NYSBA

SUMMER 2020 | VOL. 31 | NO. 3

Entertainment, Arts and Sports Law Journal

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

"In Memory of Judith Bresler"

In This Issue

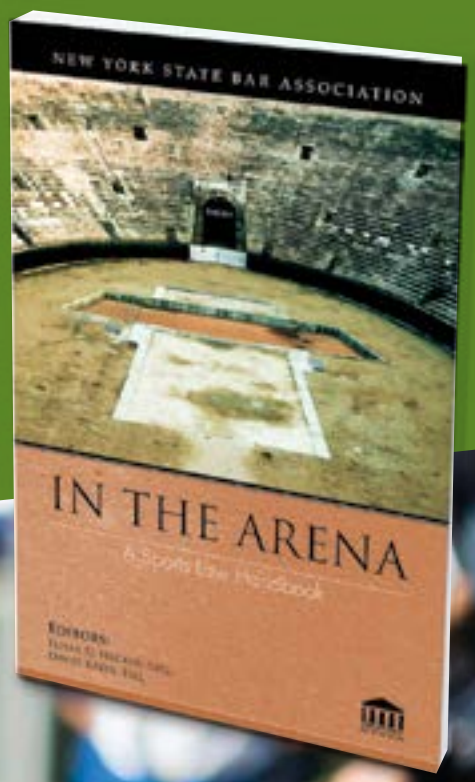
NYSBA.ORG/EASL

NYSBA PUBLICATIONS

In The Arena:

A Sports Law Handbook

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



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.

Book (4002)
eBook (4002E)

NYSBA Members $65.00
Non-Members $80.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

Table of Contents

Page

Remarks From the Chair

By Barry Werbin

"It is under the greatest adversity that there exists the greatest potential for doing good, both for oneself and others."
The Dalai Lama

The past six months have indeed put us face to face with great adversity, challenging all of us to adapt to a "new normal" with a worsening pandemic through the Spring, initial signs of relief when the statistics started declining, and renewed concerns as spikes emerged where states opened too early or disregarded pandemic precautions. Our selfless doctors, nurses, health care workers and first responders battled on throughout this period despite the potential risks to themselves. Actors, musicians, and performing artists, most of whom were forced out of work at least temporarily, have brought joy to our homes with virtual performances that have lifted our spirits. In our great state of New York where the pandemic struck with ferocity, we saw this crisis bring out our best potential for doing good.

As I write this, the summer is winding down, New York is reporting record low numbers for new COVID-19 cases while hotspots continue bubbling up elsewhere, the Black Lives Matter movement has re-focused us on critical issues surrounding race relations in our country, and the world as we knew it is heading into uncharted territory as cooler weather and the flu season approach; not to mention what likely will be one of the most contentious, nasty, nail-biting presidential elections in history.

As major protests unfolded in nearly every major city across the country, we were jolted into a new awakening that our country still has a long road ahead to combat entrenched systemic racism and injustice. We join with NYSBA President Scott M. Karson, who recently said:

> George Floyd's death at the hands of law enforcement and its aftermath were not aberrations; they were the culmination of a long history of racism and inequality that continues to plague our nation. It is now up to us, as a society, to seize this important moment and make sense of what must come next. The death of George Floyd is a call for bold action, including institutional and cultural reform—in law enforcement, as well as within the broader criminal justice system.

We support the many police and law enforcement personnel who regularly put their lives on the line and do have real concerns for the communities they protect. Yet there are bad apples in any mix, and it is time to take peaceful but committed corrective action through accountability, better training and transparency to finally rid law enforcement systems of systemic racial profiling and use of unnecessary force in unwarranted situations where it is triggered only by the color of a person's skin.

Amidst these upheavals, we were deeply saddened to learn in May of the passing of our long-time member and former EASL Chair, Judith Bresler. Judith was a leading and highly respected art law attorney, who was devoted to EASL and its mission. Almost singlehandedly, Judith was responsible for administering and jump-starting the annual EASL Phil Cowan Memorial Scholarship program, which sponsors and offers up to two $2,500 awards on an annual basis to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law. In honor of Judith, the EASL Executive Committee has voted unanimously to amend the name of the program to the Phil Cowan – Judith Bresler Memorial Scholarship program. This issue of the *Journal* features personal tributes to Judith by her friends and colleagues. She will be greatly missed.

As lawyers, we have a calling to help those in need in times of strife. In May, the EASL Executive Committee approved a $2,500 donation to the New York Bar Foundation's COVID-19 Emergency Relief Fund. Our Committees have been actively planning virtual programs, which will continue through year-end to assist NYSBA members with keeping up on important legal developments, including the detrimental impact that COVID-19 has had on the entertainment, arts, and sports industries. Diversity remains a key goal of EASL. Our future programs will be more inclusive and help focus awareness on race-related issues that need to be addressed in the entertainment, arts and sports industries.

All EASL Section programs will continue to be virtual through at least the end of 2020, and the NYSBA and EASL Annual Meetings in January are currently planned to be virtual as well. We are already up and running planning a terrific series of virtual CLE programs for the Annual Meeting. The annual (renamed) Phil Cowan /Judith Bresler Memorial Scholarship Competition is getting off to a good start, and we're looking forward to some excellent submissions by law school students interested in potential careers in the arts, entertainment and sports fields.

Remarks from the Chair continued on page 6

Editor's Note/Pro Bono Update

By Elissa D. Hecker

This *EASL Journal* Is Dedicated to Judith Bresler's Life, Her Impact, and Her Memory

Judith Bresler is the reason why I joined the EASL Section. As Chair of the Section, she had placed an ad with NYSBA for an editor for the then-EASL Section Newsletter. Fresh out of law school, but with years of editing experience and encouragement from Judith, I joined the Section and worked under a formidable mentor.

As you will read, in all of the tributes to Judith contained in this issue, she was a force of nature. One knew when Judith was in the room. She had a fierce intellect, keen eye, and elegant sense of style. When around her, I always sat up a little straighter.

Judith set the example and paved the way for so many women attorneys in a field that was largely comprised of men. She had strong opinions and was not shy about sharing them. She was also usually correct, yet willing to listen to others. She was an extraordinary leader who lifted so many of us up. I was proud to have her by my side on the EASL Executive Committee when I became Chair of the Section.

Judith had the soul of an artist with the tenacity of a warrior. She was dedicated to her family, the arts, and her passions. She surrounded herself with interesting people. Judith expected the best of everyone and led by example. She has left an indelible shadow.

It is hard to believe that we will not see Judith again in person. She will certainly continue to live on in the hearts and memories of all who knew and loved her. She made the world a better place.

Elissa

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

Pro Bono Update

Clinic/Webinars

Elissa D. Hecker, Tun Fu (Tiffany) Tsai, and Carol Steinberg

As with everyone, the Pro Bono Committee has had to pivot with the pandemic. Rather than offer live, in-person clinics and speaking engagements/programs, we instead partnered with New York Foundation for the Arts (NYFA) and Volunteer Lawyers for the Arts (VLA) to offer webinars to those in the creative industries affected by COVID-19. The topics included contracts, copyright and digital content, immigration, real estate/housing, basis artists' rights, and the CARES Act, among others. The webinars were presented by EASL members Diane Krausz, Cheryl Davis, Ariana Sarfarazi, Michael Cataliotti, Tiffany Tsai, Elissa D. Hecker, and Carol Steinberg. The webinars were well-attended and the feedback was that the attendees were extremely appreciative to have access to clear information in such a chaotic time.

In addition, Carol Steinberg plans to continue to offer a series of more in-depth webinars about basic legal rights in plain English, accessible even to those for whom English is not their first language, through NYFA and VLA.

We encourage EASL members to volunteer as pro bono attorneys and webinar speakers for other topics that are relevant to the creative communities. Please contact Elissa, Tiffany, or Carol if you are interested in doing so.

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

Webinars/Clinics

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

- **Elissa D. Hecker**, eheckeresq@eheckeresq.com
- **Tin-Fu (Tiffany) Tsai**, dinfutsai@gmail.com

Speakers Bureau

Carol Steinberg coordinates Speakers Bureau programs and events.

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

Remarks from the Chair continued from page 4

Meanwhile, EASL's many Committees have been hard at work sponsoring numerous CLE and non-CLE programs. In May, we presented Professor Stan Soocher's annual Entertainment Year in Review CLE webinar, always a crowd favorite at our Spring Meeting. In June, EASL's ADR Committee and the NYSBA Dispute Resolution Section jointly presented a webinar on "Negotiation Theory and Practice: ADR and Entertainment." The Sports Law Committee sponsored a webinar on "The Impact of COVID-19 on Sports: A Legal Perspective," and has put together an ongoing informal virtual "Brown Bag" lunch speaker series, featuring experts addressing current key issues impacting the sports world.

In June, our Committee on Literary Works and Related Rights held a timely program on "Publishing Contracts – Boilerplate Provisions Newly Significant Now." Our Motion Pictures Committee sponsored a webinar in mid-September on "Reopening Motion Picture Productions During COVID-19."

Our fall virtual Music Business Law Conference is now on the calendar as webinar sessions over four dates in October through November, covering music litigation, music finance, music industry 2020 review, and a final session on the Music Modernization Act/Music Licensing Collective.

Wow are we busy! Kudos to all the EASL Executive Committee members and Committee Co-Chairs for stepping up to the plate and helping to keep EASL's members and the New York bar engaged and informed on cutting-edge issues impacting our core markets.

As we enter the fall months, I wish you all peace and health. Please stay safe, follow COVID-19 guidelines, and continue to advocate for justice and education.

Barry

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

Law Student Initiative Writing Contest

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL 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 **January 22, 2021.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

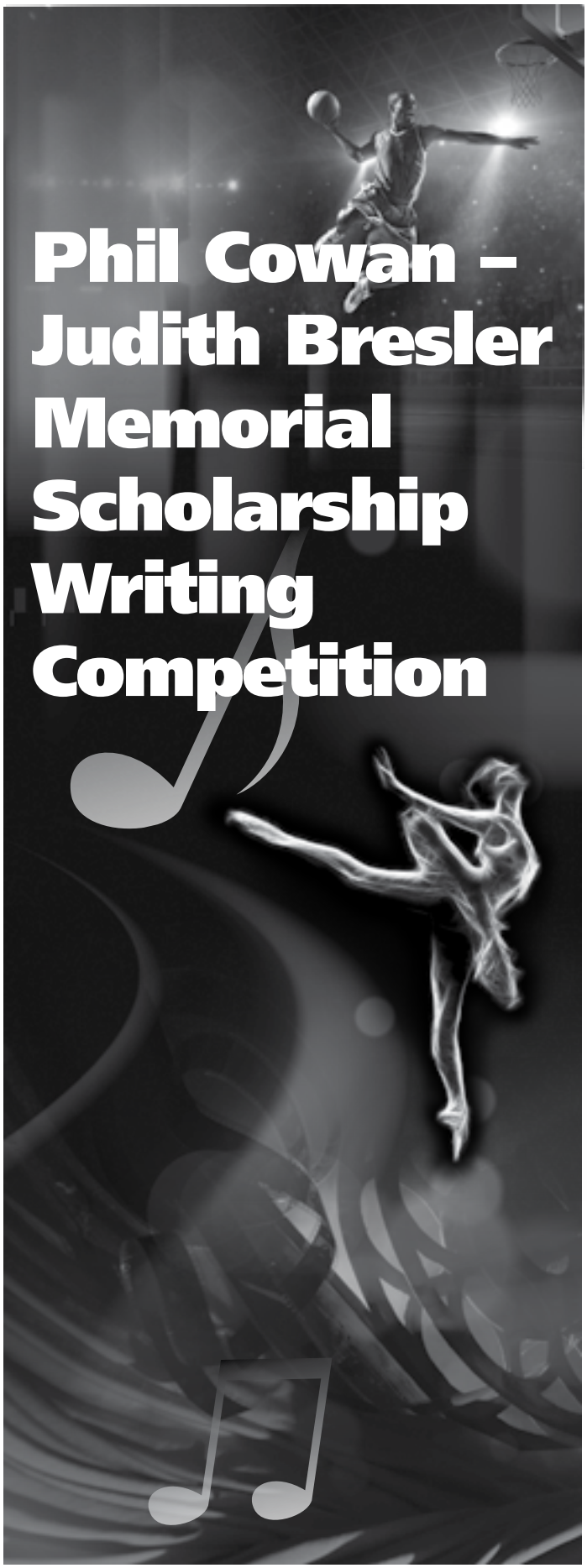
Topics

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.



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)'s Phil Cowan - Judith Bresler Memorial Scholarship, named after two esteemed former EASL Chairs, offers *up to two awards of $2,500 each on an annual basis* in Phil Cowan's and Judith Bresler's memories to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan Cowan - Judith Bresler 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 12 to 15 pages in length (including *Bluebook* form endnotes), 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/their Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her/they to the 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 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 10 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 submission year of the paper.

Submission Deadline

***January 8th*:** Law School Faculty liaison submits all papers she/he/they receives to the EASL Scholarship Committee, via email to Dana Alamia at dalamia@nysba.org, no later than January 8th.

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

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 website. 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.

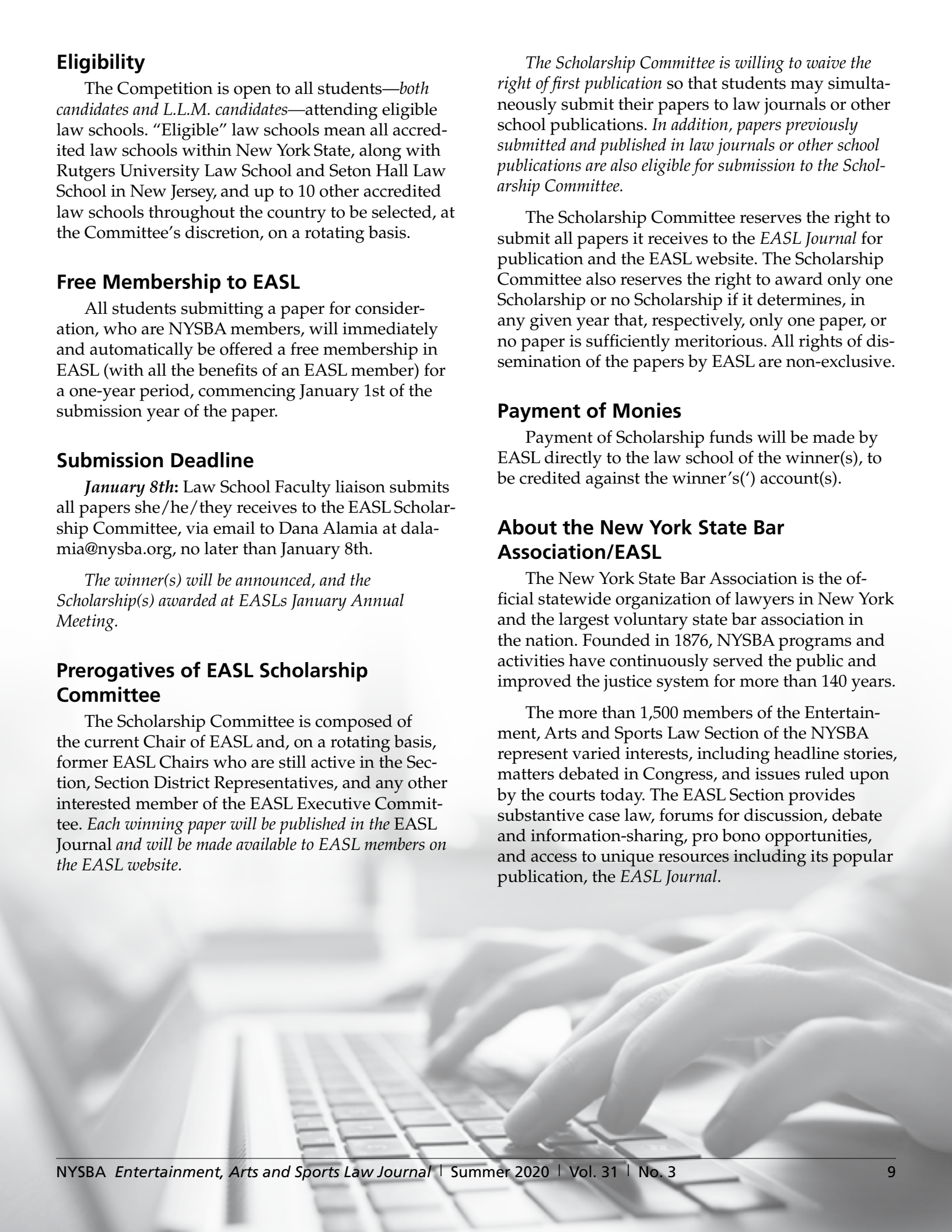
Payment of Monies

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

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.

Tributes to Judith Bresler

Judith Bresler passed peacefully at New York Presbyterian Hospital on May 21, 2020, following a valiant battle with Non-Hodgkins Lymphoma. The distinguished lecturer and prominent art law attorney delighted in playing the piano, and flourished in her innate gift for language; writing poetry, mastering her boggle skills, and eventually becoming co-author of the leading treatise on Art Law, referred to by Forbes as the "bible of the industry." Unapologetically opinionated, yet remarkably caring with impeccable etiquette, Judith loved a debate; her cunning and joie de vivre made her a gift to both her friends at book clubs and dinner parties, and to her colleagues, clients, and students throughout her inspiring career. While of counsel to the law firm WithersWorldWide, she taught Art Law at New York Law School for 25 years, where her pupils often called her "too tough," before seeking out her mentorship, and lectured as an adjunct faculty member of the University of Pennsylvania Law School (where she attended undergraduate university). Dedicated to and respected in her chosen field, further ample professional contributions include: serving as General Counsel to the Appraisers Association of America; on the Board of Trustees of New York Law School, and the Philadelphia Volunteer Lawyers for the Arts; as Chair of the Art Law Committee, and Chair of the Entertainment, Art and Sports Law Section of the New York State Bar Association, plus publishing extensively on all aspects of the art market. Never one to shy away from a new pursuit, Judith drew on her experiences, and wrote a screenplay about life in the art world. A creative at heart—unsentimental, but playful and romantic—she loved the water, horror films, whimsical accent furniture, life and her family. She was admired and adored by her daughters Alexandra Lee and Elinor Drue, and cherished by her husband of 40 years, Ralph Lerner. Judith was the life force of her family; unrelenting in her belief in those she loved, she was always there with a sensitive ear, bold encouragement, sound solutions, and a radiant smile. Determined and seemingly unshakable, the embodiment of tenacity and grace through the very end—hers is a legacy that will live in our hearts eternally.

This obituary, which was printed in the New York Times, can be accessed at legacy.com.

The following tributes were written by members of the EASL community.

My Brilliant, Elegant, Loving Friend

The loss of Judith to the art law community is profound. The loss of Judith to me personally is heart-breaking. We were "family." She was one of the true joys of my life. She was beautiful inside and out. One of the first gifts she gave me was a bracelet that was full of colorful, deeply rich, and subtly dazzling gems. That bracelet is the essence of Judith.

When she came into our home, in came a gorgeous, bright, empathetic presence. It was a joy to have her at our table. She came in with great charisma and beauty and added so much to each event with her brilliance and her special empathy. She listened with all of her being and added so much with her beautiful presence. She was full of opinions and knowledge, which she forcefully and gracefully shared.

Professionally, she was a gem and an inspiration. She was a generous and esteemed colleague. We first met professionally in the early 90s at industry meetings. She spoke at events I organized, and I often attended her talks elsewhere. When I began teaching Artists' Rights at the School of Visual Art, I prepared for the course by outlining key chapters from her treatise *Art Law: The Guide for Collectors, Dealers, Investors, and Artists,* which she co-authored with her husband, Ralph Lerner. At that point, the treatise was in its first edition and consisted of one volume. It has since expanded to three volumes, and soon we will have the fifth edition. I was honored to have been asked by Judith to review this treatise for the *EASL Journal*. Still, in my practice today, I regularly consult it.

Judith worked tirelessly and shared her expertise. So many young lawyers tell me how she mentored them and provided an example of how a modern woman could have a family and a successful career. She taught Art Law at New York Law School as an act of love and as a way of giving back. She prepared for each class as though she had not taught it before. I know she was a great teacher and deeply respected by her students.

We were family. We spent Thanksgivings together and other holidays. It was quite special to be considered "family" by her, as she fiercely loved Ralph, her husband, and her daughters Alix and Drue. She let you know that she loved you. She was so happy when I met Frank (now my husband) and always said she wanted to dance at my wedding. Ralph and Frank became good friends too, and we had many wonderful times together.

She, Judi Finell, and I were like sisters. We spent our birthdays together and vowed we would continue our cherished tradition into our 90s. It is unfathomable that we three can no longer celebrate together.

