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Product Endorsements

Beware of New FTC Guides

BY PAMELA M. DEESE

The opportunity to endorse a product means many things to an athlete or celebrity. Most often it suggests that you have arrived at a status where someone is willing to pay you because they believe that consumers will be motivated to act based on your recommendation. In fact, there is more to simply saying a product changed your life than an unwary endorser might recognize. The U.S. Federal Trade Commission ("FTC") actually developed policies known as "Guides" that provide the template for appropriate participation in the business of product endorsements.

The *Guides Concerning the Use of Endorsements and Testimonials in Advertising* as revised contain two key aspects that advertisers and endorsers should take note of: First, there are changes pertaining to consumer endorsements, which eliminate the "results

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The Robot's Record

Protecting the Value of Intellectual Property in Music When Automation Drives the Marginal Cost of Music Production to Zero

BY WILLIAM JACOBSON

The following essay is the overall winner of the GRAMMY Foundation®'s 13th annual Entertainment Law Initiative ("ELI") writing competition, open to students of all ABA-accredited law schools. The competition invites students to research, analyze, and submit essays regarding a compelling issue facing the music industry and propose a solution. It promotes future careers in entertainment law by seeking out the nation's top law students and giving them invaluable networking and educational opportunities. A national panel of legal experts judges the papers in a blind process and selects five finalists, including an overall winner. The ELI writing competition awards over $20,000 in scholarships, including all-expense-paid trips for the contest winners to

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PROFILE

Stephanie Vardavas

BY MATTHEW KIMMEL

Stephanie Vardavas wakes up in the morning facing a decision most would find daunting: What shall I do next? In depth and breadth, Vardavas' career is enviable of sports law practitioners many years her senior and now, after nearly 14 years working in the general counsel's office at Nike, after corporate and departmental reorganizations, it is once again time to find a new challenge. For her, though, the proposition is an opportunity. She credits her successes not to her sterling academic credentials or creative legal mind, but to her willingness to tackle new challenges: "Every professional job that I've ever had has exposed me to more, not fewer, possibilities. If I hadn't left Major League Baseball ("MLB") when I did and gone to work at ProServ, I would never have been exposed to tennis, golf, basketball, or football. And, in leaving ProServ and coming to Nike, I have just amped up the types of work and issues I've been exposed to. Most lawyers become more specialized as they practice longer. For me, happily, it has been exactly the opposite." At this writing, Vardavas is preparing to leave Nike for her next opportunity. Her next stop, no doubt, will utilize the skills that she has developed throughout a robust

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ENTERTAINMENT AND SPORTS LAWYER

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Message From the Chair

Dear Forum Members:

One of my favorite newspaper columnists was Warren T. Brookes, who passed away many years ago. Once he wrote a column, published on Thanksgiving Day, titled "The Power of Thanksgiving." In that column he observed, "There seems to be a metaphysical law that just as the appearance of good in our lives elicits gratitude, gratitude itself, unconditional and pure, seems to elicit more good."

Brookes' observation of this universal law of life best describes my journey as chair of our Forum. Why? Well, none of it would have happened but for the goodness I received along the path to my selection as Forum chair. That path started as the Forum's Young Lawyer Division representative. It was followed by a lengthy stint as the Forum's budget chair, and then to an opportunity I never considered possible: serving as chair of our Forum. I assure you, none of the words I am about to write can truly express or describe the gratitude I felt as such goodness accompanied me along the way. Sure, that seems a bit sappy and overdone for a "goodbye" column from a Forum chair. However, if my path to Forum chair is not indicative of the goodness that exists in our Forum, then you really don't know much about our Forum and you should get more involved.

