

Entertainment, Arts and Sports Law Journal

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

50 Years of Title IX

The Top Three Copyright Law
Developments of 2022 (So Far)

Getting Reimbursed for COVID-19
Related Funeral Expenses

Homage or Faux Pas: Cultural
Appropriation in Fashion Apparel

... and so much more!



PUBLICATIONS

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.

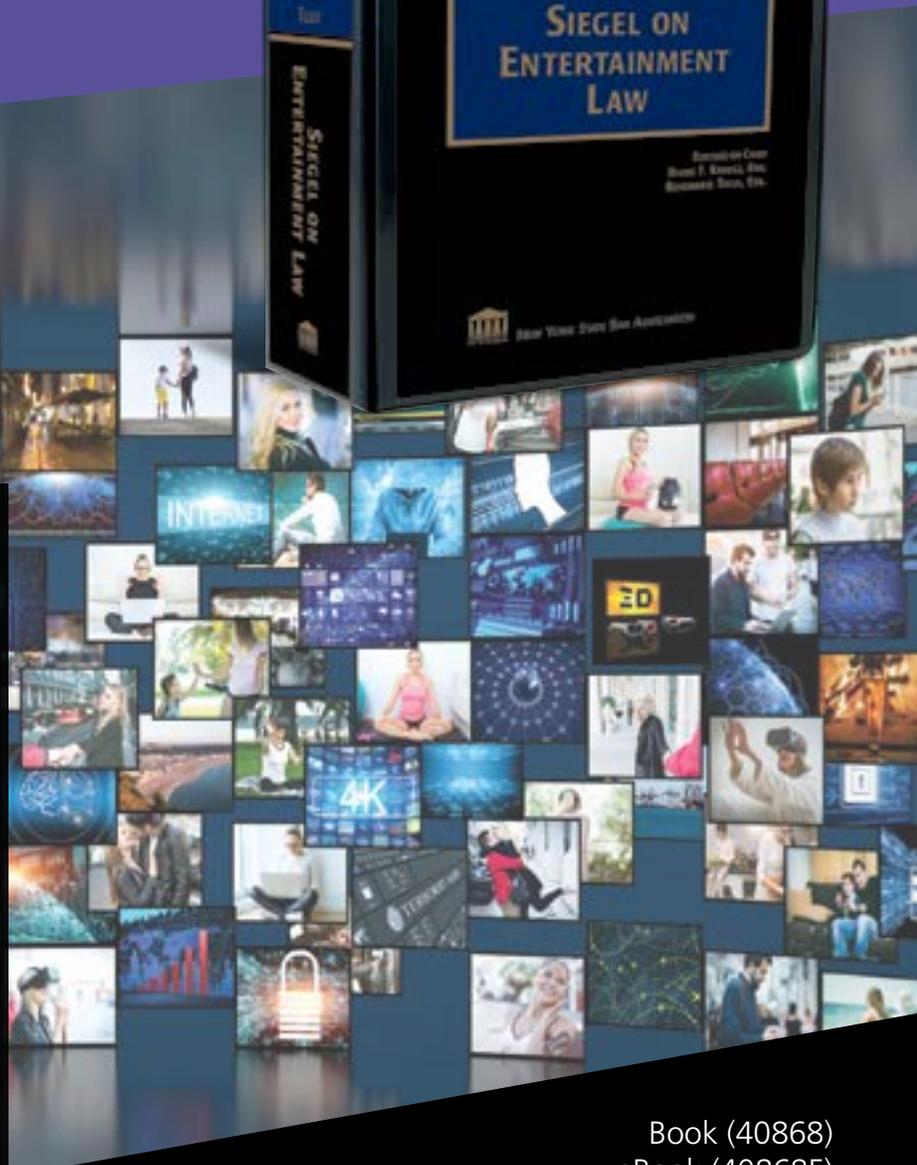
"The definitive text in the burgeoning field of entertainment law. It provides an in-depth analysis of the key issues currently confronting the practitioners of its various specialties. For both its breadth and depth, I highly recommend Entertainment Law to students, academics and professionals alike."



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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Entertainment, Arts and Sports Law Journal

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Publication of Articles

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

Elissa D. Hecker
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eheckeresq@eheckeresq.com

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

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Remarks From the Chair

By Ethan Bordman

The Law Student Meet and Greet, our first event after the 2022 Annual Meeting, featured three generations of EASL attorneys—Paul Cossu, Leslie Greenbaum, and Nancy Robertson—who shared their experiences and advice on how future attorneys can practice in EASL fields. As EASL Chair, I added my thoughts on the benefits of joining and becoming active with our Section. At this event, and at others in which I have participated as a panelist, the first question attendees asked was, “How did you begin practicing in this area of law?” Experienced attorneys too often enjoy recounting the details of how they “fell into” our areas of practice.

I recently attended an alumni event in which a music attorney discussed his background. He described his early days as a public defender, assisting in the juvenile courts. One day, a co-worker of his spouse asked if he would look at a contract for her husband, a songwriter. A record label had expressed interest in purchasing the rights to a song the husband had written and advised him to hire a lawyer. So, he contacted the public defender (the only lawyer he knew) to take a look at the agreement. With no knowledge of the music industry, the attorney obtained a book on the business of music to educate himself about contract considerations, including advances, royalties, recording masters, and publishing. Soon after, another musician called, then another; then the songwriter wrote another song that required additional contract work, and before long, the attorney left the public defender’s office to become a music lawyer. He just “fell into it” and found himself going from criminal cases and court appearances to entertainment contracts and concerts.

For many experienced attorneys, practicing law in the field of entertainment happened by chance. Yet when I speak with law students and young attorneys who are interested in entertainment law, most tell me they attended law school to focus specifically on areas such as film, music, television, sports, art or fashion law. I recently discussed this with the chairs of the Young Entertainment Lawyers Committee, the EASL Law Student Committee, and the Young Lawyer Student Liaisons to our Section. These committees and the EASL Section are all brainstorming ideas for programs designed to enable future entertainment lawyers and young lawyers to build their knowledge of EASL topics. Involvement in EASL helps law students and future lawyers gain practical knowledge; whether it is contributing an idea for an article in the *EASL Journal*, sharing an opinion on an upcoming panel, or becoming an active member of a committee. In my early days as an EASL member, I would often ask experienced EASL attorneys to work with me to plan programs. Learning from their expe-

riences during the planning process was both instrumental to the success of the event and very educational for me personally. I encourage law students and young lawyers to contact me, by phone or email, to find out how they can make the most of the knowledge-building opportunities EASL offers, thereby helping themselves “fall into” their desired practice area.



In this vein, please join me in welcoming our new committee chairs and liaisons: Sonia Autret, first year at Fordham Law School, and Lisa Mordkovich, first year at Cardozo School of Law, are the new law student liaisons from the Young Lawyers Section to EASL. Avita Delorme is the new co-chair of the Theatre and Performing Arts Committee. Mariam Chubinidzhe, currently co-chair of the EASL Law Students Committee, will now be the co-chair of the EASL Young Lawyers Committee. Pam Lester recently joined us as co-chair of the Sports Committee. We are glad they are with us and wish them success and fulfillment in their new roles.

I would also like to thank Carol Steinberg and Judith Prowda for planning, and Paul Cossu for moderating, a recent panel discussion: “The ‘Art’ of Licensing Art: Legal and Business Considerations.” This conversation raised timely issues regarding the licensing of images, including NFTs, and how artists and their representatives can protect themselves. Thank you to our speakers Eric Calderon, Kay Murray, David Stark, and EASL Executive Committee member Irina Tarsis for sharing their time and expertise on this fascinating topic.

The EASL spring meeting was held on May 12th, with two compelling panels. First, our motion picture diversity panel featured speakers from the Directors Guild of America (DGA), Producers Guild of America (PGA), Screen Actors Guild/American Federation of TV & Radio Artists (SAG-AFTRA), the Academy of Motion Pictures Arts & Sciences (The Oscars), and Color of Change. Members of this panel spoke about the importance of diversity and the initiatives undertaken by each organization to expand diversity in the motion picture industry. Our second panel featured Stan Socher, who presented his annual “Year in Review” of the most recent court decisions in entertainment law. Robert Seigel

Continued on page 4

Editor's Note/Pro Bono Update

By Elissa D. Hecker



Happy Summer! I hope that you enjoy this issue of the EASL Journal somewhere warm and beautiful.

This issue is celebrating the 50th Anniversary of the Title IX of the Education Amendments of 1972. I have included several thoughtful submissions about what Title IX means to women athletes of all ages. As Jill Pilgrim, Co-

Chair of the Sports Law Committee, 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." Thanks to the Sports Law Committee for spearheading this effort on February 2nd by celebrating National Girls and Women in Sports Day.

I would also like to welcome our newest columnist, Jacques Boubli, Certified Financial Planner and investment advisor. Jacques previously had a 20-year career in arts management, running Isaac Stern's family office and serving as

Remarks From the Chair continued from page 3

and Larry Sapadin, co-chairs of the Motion Picture Committee, contributed excellent work to this event, which was very well received.

Elissa Hecker continues her marvelous work as editor of the *EASL Journal* and is always on the lookout for submissions. Please feel free to reach out to Elissa with any ideas or contributions to future issues of the *Journal*.

I'd like to express my gratitude to Sharmin Woodall, the EASL Liaison from the NYSBA, for her many contributions to this group's success.

Finally, please join me in welcoming all new EASL Section members. We look forward to seeing you at future events!

—Ethan

production manager for Lincoln Center. He will be sharing helpful and practical advice.

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

—Elissa

The next deadline is August 5, 2022.

DO PRO BONO! DO PRO BONO!

Pro Bono Update

Programs

EASL and the New York Foundation for the Arts (NYFA) have a long history of working together. EASL has provided many speakers and full day programs on legal issues, ranging from Artists' Rights Basics, to the Basics of American Law Governing the Arts, to a group of Chinese arts professionals. This spring, NYFA requested that I speak in person to its Spring Professional Development group about artists' rights. The seminar took place at the Huntington Arts Council over two days and covered many aspects of career development, including marketing, business plans, and legal basics. I covered the basics of copyright, fair use, and contracts to a group of 25 artists from various arts practices. The group asked great questions and very much appreciated the presentation. Everyone was happy to meet in person.

—Carol

DO PRO BONO! DO PRO BONO!

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

- **Elissa D. Hecker**, echeckeresq@echeckeresq.com
- **Carol Steinberg**, elizabethcjs@gmail.com
- **Louise Carron**, louisecarron.esq@gmail.com

NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.

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

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;

- one credit is given for each hour of research or writing, up to a maximum of 12 credits;
- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the

New York State Continuing Legal Education Board
25 Beaver St, Fl 8
New York, NY 10004

A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's website at www.courts.state.ny.us/mcle.htm. Click on "Publication Credit Application" near the bottom of the page). After review of the application and materials, the board will notify the applicant by first-class mail of its decision and the number of credits earned.

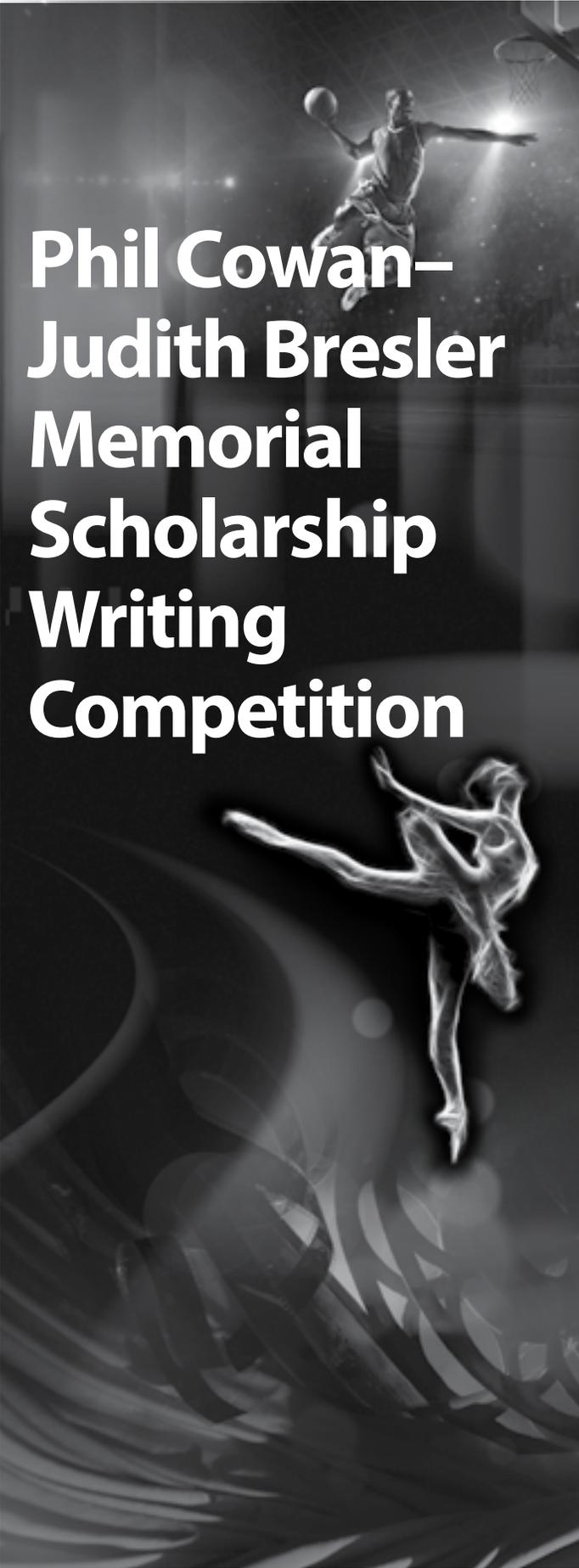
NEW YORK STATE BAR ASSOCIATION

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Phil Cowan– Judith Bresler Memorial Scholarship Writing Competition

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

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

The Competition

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

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

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

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

Eligibility

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

Free Membership to EASL

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

Submission Deadline

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 EASL's 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 state-wide 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*.



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 **August 5, 2022**.
- **Submissions:** Articles must be submitted via a Word email attachment to checkerresq@checkerresq.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.

of Health, Education, and Welfare (HEW), were issued three years later.⁹

The law has certainly seen its fair share of adversity and backlash, particularly in its application to sport.¹⁰ Immediately following its enactment (and in the years thereafter), Title IX faced an onslaught of challenges, whether through subsequent proposed amendments or through lawsuits challenging its legality and attempting to narrow its scope.¹¹ In 1974, Senator John Tower proposed the “Tower Amendment,” which sought to exempt revenue-generating sports from Title IX’s reach.¹² When that failed, Senator Jacob Javits submitted an amendment directing HEW to issue regulations providing, “with respect to intercollegiate athletic activities, reasonable provisions considering the nature of particular sports.”¹³ The final version of Title IX, in fact, includes Senator Javits’s modification.¹⁴ That did not, nevertheless, stem the criticisms and proposed amendments that continued to flood in, by way of at least nine bills and resolutions aiming to exclude either revenue-generating sports or athletics totally from Title IX, and arguing that compliance with the athletic regulations would be unduly burdensome and would harm existing men’s programs, particularly in revenue generating sports.¹⁵ Perhaps ironically, despite their aim to steer Title IX’s reach away from athletics, some of the most notable challenges to Title IX, like the Tower Amendment, have earned Title IX its reputation as the sex equality law for sports, almost dwarfing its perceived impact on education generally.¹⁶

Fortunately, the Tower Amendment and its many similar companions were unsuccessful and, in fact, the pressure to exclude athletics from the purview of Title IX ultimately served to motivate the subsequent affirmative legislative steps taken to reaffirm Congress’s intent to include athletics under the statute’s reach and to regulate the protections against sex discrimination in sports at educational institutions with greater specificity.¹⁷ Indeed, the initial sponsors of Title IX made abundantly clear that the intent of Title IX was correctly interpreted to include athletic programs.¹⁸ Representative Mink commented: “We cannot in good conscience continue to allow our educational institutions to deny women and girls the educational opportunities that have been the assumed right of their brothers. The Title IX regulation provides a start in the direction of providing equal educational opportunity regardless of sex.”¹⁹ With respect to critics’, specifically the NCAA’s, push for revenue-producing sports exemptions, she added: “The implication is that sex discrimination is acceptable when someone profits from it and that moneymaking propositions should be given congressional absolution from Title IX.”²⁰ Ultimately and in spite of continued challenge,²¹ Title IX was upheld with its original intent to include athletics intact.²²

In 1984, the law faced what could be deemed one of its greatest setbacks, when the Supreme Court in *Grove City Coll. v. Bell* limited the scope of the law and, in effect, stripped its applications to athletics, except with respect to athletic scholarships.²³ In response, however, Congress passed the Civil Rights Restoration Act in 1987 to reverse the *Grove City* decision and reaffirm that all of the civil rights statutes, including Title IX, are to apply in all aspects of the institutions, including athletics.²⁴ That is, “if any part of an educational institution receives federal funds, then all of its programs and activities must comply with the law.”²⁵

In the late ’80s and early ’90s, after almost 20 years of noncompliance and repeated legislative and legal challenge, students and student-athletes began enforcing their Title IX rights through federal lawsuits.²⁶ The lawsuits have been highly successful and the impact ever since drastic.²⁷ In 1972, women earned only 6% of all professional degrees.²⁸ By 1998, that number rose to 43%.²⁹ Where women earned 44% of all bachelor’s degrees in 1972, they earned 57% of them by 1998.³⁰ In 2009, about 87% of women achieved at least a high school education and about 28% at least a college degree.³¹ In 1970, these figures were 59% and 8%, respectively.³² With respect to sports, in 1972, the number of girls or women participating in high school and college athletics was just over 300,000.³³ In 2012, that number exceeded three million, including over 190,000 women participating in college sports.³⁴ By 2016, there was 545% increase in the percentage of women playing college sports and 990% increase for women playing high school sports since 1972.³⁵ What is more, since access to education and sports in turn open doors to further benefits, more women are able to participate in the workforce, develop careers, reach advanced and senior leadership positions within their fields, earn higher incomes, and improve their health and increase their access to health care, among other things.³⁶

Of course, while the law has allowed women to make huge strides in its 50-year span, the path to sex and gender equality has a way to go and the push for necessary changes remains ongoing, with further regulations aiming to strengthen Title IX protections anticipated from the U.S. Department of Education sometime this year. In this issue of the *EASL Journal*, we hear from members of our community who share their personal experiences with Title IX, the impact the law has had in their lives, and their views on its effectiveness in practice.

Endnotes

1. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-88.
2. *Id.*

3. *50 Years of Title IX: The Impact on Women's Sports* | *Women's History Month*, Sporting News, 1 March 2022, <https://www.youtube.com/watch?v=LKH3MptKF0E>; Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003); *Equal Access to Education: Forty Years of Title IX*, United States Department of Justice, 23 June 2012, <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.
4. *50 Years of Title IX: The Impact on Women's Sports* | *Women's History Month*, Sporting News, 1 March 2022, <https://www.youtube.com/watch?v=LKH3MptKF0E>; Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003).
5. Executive Order 11246 (1965) as amended by Executive Order 11375 (1967); Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d; Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e.
6. Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e; Valentin, Iram. *Title IX: A Brief History*. 2 Holy Cross J. Law Pub. Pol. (1997): 123. Print.
7. Valentin, Iram, *Title IX: A Brief History*, 2 Holy Cross J. Law Pub. Pol. (1997): 123. Print.
8. Title VI, Civil Rights Act of 1964, 42 U.S.C. § 2000d; Valentin, Iram, *Title IX: A Brief History*, 2 Holy Cross J. Law Pub. Pol. (1997): 123. Print.
9. Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; *The 14th Amendment and the Evolution of Title IX*, United States Courts, <https://www.uscourts.gov/educational-resources/educational-activities/14th-amendment-and-evolution-title-ix>; *History of Title IX*, Women's Sports Foundation, 19 July 2021, <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>; 45 C.F.R. §86; *Title IX—Civil Rights*, U.S. Department of Health, Education, and Welfare, June 1975, <https://files.eric.ed.gov/fulltext/ED108299.pdf>.
10. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *History of Title IX*, Women's Sports Foundation, 19 July 2021, <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>; Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003).
11. *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993); *History of Title IX*, Women's Sports Foundation, 19 July 2021, <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix/>; Jocelyn Samuels and Kristen Galles, *In Defense of Title IX: Why Current Policies Are Required to Ensure Equality of Opportunity*, 14 Marq. Sports L. Rev. 11 (2003); Ellen J. Staurowsky, *Title IX and College Sport: The Long and Painful Path to Compliance and Reform*, 14 Marq. Sports L. Rev. 95 (2003); *Grove City Coll. v. Bell*, 465 U.S. 555 (1984).
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Entertainment, Arts and Sports Law Section BLOG



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Personal Reflections About Title IX

By Sarah Malin LeBuhn

Growing up, sports were always a huge part of my life. I remember as a pre-teen getting up early in the morning on Sundays to watch NFL Game Day preview shows and subscribing to *Sports Illustrated*, reading it from cover to cover. My father was an All-American soccer and lacrosse player in college and he always talked about how much one learns from being part of a team. When I flirted with the idea of trying out for cheerleading, he told me, “Play sports; don’t cheer for sports.” My sister and I were the only girls in a neighborhood full of boys and I much preferred playing touch football in the street to playing with dolls in my room. I always pushed myself because I wanted the boys to accept me as one of them, and treat me like an equal in whatever game we played.

I loved basketball, soccer, tennis, softball, and volleyball and played them all at different times in my youth. There was a certain pride that I felt being selected ahead of most of the boys when teams were being picked at recess. I seemed to fit in better with the boys who were very sports-focused, and playing sports helped me learn how to win and lose with grace.

My mother never seemed particularly athletic, nor had much interest in sports. It was always fascinating to hear about what sports were like when she was growing up in the 1950s. As basketball was my favorite sport, listening to her describe how different the rules were then (girls could only dribble three times and then had to pass the ball?) seemed unbelievable. Odd to me as well was that the rules were so different for boys and girls. It’s as if they worried sports would be too hard for girls, who might prove to be too fragile.

When I moved to Irvington, New York as a high school sophomore, I was fortunate enough to play varsity basketball for Coach Gina Maher. She was very tall and I knew had been a star player at Marymount College. She was very different from what I’d known of other women of that generation. She had played sports at a high level and had been a dominant figure. She clearly had immense respect for the game and saw what a positive impact it could have on the girls she coached. Our basketball team won the first Sectional Title in school

history, and subsequently Gina went on to coach her teams to six state championship over the next 40 years at Irvington, most recently in 2019.

My eldest daughter graduated this year, and she played for five years under Coach Maher, winning the most recent state championship.

It is funny how things come full circle. I married a man who played basketball in college and two of his nieces were recruited to play sports in college (lacrosse and swimming.) I believe Title IX and the equality it offers to young women has had an enormous impact on the those who have been able to take advantage of it. Now my daughter will be going off to college in the fall and was recruited to play basketball for a Division 1 program. Her experience has been shaped by Title IX as now there are a countless camps, showcases, and AAU programs in which tens of thousands of girls and young women compete every year. This industry is geared toward young women interested in developing their talents in sports, and who strive to play sports at the collegiate level. Women’s sports programs are respected at a level unimaginable when my mother attended school. Millions of dollars are spent each year in endorsement fees for female athletes and opportunities abound for women to play a variety of sports in college. There is no doubt that this has helped women in innumerable ways to reach their potential as athletes as well as human beings. None of that would have been possible without Title IX.



Sarah Malin LeBuhn is a former television actress who made a recent career change, going back to school to become a registered nurse. She is currently working for Daybreak Health, a start-up concierge COVID-19 testing company in New York City, which is moving into the public health space. She is married with three daughters and lives in Irvington, NY. As a graduate of Duke

University, she is still an avid Blue Devil Basketball fan.

Personal Reflections About Title IX

By Gina Maher and BJ Toolan

Title IX has given so many girls and women the power to shine. It has not only provided girls the opportunity to play and compete in sports just like their male counterparts, but it has also given them strong life skills that they may not have attained otherwise. Through sports, they gain self-esteem, confidence, and the ability to persist. They learn how to chase their dreams, never to back down, and hold their heads up high, even in failure or defeat.

Coaching high school girls has afforded us the ability to empower many young women. We try to lead by example and let them know that they can be strong, competitive, and passionate, while still showing class, dignity, and grace. We draw parallels between the game and life that will help them with their future endeavors. They learn that they are part of something bigger than just themselves. They are part of a team that then becomes their support system and family for life. Without Title IX, so many girls and young women would be denied unlimited opportunities and may never reach their full potential. We are so very blessed to live in a time where Title IX has leveled the playing field for our girls and they can gain the skills they need to succeed in sports and in life beyond.



Gina Maher has been coaching Irvington varsity girls basketball in Irvington, N.Y. for 46 years and has amassed close to 800 career wins, six state titles, and four Federation titles. She is one of the most winningest coaches in New York State. She also coaches varsity girls tennis and coached track and field at Irvington High School. She was inducted into the New York State

Basketball Hall of Fame in March of 2010. Maher currently resides in Irvington, N.Y.



Barbara ("BJ") Toolan Constantine has been the assistant coach for Irvington girls basketball for 22 years alongside legendary coach Gina Maher. She helped win Maher's first state title in 1990 as a player and went on to play basketball and softball at Trinity College in Hartford, CT, where she was an All-American. She has been inducted into the inaugural class of

Trinity's Hall of Fame, the Connecticut Women's Hall of Fame, and the New England Basketball Hall of Fame. Constantine currently resides in Irvington, N.Y. with her husband, Mark, and their three children.

By Becca Licht

"Athlete" is a word I still occasionally use to describe myself, as the owner of a Barre3 fitness studio, and indeed being an athlete has been a formative part of my identity. Thanks in large part to Title IX paving the way for access, team sports were a huge part of my childhood and adolescence. Title IX was passed in 1972 and its provisions of inclusivity for women student-athletes at the collegiate level trickled down to equal access in all sporting endeavors for me, growing up in the late 1980s and 1990s. I got the chance to be an athlete and from that experience, I gained quite a lot: confidence, work ethic, appetite for challenge and a sense of commitment to my team and community.

From toddlerhood, I was inspired by my big sister's soccer exploits, and snagged an orange slice from her team at half-time every chance I could. I jumped in myself for the under 5's league, wearing a salmon t-shirt and playing against my best friend in her assigned kelly green. We all shook hands and held participation trophies proudly at the end of the season. Soccer was so fun much for us! It was a reason for

pizza parties, sleepovers, and new friends until eventually, it got competitive. I muddled along for a few years, then hit a growth spurt and joined a new travel league team at exactly the right time that held my team to high standards, balancing risk taking and fun on the field in equal measure. My skills increased and I found myself the youngest person on my school's varsity soccer team. At 12, I was excited to join the 8th grade boys travel team at my summer camp, since there was no girls' program. Thanks to the policy of inclusion, I used my chance to impress the coach at tryouts with a timely breakaway goal. Each time I got to "play up," competing with older girls and boys, my confidence on the field increased—and off the field too. Riding back to camp after that boys' soccer tournament, I was on top of the world, ready to lead my bunk to victory in Color War.

This world-beating attitude was challenged by a few years of teenagerhood, and with it the pressure to excel at higher levels. My soccer skills improved, but this time, I did NOT hit a growth spurt. Suddenly my ability to maneuver as a center midfielder led to fouls from my opponents, eventually

Personal Reflections About Title IX

a nasty ankle injury, and slower running times on the field. By my sophomore year of high school, I was through with organized soccer and all of the pressure I was putting on myself. It was time to try something new. I had little exposure to rowing before a friend mentioned it casually, but it took exactly one warm spring afternoon with the Charles River sparkling at me to fall hard for it. I joined a beginners' program at Community Rowing, Inc. (CCI), a local non-profit that drew kids from all over the Boston suburbs, who went to public schools like mine with no crew team. It seemed like this new environment would offer less pressure and perhaps more fun. I was right about that—kind of. Soon I found a unique competitive opportunity: a mostly formed crew of seven young women were headed to national championships in the lightweight category, and needed an eighth to get up to speed quickly. Was I in? Suddenly, the pressure I put on myself grew enormous once more.

Unlike the frustration I'd started to feel with soccer, though, rowing kept giving me positive feedback. The intense nature of our training meant that I saw constant improvement in both my efforts and results. I was surrounded by a team of young women who all wanted me to improve my skill and finesse on the water so they could race as well. I threw myself into the pursuit wholeheartedly and was rewarded: a top four finish at the national championships and a chance to represent the United States that summer with my teammates at a youth regatta in Mexico. Rowing took up all of my free time, and more time than that besides. My teammates and I got ready for our respective proms after a sweaty practice in the mirror-less bathroom at our boathouse, and missed our high school graduation ceremonies due to a conflict with racing season. Since my team at CRI was not a part of my school experience, this became isolating by the end of high school—while I still had friends to eat lunch with at school, my mind was always on crew. Despite this isolation, I felt sure that my commitment and focus were worthwhile.

At Williams College, then, it was a new experience to be part of a well-funded, nationally recognized and celebrated rowing program. During my first season at Williams, a shoulder injury threatened to keep me off the team, but I knew this was something I really wanted to be a part of and transitioned to a new role. The coxswain in a rowing shell directs practice, steers the boat, and motivates during races. Coxing was leadership like I'd never tried before, and while nervous, I was embraced by my new teammates, many of whom were also racing at a higher level than they'd ever known. We excelled on the water, winning four NCAA championships in a row, and for the first time in my athletic career, I was able to integrate my role as an athlete with that of being a student. Ironically, while the women's rowing team added to our trophy case,

and points from our NCAA championships secured Williams a prize for the most successful athletics across all Division III schools, our counterparts on the men's team were not even sponsored by the NCAA and finished their season, usually at the middle of the pack, at our regional ECAC championships. The pride I felt about these accomplishments, as well as the friendships within my team, built my confidence in all areas of my school life and have endured until now.

The opportunity to be an athlete has taught me much. I've learned that focus, commitment, and effort lead to results, and that building camaraderie can make all of the hard work so much more enjoyable. These lessons, friendships, and memories built from over 15 years of soccer and rowing have stuck with me in my professional and personal pursuits. When I launched my own business, I took big risks to leave a desk job and worked diligently for nearly a year to bring Barre3 to my community, applying new skill with focus, commitment, and effort. Every day as a business owner is a new challenge, and yet I feel confident that with the support of my own team now, we can rise to meet it.



Becca Licht lives in Dobbs Ferry, N.Y., with her husband, young son, and a fuzzy labradoodle. She is the owner of Barre3 Rivertowns, a fitness studio that opened in 2019 built around community, inclusivity, connection and movement. Prior to bringing Barre3 to her town, Becca worked in strategy consulting and with a women's health focused startup, with projects across the country and the world. Some of her proudest accomplishments have included the four NCAA championships she helped to win as a coxswain on the Williams College (MA) rowing team, and a racing record at the Head of the Charles Regatta that stood for nearly 10 years. She credits rowing and soccer with instilling an appetite for challenge, a confidence, and a commitment to others that have led her to professional achievements.

Personal Reflections About Title IX

By Emma Friedman

Even though I am only 15, as an avid follower of politics, I have been aware of Title IX for years. It states: “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Or, to put it briefly, that no one living in the United States can be discriminated against on the basis of sex in federally funded programs, including school sports.

As a female student athlete, Title IX has deep personal meaning to me. Over the course of the last five years, volleyball has become my emotional and physical outlet. I cannot imagine myself without it, and I don't have to, partially due to Title IX and the opportunities it has granted girls all over the country. Throughout history, women, and our issues have been brushed under the rug and dismissed. Girls' sports were virtually nonexistent at the time of my grandmother's high school experience. It is difficult for me to imagine a reality where they were seen as an afterthought, as they are currently at the forefront of my school experience. Title IX has provided equal opportunity for both girls and boys in school sports. My sport gives me solace at the end of a school day packed with new information, tests, quizzes and note-taking. Without Title IX, this would not exist. Although Title IX may never be able to stop sexist comments, such as “you throw like a girl”, or jeers from classmates, it has provided women with the stage to prove that we belong in athletics and are just as athletic as men.

Despite the fact that Title IX has granted great opportunities to women and girls all over the country, there is still much work to be done regarding true gender equality in sports, including the misconception that many people believe that women's sports are easier, or take less skill than men's sports. Oftentimes, when I mention I play volleyball, I am met with comments, including, “I could beat you eas-

ily,” or “that's not even a hard sport, try playing baseball.” Take Simone Biles, arguably the most dominant athlete in her sport; many of her achievements have been discredited by men, arguing, against the mountain of evidence pointing to Biles, that Tom Brady or Michael Jordan is clearly the better pick. Additionally, many men argue that the wage gap among female professional athletes is due to the fact that they do not get as many viewers on television. Much as that may be true, *why* they don't get as many viewers is because they don't get as much air time. Many athletic achievements of women have been missed because the television channel was focused on a men's game. Although Title IX has provided bountiful opportunities for women all over the United States, however, there is still more to be done to truly achieve equality.

