

Entertainment, Arts and Sports Law Journal

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



E-sports! We're Talking Only About E-sports. And Immigration, of Course

ABCs of NFTs, Art and Law

Defamation Jurisdiction, Copyright, and Talent Contest Agreements

Going For Gold and Protecting It Too: Intellectual Property and the Olympic Games

"Zoom Fatigue": Why We Have It and How To Combat It

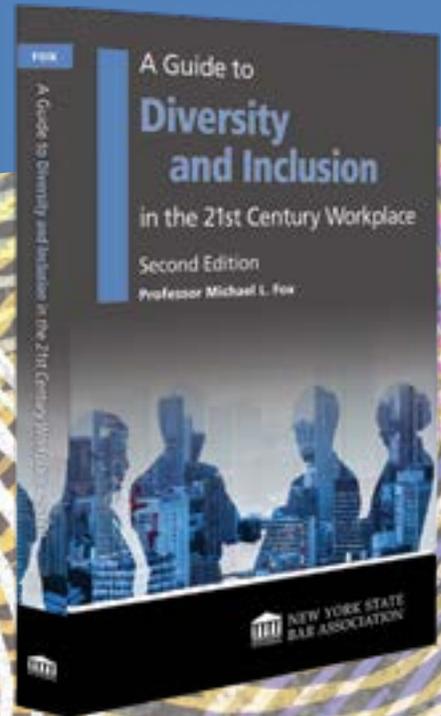


A Guide to Diversity and Inclusion in the 21st Century Workplace

2nd ed.

Author

Professor Michael L. Fox



This book provides the reader a concise reference on the major issues of diversity and inclusion by evaluating federal and New York State laws and regulations that protect against discrimination, retaliation and harassment in employment. Through this evaluation, attorneys, judges, and students will gain an understanding not just of the requirements of the law, but also a respect for diversity. Business professionals, particularly those in human resource management, can rely on this book to better understand their obligations, recognize potential issues, and articulate what they need to discuss with counsel.

The Second Edition includes coverage of the following topics:

- State and federal anti-discrimination, antiharassment and anti-retaliation provisions, including 2019 amendments to New York's laws;
- The U.S. Supreme Court's groundbreaking 2020 decision in *Bostock v. Clayton County*, which addresses sexual orientation and gender identity;
- EEOC hearings and the importance of maintaining clear employer policies and concurrent paperwork;
- Federal and state leave laws;
- Website accessibility for those with disabilities;
- The impact of COVID-19 on employment practices.

Print (415820)
eBook (415820E)

NYSBA Members \$22.00
Non-Members \$30.00



Contents

- 3** Remarks From the Chair
Barry Werbin
- 4** Editor's Note/Pro Bono Update
Elissa D. Hecker
- 6** NYSBA Guidelines for Obtaining MCLE Credit for Writing
- 7** Law Student Initiative Writing Contest
- 8** The Phil Cowan–Judith Bresler Memorial Scholarship Writing Competition
- 10** Second Circuit Reverses Fair Use Decision—Holds Warhol Foundation
Infringed Lynn Goldsmith's Photo as a Matter of Law
Joel L. Hecker
- 13** ABCs of NFTs, Art and Law
Louise Carron
- 15** Sports and Entertainment Immigration: E-sports! We're Talking Only
About E-sports. And Immigration, of Course
Michael Cataliotti
- 18** Resolution Alley | Dispute Resolution During the Pandemic and Beyond
Theo Cheng
- 21** Recent Developments in Entertainment Law: Defamation Jurisdiction,
Copyright, and Talent Contest Agreements
Neville L. Johnson and Douglas L. Johnson
- 25** Johnny Rotten or Johnny B. Goode?
Amber Melville-Brown
- 30** Going For Gold and Protecting It Too: Intellectual Property and the
Olympic Games
Sean Boren, Law Student Initiative Writing Contest Winner
- 39** "Zoom Fatigue": Why We Have It and How To Combat It
Carol Schiro Greenwald
- 45** Krell's Korner | The Bartlet White House
David Krell
- 47** Section Committees and Chairpersons

Entertainment, Arts and Sports Law Journal

Editor

Elissa D. Hecker
Law Office of Elissa D. Hecker
eheckeresq@eheckeresq.com

Citation Editor

Eric Lanter (ericjlanter@gmail.com)

Publication of Articles

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

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

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

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

Accommodations for Persons with Disabilities:

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

Publication Date: August 2021

©2021 by the New York State Bar Association.
ISSN 1090-8730 (print) ISSN 1933-8546 (online)

Entertainment, Arts and Sports Law Section

Section Officers

Chair

Barry Werbin
Herrick Feinstein LLP
2 Park Ave
New York, NY 10016-5675
bwerbin@herrick.com

Vice-Chair

Ethan Y. Bordman
Ethan Y. Bordman, PLLC
ethan@ethanbordman.com

Secretary

Isaro L. Carter
The Carter Firm LLC
isaro@carterlawfirm.com

Assistant Secretary

Carol J. Steinberg
Law Firm of Carol J. Steinberg
elizabethcjs@gmail.com

Treasurer

Kathy Kim
101 Productions, Ltd.
260 W 44th St Ste 600
New York, NY 10036-3900
kathyk@productions101.com

Assistant Treasurer

Cheryl L. Davis
Author's Guild
31 E 32nd St Fl 7
New York, NY 10016-5583

NYSBA.ORG/EASL

Remarks From the Chair

By Barry Werbin

Well, here we are in summer, with COVID-19 restrictions lifting more and more. Sports and entertainment venues continue to re-open to increasing numbers of live fans and audiences, restaurants are finally bustling again, Bruce is on Broadway, and shows that are reopening in September are already sold out into 2022.

While our 2021 Spring Meeting programs continued to be virtual, we are hopeful that by the fall we will be able to start adding in-person programs and meetings to our agendas. Of course, COVID safety must come first.

EASL has kept up its pace in offering timely and informative programs to our entertainment, arts, and sports communities. Our Spring Meeting offered a mix of terrific programs that were highly successful due to the hard work of our Executive Committee program planners and participation of our expert panelists.

Our Sports and International Committees, along with the Dispute Resolution Section's Sports Committee, sponsored a June 1st program on the Olympics, exploring hot topics such as restrictions placed on international athletes' ability to exploit their personal publicity rights and seek endorsement deals, and COVID-related challenges facing the 2021 Tokyo Olympics.

On June 8th, our Legislative Committee sponsored a very timely program on COVID-emergence venue re-openings, which explored the challenges facing major sports and entertainment venues, as fans and audiences are craving live events and performances after more than a year of lockdowns.

Social media influencers were in the limelight at our June 16th program, where legal and business experts discussed cutting edge influencer topics, including non-traditional animal influencers, CGI influencers and "genuinfluencers," as well as racial and social justice considerations and best practices.

Finally, on June 24th, our annual Spring Meeting brought back a longtime favorite program, "Entertainment Year in Review 2021," with Stan Soocher, professor of Music & Entertainment Industry Studies at the University of Colorado. As always, Professor Soocher's presentation was engaging and comprehensive.

Apart from our Spring Meeting, EASL's Fashion Law Committee put together a May 19th informal Fashion Luminaries program (the second in a series), which again featured a prominent speaker from within the fashion

industry providing valuable insights. We have continued to offer varied pro bono programs, especially for the New York arts community. Our Pro Bono Committee partnered with the New York Foundation for the Arts (NYFA) to offer a May 13th program on an "Introduction to Artists' Rights," and a June 16th program on the recently enacted New York Right of Publicity law. Our Pro Bono and Fine Arts committees also partnered with the Artists Rights Society to present a May 12th program on "Estates Issues for Artists." Finally, our Pro Bono Committee partnered with the Intellectual Property Section and NYFA in a July 20th Virtual Pro Bono Clinic.



EASL is also well on the way to planning its popular recurring Fall Music Business Law Conference, which hopefully will be in-person and is always a crowd pleaser. Our Theater and Performing Arts Committee is cautiously optimistic about bringing back in late fall our exciting Legal Aspects of Producing program.

Reflecting back on the enormously challenging time we have all been through, as Chair, I am very proud of all that EASL has managed to accomplish during the COVID crisis. Our Section is made richer by the dedicated efforts and teamwork of our Executive Committee members and Committee chairs, who continue to create informative and engaging programs to benefit EASL's constituent interest groups. I extend my personal thanks to all our officers and committee chairs, and most of all to our members, who continue to support our important work. Have a wonderful, remainder of the summer!

Best regards,

Barry

EASL Chair

Editor's Note/Pro Bono Update

By Elissa D. Hecker

Happy Summer! I hope that you are enjoying these articles someplace where you can be around those who you have not been able to see in person for a while.

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 next issue is August 27, 2021.

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

Pro Bono Update

Clinic

On July 20th, the EASL and IP Sections co-sponsored a three-hour Virtual Pro Bono Clinic with the New York Foundation for the Arts (NYFA) and served around 50 satisfied clients.

Thank you to all of our wonderful volunteers!

David M. Adler, Adler Law Group
Ethan Bordman, Ethan Y. Bordman, PLLC
Adjckwc Browne, Browne Law
Paola Gabriela Zaragoza Cardenas
Cheryl L. Davis, The Authors Guild
Stacey Haber, The Music Firm
Max Hass, Paralore Law Group
Elissa D. Hecker, Law Office of Elissa D. Hecker
Deborah Hrbek, Hrbek Law LLC
James A. Long, Long Law
Merlyne Jean-Louis, Jean-Louis Law, P.C.
Diane Krausz, Diane Krausz & Associates
Todd D. Marcus, Law Office of Todd D. Marcus, P.C.
Kim Maynard, Frankfurt Kurnit Klein & Selz
Roxy Menhaji, Northeast New Jersey Legal Services' Consumer Law Unit
Josh Nathan, The Law Firm of Joshua C. Nathan, P.C.
Stephen Rodner, Pryor Cashman LLP
Innes Smolansky, Law Office of Innes Smolansky
Rosemarie Tully, Rosemarie Tully P.C.
Adam Weissman, Law Office of Adam Weissman
Robyn Williams, Devlin Law Firm

Programs

Estates Issues for Artists

On May 12th, EASL's Fine Arts and Pro Bono Committees collaborated with the Artists Rights Society to present a creative and informative panel on "Estates Issues for Artists." Attesting to the fact that many artists are concerned about how to establish and protect their legacies, the panel was attended by more than 150 participants. The panelists focused on topics that artists should consider during the course of their careers with a broad view towards their legacies, including intellectual property, trusts and estates, arts management, and much more. Various pieces of the puzzle were considered from the perspectives of top-level arts professionals, attorneys, and art world insiders. The speakers included Kathy Battista, Ph.D, Art Legacy Planning / Sotheby's Institute, Dorian Bergen of ACA Gallery, Michael Dayton Hermann, The Warhol Foundation, and Barbara Hoffman, Esq., The Hoffman Law Firm. Adrienne Fields, Esq., director of Legal Affairs of the Artists Rights Society, moderated the panel. The participants participated in a lively discussion about their experiences, best practices, and other useful advice for artists and their estates.

Fine Arts and Pro Bono Co-Chair Carol Steinberg collaborated with Fields for over a year to plan this program. Judith Prowda and Paul Cossu, EASL's Fine Arts Committee Co-Chairs, also assisted in the planning.

Webinars With NYFA

Three Cases Every Artists Should Know...with an update.

Carol J. Steinberg presented an Introduction to Artists' Rights program entitled "Three Cases Every Artists Should Know...with an update."

In this webinar, visual artists received an introduction to their legal rights with a focus on three important cases to illustrate those rights. The first case introduced the basics of Copyright Law by discussing the lawsuit in which photographer Daniel Morel successfully sued various news outlets for using his photographs without payment or attribution. The second case introduced the basics of Fair Use and the case used to illustrate this concept involved the photographer Patrick Cariou and appropriation artist Richard Prince. *Lynn Goldsmith v. Andy Warhol Foundation* was also discussed. The final case, the landmark 5 Pointz case, was used to illustrate the concept of moral rights; how to protect artwork from distortion, mutilation, and/or destruction and showed how artists can successfully assert their rights in the face of powerful opposing forces.

Rights of Privacy and Publicity

The next webinar was presented by Judith Bass, Co-Chair of EASL's Literary Rights Committee and Carol Steinberg, and provided the basics of the "Rights of Privacy and Publicity for an audience of artists." Two months before the presentation the event was already sold out, indicating great interest in the subject.

The webinar focused on the so-called "rights of privacy" and a "right of publicity," which may govern the "commercial" use of images of people, including celebrities. A new law became effective in New York State, which for the first time established a right of publicity for certain deceased individuals, prohibited the use of digital replicas of certain deceased performers, and also restricted the distribution of "deepfakes" of nonconsenting individuals. The basics of these laws and of the new law were presented to and discussed with individual artists across all disciplines.

Judith Bass' article "New York's Right of Publicity Law: Protecting Performers and Producers," which was published in the spring issue of the *EASL Journal* and also in the *NYSBA Journal*, was distributed to all the participants.

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

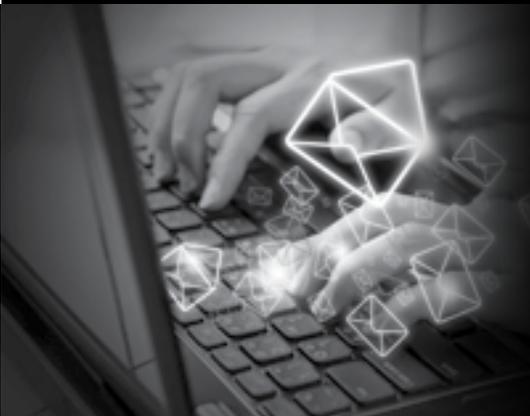
We encourage EASL members to volunteer as pro bono attorneys and webinar speakers for other topics that are relevant to the creative communities. Please contact any of us if you are interested in doing so.

Elissa D. Hecker, eheckeresq@eheckeresq.com

Carol Steinberg, elizabethcjs@gmail.com

Louise Carron, louise@itsartlaw.com

NEW YORK STATE BAR ASSOCIATION



If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

Elissa D. Hecker
Law Office of Elissa D. Hecker
eheckeresq@eheckeresq.com

Articles should be submitted in Word format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES



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

Looking for past issues?
Entertainment, Arts and Sports Law Journal



NYSBA.ORG/EASL



Law Student Initiative Writing Contest

Congratulations to LSI Winner Sean Boren of St. John's University School of Law, for his article entitled:

"Going For Gold and Protecting It Too: Intellectual Property and the Olympic Games"

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

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

Requirements

- **Eligibility:** Open to all full-time and part-time J.D. candidates who are EASL Section members. 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 August 27, 2021.
- **Submissions:** Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

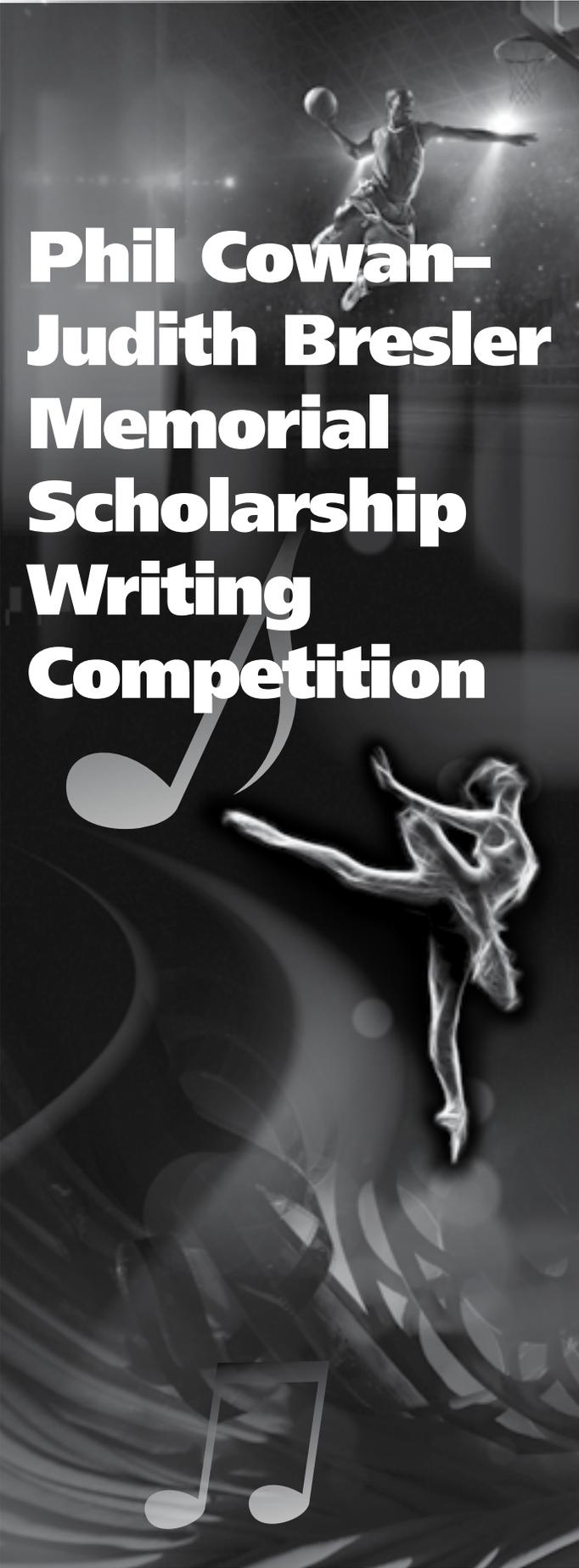
Topics

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

Judging

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

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



Phil Cowan- Judith Bresler Memorial Scholarship Writing Competition

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL)'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-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.

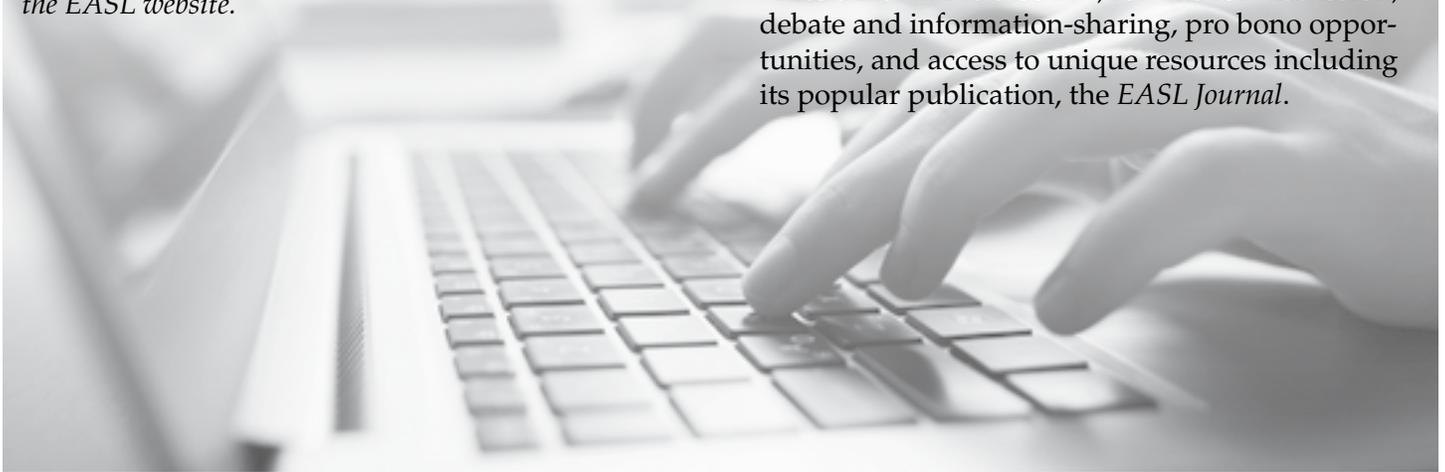
Payment of Monies

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*.



Second Circuit Reverses Fair Use Decision—Holds Warhol Foundation Infringed Lynn Goldsmith’s Photo as a Matter of Law

By Joel L. Hecker¹

On March 26, 2021, in a much-anticipated decision, the Second Circuit reversed the Southern District of New York decision, which found that Andy Warhol’s creation of 16 silkscreen prints and pencil illustrations of the musical artist Prince, which was based upon a 1981 photograph created by photographer Lynn Goldsmith, was fair use under the United States Copyright Act. The case is *The Andy Warhol Foundation for the Visual Arts v. Lynn Goldsmith and Lynn Goldsmith Ltd*² (the parties are reversed as The Andy Warhol Foundation (AWF) sought a declaratory judgment of non-infringement and Goldsmith counterclaimed for copyright infringement).

The Facts

On December 3, 1984, Goldsmith, on assignment from *Newsweek* magazine, created a series of photographs in her studio of the musical artist Prince. Goldsmith owns the copyright to these photographs. In 1984, her stock photography agency, defendant Lynn Goldsmith Ltd. (LGL), which at the time was known as Lynn Goldsmith Inc. or LGI, submitted a negative of one of her Prince photos to *Vanity Fair* magazine at *Vanity Fair*’s request for use as an artist reference in connection with an upcoming article about Prince. Goldsmith did not know that Andy Warhol was the artist *Vanity Fair* had commissioned to create the illustration of Prince.

Vanity Fair selected Goldsmith’s image to be the artist reference. That term, according to trial testimony, meant that an artist would create a work of art based on the image reference.³ LGL then granted *Vanity Fair* a license to use Goldsmith’s copyrighted photo for artist reference only, and further required a copyright credit in the name of Lynn Goldsmith to appear on the printed use in the magazine. This photo (the Goldsmith photo) is reproduced here, in figure 1.

