

ENTERTAINMENT AND SPORTS INDUSTRY

AMERICAN BAR ASSOCIATION YOUNG LAWYERS DIVISION



Committee Newsletter | Spring 2016

TABLE OF CONTENTS

Message from Your Committee Co-Chairs2
By Jeremy M. Evans and Ashley Hollan Couch

ARTICLES >>

Top Ten Issues and Predictions for the 2017 Major League Baseball
Labor Negotiations3
By Jeremy Evans
Description: The 2017 season will begin either in labor peace or in dispute. This article will discuss the Top Ten Issues and Predictions for the 2017 Major League Baseball Labor Negotiations.

New Music Streaming Battles and their Impact on Income
Distribution to Artists 11
By Rachel Aminu
Description: Music-streaming competition among distributors is strong as ever, but are the creators receiving a fair deal?

Covering the Covers: Untangling the Music Licensing Process for Cover Songs on
YouTube 12
By Ashley Hollan Couch
Description: An analysis of copyright law in the United States as it pertains to requisite licenses for posting cover songs on YouTube.

Knockout Punch: Mixed Martial Arts Finally Legalized in New York 15
By Dan Greene
Description: New York State Legislature brings Empire State out of the Dark Ages and into some money with passage of bill legalizing Mixed Martial Arts.

NEWS AND ANNOUNCEMENTS >>

ABA Young Lawyers Division Spring Conference,
St. Louis, Missouri May 5-7, 2016 18

Message from Your Committee Co-Chairs

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

Dear Entertainment and Sports Industry Committee Members:

We hope that this newsletter finds all of our members well and enjoying this lovely Spring! We are getting excited for the American Bar Association Young Lawyers Division Spring Conference, which will be held in St. Louis, Missouri at the Four Seasons Hotel. Both of your Co-Chairs will be present at the events and are slated to speak on a panel for the General Practice, Solo and Small Firm group for a discussion entitled, "Hit the Ground Running: Tackling the First Year Whether as an Associate or Hanging Your Own Shingle." There will also be some fun social events including a chance to attend a Cardinals game while in town. Please feel free to reach out to your Committee leadership if you will be in town—we would love to meet you all in person!

As always, 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. Check out our Committee page for more details, 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 >>

Top Ten Issues and Predictions for the 2017 Major League Baseball Labor Negotiations

By Jeremy Evans

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

The journey of Major League Baseball (“the owners” or “MLB”) and the Major League Baseball Players Association (“MLBPA” or “Players Association”) has enjoyed labor peace since the last strike in 1994-1995. However, labor peace has not always been the case. There have been several work stoppages along the way.

We now embark upon the end of the current Major League Agreement¹ (“Agreement” or “CBA”) at the conclusion of the 2016 season. The 2017 season will begin either in labor peace or in dispute. This article will discuss the top ten issues and predictions for the 2017 Major League Baseball labor negotiations.

1. Shortening the Season to 154 Games from 162 Games²

It has been argued that players need more rest between games (and possibly resulting in fewer injuries) and that the season drags on too long. Weather has also become an issue as most baseball games are played outside, and playing games in November during the playoffs is not ideal. These are legitimate issues, but they do not tell the entire story.

First, shortening the season to 154 games would return America’s pastime to pre-1961 statistical collection (Major League Baseball changed to a 162 game schedule for the 1961 season). Meaning, for example, a pre-1961 player would have had to attack Babe Ruth’s homerun record of 60 homeruns during a 154-game season. Since 1961, players have had an extra eight games to accomplish the same. It is a purist argument, but note that no player in the history of the game has beaten Ruth’s record of 60 or more homeruns in a season of 154 games or fewer. This statistic includes those players who have admitted to or have been alleged to have used performance-enhancing drugs.³

¹ Major League Baseball, 2012-2016 Basic Agreement, available at http://mlb.mlb.com/pa/pdf/cba_english.pdf [hereinafter 2012-2016 Basic Agreement].

² Al Yellon, *154 Games? 162 Games? Should MLB Change Its Schedule?*, SB Nation, July 17, 2015, <http://www.bleedcubbieblue.com/2015/7/17/8989491/154-games-162-games-mlb-schedule>.

³ See Baseball-Reference.com, *Single Season Leaders & Records for Home Runs*, http://www.baseball-reference.com/leaders/HR_season.shtml (last visited May 8, 2016).

Second, the key issue to be discussed is money. Fewer games on television means less money.⁴ However, Major League Baseball can combat less television revenue through increased viewership and a larger fan base. There is an argument to be made that a shortened season would attract new fans since that is what many fans and non-fans have requested. Fewer games also means less chance of injury so fans get to see their favorite players play more. Lastly, fewer games also means tighter playoff pushes as teams have less time to make the cut.

Prediction: Major League Baseball and the Players Association will agree upon a shortened 154-game season.

2. Further Developed Domestic Violence,⁵ Drug,⁶ and Tobacco Usage⁷ Policies

In 2015, when the national news was focused on former Baltimore Ravens running back Ray Rice and current Minnesota Vikings running back Adrian Peterson and their domestic violence disputes being handled by the National Football League Commissioner Roger Goodell, Major League Baseball and the Players Association quickly approved a new domestic violence policy that gives the MLB Commissioner sole authority to discipline players.⁸ Sound familiar and like a recipe for future problems? It should.

