The title of this article presupposes that there exists some well-defined and universally recognized definition of the “entertainment industry.” There is no such definition but rather diverse forms of entertainment, each with its own definition. The classic story about the circus elephant keeper is illustrative. At his retirement party when asked how he could have spent 40 years following the elephants with a shovel and wheelbarrow, he replied, “I love being in show business.”

The definition of “entertainment industry” is comparable to the definition of beauty—it’s often in the eye of the beholder. There are a multitude of activities that fall within the very broadest definition of the term. It could be defined as every activity on which the public spends its leisure time dollars. The hotels in Las Vegas consider themselves to be in the entertainment industry, as do Carnival and Princess cruises.

Section 106 of the Copyright Act provides:

Subject to sections 107 through 122, the owner of a copyright under this title has the exclusive right to do and to authorize any of the following:

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; [and]

(6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.1

These two exclusive rights of copyright are at the heart of the worldwide business of music. They involve musical compositions and sound recordings, the rights of copyright owners and limitations on those rights, and how creators and copyright owners are compensated.
Message from the Chair

Dear Colleagues:

Best regards to all for the New Year. As we embark on 2015, the Forum is poised for another great year. 2015 will be a transition year in leadership as my tenure as Chair winds down in August and our new Chair, Janine Small, will take over.

The New Year is always a time to reflect on the last year and the milestones and accomplishments (as well as the failings) that we experienced. One reflection that stands out in my mind, is the recent announcement by President Obama of the establishment of a U.S. Embassy in Cuba and the related changes in our country’s relationship with Cuba. In March 2011, the Forum took its mid-year Governing Committee meeting to Cuba as an “official” authorized trip sanctioned by the State Department. All of us remember the briefing on what we could do and what we could bring, and what we could expect. We had to use a special tourist currency that you could only obtain from the government. We were all amazed to see arriving passengers who were visiting family in Cuba bringing in tires and diapers, things which were not available due to the longstanding embargo on trade.

We attended meetings with constitutional lawyers and general lawyers. We met with representatives, including lawyers, from the film industry and music industry, and we visited the home studios and galleries of several renowned Cuban artists. In Cuba, there has been no ownership of real estate since Castro came to power, but artists are allowed to live in houses where they can have their studios, living quarters, and a gallery-style experience. For those of you who were on the trip, or are knowledgeable about the art world, then you are aware that Cuba has many great artists, some of whom have been able to show their works abroad and some not. The news of the reopening of relations with the U.S. has been met with speculation about whether the artists of Cuba will see an opening of their ability to display their work. The same is true of the film and music industries. All of us from that trip remember the great music that was seemingly everywhere. Hats off to our former Chair Kirk Schroder for the vision to take the Governing Committee there four years ago; we truly feel that we were at the forefront of the changes now finally starting to happen.

In October, I was in Buenos Aires, Argentina, for the Fall meeting of the International Section, which has an Argentinian lawyer at its helm as Chair. At the initiation of our International Chair, Alexandra Darraby, as the Forum representative, I moderated and presented a panel on global distribution of entertainment content. This initiative continues our push to engage with entertainment and sports lawyers around the globe.

In November, we inaugurated the Forum’s new affiliation with the Annual North American Entertainment, Sports, and Intellectual Property Law Conference with that conference’s meeting in Costa Rica. It was huge success.

We have our annual Video Games and Digital Media Conference scheduled on March 2, 2015 at Hastings College of Law in San Francisco. The legal issues in building a video game include film, music, art, and technology concerns, and we are pleased to present a day of panels on the cutting edge issues in that world. For those who can attend, this is a very informative, high level day of panels and discussion.

April 23 to 25, we have our sixth annual International Legal Symposium on the World of Music, Film, Television, and Sports at the Palms Hotel and Spa in Miami. This regional CLE has become an institution for the Forum and brings together entertainment and sports practitioners in the southeast and beyond. Don’t miss it.

We also continue with our entertainment or sports law webinars each month on cutting edge topics, as well as with two great publishing opportunities for our membership, the Entertainment and Sports Lawyer, which is always reviewing member articles for publication, and our robust book publishing program, for those of you who are interested in publishing a book on an entertainment or sports topic.

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It is my honor and privilege to lead this group and have the opportunity to work with so many outstanding lawyers around the country and the world. The Forum continues to broaden our membership base both in the U.S. and internationally. Our meetings and events create a professional sharing of ideas, and business and professional relationships that last a lifetime. Please take advantage of our great programming, and join today as a member if you are not already part of the family.

In closing, thank you for your continued support of the Forum. Please let us hear your views and add your voices to our initiatives, as each of you are essential to our continuing efforts and growth.

I look forward to seeing all of you at upcoming events.

Richard J. Idell

Letter from the Editor

“All the world’s a stage, and all the men and women merely players: they have their exits and their entrances; and one man in his time plays many parts, his acts being seven ages.”
~Shakespeare

This is my exit from this part of the stage. This will be my last edition of the Entertainment and Sports Lawyer as Editor in Chief. It is a bittersweet ending to a great experience. I took over from Vered Yakovee who created the editorial machine that runs to this day. Entertainment and Sports Lawyer became my passion project as we worked hard to get the best articles from the various disciplines in the entertainment and sports industry. We have the top staff at the ABA working hard to get the Entertainment and Sports Lawyer formatted and out on a timely basis. I want to thank everyone who helped me during my tenure as Editor-in-Chief.

The good news is that Brian Rosenblatt of Smith Amundsen will be succeeding me. He has great enthusiasm for Entertainment and Sports Lawyer and legal scholarship. He will do a great job. Also, I will not be leaving the leadership of the Forum. I will be serving as one of the Governing Committee Members, and I am looking forward to this transition.

In this issue, we have contributions from some of our top writers. Todd Brabec has submitted “Performance Right – A World in Transition.” The music law expert provides us with an overview of the changes in performance rights.

Long time media law expert Peter Dekom has submitted a multi-issue article on “The Television Wars.” 2015 promises to be a most tumultuous year for the television industry. Peter’s article presents these issues in a thorough examination of the changing paradigm.

Howard Fabrick, a legend in the entertainment labor arena, presents his overview of entertainment labor law from the employer perspective in an article inspired by materials submitted for the ABA Labor Law meeting in Los Angeles earlier this year. Duncan Crabtree-Ireland, a law professor at USC Gould School of Law and chief operating officer and general counsel of SAG-AFTRA, has submitted a similarly themed article, but one that presents an overview of entertainment labor law from the organized labor perspective. These two articles are fascinating for the film law practitioner and offer great insight into the morass of labor law issues.

Stephanie Adwar, a governing committee member, provided a thoughtful missive advocating against arbitration for dispute resolution in her article “The Case against Arbitration.”

Casey Schwab of the NFL contributed with an article titled “Position of Authority Statutes in Athletic Programs: A Proposed Roadmap for the Model Penal Code Revisions in Response to Jerry Sandusky.” This article examines criminal law changes in light of the revelations of the Jerry Sandusky case.

I look forward to serving the Forum in my new position, knowing that I leave the Entertainment and Sports Lawyer in good hands. We have a number of articles in process that will continue the level of scholarship that Forum members expect. Please forward your articles to Brian. It has been an honor and a pleasure to serve as your Editor-in-Chief.

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Editor-in-Chief, Entertainment and Sports Lawyer

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Labor Law in the Entertainment Industry

Supplemental Payments, Intellectual Property Rights, and the Role of Unions

BY DUNCAN CRABTREE-IRELAND

I am often asked to speak to groups of law students about careers in “entertainment law.” One of the biggest challenges in making those speeches is in defining entertainment law in the first place. One definition worth considering is: “Law or legal issues related in any way, however tangential, to the ‘entertainment industry,’ particularly those in relation to which new and/or naïve practitioners are lured to positions they would otherwise decline, based on the presumed (but false) glamorous associated with the position.”

In light of the wide range of businesses and organizations involved in the entertainment industry, an “entertainment lawyer” could be pursuing high-profile litigation for high-profile talent, but is much more likely to be drafting and reviewing a seemingly endless stream of contracts that might generously be described as “uninteresting.” Likewise, not all parts of the entertainment industry are glamorous or exciting (although some definitely are), but they share some common elements that are unique to the industry, and those are the topic of this article.

While there are many areas of uniqueness to labor practice in the entertainment industry, I intend to touch on three: First, supplemental payments, including what they are and why they exist in the industry. Second, the substantial (and perhaps surprising) relevance of intellectual property law to entertainment industry labor law practice. And third and finally, the unique roles and responsibilities of the unions and guilds in the entertainment industry.

SUPPLEMENTAL PAYMENTS

Supplemental payments, as I am referring to them, are any of a number of types of deferred compensation arrangements in which the deferred compensation is contingent on events that have not yet occurred at the time the original work is done. Many of these supplemental payments are provided for in the major union collective bargaining agreements in the industry (e.g., residuals and use fees), while others are the subject of individual negotiations between employees and the employer/producer (such as individual artist royalties or performance/success bonuses). On occasion, producers and even their counsel (especially those new to the industry) will question the logic behind the concept of supplemental payments, and particularly residuals. This is often accompanied by amusing but fundamentally misguided hypotheticals about plumbers receiving residuals for installing a new drainpipe.

The historical fact is that the underpinnings of today’s contractual and employment relationships in the industry can be traced back to the 1920s and 1930s. In those days, there were two forms of theatrical entertainment: live theater and motion pictures. In the case of live theater, performers continued to be engaged and paid for the entirety of the time their production continued. Theatrical motion picture performances were captured on film, but were shown only in movie houses and, as the only major source of audiovisual entertainment, were constantly being replaced with new production. And each of those new productions provided continuing work opportunities to the community of artists and technicians who created them.

Likewise, in radio, performers repeated their performances to accommodate time zone changes, being compensated for each performance. The first successful campaign for what could be considered true residuals originated from concerns over the loss of work from the developing use in the 1930s of recording technology to eliminate the need for those repeated performances and the performer compensation that came with them. The American Federation of Radio Artists waged a successful campaign to achieve rebroadcasting payments for the use of those recordings in its Transcription Code in 1941.

Similar concerns arose in the audiovisual performance aspect of the industry around the development in the late 1930s and the deployment in the late 1940s of commercial television. With the prospect of television diminishing the market for theatrical motion pictures, and with particular concern about lost employment opportunities resulting from what was anticipated to be an unprecedented level of reuse of recorded television programs and existing films, the Hollywood performer community stepped forward and secured agreements for residuals, first for the re-airing of television episodes starting in 1952, and eventually for the broadcasting of motion pictures on television beginning in 1960. These agreements did not come without a cost—a major, historic strike was waged by the Screen Actors Guild in order to secure employer agreement to residuals for theatrical motion pictures.

But aside from an exercise in righteousness and bargaining leverage, the insistence by creative talent on residuals makes sense. The creative process is an inherently personal and unique one, in the case of performers involving the continuing and ongoing use of the performer’s image, voice, likeness, and name. Setting aside the very real impact on a performer’s career from overexposure, the idea that employers should honor their copyright ownership under the “work for hire” doctrine have a right to continuing and renewed revenue from the ongoing use of such projects without fair compensation to artists was anathema. And the social judgment that such concerns are well placed has resulted in the adoption of international and domestic norms providing for ongoing payments to artists even in the absence of (or beyond the terms of) a collective bargaining agreement mandating them.

A detailed discussion of the mechanics of any form of supplemental payment is beyond the scope of this article. It is also...
important to note that supplemental payments are not limited to residuals. Particularly (but not exclusively) in the music part of the entertainment industry, royalties are a significant form of ongoing compensation to performers. The difference between residuals and royalties, while seemingly esoteric, is significant. Residuals are wages, are payments to employees from their employer, and are clearly defined as such by the collective bargaining agreements that created them and provide for their ongoing existence. Royalties, on the other hand, may be non-wage payments originating from or paid by third-party users of content pursuant to a statutory requirement or a contractual obligation with the rightsholder, or may refer to wage or wage-like payments from an employer.

Both forms of payment are significant to performing artists. For working actors, research shows that residuals comprise an average of two-thirds of an actor’s annual compensation. For featured recording artists (often tellingly referred to as “royalty artists”), royalty payments are an essential source of income. These sources of ongoing compensation are important not just to the artists who rely on them, but to all who want an industry driven by and content created by professional artists pursuing such work as a career rather than a hobby. In a world where freelance employment is the norm for artists, few could afford such a career on the sporadic opportunities for work that really exist, without the support of supplemental payments for ongoing use of prior work.

The practical aspects of distributing these ongoing payments are a significant consideration for entertainment unions. In accordance with the collective bargaining agreement provisions establishing them, residuals payments are made in individual checks from the employer payable to the performer, and are then sent through the applicable union, which tracks and verifies the payments and then forwards them along to the performer. As one example of this, SAG-AFTRA processes approximately four million individual performer residuals checks annually. In contrast, audiovisual performer royalties (which presently come exclusively from collections from foreign collecting societies) are paid by lump sum payments from those foreign societies, and then allocated and paid out to the appropriate performers here in the United States. Royalties for recording artists are paid in a variety of ways: some types of royalties are paid directly by the label (subject to recoupment), while others are paid directly by collective management organizations, like SoundExchange and the AFM & SAG-AFTRA Intellectual Property Rights Distribution Fund, pursuant to statutory and regulatory authorizations.

Given the complexity of the payment structures in this area, there is a unique need to verify the accuracy of payments, a complex task because of its collective nature and the fact that there is no means by which to determine at a glance whether a payment is accurate. As a result, regular and fairly extensive compliance auditing is conducted by the major industry unions, with the goal of ensuring that all payments are, in fact, paid. While in some cases auditing is done by individual unions separately, audits of the major studios and independent producers and distributors are often conducted through a program colloquially known as the Tri-Guild Audit. This program, funded in part by negotiated contributions from the Alliance Picture and Television Producers (the multi-employer bargaining unit representing the major studios in negotiations with the entertainment unions), allows for joint audits by SAG-AFTRA, Directors Guild of America, and Writers Guild of America. Consequently, it increases the efficiency and lowers the cost of the audit process dramatically, avoids the need for three or more simultaneous and overlapping audits, and ensures appropriately broad coverage and access with the resulting increased confidence in the accuracy of the residuals payments made to the employees.

**INTELLECTUAL PROPERTY RIGHTS**

Almost all workers in the entertainment industry, or at least the content end of the industry, are dependent on intellectual property law (and particularly copyright) for their livelihoods. In 2011, the production of arts and cultural goods and services employed two million workers in the United States and generated $289.5 billion in employee compensation (including residuals). Because entertainment content is intangible and potentially free for the taking, without copyright and other intellectual property rights there would simply be no practical mechanism to fund the creation of new content, nor to reward content creators for their efforts. For this reason, representing any kind of creative worker in the industry (or their unions) requires at a minimum a functional knowledge of intellectual property law.

Aside from collectively functioning as the wellspring for producer revenue, and hence employee compensation and benefits, copyright law also performs several other important functions. In thinking about the preceding topic (residuals) you might have thought, “I can understand how the unions can collect residuals from the major studios over the long term, but how do the unions collect residuals from small (perhaps one-time only) independent content producers?” And you would be right to pose that question. Over the years, the unions have developed mechanisms (called “financial assurances”) designed to protect performers’ future compensation (usually residuals) without disrupting the ability of the industry to do business. Maintaining balance in the financial assurances program is key—after all, union members want to work, and do not want financial assurances rules to impede that, but they also want to be paid for their work and to know that they will receive the benefit of the bargain they have made.

There are a number of tools in the financial assurances toolbox, mostly directed at theatrical motion pictures, including such things as security deposits, residuals reserves, participation in collection accounts, and the use of secured interests in the project’s copyright. Although all of these tools are important and regularly used, let’s focus on the last of them—the security interest. Security interests are agreements by which a copyright holder pledges the ownership of the copyright in a project as security for some benefit, such as the ability to make use of union talent on his or her production, much like a mortgage on a house secures the loan. Typically, this is done at the early stages of the production process, and certainly before the beginning of principal photography. The producer and the copyright holder will provide the documentation necessary for the union to review the chain of title of copyright on the project, and presuming it checks out, the union and the copyright holder will execute a security agreement giving the union a security interest...
in the copyright on behalf of its represented performers. Among other things, the security agreement provides that in the event of a default in payments or other obligations under the collective bargaining agreement, the union can exercise secured party remedies, such as foreclosure, to remedy the default. The fully executed security agreement is then recorded with the U.S. Copyright Office and with the appropriate U.C.C. registrar in relevant states.

In most cases, secured party remedies will never need to be invoked. But in the event of a default that goes uncured, those secured party remedies can include options such as an assignment of proceeds, in which the revenues from the ongoing exploitation of the copyright can be redirected to remedy the default, or foreclosure on the copyright, which allows the union to convey ownership of the copyright to a new party in exchange for money to remedy the debt owed on the project. Security interests can also provide important protections in the event of a bankruptcy filing by a signatory producer or another financially responsible party. Having “secured creditor” status in bankruptcy can confer priority for purposes of claims on the remaining assets of the bankruptcy estate, and often provide a better platform to achieve more favorable results for performers who are owed wages from a bankrupt entity. Finally, from a producer’s perspective, security interests can be a valuable part of a financial assurances package because they do not tie up cash that may otherwise be needed on a time-sensitive basis (e.g., to finish post-production work).

But intellectual property includes more than copyright, and for performers, the right to control the use of one’s name and likeness is of crucial importance. The protection against the unauthorized commercial use of someone’s image is generally referred to as the “right of publicity.” Other than in limited circumstances relating to allegations of false endorsement, right of publicity law exists at the state level in the United States. At present, 27 states (or more)14 recognize a statutory and/or common-law right of publicity. Although the scope and nature of the rights vary significantly from state to state, such rights often are descendible, may be assignable, and are typically viewed as a form of intellectual property.

These rights serve two important purposes: they help ensure that performers can exercise control over the use of their image and likeness, and they provide an entitlement to compensation where a performer wishes to allow the use of his or her image or likeness but where no contractual privity exists. For a performer seeking to make a living from works that employ his or her image and likeness, these rights are core, as acknowledged by the U.S. Supreme Court in Zacchini v. Scripps-Howard Broadcasting Co.: “The rationale for [protecting the right of publicity] is the straightforward one of preventing unjust enrichment by the theft of good will. No social purpose is served by having the defendant get free some aspect of the plaintiff that would have market value and for which he would normally pay.”15 The numerous amicus briefs filed by SAG-AFTRA, as well as the other talent unions in the industry, reflect the importance of this issue to creative artists, and are a useful resource.16

The importance of these issues to audiovisual performers worldwide is also reflected in the inclusion of several provisions in the World Intellectual Property Organization (WIPO) Beijing Treaty on Audiovisual Performances, such as Article 5(1)(ii) which establishes the right of performers to object to “distortion, mutilation, or other modification” of the performance that would be prejudicial to the performer’s reputation, and Article 10 concerning the exclusive right of authorization of making available performances online.17

This discussion just scratches the surface of the many ways in which intellectual property law combines, coordinates, and interacts with labor law in the interest of employees (and particularly performers) in the entertainment industry. It also begs the question, what are the unique (or somewhat unique) roles and responsibilities of labor unions in the entertainment industry?

**UNIQUE ROLES AND RESPONSIBILITIES OF UNIONS**

As may have been amply demonstrated already in this article, the entertainment industry operates in rather extraordinary ways, both with respect to labor law and otherwise. There are many reasons for this (many relating to the nature of collaborative, project-based work), but perhaps one of the most important for employees is the freelance, inconsistent nature of employment. Very few actors get up every day and go to work at the same place, for the same employer, for any length of time.19 The nature of the business for most is daily or, if fortunate, weekly employment, with a different employer each day or week, and with numerous employers over the course of a year. This is all the more pertinent if the actor is making a living by combining film/television/new media with live theater, considering the even broader constellation of potential employers. This makes the union’s responsibility to negotiate minimum terms and conditions of employment so essential for performers. In the absence of this role, performers would be subject to the overwhelming bargaining power of employers in an industry with exponentially more workers than jobs, and their terms and conditions of employment would degrade substantially.19

In the entertainment industry, the talent unions do not negotiate fixed compensation for artists in the way many unions do in other industries. Instead, each of the unions negotiates basic minimum terms, below which no employer may go, but above which the employee and employer are free to individually negotiate. This is such an important principle to SAG-AFTRA that a prohibition on setting maximum compensation is specifically enshrined in the union’s constitution.20 Thus, performers, working with their agents, can negotiate for the best possible compensation their individual bargaining leverage can achieve, while relying on the minimum terms of the collective bargaining agreement to cover the many important details. This is a benefit to the employers as well, because they are able through multimember collective bargaining to negotiate standard terms and conditions they could not otherwise impose across the industry without antitrust issues. The efficiency of consistency and predictability has great value in this very inconsistent and unpredictable industry.