Unbeknownst to Goldsmith, Warhol did not stop with the illustration that *Vanity Fair* had commissioned him to create, which is the following illustration (The Warhol Illustration) figure 2.

Warhol also created an additional 15 works, which together with the Warhol Illustration became known as the Prince Series. Copies of three of the Prince Series that were included in the panel’s opinion appear in figure 3.

The Warhol Illustration was published in the November 1984 *Vanity Fair* magazine together with the required credit to Goldsmith alongside the Warhol Illustration. In addition, there was also a separate attribution to Goldsmith crediting her with the source photograph for the Warhol Illustration.

After Warhol’s death, AWF acquired title to and copyright in the Prince Series illustrations. Between 1993 and 2004, AWF sold or otherwise transferred 12 of the Prince Series illustrations to third parties, and in 1998 transferred the other four to the Andy Warhol Museum. However, AWF retained copyright in the Prince Series illustrations and began licensing these illustrations for editorial, commercial, and museum usage.

Prince died on April 21, 2016. The next day Conde Nast (CN), the parent company of *Vanity Fair*, contacted AWF to determine whether AWF still had the Warhol Illustration that had run in the 1984 issue of *Vanity Fair*, as CN hoped to use it in connection with the planned special magazine edition of *Vanity Fair* commemorating Prince’s life. CN then learned from AWF that AWF had the entire Prince Series. CN ultimately obtained a commercial license from AWF for a different illustration from the Prince Series, which was used for the cover of the tribute magazine, published in May 2016. No credit or attribution



Figure 1



Figure 2

was given to Goldsmith in the tribute magazine for the source image. Instead, the credit was given to AWF.

Goldsmith first became aware of the Prince Series when she saw this commemorative May 2016 issue of *Vanity Fair* magazine. Goldsmith then contacted *Vanity Fair* and AWF to discuss this infringement of her copyright.

The parties began negotiations to resolve the matter but on April 7, 2017, AWF sued Goldsmith and LGL in the United States District Court for the Southern District of New York for declaratory judgment of non-infringement or, in the alternative, for fair use. Goldsmith countersued for copyright infringement, based upon the above facts, under 17 U.S.C. Sections 106 and 501.

Fair Use Factors

The district court had found that the first, third, and fourth statutory non-exclusive fair use factors favored AWF and the second factor was neutral. The Second Circuit panel disagreed and concluded that all four factors actually favored Goldsmith. The four factors, set forth in 17 U.S.C. Section 107, are:

1. the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

The First Fair Use Factor

The principal takeaways from the Second Circuit panel decision on the first factor, which are instructive for those who deal with copyright fair use matters, are:

- The panel noted that recent court decisions have placed undue reliance upon the transformative aspect of the first factor, often determining that a transformative use was sufficient for a fair use find-

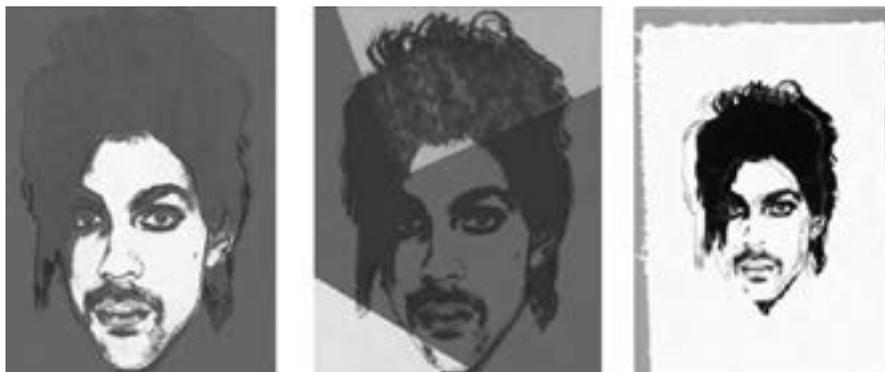


Figure 3

ing irrespective of the other three factors. The panel limited the Second Circuit 2013 *Cariou v. Prince* decision⁴ to its facts and went out of its way to write that “our review of the decision below persuades us that some clarification is in order.”⁵ The *Cariou* decision has, as the panel noted, “not been immune from criticism.”⁶ That is an understatement, to say the least, and this reversal in *Goldsmith* goes a long way to correct what many have perceived to be *Cariou’s* flawed fair use analysis.

- The panel stated that “the district court appears to have read *Cariou* as having announced [a single bright-line] rule, to wit, that any secondary work is *necessarily* transformative as a matter of law.”⁷ However, held the panel, it does not follow that any secondary work which adds a new aesthetic or a new expression to its source material is necessarily transformative. This is particularly instructive as to derivative works, since that category is specifically excluded from the scope of fair use.
- Courts typically consider the purpose of the primary and secondary works in determining if the secondary was transformative. The panel pointed out that the common thread in those cases, “where the secondary work does not obviously comment on or relate back to the original or use the original for a purpose other than that for which it was created,”⁸ the bare assertion of a “higher or different artistic use” is insufficient to render a work transformative.⁹

On this point, the panel held that the secondary work “must, at a bare minimum, comprise something more than the imposition of another artist’s style on the primary work such that the secondary work remains both recognizably derived from, and retaining the essential elements of, its source material.”¹⁰ That is, the panel found the district court’s conclusion that, “each Prince Series work is immediately recognizable as a Warhol” is irrelevant to the transformative analysis, since that logic “inevitably creates a celebrity-plagiarist privilege.”¹¹

The Second Fair Use Factor

This factor considers the nature of the copyrighted work. The district court held the Goldsmith Photo to be both unpublished and creative, but nonetheless concluded that the second factor could favor neither party because LGL had licensed it to *Vanity Fair* and because the Prince Series was highly transformative. The panel concluded that this was error and reversed, holding that once the district court recognized the Goldsmith Photo as both creative and unpublished, it should have held that this factor

avored Goldsmith, “irrespective of whether it adjudged the Prince Series transformative.”¹²

The Third Fair Use Factor

The district court weighed this factor, the amount and substantiality of the use, in favor of AWF, because it found that Warhol removed nearly all of the Goldsmith Photo’s copyrightable elements. The panel reversed, holding that this district court analysis missed the mark since, while Goldsmith had no monopoly on Prince’s face, the law granted her a broad monopoly on his image as it appeared in her photographs of him.¹³

The panel concluded that the Prince Series borrowed significantly from the Goldsmith Photo both quantitatively and qualitatively. It looked at the other photographs by other photographers that AWF had submitted as part of its motion for summary judgment in support of its proposition that the Prince pose captured by Goldsmith was not unique to the Goldsmith Photo.¹⁴ The panel concluded that these other photos had the opposite effect—“that the Prince Series would be quite different had Warhol used one of them instead of the Goldsmith Photo to create it.”¹⁵ In fact, the Warhol illustration copied many details of the Goldsmith Photo, including “the glint in Prince’s eyes where the umbrellas in Goldsmith’s studio reflected off his pupils.”¹⁶

The Fourth Fair Use Factor

The panel unequivocally stated that, as to the fourth factor analysis of effect on the market for the original, the test is not whether the secondary work would damage the market for the first, but whether it usurps that market by offering a competing substitute. The panel rejected the district court’s rationale that the market for licensing Warhol’s works (or by extension any famous artist) is a market for “Warhols,” since this would permit this aspect of the fourth factor always to weigh in favor of the alleged infringer when there is an active market for such works. The panel had no problem reversing the district court on this factor, finding that the markets for licensing Goldsmith’s work and the Prince Series overlap in both the existing market, the potential market, and the derivative markets for Goldsmith’s Photo. (The case did not involve the sales of the original 16 Warhol works, as they were sold or donated to museums prior to the running of the statute of limitations.)

Substantial Similarity

The district court did not analyze the issue of substantial similarity, which it found unnecessary, since it found in favor of fair use. The panel ruled on the procedural issue that it did not have to remand the case, because it could determine that there was substantial similarity between the Goldsmith Photo and the Prince Series as a matter of law. The panel reached this conclu-

sion because: i) Warhol did not create the Prince Series by taking his own photograph of Prince in a similar pose; ii) Warhol did not attempt to merely copy the idea conveyed in the Goldsmith Photo; and iii) in fact, Warhol copied the Goldsmith Photo itself, which was Goldsmith’s particular expression of that idea.¹⁷

Summary

In summary, the panel limited those parts of the *Cariou* decision that had been subject to extensive criticism, and clarified to a great extent how the fair use test should be applied. Hopefully, it will provide useful guidance for copyright practitioners.

Endnotes

1. Disclaimer: The author was co-counsel for Lynn Goldsmith on the district court level proceedings, but not on the appeal.
2. *The Andy Warhol Foundation for the Visual Arts, Inc. v. Lynn Goldsmith et al*, United States Court of Appeals, 2d Circuit, Docket No. 19-2420-cv, filed March 26, 2021 (“Opinion”). The district court opinion can be found at 382 F. Supp. 3d 312 (S.D.N.Y. 2019).
3. Opinion at 8; district court opinion at 783.
4. *Cariou v. Prince* (714 F. 3d 694).
5. Opinion at 18.
6. *Id.*
7. Opinion at 18-19.
8. Opinion at 25.
9. *Id.*
10. Opinion at 28.
11. Opinion at 31.
12. Opinion at 37.
13. Opinion at 39.
14. Opinion at 41.
15. *Id.*
16. Opinion at 43.
17. Opinion at 55.

Joel L. Hecker, principal of the Law Offices of Joel L. Hecker, practices in every aspect of photography and visual arts law, copyright, licensing, publishing, contracts, privacy rights, trademark and other intellectual property issues, as well as real estate and estate planning matters. He has acted as general counsel to the hundreds of professional photographers, stock photo agencies, graphic artists and other photography and content-related businesses he has represented nationwide and abroad. He also lectures and writes extensively on issues of concern to these industries. He is past chair and a member of the Copyright and Literary Property Committee of the New York City Bar Association, a longtime member and past Trustee of the Copyright Society of the U.S.A., and a member of the EASL Section. He has also been continually designated as a New York Super Lawyer. He can be reached at (917) 848-9373, at his website www.HeckerEsq.com, or via email: HeckerEsq@aol.com.



ABCs of NFTs, Art and Law

By Louise Carron

Much has been said and written about non-fungible tokens (NFTs) and attorneys are getting up to speed. Relying on blockchain technology, NFTs refer to a concept of ownership of digital or physical assets that is recorded, encrypted, and reliant on cryptocurrencies. When it comes to art, NFTs have the potential to shift control to artists, push regional boundaries, and reduce transaction costs. Lawyers are starting to grasp the complexity of the legal issues they have to address as clients ask them to navigate a field evolving on a daily basis.

A is for Art

NFTs challenge the traditional art market and have the potential to reshuffle the cards when it comes to giving artists independence from galleries or auction houses. Fine artists and digital creators alike may decide to offer their pieces for sale and the possibilities are endless. NFTs link to a unique asset, which may be a .jpg file, a GIF, a song, a limited-edition print, or even an “analog” painting. On the collector’s side, purchasing an NFT means acquiring a certificate of authenticity that cannot be destroyed, lost or modified.

One way of doing so is through one of the many platforms that exist. Foundation, Nifty Gateway, and SuperRare are among the marketplaces offering a curated

selection of original digital artworks where pieces can be bought with a simple click. One may argue (as any good lawyer would) that one could already do that without the need to involve blockchain. The innovation offered by blockchain is the creation of an immutable record of ownership, or ledger, each time the piece gets transferred, which also points to the artist as the original author.

This presents an interesting solution to age-old issues that the art market faces, such as authenticity, authorship, and transparency.

Creators now have the ability to almost instantaneously sell artworks to collectors whom they would never have met otherwise, without any intermediaries, and without having to pay the traditional 50% commission. However, they still have to pay various platform and minting fees, and studies show that NFTs are far from being a “sure thing.”¹



B Is for Blockchain and Crypto Law

The large majority of NFTs rely on a self-executing program (smart contract) that runs on the Ethereum blockchain, called ERC-721 (or the more recent ERC-1155), which identifies a unique asset (token) existing on the blockchain. NFTs can be bought using cryptocurrencies, such as Ether, and require buyers and sellers to connect a crypto wallet.

NFTs ride on the concept of scarcity: they link to a unique asset, which cannot be duplicated or replaced. In contrast, fungible tokens like cryptocurrencies rely on the ERC-20 standard and are interchangeable, divisible, and replaceable.

The creation of an NFT is called minting, which refers to the process of turning a digital asset into a token recorded on Ethereum blockchain, and creating a unique address for it, or hash. This requires the payment of fluctuating gas fees, which vary based on the demand for Ether at the time of minting.

With the blockchain lingo out of the way, here comes the legal lingo. Blockchain technology, and cryptocurrencies in particular, have been the subject of regulation attempts across the world.² From the Securities and Exchange Commission's point of view, an NFT may be qualified either as a commodity or as a security, depending on the factors of the Howey Test.³ From the Internal Revenue Service's point of view, transactions involving cryptocurrencies are taxable events.⁴ NFTs are likely subject to regular capital gains rate or may qualify as collectibles.⁵ The application of state sales tax is also a big question to which the answer is, as always: it depends.⁶

Who collects those taxes? What about consumer protection? How does one safeguard the right to privacy and compliance with the GDPR or anti-money laundering protocols? As this is not an exhaustive list of all legal issues in NFTs, it might be wise to move on before falling into the rabbit hole.⁷

C Is for Copyright and Royalties

When it comes to art, there are many intellectual property-related opportunities and issues associated with the NFT model.

Minting an artwork without the consent of its author could lead to copyright litigation. Whether that use is "fair" under the factors laid out by the Copyright Act will be a matter for the courts to resolve.⁸ Most platforms' terms and conditions contain representations and warranties that the seller is the author of the NFT and outline takedown procedures. Then comes the question that platforms have to address: how to remove an asset from a ledger that is designed to be immutable?

Another quirk of NFTs is that the collector does not automatically receive copyright ownership. Again, the terms of the marketplace may impose upon the seller a mandatory, sometimes limited, license to the buyer to display the work, but not all platforms do. Further, some may grant themselves a very broad license to reproduce and distribute copies of the artwork. Artist beware?⁹

By this point, one may ask: why would artists go through all this trouble? The answer is: resale royalties. By relying on programmatic smart contracts, NFTs have the potential to recreate equity in the art market by ensuring that artists get a share of each resale of their pieces on the secondary market. Most marketplaces offer a standard 10% royalty and a few of them offer artists with the possibility to pick the exact level of royalty. At this time, custom resale royalties are not portable across all platforms, but developers are working on it.

Consequently, NFTs offer a new way to create, sell, and collect art through a technology that leaves many baffled and which promises to be around for a while. The legal community will certainly be watching very closely.

Endnotes

1. Kimberly Parker, *Most Artists Are Not Making Money Off NFTs and Here Are Some Graphs To Prove It*, Medium (Apr. 19, 2021) (<https://thatkimparker.medium.com/most-artists-are-not-making-money-off-nfts-and-here-are-some-graphs-to-prove-it-c65718d4a1b8>).
2. See J. Dewey (Ed.), *Blockchain and Cryptocurrency Regulations 2021*, Global Legal Insights (2020).
3. *Securities and Exchange Commission v. W. J. Howey Co.*, 328 U.S. 293 (1946).
4. IRS Notice 2014-21, IRB 2014-16, and Frequently Asked Questions on Virtual Currency Transactions, <https://www.irs.gov/individuals/international-taxpayers/frequently-asked-questions-on-virtual-currency-transactions>.
5. IRC § 408(m)(2). See also, Token Tax, How Are Non-Fungible Tokens (NFTs) Taxed?, <https://tokentax.co/guides/nft-tax-guide/>.
6. Marvin A. Kirsner, *State Sales Tax on Sale of Non-Fungible Tokens (NFTs)—Questions and Answers*, 9 National Law Review 119 (2021).
7. See J. Dewey, *supra*.
8. Copyright Act of 1976, 17 U.S.C. § 107.
9. See also, Clifford C. Histed, Stephen M. Humenik, Jeremy M. McLaughlin, Anthony R.G. Nolan, Judith E. Rinearson, *The Coming Blockchain Revolution in Consumption of Digital Art and Music: The Thinking Lawyer's Guide to Non-Fungible Tokens (NFTS)*, 9 The National Law Review 84 (2021).

Louise Carron is a practicing attorney and the executive director of the Center for Art Law, a Brooklyn-based research nonprofit that offers educational resources and programming for the advancement of a vibrant arts and law community. She advises visual artists and creative entrepreneurs on contracts matters, copyright use, and business law, and teaches workshops on legal basics for artists. She frequently writes and speaks about art law and co-chairs EASL's Pro-Bono Steering Committee.

Sports and Entertainment Immigration: E-sports! We're Talking Only About E-sports. And Immigration, of Course

By Michael Cataliotti

In this edition of *Sports and Entertainment Immigration*, I want to focus on sports, specifically, a novel industry within sports: e-sports. That is, electronic sports or video games.

Some of you may be saying, "Finally!" Others may be thinking, "... Right..." However, all of us should be aware of this lesser-known, or at a minimum, less-recognized, area of the sports industry. To me, I focus on the even lesser-known or thought-about aspect of e-sports: its players and from where they hail. Therefore, in this edition of *Sports and Entertainment Immigration*, we will be laser focused on e-sports players, and specifically, look at how immigration intersects with the industry and impacts America's position within the e-sports realm.

What, Exactly, Are "E-Sports"?

E-sports, also known as "Esports," "electronic sports," and "eSports," consist of "organized multiplayer video game competitions."¹ If you are anything like I am, you might be thinking about the old days of connect-

ing multiple consoles and playing in a group setting among friends, playing online multiplayer games with individuals worldwide in a "friendly" atmosphere,² or playing console-based multiplayer games with individuals and friends nationwide in a "friendly" atmosphere—likewise, this was not always so friendly. These are all examples of e-sports, but at an amateur or recreational level. Professional e-sports consist of these types of competitions at a level that sells out arenas like Madison Square Garden,³ and feature competitors from around the globe vying for multi-million-dollar championship prize[s].⁴

Video games are not easy and require immense hand-eye coordination at a rapid pace, quick thought, great



skill, and flexibility in performing. Though it may not be the most physical of games, neither is chess, pool, bowling, nor, dare I say, golf, but we consider those competitions at a professional level to be sporting events, and so, why should e-sports be any different?⁵

A Brief History of E-Sports

It is worth understanding that e-sports are not exactly new.

Owen Good's 2012 article, "Today is the 40th Anniversary of the World's First Known Video Gaming Tournament," stated:

The earliest known video game competition took place on 19 October 1972 at Stanford University for the game *Spacewar*. Stanford students were invited to an 'Intergalactic spacewar olympics' whose grand prize was a year's subscription for *Rolling Stone*, with Bruce Baumgart winning the five-man-free-for-all tournament and Tovar and Robert E. Maas winning the team competition.⁶

Fast forward to 1978, when *Space Invaders* was released, followed by *Asteroids*. As many of us may recall, getting the high score was always a thing of prestige and great competition.⁷ Countless hours would be spent trying to obtain a high score at various games, but it was with *Space Invaders* and *Asteroids* that these public competitions and the competitive mentality in video gaming began. Then, in 1980, Atari held the "Space Invaders Championship," which "was the earliest large scale video game competition, attracting more than 10,000 participants across the United States, establishing competitive gaming as a mainstream hobby."⁸

The Various Genres and Most Popular Competitive Franchises

The most common video game genres associated with e-sports "range from popular, team-oriented multiplayer online battle arenas (MOBAs), to single player first person shooters, to survival battle royales, to virtual reconstructions of physical sports."⁹ Popular e-sport franchises include *League of Legends*, *Dota 2*, *Call of Duty*, *Overwatch*, *Street Fighter*, *Super Smash Bros.* and *StarCraft*, *Tekken*, and many more.¹⁰

For our purposes, we are going to be looking at *League of Legends*.

League of Legends in Asia: Masters of the Game

What, exactly, is *League of Legends*? It is a 2009 multiplayer online battle arena video game developed and published by Riot Games. Inspired by *Defense of the Ancients*, a custom map for *Warcraft III*, Riot's founders sought to develop a stand-alone game in the same genre.¹¹

As evidence about the size of this genre, for example, with *League of Legends*:

The game is often cited as the world's largest e-sport, with an international competitive scene composed of 12 leagues. The domestic leagues culminate in the annual *League of Legends World Championship*. The 2019 championship had over 100 million unique viewers, peaking at a concurrent viewership of 44 million. Domestic and international events have been broadcast on livestreaming websites such as Twitch, YouTube, Bilibili, as well as cable television sports channel ESPN.¹²

Remarkable.

It does not end there. As the stakes are so high in competitions and because the competitiveness at these competitions is palpable, the atmosphere has created professionals who are truly at the top of their games.

As per Kellen Browning of *The New York Times*:

Crimson lights flashed and announcers yelled in shock as a star athlete pulled off a miraculous feat: leading his team to an upset victory in the semifinals of a world championship tournament.

The setting was Shanghai, and the championship was for *League of Legends*, a video game. The enraptured crowd of thousands treated the frantic mouse-clicking with the same gravitas given to a traditional sport.¹³

What happened next was that Hu Shuo-Chieh, "a decorated Taiwanese superstar" who was the star of the moment, made a drastic announcement: "he was leaving his base in China, the hub of global e-sports, for a backwater in the world of competitive *League of Legends*: the United States."¹⁴ Wait a minute! The United States? A backwater? Although we are supreme in global sports, technically, "in *League of Legends*, the highest-profile video game played by professionals, U.S. teams lag far behind their counterparts in Asia, where e-sports are a way of life. In countries like China and South Korea, gamers start competing as children, and professionals train up to 18 hours a day."¹⁵

Well, this is a bit embarrassing? So, what, then, do U.S. teams do? The same thing any other developing sport does: it throws around lots of money, trying to acquire talent from other regions. "To keep up, U.S. teams have dangled increasingly large salaries in front of these superstars, akin to Major League Soccer's luring famous European footballers stateside. Aided by an influx of cash and big-name sponsors, these teams have recruited

at least 40 players from Asia since 2016, according to a New York Times analysis, and a similar number from Europe.”¹⁶

Each of those individuals would have required a visa to enter the United States and compete in a proper fashion. Moreover, each competitor who arrives on U.S. soil for an international competition most likely needs a visa prior to arriving.

