In re Dewey Ranch Hockey II
A Pragmatic Outcome to the Phoenix Coyotes Section 363 Dispute

BY ALAN S. GOVER AND IAN J. SILVERBRAND

PSE Sports & Entertainment, LP (“PSE”), an acquisition vehicle controlled by James Balsillie, twice attempted to secure approval from the Bankruptcy Court of the District of Arizona (the “Bankruptcy Court”) to purchase the Phoenix Coyotes franchise from Dewey Ranch Hockey, LLC (the “Debtor” or “Dewey Ranch Hockey”) and then relocate the hockey team to Hamilton, Ontario, Canada. In Dewey Ranch Hockey I, the Bankruptcy Court rejected the first attempt because “there [w]as no factual or legal history for the court to analyze,” and because there was insufficient time for all of the critical bankruptcy and antitrust issues to be fairly presented.1 Considering

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Fair Use and Its Application in News and Reviews
A Defense to Copyright Infringement and Not a Doctrine

BY PIERRE VUDRAG

Imagine that Rolling Stone music critic David Fricke, while reviewing U2’s latest CD, wants to include a small portion of U2’s lyrics to underscore his criticism in his review of the album but is prevented from doing so because the inclusion of the lyrics would be deemed copyright infringement and could lead to potential litigation. Or ESPN’s SportsCenter is prevented from including clips of Carlos Lee’s three-run homer lifting the Houston Astros to a 3–2 win over the St. Louis Cardinals because of a potential lawsuit for copyright infringement. Without the ability to use the lyrics in the review or the video clips in the news story to highlight the commentary without repercussion, negative

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Message From the Chair

Dear Forum Members:

2010 has been an exciting year for Forum activities and programs. If you were not in Las Vegas for our recent Annual Meeting this past October, you missed probably one of the most successful annual meetings the Forum has presented in quite some time. The broad range of interesting panel topics and the high quality of panelists were very informative and enjoyable. Our luncheon guest speaker, Keenen Ivory Wayans, and his interviewer, Forum Governing Committee member Peter Dekom, brought laughs, tears, and a lot of great insight about the entertainment business to our luncheon attendees. Likewise, the Four Seasons Hotel in Las Vegas proved to be a wonderful venue at a very reasonable price. If you missed it...not to worry, our next annual meeting will be in New York City in October 2011 and the Governing Committee has voted to return to Las Vegas for our 2012 annual meeting.

2011 will be even a better year for our program offerings! We are putting the final details for a new series of course webinars throughout next year. The Forum will expand its webinar course offerings to focus on even more current legal issues in entertainment and sports. We are still interested in webinar ideas and possible panelists. Please contact me if you have potential topics and panelists.

Also, the Forum will hold its second annual international symposium in entertainment and sports in Miami on April 28–29, 2011. The Forum will also present a full day program in Nashville in June of next year. The Forum is also considering a full day program in northern California during next year that will focus on the complex legal issues caused by the convergence of various and new technology platforms. Please look for flyers and emails about these programs. You will not want to miss them.

We are very proud of this edition of Entertainment and Sports Lawyer. The editors and staff are always searching for members and nonmembers to write articles for this publication, which is widely read throughout our profession. If you have an idea for an article that you believe would be of interest to our profession, please contact us. Writing for Entertainment and Sports Lawyer is a professionally rewarding experience and the editors and staff are fun to work with and make sure your article is the best it can be.

It is a pleasure serving our members. If you have any questions, ideas for new programs, or other suggestions, please feel free to contact me at ktschroder@schraderfidlow.com or Forum staff member Teresa at tucok@staff.abanet.org.

I hope you enjoy this edition of Entertainment and Sports Lawyer.

Kirk T. Schroder
Schrader Fidlow Titley & Davis, PLC
Forum Chair
“You Don’t Know Me, But I Owe You Money”
How SoundExchange Is Changing the Game on Digital Royalties

BY MICHAEL HUPPE

It’s astounding to look back at the number of times the music industry has been declared dead. Here’s just a brief sampling of the supposed causes of death: the acoustic phonograph, radio, FM radio, vinyl, television, disco, chain music stores, Betamax, the rise of the single, radio consolidation, the MP3, and the Internet. The list goes on and on. With a nod to Mark Twain, reports of its death have been highly overstated. Beneath the hyperbole and hysteria, though, there has always been adaptation. Recording technologies are a precondition for recorded music. The invention of LP vinyl paved the way for the album as an art form. Innovation has allowed the music industry to survive. And while massive changes have taken place, people continue to create and consume music.

THE EMERGING INDUSTRY

When recorded music began, the compensation of recording artists and record labels was sales-generated. People heard a song on American Bandstand or The Tonight Show, and if they wanted to hear it again and play it whenever they wanted, they had to go to the corner record store and buy the record.

At one time, young people would get together just to listen to music. They’d sit between their speakers for hours perusing an album’s liner notes. Now, when people get together to experience music, they’re playing Guitar Hero, swapping iPods, or streaming music to their computers or televisions. They listen to music while jogging, driving, sitting at work, and waiting in line at the bank. With mobile access and applications (“apps”) on the rise, people won’t need to buy, rip, or create playlists, or preload a device before a trip. When Victrola was pushing for everyone to have a phonograph in their homes, who could have anticipated the musical toothbrush, the singing mounted fish, or Pandora on the iPad? It’s an exciting time in the industry, and innovation means consumers have a wider variety of and more access to music than they’ve ever had before. Platforms are expanding, and new ideas and falling barriers to entry are opening up the business without the restrictions of shelf space in a retail store or scarce bandwidth on the Federal Communications Commission (“FCC”)-administered spectrum. People are consuming more music—more artists, more tracks, and more hours—than ever before, but they are buying much less.

The consumption of music, in the consumer’s view, is moving from a product to buy to a service to use. The historical model based on sales of a single item (LPs, 45s, cassettes, CDs, or whatever the mode of the time) is giving way to multiple rev-
A CRASH COURSE ON COPYRIGHT LAW

To understand the new frontiers of the music industry and the world of licensing, let's start with a crash refresher in copyright law. Every track produced consists of two distinct parts with their own copyrights. The first is the “song”—that is, the underlying musical composition—the notes and lyrics on a page. The song was created by a songwriter and distributed by a publisher. Its copyright is often referred to as the “musical work” and has been protected by federal law since 1909.

The second part, the “sound recording,” is the fixation of certain sounds created in a studio (or a garage or a concert venue) by musicians and vocalists. The recording, as well as the rights to it, is owned by a sound recording copyright owner, typically, but not always, a record label. The sound recording copyright of the track itself has been protected under federal law since 1972.

These two copyrights (the musical work and the sound recording) exist separately, are governed by different laws, exist under different commercial models, and are administered by completely separate entities. “Publishers” generally oversee use of the musical work (created by the songwriters), while sound recording copyright owners (typically record labels) generally oversee the use of the sound recording (created by performers and producers). Likewise, the “performance royalties” for each of these two different copyrights are collected by different groups. So some organizations (ASCAP, BMI, and SESAC) typically collect performance royalties on behalf of the songwriter and publisher for the performance of these songs in public venues (restaurants, bars, sports arenas, medical offices, and so forth), while SoundExchange collects performance royalties on behalf of the record label and performer for the digital streaming of these recordings over certain digital platforms. Sounds simple, right?

SOUNDEXCHANGE: THAT OTHER PRO

Before 1995, Sound Recording Copyright Owners (“SRCOs”) in the United States did not have a performance right in any medium. This meant that, unlike their counterparts in most of the world, recording artists and recording copyright owners did not get paid for the public performance of their works. Music service providers (whether traditional over-the-air radio or newer digital formats) used and made money from these works at will, without a dime being paid to the rightful owners or the featured artists who supplied the recordings that create the backbone of their business. The songwriters and publishers were paid (as they should be), but recording artists and labels who created the recordings—the ones who brought those sounds to life—were left out in the cold.

The Digital Performance in Sound Recordings Act of 1995 and the Digital Millennium Copyright Act of 1998 granted a performance right for sound recordings when they are used for certain types of digital streaming. These digital performance rights ensure artists and copyright holders are fairly compensated as music users increasingly switch from buying music to accessing music through Internet, satellite, and cable streaming services. As part of recognizing the new right, a small nonprofit organization was appointed to collect and distribute these new royalties. But integrating the new right wasn’t an easy process, and it remains a complicated area of entertainment and copyright law.

INNOVATION HAS ALLOWED THE MUSIC INDUSTRY TO SURVIVE.

So, when you hear Aretha Franklin’s classic “Respect” on digital radio, Otis Redding’s estate gets paid because he wrote the original song. In this case, BMI (although it could also be ASCAP or SESAC) will collect and distribute the royalties for Redding. Until 1995, that was it. As a result of the changes in the copyright law that year, Franklin, whose re-recorded single version of the song became a bestseller, and her record label are now also paid performance royalties because she’s the featured artist on that track. It’s her particular sound and her voice captured on the record that is played. A separate stream of royalties goes to her and her label for the sound recording copyright (through SoundExchange), as well as the royalties paid for the musical composition paid to Redding and his publisher (through BMI). The SoundExchange royalties earned for the sound recording are split under U.S. Copyright Law: 50 percent goes to the sound recording copyright holder (whether a record label or an independent artist), 45 percent goes directly to the featured artist (the main performer or performers on a track), and 5 percent goes to a fund that supports backup vocalists and session players.

But instead of each webcaster and satellite radio company having to go to Franklin’s record label, each asking permission to play every track, and negotiating rates with each, any music service can elect to use the statutory license. If they choose to do that, the royalties are paid to SoundExchange, which then divides the royalties on a pro-rata, per-play basis and sends out the checks. Music service providers can still negotiate individual licenses, but the default rate is set by the statutory license.
SoundExchange is the nonprofit performance rights organization that collects most of the statutory royalties from satellite radio (such as SIRIUS XM), Internet radio (like Pandora), cable TV music channels, and similar platforms for streaming sound recordings. The Copyright Royalty Board, the rate-setting entity housed in the U.S. Library of Congress, has entrusted SoundExchange as the sole entity in the United States to collect and distribute these digital performance royalties on behalf of all recording artists and sound recording.

The statutory license provided for in sections 112 and 114 of the Copyright Act is a blanket license that allows music services and streamers to use any track ever commercially released, without asking permission from the copyright holder of that recording. Therefore, the artists and copyright holders have no ability to pull their tracks from circulation or prevent any service from using them. To compensate for their inability to freely negotiate (or withhold) these rights, the Copyright Royalty Board was established to oversee the setting of “market” rates for the use of these recordings. In other words, the board helps determine how much services pay for recordings they choose to license via the United States government.

SoundExchange is uniquely situated to negotiate and advocate for fair rates on behalf of the artists and sound recording copyright owners. SoundExchange is governed by a board of directors made up of nine recording artist representatives and nine representatives from labels and copyright holders of all sizes. This is a rarity in the music industry, and the spectrum of interests represented is unprecedented. SoundExchange is run by the people it pays, and they’ve got every interest in keeping the organization as lean and proactive as possible.

As the sole administrator of the statutory licenses, SoundExchange participates in each periodic rate-making proceeding to establish rates that compensate copyright owners and performers for the use of copyrighted sound recordings. Such rate-setting proceedings are resolved either through voluntary multiparty settlements (agreements between SoundExchange and music services) or through proceedings involving the Copyright Royalty Board.

Negotiating the relative value of music has been a constant battle in a world where more and more consumers and businesses expect digital content to be free. But gradually, the idea of recording artists as creators and sound recordings as copyrighted works worthy of protection has gained momentum. At the same time, the kinds of digital services that use these recordings have been multiplying and expanding almost exponentially. With this progress has come an increase in the royalties returned to the creators of music.

When SoundExchange did its first distribution in 2003, it dispersed five years’ worth of royalties that had stacked up from 1996 to 2001, amounting to $6.3 million. The organization gave out $148 million last year and sent out an additional $166 million during the first three quarters of 2010. That’s an extraordinary growth curve.

In that 2003 distribution, SoundExchange was administering the government license for five services. Now it works with more than 1,000 services, and Pandora alone reports 2 billion performances a month. Individual payments for artists and copyright holders are growing, too. Over five years, average artist payments have increased from $700 to $2,800 a year. During the same period, average copyright holder payments have increased from $5,000 to $14,000. When SoundExchange was formed, the royalties paid out were a rounding error for most artists and labels. Now SoundExchange is a budget item for the big guys and is cranking out quarterly checks to tens of thousands of part-time musicians, garage bands, and indie singer songwriters. This is a reinvestment in the creation of great music.

This kind of curve is great news for recording artists and record labels. But it’s
also a recipe for organizational growing pains. SoundExchange has some major challenges.

THE CHALLENGES: RATES, REPORTS, AND REGISTRATIONS

By its nature, a default rate set by the government cannot take into account the needs of individual business models of the services that wish to use the statutory license. So whenever possible, SoundExchange attempts to resolve rate disputes prior to litigation using the negotiation authority granted to it by federal law. In recent years, SoundExchange has been able to negotiate successfully nine agreements with eight different groups of webcasters, tailoring the royalty rates and reporting terms to the needs of each service, while still protecting the interests of content creators. College radio stations that simulcast on the Internet, for example, indicated that it would be difficult for them to report what they play in the summer when they have very little staff. Nonprofit public and community webcasters needed flexible rates they could come together to pay. So-called “Pureplay” webcasters, whose business model consists solely of streaming recordings, did not want to be lumped in with multinational corporations that provide a music service as part of larger Internet service offerings and wanted a different rate structure to meet their unique and untested circumstances. SoundExchange was able to provide solutions to these up-and-coming services, allowing them to thrive and allowing the creators of content to share in that growth.

SoundExchange does not invoice services. Rather, the organization relies on services to provide data about what they have played and uses these playlists to divide and distribute royalties according to what's been played. Some services have been very proactive about complying with the regulations. Their reports are timely and complete, and the data are clean. But most services have compliance records that are shaky at best. The reports are often unusable or, at a minimum, contain erroneous data.

To correctly report a track to SoundExchange, a webcaster, satellite radio station, or similar service must enter certain fields of information including, at the very least, artist name, copyright owner name, and song title. Unfortunately, every little typo, alternative spelling, or skipped field causes a problem down the road. There’s a joke around the SoundExchange office that if you want to get rich quick in the music business, start a label called “Label unknown.” Then sign your first two bands: “Various artists” and “Playlist unavailable.” You’ll be a millionaire by dinner-time. (Don’t try this—SoundExchange will figure it out.) Beethoven also ranks among the top unpaid recording artists—even though he died long before the first sound recording was made. It would be comical, if it weren’t so tragic. Each track reported as Beethoven represents an orchestra that isn’t getting paid for having played that track.

PEOPLE ARE CONSUMING MORE MUSIC—MORE ARTISTS, MORE TRACKS, AND MORE HOURS—THAN EVER BEFORE, BUT THEY ARE BUYING MUCH LESS.