A rather unique aspect of the entertainment industry is its frequent use of child employees (otherwise known as young performers). In most industries, there is no justification for the use of children as workers, other than older teenagers who may take on summer or after-school jobs or apprenticeships. It is well accepted, and perhaps obvious, that in order to make a film or television or new media project that involves child characters, there is a legitimate need to have child performers. But it
is even more clear that as responsible people, we must ensure that children who work in the entertainment industry have appropriate and safe working conditions (including hours), are properly cared for, and are properly educated. No matter how famous, successful, or important a young performer may be, those interests must be protected.

Many people think that federal and state child labor laws provide adequate protection for children. The truth is that this issue is really dealt with at the state level. In some states, the laws do provide adequate protection. But in many states, child labor laws either do not apply to the entertainment industry at all or are so riddled with exceptions and exemptions that they are in essence ineffective. One need not look further than a few years back to find a very high-profile example of the problems with relying on state law for these protections—the broadcast reality series Kid Nation, in which children were sequestered in a long-abandoned New Mexico ghost-town-turned-film-set (designated a “summer camp” to avoid the already modest child-labor protections in New Mexico21), as a Lord of the Flies-esque sociological experiment to see what would happen.22 While the question of union coverage for reality television contestants remains complex, the underlying principle of child protection is not. And the reality is that in many states with lenient child performer laws, the provisions of Section 50 of the SAG-AFTRA Codified Basic Agreement are the main source of protection and provide the only meaningful national standard for, protection of young performers.

The standards set in the SAG-AFTRA collective bargaining agreement are also important to adult performers as well. Just working on set can be dangerous, and once you factor in stunts, even more so. The danger represented by entertainment industry work—when not properly planned and carried out—has been dramatically documented by terrible incidents ranging from the Twilight Zone incident in 198223 to the Midnight Rider incident in 2014.24 Because safety violations have potential life-threatening consequences, having strong collectively bargained-for safety precautions in addition to appropriate regulatory safeguards is essential to the confidence of performers in their safety on set. Whether it is the simple right to a trained, qualified stunt performer to double for an actor for dangerous stunts, or the right to adequate rest time between long work days, or any of numerous other bargained-for safety precautions, like other unions whose members work in dangerous environments, safety considerations are paramount.

CONCLUSION

The nature of the entertainment industry makes the practice of labor law a special and perhaps sometimes unsettling experience, particularly for those who didn’t start out working in the entertainment industry. But despite its quirks and its occasional preciousness, the industry can rightly claim a high level of collaboration and cooperation between its largely unionized workforce and the employers, especially the major studios, who rely on them. And, in the end, what could be more interesting than practicing law in such an environment? And for the private practitioner, perhaps entertainment industry clients are the best, as memorably pointed out by Woody Harrelson playing Larry Flynt in The People vs. Larry Flynt (speaking to his attorney, played by Edward Norton):

“I’m your dream client. I’m the most fun, I’m rich, and I’m always in trouble.”

ENDNOTES

3. The American Federation of Radio Artists (AFRA) was a predecessor of the American Federation of Television and Radio Artists (AFTRA), which merged with the Screen Actors Guild (SAG) in 2012 to create SAG-AFTRA.
7. To get a sense of the complexity of residuals payment formulae across the industry, see the chart prepared by journalist and entertainment lawyer Jonathan Handel at http://www.jhandel.com/residuals/.
8. In light of the common music industry practice of recoupment of advances paid to artists for production of sound recordings, direct-paid performance royalties for noninteractive digital streaming and satellite radio (amounting to approximately $295 million for artists in 2013 according to SoundExchange) are essential.
9. It is not uncommon for successful, professionally represented actors to book only one job for every 20 auditions, and many actors spend a substantial amount of their time seeking work. See, e.g., Booking Ratios, BACKSTAGE (Oct. 21, 2010), http://www.backstage.com/advice-for-actors/secret-agent-man/booking-ratios_2/.
10. Some below-the-line industry unions have elected to have residuals money contributed to their respective health and pension plans, avoiding the processing of individual payments.
13. See, e.g., Geoffrey Macnab, Following the Money Trail, SCREEN DAILY


18. With the exception of regulars on successful television and subscription video on demand (SVOD) series, and perhaps star performers on major feature films, especially those shooting sequels back to back.

19. Indeed, the impetus for the founding of SAG was the unilateral decision of the major studios to reduce employee compensation by 50 percent across the board in order to cut production costs.


22. For an interesting discussion of the legal issues surrounding Kid Nation, see Christopher C. Cianci, Entertainment or Exploitation?: Reality Television and the Inadequate Protection of Child Participants under the Law, 18 S. Cal. Interdisc. L.J. 363 (2009).


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The Television Wars
(the first installment of many parts... too many, we fear)

BY PETER J. DEKOM

To a casual observer, television... well... just is, you know, television. I know it when I see it. To the Television Academy, the contest is between programs, and even the new digital programming providers. You can “TiVo it,” “binge view it,” “download it,” upload it to your “digital locker” in the “clouds,” pull it down from your “SVOD” provider, buy a DVD or Blu-ray, find it on a parallel Internet site, or simply turn on the “tube” (tube? how 1980s!) and see it in real time. For those with better eyesight than mine, there is always the mobile alternative... or perhaps “television everywhere,” where you can just keep watching the same program as you move from venue to venue, device to device. Who would think that in this seemingly progressive world, there are sinister forces fighting declared and undeclared media wars, with hundreds and hundreds of billions of dollars at stake?

OUTSIDE THE BOX
These are the huge bandwidth battles raging in the courts, our regulatory bodies, and if our Congress could actually pass a controversial piece of legislation, we might have seen a massive spillover into this formerly esteemed body. Yes, we need new statutes that reflect the world as it is now! It’s all about the future of how you watch “television.” And yes, there are proposals in Congress that would amend existing laws and regulations, but does anyone think they have a shot at getting passed?

Companies have spent decades building terrestrial television networks, local stations, and station groups, and have weathered the transition from over-the-air analog to digital transmission. The struggle to create—to build nonbroadcast networks (loosely, “cable networks” or “pay-TV”) via your friendly regional carrier, where cable and satellite delivery space is limited—has cost billions.

And the rage of “digital networks”—the Netflix, Hulu, Amazon, YouTube/Google, etc., types—is now pressing against the competitive dominance of those more traditional broadcast and cable networks. You hear the words “a la carte television,” “bundling,” “net neutrality,” “retransmission rights,” and “reclassification,” to name just a few terms experts love to bandy about. With over a quarter of Americans not even having Internet access, and 30 percent of the population not able to receive online “rich media” transmissions because they lack the necessary bandwidth, we are facing a scramble that may lead to “digital polarization” to add to the economic splits we have recently witnessed.

Indeed, the expansion of “over-the-top” streaming alternatives permeates modern American viewing habits.

[0]ver-the-top content (OTT) refers to delivery of audio, video, and other media over the Internet without the involvement of a multiple-system operator (MSO—generally a cable or satellite channel aggregator) in the control or distribution of the content. The Internet provider may be aware of the contents of the Internet Protocol [IP vs. the “intellectual property” IP] packets but is not responsible for, nor able to control, the viewing abilities, copyrights, and/or other redistribution of the content. This model contrasts with the purchasing or rental of video or audio content from an Internet service provider (ISP), such as pay television video on demand or an IPTV video service, like AT&T U-Verse. OTT in particular refers to content that arrives from a third party, such as Amazon Instant Video, Dramatize, DramaFever, Crackle, HBO, Hulu, myTV, NetD, Netflix, NowTV, Qello, RPI TV, Viewster, WhereverTV, or WWE Network, and is delivered to an end-user device, leaving the ISP only the role of transporting IP packets.

The web is becoming a definite alternative to traditional television, and content buyers often use both traditional and OTT services to get their product to consumers. And trust, me, bewildered and befuddled as they may be, traditional corporate media is most definitely hedging their bets, if not doing their best to stop or at least slow the transition.

You can see “the hedge” in the acquisition patterns of some of the biggest Hollywood players:

The Walt Disney Company said it had completed a deal to pay $500 million to acquire Maker Studios, a YouTube-based video supplier that generates more than 5.5 billion views a month from a subscriber base of 380 million. The purchase, by far the largest for what Hollywood calls a multichannel network, calls for Disney to pay another $450 million if aggressive growth targets are met.

Or in their newest production activities:

CBS wants to partner with the big players in the digital space to create original shows for Netflix, Hulu and Amazon Instant Video. CEO Les Moonves hinted at the move for CBS Television Studios in the network’s Q2 earnings call on [August 8, 2014]. “Shortly, you’re going to hear about us being in business with some of the SVODs [subscription video on demand services] with [an] original program,” Moonves said. In the past year, CBS has struck multiple show licensing deals with Netflix and Amazon.
You can also read it in the tea leaves as traditional telecasters try and convince advertisers that traditional television campaigns still remain the most efficient way to reach consumers. Media buys are increasingly blended or at least coordinated web, mobile, and traditional television campaigns these days. Social media is flexing its customizable reach. But television networks now have to aggregate runs plus DVR consumption to generate “ratings,” collecting information about all consumer views over three days (so-called C3 ratings) to justify their still-stunning ad rates.

As traditional television viewership continues to erode, networks want to expand that three-day rating to so much more (like seven days—C7):

[B]roadcast networks like CBS, NBC and Fox have all pushed for the value of viewing that takes place over a longer time frame, citing increased use by consumers of digital-video recorders [DVRs] and, more recently, video on demand. As technology offers up methods for counting viewers who watch programs on tablets and mobile devices, the push to include those people will likely intensify as well.

Leslie Moonves, chief executive of CBS Corp., has been particularly vocal on the matter, telling investors as early as November of 2012 that the “most significant development we are seeing is the increased levels of viewing via the DVR streaming and video on demand. This is a good thing for us. It means that more people are watching our programming in the situations where there used to be scheduling conflicts. But it also means that you have to be more savvy when reading the ratings these days. It now takes more time to determine the true performance of a show and, in fact, even a network.

A CBS spokesman confirmed the network had struck a “C7” deal [with a major ad agency], but did not name the agency involved. Fox confirmed that it has an agreement in place to do a “C7” deal with a major agency it would not name. NBC has struck a similar deal with one agency, according to a person familiar with the situation. ABC and the CW did not respond immediately.

On September 17, 2014, Moonves announced that not only would CBS be reporting C7 ratings but that it was also already making C7 deals with advertisers. Maybe it should be views per year?! And you thought denial was a river in Egypt!

And it really doesn’t matter what anyone proposes as a solution for much of anything in this wild and woolly western wonderland—there’s going to be a pile of folks who love it and solutions for much of anything in this wild and wooly western wonderland—there’s going to be a pile of folks who love it and

Their proposal was met with immediate opposition on [August 8, 2014] from the broadcast lobby—and praise from groups representing pay-TV providers and smaller cable systems.

The rationale behind the proposal has been to limit the blackouts that occasionally take place when multichannel operators negotiate with broadcasters for retransmission rights, according to The Hill. A showdown between CBS and Time Warner Cable last year saw a month-long blackout on the latter’s systems.

Shock! And this was a rare bipartisan congressional effort too! We’re also seeing a new vocabulary, one that permeated Apple’s recent purchase of Beats, for example, describing the value of high-quality “curating” in its music streaming services. Huh? Putting thematically linked content into an appropriate consumer-recognizable pot? But by making content easier to find, consumers, especially the younger, technically savvy consumers who just dive toward specific content versus “channels,” might actually embrace (read: pay for) content in a whole new way acceptable even to them. And if there is a hallmark of these new digital services, they make finding specific content—and providing at consumer-designated playing times on consumer-designated platforms—a whole lot easier . . . and are always economically well priced. Complexity is managed through “curating.”

In a recent group interview by Deadline.com, heads of premium cable channels defended the onslaught of streaming services like Netflix, claiming better programming and cutting edge technology:

[Starz CEO Chris Albrecht] pointed out how premium “was at the forefront of technological advances” with such view-where-you-go apps as HBO GO. If premium cable is going to outlast Netflix, the trick lies in getting cable and satellite distributors to offer up such services at a suitable price point for the customer. “The consumer is increasingly becoming the buyer of such distribution equipment, and they’re going to feel entitled about what they want, when they want,” said Albrecht, who also noted,] “You still need curators, whether you label them as channels, networks or brands. Right now Netflix is curating the content they license. HBO, FX—we’re all doing that. How many curators will there be at the end of the day? I don’t know, but there will be curators whether it’s delivered linearly or through an authenticated app. The curation is the important way in which people will navigate their way through infinite choices.”

Methinks the lady protests too much. Yup, content buyers are price sensitive, and cable is pricing itself out of the younger demographics. Unless we can make Internet access forbiddingly pricier? And what, cable as a technology leader? With HBO’s Game of Thrones being the most pirated piece of IP (this time, “intellectual property”) in history? because of its restricted online availability only to HBO subscribers, it’s hard to picture premium cable as leading innovation anywhere. Curation is a nice word, a valuable concept perhaps, but the television model
is being completely reinvented. And there are so many complexities defining the future of our access to content.

Look at one more particularly important variable and its impact on web access: income. Many in lower-income neighborhoods access the web solely through smartphones. That’s it. They struggle to pay for cable access at any level, where they even have it, and the new super-fast networks are still expensive. Google’s slow rollout of its proprietary fiber optic bandwidth in select cities is a case in point. By looking at consumers’ willingness to preregister for the service (expected to cost $70/month), some interesting facts emerge:

A survey earlier this year of five neighborhoods in the Kansas City area conducted for brokerage firm Bernstein Research found that more than half of households had signed up for the service. At that rate, the service would be “very profitable” for Google, Bernstein analyst Carlos Kirjner said.

The Bernstein survey found that participation varied with income. In the Wornall Homestead neighborhood—median household income $116,000—83% of residents surveyed subscribe to Google Fiber; in the Community College area—median income $24,000—27% subscribe.

But even “ordinary” high-speed Internet access is expensive, and while some cable companies are offering basic services to lower-income families, such token efforts are hardly enough (a little bit of show for the regulators?).

In terms of measurable productivity:

Cities with gigabit connections reported 1.1 percent higher per-capita GDP than their slower counterparts, [a study by the Boston-based Analysis Group] found. That might not sound like much, but consider that per-capita GDP in the entire United States has been growing at a pace of one to two percent a year since the recession, according to the World Bank.

If you add it all up, that amounts to $1.4 billion in extra growth, the study says. The findings are consistent with predictions from economists that Internet access will enhance U.S. productivity. More than a decade ago, Alice Rivlin and Robert Litan observed in a Brookings Institution report that investments in information technology helped drive annual productivity growth in the 1990s past three percent.9

Are we looking forward to another polarizing factor in an already deeply divided United States? High-speed web access is one of the most important factors in the evolution of television. Cost goes to the very heart of what the media and communications industry can do and what they want to do with our ability to receive and transmit communications and entertainment. Standby for the Television Wars.

AN AEREO SHOOTS INTO THE AIR
It’s hard to think of Aereo as much of an actual threat.

Aereo had 77,596 subscribers, spread out among 10 cities, at the end of 2013, according to documents the company has filed with the U.S. Copyright Office . . . About 27,000 of those subscribers lived in the New York City area, which was Aereo’s first market, and launched in the spring of 2012. Boston, which launched in the spring of 2013, had 12,000 subscribers. The Atlanta area, which also launched in 2013, accounted for 10,000 subscribers.10

Compare that to Netflix’s announced global subscriber pool: 50 million customers as of July 2014 (36.2 million in the United States alone).11 Yet challenges to Aereo’s very existence were important enough to be addressed by the highest court in the land.

Following oral arguments where the U.S. Supreme Court walked around all the obvious issues, the Court was deciding a case (American Broadcasting Cos. v. Aereo, Inc.12) about whether a local digital network (Aereo) could pick up “free-over-the-air” network broadcast and retransmit for pay the identical telecast to the exact same footprint of an audience in the name of a clearer signal without the consent of the originating networks. Aereo said it was simply going to the same audience for which the networks were providing free content (advertiser-supported), which didn’t contract or impair what the networks were trying to do in the first place. The networks believed Aereo was stealing their copyrighted programming without permission or compensation. They wanted retransmission fees or, better yet, to kill Aereo.

Betamax, Part 2?
These broadcasters faced conflicting lower-court decisions and pledged that if they lost the case, they might well abandon the airways and migrate entirely to the web or cable universe. They were smug in their quest for resolution by the highest court in the land. . . . until the Silicon Valley chimed in, filing their amicus briefs, saying that the networks’ position was a severe threat to the evolution of consumers’ use of cloud storage systems and personal rights to time-shift content. Ugly!

You see, the Valley saw a direct threat to their technological advances, particularly their march toward moving consumers to the clouds (remotely located file servers with dedicated “consumer space”), if the networks prevailed. Relying on Sony Corp. of America v. Universal City Studios, Inc. (popularly known as the “Betamax case”),13 which allows consumers to record (on their personal recording machines) legitimately obtained content for later individual consumption without infringing a copyright, the Silicon Valley believed that operating distant (remote) cloud storage on behalf of consumers (the “new” version of a personal recorder they posited) would be directly threatened by the telecasters’ quest for a finding of infringement.

To fall within the four squares of the Betamax case, Aereo employed a seeming archaic physical manifestation of each consumer’s subscription—a small antenna about the size of a dime inserted onto a motherboard—which was the basis for such consumer’s receiving of the relevant local television network signals. The operation of a remote device (here an antenna, but the logic applied equally to remote file server space, said Valleysites) under the direct control of the relevant individual consumer is considered the Holy Grail for next-generation consumer content and data storage.
The Silicone Alley vs. the Silicon Valley: The Big Decision

The last time the Silly Con Valley (forgive me!) clashed big time with Hollywood’s Silicone Alley (forgive me again) was about two and a half years ago over content providers’ “sure thing” quest to pass the Stop Online Piracy Act (SOPA). When the tech-biggies took the position that SOPA was a threat to Internet freedom, the bill died almost instantly. I don’t want to appear cynical, but the Silly Con Valley seems to have a lot more campaign money to throw around these days than old-world Hollywood, but that power doesn’t also apply to judicial decisions. Or does it?

CBS President and CEO Les Moonves echoed earlier sentiments from other network heads on one particular option that has to have entertainment litigators—who love to sue over the meaning of terms (like “television”)—drooling like bulldogs:

“We have deals with most of our [pay TV distributors] for a long, long time to deliver our content,” he says. In addition “we’re thinking about over the top, delivering directly to our consumers [via the Internet]. We’re talking about doing Aereo among ourselves if it became viable.” Analysts didn’t follow up to ask how that might affect CBS affiliates. In any case, Moonves says, the tiny company has attracted “way more attention than it deserves” adding that he has “confidence that the Court will find Aereo to be illegal.”

Methinks the lady doth protest too much. It is . . . er was . . . a big deal.

In the end, the Supreme Court side-stepped the Betamax case by focusing not on the technology, but on the perceived category of services that Aereo, to the Court anyway, most resembled. In an opinion released on June 25, 2014, a 6–3 majority (three staunch conservatives dissenting) saw Aereo more like a cable system than a piece of individual technology and ruled in favor of the networks accordingly. If Aereo wanted access to local network programming, under the public performance provisions of the Copyright Act, it would have to pay retransmissions fees.

Justice Stephen Breyer expressed the majority opinion:

“Aereo claims that because it transmits from user-specific copies, using individually-assigned antennas, and because each transmission is available to only one subscriber, it does not transmit a performance “to the public.” Viewed in terms of Congress’ regulatory objectives, these behind-the-scenes technological differences do not distinguish Aereo’s system from cable systems, which do perform publicly. Congress would as much have intended to protect a copyright holder from the unlicensed activities of Aereo as from those of cable companies.”

But, you see, the Court didn’t actually empower Aereo as a bona fide cable operator such that it would automatically be entitled simply to pay such fees and be done with it.

The Post-Ruling Reactions

How did the baby antenna retransmitter react? At first anyway, the CEO of Aereo’s parent seemed ready to give up:

“It’s over,” [Barry] Diller told CNBC . . . after the ruling was handed down. [Aereo CEO Chet] Kanojia had a different take: “We are disappointed in the outcome, but our work is not done. We will continue to fight for our consumers and fight to create innovative technologies that have a meaningful and positive impact on our world.”

The winner’s view was obviously different: “Today’s decision is a victory for consumers,” the broadcasters’ lawyer Paul Clement said today. ‘The Court has sent a clear message that it will uphold the letter and spirit of the law just as Congress intended.’ Clement, a former Solicitor General, represented broadcasters during oral arguments.

