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of the New York State Bar Association

In This Issue

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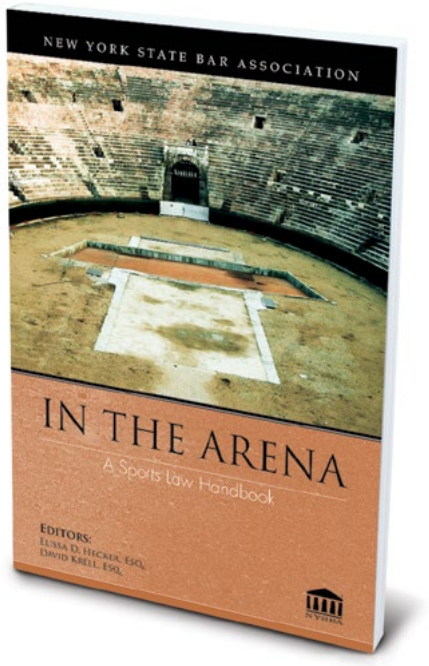
In The Arena:
A Sports Law Handbook

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



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: Coda

By Barry Skidelsky, EASL Chair

"To everything there is a season, turn turn turn" (from the Byrds' musical adaptation of an earlier Pete Seeger composition based on an underlying literary work long in the public domain, Ecclesiastes 3:1-8). As we now transition into Winter, a new decade will soon start and my two-year term as EASL's Chair ends (and yes, I feel it has aged me! *Tempus fugit!*)

Looking back, it may seem trite to say in these brief concluding remarks that it has been an honor and a privilege for me to have served as this Section's 17th Chair, but it's true nonetheless. I am particularly grateful for having had the opportunity as Chair to work more closely with my EASL Executive Committee colleagues (one of the most collaborative and collegial groups I have ever known) and the rest of you who have helped us reach our nearly 1,500 fellow Section members.

I was very happy to see so many old and new faces at EASL's 2019 Fall Meeting, which I organized, and was recently held on October 17th at UBS in midtown Manhattan (big thanks to UBS' Bill Farrell for hosting). The event combined a well-attended and well-received CLE program pairing legal and business experts who discussed entertainment finance across multiple "industry" sectors, plus a networking reception. Some called it our Section's best Fall Meeting ever. Thanks!

A few photos of that event are included in this issue, which were taken by Albany Law School student Jennifer Sherman. Thanks too to her, and to all who attended—including of course our fabulous speakers. History fans please note that this event also featured the first ever joint speaking engagement by the father-son duo of Steven and Jason Baruch. The latter leads our annual CTI co-sponsored CLE program on theatre producing (join us next Spring), but frankly his theatre producer father stole the show with his insightful and funny "war stories."

Looking ahead, and by the time that this issue goes to press, our highly regarded annual Music and Business Law Conference will have been held (on November 15th at New York Law School). Plans will also have been made for our Section's 2020 Annual Meeting (on January 28th at the Hilton), which will address digital distribution and more, plus include another networking reception jointly sponsored (for the third consecutive year) by NYSBA's Intellectual Property Section.

At EASL's upcoming Annual Meeting, we will also elect our 18th EASL Chair and other Section leaders, plus announce the winners of this year's Phil Cowan Memorial Scholarship writing competition, which is open to all students who attend law schools in New York State. Good luck to all of you!

Please visit www.nysba.org/easl for more info about all of the foregoing and more, including how you can become more actively engaged with EASL—perhaps by getting involved with one of our nearly two dozen Section committees, by contributing to our *Journal* and/or Blog (both of which are ably helmed by former EASL Chair Elissa Hecker, to whom we all also owe thanks), by helping organize or participate in one or more of our CLE programs or social and networking events, and, perhaps most importantly, by helping us find new ideas or young members to mentor and groom as future leaders.

You have a standing invitation (and are strongly encouraged) to do more than just be a passive member of EASL. Please, get involved! It takes a village; and, if we don't help each other, none of us stands a chance. https://www.youtube.com/watch?v=3s-dSoDptVc.

If that has any meaning for you, please contact me at bskidelsky@mindspring.com or at 212-832-4800. I do look forward to hearing from you. Thanks again for letting me serve as EASL's Chair. Here's to a better new year ahead for all of us! Peace, out.

Best always,
Barry

Editor's Note

By Elissa D. Hecker

The NYSBA Annual Meeting is fast approaching and the EASL Section meeting on January 28th will be one of the best places to meet up and network with EASL Section members. Many EASL committees are also having meetings during that week, so pay attention to upcoming committee emails. It's always great to be able to meet fellow committee members in person. Please make sure to register for this wonderful CLE program through the nysba.org website.

I would like to welcome Tin-Fu (Tiffany) Tsai to the EASL Executive Committee as our new co-chair of the Pro Bono Committee. She joins Carol and me so that we can offer you more clinics and pro bono opportunities.

Tiffany has in-house and law firm experience both internationally and in the U.S. She is a 2015 graduate of Columbia University School of Law and a 2008 graduate of National Taiwan University.

At Arris Properties Group LLC, a New York-based real estate development company, Tiffany leads the legal department and advises various transactional and litigation matters from start to finish. Her practice concentrates on financing, acquisitions, leasing, licensing, as well as real estate litigations.

An avid art lover, Tiffany is excited to combine her passions in art and law by helping professionals in the creative world navigate legal issues and use regulations to their advantage. As the new co-chair of the Pro Bono Committee, she hopes to leverage her international background and connect art professionals with legal practitioners as well as law students who are interested in exploring the creative world.

As always, I hope that you enjoy this issue. It contains articles that touch on legal issues concerning entertainment, the arts, and sports.

Please feel free to reach out to me with any questions or article ideas that you have at eheckeresq@eheckeresq.com.

Elissa

DO PRO BONO! DO PRO BONO! DO PRO BONO! DO PRO BONO! DO PRO BONO!

Pro Bono Update

Clinics

Elissa D. Hecker and Tin-Fu (Tiffany) Tsai coordinate legal clinics with various organizations.

- **Elissa D. Hecker,** eheckeresq@eheckeresq.com
- **Tiffany Tsai**, dinfutsai@gmail.com

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

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

The next *EASL Journal* deadline is Friday, January 31st.

Thank You!

For your **dedication**,
For your **commitment**, and
For recognizing the **value** and
relevance of your membership.

As a New York State Bar Association member, your support helps make us the largest voluntary state bar association in the country and gives us credibility to speak as a unified voice on important issues that impact the profession.

Henry M. Greenberg
President

Pamela McDevitt
Executive Director

THE NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

Law Student Initiative Writing Contest

Congratulations to:

Michael Angelini, of St. John's University School of Law, for his article entitled: "Pay Up Or Act Right: Extending The Right Of Publicity To Online-Service Users Injured By Online Behavioral Advertising"

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 website. 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 website have wide national distribution.

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the EASL Journal must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form**: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by Friday, January 31st.
- **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 website.

Phil Cowan Memorial Scholarship Writing Competition

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL) has established the Phil Cowan Memorial Scholarship! Created in memory of Cowan, an esteemed entertainment lawyer and a former Chair of EASL, the Phil Cowan Memorial Scholarship fund offers *up to two awards of $2,000 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 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 Scholarship Committee.

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

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

Submission

All papers should be submitted via email to Kristina Maldonado at kmaldonado@nysba.org no later than December 12th.

Prerogatives of EASL 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*.

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 EASL are non-exclusive.

Payment of Monies

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

About the New York State Bar Association/EASL

The 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 140 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.*

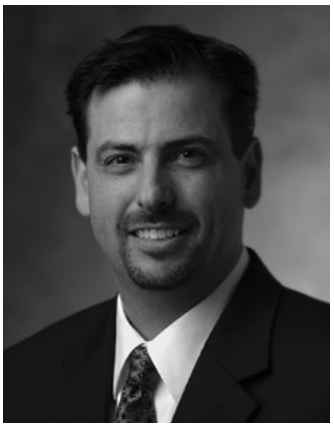
Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- 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.

Competitive Balance in Sports: "Peculiar Economics" Over the Last 30 Years

By Daniel A. Rascher and Andrew D. Schwarz



In 1984, with its ruling in *Nat'l Collegiate Athletic Ass'n (NCAA) v. Board of Regents of University of Oklahoma*,[1] the Supreme Court recognized that benefits can accrue to society when potential competitors limit their competition in the interest of competitive balance. In the 30 years that have followed, a period in which professional sports have increasingly become partnerships between owners on the one hand and strong players associations on the other (notwithstanding the recent cultural clashes between owners and players), courts and collective bargaining have mapped out boundaries of acceptable collective action geared around creating competitive balance, all in the name of increasing consumer demand for each sport's product. Similarly, college sports (though not in a bargaining-based partnership with its players) have relied on the same competitive-balance justification for its collective refusal to pay athletes at market-based rates (in addition to claims that the existence of college sports requires that "athletes must not be paid"[2]).

However, while the last 30 years have seen competitive balance put forth as a pro-competitive justification, the economic basis for this claim is not quite so clear. In fact, in many cases rules that have been adopted with the express aim of achieving competitive balance have been shown not to do so, while others that do achieve balance may only do so at the expense of consumer preferences. Figuring out which rules truly grow consumer demand is an empirical exercise—there is no one-size-fits-all theoretical answer.

At the professional level, the logic of competitive balance has received a fairly non-critical view, with players associations generally accepting that salary caps, revenue-sharing, and individual player maximums grow the total value of the sport via improved competitive balance, even though many of the mechanisms in question are not based on firm economic theory. In contrast, on the collegiate side, where in the absence of collective bargaining such rules have been challenged in antitrust litigation, courts have been more inclined to look for evidence that the team and individual player pay caps implicit in "amateurism" actually help competitive balance before simply accepting this economic nostrum as fact. Put to that test,

the argument that caps on compensation improve competitive balance has tended to fall flat.

For example, in *O'Bannon v. NCAA*, men's college basketball and football players brought an antitrust class action to challenge the NCAA's restrictions on their ability to earn money from the use of their names, images, and likenesses (NIL).[3] The district court rejected competitive balance as a procompetitive justification for the naked collusion on athlete remuneration, finding that "the NCAA's current restrictions on student-athlete compensation do not promote competitive balance."[4] The Ninth Circuit concurred.[5] In *NCAA Athletic Grant-in-Aid-Cap Antitrust Litigation (a.k.a., "Alston")*, a class of major college football and men's and women's basketball players challenged the NCAA's collusive pay restrictions preventing schools from offering more compensation to these athletes for their athletic services.[6] In that case, the notion of competitive balance as a procompetitive justification took a back seat, with the defendants (NCAA and the FBS[7] conferences) proffering no evidence and thus having this defense ruled out at summary judgment.[8]

The analysis below explores whether and when efforts by sports leagues to promote on-the-field competitive balance are in the interests of consumers. First, we show that competitive balance can be an important and pro-competitive objective and outcome of sports leagues, but that the evidence is mixed as to whether consumer demand hinges on balance.[9] Second, we discuss the history of league efforts to promote competitive balance. Finally, we analyze the efficacy of two of the rules purporting to affect competitive balance, revenue sharing and salary caps. Along the way we also explore a case study: How would a class of elite athletes demonstrate class-wide harm from an anticompetitive restraint on the commercialization of their NIL and athletic reputation.

Importance of Competitive Balance: The Historical Antecedents

The on-field dominance by the New York Yankees baseball teams of the 1920s led to attendance problems for the Yankees and for many of the other Major League

Baseball (MLB) teams. Fans grew tired of lopsided, predetermined affairs, instead preferring uncertain outcomes and balance.

In 1964, economist Walter Neale recognized the uniqueness of competitive balance to sports in noting the "peculiar economics of professional sports."[10] Neale's work pointed out that while Coca-Cola may wish that Pepsi would disappear, the Yankees benefit financially when the Oakland A's[11] are of high quality. Thus, the nature of competition was infused with a need for cooperation, which has itself been the core of the argument that sports leagues and their franchises constitute a joint venture or perhaps even a single economic entity.[12] In fact, the courts upheld the Commissioner of MLB's decision to nullify certain trades in 1976, explicitly based on the notion that athletic competition would be reduced if allowed to be consummated.[13]

Does competitive balance increase demand? The economic research offers nothing more than an "it depends." Optimal levels of competitive balance can increase demand, but there is a growing body of recent research drawing on behavioral economics showing that competitive balance may often be outweighed by fans' preference that the home team win or for there being an upset, whether expectations are met and how, or changes in league standings.[14] Notwithstanding the many measures of competitive balance (e.g., within-game, game-to-game, within-season, season-to-season[15]), increased expected closeness of a contest has been shown to increase live gate attendance and television viewership.[16] The closeness of winning percentages and total team quality (measured as the sum of winning percentages) has been shown to improve TV viewership, while the score at halftime affects the second-half television audience.[17] The closer games are expected to be (using both winning percentages and betting odds) and the higher the total quality of the two teams are, live gate attendance is improved as well (when controlling for other factors).[18] Analysis of MLB from 1901-1998 shows that attendance is improved with closer standings throughout the season.[19]

Twenty years after Walter Neale's revelation, the Supreme Court in *Board of Regents* recognized the special economic forces at work in sports leagues, holding that specific NCAA rules (namely the joint sale of television rights), which would otherwise be illegal *per se* in other industries, needed to be evaluated using the rule of reason weighing the net anti- or pro-competitive effect of the rules in question.[20] Fast forward 25 years to the more recent *American Needle* case, where the Supreme Court noted that the legitimate interest in maintaining competitive balance among teams is still subject to the rule of reason.[21] Ironically, in both of these cases, though the Supreme Court has enshrined competitive balance as a laudable aim, nevertheless both leagues/sanctioning bodies in question (the NCAA and the National Football League (NFL)) lost, with the restraint in question found not to be justified because of competitive balance, and in the two more recent cases when the NCAA tried to take advantage of the legal support for competitive balance, it found it could not prove its "amateurism" rules contribute to competitive balance.[22]

To be clear, the concept of (athletic) competitive balance is pro-competitive (in an economic sense) only when it generates a desired product attribute that enhances the product and increases revenues, although in a rule-of-reason setting, it may have to be weighed against possible anticompetitive effects. As one of this article's authors explained in *Alston*,

> "Procompetitive effects" is an economic term of art with specific economic meaning. In that economic context, the term is not a malleable, catch-all phrase, synonymous with socially desirable aims, however laudable those goals may be. To be procompetitive, a restraint must cause increases in overall economic welfare or the reduction in economic exploitation, as economists define those terms. … If a restraint causes net improvement to economic welfare according to economic theory and consistent with the results of studying the effects in the market place, a restraint can be characterized as causing "procompetitive effects."[23]

With many current leagues sharing specific revenue streams with players, it is clear that to the extent there is an optimal level of competitive balance in a given league/sport, it will benefit fans, owners, and players. Where room for debate exists is whether a specific rule actually enhances consumer demand (or even promotes competitive balance at all).

The Exogenous Structure of Sports Leagues

The notion that competitive balance is a key part of the product that customers of sports demand, and that it is really unique to sports, is essentially what Neale called the "peculiar economics of sports."[24] Three critical exogenous[25] facets of sports leagues help explain why rules aimed at enhancing competitive balance *can* be pro-competitive.

Competitive Balance Is Exogenous

As noted above, a unique aspect of sports leagues is that the primary product is typically an event (or season culminating in a championship) between two competitors, often two different companies. Yet, cooperation is needed and (some level of) parity is desired by fans. This cooperation and goal of competitive balance causes the members of leagues to create many rules that purportedly affect such balance. These rules are endogenous (e.g., a

salary cap), in that they are created internally by league members. Of course, this is also the case with individual athlete sports like golf, tennis, auto racing, or mixed martial arts. Rules are established to create a competitive environment. However, some aspects of sports leagues are essentially exogenous and occur because of market forces.

Demand for competitive balance itself is exogenous to a league. Customers demand some level of balance (or not) to make the product exciting. Leagues have to figure out how to maintain an optimal level of competitive balance, but that is because the market demands it rather than because balance is inherently superior to imbalance. The nature of needing two teams to play each other, or six or more teams to form a minimally suitable league, or 80 golfers to play a tournament, automatically causes consolidation compared with other industries where competition across different firms occurs without any need to coordination. For example, Nike and adidas do not need each other for success, nor do they want each other to be formidable competitors. Yet, the Yankees need the As to be decent enough to create competitive games and seasons.

The Market Demands That the Best Play Against the Best

In many aspects, demand for a single league or circuit may be an exogenous factor driven by fans' desire to see the best athletes and teams competing with and against each other in the same game, event, or season. Imagine if Chris Evert and Martina Navratilova had never played against each other because they were on different tennis circuits, or Jack Nicklaus did not compete against Arnold Palmer, or Jerry Rice did not catch touchdowns from Joe Montana, or Magic Johnson did not compete against Larry Bird. The market seems to demand that the best play against/with the best. This drives the long-run equilibrium toward single-sport leagues,[26] so that the single-sport provider is often a natural outcome of the nature of sports.

However, there are more competitive means to meet this demand rather than simply merging competitive leagues into a monopoly, such as when otherwise competing leagues agree to face off in a common championship. Such an arrangement allows the major European soccer leagues to crown separate champions who then face off against each other (and other major teams) in the UEFA Champions league. In some sense, both the World Series and the Super Bowl began as similar two-league championships, but in both cases the leagues soon merged (in the case of the NFL and American Football League (AFL)) or at least stopped competing for talent (in the case of the National and American Leagues, which only formally merged in the 1990s)[27] even if they remained legally distinct.

In other sports, though, multiple parallel leagues can exist and thrive. For example, in mixed martial arts, while the Ultimate Fighting Championship (UFC) has been a consistent leader in the sport, Bellator and the Professional Fighters League (formerly the World Series of Fighting) compete with UFC. Recently, an Asia-based competitor, One Championship, announced its intent to enter the market as well, signing a broadcast deal with Turner Network Television (TNT).[28] Whether this sport needs a single league or other ways to ensure that the best can compete against the best remains to be worked out.

Additionally, having many leagues (or many teams within a league) "reduces the absolute quality of play. From the perspective of the fans, some restrictions on the number of leagues in a sport and teams within a league may be socially desirable."[29] Research shows that too many leagues in baseball led to a decrease in the quality of play overall and a decline in demand.[30] Specifically, "adequate control of external effects associated with quality will be achieved only if there is but one league in a sport."[31] In other words, not only do fans desire to see the best play with/against the best, but multiple leagues also tend to dilute the existing talent base. Thus, sports can differ from most other industries, where having many providers generally leads to higher quality, more innovative products, and lower prices, all of which benefit customers. Similar to sports, there are joint ventures in other industries (e.g., biotech) that can lead to better products and distribution. Yet in sports, while customers would like lower prices (which may not be forthcoming when there are single providers of a sport instead of multiple competitors), they do not want diluted talent and do want the best to play against/with each other.

In college sports, there has been a historical evolution (within the NCAA) from schools within leagues playing each other without regard for a specific or defined level of play (i.e., MLB compared to minor league baseball). After decades of undivided competition, the NCAA organized leagues as either at the university or college level, followed by a disaggregation of schools into Division I, II, or III. Even within Division I, there remained vast differences in commitments to major spectator-driven college sports. It therefore further separated into Division IA (schools offering major college football, now called FBS), Division IAA (schools offering a level just below IA in terms of football, now called FCS, but still playing at the same level in other sports), and Division IAAA (schools playing Division I sports, but not offering football). Finally, Division IA has further separated into the Power Five conferences and the Group of Five conferences, with the former now governed by a special set of somewhat more permissive five-conference rules, inaccurately referred to as "autonomy." The talent base has tended to follow this pattern, with the most coveted athletes choosing FBS schools. Consequently, despite the (increasingly disproven) claim that capping college athlete pay improves competitive balance, we see college sports re-

cruiting— especially in football and men's and women's basketball—dominated by an elite subset of teams. Rather than spreading out talent, the college caps seem to cement existing imbalance.[32]

One of this article's authors is in the process of launching a professional college basketball league—the Historical Basketball League (HBL)[33]—with the goal of hiring a large portion of the top 150 athletes in each class entering college. The aim would be to provide fans with the ability to see the best playing with and against each other every night of the season, rather than waiting for an end-of-season tournament in March. If HBL is a success, it will be the NCAA's pay caps that led to, rather than prevented, this new league's dominance.

Sports Leagues and Teams Compete with Other Forms of Entertainment

The NFL is the single provider of major professional football in the U.S. (notwithstanding the recently failed Alliance of American Football (AAF) and the second attempt at the XFL, launching in summer 2020). Is it a monopolist, whether or not a "natural" one? That question hinges on whether the NFL competes in a larger product (or geographic) market that contains other entities. The jury in *USFL v. NFL* found that the "NFL had willfully acquired or maintained monopoly power in a market consisting of major-league professional football in the United States," but "the NFL had neither monopolized a relevant television submarket nor attempted to do so."[34] While some point to this as a confused verdict, it may in fact reflect the view that while the NFL is the dominant (or only) provider of professional football, by itself that does not mean there is a specific *television* market in which only the NFL (and erstwhile rivals such as the USFL or XFL) compete.[35] This is because sports are really multi-product bundles. The Los Angeles Dodgers (baseball) and Los Angeles Rams (football) might compete for ticket sales (at least when their seasons overlap in September), but the Dodgers and Chicago Cubs (baseball) almost surely do not. In contrast, the Dodgers and Cubs do compete for free agents and as on that dimension are much closer competitors to each other than either is to the Rams. At the same time, though it would need to be shown empirically, all three might compete in a national market for jersey sales, though it is doubtful that sports jerseys compete with unbranded sweatshirts in some broader apparel market.

Importantly, in the context of antitrust, economic competition is a term of art, based on the economic concept of cross-price elasticity of demand. What matters is not whether a family's choice to attend an SF Giants game means there is no room in the household budget, or time in a particular week, to also attend a San Jose Sharks game, but rather whether in aggregate, the quantity of tickets bought for Sharks games varies appreciably with changes in Giants' ticket prices.[36] This means that, for example, intuition about overlapping seasons, can only go so far in answering the economic question in a rigorous way. As such, many courts have found that there do exist distinct relevant markets in single sports.[37]

With that said, there is burgeoning academic research and existing industry anecdotal research, showing that sports leagues compete with other forms of sports entertainment at least with respect to key outputs such as merchandise, licensing, and television broadcasts.[38] For example, when the National Hockey League (NHL) cancelled an entire season, the National Basketball Association (NBA) and minor league hockey both experienced boosts in attendance.[39] An older study estimated that average NHL per game live attendance was nearly 20% lower in the 'average' city with three other professional sports teams and that inter-sport competition reduces MLB season live attendance by 250,000 (21%) in the "average" baseball city.[40] Other research suggests that the closer two teams are geographically, the lower attendance is at each team relative to two teams that are farther apart.[41] What has yet to be shown in a definitive way is whether moderate changes in the ticket prices of one sport's team has quantifiable impact on the quantity of tickets sold for other sports.[42]

There is overlapping fan support across sports, e.g., some Cincinnati Bengals season ticketholders likely also attend Cincinnati Reds games. Accordingly, adding a team to a market does have an impact on teams in other sports in that same market. For example, after the Nationals came to Washington D.C. in 2005, the Washington Wizards of the NBA saw a decline in attendance by 5% (for the two years prior and post-relocation), even though the Wizards improved its record by 40%.[43] The Washington Capitals also saw a 9% decline in attendance for the two years before and after the Nationals moved to Washington D.C., but this may be related to decreased on-the-ice scoring or the 2004 NHL work stoppage.[44] Now that the Nationals are established in the marketplace, it remains an open question as to how much its ticket prices influence changes in consumption of Wizards or Capitals games.