Unlike record labels, which can refuse a license to services that don’t provide enough data or routinely don’t report properly, SoundExchange cannot screen services wishing to use the government’s blanket license. Services are entitled to use these recordings, according to federal law (which is why it’s called a statutory, or “compulsory,” license). SoundExchange can’t say no, and neither can the copyright holders. As a result, SoundExchange has millions of dollars in royalties with bad data or no data at all. It is working through the bad data via manual research and also working to improve reporting compliance with the licensees. This will lead to greater payments to the proper recipients.

Not all of the problems with metadata on tracks can be laid at the feet of music services. Because the right of artists and labels to be paid for their recordings didn’t exist until 15 years ago, no one ever bothered to keep a database of which musicians were on which record, and who owned the recording during which periods. What data there were were rarely updated or curated. In the absence of any such authoritative resource, it’s been left to SoundExchange to research and correct wrong information.

Line-by-line corrections are sometimes needed, for example, to figure out who was in Fleetwood Mac when a particular track was recorded, and which label had licensed it to which distributor or marketing label at the time. Labels go bankrupt or are acquired by other labels, and no one is required to notify SoundExchange of the changes. As a result, each individual track can require lots of research to correct. New automated tools can fix some of these inaccuracies, but many more require manual adjustments. “Rigo Starr,” for example, is not a misspelled Beatles name, but an African guitarist. Texas rhythm and blues musician “Kane West” may be credited with more, or fewer, performances than he earned because of the similarity of his name to megastar Kanye West. These sorts of corrections require research and can’t be achieved merely by “fuzzy matching” software. By bringing on additional help to work through old data, and figuring out new and more effective ways to do so, SoundExchange has been able to send out money that would have been unpayable just two years ago. But the job is enormous, and it gets bigger every day.

The music economy of fractions of pennies building up into significant payments puts a great responsibility on SoundExchange to make sure each micro-payment is properly marked and routed. But it also puts great responsibility on content creators to include good metadata on tracks, even promotional and self-released content. Sending out tracks with incomplete or sloppy metadata is like putting a suitcase full of cash, without luggage tags, on the baggage ramp at a busy airport and hoping it somehow comes back to you. Encourage your clients and associates to label their outgoing tracks effectively—even prerelease and promotional copies. Tracks get ripped, burned, transferred, and e-mailed, and embedded metadata is the most reliable, and in some cases
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the only, way to track ownership and royalties.

So, while SoundExchange faces challenges on how to bring money in, there are an equal number of challenges in giving money away. Traditional songwriter-publisher Performing Rights Organizations (“PROs”), including ASCAP, BMI, and SESAC, are only obligated to collect for members who have registered with them directly. If you haven’t signed up to collect royalties through that organization, they don’t collect your money, and they don’t contact you about it. At SoundExchange, however, the law mandates collection for every track reported by services. SoundExchange is the only entity in the United States performing this function. This means it accrues balances earmarked for artists and labels who’ve never even heard of SoundExchange. This bestows the surprisingly challenging job of tracking those artists down and convincing them to fill out a registration form and tax paperwork.

SoundExchange has an outreach team that does great work tracking down artists and labels and letting them know there’s money waiting at SoundExchange. This should be an easy job—calling people up to give away money—but it’s been just the opposite. Whether because they don’t know about their rights, or because they think SoundExchange is a scam, or just out of pure procrastination, thousands of artists and labels just don’t sign up. SoundExchange can’t keep these funds, of course, so for the time being, that money just sits there—more than $40 million right now.

Getting the music community educated is a top priority. SoundExchange does panels and conferences, music festivals, web ads, and articles like this one, so that more people know that this revenue stream exists, and that they’re entitled to it. The organization works with partners in the industry like ReverbNation, TuneCore, iLike, MySpace, and dozens of others to spread the word, matching their artists and labels against SoundExchange’s unpaid list and asking them to notify these folks that they have money waiting. Unfortunately, notifying people is the easy part—once they’re contacted, only about 5 percent of artists and labels register. SoundExchange has more than $10 million for people contacted six or more times who still haven’t filled out the paperwork. Please help spread the SoundExchange message by getting informed and encouraging your colleagues, artists, and contacts to register for their digital performance royalties.

THE UNREALIZED RIGHT

Copyright law protects all “performable” copyrighted works—almost. Literary works: If you want to record a book on tape, you have to call the author and the publisher. Musical compositions: If you want to publicly perform Irving Berlin’s composition of “White Christmas,” you have to buy the rights. Dramatic works: If you want to put on a high school performance of Death of a Salesman, you’re going to have to get the performance rights and pay per seat. If you want to do pantomime or choreography, you need a performance license. Same thing if you want to show a movie or other audiovisual work. But there’s still one glaring loophole in the law—for all the progress the recording industry has made with digital rights, sound recordings are the only performable work that do not have a full performance right. They have secured that right for digital streams, but not for analog (AM/FM) transmissions. In other words, while the use of sound recordings merits a royalty when streamed on the Internet or satellite radio, there is no royalty paid for that same use on traditional AM/FM radio. Songwriters get paid, but the recording’s performer and owner don’t see a dime.

SO, WHILE SOUNDEXCHANGE FACES CHALLENGES ON HOW TO BRING MONEY IN, THERE ARE AN EQUAL NUMBER OF CHALLENGES IN GIVING MONEY AWAY.

AM and FM radio, like lots of other streaming services, sell advertising around music. Listeners don’t pay with cash for these services, they pay with attention. The services are making money because people want to hear music, and the creators of that music should get a small cut of the profits. On AM and FM radio, there’s a royalty for the songwriter and publisher, but not for the recording artist and copyright holder. Terrestrial radio’s exemption is an obsolete anachronism—one that unfairly advantages them over their competitors and deprives content creators of the fruits of their labors.

SoundExchange has been leading the fight to close AM/FM’s loophole in the law. This battle is already 80 years old (Frank Sinatra led the charge for a while, but even “the chairman of the board” got shouted down by powerful opponents), but it’s closer to reality now than it’s ever been. Bills supporting the Performance Right Act have passed through both the House and Senate Judiciary Committees and await a full vote. Everyone in this business has to adapt to the changing consumption model, and terrestrial radio is no exception. SoundExchange looks forward to securing the right of artists and rights owners to be compensated fairly when others use their work to make money.

WHAT’S AHEAD

This business is changing, but it isn’t dying. It is expanding. New ways are constantly arising to access, make, record, collaborate, and share music. The future also comes with its share of struggles: massive amounts of data, a new regulatory landscape, and a real challenge in spreading even the best of news (like SoundExchange royalties) to the very end of that long tail. Changing and adapting to that new culture isn’t easy, but it’s a part of making that future: a future that can include revenue, royalties, and new rights that didn’t exist before. This future is worth the fight.

Michael Huppe is the executive vice president and general counsel for SoundExchange, overseeing the organization’s legal, regulatory, and political activities. He can be reached at mhuppe@sounexchange.com.
When head injuries ended the careers of Hall of Fame quarterbacks Steve Young and Troy Aikman, sports writers treated their concussions like common career-ending conditions. So in the fall of 2009, why did media outlets like Forbes suddenly treat NFL concussions as a novel topic? The answer to this question begins with a group of independent scientists demonstrating that multiple NFL concussions cause cognitive problems such as depression and early-onset dementia. In response to these studies, members of the NFL Concussion Committee (“NFL Committee” or “Committee”) denied knowledge of a link between concussions and cognitive decline and claimed that several more years of research were required to reach a definitive conclusion on the issue. When the NFL Committee anticipated studies that would implicate a causal link between concussions and cognitive degeneration, it promptly published articles producing contrary findings.

Between the years 2005 and 2007, Dr. Bennet Omalu and Dr. Robert Cantu examined the brain tissue of deceased NFL players (Mike Webster, Terry Long, and Andre Waters). All three subjects of Omalu and Cantu’s studies suffered multiple concussions during their respective NFL careers. Before their deaths, Webster, Long, and Waters presented clinical symptoms of sharply deteriorated cognitive function and psychiatric symptoms including slight mental confusion, general slowing in muscular movement, hesitancy in speech, and tremors of the hands. The brain tissue of Webster, Long, and Waters demonstrated trademark neuropathological signs of CTE, including neurofibrillary tangles, neutrophil threads, and cell dropout. In response to Omalu’s report of CTE in Webster’s brain tissue, NFL Committee members Ira Casson, Elliot Pellman, and David Viano wrote a letter to the editor of Neurosurgery asking that Omalu’s article be retracted (July 2005). The subtext of the NFL’s letter to Neurosurgery was clear: “We own this field. We are not going to bow to some no-name Nigerian with some bullshit theory.” Omalu found delicious irony in the NFL’s letter given that Casson, Pellman, and Viano are not neuropathologists. After all, “[h]ow can doctors who are not neuropathologists interpret neuropathological findings better than neuropathologists?” As a result, Omalu questioned the integrity of the NFL Committee. Not only did the NFL neglect to place even one neuropathologist on the Committee, it appointed a rheumatologist (Pellman) to chair the Committee.

In 2005, a clinical study performed by Dr. Kevin Guskiewicz found that retired players who sustained three or more concussions in the NFL had a fivefold prevalence of mild cognitive impairment (“MCI”) diagnosis in comparison to NFL retirees without a history of concussions. In reaching this finding, Guskiewicz conducted a survey of more than 2,550 former NFL athletes. NFL Committee member Dr. Mark Lovell attacked Guskiewicz’s study by stating: “[w]e want to apply scientific rigor to this issue to make sure that we’re really getting at the underlying cause of what’s happening. . . . You cannot tell that from a survey.”

In 2007, congressional scrutiny coupled with mounting media pressure (Alan Schwarz, The New York Times; Chris Nowinski, Sports Legacy Institute) compelled the NFL to address the long-term effects of player concussions. Consequently, the NFL scheduled its first league-wide Concussion Summit for June 2007. Independent scientists were invited to present their findings to team medical staffs and NFL Players Association (“NFLPA”) representatives. Scientists, fans, and players were hopeful the Summit indicated a newfound willingness on the part of the NFL to revise its antiquated concussion policies. Unfortunately, the NFL’s concussion pamphlet to players issued on August 14, 2007, stated: “there is no magic number for how many concussions is too many.” This quote suggests that the research of independent scientists fell on unresponsive NFL ears.

In 2008, Boston University’s Dr. Ann McKee studied the brain tissue of two more deceased NFL players: John Grimsley and Tom McHale. McKee found that Grimsley’s and McHale’s brain tissue showed distinct signs of CTE. According to McKee, “the easiest way to decrease the incidence of CTE [in contact sport athletes] is to decrease the number of concussions.” McKee emphasized that “[t]here is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma.”

In response to McKee’s studies, former NFL Committee co-chair, Dr. Ira Casson, characterized each study as an isolated incident from which no conclusion could be drawn. Casson stated that he would not react to McKee’s studies until her findings appeared in a peer-reviewed scientific journal. When McKee published her work in 2009, Casson maintained that “there is not enough valid, reliable or objective scientific evidence at
present to determine whether . . . repeat head impacts in professional football result in long-term brain damage."

WATERSHED CONGRESSIONAL HEARING

The debate over the long-term effects of NFL concussions reached a boiling point in September of 2009. A University of Michigan study commissioned by the NFL found that NFL alumni were diagnosed with Alzheimer’s disease or similar memory-related diseases vastly more often than the national population—including a rate of 19 times the normal rate for men ages 30 through 49. Several weeks after the release of the Michigan study, Congress announced that it would hold a hearing to discuss “legal issues relating to football head injuries.”

On at least two occasions, NFL Commissioner Roger Goodell was asked whether multiple NFL concussions contribute to the early onset of cognitive decline. Goodell justifiably deferred to medical judgment on this question. Unfortunately, the NFL’s leading medical voice on the issue (Dr. Casson) was not present to answer this critical inquiry. However, the Committee played an HBO Real Sports recording of Casson denying any and all potential links between multiple head injuries and later-life cognitive decline.

The most poignant moment of the hearing occurred when Representative Linda Sanchez (D-CA) analogized the NFL’s concussion policy. On at least two occasions, NFL Commissioner Roger Goodell was asked whether multiple NFL concussions contribute to the early onset of cognitive decline. Goodell justifiably deferred to medical judgment on this question. Unfortunately, the NFL’s leading medical voice on the issue (Dr. Casson) was not present to answer this critical inquiry. However, the Committee played an HBO Real Sports recording of Casson denying any and all potential links between multiple head injuries and later-life cognitive decline.

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LEGAL IMPLICATIONS OF NFL COMMITTEE POLICY (2005–09)

Since at least 2005, the NFL Committee has been on notice of independent medical studies linking multiple NFL head injuries with later-life cognitive decline. In 2007, the NFL released the following statement two months after independent scientists delivered face-to-face presentations to NFL Committee members:

Current research with professional athletes has not shown that having more than one or two concussions leads to permanent problems. . . . It is important to understand that there is no magic number for how many concussions is too many.\(^\text{17}\)

As of June 2010, the NFL has yet to amend this inaccurate and arguably misrepresentative statement to players. NFL alumni might argue that the league is subject to liability as a result of its failure to provide adequate warning about the causal link between multiple NFL concussions and later-life cognitive decline. However, the NFL might rebut these claims with potential duty, causation, assumption of risk, contributory negligence, indemnification, and statute of limitations defenses.

FAILURE TO WARN

A duty to warn arises when one should realize either through special facts within one’s knowledge or a special relationship that an act or omission exposes another to an unreasonable risk of harm through the conduct of a third party.\(^\text{38}\) The NFL has been on constructive notice of medical studies linking multiple head injuries with later-life cognitive decline since at least 2005. By fostering a misconception in the minds of players that “there is no magic number for how many concussions is too many,” the league arguably encouraged players to treat their concussive conditions with less than due care. The NFL Committee’s failure to warn players about studies linking concussions with cognitive decline exposed NFL players to an unreasonable risk of harm. Rather than considering retirement due to concussions sustained in 2005 and subsequent seasons, NFL athletes likely continued playing in reliance on the NFL’s assertion that multiple concussions cause no “permanent problems.”\(^\text{46}\) Thus, several players might have aggravated their concussive injuries by returning to play prematurely, in reliance on the NFL’s arguably inadequate warning.
DUTY

The NFL might argue that the NFL Committee’s mere awareness of independent studies did not by itself impose a legal duty to warn players about such studies.41 This argument is based on the legal distinction between action and inaction, or “misfeasance” and “non-feasance.”42 Absent some special relationship or special duty, the NFL could argue that it is under no affirmative duty to warn league players about the cognitive consequences of concussions such as CTE, dementia, and depression.

Courts have suggested that NFL players are employees of their respective teams, not the league.43 Consequently, the NFL might argue that there is no special relationship stemming from employment that would trigger an affirmative duty to warn NFL players about the long-term risks associated with NFL concussions.

