

ENTERTAINMENT AND SPORTS INDUSTRY AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



Committee Newsletter | Winter 2016

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Message from Your Committee Co-Chairs

From Co-Chairs Jeremy M. Evans and Ashley Hollan Couch

Dear Entertainment and Sports Industry Committee Members:

As we embark on a new year, we first want to express gratitude for our leadership and membership. Without such a dynamic team, we would not have been able to accomplish so much in 2015. A new year is a time for planning, for the manifestation of creativity and excitement about new ideas and goals, and for reflection; but above all, it is a time to be hopeful for the future.

We were thrilled to kick off the new year at the ABA YLD Mid-Year Conference and were delighted to see everyone there! Both of your Co-Chairs, as well as some of our Vice-Chairs and ABA YLD leadership teams were present, hosting dynamic events and opportunities to network with our colleagues worldwide. We invite those of you who were not in attendance to reach out to us so that we can connect as well!

We encourage anyone interested in participating with our Committee to get involved in our in-person events, teleconferences and written publications. For those interested in authoring articles for our Committee Newsletter or Practice Series publications, please email ashley@hollanlaw.com for more information, as we have lots more on the horizon for the next quarter. We hosted our first Committee-wide conference call in January 2016, and invite everyone to join on our next call. Call in information for all teleconferences will be posted on our Committee page, along with links to all of our recent publications, and information about our upcoming events.

For more information on the ABA YLD Committee on the Entertainment and Sports Industry and related ABA Entertainment and Sports Forum, please visit the website links to follow.

ABA YLD Entertainment and Sports Industry Committee website:

http://www.americanbar.org/groups/young_lawyers/committees/entertainment_sports.html

ABA Forum on the Entertainment & Sports Industries website:

http://www.americanbar.org/groups/entertainment_sports.html

Thank you for your time and interest in the Entertainment and Sports Industry Committee. We are delighted to serve you in 2016!

Best Regards,
Jeremy and Ashley

ARTICLES >>

The Importance of Independent Contractor Agreements for Artists

By Ashley Hollan Couch

Co-Chair, ABA-YLD Committee on the Entertainment and Sports Industry

When serving as an attorney for creators, it is essential to know the intricacies of how copyright law may affect the relationships that your clients have with third party vendors. Whether the clients' art is in the music industry, television and film, or another realm of the arts, ensuring that your clients memorialize their relationships with third parties who might later claim ownership to the work is essential.

In the United States, the copyright to a piece is established by the copyright creator as soon as the piece is memorialized in some kind of fixed form. According to the U.S. Copyright Office,

From the moment it is set in a print or electronic manuscript, a sound recording, a computer software program, or other such concrete medium, the copyright becomes the property of the author who created it.¹

The exception to this rule arises with "works made for hire" in which, "an employer is considered the author even if an employee actually created the work."² Works made for hire generally fall into two categories: projects created within the scope of an established employer-employee relationship and work for hire agreements with independent contractors. The second category is defined by the United States Copyright Office in Section 101 of the Copyright Act (Title 17 of the U.S. Code) as,

- b a work specifically ordered or commissioned for use
 - 1 as a contribution to a collective work,
 - 2 as a part of a motion picture or other audiovisual work,
 - 3 as a translation,
 - 4 as a supplementary work,
 - 5 as a compilation,
 - 6 as an instructional text,
 - 7 as a test,
 - 8 as answer material for a test, or
 - 9 as an atlas,

if the parties agree in a written instrument signed by them that the work shall be considered a work made for hire.³

¹ U.S. Copyright Office, *Circular 9: Works Made For Hire 1* (Sept. 2012), available at <http://copyright.gov/circs/circ09.pdf>.

² *Id.*

³ *Id.* at 1-2.

The Supreme Court further addressed this issue in *Community for Creative Non-Violence v. Reed*, concluding that,

a work created by an independent contractor can be a work made for hire only if (a) it falls within one of the nine categories of works...and (b) there is a written agreement between the parties specifying that the work is a work made for hire.⁴

In contrast to the result with a work made for hire, a work is considered a “joint work” for copyright purposes as follows:

When two or more authors prepare a work with the intent to combine their contributions into inseparable or interdependent parts, the work is considered joint work and the authors are considered joint copyright owners.⁵