I have never known a life without Title IX, and luckily, I never will. My life would be on a completely different course without sports. I hope future generations of girls will be able to continue to fight for gender equality in sports and that one day, “you throw like a girl” will be nothing but a compliment. I am also grateful for the women who have come before me and paved the way for women in sports. Those early trailblazers faced a much more difficult path than I do. Without them, none of this would be possible. So many women and girls around the country rely on sports as their outlet, and Title IX has made it so that I, and every other girl, will never have to live without them.



Emma Friedman is a rising junior at Irvington High School in Irvington, N.Y. She is a member of her school varsity volleyball team, as well as captain of her 15U club team. She is an avid reader and news watcher, who carefully keeps up with politics. As a student and athlete, she is grateful for everything Title IX has provided for her and her peers.



Resolution Alley

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

'The Slap' and Emotions in Conflicts and Disputes

By Theo Cheng

By now, there is hardly anyone who is not aware that multi-talented actor, rapper, and film producer Will Smith physically assaulted stand-up comedian, actor, writer, producer, and film director Chris Rock during the live telecast of the 94th Annual Academy Awards on March 27th. For those who missed that newsworthy event, during the telecast, before presenting the Academy Award for Best Documentary Feature, Rock gestured over to Smith's wife, Jada Pinkett Smith, and acknowledged her by making a joke about her shaven head; Smith had previously shared in public that she suffers from alopecia areata, an autoimmune disorder, and had begun shaving her head in 2021. Smith, her husband, then got up out of his seat, walked onto the stage at the Dolby Theater in Los Angeles, and slapped Rock across the face with his hand. After returning to his seat, Smith continued to berate and threaten Rock verbally, loudly using profanity. Rock briefly commented on the incident and then continued the presentation. The Academy of Motion Picture Arts and Sciences (the Academy) asked Smith to leave the event, but he refused to do so.

Later that evening, Smith won the Academy Award for Best Actor. In his acceptance speech, he apologized to the Academy but notably left out any mention of an apology to Rock. The following day, Smith issued an apology to both Rock and the Academy via Instagram and Facebook. The Academy also announced that it would open an investigation into the matter, and, on April 1st, Smith resigned from it. A week later, on April 8th, the Academy banned Smith from attending the Oscars or any other Academy event for 10 years. Smith responded in a statement, saying, "I accept and respect the Academy's decision."

Much has been written about this incident and its aftermath from many different perspectives. What resonated with me, however, is an aspect of conflict and dispute resolution that is often overlooked—the presence of emotions underlying the actual dispute itself.

In attempting to resolve conflicts and disputes—whether through direct, party-to-party negotiations or through some kind of structured process like mediation, arbitration, or litigation—we frequently make the assumption that all participants are able to evaluate the strengths and weaknesses of the merits of the conflict or dispute, as well as engage in a logical

and rational determination of their respective best interests in seeking some resolution. Yet all it takes is one experience dealing with an "irrational" client or an "unreasonable" adversary to turn a seemingly simple process—one that we as attorneys have presumably been trained to handle—into one mired by high emotions.

Not all conflicts and disputes have a legal facet to them. For example, think about the kinds of disputes between neighbors for which there is ostensibly no legally cognizable claim ("I don't like it when you park on the street in front of my house"). However, the fact is that all conflicts and disputes, no matter what they are about, have an emotional component to them. By its very nature, that conflict or dispute will have triggered the emotional, primitive part of the brain called the amygdala. The amygdala is located deep within the temporal lobes of the human brain's cerebrum and has been shown to perform a primary role in the processing of, among other things, emotional responses. For example, that part of the brain is responsible for the classic "fight or flight" response. It can trigger a wide range of strong emotions such as fear, anger, frustration, sadness, disappointment, hopelessness, anxiousness, and many others—the very kind of emotions that can contribute to so-called irrational or unreason-



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able responses. This kind of emotional response interferes with the thinking, rational decision-making part of the brain called the neocortex. The neocortex is the largest part of the cerebral cortex, which is the outer layer of the cerebrum, and it is responsible for higher-order brain functions. We rely on the neocortex for, among other things, sensory perception, cognition, and processing of communications. By extension, we are dependent upon the neocortex to assist us in evaluating and making proposals for the resolution of any conflict or dispute.

Parties to a conflict or dispute are, more often than not, unable to engage in negotiations toward a resolution because the conflict or dispute has triggered the emotional, sometimes irrational part of the brain (the amygdala), which then interferes with the thinking, rational decision-making part of the brain (the neocortex). Indeed, all conflicts and disputes—no matter the subject matter, the amount in controversy, or whatever else is at stake—contain some emotional component that, if not addressed, will likely impede the consummation of a resolution, or at least threaten the durability of any resolution that is achieved, even if some enforcement mechanism is also available.

A divorce or child custody dispute, or a lawsuit involving someone who was catastrophically injured, are obvious examples that can trigger a host of emotional responses in-

terfering with the logical and orderly resolution of the dispute. Yet even in a seemingly simple breach of contract dispute—say, over the failure by a customer to pay a supplier's outstanding invoice—emotions can impact the ability of a resolution to be achieved. For example, perhaps the procurement manager working with the customer was dissatisfied with the quality of the shipped goods, but arguably objected too late under the contract resulting in the company having to legally accept the goods. Knowing that an adjudication of the dispute might involve ascertaining who is at fault, she might feel embarrassed or guilty about her role in how the dispute arose. Irrespective of how the dispute gets resolved, she may also fear retribution from her superiors and have concerns over how her conduct may impact her future employment at the company. Or perhaps the shipping manager has had repeated negative interactions with this procurement manager and so may

have been stricter than in the two companies' prior course of dealings in his application of the contractual provision at issue, which may have an impact on how the merits of the dispute are viewed later in an adjudication setting. This latest kerfuffle is also adding to his frustrations working with this particular customer. Yet, he has an obligation to fulfill the company's contracts, and the customer is, after all, the customer.

For any kind of resolution to be achieved, our human brains need to undergo a mindset shift and change from one that may be overwhelmed by a largely emotional response to the conflict or dispute to one that can logically and rationally process information that could help explore potential resolutions. Unless and until the struggle between those different parts of the brain is resolved, or at least minimized to the point where the neocortex can take back control from the amygdala, a resolution of the conflict or dispute—certainly one that is durable and has the hope of being honored—is not likely to take place.

So how can we assist parties (and perhaps even adversaries) undergo this mindset shift? For example, the parties could embrace mediation as a process for exploring possible resolutions. Mediation is a completely different mechanism from litigation. In litigation, a party advocates for positions while simultaneously trying to undermine the other party's positions. By contrast, mediation is prospective in nature and

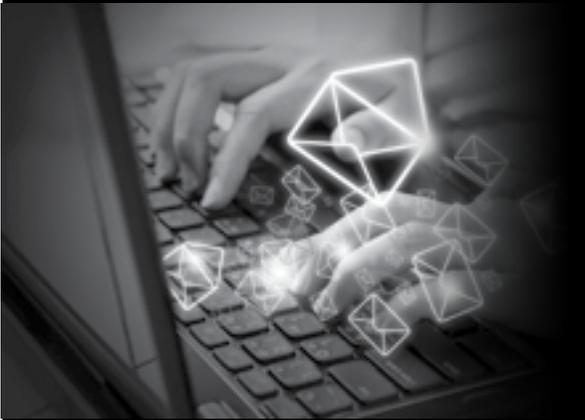
tries to help put parties on a path to a resolution for mutual benefit. One of the skills of a mediator is to help parties undergo that mindset shift because mediation is a process that focuses on collaboration and cooperation between the disputants, and not an adversarial posture. One established technique used by mediators and other conflict and dispute resolution professionals (including, in particular, hostage negotiators in law enforcement dealing with individuals in highly emotional, crisis situations) is to engage in what is called emotional labeling. Emotional labeling is a technique in which you call out by name the emotion being expressed by someone else, thereby validating the underlying emotion, while not validating its content.

For example, in the supplier-customer example above, a mediator (most likely in a private caucus) might address the procurement manager and say something like, “You seem worried” or speak to the shipping manager and say something like, “You seem frustrated.” In both cases, straightforwardly labeling (or validating) the emotion that is at issue helps the participant experiencing that emotion de-escalate from the heightened response caused by that emotion, thereby calming the amygdala and allowing the neocortex to regain control. By doing so, the mediator also continues to build rapport with this party, thus increasing the potential for progress towards a resolution. Notably, the mediator is not validating the content causing the emotion itself; that is, she is not agreeing with the veracity of the facts as perceived by the individual or the reasons for why the individual feels the way that he feels. Rather, the mediator is merely acknowledging that the individual feels the way that he does. Moreover, in the context of a mediation, an expression of concern for the feelings of the other party (such as the injury or pain suf-

fered) need not be accompanied by any admission of fault or agreement with the other party’s positions. That is, there is nothing inconsistent with a party holding a strong conviction about its own positions, while also recognizing and empathizing with the other party’s emotional state.

Seen from this lens, we can better understand—but not excuse—Smith’s conduct. Rock obviously offended Smith with his comment about his wife, which led to the conflict in question between the two men. Although there were any number of ways that Smith could have handled or channeled his anger at being offended, he chose to express that by resorting to violence. As outsiders, we cannot hope to understand why he felt what he felt and the magnitude of what he felt. Nor should we restrain ourselves from feeling that Smith made an unwise choice in the moment. However, the ensuing conduct clearly emanated from a deep emotional response that Smith felt. In fact, the slap was the direct product of his amygdala’s “fight” response caused by his heightened emotional state. As conflict and dispute professionals—whether as attorneys counseling clients or as neutrals helping to facilitate a resolution—we must be mindful that all conflicts and disputes have an emotional component underlying the substance of the dispute itself. If we do not choose to handle those emotions in some way—by using a technique like emotional labeling—we cannot hope to consummate a resolution, or at least one that is lasting.

NEW YORK STATE BAR ASSOCIATION



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REQUEST FOR ARTICLES





People Lie, Bodies Do Not

By Carol Schiro Greenwald

We know how prevalent is the impact of body language. We sense it every day. For example, when we attend a show and say an actor “inhabits a role,” we mean their body language acts just like the fictional person would. When you are on a train or in a restaurant and you muse about the dynamics of the people across the way, you are reading body language.

Body language facilitates an understanding of others for two main reasons: first, we obtain most of our knowledge from visual stimuli, and second, the body does not lie. When we misread or misinterpret body language cues it places us at a disadvantage.

It always was and still is human’s basic language. We read people unconsciously. When what someone says conflicts with their body’s message, they seem disingenuous. A common statistic says that 55% of what we communicate is visual; 38% is vocal, and only 7% is what is actually said.

If 93% of communication is nonverbal, we should know as much as possible about how to understand and use it. This article discusses key body part players and their range of actions, and then suggests how to read other peoples’ unspoken agendas and how to project your best “you” in the workplace.

Body Language Basics

Before language, humans moved in groups and needed a way to communicate. They used body language. People followed leaders by watching what they did and following along.

This is still seen when people in conversation “mirror” each other’s physical positions. Reading others occurs constantly, mostly as unconscious communication.

According to the Oxford Dictionary, body language is:

- “The conscious and unconscious movements and postures by which attitudes and feelings are communicated” and
- “the process of communicating what you are feeling or thinking by the way you place and move your body rather than by words.”

Body language includes:

- facial expressions, especially the eyes;
- how you hold your body, your posture;
- gestures, the most important of which in business situations is the handshake. Humans shake hands as a way to measure authenticity. The handshake “dance” begins when you take a small step forward, look the recipient in the eye, smile and offer your hand, palm up. In networking situations, keep your hands vertical in the shake itself indicating equality and match the other person’s pressure. Give a greeting. Step back as you release the hand. This interaction sets the initial relationship;
- touch is an important body language component, whether it is welcome or not;

- connections with inanimate objects, like cigarettes, pencils, and coffee mugs; chewing on a pencil indicates the person is unsure. Doodling while someone is talking says that person does not value what the speaker is saying;
- proxemics, which includes spatial distance and positioning

As can be deduced from this list, some body language is an involuntary, mostly unconscious, reaction to our environment and situation. Some actions, such as smoking, are learned. Some actions are inborn, like smiling back when someone else smiles; others are learned through personal experience. The meaning of body language actions is culture-bound, and influenced by many factors, including age, gender, and the relationship's power dynamic.

Reading Body Language

Reading body language is an inexact science at best. For example,

- Do crossed arms signal disagreement or a request to lower the air conditioning?
- If I scratch my nose, does it presage a lie or does it just itch?
- Does rubbing my eye signal tiredness, irritation or anger?

Movements need to be read in context and clusters. You need to see at least three coordinated body language indicators to feel that your reading is correct. For example, you might infer that someone does not like what you are saying if:

- They have their hand on their face with the index finger pointed up across their chin and the rest of the hand across their mouth suggesting disagreement.
- Legs and/or arms are tightly crossed, suggesting defensiveness.
- Their chin and head are inclined downward indicating negativity.

People look for this kind of congruence to nonverbally support spoken conversation.

One way to test the accuracy of your interpretations is to be aware of micro-signals. These are involuntary facial expressions that occur in 1/25 of a second. For example, when pupils contract, an eyebrow lifts, the corner of your mouth twitches. We do not see them, but they register with our unconscious. It is almost impossible to fake body language, because it is too difficult to align gestures, micro signals and spoken words.

Being “perceptive” means that you are good at spotting incongruities between a person’s body language and words. When your “gut tells you something” it is reacting to a discrepancy you sense. For example:

- Real smiles involve the mouth and the eyes. Fake smiles involve only the mouth. When you encounter fake smiles, take the time to review the other body’s language “tells” in order to understand why the person is feeling hostile.
- Legs and feet indicate how we feel. When networking, if in a cluster talking together one or two people have a foot pointing away from the group, then that conversation is uncomfortable or about to end. In meetings, if you see someone jiggling their feet or pointing them away from the speaker, the feet owner likely wants to run away.

Body Language and Communication

Body language is useful in conversation because it creates the base for human spoken interactions. Whatever we are saying is either reinforced or subverted by our body language. For example, eyes regulate conversation. As you speak, your eyes glance around at those listening to you. When you are ready to end a sentence, you tend to look up, signaling to others that they may speak. When you widen your eyes in conversation, it inspires trust and positive feelings.

To indicate interest in what the speaker is saying and show that you are paying attention, you can do any or all of the following body language moves:

- Tilt your head to one side,
- make eye contact with the speaker,
- nod periodically to show you are following along,
- widen your eyes to show approval, and
- lean slightly forward toward the speaker.

Business Messages

An understanding of basic body language cues is important in business situations for people who need to know what colleagues are really thinking.

- Observing body language determines our initial impression of people before they say a word. In those initial three to eight seconds, when we meet someone for the first time, we form an initial impression that becomes the lens through which we filter future impressions of the person.
- How you physically comport yourself influences your brand because body image is a powerful component of your brand image. When working or networking, it is

important that your clothing, affect, energy, comportment, and courtesy all support positive interactions with others in the room.

- When you want to create a sense of psychological comfort, mirror the behavior of others in the conversation, make eye contact, smile, stand tall, and use people's names.
- Remember the importance of mind-body connection. Understanding your own body language increases your self-awareness and self-control, which are prerequisites for emotionally intelligent leadership.

Posture is also a key tool for projecting the image you want people to see. When you walk into a room or sit in a chair, set your body so that your head is aligned with your spine, your whole body is upright, and your expression is one of interest and self-confidence. Others will see you as a positive leader.

If you sign up for a networking function and it turns out that you are having a bad day and cannot bring yourself to project authority, energy or grace, do not go. No matter how much you try to act positive, your body will show how you really feel.

Proximity

Proxemics form the basis of power formations. Humans have five spatial zones (COVID-19 notwithstanding):

1. Zero to six inches for intimate relationships like mother/child, lovers, etc.
2. Zero to 18 inches for the intimacy of close friends and crowded places.
3. Eighteen inches to four feet for people you interact with on a regular basis.
4. Four to 12 feet for social events, non-touch encounters.
5. Twelve feet or more for public areas with no interaction, with strangers.

When we have to engage in activities that violate these guidelines, we fudge it. Think of crowded elevator behavior: by facing front, looking straight ahead, saying nothing, and not touching—our minds construct an invisible cocoon around us.

Spatial relations are also vital, but unconscious, indicators of relationships. In meetings, relationships in the room and the role of the leader can be established without saying a word.

- Sitting opposite another person creates a feeling of confrontation. Sitting side by side blocks conversation,

since it is awkward and physically tiring to look someone very close to you in the eyes.

- Sitting behind a desk while the others sit on the other side emphasizes the authority and objectivity of the person behind the desk.
- When you want to create a feeling of congeniality and cooperation:
 - Sit at a 45° angle from the other person,
 - hold meetings around a round table, or
 - lead the meeting from the center of a rectangular table.
- When standing while participating in group conversations, stand at a slight angle to the others to encourage openness and congeniality.

Conclusion

Taking the time to learn more about body cues will increase your ability to communicate effectively. Understanding your own body language will allow you to project the most favorable image as a support for your position in the organization. The most intuitive leaders read bodies well. Use this knowledge to understand dissent and forge consensus in your firm, your family, with clients, judges, and juries.



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

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

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Sports and Entertainment Immigration Ukraine, Russia, and, as Always, Immigration Frustration

By Michael Cataliotti

Some 55 years ago, in 1967, Jim Morrison sang these words: “People are strange / When you’re a stranger / Faces look ugly / When you’re alone”; though I cannot say with certainty what he was talking about, that has never stopped me from ascribing a meaning to it! I was a Comparative Literature and Languages major, focusing on Russian and Latin, after all. To me and for our purposes here, these words could easily be related to immigrants within the United States at any time in this country’s history.¹

You see, no matter the individual’s achievements, international reputation, national recognition, or the amount of people who attest to their qualifications; international artists, entertainers, athletes, and entrepreneurs—across all industries and in all jobs—are having their American travels frustrated by U.S. Citizenship & Immigration Services (USCIS) officers, and agents at both Customs and Border Protection (CBP), and Immigration and Customs Enforcement (ICE). These actions and activities are having a direct impact on American businesses.

Additionally, Russia’s invasion of Ukraine has left a country in despair and its people rushing to figure out what to do next: stay or go, and if the latter, then where? It has also left Russian citizens, as well as those individuals in adjacent countries (i.e., the former Soviet states), rushing to leave for better global opportunities.

As a result of all of this, in this edition of *Sports and Entertainment Immigration*, we are going to discuss some of the American policies put in place to support those Ukrainian citizens fleeing a country at war, look at a potential policy that may be rolling out soon from the Biden administration to pull talent from Russia and elsewhere in the region, and finally, we will close with a few case examples of difficulties encountered by individuals to provide some color and context to immigration frustrations.

Temporary Protected Status for Ukrainians

On April 19, 2022, the Department of Homeland Security (DHS) Secretary Alejandro Mayorkas “designated Ukraine for Temporary Protected Status (TPS) for 18 months, effective April 19, 2022, or later date if Secretary so determines], through October 19, 2023.”² It sounds good, but what does this actually mean? “This designation allows eligible Ukrainian nationals (and individuals having no nationality who last

habitually resided in Ukraine) who have continuously resided in the United States since April 11, 2022, and who have been continuously physically present in the United States since April 19, 2022 to apply for TPS.”³

This was an expansion of Secretary Mayorkas’s initial announcement in early March that “only Ukrainians living in the U.S. as of March 1 would qualify for TPS, which also provides work permits.”⁴ There was obvious consternation and frustration over this restrictive decision, and so, we all welcomed the expansion of the program to those former Ukrainian residents who were in the U.S. at any time on or before April 19, 2022. From CBS News, “The cut-off date change could make thousands of additional Ukrainians who have managed to reach the U.S. following the Russian invasion, including those who have been allowed to enter the U.S. through the Mexican border on humanitarian grounds, eligible for TPS.”⁵

As an explanation, TPS allows certain individuals to remain in the United States, without being removed, for the designated period. Those individuals may apply for work authorization (in the form of an employment authorization document (EAD)), and in some instances, travel authorization (in the form of advanced parole).⁶ It is also worth noting that individuals who obtain TPS often can pursue permanent residency (i.e., a green card) or other more permanent non-immigrant classification. In the words of Democratic Texas Rep. Lloyd Doggett, the goal with TPS is “to help Ukrainians seeking refuge to safely live, learn, work, and participate in American society as their home country is devastated by Putin’s terror.”⁷

To put this into perspective, CBS provides some details around the number of Ukrainians who have entered the United States since February 1st:

Because they need visas to come to the U.S. directly, thousands of Ukrainians have undertaken a days-long trek from Europe to Mexico to reach the U.S. southern border, where officials have been instructed to consider exempting Ukrainians from pandemic-era entry restrictions and admit them on humanitarian grounds.



Between February 1 and April 6, U.S. Customs and Border Protection (CBP) officials processed nearly 10,000 Ukrainians who lacked prior permission to enter the country, an unprecedented number, according to internal DHS data obtained by CBS News.

During that same time period, 41,000 Ukrainians entering the U.S. with visas were processed by CBP officials, the DHS figures show.

Uniting for Ukraine

In March, President Biden asserted that the United States would accept up to 100,000 Ukrainian refugees. “Many Ukrainian refugees will wish to stay in Europe, closer to their homes, but we’ll also welcome 100,000 Ukrainians to the United States with a focus on reuniting families,” Biden said.”⁸ At that time, there was much fanfare over the statement, though there was also quite a lot of questioning about how this would be realized: the Administration provided no specifics or even a general plan for accomplishing this significant task.⁹

Then, on April 21, 2022, came “Uniting for Ukraine,” which is “a new streamlined process to provide Ukrainian citizens who have fled Russia’s unprovoked war of aggression opportunities to come to the United States. This represents a key step toward fulfilling the President’s commitment to welcome Ukrainians fleeing Russia’s invasion of Ukraine.”¹⁰

From the DHS’s “Uniting for Ukraine” Frequently Asked Questions (FAQs):

Uniting for Ukraine is an innovative approach to provide a safe and orderly process for displaced Ukrainians who have been impacted by Russia’s invasion of Ukraine. Ukrainians who have a supporter in the United States may be considered for parole, on a case-by-case basis, for a period of up to two years. Once granted parole, Ukrainians are eligible to apply for employment authorization in the United States.¹¹

Although that sounds great, there is more from the DHS’s FAQs that reveals the degree to which this program is unique and welcomed:

Am I eligible to participate in *Uniting for Ukraine*?

To be eligible, Ukrainians must have been resident in Ukraine as of February 11, 2022, have a supporter in the United States, complete vaccinations and other public health requirements, and pass biometric and biographic screening and vetting security checks. Ukrainians approved via this process will be authorized to travel to the United States to be considered for parole, on a case-by-case basis, for a period of up to two years. Once paroled through this process, Ukrainians will be eligible to apply for work authorization.¹²

Further, just *who* may be considered a “supporter” under these provisions?

What is the role of a financial supporter?

Ukrainians must have a financial supporter in the United States. Supporters initiate the *Uniting for Ukraine* process by filing the Form I-134 Declaration of Financial Support and providing information about themselves and the Ukrainian beneficiary. Supporters will be vetted by the U.S. government to ensure that they are able to support Ukrainians and to mitigate against potential exploitation.

Every Ukrainian seeking authorization to travel to the United States to seek parole must be supported by a U.S.-based individual, including representatives of non-governmental organizations. Each supporter must pass security and background vetting and demonstrate sufficient financial resources to “receive, maintain, and support” the Ukrainians they commit to support.¹³

This supporter, therefore, can be anyone who agrees to undertake financial responsibility for ensuring the safety and well-being of a Ukrainian citizen.

However, does a supporter have to be a person or can it be a corporate entity? Considering how many not-for-profits and other humanitarian-based organizations exist for these kinds of circumstances, would it be possible for one of them to sponsor a Ukrainian under this program? The short answer is yes, but an individual must still sign the form and attest to their sponsorship.

From the FAQs:

Can U.S.-based organizations support Ukrainian beneficiaries?

Yes, they may provide the financial or in-kind support, but the Form I-134 still requires an individual to sign the form. Organizations may not serve as the named supporter on a Form I-134. However, if an organization or other entity is providing financial or other services to the named individual for the purpose of facilitating support, this information should be provided as part of the evidence submitted with the Form I-134 and will be taken into account in determining the supporter’s ability to support the named beneficiary.¹⁴

Fantastic, and now, this financial sponsorship will last for . . . how long?

How long can I stay in the United States under *Uniting for Ukraine*?

Individuals granted parole under this process will generally be paroled for a period not exceeding two years.¹⁵

Understood: so, up to two years, generally, meaning it could be more, or less . . . Nonetheless, very welcome information, because at least we know when completing the paperwork, that it would be best to indicate a departure date of approximately two years from the start date that is being requested.

Unfortunately, however, we have no precise metrics yet, but from the folks at Al Jazeera, “Around 14,500 Ukrainians have filed for applications as of last week [the week of May 1–7,] to come to the United States under a humanitarian parole programme that allows Ukrainians to stay with American sponsors”, i.e., *Uniting for Ukraine*.¹⁶ Considering the Administration’s goal of resettling 100,000 Ukrainian refugees, this is a start.

Ultimately, the *Uniting for Ukraine* program is a great setup that is in place for folks to be able to file some financial and other paperwork online and to try and have their loved ones, or even liked ones enter the U.S. during this inimitable situation.

Biden Wants Russian Brains!

According to a report by *Bloomberg*, “Biden Seeks to Rob Putin of His Top Scientists With Visa Lure.”¹⁷ Well, this could be very interesting:

One proposal, which the White House included in its latest supplemental request to Congress, is to drop the rule that Russian professionals applying for an employment-based visa must have a current employer.

It would apply to Russian citizens who have earned master's or doctoral degrees in science, technology, engineering or mathematics in the U.S. or abroad, the proposal states.

A spokesman for the National Security Council confirmed that the effort is meant to weaken Putin's high-tech resources in the near term and undercut Russia's innovation base over the long run—as well as benefit the U.S. economy and national security.¹⁸

As someone who works with a broad spectrum of Russian entrepreneurs who fall within this sector, I can assure you that this would be tremendously detrimental to Russia's scientific and technological advancement.¹⁹ Worth noting is that this modification to the application or petition processes would “expire in four years” without any “changes to the vetting process, fees or other rules in the Immigration and Nationality Act.”²⁰

Anti-immigrant Policies and Practices Are Harming American Businesses

As I have been writing about for several years now:

Foreign immigration into the United States has been unusually low since peaking in 2016, according to Census Bureau data. Since then, government policy has cut the number of immigrant visas granted, and

Covid-19 restrictions further reduced the number of foreigners coming into the country. These annual declines in immigration, combined with baby boomers retiring, will keep the labor market tight for years to come.²¹

As *Forbes* reports,

The Census Bureau reported that three major factors were at work in last year's immigration: declining immigration of foreign-born people, increasing exits of foreign-born from the U.S., and changes in Puerto Rican movement after Hurricane Maria in 2017. Part of the drop in immigration resulted from Trump-era rules, while Covid-19 also played a significant role. But the downward trend started in 2017, and by 2019 net foreign immigration into the United States had dropped almost in half.²²

This has been demonstrable to any of us working on processing immigration petitions and applications, whether with USCIS or the Department of State. In some instances, journalists have been placed in what is known as “administrative processing”—that is, a black hole of visa application processing where we know nothing and receive little information from the U.S. Embassy or Consulate—and in others, clients who have raised hundreds of thousands of dollars for their businesses at multi-million-dollar valuations, have been profiled in the likes of *Le Monde* and *Forbes*, and employ multiple individuals throughout the United States to work on their Fortune 500 clients, have had their petitions denied by USCIS.

Ultimately, then, this will have a negative impact on U.S. businesses from 2020 through 2030:

Official Census Bureau projections show this decade, from 2020 through 2030, will have the lowest growth of the working age population since the Civil War. And those projections were made in 2017, before we had the data to show that 2016 was the immigration peak. The projections looked for net foreign immigration of around one million people per year. We had less than a quarter million last year. In other words, the projections that show extremely low growth in the working age population are overly optimistic.

The business implication is straightforward. Success in this entire decade will depend on



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great achievements in employee retention, employee recruiting and employee productivity. Average performing companies will struggle, while below-average companies will fail. This labor challenge will overwhelm other business challenges for years to come.²³

If only there were things that could be done to address these unnecessarily harsh immigration policies and practices that have had negative impacts. Here is hoping that we see some positive movement in the coming months.

Endnotes

1. I'll spare you all the history, but if you would like to hear, or read, feel free to e-mail or call me!
2. <https://www.federalregister.gov/documents/2022/04/19/2022-08390/designation-of-ukraine-for-temporary-protected-status>.
3. *Id.*
4. <https://www.cbsnews.com/news/temporary-protected-status-ukrainians-us-eligibility/>.
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6. *Supra* at note 1.
7. *Supra* at note 3, CBS News, "Biden administration expands Temporary Protected Status eligibility for Ukrainians in U.S."
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11. *Id.* at Frequently Asked Questions, "What is *Uniting for Ukraine*?"
12. *Id.* at "Am I eligible to participate in *Uniting for Ukraine*?"
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14. *Id.* at "Can U.S.-based organizations support Ukrainian beneficiaries?"
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16. <https://www.aljazeera.com/news/2022/5/9/ukrainians-fleeing-war-try-different-ways-to-enter-the-us>.
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18. *Id.*
19. I wholeheartedly encourage this move, and would hope that Biden would expand it to those citizens in Belarus, as well, who are also victims of Lukashenko's support of Putin's war.
20. *Id.*
21. <https://www.forbes.com/sites/billconerly/2022/04/28/immigration-very-low-despite-border-controversy-contributing-to-tight-labor-market/?sh=ab226642e30f>.
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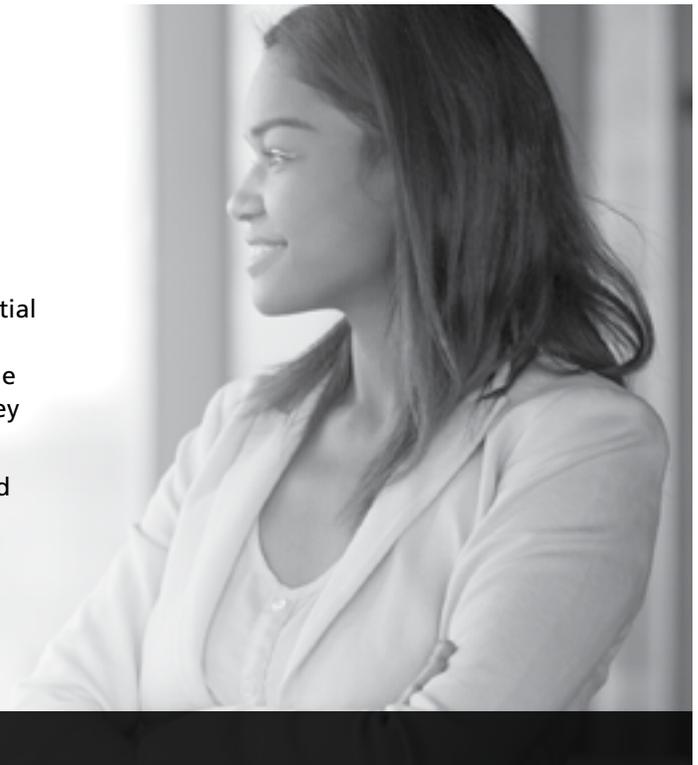
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The Top Three Copyright Law Developments of 2022 (So Far)

By Neville L. Johnson, Douglas L. Johnson and Daniel B. Lifschitz

1. The Ninth Circuit Frees Up More Musical Building Blocks (*Gray v. Hudson*)

In 2018, the Ninth Circuit upheld a jury verdict against the writers of the song “Blurred Lines” for copyright infringement¹ in a controversial decision that, while arguably based on a technicality, quickly ricocheted through the creative community, leaving many musicians feeling that they could no longer safely predict where the line would be drawn between inspiration and appropriation. In 2020, the Ninth Circuit took the opportunity to course correct in the case of *Skidmore v. Led Zeppelin*, by clarifying that it had no intention of locking up basic musical motifs under the auspices of copyright law.² Now, two years later, the Ninth Circuit has doubled down on *Skidmore*’s direction in the case of *Gray v. Hudson*.³

The plaintiff, a Christian rapper, had released a song called “Joyful Noise” that featured a simplistic yet distinctive eight-note ostinato, only for Katy Perry to release later a song called “Dark Horse” with an eerily similar ostinato. Shortly after a jury held that Perry and her “Dark Horse” co-writers had infringed upon the copyright to “Joyful Noise,” the Ninth Circuit issued its *Skidmore* decision, and the district court used the defendants’ request for a directed verdict to reevaluate whether it should have allowed a jury to opine on the similarities between the two songs in the first place. Canvassing the available authority, the court concluded that the plaintiff’s ostinato was not sufficiently original to warrant protection.⁴

The plaintiff predictably cried foul and appealed to the Ninth Circuit, arguing that the jury’s verdict should be respected. However, the Ninth Circuit upheld the district court’s decision to overturn the jury, noting that jurors only get to determine whether two songs are subjectively (or “intrinsicly”) similar if the judge first deems the songs sufficiently objectively (or “extrinsicly”) similar, and crucially, that similarity must consist of copyrightable subject matter.⁵ The Ninth Circuit held that the district court had the right to conclude that, in retrospect, the plaintiff’s ostinato was categorically uncopyrightable, meaning that the extrinsic test was not satisfied and the jury had no role to play in deciding the case.⁶

The plaintiff’s primary theory of protection—that his ostinato was comprised of a protectable “selection and arrangement” of admittedly uncopyrightable elements—found

no purchase with the Ninth Circuit, which held that “an arrangement of individual elements lacks enough creativity to garner copyright protection [. . .] when that arrangement is ‘practically inevitable’ or in keeping with ‘an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course.’”⁷ Under this standard, the ostinato was found to “consist[] of a manifestly conventional arrangement of musical building blocks” that amounted to “nothing more than a two-note snippet of a descending minor scale, with some notes repeated,” such that protecting it “would essentially amount to allowing an improper monopoly over two-note pitch sequences or even the minor scale itself.”⁸

The import of the Ninth Circuit’s decision is primarily that the court continues to be influenced by the concerns of musicologists who argue that copyright law often fails to take into account the relatively limited raw materials available to composers (as opposed to other forms of media), and that the courts are often unduly deferential to plaintiffs’ expert witnesses in music cases due to unfamiliarity with music theory. The Ninth Circuit has responded to these concerns in *Gray* by providing detailed musicological guidance for district courts to more effectively gatekeep uncopyrightable subject matter from juries.

