websites. My ex-boyfriend attempted to humiliate me publicly but to me, the worst part was how he impersonated me. He talked to literally thousands of men and tricked them into believing they were talking to me. He would explicitly describe to them the different sexual favors that "I" was going to provide them with if they came to my house, and he would give them my actual address. I remembered thinking "are these people crazy, do they actually think they're talking to me?"

My nightmare came true when men started showing up at my door thinking that the person on the other side (me) was interested in having sex with them. I even had someone leave pictures on my door step with a note that said "I'll find you." I had to explain to these men, repeatedly, that they had not been talking to me but instead to someone else pretending to be me and harassing me.

I was so full of fear. My phone constantly buzzed with text and social media messages containing photographs of the private parts of strange men that I had never met and that I did not care to meet. I wound up deleting my social media profiles and changed my phone number, in order to try and make these unwanted communications stop. I even remember turning my read receipts on for my text messages and telling my friends "if you text me and you see that I read it and don't respond, something is wrong; call the cops."

What my ex-boyfriend did to me was not just harassment on the web, but he actually placed me in harm's way, again and again. I would never wish something like this upon my worst enemy.

—Anisha Vora, victim

While this is—thankfully—not a common end result, Anisha's story should demonstrate to perpetrators and consumers of revenge porn that the consequences of these nonconsensual online postings may extend well beyond the initial goals and expectations of the original bad actors.

Revenge porn should have everyone's attention, not because it can impact anyone but because it already impacts everyone.

> Originally, the kneejerk reaction was to denounce the victim for assuming the risk by engaging in purportedly sexually provocative and dicey conduct. While that attitude still exists, in this post-Snowden time, the conversation has evolved into tsk tsk-ing the victim for being so naïve as to think she is owed any right to privacy at all. No matter whether we perceive it to be our government or our fellow citizens encroaching upon our communications, we express ourselves differently because of it. We censor and restrain. Private speech—the funny, raunchy, sad intimacies we share behind closed doors and through password-protected email accounts and devices—is without a doubt valuable and creative speech. And we lose that speech if we declare that "privacy is dead" and that all communications belong to the public.[17]

Historically, revenge porn victims have faced an uphill and often impossible battle, both in removing explicit images that have been posted online and in pursuing justice against the perpetrators.[18] As the revenge porn epidemic spreads, the fight to cure it is becoming more manageable, due in large part to increased attention to the issue, the formation of advocacy groups, an increased number of attorneys being willing to take cases on a pro bono basis, and the passage of state laws criminalizing revenge porn. More importantly for present purposes, attorneys are finding creative ways to use existing laws, including copyright law and state tort law to combat the revenge porn epidemic. This article focuses on those creative efforts and identifies some obvious challenges that remain.

Part II introduces the Cyber Civil Rights Legal Project, a global pro bono project, which provides victims with free legal help and a chance to protect their online privacy and their "cyber civil rights."[19] Part III outlines the legal processes that attorneys are using to protect those rights,

and Part IV identifies the obstacles that do, and will continue to, impede the full protection of "cyber civil rights."

II. The Birth of the Cyber Civil Rights Legal Project

On Thursday, June 12, 2014, the Miami-Dade Chapter of the Florida Association for Women Lawyers (Miami-Dade FAWL) held its annual installation luncheon. The incoming President, Deborah Baker-Egozi, spoke about her goals for the organization including her plan to make "revenge porn" one of the organization's main focuses during her term. Elisa D'Amico—at that time an associate in the Miami office of K&L Gates and a Director of Miami-Dade FAWL—was sitting next to Michael Grieco, Commissioner of Miami Beach, listening to Ms. Baker-Egozi. It was Commissioner Grieco's idea to work on getting the Miami Beach Commission to pass a Resolution (Item RTW) urging the Florida legislature to pass a law criminalizing revenge porn.

On July 23, 2014, Ms. D'Amico, Ms. Baker-Egozi, and Mary Anne Franks, Associate Professor of Law, University of Miami Law School, attended the Miami Beach Commission meeting. Professor Franks addressed the Commission regarding Item R7W and urged the Commission to pass the proposed Resolution, which aimed to convince the Florida legislature to criminalize the nonconsensual disclosure of explicit images.[20] On July 30, 2014, the Resolution passed unanimously.[21] As Commissioner Grieco notes, that resolution had one lasting effect: momentum:

> I could not be prouder that Miami Beach was able to move the needle on this issue. From the moment I listened to Miami-Dade FAWL leadership talk about the organization's mission I wanted to do something to help. By making revenge porn a topic in a formal public forum I believe we gave those advocating criminalization a proper platform to gain momentum.[22]

Fueled by this energy, Ms. D'Amico teamed up with David Bateman, a partner in the K&L Gates Seattle office with 20 years of experience in Internet and technology law, to found the Cyber Civil Rights Legal Project (CCRLP). The pair recognized that no large law firm had yet stepped up to offer a large-scale program where victims of online cyber harassment and nonconsensual pornography could seek free legal advice. As K&L Gates has extensive cyber forensic resources, including a cyber forensic lab and forensic investigators, the firm is able to offer sophisticated legal help, which includes the collection and preservation of electronically stored information, and tracing the origin of certain postings of information online. The CCRLP leverages those resources to the benefit of victims of revenge porn who desperately need help reclaiming their online presence.

The CCRLP is not limited to any particular state or to the United States; in fact the project is a worldwide effort. K&L Gates has 48 offices on five continents. The firm's global platform allows for the seamless transfer of information and permits the CCRLP to help clients located in many different jurisdictions. For example, the CCRLP's roster of victims includes:

- A victim in Switzerland whose ex-boyfriend moved out of the country and posted explicit images online after their relationship ended;
- a Canadian victim whose intimate photographs were distributed after an online relationship ended;
- a UK resident whose nude photographs were posted on U.S. social media sites;
- a UK citizen whose ex-boyfriend posted explicit videos taken during their relationship online; and
- a U.S. citizen whose explicit images along with defamatory comments were posted on a Canadian dating site.

In just seven months, more than 60 K&L Gates lawyers in the United States, the European Union, and Australia have volunteered their time to the CCRLP, which has been contacted by well over 200 victims. The CCRLP receives referrals from well-known advocacy groups, including the Cyber Civil Rights Initiative and Women Against Revenge Porn,[23] and collaborates with lawyers, academics, advocates, law enforcement, and technology industry leaders, to examine ways to fight the online cyber harassment epidemic.

The CCRLP has been praised for its work by national and international TV, radio, online, and print media outlets, including *The New York Times, CNN, MSNBC, International Business Times, The National Law Journal, The Meredith Vieira Show,* and *La Repubblica*. Since its inception in September 2014, the project has become recognized, globally, as a leader in the fight to combat cyber exploitation.

III. Legal Process—A Band-Aid® or a Cure?

The legal tools that exist to help revenge porn victims are undoubtedly imperfect. However, that imperfection does not mean that victims remain helpless or that the legal system is off limits. What it does mean is that lawyers who step up to help need to think outside the proverbial box, must be outspoken and unwavering, and cannot be afraid of taking three steps forward and two steps back. It also means that lawyers must be prepared for many unanswered phone calls, scowls, and dead-end IP addresses.

In representing revenge porn victims, lawyers must ask many awkward and uncomfortable questions. One of the first and most important questions to ask a victim is, "what do you want?" Just as not all victims suffer from the same thing, not all victims want or need the same

kind of help. Some want to stay in hiding and are unwilling to put their names and stories on public filings. Others are too embarrassed to even do a search for their own names online. However, most victims share at least the initial goal of removing the offensive material from the Internet or wherever it is residing.

Yet removal of postings often is not the only goal of revenge porn victims. Many victims wish to prevent the perpetrator from engaging in abusive behavior in the future by involving law enforcement, and some have the strong desire to force the perpetrator to answer for his actions in civil court.[24]

Each case requires analyzing the particular facts along with the wants and needs of the victim. Not every victim can get total satisfaction, but the hope is that the leak can be plugged, damage control can be implemented, and the victim can begin rebuilding an online reputation and reclaiming her online privacy.[25] More basically, the goal is for victims to feel that they can take ownership of their online identities and their lives.

To effectively represent a revenge porn victim, attorneys need not wait for the perfect law to be written.[26] There are numerous legal processes that may help, but no one method is appropriate for all cases. Outside of changing the current law, the key to success is crafting the concoction of various remedies based on the victim and the facts of the case. Thus far, the following existing tools have proven to be generally effective at combatting revenge porn.

A. Take It Off! Offline, That Is: Using the Digital Millennium Copyright Act to Combat Revenge Porn

Although copyright law is neither designed nor fully equipped to eradicate the global revenge porn epidemic, it has proven to be a rather effective notch in the revenge porn tool belt. In addition to providing protection, under federal law, against individuals who wrongfully distribute or display a victim's intimate images, copyright law often provides victims with a powerful tool to pull offensive material offline. While copyright law is not a silver bullet that can strike a death blow to revenge porn, it is an easily accessible—and often extremely powerful—weapon in the crusade.

1. The Digital Millennium Copyright Act and Its Safe Harbor for Internet Service Providers

Toward the end of the 20th century, Internet service providers (ISPs)[27] increasingly allowed and hosted user-generated content, a common practice in today's online world.[28] For example, many ISPs permit users to post videos online. Those ISPs may, but often do not, exercise discretion as to whether to permit certain categories of videos (such as erotica) on their systems. If an ISP permits user-generated content that infringes on copyright, is the ISP liable for copyright infringement? The answer is not always clear.

In 1998, Congress enacted the Digital Millennium Copyright Act (DMCA).[29] The DMCA provides ISPs a safe harbor from monetary copyright liability so long as they comply with certain "notice and takedown procedures."[30] These particular procedures require ISPs to both 1) create and maintain a system for copyright owners to report infringement; and 2) promptly respond to takedown requests.[31] The rules are simple and binary: If a website takes down infringing material upon receiving a proper DMCA notice, then it will enjoy the safe harbor from monetary liability for hosting copyrighted materials. However, if a website either refuses or fails to take down infringing material following receipt of a proper DMCA notice, it will lose the protection of the safe harbor from monetary liability afforded to it by the DMCA.[32]

2. Your Selfie Stick Holds the Power

Copyright protection applies to pictures and videos with no consideration for why those "works of art" were created. Amateur films are given just as much protection under the law as big-budget Hollywood films. That means that copyright law applies to videos taken on a camera phone as much as it does to a Steven Spielberg film. Rather than considering why a film or photograph was taken, copyright law grants a copyright in a work of art in its creator; in the case of a film or photograph, that grants special protection in federal law to the photographer. The only caveats are that the works must be both original and fixed in a tangible medium.

In the context of using copyright law to battle the spread of the revenge porn virus, because most images distributed as revenge porn are "selfies," or pictures taken by the individual featured in the image,[33] most victims own the copyrighted images. These victims, many of whom believe they are powerless, are actually empowered by the DMCA. As copyright holders, they can send DMCA notices to websites that, in turn, are required to comply in order to avoid liability under federal law.[34]

A law degree is not required to send a DMCA takedown notice, so a victim need not engage counsel before beginning to send notices to websites containing infringing material.[35] While having an attorney send a notice on a victim's behalf certainly has its benefits, resources do exist for those victims without access to attorneys. For example, CopyByte, a service provided by nonlawyers, provides DMCA takedown services at no cost to revenge porn victims.[36] DMCA Defender, another nonlegal, paid service, also provides takedown services while offering various plans that provide victims with different levels of monitoring services. Under each of these plans, the company monitors the Internet for any new postings of the victim's copyrighted works, and if an infringing post appears, DMCA Defender will send a takedown notice.[37]

The sender of a DMCA notice must be careful to identify and send the notice to the correct recipient. If the notice is sent to an improper recipient, or if the notice does not identify the proper offending web address, or if the individual that posted the material disagrees with the claims contained in the notice, the victim may receive a counter-DMCA notice. A counter-DMCA notice is sent by the poster of the material to the website (to transmit to the DMCA notice sender) objecting to the DMCA notice; a victim has 10 to 14 days from receipt of the counter-DMCA notice to file a lawsuit.[38]

Properly complying with DMCA procedure and identifying the correct recipient is tedious but auspicious. If a takedown notice is proper, both in form and recipient, and the ISP fails to respond and remove the materials, it can be held liable for the infringing material found on its system. This legal structure incentivizes most ISPs to immediately take down material upon receipt of a proper DMCA notice. On the other hand, if the form is improper, if the notice is sent to an improper recipient, or if the notice does not identify the proper offending web address, the victim may instead find that the DMCA notice is met with a counter-DMCA notice, or no response at all. More importantly, if an improper DMCA notice is sent, even if there is a valid copyright infringement, the website may leave the offending images online without facing liability.

3. Limitations on DMCA Use to Battle Revenge Porn

Two main obstacles prevent the DMCA from being a one-fix solution to revenge porn. First, not all images used in revenge porn are selfies, meaning that not all victims own the copyright in the images that are improperly posted online. Second, many ISPs are hosted outside the United States, making the threat of copyright infringement toothless and enforcement nearly impossible.

The DMCA takedown process becomes complicated where the victim is the pictured individual but not the photographer. In that situation, despite being pictured in the image, the victim does not own the copyright. She therefore has no standing to send a DMCA notice.

When a victim learns that sexually explicit images of her that someone else took have been uploaded to the Internet without her permission, one option is to seek an assignment of copyright *from* the photographer *to* the victim.[39] Where a friend or professional photographer took the photograph, obtaining an executed assignment often is not a huge challenge. Where the photographer is also the perpetrator, however, obtaining a signature usually becomes conflated with denials and requests for agreements not to sue. The nastiest perpetrators sometimes even escalate the abuse in response to requests for an assignment. On the other hand, many perpetrators wish to cooperate and execute the assignment without the need for any discussion or pleading, perhaps due to feeling remorseful, or more likely because they wish to avoid any future litigation.

If, for whatever reason, the photographer refuses to assign copyright to the victim, the victim can instead request that the photographer submit the DMCA notice directly to the ISP. This is less desirable than an assignment because, in the event of any additional postings, the victim would have to reach out to the photographer again. More fundamentally, not receiving an assignment of copyright prevents the victim from experiencing a sense of finality and an ability to begin putting the nightmare in the past.

As a final option, the victim can try to reach out to the ISP and request voluntary removal of the material. Many social media platforms, for example, have created online reporting tools where victims can report what the platforms consider to be violations of their terms of service, and which include revenge porn and in some cases online harassment. However, if the ISP is not cooperative and ignores the victim's request, it faces no liability, under the DMCA or otherwise, for failing to respond to the request.[40]

The second obstacle, where website operators deliberately avoid the DMCA's reach by hosting their websites outside the United States, is perhaps even more frustrating.[41] These operators ignore DMCA takedown notices and refuse to comply with federal copyright law, particularly when they are based in countries without intellectual property agreements with the United States.[42] It is often irrelevant whether the ISP is correct that it is beyond the reach of the U.S. court system, because the expense and complexity of filing a copyright lawsuit in federal court is a deterrent to fighting back. Having to further overcome the additional hurdle of proving jurisdiction almost always eliminates litigation as an option. Copyright law is best understood as a "situation specific way to try and mitigate the damage that revenge porn can cause."[43]

4. What About Good Ol' Fashion Copyright Actions?

We know that the DMCA does not provide ISPs with a safe harbor from monetary copyright liability if they neither institute nor comply with notice and takedown procedures. So, if the victim owns the copyright, but the DMCA is no help, why not skip the DMCA notice procedure and use traditional copyright actions?

Federal copyright law provides victims with a method of recovering damages for infringement for the posting of their intimate images online.[44] However, to file a federal lawsuit based on infringement under the Copyright Act, victims must register their images or videos with the U.S. Copyright Office, which is often the last thing a revenge porn victim wants to do.[45]

> *As a result of being a victim of this heinous crime, I am shy and unwilling to call attention to myself in part because of the dead links still available to anyone who runs an internet search of my name. At the core, I do not want*

> *anyone else to find out about my images. I am afraid for my safety, and afraid of making new connections with people because my ability to trust, and recognize the inherent goodness in people has been destroyed.*
>
> —anonymous victim

For those victims willing to register the copyright, the path remains a difficult and uncertain one. Yet, many victims affirmatively choose to traverse this path because, depending on the timing of the infringement and the registration, the statutory damages provided by the U.S. Copyright Act can be large sums of money.

Generally, victims of revenge porn are trying to seek relief from being unwillingly exposed. Unless they file a "Petition for Special Relief from the Deposit Requirements of the Copyright Office,"[46] victims—like all registrants—are required to submit copies of the materials they are seeking to register to the U.S. Copyright Office. Victims are not permitted to submit redacted versions of images, nor are they permitted to submit screenshots of videos. The end result is a public list of registered works that is searchable by the victim's name and image title; and in some cases, the works may be uploaded into the Library of Congress where they will remain on display to the public. For a victim to choose this route, she must not only have the funds to pay for registration, but she must also have the funds to pay for an attorney to file a petition seeking to exempt her from the requirement to publicly disclose her intimate media, or she must have skin that is thick enough to be able to withstand a registration process that involves further dissemination of these materials.[47]

B. Every iCloud has a "Civil" Lining

While copyright law is a valuable tool in the heroic fight against revenge porn, it clearly is not and cannot be the only tool. Creative lawyers have begun to use state law effectively to build additional weapons.

Copyright law is a federal remedy and thus a potential tool available to all victims who own or can obtain the copyright in images in which they are pictured, and tort law is a state-specific remedy. When applying tort law, the remedies available for each victim vary depending on where they live, where the perpetrator lives, and where the "injury" took place.[48] Aside from tort law, an increasing number of states have passed or are considering penal laws that criminalize revenge porn—some of which also authorize victims to file civil lawsuits alleging "revenge porn" as a cause of action.[49] Proponents of the criminalization of revenge porn argue that civil laws, alone, are no match for the devastation that revenge porn causes to its victims:

> As is the case with many preceding women's rights issues, naysayers have railed against women seeking unique protections, often arguing that civil legal remedies are already available. It is true that existing legal paradigms are being utilized more effectively. But, even in their totality, available civil laws are inadequate in their capacity to combat the speed, breadth and potency with which revenge porn exacts a toll on its victims. Denying victims and future victims criminal legal remedies unique to revenge porn would be to perpetuate its injustice.[50]

Notwithstanding whether a state has or has not enacted a revenge porn law and whether civil laws are adequate to combat the entirety of revenge porn as we know it, several civil tort and privacy laws can often be used to obtain relief for a victim.[51]

1. Defamation

Defamation is defined as "malicious or groundless harm to the reputation of another by the making of a false statement to a third person."[52] The unauthorized distribution of the images, alone, in many cases qualifies as defamatory. Moreover, the commentary and other personal information that usually accompany the nonconsensual posting of intimate media strengthen or help establish a defamation claim, and help make this cause of action quite powerful. Its strength and corresponding effectiveness varies from state to state, and because defamation laws were not drafted specifically to address revenge porn, some laws will effectively aid revenge porn victims and others will not. For example, New York law defines defamation as "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him."[53] Under New York law, defamation applies only to facts, so no matter how nasty comments that accompany a nude photograph may be, if they are presented as the opinion of the person posting them, they remain protected by law.[54] To successfully plead a claim for defamation, a victim must allege that the perpetrator made "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and, it must either cause special harm or constitute defamation per se."[55] What that means is that a victim must demonstrate that he or she suffered economic harm or pecuniary loss, which qualifies as "special harm."[56] The exception to that need to prove special harm is if the statements amount to defamation per se.