Simply put, my time as Forum chair has been a labor of love. Our Forum is blessed with so many wonderful, generous, and kind individuals—and many of them are among the top practitioners in the field of entertainment and sports law. There is this guy named Ed Pierson who took the gamble on appointing me as Forum budget chair. Then these other Forum chairs, Michael Rudell and Pam Lester, helped me figure things out while in that post. Then, even more Forum chairs had to put up with me: Joel Katz, David Given, and Ken Abdo, until the time when my predecessor, Lon Sobel, called me to say that my name had been placed into nomination as chair-elect. Of course, there are many other Forum members, too many to mention, whose relationships I cherish and for whose friendships I am most grateful. Our current Governing Committee is among the best that I have seen in our Forum. I thank them for their dedication and for being all-around good souls (including Peter Dekom). Our Forum is blessed by an outstanding ABA staff. I am grateful to Kelly Rodenberg, director of the ABA Forums, for her support and interactions; and to Dawn Holiday, our prior Forums manager, for her hard work and dedication. I especially want to thank Teresa Ucok, our current Forums manager. Being Forums manager is essentially a thankless job. Teresa does it with such grace, patience, and skill. It has been a true joy to work with her over the years. I will miss working with her.

Christine Lepera of Mitchell Silberburg and Knupp in New York City will succeed me as Forum chair. She is an outstanding person and will be a great leader for our Forum. Christine's history and knowledge of the Forum will take the Forum to new levels. She is a very open and an approachable leader. If you have an opportunity, please contact her and offer your support and assistance.

Like other endeavors in life, our Forum is essentially whatever time and effort you put in and make of it. Like many of you who have taken time to read this far, you may not know many people in our Forum. You may feel that getting involved may take too much time and effort. You may have a variety of other reasons as to why trying to increase your involvement with the Forum may not be possible. Yet, I assure you that there was a time when I experienced many similar thoughts and could not imagine how someone practicing entertainment law from a secondary market like Virginia could do much in our Forum except attend meetings and collect some business cards. In reflecting on my achievements within our Forum, it just took extra time and effort. And what I made of it was far more than worth it.

Finally, it has been a joy and honor to meet and get to know many of our members either at Forum events and/or through correspondence. I am always fascinated with the many paths our members take to practice in the entertainment and sports fields. You are a testament to how anything is possible. I thank you and wish you all the best. My gratitude for my time as Forum chair will always remain with me.

Kirk T. Schroder
Schroder Fidlow, PLC
Forum Chair

Very Much Ado About . . . Nothing

An Analysis of the Impact of American Needle v. NFL *on Collective Bargaining and Merchandising in Professional Sports*

BY IRWIN A. KISHNER AND JULIE ALBINSKY

A year has passed since the Supreme Court issued its much-anticipated decision in *American Needle, Inc. v. National Football League*,[1] the case that inspired headlines such as "Antitrust Case Could Be Armageddon" and "Why American Needle-NFL Is Most Important Case in Sports History" in the popular press.[2] On May 24, 2010, what turned out to be a not-so-fateful day after all, the Court ruled against the NFL, refusing to grant it "single entity" status and effective immunity from section 1 of the Sherman Antitrust Act, and held that the NFL's actions would continue to be subject to antitrust scrutiny. A year later, after some of the dust has settled, is a good vantage point from which to evaluate what impact the decision has had on the business of professional sports and whether any of the doomsday scenarios or grave consequences predicted by various commentators have come to fruition. There is a short and anticlimactic answer: It remains business as usual in the world of professional sports, as *American Needle* has not had much of an impact.

BACKGROUND

The story of *American Needle* began in 2001, when National Football League Properties ("NFLP")—the entity that develops, licenses, and markets the intellectual property of NFL teams and of the NFL—granted an exclusive license to Reebok to use all NFL club marks and logos for uniforms, sideline apparel, headwear, and fitness equipment. Prior to 2000, NFLP granted nonexclusive licenses to various manufacturers, including American Needle, Inc., which had a nonexclusive license to manufacture NFL logo caps for 20 years. When the NFLP granted an exclusive license to Reebok, it did not renew any of the other licenses. American Needle brought suit in the Northern District of Illinois against the NFL, the NFLP, individual NFL teams, and Reebok, alleging violations of section 1 (which makes illegal any "contract, combination . . . or conspiracy, in restraint of trade or commerce") and section 2 (which prohibits monopolies) of the Sherman Act.[3]

The NFL, employing a defense strategy that has become standard among professional sports leagues when faced with an antitrust challenge,[4] argued that it is a "single entity" and is therefore not subject to section 1 of the Sherman Act. Because the elements of a section 1 violation are (1) an agreement (2) that unreasonably restrains competition and (3) that affects interstate commerce, the "single entity" argument defeats the first element, as it is impossible for a single entity to agree or conspire with itself.