A victory for consumers? Really? If you twist very hard: “We will continue to do the same high-quality, premium programming that we’ve done and we will deliver it,” noted CBS CEO Les Moonves immediately following the ruling, “So this is a pro-consumer thing. And frankly, for Aereo to say that it isn’t is a little bit of sour grapes.” As long as consumers do it their way! But it sure makes it tougher to “cut the cord” (more below) and makes consumers more reliant on the higher quality signals for “free television” available from cable and satellite providers.

With Aereo’s future in doubt, the company’s founder and CEO Chet Kanojia blasted the Supreme Court’s ruling in favor of broadcasters, saying that it “sends a chilling message to the technology industry.”

“It is troubling that the Court states in its decision that, ‘to the extent commercial actors or other interested entities may be concerned with the relationship between the development and use of such technologies and the Copyright Act, they are of course free to seek action from Congress,’” Kanojia said in his statement. “That begs the question: Are we moving towards a permission-based system for technology innovation?”

As we’ll see below, Aereo is writhing in its seeming death throes, gasping for life that seems to be slipping away.

The Court seemed to go out of its way not to make this a “tech” decision, but was it one anyway? “Given the limited nature of this holding, the Court does not believe its decision will discourage the emergence or use of different kinds of technologies,” is the Court’s assumption. Forgetting about the time and effort of Aereo’s employees and principals, the estimate was that its investors faced a $97 million loss if the service shut down completely, a loss that became a reality when Aereo eventually filed for bankruptcy. Aereo offered consumers a refund, but asked for people to send e-mails to their representatives in Congress saying how disappointed you are that the nation’s highest court issued a decision that could deny you the right to use the antenna of your choice to access live over-the-air broadcast television. Tell them your stories of why having access to a cloud-based antenna is important to you and your families. Show them you care about this issue.

Aereo then took the Supreme Court’s “if it walks like a duck theory” and began to reinvent its business model accordingly:

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“The Supreme Court’s holding that Aereo is a cable system under the Copyright Act is significant because, as a cable system, Aereo is now entitled to the benefits of the copyright statutory license pursuant to the Copyright Act,” the company’s lawyers said in a letter to [U.S. District Judge Alison Nathan]. “Aereo is proceeding to file the necessary statements of account and royalty fees.”

Broadcasters, however, objecting to Aereo’s shift in strategy, noted that Aereo previously said that it did not fall under the definition of a cable company. The issue came up during oral arguments before the Supreme Court, but Aereo’s attorney David Frederick said it was an equipment provider, not a cable service.

“Whatever Aereo may say about its rationale for raising it now, it is astonishing for Aereo to contend the Supreme Court’s decision automatically transformed Aereo into a cable system under Section 111 given its prior statements to this court and the Supreme Court,” broadcasters’ lawyers wrote.22

Do you feel the love? Neither does another government agency:

The Copyright Office has shot down Aereo’s attempt to recast itself as a cable system that may retransmit broadcast signals to paying online subscribers with the benefit of the cable compulsory license.

“The Office does not believe Aereo qualifies for the Section 111 statutory license and will not process Aereo’s filings at this time,” says Copyright Office General Counsel Jacqueline Charlesworth in a July 16 letter to Aereo.23

Back to the courts?

Aereo tried another life-saving effort:

On [July 31, 2014], Aereo pleaded for its life to a New York federal judge, claiming it was “bleeding to death” in its current nonoperational state.

On [August 1, 2014], U.S. District Court Judge Alison Nathan reacted swiftly, knocking Aereo for having “jumped the gun in filing, without authorization, its motion for emergency consideration of preliminary injunction issues upon remand.”

Aereo’s motion has been stricken from the record . . . .

. . . .

The company’s time for reinvention might be running out.

“Aereo is currently incurring staggering costs without accruing any revenue,” said Aereo’s emergency motion. “The company is figuratively bleeding to death.”

Judge Nathan was unmoved.

According to the judge’s latest order . . . “The Court agrees with Plaintiffs that the appropriate next step is to consider a proposed order consistent with the Supreme Court’s decision and the Court directs Plaintiffs to prepare such an order, accompanied by a memorandum of law in support of their position, on or before two weeks from today’s date. Defendant’s opposition, if any, shall be filed on or before two weeks after receipt of Plaintiffs’ proposed order and memorandum of law.”24

On August 15, 2014, the broadcasters counterattacked:

Court documents . . . had TV programmers’ lawyers argu ing that Judge Alison Nathan should forget about giving Aereo another chance and simply lay down an injunction against the company that would ban it from operating.

Broadcasters are arguing that Section 111 is irrelevant. The Supreme Court’s already said everything you need to know, they say.

“The . . . opinion does not hold that Aereo is a cable system entitled to a Section 111 license, even though the Court was clearly aware of Section 111, as Aereo points out,” the broadcasters wrote.

That’s not all. Broadcasters are trying to go for the kill, calling for a nationwide ban on Aereo. They’re also demanding that any injunction address not just Aereo’s retransmission of content in near real-time, but also even content that’s played back online hours or days after the original broadcast. (Time-delayed playback has, for a long time, been considered fine under the law if the recording is being made for personal use. That’s how we got VCRs and DVRs.)25

Aereo’s attempt to get the Second Circuit to intervene was rebuffed on August 21, 2014. The appellate court told the company that it first had to deal with the trial court over getting treated like a cable television provider. Is this the stab in the heart that puts Aereo out of its misery, or can the beleaguered little company hang on, seeking relief from Congress or the courts? Time will tell.

How Tech Competitors Reacted

During this mish-mash, however, as Aereo “paused” its service to contemplate this potential repositioning, small tech companies like Iowa-based Syncbak (with investors that include CBS and the National Association of Broadcasters)—which provides a very low-cost system to allow stations to stream their telecasts on the web—are entering the fray, reversing the process. Instead of asking consumers to buy an antenna, Syncbak is going to the telecasters to see if they want access to the web.

Syncbak’s biggest challenge is to figure out, with stations, what business models make sense. “Some stations are dabbling with free,” [founder and CEO Jack] Perry says—but most likely will want to limit themselves to cable and satellite subscribers who use the distributors’ TV Everywhere
Aereo, which means a tiny footnote—a blip of transitory relevance—in the bigger battle over the future of television.

Technology solutions are popping up all the time. Time-shifting recording company TiVo has also announced a DVR (a digital video recorder, the “Roamio OTA,” at $50 plus $14.99/month with a one year minimum commitment) that works strictly with over-the-air telecasts for those who don’t have pay-TV access via cable or satellite. The company justifies its monthly fee by personalizing the service (customer-friendly dashboard, recommendations, curation functions, etc.), even though comparable technologies (e.g., Channel Master) eschew this ongoing charge. Technology solutions, often followed by “countermeasures” from industry incumbents, seem to define this space.

Television technology battles are everywhere. For example, feeling their “Aereo” oats, the broadcast networks are also using the appellate courts to challenge the “television anywhere” “Slingbox” technology deployed by satellite carrier Dish.

[On July 7, 2014, Fox] challenged the legality of a Dish Network feature that allows subscribers to [transmit and] watch station feeds on devices outside the home.

In oral arguments before the 9th Circuit Court of Appeals, Fox’s legal team sought to reverse a lower court ruling in which a federal judge refused to grant a preliminary injunction that would put an immediate halt to Dish’s Dish Anywhere service, concluding that they had not proven they would suffer irreparable harm if it continued.

Oh, Fox lost the appeal at that level. Yup, them thar networks are really dedicated to their consumers.

LEGISLATIVE POSSIBILITIES?
The impact of the Aereo decision on cord-cutting is obvious—while consumers can pull local network signals off the air (where there is no cost other than getting a real personal antenna), consumers cannot subscribe to an online service (where there is no cost other that getting a real personal antenna), consumers cannot subscribe to an online service unless that service has a retransmission deal with the networks. Legally anyway.

Remember that Rockefeller-Thune proposed legislation noted above? Could that be a backdoor salvation for Aereo?

The Senate proposal, known as “Local Choice,” would ease the pressure on cable companies who currently pay rising fees to broadcasters to get their content. This idea could work in Aereo’s favor; if the courts accept its new argument that Aereo is a cable company, Aereo might find itself lumped in with the other firms that would be affected by Local Choice, too. Local Choice would benefit Aereo by letting it avoid paying those expensive content fees itself, landing it back where it began before it was laid low by litigation. Voila—Aereo emerges more or less intact, though the details are a little more complicated.

Local Choice would end the retransmission system as we know it. Rather than have cable companies negotiate with broadcasters over how much to pay in retransmission, broadcasters would deal with viewers directly. You’d be able to unbundle the broadcast portion of your cable bills, picking and choosing which broadcast channels you want and don’t want. You could opt to subscribe to CBS and ABC but not Fox or NBC—and then you’d pay only for the channels you select. You’d get to avoid annoying content blackouts that arise from price disputes between companies. You’d have a better idea of what one channel is worth relative to another. And your choices would more directly influence the TV market. In fact, analysts say, the price of retransmission might even fall over time as competing broadcasters fought for your eyeballs. (You would still, of course, be able to get broadcast channels for free with an over-the-air antenna, just like always.)

How hard do you think the cable carriers will oppose this? Yeah . . . don’t hold your breath. That would require Congress to vote for consumers and not heavily financed special interests!

But Aereo is just one battle in a war that isn’t close to ending. With technology accelerating, this digital assault on our legal and business systems suggests that there is no peaceful settlement anywhere on the horizon. War is heck, and another mega conflict is exploding across our broadband bow.

ENDNOTES
15. Aereo, 134 S. Ct. at 2501.
17. Id.
20. Aereo, 134 S. Ct. at 2502.

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The Case against Arbitration

BY STEPHANIE ADWAR

“It is well settled that arbitration is both favored and encouraged as a means of conserving the time and resources of the courts and the contracting parties . . .”

ARBITRATORS ARE NOT JUDGES WHO, WHILE FALLIBLE, ARE OPEN TO REVIEW.

This article addresses the growing frustration among clients and attorneys with the present arbitration system and accounts for the increasing reluctance by attorneys to accept arbitration clauses in their contracts (including their own attorney retain agreements), providing real-world, anecdotal evidence that has resulted in my law firm’s current counsel to clients to avoid arbitration clauses at every possible turn.

AN OVERVIEW OF ARBITRATION

Basically, an arbitration choice is specified in a contract between the parties. There can be no arbitration unless the parties agree in advance. Additionally, the contract will specify the venue for the hearing, name the private organization that will supervise the proceeding (e.g., the American Arbitration Association, JAMS), and specify the number of arbitrators to be appointed. The arbitration is commenced when one party—the claimant—files a “demand for arbitration” and pays the arbitration organization’s filing fee. Unlike a court, the arbitration organization sets its own fee schedule. Once the demand is received by the arbitration organization, it notifies the other party—the respondent. The respondent answers the demand by disputing the claim(s) and raising any counterclaims. The claimant then replies. All this is a pattern familiar to those who practice before the courts.

The parties will then usually be requested by the organization to have an initial telephone conference with the organization’s administrator to discuss the procedure of the pending arbitration. The organization will have its own procedures and rules, which may or may not conform to those of the courts before which you regularly appear. It is wise to review these rules prior to agreeing to a specific organization. The organization will advise the parties about their respective responsibilities, including the importance of responding to the arbitrator’s directives in a timely manner, confirming their understanding and compliance with the organization’s rules and an obligation to share the arbitration fees. The parties will be directed to split the cost of the proceedings, including the arbitrator’s time and any charges for use of the venue. (Contrast this with a court where the expenses of a judge, venue, and court reporter are borne by the taxpayer.)

The parties are then provided a list of potential arbitrators from the organization’s panel from which to jointly make their election. Once chosen, the arbitrator will hold an initial telephone conference with the parties where they are expected to set forth their respective positions. On this call, the arbitrator will set the parameters for the arbitral proceeding. In a pattern reminiscent of court proceedings, the arbitrator may inquire whether the parties wish to submit an opening statement, what discovery the parties intend to request from each other and how long that might take, dates by which requested discovery will be produced, whether the parties wish to submit closing arguments, and for how many days the parties believe the arbitration will run. The parties are then expected to proceed as agreed up to and including the hearing. Upon completion, the arbitrator renders an award. The award is then submitted to a court that has jurisdiction of the matter, and the award is entered as a judgment of the court.

This seems simple enough. Make a demand, answer, get an arbitrator, present your case, make your best arguments, do some discovery (if necessary), and get a decision. Done. And sometimes an arbitration occurs in just this fashion. However, more often than not, in our experience, nothing is quite this simple.

THE PROBLEMS WITH ARBITRATION

Disputes over Choice of Arbitrator

The difficulties usually begin with the choice of an arbitrator or arbitration panel. The parties are provided a list of available and approved arbitrators from the organization’s panels, their résumés, and their hourly rates. In the many arbitrations in which my firm has taken part, we select arbitrators with significant experience, especially in the law to which the case relates. Such arbitrators will typically have hourly rates greater than others on the list. In cases of fee disputes with former clients, more experienced attorneys are more likely to understand the actual
rates charged by attorneys of similar experience and expertise in the geographic region in which the attorney practices. More than likely, the party on the other side will try to choose an arbitrator with the lowest hourly rate. In this situation, the parties will have to come to a compromise which, inevitably, means they will choose another arbitrator with an hourly fee below that of the more experienced arbitrator chosen. This can result in choosing an arbitrator who does not necessarily have the skill set to understand how to adjudicate the case. This may be a distinct disadvantage. If the arbitration concerns a legal fee dispute, it may be deadly.

The ability and legal experience of the arbitrator is the single most important factor in any arbitration. This is so because of the circumstances under which arbitrators practice. Arbitrators are not judges. They are not overseen by the Office of Court Administration. They are not subject to guidelines and laws to which judges are subject. They need no judicial training or judicial continuing legal education. For the most part, they are not subject to review (see below). The lower the hourly fee for the arbitrator, the more likely that he or she will be less experienced (both as an arbitrator and as an attorney).

In New York City, hourly rates of attorneys vary, but it is not uncommon for one who is a partner in a firm, in practice for over 20 years and who concentrates his or her practice in a specific area of the law, to bill $500 to $1,200 or more an hour. Suppose you are an attorney seeking unpaid fees and your hourly rate is $600. The arbitrator you choose has an hourly rate of $400 (and is the highest paid and most experienced arbitrator available). Inevitably, the respondent will attempt to choose the arbitrator one with a lower hourly rate. You may then be forced to appear before an attorney who has never in his or her life been qualified to bill over $300 an hour and cannot comprehend how you, the attorney, can justify getting paid the higher amount sought (despite the fact that there is a contract for the provision of these services at that hourly rate). There is an inherent bias that simply cannot be erased and inevitably becomes evident in the award that is rendered.

**Disputes over Arbitration Fees**

Suppose the respondent decides not to pay its share of the arbitration fees. What are the remedies? Unfortunately, there are no remedies. If you want the award, the burden will be on the claimant to pay the fees. Moreover, if the respondent doesn’t answer, the claimant will still be liable for the fees and the necessity of going through a procedure with the arbitrator at his or her hourly fee, which the claimant will have to pay.

Compare this procedure to a typical court proceeding when the suit is for a sum certain and the defendant defaults. In many state courts, the default for a sum certain is entered by the clerk of the court and relief is up to the defendant to secure. In federal court, there is one extra step of getting the clerk to certify the default. There is no inquest. The judgment may be filed in the usual manner and the respondent can avoid the arbitration. If he went to court, the respondent would be ordered into the arbitration. A lose-lose proposition.

Consider this real-world example: A claimant filed a demand and the respondent answered denying the claim. The arbitrator was chosen. The respondent made arguments regarding liability that proved the claimant’s demand. The facts were supported by documents and the validity of the claim was self-evident. Nevertheless, the arbitrator said that she would have to conduct research on the matter (arbitrators do not have law clerks who conduct research at the taxpayer’s expense). She billed her rate of $250 an hour for that research and billed a total of over $3,000 on an issue to which the answer was facially obvious. The issue, in the opinion of counsel, did not require over 10 hours of research. The respondent refused to pay the $1,500 share of the arbitrator’s fee. The arbitration organization advised the claimant that, under its rules, if the claimant refuses to pay its share and the respondent’s share, the matter would be peremptorily dismissed and the claimant would be liable for all other fees and expenses, including the previously unbilled time by the arbitrator.

**THE PLAIN, UNVARNISHED FACT**

**IS THAT THE COURTS DO NOT SUPERVISE ARBITRATORS.**

The claimant could not afford to carry the costs of the entire arbitration and was very concerned that even if successful and granted costs and fees, the respondent would never have sufficient assets to pay the extensive fees and disbursements incurred during the arbitration (fees that in this example would have been substantially lower in court). The claimant could not avoid the arbitration. If he went to court, the respondent would ask the court to invoke the arbitration clause and the claimant would be ordered into the arbitration. A lose-lose proposition.

(Applying this example to the case where an attorney claims a fee on unpaid bills, bills to which no objection was raised, the pitfalls become abundantly clear. The attorney has the simplest of all claims: an account stated. But because the client-respondent refuses to pay, the attorney will lose and may then be sued by the “judge.”)

A court has the power to order a defendant to respond to discovery requests, and if the defendant does not do so, a court can impose sanctions, limit discovery, or, courting an extreme case, enter judgment on behalf of the plaintiff. An arbitrator has no authority to impose sanctions. At most an arbitrator can limit discovery or enter an award. That is all.

**Lack of Supervision, Interference, and Review**

“[A]rbitrators are not bound by principles of substantive law or rules of evidence that govern the traditional litigation process—they do not use the same legal standards and methods to decide the case. They need not follow procedures and rules of evidence that govern the traditional litigation process.”

As one appellate judge stated, this is “wild west” justice. It often is not only unfair, but it also can be incredibly frustrating and time-consuming in a manner not ever experienced in a court. Even in situations where the arbitration clause includes a
requirement that the arbitrator must adhere to particular rules, such as the Federal Rules of Evidence and applicable state law, arbitrators can still completely disregard those directives with impunity. The plain, unvarnished fact is that the courts do not supervise arbitrators.

“...The courts have generally not interfered, with few exceptions, in this mode of dispute resolution.” The reason courts do not wish to interfere with the decision by arbitrators is because, as the New York Court of Appeals held in In re Aimcee Wholesale Corp.: “Arbitrators are not bound by rules of law and their decisions are essentially final. . . . More important, arbitrators are not obliged to give reasons for their rulings or awards.”

Now think about the above holding and about that arbitration clause you are about to place into your client’s agreement. How much confidence can attorneys have in a process without predictable rules and lacking in judicial supervision? How pleased is a client going to be when it has to spend thousands of dollars for the services of a judge, thousands of dollars on a reporter, the cost of the arbitral venue, and then the legal fees? Arbitration is held out as a less expensive procedure. That was true when the procedure discouraged discovery. Today, an arbitration without discovery is the exception. As we all know, it is discovery that makes U.S. litigation more expensive, by far, than litigation anywhere else in the world.

What happens when an arbitrator makes an award that flies in the face of the law and/or the facts? Section 7511 of the New York Civil Practice Law and Rules (similar in most other states) provides that an arbitral award may be vacated only in cases of corruption, fraud, or misconduct in procuring the award; partiality of an arbitrator; or where the arbitrator exceeded his or her power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made. However, courts are loathe to make such vacaturs, and they happen very, very seldomly.

“Thus our courts may be called upon to enforce arbitration awards which are directly at variance with statutory law and judicial decision interpreting that law. Furthermore, there is no way to assure consistency of interpretation or application. The same conduct could be condemned or condoned by different arbitrators.” In other words, your client is out of luck. In our experience, even if the decision of an arbitrator is outrageous, objectively unreasonable, or nonsensical, no court will overturn that award. To do so would defeat the benefit of arbitration to the courts (but neither the litigants nor their counsel)—i.e., lessening the case load. It is simply an example of an institution benefiting itself to the detriment of those it is intended to serve.

The takeaway is this: arbitrators are not judges who, while fallible, are open to review. Instead, they act as modern day Solomons. In our experience, arbitrators often make awards based upon some sense of unspecified and anomalous establishment of “fairness” unknown to the litigants. Arbitrators can and will ignore the contractual instructions as to how they are to conduct the proceedings and what law and procedure they are to apply. They do not necessarily know the law or attempt to learn what the law holds to decide a case because they simply do not have to do so. As held by the courts, they can decide whatever they want, and the litigants are bound by their decisions with no chance of review.

CONCLUSION

There are many situations where arbitration makes sense—where arbitrators make thoughtful, well-reasoned, and competent awards. The system can be invested with procedures that will make it reliable and a time saver for our courts. What is needed is that legislatures impose strict obligations of review of arbitral awards upon our courts. The stricture of appeal and review, that another will be looking over the shoulder of the arbitrator, raises the level of performance and will weed out the incompetents and result in more uniform decisions and create a level of predictability to the result. Predictability leads to early settlements. If the goal is to also reduce the costs of litigation, then strict limits may be placed on discovery and the length of proceedings and the number of witnesses so that those who elect to engage in arbitration will know in advance precisely what they are getting into. From our vantage point, the present system is only slightly more rational than Russian roulette.