A statement qualifies as defamation per se if it falls into any one of the following four categories: 1) a statement that charges someone with a serious crime; 2) a statement that tends to injure another in his or her business, trade, or profession; 3) a statement claiming that an individual has a "loathsome disease"; or 4) a statement "imputing unchastity to a woman."[57] While this list sounds somewhat antiquated, it translates particularly well to the revenge porn context; many of the heinous

comments that accompany the nonconsensual postings of intimate media discuss a victim's purported promiscuity, sexually transmitted diseases, inability to do his or her job, and often the possession and/or use or of illicit drugs, which falls into the category of criminal activity. As the circumstances in which photographs are posted and comments are made vary greatly, whether a statement will qualify as defamation per se truly depends on the particular facts of the case and, of course, the particular law being applied.

Filing a cause of action for defamation can be an incredibly powerful tool to hold the poster of intimate photographs and accompanying commentary liable in a civil court of law, particularly where a victim is able to make out a prima facie case of defamation per se, and damages are presumed.

2. Right of Publicity

The right of publicity is defined as the right to prevent the commercial use of one's own identity.[58] This right is one of the most extensive privacy laws available to revenge porn victims because the wrong it seeks to prevent—the unauthorized use of one's own image or likeness—aligns almost perfectly with the wrong perpetrated on the victims. There is no universal right to publicity but instead it is protected statutorily in 19 states[59] and it is a construction of common law in 21 states.[60] While the specifics of these laws vary, the overarching theme is the same.

In New York, for example, the unauthorized distribution of a person's image or likeness for economic gain is a misdemeanor under §50 of the New York Civil Rights Law. Section 51 of that statute provides a private cause of action for victims of such unauthorized use, which recovery is mutually exclusive from other statutory recovery, including a victim's federal rights under the Copyright Act.[61] Florida law also prohibits the nonconsensual distribution of images without the express written or oral consent of the subject if distribution is for a commercial purpose, and the law grants a nonexclusive cause of action to victims of nonconsensual distribution.[62] Unfortunately for revenge porn victims, the New York and Florida statutes only cover distribution for a business or commercial purpose. However, not all rights of publicity laws include the "business purpose" requirement. For example, the Washington statute covers infringements that occur "without regard to whether the use is for profit or not for profit."[63] Each law differs, meaning that lawyers must closely evaluate the facts and circumstances of each victim when analyzing whether and how to commence a lawsuit.

3. Invasion of Privacy

Other privacy laws may also prove useful. For example, many states recognize the tort of intrusion or invasion of privacy, pursuant to which "one who intentionally intrudes, physically or otherwise, upon the solitude or seclusion or another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person."[64] Intrusion cases are generally difficult to prove in situations where the victim took the photo and distributed it; this limitation means an "invasion of privacy" lawsuit will likely not be the best if the victim originally sent the nude images to the perpetrator for private consumption, even if the perpetrator later distributed the images more widely. Yet intrusion proves useful in scenarios where the images or videos were taken without the victim's consent and typically without the victim's knowledge. In most states, intrusion includes "unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." Intrusion offers a potential weapon to those victims unable to utilize copyright law and the DMCA.

4. Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress (IIED) is a common-law tort that reflects how offensive the perpetrator's conduct truly is, and how much it has harmed the victim. To allege this tort, the victim must establish: 1) extreme and outrageous conduct on the part of the perpetrator; 2) intent to cause, or disregard a substantial probability of causing, severe emotional distress; 3) a causal connection between the conduct and injury; and 4) severe emotional distress.[65] A number of revenge porn victims have pled IIED and won.[66]

IIED is a cause of action that can be used to enhance other claims. For example, one woman sued her ex-boyfriend who had posted her sexually explicit images on more than 20 adult websites along with her contact information and directions to "visit or phone call."[67] The perpetrator also created an imposter profile online, noting that the victim wanted "no strings attached" masochistic sex, to which strange men responded and left the victim voicemails that terrified her. The victim suffered from anxiety, which manifested physically.[68] The court also upheld the victim's claims for defamation, public disclosure of private fact, and negligent infliction of emotional distress.[69]

5. Successful Civil Verdicts for Revenge Porn "Tort" Cases

Revenge porn victims have indeed been successful at civil lawsuits alleging various torts and enforcing publicity and privacy rights under state laws. For example, on Valentine's Day of last year, a Houston jury awarded a woman $500,000 after her ex-boyfriend recorded a Skype conversation between them, without her knowledge, and then posted the improperly obtained material online. She alleged, among other things, a claim of intentional infliction of emotional distress.[70]

Again, in 2014, an Ohio judge entered a verdict against two men who posted sexually explicit images of a

woman without her consent in violation of her common-law right of publicity, and awarded the woman a default judgment of $385,000.[71] Similarly, that year a California jury awarded a woman $250,000 after an ex-boyfriend posted nude photographs of her on Facebook in violation of California's privacy laws.[72]

While these verdicts are major triumphs that will hopefully go a long way toward discouraging future bad actors from engaging in such heinous online harassment, it is important to remember that such verdicts are actually the exception, not the rule. No litigant should enter the legal system expecting a windfall verdict. It also is equally important to remember that not all victories are financial victories. For some victims, removal of images from the Internet is a life-changing and life-saving moment.

Upon learning that her intimate images had been uploaded to the Internet without her consent, one victim, "Daisy," spoke to a litany of attorneys seeking help removing the material. They all told her that nothing could be done. She also paid a "removal service" more than $2,000 to remove the images and videos from the Internet, but after more than five months, nothing had been removed. Ultimately, she was connected to the CCRLP, who used the DMCA takedown procedure to pull the nonconsensual postings offline. After learning that her images had been removed from the Internet, Daisy's response was as follows:

> *That has got to be the most amazing news I've heard in almost a year!!! I feel like I won the lottery!!! I was scared because one attorney I spoke with acted like it wouldn't do much good for me to try and reach out to the website because he thought the website would just retaliate against me and repost the material if I messed with them. So I was really afraid to make any moves.*
>
> *I am unable to stay in my home because I don't feel safe and now I can't work so I cannot afford to maintain my home even if I did feel safe in it. I am just so blessed that my son did not find out.*
>
> *You are amazing!!!!!*
>
> *Thank you!!!!!*
>
> *Tears of joy••!*

Eventually, the "removal service" also returned Daisy's $2,000.

IV. Obstacles to Enforcing and Protecting Online Privacy and Reputation

The CCRLP was founded to empower victims in retaking control of their online identities and ultimately their lives. We are proud of the progress that has been made thus far in this effort, of which we are a small but passionate part. While we utilize a number of creative ways to use existing laws to fight revenge porn, the sad truth remains that victims still face an uphill battle.

> *Today, victims feel less alone in their battle against revenge porn. There are sympathetic politicians, advocacy groups, caring pro bono lawyers, and some members of law enforcement who are willing to listen, and fight hard for victims. Notwithstanding the strong coalition that has developed, significant hurdles lie ahead. The internet is in some sense still a "men's only" club: a subculture of misogynists that seek joy in tearing apart women. Bullying, slut shaming, humiliation, and revenge porn are unfortunately topics that will be synonymous with cyberspace for some time to come.*
>
> —Charlotte Laws
> *"The Erin Brocovich of Revenge Porn"*

What precisely are those obstacles? Only time will tell what will sit on that bulleted list. For now, however, these are the most common obstacles faced by victims seeking to enforce their rights.

A. The Internet and the World Wide Web

We all use the Internet, but how many of us really understand it? When we talk about information being "online," what do we mean?

When we log onto our computers and open our browsers, we are traversing the "World Wide Web," (WWW or web) which is "an information system of interlinked hypertext documents that are accessed via the Internet and built on top of the Domain Name System [DNS]."[73] The software application used to access individual document pages or web pages on the WWW is called a web browser; web pages contain content and hyperlinks, which function as a means to navigate the web.[74]

B. What Is the Darknet?

Not everything that is "online" is integrated and accessible by simply logging on. The "Deep Web" is a portion of the Internet that is not indexed by standard search engines. The "Dark Web" or "Darknet" is a subsection of the "Deep Web." It lends itself to perpetrators of online harassment and abuse, because operators of websites on the "dark net" do not have to fear the risk of exposure. The Darknet is actually a private network where "peers" or "friends" connect by way of nonstandard protocols and ports. Unlike some other peer-to-peer networks that exist, on the Darknet, sharing is anonymous and Internet protocol (IP) addresses are not shared publicly.[75] Although peer-to-peer networks were not originally launched for any malicious purpose, the environment is a petri dish for revenge porn perpetrators and copyright infringers.

C. Peeling Back the Layers of an Onion Router

Onions are pungent bulb vegetables that contain certain chemical substances that irritate the eyes, which chemicals are released when onions are chopped or when their layers are peeled back. "Onion routing" is a term used to describe a method of anonymous communication over a computer network. In an onion network, messages are captured in numerous layers of encryption, much like the layers of an onion. Encrypted data is transmitted through onion routers, which are a series of network nodes. Each of these onion routers essentially peels away one layer, which then uncovers the next destination for the data. After the final layer is peeled back, the message arrives at its destination. Anonymity is preserved because each intermediary layer only knows the location of the nodes that immediately precede and follow, but the others are unknown.[76] Due to its anonymity, onion routers often are utilized by those engaging in online harassment, revenge porn, and cyber mob activity.

In 2002, computer scientists developed what became known as not only the largest but also the best known implementation of onion routing: The Onion Routing (TOR) project.[77] Run entirely by volunteers, there are approximately one thousand TOR proxy servers on the Internet that provide the necessary routing paths for TOR project to function. In an age when online privacy is threatened, TOR provides both a safety net and a sword: It protects identities, for better or worse. In the revenge porn context, because TOR does not maintain records the same way a domain registrar does, Pink Meth, anonib, and anon-ib (and other sites) function as hidden services and not like regular websites that we all have come to know, understand, and frequent.

D. Communications Decency Act Section 230

Section 230 was added to the Communications Decency Act (CDA) in response to the concern of ISPs that they would be held liable for the acts of their users who were posting content online.[78] Section 230 states, in pertinent part, that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[79] Through this statutory provision, Congress created a doctrine of federal immunity against "any cause of action that would make service providers liable for information originating with a third-party user of the service."[80] Section 230 has been held to immunize interactive service providers from both state and federal causes of action, affording immunity to intermediary, "interactive computer services," where the actual content at issue is created and developed by another entity (an "information content provider").[81]

Section 230 immunity is broad, applying to web hosts, e-mail providers, commercial websites, individual websites, dating services, social media platforms, chat rooms, Internet access points, ad networks, search engines, and many more "interactive computer services."[82] CDA immunity applies to protect these entities from claims of defamation, claims relating to child pornography, misappropriation, invasion of privacy, deceptive trade practices, and since no federal law yet exists, revenge porn.[83]

E. The Limitations of Civil Litigation

While civil litigation certainly provides a variety of remedies for revenge porn victims, much like the other available methods, it does not offer a perfect answer to what has become a pervasive problem. For one, victims who choose to pursue civil litigation may not remain anonymous: unlike the protection that criminal prosecution affords, a victim who decides to pursue civil litigation will not—unless extraordinary circumstances are present—remain anonymous. Civil filings are public documents and so the victim may have to face again being thrust into the public eye when that is the very thing from which the victim is trying to recover. Filing a civil lawsuit can be expensive. Attorney fees and litigation costs can easily exceed what victims are able let alone willing to spend. In addition, lawsuits take time. Being involved in a civil lawsuit can be all-consuming and encroach on a victim's personal and professional life. It can also prevent her from growing and moving forward with her life.

Even clients who succeed in litigation may find their victories hollow. Civil litigation can only result in an award for the victim if the defendant is able to pay damages. If a victim is unable to enforce a judgment, the money spent litigating is for naught. Even if a victim is successful in obtaining a judgment against a perpetrator *and* is able to enforce that judgment, that victory will not prevent individuals who have already downloaded the subject images from reposting them at a later date. While a legal victory may deter the defendant from engaging in that type of behavior in the future, it does little to discourage others from becoming or continuing to be bad actors in the revenge porn world.

V. Conclusion

Revenge porn represents just a portion of the kind of online harassment that ensues each and every day. It presents a dangerous and escalating threat not only to victims' online reputations, but to their physical well-beings. Victims suffer tremendously in the physical sense for the terror that is inflicted upon them, even if that terror is inflicted by a series of mouse-clicks. The agony is long-lasting and sometimes never subsides. Victims not only lose self-esteem, but they lose their friends, their jobs, and even their abilities to provide for themselves and their families.

While an increasing number of organizations, including the CCRLP, are working to help victims by counseling them—with both legal and nonlegal advice—so long as technology keeps advancing, "cyber civil rights" may be infringed. Being creative in the battle against revenge

porn is the smartest way to fight an ever-changing technological landscape where laws do not perfectly align with the capabilities of the cyber world.

Whether the answer lies in creating a new set of laws to address the ongoing infringement of "cyber civil rights" is not yet clear. Arming law enforcement and civil litigators brave enough to take on victims of revenge porn as clients with new tools to fight the perpetrators certainly seems like a step in the right direction. The New York Bar, and more specifically the Intellectual Property Bar, can certainly be instrumental in drafting and pushing balanced legislation. In the end it will take a bit of trial and error to determine the best way to win the war.

Whatever path we take, we must work as a society to eliminate this scourge. Perhaps part of the process is a readjustment of social norms, along with the development of law and technology.[84] For now, we are left with the laws that exist today, our current social norms, and technology as it stands. All we can do is pick up whatever is within our reach that might help us, and fight as hard as we can. By using our creativity, we can and will unearth more tools to help us emerge victorious in this battle. In the meantime, we have our passion, our dignity, and our battle cry:

> *I sing sometimes for the war that I fight*
> *'cause every tool is a weapon—*
> *if you hold it right.*
>
> —Ani DiFranco

Endnotes

1. Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 Wake Forest L. Rev. 345, 350 (2014) ("The Internet provides a staggering means of amplification, extending the reach of content in unimaginable ways.").
2. *See id. at* 346.
3. www.Motherless.com.
4. www.myex.com.
5. *See* Samantha H. Scheller, *A Picture Is Worth A Thousand Words: The Legal Implications Of Revenge Porn*, 93 N.C. L. Rev. 551, 558 (2015).
6. *See* Jenna K. Stokes, *The Indecent Internet: Resisting Unwarranted Internet Exceptionalism in Combating Revenge Porn*, 29 Berkeley Tech. L.J. 929, 929 (2014), *available at* http://scholarship.law.berkeley.edu/btlj/vol29/iss4/17 (citing Derek E. Bambauer, *Exposed*, 98 Minn. L. Rev. (forthcoming 2014) (manuscript at 29), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_.id=2315583)). Stokes borrows the term "intimate media" from Bambauer, who uses it to refer to sexually explicit photos or videos depicting the victim who is either recognizable in the media or is recognizable due to the information that accompanies the media.
7. *See* Danielle Keats Citron, *Law's Expressive Value In Combating Cyber Gender Harassment*, 108 Mich. L. Rev. 373, 379 (2009) ("From 2000 to 2008, 72.5% of the 2519 individuals reporting cyber harassment were female and 22% were male."). In light of this, and for convenience, this article uses the pronouns "she" and "her." The laws discussed, and the application thereof, are gender-neutral, and she should be read as "he or she," and her should be read as "his or her" or "him or her" as appropriate.
8. *See id* at 378.
9. *See* Laurie Segall, *Blackmailers Trade Nude Pics Like Baseball Cards On The 'Dark Web,'* CNN Money (Apr. 27, 2015, 1:34 PM), *available at* http://money.cnn.com/2015/04/26/technology/revenge-porn-blackmail/index.html?iid=EL.
10. *Id.*
11. *See* Danielle Keats Citron, Hate Crimes in Cyberspace 53 (2014) (hereinafter "Hate Crimes").
12. Citron & Franks, *supra* note 1, at 353.
13. *Id.* at 350-51.
14. *See id.* at 352-53.
15. Matt Ivester, Lol…OMG! What Every Student Needs to Know About Online Reputation Management, Digital Citizenship, and Cyberbullying 95 (2012).
16. Citron & Franks, *supra* note 1, at 352.
17. E-mail from Carrie Goldberg, Cyber Civil Rights Initiative, Board Member and C.A. Goldberg, PLLC, Founding Member (May 18, 2015, 09:42 EST) (on file with author).
18. *See*, *e.g.*, Citron & Franks, *supra*, n. 1, at 348 (explaining that there is a dearth of laws criminalizing revenge pornography because of "a lack of understanding about the gravity, dynamics and scope of the problem; historical indifference and hostility to women's autonomy; inconsistent conceptions of contextual privacy; and misunderstandings of First Amendment doctrine").
19. *See generally* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. Rev. 61 (2009) (arguing that online harassment should be understood as a civil rights violation and articulating a legal agenda to address it); Citron, *supra* note 7 Danielle Keats Citron & Helen Norton, *Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age*, 91 B.U. L. Rev. 1435 (2011). These three articles gave life to the project, Hate Crimes in Cyberspace. As the name truly fit, Holly Jacobs asked permission to use the "Cyber Civil Rights" name as the name for her organization, the Cyber Civil Rights Initiative. Later, the Cyber Civil Rights Legal Project also asked to use the name for its pro bono project to help victims of "revenge porn." Today, both organizations are named after Professor Citron's original work.
20. Miami-Dade chapter of the Florida Association for Women Lawyers, *Miami Beach Commission Unanimously Votes to Pass Resolution Urging Florida Legislature to Criminalize "Revenge Porn,"* (July 30, 2013), *available at* http://www.mdfawl.org/miami-beach-revenge-porn-resolution/.
21. Miami Beach, Fla. Item R7W, *available at* http://www.miamibeachfl.gov/WorkArea/DownloadAsset.aspx?id=80464.
22. E-mail from Michael Grieco, Vice Mayor & Commissioner of Miami Beach (May 19, 2015 at 07:26 EST) (on file with author).
23. The Cyber Civil Rights Initiative (www.cybercivilrights.org) is an advocacy group that, among other things, operates a 24-hour hotline for victims of revenge porn (End Revenge Porn Crisis Line: (844) 878-CCRI). Women Against Revenge Porn (WARP) (www.womenagainstrevengeporn.com) was founded in November 2012 by Bekah Wells, a victim of revenge porn.
24. A growing number of states have criminalized revenge porn; as of this writing, 20 states have enacted laws that criminalize revenge porn (most recently, Florida), and several other states have pending legislation. New York has not yet enacted a revenge porn law. Some of these laws—such as the Pennsylvania law (42 Pa. Cons. Stat. § 8316.1 (2014)), authorize a civil cause of action for "revenge porn." *See* C.A. Goldberg, *States with Revenge Porn Criminal Laws*, *available at* http://www.cagoldberglaw.com/states-with-revenge-porn-laws/. This article and the Cyber Civil Rights Legal Project both focus on remedies obtained through civil litigation.
25. *See*, *e.g.*, BrandYourself (www.brandyourself.com), a CCRLP partner that helps victims (and anyone) rebuild and manage their online reputation.

