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Entertainment, Arts and Sports Law Journal

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

Handling Seemingly Irreconcilable Expert Opinions

Deaccessioning at the Time of COVID-19: From Alpha to Omega

Striking All the New Chords: How Taylor Swift Is Reclaiming Her Past Works and Reshaping the Entire Record Industry

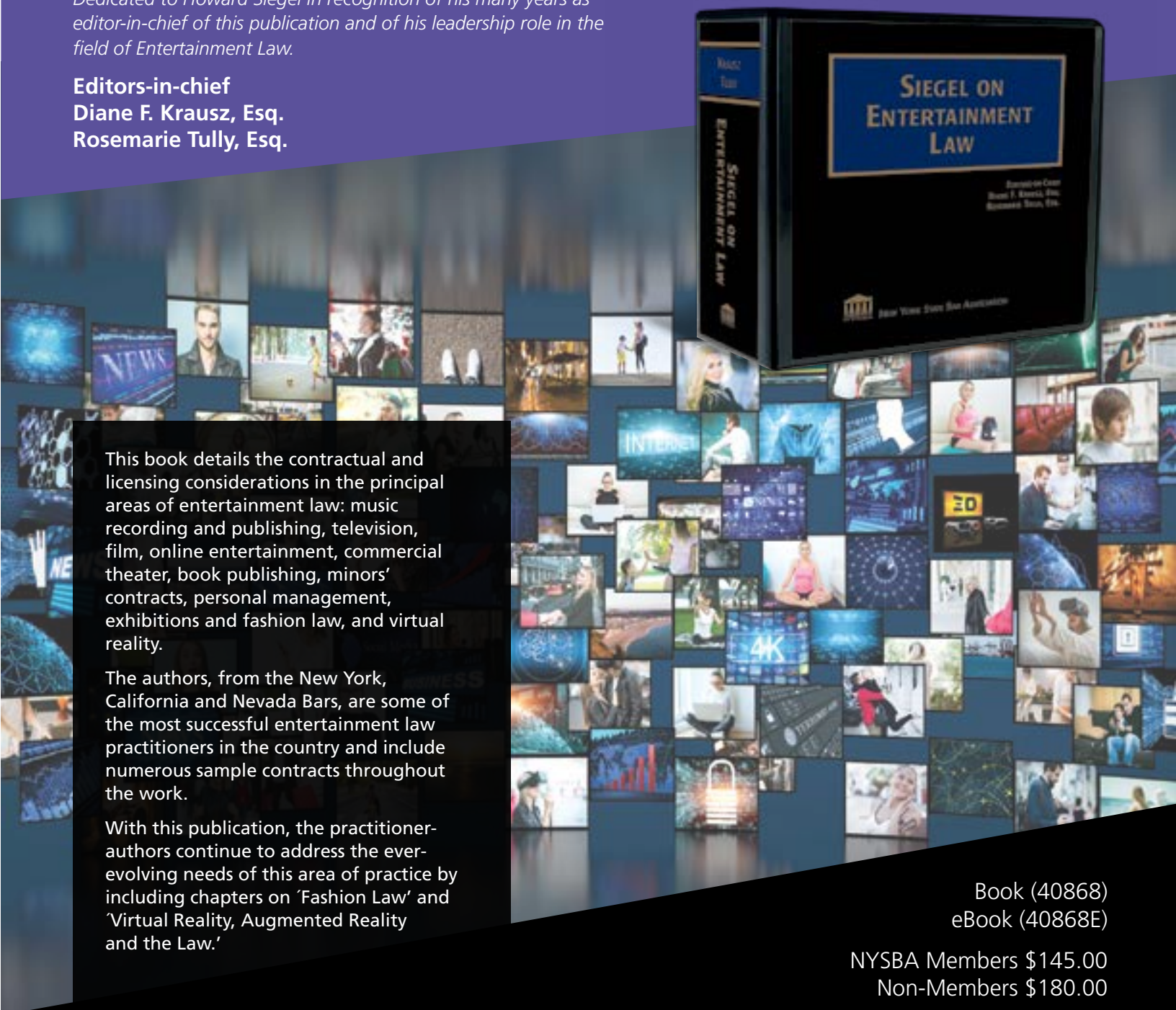
PUBLICATIONS

"The definitive text in the burgeoning field of entertainment law. It provides an in-depth analysis of the key issues currently confronting the practitioners of its various specialties. For both its breadth and depth, I highly recommend Entertainment Law to students, academics and professionals alike."

Siegel on Entertainment Law

Dedicated to Howard Siegel in recognition of his many years as editor-in-chief of this publication and of his leadership role in the field of Entertainment Law.

Editors-in-chief
Diane F. Krausz, Esq.
Rosemarie Tully, Esq.



This book details the contractual and licensing considerations in the principal areas of entertainment law: music recording and publishing, television, film, online entertainment, commercial theater, book publishing, minors' contracts, personal management, exhibitions and fashion law, and virtual reality.

The authors, from the New York, California and Nevada Bars, are some of the most successful entertainment law practitioners in the country and include numerous sample contracts throughout the work.

With this publication, the practitioner-authors continue to address the ever-evolving needs of this area of practice by including chapters on ´Fashion Law' and ´Virtual Reality, Augmented Reality and the Law.'

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Publication of Articles

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

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Entertainment, Arts and Sports Law Section

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Remarks From the Chair

By Ethan Bordman

Thank you for the opportunity to serve as Chairperson of the Entertainment, Arts and Sports Law (EASL) Section. I am grateful to the members of the Nominating Committee, EASL's Executive Committee, and EASL members for the trust that you have placed in me. I intend to uphold the level of excellence established by previous EASL Chairs and look forward to continuing to offer great opportunities and events during my tenure.

I have thoroughly enjoyed my involvement with EASL since I first became a member. Let me take you on a quick walk down memory lane. I attended my first NYSBA Annual Meeting in 2011, knowing no one. The EASL panels that year covered fascinating topics, including Nazi-era restitution, with a discussion about the theft and return of art during the Holocaust and a panel discussing life rights. At the reception, EASL members Jason Aylesworth and Kathy Kim recognized me as a new face in the crowd; after introducing themselves, they told me about EASL and I inquired about becoming an active member. Their next step was to have me meet then-EASL Chair Judith Prowda. Judith encouraged me to apply for a position as liaison to the EASL Section. Since that initial meeting, I have held co-chair positions on several EASL committees, including Motion Pictures, Cowan-Bresler Scholarship, and Membership. I have also served as EASL Section Secretary and First Vice-Chair. I share a bit about my journey to encourage EASL members to be active within the Section. All it takes is one introduction. As we are not currently able meet EASL members in person, I encourage all who are interested in becoming active to please contact me anytime, by phone or email. Whether your desired level of involvement is to contribute an idea for an article in the *EASL Journal*, share an opinion on an upcoming panel, or to become active with a committee, all of us at EASL look forward to hearing from you.

We began 2022 with the Annual Meeting, which was a great success.

I'd like to congratulate our 2022 Cowan-Bresler Scholarship Competition winners: Michael Fasciale, a third-year student at Seton Hall School of Law, author of *The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athlete's Name, Image and Likeness Compensation,* and Diana Nelson, a third-year student at St. John's University School of Law, author of *We're Gonna Rock Down to . . . Copyright Protection: The Unauthorized use of "Electric Avenue" and Other Popular Music in Political Campaigns During the Social Media Era.* The articles are included in this issue of the *EASL Journal*. I was Co-Chair of the Cowan-Bresler Scholarship this year and read all of the submissions, which were well researched and received. I encourage law students to think about and submit their papers to the 2023 competition. Thank you to the Cowan-Bresler Committee, judges, and especially my Co-Chair, Christine-Marie Lauture. She has done great work and I have enjoyed working with her.

This year's Annual Meeting panels: "NFTs in the Arts, Sports, Fashion, and Entertainment Industries," "Accessibility, Visibility and Disability in Entertainment Media and the Performing Arts," and "College Sports Chaos or Correction; From Alston to NIL to Conference Realignment to 50 Years of Title IX," were outstanding. The transcripts of this meeting are included herein. Thank you to the panelists and moderators: Jeremy Goldman, Melanie Howard, Caroline Moustakis, Eben Novy-Williams, Bill Rosenblatt, Louise Carron, Fanny Lakoubay, Jason DaSilva, Heidi Latsky, Katie McGrath, Gail Williamson, Dr. Angelica Guevara, Morgan Lily Chall, Thomas McMillen, Allison Rich, Nancy Zimpher, and Deana Garner-Smith. We are grateful to them for sharing their time and knowledge about these timely topics.

I would also like to thank the 2022 EASL Annual Meeting Program Chairs Judith B. Bass, Louise Carron, Elissa D. Hecker, Oliveria Medenica, Jill Pilgrim, Judith Prowda, Carol Steinberg, Barry Werbin, and Ella Wesly, for all their time and hard work.

Thank you to the NYSBA, Dana Alamia, Simone Smith, Pat Stockli, and their wonderful staff. I look forward to continuing our collaboration.

Thank you, Barry Werbin, for the time you spent preparing me to become Chair. Your assistance, guidance, and knowledge are, and continue to be, appreciated.

Elissa Hecker continues to outdo herself as editor of the *EASL Journal*. She is always on the lookout for submissions for this and the EASL Blog. Please feel free to reach out to Elissa with any ideas or contributions. Her excellence, and her contributions as Co-Chair of EASL's Pro Bono Committee, were recently recognized by the NYSBA as a 2022 Justice For All winner for Outstanding Pro Bono Volunteer. Congratulations, Elissa! This honor is very well deserved.

Welcome Kristin Paradisis, a first-year law student at Pace University, who is the new Co-Chair of the EASL Law Student Committee.

Continued on page 5

Editor's Note/Pro Bono Update

By Elissa D. Hecker

Welcome to the Spring issue of the *Journal*. We are all looking forward to be able to gather together safely.

Thank you so much to Immediate Past Chair Barry Werbin and the Executive Committee members who recently completed their terms as EASL officers. Barry's steady leadership continued to transform and bolster the Section and its Committees, as well as build collaborative relationships among other organizations and within the NYSBA.

EASL is lucky to have at its helm for the next two years Ethan Bordman as Chair, as well as Kathy Kim (First Vice Chair), Judith Bass (Second Vice-Chair), Isaro Carter (Secretary), Christine Marie Lauture (Assistant Secretary), Judah Shapiro (Treasurer), and Merissa Pico (Assistant Treasurer), with Delegate Steve Richman and Alternate Delegate Barry Werbin. We also have an excellent group of District Representatives:

- 1st (Manhattan) – Nayasha Foy
- 2nd (Brooklyn) – Innes Smolansky
- 3rd (Albany) – Bennett M. Liebman
- 4th (Lake Placid) – Edward B. Flink
- 5th (Syracuse) – Imraan N. Farukhi
- 7th (Rochester) – Phillip R. Hurwitz
- 8th (Buffalo) – Leslie Mark Greenbaum
- 9th (Westchster/Lower Hudson) – David Friedlander
- 13th (Staten Island) – Daniel C. Marotta

In addition to photos and the transcript from our amazing Annual Meeting, this issue also includes two Phil Cowan Judith Bresler Memorial Scholarship student award winning articles, our regular columns, and several excellent pieces that should pique your interest.

NEXT ISSUE: In honor of the 50th anniversary of the enactment of Title IX of the Education Amendments of 1972, I would love to gather stories of what Title IX has meant to you, and how you, a girl, and/or woman in your life has benefited, or is benefiting from, participation in sports. As Co-Chair of the Sports Law Committee Jill Pilgrim suggested, "it could be just the confidence gained and learning to work as a team, or maybe it's becoming an NCAA or Olympic athlete and champion." The Sports Law Committee spearheaded this effort on February 2nd by celebrating National Girls and Women in Sports Day. We want to continue that thread and share your stories. Please send any thoughts, articles or pictures directly to me at eheckeresq@eheckeresq.com.

Please also feel free to reach out to me with any questions or article ideas that you have.

– Elissa

The deadline for the next issue is April 22, 2022.

DO PRO BONO! DO PRO BONO!

Pro Bono Update

I am so proud to be the recipient of the **NYSBA Empire State Counsel Law Firm Honoree – Justice for All Award.**

In 2002, Elisabeth Wolfe and I started EASL's Pro Bono Committee. In 2004, we continued lobbying the NYSBA to push for EASL-related areas in the definition of Pro Bono for CLE purposes. In a letter to the NYSBA from that year, we stated:

> The Pro Bono Committee was created because we believe that giving back to the community is good for a plethora of reasons, including the benefit to the community, individual attorney and to the reputation of the legal field as a whole. Limiting the definition of Pro Bono to litigation and other similar services would turn away those who are eager to do "good."
>
> We have found that attorneys are more than willing to volunteer their time to do Pro Bono work, as we have defined it within the Section's activities. Our Pro Bono activities (which draw tremendous support) include staffing clinics at the Volunteer Lawyers for the Arts, providing speakers for inner-city and other schools regarding legal and legal-related issues, providing opportunities for attorneys to become involved with inner-city sports and mentoring programs, and creating a separate mentor program that matches senior attorneys with junior attorneys on a variety of Pro Bono matters.
>
> The EASL Section supports the broad policy statement of the NYSBA, as we have seen in practice the breadth of services that at-

torneys are willing to provide as volunteers. We also believe strongly in the reformation of the current CLE rules, in that the broadening of the definition of Pro Bono service should work hand-in-hand with the broadening of CLE credits that should be available for those attorneys who provide Pro Bono.

This is why I feel so deeply proud for having received this award and recognition from my Pro Bono clients and the NYSBA. We fought for years for EASL Pro Bono services to be recognized as crucial to those in need, and now the recognition of the importance of our work, and the clients who we represent, is just the norm. Our clients have especially been hit so hard with the pandemic, that I'm incredibly proud and honored to accept this award and will continue working on their behalf.

When we work together, everyone succeeds and the world is a better, happier, and more creative place.

– Elissa

Clinic

On March 17th, the EASL and IP Sections held our annual Virtual Pro Bono Clinic with Dance/NYC. Thank you to all of our wonderful volunteers, many of whom continued their attorney/client relationships outside the clinic.

Ethan BordmanAdjckwc Browne

Michael Burke

Cheryl L. Davis

Philip H. Gottfried

Elissa D. Hecker

Merlyne Jean-Louis

Diane Krausz

Deborah Robinson

Innes Smolansky

Carol J. Steinberg

Rosemarie Tully

The theme of Dance/NYC's 2022 Symposium was "Life cycles. Livelihoods. Legacies." and focused on uncovering the generational continuum of lives in dance. Sessions explored career and life navigation, underscoring dance and artistic practice as core human needs, while building understanding across generations of audiences and dance workers. This multi-day event invited participants to investigate topics of mentorship, advocacy, leadership, and equity, within an ethos of community care. Each volunteer received one full registration for the day's event (valued at $140) and appropriate credit in the materials.

Programs

The Fine Arts and Pro Bono Committees presented a virtual panel on Art Licensing for the entire NYSBA and creators on April 7th. As many fine and commercial artists are licensing their images for use on everything from fashion to NFT's, the panel's goal was to help artists, licensors, and their representatives navigate the many issues involved in these deals by sharing the general terms that are standard for such licenses.

The panel consisted of David Stark, President of **Artestar**, a global licensing agency and creative consultancy representing high-profile artists, photographers, designers, and creatives, **Irina Tarsis**, the General Counsel of the **Artists Rights Society**, which guides artists in copyright and intellectual property matters through licensing and legal support, advocacy, and educational outreach, and **Kay Murray**, who serves as both Vice President, Law at **First Look Institute**, whose mission is to empower independent voices in journalism, art, and entertainment and Special Counsel for the **Press Freedom Defense Fund**. There was also an artist on the panel. **Paul Cossu**, member of Olsoff | Cahill | Cossu LLP, moderated. Artists were able to attend at the student price of $25 and attorneys received 1.5 CLE credits. Carol J. Steinberg, Judith Prowda, and Paul Cossu, co-chairs of EASL's Fine Arts Committee, planned the panel.

– Carol

DO PRO BONO! DO PRO BONO!

We encourage EASL members to volunteer as pro bono attorneys, panel, 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, louisecarron.esq@gmail.com

Remarks continued from page 3

Welcome Sharmin Woodall, the new EASL Liaison from the NYSBA. On behalf of the EASL committee, we look forward to working with you on many future EASL events.

Welcome to all new EASL section members. We look forward to seeing you at future events.

The unusual circumstances of COVID-19 continue into a third year, but the NYSBA and EASL have adapted successfully. The Annual Meetings in 2021 and 2022 were conducted remotely, but no less successfully. We look forward to having in-person events safely and soon.

Hope to see you at an upcoming event in the very near future!

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.

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

Law Student Initiative Writing Contest

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

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

Requirements

- **Eligibility**: Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form**: Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline**: Submissions must be received by **April 22, 2022.**
- **Submissions**: Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

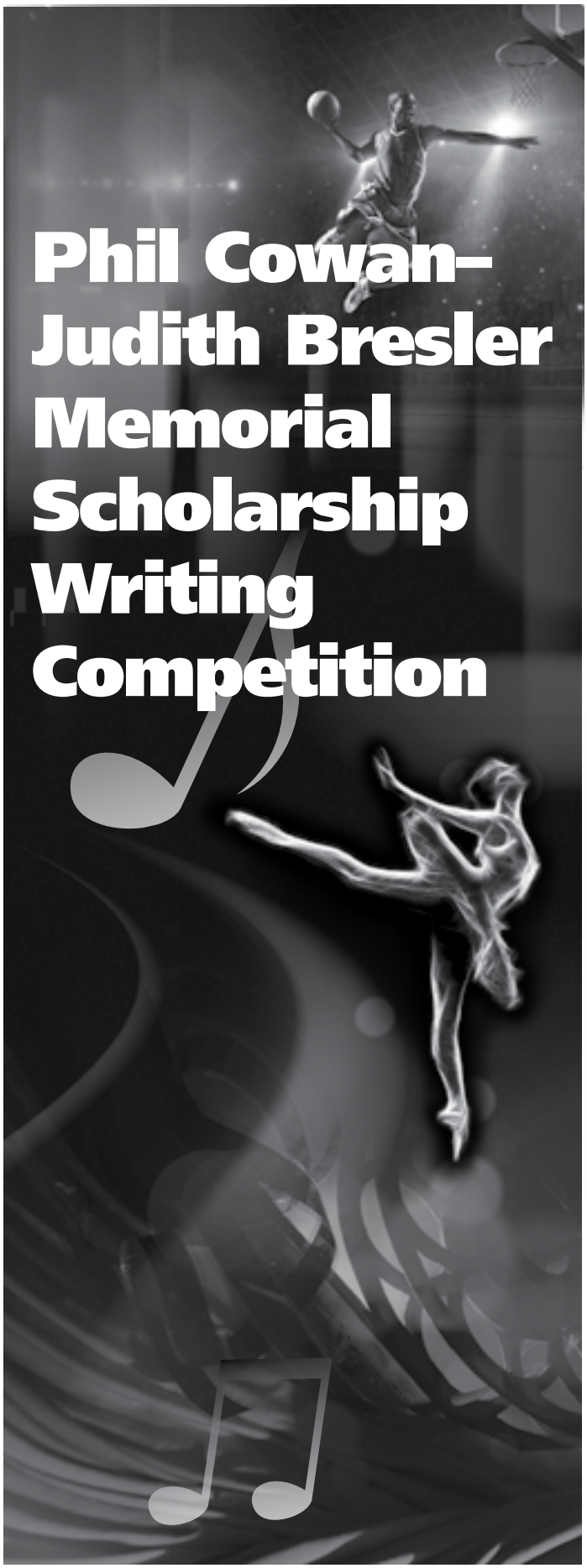
Topics

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.



Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL)'s Phil Cowan-Judith Bresler Memorial Scholarship, named after two esteemed former EASL chairs, offers *up to two awards of $2,500 each on an annual basis* in Phil Cowan's and Judith Bresler's memories to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law.

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

The Competition

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

The paper should be 12 to 15 pages in length (including *Bluebook* form endnotes), double-spaced and submitted in Microsoft Word format.

PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (not part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. The name of the author or any other identifying information must not appear anywhere other than on the cover page.

All papers should be submitted to designated faculty members of each respective law school. Each designated faculty member shall forward all submissions to his/her/their Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her/they to the committee co-chairs for distribution. The committee will read the papers submitted and will select the scholarship recipient(s).

Eligibility

The competition is open to all students—*both candidates and L.L.M. candidates*—attending eligible law schools. "Eligible" law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to 10 other accredited law schools throughout the country to be selected, at the Committee's discretion, on a rotating basis.

Free Membership to EASL

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

Submission Deadline

First week in January. Law School Faculty liaison submits all papers she/he/they receive to the EASL Scholarship Committee, via email **to Sharmin Woodall at swoodall@nysba.org**.

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 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*.

Resolution Alley

Handling Seemingly Irreconcilable Expert Opinions

By Theo Cheng

The use of expert witnesses has become ubiquitous in court litigation and arbitration, but it has also found a home in contract negotiations and mediations to resolve all types of disputes. Expert opinions are necessary in the entertainment, arts, and sports fields because many negotiations and disputes involve technical subject matter, rely heavily on industry custom and practice, or require decisions on disputed issues of economics, accounting, or other specialized subject matter. For example:

- A songwriter contests the amount of royalties being paid by the record company and has demanded an accounting. Naturally, both sides have relied upon the services of their own retained accountants who are prepared to provide analyses of the pertinent records. Counsel are contemplating having their respective accountants participate in either direct, party-to-party settlement discussions or bringing their accountants to a mediation.
- The parties to a copyright infringement dispute over an artist's work have nearly resolved their differences except for determining the value of that work so that they can negotiate and agree upon a mutually acceptable monetary figure. They each propose retaining expert witnesses who can provide an appropriate valuation for further consideration.
- An athlete defending accusations of doping and attempting to overturn a suspension in an arbitration proceeding is planning on calling the team's doctor to testify as to her course of treatment, including the necessity for her having taken certain medications and drugs. The sports league plans on calling a rebuttal physician of its own.

With each party retaining its own expert witness, parties and their counsel sometimes push their respective expert witnesses to extremes in support of their positions. To judges, juries, arbitrators, and mediators, it can often seem like the expert witnesses are coming from completely different planets. When this occurs, it can be difficult for anyone—let alone, the trier of fact—to resolve the matter. Expert witnesses often have not provided sufficient or adequate information—or even the correct information—from which to bridge the gap between their opinions. When confronted with this kind of situation, counsel can play a valuable role by either preventing that situation from ever occurring in the first place or working with expert witnesses to provide helpful assistance to judges, juries, arbitrators, and mediators.[1]

At the outset, counsel will be more persuasive (and, thus, more effective) if they ensure that their intended audience is comfortable with the technical evidence and understand the key definitions. Counsel might consider attending a settlement discussion, a pre-mediation call, or a preliminary hearing or conference prepared to have a realistic discussion about the nature and amount of expert witness participation that is expected in the proceeding. They should be prepared to advise how expert opinions may be of assistance in either determining the merits of the case or at least helping to evaluate the respective strengths and weaknesses of some of the issues in dispute. Sometimes, simply exchanging and/or submitting written summaries of expert opinions is appropriate; other times, formal reports may make more sense. Counsel might also consider exploring methods to enable opposing experts to access and manipulate their opponent's data, discussing any procedures for the exchange of the evidence relied upon by the experts, and using rebuttal reports or summaries to enable the experts to respond to one another's positions.

Further worth considering is how the expert witnesses will present their respective perspectives to judges, juries, arbitrators, and mediators. Although the intended audience might comprise individuals with insight into the technology or a background in the industry or field, more often than not, the audience will not already have a deep understanding of the specific expertise being presented. In such a case, tutorials are one way to place the audience in a position to fully consider the expert opinions that are being presented. For example, in a technology-laden case, a separate technology tutorial that includes slides and handouts might truly be of assistance. Tutorials can be presented by an outside or in-house technical expert, or even counsel with a technical background. To avoid unnecessary disputes over basic, foundational information, the contents of the tutorial could be agreed-upon by counsel in advance, focusing on the technical issues that either counsel wants to explain. A tutorial, however, is not the appropriate time to deliver another opening statement, nor is it intended to be focused on the legal positions that a party will take. Rather, it is meant to be a useful, educational tool designed to assist in comprehending and distilling the technical aspects of the case so that those issues are better handled.

There are also many variations on how expert witnesses may deliver their opinions.[2] For example, in an adjudicative proceeding, because direct examinations are frequently well-rehearsed and planned presentations of the expert witness' report, counsel can consider submitting the expert's report itself in lieu of presenting a live direct examination, and then permitting the expert to be cross-examined by opposing counsel. More generally, if the expert's opinions will include a lot of jargon or acronyms, counsel might consider providing a glossary.

Where the parties are presenting competing expert opinions, it would be helpful to consider employing tools that assist in finding common ground between the seemingly disparate positions articulated by the parties. Technical experts usually testify based upon scientific or industry expertise and, within a given scientific discipline, employ certain agreed-upon principles. For example, it is unlikely that most experts would find disagreement about the laws of physics; even economists often agree on basic methodology. It is, however, the application of the relevant laws or methodology that is the source of the seemingly irreconcilable differences that emerge when the parties present their respective expert opinions. Identifying common ground enables the audience to find which element(s) of the experts' analyses are driving that difference.

In many cases, there are a limited number of factors driving the differences in expert opinions. Experts generally value their reputations, and most reputable experts adhere to established methodologies. Careful and incisive work by counsel can expose a remarkable amount of agreement among even the most contentious experts. Doing so effectively requires an active engagement with the experts' opinions to expose the various positions and better identify and isolate those areas of common ground.

One such technique prevalent in the arbitration setting is the "hot tubbing" of experts (also known as "concurrent evidence"), which can include a situation where the expert witnesses are sworn and provide their testimony at the same time, often sitting together at a table or in the witness box. The experts may then challenge and question one another, and the arbitration panel often questions the witnesses directly, thereby stimulating a near-direct dialogue between the experts and the panel, with counsel sometimes limited to stating objections.[3] Joint testimony allows arbitrators and counsel to question the experts with immediate input from the other expert(s). It also allows the experts themselves to directly challenge each other's opinions and can enable arbitrators to more easily identify and focus in on the key issues in a case. Expert witnesses who attend mediation sessions can also engage in this kind of dialogue in a joint session, thereby helping to illuminate—for the parties, their counsel, and the mediator—the true differences between their seemingly irreconcilable opinions.

Another technique is for the parties to agree to hold a pre-hearing or pre-mediation expert meeting. The experts would meet prior to the evidentiary hearing or mediation session, with or without counsel present, to pinpoint the areas of disagreement and discuss the relevant issues. The experts could then submit a joint written report identifying those points.[4] A variation on this type of meeting is to identify shared assumptions at the hearing or session itself by scheduling an expert-to-expert colloquy.[5] In that technique, the experts briefly supplement their written reports in each other's presence and then discuss their differences to see if they can come to an agreement or better clarify the issues.

Ultimately, all of these techniques are designed to focus the inquiry on determining what is driving the difference among the experts, crystallize the disputed issues, and assist in reconciling what, on its face, appears to be irreconcilable expert opinions. Counsel can play an invaluable role in moving the dispute towards a resolution by providing this kind of assistance to judges, juries, arbitrators, and mediators.

One final option for the parties to consider is to agree upon the retention of a joint expert witness who will provide either an advisory or binding report based upon either the information and documents that have been informally exchanged during the pre-mediation period or on the evidence adduced at the hearing or trial. For example, when the valuation of a business or an item is the primary basis for the dispute itself, sometimes agreeing upon a single expert witness is both a cost-effective and expeditious course of action. By eliminating the proverbial "battle of the experts," the parties are finding yet another way to minimize the differences and moving the proceeding towards a resolution.

Endnotes

1. For a more detailed treatment of this topic in the arbitration context, *see* Theodore K. Cheng and Sherman Kahn, *When Experts Come From Different Planets: Finding the Difference Driving Seemingly Irreconcilable Expert Evidence in Arbitration*, NYSBA NYLitigator, Vol. 23, No. 1 (Spring 2018), at 19.
2. *See, e.g.*, Patricia D. Galloway, *Using Experts Effectively & Efficiently*, Dispute Resolution Journal (Aug./Oct. 2012), at 28 (discussing how established arbitral institutions have rules and procedures to afford arbitrators wide discretion in the conduct of the proceeding and encourage processes that are cost-effective and efficient); George Ruttinger and Joe Meadows, *Using Experts in Arbitration*, Dispute Resolution Journal (Feb./Apr. 2007), Vol. 62, No.1, at 48 (discussing effective expert presentation).
3. *See, e.g.*, J. Christian Nemeth and Lisa Haidostian, *The 'Hot Tub' Method of Taking Expert Testimony is Gaining Steam: What You Need to Know*, Arbitration News (Feb. 2014), at 91; Galloway, *supra* note 2, at 33-34.
4. *See* Nemeth and Haidostian, *supra* note 3, at 91.
5. *See* Galloway, *supra* note 2, at 30-33 (discussing the practice of a joint expert meeting).

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Deaccessioning at the Time of COVID-19: From Alpha to Omega

By Irina Tarsis

"Like all cultural institutions, The Metropolitan Museum of Art was forever changed in fiscal year 2020 by three events: the COVID-19 pandemic, widespread economic downturn, and social unrest related to systemic racism in the United States and globally."

From the *Report from the President and the Director, Annual Report 2019-2022*, The Metropolitan Museum of Art (NY)[1]

"Acquisitions to or deaccessions from the museum's collection must be guided by well-defined written collecting goals and acquisition and deaccession principles, procedures, and processes approved by a museum's Board of Trustees or governing body."

AAMD Policy on Deaccessioning (2010, amended 2015)

"Very well, I will marry you if you promise not to make me eat eggplant."

Gabriel Garcia Marquez, *Love in the Time of Cholera*

On Tuesday, December 21, 2021, the Metropolitan Museum of Art (the Met or the Museum) announced that, effective immediately, it would reduce visitor capacity due to yet another COVID-19 spike in New York City.[2] The announcement echoed steps taken by many other arts institutions in the United States and abroad, faced with the unrelenting threat of spreading the virus, now in its omicron variant, and jeopardizing the health of museum visitors and staff.[3] In 2020, the year when the pandemic made its landfall in the United States, the Met was supposed to celebrate its 150th anniversary with a record number of visitors and gift shop sales. Instead, it remained closed for more than 200 days and after 10 years of averaging 6.5 million annual visitors, on the anniversary year, the Met received only 1.12 million visitors.[4] Naturally, the pandemic took a severe toll on all museums, including the Met, that rely on visitors for the bulk of their operating expenses. In anticipation of a multi-million dollar loss in operating revenue, the Met laid off more than 80 employees.[5]

Over the course of its history, the Met has acquired—through gifts, loans, and purchases, over two million objects, ranging from Greek vases and architectural pieces from Egypt, such as the Temple of Dendur, to military regalia, musical instruments, and vast examples of visual arts from around the world, dating back thousands of years. In addition, the Met preserves and grants access to researchers to its archives and libraries, including the Thomas J. Watson Library. With opposing and conflicting demands on the limited resources of museums, even as large and well endowed as the Met, decisions about collection management and resource allocation are perennial, regardless of whether there is a pandemic.

Where operating revenue runs dry, the logical question surfaces: if and how museums may convert their assets, i.e. deaccession parts of their collections, to pay salaries and maintain galleries,[6] to avoid permanent closures[7] or bankruptcy?[8] This article presents a survey of older[9] and more recent examples of deaccessioning decisions, using the Met as an embodiment of all the complications experienced by a museum, to ascertain deaccession effects on reputation and operations of individual institutions. Neither illegal, immoral, nor always most efficient or effective, "to deaccession" is just one of extant practices in use, pandemic or not.

Often in the public's eye for doing or not doing something, for making hard or wrong choices, for alienating or embracing visitors, museums occupy a special place in our geographic and our cultural landscapes.[10] Many of the modern day best-known museums worldwide, including the British Museum in London and the Hermitage in St. Petersburg, the Carnegie Museum of Art in Pittsburgh and the Frick in New York City, Barnes in Philadelphia, and Phillips in Washington, D.C. were based on private collections put together by or financed with gifts from the inspired[11] or the affluent[12] of their times. Whereas private collections are arguably easier to administer because they are not beholden to public scrutiny or oversight, publicly owned and funded institutions are held to a different standard of diligence and care. They are not only subject to more rhetoric, expected to serve needs of their times, and engage in virtue signaling, they also are subject to obsolescence, oversight, and ridicule from the public and the politicians, threat of dissolution, and sanctions.

Paul Cézanne 1893-94, Still Life with a Ginger Jar and Eggplants, https://www.metmuseum.org/art/collection/search/435881.

In the 20th century, museum stewardship evolved to avoid (real or perceived) conflicts of interests, and discouraged culturally curious, if not to say insatiable, individuals from being at once collectors, dealers, and curators all rolled into one. A great example of an individual who enjoyed all three occupations was Stuart Cary Welch Jr.[13] Welch was a discerning collector of Islamic and Indian art who became a curator at the Harvard Art Museum and occasionally a dealer, as he would at times deaccession pieces from his personal collection, and sell works from his private collection to other active players in this space. To combat legitimate concerns and instances of self-serving or nearsighted decisions and violations of institutional policies or donors' intent, corporate and nonprofit laws evolved to impose specific duties on museum staffers. Now but for the "trial and error" method, how could museum officials and benefactors—donors, curators, registrars, directors—conduct their work to advance the mission and impact of their institutions without jeopardizing their longevity and integrity?

Many valuable insignia are offered by the 2020 publication of Walter G. Lehmann, entitled *Museum Administration: Law And Practice*. In his well-researched and encyclopedic treatise of 665 pages, Lehmann explores the many aspects of museum administration through the legal lens. Deaccessioning is but a brief section, given all the complexities of operating museums on a daily basis. Otherwise, for nearly 50 years, the annual conference "Legal Issues in Museum Administration" (LIMA) organized by the American Law Institute and its partners, has been inviting experts to model responsible stewards of the holdings delivered into care of museum administrators.[14] While LIMA also has too much territory to cover to focus on deaccessioning in earnest, during multi-day proceedings in March 2021, Syracuse University hosted a conference entitled "Deaccessioning after 2020," where museum leaders from across the country, including Anne Pasternak, Director of

the Brooklyn Museum and Joseph Thompson, Founding Director of the Massachusetts Museum of Contemporary Art, took a critical look at what it means to deaccession in the pandemic-ridden times and whether this controversial act maybe changed forever due to COVID-19.[15]

Whereas museum property (wherever held in public trust) is governed by the articles of incorporation of each institution, terms of their gifts and loans, tax status, and the IRS, as well as state legislation making nonprofit museums subject to oversight from the attorney general of each respective state, professional guidelines, or the so-called soft laws, also play an important role in effecting actions of museum administrators. For example, according to the American Alliance of Museums (AAM or Alliance) (est. 1906)[16] with more than 4,000 institutional members:

> deaccessioning is a necessary and appropriate tool in collections management, and a way for a museum to refine its collections. Oftentimes, an object does not fit the organization's scope of collections, cannot be cared for properly or poses a hazard to staff, so it may be considered for deaccessioning. This activity facilitates discussion to determine how well a collections plan and collections management policy help make decisions about deaccessioning. The activity also assesses the appropriateness of deaccessioning and the decision-making process.[17]

This programmatic, economic or monetary side of acquiring artifacts, while non-fungible, and selling them as needed has been a natural and long-standing part of museum collection formation. It is almost a metaphor for life and best modeled by the trajectory of great private collections that were either inherited from or collected by avid acquisitors only to be dispersed due to debts, death or divorce of their owners. Art and artifacts tend to circulate in the art market and when they come to rest in a public collection, the pause could be prolonged but it is by no means necessarily indefinite. As tastes and needs of contemporary society change, historical collections can and do undergo evolution.

According to principles set up and upheld to by more than 250-members of Association of Art Museum Directors (AAMD or Association) (est. in 1916):

> Art museums develop collections of works of art for the benefit of present and future generations. The conservation, exhibition, study, and documentation of the collection are the heart of a museum's mission and public service. Collection stewardship requires planning, resources, and professional acumen to ensure the maintenance of a dynamic collection that supports the museum's mission, serves its community, and contributes to the appreciation of human creativity. The process of adding objects to a museum collection is known as acquisition. The counterpart of acquisition is deaccessioning, the practice by which an art museum formally transfers its ownership of an object to another institution or individual by sale, exchange, or grant, or disposes of an object if its physical condition is so poor that it has no aesthetic or academic value.[18]

To protect the interest of the public and check the powers of museum curators, since the 1970s, the AAMD promulgated *Professional Practices in Art Museums* to formulate best practices in collection management.[19] In the 2000s, the AAMD announced guidelines that specifically addressed circumstances and processes under which museums could deaccession objects from their collections. To avoid conflicts of interest, AAMD underscores the importance of museum members having a publicly transparent deaccessioning process and adhesion to the fundamental principles:

> I. The decision to deaccession is made solely to improve the quality, scope, and appropriateness of the collection, and to support the mission and long-term goals of the museum; [and]
>
> II. Proceeds from a deaccessioned work are used only to acquire other works of art—the proceeds are never used as operating funds, to build a general endowment, or for any other expenses. Funds from deaccessioning can be invested in an acquisitions endowment earmarked to support the long-term growth of a museum's collection."[20]

The AAMD *Policy on Deaccessioning* was approved in 2010 and revised in 2015 to say that while deaccessioning was an important part of collection management, "Funds received from the disposal of a deaccessioned work shall not be used for operations or capital expenses. Such funds, including any earnings and appreciation thereon, may be used only for the *acquisition of works* [emphasis added] in a manner consistent with the museum's policy on the use of restricted acquisition funds"[21] thus limiting the possible uses of funds derived from the act of deaccessioning.

Institutions in violation of the AAMD or AAM policies would find themselves subject to censure, suspension, and/or expulsion. In addition, such institutions could be denied or faced with suspension of loans and exclusion from joint exhibition. Censure was not only a theoretical possibility. In fact, in 2014 the AAM Accreditation Committee voted to revoke Delaware Art Museum's (DAM) accreditation status because of its deaccessions.[22] The DAM decision to deaccession William Holman Hunt's "Isabella

and the Pot of Basil,"[23] Winslow Homer's "Milking Time," and Alexander Calder's "The Black Crescent"[24] was not for "the advancement of the museum's mission" as required by the American Alliance of Museums Code of Ethics for Museums.[25] In fact, DAM admitted that it avoided selling art received by gift or bequest (to avoid a backlash) and proceeded with the sales to pay its bond debt incurred in 2005 as part of the museum renovation and expansion efforts. The sale, which cost DAM its AAM membership, allowed the museum to "fully repay the $19.8 million it owed to creditors without significantly depleting its endowment."[26]

As far as New York state legislators were concerned, self-governance and professional guidelines might not have been enough to protect cultural property held by public institutions. In 1991, Assemblyman Richard L. Brodsky from Westchester County[27] for the first time proposed a bill to curtail deaccessioning from museums. He thought it insufficient that disposals by most museums in New York were regulated by the New York State Board of Regents, which prohibited "using deaccession proceeds to defray debts, operating expenses, and most capital expenses."[28] For decades, he would continue to work on realizing the idea of establishing guidelines for museum deaccessioning, which would avoid unethical, unnecessary, and inappropriate financial machinations in the art world.[29] In 2009, a version of this bill,[30] co-drafted with Matthew Titone, would go on to be reintroduced multiple times but never become law.[31] The soft laws perpetuated by the professional organizations, however, have gone a long way to discourage museums, or at least to push them to think long and hard about whether deaccessioning is the right course of action.

In 2010, Brodsky drafted another bill "in collaboration with the New York State Board of Regents and the Museum Association of New York" to prohibit museums from using proceeds from the sale of artworks "for traditional and customary operating expenses" (as opposed to new acquisitions, a purpose that is generally considered acceptable).[32] The idea had been discussed for a long time,[33] but while the Brodsky-sponsored bills appeared in Albany on multiple occasions, none were ever adopted into law.

Therefore, in the last 30 or so years, the window for deaccessioning objects was severely reduced, but not entirely walled off. For institutions that change their missions, strive to enhance or refine their collections and seek to grow at the time when donations from individuals are on the decline[34] and when market prices are at all record high,[35] a creative approach to collection holdings is *de rigueur*. Museums that have been accused of treating their art holdings as a store for cherry picking and selling off possessions have been subject to great scrutiny, sanctions, and even litigation brought by heirs of collectors and artists incensed by the egregious violation of terms of gifts.[36]

National Academy Museum (2008),[37] Brandeis University's Rose Art Museum (2009),[38] Montclaire (2009), and many other examples, including most recently the Massachusetts-based museum in Berkshire, sold works from their permanent collections. The Berkshire Museum's Board President, Elizabeth McGraw, released a statement defending the stance of the Berkshire Museum, titled "Securing the Future Together," where she said that deaccessioning would "allow the museum to meet the financial challenges that now threaten to close the doors in only a few years: A dwindling endowment, a weakening fundraising climate and an annual operating deficit of $1.15 million."[39] Before they did, the museum had to "lawyer up" and defend its decision to deaccession about 25 objects from its collection in court.[40] The objects chosen for sale, for the purposes of "close a budget gap, pay for building repairs and renovations, and pursue a new programming agenda,"[41] included two paintings gifted by the renown American artist Norman Rockwell, whose heirs insisted, unsuccessfully, that his gifts had to be returned to the Rockwell estate rather than be auctioned off by Sotheby's for the benefit of the Berkshire Museum.[42] As was her duty in overseeing lawful administration of nonprofit institutions, the Attorney General of Massachusetts reviewed Berkshire Museum's plans to deaccession certain works and agreed with the Board of Trustees to authorize the sale on condition that once the institution raised the needed sum, no additional sales would take place.[43] By the end of 2018, some 20 works from the Berkshire museum were auctioned off—netting over $53 million in funds. One of the Rockwell paintings that sold was *Shuffleton's Barbershop* (1950); Lucas Museum of Narrative Art purchased the piece for display in California.[44]

Conditions under which objects enter museums (such as gifts and restricted funds) often dictate the objects' futures and museum administrators certainly need to assess carefully what they accept and accession into the body of the holdings in their care.[45] Objects that have been stolen from their rightful owners, fakes and forgeries, objects acquired through money laundering or in violation of laws of their countries of origin take a toll on museum's budgets, reputations, and care of the rest of the collections. Thus, sometime in the late 2000s (between 2011 and 2020), the Brooklyn Museum decided to voluntarily return, as an unsolicited gift, over 4,000 pre-Hispanic artifacts to the Museo Nacional de Costa Rica in San José, reportedly in part because this collection, donated by American railroad tycoon Minor C. Keith, was too taxing to keep and the museum had to pare down its holdings in order to be able to carry out its mission.[46]

In 2013, the Brooklyn Museum admitted to having issues in connection with an 80-year old gift, a collection presented to the museum in 1932, which came from the retail magnate Col. Michael Friedsam. It contained many fakes and even though housing the fakes was estimated to cost the museum over $500,000 annually (in offsite storage and rent fees) according to the terms of the gift, deaccessioning was not a readily available solution.[47]

James Peale ca. 1820s, Still Life: Balsam Apple and Vegetable, https://www.metmuseum.org/art/collection/search/11734.

Museums, already in a squeeze for securing enough in operating funds, increasingly have to decline gifts from sources with unsavory, read "toxic" or optically problematic sources—such as pharma, tobacco, petroleum, weapon, and other industry affiliates.[48] Increasingly, "we live in a time in which the public is hyper sensitive to the ethics of where money comes from, and where it goes."[49] During the time when deaccessioning was actively debated, Shelby White and Leon Levy made available to the Met funds for the new Greek and Roman Gallery. Later, the husband-wife collecting team became mired in a scandal for purchasing illegally exported antiquity and had to return nearly a dozen of Greek and Etruscan objects to their countries of origin.[50] Having gone through protracted negotiations with Italy in 2006 to return antiquities illegally excavated and exported,[51] query what, if not to deaccession, would the Met have to do had it accepted more illicit antiquities as gifts from the White-Levy collection?

Doing the right thing is hard, particularly when one does not know what the right thing is and when the right thing changes from one generation to another. If in the 20th century, the right thinking might have been to accumulate private sources of funding in hopes that patrons would make in-kind donations accompanied by funds to preserve the collections, then in the 21st century, the very identity and motivation of the patrons, who typically come from affluent, privileged, and "overrepresented" backgrounds (such as white, male, Ivy League) has become an anathema.

The COVID-19 pandemic coincided with the rise of the Black Lives Matter (BLM) movement and general realization that most museums are out of sync with the communities where they are situated.[52] Just like the reminder that most of the Founding Fathers of the United States were slave owners,[53] the fact that most of the art in museums in the country display art made and collected by white men raised questions whether this is the right ration of art that needs to be displayed in the public institutions at this time. Followed by another query, what should institutions do with art removed from display: Store and pay associated

fees, or sell and buy works of underrepresented artists, and if the latter, which ones?

In March 2020, as the U.S. government began to contemplate an emergency relief fund to address the pandemic, the AAM put forth an estimate that nearly a third of museums in the country would not be able to reopen without such relief.[54] The Met, projecting between $50 and $150 million in losses in 2020,[55] called for "the implementation of a universal charitable tax deduction to incentivize giving to these institutions."[56]

Brodsky died in April 2020.[57] The same month, in response to COVID-19, the AAMD issued a resolution "recogniz[ing] the severity of the current crisis and the immediate financial needs of many institutions" and placing a moratorium on punitive actions against institutional members who would need to or chose to deaccession art from their holdings to "use some or all of the [sale] proceeds for direct care of collections."[58] Deaccessions would require board-approval and be done pursuant to a clearly defined public policy.[59] Categorized as "a watchdog group," the AAMD agreed that during these unprecedented times, deaccessioning could be a "stopgap measure . . . to help museums address financial shortfalls related to the coronavirus pandemic."[60] Specifically, the association allowed its members to use the income from collection sales to cover expenses related to direct care of collections, like curators' and conservators' salaries."[61] The moratorium was in place through April 2022.[62]

In quick succession, the Met, the Everson Museum (NY),[63] The Brooklyn Museum of Art (NY), the Baltimore Museum of Art (MD), Newark Museum (NJ),[64] and Palm Springs Art Museum (CA), announced that they would be taking certain pieces from their collections to the auction block and Christie's, Sotheby's, and others all only too happy to sign up the new consignment agreements. While some of the announced sales would help build up dwindling endowments and address operational deficits, others would help shake up and diversify museum holdings.

In the fall of 2020, the Baltimore Museum of Art (BMA) revealed its plans to sell three works from its collection, so-called "blue-chip" works by Andy Warhol, Clyfford Still, and Brice Marden. Auspiciously, the BMA was (at least as of October 2021) one of few institutions that neither laid off nor furloughed its employees during the pandemic. Instead, it announced its goals to raise $65 million to increase staff salaries, acquire postwar works by men and women of color, and expand museum open hours until 9 p.m. one weekday per week, as well as create a plan to champion racial and gender equity at the museum.[65] With questions raised about the deaccessioning choices and severe criticism that ensued, having been threatened with loss of other funding sources, the BMA called off its plans to sell the three works.[66] As a silver lining, it received three major gifts totaling nearly $1.5 million in support of its Endowment for the Future, a long-term financial plan meant to increase access and equity within the museum. A $1 million lead gift came from philanthropist and collector Eileen Harris Norton, while the Rose Company Foundation provided $350,000, and the honorary trustee Jeffrey A. Legum contributed another $110,000.[67]

When the BMA announced that it too would sell works from its collection, including paintings by Cranach, Monet, Corot, and others, critics became increasingly concerned.[68] Nevertheless, the sale went through with assistance from Christie's, although[69] it was criticized for not meeting the estimates.

In 2021, the Everson Museum deaccessioned a 1946 Jackson Pollock drip painting gifted to it in 1991, intending to use the proceeds to "refine and diversify its collection and establish a fund for future acquisitions of artworks by artists of color, women artists, and other under-represented emerging and mid-career artists. A portion of the proceeds will establish a fund for the direct care of the remainder of the collection."[70] Christie's sale resulted in only $13 million being "realized" instead of reaching the upper estimate of $18 million.[71] In early 2021, as promised, the Everson Museum announced that using proceeds from the Pollack sale, it was able to acquire "seven works by emerging and mid-career artists to its permanent collection, including works by well-known artists Shinique Smith and Ellen Lesperance, as well as pieces from local artists."[72]

Further, in 2021, the Newark Museum of Art made it known that it would sell a dozen works from its permanent collection. One piece in particular alarmed scholars of American art. Discounting their concerns, the Newark Museum proceeded with a Sotheby's sale and disposed of a mid-19th century painting by Thomas Cole, "The Arch of Nero," that came to Newark in 1957 through the Sophronia Anderson Bequest Fund. The Cole's sale brought a little under $1 million in proceeds.[73] Deemed one of Cole's masterpieces, the work was purchased by the Thomas H. and Diane DeMell Jacobsen PhD Foundation and given to the Philadelphia Museum of Art for a long-term loan.[74]

Other works sold by the Newark Museum at Sotheby's were Childe Hassam's *Piazza di Spagna, Rome* (sold for $1.23 million), Georgia O'Keeffe's *Green Oak Leaves* (sold for $1.2 million), Thomas Moran's *Sunset Santa Maria and the Ducal Palace, Venice* (sold for $352,800), and Thomas Eakins's *Portrait of Dr. Joseph Leidy, II* (sold for $352,800, seven times more than the lower estimate).[75] In response to the vocal critics of the deaccessions, the Newark Museum director and CEO Linda Harrison stated: "For our Museum, with its 112-year history, we need to cast a critical eye on outdated and harmful narratives that have hung in our galleries without enough questions being asked . . . From here, we look toward righting previous misrepresentations and ensuring that as many voices as possible are heard . . . . Our focus is to be a modern art institution that is an agent of change for diversity and inclusion in our community, state and nation."[76]

Even though a conference organized in Syracuse in 2021 discussed the topics of deaccessioning after 2020, meaning post-COVID-19, museum associations such as the AAMD have not extended the hiatus on stringent enforcement of the Deaccessioning Guidelines. Given the results of the art market where sales set countless records in 2020 and 2021 with the rise of digital art collecting, and given that museums that opted out of deaccessioning were able nevertheless to meet their operation budget needs through alternative sources, it is logical that museums could on average avoid treating their holdings as a cookie jar for easy access to supplement various streams of incomes.[77]

Conclusion

Selling art to raise museum endowments and to pay salaries or renovate facilities is a fraught way of keeping museums operational. It could start a domino effect and take a greater toll on finances and/or reputation of an institution in the public's eye and in public's trust.

According to the February 2021 statement issued by the Met's CEO and Director, Max Hollein: "The Met has always practiced deaccessioning. The Museum approaches deaccessioning with the same degree of strategy and deliberation as we apply to acquisitions. Whereas the two activities are not directly coordinated, our curators are always mindful of the effects of both on the profile of the collection."[78] Hollein went on to mention a recent public sale of a Canaletto painting where funds from the sale were used to purchase another work from the 14th century. Both decisions were recommended by the Met's curators, using their "deep expertise" and "reviewed by multiple layers of administration, beginning with the curatorial department heads and then proceeding to the Deputy Director for Collections and Administration, the Director, and for consideration of the Acquisitions Committee of the Board of Trustees before being voted on by the full Board."[79]

In Hollein's words:

> The criteria for deaccessioning works in the collection have been consistent for decades and include: (1) the work does not further the mission of the Museum; (2) the work is redundant or a duplicate; (3) the work is of lesser quality than other objects of the same type in the collection; and (4) the work lacks sufficient aesthetic merit or historical importance to warrant retention. The Met deaccessions [objects] annually, resulting in revenue that varies between as little as $45,000 to as much as $25 million, driven by the wide range of values assigned to specific pieces and different media . . . . This process takes a number of months for each item.[80]

This statement set the stage for the first round of deaccessions and sales by the Met following the AAMD moratorium.[81] What Hollein did not say was that six months later, the Met would again take advantage of the lax AAMD guidelines and deaccession over $1 million worth of art on paper and photographs, including works by Roy Lichtenstein and Robert Frank, all duplicates of pieces at the collection.[82] According to Christie's, the auction house that was entrusted with the sale, "The Met has shared [that] it will use the sale proceeds to support care of its collection in accordance with its Collections Management Policy—in line with the Association of Art Museum Directors (AAMD) policy that enables institutions to direct funds from deaccession sales toward collection care for a limited period of time in consideration of earned revenue losses resulting from the ongoing pandemic" and Christie's was "honored to be entrusted to present this selection of works from The Metropolitan Museum of Art at auction which will provide meaningful support to their care of collections."[83] After all, museums have always practiced deaccessioning.

Whether deaccessioning is like "crack cocaine to the addict—a rapid hit, that becomes a dependency"[84] or more akin to raiding cookie jars,[85] or just routine maintenance, pandemic or not, it always is hard, like change.[86]

Endnotes

1. The Metropolitan Museum of Art: The Annual Report for the Year 2019-2020, Presented to the Board of Trustees of The Metropolitan Museum of Art on November 10, 2020, https://www.metmuseum.org/-/media/files/about-the-met/annual-reports/2019-2020/annual-report-2019-20.pdf?la=en&hash=136D86C5F7F265B4C40536155A205A28.
2. Solomon, Tessa, *Met Reduces Visitor Capacity Amid Covid Spike in New York City*, ArtNews, Dec. 21, 2021, https://www.artnews.com/art-news/news/metropolitan-museum-of-art-omicron-visitor-capacity-1234614185/.
3. For more on history of the Met, see Laura D. Corey and Donald J. La Rocca, *Seeing The Met Through Crisis: Braving World War I and the 1918 Flu Pandemic*, Dec. 24, 2020, https://www.metmuseum.org/blogs/now-at-the-met/2021/met-crisis-world-war-i.
4. Given that the Museum had a pay what you will admission policy and needed to build a steady earned income to reduce its annual deficit in operating funds, less than 10 years earlier, the Met decided to institute a new admission policy making most visitors pay a compulsory entrance fee, a policy that was unsuccessfully challenged in Grunewald v. Metropolitan Museum of Art, 125 A.D.3d 438, 3 N.Y.S.3d 23 (App. Div. 2015) and *Saska v. Metropolitan Museum*, 42 Misc. 3d 548, 975 N.Y.S.2d 605 (Sup. Ct. 2013).
5. *Metropolitan Museum of Art and Philadelphia Museum of Art Make Deep Cuts to Staff*, Artforum, Aug. 6, 2020, https://www.artforum.com/news/metropolitan-museum-of-art-and-philadelphia-museum-of-art-make-deep-cuts-to-staff-83652.
6. In 2008-2009, Montclair Museum (NJ) declared its plans to deaccession art due to shrinking endowment and rising operational costs. *See* Eileen Kinsela, *Montclair Museum Deaccession Sparks Debate*, ArtNews Apr. 28, 2009, https://www.artnews.com/art-news/news/montclair-museum-deaccession-sparks-debate-1198/.
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Communicators Need to Adjust to New Normal Workplace Expectations

By Carol Schiro Greenwald

How do you know what to say in today's unsettled world? Viruses are multiplying, boosted friends are getting COVID-19, offices open for a fly-by minute and close again. Are you stressed? Unsure if, when, and how to meet in person? Wondering what to share when you return to the office?