ENDNOTES

2. Id. at 488 (emphasis added) (citing In re Raisler Corp., 298 N.E.2d 91 (N.Y. 1973)).
3. Id. (citing In re Sprinzen, 389 N.E.2d 456 (N.Y. 1979)).
5. Id.

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Position of Authority Statutes in Athletic Programs
A Proposed Roadmap for the Model Penal Code Revisions in Response to Jerry Sandusky

BY CASEY D. SCHWAB

Jerry Sandusky, in an interview with Bob Costas on NBC’s Rock Center, admitted to “horsing around” while showering with young boys.1 He denied any sexual misconduct despite this admission. Since his admission of “horseplay” but denial of sexual abuse, the American public has been calling for a broad statutory rule barring adult coaches from being present while young athletes are in the shower.2

Sandusky was convicted on 45 counts of sexual abuse and child molestation.3 His actions in the shower clearly crossed the line. However, if Sandusky had not been accused of assaulting the young boys, would the reaction to his admission of “horsing around” while in the shower be different? Let’s go one step further. If he had simply been in the shower but no horseplay was alleged, would Sandusky have been engaging in an act that should be barred by statute?

A hardline, categorical rule against coaches being present while young athletes shower may curtail sexual abuse by coaches.4 Moreover, child molesters do not want to believe their actions are abnormal; thus, a rigid rule keeping coaches out of the shower room may keep some potential abusers from acting on their desires.5 But even if both of these justifications for a categorical rule barring coaches from supervising athletes in the shower are assumed to be true, they are outweighed by the consequences that would follow from such a rule.

This article first presents the ambiguities in current state versions of “position of authority” statutes and laws criminalizing “sexual contact.” These examples support the contention that the American Law Institute (ALI) must provide a model statute in the Model Penal Code (MPC) in response to Sandusky’s crimes.

Second, this article examines the unique relationships, circumstances, and standards of conduct in athletics, revealing the prudence of a statutory structure that takes these characteristics into account. Cases exemplifying these unique constructs are presented, along with stories of falsely accused coaches and the consequences of shortcomings within current statutory authority.

Third, this article provides a proposal for the revision project of the MPC, modeled after the burden-shifting approach used in Title VII discrimination cases. The proposal begins with several reasons why the burden-shifting approach is appropriate for cases in which coaches are accused of sexual abuse and then demonstrates the benefits of each step of the approach. Lastly, potential problems with the proposal are presented.

CURRENT STATE OF THE LITERATURE
Legal scholars have long been calling for the ALI to update the section of the MPC that addresses sexual assault, section 213.6 These scholars point to the drastically different cultural views on sexuality since the 1950s when section 213 was first drafted. Its outdated vocabulary and inaccurate assumptions about sexual behavior—specifically in the context of rape—have drawn the most notable criticism from legal experts. However, these experts have failed to urge the ALI to specifically address the unique case of a coach accused of sexually abusing an athlete.7

Furthermore, scholarly literature citing Sandusky’s story is extremely limited, of course, because of its recency. Although commentators have addressed coaches sexually abusing athletes, the focus has not been on the core issues addressed here. There are journal articles discussing athletic organizations’ liability for coaches who sexually abuse;8 the differences between Canadian and American jurisprudence in respect to sexual abuse by coaches;9 and the monetary consequences of coaches who sexually abuse.10

The majority of the current relevant literature examines the consequences that follow once coaches are already convicted of sexual abuse—not how their convictions were reached. The cases in which a coach is accused of sexual abuse for engaging in an action inherently accepted or necessary in athletics, but is ultimately acquitted, have yet to be addressed by both the MPC and contemporary jurisprudence. Nonetheless, scholars have tackled similar issues. For example, one law professor takes on the issue of the sexualization of innocent grooming practices of children.11 She argues that, although grooming may provide an avenue for molesters to commit crimes, the law must construct sexual abuse in a way that does not criminalizes innocent touching. Her argument is the springboard for the present article.

This roadmap for the ALI’s revisions necessitates immediate attention. The ALI is currently revising section 213 of the MPC and, if these issues highlighted by Sandusky are not addressed, it may be another 50 years before it is revised again. Thus, the ALI must seize this opportunity.

THE ALI AND ITS REVISIONS TO THE MPC
Sandusky is not the first coach to take advantage of his role to sexually abuse children. In 1997, Sheldon Kennedy, a professional hockey player for the Boston Bruins, revealed publicly that his coach had molested him and other boys while he was a younger athlete.12 Then, in 1999, Sports Illustrated ran an article reporting an “epidemic” of sexual abuse by coaches in all sports and at all levels.13 Between 1999 and 2012, several reports of sexually abusive coaches emerged.14 None had the power of the Sandusky story.15

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There are several distinguishing—and disturbing—details to the Sandusky story that contributed to its infamy. Sandusky founded a nonprofit in 1977 that served underprivileged youth and coached at a premiere football university. Throughout his tenure at Penn State, he had access to thousands of young athletes, and in 2012, he was convicted on 45 counts of sexual abuse and child molestation. Federal officials are still investigating whether Sandusky sold child pornography that he made with his victims across state lines. Finally, the most revolting allegation of all: a former child prostitute alleged that he was taken by Ed Savitz, a convicted sexual predator, to a fundraiser hosted by Sandusky for the purpose of child prostitution. These details send a chill down the author’s spine. Undoubtedly, this is not an uncommon reaction, and the public outcry has aligned with this spine-chilling sentiment.

Crimes such as these are proscribed by state criminal codes, but statutes governing the unique role of coaches are inconsistent, and thus unpredictable, across states. Some states explicitly include coaches in their statutes. Others implicitly address coaches through statutes governing educators. Meanwhile, adding more ambiguity, some states do not address coaches statutorily at all—of these, some state courts have created a special duty through case law and others have not. In light of the foregoing, it is clear that the ALI must capitalize on its current opportunity to provide congruity and predictability by including a model statute in the MPC addressing coaches accused of sexual abuse.

Abuse of Trust Provisions and the MPC
The ALI is “the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.” It is enormously respected, and its MPC, including section 213, is often cited by courts and legislatures. But, scholars agree that the 50-year hiatus between the implementation and revision of section 213 has been far too long. Accordingly, project participants of the ALI have begun revising the model statutes addressing crimes of sexual assault.

One might propose that Congress, instead of the ALI, address this issue by passing a federal statute. On its face, this suggestion is supported by the congressional history mandating pedophile registration and notification laws. However, a closer examination of the federal government’s powers reveals a fatal flaw in this suggestion: pursuant to the Tenth Amendment of the U.S. Constitution, the federal government has limited lawmaking abilities, and policing sexual abuse does not fall within the purview of those abilities. Registration and notification laws do not add a crime to states’ criminal codes, address the elements of any particular crime, or create an affirmative defense to any particular crime—all of which are done by this proposal. Thus, a proposed federal bill creating specific provisions for addressing coaches accused of sexual abuse would likely end its life on the Senate floor.

Current Statutory Authority
State lawmakers have recognized the imbalance of power between educators and children and have accordingly passed laws that criminalize sexual relations between educators and their students. These “position of authority” statutes implicitly include coaches in some states; in others, there are separate carve-outs in the criminal code for coaches.

States have also criminalized “sexual contact” between an adult and a child. The legislative purpose behind criminalizing sexual contact between adults and children is to “protect children both from being exposed to genitalia and from being coerced to display their own genitalia . . . [and] from being the specific targets of alarming displays and exhibits of genitalia.” However, “sexual contact” is left undefined in many state statutes and is defined differently through case law from state to state.

Although both position of authority statutes and sexual contact laws have obvious advantages, both are inconsistent and thus unpredictable for coaches. These inconsistencies further evidence the desirability and likelihood of a uniform model statute specifically governing coaches accused of sexual abuse.

“Position of Authority” Statutes
“Position of authority” statutes specifically address educators and/or coaches charged with sexual abuse, and include sentence enhancements where the sexual relationship is already illegal (e.g., when a coach has sex with an athlete below the age of consent). The majority of states currently have such language. For example, Wyoming has incorporated the following language that governs anyone in a position of authority over the victim:

(a) Any actor who inflicts sexual intrusion on a victim commits sexual assault in the second degree if, under circumstances not constituting sexual assault in the first degree:

(b) The actor is in a position of authority over the victim and uses this position of authority to cause the victim to submit.

Meanwhile, some states specifically include a “coach” as a person in a position of authority and subject to the reach of the criminal code. Connecticut has the following provision:

(a) A person is guilty of sexual assault in the second degree when such person engages in sexual intercourse with another person and:

(b) The actor is a coach in an athletic activity or a person who provides intensive, ongoing instruction and such other person is a recipient of coaching or instruction from the actor and

(A) is a secondary school student and receives such coaching or instruction in a secondary school setting, or

(B) is under eighteen years of age.

Mississippi has a similar provision: “A person is guilty of sexual battery . . . if the person is in a position of trust or authority

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over the child including without limitation the child’s teacher, counselor, . . . scout leader or coach.”

Complicating the matter further, Alaska, North Carolina, Ohio, and Rhode Island have created a special duty for offenders in a position of authority through case law. The Ohio Court of Appeals created this special duty by affirming a conviction for forcible rape due to the defendant’s position of authority. The court upheld the following jury instruction:

[T]he Court wishes to give you this added definition as to force and threat. The force and violence necessary in rape is naturally a relative term, depending upon the age, size and strength of the parties and their relationship to each other; as the relationship between a stepfather and a daughter under ten years of age. . . . Force need not be overt and physically brutal, but can be subtle and psychological. As long as it can be shown that the rape victim’s will was overcome by fear or duress, the forcible element of rape can be established.

... The youth and vulnerability of children, coupled with the power inherent in a parent’s position of authority creates a unique situation of dominance and control in which explicit threats and displays of force are not necessary to affect the abuser’s purpose.

This language likewise creates a heightened duty for coaches due to the power imbalance and influence they have over youth athletes.

As these examples show, the heightened duty for coaches due to their position of authority over athletes is inconsistent both within and between states. In Ohio, for example, the duty is created through case law as well as statutory authority for coaches. On the other hand, in Mississippi and Wyoming, a coach convicted of sexual abuse will receive an enhanced sentence due to his or her position of authority.

**Other Ambiguous Statutory Authority**

Sexual contact between an adult and a child is illegal. However, exactly what constitutes “sexual contact” is ambiguous within and between states. The following are examples of statutory definitions of “sexual contact”:

- **Colorado:** “[T]he knowing touching of the victim’s intimate parts [external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person] by the actor, or of the actor’s intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.”

- **Connecticut:** “[A]ny contact with the intimate parts [the genital area, groin, anus, inner thighs, buttocks or breasts] of a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person or any contact of the intimate parts of the actor with a person not married to the actor for the purpose of sexual gratification of the actor or for the purpose of degrading or humiliating such person.”

- **Delaware:** “[A]ny intentional touching of the anus, breast, buttocks or genitalia of another person [including] those specified areas when covered by clothing.”

- **Kentucky:** “[A]ny touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party.”

- **Maine:** “[A]ny touching of the genitals or anus, directly or through clothing, other than as would constitute a sexual act, for the purpose of arousing or gratifying sexual desire or for the purpose of causing bodily injury or offensive physical contact.”

- **New York:** “[A]ny touching of the sexual or other intimate parts of a person for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”

- **MPC:** “[A]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.”

These statutory examples are inconsistent. In some states, the statute includes a mens rea requirement—that is, the accused must have “the purpose[] of sexual arousal, gratification, or abuse.” However, other states, such as Delaware, do not require a mental state at all. This means that touching a child’s intimate area—even if innocuous—is criminal. This inconsistency creates a difficulty for coaches: if a player is injured or requires stretching, the coach must be cognizant of the possibility that touching the athlete, even if solely for innocent purposes, could lead to criminal charges.

Case law regarding sexual abuse only complicates the issue. In one Kansas Court of Appeals case, “lewd fondling or touching,” for purposes of a statute criminalizing aggravated indecent liberties with a child, was defined as: “that which undermine[s] the morals of the child, which is so clearly offensive as to outrage the moral senses of a reasonable person, and which is done with the specific intent to arouse or to satisfy the sexual desires of either the child or the offender or both.”

However, whether the touching was “lewd” was dependent on the totality of the circumstances, and proof of actual arousal was not required to support a conviction for aggravated indecent liberties with a child. What does it mean to “outrage the moral senses”? Further, whose “moral senses” must the court consider—the accused or the accuser? If proof of actual arousal is not necessary, does that eliminate the mens rea requirement?

In another a case decided in July 2012 by the Connecticut Appellate Court, a provision in a “risk of injury to children” statute, which prohibited “contact with the intimate parts . . . of a child . . . in a sexual and indecent manner likely to impair the health or morals of such child,” was held not unconstitutionally vague so as to violate due process. The court reasoned that the statute clearly proscribed the defendant’s deliberate contact with the victim’s intimate parts even though the contact occurred only once in a public location. This holding focused on the victim’s perception, not the accused’s intent. By holding that the statute was constitutional, the court implicitly shifted the focus from the accused to the victim. However, this is inconsistent with statutes that require intent to arouse, gratify, or abuse.
The crimes of Sandusky have stirred public outcry as much as any crime in history, and, in the past, similar crimes have invoked legislative response. Moreover, current statutes governing coaches accused with sexual abuse, including “position of authority” statutes and laws barring “sexual contact,” are inconsistent and unpredictable across states. For these reasons, a model statute should be included in the MPC in order to redress the crimes of Sandusky. Further, the ambiguity of these laws—specifically the issue of whose mental state should be focused on—supports an individualized approach that would properly asses the unique facts of each case in reaching a verdict.

**UNIQUE CIRCUMSTANCES INHERENT IN ATHLETICS**

“I’ve had a gun to my head, so to speak, for two years and now I’m hoping slowly that I’m going to be able to get back on my feet,” said Ray Collingham. Collingham, a former gymastics teacher, was charged with seven counts of sexual assault, four counts of sexual interference, two counts of invitation to sexual touching, and two sexual exploitation charges. The allegations came from a former athlete; Collingham was acquitted on all of the charges.

A simple search on Google retrieves hundreds of stories similar to Collingham’s. These stories tell of coaches who, while acting in their role as a coach, were accused of sexual abuse and ultimately acquitted because their actions, although perhaps inappropriate in other settings, were appropriate in their role as coach. To ensure proper instruction for athletes, coaches must be able to act in accordance with traditional norms of sports, supervise athletes when they are in the locker room and/or shower, properly assist athletes in stretches to avoid injury, and adequately respond to injuries. A strict statute that bars coaches from touching an athlete’s buttocks or supervising young athletes in the shower will inhibit coaches and diminish the value of athletics. The ALI must consider the unique relationships, circumstances, and standards of conduct in sports when drafting a model law in response to the crimes of Sandusky to avoid the negative consequences of an overly rigid statute while acknowledging the imbalance of power between a coach and an athlete.

**Special Relationship between Athlete and Coach**

There is a special relationship that exists between an athlete and a coach which must shape the inquiry for convicting coaches charged with sexual abuse. There are several distinguishing characteristics of a relationship between a youth athlete and his or her coach that must be taken into consideration.

First, an athlete is encouraged by his or her parents at an early age to follow the coach’s instructions and, as the level of competition rises, will likely be punished for questioning a coach’s wisdom. Stemming directly from this is consent. Children are more likely to consent to improper sexual contact in an environment where the child is familiar with the adult and the adult is in a nurturing, parental-like role. Moreover, due to the intimate nature of the relationship, a young athlete will be internally discouraged from reporting a coach because he or she may feel as if it is wrong to get the coach in trouble. As one young athlete reported, “[Coach] had been such a friend that it was kind of like I was betraying him.”

Finally, young male athletes are often afraid of being labeled homosexual if they report their male coaches. Unlike sexual abuse generally, boys are abused more often than girls by their coaches.

These factors, which are unique to a relationship between a coach and an athlete, were present in the case of Jerry Sandusky. The man who was designated by the Pennsylvania grand jury as “Victim 1” was described as shameful and in fear of his life by his psychologist. The psychologist described Victim 1’s angst when reporting such a well-known man. “This was Jerry Sandusky we’re talking about here,” he said. He then cited an official from Victim 1’s school who said that Sandusky possessed “a heart of gold.”

The unique relationship, and the overwhelming power of a coach, must be taken into consideration when forming a statute to govern coaches accused of sexual abuse.

**Standards of Conduct**

Along with the unique athlete-coach relationship, which supports a closer look at coaches due to their overwhelming power, there are also unique circumstances and standards of conduct present in athletics that must be taken into consideration. These unique circumstances and standards support a potentially competing interest: a statute addressing coaches accused of sexual abuse cannot criminalize coaches for engaging in traditionally accepted practices or actions necessary to effectively coach their athletes.

**Buttocks Smacking**

In *Oncale v. Sundowner Offshore Services, Inc.*, the Supreme Court held that same-sex sexual harassment is actionable under Title VII. Justice Scalia, while stressing the objective component of the “severe and pervasive” standard, used the following example:

> A professional football player’s working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach’s secretary (male or female) back at the office. The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.

A coach who “smacks” his player on the buttocks is apparently exempt under Title VII, even though Justice Scalia fails to give any evidentiary support in logic or case law for this conclusion.

By assuming that buttocks smacking was not actionable harassment in the context of two adults, Justice Scalia implicitly reinforced the permissibility of this tradition within the context of athletics as a whole. This underlying assumption—that it is okay to touch someone’s buttocks during athletics but not in other settings—must be considered when drafting a statute that governs coaches accused of sexual abuse of youth athletes. Coaches, at all levels, use the “smack” on the backside as a motivator.

The act of touching a child’s buttocks is, in fact, criminal child molestation in the Fifth Circuit—which is where the claims in *Oncale* arose. This raises an obvious tension: a statute addressing coaches’ sexual abuse must have the versatility...
to withstand situations in which a coach is innocently using a smack on the buttocks as motivation, while simultaneously holding the coach with sexual intent criminally liable.

Showering

“Jerry Sandusky admitted to my face, he admitted it,” a mother of one of his victims said. “He admitted that he lathered up my son. They were naked and he bear-hugged him,” she exclaimed.65 Jerry Sandusky admitted to showering with young boys—yet, he maintained that he had not molested or assaulted them. One explanation as to why a grown man with no sexual motives would shower with young boys was given by one of Sandusky’s attorneys:

Some of these kids don’t have basic hygiene skills. Teaching a person to shower at the age of 12 or 14 sounds strange to some people, but people who work with troubled youth will tell you there are a lot of juvenile delinquents and people who are dependent who have to be taught basic life skills, like how to put soap on their body.66

The attorney went on to claim that his former cross country coach showered with him and his teammates.67 The argument that it is permissible for a grown man to shower with 12- to 14-year-old boys to teach them hygiene is not going to be explored here.68 However, it does raise another powerful concern. The shower is a place where young athletes are most vulnerable to coaches who are sexual predators—but it is also a place where these same athletes are susceptible to bullying by their peers if there are no adults to supervise. This tension must be addressed by a statute governing coaches accused of sexual abuse.

The shower is a hunting ground for bullies. As the Supreme Court has noted, “there is an element of ‘communal undress’ inherent in athletic participation.”69 Young athletes, with the same adolescent insecurities as any nonathlete, are more exposed in the shower than any other time.70 In one case, a freshman basketball player was bullied and nicknamed “Stiffy” because he was the only player to shower after practice.71 In another case, a freshman football player was approached by a gang of upperclassmen while showering after football practice.72 One of the upperclassmen grabbed the freshman’s buttocks and called him a homosexual. Finally, another football player, Brian, was subjected to the following:

Brian was grabbed as he came out of the shower, forcibly restrained and bound to a towel rack with adhesive tape. Brian’s genital area was also taped. After Brian was restrained, one of his teammates brought a girl that Brian had dated into the locker room to view him. All of this took place while other members of the team looked on.73

If Brian’s coach had been present, would this bullying have occurred? Could it have been worse if Brian’s attackers knew there was a statute barring their coaches from supervising the shower at all?

The tension between supervision and the prevention of sexual abuse by coaches is clear. Thus, a categorical rule barring coaches from supervising young athletes in and around the shower simply will not work. By solving one problem (preventing against the small percentage of coaches who are sexual abusers), a broad mandate would serve to exacerbate another (bullying in the shower).

Injury Prevention and Response

One variable common in sports that is uncommon in an educational setting is the potential for, and response to, injuries.74 When an athlete is injured at practice, his or her coach may be the only adult present to administer care.75 Administering proper care may involve taking off the athlete’s uniform or massaging the injured area, which could include the groin or buttocks. Moreover, injury prevention requires proper stretching, and this may require that a coach touch an athlete. Thus, another inherent tension arises when considering the framework of a model statute to police sexual abuse by coaches.