While general tickets findings are mixed, luxury suites clearly show a form of cross-sport competition, and the effect can be seen not just in attendance but also in price. Data from the Association of Luxury Suite Directors show that luxury suite prices are highly dependent upon the number of other sports facilities with luxury suites available in the marketplace.[45] The Capitals and Wizards had luxury suite prices that were above the average by 17% for combined NBA/NHL arenas in 2001.[46] In 2007 (after the Nationals had moved to Washington D.C.), the luxury suite prices were about 5% lower than the same group.[47] This provides evidence that there exists competition at the luxury suite level across the major sports leagues in the U.S., suggesting that to these customers, a

luxury suite in any one sport may indeed be a good substitute for any other sport, if the goal is simply a luxurious suite for entertaining clients. Studies have generally supported the twin ideas that within common geographic regions, teams both within a given sports league and across sports leagues compete with each other, albeit with the economic effects being relatively small.[48]

It is perhaps more evident that companies interested in sponsoring sports teams, leagues, events, and athletes can search for sponsorship opportunities in a competitive market. Not only is sponsorship but one of many forms of marketing, but there are many franchises, facilities, leagues, and events, with which one can partner. There is generally a media frenzy when the media rights to the NFL, for instance, are put into the marketplace. Bidding occurs across the major networks (ABC/ESPN, CBS, NBC, and FOX), with potential new bidders among the major social media, digital media, and ecommerce companies (such as, Twitter, Facebook, Amazon, and Netflix). A network that does not end up with the rights certainly finds a cost-effective way to fill those hours of programming. The NBA, NHL, and MLB appear on many different cable outlets (e.g., TBS, TNT, NBC Sports) as well as the major networks. Historically, when NBC has not won the rights to show NFL games, it has instead focused on the Olympics, horse racing, golf, and tennis. When CBS was the "odd man out" in showing NFL games (prior to regaining an NFL contract in 1998), it offered more college basketball programming. Now, the NFL is contracted with each of the big four broadcasters, earning $6 billion per year from Fox, CBS, NBC, and ESPN (ABC), and also with DirecTV. NBC has also continued with the Olympics, paying over $7 billion to air the Olympics through 2032. In addition, the leagues have Turner Sports as a competitor for their rights, as Turner-owned TNT and TBS show the NBA and MLB, respectively.

Even though fans may generally want a single league to watch the best athletes play with/against each other, rival sports compete against each other on at least some dimensions. Thus, while it is in each league's interest to maximize its revenues by enhancing consumer demand for each sport (and thus leagues aim for competitive balance), the revenue-maximizing level of competitive balance is not necessarily an equilibrium that would occur on its own. Therefore, unlike in other industries, in sports rules are seen as needed to maintain competitive balance, such as salary caps, revenue sharing (to be discussed below), and limits to the number of teams in a league. Attempts to break up the nationwide professional leagues to achieve competitive balance through competition will not necessarily be socially beneficial unless fans (i.e., consumers) feel that ultimately the question of who is best is decided on the field.[49] However, to the extent that alternative inter-league championships can be developed, multi-league competition might achieve better, more balanced (athletic) competition along with more intense (economic) competition.

The Rules That Sports Leagues Use to Maintain Competitive Balance

In response to the perceived need to maintain competitive balance, sports leagues have developed numerous rules, such as salary caps, revenue sharing, amateur draft, no-cash trades, and the reserve clause or player restrictions. Here, we focus on the history and economics of two rules that are most often heralded as the solution to competitive balance problems: Salary caps and revenue sharing.

Team Salary Caps and Floors

In response to concerns about free agency's potential impact on competitive balance, professional sports leagues and their union counterparts have agreed upon maximum aggregate payroll limits (known as salary caps) for each team, on the theory that without such caps, large-market teams (or those owned by win-maximizing owners) might "overspend" and destroy competitive balance.[50] Analogously, some leagues have also added a salary floor, i.e., a minimum aggregate payroll for each team. Although much less commonly discussed in the sports media, salary floors are generally more important for ensuring competitive balance than are salary caps (or revenue sharing, which is discussed below). This is because it is often privately optimal for small market teams to spend far less than their large-market counterparts, even if those teams are subsidized through revenue sharing. A salary floor ensures that teams spend shared money on talent, rather than pocketing it as profit. In the NFL for instance, player salaries have long been guaranteed to hover around 50% of revenues,[51] but this was not always the case.

In 1987, immediately after the end of a failed players' strike that resulted in the league and players operating without a collective bargaining agreement (CBA), the NFL Players Association (NFLPA) sued the NFL over rules limiting free agency as being anticompetitive.[52] In *Powell v. NFL*,[53] the Eighth Circuit of Appeals reversed the players' initial victory on partial summary judgment and ruled that although the CBA had expired, the existence of the NFLPA as a union provided the NFL with immunity from antitrust suits.[54] In response, the NFLPA decertified itself as a union and sued again, this time with Freeman McNeil as the plaintiff. [55] When this case (and a follow-up class action led by Reggie White)[56] went the players' way, the ultimate settlement led to a re-certification of the NFLPA and a CBA that allowed free agency.[57] At the same time, the parties recognized the possibility that free agency might harm competitive balance, and so the new CBA included a salary cap and a salary floor to ensure that all teams' payrolls fell within a common range.[58]

Thus, in the NFL, the salary floor has existed since the same 1993 CBA that also ushered in the more famous salary cap. Article XXIV of that CBA ("Guaranteed League-Wide Salary, Salary Cap and Minimum Team Salary") set

up formulaic rules for both the cap and the floor.[59] The salary cap for each season is a function of the upcoming season's expected average league revenue. Per the 1993 agreement, the salary cap rules attempted to limit each team's total player salaries to approximately 63% of the average team's defined gross revenues (DGR), while it could not go below 50% of DGR.[60] This 1993 agreement was renewed several times until a new CBA was signed for the 2006 season, in which the floor was set to 84% of the cap, increasing by 1.2 percentage points per year, so that it would have reached 90% by 2011 had the owners not exercised their option to end that CBA in 2010.[61] After a lockout that threatened to delay the 2011 season, the CBA that followed set the NFL salary cap at $120,375 million per team, and the team salary minimum at 89% of that upper bound, climbing to 95% of the upper bound for the last few years of the deal.[62]

The players are also guaranteed a league-wide share no less than 47% of total league revenues. That CBA is set to expire in March 2021. The players and league have already been meeting regularly, but none of the purported issues on the table would appear to affect competitive balance.[63]

Salary restrictions that include both caps and floors are the most effective method for maintaining or improving competitive balance because this forces teams to spend similar amounts on player payrolls. Otherwise—and this cannot be stressed enough—revenue sharing to small-market teams is unlikely, by itself, to induce the small-market team to spend more. Without a salary floor, a team spending at the optimum small-market level does not see any reason to spend even one dollar of any additional revenue it gets from other teams' actions. On the other hand, a salary floor creates a constraint that changes the optimum pay level for those small market teams (to the minimum, which is higher than the unconstrained optimum). Thus, while a binding salary maximum puts a restriction on the average salary of a player, and thus decreases the wage per unit of talent, the salary minimum effectively *raises* the pay per unit of talent, if the floor is binding, by pushing up small-market pay levels.

However, a further result is that revenues for some large market teams may decrease because they are forced to field less talented teams than would otherwise be the case. The opposite may occur for small market teams—namely, the team might produce quality in excess of the optimal level associated with maximum profit for the league. By itself, these two will not cancel out, since both small and large market teams have moved to a suboptimal level of pay, so aggregate revenues will shrink. However, the decline in overall league revenues is likely to be smaller than the decrease in salaries, thus increasing profits for each team and the league as a whole.[64] Moreover, competition across sports (especially in markets like sponsorship where sport-specific factors matter less) helps to ensure against extreme degradation in overall quality.

Similarly, salary caps keep the pay of the best players below what a free agent system would pay them. However, team payroll minimums and individual player salary minimums (players earning the league minimum) actually raise some players' salaries above what an open market would pay. In fact, almost 50% of players in the NFL earn the league minimum.[65] If the league were to have moved (via a successful *Brady*[66] lawsuit by the players) to a complete free agent system, some players likely would have gained and some likely would have lost.[67] Further, *if* league revenues are maximized with more competitive balance, and *if* an open system would have led to less balance, then the marginal revenue product (MRP) of NFL players on average would have likely declined because total revenues would have declined.[68] When MRPs decrease, so does the amount that teams can gain from players, hence their pay is lower.[69] This is ultimately an empirical question.

It is worth noting here that the same logic does not necessarily apply in a sport where there is a player maximum but not a player minimum, such as the college version of football. There, the raising of the cap has no theoretical impact on compensation for athletes at the bottom of the talent pool, unless somehow the increase in pay to stars reduces the MRP of other athletes. This is important to keep in mind, as the layperson's notion "the money has to come from somewhere"[70] is not what drives the potential for downward pay pressure in a move from a CBA outcome to a more open market outcome. Instead, it is the potential for salary floors to be removed, and for the figurative bottom to drop out of the market for marginal talent.

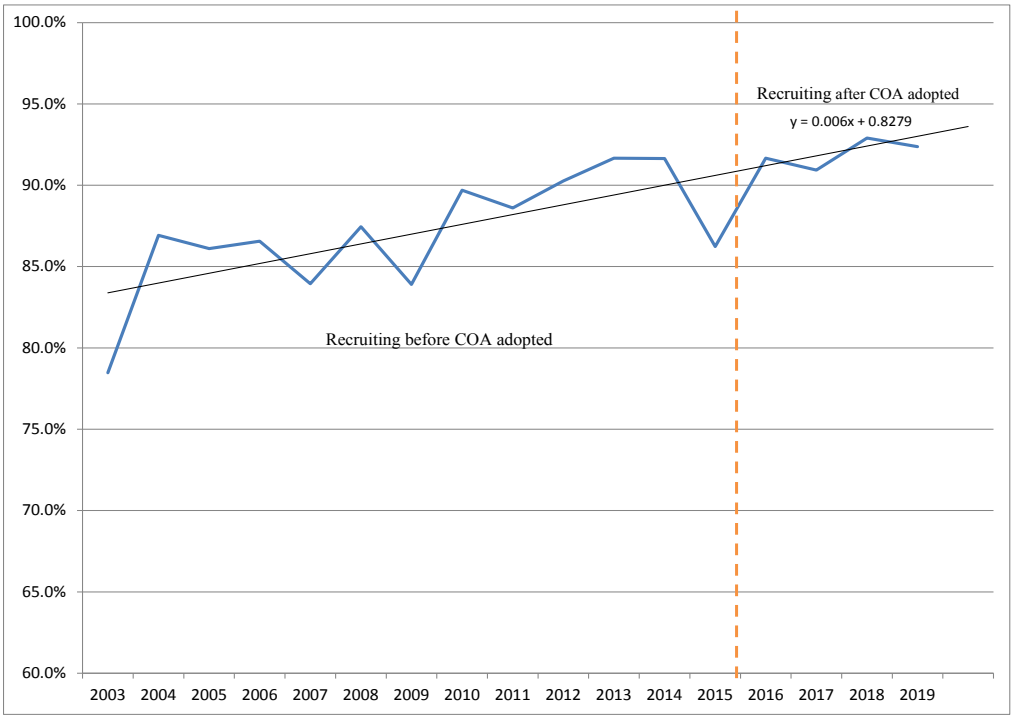
Recognize that in college sports, the compensation limits (which are essentially individual and team "salary" caps) are in some ways more complex than in unionized sports. First, each athlete faces an individual cap, with compensation limited to the full cost of attendance (COA), plus ancillary bonuses that can reach up to the tens of thousands of dollars per year for star performers. Then each team also faces a total "salary" cap, equal to a certain number of scholarships multiplied by the individual cap. In FBS football, this cap is 85 times the individual cap, whereas in FCS it is 63 times the cap. In other sports, like men's volleyball, the total "salary" cap is so low, at 4.5 times the individual cap, such that it is impossible to pay all six athletes on the starting team the individual maximum. This limit on scholarships is not a roster limit, meaning that essentially, in addition to the limited number of compensated athletes, a team may also take on a large number of "walk ons," which is the term of art for athletes who face a $0 individual cap.

Recent litigation has played a key role in driving up the individual cap level for athletes. *O'Bannon* established that a cap below the full cost of attendance was "patently and inexplicably" unreasonable, even under an "amateurism" defense.[71] *Alston* went further, showing that since athletic bonuses in the tens of thousands of dollars

are being paid today without harm to demand, caps on academic bonuses at lower amounts are also unreasonable.[72] To date, though, the NCAA team "salary" caps, in the forms of limits on the number of such scholarships that can be offered, have remained in place, even though economically, the justifications for limiting quantity are even less valid than those for capping individual "salary." Specifically, they hinge almost entirely on unproven and theoretically dubious claims that limiting the number of scholarships offers improved competitive balance.[73] Yet as anyone who follows women's basketball can attest, limiting a women's basketball team to 15 scholarships has done nothing to distribute UConn's talent across the 350 or so D1 schools.

Empirically, there is little doubt that capping the number or value of scholarships is not creating a balanced recruiting field. Consider the year-to-year annual recruiting success of major FBS football programs, based on the rankings of incoming athletes. In a world with competitive recruiting balance, there should be little or no correlation between recruiting a good class in year one and doing so again in year two. Instead, in college football, the correlation is nearly perfect (converging on 100%), and has gotten stronger over time (see **Figure 1** below).

Figure 1. Competitive Imbalance in FBS Football, 2003-2019



The year over year success in recruiting goes a long way to (a) explain the persistent dominance of a few schools, notably Clemson and Alabama, in the CFP, and (b) to demolish the myth that capping pay, or limiting scholarship availability, ensure that UMass and Wake Forest can compete for national championships in football every year.

Outside of the NCAA context, for many leagues, the caps are often not particularly binding, given all of the exceptions and ways of going above the cap (known as a "soft cap").[74] In the NBA, during the 2010-11 season, it is estimated that only six teams were actually at or below the salary cap,[75] resulting in the seemingly paradoxical result that the average team payroll in the NBA during 2010-11 season was $67 million in spite of a salary cap of only $58 million. Even in 2005 in the NFL with a stricter salary cap, nine teams had payrolls above the cap.[76]

It is much clearer that team salary *minimums* help maintain or improve competitive balance. They prevent "free riders" from paying very low payrolls, and thus making money from shared revenues and the brand in general. Free riding is a problem in the NBA, MLB, and the NFL.[77] The potential for this free-riding is well understood by players, and ensuring a true floor was a guiding principle in the NFLPA's 2011 negotiations:

> "We cannot have teams like KC spend only 67% of the cap like they did in 2009," Saints quarterback Drew Brees wrote in an e-mail to his teammates. "It doesn't matter how high the cap is if they are only going to spend that much. So with a minimum in place, it requires all teams to be at or above that minimum. More money in players' pockets."[78]

What is clear is that payrolls are more balanced in the NFL compared to other major professional leagues and that competitive balance is greater in the NFL. Noll concludes that salary caps are sufficient to achieve the goal of equal parity and that revenue sharing has no effect (more on this below).[79] However, for owners who care more about winning than profits, revenue sharing and salary caps have an indeterminate effect depending on whether owners (who want to win, even if winning is not optimally profitable) are in small or large markets.[80] The lesson to be drawn may be that the NFL leads the way in competitive balance because of the stricter floor, rather than the existence of the ceiling (although the ceiling is considered stricter than in the NBA).[81]

Revenue Sharing

Another key tool in leagues' public pursuit of competitive balance is revenue sharing, which involves the sharing of pooled revenues disproportionately to the source of those revenues. Typically, league-wide television contracts are shared equally among all teams even when certain teams drive far more of consumer demand than others. Such revenue sharing has been part of the fabric of the NFL since the first NFL national television contract was negotiated in 1962.[82] While revenue sharing prevents the lowest revenue-generating teams from becoming insolvent, it also causes a "free rider" problem, in which a team may enhance profits by fielding relatively less-talented players to keep costs down, while reaping large profits from sharing revenues with the rest of the league.

In more extreme forms of revenue sharing, leagues can share purely local revenues as well. However, the greater the revenue sharing, the lower the incentive to invest in quality, since dividing revenues dilutes the rewards of any team's investments. This creates a dilemma and a theoretical question: Will the benefits of a more evenly pooled revenue raise or lower league quality? To understand this dilemma, one needs to unpack the impact of revenue sharing on leagues' spending incentives.

First and foremost, revenue sharing lowers the wage paid to players, simply because revenue sharing lowers the return to each team on investments in talent. Revenue sharing decreases the incentive to outbid other teams for a talented player, given that part of the financial return on that player will be shared with the league. If a team determines that a certain wide receiver is worth $10 million to the team because that is how much that player can generate in extra revenues (due to increased winning leading to higher attendance, merchandise, and concessions sales), then normally that team would be willing to pay up to $10 million to hire that player.[83] Yet, if the team had to share its revenue, say 40% of the gross gains in revenue, then the player would only be worth $6 million once the sharing is netted out. In this case, the team would not bid as high for the player, therefore lowering his salary.

The key driver of this result is the fact that only revenues are shared among owners, rather than both revenues and costs. Taken to the extreme, if 100% of revenues were shared, an owner would never reap any team-specific rewards from signing a better player and the labor market for talent would dry up. In *Silverman*, Judge Sotomayor recognized this effect, noting that it was not simply a harmless exchange of dollars between owners.[84] Her ruling prevented the owners from unilaterally imposing revenue sharing rules without the consent of the players association.

While in theory revenue sharing saps profit-maximizing teams' desire to compete, not all decisions by sports teams are driven by a pure profit motive. Winning matters too. Although NFL owners have to share their revenues, they do not share their wins or Super Bowl rings. Thus, to the extent that owners care about winning above and beyond their ability to generate profits *and* are willing to make less money (or even lose it) in order to win, they might be willing to pay more for players than they are "worth" in terms of MRP, due to the dampening effect that revenue sharing plays on the relationship between winning and revenue (and thus profit).

Secondly, it is not clear that revenue sharing actually changes the incentive of teams in less lucrative markets to spend on the quality needed to achieve competitive balance. The popular notion is that small-market teams will use the net excess revenue that they receive from large-market teams through the national media and licensing contracts and through gate sharing to improve the quality of their teams. In *Bulls II*, the NBA's justification for its restriction of the Chicago Bulls broadcasts was the need to maintain competitive balance.[85]

However, it has been theorized that in equilibrium, an athlete will play for the team for which he or she generates the most revenue, regardless of who owns the rights to that revenue.[86] Under this theory, small market teams without a mandatory salary minimum will simply pocket their portions of shared revenue as profit, leaving unsolved the "small-market problem," which plagues some sports. If small-market teams are currently choosing the optimal talent level, a transfer of cash will, by itself, provide no incentive for investments in individually sub-optimally high levels of quality. In fact, most owners have enough access to capital to increase their payrolls substantially. Yet, they choose to remain at some level that they have determined makes the most sense for them. Getting an extra $10 million from the league office does not change anything—they should put it to wherever it is most valuable in their life.[87] Revenue sharing along with a salary cap may make the middle more like the top, but the lower third may remain persistent (albeit profitable) cellar-dwellers. Hence the importance, as discussed above, of combining a salary floor with any revenue sharing arrangement.

This is not merely a theoretical concern. Numerous popular press articles detailed how MLB teams that were recipients of revenue sharing money (and also luxury tax sharing, another form of revenue pooling similar to pure revenue sharing) were pocketing the money instead of spending it on players to improve the talent of the team.[88] For instance, a year after MLB's luxury tax/revenue sharing plan was implemented, the Milwaukee Brewers received the most revenue sharing money (about $8.2 million), but it also *lowered* its payroll from about $50 million to $40 million. In other words, the team may have directly used the money to purchase better players, but any such spending was more than offset when the team lowered its base payroll down to $32 million (so adding the $8 mil-

lion brought it up to $40 million) rather than adding the money on top of their previous $50 million level.[89]

On the other hand, research shows that revenue sharing can improve competitive balance if some owners care about winning.[90] A non-disputed finding is that revenue sharing can prevent some clubs from folding, which would, of course, have an effect on competitive balance, since if teams exit small markets, small market teams can't possibly win.[91]

Combining these two effects, the third effect of revenue sharing is that profits increase as the incentive to pay players declines, as long as the league in question does not face serious competition from another league in the same sport. That is, if the distribution of talent is not strongly influenced by revenue sharing but the incentive to spend on talent declines, as long as no rival league can scoop up talent on the cheap, team owners will keep a large share of a relatively unchanged pie.

Fourth, unless the revenue-sharing and salary-cap rules are airtight, the fact that some revenues or costs are shared/regulated by the league but not others can create perverse incentives for owners to generate revenue from sources that are excluded from revenue sharing (e.g. stadium revenues). Similarly, owners would also have incentives to incur costs on inefficient revenue generators if those costs are uncapped. Hence an owner may invest in stadium improvements simply because that spending is uncapped and he or she gets to keep all of the return on that investment, as opposed to investing in a new team logo from which any new revenues from national merchandising would be shared with the rest of the league. One example from the NFL is luxury suites, which remained outside of the revenue sharing/salary cap structure until the most recent CBA. This loophole then played an outsized role in the race to build new football facilities with posh and plentiful luxury suites. The new CBA in the NFL applies the salary cap to all revenues, with additional supplemental revenue sharing among owners. The players want the small market teams to have enough funds to meet the team payroll minimum, but another beneficiary may be cities who might face less pressure to build ever-more-luxurious suites to stave off threats for their football teams to leave town. Counting a broader range of revenue sources in the revenue sharing (and salary cap) formula seems to be a trend in major U.S. sports, which should work to eliminate some of these perverse incentives towards suboptimal revenue sources.

The most egregious example of the perverse incentives of salary caps and revenue sharing comes from college sports. Within most major athletic conferences (e.g. the Big 10 or SEC), revenues from media rights, postseason play, and NCAA sources like March Madness shared equally, other than comparatively small distributions to cover a portion of team's expenses for post-season play. This means that for a lower-revenue school within a conference, shared revenues make up a substantial portion of an individual school's revenues, whereas for the powerhouse schools within a conference, unshared revenue sources such as ticket sales and donations, comprise a much larger share of the pie. Combined with the finding that donations may be driven by winning,[92] this would normally create an incentive for the strongest schools in a given conference, say Alabama in the SEC or Ohio State in the Big Ten, to spend more on player salary. However, the strict salary cap in college football (where players can receive cash compensation of no more than approximately $7,000 in additional to a scholarship) shifts this desire to invest in quality towards less efficient means. This creates a strong incentive for the Alabamas and Clemsons of a conference to spend far more on facilities than, say, a Mississippi State or a Wake Forest. Despite this incentive for schools at the top of the conferences, overall spending is far more balanced within a conference than across conferences, given the fact that shared revenue tends to dominate.

Whether a Rule Enhances Consumer Demand Is an Empirical Question

The issue of whether the rules that leagues use to maintain competitive balance are pro- or anti-competitive is ultimately answered both by theoretical and empirical economics. While theory can illuminate the issue, ultimately some form of testing how these rules impact markets may also be necessary to know the impact on sports leagues, sanctioning bodies, athletes, suppliers, and buyers. Economic analysis plays an important role in understanding the special structure and economic forces inherent in sports and in analyzing the competitiveness of league conduct. Allegations of wrongdoing need to be viewed through the correct economic prism before a proper evaluation can occur. This analysis requires an understanding of the exogenous factors inherent in sports leagues, and the rules that leagues use to affect competitive balance, as well as careful study of the specifics of a given rule and how its nuances affect the market in question.

