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Entertainment, Arts and Sports Law Journal

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

NYSBA

Entertainment, Arts & Sports Law Section

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Entertainment, Arts and Sports Law Journal

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Entertainment, Arts and Sports Law Journal

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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:

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Remarks From the Chair

By Barry Werbin

Another COVID-19 milestone has passed. Just over one year ago we gathered together to learn, network and enjoy comradery at our usual in-person Annual Meeting at the New York Hilton, as we had for many years. Faced with the ongoing COVID-19 pandemic, this year's Annual Meeting was held virtually over two afternoons on February 19th and 26th. Thanks to the dedication of our terrific EASL program planners and their hard work, our Annual Meeting proved to be as engaging and rewarding as our in-person programs, absent the missed socializing.

Our February 19th programs covered critical issues facing some of EASL's key market constituents. Our first program sponsored by our Sport Law Committee, "Part 2—The Impact of COVID-19 on Sports," focused on the uncertain path forward and potential long-term impact of the pandemic on world sports. Our second program, sponsored by our ADR and Fine Arts Committees, offered a deep dive into alternative dispute resolution and how it is well suited for the arts and entertainment industries.

In keeping with the State Bar's emphasis on sponsoring programs that address diversity and expanding diversity within Section membership and leadership position ranks, EASL's two February 26th programs were devoted to diversity and inclusion in book publishing. The first of two panels examined systemic bias and other impediments that have permitted racial inequality and injustice to continue in book publishing. A second panel examined the role of in-house and outside counsel in addressing such issues, positive changes that have been implemented to combat these issues to date, and recommended actions that can be taken going forward.

EASL answered the State Bar's call to submit its Diversity Plan, which is published in full in this issue of the *Journal*. We are grateful for the ongoing hard work of our Diversity Committee. EASL will continue to offer diversity-oriented programs during 2021, as well as focusing on increasing diversity among our membership ranks and committee chairs.

Our first major post-Annual Meeting program, "Stealing Your Image and the Grateful Dead: Amendments to New York's Right of Publicity Law," took place on February 22nd. The program addressed New York's new Right of Publicity law, which takes effect in May 2021, including its enactment of new post-mortem rights, prohibitions respecting the nonconsensual use of explicit and computer-generated depictions of individuals ("deep fakes"), and prohibitions against the unlawful dissemination of intimate images ("revenge porn"). Thanks to our Publicity, Privacy and Media Committee for planning this excellent program on the new law, which is of utmost importance to EASL's constituent markets.

Insofar as all NYSBA programs will remain virtual at least through June, we are continuing to plan online CLE and informal non-CLE programs, as well as co-sponsor programs of interest to our members that are sponsored by other NYSBA sections and committees. In the interest of expanding the reach of diversity and other programming, we are working on partnering with other professional bar associations and groups, such as the Copyright Society of the USA and various regional law schools. Mindful of the economic pain the COVID-19 pandemic has wreaked on many of our members, and in keeping with our goal of expanding the reach of our virtual programs, we are working with the NYSBA Section Caucus to examine potential alternative pricing plans for CLE and non-CLE programs.

Our Law Student Committee has been re-energized and plays an important role in creating awareness of EASL's programs and membership benefits for law students in the greater New York region. We encourage all law students to join EASL, especially if you are interested in any aspects of art, entertainment, and sports law. Student membership provides unique opportunities for meeting and networking with experienced practitioners, writing for the *EASL Journal* and Blog, and keeping up with important legal and business developments in the arts, entertainment, and sport law industries.

Our Section remains fully engaged and energized as we slowly (and hopefully!) start to emerge from the pandemic. As chair, I am very proud of the amazing work our Section has done, which would not be possible without the dedicated efforts of our committee co-chairs, event planners and Executive Committee officers. I hope you enjoy this spring issue of the *EASL Journal*, and we look forward to presenting more value-added programs throughout the year, as we grow our statewide membership ranks.

Editor's Note/Pro Bono Update

By Elissa D. Hecker

Welcome to the first issue of 2021! We are looking forward to a year of promise and recovery. As you will read in this issue, EASL is committed to increasing our DEI efforts, law student participation, wonderful programming, and so many other things.

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

Elissa

The deadline for the Summer issue is April 30, 2021.

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

Pro Bono Update

Clinic

On March 17th the EASL and IP Sections co-sponsored our first Virtual Pro Bono Clinic at Dance/NYC's 2021 Symposium. Every attorney volunteer received one full registration for the day's event and appropriate credit in the materials.

Symposium attendees had the opportunity to seek support on a range of legal topics. The Symposium focused on rebuilding the dance ecology with emphasis on civic engagement, advancing justice, and the whole dance worker. It invited participants to investigate topics of decolonizing dance education, community organizing and social change, governmental advocacy, among others, in the context of a health crisis and in the wake of the social justice uprisings of 2020. In addition to the Clinic, the Symposium included panel discussions, interactive workshops, networking sessions, and a virtual service organization expo, among other offerings. We also organized a follow-up networking session for the volunteers to connect with each other.

Thank you to all of our wonderful volunteers!

Adjckwc Browne
Michael Burke
Gale Elston
Glinnesa D. Gailliard
George T. Gilbert
Sarah Haddad
Max Hass
Merlyne Jean-Louis
Mariia Khorun
Diane Krausz
Jeremy F. Manning
Giselle Ayala Mateus
Tami Morachnick
Josh Nathan
Donyale Y. H. Reavis
Ariana Sarfarazi
Nathan Sheffield
Josh Warrum
Laura J. Winston

The next Virtual Pro Bono Clinic will be held on **July 20th** and will be in conjunction with the New York Foundation for the Arts (NYFA), from 10:00 a.m. to 1:00 p.m. Stay tuned for more information!

Programs

We have a series of three webinar programs with NYFA coming this Spring.

In May, an "Estates for Artists" panel will discuss the issues that artists should consider when thinking about their estates; including the nuts and bolts of wills and trusts, gallery issues, licensing, and legacy. Each speaker will give tips on best practices and answer and discuss curated questions. The speakers include: Barbara Hoffman of The Hoffman Law Firm, Dorian Bergen of the ACA Gallery, Michael Dayton Hermann of The Warhol Foundation, and Kathy Battista of Art Legacy Planning/Sotheby's Institute. Adrienne Fields, Esq., of the Artists' Rights Society, will moderate.

Carol Steinberg will also present in May "Three Cases Every Artist Should Know." Artists will receive an introduction to three important areas of the law that govern visual art through case discussions. The first will introduce the basics of Copyright Law by discussing a lawsuit in which a photographer successfully sued various news outlets for using his photographs without payment or attribution. The second will introduce the basics of fair use, through discussion of *Cariou v. Prince*. Finally, the third illustrates the concept of moral rights and how to protect artwork from distortion, mutilation, or destruction via discussion of the 5 Pointz case.

The final webinar in June will be "Rights of Privacy and Publicity Issues for Artists/Entertainers—What to Know About Using Images of Others in Your Creative Work," with Carol Steinberg and Judy Bass. Carol will discuss the evolution and basics of the rights and Judy Bass will review the changes in the law.

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

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 any of us if you are interested in doing so.

- **Elissa D. Hecker,** eheckeresq@eheckeresq.com
- **Carol Steinberg,** elizabethcjs@gmail.com ***or*** www.carolsteinbergesq.com
- **Louise Carron,** louise@itsartlaw.com

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 **April 30th.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

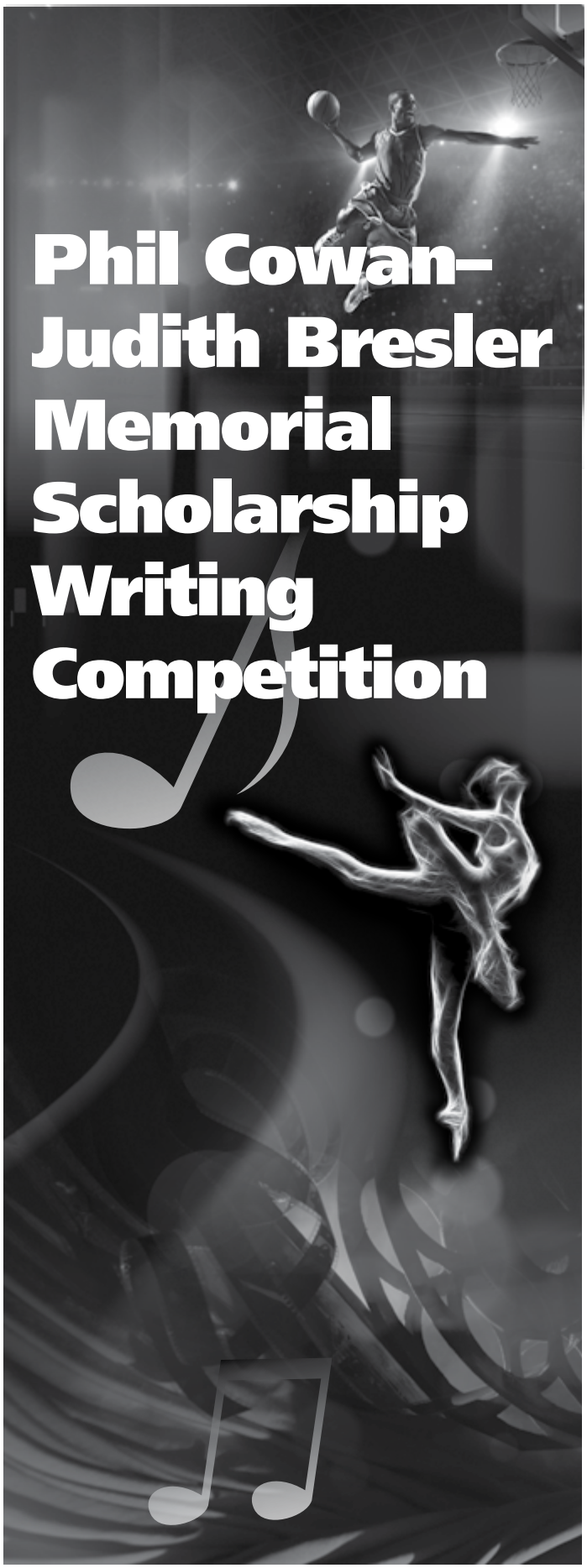
Topics

Each student may write on the subject matter of his or 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 receive 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.

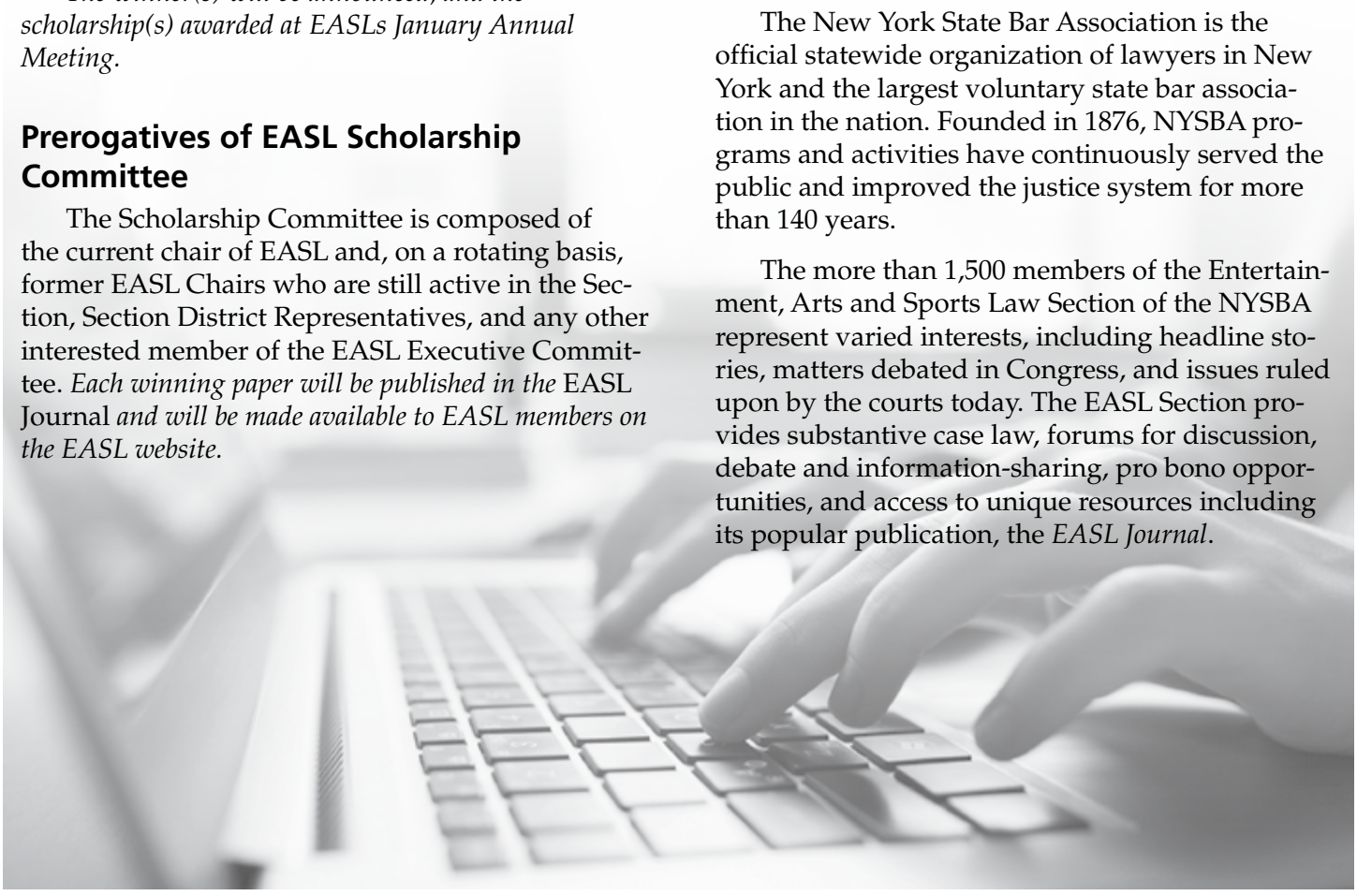
Payment of Monies

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 St, Fl 8
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 website at 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.

New York State Bar Association Entertainment, Arts and Sports Law Section 2021 Diversity, Equity and Inclusion Plan

The EASL Section committed in early 2020 to include diversity, equity and inclusion (DEI) as one its primary goals for 2020-2021 and beyond. Our goals extend to both our internal Executive Committee and the nature of programs EASL sponsors.

The COVID-19 pandemic, the disparate impact of the pandemic on BIPOC communities, the Black Lives Matter movement, and other unprecedented challenging and disturbing events of the past 12 months have highlighted ongoing inequities in our society and the need for change. Diversity continues to be a challenging issue within the broad entertainment, arts and sports markets addressed by EASL, as well as in the legal communities serving them. Key components of effecting change are greater education of and outreach to the bar, including EASL's Executive Committee and Section membership, as well as to the legal community at large.

Formula One's now-greatest driver, Lewis Hamilton, who is English and the only black winner in the sport's history, challenged his fellow drivers and teams in June 2020 to be more outwardly supportive of combating racial inequities. The response was immediate and powerful: Hamilton's team, Mercedes AMG-Petronas, rebranded its cars with a Black Lives Matter all-black livery, coupled with this commitment: "We will race in black in 2020, as a public pledge to improve the diversity of our team—and a clear statement that we stand against racism and all forms of discrimination."

EASL shares this mission to stand against racism and all other forms of discrimination (including based on religion, national origin, sexism, LGBTQ status, ableism, and ageism), and fully supports the New York State Bar Association's own mission to enhance diversity at every level of participation.

Our commitment to DEI programming was highlighted at our Annual Meeting (Part II) on January 26, 2021, where the EASL Diversity Committee put together a two-part program entitled "Writing Wrongs: Promoting Diversity and Inclusion in Book Publishing." See pages 133-34 for an outline of recommended action itmes from Michael Mejias of Inkluded. This program was an outgrowth of discussions that members of the EASL Diversity Committee had over the summer regarding an appropriate response to the killing of George Floyd. After

considering different options, the committee settled on a series of programs focusing on systemic racism in the EASL industries and what can be done to change it.

The first panel of the January 26th program focused on "The State of the Industry/Working in Publishing/Cultivating New Readers and Writers and the Path to Publication." It began with a clear-eyed assessment of the progress and lack of progress in this industry. The program then reviewed and celebrated various initiatives that are being undertaken, including internship programs, hiring senior executives from a more diverse pool, starting new imprints at the major publishers, and many others.

The second panel examined DEI from the perspectives of in-house and outside counsel, including the legal underpinnings of diversity efforts, how organizations can approach diversity and inclusion to create effective programs addressing those concerns, the role of general counsel in diversity and inclusion efforts and changing the culture, various programs undertaken for hiring, retention, and increasing organizational support for diverse employees and initiatives, and particular challenges that can be encountered. The program then addressed specific actions to improve diversity and inclusion ranging from organizational initiatives to individual interpersonal actions that we all can take.

Our annual meeting's DEI program was the first of what will be a multi-part diversity program series that will continue over the course of this year and into the future, with each program focusing on a different market sector, such as music, theater, film and fashion. In addition to focusing on systemic racism, we have begun the planning for programs on other forms of discrimination in the future.

Because so many people within EASL's constituent markets in the entertainment, arts and sports fields are of diverse backgrounds, more so than probably any other market sector in the U.S., we want our membership, committees and programming to reflect our commitment to those constituents, many of whom continue to face long-standing professional barriers and systemic prejudice. This is a driving factor behind our multi-part ongoing DEI program series.

Our DEI plan also includes partnering with other professional organizations to promote diversity-oriented programming. We recently reached out to the Copyright Society of the USA (CSUSA) with the idea of EASL and CSUSA jointly co-sponsoring one or more diversity programs in 2021, and CSUSA has happily agreed to work with us. In June 2020, an e-sports program was sponsored by EASL's Diversity Committee and the Metropolitan Black Bar Association (MBBA), with over 45 attendees. (Our Diversity Committee has held many joint programs with diverse bar associations, including MBBA and Black Entertainment and Sports Lawyers Association over the years.)

We also are committed to DEI in our Section's everyday activities, striving to invite additional members to our Executive Committee and other EASL committees, giving all the opportunity to contribute to the agenda (by making requests prior to the meeting), and allowing all to actively participate in discussions during meetings.

As of January 26, 2021, of the 47 members of EASL's Executive Committee, 21 are women or 44.7% of the total, three are Black, and two are Asian American. Of our four current officers, one is Black/female and another is Asian American/female. We can and should do better, especially in attracting more BIPOC members to the Executive Committee as committee chairs and officers, as well within EASL's overall membership. Unfortunately, the statistics for EASL, other Sections and NYSBA itself as to their overall membership compositions are incomplete, given the lack of responses. We note that the NYSBA Diversity Plan dated January 31, 2020 stated that one its goals was to "[u]rge the compiling of uniform statistics and information on diversity participation by each entity and member." It would be helpful if all NYSBA Sections and committees received such statistics on a quarterly basis for NYSBA as a whole and for each Section/committee. We also suggest that a significant outreach be made to encourage NYSBA members to provide the requested information.

We are also striving to be conscious of having sufficient diversity of speakers and the perspectives they bring in our program panels. In addition, we are focusing on having our programs appeal to broader and more diverse audiences. We want to attract diverse young lawyers and law students to join EASL to help build our base and future leadership for the longer term. One way we can implement that goal is to liaise with law school student diversity organizations and publications to encourage student membership in EASL and active participation on our committees. In addition, our Diversity Committee seeks to involve diverse lawyers in shaping and participating in EASL events, which we hope will provide richer professional connections for the committee members and EASL and NYSBA as a whole.

Sports and Entertainment Immigration: New Administration, New Goals

By Michael Cataliotti

Previously, in our little world of sports and entertainment immigration, we spoke about what to expect in a world where the previous administration was not "the previous administration," where the former president of the United States was not "former," where the difficulties that we were experiencing for five and a half years[1] continued on for another four.

Luckily, that did not come to pass: As we know, on or about November 3, 2020, Joe Biden became the President-elect of the United States, with Kamala Harris as the Vice President-elect.[2] Now, I say "luckily," because despite any individual political persuasions or preferences, in the realm of immigration, the previous administration was . . . deplorable.[3]

The fundamental question then, is, what will come of American immigration policy and practice under the Biden administration? In this installment of *Sports and Entertainment Immigration*, we will look at (1) what this new administration has done as of this writing and (2) discuss some possibilities of what may come to pass over the next four years.

Now, without further ado, let us talk about the fun stuff that is, immigration.

"It's Been a Hard Day's Night, and I've Been Working Like a Dog!"[4]

You may recall that the former resident of the White House left a voluminous amount of immigration messiness to be evaluated and revised. If you do *not* recall, however, that messiness includes (i) executive orders or "Presidential Proclamations,"[5] (ii) matters pending in district and appellate courts,[6] (iii) proposed rules,[7] (iv) a massive backlog of cases that have taken months to be accepted or rejected,[8] and (v) a near-complete suspension of routine visa services at U.S. embassies and consulates, worldwide.[9] There is plenty more as well, such as the detention, separation, and loss of individuals in detention centers along the U.S. border with Mexico.[10]

What to do about all of this? President Biden, officially the oldest President in U.S. history,[11] immediately got down to business rescinding, releasing, and introducing executive actions, policies, and legislation of his own.

For our purposes, the most notable of these actions is the creation of various task forces to *Restore Faith in Our Legal Immigration System and Promote Integration of New Americans*.[12] From the White House's press release:

> President Biden believes that immigrants are essential to who we are as a nation and critical to our aspirations for the future. The prior administration enacted hundreds of policies that run counter to our history and undermine America's character as a land of opportunity that is open and welcoming to all who come here seeking protection and opportunity. *This Executive Order elevates the role of the White House in coordinating the federal government's strategy to promote immigrant integration and inclusion, including re-establishing a Task Force on New Americans, and ensuring that our legal immigration system operates fairly and efficiently.* The order requires agencies to conduct a top-to-bottom review of recent regulations, policies, and guidance that have set up barriers to our legal immigration system. It also rescinds President Trump's memorandum requiring family sponsors to repay the government if relatives receive public benefits, instructs the agencies to review the public charge rule and related policies, and streamline the naturalization process.[13]

Though this language is positive, what exactly it means is unknown at present; however, we can infer from other actions that the Biden-Harris administration will continue to make lawful immigration more attractive and amenable to individuals around the world. Whether the administration is friendly—and if so, how much—to our particular clients and industries remains to be seen; the executive order that suspended the issuance of H-1B and L-1 visas at consulates was not rescinded. From the *Financial Times*:

> Although the ban on worker visas, including H-1B and L visas, is set to expire in March, Biden's failure to rescind the

> order worries immigration lawyers. They fear the administration will continue to view overseas workers as a threat to American employees.
>
> "There was a view put forward by restrictionists in the Trump administration that jobs are fungible, and if you have a foreign worker in a job there's not a job for an American worker, and that's just not true," said Leslie Dellon, an attorney specialising in business immigration for the American Immigration Council.[14]

Should we be worried? I believe that a healthy bit of worrying keeps us attuned and attentive to our surroundings. It is important to know, however, that the administration *did* allow the executive order (Presidential Proclamation 10052),[15] to expire on March 31, 2021.[16] If this is an indication of the administration's goals, then it is a pleasant indicator of things to come.

Nonetheless, that executive order does not necessarily impact athletes, artists, and entertainers as much as it does individual executives, administrators, supervisors, and the like. For those unsure or unfamiliar, (1) the H-1B is typically used by "engineers, teachers, computer programmers, medical doctors, and physical therapists,"[17] as well as graphic designers, architects, and many other individuals whose occupations would require a bachelor's degree or its equivalent, as well as models.[18] On the other hand, (2) the L-1 visa is typically used by individual executives or managers (L-1A), or individuals who have specialized knowledge (L-1B), and are being transferred from a non-U.S. office into the U.S. either to open a new office or direct/contribute to operations within the U.S.[19]

Still, as per an esteemed colleague of mine:

> "There is a view within the Biden camp that US workers need protection from H-1B workers in terms of wages, or that somehow H-1B workers are undercutting the wages of US workers" said Jennifer Minear, an immigration lawyer at McCandlish Holton.
>
> "It's clear that the administration is in favour of legal immigration and wants to be supportive of it," Minear said. "But there's been some signalling from the administration that it intends to tighten and make more difficult some of the prevailing wage requirements for H-1B workers…so it's not all going to be birthday cake for immigrants."[20]

This certainly is not ideal, but it is leaps and bounds ahead of where we were before, and, considering the typical uses for H-1B and L-1 visas, it is not the worst situation, either. After all, we were told to give Trump a chance.[21]

Moreover, the proposed immigration reform bill was introduced in the Senate by Senator Menendez on January 20, 2021, and was pushed by the Biden-Harris administration.[22] That bill, however, had little if anything to do with reforms to business immigration or the legal immigration system, unlike what we saw in 2013 with that delightful "Gang of 8" bill that made it through the Senate and languished in the House.[23]

Therefore, what is the current administration's position with respect to business-based immigration? We understand that there is a generally positive tone, which is far better than the previous administration's posture.

"Roads? Where We're Going, We Don't *NEED* Roads!"[24]

What, then, might happen under a Biden-Harris administration? It is doubtful with a simple majority that we will be able to see major immigration overhaul like we saw in 2013, unless, somehow, it is tied into a spending, revenue or federal debt limit bill.[25] This would allow the Senate to use the procedure of "reconciliation," allowing for, among other things, a simple majority of votes in favor.[26] It is unlikely that anyone can get nine Republicans to vote "Yes" on immigration legislation.

We can look back to the Obama years to see if we can glean what may be forthcoming. Back then, we had Alejandro Mayorkas as the director of the United States Citizenship and Immigration Services (USCIS), and we had some more consistency in adjudications, policy implementation, and petition/application reviews. As the Biden-Harris administration has tapped Mayorkas to once again lead an agency, only this time it is USCIS's parent, the Department of Homeland Security (DHS)—and he has since been sworn in to do so[27]—we have a sense of stability and perhaps, normalcy, whatever that is. For example, rather than issue an unnecessary spate of requests for evidence (RFE)[28] that have the (intended, it would seem) result of unnecessarily delaying the processing of petitions and applications, I suspect that Secretary Mayorkas will direct the director of USCIS to have front-line adjudicators (i.e. USCIS officers) do their jobs without a prejudged negative inference or interpretation. Likewise, I suspect that adjudicators will actually take some time to review the material submitted to them, which, it has appeared, many have not, or have been confused by the laws, rules, and regulations by which they are bound. The resumption of objective and knowledgeable adjudications would be most welcome, and in my opinion, likely.

I also believe that we will see some new and improved adjudication policies promulgated by USCIS, which too, would be most welcome. If we are to look to the Biden-Harris administration as more aggressive in its attempts to move the U.S. immigration system into the

21st century, and with the former director of USCIS now heading DHS, we may be in a position for great things over the next four years. We also note the rumors that Ur Jaddou is slated to take the directorship at USCIS. Jaddou is unknown to most, but she has years of experience that would serve her, USCIS, and us all quite well. From her employer's website, her biography reads:

> She served as Chief Counsel to U.S. Citizenship and Immigration Services from July 2014 to January 2017 where she provided legal counsel to the agency and interacted with the DHS General Counsel and other immigration component counsel. She was previously responsible for developing and executing congressional strategy for the U.S. Department of State as Deputy Assistant Secretary for the Bureau of Legislative Affairs.[29]

Jaddou is also the Director of DHS Watch, which is a division of America's Voice. As per its "About Us" webpage:

> The mission of America's Voice (AV) and America's Voice Education Fund (AVEF) is to build the public support and the political will needed to enact policy changes that secure freedom and opportunity for immigrants in America. Priority goal: win reforms that put 11 million undocumented Americans on a path to full citizenship.
>
> The immigration reforms we support include[] the following elements:
>
> - A direct, fair, and inclusive road to citizenship for immigrants in the U.S. without papers.
> - Channels for future legal immigration that are flexible and functional.
> - Robust protections and guaranteed rights for all workers.
> - Enforcement that is targeted and fair, and respects immigrants' rights.
> - Full and equal rights for all immigrants.[30]

My word. If I did not know any better, I would say that Jaddou is someone whose background is highly accomplished and knowledgeable in government affairs, as well as immigration matters, and that her current employer is in line with the majority of Americans who want to see immigration reform.[31]

As far as visa issuances are concerned, those are managed by the Department of State (DoS or the State Department), which oversees all U.S. consulates and embassies. As many of our people are stuck outside the U.S. and are unable to return without a newly issued visa, or stuck within the U.S. and are unable to depart because they will not be able to obtain a visa, we must look to the Secretary of State to determine whether that person will be friendly or not. President Biden's pick, Antony Blinken, was confirmed and sworn in by the Senate on January 26, 2021, making him Secretary Blinken. The name means little to many of us, so, as usual, let us look at Blinken's biography:

> Blinken is a longtime Biden aide and a key member of his 2020 campaign team. He is considered a moderate who is well regarded by foreign diplomats and can pass muster with Republicans in the Senate, where he will have to seek confirmation. At the same time, he's served as an intermediary for Biden and members of the progressive community, engaging the latter on their demands for what a Biden foreign policy will look like.
>
> […]
>
> He served on the National Security Council during the Clinton administration and has spent time on Capitol Hill, where he was Democratic staff director for the Senate Foreign Relations Committee when Biden was chairman. During the Obama years, Blinken served as deputy national security adviser and deputy secretary of State.[32]

Diplomatic experience. Check. Muscle memory. Check. State Department experience. Check. Extremist? Crickets. That is what we like, especially in the realm of national security and international relations. Lovely.

So, seeing as how Blinken is now in charge of the State Department, how then, will his presence impact us or our clients? The same policies and practices that we saw USCIS officers utilize were also utilized worldwide at consular posts: delay, frustrate, and ultimately, prolong for as long as possible the wait time for a visa. COVID's global sprint exacerbated this by shutting down consular posts to routine nonimmigrant visa services, but as we note above, there has been a "Rephasing" in of procedures. That rephasing has been terribly slow and inefficient, most likely due to a combination of antagonistic policies, incompetency by the former Secretary, and of course, social distancing/COVID-related measures.

Blinken has the authority to review the practices of the State Department, identify logjams, and relieve the pressure where appropriate. We are already seeing some

movement at consular posts, and so, with optimism, let us believe that this is a positive trend.

On the other hand, Secretary Blinken has already tightened restrictions for travelers seeking to come directly into the U.S. from Europe. A summary from the good folks at Tarter Krinsky & Drogin:

> On March 2, 2021, the U.S. Department of State announced further tightening of its COVID-19 restrictions for foreign nationals present in the Schengen areas of Europe, the United Kingdom, and Ireland. Anthony Blinken, the Secretary of State, rescinded prior guidance by the State Department granting "national interest exceptions" to the travel restrictions for senior level managers and executives, technical experts, professional athletes, and E visa treaty traders and investors. The new guidance limits the issuance of national interest exception to those foreign nationals who will offer "vital support to critical infrastructure sectors." The interpretation of the new directive has varied at each consulate.[33]

This is certainly not ideal.

How will it impact most people? Well, the tightening of this national-interest-exception criteria means that executives and managers coming into the U.S. to observe operations, hold meetings, meet with clients and managers/other executives, will no longer qualify for national interest exceptions.[34] Likewise, individuals who have invested into businesses within the U.S. will not qualify for national interest exceptions—despite potentially having invested a significant sum into their U.S. business—unless those individuals can demonstrate that they/their ventures are fundamental to the "critical infrastructure" sectors within the U.S. None of this is desirable.

As above, a healthy dose of worrying is not necessarily a bad thing. We just don't want to be like Mr. Worry, who, unfortunately, worried about everything, all the time, even to the extent that he worried when he had no more worries![35]

Concluding Thoughts

The new administration has done quite a bit already, but the hope is that we will see a change in attitude by the frontline USCIS officers who are tasked with adjudicating petitions and applications. The *Financial Times* captured this when it quoted Minear, saying: "A lot of the tone of executive orders already issued is basically—'let's not be racist any more.' […] They send a signal from the administration to the public and to career employees in the federal government that there's a new sheriff in town."[36]

Very true, but I go several steps further—and say that the real change in tone and attitude will come from the top of USCIS, as well as DHS with Mayorkas and the State Department with Blinken, we have some idea of what to expect; and with the Biden-Harris administration already pointing to a strong pro-immigration set of policies, the Secretaries may go beyond Biden's tenure under the Obama administration.

Overall, things are looking up, so stay optimistic, but stay vigilant, because we never know which way the wind will blow, and no one likes getting a gust of air to the face, especially when it is unexpected.[37]

Endnotes

1. You may think I am terrible with numbers, but I assure you, I can count. I say five and a half years, because from the time that Trump floated down that escalator, we (or at least, I) started seeing shifts in USCIS officer practices. And seeing as how that special day was on June 16, 2015, and his presidency officially ended January 20, 2021, it was five and a half years of terrible rhetoric and practices.
2. https://www.nytimes.com/live/2020/11/07/us/biden-trump.
3. https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/.
4. The Beatles, "A Hard Day's Night," https://www.youtube.com/watch?v=Yjyj8qnqkYI.
5. https://www.federalregister.gov/presidential-documents.
6. https://www.texastribune.org/2021/02/04/joe-biden-immigraton-court-backlog/; *see also* https://www.americanimmigrationcouncil.org/litigation.
7. https://www.aila.org/advo-media/issues/all/dhs-dol-rules-altering-h1b-prevailing-wage-levels.
8. https://www.uscis.gov/news/alerts/uscis-lockbox-updates.
9. https://travel.state.gov/content/travel/en/News/visas-news/phased-resumption-routine-visa-services.html.
10. https://www.cfr.org/backgrounder/us-detention-child-migrants.
11. https://apnews.com/article/joe-biden-donald-trump-health-ronald-reagan-coronavirus-pandemic-b43ea0d0049ae2cd72aead6e1816f6d5.
12. https://www.whitehouse.gov/briefing-room/statements-releases/2021/02/02/fact-sheet-president-biden-outlines-steps-to-reform-our-immigration-system-by-keeping-families-together-addressing-the-root-causes-of-irregular-migration-and-streamlining-the-legal-immigration-syst/. Emphasis in original.
13. *Id.*
14. https://www.ft.com/content/517a70a6-bb6e-4880-abff-323176e4a211.
15. https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-amendment-proclamation-10052/.
16. https://travel.state.gov/content/travel/en/News/visas-news/update-on-presidential-proclamation-10052.html.
17. https://webapps.dol.gov/elaws/elg/h1b.htm.
18. *Id.*
19. https://www.uscis.gov/forms/explore-my-options/l-visas-l-1a-and-l-1b-for-temporary-workers.
20. https://www.ft.com/content/517a70a6-bb6e-4880-abff-323176e4a211.
21. https://www.cnn.com/2016/11/14/politics/obama-news-conference-donald-trump-transition/index.html.

22. https://www.nbcnews.com/politics/immigration/biden-immigration-bill-would-provide-more-protections-child-migrants-n1255167.
23. https://www.menendez.senate.gov/newsroom/press/menendez-to-lead-biden-harris-immigration-legislation-in-the-senate.
24. Dr. Emmett Brown, as played by Christopher Lloyd, *Back to the Future Part II*, 1989, https://www.imdb.com/title/tt0096874/characters/nm0000502.
25. https://en.wikipedia.org/wiki/Reconciliation_(United_States_Congress).
26. *Id.*
27. https://www.dhs.gov/news/2021/02/02/alejandro-mayorkas-sworn-secretary-homeland-security.
28. I know, why isn't it, "RsFE"? I'm not sure. But it isn't. Moving on…
29. https://americasvoice.org/staff/ur-jaddou/.
30. https://americasvoice.org/about-us/.
31. https://www.majorityleader.gov/content/yet-another-poll-showing-americans-want-action-immigration-reform.
32. https://www.politico.com/news/2020/12/08/joe-biden-administration-cabinet-picks-442621.
33. https://www.jdsupra.com/legalnews/state-department-tightens-regulations-8399655/.
34. *Id*.
35. https://www.amazon.com/Mr-Worry-Men-Little-Miss/dp/084319961X; *see also* https://www.youtube.com/watch?v=8wanaz8aj2g.
36. https://www.ft.com/content/517a70a6-bb6e-4880-abff-323176e4a211.
37. Do not let anyone tell you: "Don't worry about it! Biden-Harris have it all under control! It's easy! You worry too much." We are trained lawyers. We worry. We think of ideas for how to resolve those worries. It's what we're paid to do!

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Resolution Alley

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

Confidentiality in Arbitration

By Theo Cheng

Two of the hallmarks of alternative dispute resolution processes are their privacy and confidentiality. It is important, however, to remember that these two concepts are quite distinct. Privacy is inherent to processes like mediation and arbitration by design. ADR processes are meant to be privately negotiated and arranged proceedings for resolving disputes outside of the traditional courtroom. They typically do not envision the participation of outside third parties, aside from anyone agreed upon by the parties, such as the mediator, arbitrator, insurance carrier adjuster, interpreter, stenographer, or non-party witnesses. Thus, agreements between parties calling for the utilization of, for example, mediation or arbitration processes often describe such proceedings as private in nature.

The concept of confidentiality, however, pertains to whether and how outsiders to a proceeding may gain access to the details of what transpired during an ADR proceeding. In many cases, the parties have agreed in advance that, subject to certain exceptions, their contemplated dispute resolution process will remain confidential from the public. For example, on November 13, 2020, three limited partners in the Washington Football Team sued the majority owner in a Virginia federal court, contending that the latter, in exercising his right of first refusal to buy out the limited partners in the face of their desire to sell their interests to a third party, declined to buy out one of the three limited partners, thereby breaching the ownership agreement.[1] The National Football League (NFL) intervened in the lawsuit, contending that the limited partners had agreed to resolve ownership disputes through a confidential, binding arbitration process overseen by Commissioner Roger Goodell. Under provisions applicable to purchasing equity in an NFL team, owners agree, among other things, to accept the NFL's constitution and bylaws, which authorize the commissioner to "arbitrate . . . any dispute involving two or more holders of an ownership interest in a member club." Owners also agree to abide by the NFL's dispute resolution guidelines, which call for confidentiality in those proceedings. On December 30, 2020, the court referred "to arbitration the issue of whether and when Plaintiffs have submitted a sufficiently complete good-faith buyout proposal to Defendant and the corresponding issue of the extent to which Defendant has properly engaged his [right of first refusal]."[2]

In other cases, parties appeared to have relied wholly on the incorporation and subsequent application of ADR provider rules, which can sometimes lead to anomalous results because the assumption that merely commencing a mediation or arbitration will ensure the confidentiality of those proceedings is both overbroad and misleading. For example, one might expect that, if an arbitration is commenced with a recognized and reputable provider, such as the American Arbitration Association (AAA), the CPR Institute, JAMS, or Resolute Systems, the rules and procedures of those organizations would maintain the privacy and confidentiality of the proceedings. The CPR Institute's Administered Arbitration Rules provide a robust and comparatively comprehensive confidentiality provision, mandating that,

> [u]nless the parties agree otherwise, the parties, the arbitrators and CPR shall treat the proceedings, any related discovery and the decisions of the Tribunal, as confidential, except in connection with judicial proceedings ancillary to the arbitration, such as a judicial challenge to, or enforcement of, an award, and unless otherwise required by law or to protect a legal right of a party.[3]

Yet not all provider rules are similarly worded or provide the breadth of coverage as do the CPR Rules. For example, the AAA's Commercial Arbitration Rules provide only that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary."[4] Unlike the CPR Institute's Rules, notably absent is any mention of an obligation by parties (or their counsel) to maintain the confidentiality of the proceeding, unless, of course, they have entered into a separate agreement addressing that issue. That is, insofar as arbitration has always been described as a "creature of contract," the parties to an arbitration clause are free to customize their dispute resolution process with a great degree of flexibility—far more than is available if the dispute were governed solely by court rules and procedures. In particular, if confidentiality is a concern, the parties may agree to maintain that confidentiality throughout their dispute resolution proceeding. Critically, absent such an agree-

ment, as would be the case in conventional court litigation, the parties would be theoretically free to engage in *any* disclosure of the proceeding, ranging from publicly speaking about the case to the media to actually revealing information or documents obtained during the proceeding itself.

Additionally, with the exception of the CPR Institute and JAMS, generally omitted in other providers' rules are any explicit confidentiality obligations imposed on a provider's staff and the arbitrators to protect information about the proceeding outside of the hearing context. However, for example, the AAA's Statement of Ethical Principles states that "AAA staff and AAA neutrals have an ethical obligation to keep information confidential." Indeed, under Canon VI of the Commercial Code of Ethics for Arbitrators in Commercial Disputes, the AAA and the American Bar Association set forth an arbitrator's obligations to maintain the confidentiality of the proceeding. Furthermore, in the Statement of Responsibilities and Understanding that all AAA arbitrators must submit on an annual basis, the arbitrators confirm that they "agree to serve in accordance with all applicable AAA-established procedures and the Code of Ethics for Arbitrators in Commercial Disputes and the Model Standards of Conduct for Mediators, as applicable, in effect now and as they may be amended." Notwithstanding the foregoing provisions, the Statement of Ethical Principles also sets forth that "the AAA takes no position on whether parties should or should not agree to keep the proceeding and award confidential between themselves. The parties always have a right to disclose details of the proceeding, unless they have a separate confidentiality agreement." Thus, the default confidentiality rule as applied to the parties is the exact opposite as between the CPR Institute and the AAA.

Non-party witnesses who participate at any point in the arbitration process are also not addressed by any of the provider rules. Unless there is a separately applicable agreement in place between those witnesses and the parties to the arbitration (e.g., a non-disclosure agreement or a cooperation agreement), non-party witnesses are neither named parties to the arbitration proceeding nor are they signatories or otherwise bound by the arbitration agreement. Accordingly, as a general matter, they have *no* obligation to maintain the confidentiality of the arbitration proceeding and are free to discuss publicly anything they may have learned or experienced, or to which they were exposed, as a result of their participation in the arbitration proceeding.

The lesson here is that it is essential to know and understand how the parties' agreement and rules regarding confidentiality operate in an arbitration proceeding. To the extent that the parties do not already have an agreement addressing confidentiality, it is a best practice to engage opposing counsel early on in the process to discuss this issue and raise it at the preliminary hearing with the arbitrator or panel.[5] Indeed, it has become common practice for parties in arbitration proceedings, much like they would in conventional court litigation, to seek to enter into stipulated protective orders governing the confidentiality of the proceeding and/or the designation and use of materials produced by parties (and non-parties) to which

access may be circumscribed. As in court, these stipulations are generally presented to the arbitrator or panel for approval, or, alternatively, the parties may engage in motion practice before the arbitrator or panel on that issue.

Finally, the parties' bargained-for confidentiality may, in fact, turn out to be fleeting if, after the issuance of an award, one or both parties seek confirmation or vacatur of the award under the Federal Arbitration Act or a state arbitration statute like Article 75 of the CPLR. In that circumstance, the contents of those petitions, which would undoubtedly include both the award itself and information derived from the arbitration proceeding, would generally be publicly disclosed. For example, in *Pennsylvania National Mutual Casualty Insurance Group v. New England Reinsurance Corp.*,[6] Pennsylvania National Mutual Casualty Insurance Group (Penn) filed a petition to confirm an arbitration award it had obtained against two of its reinsurers, requesting that the court seal the award, which it did. Before the reinsurers could respond to the petition, the parties settled and Penn withdrew its petition. Then, one of Penn's reinsurers—one that was not a party to the action—intervened and moved to unseal the award. The court granted that motion, reasoning that the common law right of access allows members of the public to access documents in a judicial proceeding. The Third Circuit affirmed, holding that, if a document makes its way into the clerk's file, it would then be subject to the presumption of the common law right of access.

Of course, the nature and scope of the arbitration award may make a difference as to how important confidentiality is with respect to later court proceedings. For example, if the award is a standard (or "bare" award) that only discloses the outcome and relief (e.g., the identity of the parties, the identity of the prevailing party, and the monetary damages or equitable relief ordered), depending upon the circumstances, perhaps not much has been dedicated to the public by the filing of a confirmation or vacatur petition. By contrast, if the award provides reasoning or explanations from the tribunal and/or delineates specific findings of fact and conclusions of law, it would be difficult to maintain any sense of confidentiality once court proceedings are commenced. As another court has noted:

> [T]he confidentiality agreement at issue in this case may be binding on the parties, but it is not binding upon the Court. And while parties to an arbitration are generally permitted to keep their private undertakings from the prying eyes of others, the circumstance changes when a party seeks to enforce in federal court the fruits of their private agreement to arbitrate, *i.e.*, the arbitration award.[7]

Notwithstanding the limitations discussed in this column, arbitration remains one of the only adjudicative processes in the overall dispute resolution spectrum over which confidentiality can, for the most part, be maintained, particularly during the pendency of the proceeding. The alternative—conventional court litigation—offers no similar advantage. Thus, although arbitration clauses are, in many instances, an afterthought, it would be prudent for both litigators and transactional attorneys to consider upfront whether and to what extent the parties wish to maintain confidentiality should they decide to seek resolution of their disputes in the arbitral forum.

Endnotes

1. *See* Michael McCann, *NFL Fights to Keep Washington Minority Owner Dispute From Public View*, Sportico.com (Dec. 10, 2020), https://www.sportico.com/law/analysis/2020/washington-football-team-ownership-suit-nfl-1234618036/.
2. *Rothman v. Snyder*, Civ. No. 20-03290-PJM, slip op. at 13 (D. Md. Dec. 30, 2020).
3. CPR Administered Arbitration Rules, Rule 20 (2019).
4. AAA Commercial Arbitration Rules, Rule R-25 (2013); *see also* JAMS Comprehensive Arbitration Rules and Procedures, Rule 26 (2014) ("JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision."); Resolute Systems Commercial Arbitration Rules, Rule 11 (1993) ("The arbitrator shall maintain the privacy of the hearings unless the law provides to the contrary.").
5. For a more thorough treatment of the confidentiality issues in arbitration proceedings, including a practical checklist to consider adopting, *see, e.g.*, Laura A. Kaster, *Confidentiality in U.S. Arbitration*, NYSBA New York Dispute Resolution Lawyer, Vol. 5, No. 1 (Spring 2012), at 23.
6. Nos. 20-1635, 20-1872, 2020 U.S. App. LEXIS 40342 (3d Cir. Dec. 24, 2020).
7. *Century Indemnity Co. v. AXA Belgium* (f/k/a Royale Belge Incendie Reassur.), No. 11 Civ. 7263 (JMF), 2012 U.S. Dist. LEXIS 136472, at *43 (S.D.N.Y. Sept. 24, 2012) (internal citations and quotations omitted).

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Copyright Developments in 2020

By Neville L Johnson and Douglas L. Johnson

2020 was an eventful year for the world of copyright law in the United States. The following cases are of particular interest.

Authorship and Ownership Are Not One in the Same: *Everly v. Everly*

This dispute between Phil Everly's heirs and Don Everly in this case arose out of the parties' dispute over the authorship of the hit song *Cathy's Clown* by the Everly Brothers, arguably one of the greatest vocal duos in pop music history, but who had a notoriously difficult relationship and used to perform pursuant to engagements where they would not have to speak to the other.[1] When the song was released in 1960, both brothers were credited as co-authors, were identified as co-authors on the original copyright registration, and received royalties pursuant to their publishing agreement with Acuff-Rose, to whom they had transferred ownership of the song.[2] Don then began to receive all royalty payments and sole credit as author.[3] In 2011, Don served Acuff-Rose with a termination notice, exercising his right as an author of the underlying musical composition.[4] When Phil died in 2014, his heirs also served a termination notice on Acuff-Rose, as well as a termination on Don with respect to the 1980 release agreement.[5] In 2017, Don filed a claim for a declaration that he was the sole author of the song, arguing that Phil's heirs' claim of authorship was untimely under the Copyright Act's three-year statute of limitations.[6] The district court held in Don's favor, since authorship claims, unlike infringement claims, can accrue only once.[7] Phil's heirs argued that the agreement was made as a favor to Don, and was not a waiver of authorship. The court reasoned that it was clear that Don had repudiated Phil's ownership as late as 2011, and that any co-authorship claims had expired by 2014.[8] Phil's heirs appealed to the Sixth Circuit and obtained a ruling in their favor.

The Sixth Circuit reversed the lower court's granting of Don's motion for summary judgment because there was a triable issue of fact as to whether Don had actually repudiated Phil's ownership in *Cathy's Clown*.[9] The court reasoned that ownership and authorship are not one in the same, and that while ownership of a copyright may be transferred, authorship cannot.[10] Therefore, under this logic, the 1980 release agreement could not have assigned Phil's authorship rights to Don.[11] The court then established that "an authorship claim will not accrue until the putative author's status *as an author* is expressly repudiated,"[12] and that "actions repudiating ownership

are irrelevant."[13] The court added that the act of repudiation "must come from someone asserting authorship of the work, not from a third party."[14] Applying these principles to the facts, the court held that there was a triable issue of fact as to whether Don repudiated Phil's authorship in the song, because it was not clear whether the 1980 release agreement served as Don's express repudiation or whether it was simply a transfer of the rights to the royalties and public credit from Phil to Don.[15]

To Boldly Copy: *Dr. Seuss Enters., Ltd. P'ship v. ComicMix Ltd. Liab. Co.*

The Dr. Seuss-Star Trek fair use battle made headlines (in the copyright world) when the Ninth Circuit reversed the lower court's decision that ComicMix's use of elements from Dr. Seuss' *Oh, The Places You'll Go!* in its Star Trek mash-up book *Oh, The Places You'll Boldly Go!* did not constitute fair use.[16] The lower court had previously adjudicated the issue of fair use on ComicMix's motion to dismiss, granting it on the grounds that it was highly transformative, did not take more than necessary, and that it was unclear whether the work presented a high risk of market harm to the Seuss books.[17] The Ninth Circuit applied the statutory fair use factors, and found that each factor weighed against fair use.[18] The court reasoned that ComicMix's work was not a parody and was not transformative because merely adding material to a pre-existing work was not a "get-out-of-jail-free card" making a work transformative.[19] Moreover, due to the substantial amount of the original work that had been used, and the potential threat the new work posed to the market of the original work, the court was not convinced by ComicMix's arguments.[20]

"Experimental Use" Enters the Fair Use Conversation: *Chapman v. Maraj*

Tracy Chapman alleged that rapper Nicki Minaj infringed her musical composition *Baby Can I Hold You* by using the lyrics and melody in Minaj's song *Sorry*, and by distributing the song to a DJ.[21] In 2017, Minaj had been working on *Sorry* to include on her then upcoming album.[22] At the time, she was unaware that the song was based off of Chapman's *Baby Can I Hold You*.[23] When Minaj realized the truth, she sought a license from Chapman in order to "clear" *Sorry* and release it commercially.[24] Chapman repeatedly declined to license the song.[25] In 2018, ahead of her album release, Minaj sent *Sorry* to a radio DJ, who played the song on his radio show.[26] Chapman sued Minaj for copyright infringement of the exclusive right to make a derivative work and the exclusive right to distribute a work.[27] The United States District Court for the Central District of California held, on a motion for summary judgment, that Minaj was not liable for copyright infringement because the fair use defense applied.[28]

What makes this a notable case is the court's analysis under the first prong of the fair use doctrine, i.e., the "purpose and character of the use." The court held that *Sorry* was not a commercial use because Minaj was "experimenting" with her vision, and that she never intended to distribute the work without a license.[29] The court emphasized that an artist should be able to experiment with his/her/their music prior to releasing it, and that having to obtain a license would "limit creativity and stifle innovation within the music industry."[30] While the policy of promoting creativity is consistent with the principles of the Copyright Act, this case sets a precedent for copyright infringement in music sampling of which it could easily be taken advantage. The court spent little time on addressing that Minaj did in fact release the song—even if not on an album—as a way to promote her upcoming album, which likely contributed to the success of its release. *Sorry* contains a sizable portion of *Baby Can I Hold You's* lyrics and melody, and is a direct reproduction of *Baby Can I Hold You*. To conclude that *Sorry* would have been a commercial use only had it been released on an album implies that anyone could sample another writer's song, release it on the internet in some fashion without a record label, gain exposure, and financially benefit.

Two Conflicting Tattoo Cases: *Solid Oak Sketches, LLC v. 2K Games, Inc.* and *Alexander v. Take-Two Interactive Software, Inc.*

In *Solid Oak Sketches, LLC v. 2K Games, Inc*, Solid Oak Sketches brought a copyright infringement claim against 2K Games for the use of certain tattoos for which Solid Oak Sketches holds licenses in an NBA basketball simulation video game.[31] Solid Oak argued that 2K Games had failed to obtain a license to depict the NBA players with the tattoos at issue.[32] The court held that there was no copyright infringement because the defenses of de minimis use, implied license and fair use applied.[33] The court granted the defendants' motion for summary judgment and held that the use of the tattoos in the game was de minimis, because out of the 400 available basketball players in the game, the tattoos only appeared three times, and when the tattoos did appear in the game, they were distorted and blurry.[34] The court then stated that 2K Games had an implied license to use the tattoos in the video game because the tattoo artists had granted an exclusive license to the players, and the players in turn had granted 2K games the license to use their likeness in the video game.[35] Finally, the court held that the use of the tattoos was fair use because the tattoos were incidental to the value of the game and were transformative; the designs were not sufficiently expressive; 2K had only taken what was necessary; and that the tattoos were transformative enough such that their use in the game would not impact the rightsholders' market.[36]

In *Alexander v. Take-Two Interactive Software, Inc,* similar to *Solid Oak Sketches*, a tattoo artist brought a copyright claim against Take-Two for depicting six tattoos by the artist on professional wrestler Randy Orton in a simulated wrestling video game series.[37] The court denied the defendants' motion for summary judgment on the grounds that there were no disputed material facts as to the fact that Alexander owned the copyrights and that there had been copying, and because there were material facts in dispute as to whether the defenses of implied license, fair use, and de minimis use applied.[38] On the implied license defense, the court found that it was unclear whether Alexander and the wrestler had discussed acceptable ways of copying and distributing the tattoos, in addition to whether any such implied license would include Orton's ability to license the tattoos as part of his likeness to a third party.[39] For fair use, the court reasoned that there were triable issues as to the four factors that could not be adjudicated on a motion for summary judgment.[40] Finally, the court concluded that the de minimis copying defense could not apply, because the defense is used to "allow copying of a small and usually insignificant portion of the copyrighted works, not the wholesale copying of works in their entirety as occurred here."[41]

No Attorney's Fees for Plaintiffs Who Overstate Their Claim to Prolong Litigation: *Otto v. Hearst Communs.*

Otto, a photographer, sued Hearst Communications, Inc. for copyright infringement for publishing his photograph of Donald Trump on its website Esquire.com without permission.[42] The court held that Hearst was liable for copyright infringement, rejecting the company's fair use defense.[43] The court then determined that a reasonable license fee for the photograph was $100, rejecting Ottos' argument that the license fee should be $4,000, and awarding $750 in statutory damages.[44] Otto then attempted to obtain attorney's fees under the Copyright Act.[45] The

court rejected the argument as a matter of law and noted that Otto was not entitled to attorney's fees because he had consistently overstated the value of his claim, leaving Hearst with no choice but to continue litigation when the value of the license in reality was only $100.[46] Otto could not be rewarded for prolonging litigation when his claim was unjustifiably inflated.[47]

Internet Service Providers Can No Longer Escape Secondary Copyright Infringement Liability: *Warner Records Inc. v. Charter Communications, Inc.* and *Sony Music Entm't v. Cox Communs.*

Two rulings from 2020 may pave the way for rightsholders to finally hold internet service providers (ISPs) secondarily liable for user-uploaded infringing materials. In *Warner Records Inc. v. Charter Communications, Inc.*, Warner Records, together with a number of other record labels and publishers, sued Charter Communications (Charter) for copyright infringement.[48] The plaintiffs alleged that Charter was vicariously liable for subscribers distributing pirated music through peer-to-peer file-sharing programs.[49] Charter argued that they could not be held liable because they did not receive a financial benefit from the piracy and they were unable to supervise all infringing users.[50] In an interesting turn of events, the court denied Charter's motion to dismiss and held in favor of the plaintiffs, reasoning that: "Charter's lack of action against known infringers likely draws further subscriptions, as subscribers know they can download infringing content without consequence, [encouraging] subscribers to continue using Charter's service as well as purchase higher bandwidth to facilitate higher download speeds."[51]

In *Sony Music Entm't v. Cox Communs.*, Sony Music Entertainment (Sony) and a number of other music companies brought an infringement claim against Cox Communications (Cox) after a third party company that Sony hired identified 10,478 pirated works shared by Cox subscribers through peer-to-peer file sharing services and sent the appropriate notices to Cox.[52] Cox raised the same defenses as Charter, namely that it received no financial benefit, that it could not monitor every user's activity, and that it did not have specific knowledge of infringing activities.[53] The court held that Cox could be secondarily liable because, in addition to the reasons above, Cox had been served with notices of infringing activities and had the ability to suspend or terminate accounts and failed to do so.[54] The court issued an order for Cox to pay $1 billion as a settlement.[55]

An Infringer Does Not Have an Expectation of Privacy Just Because He Illegally Downloads Porn: *Strike 3 Holdings, LLC v. Doe*

In *Strike 3 Holdings, LLC v. Doe*, Strike 3, a producer and distributor of adult films, sued defendant John Doe for copyright infringement for illegally downloading videos.[56] Strike 3 sought to obtain John Doe's information through his internet protocol address by subpoenaing his online service provider for his identity by filing a Rule 26(d)(1) motion.[57] The district court denied Strike 3's discovery motion on grounds that the need for the defendant's identity was outweighed by the defendant's right to be anonymous, especially given that the content at issue was pornography.[58] The D.C. Circuit Court of Appeals reversed on this issue, holding that the content of a copyrighted work is irrelevant to a motion seeking to discover the identity of an infringing plaintiff.[59] The court reasoned that "[h]aving accepted Strike 3's allegations of copyright ownership, the district court could not weaken the property rights attached to that ownership by imposing a content-based restriction on Strike 3's access to discovery."[60]

A Win and a Loss for Recording Artists: *Waite v. UMG Recordings, Inc.*

The saga of regaining ownership over master sound recordings continues. In a class action lawsuit for copyright infringement against Universal Music Group (UMG), the recording artist plaintiffs argued that UMG had infringed on the plaintiffs' copyrights by continuing to exploit their sound recordings after being served with § 203 termination notices.[61] Under § 203 of the Copyright Act, an author has a right to terminate a grant to a third party 35 years after execution, or 40 years after execution if the grant contains the right of publication.[62] In order to terminate a grant to a third party, the author must serve a termination notice.[63] In this case, the plaintiffs argued that they had terminated the grants, i.e., their recording agreements with UMG and its subsidiaries, to UMG by serving termination notices, and that UMG had committed copyright infringement by continuing to exploit those sound recordings despite those grants being terminated.[64] Aside from a number of procedural issues, the Southern District of New York held for the first time that works created on or after January 1, 1978, that were created under agreements entered into before that date, which are considered gap grants, are terminable, delivering a big win to artists.[65] This holding did come with one caveat, however, which was that recording agreements between an artist's loan-out corporation and recording agreement was not subject to termination under § 203 because, according to the statute, the grant must be executed by the author and not a third party.[66] The court found that the inducement letters signed by and between the artist and loan-out corporations were insufficient to negate this finding.[67] This caveat diminishes the win for the artist, because using loan-out corporations is a common practice within the music industry. The issue of loan-out corporations has been a major problem for screenwriters and others who used them and seek termination rights, and is a warning to those establishing loan-out entities in the present day.

Endnotes

1. *Everly v. Everly*, 958 F.3d 442, 445 (6th Cir. 2020); *see also* Kevin Rutherford, *The Everly Brothers' Phil Everly Dead at 74*, Billboard (Jan. 3, 2014), https://www.billboard.com/articles/news/5862238/the-everly-brothers-phil-everly-dead-at-74.
2. *Id.* In 1980, Phil signed a release agreeing to transfer his interest and his claim as co-composer in *Cathy's Clown* to Don. *Id.* at 446.
3. *Id.*
4. *Id.* at 447.
5. *Id.*
6. *Id.*
7. *Id.* at 448.
8. *Id.*
9. *Id.* at 455.
10. *Id.* at 453.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 467.
16. *Dr. Seuss Enters., Ltd. P'ship v. ComicMix Ltd. Liab. Co.*, No. 19-55348, 2020 U.S. App. LEXIS 39770 at *34 (9th Cir. Dec. 18, 2020).
17. *Id.* at *9
18. *Id.* at *12.
19. *Id.* at *12-34.
20. *Id.*
21. *Chapman v. Maraj*, No. 2:18-cv-09088-VAP-SSx, 2020 U.S. Dist. LEXIS 198684 at *2 (C.D. Cal. Sep. 16, 2020).
22. *Id.* at *15.
23. *Id.* at *16.
24. *Id.*
25. *Id.* at *17.
26. *Id.*
27. *Id.* at *21.
28. *Id.* at *33. The parties have since settled for a reported $450,000. Eriq Gardner, *Tracy Chapman Wins $450K in Copyright Suit Against Nicki Minaj*, Billboard (Jan. 8, 2021) https://www.billboard.com/articles/news/9508798/tracy-chapman-wins-copyright-suit-nicki-minaj/.
29. *Id.* at *27.
30. *Id.*
31. *Solid Oak Sketches, LLC v. 2K Games, Inc.*, 449 F. Supp. 3d 333, 339 (S.D.N.Y. 2020).
32. *Id.*
33. *Id.* at 353.
34. *Id.* at 345.
35. *Id.* at 346.
36. *Id.* at 346-50.
37. *Alexander v. Take-Two Interactive Software, Inc.*, No. 18-cv-966-SMY, 2020 U.S. Dist. LEXIS 177130 at *4 (S.D. Ill. Sep. 26, 2020).
38. *Id.* at *8-19.
39. *Id.* at *8-10.
40. *Id.* at *11-16.
41. *Id.* at *17.
42. *Otto v. Hearst Communs.*, No. 1:17-cv-04712-GHW, 2020 U.S. Dist. LEXIS 12246 at *2 (S.D.N.Y. Jan. 23, 2020).
43. *Id.*
44. *Id.* at *5.
45. *Id.*
46. *Id.* at *10.
47. *Id.* at *11.
48. *Warner Records Inc. v. Charter Communications, Inc.*, 454 F.Supp.3d 1069, 1072 (D. Colo. 2020).
49. *Id.*
50. *Id.* at 1073.
51. *Id.* at 1073.
52. *Sony Music Entm't v. Cox Communs.*, 464 F. Supp. 3d 795, 804-08 (E.D. Va. 2020).
53. *Id.*
54. *Id.* at 813-16.
55. Chris Egertsen, *Judge Upholds $1 Billion Major Label Verdict Against Cox Communications*, Billboard (Jan. 13, 2021), https://www.billboard.com/articles/business/9510360/cox-1-billion-copyright-infringement-verdict-upheld-labels/.
56. *Strike 3 Holdings, LLC v. Doe*, 964 F.3d 1203, 1205 (D.C. Cir. 2020).
57. *Id.*
58. *Id.* at 1206.
59. *Id.* at 1209.
60. *Id.*
61. *Waite v. UMG Recordings, Inc.*, No. 19-cv-1091 (LAK), 2020 U.S. Dist. LEXIS 143419 at *2-3 (S.D.N.Y. Aug. 10, 2020).
62. *Id.* at *2.
63. *Id.*
64. *Id.* at *3.
65. *Id.* at *17.
66. *Id.* at *13.
67. *Id.*

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New York's New Right of Publicity Law: Protecting Performers and Producers

By Judith B. Bass

When New York's new right of publicity law becomes effective on May 29, 2021, a number of new protections will become codified in New York that will benefit performers and celebrities, as well as their estates.[1] Significantly, however, these changes should not negatively impact the film, television, theater, newspaper and publishing communities, nor the photographers, artists and others working in New York who regularly utilize the images of performers to tell their stories, report the news or otherwise. The balance struck by the law is commendable and a tribute to the drafters and organizations who worked for many years to implement this new law.