In one exemplary case, a high school hockey player accused his coach of sexual assault after the coach responded to an injury at practice.76 The teen complained about soreness in his leg and testified that the coach offered to massage it. “[Coach] said he knew what he was doing, so I trusted him,” the teen said. “He started to go higher and higher and he went up into my boxers and into my groin area.”77 However, the judge did not find the testimony to be credible and held, “If, as the teen said, [the coach] did touch the teen’s groin area, it was accidental.”78 The coach was acquitted on all charges.

In a similar case, a jury acquitted a track coach accused of sexually assaulting two female track athletes.79 One of the teen girls alleged that the coach offered to help her stretch and the stretching led to inappropriate touching of her genitals. The coach testified that he had in fact helped both girls stretch, but that he never did anything inappropriate. Ultimately, the jury believed the coach’s emphatic assertion that he never had sexual intent and never touched the girls inappropriately.

These examples highlight the unique situation for coaches when an athlete gets injured or when an athlete must stretch before competition. A strict, categorical rule against coaches touching athletes will preclude innocent coaches from properly preventing and responding to injuries. On the other hand, a statute addressing coaches must hold coaches, who use a massage or stretch to prey on their victims, criminally liable.

A ROADMAP MODELED AFTER McDonnell-Douglas

If the ALI answers its call to action and includes a model statute addressing coaches accused of sexual abuse, it must consider the unique characteristics inherent in athletics, as discussed above. To avoid the inconsistency and unpredictability of its state predecessors, the model provision must have the ability to address the unique circumstances and standards of conduct in sports while acknowledging the power imbalance between a coach and an athlete. Moreover, a model statute properly evaluating claims of sexual abuse by coaches must provide clarity to the overarching question of sexual abuse law: Should the law focus on the intent of the accused or the perception of the accuser?

The following proposal begins with an examination of the burden-shifting test from McDonnell-Douglas, a seminal Title VII discrimination case. The similarities between discrimination cases and cases in which a coach is accused of sexual abuse are apparent.
A STATUTE ADDRESSING COACHES
ACCUSED OF SEXUAL ABUSE
CANNOT CRIMINALIZE COACHES
FOR ENGAGING IN TRADITIONALLY
ACCEPTED PRACTICES OR ACTIONS
NECESSARY TO EFFECTIVELY
COACH THEIR ATHLETES.

Using McDonnell-Douglas’s Burden-Shifting Mechanism
In 1973, the Supreme Court, in its interpretation of Title VII of the Civil Rights Act of 1964,81 developed a burden-shifting method for plaintiffs lacking direct evidence in McDonnell Douglas Corp. v. Green.82 For a plaintiff to succeed in a Title VII action, the employer must have had the intent to discriminate.83 The Court, recognizing the difficulty of proving discriminatory intent by an employer, created a judicial mechanism for examining cases in which a plaintiff only has circumstantial evidence of discriminatory motives in an adverse employment action.84

The McDonnell-Douglas test begins with the plaintiff’s burden of producing his or her prima facie case of discrimination.85 In a Title VII case decided after McDonnell-Douglas, the Supreme Court explained that the prima facie showing is “simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were motivated on impermissible considerations.”86 Once this burden is met, the plaintiff has raised an “inference of discrimination.”87

In the second step, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action.88 This, like the plaintiff’s prima facie showing in step one, is simply a burden of production and is presumptively legitimate, provided the reason is not because of a protected category.89

In the final step of the test, the burden bounces back to the plaintiff, and he or she has an opportunity to prove by competent evidence that the presumptively valid reason for the employer’s adverse employment action was in fact a pretext for a discriminatory decision.90

This unique judicial mechanism is an appropriate model for a model statute governing coaches accused of sexual abuse for the following reasons.

Direct Evidence of Intent
If a child or his or her parents comes forward with direct evidence of sexual intent by the accused, this proposal—like McDonnell-Douglas in cases with direct evidence of discriminatory intent—is inapplicable.91 Legislators are clearly concerned with the intent of the accused, as evidenced by the phrase “for the purpose of sexual arousal, gratification, or abuse” found in several state statutes.92 However, like discriminatory intent, sexual intent is a state of mind and is very difficult to prove.93

“Inference of Sexual Intent”
In cases decided pursuant to McDonnell-Douglas, a plaintiff who meets his or her prima facie case for discrimination is said to have raised an “inference of discrimination.”94 The same logic applies for a child who alleges sexual abuse by a coach. In fact, the Supreme Court’s exact wording in its application of the first step of McDonnell-Douglas can be applied. “[The allegations of sexual abuse are] simply proof of actions taken by the [coach] from which we infer [sexual intent] because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible [intent].”95 In the context of a coach accused of sexual abuse, after a child meets his or her prima facie case96 for properly alleging sexual abuse, an “inference of sexual intent” would be drawn.

Legitimate, Nonsexual Reasons
A district court recently granted summary judgment in favor of an employer who fired six employees because they had “liked” a page on Facebook.97 Clearly, courts and legislators have refused to replace the judgment of employers and, aligned with this principle, the McDonnell-Douglas test only requires an employer to provide a “legitimate, nondiscriminatory reason” for taking adverse action against the employee.98 The burden on the employer is not to prove that its reason was the actual reason—rather, simply that it is a possible reason.99 Thus, at the second step, the employer has a “burden of production.”100

Similarly, a coach that is accused of sexual abuse should only have a burden to produce a legitimate, nonsexual reason for the action(s) on which the accuser is basing his or her allegations. This has multiple benefits. First, by characterizing the second step as a burden of production for the coach—not a burden of proof—the ultimate burden lies with the prosecutor on the accuser’s behalf. This comports with the principle underlying criminal law that the accused is innocent until proven guilty beyond a reasonable doubt.101 Further, although policing sexual predators
is obviously the state’s responsibility, a coach must have assurance that legitimate, nonsexual touching such as massaging or stretching will not result in a criminal conviction. Without this assurance, some coaches will be depleted in their effectiveness as a coach, while many others will be deterred entirely from coaching.

Defining “Sexual Abuse” and on Whose Perspective to Focus

The phrase “sexual abuse” is not easily defined and is used differently by law enforcement agencies, social services agents, and medical professionals. This is similar to the phrase “to discriminate” in the context of Title VII—it, too, has no clear definition. The McDonnell-Douglas test was developed to properly assess this malleable concept, and so, it is a fitting model for examining another concept that is not easily defined.

One source identifies “sexual abuse” as: “the involvement of dependent, developmentally immature children and adolescents in sexual activities that they do not fully comprehend, are unable to give informed consent to, and that violate the social taboos of family roles.”

Moreover, some statutes governing sexual contact require that the accused make the contact “for the purpose of sexual arousal, gratification, or abuse.” But, then, case law (and other statutes like the “lewd touching or fondling” statutes mentioned above) focuses on the child’s perception of the event and how the child is affected. The ambiguous definition of “sexual abuse” and the inconsistencies between statute and case law epitomize the inherent tension that lawmakers face when prescribing laws to evaluate sexual abuse of children. Should sexual abuse laws focus on the intent of the accused, the perception of the accuser, or both?

A broad, rigid statute necessarily falls short of simultaneously preserving both perspectives; however, a burden-shifting approach does not. The perception of the accuser is highlighted in the first step, as the prima facie threshold is only that of production, not proof. Then, in the second step, the accused has an opportunity to proffer a legitimate, nonsexual reason for engaging in the alleged sexual contact—thus, the focus shifts to the intent of the accused. In the last step, the accuser, through the prosecutor, has the opportunity to either prove that: (1) the coach’s reason was a pretext for sexual intent, or (2) regardless of the coach’s intent, any reasonable child in the accuser’s position would perceive the contact as sexual.

Prima Facie Case and Elements of Proposal

Most cases of coaches accused of sexual abuse begin when another adult, often a parent, reports a suspicion that abuse is taking place. In fact, statutes in most states impose an affirmative duty to report suspected sexual abuse of children. By the time the coach makes it to court, the story has hit the news and much of the damage to the coach’s reputation and career is done. This proposal will not address those issues. Rather, this proposed model statute facilitates appropriate outcomes of a coach accused of sexual abuse, irrespective of the social condemnation following allegations of such abuse.

Step 1: Prosecutor’s Prima Facie Case

The prosecutor, on behalf of the child, must make its prima facie case by alleging the following elements in the criminal complaint: (1) that the alleged victim was less than 18 years of age at the time of the alleged acts that constituted sexual abuse; (2) that the accused was at least 18 years of age at the time of the alleged acts that constituted sexual abuse; (3) that the accused was acting in a role as a coach, trainer, or other athletic supervisor before or during his or her relationship with the alleged victim; and (4) a specific action, or multiple actions, by the accused that the alleged victim perceived as sexual abuse.

If the prosecutor successfully alleges these four elements, an “inference of sexual intent” is raised.

It is likely that pretrial motions will decide several of the elements. For example, if the defendant has credible evidence of “legitimate, nonsexual reasons” for her actions, she may be willing to stipulate to her own age, the alleged victim’s age, and that she was a coach in order to avail herself to this statute. Contrarily, a court may grant summary judgment in the defendant’s favor if there is no genuine, material issue of fact as to whether the defendant was the alleged victim’s coach pursuant to this statute (e.g., if the defendant is only a teacher). If this happens, the defendant will avoid the harsher penalties of being convicted pursuant to this proposal.

The prima facie elements are necessary, however, because this model statute is predicated on the unique relationships, circumstances, and standards of conduct in athletics, and thus should not be applied outside of that context.

Step 2: Coach’s Opportunity to Raise a Legitimate, Nonsexual Reason for the Conduct

Assuming the prosecutor meets its burden of alleging the prima facie elements, the statute’s burden-shifting mechanism is triggered. The accused coach now has the burden to produce—but not to prove—a legitimate, nonsexual reason for engaging in the alleged action(s) that led to the inference of sexual intent. This legitimate reason could be stretching, massaging, injury response, or supervising athletes in the shower. This step of the burden-shifting mechanism addresses the unique characteristics inherent in athletics, as discussed above.

Furthermore, at this step, the accused coach has an opportunity to present her intent, irrespective of the alleged victim’s perception of what took place. This is critical. Consider the cases above in which coaches were falsely accused of sexual abuse because they had been stretching or massaging athletes. Even if an athlete perceives sexual intent from a coach, if it is unreasonable to do so and the coach has a legitimate, nonsexual reason for engaging in the action—injury response, for example—the coach must be acquitted. This step of the analysis considers this potential and prevents false convictions.

Step 3: Prosecutor’s “Last Bite” to Show Pretext or Disprove Coach’s Reason

The final step of the test shifts the burden—at this step, the burden is one of proof—to the prosecutor. The prosecutor may prove that the accused coach had sexual intent or that, regardless of the coach’s intent, her action(s) was so egregious that it is unreasonable to do so and the coach has a legitimate, nonsexual reason for engaging in the action—injury response, for example—the coach must be acquitted. This step of the analysis considers this potential and prevents false convictions.
of authority; therefore, the child’s perception (provided that it is reasonable) is ultimately dispositive.

The first avenue for the prosecutor is to prove that the defendant’s legitimate, nonsexual reason for engaging in the alleged action(s) is a pretext (i.e., it is simply a cover-up for sexual intent). This is a fact-specific inquiry and will provide the individualization required by the special circumstances and standards of conduct in sports. For example, if an athlete alleges that his coach sexually abused him by rubbing the inside of his thigh, the coach can produce evidence that the child had an injury that required touching of the thigh. Then, the prosecutor can present evidence suggesting the child was not really injured and/or the coach has a history of allegations of abuse.

The second route for the prosecutor to secure a conviction is to prove that, irrespective of the coach’s legitimate, nonsexual reason, the action(s) was so egregious that any “reasonable” child athlete would perceive it as sexual abuse. This way of securing a conviction addresses the scenario in which a coach performs an act on a child genuinely without sexual intent, but the child is psychologically or emotionally scarred in the same way he would have been if the coach did have sexual intent. This proposed model recognizes the most important concern with any legislation regarding child victims: to protect them against abuse.

THE HEIGHTENED DUTY FOR COACHES DUE TO THEIR POSITION OF AUTHORITY OVER ATHLETES IS INCONSISTENT BOTH WITHIN AND BETWEEN STATES.

Potential Problems
The most prominent issues facing this proposal stem from applying a civil burden-shifting test in a criminal context. First, the burden of proof for the prosecutor, unlike a Title VII plaintiff, is to prove its case at the forefront of trial, knowing that the defendant (coach) will raise the defense before the defendant even had a chance to raise the issue.

Further, this proposed statute only addresses close cases. It does not provide extra protection for cases in which a coach is actually having intercourse with a child, and these are the cases that shocked the public. Thus, it may not fully satiate the public outcry for legislative response.

CONCLUSION
Consider Bob Knight and Phil Jackson: one threw chairs during fits of rage, while the other is nicknamed the “Zen Master” and rarely raised his voice. Yet, both were iconic coaches and brought the best out of their athletes. There is no definition of the “ideal coach” because athletes, from little leaguers to professionals, respond differently to different types of coaches. Coaches must be able to act freely within the unique constructs of athletics in order to be fully effective.

The ALI has the ripe opportunity to address the public outcry over Jerry Sandusky’s crimes with a model statute. If the ALI seize this opportunity, it must be mindful of the unique relationships, circumstances, and standards of conduct present in athletics. Protecting children from child abusers is obviously a paramount concern—but this protection should not debilitating current coaches’ ability to reach their athletes, nor should it deter people from coaching in the future.

ENDNOTES

2. Two defense witnesses testified that they, too, had showered with young boys in their coaching capacity. See David Lohr, Jerry Sandusky Trial: Witnesses in Penn State Sex Abuse Trial Said They Also Showered with Boys, HUFF Post Crime (June 18, 2012), http://www.huffingtonpost.com/2012/06/18/jerry-sandusky-trial-witness-showering-boys_n_1606512.html.

pagewanted=all.

4. Sex offender registration laws and their deterrent effect—or lack thereof—can be analogized to a potential categorical rule against coaches supervising athletes in the shower. See generally Rowe v. Burton, 884 F. Supp. 1372, 1379 (D. Alaska 1994) (finding that the only meaningful deterrence of sex offender registration came from the modified conduct of the police and the public, not the registrant, reasoning that the deterrence stemmed from both forewarning the potential victims of a sex offender’s presence, enabling them to take evasive action, and allowing the police to act more swiftly).

5. In a report on child pornography and pedophilia prepared for the United States Senate, experts stated that pedophiles seek justification: “A pedophile needs to know or to convince himself that his obsession is not ‘abnormal’ and dirty, but is shared by thousands of other intelligent, sensitive people.” See PERMANENT SUBCOM. ON INVESTIGATIONS OF THE COMM. ON GOVERNMENTAL AFFAIRS, CHILD PORNOGRAPHY AND PEDOPHILIA, S. REP. NO. 99-537, at 8 (1986). However, other reports suggest that the abnormality of such desires is secondary to the intensity and consuming nature of such desires. In a series of prison interviews conducted by researchers, pedophiles admitted that their lives were consumed by their perverse desires. See DUANE L. DUBBERT, HALTING THE SEXUAL PREDATORS AMONG US: PREVENTING ATTACK, RAPE, AND LUST HOMICIDE 66 (2004).

7. This contention is based upon research conducted for this article. The research, however extensive, could not reach into the minds of the current project contributors to the revisions to section 213. Thus, it is possible that the revisions will include provisions addressing these issues.


14. See, e.g., Nancie L. Katz, Jail for Coach in Sex Abuse, N.Y. DAILY NEWS, July 16, 2002, at 2 (reporting that Gary Session, a volunteer basketball coach at the Flatbush YMCA in Brooklyn, New York, pleaded guilty to charges that he sexually abused a 12-year-old girl during a basketball practice); Ex-Coach Sentenced in Child Molestation, RECORDNET.COM (Dec. 18, 2002), http://www.recordnet.com/article/20021218/A_NEWS/312189978/0/SEARCH (reporting that John Racadio, who had a prior conviction for sexual assault on a child, pleaded guilty to molesting six children while he served as an equipment manager for a California Little League organization and was sentenced to 30 years in prison); Press Release, Queens Cnty. Dist. Attorney’s Office, Soccer Coach Sent to Prison for Up to 66 Years for Sexually Attacking Six Young Boys on His Team (June 5, 2003), http://queensnyc.org/Press%20Releases/2003%20Press%20Release/06-June-05-2003.htm (announcing that soccer coach Fernando Colman, who was already serving a sentence for sexual attacks on boys in Nassau County, was found guilty by a jury of sexually assaulting six young boys during overnight stays at motels during soccer team trips in and around New York City).


17. Drape, supra note 3.

44. N.Y. Penal Law § 130.00(3).

This is notable because it is post-Sandusky. It is hard to imagine any fact finder, judge, or member of a jury not considering Sandusky's crimes given how recent it took place.

49. Id. at 914.
51. Id.
52. Use the search phrase: “coach falsely accused.”
54. Appenzeller, supra note 12, at 152.
56. Id. at 45.
57. Id. at 81–82.

58. Justice Scalia was not referring to an adult coach touching a child-athlete's buttocks, and the author is not implying that here.
59. United States v. Moore, 425 F. App’x 347, 351–52 (5th Cir. 2011) (holding that the defendant’s act of touching his 12-year-old stepdaughter’s clothed buttocks was an offense of child molestation, and thus admissible as evidence of the defendant’s similar crime).
62. Id.
63. Nick Gajda, Developing a Strategy to Teach Kids About Hygiene, 11 St. John’s J. Legal & Entertain’ment & Sports Lawyer / Volume 31, number 3, Fall 2014. © 2014 by the American Bar Association. Published in Entertainment & Sports Lawyer, Volume 31, Number 3, Fall 2014. © 2014 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
95. See id. at 579–80.
96. The proposed elements of the prima facie case are set forth below.
97. See Bland v. Roberts, 857 F. Supp. 2d 599, 610 (E.D. Va. 2012). The employees worked for a sheriff’s department and “liked” the page of a candidate running against the incumbent sheriff. When the incumbent won reelection, he fired the employees.
98. See Furnco, 438 U.S. at 577–78.
99. Id. at 577.
100. See id.
102. Id. at 177 (citing Gary May, Understanding Sexual Child Abuse 1–9 (1978)).
A narrow definition of sexual abuse would include child rape or genital stimulation. Sexual perversion, however, manifests itself in many ways; an abuser may be sexually stimulated by “[v]arious body parts, certain types or ritualistic behavior, and unusual objects and activities.” Sexual offenses are classified as non-touching, touching and violent. . . . The legal community and law enforcement take the viewpoint that sexual abuse is a “punishable criminal act.” Physicians and nurses equate abuse “with its possible consequences such as physical damage to the genitals, pregnancy and venereal disease.”

103. To discriminate under Title VII, an employer must show that it is acting prejudicially toward a certain class of people? What if an employer genuinely holds no biases, yet treats members of a protected class differently? Studies show that prejudices are often unconscious. Thus, an employer could be racist and not even know it. This is one example of how discrimination, like sexual abuse, cannot be easily defined. See Hart Blanton & James Jaccard, Unconscious Racism: A Concept in Pursuit of a Measure, 34 ANN. REV. OF SOC. 277 (2008).


105. See, e.g., Colo. REV. STAT. § 18-3-401(4); Del. Code Ann. tit. 11, § 761(1); Ky. Rev. Stat. ANN. § 510.010(7); Me. Rev. Stat. tit. 17-A, § 251(1)(D); N.Y. Penal Law § 130.00(3).


108. See, e.g., CAL. PENAL CODE § 11166; MINN. STAT. § 626.556(3); N.Y. SOC. SERV. LAW § 413; VA. CODE ANN. §§ 63.1-248.3, 4.

109. Once the investigation has advanced to the stage of criminal charges and arrest, it becomes part of the public record. Public knowledge of the alleged abuse and the accused’s identity represents only one of the problems incurred by the defendant. Following either the dismissal of the charges or an acquittal, the defendant is still subject to the doubts of the public, employers, fellow workers, and the family. The effects of such doubt include total disruption of the family through separation or divorce, loss of employment, difficulty finding new employment, loss of housing, and distancing by family and friends who fear for the safety of their own children. See Douglas J. Bershadov, Recognizing Child Abuse: A Guide for the Concerned (1990).

110. Summary judgment is appropriate where the court is satisfied “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(a).

111. Sentencing for a coach convicted pursuant to this proposed statute will not be explored here. However, the sentences would be significantly higher than for an abuser who is not in the position of authority convicted of sexual abuse.

112. Consider the application of this model statute to a teacher in a classroom. It is hard to imagine a scenario in which a teacher would have a “legitimate, nonsexual reason” for stretching or massaging a student’s upper thigh. Thus, this proposal’s fundamental predicate—that athletics have inherent characteristics that are unique and require a different statute—is improperly applied in a teacher-student context.