This article will focus on effective forms of communication in the post-COVID-19 hybrid workplace, especially preferred communication practices for law firm professionals interested in being successful in this new, ever-changing environment.

The Place Where Work Happens

Remember that March 2020 day when, at the government's behest, office workers packed up their papers and went home? The work world has not been the same since. In the ensuing 18 months, we have learned several important lessons, namely, that:

- People can work productively from home.
- Technology is available that permits safe, secured connections between offices and individual homes, making it possible to continue teamwork and client conversations.
- The expansion of videoconferencing options permits team meetings, evening cocktails, Slack chats, and Google docs or Microsoft teams shared documents and whiteboards.
- "To zoom" is now a verb.

We also learned that remote "offices" might be in bedrooms turned into private offices with doors that lock, or they might be only 10 inches on the kitchen table reserved for the computer with school books, toys, dirty dishes, and piled up mail competing for the same space.

Knowledge professionals lucky enough to have an office equivalent at home tend to enjoy their autonomy and flexibility. Those sharing space in cramped quarters or balancing work and childcare are less sanguine about the benefits of remote work. While they appreciate the scheduling flexibility, their balancing acts often create personal anxiety, depression, and burnout.

Leaders pine for remembered benefits of 2019-style offices:

- A place separated from home by the commute where the focus can be on work,
- Collegiality and teamwork, advanced through scheduled meetings and ad hoc encounters,
- The ability to evaluate colleagues informally by seeing them daily in the office, and
- In-person mentoring to teach new hires how to thrive in their culture.

COVID-19 "dramatically altered the social contract between employer and employee. Employees have stepped into their own power to demand more—more flexibility, more options, more open-mindedness about what being in the office means."[1] They are talking with their feet. The "great resignation" refers to the fact that since Summer 2021, employees have been let go or just left jobs at the rate of approximately four million a month.

They are looking for jobs that:

- Fits into the rest of their life, rather than vice versa,
- Allows "flexibility by location, by when they work or how they work,"[2]
- Gives them the autonomy to decide their own work processes and routines, and
- Practices a culture that respects employees and articulates values of which employees can be proud.

Their new attitudes reflect thinking time spent remotely and cut off from many work relationships. Pandemic-time learnings include:

- The ability to get along with less stuff, as work clothes hang unused in the closet,
- The realization that the commute can be avoided,
- Working effectively does not necessarily require people to be together in the same place or working the same hours, and
- Productivity need not suffer if people work in different geographic locations.

That was then; this is now. How to transition successfully is the key question. Our post-pandemic workplace will need to accommodate an emboldened employee independence, a fear of returning to in-person work while COVID-19 continues to morph, and a leadership mindful of old values while trying to accommodate new ones.

One answer is to encourage transparent, authentic, and more open-minded communication. A productive work environment is the product of communication, both between employers and employees and among employees.

Why Communication Is Important

Visual, verbal, and vocal communication is the secret sauce that has enabled humans to thrive. As our brains are relatively large, we are able to think outside ourselves, to contemplate a future, to conceptualize, and to organize in groups around a common purpose. Pre-speech, we communicated with body language. Then speech evolved, followed by an alphabet and the written word.

The tools expanded but the purpose remains the same: "Communication is how we relate to our world to build common connections and manage the environment around us."[3] Believable communication is the key to trust building and trust is the foundation of successful communication. People willingly follow leaders who they trust.

Trusted leaders understand what their audience expects from them. Their communication begins there—putting themselves in the shoes of their audiences and addressing their expectations. Put another way: "Following the Golden Rule, we communicate with others as *we* want to be communicated with. Following the Platinum rule, we communicate with others the way *they* want to be communicated with."[4]

Attributes of Effective Communication

The basic attribute underlying human connection is attunement; defined as "the ability to be aware of your own state of mind and body while turning in and connecting to another person."[5] Being attuned to others is "a power that enables us to perceive communications from others, to connect and have our message understood, and to manage conflict."[6]

Several techniques can be used to become attuned to an audience of any size, such as:

- Preparing oneself before speaking by clearing the mind of other concerns and planning what will be said;
- Being relevant to the audience and meeting them where they are with focus. It is also beneficial to be curious and interested in what the audience says;
- Showing attentiveness with eyes and body language, i.e., looking at a person and leaning in; and
- Practicing active listening—the talent that allows one to really hear what others say. By concentrating on others, considering their words, and reading their body language, one will learn new things and be more likely to remember them.

One can show mastery over listening skills by summarizing what was heard before offering a response. Good responses will incorporate both empathy and tolerance for ideas that may be antithetical to one's own.

Ten Techniques for Improving Conversations

- Do not be a conversation hog. Remember the one-third/two-thirds rule and listen more than you speak.
- Pay attention to those with whom you are talking.
- Be more interested than interesting.
- Be curious. Converse to learn.
- Make your points clearer by adding images and stories to give shape to concepts.
- Encourage conversation by asking open-ended questions.
- Ask more interesting questions by preparing them before conversations begin.
- Practice active listening.
- Try to speak concisely. Do not ramble or repeat yourself.
- Be real—let your personality come through.

Ten Conversational Sins

- Talk only about yourself.
- Talk too much and take over the conversation.
- Talk too fast, making it hard for others to follow your thoughts.
- Use jargon.
- Stop the flow of conversation by asking yes or no questions which tend to lead to verbal ping pong.
- Mumble, speak in a low, uninteresting tone of voice, use filler words such as "uh" or "like."
- Multitask.
- Interrupt other people.
- Think more about what you want to say next instead of listening to what others are saying.
- Finish other people's sentences when they take a pause.

Conversing Again

"We've probably grown more distant from each other and less accustomed to each other's rhythms."[7] Renewing in person conversations may require some adjustment. We need to readjust to the flow of spontaneous conversation.

It is good to begin by understanding the three levels of conversational intimacy:[8]

- Most general: small talk about the weather, the meeting topic, sports, soft news.
- Potentially controversial: religion, politics, dating.
- Intimate: family, finances, health and work issues.

Look to begin conversations with small talk, the lubricant that allows one to edge into a more substantive conversation. Look for connections, such as sports, foods, culture, and travel. During the pandemic, some had more emotionally upsetting experiences, so it is kind to tread lightly when asking about people's time at home. As some questions can also be received as sensitive, one should be ready to deflect the conversation to a less intimate, but related topic, such as, how the person feels about masks, which kind they prefer, and perhaps where have they found home test kits.

Leaders need to not only adapt their conversational style to the new normal; they also need to change their message. For employees to feel valued, respected, and essential, leaders need to honestly explain what they see happening and how they are thinking about responding. If they have agreed on a hybrid office arrangement, but have not agreed on the scheduling needed to implement it, they should say so and ask for employee ideas and preferences.

If remote work has led to employee burnout, fuzzed distinctions between work and play time and emotional distress, leaders should listen, change rules to encourage preferred behaviors, and then walk the talk. For example:

- To restore the line between work time and family time once done by commuting between the two, set evening "no message" zones during which time there will be no emails, calls, Zooms or texts, not even from the boss.
- If people have forgotten how to take a leave from work, mandate that they use vacation time, and leaders should model it by going on vacation themselves.

- If Zoom fatigue set in during 2020—the work from home year—leaders should create rules around when to use videoconferencing and when to call or write or edit shared documents instead.

During the pandemic, time alone led to shrinking connections with friends and colleagues. Relationships often began and ended with the people in one's immediate pod. As we emerge from isolation, it is time for intentional relationship building between leaders, between leaders and employees, and between employee team members as well as others outside their immediate work areas.

Key takeaways include being intentional as we expand from only core relationships to colleagues, work friends, and clients. Employees who intentionally plan time for building and rebuilding connections are more likely to be internal influencers and to plan their careers more strategically. Leaders who intentionally schedule open office hours and encourage anyone to come in for discussions begin to create a more open culture.

As hybrid models begin to take shape in offices, leaders should take measures to support conversational equity between people sitting together in a conference room and their colleagues attending via remote access. For instance:

- Installing a large monitor and setting the meeting room furniture around it so that those on screen can see those in the office, and vice versa,
- Establishing protocols to ensure participation by the remote attendees, such as calling on them first, and
- Encouraging remote team members to buddy with colleagues who will fill them in on the in-person off-side communications and ensure that they are included in plum work assignments.

If humankind made it through millennia by connecting with words and body language, we too can use communication to create relationships that sustain and grow our firms, companies, and organizations.

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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 their ability to attract and keep loyal clients.

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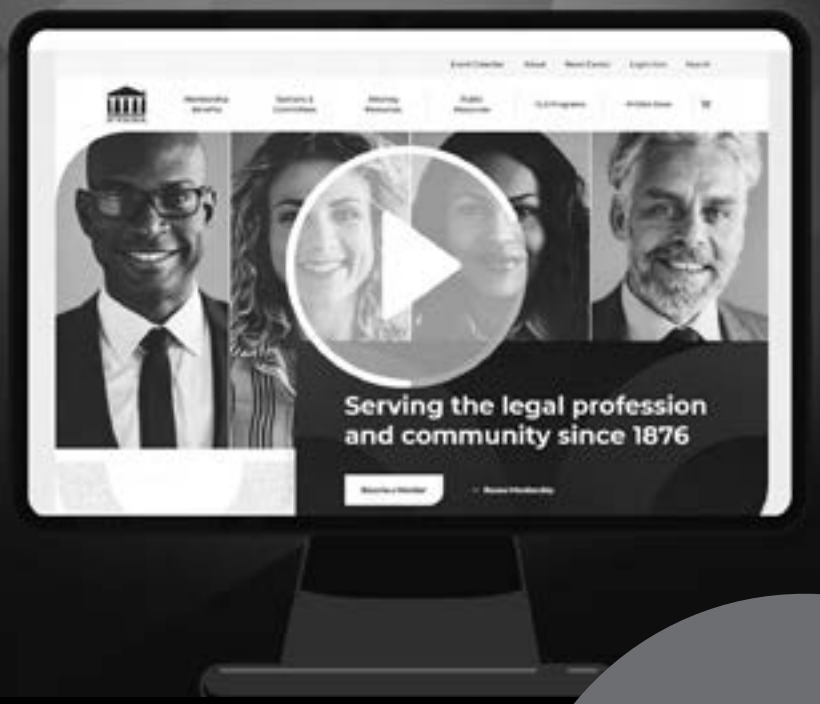

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Sports and Entertainment Immigration

Tennis, Global Talent, Immigrant Stories, and Texas

By Michael Cataliotti

In this edition of Sports and Entertainment Immigration, we will look at some matters that are flatly non-U.S. based, like Novak Djokovic's issues with Australia; others that are quasi-U.S. based, like the UK's fast-track visa offering to Oscar and Grammy winners; and those that are staunchly American, like "Telling Authentic Immigrant Stories: A Reference Guide for the Entertainment Industry," issued by Define American, and, because we are all lawyers who geek out over the law, Texas's "Operation Lone Star," which seems a bit . . . shallow . . . in its purpose.

The Tennis Star Who Dislikes Germy Interlopers

It has been reported that Novak Djokovic, the internationally renowned, crème de la crème of tennis champion, has said that "he was 'curious about wellbeing and how we can empower our metabolism to be in the best shape to defend against imposters like COVID-19.'"[1] It has also been reported that "during an Instagram live, he claimed that positive thought could 'cleanse' polluted water, adding that 'scientists have proven that molecules in water react to our emotions.'"[2]

Nope. No, they have not. At least, no seemingly respectable scientist is claiming that our emotions can clean polluted water.

Quite strange, really. However, what is not strange is that, in light of this, Djokovic has stated that he "'wouldn't want to be forced by someone to take a vaccine' to travel or compete in tournaments," and that he wants to "have 'an option to choose what's best for [his] body.'"[3]

That's fine. It is even fair. Unfortunately for Djokovic, that also means choosing between playing tennis in some countries, or cities, or towns, and getting a COVID-19 vaccine, right?

Not exactly: Apparently, Djokovic's position is that he had applied for, and was "given the impression" that he qualified for and was issued, a medical exemption.[4] The grounds of that exemption are that he had contracted COVID-19 in December 2021.[5] The presiding Justice Kelly stated:

> Here a professor and an eminently qualified physician have produced and provided to the applicant a medical exemption. Now, further to that medical exemption and the basis on which it was given was separately given by a further independent expert specialist panel established by the Victorian State Government. And that document was in the hands of the delegate. The point I'm somewhat agitated about is, what more could this man have done?[6]

Well, this seems messy, but there is more! "The government's legal defense, meanwhile, argued that authorities have a low bar to canceling visas, and that even the possibility of a risk to Australians' health was reason enough."[7]

Ultimately, Djokovic won, at least, temporarily:

> 1. The government's decision to cancel his visa is quashed […].
>
> 2. The government must pay Djokovic's costs as agreed or assessed.
>
> 3. The government must "take all necessary steps" to immediately release Djokovic from detention, which must happen no more than 30 minutes after the decision was made.
>
> 4. Djokovic's passport and all other personal effects must be returned to him.
>
> **His reasoning:** After announcing his decision, Judge Anthony Kelly explained that Djokovic had not been given sufficient notice of his visa cancelation, or enough time by the government to prepare materials.[8]

Despite this, Djokovic's visa to Australia was canceled.

The United Kingdom, Having Ostracized Itself From Europe, Tries To Get People To Come Back

As the impact of Brexit continues, the good folks in the UK administration have decided to try and recover some of their potential brain drain. From the BBC: "The Home Office has announced its decision to 'fast track' the process for those winning coveted arts awards. It is part of the government's bid to attract the 'best and brightest' from around the world."[9] Although this sounds logical, is it really that straight-forward?

> Previously the visa application process, known as the Global Talent route, meant artists and producers had to receive an

> endorsement from one of six bodies. But from Wednesday, new post-Brexit rules allow people who hold a qualifying prize to make a simpler single visa application.[10]

It is. Surely, however, the list of awards must be extremely limited and restrictive, right? Perhaps only a Nobel, or Pulitzer, Grammy, Oscar, or other nearly identical award would be accepted, just like in the U.S., right? . . . right?

Wrong.

The list of awards that allow an individual to move more seamlessly through U.K. immigration are available on the Home Office's website[11] and are organized by category. Compared to the subjective and inconclusive options available to us in the U.S., this author is officially, jelly, as they say:

Global Talent: Architecture Prizes[12]

Qualifying Prize	**Name of Awarding Body**
Pritzker Prize	Hyatt Foundation
Royal Gold Medal	Royal Institute of British Architects

Global Talent: Arts and Culture Prizes[13]

Qualifying Prize	**Name of Awarding Body**
Bessie – Outstanding Performer	The New York Dance and Performance Awards (The Bessie Awards)
Booker Prize	The Booker Prizes
Brit Awards – International Female	British Phonographic Industry
Brit Awards – International Male	British Phonographic Industry
Critics Circle Award – Best Male	Critics' Circle National Dance Awards
Critics Circle Award – Best Female	Critics' Circle National Dance Awards
Dorothy and Lillian Gish Prize	JP Morgan Chase
Hugo Boss Prize	Guggenheim Foundation
ICMA – Artist of the year	International Classical Music Awards
ICMA – Lifetime Achievement Award	International Classical Music Awards
International Booker Prize	The Booker Prizes
International Chopin Piano Competition – First place	Fryderyk Chopin Institute of Warsaw
International Dublin Literary Award	International Dublin Literary Award
MOBO – Best International Act	MOBO Organisation
Olivier Award – Best Play Author	Society of London Theatre
Olivier Award – Best Actor	Society of London Theatre
Olivier Award – Best Actress	Society of London Theatre
Olivier Award – Outstanding Achievement in Dance	Society of London Theatre
Olivier Award – Best Director	Society of London Theatre
Olivier Award – Outstanding Achievement in Opera	Society of London Theatre
Olivier Award – Outstanding Achievement in Music	Society of London Theatre
Olivier Award – Best Theatre Choreographer	Society of London Theatre
Queen Elisabeth Competition – Cello – First Prize	Queen Elisabeth Competition
Queen Elisabeth Competition – Piano – First Prize	Queen Elisabeth Competition
Queen Elisabeth Competition – Violin – First Prize	Queen Elisabeth Competition
Queen Elisabeth Competition – Voice – First Prize	Queen Elisabeth Competition
Tchaikovsky Prize – Grand Prix	International Tchaikovsky Competition
Tony Award – Best Play Author	The American Theatre Wing and The Broadway League
Tony Award – Best Performance by an Actor in a Leading Role in a Play	The American Theatre Wing and The Broadway League
Tony Award – Best Performance by an Actress in a Leading Role in a Play	The American Theatre Wing and The Broadway League
Tony Award – Best Performance by an Actor in a Leading Role in a Musical	The American Theatre Wing and The Broadway League
Tony Award – Best Performance by an Actress in a Leading Role in a Musical	The American Theatre Wing and The Broadway League
Tony Award – Best Direction of a Play	The American Theatre Wing and The Broadway League
Tony Award – Best Direction of a Musical	The American Theatre Wing and The Broadway League
Tony Award – Best Choreography	The American Theatre Wing and The Broadway League
Tony Award – Special Tony Award for Lifetime Achievement in the Theatre	The American Theatre Wing and The Broadway League
Van Cliburn International Piano Competition – Gold Medallist	Van Cliburn Foundation
Wihuri Sibelius Prize	Wihuri Foundation
WOMEX – Artist Award	World Music Expo Award (WOMEX)

Global Talent: Digital Technology Prizes[14]

Qualifying Prize	**Name of Awarding Body**
ACM Prize in Computing	Association for Computing Machinery (ACM)

Turing Award	Association for Computing Machinery (ACM)

Global Talent: Fashion Design Industry Prizes[15]

Qualifying Prize	**Name of Awarding Body**
Fashion Award – Accessories Designer of the Year	The Fashion Awards – British Fashion Council
Fashion Award – Designer of the Year	The Fashion Awards – British Fashion Council
Fashion Award – Outstanding Achievement	The Fashion Awards – British Fashion Council

Global Talent: Film and Television Prizes[16]

Qualifying Prize	**Name of Awarding Body**
Academy Awards – Actor in a Leading Role	Academy of Motion Picture Arts and Sciences
Academy Awards – Actress in a Leading Role	Academy of Motion Picture Arts and Sciences
Academy Awards – Best Actor in a Supporting Role	Academy of Motion Picture Arts and Sciences
Academy Awards – Best Actress in a Supporting Role	Academy of Motion Picture Arts and Sciences
Academy Awards – Cinematography	Academy of Motion Picture Arts and Sciences
Academy Awards – Directing	Academy of Motion Picture Arts and Sciences
Academy Awards – Writing (Adapted Screenplay)	Academy of Motion Picture Arts and Sciences
Academy Awards – Writing (Original Screenplay)	Academy of Motion Picture Arts and Sciences
BAFTA – Best Actor in a Supporting Role	British Academy of Film and Televisions Arts
BAFTA – Best Actress in a Supporting Role	British Academy of Film and Televisions Arts
BAFTA – Best Film Actor	British Academy of Film and Televisions Arts
BAFTA – Best Film Actress	British Academy of Film and Televisions Arts
BAFTA – Film Director	British Academy of Film and Televisions Arts
Golden Globes – Best Actor in a Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Actor in a TV Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Actor Musical/Comedy	Hollywood Foreign Press Association
Golden Globes – Best Actress in a Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Actress in a TV Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Actress Musical/Comedy	Hollywood Foreign Press Association
Golden Globes – Best Director of a Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Screenplay of a Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Supporting Actor Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Supporting Actress Motion Picture	Hollywood Foreign Press Association
Golden Globes – Best Supporting Actor Television	Hollywood Foreign Press Association
Golden Globes – Best Supporting Actress Television	Hollywood Foreign Press Association
Golden Globes – Best TV Actor Drama	Hollywood Foreign Press Association
Golden Globes – Best TV Actor Musical/Comedy	Hollywood Foreign Press Association
Golden Globes – Best TV Actress Drama	Hollywood Foreign Press Association
Golden Globes – Best TV Actress Musical/Comedy	Hollywood Foreign Press Association
Golden Globes – Carol Burnett Award	Hollywood Foreign Press Association
Golden Globes – Cecil B. deMille Award	Hollywood Foreign Press Association
Grammy Award – Lifetime Achievement Award	The Recording Academy

Global Talent: Science, Engineering, Humanities and Medicine Prizes[17]

Qualifying Prize	**Name of Awarding Body**
Albert Lasker Basic Medical Research Award	Lasker Foundation
Balzan Prize	International Balzan Prize Foundation
Benjamin Franklin Medal	Franklin Institute
Berggruen Prize for Philosophy and Culture	Berggruen Institute
Blue Planet Prize	Asahi Glass Foundation
Cadman Award	Energy Institute
Centenary Prize	Royal Society of Chemistry
Charles Stark Draper Prize for Engineering	US National Academy of Engineering
Copley Medal	Royal Society
Crafoord Prize	Royal Swedish Academy of Sciences and Crafoord
Croonian Medal and Lecture	Royal Society
Davis Medal	IChemE
Distinguished Fellowship	British Computing Society
Faraday Medal	Institution of Engineering and Technology
Fritz J. and Dolores H. Russ Prize	National Academy of Engineering

Fields Medal	International Mathematical Union
Fyssen Internation Prize	Fondation Fyssen
Gold Medal	Institution of Civil Engineers
Honorary Membership	British Ecological Society
Holberg Prize	Holberg Committee
Humboldt Research Award	Alexander von Humboldt Foundation
IEEE Medal of Honor	Institute of Electrical and Electronics Engineers
INCOSE Pioneer Award	International Council on Systems Engineering
Individual Gold Medal	Royal Aeronautical Society
International Award	Biochemical Society
International Medal	Institution of Civil Engineers
Isaac Newton Medal and Award	Institute of Physics
IStructE Gold Medal	Institution of Structural Engineers
J J Thompson Medal for Electronics	Institution of Engineering and Technology
James Watt International Medal	Institution of Mechanical Engineering
Japan Prize	The Japan Prize Foundation
John W. Kluge Prize for Achievement in the Study of Humanity	John W. Kluge Centre
King Faisal Prize – Medicine	King Faisal International Fund
King Faisal Prize – Science	King Faisal International Fund
Kyoto Prize – Advanced Technology	Inamori Foundation
Kyoto Prize – Basic Science	Inamori Foundation
Kyoto Prize – Arts and Philosophy	Inamori Foundation
Lasker-Debakey Clinical Medical Research Award	Lasker Foundation
Lasker-Koshland Special Achievement Award in Medical Science	Lasker Foundation
Lasker-Bloomberg Public Service Award	Lasker Foundation
L'Oréal-UNESCO Award for Women in Science	L'Oréal-UNESCO
Louis-Jeantet Prize	The Louis-Jeantet Foundation
Lovelace Medal	British Computing Society
Melchett Award	Energy Institute
Mensforth Manufacturing Gold Medal	Institution of Engineering and Technology
Millennium Technology Prize	Technology Academy Finland
Mountbatten Medal	Institution of Engineering and Technology
Nine Dots Prize	Kadas Prize Foundation
Nobel Prize – Chemistry	The Royal Swedish Academy of Sciences
Nobel Prize – Economic Science	The Royal Swedish Academy of Sciences
Nobel Prize – Literature	The Swedish Academy
Nobel Prize – Physics	The Royal Swedish Academy of Sciences
Nobel Prize – Medicine	Nobel Assembly at Karolinska Institute
President's Award	Energy Institute
Prince Phillip Medal	Royal Academy of Engineering
Queen Elizabeth Prize for Engineering	The Queen Elizabeth Prize for Engineering Foundation
Rayleigh Medal	Institute of Acoustics
Robert Koch Medal and Award	Robert Koch Foundation
Royal Gold Medal	Royal Institute of British Architects
Silver Medal	Royal Academy of Engineering
Vane Medal	British Pharmacological Society
W H Pierce Prize	Society of Applied Microbiology
Wolf Prize – Agriculture	Wolf Foundation
Wolf Prize – Arts	Wolf Foundation
Wolf Prize – Chemistry	Wolf Foundation
Wolf Prize – Mathematics	Wolf Foundation
Wolf Prize – Medicine	Wolf Foundation
Wolf Prize - Physics	Wolf Foundation

This is so clear and concise.[18] From a semi-informed perspective, and as a global migration practitioner, this is quite a nice bit of clarity that I hope will benefit many of our clients who need to travel through the U.K. in the coming months and years.

Immigrants on TV and in Film: Please Stop the Same Old Stories

From its website, Define American:

> . . . is a culture change organization that uses the power of narrative to humanize conversations about immigrants. Our advocacy within news, entertainment, and digital media is creating an America where everyone belongs.
>
> We've been recognized by *Fast Company* as one of the most innovative companies in the world for causing a stir by leveraging the power of television networks to make the world more equitable and for reshaping American public opinion. We

> humanize the conversation on immigration through television consulting, original content development and production, media advocacy, and live events. Define American has consulted on more than 90 film and television projects, such as *Grey's Anatomy* and *Superstore*, spanning networks like ABC and NBC and streaming platforms such as Netflix and Hulu.[19]

As part of that mission, the organization has recently published a "'best practices' guide in telling immigrant stories, with a focus on film and television."[20]

In the words of *Variety*,

> The guide is aimed at individual content creators, as well as production companies and studios at large, and it features detailed descriptions, definitions, historical timelines and dates, and other resources about specific communities. There is an emphasis on such still-evolving topics as DACA and, in partnership with Natural Resources Defense Council (NRDC) and International Refugee Assistance Project, global climate displacement.[21]

I am sure that some readers are thinking about this and wondering, "Why do we need a guide for this? What is the point? WOKENESS STRIKES AGAIN!" In any event, is the guide necessary? I believe so. Take, for instance, that the guide tries to emphasize the need for or value in having immigrants participate in the writing process, acting/performing, and engaging with immigrant communities, in efforts to "empower[. . .] immigrant characters to control their own narratives (rather than telling tales of white saviorism, for example)."[22]

Okay, okay. I know what you may be thinking: this all sounds super millennial and woke, right?

What about this:

> The new guide also points out that not all immigrants are Latine, incorporating data and key findings from the organization's 2020 television impact study, titled "Change the Narrative, Change the World" and published with USC Annenberg's Norman Lear Center, to support this point. Through new partnerships with Asian Americans Advancing Justice (AAJC) and The UndocuBlack Network, the guide puts a spotlight on AAPI and Black immigrants, noting they are still grossly underrepresented on TV at the moment. AAPI immigrants, for example, comprise 12% of immigrants on TV even though the study shows they represent 26% of the U.S. immigrant population.[23]

See, this is not just about some nonsensical sense of being too mushy, but rather, let us get down to practical representation—and dollars and cents—there is a vast group of people consuming American media who are not represented in that media.

In the end, the guide is a useful tool to at least evoke a conversation among content creators and potentially inspire them to look outside their typical storylines. The guide also "includes a timeline of immigration law's history and some other government and geography-based facts [that are] important pieces of the immigration narrative."[24]

Texas: 1/6 Immigrants,[25] 5/6 Nonsense

From Vanessa Croix, writing for the KENS5, a local CBS-affiliate: "As the race for state leadership heats up, Governor Greg Abbott continues to tout his crackdown on illegal immigration."[26]

Here we go…

> Operation Lone Star authorizes state troopers to arrest migrants on state criminal trespass charges.
>
> Officials said it's an effort to keep communities safe and stop illegal border crossings.[27]

That sounds reasonable enough: "keep communities safe and stop illegal border crossings." Fair enough. Law enforcement, enforcing laws.

> "It's very dangerous to make that journey, especially in these areas here when you have no idea where you're going and what the outcome is going to be," said DPS Lt. Chris Olivares.
>
> The high game fences and rough terrain in the areas of Kinney and Val Verde Counties, where the operation team is focused, can be difficult to navigate for both law enforcement and migrants.

Sounds quite risky. Perhaps there is something significant with respect to the local landowners and their property. According to Olivares, "Some of the landowners were voicing concerns that illegal immigrants were trespassing on their property, damaging their fences. They didn't feel safe around their homes because of these illegal immigrants who were coming across," [. . .] "They resist our law enforcement. There's been several incidents where they throw rocks at our law enforcement personnel because again, they're trying to avoid apprehension."[28]

. . . Right. Well, that is anticlimactic. While the need to feel safe in one's own residence and on one's own property is important, I am not sure that this is such a vastly successful program to "keep communities safe and stop illegal border crossings."

Very few would object to arresting gang or cartel members, as that is most definitely keeping communities safe. Olivares claims that they have arrested some of those individuals. Those instances are definitive wins.

However, stopping illegal border crossings?

"Olivares said more than 1,800 migrants have been arrested since July in the area, and the initiative is becoming a deterrent to potential migrants. 'We feel it's been very effective. The message is getting out that if they do come to these areas, they will be arrested,' said Olivares."[29]

I find this highly doubtful. For starters, most people who are trying to cross the border without inspection are doing so because they have not been able to apply for asylum at the border. However, our laws have prescribed methods to apply for asylum, which requires that an individual be present within the United States.

From the American Immigration Council:

> 1. **Affirmative Asylum:** A person who is not in removal proceedings may affirmatively apply for asylum through U.S. Citizenship and Immigration Services (USCIS), a division of the Department of Homeland Security (DHS). If the USCIS asylum officer does not grant the asylum application and the applicant does not have a lawful immigration status, he or she is referred to the immigration court for removal proceedings, where he or she may renew the request for asylum through the defensive process and appear before an immigration judge.
>
> 2. **Defensive Asylum:** A person who is in removal proceedings may apply for asylum defensively by filing the application with an immigration judge at the Executive Office for Immigration Review (EOIR) in the Department of Justice. In other words, asylum is applied for as a defense against removal from the U.S. Unlike the criminal court system, EOIR does not provide appointed counsel for individuals in immigration court, even if they are unable to retain an attorney on their own.[30]

Therefore, "Asylum seekers who arrive at a U.S. port of entry or enter the United States without inspection generally must apply through the defensive asylum process."[31]

So, there are individuals who are, generally, trying to apply for asylum, but because they cannot, they take the dangerous trek of trying to enter the U.S. anyhow, presumably, where they will eventually try to apply for asylum. What, then, about the criminal charge of trespassing? That should prevent these individuals from qualifying for asylum . . .

Not necessarily! Trespassing, on its own, does not necessarily give rise to what is known as a "crime involving moral turpitude." From the USCIS Policy Manual, Volume 12, Part F, Chapter 5:

> "Crime involving moral turpitude" (CIMT) is a term used in the immigration context that has no statutory definition. Extensive case law, however, has provided sufficient guidance on whether an offense rises to the level of a CIMT. The courts have held that moral turpitude "refers generally to conduct that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general." [Citing *See Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001), quoting *Matter of Danesh* (PDF), 19 I&N Dec. 669, 670 (BIA 1988). *See Matter of Perez-Contreras* (PDF), 20 I&N Dec. 615, 618 (BIA 1992). *See Matter of Flores* (PDF), 17 I&N Dec. 225 (BIA 1980) (and cases cited therein).][32]

The guiding law is *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979), in which "the respondent was convicted of malicious trespass."[33] "The BIA determined the portion of the law which was violated, from the record of conviction, and it included the charge of breaking into a dwelling with **intent to commit a misdemeanor, to wit: petit larceny** (emphasis added). [. . .] The BIA stated that petit larceny is a crime involving moral turpitude: therefore, the respondent's conviction for malicious trespass was a crime involving moral turpitude."[34]

Specifically, and back to the Policy Manual: "Moral turpitude attaches to any crime against property which involves fraud, whether it entails fraud against the government or against an individual. Certain crimes against property may require guilty knowledge or intent to permanently take property. Petty theft, grand theft, forgery, and robbery are CIMTs in some states."[35]

Well then, what does the Texas statute at issue have to say about intent and criminal activity? "According to Texas Penal Code 30.05, criminal trespassing is the act of knowingly entering private property without the consent of the owner."[36] Is this, therefore, just grandstanding by the Texas governor? "[A]ccording to media reports from multiple outlets, suspected illegal immigrants caught at the border are being arrested for misdemeanor trespassing and then being held in jail. And then…nothing, frequently. The Wall Street Journal reports that only 3 percent of the 1,500 people who have been arrested under Operation Lone Star have been convicted, all with guilty pleas of misdemeanor trespassing."[37]

> Of 170 Operation Lone Star cases resolved as of Nov. 1, about 70% were dismissed, declined or otherwise dropped, in some instances for lack of evidence, according to court records. The remaining cases ended in plea agreements during arraignments held via videoconference. The men were given sentences equal to or less than the time they had already served in jail.
>
> In two cases, Val Verde County Attorney David Martinez refused to prosecute after evidence showed migrant defendants were directed onto private property by officials before their arrests, he said. Body-camera footage in one showed troopers waving two men and a woman from Venezuela through an open gate.[38]

Concluding Thoughts

Much is going on, and this is only a taste of what we are seeing happen worldwide. It is now 2022, and COVID-19 appears here to stay, so, let us keep on moving forward. Clearly, there is a lot of nonsense out there, whether it be in the form of cleaning water with our minds, or arresting individuals for political points, but there is also some logical positivity in the form of administrative clarity, albeit from the UK; let us make this true within the U.S. as well.

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9. https://www.bbc.com/news/entertainment-arts-56991724.
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11. https://www.gov.uk/government/publications/global-talent-eligible-prize-list.
12. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-architecture-prizes.
13. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-eligible-prize-list.
14. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-digital-technology-prizes.
15. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-fashion-design-industry-prizes.
16. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-film-and-television-prizes.
17. https://www.gov.uk/government/publications/global-talent-eligible-prize-list/global-talent-science-engineering-humanities-and-medicine-prizes.
18. I am as taken by this, as Luigi was in *Cars* when he met a "real Ferrari!" For those of you wondering, Luigi proceeded to say to his partner, "Punch me, Guido! Punch me in the face! This is the most glorious day of my life! [Luigi faints and tips over]." https://www.imdb.com/title/tt0317219/characters/nm0001724.

19. https://www.defineamerican.com/about.
20. https://variety.com/2021/tv/news/define-american-best-practices-guide-immigrant-representation-1235105265/.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. https://www.americanimmigrationcouncil.org/research/immigrants-in-texas.
26. https://www.kens5.com/article/news/special-reports/at-the-border/crackdown-on-illegal-immigration-focuses-on-ranches-in-kinney-val-verde-counties/273-9e480ce9-1ec7-4dc6-818b-031c250d34b6.
27. *Id.*
28. *Id.*
29. *Id.*
30. https://www.americanimmigrationcouncil.org/research/asylum-united-states.
31. *Id.*
32. https://www.uscis.gov/policy-manual/volume-12-part-f-chapter-5#.
33. https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiUuPbe56f1AhVaj4kEHQ9BAZ0QFnoECA0QAw&url=https%3A%2F%2Fwww.uscis.gov%2Fsites%2Fdefault%2Ffiles%2Ferr%2FH2%2520-%2520Waiver%2520of%2520Inadmissibility%2520-%2520Criminal%2520-%2520212%2520(h)%2FDecisions_Issued_in_2005%2FAUG162005_09H2212.pdf&usg=AOvVaw2llPW-yhPpvd6yGcLU5k6O, Decision by the Administrative Appeals Office from August 16, 2005, discussing whether the crime at issue in that matter involved moral turpitude.
34. *Id.*
35. *Supra* note 30, at Crimes Against Property.
36. https://www.attorneysamuelgardner.com/criminal-defense/criminal-trespassing/.
37. https://reason.com/2021/11/08/texas-costly-operation-lone-star-leaves-alleged-illegal-immigrants-trapped-in-jail-with-no-due-process/.
38. https://www.wsj.com/articles/texas-jails-fill-with-migrants-as-border-arrests-overwhelm-courts-11636376402.

Michael Cataliotti is the Principal of Cataliotti Law P.C., a law firm concentrating on business immigration and international corporate transactions. His clientele includes individuals and entities from such industries as sports, music, fashion, film, television, art, theatre, new media, and technology. He 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.

Three Things to Know About Evolving Entertainment Law Issues in 2022

By Neville L. Johnson and Douglas L. Johnson

1. New York's New(ish) Anti-SLAPP Law Is Getting Road-Tested

In late 2020, amidst the tumult of the most recent United States presidential election and the height of the COVID-19 pandemic, then-New York Governor Andrew Cuomo approved a significant expansion of the state's anti-SLAPP[1] protections, which afford defendants an expedited path out of unmeritorious and censorious litigation brought under color of state law. Rather than being cabined to lawsuits implicating governmental petitioning activity, New York's law now more closely resembles the scope of California's anti-SLAPP statute, applying as it does to "any communication in a public place open to the public or a public forum in connection with an issue of public interest" or based upon "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest" (meaning "any subject other than a purely private matter").[2] It permits courts to consider evidence outside the pleadings at the dismissal stage when supported by affidavit,[3] heightens the merits burden on plaintiffs by requiring a "substantial" (rather than merely "cognizable") presentation of their claims,[4] freezes discovery upon an anti-SLAPP motion's filing,[5] and mandatorily shifts fees to prevailing defendants (whereas the statute previously made such a shift discretionary).[6]

Just over a year since the expanded anti-SLAPP law's enaction, nearly two dozen decisions have been issued by New York courts (both state and federal) examining its effect on extant litigation, allowing us to make the following observations: There is general agreement that the statute applies retroactively to cases pending upon its enaction.[7] It imposes the "actual malice" standard under state law on all defamation claims involving public figures, eschewing the standard's prior circumscription to select narrow fact patterns.[8] It covers social media sites as public fora.[9] Further, it does *not* cover facially illegal activity, such as threats and intimidation in violation of the federal Voting Rights and Klu Klux Klan Acts.[10]

Where there is greater disagreement, however, is the statute's relevance to federal litigation. Some courts have found the statute to be substantive and therefore applicable in federal court under the *Erie* doctrine.[11] Others have held it to be procedural, clashing with the Federal Rules of Civil Procedure, and therefore inapplicable in whole or part to federal litigation.[12] This debate is not new in the context of anti-SLAPP statutes, with the Second Circuit having decided in 2020's *La Liberte v. Reid* not to allow California's iteration to apply in its courts.[13] Some district courts have noted differences between the California and New York anti-SLAPP statutes to suggest that *La Liberte* may be distinguishable on such basis.[14] It seems inevitable that the Second Circuit will have to chime in once more to settle this debate.

2. Arbitration Clauses Continue To Predominate in Entertainment Contracts

The problems with mandatory arbitration clauses in entertainment contracts are well known among plaintiffs' counsel, perhaps best captured in a seminal 2015 law review article by Ron Nessim and Scott Goldman.[15] Among the many issues raised therein are "repeat provider bias" (wherein the same arbitration providers are recycled by the same institutional defendants, the former thereby incentivized to please the latter in order to keep their business), lopsided levels of experience between the arbitrating parties, general subconscious bias favoring institutional players, and the cumulative effect of these hurdles dissuading plaintiffs from even pursuing arbitration as a viable remedy in the first instance. Indeed, while judges are incentivized to clear their dockets as quickly as possible, arbitrators – many of whom command anywhere between $400 and $1,000 an hour for their services – are instead incentivized to bleed litigants dry. For this reason alone, both sides to a contract should be willing to challenge prevailing wisdom regarding the purported benefits of mandatory arbitration.

Nevertheless, courts have shown relatively few signs of retreating from public policy favoring arbitration as outlined in *AT&T Mobility LLC v. Concepcion*,[16] with only minor exceptions being carved out in the #MeToo era for employers facing sexual assault claims.[17] Institutional defendants reliably continue to shunt dispute resolution through the familiar halls of JAMS to avoid the public scrutiny, lengthy procedures, and greater unpredictability that comes with civil litigation. In many instances, a prospective plaintiff has no say in the existence or wording of the arbitration clause baked into their agreement and is presented with the institutional defendant's iteration on a take-it-or-leave-it basis. This, of course, raises issues of substantive and procedural unconscionability discussed at length in Mssrs. Nessim and Goldman's scholarship. To the extent a prospective plaintiff is ever allowed to pick up the pen and redline their arbitration clause, however, the following provisions should be entertained:

First, the arbitration clause should contain provisions allowing an indigent client or one of modest means to have

their arbitration fees advanced by the other side, with the prevailing party to be paid their reasonable costs and attorney's fees. This helps to even out the often-disparate resources of the contracting parties by helping to ensure that neither is precluded from seeking justice in the first instance, and that an eventual victory on either side is not rendered financially pyrrhic.

Second, and further to the first point, the arbitration clause should include an escape provision allowing the plaintiff to file in open court if its claim is stipulated to be worth less than a specific dollar amount. As arbitrators are paid by the hour for their time, this helps to ensure that lower-value claims (relative to the cost of arbitration) are not incongruously given identical treatment to bet-the-business disputes. The same right should be considered for inclusion if a well-off party refuses to advance the arbitration fees of a cash-strapped party. Otherwise, the courthouse doors are closed unfairly.

Third, the arbitration clause should generally specify the number of arbitrators to be used (more than one generally only being worthwhile in multi-million dollar cases), the procedures for selecting said arbitrator(s), the location of the arbitration, which state's substantive law will apply to a given dispute, and that the arbitrator is empowered to grant discovery. This last item is particularly important if the agreement has a California choice of law provision, as neither the Federal nor California Arbitration Acts grant arbitrators the authority to issue discovery subpoenas (other than for wrongful death or personal injury claims), meaning the authority must be derived from contract or otherwise ceded.[18]

Lastly, the arbitration clause should specify that the arbitrator's decision is appealable to a tribunal within the arbitration provider on the same basis one would normally appeal a trial court decision. Otherwise, New York jurisprudence holds that an arbitrator's award cannot be vacated "unless it is totally irrational" or "violates a strong public policy and therefore exceeds the arbitrator's powers," even if it otherwise entails mistakes of fact and law or disregards the plain language of the parties' agreement.[19]

3. The Ninth Circuit's Server Test Is Under Increasing Scrutiny in the Second Circuit

In 2007, the Ninth Circuit handed down a highly influential internet law decision in the form of *Perfect 10, Inc. v. Amazon.com*, Inc.,[20] holding that under the so-called "server test," the public display of a copyrighted work on a website is not infringement when accomplished by linking to a file hosted on an unrelated third party's servers. The test was an immediate boon to image search providers, such as Google (whose products are reliant on the practice of in-line linking), and a thorn in the side of content owners unable to hold aggregators to account.

However, in the years following its issuance, *Perfect 10* has been subject to a bevy of criticism that it favors form over function, as the average website user makes no distinction as to where an online image *physically originates* from, only caring that it *appears* on the particular website being viewed. As such, district courts within the Ninth Circuit have been largely content to restrict Perfect 10 to its facts,[21] similar to what the Supreme Court recently elected to do with the fair use of software code in *Google LLC v. Oracle Am., Inc.*[22]

In the past few years, the server test has become something of a whipping boy within the Second Circuit, with its courts far more inclined to focus on where a copyrighted work is incorporated rather than where it originated. As recounted in 2018's *Goldman v. Breitbart News Network, LLC*, "[f]our courts in [the Southern District of New York] have discussed the Server Test and *Perfect 10*'s holding; none adopted the Server Test for the display right."[23] Instead, the *Goldman* court held that "[t]he plain language of the Copyright Act, the legislative history undergirding its enactment, and subsequent Supreme Court jurisprudence provide no basis for a rule that allows the physical location or possession of an image to determine who may or may not have 'displayed' a work within the meaning of the Copyright Act."[24] This has become particularly crucial at a time where, due to outcry from the artistic community, popular sources of embedded content, such as Instagram, have become increasingly reticent to grant any automatic sublicenses for works hosted on their servers, despite having the power to do so under their terms of service.[25]

The most recent district court in the Second Circuit to tackle the server test, *Nicklen v. Sinclair Broad. Grp., Inc.*, was no more charitable than the *Goldman* court three years prior, finding that "[t]he server rule is contrary to the text and legislative history of the Copyright Act," as "[t]he Act defines to display as 'to show a copy of' a work, 17 U.S.C. § 101, not 'to make and then show a copy of the copyrighted work.'"[26] "The Ninth Circuit's approach," it held, "under which no display is possible unless the alleged infringer has also stored a copy of the work on the infringer's computer, makes the display right merely a subset of the reproduction right."[27] Given this withering fire, and with multiple litigants looking to have the Ninth Circuit revisit the doctrine,[28] it would not be surprising if the matter is eventually escalated to the Supreme Court on the back of a coastal circuit split.

Endnotes

1. Anti-Strategic Lawsuit Against Public Participation.
2. C.R.L. § 76-a.
3. C.P.L.R. § 3211(g)(2).
4. C.P.L.R. §§ 3211(g)(1), 3212(h).
5. C.P.L.R. § 3211(g)(3).
6. C.R.L. § 70-a.

7. *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020); *Coleman v. Grand*, 523 F. Supp. 3d 244, 258-59 (E.D.N.Y. 2021); *Sackler v. Am. Broad. Cos., Inc.*, 144 N.Y.S.3d 529, 532 (Sup. Ct. 2021).
8. *Palin*, 510 F. Supp. 3d at 29; *Coleman*, 523 F. Supp. 3d at 259; *Sackler*, 144 N.Y.S.3d at 534.
9. *Coleman*, 523 F. Supp. 3d at 266.
10. *Nat'l Coal. on Black Civic Participation v. Wohl*, 512 F. Supp. 3d 500, 517 (S.D.N.Y. 2021); *compare Flatley v. Mauro*, 39 Cal. 4th 299, 320 (2006) (holding California's anti-SLAPP statute not to apply to activity that is illegal as a matter of law, such as civil extortion).
11. *Palin*, 510 F. Supp. 3d at 26; *Coleman*, 523 F. Supp. 3d at 258.
12. *Nat'l Acad. of TV Arts & Scis., Inc. v. Multimedia Sys. Design, Inc.*, No. 20-CV-7269 (VEC), 2021 U.S. Dist. LEXIS 142733, at *29-32 (S.D.N.Y. July 30, 2021); Sweigert v. Goodman, No. 1:18-cv-08653 (VEC) (SDA), 2021 U.S. Dist. LEXIS 77704, at *6-7 (S.D.N.Y. Apr. 22, 2021).
13. *See La Liberte v. Reid*, 966 F.3d 79, 88 (2d Cir. 2020).
14. *See Goldman v. Reddington*, No. 18-CV-3662 (RPK) (ARL), 2021 U.S. Dist. LEXIS 78103, at *14 n.2 (E.D.N.Y. Apr. 21, 2021).
15. Ronald J. Nessim and Scott Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA Ent. L. Rev. 233 (2015).
16. 131 S. Ct. 1740 (2011).
17. *See generally Chamber of Commerce of the United States v. Bonta*, 13 F.4th 766 (9th Cir. 2021).
18. *See Aixtron, Inc. v. Veeco Instruments Inc.*, 52 Cal.App.5th 360, 396 (2020).
19. *See Hackett v. Milbank, Tweed, Hadley & McCloy*, 86 N.Y.2d 146 (1995).
20. 487 F.3d 701 (9th Cir. 2007).
21. *See, e.g., Free Speech Sys., LLC v. Menzel*, 390 F. Supp. 3d 1162, 1172 (N.D. Cal. 2019) ("FSS cites no case applying the *Perfect 10* server test outside of the context of search engines. Indeed, subsequent cases have refused to apply the Perfect 10 server test outside of that context.").
22. 141 S. Ct. 1183, 1208-09 (2021).
23. 302 F. Supp. 3d 585, 591 (S.D.N.Y. 2018).
24. *Id.* at 593.
25. *See* Timothy B. Lee, *Instagram just threw users of its embedding API under the bus*, Ars Technica (June 4, 2020), https://arstechnica.com/tech-policy/2020/06/instagram-just-threw-users-of-its-embedding-api-under-the-bus/.
26. No. 20-cv-10300 (JSR), 2021 U.S. Dist. LEXIS 142768 at *12-13 (S.D.N.Y. July 30, 2021).
27. *Id.* at *13.
28. *See, e.g., Hunley v. Instagram, LLC*, No. 21-cv-03778-CRB, 2021 U.S. Dist. LEXIS 177667, at *7-8 (N.D. Cal. Sep. 17, 2021) ("In Hunley's view, the Ninth Circuit's server test misinterprets the Copyright Act. Hunley is free to present that argument to the Ninth Circuit and the Supreme Court. But this Court is not free to artificially narrow or overrule binding precedent.") (internal citation omitted).

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

VIRTUAL ANNUAL MEETING
January 2022

Welcome and Introduction of Program

Entertainment, Arts and Sports Law Section Chair

Barry Werbin, Esq.
Herrick, Feinstein, LLP
New York, NY

Program Chairs

Judith B. Bass, Esq., Law Offices of Judith B. Bass, New York, NY
Louise Carron, Esq., Klaris Law PLLC, New York, NY
Elissa D. Hecker, Esq., Law Office of Elissa D. Hecker, Irvington, NY
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Judith B. Prowda, Esq., Sotheby's Institute of Art, New York, NY
Carol J. Steinberg, Esq., Law Firm of Carol J. Steinberg, New York, NY
Barry Werbin, Esq., Herrick, Feinstein, LLP, New York, NY
Ella Wesly, Santa Clara University School of Law, Sunnyvale, CA

Barry Werbin: Good afternoon, everyone. As Chair of the EASL Section, and on behalf of EASL's Executive Committee, I am Barry Werbin, and I want to welcome everyone to our much-anticipated 2022 Annual Meeting program.

Although we were hoping this would finally be in person, COVID again unfortunately intervened, and we're back doing this virtually as we did last year, but I think our programs for this Annual Meeting are some of the best ever and address cutting edge issues, including NFTs in the arts, sports, fashion, and entertainment industries; accessibility, visibility, and disability issues in entertainment media, and the performing arts; and for our January 25th program next Tuesday afternoon, 50 years of Title IX in college sports.

EASL is once again very proud to sponsor our annual Philip Cowan–Judith Bresler Memorial Scholarship writing competition for law school students, offering two $2,500 awards for original papers on topics of interest to the EASL community.

For those of you who already are EASL members, thank you for your ongoing support and participation. If you are not already a member, I urge you to please join and become active on one of our many committees, especially as EASL Section dues are very modest if you are already a member of the NYSBA. And law student members are also very welcome, and we want you. The benefits of EASL membership includes fantastic programs like those you'll see today and next week, at our annual spring and fall meetings, our annual Music Business Law conference, EASL's many committee programs held throughout the year, both CLE and free and formal gatherings, and receiving the acclaimed EASL Journal that also provides opportunities for you to have articles of interest published. Of course, there's also ongoing and valuable networking throughout the year, especially when we're back in person.

Before we commence our formal program with the Cowan–Bresler award ceremony, we do have one piece of very important formal EASL business to conduct. Every two years, you, the members of EASL, elect new officers, delegates to Albany, and our judicial district representatives throughout the state. EASL's Nominating Committee has put together a slate of highly qualified individuals to fill these positions starting February 1st. You should all have received by email the nominating slate for your review and vote today. EASL's Executive Committee has unanimously endorsed the Nominating Committee's slate, which includes the following nominees. First, for new officers, as Chair, Ethan Bordman, who is currently Vice Chair. First Vice Chair Kathy Kim, who is currently Treasurer. Second Vice Chair Judith Bass. Secretary Izaro Carter, who has currently been serving as Secretary, having filled the one year gap. As Assistant Secretary, Christine-Marie

Lauture. Treasurer Judah Shapiro, and Assistant Treasurer Merissa Pico.

As delegates to Albany, the committee has nominated Steven Richman, who is the incumbent, and myself as the alternate.

For new District Representatives, we're very proud to nominate for the 1st District in Manhattan, Nayasha Foy, who is senior counsel at Buzzfeed. For the 5th District in Syracuse, Imraan N. Farukhi, who's assistant professor at Syracuse University's S.I. Newhouse School of Public Communications. In the 7th District covering Rochester, Phillip R. Hurwitz, an entertainment attorney. And in the 9th District covering the Lower Hudson region and Westchester, David Friedlander, an entertainment and sports practice attorney in Mount Kisco.

And last, incumbents for reelection as district representatives, for the 2nd District in Brooklyn, Innes Smolansky. The 3rd District in Albany, Bennett M. Liebman. The 4th District in Lake Placid, Edward B. Flink. The 8th District in Buffalo, Leslie Mark Greenbaum. The 11th District in Queens, David H. Faux. And the 13th District in Staten Island, Daniel C. Marotta.

Before we vote on this slate, is there a motion by any attending EASL member for any other nominations for the floor? If so, please indicate by speaking up or by using the chat feature.

Seeing there being no other floor nominations, is there a motion to move forward with voting on the EASL Nominating Committee's proposed slate?

Elissa D. Hecker: Making the motion.

Barry Werbin: Okay. Is there a second?

Speaker 4: Second.

Barry Werbin: All right. Okay, the voting is so moved.

Using the on-screen voting interface, I ask that each EASL member in virtual attendance to please mark your voting ballot accordingly for or against the proposed slate of candidates or abstain if you wish. Please proceed.

Okay. Simone, are we finished? Another few seconds?

Yep. That would be it right there.

Okay, great. So, the results are in and I am very pleased to announce that the nominated slate of candidates has received 97% of votes, yea in favor, 3% have abstained. So, congratulations to all the new winning candidates. Your terms will become effective as of February 1st and we look forward to transitioning and to another great two years under your careful watch and guidance.

Last, as my tenure as Chair winds down, I want to extend my sincere thanks to the entire EASL Executive Committee. All of our other officers and former chairs are dedicated NYSBA liaisons past and present. Pat Stockli, Director of Section and Meeting Services, Kathy Suchocki, Senior Director of CLE and Law Practice Management, all of their staff, and all of you who have helped make EASL the dynamically rich section it has become over the years. And for me, it has been an enormous personal pleasure and honor to service Chair over the last two years.

And with that, it is my pleasure to turn the program over to Ethan Bordman, our new EASL Chair-Elect, and Christine-Marie Lauture, our new EASL Assistant Secretary-Elect, to introduce this year's Cowan-Bresler award winners.