The NFL is not a clear-cut example of a "single entity" because it is made up of 32 separately owned teams. Although the NFL, among other things, sets and enforces rules and policies, regulates team ownership, and negotiates labor agreements, the individual teams are owned and managed by independent owners. In the context of the NFL—or the NBA, MLB, or NHL for that matter—the question becomes whether the league is more akin to a collection of McDonald's franchises (interconnected entities with a common interest) or a collusion among McDonald's, Wendy's, and Burger King.[5] Professional sports leagues, including the NFL, have persistently raised the "single entity" argument in most antitrust cases in which they have been involved over the past few decades and have been uniformly unsuccessful.[6] The argument is attractive, and the leagues have, understandably, continually tried to raise it because obtaining "single entity" status would mean immunity from section 1 antitrust scrutiny and the costly, protracted, discovery-heavy lawsuits that rule-of-reason analysis under section 1 often entails.

The district court, on a motion for summary judgment, dismissed American Needle's Sherman Act claims, holding that because the NFL was acting as a single entity, its conduct could not be challenged as a conspiracy among competitors.[7] American Needle then appealed to the Seventh Circuit, which affirmed the lower court's ruling and held that the NFL is a single entity for the purpose of intellectual property licensing.[8] The Seventh Circuit decision was a momentous break with the holdings of almost every other court that had examined the issue, including the First, Second, Third, and Ninth Circuits, as well as a multitude of lower courts, which all found that "single entity" was not appropriate for professional sports leagues and that their actions should be subject to antitrust scrutiny under section 1.[9]

SEVENTH CIRCUIT DECISION

The rationale of the Seventh Circuit decision relied on *Copperweld Corp. v. Independence Tube Corp.*,[10] in which the Supreme Court held that a parent corporation and its wholly owned subsidiary are a single entity for antitrust purposes. In *Copperweld*, the Supreme Court made the distinction between "concerted" and "independent" or "unilateral" action, stating that it is concerted action that is the concern of section 1 as it "deprives the marketplace of the independent centers of decision making that competition assumes and demands" (while independent action triggers only section 2 and is unlawful only when it threatens actual monopolization, as opposed to the lower threshold of a restraint of trade under section 1).[11] The central concern of section 1 is that competitors or potential competitors are colluding to restrain trade, which is harmful to consumers. When a unilateral actor is concerned, there can be no question of competition or potential for competition to begin with. The Supreme Court reasoned that it is impossible for a parent and its wholly owned subsidiary to conspire because they "have a complete unity of interests . . . [and] their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one," analogizing them to "a team of horses under the control of a single driver."[12] The Supreme Court further reasoned that because there is "no sudden joining of economic resources that had previously served different interests, there is no justification for Section 1 scrutiny."[13]

The Seventh Circuit held that "the question of whether a professional sports league is a single entity should be addressed not only one league at a time, but also one facet of a league at a time" because in some contexts a league is more aptly described as a single entity (e.g., fans view the league as a single source of entertainment that produces one product) and in others as a joint venture between independently owned teams (e.g., from the perspective of an individual seeking employment with a team, the league is a loose affiliation of companies), and thus narrowed its focus to only the intellectual property licensing activities of the NFL.[14] The Seventh Circuit interpreted *Copperweld* not to require "complete unity of interest" for a single-entity determination because even a single firm contains many competing interests and stated that the focus of the analysis should be on "whether the conduct in question deprives the marketplace of independent sources of economic control."[15] The court found that "[c]ertainly the NFL teams can function only as one source of economic power when collectively producing football."[16] The rationale was essentially based on three arguments: (1) at least two teams are needed to play football games, so no team can produce a football game alone; (2) a league competes with other forms of entertainment; and (3) most importantly, as the court said, "since 1963, the NFL teams have acted as one source of economic power—under the auspices of NFLP—to license their intellectual property collectively and to promote NFL football."[17]

