Dear Forum Members,

I hope everyone has had a great 2018 and wish all Forum members a very happy and healthy holiday season and New Year!

There is lots of news to report. At our 40th Anniversary Annual Meeting at the Cosmopolitan Hotel in Las Vegas in October, we honored many of our Past Forum Past Chairs including Jay Cooper, Ed Pierson, Michael Rudell, Pam Lester, Joel Katz, David Given, Ken Abdo, Kirk Schroder, Richard Idell and Janine Small. Among many other important moments was a panel with Rachael Denhollander, the first gymnast to go public with sexual assault allegations against Dr. Larry Nassar, and John Manley, one of the leading attorneys representing victims of sexual abuse including many of Dr. Nassar’s victims. We were also treated to a state of the television industry keynote address by Jack Sullivan, the CEO of Broadway Video. Among the social highlights were the receptions hosted by Ted Reid of Morgan Stanley at Chateau in the Paris hotel and by the Sports Business Leadership Association at Beer Park, also in the Paris hotel and the behind the scenes tours of the new eSports Arena at The Luxor, LOVE by Cirque de Soleil at The Mirage and Michael Jackson ONE by Cirque de Soleil at The Mandalay Bay.

Looking forward, several members of Forum leadership will be at the Grammy Awards in February as a sponsor.

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of the Grammy Foundation’s Entertainment Law Initiative Writing Competition, at SXSW in Austin in March, and at MIDEM in the south of France in June.

The Forum will be holding its annual Leadership Meeting in Memphis from April 4-6, 2019. We will also be having a CLE and networking event on Thursday, April 4 and taking advantage of being in Memphis by visiting many of the local landmarks. Save the date and be there when the Forum comes to Memphis! The event will begin with a luncheon featuring renowned author Robert Gordon whose books *Memphis Rent Party* and *Respect Yourself* tell the stories of Stax Records and Memphis’s rich musical tradition. The program includes three hour-long CLE panels, including the State of the Entertainment and Sports Industries, Ethics and a Litigation Update. The program concludes with a reception, and the entire afternoon will take place at the Cecil C. Humphreys School of Law, just off the Courthouse Square in downtown Memphis. Special thanks to our Planning Committee comprised of Tim Warnock (Program Chair), Peter Strand, Judy Tint, Taylor Cates, Dan Werly, Lani Lester and Polina Ivko. Here is a link to registration page for the Memphis event: https://www.americanbar.org/events-cle/mtg/inperson/349888205/.

Be sure to save the date for the Forum’s 2019 Annual Meeting being held October 11–13 in Las Vegas at the beautiful Four Seasons Hotel in Las Vegas. I am pleased to report that the Forum has entered into an agreement with the Four Seasons to keep our Annual Meeting in Las Vegas for another three years!

As always, we welcome your involvement in the Forum. We are always looking for articles for our marquee publication the Entertainment and Sports Lawyer, so ably helmed by our Editor-in-Chief Brian Rosenblatt. Please submit any proposals you have for articles to Brian at brosenblatt@bdflfirm.com. If you have an idea for a webinar for our newly revamped webinar series, please submit it to our Webinar Co-Chairs Bob Pimm (bob@rgpimm.com) and Steve Weizenecker (sweizenecker@btlaw.com). 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 in Memphis, 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 Forum Manager Bernadette Steele at 312-988-5868 or Bernadette.Steele@americanbar.org.

Best regards,

Len Glickman
Chair, ABA Forum on the Entertainment & Sports Industries
Many of our Forum members attended our 40th Anniversary Annual Meeting at the Cosmopolitan Hotel in Las Vegas in October 2018. Our staff of Law Students and Young Lawyers (Chardae Davis, Priscilla Bonsu, and Kevin Chung), share with the Forum their perspectives on several of the panels and topics presented.

And finally, Valencia King reviews “The Essential Guide To Entertainment Law: Dealmaking”, by Jay Shanker and Kirk Schroder. This is a text that every Forum member should add to their collection!

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: https://www.americanbar.org/groups/entertainment_sports/publications/.

The pending deadlines for article submissions are:

- Spring 2019 (anticipated April Publishing)  
  February 15, 2019
- Summer 2019 (anticipated July Publishing)  
  May 15, 2019
- Fall 2019 (Anticipated October Publishing)  
  August 15, 2019
- Winter 2019/2018 (anticipated January Publishing)  
  November 15, 2019

Please share with me your ideas for the Journal.

Best,

Brian A. Rosenblatt
Bryce Downey & Lenkov LLC
Editor-in-Chief, Entertainment and Sports Lawyer
What You Need To Know About The Music Modernization Act
Abdo & Abdo

On October 11, 2018, The Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) was signed into law. The MMA amends the Copyright Act and will have a significant impact on the music industry in general and the music publishing industry in particular. Since the last major revision of the Copyright Act in 1998, the music industry has experienced a profound paradigm shift. Most music consumers no longer purchase physical records, such as CDs, cassette tapes, and vinyl records. In 2016, for the first time ever, streaming services accounted for the majority of U.S. music industry revenue. As of Mid-Year 2018, the Recording Industry Association of America (“RIAA”) reported that streaming accounts for 75% of U.S. recording industry revenue, followed by digital downloads at 12%, all physical product sales at 10%, and master use license fees (as synchronized with visual images for TV, movies, commercials, etc.) at 3%. In the developing streaming economy, rightsholders receive only a fraction of what they once earned from the sale of physical audio recorded products. Interactive and non-interactive digital service providers, such as Pandora and Spotify, are also subject to inequitable licensing regimes. In particular, songwriter and music publishing have struggled in this new economy.

The Copyright Act was ill-suited for the streaming economy. Its mechanical licensing scheme was inefficient. Public performance royalty rates did not reflect the true market value of musical compositions. The Copyright Act did not provide authority for the payment of digital sound recording royalties to those recordings fixed prior to February 15, 1972, (“pre-1972 sound recordings”). Finally, producers and engineers, who are creative contributors to sound recordings along with the musical performers, did not enjoy a statutory right to royalties on streaming revenues. To understand the MMA, it is essential to understand that music audio recordings embody two distinct copyrights: (1) a musical composition copyright (songwriting and music publishing) and (2) a sound recording copyright (the recorded version of a composition). Songwriters often assigned an administration and perhaps an ownership interest in the musical composition copyright to music publishers. With the administration authority granted by the songwriter (author), music publishing companies are empowered to collect revenues earned from songwriting and then account to and pay the songwriter their share of a negotiated “split” of the collected revenues. Recording artists (performers) often assign rights to recording companies, by license or by grant of copyright ownership interest, the exclusive right to exploit sound recordings.

Copyright protection in musical compositions was initially created in 1831. A “compulsory” mechanical license (further described below) was established in 1909 because of the mechanical ability of piano rolls to embody a musical composition. The compulsory mechanical license provided the composition’s author a fee of the sale of each piano roll containing his work. Copyright protection for sound recordings did not become effective until 1972 (and only prospectively) when reel-to-reel and cassette tapes made copying sound recordings easier than previous technology allowed. Broadcasters opposed the sound recording copyright for fear it would include a public performance right. In response, record labels agreed to a limited copyright that did not include a public performance right. Rights and revenues for both musical compositions and sound recordings are impacted by the MMA though the biggest benefactors are songwriters and music publishing companies.

Title I: Music Works Modernization Act
Copyright holders enjoy a set of exclusive property rights “intended to provide the necessary bargaining capital to garner a fair price” for their works. Fundamental among these rights is the exclusive right to reproduce one’s work and distribute copies thereof to the public. To encourage creativity and prevent monopolization, Congress created a narrow exception to the reproduction and distribution rights for musical compositions: the compulsory mechanical license. The compulsory license affords songwriters a royalty whether the songwriter performed their work or another musician performed it (cover recording). Anyone can record a previously published or distributed audio recording, without permission from the songwriter, provided they pay a pre-set “statutory rate” royalty. Section 115 of the Copyright Act sets forth the statutory scheme governing the license. Among other things, prescribes strict procedural formalities for obtaining the compulsory
license. Failure to abide the statute’s strictures, “forecloses the possibility of a compulsory license and, in the absence of a negotiated license, renders the making and distribution of phonorecords actionable as acts of infringement.”

Problems:
This process was created to address physical recorded products (and was applicable to digital downloads) for about 90 years, but was not suited for streaming. It permitted streaming services to avoid paying royalties for so-called “orphan works,” which are works of unknown authorship or ownership. Digital Music Providers (“DMPs”), such as Spotify, Apple Music, Pandora, etc., would simply not pay the unknown songwriters and would keep that money or treat it as unclaimed property. There was no industry wide public data base pairing writers with songs. Royalty payments were often untimely. Filing requirements imposed a substantial administrative burden.

Previously, when an entity wanted to obtain a mechanical license for a song, it had to file a Notice of Intent (“NOI”) with the U.S. Copyright Office on a song-by-song basis (although some DMPs would simultaneously file tens of thousands in a single data dump that were referred to as “bulk NOI filings”). For services that license millions of songs, the process was ineffective and inefficient. The Copyright Office was simply overwhelmed and it resulted in songs not being properly licensed and songwriters not being properly paid. By filing the NOI, entities were immune from infringement until and if the songwriter or their publisher could be identified. Since 2016, more than 45 million NOIs had been filed by DMPs. The burden was on the rightsholders to claim royalties. Though DMP’s could be exposed to legal liability for failing to comply with statutory formalities, payment, or ultimate possible infringement, the sheer volume allowed DMPs to use this loophole to enjoy the financial benefit of not paying the rightsholders while the overwhelming process was underway. Notwithstanding the precedent of paying, DMPs even took the position in litigation that using compositions for interactive streaming did not require a mechanical license.

Under Section 115 of the Copyright Act, the Copyright Royalty Board (“CRB”) sets the compulsory royalty rate for mechanical licenses. A four-point legal standard is provided to determine the rate rather than considering what would be the rate between a willing buyer and a willing seller. The result was depressed rates. This was the thrust of the previously proposed Songwriters Equity Act that was unsuccessful in legislation.

The largest and oldest performing rights organizations (“PROs”) in the U.S., ASCAP and BMI, collect money for their member songwriters from the public performance exploitations of their songs, notably broadcast over cable, satellite, and the internet. Because there was little competition in the marketplace, these PROs have been under government regulation vis-à-vis Consent Decrees dating back to 1941. Among other provisions, when these PROs are unable to negotiate an applicable royalty with a licensee, the matter is heard before a singular rate court judge, one for ASCAP and one for BMI, sitting on the District Court for the Southern District of New York, who hears and decides all disputes for the respective PRO. This gave rise to a potentially prejudiced environment where the appointed judge was improperly influenced by prior proceedings.

Furthermore, under Section 114(i) of the Copyright Act, the Federal Rate Court overseeing the Consent Decree, (also the District Court for the Southern District of New York), in setting blanket licenses and other public performance royalty rates applicable to the DMPs, cannot consider sound recording royalty rates negotiated in the free market. This creates a disparity in the sound recording and music composition licensing rates.

The Solutions:
Title I of the MMA establishes a new blanket mechanical license for qualified DMPs. This enactment formally recognizes that under copyright law, digital interactive streaming includes a mechanical reproduction right. A DMP that engages in digital distribution and adheres to other statutory requirements, namely, reporting requirements, may avail itself of the blanket license. The statutory rate for the blanket license is set by the Copyright Royalty Board (“CRB”) through scheduled rate-setting proceedings based on the willing buyer, willing seller standard rather than reasonable rate factors. Voluntary licenses, entered prior to the MMA’s enactment, remain in effect until the expiration of such licenses in accordance with their terms.

Title I creates the Mechanical Licensing Collective (“MLC”) to administer the newly created blanket license. The MLC is an independent not-for-profit organization. The MLC eliminates the need for third party mechanical license administration vendors and therefore results in greater payments to songwriters. The MLC will maintain a publicly accessible, searchable database of eligible works which includes, among other things, titles, mechanical rights ownership information including ownership percentages, and contact information for copyright owners. The MLC database is a key feature of the MMA and will provide a wealth of information for fans and music industry professionals alike. The MLC will also maintain a publicly accessible database of orphan works to be publicized throughout the music industry and will provide a process whereby unmatched works can be reclaimed. This unprecedented data base will make the identification, and hence payment to songwriters, much easier and more accurate. The MLC collects gross revenues from DMPs and remits those fees to appropriate rightsholders. Payment is made by DMPs to the MLC even if the rightsholder is not known. The MLC then remits royalties in accordance with usage data and other relevant information. Royalties for works of unidentified authors (“unmatched works”) are held by the MLC in an interest-bearing account. Upon the expiration of the prescribed holding period of three years, unclaimed royalties are distributed (liquidated) on an equitable basis to known copyright owners. Though this will benefit the major publishing companies and the writers they represent (as they control a greater market share) all writers will benefit as money will no longer be suspended in black-box accounts and at least 50% must be distributed to their
writers. The MMA provides the right for the MCL to audit the DMPs and the right for the copyright owner to audit the MCL. This accountability mechanism fortifies the likelihood of more accurate accountings and payments.

The MLC is governed by a board of directors consisting of ten members representing music publishers and four members representing self-published songwriters. Industry trade associations are given a nonvoting advisory role. There will be songwriters and self-published songwriters (along with publishers) on the MLC Board of Directors, Operations Advisory Committee, Unclaimed Royalty Oversight Board, and Dispute Resolution Committee. This representation by songwriters in the mechanical licensing regime is unprecedented and will likely contribute to what is expected to be greater revenues to songwriters and publishers.

Title I limits covered DMPs’ legal liability for prior unlicensed use of a musical composition in cases commencing on or after January 1, 2018. The copyright owner’s sole and exclusive remedy against a covered DMP for such misuse is to recover under the statutorily prescribed royalty rate. The copyright owner may not recover statutory damages or attorneys’ fees. To be afforded this protection, DMPs must comply with certain conditions commencing 30 days after enactment and running through the period 90 days after the License Availability Date, April 2021. The Title I further adjusts the statute of limitation for infringement by a covered DMP to three years after the date on which the claim accrued, or two years after the blanket license availability date. These measures, among others, eliminate the NOI regime, reduce DMPs’ legal exposure, and foster investor confidence. This limitation of liability, which avoids lawsuits such as the prior class action suits, was a major incentive for DMPs to endorse the MMA.

Title I enacts rate court reform provisions. First, it adopts the wheel approach in selecting judges to adjudicate consent decree disputes. Under this approach, a judge is selected at random from a pool of federal judges of competent jurisdiction over the matter (the District Court for the Southern District of New York). This allows the court to be more responsive to changes in market conditions and approach disputes with new eyes as opposed to the previous practice of a singular judge for each dispute by ASCAP and BMI. Second, prior to the MMA, rate courts were disqualified from considering certain evidence when setting performance royalty rates. Title I repeals Section 114(i) of the Copyright Act and permits courts to consider a broader body of evidence, including, “the rates and terms for comparable types of audio transmission services and comparable circumstances under voluntary license agreements.” ASCAP and BMI Rate Courts no longer must rely on the narrow legal standard but can consider free market value including concomitant sound recording rates. Collectively, these considerations are referred to as the “willing buyer, willing seller standard.” Satellite radio stations will employ the free market approach in setting rates and not the prior legal standard. These rate court and other reform measures should modernize the rate setting process and bring a fair market approach to the valuation of musical compositions. Accordingly, it is expected the publishers and songwriters will financially benefit.

Title II: Classics Protection and Access Act
In 1971, Congress extended limited federal copyright protection to sound recordings fixed on or after February 15, 1972, (“post-1972 sound recordings”). Congress limited the exclusive rights in sound recordings to a reproduction right and a distribution right. Congress did not grant sound recording copyright owners a public performance right. Unfortunately for performers (recording artists) and their recording companies, the MMA does not change this existing law. Performers still do not receive a performance royalty for the broadcast of their works over terrestrial (AM/FM, non-digital) radio. This had been a hard-fought campaign by performers that was opposed principally by the National Broadcasters Association (“NAB”) because such a payment would increase the cost of business for an industry that is losing market share and advertisers to the internet, cable, and satellite broadcasters.

Congress did not protect sound recordings fixed before February 15, 1972, (“pre-1972 sound recordings”). Congress, however, did not preempt states from protecting pre-1972 sound recordings under common law or state statute. In 1976, Congress enacted sweeping copyright reform, but again declined to extend federal protection to pre-1972 sound recordings. The Digital Performance Right in Sound Recordings Act created a limited public performance right for post-1972 sound recordings performed “by means of a digital audio transmission.” Pre-1972 sound recordings were not afforded this digital performance right. Courts had subsequently declined to recognize a digital performance right in pre-1972 sound recordings on the grounds that it is an “inherently legislative task.”

Title II of the MMA creates a digital performance right for pre-1972 sound recordings. Pre- and post-1972 sound recordings now enjoy the same digital performance royalty rights. This creates new income for the performers of many pre-1972 hit recordings. SoundExchange will administer royalties for pre- and post-1972 sound recordings. Title II does not afford complete federal copyright protection to pre-1972 sound recordings; rather, it creates a sui generis digital performance right. The term of protection under this new scheme is as follows:

<table>
<thead>
<tr>
<th>PUBLICATION DATE</th>
<th>TERM</th>
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<tbody>
<tr>
<td>Pre-1923</td>
<td>Ends December 31, 2021</td>
</tr>
<tr>
<td>1923–1946</td>
<td>100 years from first publication, ending on December 31 of that year</td>
</tr>
<tr>
<td>1947–1965</td>
<td>110 years from first publication, ending on December 31 of the year</td>
</tr>
<tr>
<td>1957–February 15, 1972</td>
<td>Ends on February 15, 2067</td>
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</tbody>
</table>
Title II also provides a limitation on liability for state law claims for covered actions.88

**Title III: Allocation for Music Producers Act**

In addition to creating a digital performance right, the Digital Performance Right in Sound Recordings Act of 1995 established a statutory royalty right for featured recording artists for works performed on non-interactive, digital music services.89 Studio professionals (i.e., producers, mixers, and sound engineers) were not included in the act and thus not afforded any portion of the royalty under the terms of the act.90 Title III of the MMA addresses this inequity by amending Section 114(g) of the Copyright Act to give studio professionals the right to collect royalties from non-interactive, digital streaming pursuant to a letter of direction with the featured artist.91 Title III codifies what has already been industry practice. Producers and engineers have often been accommodated by the recording artist with a share of that artist’s “featured artist share” (administered by SoundExchange). However, there was no legal right for producers or engineers to this share and the accommodation was made only if there was an agreement between the featured artist and the producer (and other studio professionals). The allocation was also revocable by the artist at any time.

Since the digital performance right was not created until 1995, sound recordings released prior to 1995 did not contemplate the featured artist share nor the letter of direction process. Title III directs SoundExchange to establish a procedure for studio professionals to collect royalty payments without a letter of direction.92 Provisions regarding pre-1995 recordings do not take effect until January 1, 2020.93 Perhaps most significantly, Title III gives recognition to producers, engineers, and other studio professionals in U.S. copyright law for the first time ever.

**COMPROMISE**

Those that believe the MMA did not go far enough are dismayed that a provision of the Fair Play Fair Pay Act, which would have created a public performance right for sound recordings when broadcast over terrestrial radio, was not included in the legislation over concerns raised by the broadcast industry.94 They see the legal protection given to streaming services as an unnecessary concession.95 And they complain that the MMA does not address the licensing regime of musical works embodied in physical recordings. Those who believe the MMA went too far question the MLC’s ability to maintain an accurate database and timely remit royalties to rightsholders. They dislike the administrative burden placed on songwriters and publishers to submit copyright applications for all of their musical works and sound recordings to the MLC. And they question whether the MLC database will inspire litigation over copyright ownership among co-authors. Others express umbrage at the government taking such an active role in regulating the marketplace at all.96

**CONCLUSION**

The MMA marks the latest evolution in copyright law. The MMA closes loopholes, streamlines the collection and remittance of royalties, reduces legal uncertainty for music streaming services, and adopts the “willing buyer, willing seller” standard for royalty rate setting. Songwriters, legacy recording artists, and recording professionals are treated more equitably under the law and will receive increased financial reward. Streaming services benefit from the efficiency of the blanket mechanical license and reduced legal exposure. Ultimately, the MMA will hopefully benefit fans, who will now have improved access to their favorite songs on more music delivery platforms.

**IMPORTANT DATES**

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
<th>Details</th>
</tr>
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<tbody>
<tr>
<td>OCTOBER 11, 2018 (ENACTMENT DAY)</td>
<td>The Copyright Office will no longer accept NOIs (and NOIs filed with the Copyright Office prior to the enactment date will not provide licensing coverage after the License Availability Date).</td>
<td></td>
</tr>
<tr>
<td>NOVEMBER 10, 2018: (ENACTMENT + 30 DAYS)</td>
<td>Compliance with requirements to take advantage of the limitation of liability. In order for a licensee to avail itself of the limitation of liability, it must comply with requirements between this November 10, 2018, and April 1, 2021 (90 days after the License Availability Date). The requirements include engaging in certain matching efforts, including through a bulk electronic matching process, repeated every month with respect to unmatched compositions and other requirements regarding statements of account, royalties, accruals and transition to the Collective following the License Availability Date.</td>
<td></td>
</tr>
<tr>
<td>FEBRUARY 8, 2019 (ENACTMENT + 90 DAYS)</td>
<td>Due date for publication of notice in the Federal Register soliciting information to identify the appropriate entities to serve as the Collective and as the Digital Licensee Coordinator.</td>
<td></td>
</tr>
</tbody>
</table>
ENDNOTES

1 Kenneth J. Abdo and Jacob M. Abdo are the father-son law-writing team whose works include: Rock of Aging: Celebrity Estates; Termination of Music Copyright Transfer: The Renegotiation Reality; The Value Gap’s Disruptive Impact on the Online Music Marketplaces; Occasional Sex, Prescription Drugs & What’s Left of Rock & Roll; and Will Streaming Services Turn the Tide or Leave the Music Industry High and Dry?. Ken is a Partner at Fox Rothschild, LLP and is Chair of its Minneapolis Entertainment Law Department. Jacob graduated Mitchell Hamline School of Law summa cum laude and currently lives in Long Beach, CA. The authors gratefully acknowledge the contributions by Todd F. Dupler, Esq., Bob Donnelly, Esq., and John Simson, Esq.


9 See Id.


12 See Id.

13 See Id.

14 See Id.


16 See supra n. 14.


18 Id.

19 Id.

20 See Rosenblatt, supra n. 10.


22 Act of February 3, 1831, ch. 16 § 1, 4 Stat. 436, 436 (1831) (protecting musical compositions).


30 See Id. § 115(a).

31 See Id.

32 See Id. § 115(b).

33 Id.


35 See Id.

36 See Id.

37 See Id.

38 See Id.

39 See 37 CFR 201.18(f)(3).

See Id.


42 See Id.


47 A Digital Music Provider is an entity that, has a direct contractual, subscription, or other economic relationship with end users of the service, or, if no such relationship with end users exists, exercises direct control over the provision of the service to end users; is able to fully report on any revenues and consideration generated by the service; and is able to fully report on usage of sound recordings of musical works by the service (or procure such reporting). Id. § 102(c)(8).

The blanket mechanical license covers all musical works (or shares of such works) available for compulsory license . . . include[ing], the making and distribution of server, intermediate, archival, and incidental reproductions of musical works that are reasonable and necessary for the digital music provider to engage in covered activities licensed under this subsection, solely for the purpose of engaging in such covered activities. Id. § 102(d)(1)(B).

48 Id. § 102(d)(7)(F).

49 Id. § 102(d)(9)(C).

50 Id. § 102(d)(3)(A).

51 Id. § 102(d)(3)(C).

52 Id. § 102(d)(3)(E).

53 Id. § 102(d)(5)(C).

54 Id. § 102(d)(3)(C), (G).

55 Id. § 102(d)(3)(H).

56 Id. § 102(d)(3)(C), (d)(3)(J).

57 Id.

58 Id. § 102(d)(3)(D).

59 Id.

60 Id. § 102(d)(10)(A)–(C).

61 Id. § 102(d)(10)(A).


63 Id. § 102(d)(10)(B).

64 Id. § 102(d)(10)(C).


68 Id. § 104(b)(1).

69 Id.


73 See Id.


75 See Id.

76 See Id.


78 Id. § 3 (Nothing “shall be . . . construed as affecting in any way any rights with respect to sound recordings fixed before [February 15, 1972]”); see also Goldstein v. California, 412 U.S. 546, 571 (1973) (“Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972.”); see U.S. Copyright Off., Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights 14–17 (2011) (discussing state law protection for pre-1972 sound recordings);

79 The Copyright Act 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2544-45. Regarding preemption, the Act states, in relevant part:

With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

Id. § 301(c). See also Barbara Ringer, First Thoughts on the Copyright Act of 1976, 22 N.Y.L. Sch. L. Rev. 477, 479 (1977) (“The [Copyright Act of 1976] is rather a completely new copyright statute, intended to deal with a whole range of problems undreamed of by the drafters of the 1909 Act.”); Jessica Litman, Copyright, Compromise and Legislative History, 72 Cornell L. Rev. 857 (1987) (discussing the Copyright Act of 1976’s legislative history); U.S. Copyright Off., Federal Copyright Protection for Pre-1972 Sound Recordings: A Report of the Register of Copyrights 14–17 (2011) (discussing the decision to maintain two separate systems for protecting sound recordings).


81 Id.


84 Id. § 202(d)(2).

85 Id. § 202(a).

86 Id. § 202(a)(2).

87 Id. § 202(e).

88 Id. § 202(e).


90 17 U.S.C. § 114(g)(2). The sound recording copyright owner is required to remit fifty percent of the statutory royalty: forty-five percent to “featured recording artist” and five percent to “nonfeatured artists.” Id.


92 Id. § 302(b).

93 Id.


The Future of Blockchain Technology in the Music Industry

Bill Rosenblatt

INTRODUCTION
Blockchain technology is being discussed as a revolutionary force in many industries. Perhaps not since the advent of the Internet itself has a single technology buzzword captured the imagination of so many. The music industry is no exception: many music tech startup companies, R&D groups in existing companies, and venture investors are touting the promise of blockchain technology for music. Meanwhile, skeptics say that blockchain cannot possibly live up to all the hype it’s generating nowadays.

In this article, we’ll explain the basics of blockchain technology; then we’ll evaluate proposed applications of the technology to music mainly by addressing the question of whether it solves a known, current pain point or meets a current need. This criterion derives from the theory of technology market development originally propounded in the 1990s by Geoffrey Moore.1 In essence, the theory says that a fundamentally new technology has to be packaged in complete solutions to known problems in order to gain a foothold in the market. Only after the market accepts those solutions can the technology go “horizontal” and reach the mainstream.

To evaluate the impact of any technology on the music industry, it’s useful to break the industry down into two categories: B2B (business-to-business) and B2C (business-to-consumer). The B2B realm spans everything from a composer or performer creating music to the music getting to a service that will distribute it to the public. B2C covers the ways in which those services make the music available to users.

As we’ll see in this article, the most likely applications of blockchain technology to music are in the B2B realm, where it has the potential to solve some of the problems of efficiency and accountability in rights management and royalty payments that are plaguing the industry today. In contrast, the blockchain technology applications that are being discussed for B2C music generally address problems that have already been solved without blockchains, that blockchain technology is not likely to solve, or that the market has determined are not worth solving. Yet even the B2B applications of blockchain technology to music are predicated on several factors: cooperation across multiple industry factions, overcoming fundamental limitations in the technology, and unavailability of other solutions to the known problems.

Proposals for blockchain applications for music and other forms of intellectual property have come from all over the place; perhaps the best single summary is a paper written in May 2016 by the think tank COALA (Coalition of Automated Legal Applications).2

WHAT'S A BLOCKCHAIN?
A blockchain is a type of distributed database—a ledger of transactions that isn’t owned by any single entity. Instead, every entity that participates in a blockchain has a copy of it that is guaranteed to be complete at any given time. Figure 1 shows a generic example of a blockchain.

![Figure 1: An example of a generic blockchain that contains multiple transactions, pointers to previous blocks in the chain, and data used to validate the block.](image)

It’s only possible to add transactions to a blockchain; once there, they can’t be altered or removed. When a process wants to add data to a blockchain, it constructs a block of data and appends it to the blockchain with a link. Then a protocol runs to validate the data in the new block. This typically involves other entities performing complex mathematical and cryptographic calculations on the data to validate it. The data is considered valid once a sufficient number of entities has agreed on its validity as a result of those calculations; details vary from one scheme to another. The entities performing the validation need sufficient incentives to do it correctly.

The most widely-known blockchain is the blockchain for the Bitcoin cryptocurrency; but just as there can be an infinite number of databases, there can be arbitrarily many blockchains. Blockchains can be public or private, and entities that post data onto blockchains can be known or anonymous. It all depends on the requirements of the application.

Many ancillary technologies are associated with blockchains; one that’s particularly relevant to this discussion is smart contracts. A smart contract is (in this case) a set of rules or instructions that run on a blockchain automatically, such that the rules are guaranteed to be applied to all nodes in a blockchain. The Ethereum blockchain is known for its support of smart contracts.

B2B APPLICATIONS: RIGHTS AND ROYALTY PROCESSING
First we will look at B2B applications of blockchain technology for music. Whenever a songwriter creates a
Digital music services—which are known generically as license these to various copyright users, such as digital ers get a set of exclusive rights to their works. They can featured artists and so-called royalty credit for a sound recording, including the producer has over 20 composers. In addition, several people could get positions. For example, Drake’s hit song “Nice for What” a composition contains excerpts or samples from other com- have a different music publisher. This is especially the case if have a different music publisher. This is especially the case if writers for each composition, and they agree on percentages (Columbia). “Born to Run”; he published the song through his own the sound recording. “Composi- composition is said to underlie the recording. “Composition” is something of an abstract notion; it’s easiest to think of it as the written music plus lyrics, if any. Compositions are administered by music publishers, while sound recordings are usually (though not always) administered by record labels. Typically, music publishers and record labels own rights and collect portions of royalties on the copyrighted works. The simplest example is a singer-songwriter who creates both the composition and the sound recording: Bruce Springsteen wrote and recorded “Born to Run”; he published the song through his own music publisher (Bruce Springsteen Publishing) and distributed the sound recording through his record label (Columbia).

In today’s pop music world, there are often several song-writers for each composition, and they agree on percentages of royalties called splits. Each of these songwriters could have a different music publisher. This is especially the case if a composition contains excerpts or samples from other compositions. For example, Drake’s hit song “Nice for What” has over 20 composers. In addition, several people could get royalty credit for a sound recording, including the producer and so-called featured artists.

Under copyright law (17 U.S.C. § 106), copyright own- ers get a set of exclusive rights to their works. They can license these to various copyright users, such as digital music services—which are known generically as Digital Service Providers or DSPs. The most relevant rights for this discussion are public performance (live for an audience or or a recording of the song played on the radio or streaming service), reproduction, and distribution. By industry conven- tion, reproduction and distribution rights for compositions are bundled into a single right called a mechanical. So, both composition and sound recording copyright owners have performance and reproduction/distribution rights. In theory, that means that four royalty payments are required whenever someone plays a recording of the compos- ition through a DSP. As we’ll see, this is true for some but not all cases. This is shown in Figure 2.

Organizations have emerged over time that process these royalties on behalf of multiple rights holders. Some of these are known as collecting societies or collective rights man- agement organizations; these have bargaining power over royalty rates and in some cases have gotten antitrust exemp- tions in order to operate. Other such organizations can be thought of as back-office paperwork processors for rights holders; they hold no bargaining power and own no rights.

On the composition side, Performing rights organizations (PROs) are collecting societies that handle performance royalties. In the United States, these are ASCAP, BMI, SESAC, and Global Music Rights (GMR). Each music publisher and each composer belong to one of these. There are also mechanical rights organizations (MROs) that process mechanical royalties, such as the Harry Fox Agency (HFA), owned by SESAC. Finally, there are publishing administra- tors that manage royalties for music compositions (and take fees for doing so) but do not own any copyrights, such as Kobalt and Songtrust. Publishing administrators work with PROs and MROs (among others).

All of these organizations tend to serve smaller music publishers but typically not the major publishers such as Universal Music Publishing Group, Warner/Chappell, and Sony/ATV (divisions of Universal Music Group, Warner Music Group, and Sony Entertainment respectively). The majors tend to make licensing deals with DSPs directly. Many of the royalties on musical compositions are set by statute, such as 17 U.S.C. § 115 for mechanicals.
On the sound recording side, record labels typically own sound recording copyrights -- known as master rights -- outright. Exceptions to this include some big-name artists who retain ownership of their copyrights, independent artists without labels, and artists who record on the small labels that let artists retain copyright ownership. The major labels generally make direct deals with DSPs; these deals tend to cover specific types of digital performances and reproductions, such as paid permanent downloads (a la iTunes), time-bounded downloads, paid subscription streams, or ad-supported streams.

The only collecting society for sound recordings in the United States is a nonprofit company called SoundExchange, which administers royalties for performances of sound recordings on digital radio services such as Pandora, iHeartRadio, and Sirius XM under the 17 U.S.C. § 114 statutory licenses. Finally, there are organizations on the sound recording side that are analogous to publishing administrators on the composition side: so-called indie aggregators handle digital licensing for sound recordings, either for small independent labels (such as The Orchard, INgrooves, and FUGA) or for independent artists (such as TuneCore, CD Baby, and Symphonic).

The following figures show some of the most important of the many different content and money flows in digital music. The following are explanations of “typical” flows, not counting direct publisher or label deals as described above.

Figure 3 depicts the flows for musical compositions, involving songwriters and publishers, from most types of DSPs (with differing royalty amounts for different service types). In this process, a DSP has a catalog of recordings available, each of which embodies a composition. When the DSP delivers a recording to a user (whether by download or stream), the DSP pays a mechanical royalty to an MRO and a performance royalty to a PRO on the underlying composition; both of them pass along shares of those royalties to the publisher. The publisher pays the songwriter(s) shares of each of the two royalties.

Figure 4 shows the flows for sound recordings, involving recording artists and labels, from digital music download services such as iTunes. In this case, the music service pays a royalty to a record label for each track that a user downloads. The label passes mechanical royalties to the publishers of the underlying composition (as above) and pays a percentage of the remainder to the recording artist.
Figure 5 shows the flows for sound recordings from interactive streaming DSPs such as Apple Music, Spotify, and Amazon Music Unlimited. The flow is similar to the download scenario in Figure 4, except that the interactive stream counts as a performance of the underlying composition (as well as a digital performance of the sound recording), so the DSP must pay a performance royalty to the relevant PRO as well as to the record label.

Figure 6 shows the flows for noninteractive music services, which pay sound recording performance royalties to SoundExchange (the Sound Recording PRO) as described above. This should give some idea of the number and complexity of transactions that must occur, and the number of entities involved, whenever a DSP plays or downloads a music track for a user. Each play or download involves two distinct sets of rights holders and rights, and various administrators that process licenses and royalties on those rights.

As an additional layer of complexity and ambiguity, there is a perception that some of these royalties are paid to rights holders through estimates of use while others are paid on actual measured use. For all of the primary streaming services, the PROs receive census (100%) reporting of music use and allocate values based on the amount of the services’ license fees and the number of songs streamed on the site. No payments are made for compositions under a low performance threshold. Examples of the former include performance royalties on compositions: DSPs pay percentages of revenues to PROs, and the PROs estimate the payouts to each of the rights holders affiliated with them. Examples of royalties that are paid on actual measured use include mechanicals on compositions and performance royalties on sound recordings under the statutory licenses mentioned above.

As these royalty streams proliferate in their number and complexity, there is an increasingly urgent need to track them efficiently and accurately. As the above explanation implies, the different entities involved in rights management and royalty processing comprise – at best – a patchwork solution involving many unrelated proprietary entities and a paucity of reliable publicly available information.