Specifically, when players sign with teams and seek to enter the U.S. for a protracted period of time, to perform at a professional level, they must obtain employment authorization to perform their craft. As more and more individuals become weary of the culture in South Korea and China being “that of ‘working hard, grinding until you collapse’,” “putting in 18-hour practice days and even developing wrist injuries,” more are likely to see America as an open space for them to come to and enjoy a better work-life balance while being a heavyweight in the industry.

Concluding Thoughts

E-sports are here to stay. In fact, they are here to grow. As a burgeoning industry, growing at a rapid pace year after year, it is imperative that the U.S. maintains its attractiveness within not only the League of Legends community, but the other franchises, like Tekken, as well. How can the U.S. remain attractive to industry investors, competitors, and audiences? By ensuring that global talent is able to enter the U.S. to compete, whether for or against the United States, and that this talent is welcomed. Ultimately, it is immigration that will make America competitive within the e-sports landscape.

Endnotes

1. <https://www.emerald.com/insight/content/doi/10.1108/IntR-04-2016-0085/full/html>; *see also* <https://hir.harvard.edu/esports-part-1-what-are-esports/>.
2. Many will tell you; these were not often friendly. Some of the games were *Starcraft* and *Command and Conquer: Red Alert*.
3. <https://www.insidehook.com/article/tech/how-video-gamers-took-over-madison-square-garden>.
4. <https://hir.harvard.edu/esports-part-1-what-are-esports/>.
5. Now, I know what you’re thinking, a lawyer talking down about golf, how can this be? What can I say? It is not my bag. If you have not had a chance to enjoy Robin Williams on the origin of golf, I highly recommend watching it at: <https://www.youtube.com/watch?v=14NQIq4SrmY>.
6. Owen Good (19 October 2012). “Today is the 40th Anniversary of the World’s First Known Video Gaming Tournament,” <https://kotaku.com/5953371/today-is-the-40th-anniversary-of-the-worlds-first-known-video-gaming-tournament>, Kotaku; and “The Rise of Esports,” <https://www.racergamingchairs.com/blogs/gaming/the-rise-of-esports>, Racer Gaming Chairs.
7. Worth noting, I wasn’t alive in 1978, but, I can confirm that in the 1990s and 2000s, high scores still came with bragging rights.

8. “Players Guide To Electronic Science Fiction Games,” https://archive.org/stream/electronic-games-magazine-1982-03/Electronic_Games_Issue_02_Vol_01_02_1982_Mar#page/n35/mode/1up, *Electronic Games*, 1 (2): 35–45 [36]. March 1982.
9. <https://hir.harvard.edu/esports-part-1-what-are-esports/>, *supra* 1.
10. <https://influencermarketinghub.com/biggest-esports-games/>, *see also*, <https://www.forbes.com/sites/christinasettimi/2020/12/05/the-most-valuable-esports-companies-2020/?sh=4a54806d73d0>, <https://weplay.tv/news/why-street-fighter-remains-at-the-top-of-the-esports-scene-23190>, and <https://www.redbull.com/int-en/arslan-ash-pakistani-tekken-legend>.
11. <https://www.theloadout.com/biggest-esports-games/>, *see also* <https://www.nytimes.com/2014/10/12/technology/riot-games-league-of-legends-main-attraction-esports.html>.
12. *Id.*
13. <https://www.nytimes.com/2021/01/30/technology/esports-league-of-legends-america.html>.
14. *Id.*
15. *Id.*
16. *Id.*

Michael Cataliotti is Senior Counsel, Immigration, at Greenspoon Marder. His clientele includes individuals and entities from such industries as sports, music, fashion, film, television, art, theatre, new media, and technology. Michael is a faculty member at Lawline CLE; a frequent speaker on the topics of business immigration, corporate transactions, and entrepreneurship; a member of the American Immigration Lawyers Association (AILA) where he is an active participant on several committees; was most recently recognized as one of Super Lawyers’ “Rising Stars” in 2021, and sits on the Legal Committee of Dance/NYC.

Resolution Alley

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

Dispute Resolution During the Pandemic and Beyond

By Theo Cheng

It has been over a year since the nation went into lockdown due to the pandemic, and we are only just starting to return to some semblance of normalcy. The entertainment industry, in particular, has felt the full brunt of the closures. Theaters have shuttered their doors and turned away audiences and are now thinking about re-opening again. Venues and arenas have been closed to live performances. Tours and concerts have been canceled, and film and television productions have only recently started up again, resulting in delayed seasons and readjustments of marketing, distribution, and release schedules.

At the same time, there is no question that the pandemic has had a severe impact on access to justice through our court systems. In many parts of the country, courts remain closed or are operating at less than full capacity. Not surprisingly, disputes that have arisen in the entertainment field have struggled to find a pathway to resolution. Alternative Dispute Resolution (ADR) processes like mediation and arbitration can be a viable alternative because parties to these disputes share three principal concerns:

- (1) a preference for having the disputes resolved by those who understand the particular industry's special concerns during the pandemic;
- (2) the need for preliminary or emergent relief; and
- (3) the need to maintain confidentiality.

Industry familiarity or background can be very helpful in appreciating the prevailing norms and customs to which the participants are accustomed. Knowledge of the issues or legal frameworks that arise in the entertainment industry (for example, copyright law or licensing arrangements) can also be invaluable.¹ Preliminary relief—in the form of a temporary restraining order or an injunction—can also often be the main event and lead to a mutually acceptable settlement of the dispute. With the courts working at less than full capacity, the arbitral forum can be an alternative and, perhaps, more welcoming venue for emergency relief. Nearly every ADR provider—for example, the American Arbitration Association, the CPR Institute, and JAMS—has emergency arbitrator provisions in its default rules that will allow parties to obtain equitable relief through faster assignment to a decision-maker and generally faster issuance of a decision at much less cost. Although the maximum reach of any issued prelimi-

nary relief will be limited—because it can only extend to the parties and counsel who actually appear before the arbitrator—in many cases, that scope will be more than sufficient to maintain the status quo or ensure the preservation of assets. Finally, confidentiality has long been desired in entertainment disputes, and the extended duration of matters in court due to the pandemic can exacerbate that concern because matters tend to stay around on dockets much longer. Both mediation and arbitration can provide for confidentiality of the proceedings so long as the parties have an agreement to that effect.²



Resolution of disputes during the pandemic have also focused on the adoption of technological infrastructures throughout the court system and in the private bar to handle dispute resolution remotely over video teleconferencing platforms like Zoom, WebEx, and Microsoft Teams. This conversion has presented many challenges, including ensuring that there is adequate training on those platforms for judges, jurors, attorneys, clients, witnesses, arbitrators, and mediators; needing to secure appropriate software and hardware (devices, cameras, microphones, speakers, headsets, etc.); and embracing appropriate cybersecurity protocols. With courts severely hampered by the impact of the pandemic, the need to resolve disputes more efficiently and quickly naturally pointed toward ADR methods like arbitration and mediation as a potentially more viable option. Even without mandatory court-annexed mediation or other ADR programs in place, parties can freely agree to have their disputes resolved in a different forum with, for example, the assistance of a trained arbitrator or mediator. Doing so can provide litigants with a more expeditious and cost-effective way to resolve their disputes. Indeed, under the circumstances we face today, ADR is increasingly shedding its “alternative” moniker and fast becoming the principal way to resolve disputes.

One other issue that quickly arose at the beginning of this conversion was whether arbitrators could compel parties and counsel to participate in remote evidentiary

hearings. Although there is support for the notion that arbitrators do, in fact, have that authority,³ participants in the entertainment industry maintain a general reluctance to holding hearings remotely and have settled expectations that those hearings should take place in person. That expectation can be attributed to at least three things:

- (1) unfamiliarity with video conferencing platforms and how to integrate them into a trial practice;
- (2) concerns over credibility determinations that, at the very least, are differently evaluated over a video conferencing platform; and
- (3) inertia—the desire by parties and their counsel to continue conducting hearings in the manner in which they are accustomed to doing them.

In the collective bargaining agreement context, which is applicable to some sectors of the entertainment industry, there is, in fact, a settled expectation that parties intended to hold in-person hearings, and, thus, there is less of a desire to convert to remote proceedings.⁴ A year or more into the pandemic, the expectations of participants in adjudicated entertainment-related disputes have changed somewhat, because the alternative is to face indefinite delays or severely hampered in-person proceedings. Even with states opening up, individual venues may still impose health and safety restrictions that would make gathering in person difficult. For example, imagine having witnesses wearing masks that obstruct their facial expressions, demeanor, and reactions, or instituting awkward document handling protocols.

The one area of enormous change, though, has been in mediation, where the availability of conducting them remotely has had a marked impact on whether entertainment-related disputes are being resolved sooner in the current environment.⁵ In particular, proceeding remotely has permitted many additional participants from attending who might otherwise have been precluded due to time or cost considerations. For example, a party's ultimate decision-maker often would not attend mediations due to that individual's busy calendar. However, having them present at mediations is not only often required under certain court-annexed programs, but also desirable from the perspective of securing a durable and ratifiable resolution. Another mediation participant who typically participates only by telephone (or sometimes is available only by telephone) is the insurance carrier's adjuster. With the convenience of video conferencing platforms, those individuals now have an easier and better opportunity to attend and participate in mediation sessions.

Most promising about remote proceedings is the broadening of opportunities for junior members of a litigation team—many of whom are younger, women, and/or People of Color—to have the ability to attend and participate. Junior attorneys have oftentimes been unable to do so due to the additional costs that would be imposed upon both the firm and the client. Yet now, especially without the associated travel and lodging costs, they are able to both participate in the preparation work and also continue being active on the matter by attending and participating in the proceeding, so long as the firm is willing (if necessary) to write off the time. In turn, doing so opens the door to additional on-the-job training and in-



creased opportunities for younger and diverse attorneys to participate in both mediation and arbitration proceedings, which is invaluable to their professional development and will ultimately inure to the firm's benefit.

Of course, the most obvious benefit to remote mediations is the savings in travel time and expenses from being able to gather on a video teleconferencing platform. Participants largely avoid all of the logistical issues that previously arose from having to coordinate everyone's individual calendars, account for unexpected travel delays, and secure a mediation space and lodging. In turn, this has made scheduling significantly easier. Indeed, an increasing number of disputants are considering mediation even before commencing a formal proceeding in court or in the arbitral forum, especially for matters with smaller amounts in controversy. This is especially true of entertainment disputes, which can be notoriously expensive to litigate. It is even more true for matters with small amounts in controversy, which make little economic sense to file in court or submit to arbitration.⁶

Parties are also increasingly considering entering into post-dispute submission agreements, under which they agree to have their disputes handled in the arbitral forum. Specifically, parties can agree to submit only a specific dispute to arbitration, and they can do so at the time after the dispute arises, while the parties are engaged in negotiations over a resolution, or even if the dispute is already being actively litigated in court (i.e., because there was no pre-existing arbitration agreement). Although submission agreements can be challenging to consummate—because what one party perceives as the benefits of arbitrating the dispute, the other will likely view as disadvantages—the backlog in the courts has incentivized parties to enter into them.

Like so many other things, dispute resolution has significantly changed with the onset of the pandemic. After a year, for the most part, the bench, bar, and other dispute resolution professionals have accepted remote proceedings as a natural consequence of the current circumstances. In particular, advocates have adapted to the age of remote proceedings by preparing for them differently, counseling clients about new topics, and serving in their roles in a manner that does not necessarily mirror the way they are accustomed to handling in-person proceedings. Even after the pandemic has subsided, remote proceedings will not suddenly disappear; to the contrary, they will be a mainstay of dispute resolution practice for quite some time and are probably here to stay. Indeed, we will likely see the emergence of different kinds of hybrid proceedings where some portions of the mediation session or evidentiary hearing will be conducted remotely.

The resiliency and flexibility of the legal profession, and among dispute resolution professionals in particular, have been some of the shining lights during these difficult and challenging times. We continue to have much to learn and experiences to share.

Endnotes

1. For more on this subject, see Theodore K. Cheng, *Providing for Neutrals with Industry, Legal, and Business Expertise*, FBA The Resolver, at 5 (Spring 2019), <https://theocheng.com/wp-content/uploads/2019/04/Providing-for-Neutrals-with-Industry-Legal-and-Business-Expertise-Resolver-Spring-2019.pdf>.
2. For more on this subject, see Theodore K. Cheng, *Maintaining Confidentiality in Arbitration*, FBA The Resolver, at 5 (Spring 2018), <https://theocheng.com/wp-content/uploads/2019/04/Maintaining-Confidentiality-in-Arbitration-The-Resolver.pdf>.
3. For more on this subject, see Theodore K. Cheng, *Can and Should Arbitrators Compel Parties to Participate in Remote Arbitration Hearings?*, LEXIS Practical Guidance (Aug. 2020), <https://theocheng.com/wp-content/uploads/2020/09/Can-and-Should-Arbitrators-Compel-Parties-to-Participate-in-Remote-Arbitration-Hearings.pdf>.
4. On April 1, 2020, the National Academy of Arbitrators (the organization of labor and employment arbitrators in the U.S. and Canada) issued Formal Advisory Opinion No. 26, which concluded that, in the absence of a collective bargaining agreement or an *ad hoc* agreement prohibiting video hearings, an arbitrator may—in exceptional circumstances—order a remote hearing, in whole or in part, without mutual consent and over the objection of a party. However, the Academy urged arbitrators to first obtain the parties' agreement to proceed remotely before determining that a video hearing is necessary to provide a fair and effective proceeding. Indeed, nothing in the opinion "imposes an affirmative obligation to order a video hearing absent the agreement of the parties." The opinion is available at <https://naarb.org/wp-content/uploads/2020/04/CPRG-Advisory-Opinion-26-4.2020.pdf>.
5. For more on the benefits of remote mediations, see Theodore K. Cheng, *Virtual Mediation: Key Issues and Considerations*, Practical Law (June 2020), [https://theocheng.com/documents/Virtual-Mediation-Key-Issues-and-Considerations-\(2020.06.15\).pdf](https://theocheng.com/documents/Virtual-Mediation-Key-Issues-and-Considerations-(2020.06.15).pdf).
6. On December 27, 2020, the Copyright Alternative in Small-Claims Enforcement Act of 2019 was enacted. It is known as the CASE Act of 2019 and creates a new statutory scheme under which a new Copyright Claims Board will decide small copyright claims. Participation is voluntary, with a 60-day opt-out procedure for defendants that allows the parties to have the dispute heard in court. If the parties go forward before the Copyright Claims Board, they forgo the right to be heard before a court and the right to a jury trial. Damages are also capped at \$30,000 in any one proceeding. The text of the Act is available at <https://www.congress.gov/bill/116th-congress/house-bill/2426/text>. Essentially, the CASE Act creates another form of a small claims arbitration process.

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

Recent Developments in Entertainment Law: Defamation Jurisdiction, Copyright, and Talent Contest Agreements

By Neville L. Johnson and Douglas L. Johnson

Long-Arm Jurisdiction and Internet Defamation

A California Court of Appeal recently decided that it could exercise its long-arm jurisdiction over a Canadian defendant in an online defamation case.¹ Yue, a California resident, established and moderated a Chinese language community on a website called “Zhen Zhu Bay” (ZZB).² Defendant Liu, also a California resident, owns and operates a website called Yeyeclub.com (Yeyeclub).³ Yang posted sexually explicit, violent and insulting posts both on ZZB and Yeyeclub.⁴ Yue removed Yang’s posts, while Liu did not, instead encouraging Yang to continue his posts.⁵ Yang proceeded to post numerous defamatory statements on Yeyeclub about Yue.⁶ Yue subsequently sued several defendants, including Yang and Liu, for defamation and unfair competition.⁷

Yang moved to quash the complaint, arguing that the court lacked personal jurisdiction over him because he was a resident of Canada and lacked minimum contacts with California, as Yeyeclub was a website in which users interacted anonymously.⁸ Yue, in his opposition, argued that the court had specific personal jurisdiction over Yang because Yang had purposefully availed himself of the forum benefits when he intentionally aimed his defamatory comments at California, which is where many of Yeyeclub’s users reside, and many of Yang’s posts mentioned traveling to California to harm Yue.⁹ The trial court granted the motion to quash, relying on *Burdick v. Superior Court*,¹⁰ reasoning that the court had no personal jurisdiction over Yang because the interaction between Yue and Yang took place on the internet, and simply posting information on websites was not enough to satisfy the minimum contacts rule.¹¹ The trial court did not address the content of the posts themselves.¹²

The Court of Appeal reversed, distinguishing the case from *Burdick*.¹³ In *Burdick*, the plaintiffs, a group of physicians and others, had made posts on Facebook about the safety and efficacy of a skincare product.¹⁴ In retaliation, a representative of the skincare company in Illinois made a public Facebook post suggesting that those who had made the initial posts had criminal histories.¹⁵ There, the court held that it could not exercise personal jurisdiction over the Illinois defendant because merely making a post on the internet knowing that the plaintiff resides in a forum state, without evidence of a California audience or focus, was not enough to establish minimum contacts.¹⁶ In contrast to *Burdick*, the Court of Appeal noted that Yang had done far more than simply post on the internet.¹⁷ He had communicated with Yue directly, mentioned



Yue in his posts, had even threatened to come to California to harm Yue, had repeatedly referred to California and had suggested criminal liability in California.¹⁸ This, combined with the fact that Yue had offered uncontradicted evidence that Yeyeclub had a California audience and that California residents had read the posts, was enough to show a sufficient California connection.¹⁹ Therefore, the court reversed the motion to quash and reinstated the complaint.²⁰

Although it remains difficult to bring an action for defamation based on anonymous internet postings, this holding removes jurisdictional hurdles that California plaintiffs face when attempting to recover for defamation by individuals living in different states and/or countries. In contrast, New York’s long-arm statute permits the state to exercise personal jurisdiction over non-resident defendants in much narrower circumstances than California’s long-arm statute.²¹ There is a business transaction requirement, which means that simply directing a statement into the state is insufficient.²² Therefore, if a party engages in a business transaction in New York, and makes defamatory statements about that transaction outside of New York, including on the internet, then a court will have jurisdiction.²³ This requirement makes it difficult to bring a defamation action against an out of state defendant in online harassment contexts, especially in the age of social media, because it specifically requires the online posting to be based on a business transaction.²⁴ As a result, a court in New York would likely not be able to reach an out of state defendant as the California Court of Appeal was able to in *Yue v. Yang*, as described above.²⁵

The Ninth Circuit Gives Hollywood Studios Even More Protection

The Ninth Circuit lived up to its name of being the “Hollywood Circuit” when it ruled in favor of Disney in a copyright infringement case regarding the characters of its animated hit *Inside Out* in the case *Daniels v. Walt Disney Co.*²⁶ Denise Daniels is a renowned child psychologist specializing in teaching children how to cope with their emotions who developed a line of anthropomorphic characters called The Moodsters.²⁷ The Moodsters are an ensemble of graphic characters who live inside a child and are color-coded, each representing a different emotion.²⁸ Daniels hired a team to help her develop the characters into a television show, which resulted in a “bible” for the show and an animated pilot episode.²⁹ The team then developed a second generation of characters that were sold at Target and other retailers as toys.³⁰ Daniels and her team began to pitch the idea for the show to numerous entertainment and media companies, one of them being Disney, in 2008.³¹ Disney ultimately passed on the project, and subsequently began to develop the film *Inside Out*, an animated movie that features five anthropomorphized

emotions that live inside the mind of an 11-year-old girl.³² *Inside Out* was released in 2015, and Daniels filed suit for breach of implied-in-fact contract and copyright infringement in 2017.³³ Disney filed a motion to dismiss, arguing that Daniels had failed to allege that she in fact owned the characters.³⁴

The district court held in favor of Disney, reasoning that Daniels had failed to allege that the characters were protected by copyright.³⁵ Daniels appealed to the Ninth Circuit, arguing that her characters were entitled to copyright protection.³⁶ In evaluating the claim, the Ninth Circuit used the *Towle* test to determine whether The Moodsters were in fact copyrightable.³⁷ This test requires that a character (1) have physical and conceptual qualities; (2) be sufficiently delineated such that it is recognizable whenever it appears; and (3) be especially distinctive, containing some unique elements of expression.³⁸ After a lengthy analysis, the Court held that the characters did not pass the test because, although they had physical and conceptual qualities, the characters were not broadly recognizable and their traits were not that distinctive, considering that colors and emotions themselves are not copyrightable elements.³⁹ The Ninth Circuit did not stop there. In addition to the *Towle* test, the Court reversed its apparent course since the 1970s and revived the “Story Being Told” test⁴⁰ as an applicable standard, a test that had previously been limited to only literary characters and presents the highest bar to character copyrightability.⁴¹

This case sets a high bar for character copyrightability that disadvantages independent creators who do not have the resources to widely disseminate the works in which their characters live.