She couldn't come to my wedding because she was too sick, but she was there in spirit. She told me she could see me getting married in a red dress, so I shopped for one. I found a great one, but could not buy it until she saw it on me (via the phone). I wanted Judi and Judith to walk me down the aisle. Judi gracefully walked me down the aisle. Although Judith could not come in person, she was there in spirit.

We could tell each other everything and talk about our real concerns. She always let me know how much I mattered to her. She listened with her entire heart and soul. The last time I saw her was mid-February, right before she went into the hospital. Even on that day when she was so ill, she was deeply interested in a special lecture I was giving.

Judith was the essence of elegance and grace. She was beautiful on the outside and inside; she manifested an elegance and tastefulness that went far beyond the surface. She had a deep and strong spirit as well—a deep spiritual sense and courageous strength. Even throughout her devastating illness, she was the essence of grace and courage. She will always be an inspiration to me professionally and personally.

Carol J. Steinberg
Law Office of Carol J. Steinberg
Co-Chair, EASL Fine Arts and Pro Bono Committees

Judith Bresler was a true original in every way, but it was her emotional generosity and powerful empathy that tied her to my soul. She seamlessly combined self-confidence and vulnerability, just as she merged the linear mind of an attorney with the borderless imagination of a creative artist.

We first met at a bar association event in New York City where I was a guest speaker. Our initial conversation lasted only a few minutes but it forged an immediate and lasting friendship. I quickly learned that Judith was not only an authority in her chosen field of art law, but also the fiercely adoring mother of two daughters and wife to husband Ralph, her true partner in every way. I see echoes of Judith within the defined individuality of both of her daughters today, which is not surprising; Judith touched so many of us permanently.

She was a natural leader and teacher, and a born mentor to all who needed her encouragement and advice. She was passionate and tenacious and loyal and opinionated and kind. Judith possessed an unmatched intensity and true zest for life. She was simply a joy and inspiration to be around. For many years, we shared our New York Philharmonic and theater subscriptions. Even though I am a musicologist and practically live for all things musical, my favorite part of our symphony evenings together was the pre-concert dinner conversations with Judith!

Judith, the wonderful Carol Steinberg and I have enjoyed years of wonderful memories together, sharing our birthdays, beautiful summer weekends, and many meaningful milestones such as Carol's recent wedding to Frank. Judith and I "shopped" remotely with Carol for her wedding dress, and when Carol found a striking red dress, Judith immediately pronounced, "This is the one!" There was no second-guessing with Judith. She so absolutely knew what she believed to be true, and I have always admired her brilliance and certitude. She was a compassionate and staunch ally in times of crisis, and left no doubt that she believed in those she loved.

When Judith retired from her law practice, she was the most active retired person I had ever seen. She embraced this new chapter of her life as intensely as she had her law career, and soon wrote an incredible screenplay. No challenge she took on escaped her laser focus. I began to adopt Judith's guiding light for many a difficult life choice, and my internal conversation often now includes the question, "What would Judith do?"

Judith Finell
Musicologist
President of Judith Finell MusicServices Inc.

Although Judith and I met each other many times through bar associations, she really became a friend and mentor in 2006 when I was writing the first edition of *Copyright Litigation Handbook*. As an author who had been very successful with *Art Law: The Guide for Collectors, Investors, Dealers & Artists* that she had co-written with Ralph, Judith selflessly gave me advice on how to market and promote and what to expect from the publishing process. She was a dynamo in bar association events supporting the arts: I will always be grateful for her kindness and her many spirited and expert interventions as a panelist and organizer of so many events where I was able to learn from her. Judith epitomized the best of the legal and academic professions; her work and kind spirit had a profound and uplifting impact on all of us. With Judith's passing, many in the art law world will have lost their North Star. My condolences to her wonderful family.

Raymond J. Dowd
Partner, Dunnington Bartholow & Miller LLP

The name Judith Bresler was known to me before our paths first crossed in around 2009. She was a major star in the art law firmament, so accomplished and

prominent, not to mention au courant. And so, I was very excited when she accepted my invitation to appear on a panel on artists' moral rights in 2011. Then, if not earlier, Judith and I became friends. I joined EASL's Executive Board and soon learned that her reputation was honestly come by.

I dislike committees and get impatient with inefficiencies and intransigence. But working with Judith was a dream. She returned messages immediately and always answered her phone. When she said she'd do something, she did it. And the more I got to know Judith, the more I realized that she was not only brilliant and effective, but she was genuinely kind and generous. She even got me to join her ladies book club, something I would never have done for anyone else.

I recall standing in front of a supermarket at 84th Street and Madison Avenue in the spring of 2012, begging the few Democrats I could find to sign my nominating petition to run for Surrogate of New York County. Judith came to help. I marveled to myself, Judith Bresler wants to help me? I was so honored and touched. Powerhouse Judith dug in her heels and got lots of signatures and we had fun. Well, as much fun as one can have petitioning.

And so I agreed to help out with EASL's Phil Cowan Memorial/BMI Scholarship Essay contest.* Year after year, Judith ran the best kind of tight ship. In 2018, she managed, with Barry Skidelsky, to dissuade BMI from withdrawing from the project. Nothing could have gotten BMI back the following year. Not even Judith.

Judith exerted Herculean efforts in attempting to get legislation passed relating to gallery consignments. She recounted a lengthy train trip to Albany, which somehow then necessitated a long car ride. As chic as she was, Judith was never afraid to get her hands dirty. She devoted herself to her projects, too numerous to list, and she wholeheartedly believed in each. The Art Law treatise she wrote with her beloved Ralph is a testament to her.

Judith's warmth, fearlessness, openness, and her 1,000-watt smile will be sorely missed.

Justice Barbara Jaffe
New York State Supreme Court

*Now to be renamed the Phil Cowan-Judith Bresler Memorial Scholarship

---

It is extremely sad news to hear about the passing of Judith Bresler. I had the opportunity and pleasure of working closely with Judith when I served in various EASL capacities, including as Chair of the Section, and subsequently as an Executive Committee member when she became Chair. Judith was deeply dedicated to the work and mission of EASL, especially with her outreach to the newly admitted members and law students of the Section. I know that I speak for all when I say how grateful we are for her vision, wisdom, leadership, and hard work on behalf of the Section. One of her most notable contributions and legacies that I wish to highlight is the creation of the writing competition then called the Phil Cowan Memorial/BMI Scholarship for law students.* She not only helped launch the writing competition, but she continued her outstanding guidance in helping to expand the law student scholarship competition to law students throughout the country. Judith's love for the academic side of the profession is not only evident in her own internationally recognized scholarship on art law, but also on the lives of the hundreds of law students and practitioners whom she has taught over the years. I am particularly thankful for and praise her tireless efforts in sharing the virtue of honesty, integrity, professionalism, and hard work. There are not enough words to truly capture the life and profound impact she has had on us all. What a beautiful, intelligent and caring person to have known and worked with as a colleague and friend. My sincere and heartfelt condolences to Judith's husband Ralph Lerner, and to their daughters Alexandra and Elinor.

Prof. John R. Kettle III
Former EASL Section Chair
Director, Intellectual Property Law Clinic
Judge John W. Bissell Scholar
Faculty Advisor, Rutgers Computer & Technology Law Journal
University Senator
Rutgers Law School

*Now to be renamed the Phil Cowan-Judith Bresler Memorial Scholarship

---

Judith made exceptional contributions to EASL and was a wonderful colleague, mentor and friend to many. A champion of the arts, she will long be remembered for her wisdom, scholarship, generous teaching, and singular voice in the field of art law. Sincere condolences to her family and all who cherish her memory.

Judith B. Prowda
Former EASL Section Chair
Co-Chair of EASL's Fine Arts and Alternative Dispute Resolution Committees
Sotheby's Institute of Art Masters of Art Business Faculty and a founding member of Stropheus Art Law

---

Judith Bresler was a mentor. While I never actually worked with her, my relationship with Judith started about 15 years ago, when I began to develop my art law practice. I had not actually met Judith, but the *Art Law* treatise she wrote with her husband, Ralph, always remained front and center on my desk. It was the art law practitioner's bible and the first place I looked to when I

had an art law problem I needed to solve or a form I did not yet have. Some years later, when I was nominated to be the chair of the New York City Bar Association's Art Law Committee, I immediately sought Judith out for her advice, and made sure she would stay on as a member of the ALC. Her contribution to that committee and the so-called "art bar" cannot be overstated. Over my three-year tenure, I often sought Judith's advice and she gave it with generosity and enthusiasm. At the last lunch we had together, she spoke with her usual enthusiasm about her various non-legal writing projects. I will miss her intelligence, her warmth, and her friendship.

Steven R. Schindler
Schindler Cohen & Hochman

I am very saddened at the loss of Judith Bresler. When I succeeded to the chair of the New York City Bar Association's Art Law Committee several years ago, after Ralph Lerner's term ended, I inherited a very special legacy that Judith had secured. Besides her intelligence and creativity on all issues involving art law, Judith was even more importantly someone who actually listened and considered all points of view. Our respective practices and clients often caused us to take positions opposed to each other, but I was continually impressed with Judith's attempt to forge a third way to help resolve our differences. She reached out often to try to work together on seminars and other forums so that we could educate our colleagues and members of the industry on the law and move the ball to advance our practice of law. She will surely be missed by anyone who had the privilege of knowing and working with her.

Howard N. Spiegler
Co-chair, Art Law Group, Herrick, Feinstein LLP

Judith was a friend to so many of us and she will be missed. She was a mentor to me, patiently helping me prepare for my very first public speaking engagement and giving thoughtful feedback on drafting assignments. Her reputation at Withers was one of the primary reasons I joined the firm after law school and she was instrumental in shaping my career. Witnessing the dynamic of her and her husband, Ralph, in offices next to one another were lessons for me on how to succeed as a working mom and working spouse, and for that I am forever grateful. During the last few years, it had been a privilege working with her on the next edition of the *Art Law* treatise, which she referred to as a "project of love." She loved being part of our art law community and provided invaluable contributions to the field. Many of you may remember the days that she was Chair of the Entertainment, Art and Sports Law Section of the New York State Bar Association. In her memory, I hope we carry on her level of enthusiasm and support for the art community.

Diana Wierbicki
Partner | Global Head of Art Law, Withers Worldwide

Among the fond memories I have of Judith Bresler is the moment when we discovered and shared our mutual joy of playing piano.

We were waiting for a meeting to start at BMI, admiring the grand piano in its office lobby, when I mentioned to her that I had studied piano at the Berklee College of Music in Boston. Judith said that she too "tickled the ivories."

Accepting my spontaneous invitation to join me in a brief "four hands on one piano" session, Judith and I then jointly improvised several gems from the "Great American Songbook," and we joked about how her husband Ralph was not part of that body of works' famous song-writing duo of Lerner and Lowe.

When we finished, we received a round of applause from those fortunate enough to catch our act. Big smiles were all around.

As many of you know, Judith was, among many things, a tireless champion of EASL's annual law student writing competition and scholarship named for Phil Cowan, another former Section Chair.

I am particularly pleased that the EASL Executive Committee has decided to rename our scholarship to also honor the memory of Judith Bresler. She will be missed, but remembered forever.

Barry Skidelsky
Immediate Past Chair, EASL

Sports and Entertainment Immigration: How to Navigate Through the Fog of COVID-19

By Michael Cataliotti

There Is Always Something to Write About . . .

Somehow, whenever I start to write a new edition of *Sports and Entertainment Immigration*, it feels like not much time has passed. "A couple of months," I say, and yet, when I go back and re-read what was in that previous edition and then look at what has happened since, I am always[1] left asking, "How is that possible?"

This time, we reach a new high on the how-is-that-possible meter.

When I wrote our last edition of *Sports and Entertainment Immigration*, it was a simpler time: It was the days pre COVID-19. President Trump, his administration, and many Congressional antics were the norm and had direct consequences on the lives of tens of millions, but in many instances, were not immediate, and arguably, indirect—Supreme Court nominations, environmental and educational regulatory rollbacks—or focused on individuals who had little political clout—like immigrants. Ultimately, those antics were focused on helping some, at the cost of most; and so, many accepted these antics, watching with frustration, sadness, and disillusionment, but not rage. There was no pandemonium. Perhaps that was due to generational apathy; perhaps it was due to a constant barrage of antagonistic actions that tired us all out. However, with an increasing number of deaths and people losing their means of support—jobs, gigs, and performances—"America was a kettle about to sing."[2]

Now, as I write this column, America is all steamed up and we will hear her shout. The question is if or when it will be tipped over and all poured out.[3]

Nonetheless, because of the impact of COVID-19 on nearly all of our clients and their respective industries, we will spend some time looking at the practical implications of unemployment on both petitioners and beneficiaries (i.e., employers and artists/employees), see what the coronavirus (and the Administration's policies), have done to U.S. Citizenship and Immigration Services (USCIS), and close with pointing out some key lawsuits that have been undertaken in recent months.

COVID-19, Cancellations, Unemployment, and . . . Uh Oh . . .

Unemployment Considerations

As more than 40 million individuals filed for unemployment between March 15th and June 1st—merely 10 weeks; not even a fiscal quarter—those within the arts, entertainment, and recreation industries are the third-most unemployed group of workers nationwide.[4] At 47.1%, nearly half of all of our clients have filed unemployment applications.[5] This figure includes data through April 30, 2020, and is current as of June 1, 2020.[6]

It should not be surprising, then, that the most common question I have been asked is: "Can I file for unemployment?" or some other version of that same idea. "Unemployment insurance is a joint state-federal program that provides cash benefits to eligible workers. Each state administers a separate unemployment insurance program, but all states follow the same guidelines established by federal law."[7] This is important to note, because as you may recall from our last edition of *Sports and Entertainment Immigration*, the Supreme Court has allowed the new-and-improved, hand-dandy "Public Charge Rule" to go into effect nationwide.[8]

The guidelines set forth in Chapter 10 of the USCIS Policy Manual dictate that "Unemployment benefits" are one of the "public benefits that USCIS does not consider in the public charge inadmissibility determination as they are considered earned benefits."[9]

However, as we have seen in many other instances, the issue is whether the rule is going to be applied correctly, and in this climate that is very questionable. Further, because we have this new Public Charge Rule to consider—and a climate that is not kind to immigrants—whenever we are working with people who are in the United States under a non-immigrant classification (i.e., O, P, H, L, and the like), we must consider the potential impact on our clients' immigration statuses, as well as their employers.

Looking first at the employers, because the potential impact on them is less than on the athlete or artist, we see some very particular nuances, depending on the athlete or artist's visa classification. As I wrote in a recent EASL Section Blog post:

> In the case of nearly all visa categories—but most notably for our purposes, O, P, and H—when a visa holder no longer has work available to him/her/them, they

will have 60 days to find a new employer and file for an extension of the stay. Without doing so, that now-out-of-work individual will have to depart from the U.S. on or before the expiration of that 60-day period.[10]

The impact on employers, too, is quite significant, but more so if the international-artist employee holds an H-1B visa. In that instance, and assuming that an employer wants to retain the artist, the employer must be mindful not to decrease the artist's hours or pay below the prevailing wage and/or rate indicated on the labor condition application (LCA) and petition for a nonimmigrant worker (Form I-129). This is true even if the employer reduces the number of hours and pay across-the-board, for all employees. Doing so could trigger the need for the employer to file a new LCA with the Department of Labor and an amended petition—due to a "material change"—with USCIS. Should the employer not do these things, it could face fines, sanctions, and the suspension of its authorization to petition for non-U.S. citizen workers across all classifications for one to three years.[11] It is important to note here that for an H-1B, there is clear guidance about what constitutes a "material change,"[12] and so it is a bit easier to see when a new LCA and/or amended filing may be necessary.

In the event that the employee holds an O or P visa, the situation becomes a bit more complicated: Many O or P visas are issued to agents who are individuals or entities that simply hold the visa status, while the international artist works for multiple employers. There is little to no guidance regarding the potential ramifications in these instances, however, because most international artists do not hold an O or P visa tied to one employer, for which he/she/they receives a steady paycheck and a W-2, an amended filing may not be necessary. After all, [the] "petitioner may add additional performances or engagements for an O-1 artist or entertainer during the validity period of the petition without filing an amended petition," so rescheduling those performances should also be appropriate.[13] Nonetheless, keep these points in mind: (1) Safe practice would be for an agent to file an amended petition if an international-artist employee has a reduction in hours from employment for which he/she/they receive a steady paycheck and W-2; and (2) The O and P visas do not involve LCAs, nor are they typically bound to one employer or a particular performance or production. As a result, evaluate on a case-by-case basis whether there is a need to file an amended petition, asking, "Has there been a material change in the terms and conditions of the employment or the beneficiary's eligibility?"[14]

In the case where an international artist's work is terminated, another set of obligations hinge on whether the petitioner—i.e., the individual or entity that signed the paperwork for the international artist to receive a visa—is also the employer. If yes, then the petitioner-employer will need to: (1) withdraw the terminated employee's LCA from the DOL; (2) notify USCIS of the termination, thereby withdrawing the petition; and (3) pay for the terminated employee's transportation back to his/her/their home country.[15] If no, then the petitioner-agent will need to evaluate, at a minimum, whether the artist has other employers indicated within or ancillary to the approved petition, and/or if there is a continuation of events that were described in the approved petition.[16]

What is also worth noting, though, is the potential impact on the individual athlete or artist's visa classification. There are a few possibilities. The athlete or artist receives unemployment benefits for several weeks or months, and . . .

(1) . . . files a petition to renew or extend the visa status, reporting that he/she/they received unemployment without any negative impact from USCIS or the Department of State;

(2) . . . files a petition to renew or extend the visa status, reporting that he/she/they received unemployment and the petition is thereafter denied, because the athlete or artist is deemed likely to become a "public charge";

(3) . . . files a petition to renew or extend the visa status, reporting that he/she/they received unemployment and the petition receives a request for further evidence (RFE), requiring the athlete or artist (the petitioner) to submit proof that he/she/they maintained her status; and/or

(4) . . . receives a Notice of Intent to Revoke (NTR) from USCIS due to a perceived abandonment of

the work visa as demonstrated by the receipt of unemployment benefits. (We have seen several instances of this happen over the years.)

Taking these scenarios in order:

(1) Great! Nothing to worry about. I would expect this to be the likely outcome, depending upon how long the athlete or artist received unemployment benefits (irrespective of the fact that unemployment benefits are "not considered" for a public charge analysis).

(2) Not great! This would require appealing and potentially litigating. The impact of having a petition or application denied due to being deemed a "public charge" (or likely to become one), can result in the initiation of removal or deportation proceedings, negative inferences about future petitions or applications, and ultimately, is a stain on the individual's immigration record that will follow the athlete or artist for quite some time. Note, however, that the question of becoming a "public charge" primarily hinges not just on the type of benefit received, but on the duration for which the individual received the benefit. I discuss this more below.

(3) This is an interesting situation, because it does not relate to the specific Public Charge Rule or criteria, but rather, USCIS is asking: "You (your petitioner) told us that you were going to have work, but then, you went to the Department of Labor and affirmed that you *did not* have work; which is it? Did you or did you not have work?" The threshold question here is, "For how long—weeks or months—did the athlete or artist receive unemployment benefits?" If that question is answered in excess of 60 days, then there is the potential for running afoul of the rule described above: if an individual loses his/her/their employer/petitioner, then that individual will have 60 days to find a new employer/petitioner and file a new petition with USCIS. I discuss this a bit more below.

(4) As with the preceding scenario 3, this is interesting in that it does not relate to the Public Charge Rule, but rather, pertains to whether the individual maintained his/her/their status: that is, did the individual athlete or artist lose employment for a long enough period that it nullified the classification? Unlike the preceding scenario, however, the individual athlete or artist is at risk of losing his/her/their then-*current* status, unless he/she/they can demonstrate that he/she/they did have other work during the period in which the athlete or artist was receiving unemployment benefits and/or that the period was not long enough to negatively impact the status.

Obviously, scenarios 2 through 4 are unnerving, especially if they are unexpected and unanticipated; and so, this brings us to some specifics about the Public Charge Rule. As per a practice pointer that is pending publication by the American Immigration Lawyers' Association (AILA):

> It is important to note that the Public Charge Rule is focused on the duration for which the public benefits were received, not the value or amount of the benefit. If a client received a benefit for 12 individual months over a 36-month period, the application may be denied on public charge grounds. To this end, all documentation surrounding the applicant's receipt of public benefits should be maintained, reviewed, and evaluated for probative value, with specific attention paid to (1) the circumstances leading to the applicant's application for public benefits; (2) the amount of time that the applicant receipt the public benefits; and/or (3) if the applicant was certified to receive the public benefits, but did not accept them, then why not. Each of these items will prove crucial in presenting a supporting narrative for the adjudicating officer's determination of whether the applicant is likely to become a "public charge".[17]

While the threshold is 12 individual months over a 36-month period, the fact remains that USCIS will have significant latitude to issue its determination, but rather than which, while we *hope* would comport with the laws, rules, regulations, and their respective precedent-setting interpretations, the U.S. immigration system is rife with subjectivity, poor training, and significant latitude for decision-making. Compounding this is that the amount of time it may take to resolve an issue is longer than anyone would actually have, including the individual, employers, partners and affiliates, respective clients, to wait for a final determination. As such, while the *rule* allows for individuals to receive unemployment benefits for one year's time, whether this is applied correctly is another situation altogether.