The right of publicity bill was passed at the end of July 2020 unanimously in the New York State Senate and with only one dissenting vote in the New York State Assembly. The compromise language in the bill was a result of "years of negotiations primarily between the Motion Picture Association (MTA) and SAG-AFTRA, facilitated by Deputy Senate Majority Leader Mike Gianaris (D-Queens), and with input from news organizations, broadcasters and others."[2] After passage, the MPA sent a letter to Governor Andrew Cuomo, urging him to sign the bill:

> The Bill that awaits your signature represents the successful culmination of nearly two decades of negotiations between legislators of both parties, MPA, SAG-AFTRA, and numerous other stakeholders in the media, entertainment, and First Amendment communities. As with any legislative compromise, no party got everything it sought. However, we believe that the Bill strikes the right balance in adequately protecting against harmful, unauthorized exploitation of an individual's name, image, voice, and likeness, while respecting the First Amendment rights of the MPA's members, news organizations, artists, and others who engage in constitutionally protected speech.[3]

On the same day that the bill was signed by Governor Cuomo, SAG-AFTRA issued a press release applauding New York for enacting the "milestone" bill.[4] In particular, SAG-AFTRA noted that the bill would help to ensure that "New York's protection against the use of a living person's image and voice, including their 'digital avatar and digital voice' in advertising and trade, remains firmly intact, and will continue the trend of protecting against uses in expressive works unless the use is clearly permitted by the First Amendment."[5] The press release went on to say, "The bill, for the first time in 36 years, also prohibits the use of a deceased individual's voice and image in advertising and for purposes of trade."[6]

SAG-AFTRA's decades-long efforts to enact a post-mortem right of publicity bill in New York were not in isolation.[7] SAG-AFTRA has characterized these efforts as "an incredibly important 34-year campaign by the performance community giving families the right to prevent unwanted commercial exploitation of their deceased loved ones."[8] SAG-AFTRA's Government Affairs Public Policy (GAPP) Committee has targeted working with lawmakers and other "stakeholders" to "modernize laws" to safeguard its members' image and voice rights in a number of states.[9] Many states have a postmortem right of publicity, and there is currently a wide variety of what those laws provide.[10] One of the first such laws was enacted in California in 1999.[11]

Significantly, the new legislation leaves intact New York Civil Rights Law §§ 50 and 51, New York's long-standing "Right of Privacy" law.[12] Those sections prohibit the use "for advertising purposes, or for the purposes of trade" of the name, portrait or picture of any living person without obtaining his or her prior written consent. Those found to be in violation of § 50 are guilty of a misdemeanor. Under § 51, an equitable action may be maintained against the person, firm or corporation using such person's name, portrait, picture or voice within the State of New York.

The new legislation adds a new § 50-f to the New York Civil Rights Law entitled "Right of Publicity."[13] It applies to deceased individuals who die on or after the effective date of the law and who are domiciled in New York State at the time of death. Violations are compensable by damages equal to the greater of $2,000 or the amount of compensatory damages suffered by the injured party, plus profits attributable to such use, and punitive damages. The legislation applies to two categories of deceased persons: "deceased personalities" and "deceased performers."

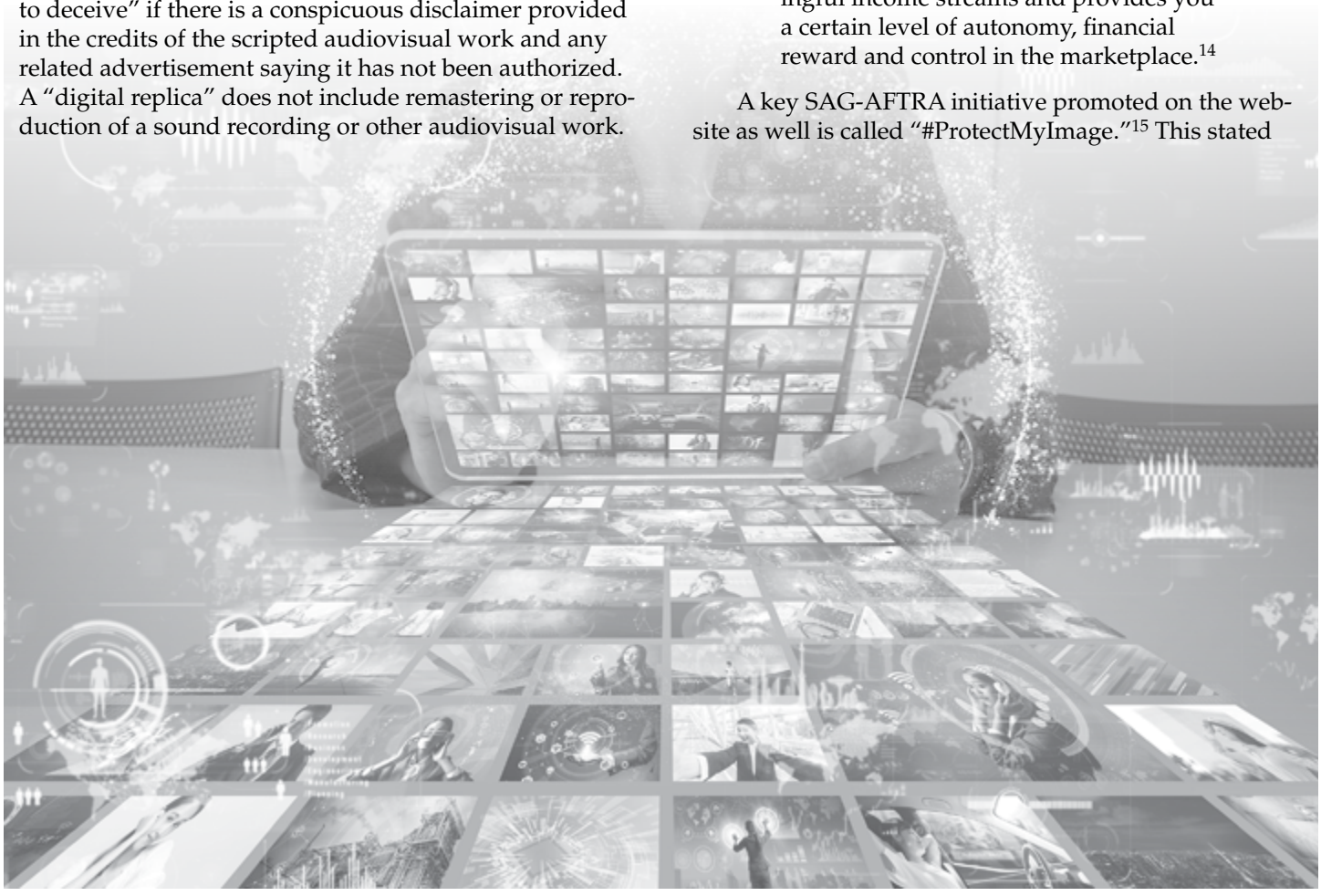
Under § 50-f (2)(a), the bill provides for a right of action on behalf of "deceased personalities" for the use of their names, voices, signatures, photographs or likenesses for commercial purposes without consent, i.e., on or in products, merchandise or goods, or for purposes of advertising those goods. A "deceased personality" is defined as a person "whose name, voice, signature, photograph or likeness has commercial value at the time of his or her death or because of his or her death . . ." The right of action extends for 40 years after the death of the deceased personality. Persons claiming to represent the rights of a deceased personality are required to register with the New York Secretary of State before any claim can be made.

Under Section 50-f (2)(b), the bill provides for damages for the use of a "deceased performer's digital replica" in a "scripted audiovisual work as a fictional character" or in the "live performance of a musical work" without consent when the use "is likely to deceive the public into thinking it was authorized." A "deceased performer" is defined as a person who "for gain or livelihood was regularly engaged in acting, singing, dancing, or playing a musical instrument." A "digital replica" is defined as a computer-generated, electronic performance in which the person did not actually perform "that is so realistic that a reasonable observer would believe it is a performance by the individual." The use will not be considered "likely to deceive" if there is a conspicuous disclaimer provided in the credits of the scripted audiovisual work and any related advertisement saying it has not been authorized. A "digital replica" does not include remastering or reproduction of a sound recording or other audiovisual work.

On the SAG-AFTRA website, there is the following advisory to SAG-AFTRA members:

> **Digital Image Rights & Right of Publicity.**
>
> Your image is valuable. Your voice is valuable. Your fan base is valuable. Your performance is valuable . . . Unfortunately, companies might wish to steal your likeness for merchandise, advertisements, or to produce video games, live concerts, or movies. This denies you the fruit of your hard work and can potentially harm your legacy. Union contracts and state and federal laws, including the right of publicity, give media artists the opportunity to consent to and be compensated for specific uses of a likeness. But the current status of the law is antiquated in light of new technologies that enable unprecedented exploitation of your likeness—both during and after your lifetime. The "Right of Publicity" is a state intellectual property right (much like a copyright) vested in you and your heirs in order to protect the right to use your likeness. . . The right of publicity safeguards meaningful income streams and provides you a certain level of autonomy, financial reward and control in the marketplace.[14]

A key SAG-AFTRA initiative promoted on the website as well is called "#ProtectMyImage."[15] This stated



desire on the part of SAG-AFTRA to protect its members from misappropriation and unconsented commercialization of their images both "in life and now post mortem" is clearly a key motivation behind SAG-AFTRA's legislative efforts.[16]

The inclusion in the New York law of a section dealing with the unauthorized use of a deceased performer's digital replica was very important to SAG-AFTRA. In particular, its website advises members that "digital replicas" are creating "new challenges that existing rules are ill equipped to handle."[17] "Digital replicas" are described as "intentional, realistic clones—produced by any number of technological means—of an individual's face, body, or voice."[18] It provides the following specific examples of potential "digital replica misuse":

> An audio publisher clones an actor's voice to construct an audiobook narration.
>
> A video game company creates a digital replica of a sports broadcaster to announce a football game.
>
> A hologram company projects a living or deceased musician before a live, paying audience.
>
> An ad agency or brand creates a replica of a deceased performer for a commercial.
>
> A creator uses Deepfake algorithms to depict nonconsenting individuals as nude or performing sex acts in motion pictures.[19]

The new New York law directly addresses the issue of digital replicas, but only of those who are in the category of "deceased performers"; accordingly, digital replicas of live performers are not included in the law's protections. In addition, the law only addresses a digital replica of a person who "for gain or livelihood was regularly engaged in acting, singing, dancing, or playing a musical instrument."[20] Digital replicas of deceased persons who were not performers are outside the ambit of the law. To comply with the law, a producer utilizing a digital replica of a "deceased performer" has to provide a "conspicuous disclaimer" in the credits of the scripted audiovisual work and any related advertisement saying that the performance has not been authorized.[21]

Of the examples cited by SAG-AFTRA, the hologram of the deceased musician would be covered, but not of the living musician. In addition, a digital replica of a living actor's voice in an audiobook narration would likely not run afoul of the law, nor would the digital replica of a sports broadcaster announcing a game. Using a replica of a deceased performer for a television commercial without consent, however, would not be permissible under both this section and §50-f (2)(a).

SAG-AFTRA's other main concern that was addressed in the legislation is the distribution of digitally created sexually explicit images, sometimes known as "deepfakes," without clear written approval from the performer depicted. The example noted above of a "deepfake" that depicts nonconsenting individuals in the nude or performing sex acts in motion pictures is governed by the new law and is not limited to deceased individuals. Under a separate section of the new law, § 52-c, a private right of action has been created for "unlawful dissemination or publication of a sexually explicit depiction of an individual."[22] A "depicted individual" is defined as "an individual who appears, as a result of digitization, to be giving a performance they did not actually perform or to be performing in a performance that was actually performed by the depicted individual but was subsequently altered" to be in violation of the section. Digitization means to "realistically depict the nude body parts of the depicted individual, computer-generated nude body parts as the nude body parts of the depicted individual, or the depicted individual engaging in sexual conduct . . . in which the depicted individual did not engage."[23] Damages for dissemination of sexually explicit material include injunctive relief, compensatory and punitive damages and attorney's fees.

Interestingly, when an earlier version of the New York bill proposed by two lawmakers in 2019 granted "digital rights to their persona" to individuals portrayed in motion pictures, video games, pornographic videos and other media, SAG-AFTRA made some very strong statements criticizing the MPA and the Entertainment Software Association (ESA) for their positions opposing the bill. In a scathing article entitled "Malicious Pornographic Deepfakes Aren't Just Free Speech," which first appeared in the *New York Daily News* on June 18, 2019, the president of SAG-AFTRA declared that the "deepfake technologies" that "use artificial intelligence to turn existing images into fictional live-action performance" are not "just another form of free speech."[24] The article goes on to say as follows:

> Even when presented with the most abhorrent, indefensible use of digital human technologies, these corporations [the MPA, the ESA and the trans-national media corporations that are their member companies] wrongly invoke the First Amendment, which already has long been balanced against other competing interest(s) like libel, fighting words, fraud, privacy and intellectual property rights, in their efforts to persuade legislators.[25]

The SAG-AFTRA position appears eventually to have been accepted by the MPA and ESA with certain

safeguards built in for the media. In the legislation that has now been enacted, § 52-c provides that the depicted individual has a cause of action against the distributor of the depiction unless the depicted individual has signed an agreement consenting to the disclosure of the depiction; a disclaimer is not sufficient.[26]

Possibly in exchange for these compromises, SAG-AFTRA on its side explicitly acknowledged even in its press release about the passage of the legislation that certain uses of its members' likenesses are "clearly permitted by the First Amendment."[27] In addition, on the SAG-AFTRA website, it provides as follows:

> It is important to note that content creators have critical First Amendment rights to use your likeness without permission, such as for the purpose of satire, parody, commentary, criticism, biographical films and documentaries or other newsworthy or educational purposes.[28]

These statements are at the heart of what makes the new New York right of publicity law acceptable to almost all parties. Indeed, there are explicit so-called "expressive works exceptions" to the prohibited uses in each of the sections of the legislation:

- With respect to the right of action for deceased personalities, pursuant to § 50-f (2)(d)(i), it is not a violation if the use of a deceased personality's name, voice, signature, photograph or likeness is in a play, book, magazine, newspaper or other literary work, a musical work, art work or other visual work (like photography), or in a work of political, public interest, educational or newsworthy value, including for purposes of comment, criticism, parody or satire, or in an audio or audiovisual work that is fictional or nonfictional entertainment (or an advertisement or commercial announcement of any of the foregoing).[29]
- With respect to the deceased performers' digital replica right, under § 50-f (2)(d)(ii) it is not a violation if the work is a parody, satire, commentary, criticism, or a work of political or newsworthy value, including a documentary, docudrama, historical or biographical work "regardless of the degree of fictionalization except in a live performance of a musical work."[30] Notably, the wording referring to "a live performance of a musical work" leaves open the question of whether an unconsented hologram of a deceased performer appearing in a live stage play would run afoul of the law, even if the play would otherwise fall within the exceptions. In § 50-f (2)(d)(iii), the law also specifically provides that it is not a violation if the use of the name or likeness is in connection with a news, public affairs or sports program, or in any political campaign.[31]
- Finally, with respect to the right of action for sexually explicit depictions, under § 52-c(4)(a) there is no liability for disclosure or dissemination of sexually explicit material if such disclosure is (i) in the course of reporting unlawful activity, exercising law enforcement duties, or in hearings, trials or other legal proceedings; or (ii) the material is a "matter of legitimate public concern, a work of political or newsworthy value, or commentary, criticism" or otherwise protected constitutionally, provided that such material is not newsworthy "solely because the depicted individual is a public figure."[32]

The inclusion of language in the New York right of publicity bill that carves out expressive works is a key strategy and accomplishment of the MPA. Indeed, according to Ben Sheffner, senior vice president and associate general counsel, copyright and legal affairs of the MPA, the language of the first state statute that incorporated a specific statutory exemption for expressive works, the California Post Mortem Statute, California Civil Code 3344.1, was actually negotiated between the MPA and SAG-AFTRA.[33] Sheffner explains what the MPA believes is the best way to protect the ability to tell stories based on or inspired by real people and real events:

> There are various ways, various possibilities. One option is via the courts, to make the best First Amendment arguments you can, and hope the decision comes out in your favor. We do that. But it is our contention that the best way is to return to the statute and have specific carve outs for expressive works, which would include books, movies, television shows, plays, songs, newspaper articles, news broadcasts, et cetera.[34]

The inclusion of that expressive works language in the New York legislation now becoming law is a key factor in achieving an appropriate balance of the interests of both sides. Sheffner noted in his 2019 article that, by his calculations, "about 47% of the Best Picture nominees over the last five years, were about or inspired by real people and events."[35] He goes on to say as follows: "Consider what movies would have been threatened if the rule is that you cannot make a movie or TV show about somebody unless you get their permission."[36] In addition, the alleged falsification and fictionalization of living people in movies and other programming has been asserted by some plaintiffs as violative of § 51 and is an issue that is being dealt with in a variety of court proceedings.[37] With this new legislation, it appears that similar claims on behalf of deceased individuals will have to get past the expressive works exceptions embodying First Amendment protections in the statutory language.

Conclusion

For those who worked for decades to pass right of publicity legislation in New York, there has long been a concern, on the one hand, that many unauthorized uses of performers' images, such as commercialization after death, creation of digital replicas in movies and other content, and the dissemination of deepfakes throughout the internet, would not be curtailed. On the other hand, there has been a continuing concern on the part of media and entertainment companies that the passage of any post-mortem right of publicity would negatively impact and restrict the production of audiovisual and other content and the dissemination of news in New York about real people and events. As a result of some skillful negotiating by the parties in interest, the assistance of committed legislators, and reasonable compromises on both sides, the new New York right of publicity bill should actually mitigate these concerns and prove to be a positive addition to New York's laws. Even though some parts may need to be tested by the courts, the new law will likely prove to be protective of the commercialization of performers' image rights after death, limit the use of digital replicas without consent, and stop the abusive practices of creating deepfakes. The new law should also not stand in the way of productions and other content based on or inspired by stories about real people, both living and deceased, continuing to be produced and distributed in New York.

Endnotes

1. https://www.nysenate.gov/legislation/bills/2019/s5959.
2. Ben Sheffner, *New York Enacts Post-Mortem Right of Publicity and Related Legislation*, MLRC MediaLawLetter (December 2020), 17. A subcommittee of NYSBA's Media Law Committee (on which this author served) also provided comments on the bill.
3. Letter of September 30, 2020 from Vans Stevenson, Senior Vice President, State Government Affairs, Motion Picture Association, to The Honorable Andrew M. Cuomo, Governor of New York State.
4. SAG-AFTRA Press Release (Nov. 30, 2020), https://www.sagaftra.org/sag-aftra-applauds-new-york-gov-cuomo-signing-right-publicity-protections.
5. *Id.*
6. *Id.* Emphasis added.
7. https://www.sagaftra.org/sag-aftra-statement-passing-new-york-assembly-bill-a8155-b/.
8. *Id.*
9. https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity.
10. *See, e.g.*, Rothman's Roadmap to the Right of Publicity, https://www.rightofpublicityroadmap.com.
11. Cal. Civ. Code § 3344.1.
12. N.Y. Civil Rights Law §§ 50-51 (2014).
13. https://www.nysenate.gov/legislation/bills/2019/s5959.
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16. SAG-AFTRA Press Release (Nov. 30, 2020), https://www.sagaftra.org/sag-aftra-applauds-new-york-gov-cuomo-signing-right-publicity-protections.
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18. *Id.*
19. *Id.*
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23. *Id.*
24. https://www.sagaftra.org/malicious-pornographic-deepfakes-aren't-just-'free-speech'.
25. *Id.*
26. https://www.nysenate.gov/legislation/bills/2019/s5959.
27. SAG-AFTRA Press Release (Nov. 30, 2020), https://www.sagaftra.org/sag-aftra-applauds-new-york-gov-cuomo-signing-right-publicity-protections.
28. https://www.sagaftra.org/get-involved/government-affairs-public-policy/digital-image-rights-right-publicity.
29. https://www.nysenate.gov/legislation/bills/2019/s5959.
30. *Id.* Note that a "live stage play" is not included.
31. *Id.*
32. *Id.*
33. Ben Sheffner, *Why Movie Studios Care About Right of Publicity*, 42 Colum. J.L. & Arts 341 (2019).
34. *Id.*
35. *Id.*
36. *Id.*
37. *See, e.g., Porco v. Lifetime Entertainment Servs., LLC*, 147 A.D.3d 1253 (3d Dep't 2017).

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The Meghan Markle Media Show is Not Coming to London Town

By Amber Melville-Brown

Do you remember the tale of the naughty newspaper and the privacy plaintiff? In looking at privacy, on both sides of the Pond in the *EASL Journal* Spring 2020,[1] we heralded the privacy battle of American actress Meghan Markle with British tabloid the *Mail on Sunday*. We left our heroine, also wife to the flame-haired Prince Harry, on somewhat of a cliff-hanger.

In Spring 2020, Meghan was midway through her privacy, copyright, and data protection litigation against the British tabloids the *Mail on Sunday* and Mail Online. Now we can help you off the edge of your seat, dear reader, as Meghan has been helped off that cliff. On February 12, 2021, the Honorable Mr. Justice Warby handed down his judgment from Lockdown London in a virtual version of the High Court of England and Wales.

Meghan won.

Her summary judgment application was successful.

She won on privacy and copyright.

There will be no public privacy trial.

It was a major victory for privacy-protecting plaintiffs and claimants and possibly a dark day for the media in England and Wales.

The End.

Although of course, that is not the end; no self-respecting soap would paint an argument of Technicolor complexity in such black and white terms. No set of self-serving tabloid media institutions—if not Associated Newspapers Ltd. (ANL) itself—would refrain from utterances of outrage over the result, and at least some display of self-defense. While Meghan is entitled to self-congratulations for this important win, some may still have reservations that when it comes to a resilient Fleet Street, she will not necessarily have won the day.

> The claimant is the actor Meghan Markle, also known as the Duchess of Sussex and wife of HRH Prince Henry of Wales, The Duke of Sussex, whom she married on 19 May 2018. The relationship between the claimant and her father, Thomas Markle, was difficult at the time. On 27 August 2018, she sent him a five-page letter ("the Letter"). This action arises from the later reproduction of large parts of the Letter in articles published by the defendant in the *Mail on Sunday* and MailOnline ("the Mail Articles").[2]

The issue of interest to media law practitioners, claimant and defendant lawyers in England and Wales, plaintiff and defendant attorneys in the United States, and any media practitioners whose clients publish in England and Wales—is the impact of this judgment on privacy and the ability of individuals to protect themselves from inquiring, intrusive media or, if you want to look at it another way, to control their image.

Last time . . .

Before we launch in to what the judgment says, it is worth a brief recap. It has been almost a year since we were perhaps binge-watching this saga and in the intervening hiatus the legal and reputational issues may have become as confused in our minds as the machinations of an early series of *A Handmaid's Tale* when we sat down and tuned in for the final season. Thus reminded, we can then jump into the litigation proper—and I should give a health-warning here, of course, because as careful attorneys we all know that jumping into litigation can result in legal proceedings—even privacy proceedings—turning into a high-profile circus making spectacular headlines for months on end and keeping that private life well and truly in the public domain. As, one might argue: is the case here?

Last Time . . . Loss: Deception

Although we join this story with a win for Meghan; but as we left it, she may have been at a loss to understand her loss at that time.

Back in May 2020 (and as the presses rolled on our original article), the Honorable Mr. Justice Warby had ruled in favor of ANL's application to strike out part of Meghan's claim, including her claim that the newspaper had acted dishonestly and had stirred up conflict between her and her father. We attorneys know that an early win can set the stage for what is to come and can be a boost for the winner. It can also land a psychological blow to

the loser. Commentators mused how Meghan was set for disappointment and word on the street was that she would surely be keen to get the heck out. However, having this loss seems to have had the opposite effect, as she went on to stuff a couple of wins under her belt.

Last time . . . Win: A Moving Moment for Meghan

In October 2020, Meghan won her application to move the trial date from January until the autumn of 2021. The application—not opposed by the defendants—was made on "confidential grounds." However, with news of Meghan's pregnancy, announced on February 14th, we can be fairly confident that this was the premise and justification for the move.

A trial of the issues would have required oral evidence, and with Meghan having left Britain's fair shores for Canada not so very long after setting foot on them, she is now happily ensconced on one side of the Atlantic—and indeed in Los Angeles on the other side of the U.S.—while ANL and Mr. Justice Warby awaited her on the other side of the Pond. London may be in lockdown and court hearings in the U.K., as across America, have taken place via video link; but there was the prospect—presumably with an optimism about defeating the pandemic and a COVID-19 vaccine being rolled out—that the Royal Courts of Justice on The Strand in London might by January have opened its doors once again and thus Meghan would have been required to attend to give testimony in person. No date was then set for the autumn trial—and that proves to have been a good saving of ink in the diary, because with her summary judgment success, there is no longer any need to ink it in.

Last Time . . . Win: Pregnancy

With the trial thus postponed, we should postpone our continuation of this story for a quick detour into the issue of Meghan's pregnancy and its announcement. We now know that she is pregnant with her and Harry's second child. We know this, because she has loudly, proudly and publicly proclaimed it, announcing it on Sunday, February 14th, just two days after the announcement on Friday, February 12th, of her privacy win. Was this choice of date deliberate? Was this wise?

As well as the outpouring of happiness at the joyous news of a new baby—as frankly, in various degrees of lockdown and pandemic malaise we are all in need of some more positive news at present—there has been confusion, upset, and media outrage over the announcement, and its timing. Shakespeare's Hamlet expresses his disgust as his recently widowed mother accepts the advances of her husband's brother: "That it should come to this! But two months dead—nay, not so much, not two," he says as he reels at the speed at which she has turned from one to the other.[3] That it should come to this, but two days on from a statement lauding her victory in privacy, Meghan has sought public applause for her pregnancy. With the sarcasm that only a British tabloid can do really well, the *Daily Star* ran the official announcement photograph, mock-obscuring the faces of Meghan and Harry with black bands across their eyes, and with the headline "Publicity-Shy Woman Tells 7.67 BN People: I'm Pregnant."[4]

Call it hypocrisy if you will, or at least find the reality of this exerted control by the couple uncomfortable, but Meghan is in my view, and one suspects if asked in the eyes of the judge and the minds of many adoring royal fans and celebrity-watchers, perfectly entitled to do this. There is a huge difference between the contents of a private letter (the subject of the privacy and copyright litigation) sent from a daughter to her father, and the public announcement of and the public interest in, the growingly obvious fact of this pregnancy after the first trimester. The one might be seen as a very private act of a civilian—as Elizabeth Hurley calls "us"—the other a public interest publication by a public figure, actor, royal by marriage, and a celebrity.

As to the timing of the announcement, while it has been reported that the late Princess Diana announced her pregnancy with Harry on the same day back in 1984, in fact Diana's announcement was made on February 13th, allowing for the media to run with heartwarming headlines on Valentine's Day. Reporting this, some media have suggested that this choice by Harry and Meghan was a touching tribute to Diana. However, the more cynical among us may question whether choosing Valentine's Day itself, rather than the day before, was a cunning ploy to reinforce the couple's control over their narrative, and to deprive the tabloids of the ability to use this for their print headlines, rather than just online, for the heart-and flower-encrusted day.

Last Time . . . Win: Famous Five Friends

Before our pregnancy detour, we were looking at some of the interim applications taking place as the parties squared up to one another before trial. Another such was Meghan's application to maintain the anonymity of five of her friends—this brought her another win in August of 2020. The Famous Five—or not so famous, as they remain anonymous due to her interim victory—had spoken out to *People* magazine on the condition of anonymity about Meghan's letter to her father. They said that they had done so to correct a false narrative, to counter what they considered to be a false picture painted of her—effectively as some sort of pantomime villain eschewing her estranged and unwell father, shortly before her glitzy, glamorous wedding. One of the headlines in the article, read: AFTER STAYING QUIET FOR NEARLY 2 YEARS, THOSE WHO KNOW MEGHAN BEST ARE SETTING THE RECORD STRAIGHT: WE WANT TO STAND UP AGAINST THE GLOBAL BULLYING WE ARE SEEING AND SPEAK THE TRUTH ABOUT OUR FRIEND.[5]

By way of reminder, that *People* article had then been relied upon by ANL as the justification for its publication of Meghan's letter; this was required, it was argued, to counter what itself amounted to a misleading portrayal by the *People* article of Meghan's dad and Meghan and her allegedly olive-branch-touting letter, which it claimed amounted to nothing of the sort. Further, ANL did not believe that Meghan had not asked or authorized her friends to disclose her letter to *People* magazine. If she had so done, the argument would go, she could hardly complain if it was then used to portray her in another, ANL would say more accurate, light. Not only was ANL entitled to correct that false image, but Meghan would have burst her own privacy balloon.

What, therefore, does this have to do with anonymity for the Five Friends? In English legal proceedings witnesses are not usually anonymized. However, while being subjected to cross examination may have been uncomfortable for the plaintiff's pals, being scrutinized before trial by the oft-times unkind eyes of the media, and dissection at the hated hands of the tabloids, could seriously have upset the litigation apple cart; the witnesses might have been spooked; or Meghan might have thrown in the towel for fear of the impact of media scrutiny on those friends. The success or otherwise of this application for anonymity, therefore, could have been a deciding factor in whether she persisted with or abandoned her case.

Thus, Meghan rode into battle on behalf of her friends—and one might argue to save her case. She succeeded on arguments both that members of this "inner circle" were entitled to protect their own privacy rights and that her confidants were entitled to anonymity as confidential journalistic sources. In the summer of 2020, Mr. Justice Warby granted the application, "for the time being at least." Now that there will be no trial of the privacy issues, we can expect that "for the time being" may in reality amount to "in perpetuity." It certainly amounted to another psychological boost for the claimant to win this bout before The Big Fight.

This time . . . Win: Desperately Seeking Summary Judgment

We are now nearly up to date. Meghan had to endure one more important round before the main attraction, the trial set for autumn 2021—and that was the summary judgment application. Ding ding, seconds out, Meghan knocks her opponent to the floor and, if not out for the count, battered and bruised. Meghan wins. She takes the belt! Yet how did she do it?

The Civil Procedure Rules (CPR) that govern civil cases in the courts of England and Wales were designed to improve access to justice and to make legal proceedings cheaper, quicker, and easier to understand for non-

lawyers.[6] They provide the means to dispose of a case at an early stage before trial, by way of summary judgment. The court may give summary judgment if "it considers that – that defendant has no real prospect of successfully defending the claim or issue" and "there is no other compelling reason why the case or issue should be disposed of at a trial."[7] This is what Meghan sought in respect of her claims in misuse of private information and in copyright infringement.

A quick reminder, then, of these claims. Meghan's misuse of private information claim, or "privacy" claim as it is colloquially known, was largely as follows:

> She [Meghan] says that the contents of the Letter were private; this was correspondence about her private and family life, not her public profile or her work; the Letter disclosed her intimate thoughts and feelings; these were personal matters, not matters of legitimate public interest; she enjoyed a reasonable expectation that the contents would remain private and not be published to the world at large by a national newspaper; the defendant's conduct in publishing the contents of the letter was a misuse of her private information.[8]

With regard to the copyright claim, the judge summarized it, thus:

> The claimant says further, that the Letter is an original literary work in which copyright subsists; she is the author of that work, and of a draft she created on her phone ("the Electronic Draft"); and the Mail Articles infringed her copyright by reproducing in a material form, and issuing and communicating to the public, copies of a substantial part of the Electronic Draft and/or the Letter.[9]

In response, the defendants remarked that their "pleaded case is diffuse and hard to summarise." The judgement records that "the defendant denies the claim. It maintains that the contents of the Letter were not private or confidential as alleged, and that the claimant had no reasonable expectation of privacy. Further or alternatively, any privacy interest she enjoyed was slight, and outweighed by the need to protect the rights of her father and the public at large."[10]

What, then, was the order for the day for the judge? In respect of these claims, he had to decide "whether it is realistic or fanciful to suppose the claims might fail at trial:[11] "So long as the lens is not obscured by fog or dust, it may be possible to see clearly that a case has only one plausible outcome, and a trial is superfluous," he said.[12] Indeed, unfogged and undusted, this is precisely what he found.

Misuse of Private Information—Article 8 vs. Article 10

Whether we are attorneys or lay people, Americans or English, we know that the concepts of privacy and free speech rub up against each other on a regular basis in media matters, and indeed, rub each other the wrong way. If we are slightly more familiar with the subject, we may know that the Human Rights Act 1998 incorporated into English law the European Convention on Human Rights, which brings with it Articles 8 and 10, respectfully protecting the rights to respect for private and family life, home and correspondence on the one hand, and the right to freedom of speech on the other.[13]

As the judgment sets out,

> the Human Rights Act 1998 obliges the Court to interpret, apply and develop English law in conformity with the European Convention on Human Rights. Where an individual complains that her privacy has been violated by newspaper reports, the Court must ensure that its decision properly reconciles the competing Convention rights, those protected by Articles 8 and 10.[14]

Therefore, how does one establish if the Article 8 right is applicable in the first place? "Liability is determined by applying a two-stage test, explains the judgment:[15] "As to stage one the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person placed in the same position as the claimant and faced with the same publicity, would feel substantial offence."[16]

Well, would one? Would a person find the publication of this private letter offensive? This certainly has the ring of something that will be familiar to an American lawyer about it, the public disclosure of private facts privacy doctrine. For sure we have different attitudes to privacy law on both sides of the Atlantic, but how would an American court have decided this?

The second test is to consider:

> whether in all the circumstances the privacy right of the claimant must yield to the imperative of freedom of expression enjoyed by publishers and their audiences . . . . The decisive factor at this state is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest.[17]

A debate of general interest, it may be argued, is not just a bit of a chat about celebrity title tattle and royal gossip—the public interest element must be more than that.

For those thinking that a summary judgment would by definition be a summary affair and over in the blink of an eye, think again. The decision ran to 171 paragraphs over 53 pages. With arguments and counter arguments, at times the reader may feel as though one is tumbling down a water park rapids ride. There are more twists and turns than I could do justice to here without reproducing the judgment in its entirety, but below are some of the salient parts ending in the one big splash, the ruling in the claimant's favor.

Finding Privacy

The judgment takes the reader through what is required under English law to establish a claim in misuse of private information: "Liability is determined by applying a two-stage test."[18] At stage one, the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person, placed in the same position as the claimant and faced with the same publicity, would feel substantial offense. There must be something of a private nature that is worthy of protection.

"In some cases, the answer will be obvious" the judgment sets out: "but the methodology is to make a broad objective assessment of all the circumstances of the case."[19] This is like a kitchen sink approach, and the court expresses it thus:

> These include (1) the attributes of the claimant, (2) the nature of the activity in which the claimant was engaged, (3) the place at which it was happening, (4) the nature and purpose of the intrusion, (5) the absence of consent and whether it was known or could be inferred, (6) the effect on the claimant and (7) the circumstances in which and the purposes for which the information came into the hands of the publisher ("the Murray factors"2). If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the Court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information.[20]

The court then turns to stage two, which the judgment explains:

> At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences. The competing rights are both qualified, and neither has precedence as such . . . . The decisive factor at this stage is an assessment of the contribution which the publication of the relevant information would make to a debate of general interest.[21]

There you have it, pretty simple, really, but not so simple that the whole analysis did not take those 171 paragraphs over those 53 pages to reach a conclusion. We know what the conclusion was—Meghan wins, that is all very well for the news-reading public. What, however, was the legal conclusion?

Reasonable Expectation of Privacy—Stage One Analysis

The manner in which the judge launched into his analysis of stage one sounds a little like the American doctrine of public disclosure of private facts. There, in broad terms, the plaintiff wins by establishing a public disclosure of private information, not of legitimate concern to the public, wherein the disclosure would be highly offensive to a reasonable person. Here, the judge said that the claimant would fail if "the reasonable person of ordinary sensibilities placed in the position of the claimant would not feel substantial offence at the disclosure in question."[22]

"There are two main questions for me," Mr. Justice Warby explained his role on this summary judgment application.[23] "First, whether the Defence sets out any case which, assuming it to be true, would provide a reasonable basis for finding that there was, at any material time, no reasonable expectation of privacy. Secondly, whether the defendant has any realistic prospect of successfully defending this issue at trial."[24] He was then perfectly clear in answering his own question:

> Nothing that the defendant has pleaded in answer to this part of the claimant's case provides any reasonable basis for defending the issue. I also consider that there is no real prospect of the Court concluding after a trial that, at the time the Mail Articles were published, or at any material time between then and now, the contents of the Letter were not private, or that the claimant did not enjoy a reasonable expectation that they would remain private.[25]

That is pretty unequivocal, which is indeed what is required at summary judgment; otherwise the matter

would go to trial. He was clear and cogent about the elements that he assessed:

- First, he confirmed that letter had not found its way into the public domain, other than via the defendants' publications. Had the privacy kitty cat already been let out of the bag by the time ANL had published—so, had the letter already been published in *People* magazine—then there would have been no way to shove that privacy cat back in. Yet here, the letter may have been referred to in the *People* article, but this little kitty letter remained tucked up, warm and safe, in her private bag. "The *People* Article had disclosed the existence of the Letter, and provided a broad description, but not its detailed contents."[26]
- Next, he considered the various factors to be taken into account. Assessing those factors, the judge decided that they all "point firmly towards the conclusion that the claimant enjoyed a reasonable expectation that the contents of the Letter would not be published by the defendant."[27] His considerations included Meghan's public figure status and her communication of her feelings.

Meghan's public figure status

The judge concluded that while Meghan was a prominent member of the Royal Family, and in that sense a public figure with a high public profile, her letter writing to her dad was not an aspect of that public role.

> She is indeed a public figure. She must accept a degree of intrusion that others would not have to bear. But it has long been established that a public figure does not, by joining that select group, give up her right to a private life, or open up every aspect of her private and family life or correspondence to examination in the press.[28]

This may have bothered some free speech proponents with the feared ramifications that it gives public figures a degree of privacy to which they are not entitled. Yet while those who enjoy a public profile do have to sing to a slightly different tune than mere mortals—on both sides of the Atlantic—stepping onto the public stage does not and should not rip every vestige of privacy from that individual. The analysis must be far more nuanced than simply, for example, "she's an actress/Duchess/public figure" and thus she's "fair game."[29]

According to the judge, even if Meghan's relationship with her father was a matter of public interest (which he did not accept was necessarily the case), then "that would beg the question of whether it followed that she had no privacy rights in relation to the details of an anguished private letter pouring out her heart." He did not see it and there are nuanced levels here. One swallow does not a summer make; and neither a sortie onto a public stage, nor one aspect of one's private life communicated to the public, does a privacy-proof plaintiff make.

Meghan's communication of her feelings

Article 8 of the European Convention seeks to protect one's private and family life, home and—specifically—correspondence. The fact that the communication here was in a letter and concerned her family life "was not conclusive of the question whether the claimant enjoyed a reasonable expectation of privacy."[30] However, citing the respected tome *Gatley on Libel and Slander 12th ed*, that: "One's correspondence with others . . . is presumptively private in nature,"[31] the defendant publishers may have been hoist with their own petard. As the judge noted, their articles referred to it as "Meghan's private letter" in which she "pours out her heart to her father."[32]

Mr. Justice Warby found no argument "capable of leading to or supporting the conclusion that, on the facts of this case, the claimant had no right to expect that the contents of her Letter would be treated as private and would not be published by the defendant."[33] The judgment might be useful for considering where a letter might not be treated as private:

- Here, Meghan's letter was "not a business letter, or one advancing a complaint to a politician about their public conduct or functions," leading to the suggestion that—all other things being equal (which of course in law or life they rarely are)—such a letter would not, *prima facie*, be considered private.
- Meghan's letter included information about Meghan's dad, but it was not solely about him, so dad's ability to tell his own story outside the confines of the letter did not defeat or override daughter's presumptive right to keep her recitation of that story private. This may therefore help us to understand that a letter that does not express the author's feelings or thoughts but merely recites facts about another person, might not be considered private.

Foreign, and importantly for us, American jurisdiction

An interesting argument for the American readership is the argument advanced by ANL that Meghan's expectations of privacy were undermined because she knew that dad, at home in the U.S., was likely to share its contents to the media and that under U.S. law, "the publication of the existence and contents of the Letter was at all times lawful."[34] Was it? However, even if there is no U.S. law, no data privacy law, no public disclosure of private fact law, no copyright law, that would protect this particular letter, "the fact—if it be so—that Mr. Markle or someone else might lawfully have published in the USA does not assist the defendant."[35] Hypotheti-

cal disclosure[s] in a foreign jurisdiction appear to me irrelevant," wrote the judge.[36]

Public domain/other similar disclosures

ANL is a little peeved that Meghan's friends—it contends with her approval or authority, which she denies—spoke about the letter to *People* magazine first, and then and only then did ANL reveal the contents of the letter. It was peeved because that would suggest that ANL or Meghan opened Pandora's privacy box, but when the *Mail on Sunday* sought to shake out its contents, it was ANL who landed in litigation.

The judge was not really having any of this argument: "The defendant's pleaded case (in paragraph 13.8) that the claimant caused or permitted 'information about the existence of the Letter and a description of its contents to enter the public domain' clearly falls short of asserting any prior disclosure of the contents of the Letter."[37] In other words, what difference does it make that the letter was referred to in *People* magazine? The letter itself was not disclosed, and therefore it was not put into the public domain by Meghan, the friends, *People*, or anyone else, before it was published without authority by ANL.

Mr. Justice Warby put to rest the old "zone of privacy" argument, thusly: "At one time it was thought that disclosures in a given 'zone' of a person's private life could defeat or at least greatly reduce the weight of any claim for privacy in respect of other information in the same 'zone.' That theory has been discredited. In the modern law, it is recognized that the respect for individual autonomy that lies at the heart of Article 8 means that the starting point is a person has the right to exercise close control over particular information about her private life: to decide whether to disclose anything about a given aspect of that life and, if so, what to disclose, when, to whom." [38]

The decision has put the privacy cat among the free speech pigeons, with outrage that this hands power to the rich and famous to control their images. The other side of that coin, however, is that this simply clarifies that a person is entitled to decide whether to disclose anything about a given aspect of one's life and, if so, what to disclose, when, and to whom, without giving up an entire right to privacy.

Another public domain argument centered around Meghan's "alleged *intention* to publicise the Letter," i.e., that its drafting, the wording chosen, the argued involvement of Palace aides (see further below), the electronic draft followed by elaborate calligraphy, all militated in favor of the view that she surely intended for this to become public, or at least "knowing that the same was very likely."[39] The judge said: "An inferential case is advanced that the claimant was "considering using the Letter as part of a media strategy to improve or enhance her image" and that the basis for this "is that the claimant disclosed the contents of the Letter to the communications team at Kensington Palace and discussed it with them prior to it being sent."[40]

This really has been problematic for those who disagree with the summary judgment ruling. How can it be, they say, that if witnesses from the Palace are willing and able to give evidence about the drafting process—and a carefully worded letter from their lawyer indicates that they can, although it does not indicate what that evidence would be, and to whose benefit—then surely this matter must go to trial, surely the issue of Meghan's intention must be considered closely, and surely only then her reasonable expectation of privacy with regard to the letter can be assessed?

I have some sympathy with that argument. The evidence from the Palace aides seems also likely to go to authorship of the letter and thus ownership of copyright (see further below). The judge has provided that these issues will go to trial; but this important matter, if considered in the copyright context, cannot help ANL's privacy argument unless the privacy summary judgment finding is appealed by ANL. As at the time of writing, ANL has said that it is surprised and disappointed by the decision and are considering an appeal.

The above notwithstanding, the judge has cut this argument off at the knees. Citing Toulson & Phipps, he states: "It is . . . now settled that an intention to publish is not inconsistent with maintaining a right of confidentiality until the intended publication takes place."[41] In other words, a party may intend to publish or consider publishing at some time in the future, but that does not permit anyone else to publish without his/her/their consent in the meantime. This is reiterated in the stage two analysis: "If (which she emphatically denies)" the judgement goes on to say,

> the claimant provided the Letter or information about it to the Authors with a view to publication, or wrote it with a view to later publicity, she might have exposed herself to claims that she had libeled her father or infringed his other rights, but she would have been well within her rights, so far as her own privacy is concerned.[42]

Although we have taken a long time to get here, but the conclusion to this first stage analysis as to whether Meghan had a reasonable expectation of privacy in the letter is that "the claimant would be bound to win at trial on this issue. It is fanciful to think otherwise."[43]

The next stage of the analysis is shorter. Stage two concerns whether, with the reasonable expectation of privacy established, it must cede to the competing right of free speech.

Stage Two—Balancing the Competing Right

Mr. Justice Warby's judgment introduces this section, thusly: "Was the interference with the claimant's reasonable expectation of privacy involved in publishing the five pages of print coverage and the corresponding online reporting complained of necessary and proportionate in pursuit of the legitimate aim of protecting the rights of others?"[44] The answer can be deduced in the tone of the question, a "no."

The judge notes that: "Naturally, the defendant relies on the factors I have already discussed as matters to be taken into account at this second stage."[45] Having considered those factors at length in the stage one analysis, it is probably fair enough that he gives them a little less room at stage two, although at first blush that might look a little dismissive to those crying "unfair."

To the arguments that those factors—such as the letter was referred to in *People* magazine, it would be allowable to publish it in America, Meghan may have intended for the letter to be published at some point, made Meghan's privacy interest "slight" or "compromised," the judge said simply this, "in my judgment, taking the defendant's case on each of those factors at its highest, there would be no real prospect of the Court striking the balance against the claimant and in favour of the defendant and its readers."[46] He continued, "in some respects, the defendant's case is legally untenable or flimsy at best."[47]

In the stage one analysis above, we talked about Meghan's status as a public figure and that it did not necessarily reduce her expectation of privacy. Mr. Justice Warby's judgment addressed this at stage two. He wrote, "The defendant invites the inference that the claimant is ready and willing to publicise details of her own private life and those of others, including correspondence, and that she does not object to publicity about her, so long as it is favourable"[48] and that a "person who actively seeks the limelight may have a correspondingly reduced expectation of privacy."[49] However, one cannot paint with such a broad brush, presumably meaning that not all celebrities, actors, and duchesses are alike, and one requires a fact-focused approach. Indeed, to those many detractors on the media benches who argue that this allows celebrities and others to paint a distorted image of themselves, let us just give that a little consideration while we are here.

A holiday-maker exits the swimming pool and sucks in his tummy as he does so; an employee throws on a jacket over her t-shirt before turning on the camera for a Zoom call; push-up bras and Spanx pants are not unlawful; stacked heels for the vertically challenged are available; and Mr. Kipling (a well-known British sweet treat purveyor) may exhort that he makes "exceedingly good cakes" without being criticized for misleading the public. Speaking of cake, Hollywood royalty Catherine Zeta Jones preferred not to share with the world images of her eating cake on her wedding day; the [House of Lords] accepted that she was entitled to object to the publication of unauthorized photographs of the wedding, notwithstanding that she intended to publish specifically chosen, and to her mind more attractive, images of her happy day.[50]

There are facets of ourselves that we might or might not wish to share with the public. It does not make us liars to choose one over the other and to reach for the Spanx. It is not an unreasonable argument that the media should not be the only purveyors of public interest veracity when it choses one image that suits its narrative, rather than ours, which suits us. Mr. Justice Warby's judgment does not invite hordes of public figures, as self-styled free speech proponents may be gearing up to argue, to jump on this judgment to seek to deceive the public as to their true identities and activities. Where there is a real public interest issue to be debated, I am confident that the law will not act as a cloak to pull the wool over the eyes of the public—nor will it act to gag the press from proper, public interest reporting.

Aside over, we are back to the judge who was making it clear that it is not enough to shout "celebrity" and pull the pin on the hand grenade of private information. To extend the metaphor, one has to carefully inspect the ticking bomb and ask oneself whether the unauthorized disclosure contributes to "a debate of general interest." Referring to the Strasbourg jurisprudence, he confirmed: "Articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to any debate of general interest in society."[51]

Mr. Justice Warby was categorically clear that here, that was not the case. The only possible justification for publication in infringement of the right to privacy was, in his judgment, to correct the public record and to prevent the public from being misled.[52] If the claimant had misled the public, the disclosure might be legitimate if it were "necessary for and proportionate to putting things right."[53] He referred to the case of Naomi Campbell, who had said that, unlike other models, she did not do drugs. When it turned out that in fact she did, and that she was attending Narcotics Anonymous (NA) to deal with her addiction, the court accepted that Mirror Group Newspapers could successfully run this "putting things right" argument to justify their publication. What they could not do thereby, however, according to the House of Lords, was justify the disproportionate additions of coloring the story with details of the meetings and images of Naomi attending at NA.[54]

In Meghan's case, it was being argued that the *People* article, which you will recall was seemingly intended to correct the false impression of Meghan as an uncaring daughter, was itself misleading in the way it characterized her father, concluding with the suggestion that after she had implored him via her letter to stop engaging with the press, his response was to ask for a photo shoot with

her and Harry. He complains that his proposal to her was in fact intended to give the media what they wanted and thus try to satisfy and pacify them. He had, however, been completely misunderstood and misrepresented. Mr. Justice Warby found "this aspect of the Defence... entirely hopeless."[55]

While an individual subject to a physical attack, or a defamatory attack, is entitled to use force or words in response by way of self-defense, that response must be proportionate. What is more, "there is no authority to support the view that the mere fact that a person "believes" his portrayal is untrue is enough to justify a reply."[56] The judge simply did not accept that it was right—indeed it was "unsustainable" and "fanciful"—to suggest that to correct this perceived misleading impression it was proportionate to disclose the private letter, let alone in the disproportionate manner that was done.[57]

While ANL was in the dog-house, however, the judge did throw it a small bone. "The *People* article did portray the Letter in a way that was inaccurate, and that would have justified some steps to ensure the true position was made known to those who had been misled."[58] However, the question here was proportionality, the level of self-defense required. He wrote:

> But it is obviously wrong for the defendant to suggest that the inaccuracies in the 25 words of the *People* Article which they quote in paragraph 15.9 of their Defence made it necessary and proportionate for it to publish the bulk of the contents of the Letter in the *Mail on Sunday* and *MailOnline*, for the purposes they identify (or any other purpose), without notice to the claimant. What was done was precipitate, largely irrelevant to any legitimate aim, and—making the fullest allowance for editorial judgment—wholly disproportionate.[59]

Using the self-defense analogy again, the *People* article—the attack in this case—did not so much as throw a punch, but prodded a shoulder; the *Mail on Sunday* article picked up a baseball bat and beat the living daylights out of the thing. To bring his position home, the judge went on,

> I do not consider it was necessary, or proportionate, for Mr. Markle and the defendant to pursue this legitimate objective [of inaccurately suggesting that Meghan's letter was some sort of olive branch when in fact it was a lengthy rebuke] in the way that they did, by publishing long and sensational articles revealing and commenting on extensive extracts from the Letter, without first approaching the claimant.[60]

There we have it. On misuse of private information, it is a win for Meghan. In conclusion, the judgment sets out that she had a "reasonable expectation that the contents of the Letter would remain private"; the articles published by ANL "interfered with that reasonable expectation"; there was a "tenable justification" for the interference with the right to respect for the private and family life, and correspondence, "was to correct some inaccuracies about the Letter contained in the *People* Article [but] on an objective review of the Articles in the light of the surrounding circumstances, the inescapable conclusion is that . . . the disclosures made were not a necessary or proportionate means of serving that purpose."[61]

Finally, the judge was required to ask himself whether there were any compelling reasons for the privacy case to go to trial. Rather, he found that there were "compelling reasons *not* to allow this aspect of the case to go to trial. It has already consumed large amounts of resources, both private and public."[62]

The judge was also unapologetic about his ability to make this finding at summary disposal level, asserting variously and categorically that: "There is no prospect that a different judgment would be reached after a trial";[63] "I can interpret the *People* Article and the Letter as well as I or another judge could do after a trial";[64] and that "I am in as good a position as a trial judge to assess the extent to which the *People* Article misled the public about the Letter in a way that, making the fullest allowance for editorial judgment, made it relevant, necessary and proportionate to make the disclosures complained of."[65]

Copyright

Although there will be no trial of the privacy matter, the copyright issue has yet to be decided. Or at least, two parts of that copyright case have yet to be decided.

It always seemed, to me at least, that the copyright claim was the more likely to succeed, and thus it seems a little strange that the seemingly more difficult and nuanced privacy claim has turned out to be a summary judgment slam dunk whereas the copyright claim requires further consideration at trial.

The A B of Copyright

Copyright subsists in original literary works. The work must be original, not a copy of another work. The rights of the copyright owner, including the right to reproduce the work, are set out in the Copyright Designs and Patents Act 1988 (CDPA).[66] Those who without permission do any of the permitted acts reserved for the copyright owner, including to reproduce a "substantial part" of the work, infringe the owner's copyright and are liable unless they have a defense. One such defense is that of fair dealing for the purposes of reporting current events. Another justification might be where enforcing

copyright would amount to "an unjustifiable interference with the right to freedom of expression."[67]

The judge clarified that "originality does not call for a claimant to prove her work is one of creative genius."[68] "It need not be novel or ingenious."[69] What is required to satisfy this is that the author puts into the work "sufficient relevant artistic effort."[70]

That Meghan's letter is original under this definition is denied by the newspaper group, citing that it is rather "primarily an admonishment" of her father, which purely recites existing facts about dad and thus are not intellectual creation or original.[71] The judge found these arguments "utterly fanciful."[72] Mr. Justice Warby was prepared to accept that the line could be drawn somewhere, just not here. "I would be inclined to agree that, in principle, statements about undisputed historic events may lack the necessary originality if cast in their most abbreviated and abstract form—'the First World War began in 1914' or "The Supreme Court building is in Parliament Square"—though even these short statements could be put in a variety of ways."[73]

Similarly then, the fact that the letter was considered less of an olive branch and more of a rebuke does not mean that it is not sufficiently artistic to claim copyright protection. "A curt rebuke, using a couple of commonplace expletives, might not qualify for protection. But the vocabulary of reproof is wide and varied, and ever-changing. Human ingenuity being what it is, a reprimand of more than a few pithy words will normally involve some choice and intellectual creativity."[74] If there are 50 ways to leave your lover, according to Mr. Justice Warby, "[t]here must be 50 ways to scold your father, and 100 more in which to explain why you have told him off."[75]

Meghan did just that. According to the judgment: "The Electronic Draft and Letter are much more than a short and banal insult. They comprise a long-form telling-off, selecting a variety of literary forms, interwoven with the narrative I have just discussed."[76] It may be sad to think that literary expression can be in the form of a letter of reprimand to one's own dad, but that is the case. The telling off, the scolding, the reprimand, however described, that collection of carefully chosen words on the page were an original artistic work and capable of protection.

Infringement—Substantial Part

The next element to establish is whether there was a substantial copying. The judge seemingly employed a word count function and came to the conclusion that the letter ran to 1,250 words and the version in the ANL articles reproduced 585 of them.[77] It is well established that the test is qualitative, not quantitative. Here, "the extracts selected for publication were the prominent parts. They represented the majority of what the claimant had to say about her relationship with her father, his conduct in around the time of the wedding, and her feelings about it."[78] Was that a substantial copying? "I consider that the only possible answer is yes."[79]

Defendants Argue That It Is Not Fair

"It's not fair" is often the plaintive cry of a media defendant when a judge finds in favor of the plaintiff. Here, an argument advanced by ANL was that it was entitled to reproduce the copyrighted work without permission because it amounted to fair dealing for the purposes of news reporting. The judge considered the defendants' case to be "perhaps a little elusive."[80] Yet even accepting the existence and reporting of the letter in the *People* article and Meghan's father's reaction to it might be considered current events for the purpose of this defense. The judge found the defense to be "unsustainable"[81] largely because the unauthorized taking was quite simply disproportionate. "The use involved an infringement of the claimant's privacy rights and was, with the modest exception I have identified, irrelevant to any legitimate reporting purpose and disproportionate to any such purpose. There is no real prospect that the court would reach any different conclusion after a trial."[82] The judgment went on: "In summary, it is only the defendant's reproduction of paragraph [15], or most of that paragraph, that can count as fair dealing for the purposes of reporting current events: Mr. Markle's objection to the inaccurate summary of the Letter that was contained in the *People* Article."[83]

Defendants Argue Public Interest

One last hoorah for the defendants was to argue that the court should exercise its inherent jurisdiction preserved under the CDPA "to refuse to allow the use of its process for purposes that are contrary to the public interest."[84] Here, they argued that the public interest was in freedom of expression. However, precedent case law has established that where a fair dealing defense has not been established it will be "rare" for the court to find that the copyright should be overridden under this jurisdiction, and Mr. Justice Warby did not find this to be one of those rare cases.[85]

Authorship and Ownership

If copyright exists, and there was no justification for its infringement, left to be decided then were the questions of who was the author and thus the owner of the copyrighted work, capable of asserting the associated rights. Requests for information by the defendants ultimately established that while she of the beautiful/unusual calligraphy, as Meghan wrote that handwritten letter, this more flourishing affair was preceded by an electronic version, which she "composed over a period of time using an app on her phone and then transcribed into the handwritten Letter."[86] (It is arguable that the handwritten version, a copy of the original less fancy digital creation, is not therefore an original, and Meghan limited

her claim in this application before Mr. Justice Warby to the electronic version.) However, is she the sole author, and thus the sole owner of the copyright?

Although Meghan claims sole ownership, it transpires that "the claimant 'involved' the Kensington Palace Communications Team, that is the 'Palace Four,' in writing the Letter. The Palace Four are Jason Knauf of Royal Communications, Sara Latham, Samantha Cohen and Christian Jones.[87] Does that really matter, and what does that mean? There are some interesting consequences of additional involvement by third parties. Were third parties involved, it is arguable that they would be joint owners of the copyright. Further still, if the involvement of Knauf was carried out in his official role in Royal Communications, and if his involvement made him a joint author, then his part of the copyright would actually be owned by The Crown and thus be Crown copyright. Further, according to ANL, if he or the other aides were involved in the creation of the letter, why?

Mr. Justice Warby was not impressed with these arguments:

> The defendant's factual and legal case on this issue both seem to me to occupy the shadowland between improbability and unreality. The case is contingent, inferential and imprecise. It cannot be described as convincing, and seems improbable. It lacks any direct evidence to support it, and it is far from clear that any such evidence will become available.
>
> It is not possible to envisage a Court concluding that Mr. Knauf's contribution to the work as a whole was more than modest. The suggestion that his contribution generated a separate copyright, as opposed to a joint one is, in my judgment at the very outer margins of what is realistic.[88]

However, there are further implications arising out of the use of the Palace aides. Would this not, ANL will say, raise important issues as to Meghan's intentions for the letter, her desire or anticipation that it would find its way into the public domain, and thus surely it impacts on her reasonable expectation of privacy? The judge does not appear to take that point. Rather, he says:

> Whilst it might be interesting to some to explore the minutiae of the process [of drafting the letter], it is not easy to identify a useful litigious purpose in a trial of these issues, the substantive effect of which would be, at best, to whittle down the remedies available to the claimant.[89]

The useful litigious purpose, one imagines ANL will argue, is to show that Meghan had no real intention of ensuring, or belief, that the letter would remain private; indeed, quite to the contrary, as evidenced by her seeking the assistance of communications specialists. Meghan, as found by the judge, did have a reasonable expectation of privacy in the letter, and he summarily found in her favor in granting her summary judgment. Will that argument sneak back in via this copyright issue? One suspects a resounding yes.

Despite his concerns about proportionality, Mr. Justice Warby said as to this limited issue: "I have concluded that the defendant's case cannot be described as fanciful and, since the defendant so wishes, these issues must go forward to a trial."[90] If this potentially explosive evidence was to have any real force, one suspects that ANL would want to raise it in the privacy argument, and not just the copyright issue. Thus far, ANL has not indicated whether it will appeal that summary judgment privacy ruling.

Happy Endings

There we have it. The ending of this tale is in large part happy for our Cinderella. To mix our fairytale metaphors, she has married her prince, she has seen off the Big Bad Wolf of the media, she is now living a fairytale life in LaLa Land, with baby number two on the way, while rubbing shoulders with political and chat show royalty, President Biden, Vice President Kamala Harris, and Oprah Winfrey.[91]

Yet as she does so, she can still take home to adorn the mantelpiece often pictured behind the couple as they take part in various Zoom interviews, a trophy as privacy savior of the people. In her victory speech, Meghan was not misusing "the Royal We" reserved for Her Majesty the Queen, when she said that this judgment was not just for her, but for all who are victims of the type of journalism that is not "reliable, fact-checked, high quality news," but which amounts to "moral exploitation" pursuant to a business model "to profit from people's pain." "I share this victory with each of you" she said, "because we all deserve justice and truth, and we all deserve better."[92]

We Deserve Better—Will This Judgment Help Us Get It?

We may deserve better—but will we? The tabloid press in England is notorious for putting people on pedestals to great applause, and then delighting in knocking them down. In Meghan's case, it may never really have given her a leg up to that pedestal in the first place. The darlings of Hollywood are used to acclaim and adoration, so find it difficult to understand, and even more difficult to deal with, when they are not loved by the media, as well as the masses. It is not surprising, therefore when they seek to take control of their own images—which should to my reckoning anyway, be theirs to start with—and then not allow it to be ripped to shreds by the media. Aye, there's the rub; because the media—which I have

described many times over as the watchdog of society, carrying out an invaluable role in sniffing and barking out wrong in society—does not much like to be told it can or cannot do.