The industry has been looking at various ways of streamlining and rationalizing the system. Some of these involve changing the laws; for example, the Music Modernization Act (which was signed into law in October 2018) purports to streamline mechanical royalties on compositions for interactive streaming services by, among other things, amending § 115 to provide for blanket licenses instead of requiring track-by-track licensing. But other efforts focus on improving ways to identify and track rights holders and usages, so that the processes can be automated with confidence.

At a minimum, automation of music royalty processes requires two things: that copyrighted works and rights holders can be uniquely and unambiguously identified, and that sound recordings be definitively linked to the compositions they embody. We’ll discuss each of these in turn.

Unique and unambiguous identification requires common standard identifiers. A standard unique identifier for sound recordings exists and is widely used among record

Two different standard identifiers for rights holders are used in the music world. IPI (Interested Party Information) is widely used among PROs to identify holders of rights in musical compositions. A newer standard, ISNI (International Standard Name Identifier), identifies creators, which can also include musicians. These identifiers are essentially redundant, and there is no reason why one rights holder identifier could not be used for all types of music rights holders. ISNIs are not yet widely used, though they are increasing in popularity among singer-songwriters – which indicates that ISNI is “crossing over” from the recording to songwriting domains, whereas the converse is not true for IPI.

DSPs receive feeds of sound recordings and associated information (metadata) from record labels and indie aggregators. Unfortunately, that information does not always reliably identify the compositions underlying the sound recordings. Sometimes labels don’t supply composition rights holder information, and sometimes the information is unavailable.

This is especially problematic for interactive streaming DSPs such as Spotify, Apple Music, Google Play, etc., because they have to pay mechanicals on a per-use basis under the § 115 statutory license. To qualify for the statutory license, they must send rights holders forms called Notices of Intention (NOIs) for each composition. If they can’t identify the rights holders, they can send NOIs to the U.S. Copyright Office and put the royalty payments in escrow. These interactive streaming DSPs ingest tens of thousands of music tracks every day and must process each of them in this way. (Editor’s Note: NOIs will be a thing of the past once the MMA takes full effect.)

The other challenge in automation of royalty payments is linking of sound recordings to their underlying compositions. There is no universal way to reliably link sound recordings to their underlying compositions; there is no public registry or database. There are a few agencies that do this work for DSPs, including HFA, Music Reports Inc., and MediaNet, but they use proprietary methods of finding matching compositions that are not foolproof (because of the fundamental data problems mentioned above). Those services must maintain separate databases for each DSP for these purposes, even though those DSPs’ huge catalogs are mostly identical.

Previous industry attempts to solve these problems have focused on creating enormous centralized registries – databases of information about copyrighted works, rights, and rights holders that can be accessed online. There have been over half a dozen major attempts of this nature, most notably the Global Repertory Database (GRD), which began in Europe in 2010 and was shelved after four years and millions of dollars. None of these efforts have succeeded, mainly because of the sheer complexity of gathering all that data in one place and keeping it up to date, the lack of financial incentives, and issues of power and control over the data by a single entity.

Blockchain technology could solve some of these rights management and royalty problems. In the ideal scenario, whenever a user downloads or plays a music track on a DSP, the DSP deposits a record on a semi-private blockchain that’s accessible to all interested parties. The record would contain identifiers for the sound recording and composition(s), the DSP, and the type of rights usage (e.g., interactive stream). Each rights holder, collecting society, and administrator would be able to read the record and institute a royalty payment transaction via a smart contract. The records and transactions would be visible to all stakeholders, establishing a permanent paper trail to aid in dispute resolution.

The biggest advantage of a blockchain in this situation is that it would reduce the industry’s dependence on closed, proprietary, largely redundant databases and transaction registries. Entities that manage rights and royalties would have less need for their own data repositories. It would be much easier for all parties to communicate with a single entity through a standard interface rather than many different entities with their own interfaces and data requirements; it would facilitate new service providers that increase efficiency; accuracy, and accountability even further; and it would increase rights holders’ visibility into royalties that they are owed.

Blockchain technology also eliminates many of the disadvantages of the centralized database approach. No single entity owns a blockchain, so there is no issue of control or influence, though it would still be necessary to design a consensus system for validating transactions that involves stakeholder incentives. The cost of building the enormous technical infrastructure would also be much lower – blockchains are largely based on open-source technology – and would be spread amongst the participants.

Yet it would certainly be a mistake to think of blockchain technology as a panacea. One of the biggest sources of inaccuracies in current rights management and royalty processing is the classic “garbage in, garbage out” problem: if you start with bad or incomplete data, you get an incorrect result. Blockchain technology will never eliminate the “garbage in” problem. But it can help reduce errors and inconsistencies that result from having to move data in and out of multiple proprietary systems. A blockchain can use data interoperability standards to establish common rules for interfacing data from existing systems (for example, PROs’ existing databases) to the blockchain. A project called the Open Music Initiative (OMI) is working on promoting this kind of data interoperability standard.

Aside from that, the biggest obstacle to the use of blockchain technology for this application is scalability. Interactive music streaming alone is in the hundreds of billions of streams per year, which puts the number of royalty transactions into the trillions, and the number is growing rapidly. Even if a blockchain is “limited” to a few thousand nodes (one for each music industry stakeholder – publisher, record label, PRO, etc.), it is nowhere near possible to handle the volume of transactions necessary. The need to replicate each transaction over every node of the blockchain severely limits transaction volume capacity. For example, as
of late 2017 the Bitcoin blockchain was estimated at 3.3-7 transactions per second.\textsuperscript{18} To put that in perspective, a volume of one trillion annual transactions averages out to over 30,000 transactions per second.

Of course, scalability is bound to improve through a combination of Moore’s Law and the innovation made possible by the huge amounts of talent and funding pouring into the blockchain space. Even nowadays it should be possible for a small set of complementary stakeholders to start building decentralized blockchain-based royalty processing solutions at a scale that current technology can handle. A current example of this is the startup dotBlockchain Music, which has been running a pilot project with a PRO (SOCAN of Canada), an indie sound recording administrator (CD Baby), an indie label aggregator (FUGA), a publishing administrator (Songtrust), and a DSP royalty administrator (MediaNet, which is owned by SOCAN).\textsuperscript{19}

\section*{B2C APPLICATIONS: MUSIC OWNERSHIP}

Now we turn to B2C blockchain applications for music. The B2C application that is most discussed nowadays is distributing digital music to consumers with transaction records on a blockchain to establish both the provenance of the music and the personal ownership of each digital file.

To the extent that proponents of this blockchain application purport to solve a pain point for consumers, that pain point is the lack of true consumer ownership of digital files. Although a market for downloaded music files has existed for roughly two decades, consumers have never had the feeling that they owned those files as they did their collections of vinyl or CDs.

The market for digital music downloads began in the late 1990s. It initially bifurcated into authorized paid downloads with digital rights management (DRM) through iTunes and other retailers, and unauthorized free downloads shared through networks such as Napster and its progeny. There were also services that sold music downloads without DRM, such as eMusic, but those constituted a small part of the market. The music industry eliminated DRM for paid downloaded files in 2009.\textsuperscript{20}

More recently, interest in paid downloads has been declining. Music industry revenue from paid downloads peaked in 2012 and has been falling at an accelerating pace ever since. One reason for consumers’ declining interest in downloads is that consumers have decided that downloads don’t give them a sense of ownership of music and/or that ownership isn’t important.

The industry’s use and eventual abandonment of DRM is indicative of the lack of importance attached to ownership. There have been, of course, many arguments over DRM; the focus of many of them was on DRM’s purported value in curbing copyright infringement versus its ability to restrict user actions that users expect to be able to do and which could be fair use, such as making copies for personal, non-commercial use on all of one’s devices, or taking excerpts and using them in other works. Yet a somewhat different aspect of DRM is often overlooked: it was an attempt to emulate elements of physical media products in the digital domain, including user ownership of those products.

The idea was that if you had a digital file that could only play on your authorized devices, it was your file and no one else’s; and you had some kind of guarantee that you got the file from a legitimate source. Although long forgotten today, some early vendors of DRM technology touted this idea of ownership emulation as a consumer benefit of DRM. As it turned out, consumers didn’t recognize this value, and DRM proved to be limited in its ability to emulate ownership anyway. DRM didn’t allow users to exercise first sale rights under § 109 (to resell, lend, or give away files), and it was ultimately a way to tie content to devices rather than people.

Moreover, the law doesn’t recognize purchased downloads of digital media files as sales of copyrighted works; it recognizes them as transactions under licenses. This means that the license agreements that govern downloads – such as the Amazon Music Terms of Use\textsuperscript{21} -- can specify whatever restrictions the publisher wants. Legal precedent says that if the rights that a user gets in a license agreement are more restrictive than those granted under copyright law, then the license terms are enforceable; see \textit{Vernor v. Autodesk, Inc.}, 555 F. Supp. 2d 1164 (W.D. Wash. 2008).

So, DRM was an attempt to emulate physical ownership that failed; and then even doing away with DRM on music downloads did not result in digital products that consumers felt they “owned.” Since 2012, the market has moved beyond downloads to streaming – a mode of delivery that does not purport to emulate ownership. More people are now interested in paying $10 per month for on-demand access to large catalogs of music (until they stop paying the $10 per month), or paying nothing for access to music with ads, than they are in paying $0.99 for digital tracks that they can play in perpetuity.

In this context, some people see blockchain technology as a way of truly emulating consumer content ownership in the digital domain.\textsuperscript{22} There are variations on this idea, but the main concept is this: an artist creates a work. She sells unique digital copies of the work by distributing small files called tokens, which contain unique identifiers. The identifiers, and identifiers for the users who purchase the tokens, are stored on a blockchain, along with a timestamp denoting the time of purchase and other information. Each token denotes a user’s ownership of the file.

If the user wants to alienate (sell, lend, rent, or give away) the file, there is a way to transfer ownership of the file by passing tokens from one user to another and adding new records to the blockchain that establish the new ownership. This way, the blockchain always has a complete and permanent record of the chain of ownership of each file. This is shown in Figure 7: User A purchases a music track and then alienates it to User B by passing a token. Note that although one user can pass a token directly to another, a DSP is still necessary to distribute music files and process alienation as well as purchase transactions.
Variations on this scheme add the ability to ensure the authenticity of the file's contents by storing a hash value of the file's contents in the blockchain records. A user can recalculate a file's hash value at any time and compare it to the hash value stored in the blockchain to ensure that the file is authentic.

This scheme could be worthwhile for visual (or audio-visual) artworks. In the art market, the provenance of art objects is very important, as is establishing that an artwork is not a forgery. There are well-known techniques in cryptography to ensure that the identity of each owner is also legitimate, such as digital certificates. Therefore, a digital art market can exist that uses tokens and a blockchain to establish chains of ownership and requires possession of valid tokens as conditions of resale or other alienation of works. A few startup companies such as Verisart and Maecenas are building blockchain-based provenance and ownership tracking solutions for physical artworks; these could easily be extended to digital art, which is a market in its infancy today.

However, this scheme has scant potential in the digital music market. First, users have come to expect certain features of digital music that a system of tokens and hash values cannot support. Users expect to be able to make copies of files for playing on all their devices. All of the major paid music download services – including those of Apple, Google, and Amazon – have “cloud sync” features that automatically make copies of music files on all of a user’s registered devices. This is not compatible with the idea of changing ownership by alienating a single copy of the file, and there is no effective means of ensuring that if a user does this, all of her copies of the file (including backups and so on) are alienated.

Users also expect to be able to make copies of music files that are not exact byte-for-byte copies for legitimate purposes, such as copies that are highly compressed (e.g., a lossless FLAC file compressed to much smaller MP3) or in a different codec (e.g., a Windows Media Audio (WMA) file transcoded to MP4-AAC for playback on Apple devices). The resulting files will not produce the same hash values as the originals and will thus be considered “inauthentic.” This type of action is generally recognized as fair use in law when done for personal, non-commercial use; see for example EMI v. MP3Tunes [cite].

A technology called acoustic fingerprinting offers a partial solution to this problem: it is a complex variation on hashing that produces the same hash value for all files that sound the same, even if the bits and bytes are different. Acoustic fingerprinting is currently widely used for other applications, most notably detecting potentially unauthorized uploads to content-sharing services such as YouTube.

However, acoustic fingerprinting does not solve the “authenticity” problem, because the notion of “forgery” is not very relevant in the music industry. Let’s assume that “forgery” in music means “recorded cover version of a composition intended to pass as the original version.” Current advancements in audio content recognition technology are making it possible, in some cases, to detect cover versions of a given composition; even if this technique were to work very well, it would not be able to distinguish a properly licensed cover version that’s meant to be faithful to the original from a “forgery.”

The second drawback of this type of B2C blockchain application for music is that consumers do not value ownership of digital music as they do physical music. The clearly ownership-free model of interactive streaming has rapidly become the most lucrative part of the recorded music industry – representing 47% of industry revenue – and is still growing fast, while paid downloads are at 15% of industry revenue and shrinking. Ironically, the non-ownership characteristics of digital music has thrown the true ownership characteristics of physical products into sharp relief: vinyl LPs have been enjoying something of a renaissance since their mid-2000s nadir. Vinyl revenue is now back up to its late-1980s levels and rising, but it’s likely much higher than industry figures if used vinyl sales are included.

A related problem with the token scheme is that it does nothing to prevent unauthorized copying – which, regardless of whether such copying is copyright infringement, further undermines the concept of ownership. There is nothing preventing someone from making copies of a file and using them despite not being verifiable as the “owner”; there is also nothing preventing someone from appearing to alienate her files while actually keeping copies of them. A requirement to check the user’s identity, such as by digital certificate validation, would not prevent these contingencies unless it were part of a strong DRM scheme governing all uses of the files. But consumers would find strong DRM unacceptable, and it would still restrict users from doing things with their files that they would expect to be able to do, as explained above.

Finally, some proponents of blockchain-based consumer digital music distribution claim that it can enable musical artists to forge more direct relationships with their fans,
because fans know that they are getting their music directly from the source.

This is unlikely. First, basic Internet technologies were supposed to do the same thing back in the 1990s – enable artists to eschew intermediaries and reach fans directly. Although artists have used Internet technologies such as social media to forge closer relationships with their fans, the same has not been true for actual music distribution. The intermediaries may have changed, but artists still need intermediaries to reach fans and still must contend with them to “rise above the noise.”

Second, blockchains will never eliminate the need for service providers that sit between artists and consumers. Artists will need service providers – including some of the same types of service providers discussed in the B2B section above – to manage all of the functions required to distribute music to the public and collect applicable royalties. The service providers may well change, but they will still need to exist.

In all, the idea of using a blockchain to support direct consumer distribution of digital files is not promising, at least not in its current forms. It does not improve much on current paid-download schemes to create a true simulacrum of ownership for digital music, and the market has gravitated to distribution models for digital music that consumers like and that are not based on the idea of ownership.

CONCLUSION
Blockchain technology is still in a very early stage. The 2017 Gartner Hype Cycle for Emerging Technologies indicates that hype around blockchain technology peaked between one and two years ago, is coming to the end of a “Peak of Inflated Expectations,” and is 5 to 10 years away from mainstream adoption. Gartner predicts that blockchain will follow a well-trodden path of emerging technologies by falling into a “Trough of Disillusionment” before rising into a “Plateau of Productivity” a few years later. In other words, we’re entering a period of backlash against all the blockchain hype.

Yet hype is valuable when it brings ingredients necessary for innovation, such as talent and funding. Blockchain technology has contributed to a resurgence of energy in the music industry after several years of decline and stagnation. Many startup companies have come into the music space with blockchain-based solutions; here’s a partial list at this writing:

- Mediachain, Stem, Ujo Music, Jaak, and dot-Blockchain have focused on rights and royalties management.
- Opus, TokenFM, Voise, Resonate, Choon, and Peer-Tracks are focusing on B2C music distribution.
- Other startups are using blockchain technology for music-related tasks like crowdfunding, venue licensing, and event ticketing.

In addition, Spotify is known to be working on blockchain-based rights management initiatives; it acquired Mediachain in 2017.

As with any new technology, there are bound to be many failed experiments before the worthwhile solutions emerge. We are not at that point yet, but an examination of current problems in the music industry should suggest where those solutions should come from. Yet the true measure of the technology’s ubiquity will be its invisibility: we will know when it has truly been incorporated into the music industry when the solutions are in widespread use, yet no one uses the term “blockchain” anymore.

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ENDNOTES
3 Another important licensable music right is one that we will not discuss here and is not included in the “bundle” defined in § 106: the synchronization or sync right, which is often required for music that is included in a visual work such as a TV show, movie, music video, TV commercial, etc.
4 It is possible for a songwriter to be affiliated with one PRO and to publish music through a publisher that is affiliated with a different PRO.
6 Some recordings, such as “mashups,” can embody more than one composition; see note 15 below for an example.
7 AFM (American Federation of Musicians) and SAG-AFTRA (Screen Actors Guild-American Federation of Television and Radio Artists) are labor unions that pay royalties to musicians and backing vocalists.
8 The latter is only the case for digital radio services such as Pandora and Sirius XM, because otherwise there is no performance right on sound recordings in U.S. law. Almost all other countries have such a right in their copyright laws.
9 See http://isrc.ifpi.org. The ISRC is administered by IFPI, the international umbrella trade organization for the recording industry.
10 See http://www.iswc.org. The ISWC is administered by CISAC, the international umbrella trade organization for composers and their rights administrators, a separate organization from IFPI.
11 See http://www.cisac.org/What-We-Do/Information-Services/IFPI.
12 See http://www.isni.org. ISNIs are used beyond the music world, such as for scholarly researchers and book authors.
13 Note that this is potentially an M-to-N mapping. A composition can have multiple recordings (think “Yesterday” by Lennon & McCartney), or a recording can embody multiple compositions (think Danger Mouse’s The Grey Album, which contains mashups of the Beatles and Jay-Z).

14 This is not just the case when the composition is old or obscure. There have been many cases of missing ISWCs for multi-songwriter compositions because of rules that require all songwriters and splits to be identified before an ISWC can be issued – resulting in hit records being released several months before ISWCs are assigned. More recently, those rules have changed and ISWCs can be assigned to compositions as long as at least one composer is identified.


16 http://open-music.org/.


20 The industry still uses forms of DRM in most streaming services. See https://copyrightandtechnology.com/2017/02/16/the-myth-of-drm-free-music-revisited/.


22 See for example the COALA whitepaper, supra note 2.

23 A hash value (or hash for short) is a mathematical shorthand for a large piece of data that represents the data almost uniquely as a numerical value. The hash value of a file is calculated by running a certain type of mathematical function on the file’s contents to produce the hash value. With a well-designed hash function, two files with the same contents will produce the same hash value, while two files with different contents are highly likely (if not quite 100% certain) to produce different hash values. Hashes are widely used in a variety of authentication and data storage applications.

24 A digital certificate is a piece of data that establishes the identity of a person or device, which is issued by a trusted entity called a certificate authority. It is somewhat analogous to a driver’s license issued by a state Department of Motor Vehicles.


27 There have been cases of recording artists exploiting the statutory mechanical license to create cover versions of hit songs for mildly deceptive purposes. In the 1970s, companies such as K-Tel sold albums of then-current hits performed by cover bands rather than the original artists. More recently, when major pop stars hold material back from streaming services, artists create cover versions and release them on those services so that users who search for the songs find and play the covers. This is far less consequential in the market than, say, a painting claimed to be a Vermeer selling for tens of millions of dollars and turning out to be a forgery.

28 For example, Todd Rundgren’s 1976 Faithful album contained licensed covers of 60s pop tunes that were intended to be as close to the originals as possible.

29 RIAA figures for 2017. Interactive streaming figures include Paid Subscriptions and Limited Tier Paid Subscriptions.

30 2017 RIAA figures attribute 5% of recorded music revenue to vinyl, up from near zero in 2006.

31 See supra note 25.

Fair Use in Copyright Law
A Dialog with the Dramatists Guild and the Dramatists Legal Defense Fund

Graham Coleman

The following transcript is from a panel that took place on October 16, 2017 at the law firm of Davis Wright Tremaine LLP. Leading up to this panel, there had been a number of major decisions involving the Copyright Act’s Fair Use defense. Dramatist David Adjmi won a 2015 declaratory judgment in the Southern District of New York that his use of the television series “Three’s Company” was a parody. Also that year, the Second Circuit decided that Jaime Keeling’s verbatim stage performance of the “Point Break” screenplay, where Keanu Reeves’ part was played by a different audience member each time, was a fair use. That same court, in 2016, deemed use of the entire “Who’s On First” routine within the play “Hand To God” to be not a fair use . . . but allowed nonetheless, as it is no longer under copyright.

Tommy DeVito and other creators had been exonerated from claims of infringing the intellectual property of an unpublished autobiography that sat dormant for years before the opening of the Broadway musical. Most recently, playwright Matthew Lombardo won a motion for summary judgment on the pleadings of his play “Who’s Holiday!” was a fair use of Dr. Seuss’s “How the Grinch Stole Christmas!” (At the time of this writing, Lombardo et al. v. Dr. Seuss Enterprises is on appeal in the Second Circuit.)

Not all recent issues of fair use in the theater rose to the level of litigation. In Seattle, an artist created quite a stir by compiling the scant text for female characters from the prior season’s most-produced stageworks. One striking display from that compilation, entitled Thatswhatshesaid, was the play that had no female characters, wherein the performer held up the script and silently, slowly flipped through its pages.

Finally, there was the example of Hamilton, which had credited Ron Chernow as a named source for the hip-hop presentation of historical events. The musical’s author could have argued that the material was public domain or transformative (and therefore a fair use). Some might theorize that the musical was not transformative, but merely derivative of Chernow’s expression of those historical facts, and thus required an underlying rights agreement.

Moderating the panel was Graham Coleman, partner at Davis Wright Tremaine and chair of its Entertainment Transactions Practice. Also on the panel was Elizabeth McNamara, a partner and litigator at Davis Wright Tremaine, David Korzenik of Miller Korzenik Sommers Rayman, Craig Pospisil of Dramatists Play Service, and Ralph Sevush of the Dramatists Legal Defense Fund. The audience comprised lawyers, agents, and authors from the theater industry. The transcript of that discussion follows.

GRAY COLEMAN: Hi everybody. I’m a partner here at Davis Wright Tremaine, where I do a range of entertainment transactional work, including a good deal of theater. And I’d like to welcome all of you tonight to a program that has been gestating for some time. It’s part of a larger relationship between our firm, Davis Wright Tremaine, and the Dramatists Legal Defense Fund. I’m very glad to say we work quite regularly with the DLDF. Some of the cases that you’ll hear about tonight are cases that came to us from the DLDF.

We have a wonderful panel for you tonight. My partner, Liz McNamara, is a media litigator and will focus on the “3C” case, Adjmi v. DLT Entertainment, to outline basis and elements of a fair use defense. David Korzenik, a partner of the firm Miller Korzenik Sommers Rayman, will discuss other recent relevant cases that explore the limits of fair use, including the Jersey Boys and Hand to God cases. Craig Pospisil, the director of nonprofessional licensing at Dramatists Play Service, will offer the perspective and experiences of agents, publishers, and writers who are confronted with the problem of distinguishing fair from infringing uses. And Ralph Sevush, executive director of the Dramatists Guild and the DLDF, will discuss best practices for authors who might find themselves on either side of a fair use claim. With no further ado, I’ll turn it over to Liz.

ELIZABETH MCNAMARA: Good evening everyone. I assume most of you are not lawyers, so I get the distinct pleasure of kind of laying down the law to you. But I’m going to try to do it in a way that is hopefully constructive, helpful, and can inform these issues. I’m going to focus on a distinct element or distinct kind of fair use, which is parody. And then David is going to speak about more traditional fair use analysis in various cases.

Just to give you a kind of a framework, the copyright law obviously gives a monopoly to people for something that they create. However, there are significant exceptions to that monopoly. And the most significant exception is the concept of fair use, which is a legal principle that’s embodied in the Copyright Act. What courts look at, and what people look at in analyzing fair use are four factors, although much of what I’m going to discuss tonight is all driven by the first factor.

The four factors are: the purpose and character of the use, what has come to be known is “Is it transformative?” The second factor is the nature of the copyright at work. Is it a factual work? Is it fiction? Is it music? Music has a higher degree of protection than straight factual information. The amount and the substantiality of the taking, and the last factor is the effect on the potential market of the owner whose work is being used in some fashion.
Parody is probably one of the most difficult things to identify; what is and what is not a legitimate parody. It's kind of the in the eye of the beholder in the same way the Supreme Court said about obscenity—you know it when you see it. But we all have different views of what constitutes those things, whether it be obscenity or parody. So it's not a clear black and white demarcation [when] you know you're on one side of the fence or the other.

In essence, an actual parody should provide social or literary criticism on the original work. You should be saying something about the original work. You should not be using the original work as merely a vehicle to say and talk about something else. And I'll give you a couple of examples that hopefully explain that a little bit. The leading Supreme Court case in this area is *Campbell v. Acuff-Rose*, in which Campbell was the owner of the rights to the Roy Orbison “Pretty Woman” song, which we're probably all familiar with. And the defendants were 2 Live Crew, and their take on it. They had their own song, but it had the key riffs, the key components to “Pretty Woman” contained in it, with some lyrics changes. Honestly, I remember back to the time listening to both of them. I would not have said, “Oh, obviously a parody.” I think this was really brilliant the time listening to both of them. I would not have said, “Oh, obviously a parody.” I think this was really brilliant lawyering.

The court found that this was a parody of “Pretty Woman,” because it was commentary that Roy Orbison was writing this somewhat insipid song about what really was a streetwalker. And I think that 2 Live Crew laid bare that point in the language of what you would expect from 2 Live Crew. You know, a little more direct. It was commenting on the story, so that was considered a legitimate parody.

Then you have the vehicle example that I mentioned at the outset; a very famous case out of the Ninth Circuit, the story, so that was considered a legitimate parody. The court found that this was a parody of “Pretty Woman,” because it was commentary that Roy Orbison was writing this somewhat insipid song about what really was a streetwalker. And I think that 2 Live Crew laid bare that point in the language of what you would expect from 2 Live Crew. You know, a little more direct. It was commenting on the story, so that was considered a legitimate parody.

Then you have the vehicle example that I mentioned at the outset; a very famous case out of the Ninth Circuit, which is in California, that involved the Dr. Seuss estate, *Dr. Seuss v. Penguin Books*. Here, an author who wrote a very clever kind of story about the O.J. Simpson trial, but he did it in the language of *The Cat in the Hat*. And it was very cleverly done. We all thought it was kind of brilliant. But it was not a real parody, because he was saying nothing about Dr. Seuss. He was saying nothing about the literary qualities of *The Cat in the Hat*. He was just piggy-backing on that as a vehicle to have commentary about O.J. Simpson. So that was held to not be a parody.

Two other quick examples. Fredrick Colting published a book about Holden Caulfield when he’s an adult, an old man, and what he had become. He tried to argue was some kind of a parody. That was found to be what’s called a derivative work. It was just taking the original Caulfield story and dressing it versus a book called “Wind Done Gone,” which took *Gone With The Wind* and did it from the slave perspective. That was found to be a legitimate commentary. It’s not straight parody, but it was commentary on the original work in a way, so that was held to be okay.

You can see that none of this is very clear. [*Laughter.*] You don’t always know for sure which side of the fence you’re on, but I think the key parameter is that there really needs to be some legitimate comment on the original work. This leads me to the *Adjmi* case, which has turned out to be a very important case for drama and the ability to have a legitimate parody. It was spearheaded by this organization and they wrote a very effective amicus brief. It was also spearheaded by my beloved former partner, Ed Davis, who really took this on and ran with it and did brilliant work on it.

It involved a play called 3C by David Adjmi, which parodied the 1970s sitcom *Three's Company*. I'm sure all of us were avid watchers of *Three's Company* back in the day. For those of us who don't remember, or never did watch it, *Three's Company* was considered kind of groundbreaking at the time. It involved three roommates, two women and a man. One of the women was Suzanne Sommers playing, not surprisingly, the bimbo blonde. And then there was the man who, because it was so radical to have three unmarried people live together on a sitcom on TV in the 1970s, [pretended to be] gay. In fact, he was not gay, but this opened the door to all sorts commentary and homophobic, anti-gay remarks that were ever present in the work because that was fine at the time. It was a very light, funny, laugh-track type of 1970s sitcom.

Fast forward to 2012.

**ELIZABETH:** It ran off-Broadway in a limited run at the Rattlestick. Charles Isherwood’s review of it was very positive, [saying] the names had been changed to protect the innuendos. [*Laughter.*] The parties argued, and it was the accepted, that 3C copied the plot of *Three's Company*, the characters, the sets. It had any number of scenes that were taken from the actual *Three's Company*. In 3C, however, the male roommate was actually gay, not just pretending to be gay. Further, it was very dark commentary. As the court found, 3C is not light fare. The court recognized that—and this is true of parody—is that it needs to mimic the original in order to make its point. When you’re looking at fair use, you’re often looking at where you’re just taking language from a previously published poem, or a previously published speech or work. You’re often looking at how much did you take in order to analyze fair use. With parody, it’s accepted that you really have to conjure up the original, or else you don’t know what you’re parodying. You give a certain amount of latitude in order to use characters, events, plot points. But the court here found—despite using so much as it did of *Three's Company*—that it was, nonetheless, highly transformative. “Transformative” has become the watchword in this area. When we first started with fair use, that concept didn’t exist. But now, what it really means is that the new work, doesn’t merely supersede the object of the original, but instead adds something new, with a further purpose or different character attributing the first with new expressions, meaning or message.

So here the court found that the play was highly transformative. It used elements to turn *Three's Company's* sunny, 1970s, Santa Monica into an upside-down dark version of itself. The court found that it was hardly a repeat of *Three's Company*, but rather a deconstruction of it. I think a key element it was deconstructing was on the gay issue. It was kind of revealing the darkness of the fact that this was a character who was being rejected by his parents, who was being rejected by people, had to keep his life hidden, and what that really meant on a personal and very real basis.
Real, the decision was made primarily on this first element asking, “Is it transformative?” If a court finds that something is highly transformative, and that it actually does constitute legitimate commentary on the underlying work, and it really has transformed to new insights, new meaning, from the original work, it’s going to give a lot of latitude, and you’re probably going to get a result that says it’s not actionable.

There was another famous case involving Salinger, where he sued over the use of excerpts from his letters. Tiny, tiny amounts were used, but a court felt like an excessive amount was being used to get the benefit of the vividness of Salinger’s language. And so the biographer was overpopulating the work with Salinger’s language because it just made his work richer. That’s piggybacking, not commenting and adding new insights to the underlying work.

It’s important to spend a moment to think about that last element I talked about. What is the effect of the market? Often, what courts look at is whether the original creator has a legitimate licensing stream. Was this a derivative work or something that normally would be done with a license, so that you’re robbing the original creator of bona fide money that he or she should have received for it? And was it—and the worst thing for the market is, is this really a substitute, so that someone might buy this later developed work or go see this later developed work in lieu of the former? Now, an exception to that substitute concept is in the area of parody, where courts recognize that a very, very good parody might so effectively skewer the original that it truly harms the work. But when you’re talking about creative work, a court will allow you to possibly destroy in eyes of people, the legitimacy or seriousness of the underlying work if you have a very effective parody. That is not a market harm that copyright law will recognize or support. So even though it has that net effect, that’s considered part of the creative universe that one should be entitled to have that type of very critical analysis of another work, and that you shouldn’t be barred or inhibited in some way for rendering that creative analysis.

Now, I want to touch on a rather odd case, Keeling v. Har. It came down out of the Second Circuit here in New York and had an unusual posture and also involved a play. The play at issue is called Point Break Live by Jamie Keeling.

ELIZABETH: The [court] accepted it was a parody for the most part. It was a stage adaptation of the 1991 action movie, Point Break, with Keanu Reeves and Patrick Swayze. For those who don’t remember the movie, or didn’t see it, Reeves played a rookie FBI agent who goes undercover to infiltrate a gang of bank-robbing surfers. The play takes actual scenes and actual language from the film, but it was through stage directions, props, and through a device, that it was really engaging in commentary. The stage device it used is that it lampooned what everyone thought to be Reeves’ rather stilted performance. But instead of using an actor playing this role, they would have random people come out of the audience and read cue cards for the Reeves character. So you knew that random people from the audience were going to be very stilted and not very effective, and so that constituted the primary—and I think key—commentary on it.

What made this case so unique, is that the original creators of the film were not suing the creator of this play, saying “you infringed my work,” rather it was performed for a relatively short run, and then the producer of the production house thought [Jamie Keeling] didn’t really have a copyright in this parody she created, and decided to just continue and do an ongoing run, without getting permission from her. Eve Hars’ argument was you don’t own a copyright in this. It was not a legitimate parody because it was the actual expression taken from the original film. And what made the parody were props and stage direction and the fact that you had random people from the audience reading the role of Reeves. There actually was a jury trial. You actually had a jury who rendered a verdict as to whether this was a legitimate parody, whether it was infringed by Ms. Hars, and what kind of damages there were. The jury found that it was a parody, it was legitimate, and awarded $250,000 in damages. Usually you have the original creator suing and saying, “You’re using my work,” and the defendant says no, no, no, I was parodying that, or it was a fair use.” But here the plaintiff, Ms. Keeling, invoked fair use as an affirmative claim against Hars saying, “I have a copyright interest in this.” The court found a legitimate copyright interest and interestingly, it says when a derivative work’s unauthorized use of preexisting material is a fair use and the work nonetheless contains sufficient originality, its author may claim copyright protection. It’s a very unusual posture, but the court found that it was protected, so that was it.

GRAY: Thanks Liz.

DAVID: I’ll just make this one comment on something you said. The Salinger case is very important because it was decided below by Judge Pierre Leval. Now Leval was reversed by a ham-fisted decision, unfair use, by the Second Circuit. And it really was a pretty klutzy decision. He was put off by that. And he wrote an article about fair use, and what its objectives really are, for the Harvard Law Review. And what’s interesting is that when the case that Liz referred to, Campbell v. Acuff-Rose, was decided, it relied very heavily on that Leval article. I had a chance to speak with him once about it, and he mentioned it’s cited fifteen times throughout the decision. What has effectively happened is that the whole way in which fair use is now understood in this country has really been transformed (no pun intended) by that article. It’s now a far more robust kind of understanding of fair use than we had before Acuff-Rose. And I would say that there’s much greater clarity about fair use than there was before Acuff-Rose, and there is an expanded sense of what its protections really are.

Keep in mind that fundamentally, everything subject to the fair use defense is in the first instance understood to be an infringement. In other words, you are using somebody else’s material without their approval. But you are doing it for a purpose that is thought to be important to copyright law. It’s transformative. It’s different. It builds upon things.
It’s often thought that copyright law is really just about protecting the owners’ monopoly in their work, so that they can stop anybody from using their stuff anywhere. That’s not true. What copyright is also about is not just giving creators an incentive to create, but also to allow others to build on what they do in order for the improvement of literature and society. So those two interests are at play as fair use is considered. Fortunately, under Acuff-Rose, that kind of transformative objective is taken far more seriously than it has in the past.

There are a number of kinds of fair uses, or transformative uses. Parody: I’m trying to make fun of somebody else’s work. I take your stuff in order to criticize it. Or I take some of your stuff, and use as much of it as is necessary to have a different angle on what you’re doing, to say something different than what you were doing with it. Or I may take some of your stuff from an historical work, because I want to build on that. Most authors have the view that they’re the ones that created it, and nobody else could possibly own it. But the reality is we live in the same cultural soup. We’re drawing upon each other’s material to do something better, to do something different, and to bring a different insight to it. That’s what fair use is somehow trying to recognize and make room for, give breathing space for, even though there is an underlying monopoly that a creative owner has.