The key point here is to prepare your clients for the potential issues, which, in most instances, will not be impossible to overcome, but as in all other areas of life, it is crucial to know the facts, because after all, "[w]hen you know the facts about something, it's less likely to worry you."[18] However, please, do not be the person who says, "Don't worry. Just relax. You worry too much! You'll be fine." I have had attorneys tell me this…I was immediately worried.[19]

Medical Considerations

Now, aside from unemployment, many individuals who have contracted—and will contract—COVID-19 have been scared to receive medical treatment, because they are concerned that it will constitute a public benefit. **This is not correct.** I cannot emphasize this enough.

Taken directly from USCIS:

> The Public Charge rule **does not restrict access to testing, screening, or treatment of communicable diseases, including COVID-19**. In addition, the rule does not restrict access to vaccines for children or adults to prevent vaccine-preventable diseases. Importantly, for purposes of a public charge inadmissibility determination, USCIS considers the receipt of public benefits as only one consideration among a number of factors and considerations in the totality of the alien's circumstances over a period of time with no single factor being outcome determinative. To address the possibility that some aliens impacted by COVID-19 may be hesitant to seek necessary medical treatment or preventive services, **USCIS will neither consider testing, treatment, nor preventative care (including vaccines, if a vaccine becomes available) related to COVID-19 as part of a public charge inadmissibility determination, nor as related to the public benefit condition applicable to certain nonimmigrants seeking an extension of stay or change of status, even if such treatment is provided or paid for by one or more public benefits, as defined in the rule (e.g. federally funded Medicaid)**.[20]

…and there you have it; straight from the horse's mouth.[21]

Now, you may question why I would trust USCIS to apply this correctly, but not the rule regarding the receipt of unemployment benefits: The simple answer is that medical care is less political than financial maintenance (i.e., unemployment benefits). Either our health or those of our friends and/or family members' have been impacted by COVID-19. To wit, we were notified that the Vermont Service Center (VSC) was closed on April 10th, due to "a potential COVID-19 exposure" that was "presumed positive." Luckily, the results came back negative, and the VSC reopened after only three days. This caused little disruption, but was—and is—a sign of how pervasive the virus can be.

Ultimately, while the receipt of unemployment benefits is not highly likely to have a direct impact on an individual athlete's or artist's immigration status, it could, and so, be mindful of the possibilities and present them clearly.

USCIS Suspends Premium Processing…

On March 20th, a Friday, without warning or fanfare, USCIS suspended premium processing . . . effective that day.[22] There was no proposed period, but what made this all the more frustrating was that "USCIS will reject the I-907 and return the $1,440 filing fee for all petitions requesting premium processing *that were mailed before March 20 but not yet accepted*."[23]

This was surprising and unexpected: Most petition review processes at the service centers are, and have been, done remotely for several years. Other than USCIS's statement that it was immediately and temporarily suspending premium processing "due to Coronavirus 2019 (COVID-19)," we don't know what the specific rationale or reason was for doing so. What we do know, however, is that by doing so, many individuals and employers, who were already struggling because of COVID-19's impact on their businesses, were stuck in an even more tenuous state. An individual who files a petition to change or extend his/her/their status before the end of the then-current status may remain in the United States pending the adjudication of that change/extension of status petition.[24] BUT! That same individual—*in most instances*—may not work after the date when the then-current visa status ends, even if the individual is authorized to remain in the United States waiting for the adjudication of the pending petition.[25]

Note that the USCIS Policy Manual dictates that:

> A pending petition does not confer lawful immigration status on an alien. In addition, a pending application or petition does not automatically afford protection against removal if the alien's status expires after submission of the application. The alien may have no actual lawful status in the United States and may be subject to removal proceedings unless and until the extension of stay (EOS) application, change of status (COS) application, adjustment application, or petition is approved.
>
> [. . .]
>
> **If USCIS ultimately approves the EOS or COS application, then the alien is considered to be in lawful immigration status on the date the adjustment application is filed.** If USCIS denies the EOS or COS application, then the alien is generally considered to be in unlawful immigration status as of the expiration of the alien's current nonimmigrant status

> and likewise on the date the adjustment application is filed. In this instance, the INA 245(c)(2) bar would apply, unless an exemption is available.[26]

This is further clarified and set forth on USCIS's "USCIS Response to COVID-19" webpage, under "Extension of Stay/Change of Status Filing Delays Caused by Extraordinary Circumstances Related to COVID-19":

> **If You File in a Timely Manner.** Nonimmigrants generally do not accrue unlawful presence while the timely-filed, non-frivolous EOS/COS application is pending. Where applicable, employment authorization with the same employer, subject to the same terms and conditions of the prior approval, is automatically extended for up to 240 days after I-94 expiration when an extension of stay request is filed on time.[27]

To clarify the last sentence of that quote, the extension of work for 240 days typically involves extensions of status, with the same employer, in the same geographic area of work, under the same occupational title, performing the same duties.[28] Many petitions do not meet these criteria, and so, the 240-day extension is not applicable. You may say, "So what? This is great!" To which I would reply, "So what? So, let's dance!"[29]

. . . USCIS Exclaims That It Does Not Have Enough Money . . .

Unfortunately, we are always doing a hot number in the age of Trump, and it is never choreographed.

USCIS is an agency that is "almost entirely self-funded. The fees they charge cover 95% of their budget."[30] This was so important to know, because whenever there have been multiple shutdown threats from Congress and elsewhere, USCIS would continue its operations without much impact. Clients, colleagues, employers, employees, performers, artists, athletes, and just about everyone was very happy about this.

Then, however, Trump and an array of isolationist policies have diminished the number of immigration petitions and applications being filed with USCIS.

Then COVID-19 closed so many businesses, as well as caused additional restrictions on immigration and international travel, ultimately further diminishing the number of immigration petitions and applications being filed with USCIS. To be clear, "The pandemic has already brought on a 'dramatic decrease' in its revenue that is only likely to worsen as applications are estimated to drop by about 61% through September, an agency spokesperson said."[31]

Further, in the midst of COVID-19, USCIS suspended premium processing services, which means rejecting $1,440 *per petition* filed. Then, as of May 16, 2020, USCIS, "is asking Congress for a $1.2 billion bailout."[32] . . . Go on.

"The agency claims it will run out of money by the end of the summer without aid due to a decline in immigration caused by the coronavirus pandemic."[33] This is understandable, but why did it suspend premium processing?

Well, fast forward to May 29, 2020, and—once again, unexpectedly and without warning—USCIS decided to resume premium processing as of June 1st.[34] USCIS proceeded in a phased process with full resumption of premium processing services by June 22nd.[35] This was great news, but still makes us wonder why it was suspended in the first place. In any event, we take what we can get, and this was a good get.

It is also important to consider that we do not know how long this will last. The goal should be to maximize opportunities for your non-citizen clients to be able to work here, and as such, try to use these opportunities—like premium processing—whenever you can. We must use all options available to us.[36]

Sabre Rattling!!

Additionally, we could also look for opportunities to sue USCIS and its ilk. In fact, I recommend this course of action, and wish for more clients who were willing to do it. We need some *quality* lawsuits brought against USCIS as they relate to business immigration. There have been numerous lawsuits related to the H-1B program, but those are largely with respect to IT consulting firms,[37] and are not as likely to impact our clientele. In fact, most of the lawsuits filed in the business realm relate to H-1B visas. The data appears to show that in many instances, taking USCIS to court may yield the desired results.[38] Yet we must be careful in what we file, such that we do not get another *Kazarian v. USCIS* case that complicates and frustrates matters.[39]

In the meantime, however, a lawsuit was filed in U.S. District Court on May 19th by . . . the Buffalo Sabres. Shout out to a local paper, the *Buffalo News*:

> The suit describes [Dr. Edward Anthony] Gannon[, the team's head strength and conditioning coach,] as "a UK national who possesses a Ph.D. in Applied Strength and Conditioning from the University of Bath — a leading university in the UK with an international reputation for research and the sciences." The team's position is that Gannon has reached the level required for certification by reaching a position held by only 31 people in the top hockey league in the world.

> The agency, however, said the Sabres have failed to show Gannon has reached national or international notoriety in his field. The team says the agency is twisting facts and not properly applying reference letters on Gannon's behalf as well as his qualifications.[40]

I, for one, have seen this first hand with a world-class, internationally recognized, weightlifter who holds dozens of world records. I have also seen this with internationally recognized physicists, and experts in 3D printing.

Let us read on:

> The Sabres cited Gannon's qualifications based on his ascension to the position, his research, training methods used by other teams and universities, speaking engagements and compensation levels.
>
> The denial decision chastises the Sabres for not including articles from the media describing Gannon's "significant original contributions" but the suit notes that "Dr. Gannon is not in a field where his work would normally be covered by media." The Sabres, in fact, like many professional sports teams, do not make their training staff available to reporters.[41]

This sounds like a clear case of an unqualified individual seeking a benefit that he does not deserve to receive. I am certain USCIS correctly denied the good doctor's credentials and global qualifications. So, let us go on; what more is there to say?

From *USA Today*:

> Gannon showed in multiple ways that "he has risen to the very top of his field," the lawsuit says, citing in part Gannon's peer-reviewed research in his field. Multiple professional sports leagues, including the NBA and NFL, use his research for training regimens, the lawsuit contends.
>
> [. . .]
>
> Federal officials determined that Gannon did not meet the criteria for the visa. Immigration officials decided that reference letters submitted for Gannon did not "illustrate how Dr. Gannon's contributions are both original and of major significance to the field," according to the federal lawsuit.[42]

. . . and there it is. Thank you USCIS, for ensuring that the rules and regulations are interpreted correctly and applied objectively.

This is typical behavior for USCIS, unfortunately. So, I would recommend looking to other classifications as a means of obtaining a green card. Perhaps an argument can be made that the good doctor above deserves to receive a green card as an individual holding an advanced degree (or possessing exceptional ability), *and* that his presence is in the "national interest" of the U.S. This would be an EB-2 National Interest Waiver (NIW).

Conclusion

I do not believe that Nostradamus has written anything about 2020, but I have been told that if I look online, I will be convinced otherwise. So prevalent has this been that Reuters—yes, *the* Reuters—felt it necessary to fact check the notion that Nostradamus predicted the COVID-19 outbreak,[43] reporting that no, Nostradamus did not prognosticate about 2020.

Nonetheless, the state of immigration is still in flux and tenuous. While we have had two positives—H-1B litigation success, quicker processing at the Vermont Service Center—we still have the same shenanigans of requests for evidence (RFEs), delayed notice issuances, and uncertainty in the application of rules and regulations.

We must remain vigilant, knowledgeable, and still, optimistic. This is especially important during these tense and uncertain times, when life, liberty, and the pursuit of happiness appear to be in jeopardy all around us.

Endnotes

1. It is worth noting that this "phenomenon" only started in 2017. Surprising, I know.
2. You may find it interesting to note that this *is* something that is (was) said. Recorded and performed by the great chart-topper, Vera Lynn, "Be Like the Kettle and Sing," was a smash when it was distributed in 1943, and featured as part of the film, *We'll Meet Again*. https://en.wikipedia.org/wiki/Be_Like_the_Kettle_and_Sing.
3. https://en.wikipedia.org/wiki/I%27m_a_Little_Teapot.
4. https://www.nytimes.com/2020/05/28/business/unemployment-stock-market-coronavirus.html.
5. https://www.bls.gov/web/empsit/cpseea31.htm It is notable that this figure only covers unemployment claims as of April 30, 2020—published on May 11, 2020—and that the two other industries that have higher rates of unemployment are "Accommodation" and "Personal and laundry services".
6. *Id*.
7. https://www.dol.gov/general/topic/unemployment-insurance.
8. Cataliotti, Michael, *Sports and Entertainment Immigration: SCOTUS, Travel Bans, Bull Riders, Dancers, and Athletes*, Entmnt, Arts, and Sports L. J., Spring 2020, Vol. 31, No. 2, p. 11.
9. https://www.uscis.gov/policy-manual/volume-8-part-g-chapter-10.
10. https://www.uscis.gov/archive/archive-news/uscis-publishes-final-rule-certain-employment-based-immigrant-and-nonimmigrant-visa-programs.

11. https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/managing-h1b-workers-during-covid19.aspx.
12. https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf.
13. https://www.uscis.gov/working-united-states/temporary-workers/o-1-individuals-extraordinary-ability-or-achievement/o-nonimmigrant-classifications-question-and-answers.
14. *Id*.
15. *Supra*, n.10.
16. http://nysbar.com/blogs/EASL/2020/05/immigrant_artists_and_their_em.html.
17. https://www.aila.org/advo-media/tools/psas/how-does-the-new-public-charge-rule-affect-you.
18. Joy Berry, *Let's Talk About: Feeling Worried*, Scholastic Inc., 2002. This is a children's book and a fantastic read. The author distills down a very heavy topic—anxiety—into very simple terms that are excellent and important for us all to understand and appreciate. The specific passages that relate to the point I am making here, though, are: "When you feel worried, you might imagine all kinds of things. Most of these things probably won't happen. Most of these things probably aren't true. [. . .] Sometimes it's impossible not to worry. When this happens, it's best not to ignore your worries. You can make yourself feel better by talking to someone about what is worrying you. Describe how you feel. Ask questions. Try to learn the facts about what's worrying you. When you know the facts about something, it's less likely to worry you."
19. In fact, I have been told this by many people, and it always has the same effect.
20. https://www.uscis.gov/green-card/green-card-processes-and-procedures/public-charge. Emphasis added.
21. Interestingly enough, this idiom comes from horse grooming and racing—along with many others. According to the Oxford Dictionary of Word Origins (https://books.google.com/books?id=J4i3zV4vnBAC&pg=PA214&lpg=PA214&dq=syracuse+herald+I+got+a+tip+yesterday,+and+if+it+wasn%27t+straight+from+the+horse%27s+mouth+it+was+jolly+well+the+next+thing+to+it.&source=bl&ots=aFA7PHtIAh&sig=ACfU3U27_KIMWf6EfboZ1yYAXlUbVxk79A&hl=en&sa=X&ved=2ahUKEwjAmqnzlePpAhVlU98KHTJmDKsQ6AEwAHoECAoQAQ#v=onepage&q=syracuse%20herald%20I%20got%20a%20tip%20yesterday%2C%20and%20if%20it%20wasn't%20straight%20from%20the%20horse's%20mouth%20it%20was%20jolly%20well%20the%20next%20thing%20to%20it.&f=false), *The underlying idea of* ***straight from the horse's mouth*** *is that the best way to get racing tips is to ask a horse directly. One of the first examples comes from a 1913 edition of the Syracuse Herald: 'Lionel hesitated, then went on quickly. "I got a tip yesterday, and if it wasn't straight from the horse's mouth it was jolly well the next thing to it."*
22. https://www.uscis.gov/working-united-states/temporary-workers/uscis-announces-temporary-suspension-premium-processing-all-i-129-and-i-140-petitions-due-coronavirus-pandemic.
23. *Id*. Emphasis added.
24. https://www.uscis.gov/policy-manual/volume-7-part-b-chapter-3, at E.1.
25. *Id*. (demonstrating the difference between "lawful immigration status" and "period of authorized stay").
26. *Id*. Emphasis added.
27. https://www.uscis.gov/about-us/uscis-response-covid-19.
28. https://www.uscis.gov/i-9-central/67-extensions-stay-other-nonimmigrant-categories.
29. https://www.youtube.com/watch?v=mX4R56zdNVA Caddyshack, Rodney Dangerfield as Al Czervik, talking to his caddy.
30. https://abcnews.go.com/ABC_Univision/Politics/heres-shutdown-affects-immigration-services/story?id=20431892.
31. https://www.vox.com/2020/5/16/21260966/uscis-bailout-coronavirus-immigration-agency.
32. *Id*.
33. *Id*.
34. https://www.uscis.gov/news/alerts/uscis-resumes-premium-processing-certain-petitions.
35. *Id*.
36. I know plenty of people don't read the notes, but for those who do, you thought I was going to say that we have to use the "tools" available to us, or the "tools in our toolbox," didn't you? I can't stand that awful phrase and analogy.
37. https://www.murthy.com/2020/03/26/it-consulting-firms-victorious-in-h1b-lawsuit-against-uscis/.
38. https://www.motherjones.com/politics/2019/12/h1b-visa-court-case-methodology/.
39. *Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), *available at* https://www.lexisnexis.com/community/casebrief/p/casebrief-kazarian-v-us-citizenship-immigration-servs and https://en.wikipedia.org/wiki/Kazarian_v._USCIS.
40. https://buffalonews.com/2020/05/20/buffalo-sabres-lawsuit-richard-gannon-immigration/.
41. *Id*.
42. https://www.usatoday.com/story/news/2020/05/19/buffalo-sabres-sue-immigration-officials-ice-over-green-card-denial-for-trainer/5221410002/.
43. https://www.reuters.com/article/uk-factcheck-coronavirus-nostradamus/false-claim-nostradamus-predicted-the-coronavirus-outbreak-idUSKCN21R388.

Michael Cataliotti is the Principal of Cataliotti Law P.C., a law firm concentrating on business immigration and international corporate transactions. His clientele includes individuals and entities from such industries as sports, music, fashion, film, television, art, theatre, new media, and technology. Michael is a faculty member at Lawline CLE; a frequent speaker on the topics of business immigration, corporate transactions, and entrepreneurship; a member of the American Immigration Lawyers Association (AILA) where he is an active participant on several committees; was most recently recognized as one of Super Lawyers' "Rising Stars" in 2019, and sits on the Legal Committee of Dance/NYC.

Resolution Alley
Virtual Mediation for the New Normal

By Theo Cheng

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

It would be an understatement to say that we are living in extraordinary and unprecedented times. This pandemic has touched everyone in some way or another. We all have family, friends, and others who have lost their jobs, are struggling to pay bills or make ends meet, had their lives turned upside down, or even lost their lives to this terrible disease. In our own legal profession, we have seen corporations, in-house legal departments, and law firms react by reducing staff, cutting salaries, deferring summer and internship programs, and otherwise managing and coping through this crisis.

In the arts, entertainment, and sports fields, the economic downturn has perhaps been even more severe and dramatic. Theatrical productions—including all of the Great White Way—shut down.[1] Sporting events, concerts, and other small and large arena performances were also canceled or postponed. Although ESPN announced that it would begin televising South Korea's Korean Baseball Organization games during the upcoming 2020 season,[2] and Governor Cuomo urged professional sports to return to New York,[3] those broadcasts looked very different without fans in attendance. Yet even more poignant, these (hopefully, temporary) shutdowns will inevitably be accompanied by the advent of numerous types of disputes, even if the country rises out of this crisis sooner rather than later. To give just a few examples:

- Actors, athletes, musicians, and other performers have found themselves out of work for many months, with no certainty about when they will be able to resume their employment or from where their next engagements or gigs will come;
- Thousands of disappointed fans and patrons will be seeking refunds and/or credits for previously purchased tickets and season passes;
- Venue owners face the prospect of tenants (both short-term and long-term) who have been unable to meet their lease obligations;
- Renters of facilities have experienced uncertainty as to when sufficient revenue would be forthcoming so as to permit them to meet their lease obligations;
- Vendors face the inability to meet their contractual obligations; and
- More generally, parties to agreements have experienced their contractual expectations thwarted through this crisis, coupled with either a reluctance or inability to truly assign blame to their counterparties.

Indeed, the disruption to normal commerce is the only certainty that these parties can see as they gaze into the future. Additionally, with the courts in varying states of readiness and operation, the possibility that justice can be achieved through formal legal proceedings, at least in the short-term, seems fleeting.

In response, the Alternative Dispute Resolution (ADR) community has increasingly embraced the use of virtual ADR processes to afford parties a viable alternative. In doing so, it has begun a significant transformation in the landscape of dispute resolution. Virtual ADR—also known as online dispute resolution or ODR—is the robust use of technology in ADR processes to substitute for or replace in-person proceedings. Although virtual ADR processes have been around for quite some time, their acceptance and growth have been slow over the past several decades. Yet seemingly overnight, there are numerous webinars and other programs touting the advantages of utilizing virtual ADR techniques to resolve disputes and help restructure contractual obligations. There are also salient differences emerging between in-person and virtual ADR processes that should inform advocates and their clients. In the end, however, under the circumstances in which we presently find ourselves, there is no question that the use of virtual ADR processes can serve as a possible viable alternative.

A variety of facilitated process, including mediation and arbitration, can be conducted virtually. Although most of us are now quite familiar with, or at least have heard or read about, the Zoom platform, virtual ADR processes are not specific to that platform and can be practiced on any audio or video teleconferencing (VTC) platform. As with all software-driven interfaces, each platform has its own special features and limitations. The key is to understand what those features are and become comfortable enough with the platform so that participants can focus on finding a resolution to their disputes.