2. SCOTUS Takes Up Its First Artistic Fair Use Case in Three Decades (*Warhol v. Goldsmith*)

On March 28, 2022, 17 words from the Supreme Court set the copyright world on fire: “Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted.”⁹ This was in response to a petition by the Andy Warhol Foundation, which is facing a copyright infringement suit from photographer Lynn Goldsmith over using her photograph of music icon Prince to create a series of silk-screen prints without her knowledge. The district court had ruled the prints to be fair use of the photograph, and the Second Circuit’s reversal of that decision has now afforded the Supreme Court its first opportunity to consider the concept of “transformative” fair use for expressive media since the landmark 1994 decision of *Campbell v. Acuff-Rose Music* that first approved of the doctrine.¹⁰

The Second Circuit’s handling of “transformativeness” has aroused much skepticism since its 2013 decision in *Cariou v. Prince*, in which it found that appropriation artist Richard

Prince had sufficiently “transformed” the Rastafarian photographs of Patrick Cariou by making quantitatively minimalistic changes that it believed nevertheless qualitatively altered the nature of the works from “serene and deliberately composed” portraits to “crude and jarring works[.]”¹¹ The Seventh Circuit, for its part, went on record the following year as being “skeptical of *Cariou’s* approach, because asking exclusively whether something is ‘transformative’ not only replaces the list [of fair use factors to consider] in [17 U.S.C.] § 107 but also could override 17 U.S.C. § 106(2), which protects derivative works.”¹²

The Second Circuit acknowledged in *Warhol* that *Cariou* has been subject to criticism and took the opportunity to provide “clarification” that not every unauthorized derivative work with a different character, expression, or aesthetic than the original will be transformative as a matter of law.¹³ Rather, the test for transformativeness is whether the derivative work can “reasonably be perceived as embodying a distinct artistic purpose, one that conveys a new meaning or message separate from its source material,” which the court noted most often occurs with “distinct works of art that draw from numerous sources, rather than works that simply alter or recast a single work with a new aesthetic.”¹⁴

Here, the Second Circuit found that Warhol had essentially just created a “high-contrast screenprint” of Goldsmith’s photo that, while reflecting Warhol’s own signature artistic style, “retains the essential elements of its source material,” and “[w]hile the cumulative effect of Warhol’s alterations may change the Goldsmith Photograph in ways that give a different impression of its subject, the Goldsmith Photograph remains the recognizable foundation upon which the Prince Series is built.”¹⁵ The court analogized Warhol’s silkscreens to motion pictures that, while they may embody distinctive and expressive stylistic choices by their directors, are indisputably derivative of their underlying screenplays in a manner that the law would not deem “transformative” insofar as fair use is concerned.¹⁶

In some ways, this showdown at the Supreme Court over the evolution of transformativeness was inevitable. Many copyright practitioners have groused for years that defendants have abused *Campbell* to short-circuit fair use analyses, and *Warhol* was the Second Circuit’s attempt to assure detractors that its fair use framework was not so susceptible to abuse. The Supreme Court’s decision to accept cert is thus not merely a review of the Second Circuit’s current framework, but three decades’ worth of decisions applying *Campbell* to what is now a fundamentally different media landscape. Given fair use’s critical role as copyright law’s built-in First Amendment “safety valve,”¹⁷ expect this to be one of the entertainment industry’s most closely watched (and heavily amici’d) Supreme Court cases.

3. Comedians Seek to Enforce Streaming Rights (*In re Pandora Media, LLC Copyright Litigation*)

While the case law on copyright protections for jokes is relatively sparse, little dispute exists that they qualify as literary works when sufficiently expressive.¹⁸ However, the public performance of jokes by those who did not write or license them has historically been policed through social pressure rather than litigation, with one high-profile exception being the case filed against Conan O’Brien that ended in settlement.¹⁹ However, times are changing, and as comedians have become increasingly reliant upon streaming services for the consumption of their work (especially in the pandemic era), the lack of any compulsory or blanket licensing structure for literary works has caused some services to gamble.

Pandora, for its part, openly acknowledged to investors that while it was licensing comedy albums for its streaming service from the record labels that owned them, this only accounted for one level of copyright protection: the particular performances of the jokes embodied in the sound recordings.²⁰ The record labels could not grant Pandora any rights to the underlying jokes being performed because, just as musicians do not give record labels ownership of their compositions, comedians do not give record labels ownership of their routines. Therefore, Pandora was exploiting only half-licensed content, which it justified on the basis that “industry-wide custom and practice” was to ignore the other half.²¹

In early 2022, the other shoe finally dropped, when a slew of comedians and estates filed copyright infringement claims



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against Pandora for its failure to secure licenses to the literary works embodied in the comedians' recorded performances.²² The lawsuits, which were filed separately but have since been consolidated into a single action, invoke Pandora's investor disclosures in order to demonstrate that the company is a willful infringer and unlock a higher tier of statutory damages under § 504 of the Copyright Act, which allows the plaintiffs to be awarded up to \$150,000 per work infringed.

Unless Pandora has an ace up its sleeve, the merits of the comedians' claims appear to be fairly open and shut. Unfortunately, because the litigation has been brought on behalf of the named plaintiffs only, there is no telling what downstream benefits will be felt by other comedians whose work was exploited for years without compensation. This has catalyzed a renewed push within the comedy world to more effectively bargain for and enforce their members' rights, whether as a trade organization akin to the National Music Publishers' Association (NMPA) or a collective rights organization similar to The American Society of Composers, Authors, and Publishers (ASCAP) or Broadcast Music, Inc. (BMI).

For now, it remains to be seen whether Pandora will quickly settle with the comedians, string out the litigation for purposes of damages discovery, or attempt to test any of the claims' premises through motion practice. The broader take-away from this litigation is that historical assumptions about what is normative within the entertainment industry versus what is legal are being challenged with greater consistency, as economics continue to shift in the digital age. Dare we dream of a world where radio stations actually pay royalties for playing the recordings that keep their audiences tuned in?²³

Endnotes

1. *Williams v. Gaye*, 895 F.3d 1106 (9th Cir. 2018).
2. *Skidmore v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).
3. *Gray v. Hudson*, 28 F.4th 87 (9th Cir. 2022) ("Gray").
4. *Gray v. Perry*, No. 2:15-CV-05642-CAS-JCx, 2020 U.S. Dist. LEXIS 46313 (C.D. Cal. Mar. 16, 2020).
5. *Gray*, 28 F.4th at 96–97.
6. *Id.* at 102–03.
7. *Id.* at 101.
8. *Id.* at 101–02.
9. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 212 L.Ed.2d 402 (U.S. 2022).
10. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994). The Supreme Court decided its only other significant fair use decision since *Campbell*, 2021's *Google v. Oracle*, shortly after the Second Circuit's initial reversal in *Warhol*, but it concerned computer code rather than expressive media, which is why the Second Circuit accounted for it as intervening authority by merely issuing an amended opinion with a handful of citations added. *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 11 F.4th 26, 32 (2d Cir. 2021) ("*Warhol*").
11. *Cariou v. Prince*, 714 F.3d 694, 706 (2d Cir. 2013).
12. *Kienitz v. Sconnie Nation LLC*, 766 F.3d 756, 758 (7th Cir. 2014).
13. *Warhol*, 11 F.4th at 38.
14. *Id.* at 41.
15. *Id.* at 43.
16. *Id.* ("As Goldsmith notes, the fact that Martin Scorsese's recent film *The Irishman* is recognizably 'a Scorsese' 'do[es] not absolve [him] of the obligation to license the original book' on which it is based.").
17. *Tenn. Fabricating Co. v. Moultrie Mfg. Co.*, 421 F.2d 279, 283 (5th Cir. 1970); see also *S.A.R.L. Louis Feraud Int'l v. Viewfinder, Inc.*, 489 F.3d 474, 482 (2d Cir. 2007) ("absent extraordinary circumstances, 'the fair use doctrine encompasses all claims of first amendment in the copyright field.'") (quoting *Twin Peaks Prods., Inc. v. Publ'ns Int'l, Ltd.*, 996 F.2d 1366, 1378 (2d Cir. 1993)).
18. See, e.g., *Foxworthy v. Custom Tees*, 879 F. Supp. 1200, 1217–19 (N.D. Ga. 1995).
19. See *Kaseberg v. Conaco, LLC*, 360 F. Supp. 3d 1026 (S.D. Cal. 2018); Conan O'Brien, *Why I Decided to Settle a Lawsuit Over Alleged Joke Stealing*, *Variety* (May 9, 2019), <https://variety.com/2019/biz/news/conan-obrien-jokes-lawsuit-alex-kaseberg-settlement-1203210214>.
20. See, e.g., Pandora Media, Inc. FORM S-3 (Sep. 16, 2013), <https://www.sec.gov/Archives/edgar/data/1230276/000104746913009097/a2216690zs-3asr.htm>.
(In May 2011, we started streaming spoken word comedy content, for which the underlying literary works are not currently entitled to eligibility for licensing by any performing rights organization in the United States. While pursuant to industry-wide custom and practice this content is performed absent a specific license from any such performing rights organization, there can be no assurance that this will not change or that we will not otherwise become subject to additional licensing costs for spoken word comedy content imposed by performing rights organizations in the future or be subject to damages for copyright infringement.)
21. *Id.*
22. *In re Pandora Media, LLC Copyright Litigation*, Case No. 2:22-cv-00809-MCS-MAR (C.D. Cal.), Dkt. 19 (Consolidated Complaint for Copyright Infringement) ¶¶ 113–33.
23. See generally Sean M. Assad, *Harmonic Progressions to a Full Public Performance Right in Sound Recordings: Examining Recent Legislative Attempts That Could Rectify United States Noncompliance with TRIPS and a Possible Modulation of the Issue to Reach a Finale*, 18 *Wake Forest J. Bus. & Intell. Prop. L.* 109 (2017).

Practical Financial Planning

This is the first of what I hope will be many helpful articles related to improving your financial lives. While they will vary in size and scope, the goal is for them to be relevant, timely, and practical.

Following a 20-year career in arts administration, which included running Isaac Stern's family office and serving as production manager for Lincoln Center, I became a certified financial planner and investment advisor in 2008, just in time for the financial crisis. Talk about market timing! I love the entertainment, arts and sports industries, as well as the people who work in them—artists, entertainers, athletes, stagehands, presenters, managers, and, of course, attorneys. If you have specific topics you would like to see addressed in this column, please let me know. As you already know, nothing in my columns should be considered legal, tax or financial advice.

Getting Reimbursed for COVID-19 Related Funeral Expenses

By Jacques E. Boubli

"Wait, what?! That's what you chose to write about in your first column?" Read on, though, as this information is relevant, timely, and practical—and very important.

The last two years have been unlike any other we have known. The pandemic has affected everyone and our industries have been disproportionately hard hit. Many, if not all of us, have lost—or know people who have lost—family and friends to COVID-19. As of this writing, over 80 million cases have been identified in the United States alone. Cloris Leachman, Dawn Wells, Ellis Marsalis, Charley Pride, Arnie Robinson Jr., Tom Seaver, and Terrence McNally are just a handful of the roughly one million people who died in the U.S. from the pandemic. A GoFundMe page raised about \$1 million to support Nick Cordero's family and pay his medical and funeral expenses.

If you lost someone due to COVID-19 and paid for the funeral, there is a federally funded program that may reimburse you. This needs-blind funeral assistance program is being administered by FEMA under the Coronavirus Response and Relief Supplemental Appropriations Act of 2021 and the American Rescue Plan Act of 2021.

How To Apply

To qualify for a reimbursement of up to \$9,000, you must be a U.S. citizen (or non-citizen national or qualified alien) who since January 20, 2020, incurred funeral expenses (including funeral services, cremation, interment, casket, clergy or officiant services, and possibly travel) for an individual whose COVID-19-related death occurred in the United States (or its territories or the District of Columbia).

The person who incurred the funeral expenses would need to call FEMA's Funeral Assistance Hotline, at (844) 684-6333, to apply for reimbursement. Funeral homes cannot apply on your behalf, and you cannot apply online. The hotline representative may ask for your income level, which you do not have to provide, as this is only for recordkeeping purposes.

The call should last about 20 minutes. During the call, the applicant will need to provide:

- Social Security numbers for the applicant and the deceased individual,
- dates of birth for the applicant and the deceased individual,
- the current mailing address for the applicant,
- the current telephone number for the applicant,
- the location or address where the individual died,
- information about burial or funeral insurance policies,
- information about other funeral assistance received, such as donations, CARES Act grants, and assistance from voluntary organizations, and
- optional information, such as the routing and account number of the applicant's checking or savings account for direct deposit.



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It is important that the applicant *never* provides this information in response to an unsolicited call or email purportedly from FEMA or anyone else.

Following the call, the applicant will need to submit:

- The death certificate;
- proof that the death was either directly or indirectly related to COVID-19. This proof will be included on death certificates on or after May 17, 2020—earlier death certificates will also require a coroner or medical examiner’s signed statement;
- receipts for covered expenses, and

- proof of funds received from other sources designed to cover funeral costs (to avoid reimbursement duplication).

For more information, visit FEMA’s COVID-19 Funeral Assistance page at: <https://www.fema.gov/disaster/coronavirus/economic/funeral-assistance>. There are helpful FAQs and other resources at the bottom of the FEMA page.

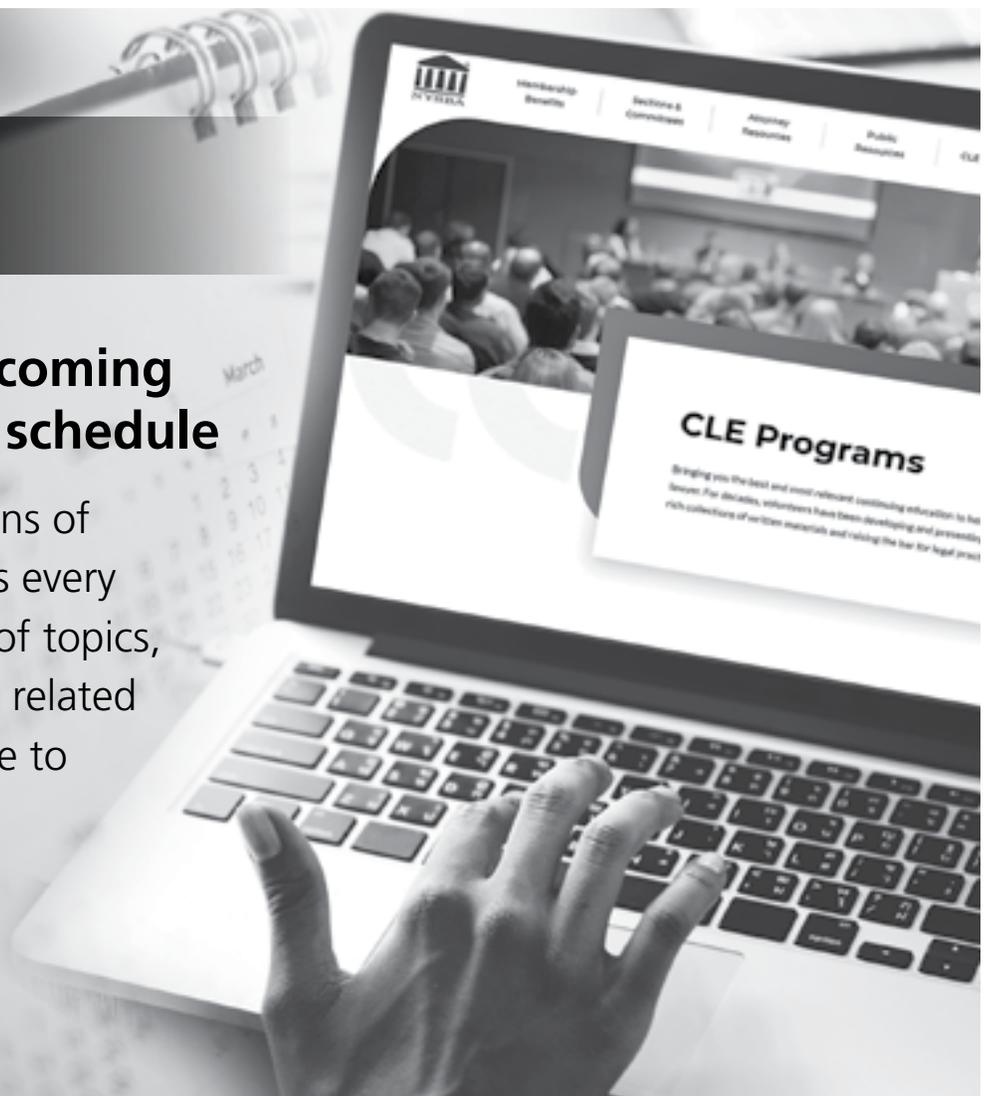
Unfortunately, this issue hits very close to home for many. The intent behind this program is clear and I encourage those who qualify to take advantage of it.



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And the Award for Best Rehabilitated Reputation, Goes to . . .

By Amber Melville-Brown



When your reputation is between a Rock and a hard place

Unless you have been hiding under a (Chris) Rock, chances are you have heard about this year's Oscars debacle.

Some actors stride onto the Academy's famous stage more than once, fortunate enough to pick up multiple awards. At the 94th Academy Awards in March 2022, actor Will Smith advanced twice—but the first time around, to give and not to receive. His second sortie was to collect the best actor award for his role in *King Richard*, depicting the father of tennis stars Serena and Venus Williams. Yet he had already prematurely—and shockingly—advanced onto the platform to give host Chris Rock a hefty slap in the face, in the face of the comedian's joke about the actors' wife Jada Pinkett Smith's shaven head.

No joke, the slap was for real—and the Oscars have been reeling ever since. Rock suffered the shock and indignity of a physical assault. The Academy endured an insult to the awards, followed by criticism for its handling of the affair. And Smith? An initial slap on the wrist with the Academy's short statement that it “does not condone violence of any form” was followed by a more robust 10-year ban from attending the awards ceremony and the instigation of formal disciplinary proceedings.

Accepting and respecting the Academy's initial rebuke, Smith resigned from the Academy. He has also been met with public indignation at his actions. That his actor wife suffers from alopecia made the joke somewhat close to home, perhaps. Still, a negative reaction to words spoken in jest should not justify resorting to physical violence. If the pen is mightier than the sword, Smith's impulsive action has re-

ignited a debate that we may have thought was long over in a civilized society—but one which should conclude that the jest is mightier than the fist.

How do incidents of this nature impact the reputations of the key players? What lessons should Smith learn from those who have trod the stage of scandal before him? What does this much-talked-of incident and its aftermath tell us about the fragility, not of egos, but of reputations?

The fragility of reputation

Benjamin Franklin wrote, “Glass, china and reputation are easily cracked and never well-mended.” Smith has assuredly dented his own brand by his own hand, although it is fair to say that in the aftermath of the activities some applauded the actor, seeing him not as an aggressor, but a gallant husband riding into battle to save a damsel (albeit not very obviously) in distress.¹

Entering the fray on such a fraught topic can be a reputational minefield in itself, where choosing the “wrong” side of the argument can damage the reputations of those who publicly speak out in defense of an action that they consider acceptable, when the tide of public opinion may be moving the other way. On the other hand, while celebrities weigh-in, or muscle in, for their own slice of the commentary pie, not engaging in the talk of the town may itself impact an individual’s reputation. Fellow actor Daniel Radcliffe, “dramatically bored”² with the whole affair, hid his opinions—whatever they might be—behind a Harry Potter-esque invisible cloak. He may be applauded for doing so.

Many hours have been spent analyzing “Slap-gate,” musing over the motivation, pondering over the apology, wondering what is next, and considering, can Smith be rehabilitated from his self-inflicted reputation wounds?

To sue or not to sue

No legal action has resulted from the verbal and physical attack—Rock declined to press charges.³ Smith’s apology to the Academy and his fellow nominees on the night—during his speech to collect his Best Actor Award—may have been cold comfort to his victim. Perhaps Rock was satisfied with the apology Smith gave—via social media, to his followers, and Rock—a day later. Or perhaps he was aware of the reputational harm that can result from any high-profile legal action, to the winner or the loser.

There is a contemporaneous precedent of sorts being created currently in the courts by Johnny Depp. He brought legal proceedings in the courts of England and Wales seeking to remedy a reputation damaged by allegations, published in the British tabloid *The Sun*, over allegations that he was violent to his now former wife Amber Heard within their marriage,

and that he was, therefore, a “wife-beater.” Yet the action to mend his reputation was bent to breaking point throughout the sensational legal proceedings until, in November 2020, it snapped entirely, with Depp losing the action. It is true that neither he nor *The Sun*’s star witness, Heard, exited the trial covered in glory, with both suffering very palpable hits to their own professional and personal reputations, as each of them struck out and struck back during the London litigation. However, as the loser in that first bout, Depp’s reputational wounds were deep.

On news of his libel loss, Depp issued a statement that his “life and career will not be defined by this moment in time.” Seeking a new reputation definition, he brought separate libel proceedings, this time against his former wife personally, litigating over similar allegations in her op-ed in the *Washington Post*, which he argued identifies and defamed him.⁴ With a phalanx of celebrity witnesses who testified, and the action streamed live on Court TV, the Virginia case was as bloody as the English case that preceded it. The Virginia jury gave its verdict largely in favor of Depp.⁵

To sue or not to sue—Amber warning

- Depp assuredly hoped to snatch sweet victory from the jaws of his bitter London defeat in seeking a second bite of the reputation remedy cherry there. However, choosing a court of law to secure rehabilitation in the court of public opinion is a high-stakes game. Depp lost round one, so round two perhaps seemed the lesser of two evils. Yet any individual looking to remedy a reputation damaged either by their own actions, as with Smith, or by the words and actions of others, should think carefully before rushing for the writ⁶ or charging in with a complaint.

Does my brand look big in this?

Some brands are too big to fail and “The brand of Will,” with his big personality, significant box-office returns,⁷ longevity—he has been in the biz since 1984⁸—sizable bank balance,⁹ and impressive following,¹⁰ is big. Can he then survive a “little” slap?

As with the value of shares, the value of brands can go up as well as down. Controversy can bring a celebrity even more publicity, which, even if negative, need not devalue them overall. This Journal has already discussed that Britney Spears can do no wrong in the eyes of her fans, even if she goes off the rails in a big way,¹¹ and that while “Bad” served both as an album title for Pop Prince Michael Jackson and for accusations concerning his private life, the public still loves his music.¹²

As a young actor, award-winner Angelina Jolie caused her own ceremony controversy when she received a Best Sup-

porting Actor award for *Girl, Interrupted*. The applause of the Oscar audience was somewhat interrupted by sharp intakes of breath as she and lookie-likie brother Haven exchanged what appeared to be a passionate, more-than-fraternal kiss on stage. Some commented that it must have been a publicity stunt (indeed, as some initially believed that the Smith-Rock interaction was more publicity-seeking than pain-giving). Yet context is everything, and reports are that the siblings' embrace followed a visit to the hospital as their mother underwent treatment for cancer. Shocking maybe, but understandable, certainly. Many years on, Jolie was still causing controversy, engaging in an acrimonious, destructive divorce dance with former husband Brad Pitt after their very public falling out of love in 2016. However, boasting Instagram fanbases of two million and almost 900,000 respectively, the brands of the former "Brangelina" are big enough to meet controversy, and win.

The Oscars were a little unkind to actor Rob Lowe who in 1989 suffered what has gone down in Hollywood history as award-ceremony infamy as he struggled manfully—alongside his fellow stage-sufferer Eileen Bowman—to maintain his onstage dignity in the Snow White-themed musical opening. *The New York Times* review opined that it would achieve "a permanent place in the annals of Oscar embarrassments."¹³ However, months later, Lowe may have been longing for that little reputational bump as he suffered a brand-bruising car-crash in the form of a leaked audio sex-tape featuring his encounter with two young women, one only 16 years old. Lowe went from sex-tape persona non-grata in 1988 to—wait for it—14th sexiest man in Santa Barbara County in 2018, according to a self-effacing post on his Twitter account.¹⁴ He also became sober, grounded, married, had kids, and gained respect.

Does my brand look big in this?—Amber warning

How we deal with a reputation malfunction can impact whether we sink or swim. On the one hand, Lowe owned his mistake, jettisoning himself out of the darkness of reputation ruin and into the sunlight of rehabilitation. In talking about his memoir, *Lowe*, in 2019, he told Sirius XM, "Any time you're doing a memoir, a book, a show about your life job one is authenticity and full transparency."¹⁵ However, you cannot please all of the people all of the time, and how you speak about your own Eureka moment can backfire. It was "the best thing that ever happened to me," said Lowe of the incident that turned his life around, giving some to complain that he was making very light of a very serious matter.¹⁶ Speaking publicly about former reputation fails can be a way to reinforce the bonds between us and our support network. Yet no matter how genuine, the content, tone, and delivery of those

messages need care if we are to avoid alienating those who might otherwise help to restore our reputation.

Sorry not sorry

If we consider and understand the harm we have done to others, an apology may be just what the doctor ordered for a reputation remedy. Taking swift steps to express real regret can turn the tide of respect in your favor. The speed, manner and tone of any apology may dictate whether you keep your head above the water or drown in a sea of negative noise.

Smith's apology to Rock came late in the day—indeed, not on the day at all, but on the Monday following the ceremony, only after he had collected his own award, apologized to others, attended the after-party and presumably had a good—or a bad—night's sleep on it.

Chris Rock is largely seen to have behaved with dignity in the immediate fallout of the event and the furor thereafter—although his own reputation has not come out squeaky clean, with many criticizing him for an insensitive joke about a medical condition.¹⁷ When a presumably well-meaning but foul-mouthed heckler at one of Rock's comedy shows in the aftermath of "slap-gate" dropped the F-bomb, shouting "F*** Will Smith" from the audience, Rock turned the other cheek. Sensibly sensing, one suspects, the potential for more reputation fallout if he picked up the gauntlet and got scrappy himself, he rather calmed the situation and went on with the job of telling jokes.¹⁸

Responding in kind to one's attacker may appear justified, but it may not be kind to your own reputation. We have all heard the phrase, "don't lower yourself to their level" and taking the high moral high-ground may keep a victim from falling victim to the same reputational fallout that their attacker has caused themselves. Jada Pinkett Smith's public response to the incident, via Instagram, was muted both in color, posted on a pale pink background, and in tone: "This is a season for healing and I'm here for it."¹⁹ Her husband's apology²⁰ however, delivered via Instagram to his 64.3 million followers—and Chris Rock—was written in stark white on a black background. Somewhat ironically and incongruously it was posted on his account immediately after, and thus on some views right next to, a sneering image of himself with his wife, a still taken from a video and series of clips before the awards ceremony, with the caption, "got all dressed up to choose chaos."²¹

Sorry not sorry—Amber warning

- Only Smith knows if his apology was genuine. There are certainly some—Rock's brother, for example—who consider it not to be.²² When choosing to apologize, the best reputation redemption will arise from a swift and unfeigned expression, one that does not lend it-

self to courting controversy, which does not wallow in self-pity or is self-serving and attention-grabbing. Protestations of remorse dispensed more for reputational gain than to stem the pain will be seen through by a discerning public. An authentic apology is preferable to a defensive apologia.

Never complain, but maybe explain?

More than a decade ago, the *New York Post* somewhat incredulously reported on “Winona’s lame excuse” for shoplifting. It reported that “a source close to the investigation told The Post” that the “five-finger discount,” which saw actor Winona Ryder leaving a Beverley Hills store without troubling her credit card, “was really just research for an upcoming movie role.”²³ Despite the actor’s actual defense that she believed that the store would keep her account “open,”²⁴ she was convicted for shoplifting and thereafter took a voluntary break from acting. Ryder later played down the conviction, which “wasn’t like the crime of the century,”²⁵ but provided something of an explanation that it gave her the opportunity to take a break from acting.²⁶

Actor Mel Gibson quite rightly drew opprobrium for his use of sexist and anti-Semitic language during a DUI arrest. Adding insult to injury, his insults and threats of injury to his then-girlfriend were caught on audiotape. Gibson’s name was mud, but as reported in the *Los Angeles Times*,²⁷ the reputation of the iconic actor was later raised from the dead like a scene from his equally controversial movie, *The Passion of the Christ*.²⁸ He explained—not blamed—his downfall on his divorce and drink.

Both actors explained rather than complained. Both have managed reputation rehabilitation. Do we equate Gibson with the eponymous Mad Max, rooting for the actor as we do for the character? Do we empathize with the angst-ridden mom, desperate to find her lost child, from the Netflix cult hit, *Stranger Things*?²⁹ Do we therefore forgive those who inhabit the roles that we love for the actions we otherwise abhor? We love an anti-hero because our fallen idols remind us of ourselves—with feet of clay. Stranger things happen than reputation rehab after a criminal conviction or a meltdown;

and both Gibson and Ryder have managed to ride the storm of controversy, despite their own actions turning their reputations, and their worlds, upside down.

Never complain, but maybe explain?—Amber warning

- Chest-beating to beat the wrap of a self-inflicted crisis is not the way to redemption. Complaining “It’s not my fault” will relegate us to the status of screaming toddlers or self-satisfied egotists. The mantra employed by the older members of the British royal family—never complain, never explain—can be edited for reputation remedy. An apology may not always be warranted, possible or attractive—but an explanation may be an alternative. Expressing regret and offering up an elucidation for our behavior may be a half-way house to bring our good name home.

Silence is not always golden

Prince Andrew dealt with accusations about an alleged sexual assault on an underage girl rather differently than did actor Lowe—and unlike Lowe, we likely will not see a memoir from him anytime soon. The Duke of York has consistently and unequivocally denied the accusations made by Virginia Giuffre, which resulted in legal proceedings against him in New York.³⁰ While as attorneys we understand that a defendant is entitled to advance his best defense and run his case as he chooses or as he is advised (although we would hope that the two were consistent), the appearance of obfuscation and refusal to engage in the legal suit in Prince Andrew’s case had the whiff of disrespect to the court, as well as to his accuser, no matter its propriety and legality.

From his ill-advised interview with the BBC, in which he advanced that he could not be guilty, as he did not sweat and because he was having pizza with his daughters;³¹ to his well-publicized attempts to have the legal case thrown out on “legal technicalities,” including for want of service;³² to his attempted reliance on a settlement agreement with the disgraced Jeffrey Epstein;³³ the optics were not good. Some words of regret proffered in the settlement agreement for the suffering of his accuser³⁴—albeit understandably no admission of liability—might provide a foot in the door for reputation remedy. However, the real reputation protector is somewhere a little closer to home (read on).

Silence is not always golden—Amber warning

- Where court proceedings are underway, threatened or anticipated, loose lips may sink litigation as well as reputations. Even if a public statement is a possibility, a no-holds-barred memoir certainly seems the unlikely approach. Preparing appropriately worded statements in advance for the occasion when they may be issued,



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and being alive to the opportunity publicly to explain, apologize or enter the discussion, can be a preferred approach to sticking one's head in the sand and hoping that the negative noise will go away. It will not—but if we do not engage, we may allow others to fill the space with their own, partial or inaccurate view, until myth becomes a reality, and fake news becomes the truth.