The Andy Warhol Case Takes Another Turn⁴²

Lynn Goldsmith is a photographer who owns the copyright in a black and white photograph of Prince, which is at the heart of this copyright dispute.⁴³ Goldsmith took a total of 23 photographs of Prince at a session in 1981, one of which she licensed to *Vanity Fair* in 1984.⁴⁴ The license permitted the photograph to be used as an artist reference for an illustration that *Vanity Fair* would publish in its November 1984 issue.⁴⁵ Unbeknownst to Goldsmith, the artist that was going to create a work based on the photograph was Andy Warhol.⁴⁶ *Vanity Fair* published the Warhol illustration together with an attribution to Goldsmith.⁴⁷ Furthermore, unbeknownst to Goldsmith was that Warhol had created 15 additional works based on the photo, comprising of 14 silkscreen prints and two pencil illustrations.⁴⁸ At some point after Warhol’s death, the Andy Warhol Foundation (AWF) acquired title and copyright to the Prince series.⁴⁹ After Prince died in 2016, AWF licensed the series to Condé Nast for the cover of a planned tribute magazine, which was published in May 2016.⁵⁰ It was at this point that Goldsmith became aware of the Prince series, which led



her to contact AWF to advise it of the perceived infringement of her copyright in the original photograph.⁵¹ She then registered the photo with the U.S. Copyright Office as an unpublished work.⁵² In 2017, AWF sued Goldsmith for a declaratory judgment of non-infringement and, in the alternative, fair use.⁵³ Goldsmith countersued for copyright infringement.⁵⁴ On July 1, 2018, the district court granted summary judgment for AWF on its fair use claim, holding that the Prince series met all four fair use factors.⁵⁵ Goldsmith appealed.⁵⁶

The Second Circuit held that Warhol's use of Goldsmith's photograph was not fair use because the fair use factors weighed strongly in favor of Goldsmith.⁵⁷ The Court found that the series was not transformative, as it had retained the essential elements of the photograph without significantly altering or adding to them; the photograph was creative in nature and unpublished; the series borrowed significantly from the photograph both qualitatively and quantitatively; and even though the primary market for the photograph and the series may differ, the use of the photograph in the series posed a cognizable harm to Goldsmith's market to license the photograph.⁵⁸ While the legal community is still debating whether this analysis was proper and the ramifications of this decision, what is also interesting about this holding is that the Court found the photograph and the series to be substantially similar *as a matter of law*, an analysis that is often reserved for a jury, that the lower court had not engaged in due to its fair use finding.⁵⁹ The Court reasoned that it was appropriate to engage in the substantial similarity analysis since access to the photograph had been conceded by AWF, and the photograph and Prince series were so substantially similar that reasonable jurors could not possibly differ on the issue.⁶⁰ The Court then held that the works were substantially similar as a matter of law because Warhol had not created the series by taking his own photograph of Prince or tried to convey the same idea by using a different subject—he had produced the series by directly copying the photograph.⁶¹ The Court did acknowledge that not all instances of copying in this manner constitute a work that is substantially similar to the original.⁶² However, in this particular instance, there was no reasonable debate to the contrary, given the degree to which Goldsmith's photograph remained recognizable within the Prince series.⁶³

The AWF has since filed an en banc petition with the U.S. Court of Appeals for the Second Circuit, asking for a rehearing of the case.⁶⁴

The Issue of Unconscionability in Television Show Contestant Agreement Waivers and Releases

Michael Simeon Smith was a contestant on the 14th season of the popular singing competition, *American Idol*.⁶⁵ Smith and the other 24 contestants were fitted for in-ear monitors in order to participate in the program.⁶⁶

The fitting process involved inserting silicone into the ear in order to form a synthetic mold of the ear.⁶⁷ While none of the other contestants had any issues, Smith experienced pain in his right ear after the impression process started, and his ear bled after the licensed hearing aid dispenser removed the silicone mold.⁶⁸ Smith then saw an ear, nose, and throat specialist, who informed him that 80% of the right eardrum was missing.⁶⁹ Smith sued *American Idol* for negligence.⁷⁰ *American Idol* filed a motion for summary judgment, arguing that the claim was precluded due to the release and waiver language contained in the contestant agreement that Smith had signed.⁷¹ In opposition, Smith argued that the agreement was both procedurally and substantively unconscionable because he was not able to negotiate any terms and was forced to sign a dense 20-page document, and that the release and waiver did not apply to a claim for gross negligence.⁷² Unfortunately, the trial court did not agree, and granted *American Idol's* motion for summary judgment.⁷³ Smith appealed.⁷⁴

The Court of Appeal held that the waiver and release language in the contract was neither procedurally, nor substantively unconscionable, and that Smith had not presented sufficient evidence to support his argument that *American Idol* had been grossly negligent.⁷⁵ On the unconscionability issue, the Court first reasoned that although the nature of the agreement was similar to a contract of adhesion due to the fact that Smith could not be on the show unless he signed it, the high level of scrutiny that would otherwise be applicable to adhesion contracts did not apply in this case, because the agreement did not involve any surprise or sharp practices.⁷⁶ The Court then stated that there was only a low level of procedural unconscionability because Smith had been given weeks to review the agreement, he could have hired a lawyer to review the document, no one had lied to him in order to get him to sign it, the waiver and release language was clearly labeled in the document, and Smith had not alleged any duress on part of *American Idol*.⁷⁷ The Court then moved on to the substantive unconscionability prong, and reasoned that waiver and release of future negligence claims was not substantively unconscionable because, under California law, these waivers are permissible so long as they do not violate public policy, and Smith had failed to meet his burden of proof on this issue.⁷⁸ Therefore, the Court concluded that the agreement was enforceable.⁷⁹

These contestant agreements are extremely one-sided, and there is no such thing as a meaningful negotiation between a contestant and a television studio in these situations. In light of what the Court has held, as described above, anyone who wants to be on a television program should be aware of the rights that they likely will be signing away, and the consequences of doing so. Most of these agreements impose significant limitations on damages, and bind a participant to mediation or arbitration, which can be costly.

Endnotes

1. *Yue v. Yang*, No. A159145, 2021 Cal. App. LEXIS 267 (Ct. App. Mar. 8, 2021).
2. *Id.* at *1.
3. *Id.* at *2.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *3-4.
9. *Id.* at *5.
10. 233 Cal. App. 4th 8, 24-5 (2015) (holding that merely posting negative comments on the internet about the plaintiff and knowing the plaintiff is in the forum state are insufficient to create minimum contacts).
11. *Id.* at *6.
12. *Id.*
13. *Id.* at *12.
14. *Burdick*, 233 Cal. App. 4th at 14-15.
15. *Id.*
16. *Id.* at 25.
17. *Yue*, No. A159145, 2021 Cal. App. LEXIS at *13
18. *Id.*
19. *Id.*
20. *Id.* at 17.
21. CPLR 302.
22. *Gary Null & Assoc. v. Phillips*, 906 N.Y.S.2d 449, 455 (Sup. Ct. 2010).
23. *GTP Leisure Products, Inc. v. B-W Footwear, Co.*, 5391 N.Y.S.2d 489 (4th Dep't 1977).
24. CPLR 302.
25. *Yue v. Yang*, No. A159145, 2021 Cal. App. LEXIS at *17.
26. *Daniels v. Walt Disney Co.*, 958 F.3d 767 (9th Cir. 2020).
27. *Id.* at 770.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 771; Characters are unique in that they cannot be given copyright protection outside of the work in which they exist, which has led to different circuit courts to formulate different tests as to the copyrightability of characters. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Nichols v. Universal Pictures Corp.*, 45 F.2d 119 (2d Cir. 1930).
36. *Id.* at 771.
37. *Id.* at 771 (citing *DC Comics v. Towle*, 802 F.3d 1012, 1021 (9th Cir. 2015)).
38. *Id.*
39. *Id.* at 771-74.
40. This test requires a character to constitute the entire story being told. *Warner Bros. Inc. v. CBS*, 216 F.2d 945, 950 (9th Cir. 1954).
41. *Walt Disney Productions v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978).
42. For more information see article by Joel L. Hecker, *Second Circuit Reverses Fair Use Decision—Holds Warhol Foundation Infringed Lynn Goldsmith's Photo as a Matter of Law*, on page 10 of this *Journal*.
43. *Andy Warhol Found. For Visual Arts, Inc. v. Goldsmith*, 2021 U.S. App. LEXIS 8806, *6 (2d Cir. 2021).
44. *Id.* *6-7.
45. *Id.* at *7.
46. *Id.*
47. *Id.*
48. *Id.* at *8.
49. *Id.* at *9
50. *Id.* at *10.
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at *14-48.
58. *Id.*
59. *Id.* at *48.
60. *Id.* at *51.
61. *Id.* at *52.
62. *Id.*
63. *Id.*
64. Petition for Rehearing/Rehearing En Banc, on Behalf of Appellee The Andy Warhol Foundation for the Visual Artist, Inc., Filed 4/23/2021, *The Andy Warhol Foundation v. Goldsmith*, Docket No. 19-02420 (2d Cir. Aug 07, 2019).
65. *Smith v. Am. Idol Prods.*, No. B301534, 2021 Cal. App. Unpub. LEXIS 2524, *2 (Apr. 20, 2021).
66. *Id.*
67. *Id.*
68. *Id.* at *3.
69. *Id.* at *4.
70. *Id.* at *4-9.
71. *Id.* at *9.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* *9-21.
76. *Id.* at *15.
77. *Id.* at *16.
78. *Id.* at *17-19.
79. *Id.* at *19.

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

Johnny Rotten or Johnny B. Goode?

By Amber Melville-Brown

What's eating Johnny Depp? Defamation litigation. The heartthrob actor and former darling of Hollywood has been knocked back by the Court of Appeal in England, which has refused to grant him permission to appeal his libel loss in the "wife-beater" litigation. He has thus exhausted his English legal routes in his action against News Group Newspapers (NGN), publishers of *The Sun*. As a result, he now faces an application in the U.S. by his nemesis Amber Heard, to dismiss his case against her in Virginia. The former Mrs. Depp is seeking to take advantage of the closed door in England to shut the litigation door in Depp's face in Fairfax County. The argument goes a little like this: English Court of Appeal decision = final judgment + principles of comity + issue preclusion + claim preclusion > Hey Presto!, the claim against her should disappear.

Depp's defeat in the English courts may have amounted to a nightmare on Fleet Street—but he may now also be headed towards some fear and loathing in Virginia. This article takes a dip into the litigation on both sides of the Atlantic, and asks whether the star of *Finding Neverland* will ever find his reputation cleared.



So let us start at the very beginning, as Julie Andrews sang in *The Sound of Music*, and look at why Depp now finds himself with a tattered reputation on one side of the Atlantic, and is trying to remedy that reputation with litigation on the other. What mountains does he have to climb in his American case to achieve his dream of reputation rehabilitation? What streams did he fail to ford under the English system leaving him there as public enemy Number One?



City of "Lies"?

The accusations and counter arguments in the alleged factual matrix have been reported upon in all their gory details in column miles, not column inches, in newspapers and across the airwaves—so we do not delve into the mire of them here. However, it is worth a quick summary of what Depp was complaining about as a claimant in England, and what he is complaining about as a plaintiff in America. Note the differing terminology—we are after all, two countries united by a common language, but separate legal systems and terms. There are also differences and similarities between the U.K. and the U.S. cases. The article that brought about Depp's proceedings in England accused him of assaulting his ex-wife. It was published by the tabloid *The Sun* and its publisher NGN. Depp's former wife Amber Heard was the newspaper's star witness. Meanwhile, in Virginia, the article of complaint was penned by Heard for the *Washington Post*, which has its printing presses in Virginia. Heard is sued personally as the named defendant. In her article she does not name Depp, but refers to a backlash she suffered after speaking out about being the victim of domestic abuse. Depp argues that the accusation was clearly intended to refer to him and he vehemently denies the accusations—as he did in England—that he was violent toward her.

Libel Tourist?

Why did Depp sue in England? The defendant, *The Sun* and NGN, are based there and Depp has a worldwide reputation that he wanted to protect there. Back in the day, celebrities used to flock to London—"A town named Sue" or "The Libel Capital of the World" as it was referred to—to get their "must have" celebrity accessory, the stamp of reputational approval, an English jury verdict. Depp may have been forgiven for thinking that libel litigation in London would be less problematic to clear his name, and less traumatic into the bargain. He might have also imagined that it was just the golden ticket to open the door to litigation success in the United States.

Yet times have changed. No longer do English juries hand out "telephone number" damages awards—so-called because the number of zeros in the substantial awards made appeared as long as a telephone number. Rather, after a series of cases in the 1990s that prompted the Court of Appeal to raise judicial eyebrows and lower the awards of lower courts,¹ juries could be directed to take account of awards given in personal injury cases. It was considered offensive for the victim suffering from a harmed reputation to be awarded significantly more in damages than a victim suffering bodily harm. Thus, the "ceiling" for damages in defamation cases was tied to the same, much lower ceiling in personal injury cases.

Moreover, while traditionally defamation cases in the English courts were tried with a judge and a jury—sharing out the responsibilities of questions of law and fact respectively—libel juries are now in practice a thing of the past since implementation of the Defamation Act 2013.² Removed was defamation's special category status, and it was flung in with other causes of action, to "be tried without a jury unless the court in its discretion orders" otherwise.³ Had they thought so before these developments, certainly thereafter claimants would be foolish to rely on any perceived "celebrity effect," expecting a star-struck jury to find in their favor, the evidence perhaps notwithstanding.

I Tried To Go to Reputation Rehab—the English Courts Said No, No, No . . .

In Depp's case, it is clear that he considered himself libeled, and he vehemently denied the serious accusations leveled at him. Thus besmirched in the jurisdiction of the courts of England and Wales by dint of *The Sun* being published there, it was not improper for him to seek to bring a successful claim to put the lie to the libel to clear his name. He was entitled to think so, and entitled so to do, and so to sue. Yet while not improper, was it wise? As we now know, he spectacularly failed. The allegations were not lies according to the English court, which found them to be substantially true; and that gave the newspapers—not just *The Sun*—carte blanche to label him a wife beater in headline letters.

Intent on seeking to overturn these findings and to remedy his reputation, Depp sought permission of the lower court to appeal the decision. He was refused. He then sought permission of the Court of Appeal itself to overturn the ruling and for the matter to be reheard. Again he was refused, the court applying well-established principles that to persuade the Court of Appeal to interfere with a judge's findings of fact, the claimant must climb over a very high bar.⁴

Depp's application was based largely on arguments that new evidence should be considered. That "new evidence" pertained to what his team argued was Heard's claim that she donated millions obtained in her divorce settlement from him to charity. This was said in court by Depp's counsel to be a "calculated and manipulative lie." Heard's legal team have previously said that she *has* made donations and will continue to do so until she fulfils her pledge. In response to the application, however, Heard's lawyers contended that any such new evidence "would not have had any impact" on the result, anyway. It seems that the Court of Appeal agreed, as it refused the application:⁵ "The hearing before Nicol J was full and fair, and he gave thorough reasons for his conclusions which have not been shown even arguably to be vitiated by any error of approach or mistake of law."⁶ Lord Justice Underhill refused Depp's application to admit further evidence in support of his proposed appeal, and concluded that the appeal had no real prospect of success and that there was no other compelling reason for it to be heard.⁷

Commenting after the initial judgment, which Depp had called "surreal," his lawyers labeled it as "flawed," and "as perverse as it is bewildering."⁸ With the double blow of these appeal applications hitting him under his swashbuckling belt, it is perhaps bewildering to many that the erstwhile Pirate is pursuing, seemingly undaunted and with a renewed fire in his belly, his separate libel action against his former wife in Virginia.

Should we be surprised that he has done so? As far as the English courts are concerned and with the now final judgment of the Court of Appeal, time has been called, which leaves the actor's tattered reputation teetering on the doorstep of the one last chance of remedy, the court in Virginia. Thus, his relentless quest for reputation remedy, and to get his professional life back on track, is understandable.

Depp remains the face of Christian Dior's perfume Sauvage—the translation for which is, incidentally, "sav- age." While he has retained this contract, when searching Google about Depp, headline after headline will appear proclaiming him as a "wife beater" and forecasting that he may never work in Hollywood again. Libel litigation is a lottery, and it was certainly a gamble for Depp to have bet all his reputation chips on a win at the libel court table in England. However, in gambling, there is an argument that by doubling your bet you might recoup your losses,

and perhaps this is what Depp is banking on, with his next hand. Yet can he win where he has thus far, lost?

Libel Law the Other Way Round

While the storyline of Depp's defamation claims is more or less the same in the two jurisdictions, there are different actors and a slightly different plot, and certainly divergences in the backdrop of legal systems and causes of action. Indeed, the two systems appear to reflect a landscape inhabited by one of Depp's own characters as he played the Mad Hatter in Tim Burton's 2016 movie, *Alice Through the Looking Glass*.⁹ In the 19th century novel that inspired the film, author Lewis Carroll's heroine, Alice, marveled at the world on the other side of the mirror, finding that things were "just the same as ours, only things go the other way."¹⁰ When looking at the libel laws in the U.S., when compared with those that have just defeated him, they do indeed appear to be the other way 'round; and as he continues in his battle in the United States, this differential is not in his favor.

We have noted that libel actions in England are now rarely heard by juries. In the United States, by contrast, libel juries still perform their function. While they hear the same evidence as legally qualified and forensic judges, juries can be more impressionable and star-struck, thus working to the plaintiff's advantage. However, it remains to be seen what, if any, impact the screaming "wife beater" headlines from overseas and the widely reported loss will have on an American jury.

Other differences between the two systems militate in favor of the defense. Under English law it is for the claimant to show that the allegation of complaint was defamatory—and section 1 of the Defamation Act 2013 provides: "a statement is not defamatory unless its publication has caused or is likely to cause serious harm to the reputation of the claimant."¹¹ Thereafter however, the burden of proof is on the defendant newspaper to prove its defense: For example, that it published an honest opinion (section 3);¹² or published in the reasonable belief that it was in the public interest (section 4);¹³ or that the allegations are substantially true (section 2).¹⁴ Thus, *The Sun* had to reach the high bar of convincing the court that the allegations made by Heard that he was violent towards her were substantially true. It did just that.

In the United States however, it is for the plaintiff to establish that the allegations are false and moreover, where the plaintiff is a public figure—and there is no doubt that Depp qualifies for this status—he must show that they were published with actual malice. The actual malice standard is that the defendant made the statements knowing that they were false or made with reckless disregard to their falsity.

Thus, on entering the threshold of the Virginia court—if it gets that far—Depp will have the weight of a British verdict against him; plus, a history of evidence

already given under oath through which the lawyers will no doubt meticulously pick; plus, a jury who will have read all the gory media reports of the English case and the breakdown of the couple's relationship. He also bears the responsibility of proving his case on one side of the Atlantic which he has, to all intents and purposes, already lost on the other.

Preclusion—and a SLAPP in the Face

Why say, "if it gets that far"? Heard is using these three little words—comity, preclusion, and "SLAPP" (Strategic Lawsuits About Public Participation)—to ask the court to stop Depp's Virginia case in its tracks. Claim preclusion—also referred to as *res judicata*, which is Latin for "a matter decided"—is the principle that "prevents re-litigation of the same cause of action in a second suit between the same parties or parties in privity with them."¹⁵ There is also issue preclusion, or collateral estoppel, preventing a party from re-litigating an issue once a court has ruled on it. Further, comity, the principle of which provides that different courts, states, and nations will mutually recognize each other's judicial acts.

The supplemental plea from Heard's legal team was filed on April 21st.¹⁶ It records that: "After extensive discovery and motions practice, a trial was held over a three-week period [in England]. On November 2, 2021, in a 129-page, 585 paragraph Opinion, the U.K. High Court found that Depp failed to prevail on his libel claim because the statements were substantially *true* and that Depp committed domestic violence against Ms. Heard on at least 12 occasions . . ."; and that, given the appeals are refused and "the U.K. judgments are now final . . . Depp has fully exhausted his rights to appeal." They also state that "Depp's claims in this Court against Ms. Heard are now barred under the doctrines of comity, collateral estoppel, issue and claim preclusion and *res judicata*."

There are, as with most things involved with litigation, gaps for argument. The parties in both sets of litigation are not the same: we recall that it was *The Sun* that defended the case in England—Amber Heard was simply a witness, whereas in Virginia she is the defendant. That said, the concept of privity considers whether the interests of the party against whom preclusion is asserted was represented in the prior litigation. While the former Mrs. Depp was not a party, Depp was, and his interests were certainly represented throughout.

As to the issue of comity, the plea proposes that "the merits of the U.K. judgments should not 'be tried afresh,'" and that: "Under the doctrine of comity, this court should recognize the U.K. judgments giving them 'full effect'" because they were "rendered on the merits" after much evidence "in a 'fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings.'" *Hilton v. Guyot*, 159 U.S. 113, 202-203 (1895).¹⁷ All very well, but while Heard may be asking the

court to note Depp's London libel *loss*, and using comity principles to ensure that the loss is recognized in the U.S. courts, had the boot been on the other foot and had Depp *won*, and asked the Virginia court to recognize a London libel win, we can imagine the outcry. Accepting a foreign judgment that seems to uphold principles of free speech is one thing, but accepting a foreign judgment that appears to go against First Amendment principles would be a very hard pill for a U.S. court to swallow. Indeed, the Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act), which prohibits U.S. courts from enforcing foreign defamation judgments that do not comport with First Amendment protections,¹⁸ would likely have made accepting an English court judgment in favor of a plaintiff impossible. How this apparent double standard will play out remains to be seen.

The argument in the supplemental plea asserts: "Giving full effect to the U.K. judgments necessitates a finding that statements in the Op-Ed published in the Washington Post are *true*—Mr. Depp committed domestic violence against Ms. Heard on many occasions, causing her to fear for her life. Therefore, as a matter of law, Depp cannot prevail on any of his claims, and Depp's Complaint against Ms. Heard should be dismissed in its entirety." Will the court in Virginia consider this new set of arguments to have the case dismissed? Or will it rather admire the bold approach to kick this claim to the curb?