26. *See* Stokes, *supra* note 6, at 946–52 (arguing that the tort of intentional infliction of emotional distress is well-equipped to handle lawsuits filed over revenge porn).

27. Those who wish to access the Internet typically connect by using an access device that is owned by an ISP, an entity that provides Internet service to its subscribers for a fee. *See* PRESTON GRALLA, How the Internet Works 49-55 (Millennium ed. 1999).

28. John Krumm et al., *User-Generated Content*, PERVASIVE COMPUTING, 2008 at 10, *available at* http://www.computer.org/csdl/mags/pc/2008/04/mpc2008040010.pdf ("User-generated content comes from regular people who voluntarily contribute data, information, or media that then appears before others in a useful or entertaining way, usually on the Web—for example, restaurant ratings, wikis, and videos. The use of such content has seen rapid growth in recent years, in part because it's fairly inexpensive to obtain (users normally supply it for no charge.").

29. 17 U.S.C. §§ 512, 1201-1332 (Supp. IV 1998).

30. 17 U.S.C. §§ 512(a)-(d).

31. *Id.*

32. *Id.*

33. *See, e.g.*, Amanda Levendowski, *Using Copyright to Combat Revenge Porn*, 3 N.Y.U. J. INTELL. PROP. & ENT. L. 422, 439-40 (2014).

34. Pursuant to 17 U.S.C. § 512(c)(3), a DMCA notice must be a signed writing and must identify both the copyrighted work and where, online, the infringing material is located (for example by identifying the offending URL (Uniform Resource Locator)). The notice must contain confirmation, "under penalty of perjury," that the copyright owner is complaining in good faith and also must contain the copyright owner's contact information or information of whomever is sending the notice on behalf of the copyright owner. A proper DMCA notice may read as follows:

> This email is official notification under Section 512(c) of the Digital Millennium Copyright Act, seeking the removal of the aforementioned infringing material from your servers. Please also be advised that law requires you, as a service provider, to remove or disable access to the infringing materials upon receiving this notice. Under U.S. law a service provider, such as yourself, enjoys immunity from a copyright lawsuit provided that you act with deliberate speed to investigate and rectify ongoing copyright infringement. If service providers do not investigate and remove or disable the infringing material this immunity is lost.
>
> We provide this notice in good faith and with the reasonable belief our client's rights are being infringed. Under penalty of perjury I certify that the information contained in the notification is both true and accurate, and I have the authority to act on behalf of the owner of the copyrights involved.

35. *See* Levendowski, *supra* note 33, at 443.

36. COPYBYTE, *available at* https://copybyte.com/stop-revenge-pornography/.

37. DMCA DEFENDER, *available at* http://dmcadefender.com/.

38. 17 U.S.C. § 512(g).

39. 17 U.S.C. § 205.

40. *See* 17 U.S.C. § 512(b)(2). The DMCA limits ISPs' liability to those instances where they directly place the infringing content online or where they refuse to comply with a takedown notice from a copyright holder or the holder's designated representative.

41. *See, e.g.*, Susanna Lichter, *Unwanted Exposure: Civil and Criminal Liability for Revenge Porn Hosts and Posters*, HARV. L.J. & TECH. DIGEST (May 28, 2013), *available at* http://jolt.law.harvard.edu/digest/privacy/unwanted-exposure-civil-and-criminal-liability-for-revenge-porn-hosts-and-posters; Lorelei Laird, *Victims Are Taking on 'Revenge Porn' Websites for Posting Photos They Didn't Consent To*, ABA JOURNAL (Nov. 1, 2013 9:30 AM), http://www.abajournal.com/magazine/article/victims_are_taking_on_revenge_porn_websites_for_posting_photos_they_didnt_c/ ("website operators overseas or those who believe they're judgment-proof can and do ignore the [DMCA] notices." Professor Eric Goldman has pointed out that "foreign websites don't care about DMCA takedown notices. Indeed, several sites have reportedly moved to overseas hosts to avoid legal consequences in the U.S.").

42. Levendowski, *supra* note 33, at 444.

43. Philippa Warr, *Using Copyright to Fight Revenge Porn*, INTERNET POLICY REVIEW (Mar. 31, 2015), *available at* http://policyreview.info/articles/news/using-copyright-fight-revenge-porn/360.

44. 17 U.S.C. § 512 *et seq.*

45. Erica Fink, *To Fight Revenge Porn, I Had to Copyright My Breasts*, CNN MONEY (Apr. 27, 2015), *available at* http://money.cnn.com/2015/04/26/technology/copyright-boobs-revenge-porn/index.html.

46. 37 C.F.R. 202.20.

47. Fink, *supra* note 45.

48. The choice of which state in which to file a tort-based lawsuit involves a strategic analysis, but typically these three choices are all fair game.

49. *See* States with Revenge Porn Laws, END REVENGE PORN, *available at* http://www.endrevengeporn.org/revenge-porn-laws/ (providing a full summary of revenge porn laws). This article focuses on the indirect causes of action available to victims. *See* Mary Anne Franks, *Protecting Sexual Privacy: New York Needs a 'Revenge Porn' Law*, 27 N.Y. ST. ASS'N CRIM. DEF. LAW, 1 (2015) (discussing how New York needs a law that directly addresses revenge porn to protect sexual privacy on the Internet).

50. E-mail from confidential academic source (May 15, 2015, 11:31 EST) (on file with author).

51. For example, some causes of action include defamation, right of publicity, public disclosure of private facts, false light, appropriation, and intentional infliction of emotional distress.

52. BLACK'S LAW DICTIONARY (10th ed. 2014).

53. *Dillon v. City of New York*, 261 A.D.2d 34, 37-38 (1st Dept. 1999). *See Albert v. Loksen*, 239 F.3d 256, 265 n.6 (2d Cir. 2001) ("Modern courts in New York still use variations on arcane definitions of defamatory: that which exposes an individual to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace, or…induces an evil opinion of one in the minds of right-thinking persons, and…deprives one of…confidence and friendly intercourse in society.") (citations and internal quotation marks omitted).

54. *See, e.g., 600 West 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 139 (1992) ("only statements alleging facts can properly be the subject of a defamation action"); *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 178 (2d Cir. 2000) (holding that opinions are provided absolute protection under the New York Constitution).

55. *Dillon*, 261 A.D.2d at 38; *accord Peters v. Baldwin Union Free Sch. Dist.*, 320 F.3d 164, 169 (2d Cir. 2003).

56. *See Liberman v. Gelstein*, 80 N.Y.2d 429, 434-35 (1992).

57. *Id.* at 435.

58. J. Thomas McCarthy, THE RIGHTS OF PUBLICITY AND PRIVACY § 1:3 (2d ed. 2000).

59. The states with right of publicity statutes are: Arizona, California, Florida, Illinois, Indiana, Kentucky, Massachusetts, Nebraska, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Washington, and Wisconsin. *See* http://rightofpublicity.com/statutes.

60. *See* McCarthy, *supra* note 58, at § 6:3 (the states that have recognized the common law right of publicity are: Alabama, Arizona, California, Connecticut, Florida, Georgia, Hawaii, Illinois, Kentucky, Michigan, Minnesota, New Hampshire, New Jersey, Ohio, Pennsylvania, South Carolina, Texas, Utah, West Virginia, and Wisconsin.). Some states recognize a statutory and common law right of publicity. Thus, the right of publicity is recognized as law in 31 states.

61. N.Y. Civ. Rights Law §§ 50, 51.

62. Fla. Stat. § 540.08 (2012).

63. Wa. Rev. Code § 63.60.050.

64. Restatement (Second) of Torts: Intrusion upon Seclusion § 652B (1977).

65. *Howell v. N.Y. Post Co.*, 81 N.Y.2d 115, 121 (N.Y. 1993).

66. *See, e.g., Taylor v. Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *3 (D. Haw. July 12, 2011); *Doe v. Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at *8 (D. Colo. June 13, 2012); in addition, a Harris County, Texas jury awarded a woman $500,000 as a result of the emotional distress revenge porn inflicted, though the case has been sealed. *See* Brian Rogers, *Jury Awards $500,000 in 'revenge porn' lawsuit*, Houston Chronicle (Feb. 21, 2014, 10:33 PM), *available at* http://www.houstonchronicle.com/news/houston-texas/houston/article/Jury-awards-500-000-in-revenge-porn-lawsuit-5257436.php.

67. *Franko*, No. 09-00002 JMS/RLP, 2011 WL 2746714, at *3.

68. *Id.*

69. *See, e.g., id.*; *Hofstetter*, No. 11-cv-02209-DME-MJW, 2012 WL 2319052, at *8 (plaintiff awarded damages for intentional infliction of emotional distress where the perpetrator displayed and disseminated victim's intimate photographs online, by e-mail and via an imposter Twitter account).

70. E.J. Dickson, *Texas woman wins largest settlement ever in revenge porn case*, The Daily Dot (Feb. 28, 2014), *available at* http://www.dailydot.com/crime/porn-revenge-law-texas/ (court papers sealed, but victim identified as "Rosie" won $500,000 for emotional damages suffered after her ex-boyfriend posted private photographs, messages, and video chat conversations online).

71. *Doe v. Bollaert*, No. 2:13-cv-486, 2014 WL 1091053 at *1 (S.D. Ohio Mar. 18, 2014).

72. *Liamsithisack v. Bruce*, Case No. 1-12-CV-233490 (Santa Clara Super. Ct. 2014) (plaintiff sued for invasion of privacy).

73. Wikipedia, http://en.wikipedia.org/wiki/World_Wide_Web.

74. *Id.*

75. Peter Biddle et al., *The Darknet and the Future of Content Distribution*, Microsoft Corporation (2002), at 2 *available at* http://crypto.stanford.edu/DRM2002/darknet5.doc.

76. Wikipedia, *available at* http://en.wikipedia.org/wiki/Onion_routing. To protect online U.S. intelligence communications, three employees at the U.S. Naval Research Laboratory developed onion routing in the mid-1990s. The Defense Advanced Research Projects Agency further built on and patented onion routing, and the Navy patented it in 1998.

77. In 2006, after the Naval Research Laboratory released the code for TOR under a free license, the computer scientists who developed onion routing and a few others co-founded TOR project as a nonprofit organization with the financial support of the Electronic Frontier Foundation (EFF) and other organizations. For a deeper explanation of the background of TOR project and how it works: https://www.torproject.org/about/overview.html.en.

78. Following the court's ruling in *Stratton Oakmont, Inc. v. Prodigy Services Co.*, No. 031063/94, 1995 WL 323710, (N.Y. Sup. Ct. May 24, 1995), Congress enacted §230 of the CDA, which created the federal immunity for neutral ISPs.

79. Section 230 of the CDA defines an "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet." It also defines "information content provider" as "any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service."

80. 47 U.S.C. § 230.

81. Earlier this year, the Second Circuit issued its first published opinion addressing §230. The case involved a dispute among some Teamster Union members who took their critiques about the plaintiffs online and posted critical remarks on a website hosted by GoDaddy. In holding that the web host was immune from liability pursuant to §230, the Court made several critical points, including: 1) a plaintiff can sue the original speaker but cannot sue the messenger; 2) the plaintiff could not sue GoDaddy because it had no "role in creating the allegedly defamatory newsletters." *See Ricci v. Teamsters Union Local 456*, 781 F.3d 25 (2d Cir. 2015). Rather, the plaintiffs' allegations were that GoDaddy "refused to remove" a newsletter, which was authored by a third party, from its servers. The Court found that "These allegations do not withstand the Communications Decency Act, which shields GoDaddy from publisher liability (with respect to web content provided by others) in its capacity as a provider of an interactive computer service." *Id.*

82. For a compilation of §230 cases, *see* https://www.eff.org/issues/cda230/legal.

83. *See* H. Brian Holland, *Section 230 of the CDA: Internet Exceptionalism as a Statutory Construct*, The Next Digital Decade: Essays on the Future of the Internet, 2010, at 189, 192.

84. *See* Eric Goldman, *What should we do about revenge porn sites like Texxxan*, Forbes (Jan. 28, 2013, 1:13 PM), *available at* http://www.forbes.com/sites/ericgoldman/2013/01/28/what-should-we-do-about-revenge-porn-sites-like-texxxan/; Eric Goldman, *What should we do about revenge porn sites like Texxxan (Forbes cross-post)*, Forbes (Feb. 9, 2013), *available at* http://blog.ericgoldman.org/archives/2013/02/what_should_we.htm (Feb. 9, 2013) ("We as a society will necessarily have to adjust our social norms about the dissemination of nude or sexual depictions to reflect their ubiquity."). *See also* Mary Anne Franks, Adventures in Victim Blaming: Revenge Porn Edition, Concurring Opinions, *available at* http://concurringopinions.com/archives/2013/02/adventures-in-victim-blaming-revenge-porn-edition.html (Feb. 1, 2013):

> I have various theories about why so many people cannot see the flaws of logic (to say nothing of humanity) inherent in gendered victim blaming, but for the purposes of this post I'm simply going to suggest that looking at how victim-blaming logic plays out in more gender-neutral issues might be instructive. I'll offer one example here. Let us imagine that there are no laws against identity theft. To the rising number of identity theft victims, we say: We do not need to have any laws against identity theft. Those who would prefer not to have their identity stolen should not own a credit card. Even if you never use your credit card, someone could hack into your computer and use your number to run up a $5000 bill on a fetish porn site. And really, most people are in fact very promiscuous with their credit card numbers, giving them to waiters and gas station attendants and all sorts of unsavory types. It would be ridiculous for them to expect that a waiter is only going to use their credit card for the limited purpose for which it was authorized; once they gave their consent for the card to be used in one context, they should expect that the waiter is going to use it anywhere he likes.

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The Journey and Legal Recovery of a Stolen 13th Century Painting

By Leila A. Amineddoleh and David J. Galluzzo

A valuable 13th-century Italian painting—which some claim is by Italian master painter Duccio de Bouninsegna (Duccio)—was stolen in Europe during the 1980s. Its theft sparked an international effort comprising decades of searches and multiple lawsuits, until it finally surfaced at a Sotheby's auction nearly 30 years later, where it was slated for sale on January 30, 2014. The United States government blocked the sale and brought suit to seize the work under Title 18 U.S.C. § 981(a)(1)(C). While most of the original owners were deceased, over 30 of their heirs stepped forward as claimants in a civil forfeiture suit in one last bid to retrieve their families' interests.[1]

This story begins sometime in 1977, with the purchase of the painting. The facts concerning which parties first purchased the painting remain muddled, but some documents produced during discovery suggest that the two original owners, Michael Hennessy and John Ryan, purchased the painting from Mill Hill Missionaries in London on or about July 20, 1977. These documents further suggest that Mr. Hennessy and Mr. Ryan sold 50% of their interest in the painting to Camille Marie Rose Aprosio, and provided John Cunningham, who brokered the sale, one sixth interest as commission for his work.[2] However, the complaint suggested that Aprosio and John Cunningham first owned the painting, and Cunningham later ceded a percentage of his interest to Hennessy and Ryan.[3]

While the true sequence of events may never be known, the government never contested that these four original owners maintained ownership interest in the painting which they each passed to their respective heirs; Aprosio's heirs retained one-half ownership in the painting, while the heirs of Hennessy, Ryan and Cunningham each owned one sixth ownership. Instead, the government alleged that that seizure in this case was appropriate because, sometime in 1986, the painting was stolen and converted by Cunningham from a safe deposit box in Geneva, Switzerland.[4] On or about February 6, 1991, the International Criminal Police Organization (INTERPOL) received a report by the Police Corps of Geneva regarding an investigation of the theft.[5] This began a long series of legal conflicts spanning from 1991 to 2015, including multiple international police investigations, and litigation among the UK, Monaco, Switzerland, France and the U.S.

On May 11, 1990, London's High Court of Justice, Queen's Bench Division rendered a decision on motion awarding damages to Hennessy and Ryan after finding Cunningham guilty of contempt for breach of a prior judgment ordering him to provide information on the location of the painting, and for failure to appear. The decision ordered Cunningham to a six-month prison term and fines, and forbade him and his wife from selling the painting.[6]

On November 26, 1990, Aprosio's heirs filed their own complaint with the *Procurer Général* in the courts of Geneva seeking restitution of the painting. The allegations of the 1990 complaint mirrored the allegations set forth in the 1991 INTERPOL report, and included an affidavit from Hennessy and Ryan stating that they considered the painting missing, and the whereabouts of Cunningham, now unknown. On December 10, 1990, Aprosio's heirs also reported Cunningham to the police in Monaco.[7]

Cunningham never turned himself in or relinquished possession of the painting; instead, for the next 20 years, he kept the whereabouts of the painting unknown to the other owners. During that time, he fled from England and moved to France, purportedly with the painting. In 2006, Cunningham died in Clearwater, Florida and left his interest in the painting to his wife, Marie Christine Cunningham (Mrs. Cunningham). Mrs. Cunningham also kept the painting for several years before contacting Sotheby's in an attempt to consign the painting. In 2011, Mrs. Cunningham imported the painting into the United States for further inspection, but did not inform the other partial owners of its whereabouts.

In or about January 2014, Mrs. Cunningham executed a consignment agreement with Sotheby's to sell the painting. In her agreement, Mrs. Cunningham did not disclose the ownership interest of the other parties, but rather represented herself as the sole owner. Under this guise, the painting was slated for auction on January 30, 2014 as part of Sotheby's "Important Old Master Paintings and Sculpture" auction held in Manhattan. However, before the auction took place, due diligence by Sotheby's revealed that the painting was stolen after the Art Recovery Group in London discovered that the painting was stolen. On June 23, 2014, the United States Attorney for the Southern District of New York initiated this action by filing a verified complaint against the stolen painting as a defendant-in-rem, and issuing an arrest warrant-in-rem filed concurrently with the complaint.[8] Sotheby's voluntarily forfeited the work to U.S. officials.

The United States alleged probable cause for forfeiture based on the fact that the painting was stolen, as reported by INTERPOL and the numerous international police reports and court orders, was imported into the United States, and was slated for sale in the United States, in violation of U.S.C. Title 18 §§ 542, 2315, and

981(a)(1)(C).[9] Mrs. Cunningham and about 30 heirs for Aprosio, Hennessy, and Ryan each filed verified claims pursuant to Rule G of the Federal Rules of Civil Procedure.[10]

The Aprosio heirs filed their Answer to the Complaint admitting that the painting was subject to forfeiture.[11] The heirs for Hennessy and Ryan filed their Answer alleging, among other defenses, that they were innocent owners and seizure of the painting would be contrary to their Constitutional rights.[12] The heirs of Aprosio, Hennessy and Ryan also filed counterclaims against Mrs. Cunningham seeking damages related to the theft of the painting.