Who is on your team?

Whether from family, friends, colleagues or client base, having support from those in high places, or from any place where they will visibly and vocally provide endorsement in the aftermath of a crisis, can stop a reputation from sinking.

Prince Andrew will undoubtedly have done himself some favors by settling the Giuffre case and expressing words of regret, but his best hope for redemption is the love of a mother. A super-fan that any celeb would likely aspire to have on their team, his mother is Her Majesty Queen Elizabeth II. She has very powerfully shown her support for her son by inviting him to escort her down the aisle of Westminster Abbey for the televised broadcast of the memorial service for Prince Philip during her Platinum Jubilee year.³⁵ “A mother's love knows no bounds,” indeed. A public endorsement from a respected individual can pay off, rubbing onto an otherwise tarnished name some of the supporter's guilt edges.

Support can come in institutional form, too. Depp may have been sacked from various roles over his “wife-beater” libel loss, but the “wild man” has retained his endorsement for Christian Dior's men's scent, “Savage.” His former girlfriend, British supermodel Kate Moss, similarly faced scandal during her modelling career. Some brands dropped her,³⁶ but she continued as the “face” of others—and she, and they, rode the reputational storm and not only survived but thrived.³⁷

Actor Robert Downey, Jr.'s trajectory from a shining star at the beginning of the century was down, down, down—and it was down to the demon drink. However, he had an unexpected ally on his side in fellow fallen star Gibson, who served as an angel for Downey when all hope seemed lost. Reportedly³⁸ offering up the essential insurance bond demanded by nervous producers and insurance companies enabled Downey to land the lead role in *The Singing Detective* and to turn his career back from base metal to gold, in *Iron Man*.

As lawyers, we are not strangers to controversy. We may face accusations regarding delay or neglect; we may receive complaints over fees; we may be criticized or sued over our advice. Like our celebrity pals, we too, need a full tank of professional love and affection to see us through, a safety net of support, should we fall from our professional pedestals. With a bank of respected referees—clients, former clients, colleagues, write-ups in professional directories—attesting to our

attributes in the event that we have a slip and trip moment, we may find ourselves with similar reputational-protecting weapons in our armory as does Spears within her Army.

Who is on your team?—Amber warning

- We can all, to a certain extent, seek to future-proof our reputations against incidents and accidents—self-inflicted or otherwise. Like our idols, those of us in professions, trades or business can generate a phalanx of loyal and supportive fans, and we must not be too proud to accept a helping hand from them should that be offered or to ask for it if it is not. Spears has her loyal Army, Jackson his Moonwalkers, and Depp his Deppheads. Will the Fresh Prince Will Smith be able to count on a fan base to carry him through this brand-bruising time? If we are reminded to keep our friends close and our enemies closer, when it comes to reputation remediation, we should ask our friends to step up in times of need.

Rehab—I say yes, yes, yes

If Smith asks those loyal to him, “Will you still love me tomorrow?” they may well answer yes, despite his serious lapse of judgment. The public and the Academy might also fall back in love with him too.

Respected actors Susan Sarandon, Tim Robbins, and Richard Gere were all banned from the Oscars's stage in 1993—not for assault, but for choosing words as their weapons and politicizing their acceptance speeches, while seeking support for HIV-positive Haitians on the part of Sarandon and Robbins,³⁹ with Gere raising issues of China's treatment of Tibetans. When Sarandon and Robbins won Oscars in 1995⁴⁰ and 2004⁴¹ respectively, they were welcomed with open Academy arms, as was Gere as he presented an award in 2013.⁴² All appear to have served their time in Academy purgatory and are still personae gratae with the public.

Our idols have hidden or apparent flaws—and to a certain extent that is why we love them, because we do too. It is entirely consistent with the “feel-good” mantra of “capable of anything”⁴³ to know that a hero one day, zero the next, can bounce back to hero with support. The bigger the fall, the bigger the climb back to the top, and the better we love our fallen heroes—because if they can do it, so can we.

We all make mistakes, lose our cool in the heat of the moment, or simply take actions of which others disapprove. If our reputation suffers, it may not easily be fixed, but it can be mended. With the right approach, despite a significant reputation malfunction, we can rehabilitate, if we take the right steps, and have the Will to do so.

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Family Ties: Divided Loyalties in Horse Racing and Other Sports

By Bennett Liebman



Introduction

In 2021, the New York State Legislature passed a bill concerning the issue of the coupling of horses in thoroughbred racing. Coupled horses in horse racing are individual horses that are joined together as a single entry for wagering purposes. Under that bill, in a race where a jockey has close familial ties with another potential competitor in the race, the horses with such familial ties would no longer be coupled in the wagering. Traditionally, when there is a potential for divided loyalty among the participants in a race, horses are coupled in the wagering. A wager on either horse is treated as a bet on both horses. Thus, traditionally where horses were owned and/or trained by the same person, they were often coupled as an entry.¹ Entering 2022, New York rules on thoroughbred racing require coupled entries where a jockey is competing against close relations, including a “spouse, parent, issue or member of a jockey’s household.”²

In 2021, there were numerous complaints that the spousal jockey coupling rule was unfairly impacting the employability of married jockeys Trevor McCarthy and Katie Davis McCarthy. The McCarthys had married in December of 2020

and moved from Maryland to New York to continue riding. In New York, they found that if they rode against each other in a race, their horses were required to be coupled.³

Before the late 20th century, coupling of horses might not have been considered a significant issue. However, the race-track industry has believed that actions reducing the number of betting entries in a race also limit fan wagering interest in that race. That belief—accompanied by a decrease in the number of horses starting in races⁴—has encouraged race-tracks to try to avoid the usage of coupled entries.⁵ While Trevor McCarthy was able to obtain rides in New York, it was much harder for Katie Davis McCarthy to find rides. She ended up riding in Maryland starting in the spring of 2021. She discontinued riding after becoming pregnant, and the McCarthys had a child in December of 2021.

Attempts to have the State Gaming Commission amend the rule to permit riders to compete against each other without requiring a coupled entry were initially unsuccessful. Instead, legislation was introduced that would end the rule requiring the coupling of horses where a jockey had familial ties with other competitors in the race. That legislation⁶ proposed

to simply overrule Gaming Commission rule 9 N.Y.C.R.R. § 4025.10.(f).⁷ The sponsors of the legislation stated that:

The Gaming Commission's regulation does not impact the husband's value in New York—he gets plenty of races. In contrast, she has not, despite coming into this season off two strong years in Maryland. This rule is sexist and out-dated [sic].⁸

The legislation passed both houses of the Legislature unanimously. It obviated the Gaming Commission rule by stating that “notwithstanding any law, rule or regulation to the contrary, all horses trained or ridden by a spouse, parent, issue or member of a jockey's household shall not be coupled in the betting with any horse ridden by such jockey.”⁹ The bill also required the racetrack operator to inform the public about the familial ties between the racing participants.¹⁰

The bill, however, was vetoed by Governor Hochul.¹¹ She found that the existing regulation had a neutral, rather than a gendered, basis, and that it was “intended to enhance the wagering public's confidence in the integrity of a race. Coupling of entries does not prevent related parties from participating in a race; rather, coupling of entries merely aggregates those related parties into a single betting interest in the race.”¹² Nonetheless, the governor directed the Gaming Commission to review the issue of “mandatory coupling and the circumstances under which such a requirement might be relaxed, and to seek input from industry stakeholders and the wagering public regarding this topic.”¹³

The Gaming Commission, acting on Governor Hochul's recommendation, held a hearing on January 11, 2022 about “conflicts in sports events upon which wagering occurs.”¹⁴ The topic of the Gaming Commission's concern goes significantly beyond the topic of coupling of entries in thoroughbred racing and looks broadly to the issue of how to handle personal conflicts of interests by participants in all sports, at a time when nearly all sports can be the subject of wagering in New York State. Based on the testimony at the hearing, the Gaming Commission at its February 28, 2022 meeting gave preliminary approval to ending the spousal jockey coupling rule.¹⁵

The purpose of this article is to provide a background on the issue of divided loyalty among sports participants, focusing on how the issue has arisen in horse racing and other sports competitions.

The Broader Issue: What To Do About Divided Loyalty?

Conflicts of interests due to familial, personal, and business ties arise in all sports competitions. What actions should sports governing bodies, state regulatory authorities, gam-

bling regulatory authorities (where applicable), and/or legislatures take to resolve these conflicts? Broadly speaking, the issues and traditional approaches for horse racing have included:

1. Who should regulate the conflict-of-interest issue? Should it be regulated by the operator of the sport¹⁶ itself or by another organization (generally a governmental body), which regulates the gambling and/or the licensing of the sport? By tradition, in horse racing, the government agency that regulates horse racing (generally categorized as a state racing commission) will regulate the conflict-of-interest issues. The racing commission not only regulates the participants of the sport, but also the gambling on the sport. Additionally, the gambling on horse racing is pari-mutuel, where the participants wager against each other. In the absence of participants wagering against the house—as in most casino games—there is even more reason for the government to regulate the conflict-of-interest potential in horse racing. Very rarely—except for the 2021 attempt to prescribe a spousal jockey competitor rule—would the state Legislature venture into establishing specific rules governing horse racing conflicts.
2. Once a determination is made that a conflict of interest exists in horse racing, what should the racing commission do about it? In the spousal jockey competitors' issue, should it simply ban the spouses from riding against each other? Would it regulate the conflict of interest by coupling the spousal participants as a single entry, like 9 N.Y.C.R.R. § 4025.10.(f)? Should conflicted participants be allowed to compete against each other without any coupling, but notify the public of the potential conflict?
3. Should no action be taken regarding the conflict and simply let the conflicted competitors compete against each other, thereby instituting a *laissez faire* of “let the bettor beware” policy for conflicts?¹⁷ The fact is that horse racing authorities have been tremendously inconsistent about potential conflicts. The rules and approaches differ among jurisdictions, and individual jurisdictions treat similar conflicts incongruently.

The Jockey Divided Loyalty Issues

Female jockeys were first licensed in the United States in Florida in 1969.¹⁸ New York State soon licensed them, and on June 5, 1969, Mary Bacon became the first female rider to win a race at New York's Finger Lakes Racetrack.¹⁹ She quickly became one of the most famous early female riders,²⁰ and was the first to record 100 victories.²¹



Bacon was also married to jockey Johnny Bacon. Initially, when female jockeys were first licensed in the United States, they were unable to ride in races against their jockey-spouses.²² Both Bacons rode at Finger Lakes starting in 1969 and were treated as one entity. Stewards and racetracks across the country ruled that they could not testify or claim foul against each other. A suspension of one of the riders also required the suspension of the rider's spouse.²³ The rules governing jockeys who were spouses allegedly forced the divorce of the Bacons in 1972.²⁴

In New York State, there were no rule provisions on family divided interest questions until 1985. As previously mentioned, jockeys who were spouses could not ride against each other. In that year, the Racing and Wagering Board promulgated rule § 4025.10(f), which has remained unchanged since that date.²⁵ Rather than banning a jockey with family ties from participating in races, it forced coupling of all horses where a jockey had a familial tie to other participants in the race. The subject of the rule, according to the regulatory impact statement filed by the Racing and Wagering Board, was to "restrict the participation in racing of members of a jockey's household."²⁶ The goal of the rule was "to insure integrity and the appearance thereof in thoroughbred races upon which pari-mutuel betting is conducted."²⁷

In the years since 1985, that rule has rarely been invoked in New York. There were instances in the 1990s where the stewards threatened to force coupling of horses if a jockey, who was cohabiting with a trainer, rode a horse that competed against the trainer's horse.²⁸ These forced couplings never came into fruition. The rule largely was not cited until the McCarthy family moved to New York in 2021.

The general issue did arise in Massachusetts in 1998, when the stewards at Suffolk Downs sought to prevent married jockeys Harry Vega and Amy Duross from riding against each other. The couple appealed to the Massachusetts Racing Commission, which permitted them to compete against each other.²⁹ However, the commission agreed with the stewards that a jockey should not compete in a race against a horse trained by the spouse of the jockey.³⁰ Thus, they approved of the spousal competition where both spouses were jockeys and disapproved it where one spouse was a jockey and the other was a trainer.

The same issue might have arisen in California in the years that jockeys Chantal Sutherland and Mike Smith were living together and dating for many years, but it does not even seem that coupling was ever considered an option by the California Horse Racing Board.³¹

In the case of father Charles “C.C.” Lopez and his son Erik, it appears that a father and son jockey were able to compete against each other at Aqueduct Racetrack in 2009 without being coupled. Erik won the ninth race on January 14, 2009, and his father finished second, to complete a \$26.80 exacta. In 2015, C.C. competed in a race at Golden Gate Fields against both his son Erik and his other son, David. David finished second in the race, Erik third and C.C. fourth.³² The horses ridden by the Lopez family ran uncoupled.³³

There are a series of other jurisdictions that have their own rules governing jockey spousal competitions. Most address the trainer/jockey spousal issue. The model rule of the Association of Racing Commissioners International (ARCI), which is the non-profit umbrella organization of all the states’ racing commissions, provides in a rule that is stricter than New York’s rule on the subject that “a jockey shall not compete in any race against a horse which is trained by the jockey’s spouse.”³⁴ Other states have adopted versions of the model rule.³⁵ Arizona has a rule more akin to that of New York’s, under which a “jockey shall not ride against a horse trained by the jockey’s spouse except as part of an entry.”³⁶ Illinois goes further to state that: “Jockeys married to owners or trainers may not ride against the spouse’s horse, whether or not the spouse holds any ownership interest in said horse.”³⁷

In California, using the general rule against conflicts of interests,³⁸ the stewards have required that a married jockey cannot participate in a race against a horse trained by the jockey’s spouse.³⁹ That rule allegedly helped to cause the divorce of trainer Laura Pinelli and jockey Joe Meier, who continued to live together.⁴⁰ At the same time, the California stewards allowed jockey Gary Stevens to ride horses against his father Ron and allowed jockey Corey Nakatani to ride horses against horses trained by his father-in-law.⁴¹ Nakatani, however, was not permitted to ride against horses trained by his wife.⁴²

The jockey spousal conflict is hardly the only divided interest issue at the racetrack for jockeys. Hall of Fame jockey Cash Asmussen started riding as an apprentice at Sunland Park at age 16 in 1978, principally riding for horses trained by his mother Marilyn. At the time, he was certainly part of his parents’ household. As a minor who is part of his parents’ household, could he ride horses against ones trained by his mother? If Cash rode a horse competing against a horse trained by his mother, should they both be coupled? Do the answers change when Cash is no longer a minor?⁴³ Under New York rules, if Cash, as an adult, rode against a horse trained by his mother, then their horses under 9 N.Y.C.R.R. § 4025.10.(f).⁴⁴ would need to be coupled, but if Cash ran against a horse trained by his Hall of Fame brother Steve Asmussen, there would be no requirement for a coupling.

Throughout much of the 1970s prominent thoroughbred owner Alfred Gwynne Vanderbilt⁴⁵ (who, for a number of years, was the chairman of the New York Racing Association) was regularly accompanied by jockey Robyn Smith. Vanderbilt was even referred to as hustling mounts for Smith, serving as her unofficial agent.⁴⁶ Should horses ridden by Smith have been coupled in the wagering with horses owned by Vanderbilt?

The potential extent for divided interest by jockeys in horse racing can be demonstrated through the career of Angel Cordero, who was New York’s most prominent rider for two decades, from the early 1970s through the early 1990s. In 1974, Cordero won the Kentucky Derby with Cannonade. After the race Cordero disclosed that he had a fee sharing agreement with two other jockeys. If one of the jockeys won the race, they shared the fee with the other two. No wrongdoing was found, but does that not present a conflict of interest among the riders?⁴⁷ If Cannonade had fouled a horse ridden by one of the fee-sharing riders, would that rider have claimed a foul against Cannonade?

In the 1978 Travers Stakes, Cordero on the longshot Shake Shake Shake, opened up the rail on the backstretch for his friend Jorge Velasquez, who was riding Alydar. Alydar surged to the lead only to be fouled by Affirmed, ridden by Laffit Pincay, who seemed surprised to see Alydar inside of him along the rail. Affirmed’s trainer Lazaro Barrera claimed that Pincay had been set up by Cordero. He said, “Cordero took my horse out to leave the rail for Alydar.”⁴⁸ While no actions were taken against Cordero, the question will always arise as to whether he purposefully helped his friend and to what extent jockeys regularly assist their friends when they do not believe that their own horses can achieve a contending position.

In the early 1980s, apprentice jockeys like Harry Vega and Lauren Ayoub lived at the Cordero home.⁴⁹ Would they have ridden hard against Cordero? Would they have claimed foul against him? If Cordero needed room to maneuver his horse into a contending position, would they have assisted him? It has also been suggested that in order to entice Cordero to ride for them, trainers, at the suggestion of Cordero’s agent, would ride Cordero’s friends and household guests who were riding in New York.⁵⁰ Should the horses ridden by these riders be coupled with Cordero’s horse?

There are many divided loyalty claims that involve jockey agents. Approximately 30 years ago, the State Racing and Wagering Board steward at Finger Lakes, Dr. Joseph C. O’Dea, made a proposal to the board.⁵¹ O’Dea proposed that all horses where the riders shared the same agent be coupled in the wagering. O’Dea believed that jockey agents exercised too much power at Finger Lakes, and riders represented by these agents would not ride with full effort against each other.

The board's investigative staff agreed, but the higher-ups at the board thought that it was excessive and did not act on the recommendation.

Given the myriad possible conflicts between multiple riders being represented by a single agent, the states have enacted a slew of differing regulations trying to address the potential problems. Some jurisdictions have allowed agents to have two riders,⁵² while others have allowed three,⁵³ and some allow one journeyman and one apprentice.⁵⁴ New York has no rule on the maximum number of riders per agent. Clearly, the variations among the states should indicate that nobody is sure how best to proceed. Will an apprentice rider give a full effort against a competing horse where the horse's rider is represented by the same agent as the apprentice? Will a rider of an offended horse be less likely to claim foul against a horse when that arguably offending horse is ridden by a rider with the same agent as the first rider? Similarly, will the rider of an offended horse be less likely to give derogatory testimony against an offending horse ridden by a rider with the same agent as the first rider?

Trainer Divided Loyalty Issues

Trainers with familial ties might, in theory, present the same issues as jockeys with divided loyalty issues. Yet these divided loyalty issues are not addressed by 9 N.Y.C.R.R. § 4025.10.(f)., which posits the requirement that one of the parties with divided loyalty is a jockey. What would happen, then, where one trainer runs a horse that competes with a horse trained by a "spouse, parent, issue or member" of that trainer's household? Numerous trainers have competed against their immediate family members without any coupling. In the 1980s, New York racing had trainer Sue Sedlacek, her husband Woody, and their sons Roy and Mike.⁵⁵ All competed without couplings. Without couplings, Hall of Fame trainer Frank Martin competed against his son Jose, and they both competed against Jose's son Greg. There have always been trainer groupings of parent and child, including the Hirsch,⁵⁶ Jerkens,⁵⁷ Birch,⁵⁸ Laurin,⁵⁹ Dollase⁶⁰ and Mandella⁶¹ families. These parent/child competitions did not require couplings.

With all the concerns about family connections, it should be noted that racing does not couple sibling competitors. Accordingly, Hall of Fame trainer Lazaro Barrera had four brothers who trained horses.⁶² Other families with sibling trainers including the Stute,⁶³ Jacobs,⁶⁴ and Kelly⁶⁵ families. Top jockey sibling competitors—who again have not been coupled—include the current Ortiz brothers,⁶⁶ the Bazes,⁶⁷ the Parkes,⁶⁸ the Renicks,⁶⁹ the Maples,⁷⁰ and the Turcottes.⁷¹ Harness racing has seen a host of families involved at the highest levels of the sport, including the Filions, Myers, Dancers, Haughtons, Abbatiellos, and Garnseys.⁷² In 1974,

based on complaints from its fans, Roosevelt Raceway, which along with Yonkers Raceway was one of the two most prominent harness tracks in the United States, banned siblings and parents and children from racing against each other in non-stakes races.⁷³ Roosevelt Raceway president George Morton Levy said, "The rule was made to eliminate the suspicion in the minds of many spectators that, when two brothers or a father and son compete against one another, it might be considered natural for them to help each other."⁷⁴ Blue Bonnets Raceway in Montreal had instituted a similar rule in 1963.⁷⁵ There is no indication that the New York State Racing and Wagering Board took any action to challenge Roosevelt's house rule.

Ten months later, Roosevelt Raceway rescinded what had come to be called the "brother's rule."⁷⁶ The rule had been questioned by the drivers at Roosevelt, and Roosevelt president Levy believed that with the conclusion of a major federal trial on race fixing, there was no longer any necessity for the rule.⁷⁷

Track Management and Conflict of Interest

In thoroughbred racing, there basically is generally no rule or law that would prevent track management from being actively involved as participants in the actual racing at a track. For example, the owners of a racetrack can run their horses at a racetrack. They can select the officials who run the racetrack. The officials can determine the conditions for all of the races at a racetrack and the amount and the quality of the stall space for the horses at a racetrack.

On an anecdotal level, that can be seen at an event that took place at Hialeah Park in May of 1999. The owner of the track was John Brunetti. He used as his trainer Greg Sacco, whose brother Rich was the general manager at Hialeah. Sacco was running one of Brunetti's horses in a claiming race, and the process for placing claims on a horse is supposed to be secret. Before the race, general manager Sacco called the horseman's bookkeeper to see if a claim had been submitted for Brunetti's horse. The bookkeeper told him that there was a claim and that the "the boss [Brunetti] isn't going to like this."⁷⁸ From there, the word that a claim had been submitted was given to the jockey of the Brunetti's horse. Before the race, the jockey advised the veterinarian that the horse was ill and should not race. The veterinarian scratched the horse, which had the effect of nullifying the claim. The trainer who submitted the claim tried to get the stewards to enforce the claim. The stewards, however ruled against the claim, finding no proof of wrongdoing by the jockey or the track general manager. They did, however, fine the bookkeeper \$500 for improperly disclosing confidential information.⁷⁹

The management conflicts have often appeared in the operation of the New York Racing Association (NYRA) which

runs thoroughbred racing at Aqueduct, Saratoga, and Belmont Park. The trustees at NYRA are permitted to own racehorses at their tracks. They have, in the past, been accused of using their powers to affect the determination of stall space and the purse distribution at the tracks.⁸⁰ There have been allegations that eligibility standards for individual races have been manipulated to favor NYRA higher-ups. In addition to controlling the operations of the racing office, NYRA also has a role in judging its races, since it appoints one of the three stewards at its tracks.⁸¹ The stewards review the running of the races to determine whether any fouls occurred in the race.

Additionally, one of the three stewards is selected by the Jockey Club.⁸² The Jockey Club is the non-profit membership organization that oversees the breed registry of the sport of thoroughbred racing and is “dedicated to the improvement of Thoroughbred breeding and racing,”⁸³ At an earlier time, the Jockey Club played an outsized role in establishing and enforcing the rules of racing. It has been considered a most elite organization; at one time, it was “the last outpost of feudalism” and the “American House of Lords.”⁸⁴ When NYRA was first created in 1955, its board of directors consisted almost exclusively of members of the Jockey Club, and members of the Jockey Club still populate it. Thus, NYRA management, directly and indirectly, name two of the three stewards at NYRA tracks. Technically, the two non-state appointed stewards have no power to take action against licensees, but they still form the majority on non-licensing decisions, such as determining scratches and disqualifications.⁸⁵ Accordingly, the management of NYRA can participate in racing and is similarly empowered to have a major role in the operation and regulation of racing.⁸⁶

The role of the officials of the track in regulating racing can bring up added issues of divided loyalty. As stated previously, racetrack operators believe that the amount wagered on races is affected by the number of horses entered in races.⁸⁷ That being the case, individuals employed by the racetrack understand that their employers would like to see individual horses run in races rather than be scratched from racing for medical purposes. All things being equal, track employees, such as starters, veterinarians and the non-government stewards, understand that their employers want full fields.⁸⁸

On the other hand, New York State treats harness racing completely differently than thoroughbred racing. In harness

racing, all racing officials, including the three judges, are selected by the State Gaming Commission.⁸⁹ Additionally, no harness racetrack employee whose job involves the classification of horses can own a horse racing at the track’s meeting.⁹⁰ Moreover, officers and executives of a harness track are barred from driving at the track, and horses in which they hold an interest are barred from being entered in an overnight race at their track.⁹¹ Therefore, in New York State, a completely different regulatory regime governs the conflict of interests inherent in the participation in races by harness and thoroughbred racing executives.

The Non-Horse Racing Sporting World

The same divided loyalty issues involving friends, families, and business interests are present in other sports. That would not have been a major issue in the past, when horse racing was the only sport in which wagering was authorized. Now, however, with legalized sports wagering in New York State and in a majority of states,⁹² the divided loyalty issues affect all sports.

New York Giant defensive end Michael Strahan in 2001 was gifted the season sack record by Green Bay Packer quarterback Brett Favre. The overall sack record is now a bettable event and Pittsburgh Steeler T. J. Watt tied that mark on the last day of the regular National Football League (NFL) season on January 9, 2022.⁹³

In baseball, we have seen purposefully grooved pitches to friends, from Don Drysdale to his long-time teammate and friend Duke Snider for a home run in 1963,⁹⁴ and Adam Wainwright, grooving a pitch to Derek Jeter for a double to start off the 2014 all-star game.⁹⁵

The sports world has had parent-child conflicts, where in baseball, Felipe Alou managed against his son Moises’ team,⁹⁶ and conflicts among the Shula,⁹⁷ Bowden,⁹⁸ Rivers,⁹⁹ Sutter,¹⁰⁰ Pitino,¹⁰¹ and Dunleavy¹⁰² families. Currently, the sports we now can bet on have the same divided loyalties as horse racing, yet they do not ban or announce these conflicts.

The New York Giants under John McGraw treated the Boston Braves much like a vassal state.¹⁰³ The same held true for the New York Yankees in the late 1950s and the Kansas City Athletics, who were also considered to function as a farm team.

The NFL in its early days functioned with a significant amount of interconnectivity. Charles Bidwill owned the Chicago Cardinals, also had stock in the rival Chicago Bears, and had lent money to Bears owner George Halas.¹⁰⁴ At one point, Bidwill also had a financial interest in the Portsmouth Spartans, who would soon become the Detroit Lions, thus owning the Cardinals and having a financial interest in two other franchises.¹⁰⁵ Philadelphia Eagles owner Bert Bell and Pittsburgh

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Steelers owner Art Rooney maneuvered their ownership interests between themselves in the early 1940s to maintain their ownership of their franchises. At one time, Rooney simply gave money to Bell to help keep him in business.¹⁰⁶

Syncing Horse Race Regulation With Sports Wagering Regulation

Rather than limiting entries or coupling entries for wagering, would it be preferable to follow the current example of legalized sports wagering and restrict actual sports participants and their proxies from wagering? The states now allowing sports wagering are forbidding participants and their proxies from wagering.¹⁰⁷ For example, in New York State, a prohibited sports bettor would include “any amateur or professional athlete if the sports wager is based on any sport or athletic event that the athlete participates in at such amateur or professional level.”¹⁰⁸ A prohibited sports bettor would further include a sports agent of an athlete as well as a proxy for the athlete.¹⁰⁹ The non-horse racing format for sports wagering deals with participant conflicts by providing a consolidated basis for dealing with conflicts. The potential conflict is not banned, but the parties with conflicting interests are banned from wagering. They cannot exploit these conflicts for profit.

Currently, as might be expected given the state of horse racing rules, there is limited comprehensibility to the rules on horse racing governing wagering by participants. Jockeys in New York are only permitted to bet through the owner of the horse and only on the horse they ride.¹¹⁰ They cannot place the bets themselves. There are no formal restrictions on other licensees in thoroughbred racing from wagering. In New York harness racing, owners, trainers and drivers can only bet on their horses. They cannot bet on “exacta, quinella, superfecta or triple wagering on a race in which such horse starts.”¹¹¹ Employees in pari-mutuel departments at New York race-tracks are not allowed to bet during the period when they are working in the pari-mutuel department.¹¹²

Under the ARCI model rules, trainers are only allowed to wager on their own horses to win or finish in first place in combination with other horses.¹¹³ The rest of the states are in disarray, with most having no restrictions on trainer or owner wagering. Jockeys, owners, and trainers in Minnesota essentially are required to place their wagers only on their horses to finish in first place.¹¹⁴ Florida’s restrictions only apply to trainers and generally restrict trainers from wagering on their horses, except to finish first.¹¹⁵ The New Jersey rule on betting restrictions applies equally to jockeys, trainers and owners, but only requires that the wager must be on the horse that they control. In the case of exotic pools, their bets must include the horse they control, but there is no apparent requirement that they place their horse to finish first in any of these wagers.¹¹⁶

In short, horse racing’s rules governing wagering by participants are a complete hodgepodge. They are in disarray. In New York, the rules governing wagering by harness racing participants are totally different from the rules that govern thoroughbred racing. They simply have little rhyme or reason.

It would be more rational if horse racing followed the sports wagering model and banned its participants from wagering. Jockeys and trainers (and their assistants and agents) would not be permitted to wager in any fashion on the races in which they participate. Owners might be allowed to wager, but only if they play their horses to win or finish in first place in combination with other horses.

Obviously, this would not be an easy sell for horse racing. The sport has a tradition of not just utilizing inside information, but also romanticizing it. Everybody wants the inside dope, whether it is the “feed box noise” or information from the “jockey’s brother [who is] a friend of mine”¹¹⁷ The renowned columnist Jimmy Breslin once wrote that George Morton Levy, the head of the harness track Roosevelt Raceway, would have loved to put up a huge sign outside his track stating, “Nine Fixed Races Here Tonight.”¹¹⁸ Old habits die hard. It is hard to imagine racehorse owners not wagering on their horses.

Nonetheless, the sports wagering model presents a rational and inclusive model for horse racing and dealing with conflicts of interest. Current horse racing regulation of conflicts of interest does not work. It pits spouses, family, friends, and business associates against each other in a manner that makes little sense. A simpler approach—banning the insiders from wagering and exploiting the conflicts—is a far better way for horse racing to deal with its inherent ethical turf wars.

Endnotes

1. 9 N.Y.C.R.R. § 4025.10. One of the more famous instances of this coupling occurred in the 1973 Wood Memorial at Aqueduct Racetrack, Secretariat finished in third place, but his entry mate Angle Light won the race (they shared the same trainer). Accordingly, had you bet Secretariat to win the Wood, you would have collected the win on your ticket due to Angle Light’s victory. Over the past few decades, the mandatory coupling rules for common ownership and common training have loosened in New York. In stakes races where the purse is over \$50,000, there is no requirement for mandatory coupling due to common ownership. There is only mandatory coupling for a common trainer where more than two horses trained by a single trainer participate in a race and that race is not a stake race where the purse is less than \$50,000. See 9 N.Y.C.R.R. § 4025.10.(g); see also *Coupling Horses in Bookmaking*, Daily Racing Form, June 4, 1909.
2. 9 N.Y.C.R.R. § 4025.10(f).
3. Bob Ehalt, *Jockey Davis Calls Rule Coupling Married Riders Unfair*, Blood-Horse Daily, Jan. 1, 2021.