Policies need to be implemented and decided upon fairly through a neutral and disinterested party or group to be effective and meaningful. Under the current policy, it will be very telling to discover what happens when a bad decision, controversial ban, or disciplinary action is handed down on a popular player where the Commissioner has full authority. The Player's Association would be wise to negotiate joint decision-making and/or having neutral arbitrators making all disciplinary decisions from the outset.

Furthermore, after time allows issues to come to the forefront, deals negotiated during labor peace and those that occur after a CBA has ended are quite different from and often more complex than those created when the parties have had time think and reflect. If you doubt the resolve of the Players Association, we only need to look at the comments of the Players Association's Executive

⁴ Jayson Stark, *MLB's biggest obstacle to a 154-game season: money*, ESPN, May 22, 2015, http://espn.go.com/mlb/story/_/id/12922131/money-mlb-biggest-obstacle-154-game-season.

⁵ Major League Baseball & Major League Baseball Players Association, Press Release: MLB/MLBPA Joint Domestic Violence, Sexual Assault, and Child Abuse Policy (Aug. 21, 2015), available at <http://riveraveblues.com/wp-content/uploads/2015/08/Domestic-Violence-Policy.pdf>.

⁶ Office of the Comm'r of Baseball & Major League Baseball Players Association, Major League Baseball's Joint Drug Prevention and Treatment Program, available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf>.

⁷ John Dorn, *New York City passes bill to ban smokeless tobacco in MLB stadiums*, AOL, Mar. 23, 2016, <http://www.aol.com/article/2016/03/23/new-york-city-passes-bill-to-ban-smokeless-tobacco-in-mlb-stadium/21332337/>.

⁸ Kavitha A. Davidson, *MLB's Domestic Violence Policy Might Just Get It Right*, Bloomberg View, Aug. 24, 2015, <http://www.bloombergview.com/articles/2015-08-24/mlb-s-domestic-violence-policy-might-just-get-it-right>.

Director Tony Clark⁹ about the upcoming negotiations. He said "Labor peace is not the goal. A fair and equitable deal is the goal."¹⁰

Moreover, although the drug policy has worked very well by most accounts, you can bet that the players' rights as it relates to the drug policy and tobacco use will be discussed and clarified in any new deal. The MLB/MLBPA Joint Drug Prevention and Treatment Program, like the Domestic Violence Policy, were agreed to during labor peace, not after the end of a CBA. More time and no current deal likely mean more to negotiate.

Prediction: Even though the treatment panels included in the Domestic Violence Policy are progressive and needed, Major League Baseball and the Players Association will agree upon less Commissioner control over disciplinary actions and there will be clarifications and possible changes to the Joint Drug Program and tobacco use as cities are passing tobacco-ban laws.

3. Prevent Tanking by Teams with a Lottery for the First Round of Draft Picks

The first issue here is whether teams are purposefully losing games to secure the number one pick. To do so, the number one pick would have to consistently be a quality investment. That is not always the case. There have been numerous number one picks that have not performed.

However, a lottery system, like what the National Basketball Association uses, might keep teams honest and diligent about continuously building winning teams. On the other hand, Competitive Balance picks¹¹ already give teams added picks when they lose a player to free agency. Parity has been terrific during the last twenty years of labor peace, so it might not be wise to add the lottery wrinkle.

Prediction: Major League Baseball and the Players Association will agree upon a first round only lottery, but it may be dependent on what happens with the Luxury Tax cap, international talent acquisition rules, and the Qualifying Offer, which will be discussed in further detail below.

4. International Draft with Simplified and Consistent Rules in Signing International Talent

For one, having streamlined rules will end the black market for acquiring talent as teams would be forced to draft or sign talent through a dedicated and fair system adding further parity to the league. It would get rid of *buscones*¹² and their use of muscle, money, and threats in getting

⁹ Travis Waldron, *Meet Tony Clark, The Most Important Man In Baseball*, Huffington Post, Mar. 4, 2016, http://www.huffingtonpost.com/entry/tony-clark-mlb-players-association_us_56d766d6e4b03a4056775de2.

¹⁰ Jason P. Skoda, *Players' union chief expects labor talks to go smoothly*, Associated Press, Mar. 23, 2016, <http://nytimes.stats.com/mlb/story.asp?i=20160314152545690261508>.

¹¹ Joe Halverson, *Explaining the Competitive Balance Lottery of the MLB Draft*, Bleacher Report, July 14, 2012, <http://bleacherreport.com/articles/1258849-explaining-the-competitive-balance-lottery-of-the-mlb-draft>.

¹² Mike Bates, *It's time to clean up the international free agent market before someone gets hurt*, SB Nation, Feb. 24, 2016, <http://www.mlbdailydish.com/2016/2/24/11109634/mlb-international-free-agent-lazarito-armenteros-agent>.

players smuggled into Mexico or another country to eventually land in the United States on a visa where they can sign and play for a Major League team. Lastly, it would be the next logical step in the graduation of the game in the international market.

Imagine drafting Japanese, Korean, Venezuelan, Cuban, Mexican, and Dominican amateurs in the same round, at the same time, and subject to the same rules. Imagine drafting international free agents in one simplified posting system—a brilliant, safe, exciting, and fair playing field. Baseball will finally be able to highlight the international game that it is. Couple this with the World Baseball Classic, and it further highlights the beautiful game of baseball.