Heard's team has also offered up another argument to slap down her litigation foe, arguing that the Virginia anti-SLAPP statute¹⁹ applies, given that Heard cannot, in light of the English court findings, be found to have acted with knowledge or reckless disregard as to falsity of what she wrote. The rationale behind anti-SLAPP legislation is that the rich and powerful bring SLAPPs, strategically litigating against those who speak out against them or criticize them to subject their detractors to the pressure and expense of litigation, and thus to silence them. This of course, would be a slap in the face to the free-speech protecting First Amendment, which U.S. law and society holds so dear. Thus, anti-SLAPP legislation is intended to right this perceived wrong, to protect public speech from being sued upon where it amounts to an attempt to intimidate and silence critics.

The Virginia anti-SLAPP legislation provides insulation from legal liability for statements that, albeit defamatory, are of public concern and would otherwise be protected by the First Amendment. However, it does *not* insulate from legal liability allegedly defamatory statements made with the knowledge of, or reckless disregard for, whether those statements are false. In other words, the Virginia anti-SLAPP legislation cannot be rolled out willy-nilly to stop legal proceedings being brought over defamatory allegations that are just thrown out there without a care as to whether or not they are true or false.

By seeking to rely on Virginia's anti-SLAPP legislation and thus avoid legal liability for what she penned, Heard is presumably arguing that her speech should be protected as a matter of public concern protected under the First Amendment, and thus is granted immunity from suit. Moreover, as the English court found her similar statements over which Depp sued in England to have been true, they cannot be said to have been published with any reckless disregard for the truth; and therefore, Depp could not rely on any reckless exemption robbing her of the right to use this legislation. What Depp could do, however, is to seek to argue that her accusations about him are matters of private, and not public, concern, and thus are not protected. All remain to be argued before the Virginia court.

Lessons Learned

While we wait for the next chapter of this dispute, let us consider what, if anything, a wannabe litigant can learn from the reputation malfunction suffered by this particular actor in the English court episodes.

Lesson one: We should pause for thought before reaching for the writ (in fact, it is a claim form under modern English legal terminology, but that loses the alliteration, so forgive me for use of the archaic language). While the glittering prize of a British libel victory might have shone like a holy grail at the outset of his English litigation, for Depp that proved as unattainable as the cup of medieval legends. A defamation action won can remedy a reputation, a defamation action lost can ruin a reputation. We saw that only too clearly in an equally high profile but less glamorous case back in 1995, when British conservative Treasury Minister Jeffrey Archer launched libel proceedings against *The Guardian* newspaper and Granada Television over accusations about his business affairs. His famous soundbite made an altruistic promise to the nation: "If it falls to me to start a fight to cut out the cancer of bent and twisted journalism in our country with the simple sword of truth and the trusty shield of fair play, so be it. I am ready for the fight."

However, his soundbite came back to bite him. Documents admitted into evidence showed elements of his testimony, relevant to his whereabouts at the time in question, to have been untrue. His case collapsed. Archer was charged with perjury and perverting the course of justice. He pled guilty. He served seven months of an 18-month sentence in custody. Archer's wife left him. He was branded a liar.

Lesson two: We should be careful for what we wish. Perhaps Depp anticipated a British banner of success, waved gloriously as he entered the Virginia courtroom head-down, would signal the way to victory there too. Rather, however, he experienced detailed and uncomfortable cross examination accompanied by weeks of sensational reporting, and ultimately a decision elevating

the original article to huge and horrendous headlines in myriad media across the globe. Hardly the clean bill of health for what he would have wished.

Lesson three: We may need to find different ways to skin the reputational cat. As it currently stands, Depp has been labeled with a very serious allegation. Where a plaintiff considers their reputation and their livelihood ruined as a result of such accusations, is it hardly to be expected that they will necessarily turn the other cheek, especially in an age when what is published anywhere is published everywhere, given the power and the reach of the omnipotent, omnipresent internet. Yet litigation is not always the answer.

Some brands are too big to fail even as a result of seriously damaging publicity, either false and damaging, or true but embarrassing. Depp's former girlfriend, Kate Moss, also, like Depp, lost a number of lucrative contracts as a result of negative publicity. Her "cocaine chic," it turns out, may not have been just a model trend of skeletal frame and pallid skin. Exposed on the front page of the *Daily Mirror* seemingly doing cocaine, Moss suffered the slings and arrows of outrageous negative publicity—but she weathered the storm, regrouped, was rehired and rehabilitated. Her heads-down approach ultimately enabled her to keep her head high.

So, what is next for Depp? He is an actor of world-wide renown with an international reputation. However, despite his continued protestations that those allegations are untrue, as a result of the judgment in the English courts, that reputation currently stands as a man who was violent towards his wife. One can shout that from the rooftops, and from the red tops (the British slang name for the tabloid newspapers) until one is blue in the face. However, were Depp to win his libel action in the U.S., if accusations that he is violent toward women are found by the Virginia court not to be true, what then? He would effectively be libel proof over that allegation in one jurisdiction, but with an antidote administered to the poison in the other; a creature with a hybrid half-sullied, half-cleansed reputation—some fantastic beast for sure.

Mad Hatter

We know the maxim, "the definition of madness is doing the same thing over and over again, expecting different results." Depp remains supported by a set of loyal fans and they and others may believe that it is not madness at all for him to press on with proceedings in Virginia, as it may be the last chance to save his reputation. Others will consider that his brand has taken such a bashing on one side of the Atlantic that by following a libel action lost in the courts of England and Wales with a similar case in the U.S., and expecting a different result, he is embodying his Mad Hatter character after all. Ultimately, the court will decide.²⁰

Endnotes

1. *Rantzen v. Mirror Group Newspapers*, (1993) EWCA Civ 16; *John v. MGN Ltd* (1995) EWCA Civ 23.
2. <https://www.legislation.gov.uk/ukpga/2013/26/enacted>.
3. <https://www.legislation.gov.uk/ukpga/2013/26/section/11/enacted>.
4. See Lord Justice Lewison's reasoning in *Fage UK Ltd v. Chobani UK Ltd* (2014) EWCA Civ 5.
5. [2021] EWCA Civ 423, <https://www.judiciary.uk/wp-content/uploads/2021/03/Depp-approved-for-hand-down.pdf>.
6. <https://www.judiciary.uk/wp-content/uploads/2021/03/Depp-approved-for-hand-down.pdf>.
7. <https://www.judiciary.uk/wp-content/uploads/2021/03/Depp-approved-for-hand-down.pdf>.
8. <https://www.reuters.com/article/us-britain-people-depp-reaction/johnny-depp-lawyers-says-uk-court-ruling-flawed-and-perverse-idUSKBN27I1FP>.
9. Depp filmography—Alice Through the Looking Glass: https://www.imdb.com/name/nm000136/?ref_=tt_cl_t1.
10. Lewis Carroll, *Through The Looking-Glass and What Alice Found There*. Chicago: W.B. Conkey Co., 1900.
11. <https://www.legislation.gov.uk/ukpga/2013/26/section/1/enacted>.
12. <https://www.legislation.gov.uk/ukpga/2013/26/section/3/enacted>.
13. <https://www.legislation.gov.uk/ukpga/2013/26/section/4/enacted>.
14. <https://www.legislation.gov.uk/ukpga/2013/26/section/2/enacted>.
15. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888 (2002).
16. <https://deadline.com/wp-content/uploads/2021/04/depp-heard-US-dismissal-request-UK-verdict-April-13.pdf>.
17. *Hilton v. Guyot*, 159 U.S. 113, 202-203 (1895).
18. Securing the Protection of Our Enduring and Established Constitutional Heritage Act (SPEECH Act), H.R. 2765, 111th Cong. § 3 (2010).
19. Va. Code Ann. § 8.01-223.2.
20. If you thought you spotted a few Depp film titles in there, or almost film titles, you did: *What's Eating Gilbert Grape*; *A Nightmare on Elm Street*; *Fear and Loathing in Las Vegas*; *Finding Neverland*; *Public Enemies*; *City of Lies*; *The Tourist*; *Blow*; *Alice Through The Looking Glass*; *Fantastic Beasts*.

Amber Melville-Brown is a partner and global head of the media and reputation practice at the international law firm Withersworldwide. Amber is a dual-qualified media-specialist and crisis management lawyer, admitted to practice in both the courts of England and Wales, and New York.

Going For Gold and Protecting It Too: Intellectual Property and the Olympic Games

By Sean Boren, Law Student Initiative Writing Contest Winner

I. Introduction

The Olympic Games are a collaborative and international event that brings the world together through sport.¹ With a viewership in the millions,² it is no surprise that they are seen as a valuable opportunity for sponsors to market their goods and services. In order to protect its image and ensure that the Games remain profitable, the International Olympic Committee (IOC) has essentially required its host cities to propose and enact “special legislation” that protects the Olympic intellectual property.³ As a result, the enforcement of these protections has become a sport in and of itself, causing a variety of legal and pragmatic battles.

II. Background

A. The IOC

Behind the scenes of the Olympic Games, there are multiple organizations with varying levels of rights and obligations.⁴ At the top of the Olympic hierarchy is the IOC, an international organization that is “the final authority on the Olympic Movement.”⁵ A total of 110 individual members make up the IOC, who represent the IOC in their respective countries.⁶ Under the IOC, each country that participates in the Games has its own National Olympic Committee (NOC).⁷ The NOCs are responsible for promoting and selecting athletes in their countries and for nominating cities to host the Games.⁸ When a host city is chosen, the NOC from that host country forms an Organizing Committee of the Olympic Games (OCOG), which ensures that the Games are in compliance with the Olympic Charter, its contract with the IOC, and other instructions that the IOC provides.⁹

The IOC owns the exclusive rights to the Olympic symbols (e.g., the “five rings”), flag, motto, anthem, and other identifications (e.g., “Olympic Games”).¹⁰ As the host-country OCOG oversees the Games, it is “responsible for controlling marketing activities,” which includes combatting ambush marketing and protecting Olympic emblems as the IOC sees fit.¹¹ Additionally, the IOC runs the Olympics’ worldwide sponsorship program—the TOP Program.¹² Through the TOP Program, nine to 14 corporate sponsors receive “exclusive global marketing rights and opportunities within a designated product or service category” for a period of four years—encompassing the winter and summer games—in exchange for multi-million-dollar fees.¹³ The revenue from these fees is then divided among the IOC, the NOC, and the two host OCOGs.¹⁴ For the 2017-2020 time period, there are

14 TOP sponsors, including Coca-Cola, Visa, P&G, and Airbnb.¹⁵

B. The United States Olympic and Paralympic Committee

In 1978, Congress created the United States Olympic Committee—now United States Olympic and Paralympic Committee (the USOC or USOPC)—by enacting the Amateur Sports Act.¹⁶ Congress then re-codified the Amateur Sports Act in its modern form under the Ted Stevens Olympic and Amateur Sports Act of 1998 (Ted Stevens Act or the Act).¹⁷ The USOPC “is a federally chartered corporation.”¹⁸ Under the Act, the USOPC has the exclusive right to use the name “United States Olympic and Paralympic Committee,” as well as a variety of specific symbols, emblems, and words.¹⁹ In addition to these statutorily designated names and images, the USOPC may register trademarks like any other entity and is responsible for determining how the Olympic symbols, images, trademarks, and words may be used in the United States.²⁰ Thus, the USOPC has two primary roles: it must “protect Olympic intellectual property in the United States” as required by its obligations to the IOC in the Olympic Charter, and it is responsible for registering, protecting, and licensing its intellectual property for Team USA—the United States’ Olympic “brand.”²¹

The Act “empowers the USOC to exercise exclusive jurisdiction over all matters pertaining to the participation of the United States in the Olympic Games”, and “vests the USOC with the responsibility of financing the participation of the United States in the Olympic Movement.”²² This is especially important because “the USOC is the only NOC that does not receive financial assistance” from its government, and its ability to license the Olympic symbols to corporate sponsors in the United States is a powerful tool to fill this void.²³ Without exclusive control over Olympic symbols within the United States, “there would arguably be reduced incentive on the part of [corporate sponsors], thereby jeopardizing [the] United States['] participation” in the Games overall.²⁴

In order to better govern the various sports in which Olympic athletes will compete, the Act allows the USOPC



to delegate the regulation of each sport to National Governing Bodies (NGBs).²⁵ The NGBs are “organizations that govern and manage all aspects of their individual sports within the United States.”²⁶ This management includes training, hosting competitions, and nominating athletes to the U.S. Olympic teams.²⁷ Between the Summer and Winter Olympic Games, there are a total of 45 sport NGBs.²⁸ The Act grants the USOPC rights to use the Olympic marks, but not the NGBs. The IOC has exclusive rights to Olympic marks, and it grants a license to each NOC; therefore, it is the responsibility of the NOCs to protect the Olympic marks, and not the NGBs. The NGBs have their own intellectual property and cannot use the Olympic marks without approval from the NOC and USOPC.

C. Likelihood of Confusion Takes a Back Seat

Under the Lanham Act, a trademark “is any combination of words, names, symbols, or devices that are used to identify and distinguish goods or services and to indicate their source.”²⁹ To succeed in an action for trademark infringement, the plaintiff must prove: (1) that its mark is entitled to protection and (2) “that the defendant’s use of its own mark will likely cause confusion with plaintiff’s mark.”³⁰ As some circuits have noted, “[t]he touchstone for trademark infringement is [the] likelihood of confusion.”³¹ While likelihood of confusion is largely associated with confusion as to the source, confusion under the Lanham Act can also include confusion as to “sponsorship, affiliation, connection, or identification.”³² “The public’s belief that the mark’s owner sponsored or otherwise approved the use of the trademark” is enough to satisfy the likelihood of confusion requirement for a trademark infringement claim.³³

Pursuant to the Act, Congress granted the USOPC the ability to bring a civil action against any party who or which, without permission, uses the USOPC’s exclusive words, phrases, symbols, or trademarks in an attempt to create a false association with the Olympic Games.³⁴ When the USOPC brings a claim under the Act, it may seek any of the remedies provided by the Lanham Act, and thus the Act is linked to standard trademark law.³⁵ However, because the Act’s reference to the Lanham Act is limited only to the *remedial* provisions, the legal standards afforded to the USOPC in *enforcing* its marks are different. The Second Circuit and the Supreme Court tackled this issue in *U.S. Olympic Committee v. Intelicense Corp., S.A.* and *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*, respectively.

i. *United States Olympic Committee v. Intelicense Corp., S.A.*

In *United States Olympic Committee v. Intelicense Corp., S.A.*, the defendant, Intelicense Corp. (Intelicense), had entered into a contract with the IOC for the “exclusive worldwide rights to be the marketing



agent” for the IOC’s official pictograms.³⁶ Intelicense’s contract with the IOC required that Intelicense receive the approval from each NOC before marketing in its respective country.³⁷ Unfortunately, Intelicense failed to obtain approval from the USOC for marketing the pictograms because the USOC believed this exclusive contract would inhibit the USOC’s ability to raise money that was necessary to fund the U.S. Olympic teams.³⁸ Intelicense nonetheless “proceeded to license the use of pictograms on products marketed in the United States.”³⁹ In response, the USOC filed suit against Intelicense under the Act, “demanding that Intelicense and its licensees cease and desist from contacting corporate sponsors within the United States.”⁴⁰ Finding that Intelicense was required to obtain the USOC’s permission to market in the United States and failed to do so, the district court granted a permanent injunction in favor of the USOC.⁴¹

On appeal to the Second Circuit, Intelicense argued that the incorporation of the Lanham Act’s *remedial* provisions in the Act meant that the Lanham

Act's "standards for *violation*" were also incorporated.⁴² In other words, Intelicense argued that violations of the Act required a "likelihood of confusion," despite the absence of this language in the Act.⁴³ The Second Circuit rejected this argument, finding that to impose the less-restrictive "likelihood of confusion" standard to the Act would "dramatically constrain the effective scope of the statute" and "frustrate the Act's unequivocal purpose."⁴⁴ In doing so, the Second Circuit established that the Act provides the USOC's symbols and trademarks protections "that go beyond traditional trademark protections."⁴⁵

ii. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*

Three years after *Intelicense*, the Supreme Court endorsed the holding and reasoning in *Intelicense* and explicitly emphasized the special nature of the USOC's statutory power in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*.⁴⁶ The plaintiff, San Francisco Arts & Athletics, Inc. (SFAA), created and began promoting the "Gay Olympic Games"—a nine-day event with athletes from around the world, featuring a "Gay Olympic Torch" and "Gay Olympic Flame."⁴⁷ SFAA sold a variety of merchandise bearing the title "Gay Olympic Games."⁴⁸ The USOC first attempted to resolve the issue outside the courts—it sent a letter to SFAA informing SFAA about the Act and requesting that it immediately stop using the word "Olympic" in relation to the Gay Olympic Games.⁴⁹ When SFAA continued to advertise its Games with "Olympic," the USOC brought suit to enjoin SFAA from using the word "Olympic."⁵⁰

The district court granted the USOC's motion for summary judgment, and the Ninth Circuit affirmed, finding that "the Act granted the USOC exclusive use of the word 'Olympic'" without requiring a likelihood of confusion.⁵¹ The Supreme Court also affirmed this judgment, stating conclusively that the "language and legislative history of [the Act] indicate clearly that Congress intended to grant the USOC exclusive use of the word 'Olympic' without regard to whether use of the word tends to cause confusion . . ."⁵² Going further than *Intelicense*—although along the same path—the Court also held that the Act does not incorporate the statutory *defenses* of the Lanham Act.⁵³ Despite this holding, however, the USOC's power over its symbols is not invincible against the First Amendment.⁵⁴ Certain noncommercial uses of the Olympic name or symbols—such as for protest—are permissible and not in violation of the Act.⁵⁵ While the *Stop the Olympic Prison* decision occurred before the Supreme Court decided *San Francisco Arts & Athletics*, the Court loosely endorsed its holding and acknowledged that it is not clear that the Act "restricts purely expressive uses of the word 'Olympic.'"⁵⁶

III. Enforcement During the Games

A. Official Olympic Sausages Only: Local Businesses Against the IOC

The IOC and its subordinate entities have built a reputation for aggressively protecting the Olympic name and symbols. For the residents and local businesses within Olympic host countries, a visit from the "Olympic marketing police" is an unwelcome but not uncommon occurrence.⁵⁷ Out of celebration for London being awarded the 2012 Summer Games, Dennis Spurr, a local butcher shop owner in Weymouth, England, created a sign for his small business that featured "the five Olympic rings made of sausages."⁵⁸ As Spurr was not an official sponsor of the Olympic Games, the IOC threatened him with a fine for "up to \$30,000 for referring to the Games using kielbasa, blood pudding or any of the more adventurous organ meats."⁵⁹ Sadly, interlocking sausage "squares" were equally unappreciated by the IOC, and Spurr was forced to take down his celebratory signs with a bitter taste towards the Games.⁶⁰ Other local shops faced similar repercussions for serving a "flaming torch baguette," or displaying the interlocking rings made from bagels and tissue paper.⁶¹

This strategy has disparately affected small businesses in a way that larger corporations can get around.⁶² Large corporations, such as Nike, have the financial and legal resources to "skirt both intellectual property laws and Olympic[-]specific legislation through creative advertisements," while smaller entities "are likely to comply" with the IOC's demands.⁶³ This method of "restricting any and all usage of anything somewhat Olympic related" has not only had "a detrimental effect on smaller entities," it has also "led to the adverse effect the very restrictions were set out to accomplish"—interest in the Games.⁶⁴ The Olympic Games are able to profit from sponsorship when there is a strong and favorable public perception of the Games.⁶⁵ But this public perception turns sour "when the public is not engaged in . . . discussing the games due to fear of litigation."⁶⁶ When local businesses are unable to show their pride and enthusiasm for the Games, "the IOC [may] be hurting its own brand by lessening public notice of and interest in the Games."⁶⁷

B. The Anti-Social Games

The Olympic marketing polices' jurisdiction is not confined solely to the physical realm—their efforts extend into cyberspace as well—warning brands and individuals alike to not present any suggestion of affiliation with the Games. Leading up to the 2016 Rio Games, the USOC sent letters to brands that *did not* sponsor the Olympic Games, "warning them about stealing [the USOPC's] intellectual property."⁶⁸ Commercial entities were forbidden from posting about the Games from corporate social media accounts, including the use of Olympic hashtags.⁶⁹ Non-media companies were warned not to reference Olympic results or share Olympic pictures (including repost-

ing from the official Olympic account).⁷⁰ News outlets covering the events were prohibited from creating GIFs or other animated graphics and short videos from any Olympic material.⁷¹

Essentially, the letters indicated that commercial entities were barred from making any public reference to the Games, because such statements would be “viewed as commercial in nature” and thus prohibited.⁷² As one author summarized the letter dauntingly: “If you are a business that is not a sponsor of the Olympic [G]ames, you cannot even congratulate an athlete who works at your firm or is a customer of your business if he or she wins a medal.”⁷³ While there are certainly commercial justifications for limiting the appearance of sponsorship when there is none, is this aggressive enforcement protecting the IOC’s and USOC’s interests at the expense of allowing fans to celebrate and enjoy the Games?⁷⁴ For an organization that is “committed to promoting sport in society,”⁷⁵ the IOC sure can make Olympic fans and potential consumers feel unwelcome.⁷⁶