Ethan Bordman: Thank you very much, Barry. And thanks everyone in attendance for your confidence in the new slate, and as the new Chair, I greatly appreciate it. I look forward to meeting everyone, hopefully in person soon, hopefully in springtime, and look forward to having people get involved. If anyone, and I'll be sending out an email soon, would like to become involved with the Section or has questions, please feel free to reach out to me or our new Section Liaison, Sharmin Woodall.

So on the Cowan–Bresler scholarship. I'm going to give a quick background on the award and then my co-chair Christine-Marie will announce our winners, introduce the papers, and such. So first, as I said, I want to thank several people who've made this year's scholarship successful. Christine-Marie Lauture, my co-chair, thank you to the students who submitted papers for the scholarship. The papers were all well researched and very well received. We received some really great papers. I've read all of them and they're very good. We'd like to thank the judges, who are EASL Executive Committee members, and EASL Chair Barry Werbin, who gave their time to contact schools, professors, students, and student organizations, to inform them of the scholarship. Thanks to Simone Smith and Pat Stockli at the New York State Bar.

The Phil Cowan–Judith Bresler Memorial Scholarship was founded in 2005 and was named after Phil Cowan, a former EASL Chair. The scholarship offers up to two awards of $2,500 on an annual basis to law students interested in the areas of entertainment, arts and sports law, and related subjects. The award was renamed in 2019 to commemorate the memory of Judith Bresler, also a former EASL Chair, who, since the scholarship's creation, had made a tremendous contribution to the success of the scholarship opportunity. The competition is open to law students in all accredited law schools throughout New York State, plus Rutgers and Seton Hall, as well as a number of other law schools on a rotating basis throughout the United States.

Two winning papers are chosen annually. The authors of the winning papers are each awarded the scholarship and the winning papers are published in the *Entertainment, Arts and Sports Law Journal*, which will be coming out in just a few months.[1]

So, I'm going to hand it off to my co-chair Christine-Marie, to announce the winners.

Christine-Marie Lauture: Thanks so much, Ethan. We are happy to announce our two winners of this year's writing competition. We have Diana Nelson and Michael Fasciale. Diana Nelson is a third year at St. John's University School of Law. And Michael is at Seton Hall School of Law. Diana Nelson's paper was titled "We're Gonna Rock Down to . . . Copyright Protection: The Unauthorized Use of "Electric Avenue" and Other Popular Music in Political Campaigns During the Social Media Era." And, definitely was an awesome paper. So congratulations, Diana. And Michael's paper was titled "The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athlete's Name, Image and Likeness Compensation." Definitely a hot topic and awesome paper as well. So congratulations, Michael.

Ethan Bordman: All right. So now I'm going to do the virtual thing of handing you guys your checks. Unfortunately, we can't do this in person, but I'm going to hand it to Diana first. We're going to hand you your check through the screen. It's a ceremonial check—you would normally be getting one of those big Publisher Clearinghouse checks. And we're going to do the same to Michael. There you go. And thank you guys very much. If you want to speak for just a few minutes, please feel free.

Michael: So, I'll be very quick. Thank you, everyone who was involved in the process of reading and critiquing each submitted entry, I'm sure there were a lot of qualified entries. So thank you again for taking the time to review them.

When I was beginning to research what I wanted to write about, I kind of just cold-called, excuse me, cold emailed a bunch of prominent sports entertainment law attorneys. And to my surprise, a lot of them got back. So, I'm very grateful for the people in this industry who truly care and seem like they really want to help others in need and will take time out of their busy schedules to help law students like us. So with that being said, thank you everyone again. And I really appreciate being awarded the scholarship.

Diana Nelson: Yes. Thank you so much for taking the time to review my paper. And thank you again for the scholarship. Before law school, I worked in media at NBC, so, going into law school I was very interested in copyright, and media, and entertainment. And so I wrote this paper during Entertainment Law over the semester. I'd like to thank my professor, Professor Joseph Salvo, and Professor Eva Subotnik for submitting my paper. And thank you again for taking the time to read my paper and thank you again for the scholarship.

Ethan Bordman: You're welcome. Congratulations. I know you're both third years, so congratulations on graduating school soon. Good luck on the bar exam, which is coming up. And again, thanks everybody. And we'll hand it back to Barry.

Barry Werbin: Great. So, thank you, Ethan, Christine-Marie, and congratulations to you, Diana and Michael, this is always a highlight. You know, we love to get law students involved. We have a Law Student Committee within EASL, and if you join, I think there's a very discounted rate for first year lawyers in the EASL Section. So, we would love to have you join and become active and help recruit some other students. It's a great opportunity.

As you said, Michael, I mean just calling and getting responses from sports lawyers who are eager to assist, and professors and the like, it really helps you understand the practice and your interests in the law and network. It's a great stepping stone for starting your practices. So thank you very much.

And now it's my pleasure to introduce our first Annual Meeting CLE program on NFTs in the Arts, Sports, Fashion, and Entertainment Industries. And that will be introduced by our temporary NYSBA liaison, Simone Smith, who's been awesome. Take it away, Simone.

Endnote

1. "'We're Gonna Rock Down To' . . . Copyright Protection: The Unauthorized Use of 'Electric Avenue' and Other Popular Music in Political Campaigns During the Social Media Era" by Diana Nelson is on page 100 of this issue. "The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athlete's Name, Image and Likeness Compensation" by Michael Fasciale is on page 111 of this issue.

Virtual Annual Meeting Program—Panel 1

NFTs in the Arts, Sports, Fashion, and Entertainment Industries

If there is one thing that professionals in the arts, sports, fashion, and entertainment industries have been closely watching, it is undoubtedly NFTs. From NBA Top Shot digital collectibles to auction houses selling multi-million-dollar blockchain-based artworks, non-fungible tokens have taken the world by storm as an innovative way to monetize content and foster fan engagement. What are NFTs, why use them, and what are the legal and ethical issues that attorneys should consider when advising creative clients interested in pursuing this new venture?

Co-Chairs:

Louise Carron, Judith Prowda, and Carol J. Steinberg

Speakers:

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Loeb & Loeb LLP
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Simone Smith: Good afternoon, everybody. Welcome to the Entertainment, Arts and Sports Law Section virtual Annual Meeting, day one. This afternoon, CLE will go from 01:15 PM to 04:30 PM and is sponsored by the EASL Section and the Committee on Continuing Legal Education of the New York State Bar Association.

At the conclusion of today's program, make sure you go back to your My Learning Dashboard and enter in the codes to receive your certificate. We would also like to ask attendees to please fill out the evaluations that are in your Dashboard as your feedback helps us develop future programs. I would now like to give over the webinar to today's moderator, Louise Carron, who's with Klaris Law PLLC in New York City. Take it away.

Louise Carron: Thank you so much, Simone. Good morning, good afternoon, good evening to all. Thank you for joining us in this digital space.

My name is Louise Carron and on behalf of the EASL Section, I'm pleased to welcome you to this wonderful

panel about non-fungible tokens in the art, fashion, music, sports, and entertainment industries. Thank you to our panelists, Jeremy Goldman, Melanie Howard, Caroline Moustakis, Eben Novy-Williams, and Bill Rosenblatt, for gracefully accepting to join this conversation. Thank you also to my co-moderator, Fanny, and to the planning committee and the NYSBA coordinators for helping make this stellar panel a reality.

Biographies for each panelist, as well as suggested reading materials in connection with today's topics, are in the materials. To get us started, Bill Rosenblatt and Jeremy Goldman will give us an overview of NFTs, after which, each panelist which highlight some of the ways that NFTs have been affecting their respective industries, followed by discussion. We do have a lot of ground to cover, and we probably will not be able to cover everything.

Bill and Jeremy, if you wouldn't mind getting us started, tell us, what are NFTs?

Bill Rosenblatt: Well, I guess I'll start. All right, great.

Good afternoon, everyone, and thank you for that introduction. Thank you for inviting me to this really interesting event. As Louise mentioned, I'm Bill Rosenblatt, I run a consultancy called GiantSteps Media Technology Strategies in New York City and I'm not a lawyer, but sometimes I play one on TV. I often serve as an expert witness in litigations that have to do with copyright and digital media technologies, copyright litigations, patent litigations, things of that nature. I do public policy work in the digital copyright arena in various ways.

What I'd like to do is give you a little presentation and I think Jeremy is going to sort of kibitz as we go along here.

I'm going to do some intro material about NFTs in general. I'm also going to focus on music, because that's my area. Another thing I should mention is that I'm adjunct faculty in the Music Business Program at NYU. I teach some of this stuff as well.

The first thing to get out of the way is a little bit of terminology, this might be review for some people, but maybe it's not. Just so that we're all on the same page, we need to know about a couple things. First of all, blockchains, what's a blockchain? Well, you've heard all kinds of things about blockchains, but the simplest way to explain what a blockchain is, is it's a database of transactions or some people use the word ledger, a ledger of transactions. It's a database that's everywhere, meaning in possession of everyone involved in whatever system it is, but it's not owned by anyone.

Here's a little diagram that shows how blockchains look conceptually. Every participant in whatever system it is will have a complete current copy of the entire database at all times. The database has certain properties that transactions can only be added to it, cannot be changed or deleted, and that makes it possible to update everyone's copy without having to synchronize all kinds of changes. There are all sorts, depending on why the blockchain is being used. There are all sorts of rules and protocols to ensure the validity of transactions added to it. If you're trying to add a transaction to a blockchain, there are certain things that happen to make sure that you are doing so in a valid way. Again, what valid means depends on the application, whether it's cryptocurrency or something regarding NFTs, which we're going to discuss this afternoon.

Blockchains also are highly secure, they're unalterable and they're persistent, meaning they keep on going, they last forever. Those are the main properties of blockchains that make them desirable for certain applications. Here on the screen, you can see there's a little diagram where there are a bunch of different blocks, with Block N, which points to Block N-1, Block N-two, et cetera. The numbers under validation are meant to represent whatever process or algorithm you have to go through to validate a transaction. This is the validation number, so to speak, for that block. Then there are a number of transactions in each block. That, again, depends on the application.

The other piece of terminology that we should know is smart contract. What's a smart contract? It's simply a bunch of code that will run on everyone's copy of a blockchain, whenever a new transaction is added. Often what that does is, it implements some business rules about what you do when the transaction is added. Common examples that we like to point to are things like royalty payments, commissions on sales. Let's say, in the music world, a common example would be, there's a blockchain of plays of music on Spotify or on some other streaming service. If I play a song on Spotify, then there might be a smart contract that kicks off royalty payments to all the rights holders, the record label, or the musical artist, or the song writer, and there are various other examples.

Jeremy Goldman: I promised to kibitz, let me kibitz for one second.

Bill Rosenblatt: Sure.

Jeremy Goldman: Just to say this. One, just to make clear, there's multiple blockchains. The biggest blockchain in the first blockchain was Bitcoin. Bitcoin, they were pretty limited in what it can do. It's mainly just a fungible token, which means a piece of currency. The main purpose of that blockchain is just to record ownership of a token from one person to the next. The second largest one, and where a lot of the activity is going on, including much of the activity that we're going to talk about today, is on another blockchain that launched later.

Blockchain launched around 2008, and 2015 brought around the Ethereum blockchain. And a lot of what we're going to be talking about today is the Ethereum blockchain network. The Ethereum blockchain network has a lot more capabilities. It's almost an operating system, think Windows or IOS, and it's that operating system that facilitated

and popularized the use of smart contracts and all these different applications that we're going to be talking about. Not just the transfer of money, but also NFTs, which we're going to talk about. It's the interactions with those smart contracts that facilitate the transactions. But I just wanted to make that clear—Bitcoin and Ethereum are the two biggest players. There are other ones, there's Solana, there's Cardano, there's Binance, there are tons of other ones, but those are the biggest ones. I thought that's helpful context for terminology.

Bill Rosenblatt: Yes, absolutely right. The main thing to recognize is that . . . Extending the analogy of blockchain as a database, just like there are many databases in the world, there can be many blockchains. This is an imperfect analogy, Oracle is a very popular database product, Bitcoin is a widely used blockchain, Ethereum is a widely used blockchain. There's one asset application for blockchains that I'd call ownership records. The idea is that you can store records of purchase and resale of assets, any asset on a blockchain. For example, in the visual art world, which we're going to hear about this afternoon and admittedly not particularly my area of expertise, you could have a record of ownership, provenance of physical works of arts, such as painting, sculptures and whatnot.

You could do that on a blockchain. That may be a reliable and trusted way to establish ownership records in an area where the truth of a provenance record is very essential to auctions and pricing and things of that nature. Authenticity of the artwork and so forth. The idea here is basically that you've got a database, a blockchain, which tracks ownership transactions and records them. Whenever somebody buys an asset it's recorded on a blockchain, and when someone resells that asset or lends it or gives it away, the new ownership or new possession of that asset is recorded on the blockchain. One of the nice things about using a blockchain for something like this is that the blockchain can be independent of any retailer or seller.

Sotheby's may have their own sales record system to indicate who bought what, but they could also deposit records on an owner-less blockchain, which is independent of the auction house or the retailer. May it be an art gallery, auction house, whatever. That leads us to this thing called an NFT or a non-fungible token. Jeremy mentioned fungible tokens, which are things like cryptocurrency. A non-fungible token is one where there's no fungible value associated with it. An NFT is really just an indication of "ownership" of something that is stored on a blockchain. I put ownership in quotes on purpose, and I'll get to that momentarily. The purchase transactions of an NFT are recorded on a blockchain.

You can create an NFT or do what's called minting an NFT on a single item, but you can mint multiple NFTs for a single item. You could sell 200 NFTs on a single item. The NFT, the record of it will go into the purchaser's wallet, which is a retailer independent storage thing that sits in your browser or an app or something like that, that shows what NFTs you've purchased. Then you can resell NFTs. There are often smart contracts that will implement rules, such as paying a resale royalty to the creator of the NFT or a sales commission to the platform on which that NFT was created or what have you. Unlike in the physical art world, it's possible to have a resale royalty on an NFT, whereas in the physical art world, that's generally not, at least in the United States, that's generally not done.

What do you get with an NFT? Well, what you really get is "ownership," bragging rights. Again, ownership in quotes, because I'm going to talk about that in a minute. You get a publicly accessible transaction record that you can point to that says, I bought this and then you can resell it, maybe at a profit you can resell an NFT. That's what you get, what do you not get? Jeremy's going to jump in. Please, Jeremy.

Jeremy Goldman: I'm going to jump in because you do get more than that, depending on the type of NFT. I imagine you're putting a quote cause we're going to talk about intellectual property to this largely intellectual property-focused law group. The industry is moving extremely fast. One of the key things that you get when you get an NFT, NFTs are also used as a credential. In addition to just being a token of artwork or whatever, NFTs are also used to verify your access to a community and that's not always the case, but for many projects, an NFT and that token can represent your ability to access certain privileges and groups and discussions. It also can represent governance, meaning your ability to vote and be involved in community decisions of the community of NFT holders.

That's something that I just wanted to note. Maybe later we'll talk about that and it's not just the future, it's going on now with some of these projects where, having this NFT acts like a password and you are key to get into other benefits and privileges, along with often a goody bag of other things that come along with an NFT. There is a lot of utility to NFTs beyond what necessarily is just right there.

Bill Rosenblatt: Yeah. I mean, here we get into definitions of what do you call an NFT and what do you not call an NFT? What do you not get? Jeremy's right in that I'm focusing on the intellectual property, copyright aspect of this. You don't actually own an asset because you bought an NFT for it. You own the NFT, not the asset. If it's a digital asset, there are exceptions to this, but in the typical case, you don't get any exclusive access to the asset. You just get this notion that you are the owner of the NFT that points to the asset. You also don't get right now, and again in most cases, a guarantee that the asset was the seller's property to sell to you.

That's an another interesting thing then that happens. Then what you often don't get is all the revenue if you resell the NFT. There may be a commission or a resale royalty payable, depending on the arrangement. Those are things that you don't get, in most cases. When people ask me to say what is an NFT, this is an analogy that I like to

use. Here we have an exhibit in the Philadelphia Museum of Art. Philadelphia is my hometown, that's where I grew up. Everyone from Philadelphia knows that at the top of City Hall, which for a long time, was the tallest building in Philadelphia, there's a statue of William Penn that was created by an artist named Alexander Calder. Alexander Calder created a bunch of smaller models of that statue, one of which sits in the Philadelphia Art Museum.

There's a picture of it. What's there on the wall is the interesting part, that is a plaque that says something like: Model for the statue of William Penn, 1886, et cetera. On loan from Mr. and Mrs. Set Charles Momjian. Set Momjian[1] happens to be a friend of a friend of mine. What does that mean? It means that Set Momjian is the owner of that statue. He is bragging about his ownership of this statue via that plaque in the museum. You, as the museum-goer, have certain things that you can do with this work of art. You can view it in a museum. You can look at it, there's probably a picture on the museum website. I haven't checked, but there probably is. You can take a picture of it with your phone and you'll have that picture on your phone. You can send that picture, do whatever you want. You can probably go into the gift shop and buy a poster or a poster of the statue in the Philadelphia Art Museum gift shop, but only Set Momjian actually owns that statue. An NFT is an indicium of ownership, it is not the statue itself.

There are many, many, many NFT marketplaces. Places where NFTs get sold and resold and minted and so on. Everyone who follows this field has their way of categorizing this rapidly evolving marketplace. But one way of looking at it, is to say there's some very big ones that are general purpose in what you can mint as an NFT on that marketplace. OpenSea is a huge one, Gifty, Gateway, Rarible. Those are all big general NFT marketplaces, although a lot of what you see there is visual artworks of one sort or another. Then there are specialized NFT marketplaces on the right side of this slide. NBA Top Shot is for NBA basketball videos and their various other ones. In the music field, there is a research firm called Water & Music, and they counted more than 50 NFT platforms just focused on music.

Now as promised, I'm going to talk about intellectual property or copyright aspects of NFTs, talk about NFTs and ownership. Here's some objects that you can own. You can own a Shakespeare book, you can own a watch. You can own, this is a Taylor Swift album, *Folklore*, the album, by Taylor Swift. This is a car. What are these? This is a cheap paperback copy of Shakespeare's complete works, which are in the public domain, $6.50 on Amazon. Down here, there's a Taylor Swift CD, which sells for $14. Over here . . . You can see the cursor/the arrow, right? Yes, okay. Here's a cheap watch or low-priced watch, a Swatch for $55. Then down here is a Honda Civic for $20,000 and change, a modestly priced car. Those are just everyday objects that you use for certain purposes.

There's this notion that the scarcer an object is the more valuable it is, this is a notion of the physical world. Here we have, it's not a cheap paperback edition of Shakespeare, it's a first folio. It's not a Taylor Swift CD, it's one that she had signed. It's not just any watch, it is a Patek Philippe, extremely limited-edition gold multifunction or multi-complication watch. Then this is a Mercedes Gullwing car, of the type that you'd expect to see in a James Bond movie. These are extremely limited in quantity and they have sold for eye-poppingly high prices, depending on your definition of eye-popping. As you can see there, I think the Taylor Swift CD thing, that was a campaign of . . . says there 300 CDs that she actually signed and then made available through certain retailers.

Now we also in the digital age have this notion that I call anti-ownership. If you want a book, you can go to library and borrow a book. If you want to listen to music, you can subscribe to Spotify and get all the music you care to listen to for $10 a month. If you want to tell what time it is, you can look at your phone or any other number of other places. If you want to drive somewhere and not own a car, you can use Uber. NFTs are a way to try to recapture this notion of scarcity and ownership in the digital age, where there are a lot of ways to do things that don't involve owning something. Or a lot of ways to enjoy art or music or content, other forms of content that don't involve owning something.

Now, we're going to turn to music now, and we're going to turn more to legal issues, as well as tech issues. There have been various developments in the music market that you could file under "ownership," meaning as assignment of ownership properties to digital files, which are inherently not owned, they are licensed. Then there is movement away from ownership towards sets of properties that don't resemble ownership. Everyone probably remembers in the mid-90s, we had MP3 file sharing. The idea of that was you can make as many copies as you want and send them around the internet, it's all free and nobody can track any of this stuff, even though it may be copyright infringement. Then in the early to mid- 2000s, Steve Jobs came along and created iTunes. He created this system that used digital rights management to limit what you could do with a file so that it only plays on your devices, your Mac or your PC or your iPhone or iPod, I should say.

Then in 2007, something came along called BitTorrent, which was a way to distribute content automatically. You have your MP3 file, or you have your video and you don't even have to send it to someone. It automatically gets copied to various places around the network, without anyone even having to take any action. Then in 2009, there was this court decision in the Ninth Circuit called *Vernor v. Autodesk,*[2] which essentially, and obviously it would be another entire talk about what this court decision said. But I think it's very important, because basically what the appeals court said was that if you have a license agreement on some content that restricts the licensee's usage beyond

what copyright says, the licensee can do, those terms are enforceable. I refer to this as verbal digital rights management (DRM). These are contract terms that tell you what you can't do, that you would be able to do if it were, let's say a book or, or a photograph record.

This court case, which involved software, said that if you have these licensed terms that are more restrictive, then those licensed terms are enforceable. The same year iTunes got rid of DRM, went DRM free and you purchased your files on iTunes, you could then make copies of them for your million best friends. Now fast forward to 2011, Vinyl starts to come back. People start to kind of rediscover the value or joy of owning a physical thing that has certain properties, like it plays music and you can look at the artwork and the cover art and the lyrics and everything like that. Then around the same time streaming starts to take off. And the music market starts to bifurcate into this one area where you own something, such as LPs on vinyl and this other area where you don't, you listen to music for free on Spotify or YouTube, or you pay a subscription fee to listen to your choice of music from an enormous catalog.

Then shortly after that bifurcation happens, the middle ground of you download one file at a time started to decline rapidly. Now, in fact, downloads—like iTunes style downloads—are very small part of the market. They've fallen off very rapidly. Then in 2017, you had another important court case in the second circuit *Capitol Records v. ReDigi*,[3] which was about this startup called ReDigi, which purported to have a digital music resale. You could buy your music from iTunes and then resell it through this platform called ReDigi. The Second Circuit upheld the lower court that said, "No, you can't, that's a violation of copyright law for various reasons." This established that, yes you can resell your iPod. You can resell your hard drive. You can resell your laptop with a hard drive, but you can't resell a pile of bits that are just a pile of bits that happen to denote a song, in this case.

Another thing that happened at the same time was something called CryptoKitties, which were these entities that only existed in the online world. These animated entities were bought through something that we now recognize as a progenitor of NFTs. These are things that people bought with real money that only existed online and they became pretty popular. NFTs really started to take off in the content world in 2020, I would say. There are some interesting observations to be drawn from when you look at music, because I'm talking about music here, what do you get with vinyl? What are the properties of downloads with DRM on a site like iTunes? What are the properties of downloads without DRM? What are the properties of NFTs that involve audio?

Let's try to focus on the more interesting parts of this. Let's look at this second row here, copies of music. If you have a piece of vinyl, then you could make a copy of what's on the vinyl, but it's not that easy. If you have an old DRM iTunes file, you can make a copy, but no one else will be able to use it. If you have a DRM free file, you can make a copy, but you may not because it goes against the terms of the license agreement that you've agreed to, in the terms and conditions.

In the world of audio NFTs, it is both easy and unrestricted and allowed. People are allowed to make copies of these things, in most cases. That's an interesting thing. You've got this situation where you can and may easily make copies, resale and loan is supported under NFTs, as we've been saying. It hasn't been allowed for digital files or it hasn't been possible if you have DRM. If you're dealing with physical objects, then of course resale is unrestricted. There's a piece of copyright law called § 109 that says when you buy a physical copyrighted work, it's yours do with as you please, including resell it.

Then we get into this last row, which says, what benefits does the maker get from sales and resales? As I've been mentioning, NFTs can be resold and the maker can benefit from a resale royalty type arrangement.

Fanny Lakoubay: Ben, I'm sorry. Just wanted to interrupt you for one second. I think there's a lot already for people to digest. I just wanted to make sure we have time for the other panelists to introduce some of the use cases that they have in their industries. Just wanted to give you time to conclude on the intro.

Bill Rosenblatt: I'm actually pretty much done. This slide, which you can look at later, is just a snapshot of recently minted NFTs in the music area. These are all music artists, but the NFTs are all different sorts of things. Some of them are audio only, some of them are audio and video. Some of them are physical objects, and so on. Here are just some statistics and I'm going to skip over these to look at this slide, which the Water & Music firm put together several months ago, this is what the NFT music market did in 2020 and 2021. What you'll see here is that there's this enormous peak around March 2021 and then it went down again. You also noticed that where it went down to was still almost double from where it started before the peak began. There's something still happening and it's a very vibrant marketplace.

Are NFTs a passing fad? Absolutely not. As Jeremy is saying, they're going into areas that are far beyond this notion of content intellectual property. My view is that this is a repeat of what we saw with the Web in 1999. It's a huge ferment of activity that's bringing a lot of investment and money, talent, ideas, work, and so on. Something interesting and huge is going to come out of this. There are investors who may lose, but then there're also investors who will win big. There's abuse, but guardrails will come. This is a very exciting area where we're only just getting started. So with that, I will stop.

Fanny Lakoubay: Thank you so much, Bill. This was a great introduction and I'm so glad you only used one

analogy because there are a million analogies out there for NFTs. Yours was one of the firsts that I found not to be very confusing, but as you very nicely pointed out, I think we've all heard of NFTs in 2021 in our specific industries and sometimes in similar ways and sometimes in very different ways. I think this is really the strength of the panelists today, is that we really do have a broad, different point of views and different industries. It really allows us, for one, to actually talk about what's similar and what is not at all similar between these industries. I think something you mentioned as well, Bill, is something that there's also not just industry-specific applications for NFTs, but also different applications when we're talking about physical objects and the use of NFTs for these objects, versus entirely digitally-native works. And we'll see that this brings even more complexity. But what I would like to do before we open the roundtable is to give the other panelists . . . I would hope if you can keep it to five minutes per panelists, to detail a little bit what you are currently doing related to NFTs, and what are the applications or examples of projects that you have seen in your own industry. Caroline, do you want to give us a little bit of background about you and how you've seen NFTs disrupt the arts industry in the past year?

Caroline Moustakis: Sure. Thank you, Fanny. Hello everybody. I'm Caroline Moustakis. I'm Senior Vice President and Associate General Counsel at Sotheby's in the legal department in New York. I've been with Sotheby's for a few years now, and prior to joining Sotheby's, I was with Christie's legal department for eight years, and then was a litigator in my life before joining the art auction world. So a bit about NFTs shaping the auction and art industry . . . I think, and I'm one who, in full disclosure, did not know what an NFT was at this time last year, so it's been a busy year for me with a lot of learning, which has been fantastic and a lot of fun, and I think I'm not alone in that. But we truly saw the NFT market explode in 2021 within the art world, and I think everybody remembers the sale of Beeple's *Everydays* in March at Christie's for $69 million. When I think of 2021 in the art world for NFTs, I kind of think of that at one end, and then another book end at the end of the year in December. There was a drop by the artist Pak on Nifty Gateway that I'll talk a little bit more about in some detail that totaled almost $92 million.

And then in between those, I saw figures for total NFT sales for the year of something on the order of $10 billion globally. Not all of that, of course, in the area of art or fine arts certainly, and we at Sotheby's as well as elsewhere, we've really seen NFTs covering all categories as everybody . . . and Bill sort of alluded to this, there's so many ideas and innovations out there now, and everybody trying to get into the market in some way, so we're seeing NFTs covering all categories, from digital art to popular culture, to collectibles, luxury goods, sports memorabilia, to name a few, and as NFTs have increasingly made their way into the mainstream art world, we're also seeing the largest influx of new buyers over any other category. So that has been an interesting development that we've been watching.

And I think, when I think of NFTs in the art world, where I think the greatest impact that NFTs have been truly transformative for digital artists, and particularly, is generative art. Generative art is a form of digital art that is generated randomly, so, whether it's by using an autonomous machine or an algorithm to create images, sound, video based on randomized elements. Whether it's a video that has some features that change or a series of individual works where each one is slightly different from the other, for digital artists and generative artists, although it's been an art form that has existed for decades, those artists struggled with a very real problem of the being unable to monetize their creative works because there was no individual unique object that they could sell in the way one would sell a painting, for instance. With the advent of NFTs, that really solved that.

So, it allows you to identify an original of easily duplicated digital works, and thereby makes it possible to assign value essentially to the ownership of really anything digital or digitized. And that opens the door to a sea of possibilities from great ideas to maybe not so great, but so much exploration and innovation. We've been seeing a lot of interesting and novel applications in the generative art world with NFTs through the use of features and options that artists never really had before. So, for instance, a piece can alter its appearance each time its bought or sold on blockchain or through a cryptocurrency interaction. The artist Rhea Myers, for instance, creates graphical works on Ethereum that users can alter by burning associated erc-20 tokens. Another artist who Sotheby's has worked with, as many of you may know, is the artist, Pak, and Pak has created NFTs that will change over time, for instance.

And then I mentioned at the beginning, that I think it was the most recent Pak drop in December, which was a drop on Nifty Gateway, where through the use of a new technology, the tokens could actually merge together in a collector's digital wallet. So I'll just elaborate on that one a little bit more, because it was really quite interesting. In that sale, it was an open edition that took place over the course of two days, and through the course of those two days, 28,000 unique buyers bought over 260,000 NFTs of the same image, same reference content, the metadata for that NFT of the Pak artwork, and the total sales amounted to almost $92 million.

And then the interesting twist for those NFTs was that once the sale closed and the feature was enabled through further sales and trading between the owners of those NFTs, they could be combined or actually merged into a single NFT or mass owned by a single buyer. So in theory, someday one owner could own all 266,000 NFTs. It would no longer be 266,000 NFTs. It would be just one merged NFT with the value of those 266. So with that drop, that made Pak the most expensive living artist over Jeff Koons and topped the Beeple sale in the spring.

A couple of other NFT features just that I'll mention . . . Bill alluded to some of these in his intro, but just in terms of things that are important in the art world, that NFTs enable a public, transparent, and irrefutable provenance for on-chain sales of NFTs. They also have unlimited storage capacity, so from a creator's perspective, a creator can associate either a single artwork with an NFT or really an entire library of multimedia data. It offers creators the ability to sell directly to fans or collectors, reducing or eliminating the role of intermediaries, such as music labels, galleries, publishers . . . also some of what Bill was talking about. And it also then makes it much easier for a creator to receive a resale royalty on subsequent sales. So, I think in so many ways it's been a big year for the art world with NFTs, but it's just a sea change of new opportunities and innovations, markets for creators as well as auction houses and other players within the art industry.

Fanny Lakoubay: Thank you so much, Caroline, for covering so much ground in so few minutes. So thank you. I think this is actually a good segue. You were talking about creators . . . to go to Melanie, Melanie Howard was more specialized in fashion and can definitely tell us more about herself and how NFT have affected the fashion industry. Hi, Melanie.

Melanie Howard: Hi. Great. Thank you. It's nice to be with all of you today. Fashion was an early adopter of the NFT craze and I think it was easier because fashion companies had already had an entree through video games, and video games, while not the same as NFTs, at least present an opportunity to engage with the digital space. Now, of course, moving into the metaverse, which I'm sure we'll discuss at some point during this panel, and we've seen a lot of adoption, a lot of collaboration across many of the luxury houses, Burberry, Marc Jacobs, Valentino, Balenciaga, Gucci, they've all made collaborations with the Sims, Roblox, Fortnite . . . all of the major gaming platforms, there have been some type of fashion piece, whether it's a skin that your avatar could wear or something more complex.

In game branding, other tie ins to in-real life experiences that you could get if you purchased that video game in-game item of fashion. And so I think that really set the stage last year when NFTs really broke into the wider consciousness for fashion to expand. And we've really seen a lot of expansion in many different ways, lots of different reasons and rationale for fashion companies to decide that they want to launch an NFT or otherwise create something in the virtual space. Brand awareness, such as campaigns around Pride and other of those types of initiatives in the virtual space, engagement with their consumer base or try-

ing to expand to a new consumer base, allowing fans to own a moment, so to speak, which really came to the foreground in the sports space.

And I know one of my co-panelists is going to probably delve deep into that area. Collaborations between in-real life brands and digital brands. We've seen a lot of brands crop up that are only in the virtual space and they're designing solely virtual or digital attire. So not only a physical garment that is replicated in the digital world, but just designing exclusively for the digital space, and sometimes then collaborating in interesting ways so that you could participate in various drops and then collectively combine those NFTs to receive an in-real life garment. Or we've seen, like with Adidas and Karlie Kloss, Adidas, the physical brand, then going crossing over and partnering with someone that really had made their name in the virtual world to have a collaboration in the virtual space. Also, we've seen a lot of efforts, that customer retention, especially in the luxury space, of course. Authenticity has been a real problem and the resale market has presented various challenges.

And I think those remain open questions that will be really interesting to see how those are tackled with the different technological solutions that the blockchain offers. But I think dipping the toe in the water to see whether there's a way that authenticity can kind of be locked down for the digital product and the in-real life product, supply chain-wise, using NFTS and other digital technologies. An interesting expansion of the royalty stream and what it really means to have a royalty stream in fashion, I don't know whether any of my co-panelists are going to discuss licensing. I think that that question might have been on my deck, but really, some creativity can be allotted in the smart contract now to have a future royalty, not just from a first sale. So those of you who are familiar with trademark law know that for brands, once you have a first sale of your product, it's really kind of hands off what they can do with it later.

And, of course, there are a lot of good arguments you can make that you don't want to destroy the trademark or have a false association on subsequent sales, but with the NFTs and the digital goods, you really can build in a continuing royalty with the resale of the NFT. And that I think expands a lot of additional royalty and commercialization opportunity for fashion brands in this space. So, if we look at some of the more recent drops, we've seen everything from Gucci that recently partnered with Superplastic to do 10 unique NFTs that came along with these physical ceramic sculptures, trying to move apart from just a digital garment. The GAP came out last week with some digital limited edition NFTs using the Tezos blockchain on their own platform that they created in collaboration with a partner.

And those actually create the experience of, you get all six of the first drop, then you have to collect the second drop, which is a partnership with Brandon Sines, a well-known artist. And then you can unlock a third tier and they're only available for a limited time, so kind of the sneaker drop bottle of "we're only here for 24 hours. You have to come to our platform to do it. You have to collect these, and be loyal, and connect something down the line." So developing that consumer loyalty, I think, has been important. We've also seen a lot of new brands come up, digital brands only that many of us haven't been familiar with previously. Artifact is one, the Fabricant, a lot of innovation directed really to your digital existence. And this is really moving us now toward the metaverse.

So not having just something that you collect, and then you get the in real life garment or not just something . . . I have this Gucci bag, and now I also buy it in Roblox, which by the way, the Roblox version sold for more than the value of the physical bag. So, that gives you an indication of the demand, but really this is now I'm solely purchasing for my digital existence. And that really, I think, is where we are having the tipping point now, going into the metaverse. And the value proposition there is really quite high. Luxury, of course, has been plagued by issues of sustainability for a long time, and consumers have demanded a focus on ESG[4]. Whether or not NFTs are more sustainable or not I think is debatable. You have to really have an understanding of what it takes to mine an NFT on the blockchain.

So, that, I think, will be an interesting conversation, but at least it's a different kind of sustainable solution. And then also just what is a value to today's consumer? Who is the target consumer and what do they value? And I think there's a lot to be said that people really do value, in many cases, the digital item, more than they value the physical item. And so, if you want to market to Millennials and Gen Z, and up and comers who really spend so much time in the digital space, then you need to make something that's valuable for them in that space.

Fanny Lakoubay: This is great. You introduced a lot of concepts that we'll definitely cover, including the metaverse. This is the big keyword that we have to cover. Through what Bill, Caroline, and you have mentioned, I think something that I want to point out to people listening and might be hearing of all these projects for the first time, this is overwhelming. Really, everybody is overwhelmed. I mean, even when you spend your days and nights, like most of us do on this subject, it is quite complex to understand. Caroline, you mentioned Pak's projects; it takes days to actually understand what he's trying to get to, and it's exhausting to follow all the projects, but also shows that it revives some creativity. And that's why so many creative industries are so interested in it is, like, the sky is the limit, literally. So, with many problems coming at the same time, but it is quite an exciting time and a scary time as well. I would love to hear from Eben, you are covering more of the sports industry, so bring it on. What's happening in the sports industry? Oh, you're muted. Don't think you're connected to sound actually.

Louise Carron: Well then, maybe Jeremy, would you mind us giving us a bit of a primer on the entertainment industry on NFTs?

Jeremy Goldman: Sure. Yeah. So, entertainment, all these things are matters of definition. Entertainment could probably cover all of the different topics, which I'm going to try to be a little specific to motion pictures and television, because I know other folks are covering fashion, video games, music, sports, which all are sort of in the entertainment world. So very brief introduction, because I think it helps explain where I'm coming from. I'm a lifelong technologist. I've also been litigating and counseling clients on issues at the intersection of intellectual property and technology for the last 15 years or so. I'm a partner at Frankfurt Kurnit Klein & Selz, which is sort of a premier law firm with a very big entertainment group, and by entertainment, I mean we represent a lot of the filmmakers.

We represent filmmakers, writers, producers, everyone but the studios. And we also have a large advertising group and litigation group. And in our advertising group, we're representing a lot of brands and advertising agencies, and everyone has gotten into blockchain and NFTs in the last year. And like you said, it's been drinking from the fire hose, is the analogy that a lot of people use, going down the rabbit hole, but it's just a continuous stream of information and it's been a wild ride. I would say, largely speaking, what's going on at a high level is we have folks that are sort of traditional IP owners, and like I mentioned, we have people that have existing IP, existing artists, people that have been operating in the real world without crypto, without NFTs, without Web3 or blockchain.

And those are all loosely the same term. There's nuanced. They're not exactly the same. So there's all those folks that have taken notice and are trying to figure out how to take existing and new intellectual property and to bring it into blockchain, and how to actualize and exploit that new market. So, you might imagine somebody who owns rights in a film library, somebody who owns rights in a TV show, and they're trying to figure out what's the best play here? Do I take the characters? Do I chop them up and make them into NFTs and sell them and then do what with it and create what kind of community with it? We have publishers that are trying to figure out how do we do this? Is this just a marketing play, another form of marketing and advertising for our clients that want to now do something, or is it a commercial play?

We just talked about fashion, but then representing some of those exact fashion brands that are trying to figure out, are we just using NFTs and blockchain as a vehicle to sell more of our physical goods, or do we a real commercial play here? And again, I've been involved in some of the big transactions there and advising companies. So, just to give an example, Nike, which is a client, just announced its acquisition of Artifact, which does digital sneakers. Again, I'm not going to talk too much about fashion. I'm just giving that as an example of traditional companies figuring out their way into blockchain, and that's absolutely happening in the entertainment space. The more exciting or equally exciting are advising more crypto native, Web3 native folks that are trying to figure out how to come into the real world, to the existing world.

And in the entertainment world, you see this with projects like the Bored Ape Yacht Club, projects like CryptoPunks, projects like a real fine art, beautiful project called Aku, where characters and generative art projects have created tremendous communities. And where the assets are sometimes very valuable and trading very high, and those communities . . . and by communities, I can kind of separate into three levels. Again, now we're going down the entertainment rabbit hole a little bit. You have what I call the mothership, which is the folks that minted the NFT. So, let's take a project like the Bored Ape Yacht Club, which is probably the second most valuable NFT generative art project next to CryptoPunks. Board Ape Yacht Club does something very innovative where they say, instead of mothership, which issued 10,000 NFTs, each an individual ape, instead of us holding onto all the IP rights, we're going to grant exclusive commercial rights to the individual owners of the NFTS.

So you've got the mothership issuing it and having the trademark rights. Then down below you have 10,000 or not, as some people have multiple apes, let's say 5,000 to 10,000 people that own individual apes with the intellectual property rights to commercially exploit those apes. And then you have in the middle, a very active community. And I was alluding to this when I talked to Bill before. I think that's the key to this and what I really want to emphasize, because I don't want people walking away thinking that NFTs are just collectibles and, I agree, Bill, there's a lot of bragging rights, but it's not just about having the thing. In between that is a very active community of ape holders and what we've been doing, and some of the work that I've been doing, that's the most exciting in the entertainment space is trying to take that bundle of sticks that we call copyright and figuring out how to divide that bundle of sticks between the mothership, between the individual holders, and between the community that is gathering around this.

And how do you divide that intellectual property to activate and to maximize the value of the intellectual property for everyone involved? And so, you have to look at it from the perspective of what's the exit strategy. If you're trying to take Bored Apes and turn it into a video game, to turn it into a movie, into a television series, and you don't want to lose the magic, then which are the individual holders, making these things extremely popular, and you don't want to lose the magic of the community, but balancing that with the Netflix, Warner Brothers and, Paramounts of the world that have traditionally demanded and commanded and required absolute exclusivity. The idea has been that when you're going to take a property and you're going to make a Bored Ape Yacht Club movie, you want to

be the only program in town that has those rights and figuring out how to chop up that bundle of sticks and divide it out and how to activate those communities, to me is one of the most fascinating pieces.

I'll leave with one more thing. To me the promise of Web3, in addition to what I've just said, is taking the concept of consumerism and really evolving it. Thus far, if I want to own, I can buy Apple products or I can buy Apple stock. They're two different things. I have all these products, but by buying them, I'm not owning any part of Apple. I have to go and buy Apple stock separately. What Web3 and tokens . . . and I think NFPs are sort of an early glimpse into what that could look like, you're really combining those two concepts whereby owning a token, you have the product and you have ownership in the company. And I see that happening first with NFTs and next with content, all the content that we're talking about: fashion music, art, entertainment, because its IP is where it's at, and that's why I'm so passionate about this. So it's been a really wild ride and that's my little elevator pitch.

Fanny Lakoubay: Thank you, Jeremy. You're all laying out very important concepts for the conversation to come. So thanks for mentioning the different thing. I want to go to Eben back to see if audio works.

Eben Novy-Williams: Sorry about that. My name is Eben Novy-Williams. I'm not a lawyer. I'm a journalist, but I've been covering the sports business world for over a decade, first at Bloomberg and now at a sports media startup called Sportico. And before I joined, I actually went back and looked to see when the first story we published that had the word NFT in it. And it was in January of 2021, so about 12 months ago. Since then, I think we've written multiple dozens of stories. So, no question this is a topic that is very prominent in the sports world. I would say that from a professional league and team standpoint, the sports world kind of stumbled into NFTs. The NBA had a very viral product early last year, NBA Top Shot, which, which Bill alluded to. For folks who are not familiar with it, it is essentially very short video clips of NBA action that are minted in a way so that there are versions that are one of 10, and they're very valuable, and there's versions that are one of 100 that are slightly less valuable, and one of 1,000, on and on.

And that product went viral. At one point, they were selling tens of millions of dollars' worth of Top Shot moments every month. It's trailed off a little bit since then, but from people I've talked to in the NBA and around other leagues, it caught everybody by surprise. They knew that they were kind of testing the waters, trying something new. They had no idea that it was going to take off in the way that it did. And because the sports world at its top ranks is a copycat industry of some sort, everybody, the NFL, Major League Baseball, NHL, everybody kind of took note and thought, oh, what can we do, I think, to kind of mimic that success? The sports world is not a particularly tech savvy corner of the entertainment world.

I think that surprises a lot of fans, but the honest truth is that I think in a lot of the industries that my fellow panelists are talking from, you're going to see a lot of innovation that happens way before you see it in the sports world. These are legacy businesses. They're very protective of their IP. In most cases, they're owned by older and predominantly male owners who are not in the digitally savvy and Web 3.0 universe in any capacity. And as a result, I think the sports world is just going to be a little bit slower to adapt a lot of the things that we're talking about. I think Top Shot was really popular for two reasons, kind of two separate trends, one being a lot of people looking for an alternative asset class during the pandemic and two, this kind of broader explosion we saw of traditional sports collectibles, things like trading cards, things like autographed footballs, signatures, all those things.

They became a lot more popular, a lot more expensive during the pandemic. And at least the early version of sports NFTs, particularly Top Shot, I think kind of displayed a digital version or maybe an next generation version of that same trend. Jeremy, I caught the tail end of what you were saying about how you don't want NFTs and the industry shouldn't think of NFTs purely as just a digital collectible kind of thing. That is firmly where the sports world is right now, especially at the professional ranks. And I think it's going to take a little while for them to get beyond that, but if you are an NBA owner, if you're an NFL owner, right now, a lot of these teams, a lot of these leagues, a lot of these athletes are thinking about NFTs purely from a fan engagement standpoint and purely from a digital collectible standpoint.

And I think that'll change over time. And the last thing I'll say, and then we can move on, in my opinion, NFTs have become kind of like a Trojan horse for sports teams to sell things that they could have been selling for the past 10 or 15 years, but never really had the creative juices flowing to get to that point. And the example I'll give, back in July of last year, the Los Angeles Dodgers sold an NFT of a replica of the World Series ring that they had won in the prior World Series, and the NFT was essentially a very cool little video that you could rotate around the ring. In connection with that, the person who bought that NFT also got a real version of the ring, a $50,000 piece of jewelry and the right to throw out the first pitch at Dodger Stadium.

Now, the Dodgers, anytime in the past 100 years could have sold to fans a ring that they had won. They also could have auctioned off the right to throw the first pitch at Dodger stadium, but because NFTs were around and everybody is kind of thinking a bit outside the box about things that they could do in connection with digital items, suddenly the Dodgers decided to sell those two things. And a lot of people wrote that story as the Dodgers were selling an NFT of the World Series ring. In my opinion, the story there is the Dodgers were selling, giving fans an opportunity to buy an actual version of the $50,000 ring that their players and their staffers got. But I think

right now, at least in the sports world, it's really, really early days. People are still thinking about this primarily as digital collectibles and or some kind of sales vehicle by which they can sell tangible experiences or tangible items that they probably should have been selling for the past two decades. They just never really got around to doing it.

Fanny Lakoubay: What you said is very true. Just one thing I wanted to add is also one of the true revolution of NFTs was that the certificate of authenticity of something physical, yes, like this is a use case, but for a digital work or anything that was a file from a video to a JPEG to anything else, PDF—before blockchain, there was no way to add truly scarcity to that digitally native work and for digital artists, for videographers, for promotions as well, for brands, this was a way to monetize it. And I think this is this creative but also commercial excitement, I think has a lot to do with that. But back to you, Louise.

Louise Carron: Thank you all. This was a great appetizer for the next part of our discussion, where we'll get to dive a bit deeper on specific legal issues, and not only legal issues, but the first thing that comes to mind was on Friday, Hermès, the luxury brand, filed a lawsuit against the makers of the MetaBurkin NFTs alleging, among other things, trademark infringement, which is one of the examples of intellectual property clashing with the First Amendment, specifically because the creators of the NFTs are saying, this is art and you can't prevent us from using the trade dress of a particular bag because we're just adding commentary, we are making art. So, the first question that I have is for Melanie: in the fashion industry, but then for everyone else in the panel, how are IP and licenses changing with the use of NFTs?

Melanie Howard: Thank you, that's such a great question. If I can spend just a few minutes on the tensions that exist in the example that you gave. I think from a trademark standpoint, you have to consider whether the work is competing commercially with what the original brand was intended to do, right? So, I think right now we've seen a lot of press and commentators saying, "Please, go register your trademarks for virtual goods, for digital goods, because it remains to be seen." Maybe this case will be the one that shows us whether the fact that you have a registration for handbags in one certain class at the PTO[5] will carry the day for a digital handbag in the virtual space. And so, that's of course, one way to come at it, is to try to bolster your trademark protections.

And you have to make the argument that the bag being sold in the digital space is actually competing with you, because you're offering a handbag, you're also offering NFTs, or you're selling into the virtual space, and it's a branded extension. It's a good that's sold commercially, and so the First Amendment doesn't get you off the hook if you're making a commercialized use. So that I think will be a really interesting case to follow. From the licensing standpoint, I think you have so many things to consider now that are really interesting from a legal standpoint, keeps it interesting for those of us that are working on these deals on a day-to-day basis, but you really have to consider whether you want, I'll call it the default of what the NFT, ownership grants the owner or the purchaser of the NFT to carry the day, or whether you're willing to alter that in some way and grant more rights than what they might automatically get, if you use a form license that some of the different platforms are offering.

And I mentioned earlier, you have a lot of opportunities to expand the royalty stream that you as the IP owner, whether you are the artist, creator, or the brand, are entitled to have through the smart contract, which is encoded into the NFT and follows the NFT as it goes through the resale market. So you can decide, "Okay, I am going to allow the NFT owner to make some commercial use of the NFT," right? The default might be, "No, you can't do that because you don't own the underlying asset," but you can alter that via the smart contract and say, as they did, actually, in the Dapper Labs, CryptoKitties's license, you can make up to $100,000 per year, I think it was, on merchandise of your own, and sell it using this NFT.

And then you have to think about where can you do that? Are you limited to the platform where that digital good or the NFT lives? This is going to become more interesting as the metaverse expands and we are able to more easily transfer assets across platforms. Right now, it's pretty challenging, in most cases, to take an NFT off the platform where you purchase it and then utilize it in a different platform, or within a different game. But as that becomes easier, you might say, "Well, you're limited to just using it within this platform in these ways." And then you have to get your head out of the space of traditional licensing, where you might want to put time and scope restrictions on it, because NFTs, unless they're burned, are going to exist in perpetuity. And so, a traditional IP owner perspective might be, I'm going to do this for a limited duration of time, and you have to really think that through much more creatively on different levels. What are you going to license? You can't say it's only going to be for two years.

You might want to put a scope on the merchandising rights, but you can't just say, "Well, I'm going to only allow you to own this NFT, that exists in perpetuity really, for two years." And so I think it's a really interesting time, and there are a lot of considerations. And also what platform you decide to sell the NFT on, I think really dictates a lot of the commercial aspects of it, a lot for fashion, the sustainability issues, because there's a lot of talk right now, whether Tezos is more sustainable than Ethereum, and now there's Palm and a lot of other things going into that space. So really choosing carefully the platform that you're on.

And I think another open issue that I'm not sure if any other panelists might want to address in more detail than I'm equipped to do so, is really the continuing concern about whether we're going to have some type of proclama-

tion from the SEC that these are now going to be deemed securities. And so just kind of being cautious about who's this actual seller of the NFT, because if you can sell them through a platform, then you can put a little bit of a buffer between the brand or the IP owner and that seller who might be then in a position to have to comply with different securities laws later. I'll pause and let others jump in, too.

Louise Carron: No, this is great. The securities issue for now is, for sure, a big question mark for a lot of us. And I think as we're all advising our clients in these industries, we're kind of all waiting for something to happen in order to give the best advice possible. Moving back to the licensing and intellectual property, is there anyone who wishes to chime in and tell us a bit about how IP has been changing, shifting around in your particular industry, maybe in the arts or in music, you mentioned the concept of ownership, but Carolyn, maybe something in the arts that you'd like to bring up?

Caroline Moustakis: From our perspective, it's not so much changing as much as that there's sort of a greater focus on when opportunities come to us or consignments come to us, making sure that the rights are there. So, whoever it is that's minting, if it's not an already minted NFT, that if it's a newly minted NFT, are the rights there? Does the person have the rights, or do they have a license from whoever has the rights for the particular content to mint the NFT? So, it's not so different than with physical art, but I think it's just that people think it's different and there's so many different kinds of scenarios and use cases. And it requires kind of a fresh look at it.

Louise Carron: In the context of art, obviously there's the copyright, but whatever is depicted in the artwork itself, as well as publicity rights . . . is there an artwork that is using the image of a celebrity, or using the name or the voice, especially if there's music? So as lawyers, we have to think about that chain of all the rights involved in that digital asset to which the NFT links. And so, whether it's in the world of art, but also in music and entertainment, that kind of creative content has to be as clear as possible before it goes live to somebody else, and then who knows what will happen to it. And that, at least in the experience that I have, has been one of the big areas of focus for us as lawyers in the entertainment and media industries. I guess we'll move into . . .

Eben Novy-Williams: Real quick, in the sports world . . . there are two main IPs in professional sports, there are the athletes themselves and then there are the team and the league. And we have seen some, like NBA Top Shot, in which you have both, and that's great. And then we've seen others in which athletes like Rob Gronkowski or Fernando Tatis have done their own NFTs by essentially whiting out the logo on their uniforms or on their hat or on their pants. So, there are athletes out there who are certainly pushing the envelope, and trying to get out their own NFTs without the consent and without the marks of the team or the league in which they play, in which case they're just digitally altering the photos in very subtle ways to make sure they're getting around that. And teams are doing the same thing, in which some teams are releasing items that don't have athletes in them at all, because they want to do that kind within the ecosystem of their own IP.

Louise Carron: Right. Right. That's interesting. Well, kind of on the question of who owns what, and making sure that the person making the NFTs has the rights to do that, maybe Jeremy, would you mind telling us a bit about the Tarantino case? It's kind of old news at this point, because everything moves so fast in that space, but I know you and I have talked about this and we both wrote something about the case. So, can you maybe bring everybody up to speed about what that case has been about and where is it now?

Jeremy Goldman: Sure. I'll update about the case. It was filed on November 16th, and it was filed by Miramax, which was owned by somebody else that we won't talk about and is now owned by new people. And Miramax is the distributor of *Pulp Fiction*, Quentin Tarantino's very famous film. Quentin Tarantino had announced that he was going to do a drop of NFTs, and the NFTs were associated with pages from his screenplay for *Pulp Fiction*, and Miramax sued, claiming that its distribution license agreement with Quentin Tarantino was broad enough in terms of the rights that were granted to cover the NFTs that Quentin Tarantino was issuing. And so they sued in a Los Angeles court in the Central District of California, alleging that he was in breach of the contract basically by stepping on their rights, and Tarantino responded very, very strongly.

They answered on December 9th. And the debate is really where Miramax is pointing to language in their license agreement that says that Tarantino is granting to us, sort of all rights in all media that exists now, or that could possibly exist in the future. And that kind of language, to me, is very interesting because that came about when different technologies started progressing how media is distributed to people. So, you could imagine contracts that were written in the 60s, certainly didn't contemplate VHS, much less DVDs, much less MP3 files, much less streaming, right? They weren't contemplating those things, so what would happen, and this is going back before blockchain, is that people would engage in those activities, claiming that your contract didn't cover it. So, licensees like the studios got smart and their lawyers tried really hard to draft language that would capture every possibility of every kind of thing that could ever be exploited.