I’ll give you an example of fair use in a theatrical case that’s more of the historical kind. A number of years back, I represented the Jersey Boys production in a case that was brought by the owners of The Ed Sullivan Show. If you’d seen the play, there’s a section in it where the band is about to perform the song “Dawn” on The Ed Sullivan Show, as indeed took place. Above the proscenium, there are a set of video screens. On one—the stage kind of goes somewhat dark, the actors start to prepare their instruments to get ready to perform on The Ed Sullivan Show, and for seven seconds there appears on the screen a segment from The Ed Sullivan Show, in which Ed Sullivan introduces The Four Seasons to the audience, and he says, “And Now, Ladies and Gentleman”—I’m not gonna do an Ed Sullivan imitation [laughter]. I’ll just tell you what he said. “Now Ladies and Gentlemen, for the young people of the audience, The Four Seasons.” And that’s it. The screen goes dark. The lights come up, and they perform “Dawn.”

Now before and after, there’s important stuff that’s said. Bob Gaudio, one of The Four Seasons, steps forward breaking the fourth wall, speaking to the audience, he saying, “Around this time there’s a little dustup called the British Invasion. Britannia is ruling the airwaves. So we started our own American Revolution. The battle begins on Sunday night at 8 o’clock, and the whole world is watching.”

Ed Sullivan video comes up, the band then performs, and then there’s another comment about them which I’ll touch on later—the subject of another lawsuit against the production, which we’ve so-called prevailed on. We did not get permission. I don’t know why. Normally you try to avoid these problems. For whatever reason, they chose not to give permission for this particular seven-second sequence from The Ed Sullivan Show, but the owners of Ed Sullivan, they go after everybody. And they went after us. We took the view that this was fair use. The other side sued and they lost. We got legal fees on the grounds that their opposition to the fair use argument was objectively unreasonable. That was upheld by the Ninth Circuit in a fun decision (it was fun for us) by Judge Tribe, who makes a very short and also a very nice statement about what fair use, because he felt that’s what this was about. In the case we had with them, the district court judge recognized if you don’t allow fair, historical reference from other people’s material, then there can only be one book written about Lincoln, because where do you think you’re getting that, but from other historians. So, that’s a classic type of fair use that is important and necessary. The key is only use as much as is needed to make the historical reference.

And there are other cases, such as Bill Graham Archives v. Dorling Kindersley Ltd.,11 in which the book actually reproduced posters of The Grateful Dead on a timeline.

DAVID: You can call them thumbnails, but it’s 100% of the stuff. They felt that was appropriate in order to show the timeline and to explain what the history of this band entailed, and that it was not an impairment of the economic value of those works. So there’s another example of fair use being upheld.

There’s been this wonderful sort of expansion under Acuff-Rose, because of Leval, in which the real purpose of fair use has been understood. And that’s expanded, but the owners have been very upset by this, because they feel after Cariou v. Prince,12 that somehow it’s taken too powerful a form. I don’t agree with that at all. But here’s a case that rattled some people.

Hand to God is a play that used almost 100% of the famous Abbott and Costello sequence “Who’s on First.” And they do it for very different purposes. The character who plays this thing is a student of comedy. That’s what he’s focused on. He’s interested in comedy. He’s an actor, and he wants to use this to show off. But he’s also using this in a very different way. He’s a student, too, of miscommunication. And that sequence is a study in miscommunication.

While the Abbott and Costello one goes in a very funny direction, the Hand to God goes in a not-so-funny direction, and a sad and dark direction. However, that may be, and it may well be that the amount used was what tipped this over, Judge Daniels, who’s generally pretty good on these type of issues, came out calling it fair use. But on appeal the Second Circuit, anxious perhaps about the way in which their interpretation of Cariou had been treated, had been criticized, called Cariou the high-water mark and reversed Daniels on the fair use decision, saying that it was not transformative.

ELIZABETH: And for those not familiar, Cariou, dealt with artist Richard Prince, who took all these existing photographs of Rastafarians and did almost little to them. He would put a guitar in someone’s hand some other small thing, and argued it was fair use. This was very contentious, amongst all sorts of creators about whether this really was legitimate commentary. The Second Circuit found the vast majority of those photographs and Prince’s tinkering with them to be sufficiently transformative to be protected.
DAVID: I’m gonna say that I feel that the decision was correctly decided. But there’s a weakness in the fair use position that I think is an unfairly exploited one in the Hand to God case. The Second Circuit uses a phrase that is troubling. It says that the use of the Abbott and Costello sequence was what they call a “McGuffin.” And they define it this way— “The dramatic purpose served by the routine in the play appears to be as a 'McGuffin,' that is, as a theatrical device that sets up the plot but is of little or no significance in itself.”

I’m not sure I agree with that. Another example is Dr. Seuss Enterprises, L.P. v. Penguin Books USA, Inc. where Seuss was a kind of carrier wave for a totally different message. You’re not really criticizing or saying anything about Seuss, you’re just using it to get attention for your take on something completely separate, namely the O.J. Simpson trial. But this is where I now go back to Oliver Wendell Holmes who says, “It would be a dangerous undertaking for persons trained only to law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme, some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned a new language in which their authors spoke.” The point I think that he’s making, is that there are many kinds of transformative undertakings and efforts that may not always be fully appreciated by the audience. You take some of the artists of the past era, Duchamp, I think, who took a urinal, and put it up on the wall. There are many types of artistic expression where people are really offended by it, don’t necessarily appreciate, or aren’t even sure exactly how to articulate what it is that’s happening. Yet, there’s something important going on.

I’ll even give you this thought, a meme: What the heck is it? My son loves them. They mean something very much to him. Some court’s gonna have to deal with memes [laughter], and when they do, my son and Oliver Wendell Holmes will be there [laughter] to defend them. So the challenge I think in fair use is for courts to understand that there are different kinds of transformative uses. When you’re up against a new one it’s not necessarily in the purpose or intent, but explaining the new genre in some way so that people understand that it’s a legitimate kind of expression. And sometimes when you’re doing these things, you need to help articulate that purpose. It happens to be the case that with music, sometimes the artists are just not particularly articulate explainers of what they’re doing, of what their genre really is. But the fact that they can’t explain it effectively shouldn’t mean that it’s not transformative.

Now, Leval adds something in another case that he once did, that’s along the same line as Holmes. He says, “First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.” So he’s saying that courts should not be invalidating the editorial province, the writer’s province of deciding what is a valid or funny or effective parody. But the failure to articulate the new genre well, even when the joke isn’t funny, is still gonna affect some judges, depending upon where you are.

But the McGuffin idea allows a judge to tamper with the editorial process, with the artistic choices that are being made. And that’s not proper, because fair use ultimately is driven by First Amendment concerns. It’s that part of copyright law that takes into account the First Amendment, and the ability to express ourselves freely. If judges undertake artistic choices, the humor or lack of humor, the effectiveness of parody or not, they are invading that process. Fortunately, the court there in our Jersey Boys case found 86 of the alleged 90 similarities to be unprotected by copyright law—I won’t get into the specifics of it this evening—leaving four of them to trial, saying that those might be protected. But then, fortunately, the judge seemed to feel that the four items he thought might be protected, were also clearly fair use.

DAVID: One of the similarities that survived the motion for summary judgment and went to trial, remarkably, comes from that same sequence that I described to you earlier in which we talked about the American Revolution, Americans fighting back against the British Invasion. DeVito of the Four Seasons wrote an autobiography with a lawyer, later deceased, who was his co-author. The writers of our play, doing research as one ought to, had access to that book. And they looked and saw some of the same events that happened in the lives of Frankie and Bob, who were defendants in this case, and they drew upon the statements there—and they interviewed DeVito himself. All proper research.

Here’s what the autobiography said: “The Beatles come to represent a whole social movement. We never aspired to be more than entertainers.” That’s what DeVito’s autobiography says. Here’s our take on that. After the music is over, Gaudio walks forward again, going to the fourth wall, and said, “We weren’t a social movement like the Beatles. Our fans didn’t sit and put flowers in their hair and try to liberate the Pentagon.” [Laughter] “Maybe they should have. Our people were the guys who were shipped overseas and their sweethearts. They were the factory workers, the truck drivers, the kids pumping gas, flipping burgers, the pretty girl with circles under her eyes behind the counter at the diner. Those were the ones who really got us, who pushed us over the top.” Totally different kind of meaning. The only similar words are the words “social movement.” That went to a jury.

I think that the jury also somehow thought that one of the other elements was Tommy being cool, so that they somehow thought that we had taken the cool personality of Tommy from the book, from the autobiography and used that cool character in our play. But as we know from Ninth Circuit cases, you don’t own someone’s personality. Copyright doesn’t have a right of personality or right of publicity. Copyright is just about expression.

Here’s the words in the biography that we are said to have possibly infringed, though the judge found this ultimately fair use: Tommy DeVito and his friends are “hanging on a Jersey street corner, puffing on cigarettes and daring anyone to mess with them. We were cool beyond belief.” What’s the similarity? DeVito’s voice is cool. His demeanor is cool, and his braggadocio is what we drew from the book and used in the play. That’s crazy, because DeVito was cool
[laughter] and cool isn’t owned by anybody, by Elvis Presley [laughter], Frank Sinatra, or other people from New Jersey [laughter].

There was one thing I will say that was interesting: when the band wrote the song, or practiced the song “Walk Like a Man,” which probably you all know, there was a fight, or a disagreement between DeVito and the others, and particularly Gaudio, over the choice of that song. So, this argument happens at 1660 Broadway—1660 or 1665, I forget the number. But it was a studio where they used to rehearse.

Gaudio comes in late, and he comes in with the song, and DeVito says, “Alright, what’s the name of the song.” And he says, “Walk Like a Man.” And DeVito says, “What’s he supposed to walk like? What’s he supposed to do? Walk like a woman?” And so there’s this dispute over it. In our play, Gaudio defends it in terms of its music. He says that it’s an anthem and a young guy who’s been wrapped around the little finger of a girl. The words are really quite similar. The conversation is reported in the autobiography as factual. There’s nothing in it that pretended to be fictionalized. Our use of it reflects our take on that same conversation in which our defendants participated in. Now, don’t take it to be just a friendly joke the way DeVito does it. They take it to be the beginning of a fissure between DeVito and Gaudio and the other band members. A very different take on it.

Fortunately, this judge, though he initially treated it as potentially protected by copyright, and therefore potentially infringing, he nonetheless recognized that historical works are thinly protected, not fully protected, and that this was a full report of a conversation reported as fact and therefore usable by others. So he questioned whether it can be protected at all in his final decision. Regardless, he said that it’s fair use, because it’s clearly a different take on what was going on. The work, he says, was unpublished, which would favor the plaintiff. He also noted that the book was unpublishable. And I don’t say that as a joke about the work itself. For the years 1990 to 2005, the owners, DeVito and his partner and later his descendants, had tried to market the book, sending it to a raft of publishers who wouldn’t take it. So, it was very different than, say, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, where the newspaper took the unpublished work and put it out days before the release of the book, thus disrupting a sort of right of first publication by the owner.

These battle lines are kind of exciting, more exciting than they should be. But the reality is fair use has expanded in a good and important way, and Ralph and his team have been strong advocates behind the growth and strength of this right. The owners have been pushing back, and they’re very agitated by it.

I will just say this one thing: the Supreme Court understands that most creative work in this country is done for-profit, so the mere fact that you made money shouldn’t make any difference. Second, when you make the fair use decision about whether you’re going to get the license or not, you have no idea whether you’re going to succeed or not. One thing that I learned, working on the *Jersey Boys* case, is the number of plays that actually fail. It’s a high percentage of them that actually do.

**Elizabeth:** This is a very important point, because, often people can be conservative about getting permission, that it’s easier to get permission sometimes, and pay a little money, and then have everything resolved. But in the realm of parody, it’s extremely difficult to get permission because who wants to have their work made fun of or criticized or critiqued? So permission is generally not an option in the world of parody. The other thing about permission is it usually doesn’t come free, not just in terms of money paid, there’s often an element of control that comes with permission and for many creators or users of works, they don’t want to have someone else dictating how their work is going to be used, what language is going to be taken or not taken, or what the scene is going to look like. So, there’s a lot that goes into the decision of whether you seek to get permission or not. Those are only some of the factors.

**David:** There’s one very nice passage in a case where Judge Souter makes a point that the fact that you ask for permission and didn’t get it doesn’t count against you in fair use. Plaintiffs love to bring that up, but the reality is it doesn’t count against you. Justice Souter recognizes that people seek permissions for prophylactic reasons: to avoid conflict. But the fact that you thought that you needed it, might want it, doesn’t mean that you feel that you were violating copyright by moving ahead without it. And sometimes, I guess, a good move is, to write to them and say, “We think this is fair use, and here’s what we think is some of the transformative character of it. We’re going to be using it.” That gives you an early ability to articulate the transformative purpose, so they don’t later say, “Oh, you made this up after the fact,” which of course shouldn’t really matter. If they say no, then you’re not going to be hurt by that, at least according to Justice Souter. But that’s in the Supreme Court. If you’re courts that are outside of New York and they don’t know how to strip these things down. Then it’s not as easily assured.

**Gray:** To give you a real life perspective on things so I’m going to turn it over to Craig.

**Craig:** I will cite no decisions. I will not quote Oliver Wendell Holmes. I respect the hell out of it, but, no, I come at this from a layman’s point of view because I have been the director of non-professional licensing at Dramatic Play Services for quite some time. We have some 4,000 plays that we publish and therefore represent. We are not necessarily the final say in those things so at a certain point, decisions will get kicked up to the author’s primary agent or the authors themselves. So I have a slightly different standing here.

I want to just come and jump in on a couple things that had been said before because the thing that you didn’t is that when David Adjmi first got sued over “3C,” he withdrew the play. He felt he couldn’t fight these Hollywood TV producers and so “3C” kind of disappeared. It got these great reviews and then he was served with this notice and thought, “Well I can’t do that. I’m an up and coming playwright. I don’t have the financial resources to fight.” So these decisions are not always based on actual law or whether
your case is necessarily a just one or not. I don’t know how many years it was before David decided to pursue litigation.

GRAY: It was actually very fast. I think it was within a year because there was a publishing offer and so David reconsidered fighting.

ELIZABETH: Right, and not everybody can. He was able to find people to do it. I think that’s one of the most important things that many people just don’t have the resources and ability to fight if it’s willful, well-financed people like the owner of Three’s Company.

CRAIG: With “Hand to God” there’s another little twist here, though. We can only license that version of the play where they actually perform “Who’s On First” in the U.S. Copyright laws are different internationally. So there is a revised version of the text for anybody outside the U.S. We had to add that to our licenses so it all goes out very black and white saying, “if you are in England you cannot do the ‘Who’s On First’ scene.” Myself as a playwright, I haven’t really tried to steal anybody’s work that I know of.

RALPH: So, were you there involved with the “That’swhatshesaid” issue?

CRAIG: Yes. That’swhatshesaid was a work that we heard about last February taking place in Seattle where, two women had created this piece called “That’s What She Said.” Erin Pike and Courtney Echuch. What they had done was they had seen the list of the most produced plays in the 2014-2015 season in American Theatre magazine and that, of the 10 or 12 writers, only two of them were female.

They decided to go through these texts and pull out the lines from all the female characters. It was one of Samuel French’s writers who had heard about it and thought that he was being made fun of and contacted his publisher and said “I don’t want this happening.” Then we heard that they were using all of these plays: Christopher Durang’s “Vanya and Sonia and Masha and Spike,” John Patrick Shanley’s “Outside Mullingar,” Jon Robin Baitz’s “Other Desert Cities,” Nina Raine’s “Tribes” and David Ives’ “Venus in Fur.”

I frequently will get word of unauthorized productions, full productions of one of our plays going on, and so I often have to send out the dreaded cease and desist letters telling people to shut down or straighten up and fly right and pay the royalties please, thank you very much. So, going on the information that we had at the beginning, we wanted to protect our authors’ rights. We didn’t have a copy of the script at that point, so we set out to try and get a copy. There was the information we had through reviews and blogs about the show. We initially sent a cease and desist based on the idea that our author’s work was being taken and presented out of context. As it turns out later, we got a copy of the script their attorney sent us, and it was much more blended. It wasn’t just, here’s all of “Vanya and Sonia” and here’s all of John Shanley’s and etc. So for myself, I eventually came around to the point of view that this was fair use. It was probably transformative and they were making a comment on the predominance of male writers. But it did go back and forth a bit.

RALPH: As Executive Director of the Dramatists Guild, I get phone calls and some of the writers that you listed are on the Council of the Dramatists Guild and they have my number. They called to say that people are making fun of their work and ask why am I not stopping them. So I had to explain the four factor test, and the notion of transformative use, and how it applies when you take 10 full length plays and boil it down to 20 pages, most of which is the stage direction.

CRAIG: It was just one actress performing all of this.

RALPH: Yes.

CRAIG: So it was much more of a performance art piece than a true play.

RALPH: The most angry [sic] of the writers was included because his play included no female characters so the actress stood onstage and just rippled through the script, silently. There’s no infringement there, obviously.

RALPH: So, fair use in that context seemed pretty clear. The political speech of the playwright and the transformative nature of the use seemed pretty clear and unambiguous. I spoke to Bruce Lazarus at Samuel French and Peter Hagan at DPS and they have a different obligation than I do. They are representing those copyright owners, you, the playwrights, and on behalf of their playwrights they want to defend their works so they have an obligation to look into situations like that. As for me, as both the executive director of the Guild and for the Dramatists Legal Defense Fund, we represent playwrights in a different way. We understand that you are both owners of copyrights and users of other people’s copyrights, especially in the musical area. Almost all musicals are adaptations of underlying work. So, we want to see the notion of transformative use permitted, but we also know that you as copyright owners have an interest in that being limited. So our perspective on transformative use is a more balanced perspective. We have to take into consideration both sides, both the author and the user, and that has led us to write briefs that come from a very specific point of view and I think lends our position more credibility when we come down on the side of transformative use as we did in the Admi case, and as we did in the Matthew Lombardo v. Seuss case. We are taking a position because we’ve done the analysis and feel strongly that it is transformative use. But I often have to advise members who are like, “Is this fair use?” and I tell them, “You’ll know it’s fair use when the gavel comes down at the end of the trial.” Because even though there’s arguably more clarity about it, it’s still an analysis being done by judges and it’s as subjective as obscenity analyses. Reasonable people can disagree. For example, Brother Korzenik and I have very different view of the “Hand to God” case. I happen to think it’s absolutely an infringing use, but didn’t have to get there because of the
copyright/public domain issue. So, you can come to different conclusions on this and not be wrong until the judge brings the gavel down.

**DAVID:** There are different groups that represent different kinds of owners, and the thing that impressed me about the DLDF is that you have this balanced sense and you understand that, in fact, more of your people are fair users than they are owners. In other words, they’re more likely to be defendants because of innocent use of the material that other people claim to have some kind of ownership interest. I remember early on that I used to give a talk at Parsons, the photography department. Their initial reaction is that they’re kind of interested in how to assert ownership of the stuff that they do, which I find totally boring, but that’s their issue. Still, I’d work around and let them understand that they’re really drawing upon other people’s ideas. That if Monet were alive today, he would’ve sued every other impressionist for imitating his stuff and he would’ve had a really good argument. But there’s something happening that’s bigger than him and it’s bigger than all of us and you guys recognize. One person who was an expert witness for us was Dramatists Guild president Doug Wright, who’s unbelievable. I mean he was so impressive at trial.

**RALPH:** Yeah, you don’t want to cross examine somebody who is hyper-articulate and smarter.

**RALPH:** I was literally on both sides of that conversation. I had Courtney, the *That’s what she said* playwright, on one line and a prominent council member playwright on the other, whose work was represented in her play. I had told-Courtney, “Look, the Guild can’t really intervene in this matter between two members. But the Dramatists Legal Defense Fund is prepared to write a brief in support of your fair use claim. So let me know if you need our help.” I’m sure that would not have made me popular at the Council meeting, but I do have those two hats and I do take the distinction seriously.

**CRAIG:** On the other hand, if you had, for example, Chris Durang on the other line, we have some plays of his, including “For Whom the Southern Bell Tolls”, a parody of “Street Car Named Desire”, “Sty of the Eye”, which is a parody of Sam Shepard’s “A Lie of the Mind” and he’s also written something called “Desire Desire Desire”, which is a parody of “Street Car Named Desire” and “Cat on a Hot Tin Roof” and throws in a character from “Iceman Cometh” as well. So he certainly borrowed occasionally.

**RALPH:** After discussing it with the council member, he came around and understood the issue. I mean the whole point of Dramatists Legal Defense Fund is that it exists at the crossroads of the First Amendment and copyright. You have to understand that copyright is a limited exception to the First Amendment. It creates a monopoly over a particular piece of expression of speech and gives ownership of it to an author for life plus 70 years. So we circle the square with the First Amendment which is “Congress shall make no law abridging freedom of speech.” The way it is resolved is fair use. The concept of fair use first evolved as case law and then was incorporated into the ’76 Act. Fair use is the ambassador of the First Amendment in the realm of copyright litigation and copyright law so you always have to understand that copyright has its limits. That being said, you are authors and owners of copyrights and I spend my days trying to help you make a living from that. So in terms of best practices, when you’re writing work that’s based on underlying work or based on other work, there’s some simple things you need to ask yourself. First you have to determine whether you need permission. So if the work is in the public domain, then no. Although, as Craig noted, there are different lengths of copyright in the U.S. then there are in some other countries. So work may be in the public domain here and not in the public domain elsewhere. Then, is what you’re taking ideas or the expression of the idea? Is there inclusion of stock characters and scenes? There are things that are so generic in theatre that you can’t own them. They are ideas and not the expression of an idea. The “boy meets girl, boy loses girls, boy gets girl” scenario; you can’t own that, but once you start identifying who the boy is and who the girl is and giving them specific characteristics and showing a plot that leads from one point to another, somewhere on that scale there will be enough original expression that copyright will attach. Where exactly? Again, the gavel will fall and we’ll know.

Facts are not copyrightable. Titles are not copyrightable. Government trials and government reporting, government activities, legislative activities; those are generally public domain in most circumstances. So you have to determine first is there a copyright interest that I need to get permission for? So, once you determine that there is a legitimate copyright and you are using it, that your work will be substantially similar to that work, then the question is, “Do I have a right to use it anyway?” And that’s where the fair use analysis comes in.

We talked about the four factor test; the purpose of the use, the nature of the work, the amount used, and the effect on the market. What has become clear, as the other attorneys have stated, is that in recent years, the first factor, purpose of the use (particularly the transformative use) has swallowed the whole analysis. If they find the transformative use, they’ll find the other 3 factors not very important. None of the factors are supposed to be dispositive. They’re all just non-exclusive factors for the court to consider. But it’s become more and more evident that transformative use is becoming a dispositive use. That brings a worry for me as a supporter of transformative use.

You as copyright owners have a right to authorize derivative works. You can license adaptations, sequels, other uses. A play can be licensed to be musicalized or turned into a movie or novelized. If somebody does that to your play and says, well I’m just transforming it, then they’re swallowing
up your derivative rights. Look at the Google case. Google was sued by the Author’s Guild because Google downloaded vast libraries without permission of anybody in order to create a database that the libraries would have access to that where people would be able to search and find snippets of various works in order to find works that they were looking for, for whatever reason. While some of the work was in public domain, much of it wasn’t. The Author’s Guild sued them and there was a settlement of the suit that was a licensing arrangement that Google worked out with the Author’s Guild, defining what sort of uses would be available, what sort of payments would be available. A whole marketing scheme was negotiated and the court threw it out as a violation of anti-trust law, holding that they couldn’t decide between themselves to fix prices in that way. Of course, the government could do it, but the government hasn’t done it. The court did it and said, yes, it’s a fair use because it’s a socially valuable use. They turned the notion of a derivative use being, well if you transform the work it’s a fair use, into the notion that if you can find a new way to use the work, it’s a fair use. That’s scary to any copyright owner and we wrote a brief in opposition to Google in that case.

ELIZABETH: We did as well. We’re strongly on your side on that.

DAVID: And, I would have been on the other side.

*GROUP LAUGHTER*

CRAIG: They actually took a market away from the writers. It was a demonstrable margin, not a theoretical one. It had been negotiated. Google was too big they were not going to go down, and they were going to win this fight because they’d already done it. Everybody knew it was a socially valuable thing when done. The issue was whether they had to pay for it or not.

RALPH: So, you have the four fact analysis and that problem with it. Maybe you decide you’re not going to rely on fair use, particularly because it is somewhat unpredictable. Some of you might choose to license the rights. This wouldn’t be the first time. In the show “Forbidden Broadway” which ran for like 30 years, with Gerard Allesandrini writing every year these wonderful cabaret parodies of songs from the past Broadway season. They were clearly parodies. There was absolutely no reason to license those works, but he wanted to because he loved and respected these writers and didn’t want them to have hard feelings about it. The writers were more than happy to do it license their material because they loved and respected Gerry’s work and felt honored to be included, even when they were being made fun of. Sometimes there is a market for parody. Not that he had to exercise it, but that was a unique circumstance, I think. But it just shows it can happen.

The other place it happens is in “Hamilton.” We talked about biography not being copyrightable, but the particular selection and arrangement of facts and the expression used to express those facts is copyrightable, if it’s original enough. Did Lin-Manuel Miranda have to license Chernow’s biography to do “Hamilton”? There is tons of biographical, factual information available to anybody who wants to write a musical about Hamilton, but I think Lin may have wanted a few things.

First of all, he may have wanted access to the biographer as a consultant. He may have wanted to use some of the structure or the copyrightable elements in the book. I’m not sure. He didn’t have to, but he wanted to and I think he may have wanted the sort of legitimizing quality of having permission of the biographer to give the work the impression of authority and realism. And maybe he wanted to just because he thought it was the right thing to do.

RALPH: The other thing here is insurance. This is a big deal. It’s sort of a logistical detail, but insurance is a very expensive thing. Most authors can’t afford it. You will ask your producer that, if they take it out, to add you as an additional insured on their policy. But it gets more and more expensive when you’re writing material like this, when there’s even a possibility of a claim. Producers are conservative. They don’t want to take on a project that has a cloud hanging over it. Eliminating the clouds is always a good idea if possible.

asking for permission – sometimes you hear people say it’s better to ask for forgiveness than permission. I don’t think that’s true and I think the rule here is the golden one. Do unto others as you would have them do unto you. You are copyright owners, so respect the copyrights of others. Here’s a case…yesterday was a Jets game in which one of the worst calls I’ve ever seen in my life was made. It was overturned by videotape analysis. There’s always question about the technical definition of a reception, a fumble or whatever. Somebody said the way this should be judged is you put 5 twelve year olds in front of the video and they’ll all come to the same conclusion. It was a catch; it was a touchdown. I think a lot of fair use analysis would be better served if the lawyers were locked out of the room and 5 twelve year olds were asked, did this guy steal, or is this fair? You might get a more consistent and more realistic assessment.

*GROUP LAUGHTER*

RALPH: Release forms – when you’re doing plays based on interviews, release forms are critically important. It’s not copyrightable unless the language is being fixed in a tangible medium, but you’re recording these interviews, so you’re fixing it. Does it mean you own it any more than a secretary owns what they’ve typed from your dictation?

You can’t register a claim unless you’ve registered the work and you need to have registered the work before the infringement if you want to take advantage of certain things like getting your legal costs covered and statutory damages. Sometimes damages are very hard to prove when the user hasn’t made a nickel, but statutory damages are fixed amounts per use that can often be a lot of money and that’s the real deterrent, so you need to have registered it. You get
a cease-and-desist letter, as David Adjmi and Matthew Lombardo did. What do you do? You can either pull your play as David originally did. Matthew lost a production because of the letter; the theatre pulled out because they were terrified of the lawsuit. So, these cease-and-desist letters matter. How do you respond to it? Well, you should go to David or someone from DWT and talk to them. Get an opinion letter about your work; first of all, is it a fair use? So, you want to get an opinion about that from a legal analysis. And then, assuming that the decision is that it is a fair use, you’ll want to respond, and response, both in the Adjmi case and the Lombardo case, was an action for a declaratory judgment.

You want to get a court to say this is a fair use. And the advantage in those cases is when you bring the suit, you’re determining the venue; you’re determining the jurisdiction. You’re not waiting to be sued. And it’s on your timetable, not theirs. And in both cases the decision was made by the courts on the pleadings. That means you didn’t have to go through the expensive process of discovery, of going to trial, of doing all that. It was just on the initial filings. The courts looked at it and said it was so clear there was nothing else they needed to know, other than here’s the play, here’s Dr. Seuss. Is it a fair use? They made that assessment for themselves. They don’t need a jury. They don’t need any further expert opinions.

**David:** No twelve year olds?

**Ralph:** No twelve year olds.

*GROUP LAUGHTER*

**Ralph:** I think it would have come out the same way. We included in your packet of material the case on the Lombardo case. Mathew wrote a parody of “The Grinch who stole Christmas” with a knocked-up Cindy-Lou Who living in a trailer on the side of Mount Crumpit.

*GROUP LAUGHTER*

**Ralph:** And the case was just decided a week ago, so I gave you the opinion. Like the Adjmi case, the judge held that it was a transformative use. This was not just free riding. We were talking about that from a legal analysis. And then, assuming that the decision is that it is a fair use, you’ll want to respond, and response, both in the Adjmi case and the Lombardo case, was an action for a declaratory judgment.

You want to get a court to say this is a fair use. And the advantage in those cases is when you bring the suit, you’re determining the venue; you’re determining the jurisdiction. You’re not waiting to be sued. And it’s on your timetable, not theirs. And in both cases the decision was made by the courts on the pleadings. That means you didn’t have to go through the expensive process of discovery, of going to trial, of doing all that. It was just on the initial filings. The courts looked at it and said it was so clear there was nothing else they needed to know, other than here’s the play, here’s Dr. Seuss. Is it a fair use? They made that assessment for themselves. They don’t need a jury. They don’t need any further expert opinions.

**David:** No twelve year olds?

**Ralph:** No twelve year olds.

I’m curious what you think about this: Harper is the early fair use case and it was undone in many respects by Acuff-Rose. But I have never seen a plaintiff that didn’t cite Harper including those elements of it that have been reversed or undone. I’m curious what you think about that because I’ve seen really top level firms use Harper in ways that are absolutely confusing to say that the factor for economic impact is more important. I’m curious what you think about that.

**Elizabeth:** First of all, you have to understand what he’s referring to by Harper. It was President Ford’s memoir and he got scooped before it was published. Days before it was published, Harper’s magazine did an excerpt from it. They excerpted what he had to say about pardoning Nixon. As everyone recognized, no one gave a hoot what Ford had to
say about anything other than what he had to say about pardoning Nixon. So they were arguably taking the heart of the work and exploiting it and getting the benefit. They had first serial rights and the like for the work planned, which were largely stopped because they already had been scooped on what was really economically of interest. So that’s *Harper*, and in that case they do, in fact, say that economic harm is the most important factor. As the evolution of transformative use has become the more important factor over economic harm. It’s not that Harper has been eviscerated or overwritten. It still holds for particular circumstances and that was a very unique circumstance where there was an unpublished work that was being scooped and depriving the owner of the economic benefit of getting the first publication of that excerpt. In that very narrow vein, *Harper* and its emphasis on economic consequences would hold. But I completely agree as to how things have evolved: whether something is transformative drives the analysis and that controls.

**GRAY:** One more, yes?

**MALE:** I still don’t know what to do. You also said that you don’t know until the gavel hits.

**GROUP LAUGHTER**

**RALPH:** That’s what we were saying about an opinion letter. If you really feel unsure, the first thing to do if you’re a Guild member is to call our office and we’ll give you more details about fair use and walk through it more carefully and slowly than we did here tonight. And after that, if you’re still feeling shaky about it, you go to an attorney and have them read your work and they’ll give you an opinion about it. And that’s something you can rely on to some degree.

**RALPH:** But look, anybody can sue anybody for anything. From one perspective, it could be an abuse of process. Seuss has the resources to bring these kinds of suits and they use their economic leverage in the market place to scare people away from any kind of use. Per the Lenz case, there may be more of an obligation on their part to have a good faith belief in that position before they just send out cease and desist letters, and if they don’t or can’t prove that they did, they might be liable on those grounds. So I think there is pushback against that kind of abuse. I also know that there’s talk and there’s been efforts in Washington to create a copyright small claims court. It’s very often people have a copyright but they can’t enforce it because they can’t afford to, especially if the damages are not that much. So a small claims court would give everybody an opportunity to bring an action in a more reasonable way, and therefore be more of a deterrent to infringement. It is a business decision, not a legal one as to whether or not you move forward with work that could be infringing.

**CRAIG:** In addition to the odds for me, there’s also the situation of “Dog Sees God”. Which is very similar to the Seuss play. It’s imagining all of the Peanuts characters as teenagers today with drug use, etc. etc. There’s a clause in the license that in all of the programs it has to say “Dog Sees God: Confessions of a Teenage Blockhead, has not been approved or authorized by the Charles and Shultz estate.”

**DAVID:** There’s one area that’s kind of troublesome and it keeps coming up where people talk about a distinction between parody and satire. This is the McGuffin problem that I think is hanging there.

**RALPH:** Satire is not protected speech; It is an infringing use. Parody is allowable, satire is not.

**RALPH:** The articles that have appeared in our magazine about the satire/parody distinction, and other issues of fair use, including educational uses which we didn’t have time to talk about tonight, are in the packet of material we’ve given to you; its available on our website as well.

**GRAY:** So thanks to our panel, please join me in thanking them.

**ENDNOTES**

The Changing Landscape of Taxing the Sports Industry

Jeremy M. Evans, ESQ., LL.M

I. INTRODUCTION

Waning are the days of non-profit professional sports league offices.¹ Dying are the days of city, state, and county taxpayer-funded stadiums.² Dead are the days of write-offs for tickets to college sports events.³ Prior to December 20, 2017, however, the day the majority in Congress passed the 2018 Tax Cuts and Jobs Act,⁴ the wheels were in motion⁵ on challenging the multi-billion-dollar sports industry.⁶ The sports industry brings in billions of dollars annually,⁷ but the industry is now facing legislative pushback, through limiting tax loopholes because of the changing public opinion on sports.⁸

This article will explore the tax implications and changes to collegiate, Olympic, and professional sports through the Tax Cuts and Jobs Act as well as other legislation. In any negotiation, the idea is to push the needle a little bit further in the direction that is more equitable and beneficial to the client. Labor negotiations in professional sports with the unions do this very thing when their collectively bargained agreements sunset. The players and their representative associations want a little more compared to the past, while the owners are maybe willing to give a little more, but not too much. Negotiations at their best, find two parties who have mutual interests (e.g., playing the game), but possibly finding a different way of getting back onto the field.

Change is inevitable in life and it just so happens that the sports industry, in all its forms, collegiate, Olympic, and professional, is being challenged to split the pie a little more. Regardless of your opinion on sports taxation, for or against, it is what is happening in the current sports market. In the end, the hope is that this article will allow participants in the sports industry to see where taxation has been, where it is today, and where it is going.

II. COLLEGE SPORTS

When Northwestern University student-athletes led the drive to unionize,⁹ it was on the heels of three major changes to college athletics, all financial in nature, and all benefitting the universities and their industry sponsors. The first event was the Power Five college conference realignment (i.e., the Pac-12, SEC, ACC, Big 10, and Big 12), based mainly on increasing television dollars for universities in each conference,¹⁰ while more changes are expected in 2023 as several conference television contracts expire.¹¹ The second triggering event was the massive apparel deals between major universities with popular and successful athletic programs and well-known sports brands like Nike, Under Armour, and Adidas.¹² The third event was the large television contracts for college teams and their conferences.¹³ The millions of dollars from college sports swayed the pendulum of public opinion. The result: litigation,¹⁴ an attempt at unionization,¹⁵ and now tax reform through the 2018 Tax Cuts and Jobs Act,¹⁶ which directly affects the college sports industry by taxing it through two provisions.