C. Contra-Brand: The Old Rule 40 Restrictions

Rule 40 of the Olympic Charter (Rule 40) requires that in order to participate in the Olympic Games, “a competitor, team official or other team personnel must respect and comply with the Olympic Charter . . . including the conditions of participation established by the IOC”⁷⁷ As of the Rio 2016 Olympic Games, Bylaw 3 to Rule 40 stated, “Except as permitted by the IOC Executive Board, no competitor, coach, trainer, or official who participates in the Olympic Games may allow his person, name, picture, or sports performances to be used for advertising purposes during the Olympic Games.”⁷⁸ What this meant was that during a specified “blackout period,” athletes and their supporting teams were prohibited from being featured in non-Olympic sponsors’ advertisements unless their country’s NOC approved and the advertising did “not create any impression of a commercial connection with any Olympic property and in particular the Olympic Games.”⁷⁹ This “blackout period” ran from July 27, 2016 to August 24, 2016—a time frame that covered the entire Olympic Games, nine days before the Opening Ceremony, and three days after the Closing Ceremony.⁸⁰ The IOC justified this strict rule under the rationale of preventing over-commercialization and protecting the IOC’s and NOCs’ ability to raise revenue to support their athletes.⁸¹ Of course, this program predominantly protected the official Olympic sponsors, “prevent[ing] athletes from hawking their own sponsors.”⁸²

Interestingly, this 2016 promulgation of Bylaw 3 to Rule 40 was a *more lenient* decree than previous years. After Olympic athletes complained in 2012 that the rule was too restrictive, the IOC relaxed its Rule 40 restrictions to “allow a country-by-country approach, with more flexibility to permit some advertising featuring athletes,” as long as Olympic-related advertising was not featured in the advertisements.⁸³ However, the USOC still took a strict

approach, requiring that the advertisements be “generic,” launch by March, and run continuously through the duration of the Olympic Games.⁸⁴ The purpose behind these requirements was to ensure that the advertisements would not convey affiliation with the Games.⁸⁵

Athletes and brands alike poked fun at these stringent requirements. Jade Lally, a British Olympic athlete, tweeted a thank you to essentially no one, including winking face emojis and a disapproving “#Rule40” to end her tweet.⁸⁶ Brooks Running Co., a Seattle sportswear company that sponsored multiple athletes in the Rio Games, created truck advertisements that said “good luck, you know who you are, on making it you know where,” and referred to a “generic worldwide quadrennial sporting event.”⁸⁷ One of the main criticisms stemmed from the fact that both large and small sponsors play big roles in getting the athletes to the Olympic Games throughout their careers, and that without the ability to capitalize on that assistance once the athlete is actually competing in the Games, it disincentivizes these brands from sponsoring athletes that do not already have national or worldwide recognition.⁸⁸

As it is the athletes and not the brands who are bound by the Olympic charter, only the athletes could be punished for Rule 40 violations—with punishments as harsh as disqualification from the Games or being stripped of metals.⁸⁹ However, while the IOC or USOC could not punish these brands pursuant to the Olympic Charter, they could go after them through cease and desist letters and civil actions under the Act’s protections of Olympic words and symbols.⁹⁰

D. Working Together: Shared Obligations Under the New Rule 40

Unsurprisingly, this “lighter” version of Rule 40 also faced criticism after the 2016 Rio Games, and the IOC has taken serious measures to compromise. The IOC amended Bylaw 3 to Rule 40, which now enables athletes and their support teams to “allow their person, name, picture or sports performances to be used for advertising purposes during the Olympic Games in accordance with the principles determined by the IOC Executive Board.”⁹¹ In conformity with this change, the USOPC established a two-step process that athletes and their sponsors must complete to comply with Rule 40.⁹² First, the athletes must register through the USOPC’s newly-created Rule 40 online portal and include the contact information of any personal sponsor that they wish to market with during the Olympic Games.⁹³ After the athletes have registered their personal sponsor(s), each personal sponsor will receive a link to the Personal Sponsor Commitment (the Commitment), which the sponsor(s) must complete.⁹⁴ Once the Commitment is properly completed, Rule 40 permission will be granted by the USOPC.⁹⁵ If a personal sponsor fails to complete the Commitment, that personal sponsor will not be able to market its athlete during the Rule 40 period.⁹⁶

The Commitment creates binding contractual obligations between the personal sponsor and the USOPC.⁹⁷ Once Rule 40 permission is granted, the company is allowed to market the athlete in two ways: (1) through “generic marketing of the product, service and brand, which includes one or more [Olympic] athletes”; or (2) athlete-focused marketing that directly references the athletes’ participation or accomplishments in the Games in a way that reflects the personal sponsor’s support of the athlete.⁹⁸ However, in both cases, the personal sponsor is prohibited from using any Olympic or Paralympic intellectual property, “or otherwise imply[ing] any relationship between that personal sponsor . . . and Team USA, an NGB[,] or the Games.”⁹⁹

Generic advertising is defined by the USOPC as “advertising [that] promotes the personal sponsor’s brand, products[,] or services, where the only connection” to the Olympic Games “is the fact [that] the advertising uses an athlete’s image.”¹⁰⁰ Rule 40 does not place any numerical limitation on generic advertising.¹⁰¹ Conversely, the athlete and the personal sponsor *are* restricted when posting “athlete-focused marketing”—a distinction that applies to marketing in which the athlete thanks a personal sponsor or in which the personal sponsor recognizes the athlete’s involvement or performance in the Games.¹⁰² Athletes are permitted to post a *total* of seven “thank you messages” to their personal sponsors, regardless of how many sponsors they may have, but they “may not mention or promote the personal sponsor’s products or services.”¹⁰³ Additionally, while the athletes are not limited in how many times they may thank *official* sponsors of the Games or the USOPC, they “may not thank [official] sponsors and personal sponsors in the same message.”¹⁰⁴ The personal sponsors are the most restricted in what athlete-focused marketing they are allowed to post. Personal sponsors are allowed to retweet or repost an athlete’s thank you message, but are not allowed to make revisions to that thank you message nor receive paid advertising for the retweet or repost.¹⁰⁵ Further, the personal sponsors are permitted to post one message congratulating the sponsored athlete for performance in the Games, but may not use images of the athlete at the Games and “may not mention or promote the personal sponsor’s products or services.”¹⁰⁶

Consistent with the USOPC’s aggressive stance towards advertising, violations of the Rule 40 guidelines can lead to a variety of consequences for the athlete and especially for the personal sponsor. If a personal sponsor does not comply with or otherwise breaches the terms of the Commitment, that personal sponsor “will lose any then-current Rule 40 permission and will not be eligible to seek Rule 40 permission for the next *two* Olympic Games.”¹⁰⁷ Additionally, the personal sponsor must take down “any and all campaign materials that use the athlete’s name or likeness.”¹⁰⁸ As for the athlete, the USOPC emphasizes that under this new Rule 40 permission, “it is the shared responsibility of personal sponsors and

athletes to be mindful of the regulations,” and that failure to comply by either party “may jeopardize the athlete’s Games eligibility.”¹⁰⁹

Altogether, the new Rule 40 requirements are a tremendous step forward for an organization that has historically taken a staunchly adversarial position towards non-official sponsors. Lesser-known or first-time Olympic athletes may have an easier time obtaining sponsors to help fund their training and participation in the Games, since these sponsors can now reap a benefit under proper Rule 40 permission and compliance.¹¹⁰ At the same time, the new Rule 40 does not diminish or devalue the USOPC’s and IOC’s most prized possessions—their symbols and trademarks.¹¹¹ Furthermore, despite the fact that the overall sports marketing during the Olympics will likely increase, the USOPC and IOC continue to serve their official sponsors by granting these sponsors the exclusive right to use Olympic intellectual property and through the restrictions on the non-official sponsors.¹¹² Although the success of this new rule remains to be seen with the 2020 Tokyo Games, it appears that protests from brands and athletes alike has brought the IOC and USOPC to the table to create a better system for all.¹¹³

IV. The 2020 Tokyo Games

A. Puma Declares War on the USOC

In early 2020, with the Olympic Games only a few months away, the sudden spread of COVID-19 forced Japan’s Prime Minister Shinzo Abe and the IOC’s president Thomas Bach to postpone the Tokyo 2020 Olympic Games by one year.¹¹⁴ However, it was agreed that the Games would still be referred to as the “Olympic and Paralympic Games Tokyo 2020” or similar variations, such as “Tokyo 2020.”¹¹⁵ Importantly for the USOPC, this meant that it could continue using its already-registered “Tokyo 2020” trademark for the games.¹¹⁶ On the very same day that the Games were officially postponed, footwear giant Puma SE (Puma) saw an opportunity to gain a commercial advantage and sought to register the trademark “Puma Tokyo 2021” (the Puma Mark) with the United States Patent and Trademark Office (USPTO).¹¹⁷

The trademark was ultimately rejected by the USPTO for: (1) creating a false connection with the USOPC and (2) being likely to cause confusion with the USOPC’s existing registrations—namely, the “Tokyo 2020” trademark.¹¹⁸ Puma then sought to register marks related to the Beijing 2022 Games and Paris 2024 Games, but was rejected by the USPTO for the same reasons.¹¹⁹ In response, Puma “initiated numerous cancellation actions and one opposition action” at the Trademark Trial and Appeal Board (TTAB), claiming that the USOPC’s marks bearing the same city and year are invalid.¹²⁰ Puma argued that the USOPC’s “host city plus year” designation was merely descriptive and should therefore be

cancelled, emphasizing its need “to advertise its own sponsored athletes who will compete in future games.”¹²¹

As the TTAB proceedings were pending,¹²² the USOPC brought an action against Puma in federal court for trademark infringement under the Ted Stevens Act and the Lanham Act, and sought a declaration that its own marks were valid and enforceable.¹²³ The claims arose not just out of Puma’s attempt to *register* the “host city plus year” marks (the Games Marks) with the USPTO; the USOPC also alleged that Puma had already begun to market and promote its Puma Mark through licensing, endorsement, and sponsorship deals, and had already “secured manufacturers to produce” apparel containing the Puma Mark.¹²⁴ The accusations in the USOPC’s complaint followed the same rationale that the USPTO provided for denying registration of the Puma Mark: that Puma’s use of the mark “falsely associate[s] Puma] with [the] USOPC and the Olympic Movement,” and is likely to confuse consumers as to sponsorship.¹²⁵ In doing so, the USOPC alleged that Puma was “thereby infringing the USOPC’s valuable trademark rights and harming the goodwill [that] the USOPC has developed” in the Games Marks.¹²⁶ In other words, Puma “has declared war on the Games Marks” and the USOPC¹²⁷—a bad enemy to have.

While the Act confers special privileges upon the USOPC in protecting its symbols and trademarks—in the sense that it does not have to prove a likelihood of confusion against defendants using trademarks or symbols that feign association with the USOPC or Olympic Games¹²⁸—the Act does not grant any special privileges to the USOPC for *registration* of its trademarks.¹²⁹ In other words, aside from the words and symbols explicitly listed in the Act, when the USOPC seeks to register a trademark—such as the Games Marks—the USOPC has to prove that the word or phrase it is seeking to register “is initially registrable or protectable.”¹³⁰

Courts have typically divided these potential trademarks into four different categories of distinctiveness: generic, descriptive, suggestive, or arbitrary and fanciful.¹³¹ Generic terms “can never attain trademark protection” because they fail to identify the source of the product in consumers’ minds and are therefore not distinctive.¹³² On the other end of the spectrum, suggestive terms “require[] the consumer to exercise imagination in order to draw a conclusion” about the goods and services being marketed, while arbitrary and fanciful terms “bear no relationship to the products or services to which they are applied,” and therefore these marks are inherently distinctive.¹³³ In the middle of this spectrum are descriptive terms, which “identif[y] a characteristic or quality of an article or service,” and are therefore not ordinarily protectable as trademarks unless they have acquired “a secondary meaning in the minds of the consuming public.”¹³⁴ Secondary meaning can be achieved when “words with an ordinary and primary meaning of their own ‘may by

long use with a particular product, come to be known by the public as specifically designating that product.”¹³⁵ To prove secondary meaning, the trademark registrant must show that the term identifies the producer, not the product, in the minds of consumers.¹³⁶

Puma seemed to recognize that it was fighting a losing battle if it argued that its Puma Mark did not create false association or was not likely to cause confusion. To get around this, Puma instead turned to the distinctiveness requirement for registration to move its obstacles out of the way: by invalidating the USOPC’s Games Marks.¹³⁷ Puma alleged in its TTAB cancellation proceedings that the Games Marks are merely descriptive *without* secondary meaning, since the marks just describe the city and year in which the Games take place.¹³⁸ Therefore, Puma argued, it “needs to be able to use” the host city plus year phrase to properly market its athletes, and the USOPC’s registered Games Marks prevent it from doing so.¹³⁹ The USOPC rebutted this argument in its complaint, claiming that the Games Marks have achieved secondary meaning since the marks are “[a]mong the most iconic of the Olympic brands” because “[t]he USOPC and its affiliates have a long tradition of branding the Olympic Games with Games Marks.”¹⁴⁰ Sadly, the answer to these challenges will not be resolved by the district court nor the TTAB, as both Puma and the USOPC voluntarily withdrew their respective cases.¹⁴¹

The unprecedented postponement the Tokyo 2020 Games created a unique situation in which the name of the Games was not the year in which they were actually taking place, and thus the “host city plus year” mark for the *actual* year—2021—was not sought by the USOPC. While the TTAB has previously held that the USOPC’s “host city plus year” mark is “a reference to the Olympic Games” and therefore “not merely descriptive,”¹⁴² it has also permitted the registration of words that are similar but not identical to the USOPC’s exclusive words and phrases in the Act.¹⁴³ Thus, although Puma’s challenge may have been far-fetched, it was not entirely without merit.¹⁴⁴ While tensions were clearly high between the USOPC and Puma, perhaps the voluntary withdrawal is a pleasant indication that Puma and the USOPC may work together on official sponsorship, or that Puma may instead seek a Rule 40 permission in the 2020 Tokyo Games and beyond.

V. Conclusion

If there is anything the IOC and USOPC have learned from their various legal skirmishes, it is that the contours of their marketing restrictions must adapt to the changing landscape of their athletes and consumers. As the lines between social issues and marketing have become increasingly blurred¹⁴⁵—especially for athletes¹⁴⁶—the IOC and USOPC face new challenges in policing their intellectual property. Brands are “speaking” on the pressing social issues of today, and the Olympic Games may

be forced to choose between silencing these messages alongside their images and symbols or letting them pass out of fear of bad publicity.¹⁴⁷ Regardless of how the IOC and USOPC go about it, the 2020 Tokyo Games are sure to be one to watch closely—in both the arenas and in the courts.

Endnotes

1. *Olympic Movement*, Olympics, <https://olympics.com/ioc/olympic-movement> (describing the Olympic games as “the great sports festival” that “bring[s] together . . . the world’s athletes”).
2. See Daniel Holloway, *How Rio Ratings Surprised NBC and Will Impact Future Olympics*, Variety (Aug. 23, 2016, 5:43 PM), <https://variety.com/2016/tv/news/2016-olympics-ratings-rio-nbc-1201843200/> (discussing an average of 27.5 million viewers across all platforms).
3. Alex Locke, *Fair Use & Fair Play: Olympic Marketing in the Information Age*, 1 Int’l Comp. Pol’y & Ethics L. Rev. 339, 346 (2018).
4. *Id.* at 344-45.
5. *Olympics and International Sports Law Research Guide*, Geo. L. Libr., <https://guides.ll.georgetown.edu/c.php?g=364665&p=2463479> (last visited Mar. 29, 2021).
6. *Id.* These members do not represent the interests of their individual countries to the IOC. *Id.*
7. Locke, *supra* note 3, at 344-45.
8. *Id.*
9. *Id.* at 345.
10. *Olympic Charter*, Olympics 22–23 (July 17, 2020), https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/General/EN-Olympic-Charter.pdf#_ga=2.13080254.82547580.1617069420-41500786.1617069420.
11. *Id.* at 28; Locke, *supra* note 3, at 345.
12. *Olympic Marketing Fact File*, Olympics 15, https://stillmedab.olympic.org/media/Document%20Library/OlympicOrg/Documents/IOC-Marketing-and-Broadcasting-General-Files/Olympic-Marketing-Fact-File.pdf#_ga=2.160069245.1371291537.1617398248-41500786.1617069420 (last updated Jan. 2020).
13. *Id.*; see also Denise Lee Yohn, *Olympic Advertisers Are Wasting Their Sponsorship Dollars*, Forbes (Aug. 3, 2016, 5:17 AM), <https://www.forbes.com/sites/deniseyohn/2016/08/03/olympics-advertisers-are-wasting-their-sponsorship-dollars/?sh=7ae64f7c2070> (emphasis added) (noting that TOP Program sponsorship “can cost over \$200 million these days” as of the 2016 Rio Olympics).
14. *Olympic Marketing Fact File*, *supra* note 12, at 15.
15. *Id.* at 16.
16. 36 U.S.C. §§ 371-396 (1978).
17. Noelle K. Nish, *How Far Have We Come? A Look at the Olympic and Amateur Sports Act of 1998, the United States Olympic Committee, and the Winter Olympic Games of 2002*, 13 Seton Hall J. Sports L. 53, 56 (2003).
18. 36 U.S.C. § 220502(a) (2020).
19. 36 U.S.C. § 220506(a) (2020). The symbols include: the “5 interlocking rings” (the symbol for the IOC), the “3 Agitos” (the symbol for the International Paralympic Committee), and the “torch surrounded by concentric rings” (the symbol for the Pan-American Sports Organization). § 220506(a)(2). The emblem consists of “an escutcheon having a blue chief and vertically extending red and white bars on the base with 5 interlocking rings displayed on the chief.” § 220506(a)(3). The words include: “Olympic, Olympiad, Citius Altius Fortius, Paralympic, Paralympiad, Pan-American, Parapan American, America Espirito Sport Fraternalite, or any combination of those words.” § 220506(a)(4) (internal quotation marks omitted).
20. 36 U.S.C. § 220506 (2020); Locke, *supra* note 3, at 351.
21. Complaint and Jury Demand at 4–6, U.S. *Olympic & Paralympic Comm. v. Puma SE, et al.*, No. 21-cv-00528 (D. Colo. Feb. 2, 2021); see also *About the U.S. Olympic & Paralympic Committee: History*, Team USA, <https://www.teamusa.org/about-the-usopc/history> (last visited Apr. 9, 2021).
22. *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 266 (2d Cir. 1984).
23. *Id.*
24. Nish, *supra* note 17, at 56-57.
25. 36 U.S.C. § 220503(8) (2020).
26. *About the U.S. Olympic & Paralympic Committee: Structure*, Team USA, <https://www.teamusa.org/about-the-usopc/structure> (last visited Apr. 9, 2021).
27. *Id.*
28. *Id.*
29. *Am. Express Co. v. Goetz*, 515 F.3d 156, 159 (2d Cir. 2008) (citing 15 U.S.C. § 1127 (2006)).
30. *Star Indus., Inc. v. Bacardi & Co. Ltd.*, 412 F.3d 373, 381 (2d Cir. 2005) (internal quotation marks omitted).
31. *Stone Creek, Inc. v. Omnia Italian Design, Inc.*, 875 F.3d 426, 431 (9th Cir. 2017); see also *Rock & Roll Hall of Fame & Museum, Inc. v. Gentile Prods.*, 134 F.3d 749, 756 (6th Cir. 1998) (“As always, the touchstone will be the likelihood of consumer confusion.”).
32. *Star Indus.*, 412 F.3d at 383.
33. *Id.* at 384.
34. 36 U.S.C. § 220506(c) (2020).
35. *Id.*
36. *U.S. Olympic Comm. v. Intelicense Corp., S.A.*, 737 F.2d 263, 265 (2d Cir. 1984).
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 267 (emphasis added).
43. *Id.*
44. *Id.* “The fundamental purpose of th[e] Act was to safeguard the USOC’s ability to raise the financial resources” to facilitate American athletes in international competition on behalf of the United States. *Id.* at 264.
45. Locke, *supra* note 3, at 353.
46. *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).
47. *Id.* at 525.
48. *Id.*
49. *Id.* at 527.
50. *Id.*
51. *Id.*
52. *Id.* at 530.
53. *Id.* at 530-31 (“[A]n unauthorized user of the word does not have available the normal statutory defenses.”). The court addressed this issue because SFAA argued that its use of the word “Olympic” was merely descriptive under Lanham Act. *Id.* at 530 n.5.