And they put very strong language in there, and Miramax has such an agreement. Now, that Miramax agreement with Quentin Tarantino includes certain reserved rights. Tarantino says, well, I still have the right to publish my screenplay. And Tarantino says, all I'm doing is using this NFT, not as a new form of media. It's not like the evolution of DVDs or streaming, and now you have NFTs, but rather,

I have the right to publish my screenplay, and I'm just using NFTs as a vehicle to exploit that right. And basically Tarantino and his lawyers came back and called Miramax a shell of its former self. They said, we have every right to do this and claim that Miramax implausibly attempts to use the concept of NFTs to confuse the public and mislead the court in an effort to deny artists such as Tarantino their hard-earned and longstanding rights. We're very much in Hollywood with language like that.

Not even in a pleading, not even in a counterclaim, but an introduction to an answer, which really isn't a thing if you're a litigator, but we can know that they're really not talking to the court, they're really talking to *Variety* and *The Hollywood Reporter.* I'll just note, that at a high level, in addition to that question, we have a lot of artists and creators coming to us, figuring out whether those 360 deals (and that's like sort of more of a music thing), deals where they gave away broad rights in their IP to a studio, to a producer, to a network and they got paid for it, and they're great that their thing got off the ground, but now years later, they're kind of feeling like Taylor Swift, right?

They're kind of like, "I'm an artist. I should be able to exploit my rights and recapture some of that value." And they're trying to figure out if they can use NFTs to do that. And so some of the work as an attorney representing folks in the NFT space is going back, just like this happened before, through those old contracts and saying, are we in the penumbra here? Are we outside of it? And one thing that contracts typically did not grant ownership of is bragging rights. Right? And I was being a little bit skeptical of Bill's use of those bragging rights, but now I'll bring it back up to say, typically those contracts don't include the right to sell bragging rights, claiming that you own a piece of the thing. It's not really an exploitation of intellectual property. It's this new weird thing. And maybe there is room for artists to recapture some of the rights through that. So that's something that I've really been thinking about and trying to advise clients on.

Louise Carron: That's absolutely right. Maybe, Bill, as a follow-up, can you, since we're talking about Taylor Swift and music, can you tell us a bit about how the music industry and specifically automated resale royalties help the industry? What are things that you've seen being done right now in the space, whether it's communicating directly with fans, having them kind of back up your project, or any other interesting things you've seen happen in that space?

Bill Rosenblatt: Oh, okay, there's a lot to unpack there. So I started getting involved with this stuff back in around 2016, where there were sort of two sets of things going on. One was what we might now call a simple, to use Jeremy's term, "collectible NFT," where somebody creates a piece of music and distributes it to consumers on a blockchain and sells it for however much they're going to sell it for. And there were a few startups that did that. Then there were other startups with a little bit of overlap that did the other type of thing, which was . . . forget about NFTs (well, of course, NFTs didn't exist), but forget about consumers, how do we use a blockchain as an efficient means of just paying royalties to rightsholders throughout the industry?

And the industry had a lot of serious problems with efficiency, with transparency, with scalability and so on that were crying out for solutions. And there was a standards initiative called the Open Music Initiative, of which I was a member, still am actually, although it's not very active anymore, that was looking to solve some of these problems with blockchain. So you had these two sets of things going on, and now fast forward to where we are now, where we've got NFTs in the music industry. I should also mention that in the middle there around 2019, I wrote an article for the *Journal of the Copyright Society* that basically said these B2B applications are where it's at for blockchain in new music, these B2C things have no future, they're nowhere. It's a non-starter, it's a solution in search of a problem.

So, I spent the last year or two kind of eating crow about the latter set of comments, "Oh, I was wrong, this whole NFT thing," but now I actually think I'm going to be right after all, because I think that the idea of purely a piece of audio as an NFT doesn't have much of a future. I think people are going to figure out more creative ways--in the music field--are going to, just like Jeremy saying, and like Evan was saying, and everyone else on this panel, people are getting creative. They're figuring out other stuff. Even now with music, you're seeing all kinds of things other than just audio being sold as NFTs. So I think there's a lot going on there and we're just at the beginning, we're going to see what happens.

The other thing that's worth talking about now in response to your question, Louise, is this notion of a DAO to distribute royalties, so that anyone who wants to buy into the DAO can get in on a royalty stream. So this is something that essentially sits in this kind of interesting area between crowdfunding and more sophisticated investor who has the wherewithal and the means to invest in a royalty stream. So we all know what crowdfunding is, and crowdfunding is this kind of mushy thing where you give an artist some money, and then they do something with that money, and you might get something in return other than just to feel good that I helped this artist or whatever. And then on the other hand, you've got various ways that an individual investor can invest in a royalty stream.

And there's been a little bit of a groundswell of platforms that enable you to do that for musical artists. David Bowie was a very early pioneer in this area where he issued debt on his royalty stream, what were called Bowie Bonds. This was quite a long time ago. And now with DAOs, that's completely opened the floodgates to anyone who wants to participate financially in royalty streams. I do think there's a lot of potential. I don't think it's for everybody. I think people just want to enjoy music. They want to listen to music, they don't want to worry about royalty streams, but there is going to be a class of people

for whom this is interesting and important. So that's kind of a panoply of things that are going on in the music industry that have to do with this. And I think I'll stop there, because we could maybe talk about any one of these, but that's a broad landscape of what's going on right now.

Louise Carron: Thank you, Bill. Maybe we'll switch gears just for a few minutes. Carolyn, I think it would be a great time for you to tell us a bit about what are the particular rights and obligations that Sotheby's requires of a consignor of an NFT. So we've talked more on the side of the creator, now let's talk a bit about side of the consignor and the case of art.

Caroline Moustakis: Sure. And for Sotheby's, sometimes the consignor is the creator too, which has been sort of interesting because that's sort of a new area for auction houses, who are typically not in a primary market, but with NFTs, that opportunity has presented itself a little bit more. So the primary provisions in our agreements are, again, provisions that existed for our physical property as well, but we've tweaked them a little bit, but they also take on sort of greater importance focus for NFTs. So, the main thing is that we're asking that the minting of the NFT, the creation of what we refer to as the "reference content," the content asset, the digital artwork, and then the sale of the NFT itself will not breach any agreements with any third parties, won't violate any law, and importantly, won't infringe any third-party rights, including intellectual property rights.

So on that last piece, on the IP rights, a few of us have touched on this, but I'll just elaborate a bit. So really anyone can mint an NFT using any digital assets. And then of course the question is, who has the right to do so? And I think with some exceptions we find that generally traditional notions and rules of copyright and IP apply in the world of NFTs. So if you are the creator of a digital asset, digital artwork, then normally you have the copyright to the work and you can use it. You can make derivative works of it, including minting an NFT. On the other hand, if you're not the creator and you wish to mint an NFT of some asset, some digital work, then you will need to have the consent or a license from the copyright holder to do so. Otherwise you will be infringing the copyright holder's rights.

So we spend a fair amount of time . . . Some are more straightforward, some that are less straightforward, just making sure that those rights are there, and we ask for a representation and warranty from the consignor, to stand behind that. On the buyer side of things then, as with physical artwork, the buyer typically acquires an implied non-exclusive license to display the NFT for their own personal non-commercial purposes, but they don't acquire the copyright to the digital work. So others here have already mentioned Bored Ape Yacht Club, some other exceptions to that sort of standard rule. And that may be something that we would see in certain projects at Sotheby's as well, but our sort of default rule is, as with physical artwork, that it's really a purchase of property. It's not a purchase of IP rights, for the most part.

I guess one other thing I could point out about our consignments, along these lines, is that when we sell an NFT currently (although this may change through the development of Sotheby's metaverse and our secondary marketplace) if it's an already minted NFT, we don't take custody of the NFT, but rather the seller of the NFT retains custody of it. And then post-sale, once Sotheby's has received the purchase price, we instruct the seller to transfer the NFT directly to the buyer. So that's a slightly different structure than with our other sales of art. So that means then, in terms of the consignment agreement, we have provisions in there that require and provides for the seller to remain responsible for any loss or damage to the NFT prior to its transfer to the buyer, that the seller is obligated for storing it safely and so forth, until it is safely received by the buyer.

Louise Carron: That's very interesting, especially since one of the concerns with physical art is in the storing it, shipping it, making sure that nothing bad happens to it. It doesn't go away just because it's digital art and you have to make sure that there are enough security considerations taken all throughout the transaction. I just find that fascinating. You just mentioned Sotheby's metaverse, which I think is a great segue into the metaverse as a whole, and how each of the industries represented today have been utilizing this set of worlds. I think rather than me having to define it, I'll let Fanny, who's much more of an expert in that world, give us the groundwork, lay of the land of what the metaverse is, and then I'd love for everyone to chime in and tell us what you're seeing, specifically in the metaverse, that are happening across the different industries.

Fanny Lakoubay: Yes. So let's open the rabbit hole of the metaverse. It's like we are always saying in NFTs and crypto, the more you open one door, it's like seven other doors that open. And Bill mentioned DAOs, which could be another three-hour conversation in itself. So, the metaverse, unfortunately, right now, most people heard about Facebook changing the name and their umbrella to Meta. We're not going to go into detail, but one thing is they really wanted to reconnect with the younger crowd, the ones who spend their life online, on video games, on 3D worlds, online. So there's a debate. Some people, and I would love to hear, and I don't know if there's a legal definition, probably isn't one right now, but some people say there's one metaverse and then there's different platforms, or people saying there's many different metaverses.

So, question is still open. I think the idea of the metaverse is not new, right? It's an online 3D world where you can interact with people via avatars and exchange things, build things, etc. And the most famous version a non-blockchain-based metaverse is Roblox, right? You can buy clothes and accessories and so on and so forth. But then if you go to another game, you cannot use the same clothes that you had in Roblox, because they're each closed metaverses, meaning that they're owned by one compa-

ny, and therefore everything you purchase and you do in one world is specific. So then blockchain and NFTs actually happened. And the NFTs is really in this more open Web3 and blockchain-based metaverse, what you do in this world is based on NFTs.

So, the world heard about NFT via people saying, "oh, it's just a JPEG." Okay, we agree or we don't agree, it's fine, but really one place you could really use all these NFTs is the metaverse, because everything you can buy, like you buy a sweater, you buy a sword, you buy a piece of land, you build a house, all of these are actually NFT-based. I'm summarizing, this is not exactly technically correct, but the idea being that if you use another metaverse, another world, you could still use the same sweater that you bought in another land, because they are all using the same standard of NFTs. And this is kind of the promise of the blockchain, is to build these universes that are open, and metaverses, you have to think like five steps ahead, it's still very rough right now.

Like, I feel drunk in this world. I feel like I'm hitting walls and I don't know where to go between the different worlds. And right now, in terms of blockchain-based metaverses that you might have heard of, there is what people call the "OG," the old style, like Cryptovoxel world, that actually a lot of galleries have built their 3D galleries and owned pieces of land in that metaverse. There's also Somnium, that works better with VR. There is Decentraland that currently looks like Second Life, so it has a very cartoony aesthetic, but works very well for brands. As a really big push, Samsung actually just opened their metaverse showroom there, and I believe Sotheby's has the London headquarters in Decentraland, and you have more gaming-oriented, metaverses like The Sandbox, and many, many, many others that actually have been developed this year. So, it's really in the making, and I would love for any of our panelists to destroy my definition, because this is what they've really meant so early on, there's really no way to define it.

Don't be shy.

Louise Carron: If nobody wants to go out, maybe I'll cold call Melanie, because you were mentioning the metaverse earlier. Tell us a bit about how the fashion industry is getting into the metaverse now.

Melanie Howard: Sure. I had a feeling you were going to call on me. No problem. I think the key there is what you just said, Fanny, about being able to have the interoperability. And that really is the allure, if I'm going to spend $40,000 on a digital garment, it's likely not going to satisfy me that I can use it only in one game or in one system. I'm going to want it to travel with me. And the promise there is really that my digital existence and my physical existence are really melding together and I'm living in the digital virtual space as I would in real life. And so in real life, I'm not just stagnant, existing only in one unit dimensional space. I'm able to wear a garment at home and then drive to work and wear it at work.

That really, I think, is what we're pushing towards and seeing whether the technology is able to get there as quickly as all of the amazing creators are aspiring to have it get there. That's why you would want to go, I think, all the way in, in creating, not just digital fashion, but also purchasing the real estate and having your brand exist just as strongly and emphatically in the digital world, in the virtual space, as it does in the present space. I think the key for fashion here is that to think about it not just that you're replicating on certain platforms, things that you're already doing in the physical world, but that you're really innovating in the virtual space and speaking to how your customers or the customers that you want to attract are living virtually.

That's more than just, here's something that your avatar wears, it's how are these people engaged in the digital virtual world and how can I appeal to them? How is my end appealing to them in that space? What does fashion mean in that space? And it's really kind of, this is my outfit I bought for my Instagram-able moment. This is the outfit that I'm wearing to this virtual fashion show, and then I might show up for a Zoom meeting in it later on. And really innovating that way, kind of changing the thinking to not just translating it, I guess, going to what Eben said, not just having it be a collectible garment, a collectible virtual watch, but really something that is useful to me as I'm existing in the virtual space.

Louise Carron: Thank you. Anybody else. Go ahead.

Eben Novy-Williams: I can piggyback on that a little bit. And what I said about NFTs in sports holds even more true for the metaverse, there's not honestly too much happening right now. The companies like Nike have Roblox worlds and there's a few other smaller or tangential sports properties that are doing similar things. The NFL has done skins in Fortnite. I would argue that Fortnite is a metaverse of sorts, as well, but there's not much going on right now. I can say that the one thing that everybody in my industry is really looking at intently regarding the metaverse is other ways to watch live sporting events. The NBA, the NFL, all these leagues have spent a long time hyping up AR and VR and versions of that as a new way to watch their game.

None of that has fully panned out yet. And I think the technology still has to evolve a little bit, but a lot of people in the sports world are looking at the metaverse as a way in which maybe they can finally build a totally new digital viewing experience where all of the NBA fans in China, for example, don't have to watch on their phone or on their TV, but can log into some world and stand courtside with their friends and talk to each other while they're watching players play out in front of them. This blending of kind of metaverse and live video is certainly something that the sports world is keeping a very intent eye on. And one other thing I'll mention, there was a platform that I'm sure

some people are familiar with called Zed Run, which is a, I would argue, kind of the first major independent sport in the metaverse, which is a horse racing world in which you can buy horses, they breed. You can sell offspring, you enter them in races. You win money if they win at races.

Again, because it's all the digital, you can host the races in very cool places where obviously horses would not be running normally. That is a property that took off pretty quickly. I think things have slowed down a little bit as well, but something interesting about that is that a lot of people in the sports world hold that up as something that kind of terrifies them. That leagues have spent a really long time building up a really big competitive moat between themselves and any other kind of upstart league. It's one of the reasons why all these upstart professional football leagues always seem to fail after a season or two, is that it's really difficult at this point to create a sports property that is compelling and draws a lot of interest kind of out of thin air. And Zed Run in a very small way, albeit, showed that that was at least possible in the metaverse.

So I notice leagues and teams are at least thinking about that as well, and that if they don't figure out a way to kind of export their product to the metaverse, that there is a fear that something like Zed Run can pop up, that essentially becomes the sports of the metaverse and they definitely don't want that to happen.

Bill Rosenblatt: So, I'll say something about music, if I may, for a couple minutes. There's not much going on now, just like Eben was talking about in the sports world. But what I think is going to happen, here's a little prediction and I almost never make predictions, but I'm going to make one now: What you're seeing happening in the music industry is these enormous sums of money being paid for catalogs of songwriters and musicians. Bruce Springsteen, and there are just so many of them, Neil Young. There are a bunch of other deals that are sort of in the air right now that everyone's just waiting for the deal to be signed. And what's generally happening here is that a much savvier group of intellectual property owners are going to be owning these assets than had in the past. These are people who are serious investors who are really looking for new ways to monetize these assets and are essentially literally and figuratively banking on the fact that they will come up with more novel ways to monetize these intellectual property assets.

And so I think you're going to see the metaverse as the next big sort of set of things that happens, building on what's been happening with the gaming platforms and music over the past couple years, Fortnite and Twitch and things like that, where artists go there to do live streams. They go there to do events of one sort or another to increase fan engagement. And I think you're going to see estate properties like, Prince, Michael Jackson, Frank Zappa, John Lennon, etc. You're going to see a lot of that going on. And I think there's going to be a merger of hologram tour technology with the metaverse to produce live events that involve live musicians and the metaverse equivalent of holograms of artists who are deceased.

I think maybe not next year, but maybe in a couple years out from now, I think we're still kind of seeing growth in the area of the gaming platforms. And I think we're going to kind of getting there, step by step, but I'm sure that the wheels are turning in the minds of people who are engineering the buying of these assets for hundreds of millions of dollars in this direction.

Fanny Lakoubay: It's actually very interesting how people, as you said, they stake a claim. They are not really sure where these gatherings are going to be. So they're really . . . If you look at like one of the metaverse called The Sandbox, it's really a gaming platform and companies that are absolutely not gaming-related have been purchasing virtual real estate there just to stake a claim. I have client who asked me, "So what are the rules? Are there other costs to buying a piece of digital virtual land?" And you already see new jobs, like virtual real estate agents, like metaverse architects. And then metaverse taxes, if we follow the same logics. And it is even more than NFTs, we're talking about the World Wide Web. I don't know what your view on the virtual real estate in this metaverses is, but it is quite unheard of.

Louise Carron: Well, lawyers are for sure going to open offices in the metaverse. I can see that happening tomorrow. Now I'd like to have concluding thoughts before we dive into the Q&A session from the audience, if everyone could give us two things: What should we expect in the next year? Think of one threat, one opportunity that for you are the things that we're looking at in the case of NFTs, that are both advantages as well as maybe opportunities for growth that we can see in that space.

Jeremy Goldman: I'll go first. Just continuing on my thread of community because as somebody who works in the United States, which is a capitalist society, but grew up with a lot of socialist ideology in my upbringing and believing very strongly that there's real benefits there, and seeing actually blockchain and Web3 as a vehicle for that. One of the coolest things that I've seen and that's already successful is the idea of a fan treasury. It's very related to what I was talking about before, which is combining consumerism and ownership of a company—there are projects now where when you do an NFT sale, rather than all of the proceeds going back to the owner or the artist of the NFT, all of the proceeds are going into a treasury that is owned and controlled by the community. And then the community gets to vote on how that money is used. This model, to me, is one of the most interesting things to happen in the blockchain and NFT space. And it's actually very core to what blockchain and cryptocurrency is really all about, which is kind of like taking that money and making it collectively owned and used and figuring out how that type of model of taking a central treasury that's owned by the community of people that get to decide what they spend

the money on, to me is something that I really want to see where that goes.

Louise Carron: That's absolutely true.

Jeremy Goldman: By the way the one I'm talking about has like $70 million in their treasury. And there's like 150 people. So it's like, we're not talking about small amounts of money, there's real incredible commercial potential there.

Louise Carron: Thank you Jeremy. Anybody else, any threats or opportunities that you want to highlight for the rest of the audience today?

Melanie Howard: I'll jump in quickly. I think that it's this kind of all on a similar theme, but in the fashion space, the barrier to entry is much lower when you're talking about digital. There have been designers discovered in the last five years and more so in the last year that weren't on anyone's radar before, because they're able to kind of play on the same stage, so to speak, as the major brands. And so that's really exciting to me to see how that equality of creativity in the fashion space can be furthered by technology. I'm always interested when the technology empowers creativity. So, I'm hopeful that the interoperability issues will be resolved and we'll be able to have more individual younger under-publicized designers kind of, come to the floor.

Bill Rosenblatt: I'm going to talk about threats, since no one else seems to want to, and Melanie's use of the word "interoperability" is a good segue. I was around for the first bubble, I'm old enough to have been around for the first bubble. I was CTO of a dotcom startup in 1999 and a lot of the hype and froth that I hear now just reminds me so much, it really takes me back to those heady days of 1999, where we were all partying like it's 1999. There are a lot of assumptions that people make that turn out to be unfounded or wrong about what's going on now. There's a lot of hammer and nail stuff going on where you've got a hammer, and so everything else out there must be a nail. There's a lot of that going on.

And there's a lot of idealism going on the way there was in the Web 1.0 world. And I think there are some lessons that we can impart here. Certainly, all this technology's going to be huge. It's going to change, you name it, fill in the blank, it's going to change it. It's going to be huge. If I knew exactly how that was going to work, I wouldn't be sitting here right now. I'd be going and doing something else, but one thing that I think is worth bearing in mind is this notion that Web3 is going to destroy intermediaries and make it so that creators and their fans can be linked closer together. I think that's hogwash. I think the whole point of capitalism is to figure out how to be an intermediary and make money off of transactions. Someone's going to figure that out.

That's why Facebook is now the Hebrew word for dead woman, Meta. And that's what they're trying to figure out right now, and there are other companies that are trying to figure that out now too. Microsoft just paid, what was it? $68 billion for Activision Blizzard. They're trying to figure that out, too. There're going to be intermediaries. They're probably not going to be the same intermediaries that we have now, but there will be intermediaries. The other thing that I will suggest is that things that you try to do with NFTs that do not more than emulate what goes on in the physical world are probably doomed to failure, because that's been a pattern from before. There's a lot of creativity and a lot of people are going to succeed with NFTs in ways that don't emulate or replicate the physical world. But if you're just focusing on replicating what happens to the physical world, it's probably not going to work out. That's where I'll leave it. Just to be a little bit provocative here.

Louise Carron: Thank you, we needed that. And sure, thinking about copyright infringements being extremely rampant and the fake projects and scams that are really out there - just a few days ago, I was reading about . . . now I forget the name of that island in the middle of nowhere that they're trying to sell plots to people using cryptocurrency and they're realizing that it's fake, and that there's nothing to back it up. Like all these things that are kind of riding on the wave, and so weeding out the real deal from the scams is something that us, at least as lawyers, we're going to have to figure out over the next year.

And along with all the legal framework that will most likely be changing, thinking about securities, taxes, and money laundering and security considerations, making sure that wallet hacks are something to be prevented. And then at the same time, Fanny and I have talked about this, as also the potential for representing the underrepresented and increasing diversity in the crypto space. And so, we want to see more women of color, we want to see more people of color in general in that space, and increase access to education in computer science and other educational institutions that are really the back end of the crypto space and encouraging the next generation to be more diverse than we currently are. So on that note, unless there are more questions from . . . Or any more thoughts from our panelists, I can open it up to questions from the audience.

One of the questions we have from Kenneth, is "how do you ensure that the terms that you've negotiated on top of the default terms from the platform are either encoded in the smart contract, or at least made clear at the moment of transaction?" So, from the practitioners in the room, how do you deal with that?

Jeremy Goldman: I can speak to that. There's no perfect solution. And to put it succinctly, the reason that there's no perfect solution is because NFTs can be transferred directly without an intermediary, to use a term that Bill just used, but you can transfer an NFT from one wallet to another, and without the acquirer of the NFT literally doing anything. You can transfer an NFT to someone without their permission, as long as you have their pub-

lic wallet address. So if that's true, how do you possibly show a manifestation of ascent to some kind of terms by that person that acquired an NFT? Now that's an extreme example, but if that's the paradigm, it really does become an issue. So, what we try to do is just, for our clients, is just take a practical, do the best we can, approach.

So, you know that there are different points of sale. If you have a primary mint where things are sold, it's kind of easy to apply terms to those people. If you have secondary sales on open sea, you have a place where you have a description, you can add terms there and just say something like, "The purchase of the NFT is subject to these terms." Totally imperfect. So, a lot of the questions that that question really brings up are the same questions that courts fortunately have been struggling with for many decades when they're dealing with things like clickwrap versus browsewrap, trying to figure out what is enforceable, what isn't enforceable. And they bring up the idea of like, "Well, can you embed the terms in the smart contract?" Sure. We've done that.

It hasn't really been tested. And the truth is that, at the end of the day, if you're talking about trying to enforce a contract, you have to say there's a person, and you have to prove that that person actually saw those terms and did something to read them and then manifest some sort of ascent to them. And so the fact that you have terms just embedded somewhere in the wacky ducky metadata of the NFTs, and it's really wacky ducky, literally, you have to go through several different jumps before you find the actual NFT metadata. So, like embedding some kind of terms in there, I don't know if it'll do anything. I think that a lot of folks are trying to think of solutions to try to solve this problem, which is terrific. And I think it is the kind of thing that ultimately is dictated more by market forces than it is by contracts. But to answer the question, we do the best we can. We put the terms where we can. We try to encourage our clients to make people that are purchasing their NFTs scroll through the terms and click them and then record it. It's like old school Web 2.0 stuff right now in order to do it.

Fanny Lakoubay: Yes. It's definitely something in the making. I would say pretty manual as well. Maybe we can go to the insurance question—that's an interesting one that a lot of people have in the space. Jason asked, "Can one procure insurance on an NFT the way one might be able to ensure a work of art or unique physical collectible from loss, destruction, etc.?" And I like to comment, in case this whole NFT house of cards comes stumbling down. But the insurance leg is . . . Have you seen any case of insured NFT? Maybe. Caroline, have you had that case?

Caroline Moustakis: I think from what I've seen, there's not a large number of underwriters or brokers that will offer that product currently, since NFTs are so new. There are some, and my understanding is that really what's being insured is your private key, your access to the NFT. So, if you lose your private key, whether you've lost it or it's stolen, that's an insurable loss because you no longer can access the NFT. The other piece of it that I find sort of interesting, that goes along with that, and one of the reasons why it may be difficult to get insurance, is basically the moral hazard associated with because it's so easy for somebody to say, "Oh, I lost the private key." Really, the only way that you would be able to obtain insurance is if you are working with a sort of trusted custodian to take custody of your private key and the NFT so that it can be insured. So that it's not just you as an individual holding that private key, but working with the custodian that is licensed and insured.

Fanny Lakoubay: Yes. And you're right. Like even art insurers are looking into it, but there's definitely no customer ready product out there. But one thing that I will say is that the more and more we've seen the responsibility of that conservation and that protection of the NFT being put back on the collector, because one thing that Bill mentioned about, like removing all the middle men, kind of the promise of the blockchain, yes, you're giving back the value to the creator, but it's also putting back the responsibility on you. If nobody in the middle is taking care of that, well, someone has to do it. And saying, "Oh, it's okay. It will be there." Or, "It's going to be okay." There are so many people involved, that's not going to cut it.

Louise Carron: Thank you, Fanny. Thank you for taking the time to be with us today. So let's take one last question. I see that we have some in the chat: "A seller can technically sell an NFT in perpetuity, how do you ensure that the artwork that it links to is always accessible to the person who has purchased the NFT? Is that part of the terms or part of the sales contract? And what happens if you click on the link, it's not there anymore?"

Caroline Moustakis: I can tell you from the Sotheby's side, it's addressed in the contract, but it's not something that Sotheby's takes responsibility for. So it's the seller's responsibility until it's transferred to the buyer, and then it's the buyer's responsibility. So absent to any special terms from a particular creator or seller that they are volunteering to carry on some kind of responsibility, then that's something that we clearly disclaim as the buyer's responsibility once it's yours.

Bill Rosenblatt: So, this is a perfect opportunity for an intermediary. This is one of a handful of, how do I put this? Things that somebody needs to take care of when you have a transaction of this nature. And if there's value to the purchaser or the seller, then there's an opportunity for someone to provide that value and make money off of it.

Jeremy Goldman: Right. So, in the ecosystem, the way that this is being dealt with is a couple ways. In the early days, you had the mentors and people like the folks behind CryptoKitties, which is Dapper Labs, they were hosting it themselves, and continue to host the artwork themselves. But where the industry has really moved to, is moving assets onto a distributed file system that's sort of adjacent

to blockchain, which is called IPFS, the interplanetary file system, which is-

Bill Rosenblatt: How much of that is actually happening as opposed to pipe dream?

Fanny Lakoubay: It's happening. Most digital assets, that are most artwork in the NFT world, are loaded into IPFS. And there's also private entities that are incentivizing people to host. And really what those are kind of like BitTorrent networks or like Napster, they're peer-to-peer kind of file sharing networks. And I agree 100%, though. By the way, I'm not an advocate of saying there's not going to be intermediaries, that of course there's intermediaries. But there are companies that are kind of pinning certain content that's hosted on IPFS. And so that's one way. And the other thing I would say about that is, what's really weird and interesting about this space, at least with the artwork, is the digital asset itself typically is like in a gazillion different places and matters very little. Like that Beeple artwork that was sold for $70 million, you can find it on 10,000 different places, including on my hard drive.

And so the fact that the artwork disappears doesn't matter. It's like there are situations, I answered the question first by talking about technical solutions and business solutions like IPFS and folks that are hovering around it, but as a theoretical matter, it doesn't matter that much, as long as you know who owns the thing, the fact where the digital object exists, it doesn't really matter where it lives. And that's kind of what's weird and interesting about this and that's kind of hard to get one's arms around. You're not going to lose the NFT. You might lose the artwork that it's associated with, but so what? Somebody has a copy somewhere.

Louise Carron: This is a great stopping place for this absolutely amazing panel. I have learned so much, and I'm only a moderator. So I hope that everybody else, including our panelists, got some nuggets of information from the rest and same goes for you all in the audience. Thank you so much for joining us. I hope you can stay for the second panel following in five minutes. We have a short break and then we'll see you again here. Thank you so much, Eben, Melanie, Bill, Jeremy, Caroline, the folks at NYSBA and EASL Section. This was wonderful and have a great rest of the day if you're not sticking around.

Melanie Howard: Thank you.

Caroline Moustakis: Thank you, Louise. Thanks everybody.

Eben Novy-Williams: So long everyone.

Barry Werbin: So long on behalf of EASL, this was absolutely fabulous and mind blowing in a lot of ways in where we're going. And it reminds me of a bit of the Matrix, the whole metaverse, will we get to a place where our entire mind universe is all virtual and everyone's becoming massive couch potatoes until someone comes along in the future and physically or literally unplugs us? So it's a lot of good stuff. Sci-fi maybe becomes a bit of reality, I want to thank our moderators and all the panelists. I mean, this was incredible, super important subject matter. I think we've learned a lot, and from this panel alone, I think everyone could see there's a lot more sophistication of thought has gone into all this. But we'll see. So thank you again on behalf of EASL and we really appreciate it. We'll be back a few minutes with our second panel. Thank you.

Endnotes

1. Set Charles Momjian died on April 4, 2021.
2. *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (2010).
3. *Capitol Records, LLC v. RiDigi. Inc.*, 910 F. 3d 649.
4. Environmental, social, and governance evaluation factors for companies that consumers are considering.
5. The U.S. Patent and Trademark Office.

Virtual Annual Meeting Program—Panel 2

Accessibility, Visibility and Disability in Entertainment Media and the Performing Arts

Presenters from different sectors of the performing arts and entertainment industry will address disability rights and issues, with each panelist discussing their personal experiences and perspectives about embracing non-ableism in their own (and their clients') creations and productions and making workspaces more accessible. The panel will also look at changing depictions of disability in the media and provide recommendations for best practices by producers and companies in the industry. The session will be led by an expert in disability rights law. "Access is a practice, a culture and a value" (artist Park McArthur).

Co-Chairs:

Judith Bass and Elissa D. Hecker

Speakers:

Jason DaSilva
Filmmaker

Heidi Latsky
Artistic/Executive Director
Heidi Latsky Dance

Katie McGrath
Theatrical Agent
KMR Talent Agency

Gail Williamson
Director, Diversity Department
KMR Talent Agency

Moderator:

Angélica Guevara, J.D., M.A., Ph.D., LL.M
Assistant Professor
Department of Business Law and Ethics
Indiana University, Kelley School of Business
American Bar Association (ABA) Commissioner on Disability Rights Business Development Specialist, U.S. Department of Labor for the Office of Disability Employment Policy (ODEP)

Judy Bass: Hi everybody. I'm Judy Bass. Very happy to have everybody here. I'm a member of the EASL Executive Committee, and I'm very happy to be a co-chair, along with Elissa Hecker, of this wonderful panel and with great panelists, which is called *Accessibility, Visibility and Disability in Entertainment Media and the Performing Arts*. I'm just going to give a very brief description where each of us are also going to give a visual description, which is certainly appropriate for this. So, I am an older white woman with, I guess, dark hair and a gray streak. Does that sound right, Elissa? Did I do that right?

Elissa Hecker: A beautiful gray streak.

Judy Bass: Okay, thank you so much and I just want to say it's really my pleasure to be working with the panelists.

And I'll just take something from one of our panelists, Jason DaSilva, who's our documentary filmmaker on here and said is that we really should think of this as a panel about X-Men. So we are all . . . I mean, I did work at Marvel at one point, but just for those of you who are not familiar, X-Men have special powers and special abilities. And we, as a community of lawyers and people working in the entertainment media and the performing arts, we're going to talk about how we are going to be on the same team with these X-Men and women, I guess. I think the X-Men and women are also called X-Men, but I don't know if I remember correctly, so I want to start it out. So, Elissa, do you want to also introduce yourself?

Elissa Hecker: Thanks, Judy. My name is Elissa Hecker. I am of the Law Office of Elissa D. Hecker, Business, Entertainment and Arts Attorney. I am 40-something, I have shoulder length brown hair. I'm wearing hoop earrings, a blue sweater, and behind me, I have a sign that says "I am a New Yorker for dance." I'm very excited about this panel.

This is an extraordinary panel. And before I introduce you to our Moderator, I wanted to lead with artist Park McArthur's quote, which is: "Access is a practice, a culture, and a value." That's something that we believe in strongly. And now I'd like to introduce you to Angélica, who will be moderating our panel today.

Judy Bass: Yes. Professor Angélica Guevara.

Elissa Hecker: Professor. Yes.

Judy Bass: And by the way, the panel we're going to have . . . Angélica will be doing a presentation of the law of disability. And then we will move to our wonderful panelists with some questions and discussion about this subject in entertainment, media, and the performing arts. So thank you. Go ahead.

Angélica Guevara: Okay. So I have brown shoulder length hair. I am a Latina. I'm wearing a brown blazer with some stripes. I have a black turtleneck on with some very small silver hoops, and I'm wearing a little bit of my hair towards the back. And I'm just going to say that I'm in my late 30s, we'll leave it at that. So, I'm very, very excited to be here. I was excited when I got invited and I was even more excited and even thrilled at the fact that they asked me to be the moderator. I actually live and breathe disability rights law, given that I am a neurodivergent Latina. I am the first in my family to graduate high school, let alone, go off to law school and do my Ph.D. I've had very low expectations all throughout my life from many very various different people.

I definitely went ahead and countered that narrative by figuring out how the law works. And so I've had to fight all the way through with my accommodations, where I basically can't understand more than about a paragraph of what I read because of my disability. So, it's considered a reading and a writing disability. So you can imagine people are just like, "You're not going to graduate high school. Don't even bother going to law school because it's heavy reading and writing. And how could you ever be able to represent someone if that is your very disability?" Well, beating the odds, I was able to learn the law and that is how I am teaching people about the law and raising awareness. So, with that, I'm excited to present for you today and to moderate, and I'll go ahead and let other people introduce themselves.

Elissa Hecker: Okay. Heidi, would you like to go next?

Heidi Latsky: Sure. I'm Heidi Latsky. I'm the Artistic Director of a physically integrated dance company, which has my name. I am an older woman with blonde curly hair. I'm wearing little gold hoops and a sweater and I am extremely excited to be here. I've been involved with disability since 2006, when I was introduced to a visual artist who was just starting to dance and she needed to work with a choreographer to make a solo. And we made together a 25-minute solo. That just changed the rest of my life, because my company then went from your traditional modern dance company to a physically integrated company.

Elissa Hecker: Thanks, Heidi. Jason?

Jason DaSilva: Yeah. Hi, my name is Jason DaSilva. I'm a documentary filmmaker and I run a nonprofit called AXS Lab. We do work around media for people with disabilities. I'm an Indian male, 40 years old. I'm in a wheelchair. I have multiple sclerosis and beyond me, there's a nice living room.

Elissa Hecker: Gail?

Gail Williamson: Hi, I'm Gail Williamson. I am a talent agent at Kazarian/Measures/Ruskin & Associates. I'm also the director of the Diversity Department, which just works with talent with disabilities. I worked 30 years ago with the California Governors Committee on Employment of People with Disabilities, their media access office, pushing their agenda of the casting liaison. And I am a fair complected grandma with a gray pixie cut.

Elissa Hecker: Thank you. And last but not least, Katie.

Katie McGrath: Hi, my name is Katie McGrath. I am a 40-year-old, Caucasian, cisgender female with brown hair, which is below my shoulders, but currently up in a bun. I also have some swoopy bangs, which need to be trimmed, and I am wearing a blouse, a very small necklace and glasses, and small rectangular tortoise shell earrings. Behind me is a black and white framed photo of Ray Charles performing in front of a very large audience in a theater or opera house and some sort of potted small tree or a large plant. And I am a theatrical agent working alongside Gail at representing actors with disabilities for television, theater, film, and animation. And I have been in actor representation since, I believe, the mid- to late-2000s.

Elissa Hecker: Thank you. Okay, Professor Guevara, it's all yours.

Angélica Guevara: All right. So I currently am an Assistant Professor at Indiana University's Kelley School of Business. So, I'm going to give this presentation in breaking down the law.

So, I had to learn disability rights law and because they were two weeks late in scanning my books in law school and they were five weeks late in scanning my books in the Ph.D., and I quickly figured out, why is this not working? Why is the law so weak? And it was then that I started to discover essentially its loopholes, but then I got even deeper into disability studies. And I just wanted to learn everything there was to know about disabilities studies because I didn't realize that I was actually ashamed of my disability.

I'm not anymore. But back then I was. And so, I remember thinking I need to get as educated and informed as possible about disability. So, that took me on this direction of a journey where I thought maybe I should go become a

law professor, but there's just such low expectations. And nowadays to be a law professor, you need a law degree, a Ph.D., and so on. So what led me in this direction over to a business school is I saw the impact I could have. So here we go. We're going to start with the models of disability. So the first one we're going to talk about is the medical model of disability. And the second one we're going to talk about is the social model of disability.

So, the medical model of disability, essentially it's doctors determining whether an individual has an impairment or a loss of function. An impairment is interchangeable for the purposes of this presentation with illness. It is a purely medical phenomenon. And so, sometimes individuals internalize that feeling of impairment. The medical model of disability basically emphasizes this personal tragedy, which suggests that a disability is some terrible chance event that occurs at random to unfortunate individuals. It views the individual with pity, as defective, or having an impairment that must be eliminated, treated, or cured.

Now, it's important to note that illness is separate from disability. Illness is that pain or that thing that needs treatment. Disability is the social treatment. Now the biggest critique of the medical model is that it fixates the problem within the individual while simultaneously absolving society from any further consideration. It perpetuates the stereotypes, perceiving people with disabilities as not whole or damaged and in need of fixing. The social model, on the other hand, empowers people with disabilities. Unlike the medical model, it puts forth the idea that society disables individuals. The structure of our society creates the disabilities. There is nothing deficient or wrong with an individual with a disability because there are diverse ways of existing in the world.

This then leads me into disability antidiscrimination law. Viewing it from that lens, just keeping those models in the back of your mind, I'm going to describe right now what is the disability antidiscrimination law. So primarily I talk about two laws, the Rehabilitation Act of 1973 § 504, that basically says that individuals are covered in federally funded buildings and organizations, institutions. However, people realize, wait a minute, it's only covering federally funded institutions, organizations, what about public spaces? So then comes the Americans with Disabilities Act, the ADA, in 1990. This then covered individuals in public spaces.

So, under the law, disability is this specific. A physical or mental impairment that substantially limits one or more major life activities. In 2008, there was an amendment to the ADA. The primary purpose of the amendment is to make it easier for people with disabilities to obtain protection under the ADA. It gave a broader scope of protection under the ADA. The definition of disability was thought of to be construed broadly. It should be construed more broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.

However, this doesn't take care of the loopholes. Essentially, it went ahead and covered more people, but it wasn't initially working to begin with. So, some of the loopholes that are out there includes the "reasonable accommodation", as just an example. It may include making existing facilities readily accessible to and usable by individuals with disabilities, but an employer or a university can argue, "Hey, what you're asking for is unreasonable." So, they're deferring, obviously, to the employer or the university, even though the average cost of an accommodation is about $500. The other loophole is the term "undue hardship." It means an action requiring significant difficulty or expense. Therefore, a person that needs to provide that reasonable accommodation can say, "Hey, what you're asking for is an undue hardship on maybe my small business or the university." And so on and so forth.

If you can, I highly recommend for you all to read this book. If you want to know disability rights law in a nutshell and the contradictions of the Disability Rights Movement and what happened and how is it that we got here today, I recommend *Law and the Contradictions of the Disability Rights Movement*, by Samuel R. Bagenstos.

Now in this book, I'm going to use two of his quotes. So, "the statutory provisions that require businesses to be accessible are widely underenforced." And "the employment rate for people with disabilities has remained stagnant at best." Again, ADA plaintiffs lose their cases at astonishing rates. The only litigants less successful than ADA employment plaintiffs are prisoner plaintiffs, who are rarely even represented by council.

Then when I started looking at this, I'm like, "Wait a minute." Then the law is just basically creating insiders and outsiders because it's following the medical model. That's very othering. It perpetuates a disability binary. You're either disabled or you're not. Well, what about the ones that fall in between where you're not able enough and you're not disabled enough? So I chose to see disability in a sphere, because disability is not in a spectrum. There's diversity within disabilities, and then there's diversity within one disability. So, where's the room for human variation?

I always recommend to people, in terms of best practices, to definitely acknowledge your privileges, become aware, like you are attending today, and know the unfortunate reality of the current law when advising a client. Stay positive and optimistic for the future of people with disabilities, as the more aware people become, to change things. That is the end of my presentation. So I'm going to go ahead and open up. I'm going to be asking panelists some questions. I'll go ahead and give this question to whoever wants to take it. So, what do you suggest should be done to go beyond mere accessibility? Who wants to take that question?

Heidi Latsky: I'll take it. I mean, I think what I have learned over the years is that accessibility, like physical accessibility is one thing, but then there's an attitudinal shift.

I think we need to shift. We need to look at things differently. One of the things that I learned, as soon as I started working with people with disabilities, I had activists in my company and they were my mentors and I learned about Nothing Without Us.[1] And that was really important. So when I was choreographing, and it still is the same today, it's all collaborative. We work together to make the decisions and I knew nothing about disability when I started. So I think it's very important for spaces to be accessible. The venues we go to that there's audio description and captioning. I wrote some notes here, but then beyond that, the society at large, just really needs to understand better what the disability community wants and what the culture is.

Katie McGrath: I'll also add to that, that I think it's not just about accessibility. It's about inclusivity in the fact that, especially as a representative for actors, when this wave that we're experiencing now, where producers, directors, cast editors are finally more consistently looking for actors with disabilities to portray roles authentically, we also want them to be considering them for just any role. Most of the roles that are out there that isn't specifically about whether they're a wheelchair user, or a leg amputee. When I'm looking at a film breakdown, television breakdown, I'm also looking at each role as a, why not? Why couldn't it be this? And the communication, like Heidi was saying, to be able to be talking about this more openly and more frequently so that people don't think it's a scary thing, because it's not.

Angélica Guevara: And as going on off what Gail and Katie said, what does accessibility mean to you in your work . . . and I'm going to open it up to the other panelists.

Gail Williamson: Accessibility is bigger than a ramp. For us, it's all sorts of things. Everything from getting a script or sides, parts that they're memorizing for an audition so that they can read it on a reader and on their computer too, it's just so many little things that come up that we need to address.

Angélica Guevara: And the world of Zoom, these little squares are moving and I'm like, "I meant to say hi to you, Katie." Thank you for that. Anybody else wants to add something?

Katie McGrath: I'll say adding on to that, it's one thing when a producer, director says, "Okay, I have this role that's written this way," or thinking one step further to what I was saying before, "Why couldn't one of those men in that boardroom scene be a wheelchair user?" But then for the most part, they think, "Okay, well the set will need to be accessible." And maybe we tell them a few other things that they need to make getting to the job and be on set accessible to them. But then they don't always think further down the line. We had a situation a few months ago where an actor was hired for exactly what I just said, to play one of the five executives in a boardroom in this big scene.

And when he got there, the director hadn't thought through shooting the scene and he had this idea, this visual in his head. And when he realized that the sight lines weren't going to be the same for the actors, because the other people were standing up, he thought, "Oh no, I can't do that. I won't change that." And so the actor got scrapped from that scene and they never told us. We heard it from the actor afterwards, and that's not right. So it's trying to get people, and unfortunately that always adds more and more layers of what we need to be doing, and to get people to start thinking about all the ways they need to be doing it. And that could have been one simple, easy tweak that that person just wasn't willing to make.

Angélica Guevara: Thank you for sharing that, Katie. Jason?

Jason DaSilva: For me, it's really important to open doors for people who would not have the opportunities. So, what I did last year is I created something called the AXS Film Fund. That's for people of color with disabilities and then they can have an opportunity to tell their stories, because otherwise those stories would just not be told. That was opened last year. And it's really important that these

stories get told and it's great. We had 30 or 40 submissions. And it's great that we're finally making it possible in all the work that we're doing. We're making it possible for these stories to finally get told. It's taken this long, but it's great.

Angélica Guevara: And in terms of actually hearing the stories, becoming aware of disability, there's a quote that I tell my students. I say, "Not everything that is faced can be changed, but nothing can be changed until it is faced." That is a quote from James Baldwin. And so sometimes people, as was mentioned earlier, they don't want to basically offend someone. And so then you've got to educate yourself on maybe what language to use. So, for example, I tell my students do not use the word "handicap," because that comes from a turn hand in cap. That's more of a beggar.

And unfortunately, you see handicap stalls everywhere with the word "handicap." Instead, it should be "Disability," which the disability community has embraced as an umbrella term to unite people, to become activists towards changing things. Or the words "apparent" and "non-apparent." Say, I have a non-apparent disability instead of saying it's a visible or invisible disability, because then that becomes ableist as you're assuming that a person who is blind can't see. They can see, they just see differently. Another one is I tell them, don't say, "Oh my goodness, I am paralyzed with work." Instead, say "I'm frozen with work," because then you're assuming that somebody that is paralyzed or is stuck, is stuck. And that's not the case. It's the way that society disables. So just little things like that. So I'm glad that that was brought up earlier. And going on that, I do want to hear about success stories. So does anybody have any success stories in advocating for change in the room?

Gail Williamson: We have a giant one. Thirty years ago when I was doing this, in fact let's just talk about reports we turned in—Katie and I turn in reports as to what we've done in a month. I was opening up the file the other day, and I went back to 2014 and I was actually recording auditions because there were so few people working. So I'd had four auditions for my clients that month. And we have probably, Katie, would you say we've got 30, 40 people working a month now?

Katie McGrath: Oh yeah. I would say at least.

Gail Williamson: The auditions are in the hundreds. So in the past 30 years we've seen such a change, but it still needs more. And the more we do, the better it gets, because the more image is out there and people that are seen, more acceptance, more understanding. My son has Down Syndrome and when he started acting, there weren't kids with Down Syndrome acting. There're kids all over the place with Down Syndrome acting now. And that's why Katie and I do what we do. We want to change the narrative and we feel like people invite the media into their home. They want to see it. So we're not marching on Washington. We're just putting images out there and making sure that people are seeing them. And we're slowly teaching production how to work with them. Katie and I do probably as much consultation as we do support of our talent.

Katie McGrath: True.

Gail Williamson: Because people want to know and they want to know how to do it. And it's all coming together now. And it's very exciting for us to see this happening.

Katie McGrath: I would say that in the past 10 years, and even more so in the past five years, there's been so much growth. If you look at shows, because I recently moved into this space of work representing this community of actors alongside Gail, but for years I was representing a more expansive community of actors. So, I was working on all sorts of projects and I remember when the original breakdowns for the Broadway production of *Curious Incident* came out and when the breakdown for *Atypical* or *The Good Doctor* came out, and when those were first cast and I had clients, you're in the mix for them. And none of them were actors on the autism spectrum and now we have two actors on the autism spectrum, who are about to premiere in a new series, *As We See It*, about three adults living on the autism spectrum.

And countlessly, there's more and more actors being cast authentically in those stories to be able to tell their stories. And we have multiple actors who are serious, regulars are shooting big films and working continuously, whether it's commercial or on episodic television or on the stage. And that has very much changed in the past few years. And Gail's right, especially in the busy time of the year, which is always, but especially right now, when we are in this traditional network pilot season that's just beginning, casting directors and directors, producers. They don't want to field calls from agents and managers. They just want to be watching audition tapes or maybe responding to emails. We get so many calls because they want to know how to be inclusive, how to be authentic. We walk them through how to write a breakdown, what terms to be using, what things are and are not protected under SAG.

And a lot of it, going off, something I think you said a little while ago, Angélica, that they're scared about what language is appropriate to use or what they can or cannot do. And we're often getting calls specifically about that, because they don't want to put in an email, we try to assure them that this is a safe space and we just are glad they want to be asking the questions. But they'll often ask us, what does it say in SAG? Or we can't find what SAG says. What's the precedent. And so we are often saying, "There is no rule under SAG," or "There is no precedent set by SAG. We are setting the precedent."

Elissa Hecker: Katie, if I could just jump in. Gail had previously said that she had always hoped that your roles would be obsolete. That once you're done, there's no more specialty, it's just fully integrated and seems like it takes a while to get that done.

Gail Williamson: It takes a long while.

Elissa Hecker: But I'm glad they're asking for education.

Gail Williamson: You know, when I first started this and we talked about that 30 years ago, at the media access office, we said, "Okay, now our job is to make our jobs go away." And I truly believed that was going to happen in my experience of employment. And here I am 30 years later and I'm going to retire next year. And we haven't done it. We still need it. Right now, there's power in the numbers because they know they can come to us for advice. They can come for us for information, and Katie gets opportunity. She does TV, film, she'll have a casting director call and just say, "Hey, I have this role. Could you just fill it with somebody interesting for me?" And it won't even go in the breakdowns for other actors to even audition for. So if you're an actor with a disability somewhere else, that's a little bit of a negative at this point. We have the opportunity to do a few more things. It's exciting though, with what's happening now. It's really exciting.

Angélica Guevara: I love hearing about success stories because sometimes I get too caught up in the numbers and the statistics, because I know that people with disabilities are making 63 cents on the dollar and I need reminders that yes, things do change even if not as fast as I would want it to, but things do change. The more that people become aware, know how to advocate, and from what I heard from Katie and Gail, you're basically talking also about having sometimes to advise. Obviously, when they come to you and say, "What do I do?" So, just even in advising of knowing what the law is and knowing what you can and cannot do, even just going to an interview, they might ask you, "What if I need accommodations? What do I do? Do I ask for them?" So, I don't know if you want to share any stories of what you've experienced when you need . . .

Katie McGrath: The sad thing that I think is also ultimately what we are trying to advise them on to empower them, which will change, is that quite often our clients are nervous to say anything. And it's difficult for me, but I so appreciate it and I'm always willing to have these conversations with my clients . . . What did you say to them? And don't tell them this. And I don't want them to think this. I don't want them to think I'm difficult. I hear that word all the time. I don't want to be seen as difficult. Actors with disabilities are often seen as being difficult and I don't want be difficult. They're always worried that they're going to get replaced or someone's going to say, "That's too much to handle. I don't want to do it."

And what I try to explain to them is a couple things. That first of all, the production is often asking, not always, but often asking and they want to make this an inclusive, accessible set or experience for them. And what we are asking for isn't anything crazy or should be seen as difficult. It is the bare and fair accommodation for what they need to do their job comfortably, safely, and to the best of their ability. And if we present it from the start, then the production can make the appropriate accommodations. Whereas, if they get to set and they're being asked to do something that is going to put them at risk or cause them pain, or just going to be that they can't actually access the space, then that is going to cause a lot of issues, that then it's going to take a lot of money or time and moving things around.

And that's where it's going to be a problem, where things are going to be seen as difficult. But if we make people aware from the start, then it's all going to be good. And also, what I tell to the production teams of casting, when I am explaining these things to them, when they're scrambling because there aren't enough companies that make and rent out wheelchair accessible trailers, it's that you need to make this investment. And we need to make these certain accommodations because it's an investment. It's like anything, or when a theater has to put in the money to make a space more accessible, you're going to have to do this eventually if you want to be more inclusive and if you do it now or when you start doing it, the more you're doing it, you just need to see it's an investment, so that a year down the line or a few months down the line, it doesn't seem like such a lift, such an ask.

Angélica Guevara: And that's one of the many layers. I want to hear from the creators. So, here's a question, either as a person with disabilities working in the entertainment industry, or as a person working with people with disabilities in their entertainment industry, what have you found to be your biggest challenge? There was some mention today, but the biggest one that you would say has been your biggest challenge.

Heidi Latsky: I'll speak. I mean, there were a lot of challenges. The first challenge is understanding the different communities you're working with and bringing them together. So, dancers who've been dancing all their lives, there's a certain work ethic. There's a way that you work. You're on time, you work really hard the whole time in rehearsal. And when you bring people with disabilities who've never had that experience, they don't have that training. As one of my activists said, it's like a culture clash. It's a culture clash and everybody gets upset. So one of the things we learned from the beginning was that we had to sit down and talk about it. We really had to do a lot of talking in the beginning so that everybody understood the rules of the room and that we all had to abide by that or else it wasn't going to work.

And the rules of the room shifted because we had people with disabilities in the room with us. So we had to work together. And as the non-disabled leader of a physically integrated company now, the challenge is perception for me. I do the Nothing Without Us. I work with everybody. My company is very diverse, but I'm not. And so that has become a new challenge as things are opening up for people with disabilities and for People of Color and someone like me, who's been fighting the fight to get what we do appreciated in the dance world and beyond, now

it's this added question of, "Well, who am I now in the world?" And that's a very big challenge right now. So it has shifted.

Angélica Guevara: And what you just mentioned, Heidi, that's a really good, best practice. Nothing About Us Without Us. Include people in the room that have disabilities and can comment on that.

Elissa Hecker: And can we take this moment to just do a 20-second clip so the folks can see Heidi's company, what she does?

Angélica Guevara: Awesome. That's perfect.

Elissa Hecker: That's just a small sample.

Angélica Guevara: I wanted to keep seeing more. So, I'll open it up for any additional comments, Jason?

Jason DaSilva: I've been part of Heidi's performances. They're really great. And it's really exciting to see that it keeps going on. It's really great for people with disabilities to be part of dance in this way. I'm going to speak about from what I've seen in the film industry over the past, maybe 15 years. So, I've gone through the whole gamut. As a person with multiple sclerosis, I was diagnosed, I was a filmmaker early on. Then got diagnosed with multiple sclerosis and all of a sudden my world changed and all the film festivals that I was going to, I had to view—am I going to be able to get to the stage to talk to people about the films that I'm working on? So, what I've seen over the past, I think, 10 to 15 years, slowly, I see both sides, it's slowly been changing.