The implications of this notion can be dire for artists who assume that they own their work simply because they have paid an independent contractor for the same. An example I hear often is that of musicians who pay mixers or other independent contractors to slightly tweak their work for a flat fee and verbal assurances that the contractor will not require future ownership of the piece. All too often, once that flat fee has been paid, and without a proper work for hire agreement executed for the same, the artist does not actually own the final product, absent the written agreement, and I often see artists having to renegotiate the terms of their independent contractor arrangements, sometimes having to pay unexpected future royalties. Furthermore, the more copyright owners of a piece there are, the harder it will be for your artist client to exploit the piece: for example in a situation where your client would like to license music for use in a commercial, the permission of all authors will be required absent a work for hire agreement granting your client full ownership despite the involvement of multiple independent contractor vendors. In fact,

The U.S. Copyright Office considers joint copyright owners to have an equal right to register and enforce the copyright. Unless the joint owners make a written agreement to the contrary, each copyright owner has the right to commercially exploit the copyright, provided that the other copyright owners get an equal share of the proceeds.⁶

In sum, it is advisable to ensure that your clients have memorialized all agreements with other creators in writing, either specifically delineating the ownership percentages in a writing signed by all parties involved such as a split sheet, or in a work for hire agreement transferring ownership of the work to the proper party. Absent these agreements, your clients may not truly

⁴ *Id.* at 2.

⁵ Stanford Univ. Libraries, *Copyright Ownership: Who Owns What?*, <http://fairuse.stanford.edu/overview/faqs/copyright-ownership/> (last visited Jan. 30, 2016).

⁶ *Id.*

own their artistic creations, resulting in potential copyright infringement, licensing headaches, and payment problems that could easily have been avoided.

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Celebrity Scandals: What They Teach Us about the Continued Applicability of Morals Clauses

By Amanda Katzenstein

Vice Chair, ABA-YLD Committee on the Entertainment and Sports Industry

An analysis of morals clauses in entertainment industry contracts.

Bill Cosby, Jared Fogle, Mark Salling. Three names that one would not expect to be in the same sentence. Yet each one of these celebrities' recent scandals, as well as their subsequent loss of work, demonstrate that morals clauses are alive, well, and perhaps, necessary.

Morals clauses can be traced to the Roscoe "Fatty" Arbuckle scandal of 1921.⁷ Arbuckle was a comedic icon of the era who signed an unprecedented \$3 million dollar deal with Paramount Pictures to star in 18 silent films.⁸ To celebrate his latest film, Arbuckle drove with two friends from Hollywood to San Francisco, where they rented three rooms at a swanky hotel and threw a huge party.⁹ At some point in the evening, one of the partygoers, Virginia Rappe, became ill and was taken to the hospital where she died of peritonitis due to a ruptured bladder.¹⁰ After her death, rumors began to circulate regarding Arbuckle's role in her death due to his size despite his asexual public image.¹¹ After enduring three trials for alleged rape and manslaughter, Arbuckle was ultimately acquitted after Rappe's pre-existing medical conditions surfaced.¹²

⁷ Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, Forbes, Jan. 2, 2014, <http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-see-morals-clause-mutuality> (last visited Jan. 30, 2016).

⁸ Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, Smithsonian.com, Nov. 8, 2011, <http://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/?no-ist> (last visited Jan. 30, 2016).

⁹ *Id.*; Sassafra, *Scandals of Classic Hollywood: The Destruction of Fatty Arbuckle*, Hairpin, Feb. 8, 2012, <http://thehairpin.com/2012/02/scandals-of-classic-hollywood-the-destruction-of-fatty-arbuckle> (last visited Jan. 30, 2016).

¹⁰ Sassafra, *supra* note 9.

¹¹ *Id.*

¹² *Id.*

The studios and the general public were less forgiving. Less than a week after Arbuckle's acquittal, the head of the newly formed Motion Pictures Producers and Distributors of America alliance banned Arbuckle from appearing in films and removed his previous work from distribution.¹³ *Id.* Further, in an attempt to capitalize on the public backlash against Paramount Pictures, competitor Universal Studios began inserting the following morals clause into its talent contracts:

[H]e (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry.¹⁴

Over the next two years, each of the major studios added morals clauses into talent contracts, mainly for public relations purposes.¹⁵ Morals clauses entered the sports world the following year with a 1922 addendum to Babe Ruth's contract, and have become customary in talent agreements ever since.¹⁶

Morals clauses do not always protect the company from the talent. Interestingly, reverse morals clauses can be traced to Pat Boone's 1968 agreement with Bill Cosby's Tetragrammaton record label where Mr. Boone could unilaterally terminate the relationship if the record label did anything to harm his reputation.¹⁷ Demonstrating the contract principle of mutuality, reverse morals clauses have been widely used in sports and entertainment deals and sponsorships to protect the talent from a corporate scandal.¹⁸

While either party does not always exercise its right to terminate the contract, recent events have demonstrated how useful morals clauses can be. By the time Subway pitchman Jared Fogle entered a plea deal on his charges, Subway confirmed that it had already ended its relationship with Jared.¹⁹ Further, Subway already swiftly suspended its ties with Fogle once search warrants were served by federal agents.²⁰ In the same manner, Adi Shankar, the

¹³ *Id.*

¹⁴ Herzfeld, *supra* note 7.