As Meghan got carried away from her wedding in London to the sound of cheering crowds who lined the streets, the tabloids got carried away with their jeering and nit-picking. As a result, she and Harry have engaged a no engagement policy with some of the tabloids, and they have both taken the media watchdog to task with litigation. This judgment may be seen as subjecting it to a lashing from the judiciary and banishment to the dog house.

Who Wins the Battle May Not Win the War

The war between the media, and Meghan and her beau, that has been raging for most of the time since she came into Harry's life was not a fight that Meghan had encountered in her life as an actor in America, and likely did not expect. However, it is a war that was raging in the heart of her husband since the death of his mother. Who fired the first shot—the tabloids themselves with their incessant incursions across the privacy borders of the soldier and the actress? Or the couple with its anti-engagement stance? It does not really matter. Viewing it from the privacy-seeking claimant/plaintiff side, or from the free-speech tub-thumping side of the tabloid media, it amounts to the same thing—it is a war that is not going to end with this judgment.

The black and white image that Meghan and Harry chose to accompany the announcement of Baby Number Two is straight out of the film *Notting Hill*.[93] The actor Hugh Grant, who played the hapless but handsome hero in the movie, has also been the face, and sometimes in fact the brains and certainly the heart, of the Hacked Off campaign in England concerned with the unlawful incursions into private life by phone hacking, which ultimately brought down the now defunct tabloid *News of the World*. Yet while Harry in the pastiche of the film cradles the head of his wife and expectant mother, Hugh's character has his head buried in a book—*Captain Correlli's Mandolin*.[94] Love is a theme of that tome, in which the heroine's father, Dr. Iannis, describes as "what is left when the passion has gone."

Passion is strong emotion, one way or the other, love or hate. For Meghan, this battle has been personal, as she says in her victory statement, "For these outlets, it's a game. For me and so many others, it's real life, real relationships, and very real sadness." For the Fourth Estate, however, it is not a game, it is business. It is not personal, it is commercial. What will be left if and when the passion that Harry and Meghan hold for the British tabloids has gone? The answer is . . . the British tabloids. They have been around in some form or another since the 17th century, and they are unlikely going anywhere fast. Meghan is not Anna Scott in *Notting Hill*; she is not just a girl, standing in front of a boy, asking him to love her. She is a determined warrior, strategizing her battle campaign, building and defending her brand, drawing up the drawbridge around all comers who seek unauthorized entry, and certainly prepared to fight to protect herself.

If this ruling does indeed curb the wilder excesses of Fleet Street, if it tames the tabloids, and if it not unreasonably reminds media institutions that they need to swap what is "manifestly excessive" to something more appropriate, then so much the better.[95] We recall that Mr. Justice Warby was satisfied that if he could see clearly that there would only be one plausible outcome, if the lens was not obscured by dust, he could summarily dismiss the claims—and dismiss them he did.[96] Yet even before the dust has settled on this judgment, the hue and cry about its perceived implications can be heard up and down Fleet Street, and whether ANL appeals or not, it is unlikely that this is the last that we will have heard of it.

Endnotes

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3. *Hamlet*, 1.2.129-159.
4. Matt Robbins, *Publicity—Shy Woman Tells 7.67 BN People: I'm Pregnant*, Daily Star (15 February 2021).
5. Michelle Tauber, *The Truth About Meghan—Her Best Friends Break Their Silence*, People (18 February 2019).
6. Ministry of Justice, *CPR - Rules and Directions*, Civil Procedure Rules (2018), https://www.justice.gov.uk/courts/procedure-rules/civil/rules (last visited 18 February 2021).
7. *CPR Rule 24.2(a)(ii) and (b)*, Civil Procedure Rules (2018) https://www.gov.uk/guidance/civil-procedure-rules-parts-21-to-40/part-24-summary-judgment (last visited 18 February 2018).
8. *HRH The Duchess of Sussex v. Associated Newspapers Ltd*., [2021] EWHC 273 (Ch), para. 40 (11 February 2021).
9. *Id*. at para. 5.
10. *Id*. at para. 6.
11. *Id*. at para. 17
12. *Id*.
13. Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1998), https://www.refworld.org/docid/3ae6b3b04.html (last visited 18 February 2021).
14. *HRH The Duchess of Sussex v. Associated Newspapers Ltd*., [2021] EWHC 273 (Ch) at para. 28.
15. *Id*. at para. 29.
16. *Id*. at para. 30
17. *Id*. at para. 31.
18. *Id*. at para. 29
19. *Id*. at para. 30
20. *Id*.
21. *Id*. at para. 31.

22. *Id*. at para. 64.
23. *Id*. at para. 66.
24. *Id*.
25. *Id*.
26. *Id*. at para. 68.
27. *Id*. at para. 70.
28. *Id*. at para. 71.
29. *Id*. at para. 72.
30. *Id*. at para. 73.
31. *Id*. at para. 74 (*citing Gatley on Libel and Slander* (12th ed. 2017) at para. 22.5 n. 41).
32. *Id*. at para. 73.
33. *Id*. at para. 76.
34. *Id*. at para. 79 (internal quotations omitted).
35. *Id*.
36. *Id*. at para. 80.
37. *Id*. at para. 81
38. *Id*. at para. 86 (citations omitted).
39. *Id*. at para. 87.
40. *Id*.
41. *Id*. at para. 91 (*citing* Charles Phipps, William Harman and Simon Teasdale, *Toulson and Phipps on Confidentiality* (4th Ed. 2020) at ch. 4, para. 27-35).
42. *Id*. at para. 102.
43. *Id*. at para. 95.
44. *Id*. at para. 96.
45. *Id*. at para. 97.
46. *Id*.
47. *Id*. at para. 98.
48. *Id*. at para. 100.
49. *Id*. at para. 101.
50. *See, e.g., Douglas v. Hello! Ltd.* [2007] UKHL 21, [2007] 2 WLR 920.
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An Artwork by Any Other Name

An Examination of Authenticators' Role in the Art Market and Suggested Legislative Improvements

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I. Introduction

Today's artists are unafraid to question the fundamental elements of artistic expression, such as medium, duration, and authorship in pursuit of new artistic achievement. Artists are rewarded for their ability to subvert consumer expectations, and prices appear to defy common sense, to say nothing of personal taste. When a banana duct-taped to the wall of a renowned art fair sells for more than $120,000, it is impossible to deny the presence of a market for works that thwart convention.[1] To navigate this unique and often counter-intuitive market, consumers must rely on the advice of experts who play an essential role in justifying such high prices. Not only do experts sort the trash from treasure, they also help resolve the biggest uncertainties in the art market: attribution, authenticity, and valuation. Art experts, also referred to as connoisseurs, use a combination of technical, historical, and experiential analysis to evaluate artwork, and the impact of their determinations is often measured in millions of dollars.

Expert advice in the art market comes from a variety of sources, such as dealers, academics and auction houses, but even an opinion from the most respected institution should not be taken as absolute truth. Connoisseurs often work with limited information and must rely on some degree of subjective evaluation. For certain works, this means that attribution depends on a consensus of the community rather than objective knowledge, and for collectors, the value of a work can change dramatically depending on where the consensus lies.[2] Art connoisseurship is further complicated by the muddled lines between interested parties: In this small market of repeat players, the tangled network of financial incentives and business relationships has been known to influence expert opinions.

When an expert is brought to court by a dissatisfied party, the judiciary often struggles to determine how accountable these connoisseurs should be for their opinions. A conventional approach suggests that as experts offering opinions as the basis for commercial transactions, art connoisseurs share the same liability as other merchants under the Universal Commercial Code (UCC). However, this approach does not take into account the speculative nature of art expertise, and the careful balancing of interests often required by art market actors.

II. Background

A. Historical Context

Connoisseurs have only recently drawn scrutiny from regulators and the public. In the past, art connoisseurship was viewed as an academic exercise unlikely to cause controversy outside its own practitioners. The discipline was described by notable artist and connoisseur Jonathan Richardson in his 1719 *Two Discourses*, where he stated that the principal aim of connoisseurship was not to determine the worth of a painting, but merely to attribute works to their creators and detect forgeries.[3] For centuries, connoisseurs believed that the influence of the market would undermine the credibility of the practice, and yet today the connoisseur's role in valuation is considered essential.[4] This reversal occurred as the result of the increasing perception of art as an investment, and a booming art market since the 1990s. Auction houses, whose results serve as a benchmark for industry health, have routinely broken records during the last three decades, and the steady inflation of prices has fostered growing demand from a new breed of investment-oriented buyers.[5] In the last 20 years alone, three Jeff Koons works have broken the record price paid for a work by a living artist: $23.6 million in 2003, $58.4 million in 2013, and $91.1 million in 2019.[6] Buyers with an art-as-asset-class mentality rely on connoisseurship in the place of due diligence to help understand and mitigate risk; however, connoisseurship's academic roots and imprecise nature have caused growing pains for art investors. As stakes in the art market continue to climb, high prices paid by litigious buyers now threaten to stifle the art experts who helped build the market.

B. Modern Climate

Today, tens of millions of dollars can turn on an artwork's attribution, which risks placing art experts at the heart of costly litigation. The first such dispute to capture national attention was *Hahn v. Duveen*, in which one of the nation's foremost connoisseurs was sued for slander of title.[7] Duveen, a respected dealer and connoisseur, was contacted by the press to comment on the sale of a painting attributed to Leonardo da Vinci. Without examining the painting, Duveen denounced the attribution and consequently decimated the painting's sale value.[8] In the art world, a negative opinion from a connoisseur, regardless of his, her or their methods, can be enough to shake mar-

ket confidence and in this case, spur litigation. Although the parties ultimately settled for a fraction of the sale price, the costly nine-year legal battle fired a warning shot to authenticators across the industry.[9]

In the years following *Hahn v. Duveen*, courts have clarified that art experts are generally only liable in instances of fraud, and where the expert did not have a good faith belief in his, her or their opinion.[10] Contract law has also been employed to define authenticators' responsibilities: the UCC provides remedies for breach of contract and the warranty of merchantability. Contract law has not, however, been a cure-all. Inconsistent application across the country has created variable levels of accountability and undermines buyer confidence. For example, recent owners of a series of forgeries in the District of Hawaii were aggrieved to discover that the warrant of merchantability did not include attributions of any kind.[11] The court ruled, perhaps optimistically, that art is valued solely based on its aesthetic merit and not its creator's identity—a decision that deviated from the reality of the market, as well as other districts.[12] These difficulties reflect the need for specialized legislation to regulate the market for the benefit of both consumers and professionals.

At the center of the U.S. art market, New York has attempted to address these difficulties through legislation: the New York Arts and Cultural Affairs Law. One central provision provides that any written assurance of a work's authorship by an art merchant to a non-merchant serving as the basis of a transaction is considered an express warranty.[13] The burden of proof under this warranty was defined in *Dawson v. G. Malina, Inc.*, which acknowledged the imprecise nature of attribution and required that a plaintiff must show through expert testimony that an incorrect attribution lacked a "reasonable basis in fact, at the time the [representation was] made."[14] This fact-based standard has provided buyers with confidence in their purchases for decades, but is thought to have created a chilling effect on the market in recent years.[15] Moreover, art experts are deterred by the cost of potential litigation and damage to their reputations, preferring instead to remain silent. Several prominent artist foundations have cited the threat of litigation as the reason for closing their authentication boards, depriving consumers and the industry of access to valuable authentication services.[16] Changes to this legislation can help restore art experts' ability to speak freely while maintaining valuable protections for buyers who lack industry savvy.

III. Proposed Changes

Application of the UCC and state law reveal a tension between protecting consumers, who lack experience in an unpredictable market, and shielding art experts from unwarranted lawsuits. Proposed amendments to the New York Arts and Cultural Affairs Law are intended to address the chilling effect of the statute by providing additional protections to certain art authenticators.[17] The most recent proposal, 1229A, would offer immunity for an authenticator who does not have a financial interest in the piece being evaluated, and establishes a fee shifting regime at the court's discretion to ward against frivolous lawsuits.[18] These changes are a step in the right direction, but it is unclear how a court would evaluate a "financial interest," which could deny immunity to deserving connoisseurs.[19] For example, a court could have ruled either way in *Hahn v. Duveen*. Although he was not directly a party to the transaction, as a prominent dealer in a small field, Duveen's business would have undoubtedly been affected by the sale of a major artwork like the disputed Leonardo. This argument is more potent in the context of catalogues raisonnés and artist foundations, whose survival depends on maintaining the market for their artists' works. An inconvenient truth is that any actor, either individual or institutional, might have an indirect or even illicit financial incentive for making a particular attribution, rendering the provision unpredictable in practice.

The proposed amendments also fail to address the "reasonable basis in fact" standard, which has proven too unreliable for authenticators to issue opinions without fear of litigation. The standard gives way to a cost-benefit analysis favoring owners with deep pockets: if a work has been devalued by more than the cost of litigation, buyers will file suit regardless of the claims' merits. As most art professionals are presumably less likely than their clients to have cash on hand for a protracted legal battle, this system encourages forced settlements. New York legislators should amend this section so that 1) all attributions—express warranties or otherwise—only need to be "reasonable," so long as they conform with industry standards, and 2) require mandatory fee shifting where authenticators have disclosed the basis of their opinions.

Lowering the bar to a standard that judges are familiar with will help authenticators dismiss unwarranted lawsuits at the summary judgment phase. Combining a lower standard with mandatory fee shifting will help tip the cost-benefit analysis away from favoring jilted owners. Notably, this protection would not extend to connoisseurs who make arbitrary attributions or render opinions without providing an explanation. In such cases, parties would have to progress to discovery to evaluate a claim's merits, and a judge could then decide if fee shifting is appropriate. Mandatory fee shifting conditional on disclosure creates a *de facto* duty to disclose, which many authenticators are sure to resist, but this standard's deference to connoisseurs must be balanced with protection to collectors. Further, parties could choose to contract around these obligations, and authenticators could expressly disavow casual opinions that do not reflect their full professional judgement. The aim of this rule is not to create new obligations for authenticators; it is to ensure that authenticators who already follow best practices receive the highest level of protection. The secondary goal is to increase consumer awareness, so that buyers understand their authenticator's opinion at the time of the transaction, and not later

during trial. Lastly, authenticators who would prefer to continue business as usual may do so, albeit while retaining much of the risk currently present in the market.

IV. Impact on Art Experts and Authenticators

A. Academics

The first priority of a law protecting authenticators should be to provide a safe environment for academics to further the scholarship of art by expressing opinions about attribution. Courts tend to favor academics' arguments under the First Amendment, although this does not always deter vengeful owners from filing suit. Duveen was hardly the last connoisseur to spark controversy by issuing his opinion: art historian and Columbia professor James Beck even faced criminal charges carrying a three-year sentence in an Italian court for speaking against restorations he believed damaged the *Ilaria del Carretto* in Lucca, Italy.[20] Even if academics are treated well in court generally, the cost of litigation is itself a chilling factor that deters providing opinions.

The Southern District of New York exhaustively considered potential liability for remarks made by the art historian in *McNally v. Yarnall*.[21] McNally, a dealer of works by John La Farge, filed suit after a series of interactions with Yarnall, an academic specializing in works by La Farge. Rivalry developed between the two after Yarnall publicly made negative statements about the value, condition, and attribution of works held by McNally. The remarks culminated in Yarnall writing to a museum sponsoring an exhibition organized by McNally in an attempt to cast doubt on his attributions.[22] The court concluded that attributions made by academics were a matter of public concern and therefore entitled to First Amendment protections.[23] The court went on to say that Yarnall's comments about McNally's reputation to an interested party were eligible for qualified privilege in the absence of malice.[24] The court reached a pro-academic ruling, but did not spare Yarnell considerable legal fees where a statute could have expedited the court's analysis or even prevented litigation altogether.

To restore market confidence, legislation must do more than make court decisions more efficient, it must inform parties about their liability before they enter the courtroom. A disclosure requirement guaranteeing strong protections would be least burdensome to academics, who are accustomed to publishing their evidence and analyses. Despite evidence of a rivalry and potential bias, Yarnall's attributions were nothing short of fully articulated academic opinions. Yarnell could have therefore issued his opinions with confidence, knowing that he would not bear the cost of litigation unless his views were found to be unreasonable. Conversely, under the reasonableness standard, it would have been easier for McNally to determine if litigation was warranted based on the publicly disclosed evidence. If McNally felt the unfavorable attributions were nevertheless untrue and acts of malice, he could still file claims of fraud or gross negligence. Moreover, if Yarnall's attributions were insincere, it should have been apparent to the rest of the art world as well. By refuting these attributions in academic circles, rather than in court, McNally might have even preserved the value of his works before the market reached its own conclusion.

Hahn v. Duveen illustrates how adopting these changes could help courts achieve greater efficiency in adjudicating disputes over attribution.[25] Rather than host a protracted nine-year battle between experts and making a determination on authenticity outside the judiciary's expertise, the court would have faced a much easier task of simply determining whether or not Duveen's assessment was reasonable. Emphasizing method over expert opinion also helps remedy the unfortunate reality of industry influence in the courtroom. It is now understood that during trial, Duveen used his prominent position in the market to rally other art historians to his side, including the then-unimpeachable Bernard Berenson.[26] Under the proposed changes, Duveen would have had an incentive to be more transparent about his attribution before it destroyed the work's value, or at least make a disclaimer about thoroughness of the opinion. In either instance, this approach leaves valuation to the market instead of the court and alleviates the court's burden of wading through difficult questions of authenticity.

B. Artist Foundations and Catalogues Raisonnés

Academics are not the only group to provide authentication services for non-commercial purposes. Both artist foundations and catalogues raisonnés offer authentication services for found or previously unrecognized works, and it is not uncommon for a catalogue raisonné to be managed by the same artist's foundation. In recent years there have been several lawsuits filed against both foundations and catalogues raisonnés, with mixed results for these institutions.[27] The rise in litigation has caused many foundations to close their authentication boards, and for catalogues raisonnés to stay silent rather than issue negative opinions. The loss of these institutions' authority has slowed the market and is a driving force behind the introduction of new legislation.[28]

Foundations and catalogue raisonnés have responded by including "hold-harmless" agreements in their contracts, which condition their services on indemnity from a lawsuit contesting the institution's determination.[29] Although these clauses have helped reduce the risk of litigation, zealous art owners have still found ways to drag institutions into court. These cases demonstrate that even if an institution can win on the merits, an overwhelming legal bill might be just as damaging, to say nothing of the potential impact on its credibility and reputation.

The most recent case to seize the attention of the art world was brought by James Mayor, owner of the Mayor Gallery, against the Agnes Martin catalogue raisonné.[30] Mayor submitted 13 works for authentication on behalf

various clients, all of whom signed hold-harmless agreements.[31] All 13 works were rejected by the catalogue and thereafter rejected by both Christie's and Sotheby's for auction, resulting in $7.2 million in client reimbursements for the gallery.[32] One work, valued at $2.9 million, had already been rejected in 2014 but was resubmitted with additional evidence of authenticity, including a photo of the work with the artist Agnes Martin.[33] A New York Supreme Court dismissed the suit, ruling that the catalogue was under no obligation to reveal what evidence it considered in rendering its opinions.[34] Responding to Mayor's amended complaint alleging malice and fraud from one of the catalogue's board of directors, the court dismissed all claims and referred the defendant's motion for attorney's fees to a Special Referee.[35]

If the Special Referee awards the catalogue attorney's fees, this case could set a favorable, if limited, precedent for both catalogues and foundations. The hold-harmless agreements support finding in favor of the catalogue, but the Special Referee might decide that alleged fraud is outside the scope of the agreement. While this case might become a win for art institutions, this article's proposed changes could have obviated the need for litigation altogether. The catalogue's secrecy might be explained by the belief that explaining determinations risks inviting litigation; ironically, it seems that secrecy was the very source of litigation in this instance. The proposed rules would incentivize the gallery to disclose this information, with the combined effect of eliminating litigation risk (lowering both the probability and cost of litigation), providing Mayor with an explanation for his clients, and reducing the appearance of fraud.

Another instructive case was filed by owner Simon-Whelan against the Andy Warhol Foundation and its authentication board.[36] Similar to *Mayor*, Simon-Whelan twice submitted a work for attribution with signed hold-harmless agreements and was rejected both times.[37] Despite strong evidence that the work had previously been recognized as authentic, the Board stamped "Denied" on the back of the painting before returning it to the plaintiff, forever compromising its resale value.[38] The suit is novel, because it is the first to allege an antirust claim against an authentication board and survive summary judgment. Although the claim was later dismissed, the precedent has been set, signaling that a similar claim might be viable under the right circumstances. Simon-Whelan's supporting claim of fraud also survived summary judgment, as the judged ruled that fraud was outside the scope of the hold-harmless agreement. Despite the foundation's victory, it was saddled with nearly $7 million in legal fees, leading to the authentication board's dissolution.[39] *Simon-Whelan* therefore illustrates that art institutions require stronger protections to deter litigation or else assurances that the cost of such litigation will not lead to financial ruin.

C. Intermediaries

The next group to authenticate works in today's market is also the most scrutinized intermediaries: auction houses and art dealers. There is a perception in the market that because intermediaries receive a direct financial benefit, they are more willing to issue favorable attributions at the cost of accuracy. While a few ignoble characters seem to validate this concern,[40] the group as a whole should not be denied protection. In reality, intermediaries are highly sensitive to the threat of litigation, and understand that a high commission today is not worth the cost of litigation tomorrow. Changing the law will help intermediaries who follow best practices, while the laws governing fraud and breach of contract/fiduciary duty will remain available to pursue experts who deceive their clients.

Rogath v. Siebenmann demonstrates how even with additional protections (in this instance contracted protections), bad actors remain vulnerable to litigation.[41] During trial in the Southern District of New York, evidence showed that dealer Siebenmann knew of a challenge to a work's authenticity before selling it to Rogath, in violation a warranty of authenticity included in the bill of sale.[42] On appeal, Siebenmann presented evidence that Rogath was also aware of the challenge before buying the piece and requested the warranty in the hopes it would provide something akin to authentication insurance.[43] The Court of Appeals correctly recognized this was not a question of authentication, but of concealment and fraud, vacating the award under the breach of warranty and remanding the case.[44] *Rogath* illustrates the difference between a negligent attribution and a fraudulent misrepresentation: had Siebenmann acknowledged the challenge in the bill of sale but offered his assurance of authenticity *despite* the challenge, he might have received more deference from the court. The proposed legislative changes would preserve this distinction and causes of action against fraudulent dealers, while extending new protections to those acting in good faith.

This point could not be better exemplified than by the fall from grace of one of New York's most prestigious institutions, the Knoedler Gallery. In 2013, it was revealed that the gallery was selling forgeries as million-dollar masterpieces with almost no investigation into provenance or authenticity. Soon after, lawsuits against the gallery and its principals began to pour in—the last of which, regarding a $5.5 million Rothko, only settled in 2019.[45] The stream of litigation was damming to the entire art market: blatant red flags were ignored (including a misspelled artist signature)[46] in favor of deference to the gallery, and the very practice of connoisseurship appeared to be on trial. Adopting the reasonableness standard for authenticators would do nothing for such intermediaries exhibiting gross negligence or fraud. Just as importantly, an environment of disclosure would have helped buyers to spot the warning signs so many were

predisposed to overlook. Legislation should respond to the faults of the past; incentivizing transparency can generate the fundamental changes needed in the market to restore buyer confidence.

Krahmer v. Christie's, a Delaware Chancellery Court decision, exemplifies how intermediaries' expertise would be evaluated in court under more ordinary circumstances.[47] Krahmer purchased a work during one of the defendant's auctions and years later discovered that the work was a forgery after a competing auction house refused to consign the work.[48] Investigation by a catalogue raisonné suggested that the original version had been replaced by a forgery while on display by the previous owner. The forgery had even been swapped into the original frame, cleverly concealing signs of foul play. The catalogue only became suspicious of the piece once it received a separate authentication request for the same work, realizing that two identical works had entered the market.[49] Although Christie's could have made the same discovery by submitting the work to the catalogue years earlier, the court determined there was no need to go beyond standard industry practices without some indication that the work was inauthentic—in essence adopting a reasonableness standard.[50] Further in line with the proposed changes, the court also held that the relationship between consignor and auction house did not create any additional duties beyond that of an uninterested authenticator.[51] Adopting this standard in New York legislation would send a signal to the industry that authenticators can conduct their business without fear of litigation, so long as they adhere to industry standards.

Another opportunity to explore this standard was presented in *Marchig v. Christie's*.[52] Christie's assured Marchig that a work the latter believed to be an Italian Renaissance painting was in fact a 19th century German work, even after removing it from its Italian frame.[53] The work then sold at auction for $12,850. Years later, technical analysis revealed the work was possibly painted by Leonardo da Vinci, and estimated at over $150 million. Having potentially lost out on the next "American Leonardo," Marchig filed suit, but was time-barred under the applicable statute of limitations.[54] Without discovery, it is difficult to say if Christie's determination would be considered reasonable or not. The case does, however, exemplify another important factor in the market beyond the court's consideration: shame. Unlike academics and artist foundations, auction houses and art dealers often occupy center stage in the art world. While Christie's may not have had to answer for its mistake at trial, it most assuredly suffered in the court of public opinion. This heightened pressure reduces the need for a distinction between financially interested parties to a transaction, as intermediaries must maintain a positive reputation or risk being shut out from the market. Advancing protections for authenticators should include the entire market and emphasize following best practices, regardless of a party's proximity to a transaction.

V. Conclusion

Adopting legislation that will affirm protections and encourage openness in the market could not only restore authenticators' ability to speak without fear of litigation, but can illuminate the vagaries of the art market for consumers who are only beginning to understand the inherent risks of buying art. This balanced approach goes further than current proposals to address certain market influences and uncomfortable realities that pose a risk to the market's vitality. The trend of rising prices suggests that the need for change will become more pressing in the years to come, and that authenticators will only face greater risks by offering their services. By adopting the recommended changes, New York State can establish an environment that protects and encourages connoisseurship at a critical time in its practice.

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45. *The Final Knoedler Forgery Lawsuit, Over a $5.5 Million Fake Rothko, Has Been Settled, Closing the Book on a Sordid Drama*, Artnet News (Aug. 28, 2019), https://news.artnet.com/art-world/final-knoedler-forgery-lawsuit-settled-1637302.
46. Eileen Kinsella, *Knoedler Forger Misspelled "Pollock,"* ArtNet News (Jun. 12, 2014), https://news.artnet.com/market/knoedler-forger-misspelled-pollock-39250.
47. *Krahmer v. Christie's, Inc.*, 911 A.2d 399 (Del. Ch. 2006).
48. *Id.* at 403.
49. *Id.* at 403-04.
50. *Id.* at 404-05.
51. *Id.*
52. *Marchig v. Christie's Inc.*, 430 F. App'x 22 (2d Cir. 2011).
53. *Id.* at 24.
54. *Id.* at 25-26.

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The Future for Federal Jurisdiction Over Nazi Looted Art Restitution: *The Applicability of the Expropriation Exception of the Foreign Sovereign Immunities Act and the Availability of International Comity Defenses for Foreign Sovereign Nations*

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Since the end of World War II, families across the world sought to reclaim what was lost. Art was taken from individuals, disproportionately European Jews, who often either fled from Nazi rule or were sent away to ghettos, concentration camps, and death camps.[1] Many of these individuals were forced to flee and sell their possessions.[2] In the years since the end of World War II, the scope of the Nazi plunder was discovered and has been "characterized as the greatest displacement of art, if not the most audacious property crime in human history."[3] Given the diaspora of both people and art during and after World War II, these lawsuits originated in myriad countries, by many different victims, with an assortment of legal claims. Some countries established legal systems to address these claims[4] and the complex legal issues related to the repatriation of Nazi looted art developed.[5] Several lawsuits brought in the U.S. implicated foreign nations, which led to a question of jurisdiction over such defendants. In response, many plaintiffs have relied upon the Foreign Sovereign Immunity Act (the FSIA or the Act). Since the Act's passage, courts, commentators, and lawyers evaluated it to determine its scope and whether it granted courts jurisdiction to hear Nazi restitution cases.

Two such questions related to the FSIA were argued before the Supreme Court in *Simon* and *Philipp* on December 7, 2020.[6] On February 3, 2021, the Court first evaluated "[w]hether suits concerning property taken as part of the Holocaust are within the expropriation exception to the Foreign Sovereign Immunities Act of 1976 [], which provides jurisdiction over suits concerning property taken in violation of international law. 28 U.S.C. § 1605(a)(3)." The Court was also posed with the legal question as to "[w] hether a foreign state may assert a comity defense that is outside the FSIA's 'comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state.'" While the Court published an opinion addressing most aspects of the first question, it did not address the issue of comity. The Court's holding on the first legal issues, as well as its silence on the second, will have substantial effects on the legal rights of people reclaiming their lost and stolen artwork from other countries within the U.S. judicial system.[7]

I. The FSIA and Its Role in Nazi Looted Art Cases

A. The History of Foreign Sovereign Immunity

The foundation of foreign sovereign immunity was articulated in Chief Justice Marshall's opinion in *The Schooner Exchange v. McFadden* in 1812, in which he granted deference to the executive branch, and determined that the U.S. did not have jurisdiction over the French government.[8] The Court reasoned that there was an implied understanding that when property enters another nation's borders, assuming the two countries are not at war, the property does not become subject to the laws of that nation.[9] This holding showed respect for other countries and maintained positive foreign relations between the U.S. and others.[10]

Following *The Schooner Exchange*, the courts would rely upon the State Department's suggestions and grant immunity accordingly,[11] which created a tradition of absolute immunity for foreign sovereigns.[12] In response to this problem, a legal adviser of the State Department released the Tate Letter, which advocated for the restrictive theory of state sovereign immunity.[13] However, the Tate Letter was ineffective both in its failure to distinguish between public and private acts as well as its inability to enforce a unified approach to assessing a nation's immunity.[14] In the years following the publication of the Tate Letter, the State Department and the judicial branch granted immunity arbitrarily, resulting in ambiguity.[15] The inconsistency with which courts applied foreign sovereign immunity highlighted the need for a more formal rule.[16]

B. The Enactment of the FSIA

In response to the problems arising with immunity, Congress passed the FSIA in 1976, codifying the restrictive theory.[17] The FSIA granted authority to the judicial branch, rather than the executive branch, to make immunity determinations for foreign sovereigns.[18] The FSIA grants immunity to all foreign sovereigns unless their actions fall within one of the several exceptions enumerated in the Act.[19] If an exception applies, then a court may exercise subject matter jurisdiction under § 1330(a) of the FSIA.[20]

C. The Expropriations Exception of the FSIA

In the cases discussed herein, the expropriations exception provides a basis for immunity. For the expropriation exception to apply, the court must determine that (1) the plaintiff has rights in property that were (2) taken in (3) violation of international law at issue and that (4) either of the two commercial-activity nexuses with the U.S. are satisfied.[21] The commercial-activity nexus (prong 4) requires that the defendant possess the expropriated property or proceeds of the property, or that the defendant partakes in some form of a commercial activity in the U.S.[22] However, over the years, the scope and meaning of the FSIA, particularly the expropriations exception, has been transformed through judicial interpretation.

II. Interpreting the Legal Questions in Front of the Supreme Court Relating to the FSIA

A. Procedural and Factual Context of *Philipp* and *Simon*

i. *Republic of Germany v. Philipp*

In *Philipp,* heirs of Jewish art dealers brought suit against Germany and the instrumentality that manages the museum where the collection of reliquaries is on display.[23] The heirs claim that during World War II their families were coerced into selling their collection, and, therefore, Germany now wrongfully possesses it.[24] Germany moved to dismiss the claims, citing that under the FSIA, the court did not have jurisdiction and that it should be granted immunity from the suit under the doctrine of international comity.[25] On appeal, the court affirmed that the district court had jurisdiction, and rejected Germany's argument that the district court should have abstained from hearing the suit since all local remedies had not been exhausted.[26]

ii. *Republic of Hungary v. Simon*

In *Simon,* Jewish Hungarians filed suit against Hungary and a state-owned railway company for compensation for their property that was seized during the Holocaust.[27] The district court dismissed the case on the grounds that the FSIA treaty exception granted Hungarian defendants immunity.[28] On appeal, the court affirmed the district court's dismissal of the claims that were not based in property law but reversed the dismissal of the common law property claims.[29] It also reversed the decision in part, claiming that the respondents had sufficiently shown the plaintiff's rights to the property and that the property was taken in violation of international law.[30] However, the court of appeals left it to the district court to evaluate any additional arguments for dismissal, such as, "whether, as a matter of international comity, the court should decline to exercise jurisdiction unless and until the plaintiffs exhaust available Hungarian remedies."[31] In interpreting this question, the district court followed the Seventh Circuit,[32] and held that the plaintiffs must exhaust local remedies.[33] In contrast, on appeal, the court relied upon the precedent set by the D.C. Circuit court, and held "that the FSIA 'leaves no room for a common-law exhaustion doctrine based on considerations of comity.'"[34]

B. The Legal Issues Presented to the Supreme Court and Their Precedents

i. Substantive applicability of the expropriation exception and the circuit court split that has led to distinct interpretations of the FSIA.

In deciding cases involving Nazi looted art, courts have been left to determine whether these cases satisfy the requirements of the expropriations exception. The first prong, that the plaintiff has rights in property that were taken in violation of international law, has consistently been interpreted broadly when applied to Nazi looting cases.[35] Usually, the expropriation exception does not apply to cases in which a foreign state seized the property of its own citizens.[36] A taking is only in violation of international law if it was the "property of a national of another state because otherwise it would be blocked by what is referred to as the 'domestic takings rule.'"[37] The domestic takings rule usually bars a claim under the FSIA, because without "an intrastate taking, [a plaintiff] cannot establish jurisdiction."[38] However, both the Ninth Circuit and the D.C. Circuit courts have allowed the expropriation exception to apply when a foreign nation takes property during a genocide. The courts have reasoned that the citizens from which the property was taken were not considered citizens from that nation's perspective during the genocide, since they were deprived of their civil liberties.[39]

The D.C. Circuit court has also expanded the applicability of the expropriations exception by equating the takings by the Nazi forces during World War II to genocide. As the courts have established that these types of takings are not protected by the domestic takings rule, they can evaluate whether the takings themselves are considered to violate international law. Since genocide is a widely accepted violation of international law, then if the taking was part of the genocide, it is sufficient to meet this requirement. The court writes that "the question [. . .] becomes whether the takings of property described in the complaint bear a sufficient connection to genocide that they amount to takings 'in violation of international law.'"[40] In its evaluation, the court decided that there is a sufficient connection to genocide, as the takings "did more than effectuate genocide or serve as a means of carrying out genocide."[41] The D.C. Circuit court explained that the takings of personal property were done to victimize the Jews as part of the genocide[42] and, therefore, the takings themselves were in violation of international law. Effectively, these interpretations of the first prong of the expropriations exception of the FSIA has broadened the Act's usual scope and allowed it to apply in Nazi stolen art restitution cases.[43] In addressing the applicability of the expropriations exception's first prong, the Supreme Court held that "that the expropriation exception's reference to violation of international law does not cover expropriations of property belonging to a country's own nationals."[44] Yet the Court withheld the crucial determination as to whether Holocaust victims are considered nationals of their own country.

The other prong of the expropriation exception, which requires that the property have a commercial-activity nexus in the U.S., has led to a circuit split that has created two distinct interpretations of the commercial nexus requirement.[45] The language of the FSIA creates a juxtaposition between "foreign state" and "agency or instrumentality of the foreign state", which has led to two divergent interpretations. The D.C. and Second Circuits have taken an "alternative threshold approach", in which foreign states and foreign states' agencies or instrumentalities have different threshold standards for satisfying the commercial nexus requirement.[46] For foreign states, the D.C. and Second Circuits require that the property is both in the U.S. and being used in connection with a commercial activity in the U.S. In contrast, the standard for foreign states' agencies or instrumentalities only requires that the agency or instrumentality owns or operates the property and that the property is used for a commercial activity in the U.S.[47] However, the Ninth Circuit has interpreted the commercial nexus requirement differently.[48] It has held an "either-or approach", whereby the court does not distinguish be-

tween the foreign state or its agency and instrumentalities and, thus, a court can gain jurisdiction over a foreign nation, regardless of which nexus requirement it meets.[49]

In *Germany v. Philipp*, Germany, as well as the U.S. State Department, argued that interpreting the FSIA expropriation exception to apply in these cases is a "radical expansion" of the FSIA.[50] The State Department, along with Judge Katsas in his dissent of the D.C. Circuit opinion, argued that reading the FSIA to allow these claims would only provide redress in claims of genocide relating to property, but not "[. . .] other acts, including killing members of a group or otherwise inflicting conditions of life calculated to bring about a group's destruction."[51] The State Department brief called this interpretation "odd," since Congress "has never enacted a cause of action for the sort of property-based genocide claims at issue in this case." Rather, these suits are based in common law claims.[52] Additionally, it argued that this interpretation contradicts the "restrictive theory" codified in the FSIA. Under the Department's interpretation of the statutory history and context of the FSIA's enactment, "[a] sovereign's taking or regulating of its own nationals' property within its own territory is often just the kind of foreign sovereign's public act (a 'jure imperii') that the restrictive theory of sovereign immunity ordinarily leaves immune from suit."[53] The Court agreed with Germany and the State Department's analysis and held that: "The exception places repeated emphasis on property and property-related rights, while injuries and acts associated with violations of human rights law, such as genocide, are notably lacking[.]"[54] The Court further emphasized that "Germany's interpretation of the exception is also more consistent with the FSIA's express goal of codifying the restrictive theory of sovereign immunity."[55] The Court echoed the State Department's argument that the heirs' interpretation, would undermine the distinction between private and public acts and rather, create an ". . . all-purpose jurisdictional hook for adjudicating human rights violations."[56]

ii. The comity defense and how it relates to the ongoing balance between the executive branch's interest in foreign policy with the judicial branch's power to claim jurisdiction over these cases under the FSIA.

The doctrine of international comity has been long recognized as respectful to other countries' laws.[57] The Court has defined international comity as "neither a matter of absolute obligation ... nor of mere courtesy and good will upon the other...[58] But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws."[59]

Chief Justice Marshall's opinion in *Schooner* also emphasized that granting "foreign sovereign immunity is a matter of grace and comity on the part of the United States," rather than a Constitutional requirement.[60] Thus, the Court has explained that its practice has been "to defer to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities"[61]

While the Court has acknowledged its history of deferring to the executive branch, it has also recognized that the FSIA was enacted to replace this practice. Specifically, the purposes section of the FSIA makes clear that Congress intended that the Act would create a balance of power in deciding sovereign immunity.[62] In this section, Congress wrote that "[c]laims of foreign states to immunity should henceforth be decided by courts. . .in conformity with the principles set forth in this [Act]."[63] The Court interpreted this to mean that the Act governs the determination of foreign sovereign immunity, not the previous common law.[64] As a result, it holds that granting immunity or requiring exhaustion should be decided within the confines of the text of the Act, rather than any international comity concerns.

The discussion of international comity as a defense for foreign sovereigns subject to litigation in the U.S has led to a circuit split.[65] In both circuit decisions, each court determined whether, as a matter of international comity, it should not claim jurisdiction over the suit since the plaintiffs had not yet exhausted all available remedies within the foreign sovereigns' state. The circuit courts agree that the language of the expropriation exception of the FSIA does not require exhaustion of local remedies. However, the Seventh Circuit has been willing to apply an exhaustion requirement in some cases, explaining that the absence of such in the FSIA does not mean that it is inconsistent with the statute.[66] Rather, in both *Abelesz v. Magyar Nemzeti Bank* and *Fischer v. Magyar Allamvasutak Zrt,* the Court held that it is a "well-established rule" of international law that "remedies for expropriation be exhausted before international proceedings may be instituted."[67] From an international comity perspective, the Seventh Circuit found it unfair to subject Hungary to a suit in which the "sum of damages [. . .] would amount to nearly 40 percent of Hungary's annual gross domestic product in 2011."[68] In considering the principles of international comity, the Court evaluated "how the United States would react" if subject to a similar suit.[69] In answering this question, the Seventh Circuit did not go as far as to say that the case can never be heard in the U.S.[70] It instead held that the plaintiffs either had to exhaust the remedies available to them in the country in question, or provide the Court with a "legally compelling reason for their failure to do so."[71] The Seventh Circuit concluded that once Hungary has had "the opportunity to address these alleged takings, by its own means and under its own legal system," then "the U.S. courts may be available to consider their claims."[72]

In contrast, however, the D.C. Circuit, in both *Philipp* and *Simon*, decided not to extend a remedy exhaustion requirement.[73] That Court made this decision based upon a Supreme Court decision, as well as its own analysis of the history, text, and purpose of the statute.[74] Specifically,

the D.C. Circuit followed the Supreme Court's holding in *NML Capital, Ltd.* and determined that requiring exhaustion of local remedies would undermine the text and purpose of the FSIA. The Court found two issues with the exhaustion requirement: "[f]irst, the terrorism exception expressly conditions jurisdiction on 'afford[ing] the foreign state a reasonable opportunity to arbitrate the claim,' but this language is not in the expropriation exception."[75] The second issue with the exhaustion requirement is that the FSIA only allows defenses, such as forum non conveniens, and this remedy is made equally available to private individuals.[76] Therefore, the Court concluded that "… a 'private individual' cannot invoke a 'sovereign's right to resolve disputes against it.'"[77] Following the Supreme Court's findings in *NML Capital, Ltd.*, the D.C. Circuit was unwilling to apply an international comity defense, as the Court deemed it inconsistent with the text and history of the FSIA.[78]

The circuit split has led to an inconsistent rule that the Supreme Court was faced with in *Philipp* and *Simon,* but opted not to address.[79] Given the executive interest in protecting international comity, the Court invited the Solicitor General to submit a brief expressing the view of the U.S.[80] In the brief, the State Department argues that the D.C. Circuit has misinterpreted the Supreme Court's decision in *NML Capital, Ltd.*[81] It states that Justice Scalia left open the possibility of a comity defense for cases brought under the FSIA.[82] Specifically, the brief references a footnote in Justice Scalia's opinion in *NML Capital, Ltd.* that stated that district courts, in defining the scope of discovery, "may appropriately consider comity interests and the burden that the discovery might cause to the foreign state."[83] Thus, the brief argues that "contrary to the court of appeals' understanding, *NML* leaves ample 'room' for 'common-law' doctrines based on 'considerations of comity.'"[84]

III. How Do the Outcomes of the Supreme Court's Decision Affect Nazi Repatriation Claims Under the FSIA?

The expropriation exception of the FSIA has provided a tool for U.S. courts to hear cases brought by Nazi victims and to gain jurisdiction over foreign nations. However, in February, the Court decided to reject the broader interpretation of the first prong as it was upheld by the D.C. and Second Circuit court. The Court's decision did not completely foreclose the applicability of the expropriation exception to these cases, as it left open the issue as to whether the heirs in this case were nationals of Germany at the time of the taking. Yet, the decision still sets a precedent that narrows the applicability of the FSIA for these cases. Rather, the Court should have allowed the 'violations of international law' to apply to property of a country's own nationals. While it is a broad reading of the statute, it remains true to a plain text understanding of the expropriation exemption to include the domestic takings rule, while still allowing the FSIA to create jurisdiction over foreign nations that took property in the furtherance of genocide at a time in which they did not consider or treat their citizens as citizens.

In analyzing the second part of the expropriation exception, specifically the FSIA's text and legislative intent, it is clear that the Court was correct in upholding the "alternative threshold approach".[85] The statute includes one phrase describing commercial activities "by the *foreign state*" as well as a separate phrase describing commercial activities "by an *agency or instrumentality* of the foreign state".[86] By delineating in the exception between the sovereign and the agency of that sovereign, Congress clearly creates two distinct standards. Additionally, the legislative intent of the FSIA evidences that the "alternative threshold approach" should be employed. Congress created this statute to codify the restrictive theory of foreign sovereign immunity. Specifically, the restrictive theory in the FSIA creates immunity for governmental activities, but does not provide immunity for acts that are similar to those carried out by private persons.[87] Given that the statute does not provide immunity for activities that are carried out by private persons, the statute should be interpreted to treat acts by agencies of foreign nations, which more closely parallel the acts of private persons, differently than acts by foreign nations themselves. Therefore, the expropriations exception should be interpreted to confer a higher threshold to claim jurisdiction over a foreign nation itself, as compared to an agency of that sovereign nation. Appropriately, the Supreme Court's interpretation followed Congress's intent to protect sovereign immunity in the FSIA, while still allowing certain exceptions under which the judicial system can gain jurisdiction.

Conversely, allowing comity defenses would undermine the meaning and intent of the FSIA. However, despite its significance to the overall understanding of the statute, the Court withheld its judgment in *Philipp.*[88] By refusing to answer the applicability of a comity defense, the Court has left confusion. Some courts may see the Supreme Court's silence on the matter as a refusal to apply an exhaustion requirement, which one author argues could discourage the exchange of cultural artifacts. This author writes, "[f]oreign nations are already wary of loaning their artwork to the United States as they fear it will lead to lawsuits for disputed pieces."[89] While this is a valid concern for the future of international cultural exchanges, requiring a plaintiff to exhaust all international remedies will limit the use of the FSIA's exceptions to litigate to determine the nations' immunity, even further than the Court's holding in *Philipp.*[90] In *Altmann,* the Supreme Court has already allowed courts to claim jurisdiction over a foreign sovereign's artwork without the work being present in the U.S. As such, the exhaustion requirement should be rejected. If it were implemented as a defense, it would prevent courts from claiming jurisdiction over issues that fall within their jurisdiction under the FSIA's exemptions.

At the center of the international comity debate lies a balance of powers among the branches of government within the United States, as well as the U.S.'s relationship with foreign nations. A broad interpretation of the expro-

priation exception leaves federal courts to "determine the existence and scope of alleged genocides."[91] Judge Katsas argues in his D.C. Circuit dissent that this could "embroil[] courts in sensitive foreign policy issues that are better left for the political branches"[92] He believes that rejecting a broad reading of the FSIA would protect the U.S. from reciprocal suits by respecting other countries and granting them immunity.[93] In contrast, however, Vivian Grosswald Curran, Distinguished Professor at the University of Pittsburgh and President of American Society of Comparative Law, explains that "[c]oupling the new genocide category with an exhaustion requirement" could have the effect of depriving plaintiffs with avenues for recovery.[94] She explains that "lawsuits in the foreign defendant states are unlikely to succeed" and once a foreign suit fails, it poses steep obstacles for a plaintiff to convince a U.S. court to retry the case after "an adverse foreign judgment has been issued."[95] Requiring an exhaustion requirement could have preclusive effects on the jurisdictional determination.

The Supreme Court's decision in *Philipp* has placed limitations on the use of the FSIA by narrowing the meaning of the expropriations exception.[96] If the Court were to pair this decision with allowing an exhaustion requirement, the Court risks undermining the FSIA to a point where the courts simply defer to the executive branch, as they once did. One author describes that if the Court allows an exhaustion of local remedies defense, "this new defense would essentially gut the FSIA's purpose and return it to the Tate Letter regime characterized by a lack of any salient consistency and subject to the whims of the executive branch's political caprice."[97] This could lead to a return to the ambiguous standard that existed before the enactment of the FSIA. The Court should not extend the principle of international comity to the expropriation exception of the FSIA, given the threat that it poses to Congress' legislative intent. Given that the Court did not allow the FSIA expropriation exception to apply to takings of property in violation of international law, and neither definitively exempted holocaust victims from the domestic takings rule nor rejected an exhaustion requirement, courts may struggle in interpreting their jurisdiction, or, in some cases, in gaining jurisdiction under an exemption, for Holocaust restitution suits against foreign nations.

Endnotes

1. *See* Jennifer Anglim Kreder, *Fighting Corruption of the Historical Record: Nazi-Looted Art Litigation*, 61 U. Kan. L. Rev. 75, 88 (2012).
2. *See id.*
3. *See id.*
4. *See* Stephanie J. Beach, *Nazi-Confiscated Art: Eliminating Legal Barriers to Returning Stolen Treasures*, 53 Loy. L. A. L. Rev. 853, 855-56 (2020). Since 2013, Germany, Austria, Holland, Britain, and France have created state-mandated advisory committees. Additionally, other countries like Sweden, France, and Italy have undertaken efforts to catalogue the provenance of their art.
5. *See generally* Patty Gerstenblith, Art, Cultural Heritage, and the Law: Cases And Material (4th ed. 2019).
6. *Simon v. Republic of Hungary*, 911 F.3d 1172, 1175 (D.C. Cir. 2018), *cert. granted in part*, No. 18-1447, 2020 WL 3578676 (U.S. July 2, 2020); *Philipp v. Fed. Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), *cert. denied*, No. 19-520, 2020 WL 3578682 (U.S. July 2, 2020), and *cert. granted*, No. 19-351, 2020 WL 3578677 (U.S. July 2, 2020).
7. While this decision has implications for restitution of Holocaust art, it could also have broader effects within foreign policy and standing in the United States, but those are outside of the scope of this article.
8. *See generally The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812).
9. *See id.*
10. *See* Paige Tenkhoff, *Artistic Justice: How the Executive Branch Can Facilitate Nazi-Looted Art Restitution*, 73 Vand. L. Rev. 569, 574-75 (2020).
11. *See* Jennifer M. Shield, *Curator Congress: How Proposed Legislation Adds Protection to Cultural Object Loans from Foreign States*, 23 DePaul J. Art, Tech. & Intell. Prop. L. 427, 428 (2013).
12. *See* Michael Cooper, *Comity and Calamity: Deference to the Executive and the Uncertain Future of the FSIA*, 45 Brook J. Int'l L. 913, 919-22 (2020). This author provides a lengthy description of how the deferral to the federal government created "near absolute immunity."
13. *See* Shield, *supra* note 11, at 428.
14. *See* Tenkhoff, *supra* note 10, at 575.
15. *See Republic of Austria v. Altmann*, 541 U.S. 677, 677-78 (2004).
16. *See* Tenkhoff, *supra* note 10, 575-77; *see also Altmann*, 541 U.S. at 677-78; Ikenna Ugboaja, *Exhaustion of Local Remedies and the FSIA Takings Exception: The Case for Deferring to the Executive's Recommendation*, 87 U. Chi. L. Rev. 1937, 1940-41 (2020).
17. *See generally* 28 U.S.C. § 1605.
18. *See Altmann*, 541 U.S. at 677-78.
19. *See* 28 U.S.C. § 1605(a)(1)-(6).
20. *See Verlinden B.V.*, 461 U.S. at 489. Conversely, if none of the exceptions apply, then the court lacks subject matter jurisdiction as well as personal jurisdiction.
21. *See id.*; *De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017); *see* also *Agudas Chasidei Chabad of U.S. v. Russian Fed'n*, 528 F.3d 934, 940 (D.C. Cir. 2008).
22. 44B Am. Jur. 2d International Law § 154.
23. *See generally Philipp*, 894 F.3d at 409.
24. *See id.* at 414.
25. *See id.* at 410.
26. *See Philipp*, 894 F.3d at 410.
27. *See Simon*, 812 F.3d at 134.
28. *See generally id.*
29. *See id.*
30. *See id.* at 132; *see also* 28 U.S.C. § 1605(a)(3).
31. *See id.* at 149.
32. *See id.* at 148-49.
33. *See* 777 F.3d 847, 859 (7th Cir.), *cert. denied*, 576 U.S. 1006 (2015); *Simon*, 812 F.3d at 149.
34. Brief for the United States as Amicus Curiae at 6, *Simon v. Republic of Hungary*, 911 F.3d 1172 (2020) (No. 18-1447) (quoting Pet. App. 14a-16a.); *see id.* at 416.
35. *See De Csepel v. Republic of Hungary*, 859 F.3d 1094, 1101 (D.C. Cir. 2017); *see also Simon*, 812 F.3d at 142-44.
36. *See Simon*, 812 F.3d at 145.
37. *De Csepel*, 2020 WL 2343405, 19-20 (citing Restatement (Third) of the Foreign Relations Law of the United States §712).
38. *De Csepel*, 2020 WL 2343405, 19-20; *see also Simon*, 812 F.3d at 144-45.

39. *See*, e.g., *Cassirer v. Kingdom of Spain*, 616 F.3d 1019, 1023 (9th Cir. 2010); *De Csepel*, 808 F. Supp. 2d 113, 130 (D.D.C. 2011), *aff'd* in part, *rev'd* in part, 714 F.3d 591 (D.C. Cir. 2013); *see also* Vivian Grosswald Curran, *The Foreign Sovereign Immunities Act's Evolving Genocide Exception*, 23 UCLA J. Int'l L. & Foreign Aff. 46, 61 (2019); Ugboaja, *supra* note 16, at 1941-42.

40. *Simon*, 812 F.3d at 142 (quoting 28 U.S.C. § 1605(a)(3)).

41. *Simon*, 812 F.3d at 142-44 (internal citations omitted).

42. *Id.* at 144.

43. *See* Curran, *supra* note 39, at 61.

44. *Germany v. Philipp*, No. 19-351 (U.S. Feb. 3, 2021) (citing *Republic of Austria v. Altmann*, 541 U. S. 677, 713 (Breyer, J., concurring)).

45. *See* generally Tenkhoff, *supra* note 10, at 569. Tenkhoff explains the difference between commercial activity exception and commercial nexus requirement under expropriation exception.

46. Compare *De Csepel*, 859 F.3d at 1104-08 and *Garb v. Republic of Poland*, 440 F.3d 579, 589 (2d Cir. 2006) (using the "alternative threshold approach"), with *Altmann v. Republic of Austria*, 317 F.3d 954, 958 (9th Cir. 2002), opinion amended on denial of *reh'g*, 327 F.3d 1246 (9th Cir. 2003), and *aff'd* on other grounds, 541 U.S. 677 (2004) (using the "either-or approach").

47. *See* Tenkhoff, *supra* note 10, at 579; *see also De Csepel*, 859 F.3d at 1104-08.

48. *See* generally *Altmann*, 317 F.3d at 954.

49. *See* Tenkhoff, *supra* note 10, at 579; *see also Altmann*, 317 F.3d at 967-69.

50. Brief for the United States as Amicus Curiae at 9, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61, (No. 19-351).

51. Brief for the United States as Amicus Curiae at 9, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61, (No. 19-351); *see Philipp*, 436 F.Supp.3d 61 (Katsas, J., dissenting).

52. *Id.*

53. Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351) (citing *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017)).

54. *Philipp*, No. 19-351 (U.S. Feb. 3, 2021).

55. *Id.*

56. *Id.*

57. *Hilton v. Guyot*, 159 U.S. 113, 123 (1895).

58. *Guyot*, 159 U.S. at 163-64.

59. *Id.*

60. *Verlinden B.V.*, 461 U.S. at 486 (citing ex parte Republic of Peru. the Ucayali., 318 U.S. 578, 586-90 (1943); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 33-36 (1945)); *see generally The Schooner Exch. v. McFaddon*, 11 U.S. 116 (1812); *see also Altmann*, 541 U.S. at 689; *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 140 (2014).

61. *Altmann*, 541 U.S. at 689; *see also NML Capital, Ltd.*, 573 U.S. at 140.

62. *See NML Capital, Ltd.*, 573 U.S. at 140. This opinion explains that the FSIA replaced the regime of the judiciaries executive deferment.

63. 28 U.S.C. § 1602.

64. *NML Capital, Ltd.*, 573 U.S. at 141-42 (quoting *Samantar v. Yousuf*, 560 U.S. 305, 313 (2010)).

65. *See generally* Ugboaja, *supra* note 16.

66. *See, e.g., id.* This argument has also been made by Judge Katsas in his dissent in *Philipp v. Federal Republic of Germany*, 925 F.3d 1349 (D.C. Cir. 2019), as well as in the Brief for the United States as Amicus Curiae, for *Federal Republic of Germany v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351).

67. *Abelesz v. Magyar Nemzeti Bank*, 692 F.3d at 679 (7th Cir 2012); *see Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015).

68. *Abelesz*, 692 F.3d at 682.

69. *Id.*

70. *See id.*

71. *Id.* at 666.

72. *Id.* at 682.

73. *See generally Philipp*, 894 F.3d at 406; *Simon*, 911 F.3d at 1175.

74. *See generally id.*; *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).

75. *See* Ugboaja, *supra* note 16, at 945-47 (citing *Philipp*, 894 F.3d at 415).

76. *Id.*

77. *Philipp*, 894 F.3d at 416.

78. *See Philipp*, 894 F.3d at 406; *Simon*, 911 F.3d at 1175.

79. *See generally id.*; *Philipp*, No. 19-351 (U.S. Feb. 3, 2021).

80. Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351).

81. *See generally* Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351).

82. *See* Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351); *see also* Altmann, 541 U.S. at 714 (Breyer, J., concurring) (noting that in a case arising under the expropriation exception, that "a plaintiff may have to show an absence of remedies in the foreign country sufficient to compensate for any taking").

83. *NML Capital, Ltd.*, 573 U.S. at 146, n. 6 (quoting Brief for Respondent 24–25 (internal citation omitted)).

84. Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351).

85. *See* cases cited *supra* note 45.

86. 28 U.S.C. § 1605 (3) (emphasis added).

87. *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1321 (2017).

88. *See Philipp*, No. 19-351, 12 (U.S. Feb. 3, 2021).

89. Tenkhoff, *supra* note 10, at 590-91.

90. *See* generally *Philipp*, No. 19-351, 12 (U.S. Feb. 3, 2021).

91. *Id.*

92. Brief for the United States as Amicus Curiae at 10, *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (2020) (No. 19-351) (citing *Federal Republic of Germany, v. Philipp*, 436 F. Supp.3d 61 (Katsas, J., dissenting).

93. *Id.*

94. *See* Curran, *supra* note 39, at 47.

95. *Id.*

96. *See generally Philipp*, No. 19-351 (U.S. Feb. 3, 2021).

97. *See* Cooper, *supra* note 12 at 913.

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Networking Needs a Strategy to Be Successful

By Carol Schiro Greenwald

It is important to review your 2020 networking activities to make sure they are still strategically relevant for 2021. Let us look at best practices for making your networking strategic.

Most people say that they are networking anytime they talk to a client, a potential client or someone who could be a conduit to potential clients. I call anytime, anywhere meetings "random acts of lunch." Fun and sometimes useful, they are not typically strategic networking.

Strategic networking is defined as: "A goal-driven process for creating personal relationships, that help individuals achieve their economic, social and emotional goals."[1] It requires an investment of time, money, and emotional well-being. To make this investment worthwhile, the implementation needs to be targeted, cumulative, efficient, and effective. It should focus on identifying, meeting, and building authentic, reciprocal relationships with people who can help you to grow and prosper both personally and professionally.

In 2020, as COVID-19-prescribed isolation was the norm, virtual networking often became the substitute for many in-person activities. There was a tendency to join online networking groups and schedule online one-on-one meetings just to converse as an escape from loneliness. Strategic purpose became less important. Now, as we face a semi-COVID-19 affected year, it is time to add "strategic" back into our networking.

Data-Driven Networking Strategy

One intention for 2021 should be to recover your strategic focus by using data to explain what 2020 was like, and why. This begins by reviewing not only 2020 profitability, realization, and turnover statistics, but also marketing-related data. These data include:

- Your preferred kind of practice for a specific kind of client under preferred working conditions.
  - What parts of legal practice do you like the most? What are the main characteristics of your favorite kind of client? Do you prefer to work alone or with a team? For example, you might prefer to work with entrepreneurial designers who need protection for their designs and ideas. You like collaborating with other lawyers who deal with business issues, while you focus on intellectual property concerns. Your preferred work environment is as part of a small, collegial firm that values collaboration.

- Characteristics of your "80/20" clients, the handful of clients who provided 80% of your revenue.
  - Who are these clients? Why did they become clients? How long have they been clients? What service(s) do they use? How strong are your relationships? The "80/20" can also refer to clients defined by demographics, client industry or family situation, the services needed, or even the intangible value of marquee clients.
- Important aspects of the 2020 environment include competitors, regulatory trends, and factors impacting your clients' livelihood and lives.
  - What outside factors impinged on your practice in 2020? Did they help or hurt your practice? In what way? Will they continue to be relevant in 2021-2022?
- Proportion of matters where you were able to practice the kind of law you prefer for the kind of clients you prefer.
  - The number of matters that were in your sweet spot. What did you do for what and with this subgroup of clients? Are the financial numbers in place for you to make this practice subset the foundation for growth?
- Impact of the pandemic on your firm's operations as well as your own practice and work environment.
  - What changes did you and your firm make because of the pandemic? Consider technological changes, remote environment changes, and new rules from governments and from the court system.

The purpose of the data is twofold:

- To serve as a baseline against which to compare 2021 activities;

- To provide content for a SWOT analysis (see below).

SWOT is an acronym that stands for Strengths, Weaknesses, Opportunities, and Threats. The strengths and weaknesses refer to your practice and your firm. The opportunities and threats refer to the outside world.

Strengths	Opportunities
Weaknesses	Threats

The SWOT matrix shows at a glance what you have to build on and what you might want to move toward. It identifies weaknesses you need to take into consideration as well as strengths upon which to build. It highlights the pluses and minuses you have to consider as you develop your marketing goals.

For example, suppose that your practice focuses on the business aspects of modern dance choreographers' works. 2020 was probably an exciting creative time for them, as they adapted current works to remote working environments and shaped new works within the new parameters. Given all the legal documents these adaptations required, you probably had a busy year. Now extrapolate to 2021 and beyond. What will your clients' opportunities look like and how will their prospects impact your business? What can you do to help them succeed? How can you reach your audience to explain what you can do for them?

The SWOT matrix juxtaposes what has been and what might be to help you create a set of data-driven SMART goals for 2021. SMART, another acronym, stands for Specific, Measurable, Achievable, Relevant, and Time-based. To make this clearer:

- Specific: The goal should be very concrete. Not, "I want to make more money," rather, "I want to make an additional $100,000 by increasing the number of clients who need 'X' specific services."
- Measurable: You need to have a beginning benchmark and metrics in order to track progress.
- Attainable: You need to have the opportunities and resources to attain the goal. Otherwise, goals become a drag rather than a motivator.
- Relevant: The goals you select have to benefit you.
- Time-Bound: The activities designed to implement the goals have to be within a set timeframe and schedule. Time-bound keeps activities focused and effective.

Goalsetting

The previous steps are intellectual and research-based, similar to other work lawyers do regularly. Just as research establishes the trajectory of a legal matter, so too, it sets the focus and metrics for networking goals. You should create only one or two 2021-2022 goals. More will dilute your efforts and nullify effectiveness and efficiency.