I've seen the film festivals that I've gone to slowly become more accommodating and really embrace people with disabilities, being not only their patrons for film festivals, but also their creators as well. So, they've had to make accommodation and they have been doing that. I think it's taken time, but we're in a good place now because I think awareness is being . . . that you guys have all done, awareness has been created over the years in a big way and slowly but surely some of the work that our forefathers did with the ADA, it's coming to fruition for people like myself, young people, and will be the case for film festivals moving forward.

Angélica Guevara: Yes. And for the audience, in terms of best practices and hearing and grabbing onto what you guys were saying, you mentioned, Jason, again, raising awareness is a step, Nothing About Us Without Us. Any other best practices that you would like to add? Heidi?

Heidi Latsky: I was just going to say that it's really important to educate in whatever forum you're in. So, what we did when we first started and we had a piece called *Gimp* and I mean, there were a lot of people on both sides, pretty upset with that name. And we decided, the company, that everywhere we performed, we would have a post-performance talk-back and we would answer questions and we would be very open and we would make it a safe space. And I feel that, that's still so important to do. It's so great that when Gail said and Katie, that they're calling you and asking you about language; I get that a lot, also. So that was one of my best practices. To tell people, don't be afraid to ask questions, anybody.

Angélica Guevara: I do community agreements. Community agreements, where each person basically says, "Okay, what are we all going to agree upon?" And each one adds something. And then one of them is do not take things personally and go down the list. That's also a way to create a safe space. So I think we should . . . If it's okay to open it up to questions.

Katie McGrath: I would just like to add, I think something that you included on your earlier presentation, a big thing that we deal with every day is that this is not one size fits all and catering to the individual, especially as we're getting into negotiations and contracts and the language, that's something that I'm sure will come up more about later, but that really is something that we try to make apparent in everyone we're speaking with.

Angélica Guevara: That human variation. And I just want to say that the ADA 1990 and the amendment, that should be the absolute floor. We should be working towards making things better. And so that's why I expose people to the social model and the medical model of disability.

Judy Bass: I just wanted to say before we move to questions, that in our materials, we have a list of best practices, there's really very important stuff about talking about hiring practices and accessibility and how to work with people.

So, I recommend that every . . . In ableism in the portrayal of disability, this comes from an organization called GADIM, Global Alliance for Disability in Media and Entertainment. And also I wanted to mention that we have a list about website accessibility and social media accessibility, best practices as people don't really think about their websites, lawyers' websites, let alone entertainment companies or theater companies or dance companies, that you need to make your websites accessible. You need to have your social media that's accessible. So, there's some materials in the CLE materials where you'll find some of that, that hopefully people can use.

Gail Williamson: This seems like the right group to mention this. I don't know if you're familiar with *Drunk History* on the Comedy Channel, but they did § 504. They did that with Judy Heumann and all. And if you go to Comedy Central, YouTube, and look for Drunk History, 504, you'll get to see a lot of our actors. And a lot of them that were people who were recurring guest stars took background jobs just to be a part of this because it strengthened them. Everyone wanted to be a part of it.

Angélica Guevara: That's awesome.

Gail Williamson: This just seemed like a good group to mention it to.

Angélica Guevara: I'm going to have to check it out.

Judy Bass: Another issue that we were talking about, SAG-AFTRA, I mean, there's one article in the CLE materials, which does mention that there is a committee that is headed by a woman named Christine Bruno at SAG-AFTRA who's Chair of the New York Local Performers with Disabilities Committee. And I think it may be great if some of us get in touch with her and suggest that. It's crazy that SAG-AFTRA doesn't have policies about this.

Katie McGrath: I actually represent Christine Bruno.

Judy Bass: You do? Okay.

Gail Williamson: And I've been on that committee for years in the past, and they are working at it. They have a voice. They have made lots of noise. It all boils down to just . . . Anyway, they're trying very hard, but there are other things to take precedence.

Katie McGrath: And I was speaking with Christine as recently as Thursday, and she told me about some stuff they're working on. I actually made her aware of something that Gail had flagged for SAG easily two months ago, and still has not been changed and apparently has not come up on that board. So, I flagged that for her and we represent other actors, and other actors who are on the board as well. So we hear a lot about that.

Judy Bass: So, what is it, is it a budget issue? Is it something that we just have to make sure production companies just will put in the right amounts in the budget, both for whether it's sign language interpreters or getting trailers that are wheelchair accessible, stuff like that? I mean, those are production budget issues.

Gail Williamson: And they do that.

Judy Bass: They do.

Gail Williamson: We get them to do it. SAG doesn't have any rules about it. I mean, if I put someone on a commercial and they hire them because they're in a wheelchair and they say, "If you're recognizable, you'll be paid for the usage of this commercial. You'll get paid for your session day, but you'll only get paid for the usage if you are recognizable in the commercial." Well, I always make sure my people are recognizable if their prosthetic leg shows, if their wheelchair shows. Because I learned once, I had a kid in a commercial where they showed him from behind accepting his diploma and he was in a wheelchair and they said they wouldn't pay it because he wasn't recognizable. So, the next time I said, "Well, when he dives into that pool, if any part of his prosthetic leg shows, I want him to be paid as recognizable." They said, "Well, I called SAG and that's not a rule." I said, "No, it's my rule. And I have the talent. So if you want the talent, that's got to be in the contract."

Katie McGrath: That's what I mentioned before, that a lot of time we are setting the precedent because they . . . And I can appreciate where the problem is, is that they don't have the foresight to think through these things. So that because Gail and I are working with actors in this community every day and going by either their individual circumstances and/or the situations that arise, we have to be saying, "No, there isn't a rule for this yet, but that doesn't mean there shouldn't be. And here's the base of what you should be working at and what's fair and what's necessary."

And then hopefully from there, people will become aware and then the rules will be set, but there's SAG-AFRA, is a whole other thing, because they're trying to tackle a whole lot of things at the moment and have been for the past few years, both because of their merger and because of the onset of the internet. So there's a lot to work through. But we do come up against that quite a bit where they're saying, "Well, they're saying that there is not a precedent for this."

Elissa Hecker: How great is it that they're given an opportunity to set precedent and the bigger the production company, the more likely it is that it will reverberate throughout the industry.

Katie McGrath: It would be better . . .

Elissa Hecker: Same for theaters.

Katie McGrath: Absolutely. It would be better if there were better laws. Of course, because I always work in the union world, I don't know how many of you know this, but Gail can speak more verbally towards this, but a great many commercials are going non-union and for reputable, large corporations who can afford to be union, but they are choosing to go non-union. And there are also things like print that are non-jurisdictional. So, Gail, while she's still covering print and commercial, often is dealing with organizations or productions that aren't going through the union. And she has to, in order to keep our clients working, because so much of that space has gone non-union and so they don't have to and can choose. Sometimes they'll choose to go by some of the SAG-AFTRA rules, but quite often she just has to negotiate every single thing and without appropriate laws in place, it's the Wild, Wild West. They can do whatever they want. And there have been times where I'm sure she'll tell you, she's had to walk away from jobs and they find someone else willing to do it.

Judy Bass: Katie, how about in live theater and IATSE or Actors' Equity or even AFM or . . . I mean, have you dealt with any issues there?

Katie McGrath: For the most part, the biggest issue that I come up against with stage is . . . and honestly recently, so far, they want to make accommodations, but a lot of these theaters are old. They're grandfathered into these old codes, so they're not fully accessible, but at least the ones I've been dealing with recently, they want to do it. And

what they'll say to me is, "We have to do this any anyway, even though we're grandfathered into this, we want to be able to welcome and include artists who need these accommodations. So we see this as an investment of something we're going to need to do anyway." So that has been really great to hear. But that takes money, that takes time. And so it's often trying to help them figure out go-arounds and are also, remind them, "No, you can't put their dressing room in the basement if it doesn't have an ADA emergency evacuation plan. They can't rely on an elevator because what if that breaks? What if there's a fire?"

And it's just the education thing. But for the most part, they're willing to do that. It's more about trying to find more people wanting to be inclusive in their casting and thinking outside the box about how they could stage the production. And there are some amazing directors and artistic directors out there who want to do that. But going back to what Jason was saying earlier, and this is true of all the different mediums, we need more people in the writer's rooms, producing, directing who are part of this community. So they can more authentically be writing those stories. But also saying, "Think about this. It's actually not maybe as difficult as you might think, this is how we've been able to make it work." But I would say that theater, as we all most know, is people from all walks of life. And so for the most part, they're not scared by this.

Angélica Guevara: Thank you, Katie.

Judy Bass: Thanks, Katie.

Elissa Hecker: I thought this would be a great opportunity for each one of you to give a final thought, a takeaway for all of us, because this has been wonderful and enlightening.

Katie McGrath: I was just going to say, I think this will probably relate most to viewers, other participants, that often when I am negotiating contracts, I have to think not only about the individual, but about what is being asked of them that is not being asked of other people. For instance, an actor who is deaf or hard of hearing classically will be expected when they arrive to set or to rehearsal to be translating a script to ASL, to be teaching some other actors or director ASL, to be talking to them about framing and how to appropriately capture their dialogue. And these are not things that they're being paid for. Their contracts are as an actor and yet classically that community of artists has been asked to wear multiple hats. But the other actors on set are in that production are not asked that.

So, when I'm negotiating, especially a large contract for a contract role in a series or a Broadway production, I am having to start off by saying, "Please either include language or confirm for me in writing that they will not be asked to perform these roles." And I'll get pushback because they're saying, "Well, of course we're paying them, hiring them to be an actor," but I have to reiterate and yet there will be people on that set expecting this of them and they will feel pressure to do it. So I need protection in their language, which I can appreciate is not going to be language saying that we will hire another person to do this or do this, but it'll at least say that their services are this and not this. And if they're being asked to do this, that they will get an additional negotiated rate.

Angélica Guevara: Thank you, Katie. Anybody else?

Jason DaSilva: Yes., So I think all of us on the panel really are keeping something good going and just keep fighting the good fight, because I think we're at a place now where eyes are opening and people, if they've not heard it before, they're going to keep hearing it. About people with disabilities being present in media, both on camera and behind the camera.

Gail Williamson: Can I quickly just say that if anybody wants to reach out to Katie or me at a later time, you're welcome to give our numbers out. We're happy to chat with people if they have any questions later after this.

Angélica Guevara: Thank you, Gail. Heidi?

Heidi Latsky: All I was going to say is one of the things that I have found over the last 15 years is that even if the quality of the work that my dancers or even when they're outside of my company are doing is good, oftentimes when the media, when they're interviewed, it gets really skewed and it gets sentimental and it changes. It changes. And I think that it's so important as agents or even as a choreographer to, also, when I talk about educating non-disabled folks, we've got to educate also our performers who are disabled, who are coming into and getting a lot of attention, let's say, that they have to really watch and make very strong decisions about how they're talking about themselves, how they're talking about the work, how people are talking to them and be more proactive.

Angélica Guevara: And I'll leave also with how can you see me if you're not even trying to empathize with me? So I'll say that what Heidi said earlier, definitely challenge yourself to get into those spaces and ask those questions and create that environment of trust to start asking those hard questions. And it starts first with wanting to be aware and wanting to be in the room. So with that, I'll turn it over to Judy and Elissa.

Judy Bass: Thank you all for doing this. This is really an education and really raising awareness for all of us, both as lawyers and who we work for and work with. And we can only wish everyone continued success and thank you for being part of this.

Angélica Guevara: Thank you for having us. Thank you so much.

Endnote

1. "Nothing About Us Without Us" is a slogan used to communicate the idea that no policy should be decided by any representative without the full and direct participation of members the group(s) affected by that policy.

Virtual Annual Meeting Program—Panel 3

College Sports Chaos or Correction, From *Alston* to NIL to Conference Realignment to 50 Years of Title IX

A discussion of hot topics in college sports, including the recent Alston Supreme Court decision, new state student-athlete NIL compensation laws, the outcome of 2021 NCAA Constitutional Convention, including plans to restructure the NCAA, College Conference Realignment, and the 50th anniversary of Title IX.

Co-Sponsored by The Sports Lawyers Association

Co-Chairs:

Jill Pilgrim and Jeff Aber

Mistress of Ceremonies:

Jill Pilgrim, Esq.
Co-Chair EASL Sports Committee
Pilgrim & Associates Arbitration, Law & Mediation LLC
New York, New York

Speakers:

Morgan Lily Chall
Columbia University Sports Management Master of Science, 2022 Degree Candidate. (Former NCAA Division 1 Gymnast; Chair, NCAA Division 1 Student-Athlete Advisory Committee, member, NCAA Division 1 Board of Directors)

Thomas McMillen
President & CEO, LEAD1 Association (formerly the Division 1A Athletic Directors Association)

Allison Rich
Senior Associate Director of Athletics, Senior Woman Administrator, Princeton University, and Vice Chair of the NCAA Division 1 Infractions Appeals Committee

Nancy L. Zimpher, Ph.D
Senior Fellow at the National Association of System Heads; Chancellor Emeritus of the State University of New York (SUNY); and Co-Chair Knight Commission on Intercollegiate Athletics

Moderator:

Deana Garner
Senior Associate Director and Deputy Diversity Equity and Inclusion Officer, Arizona State University

Simone Smith: Welcome everybody. Good afternoon. This is the Entertainment, Arts and Sports Law Section virtual Annual Meeting, day two. Today's program will run from 2:00 to 4:30 PM. The program is co-sponsored by the EASL Section and the Committee on Continuing Legal Education of the New York State Bar Association. And Jill will also mention our other sponsor.

A PDF of the form and course materials are also in your dashboard. We would also like to ask attendees to please fill out the evaluations that are in your dashboard, as your feedback helps us develop future programs. I would now like to give over the program to Barry Werbin, who is the EASL Section Chair, and he's with Herrick Feinstein, LLP, in New York City.

Barry Werbin: I thank you very much, Simone. And good afternoon, everyone. As Chair of the EASL Section and on behalf of our Executive Committee, I want to welcome everyone to this second session of our 2022 Annual Meeting program. Despite COVID-19 still keeping us, unfortunately, in the virtual world, EASL programs for this Annual Meeting are some of the best ever and address cutting edge issues. Today's program will highlight 50 years of Title IX in college sports and the changing dynamics and legal rights impacting college athletes.

For those of you who are already EASL members, thank you for your ongoing support and participation and membership. If you are not already a member, I urge you to please join and become active on one of our many com-

mittees, especially as EASL Section dues are very modest if you already are a member of the New York State Bar Association. Law student members are also very welcome and we want you. The benefits of EASL membership include fantastic programs like those presented at our annual spring and fall meetings, our annual Music Business Law Conference, and EASL Committee programs, which are held throughout the year, both CLE and free informal gatherings. And receiving the acclaimed *EASL Journal* that also provides opportunities for members to have articles of interest published.

And, of course, there's ongoing valuable networking throughout the year, especially when we eventually return to in-person events. As my tenure as EASL Chair ends in just a few days, I want to, again, extend my sincere thanks to the entire EASL Executive Committee, all of our other officers and former chairs, our dedicated NSBA liaisons past and present, Pat Stockli, our NYSBA CLE coordinator, and her staff. And all of you who have helped to make EASL the dynamically rich Section it has become over the years.

Before we begin today's program. I want to highlight the important work being done by the New York Bar Foundation, which is the charitable and philanthropic arm of the New York State Bar Association, with the goals of advancing service to the public and improving the administration of justice. I encourage everyone to contribute to their valuable mission. And now, James Barnes, a Foundation member and Chair of the Fellows, will tell you a bit more about the Foundation's important work.

James Barnes: Thank you so much, Barry. And thank you for the opportunity. We know you've got a very strong and robust Section, very active. I've gotten to know many of your Executive Committee members over the years, so we appreciate the time. Just a brief message from the Foundation today, because of your support, the Foundation presented nearly $1 million in grants, fellowships, and scholarships in 2021, fostering success for law students and giving a voice and hope to people in need of legal services. The grant program impacted more than 5.3 million of our neighbors in need of legal services throughout New York State last year.

I want to give you a brief example of how your support for the Foundation makes a difference. Here's a story from one of our grantees, a child who suffered from sexual abuse, neglect, food and medical care, physical abuse and disabilities. The child was multiple grade levels behind in school, needed special education services, had vision issues that required additional specialty care, and eventually would need an alternative safe and permanent home when the parents' rights were terminated by the courts.

Investigations going back eight years did not resolve these issues. The staff of a grantee organization was relentless in connecting with each school and teacher as the child transitioned through multiple schools, advocating for better services and classroom settings and following through to make sure services were actually provided. This carried over to vision care, including a porch pickup and drop off during the pandemic, when the child had broken glasses. Finally, advocates secured an adoptive resource after the parents' rights were terminated.

Without the support, the child may still be another system statistic. Instead, the child has been successfully adopted and is making incredible strides. Providing this type of assistance is at the heart of the Foundation's mission. We help in improving people's lives, both today and in the future. Through partnerships with several NYSBA sections, the Foundation also helps law students by presenting over $225,000 in scholarship and fellowship opportunities in 2021. Helping 87 students in law related organizations where they worked. Last year, we also held a record-breaking online campaign, raising in excess of $26,000 for veterans in need of legal services.

Together, we can have a greater positive impact on the profession and those we serve. This year's Annual Meeting campaign is a joint initiative of the Foundation and the bar association, the campaign focuses on the critical issue of attorney wellness. The pandemic has taken a toll on all of us, and as lawyers, it is critical that we stay healthy to maintain the public trust and provide legal counsel to our clients in a professional and ethical manner. Your support of this campaign will be designated for the Association's Lawyer Assistance Program, and is an example of the work of the Foundation coming together with you to make our community better and stronger.

I invite you to contribute to this campaign personally and as a section, perhaps as an honor of an award recipient or a lawyer you know. Also, on January 27th, Thursday, we'll be presenting our lifetime achievement award to John D. Feerick, Dean Emeritus and professor of Fordham University School of Law. We sincerely appreciate your support of the Foundation. Thank you very much for your time today and we hope you have a wonderful program. Thank you again, Barry.

Barry Werbin: Well, thank you, James. That was an amazing story you told about the child. It just highlights one of the numerous outreach programs and things that the Foundation does. I know former Dean Feerick from my days at Fordham Law School, with him becoming Dean after I graduated. He's just an incredible advocate and person, human being. So, the Foundation is incredibly lucky to have him as part of its organization. So, thank you. So, with that, it's now my pleasure to introduce Jill Pilgrim, the Co-Chair of EASL Sports Law Committee. Take it away, Jill.

Jill Pilgrim: Thank you, Barry. And good afternoon to the attendees who are attending this program live (virtually), as well as those of you who will see this after the fact on demand. I'm going to go back a little so that I can make sure that we focus on the title of this program, which is

College Sports Chaos or Correction: From Alston to NIL to Conference Realignment to 50 Years of Title IX. And I want to mention that, in addition to the traditional sponsors, the NYSBA committees and NYSBA, we were very pleased to have The Sports Lawyers Association co-sponsor this program.

So, we are going to get to it and introduce you to the panel. This is really quite an honor to have a panel of this depth of experience, knowledge, and professional experience. I'm going to ask you to bear with me as I go through these introductions. I tried very much to shorten the bios and I have some, but you will understand, when you hear the backgrounds of these presenters today, why it's very important what they have to say. And it's very important for you to know what their backgrounds are.

We start off with Morgan Lily Chall. Morgan is a student in the Master of Science program at Columbia University Sports Management Program. And she's expecting to get her degree this year in 2022. She received her Bachelor of Science in global and public health from Cornell University. She was on the gymnastics team at Cornell for four years. She is a two-time Ivy League champion, a scholar athlete, was on the Dean's list and was president of the Student Athlete Advisory Committee, known as SAAC.

She was the Ivy League student athlete representative to the NCAA Division 1 SAAC and the Division 1 student athlete representative to the NCAA Committee on Academics. If that's not enough, she was chair of the Division 1 SAAC, representing over 176,000 Division 1 student athletes. She was the first ever female college student athlete to serve on of the NCAA Board of Directors. Very interested to hear about that experience. And at the request of the United States Senate Committee on Commerce, Science, and Transportation, she was an advisor on potential name, image, and likeness legislation, federal legislation that may come forward in the future. We welcome Morgan.

Next up, the honorable Tom McMillen. Tom is currently president and CEO of Lead1 Association, which was founded in 1986 as the Division 1A Athletic Directors Association. Lead1 association represents the 130 NCAA Division 1 football bowl subdivision athletic directors and athletic departments and their related athletic departments. Tom was an All-American basketball player from the University of Maryland. He was a Rhodes Scholar. He was a member of the 1972 men's Olympic basketball team. He was an NBA player with teams such as the Braves, the New York Nicks, the Atlanta Hawks, and the Washington Bullets.

He was elected to three terms as the United States House of Representatives for Maryland, a three-term member of the United States House of Representatives. And he was a founding member of the Knight Commission on Intercollegiate Athletics, which was founded to investigate abuses in college sports. And we will be hearing more about that.

Next up to this all-star team, Allison Rich. Allison is currently Senior Associate Director of Athletics/Senior Woman Administrator at Princeton University. She is president of The Sports Lawyers Association. Thank you again, SLA, for co-sponsorship. And she is vice chair of the NCAA Division 1 Infractions Appeals Committee. In the past, Allison brings these amazing credentials: She worked at the NCAA national office in legislative and membership services. She worked as an athletic administrator in executive positions for Florida State University, Cal State Fullerton, and the University of the Pacific. She has been a consultant with JMI Sports LLC. She has her Bachelor of Arts from Princeton University, her JD from Chicago Kent College of Law and her Doctorate in Educational Administration from the University of the Pacific.

Nancy Zimpher, next up on our bench, is Senior Fellow at the National Association of System Heads, leading the NASH transformation agenda, which is called The Big ReThink, our Transformation Agenda for Public University Systems. She is also co-director of the Association of Governing Boards Institute of Leadership and Governance in Higher Education. And she is co-chair of the Knight Commission on Intercollegiate Athletics. In the past, she was Chancellor Emeritus of the State University of New York, we know it as SUNY here in New York. She was president of the University of Cincinnati. She was chancellor of the University of Wisconsin, Milwaukee and executive dean of the Professional Colleges and dean of the College of Education at the Ohio State University. She received her B.S. in English education and speech, her Master of Arts in English literature, and a Ph.D. in teacher education and higher education administration, all from the Ohio State University.

Next on the bench, our moderator today, is Deana Garner. She is Senior Associate Director and Deputy Diversity and Equity and Inclusion/Title IX Officer for Arizona State University. She is also the Senior Woman Administrator Liaison to the Pac-12 Swimming and Diving Coaches Committee. In the past, Deana has served as director of NFL Player Security Services, NFL Player Engagement Director of Education, NCAA Enforcement Services Agent in the Gambling and Amateurism Activities Department of the NCAA, staff council for the Indiana Gaming Commission, and deputy prosecutor with the Marion County prosecutor's office in Indianapolis, Indiana.

She has been the member of the Pac-12 council, she has been the SWA liaison to the Pac-12 Wrestling Coaches Committee and Ms. Garner-Smith, I forget to mention her hyphenated married name, received her B.A. at Dillard University, her J.D. at Indiana University School of Law. I want to thank the panelists and our moderator for giving of your time and knowledge today. And on behalf of the New York State Bar Association, I'm going to turn this over to you, Deana, to move the panel forward.

Deana Garner-Smith: Thank you, Jill. Good afternoon, everyone, our esteemed panelists, as well as our at-

tendees. We thank you for this time. Thank you, Jill and the New York State Bar Association, Entertainment, Arts and Sports Section, as well as The Sports Lawyers Association for sponsoring and organizing this panel. Thank you, audience, for joining us. We look forward to learning from you any questions that you may have throughout this program. And I believe that, because of the diversity that you have within your legal experience, that it will provide you a lot of opportunity to learn from our esteemed panelists a lot more. And we will take a deeper dive into the NCAA governance organizational structure, and talk about a lot of the hot topics that are indicated in the program agenda.

So, panelists, as we are coming upon the heels of the NCAA convention, there's lots of buzz in the air, lots of communication on all platforms of social media, as well as television, throughout these last few days. I'd like to ask each one of you to share two takeaways from the convention. And of course, as we go deeper into the program, we would love to hear your specific insights. So, first up, I'd like to talk with Tom, and if you could share your two takeaways from the convention, and then Allison will be up for further commentary.

Tom McMillen: Well, thank you. It's a real pleasure to be here today. And the convention was anti-climactic in some respects, because a lot of it was foreordained by unanimous vote of the Board of Governors. But the two big things, I would say, one, is that they are going to give a lot of autonomy to the divisions, Division 1, 2, and 3. Now, Divisions 2 and 3, the smaller programs, are not going to be changed very much. Division 1's going to go through some major changes. And they formed another committee called the D1 Transformation Committee to really review everything from membership, benefits to student athletes, access to championships, even revenue sharing involving student athletes.

And so, there's going to be a whole lot to come on the D1 area. And really, the other part that I think is a big picture item to look at is, the NCAA has always operated as sort of a big tent organization with 1,200 schools. Well, now they're going to devolve that to each division. And this is pretty historic because, how do you run a uniform national sports program when you are pushing everything down to the conference? Almost a patchwork kind of format. So, that's a question that will be remained to be seen is, what all of this means to the future as the NCAA effectively devolves a lot of its power?

Deana Garner-Smith: Thank you, Tom, for those comments. Allison?

Allison Rich: Yes. Thank you, Deana and Jill, and everybody for having me today and having us today, I'm really thrilled to be here. I agree with everything that Tom said. I think he hit it right on the head. The things that I'm hearing and the things that I've taken away is that there's a lack of clarity on what the future brings. Everybody knows the train is moving down the tracks. And I think, as people like to say, the toothpaste is out of the tube and we know things are moving along, we just don't know exactly where we'll end up. I know there is some concern about access to championships across the board. And I think that's one of the biggest concerns in Division 1, that no matter what changes with the Division 1 governance, that there's still that access for all institutions to have for those NCAA championships.

Building on what Tom said, what's interesting about the history of the NCAA is that, for years, the NCAA has been a membership-based association. So, when we say the NCAA, we mean the member schools and conferences, and those are the people, the organizations who are the decision makers of the legislation on the directions for the NCAA, and the staff that's in Indianapolis has some help in guiding and streamlining and assisting with that. But really, the decisions are made by the membership. And over the years, there's been quite a bit of outside pressure, as well as inside pressure, but outside pressure, to change, as scandals happened, as things changed in the world.

And the NCAA, as an association, has been able to persist and make changes based on taking some of that feedback from external, but also then working internally to see what works the best for the association and the organization as a whole. And I think some of the differences we're seeing now, and some of it I chalk up to just today with so much access to information and social media and the internet is that that information, that pressure that's coming from outside, is being given a lot more strength. And it seems to be guiding some of the decisions in a lot of ways. So, it's interesting to see how things have changed over the years in terms of how the association has been run and has operated. And I think we'll definitely see a lot more changes as we move forward.

Deana Garner-Smith: Thank you, Allison. Yes. I think both you and I, having worked at the NCAA, this is definitely a precipice that we're at and crossroads for sure. And I just think that the audience and all of us will just be holding on tight just to see how this is going to play out. Well, Nancy, as the co-chair and member of the Knight Commission, first, could you share with the audience what the Knight Commission is and its objectives in a few minutes? And then also, I had a couple of other follow up questions for you.

Nancy Zimpher: I'd be happy to, Deana. And I also view it as quite a privilege to be on this panel and a little intimidating. This is not my day job and there are true experts on this panel. And I certainly lean in to you. It has been my privilege for the last five years to be a member of the Knight Commission. It's a 21 member board, at the current moment is co-chaired by Arne Duncan, I think you know him, former Secretary of Education. And Len Elmore, former everything and wonderful faculty member, probably . . . definitely at Columbia and probably intersects a lot with our esteemed panelists, like Morgan.

So, it really is an advocacy organization. It doesn't make policy, it doesn't have policy responsibility. Tom was one of the co-founders at a time when, really, intercollegiate athletics needed to be saved. There were unresolved scandals, there were issues that were not being addressed. And it was the belief of the Knight Foundation, which funds the Knight Commission, that this was presidential responsibility. And as a result, the presidents of the Universities of North Carolina and Notre Dame were the first co-chairs, and it has been led mostly by university presidents ever since founded in 1989.

I think this current leadership trio is an exception and a very nice one, because now we have a national figure who believes in the education of all people in this country. And we believe in the education of student athletes, so that's Arne Duncan. And Len Elmore actually lived the experience and now is teaching it, of course, on television as a commentator as well. So, I have to say, though, that some of the things I hope to mention today are right out of the Knight Commission's script, but I am a university president and I served on the Knight Commission when it was a previous board of governors, our executive board. Learned a lot, that was at a time when we were making bold recommendations about academic eligibility.

So, this role that the Knight Commission played in the convention was to advise as an external agent. I agree with Allison and Tom, there's a lot of external interest feeding into the NCAA. I will say, though, that given the discussion about the evolution of the NCAA, I don't see membership organizations and leadership organizations as antithetical. And frankly, a bigger dose of leadership on the part of the NCAA would be my personal leadership experience desire for the Knight Commission. I think it's pretty tricky that the commission seated this Constitution Committee, which I think was really important and very participatory, and now it is going to seed the divisions. And I wonder if there could have been a stronger framework issued from the NCAA to say, "These are some of the boundaries."

And governance is a big interest of the Knight Commission and everybody on this panel, I think, from the convention, if I could just add of my two cents worth on what we were looking for, we were looking for more inclusivity, particularly representation of student athletes and independent governing board members. The Knight Commission, along with others, did advocate for independent directors on the NCAA Board of Directors. And they got five. I think that was powerful and important. We did advocate in the Constitution Committee for two student athletes. Morgan can say more about this, but we wanted to make sure both gender representation was broad and important. We didn't quite get that. We got one voter and one advisor, still working on those issues. And of course, issues around... Since this has become quite a money issue, revenue distribution. So, that's it for me, Deana.

Deana Garner-Smith: Okay. Thank you, Nancy. But one final question for you, since you mentioned about coming off of the convention and now with the constitution now allowing for all three divisions autonomy to design the future, what do you see as maybe one or two critical issues for Division 1 to address as they chart the future of collegiate athletics?

Nancy Zimpher: Well, I will revisit the participation of student athletes because, I guess I didn't really get to this. The purpose of the Knight Commission is to protect the student athletes, to protect the education, the health, the safety, the wellbeing of student athletes. And I just think it's such an important issue that we would have the voice of student athletes not segmented to a particular committee, but sitting on that board, which is supposed to, is charged to, make the big decisions, the tough decisions.

And I do think that, along with that student voice, we need independent perspective. We learned at the convention, particularly in a session that the Knight Commission hosted, that we can learn a lot from the pros. We can learn a lot about revenue management. We can learn a lot about health and safety, other rules and other disturbances that they have managed to assist in, I think would be informative to us. But the thing I hope most from, if it is at all possible, particularly the D1 discussions, is the control of revenue distribution.

The inequities of the governance system make the distribution of revenues inequitable as well. We don't have any oversight of where the college football playoff revenues land on the various campuses. I'd like to say more about this later, but those are areas where I would be very concerned that the division discussions, especially as Tom said, D1, step up.

Deana Garner-Smith: Okay. Thank you. Well, we have just two minutes before we transition into the next topic. So, Allison or Tom, do you have any final comments on anything from the convention or restructuring of the NCAA that you'd like to comment about right now?

Tom McMillen: I would just say very quickly that I think one of the core issue is not what goes down to the Division 1, but what actually gets ceded to the conferences. Division 1, 350-something schools, you have $10 million schools, you have $200 million schools. And I think the conferences are going to be seeking even autonomy from their own divisions. And that could come in the form of revenue sharing, more student athlete benefits far beyond the *Alston* case,[1] which we're going to talk about.

Deana Garner-Smith: Yes. Thank you.

Allison Rich: I agree with that as well. I also think, though, that the concern about that then falls on the competition side of things. So, yes, the different treatment. Yes, the different usage of money, different budget sizes. But if all are going to be participating in championships and even regular season competition against each other, those competition rules and the recruiting rules need to have some uniformity, so that there is some sort of fair competi-

tion. It might not be the old level playing field we used to talk about, things are going to be a little bit different in terms of the benefits available, but just to have that same opportunity to be successful on the field.

Deana Garner-Smith: Yes. Totally. Thank you. Thank you for those comments. Well, with all of the things that you mentioned, we still have the backdrop in ever-present COVID. So, that's just another thing that all of us are having to deal with, as well as other facets of society. Okay. So, we'll transition into the next topic, which I think is a definitely a hot button issue: College student athletes and the win at the Supreme Court, *NCCA v. Alston*.

Morgan, can you please share with the audience a synopsis of *Alston* and what was it about the Supreme Court ruling that was of interest to you? And if you could share a little bit about the impetus that led you to sign on to the amicus brief.

Morgan Lily Chall: Yeah. Thanks Deana. It is an honor to be here with you all today. So, the legal issue in *NCAA v. Alston* was whether the NCAA's prohibition on non-cash education related compensation for college athletes violates federal antitrust law. This case was the most significant legal challenge to the NCAA's model of amateurism since a different partially successful attempt, which ended in 2016. By way of quick background, in 1984, the Supreme Court ruled in *NCAA v. Board of Regents of the University of Oklahoma*,[2] that the NCAA's television plan violated § 1 of the Sherman Act.

But the Court also held and recognized that in order to promote competitive equity into distinguishing college athletes from professional athletes, the NCAA's rules pertaining to college athlete eligibility standards are subject to a different and less stringent analysis than other types of antitrust cases. So, for decades, that NCAA has used this defense to say that their athlete compensation limits, which they tied to college athlete eligibility, did not violate antitrust law.

Several years ago, a group of NCAA Division 1 FBS[3] football student athletes, and D1 men's and women's basketball student athletes, sued the NCAA saying that their rules restricting non-cash education-related benefits for student athletes violated federal antitrust law. Since education-related benefits are tied to athlete eligibility rules, the NCAA, again, relied on the *Board of Regent's* decision in their defense. Even though the district court ruled in favor of Alston, saying NCAA restrictions on non-cash education-related benefits violate federal antitrust law, the court, interestingly, did allow the NCAA to limit cash or cash equivalent awards for academic purposes to the same amount limited for athletic purposes. It's around $6,000.

The Ninth Circuit affirmed the district court's ruling. The NCAA wrote a *writ of cert* and the Supreme Court agreed to hear the case. In a unanimous decision, a shocking 9-0 agreement among our current Supreme Court, the Court affirmed the trial court and Ninth Circuit's decision, saying the traditional rule of reason standard applied to this case and the facts of the case were not subject to a less

stringent analysis or standard, as the NCAA argued. But most significantly, it was the Court's statement that the NCAA's role in maintaining the "revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act." General compensation restrictions were not the legal issue that the Court was answering in this case, but the Supreme Court's opinion and concurring opinion, arguably, has a far-reaching impact on how the NCAA then proceeded in reforming their NIL[4] rules and what they continue to do right now with the new constitution and transformation. So, in terms of why I signed on to the amicus brief in support of the NCAA's position on amateurism, it was a former student athlete amicus brief. The short answer is I have an incredibly unique experience and understanding of the intricacies and inner workings of the business of college athletics while also, simultaneously, having been a Division 1 student athlete.

I deeply care about all college athletes, both current and future. Their experiences, their wellbeing, their athletic opportunities. And so, I signed the brief because it was a really good way for the voices of non-revenue generating sports like myself, as a former gymnast, and specifically, for the female college athlete voice to be heard on an issue that challenges the NCAA's model of amateurism, which is an issue that oftentimes leaves out the voice of women and non-revenue generating sports. So, oftentimes athletes are also positioned against one another, especially in the media. I'm sure you see a lot of things out there around football and basketball players.

In this case, for example, really virtually only includes FBS football and D1 men's basketball and women's basketball players. The amicus brief also allowed the voices of a wide variety of NCAA sports to be heard on an issue that usually only focuses on those two sports. I honestly laugh looking back at the arguments that we made in the amicus brief, because we were right. You can see our arguments come to fruition in the latest memo issued by the general counsel of the NLRB, besides the *Alston* decision, as a reason why she believes college athletes should be considered employees of their universities.

The amicus brief points out the biggest unintended consequence to the current ruling, a compensation arms race, which I'm sure all our panelists are going to talk about, which we're already seeing, that will inevitably hurt non-revenue generating sports and teams, or in other words, the other 94% of college athletes that are not D1 football and men's basketball players, or the top one to 2% in their sport. The compensation arms race is nothing new. Any college athlete, especially women in men's Olympic sports, have experienced the effects of this arms race as their universities prioritize revenue generating sports in terms of facilities, gear, locker rooms, travel, and even the discontinuation of the non-revenue generating sports, no matter how successful the sports are.

The coronavirus pandemic also proved that when universities struggle financially, college leadership discontinues Olympic sports in order to offset their financial losses. So, the signing of the brief came from two personal fears of mine if the Supreme Court ruled in favor of *Alston*. One, my concern for the discontinuation of men's Olympic sports, like track and field, wrestling, gymnastics. And two, my concern regarding the exacerbation of what we already know to be unequal treatment of female athletes across the board on college campuses.

My reason for signing onto the brief is because knowing what I know about college sports and university leadership spending behavior, I ultimately agreed with the NCAA's position that limitations on non-cash education-related benefits are appropriately tied to athletic eligibility in order to maintain the competitive equity and the student athlete wellbeing, opportunities, experiences, and to ensure that student athletes remain not employees of their schools.

Deana Garner-Smith: Morgan, thank you. That was an exhaustive analysis. And I appreciate your recapitulation of your position, because I think it's really important for our audience to hear from female student athletes, former female student athletes, and others that are participating in the Olympic sports because, often as you said, their voices are not heard. So, I appreciate that very much. Tom, based on what Morgan just shared, how do you respond and react to it? That's the one part of the question. And then, looking at your constituency of the D1 athletic directors, is there a perspective that prevails that you can share?

Tom McMillen: Well, first of all, Morgan, very good job—you're hired as far as I'm concerned. You did a great job of explaining that case. It was a miscalculation by the NCAA to petition the Court on this case. They had lost at the district level, they had lost at the Ninth Circuit, and then, they go to the Supreme Court and they just get slapped down. And the biggest slap down was the fact that they had relied on a statement for 37 years saying, "College athletes can't be paid." And that was thrown out with everything as well.

And so, Justice Kavanaugh in his concurring statement, I think, summed it up so well. When you build a model that's based on not paying people and you use that as your defense for not paying people is a circuitous logic that doesn't hold up very much in a practical court or in a legal court. So, I mean, he really stripped bare a lot of the defenses on this. From the standpoint of FBS and college sports . . . I think Ole Miss was the first school to come out and say, "We're going to pay the basketball and football players $6,000 each in cash."

But really, we haven't seen a lot of activity in this area yet. And quite frankly, you could see unlimited intern-

ships. You could see schools give unlimited internships. Go to Europe and study. I mean, the definition of educational expenses, no one has really pushed the envelope on that. And I do think that that envelope will be pushed down the road. And so, I think this is a step along the road and so far it's been managed quite conservatively by our schools. That doesn't mean it will be so in the future.

Deana Garner-Smith: Thank you, Tom. I think that there's just so much that is at play here. And speaking of that, and for our audience to have a little bit of a better understanding of NIL versus *Alston* . . . I know in our next segment, we're going to go into a deeper dive related to NIL. However, to make sure that our audience understands and is clear, Allison, can you clarify whether or not the *Alston* case dealt with NIL? And also, can you share the distinction and talk a little bit about the distinction between *Alston* allowing for the institutional-based educational compensation versus NIL, which allows for the third-party market driven compensation?

Allison Rich: Yeah. Absolutely. Morgan did a great job. She's ready for law school already. It's interesting. There's a lot of confusion between *Alston* and NIL. And some of it, I think, it's because it both really came out or happened at the same time, around the same time frame and seem somewhat connected. The difference with *Alston* is that it's educational-related benefits only, and it's the benefits that are provided by the school, by the institution. So, it's things, like materials for courses, and graduate study, and field trips with classes, and things like that.

I think some of the concerns that have been raised is there aren't real clear parameters about what exactly are educational-related benefits. And so, there's thought that you could be paid for maintaining eligibility, or there's all kinds of different academic related benefits in addition to things like laptops, but other types of technology that could be paid for. And I guess the question is whether or not that's an issue, if those are different among different institutions. But what it comes down to, it's all the benefits that are paid for by the institution.

There isn't an issue with federal aid, because as long as a student is only receiving Pell Grants as their federal aid, then it doesn't impact their limit. So, I think there was some concern early on that it would affect the financial aid packages as well, if they were getting other educational benefits. NIL, on the other hand, is benefits payment, those types of arrangements with people outside of the institution, for the most part. So, it's market driven. It's based on the reputation, fame, ability that a student athlete has as a student athlete.

And for years, there's been a lot of talk about NIL and what it means and changing the rules around it. For years, there have been waivers for student athletes to do things, like write a book and be able to put on the book jacket that they're a student athlete at XYZ University. To develop a product and be able to have their name on it and be part of the publicity of a product or a service. We've had student athletes on our campus who are musicians, or who've developed fashion labels, or who've created different sport related products or non-sport related products.

And for years, again, you've had to have waivers for them to be able to do this. And often, we're not able to keep their name on a product or on a business because of the NCAA rule prohibiting that. And influencers, I think that's probably the biggest one now, where student athletes had to separate that part of their identity from who they were as influencers. And so, there were a number of proposals that were in place. We were all ready to vote on them at the NCAA convention in 2020, which seems like about 100 years ago. And there was some talk, then, from the Justice Department about this is potentially an antitrust violation, which again, I think, wrapped it up into *Alston*, which is all about antitrust issues in the NCAA. And there was concern, then, that the NCAA acting as a whole and passing these NIL limitations could be a restraint of trade and violate antitrust.

So, the NCAA, recognizing that there were a number of state laws that were going to become active on July 1st changed the NCAA rules. We, as an association, changed the rules to permit NIL-related activity within certain parameters. And then, leaving a lot of it up to the individual schools and the individual states. And we'll talk more about NIL, I think, in the next question, but that is a key distinction is that NIL is typically in some cases, not always, but typically, outside. It's always market driven. And it's based on that reputation, fame, ability of the student athlete. Whereas, the *Alston* payments are education-related and they're from the institution only.

Deana Garner-Smith: Thank you. Tom?

Tom McMillen: I wanted to compliment both Allison and Morgan on their remarks. But if you looked at the Supreme Court proceedings, there was a hesitancy on certain justices going too far, notwithstanding Justice Kavanaugh's concurring opinion. But the one thing that this case did is that antitrust law applies to college sports. And I think that has driven all this, "We got to send it down to entities that have less market power." And so, that's really, I think, the germ that really caused a lot of this that happened.

And the other thing that happened in this *Alston* case is that they almost invited future litigation on this matter. In other words, is saying, "We're not deciding the bigger compensation issue, but we're not saying that we shouldn't decide that down the road." So, as I said, it was a miscalculation, because if they had accepted the Court of Appeals and just let it go there, you wouldn't have these precedent-setting events that occurred, which is driving so many things. A number of states have put employment bills in, collected bargaining bills. You've got bills at the federal government. So, clearly, the Pandora's box has been open.

Deana Garner-Smith: Thank you, Tom. Allison or Morgan, anything else to add?

Morgan Lily Chall: I'll just add one more thing. We just saw that the University of South Carolina is another school that just announced they're going to give all of their student athletes NIL payments. And my first thought, as a student athlete, was the number of mid-major schools, lower resource institutions, even within Division 1 who can't afford that. So, yes. When we talk about the compensations arms race, that's what we're talking about, because that creates a recruiting inducement for people to go to the University of South Carolina, for example.

Allison Rich: I agree with what both Tom and Morgan just said, this is an interesting time. I mean, there's been a lot of talk for years now, as the NCAA, as an association, kind of rolled back on some rules that it used to be . . . If I couldn't do something, I didn't want you to be doing something and I didn't want this other school to be doing something. And so, this was that level playing field that it had to be exactly the same. And a number of years ago, the association decided that that's not exactly the way we want to do things and it doesn't make a lot of sense. And what makes sense is to say, "Here's the playing field, here are the guidelines." And that it's going to be up to the individual institution or conference to decide how they want to spend the budget that they have, what their philosophy is in terms of the things that they want to do.

And that seemed to have been working pretty well and has allowed schools with larger budgets or larger endowments or whatever it is, to be able to do some of the things that they couldn't do before and to choose not to do other things that maybe other schools were doing. And I think, now, with more opportunities, you'll see a lot more disparity in some of the things being offered. It isn't just the unlimited food that we're all providing now, but maybe in different ways, but these educational expenses and how do those grow. And then obviously, as we get into NIL as well.

Deana Garner-Smith: Yeah. Thank you. And Allison, I would just like to add one last comment, since you and I are both on institutions. I'm at a public institution and, obviously, you're within the Ivy system at Princeton. And I just think that, in our previous days working, you and membership services, me and enforcement services, all of these things would've been investigated, you would be interpreting in your staff and it's just very chaotic right now.

And I think we're going to have even more of an unevenness and inequities and people are going to be feeling a lot of burn as we continue going through the rest of the next few months. And it'll be very interesting to see how the transformation committee organizes things and what their recommendations are for Division 1, but then also the other divisions and what is that going to look like.

Allison Rich: Yes. No, there's a lot of heavy load on the compliance staff, especially talking with them and hearing all the things that they have to decide. It is isn't just, does the rule say yes? Does the rule say no? There's so much interpretation now and there's so many different things to consider. So, I absolutely agree.

Deana Garner-Smith: Absolutely. The next topic that we would like to hear from our panelists is about college athletes for NIL, which is name, image, and likeness. And we've talked a little bit about this before, but we want to have a deeper dive into it. So, this section, I think, will provide a robust understanding of different perspectives on this. So, Morgan, continuing on, from your perspective, as a former student athlete, and one that was involved heavily in the governance process, can you share whether or not your personal opinion and your perspectives of NIL, are they good for the student athlete? And if so, can you elaborate on if some may be benefiting more than others?

Morgan Lily Chall: Oh yes, Deana. I can elaborate on that. So, this is a very loaded question about whether NIL is good for college athletes. The short answer is yes, I think NIL is great. And to be perfectly clear, I have personally never been against reforming the rules around name, image, and likeness. As mentioned, I wrote a brief to the U.S. Senate Committee on Commerce, Science, and Transportation, aiding in their review of legalizing NIL rights at the federal level for college athletes. My op-ed, published in *USA Today*, was not to argue that NIL is bad, which is a lot of what the Twitter trolls believed was the argument. My perspective is that schools across the country are unable, unwilling, just simply don't provide equal treatment to their women's teams as compared to their men's teams, and without equal standards and regulations across the country, NIL will simply exacerbate these existing unequal treatment of women's teams.

At least that's my argument and perspective, and it's not just about equal treatment for women's athletes though, it's also about equal treatment and opportunity for all college athletes in protecting against exploitation. For example, did you know that the NCAA is not the only intercollegiate athletic association that exists? There are three other college athletic organizations as well, two of which regulate the athletics of community colleges. But even though these other intercollegiate athletic organizations exist, Mississippi is, I believe, the only, if not one of only a couple of states, with a statute that expressly includes community colleges. Well, what is the impact of all these various rules around the same issue with 27 different state laws on NIL, 27 or 28? As of today, while approximately 480 NCAA and another intercollegiate athletic organization, the NAIA, we love acronyms in college athletics, there are schools, there are 480 that comply with their state law, while there are 610 that comply with their interim school or conference policy.

If you average, for the purposes of math, around 300 student athletes per institution, that means approximately 143,800 student athletes comply with their state law on NIL while approximately 180,600 student athletes comply with their school or conference policy. This is an issue

because nearly every state law, which if you've read, and I've read every single one of them, and conference policy is different in some way. Some states, like Illinois and Louisiana, expressly prohibit boosters or schools from providing direct or indirect compensation related to NIL for current and prospective athletes, as a means of a recruiting inducement or pay for play. Many other state bills, like Arizona, Alabama, Georgia, Oregon, North Carolina, they have no mention of restricting booster involvement in NIL activities. In fact, there was even a lawsuit filed recently in Florida, challenging the Florida High School Athletic Association's bylaws that prohibit high school athletes from capitalizing on their athletic fame and challenging the state of Florida's NIL statute that restricts athletes from obtaining NIL deals that extend beyond the time that the players are in college, which is a provision that many other state laws have as well.

There are other various provisions between state laws and conference policies regarding the types of NIL deals that student athletes can engage in, for example, in Florida a student athlete signed the first ever NIL deal with an alcohol company because under Florida state law, that's legal. At Arizona State, as I'm sure Deana can attest to, even though Arizona has a state law, basically their law says, schools, create your own conference policy in accordance to the NCAA rules and under Arizona state's policy, having a deal, an NIL deal with an alcohol company wouldn't be allowed. The same is true in New Jersey under its state law. Florida, North Carolina, and New York are also only a handful of proposed state laws or executive orders, which require and encourage a financial literacy education requirement. In addition to lacking basic money management skills, there are so many student athletes who lack the necessary knowledge to protect themselves upon entering deals that sell the rights to their name, images, or likenesses. Student athletes are being exploited left and right in deals that throw in "in perpetuity" or "brand exclusivity," or simply taking advantage by devaluing their offer.

Schools are already using NIL recruiting inducements, but schools and states with less restrictions are offering prospective athlete NIL activities. The deregulation of NIL is already exacerbating what exists in competitive inequity among schools that we've briefly talked about earlier in the panel. Without uniformity, university competitive and recruiting inequities will continue to be exacerbated. And it's one of the reasons I believe we're seeing so many schools change conferences, which I know that we're going to discuss later on. I also believe universities attempting to indirectly use NIL opportunities as a recruiting advantage will further strain university budgets, which contributes to that compensation arms race in the win-at-all-cost mentality I was discussing earlier. And as I mentioned, the coronavirus pandemic has proven that universities offset their financial losses by discontinuing non-revenue generating or Olympic sports, which constitute a majority of the athletic opportunities available to current and prospective college athletes.

So yes, long winded way of saying, yes, I think NIL as a concept is great for student athletes, but the way that the current NIL environment is structured right now, I believe is more harmful than beneficial to the majority of current and future college athletes. And I think that the Supreme Court's decision in *NCAA vs Austin* has made it impossible for the NCAA or conferences or other intercollegiate athletic organizations to fix these issues. I think the federal government is the only one with the legal authority to solve it. And student athletes need a uniform standard. And most importantly, we need a regulatory body that is legally able and willing to enforce the rules. Those are just some of my thoughts on NIL.

Deana Garner-Smith: That's awesome. Thank you so much, Morgan, for that. Well Tom, Morgan shared a lot. So, from the athletic directors and your constituency, what are you hearing and what are your perspectives?

Thomas McMillen: Well, first of all, our athletic directors were always in favor of having student college athletes receive name, image, and likeness rights, but the NCAA was so fearful of this whole pay-for-play moniker that I think they missed a big opportunity with group licensing. Now that, yes, group licensing exists, but it should have been the front and center of NIL. Let me give you an example, the NFL, when you look at the Tampa Bay team, and they probably have deals between their union and the NFL with a number of categories, it may be apparel, it may be sneakers or maybe collectibles, cards. And everybody, Tom Brady gets the same check as the linebacker sitting on the bench and they could have opened this up and made it so much easier to administer. And because as it is working right now, a few athletes are going to do very well.

A lot of them aren't going to do so much. And it's a tremendous drain on education. I mean, a student that has to worry about their social media following is obviously not spending too much time on their books. And so, if you went to a group licensing model, you would've had so much less time demands on your student athletes. So that's one point. The NCAA tried to set up some interim rules, no pay for play, no recruiting incentives, no retention incentives, but most of that's all been thrown out the window, because you've got collectives being formed at schools, promoted by boosters. And if I go and say to the University of Maryland, "Look, I want to give a thousand dollars to everybody that makes the Maryland basketball team, as long as they go on social media and promote something I'm doing a couple times a week," that's perfectly okay. And so, there's really no fair market value standard. It becomes almost the Wild West, unenforceable and almost extremely in conflict with where the NCAA's policy was. The problem for the NCAA is if they don't do something about this, then their whole argument for amateurism goes out the window. But if they do too much, then they're inconsistent with their interim NIL policy. So,

they're in between a rock and a hard place, because I think right now, they do need to put some guardrails up. But if they go too far, you're going to be obviously tremendously inconsistent with their previous positions. So, to make a long story short, I think that the NIL was a very, very important development for a lot of student athletes, but it's being used in some very, very unfavorable manners.

For instance, the transfer portal is now closely intertwined with name image, and likeness, 2,600 kids are in the transfer portal. Why are they entering the portal? Because there may be a bigger and better NIL deal on the other side. And so, all the things the NCAA was trying to do, no recruiting, no retention inducements, pay for play, all of it seems to be illusory at this point. And it's going to require, obviously, Congress to act on this, but at this point in time, this issue is way down on the list for Congress. And there are many more bigger issues coming in college sports, which includes employment, includes collective bargaining, and so NIL is small ball right now for Congress, given all their issues that they're facing, plus the issues that college sports are facing.

Deana Garner-Smith: Awesome. Thank you so much, Tom. Well, Allison, being on your campus and being in your league, what are you seeing in your day to day? And then how are things being handled within the Ivy League system related to NIL?

Allison Rich: I think Tom's point of this is small ball for Congress is right, it's not small ball on campus though, which is where we're seeing it the most. And that lack of consistency is exactly what the issue is for most people, because there are schools that are able to work with recruits, the New Jersey State law prohibits any access to perspective student athletes, some are, as Morgan said, allowed to have their alumni or their boosters engaged, others are not. In the Ivy League, we're not permitted to have institutional involvement in arranging or setting up or any connection with NIL deals, whereas other institutions have created profit sharing with their student athletes and programs specifically set up to help student athletes find their way to the NIL agreements that they need, or even helping them put those deals together.

So, I think looking at it from a coach's perspective, there's concern that what the school next door, maybe not in our same league, but everybody else is doing something that's completely different and is being used as a recruiting tool, even though that's one of the few things that was supposed to be a hard and fast no, that it was not supposed to be a recruiting inducement by any means, it was not supposed to be used to bring students in, whether directly or indirectly. And that's happening, probably directly and indirectly at a lot of different places. So, I think there's some concern on campus with how this looks and the idea of how this can be regulated, if the NCAA really can't be engaged because of potential antitrust concerns and Congress isn't going to do it, then it looks like we're just going to be continuing on with that Wild, Wild West.