4. See Jockey Club 2021 Fact Book, <https://www.jockeyclub.com/Default.asp?section=Resources&area=11>. The average field size in a pari-mutuel race decreased by 18.7% from 1950-2020, and the average racehorse made 53.4% fewer starts per year in 2020 than it did in 1950. The State Racing and Wagering Board (the predecessor of the current State Gaming Commission) said this of limiting coupled entries in 2010:

The proposed rule amendments would provide additional wagering opportunities for bettors by removing certain existing limitations on entries in pari-mutuel races. The additional wagering opportunities would reduce the risk of canceling or not being able to offer certain pari-mutuel wagering pools (which require minimum numbers of wagering interests), and also generate larger pari-mutuel pools, which would in turn generate a proportionate corresponding increase in amounts payable as pari-mutuel tax, for purses, for breeding funds, and to be retained by the track operator. (2010 NY Regulation Text 21409, Proposed Rule, April 21, 2010.)
5. See Bill Finley, *Katie Davis Says NYRA Racing Office Discouraging Trainers from Riding Her*, *Thoroughbred Daily News*, Feb. 6, 2021. See also Natalie Voss, *A Stupid, Stupid Rule: New York Restrictions on Married Jockeys Stifling Davis' Business*, Paulick Report,

Media reports have indicated the racing office at Aqueduct has discouraged trainers from using Davis in races where McCarthy is already named, since it would not cause a coupling of what would otherwise be two betting interests in the race. The New York Racing Association has categorically denied that racing office personnel have exerted pressure on trainers not to use Davis.
6. Assembly Bill No. 7024 (2021) by Member Woerner, same as Senate Bill No. 6390 (2021) by Member Addabbo.
7. See *supra* note 2.
8. New York State Assembly, Memorandum in Support of Legislation of Bill No. 7024, *supra* note 6.
9. It is likely that the legislation, as written, may have been overbroad. By absolutely mandating non-coupling when there were jockey familial ties, it similarly would have precluded coupling in those instances where there were jockey familial ties and the horses were owned or trained by the same individuals. It might also be argued that the provisions governing familial ties ought to apply similarly to both harness and thoroughbred racing. See 9 N.Y.C.R.R. §§ 4111.15; 4119.6.
10. Current rule 9 N.Y.C.R.R. § 4025.10(g) requires that “when this subdivision permits two or more horses to race without being coupled and run as one entry, the racetrack operator shall take such actions as are necessary to inform the public adequately with regard to the common ownership and/or trainer that would otherwise require such horses to be coupled as a single betting interest pursuant to this section.”
11. Veto Message #49, Oct. 25, 2021.
12. *Id.*
13. *Id.*
14. See Matt Hegarty, *N.Y. Gaming Commission Hearing on Married-Riders Rule May Result in Elimination of all Entries*, *Daily Racing Form*, Jan. 11, 2022; *New York: Hearing Prompts Discussion About Elimination of Coupled Entries*, Paulick Report, Jan. 11, 2022.
15. See Tom Precious, *New York Changes Where Jockeys Must Serve Suspensions*, *Blood-Horse*, Feb. 28, 2022.
16. Perhaps the sports operator should be referred to as a “sports governing body” under § 1367.1.u of the Racing, Pari-Mutuel Wagering and Breeding Law (hereinafter referred to as PML).
17. The fact is that conflict notification is not especially helpful in horse racing. Public address announcements about conflicts at a track rarely attract any attention due to the din at a racetrack. You could place conflict notices in the program, but few people purchase and read the program. At a time in horse racing where over 90% of bets are made away from the track where the race is held, public notifications about possible conflicts are unlikely to reach the target audience.
18. Barbara Jo Rubin was licensed by the Florida Racing Commission in January of 1969. *Florida Drops Barrier Against Female Jockey*, *N.Y. Times*, Jan. 11, 1969. Initially, the male jockeys at Tropical Park in Miami refused to ride against Ms. Rubin. See Red Smith, *Little Men Scared of Mere G—ls*, *Washington Post*, Jan. 18, 1969. In 1968, the Maryland Racing Commission was ordered to license applicant Kathy Kusner. *In re Kusner v. Maryland Racing Commission*, Law No. 37,044 (Circuit Court Prince Georges County, Maryland, 1968).
19. *Mary Gets a 'Live One'*, *Rochester Democrat and Chronicle*, June 6, 1969. Mary Jo Rubin was the first female to win a race at the NYRA tracks on March 14, 1969.
20. She was pictured nude in *Playboy* and was named in 1973 as “Most Courageous Sports Athlete of the Year” by the Philadelphia Sports Writers Association. Bill Lyon, *Mary Bacon: Four Lives Still to Go*, *L.A. Times*, Feb. 6, 1974.
21. *Woman Jockey Wins No. 100*, *Washington Post*, July 1, 1970.
22. *Jockeys Divorce Brings Home Bacon*, *Boston Globe*, March 31, 1972.
23. *Id.*; Milton Richman, *Mary Bacon: She Riders for Her Young Daughter*, *Tonawanda News*, June 27, 1974; *A First in Horse Racing*, *Schenectady Gazette*, June 13, 1970. In 1975, a trial court in New York ruled that the automatic spousal disqualification was unconstitutional. *Halpern v. Lomenzo*, 81 Misc.2d 467, 477 (Sup. Ct., N.Y. Co., 1975).
24. *Divorce Saves Jockey Careers*, *L.A. Times*, April 1, 1972. It is somewhat difficult to say which of the Bacons was harmed more by the spousal disqualification rule. John had a better year in 1969 winning 83 races and \$145,000 in purses compared to Mary’s 55 wins and \$91,000. In 1970, Mary won 63 races in 1970 and \$107,000, while John won only nine races and \$13,000. See 1970 *American Racing Manual at A-300* (1970); 1971 *American Racing Manual at A-316* (1971).
25. See note 2 *supra*. The 1985 amendment also added current rule 9 N.Y.C.R.R. § 4040.2 forbidding horse ownership by a jockey or a member of the jockey’s household.
26. *Racing and Wagering Board*, *New York State Register* 6 (15): 43. (1985).
27. *Id.*
28. The author was a member of the State Racing and Wagering Board in the 1990s and was advised of this by the stewards working at the tracks of the New York Racing Association.
29. Ed Gray and Mark Coffman, *Racing Beat; Marriage Is Back on Track*, *Boston Herald*, Jan. 16, 1998.
30. *Id.* A California steward noted, “I’m not sure that there’s a whole lot of difference between trainer/jockey competing against each other and jockey/jockey competing against each other.”
31. See Bill Dwyre, *To Reach Winner’s Circle, This Couple Will Go the Distance*, *L.A. Times*, April 1, 2009. “In the loosest use of horse-racing terminology, they have been a coupled entry.” See also Jennie Rees, *Breeders’ Cup Grit and Gritz*, *Louisville Courier-Journal*, Nov. 3, 2011.
32. *Apprentice Wins Lopez Family Riding Battle at Golden Gate Fields*, *News Bites*, May 30, 2015.

33. See Equibase Chart of Race 6, Golden Gate Fields, May 29, 2015. C.C. in June of 2015 would ride several more races against his sons at Golden Gate Fields. The horses ran uncoupled.
34. ARCI Model Rules ARCI-008-030 Jockeys.
35. North Dakota NDAC 69.5-01-05-29; Idaho IDAPA 11.04.10.030; Indiana 71 IAC 5.5-4-6; Mass. 205 CMR 4.15; Iowa Admin. Code 491-10.5(99D).
36. Arizona A.A.C. R19-2-109. See also Regs. Conn. State Agencies § 12-574-A36.
37. 11 Ill. Adm. Code 1411.75
38. 4 CA ADC § 1901 “The stewards shall determine matters involving conflicts of interest among competing participants.”
39. Larry Borstein, *A Coupled Entry Until Post Time*, Orange County Register, Sept. 11, 1991.
40. *Id.*
41. *Id.*
42. *Id.* Bold Current, the horse, in question, trained by Nakatani’s wife Michelle Dollase, was shifted to the barn of her father, Wallace Dollase, and the stewards found that the conflict no longer existed. Del Mar steward Dave Samuel said, “The horse was switched to her father’s care, which I guess was a ruse, but what are we supposed to do? “ In its first race for Wallace Dollase, Bold Current finished second to a horse ridden by Corey Nakatani. See also Larry Bortstein, *Burke Winner ‘Super’; 5-Year-Old Unbeaten on Santa Anita’s Grass*, Orange County Register, Nov. 11, 1991.
43. In 2020, Cash’s nephew Keith Asmussen began riding as a jockey at age 21 principally for his father Steve Asmussen.
44. See *supra* note 2.
45. Vanderbilt owned the great horses Native Dancer and Discovery among other great horses. See Joe Durso, *Alfred Gwynne Vanderbilt, 87, Is Dead*, N.Y. Times, Nov. 13, 1999.
46. Gerald Strine, *Item: The Millionaire and the Jockey*, Washington Post, June 2, 1972. See also Paul Moran, *The Man Who Changed Racing*, Newsday, Oct. 27, 1985.
47. Robert Markus, *Split Field, Split Fees, Time to Split this Town*, Chicago Tribune, May 6, 1974.
48. Skip Bayless, *Affirmed Fouls Out; Trainer Hollers Foul*, L.A. Times, Aug. 20, 1978
49. Frank Deford, *Riding Horses Is the Pleasure of His Life*, Sports Illustrated, April 23, 1984, “Cordero even told Sanabria to lean on his regular clients, and when Angel couldn’t ride one of their horses, the agent was to try and get them to use Vega. So, sure enough, Vega began to get more mounts, and he began to win more.”
50. *Id.*
51. Dr. O’Dea was a veterinarian who had served as a member of the Racing and Wagering Board and the president of the Association of Racing Commissioners. See “In Memoriam: Joseph O’Dea, DVM (USA) | FEI,” <https://inside.fei.org/media-updates/memoriam-joseph-odea-dvm-usa>, July 17, 2006 [last viewed March 7, 2022].
52. 810 Ky. Admin. Regs. 2:060; N.J.A.C. 13:70–9.37; OAC 3769-7-23; 58 Pa. Code § 163.211, W. Va. Code St. R. § 178-1-29. California allows two riders, but, with the permission of the stewards, the agent can represent more than two. 4 CCR § 1790.
53. Del. Admin. Code 1001-9.2.2.3.1.1; IDAPA 11.04.14.360; 11 Ill. Adm. Code 502.500; Iowa Admin. Code 491-6.25(99D); MD ADC 09.10.01.2; Minnesota Rules, part 7877.0170; 16 TAC § 311.111; WAC 260-32-400. The ARCI Model Rule states, “A jockey agent may serve as agent for no more than two jockeys and one apprentice jockey.” ARCI-008-035.
54. 1 CCR 208-1:3.600; ARSD 20:04:22:46; 11 VAC 10-60-130; WY Rules and Regulations 038.0001.7 § 5.
55. Paul Moran, *Bounding Away with Brooklyn*, Newsday, July 21, 1985. “It was Sedlacek Day at Belmont Park.” Another son, Gregory, worked as an assistant to his parents.
56. Father Max, daughter Mary and son Buddy.
57. Father Allen and sons Steven and James.
58. Grandfather Preston, son Elliot and grandson Bill.
59. Father Lucien and son Roger.
60. Father Wallace and son Craig.
61. Father Richard and son Gary.
62. Brothers Lazaro, Luis, Oscar, Willie and Angel.
63. Brothers Melvin and Warren. Melvin’s son Gary is also a trainer.
64. Brothers Hirsch, Eugene and Sidney were all trainers. Their nephew Buddy Jacobson became a trainer, and Hirsch’s son John was a trainer. See Michael Strauss, *Rotz Rides Four Winners at Aqueduct, Three for Trainers Named Jacobs*, New York Times, June 29, 1963.
65. Brothers Tommy and Eddie. Tommy’s sons Tim and Patrick have also been trainers.
66. Irad and Jose.
67. Russell and Michael.
68. Ivan and Burley Parke were not only top trainers, but they and three of their brothers were also jockeys.
69. Sam and Joe.
70. Eddie and Sam.
71. Ron and Rudy.
72. There were eight Filion brothers who were drivers. There were seven Myer brothers who were drivers. Three Dancer brothers were drivers, as were three of their sons. Harness Racing Hall of Fame driver Billy Haughton was succeeded by three sons active in harness racing. Both brothers Anthony and Carmine Abbatiello are in the Harness Hall of Fame. Carmine’s son Eric is a driver as well. Garland Garnsey and his son Glen were exceptionally successful harness horsemen.
73. Bill Nack, *Roosevelt Raceway: Brother’s Keeper*, Newsday, May 21, 1974. See also Gerald Eskenazi, *Westbury Is Facing New Threat*, N.Y. Times, May 21, 1974.
74. *Id.*
75. Dave Anderson, *Trotting’s Blood Rule of Suspicion*, N.Y. Times, June 1, 1974.
76. Tony Sisti, *Roosevelt Drops ‘Brothers’ Rule*, Newsday, March 29, 1975. The belief was that it was principally aimed at brother Henri and Herve Filion. See Gerald Strine, *Too Many Filions Roil Roosevelt Raceway*, Washington Post, March 1975.
77. *Id.*; see also *OK Family Races at RR*, New York Daily News, March 29, 1975.
78. John Crittenden, *Hialeah: Horse Remains Brunetti’s*, Palm Beach Post, May 16, 1999.
79. *Id.*
80. See *Karlinsky v. New York Racing Association Inc.*, 310 F. Supp. 937 (SDNY, 1970); see also *Karlinsky v. New York Racing Association*, 52

- FR.D. 40 (SDNY, 1971); *Halpern v. Lomenzo*, 35 A.D.2d 41 (3rd Dept. 1970).
81. PML § 218.
 82. *Id.*
 83. See <https://www.jockeyclub.com/Default.asp?section=About&area=0>.
 84. Bernard Livingston, *America's House of Lords: The Jockey Club*, 128 *Town and Country*, 110,111 April 1974.
 85. *Halpern v. Lomenzo*, *supra* at note 22. See 9 N.Y.C.R.R. § 4022.12.
 86. In a hearing in 2022, where NYRA tried to exclude prominent trainer Bob Baffert from racing at its tracks, counsel for Baffert alleged that the reason for the attempted exclusion involved NYRA trustees seeking to limit competition from Baffert. “The long answer is the only reason we are here is that there are a handful of NYRA board members that can answer that question. They have some personal vendetta against Mr. Baffert. Do they not like him? Or perhaps since they own horses that race in New York, they are tired of Mr. Baffert coming to New York and beating them in New York races and they want to eliminate a competitor.” Bill Finley, *Sides Coming Out Swinging in Baffert-NYRA Hearing*, *Thoroughbred Daily News*, Jan. 24, 2022.
 87. See *supra* at note 4.
 88. To a certain extent, the issue for a track veterinarian is not significantly different from that of a physician for a sports team, where the team might wish to make sure that an individual player is eligible to play. See Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete-Patients*, 50 *St. Louis U. L.J.* 185 (2005); Twila Keim, *Physicians for Professional Sports Teams: Health Care under the Pressure of Economic and Commercial Interests*, 9 *Seton Hall J. Sport L.* 196 (1999). See also Tom LaMarra, *Report: Deficiencies Had Role in Horse Deaths*, *Blood-Horse*, Sept. 28, 2012.
 89. PML, § 308. In harness racing, not only are the judges selected by the state, but the secondary officials, such as starters, paddock judges, patrol judges, and recording judges are as well. 9 N.Y.C.R.R. § 4105.1. In thoroughbred racing, the starters, patrol judges, paddock judges and placing judges are selected by the racing association.
 90. 9 N.Y.C.R.R. § 4105.16.
 91. 9 N.Y.C.R.R. § 4105.17.(a). Executives of a harness track can, basically, only run their horses in stake races. The origin of this rule seems to stem from a dispute between the former state harness racing commissioner and the owner of Saratoga Raceway. See *Wiswall Quits Racing, Sells Stable Saturday*, *Saratogian*, Oct. 8, 1957; Bill Connolly, *Con-tours of Sports*, *Saratogian*, Sept. 15, 1956.
 92. As of March 18, 2022, 30 states and the District of Columbia had active sports wagering operations. Three other states had legalized sports wagering. See *Legal Sports Betting in the U.S.*, American Gaming Association, [AGA-Sports-Betting-Map-2020ax.pdf](https://www.americangaming.org/AGA-Sports-Betting-Map-2020ax.pdf) (americangaming.org).
 93. Mike Rosenstein, *Steelers' T.J. Watt ties Giants' Michael Strahan's single-season sack record*, *NJ.com*, Jan. 9, 2022.
 94. Dick Young, *Duke HRs but Mets Bow, 7-3*, *New York Daily News*, May 23, 1963.
 95. See *History Tells Us Wainwright's 'Gift' not the First*, *Pittsburgh Post-Gazette*, July 20, 2014.
 96. As a player Felipe Alou also regularly competed against his brothers Matty and Jesus.
 97. Coaches Don and Mike Shula.
 98. Father Bobby was the longtime football coach at Florida State. He coached against his son Tommy, who was the coach at Clemson.
 99. Long-time National Basketball Association (NBA) coach Doc Rivers has coached against teams where his son Austin played.
 100. Six Sutter Brothers played and competed against each other in the National Hockey League (NHL) in the 1970s and 1980s. Alphabetically, there was Brent, Brian, Darryl, Duane, Rich and Ron. Three of their sons also played in the NHL. Three Conacher brothers, Charlie, Lionel and Roy are in the Hockey Hall of Fame. Two of their sons also made it to the NHL.
 101. Long-time basketball coach Rick Pitino coached against a team coached by his son Richard Pitino.
 102. Mike Dunleavy Sr. coached against teams on which his son Mike Dunleavy Jr. played.
 103. Fr. Gerald Beirne, *Were the Boston Braves Really Controlled by the Giants and Tammany Hall?*, <https://sabr.org/research/article/were-the-boston-braves-really-controlled-by-the-giants-and-tammany-hall/>.
 104. Jack Olsen, *The Unhappiest Millionaire*, *Sports Illustrated*, April 4, 1960; David Condon, *Halas' 78th Birthday Brings Joy and Sorrow*, *Chicago Tribune*, Feb. 4, 1973.
 105. John Eisenberg, *The League*, 90 (2018),
 106. Rooney even provided a gift of \$5,000 to Bell to help keep his franchise in operation. *Id.* at 195. See Arthur Dailey, *The People's Choice*, *N.Y. Times*, Dec. 13, 1963. See also Rob Ruck and Magie Jones Patterson, *Rooney: A Sporting Life*, 182 (2010).
 107. See PML, § 1367.1.(r); see also LA R.S. 47: 9099; NJ ST 5:12A-11; NH ST. § 287-I:1; OH ST. § 3775.13.
 108. PML, § 1367.1.(r) vii.
 109. PML, § 1367.1.(r) viii and ix.
 110. 9 N.Y.C.R.R. § 4040.1. Under the ARCI model rule, jockeys can bet through an owner or a trainer but can only wager on their horses to finish in first place. Records must be kept of jockey wagering. ARCI-008-030 Jockeys. E. Version 11.0, January 2022. In January of 2022, jockey Mychel Sanchez was given a 60-day suspension for wagering against the horse he was riding. See Bill Finley, *Suspension Is Up, but Parx Won't Let Sanchez Ride*, *Thoroughbred Daily News*, March 16, 2022.
 111. 9 N.Y.C.R.R. § 4119.5.
 112. 9 N.Y.C.R.R. § 4005.4. For pari-mutuel employees at a New York harness track, see a similar rule at 9 N.Y.C.R.R. § 4122.10.
 113. ARCI -008-020 Trainers. D. for thoroughbreds and ARCI-022-020 Trainers. D. for harness racing.
 114. MN ADC § 7877.0180.3. They may not “wager on any other horse to finish better than his or her own” horse.
 115. Fla. Admin. Code. § 61D-2.004.(3). In Florida, however, a trainer can play his or her horse in an exacta in second place but only if the trainer wagers more or the same amount on that horse to finish first in the exacta wager.
 116. See N.J.A.C. § 13:70–14.11. A similar rule applies for New Jersey harness racing. N.J.A.C. § 13:71:2.4.
 117. See the lyrics from “Fugue for Tinhorns,” Frank Loesser, *Guys and Dolls* (1950).
 118. Jimmy Breslin, *The Sins of the Father Revisited by the Son*, *Newsday*, Dec. 17, 1992.

Sports and Recreational Activities—Game Over? Or, Let the Games Begin!

By Glenn A. Monk and Kaitlin Acerbo

“It’s all fun and games until somebody loses an eye.”

—*Unknown. A long time ago.*

The phrase is said to originate from ancient Rome, where the only rule to wrestling matches was no eye gouging. There was immediate disqualification if you poked your opponent’s eye out. Today, it may be more accurate to say, “It’s all fun and games until somebody gets sued.”

Brief Overview of Premises Liability

In New York, it is well settled that a landowner has a duty of care to maintain their property in a reasonably safe condition, whether the property is open to the public or not, and it does not matter if plaintiff was an invitee, licensee, or trespasser.¹ Reasonableness is determined by viewing all of the “circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.”² In the arena of sports or recreational activity, the property owner’s duty of care is to make the conditions as safe as they appear to be.³

Primary Assumption of Risk

Numerous cases involving sporting or recreational activity have been decided regarding the application of the primary assumption of risk doctrine. The Court of Appeals has limited the expansion of the doctrine to those cases that present a social value and those that occur within a designated recreational venue. However, the courts still look to the inherent dangers of the sport, whether the plaintiff appreciated those risks, the skills of the plaintiff, and if the condition was open and obvious. If found to apply, the assumption of risk doctrine provides a complete defense to property owners, overriding an application of plaintiff’s comparative negligence. The Court of Appeals has drawn distinctions as to what type of activities will permit an application of the assumption of risk doctrine, and where those activities took place.

The assumption of risk doctrine arises when one is aware of and appreciates the risks inherent in the activity and “voluntarily assumes the risk” by participating.⁴ The participant must have knowledge and appreciation of the risk. Awareness of the risk should be measured against the “background of the skill and experience of the particular plaintiff.”⁵ The assumption of risk doctrine has been applied to the layout and construction of a playing field⁶ as well as the activity. It has also been applied to where there is an open and obvious

condition where the sport is played.⁷ Determining if a defendant violated a duty of care to participants in sports and activities, “should include whether the conditions caused by defendants’ negligence are ‘unique and created a dangerous condition over and above the usual dangers that are inherent in the sport.’”⁸

Assumption of risk is not justified for reckless or intentional conduct by property owners.⁹ If a plaintiff can show that the defendant acted negligently, or a defendant’s inaction was a “substantial cause of events which produced the injury,” that plaintiff will not have assumed the risks of their sport.¹⁰

In *Trupia v. Lake George Cent. School Dist.*,¹¹ the Court of Appeals held that while assumption of the risk protects the social value of athletic and recreative activities, it does not apply outside of this limited context.¹² Thus, in *Trupia*, an infant-plaintiff sliding down a banister was not an activity of the kind of social value that warranted the protection afforded under the assumption of the risk doctrine.¹³ The court found that if the plaintiff’s harm was attributable to his own actions and not to negligence on behalf of the defendants, his actions would be taken into account under the comparative fault provision of the CPLR.¹⁴

In *Custodi v. Town of Amherst*,¹⁵ the Court of Appeals declined to apply the assumption of risk doctrine to those cases where the activity did not take place within a “designated venue.”¹⁶ Therefore, the plaintiff, who fell while rollerblading across a height differential in the street, did not assume the risks inherent to rollerblading as she would have had she been in a rink, skating park or competition.¹⁷

Field of Play Participants

Courts look to the plaintiff’s skills and experience to evaluate an application of primary assumption of risk

The assumption of the risk doctrine will apply when a defendant can prove that the plaintiff’s skill and experience afforded the plaintiff an appreciation of the risk involved in his/her sport.

In *Maddox v. City of New York*, the plaintiff, New York Yankee outfielder Elliot Maddox suffered a career-ending injury when he slipped and fell on a wet and muddy field.¹⁸ The Court of Appeals found that Maddox’s experience of playing professional baseball, coupled with his testimony that



he was aware of the condition (he had complained to groundskeepers about it), and his playing in the field constituted the plaintiff assuming the risk of his injury.¹⁹

Similarly, in *Morgan v. State*, the plaintiff was driving a two-person bobsled during a national championship race, when the bobsled tipped over and his teammate fell out. The plaintiff was an Olympic bobsledder who had over 20 years of experience and had raced down the very same run at issue numerous times.²⁰ The Court of Appeals held that summary judgment was properly granted to the defendants under the assumption of risk doctrine, based on the plaintiff's over 20-year experience in bobsledding and familiarity with the bobsled course at issue.²¹

In *Lomonico v. Massapequa Public Schools*,²² the plaintiff was an 11th grade cheerleader who alleged that she suffered from post-concussion syndrome when she was struck in the head by another student when practicing a stunt. The stunt involved one girl (the flyer) being lifted into the air by three others. The flyer should have been lifted on one foot and then to dismount, rotated 360° and landed cradled in the arms of the bases and backstop. The plaintiff alleged a lack of instruction and supervision and failure to provide protective mats.²³ The Second Department found that the cheerleader could not demonstrate the school district's liability due to the extent of her cheerleading experience; and, with this stunt in particular, she clearly knew of the risks inherent in the activity.²⁴

The effects of conditions of the field/facility under assumption of risk

A property owner or facility operator can be awarded a defense under assumption of the risk when the condition is open and obvious. A defense will not be awarded when a property owner or facility operator was found to have ne-

glected or intentionally created the condition, increasing the dangers over and above the usual dangers inherent to the sport.

For example, the Court of Appeals held in *Turcotte v. Fells*, that the plaintiff assumed the risks of his injuries when he participated in three prior races on the same day, observed the conditions of the track prior to the eighth race, and his general knowledge of the possibility of "cupping" conditions on the track.²⁵ In *Sykes v. County of Erie*,²⁶ the Court of Appeals held that the plaintiff, injured when he stepped into a recessed drain while playing basketball, had assumed the risk as the condition of the court was open and obvious. Further there was no evidence that the drain was defective or improperly maintained.

The plaintiff in *Siegel v. City of New York*²⁷ was injured when he caught his foot in the bottom of the net dividing the indoor tennis courts.²⁸ He had been a member of the club for 10 years and had been playing tennis there once a week.²⁹ The plaintiff testified that he knew the net had been ripped for over two years and although he never notified the facility's management about the issue, he knew others had.³⁰ The defendants were granted summary judgment on the grounds that the plaintiff assumed his risk by electing to play on a tennis court that he knew had a torn net for a long time.³¹ The Court of Appeals reversed the decision, finding that the torn net was not "inherent" to tennis, it was more of an "allegedly negligent condition occurring in the ordinary course of any property's maintenance . . ."³²

The plaintiff in *Siegel v. Albertus Magnus High School*³³ was assisting the coaches of his son's baseball team, and alleges when he was running from third base into foul territory, he slipped and fell on a tile mat that was covering a drainage grate.³⁴ The plaintiff argued the tile was negligently placed by the defendants, which caused a defect in the playing field,

as the tile was not a part of the playing field.³⁵ The Appellate Division, Second Department found that summary judgment was properly granted against the defendants, as the 12" x 12" white/creamish colored tile was an open and obvious condition and starkly contrasted the color of the grass.³⁶ Additionally, the plaintiff could not show that the tile was defective. Further, the court relied upon the plaintiff's testimony—that he had previously been to, and played/coached on the field; sat on the sideline near the tile; and had volunteered to be on the field at least three prior occasions—and found that the plaintiff, by volunteering, "assumed the obvious risk of slipping on the grass or on the tile by electing to play baseball on that field."³⁷

Bystanders and Spectators

In the past five years, publicity surrounding Major League Baseball (MLB) parks concerning serious injuries spectators have incurred while attending baseball games has led to increased scrutiny surrounding spectator safety. According to a September 9, 2014 *Bloomberg* article, there were roughly 1,750 injuries to spectators from foul balls.³⁸ Further, in a June 1, 2019 *New York Times* article, there were nearly 14,000 more foul balls hit in the 2018 season than there were in 1998.³⁹ The issue of bystander and spectator safety was clearly addressed by the Court of Appeals, which held "that an owner or operator of an athletic field or facility 'is not an insurer of the safety of its spectators.'"⁴⁰

While the assumption of risk doctrine extends to bystanders and spectators, there is still a duty by the landowners or occupiers to take reasonable measures to prevent injury to those present on the property.⁴¹ The assumption of risk doctrine, therefore, will not apply where there is a "reckless or intentional conduct, or concealed or unreasonably increased risks" to those spectators.⁴²

Facilities need to provide protection to spectators where the risk of being hit is the greatest

All baseball parks include some sort of netting to protect spectators in certain parts of the stadium, mainly behind home plate and dugouts, and there have recently been public discussions to extend the netting to protect more spectators in the ballparks, with some MLB teams actually doing so. In *Akins v. Glens Falls City School Dist.*,⁴³ the plaintiff was hit by a foul ball, but the Court of Appeals found that because the plaintiff chose to stand behind a three-foot fence along the third base line, instead of in the stands behind a 24-foot-high fence, she assumed the risk of being hit by a foul ball.⁴⁴ Further, the Court of Appeals found that ball park owners need only provide protection behind home plate where the danger of being hit by a ball is the greatest.⁴⁵

In *Zlotnick v. New York Yankees Partnership*,⁴⁶ the plaintiff was struck in the eye by a foul ball while attending a Yankees

game.⁴⁷ The plaintiff was sitting in his assigned seat about halfway down the first baseline and a few rows back. The First Department affirmed the decision granting the Yankees summary judgment, finding that there was no breach of duty by the defendants, as there was appropriate netting behind home plate, and there were plenty of seats available in that section. Additionally, the disclaimers on tickets and regular announcements made over the PA system advised spectators to notify a stadium employee of any particular concerns during the course of watching a game, even to request a seat change.⁴⁸

Similarly, cases have generally held that owners of hockey rinks have not breached their duty to spectators if they have provided "screening around the area behind the hockey goals, where the danger of being hit by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening."⁴⁹ However, summary judgment was denied to the defendants in *Smero v. City of Saratoga Springs*, where the infant-plaintiff was struck in the head by a puck while watching a youth hockey team practice.⁵⁰ It was alleged that the defendants were negligent in failing to install proper netting/barriers in the area where she was injured, failed to supervise, control, and maintain the activities occurring on the ice, and failed to construct or maintain the ice rink in a safe manner.⁵¹

In *Smero*, the ice rink had 4'7" boards surrounding the rink, with three-foot plexiglass panels on top of the dasher boards running along the sides of the rink, and six-foot panels of plexiglass behind the goal nets.⁵² Behind the goals there was also protective netting, but the netting did not extend along the sides of the rink.⁵³ On the date in question, however, the goals were not set up lengthwise at the ends of the rink as usual; rather, the goals were set up width wise to accommodate two different practices.⁵⁴ The plaintiff was walking along the side of the rink when a player took a shot at the goal net, launching the puck over the dasher board and plexiglass and hitting the plaintiff. The Third Department found that there was an issue of fact as to whether the defendants breached their duty to the plaintiff because the goals were set up in an area where there was a significant gap in protective screening, thereby increasing the likelihood of spectators being placed in danger of a flying puck.⁵⁵

The assumption of risk doctrine can extend to consenting bystanders and spectators, even if they are not actively watching the sporting event or activity.⁵⁶ In *Thomas v. State*,⁵⁷ the plaintiff, an inmate at a correctional facility, was struck in the eye by an errant softball.⁵⁸ The plaintiff had gone out to the recreation yard for a cigarette and walked to a bench behind the fenced-off area behind home plate before the softball game was underway.⁵⁹ He had been at the bench for around

10 minutes when someone yelled “heads up.”⁶⁰ He looked up and was immediately struck in the eye by a softball. The Court of Claims found that the state fulfilled its duty to protect inmate bystanders from softballs by having a fence behind home plate.⁶¹ Although the plaintiff was a bystander, he still assumed the risks of his injuries by standing within close proximity to the softball field.⁶² Additionally, the court found that the state did not have to warn its inmates that the “readily observable softball field may become active if and when other inmates elected to use the field to play softball.”⁶³

Design/Defects inherent to the facility

The condition of the outdoor basketball court came up in *Leitner v. The City of New York*,⁶⁴ where the plaintiff was watching his kids play basketball at an outdoor basketball court, when a basketball rebounded towards him.⁶⁵ He went to get the ball, twisting his ankle in a crack in the court.⁶⁶ The City of New York moved for summary judgment on the grounds that it did not breach a duty to the plaintiff, as he was a spectator to the basketball game.