¹⁵ Sassafra, *supra* note 9.

¹⁶ Herzfeld, *supra* note 7.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Chris Woodyard, *Jared Fogle's Plea Deal Puts Subway Back in Spotlight*, USA Today, Aug. 19, 2015, <http://www.usatoday.com/story/money/2015/08/18/jared-fogel-subway-plea/31951175> (last visited Jan. 30, 2016).

²⁰ *Id.*

director of Mark Salling's upcoming film, *Gods & Secrets*, says he will remove him from the film if the child pornography allegations are determined to be true.²¹

In addition to applying morals clauses to upcoming works, they can also be applied to prevent distribution or viewership of past works as the Arbuckle case demonstrates. Although most networks had taken down reruns of *The Cosby Show* as the Bill Cosby sex scandal exploded, once Bill Cosby admitted to supplying drugs to young women he intended to have sex with, the final networks stopped airing reruns of *The Cosby Show*.²² However, at press time, *The Cosby Show* repeats remain available on Amazon and Hulu.²³ The fallout also applied to upcoming programming. In addition to networks halting reruns of Mr. Cosby's past works including *The Cosby Show* and *Cosby*, NBC stopped development of its new Bill Cosby comedy, and Netflix shelved its Cosby standup special.²⁴

As these scandals demonstrate, including morals clauses can be beneficial to both talent and the company for which services are being provided. Ideally, agreements are clear, concise, and apply mutually to both contracting parties.

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²¹ Meredith B. Kile, 'Gods and Secrets' Director Says He'll Remove Mark Salling's Scenes if Child Porn Allegations are True, Entertainment Tonight, Dec. 30, 2015, http://www.etonline.com/news/178981_gods_and_secrets_director_says_he_ll_remove_mark_salling_scenes_if_child_porn_allegations_are_true (last visited Jan. 30, 2016).

²² Jason Lynch, *The Last 2 Networks Airing Bill Cosby's Shows Have Now Pulled Them*, Adweek, July 7, 2015, <http://www.adweek.com/news/television/after-latest-bill-cosby-sexual-assault-news-bounce-tv-pulls-cosby-165765> (last visited Jan. 30, 2016).

²³ See also Lacey Rose, *What Will Happen with 'The Cosby Show' Reruns Now?*, Hollywood Reporter, <http://www.hollywoodreporter.com/news/what-will-happen-cosby-show-813229> (last visited Jan. 30, 2016).

²⁴ Nellie Andreeva, *Bill Cosby NBC Comedy Project Not Going Forward*, Deadline, Nov. 19, 2014, <http://deadline.com/2014/11/bill-cosby-nbc-series-canceled-1201289210> (last visited Jan. 30, 2016).

Punting It Away: National Labor Relations Board Refuses to Assert Jurisdiction in Northwestern Case

By Dustin Osborne

Whether college athletes should be paid as employees is an ongoing dispute. This article discusses where we are as a result of the Northwestern case as well as where we potentially are heading.

I. Introduction

In the age-old question of whether grant-in-aid scholarship student athletes are employees under the National Labor Relations Act (“NLRA”), the football world looked to the National Labor Relations Board (“NLRB”) for an answer. Rather than take the opportunity to answer this conundrum once and for all, however, the NLRB instead chose to punt the issue away, refusing to assert jurisdiction in the case.

Initially, the NLRB found that student athletes who receive a scholarship fall within the definition of “employee” based on the NLRA and common law.²⁵ Thus, the ruling allowed for the students at Northwestern University to hold a vote to determine whether to form the first-ever union for college athletes.²⁶ The results of this vote, however, will likely never be disclosed; the rules under which the ballots were impounded prohibited them from even being counted pending Northwestern’s appeal of the NLRB decision.²⁷

Ultimately, the NLRB, pursuant to Northwestern’s appeal, ended the players’ bid at unionization.²⁸ Interestingly, however, the Board refused to address the key question that was the centerpiece of the initial decision: whether the college athletes receiving a scholarship are employees under the NLRA and common law.²⁹ Instead, the NLRB chose to exercise its discretion to not assert jurisdiction in this case, explaining that to do so would not promote stability in labor relations, a policy of the NLRA.³⁰ Accordingly, while the Board unanimously decided to dismiss the student athletes’ representation petition, the ruling is narrowly tailored to the specific facts of this case. Thus, the question of whether grant-in-aid scholarship players are employees under the NLRA and common law remains a question open to the world.