Players might argue that the NFL’s voluntary creation of its internal Concussion Committee created a duty on the part of the NFL to exercise reasonable care. Once an actor begins to render voluntary assistance to a third party, the actor undertakes a duty to proceed with reasonable care when such third party relies on the actor’s assistance.44 The NFL assumed a duty to proceed with reasonable care in its dealings with league players when it voluntarily created its internal committee on concussions. Players relied on the information contained in the NFL’s August 14, 2007, concussion pamphlet to represent a complete and accurate synopsis of “current research” on the topic: “[w]e want to make sure all NFL players . . . are fully informed and take advantage of the most up-to-date information and resources as we continue to study the long-term impact of concussions.”45 If the NFL Committee wanted players to be “fully informed” about the “long-term impact of concussions,” why did it withhold from players the findings of Doctors Guskiewicz, Cantu, and Omalu indicating a causal link between multiple concussions and later-life cognitive decline?

CAUSE

An actor’s tortious conduct must be a factual cause of another’s physical harm for liability to be imposed.46 Conduct is a factual cause of harm when such harm would not have occurred “but for” the tortious conduct.47 The NFL could point to a number of causes that might have contributed to deceased NFL players’ cognitive decline. Pittsburgh Steelers’ trainer and NFL Committee member Dr. Joseph Maroon argues that steroids, drug abuse, and other substances caused the damaged brain tissue of former NFL players Webster, Long, and Waters.48 Similarly, when NFL Commissioner Roger Goodell was asked about the trademark signs of CTE found in (deceased NFL player) Justin Strzelczyk’s brain tissue, Goodell issued the following response: “[h]e may have had a concussion swimming. . . . A concussion happens in a variety of different activities.”49

Players might rebut this causation defense by arguing that the NFL’s failure to warn must only be one cause of their cognitive injury. Tortious conduct by an actor need only be one of the causes of another’s harm.50 When there are multiple sufficient causes, each of which is sufficient to cause the plaintiff’s harm, supplementation of the “but-for” standard is appropriate.51 NFL players may concede that they sustained concussions “swimming” or in a variety of other contexts (e.g., high school and college football). However, if players can prove that they aggravated their cognitive injuries as a result of the NFL’s failure to warn, supplementation of the “but-for” standard is appropriate. Again, by asserting that “there is no magic number for how many concussions is too many,”52 players likely returned to play after sustaining two or more concussions in one NFL season. The NFL Committee’s concussion management likely caused players to aggravate any already-existing cognitive injuries.

ASSUMPTION OF RISK

The NFL could argue that players assume the risk of all injuries inherent in professional football. Generally, participants in an athletic event are held to assume the risks of injury normally associated with the sport.53 However, plaintiffs must have actual knowledge of the risk at issue to invoke the assumption of risk doctrine.54 Logically, a plaintiff cannot make an intelligent choice to confront a risk if he lacks actual knowledge of the danger. The knowledge required in assumption of the risk analysis is actual knowledge, not constructive notice.55

THE NFL COMMITTEE’S FAILURE TO WARN PLAYERS ABOUT STUDIES LINKING CONCUSSIONS WITH COGNITIVE DECLINE EXPOSED NFL PLAYERS TO AN UNREASONABLE RISK OF HARM.

NFL alumni can freely concede that they had actual knowledge of risks normally associated with professional football such as broken bones, torn ligaments, and even concussions. However, players like Brian Westbrook lacked actual knowledge of the long-term cognitive consequences of sustaining multiple NFL concussions. As Westbrook stated: “a lot of football players didn’t know, and I include myself, that if you have two—three—four concussions you’re at a higher risk of [incurring] dementia, early-onset of Alzheimer’s, etc.”56

The NFL Committee did everything within its power to deny any causal link between multiple concussions and later-life cognitive decline. DeMaurice Smith, executive director of the NFLPA, described this NFL Committee policy as such: “[u]nfortunately, the NFL . . . diminished [independent] studies, [and] urged the suppression of [independent] findings . . . for years.”57 Thus, the NFL Committee arguably stripped players of their right to make an intelligent choice about the long-term risks associated with NFL concussions.

CONTRIBUTORY NEGLIGENCE

Contributory negligence is the strongest argument at the NFL’s disposal in this hypothetical litigation. This common-law defense rests on the rule that there can be no recovery of damages for
negligence if the injured person, by his own negligence, proximately contributed to the injury.68 While contributory negligence is similar to the assumption of risk doctrine, it is a separate and distinct defense.59 Assumption of risk involves a plaintiff’s actual knowledge of danger and intelligent acquiescence in it, whereas contributory negligence is a matter of a plaintiff’s fault or departure from the standard of reasonable conduct.60

THE NFL ASSUMED A DUTY TO PROCEED WITH REASONABLE CARE IN ITS DEALINGS WITH LEAGUE PLAYERS WHEN IT VOLUNTARILY CREATED ITS INTERNAL COMMITTEE ON CONCUSSIONS.

The NFL could argue that players negligently contributed to their own injuries by (1) failing to report their concussive conditions to team doctors, and (2) returning to play before their concussion symptoms completely disappeared. The NFL’s August 14, 2007, informational pamphlet instructs players to self-report their concussive symptoms: “If you . . . have [concussion] symptoms, you should immediately report your symptoms to your team doctors and athletic trainers[.]”61 The 2007 pamphlet also contains the following return-to-play guidelines: “[p]layer[s] should be completely asymptomatic . . . before returning to play.”62

Thirty of 160 NFL players surveyed by the Associated Press (“AP”) in November 2009 replied that they either failed to report or underreported concussion symptoms.63 In conducting the study, the AP spoke with “five players on each of the 32 teams—nearly 10 percent of the league—seeking out a mix of positions and NFL experience to get a cross-section of players.”64 In the same AP study, players admitted that they returned to play while the following concussion symptoms persisted: “feeling ‘dazed’ or ‘woozy’ or having blurred vision.”65 The NFL could argue that players negligently contributed to their own cognitive injuries by failing to report “feeling ‘dazed’ or ‘woozy’ or having blurred vision,” and returning to play before becoming “completely asymptomatic.”66

Players will respond by arguing that the NFL’s contractual scheme incentivizes them to withhold their concussion symptoms from team management. NFL player contracts do not guarantee player payment beyond the season in which an injury occurs.67 This contractual structure maximizes the risk of players incurring permanent cognitive problems because it incentivizes players to withhold their concussion symptoms and play through multiple head injuries. Dan Morgan’s concussive injuries (at least five during his tenure with the Carolina Panthers) serve as a prime example of this problem. Faced with the alternative of termination, Morgan “agreed to restructure his $2-million roster bonus into payments of $125,000 for each game played. . . . [T]his contract gave Morgan a[ ] financial incentive not to reveal any concussion for treatment.”68 Quarterback Derek Anderson articulates how player contracts incentivize NFL athletes to withhold injury symptoms: “[g]uys play with [injuries] they’ve got no business playing with. . . . [Y]our job security is not there to sit out. . . .”69

Even if players are found contributorily negligent, they could still recover damages in jurisdictions that adhere to comparative negligence principles. At common law, a plaintiff’s contributory negligence served as a total bar to his or her recovery. However, modern law jurisdictions find the complete-bar provision of contributory negligence to be incompatible with the more humanitarian comparative negligence mandate. Jurisdictions that adhere to a “pure comparative negligence” approach apportion damages between a negligent defendant and a contributorily negligent plaintiff, regardless of the extent to which either party’s negligence contributed to the plaintiff’s harm. In other words, a plaintiff who is 60 percent to blame for an accident could recover 40 percent of his losses. Thus, a jury might find a player contributorily negligent for withholding symptoms and returning to play before becoming completely asymptomatic. However, if a jury finds the NFL is at least 1 percent to blame for a player’s cognitive injuries, the player can recover damages in the amount of that 1 percent.

SECTION 88/INDEMNIFICATION

The Section 88 amendment to the 2006 NFL Collective Bargaining Agreement (“CBA”) provides that NFL alumni may receive payment of up to $88,000 per year for their medical claims specifically “related to dementia.”70 Section 88 is funded by the various NFL clubs and “jointly administer[ed]” by the NFLPA and the NFL.71 Defense attorneys might argue that a player’s acceptance of Section 88 funds indemnifies the league against any future civil liability. However, this defense is not persuasive given that Section 88 contains no indemnification language.

STATUTE OF LIMITATIONS—“DISCOVERY RULE”

Football-related head trauma can be likened to asbestos exposure in that harm caused by both sets of dangers can take up to 20 to 40 years to manifest. Normally, a cause of action for personal injury will accrue at the time of injury, and a plaintiff will have only two to four years to file a claim based in tort law.72 To be fair to people with latent injuries, most states have adopted what is known as the “discovery rule.” Under this rule, a cause of action does not accrue until plaintiffs know or reasonably should have known that they were injured as a result of the defendant’s conduct.73 NFL alumni should certainly be able to invoke the discovery rule if they file failure to warn claims against the NFL. Cognitive illnesses caused by multiple concussions (e.g., CTE, dementia, Alzheimer’s, depression) represent exactly the type of latent injuries the discovery rule was intended to address.

THE NEW NFL COMMITTEE

In March 2010, the NFL selected prominent neurologists Dr. H. Hunt Batjer and Dr. Richard G. Ellenbogen as co-chairs of the new NFL Committee.74 Unlike previous committee chairs,
A home run! Professor Minan’s book is a highly entertaining and informative book about our favorite sport. It is easy to imagine this book being used as the text of a “History of American Law” course. Lawyers, baseball fans, history lovers, and non-fiction readers will love this book.

— Attorney Judy Zeprun Kalman, Boston, MA

From free agency and scalping tickets to the infamous Bartman Ball, this book has it all. The game of baseball has often resulted in brawls, both on the field and in the courtroom, and from the 1890s on, much of what baseball is today has been shaped by the law. In 18 chapters, this eye-opening book discusses cases that involved rules of the game, new stadium construction, ownership of baseball memorabilia, injured spectators, television contracts, and much more.

This book will appeal to lawyers and sports fans alike, and is written in a short-story format with additional references to movies, songs, history, and other asides that will add to the reader’s enjoyment. Discover an entirely new facet to America’s favorite pastime with this one-of-a-kind book!
Batjer and Ellenbogen have no previous ties to NFL teams, and they receive no compensation beyond expenses. This structure is intended to eliminate conflicts that previously jeopardized the integrity of NFL Committee findings.

Batjer spoke with brutal honesty when describing the substandard practices of former NFL Committee leaders:

We all had issues with some of the methodologies... the inherent conflict of interest... that was not acceptable by any modern standards or not acceptable to us. I wouldn’t put up with that, our universities wouldn’t put up with that, and we don’t want our professional reputations damaged by conflicts that were put upon us.

Batjer and Ellenbogen so wanted to distance themselves from the Committee of old that they forbade Dr. Elliot Pellman (former NFL Committee chair, 1994–2007) from delivering opening remarks at the 2010 Concussion Summit.

THE NFL COMMITTEE’S CONCUSSION MANAGEMENT LIKELY CAUSED PLAYERS TO AGGRAVATE ANY ALREADY-EXISTING COGNITIVE INJURIES.

During a May 2010 congressional hearing, Representative Anthony Weiner (D-NY) addressed Batjer and Ellenbogen with the following comment: “[y]ou have years of an infected system here, [and] your job is... to mop [it] up.” A critical step in “mopping up” the NFL Committee’s policy is to issue adequate warning to league players about the causal link between multiple NFL concussions and cognitive decline.

RECENT DEVELOPMENTS

On December 17, 2009, Cincinnati Bengals wide receiver Chris Henry, 26, died in Charlotte, North Carolina, after falling or jumping out of the back of a pickup truck driven by his fiancée. Doctors Bennet Omalu and Julian Bailes performed the postmortem study on Henry’s brain. Omalu and Bailes discovered trademark signs of CTE in Henry’s brain tissue. Bailes stated that the head injuries Henry sustained as a result of the December 17, 2009, crash were not related to Henry’s CTE findings. This is because trademark signs of CTE only develop over time.

Implications of the Chris Henry Findings

The significance of the Henry findings cannot be overstated. While Henry was the 22nd professional football player to be diagnosed with CTE, he represents the first player to have died with CTE while still active in the NFL. The fact that Henry developed CTE by his mid-20s raises questions of how many current NFL players might have the condition without knowing it. Bailes recalls his initial reaction to the Henry findings:

[as we got the results, my emotion was sad—it’s so profound. I was surprised in a way because of his age and because he was not known as a concussion sufferer or a big hitter. Is there some lower threshold when you become at risk for this disease? I’m struggling to see if something can come out positive of this.]

The NFL responded to the Henry findings through its newest voices on NFL brain injuries, Doctors Jon Weingart and Constantine G. Lyketsos. Weingart and Lyketsos are not members of the NFL Committee. However, as consultants to the NFL, they helped direct the NFL’s 2010 Concussion Summit held at Johns Hopkins. According to Weingart, extrapolating from a case like Henry’s would be a “big leap.” Weingart added that “[t]here’s not enough data... to think that [CTE] is something brewing in many players—there’s no data to support that statement.” Perhaps Weingart is not aware that 22 out of 23 professional football players tested for CTE were diagnosed with the condition.

Weingart’s Johns Hopkins colleague, Lyketsos, also attempted to raise ambiguity about the link between NFL head injuries and CTE. Lyketsos authored the following statement in the NFL’s 2010 Concussion Summit brochure: “[CTE] is now being reported in football players... with unknown frequency. These controversies have been picked up by the media with considerable hype around assertions of long-term harm to players from head injuries.”

NFL Committee co-chair Dr. Ellenbogen criticized the Johns Hopkins’ promotional brochure for minimizing evidence of brain damage in NFL players. Ellenbogen said that the frequency of reports of CTE in NFL players is not unknown: “[T]hey aren’t assertions or hype—they are facts.” The Boston University research group CSTE diagnosed CTE in all 12 former college and NFL players tested for the condition. Again, Boston University’s Dr. Ann McKee emphasized that “[t]here is overwhelming evidence that [CTE] is the result of repeated sublethal brain trauma.”

NFL Finally Issues Strong Warning to League Players

On June 28, 2010, The New York Times hinted that the NFL was working with the NFLPA and Centers for Disease Control and Prevention (“CDC”) on a concussion brochure worded far more strongly than the one given to players since 2007. Almost one month later, the NFL shocked the concussion study community by publically conceding for the first time that multiple NFL head injuries can cause illnesses like “depression” and “early onset of dementia.” The NFL’s new warning, made in the form of a poster, uses the following language in describing illnesses caused by multiple concussions:

[T]raumatic brain injury can cause a wide range of short- or long-term changes affecting thinking, sensation, language, or emotions.” These changes may lead to problems with memory and communication, personality changes, as well as depression and the early onset of dementia. Conusions and conditions resulting from repeated brain injury can change your life and your family’s life forever.

While this warning is at least five years overdue, the NFL deserves credit for finally embracing the findings of independent scientists. It is important to note that the term “CTE” does not appear in the league’s new poster/warning.
The NFL’s sea change in concussion policy is not yet complete.102 On April 30, 2010, an outside lawyer for the league, Lawrence L. Lamade, wrote a memo to the lead lawyer for the league’s and union’s joint disability plan, Douglas Ell, discrediting connections between football head trauma and cognitive decline.103

The letter, obtained by The New York Times, explained, “We can point to the current state of uncertainty in scientific and medical understanding” on the subject to deny players’ claims that their neurological impairments are related to football.104 By “scientific uncertainty,” Lamade is likely referring to the current debate between NFL Committee doctors (Bartier and Ellenbogen) and NFL consultants (Weingart and Lyketsos).105 Weingart maintains that the relationship between multiple head impacts and CTE is not a proven cause and effect.106 Rather, Weingart defines the relationship as “a correlation.”107 Weingart’s logic raises a statistical question of when a correlation is sufficiently significant to qualify as a cause-and-effect relationship. Given that CTE is incredibly rare in the general population, how many deceased NFL players presenting with CTE will qualify as definitive proof that multiple head impacts cause CTE—dozens, hundreds, thousands?