Mediation is particularly conducive to being converted from an in-person format to one that takes place online. In short, a virtual mediation would attempt to

mimic the situation where the participants have gathered together in a single physical room. Ideally, all participants should be able to see each other and interact with one another in real-time. A VTC platform provides the virtual space in which everyone would gather, and all that is needed is for participants to be able to log into the platform from some device (such as a computer, laptop, tablet or smartphone). This depends, in large part, on participants being in a location where they have access to secure, high-speed internet access, or at least can remedy any internet weaknesses or outage problems through, for example, installing a signal booster or relying on a separate hotspot. It also depends on participants having at least a reasonably working microphone/speaker (to transmit and receive audio) and, preferably, a camera of some kind (to transmit and receive video). Perhaps most importantly, it depends on participants being familiar enough with the platform and technology—not necessarily experts on it—so as to feel comfortable to log into it and focus on the issues at hand.

The mediation session can then proceed in similar fashion to an in-person proceeding, as if everyone was gathered around a conference room table. The mediator would convene the session by beginning with greetings and introductions, followed by welcoming remarks and the setting of ground rules. The parties and their counsel can also take advantage of the fact that everyone is gathered together in a single virtual room to share perspectives or otherwise engage in a typical joint session. As the conversation progresses to more substantive topics, it would not be surprising to quickly forget that no one is physically present in the same room.

At some point, there may be a need for the participants to be able to confer privately, with or without the mediator, and there are techniques specific to each particular VTC platform to accommodate that need. For example, some platforms offer the availability of breakout or caucus rooms where the mediator can virtually place participants so that they are able to communicate privately and in confidence with each other. In essence, it is no different than had the mediator assigned individuals to physical rooms across or down the hall in the in-person context. The mediator will also establish some kind of protocol to permit her/his/their entry into each of these rooms so as to facilitate discussion within and amongst the various participant groupings, preserve attorney-client privileged communications, and ensure confidentiality. Alternatively, if the platform does not offer the ability to place participants in separate rooms, while a little cumbersome, participants can simply disconnect and reconnect to the platform in various configurations to accommodate the need for private caucusing. Traditional telephone mediations have operated in this manner for decades. With a little advance planning, the protocols for mirroring caucus rooms in the virtual world can be relatively easily mapped out.

Most VTC platforms also allow parties to visually share documents with other participants. These documents can arise from the underlying dispute or encompass legal documents, photographs and other images, email communications, and even PowerPoint presentations to help illustrate certain points. Indeed, generally anything that can be brought up on a device can be shared with the other participants on a simultaneous basis so that everyone is on the same page as to what is being discussed, as if they were all present in physical proximity to each other. Additionally, if a resolution is achieved, some VTC platforms also permit parties to work collaboratively on a digital memorialization of the principal terms and conditions or even the final agreement itself through use of a screen annotation function while the common document is being shared. Alternatively, electronic signature programs (such as DocuSign) can be utilized or the terms and conditions can be read out loud and the proceeding recorded as a form of memorialization.

In converting to a virtual format, there are obviously enormous savings in travel time and expenses for both out-of-town and local participants. Instead of dedicating hours, if not days, to travel and lodging, those costs are simply non-existent when participants can all connect virtually. Additionally, the accompanying logistical issues of coordinating flight or train schedules, weather delays, and hotel availability are similarly obviated. Conducting a mediation virtually also allows additional participants to attend who might otherwise have been precluded due to time or cost considerations. In fact, the participants really only need to agree upon an available date and time for the session in order to proceed, which makes scheduling a far easier challenge than is typically encountered in the in-person context. Relatedly, because mediation sessions can be scheduled more easily, they can also likely be scheduled for disputes that are time-sensitive or otherwise need a faster path to resolution.

There are undoubtedly other issues with converting mediations to a virtual platform, including ensuring the competency of counsel, parties, and the mediator to fully utilize the platform; preserving the confidentiality and security of the proceeding; and handling the inevitable technical glitches and bugs that accompany any software-driven platform. Although these are natural concerns, they can usually all be overcome through training, education, and continued practice and use of VTC platforms, which have become ubiquitous in our everyday transactions and communications.

There are also some concerns relating to fatigue on a VTC platform and the accompanying psychological and neurological effects on communication.[4] Specifically, the distortions and delays that are inherent in video communications can confound the receipt of information and muddle social cues, creating gaps in our perception of reality. Our brains will then struggle to fill in those

gaps and make sense of the disorder. Doing so can lead to many of us feeling disturbed, uneasy, tired, isolated, anxious, and disconnected—all without quite knowing why. As a result, mediation participants may find it hard to concentrate or have difficulty developing empathy, rapport, credibility, and trust, all of which are generally critical to a successful session.

No one is advocating that virtual mediations are exactly the same as, or a perfect replacement for, in-person mediation sessions. At the same time, we really do not know how long this health crisis will continue and how society will adapt and evolve as the economy reopens. Whether we will ever return back to "normal" or whether we have irreversibly entered a "new normal" remains to be seen. What is clear, however, is that this pandemic, for better or worse, has served as a catalyst for the widespread introduction and adoption of virtual ADR processes and techniques. Given the current state of affairs—where our courts are only gradually indicating a return to the traditional litigation model to which we are accustomed—the serious backlogs and delays to access to justice are inevitable. It is incumbent upon all of us to at least recognize the possibility of reducing the burden on the courts and taking reasonable and safe steps to maintain open communications and promote the resolution of pending disputes. In that regard, virtual ADR—and, in particular, virtual mediation—is worth a considered look.

Endnotes

1. *See, e.g.*, "Curtains for Broadway: No Shows Until Labor Day, at Least," N.Y. Times (May 12, 2020), *available at* https://www.nytimes.com/2020/05/12/theater/broadway-coronavirus.html?searchResultPosition=1.
2. *See* "ESPN to televise Korea Baseball Organization games," ESPN (May 4, 2020), *available at* https://www.espn.com/mlb/story/_/id/29132165/espn-televise-korea-baseball-organization-games.
3. Tim Healey, "Gov. Andrew M. Cuomo encourages pro sports to return in New York," *New York Newsday* (May 18, 2020), *available at* https://www.newsday.com/sports/baseball/andrew-cuomo-pro-sports-teams-coronavirus-1.44749420.
4. *See, e.g.*, "Why Zoom meetings are so dissatisfying," The Economist (May 16, 2020), *available at* https://www.economist.com/books-and-arts/2020/05/16/why-zoom-meetings-are-so-dissatisfying; "Why Zoom Is Terrible, N.Y. Times (Apr. 29, 2020), *available at* https://www.nytimes.com/2020/04/29/sunday-review/zoom-video-conference.html.

Theo Cheng is an independent, full-time arbitrator and mediator, focusing on commercial, intellectual property, technology, entertainment, and employment disputes. He has been appointed to the rosters of the American Arbitration Association, the CPR Institute, Resolute Systems, the American Intellectual Property Law Association's List of Arbitrators and Mediators, and the Silicon Valley Arbitration & Mediation Center's List of the World's Leading Technology Neutrals. He is the Immediate Past Chair of the New York State Bar Association Dispute Resolution Section and has been inducted into the National Academy of Distinguished Neutrals. Mr. Cheng also has over 20 years of experience as an intellectual property and commercial litigator. More information is available at www.theocheng.com, and he can be reached at theo@theocheng.com.

Hollywood Docket
Trending: Data Privacy, Copyright Trolling, and a Clause to Keep in Mind

By Neville L. Johnson and Douglas L. Johnson

Biometric Data Privacy

Biometric data privacy is slowly but surely becoming the next battleground in U.S. privacy law. While there is currently a lack of federal legislation regulating the collection and use of biometric data, an increasing number of states have taken it upon themselves to protect their citizens, Illinois being the leading example.[1] Moreover, litigation relating to biometric data is on the rise. Recently, a class action lawsuit was filed against TikTok for failing to inform its users that it was collecting biometric data.[2] Even though most cases are filed in Illinois due to its unique privacy law, the rest of the states are following suit by enacting legislation addressing biometric data privacy. Therefore, it is important that attorneys familiarize themselves with this type of data and the claims associated with it.

Biometric data is any data that relates to human features and is used in a variety of ways to establish an individual's identity.[3] Some examples of biometric data include iris scans, fingerprints, and facial recognition.[4] Biometric data is not like a password or social security number—it is immutable and cannot be changed. This makes it highly sensitive information and companies must use heightened caution when collecting and storing it. For example, if a company uses facial recognition to verify the identity of its users, and there is a data breach, there is no way that the person whose data has been compromised can change their face to restore security.

As the use of biometric data becomes more and more prevalent, states are beginning to recognize that legislation is necessary to address the specific risks associated with this type of sensitive data. Illinois was the first state to enact legislation aimed at biometric data when it passed the Biometric Information Privacy Act (BIPA) in 2008.[5] BIPA requires entities to inform individuals in writing that biometric data will be collected, how it will be collected, and for what that data will be used. An entity is prohibited from using any biometric data it collects without obtaining a written release from the individual.[6] BIPA also prohibits entities from profiting off of biometric data, although dissemination of such data is not entirely prohibited.[7]

BIPA allows an entity to disseminate biometric data under a limited number of circumstances.[8] Disclosure is permissible if the individual gives consent, the disclosure is required by law, or the information is disseminated pursuant to a valid search warrant.[9] BIPA also requires entities to use the reasonable standard of care of the respective private industry to store the information, as well as using more caution for biometric data storage than other types of data internally.[10]

BIPA is unique, because it gives any individual plaintiff standing to sue for a violation.[11] It also provides that an individual plaintiff is entitled to the greater of liquidated damages or actual damages based on recklessness or negligence, reasonable attorney's fees, and other relief, such as an injunction, if the court sees fit.[12] This provision of BIPA has allowed many lawsuits to proceed against entities using biometric privacy data.[13] Two hundred cases were filed in the state of Illinois from 2018 to 2019 alone, and that number is sure to rise in 2020.[14] Furthermore, these class actions can lead to large settlements. For example, Facebook recently agreed to pay $550 million to Illinois users who had alleged in a class action lawsuit that the platform was unlawfully collecting biometric data.[15]

Other states are following suit. Washington[16] and Texas[17] have enacted legislation that prevents capturing or selling biometric information without consent or unless required by law. California's Consumer Privacy Act (CCPA)[18] went into effect this year and includes biometric data in its definition of personal information. The CCPA requires that entities provide notice of data being collected and that they specify if the data is being sold or disclosed to third parties.[19] A unique feature of the CCPA is that it requires entities to give consumers the ability to choose to opt out of their data being collected, request access to their data and also request that their data be deleted. New York also recently amended its laws dealing with hacking and electronic surveillance.[20] These are only a few examples of states that are taking biometric data privacy seriously. As consumers become increasingly aware of what biometric data is and how it should not be

used, the number of lawsuits and states legislating to address these issues is likely to rise.

Copyright Trolling Still on the Rise

Celebrities continue to be targeted by photo agencies claiming copyright infringement for posting photos of themselves on social media. Some recent targets have been Kendall Jenner,[21] Katy Perry,[22] Gigi Hadid,[23] and Justin Bieber,[24] all for posting photos of themselves on Instagram. Kendall Jenner's case is pending and Justin Bieber seems to have settled out of court, while Katy Perry's case is in process. Katy Perry was sued by Back-Grid USA for posting a paparazzi photo of herself dressed as Hillary Clinton at a Halloween Party in 2016 on her Instagram page. The main arguments raised in the motion to dismiss were fair use and that the photo was an unauthorized derivative work. The motion was not granted, and the case will proceed to trial; however, U.S. District Judge Andre Birotte Jr. strongly urged the parties to reach a settlement, emphasizing that this case would needlessly take up the valuable time and resources of the court.[25] Although it is rare, it is not impossible to defeat a copyright claim in this context. For example, a lawsuit against Gigi Hadid was recently dismissed because the photo agency suing her had not adequately registered the copyright of the photo at issue.[26]

Practice Note: Attorney's Fees Clauses

Under the "American Rule," attorney's fees may not be collected from the losing party by the winning party unless an award is authorized by express agreement between the parties, any applicable state statute or court order. The simplest way of ensuring payment of attorney's fees is to include in the agreement between the parties an attorney's fees clause. In California, attorney's fees are not recoverable unless there is an attorneys' fees clause in the agreement, or required by law or by statute.[27] New York also follows the American Rule.[28] For lawyers practicing in any state, it is good practice to utilize these clauses in agreements in the event that a dispute between the parties occurs, as often the availability of attorneys' fees will determine whether taking on a case is worthwhile. Many entertainment companies refuse such clauses, figuring that a plaintiff will not want to risk the expense if there is no such clause.

Good practice requires any attorney to advise clients entering into transactions of the pros and cons of such clauses. Similarly, in copyright infringement actions, attorneys' fees can be awarded to the prevailing party.[29] Failure to advise a client of the risks arguably could be malpractice.

Beware of Arbitrator Partiality: *Monster Energy Co. v. City Beverages, LLC*

The Ninth Circuit recently vacated a final arbitration award in favor of Monster Energy Co. in its dispute with City Beverages, LLC because of the arbitrator's failure to disclose his ownership interest in JAMS.[30] Although the arbitrator had disclosed that he had an overall interest in the financial success of JAMS, the omission of his ownership interest in addition to the volume of business between JAMS and Monster in the past five years[31] was enough to demonstrate that the arbitrator had not acted impartially. While the ABA has stated that the decision likely will not have much of an effect beyond JAMS adjusting its disclosure policies,[32] it is a reminder to approach arbitration with caution and to ensure prior to the commencement of proceedings that the arbitrator chosen by the parties is properly vetted. The Supreme Court denied Monster's writ of certiorari.[33]

Endnotes

1. Natalie A. Prescott, *The Anatomy of Biometric Laws: What U.S. Companies Need to Know in 2020*, The National Law Review (Jan. 15, 2020), https://www.natlawreview.com/article/anatomy-biometric-laws-what-us-companies-need-to-know-2020 (last visited May 29, 2020); *Status of Internet Privacy Legislation by State*, American Civil Liberties Union, https://www.aclu.org/issues/privacy-technology/internet-privacy/status-internet-privacy-legislation-state (last visited May 29, 2020).
2. This lawsuit was filed in California, but alleges a violation of the Illinois law and is seeking class certification. *M.E. v. TikTok, Inc.*, Docket No. 4:20-cv-03555 (N.D. Cal. May 27, 2020).
3. Milone, *Information Security Law,* § 1.01.
4. *Id.*
5. Biometric Information Privacy Act, 740 ILCS § 14, http://www.ilga.gov/legislation/ilcs/ilcs3.asp?ActID=3004&ChapterID=57
6. 740 ILCS § 15(a)-(b).
7. 740 ILCS § 15(c).
8. 740 ILCS § 15(d).
9. *See id.*
10. 740 ILCS § 15(e).
11. 740 ILCS § 20.
12. 740 ILCS § 20(1)-(2).
13. Prescott, *supra*, note 1.
14. Natalie A. Prescott, *The Anatomy of Biometric Laws: What U.S. Companies Need to Know in 2020*, The National Law Review (Jan. 15, 2020), https://www.natlawreview.com/article/anatomy-biometric-laws-what-us-companies-need-to-know-2020 (last visited May 29, 2020).
15. Natasha Singer & Mike Isaac, *Facebook to Pay $550 Million to Settle Facial Recognition Suit*, N.Y. Times (Jan. 29, 2020), https://www.nytimes.com/2020/01/29/technology/facebook-privacy-lawsuit-earnings.html
16. Wash. Rev. Code Ann. § 19.375.020.
17. Tex. Bus. & Com. Code § 503.001.
18. California Consumer Privacy Act, Cal. Civ. Code §§ 1798.100-199.
19. Danielle Ochs, *The Latest on California's Approach to Biometrics in the Workplace*, The National Law Review (October 10, 2019), https://www.natlawreview.com/article/latest-california-s-approach-to-biometrics-workplace (last visited May 29, 2020).
20. Stop Hacks and Improve Electronic Data Security Act (SHIELD Act), 2017 Bill Text NY S.B. 6933, https://legislation.nysenate.gov/pdf/bills/2019/S5575B. *See also* Prescott, supra note 8.

21. *Angela Ma v. Kendall Jenner, Inc.*, Docket No. 2:20-cv-03011 (C.D. Cal. Mar 31, 2020).
22. *BackGrid USA, Inc. v. Katheryn Hudson*, Docket No. 2:19-cv-09309 (C.D. Cal. Oct 29, 2019).
23. *Xclusive-Lee, Inc. v. Hadid*, No. 19-CV-520 (PKC) (CLP), 2019 U.S. Dist. LEXIS 119868, at *10 (E.D.N.Y. July 18, 2019).
24. *Barbera v. Justin Bieber Brands LLC*, Docket No. 1:19-cv-09532 (S.D.N.Y. Oct 16, 2019).
25. Order Denying Motion to Dismiss at 1, *BackGrid USA, Inc. v. Katheryn Hudson* (No. 2:19-cv-09309).
26. Xclusive-Lee, Inc., *supra*, note 23.
27. Cal. Civ. Proc. Code § 1033.5(a)(10).
28. *Krodel v. Amalgamated Dwellings, Inc.*, 88 N.Y.S.3d 31 (2018).
29. 17 U.S.C. § 505.
30. *Monster Energy Co. v. City Beverages, LLC*, No. 17-55813 (9th Cir. 2019).
31. 97 arbitrations for Monster in the past five years.
32. https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2020/ninth-circuits-new-disclosure-rules-for-owner-neutral/.
33. *Monster Energy Co. v. City Beverages LLC*, No. 19-1333, 2020 WL 3492685, at *1 (U.S. June 29, 2020).

Neville L. Johnson and Douglas L. Johnson are partners at Johnson & Johnson LLP, in Beverly Hills, CA, practicing entertainment, media, business and class action litigation. Suna Izgi, a third-year law student at Southwestern Law School, is a law clerk there who helped write this article.

Courtroom Connoisseur in the Battle of the Experts: An Analysis of Judicial Decisions Surrounding the Valuation of Art

By Caroline Yarbrough

How have judges ruled when thrust into the mantle of "courtroom connoisseur" to determine an objective value for art based on a transaction that has not occurred between two buyers that do not exist?[1] This elusive hypothetical willing buyer and seller standard of fair market value constitutes the cornerstone for determining tax liability. The level of subjectivity involved in establishing this value, coupled with the responsibility of judges, who are typically nescient about art, to adjudicate between connoisseur expert witnesses, has resulted in considerable litigation that highlights the fundamental challenges involved in court decisions based on the valuation of unique objects. This article seeks to explore the inherent tension that exists between the seemingly subjective nature of appraisals and the imperative for the Internal Revenue Service (IRS) and the U.S. Tax Court to establish an objective justification for valuing artwork for federal taxation purposes, including charitable deductions and estate, income, and gift tax. [2] As each valuation case presents a novel challenge to courts, due to the unique facts that emanate from the unique artwork and unique market conditions at the date in question, analyzing what aspects of the expert testimonies have swayed U.S. Tax Court and Court of Appeals judges proves revelatory in understanding how these complex cases are decided.

Doherty v. Commissioner illuminates how a "battle of the experts" concerning an artwork's appraisal inherently reduced a painting's valuation.[3] The case highlighted the opposing appraisals of two of the most notable expert authenticators on the oeuvre of Charles M. Russell, a noteworthy painter of the American Western frontier. In 1969, George and Emilia Doherty bought *Attacking the Stagecoach*, a painting purportedly created by Russell, for $10,000. In 1982 and 1983 the Dohertys donated a 40% and 60% undivided interest in the painting to the C.M. Russell Museum. They claimed these deductions based on a $350,000 fair market value of the painting, as fair market value constitutes the basis for charitable deductions pursuant to I.R.C. 26 CFR § 1.170A-1.[4] The IRS disputed the fair market value of the painting donated by the taxpayers to the artist's eponymous museum and the U.S. Tax Court found the Dohertys liable for tax deficiencies. On appeal, the legal issue presented to the U.S. Court of Appeals for the Ninth Circuit was a question of fact: What was the value of the painting contributed to the C.M. Russell Museum?[5]

The Respondent's expert, Ginger Renner, an independent consultant who maintained the most extensive archive on Russell in the country, corroborated the IRS Commissioner's valuation of $100 by arguing that the painting was a forgery. The Petitioners' expert was Ray Steele, the former executive director of the C.M. Russell Museum, who had authenticated the entirety of the 1,800 works in the collection during his 20-year tenure at the institution. He justified the taxpayers' claim. As the U.S. Court of Appeals acknowledged that the opposing experts undoubtedly represented the "foremost authorities on works by Charles M. Russell" and both experts pointed out the same formal characteristics of the work in their testimonies to come to strikingly different conclusions, it is revelatory to analyze how the court decided in this dissent between the scholars.