²⁵ *Northwestern Univ. & Coll. Athletes Players Ass’n (Northwestern I)*, No. 13-RC-121359, 2014 N.L.R.B. LEXIS 221 (Mar. 26, 2014).

²⁶ *NU Players Cast Secret Ballots*, ESPN.com, Apr. 26, 2014, http://espn.go.com/chicago/college-football/story/_/id/10837584/northwestern-wildcats-players-vote-whether-form-first-union-college-athletes (last visited Jan. 30, 2016) [hereinafter *NU Players*].

²⁷ *Id.*

²⁸ *Northwestern Univ. & Coll. Athletes Players Ass’n (Northwestern II)*, No. 13-RC-121359, 2015 N.L.R.B. LEXIS 613 (Aug. 17, 2015).

²⁹ *Id.*

³⁰ *Id.*

II. Statement of the Case

A. Original NLRB Decision

Originally, Kain Colter, a former quarterback at Northwestern University, approached Ramogi Huma, the president of the National College Players Association, and requested assistance in providing college athletes with representation in their effort to receive recognition as employees.³¹ Accordingly, Huma submitted the petition on behalf of the football players at Northwestern at the regional office of the NLRB.³²

On March 26, 2014, the Regional Director of the NLRB ruled that the scholarship football players at Northwestern were employees of the school and thereby eligible to unionize, while the walk-on players were not.³³ In defining the term “employee,” the Board used the common law definition: “an employee is a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”³⁴ Accordingly, the Board applied this test in their analysis, ultimately concluding that “players receiving scholarships to perform football-related services for the Employer [Northwestern] under a contract for hire in return for compensation are subject to the Employer’s control and are therefore employees within the meaning of the [NLRA].”³⁵

First, the Board held that the scholarship athletes clearly performed valuable services for Northwestern, reasoning that the millions of dollars of revenue generated through the college’s participation in the NCAA served as an extraordinary economic benefit.³⁶ Additionally, the Board found that it was clear that the scholarships the players receive are compensation for their athletic services performed for Northwestern throughout the regular season and postseason.³⁷ It went on to explain that the scholarships serve as “tenders” that the players are required to sign before the beginning of each period of the scholarship.³⁸ Thus, according to the Board’s analysis, “[t]his ‘tender’ serves as an employment contract and also gives the players detailed information concerning the duration and conditions under which the compensation will be

³¹ Tom Farrey, *Kain Colter Starts Union Movement*, ESPN.com, Jan. 28, 2014, http://espn.go.com/espn/otl/story/_/id/10363430/outside-lines-northwestern-wildcats-football-players-trying-join-labor-union (last visited Jan. 30, 2016).

³² *Id.*

³³ *Northwestern I*, 2014 N.L.R.B. LEXIS 221, *supra* note 25.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

provided to them.”³⁹ Finally, the Board noted that it was clear that the scholarships received are in exchange for the athletic services being performed.⁴⁰

Accordingly, the Board proceeded to analyze the final part of the test, whether Northwestern possessed control over the players.⁴¹ Upon reviewing the record, the Board held that scholarship players are under strict and exacting control by Northwestern throughout the entire year.⁴² The Board listed a plethora of reasons as to why Northwestern exercises control over the players, beginning with the 50 to 60 hours spent per week engaging in football-related activities during training camp and the control that the football coaches have during this time.⁴³ It went on to discuss the regular football season and how in addition to practices, meetings, film sessions, and workouts, the players must also compete in the games on Saturdays, noting that players often must spend 25 hours in a two-day period traveling to and from away games while also attending meetings and competing in the actual game.⁴⁴ The Board also suggested that although the NCAA limits countable athletically related activities (“CARA”) to 20 hours per week from the first regular season game until the final regular season game, or perhaps a Bowl game, the evidence nonetheless evinces that the players continue to devote 40 to 50 hours per week to their football duties through the end of the season.⁴⁵

Finally, the Board discussed the control that the football coaches possess over the players by monitoring their adherence to the NCAA and team rules and disciplining them for any violations of such rules.⁴⁶ This includes being late to practices, violating minor team rules that result in running laps, and repeatedly missing team activities or violating team rules to the point where the player is deemed to have voluntarily withdrawn from the team and will lose his or her scholarship.⁴⁷ Plus, if a player commits a more heinous violation, he or she may be suspended from the team and lose his or her scholarship.⁴⁸

Additionally, according to the Board, these rules permit coaches to have control over most aspects of the players’ private lives.⁴⁹ The Board went on to list several ways that coaches restrict the players’ private lives, including rules on living arrangements, applying for outside