For example, a client-based goal could be:

- To obtain two new clients like your "80/20" clients; or
- To deepen your relationship with your three best clients by adding additional services; or
- To develop a new market niche for clients with different characteristics, but with needs similar to your "80/20" clients.

These goals are each specific enough to provide a foundation for a strategic networking plan designed to find, meet, and form relationships with a specific audience. Specificity is important because networking should create a web of relationships based on collegiality and common interests. It is easier to build if your target market is a slice of a larger market. For example, instead of interacting with any local art gallery that comes to your attention, you could focus your networking on a specific niche, e.g., just New York City galleries that carry modern artists' works. Narrowing it to a kind of art and a specific location means that it will be easier to know their needs, wishes, desires, and buying triggers.

- People buy services from professionals they know and respect. They want to hire professionals who know their worlds, jargon, cultures, and have "walked a mile in my shoes."
- If your target market is too large, it will be too heterogenous for you to know them well enough.
- Understanding one target market really well does not preclude getting work from prospects in the larger market. That is the beauty of referrals.
- With a singular focus, it is easier to identify appropriate networking venues and prepare two key networking tools: A relevant, believable value proposition and a benefits statement.

Your Value Proposition and Benefits Statement

Value is defined by the client. It is the client's interpretation of the usefulness of your services vis-à-vis the costs in terms of its time, money, and emotional angst. To create a value proposition that resonates with your clients and potential clients, you need to be able to explain your "why": Why you do what you do, why you like providing the services they need, why you like working with them, and why you are able to see them as individuals rather than just another employment contract, trademark

application, or bankruptcy situation. Some over-simplified examples include:

- You work with soccer players because you were on a college soccer team and love the game.
- You work with fledgling actors because it gives you a sense of accomplishment when, with your assistance, they become household names.
- You work with women because you feel that the gender bias in the working world unfairly targets women and you want to work toward equality of opportunity.

Once you have written your value proposition and shared it with clients to get their feedback, go on to write your benefits statement. Notice this is about your benefit to a client, not the features of your practice. People do not care about how you do your work; they care about the consequences of it for them. How often do you go to a restaurant and ask to watch a chef prepare your meal? You do not, because you assume that a fine restaurant will have a fine kitchen.

Similarly, clients are going to judge you by comparing your client service to what they receive from other service providers, such as car mechanics to neurosurgeons. They will judge your firm by how client-facing it is. Do you understand their assessment of the issues they bring to you? Will your technology mesh with theirs? Do you accept mobile payments, credit cards? Are your work processes transparent so they can follow along? Do they understand the basis for your fees and do you offer accommodations when they are strapped for cash?

When you are networking you need to connect by highlighting your benefits, not your practice. For example, in a dispute over the value of a painting, the owner wants to know how your reputation and expertise are assets in the upcoming negotiations. The potential client is interested in how your familiarity with the judges and arbitrators who typically handle these matters helps you craft a winning argument.

To be relevant and interesting, think about stories. When you tell a story about a situation similar to theirs, you involve the listeners' emotions. Emotions color the story and make it stick in the listener's mind. It is hard to think of a good story on the spur of the moment, so it is good to prepare stories ahead of time.

Now you have the tools for strategic networking. Where will you use them?

Networking Activities and Venues

The short answer is "Go where they go." The best way to really learn about your client's world is to participate in it by joining its associations, reading the content it trusts, and involving yourself in its activities. There are several easy ways to begin your search:

- Ask your clients about their networking and professional groups. Look at relevant LinkedIn contacts' groups.
- Turn to Google. One quick Google search, looking just on the first page for entertainment associations and trade groups led to a list of:
  - Three dozen industry organizations, ranging from the Academy of Motion Picture Arts and Sciences, to A Minor Consideration, an organization focused on concerns of children in the industry,[2]
  - Four dozen talent agencies,[3]
  - Five dozen manager companies and two manager associations.[4]
- Google also provided lists for "professional organizations for actors" and "agency looking for actors."

Other online lists related to entertainment cover professional associations, guilds, unions, film commissions, film festivals, and conferences. For example, suppose you are a copyright lawyer looking for writer clients. The Writers Guild of America's website offers lists of film and television industry guilds and unions, film and television organizations, film festivals, interactive organizations, and artists' rights organizations.

For every group that seems relevant, you need to read each website to make sure that its membership includes members of your target niche. If it does, then you want to ascertain the group's geographic reach (although this factor is less important in the COVID-19 world) and if it offers the option to join as an affiliate member. You can narrow the list down to two or three groups to visit to see if you like their culture, meetings, and opportunities for participation. Ideally, you will join one.

Perhaps you want to find places to meet individuals who are part of your target niche. A Google search brings up 68 Meetup groups within 25 miles of New York City (when preparing for the return to in-person) that have some connection to entertainment. They range from The Hollywood Entertainment Connections Group to the New York Actors Gym. All of these groups also meet online. LinkedIn offers entertainment industry groups that can be vetted and joined if appropriate.

If you prefer to focus on referrers, you could begin with bar associations, joining not just the EASL Section, but Sections that include your best referral sources as members. For example, if you work with privately owned art, you might get referrals from trust and estates attorneys, intellectual property attorneys, or litigators involved in family ownership disputes. By joining their bar association sections, you will not only meet resources to help your clients, but also learn more about how these attorneys think about their clients and privately owned art. You can begin conversations about issues that you

already know interest them, thereby beginning your relationships on a warmer level.

Whatever groups you choose, the affiliation will only be successful if you participate. Luckily, at the moment, you can become involved without leaving your office. Once the world opens again, you will want to allocate the time to attend in-person meetings. When you meet someone who you would like to get to know better and perhaps add to your network, set follow-up one-on-one video get-togethers. You should also request that they link with you on LinkedIn. By immersing yourself in your clients' worlds, you will not only be using strategic networking to attain your SMART goals, you will also increase your knowledge, discover resources to use in your practice, make friends, and find work.

Endnotes

1. Carol Schiro Greenwald, *Strategic Networking for Introverts, Extroverts and Everyone in Between* (American Bar Association, Law Practice Division, 2019), p. 8.
2. Directors Guild of America website, https://www.dga.org/resources/additional/industry-organizations.aspx.
3. Pfeiffer Law Firm, https/www.pfeifferlaw.com/resources/entertainment-resources/agencies.
4. *Id.*

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Full Stream Ahead: Intellectual Property Considerations for Online Streaming

By Gregory S. DeSantis

As a former professional dancer and current intellectual property law attorney, I think about the intersection of intellectual property law and the performing arts. In 2020, live performances halted due to the pandemic and the amount of live streaming and streaming performances increased. I immediately began thinking about the intellectual property law considerations for streaming performances and how to best advise arts organizations and their counsel in transitioning to present content predominantly online, especially as that creates risks both to and for the presenters.

When audiences watched performances live in theaters, statements like, "the use of audio and video recording devices are strictly prohibited," were common. The purpose of this notice is to both avoid distractions in the theater and protect the intellectual property presented in the performance. In 2020 (and unfortunately likely for much of 2021), the performing arts were viewed predominantly through live streams[1] and video on-demand platforms.[2] Without ushers monitoring unauthorized recordings, protecting intellectual property is increasingly difficult when a high-definition version of the production is available online. In addition to enforcing existing rights, counsel for arts organizations must actively protect original content through registration and avoid infringing upon the pre-existing rights of others. This article will discuss intellectual property considerations within U.S. intellectual property law resulting from the necessary shift to online performances.[3]

Threshold Question of Fixation

Fixation is a requirement for obtaining copyright protection.[4] It is an important threshold question for the current analysis, because fixation will determine whether state privacy laws are pre-empted by federal copyright law. A live stream can occur with or without a simultaneous or pre-existing recording and state privacy laws can preempt original creative works that are not "fixed." Once "fixed" in a tangible form, such as a recorded live stream, the work can then fall within the scope of copyright[5] law. The Copyright Act protects:

> [A]n original work of authorship fixed in any tangible medium of expression, now known or later developed, from which it can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.

> A work consisting of sounds, images, or both, that are being transmitted, is 'fixed' . . . if a fixation of the work is being made simultaneously with its transmission.[6]

A non-recorded live performance, therefore, is per se not fixed in tangible form.[7] However, it may give rise to right of publicity law issues under state law. Therefore, a right of publicity claim would not be preempted by copyright law in a non-recorded live stream performance. Fixation is an important threshold question to answer prior to delving into copyright and right of publicity considerations for live streaming performances. If a performance was previously recorded and then streamed, then the fixation requirement would be met.

Intellectual Property Rights Potentially at Issue in a Performing Arts Live Stream

In the realm of performing arts, copyright law protects creative content and trademark law[8] protects identifiers of source for goods and services. State law governs right of publicity issues, user agreements for streaming platforms and employment agreements. Copyright law protects creative content, including music, choreography, set design, lighting design, costume design, videography and other original content or derivative works that are fixed in a tangible medium of expression. For most performing arts productions, a single entity aggregates the rights to the copyrightable works. One entity, which is often a nonprofit organization under the direction of an artistic director, employs the onstage talent (musicians and performers) and backstage team (set designer, lighting designer, costume designer, director, choreographer, repetiteur, and videographer). Absent contractual provisions to the contrary, the employer/employee relationship makes the talent's work product a work-for-hire and the employer is therefore the copyright owner. There is not the same default assumption for an independent contractor, absent including specific language regarding works-for-hire in the employment agreement. Without an

employment relationship, there is a default presumption of ownership for the author(s) under copyright law.[9]

Licensing Considerations: While Rights May Have Been Obtained for the Stage Production . . .

If one intends to stream a recorded work that had previously been licensed for theatrical presentation, then a license is likely necessary to be able to stream such work. Copyright law protects literary works; musical works, including any accompanying words; dramatic works, including any accompanying music; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[10] Use of a pre-existing copyrightable work requires obtaining a license unless that work is in the public domain or the use of the protected work is deemed a "fair use."

Counsel should review prior clearances obtained for the stage production to confirm whether any prior license contains language that specifically includes streams. General language, such as "media now known or later developed," that could include streams may be sufficient; however, vagueness regarding permission to utilize a copyright-protected work online increases a client's risk. Permission to perform and record a stage production for internal reference or for the sale of an edited video is substantially different from permission to stream that same work. Accordingly, the rights holder may find one permissible, and not the other.

Protecting Creative Content and Avoiding Litigation Regarding Copyright Infringement

Failure to obtain the necessary licenses makes one vulnerable to litigation. The pandemic has greatly affected the performing arts industries. Audiences are hungry for performing arts content and arts organizations are eager to generate income from virtual events. Arts organizations record most performances and numerous hours of rehearsal and performance footage exist solely for internal purposes. Many performers have been unable to obtain footage of their own performances for personal viewing. Copyright concerns are largely why audiences are only recently seeing certain works from the comfort of their living rooms.

Presenting a live stream or streaming performance creates the risk of unintentional infringement via unknowingly using a copyright-protected work. A copyright exists in the moment of fixation, although a federal registration is required to enforce those statutory rights in court.[11] Live streams present the risk of intentional infringement through downloading, screen capture technology, and knowingly using pre-existing content without obtaining a necessary license. Willful copyright infringement can result in the award of additional damages to the plaintiff.[12] Willful copyright infringement is relevant to damages and also speaks to the different scenarios in which infringement occurs. It is a rebuttable presumption and requires knowledge of the prior rights.[13] With this in mind, counsel for arts organizations should actively protect existing rights by including copyright notices,[14] promptly issuing demand letters to infringers, and filing takedown notices online.

A performing arts stream, whether live or previously recorded, will likely contain movement and accompanying music. Choreography and pantomime are both protectable forms of movement under copyright law.[15] Copyright infringement for choreography is a difficult area because of the limited case law, compared to the abundance that exists for infringement of other art forms, like music.[16] Based on the uncertainty of the outcome due to limited case law, disputes regarding choreography[17] are more frequently resolved out of court. Therefore, counsel should be extra diligent in obtaining the necessary clearance for choreography for any type of streaming presentation.

To successfully assert a copyright infringement cause of action, the rights holder must first show ownership of a valid copyright and unauthorized copying of the underlying work.[18] Based on the abundance of case law for music, the analysis for what constitutes "copying" is more clearly defined than in comparison to choreography. Copyright infringement cases for music can analyze the lyrics, melody, harmony, orchestration, and other separable elements of a musical work. Music licensing rights are generally more complex than licensing other works. When incorporating pre-existing music, counsel should consider the musical composition, synchronization, and master rights for the sound recording. Although the streaming platform may have a general license covering user-uploaded music, counsel should review this license to confirm whether additional permissions are needed.

Defenses to Copyright Infringements

Litigation may occur even when following the most diligent clearance process. There are several defenses to claims of copyright infringement. Defenses include arguing that copyright law does not protect the work in question, the unlicensed use of the work was permissible, or a lack of originality of the allegedly infringed work. The defenses to copyright infringement do not preclude other causes of action, such as breach of contract.

The most well-known defense is fair use, which analyzes four factors:

(1) the purpose and character of the use, including whether such use is of commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount of the original work used; the substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market or value of the copyrighted work.[19]

As in all areas of law, particularly with copyright decisions, the case law is very fact-specific. Illustrating the amount of discretion courts have in copyright matters, Professor Leon Friedman[20] would say that "if the judge doesn't laugh, it is probably not fair use."

Additional Considerations: Streaming Platforms Rules, Regulations and Terms of Use

To avoid an interruption to any stream by the streaming service provider, it is important to comply with the rules and regulations of that platform. The streaming provider's terms of use are generally non-negotiable for smaller arts organizations. Entities with the ability to draw higher website traffic may have more bargaining power for these terms. Most platforms require obtaining the permission of the rights holder and forbid defamatory, hateful, indecent, explicit or otherwise offensive content.

Counsel should understand that works in the performing arts often involve societal commentary, which may require the inclusion of objectionable material for some streaming platforms. For example, a dance performance by Bill T. Jones[21] at the Joyce Theater ended in full nudity with expletives yelled towards the audience. These actions commented on the AIDS crisis. The nudity and expletives, while appropriate for audiences of the Joyce Theater, may not be permissible across all streaming platforms. Accordingly, it is important to understand that there is no unlimited right to have content presented on all media platforms. Mainstream musical artists like Cardi B demonstrate the outer limits of permissible expression on streaming platforms. Provocative performances could end up with limited choices of streaming service providers.

Direct copying, however, is not required for presenting performing arts works online. To publish content online, streaming platforms no longer merely require the uploader to assert that it has obtained permission from the copyright owner. In response to the quantity of content, and an increasing number of copyright infringement claims on streaming platforms,[22] many platforms that allow streaming of user-uploaded content have implemented software[23] to detect instances of copyright infringement. To avoid potential copyright infringement claims from the rights holder, the streaming platforms often use draconian software that mistakenly removes content that does not infringe upon the original author's copyright.

When streaming via a third-party platform, it is important to carefully review its terms of service. Contained within are the platform's rights (if any) in the uploaded work and the public's ability to access the work on that platform. This can include the ability to exploit the work by that platform and allowing others to exploit the work on and off that platform, which includes uses in conjunction with advertisements. If payment is required to access the stream, it is also good to review how the platform will provide payment to the performing arts organization and associated fees.

Right of Publicity/Right of Privacy

The right of publicity protects an individual's name and likeness from exploitation for commercial gain. All clearly identifiable living individuals featured in any streaming use should provide written consent to the use of their likenesses in either the employment agreement or via a waiver. Further, audience members, when attending a public event (such as a live performance), may expect to be televised in the audience. This is particularly true with the industry customary notice: "Tonight's performance is being recorded" and consent is often provided with the ticket sale. A mere spectator, indistinguishable from the general audience, can be recorded and displayed for public view.[24] In other words, it is unlikely that a non-featured audience member at a public event would require a waiver.[25]

"[O]nce a performance is reduced to tangible form, there is no distinction between the performance and the recording of the performance for the purposes of preemption under § 301(a)."[26] Therefore, in a live stream of a non-recorded performance, there is no fixation and the right of publicity is not subject to preemption.[27] Once recorded, the performers become fixed in tangible form, and right of publicity claims arising from their performances that are equivalent to the rights contained in the copyright of the telecast are preempted by copyright law.[28]

Right of publicity generally ends at death, however, there are exceptions.[29] A recent law in New York State

regarding right of publicity goes into effect on May 31, 2021 and will align New York with 23 other states that have statutory post-mortem rights of publicity.[30] This law allows estates of performers whose names, voices, signatures, photographs, or likenesses to have commercial value to collect revenues for up to 40 years after death. The new law will also create a private right of action in New York for unlawful dissemination or publication of sexually explicit depiction of an individual.

The right of privacy is the right to control personally identifiable information about oneself, regardless of the way that information is shared. The test for right of privacy is whether there is an actual (subjective) expectation of privacy and if society is prepared to accept that expectation as reasonable.[31] Accordingly, a person in a public area might expect to be photographed or filmed, whereas someone in a private area might not. Right of privacy is also a consideration for personally identifiable information obtained through the registration process for the live stream.

Trademark Law Considerations for Streams

Trademark law is unlikely the main consideration in streaming performing arts content if the performing arts entity is streaming its own content directly from its own online platform. Trademark law becomes a more significant consideration for any kind of streaming when one uses pre-existing content from another organization or when streaming the performance on a third-party platform.

Even when an arts organization is advertising and broadcasting its own content, streaming on its own platform, and advertising the performance using its own trademark, there should still be a review for potential trademark infringement prior to any broadcast. If the stream contains third-party logos that are likely to give rise to consumer confusion regarding the source of the goods or services, it is good practice to license, remove or blur the logos. This can be challenging for a live stream occurring in real time. If the trademark use within a stream creates the impression that there is an affiliation with a brand when there is not, that mark should also be removed or blurred.

Not all trademark use requires obtaining a license. It is permissible to use another's registered trademark, so long as the use does not diminish the rights of the registered mark or imply a relationship between the entities when there is not. If the trademark use has artistic relevance and does not mislead consumers regarding the source of the goods or services, then the unlicensed use may be allowed.[32] Trademark law also acknowledges the concepts of fair use or collateral use.[33]

Trademark fair use allows for a descriptive use, if the third-party mark is used fairly and in good faith to the extent necessary, to describe the goods or services. Collateral use allows for use necessary to explain a component of a product or service: for example, COMPANY's production of SHOW will be streaming on YouTube®. This use of YouTube's registered mark is allowed without first obtaining a license, assuming that COMPANY is not misleading the public as to the source of the service. Trademark fair use allows for commentary that incidentally involves use of the mark for a purpose other than normally made of a trademark. This includes a parody, unless the parody is by competitors in an attempt to advertise their own goods or services: for example, Saturday Night Live's commercial parodies of various products, including the Amazon Echo®.

Trademark law is more likely at issue when streaming content is derived from another source. For example, a west coast theater advertising or streaming content with logos or insignia from an east coast theater may present a likelihood of source confusion. Absent a license for the use, this scenario could be both a copyright and trademark issue. In this example, viewers could be confused as to the origin of the source if the trademark for the east coast theater appears during the other theater's broadcast. Viewers may also wrongly imply that the two theaters are affiliated. An easy way to avoid confusion would be to disclaim any relationship between the parties or, in the alternative, publicize that it is a joint presentation (assuming that an agreement is in place between the parties).

Review the Classifications of the Registered Goods and Services

A federal trademark application in the U.S. requires actual use in commerce,[34] a bona fide intent to use the mark in commerce, or reliance on a foreign application or registration. Trademark registration protects the mark in connection with the registered goods and services. Providing downloadable or non-downloadable entertainment online might not have been included in previous trademark applications for many arts organizations now providing those goods or services.

Performing arts organizations that were selling DVDs and CD-ROMs pre-pandemic might require a new trademark application to cover the additional streaming services. Downloadable and non-downloadable streaming performances are in different classifications of goods and services than are live theatrical performance services.[35]

The overarching concept of trademark law involves asking whether the relevant consumers are likely to be confused regarding the source of the goods or services. If there is a likelihood of consumer confusion, and there is not permission from the rights holder consenting to this use, there is a trademark infringement claim. Evidence of actual consumer confusion is only relevant as evidence of the likelihood of consumer confusion; therefore, if the organization presenting a stream does not own the mark, and the use is not incidental to the stream, then the mark should be removed, blurred or licensed.

Conclusion

Even after theaters reopen, streaming of performing arts is likely to become a permanent fixture, since that format addresses the longstanding issue of adding more seats to theaters with finite capacities, while also making performances more accessible for those unable to access theaters due to the distance, disability or the cost of attending live performances. Protecting the intellectual property contained in streaming performances is not a problem limited to the COVID-19 era. Therefore, counsel advising arts organizations should ask their clients how they plan to interact with audience members going forward and take the necessary steps to secure rights, obtain the necessary clearances, and follow the applicable terms of use, among other considerations.

Endnotes

1. Definition: a live transmission of an event over the internet.
2. For ballet see "The Nutcracker" productions of University of North Carolina School of the Arts, Eglevsky Ballet, and Oakland Ballet. For musical theater see Broadway HD, Hamilton on Disney + and The Prom on Netflix. Many opera houses are also live-streaming previous productions in addition to streaming new live content. *See* Metropolitan Opera in New York and the San Francisco Opera in California.
3. This article will not discuss any applicable union rules associated with live-streams or pre-recorded content, FTC/FCC guidelines for broadcasts, tax considerations for non-profit organizations, or other potentially relevant issues to a performing arts organization outside of intellectual property law in the United States. For information regarding applicable union rules, see Actors' Equity Association (AEA), Screen Actors Guild and the American Federation of Television and Radio Artists (SAG-AFTRA), the American Guild of Musical Artists (AGMA), Stage Directors and Choreographers Society, and The International Alliance of Theatrical Stage Employees, Moving Picture Technicians, Artists and Allied Crafts of the United States (IATSE).
4. 17 U.S.C. § 102(a).
5. *Leto v. RCA Corp.*, 355 F. Supp. 2d 921 (N.D. Ill. 2004).
6. *Id.*
7. *Balt. Orioles, Inc. v. MLB Players Ass'n*, 805 F.2d 663, 675 (7th Cir.1986); *see also* H.R. Rep. No. 94–1476, at 131.
8. There are state trademarks which generally only function to protect marks that are not registrable as a federal trademark.
9. 17 U.S.C. § 201.
10. 17 U.S.C. § 102(a).
11. 17 U.S.C. § 411.
12. 17 U.S.C. § 504(c)(2).
13. 17 U.S.C. § 504 (c)(2); 17 U.S.C. § 504 (c)(3)(a).
14. "Copyright notice is optional for works published on or after March 1, 1989, unpublished works, and foreign works." U.S. Copyright Office Circular 3.
15. *See* U.S. Copyright Office Circular 52 for the elements of choreography and pantomime.
16. *See, e.g., Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881 (9th Cir. 2005); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005); *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994); and 3,382 other copyright cases under keyword "music" on Westlaw.
17. *See, e.g., Horgan v. Macmillan, Inc.*, 789 F.2d 157 (2d Cir. 1986); *Brantley v. Epic Games, Inc.*, 463 F. Supp. 3d 616, 622 (D.Md., 2020); *Krawiec v. Manly*, 2016 WL 374734, (N.C. Super., 2016)]
18. *Tufenkian Imp./Exp. Ventures, Inc. v. Einstein Moomjy, Inc.*, 338 F.3d 127, 131 (2d Cir.2003); *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379, 388 (S.D.N.Y. 2014).
19. 17 U.S.C. § 107. A recent decision from the Ninth Circuit notes adding to an existing working is not per se transformative, *Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, No. 19-55348 (9th Cir. Dec. 18, 2020). Following this decision, counsel should advise clients presenting a stream that adding to the original work is not inherently transformative.
20. https://law.hofstra.edu/directory/faculty/fulltime/friedman/.
21. Bill T. Jones is an American choreographer, director, author and dancer. He is the co-founder of the Bill T. Jones/Arnie Zane Dance Company.
22. *E.g.*, YouTube®, Vimeo Livestream®, Dacast®, Tiktok®, Facebook Live®, Instagram Live®, Zeldavision™, etc.
23. YouTube®, which is owned by Google® since 2006, uses the Copyright Match Tool.
24. *Gautier v. Pro-Football, Inc.*, 304 N.Y. 354, 360 (1952).
25. *Id.*
26. *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir.1997) (quoting *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir.1986)).
27. *Id.*
28. *Cummings v. Soul Train Holdings LLC*, 67 F. Supp. 3d 599, 603 (S.D.N.Y. 2014) (citing *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 849 (2d Cir.1997) (quoting *Balt. Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 (7th Cir.1986))).
29. *See* New York Senate Bill S5959D.
30. See page 23 in this issue of the *EASL Journal*.
31. *Katz v. United States*, 389 U.S. 347, (1967).
32. *Rogers v. Grimaldi*, 875 F.2d 994, 1001-02 (2d Cir. 1989).
33. 15 U.S.C. § 1115(b)(4).
34. 15 U.S.C. § 1051(a).

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Introducing the Horseracing Integrity and Safety Act and a New Era of Racing Regulation

By Bennett Liebman

The traditionally sedentary world of horse racing regulation was changed in momentous ways at the end of 2020. Congress passed, and the president signed, the Horseracing Integrity and Safety Act (HISA) as part of the huge omnibus Consolidated Appropriations Act, 2021.[1] The HISA is Title XII of Division FF of that legislation.[2] The program effective date of the legislation is July 1, 2022.[3]

Senate Majority Leader Mitch McConnell helped shepherd the bill through the 2020 Congress. Senator McConnell in previous years had indicated his opposition to a variety of versions of horseracing integrity bills, citing the position of Churchill Downs, the largest track and a major employer in McConnell's home state of Kentucky.[4] In the summer of 2020, after Churchill Downs had agreed to support the legislation,[5] he reversed course and introduced his own "Horseracing Integrity and Safety Act to recognize a uniform national standard for thoroughbred racing,"[6] because "in recent years, tragedies on the track, medication scandals, and an inconsistent patchwork of regulations have cast clouds over the future."[7] The bill was designed "to provide Federal recognition and enforcement power to an independent Horseracing Integrity and Safety Authority"[8] to govern thoroughbred racing.

The McConnell bill added a safety focus to the integrity legislation. Previously, the legislation had focused on drug uniformity and enforcement. There had been criticism that the integrity legislation failed to focus on the crucial issue of safety in horses. McConnell's bill gave the Authority control and authority over safety procedures and practices at racetracks.[9]

New York Congressman Paul Tonko consequently amended his Horseracing Integrity and Safety Act of 2020[10] to conform to Senator McConnell's companion bill, and the amended bill passed the House by voice vote on September 29, 2020.[11] The full bill was folded into the Consolidated Appropriations Act, and passed by both houses.

The bill is the culmination of legislative efforts over a decade to bring a national uniform response to the problems of drugs and safety in thoroughbred racing. For much of the 21st century, public interest in the sport of thoroughbred racing has waned. Part of the change in consumer and fan interest in horse racing has been fueled by the perception that thoroughbred horse racing is dangerous to the health of both race horses[12] and to the riders participating in racing. Much of that perceived danger was due to the use of drugs in horses. This perception was further augmented by fatal injuries to horses who competed in the Triple Crown series of races.[13] This was followed by the disclosure that the trainer of the 2008 Kentucky Derby winner Big Brown regularly treated his horses with anabolic steroids.[14]

In the 2010s, there were heavily publicized media accounts stressing the high breakdown rate of thoroughbred horses competing in the United States.[15] Finally in 2020, as a result of a longstanding federal investigation, 27 individuals were charged—including some prominent thoroughbred trainers—with a conspiracy to drug their horses.[16] "The indictments describe a network of assistant trainers, veterinarians, drugmakers and unidentified owners who, the feds say, conspired to circumvent authorities and illegally boost the performance of horses."[17]

The belief was that the existing regulatory setup featuring individual state racing commissions, each with differing rules, with limited state allocated budgets, with occasionally indolent levels of dedication to enforcing existing drug rules and employing drug testing facilities of varying levels of sophistication was not up to the enormous task of promoting safety and integrity in racing.

Earlier Legislative Reform Efforts

Federal efforts to unify and effectively enforce the drug rules in racing began with the Interstate Horseracing Improvement Act of 2011,[18] which proposed to prohibit

> entering a horse in a race that is subject to an interstate off-track wager if the person knows the horse is under the influence of a performance-enhancing drug; or (2) knowingly providing a horse with such a drug if the horse, while under the influence of such drug, will participate in a race that is subject to an interstate off-track wager.[19]

This bill was followed by Horseracing Integrity Acts of 2013,[20] 2015,[21] 2017,[22] and 2019.[23] While the details of

each changed over the years, the hallmark of these bills was the creation of an independent anti-doping organization that would establish and enforce uniform national rules on drugs. While these efforts never came close to passage, they raised both public and Congressional awareness of the problem of drugs in racehorses. In 2020, Congressman Paul Tonko's Horseracing Integrity and Safety Act of 2020 attracted 261 co-sponsors.

Besides the opposition of Majority Leader McConnell, three general issues made it initially difficult to pass the integrity bills. Horse racing's leaders had for decades opposed the involvement of the federal government in horse racing. Racing's mantra had previously been that: "States should have the primary responsibility for determining what forms of gambling may legally take place within their borders…The only role of the Federal Government should be to prevent interference by one State with the gambling policies of another and to protect identifiable national interests with regard to gambling issues."[24] The Interstate Horseracing Act of 1978, which was supported by the racing industry, states emphatically:

> The Congress finds that—(1) the States should have the primary responsibility for determining what forms of gambling may legally take place within their borders; (2) the Federal Government should prevent interference by one State with the gambling policies of another, and should act to protect identifiable national interests.[25]

Given racing's leaders' traditional belief that the federal government should steer clear of horse racing and gambling,[26] it was a difficult slog to convince people that the federal government should decide how racing would be regulated. On top of the fears of federal involvement, many elements of the racing industry did not want the private United States Anti-Doping Agency (USADA) to establish the drug rules for the sport.[27]

Secondly, the legislation always had issues over what forms of horse racing should be covered. It was clear that thoroughbred racing would be covered (the leaders of the coalition in support of the legislation included the Jockey Club, the Thoroughbred Owners and Breeders Association, the International Federation of Horseracing Authorities, the Jockeys' Guild and The Breeders' Cup). The issue was whether quarter horse racing and harness racing would be included. Quarter horse racing is a major sport in the western United States[28] and harness racing is a most significant force in the east and midwest. New York State in 2019 ran more than two-and-a-half times as many harness programs as thoroughbred programs.[29] Seventy-four percent of the races in New Jersey in 2019 were harness races.[30] Massachusetts and Maine only run harness programs. Traditionally, given the durability of its horses, harness racing has not presented the same level of safety issues as thoroughbred racing, and much of the harness racing establishment has not wanted to be included in the integrity legislation.[31] The issue for the Congress has been to what extent quarter horse and thoroughbred racing should be part of the legislation.

Finally, the main problematic issue has been the question of whether to prevent the use of the diuretic and anti-bleeding medication Lasix on race day. While other racing countries do not permit Lasix to be utilized on race day, jurisdictions in the United States have legalized it. By and large, the proponents of the Integrity Act have supported the elimination of race-day Lasix. The thoroughbred horsemen, on the other hand, have believed that race-day Lasix is necessary to protect the health of race horses. "Lasix proponents argue it is necessary as many horses bleed internally on the punishing American dirt surfaces. Several horsemen's groups passionately believe that without Lasix many horses would struggle or not be able to run at all."[32]

Resolving the Controversial Issues

The legislation resolves the federalism issue by creating a mechanism under which the purview of drug use and safety will fall within a hodgepodge of government and non-governmental actors. The legislation recognized "the private, independent, self-regulatory, nonprofit corporation, to be known as the 'Horseracing Integrity and Safety Authority,'(Authority) . . . for purposes of developing and implementing a horseracing anti-doping and medication control program and a racetrack safety program."[33] In October 2020, the leading thoroughbred supporters of the Authority concept named a seven-member nominating committee, which would name the members of the Authority and its committees.[34] The Authority, in turn, is mandated to seek an agreement with USADA that will serve "as the anti-doping and medication control enforcement agency,"[35] but will not be responsible for prescribing drug rules. The Federal Trade Commission (FTC) serves as an oversight body for the Authority.[36] It has to approve the substantive and procedural rules of the Authority[37,38] and determines appeals from final decisions issued by the Authority.[39] Aside from state involvement in racing, there is also private control from the Authority and USADA, and overall federal governmental oversight of the private actors from the FTC.

The question of the coverage by the Authority of other breeds of horses is left to individual racing commissions or breed governing organization.[40] Either the racing commission or the breed organization has the power to elect to make harness racing and/or quarter horse racing subject to Authority control. If the United States Trotting Association agreed to Authority control, for example, all of American harness racing would be subject to regulation by the Authority.[41] If either the racing commission or the breed organization elects to authorize Authority coverage, it must have a financing mechanism in place to pay for the Authority's costs.

As to race day Lasix, the legislation reached a compromise. The Authority will conduct a study of the effect of Lasix on equine health.[42] Lasix will be banned in all two-year-old races and in stakes events.[43] If a racing commission requests, the existing allowance in the state for Lasix can be continued for three years.[44] After the three-year period, only a unanimous vote from the Authority would continue the allowance for race day Lasix.[45]

General Provision of the HISA

The nominating committee[46] is given the power to establish two committees: a Racetrack Safety Standing Committee and an Anti-Doping and Medication Control Standing Committee.[47] Most importantly, the nominating committee names the nine-member Authority Board of Directors. These committees and the Authority board each will have a majority of independent directors who are not from the racing industry. Additionally, there are conflict of interest standards put in place that should eliminate the possibility that individual Authority members will act in their personal financial interests.[48]

The Racetrack Safety committee will focus on establishing and implementing a horseracing safety program, which would include racing surface standards, training and racing protocols, and could include rules governing whip use.[49] The Anti-Doping and Medication committee will advise and assist the Authority in establishing and implementing a medication control policy that will include uniform anti-doping and medication control rules.

The Authority will contract with USADA to enforce the anti-doping and medication control program.[50] Baseline drug rules will be the most stringent of a series of model rules of several non-governmental racing organizations.[51] Other than the potential exemption for Lasix, medications and substances cannot be administered to horses within 48 hours of their next racing starts.

Future rules on medications and substances cannot, unless approved by the Authority and USADA, be less stringent than the baseline rules.[52] Rulemaking is to start with the standing committees and then needs to be approved by the Authority and the FTC.[53]

Enforcement is initially through the Authority, which will charge a violation of its rule and sanction the individuals.[54] The individuals charged can request a hearing with an administrative law judge of the FTC. After that decision, the charged individual can appeal to the full FTC.[55] FTC decisions can then be appealed to the federal courts.

The state racing commissions still have a potential role as well. The Authority may enter into an agreement with a state racing commission to implement the racetrack safety program or, with USADA, parts of the horse racing anti-doping and medication control program.[56]

Constitutional Concerns

Given the opposition of some elements of the racing industry to HISA, it would not be surprising to believe that constitutional challenges will be made to the law. One likely form of the challenge will be to the incorporation of reference of the rules of the non-government organizations that are the baseline drug rules.[57] While there are issues of the propriety of delegating governmental rulemaking to a non-government actor, there are bigger questions over the uncertainties of which of these non-governmental organizational rules will apply when there are conflicts between and among the rules. How does the non-governmental Authority pick and choose which rules to apply from the conflicting rules of various non-governmental actors? How can racing participants know which rules apply?

What becomes of the rules of the racing commission that appear to govern drug testing—not merely the substantive ones, but the procedural ones governing drug testing protocols? For example, a number of states mandate the drug testing of certain horses, including the winners of races. Does USADA's jurisdiction nullify these non-substantive drug rules? Can we even tell whether these state rules on the time, place or manner of drug testing will apply to USADA's drug testing procedures?

There will be anti-commandeering allegations akin to the violation of the anti-commandeering principle of 10th Amendment found in the Supreme Court decision invalidating the Professional and Amateur Sports Protection Act.[58] If the state racing commission elects to have another breed subject to HISA, it is commanded to provide a funding mechanism to cover the Authority's costs.[59] If a state racing commission is to help enforce a component of an Authority program, it "may not implement such a component in a manner less restrictive than the rule, standard, or requirement established by the Authority."[60] There are direct commands issued by the federal government to the states.

Additionally, there is the traditional constitutional argument that a private entity cannot exercise authority over a government licensee.[61] The entire legislative scheme of HISA involves the private Authority and the private USADA exercising control over government licenses.

Fault Lines

Racing Commission Concerns

There is a near certainty that there will be conflicts between the Authority and the state racing commissions. HISA calls on the racing commissions to establish a mechanism to remit fees to the Authority.[62] Apart from the issue of the authority of a racing commission to requisition fees, there would seem to be no political reason for a racing commission to establish a fee remission procedure.

It would make total sense for the racing commission to let the Authority assess the fees.

The issue of whether a racing commission should opt to have other breeds of racing equines subject to regulation of the Authority raises a series of questions. Drug testing is traditionally the main expense of a racing commission. It encompasses veterinarians, equine medical directors, urine and blood collectors, and laboratories. Why would a state racing commission, after giving up its thoroughbred laboratory responsibilities to the Authority, wish to set up its own separate harness or quarter horse laboratory? As harness track owner Jeff Gural has stated:

> It is inconceivable that the state racing commissions are going to want to have two separate methods of regulating horse racing. The thoroughbreds regulated by the Feds and harness regulated by the state. That will never happen and over time all of the states will opt in with or without our input.[63]

The Authority can contract out some of its responsibilities to individual racing commissions, but is there any incentive for a racing commission to accept this delegation? In fact, to what extent will racing commissions wish to stay in operation? Perhaps states will begin the process of deregulating racing, under which racetracks will take over much of the jurisdiction of racing commissions, and the commissions will be left to approvals under the Interstate Horseracing Act and procedural licensing matters.[64]

The racing commissions maintain their power to determine the field of play rules governing the race. The goal is to set a level playing field for both competitors and bettors.[65] However, part of this task involves protecting safety and the riders of horses. There is considerable overlap between the rules of racing and health and safety concerns. The Authority is given jurisdiction over the use of whips. Have the racing commissions lost the power to punish riders for improper whip use? If a rider uses the whip to intimidate a competing horse, or—intentionally or carelessly—strikes another horse with a whip, will the state-authorized stewards retain jurisdiction over these incidents? The use of a battery or an electrical device to stimulate a horse can clearly affect both the outcome of the race and the safety of the horse, but is the use of a battery determined by the Authority or the racing commission? A jockey deliberately trying to injure another rider would seem to be a safety issue, but it can obviously affect the results of the race and has traditionally been one handled by stewards and racing commissions.[66] Is intentional rough riding now a federalized safety issue? Jockey alcohol and substance abuse issues surely affect racetrack safety, but human drug testing has apparently been left to the racing commissions. Racing commissions set standards for jockey helmets and jockey vests. Is this now a national issue? What is the line, if any, between the rules of the race and the issues of safety?

USADA Concerns

USADA regulation is subject to a number of potential issues. While the organization boasts of its work in combat sports, the organization has no experience with equines. It has utilized a therapeutic drug exemption for human athletes that is likely a far more expansive exception for date of competition use of drugs than the use of race day Lasix in horse racing.[67] For the championship fight between Floyd Mayweather, Jr and Manny Pacquiao in 2015, Mayweather received a retroactive exemption for IVs from USADA.[68]

In 2018, the racing commissions tested 266,300 samples.[69] By contrast, USADA tested a total of 12,262 athletic samples in 2018[70] and 14,518 in 2019.[71] Can USADA be ready by July 1, 2022? How does USADA go about accrediting laboratories in a field where it lacks expertise? The racing commissions have a general procedure of testing many horses after each race.[72] Will USADA continue to perform the same level of post-competition testing, or will it rely far more on out-of-competition testing?

Jockey Club Vice-Chairman William Lear has suggested,

> that racing will likely adopt drug-testing policies that do away with requirements for every winner of every race to be tested for a wide variety of therapeutic and performance-enhancing substances. Nearly every major sport in the world has moved in that direction, under a policy called 'intelligence-based testing' that combines mathematical analysis with boots-on-the-ground information gathering.[73]

Will "intelligence-based testing" be sufficient for the sport of racing, which held 36,207 thoroughbred races in America in 2019 with approximately 270,000 starters in those races?[74] American harness racing in 2019 held a similar number of races and an even higher number of runners.[75] It should be noted that the intelligence-based USADA testing in 2019 garnered a total of 533 tips, which produced a total of three announced sanctions involving non-analytical investigations.[76]

Is United States drug testing that much subpar when compared to the rest of the world? The major indicted trainers from 2020 ran their best horses in Saudi Arabia and Dubai.[77] These jurisdictions have the funds to pay for the most advanced drug testing available. Yet, there were no drug positives on these horses.

FTC Concerns

The FTC has much bigger business to pursue than just racing. It has the enforcement or administrative responsibilities under more than 70 laws.[78] It enforces many more laws of greater consequence to the American economy than horse racing regulation. It has no animal welfare

expertise, unlike the United States Department of Agriculture. Federal administrative proceedings are known to be time-consuming. In 2013, the hearing process for Social Security disability claims took 373 days, down from 542 in 2007.[79] By fiscal year 2020, the average processing time was still 386 days.[80] The median time from filing to trial in civil cases in federal courts is currently 28.6 months.[81] Will the FTC be more dedicated to racing regulation than the state racing commissions?

Authority Concerns

With the addition of the "safety" element to the powers of the Authority, further concerns will emerge. Understanding what safety encompasses in racing is a daunting and often unfathomable problem. After numerous studies over several decades, does anyone know for certain whether Lasix hurts or harms horse health? Is there a way to determine what safe use of the whip is, as opposed to what looks best for public consumption? Is there a scientific basis to determine what the proper surface is for racing or what the proper training procedures are for horses? Will the "safety" elements follow science, or will they be equine alchemy, simply following the latest vogue?[82]

While there is a concern over drug use in actual racehorses, the Authority's power does not extend to breeding farms. A horse is not covered by HISA until its first timed and reported workout.[83] Therefore, if someone administers steroids or other powerful drug to a horse before the horse enters its cycle of racing, there is no penalty. The young horse is not covered by HISA. If racing is concerned about safety and drugs, it ought to extend the Authority's powers to include young horses as well.[84]

Similarly, the power to sanction violators of HISA's rules is limited to "covered persons."[85] "Covered persons" are defined as including racing licensees and their horse support personnel.[86] Yet horses can be drugged by anyone, not merely by covered persons. Bettors might want to stimulate or sedate horses. Trainers frequently have enemies, and those enemies might wish to implicate these trainers by administering drugs that they know will be detected by regulators. Surely, the Authority should have the power to penalize anyone who violates its rules.

Conclusion

Most everyone can agree that this was the proper time for a change[87] in racing regulation. However, will this be American racing's road to Damascus,[88] a top flight [89] assault[90] on racing's problems, or will this reform be close but no cigar?[91] Maybe racing will regret[92] this action as a sham.[93] Will racing commissioners give the devil his due[94] and enter into working agreements with the authority, or will they simply forgo[95] dealings with the Authority? Will the Authority work as diligently as John Henry[96] to be a crusader[97] for racing interests, or will it just be a buck passer?[98] Will the constitutionality of HISA be affirmed?[99] It may be best to keep an open mind[100] on the future of racing regulation, but one should understand that upending the status quo in horse racing is always an upset.[101]

Endnotes

1. Public Law No. 116-260 (2020).
2. *Id.* [Title XII will subsequently be referred to as HISA.].
3. HISA § 1202. (14).
4. *See* Joe Drape, *A Call to Clean Up a Sport Is at Last Heeded*, N.Y. Times, (Dec. 30, 2020); *see also* Tim Sullivan, *Obstacle Becomes Advocate*, Louisville Courier-Journal, (Dec. 23, 2020).
5. After HISA passed, Churchill Downs president Bill Carstanjen stated, "This is a pivotal moment for the future of horseracing, a sport that will now be governed by world class, uniform standards across the United States." Press Release, *McConnell Leads Senate Passage of Horseracing Integrity and Safety Act*, Office of Senator McConnell, (Dec. 30, 2020).
6. 166 Congressional Record, S5, 514 (daily ed. September 9, 2020).
7. *Id.*
8. *Id.*
9. See Kieran O'Sullivan, *Nothing Focuses the Mind Like the Threat of Extinction*, Sunday Independent, (Sept. 27, 2020).
10. H.R. 1754, 116th Cong.
11. *See* Congressional Record, H4, 983, (daily ed. Sept. 29, 2020).
12. A similar concern for animal safety has brought about a near end to the sport of greyhound racing. "In 2021, greyhound racing will take place at just four tracks in three states: Arkansas, Iowa and West Virginia. And only West Virginia doesn't have a date for an expected phase out." Tracey McManus, *Greyhound Racing in Florida Ends Next Week*, Tampa Bay Times, (Dec. 14, 2020).
13. In 2006, Kentucky Derby winner Barbaro died as a result of an accident suffered in the Preakness Stakes. In 2008, Eight Belles broke down after finishing second in the Kentucky Derby and was given a lethal injection.
14. Jerry Bossert and Christian Red, *Brown's Legal Doping a Big Concern*, N.Y. Daily News (May 16, 2008).
15. *See* Walt Bogdanich, Joe Drape, Dara L. Miles and Griffin Palmer, *Mangled Horses, Maimed Jockeys*, N.Y. Times (March 25, 2012); Walt Bogdanich, Joe Drape, Dara L. Miles and Griffin Palmer, *Big Purses, Sore Horses, and Death*, N.Y. Times (April 30, 2012); John Cherwa, *Horse Racing; Horses' Deaths Raise Questions in Race Industry; Santa Anita Toll Hits 30*, L.A. Times (June 23, 2019). "The fatality rate in the United States is two-and-a-half to five times greater per race start than the fatality rates in Europe and Asia," H. Rept. 116-554 at 17 (2020) [hereinafter House Report].
16. *See Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings*, Press Release, U.S. Attorney's Office, Southern District of New York (March 9, 2020). *Manhattan U.S. Attorney Charges 27 Defendants in Racehorse Doping Rings*, USAO-SDNY Department of Justice. The trainers included Jorge Navarro, who won 30.7% of his races from 2017-2019 and Jason Servis, who won 30.1% of his races during that time period. Servis trained the horse Maximum Security, who was named the nation's top three-year-old colt in 2019. He won six of eight races. He finished first in the Kentucky Derby but was disqualified for interference.
17. Robert Klemko, *The Rise and Fall of Jorge Navarro, The Alleged Doping King of Horse Racing*, Washington Post (March 27, 2020).
18. H.R.1733, 112th Cong.; S.886, 112th Cong.
19. Congressional Research Service, Bill Summary for H.R. 1733, H.R.1733 – 112th Congress (2011-2012): Interstate Horseracing Improvement Act of 2011 | Congress.gov | Library of Congress.
20. H.R.2012, 113th Cong., S. 973, 113th Cong.

21. H.R.2641, 114th Cong., There was also the Thoroughbred Horseracing Integrity Act of 2015, H.R.3084, 114th Cong. *See generally* Peter J. Sacopulos, *Pitts vs. Barr-Tonko Bills: An In-Depth Comparison of Proposed Anti-Doping Legislation in Horse Racing*, 9 Ky. J. Equine Agric. & Nat. Resources L. 37 (2016).
22. H.R.2651,15th Cong.
23. S.1820, 116th Cong. *See also* Racehorse Doping Ban Act of 2019, S.1488, 116th Cong.
24. *See Gambling in America: Final Report of the Commission on the Review of the National Policy Toward Gambling*, 2a. (1976).
25. 15 U.S.C. § 3001, Public Law 95-515, 95th Cong.
26. *See* Steven Crist, *Federal Threat Spurs Thoroughbred Drug Reform*, N.Y. Times (Sept. 10, 1980). "Most ominous to the racing establishment, which overwhelmingly opposes the bill, it would bring racing under the regulatory jurisdiction of the Drug Enforcement Administration, an arm of the Justice Department."
27. Matt Hegarty, *Some Resistance, Questions Remain Despite McConnell's Support of Federal Horse Racing Legislation*, Daily Racing Form (Sept. 1, 2020).
28. About one-third of states offer pari-mutuel wagering on quarter horses.
29. New York State Gaming Commission, *2019 Annual Report,* https://www.gaming.ny.gov/about/index.php?ID=3 [last viewed January 14, 2021]. Nationwide, there were 3,424 harness racing programs run in the United States in 2019. *See* United States Trotting Association, *U.S. Harness Racing Wagering and Purses up in 2019*, January 6, 2020, http://ustrottingnews.com/u-s-harness-racing-wagering-and-purses-up-in-2019/.
30. New Jersey Racing Commission, *2019 Annual Report* 30 (2020).
31. *See Faraldo Issues Statement About USTA vs. HISA*, Harnessracing.com (Oct. 25, 2020), https://www.harnessracing.com/news/main/faraldo-issues-statement-about-usta-vs-hisa-10-25-2020.
32. *See* Kieran O' Sullivan, *supra* note 9.
33. HISA § 1203(a).
34. *See* Matt Hegarty, *Seven Named to Committee to Select Board for Horseracing Integrity and Safety Authority*, Daily Racing Form (Oct. 6, 2020); Press Release, *Blue-Ribbon Nominating Committee Formed to Select Horseracing Integrity and Safety Authority Board Members*, Paulick Report, (Oct. 6, 2020). The co-chairs of the nominating committee are Leonard Coleman, the former president of baseball's National League and Dr. Nancy Cox, dean of the College of Agriculture at the University of Kentucky. Nothing in the press release indicates who selected the nominating committee and what enabled these groups or individuals to select the nominating committee. Per the website of the Coalition of Horse Racing Safety, the "incorporator" named the nominating committee. *See* http://www.horseracingintegrity.com/.
35. HISA § 1205(e)(1)(A).
36. HISA § 1204.
37. *Id.*
38. HISA § 1205(c)(2).
39. HISA § 1209.
40. HISA § 1205(l).
41. The same would be true of an election by the American Quarter Horse Association. It would place all of quarter horse racing under Authority control.
42. HISA § 1206(e)(1). *See generally* House Report *supra* note 15, at 26.
43. HISA § 1206(f)(2).
44. HISA § 1206(f)(1).
45. HISA § 1206(e)(3).
46. *See supra,* note 34.
47. House Report, *supra* note 15, at 24.
48. *Id.* at 25.
49. HSIA §1207(b).
50. HISA §1205(e).
51. HISA § 1206(g).
52. *Id.*
53. HISA § 1204.
54. HISA § 1208.
55. HISA § 1209.
56. HISA § 1211.
57. *See generally* Emily S. Bremer, *Bureaucracy Unbound: Can Limited Government and the Administrative State Co-Exist?: Article: Incorporation by Reference in an Open-Government Age*, 36 Harv. J.L. & Pub. Pol'y 131 (2013); Jonathan R. Siegel, *The Use of Legislative History in a System of Separated Powers*, 53 Vand. L. Rev. 1457 (2000).
58. *Murphy v. N.C.A.A.*, 138 S. Ct. 1461 (2018). *See also New York v. United States,* 505 U.S. 144 (1992). It may be that if a court found a violation of the 10th Amendment it would strike out the offending provision, without invalidating the full statute.
59. HISA § 1205(l)(2). It is questionable whether a racing commission, acting without the legislature, can mandate a funding mechanism.
60. HISA § 1211(a)(2).
61. *See Fink v. Cole*, 302 N.Y. 216 (1951) finding that the delegation to the private Jockey Club that gave the Club significant authority in the licensing decision of the State Racing Commission was an abdication of legislative power. *See also* Conor R. Crawford, *Nutraceuticals in American Horseracing: Removing the Substantive Blinkers from National Racing Legislation*, 23 Animal L. 163 (2016). On the general issue of delegation of functions to private entities, *see* James M. Rice, *Note: The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations,* 105 Calif. L. Rev. 539, (2017); Gillian E. Metzger, *Privatization as Delegation*, 103 Colum. L. Rev. 1367, (2003).
62. HISA § 1203(f).
63. HRU Feedback (2020-10-10) – *Letters to the Editor*, Harness Racing Update, https://harnessracingupdate.com/2020/10/10/hru-feedback-2020-10-10-letters-to-the-editor/.
64. Interstate Horseracing Act of 1978, *supra* note 25.
65. Despite the HISA move to national uniformity, racing commissions will continue to have their own separate rules of the race.
66. The star rider Eddie Arcaro was suspended for a year in 1942 by racing officials in New York for trying to injure rider Vince Nodarse in a race. The stewards asked Arcaro "if he had deliberately tried to drop Nodarse over the rail. No, Arcaro said, 'I was trying to kill the SOB.'" Steve Jacobson, *He Rode to Win*, Newsday, November 16, 1997. *See also* Frank Graham, *Setting the Pace*, Asbury Park Evening Press (Aug. 10, 1943).
67. Horse racing has no therapeutic drug exemption. USADA in 2019 granted 477 therapeutic use exemptions out of 884 applications. Only 45 were formally denied. U.S. Anti-Doping Agency, 2019 Annual Report, 29, https://www.usada.org/wp-content/uploads/2019-USADA-Annual-Report.pdf.
68. Todd Dewey, *Report: Floyd Mayweather Received Banned IV's Before Pacquiao Fight*, Las Vegas Review-Journal, September 9, 2015.
69. *See Legislation to Promote the Health and Safety of Racehorses* focusing on H.R.1754, the "Horseracing Integrity Act of 2019," before the House Energy and Commerce Subcommittee on Consumer Protection and Commerce (testimony by Edward Martin, President and CEO, Association of Racing Commissioners International, Inc.).
70. *Id.*
71. *See* USADA 2019 Annual Report, *supra* note 67.
72. Matt Hegarty *supra* note 27.

73. *Id.*

74. *2020 Jockey Club Fact Book*, http://www.jockeyclub.com/default.asp?section=Resources&area=11. This is based on an average of approximately 7.5 starters in the 36,207 races.

75. The United States Trotting Association reported that in 2019 there were 35,714 pari-mutuel races with 283,080 total starts. Email from Dan Leary, director of marketing and communications, United States Trotting Association to author (January 25, 2021) (on file with author).

76. 2019 USADA Annual Report, *supra* note 66, at 55. In fact, despite its intelligence-based testing, USADA in 2019 found a total of 120 potential drugging violations, of which only 29 resulted in a sanction.

77. Manhattan U.S. Attorney Charges 27 Defendants, *supra* note 16.

78. Federal Trade Commission Annual Performance Report for Fiscal Year 2020, https://www.ftc.gov/system/files/documents/reports/annual-performance-report-fiscal-year-2020/p859900fy2020performanceplan.pdf.

79. *Judges' Lawsuit: Disability System 'in Crisis,'* Chicago Daily Herald, (April 20, 2013).

80. SSA_Final_FY_2020_Annual_Performance_Report_01_19_2021_Signed.pdf 13 SSA Annual Performance Report Fiscal Year 2020 41 (2021).

81. United States District Courts—National Judicial Caseload Profile fcms_na_distprofile0331.2020.pdf (uscourts.gov).

82. Racing's ideas on what constitutes a safe track surface have constantly changed. In 1963, the Meadows, a harness track in western Pennsylvania, installed 3-M's "Tartan" track. Several years later, Calder and Tropical in South Florida added a "Tartan" track. The "Tartan" track was supposedly safer because of its consistency and absence of holes. It did not prove to be successful. Aqueduct in the 1970s constructed an inner dirt track that had added salt, which would be safer in the winter because it would prevent the track from freezing. Remington Park in the 1980s built an all-weather Equi-Track, which was designed to be safer and more consistent. Synthetic tracks in the 21st century came into style, then were frequently replaced and may be coming back into style. *See* Stan Bergstein, *Synthetic Experiments Meet Similar Fates*, Daily Racing Form, October 19, 2010; Red Smith, *Synthetic Track Proves a Success*, Buffalo Courier-Express, June 30, 1963. Safety in racing is much like the 1957 musical, "The Music Man." Not only is there a potential for charlatans like Harold Hill to pose as safety experts, but the end objective of safety, much like the song "Shipoopi," is a goal that's hard to get.

83. HISA, § 1202(4)(A).

84. *See* Edward Martin testimony, *supra* note 69. "It is not unreasonable to ask why drugs need to be given to horses that have never raced and have not been injured. This gap in the regulatory structure must be closed, either governmentally or by an NGO."

85. HISA § 1208(d).

86. HISA § 1202(6).

87. Time for a Change won 5 of 9 races lifetime and defeated the previously unbeaten Devil's Bag in the 1984 Flamingo. This was the only defeat in Devil Bag's career.

88. Hall of Famer Damascus was the Horse of the Year in 1967.

89. Hall of Famer Top Flight won 7 of 7 races in 1931.

90. Hall of Famer Assault won the Triple Crown in 1946.

91. Hall of Famer Cigar won 16 consecutive races from 1994-1996.

92. Hall of Famer Regret was the first filly to win the Kentucky Derby in 1915.

93. Sham finished second to Secretariat in the 1973 Kentucky Derby and Preakness.

94. Devil His Due won 11 races including the Pimlico Special, the Gulfstream Park Handicap and the Suburban Handicap in 1993.

95. Hall of Famer Forego was horse of the year for three consecutive years from 1974-1976.

96. Hall of Famer John Henry was the horse of the year in 1981 and 1984.

97. Hallo Famer Crusader won 9 races in 1926 including the Belmont Stakes.

98. Hall of Famer Buckpasser won 13 races and was the horse of the year in 1966.

99. Hall of Famer Affirmed won the Triple Crown in 1978.

100. Hall of Famer Open Mind won 12 of 19 races lifetime.

101. Upset in the 1919 Sanford was the only horse ever to defeat Man o' War.

Bennett Liebman is a Government Lawyer in Residence at the Government Law Center of Albany Law School and an adjunct professor of law. In his three-decade career in New York State government, he served as a counsel to Mario Cuomo, a member of the State Racing and Wagering Board, and a deputy secretary for gaming and racing for Governor Andrew Cuomo.

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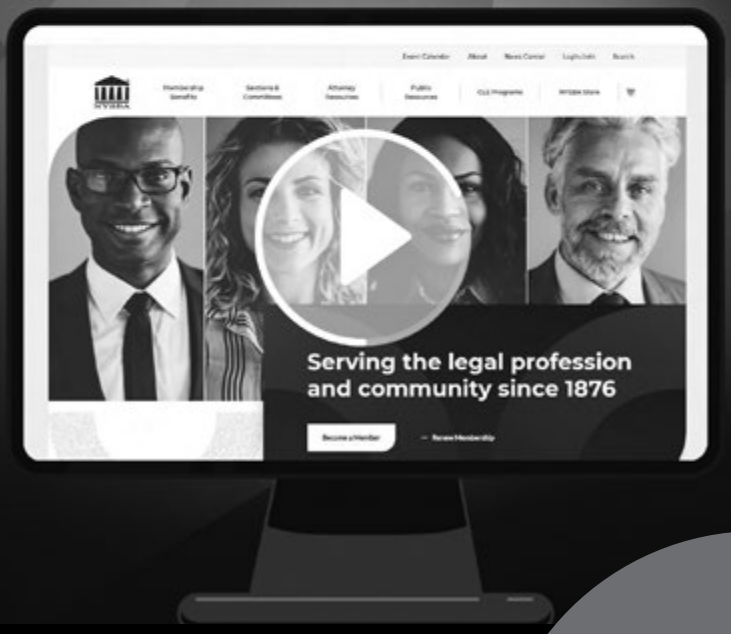

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NEW YORK STATE BAR ASSOCIATION
ENTERTAINMENT, ARTS AND SPORTS LAW SECTION

ANNUAL MEETING

Day One: January 19, 2021

WELCOME AND INTRODUCTION OF PROGRAM

Section Chair:

Barry Werbin
Herrick Feinstein, LLP
New York, NY

Program Co-Chairs:

Anne S. Atkinson
Pryor Cashman LLP
New York, NY

Judith B. Bass
Law Offices of Judith B. Bass
New York, NY

Cheryl L. Davis
Authors Guild
New York, NY

Joan S. Faier
New Rochelle, NY

SIMONE SMITH: Good afternoon, my name is Simone Smith. I am a CLE Program Manager with the New York State Bar Association. We would like to welcome you to today's program, the EASL virtual Annual Meeting, 2021, day one.

I would now like to give over the webinar to the Chair of the EASL Section, Barry Werbin. Take it away, Barry.

BARRY WERBIN: Thanks very much. Good afternoon everyone, and welcome to the 2021 Annual Meeting of the Entertainment, Arts and Sports Law Section, which we affectionately call EASL.

My name is Barry Werbin, and I am very proud and honored to be Chair of the EASL Section, especially at such a precipitous time in our history.

EASL has over 1,300 members throughout the state of New York and beyond, and addresses legal and business issues that are important to its constituent groups and markets, including sports of all kind, athletes, professional, collegiate teams and leagues, agents, and industry service providers. The arts, in all its myriad forms, including artists, galleries and museums, and online markets, and all aspects of the entertainment markets, including music, theatre, film, publishing, digital media, radio, and TV.

The past 10 months have been particularly brutal to the industries that EASL serves. The COVID-19 pandemic has decimated Broadway, movie theatres, museums, galleries, event venues, and brick and mortar bookstores, impacting the lives of so many actors, stage hands, musicians, athletes, writers, and college and pro sports teams and leagues. At the same time, the call for diversity and the need to address racial injustice in our society rang loud and clear.

Our EASL Annual Meeting Programs address some of these critical issues covering the impact of COVID-19 on sports in the U.S. and globally, the benefits and challenges of ADR in the arts and entertainment industries during the pandemic and thereafter, and a two-part diversity program next Tuesday afternoon that will focus on the publishing industry.

This will be the first of an ongoing multi-part program on diversity in the arts and entertainment industries that will continue throughout 2021. Diversity is one of EASL's primary focuses this coming year and thereafter.

I urge all of you who are not already EASL members to please join our section. As a State Bar Member, the regular EASL additional membership fee is very modest, but the benefits are great.

It's easy to become involved once you're a member in one or more of our many industry and topic-focused committees, which cover all the markets I just mentioned, as well as copyright, trademark, publicity rights, ADR, and relevant legislative developments.

We are honored to also offer the annual Phil Cowan-Judith Bresler Memorial Scholarship writing competition for law school students. Two winners will be announced at next week's January 26th second Annual Meeting session. $2,500 scholarship awards will go to the two winners and will be applied to their ongoing legal education. Motivating and helping law students network and get exposure to experienced practitioners in their fields of interest is another important ongoing EASL goal.

Other benefits of membership include getting our fabulous *EASL Journal*. We are always looking for contributing writers. And I want to thank our Editor par excellence, Elissa Hecker, for her endless devotion to the *Journal* and our Blog.

That leads me to the EASL Blog, where we welcome submissions on any new matters of interest to our constituent markets, whether cases, legislative developments or business interests, and again, Elissa oversees that as well, and we thank you. And of course, our many CLE and non-CLE programs, including member and committee specific informal meetings on topics of interest, often featuring very informative speakers and roundtable questions.

