Dear Forum Members,

Welcome to Issue 34:2 of the Entertainment and Sports Lawyer! This is the first issue for 2018, and in case anyone has not noticed…it’s cold! Florida has snow! The East Coast has been buried in sub-zero temperatures and feet of snow! Of course…here in Chicago, we merely call that “Thursday.”

It is with a heavy heart that this column is written. The entertainment industry recently lost a dear friend. Our long-time colleague and cherished member of the Forum’s Governing Committee, Richard Rappaport, passed away in Miami on December 16, 2017 after a brief illness. Richard, one of the founders and driving forces behind our annual Entertainment and Sports Law Symposium in Miami, was truly a distinguished gentleman and a credit to our profession. Not merely an outstanding attorney beloved by his clients, he was respected by his colleagues. Richard’s kindness, grace, and warmth will be sorely missed by all who had the pleasure of knowing him. We invite you to join us and members of Richard’s family at the annual conference in Miami where the initial Richard Warren Rappaport Memorial Lecture will be given by John Capouya, Associate Professor of Journalism at The University of Tampa.

2018 marks the 20th Anniversary of the Entertainment Law Initiative and its national legal writing contest co-sponsored by the American Bar Association. The ELI invites law students to write a 3000 word essay about an issue the music industry currently faces. All essays must propose a solution. Winners of the competition have gone on to successful careers in music, entertainment media, and beyond. Prizes include tickets to the 60th Annual GRAMMY Awards Telecast and other selected GRAMMY Week events, a ticket to the Annual MusiCares Person of the Year Tribute Gala, and more. For more information visit www.entertainmentlawinitiative.com or email ELI@GRAMMY.com. Our next issue will feature the winning essay.

In this issue, we feature Robert C. Walsh’s look at the music publisher’s legal battle with Spotify, Jeremy Evans guide to drafting enforceable arbitration clauses in online entertainment contracts, and K. Eli Akhavan’s primer on asset protection for professional athletes. Jeremy Evans also takes another look at the blurred lines regulating talent representation. Michelle Wahl and her team of Law Student Authors and Young Lawyers provide us with yet another stellar
Litigation Update which should be kept on every practitioner’s shelf.

We are proud to present poignant recaps of our Annual Meeting in our series: A Law Student’s Perspective. Newly admitted attorney, Amanda Alasauskas tackles both “How ‘Bigly’ is the Future of the Music Industry” and “Trademarks, Counterfeits, and Piracy! Oh My!” Kate Drass presents her take on the panel that addressed “Sports and Entertainment General Counsels” and “Hot Trademark and Advertising Issues in the Entertainment and Sports Industries.” D’Bria Bradshaw reports on “Ethics & The Addict: Legal Issues Related to the Attorney Practice of Law and to Representation of Celebrity Clients” and “ADR in Sports: It Fits Like A Glove.” First time law student authors Brett Greenberg and Andrew Winegar share their perspectives on “Negotiating Contracts in Entertainment and Sports” and Harry Reid’s Keynote Address, respectively.

And finally, we close with Shelly Rosenfeld’s parody of Tom Petty’s Free Fallin’—“Cold Callin’.”

We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf. The pending deadlines for article submissions are:

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Please, come speak with me at the Annual Meeting in Las Vegas, and share with me your ideas for the Journal.

Best Wishes for a Happy, Health, and Successful New (ABA) Year!

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The Music Publishers’ Legal Battle With Spotify Takes A Decisive Turn

by Robert C. Welsh

Recently, the National Music Publishers’ Association (NMPA), which represents all the major music publishers, announced it was preparing for yet another “fight” on behalf of “all songwriters” against Spotify, the popular music-streaming service. The NMPA’s call to arms came as a response to a legal position Spotify has asserted in a case currently pending in federal court in Nashville, Tennessee, *Bluewater Services Corporation v. Spotify USA Inc.*, Case No. 3:17-cv-01051 (“Bluewater Services”). In some instances, insurers have refused to defend or indemnify their policyholders against such claims, leading to insurance coverage lawsuits. Coverage litigation relating to claims alleging long-term brain injury such as CTE is still in its early stages, and courts have not yet clarified the application of key insurance coverage concepts in this field. Established judicial approaches to other types of claims alleging latent injuries or damage (e.g., asbestos and environmental claims) suggest possible answers to some fundamental coverage questions, such as which years of insurance are implicated for multi-year injuries (the “trigger” issue) and how defense and indemnity costs should be spread among triggered policies (the “scope” issue). However, for other issues, such as how policy exclusions regarding “participants” in athletic events might apply in the CTE context, case law offers less direct guidance.

In *Bluewater Services*, the plaintiff music publisher is seeking hundreds of millions of dollars in damages based on Spotify’s failure to obtain compulsory licenses for the millions of musical compositions it streams over its service. Under section 115(a) of the Copyright Act, 17 U.S.C. § 115(a), a compulsory license is required whenever a person “makes or distributes phonorecords” that embody a copyrighted musical composition. A compulsory license obtained under section 115(a), also referred to as a mechanical license, grants the right to reproduce and distribute new works embodying the copyrighted musical composition. The plaintiff contends Spotify, having failed to obtain compulsory licenses under section 115(a), is liable for statutory and/or actual damages arising from its infringing conduct.

What is Spotify’s new legal position that has so upset the NMPA? After entering into settlement agreements to pay tens of millions of dollars for past claims of non-payment of compulsory licenses, Spotify now contends it does not owe music publishers any compulsory license payments because “the act of streaming does not reproduce copies of sound recordings or musical compositions, and equally does not distribute copies of either sound recordings or compositions.” (Spotify’s Memorandum In Support For A More Definite Statement at p. 6.) While disclaiming any obligation to pay compulsory licenses under section 115(a), Spotify acknowledges that “[s]treaming does result in a public performance of both sound recordings and compositions” and, as a result, it has “paid hundreds of millions of dollars to license the public performances of the musical compositions it streams.” Id. As Spotify notes, the *Bluewater Music* complaint contains no claim for infringement of public performance rights. Id.

In light of Spotify’s change of legal position and the NMPA’s response, the *Bluewater Services* cases seem destined to result on a ruling on the merits of whether Spotify’s streaming service involves the reproduction and/or distribution of the publishers’ musical works and thus requires the payment of compulsory licenses.

**The Copyright Issues That Lie behind Spotify’s Change of Legal Position**

Spotify’s reversal of position appears to be part of a larger rethinking of the appropriate copyright labels to apply to the way computers transfer copyrighted material over the Internet.
In Spotify’s situation, advances in computer technology have made it possible for computers to stream music to consumers without causing the creation of a second copy of the musical work in the consumer’s computer. Spotify will likely argue that since its service does not cause the proliferation of “copies” as defined under the Copyright Act, it cannot be found to have engaged in any “reproduction” or “distribution” of the musical works and thus is not liable for the payment of compulsory licenses.

While the Copyright Act defines the term “copies,” it provides no corresponding definitions for the terms “copying” or “reproduction.” The absence of such definitions has left open the question whether it is possible for an infringing act of “copying” or “reproduction” to occur even though it may not involve the making of any “copies” within the meaning of the Copyright Act.

This question has real import in the context of transmission of copyrighted material over the Internet. Computers perform their basic functions by reading digital code, which requires the making of temporary reproductions. If all copying conducted by computers, regardless of how transitory, is found to be infringing, then almost any use of computers to read or process copyrighted electronic files may likewise be found to be infringing unless expressly authorized by the copyright owner.

In short, resolution of the music publishers’ claims and Spotify’s defenses will likely require the court to choose between two competing views of what constitutes “copying” or “reproduction” under the Copyright Act. On the one hand, federal courts could hold that the way computers perform their tasks is inherently infringing and thus subject to the copyright owner’s control. On the other hand, federal courts could hold that computer-generated copying is not inherently infringing and instead, infringement will depend on whether the technology causes a proliferation of “copies” or “phonorecords” containing the copyrighted work.

The Significance of the Copyright Act’s Definitions of “Copies” and “Phonorecords”

Under section 106(1) of the Copyright Act, copyright owners have the exclusive right “to reproduce the copyrighted work in copies or phonorecords.” 17 U.S.C. § 106(1) (emphasis added). Similarly, section 106(3) grants copyright owners the exclusive right “to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.” 17 U.S.C. § 106(3) (emphasis added). In turn, the Copyright Act defines “copies” as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, directly or with the aid of a machine or device.” 17 U.S.C. § 101. Similarly, “phonorecords” are defined as “material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.” Id.

Congress has amended Section 115(a) to extend the obligation to obtain compulsory licenses to what Congress calls “digital phonorecord deliveries.” In section 115(d), Congress defined a “digital phonorecord delivery” as “each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.” 17 U.S.C. § 115(d).

That same provision goes on to state:

“A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its
receipt by the transmission recipient in order to make the sound recording audible."

17 U.S.C. § 115(d) (emphasis added). Thus, the issue posed by the Bluewater Music lawsuit is whether Spotify’s “on demand interactive streaming service” is required to obtain compulsory licenses even though its service arguably does not result in a “reproduction of the sound recording or the musical work embodied therein.”

Although the Bluewater Music complaint is based entirely on a single cause of action for infringement of the plaintiff’s reproduction right (for failing to obtain necessary compulsory licenses), the plaintiff is notably vague about the specific acts of “copying” or “reproduction” that Spotify is alleged to have committed. Notably absent from the plaintiff’s complaint is any specific contention that Spotify’s streaming service actually conveys “phonorecords” of the music being streamed to the consumer that the consumer could replay or transfer at a later time. Rather, the music publishers appear to be contending that regardless of whether any other “copying” or “reproductions” occur, a compulsory license is always required simply because of the copying inherent in the way computers operate.

Is “Copying” Infringing If It Does Not Cause The Making Of Any “Copies”?

In the early copyright cases challenging computer file-sharing technologies, it was easy for the courts to conclude that such technologies were infringing because they all involved the making of additional “copies” or “phonorecords” of the copyrighted works. Indeed, precisely because those technologies were designed for the purpose of proliferating “copies” or “phonorecords” of the copyrighted work, there was no need for courts to distinguish between the unauthorized and infringing creation of additional “copies” or “phonorecords” permitted by such technologies and any incidental non-infringing “copying” or “reproductions.” Under these circumstances, it was easy to conclude that any use of computers to read or transmit copyrighted material without the copyright holder’s express permission must always be infringing.

The Ninth Circuit’s decision in MAI Systems Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993), was the first appellate decision to address the issue of whether the copying necessary for a computer to perform its basic functions was sufficient to support a claim for infringement of a copyright owner’s reproduction rights. The plaintiff was a computer manufacturer that also designed and licensed the software necessary to operate its computers. The terms of the computer software license only permitted MAI customers to use the software for their own internal information processing and therefore, as the Court concluded, “any ‘copying’ done by Peak is ‘beyond the scope’ of the license.” Id. at 517. The defendant was an independent servicer of computers. As part of its servicing of computers manufactured by plaintiff, it was often necessary for the technicians to operate the computer and its operating system software in order to make sure the machine was running properly. The plaintiff claimed that such copying was sufficient to infringe its reproduction rights.

Though acknowledging the absence of any cases “hold[ing] that the copying of software into RAM creates a ‘copy’ under the Copyright Act,” the Ninth Circuit nonetheless concluded that “the copy created in the RAM can be ‘perceived, reproduced, or otherwise communicated,’” and therefore the loading of software into the RAM creates a copy under the Copyright Act. Id. at 519. By so ruling, the Court appeared to have accepted the view that so long as the computer-generated copy is “perceivable” by the computer itself—which is presumably a prerequisite for the computer to do its job—it constitutes a “copy” within the meaning of the Copyright Act and infringes the Copyright holder’s reproduction rights. Under this reading, any computer-generated “copying” may be found to be infringing.

Not all courts have followed the MAI Systems decision. Notably, in Cartoon Network LP v. CSC Holdings, Inc., 536 F.3d 121 (2nd Cir. 2008), the Second Circuit Court of Appeal was presented with the issue of whether a cable company’s
creation of a buffer copy of the plaintiff's copyrighted television programs, standing alone, constituted an infringement of the copyright owner's reproduction rights.

The cable company's DVR system operated by sending the data stream containing the copyrighted programming to the cable company's server, which consisted of two data buffers and a number of high-capacity hard disks. *Id.* at 124-125. As the first stream of data moved through the server's primary buffer, the server identified any customers who wished to record the program. For customers seeking to record the program, the data stream was sent to the second buffer, which then recorded the program on the hard disks allocated to those requesting customers. This process occurred very quickly as the data residing on the first buffer was automatically overwritten and replaced with new data every tenth of a second. *Id.*

The lower court had ruled that the DVR system infringed the copyright owners' rights by (1) creating a buffer copy of the copyrighted data stream, and (2) by allowing consumers to store "copies" of the programming on the cable company's server. The Second Circuit reversed both of the lower court's findings.

The Court ruled that any resulting personal "copies" of the copyrighted television programs (which were stored in the cable company's hard disks) were made at the direction of the consumer, and thus the cable company was not directly or contributorily liable. *Id.* at 130-133. As a result, the cable company could only be held liable if the first buffer copy that the cable company made—which was created before receiving notification of any consumer requests to record—was found to infringe the plaintiffs' rights.

To answer this question, the Court turned to the Copyright Act's definition of "copies" and analyzed whether the buffer copies satisfied the definitional requirements. As the Court explained:

We believe [the Copyright Act's definition of "copies"] imposes two distinct but related requirements: the work must be embodied in a medium, i.e., placed in a medium such that it can be perceived, reproduced, etc., from that medium (the 'embodiment requirement'), and it must remain thus embodied "for a period of more that transitory duration (the 'duration requirement'). [Citation omitted] Unless both requirements are met, the work is not 'fixed' in the buffer, and, as a result, the buffer data is not a 'copy' of the original work whose data is buffered.

*Id.* at 127. Although the Court found the buffer copies satisfied the "embodiment requirement" because the data was "perceivable" by the cable company's computer, the copies failed to satisfy the "duration requirement" and thus were not "copies" within the meaning of the Copyright Act. See *id.* at 127-130. As a result, the Court ruled that the cable company was entitled to summary judgment that its DVR system did not infringe plaintiffs' rights. *Id.* at 133.

In *Capitol Records, LLC v. Escape Media Group, Inc.*, 2015 WL 1402049 (S.D.N.Y. March 25, 2015), the district court addressed whether a music streaming service infringed the rights of a sound recording copyright owner in the context of a summary judgment motion brought by the plaintiff. The district court had no difficulty concluding that the defendant's streaming service infringed the plaintiff's public performance right. See *id.* at *39 (music streaming service publicly performed plaintiff's copyrighted sound recordings because the service "streams content to users by storing a single master copy of each recording in its central library and allowing multiple users to share access to that same file; no unique files capable of transmission to only one subscriber are created").
However, the district court denied summary judgment on the plaintiff’s claim that the music streaming service violated its reproduction rights. The basis for the court’s denial was lack of evidence. As the court explained, “[t]here is no submitted evidence that would allow the Court to reach any conclusions as to whether the process by which Grooveshark streams MP3 files results in unauthorized reproduction—i.e., evidence bearing on whether the streaming process creates copies of the copyrighted work that are long enough or complete enough for a the copy to be considered ‘fixed’ under the Copyright Act.” Id. at *40.³ Relying on the Second Circuit’s Cartoon Network decision, the district court concluded that the plaintiff’s evidence “fails to establish that Escape reproduces [plaintiff’s] copyrighted work “in copies,” 17 U.S.C. § 106(1), either through the uploading process or through the streaming process.” Id. Ultimately, the lawsuit was resolved without trial following the parties’ stipulation to entry of a consent judgment and permanent injunction.

The Significance of the Music Publishers’ Legal Battle with Spotify

Spotify’s apparent change of legal position in the Bluewater Music case, coupled with the NMPA’s decision to press forward with the music publisher’s claims, signals that both sides recognize the necessity of obtaining a ruling on what the district court in Escape Media referred to as “the unsettled area of law regarding the copying that is inherent in the digital streaming process.” Id. at *40. Will the court conclude that such copying is infringing without regard to whether it causes the creation of additional “copies”—or will the court follow the Second Circuit and hold that copying is only infringing if it results in the making of additional “copies” within the meaning of the Copyright Act? It does not seem to far-fetched to say that the scope of Internet commerce will be vitally affected by how this question is resolved.

¹ See A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1011 (9th Cir. 2001) (defendant allowed users to make copyrighted MP3 files “available for copying by other” users and transferred exact copies of those files over the internet); In re Aimster Copyright Litig., 334 F.3d 643, 645 (7th Cir. 2003) (service facilitated “the swapping of digital copies of popular music”) (emphasis added); Yesh Music, LLC v. Amazon.com., Inc., 2017 U.S. Dist. LEXIS 54417, at *5 (E.D.N.Y. Apr. 8, 2017) (services creates a “fixed copy” on users’ devices); UMG Recordings, Inc. v. Brown, No. 3:07CV0289, 2008 U.S. Dist. LEXIS 122123, at *7 (S.D. Ohio Aug. 6, 2008) (service allowed users to download reproductions and distribute to others); United States v. Am. Soc. of Composers, Authors, Publishers, 627 F.3d 64, 69 (2d Cir. 2010) (service “offer[ed] to users copies of recordings of musical works”) (emphasis added); Maverick Recording Co. v. Goldshteyn, Civil Action No. CV-05-4523 (DGT), 2006 U.S. Dist. LEXIS 52422, at *9 (E.D.N.Y. July 31, 2006) (service reproduced and distributed copyrighted files); Sega Enterprises Ltd. v. MAPHIA, 948 F. Supp. 923, 929 (N.D. Cal. 1996) (“A copier is necessary to play games which have been downloaded from the” service) (emphasis added).

² Interestingly, the Second Circuit specifically addressed the Ninth Circuit’s MAI Systems decision and concluded that the two decisions were reconcilable. As the Second Circuit explained: “We do not read MAI Systems as holding that, as a matter of law, loading a program into a form of RAM always results in copying. Such a holding would read the ‘transitory duration’ language out of the definition [of “copies”], and we do not believe our sister circuit would dismiss this statutory language.
Finding The Needle In The Haystack: Drafting Enforceable Arbitration Clauses In Online Entertainment Contracts

by Jeremy M. Evans, LL.M

I. INTRODUCTION

One of the larger issues in contracts today is how they fit into an online world through accepting terms and conditions on websites. In this article, we will tackle the issue of drafting enforceable arbitration clauses in the terms and conditions of websites. Digging deeper, we will look at the entertainment industry and how entertainment-type businesses have utilized terms and conditions on their websites when streaming movies, television shows, and music. We will close by looking at the best practices of drafting online arbitration clauses in the terms and conditions as being recognizable by consumers, enforceable by law, and approved by courts of law.

II. WHAT IS AN ARBITRATION CLAUSE?

An arbitration clause prevents the publicity of disputes, decreases discovery, litigation costs, exposure to class actions, with the ability to obtain a business-friendly adjudicator. In a world of social media and video recording at nearly everyone’s fingertips, discretion is appreciation. In the entertainment industry, even more so today, arbitration clauses are utilized because the only thing gaining publicity and traction should be the marketing of the film, album, single, or television show, not personal and business disputes that become public. Increasingly with the ability to become instantly

without even discussing it.”

536 F.3d. at 128 (emphasis in original). Whether the Second Circuit’s reading of MAI Systems is correct remains in doubt. Recently, in Disney Enterprises, Inc. v. VidAngel, Inc., 2017 WL 3623286 (9th Cir. August 24, 2017), the Ninth Circuit again found infringing copying on the basis of its MAI Systems holding without any discussion of the duration requirement, much less whether it was requiring that all infringing copying involve the creation of “copies” that satisfy the duration requirement. Id. at *13 – 14.

3 The quoted language is from the Magistrate Judge’s discovery report, whose recommendations were adopted in full by the district court. Id. at *1.

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infamous, arbitration clauses are very useful and appreciated when dealing with legal disputes.

An arbitration provision is something you will generally see as a clause inside a contract. Generally, it is placed towards the front of the agreement to increase exposure of the clause. It typically will include when arbitration is triggered (by some act or breach of the agreement), where the matter will be heard, who will be the arbitrator or arbitration entity, and who will bear the costs of the arbitrator to start and at the end where a decision is rendered.

Practically, an arbitrator is a neutral party, sometimes a judge or someone with relative dispute-resolution experience that can render a competent decision in a matter presented by the disputing parties. Arbitration is private and not public (unlike a court of law). Courts will not overturn arbitration decisions unless due to fraud, corruption, or misconduct by the arbitrator unrelated to the facts and circumstances of the underlying decision2 (Code Civ. Proc., § 1285 et seq.). Furthermore, the parties can sign a non-disclosure and confidentiality agreement(s) to protect the filing, process, settlement, and/or award.

Per the Association of Corporate Counsel, a sample arbitration clause would look like this:

“Any controversy or claim arising out of or relating to this contract or the breach, or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its applicable Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall take place before a panel of three arbitrators in ________________, ________.“4

A sample Judicial Mediation and Arbitration Services (“JAMS”)5 arbitration clause for a standard domestic contract would look like this:

“Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS’ Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.”6

A sample American Arbitration Association7 arbitration clause for a domestic contract would look like this:

“Any controversy or claim arising out of or relating to this contract or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules [including the Optional Rules for Emergency Measures of Protection]. The arbitration hearing shall take place in ________________, _______ before a single arbitrator. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof.”3

Per the Association of Corporate Counsel, a more complex arbitration provision would look like this:

“Any controversy or claim arising from or relating to this contract or the breach, or the breach thereof shall be settled by arbitration administered by the American Arbitration Association under its applicable Procedures for Large, Complex Commercial Disputes, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. The arbitration shall take place before a panel of three arbitrators in ________________, ________.“4

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Lastly, per California Lawyers for the Arts, a sample clause calling for arbitration would look like this:

“All disputes arising out of this agreement shall be submitted to final and binding arbitration. The arbitrator shall be selected in accordance with the rules of Arts Arbitration and Mediation Services, a program of California Lawyers for the Arts. If such services are not available, the dispute shall be submitted to arbitration in accordance with the laws of the State of California. The arbitrator’s award shall be final, and judgment may be entered upon it by any court having jurisdiction thereof.”

The Independent Film and Television Alliance have similar sample arbitration provisions. Now that we have a flavor for what arbitration clauses look like, let us turn to how consumers generally view arbitration clauses to better understand how they might be drafted and interpreted by courts of law.

III. HOW DO CONSUMERS VIEW ARBITRATION CLAUSES?

Prior to becoming a lawyer, and specifically a practitioner who uses arbitration in their practice for their clients or as a retired judge or lawyer, understanding let alone knowing what an arbitration clause is a difficult proposition. This would be akin to asking this author how to solve a quantum physics problem or for a non-mechanic to tune a 1956 Bel Air Chevrolet correctly. With specific reference to mandatory arbitration clauses found in many online contracts, arbitration is just not common enough to come across in everyday life, to understand it or to recognize it.

Furthermore, in taking a self-experiment, think about the last time you actually read the terms and conditions when you made a purchase or signed up for a social media account. How about the last time you made a purchase via Amazon.com Prime®. Did you purchase a new iPhone 8 or X recently, did you actually read the terms and conditions for the contract? You did not, unless, of course, you were an attorney litigating a case or found yourself subject to an arbitration clause which you did not know that you agreed to in the first place.

What’s more, since you did not review the terms and conditions, it is unlikely that you saw one clause or provision in the terms and conditions of the online contract. The specific provision being a mandatory arbitration clause hauling you before an arbitrator. This is important for consumers because when agreeing to online contracts you are subjecting yourself to terms and conditions you might not be familiar. In this light, arbitration clauses take away certain remedies available to consumers, like injunctions or litigation before a civil court. Remedies that might be available to consumers, but harmful to businesses. Where remedies are taken away, the law and courts in California have attempted to protect consumers, but they have been restricted due to the Federal Arbitration Act (“FAA”) and the United States Supreme Court’s interpretation of FAA preemption.

IV. WHAT MAKES AN ONLINE ARBITRATION CLAUSE ENFORCEABLE BY LAW?

Formation is the all-important term in drafting enforcement written and online contracts. Formation of a contract in the online setting requires the “reasonably conspicuous notice of the existence of the contract terms” by the business and the “unambiguous manifestation of assent to those terms” by the consumer. (Specht v. Netscape Communications Corp., 306 F.3 17 (2d Cir. 2002).) In the context of arbitration provisions in online contracts, a business would have to noticeably post the terms and conditions that included an arbitration clause on their website and the consumer would have to agree to those terms and conditions prior to the online purchase/registration.

In the online context, posting of terms and conditions is commonly seen in two formats, “Clickwrap/Clickthrough” and “Browsewrap” type agreements. From attorneys Alison Brehm and Cathy Lee with Kelley Drye & Warren LLP, describing the differences of each:
“Clickwrap and browsewrap agreements differ in presentation and functionality. Clickwrap agreements require a user to affirmatively click a box on the website acknowledging agreement to the terms of service, which are often available in a scrolling text box, before the user is allowed to proceed. Browsewrap agreements have hyperlinked terms of use that are typically found on a separate webpage, which the user does not have to visit to continue using the website or its services.

Generally, courts have declined to enforce browsewrap agreements because the fundamental element of assent is lacking. As an initial matter, because no affirmative action is required by the user to agree to the terms other than use of the website, the validity of a browsewrap turns on whether a user has actual or constructive knowledge of a site’s terms.

Restatement § 69 of Contracts (Acceptance By Silence Or Exercise Of Dominion) also provides that:

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:
(a) Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to know that they were offered with the expectation of compensation.

The seminal case using Restatement § 69 of Contracts is Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004). The court held that because the consumer took the benefit of the offer (even without an “unambiguous manifestation of assent” through a “browsewrap” type agreement), the consumer (a business) accepted the terms and conditions of the offer (and the arbitration clause) where there were multiple transactions between the parties. The court reasoned that the familiarity, occurrence, and knowledge of the consumer (a business-to-business online contract) played a role in the court’s decision distinguishing Verio from the Specht decision requiring the “unambiguous manifestation to assent” to the “reasonably conspicuous notice” of terms.

Therefore, in online contracting, when considering a consumer (non-business to business relationship), an arbitration clause is enforceable where there has been a “reasonably conspicuous notice of the existence of the contract terms” by the business and the “unambiguous manifestation of assent to those terms” by the consumer.

V. APPLICATION AND ENFORCEMENT: SELECT ONLINE ENTERTAINMENT INDUSTRY ARBITRATION CLAUSES

When considering online entertainment contracts, we are specifically referring to the terms and conditions (and arbitration clauses) contained on an entertainment-type company’s website. For example, a music streaming company like Pandora or a television, film, and original content streaming service like Netflix. Pandora’s online arbitration provision provides as follows:

“[25. Governing Law and Disputes.] (d) Arbitration Agreement. Any claims by Pandora, or claims by you that are not resolved by the Informal Resolution procedure described in section 25(c) above, arising out of, relating to, or connected with this Agreement must be asserted individually in binding arbitration administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules and Supplementary Procedures for Consumer-Related Disputes (including utilizing desk, phone, or video conference proceedings where appropriate and permitted to mitigate costs of travel). This Agreement and each of its parts evidence a transaction involving interstate commerce, and the Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) will apply in all cases and govern the interpretation and enforcement of the arbitration rules and arbitration proceedings. Judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction. In addition to and notwithstanding the terms stated above, the following will apply to your disputes: (1) the arbitrator, and not any federal,
state, or local court or agency, will have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement including any claim that all or any part of this Agreement is void or voidable; (2) the arbitrator will not have the power to conduct any form of class or collective arbitration, nor join or consolidate claims by or for individuals; and (3) you hereby irrevocably waive any right you may have to a court trial (other than small claims court as provided above) or to serve as a representative, as a private attorney general, or in any other representative capacity, or to participate as a member of a class of claimants, in any lawsuit, arbitration, or other proceeding against us or related third parties arising out of, relating to, or connected with this Agreement.