113. If the prosecutor fails to successfully allege one of the elements, or if the defendant succeeds on summary judgment on any of the elements, the criminal complaint fails on its face.

114. This relates back to the discussion about the unique nature of a relationship between a coach and an athlete. Due to the position a coach holds, this proposal for the revision project seeks to ensure protection for children who are vulnerable.

115. This article has focused on the difficulty of parsing out the accuser’s perception and the accused’s intent. The step-by-step process attempts to address both but, ultimately, one side must outweigh the other. The author contends that the perpetrator concern in any statute such as this is to protect children—thus, the child’s perception ultimately outweighs the accused’s intent.

116. Proof of sexual intent may be sufficient for a coach to be convicted of sexual abuse, but should not be necessary. Consider the following hypothetical: an unwitting coach massages his young football player’s groin when he is injured. The coach genuinely has no sexual intent. Yet, the boy feels sexually violated. The boy begins having feelings of deep-seeded fear before practice because he knows his coach is going to touch him. This coach should be convicted, irrespective of his intent and the standards of conduct, solely because of the athlete’s perception. If the coach in this hypothetical is not held accountable because of the lack of intent, the legislative purpose of protecting children is lost.

117. See John Feinstein, A Season on the Brink: A Year with Bob Knight and the Indiana Hoosiers (1986); Mark Heisler, Phil Jackson’s Tenure Produced the Most Success and Fun We’ve Ever Seen, L.A. Times, May 11, 2011, http://articles.latimes.com/2011/may/11/sports/la-sp-heisler-lakers-20110512. Bob Knight was an NCAA men’s basketball coach for 43 years and has the second most wins of any coach. He was also well-known for his fits of anger—throwing chairs, swearing at reporters, and being physical with players. Phil Jackson won 11 NBA titles and has the highest winning percentage of any NBA coach.

118. The driving force behind this article is the author’s aspiration to follow in the footsteps of the best coach he ever had. After hours of jump-shots, groundballs and the occasional argument, one man exemplified the meaning of “Coach.” Thank you, Dad.

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No one doubts that theme parks such as Dollywood, Disney World, and LEGOLAND are in the entertainment industry. No one can make a persuasive argument that sporting events from NASCAR to horse races and major league sports are not components of the entertainment industry. It is also worth noting that the employees in those major league sports are represented by “labor unions,” albeit with names like the NBA Players Association, and covered by collective bargaining agreements with provisions unique to their “industry,” such as salary caps and rules covering income sharing from commercial endorsements.

The more traditional view of the entertainment industry was that it consisted of the performing arts: music, dance, and acting. Even that definition can be narrowed down between live performances of opera, ballet, theatre, and concerts and the creation of recorded audio and visual performances, which have a continuing existence. It is to aspects of this latter area of the entertainment industry—the recorded performing arts—to which this article is directed. Please note, however, that the other highly unionized areas of the entertainment industry also have their own unique labor law practices and issues.

The recorded performing arts include recorded music, radio, motion pictures, and television. Though initially radio and television were only broadcast, technology was developed that permitted recording and rebroadcast. Advancements in technology over the past 50 years have altered the manner in which audio and visual material is recorded and introduced new forms of transmission beyond the movie theatre, phonograph, or television screen. Those same advances in technology have generated new forms of entertainment, for example “mobisodes” and interactive videogames, that draw upon the same union-represented creative and production talent that create motion pictures and television shows.

Regardless of how you define the entertainment industry, there are a number of factors that make it unique from a labor relations perspective. Many components of the broadly defined industry are highly unionized, and contrary to the decline of the industrial unionized workforce, the labor organizations that represent performing talent and technicians in the various forms of entertainment are by and large healthy, and in some areas have enjoyed significant growth in membership.

**ENTERTAINMENT LABOR ORGANIZATIONS**

The proliferation of guilds and unions that represent the employees in all forms of entertainment frequently confuse employers and their lawyers as to which organization represents a particular area of activity. Dancers and singers appearing in a Broadway “book” musical are represented by Actors’ Equity, but the same artists appearing with a symphony may be represented by the American Guild of Variety Artists (AGMA) or the American Guild of Musical Artists (AGMA). In the Yiddish theatre, actors are affiliated with the Hebrew Actors’ Union (HAU). Broadcast technicians at the ABC and NBC networks are represented by NABET (National Association of Broadcast Employees and Technicians), while technicians at the CBS network are represented by the IBEW (International Brotherhood of Electrical Workers). In the late 1960s when the size of broadcast standard videotape was reduced, a number of program types that had been the exclusive domain of the broadcast networks moved to nonbroadcast venues and were produced by employers whose technicians were represented by the IATSE (International Alliance of Theatrical Stage Employees), the same organization that represents the stagehands on Broadway and motion picture production crews.

Up until this year, there were prime time dramatic programs and sitcoms produced under agreements with both the Screen Actors Guild (SAG) and the American Federation of Television and Radio Artists (AFTRA). While the SAG Television Agreement covered all productions shot on film, its contract jurisdiction also included electronic photography. AFTRA’s jurisdiction covered live broadcasts and programs recorded with electronic cameras. As a consequence, recorded television programs were being produced under both of their agreements. During the last five years, AFTRA had been getting the lion’s share of both prime time network and cable television production, as film was supplanted by digital photography. The recent merger of SAG and AFTRA and the negotiation this year of a single agreement covering all prime time and cable television production will eliminate their prior competition for that work. It should also be noted that SAG and AFTRA have each had virtually identical agreements covering performers utilized in the production of television commercials, which likely will be integrated into one agreement in light of their merger. SAG has also maintained a separate agreement for animated television programs, although the voices in animated feature films are covered by its Basic Agreement, as are performers in live action films.

There is virtually no confusion as to the respective jurisdictions of the creative guilds behind the camera in motion pictures and television. The Writers Guild of America (WGA) has a single agreement covering the production of motion pictures and all forms of television regardless of how recorded or where exhibited. Its agreement also covers productions for the “new media” but does not cover animated motion pictures or the writing for television commercials. The nearly 500 pages of the WGA Theatrical and Television Basic Agreement (WGA Agreement) contain some of the most complex provisions found in any union or guild agreement and embody concepts that astound labor lawyers who work outside the entertainment industry. More later on some of those provisions.

The Directors Guild of America (DGA) needs two agreements to cover the same territory as the WGA, aggregating over 800 pages. Its Basic Agreement was originally developed to cover the production of motion pictures and later television programs on film. As television production of programs on videotape moved out of the networks, the DGA developed its Freelance Live and Tape Television Agreement to cover its members employed by independent television production
companies. When digital technology began to supplant the use of film and tape, initially in television and more recently in motion picture production, the DGA had to secure clarification of its two core agreements as to how they would apply. The controlling factor was agreed to be the genre rather than the recording technology used. Theatrical motion pictures and dramatic television programs remained covered by its Basic Agreement, and provisions were negotiated relating to which agreement covered multicamera television productions. The DGA has separate agreements covering the production of television commercials and with each of the broadcast and pay television networks.

Whether you view the American Federation of Musicians (AFM) as a union or guild, it continues to play an active role in the production of recorded visual entertainment products. The AFM has agreements covering the creation of music soundtracks for both motion pictures and television but has been hard hit by both new technology and the fragmenting of the film and television production industry. While the major studios and some major independent production companies have continuing bargaining relationships with the AFM, many independent producers of motion pictures and television do not. Music scores for films are frequently recorded on a non-AFM basis, both within the United States and in foreign countries. While many of the most prominent composers of music for motion pictures and television are members of the AFM, the AFM’s contract jurisdiction does not cover composition. Further, the advent and maturing of electronic music has permitted the creation of music scores by both nonmusicians and non-AFM musicians at the keyboard of an electronic synthesizer.

The AFM has been aggressively trying to address the steady shrinkage of motion picture and television employment opportunities for its recording musicians. Unfortunately, it has done so by pressuring its composer members, who maintain their memberships because they want to both orchestrate their compositions and conduct their recordings—functions covered by the AFM’s agreements. The AFM continues to have agreements with the recording industry and the advertising industry for commercial jingles but has had little success in its effort to secure agreements with videogame producers who make extensive use of music in their games.

ENTERTAINMENT LABOR AGREEMENTS

The context in which the guild and union agreements are negotiated bears no relationship to the circumstances under which union agreements are negotiated for the manufacturing, retail, or service industries. Employers in those industries have established workforces, product lines, and permanent facilities. The unions that represent the employees in those industries secured their representational rights by traditional organizing that led to voluntary recognition or by winning elections conducted by the National Labor Relations Board (NLRB). The processes followed in the entertainment industry bear little resemblance to those conventional practices.

Securing the Agreement

The primary collective bargaining agreements in the motion picture and television industry are negotiated by employer trade associations. The Alliance of Motion Picture and Television Producers (AMPTP) negotiates contracts of national geographic application with the WGA, DGA, SAG-AFTRA, AFM, and IATSE. No one ever raises the question of whether the broad geographical scope of these agreements constitutes an “appropriate unit.” In some contracts, employees who are clearly statutory supervisors are covered without question. Individuals who could be properly treated as independent contractors are covered along with common-law employees, and professional employees are included in bargaining units with nonprofessionals absent any suggestion they have a right of self-determination. Every three years, when signatory production companies come to the bargaining table to renew their agreements, many seldom have any current employees covered by those agreements. They are negotiating contracts to cover writers they have yet to hire, directors and actors for films which they have yet to think of, and production crews they may only employ if they ultimately develop a project worth the business risk to produce. In that environment, they bind themselves to three-year agreements, a practice unique to American industry, with the possible exception of construction where the law permits pre-hire agreements.

The process by which the unions and guilds involved in the production of motion pictures and television secure their collective bargaining agreements with independent production companies is contrary to the experience of the traditional management labor lawyer. The guilds and frequently the craft unions secure executed collective bargaining agreements not only before there is a “representative complement of employees” in NLRB terminology, but frequently when the employer has only one or no employees covered by that agreement. The fact that the NLRB precedent is that there is “no duty to bargain” over a one-employee unit does not deter producers from immediately signing with the WGA when their first writer is engaged or the DGA when a director is assigned. There are several reasons why these have become standard practices.

With rare exception, writers and directors who have established track records in their respective capacities are members of these guilds, which have bylaws requiring them to only accept employment with a signatory to their guild’s agreement. Further, these guilds have entered into agreements with the talent agents who represent these writers and directors, which provide that they must only secure employment for their clients with a guild signatory. The Association of Talent Agents (ATA) negotiates “franchise” agreements with the WGA, DGA, SAG-AFTRA, Actors’ Equity, and other talent guilds. Another reason that actors, directors, and writers want guild affiliation is because the Academy of Motion Picture Arts and Sciences has branches comprised of individuals from each of the primary creative areas who nominate their peers for Academy Awards, and each of the major guilds has its own individual prestige awards as well. Peer recognition and acceptance plays an important part in the lives of actors, directors, and writers, and guild membership is viewed as essential by most.

There are consequences, however, for the production company that signs the WGA Agreement. It may have signed to cover only one writer, but if that company had a prior life before it hired its first WGA-represented writer, it needs to understand that the WGA position is that the agreement is effective as of its stated effective date, not the date the production company
signed. A production company that signed the 2008–2011 WGA Agreement in 2010 may find the WGA asserting a claim on behalf of a writer the company had hired in 2009 who was not accorded WGA minimums and benefits.

A production company becoming a DGA signatory when it hires its director effectively limits who it can hire in other classifications represented by the DGA many months later when it has a greenlit project and wants to engage a unit production manager and assistant directors. The agreement the company signed limits its hiring to only those individuals whose names appear on the DGA qualification lists in those capacities based on their prior employment experience. While technically not a “seniority system,” the practical effect is no different and serves to protect several classifications of employees whom the NLRB has ruled to be statutory supervisors.

The employment of talent who will appear in front of the camera is equally unique to the entertainment industry. SAG for many years, and now presumably SAG-AFTRA, has its membership rule number one: no member shall accept employment with an employer in a field where SAG has an agreement with an employer not a signatory to that agreement. Further, for reasons that will be noted hereafter, the process of becoming a SAG signatory is not one that can be completed expeditiously. SAG has established a call-in system so its members and their agents can determine whether the producer who has offered employment is a signatory, and most hold off signing binding employment agreements until that status is confirmed. At the time the production company does complete the signatory process, it may only have the principal cast under contract, with significant hiring left to do for smaller roles and stunt performers. However, once it becomes signatory, it has also limited its hiring options because it must give preference of employment to professional performers, a term defined in the agreement and for which there are limited exceptions.

The SAG Basic Agreement has one aspect related to union membership that is totally unique to SAG. While most lawful union security clauses provide that an individual has an obligation to apply for union membership after he or she has been an employee of an employer for 30 calendar days, the SAG Agreement provides that obligation arises 30 days after an individual’s “first employment as a performer in the motion picture industry.” As applied, that means that an individual who had one or two days of employment in a film in 1990 is a “must join” if he or she secures another film acting job 20 years later for another two days with a different employer, which is subject to a monetary penalty if the performer does not resolve his or her membership status. In light of all the film production now taking place in various tax incentive states that are also “right to work states,” it would be interesting to know how that provision is being applied if those first two days were in Georgia or Louisiana and the second two days in California or New York.

The manner in which the IATSE and the Teamsters secure their agreements with motion picture and television producers is a little more conventional than the process followed with the guilds. The IATSE and Teamsters are commonly referred to as “below-the-line” unions because of the location of costs related to their services, which appear on production budgets. Further, the process of hiring “below-the-line” personnel starts later in the production process, hopefully after scripts have been finalized and financing secured. Teamster-represented casting directors and location managers are generally the first Teamster-represented employees on board. While covered by separate contracts, it is common for the production company to simultaneously sign contracts also covering drivers before any drivers are hired. Signing with the Teamsters to cover productions based in Los Angeles binds the producer to hire its drivers from those listed on the Industry Experience Roster for drivers. Usually, the first IATSE-represented employees to be hired are the production designer and/or art director and the director of photography. Contracts with the IATSE may be signed at this point or after a number of additional crew members have been engaged. When the IATSE or Teamsters find a production working without a contract, they exert efforts to organize the production the old fashion way. They usually have members on the production in key positions that the producer needs to retain, so agreements get executed but sometimes only after efforts to secure concessions from the standardized agreements.

As noted, pre-hire union and guild agreements, a term that the guilds and unions do not favor, are the norm in the motion picture and television industry. The process is sometimes also referred to as “top down” organizing, and there is a classic and true story that literally defines that term. A number of years ago, a film company was shooting in Florida at a location not too far from the home of its key lead male performer, an actor who was “follicly challenged.” The entire below-the-line crew was nonunion save one member, that actor’s hair stylist. When the IATSE organizer showed up to seek a contract, only the hair stylist indicated he would support the organizing effort, and the producer quickly signed the IATSE Basic Agreement when the lead male performer advised, “I don’t work without my hair!”

Residuals and New Use Payments
What is even more fascinating to the traditional labor lawyer than how the guilds and unions secure their collective bargaining agreements are some of the subject matters addressed in those agreements. The one topic reflected in all the guild agreements and in the Hollywood below-the-line agreements is generically referred to as residuals, a term familiar to the public at large. The concept of residuals is unique to the entertainment industry collective bargaining agreements. It is hard to think of any union contract outside the entertainment industry where after employees are paid for their labor in creating a product, additional money is paid to or for the benefit of those same employees because of the continued use of the product they made. An analogy would be if the United Auto Workers secured a clause in their agreements with the big three auto makers providing that any time a car made by its members exceeded 50,000 miles, an additional payment would be made by the car company to or for the benefit of the employees who made the vehicle, with further payments after each additional 50,000 miles.

All of the guild agreements contain “residual” provisions, but that term technically is only applicable to the continued exploitation of television programs and television commercials in the same market for which they were originally produced. A rerun of a television program on television is a reuse and generates a residual. The release of a feature film on television is a not a reuse but a new use in a different market and generates
a different kind of payment. Residual payments are calculated on a formula related to the original compensation paid for the service, whereas a new use payment is based on the revenue derived from the new use. Television residual payments, though based on original compensation or applicable minimums are not fixed in stone and decrease with reuse. The second network prime time run of a program generates a significantly higher residual payment than a fifth run after the late night news. Residuals in television commercials generate the most revenue for the performer because the initial payment buys out the right to use for only a limited period of time. To air that commercial again after the initial time period has run, the reuse payment equals the original payment for the next block of time.

The payment formulas for new use, as noted, are based on a percentage of the revenue generated from that form of exploitation. This is the area where many of the industry’s disputes arise. The percentage payments for the release of theatrical films on all forms of television and in video formats are based on contract definitions of “producer’s” or “distributor’s” gross. While there was an effort to standardize the provisions across the guild agreements and the Hollywood craft union agreements to provide for consistency in administration, there is not total consistency in the interpretation of these provisions on either the union or producer/distributor side. One reason is that each union group is dealing with a different constituency. There may have been six writers who worked on a feature film, but only the one(s) accorded screen credit as determined by the WGA receives those new use payments. The director of a feature film secures the full amount of the new use payment from the exploitation of his or her film on free television, but shares a larger payment derived from pay television and video with his guild-represented production team. As for performers, the entire cast shares in the new use payments from all markets on a complex formula set forth in the SAG Agreement. The largest new use payments from the exploitation of feature films are specified in the IATSE Basic Agreement but go to the Motion Picture Industry Pension Plan, where the benefit inures to many more individuals than the original production crew. Similarly, the AFM agreements also call for payments generated by the new use of motion pictures and television programs. The percentage payment generated goes to the Film Musicians Secondary Markets Fund, which technically acts as the distribution agent for the contributing producers, who did not want the burden of figuring out how to allocate the new use payments among the musicians who participated in creating the music track for the title involved.

There is only one market where it can be safely assumed that the continued exploitation of a motion picture will not impose a continuing payment obligation, and that is its exhibition in the traditional theatrical venue—a movie theatre before a paying audience. Under the guild agreements, the release of a television motion picture theatrically is considered a “new use” and triggers a theatrical use payment. However, that payment does not convert the title to a theatrical film, and its continued exploitation on television generates residuals.

While residuals and new use payments are common to both the guild and Hollywood craft union agreements, the guild agreements each contain provisions totally unique unto themselves and which bear no resemblance to provisions found in union negotiated agreements in any other industry.

**Separated or Reserved Rights**

Residuals and new use payment obligations are not the only encumbrances on the product in which motion picture and television producers invest. One of the most unique restrictions are those on the ownership rights in the literary material written by writers employed by WGA signatory production companies or purchased by those companies from “professional” writers. Those restrictions are generally known by the terms “separated” or “reserved” rights. Though these provisions vary as between motion pictures and television, they arise from the same issue that the WGA sought to overcome for many years—that the “copyright” of literary materials written by “employees for hire” belonged to the writer’s employer. The history of how these provisions found their way into the WGA Agreement deserves comment.

Prior to the advent of “talkies,” movie producers needed only loose story lines with shooting scripts. As early as 1921, the writers employed to do this work formed the Screen Writers Guild. With the advent of “talkies,” the film studios needed better quality stories with scripted dialogue. They would purchase the “movie” rights to a successful published novel, but the copyright of the underlying work remained with its author. The studios’ copyright ownership was limited to the script written by the writer they hired to do a screenplay adaptation and the resulting film, if produced. Because the studios wanted full control and ownership of the films they produced, they would hire writers to write original stories and screenplays for which the studios became the full copyright proprietor. Some of the writers they hired as “employees for hire” were published authors who with respect to their works were the copyright owner. The conflict over “ownership” of literary material was one of the major reasons these writers sought union representation in dealing with the film producers, and in 1933 the Authors League merged into the Screen Writers Guild.

While collective bargaining recognition was secured, it was not until the advent of television that the issue of ownership of literary material was resolved at the bargaining table. The first major dramatic works produced for television during its “golden age” were live presentations, essentially the telecast of a legitimate stage presentation. The authors of those televised stage plays were the same authors of plays presented in live theatres on Broadway and elsewhere. Those authors were the copyright proprietors of their works. While they would license the television rights, the rights they licensed were limited in time. These authors, many of whom also wrote screenplays, wanted ownership rights and sought strong union representation. They had been unable to secure collective bargaining rights in their dealings with the League of Broadway Producers because they were deemed “independent contractors,” not common-law employees. But when they were hired by the studios, they were hired as employees and their employers owned the material they wrote.

In the early 1950s, the East Coast writers and the West Coast writers merged and formed the Writers Guild of America to represent writers in both motion pictures and television. The newly formed WGA had increased leverage in part because the bargaining units representing writers were fragmented. The WGA had separate theatrical agreements with the major
studies and major independent producers, and separate television agreements with the major film studios, independent television production companies, and the three major broadcast networks. As a consequence, the WGA was bargaining with different competitive employer groups during the early 1950s, a circumstance that permitted it to play one off against the other in its effort to secure, to the extent possible, control over original literary material for the writers of that material.