And last, the opportunity for networking among experienced practitioners and your other colleagues is a great benefit of EASL. It's particularly beneficial for our law student members, who I believe can still join EASL for free, once they are New York State Bar Association student members.

We love our students, and this past year we reactivated our Law Student Committee to help attract more student members. So if you're not already an EASL member, what is holding you up?

I would like to thank our Annual Meeting program planners and our liaison with the State Bar, Ms. Dana Alamia, for all their hard work and dedication in helping to put together the terrific programs we have in store for you today and next week.

I want to thank our other officers on our EASL Executive Committee for their dedication: Ethan Bordman, our Vice Chair; Kathy Kim, our treasurer; our outgoing secretary, Bob Seigel; and our new incoming secretary, Isaro Carter.

I'd now like to introduce a representative from the New York Bar Foundation, Ms. Deborah Auspelmyer, which the Foundation helps right injustice, provide access to pro bono legal services, and train the next generation of young professionals to advance in the law.

DEBORAH AUSPELMYER: Thank you so much, Barry, and thank you for welcoming the Foundation today as you kick off your Annual Meeting week.

I just wanted to take some time to talk to you a little bit about the Foundation, and let you know that your Foundation impacted more than five million of our neighbors in need of legal services throughout New York State this past year.

I would like to share a grant highlight. Why is this important? Because we all know a veteran we can appreciate. Through a grant to legal services of the Hudson Valley, you helped veterans with critical needs. Eight hundred and ninety-five people were affected by this one grant, a disabled veteran with PTSD who supports his adult daughter and grandchildren who live with him.

He had received notice of overpayment for his veteran's benefits, which resulted in a two-thirds reduction and subjecting him to wage garnishment. With legal assistance from the grant, he succeeded in stopping the garnishment of his veteran's benefits and was able to continue payment of his rent and supporting his family, something that is certainly important in these crazy times.

This type of access to justice is at the heart of our mission and is fundamental to the rule of law. It is important to improving economic fairness and social equity, and aides in achieving greater inclusion and fairness. And as Barry noted, it is more important now than ever.

Last year we also conducted a COVID-19 emergency legal relief campaign, which resulted in raising $100,000 to help people impacted by this horrific pandemic and in need of legal services. Many of the NYSBA Sections participated in this initiative, including your Section, thank you very much.

We also raised more than $19,000 for veterans in need of legal services through the online 24-hour campaign, and funded $236,000 in law student scholarships and fellowships, as we also value the importance of the law students. The Foundation distributed more than a half a million dollars in grants for critical quality of life issues touching on domestic violence, health care, and COVID-19-related matters, thanks to your gifts. Together we do make a difference.

I invite you to help us to continue to do this good work by making a personal gift in honor of someone you might know who's receiving an award this week or perhaps in memory of someone that was special to you as part of our Annual Meeting week campaign.

I invite you to become a legal hero today. Thank you so much for your time.

BARRY WERBIN: Thanks very much, Deborah, and again, for highlighting the very important and critical work the Foundation is doing, particularly in these challenging times.

I next want to thank our terrific sponsors who have really helped us here, because EASL itself is experiencing financial challenges because of the lack of in-person CLE programs and other issues. And the sponsors have really come out to help us this year.

So, starting from our three Bronze sponsors, I first want to thank Arts Minutes, which offers company formation and related services for those in the entertainment fields. Their current mission is to amplify the voices of Women, Black, Indigenous and People of Color, LGBTQ, under-represented, and emergent filmmakers.

Next, I want to thank 101 Productions, which has been providing Broadway, touring, and live event management services for over 25 years. As active members of the Broadway League, they are on the forefront of bringing Broadway and live theatre back to New York and to the road as soon as possible, and they look forward to tackling the challenges ahead.

Last, but certainly not least, I want to thank my own law firm, Herrick Feinstein, for being a Bronze sponsor. Herrick is a full-service regional firm based in New York and New Jersey, with a diverse practice cutting across all aspects of litigation, corporate real estate, bankruptcy, tax, trust, and estates.

The firm has a well-known prestigious national and international art law practice, along with a top regional and national sports law group, and an IP and technology practice, which I head up.

Next, I'd like to thank our Silver sponsor, JAMS, which needs little introduction. JAMS is the world's largest private alternative dispute resolution provider, with a panel of neutrals including more than 400 retired state and federal court judges and attorneys with proven track records and extensive practice area and industry experience.

JAMS provides efficient, cost effective, and impartial ways of overcoming barriers at any stage of a conflict with their customized dispute resolution services through a combination of industry-specific experience, first class client service, top notch facilities, and highly trained panelists.

And finally, I want to give a special thanks to our terrific Gold sponsor, iBERIABANK First Horizon, which has a unique national focus on sports and entertainment banking that recognizes the unique financial challenges to those industries.

The following video presentation from T.J. Reichmann from iBERIABANK First Horizon will tell you more about the services they offer to the sports and entertainment industries.

T.J. REICHMANN: Thank you for the introduction, Barry. I'm so happy to be here today with you to introduce the first panel for the New York State Bar Association, Entertainment, Arts and Sports Law Section 2021 Annual Meeting.

My name is T.J. Reichmann. I'm with iBERIABANK-First Horizon Sports and Entertainment Group. For those of you who don't know us, our two companies recently merged and will soon operate as First Horizon. Together we're a full service, $85 billion regional bank operating in 12 states with over 130 years in the banking industry. Our New York headquarters are located right here in midtown Manhattan.

A little bit about myself, after a successful collegiate lacrosse career, I moved into banking and have been in the industry for over 16 years. My role at iBERIABANK is working specifically with our individual athletes, entertainers, and their attorneys to help their clients reach their financial goals.

As rewarding as this can be, it doesn't come without challenges. And speaking of challenges, 2020, what a year. From event cancellations, re-openings, sports bubbles, and the familiar ongoing question of when will we return to normal?

Artists and athletes have been at the forefront of knowing how to pivot to new and innovative business ventures throughout this past year. 2020 was definitely a year of trying to figure out how we can still be in the game, but play it safe, so to speak.

With that said, we are really proud to be partnering with the EASL Section to bring you "The Impact of COVID-19 on Sports; A Legal Perspective—Part II," which is a follow up from the Part I offered in June of 2020.

Now, without further ado, I'll turn the mic over to start the panel discussion. Thank you so much, and have a great day.

BARRY WERBIN: Thanks very much, T.J., we appreciate that, and the services you are offering to our constitute industries.

So, without further ado, I will turn the program over to our first panel on the impact of COVID-19 on sports, and introduce our moderator, Jill Pilgrim.

THE IMPACT OF COVID-19 ON SPORTS: A LEGAL PERSPECTIVE—PART II

Moderator:

Jill Pilgrim, Esq.
Pilgrim & Associates Law Office
New York, NY

Speakers:

Derrick Crawford, Esq.
Managing Director of Enforcement, NCAA

Bernhard Welten
Founder and Partner in the law firm of KanzleiWelten
Bern, Switzerland

Brian D. Stanchak
Founder and President, The BDS Agency
Mountain Top, PA

Stephen Starks, Esq.
Counsel, Bryan Cave Leighton Paisner LLP
(Former IndyCar Series Vice President of Promoter and Media Relations)
Indianapolis, IN

JILL PILGRIM: Thank you, Barry, and welcome everybody this afternoon. We appreciate that wonderful introduction and the acknowledgement of our sponsors, and here we go.

"The Impact of COVID-19 on Sports: A Legal Perspective—Part II," presented by the EASL Section. And what I'm going to do now is give you a brief review of the panelists. For the full biographies on the panelists, that is in their course materials. I'm going to quickly hit some highlights so that you can be in awe as I am of the incredible talent and experience and knowledge that's represented on this panel.

First, we have Derrick Crawford, who is the managing director of enforcement for investigations and processing for the National Collegiate Athletic Association. He is responsible for providing leadership and oversight of the NCAA's investigations and processing department for all three NCAA divisions. Before that, he worked at the NCAA as a director of enforcement for football. And previous to that, he served as associate vice president for diversity, educational equity and ombudsperson at California State University at San Marcos; it goes on.

His incredible experience also includes working for 11 years at the National Football League. His last position there was the NFL's director of human resources for media, where he was based in Los Angeles.

Prior to that, Derrick was assistant general counsel in the Office of the Alabama Attorney General. And previous to that, Derrick was a special agent with the Federal Bureau of Investigation. He obtained his undergraduate and law degrees from the University of Alabama. Welcome, Derrick.

Next, we have as a panelist, Bernhard Welten, who is a founder and partner in the law firm of KanzleiWelten.

We welcome him to add his insights on mergers and acquisitions and sports practice. He is also a Court of Arbitration for Sport Arbitrator. Mr. Welten also received an LLM degree from Duke University School of Law.

We also have Adam Neuman, who is the chief of staff, strategy and operations at the Big Ten Conference. Adam works with Commissioner Kevin Warren. And prior to serving in the role he has now, he was a corporate associate at Simpson Thacher & Bartlett in the Capital Markets Division.

He obtained a joint degree in law and MPA at the University of Pennsylvania Law School and the University of Pennsylvania's Fels Institute of Government.

Adam also obtained a Certificate in Business Management from the Wharton School. Prior to that, he was manager of communications and lead speech writer to the president of Yeshiva University. He earned his B.A. in Political Science, magna cum laude, from Yeshiva University.

Outstanding panelists continue. We have Brian D. Stanchak, the founder and president of The BDS Agency. His experience includes being the Collegiate director of athletics and representing NCAA Division 1 basketball coach clients. In his previous iteration of business, he was the director of athletics at Penn State University, and he served 10 years as an assistant basketball coach at the Division 1 level. Brian has taught Sports Management at Misericordia University and obtained his master's degree in Sports Management Studies, Intercollegiate Athletic Administration from California University of Pennsylvania.

We also have Stephen Starks, who is currently counsel to the law firm Bryan Cave Leighton and Paisner. He focuses in their Washington Office in guiding the Sports and Entertainment Properties Division.

Prior to joining Bryan Cave, Stephen was vice president, promoter and media partner relations for IndyCar. Prior to serving with IndyCar in that capacity as vice president, he spent two years as deputy general counsel for Hulman & Co., which is now the Penske Entertainment Corp., the parent company to IndyCar, Indianapolis Motor Speedway, and IMS Productions.

So, let's jump into it. We have this awesome panel who has all this great knowledge to share with us. So, we're going to jump off talking to the panelists about what they are talking, and getting their feedback on where we are now.

We wanted to start with just giving you a flavor of the media that is nonstop that we've been seeing this year, about all the issues that attenuate with sports trying to function; starting, stopping, not starting, all different combinations of things. So, some of the big news has been that Stanford dropped 11 of its sports attributable to the pandemic. The Big Ten's decision to play football after deciding not to play. Maybe we can get Adam to talk about that.

Currently, the NBA is having to cancel a lot of games even though the NBA is generally seen as the league that has had the most success so far with getting a season under its belt during the heavy part of COVID-19 when it first started. One could argue the NFL has also had some great success; all have had hiccups.

Then we get into coaches—the controversies involving coaches' pay in the era of pandemic at the collegiate level. And surely, we will get Ryan to speak about that.

Meanwhile, over in Europe, soccer, football over there, seemed to be getting most of their matches done. And it will be interesting to hear why we think Europe was able to make that happen in a way that we weren't able to do it here.

Then NASCAR went somewhat virtual, in addition to getting some races under its belt.

So, let's talk to the panel and just see from a legal perspective, as well as a business perspective, how things have moved forward. And as we have gained experience with COVID-19, and been able to now see how other sports have managed themselves.

So, we're going to start off by, let's ask Adam. Adam if you can un-mute yourself and talk about how, as the athletic season started in the fall, and the academic season. What was your big challenge in dealing with student athletes and college sports?

STEPHEN STARKS: Sure. Thank you, Jill. And really a privilege to be on this panel today with these esteemed professionals, so great to be here with the New York State Bar Association.

When I started with the Big Ten Conference about a year ago on January 1st of 2020, the Commissioner made a bold goal to visit all 350 teams across 14 universities and 11 states. It was something that had never been done before. I think in general sometimes collegiate leagues focus more on the revenue-generating sports. But Commissioner Warren, and myself, and our office felt that in order to get a really good handle on what student athletes wanted, we needed to meet them, we needed to eat with them, we needed to laugh with them, and we needed to go to their games.

We actually got to see 104 games out of 350 prior to the pandemic really halting sports when we had to cancel, unfortunately, our men's basketball tournament back last March. And from March until we decided to play again, which as you noted and alluded to, did include a pause and play, we really wanted to play all along, that was the goal. But to Commissioner Warren, health and safety always will remain in the forefront of the discussion.

When we decided to pause, we received a lot of flack; it wasn't easy, not all of the other leagues decided to pause as we did. But what we found during the pause, and I think it was about 40 to 60 days, we found that through rapid antigen testing, that through that test, which was not the gold standard by any means at point, it was really PCR testing, the brain buster that goes all the way up the nose, we felt that through rapid antigen testing, we can test athletes and if someone was positive, we could remove them in time from infecting the rest of the team.

From a legal perspective, this was probably one of the most challenging legal times of my career, and I believe of the commissioner's career, trying to line up an organization that would provide the rapid antigen testing. Then you need people on the ground, medical nurses that are actually swabbing, collecting, testing. We performed validity testing on the test to ensure that not only are there not false positives, but there aren't false negatives.

Then the schools themselves wanted to conduct additional PCR testing on top of the antigen testing for di-

agnostic purposes, creating what was known in the legal field as a surveillance program.

So, sort of putting this together in, I believe, 15 days with the wonderful law firm of Jones Day, and a hundred other consultants all across the country, we were able to put together what we thought was the most robust, and intentional, and thoughtful testing program in the country, testing between six and seven days a week on all sports for football, basketball, and hockey.

Now as we progress into Olympic sports, the NCAA has thoughtfully decided what is high contact, what is medium contact, what is low contact, and they have provided either higher or lesser degree of testing provisions. But really, it all went back to the idea that student athletes want to play. They came to college, they received scholarships because they wanted to play and perform. And we felt to be able to get a field of clean athletes, it wasn't perfect. Testing, as we always like to say, is not preventative of the illness, it simply tests the actions that are reflective of the people that are being tested. So, if you're not putting on your masks, if you're not having the opportunity to stay six feet apart, if you're not being safe, you're going to be in trouble, no testing is going to prevent you from that. But we sit here today feeling very positive that with the help of the chancellors and presidents of our universities, with all the medical help from the NCAA, and from all of our institutions, that we have a program and a protocol in place that keeps our athletes safe in the midst of what is absolutely, and I'll be the first one to say it, an unprecedented—I know that becomes the line of the year, an unprecedented time in college sports.

So, we're happy to be here. We were happy to see Ohio State make it to the National Championship. And just a really taxing, exciting, challenging year for the Big Ten, but we're happy to be standing, and we're happy that we're about to be beginning on another 20 sports, and doing it in a very responsible and thoughtful way.

JILL PILGRIM: Indeed, so much has been happening in college sports. And you have spoken about protecting the athletes. Let's also talk about the coaches.

So, Brian, huge in the Power Five football, basketball sports. You have these coaches making huge amounts of money, but there are thousands and thousands of coaches across the spectrum of collegiate sports. How did COVID-19 impact your bread and butter, which is negotiating on behalf of college coaches?

BRIAN STANCHAK: Sure, well thank you so much for having me. Really happy to be here and asked to partake on this great panel. Yeah, it's certainly been a challenge, especially with representing college basketball coaches because all of a sudden everything's looking great and then the conference tournaments are going on, and everything comes to a complete halt. And so, I think with negotiations, just being extremely sensitive to the fact that now there's a lot of other things that are on the plate so that athletic administrators, not just financially, but stress-wise. And so being able to navigate that without pissing anyone off while they're stressed with everything, and just being able to be sensitive financially and what-not. But coaches have been impacted tremendously, and not just coaches, but athletic departments, staff members, and university staff members as a whole.

I've had clients that have faced "voluntary" salary reductions. And I say that in quotations, because when a coach is under a multi-year contract, it makes it very challenging to be able to just give them a salary reduction, and so it almost has to be voluntary. And as long as the ask has been reasonable, there has not been one client that I've told not to take a voluntary salary reduction to help out their university. But they've also faced furloughs, elimination of staff positions. Positions that have been open on their staff have not been able to be filled, decreased budgets, which we'll talk a little bit about later, suspension of bonuses.

I've had clients where—I have one client—and if you're familiar with women's basketball, you know, UCONN was the dominant force in the AAC, and I represent the head coach in the University of South Florida, he's been runner up in the conference for years. I'm like, this is not the year to forgo those bonuses for conference championships, because this is the year you can get them. But coaches have had no 401K or 403B matches by the university, suspension of stipends, whether it's car, cell phone stipends, and then again, anticipated raises. There were a lot of discussions that happened before the season in terms of raises, extensions that just couldn't go through.

In addition to job openings, it saved some coaches because universities were being much more cautious with the dollar. We haven't seen it necessarily on football this off season, but you know, when it came to men's basketball and women's basketball last off season, if coaches weren't at the end of their contracts and some that were, it helped give them a little bit of an extra lifeline before universities weren't in a position to afford to terminate them. So, a lot of different factors affecting college basketball and football coaches in general.

JILL PILGRIM: That's great, great information. And I know you've been kept busy by taking those calls from the coaches.

So, we're going to turn to Derrick and ask him some questions as a representative of the NCAA. I do want to make the point that I'm sure Derrick will also make, that you work in a very specific part of the NCAA: You are the police force, prosecuting agency, you're the people at the NCAA that nobody wants to see coming. So how has COVID-19 impacted what you do?

DERRICK CRAWFORD: Thanks, Jill. And again, thanks for the opportunity to participate in the program today. When the tournament was cancelled back in March of last year, it was very difficult for the NCAA, as it's been for many folks in college athletics and professional athletics.

The vast majority of our revenues that operate the Association are derived from the Division 1 Men's Basketball Tournament, about 70%. So, imagine taking a 70% loss in revenue and then still being able to provide services to our members, that's the most important thing that our president, Mark Emmert, talked to us about when the decision was made to cancel the tournament and thereafter. We still need to be able to provide quality services to our members and making sure that we can support our student athletes.

Thankfully, some really really smart people at the NCAA negotiated a great event cancellation and event business interruption insurance that covered a pandemic, if you can imagine that. They had the foresight to do it, and it's made a huge difference in our ability to operate and provide those services to our members and in supporting our student athletes.

The impact on enforcement, I think, really has not been significant. I mean, the entire office, as you all know, has gone through furloughs, so we've all been in a period of non-pay status for awhile. It's impacted some longer than others, but it really hasn't impacted the way we do our business, I guess surprisingly, because you learn to adapt, you learn to do more with less. You learn to be creative in a way that maybe you didn't think you could be, because now you have to be.

So, in our group, in terms of our ability to conduct investigations and process cases, it really has not had a significant impact. The first two months we were working remotely, March and April of last year, with the two most successful months in the history of enforcement in terms of cases we submitted to the Committee on Infractions. The three committees; there's a Division 1, 2 and 3, we submitted 30 cases. And what we found from that was that you can be very effective and efficient in getting your work done, you just have to do it differently.

So, our preferred method is to do interviews, would be to do it in person, but we learned through the use of Zoom and Microsoft Teams and other video platforms, you can do very quality substantial interviews by video.

You take out all the travel and all the other expenses that goes with that, you could still assess the credibility of a witness and information that you receive. And so, we were able to operate very effectively and very efficiently even doing it remotely, we just had to think, and pardon the cliché, thinking outside of the box if you will, and how do we do our work differently, but still knowing we need to be responsive to our members. And even during a pandemic and even during dead periods, violations still do occur, and we have an obligation to investigate those to make sure that those institutions who are abiding by the rules aren't disadvantaged by their commitment to compliance and holding accountability for those that are.

So that's the impact that it had, it's had a significant impact on the overall finances of the association, the distribution that goes back to our members. But from enforcement it's really been negligible, because we just had to think differently, how do we do our work knowing we still have to be accountable, we still have a job to do, but we've got to think about it creatively and how do we get our job done. Surprisingly, and pleasantly, we've been able to do it without a whole lot of disruption. So that's the good story.

JILL PILGRIM: Thank you, Derrick. That's really interesting. So, from across the ocean, we have Bernhard, welcome to our panel today.

BERNHARD WELTEN: Thank you very much, it's a pleasure being with you.

JILL PILGRIM: Okay. And I wanted to ask you a question. Bernhard, first of all, you were great to pinch hit for us and join our panel at the last minute, whenever we're talking to Europeans, whenever I try to have a conversation about sports with Europeans, I find out I'm talking about soccer, like all the other sports don't exist.

So, what's been going on, how has COVID-19 impacted soccer or any other sport or business that you've been dealing with over in Europe?

BERNHARD WELTEN: First of all, soccer is the most important sport here in Europe definitely, definitely. But I'm coming from Alpine Skiing, which is also very important, there are other sports as you can see, and all of them are affected by COVID-19.

Looking back at what's happened in 2020, I still remember, I was on holidays in Lochan, Finland coming back end of February. And in March we had just a lockdown. It started immediately, nothing was going on anymore, no more ski races, no more soccer games, no more hockey games, and we didn't know how we should handle this, and it was a big problem.

In my function I'm also a president of the Swiss Football Licensing Commission, giving the license to the professional teams in Switzerland. So, we had to look at the teams and try and do everything so that they are not going bankrupt.

So, in the first moment, the state already announced that the state will help because the state was forbidding the sport, but we didn't know how.

In the end it was trial and error that we had to do. It was a discussion we started then. When we knew that the first wave was going to end, there were less positive

cases, we said, okay, now we can take the risk and open the shops again, open restaurants, and with this we think we are ready to let people go to the stadiums, it was very restricted.

So, first of all, we started with 1,000 persons, and you can imagine our state inside, not as big as in Germany, or Italy or Spain where they fit 80-90,000, our stadiums are 35,000, but still 1,000 people in such a stadium, it's ridiculous, you don't have any ambiance, you don't have anything, it's terrible to see such a game. But the problems started again. And there were rumors that the state was coming up and saying, oh, it's not very good. In the end, we reduced to 100 persons. Before finally, I'm talking about before finally stopping any person to enter, so it was only the teams being there, the coaches, and beside you had a few staff members which were allowed, but not even the wives of the players or anything, they were not allowed in the stadium.

So, it was like, as we call it, the ghost games. It was terrible, it was the first time you could hear the athletes speaking to each other. You could hear what the coach was screaming to them. And for us it was an atmosphere which is just terrible, you don't want to see this.

Like this, we finished the season, we were able to finish the season. So, the models we had, it was going to survival models for soccer, because everybody knew if we have to stop, it will have a huge impact, our teams are not so wealthy, so we knew if they were going bankrupt, everybody will go bankrupt. So, we have to restart, and we can't allow to rebuild the whole system.

As you know, the sport system, it's in a different way organized than in the U.S., or us, we have the federations. The top team is in the top league often, and below we have at least two other active teams with adults, and then all the junior teams, they're all in the same federation, which means if you stop the professional team generating money to support the junior teams, you can stop everything. So, you have to rebuild the whole sport system, that was a huge problem. And we say, that's why—surviving models, we said somehow we need to try to move on even if it's without spectators, which isn't fun to see, but that's what we had to do and continue as nothing would have happened.

I'll tell you like this, in the beginning when the pandemic came, it was also a huge problem for the testing. We didn't have enough availability for the tests. So that was also a huge problem, how you handle this. And then we said, okay, we have the professional sports, it's a big industry, it's an important thing to see in all Europe. So, we want to test first the players and to be on the safe side there that nothing is happening, so most of the tests were done there. And it was only afterwards when we had enough availability of the testing, that the general population was also able to take tests if needed. But then moving forward, we were discussing in summertime about how to start the new season: Should there be a ghost season, should it be with spectators, everything. In summer, it didn't look that bad here in Europe, because the cases were going back, shops were open, we could do more or less whatever we wanted to do.

In certain areas you had to wear the masks, especially if you go in a shop, but that was it. In a restaurant you had to enter with a mask, when you're sitting at the table you can take it off.

Then, when more cases came back, the second wave started slowly. The problem was again, with the sport, what do you do there. Then September, October, starting the soccer league here. Hockey was not yet—they started only in late October. For hockey we didn't know if a start is possible at all.

I remember I have a season ticket for my local team here, hockey, I was at one game. After the second game they shut down and said, no more spectators, it's over, it's done. So, we had to find the solution between having the sport as entertainment, but also taking care of the teams and everything, that they're not going bankrupt, destroying the whole system we have with the juniors team below, etc., because that would have been a huge shock, and it would have taken forever to build this up again. So that's the rough overview.

JILL PILGRIM: Thank you. Thank you very much, that's so interesting. That's not dissimilar to the college sports model, where a few sports spawn the rest of the sports. Let's turn now to Stephen. Stephen, you are in a sport that, at least from a New York City perspective, I don't hear a lot of conversation about.

I did at one time live in Indianapolis, where both you and Derrick live, and of course auto racing looms large, along with basketball and football in the Midwest. So, talk to us about auto racing, how was auto racing impacted by COVID-19? I know there's spectators, but you can still drive cars around the circle with one driver in a car without COVID-19 concerns, right?

STEPHEN STARKS: Yeah, thanks Jill. 2020 was a crazy year for me, like it was for everybody from a professional and sports perspective.

As you alluded to in the intro, I didn't start at Bryan Cave until fourth quarter of 2020, so my last day at IndyCar was September 30th, and just to kind of give you a frame of reference as to what that meant, my last five years at IndyCar, I've spent as kind of the chief schedule developer, I make all the deals for all the events that we raise. The schedule usually is comprised of about 17 events throughout North America including, as everyone knows, the crown jewel at the Indianapolis 500-mile race.

So, on September 30th, my last day at IndyCar, the last thing I did was turn in the 2021 schedule. And so, working backwards from that you can imagine how diffi-

cult 2020 was, the whole year was spent trying to essentially make two schedules.

It takes about six months to a year to release a schedule for the subsequent year, but the challenge and the wrench that was thrown to us all this year, particularly in my area of expertise at IndyCar, was the fact that in addition to trying to make the 2021 schedule, I had the challenge of trying to re-adjust over and over depending on what was happening circumstantially with the COVID-19 environment, the 2020 schedule that we were living in.

So, if you think about IndyCar, the season usually kicks off in mid-March in the streets of St. Petersburg and ends the third week of September in Monterey, California.

So, when COVID-19 hit, we were literally in St. Petersburg getting ready to kick off the season, and that event was cancelled. And so, the rest of the dominos had to be put in place to try to figure out what we we're going to do. And again, that was squarely within my wheelhouse when I was at IndyCar.

So I literally spent the entire season as the season was unfolding trying to figure out week to week where we were going to race, whether events could happen, and have to get creative as to manipulating the schedule depending on what was happening in local markets with COVID-19.

We added double headers, we moved the Indianapolis 500. We took the event that we started with in the streets of St. Petersburg in March that we didn't have and moved it to the back end of the schedule. Obviously, you can imagine the negotiation with the mayor and the city administration that is required to go into that. I'd still like to say, it was a very very complicated year while we were still trying to figure out what we were going to do for 2021. And I'm proud to say that in 2020 IndyCar did have 14 of the 17 regularly scheduled events at least in number. The schedule looked a lot different than it was originally anticipated to be.

I think the way I kind of break down the challenges that faced us specifically are just—I alluded to one, which was just dealing with the state and local government. It required a keen eye as to what was going on in each market to try to figure out what the landscape was, because what was happening in Illinois was entirely different than what was happening in Indiana from a COVID-19 environment perspective.

So, I think that's one of the things that was really interesting. I think you'll see in the materials that we included, kind of an example of the way we worked on our COVID-19 prescreening protocols at one of our events at Mid-Ohio, and obviously that takes the input and feedback of not only IndyCar at the league, the promoter that controls and organizes the event in the local market, and the local authorities including the health inspector. But those were the kinds of things that we had to navigate on the day-to-day basis to try to figure out whether our events were even going to happen. And we kind of had from a team perspective, understanding the needs and circumstances of our teams and drivers, we kind of had a magic number of how many races they need to get in to have a complete season from a sponsor and just a business operations perspective, and I'll just say that we did exceed that number. So again, proud of the work we were able to do to get those 14 of the 17 events in for 2020, but it definitely was a challenge.

So, the first thing would be state, local, government authorities and then negotiate some general things to figure out what you can and can't do in markets which impact when you might want to move an event and just kind of sit back and wait to see what happens as things develop in a market to see if maybe you could pull that event off later in the year. Big challenge, team effort.

The kind of the second piece in my mind was just the economics behind the events. Obviously, kind of flowing from the first point about what was happening in the local markets, capacity restrictions are imposed on events, and the promoters that organize and control the events, are actually in the business of racing to have these events so that they can make money. If they're told that they can't have fans, then obviously that changes the economics of what they can do with us. It obviously changes the economics of the interest of certain sponsors to activate at events, and whether they're willing to pony up the same type of money to participate in the events. And obviously, if they want to reduce the money that they pay to IndyCar to bring the show, then obviously that impacts what IndyCar can do to kind of subsidize the teams and the participants. So, it's just a vicious ecosystem impact hit that kind of started with what was going on in the local markets.

And then the third overall, Adam obviously mentioned what Kevin Warren was, as did Derrick with Mark Emmert. Obviously, the health and safety of the athletes, and participants and the fans, is obviously first and foremost. But in my mind, it was kind of this general, okay, what can you do in the state and local, what can you do in the state, what can you do in the market, where are the economics behind the event? And then you kind of hit this point where you just had to say, okay, what are we trying to accomplish—do we need to have a double header here, is it worth it, do we need to have this event on this day, or do we just cancel it, or do we try to move it?

Just kind of the general philosophical strategy on what you were trying to accomplish as a sports league, kind of was the third piece that really might have been the most challenging piece, because once you kind of got through some of the hurdles of what can and can't be done from an event perspective, then you had to figure out the why. And I think that we as a league overall, from an IndyCar perspective, did a pretty good job of trying to

figure that out. But you know, like I said, the 2021 schedule was released. I was proud of that before I left IndyCar, but I can tell you that we are normally set to kick off the season, like I said, in March, and the 2021 schedule's already been adjusted because of expectations of what is going to happen by way of COVID-19 in places like Florida and California. And so that schedule will continue to look different. And I think you'll see that sports, all sports have to continue to adjust like we had to adjust. And it was a very challenging year, but I think that hopefully we can see around this curve and get back to normal soon.

JILL PILGRIM: So, I want to ask Stephen, a very specific narrow question for you to address. If you know the answer to this question, from the perspective of the drivers, how were they impacted by not having all those spectators, or was it business as usual for the IndyCar drivers? Were their operations impacted?

STEPHEN STARKS: Well, I think maybe in economic terms, not so much. I think that the events, as I mentioned, getting the events in to a level that was satisfactory to their sponsors in terms of the exposure, they were going to get to keep the cars running and to continue with the business operation, I think was most critical. And that was something that was top of mind for us. It wasn't just an IndyCar move, and what was best for the league, it was thinking about the entire ecosystem, including the drivers and teams, and what can make it work for them.

There's a complicated model where IndyCar also subsidizes full time participants. And the fewer events obviously, there have to be reduced payments to those teams, so that's a part. But I also think that, like I mentioned, from the sponsor's perspective, of the individual sponsors, and teams and drivers, the more events the better for them.

So that was critically important, something that we had at the top of our minds, which is what I mentioned when I said we kind of had that magic number of how many events we had to get in to make sure that it was a situation where the teams could continue to thrive and go forward, and we did hit that, I think.

I think from a performance standpoint, Jill, if that's what you're asking, to be honest with you, it's hard for me to believe that the fan interaction, once the drivers are in the car exceeding speeds of 240 miles per hour around the oval, that the fan, or lack thereof, their presence not being there really has an impact on drivers. Maybe on kind of the buildup to an event. And obviously it's just not what you want to see, even from a TV perspective, events don't look good and it doesn't make the drivers and participants feel good about participating in an event where there are no spectators. So, for a variety of reasons, having spectators at events was obviously the goal and is best for all leagues, you can pull it off—a lot of NBA, but maybe unlike the NBA, our drivers are not as impacted from a performance standpoint as players in those leagues.

JILL PILGRIM: Thank you for that. Bernhard, I want to ask you a very focused question, focus on the players of soccer and how they were impacted in their training. We have included in the course materials a CAS award that deals with soccer playoffs that were impacted by a number of players getting COVID-19, and being quarantined when they flew to another country to play a match, and then they had substitute players who also got COVID-19. So, talk about the impact on the players themselves of COVID-19 and what you've seen in your practice.

BERNHARD WELTEN: The CAS case you're talking about, it must be the game when the Turkish team came to Switzerland for the most important qualification game, and then in the end the state medical doctor, when the game was in Switzerland, said, you can't play, you have to be in quarantine and Switzerland won 3-0.[1]

So that was the case.

The players obviously were very very much impacted. The example I gave you in Germany when they restarted, they took the whole team out of their families, they all moved to a hotel, they lived in a hotel. All they did was moving from the hotel to the training camp and back. So, nothing else, no life besides, no restaurant visits, nothing, which must be terrible. And then you're playing a game as a ghost game, and you don't have any spectators cheering, so it must be terrible.

Through it the athletes were also affected on a voluntary basis because they couldn't play. Most of the teams, they negotiated with them for a salary reduction, obviously. And what I heard, especially one team I know quite well in hockey, they waived 20%. So, the salaries came all down 20% on a voluntary basis, not to let the club go bankrupt, because if the club is bankrupt you don't play anymore, no salary anymore.

Nowadays, I think it's a little bit better. What you see, to take another sport, alpine skiing for the moment, which is ongoing, the World Cup. They are usually traveling together, so they're chartering an aircraft, and everybody is moving to Finland when they started, for example, in November, they came back together, they had no case there. But now it started, for example, in Switzerland, they would have had on last weekend the famous Lauberhorn races, downhill and slalom. But two days before everything was ready, two days before the state medical doctor in Switzerland said yes, you can have the races, over the night they realized there were many cases with the new coronavirus, the English one. They said no, stop, no races at all, so all races were cancelled. Athletes on the way to travelling here had to return back, and finally they went to Austria to have the race. So, you live from one day to the other.

Another example I give is hockey, for example, the athletes, my team in Bern here now, once you have two positive cases in the team it means the whole team has to go in quarantine, which means 10 days, so 10 days no games. If during the 10 days another two cases are coming up, it's extended.

So, my team in Bern now has 19 games, whereas all the other teams, they have 27 games, which means for the end of the season before playoffs will start my team will have to play every second day, a game, which is quite unusual. Yeah, yeah, it's tough, so you see—but you have to take how it goes, and you're happy that you can go on the ice, on the soccer field, on the ski slopes, that's what they want to do in the end, but you never know what's happening tomorrow, terrible.

JILL PILGRIM: So, continuing with the theme of what is happening with athletes and players, specifically with respect to how they're dealing with the COVID-19 pandemic. We see all the drama that is playing out with the Australian Open tennis players who were in quarantine, and they're up in arms because they came with their entourages.

Then we had in the NFL, we had that—I don't remember which team it was, but where both of their quarterbacks were affected by a COVID-19 quarantine, the primary quarterback and the backup quarterback, so then they didn't have a quarterback, and they had a poor fellow who had to pretend to be a quarterback go out there.

So, I guess the question—I want to continue with this theme, Adam. You're dealing with young people who are college student athletes, and they probably think they're invincible, right?

How has the actual testing that you talked about and the restrictions on play—how did you lock down the football players to—and deal with the personalities and the inclination to want to have freedom with the athletes, student athletes?

ADAM NEUMAN: Yeah, I think a lot of that had to do with the coaches. We have a terrific collection of coaches who serve, I don't think just as people that say yes, no, on the football field, but people that are really meaningfully impactful in these student athletes' lives far past when they graduate. And when I think you emphasize the collective, and what your personal actions can do to be detrimental to the team, I think ultimately that is something that can really have a deep effect on a student athlete and recognize when they're part of this bigger picture, and it's not just them anymore, that their behavior needs to reflect that of what would be befitting of a team that's trying to compete, whether for a championship or whether just to perform on the practice field.

There was a certain level of growing up. There was a certain level of maturity that I think you saw throughout the season that I think, I hate saying this, but I do believe that will pay dividends in their futures, I think having this really miserable terrible experience.

Derrick spoke thoughtfully about canceling the NCAA tournament, and I can't imagine what that meant to some of our student athletes, and to other student athletes who some of them, it's their last chance to really play competitive sports. But I do think maybe that lesson then is better than 30 years later.

So, I think to kind of answer your question, how to get kids in line, I don't know if it's about getting them in line, I think it's about appreciating the circumstances. And I think again, I think that has a lot to do with the mentors in their life, their parents, their trainers, and all the folks that help, graduate assistants.

I mean, these institutions and these teams are filled with just wonderful people that serve as role models for these student athletes, it's really not just a head coach, or an assistant coach, there are grad assistants, there are trainers, there are mental health specialists. There are just so many wonderful people. There's of course the NCAA, there are people working with all these different people. And I think what we saw, Jill, is that those people did not hit the brakes during COVID-19, I think they hit the gas. And I think what you saw is that these coaches, and these therapists, and these grad assistants, I think they worked even harder to make sure that these student athletes were in a good place whether they were competing or not competing.

It's such a credit to them, it's such a kudos to them and it shows that the people that really enter into this field deeply deeply understand the meaning of what sports are, which I know people on this call appreciate. It's not just about winning or losing, it's how you win, it's how you lose, it's about grit, it's about toughness, it's about teaching you skills of how to succeed out of the classroom, inside the classroom, and for life.

If we're not preparing our student athletes for life post graduating, we're failing. If it's just about final fours, we're in trouble. If it's just about who can throw the ball the hardest, we're in a lot of trouble.

So, to sort of take a group of student athletes, get them focused on the right mindset, and to really care about each other and one another, that teamwork, I think, will last a very very long time, far after they graduate.

JILL PILGRIM: Adam for Commissioner of the NCAA, or at least you're my motivational speaker of the moment. So, very briefly, Brian, do you agree that the coaches have played such a big role in the personal touchy-feely aspects of dealing with COVID-19 with the athletes?

BRIAN STANCHAK: Sure, no question. I think not just coaches but administrators and conference commissioners. Just as the student athletes are looking for their

coaches for guidance, the coaches are looking at athletic administrators, and the athletic administrators are looking at the conference, and their upper administration. And I think it's kind of a cyclical fact here, but I think the biggest thing that coaches have that have mastered managing this COVID-19 situation is just accepting that change is inevitable and understanding that on a day-to-day basis, no matter what you have planned all of sudden.

I have a client who had traveled seven hours on a bus to play another team and that night the team called and said, hey, we can't play, enough of our kids tested positive for COVID-19, and so they had to turn around and go back. And you can't let it affect you, and you've got to try to remain as positive as possible.

So, I think for coaches and administrators, just to be that voice and sounding board, and just that steady ship under these circumstances have been huge.

JILL PILGRIM: Great, thank you. And Derrick, you've already spoken about how it impacted the enforcement staff, so I'm going to skip to our last segment for comments, since we're a little short on time.

We still have time for your full comments on this. So, let's talk about what the future looks like for sports in 2021. Hopefully, when we get on the other side of the coronavirus, or at least at a place where, even if things can't go quite back to normal, they can be more regularized.

So, Adam, will college sports resume as usual in the third quarter of 2021, which should be somewhere between the fall, it would be the start of the academic calendar year. What's your view on that?

ADAM NEUMAN: I can't be too speculative. My hopes are that things can return to as normal as possible. But what I can tell you is that I know that the conferences and the NCAA will continue to remain nimble, and I think that it will continue to work hard to ensure that the student athlete experience resumes as best as it can.

I think a lot of us are waiting to see the impact of the vaccine, and how many people take the vaccine, and how quick we can get the vaccine out. I think a lot of us are waiting to see if COVID-19 stops spreading as quickly as it does, but I think the most important point is that the organizations at hand will be prepared to make the tough decisions, and ultimately, what I think will be the correct decisions even amidst the pandemic or the ending of a pandemic.

The beginning of 2021 is still far away from here. We await it, we hope that it comes robustly in a wonderful way that allows us to return to 2020 or 2019. But I know that we will meet whatever challenge comes, whether it's a testing challenge or whether it's a quarantine challenge. I think the schools and universities across the country, across all conferences, have proven that they can make the right decisions on behalf of their student athletes, and that includes places like the Ivy League shutting it down, and saying this is not appropriate for our student athletes.

We salute all universities for making the right decisions for their student athletes. And that's what makes college athletics so idiosyncratic, it's not a one size fits all. And that's why I do not envy Derrick's job. I do not envy what the NCAA has to do when they take a stance across so many different landscapes, and so many different pieces. We see certain schools within the same state taking different positions based on their departments of health. So, it's a tough time, but I know we're up for the challenge.

JILL PILGRIM: So, Derrick, let's segue to you on this. You see on the slides we've got the Duke Blue Devils Women's Basketball deciding not to play in the best interests of the health of the student athletes and everyone involved. And then you have a legendary college football coach jumping from the collegiate ranks to the professional ranks.

Clearly, the Duke decision is COVID-19 related. Do you think—this has nothing to do with enforcement, I just want your opinion, if you can share it, do you think Urban Meyer jumping ship from the collegiate ranks is somehow also motivated by COVID-19? And I'll ask you that too, Brian, later.

DERRICK CRAWFORD: Well, that's a good question. I really don't know, because actually, kind of technically, he wasn't in the collegiate ranks. He actually had been out of intercollegiate athletics and had been, I think, a commentator with one of the networks prior to going to work for the Jaguars. So, I don't know specifically what impact that may have had on his decision.

Since the Blue Devils, the women's basketball team, I think we've had Virginia as well, and I think there was another women's basketball team, they just had made the decision not to continue competing.

So, I think these are very much individual institutional decisions based on what's going on in the individual market or individual area in terms of what institutions want to do, I think, first and foremost keeping in mind the student athlete health issues, mental health as well. We have a great chief medical officer, Dr. Brian Hainline who works closely with a lot of our institutions in terms of best practices and those types of things about what makes sense.

I think in terms of the larger question, what the fall looks like, again, I think it will be very much based on what the environment looks like. How well the vaccine has been distributed, and if there is some semblance of herd immunity and those types of things, I think that will impact largely about what the fall looks like. I think we're cautiously optimistic that there will be some return

to normalcy hopefully, that will be the case, but I think it kind of remains to be seen what it's going to look like going into the fall.

JILL PILGRIM: So, your staff was furloughed. What percentage of the NCAA staff was furloughed if you know, or can say, or can you just speak to the enforcement staff and how that impacted your—you mentioned before that working, you worked differently, but you still got your work done. So now with institutions doing away with some collegiate sports, with Duke and some other schools shutting down their season, does that mean if you had investigations related to them that they stop?

DERRICK CRAWFORD: Well first and foremost, 100% of the staff was furloughed, so we all got furloughed from anywhere from three weeks, to two months, or eight weeks. It has been extremely disruptive in many ways partly because people, they gave us a lot of flexibility when you took your furlough, so you may have taken your furlough at one point. You may have a colleague, for example, in our academic and membership affairs staff, or the eligibility center who took it at a different time. Depending on when you took your furloughs, there may have been someone you needed to consult with who you were not able to talk to for three, four or five weeks because of that furlough schedule.

So, it has been extremely disruptive to the, I think, operations internally, just the ability to talk with colleagues as you normally would. Members of our Office of Legal Affairs were furloughed. So, if you got a principal lawyer who works with enforcement you may not be able to talk to that lawyer for an entire week while he's on furlough. There may be other people than you deal with then that lawyer when they get back.

So, it has certainly presented some challenges in terms of officially operating. But the membership, they understand, they dealt with the furloughs as well, and so they understand our response time may be slower than it was in the past, but that's just kind of the way we have to operate with the furloughs and trying to be nimble and trying to get things done.

I think, what was the other question you had, very quickly?

JILL PILGRIM: I just wanted to know when—if a school shuts down its athletic programs like Stanford, if you had investigations dealing with Stanford, or if a coach was being investigated and then they jump ship and go to a professional team even if they're transitioning in between, do investigations stop or how do you handle that in enforcement?

DERRICK CRAWFORD: They don't stop, they continue, because also in addition to individual responsibility there's institutional responsibility.

So, if a person were to commit a violation and go to another institution, they're still very like an infractions case because that institution is responsible for the behavior of its staff members. And if that involved individual were to go from one institution to the other, that violation very well follows him or her, even if they leave collegiate athletics altogether, our bylaws require current and former staff members to participate in the infractions process.

Now, you don't have a lot of enforcement mechanisms necessarily for someone who leaves a collegiate ranks the way you do someone who remains in the collegiate ranks, but those violations do follow the involved individual.

Even if the sport program is discontinued, if violations occurred, they're still processed because they had an operating department at the time the violations occurred, and whatever penalties would be imposed, they would be institutional penalties as well as penalties for an involved individual. So, they would remain as a part of the investigative process even if a program was disbanded or the athletics department shut down for a season, because in general they shut down, it's not permanent, it's for a season or for a period of time, and it would still be processed with any penalties to be imposed at a future date.

JILL PILGRIM: Thank you for that. So, Brian, so I showed my football ignorance, I didn't know Urban Meyer wasn't at a collegiate institution in between. But do you think he would have considered, you may or may not want to speculate on it, I don't even know if he was your client, but on whether—if someone had the option of going pro sports or collegiate sports during a pandemic, how would you advise them?

BRIAN STANCHAK: I think there's certainly going to be a lot of coaches out there that if this continues and we don't see improvement in terms of how things are going with COVID-19, and operating, might want to enter the professional ranks because of the challenges that you face.

Honestly, the biggest thing, one of the biggest things I hear from coaches is just the amount of conversations they've had with parents during this time. And I was saying to one today, a power 5A coach, I said, you inadvertently opened up the door to that because you've tried to maintain this sense of communication with the parents throughout this process of COVID-19, and making sure that they know that their daughter and son is safe, and you're doing everything you can to make sure that they're safe. And so now the parents feel that there's this accessibility that might not have been there prior. And so, it's one of the things I hear the most from coaches.

So, in that aspect there are a lot of coaches who just don't want to deal with the recruiting, don't want to deal

with babysitting, and just figure professional ranks is the way to go.

JILL PILGRIM: What's your prediction for your business as an agent for collegiate coaches in 2021, is your business going to slow down, or pick up or be the same?

BRIAN STANCHAK: I think it's going to be still just as busy, but we might not see necessarily as much turnover. I think there's—one of the big things that we're going to be looking for this off season is obviously a lot of contract extensions based on the challenges that this year has faced, and the salary reductions that coaches have taken.

One thing to keep in mind and everyone on this panel, you haven't heard the term force majeure more than you've heard it in the last year, and it's something that is often overlooked in contracts, or you think, ah, that's not going to impact us, but it is because whether you were running an event, looking to get out of your contract, or coaches on guaranteed multi-year contracts, universities were looking to be able to have that flexibility to give a salary reduction or furlough, that's become increasingly important.

I had two clients this off season where an administrator had just said, hey, we're going to give you an extension, and then they put the amendment, and it says the year extension, then it adds the force majeure clause that wasn't in their contract, but it was very favorable to the university, and we went back and negotiated. And I understand it, being a former administrator, I'm not going to say, don't put that in there, but I think there has to be a fairness to it.

So, I think you're going to see much more awareness of the flexibility of what is guaranteed in contracts.

JILL PILGRIM: So, Bernhard, what's the prediction for soccer in 2021, and what about the World Cup that's coming up next? How do you think—are things going to roll out as usual or what's your prediction?

BERNARD WELTEN: I hope we're going back to a new reality, but it's very difficult to say for the moment. The World Cup will be in Qatar in '22, and there's still a long way to go for it.

So, we don't know if the pandemic will still be around. Obviously, the coronavirus will be, but if it's still as bad as it is now, we don't know.

The qualification, everything for the tournament at the World Cup, I think that will go on with or without spectators. The question is then only what happens. I think FIFA already sold the merchandise rights, the TV rights and everything. So, the money should come in, but maybe all the companies there investing, promoting, maybe they are negotiating to get a lower price because it's a different event somehow. And with this, possibly it has a huge effect on salaries.

We heard the excesses that were here or still are here, especially in Europe for soccer, but we don't know. But in my view looking at how emotional such decisions are often taken by the presidents of the clubs; I think the money will quickly be back in game and be distributed among the players. But for the World Cup I'm positive it will happen. We don't know how, we don't know if with spectators or not, but we will see.

JILL PILGRIM: Stephen, what's your prediction for auto racing for the rest of 2021, if there's anything in addition you want to add to that?

STEPHEN STARKS: Yeah, like I said before, I think it just depends on what happens with the cases. And I think we can probably expect much of the same in '21 as you saw in 2020, at least through the first half of '21, but I think it will be 2022 before sports in general looks anything like it used to look. I think that has a lot to do with the investment and the recovery that's required of the investors, sponsors, etc., etc., and the sports, and I don't think anybody has the money.

So, I think that it's not just a case count, although I think that's the primary thing to focus on and kind of the state of the union as it relates to the coronavirus.

I think more importantly, I think folks that spend in sport, for example, some of those programs, those collegiate programs you talked about that ceased operations for 2021, there's a business case to that. It's not just a health and safety case and I think you'll kind of see that logic apply for the rest of 2021, and I think we're looking at 2022 at the earliest before things look anything the same.

JILL PILGRIM: Okay, I'm going to do a quick hit question. There are questions coming in and before we turn to those questions that people are asking from the audience, I would like each of you to quickly comment very quickly whether you think the Olympic Games, the Tokyo Olympic Games should go forward or will go forward. Derrick.

DERRICK CRAWFORD: No and no.

JILL PILGRIM: Okay. Any quick comment as to why?

DERRICK CRAWFORD: I just think there's so much uncertainty right now. And I think the Games are scheduled what, for the summer? I think if the environment changed, I think nothing would be greater, I think the Olympics is a great way to celebrate, lift people's spirits and we certainly need that. I just think it's too uncertain at this point.

If things start to change, you know, April, May, in a really positive thumbs up, but right now it's just hard for me to see that taking place.

JILL PILGRIM: Bernhard, how do you feel?

BERNHARD WELTEN: I hope they will go on. I think it must go on especially for the athletes waiting four years, now five years to go to the Olympics, and I mean, it's the best event they can ever have. It wouldn't be fair for a whole generation to skip them and say sorry, you don't have any summer Games.

JILL PILGRIM: Adam.

ADAM NEUMAN: I think they will, that's my sense from what I'm understanding and hearing. In terms of if they should, I admittedly do not know enough to make a comment on that, about all the particulars, but my sense is that they will.

JILL PILGRIM: Brian.

BRIAN STANCHAK: Yeah, I'm probably not the best person to ask, but I think similar to Adam, I think that they will go on, what that will look like, I have no idea.

JILL PILGRIM: Well, there are collegiate coaches who do become Olympic coaches right so—

BRIAN STANCHAK: Yeah.

JILL PILGRIM: Yeah.

BRIAN STANCHAK: I think that it's probably best to—again, if we looked at it a year ago, we probably would have said, ah, by next February we're going be fine and there's going to be no issues. So, you know of course when you push things off now, we get to that point, I think again, now we're much more mindful of things, and so I think we need to be proactive with the decisions we make for the next couple of months, because unless everyone gets that vaccine, and it's proven to be effective, it's going to be hard to do something of that scale.

JILL PILGRIM: Stephen, last comment before we take some of the audience questions.

STEPHEN STARKS: Sure hope they happen, again that's about the timing that I mentioned before, in terms of the point in 2021 where you start to hope you can get optimistic again.

I can tell you though, just thinking about revenue to media partners for examples, I think you'll see a residual effect on other sports if those partners aren't able to receive the revenue they anticipate yet again on a property like the Olympics.

So, I just think that—I don't want to make everything about the numbers. I think we've got the health and safety covered, and obviously, that's critically important, but man I'll tell you, if the Olympics don't happen, I think that you'll kind of see the impact of that negatively on other sports.

JILL PILGRIM: I agree. There's a question, I presume this is for Derrick. Whether student athlete waivers are still to be used by collegiate institutions given COVID-19.

DERRICK CRAWFORD: Which particular waivers are—

JILL PILGRIM:—the question just says—it just talks about the waivers, I'm not sure if I can get more specific than that.

DERRICK CRAWFORD: I don't really know, partly because the waivers, there are a lot of waivers in terms of transfers, and another season of competition. If it's referring to the season of competition, I think that's still there. As we know, this year didn't count, so student athletes get an extra year of eligibility, I don't know that they have to go through the waiver process.

I know that what's been talking about in our office from our president, Mark Emmert, is to be very student athlete friendly with respect to waivers in a lot of the areas to whether it's a season of competition, ability to transfer. I think that transfer issue will be worked out shortly. So, I do think the goal is to be very student athlete friendly in the waiver process.

JILL PILGRIM: I just got clarification, COVID-19 waivers.

DERRICK CRAWFORD: Well, that's the same thing, I guess, kind of to opt out some things, that it still is where we are. They get an extra season of competition, so this year essentially did not count toward your four-year clock in eligibility.

So, a student athlete who opted out or even one who competed will have an additional year of eligibility. And I don't know that they necessarily need the waiver for that, they've been granted that, in my understanding, across the board.

JILL PILGRIM: Brian, do you think there has come time for a correction in coaching salaries?

BRIAN STANCHAK: You're putting me on the spot here. You know I think a lot of it depends on the university that you're at, the expectations that are provided, the revenue that is generated, so I think there's a lot of factors.

Again, a lot of my work is with women's basketball coaches. I joke if I've had the success I've had on the women's side on the men's side, I would be in private jets all the time right now, and so there is a big disparity right there. But I think from a whole standpoint you're going to see salaries—and it's not going to be every school, you're going to have some schools that are still going to be throwing out money like crazy, but I think every aspect of what schools are spending is going to be covered. You see it at Michigan with Jim Harbaugh, how they had decreased his salary and he remained the head coach there, would not have happened if he was winning national championships, probably not, but I can see that there's going to be a lot of people in similar situations that are

going to be much more realistic in terms of what they're offering compensation wise.

JILL PILGRIM: Okay. I'm going to throw this out to anyone who wants to take it. Maybe Bernhard and some others. Do you see any major sports teams being sold or ceasing operations due to the loss of revenue?

BERNHARD WELTEN: If you go back to soccer, yes, there are the rumors going on that Inter Milan is for sale for the moment, having financial troubles, having the loss of £100 million, so obviously, yes. But Barcelona, we heard at the start of the season they have a budget of £1 billion now per year, which is enormous, enormous. They can't finance it anymore, but they want to get the other players back, so obviously, also there will be a lot of pressure. If there's no state help, if there's no miracle happening, I think yes, you will see teams being sold, definitely.

JILL PILGRIM: So, one last question. So COVID-19 clearly has had a negative revenue impact on many, many businesses, Fortune 100, 500, 1,000 companies, all the way to the local store, there are a lot of empty storefronts now in my neighborhood, and all over New York City from stores that couldn't survive. Yoga studios are gone, they used to be everywhere, now people can't be in a yoga class.

So, the question has to do with sponsors of sport, right? Everything from the Olympics to professional sport to collegiate sports. What do you think is going to happen in 2021 or has been happening since COVID-19; are sponsors renegotiating contracts to provide less support to withdraw their support? What are you seeing?

Now, we did have a few slides in this presentation where Visa stepped up and is giving support, but does anyone care to comment on what's happening or what your prediction is?

DERRICK CRAWFORD: Yeah Jill, I'll jump in on that one. I think it depends on why sponsors get engaged. I think we saw this year across all sport, kind of varying results as it related to sponsors' involvement.

For example, if sponsors really are looking to get exposure through TV or broadcast digital media, and the events happen and they're televised, then you know, whether fans are there, it probably doesn't matter so much. But then there's a great handful of sponsors that involve themselves in sport because of the kind of at-venue engagement. And obviously, no spectators has a tremendous negative impact on that.

So, I think it's a hard question to answer, because it really depends on why the sponsors are engaged in the sport, and the way that they activate within the sport, but I think it starts with events have to happen. At best case, events happen with spectators, and then there's some version in between where there could still be a good result if it's just broadcast or digital media and no spectators. Maybe that's not saying a lot, but I'm just trying to frame the question in a way where I think it really depends on why sponsors get involved, and I think you're going to continue to see varying results.

JILL PILGRIM: Isn't the reason that sports are being played with empty stadiums is to make sure that there's a product for the sponsors, I think that's why they get involved?

DERRICK CRAWFORD: That's the point.

JILL PILGRIM: The crazy thing about COVID-19, at a time when all the eyes would be on whatever sporting event is being televised, it's hard to put on a sporting event. Adam, did you want to comment here?

ADAM NEUMAN: Yeah, I wanted to say I think that's really the critical point between sponsorships almost versus partnerships. If the sponsorship is really just about visibility and how many times we can be on TV then you're going to lose that sponsor, and we've lost sponsors like that because we don't have the inventory to demonstrate and showcase all of their key pieces. But if a sponsor becomes part of a partnership where they're really inculcated into the values of what you're doing, so they take place in some of the goodwill that you're doing in the community, or they sponsor all of the different financial pieces that you're doing, or they're taking care of a technological piece throughout the conference as opposed to just on that angle. And I think that goes exactly to what the gentleman before me was just saying, which is that what's the reason they're in the game for. If they're in the game because they're really a partner, then I think you have a shot, but if they're really in the game from just a visibility standpoint without events, and as he just said, without spectators at those events, those numbers are going to rapidly drop.

Think about it, they come to a business meeting and say, this is what we want, and we're like, we can't provide that, that's just not something that's on our docket. So, I think that's some of the way, I think, you can be creative about trying to figure it out during this time period where there are less people viewing your sponsorship opportunities.

JILL PILGRIM: Okay, in our last two minutes does anyone want to comment in relation to that comment? Adam, so there's not a live TV event that's happening, but now there are all these online events, right, that are created. The pivot was to go online. Weightlifting events online. Track and field did a thing where they had athletes at different tracks and different countries running the same race and being timed, and then declaring the winner. Like what happened is sports pivoted and went online. So, anybody want to comment about that, because you can still give sponsors eyeballs, it's just in a different place, right? We only have one minute; anyone want to comment on that? No?

Okay, well, I'll take the rest of the minute then to thank you all very very much for participating in this panel. It was supremely interesting and it was really great to have all your collective experience, and talent and knowledge to share with the audience here.

So, I thank you all very much. The New York State Bar Association thanks you, the EASL Section thanks you, and the Section sponsors. And I'm going to hand this back over the Barry, and thank the panel so much for your time and participation.

BARRY WERBIN: I echo Jill's comments, and again, on behalf of EASL and the State Bar, I thank you all so much. And my old dear friend, Bernhard from Switzerland, hang in there, we need the Olympics. And all of you, just keep at it, this is your love and life, and just stay focused, that's all we can do.

I think we're going to segue to a short break, I'll turn it over to our State Bar admins here, and then we'll see you again shortly for our second terrific afternoon program where we're going to switch—continuing with the theme of COVID-19 of course, but switching to ADR in the arts and entertainment industries. See you shortly.

Endnote

1. CAS Award 7356—*SK Slovan Bratislava v. UEFA v. KI Klaksvik-Covid Quarantine*.

DISPUTE RESOLUTION IN THE ARTS IN THE TIME OF CORONAVIRUS AND BEYOND

Moderator:

Judith B. Prowda, Esq.
Faculty, Sotheby's Institute of Art; Principal, Stropheus Art Law
New York, NY

Speakers:

William L. Charron, Esq.
Pryor Cashman LLP
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Paul Cossu, Esq.
Olsoff Cahill Cossu LLP
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Luke Nikas, Esq.
Quinn Emanuel Urquhart & Sullivan LLP
New York, NY

Aimee Scillieri, Esq.
Vice President and Associate General Counsel, Sotheby's Inc.
New York, NY

BARRY WERBIN: Welcome back everyone. It's Barry Werbin again, EASL Chair, and we're going to start our second program of our Annual Meeting, which is actually in two parts. The first part is, "Dispute Resolution in the Arts in the Time of Coronavirus and Beyond," followed by a second panel focusing on "Dispute Resolution in the Entertainment Industry in The Time of Coronavirus and Beyond." And now I will turn it over to our panel Chair and Moderator, Judith Prowda.

JUDITH PROWDA: Welcome everybody. Thank you so much, Barry, and welcome everyone. Welcome to this two-part program on "Dispute Resolution in the Arts and Entertainment Industries in the Time of Coronavirus and Beyond."

I'm Judith Prowda, I'm Chair of EASL's ADR Committee and Co-chair of EASL's Fine Arts Committee, and former Chair of EASL.

I would like to thank my program Co-chairs Carol Steinberg, Paul Cossu, and Kathy Kim, for working with me to create both panels, and of course I thank the panelists for participating.

I will be moderating the panel on ADR and the arts, and Justice Barbara Jaffe of the New York State Supreme Court will moderate the entertainment panel and introduce the panelists for her panel.

Over the years I have perceived a steady recognition in the legal community in the value of resolving entertainment disputes by means of mediation, arbitration, and processes other than litigation. However, the art market has been slower to embrace ADR.

Recently however, I've noted a gradual but significant increase in the use of mediation and arbitration and the inclusion of ADR provisions in art related contracts in a broad range of transactions.

Has this trend toward acceptance of mediation and arbitration in our disputes intensified during the pandemic, or are art market participants turning to the courts? What are some of the challenges of conducting ADR processes and traditional court proceedings?

We have a stellar panel of experts who will unpack these questions and more. Their bios are included in the materials.

Briefly, Bill Charron is partner at Pryor Cashman. He represents clients in a wide range of art authenticity, title, and related matters.

Paul Cossu is partner at Olsoff Cahill Cossu, and handles a range of litigation and transactional matters.

Luke Nikas is a partner at Quinn Emanuel Urquhart & Sullivan, and he represents clients in a wide range of complex litigation.

Aimee Scillieri is vice president and associate general counsel at Sotheby's, Inc. the auction house. Her role includes day-to-day management of legal affairs, negotiation of settlement agreements, and handling of government investigations.

So, to begin this discussion, I would like to pose a general question: First, do you agree with my remark that mediation and arbitration have been increasing in the art market recently, and then we'll get more specifically into the recent days in the pandemic would anybody like to begin this?

PAUL COSSU: Sure, I'll jump in. Yes, I would say so. I mean, I think, sort of broadly, I would say in the last decade to two decades the increase just in the value of contemporary art has made sort of all forms of dispute resolution between the courts, ADR, etc. more abundant just because the prices have gotten higher, and the stakes have gotten higher as a result. Particularly in the last year in light of COVID, particularly obviously when the courts were closed, ADR offered a fast and efficient way to try to resolve disputes when one couldn't even seek relief from the court for a certain period of time.