Hence, while the economic factors that sports leagues control, e.g., revenue sharing and team salary restrictions, may superficially appear to be anticompetitive—and even be anticompetitive along one dimension—they nevertheless could promote sufficient growth in revenue because their net impact on competitive balance is pro-competitive. On the other hand, restrictions designed to address competitive balance may merely lower average cost without improving competitive balance and may have unintended side effects as teams' and leagues' incentives diverge. In a nutshell, this is the reason why the economics of sports restraints typically fall within a rule of reason analysis, because the answer is almost always "it depends." Policy decisions made without the proper understanding of this crucial fact—that the economics of competitive balance is not as clear cut as sports leagues often claim—may prove to be detrimental to consumer welfare.

Can Economics Measure the Anticompetitive Impact of Salary Limits?

In the context of a rule of reason antitrust case related to competitive balance measures, a key question is whether economic models can be used to predict what individual athletes would receive in payment in a world with less restrictive rules. For example, in *O'Bannon*, class certification was denied to the damages class (but granted for injunctive relief) over the court's concern with a model that did not account for the possibility that individual athletes at the low-end of the talent spectrum might have benefitted from restrictions on payments to more talented athletes.[93] Yet in the interim, economists have moved away from old-style *ex post* models of productivity, where value can only be predicted after the athlete has performed his or her services, to *ex ante* models that better align with how compensation offers would work in a marketplace. Unlike *ex post* models that can sometimes show the result that schools are consistently making irrational scholarship offers, models based on athletes' *ex ante* ratings generates econometric results that comport with schools' revealed preferences. They provide for ways to identify a class of athletes who could allege and prove classwide common impact and model forgone licensing revenues using a common formula, solving the issues raised in *O'Bannon* by showing that each class member would have earned more than the current limits. Given that the NCAA itself may soon acknowledge that some forms of NIL payments are not demand-decreasing, one can easily imagine a hypothetical class action needing such a model to prove its forgone NIL payments for the four years prior to the lifting of the zero-dollar cap on NIL.

Consider the following hypothetical class: male athletes who entered Division 1 basketball in the four years prior to the NCAA finally allowing for athletes to earn some form of revenue from their NIL and athletic reputations, who were also ranked by a major college recruiting service with three stars or more.[94] Further assume that in this new NCAA model, athletes can either choose to market their NIL on their own, or to partner with their schools to jointly market the schools' intellectual property (IP) along with that of the athletes. In this world, athletes will choose between these two models (self-marketing or joining with a school) on an *ex ante* basis—that is, prior to the athlete enrolling in college—and schools will thus base their competitive offers on an assessment of the value of adding those athletes to the schools' IP portfolios. Athletes who see their individual value exceeding a schools' offer would choose not to jointly market; athletes who do not will sign up. Thus, assessing the *ex ante* value of the athletes' IP to the schools' portfolio establishes a lower bound for forgone revenues. In other words, being able to model each athlete's expected contribution to school revenue[95] essentially establishes a base level of damages experienced by each athlete.

Such a model exists in the sports economics literature. Using data from 2008-2017, Rascher et al. develop multiple models of college basketball player value to specific schools utilizing what is known in the labor market during recruiting, i.e., their ranking by high school athlete rating services, athletic conference specific effects, and year.[96] Team revenues and winning percentage are also utilized to establish the relationship between winning and revenue. These models all show that above-average and star men's basketball players statistically significantly improve the revenue generated by their programs by hundreds of thousands of dollars and in some cases millions of dollars per year. These models also allow for individual athlete valuations.

With such a model, each athlete who had been recruited prior to the relaxation of the NCAA's rules could establish his own *ex ante* value to the team he ultimately chose. Thus, each athlete could: (a) establish his antitrust injury (the fact that he was paid zero for his NIL when his but-for value exceeds zero); and (b) establish his own damages (based on that difference). The identical formula could be used for each such athlete, making it amendable to class certification.

The Future of Competitive Balance: What Will the World Look Like in 2050?

One aspect of the NFL's efforts to achieve competitive balance is a scheduling method called unbalanced scheduling, where teams that do well in a given season are matched against better competition in the following year. This allows for more marquee match-ups. It also allows the worst performing teams to play each other more often, providing those teams' fans with the hope of winning more games. In contrast, for the portion of the college football season in the control of individual schools, college football usually does the opposite—powerhouse schools pay weaker teams to offer themselves up as sacrificial lambs and generate incremental revenues for the smaller school.[97] In large part, this is a function of perverse incentives in college football's current post-season, where losses, even to quality opponents, are punished much more than "cupcake" wins.

However, now that there is the CFP (a playoff in major college football, albeit with only four teams, though widely believed to eventually grow to eight), college football seems to be recognizing the benefits of more competitive balance in the early portion of the season, with the result being that schools are scheduling better non-conference games. At the same time, as the NCAA's compensation limits have been forced to change with every new legal challenge, each new set of rules further tests the idea that pay caps affect balance, and in each case, no evidence has emerged of greater imbalance. As just one example, first dozens and now hundreds of D1 schools have adopted COA payments, but there has been

no notable change in the FBS football or D1 basketball pecking order.

The NFL has led the charge in its focus on competitive balance, but the other major sports are addressing it as well. Using the Noll-Scully[98] measure of competitive balance, MLB had improved greater balance in 2014-17 than it had during the prior six years. However, the imbalance shot up in 2018, mostly driven by the AL's lack of balance that year. It looks as if the big-spending teams are continuing to spend even more, despite the luxury taxes being paid. It remains to be seen if that level of increase spending makes sense, or whether the big-spenders will need to come back to pack. In the next five to 10 years, MLB should see improved competitive balance, because revenue sharing recipients will find it more difficult to avoid using their additional funds to improve their on-the-field product, and large market clubs will be exempt from being recipients of revenue sharing money. MLB owners and players alike recognize the need to grow baseball's fan base, both domestically and internationally. The Industry Growth Fund coming from luxury taxes will help, as will the growth of the Australian Baseball League and domestic leagues in other countries. The World Baseball Classic should help speed up the growth of baseball worldwide, which will position MLB as the premier league for a new generation of fans.[99] These issues, while relatively uncontroversial, will be a focus in future CBAs.

To the extent that competitive balance is critical for consumer demand, the need for competitive balance will only be enhanced as sports increasingly compete against each other for domestic and international viewership. Increasingly, soccer, especially the English Premier League, is programmed against major American sports as networks without football or basketball (especially new cable channels dedicated solely to sports) look for new ways to attract viewers to live sports. At the same time, the growing international popularity of American sports will likely lead to overseas expansion, with perhaps the NBA having multiple teams in Europe within the next two decades.[100] As sports across the globe are pitted against each other for viewers and fans, each league may be tempted to emphasize those rules that enhance consumer demand for its sport, and efforts to optimize competitive balance will be in the forefront of that movement. What remains to be seen is whether a foreign league with strong competitive balance has higher or lower demand than a foreign league with few super teams. That is, while competitive balance may matter for local interest in a team, imbalance may help drive outside demand to see truly elite play.

Endnotes

1. 468 U.S. 85, 102 (1984).
2. *Id.* at 102.
3. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).
4. *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 7 F. Supp. 3d 955, 978-79 (N.D. Cal. 2014) (noting that testimony by the plaintiffs' expert witnesses cited several academic publications that showed the lack of a relationship between the pay restrictions and competitive balance), *aff'd in part, vacated in part*, 802 F.3d 1049 (9th Cir. 2015).
5. *O'Bannon*, 802 F.3d at 1072 ("We therefore accept the district court's factual findings that the compensation rules do not promote competitive balance….").
6. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019) (also known as *Alston v. NCAA*).
7. FBS stands for Football Bowl Subdivision, the set of approximately 130 schools that play football at the highest collegiate level. FBS was formerly known as Division 1A. At the time the *Alston* litigation was filed, there were 11 such conferences. In the interim, the Western Athletic Conference (WAC) stopped sponsoring football, so there are now 10 such conferences.
8. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-CV-02758-CW, 2018 WL 1524005, at *10, n.7 (N.D. Cal. Mar. 28, 2018).
9. *See*, *e.g.,* Daniel A. Rascher, Joel Maxcy & Andrew D. Schwarz, *The Unique Economic Aspects of Sports*, at 8 (Jan. 5, 2019) ("… despite the existence of so many team-sport league policies, such as restrictions on competitive markets for players' services and revenue sharing between clubs, that are publicly justified by an appeal to the need for outcome uncertainty and competitive balance, empirical tests by sports economists have repeatedly found (a) little effect of outcome uncertainty on consumers demand for sports, and (b) little effect of most policy changes on competitive balance. In lay terms, the rules do not seem to help competitive balance, and competitive balance doesn't seem to sell that many tickets anyway.").
10. Walter Neale, *The Peculiar Economics of Professional Sports: A Contribution to the Theory of the Firm in Sporting Competition and Market Competition*, 78 Q. J. of Econ. 1, 1-14 (1964).
11. When Neale wrote his paper, the A's were still located in Kansas City and were notoriously bad. During its 13 years (1955-1967) in Kansas City, the As lost almost 60% of their games.
12. *See* Michael A. Flynn & Richard J. Gilbert, *The Analysis of Professional Sports Leagues as Joint Ventures*, 111 The Econ. J. F27, F44-45 (2001).
13. *Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 538 (7th Cir. 1978), *cert. denied,* 439 U.S. 876 (1978).
14. Coates, D., Humphreys, B. R., & Zhou, L., *Outcome Uncertainty, Reference-Dependent Preferences and Live Game Attendance*, Economic Inquiry, 52, 959–973 (2014). Humphreys, B. R., & Zhou, L., *The Louis-Schmeling Paradox and the League Standing Effect Reconsidered*, Journal of Sports Economics, 16, 835–852 (2015).
15. Within-game balance essentially means that the outcome of the game is typically decided near the end of the game. This has been shown to have an impact on television ratings during the game, as viewers stop watching one that has essentially been decided. Game-to-game balance means that teams have an equal chance of winning every game, so that the last game's winner is no more likely to win than the last game's loser. Season-to-season balance means that every team has an equal chance to win each year, regardless of how it did the prior season.
16. Rodney Fort describes the various measures of competitive balance. He also notes that the NFL has had the most balance over the years and attributes at least some of that to salary caps. Rodney Fort, *Competitive Balance in North American Professional Sports,* Handbook of Sports Economic Research 190, 190-206 (John Fizel ed., 2006).
17. Rodney J. Paul & Andrew B. Weinbach, *The Uncertainty of Outcome and Scoring Effects of Nielsen Ratings for Monday Night Football*, 59 J. of Econ. & Bus. 199, 210 (2012).

18. Daniel A. Rascher, *A Test of the Optimal Positive Production Network Externality in Major League Baseball*, Sports Economics: Current Research, 37 (John Fizel, *et al.* eds., Praeger Press 1999).

19. Martin B. Schmidt & David J. Berri, *The Impact of Labor Strikes on Consumer Demand: An Application to Professional Sports*, 94 Am. Econ. Review, 344, n.1 (2004).

20. *Board of Regents*, 468 U.S. at 102.

21. *American Needle, Inc. v. National Football League*, 130 U.S. 2201 (2010).

22. *See* discussions of *O'Bannon* and *Alston* and accompanying notes 5-11, *supra*.

23. Rascher Direct Testimony, ¶4, *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-md-02541 CW (N.D. Cal.).

24. *See* Neale, *supra* note 10.

25. Exogenous means "from the outside" and refers to forces outside of the control of the parties to the transaction, in contrast to "endogenous" forces within their control. A college soccer team's budget is set endogenously by the college, but a change in demand for soccer in the U.S., driven by the popularity of the FIFA video game, would result in an exogenous change in demand for that college's soccer team's tickets.

26. For a discussion of single sport leagues, see Paul C. Weiler, et al., Sports and the Law: Text, Cases, and Problems, 743 (4th ed. 2011).

27. In 1903, the American and National Leagues, which agreed on rules about player employment, did not merge. The two leagues also had separate offices and presidents until 1999. Pooled sales of broadcasting rights only occurred in 1962, and interleague play only started in 1997.

28. https://www.foxbusiness.com/features/ufc-one-championship-tnt-deal-north-america.

29. Gerald Scully, The Market Structure of Sports, 23 (University of Chicago Press 1995).

30. Michael E. Canes, *The Social Benefits of Restrictions on Team Quality, in* Government and the Sports Business 81, 95 (Roger G. Noll ed., 1974). In the same book, Roger Noll noted that average quality of play was likely higher when there are fewer teams, but also it was unknown how important that was to fans (as opposed to close competitions). *Id*. at 412.

31. *Id*. at 95.

32. Katie Baird, *Dominance in College Football and the Role of Scholarship Restrictions*, *J. of Sport Mgmt*, 18, 233 (2004).

33. *See* www.HBLeague.com.

34. *United States Football League, et al. v. Nat'l Football League, et al.*, 842 F.2d 1335, 1341 (2d Cir. 1988).

35. Or as was noted that much more economic research is needed to determine the degree and type of competition that exist across sports franchises (whether in the same or different sports). *See* Kenneth Lehn & Michael Sykuta, *Antitrust and Franchise Relocation in Professional Sports: An Economic Analysis of the Raiders Case*, 42 Antitrust Bull. 541, 563 (1997).

36. Economically, this concept is referred to as cross-price elasticity of demand.

37. For example, in *USFL v. NFL* (*supra* note 37), it was determined there was a relevant market consisting of major-league professional football in the United States. In *Chicago Professional Sports Limited Partnership and WGN Continental Broadcasting Company, v. NBA* (known as the *Bulls* case), 808 F.Supp. 646 (N.D. Ill.) the court decided the case in the context of a market in which production was measured as the number of basketball games on television.

38. This is in contrast with key inputs, such as players or coaches, where a given professional league is rarely a substitute for another as a potential employer for a highly skilled athlete. For the idea of each league/sanctioning body as a monopolist or single buyer in a labor market, see *Brady v. Nat'l Football League*, 640 F.3d 785 (8th Cir. 2011), *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015), *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d 1058 (N.D. Cal. 2019), *Le v. Zuffa, LLC,* 216 F. Supp. 3d 1154 (D. Nev. 2016), and *McNeil v. Nat'l Football League,* 790 F. Supp. 871 (D. Minn. 1992). With respect to venues and other elements of professional sports marketing, it is often hard to see who is buying and who is selling. The discussion about who is a buyer and who is a seller is similar (but distinguishable) to the relatively new research on two-sided markets that was spawned by the credit card lawsuits. *See, e.g.,* Jean-Charles Rochet & Jean Tirole, *Cooperation Among Competitors: Some Economics of Payment Card Associations,* 33 Rand J. of Econ., 549 (2002). Under this hypothesis, the NFL would be seen as a two-sided market that brings together fans and apparel makers, charging both of them (and adding some valuable intellectual property to up the ante). Similarly, the NFL is a two-sided market bringing together fans, sponsors, and facilities and charging each of them access to the other. However, the recent Supreme Court ruling has made it clear that while many entertainment markets, including sports, have elements of two-sided (or multi-sided) markets, they do not fit into the classic "platform" type of two-side market, where what the platform sells is the connection. *See Ohio v. American Express Co.,* 138 S. Ct. 2274 (2018).

    Specifically, while NFL teams may provide sponsors with access to fans, they are not really selling sponsors to fans. Thus, just as the Court distinguished newspapers, which sell access to customers and advertisers but do not sell advertisers to customers from credit cards, which do provide direct (and reciprocal) matchmaking between merchants and customers, so too should most sports markets be distinguished as well. For college sports to be akin to a credit card, fans would need to be paying directly for athletes' services, with schools simply providing matchmaking services for a commission. Even in a cynical view of under-the-table payments, this is not how schools generate revenue from college sports, unless one believes that colleges get a cut of "bag money" alleged to be paid by boosters to athletes.

    Hence, in *Alston*, the court rejected the idea that because fans want to watch athletes and athletes want to be watched by fans, college sports is a two-sided market. The court pointed to *American Express* for the simple distinction, that is, to be a true two-sided platform, there must be a "simultaneous interaction or proportional consumption through a platform by different market participants of what essentially constitutes 'only one product.'" The court thus concluded: "The multi-sided relevant market proposed by Dr. Elzinga is not analogous to the relevant market that the Supreme Court recognized as two-sided in American Express. In this litigation, the market participants and their interactions are nothing like what the Supreme Court observed in the context of credit-card transactions in American Express." *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, No. 14-MD-02541 CW, 2018 WL 4241981, at *4 (N.D. Cal. Sept. 3, 2018).

    With that said, in entertainment markets, even if it is clear the market is a standard one-sided one where supply moves downstream to the ultimate customer, the question of who is buying and who is selling (or if both parties are doing both) can be a difficult one to answer.

39. Daniel A. Rascher, Matthew T. Brown, Mark S. Nagel & Chad D. McEvoy, *Where Did National Hockey League Fans Go During the 2004-2005 Lockout? An Analysis of Economic Competition Between Leagues*, 5 Int'l J. Sport Mgmt. & Marketing, 183, 192 (2009). Using the natural experiment of the NHL lockout in 2004, the research analyzed what happened to NBA franchises and minor hockey league franchises in terms of attendance. The NBA saw an increase in attendance of approximately 3.2%, while the minor hockey leagues saw increases ranging from 0% to 6%. The analysis

controlled for other factors and looked at the years prior to and post-lockout.

40. Roger G. Noll, *Attendance and Price Setting*, Government and the Sports Business, 115, 124,150 (Roger G. Noll ed., 1974). Noll defines this as a city with a metropolitan population of 3.5 million and three other professional sports teams.

41. Jason A. Winfree, Jill J. McCluskey, Ron C. Mittelhammer, & Rodney Fort, *Location and Attendance in Major League Baseball*, Applied Economics, 36, 2117-2124 (2004) (The study used a travel-cost model to analyze the attendance impacts on MLB of the closest substitute MLB team. The study also found that when a new team moves into the area of an existing team, there is an additional initial reduction in attendance for the incumbent team. The authors found that each mile closer an MLB team moved from the sample average translated to 1,544 fewer attendees for the year, or nearly $47,000 in ticket revenue losses. This is consistent with Rascher et al., who found that NFL teams lose about 2% of local revenues, all else equal, for each additional major professional sports team that is located in its metropolitan area. *See* Daniel Rascher, Matthew T. Brown, Chad E. McEvoy, & Mark S. Nagel, *Financial Risk Management: The Role of a New Stadium in Minimizing the Variation in Franchise Revenues*, J. of Sports Econ., 13, 431 (2012).

42. Some evidence of price competition across sports is found by Mills et al., yet more research needs to be done. Brian M. Mills, Jason A. Winfree, Mark S. Rosentraub & Ekaterina Sorokina, *Fan Substitution Between North American Professional Sports Leagues*, Applied Economics Letters, 22:7, 563-566.

43. *See* SportsEconomics, LLC, *The Effects on SVSE and the City of San Jose from the Oakland Athletics Relocating to San Jose*, 12 (Dec. 11, 2009) (consulting reporting prepared for Silicon Valley Sports and Entertainment (SVSE)).

44. While the 2004 work stoppage may be a cause of this decline, average attendance at NHL games during the season after the lockout was up by 2.5% compared with the year before the lockout. Moreover, the rest of the NHL experienced this increase in attendance while also raising prices by 2.5%. In contrast, the Capitals lowered ticket prices by 9% during the two years after the NHL lockout compared with the previous two years and still experienced a decline when the Nationals came to Washington. *Id.*

45. Stephen L. Shapiro, Tim DeSchriver & Daniel Rascher, *Factors Affecting the Price of Luxury Suites in Major North American Sports Facilities*, 26 J. of Sport Mgmt. 249, 249 (2012).

46. *See* SportsEconomics, LLC, *The Effects on SVSE and the City of San Jose from The Oakland Athletics Relocating to San Jose*, 12 (Dec. 11, 2009).

47. *Id.* Of course, as with all such natural experiments, this decline may be driven, at least in part, by other factors.

48. *See* Dennis W. Carlton, Alan S. Frankel, & Elisabeth M. Landes, *The Control of Externalities in Sports Leagues: An Analysis of Restrictions in the National Hockey League*, 112 J. of Political Econ. no. 1, S268 (2004); David Boyd & Boyd, Laura, *The Home Field Advantage: Implications for the Pricing of Tickets to Professional Team Sporting Events*, 22 J Econ. & Fin. 169; Ha Hoang & Daniel Rascher, *The NBA, Exit Discrimination, and Career Earnings,* 38 Indus. Rel., no. 1 (Jan. 1999); Daniel Rascher, *A Test of the Optimal Positive Production Network Externality in Major League Baseball,* Sports Econ.: Current Research (1999); Daniel Rascher & Heather Rascher, *NBA Expansion and Relocation: A Viability Study of Various Cities*, 18 J. Sport Mgmt. 274, no. 3 (July 2004); Depken, C. A., III, *Fan Loyalty and Stadium Funding in Professional Baseball*, 1 J. Sports Econ., no.2, 124-138 (May 2002) (using MLB data from 1991-2001); Brian M. Mills, Michael Mondello & Scott Tainsky, *Competition in shared markets and Major League Baseball broadcast viewership*, Applied Economics, 48:32, 3020-3032 (2016).

49. In some sports, such as international soccer and American college sports, regional leagues have been successful despite the tendency for fans to want a single league of best-against-best. European soccer leagues have managed this through the use of the Champions League, while college sports has relied on its post-season (i.e., CFP for football and "March Madness" for basketball, as well as inter-conference (inter-league) play).

50. In some cases, these agreements have also included individual player maximum salaries.

51. With the definition of revenue adjusted based on the collective bargaining process.

52. Kevin G. Quinn, *Getting to the 2011-2020 National Football League Collective Bargaining Agreement*, 7 Int'l J. of Sport Fin. 141, 145 (2012).

53. *Marvin Powell, et al. v. Nat'l Football League, et al.*, 930 F.2d 1293 (8th Cir. 1989).

54. *Id.*; *see also* Quinn, *supra* note 54.

55. *McNeil et al. v. Nat'l Football League*, 790 F. Supp. 871 (D. Minn. 1992).

56. *White v. Nat'l Football League*, 585 F.3d 1129, 1134 (8th Cir. 2009).

57. *See* Quinn, *supra* note 54, at 146.

58. Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, 86-142 (1993), *available at* https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1572&context=blscontracts.

59. *See id.*; *see also* Scott McPhee, *First Down, Goal to Go: Enforcing the NFL's Salary Cap Using the Implied Covenant of Good Faith and Fair Dealing*, 17 Loy. L.A. ENT. L. J. 449, 457-58 (1997).

60. DGR was an NFL term of art that includes most NFL national revenue but excluded certain local revenues such as luxury suite revenues.

61. John Vrooman, *Theory of the Perfect Game: Competitive Balance in Monopoly Sports Leagues,* 34 Rev. of Indus. Org., 5, 11 (2009), *available at* https://my.vanderbilt.edu/vrooman/files/2016/06/Vrooman-perfectgame.pdf.

62. Gary Myers, *NFL Collective Bargaining Agreement Includes No Opt-Out, New Revenue Split, Salary Cap, Rookie Deals,* N.Y. Daily News (July 26, 2011), *available at* http://www.nydailynews.com/sports/football/nfl-collective-bargaining-agreement-includes-no-opt-out-new-revenue-split-salary-cap-rookie-deals-article-1.162495.

63. Dan Graziano, *2021 NFL CBA Negotiations: The Nine Biggest Looming Issues*, ESPN (July 3, 2019), *available at* https://www.espn.com/nfl/story/_/id/27103713/2021-nfl-cba-negotiations-nine-biggest-looming-issues.

64. Daniel Rascher, *A Model of a Professional Sports League*, Advances in the Econ. of Sport, 2 (1997).

65. Adam Schefter, Chris Mortensen, John Clayton & Andrew Brandt, *NFLPA Still Discussing Proposed Deal*, ESPN (July 23, 2011), *available at* http://espn.go/nfl/story/_/id/6793054/nfl-lockout-nflpa-work-weekend-sources-say.