³⁹ *Northwestern I*, 2014 N.L.R.B. LEXIS 221, *supra* note 25.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

employment, driving personal vehicles, traveling off-campus, posting items on the Internet, speaking to the media, using alcohol and drugs, and engaging in gambling.⁵⁰ Finally, the Board noted that although many of these rules are in place in order to protect the players and Northwestern from violating NCAA rules, that does not detract from the amount of control the coaches possess over the players' everyday lives.⁵¹

Ultimately, the Board held that the football receiving scholarships fall within the broad definition of what constitutes an "employee" based on the NLRA and common law.⁵² However, it further held that at the same time, walk-on players do not meet this definition due to the fact that they do not receive any compensation for their athletic services performed, though it did note that this status would change should the walk-on player receive a scholarship later in their time at the school.⁵³ Thus, the Board concluded that "only those players who are currently receiving scholarships and who have not exhausted their four years (or five years, in the case of a "redshirt" player) of NCAA playing eligibility will be [considered an employee and] eligible to vote [whether or not they desire to be represented for collective bargaining purposes by College Athletes Players Association]."⁵⁴

B. Most Recent NLRB Decision

As a result of the initial NLRB decision, Northwestern's scholarship football players were permitted to vote on whether to form the first-ever union for college athletes.⁵⁵ The results of the vote, however, could not have an immediate impact.⁵⁶ Due to the rules of the vote, the ballots could not even be counted while Northwestern's appeal of the NLRB decision remained pending.⁵⁷

Sixteen months later, on August 17, 2015, the NLRB issued its decision and reversed the earlier finding, thereby ending the Northwestern scholarship athletes' bid at unionization.⁵⁸ The unanimous decision, however, refused to address the key issue on appeal: whether college athletes are employees under the NLRA.⁵⁹ Instead, the Board exercised its discretion to not

⁵⁰ *Northwestern I*, 2014 N.L.R.B. LEXIS 221, *supra* note 25.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *NU Players*, *supra* note 26.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Northwestern II*, 2015 N.L.R.B. LEXIS 613, *supra* note 28.

⁵⁹ *Id.*

assert jurisdiction in this case, explaining that it would not effectuate the policies of the NLRA to do so.⁶⁰ More specifically, it noted that:

[B]ecause of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of FBS football (in which the overwhelming majority of competitors are public colleges and universities over which the Board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case.⁶¹

Finally, the Board continued, nothing in the Board's precedent required them to assert jurisdiction in this case.⁶² It noted how it had never in its history been asked to assert jurisdiction in a case involving scholarship college athletes, and as such, it declined to make this the first time.⁶³ Moreover, the Board emphasized that its decision "does not concern other individuals associated with FBS football, but is limited to Northwestern's scholarship football players."⁶⁴ Finally, it went on to clarify that this ruling does not preclude a reconsideration of this issue in the future, suggesting that "recent changes, as well as calls for additional reforms, suggest that the situation of scholarship players may well change in the near future[.]" resulting in the Board revisiting its policy in this area.⁶⁵

Conclusion

Notably, although the NLRB took sixteen months to punt on the merits of the legal argument of whether scholarship student athletes are employees, it indicated that both sides offered persuasive arguments. Thus, it remains unclear how the NLRB would substantively rule should the issue come before it in the future—a possibility that the NLRB itself noted in its final decision.

Although the decision ultimately prevents the Northwestern scholarship athletes from unionizing, Kain Colter refuses to mark the decision down as a loss.⁶⁶ He notes that "[s]ince [they] started this movement, a lot of positive changes have come from this—the introduction of four-year scholarships, increased stipends, maybe better medical coverage, the lifting of food restrictions. A lot of things that [they've] been fighting for have been adopted. But there is a lot of room to

⁶⁰ *Northwestern II*, 2015 N.L.R.B. LEXIS 613, *supra* note 28.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Tom Farrey, *Northwestern Players Denied Request to Form First Union for Athletes*, ESPN.com, Aug. 17, 2015, http://espn.go.com/college-football/story/_/id/13455477/nlrbsays-northwestern-players-cannot-unionize (last visited Jan. 30, 2016).

go.”⁶⁷ Thus, although college athletes still cannot unionize at least for the time being, changes have still resulted from their action.

Additionally, because Northwestern is a private university as noted by the NLRB, this new precedent likely gives other private universities such as Syracuse, Boston College, and TCU confidence should a situation like this arise at one of those schools. At the same time, because the NLRA only covers private employers and this ruling only covers the facts of the Northwestern case, student-athletes at public universities could soon raise similar issues based on their particular state labor laws.