Prediction: With the ease of relations between the United States and Cuba, we are already seeing a move towards simplified and consistent rules to acquiring international talent. A lack of time may prevent Major League Baseball and the Players Association from implementing a complete overhaul, but it is ripe for the pickoff (pun intended).

5. Luxury Tax and Equal Share of League Revenues between the Owners and the Players

Major League Baseball does not have a salary cap. However, the luxury tax sets an amount for team spending and taxes teams who go over the dollar amount (currently \$189 million United States Dollars, “USD”). The League distributes the taxes collected to the other teams in the League. The international free agent pool works in the same manner. The tax does not prevent teams from going over a specified spending amount, but it does challenge teams to stay below the amount to avoid the tax (i.e., giving free money to their competitors).

On a different note, Major League Baseball and the Players Association have done an equitable job on dividing league revenues at nearly 50/50. Owners still own a slight advantage, but there is sure to be some discussion on moving the seesaw in the players favor. This is especially true where *Forbes* just ranked the value of MLB franchises. The Yankees, for example, top the list, and are worth \$3.4 billion USD.¹³

Prediction: The luxury tax limit will be increased to somewhere between \$200-210 million USD to accommodate the rising cost of talent and inflation, and revenues will move towards a 50/50 split between the players and owners. This is especially true in light of the massive television deals that have been signed to date and that may be signed in the future.

6. The Use of the Qualifying Offer Tied to Free Agents¹⁴

The problem has become that there are free agents who have taken too long to sign and others who have not yet signed. Why? It is because once the team that had the free agent extends a qualifying offer to a soon-to-be free agent and the player turns down that offer, any new team that signs the free agent has to give up a draft pick to the team who lost the free agent player. This

¹³ Darren Rovell, *Forbes estimates Yankees worth MLB-high \$3.4 billion*, ESPN, Mar. 23, 2016, http://espn.go.com/mlb/story/_/id/15051301/new-york-yankees-worth-mlb-high-34-billion.

¹⁴ Ronald Blum, *AP Interview: Union head Tony Clark pitches for more jobs*, Associated Press, Feb. 11, 2016, <http://bigstory.ap.org/article/19e2abcf454421ba409ece485c49e81/ap-interview-union-head-tony-clark-pitches-more-jobs>.

creates a situation where teams wanting to sign such free agents must pay the salary demands and give up a draft pick.

The qualifying offer feels too much like the institutional control that the National Football League has over its teams through franchise tags. Major League Baseball has what many consider to be the strongest union in the world—the Players Association—and it is likely that the Players Association will be pushing to get rid of the qualifying offer because of the control it gives teams over free-agents. Free agents should be able to hit the market unhindered. If a free agent is not free, what is he?

Prediction: Major League Baseball and the Players Association will eliminate the Qualifying Offer for the 2017 Agreement.

7. The *World Baseball Classic*¹⁵ and Games Played Overseas

Major League Baseball realizes that it must change to keep up with other major sports by growing itself into an international brand. Baseball has done this by playing exhibition, World Baseball Classic, and regular season games in China, Cuba, Australia, Japan, and other locations, and then offering television licensing in those areas to broadcast games.¹⁶ However, many of the best American players have not bought into the program by refusing to play because of injury or circumstance. It will take some time for American baseball players to buy into the program; by comparison, basketball has had a head start, soccer/fútbol is *the* international game, and American football is making its inroads abroad as well.

For the game of baseball to grow internationally, the following must occur. First, World Baseball Classic games and games played abroad¹⁷ need to occur during an extended All-Star break (July) or after the World Series has ended (October). Holding games during Spring Training¹⁸ (March) prevents American players from being at their best, and it forces players to make precautionary decisions based on injuries or health concerns as they have not begun their training regimens.¹⁹ Second, pay players and coaches large bonuses to incentivize participation, and convince owners and management to support player decisions without pressuring them not to play. Third, all teams need to have adequate time to play together in advance of the tournament to create the best environment for success. In closing, baseball is not international enough for the World Baseball

¹⁵ World Baseball Classic, <http://www.worldbaseballclassic.com/> (last visited May 8, 2016).

¹⁶ Richard Justice, *MLB, Le Sports bring live baseball to China*, MLB.com (Jan. 7, 2016), <http://m.mlb.com/news/article/161229624/mlb-strikes-deal-to-stream-live-games-in-china>.

¹⁷ *MLB 'very interested' in playing regular-season game in London in 2017*, The Guardian (Associated Press), Jan. 26, 2016, <http://www.theguardian.com/sport/2016/jan/26/mlb-very-interested-in-playing-regular-season-game-in-london-in-2017>.

¹⁸ Jeff Passan, *World Baseball Classic's heart is in the right place, but money, spring training hurting its appeal*, Yahoo Sports, Mar. 5, 2013, <http://sports.yahoo.com/news/world-baseball-classic-s-heart-is-in-the-right-place--but-money--spring-training-hurting-its-appeal-141419185.html>.

¹⁹ Rob Neyer, *Yes, we're still arguing about World Baseball Classic and injuries*, SB Nation, Jan. 17, 2013, <http://www.sbnation.com/2013/1/17/3887334/wbc-rosters-pitchers-injuries-justin-verlander>.