The court in *Leitner* found that the cracks in the basketball court were not inherent to game of basketball and it was not designed with cracks in it.⁶⁷ The court found that the City of New York was still liable for its failure to maintain the premises in a reasonably safe condition.⁶⁸

Assumption of the risk can extend to bystanders and spectators if the conditions or risks are open and obvious

A plaintiff assumes the risk of injury arising from any open and obvious condition of the place where the activity is occurring.⁶⁹ For example, mud in front of a dugout was found to be an open and obvious condition and not inherently dangerous when a grandmother who was watching her grandson’s Little League game fell while walking across it to say good-bye to her grandson.⁷⁰

Further, in *Roberts v. Boys and Girls Republic, Inc.*, the plaintiff was struck in a head by a bat being swung at her son’s baseball practice.⁷¹ The First Department found that bats being swung are inherent to the game of baseball, and knowledge of the sport of baseball is not required to appreciate the risk of an injury from a swung bat, as it is perfectly obvious.⁷²

Playgrounds

It is well established that schools “are obligated to exercise such care of their students as a parent of ordinary prudence would observe in comparable circumstances.”⁷³ However, a school is not “an insurer of safety, and cannot be expected to continuously supervise and control all of the students’ movements and activities.”⁷⁴ Where playgrounds are involved, a school district has a duty to supervise students on how to

safely use the playground equipment, the breach of which can result in liability.⁷⁵

The condition of the playground facility and equipment will be critically assessed by expert proof

In *A.C. by Fajardo v. Brentwood Union Free School Dist.*,⁷⁶ the plaintiff, a second grade student, fell while using the zipline apparatus in the playground of his school.⁷⁷ The plaintiff asserted claims of negligent supervision, instruction, and the existence of a dangerous and defective conditions (i.e., failing to provide proper padding beneath the zipline, and failing to have “proper non-slip material” on the zipline handle).⁷⁸ In deciding the unopposed summary judgment motion brought by the defendants, the Nassau County Supreme Court found that there was a triable question of fact as to whether the plaintiff was properly instructed as to how to use the zipline apparatus.⁷⁹ Discrepancies existed in the testimony of the plaintiff and the gym teacher who was on the playground with the students.⁸⁰ The plaintiff testified that he did not receive any instruction on how to use the zipline apparatus, and just followed how the other kids were using it.⁸¹ The gym teacher testified that he instructed the students to hold the zipline handle with two hands, to make sure there were no students underneath them, and that there were no students standing on the landing dock.⁸² According to affidavits provided by the defendants’ experts, the zipline apparatus was inspected and found to be in “excellent” condition; additionally, the “engineered wood fiber ground cover underneath the apparatus conformed to all applicable safety standards, and was to help prevent life-threatening head injuries, not to prevent all types of injuries.”⁸³ As to the non-slip material on the handle, there were no safety specifications, standards or regulations saying that it was required.⁸⁴ The court concluded that the zipline apparatus was not dangerous or defective.⁸⁵

Similarly, in *Valenzuela v. Metro Motel, LLC*,⁸⁶ an action alleging a defective condition was brought against the landowner on behalf of an infant-plaintiff whose leg became caught in a gap between two platforms on playground equipment.⁸⁷ Through an expert affidavit, the defendants were able to show that there was no defective condition, the playground was maintained in a reasonably safe condition, and the gaps did not violate any applicable guidelines or standards.⁸⁸

Summary judgment was denied to the defendants in *Adriana G. v. Kipp Washington Heights Middle School*,⁸⁹ where the infant-plaintiff’s ring finger was amputated after it was caught in a playground fence.⁹⁰ A triable question of fact was found as to whether the fence was in a reasonably safe condition at the time of the accident.⁹¹ The defendants’ expert’s affidavit asserted that the fence was in compliance with the New York City School Construction Authority’s (NYCSCA) standards, while the plaintiff’s expert’s affidavit asserted that the fence was not in compliance with the NYCSCA’s stan-

dards, as the fence had sharp edges that were present at the time of the accident.⁹²

New York Statutes

New York General Obligation Law § 9-103 | Recreational Use

The New York statute was enacted to limit liability of landowners that allow the use of their land without any fees. The statute provides that, where a user engages in one or more of a number of enumerated activities, protection can be afforded to a property owner if it can establish that:

1. The injured party was pursuing one of the enumerated activities⁹³ on the premises.
2. The property was physically conducive to the activity.⁹⁴
3. The property is of a type that is appropriate for pursuing the activity at issue.⁹⁵

The intent of the statute was to encourage landowners to allow the public to use their land to engage in certain recreational activities without fear of liability for the injuries suffered by those participants.⁹⁶ In *Albright v. Metz*,⁹⁷ the plaintiff was injured when he was motorbiking on the defendants' property, which was being used as a gravel mine and landfill.⁹⁸ The Court of Appeals found that the property was used numerous times by motorbikers and, as such, the land was physically conducive for the activity. The plaintiff tried to avoid the statutory bar by arguing that the landfill was hazardous and not appropriate for motorbiking. The court declined to accept that argument and determined the land was suitable for motorbiking, therefore affording the land owner immunity under the statute.⁹⁹

However, in *Sena v. Town of Greenfield*, the plaintiff was injured when sliding down a hill that was supervised by the town for the purposes of sledding.¹⁰⁰ The Court of Appeals held that the statute did not provide immunity to municipalities who still had a duty in the operation and maintenance of a supervised public park and recreational facility.¹⁰¹

New York General Obligation Law § 18 | Skiing

New York has recognized that skiing is a voluntary activity that may be hazardous, regardless of all feasible safety measures that can be undertaken by ski area operators. New York has also recognized, in § 18-101, that there are inherent risks to skiing caused by “variations in terrain or weather conditions surface or subsurface snow, ice, bare spots or areas of thin cover, moguls, ruts, bumps; other persons using the facilities; and rocks, forest growth, debris, branches, trees, roots, stumps or other natural objects or man-made objects that are incidental to the provision or maintenance of a ski

facility.”¹⁰² Section 18-106 of the statute provides that ski area operators have additional duties to:

1. post at every point of sale or distribution of lift tickets, a “warning to skiers” about the inherent risks of skiing;
2. make ski instruction and education as to the inherent risks of skiing available at a reasonable price; and
3. post a notice to skiers as to the availability of a refund to those who feel unprepared or unwilling to ski due to the inherent risks.

Section 18-106 additionally states that skiers have a duty to seek out information to make an informed decision as to their participation in the sport.

In *Sytner v. State*,¹⁰³ snow making was in progress on the right side of Mohican Trail, leaving only the left side of the trail open for skiers.¹⁰⁴ There were no signs at the start of the trail notifying skiers that snow making was in progress.¹⁰⁵ The left side of the trail, however, contained an icy patch about 25 feet to 35 feet wide and 40 feet to 50 feet in length.¹⁰⁶ The ice patch also contained a bare spot.¹⁰⁷ The plaintiff, a novice skier, was following her neighbor down the left side of the trail¹⁰⁸ when she lost control on the ice and was unable to avoid the bare spot that caused her skis to abruptly stop and sent her flying into the air.¹⁰⁹ The Third Department noted that although icy patches similar to the one that the plaintiff skied over are deemed inherent to skiing under § 18-101, that section was not meant to encompass an icy patch as large as the one at issue. Additionally, the defendant did not comply with § 18-103, because it did not maintain the proper signage at the top of ski slopes and trails regarding trail maintenance including snow making.

In *Fest v. Apel Capital, LLC*,¹¹⁰ the Second Department determined that the snow mound (commonly known as a snow whale), that the infant-plaintiff used to “catch some air” was intentionally placed by the defendant for that purpose and to preserve artificial snow. The snow whale constituted an inherent risk to snowboarding.¹¹¹ Additionally, the crevice into which the plaintiff fell after catching air was a natural occurrence of “variations surface and subsurface snow conditions,” and considered an inherent risk under § 18-101.¹¹² Therefore, the Second Department granted the defendant's summary judgment motion.

New York General Obligation Law § 5-326 | Waivers

Attending a baseball game is perhaps America's favorite pastime, but few patrons read the fine print on their ticket to a Major League Baseball (MLB) game. All tickets include a disclaimer that generally states that spectators assume all risks of attending a baseball game. The disclaimers are intended to shield the MLB from liability.

New York's statute addressing waivers provides that a waiver will be deemed to be void as against public policy if:

1. the agreement entered into is between the owner or operator of a recreational facility and the participant;
2. it exempts the owner or operator from liability; and
3. that owner or operator receives a fee in exchange for use of the facility.

The New York General Obligation Law § 5-326 reads:

Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.

Under this section, a waiver can be upheld if the fee paid by a plaintiff was not paid to the owner/operator of the facility, and the language of the waiver must clearly spell out the intent to relieve the defendant of any liability for injuries incurred.¹¹³

New York General Business Law § 399-dd | Playground

New York's playground statute sets forth the following pertaining to the installation, inspection and maintenance of playgrounds:

1. The State shall promulgate rules and regulations for the design, installation, inspection and maintenance of playgrounds and playground equipment in substantial compliance with the handbook for public playground safety produced by the United States Consumer Products Safety Commission; and
2. Playgrounds shall be constructed or installed in accordance to the rules and regulations pursuant to this section. (One, two and three-family residential real property are exempt from the requirements of this section).

In *Boland v. North Bellmore Union Free School Dist.*,¹¹⁴ the court found that the plaintiff raised a triable issue of fact through her expert's affidavit which opined that the ground cover underneath the apparatus from which the infant-plaintiff fell did not meet the standards established by Consumer Product Safety Commission.

Other Issues Surrounding Student Athletes

Recent years of heightened attention to the risk of head injuries to National Football League players and the emergence of chronic traumatic encephalopathy (CTE) has now brought heightened attention surrounding the NCAA student athletes, even K-12 public schools,¹¹⁵ and how to properly assess and treat head injuries before a player is allowed to return to play. The NCAA has faced numerous class actions surrounding the concussions suffered by student athletes of many sports, not just football.

The NCAA governs the rules and regulations of players of over 24 different collegiate sports, including what kind of protective equipment can be worn by student-athletes. The rules may differ between male and female athletes for the same sport, like lacrosse. In 2015, the NCAA passed legislation amending Article 3 of its Constitution, requiring Division I Institutions to submit its Concussion Safety Protocol to the Concussion Safety Protocol Committee by May 1st of each year.¹¹⁶

Although land owners and operators of the facilities will be able to assert an affirmative defense under the assumption of the risk doctrine, when faced with claims of breaching their duty of care, whether other organizations that set standards and regulate sports activities and equipment, such as the NCAA, will be deemed to have a duty of care to the student athletes as well, seems to be the next development in this area.

In *Greiber v. Nat. Collegiate Athletic Ass'n*,¹¹⁷ the plaintiff student-athlete alleged she suffered from two concussions from playing women's collegiate lacrosse. The first concussion occurred in 2013, when a ball ricocheted off bleachers, hitting the plaintiff in the head.¹¹⁸ The second concussion occurred almost a year later, when she and another player slipped on wet grass, colliding heads.¹¹⁹ The plaintiff brought suit against the NCAA (among others), alleging that the NCAA had a duty to her to supervise, regulate, monitor and provide reasonable and appropriate rules to minimize risk of injury to student athletes.¹²⁰ In support of her allegations, the plaintiff argued that while men were required to wear hard helmets when playing men's collegiate lacrosse, women were not, and by not allowing women to wear helmets, the NCAA exacerbated the risk of sustaining a head injury. The NCAA, in a motion to dismiss for failure to state a cause of action, argued that it did not breach any duty to the plaintiff, stating

that it is made up of over 1,000 autonomous member institutions, and did not have a special relationship with the plaintiff or any of the other 460,000 student athletes.¹²¹ The NCAA further argued that the plaintiff assumed the inherent risks of participating in contact sports.¹²² The Supreme Court, Nassau County, denied the NCAA's motion, finding that the NCAA prohibited the plaintiff from utilizing protective head gear, as it had the authority to make rules and exercised those rules over the safety equipment worn by student-athletes.¹²³

Conclusion

Before you pick up those golf clubs, attend your child's Little League game, or enjoy a trip to Busch Gardens, make sure to read the fine print on your entry ticket, watch where you step, and steer clear of foul balls. "Be safe out there."

Endnotes

1. *Peralta v. Henriquez*, 100 N.Y.2d 139, 143-144 (2003).
2. *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976).
3. *Turcotte v. Fell*, 68 N.Y.2d 432, 439 (1986).
4. *Morgan v. State*, 90 N.Y.2d 471, 484 (1997).
5. *Maddox v. City of New York*, 66 N.Y.2d 270, 278 (1985).
6. *Bryant v. Town of Brookhaven*, 135 A.D.3d 801, 802 (2d Dep't 2016).
7. *Sanchez v. City of New York*, 25 A.D.3d 776 (2d Dep't 2006).
8. *Owen v. R.J.S. Safety Equip.*, 79 N.Y.2d 967, 970 (1992).
9. *Turcotte*, 68 N.Y.2d at 439 (1986) (citations omitted).
10. *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 659 (1989).
11. *Trupia v. Lake George Cent. School Dist.*, 14 N.Y.3d 392 (2010).
12. *Id.* at 395.
13. *Id.* at 396.
14. *Id.*
15. *Custodi v. Town of Amherst*, 20 N.Y.3d 83 (2012).
16. *Id.* at 89.
17. *Id.*
18. *Maddox*, 66 N.Y.2d at 275.
19. *Id.* at 278-79.
20. *Morgan*, 90 N.Y.2d at 480, 486.
21. *Id.* at 486.
22. *Lomonico v. Massapequa Public Schools*, 84 A.D.3d 1033 (2d Dep't 2011).
23. *Id.* at 1034.
24. *Id.*; see also *Digose v. Bellmore-Merrick Cent. High School Dist.*, 50 A.D.3d 623, 624 (2d Dep't 2008).
25. *Turcotte*, 68 N.Y.2d at 443. (the plaintiff alleged foul riding by another jockey, and that the racetrack was negligently watered and groomed); *id.* at 436 (cupping comes from over-watering of the race track); *id.* at 443.
26. *Sykes v. County of Erie*, 94 N.Y.2d 912 (2000).
27. *Siegel v. City of New York*, 90 N.Y.2d 471 (1997).
28. *Id.* at 482.
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* at 488-89.
33. *Siegel v. Albertus Magnus High School*, 153 A.D.3d 572 (2d Dep't 2017), *lv denied*, 30 N.Y.3d 906 (2017).
34. *Id.* at 573.
35. *Siegel v. Albertus Magnus High School*, 2015 WL 12805935, at *3 (Rockland County Sup.Ct., 2015).
36. *Siegel*, 153 A.D.3d at 575.
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93. Such as hunting, fishing, organized gleaning as defined in § 71-Y of the Agriculture and Markets Law, as well as canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs.
94. In determining if a property is conducive to the activity in question, courts should look to see if the property has been used by recreationists in the past for the same activity. *Iannotti v. Consolidated Rail Corp.*, 74 N.Y.2d 39, 45 (1989).
95. *Id.*
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115. In 2012, New York enacted 8 N.Y.C.R.R. § 136.5 which lays out the minimum standards for public schools and concussion management. (The regulation is mandatory for public schools and charters, and may be implemented by nonpublic schools, if they choose).
116. Prior to 2015, the NCAA's Constitution only required that Division I institutions have a concussion management plan for student-athletes. The plan did not have to be submitted to the NCAA for approval.
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119. At the time of the plaintiff's accidents, schools were not required to submit their concussion management plans for review.
120. *Id.*
121. *Id.* at 4.
122. *Id.*
123. *Id.* at 5.



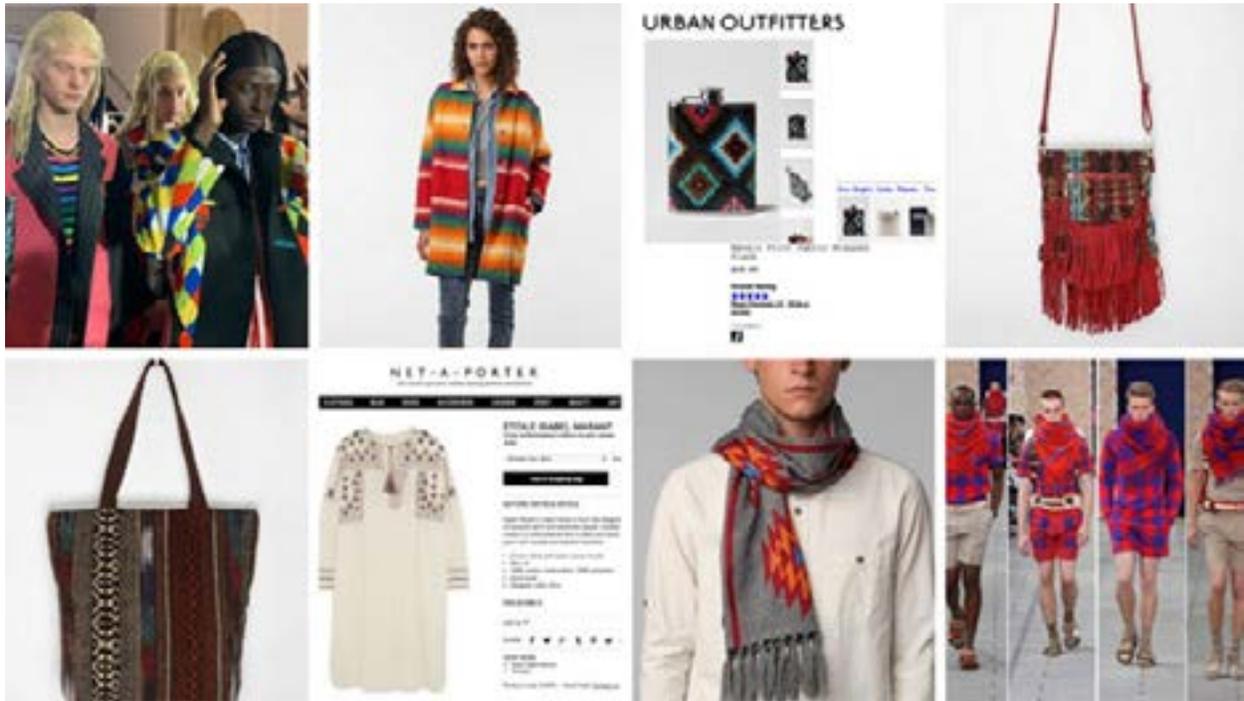
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Homage or Faux Pas: Cultural Appropriation in Fashion Apparel

By Amber Lee



Comme des Garçons, Paris Fashion Week Show 2020; exhibits to the complaint filed in *Navajo Nation v. Urban Outfitters, Inc.* 935 F. Supp. 2d 1147, 1161–1169 (D.N.M. 2013); Isabel Marant, Etoile Line, 2014; Louis Vuitton, Maasai Collection, Spring/Summer 2012.

The issue of appropriation by fashion brands of minorities' culture resurfaces every now and then and at each Fashion Week. For example, in 2011, American retail company Urban Outfitters came under fire after it launched its Navajo-themed clothing and accessories line, which some members of the indigenous community found to be "culturally offensive."¹ Three years later, French designer Isabel Marant was accused of plagiarizing the traditional Tlahuitoltepec blouse of the indigenous Mixe community in Mexico.² In 2017, the public similarly gave Canadian fashion brand Ports 1961 a difficult time when it featured models with shirts bearing "ONLY LOVE MATTERS" and "EVERY COLOR MATTERS," slogans that social media users felt belittled the message of the Black Lives Matter movement and improperly appropriated the cultural expressions of a minority group.³ During the Paris Fashion Week show in January 2020, Comme des Garçons found itself placed under international scrutiny for putting cornrow wigs on white models as part of its participation in the show.⁴ Responding to online criticisms of his fashion choice, hairstylist Julien d'Ys apologized, but not before clarifying that he never intended to "hurt or offend anyone, ever."⁵ He defended the use of the cornrow wigs

on these models, stating that it was an inspiration and an homage to an Egyptian prince.⁶ Perhaps d'Ys was genuinely inspired, but given the public's growing awareness of cultural appropriation, it is hardly surprising that the public reacted negatively to the hairstylist's apparent lack of sensitivity in this matter.



Source: Instagram (https://www.instagram.com/p/B7d_RujHnx3/).

Ahead of the 2019 New York Fashion Week, the Council of Fashion Designers of America asked its designers to “remember to promote diversity and inclusion, on and off the runway.”⁷ Yet the line between inspiration and appropriation is often unclear. Culture evolves and shifts beyond the constraint of geographical boundaries. Especially in this digital age, cultural ideas and expressions have become increasingly accessible to many instantaneously. Thus, fashion designers may easily and inadvertently cross the line of appropriating a minority’s culture instead of celebrating it, even as they endeavor to act in good faith.

Cultural Appropriation Defined

“Cultural appropriation”—the very thing that Urban Outfitters, Isabel Marant, Comme des Garçons and other fashion houses seem to have been accused of—is nestled in the blurry divide between an impermissible appropriation (that is, a taking that could subject the taker to legal sanctions) and a permissible inspiration.⁸ Cultural and legal scholars alike have written on the meaning of cultural appropriation, which comes down to this basic definition: cultural appropriation is something that happens when “a person or group of a certain culture (‘the appropriator’) ‘takes’ certain tangible or intangible objects (‘cultural products’) from a different culture (‘the source community’).”⁹

Professor Sally Engle Merry of NYU Law describes cultural appropriation as an improper recontextualization of a cultural product,¹⁰ which can be likened to “taking [a] tune and playing it in a different key or at a different tempo so that it becomes something different, yet still the same.”¹¹ While this could very much be a well-intentioned act that treads on the brink of cultural inspiration, the danger of such taking is that the resulting cultural product might one day be completely disassociated from its source community, akin to the erasure of a community’s cultural identity.¹² Another way of characterizing cultural appropriation is that it is a manifestation of power imbalance deeply rooted in colonialism and the historical subordination of certain minority groups.¹³ One sees this in the oft-reported controversies involving the use of Native American headdresses as part of costumes or fashion shows.¹⁴ The launch of the Navajo-themed collection by Urban Outfitters (a publicly-traded retail company headquartered in Pennsylvania), which culminated in a legal struggle between the retail company and the Navajo Nation, is yet another example of this.

It is also unfortunately the case that source communities are often left out of the entire production process, while appropriators benefit financially from the taking of cultural products without attributing their “inspiration” to these source communities.¹⁵ Isabel Marant, for example, did not seek the Mixe community’s permission to use patterns from

the Mixe’s traditional Tlahuitoltepec blouse called the *huipil* on her *Étoile* line, nor did she outsource the creation of the blouse to Mexico.¹⁶ Instead, they were manufactured in India and sold for a hefty price of \$365 each.¹⁷

It would seem that for fashion industry players, claiming inspiration to justify a cultural taking is an easy way out of what could constitute a cultural or even an impermissible appropriation. Source communities are thus the truly disadvantaged party in this scenario, as they lose out on the economic opportunities of the fashion venture and risk having their heritage cherry-picked and erased for the financial benefit of their appropriators. In other words, cultural appropriation in fashion monetizes years of tradition and know-how, and takes away from the significance of symbolism behind cultural apparel.

Is the Existing Legal Framework Sufficient to Safeguard Cultural Heritage from Appropriation?

Writing specifically to address the issues of cultural appropriation and the Native people, Professor Rebecca Tsosie—an Arizona State University professor specializing in federal Indian law—points out that the Native people’s cultural and spiritual interests, which are intrinsically tied to land, often do not fit neatly in the existing legal structure of property law.¹⁸ Even tangible cultural resources seem to find a difficult place in the traditional theory that props up real property, personal property, and intellectual property law since the concept of “property” and “culture” tend to conflict with one another: the former denotes the idea of individual ownership, while the latter stands for something that is shared and held collectively.¹⁹ Notwithstanding the form of the cultural resource, whether it be tangible or intangible, the difficulty of finding an effective legal tool to shield against cultural appropriation becomes apparent for the reasons set forth below.

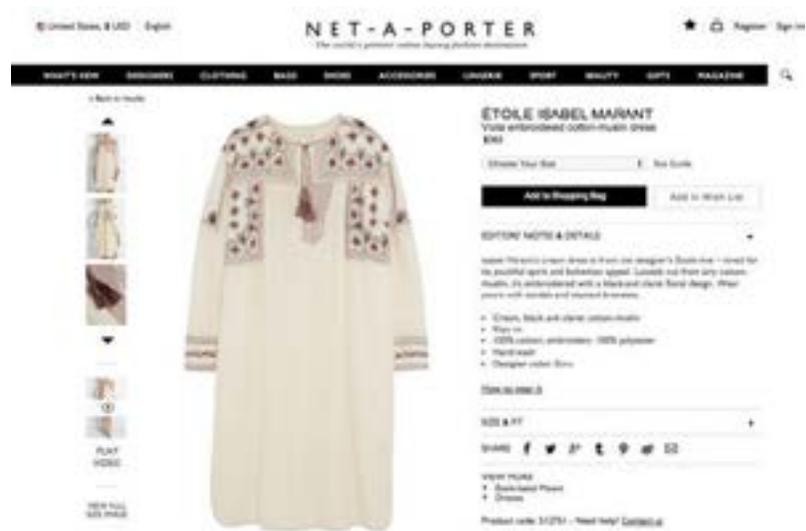
Copyright Laws

In an effort to curb cultural appropriation, a source community might turn to copyright laws for protection. However, cultural products and expressions, such as designs, stories, and songs are held collectively within a community and passed down from generation to generation, which means not one single individual can claim authorship of any given work.²⁰ This in turn creates a barrier for source communities seeking copyright protection in the United States for two reasons. First, the date of the author’s passing is a requisite information in determining the term of protection under the Copyright Act of 1976.²¹ Second, even though the Copyright Act affords protection for anonymous works, the term of a work’s protection is contingent upon the year of its publication.²² Without an ascertainable author and a date of publication, it is simply impossible for anyone to determine how long a cultural product might be protected under the Copyright Act. Further, even if a cultural product was once given intellectual property

protections, any term of protection would have already lapsed due to the passage of time.²³ For these reasons, cultural products often fall into the public domain.²⁴

Failing to afford legal protections to source communities, copyright law has also insulated appropriators seeking copyright protection for works that incorporate unprotected or unprotectable cultural products.²⁵ This is prevalent enough in the history of the music industry where, for example, white musicians appropriated and copyrighted music first innovated by Black musicians.²⁶ Thus, it would appear that copyright law is ill-equipped to provide source communities with legal protections to safeguard their heritage.

Fortunately, the abuse of copyright law by an appropriator does not always guarantee a favorable result to the appropriator, at least across the pond. Recall the controversy involving the French fashion designer Isabel Marant and her *Étoile*



Source: Huffington Post (https://www.huffpost.com/entry/mexico-prevents-indigenous-designs-from-being-culturally-appropriated-again_n_56e87879e4b0b25c9183afc4).

goodwill, the Mixe community invited her to visit it so that she could meet the women who have been instrumental in the continuation of the tradition of making these *huipil* blouses.²⁸

Ironically, Marant's dress soon became roped into a copyright dispute with Antik Batik, another French fashion label, that claimed ownership of the design.²⁹ As a defense, Marant argued that Antik Batik could not have owned the design because the design originated from the Mixe community in Mexico.³⁰ A Paris court eventually ruled against Antik Batik, holding that neither Antik Batik nor Marant could hold copyright of the design that belongs to the Mixe people.³¹ Had the court ruled in favor of Antik Batik, Antik Batik would have been granted legal ownership of the *huipil* designs, which means that the Mixe community would have lost control over a piece of its heritage.

Trademark Law

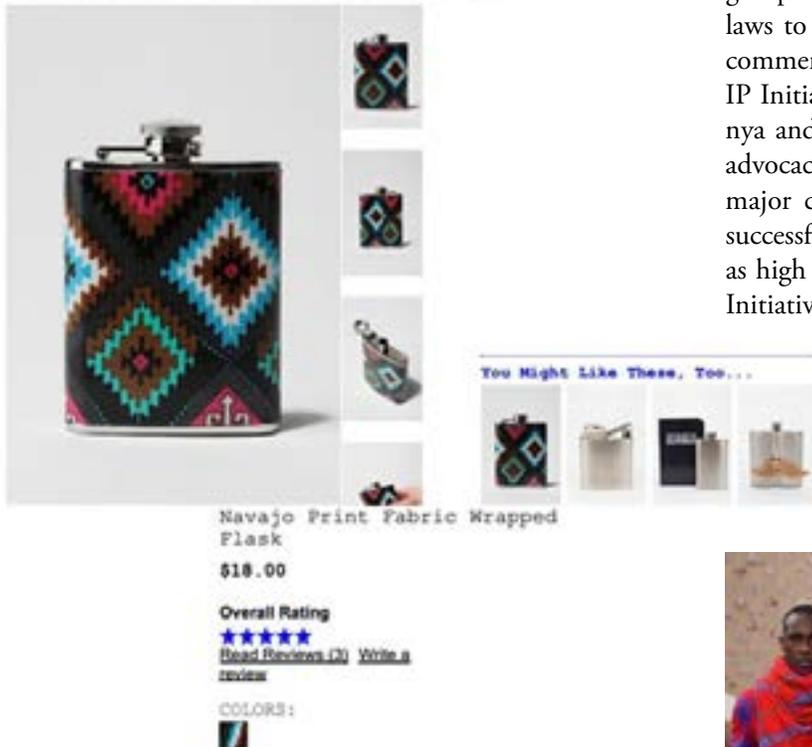
Trademark law is another avenue that a source community might turn to for legal protection against cultural appropriation. In 2012, the Navajo Nation (represented by the Navajo Nation Department of Justice and Keller Rohrback, L.L.P.) filed a complaint against Urban Outfitters alleging that the retailer's use of "Navajo" and "Navaho" in their products, which included items such as "Navajo Nation Crew Pullover" and "Navajo Hipster Panty," violated federal and state trademark laws.³² At the time of the complaint, the Navajo Nation had 86 registered trademarks on the Navajo name and made more than \$500 million in sales of goods bearing the Navajo name.³³ Finding that the Navajo Nation had alleged enough facts to demonstrate secondary meaning in its mark, the district court held that the mark was therefore not generic.³⁴ Additionally, the district court also found that the Navajo



AlejandroLinaresGarcia, traditional embroidered blouse of Santa Maria Tlahuitoltepec, Oaxaca, on sale just off the main plaza, Feb. 4, 2017 (<https://commons.wikimedia.org/wiki/File:Tlahuitoltepec055.jpg>).

line, which incorporated patterns from the Mixe's traditional *huipil*. Not only did the controversy spark reactions from the social media community condemning the appropriation, but it also prompted the Mixe community to ask for reparation damages, the removal of Marant's dress from her collection, and Marant's acknowledgment that the patterns on Marant's dress were taken from the *huipil*.²⁷ Perhaps also as an act of

URBAN OUTFITTERS



Navajo Nation v. Urban Outfitters, Inc., 935 F. Supp. 2d 1147, 1161–1169 (D.N.M. 2013). Exhibit A to the complaint filed on Feb. 28, 2012, (<https://turtletalk.files.wordpress.com/2012/02/exhibita.pdf>).

Nation had sufficiently alleged facts to support its trademark infringement and dilution claims, so it denied Urban Outfitters’ motion to dismiss.³⁵ The legal battle came to a conclusion in 2016, when the Navajo Nation and Urban Outfitters agreed on a settlement, which included a supply and licensing agreement for a collaboration between the two parties.³⁶



Harvey Barrison, traditional dance welcoming us into a Ngorongoro Maasai Village/The Maasai are a Nilotic [Nile Valley] ethnic group of semi-nomadic people located in Kenya and northern Tanzania, May 31, 2012 ([https://commons.wikimedia.org/wiki/File:Maasai_2012_05_31_2750_\(7522650472\).jpg](https://commons.wikimedia.org/wiki/File:Maasai_2012_05_31_2750_(7522650472).jpg)).

Outside of the United States, the Maasai—an Indigenous group living in Kenya and Tanzania—also look to trademark laws to better control the use of their cultural products by commercial users.³⁷ As part of an ongoing effort, the Maasai IP Initiative Trust (which represents the Maasai in both Kenya and Tanzania) has collaborated with Washington-based advocacy group Light Years IP to recover trademarks from major corporations.³⁸ If the Maasai’s trademark rights are successfully enforced, licensing revenues are estimated to go as high as \$10 million a year.³⁹ According to the Maasai IP Initiative, this has the potential to benefit the Maasai tremendously, because licensing revenues could be used to support the local community both socially and economically.⁴⁰

Although it would appear that source communities might find solutions to the issue of cultural



Louis Vuitton Maasai 2012 Spring/Summer Collection

appropriation in trademark laws, scholars have noted their shortcomings as effective legal tools, as far as U.S. trademark law is concerned.⁴¹ For example, a source community pursuing the cancellation of an appropriator’s trademark that uses that community’s cultural product might find itself stumbling back to square one when, at the end of a successful cancellation proceeding, the appropriator becomes entitled to common law protection for her now unregistered mark.⁴² Further, if an appropriator loses the common law protection, the mark would be readily available for widespread third-party uses—surely, an even more undesirable outcome for the source community.⁴³

Notably, another barrier for source communities seeking to have their cultural products recognized as valid trademarks

is that U.S. trademark law requires such cultural products to be “used in commerce” and have met the “distinctiveness” requirement.⁴⁴ After all, the heart of trademark law lies in the protection of commercial symbols or source identifiers, not mere cultural expressions.⁴⁵ For source communities that succeed in meeting the used-in-commerce and distinctiveness requirement, there is yet another obstacle—even if they were to bring infringement claims against appropriators for their use of the source communities’ marks, these source communities might still find it challenging to raise dilution claims due to the lack of nationwide recognition of the marks.⁴⁶ Thus, it would appear that the existing framework for trademark law does not adequately provide avenues for source communities to protect their cultural products from being monetized.