The provisions that went into the feature film agreements were not the same as the television provisions, which were far broader. The creator of a television series controls all rights related to that series, including theatrical rights, dramatic rights, publication rights, merchandising rights, radio rights, live television rights, interactive rights, and all other rights, excluding only sequel rights. Though the employer may have owned the copyright if the series creator was an employee when he or she wrote the pilot script, all that employer essentially got was a license to produce a series based on that script. All other rights were reserved to the creator, the writer whose credit for the pilot script and series read “created by,” a credit that can only be accorded by the WGA in the credit determination process it controls. The writer with a “created by” credit will be paid a sequel payment for each episode of the series produced, and residuals as those episodes are rerun.

THE PROCESSES FOLLOWED IN THE ENTERTAINMENT INDUSTRY BEAR LITTLE RESEMBLANCE TO THE CONVENTIONAL PRACTICES OF THE MANUFACTURING, RETAIL, OR SERVICE INDUSTRIES.

If the producer fails to produce a series based on the pilot script within a specified time period, the sequel rights revert to the writer, who can sell the series concept to another producer. The writers of long-form television movies who are accorded credit by the WGA in the form “story by” or “written by” also enjoy separated rights but they are significantly different, particularly with respect to sequel rights. If the producer wants to exploit any of the writer’s reserved rights, the WGA agreement has complex provisions dictating the negotiation process the producer must follow in dealing with both the writer and the WGA.

On the motion picture side, the structure of separated rights differs. This is the area where the producer traditionally enjoyed full copyright ownership of the material it hired writers to write. Separated rights for a theatrical film are accorded for the writing of an “original story” or “original story and screenplay.” The entitlement to those rights is reflected on the screen credits accorded for the work primarily by a “story by” or “written by” credit, though there are some other credit forms that connote separated rights. Separated rights in theatrical films are limited to “publication,” “theatrical [live dramatic],” and “sequel” rights. As in television, residuals and new use fees go to only credited writers. Unlike television, if the writer wants to reacquire the rights to his or her screenplay if not produced within a specific time, the writer must repay the studio what he or she was paid for his or her services and must also agree to bind any purchaser of the theatrical rights to repay the original studio other sums it had spent on the development of the property. If a film is produced and either the producer or writer wants to exploit any of the reserved rights, there are specific provisions in the agreement setting forth the procedures that must be followed.

While the WGA was seeking to secure for writers control over the literary material they created, the DGA had a different agenda. The DGA sought for its director members control of the production process so the directors could realize their vision of the story embodied within the writer’s screenplay. Though the DGA secured initial recognition from the Motion Picture Producers Association in the late 1930s, it was not until the early 1960s that the DGA first started to secure in its collective bargaining agreement provisions that are now referred to collectively as the “director’s creative rights.”

The first of the rights it sought and which was strongly resisted by the producers was the right to a “first cut.” Previously, the editing of motion pictures was the domain of the film editor, who was supervised by the producer, who determined the final edited version of the film for release. With the rare exception of directors like Billy Wilder, Frank Capra, and Alfred Hitchcock, who had the individual clout to secure editing rights, directors were frequently excluded not only from the editing process but also even the editing room. Ironically, it took the advent of television to ultimately give the directors of motion pictures the right to edit their films. It was the “golden age” of television that had introduced the directors of live dramas to television, and they had controlled what the television viewing public saw. When those same directors started working in filmed television, they couldn’t believe they were being denied the right to put their productions into final form for viewing. The right of the directors to edit their work became the major negotiating issue, and it was only after the directors told the producers it was so important to them that they would do it for free that the producers ultimately agreed that the directors of both feature films and television would have the right to do the first “cut” of their work. Motion picture directors get 10 weeks to do their cut of a film, and television directors also get the right to do a first cut although the time periods vary. Protections went into the agreement to protect that right—no one can “cut behind” the director, and no one gets to see the director’s work until he or she completes the first cut, and then the director is only required to show his or her cut to the producer and the studio executive, who has final cutting authority.

Further “creative rights” provisions were negotiated that essentially give the director full control over all aspects of production once a project is green lit. Directors are not only...
involved in all aspects of pre-production, they also have effective control over who is employed to work on the film, from cast to DGA-represented members of the production staff to key technical crew members, production locations, and shooting schedules. Once the director has completed 90 percent of scheduled photography, his or her post-production creative rights vest. While the director can be replaced for that last 10 percent, he or she cannot be replaced by someone who has been on the production at any point after photography starts, be it by a lead actor who has clout or the producer who is not happy with the daily rushes. The requirement that a stranger to the project be brought in to take over as the director is a real disincentive to replacing the director. Once the director completes 100 percent of scheduled principal photography, he or she cannot be replaced except for “gross willful misconduct,” a high standard to satisfy and seldom done successfully.

While directors are not compensated for their post-production services, including their 10-week cutting period, they continue to have the right to be involved in every aspect of post-production. This includes the selection of the composer, the recording and placement of music, and the creation of sound and visual effects to be included in film. They have a right to have a preview of their cut before a public audience. They are entitled to be present and consulted with respect to editorial changes the producer wants to make. If additional photography is needed, they have the right to direct it. If dialogue needs to be replaced, they have the right to direct the performers recording that dialogue. If the producer objects to the rating given the film by the Motion Picture Association of America (MPAA) and lodges an appeal, the director has the right to participate. After a feature film has completed its initial theatrical run, if the film needs to be edited for time or content for release to “in flight” or on television, the director has the right to do that editing. The creative rights of television directors are comparable, but the exercise of these creative rights are subject to the director's availability, and because of the time exigencies of television production, some of these rights are not exercised as frequently.

No collective bargaining agreements of which I am aware give to covered employees the same level of control over projects with multimillion dollar budgets as that accorded to directors, albeit denominated “creative rights.”

From time to time, the creative rights of the director have clashed with the rights of a film’s credited writers. In past negotiations, the WGA has bitterly complained to the producers that according a director a presentation credit on screen and in paid advertising in the form “A Sam Jones Film” or “Sam Jones’s [Title]” creates the impression of “authorship” and demeans the writers’ credit. The issue became so hot that in the late 1960s the DGA threatened to go on strike over the WGA’s agreement with the producers to limit those and similar forms of possessive credits to only directors who were also the credited writer of the film. While jokingly referred to as the threatened “apostrophe” strike never materialized after the intervention of Lew Wasserman and a committee of studio heads who joined the negotiations. A permanent producer’s creative rights committee was formed and an accommodation was reached with the WGA and DGA. From that point forward, the creative rights of directors was assured.

FINANCIAL ASSURANCES
There is one area unique to the entertainment industry that generally shocks traditional labor lawyers when called to their attention. It’s a practice now common to all three of the major guilds, euphemistically referred to as “financial assurances.” It is not uniformly applied, and its validity is questionable under the National Labor Relations Act (NLRA). In a nutshell, it’s a requirement that a producer demonstrate financial viability both in respect to its ability to pay the wages and benefits earned by its guild-represented employees during production and also to satisfy the guilds’ projected expectation of future residuals and new use payments.

WHILE RESIDUALS AND NEW USE PAYMENTS ARE COMMON TO BOTH THE GUILD AND HOLLYWOOD CRAFT UNION AGREEMENTS, THE GUILD AGREEMENTS EACH CONTAIN PROVISIONS TOTALLY UNIQUE UNTO THEMSELVES.

For the independent producer making one picture at a time, the financial assurances it is required to provide include security agreements and form UCC-1, which provides the guilds a security interest in the producer's film. In some cases, the producer is required to give SAG a deposit or letter of credit in an amount sufficient to cover the highest two weeks of projected cast payroll and benefits, and an additional deposit to cover SAG’s projection of anticipated residual obligations. The guilds may, in lieu of a residual deposit, accept being a party to a distribution agreement provided that agreement guarantees that residuals receive payment priority. While the WGA is not in a position to obtain security agreements or residual deposits before a screenplay is written or the film is produced, it has a provision in its agreement that provides that the WGA is to be provided with the same financial assurances as those provided to SAG and the DGA. In the absence of financial assurances at the time the writers perform their work, the WGA requires new signatures to its agreement to provide the written guarantee of the owner of the signatory company, be it an individual or a corporation. Many such personal guarantees have been executed by individuals who had no understanding of the scope of the obligations they assumed. SAG holds the deposits it requires in its own accounts. When the DGA requires a production deposit, it prefers that deposit be held by an independent third-party payroll company servicing the production, only to be released after the DGA confirms that all required wages and benefits have
been paid and there are no outstanding claims. The IATSE also requires production deposits from single production independent producers, but follows the same practice as the DGA with respect to the depository. The guilds and IATSE have exempted the major studios and a group of the more significant production companies, which have an established record of meeting their obligations and which meet defined standards from the foregoing requirements.

What surprises traditional labor lawyers about these “financial assurance” practices is their knowledge that the NLRB ruled many years ago that all of these forms of financial assurances are “nonmandatory” subjects of collective bargaining, meaning that a labor organization could not insist to impasse or go on strike to secure the same. Ironically, this original determination dates from the very early years of the NLRA and predates the 1948 Taft-Hartley Act. Those early cases involved demands by employers that unions provide a surety bond to assure their compliance with their “no strike” agreement, or that their parent international union guarantee their performance. The NLRB ruled that an employer could not insist to impasse on these types of performance assurances from the union representing its employees, and later issued consistent rulings when labor unions made similar demands at the bargaining table. However, to the knowledge of the author, neither the courts nor the NLRB has considered the validity of these types of provisions in light of a provision in the Taft-Hartley Act. While the NLRB has ruled that these provisions are not mandatory subjects of collective bargaining, they are “permissive” subjects of bargaining and subject to “voluntary” agreement and inclusion in union agreements.

The nature of collective bargaining between an independent producer and SAG or the DGA is hardly the model of free collective bargaining that labor lawyers deal with in other industries. These guilds have mature collective bargaining agreements that took them years and multiple negotiations to develop, and the independent producer seeking to employ guild-represented talent has no leverage and signs on to these agreements because he or she has no alternative. When I once suggested to a prominent independent producer that there was a legal basis on which to challenge the validity of the production and residuals deposits demanded, his response was short and to the point, “I am interested in making a movie, not legal precedent!”

CONCLUSION
While many of the practices followed in motion picture and television production run counter to the substantive labor practices in other industries, be it in how contracts are secured, the subject matters covered, or their administrative or enforcement procedures, these unique aspects work well and serve the mutual interest of both labor and management in producing motion pictures, television, and the new forms of recorded visual entertainment. While there has been the occasional disruptive strike, labor and management have worked together and resolved issues related to the introduction of new production technology and the new multiple forms of exploitation. In the end, both management and labor have demonstrated the same shared interest—to make movies, not labor law precedent.

ENDNOTES
1. A term initially meaning video cameras that now also includes digital photography.
2. Even though the SAG-AFTRA franchise agreement expired in 2002, most talent agencies continue to utilize the standard forms developed by the ATA for their representation of talent.

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THE MUSIC BUSINESS PRE-DIGITAL

In the world of traditional media—radio and television primarily—the music licensing process has evolved into a fairly straightforward process. For musical compositions, songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC (performing rights organizations or PROs), which negotiate license agreements for the use of music, collect the fees, and distribute them back to writers and publishers who have performances in specific media. If the PRO and a user cannot come to an agreement as to license fees, courts intervene and determine “reasonable fees” for music use.

In the area of sound recordings, performances on traditional over-the-air radio are exempt from royalties and considered as “promotional” tools to drive sales. A record company’s main source of income, other than record sales, comes from the licensing of master recordings to television series, feature films, and advertising commercials, among other uses. And then came the online/digital world—a technological revolution that changed everything.

A rather simplistic view of the music business, but one that serves as an appropriate starting point for an increasingly changing and complex business.

MUSICAL COMPOSITIONS

In the United States, there are three primary organizations that represent songwriters, composers, and music publishers on a nonexclusive basis in the negotiation, collection, and distribution of music performance license fees. The organizations are the American Society of Composers, Authors and Publishers (ASCAP, 1914); Broadcast Music, Inc. (BMI, 1939); and SESAC (1930). They are referred to as performing rights organizations (PROs). The primary sources of license fees are traditional radio, broadcast and cable television, and general licensing (live performance, music in bars and restaurants, etc.).

New media license fees, which include online and digital music services, currently represent a relatively small portion of U.S. domestic music license fees (approximately $100 million of a total annual U.S. domestic PRO collection of $1.4 billion). Royalty distributions are made 50 percent to writers and 50 percent to music publishers after operating costs are taken into account (approximately 12–13 percent in the case of ASCAP and BMI). There is a PRO in practically every country of the world where, via reciprocal agreements with ASCAP, BMI, and SESAC, U.S. writers’ and publishers’ works are represented and paid for when performances occur in foreign territories.

In the case of ASCAP and BMI, both entered into consent decrees with the government in 1941, with amendments to those decrees in 1950, 1960, and 2001 in the case of ASCAP, and in 1966 and 1994 for BMI. One aspect of these decrees that has had a significant effect on the determination of license fees is the existence of a separate “rate court” for ASCAP and for BMI, which comes into play when the PRO and a music user cannot come to a negotiated agreement as to what “reasonable” license fees should be in any given area. The decree allows any party to apply to the court (U.S. District Court for the Southern District of New York) for a determination of interim and final fees. These rate courts have been in existence with ASCAP since 1950 and with BMI since 1994, and have determined fees and license terms for the major traditional media areas of radio and broadcast and cable television, as well as, in recent years, the online music community. It is in these latter “new media” decisions and settlements where most of today’s complex issues have arisen.

SESAC, the smallest of the U.S. PROs, operates on a for-profit basis as opposed to the nonprofit operations of ASCAP and BMI, is not governed by a consent decree with the government, and does not have a “rate court”-type procedure for license fee adjudications and disputes. Under a recent October 2014 settlement with the Television Music License Committee (TMLC) regarding a class action antitrust suit involving local television stations though, SESAC has agreed to binding arbitration for any future licensing fee disputes with the settlement class that cannot be resolved by negotiation. It was further agreed that SESAC could not interfere with the ability of any affiliate to issue a public performance rights license directly to a settlement class member. A final settlement approval hearing is set for March 2015 in the U.S. District Court for the Southern District of New York.

In the online world of music licensing, the ASCAP rate court has been instrumental in deciding not only what “reasonable” license fees should be but also what is actually licensable by the U.S. PROs. Interim fee and final fee decisions have involved many of the biggest players in the “new media/technology” world and have resulted in license fees significantly below what the PROs and copyright owners were requesting. To put the online fees into perspective, ASCAP, BMI, and SESAC collected approximately $1.4 billion in domestic U.S. license fees (radio, broadcast and cable television, live, etc.). Of this amount, approximately $100 million was generated from all online/digital uses. An additional $700 million is received each year by the U.S. PROs from foreign collection societies (PRS, GEMA, SACEM, SIAE, SGAE, SOCAN, APRA, IMRO, etc.) for performances of U.S. writers’ works performed in foreign countries, with a small portion of that money attributable to online uses. Most publishers, incidentally, collect their foreign country performance royalties directly from those societies as direct members or through subpublishers.

Commencing with the 2007 AOL/RealNetworks/Yahoo case, rate court filings, hearings, and decisions have involved YouTube, MobiTV, AT&T Mobility, Verizon Wireless, Spotify, Ericsson, and Netflix, among others. A brief summary of some of the most important points of these cases should help in understanding the current status of online performance licensing:

The AOL/RealNetworks/Yahoo rate court case had major worldwide significance, as there was a summary judgment ruling that the downloading of a music file did not constitute a public performance under the Copyright Act—a ruling totally contrary...
to the laws of most other countries with the exception of Canada. This decision was affirmed by the Second Circuit Court of Appeals, with cert denied by the U.S. Supreme Court. The Second Circuit also remanded the fee formula back to the district court for further proceedings.

The 2009 Verizon Wireless rate court case reaffirmed the AOL “no performance in a download” decision in a ruling that stated that the transmission of a ringtone to a cellular telephone customer did not constitute a performance, and that the mechanical ringtone rate of $0.24 per download was the only appropriate right and compensation involved. The primary issue of the 2009 AT&T case was whether previews of ringtones were to be considered “fair use” rather than licensable performances. The court ruled in favor of ASCAP, and a customer’s previewing of ringtones was therefore licensable by the PROs. An interim fee 2009 decision regarding YouTube was a good example of the size of court-set “reasonable” music license fees, with an order of $70,000 a month.

The 2010 MobiTV case involved what a reasonable license fee should be for the delivering of television programming to mobile telephones and audio channels. In this case, the court returned to the early 1990s ASCAP performance licenses with Turner Broadcasting that set a three-tiered license based on the music intensity of the program. The music intensive fee was 0.9 percent of defined revenue, with 0.375 percent for general entertainment and 0.1375 percent for news and sports programming. The Second Circuit affirmed the lower court decision.

All of the aforementioned cases were eventually settled, with additional settlements and agreements entered into with Apple, Rdio, Spotify, Netflix, Hulu, and others. Practically all settlements in this area are confidential.

**DMX and Pandora**

Two additional rate court cases, DMX and Pandora, involved not only the determination of reasonable license fees but also the role that direct licensing plays in the PRO licensing picture. Under the ASCAP and BMI consent decrees, the agreements that writers and music publishers sign with ASCAP and BMI are nonexclusive—members and affiliates are allowed to directly license their works to a music user and bypass the PRO structures entirely.

DMX is a leading background and foreground music service provider that provides preprogrammed music for business establishments via direct broadcast satellites or on-premises delivery mechanisms. DMX hired a company to assist and design a direct licensing program with copyright owners that eventually resulted in direct licenses representing over 7,000 catalogs, including one major music publisher, Sony. DMX was requesting from ASCAP and BMI a “through-to-the-audience” blanket license that reflected the DMX direct licenses already obtained as well as those to be negotiated in the future.

In July 2010, the BMI rate court entered a final rate for the blanket license subject to adjustment of DMX’s BMI performances directly licensed. In a separate decision, the ASCAP rate court ruled that ASCAP is required to issue to DMX a blanket license with “carve-outs” for the direct licensing program. Both decisions were appealed to the Second Circuit, which in June 2012 affirmed the district court decisions. The resulting rates significantly reduced the license fee that DMX was paying to ASCAP and BMI.

Pandora is the leading Internet customized radio service and is considered a noninteractive service as opposed to an on-demand/interactive service where the user chooses what he or she wants to hear. Pandora entered into license agreements with both ASCAP and BMI in 2005 and terminated those licenses at the end of 2010 and 2012, respectively. In the case of ASCAP, Pandora applied to the court for a through-to-the-audience blanket license for the period 2011 through 2015. In the case of BMI, Pandora filed an application for a five-year license commencing January 1, 2013.

Based primarily on the small license fees that were awarded by the ASCAP and BMI rate court judges commencing with the AOL/RealNetworks/Yahoo case in 2007, the major music publishers, starting with EMI (later acquired by Sony), notified ASCAP and BMI that they were withdrawing their catalogs for online licensing purposes. The majors felt strongly that they could negotiate more financially acceptable online value deals than the arrangements that had been set by prior rate court decisions and the subsequent settlements emanating from those decisions. These online media withdrawals were accomplished by specific changes in the rules, regulations, and practices of ASCAP and BMI. Upon withdrawing their works, a number of the publishers entered into direct licensing deals with Pandora, in effect creating a system whereby Pandora had licenses with ASCAP, BMI, and SESAC, as well as short-term negotiated direct performance licenses with the major publishers. Discussions were also held between ASCAP, BMI, and the major publishers with a view toward ASCAP and BMI handling the administration of the online licenses negotiated by the publishers.

In response to a motion for summary judgment in September 2013, Judge Cote, the ASCAP judge, ruled that a selective withdrawal of new media rights by publisher members could not be implemented without violating the consent decree, and further that the ASCAP repertory subject to that license is all works in ASCAP at the time Pandora applied for a license (January 1, 2011)—not when the final license is arrived at. In short, an application for a license is treated as a license in effect, and in this case no works could be removed by any ASCAP member during the period 2011 through 2015. And when works are finally removed by any publishers, those works have to be removed for all licensing purposes, not just for online licensing. Any users with license agreements still in effect at the time of the withdrawal could continue to use the withdrawn works up until their specific license agreement expires.

In a similar motion for summary judgment in the BMI case, Judge Stanton allowed the removal of works that occurred prior to January 1, 2013, but ruled that those works could not be licensed by BMI to any others after any existing license agreements expired. If BMI cannot offer those compositions to new media applicants, their availability does not meet the standards of the BMI decree and they cannot be held in the BMI repertory. The BMI-Pandora rate court trial is set for 2015.