66. *Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011).

67. This may have prevented the class from being certified, given that some players would have benefited from free agency and others may have been harmed.

68. Marginal Revenue Product is the term economists use for the additional revenue that is earned when one more unit of labor is used/employed. Essentially, it measures how much more output is created (e.g., tickets, merchandise, etc. sold) when a "better" player is hired, then converted to revenues when those units of output are sold.

69. Some of the literature shows that league revenues are maximized when large markets have better teams because the incremental gain in revenue from winning is higher in larger markets compared with smaller markets. *See generally* Rodney Fort & James Quirk, *Cross-subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*, 33 J. of Econ Lit., 1265 (Sept. 1995).

70. Of course, money has to come from somewhere, but that "somewhere" could be sources other than other players' paychecks.

71. *O'Bannon*, 802 F.3d at 1075.

72. *In re Nat'l Collegiate Athletic Ass'n Athletic Grant-in-Aid Cap Antitrust Litig.*, 375 F. Supp. 3d at 1102.

73. Sutter, D., & Winkler, S., 4 *NCAA Scholarship Limits and Competitive Balance in College Football*, Journal of Sports Economics, 3-18 (Feb. 2003) (finding no consistent evidence that limits on the number of scholarships improves competitive balance).

74. *Id*.

75. Email from Tom Ziller, NBA writer for SB Nation (Jul. 29, 2011) (on file with authors).

76. Michael Leeds, *Salary Caps and Luxury Taxes in Professional Sports Leagues*, 2 The Business of Sports: Economics Perspectives on Sport, 181, 191 (Brad R. Humphreys & Dennis R. Howard eds., 2008).

77. Daniel Rascher, Matthew Brown, Mark Nagel, & Chad McEvoy, *Free Ride, Take it Easy: An Empirical Analysis of Adverse Incentives Caused by Revenue Sharing*, 25 J. Sports Mgmt. 373, 386 (2011).

78. Mike Florio, *Per-Team Spending Minimum Doesn't Apply Until 2013*, NBC Sports (July 30, 2011), http://profootballtalk.nbcsports.com/2011/07/30/per-team-spending-minimum-doesnt-apply-until-2013/.

79. Roger Noll, *The Economics of Sports Leagues*, Law of Professional and Amateur Sports (Gary A. Uberstine ed. 1988).

80. Daniel Rascher, *A Model of a Professional Sports League*, Advances in the Econ. of Sport, 2 (1997).

81. Alternatively, the NFL's parity may be driven by specific scheduling decisions designed to match poor performers against each other to encourage some number of wins even for woeful teams.

82. Such a coordination is explicitly exempted from antitrust scrutiny by the Sports Broadcasting Act of 1961, revised in 1968. Sports Broadcasting Act, 15 U.S.C. § 1291.

83. The economics are bit more complicated than just this, as the team would need to determine what the MRP is of the next best player available in order to figure out which player was the better value.

84. *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 253 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2d Cir. 1995).

85. *Chicago Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 95 F.3d 593, 603-04 (7th Cir. 1996).

86. This is an application of the Coase Theorem known as the Invariance Principle first put forth by Simon Rottenberg in 1956 (prior to Coase's seminal article). *See* Simon Rottenberg, *The Baseball Players' Labor Market*, 64 J. OF Pol. Econ., 242 (1956); *see also* Ronald H. Coase, *The Problem of Social Cost*, 3 J. Law & Econ. 1 (1960).

87. MLB, for instance, mandates that owners use their revenue sharing money to improve their clubs, usually by investing more in player development or putting more money toward free agents. However, an owner can simply lower player payroll by $10 million, for example, and then apply the new $10 million received through revenue sharing toward player payroll, effectively doing nothing to improve the team.

88. *See* Andrew Zimbalist, *The Gold in Baseball's Diamond*, N.Y. Times (Sept. 30, 2003), *available at* http://www.nytimes.com/2003/09/30/opinion/the-gold-in-baseball-s-diamond.html.

89. Similar articles have appeared about the Pittsburgh Pirates and Tampa Bay Rays making a profit from the revenue sharing, while maintaining a very low payroll (the lowest in MLB at times). *See Buried Treasure: Pirates to Make $12.8M Profit This Year*, 152 Sports Bus. Daily 17 (May 2, 2005), *available at* https://www.sportsbusinessdaily.com/Daily/Issues/2005/05/02/Franchises/Buried-Treasure-Pirates-To-Make-$128M-Profit-This-Year.aspx; *see also Pirates made $29.4M in 2007 and 2008*, ESPN (Aug. 22, 2010), *available at* https://www.espn.com/mlb/news/story?id=5484947; Alan Snel, *As Rays Whiff, Front Office Scores*, Tampa Tribune (April 20, 2005), *available at* https://boards.sportslogos.net/topic/19692-d-rays-among-most-profitable-teams-in-baseball/.

90. *See* Scott E. Atkinson, Linda R. Stanley, & John Tschirhart, *Revenue Sharing as an Incentive in an Agency Problem: An Example from the National Football League*, 19 Rand J. of Econ., 27, 40 (1988); *see also* John Vrooman, *A General Theory of Professional Sports Leagues*, 61 S. Econ. J., 971, 975 (1995); Daniel S. Mason, *Revenue Sharing and Agency Problems in Professional Team Sport: The Case of the National Football League*, 11J. Sport Mgmt., 203, 209 (1997); Daniel Rascher, *A Model of a Professional Sports League*, Advances in the Econ. of Sport, 2 (1997).

91. Mohamed El-Hodiri & James Quirk, *The Economic Theory of a Professional Sports League*, Government and the Sports Business, 57(R.G. Noll ed., Washington, DC: Brookings Institution 1974); *see also* W.L. Holahan, *The Long Run Effects of Abolishing the Baseball Player Draft-reserve System*, J. Legal Stud., 129, 131 (1978); Roger G. Noll, *The Economics of Sports Leagues*, L. J. of Prof. & Amateur Sports, § 17.03[4], 17-20 to 17-28 (Gary A. Uberstine ed. 1988); *Cross-Subsidization, Incentives, and Outcomes in Professional Team Sports Leagues*. 33 J. of Econ. Literature, 1265-1299 (1995); Linda R. Stanley, *Essays in Applied Microeconomics: Evidence of Non-Profit-Maximizing Firm Owners and Bargaining within the Shadow of the Law* (1985) (unpublished Ph.D. dissertation, University of Wyoming).

92. Michael L. Anderson, *The Benefits of College Athletic Success: An Application of the Propensity Score Design*, 99 Review of Economics and Statistics, 119-134.

93. *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, No. C 09-1967 CW, 2013 WL 5979327, at *8 (N.D. Cal. Nov. 8, 2013): "if these [talented] athletes had stayed in college—as they might have done if not for the alleged restraints on competition in the group licensing market—they would have displaced other student-athletes on their respective teams … Those displaced student-athletes would have either been forced to play for other Division I teams or simply lost the opportunity to play Division I basketball altogether. In either case, they would not have suffered injuries as members of the teams for which they actually played … Indeed, many of these individuals—all of whom are putative members of the Damages Subclass—may have even benefitted from the challenged restraints by earning roster spots that would have otherwise gone to more talented student-athletes.").

94. Rivals.com rates high school basketball players who are being recruited by universities as either five, four, three, two, or zero stars, with five stars being the mostly highly recruited. Rivals.com rarely uses a one-star ranking.

95. Many will attempt to distinguish an athletes' commercial value as an endorser from his or her value as an athlete (i.e., on the field or court), but this is an artificial distinction. Consider the value of footage of a star quarterback for a local car dealer. If that athlete performs poorly, or worse still, is wearing the uniform of an out-of-town rival, his or her commercial value to the car dealer is virtually nil. However, if the athlete is throwing a touchdown for the hometown team, the marketing value is much higher.

96. Daniel A. Rascher, Andrey Tselikov, Mark Nagel & Andrew Schwarz, Because *It's Worth It: Why Schools Violate NCAA Rules and the Impact of Getting Caught in Division I Basketball*, 12 Journal of Issues in Intercollegiate Athletics, 226-243 (2019).

97. These games are commonly called "guarantee games" because the smaller team is guaranteed a specific payment for coming to play the stronger team in the stronger team's stadium. Facetiously, the term is also used because the powerhouse team is virtually guaranteed to win.

98. The Noll-Scully measure of competitive balance is $SD/0.5/\sqrt{m}$, where m is the number of games played and SD is the standard deviation of winning percentages. Stefan Késenne, The Economic Theory of Professional Team Sports: An Analytical Treatment (Edward Elgar Pub.), 10.

99. Mark S. Nagel et al., *Expanding Global Market for American Sports: The World Baseball Classic*, Sport and Public Policy: Social, Political, and Economic Perspectives 215, 229 (Charles Santo & Gerard Mildner eds., 2010).

100. William Bigelow, *Stern: Multiple BA Teams in Europe in 20 Years* (Jan. 5, 2013), *available at* http://www.breitbart.com/Breitbart-Sports/2013/01/05/Stern-NBA-Europe ("I think so … I think multiple NBA international teams. Twenty years from now? For sure. In Europe. No place else. In other places I think you'll see the NBA name on leagues and other places with marketing and basketball support, but not part of the NBA as we now know it."). Additionally, the NBA is launching a league in Africa. *See* Jeff Feld, *NBA's Basketball Africa League Gets One Step Closer to Reality with Announcement of Host Cities*, Forbes (July 31, 2019).

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Copyright Lessons from the Bench—Third Circuit Analyzes Work for Hire and Assignment Requirements and Standard for Injunctive Relief

By Sarah Robertson and Sandra Edelman

When a judicial opinion refers to a "bitter feud," a plaintiff "beset by acrimony," and a "rock star" banker who "faced his peripeteia" (Greek for "reversal of fortune"), there is sure to be an interesting backstory to a copyright dispute. That is indeed the case in *TD Bank N.A. v. Hill*,[1] a recent Third Circuit decision that provides an in-depth analysis about whether the copyright in a business book manuscript co-authored by a former bank CEO is owned by his bank employer as a work for hire or by assignment—and why the distinction matters. The appellate court concludes that a letter agreement "deeming" the manuscript a work for hire, without more, could not make it so unless it meets the specific requirements of the work for hire provisions of the Copyright Act.[2] The court further held that rights in the work were in fact assigned by that letter agreement, even though the word "assignment" was never mentioned.[3]

The man at the center of the copyright dispute is Vernon W. Hill II, the founder of Commerce Bank, who led and grew the institution from 1973 until shortly before it was acquired by TD Bank in 2007 for $8.5 billion. In 2006, Hill decided to write a book about his business philosophy. Commerce Bank supported this endeavor by hiring a collaborator to help him write the manuscript and by entering into an agreement with the Portfolio division of Penguin Books. In the publishing agreement with Portfolio, Commerce Bank was defined as the "Author," and it represented and warranted that it was the exclusive owner of all rights in the manuscript. Hill signed an accompanying letter agreement with Portfolio in which he agreed that "the Author [i.e., Commerce Bank] will, in all respects, faithfully perform and fulfill all obligations of the Agreement."[4] Hill also guaranteed that the "Work is a work made for hire within the meaning of the United States Copyright Law and that the Author is the owner of Copyright in the Work and has full power and authority to enter into the Agreement."[5]

Hill's manuscript was finished in 2007, but then the relationship between Hill and Commerce Bank "soured," Hill was terminated, and TD Bank acquired Commerce Bank shortly after.[6] The manuscript was never published and, by 2008 Commerce Bank terminated its publishing

agreement with Portfolio. Several years later, Hill decided to co-author another book about the founding of a bank in the UK, which was published in November 2012, and which made use of certain parts of the 2007 unpublished manuscript. TD Bank learned about this new book published by Hill, "suddenly registered" its copyright in the 2007 manuscript and sued Hill for copyright infringement.[7] Interestingly, TD Bank admitted during the litigation that, "at most, 16%" of the 2012 book infringed the 2007 unpublished manuscript and that it had no intention of ever publishing the 2007 manuscript.[8]

On a motion for summary judgment, the district court concluded that because the letter agreement "deem[ed] the work to be a work made for hire," it was a work for hire, vesting the copyright in the 2007 manuscript in Commerce Bank as Hill's employer.[9] Although the district court initially declined to grant injunctive relief, it did so a year later after Hill continued to promote the 2012 book and TD Bank contended that it would suffer irreparable harm if an injunction did not issue. Hill then appealed.

Work for Hire—Back to the Basics

On appeal, the Third Circuit overturned the district court's holding that the 2007 unpublished manuscript was a work for hire.

Revisiting the basics of what types of works can in fact constitute works for hire, which often get brushed over in written transfer documents, or conflated with the assignment concept, the appellate court laid out the work for hire provisions of Section 101 of the Copyright Act. These dictate that a work can be considered a work for hire in only one of two ways: The first is where a work is created by an employee within the scope of employment. The second is where a work is specially ordered or commissioned, but only if it falls within nine specifically enumerated categories of works (including a contribution to a collective work or part of an audiovisual work), and the parties agree to designate the work as such in a signed writing. As the court put it, these are "two mutually exclusive means," with "the first for employees, and the second for independent contractors."[10]

Applying these two statutory sub-parts to the operative facts, the Third Circuit held that the 2007 manuscript could not be deemed a specially ordered or commissioned work under the second part of the definition, because Hill was not an independent contractor and the manuscript did not fall within any of the nine statutorily prescribed categories of works. As for the first part of the definition, Hill was an employee of Commerce Bank when the manuscript was authored, but to be a work for hire the manuscript would need to have been created within the scope of his employment.

The district court had correctly recited these principles, but then went in a different direction, holding that TD Bank owned the rights to the 2007 manuscript as a work for hire merely based on the letter agreement, which had simply deemed the manuscript as such. The Third Circuit rejected this approach, holding that "a bare statement that a particular work is 'for hire,' says nothing about the scope of an individual's employment and cannot suffice on its own. Had Congress intended to permit parties to 'deem' works by employees as 'for hire,' it would have so specified in [the statute], just as it did for independent contractors."[11] The Third Circuit also noted that "only nine specified categories of works by independent contractors [] can be deemed 'for hire' through a signed writing," of which the manuscript was not one.[12]

Wrong Label—Same Outcome

The appellate court then explored whether TD Bank had acquired rights in the 2007 manuscript by assignment rather than as a work for hire, first highlighting the practical consequences between the two distinctions. In particular, a work for hire vests both authorship and ownership in an employer or principal, effectively removing any rights from the creator of the work, whether the creator is an employee or independent contractor. In contrast, in the case of an assignment, the creator of the work, as author, still "retains certain non-waivable rights to cancel the transfer after 35-40 years" and, for some types of works, certain waivable moral rights too.[13] Allowing parties to deem a work 'for hire' without meeting the statutory requirements would negate these fundamental differences between a work for hire and an assigned work, and explains why an employee's work created outside the scope of employment cannot simply be "'deem[ed]' for hire."[14]

However, the Third Circuit ultimately concluded that "although it affixed the wrong label," the lower court was correct in finding that TD Bank owned the 2007 unpublished manuscript on the basis that the letter agreement operated as an assignment.[15] Even though the word "assignment" was not expressly used in the letter agreement, the appellate court found that Hill's commitments in the letter agreement, including "Hill's assurance that the manuscript 'is a work made for hire'" (even though insufficient to render it one), along with his acknowledgement that Commerce Bank was the owner of copyright, "denote[d] an intent to relinquish his interest in the copyright" under both the Copyright Act and New York law.[16] The appellate court also confirmed that an agreement "need not comply with any formalities or invoke particular language to constitute an assignment; any writing will suffice as long as 'the assignor has, in some fashion, manifested an intention to make a present transfer of his rights to the assignee.'"[17]

Concluding its analysis of the ownership of the 2007 manuscript, the court stated that while the letter agreement constituted a valid assignment, the question remained whether it could also be considered a work for hire under the first part of the statutory definition because Hill wrote it as part of the scope of his duties as a bank employee. If the work was created within the scope of Hill's employment, "the work would receive for-hire treatment and Hill would lack any right to terminate the assignment."[18]

Scope of Employment Test

Although the Third Circuit had not previously ruled on when a work falls within the scope of employment, the court in *TD Bank* stated that the opinion of the United States Supreme Court in *Cmty. for Creative Non-Violence (CCNV) v. Reid*[19]counsels that the terms "employee" and "scope of employment" should be construed in light of general agency principles, as elucidated in the Restatement (Second) of Agency.[20] Using this approach, as other sister circuits had done, the appellate court laid out the factors that should be examined to determine if a work was created within the scope of an individual's employment: (1) whether the work is of a kind the individual is employed to perform; (2) did the work occur substantially within the individual's authorized time and space limits; and (3) was the work actuated, at least in part, by a purpose to serve the employer.[21]

After articulating these factors, the *TD Bank* court provided interesting commentary on the second of the three factors, stating that "courts must consider time and spatial bounds with care" in the context of the modern workplace.[22] As the court explained, the factor will be "most probative for employees who work shifts or otherwise have regular hours and definite workplaces."[23] However, in an "increasingly mobile work culture . . . many executives and professionals—for better or worse—lack obvious temporal or spatial boundaries for their work."[24] For these types of employees, "the second factor will illuminate little, and a fact-finder cannot indulge in the fiction of a 9-to-5 workday."[25] Even when an employee has ascertainable time and space boundaries, an employee could make a "unilateral decision to continue working at home or beyond normal hours" and that would have little bearing on whether the copyrighted work created outside of the physical workplace and working hours was "of the kind" that the employee was hired to create.[26]

Turning back to the question of whether Hill created the 2007 unpublished manuscript as a work for hire, the Third Circuit held that "unfortunately" it was without the benefit of an opinion below applying the scope of employment test because the district court had considered only the effect of the letter agreement on the question of ownership.[27] Accordingly, the Third Circuit remanded the fact-intensive inquiry on the scope of employment issue back to the district court. The appellate court observed that "Hill may choose to forgo this inquiry" and the parties may decide not to "open yet another chapter in this litigation." Yet the court also cautioned that a ruling on the issue "is not academic because it would determine whether Hill or his successors may eventually terminate the assignment."[28]

Propriety of the Injunction

Finally, the court considered the propriety of the district court's permanent injunction, which prohibited the publication, marketing, distribution or sale of Hill's 2012 book. Even after prevailing on the merits, TD Bank still needed to establish an entitlement to injunctive relief based on a showing that: (1) it would suffer irreparable injury; (2) there was no adequate remedy available at law to remedy the injury; (3) the balance of hardships tipped in TD Bank's favor; and (4) an injunction would not disserve the public interest.[29] The district court's determination of these factors was subject to review by the Third Circuit on an abuse of discretion standard. The court also emphasized that while it would consider these four factors "holistically," the "inability to show irreparable harm—or, relatedly, that a legal remedy would be inadequate—defeats a request for injunctive relief."[30]

Before analyzing the four factors, however, the Third Circuit first needed to determine whether it was appropriate to presume irreparable injury based upon a finding of copyright infringement, in light of the Supreme Court's decision in *eBay Inc. v. MercExchange, LLC.*[31] That case rejected the longstanding rule in patent cases requiring the imposition of a permanent injunction after a finding of infringement, absent "unusual" or "exceptional" circumstances.

Subsequent to *eBay*, the Third Circuit had held in *Ferring Pharms., Inc. v. Watson Pharma, Inc.*,[32] that the "logic" of *eBay* should be applied to trademark disputes. Yet the Circuit had not previously ruled on whether *eBay's* elimination of a presumption of irreparable injury should be applied to copyright disputes as well. The *TD Bank* case presented that opportunity, with the court declaring: "We hold today that *eBay* abrogates our presumption of irreparable harm in copyright cases.[33]" Thus, irreparable injury in copyright cases "must be prove(n), not presumed."[34] With this threshold principle in hand, the Third Circuit proceeded to consider whether the district court had abused its discretion in issuing a permanent injunction against the publication of Hill's 2012 book.

On the first factor of whether irreparable injury had been demonstrated, the appellate court rejected TD Bank's contention that continued copyright infringement necessarily constitutes irreparable harm, since "the prospect that infringement will continue merely precipitates the question whether any future infringement would irreparably injure the copyright owner."[35] The district court's further reliance on a "right to not use the copyright" as necessarily amounting to irreparable harm was also improper because that would "not only resurrect the presumption of irreparable harm, but make it irrebuttable, even where, as here, the infringement bears only a tangential relation to the copyright holder's business."[36] The appellate court accordingly held that the district court had abused its discretion in relying on Hill's violation of the "right not to use" TD Bank's copyright to establish irreparable harm.[37]

The district court also committed error in analyzing the second factor, holding that TD Bank's injury was not quantifiable at law because Hill's 2012 book was being distributed for free. According to the Third Circuit, since the Copyright Act permits the imposition of a reasonable royalty or statutory damages even where an accused infringer has reaped nothing from infringement, TD Bank still had an adequate remedy at law. The availability of monetary relief did not necessarily mean that such a remedy would be adequate, but TD Bank had not presented evidence of actual harm that would be caused by further publication of Hill's 2012 book.

The district court's analysis of the third factor—the balance of harm analysis—fared no better with the appellate court. The lower court had "relied solely on TD Bank's 'property interest in its copyrighted material'—in other words, the right to exclude—and dismissed any hardship that the injunction would inflict on Hill."[38] The Third Circuit disagreed with this approach. Rather, "considering the interests on both sides, the balance of equities favors neither party."[39] TD Bank had not submitted any evidence of actual harm, and based on TD Bank's concessions that no more than 16% of Hill's 2012 book infringed its copyright and that the 2016 book was non-infringing, Hill would not have needed to devote much effort to develop a non-infringing version of the 2012 book.

Evaluating the fourth factor, the Third Circuit agreed with Hill that the district court had improperly discounted the interest in enabling the public to purchase the 2012 book. The appellate court's assessment of this factor was clear-eyed about the likely literary value of the disputed work, while at the same time offering a full-throated defense of the right of public access, particularly given TD Bank's admission that it did not intend to publish the work itself: "Hill may perhaps not be the next prize-winning, or even best-selling business-book author. But he has a story to tell and readers eager to learn from him. This injunction deprived the American public of the ability to purchase this book from any lawful source for the

foreseeable future. At the same time, whatever spurred TD Bank to bankroll this copyright litigation, it was not a desire to protect the commercial value of the 2007 manuscript. By its own admission, TD Bank has no real intention of ever publishing or licensing the work."[40]

In concluding its thoroughly reasoned opinion, the Third Circuit acknowledged that as an appellate court, "we police only the margins of a district court's equitable discretion."[41] In this case, however, "no invocation of abstract principles can obscure that TD Bank suffered no actual harm from Hill's infringement and the Bank had adequate remedies at law."[42] Accordingly, while the court affirmed the district court's grant of summary judgment to TD Bank on the issues of copyright ownership and liability, it vacated the permanent injunction and remanded the case back to the district court for further proceedings consistent with its opinion.

Partial Dissent

Judge Robert Cowen concurred with many of the majority's findings, including that the District Court was mistaken in concluding that the letter agreement vested ownership of the 2007 manuscript in TD Bank by deeming it a work for hire, and also that the district court's permanent injunction should be vacated. However, Judge Cowen disagreed with the majority's assignment analysis for two main reasons.