A. 2018 Tax Cuts and Jobs Act: Excise Tax on the Highest Paid Employees

Per Sporting News, “The bill requires that non-profit organizations, such as universities, pay the [21%] excise tax on any employee who makes above $1 million⁷ or the top five highest-paid employees, even if their compensation [does not] exceed six figures."¹⁷ The dilemma and likely reason for the tax (e.g., to increase revenue) is “[b]ecause college football and basketball coaches typically are among the highest-paid employees at NCAA Division I schools . . . [and] USA Today reported that [in 2017] 90 head or assistant coaches in just football made more than $1 million.”¹⁸ Therefore, the 21% excise tax will be a new source of revenue for the federal government as taxes are reduced in other areas, specifically for American corporations from 35% to 21%, bringing the corporate rate in line with the rest of the industrialized nations.¹⁹

For example, “based on 2017 salaries, 65 public schools would have paid a combined $30 million in tax just for their football coaches.”²⁰ To put the new 21% excise tax in perspective, the University of Alabama, the SEC football powerhouse, could pay an extra $2,340,450 in taxes for their head football coach Nick Saban, on top of his $11.145 million annual salary.²¹ Unsurprisingly, college coaches’ salaries have increased despite the new tax,²² possibly because the 21% excise tax does not outweigh the benefits from winning football games by hiring a winning coach and having a winning athletic program.²³ Winning puts fans in seats, fans increase revenues, while allowing for large coaching contracts for the best coaches, and thus the circle of success in sports programs continues.²⁴

B. 2018 Tax Cuts and Jobs Act: Tax Code Change

Secondly, the Tax Cuts and Jobs Act changed the tax code. Where donors once made financial gifts to athletic departments, tied to purchasing season tickets, which were tax deductible, the write-off/tax deduction has been removed from the tax code.²⁵ Practically speaking, this means that if a donor once gave money and received tickets to games in return, the tax deduction that came from that is no longer available.

C. Reasoning for the Changes

Without knowing the history of colleges and student-athletes, there will be a lack of understanding as to why Congress would want to regulate non-profit universities. The simple answer is a logical one. The logical reasoning for closing the loophole is that universities have been non-profit (untaxable) entities which collect donations, and the people giving the donations were using their donations to
shield income for a cause they care about (i.e., college athletics, student success, etc.), in exchange for being able to attend collegiate games as a season ticket holder. This means that the donation on either side was not being taxed. Congress saw the loophole and closed it, thereby increasing government revenue.  

Have universities and their athletic departments outgrown their statuses as non-profits when it comes to college sports and the student-athlete? When Ed O’Bannon sued EA Sports and the NCAA, it was never about O’Bannon being upset about his playing time or experiences at UCLA with the 1995 National Championship basketball team. O’Bannon saw a different way to slice the pie after his collegiate and professional career had ended. He saw a gaming company, EA Sports, his alma mater, and the NCAA raking in substantial profits off his and others’ images and that is what motivated him to sue. When Jackie Robinson was a four-sport athlete at UCLA, college sports were not involved with video games, merchandise, or television contracts. Robinson and the university were concerned about education, excellence, and non-sports related career prospects post-graduation. UCLA’s and other colleges’ missions have not changed, it is just that they make more money from those endeavors now and there is a substantial divide between those who earn (colleges) and those who do not (student-athletes who do not end up playing professionally). The O’Bannon litigation eventually moved the needle for student-athletes toward higher scholarships, at least for schools in the Power Five conferences, while tax reform takes some universities with highly paid coaches and significant donors to task.

III. OLYMPIC GAMES & SPORTS

Outside of the major issues in the various Olympic sports and the Olympic Games surrounding doping, international sanctions and corruption, and sex abuse, except for 2016 legislation, the tax issue has somewhat been ignored by the federal government. However, this seems logical because the Olympic Games are generally seen as a benefit to society and they only occur every four years. Moreover, Olympic sports do not bring in the annual spending and tax revenue compared to the five major American professional sports (football, baseball, basketball, hockey, and soccer) that do occur annually.

A. Introducing the 2016 Victory Tax

In 2016, U.S. Congressional legislation voided the Victory Tax on some medals for Olympians. The 2016 legislation eliminated the Victory Tax for “Olympic athletes who bring home the gold, silver and bronze for Team USA” as the IRS cannot now tax most medals or other prizes awarded to U.S. Olympians. As an example, “The U.S. Olympic Committee awards cash prizes to medalists, ranging from $25,000 for gold, $15,000 for silver and $10,000 for bronze. The cash prize comes on top of the value of the medals themselves: $600 for gold and $300 for silver; bronze medals are not worth much.” The “winnings” and medals were considered “earned income” under the former tax code making it taxable.

“Lawmakers who objected to the tax passed legislation to eliminate it, citing the levy as an unfair burden on U.S. athletes who spend years sacrificing and training in their sport, often at great financial expense.” However, “not all Team USA medalists will be exempt. The tax will still apply to high-profile athletes who earn at least $1 million a year.”

For example, Michael Phelps, who made more than $1 million and earned five gold medals during the 2016 Rio Olympics in Brazil, likely received a $55,000 tax bill. Gymnast Simone Biles, who also met the $1 million threshold and earned four golds and one bronze medal in Rio, likely received a $43,000 tax bill. Rep. Robert Dold, R-III., the sponsor of the Victory Tax legislation, added in response to the purpose for the bill: “Most of these athletes will never sign an endorsement deal or a professional contract, which is why [it is] so important that these athletes will no longer be forced to pay a big tax bill when they achieve their Olympic dreams representing the United States.” The legislation passed the U.S. House of Representatives in October 2016 by a 415-1 vote and the law applies retroactively to the 2016 Olympic and Paralympic Games in Rio de Janeiro. However, the legislation does not affect taxes on an athlete’s endorsement or sponsorship income, but where Team USA brought home 121 medals from the Rio Games, including 46 gold medals, but the government revenue in unlikely to be substantial relative to athletes in the $1 million+ earner range who win a lot of medals.

IV. PROFESSIONAL SPORTS

The current marketplace is one filled with substantial revenue from television deals and controversy, with the National Football League removing its non-profit status. Nonetheless, where the Tax Cuts and Jobs Act does not directly affect professional sports as was once debated, state law, specifically tax exemptions, have increased despite some cities and citizens becoming more wise to resisting giving their taxpayer dollars to professional sports franchises to build new stadium homes.

A. California Penal Code 320.6 (2014) and similar state laws

In the state of California, Penal Code Section 320.6 provides for legal gambling through “50/50” raffles inside professional sports venues, including at NFL, MLB, NHL, NBA/WNBA, MLS venues, at PGA/LPGA Tour and NASCAR events. The text of the legislation provides:

California Penal Code Section 320.6

“(a) Notwithstanding Section 320.5, this section shall apply to an eligible organization, as defined in subdivision (c).

(b) A raffle conducted by an eligible organization, as defined in subdivision (c), for the purpose of directly supporting beneficial or charitable purposes or financially supporting another private, nonprofit eligible organization, as defined in subdivision (c) of Section
320.5, that performs beneficial or charitable purposes may be conducted in accordance with this section.

(c) For purposes of this section, “eligible organization” means a private, nonprofit organization established by, or affiliated with, a team from the Major League Baseball, National Hockey League, National Basketball Association, National Football League, Women’s National Basketball Association, or Major League Soccer, or a private, nonprofit organization established by the Professional Golfers’ Association of America, Ladies Professional Golf Association, or National Association for Stock Car Auto Racing that has been qualified to conduct business in California for at least one year before conducting a raffle, is qualified for an exemption under Section 501(c)(3) of the Internal Revenue Code, and is exempt from taxation pursuant to Section 23701a, 23701b, 23701d, 23701e, 23701f, 23701g, 23701k, 23701l, 23701t, or 23701w of the Revenue and Taxation Code.49

How this works is when fans attend a sporting event there are 50/50 team raffle employees who collect donations from fans and in return they are entered into a drawing where one fan can win 50% of the total monies collected. If more fans donate, the pot gets larger. What this also means is that a professional sports team may take 50% of the donations proceeds, untaxed, from raffles hosted inside their venues and then donate the team’s share to a charity of its choice, generally a community-based charity or endeavor or the team’s own non-profit, while, again, the winning-fan takes home the remaining 50%.50

In the state of Arizona, the NFL’s Cardinals and MLB’s Diamondbacks have taken the 50/50 raffle a step further by offering the 50/50 raffles from the comforts of people’s homes where television audiences can enter and win the raffle from their couches.51 In addition, all four professional sports teams in Arizona, including the Cardinals, Diamondbacks, NHL’s Arizona Coyotes, and NBA’s Phoenix Suns, offer 50/50 raffles to game attendees in their stadiums.52 Moreover, two universities, Arizona State and Michigan State, now offer 50/50 raffles at their college sporting events.53 Again, “eligible organizations,” like in California, are the nonprofit organizations affiliated with a professional sports team and also include universities.54 The total 50/50 raffle take home dollars vary by game and club, but it is in the millions of dollars for some, as measured by the MLB’s Los Angeles Dodgers,55 and separately where a Canadian Football League fan won $345,160 in July 2017, where the team received $345,160 in untaxed proceeds, or $690,320 between the fan and the team.56

However, the 50/50 raffle should not be misunderstood here. The untaxed proceeds do go to registered 501(c)(3) organizations that are used presumably for legitimate, needed services, facility upgrades or community-based charities and endeavors. Moreover, one lucky fan always wins 50% of the donated proceeds, which could be significant.57

Interestingly, the University of California, Los Angeles (“UCLA”) Bruins football team who play their home games at the Rose Bowl in Pasadena, California, finds itself in a peculiar situation, otherwise known as legislative purgatory, where UCLA plays its home football games in the legendary stadium, but UCLA cannot host 50/50 raffles because the California legislation is applicable only to professional teams.58 Essentially, colleges are not allowed to host 50/50 raffles in California. An imbalanced situation for UCLA, but until something changes, some states have 50/50 raffles, some do not, and some colleges do too. It is another source of revenue for professional sports franchises and universities in terms of community development or for improvement projects where the proceeds are donated to the teams or universities own a non-profit.

B. Jock Taxes and the California Workers Compensation Dilemma

In California, athletes are being taxed directly through Jock Taxes,59 and yet are being limited from obtaining workers compensation benefits in the state where they played during their professional careers.60 Jock Taxes, per SI.com, work as follows:

Of the 25 states with professional sports teams, 21 impose a Jock Tax. But this year, the stage for the Super Bowl [2016 Super Bowl between the NFL Carolina Panthers and Denver Broncos] happens to be in the state [California] with the highest income tax rate in the country at 13.3%—nearly three times the rate of Arizona, home to last year’s Super Bowl. . .

In 2013, for example, California collected more than $229 million in income tax from athletes. Hosting Super Bowl 50 will only be an extra boost for state coffers.

When you add up [NFL quarterback Cam Newton’s] salary, signing bonus and postseason bonuses, the 26-year-old star quarterback will earn more than $20 million in 2016 [not including endorsement deals]. For the days Newton spends in Santa Clara [Super Bowl 50] for his employment as a Carolina Panther . . . Newton will owe [California] approximately $137,000 in taxes. Remember, Newton [is not] a resident of California and he [is not] employed in California. Yet the amount of money Newton will owe California in taxes more than doubles the median income in the U.S. (approximately $54,000).61

However, the workers compensation legislation cuts the opposite direction of Jock Taxes as “[p]rofessional
athletes who spend most of their careers with teams in other states [are now] prohibited from filing workers’ compensation claims in California. 66 This is a significant loss for professional athletes as California is typically an employee-friendly state with its “broad rules on how long former athletes can file claims in California” and is “one of nine states that permit workers’ compensation claims on cumulative trauma injuries like those claimed by professional athletes.” 67 For some perspective, “the California Insurance Guarantee Association has paid nearly $42 million in claims to professional athletes since 2002.” 68

Seemingly, an unfair situation where the very athletes and high earners who are being taxed are conversely being limited on their injury recovery options in the very state where they pay the highest tax rates. In California, the legislative plan of action seems to be one of giving tax breaks to the professional sports franchises through the 50/50 raffles, while taxing and limiting injury-recovery options for the athletes that play for the professional sports franchises. One could make the argument that the unfairness of the tax towards out of state earners is a violation of the United States Commerce Clause as they are being treated differently from California residents. 69 Essentially, out-of-state athletes are not getting the same benefit of the tax code and recovery options for injuries where not every athlete can play for a California-based franchise.


The Tax Cuts and Jobs Act did “repeal the tax exemption for interest earned on advanced refunding bonds,” which under previous law were used to refinance tax-exempt bonds issued by state and local governments and certain charitable activities of Section 501(c)(3) organizations. 70 However, “There has been no change to the exemption for interest earned on private activity bonds, or on bonds, the proceeds of which are used to finance or refinance professional sports stadiums. A previous version of the legislation had proposed to repeal the exemption for these bonds[,]” but did not make it into the final version of the bill. Practically speaking, this means that team owners will continue to utilize public funding to build billion dollar stadiums. Right or wrong, the bonds are a benefit that professional sports franchises will continue to utilize.

D. Capital Gains Tax on Player Contracts

The Tax Cuts and Jobs Act did not include language that would directly affect the trading of professional athletes and their contracts to another team. 71 However, the addition of one word in the tax cut law passed by the 115th Congress, “real,” (for real estate) could do just that. Specifically, based on this change to the exempt transactions, when a professional athlete is traded to another team that transaction could now be subject to the capital gains tax. The capital gains tax is a tax levied on the profit from the sale of property or of an investment, but investments, including a professional sports team’s players, were exempt (as finding market value and profit from a trade is very difficult to determine). 72 “With little clarification from the IRS or Senate Finance Committee on how the tax law changes would be specifically instituted for professional sports organizations, the situation remains a question mark.” 73

V. CONCLUSION

A dichotomy is presented here because on the one hand Congress has regulated college sports through two specific provisions in the Tax Cuts and Jobs Act, but at least through the current legislation has not increased taxes or closed loopholes with regard to professional sports. If anything, at least at the state level, some legislatures have passed legislation that has benefited professional and collegiate teams via exemptions to host 50/50 raffles, where the donated proceeds are untaxed. In some sense, a logical argument could be made that the money lost through the 21% excise tax on our universities’ high earners could be regained through 50/50 raffles (at least for colleges that can host the 50/50 raffles). Olympic athletes on the other hand, find themselves in a situation where some of their winnings have been made exempt from the tax code, but not for the highest earners/most successful Olympic athletes making over $1 million annually.

The needle has been moved towards higher taxes in the sports industry, at least at the federal level, levied against the highest earners in Olympic and employees in collegiate sports and for the largest donors in college athletics. Are professional sports next in line to be taxed? The future holds the key. For now, at the state level, some legislatures are giving professional sports franchises tax breaks through 50/50 raffles, and some colleges too, while the state of California has simultaneously reduced recovery options under workers compensation laws for professional athletes. On the other hand, the federal government has implemented taxes against the few existing highest individual Olympic athlete earners and removed write-offs from the tax code for the largest donors to Universities, supported team owners who might utilize public funding to build stadiums and also, imposed a capital gains tax on the profit from the sale of an investment, which may ultimately turn out to affect trades of professional athletes.

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52 Id.; “About the 50/50 Raffle,” AZCardinals.com (http://www.azcardinals.com/community/programs/5050-raffle.html); “Phoenix Suns Charities 50/50 Raffle,” (http://suns.ms.5050central.com/)


57 Id.

58 Cal.Crm.Code Section 320.6 (the code only includes professional sports teams in California)


63 Id.
64 Id.

65 United States Constitution (Article I, Section 8, Clause 3)


Rich-from-birth Donald Trump never faced deprivation, a lack of dental or medical care, economic hopelessness, a bare and shameful caged life, separation from parents or children and a complete unknowing future that could entail indefinite incarceration... all because of desire to escape violence or seek a life where his children could find food, shelter and education.

Through the harshest measures since the internment of Americans of Japanese ethnicity in World War II, and in defiance of international conventions on the treatment of refugees and the Equal Protection provisions of our own Constitution (Fifth and Fourteenth Amendments), the United States has ramped up both its rhetoric and it treatment of the millions of undocumented aliens living in the United States and those suffering from violence and repression within in their home countries seeking asylum and hope here in the United States. We have moved from a difficult program of pragmatism with a heart to a policy that seems based on a most un-American level of cruel and unusual treatment of these desperate peoples.

That much of the violence south of our border is directly linked to America’s massive demand for narcotics – which has escalated as the Trump administration continues to try to reduce addiction treatment coverage from federal healthcare programs – and the rather easy access to assault weapons purchased in the United States and then smuggled south to enable gangs/cartels to mount civil wars in Latin American countries with piles of cash to corrupt local officials.

We seem to absolve ourselves from the responsibility for our own actions and inactions associated with the violence and hopelessness that drives desperate migrants from their homes. That former Attorney General Jeff Sessions instructed his immigration “judges” (Department of Justice employees who can be fired at any time) that justifiable fear based on domestic or gang violence would no longer be justification for asylum in the United States emphasizes how this nation continues to deny its responsibility for this chaos built on desperation. Trump’s take is strict interpretation of immigration policies with “zero tolerance.” Detention and pain.

“Zero tolerance” from a nation of immigrants seems strange and difficult to justify even though there is certainly a legitimate reason to maintain secure international boundaries. But the underlying justifying logic was woefully lacking in facts. Stating that only a very few of the “catch and release” immigration violators, seeking a hearing on asylum requests or deportation orders, ever appeared for those hearings, Trump justified the new policy. The facts, as is not uncommon with Trump assertions, suggest quite the contrary.

“In absolute terms, more than 100,000 non-detained immigrants have been ordered to be deported in recent years because they failed to appear before an immigration judge. However, as a percentage, most undocumented immigrants do show up for court.

“According to Justice Department data from the last five available years, around 60 to 75 percent of non-detained migrants have attended their immigration court proceedings. That’s determined by subtracting the percentage of judgments entered against migrants in their absence (known as an in absentia ruling) from total judgments entered.” Polifact.com, June 26, 2018.

I am equally shocked at that evangelical portion of Trump’s base that wishes to ban abortions but favors military intervention in the Middle East, the death penalty and seems to deny the New Testament’s charitable mandate and admonition to “love thy neighbor”... as they champion an immigration policy that is both cruel and ill-conceived. What would Jesus do? Read the Bible and find out! “Love thy neighbor” is not an allusion to your immediate neighbor as some actually believe! Opening your heart and pocketbook is not relegated to support whites born in the U.S. only!

The fact of the matter is that Donald Trump stumbled on a sensitivity to blue-collar workers’ belief that foreigners and undocumented aliens were supplanting their white Christian-driven culture and taking their jobs away – an economic reality maybe valid 10-20 years ago but long since replaced by automation. His shoot-from-the-hip campaign somehow took a “how about building a wall” ad hoc statement, found the audience loved that... and turned it into an immigration policy that not only slams the poor fleeing violence and seeking a better life for their families... but excludes highly-educated scientists and engineers needed by American industry... the real job creators.

But since “diversity” tends to vote Democratic, Trump has informed the his base that he is exploring how to delegitimize the citizenship of children born in the United States to undocumented aliens, claiming we are the “only country” to do so. That this is common practice in the developed world, that there are 30 countries where this is the norm, is yet one more “fact” that Donald Trump wished to repeal. Instead he wishes to embrace an interpretation of the Fourteenth Amendment championed by conspiracy theorists and a tiny rogue faction of constitutional lawyers.

What underscores Trump’s policies is how little thought goes into the obvious impact his shoot-from-the-hip initiatives have across the board, that implementation requires expensive and careful preplanning, and that caring about human values has to be a component of every decision he makes. But none of that seems to happen, a factor so clearly evident with his “zero tolerance” immigration policies that still separate little children from their families or force those youngsters into terrifying detention facilities. Instead, America now lives in an adhocracy... where policies and
priorities are reduced to whim-driven “solutions” laced with misstatements and vitriol.

Trump loves to employ bullying horse-trading to get his agenda and reward and hold his base. He initially challenged Congress to solve the issue of allowing “Dreamers” (those undocumented residents brought to the United States by their parents as young children) – under the DACA (Deferred Action for Childhood Arrivals) program initiated under the Obama administration – to remain in the United States. But when Democrats wouldn’t give in on other issues to pass “DACA” legislation, he issued an executive order to end DACA. So far Trump’s efforts to end DACA and begin to deport all those people, who have never known life in any other country but the United States, have failed in the federal courts.

In a 99-page opinion, a three judge panel from the Ninth Circuit ruled against Trump, sustaining a lower court preliminary injunction against his DACA termination order (Regents of the University of California vs U.S. Department of Homeland Security, 18-15068, D.C. No. 317-cv-05211-WHA, November 8, 2018). “In the Ninth Circuit ruling, the majority also didn’t agree with the Justice Department’s claims that DACA was unlawful when instituted by the Obama administration in 2012. Judge [Kim] Wardlaw concluded ‘that, because the Acting Secretary was incorrect in her belief that DACA was illegal and had to be rescinded, plaintiffs are likely to succeed in demonstrating that the rescission must be set aside under the APA as arbitrary and capricious.’

“One of three judges, John B. Jones, didn’t agree that the arbitrary and capricious claim would succeed, but all three said Equal Protection claims justified the national injunction.” ConstitutionCenter.org, November 8, 2018. Will the reconfigured Supreme Court reverse this finding? Time will tell.

The Trump administration has set a pattern to treat desperate people seeking shelter in the United States – refugees by any definition – as less than human. Picture unescorted 5-year-old children, who do not speak English, standing before an immigration “judge” without a hint of legal representation (also pulled by the DoJ) to make his or her case for entry into the United States. The sham immigration courts, spending literally minutes on the average case, were subject to DoJ requirements to increase the volume of processing… without any mention of a requirement of “justice.” “Judges” who fail to comply with these requirements are often simply removed.

Indeed, Trump’s “zero tolerance” policies slammed into undocumented families crossing the border and trapped many undocumented residents who have lived in the United States for years. Once detained, refugees were separated: adults one way… their children the other.

Publicity photographs allowed by the government in a few centers where the press was allowed show “nice” kids in “pleasant” quarters learning and having fun. But then, the press is generally denied access to processing centers except where the government wants to present a positive spin. How very “North Korea” of them! Simply put, the government was woefully unprepared for the structures needed to implement the Trump administration’s “zero tolerance” program.

“The Trump administration botched the implementation of its ‘zero tolerance’ border policy this year and failed to adequately prepare for the consequences of separating immigrant children from their parents, according to a report released Tuesday [10/2/18] by federal investigators.

“The Department of Homeland Security’s inspector general found that separated children were routinely held for five days or more in detention centers that were not equipped for long-term stays. In one case, a child remained in such a detention center for 25 days.

“Once families were detained, the report says, the administration routinely lost track of the locations of separated parents and minors. A central database the administration said it built to help reunify families was, in reality, a hastily thrown together spreadsheet that was incomplete and full of errors.

“The Department of Homeland Security ‘struggled to identify, track and reunify families separated under zero tolerance due to limitations with its information technology systems … raising questions about the government’s ability to accurately report on separations and subsequent reunifications,’ the report found.

“It marked the federal government’s first independent assessment of the ill-fated zero-tolerance policy and resulting fallout, which sparked widespread protest this year when more than 2,600 immigrant children were separated from their parents and placed into government custody. The outcry was so loud that President Trump issued an executive order halting the practice on June 20.

“Soon after, a federal court ruled the separations were illegal and ordered families reunified within 30 days. But even then, the administration struggled to comply. By late last month, hundreds of detained children were still not back with their parents.

“In a written response to the investigators, the Department of Homeland Security took issue with several of the findings. It said investigators did not take into account complicating factors that delayed the placement of children into long-term facilities, such as medical issues. And the department objected to the report’s characterization of its efforts to keep track of families and reunify them as disorganized and technologically incompetent.” Los Angeles Times, October 3rd. Hey Homeland Security folks, you should have anticipated the obvious!!!!

A June 26, 2018 court order issued in the Federal District Court in San Diego, California (Ms L vs. U.S. Customs and Immigration Enforcement (Case number: 18cv0428 DMS [MDD])) mandated an end to the Trump administration practice of separating undocumented children from their parents. Though the Trump administration began to attempt to reunite families (under an executive order issued two days later), mostly by slamming the entire family into a prison-like detention center, many children are still not reunited, and where there is some color of a possible criminal accusation against a parent (like a former deportee returning to the United States), such separations continue.

This is an explosively expensive policy which siphons massive tax dollars away from needed infrastructure and healthcare at time when undocumented immigration is at
a recent low. Trump literally shifted hundreds of millions of dollars for cancer and AIDS research into building more detention facilities!

But exactly what happens in those detention facilities? A Homeland Security Inspector General report – Management Alert – Issues Requiring Action at the Adelanto ICE Processing Center in Adelanto, California (OIG 18-86) – paints an ugly picture of this privately-run facility. Those willing to speak, with access to other comparable such “processing centers,” seem to suggest that the horribles presented in this report are fairly common at other such facilities, both privately-run and those directly controlled by the government:

“When federal officials arrived in May of this year for a surprise inspection of the privately-run immigration detention facility, they found nooses made from bedsheets in 15 of 20 cells.

“When we asked two contract guards who oversaw the housing units why they did not remove the bedsheets, they echoed it was not a ‘high priority,’ officials with the Department of Homeland Security inspector general’s office wrote in a scathing report made public Tuesday [10/2] detailing dangerous conditions found at the facility during their unannounced visit.

“The nooses are just one of many problems posing ‘significant health and safety risks’ identified by federal inspectors at Adelanto, which can house nearly 2,000 detainees as they await the outcome of their immigration cases.

“Detainees reported waiting ‘weeks and months’ to see a doctor, and inspectors met with a dentist who dismissed the necessity of fillings, and suggested that detainees use string from their socks to floss, the report said.

“Inspectors also said they found that detainees were commonly subjected to disciplinary segregation before being found guilty of violating rules.

“The report is the latest from government inspectors to document significant deficiencies at Adelanto since it opened in 2011… It comes one year after immigrant advocates raised alarms about conditions at the facility following the deaths of three detainees in a three-month period in 2017.

“The Times reported in August 2017 that there had been at least five attempted suicides at the facility in less than one year, according to a review of 911 calls…

“Some detainees arrive at the facility soon after crossing the border; others after having lived in the U.S. for decades. They can stay in detention for months, and in some cases years, as their cases are decided… Pablo Paez, a spokesman for GEO Group, referred questions about the inspector general’s report to ICE.

“According to the report, in the months after Osmar Epifanio Gonzalez-Gadba, 32, of Nicaragua was found hanging from bedsheets in his cell and later died, ICE compliance reports documented at least three suicide attempts by hanging at Adelanto, two of which specifically used bedsheets.

“Still, when inspectors visited the facility, they found braided sheets that both staff and detainees referred to as nooses hanging from the vents in 15 of the approximately 20 male detainee cells that they visited in four housing units.

“The guard who escorted the inspectors began removing the nooses but stopped after realizing how many there were, the report said. Some detainees said they use the unfurled sheets for privacy, while others said they used them as clotheslines.

“One detainee, however, told inspectors that he had seen ‘a few attempted suicides using the braided sheets by the vents.’ ‘The guards laugh at them and call them ‘suicide failures’ once they are back from medical,’ the detainee told officials.” Los Angeles Times., October 3, 2018.

The GOP anti-immigrant mantra continues to resonate with Trump’s base. The President loves visual manifestations that he can twist to suit his political agenda and bolster his hold on his base. Then the big visual stepped onto the global stage. Conveniently immediately prior to the midterm elections.

This fall, as one of several recently-organized “caravan” of asylum-seekers – a large body that at one point seemed to have swelled to as many as 15 thousand Central American refugees – was wending its way toward the United States, Trump seized on a prelection variation of his anti-immigrant theme. Families. Unarmed. Desperate.

Although this caravan of refugees gathered together as a defense against the obstacle course of robbers, rapists, gangsters and murderers who typically prey on such desperate migrants in smaller groups – without the slightest evidence to support his allegation – Trump claimed MS-13 gang members and hidden Middle Eastern terrorists populated this group. Those seeking shelter from criminal assault were now themselves labeled as criminals. Instilling fear among his base of this “invasion” worked. Several exit polls suggested that the strength of the GOP hold on the U.S. Senate from the November 6, 2018 mid-term election was generated in significant part from concern of lax border security, heightened by Trump’s response to this particular caravan.

The cost of additional costs of detention and the rushing of troops to our border to defend against “huddled masses” moving together in a Central American caravan are rising fast. Even though as of this writing, the troop surge to the U.S./Mexican border still numbers about 5,900, Trump’s threats to increase the number of U.S. troops on that border to 15,000 would be more than U.S. troops deployed in Afghanistan and way more than those deployed in Afghanistan!

Even the lesser military border deployment was estimated to costs taxpayers a bundle: “Using thousands of military troops to help secure the Southwest border will cost an estimated $210 million under current plans, the Pentagon told Congress on Tuesday [November 20, 2018], even as questions arose about the scope and duration of the controversial mission.

“The total includes $72 million for approximately 5,900 active-duty troops providing support to Customs and Border Protection, plus $138 million so far for 2,100 National Guard troops who have been performing a separate border mission since April [2018], according to a report sent to Congress on Tuesday [November 20, 2018] but not released by the Pentagon.” Associated Press, November 21, 2018. But Trump’s assault on this hapless caravan of unarmed civilians was not over.
On November 8, 2018, in anticipation of the approaching caravan, Donald Trump issued an executive order making the application for asylum much more difficult for those seeking entry along the U.S./Mexican border. Among other elements, the order mandated that asylum-seekers could only apply at a few, limited ports of entry, where long lines and lengthy delays, with many applicants simply turned away, were effectively making those centers virtually inaccessible, while banning such applications from anywhere else along the border. The American Civil Liberties Union joined several other public interest organizations to challenge the administration.

On November 19, 2018, in East Bay Sanctuary Covenant vs. Donald J. Trump (case no: 318-cv-06810-JST, Northern District of California), San Francisco-based U.S. District Judge Jon S. Tigar issued a temporary restraining order after hearing arguments. The court found that the Trump administration was usurping the legislative role of Congress in this unilateral action, specifically the Immigration and Naturalization Act’s mandate to allow such asylum applications “whether or not at a designated port of arrival” (8 U.S.C. Sec. 1158(a)(1)).

The President responded: “This was an Obama appointed judge, and I’ll tell you what, this is not going to happen anymore.” Alluding to the Ninth Circuit, which he labeled as a “disgrace,” Trump continued: “It means an automatic loss no matter what you do. People should not be allowed to immediately run to this very friendly circuit and file their case.”

The Departments of Justice and Homeland Security also responded: “The Trump administration suggested the defeat could be temporary, alluding to a 5-4 decision by the Supreme Court in June that upheld a revised version of Trump’s travel ban, an effort to bar foreigners from certain majority-Muslim nations and other countries from the United States.

“As the Supreme Court affirmed this summer [in International Refugee Assistance Project vs. Trump, 583 U.S. ___, June 26, 2018, popularly known as the case upholding Trump’s ‘Muslim ban’], Congress has given the President broad authority to limit or even stop the entry of aliens into this country, the Justice Department and the Department of Homeland Security said in a joint statement. ‘We look forward to continuing to defend the Executive Branch’s legitimate and well-reasoned exercise of its authority to address the crisis at our southern border.’” The Washington Post, November 20, 2018.

But this litigation was a minor bump in the media, gone from the headlines in a day; after the November 6th election, focus on this caravan and immigration was reduced to the back pages of news reporting.

On November 25, 2018, as the entire San Ysidro Port of Entry was temporarily closed. At nearby border areas, “[a]bout 500 migrants on the Mexican side of the border overwhelmed police blockades... On the US side, 69 people were arrested for illegally crossing the border, US Customs and Border Protection Commissioner Kevin McAleenan said [November 26, 2016]. Tijuana police said they arrested 39 people Sunday on the Mexican side. Those identified as trying to rush the US border illegally will be processed for deportation in their home countries, Mexico’s Interior Ministry said.

“US President Donald Trump threatened to close the border ‘permanently if need be.’ He also claimed many of the migrants are ‘stone cold criminals,’ but gave zero evidence to support that claim.” CNN.com, November 26, 2018

Of those arrested in the United States for crashing the border, none was ultimately prosecuted because of the underlying confusion. However, with U.S. agents infiltrating the caravan, there were two arrests of known gang members with U.S. arrest warrants attempting to blend in with asylum-seekers in the caravan. As of this writing, the caravan sits in foul weather at or near the border, with many people turning back or electing to stay in Mexico. Even with all this turmoil, immigration issues remained relegated to the back pages of news reporting.

Nevertheless, the Trump Administration is continuing to find a hostile reception for statutes hastily passed by a his ideologically-sympathetic GOP-dominated Congress. On December 4, 2018, a three-judge panel of the Ninth Circuit ([United States vs. Evelyn Sineneng-Smith, No. 15-10614 D.C. No. CR 10-414 RMW] addressed a clause in such a federal criminal statute, 8 U.S. Code § 1324 (a)(1)(A)(iv), making it a felony for anyone who “encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law...”

The forty-two-page Ninth Circuit opinion, reversing a criminal conviction based on what was ruled to be an unconstitutional statute, was written by Judge A. Wallace Tashima. The opinion relied heavily on First Amendment arguments and the overbroad nature of the law: “Although the ‘encourage or induce’ prong in Subsection (iv) may capture some conduct, there is no way to get around the fact that the terms also plainly refer to First Amendment-protected expression.” Page 22. The Court added that the statute appeared to apply to statements amounting to “pure advocacy on a hotly debated issue in our society... Criminalizing expression like this threatens almost anyone willing to weigh in on the debate.” Page 40. Even legal advice to an undocumented client to remain in the United States as part of an asylum plea could run afoul of the law.

In early December, Trump again threatened to shut down the federal government (even though 75% of the government is pre-funded) if he does not get an appropriation to build his wall, the same wall he promised that Mexico
would pay for. Statutes. Threats. Troops. That Trump had rushed regular Army troops to the border to prepare for this caravan “invasion” also raises serious legal questions. Hence, an examination of the law, which that appears to be at best an after-thought in Trump’s shoot-from-the-hip advocacy, would seem to be in order.

Absent a declaration of martial law, Trump’s sending more regular federal U.S. troops to the Mexican border than are currently stationed in Afghanistan is little more than expensive saber-rattling. While such troops can provide support services – like building facilities or stringing up barbed wire – they are statutorily forbidden from actively engaging in arresting violators or serving in a policing capacity. He has extended their stay at least until January as well.

In a reaction to Abraham Lincoln’s suspension of the rights of habeas corpus and using Union troops to serve as de facto law enforcement officers, the post-Civil War generated concerns of a president misusing federal troops as police, seen very much as a threat to civilian rule. While this statute did not apply to state militias (like the National Guard) or even the Coast Guard (often charged with drug interdiction), the “Posse Comitatus Act of 1878 [18 U.S.C. Sec. 1385], prohibits the use of U.S. military forces to perform the tasks of civilian law enforcement such as arrest, apprehension, interrogation, and detention unless explicitly authorized by Congress.

“The Posse Comitatus Act, signed into law by President Rutherford B. Hayes on June 18, 1878, limits the power of the federal government in the use of federal military personnel to enforce U.S. laws and domestic policies within the borders of the United States. The law was passed as an amendment to an army appropriation bill following the end of Reconstruction and was subsequently amended in 1956 and 1981.

“As originally enacted in 1878, the Posse Comitatus Act applied only to the U.S. Army but was amended in 1956 to include the Air Force. In addition, the Department of the Navy has enacted regulations intended to apply the Posse Comitatus Act restrictions to the U.S. Navy and Marine Corps.

“The Posse Comitatus Act does not apply to the Army National Guard and the Air National Guard when acting in a law enforcement capacity within its own state when ordered by the governor of that state or in an adjacent state if invited by that state’s governor.

“Operating under the Department of Homeland Security, the U.S. Coast Guard is not covered by the Posse Comitatus Act. While the Coast Guard is an ‘armed service,’ it also has both a maritime law enforcement mission and a federal regulatory agency mission.” ThoughtCo.com. Even Defense Secretary James Mattis was at a loss to explain to his troops exactly what their role at the border could be other than some general notion of “support” for ICE. Nevertheless, as of this writing, President Trump was expected to issue an executive order that flies in the face of the Posse Comitatus Act, “giving armed [regular Army] troops the authority to intervene if U.S. personnel are endangered by migrants trying to cross the border, the officials said. The order doesn’t rule out the use of deadly force.” Los Angeles Times, November 21st.