The arbitration proceeding and the results thereof will be kept confidential by each party and not used for any purpose other than a party exercising its rights and fulfilling its obligations with respect to the other party; provided, however that either party may disclose the existence and results of the proceeding: (1) as required by law, rule, or regulation; (2) to its accountants, attorneys, and other fiduciaries; and (3) to an arbitrator or third party who has exercised its rights under this section 25 for use as persuasive authority in other proceedings brought pursuant to this section 25.

(e) Limitation of Actions. Regardless of any statute or law to the contrary, any claim or cause of action you may have arising out of, relating to, or connected with your use of the Services, must be filed within twelve (12) months of the date the facts giving rise to the suit were known by you, or forever be barred.”

Pandora’s “Terms” are a “browsewrap” agreement located on their homepage, as seen below:

Would Pandora’s arbitration clause be enforceable under Specht where there is no unambiguous manifestation of assent or conspicuous notice? Possibly, if the transaction was a business-to-business relationship with multiple transactions (like Verio), but not where Pandora has failed to have a check box or pop-up specific to the terms and conditions to a non-business entity consumer trying to listen to streamed music.

Netflix’s arbitration clause in the “Terms of Use” link and provides as follows:

“[15.] Arbitration Agreement

If you are a Netflix member in the United States (including its possessions and territories), you and Netflix agree that any dispute, claim or controversy arising out of or relating in any way to the Netflix service, these Terms of Use and this Arbitration Agreement, shall be determined by binding arbitration or in small claims court. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award. You agree that, by agreeing to these Terms of Use, the U.S. Federal Arbitration Act governs the interpretation and enforcement of this provision, and that you and Netflix are each waiving the right to a trial by jury or to participate in a class action. This arbitration provision shall survive termination of this Agreement and the termination of your Netflix
If you elect to seek arbitration or file a small claim court action, you must first send to Netflix, by certified mail, a written Notice of your claim ("Notice"). The Notice to Netflix must be addressed to: General Counsel, Netflix, Inc., 100 Winchester Circle, Los Gatos, CA 95032-1815 ("Notice Address"). If Netflix initiates arbitration, it will send a written Notice to the email address used for your membership account. A Notice, whether sent by you or by Netflix, must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought ("Demand"). If Netflix and you do not reach an agreement to resolve the claim within 30 days after the Notice is received, you or Netflix may commence an arbitration proceeding or file a claim in small claims court.

You may download or copy a form Notice and a form to initiate arbitration at www.adr.org. If you are required to pay a filing fee, after Netflix receives notice at the Notice Address that you have commenced arbitration, Netflix will reimburse you for your payment of the filing fee, unless your claim is for greater than US$10,000, in which event you will be responsible for filing fees.

The arbitration will be governed by the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA"), as modified by this Agreement, and will be administered by the AAA. The AAA Rules and Forms are available online at www.adr.org, by calling the AAA at 1-800-778-7879, or by writing to the Notice Address. The arbitrator is bound by the terms of this Agreement. All issues are for the arbitrator to decide, including issues relating to the scope and enforceability of this arbitration agreement. Unless Netflix and you agree otherwise, any arbitration hearings will take place in the county (or parish) of your residence.

If your claim is for US$10,000 or less, we agree that you may choose whether the arbitration will be conducted solely on the basis of documents submitted to the arbitrator, through a telephonic hearing, or by an in-person hearing as established by the AAA Rules. If your claim exceeds US$10,000, the right to a hearing will be determined by the AAA Rules. Regardless of the manner in which the arbitration is conducted, the arbitrator shall issue a reasoned written decision explaining the essential findings and conclusions on which the award is based. If the arbitrator issues you an award that is greater than the value of Netflix’s last written settlement offer made before an arbitrator was selected (or if Netflix did not make a settlement offer before an arbitrator was selected), then Netflix will pay you the amount of the award or US$5,000, whichever is greater. Except as expressly set forth herein, the payment of all filing, administration and arbitrator fees will be governed by the AAA Rules.

YOU AND NETFLIX AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further, unless both you and Netflix agree otherwise, the arbitrator may not consolidate more than one person’s claims with your claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void. The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party’s individual claim."31

Netflix, like Pandora, also has its “Terms of Use” as a “browsewrap” agreement located on their “Sign up/Register page as seen below:32
At first glance, we can see that Netflix’s arbitration clause is more detailed than Pandora’s, and it also exempts class action lawsuits (sixth paragraph of section 15) if a consumer wanted to bring such a claim with similarly situated consumers. Would Netflix’s arbitration clause be enforceable under Specht? Like Pandora, possibly, if it was a business-to-business relationship with multiple transactions like in Verio. However, with a consumer just wanting to stream their favorite television show or movie, the arbitration clause is likely to be unenforceable where there is a lack of notice and assent to the terms and conditions absent a check box or pop up requiring the act of assenting before proceeding to signing-up/registering for the service.

Are arbitration clauses for entertainment companies and their online contracts different from other businesses? The obvious answer might be “yes” where each business’s arbitration clause is likely, and hopefully, drafted differently and specific to the business’s needs. In the entertainment industry, we might see more protection against the consumer’s use of the business’s license of other’s intellectual property in music, television, and film because content and other’s rights are at the heart of the industry. This makes sense because the intellectual property is the underlying value of the service being provided (e.g., streaming of music/television/film content). An entertainment company would, therefore, want to protect itself and content owners (via a license) from harm by reducing the available consumer remedies (e.g., requiring mandatory arbitration in the terms and conditions). We can see these differences between the arbitration clauses in the sample ACC, JAMS, AAA provisions for business contracts and those with Pandora and Netflix.

Where an entertainment company might be more protective of their business model/license, how might an in-house or outside counsel attorney draft the best arbitration clause to make sure it is understandable, recognizable, and enforceable as a matter of law in the courts. That is what we will discuss last.

VI. CLOSING: BEST PRACTICES IN DRAFTING ENFORCEABLE ONLINE ARBITRATION CLAUSES

Enforceable contracts, whether written or online, turns on the formation. Formation of a contract in the online setting requires the “reasonably conspicuous notice of the existence of the contract terms” by the business and the “unambiguous manifestation of assent to those terms” by the consumer. (Specht v. Netscape Communications Corp., 306 F.3 17 (2d Cir. 2002).) In the context of arbitration provisions in online contracts, a business would have to noticeably post the terms and conditions that included an arbitration clause on their website and the consumer would have to agree to those terms and conditions prior to the online purchase/registration for the consumer to be subject to the terms and conditions.

According to Specht, the arbitration clause would need to be a part of a “clickwrap/clickthrough” agreement to be enforceable. The user/consumer would be forced to physically do something to assent to the terms. Think of the “check-box” before purchasing something or some service online as a digital signature to an agreement right before payment/registration is made. It is currently the best-known way to make terms and conditions, and specifically arbitration clauses, enforceable. It also puts the consumer on notice by having the consumer forced to click something before a purchase/use.

Per attorneys Brehm and Lee, mentioned earlier
in this article in “Click Here to Accept the Terms of Service,” they provide the following practical advice in drafting:

“Best Practices for Ensuring Enforceability”

A review of the decisions addressing online agreements—whether clickwraps, browzewraps, or a combination of both—reveals that there are a variety of ways to increase the likelihood that the agreements will be enforced, and these can be easily followed by website owners:

• There is a check-box that users must click adjacent to an affirmation similar to, “By clicking on the box, you are indicating that you have read and agree to the Terms of Use”;
• The webpage is designed so that if the user does not check the box manifesting assent to the terms, the user cannot proceed in the transaction;
• In addition to a check-box that users must click, the terms of use are available either in a nearby scrolling text box or a nearby hyperlink;
• Any hyperlink of the terms is obvious, e.g., “Terms of Use” is underlined and has decent size lettering and visible coloring (not small lettering and not obfuscatory coloring);
• Any hyperlink of the terms has a central or obvious location on the webpage, e.g., the hyperlink is directly below the “I Agree” button (not relegated to the bottom of the webpage, which would require the user to scroll down to a submerged portion of the webpage);
• Any hyperlink of the terms immediately displays the terms (instead of requiring the user to click on a series of hyperlinks to view the terms);
• The terms of use are evident in every webpage on the website (rather than visible on only one webpage), in addition to requiring users to attest that they have read the terms of use;
• The terms are in readable font (at least 12 point); and
• The agreement contains all requisite elements of an enforceable contract (e.g., consideration, sufficiently definite material terms, etc.).

Both website owners and users stand to benefit from such clear presentation of the terms. The owners have more certainty in knowing that the agreements will be upheld, and the users have a greater understanding of the terms dictating their use of the website or any commercial transaction. Ultimately, the more that an agreement looks like a clickwrap (i.e., requiring users to check the box next to the statement, “I have read and agree to the Terms of Use”), the more willing courts will be to find the notice necessary to give rise to constructive assent and enforce the agreement.

Brehm and Lee’s advice has a consistent theme: be clear, be up front, and be consistent. With online agreements, the tendency may be to hide the terms and conditions, but the opposite is true. Drafters should be making it easier for consumers to consume not only the product being sold, but also to consume the entire benefit and consequences of their assent to the agreement.

In this light, some companies with quirky personalities have turned their terms and conditions into funny and entertaining scenarios where you could imagine the wording being something like “Our Lawyers Made Us Do This” or “READ THIS BECAUSE WE MIGHT OWN YOU AFTERWARDS.” It is not advisable, but it is an interesting note because it shows some companies understand what consumers are actually agreeing to, so companies should make it clear for them to understand and assent so they can get on to enjoying the very product they are trying to purchase/enjoy.

Professor Eric Goldman of Santa Clara University School of Law has some similar, but more specific advice when drafting online agreements (and making sure online arbitration clauses are enforceable). Goldman suggests that when advising tech, entertainment, or business clients, or any business doing business online that the attorney draft a “mandatory non-leaky clickthrough agreement.” This means that the process for assent to the agreement is a single process...
and is mandatory before the consumer can move forward/enjoy the thing that they are purchasing. Non-leaky means that a person cannot bypass the “accept” button of the terms and conditions. Clickthrough means the consumer has to scroll through the agreement’s terms and conditions before clicking the accept button. In some sense, Goldman’s three-point way is to ensure everyone is on the same page when conducting business online. In the Pandora and Netflix examples, their browsenwrap agreements lacked the both the check box/pop up and the clickthrough, thus likely making them unenforceable with a non-business consumer.

It is also essential that an attorney does not just copy and paste what other companies have done with their online agreements. In this way, Zachary Briers of Pepperdine University School of Law proposes three rules when drafting online agreements. First, ensure that your contract is not illusory. If the contract reserves to one party the unilateral right to revise the agreement, provide that any future revisions are prospective only, provide notice and opportunity to opt-out, or provide a new contract. Second, maintain evidentiary support, meaning proof showing what the website looked like at all stages with screen-shots or a history, when changes were made and why, and evidence of individual assent and to what terms. For example, a consumer who agreed to the terms and conditions thirty times in a month period showing continuous access and assent to the terms. Third, avoid the “every-one is doing it meme.” Meaning, just because a large company is doing it does not make it the best way of doing things.

Let us break down Briers’s advice a bit further. First, for illusoriness, one seminal case is Harris v. Blockbuster, Inc., 622 F.Supp.2d 396 (N.D. Tex. Apr. 15, 2009). In Harris, the court established precedent that when a contract reserves to one party the unilateral right to revise the agreement, provide that any future revisions are prospective only, provide notice and opportunity to opt-out, or provide a new contract. The practical advice here is to draft agreements with clauses and provisions that stick. Meaning, do not leave open to change the contract or its terms unless it is purposeful and needed. Once you make the terms changeable, unilaterally, it takes away from the bargain agreed to between the parties, thus, making it illusory, misleading, and deceptive, even if your intention was the opposite.

If a client wants to change the agreement, send a notice. We are all used to seeing these. Sometimes we receive letters in the mail, emails, or pop-ups while browsing that notify the user that the terms and conditions for the company and those who use its services have changed. We often do not read them, but then again, we hardly read contracts as consumers unless something goes wrong. The point here is (1) as a business, to send a notice when the terms change and (2) as a consumer, to pay attention when it happens.

As an example, Pandora has a notice of change to the agreement in their terms of service, but they also provided wording that if a change were to occur, the user would be notified and have a thirty-day opportunity to opt-out. We can see the Pandora.com example below:

Pandora has drafted well because the term is not illusory by offering notice and opt-out opportunities, but also by giving itself some leeway as laws and its business model change. As an aside, another way to enhance Pandora’s “change in terms” provision would be to make clear that any revisions to the arbitration provision would only apply to disputes that arise prospectively, after the implementation of the revision, and not to previously accrued disputes.

As far as evidentiary support, this makes
sense and is likeable to our elementary mathematics teacher telling us to show our work. Businesses need to keep evidence handy showing what they did and did not do. Furthermore, businesses, with all of the technology and search programs, need to reasonably keep track of who is visiting their site and why. This is good for advertising and consumer use, behavior, and sale projections, but is also important for litigation and proving that something did or did not happen.

Lastly, as our mother’s would tell us growing up, be the leader, do not follow Johnny jumping off the cliff. In business, the same principle applies. The worse thing a new or existing business can do is copy something from another business. Without a mandatory non-leaky clickthrough agreement, the Netflix and Pandora examples provided above are completely unenforceable in most states because they lack conspicuous notice to the terms. The difference here between browswrap and a clickthrough agreement being an unenforceable contract and the attorney drafter possibly losing his job or worse.

In closing, the pop-up or check box and mandatory clickthrough requiring the consumer’s signature and review places the terms and conditions before the consumers eyes so that they have the option to review the agreement and its terms and conditions/terms/terms of use. With the above, you can have the consumer “unambiguous[ly] express their] manifestation of assent to those terms” (including an arbitration clause) by having the business place its terms (including an arbitration clause) on its website prior to purchase/use with a notice providing “check-box” accept button that is a “reasonably conspicuous notice of the existence of the contract terms.” In this manner, the consumer can find the needle in the haystack and the business will have drafted an enforceable online arbitration clause.

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13 Id.
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19 DashFarrow.com LLP, “Website Agreements: Browse-wrap vs. Clickwrap Agreements,” July 19, 2012 (http://www.dashfarrow.com/website-agreements-browse-wrap-vs-clickwrap-agreements/): “A Browse-wrap agreement is one where the terms of an agreement are located on a website, but are often connected to the main web page of the product by a hyperlink to another web page that contains the contracts terms and conditions. Normally there is no affirmative manifestation of assent necessary to agree with the terms located on the linked web page. The customer must also affirmatively click the hyperlink to even access and become aware of the terms of the agreement.” (Last accessed on 9/21/2017)
20 Alison S. Brehm, Cathy D. Lee, “Click Here to Accept the Terms of Service,” Communications Lawyer, Vol. 31, No. 1, American Bar Association, January 2015
21 The phrases “terms of use” and “terms of service” are often used interchangeably. See Be In, Inc. v. Google Inc., No. 12-CV-03373-LHK, 2013 WL 5568706, at *6 (N.D. Cal. Oct. 9, 2013)
23 Be In, 2013 WL 5568706, at *6
The Best Offense is a Good Defense


Restatement § 69 of Contracts (Acceptance By Silence Or Exercise Of Dominion)

Register.com, Inc. v. Verio, Inc., 356 F.3d 393 (2d Cir. 2004)

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Netflix.com (https://www.netflix.com/) (Last accessed on 10/10/2017)

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A Primer on Asset Protection Planning for Professional Athletes

by K. Eli Akhavan, Esq.

Advisors, agents and managers need to provide asset protection guidance to their professional athlete clients. While asset protection planning may also be part of an estate plan for a professional athlete, this article’s focus is primarily on creditor protection and shielding a professional athlete from frivolous and aggressive litigation. Professional athletes have heightened exposure to litigation and risk and require asset protection planning for the following reasons:

- Income and wealth levels are reported in the media
  - Due to the public nature of professional athlete contracts, player salaries and fortunes are popular media fodder. Social media and the internet may serve as sources of marketing and riches for professional athletes, but they also publicize their wealth levels.
- Romantic relationships
  - Professional athletes’ romantic relationships may oftentimes be tumultuous and they can be the subject of civil and criminal liability. Additionally, professional athletes may have multiple personal relationships that may result in substantial child support and alimony obligations. Professional athletes are also frequent targets of paternity lawsuits.
- Luxury goods
  - Since professional athletes accumulate a large amount of wealth in a relatively short period, they often spend on luxury items such as multiple homes and vehicles in excess of their earnings. If these assets are not titled properly, they are subject to public scrutiny and lawsuits.
- Luxury goods
  - Since professional athletes accumulate a large amount of wealth in a relatively short period, they often spend on luxury items such as multiple homes and vehicles in excess of their earnings. If these assets are not titled properly, they are subject to public scrutiny and lawsuits.
  
Non-expert advisors and misguided investments
- Many professional athletes turn to family and childhood friends who are not experts in financial advisory for guidance and management. This in turn may lead to financial ruin and lead professional athletes to declare personal or business bankruptcy. Additionally, many professional athletes invest with friends and acquaintances out of feelings of loyalty and guilt for having “made it.”

As such, the following outlines asset protection methods and techniques that can be used by professional athletes and their managers and agents to help preserve and protect their clients’ fortunes.

Privacy and Anonymity – How to Title Assets

Professional athletes who desire privacy and anonymity should own assets through entities such as revocable living trusts, irrevocable trusts and limited liability companies (LLC). With respect to both revocable living trusts and irrevocable trust, title to an asset is held in the name of the trustee on behalf of the trust. The professional athlete and those closely affiliated with them should not be the trustee so that they do not appear in the chain of title for a particular asset.

In terms of benefitting from the assets of the trust, the professional athlete may be a beneficiary of the revocable living trust. It must be emphasized that a revocable living trust does not provide any form of protection from creditors nor does it protect from estate taxes. The primary purposes it can serve for a professional athlete is to guard the beneficial owner’s identity. In many jurisdictions the revocable living trust can also avoid probate for the assets owned by the trust. With respect to an irrevocable trust, the professional athlete may be a discretionary...
A professional athlete may be a discretionary beneficiary of income and principal of the trust and still be protected from creditors if the trust is established in jurisdictions which have enacted self-settled statutes. Currently, there are 17 states which have enacted such legislation.

While the professional athlete’s name may be listed on the trust agreement, the trust agreement itself is usually a private internal document that does not need to be filed with public recording agencies. However, if there is a concern that the trust agreement may become public record, the document can refer to the athlete indirectly through devices such as “descendant of X”, “youngest child of Y”, etc. Additionally, where appropriate, the trust agreement may provide for a Trust Protector that can be given the power to add beneficiaries to the trust in the future. Of course the Trust Protector can be a friendly party to the professional athlete.

With respect to an LLC, title to the asset will be held by the LLC with the manager of the LLC signing on behalf of the entity. Care should be taken that the LLC is set up in a jurisdiction that does not require reporting the identities of the beneficial owner of the LLC. The two fundamental governance documents with respect to an LLC are its articles of organization and its operating agreement. The beneficial owner’s name generally does not have to appear in the articles of organization which is generally a public record. The operating agreement, which names and lists its owners is generally not part of public record. If reporting of beneficial owners is required, or if there is concern that the operating agreement may be made public, then the members of the LLC can be entities affiliated with the professional athlete so that the professional athletes name does not appear on documents related to the LLC.

**Umbrella Insurance**

The starting point of any asset protection plan is umbrella insurance. Umbrella insurance protects additional insurance on top of homeowners and vehicle insurance to protect in the event of excessive liability and devastating judgment. The advantages of umbrella insurance is that it can serve as source of funds for legal defense, property damage to others, lawsuits involving defamation, and injury or damage to tenants. Umbrella insurance does have signification limitations. It generally does not protect from intentional and criminal acts by the athlete such as battery and sexual assault. Additionally, umbrella insurance does not provide coverage for punitive damages.

Umbrella insurance policies should carefully be reviewed to accurately determine which claims are covered and which claims are excluded. Accordingly, while umbrella insurance is necessary for any asset protection plan, it is not a substitute for a comprehensive asset protection plan to shield the athlete.

**Limited Liability Companies**

Many athletes own substantial tangible and intangible assets as well as real property that can be subject to creditor claims. For assets that are being held for investment and business purposes, they should be held by multi-member limited liability companies. Multi-member limited liability companies should segregate assets based on liability. For example, if an athlete owns residential property in Miami Beach, and rents it out part time, the property should be held by an LLC with no other assets held by the same LLC. When more than one asset is held by the same LLC, each asset is subject to the creditor claims of the other asset.

The LLC will afford a two-pronged protection for both “inside” and “outside” liability protection:

1. “Inside liability” protection – “Inside liability” refers to liabilities arising from the assets held by the LLC. For example if there are any liabilities arising from the Miami Beach rental property (e.g., gas leak explosion, swimming pool death, slip and fall during a party, etc.) the athlete’s personal liability is limited to the value of the LLC assets. Accordingly, rental real estate should be held in its own LLC without any other assets, so that in the event of a liability judgment arising from the property,
the athlete's assets outside of the LLC will not be exposed. Of course, the LLC is a business entity, and business entity formalities and purpose must be followed to ensure liability protection.

(2) “Outside liability” protection – In addition to “inside liability” protection, an LLC shields the assets it owns from “outside liability”. Outside liability is liability arising from claims unrelated to the assets of the assets held by the LLC. For example, in the case of the LLC that owns the Miami Beach property, an example of outside liability with respect to the LLC is liability arising from a car accident or assault claim. If there is a large judgement arising from outside claims, the assets in the LLC generally are not subject to creditor claims.

The LLC must be structured properly and should be established in a state that provides for the charging order as the sole remedy against creditors. Charging order as sole remedy means that a creditor is only entitled to proceeds from the LLC if there are actual distributions made from the LLC. Additionally, the creditor will not be entitled to foreclose on the athlete's LLC ownership interest. Accordingly, if no distributions are made, then the creditor will not be entitled to any assets from inside the LLC. This would make the LLC interest an extremely unattractive asset to go after to satisfy a judgment and would incentivize the creditor to settle.

For many states, the charging order as exclusive remedy may not apply to single member LLCs. The applicable statutes should be analyzed to determine whether a particular state is the appropriate jurisdiction for the LLC. Even if the state statute is silent on charging order as exclusive remedy, the recommended course of action is to make the LLC into a multi-member LLC by giving a significant interest (e.g. 1% - 5%) in the LLC to another party. Some states, such as Nevada, provide that the charging order remedy is the exclusive remedy even for single-member LLCs.

The LLC’s operating agreement is key for asset protection planning. Important provisions include clauses that allow for non pro-rata distributions. This would allow the LLC to make distributions to other members without having to make a pro-rata distribution to the debtor partner that would go straight to the creditor. The LLC should be managed by an independent manager and not the members in order to defend against the argument that the debtor-member controls distributions. However, the professional athlete can be given the power to hire and fire managers of the LLC.

“Romantic Involvement” Agreements

As professional athletes move through their career they will get involved in romantic relationships. Unfortunately, these relationships may involve individuals with ulterior motives and individuals who may feel spurned.

For professional athletes contemplating marriage, the most basic form of protection is a prenuptial agreement. Generally, in the event of divorce, each party is entitled to an equal share of marital assets. The prenuptial agreement will allow professional athletes to mitigate the financial effects of a divorce by detailing which assets won’t be subject to equitable distribution as well as outlining the alimony payment obligations.

For professional athletes that have already entered marriage without a prenuptial agreement, a post nuptial agreement is highly recommended to help protect assets. Transmutation agreements will help athletes in community property states (e.g., California) to “transmute” or convert community property belong to both parties to separate property belong to a single party. Without a transmutation agreement, property acquired (income, assets and debt), will generally considered one-half property of each party.

For athletes that don’t enter marriage but are involved in a long term relationship, they should consider cohabitation agreements to help protect their assets and their rights especially with respect to potential child support obligations.

Finally, athlete may consider using a DAPT as an alternative to a prenuptial agreement as
discussed below.

**Irrevocable Trusts and DAPTs**

**Fundamentals of Self-Settled Trusts**

As noted earlier, irrevocable trusts can provide creditor protection for a professional athlete. There are two ways that a trust can protect an athlete. First, if the athlete is expected to receive a substantial inheritance from a parent or another third-party, they should make sure they will be bequeathed the property in trust so that the assets won’t be subject to creditor claims. Second, for assets that the professional athlete already owns, the professional athlete would transfer title to the assets to the trustee of an irrevocable trust the athlete will set up, and if no “fraudulent transfer” was involved, the assets transferred to the trust are generally protected from the professional athlete’s creditors.

The main drawback of an irrevocable trust is that under the law of most jurisdictions, for the settlor of the trust (the one who transfers assets to the trust) to have creditor protection, the settlor cannot be a discretionary beneficiary of income or principal of the trust. Many professional athletes (and their advisors) may not want to make a transfer to a trust of which they cannot be a beneficiary, especially if there are no other beneficiaries such as a spouse or children. To resolve this issue, a Domestic Asset Protection Trust (DAPT) should be considered. A DAPT generally refers to an irrevocable trust that has as its situs a jurisdiction that has enacted self-settled protection, i.e., provides creditor protection to the settlor of a trust even if the settlor is a discretionary beneficiary of the trust.

In the United States, the general rule—that the settlor of a trust cannot be a beneficiary of an irrevocable trust and maintain creditor protection—was upended in 1997 when Alaska became the first state to provide asset protection benefits on self-settled trusts. Delaware followed shortly thereafter, and currently there are 17 jurisdictions that recognize self-settled asset protection trusts (i.e., the settlor can be a discretionary beneficiary of the trust and still have the assets he or she transferred to the trust be protected from creditors).

A DAPT can also serve as an alternative to a prenuptial agreement. Many professional athletes, due to inexperience and relative youth, don’t wish to “ruin the romance” by requiring a prenuptial agreement. As an alternative, the professional athlete can set up a DAPT prior to marriage (in a jurisdiction in which divorcing party is not an exception creditor) and remain a discretionary beneficiary of the DAPT in order to have access to the DAPT assets. In the event of a divorce, the assets in the DAPT should generally be protected for equitable distribution rules. However, for spousal and/or child support obligations, these assets may be considered in determining the level of financial obligations.

**Trust Design**

While it all depends on the facts and circumstances, if the professional athlete does not require immediate access to the assets, it is generally not recommended that the professional athlete be named as a discretionary beneficiary of the trust from the onset. This is to make sure to avoid claims and assertions in court that the professional athlete is the true owner of the assets in the trust. Instead, an independent Trust Protector should be provided for in the trust agreement, and the Trust Protector may be given the power to add and remove beneficiaries. One of those beneficiaries may include the professional athlete.