First, Cowen found that TD Bank had waived the assignment issue by solely taking the position in the lower court that the 2007 manuscript was a work for hire, and by not raising or arguing as an alternate theory that Hill had assigned his rights to the manuscript, if a work for hire were not to be found. Further, Cowen noted that TD Bank had in fact affirmatively conceded during the course of written discovery that the letter was "not an assignment" but that, rather, TD Bank had been the copyright owner from "day one."[43] Cowen also found that TD Bank had similarly failed "to raise or contest the issue of assignment" on appeal in the course of briefing, and only advocated in favor of an assignment during oral argument, after the Third Circuit had directed the parties to be prepared to discuss the issue.[44] The majority countered this holding on the basis that "where two arguments relate so closely, neither is waived or forfeited" and that TD Bank's position of a lack of an assignment was only maintained to the extent a work for hire theory could be found.[45]

Even if the assignment issue had been properly before the Third Circuit, Cowen opined that the letter agreement did not meet the legal requirements for an assignment of a copyright interest, because the language of that agreement was "doubtful and ambiguous."[46] In particular, Cowen contended that neither Hill's letter agreement nor Commerce Bank's publishing agreement stated that Hill was assigning, transferring or granting his copyright interest or that such an assignment, transfer or grant had taken place (or was to occur in the future), which "would have dispelled doubt and 'convey[ed] an unmistakable intent' to effect a transfer."[47] Rather, Cowen found that these documents consisted only of a guarantee and an attempt to confirm the work for hire status of the manuscript. Cowen also contended that, although "not strictly required as a matter of law," the existence of a separate document signed directly between Hill and Commerce Bank "would also have been stronger evidence of an assignment than what we have here."[48] The dissenting view thus required stronger evidence of Hill's "unmistakable intent to effect a present transfer" even though both the majority and the dissent agreed on the legal standard for construing a copyright assignment, *i.e.,* that no special language or formalities are necessary to effect one.[49]

Takeaways

The Third Circuit's analysis and holdings help to cement basic copyright ownership principles, particularly in the corporate context, where documents providing for the transfer of rights in creative output to a corporation often simply deem a work to be a work for hire, without specifying anything more, such as the category of work involved (in the case of an independent contractor), or the scope of the employment duties within which the work falls (in the case of an employee).

The decision also highlights the importance of having a clearly expressed assignment provision in an agreement to transfer rights to an employer if it is likely a work will not be "deemed" a work for hire or if it will be unclear whether a work was created by an individual within the scope of employment.

Finally, the Third Circuit has now confirmed that irreparable injury will not be presumed from a finding of infringement in a copyright case. If a prevailing plaintiff seeks the imposition of injunctive relief, it will need to present credible evidence of actual harm that cannot be adequately compensated by monetary remedies if continued exploitation of the copyrighted work is not enjoined.

Endnotes

1. *TD Bank N.A. v. Hill*, 928 F.3d 259 (3d Cir. 2019).
2. *Id.* at 273.
3. *Id.* at 274-75.
4. *Id.* at 266-67.
5. *Id.* at 267.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *TD Bank*, 928 F.3d at 272.
11. *Id.*
12. *Id.*
13. *Id.* at 273.
14. *Id.*
15. *Id.*

16. *Id.* at 275.
17. *Id.* at 274.
18. *Id.* at 276.
19. Cmty. for *Creative Non-Violence (CCNV) v. Reid*, 490 U.S. 730 (1989).
20. *TD Bank*, 928 F.3d at 276.
21. *Id.* at 276-77 (citing *Avtec Sys., Inc. v. Peiffer*, 21 F.3d 568, 571 (4th Cir. 1994)).
22. *TD* Bank, 928 F.3d at 277.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *TD Bank*, 928 F.3d at 278.
30. *Id.*
31. *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).
32. *Ferring Pharms., Inc. v. Watson Pharms., Inc.*, 765 F.3d 205 (3d Cir. 2014).
33. *TD Bank*, 928 F.3d at 279.
34. *Id.* at 280 (quoting *Flexible Lifeline Sys. v. Precision Lift, Inc.*, 654 F.3d 989, 1000 (9th Cir. 2011)).
35. *TD Bank*, 928 F.3d at 279.
36. *Id.* at 280-81.
37. *Id.* at 282.
38. *Id.* at 283.
39. *Id.* at 284.
40. *Id.* at 285.
41. *Id.* at 286.
42. *Id.*
43. *TD Bank*, 928 F. 3d at 286-87 (Cowen, J., dissenting in part).
44. *Id.* at 287 (Cowen, J., dissenting in part).
45. *Id.* at 276 n.9.
46. *Id.* at 289 (Cowen, J., dissenting in part).
47. *Id.* (Cowen, J., dissenting in part).
48. *Id.* (Cowen, J., dissenting in part).
49. *Id.* at 291 (Cowen, J., dissenting in part).

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Pay Up or Act Right: Extending the Right of Publicity to Online-Service Users Injured by Online Behavioral Advertising

By Michael Angelini

I. Introduction

Modern technology may have revolutionized the way people approach everyday problems and made traditionally inconvenient tasks less onerous, but its latent costs may prove too onerous to bear in the context of data mining. As internet-based services become more accessible around the world, "personally identifiable information" (PII), or "a persistent identifier that can be used to recognize a user over time and across different Web sites or online services,"[1] becomes easier to harvest for data collection firms like Facebook and Google. As the appropriation of user identities is a vital component of data collection firms' success, however, such a practice falls within the scope of the right of publicity. The right of publicity, or "the inherent right of every human being to control the commercial use of his or her identity," provides a cause of action for injured plaintiffs whose identities have been appropriated without their consent.[2] If expanded to encompass online behavioral advertising, the right of publicity would afford online service users meaningful opportunities to know and control how their data is harvested and used by commercial entities.

Data collection firms[3] covet personalized information because "collect[ing] detailed information about people's activities as they search, shop, and interact online, and… us[ing] complex data analyses to make predictions about individuals and their likely behavior"[4] radically enhances the quality of marketing services those organizations can offer to institutional clients. The personalized information harvested by these companies largely consists of "metadata,"[5] or "an electronic 'fingerprint' that automatically adds identifying characteristics" to internet use "that is not evident by just looking at" a webpage.[6] Metadata records when and where a user accesses the internet, who he/she/they is/are, how long each remained on any webpage, whether the user used particular services, and a wealth of other particularized information data collection firms can process to identify the user with near-perfect accuracy.[7] Through "online behavioral advertising,"[8] data collection firms can target individual consumers and market them particular goods or services based on their digital profiles.[9] Therefore, rather than having to aim their marketing initiatives at the general public and hope for the best (e.g., by putting up a billboard), businesses can now commission data collection firms to analyze online consumer profiles and funnel to users targeted advertisements tailored to their interests.[10]

While a solid majority of the internet-based services used to harvest personalized information are free, the commercial businesses who provide them certainly get their money's worth: online behavioral advertising generates hundreds of billions of dollars each year.[11] As technology develops and targeted marketing becomes more accurate, it is fair to assume that revenue will grow. Yet what do users get out of the meticulous dossiers commercial businesses have assembled about every aspect of their lives? Online behavioral advertising isn't possible without personalized information, and is only as useful as it is capable of identifying individual users and marketing them particular goods or services. The user's "identity," or "the distinguishing character or personality of" that user,[12] is thus a fundamental component of that enterprise.[13] Online behavioral advertising necessarily depends on "'appropriat[ing] the commercial value of a person's identity by using without consent the person's name, *likeness*, [and] *other indicia of identity* for purposes of trade,'"[14] and falls within the right of publicity's scope as a result.

In light of the fact that most of America's data collection firms are headquartered in California's Silicon Valley (or if not headquartered in Silicon Valley, have their principal places of business there),[15] and because "[t]he right of publicity is a creature of state law,"[16] the focus here will be on California's statutory and common law rights of publicity. Under California's *common law* right of publicity, a plaintiff must establish: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury."[17] Notably, even if a plaintiff fails to establish the fourth prong, California courts "routinely 'presume [injury] has been established if there is sufficient evidence to prove the first three elements.'"[18]

Similarly, under Civil Code § 3344, California's *statutory* right of publicity, plaintiffs have to establish the common law test's four elements as well as two additional prongs: (5) "a knowing use by the defendant"; and (6) "a direct connection between the alleged use and the com-

mercial purpose."[19] Although, under California's common law right of publicity, a defendant's use of someone's identity is actionable as long as such use was "to [the] defendant's advantage 'commercial or otherwise,'" under § 3344, "the use must be commercial."[20] Unlike New York's right-of-publicity framework, California's statutory right "exists for celebrity and non-celebrity plaintiffs alike";[21] and given that "courts have long recognized that a person's 'name, likeness, or other attribute of identity can have commercial value,' even if the individual is relatively obscure,"[22] it is reasonable to assume that California's common law right of publicity likewise exists for non-celebrity plaintiffs. However, regardless of which California right-of-publicity standard is applied in the context of online behavioral advertising, they will both produce the same effect: Data collection firms may be found to have misappropriated user identities to their commercial advantage, injuring those users.

II. The Right of Publicity in the Context of Online Behavioral Advertising

A. Use of Identity by Commercial Businesses

To meet the first element of California's right of publicity, a plaintiff must establish that the defendant used its identity and benefited from doing so (whether commercially or otherwise). As data collection firms have to ascertain the identities of online service users before they can sell them to clients, and since identifying and marketing those identities is an essential component of their enterprise, this prong should be somewhat easy to meet.

The Federal Trade Commission (FTC) "regard[s] data as 'personally identifiable,' and thus warranting privacy protections, when it can be *reasonably linked* to a particular person, computer, or device."[23] This type of information includes "a consumer's zip code, social media usage, [and] shopping history,"[24] browsing history, internet protocol (IP) address, visitation and usage timestamps, and a wide variety of other details users reveal when taking part in online activity.[25] "PII has the potential of becoming the *digital equivalent of a living person's identity*"[26] when aggregated, and since that "living person's identity" can provide important insights on his/her/their spending habits and consumer preferences, commercial businesses can exploit it when conducting their marketing initiatives. Data collection firms "deal quite specifically in information that identifies a person," which they harvest exhaustively to fill out gaps in consumer profiles, because the value of the information "is based on the accuracy and completeness with which the person is identified."[27] Although an individual fragment of PII, without more, may not be of much value, using PII to assemble and sell more comprehensive portraits of consumer identities to clients is a lucrative business.

Data collection firms do not just "use" identities, but also fundamentally rely on their appropriation. Selling user identities is the primary means through which they generate their revenue, and without those identities, they would have nothing to offer their clients. Accordingly, when a data collection firm harvests a "person's name, *likeness*, [and] *other indicia of identity*,"[28] uses such information to craft a consumer profile uniquely tied to that person, and sells it to clients, it is exploiting that person's identity.

While, in certain circumstances, the "newsworthiness" exception can immunize a defendant's unauthorized use of someone's identity for a commercial purpose, that defense's requirements are probably difficult to meet in the context of online behavioral advertising. The newsworthiness exception "tracks the constitutional right to freedom of speech under the First Amendment" and protects "'the publication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.'"[29] However, this defense only protects the "publication or reporting of newsworthy items" that are matters "of 'public interest,'"[30] and would not extend to circumstances in which user identities are appropriated through online behavioral advertising.

If the firms that assemble online consumer profiles wanted to use them as a mechanism for informing the public, they would, at the very least, make them publicly available. However, online consumer profiles are only made available to institutional clients,[31] who specifically use them to *market goods and services more effectively* to the public and not as a means of *informing* the public. Moreover, when news publications like *The New York Times* report on matters of public interest, (1) their journalists gather information through real-world observations and documentary evidence, not algorithmic groupings of PII; and (2) their primary interest in doing so is unrelated to marketing goods or services to readers, which is, at most, just a peripheral means of bankrolling their journalistic efforts through ad revenues.[32] Since consumer profiles are, in essence, private ledgers assembled exclusively for sale and without any intention of disseminating information to the public, their appropriation would not be covered by the right of publicity's newsworthiness exception.

B. Data Collection Firms' Appropriation of Names and Likenesses to Their Commercial Advantage

Since the overwhelming majority of any data collection firm's revenue depends on using aggregated PII to accurately identify individuals and their preferences, which they market to clients in the form of comprehensive consumer profiles, such firms are appropriating individuals' "name[s], likeness[es], [and] other indicia of identity." Further, with consumer profiles generating billions of dollars each year for the companies who compile and sell them,[33] appropriating names and likenesses is certainly to their advantage. Acknowledging the direct connection between those massive profits and big data firms' misappropriation of consumer identities, this prong should not be too hard to meet, either.

Notwithstanding an absence of case law on point, a number of holdings concerning similar misappropriations of identity suggest that the right of publicity readily extends to aggregated PII. For instance, in *O'Bannon v. NCAA*, a college basketball player sued the National Collegiate Athletic Association (NCAA) (which prohibited student athletes from receiving compensation for their names, images, and likenesses) for antitrust violations under the Sherman Act, 15 U.S.C. § 1, after coming across his digital avatar in a college basketball videogame.[34] Even though the plaintiff in *O'Bannon* brought his claim under the Sherman Act instead of the right of publicity, this case is important for right-of-publicity purposes because it suggests that creating someone's digital avatar and selling it without his/her/their consent is a misappropriation of the individual's identity.[35] Likewise, the holding in *Keller v. Elec. Arts Inc. (In re NCAA Student-Athlete Name & Likeness Licensing Litig.)*,[36] a class-action suit brought against a video game developer for misappropriating the likenesses of college basketball players by including them in a video game without their consent, also suggests that likenesses can be appropriated by incorporating them into a digital portrait and using that portrait to sell goods or services. Notably, the defendant in *Keller* "did not contest… that Keller ha[d] stated a right-of-publicity claim under California common and statutory law,"[37] indicating that using someone's digital portrait for commercial purposes and without their permission may presumptively violate California's right of publicity.

As when a video game publisher includes a basketball player's digital avatar in a videogame to boost sales, a data collection firm appropriates someone's identity whenever it assembles a comprehensive consumer profile using that person's PII and sells it to clients. While traditionally, the right of publicity's application was limited to cases involving celebrity plaintiffs whose *fame* had been appropriated, "advertisers' ability to conduct targeted marketing has now made [online behavioral advertising] a valuable marketing tool"[38] that can be used to exploit the identities of people without any fame or notoriety. Were it profitable to exploit non-celebrity identities when the right of publicity was first promulgated, commercial businesses probably would have done so. However, online behavioral advertising has fundamentally changed the way businesses market their products to consumers, and to account for this change, courts will not "impose a higher pleading standard on non-celebrities than on celebrities"[39] when evaluating right-of-publicity claims. Considering that, *now*, the appropriation of non-celebrity identities is a lucrative enterprise, it makes sense to extend those identities protection through the right of publicity.

Although another defense, the "incidental use" exception, can shield defendants from right-of-publicity liability in certain circumstances, it probably will not be of much help for defendants in the context of online behavioral advertising. Under the incidental use exception, a plaintiff's identity is not considered to have been appropriated "where 'it is published for purposes other than taking advantage of his reputation, prestige, *or other value associated with him*.'"[40] The factors courts use to make this determination include: "(1) whether the use has a unique quality or value that would result in commercial profit to the defendant, (2) whether the use contributes something of significance, (3) the relationship between the reference to the plaintiff and the purpose and subject of the work, and (4) the duration, prominence or repetition of the likeness relative to the rest of the publication."[41]

As applied to online behavioral advertising, these factors should be somewhat easy to satisfy: (1) Online behavioral advertising generates billions of dollars in revenue each year, and the unique quality of individualized consumer profiles is what makes it so valuable. (2) Big data's use of consumer identities has revolutionized the marketing field, and has made it possible for businesses to conduct their marketing initiatives with much more effectiveness and efficiency than they could using traditional methods. Having radically enhanced the precision with which commercial entities can target specific consumers with their marketing initiatives, such use contributes "something of [massive] significance" to online behavioral advertising.[42] (3) Since, without individualized consumer profiles, data collection firms would have nothing to offer their clients, appropriating user identities is both the primary purpose and exclusive subject of their business. Finally, (4) because individualized consumer profiles are created by aggregating separate pieces of information about a user's identity, every component of such a profile would necessarily involve the user's identity.[43]

"As when a video game publisher includes a basketball player's digital avatar in a videogame to boost sales, a data collection firm appropriates someone's identity whenever it assembles a comprehensive consumer profile using that person's PII and sells it to clients."

As a trillion-dollar industry,[44] online behavioral advertising provides extraordinary rewards to the companies who utilize it, but affords few benefits to users whose identities are appropriated and sold in the process of raking in that mountain of cash. Considering that every passenger car in big data's gravy train is occupied by someone's appropriated likeness, the misappropriation of user identities is a fundamental component of online behavioral advertising.

C. Appropriation of Identity without Consent

Although data collection firms, when fending off right-of-publicity claims, often brandish terms of service (TOS) or terms of use agreements as evidence of plaintiffs' consent to having their identities commercially appropriated, there is *very little* reason to believe that users have actually consented to these agreements or their related privacy policies. As a matter of everyday experience, when was the last time anyone read a TOS agreement or privacy policy in its entirety, or even at all?

A TOS agreement is essentially a contract that users have to enter into before they can use internet-based services or software programs, and a privacy policy is a "written description posted on a company's Web site explaining how the company applies specific fair information practices to the collection, use, storage, and dissemination of personal information provided by visitors."[45] Other than the people charged with drafting them, *no one* reads TOS agreements or privacy policies in their entirety, and very few people read them at all.[46] This reluctance to waste thousands of hours of one's life scrutinizing the minutia of every TOS agreement and privacy policy encountered is shared by most Americans for two reasons: (1) TOS agreements are drafted in favor of consumer confusion and filled with technical, legalistic language, making them remarkably boring reads;[47] and (2) even if someone had the patience and resolve to scrutinize every TOS agreement and privacy policy a user encounters, "[t]he average user would have to spend between *181 and 304 hours* each year reading privacy policies."[48] To put these numbers into perspective, because I have been using internet-based services for the past 11 years, I was apparently supposed to have spent anywhere between 1,991 and 3,344 hours (i.e., between 83 and 139 full 24-hour cycles) *just reading privacy policies*.

Even if I had bothered to waste between 1,991 and 3,344 hours of my life drudging through every privacy policy I came across, and even if I had spent additional time scrutinizing the particulars of every TOS agreement I encountered, what material benefits would that provide for me? TOS agreements and privacy policies are non-negotiable and their terms cannot be varied or erased by users, so if I disagree with a service's terms, all I can do to avoid being bound by those terms is refuse to use the service. This is because, like all contracts of adhesion, TOS agreements and privacy policies only include "terms [that] are dictated by one contracting party to another who has no voice in its formulation,"[49] and are exclusively offered to users on "a 'take it or leave it' basis."[50] In fact, "contracts entered into over the internet are the epitome of take-it-or-leave-it" offers "that allow for no negotiation."[51] Inasmuch as "there is no possibility of negotiating" and "using popular websites to procure goods or services" is generally not considered a legal risk-intensive activity, "there is no incentive to even read the terms that govern" online services.[52] As such, poring over a TOS agreement or privacy policy—just to find out that, like almost *every other* agreement of its kind, one either has to consent to the commercial appropriation of one's identity or refuse to use the service altogether—seems less like consumer diligence and more like a Sisyphean nightmare.

With that in mind, a user's general "consent" to an online service's terms does not necessarily establish consent to each term, let alone consent to comprehensive monitoring so that information about the user can be harvested and sold at will. This is especially the case when a minor agrees to an online service's terms, as minors lack capacity and cannot provide the consent required to enter into contractual agreements. Although contracts entered into with minors are not automatically void as a matter of law, they are *voidable*, and can be disaffirmed when a minor party reaches the age of majority.[53] Considering that adolescents make up around 13% of the United States population,[54] and that "95% of teens now report they have a smartphone or access to one,"[55] can they all disaffirm any TOS agreements or privacy policies they agreed to before reaching the age of majority? If so, would not that also apply to any adults who entered into similar agreements before reaching the age of majority? If that is the case, a user's ostensible consent may be a much less viable defense to right of publicity claims than data collection firms make it out to be.

"TOS agreements and privacy policies are non-negotiable and their terms cannot be varied or erased by users, so if I disagree with a service's terms, all I can do to avoid being bound by those terms is refuse to use the service."

These observations were echoed in several right-of-publicity cases brought in the Northern District of California that concerned two of Facebook's features (*i.e.*, "Friend Finder" and "Sponsored Stories") and one of LinkedIn's (i.e., promotional emails sent to users' contacts). More specifically, in *Cohen v. Facebook Inc. (Cohen I)*, the court found that the plaintiffs had not consented to Facebook's "Friend Finder" service[56] because "[n]othing in the provisions of the Terms documents… constitutes a clear consent by users to have their name or profile picture shared in a manner that discloses what services on Facebook they have utilized…."[57] Similarly, in *Fraley v. Facebook, Inc.*, which involved Facebook's "Shared Stories" feature,[58] the court followed *Cohen I* in concluding that "even if [Facebook's privacy policy] can be broadly construed to encompass Sponsored Stories," plaintiffs had stated a plausible claim that "such 'consent' was fraudulently obtained and thus not knowing and willful."[59] In *Perkins v. LinkedIn Corp. (Perkins I)*, which dealt with LinkedIn's practice of sending endorsement

emails through user email accounts for purposes of expanding its userbase, the court determined that "[n]othing in LinkedIn's disclosures alerts users to the possibility that their contacts will receive not just one invitation, but three."[60]

Significantly, however, the *Perkins I* court also held that the plaintiffs had consented to LinkedIn's use of a *single* endorsement email (as opposed to more than one) because its disclosures about such use were sufficiently obvious: "The disclosure explicitly states that LinkedIn intends to send an invitation to the email addresses that remain selected."[61] On the other hand, it was also "entirely plausible that a reasonable user would have thought that by agreeing to LinkedIn's invitation… the user authorized LinkedIn to send only one invitation and that further emails would require further authorizations."[62] As a result, the court held that the plaintiffs had not automatically agreed to LinkedIn's use of more than one endorsement email simply by virtue of having consented to the first such email.

What makes *Perkins I* especially important in the right-of-publicity context is that its holding suggests that users are not necessarily bound by every clause in a terms-of-service agreement or privacy policy, and that inconspicuous terms are much less likely to bind users than obvious ones. Given that LinkedIn's disclosures were conspicuous, colloquial, one-line sentences prominently displayed on its webpages requesting user consent to its endorsement emails[63]—and that the consent furnished by the plaintiffs' agreement to those disclosures was *still* limited by the court—it's reasonable to assume that less conspicuous disclosures will not automatically bind users to a service provider's terms. However ostensible a user's "consent" to a service provider's terms may be, the overwhelming majority of users haven't consented to the commercial exploitation of their identities. As a consequence, the third prong of California's right of publicity, "lack of consent," should also be somewhat easy to establish for claimants.

D. Resulting Injury

Data collection firms often respond to right-of-publicity claims with a motion to dismiss for lack of standing, arguing that plaintiffs have not "suffered sufficient injury to satisfy the 'case or controversy' requirement of Article III of the U.S. Constitution."[64] To satisfy Article III's standing requirements, a plaintiff must "allege: (1) an injury-in-fact that is concrete and particularized, as well as actual or imminent; (2) that the injury is fairly traceable to the challenged action of the defendant; and (3) that the injury is redressable by a favorable ruling."[65] Fortunately for plaintiffs bringing right-of-publicity claims against data collection firms, recent events like the Cambridge Analytica scandal suggest that Article III standing requirements are readily met in this context.[66]

Online behavioral advertising may not harm users in a traditional sense because it primarily causes "injury to the feelings" without damaging "the [plaintiff's] property, business, [or] pecuniary interest,"[67] and admittedly, it's difficult to quantify the damages plaintiffs have suffered from data mining since they're usually unaware of who is conducting it or when it's occurring.[68] Be that as it may, "this type of injury, using an individual's name for personalized marketing purposes, is precisely the type of harm that California's common law right of publicity is geared toward preventing."[69] And with millions of user identities in their repertoires[70] and billion-dollar revenues in their bank accounts, data collection firms can't seriously argue that "the numerosity of [their] potential offenses or the alleged unimportance of any one individual" relieves them of liability.[71]

Moreover, modern data collection practices also readily establish the two additional prongs of California's statutory right of publicity, Cal. Civ. Code § 3344: (5) "a knowing use by the defendant"; and (6) "a direct connection between the alleged use and the commercial purpose,"[72] the latter of which overlaps with Article III's second prong. Data collection firms necessarily understand that they are harvesting user data, aggregating that data through algorithmic grouping, and selling the resultant consumer profiles for profit—that is, unless there's reason to believe Facebook doesn't understand why those billions keep hitting its account every month. Similarly, there's a direct relationship between the appropriation of user identities and data collection firms' commercial purpose, which, in view of the fact that appropriating user identities is their *only* commercial purpose, could be considered one in the same.