On November 22, 2018, the President added this about the regular Army troops at the border: “If they have to, they’re going to use lethal force. I’ve — I’ve given the OK. If they have to. I hope they don’t have to.” What could possibly go wrong?

For those of us who believe in God and/or a moral mandate, perhaps even the existence of heaven and hell, these moral, legal and ethical choices by our government, especially the support they are drawing from people who seem to think they are committed Christians, is nothing short of some of the worst human conduct imaginable. Unjustified by any explanation. Immoral under virtually any religious code. And, most of all, deeply un-American!

Why am I writing this for a journal aimed at sports, entertainment and arts lawyers? Why does this remotely matter to us? Because we and our clients are the media. They tell stories, instill emotion and power in their music and art… and gather admirers for their athletic prowess. We support them. Empower them. People are looking at us and our clients more than almost any other segment of our society. And with this visibility comes responsibility, the mandate that all lawyers carry to promote and defend justice. To defend the values that have defined “America” since its democratic inception. Because we can. Because we should. Because it is right.

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Chinese Film Laws
An Unintended Driver of Intellectual Property Infringement
Keith Kelly

I. INTRODUCTION
With box office receipts of $8.6 billion in 2017, China’s theatrical film industry is both the fastest growing and likely the most important in the world. However, the Chinese government employs a complex system of laws that severely limits Hollywood’s access to its market and undermines copyright law. China implements an import quota scheme, strict censorship requirements, and release-scheduling policies in efforts to protect domestic competitors, to comply with certain obligations as a member of the World Trade Organization (WTO), and to promote the Communist Party’s core socialist values. These measures are largely ineffective in sheltering Chinese citizens from exposure to foreign content because most see pirated foreign films in their original, uncensored format.

Because China denies its citizens the ability to legally see the majority of foreign films, either uncensored or altogether, its film laws push Chinese consumers to piracy, furthering China’s non-compliance of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This Article’s goal is to highlight the unprecedented rise of China’s theatrical film industry and Hollywood’s subsequent reliance on the market while also analyzing China’s film regulations as a driver of intellectual property theft, and to propose realistic solutions that would allow regulators to achieve legitimate policy goals while honoring China’s WTO commitments and protecting copyrights.

Part II provides a brief history of China’s film industry, emphasizes the importance of the market, and identifies the key domestic stakeholders. Part III focuses on China’s market access and intellectual property obligations as a WTO member. Part IV outlines China’s current laws applicable to the film industry. Finally, Section V proposes solutions that may help China achieve its policy goals while providing fairer market access and better protecting intellectual property.

II. A BRIEF HISTORY OF THE FILM INDUSTRY IN CHINA

A. Early Years
China has one of the oldest film industries in the world, with its first film, The Battle of Dingjunshan, created in 1905. It continued to develop until 1966, when Mao Zedong’s Cultural Revolution severely restricted the industry by limiting content to Communist propaganda. In the ensuing years, China saw a boom in domestic film production with an increase from 19 feature films in 1977 to 125 in 1986. The Fifth Generation filmmakers of the late 1980s helped increase the popularity of Chinese films abroad.

Western audiences began to embrace the films of Chen Kaige and Zhang Yimou, including Raise the Red Lantern (1991) and Farewell My Concubine (1993), which won the Palme d’Or at the Cannes International Film Festival.

B. Reforms and Opening Up
After the death of Mao Zedong in 1976, China began a phase of significant reforms under Deng Xiaoping’s leadership. By 1994, in an effort to open its economy and to revive its slumping theatrical business, China began allowing ten imported films per year that “basically reflected the finest global cultural achievements and represented the latest artistic and technological accomplishments in contemporary world cinema.” Later that year, China allowed entry to its first Hollywood blockbuster, The Fugitive. It was a resounding hit with Chinese moviegoers, grossing more than $3 million in the Middle Kingdom.

The import quota has slowly increased because of market-driven pressure and to comply with WTO requirements. It increased from 10 to 20 films per year in 2001 when China joined the WTO, and then to 34 foreign films per year in 2012, after negotiations with the Motion Picture Association of America (MPAA) and Vice President Joe Biden. While the annual import quota currently remains at 34, the recent trend is to allow more foreign access in an effort to appease domestic audiences and powerful Chinese cinema operators. In 2017, 44 American films were released theatrically in China, grossing a combined $3.26 billion.

C. Rapid Rise and Hollywood’s Reliance
Since opening up, China’s theatrical film industry has grown with breakneck speed. With a population of nearly 1.4 billion people and an ever-expanding middle class, the entertainment business is lucrative in China. Box office figures have skyrocketed from $150 million in 2003 to $8.6 billion in 2017, nearly a 30% increase from 2016. The trend continued in the first half of 2018 with China outpacing the United States for the first time by reaching $4.77 billion, up 16% from 2017. On the other hand, the United States saw a domestic decline of 2.3%, with a box office totaling $11 billion in 2017. In 2013, China had less than 20,000 movie screens. It has added an average of 19 new screens per day since 2012, now totaling more than the United States with 50,766 screens across China.

With slumping and less predictable box office results domestically, Hollywood has proceeded with an eye toward China. Increasingly, Hollywood studios have relied heavily on China’s box office receipts to prop up lackluster domestic performances and contemplate Chinese audiences during every stage of green light discussions.
Simple economics require creative decisions that appeal to Chinese audiences “because oftentimes the Chinese box office is larger than the U.S. box office,” said American film producer Dede Nickerson in a 2016 interview with 60 Minutes. Hollywood studios often completely change storylines, add cast members, and insert Chinese products into films in an attempt to satisfy regulators and win over Chinese audiences.

D. Current Stakeholders

Countless Chinese production companies, influential cinema operators, and technology giants have now formed and operate within China’s film industry beyond the Hollywood studios. A report from the MPAA found that the film and television industry contributed $86.3 billion to the Chinese economy and supported 4.1 million jobs in 2016. As such, there are essentially four categories of stakeholders in the booming Chinese film industry: the numerous foreign and domestic film production companies, technology companies, cinema operators, and governmental organizations that regulate the industry.

1. Production Companies

The Big Six Hollywood studios grossed a combined $3.26 billion at the Chinese box office in 2017, up 19% from 2016. Despite the increased revenues, Hollywood’s market share remained flat at 40% and was overtaken by Chinese films in the first half of 2018. Observers have attributed a number of factors to explain Hollywood’s stagnant market share, including tighter governmental control, but also the growth of domestic filmmakers and studios. The production quality of Chinese films has increased significantly and lighthearted blockbuster storylines are far more appealing to mass Chinese audiences. Award-winning feature films with Western plots and ideals have not fared as well at the Chinese box office. Simply put, Hollywood blockbusters are no longer the only game in town, and that is due in large part to the advancement of Chinese production and technology companies.

Typically, the leading Chinese studios are highly diversified companies that also control technology arms, including mobile ticketing platforms and online marketing. The top grossing production and distribution companies include Alibaba Pictures, Huayi Brothers Media, Wanda Film Group, Bona Film Group, and Beijing Enlight Pictures. There are countless smaller independent production companies across China with domestic films making up 13 of the top 20 grossing films of all time in China.

In addition to the rise of domestic film production companies, a wave of outbound acquisitions began in 2007 with Chinese entities buying numerous American studios and entertainment companies. In 2016, China’s overseas deals swelled to $241.4 billion. Notable entertainment acquisitions by Chinese property developer Dalian Wanda Group (Wanda) include its purchase of AMC Theaters in 2012 for $2.6 billion, 2015’s purchase of Australian cinema leader Hoyts for an estimated $750 million, the record-setting acquisition of Thomas Tull’s Legendary Entertainment (The Dark Knight, Jurassic World, Godzilla) in 2016 for $3.5 billion, the 2016 purchases through AMC Theaters of Europe’s leading cinema operators Odeon and UCI Cinema Group for $1.21 billion, the U.S.’s Carmike Cinemas for $1.1 billion, and its purchase of Hollywood entertainment marketing agency Propaganda GEM. Wanda has also invested more than $8.2 billion to develop the world’s largest film production facility in Qingdao, China.

However, in 2017 Chinese regulators limited outbound investment in certain industries, including entertainment. As a result, Chinese outbound investment dropped 29.4% in 2017, and Wanda has sold off many of its newly-acquired non-film assets in a pivot towards more domestic investment and to manage debt.

2. Technology Companies

In part due to China’s strict censorship regime that blocks Google, Facebook, Twitter, YouTube, and other American technology and news companies, three Chinese technology giants dominate the market. Baidu, Alibaba, and Tencent (collectively known as “BAT” in China) control the overwhelming lion’s share of the market for messaging, online video, gaming, and film ticketing. Baidu is China’s leading search engine. Alibaba is the world’s largest e-commerce business. Tencent, valued at $500 billion, owns the wildly popular social media messaging apps QQ and WeChat, which has over 1 billion active users worldwide. Additionally, top streaming video platforms include Youku Tudou (acquired by Alibaba in 2016 for $4 billion), iQIYI (valued at $17 billion), Tencent Video (62.6 million paid subscribers), Sohu Video, Mango TV, and Bilibili.

The technology giants work in conjunction with domestic and foreign film partners to bolster marketing and ticketing for theatrical releases in the Middle Kingdom. Nearly 80% of all filmgoers purchase movie tickets online through their mobile phones. A notable example is the partnership of Legendary Entertainment (owned by Wanda, the largest cinema operator in China) with Tencent for the 2016 theatrical release of Warcraft in China. The film’s opening weekend box office in the United States was a disappointing $24.1 million compared to China’s $156 million. It has gone on to earn more than $233 million in China, making it the 18th-highest-grossing film in the country’s history. Tencent has been the Chinese marketing and ticketing partner for numerous Hollywood films, including La La Land in 2017.

3. Cinema Operators

As mentioned, China now outpaces all other nations in the total number of film screens. The leading cinema operators include Wanda Cinemas, China Film Stellar, Dadi Theater Circuit, and Shanghai United Circuit. The overwhelming front-runner is Wanda Cinemas who benefits from its company’s familiarity with property development. In China, most movie theaters are built in or near new shopping malls in urban areas. Cinema operators’ primary concern is attracting customers to their theaters, regardless of what country produces the film. That motivation is likely why more Hollywood blockbusters have recently made it into China than the import quota technically allows.
China agreed to initially increase the foreign film importation of its WTO requirements. A three-member panel SOEs, and alleging that China's censorship rules were in violation of the WTO for limiting imports of foreign films, music, and books, forcing the distribution of foreign content through intermediary channels; it did not require an immediate change to the annual import quota for theatrical releases. After significant pressure from the MPAA and the United States Trade Representative's (USTR) office, and to bring China into compliance with the 2009 WTO ruling, Vice President Joe Biden and then-Vice President Xi Jinping negotiated a five-year agreement requiring China to increase its annual import quota of 3-D or IMAX films to 14, bringing the total number of movie imports to 34, and to increase foreign studios' share of gross box office proceeds under the revenue-sharing scheme to 25%. China was to allow foreign studio distribution options through private companies, instead of exclusively with the state-owned China Film Group. It has never fully complied with this part of the ruling. The memorandum of understanding expired in February of 2017, and has not been renegotiated under the Trump administration despite USTR reports detailing China's continued non-compliance.

IV. CURRENT CHINESE FILM LAWS

China prohibits “printed matters, films, photographs, audio tapes, computer disks, and other media that are considered detrimental to China’s politics, economy, culture, or morality” from entering its country. It believes foreign films are an important form of soft power and has viewed them as a product of “the political, economic, military and cultural invasions of the West.” Audio-visual products that are legally imported must first be approved by government regulators. Foreign direct investment (FDI) in China is categorized as encouraged, restricted, or prohibited. In the film industry, which is considered a cultural industry, FDI is strictly prohibited without a local partner. Foreign companies are not allowed to wholly own a production company in China or independently produce films within its borders.

As China struggles to square the policy goals of the Communist Party with its increasingly capitalistic economy, the following laws are in need of reconsideration in order to comply with its WTO commitments and protect intellectual property.

A. Copyright Law

It is well-documented that China struggles with intellectual property enforcement. China has a piracy rate of 95%, costing Hollywood studios $244 million in lost revenue in 2005 (when the import quota was limited to 20). However, in 2010, China amended its copyright law to largely track that of the United States and civil law nations in order to comply with its obligations under the Berne Convention and TRIPS. Significant differences in cultural attitudes towards copying has perhaps made China less incentivized to seriously penalize the practice. Article 48 of China’s Copyright Law addresses infringement liability:

Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects

III. WTO REQUIREMENTS

When China became a member of the WTO in 2001, it undertook commitments to liberalize its economy and increase market access for goods not reserved to its SOEs. China agreed to initially increase the foreign film import quota from 10 to 20% and raise the revenue-sharing percentage to a sliding scale of 13-17.5% of gross box office receipts. Additionally, as a WTO member China was required to ratify the TRIPS Agreement, which sets minimum standards for the regulation and enforcement of intellectual property by national governments.

In 2007, the United States brought a claim against China to the WTO for limiting imports of foreign films, music, and books, forcing the distribution of foreign content through SOEs, and alleging that China’s censorship rules were in violation of its WTO requirements. A three-member panel sided with the United States in 2009 regarding the limitations and forced distribution of imported entertainment products, but declined to address the censorship claims. The WTO decision appeared to be primarily concerned with China’s intellectual property.

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4. Government Regulators and State Owned Enterprises (SOEs)

The Chinese film industry is heavily regulated. The country’s largest film distributor is China Film Group Corporation, a SOE with which all imported films are required to partner for theatrical distribution. The organization also operates theaters, finances and produces films, and owns China Film Giant Screen, a competitor to IMAX. Subsidiaries of China Film Group include the China Film Import and Export Corporation, tasked with the import and export of films in China, and the China Film Distribution and Exhibition Bureau, who oversees the contractual terms of film distribution, theatrical release dates, and admission prices, among other things. Additionally, state-owned Huaxia Film Distribution was created in 2003 to assist China Film Group in distributing foreign films in China.

Prior to being allowed access to the Chinese market, foreign films must be submitted for censorship and content review by the Chinese government. Historically, this review process was conducted by the State Administration of Press, Publication, Radio, Film and Television (SAPPRFT). However, in March of 2018, the organization was abolished, and its duties were delegated to the Propaganda Department of the Communist Party’s Central Committee. Its responsibilities related to film supervision are “managing administrative affairs; guiding and supervising production, distribution, and screening; organizing the review of movie content; guiding the coordination of major national movie activities; and undertaking cooperative foreign productions, international cooperation and exchange of input and output films.” The China Film Group Corporation and Propaganda Department of the Communist Party’s Central Committee are now two of the most powerful governmental organizations in China’s film industry, if not the world.

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of the act, making an apology or paying damages, depending on the circumstances’ and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability.99

Thus, monetary damages may be calculated using (1) the plaintiff’s actual losses; (2) the defendant’s unlawful gains; or (3) a fine at the court’s discretion. No statutory damages calculation method is available for plaintiffs. Additionally, Article 49 states that if actual losses or illegal gains cannot be calculated, which are often difficult to ascertain, copyright claims are limited to RMB500,000, or $79,000.100

Though Article 48 does provide for criminal liability for infringement, it is rarely enforced.102

On the other hand, the United States uses a strict liability system where each infringing use is subject to statutory damages of up to $30,000, or $150,000 if willful.103 American courts occasionally enforce the maximum statutory damages, evidenced by a $1.92 million judgement against a single mother of four for illegally downloading and sharing 24 songs in 2009.104 The United States has regularly enhanced its criminal law penalties for copyright infringement though prosecution is rare absent willful repeat infringers.105

Inadequate monetary penalties discourage investing and do not adequately deter infringement. President Xi Jinping acknowledged in a 2017 speech that China “must step up efforts to punish illegal infringement of intellectual property rights and force infringers to pay a heavy price.”106

Without stiffer statutory penalties and timely access to knowledgeable courts, copyright holders are discouraged from pursuing claims where maximum damages could be capped at RMB500,000. China has done an admirable job of developing specialized intellectual property courts in first tier cities, but the sheer number of intellectual property cases brought in China creates a staggering backlog, delaying access to justice.107 Additionally, a lack of familiarity with where Chinese pirates operate and how to best shut them down forces many Hollywood studios into licensing arrangements with Chinese partners under the flat fee scheme, earning a fraction of what they could under the revenue-sharing model.

Despite this divergence in statutory law, there are positive signs for studios operating in China. Copyright law provides an incentive to invest in creative works and Chinese entities have done just that at an alarming rate over the past decade. As the number of domestic film producers and technology companies has skyrocketed, so has the use of copyright law as a tool to combat infringement in China.108 The same technology companies historically used to discover and share pirated content are now more likely to be plaintiffs in Chinese courts.109 The greater number of domestic stakeholders in the film industry naturally provides more incentive for Chinese courts to enforce its copyright laws, at least for Chinese rights holders. “Copyright is no longer something imposed on China by the U.S. It is now a tool in Chinese hands,” Beijing-based entertainment attorney Mathew Alderson told The Wall Street Journal.110 In 2016, almost 87,000 copyright cases were filed in China, a 15-fold increase from 2006,111 with judicial analysis demonstrating convergence with established United States case law.112 Average damage awards have increased to RMB458,000,113 reaching as much as $1 million in Tencent’s 2017 judgement against Baofeng Technology for illegally streaming six episodes of The Voice of China.114

China’s copyright law regime would benefit from an update to reflect statutory damages closer to the actual value of the copyrighted works, increased criminal prosecution, and expansion of specialized intellectual property courts. However, its statutes and enforcement systems are not the shortcomings that ultimately make China notorious for film piracy. Chinese film laws aimed at promoting the Communist Party’s core socialist values and protecting domestic market participants are the most significant drivers of intellectual property infringement in China’s film industry, undermining its efforts at strengthening copyright law.

B. Import Quota System

Despite many predictions of an increase in 2017,115 many observers now believe that the Trump administration’s escalating trade war with China is likely to further delay negotiations and may subject Hollywood films to retaliatory tariffs.116 The current import quota remains 34 non-Chinese films per year on a revenue-sharing basis with 14 films being 3-D, IMAX, or other specialty formats that generate higher ticket prices.117 Foreign films continue to receive 25% of gross box office receipts under the revenue-sharing model.118 This means that at least 75% of the proceeds from a revenue-sharing foreign release remain in the Middle Kingdom. While initially it may seem like a bad deal for foreign studios, the sheer size of the Chinese market quickly makes apparent why Hollywood studios go to great lengths to compete for the highly coveted slots.119

An additional 36 import slots are allowed under the “flat fee” scheme where Chinese entities license foreign films for distribution in China at a set rate.120 Often more than 36 films enter the Chinese market per year under this model, but because the rates are relatively low and foreign studios do not receive any of the box office proceeds, the financial incentive for Hollywood is much lower. The record fee is believed to be $7 million paid by Leomus Pictures for Resident Evil: The Final Chapter,121 which grossed more than $159.5 million in the Middle Kingdom.122

Though seldom implemented by Hollywood studios, the co-production is an additional method of entering the Chinese market, bypassing the strict quota system and receiving a 43% share of the box office.123 After obtaining censorship approval from the Propaganda Department, the film is considered a domestic product and may enjoy the benefits in mainland China.124 There are several types
of co-productions with the most common being a joint-production where both the Chinese and foreign company partner invest capital and produce a film, sharing the copyright and profits. Chinese law creates many requirements and oversight, including demanding that at least one-third of the main cast members be Chinese. An obvious drawback of this partnership arrangement is less creative control of the storyline and cast, and ultimately creating a film that may not resonate with an international audience.

The last co-production primarily created for a Chinese audience to be financially successful in the West was *Crouching Tiger, Hidden Dragon*, released in 2000. A recent co-production hit is Paramount and Jiaflix Enterprise’s 2014 action blockbuster *Transformers: Age of Extinction*, which included many Chinese product placements and inserted government propaganda in hopes of being approved. The film raked in more than $1.1 billion worldwide, with more than $320 million in China. The latest blockbuster co-production was 2016’s *The Great Wall* by Wanda-owned Legendary Entertainment, which featured Matt Damon in the leading role of an East meets West storyline directed by famed Zhang Yimou. The film disappointed at the box office, losing more than $75 million.

Increasing the import quota and box office remittance allocation in 2001 and 2012 were in direct response to its duties under the WTO. However, the WTO generally prohibits members from implementing non-tariff barriers such as quotas on foreign goods. In its Accession Protocol, China committed to allow foreign companies and individuals to trade in all goods, absent a list of reservations, which did not contain film. China has benefitted greatly from the trade in all goods, absent a list of reservations, which did not contain film. China has benefitted greatly from the WTO since 2001, yet its use of a film import quota inherently contradicts WTO rules.

In addition to non-compliance with its market access obligations, the import quota’s unintended consequence of driving piracy undermines China’s copyright law. Chinese audiences are legally limited to at most 34 non-Chinese films per year, yet are aware of and have a sincere desire to see films that do not make it into theaters. A few recent Hollywood blockbusters to never legally see a Chinese screen include *Deadpool*, *Ghostbusters*, *Mad Max: Fury Road*, and *The Dark Knight*. Just over half of 2018’s Oscar Nominees for Best Picture received a theatrical release in China, which was a record-setting amount. Market demand coupled with an inability to legally pay to view the vast majority of Hollywood films leave Chinese audiences with no alternative but to turn to illegal methods. The rate at which China’s box office has grown indicates that, if given the opportunity, Chinese moviegoers are willing to pay to see films legally.

### C. Censorship

China implements a strict censorship regime that requires all films to be reviewed and edited prior to any official release. This policy undermines copyright law because it significantly limits the content that audiences may legally view, but also the lengthy governmental review process often causes films to miss important theatrical release dates. Chinese film fans are forced to piracy to view the “real” versions of films while Hollywood studios are required to compete with pirates who frequently flood the market well in advance of a legal release date.

#### 1. Prohibited Content

Censorship in China of politically sensitive material is not a new concept, dating back to at least the advent of the printing press during the Tang Dynasty (618-907 A.D.). Presently, censorship of the press and entertainment industry is inescapable and implemented through numerous governmental agencies, regulations, and informal pressure to self-censor. In 2017, China ranked number 176 out of 180 countries in the Reporters Without Borders’ World Press Freedom Index. Censorship review is often the most significant obstacle for filmmakers and studios hopeful of entering the Chinese market, including domestic participants.

Currently, Article 16 of 2016’s Film Industry Promotion Law of the People’s Republic of China prohibits the following content in film:

1. violations of the basic principles of the Constitution, incitement of resistance to or undermining of implementation of the Constitution, laws, or administrative regulations;
2. endangerment of the national unity, sovereignty or territorial integrity; leaking state secrets; endangering national security; harming national dignity, honor or interests; advocating terrorism or extremism;
3. belittling exceptional ethnic cultural traditions, incitement of ethnic hatred or ethnic discrimination, violations of ethnic customs, distortion of ethnic history or ethnic historical figures, injuring ethnic sentiments or undermining ethnic unity;
4. inciting the undermining of national religious policy, advocating cults or superstitions;
5. endangerment of social morality, disturbing social order, undermining social stability; promoting pornography, gambling, drug use, violence, or terror; instigation of crimes or imparting criminal methods;
6. violations of the lawful rights and interests of minors or harming the physical and psychological health of minors;
7. insults of defamation of others, or spreading others’ private information and infringement of others’ lawful rights and interests;
8. other content prohibited by laws or administrative regulations.

Somewhat clearer but no less restrictive, on June 30, 2017, China’s governmental body for online broadcasting passed a set of guidelines prohibiting its more than 600
members, including Tencent, Sohu, and Youku, from displaying a myriad of things online, including:

(1) Defamation of revolutionary leaders, heroes, People’s Liberation Army, armed police, national security apparatus, public security apparatus, and the judiciary branch, etc.;

(2) Pornography and cheap taste: prostitution, rape, masturbation, incest, homosexuality, hentai, sexual assault, sexual violence, extramarital affairs, one-night stands, sexual freedom, wife swapping, prolonged or provocative scenes of physical intimacy;

(3) Feudalistic ideology with is pseudoscience: spirit possession, reincarnation, witchcraft, etc.;

(4) Showcasing excessive horror, psychological pain, hysteria, causing strong stimulation to senses and emotions with uncomfortable pictures, lines, music, and sound effects, etc.\(^{139}\)

Though these are unofficial English translations, the vagueness is indicative of most Chinese statutes and provides regulators significant latitude in censoring content.

While the laws may be successful in providing competitive advantages to Chinese stakeholders, evidence suggests that the Communist Party’s policy goals geared toward promoting its core socialist values do not prevent exposure by its citizens and are undermined by the consistency at which Chinese consumers view uncensored pirated films, furthering China’s non-compliance with TRIPS, an essential component of the WTO.

If a studio is able to censor a film in a way that allows it to legally enter the Chinese market, the film is likely to have morphed into something unrecognizable by viewers outside of China. Occasionally, two versions of a film will be created; one for Western audiences and one to appease China’s regulators.\(^{140}\) For example, the Chinese version of Looper was vastly different than the original, containing 15 minutes of added scenes based in Shanghai.\(^{141}\) Transformers: Age of Extinction features 14 prominent Chinese product placements and was approved for a theatrical release,\(^{142}\) grossing over $320 million in the Middle Kingdom.\(^{143}\) The Western release of Skyfall featured James Bond defeating Chinese men who were completely removed from the Chinese version of the film.\(^{144}\) Though The Lost City of Z received a Chinese theatrical release, producers cut 37 minutes of the film to satisfy Chinese cinema operators, who favor films with runtimes under two hours in order to show more films and sell more tickets.\(^{145}\)

While record box office statistics indicate that many are willing to pay to see censored versions of films, Hollywood’s market share remains flat. As Chinese moviegoers’ taste develops beyond easily editable action films, more and more of its citizens will be forced to illegal methods to view the “real” film.

2. Review Process

All films, regardless of origin, must now undergo a lengthy review process from the Propaganda Department to ensure the content meets the government’s standards. After recently shaking up the structure of the central government and abolishing President Xi Jinping’s term limits, the review process under the Propaganda Department is uncertain, but observers have noted that by moving the oversight directly under the control of the Communist Party, it “likely signals increased censorship and the promotion of home-grown patriotic films.”\(^{146}\) Even under SAPPRTF’s control, China took film censorship seriously, reportedly banning actor Brad Pitt from entering the country because of his role in 1997’s Seven Years In Tibet.\(^{147}\) SAPPRTF was created in 2013 during reforms that privatized many bloated governmental organizations with the goal of streamlining the clearance process.\(^{148}\)

Beginning with the script, the SAPPRTF would proceed as follows: (1) studios submitted their scripts or final film to the Censorship Board for review, which had 15 days to respond, though this was often delayed; (2) SAPPRTF would either accept, deny, or offer suggestions to alter the film to meet censorship requirements; and (3) films were resubmitted for consideration after editing to conform.\(^{149}\) If a film was rejected, at the end of the process, the studio could apply for an additional review presumably with new reviewers.\(^{150}\)

The review process under SAPPRTF consisted of about 50 gatekeepers in Beijing, mostly over 50 years old, who reviewed films each day in randomly assigned groups of five.\(^{151}\) Each reviewer would give the film a score from 1-5 and suggest content that should be edited for approval.\(^{152}\) The reviewers would discuss any disagreements and if they could not reach a consensus, a new panel of five reviewers would take over.\(^{153}\) An interview with Liu Huizhong, a 77 year-old SAPPRTF reviewer highlights the arbitrariness of the process:

“To maintain the harmony of the State, you need to guard it,” he told Portrait, explaining that this was a mission that didn’t have any quantitative criteria, and completely depends on one’s judgment. “If you don’t pay attention and don’t follow the right rules, you may end up making mistakes,” Liu said. To sharpen his judgment, he insists on reading newspapers, watching TV and studying politics, but still feels that his understanding of politics is lacking.\(^{154}\)

The article goes on to point out that Mr. Liu rejected a film because its lighting of Tiananmen Square “made it look gloomy.”\(^{155}\) With limited staff and a high volume of films to review, the censorship review process regularly drags well past established timelines.

Often, Hollywood films are released in the United States and international territories on or near the same date. This maximizes promotional efforts but also helps limit pirated copies from flooding a market prior to an official theatrical release.\(^{156}\) The inability to coordinate release dates in China...
drives copyright infringement by giving pirates a head start. In a theatrical market the size of China’s, it is unrealistic to assume that audiences will wait months after a film’s world-wide release for their turn to legally see highly anticipated films. By the time a delayed film reaches Chinese theaters, not only has the promotional buzz subsided, but the majority of its audience will have had countless opportunities to see the film illegally.

D. Release Scheduling
Once a film has made it past the hurdles of the import quota and censorship review, the government then dictates its release date, often informing studios only weeks prior to the date, further limiting promotional opportunities. China requires domestic films to receive no less than two-thirds of the total available screening time each year, and its government pays cinema operators to show more Chinese films. Since 2004, China has utilized a “Hollywood blackout” during summer months and major holidays, prohibiting foreign films from screening in theaters during these lucrative movie-going periods. Aside from being barred from access during ideal release windows, this regulation has detrimental intellectual property implications because of release delays in the Chinese market.

Chinese law interferes with the timing of theatrical film releases in two ways. First, lengthy censorship reviews can delay releases and cause studios to miss ideal release windows. Second, once approved, studios still must wait for Chinese authorities to notify them of their release date. With blackout periods and little time to prepare a promotional campaign, the chance of maximizing the financial potential for a Chinese release becomes much less predictable.

Recent examples of delayed film releases in China include Spider-Man: Homecoming (delayed two months after its U.S. release), Frozen (delayed two months after its U.S. release), and Despicable Me 2 (delayed six months after its U.S. release). Studios and financiers are forced to compete with pirates after regulators provide them with a significant head start. These protectionist policies offer pirates distinct advantages and undermine China’s legitimate copyright efforts.

E. Revenue-Sharing Remittance and Box Office Authenticity
The financial incentive for foreign films admitted under the revenue-sharing scheme is limited to 25% of the gross box office receipts, whereas co-productions receive 43%. The amount varies contractually in the United States, but ordinarily studios receive 60% of the box office proceeds with cinema operators keeping 40%. While receiving a 25% cut may seem unfair, it only gets worse for foreign studios in China. Widespread box office fraud has plagued China, and a 2016 MPAA audit confirmed that Hollywood ticket sales were underreported by 9%, or $40 million in lost revenue.

After some estimates put the number closer to 20%, China instituted a law cracking down on box office fraud in 2016. Article 34 of the Film Industry Promotion Law requires Chinese cinema operators to “truthfully keep statistics on ticket sales and provide truthful and accurate statistical data, and must not use fake transactions, falsely concealing ticket sales or other unjust methods to trick or mislead audiences, disrupting order of the film marketplace.”

The following is an exemplar:

In one case in 2011, a woman posted on social media site Weibo a photo of a ticket she had purchased for Rmb80 to the film Transformers 3. The ticket actually consisted of a Rmb20 ticket to the Transformers film, and a Rmb60 ticket to Yang Shanzhou, a little-known documentary about the life of a highly honoured civil servant which she had not been to see.

The net result is a fraudulent box office report that credits Transformers 3 with a RMB20 sale, instead of the RMB80 that the customer paid. Yang Shanzhou illegally received a RMB60 sale despite the customer never watching nor paying to see it. Thus far, over 300 theaters across China have been punished, but no independent auditing system has been implemented.

V. SOLUTIONS
The following changes would help China balance the competing forces of WTO compliance and strengthening copyright law with the Communist Party’s desire to limit foreign influence and protect domestic stakeholders.

A. Reform Copyright Law and Enforcement
Only after significant pressure from the United States to comply with the Berne Convention and TRIPS did China revise its Copyright Law in 2010. Further reforms are needed for penalties and enforcement mechanisms if China is serious about curbing its intellectual property abuses. China should truly enforce criminal liability under Article 48 for willful commercial-scale infringers. It could institute a statutory damages calculation similar to the United States’ Section 504. In the absence of a statutory scheme, China needs to continue expanding its specialized intellectual property courts and staffing them with experienced judges. With nearly 100,000 copyright cases filed in China each year, a focus must be on expeditiously hearing claims by stakeholders.

While China’s existing copyright law is not a primary driver of infringement in its film industry, the proposed reforms would improve deterrence, provide more incentive for investors in China and Hollywood, and allow studios to operate without having to calculate rampant piracy as a cost of doing business in China.

B. Increase Import Quota
Since the 2012 Biden-Xi Agreement has expired, it is time for the USTR to renegotiate the terms related to China’s import quota and revenue-sharing remittance. The Trump
administration’s intensifying trade rhetoric has undoubtedly put negotiations on the back burner. However, to comply with its WTO promises, China should eliminate the quota altogether; however, it needs to increase the allotment for a number of reasons. First, historically more than 34 films a year actually make it into Chinese theaters. Second, an increase would take further steps towards honoring China’s WTO obligations. Third, market-driven pressure from Chinese cinema operators, film financiers, and moviegoers demands more Hollywood films in China. The lion’s share of the proceeds from foreign films remains in China and could increase considerably with more Hollywood films. Finally, an increase in foreign imports will afford Chinese audiences an opportunity to legally see more films, reducing the necessity to resort to piracy while also honoring China’s TRIPS requirements.

China could look to models that other nations use to sensibly balance market-demand and a desire to protect cultural identity. France’s exception culturelle provides subsidies and tax breaks to French films and limits screen time for foreign films in an effort to protect its cultural identity. South Korea requires that theaters show local films at least 73 days a year. Notably, Japan and India have no limitations on the importation of films and Japan recently signed a bilateral treaty with China for co-productions.

C. Relax Censorship Requirements

Undeniably, it is an unenviable task to dictate cultural attitudes to another nation. The concepts of free speech and a healthy marketplace of ideas are not yet welcome in China, evident by its vigorous censorship of all media, including film. The Film Industry Promotion Law further outlining prohibited content just came into force in 2017. On April 13, 2018, Sina Weibo, the Chinese version of Twitter, announced that it would target and block any homosexual content, a move encouraged by authorities. Only after an uproar from millions of its users did it reverse the policy five days later.

The market-driven pressure to relax censorship rules, at least in the isolated case of Weibo, was sufficient to walk back policies detrimental to free thought and expression. The push for less film censorship should likely come from Chinese audiences and stakeholders, who are affected the most by suppression. Providing a mechanism for Chinese audiences to legally pay to see “real” versions of films would dissuade them from seeking out that content through illegal means. From a policy perspective, China could continue to monitor the content that it believes is fit for its citizens, perhaps through a MPAA-like rating system, yet allow audiences the opportunity to financially reward domestic and foreign filmmakers by providing legal opportunities to view original or lightly censored works.

Governmental regulations have started to adversely impact domestic companies, as well. In the gaming sector, Tencent lost $187 billion in market-cap largely due to government regulators abruptly freezing all new video-game approvals, regulators pulling its top-selling game Monster Hunter: World from app stores, and delayed approvals for the wildly popular game Fortnite. If censorship and regulation delays continue to harm the bottom lines of China’s most important technology and film companies, Hollywood studios will not be alone in calling for streamlined approval processes and relaxed censorship policies.

D. Shorten Censorship Review Periods

Though unlikely, the new censorship review system under the Propaganda Department may run quicker and be more transparent. Under SAPPRFT, censorship reviews often took a very long time, causing studios to miss opportunities at ideal release dates and allowing pirates to beat studios to market. Admittedly, pirating is a challenge all copyright holders face, yet allowing studios to enter the market at the same time as pirates at least somewhat levels the playing field and provides moviegoers with the ability to compensate the creators of a film. China’s policy goals, at least those centered around censorship, would not be impacted by smoother censorship reviews.