Renner argued that the naïve elements, such as the figures devoid of volume and the overall lack of realism, proved that this work "could not possibly be an authentic Russell." On the other hand, Steele alleged that the crude elements Renner flagged embodied common characteristics of the artist and exemplified his singular spontaneity in this quickly executed oil sketch. According to Tax Court Title IV: Rule 142 A, the IRS Commissioner's determination that the taxpayer was deficient in meeting his/her/their tax liabilities was presumed correct, therefore the Dohertys bore the burden of proof by the preponderance of evidence standard.[6]

As this case involved an artwork with an appraised value over $50,000, the appraisal was first reviewed by the IRS Art Advisory Panel. The Panel is comprised of 25 of the foremost dealers, scholars, and museum curators of fine and decorative arts in the nation, who draw upon their seasoned experience in the field to review the appraisal, which consists of information including size, medium, physical condition, provenance, date and method of acquisition, and comparable sales; as well as high resolution photographs of the work to recommend an adjusted fair market value when the specialists concur a misstatement has occurred. While their recommendations are "strictly advisory" to the Tax Court, the due diligence invested in refuting the taxpayer's claim constitutes why the taxpayer bears the burden of proof.[7]

After weighing the expert testimonies, the Court of Appeals affirmed the U.S. Tax Court's judgment that the fair market value of the Russell painting would have been $30,000 at the date of contribution, and thereby the appellant taxpayers had overstated the amount claimed as a charitable contribution. It noted that the U.S. Tax Court wields broad discretion with respect to questions of valuation. In the Memorandum Opinion, U.S. Tax Court Judge Carolyn M. Parr maintained that disputes over authenticity inherently deflate values, stating that the "shadow cast by a question of the authenticity of a painting acts as a depressant on its value."[8] The Tax Court declared that the discord, which reasonably should have been known at the time of donation, would have impacted the bid of a hypothetical willing buyer and prompted the painting to change hands at a lower price than one for which authenticity is undisputed. It is significant that the mere presence of a debate between experts on a question of fact rife with complexity and subjectivity in and of itself depressed the adjudged value of the work in question.

By situating *Doherty* within the landscape of other valuation cases, it becomes clear that the wary nature of judges towards adjudicating on the value of artwork accounts for the great weight placed on the opinion of art specialist witnesses. However, the reliance on opposing experts has proved a challenge for courts as well. Nearly every case references *Messing v. Commissioner*, wherein the Tax Court judge asserted that valuation cases consistently culminate in the same scenario; a battle between experts so convinced of their "unalterable correctness" that they overzealously strive "to infuse a talismanic precision into an issue which should frankly be recognized as inherently imprecise and capable of resolution only by a Solomon-like pronouncement."[9] After experts advocate a valuation methodology and testify that the formula used by the opposing expert is erroneous, courts apply the preponderance of the evidence standard to weigh the persuasiveness of the expert testimonies and adjudicate the ultimate valuation.[10]

The majority of valuation cases, in which the exempt character of the recipients and the right of the petitioner to deductions pursuant to 26 U.S. Code § 170 are not under dispute, result in decisions that rest upon either the credibility of the appraiser or the cogency of his/her/their systematic methodology.[11] *James J. Isaacs v. Commissioner* serves as an example of a valuation case in which a charitable deduction was denied based on the deficiency of the taxpayer to provide the proper documentation and qualified appraisal. When making a charitable transfer of artwork, donors are required to supply documentation to validate the public charity, related use, and qualified appraiser.[12] The Tax Court held that Isaacs failed to comply with the technical requirements to enjoy the privilege of the $246,300 claimed deduction for his donations of 12 fossil trilobites to the California Academy of Sciences when he neglected to submit an appraisal, records of the fossils' provenance, and an explanation substantiating the fair market value for which he based his deduction. Issacs failed to meet the requirements outlined in IRS 26 U.S. Code § 170 (11)(A) and (B) for "qualified appraisal," which is required when deductions of more than $5,000 are claimed on contributions of property.[13]

Cases such as *Franklin P. Perdue v. Commissioner*[14] and *Robson v. Commissioner*[15] evidence how the question of the most relevant market for comparables marks a contested aspect of valuation formulas that the U.S. Tax Court and Court of Appeals consider closely. In *Perdue,* the primary difference in the methodology to value the 17th century Spanish gold disc, chain, and coin donated by the taxpayer to the National Museum of American History concerned the appropriate marketplace to draw comparables for the hypothetical fair market transaction. The artifacts had been recovered from a Spanish galleon, the Nuestra Senora de Atocha, which sunk in 1622 while transporting gold objects from Havana, Cuba to Cadiz, Spain. The petitioner's expert, a maritime archaeologist, corroborated the fair market value of $374,814 claimed by the petitioner. He argued that the romance and excitement from the sunken shipwreck provenance engendered a considerable premium in the auction and museum shop market of artifacts. The respondent's experts, one of which was a Spanish professor with a specialization in the coinage of the Spanish empire in the Americas, dismissed the "glamour market" of auctions as rife with dilletantes. Instead, he relied on comparable sales in the numismatic market to arrive at an appraisal of $74,000. The determination of a $311,000 fair market value demonstrates how the persuasiveness of an expert's methodology to consider wider markets beyond the niche coin market, one that encompasses the diverse motivations of buyers, resonated with the Tax Court judge as a more thorough methodology.[16]

Robson revealed that the Tax Court favors fair market value comparables over the replacement method, even when the sale of the object in question is illegal in that jurisdiction. The case concerned the IRS' determination of deficiencies in the Petitioners' federal income taxes related to their charitable deductions of hunting game mounts. At the time of the donations, it was illegal according to California state law to sell mounted animal specimens. The dearth of comparable sales, due to that law, prompted the petitioners' expert, a board member of the World Wildlife Museum, to utilize a replacement cost methodology, which included the travel and taxidermy expenses incurred by undertaking a hunting trip. The Tax Court rejected that methodology and instead decided according to the Respondent expert's approach that drew upon comparable sales in other states. As charitable deductions are determined based upon a theoretical transaction between a willing buyer and seller, comparables in neighboring jurisdictions were deemed admissible in determining the value.[17]

As judges do not view themselves in a position to "extend their role as an art expert," cases such as *Greenberg Gallery, Inc. v. Bauman* demonstrate how court decisions are contingent upon the persuasiveness of systematic methodologies, which could be based upon seemingly trivial factors, such as the amount of time devoted by experts to examining the work.[18] In *Greenberg Gallery*, the plaintiff, Greenberg Gallery, claimed that the defendants, a private collector and Entwistle Gallery, sold it a forged Alexander Calder mobile, and thereby sued on fraud and contract claims. The U.S. District Court for the District of Columbia held that the plaintiff's expert, Klaus Perls, had failed to persuade by a preponderance of the evidence that the mobile was not created by the artist. Albeit the District Judge acknowledged that Klaus Perls constituted the foremost expert on Calder due to Perls's role as Calder's exclusive dealer during the artist's lifetime, the trial court deemed his methodology too "cursory" of an examination of the sculpture to justify his opinion that the sculpture was inauthentic. Although this case was not heard in Tax Court, it nevertheless provides a revelatory parallel to *Doherty* and offers insight on the decisions that judges make between contesting expert opinions on the authenticity of artwork.[19]

Similar to the decision in the *Doherty* case, the Tax Court in *Mathias v. Commissioners* refused to rule on the legitimacy of the artists' hand due to the conflicting nature of the evidence presented by the opposing experts over authenticity and their keen awareness of the significant impact the identity of the artist has on value. This case concerned a claimed charitable deduction and fair market value of a painting purportedly by Gilbert Stuart. Despite refusing to state its decision about the authenticity of the painting, the Tax Court maintained that the "potentially substantial" blemishes, meaning hesitations about the attribution, "reasonably should have been known to petitioner and his appraisers at the critical date" and therefore served as "substantial depressants of the value of the painting."[20]

The decisions of the Tax Court in *Parks v. Commissioner,*[21] *Estate of Kollsman v. Commissioner,*[22] and *Furstenberg v. United States*[23] reinforce how courts place great emphasis on the unbiased, qualified appraiser and how judges will immediately reject the opinions of experts who they deem present a conflict of interest. *Parks* reveals the necessity for a taxpayer to call on an expert appraisal witness in court to justify the methodology used for arriving at the appraised value and to testify as to his/her/their qualifications to conduct the appraisal. The Tax Court found that the Parks had overstated the fair market value of a sailboat they had donated to the California Maritime Academy Foundation. Instead of introducing the expert testimony of the appraiser, who had valued the boat at $50,000, the petitioner tried to substantiate the valuation by citing comparables in the book the *Used Boat Pricing Guide*. The ruling of $24,000, as opposed to the petitioners' stated claim of $50,000, conveys how the Tax Court judge was swayed by the courtroom presence of the defendants' expert, a marine surveyor, and his methodology explanation for settling on a fair market value of $20,000.[24]

The *Estate of Kollsman* decision provides another example of a discredited appraisal that highlights the importance of securing a qualified, impartial expert to support contested value. The U.S. Court of Appeals for the Ninth Circuit discerned bias in the identity of the estate's appraiser, an Old Masters specialist and Vice President at Sotheby's, who appraised the estate under a stipulation that would grant Sotheby's exclusive rights to auction the paintings if they were to be sold. The Court of Appeals believed this conflict of interest directly incentivized the Sotheby's executive to "*lowball* estimates that would lessen the federal estate tax burden borne by the estate" in order to "curry favor" with the executor.[25]

In *Furstenberg,* the judges in the U.S. Court of Claims weighed the testimonies of the expert witnesses, who it declared all constituted valuation experts with impressive qualifications, to determine the fair market value of a painting by Camille Corot that had been donated to the University of Houston. Yet, their per curiam opinion reveals the judges decided to "substantially discount" their reliance on the plaintiffs' expert, Spencer A. Samuels, because the "record indicates that Mr. Samuels and Mrs. Furstenberg, [the taxpayer], are close friends and longtime business associates."[26] By dismissing the testimony of a witness based on a perceived conflict of interest, the Court of Claims reinforced that the identity of the appraiser constitutes a significant factor in decisions requiring an adjudication between battling experts.

Determinations of artwork authenticity and value represent singularly complex and subjective assertions of fact, which are partly contingent on the "eye of the beholder."[27] Yet these cases illuminate that courts first scrutinize the identity of the beholder before considering any claims. Within the subjectivity of valuing art to determine tax liability, the IRS ensures a level of objectivity and consistency by requiring appraisers, taxpayers, and estate executors to adhere to Title 26 of the Internal Revenue Code and professional codes of ethics.[28] Penalties are imposed on taxpayers and appraisers when gross misvaluations occur.[29]

Disputes over attribution in particular highlight how courts routinely verbalize the inadequacy of the legal system to definitively determine issues of authenticity. Furthermore, judges, such as Justice Saxe in *Thome v. Alexander & Louisa Calder Foundation*,[30] consistently acknowledge that their holdings would prove meaningless beyond the courtroom unless supported by "the level of justification sufficient to support a pronouncement by a recognized art expert with credentials in the relevant specialty."[31] Moreover, the consequences of cases such as *Greenberg Gallery* evidence the misalignment between the law and the marketplace. After it became public knowledge that

the leading Calder expert deemed the mobile inauthentic, the marketplace responded by rejecting the sculpture and considering it of negligible value. The sculpture has subsequently failed to find a buyer in the decades since the case. Lawyer Peter R. Stern asserted that "judges now recognize that while their word is law in the courtroom, in the art world their verdicts can be overturned by a higher authority: the market."[32] This case bears witness to how an art expert's opinion can eclipse a judge's official ruling on a work's authenticity in the eyes of the market.

As the preceding cases evidence, U.S. Tax Court and Court of Appeals judges underscore their dependence upon art specialists, but when experts disagree, these judges must assume the precarious position of "courtroom connoisseur" to decide between them. As the value of art continues to rise and the IRS Art Advisory Panel witnesses an escalating taxpayer claimed value each year, the issue of adjudicating between opposing experts over the value of art becomes paramount, as ultimately the government's revenue is at stake.[33] Yet the challenges revealed in the cases discussed herein raise the question as to if a different model could prove fruitful in cases when judges are forced to make a declaratory judgment between competing art connoisseurs.[34]

Endnotes

1. Patricia Cohen, *Ruling on Artistic Authenticity: The Market vs. the Law*, N.Y. Times, (Aug. 5, 2012), https://www.nytimes.com/2012/08/06/arts/design/when-judging-arts-authenticity-the-law-vs-the-market.html
2. Michael W. Maizels and William E. Foster, *The Gallerist's Gambit: Financial Innovation, Tax Law, and the Making of the Contemporary Art Market,* Columbia J. Of Law & The Arts, 42 (2019), 490; Ralph E. Lerner, Art and Taxation in the United States," *Fine Art and High Finance: Expert Advice on the Economics of Ownership,* ed. Clare McAndrew (New York: Bloomberg Press, 2010), 219.
3. *George O. Doherty and Emelia A. Doherty v. Commissioner of the Internal Revenue Service*, 16 F.3d 338 (9th Cir. 1994), https://www.leagle.com/decision/199435416f3d3381282.
4. Fair market value is defined in § 1.170A-1(c)(2) as the "price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts." I.R.C. 26 CFR § 1.170A-1, https://www.law.cornell.edu/cfr/text/26/1.170A-1; At the outset of the trial, the Petitioners sought and were granted the opportunity to amend the fair market value, and thereby the deduction claimed, to $200,000. Tax lawyer Samuel Thomas explained that this was likely due to more lax appraisal standards in the early eighties, but the amendment is essentially negligible to the crux of the case. *Doherty v. Commissioner;* Samuel Thomas, (associate lawyer at Seward & Kissel LLP), in discussion with the author, February 17, 2020.
5. *Doherty v. Commissioner;* 26 CFR § 1.170A-1 (c)(1), provides that "if a charitable contribution is made in property other than money, the amount of the contribution is the fair market value of the property at the time of the contribution." *Doherty*, 16 F.3d at 338.
6. "Title IV: Rule 142 A." In *United States Tax Court: Rules of Practice and Procedure*, 96, https://www.ustaxcourt.gov/rules/rules.pdf.
7. The Art Advisory Panel Of the Commissioner Of Internal Revenue, *Annual Summary Report for Fiscal Year 2018*, Department of the Treasury: Internal Revenue Service, (2018), 2-3, https://www.irs.gov/pub/irs-pdf/p5392.pdf.
8. *Doherty v. Commissioner,* T.C. Memo 1992-98, 1992 Tax Ct. Memo LEXIS 110, 63 T.C.M. (CCH) 2112, T.C.M. (RIA) 92098 (United States Tax Court. 1992), https://advance-lexis-com.ezproxy.sothebysinstitute.com/api/document?collection=cases&id=urn:contentItem:3SXF-57N0-003N-2506-00000-00&context=1516831.
9. *Messing v. Commissioner*, 48 T.C. 502, 512 (U.S. Tax Ct. 1967), https://advance-lexis-com.ezproxy.sothebysinstitute.com/api/document?collection=cases&id=urn:contentItem:3SGP-KVG0-003B-D01X-00000-00&context=1516831.
10. Roy S. Kaufman, *Art Law Handbook* (Gaithersburg: Aspen Law & Business, 2000), 855.
11. Ronald D. Spencer, *The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts* (Oxford: Oxford University Press, 2004), 210.
12. Taxpayers must complete Form 8283, "Noncash Charitable Contributions" for noncash charitable contributions when the amount of their claimed deduction exceeds $500. This form, as well as a signed appraisal by a qualified appraiser within 60 days of donation, is required for deductions over $5,000 pursuant to I.R.C. 26 CFR § 1.170A-11. R.C. 26 CFR § 1.170A-11, https://www.law.cornell.edu/cfr/text/26/1.170A-1.
13. *James J. Isaacs v. Commissioner,* T.C. Memo 2015-121, 2015 Tax Ct. Memo LEXIS 130, 109 T.C.M. (CCH) 1624 (United States Tax Court, 2015), https://advance-lexis-com.ezproxy.sothebysinstitute.com/api/document?collection=cases&id=urn:contentItem:5GBH-60N1-F04K-6002-00000-00&context=1516831.
14. *Franklin P. Perdue v. Commissioner,* 79 TCM 1415 (United States Tax Court 1991).
15. *Robson v. Commissioner*, 73 TCM 2574 (United States Tax Court 1997).
16. *Franklin P. Perdue v. Commissioner,* 79 TCM 1415 (United States Tax Court 1991), https://www.leagle.com/decision/199190762ggtcm8451719.
17. *Robson v. Commissioner*, 73 TCM 2574 (United States Tax Court 1997), https://www.leagle.com/decision/1997264773fttcm257412472.
18. *Mathias v. Commissioners*, 50 T.C. 994 (United States Tax Court 1968), https://www.leagle.com/decision/1968104450cvtc9941945.
19. *Greenberg Gallery v. Bauman*, 817 F. Supp. 167 (United States District Court 1993), https://www.leagle.com/decision/1993984817fsupp1671938.xml.
20. *Mathias v. Commissioners*, 50 T.C. 994 (United States Tax Court 1968), https://www.leagle.com/decision/1968104450cvtc9941945.
21. *Parks v. Commissioner*, 67 T.C.M. 1911 (United States Tax Court 1994).
22. *Estate of Kollsman v. Commissioner*, 777 Fed. Appx. 870 (9th Cir. 2019).
23. *Furstenberg v. United States*, 595 F.2d 603 (United States Court of Claims 1979).
24. *Parks v. Commissioner*, 67 T.C.M. 1911 (United States Tax Court 1994), https://www.leagle.com/decision/1994197867atcm191111978.
25. *Estate of Kollsman v. Commissioner*, 777 Fed. Appx. 870 (9th Cir. 2019), https://advance-lexis-com.ezproxy.sothebysinstitute.com/api/document?collection=cases&id=urn:contentItem:5WD0-79F1-JBM1-M4C4-00000-00&context=1516831.
26. *Furstenberg v. United States,* 595 F.2d 603 (United States Court of Claims 1979), https://www.leagle.com/decision/19791198595f2d60311090.
27. *Thome v. Alexander & Louisa Calder Foundation*, No. 600823/07 (N.Y. Sup. Ct. 2008); *aff'd* 70 A.D.3d 88 (N.Y. App. Div. 2009), http://www.courts.state.ny.us/REPORTER/3dseries/2009/2009_08889.htm.

28. Emily Lanza, *In the Eye of the Beholder: Appraisals of Art for Estate Tax Liability*, Center for Art Law (May 19, 2017), https://itsartlaw.org/2017/05/19/in-the-eye-of-the-beholder-appraisals-of-art-for-estate-tax-liability/.
29. Internal Revenue Code. Title 26 U.S. Code § 6662, https://www.law.cornell.edu/uscode/text/26/6662.
30. *Thome v. Alexander & Louisa Calder Foundation*, No. 600823/07 (N.Y. Sup. Ct. 2008); *aff'd* 70 A.D.3d 88 (N.Y. App. Div. 2009).
31. *Id.*
32. Cohen, "Ruling on Artistic Authenticity: The Market vs. the Law."
33. An analysis of the IRS annual reports illustrates the perpetual increase in cases reviewed by the IRS Advisory Panel for appraisals of artwork valued over $50,000. In 1990 the aggregate taxpayer valuation of the cases reviewed by the Panel was $88,168,000. In 2018 the aggregate taxpayer claimed value was $360,866,084. The Art Advisory Panel of the Commissioner of Internal Revenue. "Annual Summary Report for 1990." *Department of the Treasury: Internal Revenue Service,* (1990), https://books.google.com/books?id=ozFFAQAAIAAJ&pg=PP109&lpg=PP109&dq=irs+art+advisory+panel+annual+report+1990&source=bl&ots=3UMcSRTbbt&sig=ACfU3U2EJLdSkHAvuYeiUXUlT4VI0VrZOg&hl=en&sa=X&ved=2ahUKEwiKlZfTnPznAhX8mXIEHbXKCg0Q6AEwAnoECAgQAQ#v=onepage&q&f=false; The Art Advisory Panel of the Commissioner of Internal Revenue, "Annual Summary Report for Fiscal Year 2018," 5.
34. Reeves describes the U.S. practice to establish authenticity in the courtroom a "folly" where judges "call expert witnesses and then pick the winner of the beauty contest." Van Kirk Reeves, "*Establishing Authenticity in French Law*," in The Expert Versus the Object: Judging Fakes and False Attributions in the Visual Arts, ed. Ronald D. Spencer (Oxford: Oxford University Press, 2004), 228.

Caroline Yarbrough is a Master's of Art Business graduate student at the Sotheby's Institute of Art. She graduated with BA in Art History and Phi Beta Kappa distinction from Davidson College in May 2019. Caroline's insatiable curiosity about how the legal and regulatory landscape impacts estate planning and charitable donations of art and her yearning to better understand the legal implications of appraisals informed her decision to research and write this paper for her course, "Art Law II: Ethics & Policy in the Art Profession," taught by Judith Prowda, Esq., member of the Art Law Committee of the New York City Bar Association.