As such, plaintiffs who bring right-of-publicity claims against big data firms for appropriating their identities may have access to § 3344's "minimum statutory" damages of $750 if successful,[73] which was "aimed at compensating [no]thing other than mental harm."[74] While not much of a payout, § 3344's minimum statutory damages provision is significant because it provides a legislative remedy for plaintiffs who can't otherwise meet Article III's injury-in-fact requirement, and "was in fact meant to solve the 'proof problems' associated with non-celebrity claims of 'mental suffering.'"[75] Article III standing can "exist solely by virtue of statutes creating legal rights, the invasion of which creates standing,"[76] and through its enactment of § 3344(a), "the Legislature provided a practical remedy for a non-celebrity plaintiff whose damages are difficult to prove and who suffers primarily mental harm from the commercial misappropriation of his or her" identity.[77] While others may argue that users aren't harmed by online behavioral advertising (or that even if they are harmed, their injuries are too speculative to meet Article III requirements),[78] the California legislature says otherwise, and courts applying California law are bound by that determination. So, as long as a plaintiff can establish § 3344's two additional right-of-publicity

prongs, it will be able to meet Article III's injury-in-fact requirement.

Even if a plaintiff cannot meet § 3344's requirements, courts "routinely 'presume injury has been established if there is sufficient evidence to prove the first three elements'" of California's *common law* right of publicity.[79] In light of (1) big data's use of consumer identities, (2) its appropriation of users' names or likenesses to its commercial advantage, and (3) evidence suggesting that users have not actually consented to online behavioral advertising, a plaintiff may not even have to establish that it suffered any harm to prevail on its right-of-publicity claim against a data collection firm. Since the right of publicity specifically addresses a harm that "impairs the mental peace and comfort of the person," and that "may cause suffering much more acute than that caused by a bodily injury,"[80] it should not have to.

Furthermore, however difficult it may be for plaintiffs to assess the damages they have suffered as a result of online behavioral monitoring, the extension of right-of-publicity safeguards to plaintiffs whose identities have been misappropriated would not concern monetary loss. True, users rarely (if ever) know which entity is harvesting their PII, when their PII is being harvested, to whom their PII has been sold, or how many businesses are in possession of their PII.[81] Even if a plaintiff could assess the actual damages it suffered from online behavioral advertising, those damages will likely be too low to justify bringing right-of-publicity claims against data collection firms, since their revenues are often spread across millions of users. On the other hand, if conceptualized as more of an equitable remedy than a legal one, the right of publicity would afford plaintiffs a pragmatic means of enforcing their "inherent right… to control the commercial use of [their] identit[ies]."[82] If statutory minimum damages are made available to millions of online-service users, data collection firms would have a *strong* economic incentive to seek their unambiguous consent before appropriating their identities. By enforcing their right of publicity against the "injury to the feelings"[83] they have suffered from online behavioral advertising, plaintiffs will be able to manage how their data is harvested and sold online.[84] Consequently, the injuries online service users have suffered are "redressable by a favorable ruling."[85]

III. Conclusion

Through its enactment of Cal. Civ. Code § 3344, California's legislature furnished plaintiffs with a statutory remedy for the misappropriation of their identities. This statutory remedy readily extends to online behavioral advertising, as does its common law counterpart. In light of its nationwide application through California's jurisdiction over data collection firms and those firms' "minimum contacts"[86] with every state (and most countries),[87] extending right of publicity protections to PII and online behavioral advertising would afford Americans beyond the state of California the power to better manage how their identities are commercially appropriated online.

With that in mind, (1) data collection firms use online service users' identities when conducting online behavioral advertising; (2) they appropriate users' names and likenesses to their advantage, as evidenced by the massive profits online behavioral advertising generates; (3) they conduct online behavioral advertising without having first obtained user consent to do so; and (4) users suffer "injury to the feelings"[88] as a consequence of having their identities misappropriated without any means to prevent such abuse.[89] Moreover, (5) unless data collection firms somehow have no idea where their billions of dollars are coming from, they "knowing[ly] use" digital identities when conducting online behavioral advertising;[90] and (6) because online behavioral advertising fundamentally relies on the appropriation of user identities, without which data collection firms would have nothing to offer their clients, there's "a direct connection between" data collection firms' misappropriation of user identities and "the[ir] commercial purpose."[91]

Accordingly, there's good reason to believe that the right of publicity's scope readily extends to online service users whose identities have been misappropriated through online behavioral advertising. Whatever consequences might result from the right of publicity's extension to online service users, at the very least, data collection firms will have to start negotiating arm's-length transactions with them whenever they want to appropriate their digital identities. Even if that is all users could get from an expanded right of publicity, they would still be in a substantially more advantageous bargaining position than they are now. The right of publicity may not operate as a panacea for online data misuse, but it is certainly a good start for mitigating it.

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46. *See* Caroline Cakebread, *You're not alone, no one reads terms of service agreements*, Business Insider, November 15, 2017, https://www.businessinsider.com/deloitte-study-91-percent-agree-terms-of-service-without-reading-2017-11 (citing Deloitte, Global mobile consumer survey: US edition (2018), https://www2.deloitte.com/us/en/pages/technology-media-and-telecommunications/articles/global-mobile-consumer-survey-us-edition.html?icid=formsubmit) ("… 91% of people consent to legal terms and services conditions without reading them. For younger people, ages 18-34 the rate is even higher with 97% agreeing to conditions before reading."); Debra Cassens Weiss, *Chief Justice Roberts Admits He Doesn't Read the Computer Fine Print*, American Bar Association, October 20, 2010, http://www.abajournal.com/news/article/chief_justice_roberts_admits_he_doesnt_read_the_computer_fine_print/.

47. *See* Erica Newland, *Disappearing Phone Booths: Privacy in the Digital Age*, Center for Democracy & Technology, May 2012, https://www.cdt.org/files/pdfs/Privacy-In-Digital-Age.pdf (last accessed April 13, 2019) (citing Aleecia M. McDonald & Lorrie Faith Cranor, *The Cost of Reading Privacy Policies*, I/S: A Journal of Law and Policy for the Information Society, http://lorrie.cranor.org/pubs/readingPolicyCost-authorDraft.pdf) (emphasis in original) ("[C]ompanies… write privacy policies that are simultaneously extraordinarily vague and extraordinarily long and legalistic. Many of them use a lot of words to say nothing.").

48. *Id*. (emphasis in original).

49. 1 Corbin on Contracts § 1.4 (2018), at fn. 3.

50. Edith R. Warkentine, *Beyond Unconscionability: The Case for Using 'Knowing Assent' as the Basis for Analyzing Unbargained-for Terms in Standard Form Contracts*, 31 Seattle U. L. Rev. 469, 493 (2008) (quoting Arthur Leff, *Contract as Thing*, 19 Am. U. L. Rev. 131, 147-148 (1970)).

51. 1 Corbin on Contracts § 1.4 (2018).

52. *Id.* at fn. 2.

53. *See General Motors Acceptance Corp. v. Stotsky*, 60 Misc. 2d 451, 455 (N.Y. Sup. Ct. 1969).

54. *See* Office of Adolescent Health, United States Department of Health & Human Services, *The Changing Face of America's Adolescents* (2018), https://www.hhs.gov/ash/oah/facts-and-stats/changing-face-of-americas-adolescents/index.html.

55. Monica Anderson & Jingjing Jiang, *Teens, Social Media & Technology 2018*, Pew Research Center, May 31, 2018, https://www.pewinternet.org/2018/05/31/teens-social-media-technology-2018/.

56. See *Cohen v. Facebook, Inc.* (*Cohen I*), 798 F. Supp. 2d 1090, 1092 (N.D. Cal. 2011) (describing Facebook's "Friend Finder" service, in which users can allow Facebook "access to email accounts the user may have on other services. The system then searches the contact information in those accounts… and presents the user with a list of other Facebook users he or she already knows, but who are not among his or her Facebook 'friends.'").

57. *Id.* at 1095.

58. See *Fraley*, *supra*, note 22, at 791 (describing Facebook's "Shared Stories" feature as "a form of paid advertisement that appears on a member's Facebook page and that generally consists of another Friend's name, profile picture, and an assertion that the person 'likes' the advertiser.").

59. *Id.* at 805-06.

60. *Perkins v. LinkedIn Corp.* (*Perkins I*), 53 F. Supp. 3d 1190, 1216 (N.D. Cal. 2014).

61. *Id.* at 1215.

62. *Id.* at 1216.

63. *Id.* at 1215 ("[B]efore the endorsement emails are sent, LinkedIn users must review a LinkedIn page that bears the title 'Why not invite some people?' and that states 'Stay in touch with your contacts who aren't on LinkedIn yet. Invite them to connect with you'….. [T]hese disclosures, which were contained on a page that allowed users to deselect some or all of the recipients or to 'Skip this step' altogether, combined with the fact that Plaintiffs explicitly chose 'Add to Network,' suggests that Plaintiffs have consented to [LinkedIn's] dissemination of endorsement emails….").

64. *Id.* at 1207.

65. *Id.*

66. *See* Nicholas Confessore, C*ambridge Analytica and Facebook: The Scandal and the Fallout So Far*, New York Times, April 4, 2018, https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html; Clyde Wayne Crews Jr., *Mark Zuckerberg Testimony: Will Washington Cast the First Stone at Facebook?*, Forbes, April 8, 2018, https://www.forbes.com/sites/waynecrews/2018/04/08/mark-zuckerberg-testimony-will-washington-cast-the-first-stone-at-facebook/#17ade4582f13.

67. *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1002 (2008).

68. *See In re Tel. Info. Needed for a Crim. Investigation*, 119 F. Supp. 3d 1011, 1029 (N.D. Cal. 2015) ("[C]ell phone users… will often not know the identity of the third party to which they are supposedly conveying information…. [A] cell phone user therefore has less reason to suspect that she is disclosing information to a third party, especially since she may not even know that the information is being disclosed or who the third party is.").

69. *Perkins I*, *supra*, note 60, at 1210-1211.

70. Or in the case of Facebook, 2.27 billion user identities. See Jason Abbruzzese, *Facebook hits 2.27 billion monthly active users as earnings stabilize*, NBC News, October 30, 2018, https://www.nbcnews.com/tech/tech-news/facebook-hits-2-27-billion-monthly-active-users-earnings-stabilize-n926391.

71. Keller, *supra*, note 30, at 1276, fn. 7.

72. Downing, *supra*, note 19, at 1001.

73. Cal. Civ. Code § 3344(a).

74. *Perkins v. LinkedIn Corp.* (*Perkins II*), 53 F. Supp. 3d 1222, 1244 (N.D. Cal. 2014).

75. *Id.*

76. *Fraley*, *supra*, note 22, at 796 (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (internal citations omitted)).

77. Miller, *supra*, note 67, at 1002.

78. *See In re iPhone Application Litig.*, No. 11-md-02250-LHK, 2011 U.S. Dist. LEXIS 106865, at *4 (N.D. Cal. Sept. 20, 2011); *La Court v. Specific Media, Inc.*, No. SACV-10-1256-GW (JCGx), 2011 U.S. Dist. LEXIS 50543, at *3-4 (CD. Cal. Apr. 28, 2011); *Low v. LinkedIn Corp.*,

No. 11-cv-01468-LHK, 2011 U.S. Dist. LEXIS 130840, at *4-6 (N.D. Cal. Nov. 11, 2011).

79. *Estate of Smith*, *supra*, note 18, at *26 (quoting Fraley, supra, note 22, at 807).

80. *Miller*, *supra*, note 67, at 1002. See also Perkins II, supra, note 74, at 1243.

81. *See In re Tel. Info.*, *supra*, note 68, at 1029.

82. *ETW Corp.*, *supra*, note 2, at 928.

83. *Miller*, *supra*, note 67, at 1002.

84. *See* Aaron Smith, D*eclining Majority of Online Adults Say the Internet Has Been Good for Society*, Pew Research Center, April 30, 2018, https://www.pewinternet.org/2018/04/30/declining-majority-of-online-adults-say-the-internet-has-been-good-for-society/; Aaron Smith, *Public Attitudes Toward Computer Algorithms*, Pew Research Center, November 16, 2018, https://www.pewinternet.org/2018/11/16/public-attitudes-toward-computer-algorithms/.

85. *Perkins I*, *supra*, note 60, at 1207.

86. *See Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 108-109 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)) (internal citations omitted) ("'[The] constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant purposefully established minimum contacts in the forum State.'"); *Id.* at 110 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) ("'[I]f the sale of a product… is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owners or to others.'").

87. *See* Social Media Fact Sheet, Pew Research Center, February 5, 2018, https://www.pewinternet.org/fact-sheet/social-media/ ("Today around seven-in-ten Americans use social media to connect with one another, engage with news content, share information and entertain themselves."); Mariel Soto Reyes, *Scandals and teen dropoff weren't enough to stop Facebook's growth*, Business Insider, April 26, 2019, https://www.businessinsider.com/facebook-grew-monthly-average-users-in-q1-2019-4 ("Overall, Facebook now boasts 2.7 billion monthly users across its family of apps. That includes Messenger, WhatsApp, Instagram, and core Facebook, with 2.1 billion of those people accessing one of the apps every day.").

88. *Miller*, *supra*, note 67, at 1002.

89. *See Abdul-Jabbar*, *supra*, note 17, at 413-14.

90. *Downing*, *supra*, note 19, at 1001.

91. *Id.*

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Joseph Salvo was the supervisor attorney for this article.

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Second Circuit Court of Appeals Reverses Work Made for Hire Decision

By Joel L. Hecker

The Second Circuit Court of Appeals had a recent occasion to discuss the issue of works made for hire. It was in the context of what constitutes a written instrument and when such an instrument needs to be signed in order to create a work made for hire. The case is *The Estate of Stanley Kauffmann v. Rochester Institute of Technology,* and the decision was rendered on August 1, 2019.[1] It reversed the District Court decision, which granted summary judgment to the defendant.

Statutory Basis of Work Made for Hire

Under the United States Copyright Act, the creator of a work is deemed to be the owner of the copyright[2] unless it is a "work made for hire,"[3] which is defined in the statute as:

> In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.[4]

A work made for hire is either:

> (1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.[5]

Facts

The facts were relatively straightforward as summarized in the Second Circuit Decision.

The parties to the litigation were the Estate of Stanley Kauffmann and Rochester Institute of Technology (RIT). Kauffmann, who was a film critic and died in 2013, wrote 44 articles that first appeared in *The New Republic* magazine (TNR) in 1999. Defendant published an anthology of Kauffmann's reviews after Kauffmann's death. The anthology, titled *The Millennial Critic: Stanley Kauffmann on Film: 1999-2009*,[6] included these 44 Kauffmann's film reviews from 1999.

It was edited by the third-party defendant Robert J. Cardullo (who is not a party to the appeal). Cardullo must have been some type of character, as the court described him as:

> a serial plagiarist of writings by Kauffmann and others, [who] misrepresented to RIT that Kauffmann's will had granted him sole authority to prepare an anthology of Kauffmann's film reviews. He went so far as to forge a letter purporting to be from counsel for the estate. In emails to counsel in this litigation, Cardullo admitted that he was 'fully guilty of all the charges against [him] and that RIT Press was duped by [him] in this affair.'[7]

The Circuit Court noted that Cardullo, who was served with the summons and complaint in Finland, never appeared in the action. As a result, the District Court entered a default judgment against him, making him liable to RIT for attorney's fees of $178,096.64. RIT will presumably never be able to collect any of it.

The Complaint

The Estate of Stanley Kauffmann is the successor owner of Kauffmann's copyrights. In 2015, it discovered the anthology and brought this action for copyright infringement, claiming that it was the owner of the material printed in the anthology.

During discovery, an agreement from 2004 was produced from TNR's files (the 2004 Agreement). The 2004 Agreement purported to establish that the material created by Kauffmann and published in the anthology were works made for hire, with RIT owning the copyrights thereto as the author of the articles.

Summary Judgment Motions Before the District Court

Based upon the 2004 Agreement, RIT moved for summary judgment, contending that the Estate was not the copyright owner of the articles because they had been cre-

ated as works made for hire. The Estate cross-moved for partial summary judgment on the issue of liability.

The District Court granted RIT's motion and denied the Estate's cross-motion, ruling that the 2004 Agreement "unambiguous[ly] memorialize[d] in writing a preexisting oral contract, evidently dating back to when Kauffmann started writing for *The New Republic* in 1958," and that Kauffmann's contributions to the magazine, including the 44 articles at issue in the litigation, were therefore created as works made for hire.[8] As a result, according to the District Court, Kauffmann never owned any copyrights in the articles and thus the Estate, as his successor in interest, could not maintain this copyright infringement action.

Circuit Court Reversal

As stated above, the first prong of the test as to what constitutes a work made for hire is whether the work is prepared by an employee within the scope of employment. As the parties to the litigation all agreed that Kauffmann was not an employee of TNR and that the articles were commissioned for use in a collective work, it was clear to the Circuit Court that Kauffmann was never an employee of TNR. Therefore, the litigation necessarily turned on whether the 2004 Agreement constituted a valid and enforceable written agreement under 17 U.S.C. Section 101(2).

The 44 Articles were written in 1999 and the 2004 Agreement was obviously entered into in 2004 or five years later. The question before the Circuit Court was the effect of this delay in memorializing the purported work for hire oral agreement on the copyright ownership claim.

Split Among Circuit Courts

There is a split in the circuit courts as to whether an agreement that establishes a work made for hire needs to be executed before the creation of the work or whether it can be executed afterwards. The Seventh and Ninth Circuit Courts have held to the effect that such an agreement must be executed before the creation of the work.[9]

The Second Circuit has previously ruled to the contrary, that in some circumstances a series of writings executed after the creation of the works at issue might satisfy the writing requirement of Section 101(2), citing to its 1995 *Playboy Enterprises, Inc. v. Dumas* decision.[10] The Circuit Court in this case found *Playboy* to be persuasive and therefore the better argument. Such writings, said the *Playboy* court, must confirm a prior agreement, either explicit or implicit, actually made before the creation of the work, even if the actual writing postdates it.

The facts in the *Playboy* case are relevant to an understanding of the *Kauffmann* Circuit Court decision. In *Playboy*, Patrick Nagel created paintings that were contributed to *Playboy* magazine. *Playboy* paid Nagel for each of the paintings by issuing a check made out to him after it received each particular painting from him. *Playboy* had two versions of legends stamped on the backs of the checks. Both versions included the words "BY ENDORSEMENT, PAYEE: acknowledges payment in full for services rendered on a work-made-for-hire basis in connection with the work named on the face of this check."[11]

Nagel was, by agreement between the parties (as was Kauffmann), not an employee of *Playboy* and therefore the question in that case was whether the legends satisfied the writing requirement of Section 101(2). The Second Circuit opinion in *Playboy* rejected an absolute rule that the requisite writing had to always be executed before the work was created since, according to the court, that would have thwarted Congress's goal of ensuring "predictability through advanced planning."[12]

The Second Circuit opinion in *Playboy* went on to indicate that a subsequent writing would be acceptable where there was "unanimous intent among all concerned that the work for hire doctrine would apply, notwithstanding that some of the paperwork remained not fully executed until after creation of the subject work."[13] In *Playboy*, Nagel endorsed all the checks bearing one or the other version of the legend. The *Playboy* court held that the first endorsement of the first check might not be evidence of a consent to a work for hire relationship, but that Nagel's subsequent and continuing endorsements created such a relationship.

The *Kauffmann* Circuit Court, in specifically accepting the *Playboy* decision, found that the five-year separation between creation of the articles in 1999 and execution of the 2004 Agreement was an insurmountable barrier to a finding of works made for hire. Specifically, the court said that the finding adopted by the District Court would risk endorsing a fiction of "two separate authors," which was specifically rejected in *Playboy*, referring to one period during the initial five-year interval before the 2004 Agreement was executed and another one for the time period thereafter. The court also mentioned that a work made for hire decision under these circumstances would render uncertain several aspects of the copyright in each article, such as its duration, renewal rights, and termination rights.[14]

Conclusion

In reliance upon the *Playboy* decision and its own interpretation of the facts, the Circuit Court concluded that the five-year period between the delivery of the articles and the 2004 Agreement was simply too long a period of time. Accordingly, it did not satisfy the statutory requirement of a work made for hire. Therefore, the District Court decision was reversed.

The Circuit Court did not opine as to how short (or long) a period would be required to constitute sufficient grounds for an acceptable work for hire written agree-

ment created after the fact, nor did it give any indication as to what factors would go into such a determination (except of course, that five years was too long). That decision was left to another day, another court, and another case.

Endnotes

1. 2nd Circuit Docket Number 18-2404-cv.
2. 17 U.S.C. § 201(a).
3. 17 U.S.C. § 201(b).
4. 17 U.S.C. § 201(b).
5. 17 U.S.C. § 101(2).
6. Circuit Court Opinion at page 3-4.
7. Circuit Court Opinion at page 5.
8. Circuit Court Opinion at page 5, citing to the District Court Opinion at *Estate of Kauffmann v. Rochester Institute of Technology*, No. 17-CV-6061, 2018 WL 3731445, at *3 (W.D.N.Y. Aug. 6, 2018).
9. *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 412-13 (7th Cir. 1992); *Gladwell Government Services, Inc. v. County of Marin*, 265 F. App'x 624, 626 (9th Cir. 2008). See also Goldstein on Copyright § 4.3.2.2 (3d ed. 2019) and Patry on Copyright § 5:49 (2019), which both comment favorably on these decisions.
10. *Playboy Enterprises, Inc. v. Dumas*, 53 F.3d 549, 558-59 (2d Cir. 1995). See also Nimmer on Copyright § 5.03[B][2][b] (2019) which comments favorably on the *Playboy* decision.
11. Circuit Court Opinion at page 8, citing to *Playboy supra*, 53 F.3d at 552-53.
12. Circuit Court Opinion at page 8, quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 750 (1989).
13. Circuit Court Opinion at page 8.
14. Circuit Court Opinion at page 8-9.

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Sports and Entertainment Immigration: New Rules, New Bodies, New Songs, Same Old Dance

By Michael Cataliotti

As is always the situation under the Trump administration, so much happens in so little time. So little of that is good and so much of it is bad or useless. Though objectively "bad" and/or "useless," the power of *alternative facts* and mind-numbingly simple catchphrases is undeniable. As a result, we will continue to do the only thing we can: We will talk and write about the harm that has been and continues to be done to our clients.

Therefore, in this installment of Sports and Entertainment Immigration, we will look at the new "public charge rule," evaluate the (potential) new staffing at the Department of Homeland Security (DHS) and U.S. Citizenship and Immigration Services (USCIS), take note of activities by Customs and Border Protection (CBP) and Immigration and Customs Enforcement (ICE), and conclude by reviewing the current state of immigration.

Who Is a Public Charge? Better Yet, Who Could, Maybe, Possibly, Might Become a Public Charge? What Does the Department of Homeland Security Say?