Calls for Reform

In 1991, six claimants lodged a claim with the Waitangi Tribunal, a permanent commission established in 1975 by the New Zealand Parliament tasked with making inquiries and recommendations on claims—allegations that the Crown has breached the Treaty of Waitangi—affecting the Māori-Crown relationship.⁴⁷ In a nutshell, the Wai 262 claim (i.e., the 262nd claim registered with the Waitangi Tribunal) concerns the Māori’s culture, identity, and traditional knowledge and their place in New Zealand’s laws, government policies, and practices.⁴⁸ Namely, it “concerns who controls Māori traditional knowledge, who controls artistic and cultural works such as haka and waiata, and who controls the environment that created Māori culture.”⁴⁹ Twenty years later, the Waitangi Tribunal released a comprehensive report on the Wai 262 claim, observing that New Zealand’s intellectual property regime protects indigenous works only to a limited extent.⁵⁰ Therefore, the tribunal recommends amending existing laws to include two mechanisms by which the general public can “object to derogatory or offensive public use of taonga works, taonga-derived works, or mātauranga Māori” and that the kaitiaki (guardian) is empowered to object to non-derogatory commercial use of taonga works or mātauranga Māori, but not taonga-derived works.⁵¹

In a similar effort to address issues of cultural appropriation in the fashion industry, Law Initiative 5247 was introduced by Guatemalan Congressman Leocadio Juracan to seek collective recognition and intellectual property rights for the Mayan weavers in Guatemala.⁵² Though the proposal has met general support from indigenous lawmakers, there are concerns over the application of modern laws to a traditional practice that has spread throughout the region over the years.⁵³

What of efforts within the United States to advocate for stronger legal protection of cultural expressions and products? In 2018, it was reported that Aloha Poke Co., a midwestern chain selling poke (a Hawaiian staple made from chunks of

seasoned raw fish), sent cease-and-desist letters to various businesses across the nation, including shops in Hawaii, Alaska, and Washington, demanding that they cease using the words “Aloha” and “Aloha Poke.”⁵⁴ Fearing legal ramifications, some businesses—even ones that were owned and operated by Hawaiians—complied by changing their names.⁵⁵

Although the Aloha Poke controversy unfolded in the food and beverage world instead of the glitz and glamor of a fashion runway, a similar level of outrage was felt, as people thought it unjust for a midwestern company to prevent native Hawaiians from using their own language in running their businesses. Recognizing that existing western intellectual property laws facilitate misappropriation of indigenous knowledge across various industries, including the fashion industry, Hawaiian lawmakers thus passed a resolution establishing a task force to develop a legal framework to protect Native Hawaiian “cultural intellectual property, traditional cultural expressions, and genetic resources.”⁵⁶

As discussed in the preceding sections, the difficulty in protecting cultural expression and products lies in the used-in-commerce requirement and temporal limitation of the existing intellectual property law. A task force like the one introduced by the Hawaiian lawmakers may just be the much-needed first step in advocating for a more culture-centric intellectual property law. Other proposals to prevent the misappropriation of traditional cultural expressions include adapting the existing collective and certification marks regime as a defensive measure by source communities.⁵⁷

In the international arena, Professor Julia Janewa Osei-Tutu has proposed harmonizing cultural intellectual property



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the Center for Art Law, 195 Plymouth Street, Brooklyn, NY 11201; www.itsartlaw.org. The Center for Art Law is committed to supporting members of the art and cultural heritage fields and to mentoring future art law leaders. It even launched the Judith Bresler Fellowship for recent graduates, honoring the former EASL Section Chair Judith Bresler. A brilliant legal mind and one of the leaders in the field, Judith co-authored the seminal *Art Law Treatises*. She passed away in 2020.

across borders by making a minor modification to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).⁵⁸ Specifically, Osei-Tutu argues that the existing model based on the international protection of geographical indicators (GIs) or governmental symbols could be used to protect cultural intellectual property, especially those that are attributable to specific geographical origins.⁵⁹

Conclusion

Despite legal hurdles, not all is lost in the source communities' effort to prevent their cultural heritage from being unfairly monetized by appropriators. After all, the Navajo Nation and the Maasai were able to work out licensing agreements that would not only financially benefit both the source communities and their appropriators, but would also allow the source communities to assert some degree of control over the use of their cultural product in fashion retail.

With all things considered, any legal reform that strives to enhance protection for cultural products must balance the competing interests of safeguarding a source community's cultural identity with the need to preserve the free flow of ideas in support of cultural exchange. After all, the "cross-pollination of cultures is an essential feature of multicultural and non-segregated societies."⁶⁰

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An Overview of Entertainment and Sports Domain Disputes

By Bobby Desmond

Introduction

Virtually every sport and nearly every facet of the entertainment industry has been targeted by cybersquatters seeking to profit off the goodwill and reputation of a celebrity or organization through an abusive domain name. The Anticybersquatting Consumer Protection Act (ACPA) allows trademark owners to pursue civil actions against those who, in bad faith, register a domain name that is identical or confusingly similar to a mark.¹ However, filing and trying such a lawsuit takes considerable time and expense. Fortunately, there is a quicker and less costly way to resolve domain name disputes.

The Uniform Domain Name Dispute Resolution Policy (policy)² was adopted in 1999 by the Internet Corporation for Assigned Names and Numbers (ICANN),³ and the current set of related rules were implemented in 2015 (rules).⁴ The policy and the rules apply to domain names that use (i) generic top level domains such as <.com>, <.net>, and <.org>; (ii) certain country code top level domains that have adopted the policy on a voluntary basis such as <.au>, <.cn>, and <.es>; or (iii) one of the more than 1,300 New gTLDs, such as <.gay>, <.mobile>, and <.latino>.⁵ Registrations that use any other top level domain are subject to different domain dispute policies.⁶

The policy provides a mandatory online alternative dispute resolution method by which a trademark owner (complainant) may institute a proceeding against a cybersquatter (respondent) to request cancellation or transfer of a domain

name that infringes upon the mark.⁷ However, cancellation is generally advised against because it leaves open the possibility of the respondent immediately re-registering the domain name—which would, in turn, require the complainant to file a second complaint for the same domain name.⁸

I. Policies and Procedures⁹

A. Complaint and Response

The complainant must electronically file a complaint¹⁰ before the World Intellectual Property Organization's Arbitration and Mediation Center (WIPO)¹¹ or the Forum¹² (each, a "provider").¹³

The complaint must include the contact information of the complainant and the respondent;¹⁴ a preferred method of communication; the domain name(s) and associated registrar(s); the marks; the remedy sought; an identification of any other relevant legal proceedings; and a signed statement that the complainant submits to the jurisdiction of the courts in at least one specific mutual jurisdiction.¹⁵ The complaint must also provide evidence of (i) the manner in which the domain name is identical or confusingly similar to the mark, (ii) why the respondent has no rights or legitimate interests in the domain name, and (iii) the manner in which the domain name was registered and is being used by the respondent in bad faith.¹⁶

After a complaint is filed, the provider will submit a request for the registrar to lock the domain name during the

proceedings.¹⁷ From the commencement of the proceeding until 15 business days after it has concluded (and during any pending court proceeding), the respondent may not transfer the domain name to another holder or registrar—except that the respondent may transfer the domain name to another registrar during a pending court proceeding if the dispute remains subject to the policy.¹⁸

Once the provider confirms that the complaint satisfies the minimum requirements of the policy, the provider notifies the respondent of the commencement of the proceeding.¹⁹ Within 20 days of the commencement of the proceeding, the respondent may submit a response in electronic form, which responds to the allegations of the complaint and includes any and all bases for the respondent to retain registration and use of the domain name.²⁰ This deadline must be extended by an additional four days upon the respondent's request,²¹ and this deadline may be further extended by the panel in exceptional circumstances.²² The response must include the respondent's contact information; a preferred method of communication; an identification of any other relevant legal proceedings; a signed statement; and relevant evidence.²³ If no response is submitted, the panel will decide the dispute based solely upon the complaint, unless exceptional circumstances exist.²⁴

The complainant must elect to have the proceeding decided by a single panelist or a three-member panel.²⁵ It must pay for the cost of the proceeding, except in cases where the respondent seeks to expand from a single panelist to a three-member panel.²⁶ In such cases, the fee is split evenly.²⁷

Unless either party selects a three-member panel, the provider will appoint a panelist within five calendar days of receiving the response or the lapse of the time period to submit a response.²⁸ The panel must be impartial and independent, and the panelists must disclose to the provider any circumstances giving rise to justifiable doubt as to their impartiality or independence.²⁹ All communications between the panel and either party must be made through a case administrator appointed by the provider.³⁰ The panel shall treat the parties with equality; conduct the proceeding with due expedition; and determine the admissibility, relevance, materiality, and weight of the evidence.³¹

B. Consolidation

The panel may also decide to consolidate multiple disputes into a single proceeding,³² if the domain names are registered by the same Registrant.³³ More specifically, consolidation is permitted where the complainant shows that the domain names “are subject to common control” and the panel determines that consolidation is procedurally efficient, fair, and equitable to all parties.³⁴

The provider must first determine whether there is a *prima facie* case to permit consolidation.³⁵ If the panel later finds otherwise, it may permit separation of the proceedings.³⁶

Examples of evidence that support consolidation include, but are not limited to, proof that (i) the domain names are registered in the same person's name,³⁷ (ii) the domain names are registered to different people or organizations that share the same contact information,³⁸ (iii) the domain names are registered to registrants in the same country,³⁹ (iv) the domain names are registered with fictitious names or addresses,⁴⁰ (v) the domain names use the same or similar naming patterns or structures,⁴¹ (vi) the domain names resolve to websites with the same or similar layouts, menus, fonts, logos, or content,⁴² (vii) the domain names resolve to websites that are engaged in the same or similar bad faith behavior, such as allowing users to access content pirated from the complainant's services,⁴³ (viii) the domain names resolve to websites that offer the same or similar services, product plans, and prices,⁴⁴ (ix) the domain names were registered on the same date or around the same time,⁴⁵ (x) one or more of the domain names was/were registered after the respondent received a demand letter from the complainant,⁴⁶ (xi) the domain names were registered at the same registrar⁴⁷ or (xii) the domain names were registered using a privacy service.⁴⁸

C. Language of the Proceedings

The proceedings will be conducted in the language of the registration agreement, unless the parties agree otherwise, the registration agreement specifies otherwise, or the panel finds otherwise.⁴⁹ It is proper to conduct the proceedings in another language where substantial expense and delay would be incurred if the complaint had to be translated to the language of the registration agreement, and where there is evidence that the respondent understands the other language.⁵⁰ Relevant evidence includes (i) the language of the domain name, the website, or its script, (ii) prior cases involving the respondent in a particular language, (iii) prior correspondence between the parties, (iv) evidence of other domain names owned by the respondent corresponding to a particular language, (v) the use of a particular language agreement for some (but not all) of the domain names, (vi) currencies accepted on the domain name, and (vii) other indicia tending to show that it would not be unfair to proceed in a particular language.⁵¹

D. Settlements

The parties may negotiate a settlement and terminate the proceeding by providing written notice of a request to suspend followed by a completed settlement form.⁵² It is important to note that the settlement forms provided by the providers are not intended to take the place of a fully executed settlement agreement but are instead intended to summarize the essential terms of such an agreement.⁵³ Settlement dis-

cussions are considered admissible.⁵⁴ In the event of a settlement, the fee will be refunded.⁵⁵

E. Decisions

If no settlement is reached, the panel will make a decision within 14 days of appointment.⁵⁶ Then, within three business days, the provider will notify the parties, ICANN, and the registrar of the decision,⁵⁷ which will be published in full online, unless a portion is redacted due to exceptional circumstances.⁵⁸

If the panel decides that the domain name should be canceled or transferred, ICANN waits 10 business days after receiving notice from the provider before implementing the decision.⁵⁹ During that time, either party may commence a lawsuit, which will cause ICANN to postpone implementation of the decision until it receives (i) evidence of a resolution between the parties; (ii) evidence that the lawsuit has been dismissed or withdrawn; or (iii) a copy of an order from the court dismissing the lawsuit or ordering that the respondent cease using the domain name.⁶⁰

II. Standing

The complainant must show standing by proving that it has valid trademark rights in the mark.⁶¹ The policy may be used to protect both registered and unregistered (or “common law”) marks.⁶² The jurisdiction(s) where the mark is valid, the relevant goods and services, the filing or priority date, date of registration, and date of first use are not relevant under the first element, but may bear on the second and third elements.⁶³ Further, a registered mark is prima facie evidence that the complainant has standing to file a complaint.⁶⁴

A complainant may assert common law rights in an unregistered mark that has acquired secondary meaning through specific evidence that the mark has become a distinctive identifier that consumers associate with the complainant’s goods and/or services, such as proof of (i) the duration and nature of use of the mark, (ii) the amount of sales under the mark, (iii) the nature and extent of advertising using the mark, and (iv) actual recognition by consumers, the industry, and the media.⁶⁵ Similarly, acquired distinctiveness must be shown if a complainant asserts rights in a registration on the U.S. Patent and Trademark Office’s (USPTO’s) Supplemental Register.⁶⁶

Many entertainers and athletes may attempt to register their personal names as domain names, only to find that the domain names were already registered by cybersquatters. If an entertainer or athlete has a trademark registration on their personal name, then that mark will provide standing to file a complaint.⁶⁷ However, if the complainant does not have a registration on their personal name, then the complainant must establish common law rights by showing that their per-

sonal name is being used as a trademark.⁶⁸ Merely having a famous name is insufficient, especially where that name is a common or generic word, such as STING.⁶⁹

III. Confusingly Similar

The first element requires the complainant to show that the domain name is identical or confusingly similar to the mark.⁷⁰ The test to prove confusing similarity typically involves a side-by-side textual and phonetic comparison of the domain name and the mark.⁷¹

The applicable top-level domain (TLD) in a domain name “is normally disregarded” under the confusing similarity test, since inclusion of a TLD is “a mere technical requirement of domain name registration.”⁷² However, the TLD should be considered under the confusing similarity test where the combination of the applicable TLD and the second-level portion of the domain name comprise the mark.⁷³

A. Entire Mark

Incorporating a mark in its entirety is sufficient to establish that a domain name is identical or confusingly similar to the mark.⁷⁴ For example, many of the decisions cited in this article include domain names that are identical to a mark, including the names of celebrities, like <madonna.com>, <juliaroberts.com>, <celinedion.com>, and <mirandakerr.com>, and the names of companies, like <redbull.org>.⁷⁵

The addition of other terms (whether descriptive, geographical, pejorative, meaningless, or otherwise) do not prevent a finding of confusing similarity.⁷⁶ For example, many of the decisions cited in this article include domain names comprised of a mark and an additional term that did not prevent a finding of confusing similarity, such as <whitespeedos.com>, <vogueaustralia.com>, and <officialnascar.com>.⁷⁷

B. Dominant Feature of the Mark

The domain name will typically be considered confusingly similar to the mark if a dominant feature of the mark is recognizable in the domain name through typosquatting.⁷⁸ That occurs when the domain name consists of a common, obvious, or intentional misspelling of the mark using (i) adjacent keyboard letters, (ii) substituting similar characters,⁷⁹ (iii) non-Latin internationalized or accented characters,⁸⁰ or (iv) additional interspersed letters or numbers.⁸¹

A less frequent type of dispute involves a domain name that involves a truncated or abbreviated version of the mark. For example, <leakedfanscontent.com> and <leakedof.com> were found to be confusingly similar to the ONLYFANS mark, despite only containing the word FANS or the abbreviation OF.⁸²

Although typically disregarded under the first element, a panel may consider the broader context of a dispute if the panel would benefit from affirmation as to confusing similarity with the mark.⁸³ This broader context may include, for example, evidence that the respondent is targeting the mark, such as where <leakedfanscontent.com> and <leakedof.com> featured content pirated from <onlyfans.com>.⁸⁴

Since geographical terms are often a component of entertainment and sports marks, an issue could arise where a sports or entertainment mark contains a disclaimed geographical term in the mark. For example, CBS has a registration on CSI: VEGAS, which disclaims the geographic term VEGAS.⁸⁵ Hypothetically, this registration would not provide legal grounds if the domain name contains only the geographical term, such as where a respondent promotes Nevada tourism on <visitvegas.com>. However, there would almost certainly be a likelihood of confusion if the broader content shows the respondent is targeting the mark, such as by selling t-shirts containing images of CSI: VEGAS characters on <vegasmerch.com>.

C. Multiple Marks

A common issue in entertainment and sports domain disputes are domain names comprised of more than one mark owned by more than one party, such as <legostarwarsvideo-game.info>⁸⁶ and <nfl-nba-nhl-mlb-ncaa-online-betting-lines-odds.com>.⁸⁷ In such cases, the domain name may be transferred to the complainant without prejudice to the owners of the other trademarks.⁸⁸

IV. Rights or Legitimate Interests

The standard of proof in disputes under the policy is a preponderance of the evidence.⁸⁹ As the overall burden of proof is on the complainant, it is commonly recognized that the complainant has the “impossible task of proving a negative proposition, requiring information that is primarily if not exclusively within the knowledge of the respondent.”⁹⁰ Thus, once the complainant makes a prima facie showing that the respondent lacks rights or legitimate interests in the domain name, the burden shifts to the respondent to provide evidence demonstrating that it has rights or legitimate interests in the domain name.⁹¹ The policy explicitly provides three non-exhaustive instances where a respondent has rights and legitimate interests in the domain name.⁹²

A. Bona Fide Offering of Goods and Services

First, a respondent may show that it has rights and legitimate interests in the domain name if it is used in connection with a bona fide offering of goods or services before any notice to the respondent of the dispute.⁹³ Evidence that may be used to show a bona fide prior use include, but is not limited to, evidence predating notice of the dispute, which

shows (i) business formation, due diligence, and legal advice, (ii) credible investment in website development or promotional materials (iii) a genuine business plan, and/or (iv) registration and use of related domain names.⁹⁴ For example, although CBS is easily able to prove trademark rights in the SURVIVOR mark, even without a registration, CBS would be unsuccessful if it brought a complaint against a hypothetical respondent who offered online support groups to survivors of cancer on <survivor.com> before the hit reality television show premiered in 2000.

B. Respondent is Commonly Known by the Domain Name

Second, a respondent may show that it has rights and legitimate interests in the domain name if the respondent is “commonly known” by the domain name.⁹⁵ This occurs when the domain name contains the respondent’s actual given name, stage name, nickname, initials, or other moniker.⁹⁶ For example, a previously registered trademark corresponding to the domain name can be used to show rights or legitimate interests, unless such registration was a pretext to circumvent application of the policy.⁹⁷

While the respondent need not prove that it has acquired trademark rights in the name, it must provide evidence that it is actually known by that name, including, but not limited to, (i) a birth certificate, driver’s license, or other government-issued ID, (ii) independent and sustained secondary material, such as websites, articles, or correspondence, (iii) bills/invoices, and/or (iv) business formation documentation.⁹⁸ For example, a respondent who claimed that his childhood nickname was Red Bull did not have an interest in <redbull.org>, because he did not provide any evidence to that fact.⁹⁹ If the respondent does not put forth any evidence that it is “commonly known” by the domain name, then the panel may consider the respondent’s WhoIs registration information in determining that there is no evidence indicating that the respondent has been commonly known by the domain names.¹⁰⁰

C. Fair Use

Finally, a respondent may show that it has rights and legitimate interests in the domain name if the respondent makes a legitimate noncommercial or fair use of the domain name, without intent for commercial gain to misleadingly divert consumers or to tarnish the mark.¹⁰¹

The fair use defense allows anyone to use a mark, provided that (i) the good or service is not readily identifiable without using the mark, (ii) the mark is only used as is reasonably necessary to identify the good or service, and (iii) the use of the mark does not suggest sponsorship or endorsement by the owner of the mark.¹⁰²



Panels will consider the broader context of a case when determining whether a use is fair, including, but not limited to, whether (i) the domain name was registered and is being used as a pretext for commercial gain, (ii) the respondent reasonably believes its referential, laudatory, or derogatory use is truthful and well-founded, (iii) it is clear that the website is not operated by the complainant, including whether a disclaimer is used, (iv) there is an actual connection between the content of the website and the complainant or a competitor, (v) the respondent engaged in a pattern of abusive domain registrations, (vi) the respondent provided false contact information, or (vii) the respondent engaged in cyberflight.¹⁰³

Fair use does not typically extend to a domain name that is identical to a mark (that is, <trademark.tld>), since such use creates an impermissibly high risk of impersonation or implied affiliation.¹⁰⁴ Additionally, fair use does not typically extend to a domain name containing a mark (such as MISS USA) and an additional term that refers to the complainant's goods or services (such as "pageant.")¹⁰⁵

However, fair use may extend to a domain name containing a mark and an additional term in some instances. Fair use may exist where the website contains (i) a laudatory term (such as "fan") praising the complainant,¹⁰⁶ (ii) a derogatory term (such as "sucks") criticizing the complainant,¹⁰⁷ or (iii) an unflattering, pejorative, or inflammatory word parodying the complainant.¹⁰⁸ Fair use does not exist where the website (i) contains false or misleading statements amounting to defamation or tarnishment¹⁰⁹ or (ii) engages in commercial activity beyond what is incidental to offset the costs of operating the website.¹¹⁰

Fair use may also exist where a reseller or repair service (i) uses the website to resell or repair only the complainant's goods or services,¹¹¹ (ii) accurately and prominently discloses its relationship to the complainant,¹¹² (iii) does not corner

the market on domain names containing the mark,¹¹³ and (iv) does not have a prior agreement prohibiting the registration and use of domain names incorporating the mark.¹¹⁴ For example, the registrant of 19 domain names containing the NFL mark could not assert a reseller fair use defense, because (i) the respondent linked to third party gambling websites unrelated to the NFL or its football games, (ii) the website did not include a disclaimer, and (iii) registering 19 domains is more than necessary to meet the legitimate requirements of a *bona fide* reseller.¹¹⁵

With a global ticket scalping market valued at \$1.5 billion,¹¹⁶ sports and entertainment companies are bound to eventually find a cybersquatter engaged in such activity. Simply purchasing tickets from the complainant does not guarantee the respondent a fair use right to scalp those tickets on a domain name that is confusingly similar to the complainant's entertainment or sports mark. The scalper must comply with the fair use test for resellers. For example, one respondent had a fair use right to resell tickets on domain names containing the terms "seats" or "tickets" and NCAA marks, since the website included a disclaimer.¹¹⁷

On the other hand, one respondent was denied a fair use defense to resell tickets to NCAA games on 10 domain names containing NCAA marks, since the website sold tickets at highly inflated prices and also sold tickets to other events.¹¹⁸ Similarly, that same respondent could not resell DAYTONA 500 tickets on a different website, which (i) sold tickets to races sponsored by third parties, and (ii) did not include a disclaimer.¹¹⁹ Further, evidence that the respondent may be violating laws that prohibit reselling tickets at substantially inflated prices may be relevant to fair use evaluation; however, proceedings under the policy are not the appropriate forum to adjudicate such allegations if they are contested by the respondent.¹²⁰

V. Bad Faith Registration

The third element requires the complainant to show that the domain name was registered in bad faith.¹²¹

A. Rights in the Mark Must Pre-Date the Domain Name Registration

Bad faith registration generally is not found unless the respondent registered or obtained the domain name before the complainant obtained rights in the mark—that is, before the mark was registered or acquired distinctiveness.¹²² Bad faith registration may be found even when the domain name pre-dates the complainant's rights in the mark, if the domain name was registered (i) shortly before or after the complainant announced a merger or product launch, (ii) with insider knowledge (such as if the respondent was a former employee of the complainant), (iii) in response to significant media attention, or (iv) after the complainant filed a trademark application.¹²³ For example, bad faith registration was found in relation to <pac-12neetwork.com>, <pac12network.com>, and <pac-12network.org>, because the Pacific-10 Conference was publicly considering expanding at the time when the respondent registered the domain names.¹²⁴

B. Presumption of Bad Faith for Famous or Well-Known Marks

Registering a domain name that is identical or confusingly similar to a famous or well-known mark creates a presumption of bad faith.¹²⁵ As many entertainment and sports marks are widely known, it may often be inferred that a respondent could not credibly claim to have been unaware of the mark at the time of registration, unless the mark is a dictionary term or inherently attractive as a domain name.¹²⁶

VI. Bad Faith Use

The third element also requires the complainant to show that the domain name is being used in bad faith.¹²⁷ The policy explicitly provides the following four non-exhaustive instances of bad faith use.¹²⁸

A. Offering to Sell the Domain Name for a Profit

First, a complainant may show that the respondent is acting in bad faith if the respondent registered or acquired the domain name for the primary purpose of selling, renting, or otherwise transferring the domain name to the complainant for valuable consideration in excess of the respondent's out-of-pocket costs directly related to the domain name.¹²⁹

An offer to sell a domain name is not evidence of bad faith on its own.¹³⁰ For example, in response to a demand letter from NASCAR, a respondent stated: "I estimate a loss of \$27,600.00. With this amount I would be willing to immediately turn over the <nascaracing.com> domain name to NASCAR."¹³¹ This was insufficient to show that the re-

spondent registered the domain name *primarily* to sell it for profit.¹³²

More evidence is necessary to show an intent to sell the domain name in excess of costs, such as proof of (i) the respondent's knowledge of the mark, (ii) the distinctiveness of the mark, (iii) a pattern of abusive registrations by the respondent, (iv) website content targeting the mark or linking to the complainant's competitors, and (v) a respondent's past conduct or business dealings.¹³³ For example, a respondent's offer to sell <officialnascar.com> to NASCAR for \$500 and then threaten to auction the domain name on eBay was in bad faith, when the prevailing rates for registering and transferring a domain name with the registrar at that time were less than \$500.¹³⁴ Even if the respondent provided evidence that the costs were greater than \$500, the threat to auction the domain name "betrays a clear motive to extract the maximum available profit from the domain name," which is proof of bad faith.¹³⁵ Similarly, a respondent's attempt to seek \$60,000 for <vogueaustralia.com> was found to be "extortionate" when it was revealed that the figure was based on "nonexistent/irrelevant business expenses."¹³⁶

B. Preventing the Complainant from Registering the Domain Name

Second, a complainant may show that the respondent is acting in bad faith if the respondent registered the domain name to prevent the complainant from using the mark in a corresponding domain name, provided that the respondent has engaged in a pattern of such conduct.¹³⁷ Evidence that the respondent is a "serial cybersquatter" who engages in a pattern of registering domain names containing the marks of the complainant or a third party is evidence of bad faith.¹³⁸ For example, bad faith has been found where the respondent admitted to registering multiple domain names containing the names of famous celebrities.¹³⁹

C. Disrupting Business

Third, a complainant may show that the respondent is acting in bad faith if the respondent registered the domain name primarily to disrupt a competitor's business.¹⁴⁰ Business disruption has been found where the respondent uses the domain name primarily for the purpose of diverting potential customers from the complainant's sporting goods business.¹⁴¹ However, business disruption is not often discussed at length by panels deciding disputes involving entertainment and sports marks.

D. Attracting Users for Commercial Gain

Fourth, a complainant may show that the respondent is acting in bad faith if the respondent uses the domain name with the intention of attracting, for commercial gain, internet users to the respondent's website or another website, by

creating a likelihood of confusion with the mark as to the source, sponsorship, affiliation, or endorsement of such website or a product or service thereon.¹⁴²

Evidence of attraction for commercial gain may include, but is not limited to, proof of (i) actual confusion, (ii) seeking to cause confusion, even if unsuccessful, and (iii) redirecting the domain name to a website owned by the complainant, its competitor, or the respondent, even if a disclaimer is used.¹⁴³ For example, a respondent with agreements to promote other websites does so in bad faith, regardless of whether the respondent receives payments or merely the benefit of cross-promotion without money changing hands.¹⁴⁴

Direct competition occurs when the respondent offers similar products or services as the complainant or links to the complainant's competitors.¹⁴⁵ For example, in one case, "[t]he respondent offer[ed] online sports coverage, including live games, matches, and tournaments" on <livefoxsports.info>, which directly competed with the "online sports entertainment, including news, information, up-to-date scores, play-by-play coverage of games, and streaming videos" offered by Twentieth Century Fox.¹⁴⁶

Piracy and counterfeiting are more brazen and troublesome ways a respondent may use an entertainment or sports mark in a domain name to attract users for commercial gain. While direct competition involves a respondent offering similar services, piracy involves the respondent offering the complainant's services themselves (such as stolen entertainment content),¹⁴⁷ and counterfeiting involves the respondent offering fake versions of the complainant's services (such as jerseys bearing an imitation of a sports team's logo).¹⁴⁸

Bad faith may also be shown by any other evidence of illegal activities by the respondent such as phishing, distributing malware, hacking, and other types of fraud.¹⁴⁹ For example, bad faith may be shown if the website offers illegal cheat codes, hacks, or jail breaks that provide unauthorized access to video games.¹⁵⁰

Conclusion

The policy is an extremely useful tool for entertainment and sports brands seeking to obtain or cancel domain names that are identical or confusingly similar to their marks. However, the policy has its limits. Complaints are typically ineffective in cases of anticipatory cybersquatting¹⁵¹ where the domain name was registered prior to the entertainment or sports brand registering its mark or obtaining acquired distinctiveness. Further, complaints are always ineffective if brought against a good-faith registrants with legitimate rights or interests in the domain name, such as a respondent who was commonly known by the domain name before the complainant obtained rights in the Mark, a respondent engaging

in comment or criticism, and a respondent who is engaged in reselling or repairing the complainant's goods or services.

Despite these inherent limitations, the policy is an effective and efficient method of combating abusive registrations that seek to extort the complainant, prevent the complainant from registering a domain name, disrupt or directly compete with the complainant's business, or that engage in illegal activities common in the entertainment and sports industries such as piracy and counterfeiting.

If either party believes that the dispute was decided incorrectly, the aggrieved party can bring suit in federal court. If the complainant wins the proceeding and the domain name is transferred or cancelled, the aggrieved respondent may file suit alleging that the complainant acted in bad faith in bringing the proceeding and engaged in reverse domain name hijacking.¹⁵² If the respondent raises a successful defense and maintains registration of the domain, the complainant may file suit for trademark infringement.¹⁵³



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Endnotes

1. Pub.L. No. 106-113 § 3001 *et. seq.*, 113 Stat. 1501A-545; 15 U.S.C. §§ 1125(d), 1114.
2. See *Uniform Domain Name Dispute Resolution Policy*, ICANN (Oct. 24, 1999), <https://www.icann.org/resources/pages/policy-2012-02-25-en>.
3. Policy, Paragraph 1.
4. See *Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN (Sept. 28, 2013), <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en> (applicable to all complaints filed on or after July 31, 2015) ("Rules").
5. See *WIPO Guide to the UDRP*, section A, WIPO, <https://www.wipo.int/amc/en/domains/guide/>; Delegated Strings, ICANN, <https://newgtlds.icann.org/en/>.
6. See, e.g., *the Dispute Resolution Service Policy for .uk Domains*, Nominet, <https://www.nominet.uk/domain-support/uk-domain-disputes/>. As most disputes can be brought under the Policy and the elements of other domain dispute policies often share substantial similarities with the Policy, this article focuses on the elements of the Policy and highlights cases brought under the Policy.
7. Policy, Paragraph 4 (note that although the Policy's procedure is mandatory, neither party is prevented from submitting the dispute

- to a court of competent jurisdiction for independent resolution before the proceeding begins or after it concludes).
8. *National Football League v. Online Marketing International also known as International Marketing Group*, D2008-2006 (WIPO Mar. 2, 2009), <https://www.wipo.int/amc/en/domains/decisions/html/2008/d2008-2006.html> (cited herein as NFL).
 9. For brevity, this article focuses on the procedures related to disputes brought before WIPO, as those procedures are laid out in the WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition, <https://www.wipo.int/amc/en/domains/search/overview3.0/> (Overview).
 10. Rules, Paragraph 3(a); WIPO provides a model complaint form and filing guidelines at <https://www.wipo.int/amc/en/domains/complainant/>; Form provides a model complaint form at <https://www.adrforum.com/assets/resources/UDRP/UDRPMModelComplaint2016.docx>.
 11. WIPO, <https://www.wipo.int/amc/en/domains/>.
 12. Forum, <https://www.adrforum.com/domain-dispute/udrp>.
 13. Previous providers included the eResolution Consortium and the International Institute for Conflict Prevention & Resolution until 2001 and 2006, respectively. See *Domain Name Administrative Decisions*, Disputes.org, <http://www.disputes.org/index.htm>; *ICANN Decisions*, CPR, <https://www.cpradr.org/resource-center/icann-decisions>.
 14. Overview, section 4.4.1 (if the Respondent uses a privacy service, WIPO will disclose the Registrant's contact information to the Complainant after filing and invite the Complainant to amend the complaint in light of the new information).
 15. Rules, Paragraph 3(b).
 16. Rules, Paragraph 3(b)(ix).
 17. Rules, Paragraph 4(a).
 18. Policy, Paragraph 8.
 19. Rules, Paragraph 4(f).
 20. Rules, Paragraphs 5(a) and 5(c)(i); WIPO provides a model response form and filing guidelines at <https://www.wipo.int/amc/en/domains/respondent/>; Forum provides a model response form at <https://www.adrforum.com/assets/resources/UDRP/UDRPMModelResponse.docx>.
 21. Rules, Paragraph 5(b).
 22. Rules, Paragraph 5(e).
 23. Rules, Paragraph 5(c).
 24. Rules, Paragraph 5(f).
 25. Rules, Paragraph 3(b)(iv).
 26. Policy, Paragraph 4(g).
 27. *Id.*
 28. Rules, Paragraph 6(b).
 29. Rules, Paragraph 7.
 30. Rules, Paragraph 8.
 31. Rules, Paragraph 10.
 32. Rules, Paragraph 10(e).
 33. Rules, Paragraph 3(c).
 34. *Speedo Holdings B.V. v. Programmer, Miss Kathy Beckerson, John Smitt, Matthew Simmons*, D2010-0281 (WIPO May 18, 2010), <https://www.wipo.int/amc/en/domains/decisions/text/2010/d2010-0281.html>.
 35. Overview, Section 4.11.
 36. Overview, Section 4.11.
 37. See, e.g., *Fenix International Limited v. Nemanja Krecelj, Rocket Science Group*, D2021-2667 (WIPO Nov. 10, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-2667>; *Fenix International Limited v. Ladislav Hricko/1a world Ltd, admin Mel/Whois Privacy Corp.*, D2021-2522 (WIPO Oct. 5, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-2522>.
 38. See, e.g., *Speedo*, *supra* note 34.
 39. See, e.g., *Fenix International Limited v. Domain Administrator; see PrivacyGuardian.org/Kelly Smit, onlyfansleak and Withheld for Privacy Purposes, Privacy service provided by Withheld for Privacy ehf/Robert Scean*, WIPO D2021-2706 (Oct. 11, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-2706>.
 40. See, e.g., *Scean*, *supra* note 39.
 41. *Id.*
 42. See, e.g., *Scean*, *supra* note 38; *Hricko*, *supra* note 37; *NFL*, *supra* note 8.
 43. See, e.g., *Scean*, *supra* note 39.
 44. See, e.g., *Speedo*, *supra* note 34; *Hricko*, *supra* note 37.
 45. See, e.g., *Fenix International Limited v. WhoisGuard Protected, WhoisGuard, Inc./Yazid Laiss/Stive Belb/Ahmed Bel Bouahli*, D2021-0152 (WIPO Mar. 25, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-0152>.
 46. See, e.g., *Hricko*, *supra* note 37.
 47. See, e.g., *Laiss*, *supra* note 45.
 48. *Id.*
 49. Rules, Paragraph 11(a).
 50. *xHamster IP Holdings LTD v. zhanglong*, D2020-0743 (WIPO June 6, 2020), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2020-0743>.
 51. *xHamster*, *surpa* note 50; *Fenix International Limited v. Kiril Kirilov*, D2021-0853 (WIPO May 27, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-0853>.
 52. Rules, Paragraph 17(a).
 53. Rules, 17(a)(iii).
 54. *Advance Magazine Publishers Inc. v. Marcellod Russo*, D2001-1049 (WIPO Nov. 22, 2001), <https://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1049.html>.
 55. Overview, section 4.9.
 56. Rules, 15(b).
 57. Rules, 16.
 58. Policy, Paragraph 4(j).
 59. Policy, Paragraph 4(k).
 60. *Id.*
 61. Rules, 3(b)(ix)(1); Overview, section 1.7.
 62. Overview, section 1.1.1.
 63. Overview, Section 1.1.2.
 64. Overview, Section 1.2.1.
 65. Overview, Section 1.3.
 66. Overview, Section 1.2.2.