Ultimately, the claimants were able to resolve their differences, as their attorneys worked with the government to facilitate a favorable settlement agreement. Judge Analisa Torres signed the settlement agreement on May 11, 2015, stating that: "The United States and the Claimants agree to the sale of the Defendant Property."[13] The work will be placed for "public sale," which will likely be an auction at one of the large international auction houses.

Civil forfeiture proceedings are routinely used against illegal art and antiquities imports due to the fact that a civil forfeiture proceeding allows the government to seize objects and return them to rightful owners without the burden of proof imposed by criminal statutes, such as the National Stolen Property Act (NSPA).[14] Under the NSPA, the government is required to prove scienter, or knowledge, on the part of the smuggler or purchasers.[15] That is a difficult burden to overcome. However, civil forfeiture does not require the government to prove anything as to the purchaser's or smuggler's state of mind. The U.S. Immigration and Customs Enforcement Agency has used civil forfeiture proceedings against Nazi-looted art (most famously with the seven-year litigation over the painting "Portrait of Wally"[16]), antiquities, and even dinosaur fossils.[17]

One of the first major civil forfeiture matters used in an art or antiquity matter was the New York proceeding against a 4th-century B.C. golden phiale.[18] In that case, the golden bowl was smuggled out of Italy and into Switzerland, and then sent to New York. The Italian dealers did this to bypass strict Italian export regulations and benefit from lax Swiss customs laws. When the object was declared at customs in New York, the country of origin was intentionally misidentified as "Switzerland," and the value of the object was also grossly underreported to be $250,000, rather than $1,000,000. A few months later, customs agents seized the phiale from buyer Michael Steinhardt's apartment, and then filed an *in rem* forfeiture complaint against the object because it was imported into the United States by means of a fraudulent invoice and false statements regarding the phiale's true country of origin and value. In addition, the complaint alleged that the phiale was subject to forfeiture under the NSPA because it belonged to the Republic of Italy under its national patrimony laws.

Steinhardt claimed that he was an innocent owner and that the false statements were not "material." The district court ruled in the government's favor on all grounds. Steinhardt appealed to the Second Circuit Court of Appeals, and was unsuccessful there. The appeals court determined that a false statement on a customs form could be material so long as it had "the potential significantly to affect the integrity or operation of the importation process as a whole," a standard that includes statements related to the country of origin.[19] The court also ruled that under the laws at issue there was no "innocent owner" defense available to a purchaser such as Steinhardt, even though he was never accused of any wrongdoing in connection with the phiale transaction.[20] Steinhardt appealed the case, but the U.S. Supreme Court declined to hear it.

Earlier this year, 11 seized objects were returned to Italy with the help of Homeland Security. Most notable was "Sleeping Beauty," an ancient Roman marble sarcophagus lid with the image of Sleeping Ariadne. The marble carving was part of a collection belonging to a known antiquities trafficker in Italy.[21]

One of the interesting aspects of civil forfeiture matters involves the destiny of the seized objects. Some are returned to foreign governments (as in the case of the golden phiale), rightful owners (as in the contentious "Portrait of Wally" litigation), but some languish in storage for years. Art dealer Hicham Aboutaam, co-owner of Phoenix Ancient Art, pleaded guilty in court and acknowledged that in 2000 he falsely claimed the origin of an ancient griffin-shaped rhyton; he claimed that the object came from Syria, rather than Iran.[22] The rhyton was seized from the ultimate purchaser, a trustee at the Metropolitan Museum of Art.[23] However, after its seizure, the object remained in a government storage facility for a decade due to the lack of a diplomatic relationship between the U.S. and Iran.[24] The rhyton was finally returned to Iran in 2003.[25]

In the present matter concerning the purported Duccio painting, it will go to public auction by late 2015 or early 2016. The valuation of the painting is both interesting and the subject of great debate. When first consigned to auction by Mrs. Cunningham, the work was attributed to a follower of Duccio, and Sotheby's estimated the value of the painting to be between $600,000 and $800,000. However, some art historians believe that the work may actually be by Duccio himself. If that is the case, then the work may sell for tens of millions of dollars. In addition, given the favorable settlement and now clear title, no other parties can claim ownership rights in the work. Come January, there may be another blockbuster sale!

Endnotes

1. (D.I. 57-1).
2. (D.I. 57-3).
3. (D.I. 1, p. 3).
4. (D.I. 1, p. 2).
5. (D.I. 1, pp. 2-3).
6. (D.I. 57-8).
7. (D.I. 1, pp. 3-4).
8. (D.I. 1; 3).
9. (D.I. 1, pp. 7-8).
10. (D.I. 8-19; 25-40; 52-53; 59).
11. (D.I. 45).
12. (D.I. 57).
13. (D.I. 76).
14. *See* 19 U.S.C. §§ 2601-2613 (2006).
15. *See* 18 U.S.C. § 2315 (requiring knowledge that the object was "stolen, unlawfully converted or taken"); *see generally McLain*, 545 F.2d at 1002 (noting that defendants' lack of knowledge that the articles were deemed "stolen" under Mexican law, they were not liable under the NSPA).
16. *United States v. Portrait of Wally, a painting by Egon Schiele, Defendant in Rem,* Opinion and Order, 663 F. Supp. 2d 232 (S.D.N.Y 2009).
17. http://www.ice.gov/factsheets/cultural-artifacts; http://dealbook.nytimes.com/2013/01/01/crime-forfeiture-pays-for-u-s-attorneys-office-sometimes-in-dinosaur-bones/?_r=0.
18. *United States v. An Antique Platter of Gold*, 184 F.3d 131 (2d Cir. 1999), *aff'd*, 991 F. Supp. 222 (S.D.N.Y. 1997).
19. *United States v. An Antique Platter of Gold, known as a Gold Phiale Mesomphalos C. 400 B.C., Defendant-in-rem, Michael H. Steinhardt, Claimant-Appellant, Republic of Italy, Claimant-Appellee,* No. 97-6319 (2009).
20. *Id.*
21. Alexander Nguyen, *Looted Treasures Returned to Gov't of Italy by Homeland Security*, Times of San Diego, Feb. 25, 2015, *available at* http://timesofsandiego.com/arts/2015/02/25/looted-treasures-returned-government-italy-homeland-security/.
22. Barry Meier, *Art Dealer Pleads Guilty in Import Case*, NY Times, June 4, 2004, *available at* http://www.nytimes.com/2004/06/24/arts/art-dealer-pleads-guilty-in-import-case.html.
23. *Id.*
24. Melissa Klein, *Rogues gallery: the Queens warehouse that holds a fortune in stolen art*, NY Post, June 6, 2006, *available at* http://nypost.com/2010/06/06/rogues-gallery-the-queens-warehouse-that-holds-a-fortune-in-stolen-art/.
25. *US Returns 2700-year-old Rhyton to Rohani*, Iran Times, Oct. 4, 2013, *available at* http://iran-times.com/us-returns-2700-year-old-rhyton-to-rohani/.

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Surreptitiously Created Photos of Children Held Not to Constitute Invasion of Privacy

By Joel L. Hecker

The tension between a person's right to privacy, codified in New York in §§ 50 and 51 of the Civil Right Law, and the basic protections of freedom of speech protected by the First Amendment was once again evident in a recent decision by the Appellate Division, First Department. The case is *Foster v. Svenson*,[1] which upheld the decision by Justice Eileen A. Rakower, who denied the plaintiffs' motion for a preliminary injunction and granted defendant's cross-motion dismissing the Complaint.

Facts

The defendant, Arne Svenson, is a critically acclaimed fine art photographer whose work has appeared in galleries and museums throughout the United States and Europe. In February 2012, he began photographing people living in the building across from his home. This was facilitated as the neighboring building had a mostly glass facade, with large windows in each unit. Svenson admittedly photographed the building's residents surreptitiously, even to the extent of hiding himself in the shadows of his darkened apartment. According to Svenson, he did so for reasons of artistic expression. He decided to obscure his subjects' faces as he was seeking to comment on the "anonymity" of urban life, where individuals only reveal what can be seen through their windows.[2] Svenson exhibited a selection of these photos, called "Neighbors," in galleries in Los Angeles and New York.

The promotional materials for the exhibit stated that for his "subjects there is no question of privacy; they are performing behind a transparent scrim on a stage of their own creation with the curtain raised high." The defendant further stated that "The Neighbors" did not know they were being photographed, and he "carefully" shot "from the shadows" of his apartment "into theirs." The defendant apparently spent hours in his apartment waiting for his subjects to pass the window, sometimes yelling to himself, "Come to the window!"[3]

Some of the photos were of the plaintiffs' children, aged three and one. Despite the defendant's professed effort to obscure his subjects' identity, these children were identifiable in two of these photographs. Their mother called Svenson to demand that he stop showing and selling the images of her children. The defendant agreed with respect to one of the photos, but was noncommittal about the other. The plaintiffs' counsel then sent cease and desist letters to the defendant and the Manhattan gallery where the photos were being shown, demanding that the photographs of the children be removed from the exhibition, the gallery's website, and the defendant's website. Defendant and the gallery complied. Plaintiffs' counsel sent a similar demand to an online art sales site called "Artsy." It, too, complied.

Despite this, one of the photographs of the plaintiffs' daughter was shown on several New York City television broadcasts discussing Svenson and his show. In addition, the address of the building was revealed in print and electronic media, including on a Facebook page. This lawsuit followed, seeking injunctive relief and damages pursuant to the statutory tort of invasion of privacy and the common law tort of intentional infliction of emotional distress. The defendant cross-moved to dismiss the Complaint, under the theory that, because the photographs were art, they were protected by the First Amendment, and their publication, sale, and use could not be restrained.

In August 2013, Justice Rakower denied the plaintiffs' motion for a preliminary injunction and granted the defendant's cross-motion, dismissing the entire Complaint, on the basis that the photographs were protected by the First Amendment. Specifically, she found that the photographs conveyed the defendant's thoughts and ideas to the public and served more than just an advertising or trade purpose, because they promote the enjoyment of art in the form of a displayed exhibition.

Appellate Court's Discussion

The Appellate Division panel first discussed New York State's privacy statute which prohibits the use of a person's name, portrait, picture or voice for advertising or trade purposes. The courts, however, in interpreting the phrase for advertising or trade purposes, have refused to adopt a literal construction because those limitations of the privacy statute were drafted with the First Amendment in mind.[4] As a result, §§ 50 and 51 do not apply to newsworthy events and matters of public concern because such dissemination or publication is not deemed strictly for the purpose of advertising or trade within the meaning of the privacy statute.[5] This exemption has been applied in a number of cases addressing materials published or televised for the purpose of entertainment because, according to the decision, there is a strong societal interest in facilitating access to information that enables people to discuss and understand contemporary issues.

The Appellate Division relied upon a number of cases where this newsworthy and public concern exemption was specifically applied to artistic expression, including literature, movies and theater, holding that it therefore logically followed that the exemption should also be applied equally to other modes of artistic expression.The panel agreed with the views expressed in the cited prec-

edents, where works of art were held to be outside the prohibitions of the privacy statute under the newsworthy and public concerns exemption, because the informational value of the ideas conveyed by the art work was seen as a matter of public interest.

The Court did limit the scope of its opinion, however, in holding that under New York law, the newsworthy and public interest exception does not apply where the newsworthy or public interest aspect of the images at issue is merely incidental to its commercial purpose.[6] One such example would be where the unauthorized images appear in the media under the guise of news items, solely to promote sales. In such case it is an advertisement in disguise and its commercial use deserves no protection from the privacy statute.

Similarly, there is no protection when there is no real relationship between the use of the plaintiff's name or picture and the article it is used to illustrate. This is because, by definition, if a person's image has no real relationship to the work, then its only purpose must be for the sale of the work.[7]

Accepting the plaintiffs' allegations as true, the Court concluded that they did not sufficiently allege that the defendant used the photographs in question for the purpose of advertising or for purpose of trade within the meaning of the privacy statute, since the defendant's actual uses were constitutionally protected conduct in the form of a work of art. Any advertising undertaken in connection with the promotion of the art work was therefore also permitted.

The Court pointed out that, although a profit might have been derived from the sale of the art work, that does not diminish the constitutional protection afforded by the newsworthy and public concern exemption since "[i]t is the content of the article and not the defendant's motive... which determines whether it is a newsworthy item, as opposed to a trade usage, under the Civil Rights Law."[8]

The plaintiffs also argued, to no avail, that the manner in which the photographs were obtained constitutes the extreme and outrageous conduct contemplated by the tort of intentional infliction of emotional distress and serves to overcome the First Amendment protection contemplated by Civil Rights Law §§ 50 and 51.

In prior opinions, the Court of Appeals set a high bar for what constitutes outrageous behavior in this context, requiring the means by which a person's privacy was invaded to be truly outrageous. The Appellate Division found that the defendant's conduct, while clearly invasive, did not implicate the type of criminal conduct covered by Penal Law § 250.40 *et seq.*, which prohibits unlawful surveillance. However, the Court, while explicitly acknowledging the plaintiffs' concerns, said that such complaints are best addressed to the Legislature and called upon the Legislature to "revisit this important issue," since the Court was constrained to apply the law as it exists.[9]

Conclusion

The Appellate Division was clearly troubled by the defendant's conduct in surreptitiously—in effect, stalking—the subjects of his photos, including young children. However, it obviously felt itself to be bound by precedent and therefore that it did not have the authority to find a viable cause of action based upon §§ 50 and 51.

Its call for legislative action to specifically provide protection for individuals whose privacy is invaded, as the plaintiffs alleged in this case, will undoubtedly fall upon deaf ears in the current legislative environment in Albany, and the power of the lobby of the press, which stands to gain by an ever expanding definition of the exceptions to the right to privacy. For better or for worse, this is clearly the direction our country is heading, given the tracking ability of new and emerging technologies over phone records, social media access, and the like.

Endnotes

1. *Foster v. Svenson,* 2015 N.Y. Slip Op. 03068 (Apr. 9, 2015).
2. *Id.* at 2-3.
3. *Id.* at 3.
4. *Id.* at 4.
5. *Id.* at 6.
6. *Id.* at 9.
7. *Id.*
8. *Foster,* 2015 N.Y. Slip Op. 03068, at 11, citing to *Stephano v. News Group Publs.*, 64 N.Y. 2d 174, 185 (1984).
9. *Foster v. Svenson,* 2015 N.Y. Slip Op. 03068, at 12-13.

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Dog Racing, Judge Fuchs and Babe Ruth: Boston Braves Baseball in 1935

By Bennett Liebman

1934 was another in a series of difficult years for Judge Emil Fuchs[1] as the principal owner and president of the National League's Boston Braves. His team finished a respectable fourth in the eight-team league with a record of 78-73, but the team's finances continued to deteriorate. The team drew approximately 300,000 fans, (sixth of eight in the league) and attendance declined by more than 41% from 1933 to 1934. Fuchs owed considerable sums to Charles Adams, the team's vice president and the largest shareholder of the Braves.[2] There was allegedly a $200,000 lien against the team's assets and players.[3] Fuchs needed $50,000 to be able to finance spring training in 1935.[4] The team lost $44,000 in 1934.[5]

Yet in November of 1934, Fuchs had reason to believe that 1935 would be a better year for him and the Braves. First of all, his close friend former Boston Mayor James Curley had been elected governor of Massachusetts. Fuchs was not only a friend of Curley's, but also employed Curley's son Paul as the travelling secretary of the Braves.[6]

More importantly for Fuchs, he believed that the 1934 passage of pari-mutuel legislation in Massachusetts would allow him to obtain a possible dog racing license for his home ballpark, Braves Field in Boston.[7] The legislation authorized both dog racing and horse racing in Massachusetts. Horse racing would be conducted during the day and dog racing at night. There would be a maximum total of 200 dog racing programs to be conducted between April 18th and October 31st of each year. Dog racing could be conducted in both indoor and outdoor facilities.

Horse racing and dog racing were each subject to county wide referenda in 1934. At the 1934 general election—the one at which James Curley was elected governor—each county voted separately on whether to authorize both dog and horse racing. Every county voted in support of horse racing. All but one voted in support of dog racing. Suffolk County—which included the city of Boston where Braves Field was located—voted in support of both referenda.

At the time, pari-mutuel racing on dogs and horses was considered a virtual guarantee of financial success. Pari-mutuels had opened in Rhode Island in 1934 and proved extremely popular.[8] It was the equivalent of opening up a casino in the 1990s.

So soon after the 1934 general elections, even before the Massachusetts Racing Commission started its operations, the Boston Braves announced plans to bring dog racing to Braves Field.[9] Since the Braves played their games during the day, and dog racing could only take place at night, the stadium could accommodate both dog racing and baseball. "The making of the race track will not interfere in any way with the playing of the games at Braves Field, for the track will be run around the outer edge of the playing field not touching the diamond at all, and be of sufficient length for all distances in the dog races, and the rail can be removed for the ball games."[10] Charles Adams even agreed to sell his interests to Judge Fuchs should the team obtain a dog racing license.[11]

Organized baseball did not view the dog racing issue that charitably. On December 7, 1934, the same day that Judge Fuchs officially applied for a racing license, Ford Frick, the newly appointed president of the National League, called the application "absolutely preposterous."[12] Allegedly, baseball Commissioner Kennesaw Landis threatened to quit if the dog racing proposal was allowed.[13]

This did not end the Fuchs proposal. Fuchs was determined to bring dog racing to Braves Field,[14] and there were reports that the owners were actually divided on the proposal. It was also suggested that the Braves Field be devoted exclusively to dog racing while the Braves could play their home games at Fenway Park, the home of the American League Red Sox.[15] Eddie Collins, the general manager of the Red Sox, had reputedly given approval to Fuchs to allow the Braves to play at Fenway.[16]

The baseball owners met in their annual meetings in mid-December of 1934. The National League owners ducked the question. They made no decision and held no public discussions on dog racing,[17] and Fuchs went out of his way to note that he wanted to do nothing to embarrass racing. Some thought that a deal had been worked out for the Braves to play their games at Fenway while the dogs raced at Braves Field.[18]

If there was such an arrangement, it was not approved by Commissioner Landis. Landis told the Braves that "dog racing would not be permitted in Braves Field at any time while it was in any way connected with baseball, nor would any officer or director of the Boston club be permitted to remain in baseball if he associated himself with a dog-racing company."[19]

With dog racing apparently out as an option for the Braves, Fuchs' next move to salvage his ownership stake in the Braves involved the potential acquisition of Babe Ruth from the New York Yankees. Ruth was turning 40 years old. He had been in the major leagues since 1914. He was coming off his worst year as a position player

where he hit .288 with only 22 home runs.[20] He was widely believed to be looking to stop playing and become a manager, but Yankee management had absolutely no interest in making Ruth the manager of the team. Ruth had started his major league career as a pitcher for the Boston Red Sox. A decent Ruth season could potentially bring new energy and fans to Braves Field and help maintain Fuchs as the owner of the Braves.