Sometimes Just Say No: Assessing a Potential Plaintiff's Copyright Infringement Claim

By Brian D. Caplan

The United States Copyright Act protects expression but not concepts, ideas or scénes à faire (sequences of events that result from the choice of a setting or situation). This legal principle is easier said than understood. An example will illustrate the doctrine. If you were to write a one-page summary or "treatment" for a potential show called *Seinfeld* and listed the character traits of the four featured characters as follows:

Jerry Seinfeld: a neurotic, self-doubting, stand-up comedian, who cannot maintain a steady relationship;

Elaine: quirky, frequently puzzled, ditzy, critical, not easily impressed;

George: uncomfortable in his own skin and on occasion a buffoon, awkward, brazen, prone to say the wrong thing at the wrong time;

Kramer: a zany, slapstick goofy looking guy who always gets into trouble.

You would have *no rights* in the show called *Seinfeld*.

Your one-page treatment is simply a concept or idea that can be expressed differently a thousand times over. Nobody has a monopoly on concepts and ideas, and they are not copyrightable. Yet each *episode* of the show *Seinfeld* would be a different protectable and copyrightable expression based upon its plot line and dialogue.

William Roger Dean was a famous artist and designer who produced work in various media, including architecture, design, and painting. His work has hung in museums and he is well known for creating cover art and logo designs for rock bands, including the group Yes.

Many of his works were also featured in coffee-table art books.

When the blockbuster hit movie *Avatar* was released, many bloggers and commentators took to the internet and opined that aspects of the film's ecosystem, including mountains, stone arches, trees, and wildlife, were similar to or copied from works done by Dean. To compound matters, James Cameron, the talented writer and film director whose works include *The Terminator*, *True Lies*, and *Titanic*, was rumored to have been "inspired" by Dean.

Dean had created paintings with floating land masses, rock, moss, and trees ascending into heaven, solid arches in the mist, flat-topped trees, floating jungles, and flying dragons. Cameron's movie also had floating land masses, rock, moss, and tree structures ascending into the sky called "Hallelujah, Mountains," stone arches, a "hometree" resembling a flat-top tree from Africa, a "tree of voices," and a horse-like creature called a "banshee" that could fly.

A side-by-side comparison of Dean's creations and Cameron's work revealed that no works were identical, but some had a similar "look and feel." However, as stated above, one cannot get a monopoly on various ideas and concepts that can be expressed differently by hundreds of different graphic artists. Floating land masses, stone steps covered in moss going into the sky, solid-mass arches, funny-shaped trees and animal configurations are general concepts and ideas.

After watching *Avatar* three times and doing a detailed analysis of Dean's work, I politely declined the opportunity to represent Dean in a significant, high-visibility copyright infringement case against James Cameron and Twentieth Century Fox Film Corporation, the writer/director, and motion picture company, respectively, behind *Avatar.*

In September of 2014, United States District Court Judge Jesse Furman in the Southern District of New York dismissed Dean's copyright infringement claim against Cameron and Twentieth Century Fox, that had been commenced by another attorney, finding that no substantial similarity existed between *Avatar* and copyrightable elements of Dean's artworks. Judge Furman noted in his decision that:

- Dean did not have a monopoly on the idea of floating or airborne land, an idea that has been around since at least 1726, when Jonathan Swift published his classic, *Gulliver's Travels*;
- The shapes of some of the land masses and features such as foliage on waterfall, to the extent these elements appear in nature, are in the public domain and "free for the taking";
- Ideas, such as flying dragon-like creatures, and other features taken from nature (stone arches, acacia trees, willow trees, and colorful amphibians and reptiles) were not subject to copyright protection; and

- dissimilarities between many aspects of the work out-weighted any similarities.

When I read the 14-page court decision, it reaffirmed my belief that sometimes the best decision you can make is to turn down taking a new case.

How to Assess a Copyright Infringement Claim

Assessing a copyright infringement claim in the entertainment industry can be a challenging endeavor. While the fundamental elements of an infringement claim appear to be straightforward enough – namely the ability of a plaintiff to prove (1) that an alleged infringer had access to the plaintiff's work before creating the allegedly infringing work and (2) that there is substantial similarity of protected copyrightable expression from the original work incorporated in the claimed infringing work – many impediments to a successful infringement claim may not be readily apparent on day one of an analysis.

Numerous fact specific and nuanced defenses to a copyright infringement claim may exist, each of which can require thoughtful study and investigation. Such defenses may include, but are not limited to:

- Lack of originality;
- lack of copyrightability;
- independent creation;
- fair use;
- de minimis taking;
- lack of substantial similarity of protectable expression; and
- lack of access.

Cases involving music, books, photography and motion pictures/television productions each present their own issues relating to protectable expression. Proving the first element of a copyright infringement case, access, for each of these creative genres will not differ significantly as the plaintiff will need to prove that the defendant had a reasonable opportunity to hear, see or read the plaintiff's creative work before creating the later work. Normally, direct evidence of copying is not available, so the plaintiff must prove access through the wide dissemination of his/her/their work or through a third-party intermediary who would be likely to have shared the plaintiff's work with the defendant.

Music

Generally speaking, similarity of melody or lyrics is a requirement for a successful copyright infringement case in the music industry, although on rare occasions a unique combination of otherwise non-protectable elements in a song can rise to the level of copyrightable expression.

Often two songs sound similar to the naked ear. However, an infringement assessment does not stop there. If the lyrics and melody of two compositions are dissimilar, and the only similarities between two works relate to structure, instrumentation, tempo, "feel" and the genre of music (i.e., country, salsa, urban), then no protectable copyrightable elements would be wrongfully misappropriated by the secondary creator.

If similarity of melody or lyrics can be identified between two works, however, a number of fundamental questions still must be answered:

1. Has the subject music or have the lyrics been used in prior compositions (so-called "prior art");
2. Is the nature of the subject music or lyrics such that they lend themselves to a claim of independent creation (i.e., that the defendant would not have had to rely on the plaintiff's pre-existing work when creating his/her/their own); and
3. Is the subject music or lyrics trite or commonplace?

Additionally, until a thorough review of prior art can be conducted by a worthy musicologist to determine the originality of the claimed infringed material, the practitioner will not know the actual strength of the claim.

Books

Copyright does not protect an idea, but only the expression of an idea. Determining the distinction between an idea and its expression can often be a challenge. A two-page summary of a novel containing a story line and a brief description of each character would generally not be subject to much protection, as the novel could be expressed in numerous fashions and the summary would simply reflect an idea. When assessing the similarities between two books, one must determine whether there is similarity of protectable expression.

"Copyright protection doesn't not extend to historical or contemporary facts, material traceable to common sources or in the public domain and scénes à faire."[1] Scénes à faire, also known as sequences of events that "necessarily result from the choice of a setting or situation" do not enjoy copyright protection.[2] While consideration can be given to the total concept and feel of a work, similarities in theme, setting, characters, time sequence, plot and pace are generally more important.[3]

Showing that two literary works contain substantial similarities of protectable expression is not an easy undertaking. A review of the case law reflects that most infringement claims relating to literary works fail. The practitioner should be careful to separate non-copyrightable subject matter from protectable expression before taking on an infringement claim and understand that it will be an uphill battle.

Photographs

The nature of copyright protection in photographs differs from other forms of creative expression. An individual who takes a generic photograph of the Statue of Liberty would not have protectable copyrightable expression in his/her/their work to support a claim against a subsequent photographer who takes a similar photo. Since originality is the "sine qua non of copyright,"[4] "copyright protection may extend only to those components of a work that are original to the author."[5] While only a minimal degree of creativity is necessary to establish such "originality," it is required nonetheless. As one court has noted:

> ...the photographer of a building or tree or other pre-existing object has no right to prevent others from photographing the same thing. That is because originality depends upon independent creation, and the photographer did not create that object. By contrast, if a photographer arranges or otherwise creates the subject that his camera captures, he may have the right to prevent others from producing works that depict that subject.[6]

Generally, a photograph may be original in three different respects: the manner in which the photograph is rendered, also known as "rendition," the timing of the photograph, and the creation of the subject.[7]

- "Rendition" relates to the angle of a photographic shot, light and shade, exposure and effects achieved by means of filters and developing techniques, and does not depend upon the scene or object being photographed.
- "Timing" relates to the fortuitous timing of taking a photo not previously taken.

Examples include photographer Tom Mangelsen's "Catch of the Day" (the well-known photo of a salmon jumping up a waterfall into the open mouth of a bear) and "V-J Day in Times Square," the iconic Alfred Eisenstaedt photo of a young sailor kissing a woman on VJ-Day in Times Square.

With respect, to both rendition and timing, the underlying subject of the photo does not qualify for copyright protection, i.e., another photographer can photograph an image of a bear about to catch a salmon swimming upstream at a waterfall or a young sailor kissing a woman.

Where a photographer creates the scene or subject to be photographed, he/she/they may claim originality and protection over the precise scene or subject created, as long as it was original.[8] When comparing two photographs for a potential copyright infringement case one must distinguish what elements of the original image are subject to protection in order to determine whether a viable claim exists.

Motion Pictures and Television

Authors of screenplays and treatments for television shows often bring claims against works that embody the ideas contained in their submissions. Without significant similarity of an elaborate plot, characters, and dialogue, such claims are usually destined for failure. A reality television show treatment about a nude resort on a small island will not be subject to copyright protection as each episode of the produced reality show will have different characters and different dialogue, which would be the expression of the idea contained in the treatment. Similarly, screenplay authors usually have a difficult row to hoe demonstrating infringement. Further, similarity of a general plot line alone will never be enough as that plot can be expressed in many different ways through different characters in different settings using different dialogue.

Both *Willams* and *Chase-Riboud v. Dreamworks*[9] are instructive in showing the difficulties in sustaining claims against a motion picture for copyright infringement. While both cases involve plaintiffs' claims of infringement of novels, when stripped of the non-protectable elements of their novels, no substantial similarity was found relating to any protectable expression.[10]

Conclusion

As indicated above, different forms of creative expression have different levels of protectability under existing copyright law. Claims relating to music, books, photographs, and motion pictures/television shows each present their own issues relating to protectable expression as well as the process by which to conduct a copyright infringement analysis. Given the fact specific nature of many defenses to copyright infringement claims, many of which are not readily apparent at the early stages of assessment, the practitioner must be wary of jumping to a premature conclusion about the viability of a claim. Further analysis and substantive investigation can often undermine the viability of a claim. Apprising a client of the difficulties inherent in prosecuting a copyright infringement claim and tempering a client's expectation until a thorough analysis had been completed is advisable.

Endnotes

1. *Walker v. Time Life Films Inc.*, 615 F. Supp. 430, 435 (S.D.N.Y. 1985).
2. *See generally Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986) (scénes à faire would, among other things, include the setting, commonplace experiences, and tools used in a particular trade, i.e., policemen, firemen, zookeepers, etc.).
3. *See Williams v. Crichton*, 84 F.3d 581 (2d Cir. 1996).
4. *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 345 (1991).

5. *Id.* at 348.
6. *Mannion v. Coors Brewing Company*, 377 F. Supp.2d 444 (S.D.N.Y. 2005) (citing *Cararzas v. Time Life, Inc.*, No. 92 Civ. 6346 (PKL); 1992 WL 322033 (S.D.N.Y. 1992); *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)).
7. *See Mannion*, *supra*.
8. *See Rogers v. Koons*, *supra* (a photograph of a husband and wife sitting on a park bench with eight puppies arranged on their laps was subject to protection); *Gross v. Seligman*, 212 F. 930 (2d Cir. 1914) (a photo of a model in an identical pose to the original photo, with the only exception being that she had a smile and cherry stem between her teeth infringed the original work).
9. *Williams v. Crichton*, *supra*; *Chase-Riboud v. Dreamworks*, 987 F. Supp. 1222 (C.D. Cal. 1997).
10. *Williams v. Crichton* (author of multiple children's fictional dinosaur books brought action against novel and movie "Jurassic Park"); *Chase-Riboud v. Dreamworks* (author of historical fiction novel *Echo of Lions* about the slave ship Amistad brought action for infringement relating to the motion picture *Amistad*).

Brian D. Caplan is the author of *J.D. to J.D. My Journey from Juvenile Delinquent to Doctor of Jurisprudence*, from which the first half of this article is borrowed. Brian is a partner at Reitler Kaias & Rosenblatt LCC. His clients have included recording artists, producers, publishing companies, record labels, personal managers, business management, accounting firms, professional athletes, and dealers in fine art. In addition to contractual disputes, defamation cases, and the prosecution and defense of copyright and trademark infringement actions, Brian has represented clients in a broad range of disputes relating to partnerships and closely held corporations, as well as employment matters. He has also successfully tried jury trials in both State and Federal courts. Brian is also Co-Chair of EASL's Litigation Committee.

MET the Sacklers: A Case Study

By Aiho Tan

Museums are public, quasi-academic institutions that serve as depositories of objects of human cultural heritage and specimens of the natural world.[1] All museums share common goals of delivering on their mission statements and serving in the public's best interest. However, museums require consistent funding to operate and successfully deliver. They are currently facing financial pressure as government funding for the arts has declined significantly, with the National Endowment for the Arts even labeled as "wasteful and unnecessary."[2] As a result, museums are becoming increasingly reliant on private philanthropy to financially sustain themselves.[3]

The Metropolitan Museum of Art (The Met), a leading world-class institution, is one of many museums that rely heavily on funding from private donors. Over the past few decades, the Sackler family, which made its fortune from the ownership of Purdue Pharma, the manufacturer of OxyContin, an opioid painkiller that has been largely responsible for the opioid epidemic, has donated millions of dollars to The Met.[4] The controversy surrounding the Sackler family has increased public scrutiny on museums that accept sponsorship from questionable sources and raises ethical concerns over museum governance and regulations surrounding funding. While organizations such as the American Alliance of Museums (AAM), Association of Art Museum Directors (AAMD), and International Council of Museums (ICOM) have developed codes of ethics designed to encourage transparency and accountability of museums, questions remain as to the effectiveness of these policies.

This article investigates The Met's decision to stop accepting donations from the Sackler family and discusses the ethical dilemmas museums face as they balance their goal of delivering on their mission statements while adopting the moral high-ground when accepting funding and sponsorship. Following this, ethical recommendations pertaining to funding and governance of museums will be proposed.

Case Study: The Sackler Opioid Scandal

In May 2019, The Met publicly announced that it would stop accepting gifts and donations from members of the Sackler family associated with Purdue Pharma.[5] Other institutions, such as the Solomon R. Guggenheim Museum in New York and the Tate Modern in London, have also adopted a similar stance.[6] The Met's decision to distance itself from the Sackler family follows growing public outrage surrounding the family's role in the opioid epidemic as well as the museum's attempts to minimize and mitigate the potential damage to its image and reputation.

Nan Goldin, an artist who personally overcame an OxyContin addiction, founded activist group P.A.I.N. (Prescription Addiction Intervention Now) to draw attention to the deep-rooted ties between The Met and the Sackler family, historically one of the museum's most prolific donors.[7] Goldin organized a protest at The Met by staging a "die-in" and flooding the famous ancient Egyptian Temple of Dendur's pool, housed in the Sackler Wing, with OxyContin prescription bottles.[8] P.A.I.N. urged The Met to remove the Sackler family name from the Wing, as it had amassed a fortune through the manufacturing and marketing of opioids.[9] The Met was confronted with an ethical dilemma, as it had to balance its goal of acting in the best interest of the public while appeasing the Sackler family, whose funding over the past five decades enabled The Met to secure its place as one of the world's most renowned cultural institutions.[10] Daniel H. Weiss, the President and Chief Executive Officer of The Met, summarized the dilemma in a delicately worded statement to *The New York Times*, stating that "the museum takes a position of gratitude and respect to those who support us, but on occasion, we feel it's necessary to step away from gifts that are not in the public interest, or in our institution's interest. That is what we're doing here."[11]

While The Met stopped accepting donations from the Sackler family, the museum did not take the more drastic step of removing the Sackler name from the Wing, as it was "not in a position to make permanent changes while litigation against the family was pending and information was still coming to light."[12] Brigit Kavanagh, a non-profit law expert, affirms that unwinding "naming" gifts would require either the consent of the donor or the authorization of some judicial authority.[13]

While the Sackler name remains on the Wing, The Met updated its gift acceptance policy to include newly codified rules.[14] The Met disclosed that its former gift naming procedure allowed for oversight from staff in the development, legal, and finance departments, as well as trustee committees.[15] An overview of The Met's newly codified gift acceptance guidelines stipulates that all naming gifts must be reviewed and approved by (i) the Gift Review Committee, (ii) any relevant programmatic areas or departments as determined by the Gift Review Committee, (iii) the President, (iv) the Director, (v) the Devel-

opment Committee, and (vi) the Board of Trustees or the Executive Committee.[16] The Met must also adhere to New York City policy that stipulates that donor recognition at city-owned buildings, a gallery, or other space within the Museum may be named for a period not to exceed 50 years.[17] The Met reaffirmed and supplemented its mission statement to "collect, preserve, study, exhibit and stimulate appreciation for and advance knowledge of works of art that collectively represent the broadest spectrum of human achievement at the highest level of quality, all in the service of the public and in accordance with the highest professional standards."[18]

Are the AAM and AAMD Codes of Ethics Enough?

The Code of Ethics for Museums (the Code), which was adopted in 1993 and amended in 2000 by the AAM, an accrediting body, emphasizes that "Legal standards are a minimum. Museums and those responsible for them must do more than avoid legal liability; they must take affirmative steps to maintain their integrity to uphold public confidence. They must act not only legally but also ethically."[19] In addition, the Code stipulates that, as "non-profit institutions, museums are expected to comply with applicable local, state and federal laws as well as international conventions."[20] The Code serves as a set of foundational principles that should be incorporated into each museum's own institutional code of ethics.[21]

However, the AAM does not offer any recommendations about the type of funding institutions The Met should avoid.[22] Instead, Laura Lott, the President and Chief Executive of the AAM, suggests that "museums need to take steps and create transparent policies to ensure that current and future funding sources are diverse—not overly reliant on any single source—and consistent with their mission." [23] Further, in *Museum Ethics*, Gary Edson asserts that the Code of Ethics cannot stop unethical behavior in a museum, such as accepting funding from questionable sources, as it merely serves as guidelines and "best practices" for institutions to adopt, raising questions on the effectiveness of the AAM and its policies.[24]

The AAMD's Code of Ethics also imposes a duty on museum directors to act with integrity and in accordance with the highest ethical principles without compromising their positions or the institutions for which they are responsible.[25] However, like the AAM, the AAMD has not issued guidelines for acceptable sources of funding.

A Sustainable Future for Museums: Ethical Recommendations

The Sackler controversy and The Met's ensuing decision has shone a powerful spotlight on the ethics and governance of museums around the world. In the absence of effective regulatory bodies governing and enforcing the practices of museums, it is clear that museums, such as The Met, have a social and ethical responsibility to be at the forefront of leading industry-wide changes to increase accountability and transparency in regards to museum funding. The Met's decision to sever ties with one of its most significant and long-standing donors and to codify its gift acceptance guidelines serves as a precedent and a blueprint for other museums to follow and begin closely reviewing the manner in which they engage with gift acceptance on an ethical and administrative level.[26] Other museums should also consider developing regulatory bodies, consisting of museum directors, boards of trustees, attorneys, experienced art world professionals, and even artists, to help formulate and codify guidelines for ethical practices and to effectively rule on future ethical dilemmas. Once museums have implemented these recommendations, the onus will be on bodies such as the AAM and AAMD to revise and update their codes of ethics and to implement more holistic and enforceable guidelines. The adoption of this holistic approach for museums is a viewpoint that is supported by Max Hollein, the Director of The Met, as it will facilitate a more just and equitable outcome in the adjudication process of future controversies and dilemmas that will undoubtedly arise.[27]

The COVID-19 pandemic has exacerbated the need for accountability and transparency with regard to museum funding. According to the AAM, museums in the United States alone are losing an estimated $33 million a day as a result of the pandemic.[28] The Met, a heavyweight with an endowment of $3.6 billion, announced that it is expected to lose around $100 million.[29] As museums continue to hemorrhage money, there are concerns that these institutions may resort to unethical sources of funding as they struggle and fight for survival.

It is apparent that the introduction of museum regulatory boards, and the subsequent revision of the AAM and the AAMD's codes of ethics, particularly in a post-COVID-19 world, will be essential in promoting transparency of museums and ensure that they can continue to focus on delivering their mission statements while serving in the public's best interest.