Care must be given that the Trust Protector is independent and not under the control of the settlor of the trust to avoid a judge exercising jurisdiction over the trust in favor of creditors. Additionally, an independent party should be appointed to have the power to hire and fire trustees. While the professional athlete, as the settlor of the trust can have this power, it would be preferable that they don’t for asset protection.
purposes.

**DAPT Jurisdiction**

Not all DAPTs come in one flavor. Different jurisdictions have distinct rules when it comes to asset protection. In evaluating which DAPT jurisdiction would best serve a professional athlete’s needs, the following factors should be considered: (1) statute of limitations; (2) exception creditors; and (3) conflict of laws.

**Statute of Limitations**

Different jurisdictions have different laws when it comes to when the statute of limitations from the time a transfer has been made to a DAPT. For example, in Delaware, if a future creditor’s claim arose after four years of the transfer, the assets can still be subject to clawback. For a pre-existing creditor, the time is further expanded to four years after the transfer or one year after the transfer was or could reasonably have been discovered.

In contrast, Nevada has a two year statute of limitations under which a fraudulent transfer may be set aside for a future creditor. A pre-existing creditor can set aside a fraudulent transfer within two years after the transfer, or, if longer, six months after the transfer was or could reasonably have been discovered if the claim was based upon the intent to hinder, delay or defraud a creditor. A transfer is deemed discovered when it is reflected in public record (as opposed to constructive fraud).

**Exception Creditors**

In addition to statute of limitations concerns, advisors must carefully evaluate a client’s creditor concerns to ensure that a DAPT will be an appropriate protection vehicle. Many DAPT jurisdictions provide for “exception creditors” by statute. If a creditor is classified as an “exception creditor”, the creditor can reach the assets inside the DAPT. Delaware and South Dakota both provide that a divorcing spouse, alimony and child support payments are excluded from the general rules protecting assets in a DAPT. Additionally, Delaware has an exception for pre-existing torts.

Currently, the most popular DAPT jurisdiction that does not have exception creditors is Nevada.

**Conflict of Laws**

The overarching weakness of a DAPT is that a court can deny enforcement of another state’s statutes if there are strong public policy reasons to do so.

For example, assume a professional athlete who is a resident of California funds a Nevada Asset Protection Trust. Three years later, which is after the statute of limitations (SOL) for a Nevada DAPT fraudulent transfer claim, but prior to a California SOL, a California creditor obtains a judgement in a California court against this settlor. While a settlor may designate which jurisdiction’s laws governs the trust’s administration, public policy concerns may override the designated jurisdiction.

In other words, a California judge may ignore the designation of Nevada as the situs of the trust due to public policy concerns. There are very few cases, especially outside the purview of the Bankruptcy context that address conflict of law issues. This may be because these cases generally settle outside of court and most likely favorable to the debtor (possession is 9/10s of the law). Some would argue that this is proof that a DAPT “works”.

Nevertheless, a Foreign Asset Protection Trust (FAPT) may be the optimal solution in a case where there is concern that a U.S. based judge may be likely to have an anti-debtor perspective based on the facts and circumstances and where the debtor is not a resident of the DAPT state.

**Foreign Asset Protection Trust**

**Hurdles of Foreign Litigation**

The primary advantage of a FAPT over a DAPT is that since the trust and the trustee are domiciled in a foreign jurisdiction, they are not
required to respect and enforce US judgments. For example, if a creditor obtains a judgment in a California court against a California debtor, there is no requirement for the foreign court to accept that judgment. Accordingly, a creditor must commence a new case in a foreign jurisdiction that could be thousands of miles away. Additionally, the jurisdiction may require the creditor to post a bond before commencing a lawsuit. This could be costly and expensive, reducing the likelihood of a lawsuit.

Standard of Proof and Statute of Limitations

Most FAPT jurisdictions impose a “beyond a reasonable doubt” standard in proving fraud as opposed to the US “clear and convincing” or “preponderance of evidence” standards. The “beyond a reasonable doubt” standard in proving a fraudulent transfer is a higher standard to meet. To illustrate the point without making any judgments, consider that O.J. Simpson was found not guilty of murder because the prosecution couldn’t meet the “beyond a reasonable doubt standard.”

Additionally, the statute of limitations for transfers that were made fraudulently is typically shorter in foreign asset protection jurisdictions. For example, in the Cook Islands, if a trust is settled more than two years after the date of the occurrence of the event giving rise to the claim, then the transfers to the trust are not deemed fraudulent. If the trust is settled less than two years after the date of the event giving rise to the claim, then the creditor must commence a cause of action within one year from the date of the settlement of the trust. In Nevis, a trust is not deemed fraudulent if it is settled after the expiration of two years from when the creditor’s cause of action accrued. As in the Cook Islands, the creditor must commence a cause of action before the expiration of 1 year from the date of the settlement.

The Bahamas, although not as strong as the Cook Islands and Nevis, has favorable asset protection laws. Under the Fraudulent Dispositions Act, a transfer of asset is voidable if the liability to the creditor existed at the time of the transfer. However, the creditor must establish an intent to defraud in order to unwind the transfer. Additionally, the creditor must bring the action within 2 years of transfer.

Nevada or the Cook Islands?

The answer as you may guess is—“it depends.” For a Nevada resident (or the resident of any other DAPT jurisdiction) who wants to set up a Nevada trust for Nevada beneficiaries and with Nevada situs assets and has absolutely no creditor concerns—the answer is clear—“set up a Nevada DAPT.” However, if the client is not a resident of a DAPT state and/or may have “gray area” creditor concerns--the answer is clear – “set up a Nevada DAPT.” However, if the client is not a resident of a DAPT state and/or may have “gray area” creditor concerns that would lead a judge to deem a transfer as “fraudulent”, a FAPT may be the safest choice. Of course, the cost of maintenance of a foreign trust, U.S. tax reporting requirements, and the administrative inconveniences of dealing with a foreign entity must be considered. Additionally, whether assets are transferred to a DAPT or a FAPT, if a U.S. judge deems the transfer to be fraudulent, he or she may hold the professional athlete in contempt of court until a judgement creditor is paid off.

Federal and State Protections

In addition to the sophisticated techniques discussed above, professional athletes should make convert non-exempt assets into assets that are afforded special creditor protection under federal and state laws. For example, the owners and beneficiaries of pensions, annuities and life insurance products are protected from creditors in many states (assuming that the money used to purchase these assets weren’t obtained fraudulently and the purchase itself wasn’t done with intent to defraud creditors). Cash value/variable life insurance may be an especially attractive asset protection tool since it provides death benefits for the family, and the owner can also borrow against the cash value.

One of the more famous state exemptions is the homestead exemption. The homestead exemption protects the equity in a personal residence from different types of creditors. Many states have homestead exemptions but the most
famous one is Florida. The Florida homestead exemption protects a permanent Florida resident’s primary place of resident in Florida from certain creditors and the level of exemption is generally unlimited with a few exceptions.

**Conclusion**

Professional athletes undoubtedly need asset protection planning to protect themselves and their families. The level and sophistication of planning will depend on the facts and circumstances. A professional athlete’s advisory team must be familiar with the different techniques and provide the appropriate recommendations. And with respect to asset protection, planning must be done way in advance of any potential creditor concerns--otherwise the fraudulent and voidable transfer laws are implicated. Always consult an expert in these matters.

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For a more detailed discussion of estate planning strategies for professional athletes and celebrities see K. Eli Akhavan, Legal Gaga, Tax Planning and Asset Protection Strategies for Celebrities, Trusts & Estates, February 2012 and K. Eli Akhavan and Jonathan I. Shenkman, Don’t Drop the Ball, Trusts and Estates, April 2016.

To be discussed further below in the section titled “Domestic Asset Protection Trusts”.

Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia and Wyoming.

Trust Protector provisions must be drafted carefully and their powers and identity may be limited if the trust is to be effective for estate and gift tax purposes.

The professional athlete’s access to the assets in the LLC will be discussed below in the section titled “Limited Liability Companies”.

Fraudulent transfer generally involves transferring property without reasonably equivalent value with the intent to delay, hinder or defraud a creditor. While fraudulent transfer laws are crucial to asset protection, a detailed analysis of the fraudulent transfer laws is beyond the scope of this article as the state of the law is complex and highly based on facts and circumstances. Additionally, many states have recently adopted the Uniform Voidable Transactions Act (UVTA) which has made substantial amendments to the Uniform Fraudulent Transfer Act and the Uniform Fraudulent Conveyance Act. Under the UVTA, “voidable transfers” can be unwound depending on the facts and circumstances.

A properly structured irrevocable trust will also remove the appreciation of the assets from the professional athlete’s estate for federal estate and gift tax purposes.
Lawyers, Agents, and the Blurred Lines
Regulating Talent Representation

by Jeremy M. Evans, LL M

I. THE HOLLYWOOD DILEMMA

Professionals who serve as talent agents, sports agents, and/or lawyers all must meet specific regulatory and licensing requirements. Regulations are specific by state, and California is no different. This article focuses on regulations governing agents and lawyers who represent talent in the sports and entertainment industries in California. Part I of this article introduces the issues of navigating the talent representation industry, which includes agents, lawyers, managers, and clientele and presents the “Hollywood Dilemma” where lawyers cannot represent talent without a secondary license and/or registration. Part II describes the major registration requirements for talent agents, sports agents, and lawyers, with a discussion on the somewhat ironic similarities between agents and lawyers. Part III discusses the ethical and practical dilemmas in representing talent. Part IV sets forth the debate regarding the constitutionality of limits placed on lawyers through the Talent Agencies Act (“TAA”). The California Secretary of State licenses and regulates sports agents through its powers and the Miller-Ayala Act. The State Bar of California along with the California Supreme Court licenses and regulates lawyers. The question of whether lawyers can be excluded from or regulated under the TAA and other California agent requirements from representing or working with talent or sports clients when lawyers are duly licensed by the State Bar of California and the California Supreme Court to do so has been hotly debated.

The California Labor Commissioner licenses and regulates talent agents and those who procure employment for talent in California through the TAA. The California Secretary of State licenses and regulates sports agents through its powers and the Miller-Ayala Act. The State Bar of California along with the California Supreme Court licenses and regulates lawyers. The history of the TAA begins with Hollywood and the talent agent community that lobbied the California State Legislature to pass legislation excluding lawyers and everyone one except licensed talent agents from working with Hollywood’s best. Nonetheless, how and why a licensed attorney cannot represent talent without the fear of being left holding the proverbial bag (with no money in it), but a licensed talent agent can practice law without a license is an important question because it raises the issue of fairness.

This article explores the foregoing questions, with the following parameters. First, lawyers face a variety of interesting ethical dilemmas when representing talent. Second, this article will apply to both sports agents representing athletes and talent agents in the entertainment industry representing actors. Third, although the registration requirements are different in terms of representing entertainment talent versus sports clients, the barriers to entry are similar. The focus in this article will be on the two camps...
that must be licensed to work in one form or another, lawyers and agents, since managers do not require any formal registration requirements when not procuring employment for clients.\(^{12}\)

### II. AGENT AND LAWYER LICENSE AND REGISTRATION REQUIREMENTS

Below are the various registration requirements when a person wants to represent talent.\(^{13}\)

#### A. Sports Agents

Sports agents in California are licensed and regulated by the California Secretary of State through the power of the office and the Miller-Ayala Act.\(^{14}\) The statutory scheme is as follows:

[I]n California, a player agent must register with the California Secretary of State as an agent, while making mandatory declarations and disclosures, paying a small fee, and obtaining a bond.\(^{15}\) If the agent wants to advise and work with student-athletes, he or she must register at the school that the student is attending.\(^{16}\) Failure to comply may result in the agent/advisor being fined, suspended, or being disabled from representing athletes in one form or another.\(^{17}\) Further, certain acts by agents (or others) could affect the eligibility of the student-athlete—and could therefore result in liability on the part of the agent. There is no formal education requirement to become an agent in California.\(^{18}\) However, one must demonstrate relevant experience.\(^{19}\)

Athlete advisors are like agents in that they are generally the same person with a different registration requirement completed. Athlete advisors work with high school and college athletes who are entering the draft or thinking about entering the draft for a team or entering as an individual in a professional sports league. Registration generally requires payment of a fee and paperwork. Advisors are generally **non-lawyers** and may **not** practice law unless they are licensed to do so.

Lastly, for an agent to represent a professional athlete in an American professional sports league (such as for the National Football League\(^{20}\) draft or in free agency, or a Major League Baseball\(^{21}\) player’s (athlete’s) arbitration, free-agency contract, or related matter), the agent must register with the Player’s Association of the respective league where the athlete plays or will play. As an example, the National Football League (NFL) and Major League Baseball (MLB) both require a fairly large application fee, annual fees, passing a knowledge-based test, a background check, have a player on a professional team’s roster, and in some leagues must have a four-year degree and a graduate-level degree. MLB does not require a formal education, but if one has a formal education, he or she have the opportunity to be designated as an “Expert Agent”\(^{22}\) by applying and going through the approval process. Professional league agents are generally referred to as “Certified Agents” or simply “Certified.” Certified Agents are generally not lawyers and may not practice law unless they are licensed to do so.\(^{23}\)

Sports agents are often represented by lawyers and agents. Agents typically handle the negotiations with the professional sports league and the lawyer handles the contract review and the personal and business matters off the field. Sometimes the lawyer will wear two hats, acting as an agent and a lawyer where properly licensed/registered to do handle both.

#### B. Talent Agents

In California, the TAA is the regulatory scheme governing talent agents. The TAA provides, in general, that one must apply for a license, pay a fee, go through a background check, and obtain a bond.\(^{25}\) No formal education is required, but applicants must provide and demonstrate experience in the industry. The TAA\(^{24}\) was created out of protection for the talent industry in Hollywood to protect itself from unscrupulous individuals who might not have the client’s best interest in mind.\(^ {26}\) The California Labor Commissioner has jurisdiction under the authority of the TAA over talent agents and those who
procure employment for talent.  

C. Lawyers

Lawyers have the highest bar to reach their profession and have the highest ethical standards imposed compared to talent agents and sports agents. In California, to graduate from an American Bar Association accredited law school, prospective lawyers must enter law school with 15 years of school (a bachelor’s degree), take the Law School Admission Test (LSAT), have a good grade point average, take and pass three years of law school, pass the Moral Character (background check), take and pass the Multistate Professional Responsibility Exam (MPRE), take and pass the California Bar Examination, maintain continuing legal education requirements, and obtain legal malpractice insurance or disclose to clients otherwise that the lawyer does not carry malpractice insurance. Once the above requirements are fulfilled and adhered to with the highest ethical standards, a lawyer may then practice law.

D. Similarities Between Agents and Lawyers

The work that lawyers and agents engage in representing talent are eerily close, and one could make the argument that the agent industry was based on the qualifications of becoming a lawyer. For example, one of the interesting questions that have crossed the minds of many lawyers is whether malpractice insurance can serve as the bond required by the TAA and state sport agent regulations in California. A bond serves as guard against some error by the agent that the talent can recover to compensate for the loss. Similarly, malpractice insurance serves as a guard against some error by the lawyer that the client can recover to compensate financial for the loss. Arguably, these forms of insurance coverage mirror each other and are interchangeable minus the higher threshold to prove malpractice has occurred versus recovering on a bond.

In the instance where bonds and malpractice insurance are interchangeable makes for an argument that lawyers could just as easily be covered in representing talent as talent can recover from lawyers. Of course, in California, pursuant to Rule of Professional Conduct 3-410-Disclosure of Professional Liability Insurance, malpractice insurance is not required for lawyers, but lawyers must disclose the absence of malpractice insurance in writing to the client at the time of retention. If lawyers were allowed to represent talent without registering as a talent or sports agent, there is room for cooperation to make it so that lawyers must carry malpractice insurance when working with talent to cover the TAA’s bond requirement.

Interestingly, personal experience has shown that malpractice insurance rates for sports and entertainment lawyers are higher than other practice areas. Moreover, only certain insurance companies will insure lawyers working in the sports and entertainment industries. The higher rates also show that the insurance industry is behind the ball on servicing lawyers as clients because talent clients are not more likely to file suit against their lawyers because they work in the sports and entertainment industry. There is actually an argument that it is less likely for a lawyer to be sued by a client or vice-versa because celebrities and athletes get enough attention and suing someone is not the type of attention talent would want. It also shows that there is a general misunderstanding and distrust where the rules and regulations are murky and hard to comply.

Another similarity can be found in the requirements to become a licensed talent agent, sports agent, and lawyer. In California, as in most states, a law student graduate who wants to practice law must take and pass both the bar exam and the moral character evaluation, pay the necessary fees, and keep up with their continuing legal education requirements, while purchasing malpractice insurance or disclosing to the client [or prospective client] that he does not carry malpractice insurance in writing. A lawyer in California may also become specialized in a field by taking and passing a test after a certain number of years in practice.

In California under the TAA, a prospective
talent agent must pay a fee, post a bond, pass a background check, and demonstrate their experience. Likewise, a sports agent in California must pay a fee, post a bond, pass a background check, and demonstrate their experience. Furthermore, a sports agent must also register with the respective players association where the agent will/is representing talent by paying a fee and/or passing a collective bargaining agreement exam, among other requirements like having an undergraduate and a post graduate degree demonstrating knowledge and experience (ex: National Football League Players Association). The players' association registration requirement currently only applies to the five major unionized team sports in the United States: the National Basketball Association, Major League Baseball, Major League Soccer, the National Hockey League, and the National Football League.

In looking at the qualifications and requirements for each, there are four common denominators: (1) paying a fee, (2) being ethically and morally responsible/passing a background check, (3) taking a test and/or showing background and experience/continuing education, and (4) posting a bond/having malpractice insurance. The only differences here are that it is ironically cheaper in yearly fees to become/stay a licensed lawyer compared to both sports and talent agents, but it is harder to become and stay a lawyer by way of the legal education, bar exam, moral character test, background check, continuing legal education, paying for costly malpractice insurance, and abiding by the ethical and client confidentiality obligations and requirements.

The comparisons between the agent and legal industries reiterate the point that where lawyers historically existed before agents, the agent model was based upon the lawyer model, both in fact and in practice. However, agents can do lawyerly activities without being licensed lawyers, like negotiate contracts and represent talent clients, but lawyers cannot do the same activities without being subject to discipline, disbarment, fines/fees/litigation, and/or loss of earned legal fees by way of the TAA. Until the current system changes, the question of why the barriers of entry have been lowered to work closely with the most high profile talent groups is left unanswered.

III. ETHICAL DILEMMAS AND PRACTICAL REALITIES IN REPRESENTING TALENT

Practically speaking, the two most common responses to the dilemma that lawyers have to register as talent agents by agents or otherwise are (1) quit complaining, just register and pay the fee, or (2) get a law passed to exclude/include lawyers from the TAA. Both responses are related because the consequence for each is the same. For one, if a lawyer registers as a talent agent under the TAA, the lawyer is still subject to the ethical rules as a lawyer unlike that of the agent competition/counterpart. Second, this creates an unfair advantage for agents over lawyers. Third, it also ignores the fact that lawyers, who have the most stringent educational and testing requirements (especially in California), would be best served to service high profile clientele. Fourth, assuming the lawyer lobby were to convince the California State Legislature to pass a bill to exclude/include lawyers in the TAA or the Miller-Ayala Act, lawyers would be still be subject to the high ethical standards set by the State Bar of California and the Professional Rules of Conduct. Lastly, a lawyer obtaining an agent license ignores that lawyers are actually licensed to practice law, which is the thing agents are practicing unlicensed when negotiating contracts and the like.

Ethically speaking, there are four leading ethical dilemmas faced by lawyers when representing talent. The first ethical dilemma has to do with recruiting clients/talent, the second with practicing law in multiple states, while the third and fourth surround issues of conflicts of interest and attorney communication with a represented party. As partially quoted from “Ethical and Practical Implications and differences between Sports Agents and Attorneys:

IN-PERSON CONTACT WITH PROSPECTIVE CLIENTS
American Bar Association (ABA) Model Rule of Professional Conduct 7.3(a)(2), Direct Contact with Prospective Clients, Solicitation of Clients:

A lawyer shall not by in person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer’s doing so is the lawyer’s pecuniary gain, unless the person contacted: ... (2) has a family, close personal, or prior professional relationship with the lawyer. 42

California Rule of Professional Conduct 1-400, Advertising and Solicitation, provides:

(A) For purposes of this rule, “communication” means any message or offer made by or on behalf of a member concerning the availability for professional employment of a member or a law firm directed to any former, present, or prospective client, including but not limited to the following: ... (4) Any unsolicited correspondence from a member or law firm directed to any person or entity.
(B) Any unsolicited correspondence from a member or law firm directed to any person or entity.
(C) A solicitation shall not be made by or on behalf of a member or law firm to a prospective client with whom the member or law firm has no family or prior professional relationship. 43

THE MULTIJURISDICTIONAL PRACTICE OF LAW

ABA Model Rule of Professional Conduct 5.5(a), Unauthorized Practice of Law—Multijurisdictional Practice of Law, provides:

A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so. 44

California Rule of Professional Conduct 1-300(a)(b), Unauthorized Practice of Law, provides:

(A) A member shall not aid any person or entity in the unauthorized practice of law.
(B) A member shall not practice law in a jurisdiction where to do so would be in violation of regulations of the profession in that jurisdiction. 45

[CONFLICTS OF INTEREST EXPLAINED BELOW]

LAWYER COMMUNICATION WITH A REPRESENTED PARTY

California Rule of Professional Conduct 2-100, Communication With a Represented Party, and ABA Model Rule 4.2, Communication with Person Represented by Counsel, prevent lawyers from communicating with represented parties without the represented party’s lawyer approval and/or a court order . . . The Talent Agencies Act, the Miller-Ayala Act and MLB/NFL Player Association rules regulate agent changes/designations, but are mostly quiet when it comes to solicitation and communication as long as the agent(s) are registered [or licensed] properly. 51

First, recruiting is essential in both the sports and entertainment industries. There is a dilemma of how lawyers can comply with being talent or sports agents in any form where the underlying job and roles of an agent place the lawyer in a compromising position(s) by (1) having to recruit clientele without prior relationships and (2) to work out of state (i.e., outside the jurisdiction where the lawyer is licensed to practice law). Therefore, the lawyer would be violating the first two rules of conduct mentioned above if the lawyer recruited a talent athlete or actor in another state.

Moreover, California Rule of Professional Conduct 3-310-Avoiding the Representation of Adverse Interests presents another principal issue with lawyers representing talent as the current system is devised. Imagine a lawyer that represents Los Angeles Dodgers starting second baseman as well as the top rookie in baseball who happens to play second base. The Dodgers organization wants to trade or not renew the
veteran client’s contract at the end of season, while simultaneously calling up the young prospect client. Even with written disclosures by each party notifying of the actual (not perceived conflict of interest), the lawyer would be conflicted out of the representation.

In providing an entertainment-based industry example, paraphrasing a story the book “Power House: CAA The Untold Story of Hollywood’s Creative Artists Agency” by James Andrew Miller will be illustrative. Actor Nicole Kidman wants a top part in the next hot summer movie. Actor Julia Roberts, her peer and also a highly talented actor, wants the part too. A lawyer represents both. As an agent, the common phraseology would be that the director or the producer makes the final decision and therefore if there is a conflict of interest it is out of the agents hands. Similarly, the general manager of the baseball team or the front office and ownership makes team decisions when signing their next second baseman, not the agent, therefore a conflict of interest does not exist with the agent.

However, the issue in conflicts of interest is not in who makes the decision, i.e., the judge or jury, general manager, director or producer, it is how well the lawyer zealously advocates for the client within the bounds of the law. A lawyer could not conceivably represent both interests of the clients equally where the two are fighting for the same role or field position. Someone will have to compromise and the lawyer will have been compromised by being the position to represent conflicting parties in the same transaction.

Lastly, with regard to attorney communication with a represented party, using the Kidman and Dodgers examples above. Again paraphrasing from the Power House book by Miller, imagine Lawyer “A” represents actor Kidman, but not actor Roberts who is represented by Lawyer “B.” Lawyer A wants to represent Roberts to add to his book of clientele. However, by approaching actor Roberts without Lawyer B’s written consent Lawyer A would violate both the in-person contact rules and the attorney-client communication rule because Roberts is already represented by Lawyer B. On the sports side, replace the actors with the second basemen and the same result follows.

And therein lies the Hollywood Dilemma. Lawyer ethics require one permissible act, while the practicalities of the entertainment and sports industries provide for another. It is not a judgment on one or the other, it is a reality that lawyers and agents face on a day-to-day basis. It is also why Hollywood and the sports industries rely heavily on talent agents to navigate difficult waters and why lawyers have been excluded, by rule or self-preservation, maybe both, from representing talent.

IV. CONSTITUTIONALITY AND DISRUPTION OF THE TALENT AGENCIES ACT

The foregoing parts of this article discussed how state legislation, specifically the TAA and the Miller-Ayala Act, imposes barriers on lawyers representing talent in the entertainment and sports industries. This section examines the constitutionality and fairness of all the rules and regulations on lawyers in representing talent through case law.

In applying the TAA to an actual case, the Solis v. Blancarte, TAC-27089 (2013) matter that was heard before the California Labor Commissioner (who has jurisdiction over the TAA matters). The case is instructional because it highlights that a lawyer, although duly licensed to practice law in California, cannot represent talent (including reviewing contracts) without being a licensed talent agent. A lawyer cannot review or negotiate a contract for talent because that act is seen as “procuring” employment, which is in violation of the TAA. As a result of the case, lawyer Blancarte lost his negotiated percentage fee from the agreed upon retain agreement. The case demonstrates a few lessons that will be discussed later in this article, but for now know that not being licensed/registered as a talent agent in California has serious consequences and implications.
A. Case law: Constitutional Challenges

In 2008, the National Conference of Personal Managers brought a lawsuit against the Governor of California (National Conference of Personal Managers v. Edmund G. Brown, 9th Cir. No. 15-56388, April 25, 2017) claiming that the TAA was unconstitutional for vagueness, a violation of the commerce clause, a violation of the first amendment, and void as involuntary servitude. The case was dismissed, but the matter arose out of a 9th Circuit Court of Appeal case, Marathon Entertainment, Inc. v. Blasi, 9th Cir. No. B179819, June 23, 2006, where the manager for the talent sought to recover unpaid fees, but the court found for the talent because the manager procured employed while not being licensed under the TAA. The Brown court held in dismissing the case that:

“[C]ourts have already have sufficiently established what “procuring” means, noting that it is contained in numerous California statutes that have not been challenged [and that personal managers were subject to the Talent Agencies Act according to the Blasi case] . . . [The court] said ‘Not being compensated for work performed does not inevitably make that work involuntary servitude. Plaintiff’s members [managers] have choices’ . . . [The Court] also rejected claims that the Talent Agencies Act violated the Commerce Clause . . . and the First Amendment. Of the latter, [the court] wrote that the state statute ‘protects conduct, not speech. It does not limit the speech of a personal manager; it limits the personal manager’s ability to enforce contractual obligations when that person engages in the conduct of procuring employment.’