E. Eliminate Hollywood Blackout Periods

Purely protectionism, the Hollywood blackouts serve no legitimate purpose other than giving domestic competitors unequal access to the market during peak movie-going times. By locking Hollywood films out of the market during lucrative times, audiences are prohibited from paying for films and must resort to pirated versions. With the development of the internet and globalization, the world is increasingly interconnected. Chinese audiences are aware of the buzz surrounding blockbuster film releases in the United States and naturally want to see them. While eliminating blackout periods may initially harm domestic studios financially, competition helps create better products and drives innovation in market economies. Chinese studios, cinema operators, and audiences stand to benefit in the long term.

F. Independent Box Office Auditing

China should implement an independent auditing process for verifying box office proceeds. While not traditionally thought of as intellectual property theft, fraudulent reporting of box office receipts is a major financial loss to Hollywood studios, at least $40 million in 2016. A more transparent process would provide greater financial reassurances to all film producers operating in China and also lend more credibility to China’s box office statistics.

IV. CONCLUSION

China’s theatrical film industry has seen an unprecedented rise over the past decade, poised to take over the United States as the world’s largest in the coming years. However, the complex set of laws that its government uses not only flies in the face of China’s obligations under the WTO but also are largely ineffective in promoting the Communist Party’s core socialist values. China has made significant efforts at reforming and enforcing its copyright law, yet its film laws have the unintended consequence of undermining this progress by driving widespread copyright infringement, costing film studios millions. This Article proposes realistic solutions that would allow China to achieve legitimate policy goals while also honoring its commitments as a WTO member and reducing losses to piracy.

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THE NINTH CIRCUIT VACATES JURY VERDICT FINDING “STAIRWAY TO HEAVEN” DID NOT INFRINGE “TAURAS”

It has been more than two years since a jury found Led Zeppelin’s “Stairway to Heaven” was not substantially similar and did not infringe upon Spirit’s song, “Taurus”. Now Led Zeppelin faces a new trial, after the Ninth Circuit vacated that decision in September 2018, citing erroneous and prejudicial jury instructions and misleading the jury on key copyright laws.

During the initial trial, Led Zeppelin was accused of stealing one of the most recognized riffs in the music business – the descending chromatic scale at the beginning of “Stairway to Heaven”. Responding to those allegations, Led Zeppelin’s counsel argued that the chord progression at issue dated back to the 1600s, making countless references to it historical use in the music industry. However, the jury neither heard a recording of “Taurus” nor “Stairway to Heaven” during the trial, but rather, listened to the testimony of musicologists and various renditions of “Taurus”, intended to mirror the “Taurus” sheet music that was subject to copyright protection. In other words, because “Taurus” was copyrighted before sound recordings were covered under federal copyright law, the District Judge disallowed the jury to hear an actual recording of the song. However, many claim the sheet music was not faithful to the recording and as such, failed to provide an opportunity for fair comparison of the two works.

Additionally, the District Court Judge failed to advise jurors that a combination of notes or scale may qualify for copyright protection, even when those individual elements alone may not, and erroneously advised that copyright does not protect short sequences of notes or chromatic scales. In its’ opinion, the Ninth Circuit held that the jury was improperly instructed about unprotectable musical elements and originality in the music space and recognized that while a single note may not be copyrightable, an arrangement of a limited number of notes can garner copyright protection. Although “Taurus” is subject to the copyright law that governs that work and as such, cannot be used to prove substantial similarity, the recording should have nevertheless been played for the jury to demonstrate Led Zeppelin’s access to “Taurus.”

For these reason, the Ninth Circuit held a new trial was warranted. In its decision, the Ninth Circuit further opined that during re-trial, the District Court should revisit the issue of whether an inverse ratio jury instruction is merited. Application of the inverse ratio jury instruction would lower the standard to establish similarity between the two songs, to the extent defendant had access to the work purportedly copied. Specifically, if a high degree of access to “Taurus” can be established, a lower amount of similarity between the two songs is needed to prove Led Zeppelin copied the work. Stay tuned for coverage on the new trial.

MOVIEPASS CLASS ACTION LAWSUIT

MoviePass, an entertainment company that advertised a new way to attend movies through a subscription service initially allowing members to attend a number of movies per month for a flat monthly fee, is now faced with a shareholder class action lawsuit filed in August in New York federal district court against its parent company, Helios and Matheson Analytics, Inc. After Helios acquired a majority stake in MoviePass last year, a new business model was introduced which allowed subscribers to see unlimited movies for only $9.95 per month.

The complaint asserts that Helios violated federal securities laws by failing to disclose, or materially misrepresenting, facts relating to the business model of MoviePass, as well as the sustainability of the new business model. Specifically, the complaint relies on several press releases issued by Helios that discuss rapid increases in MoviePass’ subscription numbers as well as projections for subscriber retention. For instance, Helios stated in a press release dated September 17, 2017, that it projected 2.5 million additional subscribers to join MoviePass in the next year and directly stated that the business model was “sustainable.” The complaint alleges that the statements made in these press releases failed to indicate to shareholders that the business model was unsustainable.

Beginning in late July of this year, the price of Helios common stock rapidly began to decrease after Helios filed a Form 8-K with the SEC stating that it was unable to make various payments to vendors. Shortly after the SEC filing, MoviePass announced a significant change in its business model by limiting the number of movies its members were entitled to see during the span of one month to only three movies, rather than the unlimited model previously in use. This was done even though six months prior, Helios had stated the subscription numbers continued to grow.

Jeffrey Braxton, the shareholder who filed the suit, is requesting compensatory damages for all shareholders who purchased shares in Helios between August of 2017 and July 2018. Braxton also requested other costs such as attorneys’ fees. Braxton believes Helios deliberately deceived shareholders into believing that a workable business model existed. Braxton also introduced different media reports supporting the notion that MoviePass was unsustainable in its current construction. However, Braxton believes that discovery will reveal additional support for the allegations discussed in the Complaint.

The biggest question currently facing MoviePass is whether MoviePass can develop a sustainable business model going forward. With other movie theatre companies releasing their own membership programs, it is likely that MoviePass will face continuing difficulties in addition to this class action lawsuit.
DISNEY GRANTED INJUNCTION AGAINST REDBOX

On August 29, 2018, the United States District Court for the Central District of California granted a preliminary injunction requested by Disney Enterprises. This Court had previously denied Disney an injunction and had concluded that the language on the packaging was insufficient to create a license.

The original complaint was filed by Disney due to Redbox renting and selling DVDs that had originally been included in Disney “Combo Packs.” Disney alleged that Redbox has been purchasing the Combo Packs, removing the DVD discs from the packaging, and then renting the discs to their customers. Initially included in these Combo Packs were redeemable codes that Disney customers could use to obtain a digital copy of the movie included in the purchased Combo Pack. Redbox also been selling the individual download codes to customers, separately from the discs.

Disney originally alleged that Redbox’s actions constituted both a breach of contract and contributory copyright infringement. After its initial request for a preliminary injunction was denied, Disney made several changes to both the language on the Combo Pack packaging as well as the download websites where the codes could be redeemed. Changes to the Combo Pack includes language that prohibits the selling of the digital code separately, while the download websites now include pop-up text boxes stating that the codes are not authorized for redemption or sold separately from the Combo Packs. The Court determined that these changes did not impinge on the rights of any Combo Pack purchasers.

The amended complaint filed by Disney only alleged contributory copyright infringement. In granting the preliminary injunction, the Court determined that Redbox had encouraged its customers to infringe upon Disney’s copyrights by instructing purchasers to redeem the digital codes. By purchasing the Combo Packs, the Court said this did not give Redbox, or any purchaser of the Combo Packs, ownership rights to the digital content. Additionally, the Court noted that Redbox had encouraged its customers who purchased the individual codes from their kiosks to redeem the codes online, violating the terms that are now displayed on the download websites.

Redbox’s encouragement of this action, coupled with the Court’s determination that no reasonable consumer could believe the purchase of a Combo Pack granted ownership rights to the purchaser, led the Court to determine that it was proper to enjoin Redbox from selling or renting the codes originally included in the Disney Combo Packs. The Court also rejected a first use doctrine defense by Redbox. The Court reasoned that the redeemable digital copies of Disney’s copyrights do not exist until the code is utilized, and therefore there is no product to which the doctrine could be applied. Finally, the Court rejected a misuse defense by Redbox due to the changes Disney made to the various terms of use on the download websites. The Court determined that these changes did not impinge on the rights of any Combo Pack purchasers.


AFTER YEARS OF PREDICTION, THE MUSIC FESTIVAL BUBBLE IS FINALLY BURSTING

The clairvoyants predicting the music festival bubble was beginning to burst as early as 2015 are finally being affirmed. As the 2018 festival season is just about wrapped up, the state of music festivals has never looked more alarming this decade. While blaming a single factor on the declining ticket sales and festivals folding altogether would be reckless, it may be fair to point a finger at the combination of market saturation and homogenous repetitive headlining slots.

In the past, skeptics have been reading festival cancellations as an indicator of the bubble bursting. This is a poor metric because numerous smaller niche festivals are cancelled almost every year while barely registering a blip on the music festival radar. Hilary Saunders, Why Have So Many Music Festivals Cancelled in 2016?, 2016, Everfest.; Frank Mojica, 20 Cancelled Music Festivals: A Guide To The Dearly Departed, 2016, Consequence of Sound. Meanwhile, the established festivals would continue to sell out in minutes. Tracy Swartz, Lollapalooza 4-day general admission passes quickly sell out, 2016, Chicago Tribune. The festival economy was far from bursting, instead proving it was difficult to grow and differentiate in a world of established titans and hundreds of festivals clawing to the top. Still, the number of marquee music festivals has exploded along with smaller niche festivals trying to fill the void of what disappeared, creating a plethora of options for the festivalgoer. Eric Danton, Have We Reached Peak Festival?, Paste, 2016. More music festivals than ever require more festivalgoers than ever, and in the past, if you built it they would come. In 2017, over 32 million people attended a music festival. Jonathan Wynn, Are There Too Many Music Festivals?, Washington Post, 2017. That trend seemed to change in 2018.

While the small fry festivals always seem to come and go, what surprised many was that 2018 saw its fair share of established giants fold. Three major festivals called it quits this year: Sasquach, FYF Fest, and Warped Tour. Michael Rietmulder, Sasquatch Music Festival is Calling It Quits, The Seattle Times. These festivals were all well past the decade mark of existence and had a combined number of 54 festival years split between them. Medea Giordano, R.I.P. Warped Tour. At Least We Still Have Vans, The New York Times, 2018. Ticket sales at the big festivals suffered as well. America’s largest festivals such as, Lollapalooza and Bonnaroo all had tickets available months after going on sale when in past years they were gone within minutes. Karen Grigsby, Bonnaroo tickets: Are they still available?, Tennessean, 2018; Greg Kot, Slow Lollapalooza ticket sales reflect
competition, price and security concerns, Chicago Tribune, 2018. Festivalgoers across the country began seeing the cracks in the façade appearing and panicked rumors about numerous festival cancellations were spread. At this point, even failing to reveal your line-up a couple weeks in advance has festivalgoers sounding the alarms that a cancellation is imminent. Jessi Roti, Riot Fest Is Happening, Chicago Tribune, 2018. The large festivals that were once seen as sure bets have festival goers now skeptical if the events will even happen at all when the slightest whiff of uncertainty is detected. Small to medium size festivals were always a bit of an uncertainty, but seeing large festivals fold and fail to sell out is one indication that the festival audience may not be what it once was. Festivalgoers have departed leaving a highly oversaturated market in their wake.

Major festivals folding and low ticket sales can possibly be attributed to repetitive reoccurring headliners at festivals across the country and over the past decade. Take Eminem for example. In 2018, Eminem headlined 7 festivals in the United States including Bonnaroo and Coachella. Setlist FM, 2018. Eminem also headlined Lollapalooza in 2014 and 2011. Id. Muse headlined four music festivals across the United States and three in Canada in 2017. Id. The British rock band also headlined Lollapalooza in 2010 and 2014, Bonnaroo in 2018 and Lollapalooza in 2007, 2011, and 2017. Id. The Weeknd headlined Lollapalooza in 2012, 2015, and 2018; Coachella in 2018, 2015, and 2012; and Bonnaroo in 2017. In 2014, Outkast headlined over 40 festivals across the world. Eric Denton, Have We Reached Peak Festival?, Paste, 2016. Artists like The Killers, Lorde, Arctic Monkeys, Kings of Leon, and Foo Fighters all have similar track records this decade at the three major festivals as well as spread across the country’s smaller fests. Setlist FM, 2018. When examining six of America’s well-established festival lineups in 2018 (Hangout, Boston Calling, Coachella, Shaky Knees, Bonnaroo, and Governor’s Ball) there were 12 unique headlining acts. Philip Cosores, This Is The Way Music Festivals End, Not With A Bang But A Whimper, Uproxx, 2018. That number declined to 18 unique headlining acts in 2018, showing options were shrinking. Id. The numerous options of marquee festivals provided only an illusion of choice in 2018 and those choices were just not very exciting for repeat festivalgoers who likely had seen a headliner or two in a prior year.

Festivals seem unwilling to risk headlining spots on unproven acts, but repetition across festivals over the years has created a homogenized festival going experience with the headliners becoming predictable and stale. With the music festival market more saturated than ever, offering fans a product they have already consumed is surely a doomed business model. As festival options and ticket prices continue to increase, expect many to stay home rather than spend triple digit dollars to sing Mr. Brightside in ninety-degree heat for the third time.

Hyperlinks:
Frank Mojica: https://consequenceofsound.net/2013/06/twenty-canceled-music-festivals-a-guide-to-the-dearly-departed
Tracy Schwartz: http://www.chicagotribune.com/entertainment/music/sasquatch-music-festival-is-calling-it-quits
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Philip Cosores: https://uproxx.com/music/music-festivals-bubble-bursting/2/

ANALYSIS OF STREAM TRENDS IN LIGHT OF G.O.O.D. MUSIC’S 7 TRACK ALBUMS
In Mid-April of this year, Kanye West and his label, G.O.O.D. Music, revealed that they would be releasing five albums in 2018 (Pusha-T, Kanye West, Kanye West & Kid CuDi, Nas, Teyana Taylor). Hugh McIntyre, Kanye West Has Five Albums on the Way as Both a Producer and Artist, Forbes, 2018. All five were to be produced by Kanye West and have a mere seven tracks each. Id. Not a single one of the 5 albums eclipsed the thirty-minute mark. Sticking to a concise track list was seen as a contrarian response to a trend running rampant throughout hip-hop—releasing bloated track lists for the purpose of generating higher streaming numbers.

Ever since streaming became factored into artist sales for purposes of the RIAA’s Platinum or Gold status, artists have learned that more tracks likely means more streams and thus more “sales” for purposes of these sales achievements. https://www.riaa.com/riaa-debuts-album-award-streams/, Feb. 1, 2016. Hip-Hop’s largest artists like Drake, Migos, Future, DJ Khaled, and Nicki Minaj have been dropping projects with high run times and numerous tracks. All of the aforementioned artists’ most recent albums featured at least nineteen tracks and run times of well over an hour. With longer albums containing more tracks seemingly on it’s way from trend to industry norm, it was unknown if G.O.O.D Music’s condensed efforts would be able to generate the streaming numbers of their lengthy contemporaries. Fans would have to listen to one of the G.O.O.D. Music releases 3 times to match the streaming numbers of just one playground of Migos’ Culture II for instance. The more digestible format was certainly a risk if the artists were hoping to garner big streaming numbers and the sales achievements that come with.

To account for streaming’s massive grip on music consumption, the RIAA revised it’s sales calculations in 2016
to a formula of 1,500 on-demand audio and/or video song streams = 10 track sales = 1 album sale. Id. Hip-Hop’s major players were quick to discover that one person streaming a twenty-two track album once garners much more streams than one person streaming a ten-track album once. “It only takes just over 68 people to listen to Drake’s new release (22 tracks total) to count as one “sale,” whereas a 10-song collection would require 150 people to stick with it all the way through.” Hugh McIntyre, How Longer Albums And Streaming Giants Are Manipulating The Charts, Forbes, 2017. With fans likely to revisit the album, it is easy to see how sales can add up quickly for artists with massive fanbases. While it is possible for a fan to stream a thirty-minute album more and in less time, G.O.O.D. artists are starting at a drastic disadvantage when it comes to one-time listeners that are curious to hear an album its entirety, but never revisit.

The RIAA also incorporates streams from the track-equivalent units moved by previously released singles into an album’s total streams. Matthew Parizot, Drake's Scorpion Went Platinum The Day It was Released, Hot New Hip-Hop, 2018. This gives artists the freedom to test the waters with a single while retaining those precious streaming numbers when it comes to calculating total sales as long as that same single is included on the album. This is how Drake's 2018 album Scorpion went platinum the day it was released without having been released yet. Id. The album's early singles “God's Plan”, “Nice for What”, and “I’m Upset” all dropped ahead of Scorpion and generated enough streams by themselves to net the album a Platinum plaque upon release date. This system also explains why Drake tacked the massive single “Hotline Bling” on to his 2016 album Views as a bonus track despite the track preceding the album by 9 months. Including “Hotline Bling” rocketed the album to quadruple platinum status. Gary Suarez, How Drake’s ‘Views’ Track Listing Guarantees Him A Platinum Plaque, Forbes, 2016. Under the current system, artists are securing Gold and Platinum status, streaming over a billion times in a week, and shattering streaming records with ease. Kevin Rutherford, Drake’s ‘Scorpion’ Is the First Album to Hit 1 Billion Global Streams in a Single Week, Billboard, 2018. None of the G.O.O.D. Music releases had singles released ahead of the albums. Despite the shorter format’s inherent disadvantages, Kanye West’s star power proved enough to compete with the rest of hip-hop royalty. West’s latest effort, Ye, has been certified Gold by the RIAA, landed at Number 1 on the Billboard Hot 200 chart, and was the fifth bestselling debut week of 2018 so far. Keith Caulfield, Kanye West Earns Eighth No. 1 Album on Billboard 200 Chart With ‘Ye’, Billboard, June 10, 2018. Although the rest of G.O.O.D. Music’s roster was not expected to garner the numbers that Kanye can, their efforts were still felt. At one point, the top three albums on streaming platform Apple Music were held by three G.O.O.D. Music artists: Kanye West, Kids See Ghosts (which is made up of West and Kid Cudi), and Nas. David Opie, So How Good Was the G.O.O.D. Music Rollout?, High Snobbery, June 26, 2018. The concise format also seemed to work for Pusha-T who debuted at number 3, his highest charting album. Erik Skelton, Here Are The First Week Numbers For Pusha-T’s and A$AP Rocky’s New Albums, Complex, June 3, 2018. While Ye has garnered respectable numbers, especially given the run time and lack of a proper single, it remains to be seen if more artists will be willing to risk lower sales numbers with a shorter track list. As artists and labels continue to wrestle with freedom after being confined to physical media for so long, navigating the streaming world continues to be difficult to map.

Citations

A CASE OF COLLUSION FOR THE AGES

In a critical decision concerning the collusion grievance brought on October 15, 2017 by former San Francisco 49ers quarterback Colin Kaepernick against the NFL, arbitrator Stephen Burbank ruled to deny the NFL's request for summary judgement in response to Kaepernick’s grievance on August 30, 2018. This means the NFL and its teams failed to meet the standard for summary judgement and Kaepernick’s grievance will live to see a trial hearing before Burbank.

On September 1, 2016 Kaepernick opted to kneel during the national anthem of a pre-season NFL football game in a protest against social and racial inequality. Kaepernick continued his protest through the 2016 NFL season and played in his last NFL game on January 1, 2017. The following March of 2017 Kaepernick opted out of his contract with the San Francisco 49ers, became a free agent, and to this day has not been signed to any NFL team. Kaepernick not signing with a NFL team led him to file a grievance against the San Francisco 49ers quarterback Colin Kaepernick against the NFL, arbitrator Stephen Burbank ruled to deny the NFL’s request for summary judgement in response to Kaepernick’s grievance on August 30, 2018. This means the NFL and its teams failed to meet the standard for summary judgement and Kaepernick’s grievance will live to see a trial hearing before Burbank.

On September 1, 2016 Kaepernick opted to kneel during the national anthem of a pre-season NFL football game in a protest against social and racial inequality. Kaepernick continued his protest through the 2016 NFL season and played in his last NFL game on January 1, 2017. The following March of 2017 Kaepernick opted out of his contract with the San Francisco 49ers, became a free agent, and to this day has not been signed to any NFL team. Kaepernick not signing with a NFL team led him to file a grievance against the NFL and its teams accusing them of colluding to keep him out of the NFL. The genuine issue in Kaepernick’s grievance is whether Kaepernick has been a victim of collusion in which the NFL and its teams have deprived him of his right to sign with an NFL team. Ultimately, Kaepernick is alleging that the NFL teams have conspired together to keep him out of the NFL after Kaepernick used his NFL platform for social purposes in kneeling during the national anthem.
Under Article 17 of NFL collective bargaining agreement, collusion requires finding two or more teams or the league and one team conspired against Kaepernick’s ability to negotiate with a team or receive a contract offer. Meeting this standard for collusion requires evidence in the form of video, recording, text, email, or witness statement. Speculation and conjecture are not enough to satisfy collusion. Collusion also requires the parties subject to collusion must be governed parties. Third parties involved in any speculation or hard evidence will not meet the requirements of collusion. Kaepernick also must establish by a clear preponderance of evidence that the NFL and its teams colluded against him and economically injured him to satisfy his burden of persuasion. This is a higher standard than that required to prove a genuine issue of material fact, which is the standard met to survive a motion to dismiss.

Kaepernick’s claims focus on a targeted group of NFL executives and team owners, including but not limited to NFL Commissioner Roger Goodell, Denver Broncos general manager John Elway, and New England Patriots owner Robert Kraft. Kaepernick also focuses his claims around President Trump and his involvement with the NFL and team owners. Kaepernick alleges he is being denied employment on a basis of political provocation by the Executive Branch of the government. Interpreting Kaepernick’s claims against the standard of collusion invites issues of admissibility of third parties to his collusion claim and the hard-standard requiring evidence of two teams colluding together.

The NFL has denied this allegation and argues the NFL teams make their own decisions independently on a valuation of what is best for their team and there have been no efforts to collude against Kaepernick.

On September 3, 2018, Nike announced Kaepernick would be the face of the company’s campaign. Kaepernick’s involvement with the campaign included an image of Kaepernick himself with the words “Believe in something, even if it means sacrificing everything.” This poses a question for Kaepernick’s collusion grievance: would Kaepernick have been able to state those words and participate in this advertisement if he was signed to another team? Kaepernick’s Nike deal may affect his collusion grievance and/or may mitigate the damages he could seek. Article 17 limits the collusion investigation to conduct of the NFL and its teams. Therefore, Kaepernick’s deal with Nike would likely be outside the scope of collusion. As to damages, Article 17 asserts if a player proves collusion, they are entitled to compensatory and non-compensatory damages. Compensatory damages are further defined in Article 17 as the amount the player has been injured as a result of the NFL teams and/or the league colluding against the player. This definition would be subject to interpretation by Burbank and he would have to decide if the definitions of damages are structured strictly around the player’s employment in the NFL or outside sources of employment as well.

Burbank will soon hear more evidence during the trial planned to commence before the end of 2018.

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Jerry Glover
A Man of Many Talents

Interviewed by: Marci Rolnik Walker
Transcribed by: Kyle Serilla

Put Jerry Wayne Glover in front of an audience, and he is certain to entertain. He’s boisterous and engaging, whether giving a lecture or performing on stage. Pianist, actor, singer, professor, journalist, baker, dancer, violinist—there is little this jack of all trades cannot do.

Jerry takes on a wholly different persona when asked to talk about his life’s work. He is humble about his areas of expertise, but those of us who know him understand that for all his loud talking, Jerry is a person with tremendous introspection and depth. He can tear it up on the dance floor and then turn around and play an absolutely riveting piano piece that stirs the soul.

Jerry started acting in his childhood and, like everything to follow in his life, he made a study of the work, listening to show tunes while growing up in Little Rock, Arkansas. Jerry earned his bachelor’s degree in journalism from the University of Arkansas and earned his master’s at the University of Oklahoma, where he was also teaching assistant.

Talking to Jerry, he rattles off his history as if it is mundane. In his view, he never acted or performed professionally, but had a lead singing role in a Gian Carlo Menotti opera at the age of nine. He also slipped into conversation that he taught journalism as a full-time professor at the University of Arkansas while also enrolled in its law school. No sweat—he was young at the time.

Jerry went on to an appointment teaching legal writing at the William H. Bowen School of Law at the University of Arkansas. He then earned a teaching fellowship at the National Law Center of George Washington University, but his time was cut short by a cancer diagnosis that led him back to Arkansas for two years of recovery.

Jerry speaks candidly about these events, later times heading the professional writing program at The John Marshall Law School, and his 17 years at WTTW Chicago, where he later became Senior Vice President and General Counsel. He co-founded Leavens, Strand & Glover, LLC in Chicago, with fellow long-term colleagues, Tom Leavens and Forum Chair-Elect, Peter Strand. He met them through the Chicago Bar Association, later serving together on the Board of Directors of Lawyers for the Creative Arts. A Past President of LCA and of the Chicago Gay Men’s Chorus, Jerry has committed his time and talents to serving and leading charitable organizations.

Jerry retired at the end of 2017, stating he has no intention to practice law. He has nonetheless continued teaching and performing pro bono work through LCA, and he continues to be an inspiration to artists and lawyers alike. A two-time recipient of Best Lawyer of the Year in Motion Pictures & Television (Best Lawyers, 2012 and 2017), Jerry has had a distinguished career as an entertainment lawyer and is well loved and respected in the industry as a true friend to the arts. He is modest about his many accomplishments, but willingly sat down with me over cocktails to share his history, anecdotes, and advice.

Could you tell me about your hometown where you grew up?
I was born in Little Rock in 1949. It’s a pleasant place in terms of its physical surroundings. The people are really nice folks—very Southern.

What was it like living through desegregation in Little Rock?
I was about six or seven years old when the integration crisis occurred. What I remember about it was they called out the National Guard. I see footage of it now and think, “Oh my God!” The governor was not on board with what they called integration back then, so Eisenhower had to call out the troops. Even when I was attending Little Rock Central High School, the African-American students were a small group, and that was in the mid-sixties.

I read that you started acting at age nine?
Yes, I was cast in a Christmas opera called Amahl and the Night Visitors. It’s by Gian Carlo Menotti. As a nine-year-old it was quite an initiation. It was in a 600-seat theater, a full-pit orchestra, the whole schmear, you know? Lights, sets, costumes, and very good singers. I was Amahl—one of the leads.

How did you get cast?
I don’t remember. Maybe someone recommended me? I had a good voice, I guess, at least good enough to get cast. The show was done for school children in Arkansas, so they bused in a lot of kids just to see this. One of the things that I remember still is when the curtains opened, all these kids would go, “Oooooooh!” It was set in the nighttime, and they used blue lights to indicate evening. It first premiered on NBC in 1956, and then, of course, it was licensed out after that.

What company produced the play?
It wasn’t a production company and may have been a group of people brought together by the state’s Department of Education.

Did this lead to other roles?
Well, I got initiated into the ways of show business, and was cast again the following year in Humperdinck’s Hansel and Gretel. But was I Hansel? No. Was I Gretel? No. I was in
the chorus. I was a Gingerbread Boy and only appeared in the last act.

[Laughing] What does a Gingerbread Boy do?
The chorus—you know around the witch’s house?

Was there anything else about your upbringing that sparked your interest in the arts?
Wasn’t that enough? Well, I took tap dance classes. There was a TV show produced in Little Rock, I think by the NBC affiliate, and it was called Betty Fowler and the Little Rascals. Betty Fowler was a well-known personality in Little Rock and a piano player, and she had her own TV show for kids, so it was broadcast in the afternoons. I tap danced solo on the show once. I got a hot dog for it!

Did anyone encourage you or push you toward the arts?
I didn’t need that.

Did anyone encourage you to audition?
No, I didn’t need that. I also didn’t ever audition. I was just always cast. I mean, yes, I did audition—they needed to know if I could sing—but it wasn’t the traditional audition where you walk out on a stage by yourself and sing. Someone might come to our house and use our piano and audition me.

How big was show biz growing up?
I don’t know, but I do remember listening to a lot of cast albums that my parents had. They didn’t seem to be big show people at all, but they had some Broadway cast albums that I really liked. I think one of them was My Fair Lady.

So after these different performances, tap dancing, the opera, and the Gingerbread Boy opportunity…
[Jerry correcting]: Chorus

…were you in other productions?
No, that was it. That was pretty much it until, gosh, many years later. There was the Fine Arts Auditorium in Little Rock where I later did other shows as a pit player—like Funny Girl and Guys and Dolls—mainly musicals, of course. When I look back, I’m amazed at how many shows I’ve done.

Any favorites?
Pippin.

When were you in grade school, what did you want to be when you grew up?
I don’t remember thinking about it then but for a long time—and I don’t know when it started—I wanted to be a teacher.

When were you first introduced to the piano?
We had an upright piano in my home growing up. My parents started giving me lessons when I was five and then I picked it up again about ten years ago—just for fun and took lessons again. I still play the piano.

Did you start with the classics or focus on other genres of music?
It was always classics. After you get past the fundamentals you can understand what that’s about.

Do you play by ear?
Not much.

Do you sight read?
Oh yes. Like a son of a bitch. [Pause] Like a son of a bitch.

What do you most love about piano?
There’s just so many ways that you can interpret a piece on the piano. One person can interpret the same song in different ways, depending on their way of phrasing and volume. It is a flexible medium but really isn’t thought of that way by most people, because it’s not an instrument you can use like the violin with the vibrato. It’s not a reed instrument that you can change the sound, but it’s still flexible.

When did you begin taking an interest in writing?
I taught myself Gregg shorthand when I was in high school which has been valuable to me ever since. After all these years, I still use it and I’m the only one who can read what I write though [laughing], but you know, that’s cool…. I later studied journalism at the University of Arkansas and earned my master’s at the University of Oklahoma.

What made you go to law school?
I don’t recall, but I was a full-time professor of journalism at the University of Arkansas while attending law school.

Wow. That’s impressive.
Whatever. I was younger then and could do it. After that I briefly worked in legal aid before returning as a legal writing professor. So after I finished law school and taught for a year in Little Rock at the law school... I went to a fellowship in D.C. It was at the National Law Center at George Washington University, that’s where I was diagnosed with cancer. So, I went back to Little Rock.

Did you give up the fellowship?
Yes, and I came back to Arkansas.

Did you ever complete it or want to go back?
I had called them shortly, a few months later. I did not get it back. I think they were concerned about my illness. They even said that. That would be illegal today.

How did it make you feel?
I was surprised.

What did they say specifically that you recall?
“What if you get sick again?”
Okay…
[Exhales] Yeah. I totally understand it, but I don’t think they could do that today.

Armstrong stole my thunder; I didn’t even know there was such a thing as testicular cancer. Had no idea. I never heard of it. It’s very rare, but it is, I learned, the most common form of cancer for men between the ages of 17 and 34. But it’s still very rare.

What was it like going through Chemo?
The first three months were hell. A lot of throwing up, hair loss—not total baldness but hair loss—and the inability to do much.

And at that time did they use radiation? Were you ever exposed?
No, I was totally drugged and had surgery.

And you went into full remission after the surgery and the chemotherapy treatment. How often do you have to go back?
You go back, after you complete your chemo—two years of chemo—then you have your check-
I completed it here though, that period of time for check-
ups, here in Chicago after recovering in Little Rock for a couple years.

Oh—I forgot a whole chapter. After I’d been back from D.C. and was finishing up my chemo treatment, I got a call from a guy who had been a fraternity brother of mine named Steve Nickeles. He had gone to the University of Arkansas in the Fayetteville campus law school. He never to my knowledge practiced law, but he was a very scholarly guy.

He taught at Arkansas; that’s why he called me. He got his SJD, doctorate in law, at Columbia. He came back and taught at the University of Arkansas and called me to come teach the legal writing course there.

So, I was back in Arkansas or back in Fayetteville, teaching after finishing up my chemo treatments.

While I was there the theater department did Pippin. So I decided to go out and try for it. So I auditioned and was cast as—I’ve done it twice so I’m trying to remember which thing I did when—I was chorus, I think, in Fayetteville. And then, after I started teaching at the University of Arkansas in journalism, they did Pippin there in Little Rock. So I auditioned again.

What did you play or were you chorus this time?
The Ben Vereen role on Broadway is called the Principle Per-
former and so they cast me and two other people to share the role. And that’s what I did for… in Arkansas when I got back to teaching in Little Rock.

How did you start teaching in Chicago?
There’s an annual conference of law school professors that’s held, where there’s recruiting for teachers. I spoke to those looking for writing instructors—that’s what I knew—and I eventually talked to two or three and eventually chose John Marshall.

And you wanted to get out of Little Rock anyway…
Out of Arkansas. I didn’t think there was much there for me. I just wanted to go somewhere else. I’d been there most of my life, except for Oklahoma for my master’s, but never had really been anywhere else for a great length of time so, why not?

So you move to Chicago…
Yeah. And taught legal writing at [John] Marshall for five years…and then ultimately became the head of the program. While I was there—the American Bar Association allows law professors to practice limited number of hours—I did some pro bono work through LCA. I knew Tom Leavens at the time and think he started as the first Executive Director of LCA in the late 1970s. I knew Tom through the Bar Association, where LCA started as a committee. So while I was teaching at Marshall, I helped theater and other clients here and there: a choreographer, director, whatever. And because of my theater background, I could understand what they were doing.

That’s really what garnered my interest in entertainment law. And I just had the opportunity after five years at John Marshall when an in-house attorney position became available through WTTW public television station, because I knew the general counsel, Katherine Lauderdale, again through the Bar Association.

I know that name…
Well, Katherine is now general counsel for PBS in Washington.

So, you were a professor of legal writing. What made you a good candidate to them?
I knew Katherine…and she knew I did a lot of work with entertainment type people. So I wasn’t just all professor. I do remember during the interview at WTTW she said “You know, your resume says ‘smart’” and that was not in a good way. And I went “Oh, hell, Katherine. We’re all smart people.”

And I told her [laughing]… “Look, when I teach, I don’t teach, you know, theory. I teach actual writing. I teach experience and trying to communicate with other people. I don’t care about anything else.”

I think I was one of the few candidates that had experience in the entertainment area. And at that time—and still pretty much today—Channel 11 was considered, within the public television system, what was known as a major producing station, which means they produced a lot of shows for national broadcast—making them available to over 300 public television stations—as well as, local shows like “Chicago Tonight.”

So at the time there was a lot of work. When I moved over to WTTW there was Katherine, one other attorney, and me. Ultimately, there were two other attorneys brought on, so there were five lawyers at one public television station. So there was a lot of work to do and that’s where I really learned.

I did everything. I mean we all did. I did co-production deals. I did actor deals. I did director deals. Writer deals. You know, I did licensing deals for our programming in foreign markets. I was at the bargaining table with unions they were
signatory to, at that time, like AFTRA, now SAG-AFTRA, the Director’s Guild, and the technical union, IBEW. So that’s where I really learned how it works in the business world and more as an attorney than I had any place else.

What types of matters did you handle that were not arts related? I assume you had a bulk of labor law? Well, it was a corporation. It’s a not-for-profit. So, yeah. There may have been some HR situations, but most of it was entertainment. Yeah.

That’s unusual.
Yeah. It is. It is. I got lucky. It was timing, [laughs] and Katherine was the best in terms of being a mentor and a leader. The best.

What made her a great mentor?
She let you do what you wanted to do, where she could allow that and gave you a lot of responsibility and was always there for questions. [She] knew the local company as well as the PBS national system very well and the politics of it. And so again, I moved up a little bit there from Counsel to VP Assistant General Counsel to eventually Senior VP & General Counsel when she left to become General Counsel at PBS in Washington.

Did you ever envision yourself doing work like that? Entertainment work?
Working for a big PBS station.
I never thought of it ‘til the job came up.