CONCLUSION

Professional football is referred to by many as America’s favorite sport. Unfortunately, cognitive illnesses are significantly more prevalent among NFL alumni in comparison to the national population. Studies performed by the nation’s foremost scientists confirm a causal link between multiple NFL concussions and later-life cognitive decline. The NFL Committee has been aware of these studies since at least 2005. Despite being on constructive and actual notice of such studies, the NFL Committee failed to issue adequate warning to league players from 2005 to 2010. As a result, NFL alumni might target the league with tobacco-like failure-to-warn claims to recover for their cognitive injuries. However, the NFL has a number of persuasive defenses at its disposal.

At the October 2009 congressional hearing, a congressman asked Dr. Ann McKee (Boston University—CSTE) whether professional football was too dangerous in light of the cognitive injuries caused by multiple head impacts. McKee answered this billion-dollar question without blinking an eye. She calmly stated that cigarette smokers did not stop smoking as a result of tobacco litigation. Rather, smokers were faced with a conspicuous warning every time they reached for a cigarette.

Sean Morey is a Brown University graduate, recently retired NFL player, and co-chairman of the NFLPA’s brain-injury committee. Morey’s sentiments succinctly summarize the central message of this article: “We have to educate the players . . . . The players have to have the ability to have informed consent.”108 The NFL’s recently issued poster does not specifically warn players against the risk of incurring CTE. However, the poster provides players with enough facts to make an informed decision about illnesses caused by multiple head injuries.

ENDNOTES


6. See Cantu, supra note 5, at 223.

7. Id.

8. Id.

9. Id. at 223–24.

10. Id. at 223.

11. See Laskas, supra note 1.

12. Id.

13. Id.

14. Id.

15. Id.

16. Id.


18. Id. at 719–22.


23. Id. (emphasis added).


27. See, e.g., Alan Schwartz, Congress to Hold Hearing on N.F.L. Head Injuries, N.Y. Times, Oct. 2, 2009. See also Legal Issues Relating to Football Head Injuries

Joseph M. Hanna is a partner at Goldberg Segalla LLP, where he is the Sports and Entertainment Law Practice Group leader. He can be reached at jhanna@goldbergsegalla.com.

Daniel Kain is a 2009 graduate of Rutgers Law–Camden and an associate at Campbell Campbell Edwards & Conroy.


30. Id.

31. Id.

32. See, e.g., Alan Schwarz, Concussion Expert's Removal Is Sought, N.Y. Times, Nov. 20, 2009 (explaining that the NFLPA called for the removal of Dr. Casson as co-chair of the NFL Committee due to his efforts to discredit independent and league-sponsored evidence linking NFL careers with heightened risk for dementia and cognitive decline). See also Alan Schwartz, N.F.L. Head Injury Study Leaders Quit, N.Y. Times, Nov. 24, 2009.

33. See, e.g., Alan Schwartz, N.F.L. Acknowledges Long-Term Concussion Effects, N.Y. Times, Dec. 20, 2009 (noting that league spokesman Greg Aiello communicated that the NFL could donate $1 million or more to CSTE). See also Alan Schwartz, N.F.L. Gives $1 Million to Brain Researchers, N.Y. Times, Apr. 21, 2009 (confirming the league's official donation of $1 million to further CSTE's research efforts).

34. See Schwartz, supra note 33 (emphasis added).


37. See Press Release, Nat’l Football League, supra note 20 (emphasis added). The NFL will likely argue that Section 301 of the LMRA, 29 U.S.C. § 185(a) completely preempts state law claims, including tort law claims, that involve the interpretation and application of a CBA. In response to this argument, NFL alumni will argue that under State law, independent of any CBA or other contract, the NFL owed a duty to NFL players, as it did to the general public, to use due care in warning against the long term impact of repetitive concussions. Further, players might argue that the NFL, as the employer of NFL committee members, is vicariously liable for any negligent affirmative actions of its employees that fall within the scope of their employment. For a detailed analysis on this preemption issue, please see Brown v. National Football League, 219 F.Supp.2d 372 (S.D.N.Y. 2002); Stringer v. National Football League, 474 F.Supp.2d 894 (S.D. Ohio 2007).

38. See Restatement (Second) of Torts § 322B (1965).


40. Id.

41. See, e.g., Restatement (Second) of Torts § 314 (1965).

42. See id., cmt. c.

43. See, e.g., N. Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982).

44. See, e.g., Restatement (Third) of Torts § 42 (2005).


46. See Restatement (Third) of Torts § 26 (2002).

47. Id.


50. See Restatement (Third) of Torts § 26, cmt. c. (2002) (emphasis added). See, e.g., Alaska v. Abbott, 498 P.2d 712, 716 (Alaska 1972); Peterson v. Gray, 628 A.2d 244, 246 (N.H. 1993) (defendant's tortious conduct must be a cause of harm, not “the” cause); see also Dedes v. Asch, 521 N.W.2d 488, 490–92 (Mich. 1994) (rejecting argument that statutory language “the proximate cause” meant that defendant's conduct must be the only cause of harm); David A. Fischer, Causation in Fact in Obstruction Cases, 1992 Utah L. Rev. 1335, 1338 (1992) (“Clearly, however, there can never be a single cause of an event. A very complex set of circumstances must be present for any effect to occur.”).

51. See, e.g., Restatement (Third) of Torts § 27 (2005).

52. See Press Release, Nat’l Football League, supra note 20 (emphasis added).


54. See, e.g., William L. Prosser, Law of Torts: Examples & Explanations (3d ed.); see also Restatement (Second) of Torts § 466 (1965).


56. See Brian Westbrook on Concussions and His Future in the NFL: Deleted Scenes from His Dan Rather Reports Interview, available at http://www.youtube.com/watch?v=W3kYWD_L/EIA (last visited June 20, 2010).

57. Legal Issues Part II, supra note 25, at 41 (statement of Mr. DeMaurice Smith, Executive Director, NFL Players Association).


59. See 82 A.L.R.2d 1218.

60. Id.


62. Id.


64. Id.

65. Id.

66. Id.


70. See NFL CBA, supra note 67, art. XVIII-D 88 Benefit.

71. Id.

72. See, e.g., 42 PA Con. Stat. Section 5524 (2 Yrs. SOL).

73. See, e.g., Cornell v. E.I. Du Pont de Nemours & Co., 841 F.2d 23, 24 (1st Cir. 1988).


75. Id.

76. See Alan Schwartz, Concussion Committee Breaks with Predecessor, N.Y. Times, June 1, 2010.

77. Id.


79. Id.

80. See Alan Schwartz, Former Bengal Henry Found to Have Had Brain Damage, N.Y. Times, June 28, 2010.

81. Dr. Bales is the chairman of the department of neurosurgery at West Virginia University. Id.

82. Id.

83. Id. Henry’s brain sample demonstrated brown discolorations, a tau protein buildup, inflammation, and white matter changes. See Madison Park, Young Player Had Brain Damage More Often Seen in NFL Veterans, CNN.COM, http://www.cnn.com/2010/HEALTH/07/02/brain.damage/index.html. In healthy brain tissue, virtually no protein tangles, which show up as brown spots, are visible. Id.

84. See Schwartz, supra note 80.

85. Id. Like many of the other players found to have had CTE after their deaths, Henry had behav-
ioral problems in his final years that might have been at least partly a result of the disease, which is linked to depression, poor decision making, and substance abuse. Id. He was arrested five times in a 28-month stretch for incidents involving assault, driving under the influence of alcohol, and marijuana possession. Id. The league suspended him several times for violating its personal-conduct policy. Id.

86. Id. CTE can only be detected by way of postmortem examination. Id.

87. Id.

88. Weingart is a professor of neurological surgery and oncology at Johns Hopkins University. See Park, supra note 83.

89. Lyketsos is a professor of psychiatry and behavioral sciences at Johns Hopkins University. See Schwarz, supra note 76.

90. Id.

91. See Park, supra note 83.

92. Id. (emphasis added).


94. See Schwarz, supra note 76.

95. Id. (emphasis added).

96. Id.

97. See McKee et al., supra note 22 (emphasis added).

98. See Schwarz, supra note 80.


100. Press Release, Nat’l Football League, Concussion: A Must Read for NFL Players (July 26, 2010) (emphases added). The new poster will be displayed in all 32 NFL locker rooms, and its content will be used in the league’s new brochure on head injuries. See Schwarz, supra note 99.

101. Dr. H. Hunt Batjer and Dr. Richard Ellenbogen directed the poster project in conjunction with the CDC. See Schwarz, supra note 99.

102. Id.

103. Id.

104. Id.

105. See supra notes 92–95 and accompanying text.

106. See Park, supra note 83.

107. Id.

108. See Schwarz, supra note 80.
My Coach Won’t Let Me Twitter?  
Understanding the Legal Implications of Social Media on and off the Field

BY JAIA A. THOMAS

TWITTER: THE NEW ROOKIE

Twitter has recently become a source of fascination and legal controversy for the sports world. Everyone from professional golfers (Steward Cink has more than 900,000 followers) to professional basketball players (Shaquille O’Neal has more than 1.8 million followers) have signed on to Twitter. Athletes rely on Twitter to share their thoughts, post pictures, make announcements, and even relay inspirational messages to fans.

For those unfamiliar with the new social networking phenomenon Twitter, or who have been living under a rock for the past year, here is a brief primer: Twitter, founded in 2006, is a free social networking and microblogging service that enables its users to send and read messages known as “tweets.” Tweets are text-based posts of up to 140 characters displayed on the author's profile page and delivered to the author's subscribers, who are otherwise known as “followers.” Currently Twitter has 7 million unique monthly visitors and has a monthly growth of 1,382 percent. Technology gurus predict Twitter will surpass other social media outlets like Facebook and MySpace in the near future.

PENALTY FLAGS AND FOUL BALLS LEAD TO NEW REGULATION

Athletes should be aware that opening a Twitter account also can open oneself up to a number of legal risks. Throughout the summer and fall of 2009, new Twitter accounts ushered in new problems and new fines for a number of athletes. In August 2009, the San Diego Chargers fined cornerback Antonio Cromartie $2,500 for using Twitter to complain about the food served at the team’s training camp.3 The offending Twitter post not only complained about the food served at the team’s training camp but also insinuated that it contributed to the team’s failure to make it to the Super Bowl in recent years.4 During a recent game against the St. Louis Rams, Washington Redskins backup linebacker Robert Henson used his Twitter page to label booing fans “dim-wits” and ask how people “who work 9 to 5 at McDonald's” could know what’s best for the team.5 Henson later apologized and deactivated his Twitter account.

Amid such recent controversy, many sports leagues have begun instituting formal Twitter policies. The National Football League’s (“NFL’s”) new Twitter policy, which applies to players, coaches, and other team personnel, prohibits Twitter use beginning 90 minutes before a game until following the conclusion of media interviews after a game.6 The league does not restrict Twitter use by players and coaches on other days.7 Violations of the new NFL policy can prove to be a bit more than just a slap on the wrist. Cincinnati Bengals wide receiver Chad Ochocinco was recently fined $25,000 by the NFL for posting Twitter messages during a Bengals 2010 preseason game.8 In conjunction with their new policy, the NFL did issue an announcement that states “the growth of social media platforms such as Twitter and Facebook has created new ways for the NFL and clubs to communicate and connect with fans. The NFL has been at the forefront of the use of new media and will continue to emphasize innovation and approach use of these new forms of communication.”9

Fearful that the casual nature of Twitter could inspire players to inadvertently disclose privileged information ranging from game plans to injuries, the National Basketball League (“NBA”) also has followed suit by issuing a formal policy. On September 30, 2009, the league issued a policy prohibiting “coaches, players, and other team basketball personnel” from using cell phones and other communication devices 45 minutes before game time until after players have finished their responsibilities after the games.10 This includes halftime.11

Following the lead of the NFL and NBA, the National Hockey League (“NHL”) most recently instituted a league-wide policy pertaining to Twitter. The NHL policy prohibits players from using communication devices for social media activity—including Twitter and Facebook—30 minutes before and after games, practices, meetings, and media access periods. In regard to the new policy, NHL Director of Social Media Marketing Mike Dilorenzo stated, “I looked at what the NBA was doing and what the NFL was doing and used those as a basis for my own recommendation.”12 Major League Baseball (“MLB”) has no specific guidelines but has a longstanding policy regarding communicational devices that prohibits their use 30 minutes before the start of a game.

DEFENSE V. OFFENSE: TWITTER’S FIRST COURT CASE

While Twitter opens a Pandora box of legal issues, there is little, if any, court precedent to provide guidance on the legal consequences of social networking. Thus far, the court has only been confronted with one suit from a representative of the sports world. On May 6, 2009, St. Louis Cardinals Manager Tony LaRussa (who also happens to be an attorney) filed a lawsuit against Twitter in the Superior Court of California, San Francisco.13 LaRussa was prompted to file a lawsuit after an imposter created a false Twitter account under his name. The imposter posted controversial and sensitive tweets about the St. Louis Cardinals team and deceased players.

The lawsuit alleged eight causes of action—trademark infringement, trademark dilution, false designation of origin, cybersquatting, misappropriation of name, misappropriation of likeness, invasion of privacy, and intentional misrepresentation.14 Ultimately, LaRussa dismissed the complaint, but the lawsuit clearly spelled out some of the potential legal problems associated with having a Twitter (whether authentic or falsified) account.

In response to LaRussa’s suit, Twitter recently launched a “Verified Accounts” program. The Verified Accounts program allows celebrities, musicians, athletes, actors, and public figures to display a Verified Account message on their page. The Verified Accounts program curbs some of the legal problems outlined in LaRussa’s complaint and appeases celebrities’ concerns about impersonators on Twitter. The Verified Accounts program also provides users with a confidence about who they are actually following.

PREVENTING LEGAL FUMBLES AND FOULS

While Twitter’s newly created Verified

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Accounts program addresses legal issues of misappropriation and misrepresentation, issues still remain concerning trademark, copyright, invasion of privacy, and defamation.13 The lack of court precedent on these issues leaves many questions unanswered: whether repeating someone’s Twitter message can constitute copyright infringement; whether a Twitter message fulfills the libel requirement of “publication”; whether posting private information about someone else constitutes a legal invasion of privacy.

As the popularity of Twitter continues to grow, Twitter and the leagues should continue working on policies to curtail potential lawsuits. Twitter, in conjunction with the leagues, should consider implementing a Disclaimer policy. To protect themselves from any liability that may arise from future suits, the leagues should require players to include a disclaimer on their profile. For instance: “The views and ideas expressed on this Twitter account do not express the views and ideas of the NFL/NHL/NBA and its affiliate companies.” A disclaimer would provide an extra coating of protection for the leagues.