In short, the Braves' acquisition of Ruth represented a longshot effort at financial respectability. "If the Braves cannot have dogs, it seems that one of their officials will try to get Ruth."[21] The Braves "went out and sought the services of Babe Ruth of the New York Yankees to be assistant manager under Bill McKechnie."[22] Both Fuchs and Yankee owner Jacob Ruppert denied any possible transaction.[23] Fuchs advised the press of his loyalty to current Braves manager Bill McKechnie,[24] but it was clear that a potential deal was in the making.

The Braves in January of 1935 made one last move at obtaining a dog license for Braves Field. The owners of the actual stadium—which was the estate of former Braves owner James Gaffney—decided to enter into a lease with a third party, known as the Boston Kennel Club, which filed an application for a dog racing license.[25] This placed the baseball club in an awkward position. Major League Baseball opposed the joint use of the park as a racetrack and a ballpark. That left the issue of where the Braves could play in Boston up to the ownership of the Boston Red Sox. Again, while there was some indication that Tom Yawkey, the owner of the Red Sox, might consent,[26] Yawkey decided against letting the Braves play home games at Fenway.[27] After that, the owners of Braves Field declared that the baseball team had breached its lease with the ballpark and that the team would not be permitted to play at Braves Field in 1935.[28]

The National League owners then held an emergency meeting to determine what would be done about the Braves. The league continued to oppose dog racing at Braves Field and stated that the team would play its games at Braves Field. This was accomplished by the National League taking over the lease with Braves Field, guaranteeing payments on the lease until 1946 and subletting the lease to Judge Fuchs.[29] Fuchs retained control over the Braves but was given until August 1, 1935 to pay his debts to Charles Adams and other stockholders. Fuchs clearly had his work cut out for him. Governor Curley and other elected officials tried to help him out by announcing their support for purchasing subscriptions of blocks of Braves tickets. This action raised $43,000 for the Braves.[30]

Clearly, however, Fuchs needed more than $43,000 to retain his control over the Braves. That is where Babe Ruth came in. Fuchs began negotiations with Ruth and Yankee owner Jacob Ruppert. Despite Ruth's box office attraction, Ruppert was clearly not anxious to keep Ruth. Ruppert had no desire to have Ruth become the manager of the Yankees. He did not believe that Ruth had any future as a player. He also had no desire for Ruth to go to a rival American League team.[31]

Fuchs, on the other hand, needed Ruth. "His resources were exhausted. In desperation, he reached for a twig, a straw, a leaf. Ruth was a twig, and Ruth reached for him."[32] Fuchs definitely had Ruppert's blessing in signing Ruth and taking him off Ruppert's hands.[33]

Ruth quickly signed on for $25,000 per year as a player with a share in the profits for service as assistant manager and second vice president.[34] He soon headed for spring training where all was good for a few days. Ruth's reception in Florida was tumultuous.[35] It did not last.

Ruth was old and not particularly mobile as a player. On the financial side, he and Fuchs did not get along. He had no real duties as assistant manager or vice president. There obviously were going to be no profits for Ruth. Fuchs supposedly wanted Ruth to invest $50,000 in the club.[36] Ruth did not fulfill many of the publicity and appearance duties that Fuchs had expected him to perform.[37]

On the field, Ruth was not his old self. On opening day, Ruth drew 25,000 to Braves Field as he hit a home run off Carl Hubbell of the Giants in leading the Braves to victory.[38] The Braves drew over 47,000 when the Giants held their home opener. Yet Babe did not hit and could hardly move. He was often ill. He was hitting .155 by late May. Babe had his last hurrah. He hit three home runs at Forbes Field in Pittsburgh on May 25, 1935. His final home run—#714—allegedly traveled 600 feet. Ruth had not hit three home runs in a game since 1926. His final home run was his last hit. He played several more games without any hits. He hurt his knee in a game on May 30, 1935 and announced that this would be his final game. He formally retired a few days later, exchanging nasty remarks with Fuchs.[39] He batted .181 that season with six home runs.

The Ruth experiment was a total loss for Fuchs, who was also not helped by the overall performance of the Braves. The team finished that year with a record of 38-115, the worst percentage record in the history of National League baseball. Even the performance of the infamous 1962 Mets, who finished with a 40-120 record, was better than the performance of the 1935 Braves.[40]

With no possibility of repaying his loans to Charles Adams, Fuchs forfeited his interest in the Braves on August 1, 1935. Governor Curley the next month appointed Fuchs to a six year term as the chairman of the state's Unemployment Compensation Commission at $6,500 a year.[41] According to Fuchs' son, Governor Curley frequently referred potential clients to Judge Fuchs' private legal practice.[42] Nonetheless, in September 1938, Emil Fuchs filed for bankruptcy, listing debts of $263,299 and no assets.[43]

The forfeiture of the Fuchs' interest in the Boston Braves did not end the saga of the Braves ownership mess. Charles Adams was also one the chief stockholders in Suffolk Downs, the thoroughbred racetrack in East Boston that opened in July of 1935. Given Adams' interest in a gambling enterprise, Commissioner Landis could not possibly want him running a Major League Baseball team. Efforts during the baseball season to find someone else to purchase the Braves from Adams failed. In November of 1935, the National League took over the operations of the Braves,[44] but ended up relenting to a position that kept Adams involved informally. Adams would hold no formal position with the Braves, but ended up providing the financial backing to Bob Quinn, the general manager of the Brooklyn Dodgers, who became the president of the team.[45] Adams retained his stock in the Braves—who were called the Boston Bees from 1936-1940—until he was bought out by a syndicate of purchasers in 1941.[46]

In this manner, dog racing—or the absence in Boston thereof—was able to play a significant role in 1935 in the fortunes of Major League Baseball, Babe Ruth and the Boston Braves.

Endnotes

1. Fuchs was a politically connected Republican Party-affiliated lawyer in New York. He had once served as a magistrate in New York City. Fuchs had purchased the Boston Braves in 1923 with pitching great Christy Mathewson and banker James McDonough. Upon Mathewson's death in 1925, Fuchs headed up the ownership interest in the team. In 1929, he served as the manager of the Braves and guided the team to a last place finish.
2. Adams was also the owner of the Boston Bruins of the National Hockey League.
3. "Babe's Ability To Save Braves' Finances Tested," AP, *Hartford Courant*, April 5, 1935.
4. "Campaign for Funds to Aid Braves Opens," AP, *Los Angeles Times*, January 31, 1955.
5. "Braves List Net Loss for 1934 at $44, 308," AP, *New York Herald Tribune*, June 5, 1935.
6. The *New York Herald Tribune* wrote, "He had assisted James M. Curley in his Gubernatorial campaign. He has influence." Rud Rennie, "Braves, Dispossessed, Are Left Without a Field as Red Sox Bar Them," *New York Herald Tribune*, January 15, 1935. Decades later, Fuchs' son claimed "Gov. Curley gave my father the license to have the first greyhound track in Boston… What he tried to do was to install a track in the ballpark, so that the money he drew from the track could help the baseball team. But Judge Landis, commissioner of baseball, would not allow racing to happen the night of a baseball game in the daytime, so my father tried to talk Mr. Tom Yawkey into letting the Braves play in Fenway Park when the Red Sox were on the road. Mr. Yawkey wanted Fenway to be only for the Red Sox, so my father gave the license back to Gov. Curley." Ian Thomsen,"Home of the Braves Thirty-Five Years Ago, The Boston Braves Left Town this Weekend," *Boston Globe*, August 5, 1988. On opening day of the baseball season in 1935, Governor Curley proclaimed the day "Judge Fuchs Day."
7. Mass. Ch, 374, L. 1934.
8. "Racing Interests Plan Palatial Tracks At Boston," *Hartford Courant*, November 14 1934; "13 States Received Income of $5,800,139 From Racing in 1934," AP, *New York Times*, February 7, 1935.
9. James O"Leary, "Braves Directors to Apply for License to Race Dogs," *Boston Globe*, November 17, 1934. The owners of the Boston Garden similarly applied for a dog racing license.
10. *Id.*
11. John Barry, "Summoned To Racing Hearing," *Boston Globe*, December 5, 1934.
12. Victor O. Jones, "Frick Opposes Fuchs' Action," *Boston Globe*, December 8, 1934.
13. "National League Won't Allow Braves To Use Park For Ball Games And Dog Racing," AP, *Hartford Courant*, December 8, 1934.
14. Edwards Burns, "Major League Owners Split on Dog Racing," *Chicago Tribune*, December 11, 1934. See also "Clubs Want Him to Stay in League," *Washington Post*, December 11, 1934.
15. "Braves May Play Games At Fenway," *Hartford Courant*, December 8, 1934; Edward Neil, "Moguls Facing a Delicate Job Handling Fuchs," *Atlanta Constitution*, December 11, 1934.
16. *Id.*
17. Melville Webb, "Club Owners Ignore Dog Racing Plan," *Boston Globe*, December 12, 1934.
18. See "National League Approves Seven Night Games For Each Home Club In '35," *New York Sun*, December 13, 1934.
19. Rud Rennie, "Landis Ultimatum to Boston Braves Frustrates Attempt to Mix Dog Racing With Baseball," *New York Herald Tribune*, December 14, 1934.
20. While many seemed to think that Ruth's 1934 season showed that he was finished in baseball, modern statistics would show otherwise. His OPS numbers—on base plus slugging—placed him fifth in the American League in 1934. His WAR number for position players—wins above replacement players—put him in tenth place in the American League. See generally http://www.baseball-reference.com/players/r/ruthba01.shtml.
21. Rud Rennie, *supra* note 19.
22. *Id.*
23. John Drebinger, "Giants Get Davis of Phils and Koenig and Stout of Reds," *New York Times*, December 14, 1934.
24. John Drebinger, "Sports of the Times: Wrong Again, It Must Be a Gift," *New York Times*, December 24, 1934.
25. Roscoe McGowen, "Dog Racing Asked For Braves Field," *New York Times*, January 13, 1935. Allegedly Fuchs had no connection with the ownership of the Boston Kennel Club.
26. James O'Leary, "Eddie Collins Disclaims Knowledge of Any Arrangement to Permit Braves to Play at Fenway Park," *Boston Globe*, January 13, 1935.
27. Rud Rennie, "Braves, Dispossessed, Are Left Without a Field as Red Sox Bar Them," *Boston Globe*, January 15, 1935.
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38. James P. Dawson, "Ruth's Home Run Defeats Giants in Boston by 4-2," *New York Times*, April 16, 1935. The Times story started, "The greatest figure baseball ever knew, Babe Ruth, was never greater than he was today."

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40. Wally Berger did, however, lead the National League in both home runs and runs batted in. Berger hit 34 home runs. Ruth finished second on the time with his six homers.

41. "Baker Allows Council to Become Democratic," *Boston Globe*, September 12, 1935.

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43. "Emil E. Fuchs Files Bankruptcy Plea," *Boston Globe*, September 4, 1938.

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Courts Find "Your Art Dealer Is Not Your Friend": Due Diligence Requirements for Purchasers of Artwork

By Yelena Ambartsumian

Introduction

The largest art scandal of 2015 unraveled in late December 2014, when Dmitry Rybolovlev was vacationing in St. Barth. Rybolovlev is a Russian billionaire and an avid collector of art. This oligarch is particularly fond of Picasso, Van Gogh, Gauguin, Rothko, and Modigliani.[1]

Last December, while Rybolovlev was mingling with other guests over lunch at the Eden Resort, the polite conversation turned to art. As the guests discussed the record high prices commanded by the secondary market for art, New York art dealer Sandy Heller blithely remarked that one of his clients had just sold a Modigliani painting to an undisclosed buyer.[2]

It was at this moment that Rybolovlev finally heard something that he had not heard before. Curious, Rybolovlev asked, "Which Modigliani?" and Heller responded that it was "Nu Couché au Cossin Bleu"—one of Modigliani's most celebrated erotic portraits of a reclining female nude. Rybolovlev asked Heller the sale price of this particular Modigliani. After checking with the seller, Steve Cohen, Heller informed Rybolovlev that the painting had sold for $93 million.[3]

Unbeknownst to Heller, Rybolovlev was actually the "undisclosed" buyer of this very painting. However, Rybolovlev had paid not $93 million for it. Instead, he had paid $118 million—a markup of over $22 million—which included a 2% commission of $2.36 million for his art dealer, Yves Bouvier.

Rybolovlev returned to Monaco, where he resides, and filed a complaint against Bouvier, the Swiss art dealer with whom he had a relationship of over a decade.[4] Bouvier, also a billionaire, also ran Luxembourg's Le Freeport storage facility until recently.[5]

The complaint alleges forgery and fraud. It characterizes Rybolovlev's relationship with Bouvier as a friendship, within which Bouvier "enjoyed the absolute trust of the buyers and had sole responsibility to carry out the usual verifications, including concerning the price of the work." Bouvier denies the charges, claiming that Rybolovlev owes him money for another transaction. In any event, Bouvier's attorney clarified that his client and Rybolovlev are certainly not "friends."[6]

To some degree, Bouvier's attorney is correct. At least in New York, art galleries and brokers do not owe a fiduciary duty to collectors, no matter how longstanding or intimate their relationship.

In fact, a recent string of decisions in the state and federal courts of New York demonstrates that collectors must conduct due diligence not just to discern a work's authenticity,[7] but also to determine the market value before making a purchase—even if the purchase is from someone whom they trust.

These discussions illustrate two key points: First, courts are reluctant to jump into a dispute between a collector and his or her dealer,[8] and, second, just as the "aura" of art is disappearing,[9] so is the willingness of courts to tolerate the "gentlemen's agreements" that continue to dominate the notoriously opaque art market. While galleries owe a fiduciary duty to artists who consign their work to galleries, under the New York Art and Cultural Affairs Law, galleries owe no such duty to collectors.[10] Accordingly, a potential purchaser of artwork must conduct his or her own inquiry into the authenticity and fair market value of the work. Moreover, because the art gallery owes no fiduciary duty to a purchaser, it is imperative that any agreement between the two be memorialized in writing. Indeed, if one's decades-old relationship with an art dealer cannot withstand the test of a written agreement, then the art dealer is certainly not a friend.

An Oral Agreement Is Only as Good as the Dealer's Word

Recently, in *McKenzie v. Fishko*,[11] Richard F. McKenzie brought suit on behalf of his foundation against his longtime dealer Forum Gallery, run by Robert and Cheryl Fishko, for breach of contract, fraud, and breach of fiduciary duty. McKenzie claimed that he had purchased more than 100 artworks through Forum Gallery based on two oral agreements: 1) for artists not represented by the gallery, McKenzie paid a 5% commission on purchases "at the best possible price" and 2) for artists represented by the gallery, McKenzie received a 20% discount on purchases where Forum Gallery would act as McKenzie's agent.

In 2011, McKenzie learned that Forum Gallery had allegedly been inflating the price of the artworks in the latter category, in order to eliminate the 20% discount. McKenzie also learned from a competitor of Forum Gallery that a Ralph Goings painting which he thought he had purchased from a collector *through* Forum Gallery had actually been sold *to* the gallery for much less than "the best possible price" that he was later charged. Similarly, McKenzie learned that Forum Gallery had paid $1,025,000 for a Norman Rockwell painting that it had purchased

on McKenzie's behalf—though the invoice to McKenzie charged him for almost $200,000 more—with Forum Gallery charging $1,225,000 instead of the purchase price plus 5% commission ($51,250), based on their oral agreement.[12]

In February of this year, a federal judge in the Southern District of New York granted summary judgment to Forum Gallery, dismissing all of McKenzie's claims. Specifically, the court found that McKenzie "failed to proffer evidence sufficient to sustain the burden of proof on [his] breach of contract claim," citing to McKenzie's vague and inconsistent deposition testimony and his "constantly-shifting conclusory proffers."[13] The court also dismissed McKenzie's general claims sounding in fraud as duplicative of his breach of contract claim. As for the specific misrepresentations (including the price of the Rockwell painting), the court found that McKenzie's proffers fell short of showing the clear and convincing evidence required to demonstrate fraud, particularly as McKenzie had earlier sworn that the oral agreement as to the 5% commission did not include the Rockwell painting.[14]

Significantly, as for McKenzie's breach of fiduciary duty claim, to the extent that it was not entirely duplicative of the breach of contract claim, the court found that McKenzie had not proffered sufficient evidence to show that Forum Gallery and its principals owed McKenzie any fiduciary obligations whatsoever. The court explained that "'when parties deal at arms length in a commercial transaction, no relation of confidence or trust sufficient to find the existence of a fiduciary relationship will arise absent extraordinary circumstances.'"[15] Thus, purchasing over 100 pieces of artwork from someone over the course of two decades—and enough artwork to amass a collection of approximately $200 million housed in a private museum on one's property[16]—does not constitute extraordinary circumstances, no matter how close one feels to his or her art dealer.

Art Purchasers Are Intrinsically Sophisticated Parties—They Should Therefore Consult Equally Sophisticated Attorneys Beforehand

Another recent case illustrates that even where there is a written purchase agreement between a buyer and the art dealer, the buyer may not solely rely on the art dealer's representations. In *MAFG Art Fund, LLC v. Gagosian*,[17] Judge Kapnick of the New York County Supreme Court granted the Gagosian Gallery's motion to dismiss the complaint for failure to state a cause of action against it[18]—including breach contract, breach of implied covenant of good faith and fair dealing, unjust enrichment, and breach of fiduciary duty—but not the plaintiffs' cause of action sounding in fraud. The court explained that it could not determine that the "plaintiffs' alleged reliance on defendants' representations regarding the art market and intrinsic value of particular works of art was *per se* unreasonable or unjustified."[19]

The action arose from the plaintiffs'[20] purchase of various sculptures and paintings from defendants Larry Gagosian and the Gagosian Gallery, Inc., including a black granite sculpture titled "Popeye" by Jeff Koons for a purchase price of $4 million. At issue were also several "exchange transactions" whereby the plaintiffs acquired artworks from the Gagosian Gallery by paying for the works with a combination of cash and a transfer or consignment to the Gagosian Gallery of other artworks, including the "Popeye" sculpture. For example, through the exchange, the plaintiffs acquired Cy Twombly's "Leaving Paphos Ringed With Naves," which they purchased for $10.5 million by paying $250,000 in cash and exchanging four works of art, including "Popeye," two Willem de Kooning oil paintings, and Roy Lichtenstein's "Brushstrokes in Flight." In their Complaint, however, they alleged that the Gagosian Gallery intentionally suppressed the value of the exchanged works, so that, essentially, the plaintiffs were giving more than they were receiving.