We had heard rumblings of DHS wanting to create a new means-test to determine which foreign nationals may pursue public assistance during their stay in the U.S. Then, we had the "Memorandum on Enforcing the Legal Responsibilities of Sponsors of Aliens" issued on May 23, 2019 (the Memorandum).[1] "The purpose of this memorandum is to direct relevant agencies to update or issue procedures, guidance, and regulations, as needed, to ensure that ineligible non-citizens do not receive means-tested public benefits, in better compliance with the law."[2] The Memorandum repeatedly refers to applicants for permanent residency (i.e., people trying to obtain their green cards). It does not make reference to other classes of foreign nationals, such as nonimmigrant workers (i.e., those in the U.S. under O, P, E, H-1B visas, and the like). Despite this, DHS's final rule "applies to applicants for admission, aliens seeking to adjust their status to that of lawful permanent residents from within the United States, and **aliens within the United States who hold a nonimmigrant visa and seek to extend their stay in the same nonimmigrant classification or to change their status to a different nonimmigrant classification**."[3]

To be clear: The Memorandum refers only to green card applicants who are sponsored by another individual, and DHS's final rule reads this as an opportunity to expand coverage more broadly; why expect any less?

On October 9, 2019, USCIS posted several new editions of necessary forms to its website, including Forms I-485 (Application for Permanent Residency), and I-129 (Petition for a Nonimmigrant Worker), as well as the brand new I-944 ("Declaration of Self-Sufficiency").[4]

It is the newcomer, Form I-944, that is DHS's new public charge fact sheet. Unsurprisingly, it reads like a loan application, requiring the following information that includes:

- The type(s) of asset(s) that the foreign national and/or the foreign national's sponsor holds and their value(s). These include checking accounts, savings accounts, retirement funds, real property, and any other assets;[5]
- Whether the foreign national has any mortgage(s), loans, credit card debt, liens, tax debts, and/or the like;[6]
- If the foreign national has a credit score in the U.S.;[7]
- Whether the foreign national has ever filed for bankruptcy;[8]
- If the foreign national has health insurance and, if so, whether she or he received an ACA tax credit, how much, what is her or his annual premium / deductible, and when does the policy terminate;[9]
- Whether the foreign national received any public benefits (i.e., Medicaid, social security, government-provided financial assistance);[10] and
- The foreign national's education history from high school and up with the types of degrees earned.[11]

Now, this is concerning for a variety of reasons: Who is going to be reviewing this information? Is the reviewer going to be the same person reviewing the foreign national's visa qualifications? Will there be specialized training pertaining to what does and does not indicate the likelihood of needing public assistance? What *does* indicate the likelihood of needing public assistance?

By this rationale, it could be argued that nearly any live performer—dancers, actors, comedians, and musi-

cians—and most other artists, writers, and the like, would qualify for the visa they seek based on experience, but not based on the "self-sufficiency" tests.

Further, although we do not yet have answers to all of these questions, we at least know that it will not be USCIS or any other body under DHS authority: On October 11, 2019, three courts—SDNY, the Northern District in California, and the Eastern District in Washington— "enjoined DHS from implementing and enforcing the final rule [. . .] and postponed the effective date of the final rule until" the cases have been resolved.[12]

Does Anyone Else Have Any Input? Oh, Hello, Department of State…

Nonetheless, though DHS will not be implementing its final charge rule any time soon, the Department of State (DoS)—the body that is responsible for issuing visas at the U.S. Embassies and Consulates worldwide—*is* going to be implementing and enforcing the rule. Nicole Narea at Vox explains: "There's also a companion rule at the State Department, introduced on October 10 and almost identical to the one at DHS that was blocked on Friday, that an agency spokesperson confirmed is still scheduled to go into effect October 15. If it stands, it affects a much broader population—about 13 million visa and green card applicants annually, [Doug] Rand[, a former White House official who worked on immigration policy in the Obama administration,] said."[13]

This certainly does not sound good, but what exactly does it mean? "That means that, barring any court orders in the next few days, immigrants can be denied new visas or green cards at consulates abroad under the Trump administration's 20-factor public charge test. The rollout of this could be messy, given that the State Department has yet to issue any guidance on how to implement the rule for its consular officers charged with evaluating applicants."[14]

Well, this is not ideal. Trying to fight a DoS decision is far more difficult and far worse than trying to fight DHS: direct communication is limited, appeals are nonexistent—the mechanism is a "Motion to Reconsider," a nice way of saying, "Please! C'mon!"—and all the while, the foreign national is suddenly and abruptly stuck outside of the U.S.

On October 14, 2019, Camilo Montoya-Galves reported that "The State Department public charge rule will take effect tomorrow [October 15, 2019]—but it won't be implemented until a new form is approved, per a StateDept official."[15] So it will take effect, but not be implemented? Correct: "So, it will not be implemented tomorrow, [October 15, 2019], per the official." This is welcome news, but if we look at the overarching work of the administration, this may be a matter of semantics: Even though the official rule is not being implemented, "The State Department last year expanded "public charge" considerations" used by consular officers to grant or reject visa applications.[16]

What is more:

> The White House budget office is also currently reviewing a proposed Justice Department regulation that would allow the U.S. to deport immigrants deemed a "public charge" under the new guidelines of the USCIS rule that was blocked on Friday.
>
> Earlier in the month, the administration announced that it is preparing to reject visa applications from immigrants the government determines will not be able to pay for health insurance or cover health care costs in the U.S. The new requirement is set to go into effect November 3."[17]

Unfortunately, we will simply have to wait and see what the DoS does *in practice*, but if the rash of administrative processing and increasingly longer wait times at U.S. embassies and consulates is any indication, it will not be pleasant.

"Boom, Clap, the Sound of My Heart! The Beat Goes On, and On, and On, and On and…." The Immigration Apprentice Continues!

Unsurprising to everyone, another "Acting" Administration official is out. We bid farewell to the Acting Secretary of DHS, Kevin McAleenan, after an arduous six months in which U.S. border crossings have decreased.[18] (Fun fact: U.S. border crossings have been decreasing for years.[19] That they have decreased during McAleenan's semester-long tenure does not mean that it is the direct result of his handiwork.[20])

However, as McAleenan has decided that he "wants to spend more time with his family and go to the private sector," we must wonder who will replace him. The name getting much coverage is Ken Cuccinelli. You may remember Cuccinelli as the individual we previously mentioned who was opposed by most for the position at USCIS—including by Mitch McConnell—but who was likely to take the USCIS role, anyhow—which he did—and that he would be significantly problematic—which he has been.

Nonetheless, Cuccinelli is most likely going to take the role of Acting Secretary for all of DHS, meaning that he will be responsible for overseeing CBP, USCIS, and ICE. As reported by Newsmax on October 3, 2019; "Sources within the Department of Homeland Security told Newsmax on Thursday they expect Acting DHS Secretary Kevin McAleenan to leave his position soon. […] The same sources agree the front-runner to replace him is Kenneth T. Cuccinelli, acting director of the Citizenship and Immigration Services Office (CIS)."[21]

Unexpectedly, this was not the case. As first reported by Politico, Trump upended the bookmakers and named Chad Wolf, who served as Chief of Staff to former DHS Secretary Nielsen, as undersecretary of the Department of Homeland Security.[22] The seemingly unexpected move

caused then-Acting Secretary McAleenan to stay on to at least November 7th. Why the three-card monte and musical chairs, confirming Wolf as "undersecretary", and keeping Secretary McAleenan later than he initially indicated? From the *Washington Post*:

> Wolf, the current acting DHS undersecretary for strategy, policy and plans, was nominated for that job in February but has not been confirmed. Senate Majority Leader Mitch McConnell (R-Ky.) aims to hold a vote for Wolf early next week for the undersecretary job, according to an administration official, a senior GOP aide and a congressional staffer monitoring the succession plan. They spoke on the condition of anonymity to describe personnel moves within the Trump administration.
>
> Once confirmed for the undersecretary role, Wolf could be placed in the top job at DHS, the people said, allowing the White House to install him through what essentially amounts to a bank shot.

Interesting strategy here; but still, why the complex maneuvering? As CNN reported:

> The White House scrambled to find a replacement for McAleenan, who was initially expected to step down at the end of October. The administration tried to elevate immigration hardliners Ken Cuccinelli and Mark Morgan, both of whom lead immigration agencies in an acting capacity. But the Justice Department's Office of Legal Counsel concluded that they were not eligible to succeed McAleenan because they had not served at least 90 days under the last Senate-confirmed Homeland Security secretary, Nielsen.
>
> The legal hurdles appeared to draw out the process for finding a new acting secretary.
>
> Cuccinelli has now been elevated to acting deputy secretary of Homeland Security, according to an internal memo sent by Wolf that was obtained by CNN.[23]

Well, it certainly looks like Cuccinelli is moving closer to serving as DHS Secretary, whether acting or otherwise; but who then is running USCIS?

Cuccinelli! As per the USCIS website, "In November 2019, Ken Cuccinelli was named by Acting Secretary Chad Wolf to serve as Senior Official Performing the Duties of Acting Deputy Secretary of the Department of Homeland Security. He continues to also serve as the acting director of U.S. Citizenship and Immigration Services."[24]

Is he though? We don't know with certainty how Cuccinelli manages it all, but some reporting from BuzzFeed News is helpful, "In his email to staff, Cuccinelli announced that Mark Koumans, the deputy director of the agency, would lead USCIS during the transition."[25] Well, there's that. So, then who is actually running USCIS? According to one USCIS official, "Wolf will delegate all immigration matters to Cuccinelli as acting deputy secretary, thereby giving him authority over all DHS immigration matters."[26]

This is all to say that Cuccinelli, a fervent and unabashed anti-immigrant hardliner, has an outsized influence over current immigration policy with seemingly little oversight from anywhere within DHS, the administration, and Congress, something that would indicate that the difficult days are not yet behind us. It also shows us that the administration has no signs of slowing down its attempts to circumvent Congress wherever, whenever, and however; time for more legal actions in the courts throughout 2020.

"Knock, Knock." "Who's There?" "Orange." "Orange, Who?" "Orange You Glad I Didn't Say 'Orange'?" No, That's Not Right.

It should come as no surprise to anyone acting as outside counsel, in-house counsel, employment attorneys or anyone handling employment matters for corporate clients, that DHS, through its enforcement arm that is ICE, has been conducting a significant number of inspections of employers' I-9s. As published by *The National Law Review* on July 30, 2019, ICE "has sent an unprecedented number of I-9 audits, called Notices of Inspection (NOIs), in the previous three weeks reportedly to more than 3,000 companies. At least another 3,000 are likely on the way since ICE has requested (and received) an additional $6.5 million to hire new 27 Junior Compliance Officers (JCOs), some of whom will be staffing four new HSI (Homeland Security Investigation) offices in Charlotte/Charleston, Kansas City, Las Vegas, and Nashville/Louisville." [27]

The current "Acting Director of ICE, Matt Albence, said the goal of the agency's surge 'is to pursue criminal prosecution against those businesses [whose] business model is based upon illegal employment.'"[28] We can respect and appreciate this.

"Large civil penalties can also be assessed for mistakes on the I-9, ranging from $220 to $2,292 per violation."[29] That is quite a large range, and depending on the size of the company, could cripple it over what may be a technical error, such as writing the wrong ID number, or using the incorrect form of identification, despite the individual worker having lawful authorization to work within the United States.

The article continues to indicate that in 2018, "there were 5,981 audits, up from 1,360 in 2017. This year, 3,282 audits were noticed in just three weeks." Clearly, this is a priority for ICE.

The industries impacted include "hospitality, agriculture, food processing, landscaping, and construction." This list is obviously inconclusive and presents the industries most commonly thought of by the public; of course, we will investigate people working repetitive, "low-skilled" jobs, they might say.

The reality, however, is that ICE is also largely looking at employers who hire individuals holding Optional Practical Training (OPT) employment authorization documents (EADs), as well as STEM-OPTs and their related extensions. Just as we have seen a barrage of attacks on foreign national students,[30] whether from China[31] or elsewhere, we have also seen more oversight of their employers. This does not appear to be the result of any particular instance of abuse or knowledge of widespread misfeasance within the OPT/STEM-OPT programs, but rather, appears to be a general attack on lawful immigration.

What ICE's activity means for us as practitioners is that we must be mindful to review how our corporate clients are verifying the accuracy of their employee's I-9 information. If one is unfamiliar with how to do this, there are tutorials on the Department of Labor website and elsewhere. One can also consult with most corporate immigration practitioners who will have some knowledgebase to do so.

The Harvard Student Who Was Denied Entry Into the United States; the Most Chilling of Situations.

As reported in the *New York Times*, "A 17-year-old Palestinian student set to start his freshman year at Harvard says he had his visa revoked and was sent back to Lebanon,"[32] The student recounts that after arriving at Logan International Airport in Boston, he was pulled aside (for secondary screening), at which time, "an immigration official questioned him about his religious practices and searched his phone and laptop for five hours,"[33]

The student went on to note something rather concerning: "After the five hours ended, she called me into a room, and she started screaming at me. She said that she found people posting political points of view that oppose the U.S. on my friend[s] list."[34]

CBP has not publicly stated its rationale for refusing the student entrance to the United States, other than to release a statement that read: "Applicants must demonstrate they are admissible into the U.S. by overcoming all grounds of inadmissibility including health-related grounds, criminality, security reasons, public charge, labor certification, illegal entrants and immigration violations, documentation requirements, and miscellaneous grounds." The statement continued: "This individual was deemed inadmissible to the United States based on information discovered during the CBP inspection."[35]

The student's position was that "I responded that I have no business with such posts and that I didn't like, [s] hare or comment on them and told her that I shouldn't be held responsible for what others post. […] I have no single post on my timeline discussing politics."[36]

Even if we disbelieve the student's story, and instead believe that he was posting anti-Trump or anti-U.S.-policy memes, language or the like, his denial is still a petrifying thought. As the Senior Director of the Free Expansion Programs at PEN America, Summer Lopez, said to in a statement to *Time*, "The idea that Ajjawi should be prevented from taking his place at Harvard because of his own political speech would be alarming; that he should be denied this opportunity based on the speech of others is downright lawless."[37]

Treating this story as a cautionary tale, and going back to our previous discussions about DHS and DoS looking into individuals' social media platforms and posts, it is best to incessantly remind individuals to be careful about what they post. I wholeheartedly disagree with the policy and practice being instituted by DHS and DoS, but that does not mean that I can force them to issue a visa, particularly in a timely fashion, so that my client can enter the U.S. as scheduled to perform.[38]

The ever-watchful eyes of DHS and DoS appear to be expanding their line of sight, so people who post whatever they wish should be prepared or mindful of what may happen.

Conclusions? Where We're Going, We Don't Need Conclusions![39]

There is much going on in the world of immigration, but these are the fundamental aspects that are impacting us at this time.

I have not mentioned other topics that we have been discussing, because, well, nothing has changed: The invisible wall is still ever present, the unwritten processes and procedures in place are still changing from time to time without warning,[40] the H-1B is still an unpleasant visa for most of our clients (and anyone daring to file it), Requests For Evidences are ever present, and still, there is barely any word about the harm that all of this is causing the various entertainment, arts, and sports industries—and I include the sciences, academia, and business, as well. We have seen a few articles, such as an opinion piece in *The Hill,* writing about a Mexican group that was denied a visa as presenting culturally significant works (presumably, a P-3 or Q),[41] but generally, little is mentioned of the difficult hurdles facing folks pursuing employment-based visas.

So, while so much continues to change, we have become accustomed to these occurrences. The key points to remember are that these changes will not stop any time soon, that the management of, and policies and procedures in place at both the DHS and USCIS (including CBP and ICE), are likely to become even more restrictive, and that the public charge rule is not in effect within the United States, but it is highly likely to be implemented outside of the 50 states at U.S. embassies and consulates.

As with most things, change is inevitable. In this situation, the tide of America's immigration policies and procedures will turn. How long it will take us to reach a stable, functional, beneficial, and healthy place is anyone's guess. As a wise man once said, "Tide goes in. Tide goes out. You can't explain that."[42] I suppose not.

Endnotes

1. https://www.whitehouse.gov/presidential-actions/memorandum-enforcing-legal-responsibilities-sponsors-aliens.
2. *Id*. at Section 1.
3. https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility. (Emphasis added.)
4. *Id.* It is important to note that Form I-944 itself has since been taken down by USCIS. Accordingly, references herein related to the Form will be made to this page, the instructions that are available online, and a copy of the Form.
5. https://www.aila.org/File/Related/18092430c.pdf draft instructions; copy of draft form available at http://lallegal.com/wp-content/uploads/2018/10/I944-FRM-PubCharge-60Day-09262018.pdf.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.
10. *Id*.
11. *Id*.
12. https://www.uscis.gov/legal-resources/final-rule-public-charge-ground-inadmissibility.
13. https://www.vox.com/policy-and-politics/2019/10/11/20899253/trump-public-charge-immigrants-welfare-benefits-court.
14. *Id*.
15. https://twitter.com/camiloreports/status/1183922125675122688.
16. https://www.cbsnews.com/news/public-charge-rule-judge-blocks-attempt-to-deny-green-cards-and-visas-to-low-income-immigrants.
17. *Id*.
18. https://www.npr.org/2019/10/11/736030516/acting-homeland-security-secretary-kevin-mcaleenan-is-out.
19. https://www.nytimes.com/2018/06/20/us/politics/fact-check-trump-border-crossings-declining-html.
20. From Nicole Narea at Vox, "He struck international deals that would force migrants seeking asylum to return to Central American countries struggling with high levels of crime and violence. He implemented the administration's Remain in Mexico policy—under which over 50,000 migrants have been sent back to Mexico while they await decisions on their asylum applications—across the entire southern border.

    He rolled out the so-called public charge rule, which was blocked by courts but would make it more difficult for low-income immigrants to legally enter and settle in the U.S. He also ended the administration's practice of releasing immigrant families from detention into the U..S, which Trump has called "catch and release," instead sending them to Mexico," https://www.vox.com/policy-and-politics/2019/10/11/20905033/acting-dhs-secretary-kevin-mcaleenan-resigned-border.
21. https://www.newsmax.com/john-gizzi/kevin-mcaleenan-dhs-ken-cuccinelli-zero-tolerance/2019/10/03/id/935583/. I note here that while Newsmax is not an impartial source of information, it does have significant relationships and influence within the current administration. As such, an article like this, whether factual or not, is persuasive. Likewise, there are many other instances of quotes being attributed to "allies" of the administration wanting Cuccinelli in office. *See* https://www.npr.org/2019/10/11/736030516/acting-homeland-security-secretary-kevin-mcaleenan-is-out, quoting a "hard-line immigration enforcement ally" of the Administration; *see also* https://www.foxnews.com/politics/ken-cuccinnelli-floated-as-likely-next-dhs-chief-after-mcaleenan-to-step-down, writing, "A former senior DHS official with close ties to the administration told Fox News Friday that Cuccinelli is on the top of Trump's list to be the next acting secretary."
22. https://www.politico.com/news/2019/10/31/chad-wolf-acting-dhs-secretary-063363.
23. https://www.cnn.com/2019/11/13/politics/chad-wolf-acting-dhs-secretary/index.html.
24. https://www.uscis.gov/about-us/leadership/kenneth-t-ken-cuccinelli-ii-acting-director-uscis.
25. https://www.buzzfeednews.com/article/hamedaleaziz/ken-cuccinelli-dhs-deputy-uscis-immigration-trump.
26. *Id.*
27. https://www.natlawreview.com/article/dhs-high-pressure-activities-continue.
28. *Id.*
29. *Id*.
30. https://time.com/5663283/harvard-student-visa-ismail-ajjawi-lebanon.
31. https://www.ft.com/content/fc413158-c5f1-11e8-82bf-ab93d0a9b321.
32. https://time.com/5663283/harvard-student-visa-ismail-ajjawi-lebanon.
33. *Id*.
34. *Id*.
35. *Id*.
36. *Id*.
37. *Supra,* note 32.
38. This aside, I would prefer to see everyone post whatever they wished, such that DHS and/or DoS were completely overwhelmed with their policy. A peaceful, yet ongoing and exacting protest, if you will.
39. For those unaware or who cannot recall, this is a quote from Doc Brown in *Back to the Future*.
40. What I mean by this is the USCIS Officer's interpretation of evidence demonstrating cultural significance, extraordinary ability, exceptional ability, or any other requirement for a visa, as well as the standard that she/he applies when reviewing that evidence.
41. https://thehill.com/opinion/immigration/463851-how-trumps-isolationist-policies-harm-american-arts-and-culture.
42. Bill O'Reilly, Fox News Channel: The O'Reilly Factor, January 4, 2011.

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Resolution Alley
Three Lessons From an Unsuccessful Mediation

By Theo Cheng

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

In March 2019, 28 women's soccer national team players commenced a federal court action in Los Angeles against the United States Soccer Federation (USSF), the federation which governs soccer in the United States and runs the country's national teams. In the lawsuit, the players alleged that the federation had discriminated against the women in their pay, medical treatment, and other working conditions, much of which are dictated by a collective bargaining agreement entered into in 2017. The underlying dispute between USSF and the women's team harkens back to 2016 when five players filed a wage discrimination complaint with the Equal Employment Opportunity Commission, alleging that USSF had deprived them of, among other things, pay, bonuses, appearance fees, and per diems. Due to a lack of progress on that complaint, the larger group of players then commenced this lawsuit in early 2019.[1]

In June 2019, it was reported that, after the start of the FIFA Women's World Cup tournament, the lawyers for the women players had reached out to USSF's lawyers to ask if the federation would be interested in engaging in a mediation process over the players' gender discrimination claims.[2] As the World Cup unfolded and the women's team won their fourth championship on July 7th, the demand for "equal pay," in particular, became a rallying cry in the court of public opinion and in the media.[3] Congress also weighed in, with Senator Joe Manchin of West Virginia even introducing a bill that would withhold federal funding for the 2026 Men's World Cup (which will be held in the U.S.) until the men's and women's national soccer teams received equal pay. Some sponsors of USSF and the World Cup also supported the women players.[4] For example, Nike released a commercial celebrating the championship and female empowerment, implicitly endorsing the players; Visa announced a five-year sponsorship agreement, contractually requiring that more than half of the money be spent to support women's soccer; and Secret introduced a commercial (coincidentally 10 days after the players had commenced the lawsuit) supporting equal pay and featuring one of the named plaintiff-players. Indeed, one week after the team had won the championship, Secret also bought a full-page ad in *The New York Times*, announcing that it would donate $529,000 – $23,000 for each of the 23 players on the roster—to the national team's players association, criticizing USSF by urging it to be on "the right side of history."

For its part, USSF remained relatively quiet about the dispute leading up to the World Cup, opting to focus its resources on the tournament and celebrate the women's team's victory, while also hiring lobbyists to defend its reputation on Capitol Hill.[5] However, on July 29th, USSF took to the offense, and its president issued an open letter outlining the federation's positions and detailing its financial commitment to the women's national team program.[6] Not surprisingly, the letter was poorly received by the players.

Ultimately, the parties reportedly did agree to schedule a multi-day mediation in New York in mid-August.[7] Unfortunately, the parties reached an impasse, and they now appear headed toward a trial, which is likely to take place sometime in 2020. In a public statement, a spokeswoman for the players stated, "We entered this week's mediation with representatives of U.S.S.F. full of hope. Today we must conclude these meetings sorely disappointed in the federation's determination to perpetuate fundamentally discriminatory workplace conditions and behavior. It is clear that U.S.S.F., including its board of directors and President Carlos Cordeiro, fully intend to continue to compensate women players less than men. They will not succeed." USSF also issued a statement, stating: "We have said numerous times that our goal is to find a resolution, and during mediation we had hoped we would be able to address the issues in a respectful manner and reach an agreement. Unfortunately, instead of allowing mediation to proceed in a considerate manner, plaintiffs' counsel took an aggressive and ultimately unproductive approach that follows months of presenting misleading information to the public in an effort to perpetuate confusion."