Thus, with the NLRB having punted the main question of whether college athletes receiving grant-in-aid scholarships from a university should be considered athletes, it appears as though another team of players must drive down the field to reach the solution—though it ultimately may be worth the challenge.

About the Author: Dustin W. Osborne is a third-year law student at Syracuse University College of Law, where he is the 2016 Class President. He focuses his studies on entertainment and sports law. He earned his undergraduate degree in economics from the University of Georgia.

FilmOn, Compulsory Licenses, and the Changing Face of Media

By Keith Black

Technology, and the way we consume it, is constantly changing. Unfortunately, at times, the law is not fast enough to catch up with reality. Such is the case with respect to television, and television consumption. As “cord-cutters” and “cord-nevers” become more prominent in the television-watching market, courts and legislatures will be forced to face new business and technological realities.

The Copyright Act and FilmOn

Much of the focus of recent debate about television broadcasting is about the Copyright Act Section 111. Being defined as a “cable system” is extremely critical, as any cable system is allowed to, under copyright law, retransmit programming under a compulsory license from the copyright holder.⁶⁸ In Section 111, a cable system is defined as “a facility...that in whole or in

⁶⁷ *Id.*

⁶⁸ John Bergmayer, *Cable and Satellite Compulsory Copyright Licenses* 1 (Apr. 29, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2285539.

part receives signals transmitted or programs broadcast by one or more television broadcast stations...and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels.”⁶⁹ In other words, there are two parts to being classified as a cable system: (1) a facility that receives the signals transmitted and (2) secondary transmission of that signal.

Initially, compulsory licenses were designed to foster the growth of cable technologies, allowing more cable companies to reach a wider group of people—if a company was willing to pay the compulsory license fee, and it qualified as a cable system, it would be entitled by law to obtain that license.⁷⁰ Fostering innovation, and “promoting the arts and sciences” has long been a central tenet of copyright law,⁷¹ and so it should be of no surprise that it continues to be a critical pivot point in determining what does, and does not, constitute a cable system under copyright law.

On the heels of Aereo, FilmOn X, LLC has been a central figure in the debate of what does and what does not constitute a “cable system.” Two recent decisions have thrust FilmOn X into the spotlight, and interestingly these two decisions are at odds with each other about whether FilmOn X would be defined as a cable system, and as a result would be entitled to retransmit that content upon paying a compulsory fee.

The first FilmOn X decision was in California. Judge George Wu, in a fifteen page preliminary decision, intimated that an Internet-based broadcaster would be entitled to obtain a compulsory license under the law.⁷² Judge Wu took issue with an earlier Second Circuit argument in *WPLIX, Inc. v. ivi, Inc.*⁷³ . In that case, the court ruled that being on the Internet did not qualify as a “facility,” as then any person with Internet access could be considered a cable system.⁷⁴ Judge Wu, on the other hand, did not find this persuasive.

According to Judge Wu, FilmOn’s business model fit within the definition of a cable system. The “facility” was where the actual signals were received, and antennas received those signals in FilmOn’s business model.⁷⁵ As a result, the first portion of the test was met. The secondary transmission was sent via Internet, which Judge Wu stated qualified as “wires, cables,

⁶⁹ 17 U.S. § 111(f)(3) (2012).

⁷⁰ Bergmayer, *supra* note 68, at 3.

⁷¹ Brigham Young Univ., *Module 1: Copyright Basics & Requesting Information*, Copyright 101, <http://copyright101.byu.edu/module1/page3.htm> (last visited Jan. 30, 2016).

⁷² Joe Mullin, *Federal Judge gives FilmOn the Copyright Win Aereo Couldn't Get*, *Ars Technica*, July 17, 2015, <http://arstechnica.com/tech-policy/2015/07/federal-judge-gives-filmon-the-copyright-win-aereo-couldnt-get/> (last visited Jan. 20, 2016).

⁷³ 765 F. Supp. 2d 594 (S.D.N.Y. 2011).

⁷⁴ *Id.* at 616-17

⁷⁵ *Fox Television Stations, Inc. v. FilmOn X, LLC*, Case No. CV-12-6921, available at: <https://www.publicknowledge.org/documents/filmon-preliminary-decision>.

microwave, or other communications channels.”⁷⁶ In other words, FilmOn only needed to meet the “facility” test for the actual receipt of the initial broadcast—and because they did not merely receive the initial broadcast over the Internet, but rather at a physical location, FilmOn was able to meet both elements of the cable system test.