Furthermore, it may benefit the NFL and other leagues to codify their new rules in future player contracts. A legal binding clause contained within a player’s contract eliminates the risk of NFL players claiming ignorance or an unawareness of new media policy and procedures. Players’ signatures would constitute a legally binding obligation to abide by the new rules.

As controversy continues to ensue over the usage of Twitter, attorneys should make a concerted effort to keep athlete clients abreast of new policies and legal precedent as they arise. Although it may seem like common sense, attorneys also should continue to remind clients to think twice before posting information on social media outlets. Not only is it important to think twice about posting one’s own messages, it may be even more important to think twice about reposting another’s message. Adding comments to another’s message can easily lead to misinterpretations and misunderstandings.

When used responsibly, Twitter is an effective tool to bridge the gap between players and fans. Players enjoy it. Fans enjoy it. Before his most recent Twitter violation for in-game tweeting, Chad Ochocinco used Twitter to announce to Cincinnati fans that he was purchasing movie tickets for the first 40 fans who arrived at a local movie theater to watch a newly released film with him (he generously also promised to buy popcorn and drinks). As the popularity of Twitter continues to skyrocket, so does the potential of lawsuits. The relationship between social media, sports, and the law is still in an ill-defined state. As the relationship begins to take shape, it would benefit those in the legal profession to closely follow developments and court decisions as they arise. The sooner we realize Twitter is the current and future trend in communication, the sooner we can educate athletes about the legal implications on and off the field.

Jaia A. Thomas is a 2006 graduate of The George Washington University Law School. She currently oversees her own law practice (The Law Office of Jaia Thomas), which counsels entertainment professionals and athletes in the areas of intellectual property and new media. She can be reached at jaia@jathomaslaw.com.

ENDNOTES

1. Recently, Reggie Bush, of the New Orleans Saints, posted on his Twitter page: “People of character do the right thing, not because they think it will change the world but because they refuse to be changed by the world.”


4. Id.


7. Id.


9. Id.


11. Id.


14. Id.

15. See Simorangkir v. Love, No. BC410593 (Cal. Super. filed Mar. 26, 2009). The first Twitter defamation case is currently underway in the Los Angeles Superior Court. Clothing designer Dawn Simorangkir has filed suit against singer Courtney Love for comments Love made on her Twitter page. Simorangkir is suing Love for defamation, invasion of privacy, and emotional distress. The court’s upcoming decision will hopefully provide guidance and precedent on many of the legal issues surrounding social media.
Fields of Dreams
The Benefits of Public and Private Cooperation in Financing Professional Sports Stadiums

BY IRWIN A. KISHNER AND DAVID R. HOFFMAN

In recent years, fans of professional sports in the United States have had numerous opportunities to experience the fanfare and celebration associated with opening day at a new stadium. Since 2008, new ballparks and gridirons have sprung up in cities as geographically diverse as Washington, D.C.; Indianapolis; Minneapolis; Dallas; and New York. These new stadiums reflect cutting-edge design and construction technologies and offer a panoply of modern amenities including high-definition video boards, luxury seating, and gourmet cuisine. Their construction and operation spur local economies, promote job creation, increase tourism, and instill civic pride in the countless fans who come to see their teams play in new, state-of-the-art arenas.

Most modern professional sports stadiums represent a partnership between public and private interests. A typical stadium financing plan will involve taxpayer participation by way of bond issues and other public subsidies, as well as private participation through contributions by the owners of the team(s) that will be using the stadium property. Historically, this public/private partnership has not always been evident in stadium financing efforts. At the turn of the 20th century, professional stadiums were generally planned and built without public participation. The first professional sports stadium in the United States, the Baker Bowl in Philadelphia, was constructed in 1887 using only private money.¹

The era of public financing of sports stadiums began in 1923, with the opening of the Los Angeles Coliseum. Erected by the City of Los Angeles in a failed bid for the Olympic Games, the Coliseum was the first wholly publicly funded professional stadium in the United States and cost taxpayers just under $1 million.² Chicago and Cleveland quickly followed suit with their own publicly financed stadiums in 1929 and 1931, respectively.³ These stadiums precipitated a gradual shift in the United States toward public participation in the financing of nearly all professional sports facilities; by the 1950s, public financing had become the norm. From 1953 to 1970, 27 of the 30 professional stadiums built in the United States received financial support from taxpayers.¹

During the 20th century, more than $20 billion was spent on professional sports stadiums, including at least $14.7 billion in public subsidies.⁴ This latter number excludes billions of dollars in indirect public subsidies provided through the use of tax-exempt municipal bonds and uncollections property tax revenue. In the modern era, the public’s participation in stadium financing efforts in many communities is perceived as an investment rather than a burden. The construction of Jacobs Field (now Progressive Field) and Gund Arena (now Quicken Loans Arena) in 1994 revitalized Cleveland’s historic Gateway District.⁵ Similarly, in downtown Baltimore, Camden Yards has helped to rejuvenate the Inner Harbor neighborhood, bringing bars, restaurants, and retail stores to an area that was previously home to moribund industrial facilities.⁶ In the decade before the 1992 opening of Camden Yards, Orioles attendance averaged 26,823 per game.⁷ In the five years following opening day at the new ballpark, average attendance rose to 45,034 per game.⁸ This jump in attendance has led to a corresponding increase in revenue from gate and venue receipts. In the year after Camden Yards opened, the Orioles’ basic gate receipts rose 161 percent.⁹

Some have criticized the idea of allocating public funds to finance stadium construction. The primary arguments made against public funding generally fall into one of two categories. First, opponents claim that sports stadiums used and operated by private interests do not serve a public good, and thus fall foul of the “public purpose doctrine” enshrined in many state constitutions. Contrary to the position taken by these critics, however, the New York Court of Appeals has held (in Murphy v. Erie County, 1971) that a publicly funded stadium used for the benefit of a private corporation fulfills a public purpose and does not represent a gift of public property to a private entity. In the words of the court, “the private benefit is incidental to the conceded public purpose of the stadium.”¹⁰ Similarly, in a 1997 ruling, the Supreme Court of Florida held that the public purposes provided by a sports stadium include the anticipated economic benefits arising from the construction and operation of the stadium, as well as “national media exposure” and the “civic pride and camaraderie” associated with having a professional team play in a city.¹¹ State courts throughout the United States have consistently held that sports stadiums serve a public good and that public funding of stadiums is constitutional.

The second category of arguments made by critics of public stadium finance typically center around a belief that new stadiums do not provide sufficient economic benefits for the communities in which they are built, and that all of the financial gains from a new stadium flow to the ownership of the team(s) using the stadium. While improved attendance and increased revenues certainly result in financial success for the team(s) that use the stadium, new stadiums also significantly benefit the communities in which they are built. Under the venerable Keynesian view of economics, it is understood that increases in public spending result in a rise in total economic activity by a multiple of that increase (the so-called Keynesian multiplier). In other words, the money spent on building facilities, the dollars paid by fans, and other revenues (including from tourism and taxes) are multiplied to arrive at the total amount of economic activity generated by a new professional sports stadium.¹² According to one industry analyst, for each $1 spent on professional sports, an additional $1.75 is created in the economy and household income rises 17 cents.¹³ This same analyst also posits that for each $1 million spent on professional sports, 76 jobs are created.¹⁴ New jobs are produced by stadium construction, stadium operation, and tourist expenditures. By way of example, an estimated 450 to 550 jobs were created in Baltimore by out-of-state tourist expenditures alone, owing to the development of Camden Yards. At any given Orioles game, approximately 31 percent of those in attendance will have come from outside Maryland; this figure towers over the 10 percent of out-of-state attendees present at Orioles games.
prior to the opening of Camden Yards. With increased tourism come increased tax revenue, booked hotel rooms, crowded bars and restaurants, and retail sales.

Stadium projects bring numerous intangible benefits as well. A new stadium instills a healthy dose of civic pride in city-goers and provides fans with a fresh rallying point to cheer on their team. The presence of a professional franchise in a community is a valuable amenity and a cultural asset, providing happiness to many families and individuals who might otherwise never attend a game. As there are significant benefits to be derived for a community from having a professional sports team, there is naturally an important public interest in attracting and retaining a team and providing that team with a place to play. This public interest predictably engenders a good deal of competition among communities. As professional leagues restrict the number of teams permitted to join the league, the opportunity to host a team is made available to only a limited number of markets. The ability of a team to relocate with relative ease has the effect of validating offers from competing communities and increases pressure on the team’s home city to make accommodations to retain the team. This competition among communities underlines the value a professional sports team brings to a city.

Baltimore’s Inner Harbor and Cleveland’s Gateway district are exciting examples of how taxpayer-supported stadium development may be used to rejuvenate a neighborhood, benefit a community, and reenergize a team. Indeed, public financial support of stadiums has increased dramatically during the past 50 years owing in large part to the massive expansion of professional sports leagues across the country and mounting construction costs. Even accounting for inflation, construction outlays for stadiums have risen spectacularly. In 1914, the construction of Wrigley Field cost $5,403,000; building Dodger Stadium in 1962 cost nearly 40 times as much, totaling $200,907,000. Less than three decades later, in 1992, Camden Yards was built for $327,157,000. Target Field, which opened in 2010 in the Warehouse District of Minneapolis, Minnesota, cost upward of $545,000,000.

Public support has become an integral part of modern stadium financings. As highlighted throughout this article, a central theme of contemporary stadium finance is cooperation among private and public participants. Most public subsidies used to finance stadiums are in the form of a municipal bond issue, the proceeds of which are used to finance construction and maintenance costs. Interest accruing on municipal bonds is typically exempt from federal taxes, making such debt less expensive to service than taxable bonds. In a tax-exempt bond issue, stadium construction is directly subsidized by the local government that issues the bond, and indirectly subsidized by the federal government through uncollected tax revenue. The benefits of public capital facilities like stadiums extend beyond the jurisdiction that provides them, and that without federal public subsidy, such facilities would be provided at less than an optimal level.

The community also may elect to subsidize a stadium by, among other things, making capital investments to improve infrastructure in and around the stadium property, granting property tax exemptions, and/or upgrading public transportation options to and from the stadium. These public subsidies may be financed by the community in a number of ways, including increasing “sin taxes” on products like tobacco and alcohol, allocating lottery funds to debt service payments, introducing a “tourist tax” on goods and services such as hotels and rental cars, and/or leveling a special income tax surcharge on the salaries of players and team employees. In modern stadium financings, the burden assumed by taxpayers is typically reduced by private contributions from the owners of the team(s) that will be using the stadium. This private contribution may consist of the proceeds from granting naming rights to the stadium, income from personal seat licenses, pouring rights (i.e., the right of a beverage manufacturer or bottler to control beverage distribution at a venue), concessionaire arrangements, and/or loans or donations from the owner or team. Private bank loans or support from private investment consortiums also may be used to help finance stadium construction. Additionally, a sports team helping to finance a stadium on property that is exempt from local property taxes may elect to make payments in lieu of such property taxes to help finance debt service on municipal bonds. These “payment in lieu of taxes” (“PILOT”) structures are gaining popularity as a means of allowing a team to take a significant stake in the financing arrangements for a new stadium in which it intends to play.

The many benefits accruing from a new professional sports stadium are diversely allocated among the team(s) that will use

Safeco Field in Seattle
the stadium, the municipal and state governments having jurisdiction over the stadium, the general public in the community surrounding the stadium, and fans across the country and around the world. History shows us that new, modern stadiums result in increased attendance figures and a corresponding rise in gate and venue receipts. They also result in the creation of new jobs, increased revenue from tourism and taxes, and heightened civic pride. When public and private interests cooperate to finance a stadium to attract or retain a professional sports franchise, everyone benefits.

Irwin A. Kishner is a member of the following American Bar Association entities: Business Law Section, Forum on the Entertainment and Sports Industries, and Corporate Governance Committee.

David R. Hoffman is an associate in the Corporate Department of Herrick, Feinstein LLP. He can be reached at dhoffman@herrick.com.

ENDNOTES

4. Phelps, supra note 2, at 984.
5. Keating, supra note 1, at 1.
8. Id. at 245.
9. Id.
10. Id. at 257.
12. Poe v. Hillsborough County, 695 So.2d 672 (Fla. 1997).
15. Id.
16. See Hamilton & Kahn, supra note 7, at 264.
19. Keating, supra note 1, at 11 (amounts are shown in 2010 dollars, accounting for inflation).
20. Id.
22. See Fox, supra note 18, at 484.

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the second attempt, the Bankruptcy Court in Dewey Ranch Hockey II disregarded some of its earlier analysis and essentially concluded that neither PSE nor any other bidder not supported by the National Hockey League (“NHL”) could ever acquire the Coyotes franchise pursuant to section 363 of the Bankruptcy Code.4

Despite the record’s improvement between the entries of the two opinions, the facts and law supportive of the Bankruptcy Court’s determinative analysis in Dewey Ranch Hockey II appear to have been apparent when the Bankruptcy Court entered Dewey Ranch Hockey I. So, why did the Bankruptcy Court wait until September 30, 2009, in Dewey Ranch Hockey II to reject PSE when it could have incorporated the same holding in its June 15, 2009, opinion in Dewey Ranch Hockey I? Perhaps the answer is that the Bankruptcy Court delayed reaching conclusions to encourage parties in interest to continue negotiating over the outcome of the Debtor’s business asset and increase value for the bankruptcy estate. Only when it became evident that negotiations would no longer add value to the bankruptcy estate did the Bankruptcy Court announce its pragmatic holding.

THE HISTORICAL FINANCIAL PERFORMANCE OF THE PHOENIX COYOTES CAN BE OBJECTIVELY CHARACTERIZED AS DISASTROUS.

This pragmatic holding, however, could restrict debtors from pursuing reorganizations that depend on transfers of assets. Sales of debtor assets through use of section 363 of the Bankruptcy Code are quite common because they maximize value for debtors’ estates; broad application of Dewey Ranch Hockey II can doom reorganizations that contemplate the transfer of assets. While the Bankruptcy Court might have reached the “right” outcome for the Debtor, other courts need to be mindful of the unique facts and policies that may have shaped the Bankruptcy Court’s analysis.

BACKGROUND4

The historical financial performance of the Phoenix Coyotes can be objectively characterized as disastrous. From 1996, when the Coyotes franchise moved to Glendale, Arizona, from Winnipeg, Manitoba, Canada, through to the Debtor’s bankruptcy filing, the franchise had a cumulative EBITDA loss of more than $315 million. Unable to continue financing the Coyotes’ substantial losses, the franchise’s owner, the Debtor, resolved to either sell the Coyotes or “go dark” before the upcoming hockey season. PSE, though, had a vision of how to guide the franchise to profitability and negotiated to purchase the Coyotes franchise from the Debtor. To facilitate the sale of the Coyotes franchise to PSE, on May 5, 2009, the Debtor filed a voluntary chapter 11 petition and filed a motion for an order authorizing a section 363 sale (the “Initial Sale Motion”). PSE offered $212.5 million in cash for the Debtor’s membership interest in the NHL and ownership of the Coyotes franchise. The bid would have provided unsecured creditors with recovery of about 63 cents on the dollar but was contingent upon the franchise’s relocation to Hamilton before the 2009–10 hockey season.