In addition, because the art world tends to place such a high premium on confidentiality both of the clients and of the artworks that are transacted, ADR offers a way to resolve those disputes without the ugliness of a public lawsuit, which, even if the work isn't physically damaged, it can cause damage to the reputation of an artwork, which may devalue it in the future, which is not to anyone's interest typically, even when there's dispute over an artwork.

JUDITH PROWDA: Thanks Paul. Would anybody else like to weigh in?

LUKE NIKAS: I think, in addition to Paul's comment about the observation of the value of art triggering more disputes, we also have over the past 10 years several significant high profile matters where potential litigants can look at what happened on both sides and decide whether they want to submit their dispute to the litigation process.

So, look at the Knoedler Gallery case as one example. You look at the defendant's side, obviously, if you're accused of what the defendants were accused of, in that case you suffer the potential risk of severe reputational damage and cost defending your reputation, and ultimately your bank account in those cases. If you're on the plaintiff's side, you face the risk of being judged for having acquired a work of art that's not authentic. You have to submit your private businesses, your private collections, your private art collecting generally to the scrutiny of the press, the scrutiny of the defendants. So, we saw about a third of their collectors filed lawsuits in that case, notwithstanding the strong accusations they had.

You look at the Robert Indiana case, where you've got plaintiffs in that case accusing the individuals around Indiana of doing terrible things, and you've got counterclaims that they received in response to that.

So, we could all go on for awhile about all of these examples. I think people look at them and ask themselves seriously, do I really want to go through that, even if I feel like I've been wronged?

JUDITH PROWDA: Especially publicly.

LUKE NIKAS: Precisely.

WILLIAM CHARRON: And piggybacking on that briefly, everyone on this panel has been involved in the large cases along the line of what Luke is discussing, but there's also no shortage of the more modest and even small art disputes where I think mediation, particularly given the ease with which it can be conducted these days by Zoom, is a much more appealing offer. I have seen an uptick in interest in trying to make particularly the smaller matters go away more quickly if possible. So, I think that feeds into it too.

JUDITH PROWDA: Yeah, and I would think, Aimee, you were involved in dispute resolution at the auction

house. Do you find that your involvement has increased since the pandemic?

AIMEE SCILLIERI: Not necessarily since the pandemic. To Bill's point, I think for the smaller disputes that may have otherwise we wouldn't consider litigating, we would consider going to mediation. It's obviously a time and cost analysis for each case, but we have had successful mediations in the past few years, so it's definitely something we consider.

JUDITH PROWDA: So, time efficiencies, costs, these are some of the characteristics of ADR that are welcome in the art field, because of sometimes the size of the dispute and also the stakes of confidentiality and the importance of confidentiality and discrepancy in the art world.

Do you think that, is there something special about art disputes that should be considered in deciding whether to resolve them through mediation and arbitration remotely?

WILLIAM CHARRON: I'll jump in first on that. Remotely, I think that question could probably be applied to all manner of commercial disputes. I do think that the remote access to mediation is a benefit and not just to art disputes. I question whether perhaps the mediators themselves may not feel the same way, they may prefer to have people in a room and they can kind of get in their faces and try to generate some heat, because the idea is to make people settle that day, perhaps you lose something there. I'd defer to the mediators themselves to answer to that, but from the litigant or participating standpoint, I have found the technology to be extremely useful and very facilitative for the mediation context. We'll talk about trials and arbitrations as well, I think that there's been some use there too. But particularly for mediation, the ability to have breakout rooms, the ability to bring people together quickly, I mean really, you've just reduced the transaction so substantially. And whether it's bringing a lawyer from across the city and the time, the traffic involved in just getting over to a mediator's office, or across the country or across the world, that's so much easier now.

So again, I think for art disputes like any disputes, that would be pretty appealing.

LUKE NIKAS: The caveat for an art dispute when talking about remote resolution, mediation, arbitration, I think, is a whole different animal. When you're thinking about mediation and you compare your typical art dispute with your typical complex commercial litigation, what I find more often than not is on the complex commercial litigation it's a business saying, here's what my costs are, here's what the cost of litigation are, here's my risk. You've got in-house counsel assessing their litigation budget, and ultimately you have a lot of rational thinking about the costs and benefits of moving forward in a number of art disputes, Emotion comes into play on a different level: I've been defrauded with respect to this painting, this painting has been in my living from, I've lived with it for 10 years, and you mean to tell me this person did this to me . . .

There's a level of emotion that goes into buying art of course, and living with it, and when that really animates a dispute, I find that being a little person in a box on Zoom is less likely to result in the kind of hard conversations that need to happen between the mediator and the clients across the aisle that can really result in a resolution. And so I think for certain kinds of art disputes, remote mediation is not as ideal.

JUDITH PROWDA: So, are you saying that in some instances it may be preferable to wait until the pandemic is over to resolve those disputes or to—what do you—how do you manage that?

LUKE NIKAS: I think that's a function of time and cost. So, none of us really knows when this is all going to be over. Sometimes you really only have one shot at a mediation to get it right or else everyone goes to their corners and they incur the costs.

In my view, if you've got a situation where it's going to cost you a million dollars between now and six months from now to litigate the case and positions are going to harden, and things are going to get worse, and some costs are going to make people think differently about settlement, and today you can do it over Zoom and try to go for it, I say you go for it.

If in six months nothing's going to happen, you're going to have the same opportunity, and you really think you only have one opportunity to get all these people in a room, then you might think differently about it. It's cost and time.

PAUL COSSU: Yeah, just to jump on what Luke said there, I think it really does matter as to the sort of emotional bond with the case and the anger at the other side, because I've had one mediation go very well during this Zoom time, and I had one go disastrously where the lawyer wouldn't even let his client appear on screen and basically just wanted to do the same sort of shuttle diplomacy that you could do by email via Zoom, and you just don't achieve anything that way, and the mediator wasn't even able to get in front of the parties directly to sort of talk them through why we all listen to counsel, but maybe we should in this case, think about how we settle this and not just keep fighting, and so I think Luke's point is very well taken there that you have to sort of judge the emotional tenor of your clients and the case, because the box is just—you know, they can't replicate everything that we could do in real life.

WILLIAM CHARRON: To play a little bit devil's advocate to that point. Most of my art mediations have been restitution or contract. Contract is more in the commercial range that Luke was mentioning and I think it's just more dispassionate overall.

Restitution, though, I think in every one of them it's precisely because it's a zero-sum game. Somebody's going to win, somebody's going to lose, and the emotion is maybe strongest in that context. And the mediations don't work when they're together. You actually have to separate them a lot of times or spend—I've spent an inordinate amount of time preparing a client to just keep their cool when they're in the same room, and listening to what the other side is saying. And so, I certainly appreciate the point that Paul and Luke are saying. I don't disagree with it at all.

I do think, though, that it could be modulated slightly to keep in mind with restitution cases in particular. Separating them is probably more likely to be productive anyway, and so I think that the virtual platform doesn't—you don't lose that much in that regard.

JUDITH PROWDA: Aimee, do you have any comments on this?

AIMEE SCILLIERI: Yeah, I think from the auction house perspective, a lot of it is educating our external clients, our consignors about the reality of what the lawsuit looks like. We might have a consignor in a defaulting purchasing situation that says just litigate, just sue them, I want my money, and I want them to pay for not paying us. And it's educating them that it's not going to be very timely, this is not going to happen quickly, you're not going to get your money quickly, and that litigation can go on for years.

So, I think it's a case-by-case basis, but it's also educating our clients to what that cost benefit analysis is and what their—what they want, what their expectations are in managing those.

JUDITH PROWDA: Right, exactly. So, turning maybe for a moment to arbitrations. Have you experienced some of the same issues in the technology, the disadvantages or maybe even advantages of technology, using technology in an arbitration?

PAUL COSSU: I'll jump in just having finished one recently. The benefits to the technology are great in the sense of we had two witnesses in Europe appearing via Zoom for a deposition that would have been obviously almost impossible during COVID-19, but would certainly have been very costly even prior to then.

The disadvantages are, as you may be able to hear, there's drilling going on in my house or my apartment right now, so when you have to deal with that in the background as well as intermittent internet, thank you, Spectrum, there are certainly annoyances that come up in the process that cause delays.

You're also dealing with witnesses who aren't always technologically savvy. I had a witness try to appear by their iPhone, which just does not work for a variety of reasons, including showing documents and exhibits to them. On the other hand, the nice thing about using ADR, particularly in arbitration, is with the relaxed evidentiary rules, it's much easier to get documents in, to put them on screen without fights as to admissibility, you try to address all of that in advance. And you're all together in the same virtual room, if not a real room. So, I found that to be very helpful to the process.

The sense we got from the tribunal was that they actually preferred being able to select the witness and just stare at that witness, lock that screen in and stare at that witness while they were being directed and cross examined to really judge facial expressions, etc., that you might otherwise miss if you're going back and forth between watching the attorney ask the question, and watching the witness respond, or if you're a judge you're up top and the witness is on the stand, so you may not see it as clearly.

So, I think in that sense the feedback we got from the tribunal and the arbitration is they actually found it helpful to do the arbitration that way. So that it's a lesson for the future, I think, in terms of how more of these will take place.

JUDITH PROWDA: That's very interesting. Speaking about depositions, how have you found conducting a deposition remotely, Bill, maybe you could speak to that?

WILLIAM CHARRON: Yeah, it's been the best of times and the worst of times.

JUDITH PROWDA: That sounds familiar.

WILLIAM CHARRON: I've had—well first let me—to something Paul just said, the technology is really important, the platform in a deposition is critical. Certainly your Wi-Fi is very important, if your Wi-Fi craps out there's nothing you can do. But I had one deposition where just the platform of pulling up the exhibits and being able to mark them while the witness is there, it was terrible, you just couldn't navigate it effectively. And I think with less so with the deposition, but more with an arbitration and certainly with a trial. And I know Luke has been kind of living in virtual trial land for awhile, so he can speak to this probably better than any of us, but there's some stagecraft involved in a trial or an arbitration, much less so than in mediation.

So, the technical elements of that, the ability to time when you bring up an exhibit and how you're going to use it is very important. If the technology is good, I've had it go very effectively in the deposition context, very effectively, but I've also had the exact opposite.

JUDITH PROWDA: What about the mischief factor with attorneys texting to their clients or otherwise coaching them. Have you experienced any of that?

WILLIAM CHARRON: I haven't. First of all, I think people—I believe this, that we do take our oaths pretty seriously, and people generally try to play by the rules.

But also to something that Paul was saying, on Zoom, you're in somebody's face, it's very hard. You can blank out your screen I suppose, but it's very effective in evaluating a witness. I did a trial by Zoom and lost nothing, in fact, probably gained by being able to notice every slight eyebrow raise of the witness or the judge, it's easier. But let me hand it over to Luke, because he'll have more to say about that I'm sure.

LUKE NIKAS: I think on the technology first putting aside strategy, I think the biggest hurdle I've encountered with the technology is simply continuity. And it hasn't happened to me, but I had a client who was giving a deposition and it was clear the opposing counsel was setting up a line of questions to get to the punch line, and he got closer, and closer, and closer, and said, "isn't it true that"—and we sat there for 10 minutes while my client got to think about what was going to be true, and what wasn't true, and what that whole process was all about. And then finally when he comes back, we're all sitting there waiting, the client had obviously had an opportunity to really think carefully about the answer, completely a missed opportunity for the other side.

JUDITH PROWDA: Wow.

LUKE NIKAS: So, the technology is key in terms of supporting continuity of process.

When it comes to strategy, when I think about trials I think about at the very core, what is a trial about? A trial is about authenticity and ultimately a big morality play. Who do you believe, who do you trust? And when you walk into a courtroom, you know who you are, and you know what your style is, and you know what it means to ask a question. And you know whether you are loud and indignant, or quiet and persistent. We all adopt a personality and approach that's consistent with who we are, and you really have to rethink that.

Again, when you're a little person in a box, righteous indignation feels differently in a cavernous courtroom versus a Zoom platform. Quiet in a courtroom, and professor-like, you know, professorial comes out differently when you're in the close proximity of a jury versus trying to get a microphone to pick up the sound. So, you really have to think about who you are and how you approach the trial.

Strategically, I agree with Bill in terms of reading the audience, reading the judge, reading the witness. You rarely have the opportunity to look just centimeters, inches from the judge's face and see, does he or she blink when you ask questions, or frown, or scowl, or when you put up a deposition exhibit, or excuse me, a trial exhibit, and you're questioning the witness about the contract, you can see if the judge is still looking at that contract. And maybe you want the judge to refocus on something. And so you can say, I want to make sure the judge understands the importance of this point. Could you again refer us to this part of the contract, and all of a sudden you see the judge pick up the piece of paper again.

So, you can control the room and read the room in a very different way than you'd have the opportunity to do in a courtroom. And so, you just really have to think through strategically how to take advantage of all of that in ways on Zoom.

PAUL COSSU: Yeah, I would just follow-up that I think the risk of hijinks is pretty low, I mean, I have my concerns.

I saw one deposition started with the attorney asking a question and the witness sort of appearing to look up slightly and basically read a two-page statement onto the record, but that's also just true of depositions in general.

The bigger issue I found is when you're really in the moment of a trial or arbitration, and the witness says something, but you're not the one directing, but you want to get a note to the person who is, it's a lot harder via Zoom. I literally texted, used the Zoom chat function, but it's not the same as just passing a quick note, or tapping them on the elbow the way you could if you're both sitting together, which is obviously not something that's really possible these days.

JUDITH PROWDA: Right. Well, with the experience we've had on Zoom, do you feel that some of these practices will carry over in the post-pandemic world? And there will be a post pandemic?

WILLIAM CHARRON: So, I do think mediations are likely to continue in this format. Maybe that won't be the norm, I just think that it's too easy and appealing. And for the right case, you can just throw together a mediation now pretty quickly. You still want to get your mediation statement, and you want to get some exhibits over, and all of that in advance.

Mediation itself doesn't—the transaction costs again, are just so much less. I think that trials, arbitrations, and depositions, my sense is less so. I'll speak for myself, I would prefer to conduct a deposition in person, I'd prefer to have the exhibits tangible there with a colleague by my side, able to kind of go with the flow, and not have to navigate on the screen.

To the last thing that Paul said, which I strongly agree with, being able to pass notes during a trial or an arbitration to a colleague is—I experience that first hand as well, and I don't think you realize how important that is until something starts going sideways, and you're trying to figure out how to communicate to your colleague and you just can't. Even if you send a text, they're not looking at their phone.

So, I think that it's more likely that there can still certainly be, this proves that it's possible, you can do, for the right case, maybe with a case with relative minimal evidence, witnesses, documents, what not, it's more easily

manageable. I expect in person will continue to be the post-pandemic norm.

JUDITH PROWDA: Any other views on that? Aimee, do you feel that some of the processes will continue post-pandemic at the auction house?

AIMEE SCILLIERI: Process in terms of --

JUDITH PROWDA: Mediation, arbitration. Have you been involved in any arbitrations with the auction house?

AIMEE SCILLIERI: Not an arbitration. I did have a mediation a few months ago, it was three-day mediation over a contract dispute. Unfortunately, it was unsuccessful; we weren't able to settle after the third day. But I thought it went pretty smoothly.

The only thing I would say is I think it was a little—to Luke's point about continuity, it's jumping on and off of Zoom calls with a mediator and then leaving to go talk to my external counsel, and then hopping back on Zoom calls, and there was a lot of waiting time in that way. But I didn't mind the virtual aspect of the mediation.

We've also had depositions as a third-party witness in other litigations, and I did miss sitting next to the witness for that. Again, to Bill and Paul's point passing notes, taking a break, being able to step in the hallway, gauge how the witness is doing, if they're feeling comfortable, things like that, I think, are missing when it's not in person.

JUDITH PROWDA: Do you think that the case—the mediation that you mentioned, the three-day mediation, do you think it might have been more likely to have settled if it had been done in person?

AIMEE SCILLIERI: I don't know, I don't think so, to be honest.

JUDITH PROWDA: Okay. Bill, since you're here and you were the mastermind of the Court of Arbitration for Art (CAFA), maybe you could speak about that process, how that evolved, and what the status is today, if you can tell us a little bit about that.

WILLIAM CHARRON: Sure. I appreciate the comment, but it was truly a team effort including yourself, and Luke, really really integrally involved in forming something that, kind of going back to one of your earlier questions today, Judith.

The idea—you said you've been seeing an uptick in ADR in the entertainment industry. There are specialized tribunals. Luke can speak to this very well in terms of, you know, he really helped put together the underpinnings for the CAFA in this regard, but the idea of specialized courts and other contexts, be it patent or sport.

Art, I think, really does lend itself—art disputes lend themselves to a specialized tribunal, that was really the kernel of the idea, is that there are too many instances out there of the courts taking too long, costing too much and arriving at too many uncertain or problematic results that our thinking, our working group thinking was that if we could really flatten that learning curve by having arbitrators and mediators who speak the language. At the core, I think it's a language issue, and there's just a different language within our industry.

I like to say that art law is a little bit of a misnomer, because art law is just sort of a—it's like a turducken of property law, and sales law, and Civ Pro, and evidence and all of that. If you like those things, you're probably going to like practicing art law, I know I do. But it is in fact, a body of law, and I think it depends very heavily on how the stakeholders within the market react to results and weigh evidence, and then in terms of the legal issues.

Going back to restitution, for instance, there are a lot of procedural issues. There are a lot of international legal issues that come into play and choice of law. Lots of questions about the meaning of laches, which is not applied the same way in a typical commercial case. And so, there's just a lingo and a familiarity with these issues that develops when you practice in this area that you're not going to find with just a judge that's got an art dispute on her docket followed by 75 different kinds of cases all together.

So, the CAFA was designed to bring together people who are really experienced practitioners and knowledgeable substantively, and procedurally and legally in these issues to be arbitrators and mediators.

We spent a long time working together, putting together ideas for rules and then coalescing them into actual rules. If the CAFA is administered through the Netherlands Arbitration Institute or NAI, which is like a JAMS or American Arbitration Institute, it's been around since the 1940s. The founder of the NAI is one of the authors of the New York Convention, which implements arbitral awards, and so they're very well known and respected. They administer it, they have a dedicated staff, and a board that administers it.

We've now got—the CAFA now had—it's up and running. It's got arbitrators and mediators on literally every continent except Antarctica, I'm just looking at some stats right now, there are 51 neutrals in North America/U.S., 122 in Europe, 10 in Asia, three in Africa, 11 in South America, one in Australia, and applications continue to come in.

There are also 30 mediators, mediators are all certified. I think—I can speak from personal experience that the difference between mediating and certainly litigating, but both kinds. When you go to somebody who knows this area, the chance of a mediation success, I think, is just exponentially better.

I just had too many circumstances with a court ordered mediation—would say a magistrate or a special ref-

eree who just doesn't understand the issues, and it's too complicated and they're just not following verses, hitting the ground running with somebody who knows these issues, and is able to bring the parties together and speak to both sides' concerns, because they can bring together a common language. Ultimately, that's what mediation is about, I think, much more quickly. And in the decisional context—I'll just give a little anecdote.

I've got a case right now, where it involves a question of authenticity and so there was a connoisseur who said that a work was consistent with the works by that artist; however, the connoisseur would like to see the work in person to confirm the opinion, and the trier of fact looked at that and said, that sounds like 100% confirmation of authenticity. And trying to explain why that's not, but having somebody on the other side saying, oh no, the words "consistent with" are magic words, and that ends the discussion right then and there. And it sounds plausible to a trier of fact and they go with it, I think if you've got people who are more conversant, you might have a different sort of process.

Anyway, the CAFA is positioned with these kinds of disputes in mind. There have been a number of submissions now for mediation in particular. And if you go on the CAFA website, you've got neutrals now broken down by geographic area, but also by the areas in which they're particularly experienced, and you can kind of customize or select the right neutral for you. And so there quite a few inquires being submitted right now to the CAFA mediation in particular, in mind, to start.

PAUL COSSU: Bill, in addition to the neutrals, I know CAFA actually has potential experts that can be retained on issues from provenance to authenticity. How has that played out so far?

WILLIAM CHARRON: So, thanks for the alley-oop. So, over the last year there was a vetting committee of retired judges and professors who are responsible for processing the applications of the neutrals. Another vetting committee was formed last year, which spent a lot of time developing criteria for two pools, forensic science and provenance research, which were deemed to be areas that could be applied in different kinds of art disputes across different kinds of artists and mediums, as opposed, to say connoisseurship, which is artist specific and art specific. But for those pools, criteria were developed. The applications have come in and both pools are now constituted with experts from around the world and those two are continuing to grow. But basically, for the right kind of case, authenticity, restitution, where you've got science and/or provenance at issue, you select one of those experts and more like a French and a German court model, as opposed to say the U.S. model, that is the sole testifying expert with the right and obligation to go back and go through a discovery process and correct any errors or omissions that might be found during that process.

So, the idea as Luke liked to say, it was about decisional accuracy, was a main goal here rather than having advocating experts. You still have advocating experts; you can't have expert pools for everything.

So, if you're going to have connoisseurship as an issue, or appraisals, or custom and practice in the industry, you'll still have that dynamic, but for provenance and forensics there are these pools.

JUDITH PROWDA: That's great. Thanks for that update. So, you don't have the battle of the experts that you see where the court is trying to weigh the evidence, the burden of proof is preponderance of the evidence, so it's more likely than not. And there have been cases where the art market would not follow the decision of the court.

WILLIAM CHARRON: Right. We were trying to minimize that issue where we thought reasonably possible.

JUDITH PROWDA: That's great. Aimee, you mentioned earlier, educating your clients, and I was wondering how to go about doing that, and as well, how to educate artists in this space about mediation and arbitration.

AIMEE SCILLIERI: Yeah, I think with respect to our external clients, our buyers and sellers, obviously we deal with collectors who are sophisticated, and some clients who, if this is their first art transaction, is consigning a family heirloom with us. And I think when an issue does arise, especially in the context of, say, going after that defaulting buyer that I mentioned, it's educating them about the realities of litigation, and the realities of what their options are, whether mediation would make sense, whether a trial would make sense, or just brokering some type of settlement discussion with the parties.

It's obviously case by case, depending on the client and the expectations of that client, the sophistication of that client. And a lot of times we don't give legal advice to our clients, but I will suggest that they retain outside counsel to best serve their interests when we can't be of assistance in brokering a settlement.

JUDITH PROWDA: Bill mentioned the difficulty of art restitution cases. And the auction house has a department that focuses on settling art restitution claims.

AIMEE SCILLIERI: Right, we settle those types of claims all the time, we've got dedicated specialists and employees whose sole role is to research provenance, and raise potential red flags. And we build relationships with families that suffered during the war and their attorneys worldwide. And there's not an impressionist or modern art sale or an old master sale that usually doesn't have some type of potential claim for restitution.

JUDITH PROWDA: And maybe this is a good time if anybody has any questions that they would like to ask each other, this would be a good time maybe to do that.

PAUL COSSU: I'll bug the one auction house rep who is here just to get your sense of, you know, there's been a lot of talk about AML (Anti-Money Laundering Law) and the Bank Secrecy Act beginning to potentially apply to art market participants. Do you see that changing Sotheby's processes that are already in place in any way?

AIMEE SCILLIERI: Sotheby's already has a robust AML and compliance policies. I think that obviously it would change if the Bank Secrecy Act comes into play and starts regulating us as an auction house, but we take the AML, the KYC (Know Your Customer) requirements very seriously to begin with. We do a lot of diligence on our clients; we get reps and warranties from them as well.

I think it would be quite a leap to have the Bank Secrecy Act apply to auction houses and dealers, but I think it's definitely showing the push that dealers and art market participants have to take extra steps to iron out those diligence requirements.

JUDITH PROWDA: Any other comments before we turn to the audience?

PAUL COSSU: I'll bug Luke as well, just because I have the chance to now and put him on the spot. Luke, I don't believe it's been mentioned, but you represent Philips from time to time, and you've dealt with the force majeure case recently, and I was just wondering if you could sort of talk to us about that case, and sort of explain how COVID-19 may be forcing people to reconsider force majeure clauses that they probably barely bothered to read the first time around when signing a contract.

LUKE NIKAS: I think it's two things. One is direct, so what do you want your force majeure clauses to say in order to give yourself the protection you need when something happens?

We all put in boilerplate provisions, and settlement agreements, transactional agreements without really thinking about the last 12 paragraphs of the agreements. Force majeure is oftentimes one of those, how often do they happen. But when you actually look at the law that governs them, it's fairly specific. When you look at the possibilities that can come up and how they could impact your ability to perform an agreement or delay your performance, there are a lot of different ways and you have to think about what your business needs are and how they might change, and whether you need a force majeure to address that. So, in my view, that's the first category, what do you want the clause to say to protect you.

The second—and in the *Phillips* case,[1] natural disaster, for those of you who haven't looked at it, natural disaster was one of the force majeure events. And the argument revolved around, in part, whether this pandemic was a natural disaster.

Then there's the collateral effect. When you're looking at the force majeure clause, then you would have to ask yourself what the actual performance was, right, so if you can't perform, the first question is, what does it mean to perform an agreement?

So, in an auction house agreement, for example, they typically say, a consignment will say, we're going to auction your work, it's going to be in the spring evening sale for contemporary art, and it's going to be on May 21st in 2021. You have all this language about what's going to happen. But one of the key categories of questions that came up in the *Philips* case is, what is the spring evening auction? Is it an online auction? is it an in-person auction? This date, this May date, is that a fixed date? Is not a fixed date? What happens if we move the date and we have the auction in the summer? Is that still the spring evening auction, even though it's presumably some or all of the same works that were going to be offered in the spring, but now it's just a different season, does that mean it's a different auction? What is the performance the parties are agreeing upon?

So, auction houses have very specific business models when they think about, what particular works are we going to offer? Are we going to get guarantees or not? Is it a day auction? Is a night or an evening auction? You put in all this modeling to figure out what the best way to set up a sale is, you'd better have an agreement that reflects the business side. Your expectations of performance in the contractual documents need to match up with the business. So, my view is, you've got to re-evaluate the whole contract to make sure that if there is a force majeure event, it's defined so that the specific performance you had in mind is the performance that you don't need to do anymore, and therefore the consequences under the clause get triggered. But if the performance is much much broader, and a different kind of performance is the performance the judge says satisfies the agreement, but the business folks say absolutely not, that's not at all what we wanted to do here, that's not performance, that is a failure, than you've got a document problem.

AIMEE SCILLIERI: And I think that's one of the things that we've seen on the auction side, even pre-pandemic, but was definitely emphasized during the pandemic, is that we would like the flexibility to be able to move sales to kind of broaden, as Luke said, the performance part of it, so we have that flexibility to take a live auction and put it online. That if we need to move the date, we have the ability to do so. And of course, those are heavily negotiated in some of our bigger agreements, but we are looking to adapt and have more flexibility so as we can continue on with the business.

LUKE NIKAS: And this is one of those points on exactly that issue that Aimee just raised. When an auction house thinks about the discretion to move the date, you've got to tie that into the language. And so, one of the issues we had to address with this court on a motion

to dismiss was showing that the spring evening auction in this specific time frame set up in this particular kind of way, marketed to the collector base as we know the auction houses do, was a very special kind of term.

The Spring evening auction is a very—in person is a very different thing from a day auction online in the middle of the summer. And so, this is where it was extremely helpful to have a thoughtful judge who really read the papers carefully, who analyzed the language carefully, and we took advantage of a few missteps by the other side that set up this argument really well in the litigation, so that we were able to demonstrate this is what the language meant. But this could have been a situation where the judge said, aren't all auctions the same? And ultimately there are, I think, circumstances where someone without the sophistication, without the experience can fall into that trap, which lends these kinds of disputes potentially to the model Bill was talking about. Having the CAFA, having the experts, having people who understand the customs, and the practices, and the language of the field.

JUDITH PROWDA: Well, thank you for that. If you—are there any other questions you'd like to ask each other before I turn it over to the audience, this is your chance. Okay, let's see if there are any questions from the audience.

SIMONE SMITH: I don't see any questions right now, Judith.

JUDITH PROWDA: Okay, we can continue then. Aimee, you were mentioning educating your clients, and I was wondering maybe—how do you educate artists? Artists, we haven't really talked so much about artists. I know that's in the next panel. I'm not in the business of educating artists unfortunately. Okay, we can wait until the next panel.

WILLIAM CHARRON: Let me ask you though about clients being more accepting of online sales or online auctions of their artworks. I think, for a long time that's been viewed as the lower valued property goes into online sales, but obviously we're living in a different world now, and are for at least the foreseeable future, although hopefully not too long.

Are clients getting more comfortable that they'll get the same level of bidding for a high value lot during an online sale as they would a live auction?

AIMEE SCILLIERI: I think clients have gotten more comfortable. I think at the beginning of the pandemic it was exactly what you said, people were nervous, anxious. Even though we've had online bidding capability since 2010, it hasn't been the predominant platform for our sales.

So, when we were switching over from live auctions to online, there are definitely conversations with clients to get them comfortable, more comfortable with the platform. And as we had more online sales throughout 2020, that confidence level has definitely grown. We've—now over 70% of our sales are happening online. And we have seen over 2020 the sale of major artworks, which I think has instilled a lot of confidence in the online platform.

We saw Basquiat's "Untitled (Head)" sold for $15.2 million, that's a lot of money to spend at an online sale. So, I think definitely the gears are shifting, and the comfort level is definitely rising. And I think the online platform is just something we're going to see going to see going forward, it's not going anywhere anytime soon.

JUDITH PROWDA: And also, the auctions are taking place at other times that are not the usual times on the auction calendar. And there are different kinds of auctions that are a global and works that are presented together that would have otherwise never been presented together.

AIMEE SCILLIERI: Absolutely, and we're calling them our marquee sales, which we started as a result of the pandemic, and it was a live auction with live phone bidders in New York, London, and Hong Kong, taking bids from clients over the phone and online, and it was hugely successful. And we saw prices, one sold extremely well, just a little under $90 million, and there was a lot of participation. I think there's room for improvement no doubt, and again it's getting clients comfortable in participating and then putting their property up for sale in these new platforms.

WILLIAM CHARRON: Judith, there's a question about the cost of mediation and arbitration, and I just want to speak quickly particularly to arbitration as opposed to litigation.

JUDITH PROWDA: Okay.

WILLIAM CHARRON: The idea, one of the big points of doing ADR is to make it less costly and more efficient. Arbitration, you typically are going to get less discovery. The CAFA's administrator administers out of The Hague, which is viewed as central for a lot of international courts, but you can do the arbitrations and mediations anywhere in the world. But there was still this—there's a sensibility particularly in Europe. They're highly allergic to discovery, much more so than in our country. But still, I think one of the biggest benefits of arbitration, and certainly mediation, but arbitration is—the discovery process is going to be more circumscribed, hopefully more tailored.

Luke can tell horror stories about the *Knoedler* case. The safest thing for a judge to do who's not very conversant with the issues is to allow the discovery in and figure that he or she will work it all out later. And you kind of learn that, I guess in judge school, on day one, and that's really the safest way for the judge to go, and you can get it. It comes at an enormous cost to the parties, particularly

in some of these art disputes where you can take parties on a chase in terms of discovery that's not really needed.

So, arbitration and certainly the CAFA is designed to really rein that in and customize it, which should bring down costs very very substantially.

LUKE NIKAS: And then to pick up the question from there that was asked about comparing the cost of mediation, arbitration, as Bill said, arbitration is the analog to trial in a courtroom.

So, the goal is to make arbitration less expensive than a litigation in court by constraining the scope of discovery by making it less formal so you can put in a letter application to the panel instead of full-fledged briefing, or get on the phone and talk about an issue or argue an issue without having to brief it. In my experience, that does bring down the cost of arbitration, sometimes materially but it's still very expensive. We're not talking about a 50% cut, maybe it's 10% in some cases, maybe it's 30% in some cases, but ultimately, it's still comparable on some level to litigation.

Mediation is not at all a—usually, not at all a binding process where you are submitting a full-fledged case to a panel after conducting depositions, and briefing and trial, it is in essence an effort to short circuit that by saying, instead of going through litigation or instead of continuing litigation or arbitration, let's get a mediator, a neutral who can come in, receive a submission from both sides, sometimes together, sometimes mediator sides only, and can facilitate a conversation and try to bridge the gap, and bring about a settlement.

So, the cost of mediation is significantly lower than arbitration, maybe it's 5%, 2% of the total cost of an arbitration or a trial, because it's designed just to be a settlement discussion and then over.

There's another question on there, Judith.

JUDITH PROWDA: Yes, I see this. This question is perhaps—it's a bit off topic, but whether the speakers have ideas they might like to share with regard to gallery exhibitions, and performance in terms of exhibiting artists works, as well as issues surrounding large art shows such as fairs, and expectations of these shows going forward and whether they're in the kinds of releases. I'm not sure if I really have understood this question entirely, but maybe we can talk a little bit about the market, what changes you've noticed in the market in exhibiting works.

We just spoke with Aimee about some of the changes that the auction house is seeing, but what about the exhibit of works in galleries and the business in the art gallery world?

PAUL COSSU: Well, to take a quick stab at it, I think everyone's trying to comply with the appropriate regulations, and it depends on what jurisdiction you're in.

From what I've seen from galleries, there's a lot of online appointment making, but they will let walk-ins go to exhibitions. You have to provide your information for contact tracing, etc., and confirm that you haven't had recent COVID-19 illnesses or been exposed to anyone. I think that's going to continue until we hit, hopefully, enough vaccines in the country to give the sort of herd immunity that is needed. No good idea when that's going to happen, unfortunately, but hopefully at some point this year. My best guess for the art fairs is it's going to be difficult to put them on before the latter half of 2021.

I know Frieze is going to be trying in May at The Shed, and I think there's some talk about—it'll be—the Shed can open up, so I'm not sure if part of it's going to be open weather permitting to sort of minimize COVID-19 risks. But I think what we initially saw was the shift to the online virtual room, to the OVRs for the fairs, and for galleries.

Then I think quite quickly after that everyone became pretty fatigued with that and with all the emails, and various rooms that are open at all different times. And much like people prior to 2020 complained about fair fatigue and having to travel every two weeks to a new fair, I think online viewing room fatigue has set in. So maybe we'll be back to travel fatigue sometime next year.

But for the moment I haven't seen much in terms of requiring anyone to sign a release. Best practice if you're the gallery is to make sure you're compliant, if you're in New York, with all New York regulations. Making sure you're accommodating your employees, and either doing split schedules to make sure that they're not—everyone isn't crowded in rooms, but other than that I haven't seen a whole lot that's been done other than the standard contact tracing that's required.

JUDITH PROWDA: Right, and just limiting the number of people in a room, just the same way you need to make a reservation to go to a museum exhibition.

LUKE NIKAS: And I think the first part of the question about performance related to exhibiting artists' works, I think this ties back into the force majeure discussion.

JUDITH PROWDA: Yeah.

LUKE NIKAS: When you're a gallery and you're going to take works on consignment, you're going to open a show, one of the things you need to think about are, what are your obligations, how often do you need to open the doors, how much do you need to spend on marketing or do you have marketing obligations? Do you have obligations to the artist of any kind, and what might a pandemic, for example, might the kind of regulations Paul's referring to, what might they do to your ability to perform? And then on the artist side, if you're an artist you have an obligation to show up at exhibitions. You have obligations of your own to promote your work, to bring in contacts,

to connect with people, to meet with people, to come in and help set up the show, or show up throughout the exhibition during different days to give speeches or meet and greet, that may be restricted by pandemic regulations or the pandemic generally. What is your performance obligation and how do you need to protect yourself?

So again, this is thinking really carefully about defining performance in a very specific way so that if the pandemic prevents it, that specific performance, then you don't have to do an alternative performance, there's no debate over what you were supposed to be doing, and you've got clauses to protect your delay or failure to perform.

JUDITH PROWDA: Well, thank you. I think we're just about out of time. Thank you very much all of you for participating in this very lively discussion. And thank you to the audience for questions, and I look forward to seeing you at the next panel.

Endnote

1. *JN Contemporary Art LLC v. Phillips Auctioneers LLC.*

DISPUTE RESOLUTION IN THE ENTERTAINMENT INDUSTRY IN THE TIME OF CORONAVIRUS AND BEYOND

Moderator:

Justice Barbara Jaffe
Supreme Court of the State of New York
New York County, NY

Speakers:

Laverne Berry, Esq.
Berry Entertainment Law
Brooklyn, NY

Theo Cheng, Esq.
ADR Office of Theo Cheng
New York, NY

Amy A. Lehman, Esq.
Director of Legal Services, Volunteer Lawyers for the Arts
New York, NY

Michael D. Young, Esq.
JAMS
New York, NY

JUSTICE BARBARA JAFFE: Good afternoon, I'm Barbara Jaffe, and I'm delighted to introduce you to this outstanding panel on "Dispute Resolution in the Entertainment Industry in the Time of the Coronavirus and Beyond."

The challenges posed by the pandemic face all lawyers, including those in the entertainment industry. The generous and hard-working lawyers who assist, advise, and advocate for artists of all kinds have admirably adjusted to the new environment presented by the pandemic. Some of those wonderful advocates are with us today, eager to share with you their knowledge.

While the written materials contain biographies, I will give you some brief introductions.

Laverne Berry practices entertainment and media business affairs law, following a career as a television producer and distribution executive. She now represents independent film and television producers, directors, etc., etc.

Ms. Berry is a member of the American Arbitration Association, among other panels, and has arbitrated and mediated numerous film, television, theatre, and music disputes.

Amy Lehman is director of legal services at Volunteer Lawyers for the Arts, and she runs its MediateArt program. Before attending law school, Ms. Lehman practiced in matters involving art law, media law, and other fields affecting the entertainment industry. She was also a professional ballet dancer.

Michael Young is a longtime JAMS mediator who has arbitrated and mediated all kinds of matters, and now specializes in mediation in arbitration of sports and entertainment matters, cross border commercial disputes, and insurance coverage disputes.

Last, certainly not least, is our own Theo Cheng. A full-time arbitrator and mediator, and Immediate Past Chair of our State Bar's Dispute Resolution Section.

He focuses on the mediation and arbitration of, among other things, intellectual property, entertainment, and employment disputes, and he serves on many panels, such as the AAA.

Many of you are familiar with Mr. Cheng's *EASL Journal* column, Resolution Alley, from which we have culled many of his excellent articles.

So, to start off the program we're going to ask a couple of questions of the panel, and I think the panel will probably start acting independently of me, hopefully. And the audience we will ask for questions, and we'll try to intersperse them.

So, we begin with Ms. Berry. Ms. Berry, are there industry-related responses to COVID-19 that are leading to arbitrations and mediations?

LAVERNE BERRY: The answer to that is yes. Unlike Michael and Theo who do full-time ADR, I am working both with ADR and with my film and media clients. So, on the one hand when COVID-19 struck, my first two months with the film and media clients were all about change of circumstances, and whether or not they were going to be able to perform, and what does a force majeure clause really mean, and how are they going to be able to make projects actually happen. And when I was listening to them, and preparing them to go through things, and looking at the clauses, and thinking about whether or not we were going to go to mediation around certain things, I was thinking, wow, there should be a lot of cases about matters that are coming forward that are directly related to the change of circumstances because of the pandemic.

However, on the other hand, within the first two months of the pandemic, all of my arbitrations that were scheduled were either put into abeyance or pushed further into the year.

So, on the one hand, I thought there must be a lot, and on the other hand, I thought there aren't going to be that many.

So, for this panel I actually reached out to a number of the tribunals to try and see what kinds of cases were really being brought forth. And I looked at places like AAA, in which I did kind of a deep dive into their numbers, and a little bit into JAMS and some others, and I actually looked at all of the arbitration provisions with the unions and the guilds. So, the DGA, the WGA and the like, and I found that what actually was happening was both.

At the beginning of the pandemic a lot of projects and matters did, in fact, get pushed down the road. It's just like we thought, one day there would be lots of toilet paper on shelves, and we just have to wait long enough. But immediately some cases and matters came in that were directly related to pandemic change of circumstances.

Things like performance venues that were now frustrated because you couldn't have a large crowd there, but they had made these agreements and wanted to make sure that somehow the agreements would go forward.

Things like distribution agreements, where people had bargained for distribution in individual theatres, and now that wasn't going to happen.

So, looking at, for example, the numbers with the AAA in that sort of first period, these change of circumstances, arbitrations and mediations actually went up. That's not a large part of their everyday matters, but they went up by about 40%. Meanwhile, other kinds of matters definitely went down.

It took time for people to think about whether or not they were going to go forward with those matters. It took time to think whether or not they would do just one more pass of trying to figure out a way to settle. And in some areas that were directly dependent upon making deals, like individual artists and agents, since there were no places for these individual artists to go, their agreements were not being pushed forward. And in areas like that, things really went down. And on the guilds' side, there wasn't such a big difference, because the guilds and the unions have several levels before they get to the level where arbitrations generally occurred, those change of circumstance issues were being negotiated out at the grievance level, and were not getting all the way up to arbitration.

So, for guilds and unions the arbitration numbers and the mediation numbers especially are very small. But for the tribunals the numbers continued.

JUSTICE BARBARA JAFFE: Thank you. Interesting. Ms. Lehman, similar question. How has mediation changed with you since the advent of the pandemic, and what are the key issues and considerations that arise from virtual mediation for you?

AMY LEHMAN: Yes, so I think everyone will probably find that they're coming across the same issues and questions with getting our clients comfortable with the

idea of virtual mediations, because it is remote, it isn't the same experience that you would have in person in the same room.

For us, and I see this not just with VLA but also the Southern District initially, of course now we're all so much more used to Zoom and we're all more comfortable with the whole idea of working remotely, but initially, there was this sense of, well what about confidentiality, what about security, what happens with all the technology and how do you make sure that everybody's equally—has equal access to this?

One of the things that I think would be an issue for us, for our low-income artists generally, is that not everybody has access to a computer. What do you do if somebody needs to find a computer where they have privacy and are able to participate at that level?

So not everyone will—even for us, we have people who don't have access to computers and they send us paperwork in the mail or they want to drop it off in person. So, Zoom is not something that they already are familiar with, or comfortable with, or even can access. So that's an issue.

Prior to COVID-19, we had had some mediations where one person was in another state so we had them on video conference, which at the time seemed very technologically advanced, and someone saw a video conference from another place. But when you have that scenario where one person's on video conference and everybody else is on the same location, meaning the mediators are in the same room as one party but not the other, that was actually more problematic, because there's the sense of inequality and potential bias.

So at least now everybody has the same issue of separation. But I think the biggest problem is that some people just don't have the ability to access this.

JUSTICE BARBARA JAFFE: Mr. Cheng, are there any special aspects of entertainment disputes that need to be considered in resolving these disputes during the pandemic?

THEO CHENG: I think so, Judge. I mean from my perspective as an arbitrator and a mediator, I think entertainment disputes present some unique issues. And I would say at least three things come to my mind. One is seeking to have your dispute resolved in mediation or an arbitration by someone who has some familiarity or knowledge of the industry that the dispute is arising in. Secondly, the ability to seek interim or emergent relief, preliminary relief. And then third, confidentiality. I'll talk a little bit about those three very briefly.

First, industry familiarity or background can be so helpful for appreciating the norms and the customs that exist in any particular industry, whether it's theatre, or it's TV, or music. And even having just knowledge of the issues that arise in those industries, or the legal frameworks, like whether it's copyright or licensing, could be so instructive to have that person sit as the mediator or the arbitrator. And I think that's one of the advantages of ADR, which it allows you to choose someone to be your adjudicator or someone to help you broker that resolution.

As to the preliminary relief, in the form of a TRO or an injunction, that's sometimes the main event, and can often end the dispute and lead to a resolution right then and there.

Nowadays, in all of the major ADR providers have rules in place for arbitrators, for example, to issue injunctions, and also to appoint emergency arbitrators if necessary when there's something that comes up all of a sudden. And with the courts being overworked and backlogged, and working at less than full capacity, the arbitral form could be a welcome venue for—

JUSTICE BARBARA JAFFE: —Yes, yes.

THEO CHENG: I'm sure you agree. Emergency relief is available and it can be done faster in some sense because the neutral could be appointed faster. It's going to be less expensive because it's going to be by default less discovery generally going on. And there's also generally a faster decision timeline, as well as less of an evidentiary burden in order to get that injunctive relief, because evidence, as you know, is not strictly adhered to in the arbitration forum.

Confidentiality has always been a long hallmark of entertainment disputes. And obviously, again with the courts sort of holding back cases or delaying cases, if you have an entertainment dispute that requires some level of confidentiality, the fact that it can sit on the docket for quite some time can really exacerbate that need.

So obviously for purposes of arbitration and mediation, both those processes can afford that level of confidentiality the parties may be looking for so long as there's an agreement in place.

JUSTICE BARBARA JAFFE: And Mr. Young, what's been your experience as a neutral in using Zoom or any other video platform for mediations, for arbitrations? What's been the reaction of counsel and parties?

MICHAEL YOUNG: Well, I think the reaction, as Laverne said and Amy was saying, initially there was some level of reluctance. Some of that reluctance was mixed with wishful thinking that if we adjourn a couple of months, we'll all be back to normal, so that will be wonderful. Obviously, that didn't happen. And some of it was level of sensitivity about the news that was coming out seemingly every day about security problems with Zoom and some of the other platforms.

I think there then became some level of realization that this was not a question of comparing an in-person

mediation with a Zoom mediation, or an in-person arbitration with a Zoom arbitration, because essentially it was comparing trying out one of these video platforms or just not doing it. And most people or a lot of people started to be willing to try.

I would say that my experience and the experience of many of my colleagues has been pretty positive. I won't say 100% positive, and I'll address some of the issues, but I would say for the most part very positive. I think all of us approach it at some level of trepidation about both the technology, and about just how it would affect the dynamics both on the mediation and the arbitration side. But again, taking into account, it's particularly in the mediation, not being in the same room with somebody is probably a disadvantage, but vis-à-vis what the alternative is to the extent that there's a dispute that does need to be resolved sooner than later has proven to be very successful.

I would think most mediators and probably most parties in the context of mediation would agree to that. Some people ask me, well what's the success rate of people successfully settling cases, and I think they are. I know I am and I know my colleagues are. Whether we would do a little better in person, maybe, but you can argue whether that's a factor of the platform or is a factor of other situations.

Like, Judge, the fact that there's no pressure from the courts really to move cases at this point, makes it a little harder, maybe to settle cases, as opposed to just a deficiency in the process.

One thing Amy said I want to pick up on is that it's not just a question of uneven access through technology, it's a question of the quality of the technology. And I will confess that sometimes in an arbitration or a mediation hearing, when somebody's Wi-Fi is not very good, or you're constantly getting the feedback for whatever reason that person is being dropped, it's a problem, and it's a problem both to that person, but it's a problem for the process and the system.

JUSTICE BARBARA JAFFE: It's also a problem in the courtroom, Mike, when somebody doesn't speak distinctly and you have to keep reminding them. These are not unusual problems.

MICHAEL YOUNG: Well, and I'll also say it's not necessarily only a claimant or a party who is a person. I've had lawyers who have that problem also, and presumably they have firms that should be able to fix that.

Last thing I'll say is that it's also been successful in the arbitration side, initially there was the same reluctance. We occasionally were faced with one party who wanted to arbitrate by Zoom, another party not wanting to, and a lot of people in the arbitration community started thinking, well do we have the authority to order a Zoom? And the rules of the AAA or JAMS do allow you to order that under certain circumstances, and people exercise their discretion under certain circumstances to order the Zoom hearing.

I've had probably by now five or six full hearings, including some that proceeded and were successful, at least in terms of the technology and the ability to hear and communicate with parties.

I think Theo's point about the advantage of having the opportunity to conceivably get preliminary relief is a good point. And the last point I'll make, which is a responsive part to Amy, is when we get at the end of this discussion to what could we look forward to.

Part of this is a question of, well this is what we have to deal with so let's be as creative and successful as possible. Well, one of the things people are thinking about is in the future there may be more use of these hybrid type of processes where certain people are in the room and certain people who may be at different parts of the country, or in some cases, different parts of the world may not want to spend the money to come to New York for an in-person, and why not try to figure out a way to include that person in by video as long as it's not disadvantageous, and you have certain safeguards?

So, there's sort of out of necessity comes opportunity. There may be some good things we can use and learn going forward. But I think generally the report card has been very good.

JUSTICE BARBARA JAFFE: Necessity is the mother of invention, is it not?

MICHAEL YOUNG: Okay, is that the phrase? Yeah.

JUSTICE BARBARA JAFFE: So, Ms. Berry, in your experience, do parties in the film, TV and theatre industry seem to—do they feel restricted in any way by the way the current sessions are being held?

LAVERNE BERRY: I think it depends on what it is, because in a lot of cases it's a cost benefit analysis, and I don't just mean money costs, I mean opportunity costs and being able to move forward.

So, my most recent mediation, everyone was actually relieved amazingly, to think they were going to be able to do it on Zoom and that was acceptable, because one party was in New York, one party was in L.A., and it took away that burden of, we have to be in the same place, we have to incur those costs, we have to take those days. We can set this up and do this in a way that's more expedient.

There is a cost to that with the mediation and being in the same room, and being able to work on the emotion aspect of some mediations, which comes up and it's a lot harder to do that than on Zoom. But I think that, just like Michael was saying, that going forward we're going to be looking at not only what the ADR type is, but what might

best suit that ADR type, and that might be that invention or opportunity.

JUSTICE BARBARA JAFFE: Mr. Cheng, to participants in the entertainment industry, do they have settled expectations about hearings, that they should take place, or—we're kind of going over this, but did you have anything to add about settled expectations?

THEO CHENG: I do. And I do think they have some settled expectations. You know, in speaking to counsel and their clients, I do still see some reluctance, just like Michael said, far less than it was in the April-May time period, but still some reluctance to go forward with remote hearings, and I kind of attribute that to maybe three things.

One is the unfamiliarity still with the video teleconferencing platform and how to integrate that into a regular bustling trial practice.

Secondly, some concerns I keep hearing over credibility determinations that may be either more difficult or differently evaluated over a video platform, and I don't want to get sidetracked, I have some different views on that, I think that you may actually do better credibility-wise looking over some people on a video platform. I might add that what's the alternative, right, having people show up in a room with masks where you can't see their demeanor, or check their reactions, and having all these sort of other protocols in place just to be safe with each other?

Third, really it's inertia, right? I mean, this is a desire by advocates and their clients as well as some arbitrators really, to do things the way they're used to doing things, right, they don't want to change. They were trained to try cases in a certain way, and they don't want to have to do it over this funky video platform.

And I will say one other thing, in the collective bargaining agreement context, there is a definite settled expectation there, because when union and management got together and agreed to get involved into a CBA, the expectation was that parties intended these hearings, whether they're grievance hearings or other kinds of disputes, to be done in person. And so, it's not likely to be trampled over to upturn that and compel them into a remote situation. And in fact, the National Academy of Arbitrators, which is the premier organization for labor arbitrators, has issued Formal Advisory opinion No. 26, it's the equivalent of an ethics opinion, advising arbitrators that they should really seek to cultivate agreements between the parties about moving a hearing to a remote situation rather than forcing one party to go when they're opposing the request by the other party.

So, I think—and there's some good guidance in there. I mean, my own view is that if you are going to move parties to a remote hearing, before you make that decision, you should have a robust conversation with counsel and their parties about what their concerns are before you make that decision. I think it's very important to hear them out. And this is a dynamic situation, right, just as Michael said. We keep hearing reports all the time about different things.

I think I just heard this morning, Dr. Fauci said that theatre is coming back in the fall, and I hope he's right, I hope he's definitely right about that, but we don't know, we don't know how the vaccination schedule is going to go. So, we need to be mindful and cognizant about people's safety and health, that's just a major concern before you order somebody away from a remote and put them into an in-person, for example, or vice versa. Making sure, as Amy noted before, making sure that the technology is there, that people are well versed enough so they can actually fulsomely participate, otherwise you're going to have people prejudiced in a way that isn't comporting with due process and fairness.

MICHAEL YOUNG: Could I just say one thing. Theo's point is really well taken. The first couple of arbitrations I had where there was a dispute, I was adjudicating the dispute as to whether or not we should go to a video platform.

What struck me was that the party that wanted to use the video platform, some of it was a desire to move the case and not have a delay, but some of it was a legitimate concern that some of their witnesses might not be available in person, given the person's age or other situation. And that frankly, the lawyers themselves who were being—didn't want to be put in a position where they had to serve the client by doing something that they felt was very inappropriate for their own lives. And that's a factor that has to really be thought about. But I think Theo is obviously right, that having that kind of discussion is very important.

JUSTICE BARBARA JAFFE: Yes, and to travel back a bit to Ms. Lehman mentioning artists who don't have the technology. How does VLA deal with that?

AMY LEHMAN: Well, so far so good. As of this point, we haven't come across this yet, but it's just something that has—I mean, in the past we've always worked out of law firm offices to do mediations, and so they've handled it for us, it's been very helpful. And one of the things that has happened to us during COVID-19 is that the pipeline of mediations has pretty much dried up. I have a list of requests that are out, and people are reluctant to do it. And so, I think some of them feel like, well you know, we can wait until COVID-19 is over and we can do it in person. And for our purposes it's voluntary, it's not court-ordered.

So, when someone comes to us who wants to do mediation, the other side has to agree to do it of their own accord. So, it's generally harder to get them into the pipeline, and so we have sort of a waiting list right now. And I

think we've only done one or two over COVID-19. So, the issue of someone not having access didn't come up, and it's been something that's been in my mind that it can. And I do mediations for the Southern District where it's not an issue, everybody's got attorneys who have access to any kind of technology that they need.

One of the things that Ms. Berry touched on was about the relationships and between the clients. And especially in the arts and in the arts community, for us I think one of the issues that I find, it's always really addressed in an in-person mediation, is that these are people with relationships. They've been working together, there have been collaborators, they have a dispute amongst themselves, it's not always adverse parties in a litigation. It's people who are trying to resolve something between people who might have had a long-term relationship. And so, there's a lot of emotional content there that is much harder to address through a screen.

Although, on the flip side of that, we've had mediations in the past where one side doesn't want to be in the room with the other person. So, this solves that problem in a beautiful way where you don't have to strong-arm them to come to the mediation because they feel safe, because they're not in the same room. And so, I found that to be really fascinating, in that I've actually thought we've had mediations in the past where it was really hard job to get people in the room. And in fact, one of the mediations almost fell apart because one of the parties got really upset about having to be in the room with the other person. So, if we had this tool in the past it would have been easier. So, it really can go both ways.

JUSTICE BARBARA JAFFE: That's true, it can. In the court system, just to add a little something for pro se self represented litigants, when we need to do remote hearings or oral argument, they can go to a room at 60 Centre Street, I don't know if the other court has this, but a pro se litigant can go to a room and use a computer to participate in virtual hearing. So, you might, all of you want to think about finding a conference room that you can safely situate somebody who doesn't have the technology, because to the courts as you know, safety is paramount in the mind of our Chief Judge and most judges.

THEO CHENG: If I may I'll tell you a quick funny story. I just had a hearing in which the counsel wanted to be in the same room as his client. So, he invited the client to his conference room, but what he didn't realize was because they were both going to be there, they both had to wear masks, and then they had to mute one of the microphones—they were using separate laptops, but they had to mute one of the microphones because otherwise there would be feedback.

So, then what ended up happening was, from a credibility determination perspective, I was left with a situation where this was no better than if I had just shown up in person and worn a mask.

Here's the worst part, the entire trial was interpreted. Every question, every answer was interpreted so I don't know in the end if I'm going to make that credibility call, but we'll have to see.

JUSTICE BARBARA JAFFE: It's a learning process, we're all learning so much from this.

So, Ms. Lehman, you had mentioned at one point about how should artists be educated; you said you didn't know, but maybe you can talk a little bit more about that.

AMY LEHMAN: Yeah. Actually, that's 50% of my job. Fifty percent is legal services and getting them assistance, and then MediateArt, and helping them get mediations. But education about mediation is a major part of getting them to mediation, because most artists haven't heard of it, they don't know what it is.

I had someone outside the context of work, I mentioned mediation and they thought I was talking about meditation, of course. So, I was like, no, I don't have a guru, that's not on my agenda. But we teach mediation training, we have a mediation training program which is open to artists, artists can become mediators. Outside the court system you don't have to be an attorney to be a mediator.

So that's one element. But also, whenever someone comes to us with a legal services question, they come to us because they have a dispute with someone they want to help get resolved. If it looks like it's a situation that would be well served by mediation, I give them a little tutorial on what is mediation, how does it work, you know, if you're working with a neutral, and they're not advocating for either one of you, all of that information, and I send them out in the world to tell all of their friends too.

So, we try to spread the word about what it is. We have information on our website about it. And just sort of giving that information to the artists who are out there who come to us, spreads the word.

Now, is there a better way? Probably. I actually am thinking about it, should have a general class on our schedule about what is mediation and how will it help you. And we do have a general ADR class in our educational programming.

So, we do, as I say, part of our mission is to teach artists about their legal rights, but also ADR is part of that, so that's just a lot of what we do.

JUSTICE BARBARA JAFFE: And for the future, post-pandemic, if we can even visualize it at this point, and this question goes out to all four panelists. Do any of you foresee continuing the use of these platforms? We did touch upon that a little bit, but maybe we can go into some more detail.

AMY LEHMAN: I'll jump in. I think yes, and probably because right now where we are in this COVID-19 world that we didn't anticipate existing at all a year ago, and maybe it's just that we're all going to have a little bit of PTSD as we go forward. I can't imagine, we're going to all have vaccines at some point, but by that time we may be a year and a half, two years into this. I don't see us all going back to the world the way it was before anytime soon. And I think we have discovered the benefits of being able to communicate with people who aren't able to get to us.

We have a lot of people who might not be mobile, they might not have access to transportation to get to a conference room in a law firm somewhere, so, or we might be in different cities. I think a lot of people will continue to work remotely, generally. People have become digital nomads, and aren't going to necessarily be all in the same place at the same time.

I know for us we often had—before COVID-19, we often had people who had gone somewhere to work in a show, or to be in another city doing their artwork, and it was a hardship for them to try to be here at a certain date for a mediation.

So, this expands the opportunities for everyone to move the ball forward as, I think, as other people have mentioned.

MICHAEL YOUNG: I was going to say, just picking up on that last point, I think people have developed a level of comfort, so from that perspective there's going to be a choice made by certain litigants and their counsel to want to continue to use the video platform. But even if that's not the case, you have the opportunity in mediation context to have these hybrids where not everybody has to be there.

There will be some instances that for whatever reason, parties and litigants will choose to continue to do mediation by video. In other cases there will be the hybrid model, where one or another individual might not want to come to New York or might for whatever reason prefer to do it by video and the parties will be able and willing to do a hybrid model.

The other advantage we've discovered is what one of my colleagues calls the asynchronous model, where we're used to having a mediation where everybody comes together for a day or less, but for a scheduled amount of time. The asynchronous model is that not everything has to happen on the same day at the same time; you could have a session with one party on day one, and a session with another party on day two, sometimes that's to accommodate schedules, sometimes that's to accommodate some other reason. But it allows us to do that when we have that opportunity.

Just briefly, on the arbitration side. One thing to keep in mind is, I've been around in this field for a long time, and we've done forever some witnesses by telephone, some witnesses by video. This now makes the video vehicle more available and may make it more efficient so that not every witness has to come to the hearing room. And if in fact, a third party, for example, doesn't want to come to the hearing room, there's an easier means to get that testimony.

I will also say, my last point is, in many arbitrations, there's a lot of activity before the merits hearing, even when everybody's in New York, frequently that's done by conference call, and there's a lot of cases where you don't even see opposing counsel until the day of the merits hearing, but everybody's now getting comfortable with video, and we're doing more and more of these preliminary hearings, discovery disputes, arguments on an issue here or there, case management conferences by video.

The only last thing, I'll say with a smile, is everybody's used to now doing everything in business casual attire; I don't know if we'll ever go back to wearing suits, and that applies to men and women.

JUSTICE BARBARA JAFFE: I'd like to ask Theo though, mention something that you had mentioned before, Theo, about the injunctive relief, which is wonderful. That arbitrators can do it if it's in the contract, of course. But you said that the rules of evidence don't apply. That sounds a little sticky to me, because when you're seeking really extreme injunctive relief, not to have that based on sound rules, sound evidence, it's a little troubling. No? Can you—

THEO CHENG: You know, I think it's not necessarily that the rules of it don't apply at all, it's just that they're not strictly adhered to.

So, most arbitrators, not all, but most arbitrators are lawyers by training. They are more comfortable using some set of rules of evidence, whether they're New York common law rules or the federal rules in order to guide them in evaluating evidence. But the fact is that with respect to an injunction where you may not have the time necessarily always to dot your i's, and cross all your t's, you have the ability to get in front of an adjudicator faster, and you may be able to get that injunction issued faster, at least the TRO, right, to hold the status quo until you can get to a merits hearing. That's really all I meant by that.

I just want to follow up on what Michael added, too. I think that we've all seen now the enormous benefits that ADR provides in this online environment, the enormous savings in time and cost. But really what I've been most impressed about is the ability of more and more participants to be present at mediations and arbitrations. For example, the ultimate decision makers can now Zoom in even if they can't be there the whole day.

The adjuster, who oftentimes would only be a phone call away, now is willing to Zoom in because the adjuster doesn't always have to pay 100% attention to the Zoom

call, or, and this is a point that touches me most personally, is junior associates, younger attorneys who sometimes are left back at the office because a client couldn't pay for them to attend. Well, if the partner is willing to write the time off, they can now attend. And that means we're opening up ADR processes, the litigation process to newer younger people, more diverse people who can participate in these proceedings. And in that regard, I think going forward after the pandemic, it's starting now already, people are bringing things to mediation even before they're filing a lawsuit now.

A lot more pre-litigation mediation is starting to happen, as well as what we in the arbitration business call submission agreements, meaning the parties have already started a litigation, they don't have an arbitration agreement between them because they're strangers, right. Sometimes in entertainment disputes they're just strangers to each other, they don't have a pre-existing relationship, but they realize that they can get their dispute handled faster in the arbitral forum so they will submit their dispute to an arbitrator.

I think we're going to see more of that go forward, because they now realize that they can get to a resolution faster given the situation right now.

The last thing I'll point out is, I think just last month Congress passed the CASE Act—it was signed into law, the CASE Act, which is going to create a Small Claims Copyright Tribunal, which again would allow smaller disputes that would not have been able to get into court due to cost issues. Now smaller copyright owners who are largely in the entertainment field, for example, can get their case heard before a tribunal and get to a decision. And this is a form of an alternate dispute resolution because it is outside of the court system.