The problem with the above decision is that it does not attack the Hollywood Dilemma head on with regard to what the rule of law is “supposed to do” and how it applies to lawyers, who are licensed to practice law. The American rule of law is based in fairness and the treatment of people equally. In that sense, the law should bring people and their activities to the light, not into the dark. What the current system does is to force lawyers into small exceptions to work

B. Case Law: Disruption in the Talent Agencies Act Power of Arbitrating Claims

There has been some crack in the armor of the TAA though and the California Labor Commissioner who hears matters under the TAA's jurisdiction. Again, in 2008, the United States Supreme Court in Preston v. Ferrer, 552 U.S. 346 (2008) held that an arbitration clause in a lawyers contract with talent, even though the lawyer was unlicensed as a talent agent under the TAA, the talent would still be forced to submit to mandatory arbitration as opposed to a hearing before the California Labor Commissioner. The court reasoned that “when parties agree to arbitrate all questions arising under a contract, state laws [the TAA] lodging primary jurisdiction in another forum [the California Labor Commissioner], whether judicial or administrative, are superseeded by the FAA [Federal Arbitration Act].” An overhauling of the TAA is not a complete win for Lawyers because an arbitrator would still have to apply the TAA and the law to a dispute, but it is a break in a series of victories for the TAA's authority.

C. Potential First Amendment Challenges to the Talent Agencies Act

The above decision highlights the remaining constitutional question. In this light, the 14th Amendment to the United States Constitution provides that:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge
the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.\textsuperscript{71}

The law should be fair to all and apply equally according to the 14th Amendment. Certain classes of people, especially lawyers who are duly licensed, should not be excluded from representing talent-based clients. Furthermore, all prospective clients, including talent, should have access to legal services as they wish.

According to another legal theory, an argument could be made that restricting lawyers to not representing talent without a talent license is a restraint on trade and intra/interstate commerce. There are three sources of law for commerce. The Commerce Clause describes an enumerated power listed in the United States Constitution (Article I, Section 8, Clause 3).\textsuperscript{72} It is one of Congresses’ most recognized powers as a listed duty in the Constitution to regulate commerce.

The “Dormant Commerce Clause ultimately means that because Congress has been given power over interstate commerce, states cannot discriminate against interstate commerce nor can they unduly burden interstate commerce, even in the absence of federal legislation regulating the activity.”\textsuperscript{73} The Dormant Commerce Clause is not a specifically enumerated power listed in the Constitution, but has been developed through case law. Lastly, there is intrastate commerce that is generally regulated by the states unless preempted by federal law. Intrastate commerce is business that occurs within one state’s border only.

The major prevention from applying any form of the commerce clause to the lawyer-agent dilemma, specifically the TAA and the Miller-Ayala Act, is that lawyers are limited to practice law in the states where they are licensed. Specifically, when a lawyer practices outside the licensed jurisdiction (i.e., California), the lawyer, minus specific exceptions, would be subject to discipline, fines, civil litigation, malpractice claims, and possibly loss of license to practice law. Therefore, the focus is really on intrastate commerce.

Intrastate commerce is regulated by the states. Even for a lawyer who has licenses in two or more states, the representation would be limited to one state and in one court at a time. Lastly, there is no preemption yet by federal law, but the National Collegiate Athletic Association’s proposed Uniform Athlete Agents Act\textsuperscript{74} and the existing Uniform Bar Examination\textsuperscript{75} could be precursors of what is to come to help regulate the crossover between the entertainment, legal, and sports industries to allow lawyers to work with talent in a more seamless, efficient, and ethical manner. Currently, however, despite the unfairness and lack of clarity, lawyers will have to continue to avoid representing talent or find a narrow exception to do so without being subject to discipline and/or losing earned legal fees.

\section*{V. WHO IS BEST TRAINED TO SERVICE TALENT?}

This article has discussed the needs of talent representation and the roles, often overlapping, of agents and lawyers in that process. This article also discussed that lawyers must be registered as agents under the TAA, even though lawyers are licensed by the State Bar of California to practice law. This article then turned to the ethical and practical dilemmas in representing talent. Now this article closes with a discussion on perhaps the most important aspect of all in representing clientele (which may include talent), i.e., relationships, while providing some solutions to Hollywood dilemma.

The lawyer-client relationship is one of the most closely held and respected according to the letter-of-the-law and practice. It is equal to the doctor-patient and clergy–penitent privileges. However, the TAA and the various sport agent registrations restrict talent and sports clients from utilizing their counsel of choice without some registration, exception, or third party relationship, which as discussed above
presents its own lawyer-client privilege and fiduciary duty challenges.

For contexts sake, it takes a lawyer nineteen years of schooling after taking a bar examination and passing the moral character test before being able to practice law. A lawyer also has further continuing legal education and ethical duty requirements while practicing law. In addition, without disregarding the many talented talent and sports agents in America and around the world, the question becomes why lawyers are limited from being able to work with talent directly without an additional license. The situation should really be turned on its head. It is agents who should be seeking to become lawyers to represent clients to avoid the unauthorized practice of law, not lawyers losing earned fees and relationships because of a specialized license requirement.

Talent and sports clientele should be free to seek legal counsel from those who have obtained the highest ethical and education standards. The rhetorical question is why the entertainment and sports industries have allowed lower standards where agency work is not subject to conflicts of interest and other important and necessary rules and requirements as lawyers. Turning the dilemma on its head, the question becomes should the California State Legislature make it harder for agents to represent talent by raising the requirements (i.e., to become licensed lawyers before representing talent in the sports and entertainment industries). Currently, the TAA and case law has created the Hollywood Dilemma has dealt with the matter unfortunately by asking who is better situated with the current rules to represent talent, not by asking who is better qualified/trained to represent talent.

VI. CONCLUSION: SOLUTIONS TO THE HOLLYWOOD DILEMMA

Over the years, many authors before have written on the Hollywood Dilemma. In 2001, Gary Devlin at Pepperdine University School of Law wrote on many of the same topics in “The Talent Agencies Act: Reconciling the Controversies Surrounding Lawyers, Managers, and Agents Participating in California’s Entertainment Industry.” Some courts and administrative bodies have jumped into the discussion since that time, including the Solis, Blasi, Ferrer, and the National Conference of Personal Managers cases in 2006, 2008, 2013, and 2017.

The Ferrer case is good law and a U.S. Supreme Court case, but that dealt with arbitrations in private contracts with talent where the lawyer is not licensed as a talent agent (thus highlighting the power of severability in contracts). It did push back against the TAA and California Labor Commissioner’s jurisdiction, which cannot be understated considering the case history, but according to Blasi and National Conference of Personal Managers, it is the act of procuring employment that places individuals under the auspice of the TAA, not the job title of the individual (lawyer or otherwise). The Solis case is dispositive as to lawyers, but it is not authoritative law as a California Labor Commissioner decision.

The difficulty of navigating the lawyer vs. agent arena in representing and working with talent as dealmakers is a Hollywood Dilemma. The topic is interesting from a policy perspective because it seems backwards that the most educated and sometimes the most experienced people in the room (lawyers) cannot “procure” work for talent without a talent agent or sports agent license where “procure” could mean something as customary for a lawyer as reviewing a contract. Conversely, a talent agent who is unlicensed as a lawyer can act as a lawyer when reviewing and negotiating contracts. Therefore, any solution should require (1) exclusion from getting licensed as an agent if one is a licensed lawyer, or (2) inclusion in the TAA or new law as an agent if one is a licensed lawyer, and (3) coming to terms/a compromise on how to deal with the ethical dilemmas when practicing law as a talent agent or as an exception because one is acting as an agent.
One solution revolves around not being licensed as a lawyer at all. This may seem like an attractive solution at first, but not when law school is arguably the legal education one needs to be a successful agent, specifically in contract drafting and negotiations, and yet costs significant time, preparation, six figures, and three-years to obtain. It is therefore not a practical one or financially sound one to ignore the law license all together.

On the other hand, Ari Emanuel with WME | IMG, one of the top talent agents and executives in Hollywood, along with many others, have never attended law school, proving that law school is not a guaranteed path to success in the talent representation business. However, ignoring the issue by forgoing law school or forgoing a license to practice law does not seem to be the best path forward since there are very talented lawyers in the talent representation business. Back to the dilemma at hand, how do lawyers to work with talent without being subject to the TAA?

One observable, but problematic solution may be to ignore legal ethics and the TAA all together. There is some evidence that this occurs on the recruiting side in general and where lawyers are wearing two hats, one as a lawyer and one as agent. The dilemma here is navigating the waters between those two hats. Moreover, the result of being caught is that lawyers are subject to discipline and a loss of license by the State Bar of California and/or losing an earned fee via the California Labor Commissioner when acting as a talent agent.

A third and possibly more practical and ethical solution is to utilize the TAA and the various sport agent registration requirements to the lawyer’s advantage by working within the Rules of Professional Conduct. First, this is practical because maybe as a lawyer one may not want to do as much handholding as an agent. Maybe a lawyer wants to focus on the broader concepts and ten-thousand foot view in representing the client as there something very powerful, rewarding, and nostalgic in the lawyer-client relationship.

The above solution works by having the lawyer work with a licensed talent agent. Working with talent directly or with a talent agent is possible because 1700.4(a) and 1700.44(d) of the TAA provides for exceptions to those who are working (1) on music contracts or (2) at the written request of and with a registered talent agent. However, the issue with the music contract exception is that this is a small exception in comparison to the larger body of work being done in film, television, and sports (there is currently no exception for lawyers to work with sports agents in Miller-Ayala Act or other registration requirements). It is, in other words, a start, but not the finish. For one, too many clients are left without service by lawyers in the music exception model where the industry has also been seriously disrupted with the advent of over-top-media and direct to consumer distribution. On the second exception, this is a start because, as will be discussed later, additional issues arise when a lawyer acts in concert with an agent.

For one, California Rule of Professional Conduct 1-320-Financial Arrangements With Non-Lawyers, requires that the lawyer’s role in the matter be limited to (1) reviewing contracts and advising generally on business matters, and (2) to be paid by the company as general or outside counsel or directly by the client. The lawyer would not be able to exchange legal fees with a non-lawyer (the agent), thus somewhat preventing percentage fees, or on working with the client to procure employment (e.g., for sports agents read “recruit” or “negotiate a deal”) with a studio or professional sports team. Essentially, the lawyer would be acting as a lawyer not a talent agent, however, the issue here is to determine whether lawyers can work with talent without being licensed as a talent or sports agent not whether regulations can box lawyers in to one specific activity. It seems, at least according to Rule 1-320 and the TAA that lawyers would be limited to working with talent in conjunction with a licensed talent agent in a non-music deal where the other parameters apply. Seems onerous and it is.
Second, keeping in mind the above requirements, California Rule of Professional Conduct 1-310-Forming a Partnership With a Non-Lawyer also forbids lawyers from entering into a partnership with non-lawyers (e.g., agents) where the underlying work is legally related (e.g., where legal advice is being provided). Therefore, a lawyer could work with a licensed talent agent as outside or general counsel in a non-music deal where the lawyer is paid by the company or talent directly and does not share the legal fee, but the lawyer could not be a partner in the company or take any profit sharing.

The above is both impractical and unrealistic. This is similar to putting limits on making a living for lawyers like the National Football League does with its rookie player contracts. One can see with the convoluted application of such rules, lawyers forgo becoming licensed lawyers and having to take the feared California Bar Exam to become licensed talent or sports agents. It also begs the question of whether the TAA has lowered the barriers of entry in working with the most high profile and wealthy populations in the world, entertainment, and sports clientele. Lastly, in working in conjunction with a licensed talent agent in a non-music deal where the pay structure and relationship is legal and ethical, a lawyer could advise one client, but not necessarily, the other in the same transaction because there would be a conflict of interest and disclosures could not cure that conflict.

However, there are two solutions to solve the Hollywood Dilemma as mentioned at the beginning of this section. First, the California Legislature needs to exclude lawyers from the TAA because lawyers are licensed, carry malpractice insurance, and are trained in art that talent need the most (contracts, intellectual property, dispute resolution, and negotiations) when protecting clientele’s business and careers. Second, the United States Congress needs to pass legislation that covers both entertainment and sports agents so that a lawyer working in California may represent an athlete or actor working in Georgia, for example.

The second solution is really two parts because (1) it covers “agency” work that is legal in nature, and (2) covers legal work in a state where a lawyer is unlicensed. In some sense, the second solution is a “National Agency and Licensure Act” for lawyers. The business-side of this is that it is more inclusive in including lawyers, while still permitting current agents to keep current and future clients.

Professor Devlin agrees that a single legislative bill would be the best step forward, not one specific to managers, agents, or lawyers. Since he wrote on the subject in 2001, the issue of lawyers being exempt from the TAA has not occurred. The current legislation is the same, the TAA abides. Other than Solis, lawyers have not attempted to directly challenge the TAA through litigation. Unfortunately, where the California Labor Commission has jurisdiction over the TAA, Courts have not ruled on the matter as to lawyers, and thus the process is cyclical. However, the court in Ferrer showed a willingness to treat the lawyer-client relationship with deference by respecting a contractual matter in a retainer agreement, or maybe it was just specific to a federal question by way of the Federal Arbitration Act preemption.

The question of whether talent is better served by restricting lawyers from working with talent where lawyers are the best trained to service talent is an important one. The dilemma is similar the sports agency industry where the National Collegiate Athletic Association limits when and where agents can work with athletes. Arguably, the law should be allowing open communication, not restricting it. It seems both constitutional and simple business savvy to allow communication versus restricting it. With a “National Agency and Licensure Act,” the sports and entertainment industries can have a much clearer system that is understandable and fair to both lawyers and clientele.

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2 The Artist Management Law (1937) and Artist Management Act (1943) were precursors to the 1978 Talent Agencies Act in California

3 Talent Agencies Act, 1700-1700.46

4 The Miller-Ayala Act (Cal. Bus. & Prof. Code, div. 8, ch. 2.5, § 18895 et seq.); (A copy of the required Athlete Agent Disclosure Statement can be found here: http://bpd.cdn.sos.ca.gov/sf/forms/sf-aa1.pdf) (Last accessed on 10/14/2017)

5 Admission Requirements, State Bar of California (http://www.calbar.ca.gov/Admissions/Requirements) (Last accessed on 10/14/2017)


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36 Talent Agencies Act, 1700.4

37 Athlete Agent Disclosure Statement, Secretary of State, State of California (http://bpd.cdn.sos.ca.gov/sf/forms/sf-aa1.pdf) (Last accessed on 10/14/2017)

38 How to Become an Agent, NFLPA.com (https://www.nflpa.com/agents/how-to-become-an-agent) (Last accessed on 10/14/2017)


40 Rules of Professional Conduct, State Bar of California (“The California Rules of Professional Conduct are intended to regulate professional conduct of attorneys licensed by the State Bar through discipline. They have been adopted by the Board of Trustees and approved by the California Supreme Court pursuant to statute to protect the public and to promote respect and confidence in the legal profession. The rules and any related standards adopted by the Board are binding on all members of the State Bar”) (http://www.calbar.ca.gov/Attorneys/Conduct-Discipline/Rules/Rules-of-Professional-Conduct) (Last accessed on 10/14/2017)

41 Jeremy M. Evans, “Ethical and Practical Implications and differences between Sports Agents and Attorneys,” Big News for Solo & Small Firms, Solo and Small Firm Section of the State Bar of California, Summer 2016, Volume 22, Issue 3


43 California Rules of Professional Conduct, rule 1-400

44 ABA Model Rules of Professional Conduct, rule 5.5

45 California Rules of Professional Conduct, rule 1-300

46 California Rules of Professional Conduct, rule 2-100

47 ABA Model Rules of Professional Conduct, rule 4.2

48 Talent Agencies Act, 1700

49 The Miller-Ayala Act, supra

50 MLBPA Regulations Governing Player Agents, supra; NFL Players Association Regulations Governing Contract Advisors (as amended through August 2016) (https://nflpaweb.blob.core.windows.net/media/Default/PDFs/Agents/RegulationsAmendedAugust2016.pdf) (Last accessed on 10/14/2017)

51 Jeremy M. Evans, “Ethical and Practical Implications and differences between Sports Agents and Attorneys,” Big News for Solo & Small Firms, Solo and Small Firm Section of the State Bar of California, Summer 2016, Volume 22, Issue 3

52 California Rules of Professional Conduct, rule 3-310


54 People v. McKenzie (1983) 34 Cal.3d 616, 631

55 DLSE - Talent Agency Cases, Dept. of Labor Standards and Enforcement, Dept. of Industrial Relations, State of California (http://www.dir.ca.gov/dlse/dlse-tacs.htm) (Last accessed on 10/14/2017)

56 California Rules of Professional Conduct, rule 2-100; ABA Model Rules of Professional Conduct, rule 4.2

ABA Model Rules of Professional Conduct, rule 7.3; California Rules of Professional Conduct, rule 1-400

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Litigation Update

by Michelle M. Wahl; Patrick Ouellette; Kathryn S. Yoches; Katie R. Day; Kyle E. Simmons; Bernetta Hardy

A Landmark Win for YouTube Users

The U.S. Copyright Act affords a “fair use” defense for alleged infringement in some instances. However, successfully arguing such a defense is not always a simple task. Without any bright-line rule or definitive standard, courts find themselves rendering decisions on a case-by-case basis. Granted, courts are required to consider a number of non-exhaustive factors, including (1) the purpose and character of the work, (2) the nature of the copyrighted work, (3) the quality, amount and substantiality of the portion of the copyrighted work used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

This defense became crucial in 2016 when Matt Hosseinzadeh ("Hosseinzadeh") a YouTuber, sued the creators of YouTube channel H3H3, Ethan and Hila Klein, alleging they had misused fair use and were infringing Hosseinzadeh’s copyright when H3H3 posted a video featuring clips of Hosseinzadeh’s video and then criticizing the same. Besides copyright infringement claims (and a defamation claim), Hosseinzadeh alleged that the Kleins had violated the Digital Millennium Copyright Act by asserting misrepresentations in a counter-takedown notice.

In its fair use examination, the Court held that criticism and comment, such as that exhibited by the Klein’s video at issue, were classic fair use examples and were one of the key factors favoring the Kleins. However, because the Hosseinzadeh video was considered a creative work protected by copyright law, factor (2) favored Hosseinzadeh. Factor (3) was a flush given that the use of Hosseinzadeh’s video in Klein’s video was a necessary element for its critique and criticism. Finally, in light of the differing nature of the two videos, the Court held that the Klein’s video was not a substitute for the Hosseinzadeh video. Considering

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[^3]: California Rules of Professional Conduct, rule 1-310
[^5]: Id. at 406
these factors, the Court concluded the video amounted to fair use and thus, did not amount to copyright infringement. As such, Hosseinzadeh’s misrepresentation claim was also dismissed and further held that even without the fair use defense at their disposal, the Klein’s would not have violated the Digital Millennium Act based on their good faith belief that use of Hosseinzadeh’s video was not an infringement. The defamation claim was dismissed as well, based on a similar rationale.

Why is this case a win for YouTubers?
YouTubers often use video clips and then comment on them, thereby creating their own material (commonly referred to as “reaction videos”). Although, as noted above, fair use requires a case-by-case analysis and often hinges on purpose and extent of use, this case is certainly persuasive for future YouTube cases involving similar allegations.

A $400,000 Decision Favoring Eminem Has the Sound-Alike Industry on Alert!

Albeit a niche industry to some extent, “sound-alikes” thrive on making music that sounds strikingly similar to famous songs. In doing so, those creating sound-alikes avoid paying often enormous fees for use of the famous song, and instead license something similar at a largely reduced fee. By attempting to exploit loopholes in the U.S. Copyright Act, those engaging in sound-alikes not only pay less fees, but also pass along those savings on to their respective advertisers. However, that activity may be coming to a screeching halt in light of a recent ruling addressing a sound-alike to “Lose Yourself,” a major hit for Eminem.

“Lose Yourself” gained notoriety when it was placed in 8 Mile, a major motion picture, which also gave rise to an Academy Award for the song in 2003. The National Party purchased the sound alike, “Eminem Esque” from Beatbox, who had previously licensed the song from Labrador. In doing so, the National Party believed copyright clearance had been covered. Specifically, they argued that the music was purchased from a well-known Australian-based music production library who had purchased the song from a U.S. supplier. Moreover, the National Party contended that, coupled with its reliance on the supplier, they believed the purchase was legal given it was licensed with Australasian Mechanical Copyright Owners Society, which made it available for purchase. A New Zealand Judge disagreed and ruled in favor of Eminem’s publisher, awarding $600,000 in damages.

Now, the National Party is asserting a claim for retribution from the parties who supplied and licensed the track for the National Party’s use. In the interim, however, Eight Mile Style, Eminem’s publishing company, stands to collect the damages awarded.

In light of this ruling, the sound-alike industry is on high alert as to the implications and how best to avoid a similar scenario with their works. For example, advertising agencies need to think twice about using works that sound very similar to the original. In addition, the availability of stock music licenses and work that might otherwise go to sound-alike producers, may begin to decrease. The real impact of this ruling is yet to be seen, but at the very least, parties who previously engaged in sound-alike activity, might want to think twice.

Pre-1972 Sound Recordings & Potential Copyright Protections - Update

The California Supreme Court recently advised that it will refrain from deciding the issue of whether pre-1972 sound recordings should be subject to U.S. copyright laws. It is an unfortunate notice in light of the sheer volume of artists and their estates who would be affected by the Court’s decision on the issue. In addition, this is just one of several courtroom battles addressing this matter. For example, this question is the root of the battles between oldie artists and entities like Sirius XM and Pandora, the latter of who argue they are not required to pay royalties for any sound recordings released prior to February 15, 1972 (when federal copyright protections attached to sound recordings).

In addition to this news, Howard Kaylan and Mark Volman, members of the Turtles (aka “Flo
& Eddie”), who some would say have been leading the charge on this topic for years, were also dealt a devastating blow when the Florida Supreme Court ruled that nothing in the Florida law books provided Flo & Eddie/The Turtles copyright protection for songs recorded and released before the February 15, 1972 cutoff date, and that no such protections were afforded by the U.S. Copyright Act. By way of reminder, prior to 1972, artists relied on state laws to derive any such rights (to the extent they existed) and even after 1972, Congress left such decisions to the states. Unfortunately, no such right of public performances in pre-1972 sound recordings existed under Florida laws and any such sound recordings are deemed public domain and freely accessible and usable by anyone. Thus, all claims against Sirius XM Radio for broadcasting Flo & Eddie’s pre-1972 sound recordings failed under Florida law. This decision follows the New York decision that ruled similarly. In other words, a ruling by the California Supreme Court could either provide the concurring decision or deviate from the Florida and New York rulings, shifting this issue into even greater chaos and inconsistency. However, unlike its predecessor rulings in Florida and New York, California must address a separate 1982 law that only vaguely discusses ownership rights.

The rulings and the current state of litigation impliedly, if not explicitly, suggest that this may be an issue best left for legislators to address. Given that many states treat these recordings as works in the public domain and have always done so, without a federal statute specifically addressing these recordings, the chaos and inconsistency in addressing pre-1972 sound recordings may be the future.

**Studios Come Together in Fight Against TickBox**

Universal, Columbia, Disney, 20th Century Fox, Paramount, Warner Brothers, Amazon, and Netflix are all suing TickBox in a California district court, alleging that TickBox’s hardware device allows for mass copyright infringement of their TV shows and films. According to the lawsuit, the device, which plugs into a user’s television, enables copyright infringement by downloading illegal, pirated content streams. The studios claim that TickBox is taking money away from the studios by allowing users access to “the largest online media library on the planet” for no cost. Furthermore, TickBox promotes the device as a way to “cut the cord” for viewers who are “sick” of paying for cable and “tired of wasting money” with online streaming services. The TickBox can be purchased for $89.95 online and once the user receives it, they need only the device, an Internet connection, and a screen to get access to a plethora of movies and television shows. The user can then select add-ons based on their viewing desires, which direct the user to pirated movies and television shows. One of TickBox’s most popular add-ons, Covenant, boasts clearly pirated content, including movies that have not yet been authorized for in-home viewing and films that are still in the theater. With its clearly infringing purpose and advertising that claims TickBox replaces legitimate means of viewing, the studios are alleging willful infringement and claiming they are entitled to $150,000 per infringed work. The studios are also requesting that the court impound all devices in TickBox’s possession. While TickBox has yet to respond, its website notes that the device is legal and is merely “a directory or library of content which is hosted by third parties on the internet.” It will be interesting to see how TickBox’s argument holds up in court and how the court will rule on damages if it does find TickBox to be infringing. Whatever it holds is likely to set an example for other similar devices. Another interesting aspect of this case is the addition of Netflix and Amazon as plaintiffs, as the streaming services have tried to set themselves apart from so-called “legacy media” like Universal and Columbia. While legacy media and online streaming services may have significant differences, they appear willing to set those differences aside when it comes to fighting copyright infringement.

**VidAngel Keeps Fighting**

Family-friendly technology service VidAngel was known for its unique business model. It sold new movies to customers for $20, and then bought them back for $19, resulting in movies for $1.
In order to offer those movies to customers, VidAngel would buy the DVD or Blu-ray discs containing the movies and television shows, “rip” decrypted copies onto computers and then stream the content, which it would “sanitize” to make it family friendly. Unhappy with the fact that their movies were being copied, Disney, Lucasfilm, Twentieth Century Fox Film and Warner Bros sued VidAngel alleging copyright infringement. The legal battle between the studios and VidAngel has dragged on for over a year and VidAngel seems unwilling to give up, alleging that it is protected under the Family Home Movie Act. A California court disagreed with VidAngel, issued a preliminary injunction, and dismissed the company’s antitrust counterclaims. VidAngel tried once more to shut down the lawsuit by coming out with a new service in June. VidAngel argues that the new service allows families to filter licensed streams, which is not copyright infringement. With the new service released, VidAngel went back to court with a motion to clarify the injunctive order and get court approval that the service does not violate the preliminary injunction. The studios responded to VidAngel’s motion by stating that they did not have sufficient time to conduct targeted discovery of the new service and by pointing out several unanswered questions including whether VidAngel is purchasing a digital transmission for every customer or only using a master copy and how the company is protecting against piracy. After allowing the studios time for discovery, the court ruled against VidAngel in August, meaning the filtering company will remain banned from using its technology on movies from the studios. VidAngel has proved to be a persistent thorn in the studios’ side, so it is unlikely that it will give up at this point in the lawsuit. The outcome of the impending litigation will help clarify if and/or how services like VidAngel can manipulate films and television shows without violating copyright laws.

Computer Graphics Causing Copyright Confusion

Rearden, LLC, the plaintiff in this case, is a Silicon Valley firm who claims to own the MOVA software, which captures facial expressions to create realistic computer graphic effects. Rearden also claims that this technology was stolen from it by a former colleague and has since landed in the hands of a Chinese company. Rearden sued the Chinese company and won an injunction, but that is not enough. Reardon is now suing the customers of the stolen technology, including Disney, Fox, and Paramount, who have used the technology to create characters in blockbuster films such as Guardians of the Galaxy, Deadpool, The Curious Case of Benjamin Button, and Avengers: Age of Ultron. The studios are not disputing that they used the stolen technology and that they did so knowingly. Their argument is that it does not matter because whatever shows up on the screen is a product of human input and therefore the technology company cannot own the output. The studios’ attorney noted that if Rearden’s authorship-ownership theory were the law “then Adobe or Microsoft would be deemed to be the author-owner of whatever users created using Photoshop or Word.” Rearden of course rebutted the studios argument, citing the 2001 case Torah Soft, Ltd. v. Drosnin in which the court held that in some cases “an end-user’s role in creating a matrix is marginal” and unlike programs like Photoshop which require the user to create an original work of art, the program at issue in Torah Soft required user to input a simple word or phrase and required the software to do “the lion’s share of the work.” Rearden argues the same is true the MOVA program and that the software makes artistic choices such as camera angles, arranging of the costume, and lighting without any human input. Therefore, Rearden argues that “substantially all of the operations” are done by MOVA, which is sufficient to state a claim that Rearden owns the copyright in the output. Furthermore, Reardon acknowledges that the studios are not copying the software output in its raw form, but rather alleges that the studios are making derivative works by copying the movement and facial expressions MOVA creates. In the complaint, Rearden states that the studios’ films “incorporate some or all...outputs including Skin Texture, Makeup Pattern, Captured Surface, and Tracking Mesh outputs in their entirety” making them unauthorized derivative works. The studios have a chance to respond before the judge issues a ruling. Depending on the outcome, this case has the potential to drastically change
How studios use computer graphics moving forward and in turn how those studios go about making the blockbuster films that the public has come to love.