Endnotes

1. Robert Lind, Robert Jarvis and Marilyn Phelan, Art and Museum Law: Cases and Materials (Durham: Carolina Academic Press, 2002), 451.
2. *President Trump Is Trying to Eliminate the National Endowment for the Arts – Again – in His Just- Released 2021 Budget Proposal*, Artnet News, accessed February 22, 2020, https://news.artnet.com/art-world/trump-proposes-eliminating-nea-and-neh-again-1774236.
3. Robert Lind, Robert Jarvis and Marilyn Phelan, Art and Museum Law: Cases and Materials (Durham: Carolina Academic Press, 2002), 430.
4. *The Met Will Turn Down Sackler Money Amid Fury Over the Opioid Crisis*, N.Y. Times, accessed February 22, 2020, https://www.nytimes.com/2019/05/15/arts/design/met-museum-sackler-opioids.html.

5. *Id.*
6. *Id.*
7. *Nan Goldin on art, addiction and her battle with the Sacklers over opioids*, Financial Times, accessed February 23, 2020, https://www.ft.com/content/d6500c16-002a-11ea-b7bc-f3fa4e77dd47.
8. *Id.*
9. *Nan Goldin's Activist Group Escalates Its War Against the Sacklers With an Open Call to Action at the Met*, Artnet News, accessed February 23, 2020, https://news.artnet.com/art-world/nan-goldin-sackler-met-2019-1460413.
10. *The Met Will Turn Down Sackler Money Amid Fury Over the Opioid Crisis*, N.Y. Times, accessed February 22, 2020, *available at* https://www.nytimes.com/2019/05/15/arts/design/met-museum-sackler-opioids.html.
11. *Id.*
12. *Id.*
13. *Why haven't major institutions cut ties with the Sackler family?*, Washington Post, accessed February 23, 2020, https://www.washingtonpost.com/outlook/why-havent-major-institutions-cut-ties-with-the-sackler-family/2019/03/15/6b06d2ec-4102-11e9-a0d3-1210e58a94cf_story.html.
14. *New York's Met museum to shun Sackler family donation*, BBC News, accessed February 23, 2020, https://www.bbc.com/news/world-us-canada-48288803.
15. *Id.*
16. *Gift Acceptance Guidelines*, The Metropolitan Museum of Art, accessed February 23, 2020, https://www.metmuseum.org/join-and-give/donate/gift-acceptance-guidelines#Contents.
17. *Id.*
18. "Mission Statement," The Metropolitan Museum of Art, accessed February 24, 2020, https://www.metmuseum.org/-/media/files/about-the-met/annual-reports/2010_2011/mission-statement.pdf.
19. "AAM Code of Ethics for Museums," American Alliance of Museums, accessed February 24, 2020, *available at* https://www.aam-us.org/programs/ethics-standards-and-professional-practices/code-of-ethics-for-museums/.
20. *Id.*
21. *Id.*
22. *Philanthropy, but at what price? US museums wake up to public's ethical concerns*, The Art Newspaper, accessed February 25, 2020, https://www.theartnewspaper.com/news/what-price-philanthropy-american-museums-wake-up-to-public-concern.
23. *Id.*
24. Gary Edson, Museum Ethics (London: Routledge, 1997), 108.
25. "Code of Ethics," Association of Art Museum Directors, accessed February 27, 2020, https://aamd.org/about/code-of-ethics.
26. *Id.*
27. *Max Hollein on How the Met Will Redefine the Entire Way We Think About Contemporary Art*, Artnet News, accessed February 28, 2020, https://news.artnet.com/art-world/met-director-max-hollein-interview-part-2-1355749.
28. "Museums Included in Economic Relief Legislation," American Alliance of Museums, accessed May 27, 2020, https://www.aam-us.org/2020/03/27/museums-included-in-economic-relief-legislation/.
29. *Met Museum Prepares for $100 Million Loss and Closure Till July*, The New York Times, accessed May 27, 2020, https://www.nytimes.com/2020/03/18/arts/design/met-museum-coronavirus-closure.html.

Aiho Tan is currently completing her Master's in Art Business at Sotheby's Institute of Art New York, with a concentration in Art Law and Museum Management. She is originally from Australia, where she obtained her LLB and worked as Graduate Lawyer.

Cybersecurity: Law Firms Are Under Attack

By David J. Rosenbaum

One day in early May, the attorneys at a prominent law firm sat down at their computers to work, only to discover that none of their files were accessible. Making matters worse, the hackers who had infiltrated the law firm's network stole 756GB of firm and client data before encrypting everything on the firm's servers, demanded $21 million in ransom (later raised to $42 million) and threatened to begin releasing confidential data about the firm's clients to the public.

The information stored by law firms is among the most sensitive, potentially saleable, and therefore most desirable data imaginable. Law firm breaches can have catastrophic effects on people's lives, including wealthy and powerful world leaders. For example, after the hack of the Panamanian law firm, Mossack Fonseca, the offshore dealings of hundreds of politicians were exposed, including those of Russian leader Vladimir Putin.[1] Exposure of an entertainment, arts or sports figure's negotiations can have a dramatic effect on that professional's earnings potential. Even on a lesser scale, if the details of an acrimonious divorce or business deal were exposed after a data breach, it could result in ruination for personal lives and fortunes alike. As the risks associated with storing information continue to grow exponentially greater, attorneys' ethical responsibilities to protect the confidentiality and integrity of the confidential and privileged data they hold take on even greater significance. The failure of attorneys to properly understand the implications of cybersecurity can result in a devastating impact on their clients and may even threaten their licenses to practice law.

What Is Cybersecurity?

From the largest multinational firm to the smallest solo practice, nobody is immune from a cyberattack or a cyberbreach. The best a firm can do is understand the risk, then take steps to manage the risk and mitigate the potential impact of a breach. In order to manage cybersecurity risk, it is important to first understand what cybersecurity is and the specific impact it can have on a law firm.

Cybersecurity encompasses not only the protection of hardware and network devices but also data stored and transmitted throughout the firm. Cybersecurity is protection of:

- **Computers**—All of the devices used to access data, including desktop computers, laptops, tablets and smartphones;
- **Networks**—Collections of devices used to connect computers and share information, including file servers, firewalls, peripheral devices like printers and scanners, and Internet-connected appliances (IoT – the Internet of Things);

- **Data at Rest**—Data that is stored on file servers, computer hard drives, backups or removable media, and in the Cloud; and
- **Data in Motion**—Data that is moving between computers and between networks, including email, websites, portals, networks, Wi-Fi, faxes, and phones.

While data privacy is most commonly understood as the focus of cybersecurity, there are actually three cybersecurity objectives:

- **Confidentiality**—Ensuring that data can be seen, accessed and used **only** by authorized individuals (e.g., the theft and subsequent release of client data stolen from the law firm mentioned above resulted in unauthorized disclosure of confidential and privileged information);
- **Integrity**—Ensuring that data cannot be modified by unauthorized individuals, and that it is not inadvertently modified by authorized individuals (e.g., the hackers who breached the law firm encrypted all of the data on the firm's network, representing an extreme form of unauthorized modification of data); and
- **Availability**—Ensuring that data is accessible when needed (*e.g., the ransomware that was used to encrypt the law firm's servers disrupted the firm's ability to access its data*).

All organizations, including law firms, are subject to specific cybersecurity-related compliance requirements, such as state privacy laws (e.g., New York State's the Stop Hacks and Improve Electronic Data Security Act, otherwise known as the SHIELD Act). Firms that accept credit cards for payment of fees are subject to the Payment Card Industry Data Security Standard (PCI DSS) requirements. Law firms with health care practices may be subject to compliance with certain provisions of the Health Insurance Portability and Accountability Act (HIPAA) Rules. Firms with clients or counterparties in California are subject to the California Consumer Privacy Act (CCPA); those

with clients or counterparties in the European Union are required to comply with General Data Protection Regulation (GDPR) privacy rules. Along with the compliance requirements applicable to all organizations, attorneys have additional ethical obligations under the Model Rules of Professional Conduct to ensure the protection of client data from inadvertent or unauthorized disclosure. Clients may also have specific requirements regarding a law firm's cybersecurity, especially as firms are considered to be third party providers, and the list goes on . . .

The costs of a cyber breach are significant and may include fines and penalties, technology expenditures, forensics and legal costs, constituent notification requirements, operational downtime, and loss of billings. However, one of the most significant costs to a law firm is the reputational damage that can result from a breach. Clients are entrusting a firm with their confidential information; if one cannot protect this information, then clients will find another firm that can.

What Can a Law Firm Do to Protect Itself?

Although there is no way to fully protect a firm's or clients' data, there are best practices that will help to manage risk and mitigate losses in the event of a breach:

- Make cybersecurity awareness a part of the firm's culture. For example, one of our clients has a policy that every meeting starts with a reminder about cybersecurity, even if it is as simple as asking each attendee if he/she/they locked his/her/their computer screen before coming to the meeting.
- Understand what information you have, where the data is stored, who has access to it, how it is protected, and what regulations and standards apply to the data and to the firm.
- Develop and enforce **written** cybersecurity policies and procedures.
- Enforce the use of complex passwords, firewalls, antivirus and antispam software, data encryption, and comprehensive data backups. Perform periodic vulnerability assessments and penetration tests to discover and correct holes in your security before they're discovered and exploited by bad actors.
- Understand and evaluate the cybersecurity controls of the firm's vendors and service providers; remember that that they often have access to the firm's systems and information.
- Do not collect or retain more data than necessary, and limit access to that data. Segment the data so that individuals have access only to the specific files they need for the matters with which they are directly involved.
- Social engineering techniques are **very** effective at tricking people into opening attachments, clicking on links, and otherwise disclosing confidential information including network credentials. Users are the weakest link in cybersecurity. Train yourself and your staff to be aware and alert.
- Audit **and test** the firm's cybersecurity controls, repeatedly, to ensure that they are being followed.

Most firms are not anxious to devote time and money to activities that are neither client facing nor revenue generating, but protecting the firm's and clients' data is a regulatory requirement, an ethical obligation, and just good business.

Elimination of cyber risk is not possible, but by gaining an understanding of the importance of cybersecurity, leveraging the use of expert advisors, and focusing on continuous incremental improvement, significant risk reduction is possible and necessary . . . unless you want your firm to be in the latest headline about a law firm breach.

Endnote

1. Chirgwin, Richard, *'Panama papers' came from email server hack at Mossack Fonseca*, The Register, 5 Apr. 2016.

David J. Rosenbaum, MBA, is a principal at Citrin Cooperman and a practice leader of the firm's technology consulting group. He has more than 40 years of experience in the information technology field and can be reached at 914.693.7000 or at drosenbaum@citrincooperman.com.

LOVE Is the Message: How Conflicts of Interest Can Impede an Artist's Legacy

By Nathan Krasnick

When thinking of the most iconic Pop images associated with the latter half of the 20th century, one may consider Andy Warhol's *Marilyn* or any one of Roy Lichtenstein's comic-strip paintings. However, few Pop images are as widely recognized as Robert Indiana's *LOVE*. Originally designed as a Christmas card commissioned by The Museum of Modern Art in 1965, *LOVE* has been reproduced in almost every imaginable medium, the four-letter typeface has been translated in multiple languages, and the resulting works can be found in both public and private collections all over the world. With all of its success, one would think that the artist who conceived it would have the financial means to fulfill any legacy that he intended to realize. The latest estimates value Indiana's Estate at $90 million and expect it to exceed $100 million soon.[1]

Similar to many other artist estates, however, much of the Indiana Estate's net worth is tied up in the works of art themselves and the valuable rights that come with them. That is why the agreements made by Indiana, with the advice of his art market agent, Simon Salama-Caro, and the Morgan Art Foundation, whom Salama-Caro also acted on behalf of as representative, have come under much scrutiny. The most recent and ongoing court decisions coming out of the legal disputes between Robert Indiana's Estate and the Morgan Art Foundation will have a significant impact on not only the fulfillment of Indiana's intended legacy, but also future legal disputes involving artist estates.

In 1999, Robert Indiana entered two separate contractual agreements with the Morgan Art Foundation (MAF). Under the first agreement effectuated in April of that year (the April 1999 Agreement), Indiana transferred to the MAF all of his intellectual property rights in perpetuity to many of his most iconic images including, among others, *LOVE*. Both parties later came to a second agreement (the Sculpture Agreement) in December of that year, whereby Indiana granted to the MAF the exclusive right, in perpetuity, to produce and fabricate the sculptures included in the April 1999 Agreement as well as specific others. In consideration for these rights, the MAF agreed to pay Indiana 50% of the net income generated from its use of the images and 20% of the net income generated from its sale of the sculptures. Additionally, the MAF agreed to provide the artist a periodic accounting of his net income generated by these activities. Indiana later entered a third agreement with Simon Salama-Caro in December 2006, granting Salama-Caro the sole right and responsibility for producing and publishing the Catalogue Raisonné of Indiana's complete oeuvre (the Catalogue Raisonné Agreement).

On May 18, 2018, the MAF filed a lawsuit against Indiana (and later The Estate), Jamie Thomas (Indiana's caregiver and housekeeper to whom Indiana granted power of attorney in 2016), American Image Art (AIA), and Michael McKenzie (AIA's Founder) for producing, exhibiting, and selling certain works that purported to be "authentic works by Robert Indiana," but in fact were forgeries since they were unauthorized reproductions of the *LOVE* image and in breach of the MAF's ownership of the image's copyright.[2] On May 19, 2018, Indiana passed away and, subsequently, the executor of The Estate, James Brannan (The Estate), filed counterclaims against the MAF and Salama-Caro in September 2018.[3] The most recent judgment analyzed here in *Morgan Art Found. Ltd. v. Brannan* addresses The Estate's four remaining counterclaims currently under question and the MAF's motion to dismiss those remaining counterclaims.[4]

The counterclaims reviewed in the ongoing case of and heard by the U.S. District Court for the Southern District of New York comprise two main legal issues broadly. The legal question underpinning The Estate's first counterclaim asks the court whether there is sufficient ground to argue that the previous agreements between the MAF and The Estate are void as a result of either Robert Indiana's death or the MAF's material breach of contract during certain periods before Indiana's death. The legal question underpinning The Estate's other counterclaims essentially asks the court whether there is sufficient ground to argue that a fiduciary duty existed between Salama-Caro and Robert Indiana and, in acting unfaithfully, Salama-Caro breached his fiduciary duties.

In its first counterclaim, the defendants argued that the agreements between the plaintiff and Indiana were terminated upon the artist's death because, under New York law, the agreements, in fact, amount to consignment contracts with Indiana as the principal and the plaintiff as the agent. Under § 12.01 of the New York Arts and Cultural Affairs Law (NYACAL), a consignment does not result in the property's title passing from the consignor to the agent.[5] As demonstrated *In re Estate of Friedman*, title never passes to the agent in a consignment, and,

further, the consignment contract terminates upon the death of the principal.[6] The defendants also contended that the agreements could be characterized as personal service contracts under New York law and that *Artists Rights Enf't Corp. v. Estate of King (King II)* set a precedent, "where a servant is employed to render personal services, such contract is terminated by the death of the servant."[7] Lastly, the defendants argued that, even if the agreements were neither consignment nor personal service contracts, The Estate terminated those agreements as a result of three allegedly material breaches: (i) the MAF's reproduction of works outside the scope of the parties' agreements; (ii) the MAF's persistent failure to provide itemized, periodic accountings; and (iii) the MAF's failure, since December 2017, to provide any royalties to The Estate.

The defendant's second counterclaim argued that Salama-Caro owed fiduciary duties to Indiana as his art market agent with respect to promoting and selling Indiana's art, and that he breached those duties in four primary ways: (i) Salama-Caro took undue advantage of Indiana's "age, isolation, and financial difficulties," making the agreements "unconscionably lopsided"; (ii) Salama-Caro took advantage of his "double-agent" status to divert the benefits of the agreements from Indiana to himself by purchasing the artist's works from the MAF at below-market prices and then reselling those works at market value—retaining the profits for Salama-Caro's benefit without paying any portion to the artist; (iii) "burnish[ed] [Salama-Caro and Morgan's] reputations in the art market" by "loaning and donating some of the Indiana works to museums and galleries for exhibition"; and (iv) Salama-Caro worked on Indiana's catalogue raisonné for the purpose of "authenticating and legitimizing" the works he bought and resold to third parties, and also operated robertindiana.com without compensation to the artist. The third and fourth counterclaims build on the second one by charging the MAF with aiding and abetting Salama-Caro's breach of fiduciary duties owed to Indiana.[8]

The plaintiffs, in their motion to dismiss the first counterclaim, argued that the agreements with Indiana did not terminate upon the artist's death because: (i) the language contained within the agreements proved that they were not intended to expire at the time of the artist's death, (ii) The Estate was judicially estopped from pleading otherwise, and (iii) The Estate did not prove that a material breach of those contracts had occurred of significant size to warrant termination. With regard to the dismissal of the other counterclaims, the plaintiffs argued that there was no fiduciary relationship established between Salama-Caro and Indiana as a matter of law, and that, even if such a duty was established, Salama-Caro and the MAF's actions were expressly permitted under the agreements that they had made with Indiana.[9]

The court, in its decision, granted in part and denied in part the plaintiff's motion to dismiss the defendant's counterclaims. Concerning the first, the court denied the plaintiff's motion to dismiss The Estate's allegation that the Catalogue Raisonné Agreement was a personal services contract and thus could be terminated upon Indiana's death. In addition, the court denied in part the plaintiff's motion to dismiss a material breach of contract on the part of MAF. With regard to the second, third, and fourth Counterclaims, the court denied the plaintiff's motion to dismiss The Estate's allegation that Salama-Caro owed Indiana fiduciary duties and breached those fiduciary duties by purchasing the artist's works from the MAF at below-market prices and then reselling those works to third parties at market value and retaining the resulting profits for Salama-Caro's sole benefit. In all other respects, the plaintiff's motion to dismiss was granted.

Judge Barbara Moses found that the terms contained within the April 1999 and Sculpture Agreements were fundamentally different from a typical consignment agreement under New York law. Further, the judge highlighted that, in the case of *Re Estate of Friedman*, the art dealer's offer to return the artist's paintings was strong evidence of a consignment relationship, which was not found in the present case at hand.[10] Further, the judge noted that "NYACAL § 12.01(1) does not apply to the April 1999 Agreement or the Sculpture Agreement because Indiana never 'deliver[ed] or cause[d] to be delivered' any actual work of art or 'print of [his] own creation' to the MAF for sale, as required in order to create a consignment relationship under that statute."[11] With the exception of the Catalogue Raisonné Agreement, the court found that the plain language of the April 1999 and Sculpture Agreements did not constitute personal service contracts since neither expressly contemplated Salama-Caro's sole services for the perpetuity of the contract's life. Lastly, by fabricating and selling versions of the *LOVE* sculpture beyond the "colors, dimensions and edition sizes" authorized by the artist, The Estate did make a case to allege material breach of contract. Judge Moses found that The Estate made an even stronger case of breach by alleging the failure of the MAF to pay any royalties since December 2017, since the payment of royalties "goes 'to the root' of the parties' agreement."[12]

When determining whether Salama-Caro owed a fiduciary duty to Indiana, the court focused on the "substance" of their relationship, and not their respective labels.[13] To this end, the court concluded that, in the plaintiffs' own pleadings and testimony, Salama-Caro not only established, but further developed, a relationship of trust and confidence between him as an exclusive agent and Indiana as principal. With the responsibility for preserving the artist's legacy as well as the market for his art, Salama-Caro may, in fact, owe Indiana fiduciary duties. Whether or not Salama-Caro was in breach of his fiduciary duties, however, the court focused mainly on The Estate's allegation that Salama-Caro was self-dealing Indiana's works between the MAF and third parties. If proven true, the court reasoned that these actions could

be deemed a breach of Salama-Caro's fiduciary duties and would have resulted in damages to Indiana's market.

The issue of self-dealing here is eerily reminiscent of the matter *In re Estate of Rothko*, where two executors of Mark Rothko's Estate were found to be in breach of their fiduciary responsibilities when they began self-dealing hundreds of Rothko's works to corporations listed under one of their names. This case reaffirmed that an executor of an estate must not be involved in self-dealing of any kind, must avoid conflicts of interest, and must not violate its duty of loyalty to the estate.[14] Indiana did not appoint Salama-Caro as an executor, but it could be argued that Salama-Caro does, in many respects, have more control than the actual executor, Brannan, over the administration of The Estate and thus owes the same duty of loyalty to The Estate as an executor. This reality is even starker when taken into consideration with the Catalogue Raisonné Agreement between Salama-Caro and Indiana.

Although the court did not find Salama-Caro's preparation of Indiana's catalogue raisonné as substantial grounds for the defendants to pursue a claim for breach of fiduciary duty, Salama-Caro's preparation of the catalogue raisonné does point to a larger issue at hand. As an authoritative tool, a catalogue raisonné can help to define a particular artist's supply of works empirically, thus significantly impacting the value of that artist's market. In addition, an artist's catalogue raisonné should maintain sufficient independence in order to achieve both academic and commercial integrity. Salama-Caro may well be an expert on Robert Indiana's artistic practice and history; however, if so determined, the conflicts of interest between him and the Estate could make him an unreliable producer of the artist's catalogue raisonné and may even reduce the art market's confidence in that catalogue raisonné as an authority. Further, Salama-Caro's status as de facto gatekeeper seems to place him in a position of undue power relative to The Estate, which is wholly reliant on Salama-Caro and the MAF's influence over the artist's market that accounts for the substantial value of The Estate.