In a DC case, however, FilmOn received essentially the opposite ruling. In that case, Judge Collyer focused on the fact that the Internet is not a facility, and does not reside in any state.⁷⁷ But, more than that, Judge Collyer noted that while certainly the Internet qualified as a communication channel under the law, because FilmOn did not control the Internet—in other words, a user could receive FilmOn through any Internet operator that was not run by FilmOn—that they could not claim that transmission via the Internet qualified as a secondary transmission.⁷⁸ FilmOn does not run or control its own network, and so according to Judge Collyer FilmOn was not analogous to things like AT&T U-verse and Verizon Fios.⁷⁹ As a result, FilmOn was not entitled to be called a cable system and not entitled to a compulsory license to retransmit television feeds.

Clearly, it is up for debate whether an Internet-based broadcaster should be considered a cable system for compulsory license purposes. But as technology changes and evolves, the law needs to change with it.

The Changing Face of Television

How people watch television is changing rapidly. According to a recent study, fifteen percent of American adults are cord-cutters—people who have cancelled their cable or satellite services in favor of more on-demand or Internet-based services.⁸⁰ More and more, millennials and cord-cutters have become top-of-mind for the entertainment industry. Billboard stated that in 2015,

⁷⁶ *Id.*

⁷⁷ Kevin Goldberg, *Meanwhile, on the East Coast: D.C. Court Rejects FilmOn X Claim to Compulsory License*, CommLaw Blog, Dec. 16, 2015, <http://www.commlawblog.com/2015/12/articles/broadcast/meanwhile-on-the-east-coast-d-c-court-rejects-filmon-x-claim-to-compulsory-license/> (last visited January 30, 2016).

⁷⁸ Dave Oxenford, *DC Court Finds FilmOn X Internet TV Service is Not a Cable System and Cannot Rely on Statutory License to Retransmit Over-the-Air Signals*, Broadcast Law Blog, Dec. 7, 2015, <http://www.broadcastlawblog.com/2015/12/articles/dc-court-finds-filmon-x-internet-tv-service-is-not-a-cable-system-and-cannot-rely-on-statutory-license-to-retransmit-over-the-air-tv-signals/> (last visited Jan. 30, 2016).

⁷⁹ *Id.*

⁸⁰ Paul Bond, *Fifteen Percent of American Adults are ‘Cord-Cutters’, Study Finds*, Hollywood Reporter, Dec. 22, 2015, <http://www.hollywoodreporter.com/news/fifteen-percent-adult-americans-are-850755?utm> (last visited Jan. 30, 2016).

the “cord-cutting millennial wreaked havoc on Wall Street.”⁸¹ Just as worrisome are cord-nevers, those who have never subscribed to a traditional cable or satellite service.⁸² In fact, according to one research poll, it is estimated that in 2025, half of people under the age of 32 will have never had a traditional cable or satellite package.⁸³

Internet-based on-demand services such as Netflix have caused real disruption for the entertainment industry,⁸⁴ and while conventional wisdom may be that on-demand services serve as an addendum to traditional television, more and more direct Internet-based competitors to the cable and satellite live TV model are arriving. Dish’s SlingTV, Playstation Vue, and the potential threat of an Apple-based live TV service indicate that it’s not just the independent FilmOn and Aereo getting in on the Internet-based live television game—major players are in on the business and may view live TV over the Internet as a way to capitalize on the ever-increasing number of cord cutters.

As the reality of this new market becomes more evident, and as more companies look to deliver television online, perhaps the initial intent of copyright law—to foster the arts and sciences—should be taken into account in determining policy moving forward. As noted earlier, the purpose of compulsory licenses was to avoid stunting the growth of the cable industry and to bring broadcast content to a wider audience. If that logic still applies, courts and legislatures need to then consider the very real fact that the Internet is becoming the primary mode of entertainment consumption for a growing generation.

The fact of the matter is that media is changing. If the initial intents of both the Copyright Act and the compulsory license are to be upheld, Congress and the courts have to reconsider how media and technology are evolving. The Internet is changing how we communicate and how we consume content—and to foster that innovation it seems logical that the courts attempt to consider compulsory licenses on the intent of the law. At the same time, the way the law is drafted makes it at least arguable that Internet exploitation was not intended to be covered by compulsory licenses—as evidenced by the conflicting decisions with regards to FilmOn. As a result, it may take action from legislatures to foster innovation.

Either way, it seems clear where media is headed—away from more traditional broadcasting and more towards an Internet-based ecosystem. As the Internet-based models become more and more commonplace, cases like FilmOn will continue flooding the courts. Eventually, we will

⁸¹ Paul Bond, *Cord Cutters Wreaked Havoc on Entertainment, Media Stocks in 2015*, Billboard, Dec. 30, 2015, <http://www.billboard.com/articles/business/6828171/entertainment-stocks-report-2015> (last visited Jan. 30, 2016).