So, I think there's a lot to look forward to, and in some respects, with all due respect to the court system, I think alternative dispute resolution really isn't alternative so much anymore, it's kind of like the principal way in which people can resolve disputes, given the fact that we have this pandemic to deal with.

JUSTICE BARBARA JAFFE: Absolutely. Anybody have a war story or something like that?

LAVERNE BERRY: Well, I don't have a war story, but I do have one thing that I wanted to follow on Theo about is that this new way of proceeding also helps with some types of international arbitrations, because there are a lot more arbitrations than litigations in media in the international realm, and the ability to have, as Michael had said, that's kind of hybrid, makes that so much easier to move forward, and to bring up. And I think that will lead to disputes being resolved faster. And I don't want to say faster and more efficiently and make it seem like it's the same thing. Sometimes things are efficient when they're slow, but sometimes even being slow is not efficient. And so, I think that that hybrid will help with that.

The other thing that I wanted to say is that, at least for my clients who are a lot of young film and television makers, Zoom, it's right up their alley. They feel very comfortable with the medium. And so, I think that as we look to Millennials and beyond as the clients, it's going to be easier to have this platform work for them.

JUSTICE BARBARA JAFFE: Very true.

MICHAEL YOUNG: The one thing I would say, just to put a little coda on this, is people become mediators in part because they're people people, they like dealing with people. And there is still something that's missing by dealing with people through a screen. So, I think despite all the conversation about the advantages, the sort of functional advantages, and maybe cost advantages of what we've been going through, I think there is some level of yearning to get back into a conference room, and be able to actually shake somebody's hand, something like that, which is such a great feeling at the end of a successful mediation day. Be able to chit chat with a lawyer during a break, and learn a little about that person. All that we miss.

JUSTICE BARBARA JAFFE: Networking, right?

MICHAEL YOUNG: Well, it's networking, but it's also nice.

AMY LEHMAN: Actually, I wanted to jump in there, because I found that I have been able to do that a little bit even in Zoom, because if you've had breakout rooms, and you're in the main room, there can be opportunities to have sort of a casual relaxing conversation in the breaks in between. It sort of breaks the ice anyway, and I don't think it's entirely impossible to do on Zoom.

MICHAEL YOUNG: I think it's, do you run into somebody at the coffee stand? You obviously don't at Zoom.

THEO CHENG: Right, but I think there's also this—and maybe Amy, this is what you were getting at, there's also this sort of shared suffering that we're all going through, right? The fact that I haven't seen, laid eyes on one of my colleagues in the field for so long other than through Zoom. Or that I'm relegated to seeing people in little boxes across my screen somehow.

At the same time, I'm also getting wonderful little tours of people's houses and homes, because of where their cameras are placed, it's rather really interesting actually, the whole experience.

JUSTICE BARBARA JAFFE: You know, you had mentioned something, Theo about the masks and you not being able to read people. I've been trying cases for many many years, and I can't say that I've ever referenced a witness's demeanor on the stand, I've never done that.

And why I don't do it? Is it because I've never found anybody shifty looking, no, it's not because of that, it's before I'm afraid to do that at times, I'd rather listen to the words and see whether the words make sense.

So far in the hearings I've done via Zoom I haven't felt restricted in my credibility findings.

MICHAEL YOUNG: Judge, we've had a lot of internal discussion at JAMS, and as you may know there are a lot of former judges on our panel, and that's a precise discussion point where most people say it's not so much demeanor, it's not whether the person's twitching, whether their eyes are shifting one way or the other, it's the story, it's the consistency of the story, does the story make sense, is it consistent with prior statements, a lot of other devices.

JUSTICE BARBARA JAFFE: Exactly.

MICHAEL YOUNG: But I do think Theo's point is correct, is I think it would be somewhat—to whatever extent somebody's arguing, that you can better assess credibility in person, the reality is in person today, the person will be wearing a mask. And on the screen, even if the box is sometimes a little too small or a little smaller than is ideal, at least the person is not wearing a mask and you can see the face. But I think your point is a good one.

JUSTICE BARBARA JAFFE: Any interesting more stories like having—

MICHAEL YOUNG: I'll tell you the one thing people have said to me, one of the disadvantages of Zoom is when people do travel from wherever, even if it's from their office and somewhere else in Manhattan to the facility where the mediation is, there is somewhat greater investment in the process. It's a little harder to leave than it is if you're on Zoom. And people say that the joke is, somebody gets up and leaves, they're just going from their office to their kitchen or to their dining room, as opposed to having to get on a train, or get on a subway, or get on an airplane. So, there's a little less investment.

I think I've seen occasionally; I mean obviously, as a neutral you're trying to keep somebody there and you're doing what you can, but it is a little easier to turn off.

AMY LEHMAN: I wouldn't say this is exactly a war story, but I think in response to that in the mediations that I have done on Zoom since March, it's been very clear to me when the parties are there to get it done, or they're just there to say they showed up. And whether they had shown up on Zoom or showed up at court, to a conference room, or at a law firm in a conference room, I don't think I would have had more sway over them in person to get them to stay anyway. I think that it didn't matter that they were on Zoom, the ones who showed up just to show up to say they could, to tell the judge they'd shown up, they weren't there to settle, and they would never—even if we had shown up in a conference room, they would have left anyway.

MICHAEL YOUNG: The other thing I would say, and this is not a war story, but I think for the perspective of counsel who are representing a party in a mediation or arbitration, there are a lot of little tips that people should—to the extent that they're going to be in a case, then it's worth looking into or investing the time.

There have been articles written about little tips about how to best present a case on a Zoom context. And there are little things such as what Theo was referring to before, lawyers may want to be with their client, but be sensitive to having it open at once, and sort of getting the echo. Be sensitive to the fact that if you're sitting apart, and one person is further away, that person is further away from the screen, and from the mediator or arbitrator and that's a problem.

I had a case last week, it was an oral argument, did a really good job generally. She had on her bookshelf a book, and it was very visible. And it was interesting enough to me that I constantly felt myself being distracted to see the cover of the book. And so, you got to be careful about little things like that.

JUSTICE BARBARA JAFFE: Your backgrounds, absolutely.

THEO CHENG: I think one of the things that I've been talking to counsel more about is sort of the preparation part for either a remote mediation or a remote arbitration hearing, it's just different. How you prepare your client, to how you prepare your witness for that experience is very different, because for a mediation for example, or even if you're testifying, it's almost like you're appearing for, like a TV interview.

So you've got to think about camera angle, and lighting, and all these things that you wouldn't ordinarily have talked to your client about, but it matters right, because—and Michael, you may do this too, for an arbitration hearing I always hold a test session like a week or two before the actual hearing, and I ask the counsel to try to bring all the witnesses to that test session so that I can see them, and let them know whether or not I can hear them, see them properly, whether they're lit properly. And I try, even though they don't always necessarily listen to me, I don't order it, but I try and dissuade them from using Zoom on an iPhone when they're trying to testify, because when you use it on an iPhone, you get this sort of narrow sliver of a camera view, and it really makes it difficult for me to see the witness very well. But it's all these kinds of preparations that you didn't have to do in the real world in person, but now it makes some sense to spend some time doing that.

MICHAEL YOUNG: And a big one is to learn how to use documents and use the screen share function on Zoom, because particularly in the context of an arbitra-

tion, we're going to rely on documents, which happens a lot obviously. It could be frustrating if you can't quite bring the document up on a timely basis, and you need to really explore that.

I would also say to anybody out in the audience who's a little skeptical, there have been, particularly in the arbitration context, most arbitrators now will order, and I use the word order, a protocol or how the process is to be conducted, which includes certain types of procedures and steps to ensure security. Both security external, as well as security internal, and by that, I mean where we could be sure that the witness is not getting notes passed to him or her, or any other kind of help, because obviously, the witness is—one of those, for example, is that they can't have a virtual background, because with a virtual background you won't be able to see if there's somebody else in the room passing notes.

I think we rely a lot on the integrity of lawyers, and I think that's deserved and should be the case, but there are certain rules we go into as well.

JUSTICE BARBARA JAFFE: That's an excellent point. No virtual backgrounds, I never thought of that, for hearings that would be very good. I've often suspected—

MICHAEL YOUNG: And that's what people are concerned about, and there's ways—that's one way, one tip in terms of how you can control it.

JUSTICE BARBARA JAFFE: Yes.

THEO CHENG: To echo that, I'll say that I think whether you do something in person or virtually these days, it's probably good to have some sort of a conference with counsel to go over what protocols you're going to use. And in the case of an arbitration, obviously issue an order that sets forth those protocols.

Even on the mediation side, after I have that conversation with counsel, I will issue a set of protocols that I call "agreed upon by the parties," and I'm happy to revise them as we go forward, but I think it's important to know what to do if there's a connectivity problem, or what to do if—how is the media going to go from room to room, because if you've done it on Zoom, you know that there's no virtual knock. I can just enter into someone's room all of a sudden, and it's a big surprise probably. Not only is it rude, but I could be interrupting an important attorney client communication, which I don't want to do, and so you'll set up the protocols.

The way I usually do it is you are usually texting counsel in advance, that means exchanging cell numbers in advance to make sure that I text them before I go in and they can tell me, no, no, no, Theo, don't come in, give us another few minutes. You want to set these things up rather than fall flat later during the mediation or embarrass yourself or something like that.

JUSTICE BARBARA JAFFE: Excellent idea. I'm writing all this down myself for my own stuff. I have to say, so many interesting ideas were batting around. We still have a few minutes. I do have a comment from an audience member, but it's not a question. I will read out the comment. Are there any other further observations from any of our panelists?

Jason Baruch wrote to you all as follows: Thank you panel organizers, panelists, and fellow audience members for a terrific day of programming. I wish I could see you all in person, not virtually, mingle and/or have a burger and/or drink at the Bar and Burger. Hopefully, we will all have the opportunity to reassemble in person for the next State Bar Annual Meeting.

I'm sure we all join you, Jason in that sentiment. But in the meantime, I think everybody who is watching this would agree that these are lawyers, mediators, arbitrators with us this afternoon who are working damn hard, and seeing that people's disputes are adequately indeed excellently addressed, and that is how our system works and it is so important, whether you are trying a case in a huge courtroom with all the bells and whistles or whether you're in a small Zoom conference with two individuals who just want to iron out some dispute, you guys are the ones who are doing it and you are all to be commended.

THEO CHENG: Thank you.

JUSTICE BARBARA JAFFE: On that note, I think that's the end—wait, there's another question. Tyler Simms asks, as an arbitrator do you ask a witness if they have any documents, cell phone, etc., in front of them prior to testimony?

MICHAEL YOUNG: Theo, do you want to take that?

THEO CHENG: Sure. Actually, it's one of the questions I go over with counsel in my protocols conference, and it's in my order that witnesses should testify on a clean desk with no notes of any kind, unless they disclose it ahead of time.

So, I don't ask at the hearing unless there's some allegation made or an objection made by someone that perhaps the witness is using some notes, and just can't be seen off camera.

I do, however, when I administer the oath, and might I add that there's mixed case law on whether or not you can administer an oath over Zoom, but I do get consent of the counsel—they don't object to my administering the oath over Zoom. And part of my oath after I administer the typical oath that's done in court, I ask the witness to swear or affirm there's no one else present in the room in which they're testifying.

So at least I eliminate the possibility that there's some helper elf underneath the desk passing answers to the witness. But other than that, I don't ask specifically about notes and things like that on the desk.

LAVERNE BERRY: And I do the same type of thing as Theo, although I go one step further, in that I note that these have been the protocols that we've all agreed to when I start. So, I sort of do a truncated version of what we've all agreed to as part of my kind of opening statements.

JUSTICE BARBARA JAFFE: That's great. I think, my gosh, I've learned so much, and I know that everybody else has. Barry Werbin is here who is our Section Chair. Good to see you, Barry, hope everything is well. You want to thank me?

BARRY WERBIN: I do, I do want to thank you. You beat me—this is like the subliminal Zoom metamorphosis that we've gone through. You don't even have to speak anymore. But since we have a lot of people watching this, I'm coming on at the end, because I see we're done with questions.

I want to personally thank you, Judge. I know most of you, Laverne, Theo, Amy, Michael, thank you for a terrific, enlightening, and engaging discussion. I think it's really important.

I have a major mediation in federal court in Indiana coming up later in February where, thank God, it's remote so I don't have to go to Indiana, though it's a beautiful place. But this is a huge issue with a lot of people, all of us litigators, in particular, and clients, on the client side. The cost of litigation is obviously something that as years go by is becoming a huge issue and drain on corporate coffers and the like, and it's just very refreshing to hear everything you've been going through and how you're dealing with the pandemic and ADR and all the benefits of it, and how to manage it through this. So, thank you very much again.

In closing this first part of the EASL Annual Meeting, I want to thank all of our terrific program planners, moderators, and speakers for presenting today and discussing some of the most critical challenges we continue to face due to COVID-19.

I look forward to our continued Annual Meeting two-part program on Diversity next Tuesday afternoon, January 26th.

I again encourage all of you if you're not already members of EASL in the audience, to please join our Section. I think you can see by the quality for these programs, the benefits of membership. And thank you very much, and see you all next week.

JUSTICE BARBARA JAFFE: Thank you, panelists, it was a pleasure getting to know you all, and I look forward to seeing you on Zoom in the near future. Stay safe everyone.

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

ANNUAL MEETING

Day Two: January 26, 2021

WELCOME, AWARDS AND INTRODUCTION OF PROGRAM

Section Chair:

Barry Werbin
Herrick Feinstein, LLP
New York, NY

SIMONE SMITH: Good afternoon, my name is Simone Smith, I'm a CLE program manager at the New York State Bar Association. We would like to welcome you to today's program, which is the EASL Virtual Annual Meeting 2021. I would now like to hand over the webinar to the Chair of the Section, Barry Werbin.

BARRY WERBIN: Thanks very much. Good afternoon everyone, I'm Barry Werbin, Chair of the EASL Section, and I want to welcome you to Part 2 of our Section's Annual Meeting.

Our panelists today will take a deep dive into the diversity challenges facing the publishing industry. This actually is the first part of what will be a multi-part Diversity Program Series sponsored by EASL and EASL's Diversity Committee that will continue over the course of this year, with each program focusing on a different market sector, such as music, theatre, and film.

Some of you may have heard my membership pitch at last week's session so I don't want to belabor it, but for those of you who did not, and for those of you who did but are still not EASL members, I again strongly encourage you to please join our Section.

EASL has over 1,300 members and addresses legal and business issues that focus on its constituent markets, including sports, athletes, professional collegiate teams, the leagues, agents, etc., all aspects of the arts including artists, galleries and museums, and online, and all aspects of the broader entertainment markets, including music, theatre, film, publishing, digital media, radio and TV, all of which have been deeply impacted by COVID-19, as well as the diversity issues we'll be discussing today.

We see time and time again that the effects that COVID-19 has had on shutting down Broadway, closing museums, galleries, small bookstores, and the like. Musicians, actors, stage hands, writers, athletes and athletic teams have all been deeply impacted by COVID-19.

At the same time, these past 12 months have really highlighted the call for diversity and the need to address racial injustices in our society, which rang loud and clear. And diversity remains one of EASL's primary focuses in 2020.

The additional benefits of joining EASL, apart from great comradery and networking, is receiving the *EASL Journal*, which is among the top-rated journals of the State Bar.

Contributing to the EASL Blog as well, we always look for contributors to write on anything of interest in the legal and/or business areas of interest to EASL's constituents. And we just have terrific programs that you can get involved in helping to plan, and not all are CLE, we have many non-CLE programs, luncheon programs with speakers of interest and the like.

I'd like to again thank our many Annual Meeting program planners. A huge amount of work went into putting this Annual Meeting together. And I'd especially like to thank Dana Alamia, who is our liaison at the State Bar, for her hard work and dedication in helping to put this program together, along with our officers, Ethan Bordman, Vice Chair; Kathy Kim, our treasurer; our outgoing secretary, Robert Seigel, and our new incoming secretary, Ms. Isaro Carter.

I also want to thank our terrific sponsors who have really helped out in a difficult year financially for us. First and foremost, our Gold sponsor, iBERIABANK First Horizon. iBERIABANK First Horizon offers unique banking services with a focus on the sports and entertainment sectors that recognizes the unique financial challenges those industries face. If you click on their icon, the sponsorship icon on the EASL website page, you can find out more about them, and hopefully they can help you in your business or industry or with that of your clients.

Next, I want to thank our Silver sponsor, JAMS, which of course needs little introduction. JAMS is the

world's largest private ADR provider. Its panels of neutrals include more than 400 United States and federal judges and attorneys with proven track records and extensive practice areas and industry expertise.

And then we have three Bronze sponsors I'd like to thank. First, Arts Minutes offers company formation and related business services for those in the entertainment fields, and their current mission is to amplify the voices of Women, Black, Indigenous and People of Color, the LGBTQ community, and under-represented and emerging filmmakers.

101 Productions, another one of our Bronze sponsors, has been providing Broadway touring and live event management services for over 25 years. They are active members of the Broadway League and are on the forefront of bringing Broadway live theatre back to New York and to the road as soon as possible, and they look forward to tackling these challenges ahead.

And last but not least, I'd like to thank my own firm, Herrick Feinstein, for being a Bronze sponsor. Herrick is a full-service legal firm based in New York and New Jersey with a diverse practice cutting across all aspects of litigation, corporate real estate, bankruptcy, trusts and estates, and taxes, with specialty practices and intellectual property and technology, which is my area, along with a nationally recognized art law practice and sports law practice.

Now I'm extremely pleased to introduce our newly renamed Phil Cowan-Judith Bresler Memorial Scholarship writing competition, and our two winners for this year.

This is something that's been very near and dear to EASL for a bunch of years. We were extremely saddened last fall to lose our long time EASL Executive Committee and former Chair, Judith Bresler. Judith was one of the pre-eminent art lawyers in the country, and in her honor, EASL added her name to the scholarship program of which she had been a passionate supporter and leader.

Our Scholarship Committee Co-chairs Ethan Bordman and Christine-Marie Lauture will now announce and introduce our two winners.

ETHAN BORDMAN: Thank you. First, I also want to start with some thank you's. Thank you to Christine-Marie Lauture and I want to thank several people who have made this year's scholarship successful. Thank you to all the students who submitted papers for the scholarship. They were all well researched and well received.

We also want to thank the judges, EASL members, and EASL Chair Barry Werbin, who gave their time to contact schools, professors, students, student organizations to inform them of the scholarship, and thanks to all the judges.

Also thank you to Dana Alamia, the EASL Liaison, who did a tremendous amount of work, thank you. And I'd like to thank Christine-Marie Lauture for co-chairing with me. We had a lot of fun, a lot of work, but a lot of fun as well.

The Phil Cowan-Judith Bresler Memorial Scholarship was founded in 2005, named after Phil Cowan, a former Chair of the EASL Section. The scholarship offers up to two awards of $2,500 on an annual basis to law students interested in the areas of entertainment, art, and sports law.

As Barry stated, the award was renamed in 2019 to commemorate the memory of Judith Bresler, also a former Section Chair, who since the scholarship's creation has made a tremendous contribution to the success of this opportunity.

The competition is open to all law students in all accredited law schools throughout New York State, along with Rutgers and Seton Hall, as well as a number of other law schools on a rotating basis throughout the United States.

Two winning papers are chosen annually. The authors of the winning papers are each awarded the scholarship and the winning papers are published in the *Entertainment, Arts and Sports Law Journal*.

Now, I'm going to hand it off to Christine-Marie Lauture, my Co-chair, to announce the winners, and then I'm going to hand back and we're going to present the checks to the winners.

CHRISTINE-MARIE LAUTURE: Thank you, Ethan. So, our first winner is Deanna Schreiber. Deanna is a 2L at Fordham University School of Law, and her paper was, *The Future for Federal Jurisdiction over Nazi Looted Art Restitution: The Applicability of the Expropriation Exception of the Foreign Sovereign Immunities Act and the Availability of International Comity Defenses for Foreign Sovereign Nations*. Congratulations, Deanna.

DEANNA SCHREIBER: Thank you.

CHRISTINE-MARIE LAUTURE: And our second winner is Lawrence Keating, also at Fordham University School of Law. His paper was, *An Artwork by Any Other Name An Examination of Authenticators' Role in the Art Market and Suggested Legislative Improvements*. Congratulations, Lawrence.

LAURENCE KEATING: Thank you very much.

ETHAN BORDMAN: So, I'm going to give you guys your virtual checks. The actual monies are going to go to your school in the next few weeks toward your tuition. And so, here's check number one, I'm going to hand it through the computer, and check number two, and there they are, look see they have them immediately.

Thank you, guys, thank you so much for writing. Congratulations, well deserved. And I'm going to hand this back to Barry.

BARRY WERBIN: The certificate. Do we have the certificates? Guys, hold them up closer to the camera so that we can all see them. Excellent.

All right, guys. Ethan, Christine-Marie, thank you very much. As Chair, I want to personally extend my congratulations to Deanna and to Lawrence, job very well done.

This is a very competitive—right, a competition, we had a bunch of papers from different schools. The authors are reviewed by our judges anonymously, so we don't know who you are, so it's truly on merit and neutrally reviewed.

So, congratulations again, and we look forward to seeing your papers in print in the *EASL Journal*,[1] which I'm sure you'll get some hard copies of as well, we'll make sure of that.

And I just want to say that scholarship and working with law school students is also a major part of EASL's programming goals. We really re-upped our Law Student Committee last year, which is chaired by one or two law students, 2Ls or 3Ls, to get law students involved. It costs you nothing to become an EASL member, and I think it costs you nothing, a nominal student fee, to become a student member of the State Bar. It's great way to get involved with experienced practitioners in a field of interest that you really love, and I strongly recommend it, and you can spread the word.

Now without further ado, we have a very full program today. So, we're actually going to start a little earlier it looks like, which is great for lawyers.

Endnote

1. See pages 42 and 48 in this issue of the EASL *Journal*

WRITING WRONGS: PROMOTING DIVERSITY AND INCLUSION IN BOOK PUBLISHING—INDUSTRY BACKGROUND, CULTIVATING NEW READERS AND WRITERS, AND WORKING IN PUBLISHING

Moderators:

Cheryl L. Davis, Esq.
General Counsel
The Authors Guild
New York, NY

Michael Mejias
Founding Director, Writers House Intern Program; Founding Executive Director, Inkluded
New York, NY

Speakers:

Amanda Armstrong-Frank
Director, Workplace Culture and Diversity Initiatives
Simon & Schuster, Inc.
New York, NY

Jalissa Corrie
Marketing and Publicity Manager
Lee & Low Books, Inc.
New York, NY

Annysa Polanco
Director, Diversity, Equity & Inclusion
Penguin Random House LLC
New York, NY

BARRY WERBIN: I'd like to introduce today's program moderators, Cheryl Davis, who is also on our Executive Committee. Cheryl is general counsel for the Authors Guild. And Michael Mejias. Michael is founding director of Writers House Intern Program, and the founding executive director of Inkluded. I urge you to go to their websites, because they're doing fantastic things for young writers, and focusing on diversity and opening up greater opportunities in publishing. So, you guys take it away.

MICHAEL MEJIAS: Thank you, Barry. It's great to be here this afternoon with everybody on this rainy day in Manhattan.

Before we really start to unpack all this information, I want to talk a little bit about how we're going to do it, the structure of the panel, at least this portion of it.

So, we're breaking it up into three sections, or three stanzas, the first being the state of the industry; the second being working in publishing; the third being cultivating new readers, and writers, and the path of publication. So that's how we're going to break it up, one, two, three, and we'll start with state of the industry.

To talk about the state of the industry, for me and for a good many of us, we have to start with Lee & Low Books, it's what we talk about with writers and with other publishing folk. We talk a lot about inciting incidents or triggering incidents. And the Lee & Low Diversity Baseline Survey was certainly that sort of thing. It was a seismic event that graduated the discussion regarding the lack of diversity in publishing.

We're happy to have with us today, Jalissa Corrie from Lee & Low. And I'll ask Jalissa to introduce herself, and I hope I have your name right, to introduce herself, and tell us more about this.

CHERYL DAVIS: Michael, I think Jalissa may not actually be here, because we actually did start the panel about 15—

MICHAEL MEJIAS: Early, hah. Okay. All right.

CHERYL DAVIS: That being said, hi, I'm Cheryl Davis, general counsel, the Authors Guild, Co-chair of the Diversity Committee. I'm going to vamp a little bit here.

Michael is going to be handling the first part of the program, which deals primarily with the publishing—the nature of the publishing industry. After our brief break, we're going to be delving into the legal aspects of it, what sorts of employment laws affect diversity in publishing and other industries.

We're going to hopefully go through some action items, and how people can address these issues going forward.

One of the things we want to do on the Diversity Committee by going through these, is by showing not just what's going on in the publishing industry here, but what sorts of diversity efforts can you take from what we're talking about and go on and use in your firm, in your company, in your industry.

You may hear things here that will inspire you to make your own diversity committees, you might enter into new practices in your companies, and we applaud that, we'd love to hear more about it.

Jalissa is not here about 14 minutes early. Let's see. We would rather start with the state of the industry rather than jumping forward. Well, what we could do—

MICHAEL MEJIAS: Well, why don't we just talk about, in general, the Lee & Low?

CHERYL DAVIS: Yep.

MICHAEL MEJIAS: Since it was such a big and impactful moment in it, and I'll start. As somebody who's working on the agency side, it was a real call to arms.

I had been participating, and Writers House had been participating, in these discussions since, at the very least, when I walked through its doors back in the late '90's, and there was always a concern. There was always a concern that some people got to tell their stories and some people didn't. But admittedly it was Lee & Low that graduated the conversation that the Writers House Intern Program really graduated and took a big step, and the survey was a real big part of the narrative in that space. And I'm wondering how it impacted PRH (Penguin Random House) and S&S (Simon & Schuster). And since we have Elda here, Elda, please introduce yourself and maybe you can talk to us a little bit about how it all went down once Lee & Low blew into town.

ELDA ROTOR: Thank you so much for having me as part of this conversation. I'm looking forward to learning from my colleagues as well.

I would say that one of the main reasons why Lee & Low was so important is because of the idea of metrics. And we can talk about diversity and inclusion in broader ideas, right, philosophical ideas, but when it comes to running a business and in terms of accountability, it's important to see data. And I think Lee & Low has been such a leader in sharing that data with us and giving us a chance to have points to use in conversation, with talking about areas of improvement, issues that we might have in different aspects of our business.

I commend them because honestly, I think we rely on them. There aren't that many data resources out there that are looking at publishing on a regular basis. And it always kind of presents an opportunity for us and the ability to talk to each other about where we are and where we want to go.

CHERYL DAVIS: That's great. Elda, can you please introduce yourself and your company, and tell us your position there.

ELDA ROTOR: My name is Elda Rotor, and I'm the vice president and publisher of Penguin Classics at Penguin Random House.

CHERYL DAVIS: And that is wonderful.

MICHAEL MEJIAS: Thank you. And I just want to take a step back because there might be some of us who don't know what we mean when we're saying Lee & Low.

Lee & Low was a survey that was published in all of the industry periodicals. And what it helped us realize and what it told us was that BIPOC community wasn't particularly represented in our industry, that it was about 5% Black, and 6% brown, and 4% Asian, and those were numbers that we weren't satisfied with. And there was a real concern in the industry, and we started to really have the difficult conversations, and that was certainly a first time that was happening in my career. And I'm wondering now, just working off of that, Amanda, if you can introduce yourself, who you are, the work you do. It's good to see you.

AMANDA ARMSTRONG-FRANK: You too. Hi everyone, my name is Amanda Armstrong-Frank. And I've been doing diversity work at S&S for more than a decade.

I'm head of the company's Diversity Council, which has been in existence for more than 10 years. So, my commitment has been longstanding. And I expanded our initiatives in employee participation. And on October 1st, became our company's first Director of Workplace Culture in Diversity Initiatives.

MICHAEL MEJIAS: Bravo.

AMANDA ARMSTRONG-FRANK: Thank you. The easiest way for me to explain my role is to say that it's my responsibility to cultivate an employee-sensitive and business sustaining culture, that's what we do.

The Lee & Low survey, I agree with Elda, it was the first time we've seen those metrics. We all whisper and think that what they showed was happening, but now we have real quantifying data that showed us exactly where we were. Luckily, we, in-house had been doing that kind of research for ourselves, amongst ourselves in the com-

pany for quite some time, but it was startling to actually see it across the industry.

MICHAEL MEJIAS: Thank you, I always teach the interns that an opinion with numbers is better than just an opinion.

AMANDA ARMSTRONG-FRANK: Absolutely.

CHERYL DAVIS: And speaking of the numbers, Jalissa has actually joined us now.

MICHAEL MEJIAS: Hey there, Jalissa.

CHERYL DAVIS: So we go to the source.

MICHAEL MEJIAS: How are you, welcome, welcome.

JALISSA CORRIE: Good, thank you.

MICHAEL MEJIAS: You missed my lovely introduction of you. It was superb, I brought down the house. Welcome, sister.

We're talking about the Lee & Low survey, something you know a little bit about.

JALISSA CORRIE: Yes, absolutely.

MICHAEL MEJIAS: Why don't you go ahead, introduce yourself and tell us about the survey.

JALISSA CORRIE: Absolutely. I've also prepared a nice handy dandy PowerPoint so that people can see the results as well. So let me go ahead and share my screen. All right, everyone sees the screen?

MICHAEL MEJIAS: Yes.

JALISSA CORRIE: All righty, perfect. So, thank you all for having me. My name is Jalissa Corrie, I am the marketing and publicity manager at Lee & Low Books. So, I've been there five years this year. Before that I was in the apparel and home furnishings industry, so very different.

Of course, I'm here to talk to you all about the Diversity Baseline Survey, how it came about, the impact, the results and such. Before I do, I just want to give a little background of Lee & Low Books, just so everyone knows who we're about.

So, we are the largest multi-cultural children's book publisher in the United States. This year is our 30th anniversary, so we're going to be celebrating this year. We're New York-based, family owned, minority owned, and independent. We make our own decisions as to what we publish and how we go about things. And our mission is about everyone for everyone, because we want everyone to be represented equally and equitably.

So, we began with a focus on racial diversity, but we have since expanded to other facets of diversity. Our stories stand for People of Color, and we have a history of activism that goes beyond just books, because we're trying to push the conversation forward, and to see why we're not seeing what we should be.

So on to the Baseline Survey. So, as you have already said, people have—there's been rumblings about this. We know that when we go to a meeting, we are pretty homogonous, we know what they look like, but we didn't have any anecdotal or any information to really go off of that. We've always had that question, like where are all the books where marginalized people are represented? Why is there such a dearth of books of People of Color on the cover? Why is it difficult for, like for me, to see someone looks like me and is represented? And for me, it's because I love sci-fi and fantasy, where can I find that, rather than the oppressive narrative where struggle is always a conflict, and our joy is kind of relegated, not considered included or believed?

So, it's important to have concrete numbers for those reasons. So, everyone understands the scope of the problem, and so we can measure the actual progress, and so this is why we created this.

I do want to first start with, this is the first survey that we did in 2015. Here's a picture of the overall result.

We had academics who aggregated the data when we deployed the survey, all data was analyzed and aggregated by Dr. Sarah Park Dahlen and Nicole Catlin of St. Catherine University.

For the survey we used four different markers of diversity, so that includes race, gender, sexual orientation, disability, so we can be inclusive, and also acknowledge identity acts that were important, but not necessarily visible to everyone. And with this, this way we can track progress in our industry, show over time how we are improving or not improving and represented in representation and inclusion.

So why does diversity in publishing matter? The book industry has the power to shape our culture in so many different ways, I mean half of the television shows and movies we see, they come from books. So clearly, the people behind the books who serve as gatekeepers when it comes to producing this material, and they can make a—really we—can make a huge difference in determining which stories are amplified, and then which stories are shut out.

So, if the people who aren't working in publishing are not diverse, then how can diverse voices really be represented?

So, for the overall results for this survey, we had like 80% respondents identified as white, 70% were women, 88% were straight, 92% were non-disabled. So, this was at a time where a lot of readers were demanding to see themselves in books. And of course, our industry didn't

really come very close to representing that of the United States.

So, let me go on to the results that we released last year, January 2020. We had worked on this survey and deployed it in 2019. And this time we had a much larger sample, so this time around we included literary agents, which we didn't have before, and also university presses.

So, four years ago, we only had 35 publishers who participated and I think eight review journals. For this one we had 155 or 153 companies participate and it was deployed to 21,000 people. So, this is more—a little bit even more accurate than the 2015 one.

So, the data was aggregated again by academics, Laura M. Jiménez and Betsy Beckert at Boston University. And according to their findings between the last survey and this survey, the field is just as white today as it was four years ago. So, between those four years there wasn't a huge statistical change.

So, what else do the results show, I'm just going to go through a few facts, it's not everything, it's very verbose. We had a lot of information that we were looking at and there are so many different points to see. So, this is just a few, but you can find all this information at our blog, which I will cite at the end of this whole presentation.

So, for editorial you can see 85% white, 77% women, 76% straight, 88% non-disabled. So given these statistics, it's not that surprising that sometimes problematic content in books can slip through or even erasure can happen when people are not really considering, hmm, how about people who do not look like me. So as long as certain departments are very homogonous, this is what we're going to produce.

So, this places limitations on what actually is acquired, like editors have a lot of power when it comes to choosing what is published, because it comes to their desk. Same thing with literary agents, which I'll get into in a little bit. But they have a question, like does this resonate with me personally, am I connected with the narrative format that this book is presented in?

Like for example, storytelling elements are much different in native communities. If we have a mostly white editor base, is that something that they'll be able to connect with or understand beyond the merits of the writing, and such? So, the more homogenous our editors are, the more homogonous most likely our books will be.

So same thing with book reviewers. Sales are driven by book reviewers, especially in school library marketing, which is what we're a part of. But since book reviewers are also largely white, women, straight, non-disabled, how do we know these reviewers have the content knowledge needed for reviewing certain books? Like how are we weighing reviews that come from a well-known review journal versus say a blog from someone who's an expert, or someone who comes from that identity and such. But you know, maybe the incoming class can help change these numbers.

So, this was the most fascinating part of the Diversity Baseline Survey in particular for me. We did not break away interns in our last survey, so this was very eye opening. So, interns were significantly more diverse than the industry as a whole, and of the intern survey, we had like 50% identify as Black Indigenous POC; 50% are on the LGBTQ spectrum; we have 22% who were identified as having a disability. So, it was a lot more representative of, say the United States at large, than the industry overall.

So, this is such a dramatic departure, like we can see that clearly—there's people of all different backgrounds who want to work, but there are also—we had some questions of barriers too. A lot of interns can work outside of New York City. New York City is very expensive. Are people able to stay in this industry, especially with what people are paid? So, these are also questions to have for ourselves so that we can help to retain this more diverse, more inclusive class, but that requires a lot of change, especially in corporate structures.

So last little point before we move on—for sexual orientation, out of all of the four categories, this category saw the most change in the industry overall from 88%, which was was in 2015, to 81% this time around.

For editorial, the people who self identified as white, it increased from 82% to 85%. So even though there are more diverse books out there, more that are on the *New York Times* Best Sellers list, it's fair to assume that the large majority of people who are acquiring these books are white. Marketing publicity is more racially diverse than other departments, generally speaking. And literary agents in particular, since we included them this time around, they were actually in line, as far as the demographics go, were in line with the rest of publishing, so they didn't actually change the numbers drastically from before we had done the survey, and literary agents were not included.

So that's my spiel. One of the questions was like, what's the impact of the survey, and I know that you all have just been discussing that when I peeked in. We created these surveys so that they can be used as a baseline so that there's numbers to go back to as you have said, so that when we're talking about the need to diversify the industry, the need to provide equity and inclusion, that those numbers are there, there's proof, we can go back to it and can see it.

So, we hope to continue to release more updated surveys. So right now, it's looking like every four years, and hopefully that will continue so that we can track our progress. And we just want these surveys to provide a means for more meaningful conversations about this

need. This need is equity and inclusion, how by systemic oppression manifests within publishing, how can we question those biases that we have. And we hope that the survey leads to some solution to an issue that affects really everyone in the industry, because everyone in this industry does have a voice and deserves to be heard.

So lastly, if you want more information about it, the Diversity Baseline Survey, you can find it at our blog; blog.leeandlow.com. We have the methodology, we have a whole write-up, there's a lot more information. You can see the full study; I only gave you a few snippets. Once you go to the site you can go to the left menu, this little link, Diversity Baseline Survey, and all that information will be there. If you have additional questions or anything you can always email me, and also here's where you can find us on social media. So that's that.

MICHAEL MEJIAS: Thank you, Jalissa.

JALISSA CORRIE: And I talk a lot.

MICHAEL MEJIAS: Thank you. I appreciate it, we appreciate it. It matters, this is at least for me why it matters. That books, and plays, and movies, they help us arrive at understanding and empathy, right? And it's harder when these things don't exist the way they need to exist for us to arrive there as a community and as a country. And I think we all agree right now that we do want to arrive at that place, and that's the country we want to live in.

So, thank you for all the work that Lee & Low is doing, and thank you for being part of what we're all talking about today, and being in community with us, that it's important.

JALISSA CORRIE: Absolutely.

CHERYL DAVIS: We also want to let people know that a link to the survey is a part of the materials that you received earlier today.

MICHAEL MEJIAS: Indeed. Indeed.

JALISSA CORRIE: Thank you.

MICHAEL MEJIAS: And I think Jalissa will agree, we don't do this work alone. We have—I know at Writers House from the tippity top, people invested in resourcing, people interested in participating. This is Simon Lipskar, this is Amy Berkower at the tippity top of Writers House, all the senior agents, all the junior agents, all of the assistants, former interns, interns, all of us together in community. And the success that we arrive at is in very large part because of the collaborations, and it's worth talking about that a little bit. And I want to swing it back to Elda and ask her who she's collaborating with on these efforts.

ELDA ROTOR: Well, if you'd like me to talk about about my work at Penguin Classics, I'm happy to do that first, and then talk about some company-wide initiates.

MICHAEL MEJIAS: Please do.

ELDA ROTOR: So, at Penguin Classics, it's been part of our mission, I've been at Penguin Classics for 15 years, and I think that initially people's experience with Penguin Classics are the books you're made to read in school, right? And a lot of the general public assume that Penguin Classics are old dead white men, and that's it. But what our mission has been is to really think about the reputation historically of Penguin Classics, what is it; it's accessible authoritative editions that are contextualized by experts to give the reader the best experience reading a book. And I feel very strongly, and so does our team, that that could be applied to so many disciplines, so many subject areas. And we realized historically that we were strong in certain areas, but we didn't really have titles in most areas.

So, over the last 15 years we've been looking at those and thinking about building our audience, not because we're tapping what the classics are, but we're listening to communities who say, of course you should have this book in Penguin Classics, it's about time you have this book in Penguin Classics. It's a real change and shift of listening, and also honoring what a lot of people already love, and already study, and are already part of their personal canon.

So, we had built a lot of African American classic titles through the year. I also had a separate series with Henry Lucas, Jr., who tasks scholars that he worked with who are experts with particular authors like Ida B. Wells or Frederick Douglass.

We also have worked with the New York Public Library on *The Stonewall Reader* for the 50th Anniversary, and worked with their curator on their archival material. And most recently, I'm very excited about working with the Schomburg Center. It's our first book with the Schomburg Center, and Kevin Young. And with that we're highlighting their archival records of anti-slavery writings particularly, abolitionist and everyday activists that you might not see because their work hasn't been widely published.

So, a lot of the idea of partnering is not assuming, because I think that there's a fear, right, in working like, I don't know enough, how can I get up to speed. But there's an important balance of partnering with people who do have expertise who can help celebrate certain communities that are under-represented, and doing that work together. So that is the goal.

One of our new series is called Penguin The Read Down and they're beautiful hard cover series, a majority of which are by BIPOC writers. And why we did this is because people love their books, they love to buy several editions of their books, but it doesn't always have to be Charles Dickens. You can love that, right, but how many other people love Audre Lorde, how many other people

love Nella Larson or Frederick Douglass? And so why not make beautiful editions as part of our series. That's not to say we're the first publishers to do this, but in terms of having the privilege of working at Penguin Classics, I think it's time to do it, right.

In terms of company-wide initiatives, I just have a few things that I'm excited about. We're doing an audit of our publishing program. And from that we hope that the data and the learning will give us enough material to move forward, because there's something different between having an intention, right, and then having goals to set. So, seeing what you actually acquired and then having conversations. Some of them are hard, some of them might be admitting we don't know how to find these books, or who do we need to start working with differently now. So, I'm excited about that, that's a work in progress.

In terms of culture, we had our first company-wide book read. So, we read Dr. Kendi's book, *How To Be an Anti-Racist*, as a whole company, but also different departments and different partners had their own smaller conversations around it. And I think that will continue.

Dr. Kendi also did a virtual conversation with this publisher, specifically for PRH employees. And what I thought was challenging in an exciting way was him saying, I'm talking about policy changing, how do you apply that to your work as a publisher?

The other things that I think were very successful going forward are talking about psychological safety in blogging, personally. So, what I would recommend for companies is to think about creating ERGs, which are Employee Resource Groups. We have POC at PRH, the LGBTQ network and accessibility in wellness, which is around invisible and visible disability. And these are ERGs, they become a collective voice around shared issues and they provide opportunity for employee development, education, recruitment.

The other thing that I find really is effective is almost like soft power, it's called Penguin Stories. And what we do here is almost like The Moth, where we have storytelling. We invite our colleagues to share our personal stories about their backgrounds. And sometimes it's just because employees, colleagues, people you're friends with might not feel like they have the space to talk about their immigrant background, or the struggles assimilating as a teenager, or sort of setbacks that they find themselves in when they feel underrepresented around the boardroom, this has been probably one of the most powerful connections that has been made among my colleagues. And we try to do them maybe twice a year, and invite colleagues to start storytelling with each other. Thank you.

MICHAEL MEJIAS: Wow.

CHERYL DAVIS: Elda, you have used the term BIPOC, so can you explain for those in the audience who may not be familiar with it.

ELDA ROTOR: Yes. I mean Black Indigenous People Of Color, that's BIPOC.

CHERYL DAVIS: Thank you.

MICHAEL MEJIAS: And you've said a lot of fantastic things. And just to quickly elevate some of it, because all of it was fantastic: Listening is very very important, and is always the first best step. I love what you said about honoring, which is what's birthed from listening, right?

I'll add to that, we all have to find ways to redefine winning in our culture, in our publishing culture. And the sharing of stories, wow, that's pretty brilliant, kudos, kudos to everything that you're doing and all the people that you're doing it with.

I want to give some time to Amanda to speak to some of the things they're working on on her side of things.

AMANDA ARMSTRONG-FRANK: I agree with everything that Elda was saying as well, because I believe that listening is the first step. So, for us we have—sort of, I had a listening tour, and we listened to every group. So, we had listening tours with each department, domestically and internationally, because in order for anybody to feel included, they have to feel like they've been heard, and they can't be heard if no one's having a conversation with them.

So, it was really important for us to have those conversations and hear what everybody's thoughts are around all the things that we had identified with and had seen from these surveys.

So, we've gone through, and we have diversity counsel that have been up and running domestically for quite some time, always trying to evaluate what's happening, and working on development of other things.

So, as you can imagine, right, I'm involved in all these various efforts and we are creating and implementing programs. We have a program that we started last year, which is called Books Like Us, and it allows the various authors, as well as employees, to talk about what was the first book that you read where you can identify with the character. What was the first book that you read that you saw someone in that reading that looked like you? And that's been hugely successful, because people start to understand what that means. People don't understand that for some of us we didn't see anyone until we were maybe a teenager, not even a child. So that was very important.

Those videos, we have them with various authors. And it's even interesting to hear their concepts of how it made them create a book. For some authors, they hadn't seen anybody and they wanted to create that space,

because they wanted the next generation to be able to see themselves. So, we have programs like that, which are extremely important.

For us, navigating around how we worked with the younger generation to bring them in, part of having diversity is to be able to bring in more diverse people in your company, have more diverse voices, and it's about stories as well.

So, we also looked at where are we, what have we been publishing. How has it changed in five years and in 10 years, are we still the same? Have we increased, have we decreased, and what's going to happen in the future? I don't really believe in setting goals as a number, because I always feel like, well if you say—by 2023 we're going to have 50 more books around diverse voices, well, A) can you really do that, right, because you don't know what's out there, but, B) so what happens after that? So, you have 50 voices now, do you stop, no, you keep continuing, it should never be a stop gap.

So, we've looked at those types of things, we've created those things. We've created a pipeline to bring in more people with various backgrounds and voices by again, looking at the younger generation, looking at students, looking at high school students. How are they in the internships, how do you help them?

So, we had already been in creation with these types of things. We have a scholarship for students. We have a program where we bring students in to have sort of an open house with us so they can hear about what goes on in the publishing world. We also produce a book with them. We started work with the staff of a school in the Washington Heights area, and talked to them about what publishing is, and do you understand all the aspects of it. and let us give you a publishing one on one, let's teach you. But more important, let's bring you into the fold. We want you to develop a book. We're going to take you through the publishing process so that you can understand and learn those concrete skills, and be able to see yourself in a place that you may not have seen yourself before.

So, we go through a whole program every year to teach them about publishing. They pick a theme, they write essays, submit essays, and photographs, and art, and we create a book with them every year that they get, so they are all published authors from ninth grade to 12th grade. To start to understand what that is, they get a managing editor, they get an editor, they get an art director, all these things to help them understand about publishing, get that interest—have that bright light. And then you're looking at us and saying, oh, you have an internship program, let's join, I want to be involved. I'm keeping my grades up because I want to come in here in Simon & Schuster.

We've got an Associates Program, a rotational program, because that's the way to bring in more voices. And of course, you can't only bring them in at the entry level, you want to bring them in at other levels. And I think that we've done that successfully. The hire of Dana Canedy as a publisher at S&S. Her hiring of—and forgive me, because I can't remember specifically Mindy's name, I think it's Mindy, but I'm probably incorrect, because I can't remember off the top of my head. I'm bringing in somebody that's head of editorial.

All these changes are allowing us to be able to listen to what's happened, see what's in front of us, and keep moving forward with that. And we couldn't do that without this survey. I don't think we noticed it as much or we saw it. And that new hire, I'm sorry, her name was Mindy Marqués as our executive editor. And also notably creating a new V.P., director of multicultural marketing.

So, I think those are the things that we started to look at and say, these are things we can do, here's some concrete things that we can do based on everything we know now, and we know so much more, because of Lee & Low.

MICHAEL MEJIAS: Indeed, indeed. Fantastic. A few things I want to pick up, these are great ideas and I'm going to borrow them for Writers House and Inkluded, you must know that, and claim that as my own, like the petty little man I am.

The listening tour is fantastic, and things that are implementable. That books like us, I talk a lot about that in reading *Down These Mean Streets*, and just realizing that a book could be that. A book is about people that looked like us, and sounded like us, and that was amazing, and probably the first big step to reading in this room right now.

So, that all of these initiatives help in small ways and big ways. And I absolutely agree that it's not about a number. You were talking about numbers like that, because what we're really talking about is attitude, right, changing the attitudes and fortifying the will, and elevating those people who do align with everything that we're talking about. So, it's exciting to hear from the both of you. It's all pretty impressive. And I know that S&S has a pretty long history of working in this space.

I've borrowed more than one idea from you, Amanda, and Joy, whose name should be mentioned.

Also, it's worth mentioning that there was somebody on the panel, who at the last moment couldn't be with us. Cheryl, can you help us there.

CHERYL DAVIS: Yes. Krishan Trotman from Hachette Books was supposed to have been with us this afternoon, and she had a scheduling conflict. So, in case you're looking in your program, she's not going to be appearing today.

MICHAEL MEJIAS: Thank you. A couple of more questions for you guys. You've touched on this, but maybe you can drill a little deeper.

I want to talk a little bit about where each of your companies are placing its focus. Is it the workplace, is it books, the content itself? What do you find is working best? What do you think is most effective? So either of those, and we'll start with Elda.

ELDA ROTOR: I think that the Penguin Random House, it has a multi-pronged plan, I think that there has been a lot of communication and understanding that our most senior leaders need to work with by example. And to take DEI very seriously.

You know, I think in general, I've observed that the activity of DEI on an everyday basis is usually led by junior colleagues, they're passionate, they're well informed and educated. They have that activist culture that I really admire. And I just wanted to digress and say how exciting it is for me to see the demographic of the interns of Lee & Low that was shared earlier. It just shows you the intent, and how do we keep the young people in our industry, because I think we have that responsibility to keep them, and foster them, nurture them. I think Amanda's program can definitely do that and I'm inspired by that too.

So, it's a multi-level, planned and led by our highest level, by our board level. And I think that we're going to have to work in tandem with each other in terms of internal change and outside: So how are we taking care of our colleagues? How are we making sure that that psychological safety is there, and that people who do not feel that they have the power in the room are able to speak up? And that's to reflect how to be moved forward with the books we publish and the readers that we want to work with, our audience.

So, I think that for the company, there are so many people that are working very seriously on these issues, and we're in constant communication. I don't think it's going to improve very quickly very soon. I think that it's got to be incremental changes, and while they're happening, I think it's important to keep talking to each other and saying, it's not about meeting one goal, right, one number as Amanda said, but it's more about the journey, it's about changing our attitude towards our business for the better, and not expecting that we will stop once we hit a certain number, it's not about that at all.

MICHAEL MEJIAS: You're right. Understanding that it's work, and that it requires practice, like anything else we want to get good at.

I loved what you said, it's important for any community in or out of publishing, how we're taking care of each other, right. How we're taking care of each other. Thank you.

Jalissa, I was wondering if you wanted to address these same questions.

JALISSA CORRIE: Sorry. Could you repeat the question for me?

MICHAEL MEJIAS: Sure, where is your company placing its focus, is it the workplace or the books naturally your mission, is this mission here—what do you find is working most effectively for you all? You're doing a lot of effective things, but what's most effective?

JALISSA CORRIE: Well, I mean, because in our 30 years, which I'll even admit is my whole lifetime, they were starting with like focusing more on People of Color, but like as things have changed, we also have to consider inter-sectionality. Are we also serving People of Color who are on the LGBTQ spectrum? There's still a clear dearth of, I think, people with disabilities as far as own voices or #ownvoices, meaning the story that's being told by someone who's actually within that same identity, that same identity, that same marginalization, that same experience, and etc.

So, these are something for us to keep in mind as we move forward. The conversations, they change, they expand, they grow, and this is something I know—I know I just want more—I know I want more queer books that represent me; of course, I'd be that advocate for that, and then also taking those chances too. I know that there are a lot of publishers who are a little hesitant to go the extra step.

We published a book about a transgender child who was just nervous about welcoming their sibling into the family, and that was literally it. And I know that there have been conversations in other publishing houses where it's like, we're a little bit nervous about publishing something like this, and this and that, taking those chances, asking those hard questions. Admitting also what you all had said earlier, like maybe we don't all know, because we don't, we aren't perfect, right, we all make mistakes.

So at least that's where I see Lee & Low progressing. And also, just to talk a little bit about the assistants, the interns that are coming into everything. I've only been in a part of the industry for five years as compared to Jason Low, who's going through this presentation. He's been—it's his—part of his family's business, so he's been around for a very long time. But I guess from my point of view, with retention and everything, I'm glad that there are more thoughts about focusing on retention and things like that.

When I first started as an intern in 2016, I remember just looking at Twitter, seeing who's in the publishing industry world, hey, let's meet for a drink, and this and that, and of course that was me, but as long as other publishers are thinking of that and including that within their mission to diversify their links and such, it's very important.

With me just sending an email to some—it ended up being the co-founder of People of Color in Publishing, was just started from an email, like hey, you know a lot of people, let's chat, and that's how it started.

So now we're going to—we're hoping to go to non-profit status. We're hoping to talk to more BIPOC that are in the industry and such, and just making sure they stay, because also, people need other people who look like them to talk to, and that's what I've always loved, so I'm glad to have that too.

MICHAEL MEJIAS: At Inkluded and at Writers House.

JALISSA CORRIE: Yes.

MICHAEL MEJIAS: We have an aftercare program, because we know that retention is just as important as accessibility. And Amanda knows we talk about that too, she and I. And so, I wanted to lift that up and quickly comment on the diversity within the diversity, but every narrative isn't about us suffering. I'm not suffering wholesale; I have other emotions that should be articulated and communicated. I get to be gleeful and joyous, we all do, right, so that's important. And own voices, this is why at least for me it matters. It's the way we make room, because if I'm not allowed to write the narrative for Michael Mejias and for Latin men and I'm not allowed to write any other, how do I participate. And somebody's speaking for me, then clearly I'm not needed, and that's not being messaged, and that's what we're trying to about-face?

Quickly to Amanda to tackle that focus. You're doing so many wonderful things; I wonder where you guys are focused.

AMANDA ARMSTRONG-FRANK: Well, you know, we're focused on everything, right. So aside from the workplace aspect, my focus is also on supporting our efforts on our titles, from and about multi-cultural voices in any way that I can, it's championing titles, and/or authors. Expressing thoughts to editors, or publishers on titles about or authors from under represented voices that I have heard about or even been exposed to that could be a possible acquisition. So, we're all over everything.

We're looking at initiatives to strengthen and fortify the retention rate, and the psychological well-being of our employees, especially the new hires, because especially at this point right now they are coming in to what; they're not coming into an office to meet people and be around everybody, so it's those things that are really really important.

Like I said to you, additionally, we're focusing on educating and exposing our young adults to the world of publishing, because it's really important, and I think that when they hear our stories, and when they learn about books and everything that's in publishing, not just editorial, we know that that's useful, that's exposure that's useful, and that has an impact, because it opens up their possibilities.

As far as specific programs which we found to be effective, there are some that are short term, there are others that are long term. We've got a great internship program that pulls in many future employees from all of the underrepresented groups.

As head of our Council, like I said, I work with H.R. to create our Associates Program, and it is an extremely successful program that is predominantly diverse, and it's been in place for more than 10 years. The students that come through it, the new hires that come through it, they all sort of roll into a full-time permanent position, each and every one has.

So, we've been fortunate to have so many students participating, because we cast a really wide net in terms of the schools that we draw students from, and these are just great ways of having a feeder pool for our acquiring talent for us.

MICHAEL MEJIAS: Thank you.

CHERYL DAVIS: That is great. And I'm not going to cut this short, but I'm going to expand the discussion to move onto the next phase of our discussion. Michael.

MICHAEL MEJIAS: Yeah. This is the third stanza, and we're talking about cultivating new readers, writers and the path of publication.

I'll talk a little bit about the agents' perspective. I'm not an agent, I work at a literary agency. Some of my best friends are agents. But this is what's very interesting these days, what's promising is that for the first time in my 20-plus years I'm having the challenging conversations with my colleagues in and out of the agency about their list and how to make their list more diverse. And more than that, more than that, we're getting people the training formally and/or informally so that they can grow in their appreciation of the aesthetics, develop the understanding that's requisite to their selection process, because it's like how do we get them there, how do we graduate the thinking. And we need those conversations, we need people to listen, like we were saying, we need to have these conversations however uncomfortable. And then there's formal and informal training that people can engage in so that they're making better decisions that we would be doing it in any other aspect of our business, and we're inviting everyone now to do just that.

I want to introduce Nicola and David to the mix and ask each of you to introduce yourselves, and talk to the issue of new readers, and writers, and the path of publication.

NICOLA YOON: Hi.

DAVID YOON: Hi everybody.

NICOLA YOON: Thanks for having us. We're so happy to be here. I've been really enjoying the discussion so far.

David and I started a new imprint at Random House Children's Books called Joy Revolution, so it's a young adult imprint. And I think our perspective is we need more love stories with People of Color, that's our whole mission.

I think, Michael, maybe you had said it earlier, just that we get to have joy, right. So many times we hear stories with Black people or Asian people, or sort of any marginalized community, and there is a lot of pain that is—the books are meant to teach a lesson, this is not that. I feel like we need those books, those books save lives, but you also need the other kind of metaphysical life saving, right. You need the big love, and the joy, and the kissing, and the swooning, and you know, you just need a safe space, right.

DAVID YOON: Yeah, and that's sort of the whole concept. I'm so glad that you said, I deserve joy too, because that's the whole concept of Joy Revolution, which is like you know when you get that feeling when you're reading a book or watching a movie, and you see a character that looks like you. And I get this feeling where I feel dread. I'm like oh wow, there's someone who looks like me, but at the same time I'm like, oh God, please don't screw this up.

NICOLE YOON: You have to trust the writer, right. Like are they going to screw it up, are they going to mess up, is that character going to die.

DAVID YOON: For me it's like, please don't die first. Please don't have some like thick Asian accent, please don't be martial artists, please don't screw it up. So, Joy Revolution is all about providing that safe space for readers to pick up the book, and know that they don't have to experience that dread, they can just dive right into just pure joy, and not worry about anything.

NICOLE YOON: And also kissing, let's not forget kissing, we're allowed kissing.

MICHAEL MEJIAS: And of course, let's not forget the kissing. The all important kissing. I think we have Christopher Myers here too.

NICOLE YOON: Yay, Chris.

MICHAEL MEJIAS: So, I want to throw Christopher in to this mix, introduce yourself, explain all that's going on.

CHRISTOPHER MYERS: Hey y'all, first of all. It's nice to see friends during this time where we don't get to leave the house really that much, so I'm excited to see Nicole and David very much.

So, in terms of who I am, I've been making books for a number of years, and I also have an imprint at Random House, which is one of the many strategies that folks are using in order to solve this program, to come at this problem from new ways. It's to ask creators like myself, like Nicole or like David, to think about what books would we want to see in the world. What books do we feel are desperate to be published?

What I have found over the years is that we're at an inflection point right now. We're at this moment in which there's a possibility for great change, there's also a possibility for some regression.

This question of diversity within the book industry, it flares up about every 20 years, okay. So, since 1965 when Nancy Larrick, a brilliant librarian, published an essay in the *Saturday Evening Post* called, *The All White World of Children's Books*. That was 1965 that this was first sort of brought to a popular notion of this is part of our American consciousness at the very least that needs to be addressed.

1986, my father, Walter Dean Myers, wrote an essay in the *Times*. 2014, I and my father wrote essays in the *Times*. About every 20 years the publishing industry decides, hey, we need to deal with this issue. And that history is important for us to know, both because we should understand that this is not a new issue, and also we need to understand that people have been thinking about this. What can we learn from those people that came before us?

At one point, for example, there was a group of writers, Nicholasa Mohr, Sheila Hamanaka, a few others who had an office at HarperCollins, just trying to find new writers. And they found writers like Christopher Paul Curtis.

So, at each moment, at each inflection point, a little bit of light shines in the door. We all hope that this is the moment that the doors are thrown wide open, and that's what our goal is.

That being said, I'd like to just touch on some of the things that I've heard Jalissa talk about, and Nicola and David, is that we are often in this question caught between the two poles; the demographic pole and the kind of spiritual artistic poles.

So, we're artists first and foremost, we care about storytelling, we believe that storytelling is important. And at the same time then we need these statistics to tell us that our stories are not being told. So, the beauty of the Lee & Low survey, and the CCBC (Cooperative Children's Book Center) survey, is that we try to render all of these kind of spiritual stuff into metrics.

We're oftentimes caught in the same conundrum that NGOs are caught in. NGOs are often trying to prove—I'm currently designing a program for—like an arts program for the world's largest refugee camp, and Cox's Bazar in

Bangladesh. And at the very inception of this the World Food Program, who I'm working with is asking me, how can I measure the effectiveness of this? And I think that's a question that we're all being tasked with is, and that runs in often times counter to our impulse as storytellers.

We want to measure the effectiveness in terms of how deeply into our soul does it cut, which we can't really measure. I mean actually, David can measure it because they've got the science behind it that you know, they've been working—they're like this love story cuts 37% deeper than this love story, which is what I really love about their work is that they've got like a lab of love stories in which they measure size, tears, heartbreak, and joy. That's what I think is really beautiful about what they do. But this question of being caught between these two poles, I think, often comes up for all of us in the industry.

So, we want to say there are this many books being published, but then as we are all pointing to on this panel, just having brown faces, queer faces, women's faces on the covers of the books, doesn't necessarily solve all the heart problems, right?

If you look at the late 1960's there was a flourishing of books about young Black kids at that time. Books like *Toby,* in which there were these photo documentary books about the poorest of Black children. And there was an anthropological desire for many people to see these brown faces in abject poverty, and people can say, wow I read a book about a sad Black child. And then all of us who were sad Black children would say, maybe that's not for me.

So again, being caught between these demographics is interesting for the kind of—because we're talking to lawyers, for me one of the more interesting kind of legal aspects of demographic metric issue is when you look at the 1954 *Brown v. The Board of Ed* arguing in that Thurgood Marshall does, right? What's interesting is that it's one of the first times that psychological evidence gets introduced into the court through the groundbreaking studies of Kenneth and Mamie Clark.

So, we're trying to find metrics for why segregation is bad, because everyone was able to show the metrics to say, look, everyone's got separate but equal facilities, they have a school and they have a school. And Kenneth and Mamie Clark go in there and say, hey, these are the metrics, we will provide new metrics to say that this arrangement, this special arrangement of segregation is having adverse effects on children, and it's also like this early bringing in of psychological evidence as being somehow important.

That being said, what metrics can we look at? Well, we look at sales, I mean and I think that that kind of is one of the more important ones for the business side. And that is oftentimes that idea of sales and circulation can fly in the face of common knowledge.

There's an anecdote that I find super interesting about *The Village Voice* when it used to be on sale as an alternative newspaper in New York, I think it ended in 1990 something. And one of the things that was interesting is that circulation went up whenever there was a Black face on the cover. And everyone knew this in the company, although in publishing the common knowledge at the time was that a Black face on the cover of the book would lessen sales, would lessen circulation. This has been proven over and over again. And you see often times in other media artistic communities we see that hip hop albums, when album sales were a thing and not streaming, it wasn't only urban inner city kids buying Biggie albums. There were lots of white suburban kids who really wanted to see that little Black baby on the cover of "Ready to Die."

MICHAEL MEJIAS: Christopher, can I just cut you off, because I want to swing back to Nicola and David. Thanks, we appreciate you.

I want to talk to Nicola and David real fast with the few minutes we have to talk about their experiences as writers, as authors yourselves, experiencing publishing, encountering systemic bias, or racial issues on the way to getting published. I'd like to hear it.

NICOLA YOON: So, I will say that my team at Random House has been great, which is not to say I don't know many many stories of it not being great for people, right, we already have that story, there is already a Black fantasy, there is already this interracial story, right, that kind of mentality, but I'll tell you a personal story.