The plaintiffs' argument as to the suppressed value of "Popeye" was based on the Gagosian Gallery's alleged disincentive to resell the sculpture, due to provisions in earlier agreements. Before "Popeye" was completed, the parties had entered into a purchase agreement for the anticipated sculpture, whereby the plaintiffs were to pay the $4 million purchase price in five installments of $800,000, with the final payment due upon completion of the sculpture. The plaintiffs certainly knew that the sculpture had not been completed. What they did not know was that the Gagosian Gallery allegedly did not own the sculpture it was purportedly selling. Rather, the plaintiffs claimed that "in reality, the Gallery had no rights to the "Popeye" sculpture at the time the Gallery entered into the MacAndrews Purchase Agreement, as evidenced by a separate but subsequent agreement entered into between the Gallery and Sonnabend Gallery, Inc."[21] In this second agreement, Sonnabend represented that Jeff Koons, LLC was "the sole and legal owner of ["Popeye"]"[22] and that "Popeye" would be sold to the Gagosian Gallery for a purchase price of $4 million to be paid in five equal payments of $800,000, with the final payment due upon completion.

Most significant, however, was that the Sonnabend Purchase Agreement provided that if the Gagosian Gallery sold "Popeye" for a "Profit" to a third party within two years after the date of the Agreement, then the Gallery would pay Jeff Koons "an amount equal to 70% of such Profit." The Sonnabend Purchase Agreement defined "Profit" as "the amount by which the Work's price in a Secondary Sale exceeds the Purchase Price"[23] of $4 million. If the Gagosian Gallery sold "Popeye" to a third party and subsequently resold the sculpture within five years of its original delivery to such third party, then the Gagosian Gallery agreed to pay a 50% resale commission to Jeff Koons, LLC. The plaintiffs claimed that this effectively destroyed their ability to enjoy any appreciation on

"Popeye," as Koons' works typically appreciate immediately after delivery to the first purchaser, but the Gagosian Gallery, as Koons' exclusive dealer, would be unwilling to be involved in any future resale of "Popeye" while the profit-sharing provisions of the Sonnabend Purchase Agreement were still in effect. Essentially, the plaintiffs argued that Gagosian's alleged refusal to be involved in any further sales of "Popeye" suppressed the true value of the sculpture. Without Gagosian, the plaintiffs would not be able to realize as high a price on the resale of "Popeye." The motion court found the plaintiffs' argument unavailing, as the plaintiffs' agreement with the Gagosian Gallery contained no such obligation on the Gagosian Gallery to be involved in the future resale of "Popeye." Nor did the purchase agreement represent that the plaintiffs had a right and expectation that they could sell "Popeye" back to the Gagosian Gallery or exchange it for other works of art.

The Appellate Division, First Department, largely agreed with the motion court, but it went one step further by ruling that the Gagosian Gallery's motion to dismiss the fraud cause of action should also have been granted, thereby dismissing the entirety of the plaintiffs' Complaint. The First Department determined that the Complaint "failed to state a cause of action for fraud because plaintiffs did not allege justifiable reliance… As a matter of law, these sophisticated plaintiffs cannot demonstrate reasonable reliance because they conducted no due diligence; for example, they did not ask defendants, 'Show us your market data.'"[24] Nor could the plaintiffs rely on the Gagosian Gallery's alleged misrepresentations as to the value of certain artworks, because "statements about the value of art constitute 'nonactionable opinion,'"[25] and such opinions do not provide a basis for a fraud claim.

The *MAFG Art Fund* case is significant in that, even despite such purported double-dealing by an art gallery, the courts were not interested in becoming involved in the dispute. Tellingly, the underlying motions were based on the plaintiffs' failure to state a cause of action, and the Appellate Division granted even further relief to the Gagosian Gallery than did the motion court. Moreover, the case demonstrates that a buyer must conduct his or her own due diligence to determine the market value of the work and cannot rely on any representations made or implied by the seller. The First Department highlighted that the plaintiffs were sophisticated purchasers of art, and that, essentially, they should have known better. Indeed, if a party is spending millions of dollars on a work, that party should spare no expense in protecting itself—by consulting an independent art adviser and/or an attorney to aid in drafting the purchase agreement.

To the extent that the buyer is relying on any unspoken assumptions, he or she should be certain to include them in a written contract. In this case, the buyer's unspoken assumption—and indeed, the likely assumption of the art world—is that the Gagosian Gallery would be involved in the future sale of the multimillion dollar artwork, whose artist it exclusively represents. Yet neither court was willing to read such an assumption into the parties' agreement.

Fair Market Value May Be What You Pay For

Last, in a case of buyer's remorse, *Arthur Properties, S.A. v. ABA Gallery, Inc.*,[26] Oleksandr Savchuk, acting through Arthur Properties, bought 18 paintings from defendant ABA Gallery, Inc. for a total of $9.58 million—sight unseen. A few years later, Savchuk brought suit alleging that four of the paintings were not authentic and that ABA Gallery's principal, Anatoly Bekkerman, had misrepresented the "fair market value" of many of the works. For example, Savchuk alleged that one of the paintings—"Seascape with Peter the Great" by Ivan Aivazovsky, the great Armenian master painter during the Russian Empire from the Cimmerian Art School[27]—was worth only $800,000, even though Savchuk paid $4 million for the work.[28]

The ABA Gallery is located in New York and specializes in 19th and 20th century Russian art. Savchuk claimed that in 2006 and 2007, Bekkermen sought to persuade him to purchase artworks located in the ABA Gallery, over the course of "'numerous' but entirely unspecified communications, phone calls and personal visits."[29] Savchuk also claimed that while he himself had no expertise in art, Bekkerman allegedly represented to him that he was an honest dealer and expert on Russian art, and that he would never risk the reputation of his daughter, who worked for Sotheby's, by offering paintings that were inauthentic or sold for more than their fair market value. Savchuk ultimately trusted Bekkerman and purchased several paintings, without ever seeing them, for $9.58 million. After taking delivery of the paintings, Savchuk claimed that he discovered that four of them were inauthentic and that the prices he had paid for the other paintings were significantly higher than their market value.

In 2011, Judge Kaplan in the Southern District of New York dismissed Savchuk's complaint, which alleged breach of contract, unjust enrichment, fraudulent inducement, and negligent misrepresentation, among other claims. With regard to the breach of contract claims, the court noted that "[b]y definition, the fair market value of an asset such as a work of art, a used car, a piece of real estate, and many other assets is 'the price that a willing buyer and a willing seller would agree to in an arm's length transaction.'"[30] The court noted that Savchuk was under no compulsion to buy the paintings, and thus, the fair market value of the paintings is what Savchuk willingly and voluntarily paid for them.

With regard to the negligent misrepresentation claim, the court determined that Savchuk did not have a special relationship with Bekkerman and the ABA Gallery,

despite that the latter two had expertise in and superior knowledge of Russian art. A negligent misrepresentation claim, under New York law, requires: (1) carelessness in imparting words, (2) upon which others were expected to rely, (3) and upon which they did act or failed to act, (4) to their damage. Such a claim also requires that a "special relationship" exists between the parties such that a duty of care is imposed on the defendant to accurately convey information to the plaintiff. Unfortunately for Savchuk, courts in the Southern District have found that "allegations of superior knowledge of expertise in the art field are per se insufficient to establish the existence of a fiduciary relationship."[31] Thus, no matter how much Bekkerman knew about Russian art and how little Savchuk claimed to know, there did not exist a special relationship between the parties. Accordingly, the district court dismissed Savchuk's negligent misrepresentation claim.

Conclusion—The Takeaway for Rybolovlev and Others

Perhaps Swiss courts look more favorably upon millionaires, billionaires, and those sophisticated and rich enough to compete in today's art market than do the courts in New York. If Rybolovlev's claims were governed by New York law, the outcome would not be favorable for him. From the recent decisions surveyed above, it is clear that New York state and federal courts will not recognize a fiduciary relationship between a collector and his or her art dealer—no matter how close the relationship has grown or how disproportionate the art dealer's expertise. Simply put, if someone is in a position to purchase millions of dollars worth of artwork in New York, then he or she is *per se* a sophisticated party. As such, that party should have enough sophistication to also: 1) hire an attorney to review his or her agreements with the seller; 2) put any provisions, no matter how obvious, in writing; and 3) conduct due diligence as to a work's authenticity or market value by enlisting the help of art advisors or appraisers—and of course, inspect the paintings in person or hire someone else to do so. Above all, a purchaser of art must remember that no court in New York State will find that your art dealer is your friend.

Endnotes

1. Rory Mulholland, *Monaco FC Owner Rybolovlev among Alleged Victims of Huge Art Scam*, The Telegraph (Feb. 26, 2014, 8:23 PM), *available at* http://www.telegraph.co.uk/news/worldnews/europe/monaco/11436640/Swiss-businessman-Yves-Bouvier-arrested-for-art-fraud.html.
2. Robert Frank, *A Multimillion-Dollar Markup on a Modigiliani*, N.Y. Times (Apr. 4, 2015), *available at* http://www.nytimes.com/2015/04/05/business/a-multimillion-dollar-markup-on-a-modigliani.html?_r=0.
3. *See supra* note 2.
4. Bouvier has sold Rybololev at least 40 other "major works." The complaint also focuses on the markup of Leonardo Da Vinci's "Salvator Mundi" painting, for which Bouvier allegedly pocketed $52.5 million, after purchasing it for $75 million and flipping it to Rybolovlev for $127.5 million including his fees. *See* Agustino Fontevecchia, *Steve Cohen's Modigiliani in the Middle of an Art Market War: Billionaire Ryvolovlev vs Yves Bouvier*, Forbes (Mar. 12, 2015, 11:59 PM), *available at* http://www.forbes.com/sites/afontevecchia/2015/03/12/steve-cohens-modigliani-in-the-middle-of-an-art-market-war-billionaire-rybolovlev-vs-yves-bouvier/.
5. Sarah Cascone, *Accused of Art Fraud, Yves Bouvier Steps Down from Le Freeport*, Artnet (Apr. 13, 2015), *available at* https://news.artnet.com/market/yves-bouvier-steps-down-at-le-freeport-287388.
6. *See supra* note 2.
7. *See, e.g.*, *ACA Galleries, Inc. v. Kinney*, 928 F. Supp. 2d 699 (S.D.N.Y. 2013), *aff'd*, 552 F. App'x 24 (2d Cir. 2014) (determining buyer could not rely on alleged misrepresentations by seller regarding authenticity of a painting by Milton Avery); *Foxley v. Sotheby's Inc.*, 893 F. Supp. 1224 (S.D.N.Y. 1995). For an informative discussion of fiduciary duty, authenticity, and price-fixing from an auction house perspective, see Judith B. Prowda, Visual Arts and the Law: A Handbook for Professionals 183-202 (2013).
8. *See* Amelia K. Brankov, *Court Dismisses Art Collector's Overcharge Complaint*, Private Art Investor (Mar. 31, 2015), *available at* http://www.privateartinvestor.com/art-law-2/court-dismisses-art-collectors-overcharge-complaint/.
9. Walter Benjamin, *The Work of Art in the Mechanical Age* (1936), *available at* https://www.marxists.org/reference/subject/philosophy/works/ge/benjamin.htm.
10. New York Art and Cultural Affairs Law § 12.01, *available at* http://codes.lp.findlaw.com/nycode/ACA/C/12/12.01, states: "Notwithstanding any custom, practice or usage of the trade, any provision of the uniform commercial code or any other law, statute, requirement or rule, or any agreement, note, memorandum or writing to the contrary: (a) Whenever an artist or craftsperson, his heirs or personal representatives, delivers or causes to be delivered a work of fine art, craft or a print of his own creation to an art merchant for the purpose of exhibition and/or sale on a commission, fee or other basis of compensation, the delivery to and acceptance thereof by the art merchant establishes a consignor/consignee relationship as between such artist or craftsperson and such art merchant with respect to the said work, and: (i) such consignee shall thereafter be deemed to be the agent of such consignor with respect to the said work; (ii) such work is trust property in the hands of the consignee for the benefit of the consignor; (iii) any proceeds from the sale of such work are trust funds in the hands of the consignee for the benefit of the consignor; (iv) such work shall remain trust property notwithstanding its purchase by the consignee for his own account until the price is paid in full to the consignor.…"
11. No. 12-CV-7297-LTS-KNF, 2015 WL 685927 (S.D.N.Y. Feb. 13, 2015).
12. Amelia K. Brankov, *Court Dismisses Art Collector's Overcharge Complaint*, Private Art Investor (Mar. 31, 2015), *available at* http://www.privateartinvestor.com/art-law-2/court-dismisses-art-collectors-overcharge-complaint/.
13. *McKenzie v. Fishko*, No. 12-CV-7297-LTS-KNF, 2015 WL 685927, at *7 (S.D.N.Y. Feb. 13, 2015).
14. *See id.* at *8.
15. *Id.* at *9 (citing *Pan Am Corp. v. Delta Air Lines, Inc.*, 175 B.R. 438, 511 [S.D.N.Y. 1994]).
16. *See id.* at *1.
17. 123 A.D.3d 458 (1st Dep't 2014).
18. *Mafg Art Fund, LLC v. Gagosian*, 2014 WL 359341 (Sup. Ct. N.Y. County 2014), *aff'd as modified by*, 123 A.D.3d 458 (1st Dep't 2014).
19. *Id.*
20. MAFG Art Fund, LLC and MacAndrews & Forbes Group LLC.
21. *Mafg Art Fund, LLC*, 2014 WL 359341.
22. *Id.*

23. *Id.*
24. *Mafg Art Fund, LLC*, 123 A.D.3d at 460 (internal citations omitted).
25. *Id.*
26. 2011 WL 5910192 (S.D.N.Y. Nov. 28, 2011).
27. Aivazovsky is considered to be one of the greatest Russian marine painters of the 19th century, whose work is housed in dozens of Russian museums and featured prominently (somewhat ironically given the geopolitical history of the 20th century) in the Presidential Palace in Turkey, once owned by the Kassabian merchant family. *See Aivazovsky's Works on Sea at Naval Museum,* HURRIYET DAILY NEWS, *available at* http://www.hurriyetdailynews.com/aivazovskys-works-on-sea-at-naval-museum.aspx?pageID=238&nID=60235&NewsCatID=385.
28. Julie Zeveloff, *New York Art Gallery Sued for Selling 46.5 Million in Phony and Overvalued Russian Art*, Business Insider (July 5, 2011, 2:06 PM), *available at* http://www.businessinsider.com/art-gallery-sued-over-phony-russian-art-2011-7.
29. *Arthur Properties, S.A. v. ABA Gallery, Inc.*, No. 11 CIV. 4409 LAK, 2011 WL 5910192, at *1 (S.D.N.Y. Nov. 28, 2011).
30. *Id.* at *3.
31. *Id*. at *5; *see also Granat v. Center Art Galleries—Hawaii Inc.*, No. 91 CIV. 7252, 1993 WL 403977, at *6 (S.D.N.Y. Oct.6, 1993) (citing *Mechigian v. Art Capital Corp.*, 612 F. Supp. 1421, 1431 [S.D.N.Y.1985]).

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Laws of Unintended Consequences: The Effects of Cultural Patrimony on the Markets of Modern Mexican Artists

By Isabel Suárez

Introduction

When analyzing and understanding any art market, it is imperative to consider all of the factors that impact its success or failure. While the economic climate is often cited as a major influence on the art market, the effect of the legal system is often overlooked. Government policies can play an enormous role in determining the economic success of the art market at large, as well as that of a specialized market. Governments that create legislation allowing for open and fair trade stimulate all sectors of the economy, including the art market. Governments that implement restrictive legislation with regard to the sale of goods, namely art, shrink the market for works that fall under those regulations. The Mexican government is such an example. By creating extremely restrictive cultural patrimony laws, the Mexican government has stifled the growth in the international markets for its most important modern artists. While these laws are meant to protect items that define the country's national identity, they ultimately restrict all sales and loans. Artists whose markets have been affected by their inclusion in the cultural patrimony include, but are not limited to, Diego Rivera, Frida Kahlo, Jose Clemente Orozco, and Maria Izquierdo.

What Are Mexican Cultural Patrimony Laws?

In order to understand how Mexican cultural patrimony policy affects the market for artists such as Diego Rivera, one must first analyze the statutes in question. In 1972, President Luis Echeverria enacted a series of federal regulations dealing exclusively with the protection of monuments, museums, and works of art considered part of the Mexican cultural patrimony. The regulations stipulated that all works of art by Mexican artists, regardless of where they were produced, were eligible to become works of cultural patrimony.

If selected as part of the country's cultural patrimony, the entirety of the artist's work would be considered an "historical monument" and monitored by the National Institute of Fine Art (INBA).[1] Furthermore, works of foreign artists that had been produced on Mexican territory were also subject to consideration of patrimony. In addition, the regulation prohibited the "permanent exportation" or sale of any work, whether in a public or private collection, that formed part of the Mexican cultural patrimony. These regulations also provided specific details on the special permission required when exhibiting a work of cultural patrimony outside Mexico, as well as the requirement that all collectors register their works with the National Institute of Fine Arts, and follow certain restoration standards.[2]

The Case of Maria Izquierdo

In conjunction with the analysis of the regulations passed under President Echeverria in 1972, it is imperative to also consider the various decrees issued by other Mexican presidents, which affect the oeuvre of many artists. These decrees are instrumental in understanding how the government justifies making the work of an artist part of the cultural patrimony. The decree issued in 2002 regarding the work of modern artist Maria Izquierdo is especially interesting, in that it provides a list detailing why her work should form part of the cultural patrimony. The summary of the decree argues that Mexican art of the 20th century is recognized globally as one of the most important developments in modern art. Therefore, it states, Maria Izqueirdo, who received much international acclaim as a modern Mexican artist, played a crucial role in the development of 20th century modern art. Finally the decree argues that her artwork is the incarnation of Mexican identity, and forms a crucial part of Mexican history.[3]

When the government issued the aforementioned patrimonial decree in 2002, a group of six collectors sued it in the hopes of proving the law unconstitutional. This group owned the majority of Maria Izquierdo's works, and by means of a lengthy legal process, not only called for a repeal of Izquierdo's work within the cultural patrimony law, but also aimed to reform the cultural patrimony laws in general. While the collectors were successful in obtaining protection from the law itself, granting them exemption from cultural patrimony restrictions with regard to Izquierdo's work, this protection was only extended to that small group which participated in the trial. Legal counsel for the collectors was successful in finding unconstitutional elements of the cultural patrimony laws, but was unable to discredit all.[4] This case illustrates the discontent of Mexican gallerists and collectors with the legal restrictions inhibiting the sale of art.