What made you stay for 17 years?
I enjoyed it, and the people there are incredible. They are so creative. They’re talented, and they don’t have a lot of money always to the commercial area or the for-profit area. But they do so much with the little they have, and it’s just incredible.

I mean they did things—they don’t do it much anymore unfortunately—but they did experimental things. They did a one-act drama for national production that starred Terry Kinney. They do a lot of Chicago Symphony broadcasts. They still do Lyric Opera broadcasts. WFMT is also a national player through what they call the WFMT satellite network, which distributes, nationally and internationally, symphonic and other types of music programming that they produce in-house.

Did you feel that you were vicariously helping the arts…?
Well, you hope so. You don’t ever think, “Oh, I’m a patron of the arts.” You just do your job. You’re lucky that it is arts and entertainment related. Whether it’s art or not is not your problem.

I remember you saying that you used to host the annual fundraiser?
I wasn’t the host. I was one of the irritating people that would beg you for money on camera during the pledge drives.

It seems unusual that there were five attorneys in-house for a not-for-profit corporation.
Yeah, we did a lot of production, but they got rid of legal in 2003. At the time, I was the last lawyer left.

How did you deal with budget constraints? Did you ever out-source to other lawyers?
You take on more responsibilities. No, we never sourced out.

So what happened financially with the company?
I don’t know. It was one of those time periods after 2001 when fundraising was more difficult for something like public television.

You said you loved the work.
I did. It was great. [Pause] It was great.

Is that when you went to EIP?
Yes. Then I was looking for a job and became Counsel for the Entertainment and Intellectual Property Group, the law firm headed by David Garfinkle.

What do you like about private practice?
It was like any work at WTTW; I was doing the same thing. They already had stable clients when I got there, including some national clients. I was able to take over some of those, including Telepictures/Warner Brothers for their syndicated programing, primarily in the promotions and marketing area, like the Ellen Show, Judge Joe Brown, TMZ—something like that primarily was in the contest and sweepstakes area. There were other clients with more traditional entertainment work.

As you remember, David eventually essentially moved to New York to produce Spiderman.

Yeah.
Well, first he produced an off-Broadway musical called The Immigrants at The Dodger Stages that had a short run. But then along came Spiderman. I don’t know why he and his producing partner thought it would ever be a great musical but they went after the rights at Columbia and got them, and they did their thing in New York, trying to raise the money, that whole shtick. At the time David was doing that, it was me and one other attorney in the law firm, obviously a small law firm. And although David was always available, his major job then was to produce this show that ultimately got out of hand. His producing partner died early in the process, unexpectedly, of course. And so, David, and you know, I have all the admiration in the world for him, brought in other people. Ultimately, they took over. I did some legal work with them at the beginning on the show.

But I also learned how to bring in clients, which I had not really encountered before. It was primarily though connections with people I already know, whether it be through the Bar Association or some other way—or connections to WTTW. For example, our labor counsel/outside counsel while I was at WTTW was Bill Becker. He was our union guy. He eventually became General Counsel at Harpo, while
Oprah was still here doing her show, and I got Oprah and her company on board through him with our EIP group. I also ultimately represented Miss Winfrey herself for a couple of things, like her Broadway producer deal on the musical *The Color Purple* and then a book writing deal with another person. But most of my work was Harpo, not her.

At the time same when I was at EIP, we represented, or I represented Paramount Pictures for their worldwide marketing partnerships department, which required contracts between Paramount and major corporations like General Motors, that would come in to co-promote a new movie coming out. So the delivery service DHL might be featured in a new Tom Cruise movie and they would be a promotion partner; they would create commercials not only involving their service but also the film.

Sometimes there would be contests and sweepstakes that a co-partner with Paramount would produce in connection with the film, so that was a very interesting line of work, to work with a major studio and major corporations at the same time and the competing interests there that really meshed. But sometimes they weren’t always on the same page.

You mentioned Oprah and I’m sure there have been others since, when you’re counseling someone who has fame…

You don’t counsel her. You talk to “her people.”

You never talked to her directly?

I’ve met her but… No. No. It was always “her people.”

How did you transition from EIP to Leavens, Strand & Glover?

I remember we founded the firm in December of ’09. Tom and Peter got together for maybe six to nine months… and they kept courting me for lack of a better word [laughs]. They kept talking to me about joining them and ultimately I gave in.

What was alluring about joining a firm and running it?

Well, it’s your responsibility then. I knew from EIP what running a law firm was all about, or at least I thought I did. It was still a small firm, but I was one of three lawyers responsible for it. I was just an attorney at EIP; I wasn’t management.

When you left did clients follow you…

Yes. Yes, they did.

You mentioned that you knew Tom through the Bar Association.

Yes, and I knew Peter from way back, too, through the Bar Association—and through LCA.

When did you join LCA’s board?

It was a long time ago. I want to say the late ’80s, early ’90s.

Did the board affiliation help you in your career?

Just meeting people, sure. They knew who I was. I learned who they were. That’s pretty much what happens when you are on a board, whether it’s for-profit or non-for-profit.

Was it difficult starting your firm?

You play a lot of it by ear. Peter and Tom knew because they had been doing their own thing, so… I could defer to them on a lot of stuff.

Did you see opportunity?

I saw opportunity and I liked the two guys, and I’ve known them for a long time and always liked them. Ultimately, they convinced me that this could be a “go,” and I thought it was an opportunity to be the go-to entertainment law firm in Chicago. It had been kind of scattered up to that point—people in law firms, individuals, two or three people maybe at most at a lot of larger law firms worked in this area, primarily “IP people,” as opposed to strictly “entertainment people” of course. But yeah, I thought it was a good opportunity.

Peter had already been representing musicians and other creators; he understood the need for that kind of representation. So again, I brought a lot of my clients with me, they had a lot of their clients from their past, so we were good from that standpoint from the beginning.

What were some of the difficult start-up issues for you?

Oh, God! Just learning what it was to run your own firm with two other people and how to split-up the duties because it was just us. We didn’t have an office manager or a law firm managing partner.

How did you go about developing your business?

Through your contacts with people on the board of LCA, through people you met at the Bar Association, through writing articles that got you known…

So going back a little but to WTTW, you had Katherine as a mentor, who are some of the other go-to lawyers that you went to when you were in a jam or had questions?

A part from labor law—that was Bill Becker—well, that’s pretty much it. Pretty self-reliant…not that I thought I knew it all. I’m not saying that. I’m just saying that I thought I could, you know, learn.

How would you compare working in-house to private practice?

In-house, is working with the same group of people all the time, every day, and you know you have a common cause. When you’re in private practice, you may have a lot of clients there for a long time, but they are all doing different things. So you have to adjust to the needs of each individual client as they arise. Working in-house you’re working with different personalities, especially producers, which is kind of
Like having individual clients, you know what I’m saying, in private practice.

What reward do you feel as a teacher versus as an attorney?
Well, I look at it as the way I was mentored by Katherine at WTTW. I think that you’re there to make sure they understand not only what the current law might be, but in the entertainment classes, you have to make sure they understand the business of film, of television, of theater, of book publishing, whatever it is you’re teaching. There’s more to just “THE LAAAW.” You’ve got to know what the customs and practices of the industry. I also encourage them to read the industry trades, like Hollywood Reporter and Variety, to learn who are the players because they constantly change.

If they really want to be an entertainment lawyer, as opposed to taking the just class for a grade or hours, they’ve got to know those things. Being a law professor means nothing if it doesn’t teach them the realities of the work and the business that we’re trying to explain to them.

What do you enjoy doing outside of work?
Two years after I got here, I joined the Chicago Gay Men’s Chorus. I saw their holiday show and loved it. It was hilarious, The Chorus has been around since January of ’82. I joined in January of ’83. The Chicago Gay Men’s Chorus has never been a chorus that just stands and sings; they are also show chorus. They did shows. I mean theater productions…. we did The Wizard of Oz twice. I was The Scarecrow. We did Gilbert and Sullivan shows: Pirates of Penzance, H.M.S. Pinafore, The Mikado. We did an original musical written by the artistic director and a member of the chorus—a parody of the film The Ten Commandments—where I played a mute slave and was told I never sounded better.

[Laughter.]
And so, this was something I did for twenty-five years. Before I quote “retired.” And it was a big part of my life. It was incredible to be in a group ranging from 50 to 150 people, especially, in the ’80’s and early ’90’s with the AIDS epidemic where you lost so many people. That became a very unifying force. But it was basically not only hard work, but fun, and my theater background helped a lot, I think. But yeah it’s fun; I even went back to the tapes and the DVDs of the old shows to see how great they still hold up, because a lot of them were just funny.

You were inducted into its hall of fame.
Yeah.

What does that mean?
[Laughs] I have no idea. I was one of the first when they formed the hall of fame. I was President of the Board of Directors of the Chorus, in the late ‘80’s.

Does the chorus have an amateur or a professional director?
The Artistic Director, our first one, Kip Snyder is a professional singer and choral director. He’s with the Chicago Symphony Chorus and many other things. The second one was Patrick Sinozich who is a professional pianist with the Chicago Symphony Chorus and a teacher. And he was one of the guys who wrote The Ten Commandments.

Did you ever act professionally?
[Without hesitation] No.

Did you ever want to pursue that?
[Without hesitation] No.

Why not?
Didn’t care.

How do you feel about foregoing a journalistic career?
I became more interested in law and I’m glad I went that way.

Do you feel like you used your journalistic training as an attorney?
Well, in terms of the writing, yes. The “who, what where, when, why, how” and “so what?” [laughs] makes an important difference in how you write.

What have you enjoyed about being on the stage?
In addition to…
I’M ON STAGE!

Yeah, Why do you love it?
I don’t know. Ask anybody that. I have no idea.

What’s your favorite aspect of the arts in general? Is it music, is it theater, is it acting…
Everything. Yeah, you can’t separate them. They are all one thing.

Which clients are you most excited about when they come to you for legal help?
Oh, new clients of any kind. I don’t care. [laughs] I don’t care. You know, as long as they don’t want me to do their wills. That’s not my area.

I’m curious, do you remember things naturally?
I have no photographic memory…I’ve forgotten more than I remember, but I keep a very extensive file of cases and articles. God knows I don’t remember most of them.

How would you define entertainment law?
Entertainment law is the representation of artists and/or producers of film, theater, television, digital media, books—anything that people use for what we call “entertainment.” Which means a use of property for self-satisfaction. Or group-satisfaction.

What are all the different areas of law that you need to know to practice entertainment law effectively?
I tell people this the first day I teach, when I teach
entertainment law at John Marshall. Contracts. All the required courses in law school are important, because, yes, you can take courses that the law school may offer in entertainment law or anything like that, but as an entertainment lawyer you really have to be versed in what I call “the meat and potatoes” areas of the law school classes, which is contracts, labor law, corporate law, sometimes even administrative law (although that’s not necessarily core curriculum), tort law, copyright, and trademark law—any of those things that most people are going to take in law school are important for the entertainment lawyer.

So, with the areas of practice or of legal concentration being so varied, do you find it difficult to build a curriculum that you can get through in 13 or 15 weeks?
It is hard, so, I usually devote one week to each area... but you’re still rushing even then.

What do you think is the hardest thing about building an entertainment law practice?
In Chicago, which is different from L.A. and New York, I mean we are, of course, “fly-over,” [laughs] it’s making sure there are clients that can pay. There are a lot of clients out here that, even if they’ve been in the business for a long time, can’t really afford a lot of legal fees. So it’s difficult in a law firm atmosphere versus solo practice to, you know, pay your way.

But I mean you’d have a lot of that same overhead as a solo practitioner unless you’re working out of your home.
Yes, but not as many. Not as many.

What’s the benefit to you to having partners?
You’ve got people to talk to and ask questions of and rely on their experience.

Would you say you have a close partnership?
[Without hesitation] Yeah.

What do you value about your partners?
They’re experienced, like me. They’ve done it, and like Peter, they’ve performed.

Why do you think that it’s important to integrate pro bono work into practice?
It’s because you owe back to the community—the community you’re practicing in. That’s especially true in the entertainment area...

Do you feel it’s important to cut your fees for certain clients who can’t afford you?
[Without hesitation] Yes.

And how do you go about making those kinds of decisions?
You talk to your partners, of course, but, you know, there are some people that come to you that have important projects and they need your help. They just can’t afford your normal fees. And, sometimes you’re a sucker, but most of the time you know that it can lead to other things in the future if they are successful.

Do you think pro bono work has helped you at all in your career?
Well, it’s expanded things I’ve been exposed to.

Do you think there are certain disciplines that should be seeking legal help more than they do?
There always are. Most of the time LCA clients come to you when they should have come to you—or they should have come to LCA a long time before they did, because they’ve already done things that bind them.

Do you have any idea how many people you’ve mentored over the years?
God, no. I have no idea, because I’m also a mentor for the Lesbian and Gay Bar Association ...and I don’t know how long that’s been going on. [laughs].

Do you act as co-counsel or backstop?
No, I’m just there for advice but not on specific client matters. And these are students who are still in law school.

How do you think young lawyers can best learn skills to get into real-world practice?
They just learn by doing and that’s usually through a job right out of law school, hopefully with a firm of some size, two or three people at least. Just learning by doing.

And you mentioned it’s difficult to find paying clients in the Chicago area, so what do you recommend to students in this market?
Well, you become a member of the American Bar Association’s Entertainment Forum and you start meeting people outside of the city that you live and you go to the Annual Meetings and make yourself available to work on Forum projects.

What does retirement mean to you?
I’m not going into the office on a daily basis. I’m not taking on any clients or handling any firm management. I’m done. Done. But I will seek out volunteer opportunities, maybe in the food industry.

True to character, Jerry arrived to our interview with a delicious home-baked and perfectly presented boxed cake. He mentioned as an aside that he took culinary classes at Kendall College in Chicago and that he also learned to play violin. He returned to the piano as an adult, and although I’ve only heard him play once, it was a private performance
that no one present will forget. He attended a retirement party for Bill Rattner, who served as LCA’s Executive Director from 1999-2014. Rather than step up to the podium to roast him or to give a brief speech, he sat down at the piano and said he could only express his sentiments through music. I don’t know what he played, or how long he played, but those brief moments reminded us all of why we do what we do to support the arts.

Jerry says he doesn’t care how he is remembered or if he is remembered, having little perception of just how much he’s meant to his clients. In some of their words:

“Jerry is a phenomenal attorney who always negotiated the best deals for me as a screenwriter. Whether it was contracts with managers or independent producers, I could always rely on Jerry to have my back. He was also vital in referring me to other individuals who could help me with things outside of the legal realm such as getting me introduced to public relations professionals who helped me tremendously. I signed on with Jerry as a student at Columbia and have enjoyed having him to rely on these last 5 years. Hiring Jerry was one of the best decisions I ever made and I wish him all the best in retirement.” (Matt Grodsky, Screenwriter)

“I got excited, and it was encouraging to work with someone who took the time to really listen and offer valuable advice from the first meeting… Jerry [also] offered me a cookie that he had baked and it was truly delicious!” (Veros Productions)

“Jerry was willing to provide me with advice on legal aspects of publishing a book on short notice. He provided me insights into the law and practical aspects of how to address the questions I had. I was able to proceed with publishing the book while ensuring I was not at risk of any legal issues. It can be intimidating to meet with a lawyer but Jerry was very friendly and immediately put me at ease.” (Elle Dahlman, Writer)

“Jerry was my entertainment attorney while I was an independent filmmaker in Chicago, and I liked him and his work so much I continued to retain his services even after moving to Los Angeles. Professionally, I respected Jerry’s thorough nature in reviewing contracts and exploring all potential pitfalls of a deal. He made me feel he always had my best interests in mind, and that I knew all sides of an issue as the law was concerned… His pleasant demeanor took the sting away from sometimes unpleasant news or negotiations, and besides, he has a great accent. I’ve enjoyed working with Jerry throughout the years, and though I wish I could continue that relationship, my greater wish is for him to enjoy his retirement knowing he helped me, and I’m sure many others, in the work he did these 43 years.” (James Francis Flynn, Producer)

“When you work with Jerry, you find an attorney with a lot of experience in the entertainment world and also a person with a good sense of humor. At the same time, you find a person who will always help you to keep your feet on earth and someone who will help you to see the reality on the direction you are taking your project. I think, we artists and producers need to have our feet on earth so we can make our dreams happen in a good way. Now that Jerry is retiring from the practice of law, this space of knowledge of the arts, the entertainment industry, the law, and mentorship for the artists and producers that he has developed… will be missed. I’m sure other attorneys will follow his great example to continue helping us to create wonderful artistic productions for the world…Thank you very much Jerry!” (Kuntur, SAG-AFTRA Actor, Singer and Dancer)

Thank you, Jerry, for sharing your wisdom, kindness and hard-working example. Thank you for entertaining and illuminating us, and thank you most sincerely for your friendship. Everyone who has come in contact with you is better for it.

INTRODUCTION
Jack Sullivan has been serving as the Chief Executive Officer of Broadway Video Entertainment since 2002. He joined in 1994 and oversees all of Broadway Video’s operations, including the New York based digital studios, production services, digital delivery, licensing, and ventures divisions; and the Los Angeles based television, film, branding, and creative divisions. Jack began his career as a finance executive for USA Network. He received his Juris Doctorate degree from Pepperdine University School of Law and his undergraduate degree in business administration from Tulane University.

HISTORY AND CORPORATE STRUCTURE
Broadway Video is a global entertainment and media company which was founded by Lorne Michaels, creator of Saturday Night Live and producer of several other television programs and movies. It was launched in 1979 in New York’s historic Brill Building and has offices in Los Angeles and Beverly Hills. Broadway Video has grown into an independent multimedia entertainment studio that now produces and distributes original comedic content for various platforms. It develops television programming for broadcast, cable, digital marketplaces, film, musical, and commercial projects. The company also offers post-production services, as well as digital file storage and distribution.

COMPANY ASSETS AND REVENUE MODEL
Broadway Video’s ventures department is in charge of management and maintaining assets. It has investments and partnerships with many technology companies that have a focus on entertainment. One of the investment opportunities that Broadway Video Ventures engages in is a start-up called ‘Meerkat’. This app allows people to live-stream what they are doing. One of Broadway Video assets is a company called ‘Above Average’ which is an online distribution sights website for original comedic content (Aboveaverage.com). Revenue comes from networks and companies purchasing production and post-production services for which companies pay a fee. The amount the purchaser pays depends on the requested service, the size of the project, and the allowed time frame in which Broadway Video works on the project. The content that Broadway Video owns (e.g. Saturday Night Live) is another revenue stream. For this reason, NBC purchased the right to SNL in order for NBC to air it.

CHALEDGES FACED BY BROADWAY VIDEO
The Rise of the-top video providers
Content producers are facing real competition from over-the-top (“OTT”) video providers such as Netflix and Amazon. It is certain that there will be more OTT offerings in the years to come. In fact, seemingly every major media company has been making waves in the direct-to-consumer space, including Disney, AT&T, Viacom, and Fox. Despite the growth of OTT, it pales in comparison with the amount of viewership garnered by broadcast television. According to Nielsen, it has a 5-to-1 consumption ratio: for every single hour of OTT viewed each day, the average consumer also views 5 hours of broadcast television. Comcast has already stated that it is not in a hurry to follow its competitors onto the OTT bandwagon. According to its CEO, direct-to-consumer offering is “not a substitute” for the company’s very strong broadcast and cable television business. Although Comcast is taking its time with a larger OTT offering, it is ramping up other smaller streaming services like NBC News Signal and announced the launch of the Xfinity Stream app for Comcast Business TV in 2018.

Threatening Consolidation Environment
Broadway Video, among other companies, will compete increasingly with consolidated TV industry as mega-mergers loom on the horizon. Comcast has been battling with Walt Disney Company for a chunk of Rupert Murdoch’s empire, submitting a $65 billion offer for assets. Disney immediately brushed back Comcast’s offer with a higher bid of $71.3 billion which was quickly accepted. Comcast, however, outbid 21st Century Fox Inc. in an auction for control of Sky Plc, a satellite-TV company with a TV studio and valuable sports rights, including premier league soccer for $39 billion. A potential merger of CBS and Viacom is also making headlines after the two companies said that they were exploring reunion plans. According to BTIG analyst Rich Greenfield, Viacom and CBS need to merge in order to keep up with rivals like Disney or the streaming giant Netflix. Overall, TV content producer mergers and acquisitions more than doubled between 2013 and 2017. Most mergers are driven by the need for new wireless distribution channels that can reach younger audiences. The building trend also reflects the vital importance of the ownership of the TV Programming rights.
Netflix’ aggressive price strategy
The world’s largest streaming services, such as Netflix and Amazon, intend to acquire and produce a practically limitless amount of engaging and diverse entertainment. Netflix has been growing rapidly. In early October, Netflix announced that it is in its final stages of negotiations to buy its first production studio complex, ABQ Studios in Albuquerque, New Mexico. It has now about 130 million subscribers worldwide and currently leads the charge over competitors such as Hulu and Amazon Prime Instant Video. It also has been spending a lot to produce its own original shows and movies. Locking down ABQ Studios will allow Netflix to be even more efficient and flexible with its original content.

According to Jack Sullivan, Netflix is one of Broadway Video’s major buyers. Initially, the company was rather hesitant to negotiate with Netflix because the business models of the two companies did not seem to go well together. Since then doing deals with Netflix has not become easier. In fact, the streaming service giant has just recently introduced a different model (‘cost-plus model’) for TV shows, paying more up front, but keeping more later on big hits. In other words, Netflix buys shows at a rate of the cost of production plus about 30 percent of production costs, but it remains most of its future licensing rights. This makes it hard for TV networks to compete. Networks typically license shows and often only cover 60-79 percent of production. However, the production company retains the majority of the rights, giving them the opportunity to make more episodes in the future if the show is a hit.

However with this new model, Netflix seizes more of the upside on big hits, meaning that the creators sign away most of their future revenue opportunities. This means that tens of millions of dollars go to Netflix on the most successful shows. In contrast, on a traditional TV network, deals are typically renegotiated after the first few seasons to cover more show production costs, recoup losses on earlier seasons and incorporate additional bonuses. Netflix contracts also require the production company to pay residuals, or fees to actors and crew once the episode airs. Content producers must also give up most merchandising rights. In addition, production companies can lose out on significant upside if the show becomes a big hit. Lastly, Netflix usually earns the majority of money from any advertisements, which are mainly restricted to product placement.

CONCLUSION
With a rich history of creating entertainment experiences, Broadway Video has an outstanding reputation for finding and nurturing talent. From post-production and 4k transmissions to delivery to OTT platforms, the company has worked on various notable broadcast productions. Besides the usual challenges as content producer such as earning the trust of readers, and consistently producing a variety of valuable content, the company is also facing a revolution.

The latest developments center on OTT delivery directly to television sets. This has led to suggestions that linear TV viewing is likely to disappear in the face of multiple multimedia platforms and that apps will eventually replace channels. But television is not dying. It is actually thriving, just not in the traditional business sense. People may no longer watch television at a specific time on a specific day on a broadcast network. Instead, television is now being watched everywhere, on every device, at any time, in blocks of episodes and at individual events. The emergence of Hulu, Amazon, Netflix, and Crackle has transformed the industry
and opened a wealth of opportunity for writers as well as producers: this is the future of television.

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ENDNOTES


3 Id.

4 Id.


7 “Saturday Night Live”


15 Id.

16 Id.

17 Id.

18 Id.


23 Id.

24 Id.


A Young Lawyer’s Perspective
Route to Reasonable Foreseeability: How Contemporary and Traditional Risks at Public Events Impact Security and Liability

Chardae Davis

On October 1, 2017, Las Vegas experienced the deadliest mass shooting in the United States. Instead of fond memories of an evening immersed in the sounds of country music, that date is now marked by tragedy. While safety is a familiar issue within live entertainment, there has been a shift in perceivable dangers when attending events. Las Vegas, Manchester, and Paris have all been targeted within recent years when attendees simply gathered to hear music. Whether it is the onset of social media dissemination, change in civilian action, or horrific events being sensationalized, it must be examined how security concerns impact the creation of a live event. Furthermore, liability for all parties involved is center stage, as entities must evaluate how to best protect themselves in the future.

This year I attended the ABA Forum on the Entertainment and Sports Industries’ 40th Anniversary Annual Meeting as a reporter. I attended the panel, Chasing a Moving Target: Managing Public Event Security and Liability in Anticipation of Modern Threats, which included a timely discussion on safety precautions revolving around live events. The panel included Steve Adelman, Principal of Adelman Law Group and Vice President of Event Safety Alliance; Phyllis A. Gilland, Senior Vice President and General Counsel of Golden Entertainment, Inc.; and Avi Korein, President and CEO of Screen International Security Services, with materials and information from David Schotts, Vice President of Ascend Insurance Brokerage. The panelists discussed how lawyers can advise clients on security, the role of a security company in executing security plans for events, and general advisement on insurance, liability, and preparation. As the entertainment industry continues to increase live events to match consumer taste, the topic is significant to lawyers in their legal capacity, as well as in their role as consumers.

HAVE EVENTS BECOME MORE VIOLENT?
Live entertainment events have been happening for decades, so the question of whether violence at events has increased arises. The panelists explained that the type of threat has not necessarily changed drastically, but specific types of violence have increased. Not only are active shooter events more frequent, they have also become deadlier. This is particularly relevant for evaluating density and preparing security. Predictive violence produced by the talent can also be a consideration. One might imagine that in today’s climate, shootings and similar types of violence outnumber other kinds of violence. Surprisingly, occurrences such as falling equipment, golf cart accidents, and trip and falls are much more common than a shooting or vehicular event. These kinds of events are also highly litigated.

With the influence of publicity and social media, every event becomes more magnified, prompting and possibly enticing future actors to outdo a previous violent event. Nontraditional media increases the quick dissemination of violent events. Instead of primarily being funneled through the nightly news, awareness of violent news has a wider scope. Each event is almost sensationalized in its reporting and violent actors seeking attention are likely to take note. The heavy rotation of these tragedies has likely influenced the perception of these events. However, expanded awareness can change party leverage in a lawsuit and public scrutiny.

THIRD PARTY LIABILITY
As lawyers and their clients continue to plan for events, understanding the potential risk and liability of both new and traditional threats is critical. Multiple parties are often involved in executing these events, so advising clients on how to best protect themselves is important. Adelman noted that reasonable foreseeability is the threshold for determining third party liability. As clients are liable for the acts of third parties, it must be determined whether it was reasonably foreseeable for an invitee, or attendee, to incur such an injury. Liability can be examined through fact-specific tort inquiries. Determining the duty of care and reasonable foreseeability of an injury are often points of analysis for live entertainment. Many prior cases look at the more routine injuries associated with events such as falls and fights.

The question becomes what constitutes a reasonably foreseeable event. To date, there have been several violent events at concerts. That begs the question of what is considered reasonably foreseeable when it is no longer unexpected for a violent act to occur at an event. It must be determined how organizers structure security when a properly staffed event can still incur an attack that security “didn’t see coming” and still “can’t prepare for something like this.” Even if every reasonable precaution is taken, one must ask whether these types of acts are now foreseeable. Furthermore, the fact-specific inquiry could examine how frequently an event occurred in the past at a specific property and whether a property owner could have known a specific type of injury was foreseeable. With each violent event, though at different venues, one must ask whether a violent event at one concert can make that same event foreseeable at another concert. Perhaps the rarity in comparison to the frequency of concerts affords certain types of violence the ability to not break the threshold of foreseeability. A balance between
consumer enjoyment and extreme security precautions must also be maintained as event hosts seek not to make attendance more inconvenient than enjoyable.  

Though shootings, vehicular violence, and similar acts have not been deemed to be foreseeable, several courts have examined how venues have been liable when an injury does occur. Social media has altered the way individuals hear about violence at events and can potentially draw the attention of violent actors, but the question is whether this changed form of notoriety makes an event more foreseeable. One panelist argued that settlements have been impacted by vast coverage of events, rather than changes in risk. Publicity, in the more traditional sense, also stems from how a live event is promoted. More promotion can lead to more awareness, and therefore an increased potential for violence from those seeking to carry out a violent event. Whether the event is intimate and invitation only, or free and curbed by capacity, the promotion surrounding an event can impact the results. When it comes to foreseeability and third party liability, an entity’s promotion to engage the customer is significant. A Washington D.C. McDonald’s was deemed not to be liable for a shooting outside of its doors.  

In *Casey v. McDonald’s Corp.*, a shooting occurred on the grounds of a McDonalds. The court held that McDonald’s was not liable for the injury. The court reasoned that the national standard of care required in the jurisdiction was not met. The other McDonald’s locations with security were an exception, not the standard. Though property owners are liable for injuries to the public while they are on the land, the specifics of the particular event showed there was no general duty.

The tort inquiry into liability also depends on the classification of the plaintiff. Event attendees are often deemed to be invitees rather than licensees. An invitee passes a benefit of the original business purpose for being on the premises ends. An attendee or customer’s invitee status can terminate if the original business purpose for being on the premises ends. In *Mayer v. Willowbrook Plaza*, a shooting occurred in an abandoned shopping center parking lot. When evaluating invitee status, the court held that the store did not owe the plaintiffs a duty because they were returning to their car in the early hours of the morning after the center was closed. It was not reasonable for the security to still be active at that time. Similar to *Casey*, a business owner is not necessarily required to have security past business hours or be liable for injuries outside reasonable business hours. This case demonstrates one must consider the reasonable parameters of security duration on one’s property.

In *Maheshwari v. City of New York*, an individual was attacked in the parking lot of Lollapalooza, a popular music festival. The plaintiff sued the city and the festival promoter claiming both had a duty to protect him, though no police were assigned to guard that specific parking lot. The plaintiff claimed Lollapalooza incurred prior criminal incidents that should have put organizers and the city on guard for potential conduct. The defendants argued the act was a random criminal act. The court held that the same defendants were not liable for a plaintiff’s Lollapalooza injuries as they were due to an intervening act, not inadequate security.

One consideration in distinguishing these decisions is the publicity involved and how a premises owner publicizes customers being on the premises at a specific time. Korein suggested a permanent location such as McDonald’s is distinct from a temporary event. Through several mediums, one can be prompted with information about an event, enticing attendance. The event holders are inviting the customer to come to the property at a certain time on a certain day. McDonald’s did not invite the injured party to the property at a certain time or day, while Lollapalooza encouraged attendance within a specific window. An event of deliberate activity partnered with robust publicity compared to commonplace advertisement coupled with arbitrary encouragement can separate the cases. The difference between enticement and instructive requests can potentially lead to differing outcomes. These cases can also be evaluated through the lens of security. Adequate security, in terms of presence, compared to effective security, can serve as a point to consider. The panel also discussed that though potential danger has not necessarily changed due to wider publicity through the media, settlement negotiations have changed. With a wider eye on cases, plaintiff leverage can escalate.

**ASSESSING RISK**

The panelists discussed how one should prepare for an event as well as how to assess the risks involved. First, a client should evaluate their biggest concerns. Second, the opposition to those concerns should be pinpointed. Next, it must be decided whether steps should be taken to engage with potential violent actors to gauge potential threats. Finally, one must be mindful of individuals attending the event that fit within the identified guidelines. The first three steps focus more on preparation and determining the potential types of violence that may occur. For example, if certain groups oppose the talent or oppose the message of the event, a security company should evaluate what type of action the opposition might take. When taking these steps, a security company’s client should be very realistic about potential threats. It is better to err on the side of caution than underestimate risks.

The last step focuses on the event itself, where executing a security plan can differ based on the location. Risk assessment can differ for indoor and outdoor events. An indoor event has built-in boundaries and exits. An outdoor event requires boundary planning, a decision that can impact one’s risk. The larger the designated space, the greater the liability for the parties involved. More checkpoints available before entry likely leads to a higher deterrence of potential violent actors. Once an event begins, depending on the size of the event, multiple parties work together to ensure the safety of attendees. The final step involves monitoring attendees on the ground to look for inconsistencies and properly executing the security plan.

**INDEMNIFICATION AND INSURANCE: CONTRACTUAL PROTECTIONS**

Aside from physical protection on the premises of the event, contractual protection is also crucial in managing liability.
Indemnification serves as a standard clause built to protect one side. In the event of an injury, multiple parties are often sued. Everyone from the artist to the venue is typically brought into the lawsuit. Indemnification clauses protect one party by requiring the other party to cover any loss caused by a certain event. Private security companies inherit the brunt of liability when partnering with these events. To ensure security is properly executed, security companies are often brought on to run a risk assessment, advise clients on a strategy, and implement staff on the grounds. These security companies sometimes hire additional staff on the premises that handles individuals such as hourly security personnel. Indemnification helps protect clients when enlisting other parties for public events.

Another non-physical form of protection is having a satisfactory insurance policy. Insurance policies often protect venues and promoters in the instances of violent acts. Discussion around these events can include whether an act is considered terrorism. The Terrorism Risk Insurance Act (TRIA) (“Act”), enacted after September 11th and extended in 2015 as the Terrorism Risk Insurance Program Reauthorization Act of 2015,15 is a program that provides compensation for terrorism related losses.16 The 2002 legislation defines terrorism as a Secretary of the Treasury and Attorney General of the United States certified act that (1) is a terrorism act, (2) endangers people, property, or infrastructure, (3) occurred within the United States or relatively related, and (4) was carried out in connection to a foreign objective, individual, or to influence the United States.17

One can conclude that an actor carrying out a violent event with personal and non-foreign motives may not fall within this definition. This narrow definition, understandable based on when it was enacted, almost requires the intent of the actor. In order to classify as an act of terrorism, triggering a government payout, it appears the actor’s intent must be ascertained and fall within this limited scope. Many of the violent acts that occur may not prompt the coverage. Though parts of the Act have been updated with recent extensions, this definition remains unchanged. Furthermore, the Secretary of the Treasury must certify an event as terrorism.18 Therefore, the discretionary nature of the classification leaves room for less protection for clients purchasing the policy.

**CONCLUSION**

Many considerations contribute to the preparation and execution of security at an event. Though traditional liability concerns at an event remain the most frequent, companies today have shifted their strategy in some capacity to address the increase in shooter and vehicular violence. The rapid evolution of technology has also become a new consideration when making preparations. Traditional tort inquiries have governed many litigation outcomes, while modern legislation has provided a new avenue of protection for some. While many violent events still cannot be predicted and clients cannot prepare for every possible scenario, attorneys must continue to advise clients based on the reasonably foreseeable standard.

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**ENDNOTES**

4 Id.
5 Id. Security has evolved over time as a result of violent events. Security at airports and large venues was once more lenient, but customers have adjusted to changes in security entrances.
6 Casey v. McDonald’s Corp., 880 F.3d 564, 569 (D.C. Cir. 2018)
7 Id.
8 Id.
9 Restat 2d of Torts, § 344 (2nd 1979).
10 Restat 2d of Torts, § 332 (2nd 1979).
13 Maheshwari, 2 N.Y. 3d 288 at 293.
16 Id.
A Young Lawyer’s Perspective
Flood Watch: The Video Streaming Giants Embrace for the Impact of New Disrupting Entrants

Chardae Davis

Not long ago, a few large companies primarily controlled the entertainment industry. Film, television, and music companies could more easily be categorized, and the channels to widespread dissemination were narrower. Today, the landscape has changed and continues to evolve at a rapid pace. Not only are there more companies at the table, but also more traditional forms of entertainment are now accompanied by an expansive category of content. During the ABA Forum on the Entertainment and Sports Industries’ 40th Anniversary Annual Meeting, I attended The Evolution of Netflix, Amazon, and Hulu, and How the Entry of Google, Apple, Facebook and Others May Disrupt the Landscape session as a reporter. The session featured Vernon Chu, General Counsel of BBC Studios - Americas; Anuj Gupta, Counsel for Vox Media; Steven Haft, Senior Advisor, Vaudeville Ventures and Former Senior Vice President of Innovation at Time Inc.; and moderator Daniel H. Black, Shareholder and Vice-Chair, Global Entertainment & Media Practice and Chair, West Coast Entertainment and Media Practice of Greenberg Traurig, LLP. The session investigated how Streaming Video on Demand, or Subscription Video on Demand (“SVOD”), has evolved and disrupted the market, as well as how both new and more established players have adapted.