The NHL objected to the Initial Sale Motion by claiming that a sale would violate the NHL’s governance agreements by transferring the Coyotes’ ownership and relocating the team without the consent of the NHL. The NHL also claimed it would be impossible to coordinate the upcoming season’s schedule if an expedited relocation occurred. On June 15, 2009, the Bankruptcy Court rejected the Initial Sale Motion for nonsubstantive reasons.5 However, Dewey Ranch Hockey I suggested that the Bankruptcy Court was receptive to PSE’s bid; the Bankruptcy Court explicitly rejected arguments asserted by amicus sports leagues that sports franchise owners should not be permitted to “enlist the aid of the bankruptcy courts in an effort to circumvent established league rules.”6 The Bankruptcy Court also noted that the NHL’s purported membership selection right could only be exercised in good faith, and that “it appear[ed] to the court that the NHL cannot object or withhold its consent to PSE becoming the controlling owners of the Phoenix Coyotes.”7

Contemporaneous with its denial of the Initial Sale Motion, the Bankruptcy Court implemented alternative bidding procedures that required the Debtor to first participate in an auction for bids that would have the Coyotes franchise remain in Glendale and then an auction for relocating bids. The bid deadline for Glendale bidders passed without any qualified Glendale bid materializing.8

The prudent Bankruptcy Court revised the auction and sale hearing schedule to provide potential Glendale bidders with additional time to finalize their bids. The Bankruptcy Court announced that it would consider Glendale bids and relocating bids at a single sale hearing to take place on September 10, 2009. Again though, no Glendale bidder finalized a bid in advance of the Bankruptcy Court-ordered deadline to file an ownership transfer application with the NHL. Fearful that the absence of a qualified Glendale bid would result in PSE’s being deemed the auction’s winner, Coyotes Newco, LLC (“Coyotes Newco”), a company owned by NHL owners with intentions of keeping the Coyotes in Glendale, bid $140 million (inclusive of the purchase of certain unsecured claims).9

In advance of the September 10 sale hearing, the NHL objected to PSE’s offer, claiming that the Coyotes were con-
tractually obligated to play in Glendale and that the Debtor was prohibited from transferring its ownership interest to PSE because the NHL’s Board of Governors was entitled, and refused, to approve Balsillie as an NHL owner. PSE responded that section 363(f) of the Bankruptcy Code permits the sale free and clear of interests when those interests are subject to bona fide dispute, and that the NHL’s authority to prohibit relocations and ownership transfers was subject to bona fide dispute in light of antitrust and bankruptcy law. PSE suggested that the Board of Governors did not act in good faith when it rejected Balsillie as an owner because the NHL was inherently conflicted by Coyotes Newco’s bid. PSE also offered to raise its bid to approximately $242.5 million if the City of Glendale withdrew its objection to PSE’s bid (Glendale did not withdraw its objection), and stated that it would no longer condition its bid on a relocation before the 2009–10 hockey season.12

After a two-day hearing, the Bankruptcy Court canceled the scheduled auction and, after a few weeks of consideration, rejected both bids for the Coyotes franchise. However, unlike in Dewey Ranch Hockey I, the Bankruptcy Court in Dewey Ranch Hockey II reached a decision that went to the very merits and viability of each bidder. The Bankruptcy Court rejected the Coyotes Newco bid because Coyotes Newco intended to unilaterally select which creditors were “legitimate” and would be entitled to sale proceeds. However, the Bankruptcy Court did note that “the defect in [Coyotes Newco’s] bid could be easily cured by the NHL.”13 More damning then was the Bankruptcy Court’s analysis of PSE’s bid; PSE’s bid was rejected with prejudice because the Bankruptcy Court believed it impossible for PSE to adequately protect the NHL.

The Bankruptcy Court explained that the NHL had three interests: (1) the right to admit only new members who met the NHL’s written requirements, (2) the right to control where members play their home games, and (3) the right to a relocation fee to the NHL, the Bankruptcy Court admitted that it struggle[d] with how it can adequately protect the NHL’s membership selection right and control over home team location rights if the court were to allow PSE to move the Coyotes to Hamilton. These are not monetary/economic rights such that impounding funds would be adequate protection. If the NHL ultimately prevails in litigation on these issues and the team has already moved to Hamilton in the interim, there will have been no adequate protection of the NHL’s interest.12

The Bankruptcy Court concluded that “[t]he requirement of adequate protection in Section 363(e) is mandatory. If adequate protection cannot be provided, such sale must be prohibited.”13 This holding implies that, notwithstanding bankruptcy law, sports leagues have near absolute control to determine who can become a member and where each franchise can play its home games.

THE NHL PLANS TO FIND A BUYER TO KEEP THE TEAM IN GLENDALE; HOWEVER, IF THE NHL CANNOT FIND A GLENDALE BUYER, A RELOCATION WILL BE CONSIDERED.

After explaining its adequate protection holding, the Bankruptcy Court noted that its “conclusion effectively is the end for the efforts of PSE, Balsillie, Moyes [the Debtor’s controlling shareholder] and the Coyotes to force a sale and relocation of the hockey team.”14 Taking his cue almost instantly, Balsillie withdrew from his pursuit of the Coyotes franchise.15 With no other alternative, the Debtor agreed to sell the Coyotes franchise to Coyotes Newco. The NHL plans to find a buyer to keep the team in Glendale; however, if the NHL cannot find a Glendale buyer, a relocation will be considered.

THE BANKRUPTCY COURT’S CASE MANAGEMENT AND LEGAL ANALYSIS ADVANCED A VALUE-ENHANCING, PRAGMATIC OUTCOME

The Bankruptcy Court’s case management preserved a precious community asset (for at least a short while), and perhaps even brought value to some creditors of the Debtor’s estate. However, if the Coyotes are eventually relocated, it is possible, if not likely, that many of the Debtor-successor’s creditors and parties in interest will be left worse off than if PSE’s bid was accepted. This possibility illustrates the significant consequences of broad application of the Dewey Ranch Hockey II holding. Section 363 sales are oftentimes value-maximizing transactions necessary to the preservation of creditors’ value. Though the Dewey Ranch Hockey Bankruptcy Court might have reached an appropriate decision in this particular circumstance, other courts contemplating application of Dewey Ranch Hockey II need to consider the unique considerations that may have contributed to the Bankruptcy Court’s analysis.

The Bankruptcy Court’s Case Management Inured Value to the Debtor’s Estate

Ultimately, attempts to have the NHL, PSE, and the Debtor reach a consensual agreement failed because PSE’s vision of relocating the Coyotes to Hamilton was irreconcilable with the NHL’s insistence on geographical balance of franchises and unwillingness to have Balsillie become a franchise owner. However, the Bankruptcy Court’s case management strategy increased value for the Debtor’s estate. By refusing to be rushed to rule on the merits of PSE’s bid in Dewey Ranch Hockey I, then implementing alternative bidding procedures, and then modifying the bidding procedures, the Bankruptcy Court encouraged parties in interest to reach a consensual agreement and to improve the terms of their unilateral proposals.
When it first entered bankruptcy, the Debtor claimed that it would either sell the Coyotes franchise to PSE, the only entity then interested in purchasing the franchise, or “go dark” (that is, cease operations). That claim proved untrue, as, after the Bankruptcy Court entered its opinion in Dewey Ranch Hockey I, PSE continued its pursuit of the Coyotes franchise (and conditionally offered to increase its bid by $30 million) and several other entities expressed interest in the team. Ultimately, the alternative to PSE’s bid changed from “going dark” to transferring ownership to Coyotes Newco. Although the NHL probably would not have permitted the Coyotes franchise to “go dark” if the Bankruptcy Court rejected PSE as a bidder outright in Dewey Ranch Hockey I, Coyotes Newco might not have bid as much as it did without the pressure to be competitive with PSE’s bid. By keeping the PSE bid in play, the Bankruptcy Court increased value for the Debtor’s estate and creditors.

Considering Complex Issues, the Bankruptcy Court Reached a Pragmatic Decision

Section 363 of the Bankruptcy Code is often relied on by debtors wishing to sell assets. Indeed, even the Tribune Company relied on section 363 to sell its interests in the Chicago Cubs baseball franchise. However, PSE’s bid was unique because it contemplated selling and relocating an interest in a business association over the objection of the other members in the association. Though we may never know the extent to which the Bankruptcy Court’s decision was based on practical considerations, if the Bankruptcy Court was concerned with the impact of its ruling on the management and operations of sports leagues, then it reached the appropriate decisions.

BY KEEPING THE PSE BID IN PLAY, THE BANKRUPTCY COURT INCREASED VALUE FOR THE DEBTOR’S ESTATE AND CREDITORS.

Approving PSE’s bid would have had substantial consequences well beyond those that occur when tangible property is transferred pursuant to section 363 of the Bankruptcy Code. If the Bankruptcy Court authorized a section 363 sale to PSE, then, in the future, controversial individuals who could not receive league approval to become sports franchise owners would look to bankruptcy courts to approve their “hostile takeovers.” Similarly, entities interested in relocating sports franchises would look to bankruptcy courts to bless movements that traditionally require the approval of the league. In short, sports leagues would lose control of their destinies to league outsiders and bankruptcy courts. Given the potentially disastrous operational implications of approving PSE’s bid, the Bankruptcy Court’s reaffirmation of the control of sports leagues to determine who can become a member and where each franchise can play its home games is understandable.

The Bankruptcy Court Cited to, and Substantially Expanded, Precedent

The Bankruptcy Court ruled on the merits of PSE’s bid only after it did all that it could to manage the case in a way that would maximize value for the Debtor’s estate. While it had some precedential basis, Dewey Ranch Hockey II relied on, and expanded, case law to reach an otherwise unprecedented conclusion that property subject to disputed noneconomic interests cannot be sold in accordance with section 363 of the Bankruptcy Code because the interests cannot be adequately protected. Though courts regularly expand precedent, the Bankruptcy Court could have looked to the same precedent and reached a different conclusion. In support of its adequate protection holding, the Bankruptcy Court only cited In re Magnes, which considered circumstances whereby a chapter 7 trustee attempted to assume and assign through a section 363 sale the debtor’s membership in a private golf club. The Sixth Circuit rejected the attempt because the sale of membership implicitly affected the rights of those on the waiting list to fill the next vacancy, and those rights “cannot adequately be protected in any manner except by prohibiting the sale and assignment of the membership.”

Magnes, though, was distinguishable from Dewey Ranch Hockey II because Magnes (1) recognized that the individuals on the waiting list to join the golf club had a property interest with an economic value and (2) concluded that under applicable law the interest was valid. The section 363 sale considered in Magnes was prohibited, not because the waiting list members had noneconomic interests, but because the Sixth Circuit believed that the undisputed economic rights of the individuals on the waiting list could not be adequately protected. Magnes thus contrasts substantially with Dewey Ranch Hockey II, in which the Bankruptcy Court held that the NHL had noneconomic interests that were subject to an unresolved, bona fide dispute.

Because of this expansion of precedent, financially distressed companies of all sorts need to be concerned by Dewey Ranch Hockey II. With respect to sports franchises, the decision may be seen as authority to subordinate the interests of creditors to the interests of sports leagues. Such an interpretation of Dewey Ranch Hockey II would, in effect, turn sports leagues into a “super class” whose interests are controlling, despite statutory and judicial authority that suggests the propriety of a debtor’s reorganization efforts turns upon whether the efforts are in the best interests of creditors.

Distressed companies operating outside the sports industry also may be affected by the opinion because it could be interpreted as prohibiting section 363 sales when third parties purport to have noneconomic interests in the sale subject matters and fail to support the sales. For example, how can the holder of a disputed scenic easement be adequately protected when a debtor wishes to sell an adjacent property to a real estate developer planning to build...
an obstructive building? Applying the logic of Dewey Ranch Hockey II, because the easement holder’s view is a disputed noneconomic interest, adequate protection is impossible and no section 363 sale of the adjacent property can be permitted absent support of the easement holder. Further, parties to executory contracts containing anti-assignment clauses that are otherwise unenforceable under section 365 of the Bankruptcy Code may rely on Dewey Ranch Hockey II as a basis to object to section 363 sales that transfer contractual, noneconomic interests. Dewey Ranch Hockey II thus has substantial ramifications for many section 363 sales.

EPILOGUE

Subsequently, the membership selection rights of Major League Baseball (“MLB”) became an issue in the bankruptcy case of the Texas Rangers Baseball Partners (“TRBP”). The debtor filed for bankruptcy to effectuate a sale of the Texas Rangers franchise to Rangers Baseball Express LLC (“RBE”); however, TRBP’s parent’s lenders argued that the sale was for a suboptimal price and that the sale should be market-tested through multiple auctions. It was suggested on numerous occasions that a sale to RBE was proper, notwithstanding that an alternative, prospective purchaser might be willing to offer a higher dollar bid, because MLB had the complete right to decide who could become a member of the league and MLB preferred RBE.

The TRBP bankruptcy court never directly ruled on the scope of MLB’s consent rights in bankruptcy because an auction resulted in RBE’s offering a higher and better bid than offered by an alternative, prospective purchaser. Nevertheless, the Bankruptcy Court appeared inclined to condition MLB’s consent rights upon good faith, in accord with Dewey Ranch Hockey I, not Dewey Ranch Hockey II. The Bankruptcy Court entered and utilized a bidding procedures order that granted the bankruptcy court the authority to determine who was a successful bidder, notwithstanding the recommendations of the debtor or its general partners. However, the same order noted that following the Bankruptcy Court’s approval of a successful bid, the successful bidder was required to seek the approval of Major League Baseball and that “MLB shall act in respect of such approval in good faith; in the event MLB declines approval of the Successful Bidder, the Bankruptcy Court, upon motion by the Debtor, its general partners or the Successful Bidder will determine whether MLB has acted in good faith.” Accordingly, it seems that courts are already being cautious when assessing the issues implicated by the Dewey Ranch Hockey decisions and are engaging in the exacting analysis necessary to ensure that Dewey Ranch Hockey II does not become an excessively broad, overapplied decision.

Alan S. Gover is a partner and Ian J. Silverbrand an associate in the Financial Restructuring & Insolvency Group of White & Case LLP. White & Case LLP represented Rangers Baseball Express LLC in the Texas Rangers Baseball Partners bankruptcy case. The views expressed herein are those of Messrs. Gover and Silverbrand alone and not those of White & Case LLP or Rangers Baseball Express LLC.