Notwithstanding the lost opportunity to resolve this long-running dispute, and although (naturally) the details are shrouded under the veil of mediation confidentiality, there are at least three lessons worth noting.

Lesson #1: There Is No Weakness in Suggesting Mediation

There is an unhelpful notion being perpetuated by advocates that the party suggesting mediation as a mechanism for resolving a dispute somehow lacks confidence it its positions or otherwise looks weak. Although there is no question that those scenarios are distinct possibilities in any given dispute, more often than not much more is driving the decision to engage in a mediation process. For example, while it was the players who approached USSF to pursue a possible mediation, there does not seem to be any apparent reason to believe that the players somehow lost confidence in their legal arguments or think they are somehow less persuasive. A more obvious reason for suggesting mediation arises from the fact that the dispute between them and the federation has been pending for at least three years, and that they undoubtedly feel frustration with the level of tension that these legal proceedings have had on their relationship with USSF. Additionally, as this lawsuit has waged on, it has likely become increasingly clear to all parties that a trial in the upcoming months would be expensive, time-consuming, and emotionally draining. It would also deprive everyone of any control over the ultimate outcome. Thus, in an attempt to bring about a faster and less costly resolution of the dispute before matters got worse—just two of the many benefits of undergoing a mediation process—the players reached out to the federation to see if the parties could explore a possible out-of-court resolution with the help of a mediator. They should be commended for getting off the litigation train and, instead, trying to see if a mediation process could be of assistance.

Lesson #2: Every Dispute Has Both an Emotional and Legal Component

Too often, the parties and their counsel focus narrowly on the nominal claims-at-issue and their respective legal rights and interests, rather than appreciating and handling the emotional underpinnings that led to the dispute in the first instance. Characterizing the dispute as being about vindicating rights, correcting an injustice, or clearing their names are all laden with deep emotions. Perhaps it is about a relationship that has gone awry, a wrong done (actual or perceived), or a communication received poorly or incorrectly. Whatever the case may be, the need to be emotionally validated—that is, learning about, understanding, and expressing acceptance of another's emotional experiences—is at the root of all disputes. Ignoring and failing to deal with the emotional aspects of a dispute generally means, to paraphrase a famous quote, planning to fail at the mediation and/or arriving at a resolution that may not ultimately be lasting or enforceable. The players' calls for pay equity and fairness have obviously resonated with certain segments of the public, including fans, sponsors, and even Congress. At the same time, these rallying cries have also undeniably irked USSF—enough so that it felt compelled to issue a public letter defending its record in an attempt to assuage public opinion. That, in turn, appears to have had an even more negative emotional reaction from the players and their supporters. All of these emotions, both explicit and pent-up, need to be dealt with, along with any legally based resolution, in order for there to be true peace.

Lesson #3: Never Underestimate the Influence of Outsiders on a Mediation

Although a properly conducted mediation process honors the self-determination of the participants, there is no question that individuals and third-parties who are not nominally named (such as in the caption of a lawsuit) often have enormous influence over the decision makers who appear to participate in the process. Thus, it is always a good practice to at least consider whether those who may have such influence—be they spouses, other family members, close friends, business colleagues, or trusted advisors—should also be present at the mediation session or at least be available by phone.

The dispute between the players and the federation presented any number of outside influencers, including family members, fans, the media, sponsors, and members of Congress. They each unquestionably played a role in how the nominal parties here perceived both the dispute and the strengths and weaknesses of their positions. Although none of the foregoing individuals or entities are likely to be ones who would physically attend a mediation session, being in touch with them and/or being cognizant of how they view the dispute ought to be a factor during the mediation process and how any outcome, whether a resolution or an impasse, would be perceived by them. Here, adverse public perception and damage to either individual or institutional reputations would be a consideration by both the players and the federation in either arriving at a resolution or continuing the litigation.

Admittedly, aside from what is being reported in the media, we can only surmise what the players and the federation think about their unsuccessful mediation and how they now view their respective chances of a favorable outcome in court. Additionally, most of the disputes we come across will likely not be as high-profile as this one. Yet the lessons that can be derived from the experiences of the players and USSF this past summer are worth remembering in the context of every dispute.

Endnotes

1. *See, e.g.*, Andrew Das and Kevin Draper, *U.S. Women's Team and U.S. Soccer Agree to Mediation Over Gender Discrimination Claim*, The New York Times (June 21, 2019), available at https://www.nytimes.com/2019/06/21/sports/soccer/us-womens-team-discrimination-html.
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3. *See, e.g.*, Ryan Lake, *USWNT Set Sights on Fight for Equal Pay in Upcoming Mediation with US Soccer*, FORBES (July 10, 2019), available at https://www.forbes.com/sites/ryanlake/2019/07/10/uswnt-set-sights-on-fight-for-equal-pay-in-upcoming-mediation-with-us-soccer/.
4. *See, e.g.*, Kevin Draper, *Pushed by Consumers, Some Sponsors Join Soccer's Fight Over Equal Pay*, THE NEW YORK TIMES (August 5, 2019), available at https://www.nytimes.com/2019/08/05/sports/soccer/womens-soccer-nike-sponsors.html.
5. *See, e.g.*, Andrew Das, *Mediation Talks Between U.S. Women's Team and U.S. Soccer Break Down*, THE NEW YORK TIMES (August 14, 2019), available at https://www.nytimes.com/2019/08/14/sports/uswnt-mediation-us-soccer.html.
6. *See, e.g.*, Andrew Das, *U.S. Soccer Says It Pays Women's Team More Than Men's Team*, THE NEW YORK TIMES (July 29, 2019), available at https://www.nytimes.com/2019/07/29/sports/soccer/us-soccer-equal-pay.html.
7. *See, e.g.*, Das, *supra* note 5.

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Hollywood Docket
Interesting New Developments About Which All Practitioners Should Be Aware

By Neville L. Johnson and Douglas L. Johnson

Protecting your rights abroad can be a tricky prospect. Procedural hurdles continue to develop and compound depending on the right being vindicated and the country of the transgression. For example, most attorneys who deal with copyright are aware that United States copyright law does not apply exterritorialy, but defendants love to seize on this and take it one step further to say that plaintiffs cannot sue for *any* damages that occur outside U.S. borders. However, when infringement happens both domestically and abroad, you can sue for both in U.S. courts.

I. Copyright Infringement

The U.S. Supreme Court held in *Fourth Estate Public Benefit Corp. v. Wall-Street.com*[1] that a copyright infringement suit must wait until the copyright is successfully registered by the United States Copyright Office before a lawsuit can commence in U.S. courts.

Suing internationally, there is no such registration requirement. Under the Berne Convention Article 5(2), "The enjoyment and the exercise of these rights shall not be subject to any formality" and members of the World Trade Organization (WTO) have implemented this provision. However, this requires a party to actually go to the country where infringement is happening and litigate in that foreign court. Alternatively, a plaintiff could sue in a U.S. forum applying the law of the country where the infringement is taking place.[2] Both are daunting and potentially expensive propositions.

In *Levitin v. Sony Music Entertainment*,[3] Levitin sued Sony and its foreign affiliates in the United Kingdom, Italy, Germany, Mexico, Spain, Canada, Australia, France, and South Korea. The court dismissed the domestic defendants because Sony had a license from a song co-owner. The foreign defendants also moved to dismiss, arguing that the copyright laws of the foreign countries, which require all co-owners of a copyright to agree to license, did not apply. The court rejected this argument under the Second Circuit's decision in *Itar-Tass v. Russian Kurier News Agency*,[4] which stated that copyright ownership is determined under U.S. copyright law and issues

of infringement are decided under the law where the alleged infringement occurred. To litigate such a case, Levitin would have had to navigate nine different countries' copyright systems against defendants on four continents.

Levitin was unable to allege any actionable "predicate acts" of infringement. However, if as in *Unicolors, Inc. v. H &M Hennes & Mauritz, L.P.*,[5] a defendant "copies a work in the United States and disseminates copies in another country, a plaintiff can collect damages for the foreign exploitation of the copyright." Therefore, the work is not an infringement happening abroad, subject to foreign copyright laws, but an extension of an infringing act that occurred in the United States.[6] A plaintiff could then recover actual damages for that extraterritorial infringement.

A. Attorneys' Fees

After the court dismissed Levitin's claims against domestic defendants under the Copyright Act, the domestic defendants moved for attorneys' fees from him as the prevailing party under 17 U.S.C. § 505. The *Levitin* court reasoned that attorneys' fees are "are available to prevailing parties . . . but are not automatic."[7]

The defendants argued and the court agreed that attorneys' fees are granted as a form of deterrence to prevent frivolous and unmeritorious litigation.[8] Therefore, as the prevailing party, the defendants argued that Levitin could never possibly recover on his claims, thus entitling them to attorneys' fees. The court disagreed, however, stating that Levitin's claim was not "objectively unreasonable," and furthermore "Plaintiffs' suit served to further define the contours of the predicate act doctrine."[9]

B. Tying Foreign Damages to Domestic Claims

In *Ellington v. EMI Music, Inc.*,[10] a New York state court reviewed an agreement regarding royalty payments between a songwriter and publisher where a foreign sub-publisher subtracted monies to pay itself before the songwriter's 50% royalty was calculated. EMI later acquired this sub-publisher and continued to subtract monies, a situation that appeared to be self-dealing to the plaintiffs. The New York court disagreed, concluding that the un-

ambiguous language of the contract did not prohibit EMI from deducting from gross receipts monies paid to affiliated foreign sub-publishers. These sub-publishers were performing the same role as previously and were paid the same amount.

However, the court in *Stewart v. Screen Gems-Emi Music, Inc.*[11] found that there was jurisdiction over a foreign defendant and distinguished the case from *Ellington*,[12] under Alter Ego or Agency Theory. EMI UK was not merely a sub-publisher, parent-subsidiary or mere sister-sister entity, it was an "Alter Ego" of Screen Gems-EMI, operating as part of a single enterprise.[13] With that link, the plaintiffs could state "a claim for breach of contract against [Defendants] since the 'Publisher,' i.e., the single enterprise EMI Music Publishing, of which Screen Gems-EMI is one arm, is contractually obligated to pay Plaintiff 50% of 'any and all net sums actually earned and actually received' by it," which, based on the single enterprise allegation, includes sums that the foreign sub-publishers received, as well."[14]

II. Defamation

In a recent ruling, Europe's top court, the European Court of Justice (ECJ), held that individual countries can order Facebook to take down defaming posts, photographs, and videos worldwide. Not only specific defaming posts, but all similar posts must be removed.[15] This is a powerful remedy for a defamation suit, as it puts the onus on Facebook to monitor and filter content, rather than forcing plaintiffs to hunt down and report every instance of the defaming material.

The language of the European Union Court of Justice reads, in relevant part:

> Today's judgment . . . **does not preclude a court of a Member State from ordering a host provider:** . . . to remove information which it stores, the **content** of which is **equivalent** to the content of information which was previously declared to be unlawful, or to block access to that information, provided that the monitoring of and search for the information concerned by such an injunction are limited to [identical material] . . . (thus, the host provider may have recourse to automated search tools and technologies).[16]

This ruling comes as a surprise, as only a week prior the ECJ affirmed a 2014 ruling that Google must respect the "right to be forgotten" by delisting content by region, but not outside the EU, and certainly not globally.[17] Google's "Geoblocking" feature delists content by country, so a French citizen enforcing his/her/their right to be forgotten could delist content on "Google.fr," but residents of England and Germany could still find the content on "Google.uk" and "Google.de."

A. Conflict With U.S. Law

It will be interesting to see if this global delisting can be applied in the United States, as a similar battle happened in *Google Inc. v. Equustek Solutions Inc.*[18] In *Equustek*, the Canadian Supreme Court ordered Google to block infringing websites worldwide, not just "Google.ca."

Google filed an action in the Northern District of California, seeking "a declaratory judgment that the Canadian court's order cannot be enforced in the United States and an order enjoining that enforcement." The federal court granted Google's injunction, holding: "By forcing intermediaries to remove links to third-party material, the Canadian order undermines the policy goals of Section 230 and threatens free speech on the global internet."

If a U.S. plaintiff sought a worldwide delisting of defaming material, it is unclear if U.S. courts would also enjoin the enforcement of such a remedy on the grounds that the order undermines the U.S. law and threatens freedom of speech. However, a U.S. plaintiff who has won its U.S. claim could ask the European courts to order Facebook to remove all defaming materials worldwide.

This strategy of enforcing judgments in other jurisdictions was employed in so-called "libel tourism," where plaintiffs would pursue liable suits in the preferential forum of England and Wales. When plaintiffs tried to bring these judgments back to the U.S., Congress passed the "Securing the Protection of Our Enduring and Established Constitutional Heritage" (SPEECH) Act in response.

The SPEECH Act makes foreign libel judgments unenforceable in U.S. courts, but the ECJ ruling is not telling libel and defamation plaintiffs to go to the U.S. forum and have U.S. courts enforce their judgments. The ECJ ruling instead states that EU courts can order companies to remove material in U.S. jurisdictions, without getting U.S. courts involved.

B. International Ramifications

It is also interesting to speculate about what rogue nations like Russia and China might do with the ability to delist content. Could Russian courts, on behalf of Vladimir Putin, order Google and Facebook to delist content worldwide that they find defamatory? Could China try to silence criticism outside its own borders? It is possible that these nations could use the ruling as a justification for cracking down on political dissidents.

III. Fraud and Self-Dealing

There are two cases regarding underpayment of net profits that are important for attorneys to know. Twentieth Century Fox Film Corporation (TCFTV), as a multi-media company that moves assets between affiliate companies, included an "Affiliate Transaction Protection" provision in its contracts with the actors and staff of the hit TV show "Bones," that read:

> Dealings with Affiliates: Each of Company and Artist acknowledges that Fox is part of a diversified, multi-faceted, international company, whose affiliates include, or may in the future include [various companies, producers, and distributors] (individually or collectively, "Affiliated Company or Companies"). In consideration thereof, Fox agrees that Fox's transactions with Affiliated Companies will be on monetary terms comparable to the terms on which the Affiliated Company enters into similar transactions with unrelated third-party distributors for comparable programs.

As Fox did not abide by this agreement, it wound up in arbitration with the cast of *Bones,* which led to a $179,000,000 arbitration verdict against it, of which $128,000,000 was punitive. Fox appealed, and the Superior Court rejected the punitive damages award, saying that punitive damages were expressly forbidden by the contract.[19] This issue was on appeal when the case settled.

The Arbitrator found so heavily against Fox because, among other things, Fox violated the above portion of its own contract, "assert[ed] an interpretation [of its contract] that strains credulity and [is] devoid of common sense," effectuated a plan to minimize "leakage" by ensuring that 100% of revenue was funneled to the Fox Broadcasting Company (FBC) even though TCFTV had never licensed it the rights, and effected a similar scheme which licensed the show to domestic and foreign affiliate entities to hide the revenue.[20] For the Fox owned streaming service, Hulu, the licensing agreement was signed by the same executive, Dan Fawcett, who was simultaneously the President, Digital Media of Fox Entertainment Group *and* the Vice President of Hulu. When the former Chairman and CEO Peter Chernin was asked how this was possible, he replied "I have no idea."[21]

These fraudulent dealings claims can reach across national borders. French corporation Vivendi recently agreed to go to mediation with the creators of *Spinal Tap* after the California Central District Court declined to dismiss claims that Vivendi had fraudulently hidden profits from the movie by shifting and bundling the rights and profits.[22]

IV. Conclusion

The beauty of the legal profession is that it is an ever-changing landscape. One day the courts can create extra hurdles to pursuing a copyright infringement claim, and the next they enable worldwide enforcement of defamation remedies. These changes can directly impact your transactional and litigation practices and in the expanding entertainment world, it is necessary to stay on top of the latest developments of international and domestic law.

Endnotes

1. *Fourth Estate Public Benefit Corp. v. Wall-Street.com*, 586 U.S. _ (2019).
2. *See* Roberto Garza Barbosa *International Copyright Law and Litigation: A Mechanism for Improvement*, Marq. Intell. Prop. L. Rev. (2007), 82-84.
3. *Levitin v. Sony Music Entertainment*, 101 F.Supp.3d 376 (S.D.N.Y. 2015).
4. *Itar-Tass v. Russian Kurier News Agency*, 153 F.3d 82 (2d Cir. 1998).
5. *Unicolors, Inc. v. H &M Hennes & Mauritz, L.P.*, No. 2:16-cv-02322-AB (SKx), 2017 U.S. Dist. LEXIS 222511, at *16-17 (C.D. Cal. Nov. 15, 2017) (citing *L.A. News Serv. v. Reuters Tel. Int'l, Ltd.*, 340 F.3d 926, 992 (9th Cir. 2003)).
6. *Marderosian v. Warner Bros. Entm't*, No. 2:17-cv-01062-CAS(GJSx), 2017 U.S. Dist. LEXIS 66173, at *7-8 (C.D. Cal. May 1, 2017) (citing *L.A. News Serv.*, 149 F.3d at 992).
7. Citing *Medforms, Inc. v. Healthcare Mgmt., Sols., Inc.*, 290 F.3d 98, 117 (2d Cir.2002).
8. *Fogerty v. Fantasy*, 510 U.S. 517, 534 (1994).
9. *Levitin v. Sony Music Entertainment*, 2015 WL 5577565 at 1-2; *see also* Matthew Bender, 240 F.3d at 122 ("When close infringement cases are litigated, copyright law benefits from the resulting clarification of the doctrine's boundaries. But because novel cases require a plaintiff to sue in the first place, the need to encourage meritorious defenses is a factor that a district court may balance against the potentially chilling effect of imposing a large fee award on a plaintiff, who, in a particular case, may have advanced a reasonable, albeit unsuccessful, claim.").
10. *Ellington v. EMI Music, Inc.*, 24 N.Y.3d 239 (2014).
11. *Stewart v. Screen Gems-Emi Music*, Inc., 81 F. Supp. 3d 938 (N.D. Cal. 2015).
12. *Ellington*, 24 N.Y.3d at 239.
13. *Id.* at 960-64.
14. *Id.* at 960.
15. Court of Justice of the European Union press release No 128/19, Luxembourg, 3 October 2019.
16. Emphasis in original.
17. Court of Justice of the European Union press release No 112/19, Luxembourg, 24 September 2019.
18. *Id.* at 4.
19. *Wark Entertainment Inc v. Twentieth Century Fox Film Corp.*, BC602287.
20. *Twentieth Century Fox Film Corporation v. Wark Entertainment, Inc.*, JAMS Arbitration Case Reference No. 1220052735 (Feb. 4, 2019), at 16 and 37.
21. *Twentieth Century Fox Film Corporation v. Wark Entertainment, Inc.*, JAMS Arbitration Case Reference No. 1220052735 (Feb. 4, 2019), at 43.
22. *Century of Progress Productions v. Vivendi S.A.*, 2018 WL 4191340, (C.D. Cal. at *14) ("Plaintiffs have sufficiently alleged a fraudulent scheme that involves UMG, and which sufficiently puts Defendants on notice of the import of the allegations against them.").

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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.

Batmania '89 and the Importance of Trademark Maintenance

By David Krell

When *Batman* hit theaters in the Summer of 1989, it was complemented by enough merchandise to fit stately Wayne Manor 10,000 times over. Or so it seemed.

Michael Keaton's portrayal of wealthy Gotham City playboy Bruce Wayne and his crimefighting alter ego combined with Jack Nicholson's interpretation of the Joker was ripe for a blockbuster. Tim Burton's vision of the Dark Knight was inspired, in part, by Fritz Lang's 1927 film *Metropolis* and starred Kim Basinger as photojournalist and Wayne paramour Vicki Vale, a character with a lineage in the Batman comic books; Robert Wuhl played her partner, newspaper reporter Alexander Knox, who was created for the film. Burton shot *Batman* and its sequel, *Batman Returns,* at Pinewood Studios in London. He had previously directed Keaton in *Beetlejuice*.

"Unlike Superman, he's without super powers," reminded Batman creator Bob Kane. "Therefore, any man could actually visualize himself being Batman—if they were born tall, dark, handsome and rich."[1]

Though the entertainment industry has had character-based merchandising tie-ins dating back to the 1930s and old-time radio shows, *Batman* set a new standard. Walking on a thoroughfare in any major city, suburban park, or shopping mall would undoubtedly find somebody wearing a T-shirt or drinking from a water bottle with the Batman logo. The movie also coincided with the 50th anniversary of Batman's first appearance in comic books, which added to the promotion and celebration of the character.

Hype was not limited to film-specific merchandise, though. In San Francisco, KOFY aired the mid-1960s *Batman* show and 1966 film in a 24-hour marathon the week of the film's premiere. Additionally, the city's Cartoon Art Museum highlighted Batman art from the character's début through the decades.[2] The film's success prompted The Family Channel, now Freeform, to air reruns of the 1966-1968 *Batman* television show, starring Adam West as the title character.

The *Los Angeles Times* reported that Warner Brothers and DC Comics lined up more than 100 licensees to plaster the Batman insignia and images of the actors across the merchandising spectrum. In turn, there was revived interest concerning merchandise from the television show and subsequent versions, including 1970s cartoons. "When we started stocking this stuff 10 years ago, we were nearly laughed off the planet,"[3] said Southern California store owner Chris Scharfman. Though some marketing experts looked at the merchandising plans askance, the licenses raked in sales estimated to be in nine figures. Bat-merchandise added to Hollywood's cultural legacy by reminding owners of intellectual property that a character's universe, when handled properly, can improve the bottom line in a highly significant manner. Trademark maintenance is crucial.

With a film of great magnitude involving fictional characters boasting a well-known lineage, great care must be given to protect the owner's trademark rights. The strategy should begin with the marketing department including trademark attorneys at every step, from conception of merchandising tie-ins to execution. This will ensure that contracts are properly drafted and trademark notices are correct in their wording and placement on the licensed items and packaging. In turn, the trademark attorneys will be better equipped to devise strategies for trademark applications; forecast infringements; create a cease-and-desist plan; incorporate artistic standards in the contract (e.g., proportion of character size, exact color shades); and troubleshoot possible issues that may emerge.

Whether in-house or outside counsel, corporate trademark attorneys will need to address these issues across the corporate spectra. For instance, a merger of two regional banks resulting in a new name and logo; a restaurant chain stepping up its marketing with a new television commercial; a restaurant chain advertising on billboards; a sports team promoting its new stadium with jigsaw puzzles and posters; and a gasoline giant offering toy giveaways during the Christmas shopping season, are examples of how the basics of trademark maintenance touch every owner, no matter its corporate mission. Managing this is easier when a business has in-house counsel dedicated to overseeing its trademark portfolio.

Bruce Wayne may battle the rogues of Gotham City by night as Batman, but the gadgets in his utility belt, the technology in the Batcave, and the power of the Batmobile cannot protect Wayne Enterprises from the intricacies of trademark law. Batman strikes fear into the hearts of villains, but a good trademark strategy can do the same for potential or actual infringers.

Endnotes

1. Ben Fong-Torres, "Return of the Dark Knight," Democrat and Chronicle (Rochester, NY) (June 16, 1989), 18.
2. Leslie Goldberg, "It's become a bat world out there," San Francisco Examiner (June 21, 1989), 2.
3. Bruce Horovitz, "Holy Tie-In! Batman Bores Consumers Just as Retailers Prepare for Film," Los Angeles Times (Feb. 28, 1989), 46.

David Krell is the author of *The New York Yankees in Popular Culture* and *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*.

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