Classic and similar international games to stand on their own without complete and unfettered support by the Americans. Such support may also help the Americans *actually* win the tournament that represents their pastime.²⁰

Prediction: We know the World Baseball Classic and games played abroad have been profitable²¹ and exciting, so Major League Baseball and the Players Union would be wise to negotiate a schedule that allows for more star-level player participation. We can expect the parties to agree on changing the schedule, while expanding into newer markets. We can also bet that a discussion of international broadcasting and licensing revenues will enter the profit sharing split between the Owners and the Players.

8. Major League Minimum Salary, Salary Arbitration,²² and Player Control

The current Major League Minimum Salary is \$507,500 USD. Generally, this number goes up in every new CBA and sometimes every year inside an existing CBA. This issue is probably the most certain aspect to change in the 2017 CBA.

Similarly, the Major League Baseball arbitration process has been successful in terms of teams and players arguing their worth in front of neutral arbitrators. Therefore, not much change is anticipated here. However, team agency control over when a player begins to run the clock on their controlled, arbitration, and free agency years, will be negotiated.

Under the current model, a player reaches free agency after making the twenty-five man roster of a Major League Baseball team and plays the equivalent of six years in service time (162 games multiplied by 6 seasons). During the first three-years, unless the player reaches the “Super Two” threshold of total games played during his first two seasons, the player is team controlled and may be paid the Major League Minimum Salary. Years four, five, and six are salary arbitration years, and the player will be given a raise agreed to between the team and player or as awarded by a neutral arbitrator. A team may also buy out a player’s arbitration years by signing a long-term deal with the player’s consent.

The process seems fair and straightforward, but issues arise when a team holds a player back for development (says management) or salary control (says the player). Sometimes complicating matters are the representatives of these younger players who want to see their player paid—

²⁰ *Why the USA can't win the World Baseball Classic*, Irish Central, Mar. 16, 2013, <http://www.irishcentral.com/sports/usa/why-the-usa-cant-win-the-world-baseball-classic-198593221-238174281.html>.

²¹ Benjamin D. Goss, *Taking the Ballgame Out to the World: An Analysis of the World Baseball Classic as a Global Branding Promotional Strategy for Major League Baseball*, J. Sport Administration & Supervision (Apr. 2009), <http://hdl.handle.net/2027/spo.6776111.0001.114>.

²² 2012-2016 Basic Agreement, *supra*, at Article VI (E), Salary Arbitration (http://mlb.mlb.com/pa/pdf/cba_english.pdf)

case-in-point: Chicago Cubs third baseman Kris Bryant and his agent Scott Boras.²³ Whichever is true, maybe both, the issue of player control will be negotiated.

Prediction: The Players Association will push for more standards on when a player is promoted. However, the grievance process inside the current CBA already provides the way for disputes to be resolved. It is unlikely to see much change as player development and scouting is subjective in nature, but objective in statistical performance. The problem is that playing in the minor leagues and dominating there does not guarantee Major League success. This may become one of the more contentious items negotiated for the 2017 CBA.

9. The National League adding a Designated Hitter

In 1973, the American League adopted the designated hitter (“DH”) rule allowing one player to hit for the pitcher.²⁴ However, the National League did not adopt the rule and still allows the pitcher to hit for himself. Since that time, fans and executives alike have been arguing for one side or the other.

MLB Commissioner Robert Manfred says the American League is more *exciting* with the DH, while the National League is more *interesting*.²⁵ Commissioner Manfred also said, “The most likely result on the designated hitter for the foreseeable future is the status quo [meaning no change].”²⁶ However, others believe that the decline in pitchers’ performances in the batter’s box will force the National League to change by adopting a DH rule.²⁷ On the other hand, several National League pitchers—you know, the folks who are actually batting—wish to continue to hit and think it adds an interesting and fun wrinkle to the game.²⁸

Prediction: Based on MLB Commissioner Manfred’s statement and the pitchers in the Players Association who prefer hitting to sitting, the National League will not adopt a DH rule. It is of note that having at least one variance between the American and National Leagues makes it different from any other professional sport in the world, while also providing deference to history.

²³ Cliff Corcoran, *Don't blame Cubs for taking advantage of rules with Kris Bryant*, Sports Illustrated, Mar. 18, 2015, <http://www.si.com/mlb/2015/03/18/chicago-cubs-kris-bryant-scott-boras-theo-epstein-service-time>.

²⁴ *This Day in History (January 11, 1973): American League adopts designated hitter rule*, History.com, <http://www.history.com/this-day-in-history/american-league-adopts-designated-hitter-rule> (last visited May 8, 2016).

²⁵ Barry Petchesky, *The National League Isn't Getting The DH For A While*, Deadspin.com, Jan. 26, 2016, <http://deadspin.com/the-national-league-isnt-getting-the-dh-for-a-while-1755150183>.

²⁶ Jerry Crasnick, *Rob Manfred: No foreseeable change to DH rule coming*, ESPN, Jan. 26, 2016, http://espn.go.com/mlb/story/_/id/14643947/mlb-commissioner-rob-manfred-says-no-foreseeable-change-designated-hitter-rule-coming.

²⁷ Jared Diamond, *Why a National League Designated Hitter Is Inevitable*, Wall Street Journal, Jan. 22, 2016, <http://www.wsj.com/articles/why-a-national-league-designated-hitter-is-inevitable-1453511041>.