67. See, e.g., *Madonna Ciccone, p/k/a Madonna v. Dan Parisi and "Madonna.com"*, D2000-0847 (WIPO Oct. 12, 2000), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0847.html>.
68. See, e.g., *Julia Fiona Roberts v. Russell Boyd*, D2000-0210 (WIPO May 29, 2000), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0210.html>; *Celine Dion and Sony Music Entertainment (Canada) Inc. v. Jeff Burgar operating or carrying on business as Celine Dion Club*, D2000-1838 (WIPO Feb. 13, 2001), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-1838.html>.
69. See, e.g., *Gordon Sumner, p/k/a Sting v. Michael Urvan*, D2000-0569 (WIPO July 20, 2000), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0596.html> (finding STING did not act as a trademark, because it is also a common word in the English language with numerous meanings).
70. Rules, Paragraph 3(b)(ix)(1).
71. Overview, Section 1.7.
72. See, e.g., *Hricko, supra* note 37 (disregarding <.com> TLD in <buyofansubs.com>, <buyonlyfansubs.com>, <ofsubs.com>, and <onlyfansubs.com>; *Scean, supra* note 39 (disregarding <.cc> TLD in <onlyfansleaks.cc>).
73. Overview, section 1.11.3 ("For example, a hypothetical TLD ".mark" and a mark "TRADEMARK," the domain name <trade.mark> would be confusingly similar for UDRP standing purposes").
74. *Kirilov, supra* note 51 (transferring <upgradeonlyfans.com> to owner of ONLYFANS mark).
75. *Madonna, supra* note 67; *Julia Fiona Roberts, supra* note 68; *Celine Dion, supra* note 68; *Miranda Kerr, infra* note 106; *Red Bull, infra* note 99.
76. *Krecej, supra* note 37.
77. *Speedo, supra* note 34; *Advance Magazine Publishers, supra* note 54; *Imaging Solutions, infra* note 134.
78. *xHamster, supra* note 50.
79. See, e.g., *Laiss, supra* note 45 (replacing the letter "s" with the letter "z" in <onlyfanz.xyz>).
80. Overview, Section 1.9.
81. See, e.g., *xHamster, supra* note 50 (adding the numeral 5 in <xhamster5.com>).
82. *Krecej, supra* note 37.
83. Overview, Sections 1.7 and 1.15.
84. *Krecej, supra* note 37.
85. USPTO Reg. No. 90639534.
86. *LEGO Juris A/S v. Ken Rolling*, D2011-1413 (WIPO Oct. 21, 2011), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-1413>.
87. *NFL, supra* note 8.
88. *Id.*
89. *Madonna, supra* note 67.
90. *Harpo, Inc. and Oprah's Farm, LLC v. Robert McDaniel*, D2013-0585 (WIPO June 17, 2013), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0585>.
91. *Id.*
92. Policy, Paragraph 4(c).
93. Policy, Paragraph 4(c)(i).
94. Overview, Section 2.2; see also *Oprah, supra* note 90 (finding that the Respondent offered no supporting evidence of "demonstrable preparations" to use the site as a noncommercial blog).
95. Policy, Paragraph 4(c)(ii).
96. Overview, Section 2.3.
97. *Madonna, supra* note 67 (finding the Respondent's Tunisian MADONNA registration was a pretense to abuse).
98. *Id.*
99. *Red Bull GmbH v. Harold Gutch*, D2000-0766 (WIPO Sept. 21, 2000), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0766.html>.
100. See, e.g., *Krecej, supra* note 37 (finding registrant name "Nemanja Krecej" and Organization name "Rocket Science Group" do not correspond to the domain name); *Hricko, supra* note 37 (finding registrant name "Ladislav Hricko" and organization name "1a world Ltd, admin Me" do not correspond to the domain name).
101. Policy, Paragraph 4(c)(iii).
102. *New Kids on the Block v. News America Publishing Inc.*, 971 F.2d 302, 306-08 (9th Cir. 1991).
103. Overview, Section 2.5.2; see, e.g., *Playboy Enterprises International Inc. v. Global Media Domain Trust*, D2006-1543 (WIPO Feb. 21, 2007), <https://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-1543.html> (explaining that "cyberflight" is an attempt to avoid or delay legal proceedings by changing the registration details).
104. *Willem Vedovi, Galerie Vedovi S.A. v. Domains By Proxy, LLC/ Jane Kelly*, D2014-0780 (WIPO July 9, 2014), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2014-0780> (finding that the Respondent could have a fair use defense in <thetruthaboutwillemvedovi.com> but not <willemvedovi.com>, because the latter falsely conveyed association with the Complainant).
105. *Miss Universe L.P. v. The Marketing Model/Steven Roddy*, D2010-1939 (WIPO Dec. 29, 2010), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2010-1939>.
106. *Miranda Kerr v. orangresarecool.com*, D2013-0553 (WIPO May 28, 2013), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2013-0553> (finding that, although <mirandakerrweb.com> was "a fan site containing photographs and news about" Miranda Kerr, such use was not fair, because the website contained "unrelated third party ads with pay-per-click links.").
107. *Vedovi, supra* (criticizing the Vedovi art gallery); *Bloomberg L.P. v. Secaucus Group*, FA0104000097077 (Forum June 7, 2001), <https://www.adrforum.com/DomainDecisions/97077.htm> (finding fair use where the Respondent used <michaelbloombergsucks.com> to criticize the media company); *Lou Taylor v. Noelle Van Der Valk*, D2021-2824 (WIPO Dec. 2, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-2824> (denying complaint where <loutaylorinvestigation.com> criticized the sports and entertainment business manager).
108. *Mercury Radio Arts, Inc. and Glenn Beck v. Isaac Eiland-Hall*, D2009-1182 (WIPO Oct. 29, 2009), <https://www.wipo.int/amc/en/domains/decisions/html/2009/d2009-1182.html> (denying complaint where <glennbeckrapedandmurderedayounggirlin1990.com> parodied Glenn Beck's interview style).
109. *Lou Taylor, supra* note 107.
110. Overview, Section 2.6.3; see, e.g., *Kerr, supra* note 106.
111. Overview, Section 2.13.

112. *Beyonce Knowles v. Sonny Ahuja*, D2010-1431 (WIPO Oct. 15, 2010), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2010-1431> (finding that a fragrance business could not use <beyoncefrance.com> to sell the BEYONCE fragrance, because the business failed to “accurately disclose” its relationship to Beyonce).
113. Overview, Section 2.8.1.
114. *Id.*
115. *NFL*, *supra* note 8.
116. *Secondary Ticket Market Overview*, All The Research (July 2021), <https://www.alltheresearch.com/report/730/secondary-ticket-market>.
117. *NCAA v. Randy Pitkin*, D2000-0903 (WIPO Mar. 9, 2001), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0903.html>.
118. *National Collegiate Athletic Association and March Madness Athletic Association, L.L.C. v. Mark Halpern and Front & Center Entertainment*, D2000-0700 (WIPO Dec. 10, 2000), <https://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0700.html>.
119. *HBP, Inc. v. Front and Center Tickets, Inc.*, D2002-0802 (WIPO Feb. 11, 2003), <https://www.wipo.int/amc/en/domains/decisions/html/2002/d2002-0802.html>.
120. *Id.*
121. Rules, 3(b)(ix).
122. *Pacific-10 Conference v. Kevin Lee*, D2011-0200 (WIPO May 17, 2011), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2011-0200>.
123. *Id.*
124. *Id.*
125. *Fenix International Limited clo Walters Law Group v. Privacy Service Provided by Withheld for Privacy ehflAndrei Ivanov and Andruce Petr*, D2021-3384 (WIPO Nov. 29, 2021), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2021-3384>; *see also Hricko*, *supra* note 37.
126. Overview, Section 3.2.2; *NFL*, *supra* note 8 (finding that that “[t]he Respondent was obviously aware of the Complainant’s NFL and SUPER BOWL marks when the domain names were registered. Both marks are extremely well known, and the contents of the Respondent’s websites leave no room for doubt that the Respondent was aware of the marks.”).
127. Rules, Paragraph 3(b)(ix).
128. Policy, Paragraph 4(b).
129. Policy, Paragraph 4(b)(i).
130. Overview, Section 3.1.1.
131. *National Association for Stock Car Auto Racing, Inc. v. Steven R. Shacklette*, D2001-1350 (WIPO Feb. 4, 2002), <https://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1350.html>.
132. *Id.*
133. *Id.*
134. *National Association for Stock Car Auto Racing, Inc. v. Imaging Solutions*, D2001-0777 (WIPO Aug. 13, 2001), <https://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-0777.html>.
135. *Id.*; *see also Miss Universe*, *supra* note 105 (bad faith due to threat to auction after offer in excess of expenses).
136. *Advance Magazine Publisher*, *supra* note 54.
137. Policy, Paragraph 4(b)(ii).
138. *See, e.g., Ivanov*, *supra* note 125 (finding bad faith where “the Respondent is a serial cybersquatter” who “has been the unsuccessful respondent in eleven other cases decided under the Policy”); *Krecelj*, *supra* (finding bad faith where there was “a previous proceeding under the Policy between the Parties”).
139. *Julia Roberts*, *supra* note 68; *Celine Dion*, *supra* note 68; *Miranda Kerr*, *supra* note 106.
140. Policy, Paragraph 4(b)(iii).
141. *Sports Holdings, Inc. v. WhoisGuard Protection*, D2006-1360 (WIPO Jan. 11, 2006), <https://www.wipo.int/amc/en/domains/decisions/html/2006/d2006-1360.html>.
142. Policy, Paragraph 4(b)(iv).
143. *NFL*, *supra* note 8 (finding bad faith where the Respondent reproduced the NFL logos to make it appear as if the websites were “official NFL websites” or “authorized by or affiliated with NFL”); *Andrey Ternovskiy dba Chatroulette v. Whois Agent, Domain Protection Services, Inc./Marco Carta, MC*, D2018-2678 (WIPO Jan. 14, 2019), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2018-2678> (finding “the presence of a disclaimer on the domain name <chatrouletteit.com> website makes it abundantly clear that the Respondent knew of the Complainant when registering and using this domain name”).
144. *See, e.g., National Association for Stock Car Auto Racing, Inc. v. David Crawford, Jr.*, D2001-1338 (WIPO Jan. 20, 2002), <https://www.wipo.int/amc/en/domains/decisions/html/2001/d2001-1338.html>; *Imaging Solutions*, *supra* note 134; *Shacklette*, *supra* note 131; *LEGO*, *supra* note 86.
145. *See, e.g., Playboy*, *supra* note 103.
146. *Twentieth Century Fox Film Corporation v. Domains by Proxy, Inc./Samina Rahman*, D2009-1121 (WIPO Oct. 6, 2009), <https://www.wipo.int/amc/en/domains/decisions/html/2009/d2009-1121.html>.
147. *See, e.g., Krecelj*, *supra* note 37; *Scean*, *supra* note 39.
148. *Miami Heat Limited Partnership v. Whois Privacy Corp./Ryan G Foo, PPA Media Services*, D2015-1479 (WIPO Nov. 10, 2015), <https://www.wipo.int/amc/en/domains/search/text.jsp?case=D2015-1479>.
149. Overview, Sections 2.13.1 and 3.1.4.
150. *See, e.g., Nintendo of America, Inc. v. Ali Asad Ur Rehman*, FA2001001881671 (Forum Feb. 26, 2020), <https://www.adrforum.com/DomainDecisions/1881671.htm>.
151. Kurtzman, Tamara, *CYBER CENTER: The Continued Hijacking and Ransoming of the Domain Name System by Modern-Day Corporate Privateers*, American Bar Association (June 20, 2016), [NYSBA Entertainment, Arts and Sports Law Journal | 2022 | Vol. 33 | No. 2](https://www.americanbar.org/groups/business_law/publications/blt/2016/06/cyber_center_kurtzman/#:~:text=The%20Anti%2DCybersquatting%20Consumer%20Protection%20Act%20(ACPA)%20was%20enacted,back%20to%20the%20trademark%20owner%20(Anticipatory cybersquatting” occurs when a domain name “with minimal present value” is registered “in the hopes that these names will become desirable” so it can be resold “at a later stage to companies that have a legitimate connection to that domain” for “a much higher price”).
152. 15 U.S.C. § 1114(2)(D); <i>Gen. Media Commc’ns, Inc. v. Crazy Troll</i>, LLC, No. 06 CIV. 4051 LAKFM, 2007 WL 102988, at *7 (S.D.N.Y. Jan. 16, 2007) (explaining the differences in two reverse domain name hijacking provisions).
153. <i>Id.</i> (finding decision declining to transfer <penhouseboutique.com> under the Policy was decided incorrectly).

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Image Right Clauses in Football (Soccer) Player Employment Contracts

By Sherzod Khodjimurotov

Introduction

From an economic point of view, image rights in football¹ are becoming one of the most discussed topics in the field of sports law. According to the World Intellectual Property Organization's paper, "The Role of IP for Athletes and Image Rights,"² "[t]he right to one's own image is the ability to decide when, how and by whom our physically recognizable features (image, voice and name) can be captured, reproduced or published."³ One's image, voice, and name can be used in different ways by third parties according to the permission of the rightsholder. In this article, the athlete is considered the author of the performance.⁴

In the words of Dr. Ian Blackshaw, a British professor of international sports law, author, and member of the Court of Arbitration for Sport:

Sports are big business and worth more than 3 percent of world trade. Not only are mega sums generated by the sale of sports broadcasting rights, especially to major sports events, such as the Olympic Games and the FIFA World Cup, but also through the commercialization of the sports image rights of well-known teams and sports persons.⁵

The High Court of England and Wales characterized sports image rights in a notable case involving former Manchester United striker Wayne Rooney as:

Image Rights means the right for any commercial or promotional purpose to use the Player's name, nickname, slogan and signatures developed from time to time, image, likeness, voice, logos, get-ups, initials, team or squad number (as may be allocated to the Player from time to time), reputation, video or film portrayal, biographical information, graphical representation, electronic, animated or computer-generated representation and/or any other representation and/or right of association and/or any other right or quasi-right anywhere in the World of the Player in relation to his name, reputation, image, promotional services, and/or his performances together with the right to apply for registration of any such rights.⁶

With respect to football, typically, clubs compensate their players just for their participation. While commerce drives football into the realms of entertainment and branding, clubs are seeking new methods to diversify their revenue streams. As a result of these business relationships, sponsors want to be linked with clubs and their famous players.⁷

The physical appearance of the player, as well as his name, nickname, voice, signature, and shirt number, for instance Cristiano Ronaldo's number 7, which comes as "CR7," are included among image rights of the players. In this sense, in modern football even a football player's goal celebration could be considered a covered right.⁸ As a result, commercial sponsors and companies are prepared to spend substantial amounts of money in order to get the promotional services of these internationally recognized "household" names like Cristiano Ronaldo, Lionel Messi, and Kylian Mbappé.

The need for club image rights agreements

Recognizing and protecting one's image rights is equally important. In order to ensure the protection of the image rights of professional football players, first, it is necessary to include and strengthen the "image rights" in their employment contracts. As part of the transfer negotiations, the club should also settle any image rights costs.

How exactly do player image rights deals work?

There are several crucial considerations to keep in mind, such as which portions of a football player's image a football club is allowed to exploit and which parts a club cannot utilize to avoid future misunderstandings.⁹ Image rights deals can take on a variety of forms; for example, they can be in the form of player-employer contracts or sponsorship deals between companies and players. A club or brand, as a rule, contracts with a player's image rights company to use the image of the player in exchange for remuneration.¹⁰

In top football leagues, a player may enter into a separate image rights deal with a club that gives an economic advantage to the player, in addition to the income from wages and incentives that the player would earn under his employment contract with the club. It is customary for a player to form a limited liability company to which the ownership of the property right to his image is transferred, and the entity will then enter into an image rights agreement with the club. Both the club and the player may also get tax benefits from



this arrangement, as usually, an image rights agreement lies outside the scope of a club's employment relationship with a player. However, the English Premier League Standard football player contract shows that there are still some provisions that establish image rights exploitation and in what circumstances a club can use an image of a player subject to the consent of a player. For instance, in the clause 11. ii) of the English Premier League Standard football player contract,

The Player agrees that the Club shall be entitled to use, in a reasonable manner and so as not to bring the Player into disrepute, the name, the nickname, signature, image, voice, film portrayal and other characteristics of the Player in connection with manufacture, selling, distribution, licensing and promotion of items of official Club merchandise relating to the Club and its players.¹¹

Some issues with football player image rights

Image rights deals may pose a variety of problems, including restrictions, tax issues, and conflicts of interests between players' sponsorships and club sponsors.

Image rights restrictions

Most top Premier League clubs will strive to restrict a player's personal image rights opportunities while negotiating a club image rights deal with the entity that holds such

rights. In the example of Paulo Dybala's collapsed transfer to Tottenham Hotspur, midway through the negotiations, Dybala's camp demanded that the Spurs pay £13.7 million payment for the purchase of the player's image rights from a third party. Tottenham club officials then decided to call off the transfer, and it was revealed that Dybala had previously sold his image rights to his agent in his early playing career. These rights are currently owned by Star Image Limited, a Malta-based company that also holds at least 15 trademarks relating to Dybala, including worldwide trademarks for PAULO DYBALA and a DYBALA logo.¹² Limiting the football clubs from sourcing deals means that they are further restricted from entering into lucrative brand deals.

Sponsorship conflicts of interest

Conflicts of interest might arise if well-known players sign image rights deals with several parties at the same time. According to some reports, image rights deals may cause potential conflicts of interest with those clubs that already having existing sponsorships.¹³ When Jose Mourinho was revealed as Manchester United's manager in 2016, he found himself at the heart of a conflict of interest over his image rights. Prior to joining Manchester United, Mourinho entered into several commercial deals that may have directly competed with the club's own sponsors, Jaguar and Hublot, as well as United's sponsorship agreements with Chevrolet and Bulova.¹⁴

This approach places the intellectual property in the hands of a third party, who may handle it as an economic asset. According to World Trademark Review, one alternative to an outright purchase would be to agree on a license to use the image rights as trademarks for a certain fixed term, possibly the duration of the player's contract with a new club.¹⁵ Sponsorship conflicts of interest may also arise in the football player loan agreements. For example, the Danish Football Association player loan agreement paragraph 1.3 of Section 1 says: "During the Loan Period, the Borrowing Club will also assume the Lending Club's rights and obligations under the Player's Contract with regard to advertising, endorsement and sponsorship contracts, etc."¹⁶ The understanding from this context would be that during the loan period, while a player, away from his permanent club, signs a temporary employment contract, image rights contract with other companies on behalf of the permanent club, or if his permanent club agrees to exploit a player's image rights on a shared basis, then those image rights agreements have to be respected and legally protected by borrowing clubs.

Morality Clauses

Football players get paid huge amounts of money for their part in football on and off the pitch, through their endorsements and sponsorship deals. However, they have to comply with the certain requirements and obligations in front of their clubs and sponsors, such as:

The Sports Personality shall, at all times, during the term of this Agreement act and conduct himself/herself in accordance with the highest standards of disciplined and professional sporting and personal behaviour and shall not do or say anything or authorize there to be done or said anything which, in the reasonable opinion of the Licensor, is or could be detrimental, whether directly or by association, to the reputation, image or goodwill of the Company or any of its associated companies. The Sports Personality shall not, during the term of this Agreement, act or conduct himself/herself in a manner that, in the reasonable opinion of the Company, offends against decency, morality or professionalism or causes the Company, or any of its associated companies, to be held in public ridicule, disrepute or contempt, nor shall the Sports Personality be involved in any public scandal.¹⁷

As one can see, this morality clause was established to impose certain obligations on football players and to address certain aspects of their behavior and the ramifications for the companies that pay for the players' image exploitation. If

football players violate the provisions of the morality clauses, whether knowingly or unintentionally, their image rights agreements may be terminated. For example, in 2011, former Manchester United player Wayne Rooney's endorsement deal worth £2.5 million was terminated by Coca Cola, which was a big setback for the disgraced football player. This occurred after Rooney scored against West Ham—completing a hat-trick and rescuing his title-chasing club from a two-goal deficit—then rushed to celebrate with the visiting United supporters. However, when he neared the pitch's edge, he shifted his focus to the camera and used abusive language.¹⁸ In another case, Nike released a statement that Manchester United forward Mason Greenwood "is no longer a Nike athlete" after his arrest on allegations of raping, sexually assaulting, and threatening to kill an 18-year-old student.¹⁹ According to the *Daily Mail's* understanding, a clause in Greenwood's endorsement agreement allowed Nike to terminate the agreement without compensating the player for reputational harm and commercial value loss.²⁰

These cases highlight why morality clauses should be treated carefully when a football player has a deal with sponsors.

Legal protection of image rights

Eleni Synodinou believes that the EU's regulation of image rights is far from uniform, let alone harmonised. The approach of civil law and common law, as well as the rich source of image rights in national legal systems, diversifies the regulation of image rights.²¹ Protecting the image rights of well-known people in the United Kingdom, for example, is achieved through trademark and copyright law, as well as the common law idea of "passing off."²²

In Germany, the Constitution²³ is the primary document that guarantees the rights to one's own image. As article 1 of the German Constitution stipulates:

- (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
- (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.
- (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law.

In addition, the state Constitution contains Article 2, which is dedicated to the personal freedoms that every German citizen is entitled to:

[Personal freedoms] (1) Every person shall have the right to free development of his



personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law. (2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

In 2003 Oliver Kahn, the former German national team goalkeeper, prevailed in a lawsuit against video game developer Electronic Arts (EA). Kahn filed a lawsuit against EA for using his image and name in the computer game “FIFA World Cup 2002.” EA acquired permission to use images of football players from both the German Bundesliga and the FIFPro,²⁴ but Kahn argued that he was never member of either of those organizations.

Kahn presented arguments that were based on both the Civil Code and the Artistic Authors Rights Act, as well as the human rights provisions of the German Constitution. The Hamburg Court of Appeal ruled that the use of Kahn’s name and image in the advertising campaign without his prior agreement was illegal.²⁵

As the exclusive owner of his image, a football player may consent to the use of his image by a company, a third party or a club through an image rights licensing agreement. Accepting expressly that the counter-party may reproduce, publish, capture, and monetize his image within a defined scope of usage, the image rights contract should be very clear and concise. It should include clauses defining the duration, fees and

payment terms, scope of image exploitation, parties’ obligations, protection of intellectual property and trademarks, termination conditions, jurisdiction and, governing law chosen by the parties.

Conclusion

The article emphasises the economic and legal importance of image rights in football. Although academics continue to conduct in-depth analyses of who owns and controls these rights, athletes are often urged to be as protective as possible in securing their rights in order to maximize their economic opportunities, as exploiting their own image rights gives them a certain degree of control over their products and services. It is also self-evident that certain influential players, such as football stars, may dictate how these image rights are managed.

Image rights should be considered very carefully when dealing with sports employment contracts; even a minor mistake might have serious repercussions for football clubs and players that and who compete at a professional level. This was the case mentioned above with former Manchester United player Wayne Rooney, who hurled abusive language at the camera while celebrating his goal against West Ham, which led to termination of an endorsement deal worth £2.5 million.

Football players should be made aware of possible conflicts of interest and should endeavour to prevent them if they emerge. Sometimes players intentionally or recklessly sign endorsement contracts with several parties at the same

time, which was previously mentioned in the example with Mourinho, who had already entered into several commercial deals that may have directly competed with the club's own sponsors. During the negotiations, the club and coach found themselves in a difficult position. While safeguarding the rights and interests of the lending clubs as well as those of the players on loan, this situation contributed to the clarification of one of the most complicated aspects of the relationship between lending clubs and their players.

Moreover, occasionally, football clubs believe that it is reasonable to restrict a player's personal image rights prospects while negotiating an agreement with the company thought to have such rights, particularly when the buying club officials decide to call off the move because of an obstacle caused by the player's selling his image rights to third parties. In sum, image rights could be vital source of income for both football clubs and players. They also have significant legal relevance, because both clubs and players must consider legal ramifications before engaging in commercial deals aimed at their exploitation.



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Endnotes

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A Picture Is Worth a Thousand Words . . . and Maybe a Thousand Dollars

By David Krell

Photographs in nonfiction books are like sprinkles on ice cream. They are valuable, but not vital.

Authors who want photographs to enhance the narrative should conduct due diligence for determining rights and license fees, not only to prevent legal snags but also to honor their brothers and sisters in the visual arts. Publishers usually place the responsibility of selecting and obtaining clearances for photos on the authors, but in most cases will select and license the cover photo themselves because cover art is a key part of the marketing process.¹

Licensors may charge an initial use fee for the photographs and the license terms can differ depending on the uses, distribution, and other factors. There may also be occasions where usage is possible without having to pay a license fee.

Let us take the following fictional scenario into account.

- John Doe is writing a book about 20th century Art Deco architecture, which will include discussions of the Chrysler Building in Manhattan; Luhrs Building in Phoenix; Hollywood & Western Building in Los Angeles; Niagara Mohawk Building in Syracuse; and Nebraska State Capitol Building in Lincoln.
- In 2010, Mega Bank received a vast collection of Art Deco photographs, books, and associated paraphernalia as part of a bankruptcy settlement with one of its clients, Rich Moneybags. The collection was valued at \$2 million. Moneybags had owned all rights to the photographs, including copyrights. Those rights were transferred to Mega Bank.
- As the bank had no interest regarding licensing the photographs, it donated the collection and the rights to Big City Library in Big City, Big State for a tax write-off, where it is known as the “Mega Bank Collection.”
- Doe discovers the collection during his research.
- Doe’s first inclination is to reach out to the library’s photo department to find out the permissions and fees needed for usage. The photograph fee is \$40 per photo and the license fee is \$60 per photo. Doe will then fill out the library’s order form, send payment, and receive

digital copies of the photos that he can forward to the publisher. We are assuming that the library agrees to let Doe use the photos for the book.

- Being a diligent sort, Doe realizes that he may need to obtain an additional license from (and perhaps pay a fee to) the bank. Thankfully for his budget, Doe contacts the office of the bank’s CEO and receives an email explaining that the bank has no ownership stake, legal rights, or financial interest in the collection. Those evaporated when the donation was made, along with a full assignment and transfer of rights, in 2010.

There may also be times when a collection is donated with restrictions, so it is advisable to reach out to the original donor, if possible, for clarification and not simply rely on the word of the present-day licensor. In addition, the licensor should be able to supply a preferred citation to acknowledge the sources of the photographs in the book. Here, a citation might read: Courtesy Big City Library, Mega Bank Collection.

Authors may also find licensors who are all too willing to provide photographs in their archives but do not claim ownership. Often, they categorize their photos as “low risk,” meaning that it is unlikely that the owner of the underlying rights will make an infringement claim, particularly if the book will be published by an academic or boutique publisher. The staff may not even have paperwork concerning how the photos ended up in their collection or information regarding the original owner.

In another scenario, Doe finds extraordinary photos of Los Angeles City Hall on the fictional American Architectural Hall of Fame (AAHOF) website. The AAHOF will license the photos for \$150 each, with no claim to the underlying rights, only giving Doe possession of the physical and digital copies.

Doe then has to decide whether to further investigate the underlying rights or risk usage. This is a highly significant decision, because it is standard for publishing agreements to contain language requiring the author to represent and warrant the clearance of all such rights and indemnify the pub-

lisher against any third-party infringement claim. Doe will therefore be liable for any infringement claims.

Licensors may escalate their license fees depending on the number of books in the print run. Here, the author will need to consult with the publisher on the anticipated number. Optimally, the license will be sought for the formats of hard cover, paperback, and electronic books. Again, a conversation with the publisher will be helpful before paying any license fees.

If the photos are pre-1923 or if they belong to the U.S. government, they are in the public domain and therefore do not require licenses. For example, presidential libraries come under the umbrella of the National Archives Records Administration. A book about the Cuban missile crisis will necessitate photos of President Kennedy and his staff, particularly during that 13-day period in October 1962. The author will then want to contact the Kennedy Library to find out whether high-resolution photos are available.

Publishers will also want to know whether the license sought is for foreign territories and foreign language editions. Additionally, the estimated number of copies for the first run will be needed. There may be a sliding scale where the publisher requires an escalated fee if a certain number is met. For example, a worldwide license in perpetuity may be \$200 for the first 5,000 copies, but the next 5,000 could mandate an additional \$200 fee. It will be up to the licensor to monitor the number of copies and editions.

Authors should take note that, even if the photos are considered to be in the public domain, there may be a duplication or processing fee. Further, there's an overarching question that must be answered before any licensing fees are paid. Do the photos meet the high-resolution requirements

of the publisher? If not, then the author should seek alternate photos.

In conclusion, attorneys should advise their author clients about photo licenses during negotiations with the publishers. Authors need to know that they have certain other obligations in addition to writing and submitting the manuscripts. Further, they might not realize that the financial burden for licensing photos lays with them, and it is important that clients understand the fees, limitations, and risks associated with licensing photographs.

Endnote

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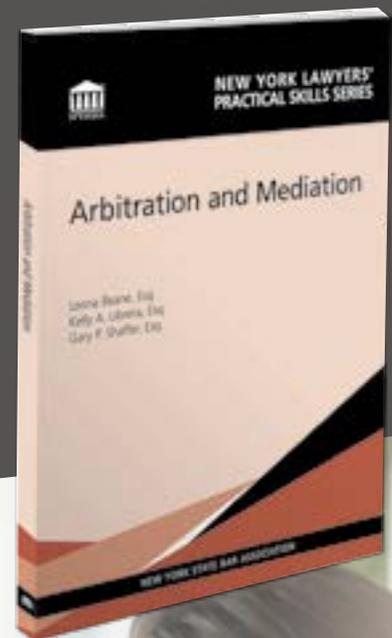


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