And that just becomes the norm. And at what point can you not reel it back in? So that then tees up that whole pay for play concept, which is what everybody really wanted to avoid. At least everybody who's in college athletics, and it seems like there's a very fine line at this point between pay for play and what we're doing now. And maybe sometimes that line isn't even quite as fine. So that's been interesting, I think from the Ivy League, because we have some consistency across the league, it's not as hard with our direct competitors, but we also compete with institutions across Division 1. So, we're not looking to limit ourselves to only what the Ivy League is doing, we appreciate the consistency across the league, but there's also that look outward to see, how are we going to be able to keep up? Is this something that is going to be possible for us? And where does this all end up? I think, with the way the transformation is moving along, I don't know if there's going to be any work on NIL, we're hopeful having our commissioner or our executive director on that committee is going to be a positive for us, as well. But it's definitely interesting times. I think we're all just waiting to see. I do feel for the compliance officers who are really bearing the weight of this all, there are some schools that have been able to hire new people just to manage NIL, we haven't done that. We've tried to spread the load a little bit out among the various compliance officers, but it's difficult, the contracts need to be disclosed and reviewed and then sent back. We have a software that we're working with. We have our own institutional policy, we have New Jersey law, Ivy policy, and then the NCAA. So, I think there's a lot on their plates as everything else still continues to ratchet up along the way. Interesting times for sure.

Deana Garner-Smith: Yeah. Thank you. Thank you very much, Allison. And we are feeling the burn as well as you, and within the pack and then in a big institution, a public institution, we're seeing a lot, we're just trying to educate as best we can and working with open doors and others just to provide education to our student athletes, but it is very difficult and unwieldy. We have our first question in the Q&A, and it goes to Tom. So, Tom, the audience would like to know, can you please very clearly share and explain what the transfer portal is and why you brought the transfer portal up in this particular conversation?

Thomas McMillen: The transfer portal was designed because for many years there were 14 sports that you could pretty much transfer at will, but basketball and football you could not. And so, the NCAA amended its rules to allow this one-time unlimited transfer. What has happened, two years ago, you had about 1,600 kids go into the portal, last year you had 2,600 kids going in the portal, and they don't have to go in with a lot of the whistles and bells like they used to. To transfer as a basketball player or football player, you had to notify your coach and it was a very laborious process. Now, you just go to this portal and you go into it. So, what's happened is the transfer portal has merged with NIL, because a lot of the kids are going in the

transfer portal because they think there's a better NIL deal in another school.

And so, that has been very much a concern. The transfer portal was designed to give kids this flexibility; a coach can leave, all other athletes can leave, why can't basketball and football players leave? But combined with NIL, it has been a potentially a lethal combination. And to those who look at the transfer portal and look at a new model for college sports, we're going to have to find a way to incentivize kids for staying in college. If we abandoned the educational mission and the educational core of college sports, college sports is in big trouble, it would be nondifferentiated from the NFL and the NBA.

So, they've got to find a way economically to make it worthwhile for kids to stay longer in school and that will be a challenge. And I hope the D1 transfer committee looks at this, because there are cases right now that could have major ramifications, there are cases in the Ninth Circuit Court right now, one where a group of student athletes are trying to get a class action, where they are basically saying they have a right to some of those television royalties because of name, image, and likeness. And that case will have a lot of impact on all this. So, the transfer portal was meant to give flexibility and mobility, is now right smack in the middle of the NIL situations.

Deana Garner-Smith: Thank you, Tom. Morgan, from your perspective, I think you had something else you wanted to share.

Morgan Lily Chall: Yeah. And I can also answer that Q&A in my answer. So what Tom was talking about, he was talking about if I was at Cornell University and I wanted to transfer to Princeton University, so it's transferring from one school to another. One of the things that I think is important, what Tom mentioned, is he combined the transfer portal with a previous, now archaic rule, the one-time transfer rule. So back when I was involved with Division 1 SAC, and when I was chair, prior to that, my first few years on the committee, which is the student athlete committee within the NCAA governance structure, the transfer portal was being put into place. It was being created. And that actually affected all college athletes, because every college athlete had to get permission.

They had to ask their coach for permission to transfer. So just wanted to clarify that, is that the transfer portal provided that flexibility, as Tom mentioned, and it allowed all college athletes, regardless of sport, to put their name into the system, without having to ask permission from their coach to transfer institutions. The one-time transfer rule, which is now no longer a thing, that only affected a few sports, as Tom mentioned, men's basketball, football, I believe women's basketball, women's hockey and men's ice hockey. Those four sports. So, it affected, as we just mentioned, those four sports and for the longest time, every other sport could transfer and immediately be eligible to play their sport. But those four sports, when they transferred, they were not eligible, no matter what they did to play their sport that next year, they had to sit out a year.

And so, what is now in place is it's combined both that transfer portal, but now no longer those four sports, there is a uniform transfer policy and they no longer have to sit out a year. And for sports like football and men's basketball, which, as we mentioned, everything around college sports revolves around those two sports, because they're the revenue drivers. The fact that they couldn't have that flexibility and liberty to play, so they had to sit out that year, it affected their draft prospects, it affected their education. There's a lot of different reasons why the rule was in place, but it also was not uniform and it wasn't fair for those athletes. So that's no longer a thing. And interesting, Nancy, I'll throw in this little story, because you asked about, earlier, my experience on the Board of Directors. So fun little fact is that I actually advocated on behalf of D1 SAC. My very last meeting, it was put online May 1st, I remember it, 2020.

And we were talking about the one-time transfer rule. And it wasn't a thing yet. Those four sports still had to sit out a year and I spoke, I knew it was a losing battle before I opened my mouth. But I spoke as the only person on the board saying, "This is what student athletes want. This is what student athletes need. And D1 SAC supports it. All these student athletes support it. We need to pass this rule." Because the board was dealing with revenue distribution, having lost hundreds of millions of dollars for March Madness and all these others, they didn't see it as a top priority. Fast forward five, six months with a bunch of media on their butts to pass this rule. They all of a sudden pass the rule again, but they could have avoided a lot of that, had they just listened to me in that meeting and listened to the student athlete voice. So yes, having another student athlete in the boardroom will make a huge difference.

Allison Rich: So, lesson learned, listen to Morgan.

Deana Garner-Smith: And student athletes.

Allison Rich: And athletes, of course. I think the one other thing that I'll add to that is that in the interim, there was the ability for student athletes in those supports to transfer and be immediately eligible as graduate students. And so that was something, if you recall about Russell Wilson, who was one of the first and that took off. And so many student athletes in those sports that had a season of competition remaining, could, if they graduated at their current institution, transfer as a graduate student and start a graduate program at the new school. So, when that happened and the world didn't end, it did seem like something that made a lot of sense, again, there was the incentive of graduating first before going, but I do think it is something that is definitely for the best of student athletes, I think it's just my concern is the advice or the lack thereof that some student athletes appear to be getting that there's that whole grass is always greener.

But when you go to college and you're starting with your team, it's rare that somebody as a first year is going to start right away, that somebody's going to be the star right away, that somebody's going to play all the games. And so, there was always that period of time where you'd get in there and you'd learn your way and you learn how to be a college athlete. And some, again, would, would move up right away, but now there's this feeling and there's a lot of people chirping in people's ears that, "Oh, you're not starting. You should go somewhere else. The coach doesn't appreciate you. The school doesn't appreciate you." So never mind, even though the NIL deal whispering and all of the other grass is greener pieces, there's a lot less patience to come in and learn and learn from coaches and to learn from the college experience and a lot more towards this instant gratification, which I think we're seeing in most of our society.

So, it's not really surprising, but it concerns me, because I think it leaves a lot of student athletes potentially stuck, whether they're without a scholarship or they can't find a place to go. And then they have to come back and be the person who wanted to leave. They might have lost their scholarship, if they were in the portal waiting for a certain amount of time, they might end up somewhere else they hate and they can't transfer a second time and be eligible right away. So, there's a lot of concern that I have there in terms of the lack of good advice or the lack of listening to good advice. And I don't know that there's a fix for that. And that's that whole in loco parentis thing, I think. But it's just something to watch as we look at this, even though I think it is a wonderful thing that all students can transfer, as they would like to.

Deana Garner-Smith: Thank you. Thank you. Thank you everybody for that robust conversation. So, I just want to make sure I'm mindful of making sure that we're able to transition to our next session, which I think there's going to be a lot of discussion about too. When we think about, and we talk about realignment of college athletic conferences, good or bad? We have lots of commentary that I think our audience wants to hear from Nancy, Tom, and Morgan. And Morgan, I want to start with you and from your viewpoint, how does the collegiate athletic conference realignment affect the student athlete experience? And then I would like to know from your perspective, as a female student athlete, does it affect Olympic female student athlete sports any differently than, say, other sports? And then when you think about the revenue generation sports, basketball and football. So, if you could just comment for a little bit on that, that would be great.

Morgan Lily Chall: Do you want me to talk about the difference between scholarship and not scholarship athlete as well?

Deana Garner-Smith: Yes. I think the audience would want to know, what is that like? What is that experience like? Because they may not know.

Morgan Lily Chall: Okay. So quick background, I was an Ivy League student athlete. And so, in the Ivy League, we're the only Division 1 conference that doesn't have athletic or academic scholarships available. The only aid you can receive is need-based aid. So, I wasn't on scholarship or anything, you still get recruited. It's a whole different system, but I'm not going to go into it for purposes of this panel. One thing to note is that there are what's called equivalency sports and headcount sports. In equivalency sports, those are partial scholarships for the most part. Starting with headcount sports, because that's the easiest to explain, that's FBS Division 1 football, men's basketball, women's basketball, women's gymnastics, and women's tennis. And those five sports and women's volleyball, six. Those six sports can have a certain number of people on their teams on scholarship, but that's their restriction.

All other equivalency sports can have . . . So, think like, swimming, wrestling, most of the Olympic sports, or even actually Division 1 football, if you're at an FCS school, so the schools that Tom's organization does not oversee, all of those sports can have an unlimited number of athletes on scholarship, but they only have a certain amount of scholarship money available. So, I think understanding that background also gives you a little bit of an understanding in between the different aid student athletes are on. And it's a lot rarer to find a soccer player, for example, on a full ride scholarship, just because of those scholarship rules in the NCAA. And to answer your question about the differences between how that affects the student athlete experience, so, I had a friend, and this rule might be archaic at this point, but at least back in 2019, she was a Division 1 women's soccer player at a school in California and she was on a book loan scholarship and she wanted to create a library of books to hand down the textbooks to her teammates who weren't on book loan, because as we all know, they can get very expensive, but due to some rule, that wasn't allowed because the scholarship covered her books, it didn't cover somebody else's books. So, she couldn't share it. That might not be a rule anymore. So don't quote me on that, but at least three years ago, that was a rule. So, it does affect the student athlete experience a bit like that. And I think differences in terms of between different sports, I would say the biggest difference, especially at an Olympic sport, I'll give an example. Even though I was on a D1 gymnastics program for my four years at Cornell, you always see athletes getting free gear and stuff.

I got a single t-shirt and a single pair of tennis shoes that we would wear at meets or to lift. That was the free gear that my team got at Cornell for four years at a D1 program. I'm pretty sure because of Title IX stuff, they get more now, but that was the case four years ago. Women's lacrosse at the time, and football, and wrestling, they all got way more than that. Wrestling at my school, and I'm not trying to harp on my school, it's an example of any school across the country and it was a lived experience of mine, so wrestling just got a new state-of-the-art facility and it's probably the nicest facility on campus. They have

their own weight room, in addition to the weight room that all of the other college athletes share as well.

And so, it affects your different experiences. The other difference around sports is because of this compensation arms race that we've been talking about and the discontinuation of sports like wrestling and men's gymnastics, those sports become more costly for universities because those teams have to travel further in order to find competition that schools offer. And even for women's gymnastics programs, when I was in college, we actually competed against D2 and D3 schools because those were the schools available in the Northeast. We also competed against D1 schools, but also didn't have the budget of a big conference, like University of Georgia, who could just fly around the country. And I think another difference I would want to point out is attendance at games and just how university leadership treats different sports. So, our men's and women's ice hockey teams were number one in the nation, go Big Red, my senior year of college. But guess how many people would attend the women's ice hockey matches compared to the men's team.

The men's team would sell out the arena, the women's ice hockey team, number one in the nation, would maybe get a quarter of the people in their stands and several of those players are going to the Olympics this year, by the way, they were very talented and still are. Last difference I would point out, just for the audience's understanding of different teams, is the type of sport it is. So, a sport like track and field, they have sometimes over a hundred people on their team and they practice at different times, like depending on what event they do, if you're a sprinter versus if you're long jump or triple jump, you name it, you have different practice times. And then that affects the team culture too, because you might not actually know everybody on the team if you're not hanging out with them and practicing with them.

But on smaller sports, like swimming, gymnastics, you know everybody. And so that affects the culture of the team as well. I could keep talking and I'm sure you'll come back at some point about the differences, but generally speaking, I would also just point out the obvious of men's basketball, men's lacrosse is another big one, especially in the Northeast, they get a lot of attention from the fan base in schools, wrestling at certain schools, football, of course, and then baseball is hit or miss. Honestly, I think that that's a sport that people always think is a big sport on campus, but they tend to get the short end of the stick as well.

Deana Garner-Smith: Okay. Thank you. Thank you, Morgan. Well, Nancy, can you share with the audience the Knight Commission and there was a report that was issued in a PowerPoint about the Care Model. So, could you talk about the Care Model and the concept to assist in reorganizing and positively influencing according to the Knight Commission's perspective on collegiate sports?

Nancy L. Zimpher: Well, I just first was going to say I would follow Morgan into a boardroom any day, and who wouldn't want more insights from student athletes like Morgan to talk to power, truth to power in many respects. So, I really appreciate what you've been saying, Morgan. Well, the NCAA in the Knight Commission report has proposed a financial revenue distribution model that is intended to solve several problems. And we have made it this far in this webinar without talking about the outrageous escalating, incredible to believe financial revenues that are coming in from the College Football Playoff, specifically, which will surpass the March Madness pretty soon, probably rising to something like $2 billion a year. When people say, "What changed it all?" We could go back and say, "Well, television changed it all." But obviously these are escalating contracts and they go to a limited number of people in the distribution of $500 million from the current revenue generated from the College Football Playoff, roughly 80% goes to 64 schools, also known as the Power Five.

We are learning increasingly that a lot of people do not know an obvious statement of fact, which is the College Football Playoff is an independent LLC. It is not connected to the NCAA. I'm only saying this because I believe there are people listening in who have no idea that that is the case. And while I'm on it, you would also know that the NCAA, and there are people here who've lived and worked in the NCAA, they cover for a lot of costs generated by big-time football, including litigation, which we've spent two sessions talking about. Including now, responsibility for rules and infractions, including now generating much initiative around racial and gender equity. And I will say in our recent past, the Knight Commission did seek a request to the College Football Playoff board that a penny on a dollar be committed to racial and gender equity and that a penny on the dollar be set aside for concussion research, both of those requests were declined. This is the not pretty face of big-time sports and revenue generation. I could say just because it hasn't been said yet today, the coaching salaries have escalated three times more than when we started, maybe even five years ago, coaching salaries for three Power Five schools are roughly $95 million over 10 years, which is $9.5 million a year. Some clever writer for the *Chronicle of Higher Education* pointed out that one coach's salary at $9.5 million a year could generate 111 assistant professorships over 10 years. And I will add further, Morgan has to tell you a story of how the revenue is distributed at the institution where she graduated, because we have no data, no transparency about where the revenue goes. So, this is the big payoff for chaos or correction, because we have now a seated correction in this case to a D1 discussion, which will filter out, as Tom predicts, to the conferences with no umbrella policy about revenue distribution.

So, it might seem pretty obvious that the Knight Commission would get interested in this issue and create this connecting athletics revenue with the education experi-

ence, otherwise known as the Care Model, which they did spend some time on at the convention articulating. But first and foremost, it calls for transparency, data does matter; we learn things from the collection and exposure of data, pretty particularly around equities in allocation of funding for sports and for gender equity and racial equity. Secondly, we have not done the best job ourselves at overseeing revenue distribution. So maybe we need more independent eyes, maybe we need to look at some ideas, some generated from professional league management of finances, so that independent directors, if you will, could form an oversight committee that follows revenue distributions, aligned, we would think, with a set of principles, like student athlete health, safety, wellbeing, and education.

There is a gender equity plank in this Care Model that follows the money. I don't have to do what Morgan said, these are the stories. How about a database that tells you that unequivocally? The growth of sports, we saw reduction in sports when COVID-19 hit. And we needed to make sure that we got the investments from our football competitions. We had debt reduction. We have a lot of other issues to cover. So not a lot, but a number of significant cuts were made in the sports offered by various campuses. And then just the filtering of revenue to what matters most, which is the condition of student athletes, their health and safety. But frankly, personally, I wouldn't say this through the Knight Commission. I'll just say it as me, for the College Football Playoff, not to think about spending a very small piece of their revenue on two issues that are critically important to us in universities and to our society, meaning racial and gender equity and concussion research is just beyond my understanding.

So, I'm worried, a lot worried, that this cascading of decision making, which, as Tom said, and I don't want to misquote you, I just want to say, where is the responsibility of the leading association? Why did it decide that it was okay to form the College Football Playoff when no revenues would come back to the organization? And the organization would continue to pay the expenses of the very people who are not sending revenue their way? Leaving it all to March Madness and our basketball revenues. It's a dreary picture unless we have leadership. And as a university president, and given that the presidents populate the D1, D2, D3 divisions and populate the Board of Directors, I'd like to see more voices on these obvious issues in this runaway revenue expansion. And it's not going to help us to hope that this filters down, to wait and see if anything's going to happen.

And I'll just close these comments with this point. In the fall of last year, we did a survey of hundreds and hundreds of key athletic constituent groups, from university presidents to athletic directors, to coaches, to students. Everybody wants reform, that was unanimous. We have got to change, we've got to do something different, and yet very few creative solutions have come forward. So, I am proud to say that the Knight Commission has offered four commentaries, one on governance and structure, one on NIL, one on revenue distribution, and one on racial equity. And the feedback is, "Well, those might be outrageous ideas."

Well, give me another one. Let's try on something else. And I think that's the most devastating, puzzling part of the whole chaos side of the equation. Where is the correction if we can't put provocative proposals on the table and let them be debated in the public forum? So, whether that relates to conference expansion, I think the key here is that what it's driving is access to revenues. And before the College Football Playoff decides to go down a path of expansion, we need to fix the financial model.

Deana Garner-Smith: Thank you. Thank you so much.

Nancy L. Zimpher: Got me in a lot of trouble.

Deana Garner-Smith: Thank you.

Nancy L. Zimpher: As clear as I can say it.

Deana Garner-Smith: We appreciate your comments. And Tom, from the ADC's perspective and your constituency group, if you could just share, for a few minutes, your perspectives on realignment and everything that Morgan and Nancy have shared, that would resonate with your perspective, we would appreciate that.

Thomas McMillen: I may come at this just from my own view in business, in industries where costs rise, enormous inefficiencies, whether it's airlines or whatever, consolidation occurs. And that really is needed in college sports, in Division 1 you have 350 schools. That's about 11 per conference, 32 conferences, and they're spread out. I mean, the drivers have been very Darwinian. It's about money, as results become sprawling, very inefficient, academically unfriendly to the kids who have to play these sports. If you're a Big 10 player, like I was at the ACC, we used to play and drive to most of our games. Now Maryland's in the Big 10, Maryland can't drive to Nebraska and Iowa and all that, and it affects students. It affects the education and all that. And so clearly you ought to have more consolidation.

There ought to be conferences that are more regionally based, and they ought to be focusing on regional play, trying to keep their fans engaged, as opposed to sprawling all over the country. As we see the current model, and college sports really needs to take a hard look to see how that happens, so, they award and champion what's called automatic qualifiers to every conference. Well, so, if you're a conference and say, "Well, I want to add four or five more schools, all in my backyard." You don't do that because your chances of your AQ spread just among one conference now gets diluted amongst four schools. So, your chances of winning that money are less and less. So, all the systems in college sports are really not congruent with efficiency. And that's one of the things, Nancy brings up a point about the College Football Playoff.

Yes, it's true. Before my time, this CFP was formed and siphoned off in the NCAA, but I don't think college sports from within is going to be able to change that. It's going to be very difficult to self-reform this stuff. You may get a little bit on the margin, but it's going to have to take some kind of national look at this, whether it's a presidential commission or something to rationalize all this and to try to get it back into the academic educational model. And so, what has driven college sports today and conference alignment is basically linear TV. We've got to go for eyeballs. We're not worrying about students going to class. We're not worrying about educational value. We're worrying about raising the pot of money and that's a core issue. And the only way you're going to get to that is really restructure the whole thing. So, is conference realignment good or bad? I would say that for the most part, it has been and has had a deleterious effect on student athletes.

Deana Garner-Smith: Thank you. Thank you for those remarks, all of you. And we want to make sure that in light of the 50th anniversary of Title IX, we want to give Title IX it's due time. So, let's talk a little bit about, has Title IX changed the gender equity landscape and collegiate sports enough? Nancy, I'd like to start with you from a governance perspective, what more do you think can be done to advance gender equity in college sports? And what's the NCAA's role with that?

Nancy L. Zimpher: Well, I would've thought the NCAA's role in everything was to put forward a leadership agenda that solved our problems. So, I don't know what their role is now. I wish an NCAA would survive in the new world and I don't disagree with Tom about who's going to solve this problem. I think it's going to have to be higher level. I think we lost that bid a long time ago, unfortunately, but an overarching organization does have a role in gender equity. And I'm old enough to remember when we had a quasi-accreditation process in collegiate athletics. Now people have a lot of views about accreditation, mostly, "Get out of our way, get out of our hair." But I think accreditation does a lot of good. I've been a self-study writer, I've been on teams, I know that a whole lot of information gets articulated for accreditation that would never be shared otherwise, would never be written up as much of a pain as it is.

So, we had this self-study process where institutions engaged in a review of where the money went, where the equity was between sports, where gender equity lived, big time, where racial equity lived, and they didn't appoint the inside athletic enterprise to review this, they appointed professors and deans and boards of trustees and external alumni, big supporters or not. And I will tell you, in my experience, we found things that a university wouldn't be proud of. This was an exercise that mattered and an overarching organization, whatever this body that's going to solve all our problems does, I want to see that kind of transparency on a regular basis. We are an academic enterprise.

This is a fight between commercialization and the values of the academy. And one of the big values of the academy is this self-examination of curriculum, of student success, of where our money goes, how we deal with personnel issues. And I think gender equity could benefit immensely if something like that came back. And I know there are other solutions, but this is something an institution can do for itself to determine if we're moving in the right direction and make it very, very public. And I'm pretty darn sure that abuses will be uncovered that would otherwise be issues of silence.

Deana Garner-Smith: Thank you, Nancy. Allison, again, almost 50 years of Title IX have occurred, from your perspective, what has changed? What are you seeing within the landscape of the Ivy League structure? What are you seeing just with all the vast experience that you've had working in collegiate athletics? What are you seeing now that you hadn't seen before? So, if you could share some of your perspective, that would be great.

Allison Rich: Sure. Thanks, Deana. And I have to echo Nancy as somebody who served on the NCAA certification committee and was a peer reviewer for multiple schools and was on steering committees at three different institutions where I worked. The NCAA certification was a great way to look at your program from top to bottom. And I think in addition to finding abuses, potentially, it also helped uncover things that needed support. So, things that were brought to light before, but maybe didn't have the funding or didn't have the support, could then be shown in terms of what the national standard is, what the expectations are, and be able to have the institution see that these are areas that do need a little bit of funding. So, I think it was helpful in that way. There is a requirement now for a gender equity review on campus every so many years.

And I don't know where that is on a lot of campuses, but that is something that I think was intended to at least pick up some of the slack in that area. But I agree, even though it was an onerous process, I do somewhat miss those days, because I think it was very helpful. In terms of the 50 years of Title IX, I think there's a lot of things that have changed and some things that haven't, there's still a little bit of a lack of understanding as to what Title IX is and how it applies, and can you leave football out of it? And how do you gauge it? That it's an athletics law where, really, this is an education law that has been extended to and interpreted to include college athletics and has been wonderful in terms of helping college athletics, helping women in college sports be able to do the things that they want to do.

I think with that lack of understanding, one of the things that we, with The Sports Lawyers Association, are doing is this Time for IX Initiative, where we were doing all kinds of education throughout the year and celebration and recognition of Title IX, but also in order to educate people on what exactly Title IX is, and how much it has helped

along the way. That it's not this gender quota system, but it is really to help women achieve some sort of equity in the sports world and how it's applied beyond high school and college athletics into the professional world and into the sports law world. I think Title IX received a lot more attention after the 2021 Final Four and Sedona Prince's pictures[5] and all that conversation and the Kaplan review.[6] And I think that's important.

We're also seeing a lot more attention being paid to Title IX issues in terms of NIL that name, image, likeness opportunities when coordinated by or provided by an institution will then be covered under Title IX and need to be provided equitably to men and women on the campus. So, those are things that we're seeing that are really popping up right now. I think over the years, we've seen the sport offerings, the number of sports for women increase, there's the emerging sports for women that continue to grow with the addition of women's wrestling just the past year, that's growing like wildfire. And at Princeton, we're adding or elevating women's rugby from club sport to varsity, starting in the fall. So, the ability to have participation opportunities for women in sports that we hadn't seen before. Some combat sports for women, which is really an interesting and exciting direction as well.

So, that's been something that we've seen the changes over the years. I think we've seen facilities go from largely facilities that were built with only men competing at the time they were built to having facilities that are taking into consideration that women are participating. I think that's been important and that laundry list, all the other things that go into participation in college athletics. That it's more than just, "Okay, we've given you a team. Okay, you have a coach." It's what kind of coaches are being hired? What's their experience level? How many coaches? Are they the same across men's and women's sports? What do the uniforms look like? I mean, Morgan talks about her one t-shirt and pair of shoes. I think it's important a lot of schools have overall department sponsorship. We have a contract with Nike, which is wonderful and allows us to provide equitable equipment and gear to all of our student athletes, male and female.

What does it look like when student athletes are traveling? Are they two to a bed, four to a room? Is it different for men and women per diem? All of that. And I think there's a lot more attention paid to the overall experience of student athletes as a whole and not just, "Okay, have this many sports, so we are in compliance with Title IX." So, there's definitely been a lot of changes over the years. I think there's still a way to go. I think we saw with the Final Four that there's been conversations and there's been changes over the years, but sometimes we get comfortable with the way things have been, and don't look at things side by side and don't think about it, until they're really brought out into light and seeing those gives us that chance and that requirement really to address those. So, there's more work to be done, but we are certain, certainly so much farther ahead than we were at the beginning of Title IX, and even just in the last several years.

Deana Garner-Smith: Yeah. Thank you, Allison. And to your point about just where we are in the fact that member institutions who receive federal funds, they're required to comply with Title IX, but the NCAA is not, and neither are conferences, since they're not academic institutions. And so, it's been interesting being a member of the Pac-12 member institution and our conference communicate to us that they took it upon themselves with some prompting, to do a gender equity review of everything that they're doing, which I think is really, really important for other conferences to look at; what are their systems? How are their championships being run? How are they providing equitable support for all student athletes that are participating under the umbrella of that particular league? So, thank you for those comments. Morgan, so how has Title IX impacted your experience as a student athlete and what are your hopes for the future, as we hopefully come out of some of this chaos?

Morgan Lily Chall: Being a female athlete, Title IX has completely changed my life. It's forever part of who I am. I'm a living example of why Title IX is so important for women everywhere and women's rights in general. I started doing gymnastics when I was four years old and throughout elementary and middle school, I was beating all the boys at pushup contests, despite being a small, probably at the time, only around four foot girl, nobody wanted to mess with me. In all seriousness though, the kids not messing with me was not because I was scary or aggressive, I think it was more from a sense of respect for what I did and who I was. I did something so cool to everyone, flips and twists in the air, something they could never imagine doing themselves. In a world that socializes and devalues young women and girls, being a great athlete at an early age earned me the respect of my young peers and showed them that girls are just as capable and strong as boys.

I also got to travel for competitions, meet people from all across the country and the world. From an early age, I was exposed to different cultures and ethnicities and religions. And I believe that my involvement in sports is one of the reasons for this, but the single biggest impact that Title IX has had on me as an athlete, as student and a person, is confidence. Gymnastics has proved to that four-year-old little girl that I have the confidence, the ability, and the perseverance to adapt to any challenge in my way, even the seemingly impossible ones. I actually never had dreams of competing as a Division 1 athlete or ever going to the Olympics, despite being a gymnast. It's every little girl's dream. My goal in gymnastics was never to achieve a certain status or level. My drive and dedication in the sport always came from loving what I did because it tested my limits and pushed me physically, mentally, and emotionally more than anything else in life.

And I'm still trying to find that today. Gymnastics is a sport based on striving for a perfection that is near impossible to achieve, in order to make it in this sport, you have to make room for when things don't go perfectly, which is quite often. You have to learn self-compassion and how to stand up taller than you were before you were knocked down. In a world that often teaches little girls the limits of what they can achieve, being a gymnast taught me that I have limitless potential. Sports instilled a confidence and work ethic in me that I hope every little girl grows up experiencing. And I was able to experience and learn all of that because of Title IX. Women athletes everywhere are some of the strongest, most brilliant leaders that I know. I'm on the screen here with four of them today. My hopes for the future of women's collegiate sports, I would really, really love to see an official coach accreditation program.

It's interesting that you brought up the revenue accreditation type program, because I think that college athletics really need something that holds all college coaches, strength coaches, trainers, anyone who works with colleges or youth athletes accountable for their behavior. Did you know that anyone can pretty much be a college coach? There's no official standard that has to be met. Equal treatment is also about health and safety, there are too many institutions that put profit before the health, safety, and welfare of their student athletes, especially their female student athletes. I would really love for the system to be improved in terms of how women athletes are treated in regards to coming forward with sexual assault, interpersonal violence, and verbal abuse allegations against individuals in the athletic department or university athletic teams. And I want to see more women in leadership positions within the athletic departments. I want athletic directors and other university leaders to devote the same energy, respect, and commitment to their women athletes as they do their men athletes.

We've talked a lot about today, during this panel, around the NCAA governance structure. And we've alluded to the fact that at the board level it's full of university presidents and chancellors. Well, I'm pretty sure of all of the higher research institutions, somebody correct me, the statistic, I knew it a few years ago when I was on a panel, it was something like five, 6% of university presidents are women of high research institutions. Well, if the pool of what the NCAA is working with only has a certain number of women in those positions, then of course the boardroom is going to continue to be filled by men. And lastly, I hope that we all empower more women's sports at the youth college and pro sport levels. I hope women's sports in general continue to grow our allyship base because we can't progress alone. We need everyone to be accountable and society as a whole is better off when women succeed. My little speech on women empowerment.

Deana Garner-Smith: Thank you. Thank you so much, Morgan. Allison, you mentioned this and I neglected to ask you before we transitioned to Morgan, but can you tell us a little bit about The Sports Lawyers Association Title IX initiative and what they're planning to do in February, and then also, is there any way that people can get involved?

Allison Rich: Oh, sure. Thank you. No, that's a wonderful question. So, The Sports Lawyers Association, we wanted to, like I said, celebrate and really recognize the 50 years of Title IX, looking at where we've been and where we're going, and how much amazing success there's been along the way, and then what there is that's left to do. And so, we've had this initiative called Time for IX. We've had quite a few panels already, most of which can be found on The Sports Lawyers Association YouTube channel or on our website.[7] So, hopefully people will check those out. On February 2nd, we are celebrating National Girls and Women in Sports Day with another really great event and we have interviews with four really outstanding women in the sports law world who are advocates for gender equity, especially in sports and sports law.

And so, they're going to be fabulous. I have these four interviews and then we'll be following those with breakout that will be coordinated by our various board members. And we'll discuss the issues and the ideas that were raised by our different interviewees, as well as other topics related to Title IX and the participation of girls and women in sports. So, we are gearing that in some ways towards law schools. So, we hope that any law students out there will get together with their sports and entertainment law society, or their women in law society and join us for this event on February 2nd. But then also our other lawyers around the country will hopefully join us as well. And I think it's going to be a really great opportunity and we'll have more events after that as well, with that as our next one and we're very excited about that.

Deana Garner-Smith: Thank you. That's awesome.

Jill Pilgrim: I have a sort of a question and an observation. I noticed several times that Morgan mentioned revenue generating sports and full disclosure, I'm also on the Knight Commission, and I recall in some of the committee meetings and outside the commission as well, because I read a lot about college sports, that I thought I had heard and maybe Tom and Nancy can speak to this too, that we're misusing the term "revenue generating sports" or we may be because there's a difference between generating revenue and making a profit.

So, for instance, when people tend to exclude my beautiful sport of track and field, the best sport in the world, from the discussion of revenue generating sports, I think about the time a couple of years ago, I went to the Ivy League Championships at my alma mater, Princeton, and had to pay to get into the Championships that I used to be able in the past to just go and see. So, what's the distinction between revenue generation and making a profit? Do most programs, the so-called revenue generating sports, do they actually make a profit or are they just generating revenue

and then we're using the term "revenue generation" in a way that's not appropriate?

Allison Rich: Well, actually, most college sports do not generate a profit. There are small percentages that do, mostly the football or basketball and a few others along the way, but those profits are usually used then to supplement the rest of the athletic department. And that's the way a lot of departments are funded, some are funded by student fees, some get university budgets and maybe portions of those. But then there's also the opportunity to use any revenue that's generated again, by just a small number of schools to supplement some of those other sports as well. So, that's a very quick answer, but I'm sure there's others who might want to jump in there.

Thomas McMillen: I would say in the aggregate, there's only a handful of schools that make money given all the sports that they support, but I don't think revenue producing is the right term. I mean, usually it's revenue and lower revenue sports. Basketball and football, men's basketball, men's football are high revenue sports. And they subsidize literally most of the other sports. So, I use the word "lower revenue generating sports" because that's more descriptive of what's involved here.

And the real core issue, and it's fundamental because it gets to the point Nancy said about commercialism and education, is that a lot of people say, "Look basketball and football players, many of them African American, why are they subsidizing other sports? If their labor is making basketball and football that profitable, why do they need to subsidize other sports?" And so, there's a core issue there of values. And the answer of course we say is that colleges are about expanded opportunities, broad opportunities. And just like the chemistry department may be very profitable in the university, it might subsidize the English department, but that argument often falls short amongst lawyers and some of the legal battles that we're facing right now.

Morgan Lily Chall: I'll jump in here. So, I actually do remember this number, of all of the 350 Division 1 schools, only 29 actually produce a profit, and we always talk about the Power Five schools. There's, I think, 65 Power Five schools, but only 29 of them actually produce a profit, and so even among those top schools that you would think about with really great athletes, they don't actually make money by having college sports. Most schools lose money by having college sports, as I'm sure all of the college athletics leaders on this panel can attest to. But I actually think the biggest problem that we see, and it relates back to all the conversations that we've had earlier today in terms of NIL, should we pay athletes, the *Alston* case, is that from the media perspective, which I think they change the conversation around college athletics tremendously, from the media perspective, this is how they paint college sports -they paint it as a poor, usually African American young man from a low income background and they received a full ride to play basketball or football at this institution. And this institution is making so much money because they're paying their coach $10 billion, they're paying their assistant coordinator $4 million. And that's what people see. They just see those numbers. And part of that has to do with the amount of money that's actually being poured back into the student athlete experience. So, I know it seems like a very simple solution, but I've always said that university leadership just needs to decide how they're spending their money. They're not spending it on actually enhancing the educational experience of student athletes. And as the NCAA rules are written right now, there are plenty of ways that they can do that. And it's not just about giving them the $6,000 that the *Alston* case allows for them to do.

They could pour it into financial literacy workshops. The number of student athletes who graduate from college don't know how to balance a checkbook, don't know what it means to have a credit card, don't know basic financial principles. I went to Cornell University, which I absolutely loved. I've got the biggest Big Red pride, even though I harped on them earlier around college athletics, I never took a single finance class in college until my master's program. I never knew what a T table was until my master's program, because I had to take it for my master's, but I was a science major in undergrad. I took chemistry, I took biochem. I took all of those hard sciences, biology. I didn't have to take finance. So I didn't. I never took those core business classes that any person who graduates college should just have a basic knowledge of.

So, why is university leadership not investing in their student athletes in that way, especially, we're talking about the heels of NIL legislation and legalizing that? So, now you're allowing these kids, because some of them are, they start college at 17, these 18, 19, 20-year-olds to create some sort of business for themselves, but you're not giving them any education related to how to manage their money. Because I can tell you, even if that struggling basketball player does struggle, they've got a full ride, they've got a lot of other stuff for them as well and there are a lot of student athletes who need that money management help. And that's just one example of ways, I'm sure other panelists have also ideas in terms of ways you can enhance the student athlete experience and then hopefully keep them in college for all four years because they want to continue learning.

Nancy L. Zimpher: Well, this is exactly the takeaway, it seems to me, of our entire conversation. This is about policy, see, this is about implementing policy and holding people accountable. And if Tom is right and we really just have to say, it's got to be a superpower outside of our enterprise, which is debilitating and defeating, then we have to have that, we cannot keep going in this way. And I do fault us, we live within the presidential organization that is supposed to conquer these issues, but it's been so long and it's been unraveling at lightning speed that we would perhaps have to defer, probably, Tom, not necessarily to Con-

gress, but a presidential . . . Many issues in this country have been addressed by esteemed presidential platforms. And that could have come out of the convention all the way back to our first question.

Really? Are you disappointed that something big didn't break through the facade? I remember in Knight Commission discussions, Jill, Paul Taglavu would talk about the Congress, Tom, about using the hearing structure to expose issues, maybe not to get a specific bill or an act, but to bring public attention to the issues, which is a different way of thinking about our congressional relationship or calling for a presidential task force, that could be part in the enterprise and largely outside the enterprise. But it's hard to believe that this next step or the one after that or the one after that is going to solve the issues we have raised today.

Allison Rich: And it's tough because nobody wants to be the first one, nobody wants to be the one who puts aside their ability to be competitive or to be successful and stand up for that. And so, I think that's where there's that bit of defeatist attitude is if nobody's going to stand up and do it, then does it have to be from outside, but it's not ideal. And it's certainly not what I think any of us would like to see. I think we'd like to see us able to take charge of this environment, and as you said earlier, not lose the NCAA and not lose what we're doing as an enterprise that supports student athletes. And I think one of the things Morgan said is really important, that most of the people outside don't know exactly what's provided for student athletes.

There's this poor starving student, can't even to afford a pizza. And I think, sure there are some people, and I don't want to minimize backgrounds or anything, but there's so much money and support available for student athletes and has been for years in various funds, for clothing, for food, for travel, for emergencies, for academic supplies, so many different funds that can be applied for and the level of need required for them, for those that do require. So, I think we've been trying to educate the public more, I think on what the NCAA is all about. I think it's tough because the exciting part, the sexy part, is the bad stuff—is this evil enterprise looking to take advantage and get rich on the backs of these poor student athletes? And so, I think that's an issue as well and it is very difficult to overcome as much as we try to have these conversations.

Deana Garner-Smith: I think that the conversation has been robust. There are lots of different ways and perspectives that have been shared to try to arrive at some solutions to address a lot of the chaos.

I don't know if this would be helpful or not, but one to Morgan's point about financial literacy. So, at Arizona State, we are combining our NIL education efforts along dual track with financial literacy. And so those things are happening on a regular basis, coordinated with SAC, approved by SAC, in addition to others who are not involved in SAC, because we want to make sure that those who may have to work, or they may have other conflicts where they cannot attend SAC. We want them to be seen, we want them to receive the information and we want them to be educated. So, it's very highly important to our university president, as well as my athletics director and all of us within the athletics department, that we continue to educate.

Is it easy to do? No, it's difficult, because everybody's schedules are whatever they are. And just trying to make it interesting, so that you cannot mandate, but encourage, highly encourage and suggest like, "This is going to benefit you because you are trying to do X, Y, and Z. And we want to make sure you aren't scammed. You don't have to pay exorbitant tax liability because now you're going to have to pay taxes on things that you didn't even think you'd have to pay taxes on." So those are some of the things that we're doing at our university. Would anyone else like to add what you're seeing or anything else?

Allison Rich: I agree with you completely there, Deana. I mean, that's important. And the point you hit on is making it interesting and knowing how busy their schedules are. And I think that's one of the other things that we talk about all of these things, but there's so many other issues on the plates of students in general, student athletes in particular, because they're trying to practice and compete and be the best they can be in their sport. They're trying to get an education and to keep up with their classes, to have a social life, to learn, to get to know their institution, they're dealing with all kinds of complex issues. We're talking about diversity and inclusion and equity across the spectrum. There's so many different things that are a part of life that I think not every student athlete is even thinking about all of these issues.

That doesn't mean we don't have to think about because we do, and they're very important, but I think the reality of the day-to-day experience on the college campus, when you put things out about NIL, for example, is that those who are interested will jump on it and get right into it. And others say, "I might think about that later. It's interesting, but I just don't have time right now." Or, "I don't have time to go to these training sessions and we do all kinds of other training too."

So, it's not any excuse whatsoever, it's an interesting facet, is that some of the times that we offer these programs that we think will be fantastic and will be really appreciated, the students are like, "No, we're good. We don't need those right now because we have so many other things on our plate." So, I think it's also a bad balancing act, it's like understanding your population, your student athletes, your institution, what their needs are, and having the opportunities available for them when they're ready or when they need them, but not forgetting that there's a whole lot of other things that go into being a student athlete and trying to support them through those, as well.

Morgan Lily Chall: I think I want to add into this and it's a perfect segue to my final thoughts as well, Deana, is I completely agree with both of your comments, and I love that your institutions are doing something to support student athletes in that area. And I also know, especially having had a student athlete leadership position on my campus, how lazy student athletes are, and I'm hesitant to say they're lazy because they're not, they're some of the hardest working people on campus, and they manage a whole bunch of things on their plate. But I think my final comments are really that I think everyone, and the media, and everybody surrounding student athletes needs to empower them, needs to treat them like adults, needs to treat them with responsibilities, which they now have because they can handle it.

And I think that student athletes need to be told, I've been able to manage everything on my plate, because I have people who are telling me that you can handle this, figure it out, you can handle it. And I think a lot of student athletes need to be surrounded by that because being a college athlete is hard and you are devoting a lot of time to various different responsibilities. And in turn, since this is a bunch of lawyers that we're speaking to, my final thing that I would say is as a former female athlete and somebody who is aware of Title IX, I would still say the average female athlete does not know their rights under Title IX. And that is the single biggest issue I think on college campuses, because it's the student athletes who eventually drive the biggest change that you see and throughout all of these different issues that we've discussed today. So, anything that you can do in your community to help educate student athletes, especially female student athletes on their rights under Title IX, then I think Title IX is there to help them. It's just universities that aren't complying with it.

Deana Garner-Smith: Thank you, Morgan. Nancy or Tom, any final remarks?

Nancy L. Zimpher: I am happy with this conversation. I learned a lot. I'm thrilled to be here and thank you for the privilege.

Deana Garner-Smith: Thank you. Tom?

Thomas McMillen: As I said, "this is deja vu all over again." In 1948, the NCAA had to pass a sanity code because in the '20s and '30s, it was out of control. Schools, conferences were doing whatever they wanted. So here we are, again, we're going to throw it out to the locals and we're going to hope that we can run a national enterprise of sports that way. Chances are, we'll be back here looking at new ways to try to harmonize this in the years to come and we may need help from Congress.

Deana Garner-Smith: Yes. Thank you. Allison?

Allison Rich: I agree. One quick thing, and I appreciate the opportunity to be here today. On behalf of The Sports Lawyers Association, I want to say we were really thrilled to partner with the NYSBA on this panel today. My esteemed panelists, it has been amazing to hear from you. I've learned a lot and looking forward to continuing moving forward in our battle and hoping that we can move forward with the NCAA in a positive direction.

Deana Garner-Smith: Thank you, Allison. Thank you, panelists for everything.

Thomas McMillen: Thank you.

Nancy L. Zimpher: Thank you.

Barry Werbin: So, on behalf of EASL and its Chair for a few more days, this was fabulous. I'm not a huge follower of college sports, but I've been reading about all these issues and this is the most amazing panel in terms of credentials and people like Morgan, everybody. To have athletes here and Nancy, everybody. But Allison, we really appreciate The Sports Lawyers Association co-sponsoring this, I hope your members, if they weren't watching this, it is on demand, they can get it.

But I also want to say, send kudos to Jill and her co-chair, Jeff Aber, EASL Sports Law Committee Co-Chairs, but when Jill started sending the names, when we had internal emails, it was like, "Wow, how did you pull that together so fast?" So just great, Jill and Jeff, wonderful job. And I think this epitomizes the high quality and cutting-edge nature of so many of EASL's programs. And again, I would ask if you're not a member and you're watching this live or on demand, please join EASL and you get a lot of valuable, programs like this. So, with that, I'm done. And thank you again.

Jill Pilgrim: Thank you all. This was amazing. Appreciate it.

Simone Smith: Thank you so much. And the attendees, make sure go back to your learning dashboard and enter in your CLE codes to receive your certificate. And again, to the panelists, the program chairs, the section chair, thank you much for your time and expertise and service to your profession and to your colleagues. And I wish you all a wonderful rest of the day.

Endnotes

1. *National Collegiate Athletic Association v. Alston*, 594 U.S. ___.
2. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984).
3. Football Bowl Subdivision.
4. Name, image, and likeness.
5. https://www.latimes.com/sports/story/2021-03-18/difference-ncaa-tournament-womens-weight-room-march-madness.
6. NCAA External Gender Equity Review, Kaplan Hecker & Fink, LLP, https://context-cdn.washingtonpost.com/notes/prod/default/documents/58085c46-e386-4fb4-a9af-1349573c2133/note/4f6f18da-d3bd-4630-86fd-8a18f06efb65.
7. www.sportslaw.org.

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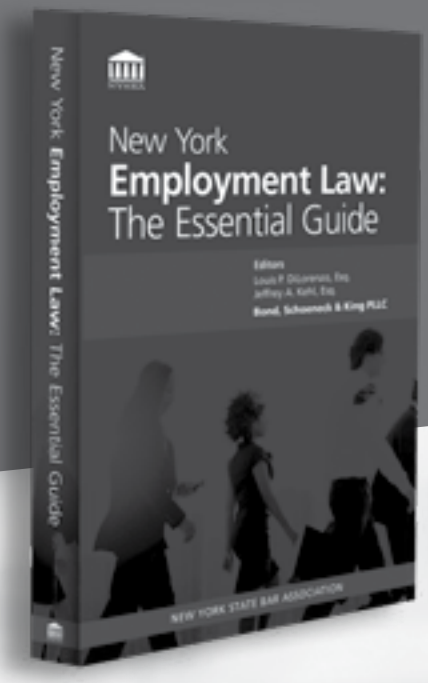

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Meghan's Win in the Court of Appeal

By Amber Melville-Brown

Most fairy tales conclude with a happy ending, unless they were written by the Brothers Grimm,[1] and while the ending for Meghan Markle in her privacy fight against the British tabloid the *Mail on Sunday* has ended happily for her, it is a grim result for the newspaper.

Her success may be somewhat of a turn around in the fortunes of the actress turned Duchess. Despite meeting her handsome prince, marrying in a castle, and becoming a bejeweled member of the British royal family, former *Suits*[2] star Meghan Markle struggled to find her own happy ending in England. She was cast—including notably by the British tabloid newspapers—as more of a wicked witch than a fairytale princess. Heeding the cry "Go West, young woman"[3] she and hubby Harry abandoned England and senior royal status to start their own dynasty as Hollywood royalty in California.

Yet while she may have departed from England, Meghan left her privacy and copyright battle over the unauthorized publication of her "Dear Daddy" letter in the safe hands of the High Court of England and Wales, and latterly, its Court of Appeal. She has exited victorious from both litigation bouts, with Mr Justice Warby finding in her favor in the lower court,[4] and Sir Geoffrey Vos, Master of the Rolls, Dame Victoria Sharp, and Lord Justice Bean of the Court of Appeal upholding the lower court decision to grant summary judgment against the *Mail on Sunday* over its decision to publish large swathes of her private "heartbroken of Windsor" letter to her father following her wedding to Harry.[5]

With this latest loss, newspaper group Associated Newspapers (ANL), publishers of the *Mail on Sunday* had no option but to comply with the lower court's order to publish a front-page apology to the Duchess of Sussex. Thus, very late on Christmas Day—when any self-respecting Brit was asleep in front of the telly, belly full of turkey and mince pies rather than checking the news—the *Mail On Sunday* quietly published a banner atop the red top, referencing the court's decision.[6]

The End.

Except that it is not quite over: Meghan's win is unlikely to herald the end of her battle with ANL in particular, or the media as a whole. Indeed, that seems a long way off while she and Harry continue to live a high-profile, celebrity life, courting some elements of the media—vis, Oprah,[7] Ellen,[8] Netflix[9]—while at the same time still seeking to secure privacy for themselves and their two children. While some of us may think that is an entirely acceptable compromise, it is, in some editorial minds at least, anathema.

Moreover, it is not the end, because it is only the beginning of a fresh debate in England, hard on the heels of the Court of Appeal's ruling, about the extent to which there has been an unacceptable "drift"[10] in England and Wales

away from free speech protection in favor of privacy, and thus the need to readdress the balance. Meghan's win has served as the perfect peg on which to hang a discussion about the possible demise of the Human Rights Act 1998 (HRA), which brought with it "Continental-style privacy protection"[11] and a free-speech-defeating tendency, which British Deputy Prime Minister and Justice Secretary Dominic Raab believes requires correction.

Let us pause for a moment and ask why a largely American audience, untroubled by the restrictive constraints in the UK, should read on. The outcome of the case could have much broader ramifications than anyone might have anticipated, as the forecasted "overhaul"[12] of the English system proposed by the Justice Minister has generated mutterings about a move to a British constitution more akin to that with which U.S. readers are more familiar, perhaps even the implementation of its own Bill of Rights.

We have dedicated some column inches to Meghan's story already. In the *EASL Journal* Spring 2000 issue,[13] we set the scene and read the first few chapters of Meghan's legal fight with the naughty newspaper. We continued the story[14] when Meghan won her summary disposal of the claim, Mr Justice Warby finding that she had a reasonable expectation of privacy to protect, undefeated by any of the defendant's arguments.[15] Thus, we will not repeat the legal arguments discussed already or delve too far into the legal issues or the evidence. However, the Duchess has hailed this win as "precedent setting,"[16] and, whether that is the case or whether the decision was simply an appliance of accepted and existing legal principles, the ramifications may be significant. Thus, in order not close the book, we make one more foray into the machinations of the media, the deliberations of the Duchess, and the conclusions of the Court of Appeal.

Second Bite of the Cherry for the Red Top[17]

Here is brief reminder of the salient details: The *Mail on Sunday* published without consent substantial extracts of a private letter that Meghan now very famously penned to her father Thomas Markle shortly after her wedding to Prince Harry. We know that she sued for copyright infringement and misuse of private information (a/k/a privacy invasion). We know that the newspaper robustly defended the claim and its defense was summarily struck out by Mr Justice Warby in the lower court.[18]

The defendant was never going to take a loss on summary judgment lying down. It did not accept that Meghan had a reasonable expectation of privacy in the letter; if she did, ANL claimed that it was publishing in the public interest; and that a balance between Meghan's privacy (if any) and its free speech had not been properly undertaken. Not only did ANL presumably wish to avoid an unattractive precedent loss, but a loss against this particular nemesis would be a considerable indignance. Add to the mix some seemingly incendiary evidence that the defense considered would blow the lower court ruling apart, and little wonder that ANL fancied its chances in the Court of Appeal.

Its hopes were dashed with the decision, however. As set out in the news summary[19] (note, not part of the formal judgment but an aid for the press and the public):

> The central question in this case was whether the judge, Mr Justice Warby, had been right to grant summary judgment for breach of privacy and breach of copyright to Meghan, Duchess of Sussex, against the publishers of the Mail on Sunday newspaper and MailOnline, Associated Newspapers Limited. The claims related to the publication in the Mail on Sunday and the MailOnline (together "Mail on Sunday") of about half the contents of a 5-page handwritten letter (the Letter) which the Duchess had sent on 27 August 2018 to her father, Mr Thomas Markle (Mr Markle).

In conclusion, on this central question, the court found that the judge had been correct. Again, from the press summary:

> The Court of Appeal (Sir Geoffrey Vos, Master of the Rolls, giving the lead judgment, with which Dame Victoria Sharp, President of the Queen's Bench Division, and Lord Justice Bean agreed) upheld the judge's decision that the Duchess had a reasonable expectation of privacy in the contents of the Letter. Those contents were personal, private and not matters of legitimate public interest [84]. The articles in the Mail on Sunday interfered with the Duchess's reasonable expectation of privacy, and were not a justified or proportionate means of correcting inaccuracies about the Letter contained in an article published on 6 February 2019 in People magazine in the USA ([95] and [106]).[20]

Reasonably Expecting Privacy

We recall that to establish a privacy case in England and Wales, one applies a two-stage test. A claimant (plaintiff) must establish that they have a "reasonable expectation of privacy" in respect of the information that they wish to protect from disclosure; if they do, that right must be balanced against other rights advanced. That is what this case is all about really—whether the Duchess had a reasonable expectation of privacy in that letter which was disputed by the defense, as we have already discussed in earlier issues and refer to below, and whether the judge had exacerbated matters altogether for the media by failing properly to apply the rest, and thus tipping the balance far too heavily in favor not only of the Duchess, but for all those who argue privacy claims in future.