²⁸ Rob Neyer, *The Two Pillars of the Great DH Debate*, Just a Bit Outside, Foxsports.com, Apr. 27, 2015, <http://www.foxsports.com/mlb/just-a-bit-outside/story/adam-wainwright-dh-national-league-will-it-ever-happen-042715>.

10. Discussion about Litigation regarding the Unionization of the Minor Leagues²⁹

You may be thinking the Players Association has no say or part in the minor league unionization litigation. However, an endorsement by the Players Association for a minor league players union would go a long way in getting traction. Major League Baseball is the defendant in this matter representing the team owners, so their endorsement and support is doubtful considering the antitrust exemption afforded to the MLB.³⁰ Owners likely want to keep the status quo from a business model and profits standpoint.

As an example, Major League Baseball and the Players Association would be wise to look at the National Hockey League (“NHL”) equivalent in the Professional Hockey Players Association (“PHPA”)³¹. The PHPA represents minor league hockey players, but is not officially affiliated with the NHL. It would be hard to argue against the proposition that the PHPA has leveled the playing field with the team owners by the simple fact that minor league hockey players are paid well above their minor league baseball counterparts.³²

Prediction: With many issues to be negotiated in the 2017 MLB CBA, it is unlikely that an effort to unionize baseball’s minor leaguers will go much farther than that effectuated by the current litigation set for trial in February 2017.

Closing thoughts

The leaders on each side are friendly and respectful of each other. Both want and foresee a less contentious negotiation. Both sides also seem poised to make a fair deal. A beneficial CBA and labor peace for another twenty years is likely, and hopeful. Now play ball!

**ORIGINALLY POSTED WITH THE CALIFORNIA SPORTS LAWYER WEBSITE
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²⁹ Jorge L. Ortiz, *In suing MLB, minor leaguers want minimum wage for maximum effort*, USA Today.com, Apr. 22, 2015, <http://www.usatoday.com/story/sports/mlb/2015/04/22/minor-league-baseball-players-lawsuit-mlb-major-league-baseball-minimum-wage/26179605/>.

³⁰ Harold Uhlman, *Minor League Baseball – Is Financial Emancipation on the Way?*, Think-BlueLA.com, Mar. 15, 2014, <http://www.thinkblueLA.com/index.php/2014/03/15/minor-league-baseball-is-financial-emancipation-on-the-way/>.

³¹ Professional Hockey Players Association, <http://www.phpa.com/> (last visited May 8, 2016).

³² Brian MacPherson, *Minor league hockey players benefit from NHL relationship*, Providence Journal, Feb. 21, 2015, <http://www.providencejournal.com/article/20150221/NEWS/150229777>.

New Music Streaming Battles and their Impact on Income Distribution to Artists

By Rachael Aminu

The birth of a new age of music distribution has revolutionized payments to artists and changed the creative landscape of music production. The originality and inventiveness behind the creative process appear stifled by a deafening drive to generate revenue from every means possible. The focus has shifted from quality of music to the quantity of sales, with decreasing emphasis on artist development and quality content. Companies like Spotify, Pandora, and iTunes are researching new ways to stream music to consumers at low operational costs, while artists continue to struggle to keep rights to their work and maintain creative control.

Despite the outcry from artists and their legal and business representatives, a wave of music-streaming competition has ensued between *Spotify*, *Apple Music*, *Google Music (YouTube)*, and *Amazon*, among others. However, little attention is paid to whether artists will receive fair compensation for their work or whether artists will be incentivized to create quality music and audiovisual content. Meanwhile, record labels dependent on sales of physical albums and digital downloads attempt to recoup lost sales with 360 deals that artists, struggling to stay afloat, consider one-sided.

For example, in October 2015, *Google Music* officially unveiled *YouTube Red*, a paid subscription service offered by *YouTube* to provide “advertising-free streaming of videos and access to advertising-free music streaming through the *Google Play* music service.”³³ The *Wall Street Journal* then reported on December 2, 2015, that *YouTube* is pursuing rights to stream television shows and movies in addition to its catalogue of music licenses in an effort to bolster *Red* against competitors like *Apple Music* and *Spotify*.³⁴

Amazon quickly followed suit. According to the *New York Post*, Jeff Bezos, Amazon’s Chief Executive, noted that *Amazon* is working on a “full-blown subscription music service”³⁵ that would dominate streaming music market leaders *Spotify* and *Apple Music*.

Perhaps not all is lost for record labels. There is a possibility that increased music streaming may increase digital track downloads. Music streaming has become the new mainstream for younger listeners, allowing them to receive and replay sounds without the need to download the files. In some circumstances, however, music streaming still serves as an advertising tool that showcases rising and established artists leading to more record sales.

³³ Ryan Nakashima, *Youtube to Launch \$10-a-month Ad-free Video, Music Plan Red*, AP, Oct. 21, 2015, <http://bigstory.ap.org/article/1e997c3066c94b40af9b33242e76dd72/youtube-launch-10-month-ad-free-video-music-plan-red>.

³⁴ Mike Shields, *Spotify Ready to Introduce Video Product: Content from BBC, Maker Studios, ESPN Will Soon Be Added to Popular Music App*, Wall Street Journal, Jan. 25, 2016, <http://www.wsj.com/articles/spotify-ready-to-introduce-video-product-1453719601>.