**What is the Future of Biopics and Documentaries?**

Lately it seems that biopics and documentaries are popping up left and right. Studios and streaming services are scoring big with titles such as The People v. O.J. Simpson: American Crime Story, The Social Network, and The Revenant. However, a recent judicial decision has left the appellate court to deal with issues that may change the future of these types of programs. The case involves Street Survivor: The True Story of the Lynyrd Skynyrd Plane Crash, which a New York federal judge banned. The August ruling stems from the fact that the filmmakers spoke with and received material from Artimus Pyle, a former Lynyrd Skynyrd drummer, who agreed not to capitalize on the plane crash, which occurred in 1977 and killed two members of the group. The judge ruled that entering that agreement, Pyle had given up his free speech rights, and therefore, filmmakers and the studio must be enjoined from acting in concert with him. In response to that decision, Hollywood big names such as A&E, HBO, MGM, NBCUniversal, Paramount Pictures, Sony, 20th Century Fox, Univision and Warner Bros. requested permission to file an amicus brief in the appeal now before the 2nd Circuit. In the brief, the studios argue “If this Court were to adopt the District Court’s unprecedented and unconstitutional view of the prior restraint doctrine, it would significantly chill the willingness of content creators to undertake the substantial research necessary to create high-quality films, television programs and documentaries that depict real people and events.” In a separate brief, Reporters Committee for Freedom of the Press and 13 media organizations argue that “if this Court were to permit an injunction permanently preventing the publication of speech in this instance, such a precedent could be used to permanently enjoin the press from publishing information from a source on the basis of the source’s agreements with other entities.” Media entities, including journalistic sources, are concerned about the impact of restricting the publication and production of stories and films when a contractually limited source is involved, noting that it may prevent important stories from becoming public.

**North American Soccer League vs. United States Soccer Federation**

Over the past seven years, the United States Soccer Federation (USSF) has classified the North American Soccer League (NASL) as a Division II league. The NASL was recently informed by the USSF that it would not be approved as a Division II league moving forward. As a result, the NASL has filed a complaint against the USSF alleging antitrust violations that in denying the NASL from being approved as a Division II league, the USSF has in fact illegally protected the monopoly position of its business partner: Major League Soccer (MLS).

Historically, the USSF determines the different tiers of soccer leagues. The USSF has granted tier I status to MLS, tier II status to the United Soccer League (USL) and now tier III to the NASL. The division structure is based on specific criteria such as number of teams, geographic distribution of teams, market size of team’s city, stadium capacity as well as financial requirements of team owners.1 The USSF over the years had also provided for waivers allowing the NASL to continue with its Division status. However, following the 2016 season, the USSF made the Division II status conditional based on the league’s ability to field 12 teams.2 This did not occur and the USSF downgraded the NASL to a Division III in its structured tier program.

The purpose of antitrust laws are to ensure that there is free and open competition and does not guarantee anyone business success over other competitors. The complaint filed by the NASL alleges three distinct issues stemming from the USSF’s demotion of the NASL’s Division level and are denoted below3:

- The first allegation suggests that the USSF has violated federal antitrust laws through its
anticompetitive "Division” structure that divides men’s professional soccer based on arbitrary criteria manipulated to favor MLS;

• The second allegation claims that the USSF has selectively applied and waived its divisional criteria to suppress competition from the NASL with emphasis applied to criteria like stadium capacity and market size;

• The third allegation in the complaint states that the USSF sought to limit competition and now seeks to destroy the NASL by arbitrarily revoking the Division II status before the 2018 season.

The two substantive claims in the antitrust complaint are that of conspiracy and monopoly. The first allegation indicated in bullet one references the claim to conspiracy or a violation of Section 1 of the Sherman Act. “To prevail on a claim of violation of Section 1 of the Sherman Act, a plaintiff must prove by a preponderance of the evidence four elements.” 4 The elements include: (1) proving that a conspiracy existed; (2) alleged conspiracy resulted in an unreasonable restraint on interstate commerce; (3) substantial effect upon a substantial amount of interstate commerce; and (4) the injury to the plaintiff was caused by the conspiracy. 5 The NASL argues that the USSF with the help of its co-conspirators damaged the competition across men’s professional soccer and thus effectively made it impossible for the NASL to compete with MLS. The parties in this case are likely to debate what is considered to be the relative market; two tier league vs. sports and entertainment industry. 6 The other critical issue will be under the application of the rule of reason standard. Under this analysis, the issue will be whether facts and circumstances disclosed will prove anticompetitive effect on the market and no justification or competitive benefit.

In conclusion, the NASL may have this suit thrown out of court entirely due to its failure to follow due process procedures. The USSF is a member of the Federation of International Football Association (FIFA). FIFA statutes require disputes impacting leagues and clubs first go to arbitration before heading to court. Since, NASL filed in court first, it is likely the court could dismiss the case for following to exhaust administrative remedies first. NASL will likely argue that arbitration cannot provide for the relief that they are seeking, but it is not clear if that argument will be successful.

Suit against Pop Warner Moves Forward
(Kimberly Archie v. Pop Warner Little Scholars)

On October 20, 2017, a California District Court weighed in on the pending litigation regarding Pop Warner Little Scholars Inc. (Pop Warner) and its failure to safeguard children from chronic traumatic encephalopathy (CTE), a progressive degenerative brain disease. The decision rendered was based on procedural arguments and not on the merits of the case itself.

The District court dismissed the case in part pertaining to the second amended complaint. Nonetheless, the case against Pop Warner does not end there. This court decision does four things: (1) it grants the motion to dismiss by the National Operating Committee on Standard Athletic Equipment (NOCSAE) and thus effectively removing NOCSAE as a defendant; (2) it dismisses the claims of two plaintiffs; (3) it dismisses two causes of actions unless cured by November 20, 2017; and (4) it preserves the claims of two plaintiffs.

At this junction, the decision simply removes NOCSAE as a defendant because the plaintiff’s fail to address the arguments made by NOCSAE and thus, the court views that as conceding the very nature of the issue. Moreover, the plaintiffs also failed to establish that NOCSAE was availed to the forum state an issue that was supposed to have been cured after the first amended complaint. As a result, NOCSAE is dismissed from the matter altogether.

The order also dismisses with prejudice plaintiffs McCrae and Barnes due to timelines
and lack of standing, respectively. The decision also dismisses the alleged cause of action for violating California’s Unfair Competition Law and the alleged violation of California’s False Advertising Law because the plaintiffs’ claims were not based on business practices, but on personal injury. The plaintiffs tried to argue the injury was economic but in the second amended complaint attributed the economic loss to that of the personal injury and not the business practices. For that reason, the court concluded that the alleged violation of California’s Unfair Competition Law and False Advertising Law are dismissed with the ability to amend the complaint on these causes of action if done so by November 20, 2017, or those cause of actions will be deemed dismissed with prejudice. On the other hand, the District Court has permitted claims of fraud and negligence about Pop Warner’s alleged misrepresentation surrounding it safety practices to continue onward to address the merits of the case.

This suit first came to fruition when Kimberly Archie and Jo Cornell discovered that their sons suffered from chronic traumatic encephalopathy (CTE), a progressive degenerative brain disease after their untimely passing. As a matter of clarification, the lawsuit is one of a survival action where the claims belonged to a person before death and after death passed on to their estate. Archie and Cornell filed a class action suit and assert seven causes of action against Pop Warner and NOCSAE (now dismissed from the case): (1) negligence; (2) fraud; (3) fraudulent concealment; (4) negligent misrepresentation; (5) wrongful death; (6) violation of California’s Unfair Competition Law (now dismissed unless cured by November 20, 2017) and (7) violation of California’s False Advertising Law (now dismissed unless cured by November 20, 2017).

The main argument for this lawsuit is that Pop Warner failed to adequately train its coaches and staff on neurological injury prevention and identification. Plaintiffs charge Pop Warner with: “(1) failing to create and implement league-wide guidelines concerning the treatment and monitoring of players who suffer a brain injury during a practice or game; and (2) failing to adequately warn players and parents of the dangers of the sport.”

While this case in approach mirrors cases litigated in high schools, colleges and even on the professional level against the National Football League (NFL), the distinguishing factor is that the participants of Pop Warner are children and that the assumption of risk doctrine may not necessarily carry over for children. In light of evidence suggesting a direct link between CTE and that of playing football a number of cases have been settled by the NFL. It is likely that Pop Warner will have to follow suit especially as this case involves children and could be a potential public relations disaster if not handled delicately.

Rick Pitino Sues Adidas Over Dealings with Recruits (Richard A. Pitino v. Adidas America, Inc.)

Early this year, the Federal Bureau of Investigation (FBI) announced a number of college coaches within Division I programs had been arrested on corruption and bribery in conjunction with recruiting practices. Although no one from the University of Louisville was directly named, Rick Pitino (Pitino), head coach for the University of Louisville Basketball program was terminated and the University of Louisville acknowledged that it was part of the scandal that allegedly used Adidas to funnel money to unnamed recruits. Shortly thereafter, Adidas terminated their personal services agreement with Pitino, which still had $46 million remaining on the contract.

One day after the firing of Pitino, Pitino filed a civil suit against Adidas America as a result of their “outrageous conduct in conspiring to funnel money to the family of a college basketball recruit...all without Pitino’s knowledge, participation or acquiescence.” In fact, the complaint filed by Pitino’s attorneys alleged that the conduct of Adidas in the bribery recruiting practices should yield damages under Kentucky’s state tort law.
In Kentucky, the courts recognize a gap-filler tort called the tort of outrage, which is meant to be applied when no other traditional tort applies. The tort of outrage authorizes the recovery of damages from one who exhibits: (1) extreme or outrageous conduct; (2) intentionally or recklessly; and (3) causes emotional distress to another. In his complaint, Pitino explains that the actions of Adidas in conspiring to funnel money to the family of a college basketball recruit rises to this tort.

This case is far from over and, it is not clear how the actions of Adidas will result in emotional distress to Pitino. The elements to prove a tort of outrage require the element of emotional distress. Emotional distress would require Pitino being able to demonstrate that as a result of the story breaking, Pitino had to seek medical or psychological attention, that everything is very well documented and that the filing of the case was timely. Another impact to the overall corruption and bribery charges and this case is that the outcome will cause for an overhaul of the rules and procedures surrounding recruiting practices in the National Collegiate Athletics Association (NCAA). To date, at least four coaches from four different schools have been charged with alleged bribery violations. It is clear that reformation is needed because “big business” has found a way to infiltrate the system, and levy its influence on amateur athletics.

Colin Kaepernick Files Grievance for Collusion Against NFL Owners

Colin Kaepernick (Kaepernick), former quarterback for the San Francisco 49ers has filed collusion charges against the National Football League (NFL). Kaepernick is the African-American football player that led the charge of kneeling during the national anthem being played at NFL football games during the 2016-2017 seasons. The kneeling during the national anthem was Kaepernick’s way of conducting a protest to the number of unarmed killings of African-American persons to law enforcement personnel. As a result of the political statements made by now Free-Agent Kaepernick, the offers for employment on any of the 32 teams in the NFL has seemed to all but disappear.

The grievance that was filed is that of collusion, which has a specific meaning under the law. Collusion in sports can occur when two or more teams, or even the NFL front office and one team, join together to deprive a player of a contractually earned right. Normally, a charge of collusion speaks to a secret or illegal agreement. The critical analysis requires whether the contract, is concerted action, meaning, whether it joins together separate decision makers such that the agreement deprives the marketplace of independent centers of decision making. In other words, two or more teams or a team and the NFL itself must interact to conspire to deprive Kaepernick a contractual right. That right in these circumstances is the collectively bargained right for free agents to sign with new teams.

Pursuant to the collective bargaining agreement between the National Football Players Association (NFLPA) and the NFL, “[a]rticle 17 states that the collective bargaining agreement can be terminated on an account of collusion against one player if there is clear and convincing evidence that 14 or more teams colluded against that player.” To prevail on a claim of collusion, there needs to be direct evidence, such as an email of admission from a team official. The burden of proving the case is on Kaepernick by a clear preponderance of the evidence that collusion occurred and caused an economic injury. Normally, when grievances are made citing the collective bargaining agreement, they are usually initiated by the union (NFLPA). However, in this instance the grievance was filed by Kaepernick, himself. It is important to note that the collective bargaining agreement does not prohibit each team from deciding for itself whether it was to negotiate with a particular player. This is even true if all of the quarterbacks that were signed were of a lesser athletic talent then Kaepernick.

To prove a case of collusion, Kaepernick
must show evidence such as emails, text messages and other documents demonstrating a concerted action has taken place to prevent Kaepernick from being signed by an NFL team. Currently, the case is in the discovery phase. Kaepernick’s legal team has a list of people they intend to depose, including Dallas Cowboys owner, Jerry Jones, Houston Texas owner, Bob McNair, and Robert Kraft, owner of the New England Patriots. Additionally, a request was made to the NFL to depose Roger Goodell and other executives and includes information requests and production of documents with terms such as “Kaepernick,” “workout,” “Trump,” “Jeff Nalley” (Kaepernick’s agent). The hope is that through these different discovery requests, tangible evidence will be elicited proving collusion.

Kaepernick’s legal team has an uphill battle. As stated above, collusion requires concerted activity between two parties. The legal team will try to look at creative ways to demonstrate collusion, such as the relationship between Jerry Jones and the other NFL Owners with Papa John’s. Another avenue is looking at the communication from President Trump and how he may have served as the go-between for the owners to conspire. However, what makes this strategy an uphill battle is that the collective bargaining agreement only covers the parties to the agreement; the NFLPA and the NFL. Neither the owner of Papa John’s nor President Trump are owners of a NFL franchise and thus, would not be party to the collective bargaining agreement.

Although it is not likely that Kaepernick will win this case, there could be a significant award if Kaepernick can prove collusion. Under the collective bargaining agreement, the collective bargaining agreement could be cancelled. The reasoning for this is because the collective bargaining agreement, although a bad agreement in many areas such as discipline and power to the NFL commissioner, does provide for consistent working conditions and policies along with compensation. Without a collective bargaining agreement, the NFL owners could lockout the players. This would be a horrible option and not one that the NFLPA is likely to follow.

Nonetheless, a Kaepernick win would mean an award of both compensatory damages due to the economic harm, and non-compensatory damages equal to twice the amount of compensatory damages. Since, compensatory damages are based on the economic harm suffered, Kaepernick would have to illustrate the types of contracts that were being given to the other quarterbacks and how his contract should be at the very least comparable. In other words, if Kaepernick had received a contract for $10 million dollars then that would constitute the compensatory damages. However, because the non-compensatory damages double that award as an additional award, Kaepernick would be awarded a total of $30 million dollars. The critical takeaway is that without evidence, this case is most likely going to be dismissed, but if there is evidence, then things will get even more interesting.

Hernandez v. NFL, Riddell

Attorneys for the estate of Aaron Hernandez have refiled their lawsuit against the National Football League (NFL) to include the sports equipment company Riddell.

The Hernandez estate originally filed a lawsuit against the NFL and New England Patriots in the United States District Court for the District of Massachusetts on September 21, 2017. Shayanna Jenkins Hernandez, the former fiancée of Hernandez, was named in the suit on behalf of the Hernandez couple’s daughter. The Hernandez camp argued that the league and the team had failed to protect the former star tight end from the effects associated with chronic traumatic encephalopathy (CTE). The suit stated that the NFL has been aware since at least 1994 that on-field collisions lead to latent head injuries that have long-term debilitating effects on players, such as memory loss, dementia, depression, and CTE. Specifically, it alleged that upon Hernandez entering the NFL in 2010, the NFL and
Patriots were “fully aware of the damage that could be inflicted from repetitive impact injuries and failed to disclose, treat, or protect him from the dangers of such damage.” Hernandez’s attorneys cited as evidence former Steelers player Mike Webster’s head injury case as well as the alleged failure of the NFL’s now-defunct Mild Traumatic Brain Injury Committee to conduct independent CTE research. Additionally, it referenced Boston University’s 2017 study of the brains of 202 deceased football players that found evidence of CTE in 201 of the brains, including all 101 brains examined from former NFL players.

The Hernandez estate, however, dropped this initial suit on October 13 and refiled in state court—Norfolk Superior Court in Dedham, Massachusetts—on October 16, again naming the NFL but also adding sporting good company Riddell as a defendant. Riddell was the league’s official helmet provider from 1989 to 2013. The suit’s individual counts included civil conspiracy (all defendants); fraudulent concealment (all defendants); negligence - voluntary undertaking (all defendants); negligence - licensing (NFL, Riddell); negligent hiring/retention/supervision (NFL, Riddell); and failure to warn (Riddell). In “blessing the [Riddell helmets] as the NFL’s official helmet”, the second suit alleged that the NFL had agreed with Riddell to provide high-quality helmets that would be “sufficient to protect” the general public from injury. However, the Hernandez estate argued that the NFL and Riddell, in tandem, concealed material facts related to player head injuries and CTE while also conducting “sham research”. As a result of this concealment, according to the suit, Hernandez’s decision to play football was not fully informed, as he suffered repeated blows to the head while using the Riddell helmets. These blows, the suit states, led to the development of advanced CTE and led to Hernandez suffering “a chaotic and horrendous existence in many respects, due to his undiagnosed brain injury.”

Further, the addition of Riddell to the suit as an alleged tortfeasor because it was aware of the ineffectiveness of its helmets could potentially introduce new parties to concussion-related lawsuits.

**Christie v. National Collegiate Athletic Association**

The United States Supreme Court will soon hear opening arguments in *Christie v. NCAA*, No. 16-476, which will have significant implications in sports betting and the state versus federal powers debate. Original plaintiffs included the governor of the state of New Jersey; David L. Rebuck, Director of the New Jersey Division of Gaming Enforcement and Assistant Attorney General of the State of New Jersey; Frank Z anzuccki, Executive Director of the New Jersey Racing Commission; New Jersey Thoroughbred Horsemen’s Association, Inc.; and the New Jersey Sports & Exposition Authority.

The suit focused on the enforceability of the Professional and Amateur Sports Protection Act (PASPA), 28 U.S.C. §§ 3701-3704. Congress passed PASPA in 1992 with the intention of banning state-sanctioned sports gambling, with a few limited state exceptions, including New Jersey if it passed a pro-gambling act within one year of PASPA’s enactment. New Jersey did not pass a gambling amendment until 2012, following a referendum and voter approval, when it enacted the Sports Wagering Act. Five sports leagues, including the National Collegiate Athletic Association, National Basketball Association, National Football League, National Hockey League, and the Office of the Commissioner of Baseball, sued under PASPA to enjoin the Sports Wagering Act. The New Jersey plaintiffs argued that, while the state amendment violated PASPA, the federal law was not in compliance with the anti-commandeering doctrine.

The federal district court in New Jersey held that PASPA was constitutional and enjoined the 2012 Act, known as *Christie I*. The New Jersey legislature passed a second law in 2014 that
essentially removed restrictions on sports gambling in certain casinos, and the district court granted the leagues a motion for summary judgment. In November 2014, the Third Circuit of the United States Court of Appeals affirmed the district court decision, holding that the 2014 law violated PASPA and the injunction applied to gambling on athletic contests of non-parties. The Third Circuit affirmed this decision en banc on August 2015.

The Court granted certiorari on June 27, 2017 and will combine arguments from NJ Thoroughbred Horsemen v. NCAA. The New Jersey petition again concentrated on the anti-commandeering doctrine, stating “Never before has congressional power been construed to allow the federal government to dictate whether or to what extent a State may repeal, lift, or otherwise modulate its own state-law prohibitions on private conduct. And never before has federal law been enforced to command a State to give effect to a state law that the State has chosen to repeal.” The Court will review whether PASPA's prohibition against modification or repeal of state-law bans on private conduct unlawfully usurps state regulatory power. Arguments are currently set to be heard on Monday, December 4, 2017.

NCAA clears UNC of “paper class” wrongdoing

The National Collegiate Athletic Association (NCAA) cleared the University of North Carolina (UNC) of multiple counts of academic fraud when it released its public infractions decision on October 13, 2017. The NCAA’s decision was based on the availability of the Department of African and Afro-America (AFRI/AFAM) studies “paper classes” to the entire UNC student body, as opposed to only student-athletes.

The NCAA Division I Committee on Infractions (COI) investigated a scandal that was purported to have lasted more than 18 years and found that UNC did indeed offer courses that “did not meet, involved little, if any, faculty engagement and were frequently graded by a former curriculum secretary.” An outside firm estimated 3,100 students took a paper course with abnormal outside academic help. However, the COI recognized that the NCAA grants great deference to individual schools with respect to how they define academic fraud based on their respective academic integrity policies. Moreover, since any member of the student population had access to these classes, there was no evidence of extra benefits for student-athletes.

The COI conducted its initial hearing on the “paper classes” on October 28, 2011 and went on to conduct multiple investigations and amended notices of allegations (NOA) through 2016. In its report it accused UNC of a failure to cooperate with its early investigations until UNC responded to the most recent notice on May 16, 2017. From there, COI responded to UNC by alleging that the issue was access to these courses and special assistance for only student-athletes and then conducted an infractions hearing on August 16 and 17, 2017. In addition to a failure to cooperate allegation, the panel alleged that UNC had engaged in (1) unethical conduct and extra benefits related to student-athletes’ access to and assistance in the paper courses; (2) unethical conduct by the instructor/counselor for providing impermissible academic assistance to student-athletes; and (3) a failure to monitor and lack of institutional control. Though the COI could not find academic, failure to monitor, or lack of institutional control violations, it did find a Level I and Level II failure to cooperate violation for the AFRI/AFAM department chair and secretary, respectively.

The NCAA’s lack of paper class fraud enforcement highlighted the power individual schools had prior to the investigation in 2011 to determine which classes met objective academic standards and to defend those rights against NCAA panels.

My Agent, or Not My Agent, That is the Question (CAA v. Rodriguez Complaint)

Creative Artists Agency, LLC (“CAA”) filed a complaint against Richard Rodriguez
Rodriguez) asserting three claims: (1) breach of an oral contract; (2) breach of the covenant of good faith and fair dealing; and (3) unjust enrichment.

In the complaint, CAA alleges that they and Rodriguez entered into an oral agreement in 2011. CAA was to act as Rodriguez’s agent when negotiating agreements, including the terms of employment as an on-air analyst for CBS Sports Network, and as the head coach for the University of Arizona. From 2011 to 2014, Rodriguez paid, in full, any invoice he received from CAA. In 2015, after CAA negotiated Rodriguez’s third amended employment contract with the University of Arizona, CAA invoiced Rodriguez for the work they had performed. Rodriguez paid the first invoice on the services; however, he has failed to pay the subsequent invoices.

In or about Fall 2015, Rodriguez terminated his relationship with CAA. CAA insinuates that Rodriguez terminated the relationship to avoid the unpaid invoices. CAA attempted to negotiate with Rodriguez’s attorney to avoid a lawsuit but Rodriguez refused to negotiate.

Due to the lack of negotiation, CAA requests a judgment in its favor against Rodriguez for an award of compensatory, general, and special damages, if any, in an amount to be determined at trial; disgorgement of all amounts unjustly obtained by Rodriguez; punitive damages in an amount sufficient to punish Rodriguez and to deter him and other similarly situated engaging in similar conduct in the future; an award of reasonable attorneys' fees and costs; an award of pre-judgment and post-judgement interest at the highest rate as allowable by law; and an award of such other and further relief as the Court deems just and proper.

Swing Batter Batter Batter Swing (Loos v. Cubs Complaint)

In every Major-League Baseball (“MLB”) Stadium, there is a net guarding the seats behind home plate and often times extending behind the dugout. The MLB, in conjunction with the teams, have worked hard to safeguard fans from baseballs leaving the field of play. However, John “Jay” Loos (“Loos”) does not believe that they are doing enough. On August 29, 2017, Loos was struck in the face by a baseball while attending a baseball game at Wrigley Field, causing severe facial orthopedic and optic injuries. Loos alleges that neither the MLB nor the Cubs took precautions to ensure fans would not be hit by stray balls. Loos alleges that the MLB and the Cubs were aware that patrons have suffered several injuries at Wrigley Field and other MLB Fields. Loos believes that the most dangerous areas in a stadium are the seats along the first and third baselines, foul territory. It was there that Loos was struck by a baseball.

Loos further alleges that the MLB and the Cubs have exacerbated the risk of injury by failing to extend the netting, providing distractions during the game, increasing the pace of the game, and encouraging the use of mobile devices during the game. Loos claims that the MLB failed to use their power and authority to mandate teams to take steps to increase fan safety, including the netting for the protection of patrons like Loos. Loos is suing the MLB for negligence and the Cubs for willful and wanton conduct.

Loos demands judgement against the MLB in an amount in excess of fifty thousand dollars. Furthermore, Loos demands judgement against the Cubs in an amount in excess of fifty thousand dollars.

You are OUT! (Nationals v. Orioles App. Decision)

Jordan Wyckoff, individually and on behalf of other professional baseball scouts, and Darwin Cox (collectively, “Plaintiffs”), were not happy with the call from the courts. The Plaintiffs appealed from the dismissed class action suit by the United States District Court for the Southern District of New York. The class action alleged violations of the Sherman Act, New York's Donnelly Act, and the Fair
Labor Standards Act by the Office of the Commissioner of Baseball, doing business as Major League Baseball, its current and former Commissioner, and its 30 professional baseball clubs (the “Franchises”) (collectively, “Defendants”).

In addition to the original allegations brought by the Plaintiffs, they also argued that the District Court erred by ignoring factual allegations indicating that the professional scouts’ claims fall outside professional baseball’s long-recognized exemption from antitrust regulation. It did not take long for the United States Court of Appeals for the Second Circuit to affirm the District Court’s decision.

The Court of Appeals cited Section 1 of the Sherman Act which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.” 15 U.S.C. § 1. Although the Sherman Act prohibits such restraints, since 1922, it has been recognized that the business of baseball is exempt from antitrust regulation. See Fed. Baseball Club of Balt. v. Nat’l League of Prof’l Baseball Clubs, 259 U.S. 200, 208-09 (1922). Throughout history, the Supreme Court has repeatedly affirmed baseball’s exemption from antitrust laws.

Finally, in 1998, Congress passed the Curt Flood Act, solidifying the exemption from antitrust regulation. See 15 U.S.C. § 26b. Under such premise, the Court of Appeals affirmed the District Court’s dismissal of the class action suit.