INCREASED CONTENT PRODUCTION
“Content” is the buzzword pushing companies to continually develop new material. Content is more than standard products within a company’s primary field as content can encompass multiple mediums for most companies today. For a digital media company like Vox Media, traditional content is its territory. Vox Media distributes short form content that quickly engages the audience. Gupta noted that the company seeks to generate new users and transfer those viewers from one platform to another, such as to another social media platform or to another one of its brands. With digital content, engaging the viewer and enticing them to view other channels is key. Additionally, Vox Media relies on data to influence next steps rather than considering itself an entertainment company. Instead of an entertainment company that may pull from internal creative sources to dictate future content, this company follows its data trends to outline its next steps.

As multiple mediums of content have become the standard, an increase in entrants has arisen to meet demand. Haft discussed how the number of buyers available has expanded. Since there are more opportunities to produce content, more parties are able to get involved. When comparing a movie studio to a streaming service, a streaming service or network has more slots to fill than a movie company that produces a smaller number of movies per year. Since more content is being produced in certain spaces, more buyers are making deals. An increase in customer demand has led to an increase in content production.

As more content is produced, more points of access also impact the type of content distributed. Producing a movie once took the typical path of movie theater to physical form that a customer could own. Similarly, music was consumed through CDs and television remained within the purchased television set. Points of access were finite. In contrast, today there are millions of devices trying to access content. Instead of attempting to reach a family through a television set at a fixed day and time, companies must now compete with digital content. As these devices dominate, companies seek to have its content meet that demand. Creating exclusively online clips that accompany long-form traditional episodes has risen, and engaging with consumers directly through social media has become customary. As consumers have become inundated with material, companies have recalibrated to stand out amongst the competition. Additionally, not only are companies competing against each other, but they must also compete with the average customer they seek to engage with. The average person is producing content at a rapid pace that sits amongst the curated content produced by companies. Authenticity stands as an evaluation factor for many consumers as companies seek to stand out from the masses.

With more parties able to access content, unauthorized use has become a problem for several companies. Some companies have entire teams dedicated to monitoring unauthorized use and taking preventative steps to curb this activity once controlled by cease and desist letters. It is difficult to stop content shown in one time-zone from being displayed online, ruining the suspense for other viewers, but companies utilize technology that can identify this kind of content and have it removed. Though unauthorized use cannot be completely stopped, it can be managed more efficiently than before. Content continues to saturate the market as large companies seek to further engage with consumers and individuals look to take advantage of this more open landscape. The issue now is rising above the myriad of actors simultaneously pursuing engagement and loyalty where consumers look for various qualities before extending continued participation.

TODAY’S SUCCESS FACTORS: SCALE AND SUSTAINABILITY
Physical purchases and television views as indicators of success are no longer the primary considerations. The digital
shift has introduced new signals for progression as revenue is not necessarily the primary measure of success for all companies today. Scale and viewership have now become a greater resource for determining the success of a company. Instead of focusing on the money, increasing viewership and developing campaigns around increasing viewership is now a main concern. One must question how a company can sustain itself based on these focuses rather than revenue. The theory is that advertising can be secured if a strong viewership can be maintained and demonstrated to have growth. Without the viewership, advertising may decrease. Without advertising, the revenue will likely decrease. Without revenue, sustainability may be questioned. Scale can be traced directly back to revenue, demonstrating why revenue is not always a driving force for gauging success for some companies today.

Audience engagement is a leading factor, but loyalty and consistency are intertwined with this approach. Getting views is ideal, but if the consumer does not remain engaged, sustainability can be an issue. With decreasing attention spans of younger audiences coupled with a saturated market, content services can get lost once consumers no longer deem it to be a premiere content destination. Companies must ensure they obtain sustained engagement when competing within today’s market.

TRADITIONAL CONTENT PLAYERS ENTERING THE STREAMING MARKET

Though the digital space has been flooded with non-traditional entrants, more household names are getting involved. Netflix and Hulu were some of the players that started as distributors of content. Alternatively, Amazon started in another sector and shifted over to streaming. All of these companies have also now entered into developing original content. New entrants such as Google and Apple, starting outside of video, have now ventured into this new space. Disney is now getting ready to enter the market, armed with a widely popular catalog of content. The question arises of whether a company like this will stick to making existing content available, or begin the frequent shift to original content only available on the service. The next question also arises of how entrants such as Disney, partnered with Fox, will handle content available on existing platforms like Netflix and Hulu. Before, Netflix and Hulu stood as distributors, but moving into this space will make them competitors for Disney. If Fox keeps its content on those platforms, perhaps pricing could be a distinguishing factor. Fox could also venture into exclusive content while still keeping its television episodes and movies on a service.

The distribution of leverage has taken many turns as streaming continues to evolve. Some companies are merely adding a streaming service to its portfolio, while it stands as the only product for others. Companies like Disney have several other product categories to fall back on, while a company such as Hulu remains exclusively within streaming, whether original content or not. This is where leverage plays a role. If streaming is secondary, it may impact how that company negotiates in comparison to a company that focuses on streaming. Similar to Vox Media, Disney is the umbrella for several brands. With its acquisition of Fox, it will keep ESPN+, Hulu, and Disney’s future streaming service separate to cater to different audiences. Instead of combining everything into one destination for the consumer, Disney is diversifying just within the streaming space itself to ensure consumers have multiple points of entry for Disney content. A history of success does not necessarily equate to automatic success within the streaming space. However, adding another avenue of consumer engagement will likely serve to be a step some companies can afford to take.

DIGITAL SUBSCRIPTION PACKAGES

To view network television shows directly on a channel’s website often still requires logging in through one’s cable service provider. Some companies such as Viacom still only allow online viewership through cable logins. Alternatively, companies such as HBO have moved to allowing non-cable subscribers to purchase an individual package of online-only access to its content. As more consumers move towards cutting cords and not purchasing cable services, one must question the leverage cable service providers still hold within the SVOD landscape.

If more traditional content is available online, a cable service must evaluate how to maintain customers, impacting the question of sustainability as younger generations become monetary players within the marketplace. Most dominant cable networks have direct online content or have content viewable through a streaming service such as Netflix or Hulu. If the younger generation continues to be device-reliant, negotiation leverage for cable service providers may shift. As younger consumers utilize Internet services more than cable and telephone services, cable service providers could utilize that leverage when negotiating future deals.

SIMILARITIES BETWEEN THE MUSIC INDUSTRY AND SVOD

The SVOD disruption does not have to only be evaluated through the lens of film and television norms. The music industry’s digital transition serves as an illustration of how a field steeped in its traditional processes can adapt to the prominence of digital demands. Streaming services have greatly impacted physical sales within music and traditional audiovisual distribution. The Music Modernization Act (“MMA”) created a collective that administers blanket mechanical licenses for the modern digital landscape of music. The Act addresses the music industry’s shift into digital downloads and streaming that has been governed by outdated processes. The MMA relates to television distribution in serving as an example of where the industry could be headed. The MMA serves as a response to the music industry’s digital shift, and the television and film industry, not far behind in its shift, could see the same conflict between traditional forms of distribution and streaming. Furthermore, music is intertwined with television and film. As the Act impacts licensing processes, the use of music within digital content could be affected.

Since consumer demand has evolved and content production has shifted, the quantity and type of contractual
transactions have evolved. Exclusivity once dominated many negotiations. A cable network would get a broad exclusive license as video on-demand was delivered through a customer’s cable service. A panelist noted that with the introduction of streaming companies such as Netflix and Amazon, non-exclusive licenses were requested since these companies wanted to buy in bulk. Instead of focusing on the number of viewings, price became a point of negotiation as simultaneous streams on multiple devices became commonplace.

As some key points of a contract have shifted and as the audiovisual space continues to evolve, the next question is how these parties protect against future shifts in the industry. When drafting these contracts, parties must evaluate how a contract executed today can maintain future leverage. Drafters must be forward thinking and cognizant of where the industry could be going. One clause that can address this problem is ensuring the inclusion of language around perpetuity in media not yet created. This can help alleviate some of the concern around having to adjust based on future technologies.

CONCLUSION
The overarching and persistent question within streaming is what’s next. What once started as a burgeoning field with limited players has now turned into a primary focus for many companies with continual entrants. Contract drafting and content creation concerns drive entrance and sustainability as companies seek to stay on top or merely get in the door. What comes next could be influenced by consumer demand or a new disruptor could emerge shifting focus to an alternative form of content distribution. The way the landscape has changed in the last few years gives reason to believe the landscape could shift just as quickly in the future. ■

ENDNOTES
6 VanDerWerff, Todd, Netflix or Hulu won’t win the streaming wars. Your cable company will., Vox Media (October 13, 2016), https://www.vox.com/new-money/2016/10/13/13156848/netflix-hulu-amazon-cable.
8 Id.
A Law Student’s Perspective
Music Matters: A Discussion of Current Legal Issues in the Music Industry

Kevin Chung

A fter years of negotiation and hard work, Orrin G. Hatch-Bob Goodlatte Music Modernization Act (“MMA”) was finally signed into law on October 11, 2018.1 A few days before the signing, 2018 ABA Forum on Entertainment and Sports Industries Annual Meeting invited a group of music attorneys to lead Music Matters: A Discussion of Current Legal Issues in the Music Industry session and discuss the new law. This article will summarize the session, explore MMA and describe some of the most crucial changes, and discuss other relevant issues in the industry.

The session was led by moderator Judy Tint and panelists Jacqueline Charlesworth, Todd Dupler, Jeffrey Harleston, and Sarah Rosenbaum. Ms. Tint is a professor of music business at New York University and is a private practitioner that represents artists, managers, producers, and independent labels. She serves on the board of governors for the Recording Academy in New York and is a chair of the Music and Personal Appearances Division for the ABA Forum. Ms. Charlesworth is Of Counsel for the Covington & Burling LLP and was the General Counsel and Associate Register of Copyrights for the US Copyright Office. She was heavily involved in MMA, as she was one of the people responsible for drafting the bill. Mr. Dupler is a Senior Director, Advocacy & Public Policy for the Recording Academy, best known for the annual Grammy awards. His organization represents numerous music creators, studio professionals, songwriters, recording artists, and musicians year-round. Mr. Harleston is a General Counsel and Executive Vice President of Business & Legal Affairs for Universal Music Group worldwide. He oversees all business transactions, contracts, and litigation for UMG. Ms. Rosenbaum is Music Counsel for Google and YouTube, and she works for the publishing vertical. She is a General Counsel and Executive Vice President of Business & Legal Affairs for Universal Music Group worldwide. He oversees all business transactions, contracts, and litigation for UMG. Ms. Rosenbaum is Music Counsel for Google and YouTube, and she works for the publishing vertical. She was one of the legal leads of MMA and was very involved in issues spotting and advocating on the bill. She previously worked at Music Reports, a music rights and administration company that serves streaming services and helps them administer licenses. All of the speakers were heavily involved and knowledgeable with respect to the creation and the passage of MMA. Before the discussion, panels emphasized that they were expressing their own opinions and not representing the perspective of their respective organizations.

In December 2017, the mechanical licensing portion of the bill was introduced and served as a vehicle for the other bills that were floating around Congress, such as Classics Act and AMP Act. The bill was introduced by Doug Collins, a Representative from Georgia and an advocate for songwriters, along with other members of Congress that took leadership.2 It was unanimously passed by both the House and the Senate before getting signed by the President.

MMA creates new section 115 blanket licenses for digital uses, changes section 115 rate-setting standard, changes rate-setting rules for performing rights organizations (“PROs”), federalizes pre-1972 sound recordings through the Classics Act, and allows SoundExchange to pay producers directly through the AMP Act.3 Each change will be discussed in more details.

NEW BLANKET LICENSE—NO MORE NOTICE OF INTENTS
MMA creates a new section 115 of the Copyright Act blanket compulsory license, which covers digital uses including permanent downloads, interactive streaming, and limited downloads. A user will be able to file one notice and get a license from a new agency called Mechanical Licensing Collective (“MLC”). Previously, the system of notice of intent (“NOI”) was used to initiate the licensing process. The system required individual song-by-song notices to be served on the copyright owners or the Copyright Office if the owner cannot be found. The new blanket license will replace NOI for digital uses, but NOI will remain for the physical uses.

Before the digital age, record labels were responsible for getting the appropriate licenses when their artists used copyrighted works by others to make their own records. Now in the digital streaming era, digital music providers (“DMPs”) are also responsible for such task as copyrighted works get reproduced on their servers as soon as users start streaming. DMPs always disfavored the system of NOI for its complications, and this was one of the biggest reasons why Google, YouTube, and other DMPs joined the negotiating table for MMA. Under NOI, DMPs had a hard time clearing rights on time because they often only had a few days between receiving metadata of sound recordings from the labels and having to get the works up on their services by the set release date. Within those few days, DMPs needed to figure out the accurate identities of the copyright owners of the underlying musical works and their physical addresses to mail them the physical NOIs. The process certainly gets easier once the connection is made since DMPs could opt-in for electronic NOIs. However, the first physical contact with the owner can be very difficult.

To further complicate the matter, DMPs get metadata separately from labels and music publishers, and it is onerous for DMPs to connect those data together especially since DMPs deal with countless catalogs. Despite the complications, DMPs were under the risk of getting hit with a large sum of statutory damages, up to $150,000 per violation.4 Although most copyright owners would like their works to be streamable or downloadable through DMPs since it provides an additional source of royalties, DMPs were
MECHANICAL LICENSING COLLECTIVE
MLC is the new collective that is being created by MMA to administer the new blanket compulsory licensing system. By law, MLC has to be non-profit and cannot be owned by any other entity. It is a non-governmental private entity, but there are numerous regulations placed around its activities. Register of Copyright is authorized to designate an entity as MLC after reviewing potential candidates. A qualifying entity is required to have technological capabilities to run a blanket licensing system and to perform required duties.

The board will consist of fourteen voting members: ten music publishers and four professional, self-published songwriters. There will also be three non-voting members: a representative from the music publisher trade group, a representative from songwriter trade group, and a digital license coordinator (“DLC”). The DLC will be representing DMPs in their relationship to the MLC. There are three required committees: Operations, Unclaimed Royalties, and Dispute Resolution. Operations Committee will advise MLC on technology and data issues. Unclaimed Royalties Committee will oversee the distribution of unclaimed royalties to copyright owners. Dispute Resolution Committee will establish policies for royalty payment disputes.

Getting a new section 115 blanket license from MLC is rather a simple process. DMPs can file a form with MLC and they will receive blanket mechanical licenses to reproduce and distribute songs that they wish to use in their services. DMPs will no longer be liable, or potentially liable, for uses of unlicensed works. Other key duties of MLC include collecting and distributing royalties, and establishing and maintaining a publicly accessible musical works database. Once the public database is fully established, anyone will be able to identify owners of musical works embodied in sound recordings. Some panelists thought this was incredibly important, if not the most important, aspect of MLC. They acknowledged that it will take time and effort to build a central database. However, the database will be critical to the system because it may raise sound recording copyrights to the level of musical works copyrights. The owners will be easily found, and they will be able to collect their royalties. Currently, each DMPs are conducting their own separate process and maintaining a separate database for such identification purposes which is a waste of valuable resources.

For unmatched works—works with unidentified owners—MLC will hold royalties for three years, similar to what SoundExchange has been doing already. The key difference is that under MLC, after three years, uncollected royalties will be distributed to known copyright owners, based on their respective market share. The owners are then legally obligated to redistribute at least 50% of those royalties to songwriters that they represent. The cost of running MLC and the blanket licensing system will be paid by the DMPs. They will be charged a fee called administrative assessment which is set by a separate proceeding by the Copyright Royalty Judges (“CRJs”). The fee is going to be based on the actual cost of operating MLC which was one of the important negotiating points that brought different parties together.

CHANGES IN RATE-SETTING
The US has used a “policy-oriented” 801(b) rate-setting standard for over a hundred years. The MMA changed it to a new “market-oriented” standard. Same as before, royalty rates and terms for the license will be established by CRJs, but the judges will now be using an updated willing buyer/willing seller standard.

MLC also updates the rate-setting rule for PROs such as ASCAP, BMI, and SESAC. The rate disputes used to be handled by the Southern District of New York which also oversees the ASCAP/BMI consent decrees. The same court will continue to oversee the consent decrees, but the rate disputes will now be handled by randomly-assigned federal judges who do not have jurisdiction over consent decree. The MMA repealed section 114(i) prohibition as well. Under 114(i), the fees for public performance of sound recordings were not allowed to be taken into account when the court was setting royalties and fees for the public performance of musical works. Now, the sound recording rates can be considered by the court when setting rates for digital audio performances, except when it is performed by broadcasters.

CLASSICS PROTECTION AND ACCESS ACT
CLASSICS ACT
Classics Protection and Access Act or Classics Act was originally a separate piece of legislation to federalize pre-1972 sound recordings and to require payments for the digital performances of such recordings. It was a significant, last-minute development in MMA. Before MMA, pre-72 sound recordings were only protected by patches of state laws, and there have been numerous litigations regarding such protection especially in a digital performance space. The Classics Act resolves the issues. Now, public performance of pre-72 sound recordings by digital transmission, without authorization from SoundExchange or the copyright owners, is considered infringing. However, there are a few exceptions, such as noncommercial uses of the works that are not currently being commercially exploited by the owners. In addition, as a part of the negotiation, federal protection for earlier works will end sooner than one for later works. For instance, protection for works from between 1956 and 1972 will end in February 2067, but for works before 1923 will be maintained for only three years after the enactment of MMA. Panels emphasized that, regardless of the details, the most important fact is that pre-72 sound recording artists and right owners will now be compensated.

ALLOCATION FOR MUSIC PRODUCERS ACT
AMP ACT
Allocation for Music Producers Act or AMP Act was another important aspect of the MMA. Statutorily before the passage of MMA, SoundExchange was not able to pay studio professionals directly. The AMP Act allows...
SoundExchange to distribute royalties directly to producers, mixers and sound engineers based on a letter of direction (“LOD”) from recording artists. Although SoundExchange has been acknowledging LODs already and has been paying producers and studio professionals accordingly on a good faith basis, it was not required by law to honor LODs. The process was prescribed into the law to raise the level of certainty. The Act also creates a process for pre-1995 recordings so studio professionals can go back to the older records that they worked on and ask for permission to receive royalties.

ANTICIPATED TIMELINE

Starting from the date of enactment, DMPs are immediately no longer able to file NOIs with the Copyright Office. In January 2019, the process of MLC and DLC designation will begin. By July 2019, those designations are expected to be finalized. On July 2020, initial administrative assessment — the fee collected to run MLC — will be set by the CRJs. Most importantly, starting in January 2021, the new blanket licenses will be available. Before that, the DMPs are expected to make good-faith efforts to identify individual copyright owners and accrue royalties for unmatched works as required under the MMA. If they do so, they will only be held liable for the actual damages or actual unpaid royalties for the use, not the statutory damages. On February 2021, DMPs will be transferring to MLC the accrued royalties for unmatched works. By 2023, MLC is expected to distribute the transferred unmatched royalties to the known copyright owners for the first time.

TERRESTRIAL RADIO PUBLIC PERFORMANCE ROYALTY FOR SOUND RECORDINGS WAS NOT INCLUDED IN THE MMA.

Although the MMA is a significant accomplishment and victory for the music industry, it left out one critical piece that many stakeholders have desired for decades. Royalties are still not going to be paid to performers or the owners of the sound recordings that get played in terrestrial radios. The US is one of only a few countries around the world, including China and North Korea, that does not recognize such royalties. It further complicates the matter since this lack of recognition in the US, also prohibits performers and owners from getting royalties from public performances on terrestrial radio abroad. Under the international copyright regime, if a work is protected in one state that agreed to respect other member states’ copyright, then it will be protected in other states that did the same. In other words, if a work is not protected domestically, it will not be protected internationally. Because the US does not recognize terrestrial radio public performance royalties for sound recordings, other countries also do not transfer royalties when such recordings are performed on their own terrestrial radio.

According to one of the panelists, terrestrial radio broadcasters internationally collect at least $200 million annually through playing American sound recordings, but are not paying American artists because the US does not reciprocate. The amount of American sound recording works being exported greatly outweighs international works being imported, and the US performers are losing a significant source of income. This is especially an issue for artists that do not write their own songs because this can be a life-changing source of income for them.

So why does the US not recognize such royalties? One of the panelists jokingly referred to the “urban legend” that non-recognition started because, back in the old days, artists used to perform live at radio stations, leaving behind no recordings. Even if that was true, such a rationale is no longer relevant in this day and age. The real reason is the opposing lobbying effort. It is simply unrealistic for performance rights royalty proposal to pass through Congress unless the National Association of Broadcasters (“NAB”) supports it. NAB is an influential lobbying group because of terrestrial radio’s impact on politics, especially during the election timeframe. Although conversations and negotiations are still ongoing among the stakeholders, it will be an uphill battle for the performers.

On the other hand, performance right royalties for sound recordings in webcasting and satellite radio is already being recognized. The panelists shared a concern that broadcasters may try to trade terrestrial radio royalty for the webcasting and satellite royalty. However, the influence of terrestrial radio is slowly but certainly declining while the webcasting and streaming influence is increasing. Trading those two royalties will be like mortgaging the future. The panelists and audience alike shared the sentiment that there should not be any mortgaging. In a panelist’s words, “a right is a right.”

CONCLUSION

The moderator gave a perfect analogy when she compared the passage of MMA to giving birth to a child. The road to passage was months and years of struggles and difficulties. The MMA was finally born, but the real hard work begins now. The panelists acknowledged that it is certainly going to take a lot of patience, resources, and expertise. However, if different stakeholders can cooperate and collaborate as they did for the passage, MMA will be able to bring the intended results.

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ENDNOTES

4 17 U.S.C. § 504(c).
6 17 U.S.C. § 114(i).
8 Id.
The business of sports and entertainment is a multi-billion-dollar global industry propelled by enormous consumer demand. In fact, many estimate the global sports industry alone to be worth at least between $480–$620 billion. It is considered one of the largest grossing industry sectors, even ahead of steel and the railroad industry. In this article, I will provide insights drawn from the experiences of the panelists with respect to becoming general counsel, current trends, and how politics affects the sports and entertainment world. The panel consisted of Casey Schwab, Vice President of Business & Legal Affairs for the National Football League Players Association Inc. as moderator; David Kokais, Chief Counsel for Universal Music Publishing Group; David Foster, Deputy General Counsel for the National Basketball Players Association; Nyea Sturman, General Counsel for the Orlando Magic; and Marilee F. Holmes, Vice President of Operations and General Counsel at Wilhelmina.

BECOMING COUNSEL IN THE SPORTS AND ENTERTAINMENT INDUSTRY

The role of the General Counsel depends on various factors about the actual organization and thus qualifications will differ. As organizations also continue to evolve and grow, so does the role of the General Counsel. However, one characteristic is key for all companies: integrity. Basically, the General Counsel is responsible for trying to assure that the company is acting in accordance with the law. In-house counsels of all levels must have a strong sense of overall corporate objectives at all times. However, there are several core legal functions that most in-house lawyers must provide within their organization, which include reviewing and drafting contracts, policies, procedures, oversight of all litigation, governance and compliance issues, and intellectual property monitoring and protection. Prior experience at a league office, major sports law firm or agency helps, but is not essential. Only 15% of General Counsels previously worked at a law firm with substantial sports law practice.¹ The most important attribute that companies look for in General Counsels is a good and tested judgment.²

“It is also extremely valuable to have experience in dealing with complex matters that require litigation,” said Schwab, a former prosecutor. “It is imperative that General Counsels have stellar communication skills meaning they must be able to simplify complex legal matters and use plain language.” Writing skills are always essential, as are analytical, negotiating, and listening skills. Beyond technical skills, managerial and leadership skills are critical. “Start building your expertise, join relevant associations and make use of all opportunities to network,” said Sturman. Another critical function of General Counsels is to serve as a trusted strategic business advisor and to ensure that the CEO sees them as an integrated, effective and multi-faceted core member.

Recent developments underscore how General Counsels are no longer just corporate lawyers but also chief executive officers.³ Thus, they need both a fundamental business experience and a detailed understanding of the issues unique to the industry.⁴ There can be a perception that the lawyer prevents sales, stifles creativity, drowns the organization with policies, procedures, and unnecessary details, much like a “no police.” For this reason, General Counsels need to demonstrate flexibility. In other words, they should never become the obstacle themselves, but rather solve the problem and get the organization to a “yes.” The most efficient General Counsel, therefore, is completely embedded within the organization and ultimately vested in its success. The more internal clients feel the General Counsel and entire corporate legal department is aligned with their needs, the more likely the company is to include its legal department and actually seek for legal advice.

TRENDS IN THE SPORTS INDUSTRY: ATHLETES AND THE TECH SPACE

The relationship between sports and business has always been intertwined. This continues to evolve as athletes get more involved in actual business activities. Today’s athletes are continuously redefining themselves. From tech-startups to strategic investments, leveraging social media or building a digital brand, athletes get more involved in actual business activities. Today’s athletes are more involved in actual business activities and are thereby transforming the narrative. In decades prior, many athletes ventured into the business world through ownership of restaurant franchises and service-based businesses.⁵ More recently, many are using a portion of their salaries to launch and invest in technology-related companies. There are numerous examples to point to: Steph Curry is the co-owner of two tech startups, Slyce and CoachUp;⁶ Kobe Bryant invested $100 million venture fund in tech startups;⁷ Cristiano Ronaldo invested in check-in app Mobbibo;⁸ and Lebron James co-founded Uninterrupted⁹ and invested in a hardware tech company, which was later acquired by Apple.¹⁰ According to Schwab, the NFL Players Association is doing its part to support the players and even expose players to more opportunities. A few years ago, the NFL Players Association launched the OneTeam Collective to connect up-and-coming entrepreneurs and startups with business-savvy active and former NFL players.¹¹ Although the NFL Players Association has been around...
since the 1950s, working with young startups is a new and relatively unchartered territory for the union. The current trend is that more and more athletes will be jumping into tech. In fact, more than a dozen NBA players and other athletes came together at Bloomberg’s San Francisco bureau in early 2018 for the second annual Player’s Technology Summit organized by Andre Iguodala and Cline Thomas. Aside from creating business opportunities, the NFL Players Association is hoping to provide its players with better, more efficient avenues to bring athletes and entrepreneurs together.

Moreover, the use of technology in contact sports has generally grown a lot within the last few years. It can help athletes to legally push the limits of their performance. With these technological advances, things that were only possible to be measured in the laboratory are now available during practices and games. Scientists can now measure how focused, ready, and warmed up a player is. These new techniques provide data on an athlete’s ideal ranges of motion or muscle activity. This is crucial information for performance but more importantly, crucial to evaluate and train ideal conditions to prevent injuries. The future of sports and technology is bright. There are plenty of reasons to be excited for and to be looking forward to the future of sports performance.

**POLITICAL DEVELOPMENTS AFFECTING THE SPORTS AND ENTERTAINMENT INDUSTRY**

**Activism and Use of Social Media**

What right do professional football players in the NFL have to express their political views both on and off the field? Should they be able to use their social media platforms for political protest? And where exactly is the line between advocacy and disruptive controversy? Those questions were at the heart of this year’s ABA Sports and Entertainment General Counsel panel discussion. During the past few years, we have seen a wave of on-field protests, with multiple players opting to take a knee during the playing of the national anthem in protest of political issues that included police brutality and systemic racism. This drew both support and criticism from fans and sharp condemnation from President Trump. It has also led to some players wondering whether the First Amendment even still applied to them. Historically, NFL or NBA owners have always won their public relations battles. However, today’s players have a tool they can use to try and reframe the protests, and keep the focus on their message: social media. With the help of Instagram, Facebook, and Twitter, they can communicate directly with fans and seize control of the narrative. The phenomenon of instant communication and virtual community provides that opportunity.

The latitude of platforms for self-expression also helps push the discussion into public forums. On the flip side, it can also cause harm to the athlete’s value or that of the team. For this reason, the NFL gives individual teams the authority to develop social media guidelines for players and other employees which should be professional, accurate, and consistent with the NFL and club’s mission values. Profane tweets, trash-talking, or any other violation of the league’s rules for social media use can trigger a penalty by the ruling league or the team of the athlete. Although some players can criticize each other through social media, some teams are asking players to refrain from voicing out on current issues. Others voluntarily refrain from criticizing each other out of fear of overstepping the blurry line and facing disciplinary action. The guidelines of social media could also differ depending on where the players play. According to the associations, a social media policy must not conflict with the collecting bargaining agreement in place. “If players want to engage in social issues and it does not violate certain policies, they can do whatever they want as long as they understand the impact it can have on them, their respective teams, and others” said Foster. In an effort to educate players on what teams and the leagues deem appropriate, teams have now partnered with social media companies to advise players on how to conduct themselves on Twitter, Facebook, and Instagram.

**HOLLYWOOD’S SEXISM AND EFFECTS OF #METOO MOVEMENT**

Stories of sexual harassment, assault, and widespread abuses of power have rocketed industries around the US and the world, but none has been more shaken than the entertainment industry. The #MeToo movement began in October 2017, with the dozens of women who accused film executive Harvey Weinstein of sexual harassment, abuse or rape. On October 5, the New York Times printed the first allegations and the mogul was fired. On October 15, Alyssa Milano suggested on her Twitter account that anyone who had been “sexually harassed or assaulted” should reply to her Tweet with “#Me Too.” What has changed for the entertainment industry? How does the movement affect the work of in-house counsels? #MeToo has triggered awareness of harassment, demanded reform, and made it easier for victims to report offensive behavior, especially among larger corporations. State and federal legislators introduced over 80 bills aimed at fighting sexual harassment. Much of this change focuses on the workplace. An inadequate response from companies puts them at risk for even greater damage. Therefore, most Hollywood studios and companies say they have tried to prevent harassment and maintain a harassment-free environment by retraining their staffs on harassment and unconscious bias. In addition, companies have established official channels for reporting, and created a level of transparency to help observe the engagement between the company and its employees. Others, however, refuse to talk about how they address sexual harassment. Influential organizations across the board have been updating their rules with the idea of encouraging members to stop bad behavior when they see it. The Producers Guild, the Directors Guild, the Screen Actors Guild and the Academy of Motion Pictures Arts and Sciences have all instituted new codes of conduct setting out the standards of decent, professional behavior, as well as the penalty of breaching them. There is a widespread sense that the current reckoning is long overdue. Even before the #MeToo movement, however, in-house counsels were already losing sleep over existing cases.
financial rules and filings, Dodd-Frank and Affordable Care Act requirements, as well as compliance with new data protection regulations to prevent massive information hacks. With the lawsuits resulting from the latest incident, lawyers at big Hollywood firms and general counsels are currently the busiest people in town.

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ENDNOTES
4 Id.
8 Jen Booton, Cristiano Ronaldo is One of the World’s Most Tech-Savvy Pro Athletes, SportTechie (June 2, 2017), https://www.sporttechie.com/cristiano-ronaldo-one-worlds-tech-savvy-pro-athletes/.
13 Id.
14 Id.
17 Id.
18 Id.
23 Id.
25 Id.
A Review of *The Essential Guide to Entertainment Law: Dealmaking*

By Jay Shanker and Kirk Schroder

Valencia King

The *Essential Guide to Entertainment Law: Dealmaking* (EG2L) truly is a fundamental resource for recent law graduates in entertainment law, as well as entertainment attorneys. EG2EL explores the strategies of dealmaking in film, television, music theater, book publishing, electronic gaming, and entertainment industry taxation.

Most casebooks and treatises provide law and precedent that can be difficult to understand due to excessive legalese, making the reader feel as though they are reading another language. Here, the authors/editors of EG2L, Jay Shanker and Kirk Schroder, explain the legal and business complexities within the entertainment industry in a manner that even a layperson can understand. Moreover, fifteen highly esteemed entertainment attorneys join Jay Shanker and Kirk Schroder as co-authors, providing an in-depth understanding and knowledge to the subjects presented throughout the book.

EG2L consists of two volumes in the series: basics of dealmaking, and intellectual property law principles and issues. The text contains fifteen chapters, each on a different subcategory in the entertainment industry including film, music, electronic gaming, and representation by agents and managers. The text is organized as a reference guide, although it could be read from cover to cover as well. For example, a reader can look at the index or the illustrative forms list in the back of the book to quickly refer to a particular subject. At the beginning of the book, the Contents section outlines each chapter with sub-topics broken down into an outline format as a quick reference guide also. The Glossary of Terms, which are tucked into the last few pages, is an added bonus to assist in providing a clear-cut understanding of the industry terminology.

EG2L includes illustrative form agreements which coincide with the information presented in the book. At the end of each chapter, there is a list of the illustrative forms that accompany that particular chapter’s text. When the book is purchased, the reader receives a confirmation code to access the form agreements, which are only available online. Referencing the form agreements in tandem with the text would provide even greater hands on skills to help further one’s legal knowledge and skill in entertainment law. However, the form agreements are not necessary for a clear understanding of the concepts of each subject because EG2L provides concise and detailed concepts.

For example, Chapter 8 discusses Music Publishing Law. This chapter lists the primary agreements that are utilized in the music publishing area. Some examples of agreements commonly used are: The Single-Song Agreement, the Exclusive Songwriter Agreement, the Co-Publishing Agreement, the Participation Agreement, and the Administration Agreement among many others. Chapter 8 further outlines each agreement by detailing the parties involved, when to implement certain agreements, and the essential provisions to be included in each agreement.

Furthermore, the chapters contain the basic principles and elements underlying the agreements that are utilized in the entertainment industry. Each co-author offers a distinct approach to the subjects in the book while providing clear examples of legal and business practices. Graphs and charts are sprinkled throughout the book to further illustrate points in the text. On the same hand, the footnotes provided in the chapters identify sources of case law and statutory law.

The final chapters of the book provide an analysis on structuring an entertainment entity, tax considerations, concerns regarding “boilerplate” provisions in contracts, and the role of agents and managers in the entertainment industry. The final chapter, Developing an Entertainment Law Practice, reflects the editor/author’s insights on the role of entertainment attorneys, and ethical matters that arise. Moreover, the final chapter offers invaluable advice to those attorneys who are novices in the entertainment law field. In particular, a new entertainment attorney can learn about trends and developments within the industry by subscribing to entertainment trade papers such as The Hollywood Reporter or attend legal seminars that pertain to the entertainment industry.

EG2L takes the wide range of issues encountered in entertainment law and addresses each issue in a concise and comprehensive method. The text not only encompasses the fundamentals in each sector of entertainment law, but it explores common concerns and minute details that could cost you a deal as well. For instance, Chapter 1 introduces the reader to the subject of “Motion Picture Development and Production.” The chapter first reveals the responsible party for ensuring all of the requirements are met for the development, financing, and production of a motion picture. The chapter details the underlying rights, what those rights are, how to acquire those rights, and how to ensure third parties have rights they claim to have. The chapter also explains the different agreements used throughout the development process and the collective bargaining organization that may govern those agreements.

This piece is a far cry from any casebook or study guide for entertainment law. With the abundance of information provided in the text, it does not just teach readers the baseline fundamentals of entertainment law and industry transactions; EG2L also offers readers practical guidelines, explanations, and real-world approaches to enable
law students, recent graduates, or experienced attorneys to become efficient in developing and recognizing dealmaking opportunities and challenges.

Regardless if you are a new practicing entertainment attorney or are a seasoned entertainment attorney, EG2L will provide a roadmap to navigate through negotiations and deals within the entertainment industry. The book’s use of illustrations within the chapters breathe life in legal subjects that can be challenging to understand in a practical sense. EG2L is a must-have whether you are a seasoned attorney utilizing the book as a reference or if you are a less experienced attorney who needs a refresher on particular issues. The best part: EG2L can be read from cover to cover or just referenced when addressing specific issues.

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