So, when I wrote my second book, *The Sun Is Also a Star*, the main character is Jamaican, the main girl is Jamaican, and the boy is Korean American. And so, I started writing this book, and it's not autobiographical at all, even though everyone always assumes it is. And I started writing this book, and then I had this sort of panic attack, you know, and it was like 4:00 in the morning and I went to David and I said, you know, I'm just going to write these two characters, these two non-white people into this book. And David was like, white people do this all the time. White people do this all the time, why can't we, right?

DAVID YOON: But it was a real point of stress though, because like it was what, four years ago?

NICOLA YOON: More, forever. A hundred years ago.

DAVID YOON: It was not that long ago, and even then, it was a risk to put brown faces on book covers. It's—this whole brown face—

NICOLA YOON: Well, everyone said it was anyway, right.

DAVID YOON: This whole brown face on book covers—

MICHAEL MEJIAS: That's going back to what Christopher was saying.

DAVID YOON: Yeah. It's a super recent trend, like the last two years. So, when Nicky wrote, *Everything*, *Everything*, which was like six years ago, and *The Sun Is Also a Star* was five years ago, the general consensus in publishing was like, we can't be that specific with the character because then readers will think it's only for a Black audience. And that's how recent things have changed. And this whole—Chris, I'm glad you brought up the whole anthropological point of view, that anthropological gaze, right.

NICOLA YOON: Yeah.

DAVID YOON: It happens to me a lot. I mean people love frankly, love my first book, because it talks a lot about Korean culture. And my second book, *Super Fake Love Song*, I've read reviews where it's like, "Oh I love this book it was funny. I didn't learn as much about Korean culture in this one." And if they think that, they're going to hate my next one. So that's why I think volume is really key, just sheer volume, and repetition, and repetition.

NICOLA YOON: And lots of different types of books, right? But I mean, I don't—we don't exist to teach white people things, do you know. I just can't, I can't with it, right? We exist because we exist, we get to have joy, we really do. We can tell all the stories we want.

MICHAEL MEJIAS: Let's end it there, because that's not punctuation, that's not punctuation sister.

Thank you everybody who participated in this portion of it. We could go on for awhile, I kind of wanted to, it was just getting to the good stuff, but we're going to take a little break now.

WRITING WRONGS: PROMOTING DIVERSITY AND INCLUSION IN BOOK PUBLISHING—THE ROLE OF LAWYERS AND THE LAW IN DIVERSITY INITIATIVES FROM THE PERSPECTIVE OF GENERAL COUNSEL AND OUTSIDE COUNSEL

Moderators:

Cheryl L. Davis, Esq.
General Counsel
The Authors Guild
New York, NY

Michael Mejias
Founding Director, Writers House Intern Program; Founding Executive Director, Inkluded
New York, NY

Speakers:

Min Lee
Senior Vice President and General Counsel
Hachette Book Group

Jessica Moldovan, Esq.
Lieff Cabraser Heimann & Bernstein, LLP
New York, NY

Anke Steinecke, Esq.
Executive Vice President, Chief Legal Officer and General Counsel, US
Penguin Random House LLC

Joshua Zuckerberg, Esq.
Pryor Cashman, LLP
New York, NY

Speakers from the "Industry Background" panel will join as well.

CHERYL DAVIS: I want to let you know, since we're dealing with lawyers from companies and various organizations, everybody's speaking on their own behalf, and not necessarily speaking the opinions of the entities that they represent.

Let us start off with the legal framework. We have Josh Zuckerberg, partner at Pryor Cashman. And Jessica Moldovan, who is adjunct professor at NYU.

So, Josh, can you please let us know the legal framework that we're dealing with, and how it does or does or does not relate to diversity and inclusion efforts.

JOSHUA ZUCKERBERG: I will try. Can you guys see my screen yet?

CHERYL DAVIS: Yes, we can.

JOSHUA ZUCKERBERG: I usually have some type of Zoom glitch at one point or another, so why not start it off this way.

So, what I want to talk about actually in the legal framework so what you see is the law trying to promote fairness and better treatment for employees at the workplace. The hope being, I think, the legislatures' hope being that those types of efforts can promote an increasing inclusion and diversity.

So, for example, New York City, New York State, California, a number of different states in the country right now do have training obligations. Those training obligations are mostly focused on sexual harassment, but what you also see is that those trainings have been expanded by employers, and sometimes that expansion has come at the instruction of the legislature to include not just sexual harassment, but harassment generally. And a lot of employers have then taken from that to go on to not just harassment issues, but discrimination issues more broadly.

So, we are seeing that that has an impact, obviously, on promoting fairness and equity in the workplace. And

trainings have certain requirements, folks are not told simply to do harassment training, but to include certain topics in those trainings.

So, employers now have to do a training that defines harassment, defines retaliation as often sections on bystander intervention, and it's evolved really, also, into training on investigating these types of complaints and how to deal with them.

So even for the most cynical folks who don't necessarily believe that diversity is important, or that fairness or civil rights is an important issue, the law goes through the case law and legislative efforts, have made these types of trainings and these types of efforts really something that's in the self interest of both employers and individual executives to undertake.

There's personal liability under a certain city and state human rights laws, so that individuals can be sued themselves under discrimination claims. And employers are responsible for the actions and the conduct of their supervisors. And I will note that many of these anti-harassment laws have very significant damage awards, punitive, compensatory, and the verdicts in these cases can be very high.

So, I think what you see now is a lot of employers, again, even if their heart's not really in it, are doing these trainings and taking these issues seriously, because they want to and have to try to avoid these types of claims.

Part of any type of anti-harassment program is the need to do an investigation when complaints are received. Once a harassment complaint arises, an employer has the affirmative obligation to investigate, and do it promptly, and this is the case whether the complaint is made formally pursuant to a complaint process or informally.

One of the things I often tell employers when I'm counseling them on these issues, is supervisors really can't keep secrets. If they are told about a harassment problem or some type of complaint, they have to act on it, and they have to act on it promptly.

Some of the duty to investigate and address these issues comes out of Supreme Court precedent. There are two seminal cases, *Burlington Industries v. Ellerth*,[1] and *Faragher v. City of Boca Raton*.[2] And in those cases, it's sort of established principle that for many employers, if you have a harassment policy and you take prompt remedial action, you can use the existence of that policy and that prompt remedial action as a defense in a case. That's not going to work under all discrimination laws, but certainly under federal law it remains a viable defense.

So, supervisor responsibility is certainly one issue that every employer who is dealing with harassment and discrimination issues has to be keenly aware. So, for example, with supervisor responsibility, again, you can have personal liability on the supervisor, and you can have direct liability on the employer or the conduct of the supervisor. So, they can be strictly liable for the conduct of the supervisor even if the employer did/didn't know about it. Employers may be liable if the employer, its agents or supervisors knew or should have known of the harassment.

For the conduct of independent contractors even, the employers can be responsible if they knew and did not take enough action to address the conduct of that independent contractor, which is very similar to the standard for holding an employer responsible for co-worker harassment.

In retaliation, the issue that we always have to address with retaliation is that obviously employees are free from retaliation when they make a complaint of harassment. And they have to be protected both in terms of making the complaint and in the investigation process.

An employee who engages in a protected activity is protected by law from being retaliated against because of that protected activity. Protected activities include: making a complaint of harassment, opposing a harassment, providing information during a workplace investigation, or testifying in connection with a complaint filed with a government agency or a court.

Retaliation can be, by the way, any action that's taken to alter an employee's terms and conditions of employment because that individual engaged in protected activity.

So, the standard that most courts will implement when looking at a retaliation issue, is, are the actions likely to deter a person from making or engaging in protected activity? So, it can include taking work assignments, or giving unfavorable work assignments, transferring someone to another department, icing someone out, avoiding the person, giving a poor performance review, etc.

I want to end that slide about retaliation by just noting one thing, which is that one of the things we see as a phenomenon in discrimination cases of both whether we're prosecuting them on the plaintiff side or defending them, that retaliation is one of the most common problems, because oftentimes the underlying discrimination claim itself is very difficult to prove. Retaliation, on the other hand, becomes easier to prove, because this is the area where employers often make more mistakes, and those mistakes are often documented.

Executives complain to each other about the complaint. They mistreat the complainant, they freeze people out of meetings, and they engage in other conduct that, frankly, one might understand from a human nature perspective, and that you understand, it's hard to be accused of something you don't feel like you did, but they continually make these types of mistakes that suggest to the court or the jury that they were in fact retaliating against the person for making that complaint.

So, I'm going to hand it over to Jessica now, and I'm sure I'll be able to weigh in a few other times in the panel.

CHERYL DAVIS: Thanks a lot. And Jessica, you teach and you've done research that touches both on the law and the sociological aspects of diversity and inclusion efforts. So, can you please talk to us a bit about that.

JESSICA MOLDOVAN: Absolutely, thank you for having me. So, Josh has just explained to you all the obligations under the law, and if you're an employer, all the ways in which you can screw up.

I'm here to tell you that however onerous those requirements seem to you, the law is the floor and not the ceiling. And frankly, to not be what guides your diversity and inclusion efforts.

That might sound strange coming from a lawyer, and I still want to have my job. But as a lawyer who knows that lawyers are not taught how to constructively address difference, and some people say that lawyers are notoriously bad managers, and courts are generally management friendly. So, legal incentives to push the envelope with respect to DEI are lacking.

To have effective DEI strategies, we need to ask, how do people work together across differences, particularly differences rooted in history of oppression and discrimination? And an antecedent question, how do you create a culture where people are actually themselves at work such that there are differences, whether it's gender, race or disability are encouraged and utilized without being exploited or tokenized?

So, I want to start by briefly explaining why I think the law as utility here is limited. I do have a PowerPoint, so let's see if this works. So, some of it is simply doctrinal. In the Constitutional context diversity, while a compelling state interest in education does not have that status in employment, and under a Title 7, probably more relevant here, the Supreme Court has severely limited the circumstances under which an organization can voluntarily adopt an affirmative action plan.

In general, an employer can only institute race-conscious policies when designing to remedy past discriminatory practices in a particular company, not discrimination in society more generally. But even where the law mandates training or ostensibly considers the needs of marginalized communities, the types of things that Josh discussed, the law often seeks yes or no answers: Does the company have a training or not? Is there a complaint procedure in place or not?

It's not that these questions aren't important, but the more pressing, important question I would say is, do these systems work, do they protect minorities and women, do they foster organizational change?

Brent K. Nakamura and Lauren Edelman did a fascinating study of 1,188 federal judicial opinions in the Equal Employment Opportunity context, and what they found was that judges had become increasingly likely to defer to the mere presence of what they call a "diversity structure," that's a diversity training, anything, regardless of its efficacy, so this led them to conclude the diversity structure is, "Create an illusion of fairness."

Diversity structures have become to a great extent symbolic methods of diversity, if diversity structures were uniformly effective, this trend would not be problematic, but when judges defer to diversity structures without adequate attention to the adequacy of these structures, they undermine, rather than protect, civil rights in the workplace.

So, while courts associate structures with legal compliance, social science shows that everyday practices may discriminate against employees even where policies prohibiting such discrimination exist, and that informal threats or organizational culture may lead employees reasonably to fear using employers' compliance procedures.

I'm not here to say that you should not have diversity statements, policies or training to mitigate legal risk, as Josh talked about, you must, but this is where law should give way to social science.

We'll discuss specific initiatives later, but I want to take the short time I have left to focus on how organizations approach diversity and inclusion rather than specific initiatives. And here I borrow heavily from organizational scholars David Thomas and Robin Ely in studying organizations, who concluded not only that demographic diversity was not enough to effect change, so the whole add diversity and stir, that doesn't work; I think everyone here knows that. But also, that the attitude with which an organization's leadership approaches diversity and inclusion makes all the difference.

So, they asked a very simple question, why do you want a diversified workforce? And they identified three different paradigms. And I'll just go through them briefly before talking about the last one, the most important one.

The first one is the discrimination and fairness paradigm, which is very, I think, easy to understand as a lawyer. It's "we're all the same, we deserve the same opportunities, race and gender essentially don't matter." The focus is on fair treatment, compliance with laws, and progress is measured through achieving and recruitment and retention goals, rather than by the degree to which conditions in the company allow employees to draw on their personal experiences and differences. This has major limitations, even though on the surface it sounds good.

The second theory is the access and legitimacy paradigm, which really functions the opposite way. It's predicated on the acceptance and celebration of differences, but it often can boil down to, you white women, sell to other white women. You Asian men, sell to other Asian men. Meaning companies find out that they're an

imminent threat, because their consumers or clients have diversified, so they need access to these new markets and they need to appear legitimate.

What happens with this is that you pigeonhole staff without trying to understand what people's differences mean, and how they can be best utilized by the company.

So, this leads to the third paradigm, which is the learning and effectiveness paradigm. And people on the first panel touched on a number of these ideas, but it's fostering an environment where people feel comfortable to suggest new ideas that are rooted in different cultures and life experiences. And it lets the organization internalize differences among employees so that it learns and grows because of them.

So, I'll leave the four kind of summary pieces up, because I want to make sure not to go over time too much, but I wanted to really focus on the second one, because I think that this comes up and is important in the context of publishing, because I think you have a leg up here.

So, leaders must learn about how systems of privilege and oppression operate in the wider culture. And I think this is reading *White Fragility*, this is reading *How To Be An Antiracist*, but—and in there I think this industry has a real leg up, because you're aware of all the wonderful books out there and materials out there, but then leaders have to take the next step, which is to investigate how their organization's culture reproduces those systems. And as I wrote on the slide, this won't be pleasant.

So, this is when organizations and leaders in particular need to look within themselves and see, how are we doing this? So that was a really quick overview, but I know it's strange to say, law has some place, and I think it's important to follow, but I really do think it's the floor and not the ceiling.

CHERYL DAVIS: Thanks very much, Jess. And now we're going to bring the G.C.s in the room. We have Veronica Jordan, the executive vice president and general counsel of Simon & Schuster; Min Lee, the senior vice president and general counsel of Hachette, and Anke Steinecke, executive vice president, chief legal officer and general counsel for Penguin Random House.

Now, I'd like to get into—we've heard about the industry in general, we've now heard about the law, and I would like to talk to the G.C.s a bit about how all of that interplays in their responsibilities in helping run the company.

Anke, can you please let us know more about your role as a general counsel in diversity and inclusion efforts and from your perspective.

ANKE STEINECKE: Absolutely. And as a general counsel you really have a dual role, right? On the one hand, we are the lead lawyer in the organization, we make risk assessments, we help set policies in all areas of the company, including diversity and inclusion. But as we've just heard from Jessica, equally, if not more important is actually our role as a senior executive in the company to help set the tone from the top, because it is so important, that the leadership of the company is fully invested in diversity and inclusion efforts. And as you've heard from Elda Rotor on the prior panel, how Penguin Random House is approaching its goals of publishing and empowering more diverse voices, reaching more diverse audiences, providing them with more books that reflect their worlds. And in order to accomplish that, we need to really create a more diverse and inclusive employee population and culture, and I think it is really very important to look at it as a shift in culture.

It was really interesting for me to listen earlier to Chris say that this is sort of like a phenomenon that happens every 20 years, and then some change happens, but the doors are not open, right? So, I think, really to open the doors it has to permeate the culture, it has to be part of our company's DNA, and therefore, it has to really be part of all levels of the company. And that's how we, as Penguin Random House, have been approaching our diversity and inclusion efforts.

So, I don't know whether you want me to talk more about those efforts now, whether you want to give everyone an opportunity to talk about sort of what they see the role, but I could go on.

CHERYL DAVIS: Thank you so much, Anke. I think we are going to move on to Veronica and hear more about her role at Simon & Schuster. We've also heard from Amanda. And Anke, we definitely want to hear more of the specifics later on.

VERONICA JORDAN: Good afternoon, thanks for having me. When I think about my role as the G.C., I think about being in a position to sort of ask posed questions, and challenge assumptions, because there are a lot of assumptions that are made. And that's not to say anything negative about anyone, but you have a culture that's primarily majority, and so many people think very—in very similar fashion.

So, I have seen that as being one of the roles that I can play, because I have a very intersectional lens. I'm Black American, I'm Afro-Latina, I'm a lesbian. As one of my colleagues said, Veronica, you don't really have to say anything, you just have to show up, because they have your diversity. He was joking, but it's not true, but actually it does make a difference to have somebody in the room who's different, and I'm often the only one in the room. And what that means is that it can be a little challenging to pose a question, because you don't know how it's going to be received, and it can be a little uncomfortable. On the other hand, I always feel like I have an obligation to do that, and so I do. And by and large, I have to say that the people I work with receive it really well. We're all in it together, we're all in it together.

When we saw the public lynching of George Floyd, we had a lot of conversations. I had some uncomfortable conversations with colleagues, and they wanted to know, what do I do, how do I help, how do I help the junior employees understand that we sympathize with them, and that we find this revolting? And it wasn't always clear how they could do that. But one of the things I suggested, which seems sort of simple, is have a conversation. And people never want to talk about race, it's a third rail. But you don't have to have a conversation about race to say to someone who you know is a Black parent, are your kids safe, how are you doing, and how are they doing, because I know that every time I send my Black sons out in the street, and I'm upstate where people have guns, yeah, I'm really nervous, I don't let them go out alone, which is insane, and a lot of people wouldn't understand that, but once I shared it, it made some sense to them.

So, I really do think that we have to engage in these courageous conversations and they're not always comfortable. I heard things I wasn't happy about, but we have to be willing to engage, because we're all trying to learn together.

I mean certainly if you join me, my partner, my sons for dinner you—the way they talk about me and my partner, you'd think I was a reactionary. They're 20-somethings, they feel very differently, they think very differently. But we all have a role to play and we can all learn. And so I try to push, I try to push where I can.

CHERYL DAVIS: That is great, Veronica, thanks so much. From the only Black and sometimes the occasionally woman in the room in many of my dealings too, I can totally understand, and emphasize and relate. It's very true.

MICHAEL MEJIAS: That's why we're doing this work, right, so we won't be the only ones in the room.

CHERYL DAVIS: Exactly. And Min, in addition to—since Krishan wasn't able to join us today and talk about the Legacy Lit program, we'd love to hear about your experience and your insight. And if you can mention the Legacy Lit program as well, that would great.

MIN LEE: So, I want to sort of echo off of some of the themes that have already been discussed, but I think in the earlier panels someone talked about the importance of listening. And I think that the role of the G.C. is also to be a counselor, so you're obviously listening. And to piggyback off of what Veronica was saying, you have a unique opportunity to really speak up. And you really can and should use your capital and position of influence to drive forward these initiatives.

I would like—and I think that was a theme that was also repeated earlier, that this not be a trend, but just sort of an ongoing effort to keep improving on many of these issues that we've sort of latched onto and are making a lot of progress towards meeting.

So, I think the role of the G.C.s also interesting, because we do have a birds-eye view and have a unique ability to assess risks, sure, but also to operationalize, be it through policies and such, but also processes, and maybe even some smaller bite-size initiatives and guide the company, to sort of implementing those. And so, I think that's been an interesting part of this. And the role that the G.C. plays even, gosh, now this seems like yesterday's news, but it's not. COVID-19, right, like everything else, we've all had to take on these additional roles, so you're really seeing that G.C. role expand, which I find very interesting, and in this particular case, important, while we're such a big part of the culture transformation that's happening in publishing. So that's my case on that.

On Krishan, she's very apologetic, last minute scheduling conflict. But Krishan has been at Hachette Books, the publishing company, and you have groups, and then divisions, and imprints, she is part of the Hachette Books division. And there she was an editor for four years, really bringing on investigative non-fiction to fiction, etc.

Last year she launched in the fall, Legacy Lit. It's the first imprint dedicated to books for and by People of Color. It's a really ambitious endeavor and frankly, we're all so excited about it because the real mission of the imprint is to inspire social change. So, it's not just about publishing books by People of Color or for People of Color, it's really about amplifying marginalized voices, and that's a word that's been used a lot, amplifying voices. And you've heard that theme also repeated.

So, it's a very intentional and unapologetic approach in terms of its publishing program. So, I obviously am not as close to it as Krishan, but just an example as one flagship title, the first titles will be making their appearance in January '22 is Stanford Law Professor Ralph Richard Banks, *The Miseducation of America*, and investigative journalist David Montero's *The Stolen Wealth of Slavery*. So, she has a really fantastic program that is again, very intentional and meant to amplify previously large immense voices.

So, I think these are some really wonderful approaches that publishers are taking. And you've heard from Nicola and David Yoon at Penguin Random House, which I think is fascinating, Elda Rotor's approach, and Krishan's approach, obviously which is much more targeted.

CHERYL DAVIS: Thank you so much, Min. And Anke, we're going to go back and take you up on your proposal to give us some more specifics about what you're doing.

ANKE STEINECKE: So, I think we talked a little bit about the commitment of leadership, and that includes the commitment to transparency and accountability. And you've heard from Elda about the census that we're doing on the publishing program. Similarly, we've done something with our employee population to understand

really, how do we compare to both the broader publishing survey and to the population, and we have distributed that widely to our employees so that we have a benchmark and an understanding. And as a leadership group we have made a commitment to making our employee population well representative of our society.

Again, I think that's where the legal aspects come in a little bit, because obviously you cannot commit to quota, but we are very clear that we're making a commitment to be more representative.

Also, as Josh mentioned earlier, anti-harassment training is mandatory in New York State, but doesn't really focus on—focuses more on sex discrimination, not so much on race.

Penguin Random House, for a few years has had unconscious bias trainings and workshops, which actually we have found really really helpful, both to look at what are the books that we publish, what are the unconscious biases, how are we interacting as employees. But we have now made a commitment to actually launch a mandatory anti-racism training that's going to be launched in Q1, in addition to these other two trainings to really like take things—again, our goal is really to amplify and to not lose momentum and really drive things forward at this point, where really there is that opportunity to really open the doors, and drive change.

Then when it comes to the workforce, there's a whole slew of initiatives that tie into that. And we've heard about some of them in the prior panel, there's an internship program similar to what Simon & Schuster has that is meant to create a pipeline into hiring the interns into the junior positions. About half of the positions that are filled usually in a company like Penguin Random House and probably in other publishing companies are sort of like the junior positions.

So, we're trying to obviously change the demographic on all levels, on the entry level, but then also on the more senior levels.

So, it is—the internship it is creating mentorship programs for both the interns that come in and for junior employees that start. We have created a campus recruiter position that focuses on finding more diverse candidates, recruiting in particular at universities, colleges with a historically BIPOC population. And then in terms of the more senior executives, it is the opening up and looking at positions that are beyond the traditional publishing positions. And it starts with how do you put out a position, and are you looking for someone who has publishing experience, or are you broader in how you're approaching it, and are you looking at adjacent industries, and trying to diversify that way?

And in terms of the unconscious bias and how managers are approaching hiring, we're trying to actually be very practical and drive change sort of at all points. So, sticking with the hiring, we launched and managed a toolkit that has as a part of it an unconscious bias training, essentially.

So how do you actually interview in a way that doesn't bring unconscious bias into the interview process, and giving managers sort of like the tools to be more open and as a result hire more diverse candidates.

CHERYL DAVIS: Thank you so much, Anke. And Veronica and Min, I'm also going to turn the question to you, namely are there specific programs that you think have been particularly effective. Have you had any unforeseen upsides and downsides of any efforts that you've tried?

VERONICA JORDAN: It's all up, Cheryl.

CHERYL DAVIS: I'm glad to hear it.

VERONICA JORDAN: I love what Anke said at the end, where it's the training that helps managers, because what you do—you can work really hard. And what we've done and has been extraordinarily successful is that we make sure that every position has a slate that includes diverse candidates. And after the George Floyd incident, when our CEO issued his letter to the employees, one of the commitments he made was to make sure that that was even more robust than it currently is.

So, we have a talent acquisition person that came on board 10 years ago, she's fantastic, Amanda probably mentioned her. I shouldn't say her name, because we don't want her stolen away. But in any event, she comes with a commitment to diversity. And when she was hired, she said to our former CEO, "you have to support me on this and if you're not, I'm not the right fit." And the CEO was all in. And she's done a really extraordinary job.

I've been at the company, I don't want to say, but it's been a little over 20 years, and I was always the only one in the elevator, and now I'm not, and that just—talk about Black joy, that brings me joy. I see people who look like me, I see people who don't look like me.

So, we need to do better in terms of men, we need to do better in terms of BIPOC men, but we're doing pretty well on women so I'm really happy about that.

MICHAEL MEJIAS: You are absolutely right across the board. I won't say her name—

VERONICA JORDAN: Oh yeah, yeah.

MICHAEL MEJIAS: Bravo, bravo.

VERONICA JORDAN: She's quite amazing, and she's very intentional about that. So, one of the things that I discussed with people that I work with is you often will get a lot of learning through informal networks, right. People you've gone out to lunch with, people will mentor people and sponsor people who look like them. That organic process doesn't always happen for people who

look like me or Min, I mean, it just doesn't happen. And so, a company has to be very very intentional to ensure that that is happening. And how do you level the playing field? It's not easy, I don't have an easy answer, but if a company is at least thinking about it and looking at their processes and making sure that they're encouraging.

We have a mentorship program and we're trying to encourage people to really take advantage of that. And the one thing I've heard from a couple of people, and I'll admit that it was an issue for me when I heard, well, nobody looks like me, so I'm not going to participate, no, that's the wrong attitude, a person doesn't have to look like you to mentor you. There's a lot of value in having somebody who's actually quite different mentor you.

So, we're trying to encourage people through side conversations, not company policy, to say, do this, take the time, it's good for the mentor, it's good for the sponsor, and it's good for the recipient. So that's one of the things we're trying to do sort of in a very intentional way.

We've also—I think Amanda probably talked about it, I came in a little late, but we've got a terrific internship program, which is over 50% People of Color, and we've got a terrific Associates Program, which that's also the case. And the associates—most of those associates who we've had, we've had the program for 10 years, most of them actually worked with us, and many of them have been with us more than five years, so they're actually moving up the ladder.

Joy, oh I said her name, she's worked to create a very concrete pipeline and working to move people up the ladder. In fact, we have one person who went through, I think was in the first class of the associates who actually is a lawyer at the parent company.

So, we really are trying to make sure that people see a path, you need to be able to see a path, and when you don't see people that look like you, it's a little bit harder to see a path. So, we're trying to make sure that people understand there is a path.

CHERYL DAVIS: That is great, Veronica. And Min, what's going on at Hachette?

MIN LEE: Well, I think you're hearing that a lot of the similar programs either already having been implemented or being supplemented. And I think at Hachette we've done—as I was mentioning earlier, there's an opportunity here to really be practical and give employees, as Anke was saying, sort of like a toolkit or tools, right. So, you've got your larger policies and initiatives and trainings but then how do you really operationalize that in practical ways for people who are just busy going on their day-to-day lives, but have all the right intentions, and maybe need some of that more practical guidance?

So certainly, with the hiring process, there have been some really positive improvements. We've always had a diverse slate in place, and that's also been a really successfully program at Hachette, but I think there is a lot more intention and communication around that now between managers and H.R. There is actually a meeting that takes place before any hire between H.R. and the hiring manager to make sure a broad array of sources have been actually considered. And that the toolkit essentially has been utilized.

So be it interview tips to, as Anke was mentioning, the implicit bias that can sometimes occur, and sort of guiding managers, again who mean well, but in busy times may just revert to hiring who they're comfortable with, for example.

So, I think all of that is now much more intentional and part of that process to supplement what was already in place, but now is—I don't want to use the word formalized, because it's not really that, but again, it's more of a concerted effort to support that progression forward.

So, I think that that's been a really nice change to see. I think also to support the new hires coming in, we have mentoring and a buddy system that's new that's been placed, so that's really great for them to navigate, especially in these remote times, because we've had new people start in these times, so that's great.

Another interesting effort that's underway is with mentoring, also having a reverse mentoring program. So, for more—this is going to sound off, but folks who have been around at the company for a while, to also have a reverse mentor, where maybe you are mentored with someone who has just started, or who has just been in publishing for a year or two, just to hear their perspectives. So, I think that's really great.

Again, it's this is about community and encouraging that communication, which is I think, and this is going to be my last point that is something new that we did, because a lot of this has already been discussed, but we wanted to information gather too. So, we had an employee survey last year to really hear what employees were feeling and saying that was administered by an outside consultant. And I think that was really great, that contributed to some of these initiatives, and desire for practical guidance. But I think also that is helping not just with the reverse mentoring, but just communication channels. Like everyone was saying, we need more cross level communication. So, I think that's all being—it's all marinating, some of it is already actioning, others are a bit of projects. Again, this is a long-term process, but I think we're all headed in the right direction.

CHERYL DAVIS: That's great. And Simone, you can flash another CLE code. And after that we're going to segue into our making change happen section. And Josh and Jessica, I want you to feel free to feed into that conversation about what you think employers can and cannot do legally as we start to discuss that.

Simone, can you bring up our action items. Thank you so much. This has been really great to hear the deep dive that we've been able to do on the industry and your diversity efforts of your various companies.

MICHAEL MEJIAS: All very impressive, I have tons of notes here.

CHERYL DAVIS: Veronica, when I asked about unexpected downsides, I was thinking about a small unnamed publishing house that circulated a request that they were only going to be reviewing BIPOC works for a certain period of time. And at the Authors Guild, on our community forum, we had certain people who were extremely perturbed by this and thought that was avid racism to say that they would only review works by BIPOC authors for a period of time. So, I was thinking that's kind of like an unexpected backlash or blacklash for that publisher.

VERONICA JORDAN: Maybe not so unexpected.

ANKE STEINECKE: I'm sorry, Cheryl, my laptop just crashed, so give me a moment please, I apologize.

CHERYL DAVIS: That's fine, I can actually read through the action items that are in our materials, but I'm going to go through them at a very high level.[3]

Our Roadmap for Diversity and Book Publishing: Action item 1, proposed actively work to develop personal and organizational sensitivity and empathy to diversity, equity inclusion, DEI, issues in the workplace and in the marketplace.

It sounds like everybody here has made their own efforts towards attacking that particular action item.

Action Item 2, expand the talent pipeline. Introduce mentorship, sponsorship, training, retention, and outreach programs. And I definitely know retention has been mentioned periodically throughout this afternoon. And as I said, these are in your materials as well. Two is expanding the talent pipeline with mentorship. And I'm really intrigued by the reverse mentorship that you have going there at Hachette. Sponsorship, retaining, and outreach programs, which are important.

Michael, I know people come to you asking where can we hire qualified people for these sorts of jobs. So, people need to know how to do their outreach.

Action Item 3, systemize regular communication about DEI issues. You want people to feel comfortable talking about these issues. Like Veronica said, it's often the third rail of American conversation. But you want people to feel comfortable broaching these topics.

In fact, at the Guild, we've started having on our weekly staff meeting, we broach a particular topic of DEI. Right now, on this week upcoming, we're going to talk about pronouns. So, we're trying to get it as part of our ordinary discussion.

Action Item 4, expanding goals, with progress providing for accountability. We go back to the numbers game. We talked about the Lee & Low survey, you've got to have numbers to know how you are progressing or how you're not progressing.

So, our roadmap here is, one, two, three, four, actively work and develop the organizational empathy and sensitivity, expand the talent pipeline, systemize regular communications and expand goals, review progress, and provide for accountability. And I'm going to hand off to Michael now.

MICHAEL MEJIAS: Yeah, thanks, thanks. This is all wonderful and great ideas and important. When I'm not working in publishing, I'm running a couple of nonprofits, and I sit with the board and we talk about contributions, who's a Friend, that's First Level. Who's Family, that's a Second Level. The Pillar is a Third Level, and the Angel is naturally somebody who is naturally somebody who is giving up a lot of money.

I began to migrate that same idea to this DEI work that I do. I do a lot of speaking on the issue, in and out of publishing and people always approach me, "But what can I do?" I think we've heard that question a lot today.

So, I came up with some ideas based on different levels, and I'm just going to share a few. I think that my notes are part of the materials too, if not I'll make sure that I put them in the proper hands.[4] But on the Friend Level, on the Friend Level this is what you can do, and I'm just going to read straight from my notes here:

You've seen me, you say good morning when you come in. You say good afternoon on the way to the watercooler, and you say good evening on the way home. You also notice if I'm out sick, and when you see me you ask me if I'm feeling better. These are things that you could do all of the time every day.

We were talking about how we treat each other as a springboard for all of this work, and these are easy buyins. We talked about increments and growing incrementally, and these are things that we get to practice tomorrow. And so that's the Friend Level.

The Family Level, you're doing everything that the Friend does, but you're also doing this kind of thing. You regularly acknowledge my excellent work, and when needed you offer constructive criticism. You respect my advice so you ask for it. And those are things that you can do on the Family Level.

Moving right along to Pillar, which is doing everything that you do with a Friend and on the Family Level. You're always encouraging sensitivity in the workplace. And you call on colleagues who make insensitive remarks. If you're in a position to do so, you hire qualified people from under-represented groups. You encourage others in your department to do the same. So that's Pillar.

And then finally, Angel. Naturally, you're doing everything that the Pillar does, everything that the Family member does, everything that the Friend does, but you're also bringing resumes to the attention of the hiring decision makers. In our case, editors, publicists, agents, marketing, sales people, so on and so forth.

You're also doing follow-up, you're also on, or work with, or support groups that advance diversity and inclusion, and there are ton of them now including, of course Being Black. So, these are things that I feel we can do immediately. We can do immediately on whatever level, and remember it's practice, practice, practice. Like anything else we want to be good at. Thank you, thank you, Cheryl.

CHERYL DAVIS: Thanks a lot. So here we are in the middle of discussing what best practices, what sort of things we need to do to advance. I'm going to swing back to Joshua and Jessica.

So, with all the wonderful things that you've heard suggested, are there any legal red flags or suggestions that you would have, what's your input here.

JOSHUA ZUCKERBERG: You know, from a labor employment counsel perspective, Cheryl, employers just always have to be careful about how they go about taking these steps and these efforts. It's one thing to do diversity training, and I think there's less risk associated with that from a sort of legal standpoint, and as Jess pointed out, in fact, that can strengthen a company in terms of defending against certain claims. But we continue to see in labor and employment law, employment discrimination cases brought in what we would call reverse discrimination claims, where these are often brought by white males saying that they were passed over for a position, or denied an opportunity based on a company's diversity efforts, and saying that they, you know, but for the company's diversity efforts, but for the fact that the company was trying to put a minority candidate into a certain position they would have received.

So however we feel about those types of claims from a political point of view, I'm here to tell you they still exist. There was one filed this week by an executive, he was, I think, the general counsel at Electrolux, he was there as an interim G.C., and then was ultimately replaced by a minority candidate, and he felt it was done because of his race.

So, most of the efforts that we see here are ones that I think would pass muster, because they're about reaching out and including people, not necessarily rejecting a candidate, they're based on recruiting efforts or where you're recruiting, how you're reaching out to certain communities. And I think that's probably where most companies are directing and focusing their efforts. But it remains an area that's fraught with complication and fraught with potential liability, so it should always be done in careful consultation with your labor and employment lawyers.

JESSICA MOLDOVAN: So it's interesting, I actually tried to do some research on how many reverse discrimination claims there are, and the EEOC doesn't actually keep track of that, so I couldn't get a number, and I wasn't satisfied with any of the other research that I saw, which leads me to say, and this is not—again, I wasn't satisfied with the research so I can't say this, but I do think there's a bit of a strawman, and I think the fear of reverse discrimination claims, sure it's real, and any litigation cost, even if a claim is bad, it costs money to defend. But I think it's less of a risk than you might think, and that you might be afraid of, and that there's more risk in not making these efforts, and doing these initiatives.

I know this a weird thing for a lawyer to say because it's all about mitigating risk and avoiding anything, but there's also a goal here, and that the bigger goal is to elevate marginalized communities.

So, I wouldn't be afraid—I wouldn't be too afraid of reverse discrimination claims. And I also think there's a lot of low hanging fruit. I focused on big initiatives, and big culture change, and I stand by that. I think it's much more important that leadership is invested than it is for you to have a specific mentorship program full stop. But I think there is lower hanging fruit that you can do every day that has nothing to do with the law, you know. Doing an audit of who speaks at meetings, and if people aren't speaking, actually among leadership talking about, hah, these people didn't speak, why do you think that is? Like, that's not that hard of a thing to do and yet it can completely transform who speaks up in meetings.

Do you do an audit of who you're allocating work to, who are the big projects going to? This takes time and effort, I'm not trying to minimize that, but these are things that you can do that don't run afoul with the law.

The biggest one, and probably the hardest one, and yet the most important one, is evaluating the programs that you do try, so it doesn't become a check the box exercise like we had in implicit bias training, that's great, what was the result of that training? And if you only have a satisfaction survey afterwards, you're not actually going to know, because figuring out if behavioral change was effective takes time and effort and doing interviews. And that's often why organizations and companies say, "we just can't afford or have the time to do it," but if you're really invested, you're going to try to evaluate the programs that you try out. So yeah, and I don't think any of that runs afoul with the law.

ANKE STEINECKE: What Jessica was saying is so important, and I think that you have to continue to learn, and then implement the learnings that you have to build on what you've already done, right?

So, with, I think, the unconscious bias training is a perfect example where learning is that it's something that you have to repeat over and over again so that it actually is something that becomes people's sort of second nature and understanding. You have to integrate it into normal processes that people go through all the time so that it's present in their everyday work, and it's not a silo somewhere to the side where as you say, you've done your unconscious bias training if you checked a box, but it has to be present.

Another thing that we've decided to do is to keep the focus on it and be very clear that it is something that is important to leadership. It is actually part of our personal development and growth conversation. It is sort of like one of the elements that managers are expected to go through with the employees, so that it's clear that it is valued, because as someone earlier said, it shouldn't just be on the junior, often People of Color, to try to drive the change, but it has to be across the board and it has to be clear that it is valued and that it is important to leadership.

CHERYL DAVIS: Thank you so much.

VERONICA JORDAN: I just wanted to just add onto what others were saying. I spoke to some young People of Color late in the summer, maybe early fall, and we were talking about diversity and they were being somewhat dismissive, as young people will be. And they said, you can talk about this, but show me, because I don't really care if you have training, I'm not impressed by that, show me.

The wonderful thing is that we could show them, because Jonathan Karp hired Dana Canedy, she is the publisher of our flagship eponymous imprint. She is the first Black woman to head an imprint at S&S. I didn't hire an intern, I didn't hire an associate. He brought in someone into the executive committee, that's concrete. I'm showing you now, I've made a commitment, and there was—you know when I first described hiring Dana, I said, oh, he was so audacious, but then I thought about it, it wasn't audacious, it was actually a very safe pick. The woman is a Pulitzer Prize winner, she's written her own book, and she was the administrator at the Pulitzers, she knows how to pick a winning book; this was a brilliant move on his part. And I'm going to give him credit, because I thought it was wonderful, and I could say to people, look, this is concrete.

Young people expect so much more than someone like me. I'm just so happy if you smile at me. Young people want to see something and they're pushing us, and it's annoying, but it's good.

MICHAEL MEJIAS: I talk to them about the numbers too, I know my numbers at the Writers House intern program, 370 people have been placed in jobs since we've started, 124 of them look like me, are coming out of the BIPOC space I came out of.

So, I talk to them about numbers and it becomes real. Because you're right, Veronica, they want to know, they want to know what are the results, the result facing these young guys.

VERONICA JORDAN: They're a little scary.

CHERYL DAVIS: I want to welcome Amanda back.

AMANDA ARMSTRONG-FRANK: I wanted to say too, in looking at those numbers and communicating with them, have them see that and telling them what that feedback is, positive, negative, whatever, and then giving them action items from us, that shows change, that lets them know you're doing something and making us accountable to it.

So always talking about these are the things we said we have action on, and this is where we're at with it, we may not have finished it, maybe it's just getting started, but it is progressing and we are actively working on it, and here's some additional things that we think, based on everything you've said, what else we need to do. That's what moved the needle.

MICHAEL MEJIAS: Exactly. Exactly. I take their evaluations to heart, we do at Inkluded, we do at Writers House, and they've seen in the curriculum the next go-around. The see it implemented in the program. They have a program-wide impact in how we're doing our work and how we're operating that space. We're guided by them and mentored by them too. And it is important that they know it.

CHERYL DAVIS: We're opening up for questions. One person's question is to build on what the Yoons were saying. How much room is there to negotiate approvals of cover art, less equal support from book tours, fairs, author signings, etc. now versus before. And we're also presuming—well, hopefully the world will go back to when we can actually encounter each other in life again, but I guess the question is, what is the negotiation for getting things, like your book covers, that you wish?

MICHAEL MEJIAS: Well, I'm not an agent, as I've said before, but I'll give it a shot. I hear things, everything is part of the negotiation, and so it matters, a couple of things matter. How much the author client wants it, how important it is to that author client, and how much the editor or the publisher wants that title. So those are going to be principal to what's conceded or what's not conceded.

CHERYL DAVIS: Okay. And somebody asked a question about how the pandemic is affecting mentorship, which Amanda wrote an answer to, but I'd like to also expand it. Is the pandemic affecting any of your DEI programs, and essentially, how, in addition, other than

mentorship, is it affecting how you are proceeding to walk your DEI walk?

MIN LEE: I think one silver lining from this pandemic is that we have all learned how to work remotely, and it works, and it works very efficiently.

If you're trying to expand your new hire base and expand sources, you can look outside New York. And I think all publishers are doing that. So that's one nice thing that's come out of the pandemic.

The other thing is it is easier, although we all have Zoom fatigue, to have a spontaneous conversation personally, but I think if communication is another thing, it's not a replacement for in-person, but there can be smaller groups as they form to have further conversations and more, again, cost level discussions that are more regular that might have been harder to schedule in person.

So, I think there are a couple of silver linings that come out of it. And even if you outsource sort of reaching out to Historically Black Colleges and universities or other sources, there are now—you know, we've had to get creative about how to do that in pandemic times. And also marketing for new hires through social media and live events is—there are a lot of technological tools that can support all of these initiatives. So, I think those are some silver linings that have come out of the pandemic.

ANKE STEINECKE: And I would add that if, at least at Penguin Random House, because of the pandemic, the senior leadership team was used to getting together on a regular much more frequent basis on these weekly Zoom calls, so there was a lot more opportunity in a way to talk about these important issues, implement them, have joint conversations with our DEI counsel, especially when the terrible things happened over the summer, and I think it actually helped accelerate some of the initiatives. So, I would say it had a positive impact probably on—in that regard.

AMANDA ARMSTRONG-FRANK: I would say too, that the pandemic gave everybody a more even playing field, which we didn't have before. And in having that even playing field, it made it so that when you're having meetings and discussions, conference rooms, you're in a conference room, everybody's at a big table, all the speakers or more of the power is at the table. And now when you're in a Zoom room, everybody is looking at the same thing, we're all together. So those dynamics start to move away a little bit.

So, I think that the pandemic has made it just a little easier, because it has made everyone have to stop and think and become more creative and not get complacent and sitting in, well this is what we've always done, and this is how it is, and this works, it works so it's not broken. But the pandemic came and shattered everything that you had, to rethink how things were happening and how you move all these things forward.

So, you're right, it was like a real positive thing, even though it was not.

ANKE STEINECKE: Amanda, I think that's such an important point, that it was just so much easier to be more inclusive, and I think that had a positive side impact on diversity and inclusion because you have the physical limitation of a conference room even, right? So, there would be meetings that would be very useful for a lot of junior employees to attend, but there just wasn't space, because there's not rooms big enough, but now with Zoom they can attend and that includes everyone, and has that impact on diversity and inclusion.

MICHAEL MEJIAS: I think it's very exciting for people who look like me across the country to be able to access all of the great programming in New York, that used to be very limited to New York City is now available across the country, and that's available. You know, you make lemonade.

ANKE STEINECKE: Yeah, and we're definitely seeing that with our internship programs, which are running virtually because of the pandemic and it opens the pool dramatically. And our internship program is specifically, Josh, to your point, like focused and written as targeted as meant for underrepresented in publishing interns. So, it does open sort of like the door in that regard.

CHERYL DAVIS: That is great. I want to say thank you all so much to all of our wonderful panelists. This has been an extremely enlightening, entertaining, and educational event.

As we said at the top, we hope that you have gathered some points, you in the audience, have gathered some points that you can take back to your companies, your firms, your lives, things about the importance of the numbers we got from Lee & Low at the top, the importance of walking the walk. And that this is an ongoing journey; your commitment to DEI should not be a trend, it's an ongoing journey that we all need to be on together. And I'm sending it back to Barry.

BARRY WERBIN: Well, thank you, Cheryl. And again, on behalf of EASL, as Chair I want to thank Cheryl and Michael for putting this together and hosting this. I want to thank all of our panelists who are just fabulous. And you're right, you said that COVID-19 has enabled us all to be more direct participants and I think that's one of our goals, certainly with EASL in promoting diversity, not only in our programs, but in our own ranks for the rest of this year.

So, on behalf of EASL, again, I want to thank also Simone Smith, Bridget Donlon from NYSBA. On the CLE side, Dana Alamia, our own liaison, for all of her just tremendous help all year long, and including from the annual program. All our officers, and all our many program planners who made this possible against difficult circumstances this year.

It is our hope that we will see you all live in person with food and drink next January. Hopefully, that will be the reality that returns, but we cannot lose sight of what we've been through and the lessons we've learned and yet to learn from this COVID-19 crisis, and the political upheaval we've been through in the last nine months, 12 months, on top of everything else that's happened in our society. Hopefully brighter days are headed for all of us.

So, I wish you well, peace, and take care everyone. Bye Bye.

SIMONE SMITH: Thank you so much, Barry. And we would like to thank all of today's speakers for their time and their expertise and service to their profession. To the attendees, this concludes the seminar. We thank you for choosing NYSBA, and again, thank you to all of our presenters. Thank you.

Endnotes

1. *Burlington Industries, Inc. v. Ellerth*, 524 US 742 - 1998.
2. *Faragher v. City of* Boca *Raton*, 111 F. 3d 1530 - 1997.
3. See page 136 in this issue of the *EASL Journal* for the full road map.
4. See page 137 of this issue of the *EASL Journal*.

Action Items: A Roadmap for Diversity in Book Publishing

Action Item #1—Actively Work to Develop Personal and Organizational Sensitivity and Empathy to Diversity, Equity and Inclusion (DEI) Issues in the Workplace and in the Marketplace

- Educate employees and managers to the existence of implicit bias and take on responsibility for bringing issues relating to DEI to more people's attention in the workplace.
- Conduct trainings to sensitize employees and managers to implicit bias and develop strategies to counteract it.
- Recommend that companies appoint a senior executive to take charge of coordinating and managing diversity, equity and inclusion efforts.
- Bring concerns about implicit bias to the attention of those involved in acquiring, selling and distributing books.

Action Item #2—Expand the Talent Pipeline: Introduce Mentorship, Sponsorship, Training, Retention and Outreach Programs

- From the perspective of those working in publishing, determine what pipeline issues companies are struggling to acknowledge/address.
- Work on developing a program to mentor and also sponsor more individuals entering the workplace and, for those already working in the company, to improve retention and advancement.
- Develop outreach and internship programs to diversify the pool of knowledgeable and interested candidates.
- Incentivize managers to take into account goals to increase hiring of BIPOC personnel.
- Work on diversifying the people who write books and supporting the content they write about through agents, acquisitions, new imprints and supportive promotion when the content is published.

Action Item #3—Systematize Regular Communications About DEI Issues

- Create a working group of employees, managers and senior executives to discuss on a regular basis everyday issues that arise in the publishing companies they work for relating to DEI.
- Provide a pathway for employees who want to speak out without risk to their jobs and careers.
- Discuss whether the role of the in-house lawyer goes beyond reducing legal risk. Does an in-house lawyer have an obligation to speak up if and when their organization is racially insensitive? Can or should lawyers play a role in pushing for diversity, equality and inclusion?

Action Item #4—Expand Goals, Review Progress and Provide for Accountability

- Look into issues of bias in book distribution—promoting and selling books, in bookstores and online.
- Take on responsibility for bringing issues relating to DEI to more people's attention outside the workplace through professional organizations, business relationships and conferences.
- Determine whether companies should incorporate Rooney or Mansfield Rule-type certifications/frameworks for holding outside vendors including law firms accountable to diversity and inclusion goals.
- Periodically review whether the statements and goals regarding the commitment to diversity and inclusion have gone far enough or need to be revised.
- Provide for accountability measures to determine if progress has been made.
- Review numbers for hiring and retention of BIPOC personnel. Conduct exit interviews. Have the goals missed the mark? What else needs to be done?

The Roadmap

1. Actively Work to Develop Personal and Organizational Sensitivity and Empathy to Diversity, Equity and Inclusion (DEI) Issues in the Workplace and in the Marketplace
2. Expand the Talent Pipeline: Introduce Mentorship, Sponsorship, Training, Retention and Outreach Programs.
3. Systematize Regular Communications About DEI Issues
4. Expand Goals, Review Progress and Provide for Accountability

What You Can Do Today to Advance Diversity, Equity, and Inclusion in Publishing

Friend

Thank you for what you're doing to advance the cause of diversity and inclusion. And, this is what I mean:

- You see me: You say, "Good morning" when you come in; "Good afternoon" on the way to the watercooler; and, "Good evening" on the way home at night.
- You notice if I'm out sick and when you see me next, ask if I'm feeling better.
- You regularly ask my opinion . . . and not just on Kevin Hart movies.
- Since you don't think I'm *less than*; you don't expect me to accept less than what everyone else gets, regardless of whether it's praise or a raise. Like you, I like them both and you get that.
- You don't consider yourself an expert on what *I* find offensive. Nor do you consider yourself an expert on *my* feelings and/or thoughts.
- You don't ignore the points I make at meetings. Even when we don't agree, I appreciate you acknowledge I just spoke; especially, when everyone else is willing to pretend that I didn't.
- You don't roll your eyes when you hear the words *race*, *diversity* and *inclusivity*; moreover, you acknowledge the legitimacy and benefit of a diverse, inclusive workplace.
- You never once asked to touch my hair . . . or lips.
- You don't ask me to explain racism, misogyny, bias, or prejudice as if those words and concepts somehow belong exclusively to me. These words challenge us all, you too. And, you get that.

Family

You do everything a FRIEND does and then some; so, you help make me feel like I belong. I can count on you. It's nice to have FAMILY.

- You're always there to listen to me and you're comfortable sharing with me.
- You're someone I can seek out for advice and guidance and you seek out the same from me.
- You ask if you can get me a coffee on the way back from lunch and comfortable with me reciprocating.
- You invite me to lunch. And, you make certain I know it's okay for me to invite you.
- You regularly acknowledge my excellent work and comfortable with me acknowledging yours.
- When needed, you offer constructive criticism and comfortable with receiving some from me.
- You choose to work with me on projects large and small and comfortable when I choose you as a collaborator.
- You share the credit with me and comfortable with me doing the same.
- You regularly educate yourself on cultural aesthetics and ways of expression that differ from your own and are developing a healthy respect and appreciation for them.

Pillar

You do everything a FRIEND does and everything you can count on FAMILY to do. Bravo! But, you do more. You do this:

- You send job postings to folks you know who are from underrepresented groups. You encourage all your friends to do the same.
- You routinely attend diversity panels; and, more importantly, you regularly practice what you've learned.
- You're always encouraging sensitivity in the workplace and call in colleagues who have insensitive attitudes and make insensitive remarks.
- If you are in the position to do so, you hire a qualified person from an underrepresented group. You also encourage others in your department to do the same.

Angel

You do everything FRIENDS do, can be counted on like FAMILY, and you're pro-active like a PILLAR. But, when it comes to diversity and inclusivity, you both talk it and you walk it. This is you:

- You bring resumes to the attention of the people making the hiring decisions: editors, agents, publicists, etc. and doing the requisite follow-up.
- You're bringing resumes to HR's attention and doing the requisite follow-up.
- You're writing letters of recommendation to all the aforesaid decision-makers.
- You are on, work with, or support groups that advance diversity and inclusion.
- You sit on panels and attend conferences on diversity and inclusion and speak the uncomfortable truth.
- You organize panel discussions on diversity and inclusivity. You talk and write about this subject, with the courage to express the uncomfortable truth, across different platforms be they audio, digital, or print.
- You mentor like hell.

Two more things…

- Please use the above as a springboard, create a list of all the things you aspire to be.
- Practice being it every day.

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Krell's Korner

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

You're Watching FOX

By David Krell

It seemed like the idea of a venerable fourth television network would be folly when an Australian-born media mogul decided to create one in the mid-1980s. Rupert Murdoch had the commitment, finances, and vision to build a viable competitor to CBS, NBC, and ABC. Yet he needed to change his citizenship because American law prevented a foreigner from owning "more than 20 percent direct ownership, or 25 percent indirect ownership, in a broadcast license."[1]

If there was an emotional tie to the land down under, it was not enough to stop Murdoch, who had been a successful newspaper publisher in Australia before entering the American media business in the 1970s, with purchases of the *San Antonio Express-News* and the *New York Post*. A series of shrewd deal making established Fox as a formidable concern going against "the big three," which had decades of experience in cultivating relationships, enhancing goodwill, and making deals with studios, advertisers, and talent.

A television network requires a foundation of product and distribution. Murdoch had purchased 50% of the 20th Century Fox film studio from oilman Marvin Davis in March 1985 for a reported price tag of $250 million, broken down as $162 million for the studio and an additional $88 million cited as an "advance."[2]

In May, Murdoch and Davis bought the venerable Metromedia station group with a price tag in the neighborhood of $2 billion, for outlets in Boston, Chicago, Dallas-Fort Worth, Houston, Los Angeles, New York, and Washington, D.C. The plan called for Boston's WCVB to later be jettisoned to Hearst Corporation for an announced figure of $450 million. The deal encompassed Metromedia's $1.35 billion of debt and $200 million "in new capital."[3]

A month-and-a-half later, Davis jumped ship; Murdoch was quoted as "quite happy" about taking on the Metromedia deal as a solo enterprise.[4] In September, he struck an agreement to buy Davis's remaining part of 20th Century Fox—a cash deal of $325 million.[5] Murdoch closed the deal in December.[6]

Murdoch's genesis for a fourth TV network took another step forward during the following March, when he completed the Metromedia venture. However, instead of WCVB being included, the agreement had changed—Metromedia sold it to Hearst.[7] With a platform in place, Murdoch then negotiated agreements with independent stations eager to attach to a network. Some were in the higher range of UHF channels with less than stellar antenna reception.

FBC—Fox Broadcasting Company—was born.

Though it was called Fox in advertisements, promotions, and talent interviews, the network launched with the FBC initials in *TV Guide* and the television listings in newspapers. In the network's early days, a promotional device reinforced the network's identity for the affiliates: before each prime-time show, one of the network's stars stood on the 20th Century Fox lot and reminded, "You're watching Fox!" Joan Rivers inaugurated the Fox network with *The Late Show* on October 9, 1986, airing at 11:00 p.m. Eastern Standard Time. Fox fired Rivers the following May; *The Late Show* had a series of hosts until Arsenio Hall took the reins. Fox canceled *The Late Show* in 1988; Hall had his own syndicated show from 1989 to 1994. Although there were other grand failures—including *The Chevy Chase Show*, a late-night talk show lasting a few weeks in 1993—Fox gained traction in prime time with mega-hits like *Married With Children*, *Beverly Hills 90210*, *The Simpsons*, and *The X-Files*.

A blockbuster deal at the end of 1993 removed any doubt about the standing of Fox as a legitimate fourth network when Murdoch secured a four-year agreement with the National Football League (NFL) to air National Football Conference division games. *The Washington Post* reported the cost as $1.6 billion. However, acquiring the NFL rights required more finesse than Murdoch reaching into extraordinarily deep pockets. CBS had a track record dating back nearly 40 years; Fox was unproven in sports broadcasting.[8] It needed to prove its worth as the broadcaster taking custody of a premier brand. One likely topic: the network's vision for distinguishing its broad-

casts from the competition. The "score bug" was a highly significant feature. Though distracting to some at first, the bug became an NFL fixture. Indeed, it is hard to imagine an NFL broadcast without continuously showcasing the score, time left in the quarter, the down, and the number of yards for a first down. On *Good Morning America*, NFL Commissioner Paul Tagliabue disclosed the Fox approach in general terms: "(Fox) used a lot of interactive ideas, mixing entertainment with sports, music and sports, things like that, and I think Fox will bring a lot of quality and a lot of creativity to that."[9]

The specifics of conversations behind closed doors during the bidding process remain unknown, but the pitch combined with the dollar figure led to Fox obtaining the rights. The Fox bid of $395 million a year outpaced CBS by a reported figure of $100 million a year for four seasons and Super Bowl XXXI in 1997.[10]

While some critics may have seen the price tag as excessive, with some predictions including a $500 million loss during the four-year contract, the NFL package had an incalculable value in elevating the network's prestige. It also forced the three established networks to consider Murdoch as a challenging peer.[11] The Fox-NFL relationship has continued into the 21st century and shows no signs of ending. Murdoch's venture relied on savvy, money, and deal making. In 2009, the first installment of "Krell's Korner" covered another young network seeking an identity. Unable to compete effectively with his peers at NBC and CBS because of a lack of compelling programs, ABC founder and president Leonard Goldenson negotiated a deal with Walt Disney in the 1950s to invest in the animation visionary's idea for an amusement park—Disneyland. In return, ABC acquired two programs that became cornerstones of its lineup—*Disneyland* and *The Mickey Mouse Club*.[12]

These stories are good primers for entertainment attorneys and their clients. Negotiations are more than linear assessments of the monetary value in the deal for a blue-chip product. They can be long-term investments. Upon obtaining the NFL rights, Murdoch revealed his strategy:

> The networks are saying we have so much cost and so much revenue, and they come up with a loss figure. I have naturally said, I've got nine owned-and-operated stations, and how much money are they worth? Some of them are quite small, and the NFL will make them into major stations. There's a huge capital appreciation in all our TV enterprises through having this.[13]

Endnotes

1. Reginald Stuart, *For TV Deal, Murdoch Will Seek Citizenship*, N.Y. Times (May 4, 1985): 35.
2. Richard Stevenson, *Murdoch Is Buying 50% of Fox*, N.Y. Times, (March 21, 1985): A1; Al Delugach, *Murdoch Buys 50% of Fox for $250 Million*, L.A. Times (March 21, 1985): 9.
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4. Al Delugach, *Davis Pulls Out of Deal to Buy Six TV Stations*, L.A. Times (June 22, 1985): 36.
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6. *20th Century Fox*, N.Y. Times (Dec. 5, 1985): D4.
7. *Fox, Hearst buy seven TV stations*, San Francisco Examiner (March 6, 1986): 31.
8. Leonard Shapiro and Tom Shales, *Fox Lands Contract To Televise the NFL*, Washington Post (Dec. 18, 1993): A1.
9. Brian Clark, *CBS lost a lot more than just football games*, Modesto Bee (Dec. 22, 1993): 17; *Good Morning America*, ABC (Dec. 21, 1993).
10. Jim Van Vliet, *CBS is looking live at . . . nothing*, Sacramento Bee (Dec. 21, 1993): 59.
11. *Murdoch's NFL bid aimed at putting Fox on the map*, Associated Press Palm Beach Post (Dec. 21, 1993): 92.
12. David Krell, *A Funny Thing Happened on the Way to Disneyland*, New York State Bar Association's Entertainment, Arts and Sports L. J., Vol. 20, No. 3, Fall/Winter 2009.
13. *Murdoch's NFL bid aimed at putting Fox on the map*, Associated Press, Palm Beach Post (Dec. 21, 1993): 92.

David Krell is the chair of the Elysian Fields Chapter in Northern New Jersey and Spring Training Research Committee for the Society for American Baseball Research. He wrote *1962: Baseball and America in the Time of JFK and Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*. SABR twice granted him Honorable Mention for the Ron Gabriel Award. Additionally, David edited the anthologies *The New York Mets in Popular Culture* and *The New York Yankees in Popular Culture*. He often contributes to SABR's Games Project, Biography Project, and Ballparks Project in addition to speaking at SABR conferences and the Cooperstown Symposium on Baseball and American Culture. Krell is a member of the New York bar.

The Entertainment, Arts and Sports Law Section Welcomes New Members

The following members joined the Section between November 10, 2020 to March 17, 2021.

David Adler
Rachel Anne Aichelmann
Andrea Al-Attar
Ayo Alston-Moore
Michael J. Amoruso
Evelyn Ann Ashley
Alexandra Badalamenti
Laetitia Nyavingi Kasay Basondwa
James Patrick Batson
Stephanie Berland
Andrew Bloomfield
Lucile Esther Sarah Bouhanna
Hans Bousie
Katherine Aniece Brennan
Michelle Capobianco
Michael G. Celli
Delilah Chamlin
Winnie Yee Chau
Stephanie Clemente
Ashley N. Cloud
Nicholas C. Coffaro
Joseph M. Conley
Sharon Michelle Connelly
Nyall Cook
Brittney Christine Cox
Darby Daly
Joan Bellefield Davis
Tara R. Di Luca
Christopher Clare Diaz
Paul A. Dickman
Eric G. Diefenbach
Peggy Dold
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PUBLICATIONS

Counseling Content Providers in the Digital Age

A Handbook for Lawyers

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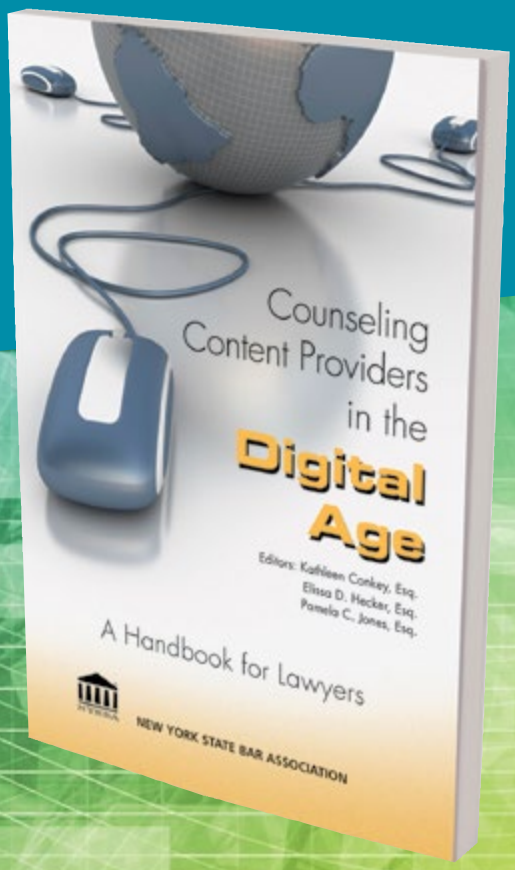

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Counseling Content Providers in the Digital Age was written and edited by experienced media law attorneys from California and New York. This book is invaluable to anyone entering the field of pre-publication review as well as anyone responsible for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

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