**Arbitrate & Legislate (Nationals v. Orioles App. Decision)**

TCR Sports Broadcasting Holding, LLP d/b/a the Mid-Atlantic Sports Network (MASN) and the Baltimore Orioles, and the Washington Nationals sought to arbitrate a dispute regarding a contractual dispute over telecast right fees. The arbitration was governed by the Federal Arbitration Act (FAA) (9 USC § 1 et seq.) and initiated before the Revenue Sharing Definitions Committee (RSDC) of Major League Baseball (MLB).

The Court found that the arbitration award issued by the RSDC on June 30, 2014 was correctly vacated based on “evident partiality” (9 USC § 10[a][2]) arising out of the Nationals’ counsel’s unrelated representations at various times of virtually every participant in the arbitration except for MASN and the Orioles, and the failure of MLB and the RSDC, despite repeated protests, to provide MASN and the Orioles with full disclosure or to remedy the conflict before the arbitration hearing was held.

**That’s All States from Here (GAME Act Draft (2017))**

The 115th Congress published a discussion draft regarding the liability for gaming activity that is lawful under State Law, and for other purposes. The 115th Congress proposes the Act to be cited as “Gaming Accountability and Modernization Enhancement Act of 2017” or the “GAME Act of 2017”. The Gaming Act will cover rules regarding: “No Federal Liability for Gaming Activity Lawful under State Law” (Sec. 2); “Use of Credit Card to Verify Age Prohibited” (Sec. 3); “Enforcement” (Sec. 4); “Gambling Addiction Prevention and Treatment” (Sec. 5); “Surveillance of Gambling Addiction” (Sec. 317U); “Definitions” (Sec. 6); “Effect on Other Law” (Sec. 7); and “Repeal” (Sec. 8).

The discussed Act allows States to take control of gaming activities within their respective states. Through this legislation one can see that Congress believes gaming activity regulations should be left up to the states; however, Congress wants to continue to monitor underage gaming and addictive behaviors. Moreover, Congress notes that the Indian Gaming Regulatory Act, Illegal Gambling Business Act, Interstate Horse Racing Act is out of the scope of this legislation. Furthermore, the Gaming Act of 2017 specifically repeals the Professional and Amateur Sports Protection Act.
You Can’t Outsmart the FBI (USA v. Person, Michel Complaint)

What do (former) Auburn’s Assistant Basketball Coach, and (former) Atlanta Clothier, NBA, and college Basketball referee have in common? Bribery, Conspiracy, Solicitation of Bribes and Gratuities, Conspiracy to Commit Honest Services Fraud, Honest Services Wire Fraud, Conspiracy to Commit Wire Fraud, and Travel Act Conspiracy.

Beginning in 2015, the FBI and USAO led an investigation regarding the criminal influence of money on coaches and student athletes who participated in intercollegiate basketball governed by the NCAA. The investigation revealed much more than the FBI and USAO originally thought. It showed how the position and power held by a coach could be used to influence student-athletes in a way that would unjustly grow their own bank accounts.

Specifically, the investigation revealed several instances in which “coaches have exercised that influence by steering players and their families to retain particular advisors, not because of the merits of those advisors, but because the coaches were being bribed by the advisors to do so.”

The United States of America has filed suit against Chuck Connors Person, the associate head coach of the University-1 Division I Men’s basketball team and a former NBA player coach, and Rashan Michel, who had a preexisting relationship with Person and operated a clothing store that specialized in making bespoke suits for professional athletes. The government used an undercover financial advisor and business manager for professional athletes (“CW-1”) to break seams in this investigation. Over a 10-month period CW-1 paid approximately $91,500 in bribes to Person in exchange for Person’s agreement to use his official influence over student-athletes at University-1 whom Person believed would enter the NBA to retain CW-1’s financial advisory and business management services to purchase suits from Michel. As part of the scheme, Person claimed to have given approximately $18,500 of the bribe money he received to the families of student-athletes whom Person sought to steer to CW-1.

[Not You Too (USA v. Evans Complaint)]

Under the same investigation as the FBI and USAO, it was revealed corrupt arrangements between assistant and associate coaches, who received cash bribes to deliver players to an advisor, and to the bribor agents or advisors, for whom securing a future NBA player as a client can prove extremely profitable. This complaint focused on the bribe payments solicited and received by three coaches at NCAA Division I Men’s Basketball teams: Lamont Evans, Emanuel Richardson, a/k/a “Book,” and Anthony Bland, a/k/a “Tony,” and facilitated by Christian Dawkins and Munish Sood.

In exchange for such bribes, Evan, Richardson, and Bland agreed to direct certain student-athletes under their supervision to retain business management and financial advisory services of Dawkins, Sood and/or CW-1.

The United States of America filed suit against the above individuals for (1) conspiracy to commit bribery, solicitation of bribes and gratuities by an agent of a federally funded organization, conspiracy to commit honest services fraud, honest services wire fraud, wire fraud conspiracy, and travel conspiracy. Beginning in 2016 and continuing into 2017, Sood and CW-1 having learned from Dawkins, that Dawkins previously had paid bribes to Evans in order to obtain access to student-athletes coached by Evans, paid at least $22,000 in bribes to Evans in exchange for Evan’s agreement to exert his official influence over certain student-athlete that Evans coached at University-2 and University-3, to retain Sood and CW-1’s business advisory and/or investment management services once those players entered the NBA.

[Third Suit is a Charm (USA v. Gatto et al. Complaint)]
The investigation did not stop there. The investigation further revealed wire fraud conspiracy, wire fraud, and money laundering conspiracy. This particular rabbit hole revealed that James Gatto a/k/a “Jim,” a high level executive of a global athletic apparel company (“Company-1”) and Merl Code, and individual affiliated with Company-1 and its high school and college basketball programs, conspired with coaches for universities sponsored by Company-1 to make payments to high school basketball players and/or their families in exchange for commitments by those players to attend and play for the Company-1 sponsored university, and to sign with Company-1 upon turning professional. In addition, Dawkins, Sood, and Jonathan Brad Augustine, brokered and facilitated the corrupt payments, in exchange for a promise that the players also would retain the services of Dawkins ad Sood upon turning professional. The complaint lays out the scheme between Gatto, Code, Dawkins, Sood, and Augustine, which sought to defraud the relevant universities and student-athletes.

Through a multitude of allegations, the FBI and USAO seek to punish the involved individuals as well as deter other fraud rings within the NCAA from continuing and/or prevent illegal similar to those listed in the suit.

**The Slants & Fashion Activism**

The election of Donald J. Trump to the highest office of the United States of America beckoned a new era, demonstrated by dramatic changes to international protocol, political campaigns, and presidential comportment. Regardless of individual political leanings, the resulting insurgence of social and political activism is irrefutable. The frenzied political climate has permeated all faucets of modern-day America, including the fashion industry. Earlier this year, the fashion editorial bible, ‘Vogue Magazine’, predicted the 2017 trends would include designers’ showcasing collections that reflected their core beliefs and values. Vogue surmised, “logo mania took 2016 fashion by storm, but for 2017, brands are focused less on themselves and more on getting a message of togetherness across. Michael Kors intarsia-ed a sweater with the word love, Haider Ackermann went with *be your own hero* on tees, and Dior’s Maria Grazia Chiuri chose Chimamanda Ngozi Adichie’s phrase *we should all be feminists.***

While fashion houses embarked on integrating apparel with progressive messaging, the Supreme Court embarked on altering decades of First Amendment legal precedent with its decision in a case commonly known as “The Slants Lawsuit.”

‘The Slants’ are the self-proclaimed, world’s first all-Asian American dance rock band. In 2011, bandleader Simon Tam submitted a trademark application for the band’s name with the United States Patent and Trademark Office (USPTO). The USPTO rejected Tam’s application, stating registration of the band’s name would violate the disparagement clause of The Lanham Act. The Lanham Act is federal legislation that permits registration of trademarks used in commerce. The Act includes a provision that specifically “prohibits any trademark that could ‘disparage ... or bring ... into contempt or disrepute” any “persons, living or dead.”

The rock band contended that its title was a “re-appropriation” of a historically derogatory term typically assigned to Asians. Tam explained that as Asian Americans, they “…grew up [with] the notion [that] having slanted eyes was always considered a negative thing. Kids would pull their eyes back in a slant-eyed gesture to make fun of us. ... I wanted to change it to something that was powerful, something that was considered beautiful or a point of pride instead.”

While the band strove to ‘re-appropriate’ the ‘Slants’ term, similarly to how “some African-American artists have attempted to defang the ‘nigger’ slur by using it themselves; Tam’s attorneys highlighted USPTO inconsistences, asserting that, “one of the most well-known and influential musical groups of the 1980s and 1990s was N.W.A., which fans knew stood for ‘Niggaz Wit Attitudes.’ While [‘nigger’] certainly may be used in a disparaging way, the members of N.W.A. did not use the word that way, and the group’s millions of fans did not interpret the name as disparaging.”
Nonetheless, the USPTO argued that its determination should stand since, “….. trademarks are government speech, not private speech, and trademarks are a form of government subsidy; the USPTO also contended that the constitutionality of the disparagement clause should be tested under a new “government-program” doctrine”.  

The Supreme Court found that trademarks are neither government speech nor government subsidies. In regards to the disparagement clause, the Court applied the standard used in cases involving limited public forum for private speech, and surmised that in its denial of registration based on offensive language, the USPTO engaged in viewpoint discrimination. Although admitting the USPTO has a benevolent interest in preventing the registration of offensive marks, the Court emphasized that such an “idea strikes at the heart of the First Amendment.” Noting that, “speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express ‘the thought that we hate’ “. Consequently, the Supreme Court ruled in the favor of ‘The Slants’, deciding that the disparagement clause of the Lanham Act violates the Free Speech Clause of the First Amendment.

The Slants decision is indicative of the social and political consciousness of the modern era. The preponderance of social and political speech on the present-day runways is undeniable. This movement was perceptibly evident during America’s premiere fashion exhibition, New York Fashion Week. Prior to the extravaganza, the prestigious Council of Fashion Designers of America (CFDA) officially joined forces with Planned Parenthood, vividly proclaiming its partnership with pins that broadcasted, “Fashion Stands With Planned Parenthood.” Numerous designers, including Keren Craig and Georgina Chapman, co-founders of the design house, ‘Marchesa,’ as well as Brandon Maxwell, Adam Selman and Michelle Smith of ‘MILLY’, proudly sported the pins. Other highlights included models, from Prabal Gurung’s show, dressed in shirts with feminist quotes and slogans from protest rallies, as well as designer Jonathan Simkhai brazenly concluding the successful display of his latest collection by donning a shirt that read, ‘Feminist AF’.

On its face, The Slants ruling ostensibly rolled back a protectionist clause of the Lanham Act that attempted to shield historically vulnerable minority groups from abhorrent terms derived from hateful practices. However, citizens of the current climate are challenging societal and political norms by embracing words and aesthetics traditionally used to minimize marginalized communities. For example, during the 1990s, young Latinas from economically strapped neighborhoods of Southern California were dismissively catalogued as “Cholas.” Now, many Latinas from various backgrounds have embraced the iconic “Chola” look as a symbol of solidarity and pride, adorning themselves with dark makeup, thin eyebrows, and hip-hop styled attire, culminating in the “Chola Fashion Trend.”

The Supreme Court ruling furthers the national discourse by protecting civilians who choose to incorporate their beliefs within their business and artistic endeavors. In light of The Slants’ decision, fashion industry influencers will continue to unabashedly utilize their art to push social and political boundaries, creating a seamless blend between creative expression and commerce.

The Supreme Court ruling furthers the national discourse by protecting civilians who choose to incorporate their beliefs within their business and artistic endeavors. In light of The Slants’ decision, fashion industry influencers will continue to unabashedly utilize their art to push social and political boundaries, creating a seamless blend between creative expression and commerce.


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A Young Lawyer’s Perspective From The Forum’s Annual Meeting: How “Bigly” is the Future of the Music Industry? It’s “Yuge!”

by Amanda Alasauskas

Music and entertainment have always been an important part of my life. Now that I have graduated law school and have been tossed into the “real world,” I have found that my passion and enthusiasm for this field is stronger than ever. From October 5-7, 2017, I found myself in Las Vegas, Nevada, attending my second Annual Meeting for the ABA Forum on the Entertainment Sports Industries, this time as a Young Lawyer Reporter. I attended the panel Turbulent Waters or Smooth Sailing: How Bigly is the Future of the Music Industry, which was comprised of an ever enthusiastic and knowledgeable panel: Bill Coulter, Vice President and General Counsel of Music Reports, Inc.; Gary R. Greenstein, Partner at Wilson Sonsini Goodrich & Rosati; Marc Cimino, COO at Universal Music Publishing Group; Susan Genco, Co-President at Azoff MSG Entertainment, LLC; and Henry W. Root, Partner at Lapidus, Root, & Sacharow, LLP. They covered a variety of topics, namely the reproduction and public performance of copyrighted works on non-interactive and interactive streaming services, the economic state of the industry, and the ASCAP and BMI consent decrees which have recently been in the spotlight.

Non-Interactive vs. Interactive Streaming Services and Public Performances

Under Section 106 of the Copyright Act, the owner of a copyright has the exclusive right to reproduce, distribute, prepare derivatives, and publicly perform the work.¹ This public performance right is limited to digital audio transmissions and not terrestrial AM/FM radio.² The type of license a provider is able to get depends on whether they are interactive or a non-interactive digital music provider.³ Non-interactive providers are those where the user will listen to music as if listening to a traditional radio broadcast and the user is not able to choose to listen to a specific song or artist. Examples of this type of provider are Sirius XM and Pandora. Non-interactive providers are able to obtain a statutory license and pay their royalties through SoundExchange. However, an interactive digital music provider allows users to have control over the specific song played, such as Spotify, and must individually negotiate a license with each performer. Terrestrial radio, meanwhile, pays nothing.

Streaming is now one of the most common ways for consumers to listen to music. 45% of consumers engage in licensed audio streaming, which is up from 37% in 2016.⁴ Video streaming, including user upload services such as YouTube, takes up 55% of on-demand music streaming time, while free audio streaming and paid audio streaming take up 22% and 23%, respectively.⁵ In the last six months, 44% of consumers are purchasing physical copies of music or paid downloads, 45% use audio streaming services, 75% use video streaming services, and 87% are listening to the radio, whether it is broadcast or internet.⁶

Whether consumers listen to Pandora, Sirius XM, or AM/FM radio, they are getting relatively the same experiences, yet are paying drastically different percentages to copyright owners. In 2012, Pandora paid record labels and publishers 55.9% of its revenue.⁷ Meanwhile, the Copyright Royalty Board determined that Sirius XM only needs to pay 11% of its revenue. Again, terrestrial radio pays nothing, due to an outdated belief that radio airtime constituted free advertising for artists.

To make matters more convulted, Spotify recently announced that it believes that it does not need
to pay for a mechanical license. A mechanical license grants the rights to reproduce and distribute copyrighted songs on various platforms, including interactive streams. It is apparent that the argument can be made that interactive on-demand services such as Spotify serve as substitutes for people buying music, and therefore publishers should receive mechanical royalties. It is even the industry consensus that mechanical royalties should be paid. The issue now is whether there is actually a reproduction of the song that takes place on interactive services that does not take place on non-interactive radio.

**The Economics of Balance Between Music and Business**

The economic prospects of the music industry are not as grim as they once were. Recorded music sales in the United States were up 11.4% in 2016 and the industry brought in $7.65 billion in revenue. These numbers show a rising amount of money paid for consumption of music, but the industry is not back to where it was when consumers forced to buy packaged goods. However, today, consumers are able to choose the music they want and there has been a growing amount of subscribers to streaming services.

Spotify is arguably the largest subscription streaming service available to music consumers. However, it does not have a parent company to stand under, like iTunes and Apple Music does with Apple, or Amazon Music with Amazon. There are countless streaming services out there, but how many will actually survive? We've already lost a couple, including Beats Music, which was bought by Apple in May of 2014, and Rdio, which was acquired by Pandora in 2015. Further, what is the evidence that standalone streaming services, like Spotify, can make money? Although it is not yet a public company in the United States, Spotify revealed it has paid out approximately 70% of its total revenue in royalties to rights holders since 2009. When a company is paying out at as approximately 70% of its total revenues solely to copyright owners, this does not leave much room to pay investors and run the company.

Long story short: a business cannot survive if it cannot make money, but this also pertains to the artists and creators themselves. The problem with streaming services are that creators are not adequately compensated. If an artist cannot go out on tour and make money, they get shut down. Business models should not rest on the shoulders of the creators and margins that these streaming services make can be used as a way to pay the creator less. The challenge is better aligning the goals of those who create and those who deliver the content to the consumers, creating an appropriate split between services and creators, which then breaks down into a further splits, such as between creators and record companies. On the bright side, as streaming services continue to be a leading source of music consumption and consumers get used to paying for music on subscription services, the market will continue to evolve and mature.

**ASCAP & BMI Consent Decrees**

The American Society of Composers, Authors, and Publishers (“ASCAP”) and Broadcast Music, Inc. are performing rights organizations (“PROs”). They grant licenses to music users, collect licensing fees, and distributes royalties to its affiliated copyright holders. The repertories of both ASCAP and BMI comprise about 90% of the musical compositions publicly performed in the United States and each take in over $1 billion annual in licensing fees. There are two other PROs in the United States, which currently operate without direct government oversight: the Society of European Stage Authors and Composers (“SESAC”) and Global Music Rights (“GMR”). ASCAP and BMI operate primarily through blanket licenses, meaning licensees have the right to perform any of the compositions in the respective repertories as often as they please for the license period. On one hand, blanket licenses reduce the transaction costs of licensing copyright compositions, let songwriters monetize their works immediately upon signing with the PRO, and immediately enable users to begin performing the works without fear of infringement. On the other hand, the PROs’ collective bargaining on behalf of rights holders who are otherwise competing afford the PROs
massive market power.\textsuperscript{18} Blanket licenses offer all of the songs in the repertories on an all-or-nothing basis, preventing songs from competing with each other based on price, raising antitrust concerns.\textsuperscript{19}

In order to secure all necessary public performance rights, the majority of music users will obtain a license from ASCAP, BMI, SESAC, and GMR, thus obtaining access to nearly all musical works.\textsuperscript{20} However, ASCAP and BMI currently operate under consent decrees, entered into after being sued by the Department of Justice in 1941. The consent decrees limit the way these two PROs operate, in several key ways: they can only administer performance rights, not other, often related rights; they must have non-exclusive licenses, meaning that publishers retain the ability to directly license their catalogues; they are required to grant a license to any party that requests one, which is then valid while the two parties attempt to negotiate a rate; and if the two sides are unable to reach an agreement regarding the rate, the dispute is settled by a rate court, which was formed under the consent decrees.\textsuperscript{21} However, in recent years, with SESAC and GMR not subject to consent decrees, songwriters formerly affiliated with BMI or ASCAP have terminated their relationship to join these unregulated PROs because they “believe they retain greater control of their public performance rights, in particular the ability to license their works at a free-market, negotiated rate, when not subject to the automatic licensing and rate court provisions in the BMI or ASCAP consent decrees.”\textsuperscript{22}

It is common for songwriters to collaborate with one another. In 2014, “93 of the top 100 charting songs had more than one writer.”\textsuperscript{23} Virtually all songwriters and composers are affiliated with a PRO, and are free to join whichever they please. Most commonly, these interests are divided between BMI and ASCAP. This means that co-writers and co-composers to a work are often affiliated with different PROs, which results in “split works.” For example, three co-writers have equal rights to a song, one is with ASCAP, another is with BMI, and the other with SESAC—each would have 33% “fractional interest” in the song. A large debate surrounding these consent decrees is the full work licensing interpretation. Currently, under the Department of Justice’s interpretation of the consent decrees, any co-author of a work is able to license 100% of the work, even if they created only a portion.\textsuperscript{24} Therefore in the above example, BMI has to license 100% of the song, even though only one of the songwriters is affiliated with them. Therein lies to controversy. Should ASCAP or BMI be able to license 100% of a song it does not full have rights to? Even further, how is a PRO to pay a co-writer to song that they do not have information for and are not contracted to? Songwriters argue that the 100% licensing interpretation will affect who writes songs with whom to how songwriters are paid.\textsuperscript{25} However, fractional licensing could increase transaction costs, meaning users would need to get a license from all PROs that co-songwriters belong to in order to use one song. Regardless, the final outcome of this legal battle, currently on appeal, will have a significant impact on songwriters and the music industry as a whole.

**Conclusion**

What it comes down to is that the future of the music industry is complex and exciting. However there needs to be an alignment of goals and business models. The music industry is much more globalized than in the past and younger generations do not consume music on a genre basis, and merely just consume music. The big players will continue to get bigger and revenues will go up on copyright owner side. It is even possible that there is no need for piracy when you can get all of content on lawful service on your phone. However, if creators are not supported, the privilege of being a culture and country who continues to produce a great export will no longer be ours, as other countries are protecting their artists in a way that is not happening in the United States.

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A Young Lawyer’s Perspective From The Forum’s Annual Meeting: Trademarks, Counterfeits, and Piracy! Oh, My! — Hot Topics in Global Intellectual Property

by Amanda Alasauskas

On Friday, October 6, 2017, while attending the Annual Meeting for the ABA’s Forum on the Entertainment and Sports Industries, I had the privilege of listening to a panel, Around the World in 80 Minutes, consisting of renowned intellectual property law experts speaking on hot-topic issues affecting intellectual property law and rights in the United States, South America, the European Union, and China. This panel was comprised of Ann Chaitovitz, IP Attaché for Bolivia, Chile, Colombia, Ecuador & Peru with the United States Patent and Trademark Office; Terry Hart, Vice President of Legal Policy and Copyright Counsel for The Copyright Alliance; Phillip H. Lam, IP Counsel for the Office of the City Attorney Mike Feuer in the City of Los Angeles; Michael Mangelson, IP Attaché for China with the United States Patent and Trademark Office; Steven J. Wadyka Jr., Shareholder at Greenberg Traurig’s Washington, D.C. office, and was moderated by Cynthia Sanchez, an Attorney for Warner Music Group. These panelists touched on a wide range of complex topics, including trademarks, copyrights, counterfeiting, and market access issues.

Trademarks and China

As more businesses are looking to expand into a global market, trademark law has become an increasing concern. One of these global markets is China, and it should come as no surprise that infringement thrives in China, from knock-off purses to bootlegged movies. Trademarks, understandably, are of major importance to any business. In 2016, there were more than 3.6 million trademark applications filed in China, alone.¹

With so many applications being filed in just one year, a major issue regarding trademark law in China is bad faith trademark filings. This has been caused by a rigid adherence to a “first to file” system for protection, where the entity that files first - regardless of whether it is the rightful owner of the trademark - gets protection. Meanwhile in the United States, a person registering for a trademark must show that they have used, or plan to use, the mark in commerce. This first to file system allows for the wrongful registration of popular marks by people other than the actual owners. These people are known as “trademark squatters,” and when international companies wish to expand their business to the Chinese market, they have no choice but to pay large amounts of money to buy their trademark, rebrand, or fight it out in the courts.² Additionally, unlike the United States, China does not require a declaration of good faith when filing a trademark application and there are no sanctions for lawyers who are filing these fraudulent applications. Not even huge companies, such as Apple, are immune, as it lost a years-long legal battle over the trademark for “iPhone” in China, challenging Xinton Tiandi’s use of the mark for leather products.³

In 2014, China amended its trademark law, stating that “the application for registration and use of trademark shall comply with the principle of good faith.”⁴ However, with this new good faith element, there was only one example of bad faith given. This is a situation of a contract, wherein a distributor of a product for a company applies for that company’s trademark. Additionally, squatters will be put on a new blacklist, which will make it difficult for offenders to acquire a trademark.

In other parts of the world, there has been reform...
in the realm of trademarks. For instance, in the European Union there has been abolishment of requirement for an applicant to submit a graphical representation of the mark, which came into effect on October 1, 2017. This abolishment will make it easier for non-traditional marks, such as sound, motion, holograms, and multimedia marks, to be registered. Additionally, applicants can now simply submit a sound file through the use of appropriate technology to in their application for a sound mark, instead of submitting the actual musical notation of the mark.

What can brand owners do to avoid this headache? Register your mark in global markets, especially China, early and often, in the Chinese character version, as well as in Latin script.

**Counterfeiting and Market Access Issues**

Aside from trademark infringement, counterfeiting is another major problem within China. Counterfeit products from China count for approximately 88% of the products seized at the US border, which amounts to approximately $40 billion lost. Additionally, approximately 80% of these products are sold on websites such as Alibaba.com. In 2015, the value of counterfeit goods sold on Alibaba exceeded $1.7 trillion. However, Alibaba has taken some responsibility started to address some of the issues of what it has done wrong. Earlier in 2017, it formed the “Alibaba Big Data Anti-Counterfeiting Alliance,” whose mission “is to pool information, data and expertise in intellectual property authentication with the ultimate goal of ‘helping block, screen and take down infringing listings.’” The coalition comprised of twenty members, including luxury brands such as Louis Vuitton and Swarovski.

Market access issues also contribute to the the counterfeiting epidemic in China. For instance, China does not have access to certain services, such as US banks, insurance companies, internet sites (such as Google and YouTube), and movies. Currently, China only accepts thirty-four foreign films per year, with fourteen titles required to be 3D or large-format movies. Additionally, China has an annual “Hollywood blackout” of sorts, wherein it does not release foreign films during specific times of the year, usually during holiday months like the Lunar New Year in the first half of the year. Television is also affected, as China does not allow an episode-by-episode release of television shows. Viewers must wait for a full season to be released, so it can properly be screened, before its release in China. Even software and video game producers are unable to sell directly into China and must go through a locally registered company in the area for access. While these forms of media are popular, if consumers do not have access they turn to digital piracy.

In the European Union, the Audiovisual Media Services Directive has been up for review, contributing to market access issues. One of the matters open for discussion, is the expansion of the quota for local content for video on demand services, such as Netflix and Amazon. The European Counsel proposes to request an offer of 20% European content in the service providers’ catalogues, while the European Parliament supports a 30% quota. Even the terms of the financial obligation of European content by video on demand providers is up for discussion. The proposal allows Member states to impose financial contributions, such as levies and investment obligations, on providers of video demand services targeting their market. These contributions feed into the film funds’ budget or investment obligations in European productions to ensure that the big players continue to the fostering of European cultural diversity.

In June 2016, Chile enabled a food labeling law to fight obesity and unhealthy eating. The Health Ministry ordered stop sign like labels to be placed on food that is high in sugar and fat. The law also bans the sale of products with advertisements that target children. The Health Ministry has been inconsistently, but regularly, using this provision to get trademarked characters and logos off packaging, meaning no more Tony the Tiger on your cereal boxes. This also affects sports drinks and sports bars. Peru has also passed a similar law, but is not applying it the same way. In Peru, the IP Agency is the agency who is applying the law.
Colombia is currently in and Out-of-Cycle review with the Office of the United States Trade Representative ("USTR"). According to the Special 301 Report issued by the USTR, "Colombian law enforcement authorities . . . have yet to conduct meaningful and sustained investigations and prosecutions against the operators of significant large pirate websites and mobile applicants based on Colombia" and “has also not been able to reduce the significantly large number of pirated and counterfeit hard goods crossing the border or being sold at Bogota’s San Andresitos markets, on the street, and at other distribution hubs around the country.”