The lower court's summary of the two-stage test was repeated in the Court of Appeal judgment:

> At stage one the question is whether the claimant enjoyed a reasonable expectation of privacy in respect of the information in question. One way the question has been put is to ask whether a reasonable person, placed in the same position as the claimant and faced with the same publicity, would feel substantial offence. There must be something of a private nature that is worthy of protection. In some cases, the answer will be obvious; but the methodology is to make a broad objective assessment of all the circumstances of the case."[21] The circumstances include the claimant's attributes, the nature of the activity at issue, where and how it happened, whether consent was given or could be inferred and the impact of the intrusion, and also relevant here the test note that "If the information, or similar information about the claimant, is in the public domain, or is about to become available to the public, the Court must have regard to that. In such a case it is a matter of fact and degree as to whether the legitimate expectation of privacy has been lost. Privacy rights can survive a degree of publicity for the information or related information.
>
> At stage two, the question is whether in all the circumstances the privacy rights of the claimant must yield to the imperatives of the freedom of expression enjoyed by publishers and their audiences [Associated Newspapers would add "or vice versa"]. The competing rights are both qualified, and neither has precedence as such.[22]

Applying this test, according to the Court of Appeal Warby J had found it "plain and obvious" that the stage one analysis pointed to a reasonable expectation of privacy;[23] and that at stage two, "the defen[s]e had not set out any case which, assuming it to be true, would provide a reasonable basis for finding that there was, at any material time, no reasonable expectation of privacy."[24] There was no failure here by the judge. Indeed, Sir Geoffrey Vos set out: "The judge did exactly what the parties had asked him to do. He decided whether the binary test at stage one was answered in favo[]r of the claimant, identifying his reasons in great detail, and then looked at stage two to see whether the article 10 right to freedom of expression outweighed the claimant's reasonable expectation of privacy. He took into account the alleged weakening of the claimant's right caused by the pleaded disclosures to People magazine and the Authors. He took into account the realities of the allegations against Mr Markle in the People Article, and the realities of the nature of the publication in the Articles. His main conclusion was that the publication of extensive extracts from the verbatim contents of the Letter was disproportionate to the limited right to reply that Mr Markle undoubtedly had."[25]

Credibility Malfunction?

What of that "the alleged weakening of the claimant's right," then? Why was ANL so insistent that Meghan could not possibly have a reasonable expectation of privacy in the letter, let alone one that would outweigh its freedom of expression to tell "the truth" (see below)? What precisely had weakened the Duchess's right to protect her privacy according to ANL?

The perceived explosive evidence on which ANL pinned some of its hopes came from one of the Duchess's former aides in the form of evidence: (1) that she had written her letter to her father in the knowledge that it could be leaked; and (2) that he had provided information, with her knowledge, to the authors of a biography of her and Harry, *Finding Freedom*,[26] despite her earlier assertions that she had not done so. These were crucial issues to be debated, according to ANL, and absent consideration of them in the lower court, the judge had been too hasty in chucking out the case without them being brought to trial.

These issues for the defense factored into the "reasonable expectation of privacy debate." As referenced in the Court of Appeal judgement: "What is suggested is that, at trial, undermining features could have been advanced to reduce the extent of the privacy that the Duchess might reasonably expect in the Letter. In particular, it is submitted that 'the extent of the claimant's dealings with the Authors of the Book and People magazine could not be properly addressed summarily' and that the 'fresh evidence after summary judgment bears out this complaint.'"[27]

They also bear on credibility which, as we know as the quality of being trusted or believed, is a vital commodity in litigation because the judge or jury refereeing any dispute that ultimately makes it into the courtroom simply were not present at the time when the dispute arose. They thus have to rely on their assessment and weight of the tangible evidence, and the oral testimony or statements of the disputing parties and their witnesses, to decide who appears the more credible. They who dares to tell the truth and be believed, wins. Of course, we also remind ourselves that just because differing accounts of events exist does not necessarily mean that either party is lying. It may be a foolish plaintiff who brings litigation knowing that they are not telling the truth, or reckless as to the validity and viability of their evidence, but litigation is rarely black and white. The mists of misunderstandings or memories fogged over time mean that in a case of "he said/she said," a lawsuit is not simply a case of truth or lie. Nevertheless, the judge or jury almost inevitably has to find for one party or the other, and in doing so, credibility can be key. Being caught out in a mistruth or even having the spotlight shone on one's

faulty memory may damage a party's credibility, possibly fatally to the claim or defense.

Meghan apologized to the court for having—albeit unintentionally—mislead it over her interactions with the media.[28] "[Meghan] intended the detailed contents of the Letter to be private, and certainly did not expect them to be published to the world at large by a national newspaper, and without any warning."[iv][29]

However, that appears contradictory to the messages later disclosed and widely reported in the media, in which she told her aide: "Obviously everything I've drafted is with the understanding that it could be leaked so I have been meticulous in my word choice but please do let me know if anything stands out to you as a liability."[30] This begged the question how can one possibly have a reasonable expectation of privacy in respect of a letter that one expects may be published? However, an understanding that something *might* be published is not the same as an expectation that it will be published, or an intention that it *should* be published.

As a communications adviser, I know that words should be carefully chosen, whatever their intended audience. That Meghan may have meticulously chosen her words in reactive rebuttal of accusations made does not necessarily mean that she wanted that information to be disclosed, and thus that she had no reasonable expectation of privacy in it. Someone in her situation may simply wish the expression of their sentiment concerning that private information to be conveyed in a particular manner, *in the event that it is disclosed*. It may not feel particularly comfortable to read someone planning so carefully for an exposure of private information. Yet as a crisis manager, I often advise my clients that to achieve the best, they should prepare for the worst—taking preparatory steps towards reputation protection in the event of a disclosure is possible, and indeed it is often desirable and highly advisable, without by dint thereof wanting or causing that disclosure to occur.

As to the evidence of the aide's communications with the authors of the Harry and Meghan biograph, *Finding Freedom*—neither did this torpedo Megan's reasonable expectation of privacy. According to Sir Geoffrey Vos, "In my judgment, the defendant is wrong to suggest that proving further dealings between the claimant and the Authors and People magazine, before or even after publication of the Articles, could abrogate her reasonable expectation of privacy in the detailed contents of the Letter."[31]

In apologizing to the court, Meghan said that she had "absolutely no wish or intention to mislead the defendant or the court."[32] The Court of Appeal's judgment that "[t]his was, at best, an unfortunate lapse of memory on her part"[33] is hardly a glowing endorsement, but one that did not affect her win.

Disproportionate Sledgehammer To Crack a Public Interest Nut

While not conceding that a reasonable expectation of privacy did exist in the circumstances, the newspaper also sought to argue that it should be saved by the greater merit to its publication in the public interest. We recall that the *Mail on Sunday* publication came in the aftermath of an article in *People* magazine,[34] headlined "Meghan Markle's Best Friends Break Their Silence: We Want to Speak the Truth," which Thomas Markle and the *Mail on Sunday* argued presented something far different indeed from the truth. Meghan's father was portrayed as a father who, in the teeth of his daughter being always dutiful and supportive with incredible generosity, had cold-shouldered her at the wedding, one of the most important times of her life; had lied about saying she had shut him out; and had given a cynical and self-interested response, ignoring her pleas for reconciliation in a loving letter. It was in the public interest, ANL advanced, to publish Meghan's letter so that the public could see it for themselves in order to counter this narrative, to prevent the public from being misled about Thomas Markle's purported status as villain, to provide him with a right to reply to the accusations made about him in that *People* article, and to serve the wider public interest in the public debate promoted by the *People* article.

Yet the Court of Appeal found that the extensive publication of the letter to be a disproportionate corrective hammer to serve that inaccurate nut and that (as summarized in the press summary), that "the judge had been right to decide that just one paragraph of the Letter could have been |justifiably deployed to rebut the allegation in People magazine that the Duchess's Letter was loving, when in fact it was a Letter reprimanding Mr Markle for talking to the press and asking him to stop doing so ([95] and [106])."[35]

As set out in the Court of Appeal's judgment:

> Essentially, whilst it might have been proportionate to disclose and publish a very small part of the Letter to rebut inaccuracies in the People Article, it was not necessary to deploy half the contents of the Letter as Associated Newspapers did. As the Articles themselves demonstrate, and as the judge found, the primary purpose of the Articles was not to publish Mr Markle's responses to the inaccurate allegations against him in the People Article. The true purpose of the publication was, as the first 4 lines of the Articles said: to reveal for the first time [to the world] the "[t]he full content of a sensational letter written by [the Duchess] to her estranged father shortly after her wedding." The contents of the Letter were private when it was written and when it was published, even if the claimant, it now appears, realised that her father might leak its contents to the media.(106)[36]

Unfair Reproduction

While the real concern here for both parties was the privacy claim, it is important to note that the Court of Appeal was not having any of it either, when it came to a defense to the copyright claim:

> the defendant knew it was dealing with an unpublished work, it copied a large and important proportion of the work's original literary content, most of which infringed the claimant's privacy rights and was disproportionate to any legitimate reporting purpose. The fairness of the reproduction was, therefore, very limited. Most importantly, perhaps, the use made of the Letter was unfair, because it was not about reporting current events, but reporting the actual contents of the Letter to make the splash of publication already referred to. (102)[37]

The End for Meghan Versus the Tabloids?

So, Meghan's privacy and copyright case has concluded satisfactorily for her. I say "satisfactorily" rather than "well," because a high-profile, highly public spat over a private matter, plastered all over the front pages of the newspapers for years cannot really ever be considered to be entirely successful. Indeed, it is not fanciful to suggest that Meghan's battle with the media will never end well, because it will likely never end. For as long as she and Harry are of interest to the public, they will sell newspapers; and for as long as they do that, they will grace their pages, willingly or not.

Is there a greater good served by Megan's win, beyond the purely personal? In her post judgment victory statement, she lauds it as a success for us all: "The courts have held the defendant to account and my hope is that we all begin to do the same. Because as far removed as it may seem from your personal life, it's not. Tomorrow it could be you."[38] The judgment has received negative backlash, unsurprisingly, from some who see it as a golden ticket for the rich and famous. For example, the leader of the House of Commons, Jacob Rees-Mogg, commented: "It is concerning that the rich and powerful can use the court to protect their private life when others can't. I would be deeply concerned about anything that undermines freedom of speech."[39] However, perhaps anticipating responses of that nature, Meghan's statement includes more than a nod at we the public, the not-so-rich and the not-so-famous, seeming to unite us all in a battle against her foe: "These harmful practices don't happen once in a blue moon—they are a daily fail that divide us, and we all deserve better."[40]

I could not agree more that it is not just the rich and famous who can become the unwitting victims of intrusion and pillory by the papers; I have advised heads of state as well as heads of private families, pop stars and politicians, and also private people. This ruling may give confidence to others to stand up to protect themselves against an unjustified attack on their privacy or reputation—but it is unlikely to stop the media from chasing down its scoops and serving the public's thirst for news, however "news" is defined. On the contrary, voices in the media argue that the decision will lead to a mass misinformation campaign where the wool is pulled over the public's eyes by the wealthy and powerful to paint a one-sided, distorted picture—and that this potential for injustice must be fought against with even more vigor.

Constitutional Crisis Corollary?

The rallying cry of the media appears to have been heard by British Justice Minister Dominic Raab. While Meghan's intention in bringing her claim may have been to put down a marker with the media that she was not to be messed with, and to seek to carve out some privacy for herself and her family, she cannot possibly have expected that her case might be used to unleash a major upheaval of the British constitution. Nonetheless, while not referring to Meghan's case specifically, the Justice Minister appears to be using it as a reason to renew his battle against the HRA and his abhorred "continental-style privacy protection."[41]

The HRA[42] incorporated into English law the European Convention of Human Rights,[43] and with it the protection of various fundamental rights including the right to life, the prohibition of torture, and importantly in media cases the right to respect for private and family life, home, and correspondence (guaranteed under Article 8 of the Convention),[44] and the competing right to free speech (Article 10).[45]

The Minister for Justice has long been an adversary of the HRA, writing in his book—*The Assault on Liberty—What went wrong with Rights*[46]—a decade ago that with the enactment of the HRA, "the spread of rights has become contagious."[47] The unfortunate choice of words mid-COVID-19 pandemic seems to take on a particular poignancy—but while we citizens of the world seek to overcome the creep of COVID-19, the British Justice Minister is set on halting the creep of rights with an "*overhaul*"[48] of the HRA.

The Court of Appeal was at pains to reiterate the narrowness of the issues it was deciding. It was followed by millions because of its glamour factor and due to the dazzling cast of characters and the twists and turns concerning the evidence. However, the legal principles have not had a dramatic makeover on this occasion solely due to their brush with celebrity. The decision was not—or should not have been—a landmark, law-changing, floodgates-opening decision. It applied well-established principles that the court must decide whether the claimant has a reasonable expectation of privacy in the material in question, and if so then undertaking a balancing exercise between it and the right to freedom of expression. However, it has been loudly criticized by elements of the media as unfairly advancing the interests of a celebrated few and diluting the

precious elixir of free speech, and has served as a timely catalyst for the Justice Minister to ride that privacy-bashing wave and to stride into battle on behalf of free speech, slaying the HRA in the process.

What will be the outcome of this legal action and ensuing debate? With "Continental-style privacy protection" out of the way, will the public be safer from the slings and arrows of outrageous privacy invasion? In the alternative, will the British tabloids have more lead in their pencils to write the sorts of stories about which Meghan protested? Rather than serving as "a victory not just for me [Meghan], but for anyone who has ever felt scared to stand up for what's right,"[49] will we find ourselves—Duchess or doctor, celebrity or civilian—still victims of a now even more intrusive, and ever-emboldened media? Or will free speech, truly at risk of demise, now be given the kiss of life?

In the Grimms' Brothers fairytale Jack and the Beanstalk,[50] the booming voice of the terrifying giant rings out: "*Fee-fi-fo-fum, I smell the blood of an Englishman*." That did not scare brave Jack as he climbed the magical beanstalk and defeated the giant. While ANL may have smelled blood in attacking Meghan, this American woman was not afraid to take on the media giant. In her victory statement, Meghan expressed a hope that "we are now collectively brave enough to reshape a tabloid industry that conditions people to be cruel, and profits from the lies and pain that they create."[51] While the giant crashed to his doom in the fairy tale, this is reality—and our media colossus will not so fall so easily. Indeed, even now, editorial desks may be buzzing with this little ditty: "*Fo-fee-fum Fi—Free speech for all, is our battle cry!*"

A truly unexpected outcome may be the impact of Meghan's case on the future of the British constitution. When American divorcée Wallace Simpson married her British royal love, she may have understood it risked ripping the royal family apart; she may even have anticipated a constitutional crisis with the abdication of King Edward VIII. Eighty years on, another American divorcée married into the same royal family, equally riven by differences, who cannot possibly have foreseen that a privacy claim over a letter to her Dad might serve as the catalyst for ripping up England's HRA, let alone Britain replacing it with an American-style constitution.

No publicly available blueprint for what the HRA-free Britain would look like is currently available, but Raab would prefer British courts to be the final arbiters of what happens on British shores. In an interview with *The Telegraph*, he said: "We want the Supreme Court to have a last word on interpreting the laws of the land, not the Strasbourg court," and that he wanted to "protect and preserve the prerogatives of parliament from being whittled away by judicial legislation, abroad or indeed at home."[52]

Unlike its American cousin, Britain does not have a written constitution. On one side of the Atlantic, the Constitution prescribes the fundamental rights of American citizens and what they are entitled to do; on the other side of the Atlantic, laws provide what British subjects may not do. In marrying Harry, Meghan's Americanisms may have infiltrated the British royal family, changing it perhaps forever. With her privacy action the land on the other side of the Pond, which she and Harry have left behind, is also perhaps set for a constitutional sea-change.

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What Tarantino Can Teach Us About NFTs

By Louise Carron

What do Quentin Tarantino and non-fungible tokens (NFTs) have in common? Both are quite popular among college-aged males and just as controversial.

Legal professionals have had to quickly understand NFTs in order to answer increasing queries from clients seeking to turn to this blockchain-based tool that opens a sea of possibilities for creators across industries. *Miramax, LLC v. Tarantino* is one of the few court cases involving NFTs that gives us delightful insights into the new problems that the technology raises, namely copyright and contractual law in the realm of art and entertainment.[1]

Revolutionizing the Arts, One NFT at a Time

NFTs offer infinite pathways for innovation, particularly for content-creators.[2] Through NFTs, it has become easier to give access to exclusive, never-before-seen audiovisual content together with a blockchain-based record of ownership, authorship and authenticity.

Thanks to the immutability of blockchain, NFTs are bringing digital and contemporary art to prominence within the art market. Beyond providing proof of ownership, some NFTs also offer exclusive perks to their holders, like access to VIP events, and the feeling of belonging to a community of like-minded collectors.

Although it is still possible to right-click and save a *Cryptopunk* and use it as a Twitter profile picture, as with walking around with a fake Louis Vuitton bag, people in the know will know, especially in such a tight-knit community where the "certificate of ownership" (the NFT record) can easily be found and traced back to the original maker. However, NFTs offer an easy avenue for copyright infringement, as any photo, meme or gif can be downloaded from the internet and turned into an NFT through a number of platforms. Who will guarantee that the person uploading the piece of content to the blockchain actually has the intellectual property rights to do so? What happens if no one does?

Legal Challenge to NFTs: The Case of Tarantino

Like numerous creators, Quentin Tarantino hopped on the NFT wagon. While speaking at the NFT.NYC crypto-art conference in November 2021, the filmmaker announced that he would soon "drop" (the crypto lingo for "release") portions of the original screenplay for *Pulp Fiction* (1994) as NFTs.

Miramax, the distribution company that owns most (but not all) of the rights to the movie, quickly sought to prevent the drop from happening. A federal lawsuit against the director ensued, filed on November 16, 2021, alleging, *inter alia*, breach of contract, copyright infringement, and trademark infringement.

The website www.tarantinonfts.com, where interested parties can add their names to a list that "increases your chances of having a spot in the auction," explains that:

> each NFT consists of a single iconic scene, including personalized audio commentary from Quentin Tarantino. The collector who will purchase one of these few and rare NFTs will get a hold of secrets from the mind and creative process of Quentin Tarantino.

The heart of the dispute lies in a series of contracts and a corporate restructuring, through which Miramax acquired "all rights in and to the Film [. . .] now or hereafter known [. . .] in all media now or hereafter known" from Tarantino, who reserved certain limited rights, including "print publication (including without limitation screenplay publication, 'making of' books, comic books and novelization, in audio and electronic formats as well, as applicable), interactive media, theatrical and television sequel and remake rights, and television series and spinoff rights."[3]

While Miramax argues that the director's reserved rights *do not* include the right to create NFTs of unpublished works, Tarantino's answer is unequivocal:

> Now a shell of its former self and flailing under a new ownership consortium, Miramax has decided to bite the hand that fed it for so many years by bringing this offensively meritless lawsuit. As Miramax knows well, Tarantino has every right to publish portions of his original handwritten screenplay for *Pulp Fiction*, a personal creative treasure that he has kept private for decades. Tarantino's contracts clearly and unambiguously grant him the opportunity to do so—those rights were carefully identified, bargained for and memorialized—and Miramax in its prior incarnation freely agreed. But now, the new Miramax implausibly attempts to use the concept of NFTs to confuse the public and mislead this Court in an effort to deny artists such as Tarantino their hard earned and long-standing rights.[4]

Arguably, Tarantino may have a strong ground on which to stand, especially since his reserved rights include the right to screenplay publication in "audio and electronic format."

However, Miramax is also suing on the basis of copyright infringement over the images associated with the NFTs that reproduced some of the movie characters—which the Copyright Act, together with case law, protects to a certain extent (although Tarantino has since changed the images).

A third claim for trademark infringement would have Miramax argue that the NFTs cause consumer confusion as to their source. As of this writing, Tarantino was moving forward with his offering, despite (or in spite of) the lawsuit.

New Technologies, Same Old Legal Questions

There are debates as to whether the act of selling an NFT linking to a work that itself belongs to someone else is copyright infringement, because making an NFT amounts to creating a *link* to a piece of content that exists in a separate storage. In the case of digital art, the concepts of copy and distribution are shifted.

Additionally, as many creatives and businesses are now looking at NFTs as a new way to disseminate content and catch a growing market, this ongoing lawsuit highlights the necessity of drafting solid licensing contracts around that content. Importantly, contracts usually seek to foresee future circumstances, which means paying attention to new technologies that could impact the way that we think about creative content. For instance, courts have had to weigh in on the interpretation of contracts during the advent of e-books,[5] digital databases,[6] and now web3. Therefore, prior to minting an NFT of a particular pre-existing work (rather than linking to one), it would be important to review old contracts to understand the scope of granted and reserved rights and whether these are "in all media now or hereafter known."

Upon inspection, while this case may not be as groundbreaking as it is touted to be—the issue revolves around a contract more than the technology itself—it goes to show that big players are prepared to fight about NFTs. For now, the Tarantino NFT auction seems to be proceeding as planned and the case is scheduled for trial in February 2023.

Endnotes

1. *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979 (C.D. Cal. filed Nov. 16, 2021).
2. S. Kaczynski and S. D. Kominers, *How NFTs Create Value*, Harvard Business Review (Nov. 10, 2021), *available at* https://hbr.org/2021/11/how-nfts-create-value. For a primer on the topic, read L. Carron, *ABCs of NFTs*, Art and Law, 32 Ent. Arts and Sports L. J. 2 (2021), https://nysba.org/app/uploads/2021/08/SECPUBS_EASL-Journal-2021-Vol-32-No-2_8.5X11_WEB.pdf.
3. *Complaint, Miramax, LLC v. Tarantino*, No. 2:21-cv-08979 (C.D. Cal. filed Nov. 16, 2021).
4. Defendants' Answer to the Complaint (filed Dec. 9, 2021) in *Miramax, LLC v. Tarantino*, No. 2:21-cv-08979 (C.D. Cal. filed Nov. 16, 2021).
5. *Random House Inc. v. Rosetta Books LLC*, 150 F. Supp. 2d 613 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 490 (2d Cir. 2002).
6. *New York Times Co. v. Tasini*, 533 U.S. 483 (2001).

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‘We’re Gonna Rock Down to’ . . . Copyright Protection: The Unauthorized Use of ‘Electric Avenue’ and Other Popular Music in Political Campaigns During the Social Media Era

By Diana Nelson

Introduction

Music has been used in political campaigns in the United States for centuries.[1] President Lincoln used “Abraham’s Tea Party” and “‘Abraham’ Our Abraham!,” Franklin Roosevelt used “Happy Days Are Here Again,” written by Milton Ager and Jack Yellen, and Ronald Reagan used Bruce Springsteen’s “Born in the USA” to “inspire, motivate and energize” their campaigns.[2] Since the 1980s, popular music and campaign songs have “become synonymous.”[3] Candidates choose a song or songs they believe best represent their personality to voters, and in this way use music “to relate to voters and gain support.”[4]

To reach voters in the modern era of social media, politicians and political campaigns often use popular songs in their visual and audio campaign materials posted to Twitter, YouTube, and other social media sites to convey their messages to voters, to support their campaigns, and to criticize their political opponents or their opponents’ policies. However, they often fail to seek the authorization of the copyright owners of the songs before doing so. This practice “has become so pervasive, especially during election seasons, that it is not unusual for one single politician or political campaign to face multiple copyright claims from multiple copyright owners.”[5] In 2020, Guyanese-British singer Eddy Grant brought suit against former President Donald Trump for Trump’s unauthorized use of Grant’s iconic song “Electric Avenue” in a video endorsing Trump’s re-election campaign posted to Trump’s personal Twitter page.[6]

The 55-second animated video begins with a depiction of a high-speed train bearing the words “Trump Pence KAG (Keep America Great) 2020.”[7] After the red train passes, “Electric Avenue” starts to play, along with an excerpt of an unflattering speech by President Joe Biden.[8]

At the same time, a slow-moving handcar, operated by an animated depiction of President Biden, comes into view bearing the words "Biden President: Your Hair Smells Terrific."[9] The video draws a sharp contrast between Trump's high-powered train and Biden's slow-moving handcar and includes Biden's unflattering language to "criticize President Biden and depict the strength of former President Trump's campaign," and, therefore, served to endorse former President Trump and "denigrate the Democratic Party's 2020 presidential nominee."[10] "Electric Avenue" begins at the 15-second mark and continues until the end of the video.[11]

The video was viewed more than 13.7 million times, and the Tweet containing the video had been "liked" more than 350,000 times, was re-tweeted more than 139,000 times, and received nearly 50,000 comments.[12] Grant, along with many other artists who have had their work used in the political sphere without their consent,[13] alleged that Trump not only infringed his exclusive rights as a copyright owner, but also offended his political and moral inclinations.[14] In turn, Trump, along with other politicians and political campaigns who have faced similar suits in the past,[15] argued that he had a right to use Grant's "Electric Avenue" without consent for political purposes under the fair use doctrine, and that the video itself was political speech protected by the First Amendment.[16] He brought a motion to dismiss Grant's claims.[17]

The case—*Grant v. Trump*—went before Judge John Koeltl in the United States District Court for the Southern District of New York.[18] Judge Koeltl rejected Trump's arguments and denied his motion to dismiss, holding that Trump's unauthorized use of "Electric Avenue" was not protected by the fair use doctrine, and prohibiting use of the song in his political campaign videos did not infringe on Trump's First Amendment rights.[19] Applying the four factors of the fair use doctrine, Judge Koeltl mainly focused on transformativeness.[20] He reasoned that "the creator of the video made a wholesale copy of a substantial portion of Grant's music in order to make the animation more entertaining. The video did not parody the music or transform it in any way . . . [and its] overarching political purpose does not automatically make this use transformative."[21] While Judge Koeltl acknowledged that there is "some inherent tension between the promotion of valuable political satire and the copyright protections of existing art that satirists may wish to use as source material," he explained that the First Amendment cannot be used to circumvent copyright law: "[If] an artist chooses to incorporate existing copyrighted expression of other artists in ways that draw their purpose and character from that work, they must pay for that material. The same principle applies to political satirists."[22]

Judge Koeltl's decision sets an important precedent for courts dealing with the unauthorized use of popular, copyrighted music in political campaigns during the social media era. As more and more artists find their work being infringed by politicians and political campaigns online, the concern becomes not only about a violation of law—but a violation of the artist's right to free expression. In these politically divisive times,[23] it is important now more than ever to preserve creators' rights not to have their speech used to push political views or messages that they do not support.[24] A song or artist becoming associated with a particular politician, political campaign or viewpoint can adversely affect the marketability or value of the original work, harm the integrity of the artist, and impact the artist's incentive to create in the first place. To this end, courts should follow *Grant v. Trump*'s guidance to protect copyright owners' exclusive rights in cases where their songs are used without consent for political purposes and where those political uses are not otherwise "transformative."[25] Doing so is consistent with the First Amendment and does not stifle political speech, discussion or criticism.

Part I of this article will explain the legal framework for analyzing copyright infringement claims in a political context. Part II will show how *Grant v. Trump* provides important guidance for courts in addressing fair use and First Amendment issues in cases involving the unauthorized use of copyrighted material in political campaigns. Part III will argue that a copyright owner's exclusive rights should be preserved in cases where an artist's material is being used for political purposes and is not otherwise transformative, and that those rights can peacefully coexist alongside First Amendment protections for political speech.

I. Legal Framework: A Copyright Owner's Exclusive Rights, the Fair Use Doctrine, and First Amendment Protection for Political Speech and Satire

The Copyright Act grants artists the *exclusive* right to, among other things, reproduce and perform their original songs.[26] As such, when a political campaign wants to use a song in a rally, campaign advertisement, or video, it needs to have authorization from the copyright owner first.

In those cases where copyright owners do file infringement suits against politicians, campaigns, or third parties for their unauthorized uses of copyrighted works, defendants often raise the fair use defense, arguing that their political uses of artists' works are "transformative, primarily commentary, or serve other noncommercial political purposes and uses authorized under the First Amendment."[27] Fair use is an exception in copyright law, codified in § 107 of the Copyright Act, that permits the unlicensed use of copyrighted works under certain conditions. The preamble to § 107 provides a (non-exhaustive) list of examples in which others might use copyrighted works without permission, including for: "criticism, comment, news reporting, teaching, scholarship or research."[28]

While politicians and political campaigns, just as anyone else, may use copyrighted works in ways that qualify as fair use with or without permission from the copyright owners, the fact that a politician or political campaign uses the work in a political context does not mean that the use is more or less likely to qualify as fair use. As the court explained in *Galvin v. Illinois Republican Party*, the "critical and political nature" of a secondary work does not automatically qualify that work as fair use.[29] Rather, fair use is a fact-specific inquiry requiring courts to make a case-by-case determination as to whether an unauthorized use is fair, considering four factors outlined in § 107.[30]

In the seminal case on fair use, *Campbell v. Acuff-Rose Music, Inc.*, the Supreme Court explained that the first factor in a fair use inquiry examines whether "the new work merely supersedes the objects of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."[31] In other words, a court must determine "whether and to what extent the new work is transformative."[32] While the *Campbell* Court acknowledged that "transformative use is not absolutely necessary for a finding of fair use," it emphasized that "the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works," and therefore "the more transformative the new work, the less will be the significance of the other factors, like commercialism, that may weigh against a finding of fair use."[33] To that end, while transformativeness is not explicitly articulated in the text of § 107, it remains a key part of the fair use inquiry.

Along with the idea/expression dichotomy,[34] copyright law provides "built in protection for First Amendment interests" through the fair use defense, which serves to balance artists' exclusive rights to their works and the public's First Amendment interests, accommodating new works that "to some extent borrow from previous works."[35] Professor Cathay Y. N. Smith explains that because copyright law already "embodies First Amendment safeguards," courts have refused to expand the fair use doctrine to create an exception to copyright law for those who use an original work in a secondary political work, for, what she calls a "political use.[36].

II. A Focus on Transformativeness in Political Use Cases: *Grant v. Trump* as Guidance for Courts

A. *Grant v. Trump*'s Transformative Analysis

In denying Trump's motion to dismiss, Judge Koeltl upheld Grant's exclusive rights under the Copyright Act.[37] In doing so, he mainly relied on the first factor of fair use, which examines whether Trump's use of Grant's work was transformative.[38] Trump argued that the video's use of "Electric Avenue" was transformative as a matter of law because the video and the song serve different purposes—as the animation in the video is "partisan political commentary" and "Electric Avenue" is not.[39] However, Judge Koeltl explained that Trump's argument "misapprehends the focus of the transformative use inquiry."[40] He explained that the inquiry does not focus "exclusively on the character of the animation," but rather "focuses on the character of the animation's use of Grant's song.[41]

He cited the Second Circuit's recent decision in *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, in which the Court identified a formula to determine whether a work is transformative: "where a 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, the bare assertion of a 'higher or different artistic use,' is insufficient to render a work transformative."[42] Judge Koeltl affirmatively declared that in this case, the "video's overarching political purpose does not automatically render its use of any non-political work transformative."[43] He further described the character of the video's use of "Electric Avenue" as "wholesale copying of music to accompany a political campaign ad," noting that "the video's creator did not edit the song's lyrics, vocals, or instrumentals at all, and the song is immediately recognizable when it begins playing around the fifteen second mark of the video, notwithstanding President Biden's audio, which can be heard simultaneously."[44] He explained that Biden's speech did nothing to obscure the song, which was "a major component of the animation, even though it appears the video's creator could have chosen nearly any other to serve the same entertaining purpose."[45] He additionally held that the video was not a parody under *Campbell* because it did not use Grant's song to "deliver its satirical message, and makes no effort to poke fun at the song or Grant."[46] Finally, Judge Koeltl concluded that just because Trump's video "on the whole" constituted political messaging, that alone did not render it transformative as a matter of law.[47]

B. The Transformative Analysis Increases Protection for Copyright Owners in Political Use Cases

In holding that the video's underlying political commentary did not make Trump's use of Grant's song transformative, *Grant v. Trump* set an important standard for other courts in political use cases and provides important protection for copyright owners against politicians and political campaigns who claim that their blanket copying constitutes fair use. In political use cases where courts similarly focused on transformativeness, the copyright owner's exclusive rights were protected.

For example, in *Henley v. DeVore*, California assemblymen DeVore produced a campaign video containing the song "The Hope of November," a play on the "The Boys of Summer," by musician Don Henley.[48] DeVore revised the lyrics of "The Boys of Summer" to create a song that poked fun at Obama, House Speaker Nancy Pelosi, and Obama's supporters.[49] First, DeVore downloaded a

karaoke version of "The Boys of Summer," which simulated the song's instrumental track, and then he supplied the vocals for "The Hope of November," attempting to emulate Henley's style.[50] DeVore then compiled images of Obama, Pelosi, and a few others, and synchronized the track with the video, which was posted to YouTube and other online sites.[51] Henley brought suit against DeVore for copyright infringement and moved for summary judgment on his claims.[52] The court found that DeVore had not sufficiently transformed "The Boys of the Summer" because he "made minimal changes only to the lyrics of [Henley's] song to make a new song about different subjects."[53] Additionally, the court noted that "The Hope of November" was not a parody because it did not comment on or poke fun at Henley himself or his song, but rather commented on DeVore's opponents and their supporters.[54] Thus, the court rejected DeVore's fair use defense and granted Henley's motion for summary judgment.[55]

Similarly, in *Hill v. Pub. Advoc. of the United States*, photographer Kristen Hill took an engagement photo of a same sex couple in front of the Brooklyn Bridge.[56] Defendants, a political organization opposing same-sex marriage, used the photo in a political mailer sent out to thousands of Colorado residents, which targeted Jeffrey Hare, a Republican candidate for Colorado's House District 48 seat who supported same-sex marriage.[57] The mailer showed the photo of the couple and was edited to have white clouds in the background and a caption reading: "Jeffrey Hare's Vision For Weld County?"[58] Hill brought suit against the defendants, alleging that they used the photo without her permission.[59]

The defendants argued that their use of Hill's photo was "highly transformative" and for political purposes, relying on the Supreme Court's decision in *Campbell*.[60] The court disagreed, reasoning that the defendants did nothing more than crop the photo and stick it into the mailer.[61] While the court acknowledged that the defendants placed a different background on the photo and put a caption on it, it explained that "such actions were not characterized as 'highly transformative.'"[62] Finally, the court held that the "mere fact that the photo was used for political purposes does not . . . favor application of the fair use doctrine."[63]

In contrast, in *Keep Thompson Governor Committee v. Citizens for Gallen Committee*, the court did not address transformativeness in its fair use analysis.[64] In that case, the defendant used the song "Live Free or Die," owned by the plaintiffs, in the background of a political advertisement criticizing a political opponent without permission from the plaintiffs.[65] The plaintiffs brought suit for copyright infringement and the defendant used fair use as a defense.[66] The court acknowledged that the defendant put the exact song owned by plaintiffs in its advertisement, which on its face, constituted infringement.[67] However, the court reasoned that the defendant's advertisement was part of a political campaign message and was noncommercial in nature, and therefore constituted a fair use of the plaintiff's work.[68]

Granted, *Keep Thompson Governor Committee* was decided before the Supreme Court's decision in *Campbell*, which established the transformativeness standard. However, the same arguments claiming that political use is synonymous with fair use are still made today. If any use of copyrighted work for a political purpose was automatically considered fair use, it would deprive copyright owners of their exclusive rights to their creations, and "would set a precedent that American politicians could pretty much use any music in any political videos without getting permission."[69] To that end, it becomes extremely important in cases analyzing the unauthorized use of songs in political campaigns to perform a close analysis of transformativeness in the interest of protecting exclusive rights.

III. The Importance of Copyright Protections in the Political Sphere

Judge Koeltl's decision "send[s] a message that recording artists' and songwriters' creative output cannot be arbitrarily usurped by politicians who wish to avoid obtaining permission to use their recordings and pay appropriate licensing fees."[70] Given the pervasiveness of infringement by politicians and political campaigns online, it becomes important now more than ever to protect copyright owners' exclusive rights. Failing to do so can harm an artists' marketability and reputation, can offend that artist's moral beliefs, and notably, can disincentivize that artist to create new works in the future.

In her testimony before the United States Senate Judiciary Subcommittee on Intellectual Property, Grammy Award-Winning Artist and Recording Academy Trustee Yolanda Adams spoke about the economic impact online infringement by political campaigns has on artists—especially during the last few years throughout the COVID-19 pandemic.[71] She notes that with the closure of many venues and the cancellation of in-person performances, many artists have to rely on "multiple income streams."[72] Specifically, she notes that when artists cannot perform, they try to make part of their living off of their recordings and digital streaming, "which only brings fractions of a penny to the creators . . . and they hope to monetize every use."[73] Adams argues that when politicians and political campaigns use artists' music online without permission, they "reduce the artists' ability to earn a living," and their actions "should be treated as infringement, plain and simple."[74] The Copyright Alliance explains that when "politicians and political campaigns use music and other unlicensed works in ways that do not qualify as fair use, they are directly interfering with the creator's revenue stream and the market for the work."[75] Each time this occurs, the copyright owner goes unpaid for uses for which they otherwise would be compensated.[76]

The fourth factor of fair use examines the effect of the political campaign's use of the song on the market for the original song.[77] In *Grant v. Trump*, the court noted that the video's use of "Electric Avenue" may threaten Grant's licensing markets, and explained that "widespread, uncompensated use of Grant's music in promotional videos—political or otherwise—would embolden would-be infringers and undermine Grant's ability to obtain compensation in exchange for licensing his music."[78] Additionally, some copyright owners argue that under the fourth factor of fair use, unauthorized political uses of their works "harm their market interests by damaging their reputations."[79] For example, an artist may lose out on future commissions because fans or labels think the artist is endorsing the politician or that the political campaign who is using their work.[80]

Professor Smith argues that when an artist's work is used without permission for a political purpose, only the "political user benefits without paying the price."[81] In many cases, she notes that the politicians do not even need to use the copyrighted work, because often "they are not using the copyrighted work to comment on the creator's skills or their artistry, but to comment on the subject matter or politician featured in the copyrighted work, which can be achieved through non-copyrighted alternatives."[82] Where, as in *Grant v. Trump*, political defendants could easily choose any other non-copyrighted song available to them to use in their commentary, courts should aim to ensure that copyright owners are protected from those defendants' complete disregard of their exclusive rights.[83]

For Adams, fair use in political cases "is not about money."[84] Rather, "it's about access."[85] She explains that fair use can be unfair if it takes her control away: "If for example, my music were used in a YouTube video that ran counter to my Christian values . . . I should have the right to take it down, regardless of the tests of fair use."[86] Adams expresses the fear many artists have when campaigns use their music without authorization; specifically, that they might become associated with a politician, political campaign, or cause that either: (1) "undermines the perceived meaning of their works[;]" (2) runs contrary to their own political views or beliefs; or (3) offends their moral values.[87] To this end, preserving exclusive rights becomes necessary to allow copyright owners to protect their personal interests, privacy interests, or dignity interests in their works.

Finally, unauthorized uses of songs in political campaigns may disincentive artists to continue making new music. If creators are unable to stop unauthorized political uses of their works, they could be less inclined to create new works, or "perhaps put less effort into making those works compelling."[88] If politicians could use artists' works for free, it opens the door for anyone to use a song without permission in any way they please, and there would be no reason to pay the artist.[89] As the Second Circuit explains, "this in turn, risks disincentivizing artists from producing a new work by decreasing its value—the precise evil against which copyright law is designed to guard [against]."[90]

Notably, it appears that copyright owners are not trying to enforce their exclusive rights under the Copyright Act in an effort to stifle political speech and discourse. They simply want to prevent politicians and political campaigns from using their copyrighted works and creative expressions without permission for political purposes. As copyright law already embodies two important safeguards protecting political speech in these types of cases, courts do not have to engage in a separate First Amendment analysis when analyzing these claims. Yet even if a court does, artists "can shed light on the significant distinction that exists between political speech and the music utilized in conjunction with a political campaign video."[91] As Judge Koeltl notes, "creators of satirical videos like [Trump's] must simply conform any use of copyrighted music with copyright law by, for example: paying for a license; obtaining the copyright owner's permission; or 'transforming' the chosen song by altering it with new expression, meaning or message."[92] Where the creator of a political campaign video does none of that, they should not be able to claim they are nonetheless entitled to the copyrighted work solely based on purported First Amendment protections.

Conclusion

Throughout the social media era, politicians and political campaigns have shown a blatant disregard for copyright owners' exclusive rights, consistently using artists' works online without permission, and subsequently defending their acts on fair use and freedom of speech grounds. Importantly, political use is not synonymous with fair use. When faced with a political use case, courts should follow *Grant v. Trump*'s guidance and perform a close analysis examining whether the politician or political campaign's use of the artist's work is truly transformative. Doing so protects copyright owners' exclusive rights to their creations, and ensures that the original goals of the Copyright Act are achieved.

Endnotes

1. *See* ASCAP, *Using Music in Political Campaigns: What You Should Know*, ASCAP, https://www.ascap.com/-/media/files/pdf/advocacy-legislation/political_campaign.pdf.
2. *See* Music in Politics: From Around the World, History, Clark College, https://wordpress.clarku.edu/musc210-mip/american-campaign-songs/history/.
3. *See* Music in Politics, *supra* note 2.
4. *See* Music in Politics: From Around the World, American Campaign Songs, Clark College, https://wordpress.clarku.edu/musc210-mip/american-campaign-songs/impact/.

5. *See* Cathay Y. N. Smith, *Political Fair Use*, 62 Wm. & Mary L. Rev. 2003, 2006 (2021). Professor Cathy Y. N. Smith notes that in the span of just one month, Tom Petty, Panic! At the Disco, The Rolling Stones, Neil Young, and Linkin Park all publicly denounced and demanded that former President Donald Trump cease using their music to promote his 2020 re-election campaign. *Id.*
6. *See* Glenda Dieuveille, *When is Music in Political Campaigns Transformative? SDNY Judge Rejects Trump's Fair Use Arguments*, Frankfurt Kurnit Klien + Selz P.C. (Oct. 5, 2021), https://ipandmedialaw.fkks.com/post/102h7yc/when-is-music-in-political-campaigns-transformative-sdny-judge-rejects-trumps-f.
7. *See Grant v. Trump*, No. 20-CV-7103 (JGK), 2021 WL 4435443, at *1 (S.D.N.Y. Sept. 28, 2021).
8. *See id.*
9. *See id.*
10. *See id.*
11. *See* id.
12. *See id.* at *2.
13. A long list of musicians, including Jackson Browne, Don Henley, and David Byrne, have taken political campaigns to court over the years for using copyrighted songs without permission. *See* Joel Rose, *Music in Political Campaigns 101*, NPR (Feb. 29, 2012), https://www.npr.org/sections/therecord/2012/02/29/147592568/music-in-political-campaigns-101.
14. *See Grant*, 2021 WL 4435443, at *2.
15. John McCain made similar arguments when he was sued by Jackson Browne for his unauthorized use of Browne's "Running on Empty." *See* Mary Ann Akers, *Jackson Browne v. John McCain–Heading to Trial?*, The Washington Post (Feb. 23, 2009), http://voices.washingtonpost.com/sleuth/2009/02/jackson_browne_v_john_mccain_-.html?hpid=news-col-blo.
16. *See Grant*, 2021 WL 4435443, at *1.
17. *See id.*
18. *See id.* at *1.
19. *See id.* at *7.
20. *See id.* at *8.
21. *See id.*
22. *See id.* at *7.
23. *See* Pew Research Center, *Political Polarization in the American Public* (Jun. 12, 2014), https://www.pewresearch.org/politics/2014/06/12/political-polarization-in-the-american-public/ (finding "Republicans and Democrats are more divided along ideological lines–and partisan antipathy is deeper and more extensive–than at any point in the last two decades").
24. *See* Copyright Alliance, *Is It Considered Fair Use for a Political Campaign to Use Music or Other Copyrighted Works?*, Copyright Alliance (2021), https://copyrightalliance.org/education/qa-headlines/music-in-political-campaigns-fair-use/.
25. *See Grant*, 2021 WL 4435443, at *4.
26. *See* 17 U.S.C. § 106 (emphasis added).
27. *See* Smith, *supra* note 5, at 2039.
28. *See* 17 U.S.C. § 107.
29. *See Galvin v. Illinois Republican Party*, 130 F. Supp. 3d 1187, 1193 (N.D. Ill. 2015).
30. The court considers: (1) "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit 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." 17 U.S.C. § 107.
31. *See Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994). Campbell specifically addressed the role of fair use with respect to parodies, which are often used in political campaigns to criticize or comment on a political opponent. *Id.* at 586. *Campbell* explained that parodies "need to mimic an [original work]" to make a point and provide "social benefit by shedding light on an earlier work, and, in the process, creating a new one," and therefore "have an obvious claim to transformative value." *Id.* at 579.
32. *See id.*
33. *See id.*
34. In *Harper & Row Publishers, Inc. v. Nation Enterprises*, the Supreme Court noted that copyright's idea/expression dichotomy "strikes a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts, while still protecting an artist's expression." 471 U.S. 539, 556 (1985).
35. *See* David L. Hudson Jr., *Copyright & The First Amendment*, Freedom Forum Institute (Aug. 5, 2004), https://www.freedomforuminstitute.org/2004/08/05/copyright-the-first-amendment/.
36. *See* Smith, *supra* note 5, at 2011; *see also* Harper & Row Publishers, Inc., 471 U.S. at 560.
37. *See Grant*, 2021 WL 4435443, at *8.
38. *See id.*
39. *Id.* at *3.
40. *Id.*
41. *Id.*
42. *Andy Warhol Found. for Visual Arts, Inc. v. Goldsmith*, 2021 WL 3742835, at *36 (2d Cir. Aug. 24, 2021).
43. *Grant*, 2021 WL 4435443, at *3.
44. *Id.* at *4.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Henley v. DeVore*, 733 F. Supp. 2d 1144, 1148 (C.D. Cal. 2010).
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1158.
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81. *See id.* at 2048.
82. *See id.*
83. *See Grant*, 2021 WL 4435443, at *4.
84. Recording Academy, *supra* note 71, at 2.
85. *See id.* at 3.
86. *See id.*
87. *See* Smith, *supra* note 5, at 2071. For example, in June 2020, Tom Petty's family objected to Trump's use of Petty's "I Won't Back Down" at his rally in Oklahoma. *See* Christianna Silva, *Tom Petty's Family Doesn't Want Trump Using His Music For A 'Campaign Of Hate'*, NPR (Jun. 21, 2020), https://www.npr.org/2020/06/21/881444533/tom-pettys-family-doesn-t-want-trump-using-his-music-for-a-campaign-of-hate. Petty's Instagram account issued a statement following a cease-and-desist letter to the Trump campaign, saying: "Both the late Tom Petty and his family firmly stand against racism and discrimination of any kind. Tom Petty would never want a song of his used for a campaign of hate. He liked to bring people together." *Id.*
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Striking All the New Chords: How Taylor Swift Is Reclaiming Her Past Works and Reshaping the Entire Record Industry

By Elizabeth Vulaj

You Belong With Me. *Speak Now*. *Look What You Made Me Do*. Several of the biggest hits from Taylor Swift's extensive catalog, some of which were penned over a decade ago, could also serve as an indicator of her current determination and passion to re-claim ownership of her music, after the master recordings of her entire first six albums were acquired by manager Scooter Braun in June 2019 and eventually sold to an investment fund in November 2020 for more than $300 million. Swift publicly claimed to have a contentious relationship with Braun and alleged that she was not given the opportunity to purchase her prior works.[1] In August 2019, just a few months after Braun's acquisition, Swift stated that she intended to re-record her first six albums upon leaving her original label, Big Machine Records, and moving to Universal Music Group. Her original contract, which she signed with Big Machine Records as a teenager in 2005, enabled her to begin re-recording her first six albums in November 2020. Ultimately, Swift delivered.

In April 2021, Swift released *Fearless (Taylor's Version)*, a re-recording of her 2008 sophomore album, which had elevated her to the wider public outside of the country music world, and for which she won her first several Grammy awards.[2] She followed up in November 2021 with a re-recording of her third album *Red*, with new versions of her original songs and supplementing even newer content, such as the famed 10-minute version of her acclaimed hit, *All Too Well*.

While Swift has made it clear that she intends to make good on her promise to re-claim all of her prior albums, many have wondered how this new method of re-claiming prior works will leave artists, record companies, and the music industry as a whole. What has led to Swift taking this course of action? What are the legal avenues that she and other artists have used in trying to take on this endeavor? Most of all, what will the music business look like in the years to come with these new changes, particularly

as the landscape has altered from album-oriented contracts to music now being consumed via streaming services?

I. Face the Music: The Acquisition and The Fall Out

As one of Swift's contemporaries, Hilary Duff, once professed: "Let's go back . . . back to the beginning." Where did Swift's inspiration and determination to re-record her first six albums come from, and why did she choose that route in order to remedy the issues spurred by Braun's acquisition of her work? On June 30, 2019, Ithaca Holdings LLC, a company owned by Scooter Braun, manager to pop acts like Justin Bieber and Ariana Grande, announced its acquisition of Big Machine Records, an independent country music record label whose first client was Swift, for over $300 million—a massive purchase backed by the Carlyle Group, a minority investor in Ithaca Holdings.[3] At the time, this acquisition was set to bring Ithaca Holdings to a total valuation of $800 million.[4] Swift was quick to voice her dismay at this acquisition, publishing a Tumblr post on the same day, calling Braun an "incessant, manipulative bully" who now owns all of the masters of the past six albums she recorded while still with Big Machine Records and stating that she was unable to buy her old master recordings, despite numerous attempts to do so.[5] In November 2020, Ithaca Holdings sold the master rights to Swift's first six albums to an unnamed investment fund for over $300 million.[6]

Swift first signed with Big Machine Records at the age of 15, when she was a virtual unknown and just about to break into the country music scene. She released her self-titled debut album the following year, sparking hits like *Tim McGraw, Picture to Burn,* and *Teardrops on My Guitar*. While this record no doubt made a big splash, Swift's bigger break came in 2008 with her second album *Fearless*, which contained the singles *Love Story* and *You Belong With Me,* and garnered Swift her first Album of the Year award at the 2010 Grammys. At this point, Swift's sophomore album was not only a success, but also an avenue for a major crossover, propelling Swift from an up-and-coming country singer to a mega pop star. The hits Swift produced for Big Machine kept coming as the years rolled on, with *Speak Now* released in 2010, the critically acclaimed *Red* in 2012, *1989* in 2014 (which assisted in shifting Swift's sound to mainstream pop), and the tonally darker *Reputation* in 2017.

When her contract with Big Machine was set to expire in 2018, Swift announced that she was leaving to sign with Republic Records and Universal Music Group, clarifying that she would own the master recordings of any music she was set to make thereafter.[7] In 2019, Swift admitted in an interview that she knew Scott Borchetta, founder of Big Machine, would sell the music from Swift's first six albums, but she did not know he would sell it to Braun, with whom she had a contentious history. In June 2019, after the acquisition of Big Machine and Swift's catalog was finalized, Swift called the move her "worse case scenario,"[8] acknowledging that she was given a chance to sign back up with Big Machine Records in 2017 and re-claim her master recordings, but with a major caveat: having to "'earn one album back at a time, one for every new one I turned in.'"[9] Instead, Swift opted to sign with Universal, knowing that Borchetta would eventually sell Big Machine and therefore her prior works, but she admitted that she never anticipated Borchetta selling her catalog to Braun.

While Swift praised Universal for allowing her to own the master recordings of all the albums she was set to create with it, calling the company a "label that believes I should own anything I create," she also expressed hope that other future artists would read her posts and "learn about how to better protect themselves in a negotiation."[10] In just two years, Swift produced a whopping five albums with Republic, including the original records *Lover* in 2019, as well as *Folklore* and *Evermore* in 2020, and the re-recordings, *Fearless (Taylor's Version)* and *Red (Taylor's Version)* in 2021. Even though Swift only recently started re-recording her older works, the effects that her moves have had on the legal field, as well as the music industry, surfaced almost immediately.

II. Marching to the Beat of Her Own Drum—Comprehending Copyright Law

To further understand the effect of Swift's re-recordings, it must be determined how exactly she is able to do so and how copyright law fits into her already meaty catalog. There are two copyrights in music, one of which is the right to the underlying composition, also referred to as the publishing rights (which include synchronization rights), and the second is the actual recording itself, which is referred to as the master right.[11] Swift is both the co-author of many of her songs, as well as the singer, so there are two sets of rights she is able to newly try and obtain. In terms of the masters, that refers to the very first recording of a song, and as far as the masters of her first six albums, Big Machine Records owns those—in sum, Swift owns the right to the songs she authored or co-wrote, but she does not own the rights to the original sound recordings of the songs. This type of set-up has been in place nearly as long as the music industry itself, with the upper hand being granted to record companies—while labels initially take a gamble in signing an unknown, as that singer becomes a major star, the company retains ownership over the masters (and often even the written work, unless the singer has co-authored or authored the tracks) and reaps a major portion of the financial benefits.

When more than one co-writer creates lyrics and/or music, that final product becomes part of a joint work, and each co-writer owns an equal share of the song.[12] As a co-writer, Swift has the power to grant non-exclusive licenses, such as for allowing use of her songs in film or television programming. However, for Swift's music to be played on such a platform, a producer also needs to obtain a license from the investment fund, as the current owner of the masters, as well as from Swift herself, as the sound will

be synchronized with the moving images.[13] Yet, with her re-recordings, Swift would own both the masters and the synchronization rights, and any producer seeking to feature the new version of her works would have to license from Swift herself for all rights, rather than any owner of the original masters.

More than most, Swift in particular is in a unique position as a songwriter to fight for further ownership of her work. First, she has solely authored or co-authored nearly every track she has released, a rarity in the music industry, when many pop acts request the assistance of numerous collaborators to co-write their works or sing songs written by others. Swift now has the advantage as author (or co-author), and when entities seek to feature her music in films or on television, they must license through her. Further, Swift has exercised her rights to trademark album titles and famous phrases spawned from them (i.e., "This Sick Beat" and "Shake It Off"), cementing even further ownership over her own words.[14] Finally and most notably, her re-recording of former works is notable in how she is modelling how to seek ownership on behalf of herself and all other artists.