⁸² See Mike Flacy, *Forget Cord-Cutters, Cord-Nevers Must Be Scaring Cable Companies*, Digital Trends, Oct. 14, 2015, <http://www.digitaltrends.com/home-theater/forget-cord-cutters-cord-nevers-must-be-scaring-cable-companies/> (last visited Jan. 30, 2016).

⁸³ See *id.*

⁸⁴ See Tatiana Siegel, *Sundance: How Netflix is Spending Huge and Annoying Studios*, Hollywood Reporter, Jan. 20, 2016, <http://www.hollywoodreporter.com/news/sundance-how-netflix-is-spending-857104> (last visited Jan. 30, 2016).

get to a point where Congress or the Supreme Court will be forced to readdress this issue head-on.

About the Author: Keith Black is an entertainment attorney in New York, NY. Keith focuses his practice on television and movie production and licensing.

NEWS AND ANNOUNCEMENTS >>

Hitting a Hole in One: Licensing 101



The *Committee on the Entertainment and Sports Law Industry*, with the *American Bar Association, Young Lawyers Division (ABA-YLD)*, and the *Center for Sports Law & Policy at Thomas Jefferson School of Law* presented the following program at the *ABA Midyear Meeting in San Diego, California*, on Friday, February 5, 2016, 10:30-11:30 a.m. (PST):

Hitting a Hole in One: Licensing 101 and Best Practices for Sports Industry Counsel and Professionals

Sports agents, general counsel of major sports companies, sports attorneys, and sports marketing professionals discussed the ins and outs of licensing athlete and company brands in the sports industry. Discussion will include the topics of licensing, intellectual property, contracts, endorsements, and sponsorships, along with best practices while serving as counsel in the sports industry. Co-Sponsored by the ABA-YLD Business, Corporate, and Intellectual Property Sections.

Panelists:

- Marty Hochman, Assistant General Counsel, Callaway Golf Company

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- Heather Harle, Account Manager, Sports Marketing at BDA, Inc.

Moderator: Ashley Hollan Couch standing in for Jeremy Evans, Managing Attorney at California Sports Lawyer and Director of the Center for Sports Law & Policy at Thomas Jefferson School of Law

ABA YLD Announcements

Social Media Team Update

The Social Media Team is pleased to announce the new Social Media Policy! The purpose of this policy is to provide direction on appropriate and effective ways to utilize social media on behalf of the ABA YLD when delivering content, facilitating engagement, and communicating with both members and non-members. The policy includes such information as sample posts, proper use of our social media channels, and of course directions for using the online spreadsheet we set up to capture posts from across the division. The new policy can be found at http://www.americanbar.org/content/dam/aba/administrative/young_lawyers/leadership_portal/social_media_policy.authcheckdam.pdf

Disaster Legal Services Team Update

The DLS team is currently implementing DLS in Mississippi, Texas, South Carolina, and California. Earlier this year, we implemented DLS in Texas, Wyoming, Saipan, and Kentucky. We expect this to be a busy year on the DLS front, as NASA predicts that this year's El Nino is going to be the worst ever.

The DLS team encourages all young lawyers to be prepared in the event of an emergency or disaster, and to coordinate with your local or state bar association to help disaster survivors.

More information about the DLS program can be found on our website.

National Conferences Team Update

In addition to the regular activities of the ABA YLD National Conferences Team during the ABA Midyear meeting, the Team is putting together a social media photo scavenger hunt. New attendees will have the opportunity to be a part of a scavenger hunt that allows them to meet seven YLD leaders, receive their business cards, and also take a selfie and post it to their social media accounts with the hashtag #YLDmidyear16. The first person to have a selfie with each YLD leader and receive their signature on a business card will receive a generous gift from the ABA YLD National Conferences Team.

Here is information about upcoming conferences:

YLD Spring Conference

May 5 – 7, 2016

St. Louis, MO

Member Services Project Update

The Member Services Project is proud to launch the Young Lawyer Toolkit at the ABA Midyear Meeting. The Toolkit is a curated collection of ebooks, tutorials, and online resources, intended to be a one-stop-shop for lawyers in their first years of practice. The Toolkit contains resources covering trial practice, the business of law, going solo/opening a firm, financial wellness, diversity and inclusion, and first-year lawyers. At launch, the Toolkit will include materials for lawyers with one to three years of experience, with materials for more experienced lawyers to come.

To access the Toolkit, please visit <http://www.ambar.org/younglawyertoolkit>. The Young Lawyer Toolkit is free for ABA Members.