Further, when consumers buy counterfeit labels, it’s not just the company that they are hurting, it is also people. Many counterweight goods are produced in sweatshops which often profit and support terrorist groups, sex traffickers, and street gangs, and are notorious for violating child-labor laws and human rights.

**Copyrights and Piracy**

Colombia has also been cited in the USTR Special 301 Report for having a large amount of buses playing copyrighted works without a license. The Minister of Transportation reportedly announced that buses did not have to pay for public performance licenses for the copyrighted works that they play. Of the 45,000 municipality buses and 6,000 tourist buses, less than 1,200 buses are licensed. This means that approximately $27 million is being “saved,” instead of ultimately being going to the performers of these works.

Streaming is the most popular way for people to listen to music. With this popularity has come the emergence of stream ripping services. These are third-party services allow you to go to websites such as YouTube and rip the audio from the video. Not only do these services compete with streaming services, they also compete with downloading services, such as iTunes and Amazon. However, civil litigation may be able to be used against these services. In 2016, Universal, Warner Brothers, Sony, and other major record labels sued the operators of YouTube-mp3.org, a German based company. The labels alleged that “tens, or even hundreds, of millions of tracks are illegally copied and distributed by stream ripping services each month” and that YouTube-mp3.org accounted for upwards of 40% of the total unlawful stream-ripping. In September 2017, a proposed final judgment was reached between the parties indicating “a decision in favor of the labels, with an undisclosed settlement fee and an order to transfer the domain to a party representing the labels.”

Kodi Boxes are a current media streaming device that are causing controversy in the copyright world. Kodi Boxes are a “free and open source media player application for playing videos, music, pictures, games, and other content. . . . It basically enables you to stream your content to any device in your home.” Approximately 6% of all US households have a Kodi Box. Kodi Boxes are not themselves infringing, but do allow third-party services, which may promote infringing access. Similarly, the European Union’s Court of Justice has ruled that the selling of pre-loaded Kodi Boxes is illegal, because these boxes are being configured in a way that promotes piracy.

**Conclusion: Practical Tips**

In light of the ongoing issues within intellectual property law, the panelists offered some practical tips in dealing with these problems. The first is to host training for border agents on how to spot counterfeits. Many counterfeits cannot be differentiated from the authentic product to the naked eye. Border agents are a major resource in helping prevent the access of counterfeit goods within the United States.

The second is to combat online piracy by site blocking. A major issue with piracy is that it is decentralized, as it is not one actor, and they are often judgment proof due to operating offshore. Site blocking is getting a judgment against a particular site, or group of sites, and taken that judgment to the intermediary providing access to the site, and having the domain blocked or
taken down. Research out of the Carnegie Mellon University has suggested that this method is effective. The study has found that once multiple websites are being blocked, the number of people going to piracy websites is decreasing, while visits to legal ad supported and subscription websites increased.

Undoubtedly, as technologies continue to advance, so will the counterfeit and piracy industries. One thing is for certain, and that is that the intellectual property rights of business owners and performers must continue to be protected in order to allow national and state economies to prosper.

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7 Around the World in 80 Minutes (October 6, 2017).
9 Id.
10 Id.
12 Cheang Ming, China is acting blatantly protectionist in an industry that’s hugely important to the US, CNBC.COM, Aug. 3, 2017, https://www.cnbc.com/2017/08/03/hollywood-blackout-china-is-giving-domestically-made-films-a-boost.html.
13 Around the World in 80 Minutes (October 6, 2017).
14 Id.
18 Id.
19 Id.
20 Around the World in 80 Minutes (October 6, 2017).
21 Id.
22 Id.


26 2017 Special 301 Report, supra note 24.

27 Around the World in 80 Minutes (October 6, 2017).

28 Id.


31 Id.


34 Around the World in 80 Minutes (October 6, 2017).

35 Id.


A Law Student’s Perspective From The Forum’s Annual Meeting: Sports and Entertainment General Counsels

by Kate Drass

The view from my room at the Cosmopolitan Hotel took my breath away, but not in the way I imagined when I first planned on attending this year’s ABA’s Forum on the Entertainment and Sports Law’s Annual Meeting in Las Vegas.

From my patio, I could see the lights, the sun, the mountains, and the strip. I could see a city vibrant, alive, and bursting color and energy. But as my eyes wandered down the strip, I’m suddenly awoken from the hypnotic effect of the colors and lights. For my eyes could see a golden hotel with a broken window, and an empty field with an empty stage. There is no band, and no fans. The field was the last place fifty-eight people stood, just four days before I arrived in Vegas.

Concerts are meant to be joyous. They symbolize people coming together, to celebrate art and reveling in harmony. Looking into the empty field, with no fans and no band, I fear the acts of one man will change the best part of loving live entertainment. I fear it will not only disrupt the harmony, but the tune will forever be slightly out of key.

This feeling was one of many that I experienced during my stay in Vegas following the tragedy, and one shared by many of the attendees and panelists at the conference. And for the panel on Sports and Entertainment General Counsels, this feeling was echoed. Along with the common issues the general counsels face day-to-day, Route 91 was a tragic reminder for all in the entertainment and sports industries that safety is a major concern.

The panel consisted of Hunter Campbell, Chief Legal Officer and Executive Vice President for the Ultimate Fighting Championship (UFC); Matt Heckman, Director and Associate General Counsel at Twitter; Lucinda McRoberts, Secretary and General Counsel of USA Swimming; and Heather Liberman, General Counsel of SXSW, LLC. The four panelists were moderated by Robert J. Caldwell, Shareholder at Kolestar & Leatham.

For a little over an hour, the panelists spoke of a variety of topics, from event planning and working with law enforcement, to other issues facing in-house legal departments in the sports and entertainment industry, all while giving an opportunity for the attendees to get a brief look of the day-to-day issues facing the sports and entertainment industries.

Life of the General Counsel

As general counsel for the various entertainment and sports organizations, day-to-day duties can expand from basic clearing and licensing to more complex legal issues. The general counsel not only acts as the legal advisor, but is often involved in many of the day-to-day operations and big business decisions of the company. Their position within the organization allows them insight to a multitude of issues and, as seen recently with the Congressional testimony of the general counsel for Facebook, Twitter, and Google, the general counsel can act as a spokesperson for the organization as a whole. But not every organization’s legal departments are alike.

As McRoberts’ put it, the legal department for USA Swimming is a “legal department of one.” Before joining USA Swimming, McRoberts worked as outside counsel for the organization. Impressed with her work, USA Swimming invited her to join their team as in-house counsel, a newly-created position. Like USA Swimming, SXSW’s legal department is also small, consisting of Liberman, an associate, a paralegal,
and an occasional seasonal attorney to help in SXSW’s busy season.10

Twitter, alternatively, employs over 50 attorneys worldwide.11 Heckman, as associate general counsel, has four other attorneys that report to him; two that work solely on video licensing and the other for marketing.12 Of the remaining attorneys, most are transactional attorneys, focusing on commercial deals.13

However, in-house legal departments, while differing in size and structure, all serve the same purpose of providing the company with important legal services. Through this purpose, every general counsel will experience common issues through their work with their organization.

Event Planning and Working with Local Governments

With respect to entertainment and sports organizations, event planning is one of the biggest responsibilities requiring legal expertise of the general counsel. In the wake of the Vegas tragedy, concerns with safety of the fans, athletes, or artists were front and center. As Campbell said, the Route 91 festival “will make everyone rethink safety and security.”14

According to Campbell, working and cooperating with law enforcement must be done extensively.15 UFC, for example, hosts events around the world and the interest in the sport is global.16 With this global presence, there are different security concerns for each country hosting an event.17 Being able to extensively work with the local law enforcement is vital for not only the safety of the fans, but the athletes and employees of UFC.18

With its involvement with the Olympics, USA Swimming is also concerned with international security of its athletes.19 However, an important aspect of the Olympic Games is to encourage the athletes’ interaction with other countries.20 Therefore, according to McRoberts, it is important to “balance” safety and security measures to protect the athletes without interfering with the athletes’ interaction with other countries’ athletes.21

But safety is not the only concern with event planning in the entertainment and sports industries. For Liberman, one of the most important aspects is knowing the infrastructure in location.22 SXSW is an annual ten-day music and arts festival taking place throughout the city of Austin, Texas.23 In short, as Liberman said, SXSW has been in Austin for over 30 years, “so as the city grows, SX grows.”24 Therefore, organizing the city-wide event requires cooperation from the entire city.25 To successfully organize SXSW, Liberman must negotiate an ordinance with Austin city officials every year, and needs to also obtain various permits and waivers.26 “Without support from the city of Austin,” she said, “they wouldn’t be able to be successful.”27

Event Planning and Contracts

Within the event itself, the general counsel is also concerned with overseeing various contracts and agreements with vendors, performers, or athletes. For example, every event, performer, venue, or attendee experience for SXSW would have a corresponding contract.28 The contracts, Liberman said, will vary in complexity; from the usual vendors, performer, or venue contracts, to the more nuanced contracts that come into play when organizing a brand, event, or user attendee experience.29

According to McRoberts, in addition to the Olympic Games, USA Swimming has many events and sanctioned swim meets across the United States.30 To ensure fairness and sportsmanship within the competition, every swimmer competing in the USA Swimming sanctioned swim meets must also sign a participation agreement for their time to be recognized.31 Among the most important terms of the participation agreement is that the athletes are bound to a code of conduct and honor code for the athletes behavior.32 The code of conduct applies to the athletes’ behavior out of the pool as well, acting as a tool to allow the Olympic swimmers apart of USA Swimming to represent their team and country respectfully at international and domestic events.33
Sports and Entertainment Events in the Digital Age

The last important aspect discussed on the panel was opportunities that general counsels should be aware of in the digital age and social media. For every organization, protecting and licensing intellectual property is an essential focus for general counsel. Protecting the organization’s intellectual property while keeping up with technology has become a major issue for many general counsel.

According to Campbell, people are no longer watching television. Instead, users only engage in specific channels they want to watch. This is a problem because UFC traditionally shows its fights on television and is at risk losing viewship. UFC’s solution is to create an app-based “hub” for all things UFC. According to Campbell, UFC must do this to be competitive.

Additionally, social media platforms like Twitter have changed the way people get information on sports and entertainment news. According to Heckman, Twitter is now making deals with various content providers, like LiveNation, to live stream events. But, considering major protections for copyright holders, the content providers and Twitter are faced with a question as to who is responsible for obtaining licenses to stream. Additionally, licenses may not be available or affordable at all. Heckman explained that sports and music events are the most protected, as the organizations themselves are highly lucrative. So, according to Heckman, Twitter and its content providers need to be selective for the types of licensing deals they will obtain. For example, instead of live streaming an entire football game, they will stream only the pre-show. This, Heckman argues, “is complimentary to the sports industry without writing the big checks.”

Conclusion

General counsel are an integral part of the success of the sports and entertainment industries. They are involved in all things within the organization and, like all other entertainment and sports lawyers, work with a passion for the art and competition. While the one hour long panel was merely a brief overview of the issues faced by sports and entertainment general counsel, it opened my eyes to the wide array of issues that general counsel are involved with.

In the solemn wake of the Route 91 tragedy, I left this panel and the conference with hope. I have hope that music and sports fans remain resilient, that we as fans, artists, and athletes will turn the pain and fear into something beautiful. Following this panel, I now know how important the general counsel for sports and entertainment organizations are to our society—they will help keep us resilient. Now I know, that while we may always be slightly out of tune, the harmony will keep playing, and the show will go on.

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1 Hunter Campbell Biography, CAMPBELL & WILLIAMS,


Id.


Id.


Id.

Id.

Id.

Id.

McRoberts, supra note 7.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

Id.

See generally, Bill Chappell, Ryan Lochte Is Suspended For 10 Months Over His Behavior At Rio’s Olympics, NATIONAL PUBLIC RADIO (Sept. 8, 2016, 11:27 a.m.) https://www.npr.org/sections/thetwo-way/2016/09/08/493113291/ryan-lochte-is-suspended-for-10-months-over-his-behavior-at-rios-olympics (describing the suspension swimmers received from USA Swimming as a result of behavior outside their code of conduct).

Campbell, supra note 14.

Id.

Id.

Id.

Id.

Id.

Heckman, supra note 39.

Id.
Perfection. Perfection. Fame. Competition. These are just a few reasons that some attorneys and their celebrity clients turn to substance abuse. The Ethics & The Addict panel at the annual ABA Forum on the Entertainment & Sports Industries, explored the ABA Model Rules of Professional Conduct applied to the ethical obligations if you know or suspect a colleague is suffering from addiction; how attorneys can detect, prevent and recommend treatment for colleagues and for celebrity clients; what special concerns attorneys must take into account when representing the addicted celebrity. The panel also explored the ethical dilemmas presented, and provided suggestions and guidance to the practitioner for analyzing, avoiding and dealing with professional and practical problems in the area of prevention of alcoholism and substance abuse.

The panel consisted of Henry W. Root, Partner at Lapidus, Root & Sacharow, LLP (moderator); Carey Caruso, member of the Evaluation Committee of California Lawyer’s Assistance Program (LAP), and Secretary of the L.A. Criminal Courts Bar Association; David M. Given, Managing Partner at Phillips, Erlewine, Given & Carlin LLP; Scott Gorman, Director of Talent Relations at Crisis Case Management; and Harold Owens, Sr. Director of Musicares/Map Fund of The GRAMMY Foundation.

Mr. Root took his cue when asking questions to the panelists from an article published in July 2017 by the New York Times “The Lawyer, the Addict” and from previous cases that they worked on. The New York Times story examined what led to the death of a partner of Silicon Valley’s Wilson, Sonsini, Goodrich, & Rosati law firm. The attorney’s ex-wife calls Peter, the decedent, “one of the most successful people I have ever known,” who died a drug addict, felled by a systemic bacterial infection common to intravenous users.

Peter had been working more than 60 hours a week for 20 years, ever since he started law school. Peter’s ex-wife noted that Peter worked so much that he rarely cooked anymore, sustaining himself largely on fast food, snacks, coffee, ibuprofen, and antacids. The panelists discussed their own personal experiences with working at major law firms and keeping up with their respective workloads, as well as analyzed the behaviors Peter exhibited that can act as triggers for family, friends, and colleagues to recognize when someone may be experiencing substance abuse, and discussed how substance abuse not only affects that person but the people around them as well.

The panelists also discussed cases that ranged from athletes abusing pain killers and player engagement directors soliciting outside help to mentor players suffering from substance abuse, to panelists that propose interventions for their clients who are heading down a path of substance abuse and need rehab. The panelists also discussed situations where they have dealt with their own colleagues, noting that they have witnessed these colleagues work 60+ hours a week to keep up with the nature of the business, all while being hyped up on prescription drugs, like Adderall, to stay awake and focused. The panelists also talked about the results of such situations, such as if they ever brought unusual behavior of colleagues to senior attorneys at the law firms they worked for, or whether they stopped contracts from being signed due to
due to a client being under the influence of drugs or alcohol.\(^6\)

### Rules

The American Bar Association has placed a standard of professional competence and ethical conduct on its members to assure that clients are getting the best representation. Below are some rules from the American Bar Association Model Rules of Professional Conduct that come into play when dealing with an attorney and/or client that may be a victim of substance abuse.

#### Client-Lawyer Relationship

**Rule 1.6 Confidentiality Of Information\(^7\)**

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;
4. to secure legal advice about the lawyer’s compliance with these Rules;
5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
6. to comply with other law or a court order; or
7. to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

**Rule 1.14 Client With Diminished Capacity\(^8\)**

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.

**Rule 1.18 Duties To Prospective Client\(^8\)**
(a) A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.
(b) Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.
(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) When the lawyer has received disqualifying information as defined in paragraph (c), representation is permissible if:
(1) both the affected client and the prospective client have given informed consent, confirmed in writing, or:
(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(ii) written notice is promptly given to the prospective client.

Maintaining The Integrity Of The Profession

Rule 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.
(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.
(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Addiction & The Profession

A. The Celebrity Client

Celebrity clients whether they are musicians, athletes, or filmmakers live in an alternate reality. For most, money, fans, and a sea of “yes men orwomen” surrounds them. Dealing with fame and fortune for child stars and 20-year-old athlete millionaires may sound like the good life, but most struggle with issues none of us know about and some come from a background of substance abuse. In 2013, CNN Entertainment published an article with over 40 celebrities who confessed to substance abuse. On the list included many A-List Celebrities such as: Olympian Gold Medalist, Michael Phelps who was charged with driving under the influence of alcohol; singer Ed Sheeran who took a year off from the music industry after he started slipping into substance abuse; actor Zac Efron who completed a rehab program to help with his difficulties with drugs and alcohol; actress andsinger Jada Pinkett-Smith who faced addictions in her younger years to deal; singer Tim McGraw who said that he replaced drinking whiskey with working out to clean his life up; and actor Samuel L. Jackson, who landed his breakout role as Gator in Jungle Fever two weeks after leaving rehab and was able to portray the role so authentically due to his own struggles with drugs and alcohol.

B. The Lawyer

Lawyers are at roughly twice the risk of becoming addicted to drugs or alcohol as people in other professions. They do also have higher incidence of depression, anxiety, suicide
and other mental health issues than the general population. While many cite long hours, huge caseloads and the stress of the field as reasons for these problems, one judge warns that the seeds of addiction are planted long before an attorney begins practicing law.\(^{12}\)

When it comes to attorneys, the addiction for some starts in law school.

On the first day of law school, studies show that the average law student is “normal” in terms of their happiness, mental health and wellness. Within the first six months, early signs of psychiatric problems, such as depression, anxiety, hostility and paranoia, can be detected. After the first year of law school, as many as 40 percent of law students suffer from depression. Symptoms often persist through law school and into their later legal careers.\(^{13}\)

“Substance abuse and depression are prevalent on law school campuses across the country.”\(^{14}\) Studies show that law students have reported using alcohol to “relax or relieve tension”\(^{15}\) and to “get away from problems.” Experts believe that the following factors play a role in attorney substance abuse:

• Stress caused by excessive workloads and intense competition
• Emphasis on analysis rather than connection with morals, values or feelings
• Intimidating teaching style
• Type of individual attracted to legal profession (often overachievers or perfectionists)
• Increased access to drugs and alcohol
• Relying on academic success to build self-worth
• Loss of connection with original reasons for attending law school (such as helping people or passion for the law)
• Emphasis on image, status, affluence and impressing others, which leads to sacrifice of positive values and subsequent loss of self-esteem and personal satisfaction
• Training to ignore emotional and personal reactions and represent positions that are in opposition to their own opinions and beliefs.\(^{16}\)

“Many attorneys turn to drugs or alcohol because they have compromised their ethical principles and moral values. They may bend the rules to hold onto a key client or pursue ‘winning’ at all costs.”\(^{17}\)

**Ethics & The Addict in Pop Culture**

In September of 2014, producer Shonda Rhimes added to her impressive resume when ABC Studios premiered her new show, *How To Get Away With Murder*. The show is centered around a criminal defense attorney and law school professor Annalise Keating and five of her students. Keating, portrayed by Emmy Award winning actress Viola Davis, suffers from alcoholism and this has resulted in her almost being disbarred, losing her job as a law professor, and her reputation tainted.

The show dives into the reality that attorneys face when they suffer from substance abuse and shows Keating seeing a therapist, being subjected to random urine tests as a part of the conditions of her reinstatement as a lawyer, and Keating working towards restoring her reputation as a competent and ethical attorney.

According to the Alcohol Rehab Guide\(^{18}\)

Alcoholism is the most severe form of alcohol abuse and involves the inability to manage drinking habits. It is also commonly referred to as alcohol use disorder. Alcohol use disorder is organized into three categories: mild, moderate and severe. Each category has various symptoms and can cause harmful side effects. If left untreated, any type of alcohol abuse can spiral out of control. Individuals struggling with alcoholism often feel as though they cannot function normally without alcohol. This can lead to a wide range of issues and impact professional goals, personal matters, relationships and overall health. Over time, the serious side effects of consistent alcohol abuse can worsen and produce damaging complications.

In regards to alcoholism on the show, due to Keating’s alcohol addiction she put her
co-workers in an ethical dilemma where some failed to uphold Rule 8.3: Reporting Professional Misconduct and she put herself in an ethical dilemma by failing to uphold chapter 8 of the Model Rules of Professional Conduct by Maintaining the Integrity of the Profession.

Substance abuse is real for celebrities has been recounted many times in the media but many people fail to realize that it is alive and well in the legal community, starting at the early stages of law school. There are many ways to prevent & cure substance abuse, and the legal profession offers many assistance programs outside the normal groups like Alcohol Anonymous and general drug rehab programs. There is a lawyer assistance program in almost every state and several drug rehabilitation centers that specialize in treating law students, lawyers, and judges.

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2 Id.
3 Id.
4 Id.
5 Id.
8 Rule 1.14.
9 Rule 1.18.
10 Rule 8.3.
12 Meghan Vivo, https://www.americanbar.org/content/dam/aba/administrative/law_students/article-addicted.authcheckdam.pdf
13 Id.
14 Id.
15 Id.
16 Id.
17 Id.
18 https://www.alcoholrehabguide.org/alcohol/
Due to provisions in the collective bargaining agreement, for most sports legal battles, arbitration is the playing field—from David Cone vs. New York Mets to Tom Brady vs. the National Football League. Arbitration is one of various methods that are referred to as alternative dispute resolution or ADR. The purpose behind methods of ADR is to provide an alternative to filing a lawsuit and going to court, which is the traditional method for resolving legal disputes. Arbitration and similar alternatives were primarily designed to provide for a streamlined and cost-conscious option to deal with a legal issue. When someone files a case in court, neither party has any input into who the judge will be because judges are typically assigned randomly to a case. However, with arbitration, the parties often have some input into who will end up being their arbitrator.¹

Mediation is essentially a negotiation facilitated by a neutral third party. Unlike arbitration, which is a process of ADR somewhat similar to trial, mediation does not involve decision making by the neutral third party. Generally, it is a short-term, structured, task-oriented, and “hands-on” process. In mediation, the disputing parties work with a neutral third party, the mediator, to resolve their disputes. The mediator facilitates the resolution of the parties’ disputes by supervising the exchange of information and the bargaining process. The mediator helps the parties find common ground and deal with unrealistic expectations. He or she may also offer creative solutions and assist in drafting a final settlement. The role of the mediator is to interpret concerns, relay information between the parties, frame issues, and define the problems.²

Arbitration and mediation, unlike litigation, are built upon compromise and collaboration. Put another way: Teamwork. The application of ADR mechanisms is thus a natural fit for an industry, which depends on teamwork. The group of esteemed ADR experts at the Annual Meeting for the Forum on the Entertainment and Sports Industries in Las Vegas, Nevada—Lance Tanaka, Vice President of American Arbitration Association; Jeffrey Benz, Arbitrator at JAMS, Managing Partner at Versus Advocates PC, and Door Tenant at 4 New Square Barristers; Barbara Reeves, Mediator & Arbitrator, at JAMS; John Sands, Mediator & Arbitrator at Sands ADR; and Cameron Myler, Arbitrator on the Court of Arbitration for Sport and Clinical Assistant Professor at New York University—discussed challenges and pitfalls in their experiences in the field, including salary and disciplinary arbitrations, and complex mediations between global sports properties.²

MLB’s Arbitration & Its Impact on Sports

In 1966, the Major League Baseball Players’ Association (MLBPA) hired Marvin Miller to be its Executive Director. In 1968, Miller negotiated the first collective bargaining agreement in professional sports. In 1970, the second collective bargaining agreement included an arbitration agreement with a jointly-designated neutral arbitrator, which was essentially a contractual dispute resolution forum to address claimed violations during the term of an agreement. Arbitration clauses appear in more than 98% of all private and public sector collective bargaining agreements, in most commercial agreements, and in a growing number of individual employment contracts. Many industries have unions such as the United States Postal Service, Rocket Scientists, and Architects, to name a few.

Panelist John E. Sands authored an article titled Baseball Arbitration and the ‘Engineering’ of Effective Conflict Management.³ In the article,
Sands, discusses the Salary Arbitration Program created by the Collective Bargaining Agreement between the MLB and the MLBPA. A MLB player must have completed six years of major league service before they become free agents. In the beginning of a player’s major league career, his employer (the club he plays for) has unilateral authority to set terms and conditions of employment within the minimum standards set by the Collective Bargaining Agreement between MLB and the MLBPA. Players that have played less than three years must accept their club’s final offers. Article VI, Section E of the Collective Bargaining Agreement lays out the Salary Arbitration Program. The program’s twin objectives are to encourage good faith negotiations between clubs and players, yet assuring that all covered player contracts (total of three years, but less than six years major league service) will be completed and signed before the start of spring training in the final week of February.

An arbitration begins with a player’s election of submission, which is communicated through the MLBPA to the MLB’s Labor Relations Department (LRD). Within three days, the MLBPA and LRD must exchange the player’s demand and the club’s offer. A player may decline the club’s offer in order to arbitrate, but a player’s election obligates the club to participate. MLB and the MLBPA select a panel of arbitrators each year, and arbitration hearings are scheduled between February 1 and 20. Each case gets a panel of three arbitrators, whose authority is limited to awarding only one of the two final offers submitted by the player and the club.

Arbitration hearings are private and confidential and each side is limited to one hour for initial presentation and a half hour for rebuttal. After the hearing is over, the arbitration panel has 24 hours to issue its award.

The criteria specified in Article VI, Section E(10)(a) for setting a player’s salary includes the quality of the player’s contribution to his club during the prior season, the length and consistency of his career contribution, the player’s past compensation, comparative baseball salaries, any physical or mental defects on the part of the player, and the recent performance record of the club. All of these factors drive the arbitration panel’s decision.

Sands notes the elegance of the “engineering” of the Salary Arbitration Program and how it asks the simple question: What will be the player’s compensation during the coming season? The program’s design is such that the players and their clubs settle well over 90% of the cases submitted to salary arbitration each year. According to MLB and MLBPA counsel, between 120 and 150 covered players and their clubs submit salary disputes to the program each year, and each year those cases require the issuance of fewer than ten arbitration awards. When drafting their arguments, both sides know the contractual criteria and relevant data requirement, and they know they must submit demands that they believe the arbitration panel will find consistent with the criteria. Many end up closing the deals themselves and not going to arbitration.

**NFL**

Originally, football had two panels of arbitrators: one for contract disputes and one for injury disputes. Later on, the league and players’ association negotiated a third arbitration process for disciplinary cases. Under the current NFL/ NFLPA Collective Bargaining Agreement, both sides agreed to the authority that NFL Commissioner Roger Goodell has when it comes to player conduct. According to Article 46, Commissioner Discipline, the Commissioner can levy punishment “for conduct detrimental to the integrity of, or public confidence in, the game of professional football,” and can also hear the appeals of any punishments.