54. See *Stop the Olympic Prison v. U.S. Olympic Comm.*, 489 F. Supp. 1112 (S.D.N.Y. 1980) (allowing the defendant to use the Olympic symbols and name on a poster for the purposes of criticism).
55. See *id.* at 1119–20 (holding that the broad language of the statute “cannot be interpreted to mean that only the defendant and its licensees may use the word ‘[O]lympic’ and the enumerated symbols for any purpose whatsoever”).
56. *S.F. Arts & Athletics*, 483 U.S. at 536 & n.14.
57. See Jeré Longman, *Where Even Sausage Rings Are Put on the Chopping Block*, N.Y. Times (July 24, 2012), https://www.nytimes.com/2012/07/25/sports/olympics/2012-london-games-even-sausage-rings-alarm-marketing-police.html?_r=0.
58. *Id.*
59. *Id.*
60. *Id.* (Spurr complaining that “[e]veryone is so serious” in relation to Olympic affiliation).
61. *Id.*
62. *Locke, supra* note 3, at 347.
63. *Id.* at 347–48. Nike was not an official sponsor of the London Games. *Id.* at 347. Nevertheless, Nike created and ran an advertisement that featured its athletes “in other cities named London throughout the world.” *Id.* at 347–48. This creative loophole allowed Nike “to take advantage [of] the popularity of the Olympics” and “cash in on the emotions elicited by the Olympics” in ways that smaller businesses could not due to their financial limitations and lack of legal know-how. *Id.*
64. *Id.*
65. *Id.* at 348.
66. *Id.*
67. *Id.* at 347. “It’s their loss, not ours.” Longman, *supra* note 57 (quoting the butcher shop owner).
68. Darren Rovell, *USOC Sends Letter Warning Non-Olympic Sponsor Companies*, ESPN (July 21, 2016), https://www.espn.com/olympics/story/_/id/17120510/united-states-olympic-committee-battle-athletes-companies-sponsor-not-olympics.
69. *Id.* (Olympic hashtags included “#Rio2016” and “#TeamUSA”).
70. *Id.*
71. Mazin Sidahmed, *Olympics Ban on Gifs and Vines Disappoints Social Media Sports Fans*, The Guardian (Aug. 5, 2016, 4:38 PM), <https://www.theguardian.com/sport/2016/aug/05/rio-olympics-ban-gifs-vines-social-media>.
72. Joseph Steinberg, *How Posting on Social Media About the Olympics Can Get You Sued*, Inc. (Aug. 6, 2016), <https://www.inc.com/joseph-steinberg/how-posting-on-social-media-about-the-olympics-can-get-you-sued.html>.
73. *Id.*
74. See *Locke, supra* note 3 (noting how “many small businesses in London forwent the opportunity to celebrate and communicate about the London Games” “out of fear and intimidation” from the IOC); see also Tom Peck, *Father of Olympic Branding: My Rules Are Being Abused*, Independent (July 21, 2012, 3:59 PM), <https://www.independent.co.uk/sport/olympics/news/father-olympic-branding-my-rules-are-being-abused-7962593.html> (interviewing the IOC’s former marketing director and creator of the TOP Program, who said that “[t]he rules were ‘never intended to shut down the flower shop that put its flowers in Olympic rings in the window, or the local butcher who has put out his meat in an Olympic display’”).
75. *IOC Principles*, Olympics, <https://olympics.com/ioc/principles> (last visited Apr. 30, 2021).
76. See Longman, *supra* note 57 (“Everyone is so serious. I’m just trying to celebrate the Olympics.”).
77. *Olympic Charter, supra* note 10, at 76 (July 17, 2020).
78. *Use of a Participant’s Image for Advertising Purposes During the Rio 2016 Olympic Games*, Olympics 1, https://stillmed.olympic.org/Documents/Athletes_Information/Rule_40-Rio_2016-QA_for_Athletes.pdf.
79. *Id.* at 1–2.
80. *Id.* at 1.
81. *Id.*
82. Chris Chavez, *What Is Rule 40? The IOC’s Rule on Non-Olympic Sponsors, Explained*, Sports Illustrated (July 25, 2018), <https://www.si.com/olympics/2016/07/25/rule-40-explained-2016-olympic-sponsorship-blackout-controversy>.
83. *Navigating Olympic Advertising: Rule 40—A Global Perspective*, LawInSport (Feb. 16, 2016), <https://www.lawinsport.com/topics/item/navigating-olympic-advertising-rule-40-a-global-perspective>.
84. *Id.*
85. *Id.*
86. Shan Li, *Olympics Bans Most Brands from Saying “Olympics” or “Rio” Even on Twitter. Snark Ensues*, L.A. Times (Aug. 11, 2016, 6:00 AM), <https://www.latimes.com/business/la-fi-olympics-rule-40-20160802-snap-story.html>.
87. *Id.*
88. See *id.*
89. Chavez, *supra* note 82.
90. See *supra* Section I.
91. *Olympic Charter, supra* note 10, at 76.
92. Jessica Borowick & Po Yi, *Let the Games Begin: USOPC Releases Personal Sponsor Commitment*, JD Supra (Jan. 29, 2020), <https://www.jdsupra.com/legalnews/let-the-games-begin-usopc-releases-97329/>.
93. *Id.*
94. *Athlete Marketing for the Olympic and Paralympic Games Tokyo 2020: Rule 40 Guidance for the United States*, Team USA 2 (Mar. 5, 2021) [hereinafter *Rule 40 Guidance*], <https://rule40registration.teamusa.org/Assets/doc/2021/USOPC-2020-Domestic-Rule-40-Guidance-March%205%202021%20.pdf>.
95. *Id.*
96. *Id.* The Rule 40 period for the Tokyo 2020 Olympic Games will run from July 13, 2021 to August 10, 2021. *Id.*
97. Borowick & Yi, *supra* note 92.
98. *Rule 40 Guidance, supra* note 94, at 4.
99. *Id.* The same “heightened” intellectual property protections of the USOC’s symbols and trademarks in the Act apply against personal sponsors that receive Rule 40 permission. See Borowick & Yi, *supra* note 78 (“Some of these rules simply reinforce prohibitions on using Olympic-related intellectual property that already existed in the Ted Stevens Amateur Sports Act.”).
100. *Rule 40 Guidance, supra* note 94, at 4. As an example of permissible generic advertising, the USOPC provides an image of an athlete wearing the personal sponsor’s apparel with text that says “GO [ATHLETE NAME].” See *id.* at 6.
101. See generally *id.*; see also *U.S. Rule 40 Education*, Team USA, <https://rule40registration.teamusa.org/Home/R40Education> (giving no indication of a numerical limit for generic advertising under the “Non-Games-related, generic advertising” expandable menu).
102. *Rule 40 Guidance, supra* note 94, at 6.
103. *Id.*
104. *Id.*
105. *Id.* at 7.
106. *Id.* at 8.
107. Borowick & Yi, *supra* note 92 (emphasis added).

108. *Id.*
109. *Rule 40 Guidelines, supra* note 94, at 3 (emphasizing that even though the new Rule 40 permission procedure forms a contract, “at its core, Rule 40 is an IOC and IPC eligibility rule”).
110. *Cf. Shan Li, supra* note 86 (noting how “athletes without a famous name . . . are still left out” because “[c]ompanies that do want to seize on the Olympic furor are more likely to sign up well-known Olympians”).
111. *See Rule 40 Guidelines, supra* note 94, at 4-10 (repeatedly emphasizing that personal sponsors may not use Olympic symbols or trademarks); *see also* Borowick & Yi, *supra* note 92 (discussing how Rule 40 reinforces the prohibition against using Olympic-related intellectual property under the Act).
112. *Rule 40 Guidelines, supra* note 96, at 10 (delineating the exclusive intellectual property rights official sponsors receive, and thus consequently the intellectual property that the personal sponsors may not use).
113. *See Shan Li, supra* note 86 (discussing how protests on social media helped relax Rule 40 after the 2012 games, and has the potential to be impactful going forward).
114. Kelly Cohen, *Tokyo 2020 Olympics Officially Postponed Until 2021*, ESPN (Mar. 24, 2020), https://www.espn.com/olympics/story/_/id/28946033/tokyo-olympics-officially-postponed-2021. Prior to 2020, the Olympic Games had never been cancelled nor postponed for anything other than a war. *Id.*
115. *See Frequently Asked Question About the Olympic Games Tokyo 2020*, Olympics (May 8, 2020), <https://olympics.com/ioc/news/ioc/tokyo-2020-q-a/#:~:text=These%20Olympic%20Games%20Tokyo%202020,and%20Paralympic%20Games%20Tokyo%202020%E2%80%9D> (affirming that the name will remain the same as a symbol of hope and celebration of humankind after the COVID-19 hardships).
116. Bill Donahue, *Olympic Committee Says Puma “Declared War” on Trademarks*, Law360 (Feb. 23, 2021), <https://www.law360.com/articles/1358085/olympic-committee-says-puma-declared-war-on-trademarks>.
117. *Id.*
118. Complaint and Jury Demand at 13, *U.S. Olympic & Paralympic Comm. v. Puma SE*, No. 21-cv-00528 (D. Colo. Feb. 2, 2021).
119. *Id.*
120. *Id.* at 14. The one opposition action was for the “PARIS 2024” application that is still pending. *Id.*
121. Donahue, *supra* note 116.
122. Complaint and Jury Demand at 15, *U.S. Olympic & Paralympic Comm. v. Puma SE, et al.*, No. 21-cv-00528 (D. Colo. Feb. 2, 2021).
123. *Id.* at 1.
124. *Id.* at 16-18.
125. *Id.*; *see also id.* at 13 (noting that the USPTO refused to register the Puma Marks because they were “likely to cause confusion with USOPC’s registrations and as creating a false connection with the USOPC”).
126. *Id.* at 18.
127. *Id.* at 12.
128. *See supra* Section I.C.
129. *See* 36 U.S.C. § 220506(c) (2020) (granting the USOPC the right to initiate a civil action for falsely representation association with the USOPC’s trademarks, but silent on registration). For clarity, the names and symbols that are explicitly listed in the Act (such as the “United States Olympic and Paralympic Committee” and the “5 interlocking rings”) are not considered “trademarks” within the Act; the USOPC is simply granted “exclusive right to use” these words and symbols. § 220506(a).
130. *Zatarains, Inc. v. Oak Grove Smokehouse, Inc.*, 698 F.2d 786, 790 (5th Cir. 1983).
131. *Id.*
132. *Id.*
133. *Id.* at 791.
134. *Id.* at 790 (internal citations omitted).
135. *Id.* at 791 (quoting *Volkswagenwerk Aktiengesellschaft v. Rickard*, 492 F.2d 474, 477 (5th Cir. 1974)).
136. *Id.*
137. Complaint and Jury Demand at 14, *U.S. Olympic & Paralympic Comm. v. Puma SE, et al.*, No. 21-cv-00528 (D. Colo. Feb. 2, 2021).
138. Donahue, *supra* note 116 (“Puma says th[at] the city-plus-year names are just descriptive terms that it needs to use to advertise its own sponsored athletes who will compete in future games.”).
139. Complaint and Jury Demand at 15, *U.S. Olympic & Paralympic Comm. v. Puma SE, et al.*, No. 21-cv-00528 (D. Colo. Feb. 2, 2021).
140. *Id.* at 6.
141. Bill Donahue, *Olympics, Puma Call Truce in “Tokyo 2020” Trademark Fight*, Law360 (Apr. 14, 2021), <https://www.law360.com/articles/1375116/olympics-puma-call-truce-in-tokyo-2020-trademark-fight>.
142. *In re Urbano*, 51 U.S.P.Q.2d 1776, at *4 (T.T.A.B. 1999) (affirming the USPTO’s refusal to register the mark “SYDNEY.2000” for being “a reference to the Olympic Games” from a non-sponsoring party).
143. *In re Midwest Tennis & Track Co.*, 29 U.S.P.Q.2d 1386, at *2 (reversing the USPTO’s refusal to register the mark “OLYMPIAN GOLDE” because it “simply is not a combination of the terms . . . set forth in [the Act],” and therefore “is not unlawful”); *see also O-M Bread, Inc. v. U.S. Olympic Comm.*, 65 F.3d 933, 938 n.3 (Fed. Cir. 1995) (discussing the same).
144. *See id.*
145. *See* Tiffany Hsu, *Corporate Voices Get Behind “Black Lives Matter” Cause*, N.Y. Times (last updated June 10, 2020), <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html> (“Companies like Nike, Twitter and Citigroup have aligned themselves with the Black Lives Matter movement.”).
146. *See, e.g.,* Allen Kim, *Nike’s All-Black Colin Kaepernick Jersey Marking 4 Years Since He Took a Knee Sells Out in Less Than a Minute*, CNN (last updated Sept. 17, 2020, at 4:51 PM), <https://www.cnn.com/2020/09/17/us/colin-kaepernick-nike-jersey-trnd/index.html>.
147. *See Athlete Protests Remain Banned at Tokyo Olympics Based on Survey Results, IOC Says*, ESPN (Apr. 21, 2021), https://www.espn.com/olympics/story/_/id/31304130/athlete-protests-remain-banned-olympics-based-survey-results-ioc-says (discussing the IOC’s prohibition on athlete protests and political messages, but allowing athletes to wear apparel containing phrases such as “Black Lives Matter”).

Sean Boren is a rising 3L at St. John’s University School of Law. Sean is currently an Associate Managing Editor of the *St. John’s Law Review*, and a member of St. John’s Intellectual Property Law Society and Entertainment, Arts & Sports Law Society. Upon graduation, Sean hopes to practice intellectual property law, with a particular interest in trademark law and the fashion industry. This article was supervised by Joseph Salvo.



“Zoom Fatigue”: Why We Have It and How To Combat It

By Carol Schiro Greenwald

On March 13, 2020 the coronavirus locked us down. People wondered what happened to life as usual. If we could not communicate in person, how would people continue to work, go to school, and hang out with friends?

Videoconferencing became the new way to stay in touch. The company name Zoom became synonymous with videoconferencing. “Zooming” is now a verb that can be applied to any company’s online meetings. Zoom fatigue also became the phrase to describe the emotional depletion and physical tiredness that hits some people on a day filled with multiple online meetings.

Zoom drains your energy, because it flattens all of your social interactions—personal or professional—into the same, unnatural grid of disembodied faces, where being stared at and inadvertently interrupting people is the name of the game.¹

Once the novelty of video meetings subsided, we noticed that they are a poor imitation of in-person meetings. They lack the full panoply of body language cues that create in person rapport and culture. The impact on the human psyche is different. Virtual meetings, unless extremely well designed and competently run, can lead to feelings of alienation, depression, and fatigue. By

contrast, in-person meetings usually generate and reinforce feelings of competence, collaboration, and collegiality.

As we move toward a more hybrid work environment, virtual meetings and conferences will continue. They save companies’ money and employees’ time. They facilitate work flow by enabling businesses to create diverse and dispersed teams. They permit companies to reduce their physical footprints. This article discusses key differences between in-person and virtual meetings, focusing on the way the brain works in both settings, and then offers some tips for making virtual meeting participation feel similar to the in-person experience.



In-person Meetings: Interactions That Build Relationships

After over a year without in-person meetings, many remember them fondly. We have not had boring, overly long discussions, camaraderie, and effortlessness of in-

person conversation. For in-person meetings, we move from our offices to conference rooms, chatting with colleagues along the way, taking detours to the coffee machines or water coolers, and finally entering the conference rooms to sit in our usual seats. As we make this transition, it cues our brain that we are going to a meeting.

While you walk into the conference room, your brain is scanning the room to be sure it is safe. Since one of the brain's main responsibilities is to keep us safe, it is always on guard against any occurrence that could impact us negatively. This focus on safety, like many other brain functions, goes back to the needs of the earliest humans. Those hunter-gatherers had to scan the environment continuously for physical threats. Should one emerge, messages were transmitted from the leaders to their people through their body language.

Today, once your brain is satisfied with the meeting environment, it then begins to look around the conference room table, noting body language that reveals who is in charge, who is in which subgroup, and who may seem isolated. You sit down and participate in the chit-chat that precedes a meeting.

During an in-person meeting, participants need to be seen as the involved professionals they are. This look begins by sitting up straight, a position that implies participation, preparation, and interest. At the same time, participants in in-person meetings rarely sit still. They move in their chairs, take notes, check their phones, lean over to talk to another person, and leave the room. They often eat and drink. Most of the time no one else notices.

Conversation flows, guided by body language cues, such as eye movements, body placement, and leadership signals that we unconsciously notice.

- People tend to look up at the end of sentences, which is a cue for someone else to speak.
- Interest is conveyed by leaning forward and nodding or tilting your head in the direction of the speaker.
- Your face and voice signal comprehension.

Body language signals increase the participants' comprehension, enjoyment, enthusiasm, and collegiality. They are the subtext of the meeting that embodies the group's culture.

Body Language: People Lie, Bodies Do Not

Communicators estimate that 93% of human communication is non-verbal. It is composed of 55% visual information and 37% tone of voice. Only 7% of communication is a result of the words themselves. Body language is a more effective form of communication than words. It signals your own brain regarding what it is expected to

do in any setting, and signals others as to your level of participation and intent.

Body language—or more precisely, its absence—is the primary cause of Zoom fatigue. Body language is partially innate and partially learned. Understanding it helps us comprehend what people mean behind their words and where they are emotionally.

Authentic body language cannot be faked, because we communicate by giving off “micro signals,” which are facial expressions that occur within 1/25th of a second. For example, pupils might contract or your mouth twitches or your eyebrows flash. We register these signals unconsciously.

Smiles: Most body language is a combination of unconscious and conscious movement. For example, consider smiling, the universal expression of pleasure. Genuine smiles are generated by our unconscious brain in response to others' smiles or because we feel pleasure. A real smile uses two sets of muscles:

- One set connects to the corners of the mouth and pulls back the mouth to expose the teeth and enlarge the cheeks as they rise up.
- The other set connects to the eye where the muscles contract, the eyes light up and the eyebrows dip slightly.

Fake smiles use only the mouth muscles, which we can consciously control. Therefore, when there are no eye laugh lines in a smile, it is a fake.

Eyes: Facial features are an important part of body language. Among them, the eyes are the most important. They communicate authority, pleasure, and displeasure. They regulate the pace of conversation and control the sequence of speakers. When speakers come to the end of a sentence they typically glance up and pause. When they are finished, they look toward the next speaker.

Gestures: A gesture is an intentional body movement that helps you to convey a message with or without words. In meetings, common gestures include nodding your head (i.e., when following along or listening), tapping your fingers (a sign of impatience), and shrugging your shoulders (no opinion).

One gesture that stands out as essentially human is mirroring. Mirroring is the body language signal of collaboration. It refers to behavior in which one person, in conversation with another, unconsciously imitates the gestures, speech patterns or attitude of someone else. It signals friendliness and respect, and is often a signal of rapport.

Posture: The term refers to how we hold our bodies—such as, upright, hunched or circled around oneself. Posture can convey information about how someone feels right now, as well as hints as to personality characteris-

tics, such as confidence, submission, and self-control. You can use posture to make a statement:

- Walking into a room with head held high, back straight, and a strong step gives the impression of confident strength and professionalism.
- Sitting up straight says that you are focused and paying attention.
- Hunching over implies boredom or indifference, or hostility or anxiety.

Posture is a key component of your image, which is a powerful part of your brand. Your brand connects you to others on an unconscious and emotional level. Your brand is your promise to the world about what you do, why you do it, and how what you do helps others.

Proxemics: This term refers to “the study of spatial interrelationships in humans” The typical human sphere of intimacy is 12 to 18 inches apart. At the other extreme, strangers should be at least four feet apart. In in-person meetings, empty chairs between participants can suggest the degree of familiarity among group members.

These five pieces of body language are of primary importance in meetings. During in-person meetings, you can observe the whole person and intuit their place in the hierarchy, their feelings about the subject matter, and their relationships with others in the room. It is these intuitions that make in-person meetings so personal and comfortable.



Virtual, Online Meetings: “What Did I Have, I Don’t Have Now?”²

Virtual meetings were seen as a godsend when the pandemic began. They were a way to link people face-to-face across various locations. Companies moved teams and committees onto virtual platforms and scheduled meetings with abandon. Soon, remote workers were attending three to six meetings a day. Creativity and innovation diminished. Productivity declined. Enthusiasm evaporated. Camaraderie faded away.

Data from the Microsoft Work Trend Index dramatize the extent of the change.

- 2.5x more time is spent in online meetings than was spent in office meetings during the previous year.
- Compensating for the lack of serendipitous office encounters, employees send 45% more chat messages and do 42% more chats out of business hours.
- 66% more people are creating documents that would presumably have been conversations before.
- Trying to make up for not being in the same room as people by spending so much of the time in Teams interactions may be why 54% of people feel overworked and 39% are downright exhausted.³

According to Kamal Janardhan, general manager, Microsoft 365 Insights, “the combination of the urgent feeling of virtual meetings and the lack of social cues and body language creates ‘digital static’ that makes it harder to communicate and understand what other people mean. That leads to fatigue, anxiety and even less of a feeling of connection.”⁴

It turns out, therefore, that it is hard to replace the informality of office meetings, the serendipity of water cooler talks, and the collegiality of ad hoc brain-storming sessions. The lack of social cues means that people’s needs and feelings are less honestly conveyed. The possibility for social miscommunication increases. A comment brushed aside in the office context sounds more biting online.

Our brains are trying to replicate their in-person meetings pattern: scanning the room first and then the participants. However, instead of one room there are rows of small squares revealing bits of many rooms. The brain, overloaded by all the stimuli, continues to try to determine our safety in this environment. The stress and anxiety make it easy for our mind to lose focus.

In addition to the background conundrum, the brain cannot pigeon-hole each individual on the screen. Natural separations between meeting participants that indicate relationships within the group have been replaced by equidistant identical boxes. Most squares show only heads, making it almost impossible to find useful body language cues.

Participants find themselves in a strange world. In the normal past no one stared from two feet away at other peoples' oversized heads. The distance of the screen juxtaposed to the intimacy of two feet between you and your device creates disquiet, and the cherry on the cake is our picture on the screen, which we check compulsively to see how we look. It is disorienting to watch ourselves speak.

A straight back still conveys professionalism, but instead of natural movements, such as wiggles or leaning forward, back and sideways during in-person meetings, in the virtual meeting world you need to sit still, maintaining one position, centered in the middle of your screen box. Should you move, everyone will notice, because online, especially in gallery view, we are all staring at each other all the time.