³⁵ Claire Atkinson, *Bezos Set to Expand Empire to Take on Spotify: Sources*, NY Post, Jan. 27, 2016, <http://nypost.com/2016/01/27/bezos-set-to-expand-empire-to-take-on-spotify-sources/>.

Not all artists are convinced that increased streaming is good thing, and many have taken matters into their own hands. According to *Forbes*, several musicians have worked within the current streaming system and reaped relatively significant and/or different financial rewards.³⁶ However, debates circle around whether streaming can remain both forward-thinking and financially viable in the coming years.

In what some might consider a statement about the current music economy and lack of emphasis on quality content, funk band Vulfpeck released a completely silent album called *Sleepify* in 2014 with the intention of creating royalties to be applied to fund a free concert for fans. Similarly, artist Mark Christopher Lee's *100 x 30* album consists of songs all approximately 30 seconds in length, created as such for the purpose playing for the minimum amount of time required to trigger royalty payments for streaming on *Spotify*. Ultimately, however, whether the current music distribution system will continue to encourage releases and pay fairly is yet to be seen.

About the Author: Rachael Aminu is the principal attorney at Aminu Law Firm, PLLC, based in Houston, Texas. She practices business and entertainment law with a special focus on music law and start-ups.

Covering the Covers: Untangling the Music Licensing Process for Cover Songs on YouTube

By Ashley Hollan Couch

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

When advising artist clients, one of the main suggestions I have is to build a strong online presence, which includes creating at least one channel to showcase work on YouTube. According to Nielsen statistics, "more people stream music from YouTube [than] all other on-demand streaming services combined."³⁷ While it is always a great idea to include the artist's original content and "behind the scenes" clips so the audience can get to know the artist and forge a more meaningful artist/superfan relationship, bands often want to include covers of songs written and performed by other artists for a plethora of reasons. Such incentives may include the potential to enhance fan engagement, show a range of talent, or to trigger attention from fans of the original artists, particularly as "cover songs can be a great way to gain attention from a wider fan base in the indie arena."³⁸

³⁶ Cherie Hu, *The Uneasy Future of Format Innovation in Music Streaming*, Forbes Media and Entertainment, Jan. 29, 2016, <http://www.forbes.com/sites/cheriehu/2016/01/29/the-uneasy-future-of-format-innovation-in-music-streaming/2/#6d5f65107034>.

³⁷ Paul Resnikoff, *YouTube Accounts for 40% of All Music Listening, and 4% of All Music Revenues*, Digital Music News, Oct. 9, 2015, <http://www.digitalmusicnews.com/2015/10/09/youtube-accounts-for-40-of-all-music-listening-and-4-of-all-music-revenues/> (last visited Apr. 21, 2016).

³⁸ Christiane Kinney, *Posting Cover Songs on YouTube Legally – Music Licensing Law Explained*, DIY Musician Blog, Mar. 28, 2012, <http://diymusician.cdbaby.com/youtube/on-posting-cover-songs-on-youtube-music-licensing-law-explained/> (last visited Apr. 21, 2016).

As a refresher of copyright law as it pertains to songs, two copyrights exist for each recorded song. There is a copyright in the original composition (which I think of as the underlying song itself) that would be registered with the U.S. Copyright Office on Form PA. There is also a copyright for each distinct sound recording of that original composition, which would each be registered with the U.S. Copyright Office on Form SR. The owner of the copyright has the exclusive rights “(1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.”³⁹

Under current United States Copyright law, “a compulsory cover license allows an artist to legally sell their rendition or “cover” of another song based on a set royalty payment scale”⁴⁰ pursuant to Section 115 of the Copyright Act. In fact, “a compulsory license is obtainable for any song that has already been previously recorded and sold with the consent of the original musical copyright holder.”⁴¹ Thus, “once a musician records and publishes a song, anyone is free to do their own cover version of that song, without the artist’s permission, by obtaining a mechanical or ‘compulsory’ license and paying the statutory royalty fee for that song (currently calculated on a penny basis of 9.1¢ per song, paid per digital or physical units sold).”⁴² This type of license, “includes the right of the compulsory licensee to make and distribute, or to authorize the making and distribution of, a phonorecord of a nondramatic musical work by means of a digital transmission, which constitutes a digital phonorecord delivery.”⁴³ Alternatively, an artist “wishing to make and distribute phonorecords of a nondramatic musical work can negotiate directly with the copyright owner or his or her agent.”⁴⁴

There are various ways to go about procuring proper permissions for a compulsory, mechanical license; however, one convenient and popular path is to contact the Harry Fox Agency (www.harryfox.com). While many artists properly procure permissions in the form of mechanical licenses, they fail to consider the requisite licenses triggered by synching the sound recording with a visual element to create an audiovisual final product, for which additional permissions are required. Synchronization licenses, known as “sync” licenses for short, are “separate, negotiable

³⁹ 17 U.S.C. § 106 (2012), available at <https://www.law.cornell.edu/uscode/text/17/106>.

⁴⁰ Peter Clarke, *Music Copyright: Compulsory Cover License*, Legal Match, Nov. 6, 2014, <http://www.legalmatch.com/law-library/article/music-copyright-compulsory-cover-license.html> (last visited Apr. 21, 2016).

⁴¹ *Id.*

⁴² Kinney, *supra* note 38.

⁴³ U.S. Copyright Office, *Compulsory License for Making and Distributing Phonorecords* (2015), <http://www.copyright.gov/circs/circ73.pdf> (last visited Apr. 21, 2016).