The league has come under fire in the past few years because of the way it has handled disciplinary cases, such as Ray Rice, Tom Brady, Adrian Peterson, and Ezekiel Elliott. Looking at the Collective Bargaining Agreement, “the NFLPA walked away from negotiations with a deal that granted the commissioner broad disciplinary powers. But overlooked is that the existing
existing agreement each side walked into four years ago granted the commissioner those same broad disciplinary powers.\textsuperscript{7}

In the Brady “Deflategate” scandal, “the judges only care[d] about the process involved with the way the NFL and the NFLPA negotiated the discipline process. Roger Goodell is judge, jury and executioner, which is absurd, but it’s the way things are set up in the CBA.”\textsuperscript{8} The Second Circuit stated:

The Commissioner was authorized to impose discipline for, among other things, “conduct detrimental to the integrity of, or public confidence, in the game of professional football.” In their collective bargaining agreement, the players and the League mutually decided many years ago that the Commissioner should investigate possible rule violations, should impose appropriate sanctions, and may preside at arbitrations challenging his discipline. Although this tripartite regime may appear somewhat unorthodox, it is the regime bargained for and agreed upon by the parties, which we can only presume they determined was mutually satisfactory.\textsuperscript{9}

On the other hand, “[t]here was a dissenting opinion from Judge Katzmann, who actually blasted Goodell for abuse of his power and his ‘own brand of industrial justice.’”\textsuperscript{10} Judge Katzmann stated:

Additionally, on a more fundamental level, I am troubled by the Commissioner’s decision to uphold the unprecedented four-game suspension. The Commissioner failed to even consider a highly relevant alternative penalty and relied, instead, on an inapt analogy to the League’s steroid policy. This deficiency, especially when viewed in combination with the shifting rationale for Brady’s discipline, leaves me to conclude that the Commissioner’s decision reflected “his own brand of industrial justice.”\textsuperscript{11}

In some cases, like the NFL, even if an arbitration process is agreed to, it does not mean it is fair for both sides.

**NBA**

Articles 31 and 32 of the current Collective Bargaining Agreement\textsuperscript{12} spell out the arbitration process for the league and the players’ association. Under Article 31:

The Grievance Arbitrator shall have exclusive jurisdiction to determine, in accordance with procedures set forth in this Article XXXI, any and all disputes involving the interpretation or application of, or compliance with, the provisions of this Agreement or the provisions of a Player Contract, including any dispute concerning the validity of a Player Contract or any dispute arising under the Joint NBA/NBPA Policy on Domestic Violence, Sexual Assault, and Child Abuse.

To file a grievance:

A player or the Players Association may initiate a Grievance (A) against the NBA by filing written notice thereof with the NBA, and (B) against a Team, by filing written notice thereof with the Team and the NBA; (ii) a Team may initiate a Grievance by filing written notice thereof with the Players Association and furnishing copies of such notice to the player(s) involved and to the NBA; and (iii) the NBA may initiate a Grievance by filing written notice thereof with the Players Association and furnishing copies of such notice to the player(s) and Team(s) involved.

Under Article 32:

The NBA and the Players Association shall agree upon a System Arbitrator, who shall have exclusive jurisdiction to determine any and all disputes arising under Articles I, II, VII (except as otherwise specifically provided by Article VII, Section 3(d)(5)), VIII, X, XI, XII, XIII, XIV, XV, XVI, XXXVII, XXXIX, and XL of this Agreement, any and all disputes arising under Article XXVIII and Paragraph 14 of the Uniform Player Contract regarding an Unauthorized Sponsor Promotion (as that term is defined in Paragraph 14(c) of the Uniform Player contract), and those disputes made subject to his jurisdiction by
Sections 9 and 10 of this Article. In addition, in the event of a disagreement between the NBA and the Players Association, the System Arbitrator shall have exclusive jurisdiction to determine whether the System Arbitrator, the Grievance Arbitrator or some other arbitrator provided for by the provisions of this Agreement has jurisdiction to hear or resolve a particular dispute.

Systems Arbitration may be initiated only by the NBA or the Players Association:

No party may initiate a System Arbitration until and unless it has first discussed the matter with the other party in an attempt to settle it. A System Arbitration must be initiated within three (3) years from the date of the act or omission upon which the System Arbitration is based, or within three (3) years from the date upon which such act or omission became known or reasonably should have become known to the party initiating the System Arbitration, whichever is later.

Either the NBA or the Players Association may initiate a System Arbitration by serving a written notice thereof on the other party, with a copy of such written notice to be filed with the System Arbitrator.

After reviewing ADR language set out in different arbitration agreements and how a player, through his union, or the league goes about filing a grievance, it is important to note how an attorney can make this process work best for their client. Panelist Barbara Reeves has written an article called *ADR Process Design: Make the Process Fit Your Goals*. In the article, she discusses the goal of ADR:

[A] more expeditious and less costly means for resolving disputes. Mediation is very useful, but sometimes a case has issues that the parties simply cannot resolve without a binding ruling. Arbitration is binding, but sometimes there are cases or issues that can benefit if the parties have an opportunity to work with a neutral to better understand, narrow and even mediate the issues, either procedural or substantive, to position the case for efficient arbitration.

Reeves also provides a solution, “design an ADR process that combines elements of arbitration and mediation, and applies them to the different issues or stages of the dispute.”

**Conclusion**

Is sports arbitration different from other industries’ arbitration process? What is a sports arbitrator? When asked these questions, panelists did not agree. On one hand, attendees heard that there is no such thing as a sports arbitrator, that it is a subset of workplace arbitrations, and the only difference with sports and other industries is the publicity of the case and the money involved, if any. On the other hand, attendees heard that there is a difference between sports arbitration and other industries, and that has to do with the time it takes for arbitrators to issue an award. Panelist Jeffery Benz said, “A unique aspect of sports arbitration is being able to deliver an award in 24 hours. Time is everything in sports.”

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As panelist Steven Wadyka of Greenberg Traurig put it, the term “collision course” sums up the common theme of the recent issues in trademark and advertising law. A collision between choice of name and disparaging speech. A collision between regulations and rights of brand holders. A collision between first amendment, trademarks, and advertising. On the trademark front, the United States Supreme Court’s decision in In re Tam, saw the collision between First Amendment freedom of speech and the disparagement clause of the Lanham Act. For advertising law, an increase in social media blogging and “social influencers” has the Federal Trade Commission (FTC) focusing on ways to regulate paid advertisements, colliding with the rights of brand holders. On the trademark front, the United States Supreme Court’s decision in In re Tam, saw the collision between First Amendment freedom of speech and the disparagement clause of the Lanham Act. For advertising law, an increase in social media blogging and “social influencers” has the Federal Trade Commission (FTC) focusing on ways to regulate paid advertisements, colliding with the rights of brand holders.

In the wake of these “collisions,” the trademark and advertising worlds face changes and new
futures, one that I especially am excited to become a part of as I finish out my law school studies. This year, I had the privilege of attending the ABA Forum on the Entertainment and Sports Law Annual Meeting in Las Vegas as a student reporter. On the last day of the conference, I had the opportunity to listen to panelists speak of some of these hot topics in trademark and advertising, including Steven Wadyka, Shareholder at Greenberg Traurig; Robert Newman, Partner at Winston & Strawn, LLP; Joel MacMull, Associate at Archer Law; and John Connell, Partner at Archer Law. The panel was moderated by Staci Riordan, Partner at Nixon Peabody. Robert Newman, it just so happens, is also my professor of Advertising Law at IIT-Chicago Kent College of Law.

**In Re Tam**

A panel on hot issues in trademark law would go amiss without heavy emphasis on the recent United States Supreme Court decision, *In Re Tam*. Luckily for the attendees of the conference, two of the panelists, John Connell and Joel MacMull, were the counsel for Simon Tam, giving a behind-the-scenes perspective on the case, the decision, and the impacts.

The case began with Simon Tam filing an application to register his band name, *The Slants*, as a trademark in 2010. Tam filed in Class 41 for “Entertainment, namely, live performances by a musical band,” and incorporated specimens utilizing Asian-related imagery. The trademark office rejected this application, stating that “Slants” was a derogatory term and citing the disparagement provision of the Lanham Act, which states, “no trademark . . . shall be refused registration on the principal register on account of its nature unless it – (a) Consists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute.”

The Trademark Manual of Examining Procedure explains this provision, stating that “scandalous” has been defined as “shocking to the sense of propriety, offensive to the conscience or moral feelings, or calling out for condemnation. . . . matter that is ‘vulgar,’ . . . 'lacking in taste, indecent, morally crude.’” Further, the Manual finds that the determination of whether a mark is scandalous, “must be made in the context of the relevant marketplace. . . . substantial composite of the general public would perceive the mark, in context, to have a vulgar meaning.”

After the rejection of his first application, Tam retained counsel and they filed a second application with alternative specimens. The second application contained nothing in the way of identifying that the applicant was Asian, other than his name.

The Patent and Trademark Office (PTO) rejected the second application, relying entirely on the record from the prior abandoned first application. Further, the PTO also relied on dictionary definitions that were “secondary and tertiary definitions of the word ‘slant’ rather than other more plausible ‘higher ranking’ dictionary definitions; outdated with regard to the meaning the Examiner ascribed to the Applicant; and British analyses of slang words, not American English.” On appeal, the board affirmed the PTO’s refusal.

Ultimately, Tam appealed to the Court of Appeals of the Federal Circuit, arguing that the disparagement provision of §2(a) is unconstitutional on its face under the First Amendment. After interesting decisions along the way, the case ultimately landed in front of the United States Supreme Court, leading to the decision at the focus of the panel.

The Court ruled 8-0, finding that §2(a) of the federal trademark statute violates the free speech clause of the First Amendment because the government discriminates based on viewpoint and targets offensive expression with an intent to discourage its use. In other words, “The Slants” is able to be added to the principal trademark register and disparagement is no longer a reason to reject a trademark.
According to Connell, trademark litigators think the decision in In Re Tam is a mess, but for other lawyers, it is a “paradigm of legal clarity.”  
The biggest criticism, he says, is that the line between commercial and non-commercial speech is not clear. There is no legal framework to look at to evaluate future cases. MacMull notes that this potential fall-out leads to arguments based on fairness and not grounded in law, which will make counseling clients more difficult.

Social Influencers and Brand Advertising

The second portion of the panel revolved around the FTC’s focus on social influencers. Social influencers can be anyone from a blogger to a celebrity who has credibility and a great social following within a certain niche on social media platforms like Facebook, Twitter, and Instagram. The influencer collaborates with businesses to create campaigns that increase brand awareness and drive sales by promoting a brand or product to their social audience. In return, the influencer is usually compensated monetarily or with free samples of the product.

The issue is that the FTC requires the influencer to disclose that the endorsements and testimonials are paid advertisements for the brand. According to Newman, no one wants to do this, especially when posts have character limitations and social influencers do not want to lose the trust of their followers by appearing to be “bought-out.”

The FTC, according to Newman, wants the influencers to disclose the relationship at the beginning of the post, above the “more,” by using specific hashtags, such as #ad. Additionally, the FTC imposes a duty for the brands to monitor the influencer to see if they are complying with their posts. Contractual requirements and written social media policies are now key for companies looking to hire social influencers to promote their brand. However, the FTC also says that the influencer is also responsible, and wants them to be “fired” for failing to comply with policies or contractual terms.

According to Newman, while the FTC has not issued any large fines they will monitor you for 20 years and require compliance. The FTC, in return, has refined their endorsement guidelines, and have a very practical FAQ section to help advise on compliance.

Another implication of the FTC endorsement guidelines is a tension between the required disclosures for bloggers and other fashion media’s no disclosure requirement. According to Staci Riordan, clothes featured in magazine spreads are frequently clothes by sponsors of the magazines. However, these magazines are not required to disclose that they are being compensated in return for the feature.

Conclusion

While the panel merely touched on the surface of the hot issues facing trademark and advertising law, the insight provided by the panelist allowed the attendees to get a grasp at these top issues.

The “collisions” in these various laws will only intensify, but as decisions and regulations advance, I have the belief that these collisions will impact our society for the better, advancing us into a new social era.

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9 Panel Materials, supra note 10.


11 TMEP § 1203.1.

12 Id.

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15 Panel Materials, supra note 10

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17 Id.

18 Id.

19 Id.

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22 Id.

23 Id.

24 MacMull, supra note 10.


26 Id.

27 Id.


30 Id.

31 Id.

32 Id.

33 Id.

34 Id.


37 Id.
A Law Student’s Perspective From The Forum’s Annual Meeting: Negotiating Contracts in the Entertainment & Sports Industries

by Brett Greenberg

Introduction

When you first think of contracts in the entertainment and sports industries, maybe Nick Saban’s record-breaking deal to coach Alabama’s football team comes to mind, or how the NFL secured Coldplay to headline Super Bowl 50’s half-time show. But what these extravagant deals have in common with more digestible deals, such as a local band’s gig at a dive-bar, is that the attorneys involved must expertly negotiate the terms of these contracts to give their clients the best deal possible.

I was fortunate enough to listen to three incredibly talented attorneys: Desiree Reed Francois, Howard Siegel, and Robert Reynolds, share their insight on some of the challenges they face when negotiating contracts on behalf of clients. As Desiree Reed-Francois, the athletic director at University of Nevada, Las Vegas, describes them, these negotiations resemble “multi-dimensional chess matches.” It’s more than merely brokering a deal that leaves two parties satisfied. Rather, there may be numerous parties involved, and factors such as politics, public relations, and legality must be taken into account.

Knowledge is Power

There are over 900,000 songwriters, composers, and music publishers affiliated with performance rights organizations like ASCAP and BMI, approximately 12,000 professional athletes in the United States, and there is an impossible-to-calculate number of bands and musicians. Considering the significant amount of individuals in the sports and entertainment industries, there is never a shortage of contracts to be negotiated, with each one being unique to the parties and conditions involved. Jay Cooper, shareholder and founder of Greenberg Traurig’s entertainment practice in Los Angeles, has said that throughout his years of negotiating contracts for clients, he has never had two of the same contracts. There are strategies and tactics that can be employed when negotiating, however, there is no cookie-cutter system to end up with the ideal contract for your client. The next best thing, is having awareness of common challenges that come into play when negotiating and knowing how to avoid or resolve them.

Possessing this knowledge is a vital way to steer negotiations in a way that benefit your client, whether they are Nick Saban, Coldplay, or an up-and-coming band playing at dive-bars.

Identifying & Naming Parties Involved

Howard Siegel, an Adjunct Professor at University of Nevada, Las Vegas' Boyd School of Law, and a veteran attorney in the music industry, stressed the importance of identifying and naming all of the parties involved in a contract. As an example, Mr. Siegel explained that a common flaw in personal management agreements is naming the personal management company – without naming the specific manager. Naming both the company and the specific manager would ensure that even if the manager left the company, he or she would still be bound by the terms of the contract. Aside from this example, the identification of involved parties presents a challenge due to the sheer number of groups involved. An artist going on tour must have contracts with venues, promoters, merchandise manufacturers, transportation services, hotels, and so on.
Multi-Dimensional Chess & Public Relations

Additionally, as Desiree Reed-Francois put it, contract negotiations in the sports and entertainment industries are “multi-dimensional chess matches.” While many contracts involving private parties are not subject to public scrutiny, contracts involving celebrities fall under public scrutiny and are subject to disclosure by media. Thus, the issue of public relations is a major factor to consider when negotiating on behalf of a client.

For example, in response to his prior domestic violence, Chris Brown faces online petitions to not allow him to perform. Despite Brown’s musical talent and success, many are uncomfortable with him performing in their hometowns, and create controversy for event promoters seeking to attract a large audience. On the other hand, NFL owners have reportedly avoided entering into negotiations to acquire quarterback Colin Kaepernick, seemingly because of the attention he has attracted through his kneeling protests. The attorneys responsible for negotiating the contracts for clients like Chris Brown or Colin Kaepernick, must consider the effects of their clients being scrutinized by the public.

Preferred Negotiation Processes

Departing from the topic of challenges in negotiating contracts, the panelists then discussed their preferred methods of negotiation. It is undeniable that many attorneys find themselves extremely busy on a daily basis, so the idea of face-to-face arrangements is not always possible. But for some attorneys, such as Mr. Siegel, face-to-face negotiations are the least ideal way to begin negotiations. Mr. Siegel explained that his ideal negotiation process is a paper markup exchange (or redlining), followed by an indefinite series of phone calls, and ultimately face-to-face meetings. Similarly, Mr. Reynolds’ preferred negotiation style is redlining, phone calls, and then face-to-face discussions to review more serious or controversial terms. Mr. Reynolds described how Lyor Cohen, former executive at Warner Music Group, managed to finalize The Killers to-be record deal after inviting him and the band over to discuss the terms in person. Ms. Reed-Francois’ preferred style of negotiating included both redlining and phone calls; however, she put a heavier emphasis on the importance of face-to-face conversation. Ultimately, it seemed that the consensus amongst the panelists was that face-to-face meetings are an inevitable occurrence, but can be reserved until there are serious issues or conflicts that need to be discussed amongst the parties.

Conclusion

As a law student, having the opportunity to observe three talented attorneys discuss important aspects of negotiating that they have personally dealt with provided me with invaluable insight into the complex nature of contracts in the entertainment and sports industries. While some of the information discussed may be found in books such as All You Need to Know About the Music Business by Donald Passman, or in Mr. Siegel’s “The Law & Business of the Music Industry” class, the only better way to acquire this knowledge is by engaging this type of work yourself, or sitting in on a contract negotiating panel such as the one at the ABA’s Forum on the Entertainment and Sports Industries.

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A Law Student’s Perspective From The Forum’s Annual Meeting: ABA Entertainment and Sports Law Conference: Keynote Speaker – Senator Harry Reid

by Andrew Winegar

Former Senator Harry Reid gave the keynote address at this year’s ABA Entertainment and Sports Law Forum’s Annual Meeting. Senator Reid served as Nevada’s Senator for 30 years, beginning his tenure in 1987 and recently retiring at the start of the 2017.¹

Political Career

Senator Reid’s political resume is lengthy, beginning with his service as the Lieutenant Governor of beginning in 1971.² After an initially unsuccessful Senate run and a Las Vegas mayoral bid, Senator Reid made a name for himself serving as chairman of the Nevada Gaming Commission from 1977 to 1981.³ His time as Chairman provided him with the experience needed to fuel a successful run for the House of Representatives and later the United States Senate.⁴ His hard work brought him the respect of many of his peers and he served as the Senate Democratic Whip, Senate Minority Leader, and eventually Senate Majority leader.⁵

As Majority Leader, Senator Reid lent a hand in passing landmark legislation such as the Affordable Care Act, the Dodd-Frank Act, and the American Recovery and Reinvestment Act.⁶ After Democrats lost control of the Senate in the 2014 elections, Senator Reid served out the rest of his career as the Minority Leader again before retiring at the start of this year.

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³ Former Senator Harry Reid gave the keynote address at this year’s ABA Entertainment and Sports Law Forum’s Annual Meeting.
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Involvement with Entertainment and Sports Law

The soft-spoken Senator started out his address by detailing his own involvement within the fields of entertainment and sports law. (This was of course after the Senator took the time to compliment the natural beauty of Nevada and offer his opinions on which native Nevadan animal species are truly noteworthy, a clear nod to his real passion – environmentalism.) By his own admission, Senator Reid has relatively little experience with these areas of law as they exist today, however he was quick to mention that he has argued in front of over 100 juries during his 18-year courtroom career – something he noted as rare in today’s legal landscape due to the amount of cases being settled without going to trial. This courtroom experience was influential in his tenure as the Chairman of the Nevada Gaming Commission, which was the period of his career he spent the most time discussing during his address. Specifically, Senator Reid recalled granting gaming licenses to Wayne Newton and Frank Sinatra; in fact, he still has the check Sinatra sent to him after granting his license request. For obvious reasons, the check was never cashed but Senator Reid admits he has held onto it for all of these years as a souvenir of his time in the gaming commission.

Senator Reid also spent time discussing the Professional and Amateur Sports Protection Act of 1992, also known as the Bradley Act. The act outlawed sports betting in the United States except for special lotteries in Oregon, Delaware, Montana, and of course, Nevada. Senator Reid emphasized the need for regulation in gambling, as it is a cash-heavy industry that can easily be manipulated. The Bradley Act gave the federal government the ability to regulate such gambling in designated States, allowing for federal oversight of gambling operations. Senator Reid also helped New Jersey navigate the legal waters of the Act when the State voted to legalize sports gambling in 2011.

Additionally, Senator Reid discussed the future of the online gambling industry. The Senator acknowledged how difficult online gambling is to regulate, which helped influence his decision to vote in favor of legalizing online gambling for poker games. He noted, that since poker games were already being held over the internet, they might as well be regulated by the Federal Government rather than being hosted out of Caribbean nations and other places abroad. By allowing the practice, the Federal Government can provide needed oversight and regulations to ensure that all transactions happening through online poker bets are happening the right way and that private citizens are not being taken advantage of by being involved in shady cash transactions over the internet.

Questions from the Audience

Following his address, Senator Reid opened the floor to questions from those in attendance. Questions ranged from asking if he could elaborate more as his time as the Chairman of the Nevada Gaming Commission, in which he had to deal with intimidations by mobsters, to discussions about the polarization of the Senate, and finally his take on current politics in general. This was perhaps when the previously quiet and tame Senator became most animated; specifically, he raised his voice noticeably as he detailed how he believed former FBI Director James Comey had truly harmed the nation by having a drastic last minute effect on the 2016 Presidential Election, going as far as saying he has “no respect for the man.” To be fair, Senator Reid has had no qualms about voicing his opinions on Comey in the past, going as far as blaming Comey for the results of the 2016 election.

Senator Reid kept up this vigor and enthusiasm when he continued to speak about how money has influenced too much of our recent elections. Senator Reid stated that he believes money in our political system has harmed the integrity of the electoral process, and it is causing elections to resemble something closer to a Russian Oligarchy, with rich families such as the Koch’s controlling a large share of political power through campaign contributions and other funding. Senator Reid specifically stated that he believes there are as little as fifteen wealthy...
families controlling the majority of the electoral processes in our nation. He believes this issue can be addressed through the Supreme Court making a ruling on the use of money in elections or by laws being passed limiting campaign spending further. In order to do this, he believes Democrats must pick up a healthy number of seats in the next electoral cycle.

Conclusion

Senator Reid’s address contained intriguing insight into the inner workings of Las Vegas gambling and the legal landscape surrounding it throughout the years. In addition, the perspectives on recent political current events from a Senator who has been a step away from the political elites dictating policy for three decades were invaluable. No matter the perspective held about the most recent election, hearing firsthand the opinions of a senior Senator regarding the current political landscape is a unique and rare opportunity. Having Senator Reid deliver the keynote address at this year’s conference provided all in attendance with this opportunity, and it is not one that many of those in attendance will soon forget.

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“Cold Callin”
(to the tune of Tom Petty’s song, “Free Fallin”)
By Shelly Rosenfeld

It’s a tough road, to get a client
Face to face with lunch or drinks
It’s a tough road, with a big cost
But without them, the law firm sinks

There's a big push to meet in person
If there’s no deal, can’t take it to heart
A new idea might bring more work
I’ll use the phone for a fresh start

And I’m cold, cold callin’
(Cold callin’, I’m-a cold callin’)
Yeah I’m cold, cold callin’
(cold callin’, I’m-a cold callin’)

I hope this plan will get some clients
The phone book, it’s sure looking good
I found a new name, will dial the number
The line rings, let’s knock on wood

And I’m cold, cold callin’
(Cold callin’, I’m-a cold callin’)
Yeah I’m cold, cold callin’
(Cold callin’, I’m-a cold callin’)

There’s time to build a book of business
There’s time to share the firm’s plan
I’m gonna cold call from my cell phone
Until they call back with a ban

And I’m cold, cold callin’
(cold callin’, I’m-a cold callin’)
Yeah I’m cold, cold callin’
(cold callin’, I’m-a cold callin’)

And I’m cold, cold callin’
(Cold callin’, I’m-a cold callin’)
Oh!
Cold callin’
(Cold callin’, I’m-a cold callin’)
And I’m cold, oh! cold callin’

Shelly Rosenfeld is Counsel, Business and Legal Affairs at ITV America.
Letter from the Chair

Dear Forum Members,

Happy New Year. I hope everyone had the opportunity to take some well-deserved time off during the holiday season and your new years are off to a great start. I am saddened to report that we lost a very important member of the Forum over the holidays. Our dear friend Richard Rappaport passed away in Miami on December 16, 2017 after a brief illness. Richard was a valued member of the Forum’s Governing Committee and one of the founders and driving forces behind our annual Entertainment and Sports Law Symposium in Miami. In Richard’s honor, the Forum has named the Friday keynote address at the annual conference in Miami the Richard Warren Rappaport Memorial Lecture. The first Richard Warren Rappaport Memorial Lecture will be given by John Capouya, Associate Professor of Journalism at The University of Tampa and author of “Florida Soul”, which chronicles Florida’s rich soul music history. Members of Richard’s family will be present.

The first event on the Forum’s calendar in 2018 is the Grammy Foundation’s Entertainment Law Initiative Luncheon being held in New York on January 26, 2018. The Forum is a sponsor of the ELI initiative, a law student writing competition that challenges students to write an essay with a proposed solution to an important legal issue facing the music industry. I will be at the ELI Luncheon along with other members of Forum leadership.

The Planning Committee for our 9th Annual Entertainment Law Symposium in Miami is well under way and a final schedule and registration details will be circulated to all members soon. Please also check the Forum’s website regularly for details. We are moving back to the Palms Hotel from April 4 – 6, 2018 so please hold these dates and plan to be there. If you want to get involved in the Miami Entertainment Law Symposium, please reach out to any member of the Planning Committee – Henry Root, Richard Wolfe, Kirk Schroeder, Julie Greer, David Fink, Polina Ivko and Ryan Kairalla.

The Forum will have a presence at the ABA Annual Meeting in Chicago in August. In a very competitive process, a topic submitted by the Forum, “The Right (or Not) to Take a Knee: Social Activism and Freedom of Speech in Sports and Entertainment”, was selected to be a panel at the Annual Meeting. Michelle Steele from ESPN has been confirmed as moderator and Big Ten Commissioner Jim Delany and Tampa Bay Buccaneers General Counsel have been confirmed as speakers. A representative of the NFLPA will also be on the panel. Special thanks to Laura Warren, Dan Werly, Peter Strand, Travis Life, Brian Rosenblatt and John Bathke for their efforts in putting this panel together.

Save the Date for our 40th Anniversary Annual Meeting being held again at the Cosmopolitan in Las Vegas from October 4 to 6, 2018. The 2018 Planning Committee is already hard at work on planning a memorable event to celebrate the Forum’s 40th anniversary. Further details will be published after our Miami conference.

As I’ve noted before in this space, there are many ways to get involved in the Forum. Write and submit articles for our marquee publication the Entertainment and Sports Lawyer, so ably helmed by our Editor-in-Chief Brian Rosenblatt, and suggest topics for and participate in Forum webinars. Recent webinars presented by the Forum include “Production Law 101” and “Breaking Down Song Splits”. Please submit any proposals you have for articles to Brian and webinar ideas to our Webinar
Co-Chairs Bob Pimm and Steve Weizenecker. We are always looking to add people to our leadership roster so if you would like to become more involved in the Forum, please reach out to me at the Annual Meeting or otherwise.

If you have any questions, feel free to contact me directly at 416-869-5993 or lglickman@casselsbrock.com or contact our new Forum Manager Bernadette Steele at 312-988-5868 or Bernadette.Steele@americanbar.org. Look forward to seeing you in Miami!

Best regards,
Len Glickman
Chair, ABA Forum on the Entertainment & Sports Industries