In his will, Robert Indiana directs for the formation of a 501(c)(3) non-profit organization that would be responsible for transforming The Star of Hope, Indiana's now-defunct home located in Vinalhaven, Maine, into a public museum.[15] To assist in transforming the house into a museum, Indiana instructed that all royalty payments received under the the April 1999 Agreement and the Sculpture Agreement go to the non-profit organization.[16] In her recent law review article, Hanna Feldman argued that Indiana's collection should not be housed at Star of Hope. Rather, it should be bequeathed to the Farnsworth Museum in Rockland, Maine, because, among other reasons, The Estate does not have the financial means to execute the original plan and Indiana's will does not provide for alternatives in the event of changed circumstances, such as the one currently unfolding in the courts.[17]

What the case of *Morgan Art Found. Ltd. v. Brannan* highlights is the glaring conflict of interest that exists between the MAF, Robert Indiana's intention for his legacy, and Simon Salama-Caro's supposed responsibility for preserving that legacy. In response to the court opinion addressed here, both parties have filed additional amendments and answers. Whether the MAF is ultimately found liable for material breach of its contracts with Indiana, or whether Simon Salama-Caro is ultimately found to be in breach of a fiduciary duty owed to Indiana, the ongoing case of *Morgan Art Found. Ltd. v. Brannan* will certainly set a cautionary precedent for living artists who are planning their estates and legacies.

Endnotes

1. Helen Holmes, *Robert Indiana's Disputed Estate Now Estimated to Be Worth Over $100 Million*, Observer (Dec 4, 2019), https://observer.com/2019/12/robert-indiana-estate-value-100-million/.
2. *Morgan Art Found. Ltd. v. McKenzie*, 2018 U.S. Dist. Ct., LEXIS 17625.
3. *See Morgan Art Found. Ltd. v. McKenzie*, LEXIS 109997 (S.D.N.Y. July 1, 2019).
4. *See Morgan Art Found. Ltd. v. Brannan*, 18-CV-8231 (AT) (BCM) (S.D.N.Y. 2020).
5. Section 12.01 of the New York Arts and Cultural Affairs Law (NYACAL).
6. Estate of Friedman, 64 A.D.2d 70, 79 (2d Dept. 1978).
7. *Artists Rights Enf't Corp. v. Estate of King*, 370 F. Supp. 3d 371, 381 (S.D.N.Y. 2019).
8. *See Morgan Art Found. Ltd. v. Brannan*, 18-CV-8231 (AT) (BCM) (S.D.N.Y. 2020).
9. *See id.*
10. Estate of Friedman, 64 A.D.2d 70, 79 (2d Dept. 1978).
11. *See Morgan Art Found. Ltd. v. Brannan*, 18-CV-8231 (AT) (BCM) (S.D.N.Y. 2020).
12. *See id.*
13. *See id.*
14. Estate of Rothko, 43 N.Y.2d 305.
15. Last Will and Testament of Robert Indiana, *supra*, note 7, at 1-2, https://stevensdaylaw.com/wp-content/uploads/2018/08/Robert-Indiana-Will.pdf.
16. *Id* at 2.
17. Hanna K. Feldman, *Preserving the Artistic Afterlife: The Challenges in Fulfilling Testator Wishes in Art-Rich, Cash-Poor Estates,* Fordham Intell. Prop. Media & Ent. L.J. 223 (Fall 2019).

Nathan Krasnick is currently an M.A. candidate at the Sotheby's Institute of Art studying Art and Business. He previously studied at the University of Michigan, where he received a B.B.A from the Ross School of Business and minored in the history of art.

Krell's Korner

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

Dodger Stadium

By David Krell

It takes less than half a second for a fastball to reach home plate. It takes about that time to conjure visions of baseball greatness after hearing the words "Dodger Stadium." Sandy Koufax' perfect game in 1965; Bill Singer's no-hitter against the Phillies in 1970; Mike Marshall leading the National League with 21 saves in 1974; Fernando Valenzuela leading the major leagues with 180 strikeouts, plus winning the Cy Young Award and National League Rookie of the Year Award, in 1981; and Kirk Gibson's bottom-of-the-ninth, pinch-hit home run off Dennis Eckersley in Game 1 of the 1988 World Series are just a few entries of excellence regarding the stadium that the Dodgers have called home since 1962.

Dodger Stadium is entrenched in Los Angeles history, lore, and culture as firmly as the celebrity handprints in front of Grauman's Chinese Theatre (now TCL Theatre). Yet its genesis was a difficult journey, fraught with legal obstacles.

Fed up with the refusal of Robert Moses—head of the Triborough Authority—to use his legal powers to condemn certain land in Brooklyn for the "public purpose" of building a new stadium, Brooklyn Dodgers majority owner Walter O'Malley envisioned a giant leap westward for the National League team that traces its roots in the Borough of Churches back to 1890. If he had any realistic hopes of transplanting to Los Angeles, though, he needed to lock up the territorial rights for baseball. It happened in February 1957, when he bought the Triple-A Los Angeles Angels, a Pacific Coast League cornerstone, which had the rights; Wrigley Field—the L.A. ballpark named for the Chicago Cubs' owner, Phil Wrigley, who had owned the Angels—was also part of the deal.[1]

A few months later, O'Malley scored a trio of victories bringing him closer to Los Angeles. On May 3rd, he met with Mayor Norris Poulson and the city's leading politicos;[2] Los Angeles documented its plan to "acquire and deed . . . 350 acres in Chavez Ravine, including the present 257 acres now owned by the city" to the Dodgers. It became known as "The Arnebergh Memorandum."[3]

In mid-May, the State Assembly passed a bill allowing a lease of property owned by a city or a city and county for "up to 99 years for stadium or recreational purposes."[4]

Nearly two weeks later, the National League owners okayed the Brooklyn Dodgers and New York Giants moving to California in a unanimous vote from the eight league owners.[5]

As the Yankees and Braves battled in the 1957 World Series, Southern Californians were absorbed in another baseball drama—the L.A. City Council voted 10-4 to bring the Dodgers to the West Coast; Mayor Poulson affirmed and signed the ordinance.[6] The Dodgers' official statement confirmed O'Malley's plan: "[T]he stockholders and directors of the Brooklyn Baseball Club have today met and unanimously agreed that the necessary steps be taken to draft the Los Angeles territory."[7]

It seemed that O'Malley had a clear path to not only move the Dodgers to Los Angeles, but also build a modern stadium for the team and the fans. Yet the latter goal was not easily reached. Voters had the power to halt the scheme for a new stadium; a referendum about building a stadium at Chavez Ravine took place on June 3, 1958. The referendum—also known as Proposition B—received a majority vote: "The integrity of the city has been upheld by the voters,"[8] said Poulson. It is likely that a five-hour telethon on KTTV helped persuade them; celebrities including Jack Benny, Debbie Reynolds, and Dean Martin appeared on the June 1st television special to urge people to vote for the referendum.[9]

Yet O'Malley's scheme for a new stadium was not yet quite free of problems.

Construction of the stadium led to a lawsuit filed by two taxpayers who wanted to prevent it from being built. In July, a Superior Court judge's ruling was a setback for O'Malley—the agreement between the Dodgers and the city allowing building at Chavez Ravine was invalid because there was no public purpose.[10] The California Supreme Court later upheld the agreement.[11]

Further legal problems emerged when three families who lived in the Chavez Ravine environs resisted attempts at evicting them. Ultimately, the L.A. politicians and O'Malley prevailed. Any injury to the Dodgers' brand was not long-lasting.

The Dodgers played in the Los Angeles Memorial Coliseum from 1958 to 1961; Dodger Stadium débuted in 1962. It was a glorious season to inaugurate the ballpark: Maury Wills broke a major-league record with 104 stolen bases; Don Drysdale went 25-9 and won the Cy Young Award; and the Dodgers tied the Giants at the end of the season, forcing a three-game playoff for the National League pennant. The Giants won and battled the Yankees in an epic seven-game World Series. The American League's colossus secured its 10th World Series championship since the end of World War II with a 1-0 victory in the seventh game.

Although the Dodgers elevated Los Angeles to the major leagues, there were consequences—the city lost both Triple-A teams in the Pacific Coast League. O'Malley moved the Angels to Spokane, where the team was redubbed the Indians. The Hollywood Stars became the Salt Lake City Bees, when an ownership group from that city bought the team.

The Dodgers' relocation to Los Angeles has been an evergreen subject for political, legal, and baseball scholarship since it happened in 1958; Dodger Stadium's impact on the public-housing debate has also inspired scholars. Books include *The Dodgers Move West* by Neil Sullivan; *Stealing Home: Los Angeles, the Dodgers, and the Lives Caught in Between* by Eric Nusbaum; *Mover and Shaker: Walter O'Malley, the Dodgers, and Baseball's Westward Expansion* by Andy McCue; and *City of Dreams: Dodger Stadium and the Birth of Modern Los Angeles* by Jerald Podair.

Endnotes

1. "Angels Sold to Brooklyn," Associated Press, San Pedro News-Pilot, (Feb. 21, 1957), at 1.
2. "O'Malley Winds Up Hectic Schedule," L.A. Times, (May 4, 1957), at A1.
3. "Timeline of Baseball's Historic Expansion to the West Coast," https://www.walteromalley.com/en/features/1957-58-timeline-of-expansion-to-west-coast/March-1-1957.
4. "Way Clear for L.A. Park Deal," San Francisco Examiner (May 18, 1957), at 17.
5. "L.A. Moves Fast to Clinch Dodgers," L.A. Times (May 30, 1957), at A1.
6. Frank Finch, "Dodgers Approve L.A. Deal, Will Play Here Next Season," L.A. Times (Oct. 9, 1957), at A1.
7. Dick Young, "It's All Over, Fellows, the Dodgers Go West," Daily News (New York) (Oct. 9, 1957), at 3.
8. "City Integrity Upheld, Claims Mayor Poulson," United Press International, The Sun (San Bernardino County), (June 5, 1958), at 51.
9. Eric Nusbaum, Stealing Home: Los Angeles, the Dodgers, and the Lives Caught in Between 226 (Public Affairs, 2020).
10. "Chavez Ravine Deal Is Ruled Invalid," Associated Press, The Sacramento Bee (July 14, 1958), at 24.
11. "Chavez Ravine Right Will Go To Highest Court," The Sacramento Bee (Feb. 12, 1959), at 50.

David Krell is the editor of the anthologies *The New York Mets in Popular Culture* and *The New York Yankees in Popular Culture*. He's also the author of *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*. David's contributions to *SABR's Baseball Biography Project* include Johnny Podres, Bucky Dent, Joe Pepitone, Kurt Russell, and Harry Sinclair. David is the chair of SABR's Elysian Fields Chapter (Northern New Jersey).

The Entertainment, Arts and Sports Law Section Welcomes New Members

The following members joined the Section between May 9, 2020 through September 23, 2020

Nelson Leon Adams
Tiffany Rae Almy
Nicole Bittan
Katherine Bonnet
Laura Capicotto
David Matthew Coats
Anna Colless
Taylor Alyse Collins
Nicole Daley
Vincenzo D'Angelo
John Gilroy
Matthew Goldman
Jackson Hanes
Nicholas Hernandez
Ru Hochen
Amy S. Ingram
Michelle Marie Kamme
Lawrence Keating
Todd David Marcus
Denise J. Mazzeo
Olivera Medenica
Frencesca Miranda
Sheetal Misra
Tami L. Morachnick
Pamela Parker Procida
Eric Riter
Miriam Joy Rosenblatt
Hayes Rule
Merhay Shalomov
Myles B. Silton
Daphne Spector
Henry Thomson-Smith
Justin Tubelli
Arielle Vishny
Garanique Williams
Olivia Yoon

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.

Scott M. Karson
President

Pamela McDevitt
Executive Director

NEW YORK STATE BAR ASSOCIATION

Section Committees and Chairpersons

The Entertainment, Arts and Sports Law Section encourages members to participate in its programs and to contact the Section Officers or the Committee Chairs or Co-Chairs for further information.

Alternative Dispute Resolution
Judith B. Prowda
Sotheby's Institute of Art
570 Lexington Ave
New York, NY 10022-6837
judith.prowda@gmail.com

Copyright and Trademark
Christine-Marie Lauture
Lauture IP, PLLC
445 Broadhollow Rd, Ste 25
Melville, NY 11747
c.lauture@gmail.com

Stephen B. Rodner
Pryor Cashman LLP
7 Time Sq
New York, NY 10036
srodner@pryorcashman.com

Digital Entertainment
Sarah Margaret Robertson
Dorsey & Whitney LLP
51 W 52nd St
New York, NY 10019
robertson.sarah@dorsey.com

Andrew Howard Seiden
Curtis, Mallet-Prevost, Colt
& Mosle LLP
101 Park Ave, Ste 3500
New York, NY 10178-0061
aseiden@curtis.com

Diversity
Anne S. Atkinson
Pryor Cashman LLP
7 Times Sq
New York, NY 10036-6569
aatkinson@pryorcashman.com

Cheryl L. Davis
Authors Guild
31 E 32nd St, Fl 7
New York, NY 10016
cdavis@authorsguild.org

Fashion Law
Olivera Medenica
Dunnington Bartholow & Miller LLP
250 Park Ave, Ste 1103
New York, NY 10177
omedenica@dunnington.com

Fine Arts
Paul Scroppo Cossu
Pryor Cashman LLP
7 Times Sq
New York, NY 10036-6569
pcossu@pryorcashman.com

Judith B. Prowda
Sotheby's Institute of Art
570 Lexington Ave
New York, NY 10022
judith.prowda@gmail.com

Carol J. Steinberg
Law Firm of Carol J. Steinberg
74 E. 7th St, Ste F3
New York, NY 10003
elizabethcjs@gmail.com

Law Student Committee
Gabrielle Costa
Syosset, New York
gcosta@student.touro.edu

Isaro Carter
Jamaica, New York
isaro.carter@brooklaw.edu

Legislation
Marc Jacobson
Marc Jacobson, PC
440 E 79th St, Fl 11
New York, NY 10075
marc@marcjacobson.com

Steven H. Richman
Board of Elections, City of New York
32 Broadway, Fl 7
New York, NY 10004-1609
srichman@boe.nyc.ny.us

Literary Works and Related Rights
Judith B. Bass
Law Offices of Judith B. Bass
1325 Avenue of the Americas, Fl 27
New York, NY 10019
jbb@jbbasslaw.com

Joan S. Faier
1011 North Ave
New Rochelle, NY 10804-3610
bookf@aol.com

Litigation
Brian D. Caplan
Reitler Kailas & Rosenblatt LLC
885 3rd Ave
New York, NY 10022
bcaplan@reitlerlaw.com

Paul V. LiCalsi
Reitler Kailas & Rosenblatt LLC
885 3rd Ave, Fl 20
New York, NY 10022
plicalsi@reiterlaw.com

International Committee
Donna E. Frosco
Dunnington Bartholow & Miller LLP
250 Park Ave, Ste 1103
New York, NY 10177
dfrosco@dunnington.com

Membership
Anne Louise LaBarbera
Thomas LaBarbera Counselors at Law PC
11 Broadway, Ste 615
New York, NY 10004
anne@tlcpc.law

Judah S. Shapiro
Judah S. Shapiro, Esq.
33 Brandt St
Hastings On Hudson, NY 10706
judahshap@aol.com

Motion Pictures
Ethan Y. Bordman
Ethan Y. Bordman, PLLC
244 Godwin Ave
Ridgewood, NJ 07450
ethan@ethanbordman.com

Robert L. Seigel
The Law Office of Robert L. Seigel
575 Madison Ave, Fl 10
New York, NY 10022
rlsentlaw@aol.com

Music
Judah S. Shapiro
33 Brandt St
Hastings On Hudson, NY 10706
judahshap@aol.com

Rosemary Tully
Rosemarie Tully, PC
P.O. Box 1054
Huntington, New York 11743
rosemarie@tullylaw.com

Not-for-Profit
Robert J. Reicher
630 9th Ave, Ste 802
New York, NY 10036
rjr@rjreicherlaw.com

Phil Cowan-Judith Bressler Memorial Scholarship Committee
Judah S. Shapiro
Judah S. Shapiro, Esq.
33 Brandt St
Hastings On Hudson, NY 10706
judahshap@aol.com

Pro Bono Steering
Louise Marie Abigail Carron
Center for Art Law
195 Plymouth St, Ste 621
Brooklyn, NY 11201
louisecarron.esq@gmail.com

Pro Bono Steering (cont.)
Elissa D. Hecker
Law Office of Elissa D. Hecker
64 Butterwood Ln East
Irvington, NY 10533
eheckeresq@eheckeresq.com

Carol J. Steinberg
Law Firm of Carol J. Steinberg
74 E. 7th St, Ste F3
New York, NY 10003
elizabethcjs@gmail.com

Publications
Elissa D. Hecker
Law Office of Elissa D. Hecker
64 Butterwood Ln East
Irvington, NY 10533-2336
eheckeresq@eheckeresq.com

Publicity, Privacy and Media
Edward H. Rosenthal
Frankfurt Kurnit Klein & Selz, P.C.
488 Madison Ave, Fl 10
New York, NY 10022-5702
erosenthal@fkks.com

David H. Faux
Law Office of David H. Faux, P.C.
1180 Avenue of the Americas
Floor 8
New York, NY 10036
davefaux@dhf-law.net

Sports Committee
Jill Pilgrim
Pilgrim & Associates
New York, NY 10026
jpesq@pilgrim-associateslaw.com

Jeffrey G. Aber
Law Office of Jeffrey G. Aber, P.C.
Mamaroneck, NY 10543
jeff@aberlawny.com

Television and Radio
Pamela C. Jones
Law Offices of Pamela Jones
P.O. Box 222
Fairfield, CT 06824
pamela@pamelajonesesq.com

Theatre and Performing Arts
Jason P. Baruch
Sendroff & Baruch, LLP
1500 Broadway, Ste 2201
New York, NY 10036-4052
jbaruch@sendroffbaruch.com

Kathy Kim
101 Productions, Ltd.
260 W 44th St, Ste 600
New York, NY 10036
KathyK@productions101.com

Diane F. Krausz
Diane Krausz & Associates
115 W 29th St, Fl 3
New York, NY 10001
DKrausz@dianekrausz.com

Young Entertainment Lawyers
Ronald J. Coleman
Georgetown University Law Center
Silver Spring, MD 20910-6278
rjc70@yahoo.com

Christine-Marie Lauture
Lauture IP, PLLC
445 Broadhollow Rd, Ste 25
Melville, NY 11747
c.lauture@gmail.com

Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted with biographical information via e-mail in Microsoft Word format. Please submit articles to:

Elissa D. Hecker
Editor, *EASL Journal*
eheckeresq@eheckeresq.com

This *Journal* is published three times a year for members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. Members of the Section receive the *Journal* without charge. The views expressed in articles published in this *Journal* represent those of the authors only, and not necessarily the views of the Editor, the Entertainment, Arts and Sports Law Section or the New York State Bar Association.

We reserve the right to reject any advertisement. The New York State Bar Association is not responsible for typographical or other errors in advertisements.

Accommodations for Persons with Disabilities:
NYSBA welcomes participation by individuals with disabilities. NYSBA is committed to complying with all applicable laws that prohibit discrimination against individuals on the basis of disability in the full and equal enjoyment of its goods, services, programs, activities, facilities, privileges, advantages, or accommodations. To request auxiliary aids or services or if you have any questions regarding accessibility, please contact the Bar Center at (518) 463-3200.

ISSN 1090-8730 (print) ISSN 1933-8546 (online)

Entertainment, Arts and Sports Law Journal

PUBLICATIONS

Counseling Content Providers in the Digital Age

A Handbook for Lawyers

Editors
Kathleen Conkey, Esq.
Elissa D. Hecker, Esq.
Pamela C. Jones, Esq.

For as long as there have been printing presses, there have been accusations of libel, invasion of privacy, intellectual property infringements and a variety of other torts. Now that much of the content reaching the public is distributed online, as well as by television, radio and in print, the field of pre-publication review has become more complicated and more important. This title provides an overview of the issues content reviewers face repeatedly.

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

Book (4063)
eBook (4063E)

NYSBA Members $55.00
Non-Members $70.00

ORDER ONLINE: NYSBA.ORG/PUBS | ORDER BY PHONE: 800.582.2452

NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION
One Elk Street, Albany, New York 12207-1002

NON PROFIT ORG.
U.S. POSTAGE
PAID
ALBANY, N.Y.
PERMIT NO. 155