ENDNOTES

3. Section 363 sales of debtors’ assets are rather commonplace in bankruptcy. The Deal Pipeline reports that between the beginning of the fourth quarter of 2008 and the end of the first quarter of 2010, approximately $81.5 billion in corporate assets were either put up for auction or actually auctioned in bankruptcy cases. During the Great Recession, some of the most discussed section 363 sales included the sale of Lehman Brothers Holdings, Inc.’s investment banking and trading divisions and certain other assets to Barclays Capital, Inc., and the “sales” of substantially all of Chrysler LLC’s assets to Chrysler Group, LLC and General Motors Corp.’s assets to General Motors Co.
4. This section draws on the authors’ earlier article about this bankruptcy case, which can be referenced for greater detail on Dewey Ranch Hockey I. See Alan S. Gover & Ian J. Silverbrand, Phoenix Coyotes Bankruptcy Can Still Be Model for Troubled Sports Franchises, 27 ENT. & SPORTS LAW. 4 (2009).
6. Id. at 42.
7. Id. at 36, 42.
8. Two groups applied to purchase the Coyotes franchise and keep the team in Glendale, but both bids included unresolved contingency components.
11. Dewey Ranch Hockey II, 414 B.R. at 593 (noting elsewhere that Coyotes Newco selected which creditors were “legitimate” without any determination of the creditors’ legitimacy and based on “ambiguous evidence”).
12. Id. at 591.
13. Id. at 592.
14. Id.
17. It could be difficult to ascribe much, if any, weight to the practical considerations given how dismissive the Bankruptcy Court was in Dewey Ranch
unable to compromise its position on membership selection rights and home team location rights and that “there now needs to be a judicial resolution to this matter.” See Debtors’ Motion for Order Compelling NHL to Attend Mediation, Dewey Ranch Hockey II, 414 B.R. 577 (Sept. 17, 2009) (No. 981); National Hockey League’s Opposition to Debtors’ Motion to Compel Mediation, Dewey Ranch Hockey II, 414 B.R. 577 (Sept. 18, 2009) (No. 894); National Hockey League’s Response to PSE’s Amended Summary of Final Bid and Supplemental Objection to Debtors’ Motion to Compel Mediation, Dewey Ranch Hockey II, 414 B.R. 577 (Sept. 24, 2009) (No. 1006). After a hearing on the motion, the Bankruptcy Court announced that it would take the motion under advisement, but it never ruled on it.

24. Courts have recognized that the debtor in possession “has an obligation to pursue all actions that are in the best interests of creditors and the estate.” Liberty Mut. Ins. Co. v. Official Unsecured Creditors’ Comm. of Spaulding Composites Co. (In re Spaulding Composites Co., Inc.), 207 B.R. 899, 904 (9th Cir. 1997). Satisfaction of the best interests of the creditors test is a condition to confirmation of a plan of reorganization. 11 U.S.C. § 1129(a)(7). Although the sale of the Coyotes franchise was not part of a plan of reorganization, and section 363 sales are not statutorily subject to the best interests of creditors, many courts have recognized that the best interests of creditors test applies to section 363 sales as well. See, e.g., In re Engman, 395 B.R. 610, 620 (Bankr. W.D. Mich. 2008) (sales must be “fair and reasonable in price and made in ‘good faith’ and must be ‘in the best interests of the estate and creditors’) (internal quotations and citations omitted); In re Dow Corning Corp., 198 B.R. 214, 222 (Bankr. E.D. Mich. 1996) (sale must be “fair and equitable,” “in good faith,” and “in the best interests of the estate”).


27. Id. at 12.

28. While we believe there is a normative appeal to Dewey Ranch Hockey I, the TRBP bankruptcy court’s bidding procedures might have been informed by the debtor’s parent’s loan documents in which the objecting lenders agreed to Major League Baseball’s consent rights. See Debtor’s Memorandum of Law Regarding Legal Issues to Be Addressed at June 15, 2010 Hearing at 8–9, In re Texas Rangers Baseball Partners, No. 10-43400-DML-11 (Bankr. N.D. Tex., June 11, 2010) (No. 158) (excerpting the Pledge and Credit Agreement).
comment or criticism would be suppressed. Fair use is a doctrine that is used to encourage criticism and commentary of copyrighted works. It is based on the concept that one should be free to use portions of copyrighted materials, such as music lyrics, thumbnail images of works of art, brief excerpts from novels, short film clips, and sports highlights, without asking permission from the copyright owner.

To understand the principle of fair use, one must have a cursory understanding of copyright law and the protection it provides to both published and unpublished works to prevent the violation of any rights owned by the holder of such copyright. Without getting mired in the minutia of well-accepted copyright principles, suffice it to say that fair use is an equitable principle that has been defined as “a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without consent, notwithstanding the monopoly granted to the owner by the copyright,”1 and is frequently used as a defense if sued for copyright infringement.

WHEN COMMENTING ON OR CRITIQUING A COPYRIGHTED WORK, FAIR USE PRINCIPLES WOULD ALLOW ONE TO REPRODUCE SOME OF THE WORK TO ACCOMPLISH ONE’S INTENT.

To get a general sense of how fair use is applied, one must understand a set of fair use factors outlined in the lineage of case law dealing with copyright infringement. These factors, which in some cases are confusing and contradictory, are weighed in each case to determine whether a use qualifies as a fair use, often through varying court decisions with an expansive or restrictive meaning that could be open to interpretation. If a use is deemed not to be a fair use, then one would essentially be infringing upon the rights of the copyright owner and may be liable for damages. Unfortunately, even if you strictly follow these factors and the copyright owner disagrees with your fair use interpretation, your dispute may have to be resolved through litigation or the payment of licensing fees.

Fair use in the general sense, with no hard-and-fast rules, is the use of copyrighted material without permission from the appropriate copyright owner for a limited and, as the courts deem, “transformative” purpose so as to comment on, criticize, or parody such copyrighted work. The concept of fair use has existed in common law for more than a century and was codified in the 1976 Copyright Act in section 107. Additionally, there are several court cases that help to define what is meant by a “transformative” use. Specifically, the Supreme Court emphasized that the transformative use factor determines whether the material has been used to assist in the creation of something new, rather than merely copied verbatim into another work. In other words, one must ask:

1) has the material taken from the original work been transformed by adding new expression or meaning? (For example, has commentary been added to highlight footage of a tennis match that brings something new to the audience other than just telling them that, e.g., Andy Roddick lost the Wimbledon final to Roger Federer?); and
2) was value added to the original thereby creating new information, or new aesthetics, or new insights and understandings? (In other words, has the use of the highlights and commentary provided the audience with a new insight into how Andy Roddick lost to Roger Federer, other than just giving the audience a blow-by-blow description of the action that they can see for themselves on the screen?)

Generally, two categories are used when making a fair use—commentary (which includes criticism) or parody. Generally, when focusing on news and editorial reviews, one would look to the first category, commentary. When commenting on or critiquing a copyrighted work, fair use principles would allow one to reproduce some of the work to accomplish one’s intent. Some examples of commentary and criticism include:

1) using a small portion of a clip highlighting an outrageous comment by Glenn Beck in a news report;
2) using a sports clip from a game when reporting on the outcome of that game;
3) when reporting on an actor’s arrest or death, using a short clip from a movie featuring such actor;
4) summarizing and quoting from a medical article on steroid use in sports in a news report; or
5) quoting a few lines from a Sheryl Crow song in a music review.

Courts have generally used four factors in resolving fair use disputes, which are laid out in section 107 of the Copyright Act:

1) the purpose and character of the use;
2) the nature of the copyrighted work;
3) the amount and substantiality of the portion taken; and
4) the effect of the use upon the potential market.

PURPOSE AND CHARACTER OF THE USE

The “purpose and character” factor of fair use is often the determining factor in many fair use decisions, as it allows the court to take a subjective look into the potentially infringing party’s intentions behind the use. Particularly in cases involving news reports, footage, reviews, and sports highlights, this factor typically favors the party claiming fair use for various reasons.

The first thing that we need to know is that copyright protection does not protect factual information conveyed in the copyrighted work, meaning that publicizing the scores of a sporting event or other factual information such as injuries, retirement, and so forth is considered fair use and does not constitute copyright infringement. What helps to strengthen a fair use argument in a case not involving the use of mere factual information is the use of the copyrighted material for the purpose
of legitimate news commentary. For example, when using a clip or photograph to report the results of a sporting event or other factual information, courts have regarded the use of copyrighted material as fair use when the use is

1) brief quotations or use;
2) use in a news report; and
3) use in a newsreel or broadcast of a work located in the scene of an event being reported.

The key determination, which news programs and organizations use to test fair use, is whether the use is for purposes of commentary, criticism, or news reporting and in a bona fide news program, such as ABC News or ESPN’s SportsCenter. Uses for these purposes strengthen the argument in favor of fair use, especially if the use of the copyrighted clip includes the reporting on a fairly recent event (usually within 24 to 48 hours) and the clip is used to underscore the reporting and commentary on the factual outcome of the event.

NATURE OF THE COPYRIGHTED WORK—PUBLISHED OR UNPUBLISHED

The scope of fair use is narrower for unpublished works because an author has the right to control the first public appearance of his or her expression. You didn’t see a news story with any footage from the last Indiana Jones film. This is because Steven Spielberg went through a lot of trouble to keep the picture under wraps until he and the studio decided to release limited amounts to the public to promote the film’s release. Because an author has the right to control the first public appearance of his copyrighted work, you have a stronger argument in favor of fair use if the material copied is from a published work rather than an unpublished work.

AMOUNT AND SUBSTANTIALITY OF THE PORTION TAKEN

A general misnomer in a fair use application is the “seven-second rule,” which many clearance representatives follow. A brief use of footage may not be deemed fair use unless all fair use factors can be applied. But the amount of footage used is a key factor in determining if a use is not fair, as highlighted in a key 1977 court case. The Second Circuit found that a CBS affiliate’s use of a one-minute-and-15-second clip of a 72-minute Charlie Chaplin film was not a fair use when used in a news report about Chaplin’s death. The court deemed that the portions taken were “substantial” and part of the “heart” of the film.2


The court’s analysis may have been different if CBS had used only a limited portion of the footage to simply enhance its news commentary on Chaplin’s death. However, the extended use for more than a minute appeared to be more of a way to exploit the footage rather than a complement to the brief commentary on Chaplin’s death. CBS’s use in this newscast did not transform the use of the footage or add new expression or meaning to the footage. It didn’t add any value to the original by creating new information, aesthetics, insights, and understandings of the film. CBS simply used the film as a backdrop to the news story that Charlie Chaplin had died and let the film clip run onscreen without commentary for an extended period of time. The Second Circuit’s ruling is a clear indication that this type of use will never be considered fair use.

EFFECT OF THE USE UPON THE POTENTIAL MARKET

One of the most important fair use factors is whether the use deprives the copyright owner of income or undermines a new or potential market for the copyrighted work. If a copyright owner feels that he or she has been deprived of income, this is very likely to trigger a lawsuit. This is true even if you are not competing directly with the original work. An example is when artist Jeff Koons used a copyrighted photograph without permission as the basis for sculptures depicting a man and woman holding puppies. Although certain aspects were exaggerated, the photo was copied in detail. Koons earned several hundred thousand dollars selling the sculptures. When the photographer sued, Koons claimed his sculptures were a fair use because the photographer would never have considered making sculptures. The court disagreed, and said that it did not matter whether the photographer had considered making sculptures; what mattered was that a potential market for sculptures of the photograph existed. Koons’ use of the photograph was deemed not fair use.3

While the four-factor test of Copyright Act section 107 provides a firm foundation for understanding which uses are fair uses, courts have infamously favored different factors in different cases, resulting in very unpredictable outcomes. Because it is often quite difficult to predict how a court will interpret the facts in a fair use determination, the most advisable approach is to seek the copyright holder’s permission to use the material beforehand, whether it is offered free of charge or in the form of a license. Obtaining the copyright holder’s permission, however, often proves to be a daunting task, especially in the news reporting industry where timeliness and exclusivity are often critical.

One may be led to believe that the unique requirements of the news reporting industry and the hardships those requirements create in obtaining permission make news reports a special candidate to receive fair treatment under fair use. After all, section 107 specifically lists “news reporting” as an example of fair use that does not infringe on the underlying copyright. But even in the most cut-and-dried cases that appear to fall under section 107’s protection, the courts remain unpredictable.
Most Americans have seen the video of Reginald Denny’s brutal beating during the Los Angeles riots of 1992, after the acquittal of police officers involved in the beating of Rodney King. Many may not realize that the footage of the beating caught by an overhead media helicopter resulted in an ugly legal battle over fair use, which proved that even exemplary “news reports” cannot always depend on the fair use defense. The Denny beating was caught on camera by an overhead helicopter operated by Los Angeles News Service (“LANS”), an independent news organization that often licenses news stories, footage, and other audiovisual works out to other media outlets. LANS had issued more than a dozen footage licenses for the helicopter shots of the beating to other media outlets but refused to issue a license to KCAL radio station. KCAL obtained the footage from another source, without paying any licensing fee, and aired the footage a number of times in the coming days.4

YOU HAVE A STRONGER ARGUMENT IN FAVOR OF FAIR USE IF THE MATERIAL COPIED IS FROM A PUBLISHED WORK RATHER THAN AN UNPUBLISHED WORK.

While the Ninth Circuit engaged in a thorough analysis of each fair use factor, the court was strongly convinced that KCAL’s use of the footage was highly commercial, thus depriving LANS of an opportunity to make a profit (therefore failing to satisfy the “no effect on the market” factor). While the opinion repeatedly admitted that many factors, including the transformative, informational, and factual nature of the news report, weighed heavily in favor of KCAL, the court felt the commercial nature of the use was enough to overcome a fair use defense, therefore finding that KCAL’s use was an unlicensed infringement of LANS’s copyrighted work.

What makes this case unique and somewhat surprising in terms of “fair use” analysis is the fact that KCAL in fact reached out to LANS seeking a license, and only resorted to the fair use defense once that license request was rejected. Is it “fair” for KCAL to be left without news footage that other news agencies had received license rights to broadcast? Perhaps the court felt that LANS’s consistent role as footage licensor made the commercial nature of this case more important than the typical fair use determination.

Regardless of the application and rationale based on the specifics of this case, LANS v. KCAL stresses the unpredictability of a court’s fair use analysis, even in situations relating to news footage and highlights, in which many may consider fair use protection to be fundamentally necessary. This unpredictability, in turn, emphasizes the high importance of making every possible attempt to obtain the rights holder’s permission to use the footage, if possible. One should only consider relying on the fair use factors as a last resort, when all else fails.

When the copyright holder is outside the United States, the importance of seeking the holder’s approval before resorting to fair use is multiplied exponentially. Until recently, fair use was a concept unique to U.S. copyright law (however, some common law countries have begun to adopt the concept of fair use in their copyright laws). To be safe, it is not advisable to syndicate or license any news programs containing fair use material outside the United States without getting permission from the rights holders in each country.

The difficulty in claiming fair use is that there is no predictable way to guarantee that a use will actually qualify as a fair use. While one may follow the fair use factors and might believe that their application of the factors qualifies their use as fair use, if the copyright owner disagrees, the dispute may have to be resolved in court. Even if one ultimately wins such a suit, the outcome in one’s favor could come at great expense and time and may outweigh any benefit of using the material in the first place without first seeking permission and possibly paying a license fee. Because there is a sizable gray area in which fair use may or may not apply, there is never a guarantee that your use will qualify as a fair use.