⁴⁴ *Id.*

license[s] that allow you to use a particular piece of music in “synch” with other visual elements, such as in [a] music video⁴⁵ or to film a live performance of the cover song rendition.

As a note, there may be another license in play as a result of the public performance of the song at the venue, although most venues will likely have blanket licenses, and yet another license will be required if you intend to reprint lyrics to any composition for which you do not hold the copyright.⁴⁶ The use of samples triggers even more requisite permissions.

Sync licenses must be negotiated with the copyright owners (who have the right to say “no” this time), so even recordings created and recorded by the cover artist require both a mechanical license and a sync license for legal publication. Listings of copyright owners for songs can be found by searching the U.S. Copyright database online at <http://www.copyright.gov/records/>. As a caveat, “many music publishers have already made agreements with YouTube that allow their songs to be used in exchange for a portion of the ad revenue generated on YouTube⁴⁷” which can be found by directly contacting the publisher of the music.

But I caution artists not to be fooled into thinking YouTube’s licenses will cover their post of a cover song—they generally will not. In fact, posting without proper licensure on the back end will typically result in Digital Millennium Copyright Act (DMCA) takedown notices requiring infringers to remove infringing content. If the infringing material is not removed at that point, or the artist engages in multiple infringing activities, it is likely that their YouTube channel will eventually be terminated, and worse, they may find themselves spending hundreds of thousands of dollars to defend a copyright infringement lawsuit. The best-case scenario would be recognition by YouTube’s Content ID platform where infringing materials may be monetized through paid advertisements with the revenue share directed to the copyright holder rather than removed entirely as in the past.

In sum, advising clients to procure the proper licenses for all music industry endeavors is always the best practice to avoid infringement and conduct ethical business. Procuring the permissions in advance (or learning that the artist will not be granted the rights before spending money to produce an entertainment product they won’t be allowed to distribute) will save your clients money and potentially embarrassment in the future.

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⁴⁵ Kinney, *supra* note 38.

⁴⁶ *Id.*

⁴⁷ Jane Haskins, *Posting Cover Songs on Youtube? What You Need to Know*, LegalZoom, Nov. 2014, <https://www.legalzoom.com/articles/posting-cover-songs-on-youtube-what-you-need-to-know> (last visited May 8, 2016).

Knockout Punch: Mixed Martial Arts Finally Legalized in New York

By Dan Greene

After years of battles in the New York State Legislature and court system, the New York State Assembly finally voted in favor of Bill No. S05949, which legalizes Mixed Martial Arts (MMA) in the Empire State. While the New York State Senate passed a bill legalizing the sport in each of the past seven years, the bill always stalled in the Assembly.⁴⁸ But, on April 14, New York Governor Andrew Cuomo signed off on the bill, making New York the 50th (and final) state to legalize the sport.⁴⁹ The law will take effect on September 1, 2016, and the first Ultimate Fighting Championship (UFC) match in New York will take place on November 12 at Madison Square Garden.⁵⁰

Besides making MMA legal in New York, the bill requires MMA promoters to increase their insurance premiums for its fighters and also stipulates that a study into possible funding for the care of fighters who suffer brain damage be undertaken.⁵¹ The bill also repeals the Combative Sports Ban, which prohibited any “combative sport” within the state. Under the terms of the 1997 statute, boxing, wrestling, judo, karate, and tae kwon do were excluded as “combative sports,” but MMA was included as a part of this prohibited sport category.⁵² The sport was disapproved because “(1) MMA fights posed a health and safety risk to fighters, and (2) MMA fights undermined public morals and had a negative influence on New York youths.”⁵³

However, these arguments have proven to be largely unpersuasive. First, one has to remember that these athletes are choosing to participate in this sport. MMA is a violent sport similar to football and hockey, where there is a real possibility of serious injury, but that doesn’t mean all violent sports should be outlawed. It must also be noted that boxing has been legal in New York for years, and there have been more boxing-related deaths in New York since 1993 (when UFC was founded) than there have been in all of MMA during that timeframe.⁵⁴ Further, by legalizing the sport, it allows for regulation of the sport, which in turn limits “underground” matches and makes the sport safer. With the passage of the bill, MMA now has the same oversight from the New York

⁴⁸ Adam Hill, *New York lawmakers’ decision to sanction MMA was long, painful process*, Las Vegas Review-Journal (Mar. 29, 2016), <http://www.reviewjournal.com/sports/mma-ufc/new-york-lawmakers-decision-sanction-mma-was-long-painful-process>.

⁴⁹ Joseph Spector & Jon Campbell, *Cuomo signs bill lifting NY’s MMA ban*, Rochester Democrat & Chronicle (Apr. 14, 2016), <http://www.democratandchronicle.com/story/news/politics/blogs/vote-up/2016/04/14/coming-today-ny-legalize-mma/83023870/>.

⁵⁰ *Id.*

⁵¹ Joseph M. Hanna, *MMA Officially Legalized in New York State*, Sports and Entertainment Law Insider (Apr. 15, 2016), <http://sportslawinsider.com/mma-officially-legalized-in-new-york-state/>.

⁵² N.Y. Unconsol. Law § 8905-a (McKinney).

⁵³ *Jones v. Schneiderman*, 974 F. Supp. 2d 322, 328-29 (S.D.N.Y. 2013).