Effects on the Market

The presence of these cultural patrimony laws not only prohibits sales, but also restricts where the works can be exhibited. In order for a work to be temporarily exhibited outside of Mexico, special permission must be received from INBA and a bond must be posted to the national treasury.[5] These laws both impact the sale price of

the works, and also restrict which gallery and museums can show the works. The restrictions may well have a detrimental effect on the provenance of the works, as gallerists have to further contend with restrictive policies when selling artwork valued over a certain price. Laws commonly known as the "Mexican Anti-Money Laundering Act" stipulate that any artwork that has a value of over 15,000 pesos ($13,000 USD) is considered a "vulnerable activity." Information from any such "vulnerable activity," including the identity of the beneficiary (purchaser), all relevant documentation concerning the sale, and the details of the sales report must be made available to the Ministry of Finance and Public Credit, as well any other corresponding government entity.[6] Not only do such laws affect gallerists and collectors living in Mexico, such as those who brought forth the case with regard to Maria Izquierdo's work, but they also increasingly affect American collectors who are willing to pay over $3 million for a work by a famous Mexican artist, such as Diego Rivera. U.S. collectors and galleries might be discouraged from purchasing established Mexican art, as they might want to avoid possible legal battles that could ensue, including unexpected restrictions on rights of ownership

The influences of restrictive Mexican cultural patrimony laws can be examined by analyzing quantifiable auction data for the markets of artists such as Maria Izquierdo, Frida Kahlo, Jose Clemente Orozco and Diego Rivera. Each of these individual markets has been affected in a different manner. For instance, Maria Izquierdo's market contains a large number of works that went unsold. Of the 90 recorded sales for Izquierdo's works, 36 were unsold, and her highest price achieved at auction was less than $200,000.[7] These high instances of unsold works and relatively low asking prices may signal that Izquierdo is a lesser known Mexican modernist. It also highlights that there may be a lack of quality work available on the market.

A similar situation can be made with Kahlo's market. While her highest selling lot was above $5 million, there were only 61 recorded sales of her work.[8] The paucity of Kahlo's works on the market can be attributed to Mexico's active repatriation of her works, as stipulated in the decree made by President Miguel de la Madrid. The high price paid at auction for a Kahlo self-portrait not only indicates the desirable subject matter, but also signals a growing collector base for this type of art.

While the markets of Frida Kahlo and Maria Izquierdo suffer from a lack of works available to purchase, the markets of Diego Rivera and Jose Clemente Orozco do not suffer from a lack of sales. While Rivera has over 1,000 documented auction sales, only 12 of those are over $1 million, with his most expensive lot being sold at over $3 million.[9] Of Orozco's over 500 sales, only one sold for $1 million.[10] These numbers reflect the lack of quality work available on the market by these artists. The high prices paid illustrate that there is an interested collector base willing to spend money on these artists; however, a lack of quality works, due to restrictive legislation, leads to fewer sales over $1 million as compared to other modern masters.

Conclusion

When examining relevant market data, it can be argued that the scarcity of works on the market by the aforementioned artists, as well as their low sales prices, can be attributed to the presence of restrictive cultural patrimony laws. By restricting international sale of important works of modern art, the Mexican government has monopolized the sale of these works, distorting the market and significantly lowering the prices for these modern masters. Furthermore, such restrictive laws have cemented these artists in a regional market, and have hindered them from gaining status within the international art historical canon, thereby jeopardizing their legacy and reputation.

Endnotes

1. Lopez Coll, Hugo, Luis Torres, and Guillermo Miranda, "In Love with Diego or Frida? A Brief Look at Mexican Art Regulations," Greenberg Traurig, 2014, 1-3, accessed February 27, 2015.
2. *Id.*
3. UNESCO World Heritage, "Acuerdo numero 317 por el que se declara monumento artistico toda la obra pictorica producida por la artista Maria Izquierdo," accessed March 1, 2015, *available at* http://en.unesco.org/.
4. Teresa Vicencio, "El INBA Se Desistió En El Caso De María Izquierdo: Teresa Vicencio," Proceso, June 1, 2010, accessed March 4, 2015, *available at* http://www.proceso.com.mx/?p=104511.
5. *Supra* note 1.
6. *Id.*
7. Art Net, "Maria Izquierdo," accessed May 8, 2015, *available at* www.artnet.com.
8. Art Net, "Frida Kahlo," accessed May 8, 2015, *available at* www.artnet.com.
9. Art Net, "Diego Rivera," accessed May 8, 2015, *available at* www.artnet.com.
10. Art Net, "Jose Clemente Orozco," accessed May 8, 2015, *available at* www.artnet.com.

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Resolution Alley
Auction, Artifacts, and George Takei: How ADR Helped Preserve a Part of Japanese-American History

By Theodore K. Cheng

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

A tragedy in the art world was recently averted when grassroots activism, coupled with a successful mediation, avoided litigation and achieved an outcome satisfying to all concerned.

As reported in periodicals such as *The Sacramento Bee* and *The New York Times*,[1] it all began when Rago Arts and Auctions, a Lambertville, New Jersey auction house, announced an April 17, 2015 auction of about 450 Japanese internment camp items, including dozens of hand-carved wooden family name plates that were attached to barracks, various other crafts (such as cigarette cases woven from onion sack string), personal objects, ID cards and portraits, prisoner artworks, and numerous family photographs. This announcement prompted Japanese-Americans in Sacramento to launch a national campaign to persuade the seller to donate the items to a museum. The campaign included the Facebook page "Japanese American History: NOT for Sale," which had garnered 6,200 followers and received almost 1,800 "likes" shortly before the auction date. Someone also started a petition on change.org, which called the sale "a betrayal of those imprisoned people who thought their gifts would be used to educate, not be sold to the highest bidder in a national auction, pitting families against museums against private collectors." Social media posts called for the collection to be turned over to an educational institution, and internees and their descendants also wrote to say that they had recognized their own family members in the photos that were up for sale. For example, after the poet Janice Mirikitani saw an image of her cousin in a batch of photos that were expected to be sold for between $800 and $1,200, she posted the following on the Facebook page: "Do not commit this travesty of cheapening and 'selling' memories of cherished family members, and artwork which was created to survive the isolation and humiliation of the camp experience."

Attorneys were not absent from this protest. The Board of Directors of the Asian/Pacific Bar Association of Sacramento (ABAS) voted unanimously to condemn the auction and wrote a letter to the auction house, expressing its "shock and disappointment" upon learning that these items were up for sale.[2] In the letter, the bar group further asked that the items "be withdrawn and that the Asian/Pacific Islander American community be given an opportunity to fully voice our concerns and work towards an avenue to preserve the incredible collection of items donated by those incarcerated during World War II and their families, so as to benefit history." The ABAS letter even likened these artifacts to Holocaust property. Indeed, there were many protesters who recalled and/or equated this planned auction to the 2013 offer for sale of about 30 apparently Holocaust-related items on eBay, which included a striped prisoner uniform from Auschwitz, a pair of shoes, a prisoner's suitcase, Star of David armbands, a concentration camp toothbrush, and other personal effects. In response to the worldwide outrage, eBay apologized, took down the items, and even donated $40,000 to charity.[3]

The auction house, however, initially refused to stop the scheduled sale, maintaining that the seller was "not in a position" to do so and was offended by the pressure being generated through social media. The collection in question had belonged to the late Allen H. Eaton, a former Oregon state legislator and anti-war activist, who became known as a champion of folk art both during and after World War II. In the aftermath of the bombing of Pearl Harbor, on February 19, 1942, President Franklin D. Roosevelt had issued Executive Order 9066, under which the Federal Government forcibly incarcerated some 120,000 people of Japanese ancestry who lived on the Pacific coast into 10 "internment" camps—also referred to as "relocation" or "concentration" camps—scattered across the United States. Approximately 8,000 of the internees were from the Sacramento area and nearly two-thirds (about 77,000) were U.S. citizens. At the close of the war, Eaton visited five of these camps to study and collect the handicrafts made there, receiving many of the items in his collection as gifts from the internees he met. In 1952, he published a book about this experience entitled, *Beauty Behind Barbed Wire: The Arts of the Japanese in Our War Relocation Camps*, which included a foreword written by Eleanor Roosevelt. The book included 81 sets of photos of Japanese-American artisans and their works, and most of the items came from Heart Mountain War Relocation Center in Wyoming, where approximately 14,000 people were imprisoned between August 1942 and November 1945.[4] Ironically, Eaton had written in the introduction to his book that he hoped that his writing would help right "a great wrong" done to Japanese-Americans. He had also

hoped to curate an exhibition of his collection of artifacts to educate the public about the plight of Japanese-Americans during the war, but, unfortunately, that never came to pass. He died in 1962, bequeathing his collection to Thomas Ryan, a contractor who had worked for the Eaton family. Ryan subsequently bequeathed the collection to his son John, who cared for it for over 35 years and ultimately became the auction's consignor.

In view of the foregoing, could the planned auction somehow be stopped through legal process? Did any of the internment camp survivors, or the descendants of those who had gifted the property to Eaton, have any legitimate claim of ownership (or some other right) to the artifacts in question such that they had a say in how they were disposed? Did ABAS or the Heart Mountain War Relocation Center have a cognizable legal basis or theory on which to challenge the planned auction? In short, there was an abundance of questions regarding who would be an appropriate party in interest here and what standing such a party had to bring, for example, an injunction application in the New Jersey courts to enjoin the auction. Based upon the collection's apparent chain of custody, Ryan's unfettered right to sell the items, and the immediacy of the auction, there appeared to be much uncertainty as to whether the auction could, in fact, be legally stopped in time. At bottom, the auction proceeding itself appeared to be a legal sale.

Then, two days before the auction, actor, director, author, and activist George Takei appeared on the scene. Takei is perhaps best known for playing the character of Ensign Hikaru Sulu, helmsman of the U.S.S. Enterprise in the "Star Trek" television series and six feature films. In 1942, when he was only a child, Takei and his family were relocated to Rohwer War Relocation Center in Arkansas and then later to Tule Lake War Relocation Center in California. The time he had spent in these internment camps had made a lasting impression on him.

With Takei's involvement, Rago canceled the auction and negotiated a sale of the collection to the Japanese American National Museum in Los Angeles, which the museum announced on May 2nd.[5] Takei, who serves on the board of the museum, was apparently "[i]nstrumental in convincing the auction house not to go forward with the sale."[6] He "stepped in as an intermediary,"[7] successfully conducting a "mediation" [8] involving "a few calls… in the wee hours"[9] that resulted in the auction lots being pulled and sold to the museum. G.W. (Greg) Kimura, Ph.D., the President and CEO of the museum, was quoted as saying, "This collection wouldn't be coming to JANM if it weren't for the intervention and passion of George Takei. He stepped in to ask Rago that the auction be canceled, and, I mean, who can say no to George?"[10] As for the man himself, Takei had this to say:

> Many of the photos picture peoples' grandparents and parents, and there's a strong emotional tie there. To put that up on the auction block to the highest bidder, where it would just disappear into someone's collection, was insensitive. The most appropriate and obvious place for the collection was the Japanese American National Museum. I talked to David Rago [of Rago Arts and Auctions] after the uproar, and he was very thoughtful and receptive.… [The internment camps were] an egregious violation of the American Constitution. We were innocent American citizens and we were imprisoned simply because we happened to look like the people who bombed Pearl Harbor. It shows us just how fragile our Constitution is. Now these items can be shared with a large audience.[11]

To its credit, the auction house issued a statement saying, "It's truly fitting that this material will reside in perpetuity at an institution dedicated to sharing the Japanese-American experience and based on the West Coast, the site of the evacuation.… [This unanticipated controversy will] fuel a larger conversation about the marketplace for historical property associated with man's inhumanity."[12]

There are number of lessons to be learned from this brief episode. First, although a seemingly obvious initial step, the court system is not always the best option when there is a great sense of urgency, and especially when there is uncertainty on fundamental gateway legal issues like identifying a real party in interest and establishing proper standing. Second, methods of alternative dispute resolution can be both fast and cost-effective. Here, with the auction looming in a matter of days, everything was resolved—including finding a home for these treasured artifacts—in about two weeks, using little more than the will and the desire to get it done. Finally, oftentimes identifying the right neutral is key to finding a satisfactory resolution. It pays to invest the time and effort necessary to select the appropriate neutral for the particular situation. Each dispute presents a unique set of circumstances, and a neutral who is suited for one dispute—because of background, skill, experience, subject matter expertise, community ties, or any other applicable criterion—is not always necessarily the best choice for every other kind of dispute. Here, Takei's involvement was not only the right and apt choice for a whole host of reasons, but also highly effective in achieving closure for all the parties. There is rarely a dispute where alternative dispute resolution methods do not have some role to play.

Endnotes

1. *See, e.g.*, Eve M. Kahn, "Auction of Art Made by Japanese-Americans in Internment Camps Sparks Protest," *N.Y. Times* (Apr. 13, 2015), *available at* artsbeat.blogs.nytimes.com/2015/04/13/auction-of-art-made-by-japanese-americans-in-internment-camps-sparks-protest/; Stephen Magagnini, "Sacramento Japanese Americans protest auction of internment camp art," *The Sacramento Bee* (Apr. 13, 2015), *available at* www.sacbee.com/news/local/history/article18443588.html.
2. Letter from Asian/Pacific Bar Association of Sacramento to David Rago (Apr. 14, 2015), *available at* www.abassacramento.com/wp-content/uploads/2015/04/ABAS-Letter-to-David-Rago-re-Auction-of-Internment-Camp-Artifacts.pdf.
3. *See, e.g.*, David Harding and Reuven Blau, "eBay apologizes for auction of Holocaust items that horrifies survivors," *New York Daily News* (Nov. 3, 2013), *available at* www.nydailynews.com/news/world/ebay-apologizes-auctioning-holocaust-items-article-1.1505276; Mark Nicol and Simon Murphy, "Ebay's sick trade in Holocaust souvenirs: Outrage over auctions of Death Camp relics," *DailyMail.com* (Nov. 2, 2013), *available at* www.dailymail.co.uk/news/article-2485251/Ebays-sick-trade-Holocaust-souvenirs-Outrage-auctions-Death-Camp-relics.html.
4. The Heart Mountain War Relocation Center is perhaps best known for the challenge by many of the younger, American-born Japanese males with U.S. citizenship (Nisei) to being drafted into the military from the camp in protest over the loss of their rights through the incarceration. This challenge led to the largest mass trial in Wyoming history, in which 63 Heart Mountain inmates were prosecuted and convicted for draft evasion. (The Asian American Bar Association of New York, led by U.S. Circuit Judge Denny Chin and Kathy Hirata Chin, has performed a re-enactment of the draft resisters' story based upon records of the court proceedings and other contemporaneous documents. This performance has since been repeated in many venues, including, most recently, at the New York Historical Society on May 16, 2015. *See* AABANY Blog (Apr. 24, 2015), *available at* blog.aabany.org/post/117271255917/new-york-historical-society-the-heart-mountain; N.Y. Historical Society, *available at* www.nyhistory.org/programs/heart-mountain-draft-resisters-trial-reenactment.) Notwithstanding this, approximately 800 Nisei joined the U.S. Army from this camp, either volunteering or accepting conscription into the famed and highly decorated 442nd Regimental Combat Team. *See* The Story of the 442nd Combat Team, *available at* content.cdlib.org/ark:/13030/hb2s2004jj/. The Heart Mountain Interpretive Center, a museum established in 2011 and dedicated to passing on the story of Heart Mountain to future generations through photographs, artifacts, oral histories, and interactive exhibits (www.heartmountain.org), also asked Rago to delay the auction or remove the artifacts from the sale so that Japanese cultural organizations could have the first chance to buy them.
5. Japanese American National Museum, "JANM Announces Acquisition of Japanese American Incarceration Artifacts," Press Release (May 2, 2015), *available at* www.janm.org/press/release/381/.
6. Deborah Vankin, "George Takei helps L.A. museum acquire internment camp artifacts," *Los Angeles Times* (May 2, 2015), *available at* www.latimes.com/entertainment/arts/culture/la-et-cm-japanese-american-national-museum-george-takei-internment-camp-artifacts-20150501-story.html#page=1.
7. Editorial Board, "George Takei steps in to put internment art in right place," *The Sacramento Bee* (April 15, 2015), *available at* www.sacbee.com/opinion/editorials/article18627510.html.
8. Anne Claire Stapleton and Steve Almasy, "After furor, auction house pulls items from Japanese-American WWII camps," *cnn.com* (Apr. 16, 2015), *available at* www.cnn.com/2015/04/15/us/japanese-american-auction-uproar/index.html.
9. *Id.*
10. Vankin, *supra*, note 6.
11. *Id.*
12. Eve M. Kahn, "Japanese American Museum Acquires Internee Artifacts," *N.Y. Times* (May 3, 2015), *available at* www.nytimes.com/2015/05/04/arts/japanese-american-museum-acquires-internee-artifacts.html.

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Legal Restrictions Imposed by Sporting Competition Organizers: The Russian Experience

By Sergey Yurlov

Introduction

Article 24 of Federal Law No.329-FZ, dated December 4, 2007 *"On Physical Culture and Sport in the Russian Federation"*[1] (as amended) (Russian Law on Sport) prescribes that every athlete is entitled to choose a sport and take part in sporting competitions. However, from a practical perspective, this right does not enjoy governmental protection. In actuality, a sporting competition organizer of individual, rather than team, sports can impose different restrictions. For example, rules and regulations may prescribe that individuals are prohibited from participating in competitions. This type of restriction is connected with the eligibility (Eligibility Test) that should be satisfied by a particular athlete. The Eligibility Test includes:

- Compliance with qualifying time standards;
- the existence of a particular sport grade (i.e., special sport categories, which exist only in the Russian Federation, Belorussia and Ukraine. To obtain such a sport grade an athlete should demonstrate the required result on a particular event. Afterwards, an athlete files an application with the Russian Ministry of sport requesting a conferment of a sport grade. A sport grade is granted by an order of the Russian Minister of sport); and
- the existence of a medical statement issued by a special medical institution (a sportdispanser) certifying an athlete's medical condition and that he or she is able to participate.

It should be noted that a competition organizer can impose restrictions as to how an athlete can take part, unreasonable grounds for athletes' disqualification, and provisions establishing fines for competition rules and regulations violations (Sporting Competition Restrictions).

Legal Provisions Restricting the Number of Events in Which an Athlete Can Take Part

Generally, once an athlete applies to a particular sporting competition upon filing of a preliminary application, the athlete may face competition restriction. Competition rules and regulations may prescribe that an athlete cannot take part in more than three events. Competition organizers may put in place this restriction due to a lack of equipment or limitation of facilities. Such a provision contradicts Article 3 of the Russian Law on Sport that enshrines "*the principle of free access to sport without any limitations.*"

Each athlete should be entitled to participate in an unlimited number of sporting events due to the following:

- Competition rules and regulations should not contradict the federal laws of the Russian Federation;
- such a provision violates the fundamental rights of an athlete;
- each athlete pays a competition fee that is intended to cover the losses of a competition organizer; and
- each competition organizer, when intending to schedule a sporting competition, should take care of all financial, organizational and other risks. In case a competition organizer cannot invest in a sporting competition, such competition should not be organized.

Unreasonable Grounds for Athletes' Disqualification

Sporting competition rules and regulations may provide for the disqualification of an athlete in case he or she fails to take part in the first race. Therefore, an athlete becomes automatically ineligible for the remaining races and is disqualified by a predetermined decision of an organization committee or another competent body.

The legal ground for such a disqualification is the fact that an athlete has not taken part in the first race. This fact is usually certified by a list of results of a particular sporting competition.