To put both judges’ “all in or all out” summary judgment decisions into real world perspective, if one were to remove works from the current $100 million PRO annual license fee area of the online world, one would be forced eventually to remove those works from the other $1.3 billion in PRO domestic license fees being generated by traditional media (radio,
broadcast and cable television, live, etc.). Not to mention the effect that such withdrawals would have on the reciprocal “flow through of money” agreements between foreign collection societies and the U.S. PROs. As a point of reference, it is important to note that practically all new PRO licensing deals with traditional media (radio, television, etc.) include streaming, website music uses, mobile apps, digital and primary broadcasts, mobile and wireless platforms, webcasts, and multicasts.

On March 14, 2014, Judge Cote issued her “determination of reasonable license fees” 136-page decision in the ASCAP-Pandora rate court case.¹⁷ The judge ruled that the appropriate fee for the years 2011–2015 was 1.85 percent of revenue less certain deductions. ASCAP had requested a rate of 1.85 percent for 2011 and 2012, 2.5 percent for 2013, and 3 percent for 2014 and 2015. Pandora had requested a rate between 1.7 percent (the current traditional radio rate—Pandora had acquired a small radio station in an attempt to qualify for this rate) and 1.85 percent (the ASCAP form rate in effect for Pandora since 2005).

Two of the more important issues in the Pandora rate court proceedings involve the concept of the divisibility of copyrights, which allows a publisher/copyright owner to make deals with various classes of users for their catalog, and the disparity in payments between artists and record companies and songwriters and music publishers for the same type of performance.

As to the latter issue, the AOL/RealNetworks/Yahoo 2007 rate court case provided evidence of the over $30 million paid by these services to the major record companies over a two-year period, whereas their fees to the PROs were, in comparison, very small. As to Pandora, the company expended in 2013 approximately $315 million of its total revenue of $600 million on content acquisition. Of that amount, close to $290 million went to SoundExchange for artists and record companies, with all three PROs collecting a total of less than $25 million for songwriters and publishers. As a point of additional reference, total 2013 limited performance right statutory royalties to SoundExchange were $650 million in addition to significant record company interactive streaming license fees and payments negotiated with the services, whereas combined ASCAP, BMI, and SESAC revenue for all new media uses from all licenses and services was less than $100 million.

In July 2014, ASCAP, along with Universal Music Publishing, Sony/ATV Music, and EMI Music as intervenors, filed an appeal from the two district court opinions with the Second Circuit.¹⁸ The basis of the appeal was that the district court erred in ruling that the amended final judgment of 2001 prohibited ASCAP from accepting partial grants of public performance rights, and that the district court in setting a final license fee ignored recent arms-length relevant benchmark agreements.

As to the “partial grants” prohibition, ASCAP’s position was that the consent decree long ago removed any prohibition on the right of members to reserve for themselves the right to grant exclusive licensing rights to music users. Further, such a
prohibition is in direct conflict with the exclusive rights provided by the copyright law to copyright owners.

As to the issue of ignoring benchmark agreements in the setting of final reasonable license fees, ASCAP pointed out that the Universal Music, Sony/ATV Music, and EMI Music Pandora direct license deals were all in excess of the 1.85 percent court-set fees, as was the 2013 negotiated ASCAP Apple iTunes radio license—all “arms-length willing buyer and willing seller agreements.” Further, the Second Circuit, in its 2010 RealNetworks/Yahoo decision, confirmed that a 2.5 percent rate was a valid benchmark even though it vacated the district court’s across-the-board application of that rate to all of RealNetworks’ and Yahoo’s services. Accordingly, the current district court erred in ignoring the Second Circuit’s guidance in RealNetworks/Yahoo, which established that a rate of 2.5 percent revenue (or higher) is reasonable for all-audio, music-intensive digital music services similar to Pandora’s.

Direct Licensing

The ability of a copyright owner to directly license a work to a music user and bypass the PROs was a major issue in the ASCAP and BMI DMX rate court decisions as well as the current Pandora litigation. Language in both the ASCAP and BMI consent decrees guarantees the right of any member or affiliate to directly license their works to a user. SESAC, as it is not under a consent decree with the government, incorporates language in its writer and publisher affiliation agreements that insures the right to directly license—“publisher retains the right to issue nonexclusive licenses directly to any third person for the public performance of the composition in the United States, its territories and possessions, of any work subject to this Agreement.”

When songwriters, composers, and music publishers join or affiliate with ASCAP, BMI, or SESAC, they sign representation agreements granting to the PRO the nonexclusive right to license the nondramatic public performances of their works. Though each PRO contract and governing documents are different as to their terms, length of contract, withdrawal of works and resignation/termination provisions, dispute resolution procedures, payment schedules, distribution rules, and benefits, they all are nonexclusive agreements whereby the writer or publisher can license a work directly. The PROs cannot interfere in any way with this right or the ability to exercise this right.

Language as to the ability to directly license as well as the effect of a direct license has been standard in many types of industry license agreements, including work-for-hire/employee-for-hire contracts, for many decades. A sample clause might read:

The performing rights in the composition, to the extent permitted by law, shall be assigned to and licensed by the applicable performing rights organization with said organization authorized to collect and receive all monies earned from the public performance of the composition and to pay the writers and publishers directly. If to the extent it is unlawful for the PRO, or any of its affiliates, to issue blanket small performing rights licenses or the applicable performing rights society does not from time to time, for any reason whatsoever maintain a regular system of collecting performance fees and/or a third-party licensee (i.e., a television network, independent television station, digital music service, etc.) requires direct licensing of such rights, company and publisher shall have the right to directly license their respective shares of the public performance rights in the composition to such third parties. If the company or publishing designee receives a distribution of earned public performance fees from any source that does not make a separate distribution directly or indirectly to publisher and to composer, then publisher shall be entitled to receive its portion of such fees and composer shall be entitled to receive the writer’s share of such fees.

Additional variations of a direct license clause are as follows: Licensee desires to obtain from publisher a blanket license for all necessary performance, reproduction, and distribution rights implicated by the delivery of programming embodying publisher’s catalog, and publisher is willing to grant such right to license on a nonexclusive basis.

The right to publicly perform and to authorize others to perform the composition by means of a media entity not licensed by ASCAP, BMI, or SESAC is subject to clearance of the performing right either from Licensor or from any other duly authorized licensor acting for or on behalf of Licensor subject to good faith negotiations in accordance with established industry customs and practices.

An issue in many agreements is what happens to the writer share when a copyright owner, usually the music publisher, directly licenses a work to a user. Clauses range from “payments to be made based upon the prevailing PRO rates for the specific use,” “compensation to be negotiated in good faith,” “reasonable fee,” “fee subject to arbitration,” “a complete buyout with no further compensation or continuing royalties,” or “50 percent of any license fee received.”

A further unresolved issue as to an allowable and effective direct license under court consent decree interpretation involves the situation where a music user (traditional broadcaster, online music service, etc.) contacts a copyright owner directly with the request versus the situation where the ASCAP or BMI copyright owner approaches the user to negotiate a direct license—a fine distinction but an important one in current litigation and consent decree interpretation.

Department of Justice Intervention

In part because of the Pandora decisions, a major development occurred in June 2014 when the Department of Justice (DOJ) announced that it would review both the ASCAP and BMI consent decrees “to account for changes in how music is delivered to and experienced by listeners [and to determine] what modifications would be appropriate.” The DOJ allowed a 60-day period for comments from any interested party (music publishers, songwriters and composers, PROs, online service companies, music users of any nature, the general public, etc.). A cross-section of some of the views was illustrative of the issues as well as the diametrically opposed positions of many of the parties. The comments very much reflected a creators vs. users scenario.
On the music user side, the National Association of Broadcasters (NAB), the Digital Media Association (DiMA), Netflix, Fox News, the Radio Music License Committee (RMLC), the National Restaurant Association, and the Consumer Electronics Association, among others, submitted comments. The creator/copyright representative side included comments from the PROs ASCAP, BMI, PRS for Music (U.K.), SOCAN (Canada), JASRAC (Japan), and SIAE (Italy), as well as the Society of Composers and Lyricists (SCL), the Nashville Songwriters Association International (NSAI), the National Music Publishers’ Association (NMPA), and the Screen Actors Guild-American Federation of Television and Radio Artists (SAG-AFTRA), among others.

ASCAP, in its comments, requested that the rate court be replaced with a faster and cheaper dispute resolution procedure, that ASCAP be allowed to bundle and license multiple rights (the current decree prohibits ASCAP from licensing any right other than performance) and allow partial grants of rights from its members. The arguments centered on the fact that new media users need multiple rights in their business, that publishers need flexibility to manage rights and negotiate contracts terms, and that property rights are divisible, assignable, and licensable either in whole or in part. BMI, which is not prevented from bundling or licensing multiple rights, requested that publishers be allowed to withdraw digital rights and that a binding arbitration model replace the consent decree mandate.

The SCL (film and television composers and songwriters) was in favor of consent decree changes and expressed concerns that if the major music publishers withdrew completely from ASCAP and BMI, the transparency and accountability of the PRO collective licensing model would be affected, and further that in a bundled rights situation it would be difficult to ascertain the value of the performance right in bundled transactions. Most writers in this field sign “work-for-hire” contracts where the backend performance royalties represent a substantial portion of their income. The 165,000-member organization SAG-AFTRA, the largest labor union representing working media artists, commented that the scales have tipped too far in favor of licensees’ interests over those of artists and that the rate setting process set forth by the consent decrees is inefficient, expensive, and burdensome on the PROs, and if not modified will significantly devalue a writer’s works.

Sony/ATV Music supported amending the consent decrees to allow copyright owners the ability to limit the scope of the rights they grant to ASCAP and BMI in their musical compositions and to require the PROs to accept those grants; supported an expedited arbitration process for resolving rate disputes; and recommended that the reviews of the decrees occur periodically to take into account new technology changes and conditions. Sony/ATV was not in favor of allowing the PROs to handle rights other than performing rights, as it was their position that these markets already functioned well and that the introduction of such regulated entities into the market for these other rights would be costly and disruptive.

As to the foreign PROs that submitted comments, widespread concern centered on the belief that the current consent decrees were outdated in today’s world and that changes were essential if music was to be appropriately licensed and compensated. Partial grants of rights and the bundling of multiple rights are commonplace in the foreign marketplace, and dispute resolution procedures are less cumbersome than the U.S. rate court. PRS for Music in the United Kingdom, which receives over $100 million a year in U.S. performance royalties for its members from ASCAP and BMI, expressed concerns over the present decrees and stated that it would consider licensing the British repertory directly in the United States rather than through intermediaries if it proved more efficient.

DiMA, a trade organization whose members include Apple, Amazon, Microsoft, and YouTube, stated that the decrees have not harmed ASCAP or BMI financially in terms of the music industry generally, and that the PROs must be subject to oversight as their anticompetitive behavior continues to this day. Further, if the DOJ does allow all the PROs to bundle rights as well as permit partial withdrawals, such that substantial oversight must be put in place; songwriters should be allowed to keep their rights with their PRO if that’s what they wanted, regardless of whether the publisher removed the works.

The RMLC strongly felt that the decrees were necessary to keep the market power of ASCAP and BMI in check. If publishers were allowed to withdraw from the PROs, they could leverage their outsized market share to extract exorbitant license fees from licensees. Both the NAB and Television Music License Committee also shared these views. As to Netflix, its position was that the decrees were in place to constrain the PROs market power. It was against allowing partial publisher withdrawals, but if the DOJ allowed them, then conditions would have to be imposed to mitigate any adverse consequences. Finally, the rate court must stay in place though it does need to be streamlined.

**SOUND RECORDINGS**

Prior to 1972, no federal copyright protection existed for sound recordings. Congress rectified that situation by extending copyright to any recordings that were fixed on or after February 15, 1972. The owners of the copyright therefore had the exclusive right to reproduce and distribute phonorecords embodying the sound recording, including by means of digital transmission, and to authorize others to do the same. Pre-1972 recordings remained subject to the protection afforded by state laws.

As to the performance right aspect of sound recordings, the right that was enjoyed by musical compositions was nonexistent for records. No performance royalty existed in any medium for sound recordings. That changed in 1995 with the passage of the Digital Performance Right in Sound Recording Act (DPRSRA), which provided for a limited right when sound recordings are publicly performed “by means of a digital audio transmission.” The 1998 Digital Millennium Copyright Act (DMCA) included webcasting as a category of performance applicable to this limited performance right. This new right applied specifically to satellite radio (e.g., Sirius XM), Internet radio (e.g., Pandora), and cable television music channels (e.g., Music Choice). Broadcast radio continued to be exempt.

It is important to note that the statutory license applies only to noninteractive services. The right to perform copyrighted sound recordings for on-demand services (interactive services) remains with the copyright owner (normally the label) and is a negotiated agreement between the label and the music user.
These deals have taken many forms, including percentage of gross or net revenue formulas, per performance rates, an equity stake in the business, or a combination of these and other elements.

The rates and terms of the sound recording statutory license are set by the Copyright Royalty Board (CRB), an administrative body created by Congress. SoundExchange, a nonprofit organization, has been designated by the Librarian of Congress and the CRB to be the sole entity to collect, administer, and distribute the royalties from noninteractive webcasting, digital cable, and satellite transmissions and satellite audio services. Congress also gave SoundExchange the right to negotiate agreements separate from those set by the CRB through the Webcaster Settlement Acts of 2008 and 2009. Services therefore can choose whether to be licensed under the CRB rates or the SoundExchange negotiated rates.

There are five major sound recording licensing categories, each of which is subject to a separate rate proceeding. The categories are webcasting, satellite radio, preexisting music services, other cable and satellite music providers, and business establishments. An example of one of these proceedings involved Sirius XM satellite radio, which concluded in 2012 and set rates for a five-year period at 9 percent of gross revenue for 2013 increasing to 11 percent in 2017.

Webcasting IV—proceeding to ascertain the future webcasting rates—commenced in early 2014 and will conclude at the end of 2015 and will set rates for the period 2016–2020. The most recent five-year CRB per-performance statutory webcasting rates were $0.0019 for 2011, $0.0021 for 2012 and 2013, and $0.0023 for 2014 and 2015.

The Webcaster Settlement Acts of 2008 and 2009 allowed SoundExchange to negotiate alternative royalty rates ("pureplay" rates) with certain webcasters. For nonsubscription services and broadcasters streaming their content on the Internet, the "pureplay" per-performance rate started as $0.00102 for 2011 and increased to $0.0015 in 2014 and $0.0014 in 2015. The rate applicable is the greater of the per-performance rate or 25 percent of U.S. gross revenue. The "pureplay" per-performance rate for subscription services started at $0.0017 in 2011 and increased to $0.0023 and $0.0025, respectively, for 2014 and 2015. No percentage of revenue figures applied to the subscription rate. Under those agreements, webcasters therefore had a choice to be licensed through 2015 either with the CRB rates or the SoundExchange "pureplay" rates.

As to the current Webcasting IV CRB proceeding, SoundExchange's initial rate proposal for the 2016–2020 period was a "greater of" formula taking into account a per-performance rate and a percentage of the service's revenue. Specifically, the per-performance rate for commercial webcasters would commence at $0.0025 in 2016 with escalations to $0.0029 in 2020. The percentage of revenue would be 55 percent for all five years. Its proposal was based on the fact that webcasting is a vibrant and growing industry, that it has widespread adoption by consumers, and that direct licensing deals between record companies and on-demand services (interactive streaming) were the most appropriate benchmarks to use. A review of these deals confirmed that the record companies received a minimum share of 50–60 percent of a service’s revenue, with allocations based on each record company’s share of total streams.

Music services, on the other hand, argued in their direct case that the industry is not profitable even considering payments under the reduced Webcaster Settlement Act agreements. Pandora, Sirius XM (streaming component), and the broadcasters, through NAB among others, came up with proposals ranging from a royalty of $0.0005 per performance for all five years, to $0.0016 pending study of the direct deals, to a $0.000125 rate similar to the Canadian rate. Pandora supported a “greater of” rate of $0.0010 per performance or 25 percent of revenue.

SoundExchange Distributions/Direct Licenses
SoundExchange collected $650 million in 2013 pursuant to the statutory license and distributed $590.4 million to artists and sound recording copyright owners. Collections and distributions for 2014 are projected significantly higher than 2013. Royalty distributions are allocated 50 percent to sound recording copyright owners (many times the label), 45 percent to featured artists, and 2.5 percent each to nonfeatured musicians and nonfeatured vocalists via the Intellectual Property Rights Distribution Fund administered by the American Federation of Musicians and SAG-AFTRA. An additional $6 million was collected from foreign country collection societies that handle the performance right in sound recordings. As to this latter collection, it is limited based on the reciprocal right being administered in each country. As the U.S. sound recording performance right is a very limited one (noninteractive streaming primarily), it substantially reduces the amount of royalties coming into the United States for overseas sound recording performances.

Finally, in the case of rights owners wishing to directly license their works to noninteractive services and not rely on the statutory license or SoundExchange separately negotiated deals, SoundExchange does offer administration services to both labels as well as artists for those works.

Pre-1972 Sound Recordings
As previously mentioned, sound recordings fixed prior to February 15, 1972, are not subject to copyright, and any rights they do have depend solely on whatever rights are afforded to sound recording owners under state law.

In September 2014, in Flo & Eddie Inc. v. Sirius XM Radio Inc., the U.S. District Court for the Central District of California ruled in a motion for summary judgment that copyright ownership of a sound recording under the California statute includes the right to publicly perform the recording, and that Sirius XM’s streaming of the 1960s band The Turtles’ pre-1972 recordings without authorization and without paying royalties constituted copyright infringement. In November 2014, the U.S. District Court for the Southern District of New York in Flo & Eddie, Inc. v. Sirius XM Radio, Inc., ruled that Sirius XM had committed copyright infringement and engaged in unfair competition by publicly performing sound recordings owned by Flo & Eddie. These cases and their appeals as well as similar pending cases regarding the same or similar issues need to be watched, as they could have a very significant impact on future sound recording license fees and royalties to labels and artists.

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WHERE DO WE NOW STAND?

Of the two performance areas under discussion, musical composition rights and sound recording rights, the sound recording side seems much clearer than the composition side. The sound recording performance right, at least for now, is a very limited right (traditional radio, for example, is not included) and has a statutory scheme in place with rates set by either the CRB, by SoundExchange with users, or by direct negotiations between copyright owners and users. Over the past 10 years, this has been, percentage wise, by far the biggest growth area for sound recording copyright owners.

The musical composition performance right, on the other hand, has more questions and unresolved issues in the licensing process than ever before. Not only do you have unresolved rate court cases and issues affecting every aspect of the licensing of music in the “new media” world (not to mention the effect on traditional media licensing) but also the entrance into the field of new types of PRO models (music publishers, business entities, administration services, foreign territory rights management organizations, etc.). This could, depending on your point of view, significantly complicate the existing licensing structure for music users, achieve “willing buyer, willing seller” market rates for the creative community and their representatives, strengthen the arguments for licensing through the traditional PRO model, weaken the current traditional PRO structures, increase license fees and royalties in some areas with reductions in others, initiate an era of PRO selective administration services only, create new writer and music publisher royalty payment formulas, values, compensation plans, guarantee arrangements, royalty advance deals, bonus and “rewards for success” policies, and other financial incentive plans, among other possibilities and results.

In addition, the direct licensing of works by copyright owners, never a major factor in the past, has taken on new significance in not only the online “new media” world of music licensing but also traditional music licensing practices. Finally, the DOJ review of the ASCAP and BMI consent decrees, in effect since 1941, could have a significant effect on the future of music performance licensing, assuming that any changes encompass more than just minor modifications.

The foreign marketplace, responsible for the collection of over $1.5 billion in annual U.S. writer and publisher performance fees, represents an additional area of concern regarding the stability, continuation, and accuracy of “overseas” royalty payments. The issues in this area are more significant for songwriter and composer royalty payments than music publishers, as many publishers collect their monies directly from foreign societies as members or via subpublishers. For successful songwriters, film and television composers, and writer estates, foreign royalties—for many, easily in excess of 50 percent of their short-term and long-term royalty income—have always flowed through the societies through reciprocal agreements, and any change in those relationships could have a major impact on the ability to license, track, audit, collect, and receive foreign country songwriter and composer royalties.

The best advice for the future—in all of your deals, negotiations, and contracts—“prepare for every contingency and possibility,” as they may very well come true. Welcome to the “new world of performance licensing.”

ENDNOTES

2. See Meredith Corp. v. SESAC, LLC, No. 1:09-cv-09177-PAE (S.D.N.Y.).
5. United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).
19. See United States v. ASCAP, 627 F.3d 64 (2d Cir. 2010).


37. 37 C.F.R. § 380.3.


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