⁵⁴ Kevin Iole, *New York appears close to legalizing pro MMA, but UFC isn’t celebrating yet*, Yahoo Sports (Mar. 30, 2015), <http://sports.yahoo.com/news/new-york-appears-close-to-legalizing-pro-mma--but-ufc-isn-t-celebrating-yet-221539557-mma.html>.

State Athletic Commission as other professional sports in the state, which allows for greater regulation of the sport.⁵⁵

While the official legalization and regulation of the sport seem to have the health and safety of its participants in mind, MMA still had its dissenters in the Assembly. For example, Assemblywoman Ellen Jaffee said the bill had no place in civilized society, and Assemblyman Charles Barron compared it to police brutality. Even Assemblyman Daniel O'Donnell (Rosie O'Donnell's older brother) went so far as to compare the sport to gay pornography.⁵⁶ Despite these largely misplaced views, it seems that common sense has caught up with (most of) the New York State Assembly as the proposed bill now includes MMA as an "authorized combative sport."⁵⁷

While the Ultimate Fighting Championship (UFC), MMA's largest and most prominent promoter, spent approximately \$2 million in lobbying for this legislation over the past eight years,⁵⁸ it will be worth it, not only for UFC (considering the number of arenas and the popularity of sports in the state), but for New York's economy as well. It has been estimated that MMA events could produce \$135 million for the Empire State's economy each year, with \$68 million attributable to events (\$33 million of which would be attributable to upstate New York).⁵⁹ This will mainly be due to the 8.5% tax on receipts on ticket sales to MMA fights, which is more than twice that of boxing and wrestling.⁶⁰

Also, not only will New York City's Madison Square Garden and Barclays Center be able to hold premiere events,⁶¹ but arenas in upstate New York like Syracuse's Carrier Dome, Albany's Times

⁵⁵ James Gormley, *UFC promising four fights a year in New York if Cuomo signs MMA bill*, Legislative Gazette (Mar. 23, 2016), <http://legislativegazette.com/archives/2981>.

⁵⁶ Adam Hill, *New York lawmakers vote to finally legalize MMA*, Las Vegas Review Journal (Mar. 22, 2016, 12:41 PM), <http://www.reviewjournal.com/sports/mma-ufc/new-york-lawmakers-vote-finally-legalize-mma>.

⁵⁷ See the proposed bill at <http://sportslawinsider.com/wp-content/uploads/2016/03/New-York-2015-A02604-Amended.pdf>.

⁵⁸ Elias Cepeda, *UFC spent over \$2 million to successfully lobby New York legislators*, Fox Sports (Mar. 31, 2016), <http://www.foxsports.com/ufc/story/ufc-spent-over-2-million-to-successfully-lobby-new-york-legislators-033116>. UFC even filed a federal lawsuit against New York Attorney General Eric Schneiderman over the law outlawing MMA, claiming that it was unconstitutional since it is "so badly written that neither ordinary persons nor state officials are able to say with any certainty what it permits and what it prohibits." See Josh Saul, *UFC sues to have MMA fights in New York*, New York Post (Sep. 29, 2015), <http://nypost.com/2015/09/29/ufc-sues-to-have-mma-fights-in-new-york/>.

⁵⁹ Gormley, *supra* note 55.

⁶⁰ Michael McCann, *Analyzing the legal, economic impact of MMA legalization in New York state*, SI.com (Mar. 23, 2016), <http://www.si.com/mma/2016/03/23/mixed-martial-arts-legalization-new-york-state-legal-economic-impact>.

⁶¹ UFC CEO Lorenzo Fertitta has noted that New York is the biggest market for UFC in the United States from a pay-per-view standpoint and "the most important media market in the United States and probably the world." Hill, *supra* note 48.

Union Center, and Buffalo's First Niagara Center⁶² will attract many New Yorkers,⁶³ as well as Canadians, to MMA events. According to UFC CEO Lorenzo Fertitta, the league is planning to hold at least four events per year in the Empire State for the next three years.⁶⁴

Overall, the passing of Bill No. S05949 will be beneficial to UFC and New York, as both will generate substantial income. As for MMA, not only does the bill's passage officially legitimize the sport in the United States, but it will also help with the legalization of the sport in other countries.⁶⁵ Objectively, the passing of this bill was way overdue as compared to legislation passed in other states, and its passage makes sense.

About the Author: Daniel S. Greene will be graduating in May from the Syracuse University College of Law where he served as an Associate Notes Editor for the Syracuse Law Review and President of the Entertainment and Sports Law Society.

⁶² UFC 7 took place in Buffalo in 1995, approximately two years before the 1997 ban. Hill, *supra* note 56.

⁶³ Assemblyman Angelo Santabarbara has noted that amateur events in the past have brought great economic impact to poorer upstate cities like Schenectady and how in the past local upstate businesses have missed out on these opportunities for "vital tourism dollars." Further, he notes that "small upstate venues could attract more than 60 events each year, leading to millions in economic activity." See Angelo Santabarbara, *MMA vote a big win for New York's athletes, fans*, Times Union (Mar. 29, 2016), <http://blog.timesunion.com/santabarbara/mma-vote-a-big-win-for-new-yorks-athletes-fans/1227/>.

⁶⁴ Gormley, *supra* note 55.

⁶⁵ McCann, *supra* note 60.

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