Such a provision may be void due to the following:

- It contradicts the Russian Law on Sport (Articles 3 and 24); and
- failure to take part in the first race cannot be deemed as a reasonable legal ground for the disqualification of an athlete. The athlete has paid all competition fees and (other than this particular rule) does not commit a violation of any other of the competition's rules and regulations.

Therefore, in such a case a competition organizer is not entitled to disqualify an athlete.

Unreasonable Fines

A competition organizer can also impose fines for the failure of an athlete to take part in a particular race. This sanction is unreasonable because a sporting competition

organizer and an athlete do not have mutual contractual undertakings. An athlete has contractual undertakings to a sporting club or another organization for whom he or she plays. Therefore, the matter of non-participation should be discussed and resolved by a sporting club and an athlete, and not the organizers.

Conclusions

1) The participation of athletes in individual sporting competitions (such as swimming, boxing and skiing) in the Russian Federation is connected with a number of restrictions. Sporting competition restrictions relating to the limitation of a number of events in which an athlete can take part should be identified, in addition to unreasonable disqualification and fines.

2) By means of those restrictions, a competition organizer creates circumstances that impact the entire sport. In other words, those restrictions trigger far-reaching adverse effects.

3) Unfortunately, the government does not have control over sporting competition organizers, and such organizers are free to impose the restrictions.

4) The Russian Law on Sport should be amended by prescribing the competence of sporting competition organizers in drafting internal rules and regulations, and should draw the line between governmental and private competence in sports.

5) Competition organizers should consider amending their rules and regulations by eliminating such restrictions and allowing free participation without any limitations in cases where athletes meet the Eligibility Test criteria.

6) The Russian government should consider establishing a new governmental body that will be responsible for supervision and control over the Russian Ministry of Sport, and sports governing bodies, the enforcement of Russian legislative Acts on Sport, and the protection of the rights of athletes. In particular, this body would conduct inspections, review sports subjects' competition rules and regulations, and would be entitled to issue mandatory instructions.

Endnote

1. Federal Law No. 329-FZ, dated December 4, 2007, On Physical Culture and Sport in the Russian Federation, "Rossijskaya Gazeta," No. 276, August 12, 2007.

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Krell's Korner

Krell's Korner is a column about the people, events, and deals that shape the entertainment, arts, and sports industries.

Abbott & Costello: A Tale of Comedy and Tragedy

By David Krell

On March 3, 1959, America lost a comedic treasure; Lou Costello died.

In the following day's edition of the *Los Angeles Times*, Walter Ames noted Costello's generosity: "Lou Costello, the roly-poly comic whose heart was as big as his girth, died yesterday afternoon of a heart attack in Doctor's Hospital, Beverly Hills, three days before his 53rd birthday."[1]

Costello paired with Bud Abbott circa 1930, creating a comedy force that succeeded in burlesque, vaudeville, legitimate theatre, films, and television; their most famous routine, undoubtedly, is "Who's on First?" Their comedy also became the topic of a rather circuitous legal argument during their heights of fame.

In a 1940 profile of Abbott & Costello in *The New York Times*, Costello explained, "Speaking of burlesque, that's how I met Bud eleven or twelve years ago. I was playing a little theatre in Brooklyn where Bud was cashier in the box office. Between shows I used to go out and gab with him. One night I asked him how he'd like to fill in for my partner, who'd gotten sick. He said O.K., and when we went on he was terrific. We've been together ever since."[2]

Radio beckoned the duo, though initial performances proved uneventful. Abbott and Costello debuted on *The Kate Smith Hour* in 1938. "We were playing Loew's State [Theater] when Ted Collins, Miss Smith's manager, caught us during a Wednesday show and right off invited us to the Thursday broadcast," Lou described. "Although we weren't terrific starting out in radio, Ted had confidence in me and Bud and kept inviting us back. Anyway, we got better fast and were asked to return to the show for twenty-one consecutive weeks."[3]

Broadway was the next arena to conquer. Abbott and Costello performed in the revue *The Streets of Paris*, which debuted on June 19, 1939. Brooks Atkinson, a legendary theatre critic, highlighted the team in his review. "Out of vaudeville and motion-picture stage shows some one has had the wisdom to bring Lou Costello and Bud Abbott to town with some remarkably gusty stuff. They belong to the traditional school of mountebanks that pairs a dazed clown with an abusive straight man, and throws water freely in its most inspired moments. Out of deference to press time, your correspondent was unable to remain for a sketch that puts Bobby Clark and Costello and Abbott on the stage at the [same] moment, which ought to be worth some sort of prize. For Costello and Abbott are also pretty funny fellows in low comedy antics."[4]

Abbott and Costello's film career began with supporting roles in the 1940 film *One Night in the Tropics*, based on *Love Insurance*, an Earl Der Biggers novel. The team stood on solid comedic ground as bumbling henchmen for Roscoe, a nightclub owner played by William Frawley, whose credits include *I Love Lucy* and *Miracle on 34th Street*.

In *The Abbott and Costello Book*, Jim Mulholland explains, "They brought writer John Grant with them to Hollywood to integrate their material into the story, although Grant doesn't receive any screen credit. One of Grant's talents was an ability to take an old burlesque standard and make it seem new by switching it around and cleverly working it into the plot of a film. He was a brilliant comedy writer in his own right. He wrote most of the Abbott and Costello comedies and contributed, in no small way, to the team's incredible popularity."[5]

After *One Night in the Tropics*, Abbott and Costello starred in three military comedies, all released in 1941—*Buck Privates*, *In the Navy*, *Keep 'Em Flying*. Success followed. Precision, timing, and comic delivery were key factors, certainly. Yet the real-life backdrop also made a highly significant contribution. "*Buck Privates* succeeded not only because it was entertaining, but topical as well," wrote Bob Thomas in *Bud & Lou: The Abbott and Costello Story*. "It began with President Roosevelt signing the draft law in a Universal Newsreel clip. The script offered a host of draft jokes and situations, some dating back to World War I and perhaps the Civil War."[6]

In his review for *The New York Times*, film critic Theodore Strauss wrote, "Army humor isn't apt to be subtle and neither are Abbott and Costello. Their antics have as much innuendo as a 1,000-pound bomb but nearly as much explosive force."[7] Indeed, Strauss's review overflowed with praise; the romantic story line of *Buck Privates*, a love triangle, received barely a notice. "Somewhere amid all this nonsense there is a story of sorts. Dismiss it. The important and hilarious thing is that Costello is just as innocently cherubic as ever, that Abbott is still his Tenth Avenue Svengali."[8] Musical numbers dotted *Buck Privates* with patriotic feeling; the Andrews Sisters contributed several songs, including their signature song *Boogie Woogie Bugle Boy of Company B*.

Upon the release of the team's second movie, *In the Navy*, film critic Bosley Crowther of *The New York Times* further analyzed the dynamic between the Abbott and Costello personas. "Their style is in the tradition of old-fashioned knockabout farce, brought up-to-date by their

lingo and a sort of toughness which is currently fashionable. Abbott is the lean and hawk-eyed wise guy, the sharpshooter who usually gets the last word. Costello is the roly-poly dim-wit upon whom the pranks are played. Abbott is tough and deceitful; Costello is a good-natured dope. And every now and then Costello manages to slip over a fast one himself—the inevitable turn of the worm, which is what audiences love.

"The success of comedians like these depends largely upon the personality of the dope, and this team is well provided with assets in that respect. Costello is a truly lovable character with patient eyes, a normally plaintive voice and the clumsily aggressive manner of a little guy trying to be a big-shot."[9]

Crowther's review of *In the Navy* lauds the duo; it is measured, however. "Maybe they aren't quite as funny as they were in *Buck Privates*, but even fair with Abbott and Costello is good enough for now,"[10] Crowther wrote. In addition, elements of *In the Navy* distracted rather than entertained, according to Crowther. "Yessir, they are really traveling in an overloaded hulk, weighted down by such nonbuoyant ballast as the Andrews Sisters, Dick Powell and a bleakly unfunny plot which places a lady-killing crooner in the fleet in order to avoid his female fans. And yet the Messrs. Abbott and Costello, who appear as a pair of seafaring dogs, make it skim and cavort like a surfboard when they are undisputed at the helm."[11]

Crowther underscored his point later in the critique: "Yes, the boys make something of *In the Navy* in spite of the fact that there is very little there. Certainly the Andrews Sisters and Mr. Powell, with their flat songs, would not be missed. They simply get in the way when you want to be watching Lou and Bud, who are the show."[12]

The United States Navy cooperated with the film's production, but adamantly opposed one part of the movie. "Their chief objection was the final maneuvers sequence, with Lou taking charge of the ship. They claimed that it made fools of the entire American fleet. They would not allow the film to be released,"[13] explained Mulholland. Screenwriter Alex Gottlieb amended the scene to reflect that it was a dream of Costello's.

Crowther's review of Abbott and Costello's third military comedy of '41, *Keep 'Em Flying*, follows the same pattern as the *In the Navy* review. "In fact, it is only proximity which brings them in touch at all with a routine and sticky story about a flying instructor, a USO hostess and her cadet brother at a training field. And whenever the latter is foremost, the picture is decidedly in the shade," Crowther opined. "But whenever the starring gentlemen have the screen more or less to themselves, they push out from it enough hilarity to brighten the darker spots. Of course, theirs is strictly slapstick humor—just old-fashioned knock-about farce—but that is still entertainment when purveyed by a couple of buffoons. Lou on a runaway air-torpedo, Lou and Bud in a wildly zooming plane or even Lou in a carnival spook-house—a sequence dragged in by its heels—are bits of rough-and-tumble nonsense which should tickle almost anyone's ribs."[14]

Tragedy struck Lou Costello in 1943. Scheduled to return to NBC's *The Abbott & Costello Show* on November 4, 1943 after a year-long absence mandated by a recovery from rheumatic fever, Costello looked forward to getting in front of a radio audience again. As Costello was rehearsing, his son Lou Costello, Jr., just two days shy of his first birthday, drowned in the family's swimming pool; Costello had bestowed the nickname "Butch" on his namesake.

In *Bud & Lou: The Abbott and Costello Story*, Hollywood journalist Thomas recounted the version of events according to Costello's sister Marie. "She told him that Anne had put Butch in the playpen beside the pool at 2:30. She went inside to answer the telephone and when she returned, Butch was gone; he was so strong that he had broken out of the playpen. Anne looked in the pool and found him floating face-down in a foot and a half of water. She pulled him out and screamed for help. Two neighbor women came running; one tried artificial respiration on the baby, the other called the fire department. Butch failed to respond to the inhalator, and the family doctor, Victor Kovner, pronounced him dead."[15]

Costello refused to abandon his return, personifying the show business adage "The show must go on!" "I told Anne to keep the baby up so he could hear me. Wherever Butch is tonight, I'm going to do the show for him," said Costello.[16]

Inspired by the need to help children, Costello spearheaded the creation of a community center for children in Los Angeles in honor of his son. The Lou Costello, Jr. Youth Center opened on May 3, 1947. Today, it is under the auspices of the Los Angeles Department of Recreation & Parks.

As box office kings in the 1940s, Abbott and Costello endured a legal battle when their comedy became a source of copyright angst in the 1945 case *Wells v. Universal Pictures*.[17] Claiming rights to the Flugel Street sketch popularized in vaudeville, the plaintiff targeted Universal and the comedians for infringement based on the sketch's use in a film. In the sketch, Costello approaches people for directions to Flugel Street. Each person gets frustrated to the point of absurdity with Costello's benign inquiry because something horrible happened to him or her on Flugel Street.

The plaintiff claimed that Joseph F. Palladino, a defendant, "…through fraudulent representations and misstatements of fact, wrongfully copyrighted the sketch under Class D, ump. No. 80434 in the Copyright Office of the United States. Palladino, in order to disguise the authorship and ownership of the sketch, is said to have changed the spelling of the title to 'Floogle Street.'"[18] Further, the

plaintiff targeted Universal, Abbott, and Costello because of the routine's appearance in a film, "which wrongfully incorporates the plot and comedy effect of plaintiff's literary production, and that the picture company, and each of the other defendants have since, and in one way or another, participated in the piracy."[19] The plaintiff wanted a restriction from further use of the sketch, an accounting of profits, and a holding for sustained damages in addition to a declaration of the Palladino copyright being "null and void."[20]

The court stated that:

> Defendants further say that inasmuch as plaintiff never copyrighted his version of "Flugel Street," the suit can not properly be held to be founded on a law of the United States. This, obviously, is so. Plaintiff, nevertheless, argues that such rule should not here be applied by reason of his allegations that his literary production was fraudulently copyrighted by Palladino, and that he is entitled to a decree declaring that copyright to be null and void.[21]

The plaintiff, in the court's view, used an anticipatory argument based on Palladino's future choice of legal avenues. Henceforth, the court relied on *State of Tennessee vs. Union & Planters' Bank*: "And by the settled law of this court, as appears from the decisions above cited, a suggestion of one party that the other will or may set up a claim under the constitution or laws of the United States, does not make the suit one arising under that constitution or those laws."[22]

Additionally, the court knocked down the plaintiff's argument that its jurisdiction was necessary because he did not have other judicial options. The court quoted *Outcault v. Lamar* to support its ruling: "The question as to whether the state court has jurisdiction depends upon the allegations of the complaint, and unless it appears therefrom that the plaintiff seeks to enforce a right based upon the copyright laws of the United States, the federal court would have no jurisdiction of the case in the absence of a diversity of citizenship, and the state courts would have exclusive jurisdiction, even though the answer presents a defense based upon the copyright laws."[23]

Therefore, in a circular bit of logic, the plaintiff claimed copyright infringement regarding a work to which he did not own a copyright. No wonder it involved Abbott and Costello.

Endnotes

1. Walter Ames, *Lou Costello Dies: Heart Attack Fatal to Famed Comedian* at 52, Los Angeles Times, Mar. 4, 1959.
2. R. W. Stewart, *The 'Hokiest of the Hoke': Stepping Out of the Old Joke Book, Abbott and Costello Clown on the Air in Unrestrained Fashion*, Los Angeles Times, Aug. 11, 1940.
3. *Id.*
4. Brooks Atkinson, *The Play: 'The Streets of Paris' Moves to Broadway—Paul Robeson in 'The Emperor Jones,'* New York Times, June 20, 1939.
5. Jim Mulholland, *The Abbott and Costello Book* 53 (1975).
6. Bob Thomas, *Bud & Lou: The Abbott and Costello Book* 84 (1977).
7. Theodore Strauss, *The Screen: At Loew's State*, The New York Times, Feb. 14, 1941.
8. *Id.*
9. Bosley Crowther, *Abbott and Costello Appear in Picture 'In the Navy' at Loew's Criterion—'One Night in Lisbon' Is Offered at the Paramount*, The New York Times, June 12, 1941.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Mulholland*, at 67.
14. Bosley Crowther, *Bud Abbott and Lou Costello Take to the Air Corps in 'Keep 'Em Flying,' a New Film, at Loew's Criterion*, The New York Times, Nov. 27, 1941.
15. *Thomas*, at 116.
16. *Id.* at 117.
17. 64 F. Supp. 852 (1945).
18. *Id*. at 853.
19. *Id*.
20. *Id.* at 853-54.
21. *Id*. at 854.
22. 152 U.S. 454, 14 S.Ct. 654, 657 (1894).
23. 135 A.D. 110, 119 N.Y.S. 930, 931 (1909).

David Krell is the author of the book *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*. He is also the co-editor of the NYSBA book *In the Arena*. David is a member of the bar in New York, New Jersey, and Pennsylvania.

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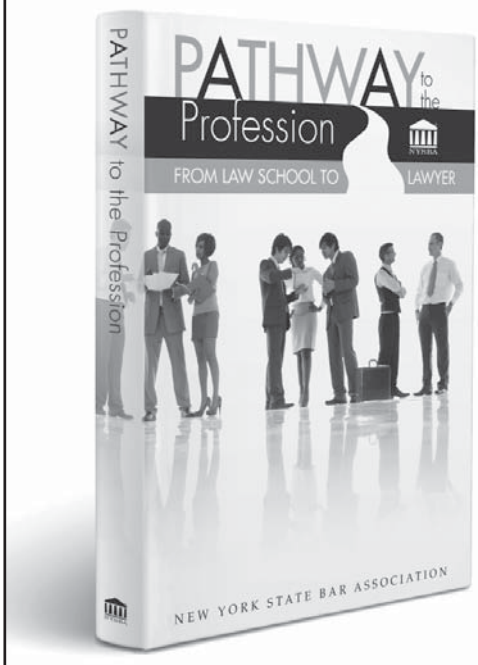

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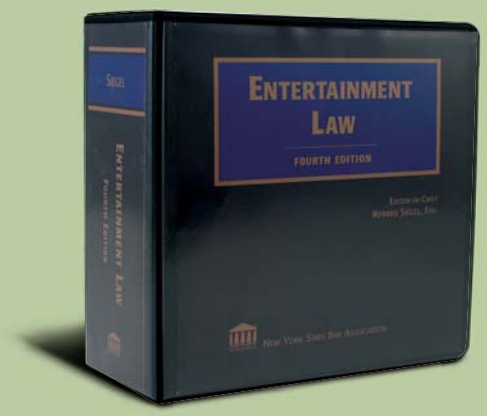

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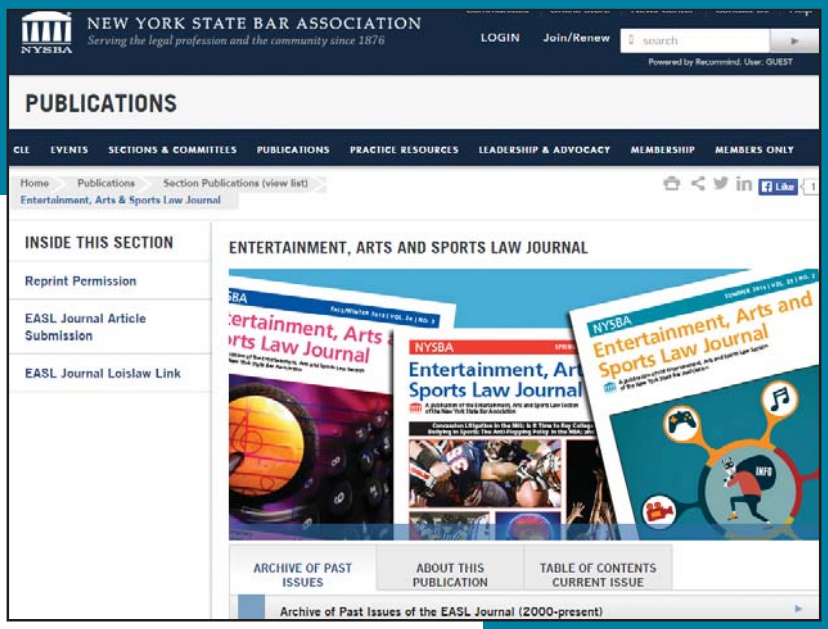

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