So how does a news organization invoke fair use without invoking potential litigation and falling within the permitted guidelines established by case law? The simplest way is to get permission from the copyright holder, but this is not always possible given the fluidity and immediacy of news reporting. To invoke fair use when using noncleared third-party clips, the news organization should follow these guidelines: (1) make sure the use is for a legitimate news report; (2) the clip should only be used when reporting on a fairly recent news event (usually 24 to 48 hours); (3) make sure that the use is a brief use of the clip to underscore the reporting of the news; (4) there must be actual commentary or criticism by a news reporter or anchor of the action appearing in the clip (remember: there has to be a transformative use of the copyrighted material); (5) if reporting on a sporting event, make sure the event has been concluded, meaning it may not be fair use if the game has not been completed (most sports rights holders deem use of sporting footage before a game has been completed as not a fair use, so remember not to deprive the copyright owner of income); and (6) the materials should be used in a bona fide news program.

Pierre Vudrag serves as in-house general counsel for the Los Angeles based cable network, Tennis Channel, where he oversees all business and legal affairs, including rights, programming, content and library acquisition, intellectual property matters, marketing and affiliate matters, litigation issues, and all operations of the channel’s studio facilities. He can be reached at pierrevudrag@gmail.com.

ENDNOTES
4. See Los Angeles News Serv. v. KCAL-TV Channel 9, 108 E3d 1119 (9th Cir. 1997).
Fair use often requires us to judge for ourselves whether the use of copyrighted material will qualify as a fair use, leaving us vulnerable to a challenge by the copyright owner if they believe their rights have been infringed upon. Courts must then engage in a fact-intensive study, based on the above-mentioned fair use principles, to determine if the use was fair. To test your understanding of the fair use principles and your ability to predict what the courts will decide, use the following fact patterns and resulting court decisions to determine if the use of copyrighted material qualifies for the fair use defense.
CASES INVOLVING TEXT

   
   **Important factors:** A substantial portion was taken (half of the work) and the work had not yet been published.

   
   **Important factors:** No more than 1 percent of Wright's unpublished letters were copied and the purpose was informational.

   
   **Important factors:** The letters were unpublished and were the “backbone” of the biography—so much so that without the letters the resulting biography was unsuccessful. In other words, the letters may have been used more as a means of capitalizing on the public interest in Salinger than in providing a critical study of the author.

   
   **Important factors:** The Nation’s copying seriously damaged the marketability of Ford’s serialization rights.

   
   **Important factors:** The amount of the material taken was substantial and the publication adversely affected the potential market for authorized books about the program.

   
   **Important factors:** As in the Twin Peaks case, the book affected the owner’s right to make derivative Seinfeld works such as trivia books, thereby having an impact on the copyright holder’s potential market.

   
   **Important factors:** Rev. Falwell’s copying did not diminish the sales of the magazine (because it was already off the market) and would not adversely affect the marketability of back issues.

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An author copied more than half of an unpublished manuscript to prove that someone was involved in the overthrow of the Iranian government.

A biographer of Richard Wright quoted from six unpublished letters and 10 unpublished journal entries by Wright.

A biographer paraphrased large portions of unpublished letters written by the famed author J.D. Salinger. Although people could read these letters at a university library, Salinger had never authorized their reproduction. In other words, the first time that the general public would see these letters was in their paraphrased form in the biography. Salinger sued to prevent publication.

The Nation magazine published excerpts from former President Gerald Ford’s unpublished memoirs. The publication in The Nation was made several weeks prior to the date of serialization of Ford’s book in another magazine that had already purchased the exclusive rights to publish the memoirs.

A company published a book entitled Welcome to Twin Peaks: A Complete Guide to Who’s Who and What’s What, which contained direct quotations and paraphrases from the television show Twin Peaks as well as detailed descriptions of plot, characters, and setting.

A company published a book of trivia questions about the events and characters of the Seinfeld television series. The book included questions based on events and characters in 84 Seinfeld episodes and used actual dialogue from the show in 41 of the book’s questions.

Publisher Larry Flynt made disparaging statements about the Reverend Jerry Falwell on one page of Hustler magazine. Falwell made several hundred thousand copies of the page and distributed them as part of a fund-raising effort.
The Los Angeles County Sheriff’s Department purchased 3,663 licenses to use a software program but installed the software onto 6,007 computers. Although the software was installed onto 6,007 computers, the computers were configured such that the total number of workstations able to access the installed software did not exceed the total number of licenses the Sheriff’s Department purchased.

Entire publications of the Church of Scientology were posted on the Internet by several individuals without the church’s permission.

The Washington Post used three brief quotations from Church of Scientology texts posted on the Internet (see previous case).

A karaoke manufacturer paid a compulsory license fee for the right to reproduce musical compositions on its machines. The music publisher requested an additional fee for the right to reproduce the lyrics on the karaoke video monitor. The manufacturer refused to pay additional fees and claimed that it had a fair use right to reproduce the lyrics.

A woman was sued for copyright infringement for downloading 30 songs using peer-to-peer file-sharing software. She argued that her activity was a fair use because she was downloading the songs to determine if she wanted to later buy them.

A television film crew, covering an Italian festival in Manhattan, recorded a band playing a portion of a copyrighted song, “Dove sta Zaza.” The music was replayed during a news broadcast.

1. NOT A FAIR USE. Leadsinger, Inc. v. BMG Music Publishing, 512 F.3d 522 (9th Cir. 2008).
   Important factors: Display of the lyrics was not a fair use because singing along to lyrics was not a transformative use, the karaoke company used all of the lyrics, and the manufacturer’s use was for profit.

2. NOT A FAIR USE. BMG Music v. Gonzalez, 430 F.3d 888 (7th Cir. 2005).
   Important factors: Because numerous sites, such as iTunes, permit listeners to sample and examine portions of songs without downloading, the court rejected this “sampling” defense.

   Important factors: Only a portion of the song was used, it was incidental to the news event, and it did not result in any actual damage to the composer or to the market for the work.
1. **FAIR USE.** *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007).

*Important factors:* The Ninth Circuit considered Google’s use of thumbnails as “highly transformative,” noting that a search engine transforms the image into a pointer directing a user to a source of information (versus the image’s original purpose: entertainment, aesthetics, or information). This transformative use outweighs any commercial factors regarding Google’s ability to earn money from placement of ads on the search results page. The court’s reasoning—that “a search engine provides an entirely new use for the original work”—reaffirmed the principles established in the Ninth Circuit’s decision in *Kelly v. Arriba-Soft Corp.*, 336 F.3d 811, 816 (9th Cir. 2003).

Similarly, it was found that the search engine’s practice of creating small reproductions (“thumbnails”) of images and placing them on its own Web site (known as “inlining”) did not undermine the potential market for the sale or licensing of these images.

*Important factors:* The thumbnails were much smaller and of much poorer quality than the original photos and served to index the images and help the public access them.

Google was involved in another fair use case when the search engine results retrieved and displayed a cached Web site. A “cache” refers to the temporary storage of an archival copy—often a copy of an image of part or all of a Web site. With cached technology it is possible to search web pages that the Web site owner has permanently removed from display.

An attorney/author sued Google when the company’s cached search results provided end users with copies of copyrighted works. The court held that Google did not infringe.

*Important factors:* Google was considered passive in the activity—users chose whether to view the cached link. In addition, Google had an implied license to cache web pages because owners of Web sites have the ability to turn on or turn off the caching of their sites using tags and code. In this case, the attorney/author knew of this ability and failed to turn off caching, making his claim against Google appear to be manufactured. *Field v. Google Inc.*, 412 F. Supp. 2d 1106 (D. Nev. 2006).

2. **FAIR USE.** *Bill Graham Archives v. Dorling Kindersley Ltd.*, 448 F.3d 605 (2d Cir. 2006).

*Important factors:* The Second Circuit focused on the fact that the posters were reduced to thumbnail size and reproduced within the context of a timeline.


*Important factors:* Unlike the “sculpture” case previously discussed, the court viewed “Niagara” as a transformative use because it commented on the use of fashion imagery in consumer culture.
RESULTS
ARTWORK AND AUDIOVISUAL CASES


Important factors: Although the court considered the use to be educational and noncommercial, and to consist of an extremely small portion of the work, these factors were outweighed by the potential loss of licensing revenue. The copyright owners had previously licensed portions of the work for broadcast and the court determined that the foundation’s use affected the potential market.


Important factors: A small portion of film was taken and the purpose was informational.


Important factors: The court was influenced by the prominence of the poster, its thematic importance for the set decoration of a church, and the fact that it was a conventional practice to license such works for use in television programs.

7. FAIR USE. Sandoval v. New Line Cinema Corp., 147 F.3d 215 (2d Cir. 1998). The court excused the use of the photographs as “de minimis” and a fair use analysis was not required.

PARODY CASES


Important factors: The author’s work was nontransformative and commercial. The Ninth Circuit Court of Appeals determined that the book was a satire, not a parody, because the book did not poke fun at or ridicule Dr. Seuss. Instead, it merely used the Dr. Seuss characters and style to tell the story of the murder.

2. FAIR USE. Leibovitz v. Paramount Pictures Corp., 137 F.3d 109 (2d Cir. 1998).

Important factors: The movie company’s use was transformative because it imitated the photographer’s style for comic effect or ridicule.


Important factors: Why is this case different from the Leslie Nielsen/Annie Leibovitz parody? In the Leibovitz case, the use was a true parody, characterized by a juxtaposition of imagery that actually commented on or criticized the original. The Moscow on the Hudson movie poster did not create a parody; it simply borrowed The New Yorker’s viewpoint (the typical New York City resident’s geographical viewpoint that New York City is the center of the world).
Profile: Peter Dekom
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producers, and film industry cars. Through the years, his client list has included the “Dream Team” of Hollywood superstars, including Barry London, Peter Chernin, Strauss Zelnick, John Travolta, Shelley Duvall, George Lucas, Ron Howard, Rob Reiner, and Keenen Ivory Wayans. His client list has also extended into the corporate realm, representing such successful corporations as Pacific Telesis, Sears, Roebuck and Co., Japan Victor Corporation (“JVC”), and entertainment companies such as Spelling Entertainment, The Geffen Company, and Imagine Films Entertainment.

Forbes listed Dekom as one of the top 100 lawyers in the United States, and Premiere magazine listed him as one of the 50 most powerful people in Hollywood. The Beverly Hills Bar Association honored Dekom as Entertainment Lawyer of the Year in 1994; he was accorded the same honor by the Century City Bar Association in 2004, and was named the Man of the Year in 1992 by the Family Assistance Program for his work with the homeless. In 2009, Daily Variety named Dekom as one of the top 15 dealmaker-attorneys in the entertainment/media industry. Dekom is the businessman behind the curtain who ensures that the projects of the industry’s leading experts get done.

Dekom grew up a child of the world. As a son of parents in the Foreign Service, he got a taste of different cultures, politics, and ideologies. After graduating from Yale in 1968, with a BA in sociology, and first in his class from UCLA Law School (JD) in 1973—which is no small feat—Dekom put his cultural experience and knowledge to good use. His diverse background allows him to more easily relate and communicate with people from all walks of life. In his legal career, and in his personal life, Dekom is a translator; he translates from “creative to business and from business to the creative,” allowing his clients’ imaginations to accurately come alive onscreen.

During his second summer in law school, Dekom experienced the fast pace and set hierarchy of a large firm at Kaplan, Livingston, Berkowitz, Goodwin & Selvin. It did not take him long to realize that the big firm life was not for him; he needed to be somewhere that the rules were not set. Dekom is a leader and a change-maker at his core, and so after graduation instead of following the set path to big law, Dekom decided to join the small firm of Pollock, Rigrod & Bloom. After making the decision, but prior to entering the workforce, Pollock, Rigrod & Bloom’s client George Lucas released the now-classic film American Graffiti. The film hit theaters on the second day that Dekom was taking the California Bar—oh, what a fantastic distraction. From there the firm exploded and Dekom hit the ground running; after only five short years Dekom became a name partner. The firm then restructured to become Bloom, Dekom, Hergott & Cook, where Dekom was a senior partner for more than 20 years. During this time Dekom authored many articles, including “Upheavals in Hollywood” (1988) and “The Net Effect: Making Net Profits Mean Something” (1992). In 1995, he left the firm to consult and write books and articles on his beloved Hollywood full-time.

In 2003, Dekom, along with Peter Sealey, authored the very informative book Not on My Watch—Hollywood vs. the Future, which details the catastrophe that 21st century Hollywood faces in today’s broadband-Internet, easy-access world, and describes how Hollywood can react effectively to meet the entertainment needs of a dissatisfied public while still holding on to profits and market shares.

Immediately after the release of Not on My Watch, and after an eight-year hiatus from the legal practice, Dekom re-entered the legal arena as “of counsel” at Weissmann Wolff Bergman Coleman Grodin & Evall LLP, with a fresh perspective. He chose the firm because it combines integrity, competence, and humanity. Dekom, for better or worse, tells it like it is; and he wanted those attributes in himself to be valued and appreciated. Working “of counsel” has allowed Dekom more freedom to work on a larger number of projects that bring him personal fulfillment. Currently he is in the process of finishing a new book, Re-Mash: Reinventing Media, Marketing & Entertainment, which illustrates the difficulties the industry faces in the evolving world and practical solutions to overcome them.

Throughout his career, Dekom has also volunteered for various legal entities because he “loves the craft and believes that lawyers want to be good.” He has served as a chairman (now Emeritus) of the American Cinematheque, on the board of directors of Imag-
foresight and ability to get things done. Two years later, with the election of Governor Bill Richardson, Dekom found a champion of the legislation who increased the dollar limits and helped push New Mexico to even greater success in luring film production to the state.

As his life and career demonstrate, Dekom does not just “do things.” He breaks down walls and conquers obstacles. He is a true innovator who treats everyone he encounters with dignity and respect. Dekom does not have to twist anyone’s arm to get things done. Instead, through candid conversation, he convinces them what is the best project to cover and the best decision to make.

Walking into his office, the first thing you notice is the big smile of the gentleman behind the desk. Dekom greets everyone with the warmth of an old friend, immediately making those he works with feel comfortable. This is one of the many talents of a very talented man. He utilizes his own confidence and charisma to give those he deals with confidence in themselves and in him. This is a genuine and innate confidence that has grown within Dekom since he was a young boy at the international school in Beirut, Lebanon.

Although he is one of Hollywood’s toughest hitters, Dekom is a kind and genuine human (the man walks to work . . . in Los Angeles!) whose self-proclaimed greatest accomplishment is creating jobs in New Mexico. He literally glows when talking about his family, about how intelligent and amazing his wife is, and how talented and mature his son is. Dekom is a man who has things in perspective; he understands what life is really about and truly relishes living every moment of it.

There is no question why this savvy yet kind attorney and businessman is so successful in everything that he does; perhaps his list of clients became the “Dream Team” due in part to the team’s key player—Dekom.

Alison Landis is a second-year law student at the University of Southern California Gould School of Law and is a board member of the USC Sports Law Society and president of the USC Jewish Law Student’s Association. She can be reached at alison.landis.2012@lawmail.usc.edu.
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