III. It's Not Over Till the Artist (Re) Sings

When Swift began releasing re-recordings of her albums in 2021, it was clear that her fans were eager to gobble up the massive content she had to offer—*Red* (Taylor's Version) features a whopping 31 tracks—and what was even more apparent was the way Swift's recordings have affected how artists and recording labels are now approaching the subject of master recordings. Swift's re-recordings both serve her and will inevitably grant artists more power, as the value of the original recordings are likely to diminish because her ever-loyal fan base have predictably chosen to stream Swift's newer versions of her prior hits, rather than the original works. Further, as Swift has written or co-written nearly all of her songs, she is able to license her re-recorded tracks for film and advertising use and turn down requests to use her original content. While these moves directly benefit Swift, they are shaking up the music industry itself—first and foremost, she has raised awareness about the significance of musicians claiming ownership over their own content: "In reclaiming her masters, and drawing attention to the saga surrounding it, she has made a dramatic statement about the importance of artists owning their work and refusing to let others capitalize on their creativity."[15] Fellow artists, such as Kelly Clarkson and Halsey, spoke out in support of Swift, urging for avenues to be paved for artists to own their own works.[16]

Many have reported that Swift's re-recordings will "reshape how recording labels frame the master recordings ownership clause for newly signed artists."[17] For example, as of November 2021, Universal (Swift's current label) has been doubling the amount of time that restricts an artist from re-recording their works, increasing the time that an artist can re-record from five to seven years from the delivery of the final album or from two to five years from a contract's expiration. Even though many labels will attempt to make it difficult for artists to re-record, it will be interesting to see how artists will negotiate and attempt push back on that, particularly those who are more established and with greater negotiation clout.[18] Further, many musicians are now seeking ownership over their master recordings in the negotiation stages when signing with new labels, again, particularly when they are able to yield the cache and power similar to Swift's when she signed with her new label.[19]

IV. Changing Hers (and Everyone Else's) Tune

Swift's actions have caused many in the industry to examine what course of actions artists will take in order to ensure protection of their works moving forward. Swift expressed dismay at the fact that she was not granted the right to purchase her albums back, and some are supporting the idea that artists should be given the right of refusal—meaning, a contractual right to enter into a business transaction with the owner of a particular entity or content, before the owner is able to explore transactions with another third party.[20] Allowing artists the first opportunity to purchase their works, particularly when certain catalogs are deemed of high value and will inevitably spur many bidding wars, is a critical issue to many artists, including Swift, who mused: "How are we really helping artists if we're not giving them the first right of refusal to purchase their work if they want to?"[21]

Another helpful tactic for artists that has been discussed in the industry is entering into shorter record deals. This would give an artist a chance to leave behind their initial deal once it has expired and seek to enter a new relationship with a company that will allow for ownership of the master recordings, once the artist has built a considerable amount of success and power to leverage on their own behalf. Swift, for instance, was an unknown teenager when she signed with Big Machine Records in 2005, which did not allow for ownership of her master recordings. However, when she left over a decade later in 2018, she had built enough critical and commercial success, power, and fervent fan following on her side when negotiating for ownership of her forthcoming albums she was set to make with Universal.

Prior to Swift's actions, no major recording artist had raised as much of a public discourse regarding re-recording their own material—while it had been done before, most artists re-recorded not for the purpose of owning their own masters, but to put a new spin on their older material (such as Alanis Morissette re-recording her 1995 album *Jagged Little Pill* in 2005, to release an acoustic version or Frank Sinatra re-recording many of his older hits when he founded his own labels, Reprise Records).[22] However, often other artists did not identify the new versions as re-recordings of their older works, and "most don't actually publicize the fact, like Swift has."[23] Now, with Swift's

precedent, other artists are taking note and following suit. Recently, singer JoJo re-recorded her first two albums (of which she did not initially own the original master recordings), when her prior label Blackground Records became defunct and therefore, her original songs were not available to be consumed via streaming and digital services. Re-recording enabled JoJo to own her masters in a way akin to Swift and also paved the way for additional revenue sources, such as streaming services.

Finally, the most critical thing Swift's move has done is raise awareness and spark public discourse regarding artists' rights to own and properly profit from the works they have spent their entire careers creating. Back in 2014, when the use of iPods began to wane and people increasingly began using streaming services like Spotify or Pandora to get their music, Swift wrote an open letter to Apple, concerned about it not paying musicians during a three-month free trial for its streaming, which the company quickly corrected.[24] Swift's latest venture is not only generating profits and greater creative control of her content for herself, it is also paving the path for future artists. Many say that Swift "is not doing the re-recordings to make more money; rather, she's raising awareness for any future artists to be aware of the contracts they're signing, allowing them to have more power and financial freedom over their own work."[25]

V. Swan Song

It is clear that Swift is delivering on her guarantee of re-recording her previous works—she has delivered two new re-recorded albums thus far, with several more to come. As her re-recordings continue to roll out, so will the lingering effects this endeavor will have on the music industry. However, the current shift caused by her re-recordings is sparking conversations and raising awareness for how artists can further protect their works. While discussions regarding artists' ownership of their own music have been ongoing for years, even by veteran musicians such as Prince and Janet Jackson, "Swift's public missives on the issue seemed to revitalize the conversation for a new generation."[26] As Swift continues to place her own mark on her catalog of hits, it is clear that her fans, the music world, and the legal industry will all be watching.

Endnotes

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The Patchwork Problem: A Need for National Uniformity to Ensure an Equitable Playing Field for Student-Athletes' Name, Image, and Likeness Compensation

By Michael D. Fasciale

I. Introduction

Student-athlete[1] compensation in the National Collegiate Athletic Association (NCAA) has historically been limited to awarding academic scholarships.[2] Recently, many states have passed laws giving student-athletes the ability to monetize their names, images, and likenesses (NIL).[3] The growing patchwork of state legislation, however, invites inconsistent application and interpretation of NIL laws. This gives rise to an important question: Is uniform federal legislative intervention the answer? This author argues that it is.

First, without some form of national uniform NIL rights, student-athletes will likely only apply for admission at schools where NIL rights are afforded. This consequence discourages a meaningful and educational choice. National uniformity ensures that student-athletes will enjoy more than simply the right to compete economically; it will allow them to receive education at the institutions of their choice. In uniformly promoting a meaningful and educational choice, federal legislation will help student-athletes enjoy better opportunities, both socially and financially, within the athletic industry as a whole.

Second, this state-by-state approach will—at a minimum—severely impact the competitive balance within college sports. As student-athletes will be incentivized to attend schools in states with the best regulatory environment for the players, power schools in states with NIL laws will enjoy massive and unfair recruiting and transfer advantages, thereby increasing the imbalances between the larger and smaller markets. Already successful athletic programs will gain even more advantages, as non-NIL states (or states with less desirable NIL rules) may suffer due to lower working capital to finance their educational opportunities and to gain advantages for their students. The hodgepodge of state laws will effectively steer the greatest future talent toward a handful of schools.

Third, although no court has explicitly addressed this issue, the fractured state-by-state approach to NIL compensation may be unconstitutional. In arguing against a state-by-state approach, the NCAA could potentially rely on the Dormant Commerce Clause (DCC) of the U.S. Constitution.[4] The DCC is an implied restriction as interpreted by the Supreme Court that effectively prevents states from passing laws that burden or discriminate against interstate commerce.[5] In relying on prior case law, the NCAA could contend that the sheer number of intercollegiate schools subjected to inconsistent state laws could potentially interfere with a national uniform governance structure, thereby unduly impacting or discriminating against interstate commerce.

Fourth, despite their asserted aims, multiple state laws governing NIL compensation are ambiguous and alarming. Based on the differences in payment structures, effective dates, legal rights, requirements regarding financial literacy, and ill-defined provisions within each passed and proposed state bill, the welfare of student-athletes will not be uniformly protected. Navigating competing state regulations will create confusion amongst athletes, agents, and athletic departments nationwide.

This article illustrates that the current athletic landscape and patchwork of state laws governing NIL compensation requires federal legislative intervention. Although the attempt by some legislators to pass federal legislation is headed in the right direction, more can—and must—be done. To mitigate mass confusion, promote educational opportunities, and pursue economic equity for student-athletes nationwide, Congress should pass federal legislation, preempt competing state laws and regulations, and restore uniformity throughout intercollegiate athletics. Until then, states with NIL laws will compete vigorously for top talent, and national uniformity in college sports and educational opportunities will be severely undermined.

II. The Passage of State Laws, Their Incompatibility, and Potential Invalidation

A. Passage of State Laws: The Patchwork Problem

As of September 20, 2021, 22 states passed NIL laws, while seven others enacted NIL laws that go into effect between 2022 and 2025.[6] States are passing NIL laws for three primary reasons: (1) student-athletes in non-NIL states (or states with less desirable NIL rules) are deprived of money, opportunities, and advantage; (2) there is bipartisan support for the idea that student-athletes are being commercially exploited through their inability to capitalize on their NIL;[7] and (3) lawmakers do not want other states to enjoy recruiting advantages, thereby losing potential recruits to states where student-athletes have the right to profit from their NIL. It is possible, if not probable, that many more states will continue to draft and propose NIL bills unless Congress solidifies a uniform plan.[8]

B. Unfair Competition: The Current Balkanization of NIL State Laws[9]

California Senate Bill 206, commonly referred to as the Fair Pay to Play Act[10] (California Bill), prohibits any postsecondary educational institution from hindering student-athletes from capitalizing on their NIL.[11] Although the California Bill is advancing NIL rights, it is not perfect. The California Bill, which took effect on September 1, 2021, prevents the NCAA from precluding universities, or any organization with authority over intercollegiate athletics, from participating in intercollegiate athletics as a result of a student-athlete's use of their NIL.[12] The California Bill allows a student-athlete to earn compensation from their NIL, but it does not define compensation or provide further context for the term.[13] In addition, the California Bill allows student-athletes to hire agents to represent them in negotiation matters and business opportunities, so long as those endorsement deals are not in conflict with the athlete's team contract.[14] As competing for high-profile players is a difficult task—especially in California's competitive sports market—it is plausible that agents will begin recruiting elite players during the early stages of their career, such as high school. Agents in California, therefore, will likely feel pressure to intervene early in a student-athlete's career, because if they fail to do so, they might miss the opportunity of representing the same player at the professional level.

Florida Senate Bill 646, known as the Intercollegiate Athlete Compensation and Rights Bill[15] (Florida Bill), took effect on July 1, 2021. The Florida Bill currently allows student-athletes to enter into contracts to license their NIL while participating in intercollegiate athletics.[16] The Florida Bill permits 64 postsecondary educational institutions[17] in Florida to be subjected to different rules than states throughout the entire country, further dividing the gap among rights afforded to amateur athletes nationwide. The Florida Bill also provides that an intercollegiate athlete may not enter into a contract for compensation for the use of the student-athlete's NIL if a term of the contract conflicts with a term of the intercollegiate athlete's "team contract." Yet the term "team contract" is not defined in the bill.[18] It also states that compensation "may only be provided by a third-party unaffiliated with" the athlete's school and that the compensation be "commensurate with the market value of the authorized use of the athlete's name, image, or likeness."[19] Again, the terms "unaffiliated" or "commensurate with the market value" are not defined in the Florida Bill. Therefore, although compensation usually means monetary compensation, it is plausible to interpret the term compensation in this context to "allow non-monetary compensation to be deemed compensation so long as it is commensurate with market value."[20]

Nebraska Legislative Bill 962, known as the Nebraska Fair Pay to Play Act (Nebraska Bill), does not take effect until July 1, 2023, but it states that "each postsecondary institution shall determine a date on or before" that date to start implementing the new law.[21] Although it has yet to happen, schools in Nebraska could allow student-athletes to receive NIL compensation as of the date when this article was written. The Nebraska Bill is silent as to whether schools can pay student-athletes (unlike the other state laws that explicitly state that schools cannot do so), leaving open the possibility that Nebraska schools themselves could potentially pay the student-athletes through endorsement deals.

Colorado Senate Bill 20-123[22] (Colorado Bill) takes effect on January 1, 2023.[23] Both the Colorado Bill and the Nebraska Bill—unlike the California Bill, the New Jersey Bill, and the Florida Bill—allow "athletes to sue schools, conferences, or the NCAA if their new rights under the law are violated."[24] The Colorado Bill allows a student-athlete "aggrieved by an action taken by an institution or an ath-

letic association in violation of this part [to] bring an action for injunctive relief."[25] In contrast, Nebraska's bill allows student-athletes "aggrieved by a violation" to "bring a civil action against the postsecondary institution or collegiate athletic association committing such violation."[26] That is, Colorado's private right of action is reduced to seeking "injunctive relief,"[27] while Nebraska's bill allows student-athletes to seek "actual damages," "preliminary and other equitable or declaratory relief," and "[r]easonable attorney's fees and other litigation costs."[28]

C. Worthy of Constitutional Protection? Potential Invalidation of State Laws Under the DCC

The U.S. Constitution expressly permits the federal government to regulate commerce among the states.[29] The DCC, by contrast, is an implied restriction in the U.S. Constitution that effectively prevents states from passing laws that burden or discriminate against interstate commerce.[30] Relying on favorable case precedent and the DCC, the NCAA could argue that the sheer number of intercollegiate schools subjected to inconsistent state laws interferes with a national uniform governance structure and thus unduly impacts or discriminates against interstate commerce (i.e., violates the DCC).[31]

The Supreme Court has adopted a two-tier approach in analyzing a DCC challenge.[32] First, if the statute "*directly* regulates or discriminates against interstate commerce, or when its *effect* is to favor in-state economic interests over out-of-state interests," federal courts will strike down the law without further inquiry.[33] Second, where the statute "regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[34]

As to the first prong, the NCAA could argue that the state-by-state approach to NIL compensation puts certain states' economic interests (those that have NIL legislation) above out-of-states' economic interests (those that do not have NIL legislation), thus creating a competitive and commercial advantage for certain student-athletes (i.e., is discriminatory in purpose or effect). In response, one could argue that each state NIL law does not discriminate against interstate commerce because it does not inject its regulatory scheme into the jurisdiction of other states. For example, as written, California's NIL statute—like many other state NIL laws—is directed only towards conduct within California and applies to in- and out-of-state entities alike.

In arguing that a patchwork of state NIL laws directly regulates or discriminates against interstate commerce, the NCAA could potentially rely on favorable case precedent like *NCAA v. Miller*. There, the Nevada state legislature enacted a statute that required the NCAA to provide student-athletes "accused of a rules infraction with certain procedural due process protections during an enforcement proceeding."[35] The Ninth Circuit held that Nevada's statute violated the DCC because it impermissibly regulated interstate commerce.[36] However, the NCAA might have difficulty relying on *Miller*. The "critical inquiry," the Ninth Circuit explained, is whether "the practical effect of the regulation is to control conduct beyond the boundaries of the State."[37] That is precisely what the Nevada law did in *Miller*—Nevada was telling the NCAA how to conduct a hearing and, in doing so, intruded on an interstate organization.[38] Yet here, the states with NIL laws are telling the universities *within their states* how to treat their student-athletes. Hence, they do not require the NCAA to do anything, and each state law is directed towards conduct within each individual state (and treats in- and out-of-state entities alike).

As to the second prong, the NCAA could argue that student-athletes will be incentivized to attend schools in states with NIL laws, effectively steering the greatest future talent toward a handful of schools. This competitive advantage, the argument goes, harms the overall intercollegiate athletic landscape because the NCAA's NIL business model requires uniformity. In response, one could argue that the burdens associated with the patchwork of state NIL laws (i.e., potential recruiting advantages) are small in connection with the purported benefits (i.e., the protection of student-athletes). Importantly, the majority of student-athletes who attend schools in states with NIL statutes will not profit extensively by marketing their NIL; rather, the minority of student-athletes will negotiate meaningful and money-making endorsement deals. Thus, the burdens associated with the patchwork of state NIL laws would not be "clearly excessive" in relation to the state's legitimate interest in protecting student-athletes.

III. Pending Federal Legislation Regarding NIL Compensation

A. *Positive Progress:* Student-Athlete Equity Act

In addition to legislation proposed by the NCAA—which fails to account fairly for student-athletes' interests—there have been seven[39] separate federal bill proposals (with additional ones expected in the foreseeable future).[40] Congressman Mark Walker's bill, known as the Student-Athlete Equity Act (Equity Act), was the first federal bill proposed.[41] The Equity Act primarily aims to "amend the Internal Revenue Code of 1986 to prohibit qualified amateur sports organizations from prohibiting or substantially restricting the use of an athlete's name, image, or likeness."[42] To date, § 501(j)(2) of the Internal Revenue Code exempts from federal taxation "any organization organized and operated exclusively to foster national or international amateur sports competition if such organization is also organized and operated primarily to conduct national or international competition in sports or to support and develop amateur athletes for national or international competition in sports."[43] The Equity Act, therefore, would force the NCAA to choose between "pay[ing] significantly more in taxes or allow[ing] student-athletes to earn NIL compensation."[44]

B. *(No) Power to the Players:* Fairness in Collegiate Athletics Act

A second federal proposal, U.S. Senator Marco Rubio's Fairness in Collegiate Athletics Act (the Rubio Bill), aims to "ensure that college athletes, and not institutions of higher education, are able to profit on their name, image, and likeness."[45] The Rubio Bill contains an express preemption provision that is critical to achieve economic equity and uniformity for student-athletes nationwide. However, the Rubio Bill is problematic, because (1) it is extremely NCAA-friendly and fails to put the student-athlete first; (2) it does not protect all student-athletes' employment rights—only those who participate in NCAA programs;[46] and (3) it (rather paradoxically) would "open the door for NIL pay, but it would also give the NCAA, conferences and schools protection from all causes of action 'in any court' regarding the adoption of rules around such a system."[47] In effect, the bill insulates the NCAA from both ongoing and future litigation, and it gives the NCAA immunity from litigation involving NIL.

C. *A (Potential) Reasonable Resolution:* Student Athlete Level Playing Field Act

A third federal proposal, Congressman Anthony Gonzalez's Student Athlete Level Playing Field Act (Gonzalez Bill), primarily aims to prevent "a covered athletic association and institution of higher education from prohibiting a [student-athlete] from participating in intercollegiate athletics because such [student-athlete] enters into an endorsement contract."[48] The Gonzalez Bill seeks to prevent schools from paying student-athletes for use of their NIL,[49] and allow student-athletes to sign contracts with companies that are competitor companies of, or have business relationships with, their respective schools. The Gonzalez Bill, like the Rubio Bill, also contains an express preemption clause.[50]

Importantly, the Gonzalez Bill would create a 13-member commission comprised of current and former athletes, coaches, directors, and administrators, "whose role would be to recommend ways for legislators to change the law as the nascent marketplace for college athletes becomes [clearer] and any unintended consequences emerge."[51] This oversight committee would provide a powerful voice for current and former student-athletes and imbue balance into the NIL quandary.

IV. The Time Is Now: A Fair Federal Framework

A. Express Preemption Clause

Preemption is based on the Supremacy Clause, which specifies that federal law is supreme over state law when each comes into conflict.[52] The Supreme Court recognizes three types of preemption: (i) express preemption,[53] (ii) field preemption,[54] and (iii) conflict preemption.[55] The only effective and reasonable means to trump the patchwork of state laws, however, is an express preemption clause, where the federal statute contains a preemption clause that explicitly preempts all state laws.

We need not look far and wide for an example of preemption language. The ideal federal bill's preemption clause should mirror the language in the Employment Retirement Income Security Act of 1974 (ERISA).[56] ERISA's express preemption clause preempts state law claims that "relate to" ERISA plans under either of the two definitions posited by the Supreme Court of the United States.[57] There, Justice Harry Blackmun "craft[ed] a functioned test for express preemption, instructing that a state law 'relates to' an employee benefit plan if it has either (1) a 'reference to' or (2) a 'connection with' that plan."[58] Congress enacted § 514(a) of ERISA to limit plan liability by preempting claims under state law (including state statutes and common law causes of action) in order to supplant the "patchwork of state law previously in place."[59]

In this respect, the express preemption clause in the Rubio Bill is strikingly similar in that it utilizes the language of "relate[s] to."[60] The Gonzalez Bill, however, uses the language "with respect to."[61] As written, each preemption clause can be improved. Thus, the express preemption clause in the ideal federal bill should model that of ERISA's clause, preempting state laws that "relate to student-athlete compensation with third parties," or the like. In other words, any state law that has a "reference to" or a "connection with" student-athlete compensation regarding NIL should be expressly preempted to achieve uniformity throughout the country.

B. Is a Narrowly Tailored Antitrust Exemption Feasible?

The NCAA has been faced with several antitrust challenges in the past, some of which it has been successful in defending. In *Deppe v. NCAA*, for instance, the Seventh Circuit held that Division I transfer rules do not violate antitrust laws because they are "clearly meant to help maintain the 'revered tradition of amateurism in college sports.'"[62] In *Worldwide Basketball & Sports Tours, Inc. v. NCAA*, the Sixth Circuit held that the lower court erred in using the wrong antitrust analysis, and dismissed the case because the plaintiffs failed to define a relevant market.[63] However, the NCAA's attempts to defend itself from antitrust attack have not always been successful. In *NCAA v. Board of Regents*,[64] for example, the Supreme Court held that the NCAA's conduct violated the Sherman Antitrust Act because the NCAA's actions constituted a horizontal restraint in trade.[65] In *Law v. NCAA*, the Tenth Circuit held that a restricted earnings cap for college coaches violated antitrust law.[66] In *O'Bannon v. NCAA*, the Ninth Circuit established that future student-athletes "can use federal antitrust law to attempt to 'prove' that there are better ways of preserving amateurism than current NCAA rules."[67]

Any antitrust exemption shielding the NCAA from liability, however, could halt student-athletes' progress and give the NCAA unbounded power to restrain athletes' fair

market rights. Recently, in *NCAA v. Alston*, the Supreme Court affirmed a 2020 ruling by the Ninth Circuit, wherein Chief Judge Thomas held that "courts must continue to subject NCAA rules, including those governing compensation, to antitrust scrutiny."[68] The antitrust law violation arose from "NCAA members agreeing to limit how much each school [could] compensate athletes for academic-related costs."[69] Thus, the question before the Court was whether student-athletes were allowed to receive payments and other benefits related to education. The Supreme Court unanimously held that (1) the district court did not err in finding that the NCAA violated the Sherman Act by limiting the education-related benefits schools could offer student-athletes; and (2) the district court properly applied a rule of reason analysis and found that the restraints were stricter than necessary to achieve demonstrated procompetitive benefits.[70] In other words, all nine justices of the Supreme Court agreed that the NCAA's restrictions on non-cash payments to college athletes related to education were anti-competitive under federal antitrust law.[71]

Although it did not directly address the issue of whether student-athletes can monetize their NIL, the *Alston* decision—and specifically Justice Kavanaugh's concurring opinion—illustrated that the Supreme Court is willing to further erode the NCAA's framework in future antitrust challenges.[72] As Justice Kavanaugh stated bluntly, "[t]he NCAA is not above the law."[73] Going forward, if the NCAA attempted to sanction a college that was complying with that state's NIL law, that conduct would almost certainly be seen as a violation of antitrust law under *Alston*.

The NCAA has publicly stated that, given the threat of future state and federal antitrust lawsuits, "the membership's ability to investigate and adopt common and adequate solutions to pressing issues facing college athletics" will be impinged.[74] In essence, the NCAA is seeking the same antitrust exemption protections that Major League Baseball has enjoyed since 1922.[75] Yet without the looming threat of future antitrust challenges, it is plausible—even foreseeable—that the NCAA will remain stagnant and be less likely to voluntarily address this issue. Furthermore, the aforementioned NCAA antitrust cases demonstrate that many college athletes would not have received the benefits and rights they did thus far without holding NCAA bylaws accountable to federal antitrust laws. An antitrust exemption shielding the NCAA from liability could halt the student-athlete's progress and give the NCAA unbounded power to restrain athletes' fair market rights.[76] Judicial checks on NCAA overreach in the antitrust realm, therefore, adequately maintain and enhance the legitimacy of the NCAA.

Although it is understandable why the NCAA seeks an antitrust exemption for college sports, a blanket antitrust exemption would do more harm than good. Specifically, it would (1) cripple the development of a NIL market that took athlete advocates years to build; (2) leave student-athletes without recourse moving forward; (3) allow the NCAA to further reap financial rewards; (4) make it less likely that the NCAA will voluntarily act; and (5) bypass well-established legal precedent. Thus, the NCAA could either rewrite its rules to comply with U.S. antitrust law or wait for courts to mandate such changes.[77]

C. An Independent Entity Established by Congress—Not the NCAA—Should Write the Rules

Another reason why a federal statute should govern NIL compensation issues is because "judges generally should . . . refrain from interfering with the internal matters of sports associations unless exceptional circumstances justify that interference."[78] For example, in a 2016 case, Tom Brady was involved in a scheme to deflate footballs below the permissible range during the American Football Conference Championship Game.[79] There, the Second Circuit noted that courts "do not sit as referees of football any more than [courts] sit as the 'umpires' of baseball or the 'super-scorer' for stock car racing. Otherwise, [courts] would become mired down in the areas of a [sporting] group's activity concerning which only the group can speak competently."[80] Judge Barrington reasoned[81] that the National Football League Commissioner "properly exercised his broad discretion to resolve an intramural controversy between the League and a player" in his role as an arbitrator under the collective bargaining agreement.[82]

As courts are hesitant to regulate, or interfere with, the interplay between athletes and the operation of private sports associations, it is likely that state courts will be reluctant to get involved in the NCAA's internal sporting affairs. This reaffirms the need for a federal statute to create an independent oversight committee to write the rules—but it should not be the NCAA.[83] An independent entity, therefore, could provide objectivity when neither side's agenda will dominate. This entity could (1) provide bi-monthly reports to Congress and explain how the NIL issue is playing out; (2) set standards and adjudicate challenges; (3) establish caps on employment and NIL compensation; and (4) oversee sports agents' requests and appeal disapprovals.[84] It ideally would consist of approximately 10 to 15 members, including former collegiate athletes, economists, and lawyers. Each member could be elected for a term of two or three years,[85] and the number of members could be increased or decreased from time to time through amendment of the entity's bylaws. This organizational structure would ensure that the commission would remain impartial and diverse.

V. Conclusion

The current athletic landscape and patchwork of state laws governing NIL compensation require federal legislative intervention. Until federal legislation is passed, states with NIL laws will compete vigorously for top talent, and national uniformity in college sports and educational opportunities will be severely undermined.

Endnotes

1. Although the National Labor Relations Board seeks to classify "student-athletes" as "employees," this article will use the term "student-athletes" for consistency purposes. *See* Gregg E. Clifton & Bernard G. Dennis III, *NLRB's General Counsel Uses Prosecutorial Authority to Assert Student-Athletes Are Employees*, Nat'l L. Rev. (Oct. 1, 2021), https://www.natlawreview.com/article/nlrb-s-general-counsel-uses-prosecutorial-authority-to-assert-student-athletes-are (arguing that "the term 'student-athlete' has a chilling effect that misleads student-athletes to believe [that] they are not entitled to the [National Labor Relations Act's] protection").
2. *See Scholarships*, Nat'l Collegiate Athletic Ass'n, https://www.ncaa.org/student-athletes/future/scholarships (last visited Dec. 28, 2021) (noting that "[o]nly about [two percent] of high school athletes are awarded athletics scholarships to compete in college").
3. An individual's NIL makes up the legal concept known as the "right of publicity," or the right of the individual to control the commercial use of one's identity. *See Name, Image and Likeness: What Student-Athletes Should Know*, Nat'l Collegiate Athletic Ass'n, https://ncaaorg.s3.amazonaws.com/ncaa/NIL/2020_NILresource_SA.pdf (last visited Dec. 28, 2021). Examples of NIL-related activities include autographs, personal appearances, business promotions, merchandise sales, video game representation, and social media endorsements. *Id*.
4. *See infra* notes 29-38 and accompanying text (exploring this argument in detail).
5. *See, e.g.*, *Dep't of Revenue v. Davis*, 553 U.S. 328, 337-38 (2008) (stating that the "the [D]ormant Commerce Clause is driven by concern about 'economic protectionism'—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors").
6. *See* Thomas Di Biasio, *Most States Pass "Name, Image, and Likeness" Laws for Student Athletes*, Multistate (Sept. 21, 2021), https://www.multistate.us/insider/2021/9/21/most-states-pass-name-image-and-likeness-laws-for-student-athletes.
7. *See, e.g.*, Patrick Hruby, *How Fighting the NCAA Became a Bipartisan Sport*, Wash. Post Mag. (Mar. 17, 2020), https://www.washingtonpost.com/magazine/2020/03/17/how-fighting-ncaa-became-bipartisan-sport/?arc404=true.
8. *See, e.g.*, Ross Dellenger, *Iowa Becomes Latest State to Introduce Athlete NIL Bill; Targeting July 1 Effective Date*, Sports Illustrated (Feb. 3, 2021), https://www.si.com/college/2021/02/03/iowa-name-image-likeness-bill-ncaa (noting how Senator Nate Boulton introduced the Iowa NIL bill because he "want[ed] to make sure [that] no Iowa athlete [was] left behind").
9. This section will not dissect each NIL state law that has been enacted (or is in the process of being passed); rather, it will analyze the representative components of certain NIL state laws to demonstrate the inconsistencies which require federal legislation to alleviate. Based on the differences in payment structures, effective dates, legal rights, and requirements of financial literacy, the welfare of student-athletes will not be uniformly protected without federal intervention. Navigating ill-defined and inconsistent state regulations will create confusion among athletes, agents, and athletic departments nationwide.
10. S.B. 206, Collegiate Athletics: Student Athlete Compensation and Representation, 383 Reg. Sess. (Cal. 2019).
11. S.B. 206 § 2(a)(2).
12. S.B. 206 § 2(a)(3).
13. *Compare* S.B. 206 (not defining compensation), *with* S.B. 20-123, 72nd Gen. Assemb., Reg. Sess. § 2 (Colo. 2020) (defining compensation as "money or other remuneration or thing of value given to a student athlete in exchange for the use of the student athlete's name, image, or likeness" and "[d]oes not include a scholarship from the institution at which a student athlete is enrolled that provides the student athlete all or a portion of the cost of attendance at that institution"), *and* L.B. 962, 106th Leg., 2d Sess. § 1 (Neb. 2020) (defining compensation as "consideration received pursuant to an endorsement contract").
14. *See* S.B. 206, § 2(c)(1), (e)(1) (describing the terms of the California Bill).
15. S.B. 646, 2020 Leg., Reg. Sess. (Fla. 2020).
16. Section 1006.74(2)(a).
17. *See* § 1006.74(1)(c). Florida defines a postsecondary educational institution as "a state university, a Florida College System institution, or a private college or university receiving aid under chapter 1009."
18. Section 1006.74(1).
19. Section 1006.74(2)(a).
20. Bob Wallace, Jr. & Matthew Misichko, *A Look at Recent Student Athlete Name, Image and Likeness Legislation*, Thompson Coburn LLP (July 7, 2020), https://www.thompsoncoburn.com/insights/publications/item/2020-07-07/a-look-at-recent-student-athlete-name-image-and-likeness-legislation.
21. Neb. Rev. Stat. § 48:3609 (2020).
22. Colo. Rev. Stat. § 23-16-301 (2020).
23. S.B. 20-123, 72nd Gen. Assemb., Reg. Sess. § 2.
24. *See* Zachary Zagger, *4 Key Issues as States Tackle College Athlete Pay*, Law360 (Oct. 9, 2020, 4:47 PM), https://www.law360.com/california/articles/1318247?copied=1.
25. Section 23-16-301(6)(b).
26. Neb. Rev. Stat. § 48:3608(1) (2020).
27. Section 23-16-301(6)(b).
28. Section 48:3608(2).
29. *See* U.S. Const. Art. I, § 8, cl. 3.
30. *See Dep't of Revenue v. Davis*, 553 U.S. 328, 337–38 (2008) (stating that the "the [D]ormant Commerce Clause is driven by concern about 'economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors'").
31. *See also* Michael Fasciale, *Is a Patchwork of State NIL Laws Unconstitutional?*, Conduct Detrimental (Oct. 5, 2021), https://www.conductdetrimental.com/post/is-a-patchwork-of-state-nil-laws-unconstitutional.
32. *See Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986); *see also Bowers v. Nat'l Collegiate Athletic Ass'n*, 151 F. Supp. 2d 526, 537 (D.N.J. 2001).
33. *Distillers Corp.*, 476 U.S. at 579 (emphasis added). This, of course, is subject to the Virtual Per Se Rule of Invalidity, which leaves open the possibility that some such laws might still pass constitutional muster. *See, e.g.*, *Maine v. Taylor*, 477 U.S. 131, 148-52 (1986) (validating a law that banned the importation of out of state fish because the state had a legitimate purpose of protecting its waters from invasive/non-native species of fish and the court found no other non-discriminatory means for achieving that interest).
34. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).
35. *Nat'l Collegiate Athletic Ass'n v. Miller*, 10 F.3d 633, 637 (9th. Cir. 1993).
36. *Id.* at 640.
37. *Id.* at 639 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989)).
38. *Id.* at 641 ("[w]e appreciate Nevada's interest in assuring that its citizens and institutions will be treated fairly. However, the authority it seeks here goes to the heart of the NCAA and threatens to tear that heart out.").
39. *See NIL Legislation Tracker*, Saul, Ewing, Arnstein, & Lehr, LLP, https://www.saul.com/nil-legislation-tracker#3.
40. Like the preceding section, this Part will only analyze the ramifications of the most recent NIL federal bills.
41. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).
42. *Id.*
43. I.R.C. § 501(j)(2); *see also* National Collegiate Athletic Association and Subsidiaries: Consolidated Financial Statements as of and for the Years Ended August 31, 2018 and 2017, Supplementary Information for the Year Ended August 31, 2018, and Independent Auditors' Report 4 (2018), https://ncaaorg.s3.amazonaws.com/ncaa/finance/2017-18NCAAFin_NCAAFinancialStatement.pdf (stating that the NCAA's annual revenue from 2017-2018 topped one billion dollars in revenue, most of which came from television and marketing rights fees, and championships and NIT tournaments). Per § 501(j)(2), however, the NCAA was not obligated to pay federal taxes in any amount.

44. Brandon Beyer, *Federal Legislation Still Has a Role to Play in the Fight for Student-Athlete Compensation*, 46 J. Legis. 303, 312 (2019).
45. Fairness in Collegiate Athletics Act of 2020, S. 4004, 116th Cong. (2020) (flush language).
46. *See* S. 4004, § 2(4)(A)-(B); *see also College Athletes Should Give U.S. Senate NIL Bill a Failing Grade: Criticism of the Fairness in Collegiate Athletics Act*, The Drake Group (June 24, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/06/Drake-Position-on-Rubio-NIL-Bill-FINAL.pdf [hereinafter *Drake's Failing Grade*].
47. Zachary Zagger, *Ball in Congress' Court as States Tackle NCAA Athlete Pay*, Law360 (Aug. 26, 2020), https://www.law360.com/articles/1304852/ball-in-congress-court-as-states-tackle-ncaa-athlete-pay (referencing § 4(b)).
48. Student Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).
49. *See* Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports.
50. H.R. 8382, § 6.
51. *See* Dan Murphy, *Bipartisan Federal NIL Bill Introduced for College Sports*, ESPN (Sept. 24, 2020), https://www.espn.com/college-sports/story/_/id/29961059/bipartisan-federal-nil-bill-introduced-college-sports.
52. U.S. Const. Art. VI, cl. 2.
53. *See* Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461, 1480 (2018).
54. *Id*.
55. *Id*.
56. Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1144(a).
57. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 (1983).
58. Plastic Surgery Ctr., P.A. v. Aetna Life Ins. Co, 967 F.3d 218, 226 (3d Cir. 2020) (citing *Shaw*, 463 U.S. at 96–97).
59. *Id*.
60. Student-Athlete Equity Act, H.R. 1804, 116th Cong. (2019).
61. Student-Athlete Level Playing Field Act, H.R. 8382, 116th Cong. (2020).
62. 893 F.3d 498, 501 (7th Cir. 2018) (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 120 (1984)).
63. 388 F.3d 955, 963 (6th Cir. 2004).
64. *Bd. of Regents*, 468 U.S. at 120.
65. The Supreme Court defined a horizontal restraint on trade as an "agreement among competitors on the way in which they will compete with one another," and noted that this type of agreement is often "held to be unreasonable as a matter of law." *Id.* at 99.
66. 134 F.3d 1020, 1024 (10th Cir. 1998); *see also In re Nat'l Collegiate Athletic Ass'n I-A Walk-On Football Players Litig.*, 398 F. Supp. 2d 1144, 1149 (W.D. Wash. 2005) (holding that the NCAA is not exempt from antitrust scrutiny under the Sherman Act for its financial aid to college students).
67. Fed. And State Legis. Working Grp., NCAA Bd. of Governors, Final Report and Recommendations 29 (2020), https://ncaaorg.s3.amazonaws.com/committees/ncaa/wrkgrps/fslwg/Apr2020FSLWG_Report.pdf [hereinafter Working Group Recommendations].
68. *In re* Nat'l Collegiate Athletic Ass'n Athletic Grant-In-Aid Cap Antitrust Litig., 958 F.3d 1239, 1254 (9th Cir. 2020).
69. Gregg E. Clifton, *NCAA v. Alston—The Wait Is Over . . . What's Next for the NCAA*, Nat'l L. Rev. (June 22, 2021), https://www.natlawreview.com/article/ncaa-v-alston-wait-overwhat-s-next-ncaa.
70. *Nat'l Collegiate Athletic Ass'n v. Alston*, No. 20-512, slip op. at 2–3 (U.S. June 21, 2021).
71. *Id*.
72. *Id*. slip op. at 5 (Kavanaugh, J., concurring) (stating that "[n]owhere else in America [could] businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate. And under ordinary principles of antitrust law, it is not evident why college sports should be any different").
73. *Id.* (Kavanaugh, J., concurring).
74. Working Group Recommendations, *supra* note 67, at 30.
75. *See Fed. Baseball Club, Inc. v. Nat'l League of Prof'l Baseball Clubs*, 259 U.S. 200, 208–09 (1922) (holding that, because baseball competitions are not "commerce," and thus baseball is purely a state affair, the professional baseball business is not subject to federal antitrust law).
76. *Exploring a Compensation Framework for Intercollegiate College Athletics, Hearing Before the S. Comm. On Com., Sci., & Transp.*, 116th Cong. 11 (2020) (statement of Dionne Koller, Professor of Law, University of Baltimore), ("An antitrust exemption would give the NCAA unchecked power to restrict athletes' free market rights . . . .").
77. Marc Edelman, *A Short Treatise on Amateurism and Antitrust Law: Why the NCAA's No-Pay Rules Violate Section 1 of the Sherman Act*, 64 Case W. Res. L. Rev. 61, 99 (2013).
78. *Davidovich v. Israel Ice Skating Fed'n*, 140 A.3d 616, 632 (N.J. Super Ct. App. Div. 2016); *see also Ruiz v. Sauerland Event GMBH*, 801 F. Supp. 2d 118, 125 (S.D.N.Y. 2010) (stating that "[c]ourts generally defer to a private organization's interpretation of its rules in the absence of bad faith or illegality").
79. *NFL Mgmt. Council v. NFL Players Ass'n*, 820 F.3d 527, 531 (2d. Cir. 2016).
80. *Id.* at n.5 (citing *Crouch v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 845 F.2d 397, 403 (2d. Cir. 1988) and *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527, 536-38 (7th Cir. 1978)).
81. Patriots fans do not read the rest of this sentence.
82. *NFL Mgmt. Council*, 820 F.3d at 532.
83. *See* Ivan Maisel, *The NCAA Must Again Put Athletes First, This Time Around the NIL Debate*, ESPN (Apr. 23, 2020), https://www.espn.com/college-sports/story/_/id/29083196/the-ncaa-again-put-athletes-first-nil-debate ("[T]he NCAA is run by a board of governors made up largely of university presidents, a class whose lack of knowledge of athletic administration is matched only by their reticence to act" and explaining how the NCAA has historically been unaccountable as an organization).
84. *See Compensation of College Athletes Including Revenues Earned from Commercial Use of Their Names, Images and Likenesses and Outside Employment*, The Drake Group (Aug. 8, 2020), https://www.thedrakegroup.org/wp-content/uploads/2020/08/8-3-20-FINAL-Drake-NIL-Position-Paper.pdf [hereinafter *The Drake Group Recommendations*].
85. *See, e.g.*, Model Bus. Corp. Act § 8.06 (2020) (describing how, in a jurisdiction that follows the Model Business Corporation Act (MBCA), a corporation's board of directors must serve staggered terms).

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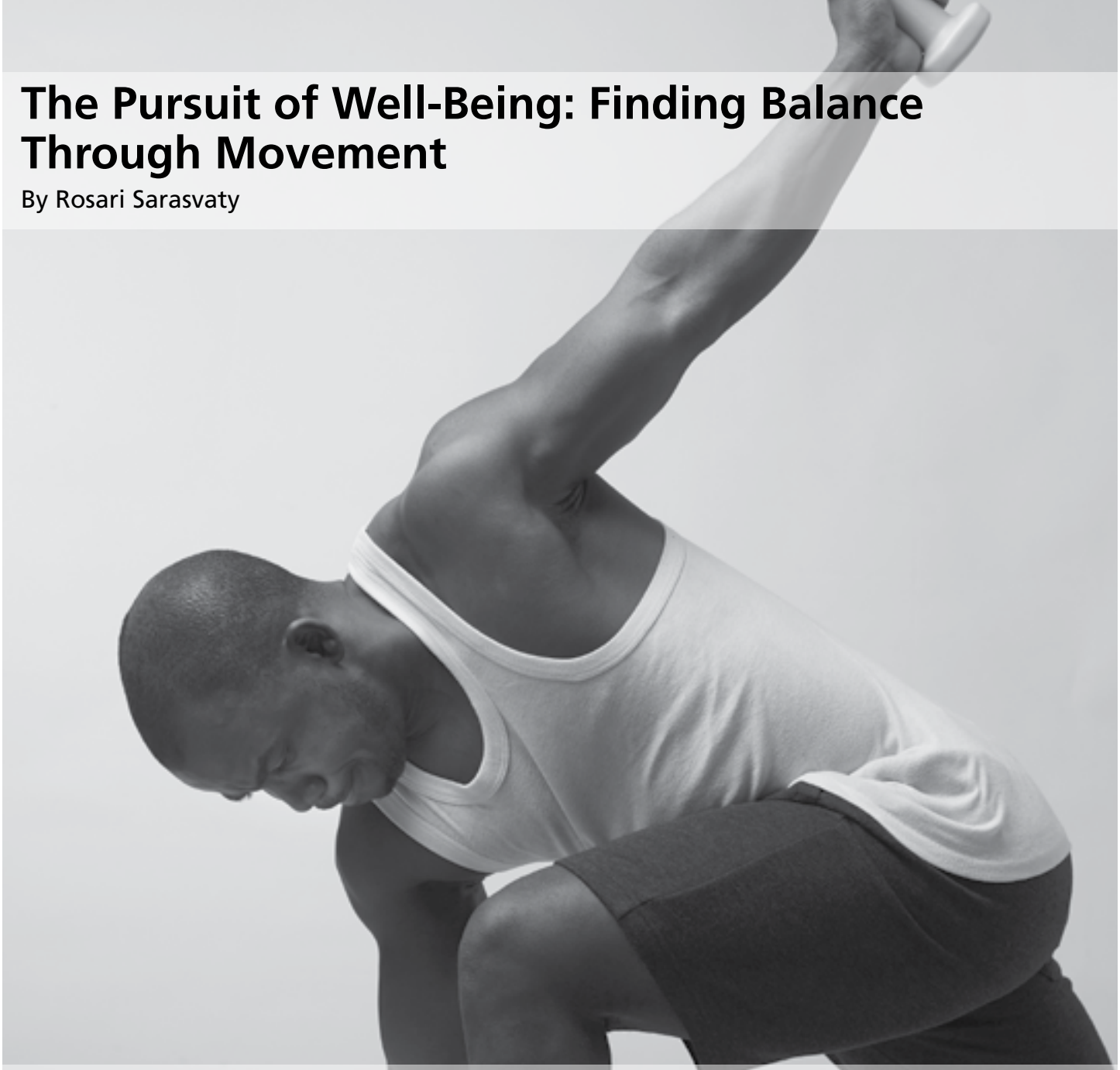
The Pursuit of Well-Being: Finding Balance Through Movement

By Rosari Sarasvaty



Focusing on health and well-being has been the theme for at least the last two pandemic years. The mainstream media often portrays well-being with a broad range of activities, such as buying a Peloton bike, becoming vegan, going to a yoga class, signing up for a barre class, having Sweet Green salad once in a while, reflexology, aromatherapy, Kegel exercises, citrus diets, and the Alexander Technique. In simple terms, it equates to judging life positively and feeling well. However, overall well-being is multidimensional and holistic, in that it includes physical, mental, emotional, and social dimensions. These aspects of our lives are dynamic and constantly affecting one another. The connections allow us to find comfort through physical exercise when we feel emotionally drained. Likewise, we tend to perform better at work when we feel good about what we do.

The pandemic has had a detrimental effect on our collective health and well-being. We are constantly put in a fight or flight mode while navigating this uncharted territory. We are bombarded with an endless supply of bad news. We feel out of control. We might find ourselves questioning our judgment more than ever. The fear of COVID-19 infection, economic hardship, uncertainty about the future, social isolation, and extended home quarantine can all take a heavy toll. Hence, those who can have become protective of their personal well-being.

Lawyers are no exception. There is a growing awareness among bar associations and the legal community as to the importance of attorney wellness. We need to be good to ourselves so that we can provide competent legal representation to our clients.

To enhance our overall well-being, we need to find the balance between exertion and recuperation. Although hard work is deeply valued, one simply cannot work constantly without rest, as our physical health and mental well-being are at risk when we do not rest properly. Rest is not a luxury; it is a fundamental need. Sadly, ongoing exertion with minimal recuperation is a familiar dynamic in the legal profession. It is an acceptable norm and culture for attorneys to work long hours. We also have to endure constant pressure from a stressful work environment, leading to mental and physical meltdowns. As a result, many attorneys find themselves struggling with mental health issues and substance abuse. On that note, various well-being initiatives in the profession try to provide resources that can help attorneys and their work-life balance.[1]

Attorneys have been constantly advised to exercise regularly to improve their work-life balance. Given the deskbound nature of the legal job, many might find regular physical activity beneficial and refreshing. It is only natural to long for physical activity when the job is sedentary, especially when relying on technologies as we increasingly connect in virtual environments. Nowadays, we crave physical activity even more, since most of us have been working from home during the pandemic. After all, movement is fundamental to our being, and its lack might cause an imbalance in our body that contributes to physical health issues, such as diabetes, obesity, and increased risks of high blood pressure.

Movement can also provide better insight. We perceive, connect, and interact with the world through our moving bodies. We construct our reality based on movements. Our movements result from our genetic biases, cultural custom, individual family dynamics, daily routine, the choices we make, and much more. All of these factors create one's unique movement pattern. Knowing something about who one is as a mover leads to better knowledge about who one is as a person. Self-awareness also supports our interactions with others. Awareness of our movement patterns enables us to control and modify our behaviors and empathize with the patterns of others. This way, movement becomes more than just a body activity. It became the expression of our whole selves in connection with the world.[2]

Subsequently, regular physical activity enables us to bring awareness to our movement. Being aware of how we move is crucial for our well-being. When we are unaware of how our bodies move, we tend to engage in bad habits that might be detrimental to our well-being. Slouching is one such example. Slouching is a habit that we want to omit since it can create muscle tension that leads to back pain. However, we often find ourselves in this position from time to time without realizing it. Aside from it, there may be other habits that we want to negate, and to do so we must first become conscious of our bad habits. Thus, an effort to reconnect with our bodies to bring back this awareness is necessary. Any physical activity can help re-center our focus, establishing consciousness on what movement patterns serve us and what does not.

As a professional dancer and dance teacher, I have found that dancing helps to re-center my focus and contributes to my well-being. Being physically challenged on a professional level has forced me to be aware of my movement. My dance training has trained me to move efficiently, with minimum effort, while creating a maximum impact. Dance training has allowed me to move intentionally and with an awareness that enables me to control my movement. Being able to control my movement and be conscious of it helps me to avoid bad habits that might lead to injuries.

I listen to my body, as it is the main instrument that I have in this art form; therefore, I must treat it with respect. I take breaks whenever necessary and challenge myself when my body is ready. Dance helps me to put myself first, because not taking care of myself can result in poor performance.

Ultimately, any initiative to enhance attorneys' well-being should enlist a holistic approach. Complete well-being requires the ability to balance the patterns of exertion and recuperation. Thus, physical activity is often encouraged to balance the sedentary nature of the profession. Regular physical activity can help develop a sense of mind, body, and soul connection that creates a sense of self-awareness. Becoming aware of our movement choices allows us to move with ease and eliminate habits that do not serve us. Therefore, movement awareness can bring a positive impact on our well-being.

Endnotes

1. Karen A.Studd and Laura L.Cox, *EveryBody Is A Body* (Indianapolis: Dog Ear Publishing, 2019).
2. *Id.*

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Krell's Korner

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

The Godfather and the National Film Registry

By David Krell

This year marks the 50th anniversary of *The Godfather*.

Based on Mario Puzo's opus of the same name—which had debuted in 1969 and became a best seller—this epic film about a mafia family in New York City was the subject of water-cooler conversations, business lunches, cocktail parties, and dorm room bull sessions upon its premiere in 1972. Critical acclaim was immense.

New York Times film critic Vincent Canby declared that Marlon Brando's performance as mafia chieftain Vito Corleone "sets the pitch for the entire production, which is true and flamboyant and, at unexpected moments, immensely moving."[1] Brando's fellow actors in *The Godfather* were astounding in their portrayals as well: James Caan, Robert Duvall, Diane Keaton, Abe Vigoda, John Cazale and Al Pacino.

Charles Champlin was equally effusive in the *Los Angeles Times*: "'The Godfather' is an entertainment, not a documentary, however close it may come to some of the realities behind the headlines. But because it generates an aura of considerable believability, it is a saving grace of the movie that it keeps its balance."[2]

Francis Ford Coppola's direction and Gordon Willis's cinematography were highly significant factors in the film's success. *The Hollywood Reporter* praised, "Very few of the New York exteriors appear to be stock shots; most have been re-created with an incredible attention to detail. Interiors have the rich, burnt-umber look of photographs taken decades ago."[3]

The Godfather takes place between 1945 and 1955. It joined the ranks of Academy Award winners: Best Picture, Best Actor in a Leading Role, Best Writing (Screenplay Based on Material from Another Medium). However, the Corleones' tale did not end with the last scene, which shows Michael Corleone succeeding his father as the mafia family's leader, otherwise known as a "don."

The Godfather II premiered in 1974 and won six Academy Awards.[4]

Ten years later, Random House released *The Sicilian*. There, Puzo used Michael's temporary exile in Sicily depicted in the original novel and film as a launching pad for a story chronicling the influence of the title character—Salvatore Giuliano.[5] The youngest Corleone son went to Sicily after killing a corrupt police captain and a rival mobster in a restaurant.

In 1990, *The Godfather III* hit theatres and obtained less than stellar reviews for its portrayal of an aging Michael Corleone craving legitimacy in the late 1970s. In that film, he severed himself from mafia ties and partnered with the Vatican on a massive business deal.[6] Despite those reviews, also that year, *The Godfather* entered a prestigious group of films on the National Film Registry. Its inclusion was accompanied by *It's A Wonderful Life*, *Raging Bull*, *Rebel Without a Cause*, *The Treasure of the Sierra Madre*, and *All Quiet on the Western Front*, to name a few.

The National Film Preservation Act of 1988 had authorized the Library of Congress to create the Registry "for the purpose of registering films that are culturally, historically, or aesthetically significant."[7] It mandated that the Librarian of Congress choose a member from 13 organizations to build the National Film Preservation Board, which has a limit of 25 films per year that can be nominated for the Registry.[8] The Librarian also has the responsibility of acquiring a copy of each film for the National Film Board Collection in the Library of Congress.[9]

President Ronald Reagan signed the bill into law during the last few months of his presidency. It was appropriate that the actor-turned-politician approved the legislation, considering his substantial film career, including portraying Notre Dame football legend George Gipp in *Knute Rockne, All American*.

There have been some changes to the law since 1988, but the primary goal remains to highlight, preserve, and publicize the films that have set the bar high for the filmmaking community. Codifying a selection might seem like a useless endeavor. The films on the Registry were already known for being iconic. With that logic, however, we would not have the Kennedy Center Honors or the bestowing of the Presidential Medal of Freedom on a roster of show-business icons, including Kate Smith, James Cagney, Lucille Ball, Carol Burnett, Meryl Streep, Rita Moreno, and Doris Day.

It is important for the government to maintain an archive of America's best films through legislative fiat,

because doing so ensures that our culture will endure. When the National Film Registry tapped *The Godfather* for membership, Vito Corleone might have called it an offer he couldn't refuse.

Endnotes

1. Vincent Canby, *Bravo, Brando's 'Godfather,'* N.Y. Times, March 12, 1972: D1.
2. Charles Champlin, *'Godfather': The Gangster Film Moves Uptown*, L.A. Times, March 19, 1972: C1.
3. *'The Godfather': THR's 1972 Review*, The Hollywood Reporter, https://www.hollywoodreporter.com/news/general-news/godfather-review-1972-original-movie-986404/, last accessed December 10, 2021.
4. Best Picture, Best Actor in a Supporting Role, Best Director, Best Writing (Screenplay Adapted From Other Material), Best Art Direction (Set Decoration), Best Music (Original Dramatic Score).
5. There was a film version in 1987, but it did not mention or show a connection to the Corleones.
6. There were also two sequel novels (*The Godfather Returns*, *The Godfather's Revenge*) and a prequel novel (*The Family Corleone*).
7. 2 USC 178, Sec 2, National Film Registry, https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg1774.pdf, accessed December 13, 2021.
8. 2 USC 178, Sec. 10(b), Powers of Board, Nomination of Films. The thirteen organizations are: Academy of Motion Picture Arts and Sciences, Directors Guild of America, Writers Guild of America, National Society of Film Critics, Society for Cinema Studies, American Film Institute, Department of Theatre Film and Television of College of Fine Arts at the University of California-Los Angeles, Department of Cinema Studies in the Graduate School of Arts and Science at New York University, University Film and Video Association, Motion Picture Association of America, Association of Motion Picture and Television Producers, Screen Actors Guild of America, https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg1774.pdf, accessed December 13, 2021.
9. 2 USC 178, Sec. 3 Duties of Librarian of Congress, "The Librarian shall endeavor to obtain, by gift from the owner, an archival quality copy of an original version of each film included in the National Film Registry," https://www.govinfo.gov/content/pkg/STATUTE-102/pdf/STATUTE-102-Pg1774.pdf, accessed December 13, 2021.

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.

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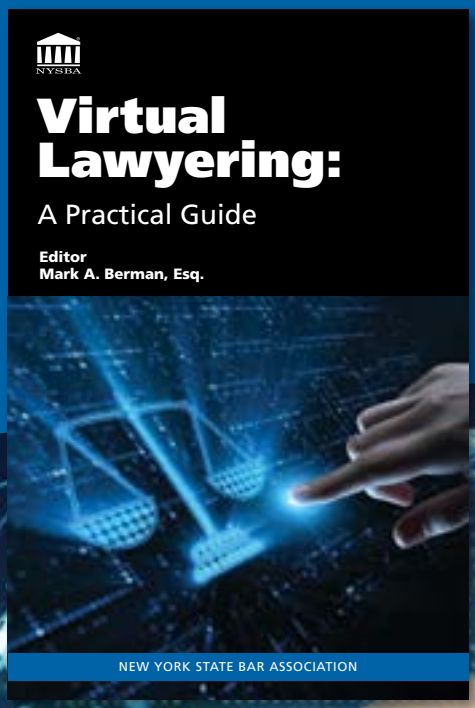

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