We not only notice, but also imply motivations from any actions. For example:

Your Action in an Online Meeting	Their Interpretation
You snort, snore, belch	Unprofessional, TMI
You look bored	Inattentive, disengaged
You slouch	Unprofessional, tired
You forgot that you were on camera and stood up with no pants on, engaging in a truly personal activity	Unprofessional, disquieting
You multitask	Uninvolved unprofessional
You are joking around	Not taking the matter or the participants seriously
You arrive late	Assume that you do not take the project seriously

Conversations are less productive online, especially as they are directed by the eyes. Yet in online meetings, you cannot interpret eye movements for a variety of reasons:

- Everyone's screen has a different configuration of squares. This makes it impossible to show others that you are listening by looking at the person talking, because that person is not in the same location on others' screens.
- In order to appear to be looking at someone the person speaking needs to look directly into the

camera lens. This is uncomfortably awkward, because humans gauge the impact of their speech by looking at their audience's responses.

Online conversation tends toward one of two extremes: cacophonous, as everyone talks over one another, or total silence as everyone wonders whose turn it is. Either way, participants have to work harder to absorb information. You cannot ask the person next to you what you missed in order to catch up. Finally, gestures, used in person to emphasize the spoken word, become amplified and awkward online.

Tips to Make an Unnatural Situation Seem More Natural

It helps to begin by writing down your desired role in the meeting, the impression you want to make, and what is your definition of a successful outcome. Prepare for the meeting as you would for an office meeting.

Before the meeting begins, create the online view of you. Appearance matters. You want to wear work clothes during the work day for two reasons:

- You want to live your brand, to be seen as professional, present, in control, precise, and relevant. Choose solid colors that set you off attractively from your background. On most work computers, black, white or patterned clothes tend to pixelate or shimmer, so it is best to avoid them. If your software offers a "touch up my appearance" option, use it to smooth your edges (think Doris Day's Vaseline on the camera lenses).
- Dressing for work is an important brain signal. Clothing, posture, and attitude combine to create a positive emotional response through our mind-body connections. Your morning work routine tells your brain that you are preparing to work and it has a work-related job to do. If you wear a tie on top and pjs on the bottom, you are sending mixed messages that confuse the brain.

Create a respectably professional background:

- If you are lucky enough to have a separate office space from wherever you are working, just be sure that what the camera sees is tidied up.
- If you do not have separate office space, look for a corner of a room where you can sit with your back to a wall or a closed door. Trying to use the kitchen table or a corner of the family room will be more distracting for you.
- If you are uncomfortable sharing a segment of your private life and want to use one of the many fake backgrounds available online, go for a bookcase or office look. However, know that unless you are showing the background against a green screen, it

is not a stable background, so whenever you move in front of it parts of your body or chair will fly off in various directions.

Technology matters. If online meetings are a fixture, you might want to invest in good lighting and a good microphone. You want your face to be visible within your screen box. Place your light source directly in front of you, next to or above your camera.

Position your camera in front of you and slightly above eye level. Camera positioning is especially important if you are using your mobile phone. Buy a phone holder so that your image will not bounce around or jiggle. Place it on a pile of books to obtain the correct height.

Advice varies as to an appropriate distance between you and the camera. In business meetings, people often want to reach their keyboard, which puts them in arm's length from the screen. It is more comfortable for our brains if people could sit four to six feet back from the screen, because then more body language is visible.

Regardless of how many times you are in virtual meetings, before each meeting, allow for five to 10 minutes to check that all the settings work and that you know where all the available participation options are on your screen and how to use them.

- Even though best practices suggest that work computers be available only for work, this is not always possible. To be sure that you do not appear as the “cat lawyer,” check all your background and filter settings.

The online format tends to magnify visuals, actions, and noise, so try to avoid big gestures, eating lunch, and sidebar noise. There is no such thing online as an unnoticed or unheard sidebar whisper.

- When stray pets or children come into camera view, have a plan for removing them.
- Turn off other programs to lessen your impulse to multitask. Everyone is watching and can tell from your body language when you are not paying attention.
- The mute button is your friend. Best practices suggest that you always stay muted unless you are preparing to join a conversation.
- Do not be lulled by your home environment or the use of the same technology that you use for everything else and do something stupid. Stupid ends up on YouTube forever with a life of its own (see again, the “cat lawyer”).

Experts suggest that to lessen Zoom fatigue, participants turn off their videos when they are just listening. On the one hand, this does provide a respite, but at the

same time, if too many participants are only represented by black boxes, it creates the impression of participant disengagement, which in turn, can destroy the sense of collaboration and progress.

- To stay online but lessen the strain, use the speaker view instead of the gallery setting so that the one person currently talking takes up most of your screen.

Finally, here are some suggestions for more closely approximating the nature of in-person meetings:

- When you enter the screen, smile and say hello to colleagues by name.
- To avoid conversation chaos, the person leading a discussion should call on participants by name or suggest a speaker sequence.
 - Leaders need to keep participation balance by reining in big talkers and encouraging spectators to share their opinions.
- Meetings need to be structured and purposeful.
 - Call meetings only when necessary. For routine status roll calls, think about using the phone, or even emails or texts. Perhaps emailing a form with check-off boxes would be sufficient.
 - * When you call an online meeting, the leader needs to provide preparatory materials similar to the preparation for in-person meetings, such as an agenda stating the purpose of the meeting and how the discussion will unfold.
 - * Preparatory materials should be sent to the participants a day or two in advance and everyone should be obliged to read them ahead of time.
 - Establish meeting rules regarding the use of reaction icons, the way to indicate a wish to participate, and the expectation that everyone will turn on their videos.

The structure of online meetings can also be configured to make interactions more closely resemble in-person communications.

- To approximate the physical flexibility of in-person meetings, change the meeting format every 15 to 20 minutes. For example, raise a topic in a general session, then pose a question for decision, and send participants to small breakout rooms to discuss. Follow this with a debriefing full group session.
 - Meetings seem longer online. Leaders encourage productivity when they incorporate personal break times into any meeting over half an hour long.

- To encourage personal information sharing, a hallmark of in-person collegiality, make time for personal news and small talk at the beginning of meetings. Suggest that as the meeting progresses, information, questions, and comments go into the chat feature.

→ You can approximate the in-person thought whispered to your neighbor by sending a private chat, but know that should the meeting be recorded, the chat is recorded too.

- To gauge the sense of the meeting, use tools such as polls or Q&A. These can then be a jumping off point for discussion.

Finally, everyone in an online meeting has to accept responsibility for its quality. During in-person meetings, when some people sit back, no one really pays attention and it usually does not impact the rhythm of the meeting. Online, everyone is looking directly at everyone else, so when participants disengage, the meeting falls flat.

To stay focused, practice active listening. Really pay attention to what others say and reflect that attention by summarizing their conversational point before adding your contribution. Remember to look and act your brand by managing your body language. Be the prepared, confident professional your colleagues expect you to be.

Endnotes

1. Bryan Lufkin, *Why Zoom fatigue won't last forever*, <https://bbe.com/worklife/article/20210308-why-zoom-fatigue-won-t-last-forever>.
2. Alan Jay Lerner, Burton Lane, "What did I have, I don't have now?" *On a Clear Day You Can See Forever* [movie].

3. Mary Branscombe, *Microsoft: Remote work is exhausting and we need to take action now*, <https://www.techrepublic.com/article/microsoft-remote-work-is-exhausting-and-we-need-to-take-action-now/>.
4. *Id.*

Carol Schiro Greenwald, Ph.D. is a networking, marketing and management strategist, coach, and trainer. She works with professionals and professional service firms to structure and implement growth programs that are targeted, intentional, and practical. Carol is a well-known, highly-regarded speaker and frequent contributor to legal periodicals on topics related to networking, marketing, business development, and leadership.

Her book, *Strategic Networking for Introverts, Extroverts and Everyone In-between* (Law Practice Division, American Bar Association, Law Practice Division, 2019) provides a training and coaching guide for linking networking activities with both personal and firm goals.

Her book, *Build Your Practice the Logical Way—Maximize Your Client Relationships* (with Steven Skyles-Mulligan, American Bar Association, First Chair Press, 2012) provides a guide to creating a client-centric practice. The result is a firm differentiated from the competition by its client-centric culture, increasing its ability to attract and keep loyal clients.

She can be reached at via phone: 914-834-9320, Email: carol@csgMarketingPartners.com, Website: <https://www.csgMarketingPartners.com>, and LinkedIn: <http://www.Linkedin.com/in/CarolSchiroGreenwald>.



Lawyer Assistance
Program

Lawyer Assistance Program Confidential Helpline 1-800-255-0569

NYSBA's Lawyer Assistance Program offers no-cost confidential services to help you or a loved one suffering from a mental health struggle or alcohol or substance use problem. Call the helpline at **1-800-255-0569** or email the LAP Director, Stacey Whiteley at swhiteley@nysba.org, to find support.

Information shared with the LAP is confidential and covered under Judiciary Law Section 499.

You are not alone. There is help available.

For self-assessment tools and additional resources go to [NYSBA.ORG/LAP](https://www.nysba.org/lap)



The Bartlet White House

By David Krell



Created by Aaron Sorkin and produced by Warner Brothers, *The West Wing* explored the complexity of hot-button political issues within the framework of an office setting, which just happens to be the seat of power in the most famous building in the world. Sorkin had also covered this area in his screenplay for the 1995 film *The American President*. *The West Wing* received 95 Emmy nominations and won 26 Emmy Awards during its seven-year run on NBC from 1999 to 2006, including four consecutive wins for Outstanding Drama Series.

Legal issues gave the writers a gold mine of storylines, proving that complexities and nuances in the law could be appealing with compelling storylines and entertaining characters. Furthermore, studios and producers usually work with attorneys who vet productions for legal theories that might raise red flags, such as defamation and invasion of privacy, as well as the use of “characters’” names, images, and likenesses. Attorneys also act as advisors when legal issues are prominent in television show plot points.

For example, in the fictional presidency of Josiah Bartlet—former congressman and New Hampshire Governor—staffers in the West Wing of the White House tackled challenges including the estate tax,¹ a lame duck Congress,² protocol for military funerals,³ Holocaust art,⁴ and land mines.⁵ In the travails of President Bartlet and his inner circle, there were three salient topics that can be used to foster discussion on the impact of presidential power among political buffs and legal professionals alike.

25th Amendment, Section 3 (Inability To Perform Presidential Duties)

In the episode “Twenty Five,”⁶ the youngest of Bartlet’s three daughters is kidnapped. The president feels that he can neither assess information nor make decisions objectively. He then invokes Section Three of the 25th Amendment:

Whenever the President transmits to the President pro tempore of the Senate and the Speaker of the House of Represent-

tatives his written declaration that he is unable to discharge the powers and duties of his office, and until he transmits to them a written declaration to the contrary, such powers and duties shall be discharged by the Vice President as Acting President.⁷

Vice President John Hoynes had resigned in the episode “Life on Mars”⁸ because of a sex scandal that involved disclosing classified information to his lover. Speaker of the House Glen Allen Walken, a staunch Republican, is the next person in the line of succession. To assume the role of Acting President, Walken resigns from Congress because he cannot hold a job in two branches of government at the same time. After Zoey Bartlet is found, Walken steps down and Bartlet resumes his presidency.⁹

25th Amendment, Section 2 (Selecting A New Vice President)

Filling the void left by Hoynes becomes a priority in the episode “Jefferson Lives.” Bartlet has to compromise for a VP replacement because the Republican-led Congress will stand firm against a far-left candidate.

Section 2 of the 25th Amendment states, “Whenever there is a vacancy in the office of the Vice President, the President shall nominate a Vice President who shall take office upon confirmation by a majority vote of both Houses of Congress.”¹⁰

Secretary of State Lewis Berryhill is the president’s first choice. To evade potential conflict that may weaken the president’s image and sidetrack legislation, President Bartlet settles on Colorado Congressman Bob Russell. It is a middle-of-the-road choice that will appease the GOP.

Democrats—especially those in Bartlet’s administration—may not be overjoyed, but conciliation in politics is the cost of doing the nation’s business.¹¹ Russell’s tenure begins in next episode.¹²

Bartlet's successor, Congressman Matt Santos, faces a similar problem when his running mate, former Labor Secretary and Bartlet Administration Chief of Staff Leo McGarry, dies of a heart attack on election night.¹³ President-elect Santos chooses Pennsylvania Governor Eric Baker, who had also sought the Democratic presidential nomination. During the transition, Santos offers the job of Secretary of State to his opponent, Senator Arnold Vinick of California. Vinick declines, thinking that it is a political ploy and declares that he will not help get Baker through the Senate confirmation process. Santos says that it is not an issue; he will get Baker confirmed. Vinick takes the job and it is assumed that Baker becomes VP.¹⁴

Censure (A Political Compromise)

When it is revealed that President Bartlet did not disclose his diagnosis of multiple sclerosis during his first presidential campaign, a Congressional investigation begins. Unfortunately, McGarry is also a target for Republicans, even more so, because he is the cornerstone of the administration. There are some on the right who want to expose McGarry's previous bouts with alcohol and drugs.

Republicans propose a middle ground for the president—censure. The Senate website offers a simple description: "It is a formal statement of disapproval." Andrew Jackson is the only president who has been censured to date. In the "Sorkinverse," Bartlet would be the second.¹⁵

This political slap-on-the-wrist will stop further investigation and potential embarrassment for the president and his trusted adviser.¹⁶ Rather than suffer further probes into the president's behavior, Bartlet agrees.¹⁷

Conclusion

Although the Bartlet presidency is fictional, it is instructive for the entertainment industry's legal community to see the intersection of politics and law depicted in plays, novels, films, and television shows. With the presidential elections of 2016 and 2020 inspiring record turnouts at the polls, politics has been elevated from conversation at the dinner table, to the water cooler, to screens and bookstores. Now, more than ever, political storytellers will do themselves a favor to work with lawyers on the pre-production or pre-publication vetting, as well as ensuring that details surrounding legal issues are both accurate and entertaining.

Endnotes

1. *The West Wing*, "Ways and Means," Warner Brothers Television, October 24, 2001, aired on NBC.
2. *The West Wing*, "The Lame Duck Congress," Warner Brothers Television, November 8, 2000, aired on NBC.
3. *The West Wing*, "In Excelsis Deo," Warner Brothers Television, December 15, 1999, aired on NBC.
4. *The West Wing*, "Noël," Warner Brothers Television, December 20, 2000, aired on NBC.
5. *The West Wing*, "The U.S. Poet Laureate," Warner Brothers Television, March 27, 2002, aired on NBC.
6. *The West Wing*, "Twenty Five," Warner Brothers Television, May 14, 2003, aired on NBC.
7. U.S. CONST., AMEND. XXV, § 3.
8. *The West Wing*, "Life on Mars," Warner Brothers Television, April 30, 2003, aired on NBC.
9. *The West Wing*, "Dogs of War," Warner Brothers Television, October 1, 2003, aired on NBC.
10. U.S. CONST., AMEND. XXV, § 2.
11. *The West Wing*, "Jefferson Lives," Warner Brothers Television, October 8, 2003, aired on NBC.
12. *The West Wing*, "Han," Warner Brothers Television, October 22, 2003, aired on NBC.
13. *The West Wing*, "Election Day: Part I," Warner Brothers Television, April 2, 2006, aired on NBC; *The West Wing*, "Election Day: Part II," Warner Brothers Television, April 9, 2006, aired on NBC.
14. *The West Wing*, "The Last Hurrah," Warner Brothers Television, April 30, 2006, aired on NBC.
15. The United States Senate, "Censure," available at https://www.senate.gov/reference/reference_index_subjects/Censure_vrd.htm.
16. *The West Wing*, "H.Con – 172," Warner Brothers Television, January 9, 2002, aired on NBC.
17. *The West Wing*, "100,000 Airplanes," Warner Brothers Television, January 16, 2002, aired on NBC.

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, Krell 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.

Section Committees and Chairpersons

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

Alternative Dispute Resolution

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

Copyright and Trademark

Christine-Marie Lauture
Lauture IP, PLLC
445 Broadhollow Rd Ste 25
Melville, NY 11747-3645
c.lauture@gmail.com

Stephen B. Rodner
Pryor Cashman LLP
srodner@pryorcashman.com

Digital Entertainment, Television and Radio

Sarah Margaret Robertson
Dorsey & Whitney LLP
51 W 52nd St
New York, NY 10019-6119
robertson.sarah@dorsey.com

Arlen M. Appelbaum
arlenappel@yahoo.com

Diversity

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

Cheryl L. Davis
Authors Guild
31 E 32nd St Rm 901
New York, NY 10016-5575
cdavis@authorsguild.org

Fashion Law

Olivera Medenica
Dunnington Bartholow & Miller LLP
230 Park Ave Fl 21
New York, NY 10169-2403
omedenica@dunnington.com

Fine Arts

Judith B. Prowda
Sotheby's Institute of Art
judith.prowda@stropheus.com

Carol J. Steinberg
Law Firm of Carol J. Steinberg
elizabethcjs@gmail.com

International Committee

Donna E. Froscio
Dunnington Bartholow & Miller LLP
250 Park Ave Fl 21
New York, NY 10169-2403
dfroscio@dunnington.com

Law Student Committee

Mariam Chubinidze
mchubinidzhe1@pride.hofstra.edu

Rachel Anne Aichelmann
rachelaichelmann@gmail.com

Legislation

Marc Jacobson
Marc Jacobson, PC
440 E 79th St Fl 11
New York, NY 10075-1451
marc@marcjacobson.com

Steven H. Richman
srichmanboe@gmail.com

Literary Works and Related Rights

Judith B. Bass
Law Offices of Judith B. Bass
jbb@jbbasslaw.com

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

Litigation

Brian D. Caplan
Reitler Kailas & Rosenblatt LLC
885 3rd Ave
New York, NY 10022-4834
bcaplan@reitlerlaw.com

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

Membership

Anne Louise LaBarbera
Anne LaBarbera Professional Corporation
405 Lexington Ave, Fl 9
New York, NY 10174-1000
anne@alpc.law

Judah S. Shapiro
Judah S. Shapiro, Esq.
630 3rd Ave Fl 19
New York, NY 10017-6731
judahshap@aol.com

Motion Pictures

Ethan Y. Bordman
Ethan Y. Bordman, PLLC
ethan@ethanbordman.com

Robert L. Seigel
rlsentlaw@aol.com

Music

Judah S. Shapiro
Judah S. Shapiro, Esq.
630 3rd Ave Fl 19
New York, NY 10017-6731
judahshap@aol.com

Rosemary Tully
Rosemarie Tully, PC
PO Box 1054
Huntington, New York 11743-0837
rosemarie@tullylaw.com

Continued on next page

Non-Profit

Robert J. Reicher
rjr@rjreicherlaw.com

**Phil Cowan-Judith Bresler
Memorial Scholarship Committee**

Ethan Bordman
Ethan Y. Bordman, PLLC
ethan@ethanbordman.com

Christine-Marie Lauture
Lauture IP, PLLC
445 Broadhollow Rd, Ste 25
Melville, NY 11747-3645
c.lauture@gmail.com

Pro Bono Steering

Louise Marie Abigail Carron
Center for Art Law
195 Plymouth St Ste 621
Brooklyn, NY 11201-1123
louiseccarron.esq@gmail.com

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

Carol J. Steinberg
Law Firm of Carol J. Steinberg
elizabethcjs@gmail.com

Publications

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

Publicity, Privacy and Media

David H. Faux
Law Office of David H. Faux, P.C.
1180 Avenue of the Americas Fl 8
New York, NY 10036-8401
davefaux@dhf-law.net

Sports Committee

Jill Pilgrim
Pilgrim & Associates Arbitration, Law
& Mediation LLC
jpesq@pilgrim-associateslaw.com

Jeffrey G. Aber
jeff@aberlawny.com

Theatre and Performing Arts

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

Kathy Kim
101 Productions, Ltd.
260 W 44th St Ste 600
New York, NY 10036-3900
kathyk@productions101.com

Diane F. Krausz
Law Office of Diane Krausz
PO Box 2668
340 W 42nd St
New York, NY 10108-2668
dkrausz@dianekrausz.com

Young Entertainment Lawyers

Christine-Marie Lauture
Lauture IP, PLLC
445 Broadhollow Rd Ste 25
Melville, NY 11747-3645
c.lauture@gmail.com

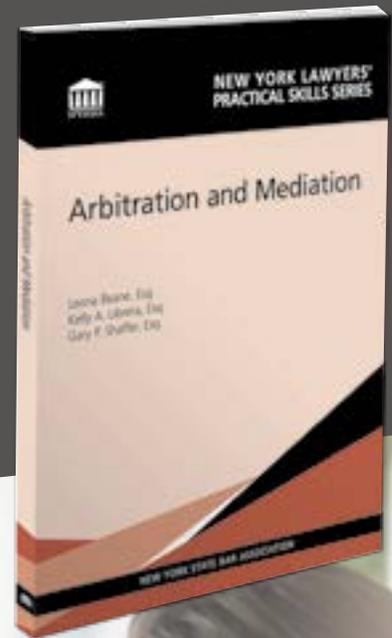


PUBLICATIONS

Arbitration and Mediation

Authors

Leona Beane, Esq.
Gary P. Shaffer, Esq.
Kelly A. Librera, Esq.



This practice guide examines the two most common forms of alternative dispute resolution. *Arbitration and Mediation* resolves the misconception that these two procedures are interchangeable by discussing their differences and providing examples of both procedures.

Complete with valuable practice pointers, sample arbitration forms and appendices, this practice guide also includes a set of Downloadable Forms.

Book (402421)
eBook (402421E)

NYSBA Members \$125.00
Non-Members \$165.00

ORDER ONLINE: [NYSBA.ORG/PUBS](https://www.nysba.org/pubs) | ORDER BY PHONE: 800.582.2452



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

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



CLE

Review our upcoming **LIVE WEBINAR** schedule

We're offering dozens of brand new webinars every month on a variety of topics, including COVID-19 related programs, so be sure to register today!

Visit us online at **[NYSBA.ORG/CLE](https://www.nysba.org/cle)**