ON TO THE SUPREME COURT

After its loss at the Seventh Circuit, American Needle appealed to the Supreme Court. In a very unusual move, the NFL supported the certiorari petition. In responding to the NFL's decision to support the petition, Drew Brees, the quarterback of the New Orleans Saints, compared it to "[asking] an official to review an 80-yard pass of [his] that had already been ruled a touchdown."[18] The NFL already won the case and had gotten a circuit court to grant it single-entity status in one arena (intellectual property licensing) in a decision that explicitly left room for expansion of single-entity status to other areas of NFL activity as well. A review of the decision by the Supreme Court held the very real risk of reversal and loss of potentially significant ground gained; however, the NFL decided to take the chance for a much bigger win—blanket single-entity status for the league and wholesale immunity from antitrust scrutiny under section 1. It is understandable that the NFL would be willing to take the risk. If the NFL lost at the Supreme Court (i.e., the Seventh Circuit would be reversed on its "single entity" holding), that would leave the NFL in substantially the same position as it had been in prior to the Seventh Circuit decision: having to defend itself in antitrust suits under rule-of-reason analysis (under which a court determines whether the pro-competitive effects of a given action outweigh its anti-competitive effects). However, a full win at the Supreme Court level, gaining wholesale single-entity status for the league, would be a true touchdown, as it would bring relief from costly, time-consuming, and resource-draining antitrust suits and would allow the NFL to act more freely without fear of antitrust scrutiny.

Save the Date!

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The Supreme Court granted certiorari and brought the focus of the nation on *American Needle*. Amicus briefs were filed by, among others, each of the professional sports leagues, by each of the players' associations for the leagues, by credit card companies (who had an interest in the case as joint ventures with analogous structures to professional sports leagues), and Electronic Arts, Inc. (which has an exclusive license to use NFL logos in video games and is the maker of Madden NFL). Antitrust scholars and sports law scholars began publishing analytical articles and holding conferences on the subject, and the popular press had a field day speculating about all the probable, possible, and conceivable outcomes and impacts of a Supreme Court decision on this issue.

PREDICTIONS OF "ARMAGEDDON"

Many speculated that if the Supreme Court granted single-entity status to the NFL, it would "create untouchable monster entities out of professional sports leagues"[19] and would have a host of wide-reaching implications for professional sports. As outlined by Kevin Mawae, the president of the NFL Players Association ("NFLPA"), during a Judiciary Committee hearing on the subject of *American Needle*, there could be multiple repercussions stemming from the grant of single-entity status to the NFL: (1) leagues would set ticket prices and would prevent teams from competing for fans; (2) free agency would end (i.e., the ability of a player to freely sign with another team once his contract expires); (3) salary schedules for players and coaches would be imposed; (4) all game broadcasts would be transferred to subscription channels; (5) taxpayers would be forced to subsidize all newly built stadiums; and (6) prices of sports merchandise, memorabilia, and games would rise while variety would decrease (as a result of exclusive licensing deals such as that with Reebok).[20]

Most of the alarmed reactions centered on the issues of free agency, player salaries, and labor negotiations in general. Under federal law, there is an antitrust safe harbor for collective bargaining between employers and unions; however, a union has the option to decertify, and the employees (in this case, the players) can bring an antitrust suit. The players' associations view the decertification option, and the threat of antitrust litigation that comes with it, as extremely valuable bargaining leverage. Because the NFL collective bargaining agreement was to expire on March 3, 2011, and the NBA and NHL collective bargaining agreements expire in 2011, while the Major League Soccer collective bargaining agreement expires in 2014, the threat of losing leverage generated much alarm. The players' associations feared that the leagues would be able to end or restrict free agency. For example, there could be a return to the days of the reserve rule in which a player's current team had an option to renew his contract indefinitely on the same terms with a set salary increase, or to the Rozelle Rule, where teams had one renewal option and were obligated to compensate one another for taking away a free agent, usually by giving away draft picks. They also feared that salary caps would be imposed and that, with the loss of free agency, salaries would be generally lower because teams would not compete (at all or as much) for players. In other words, the discourse centered around players' rights.

THE NFL DECIDED TO TAKE THE CHANCE FOR A MUCH BIGGER WIN—BLANKET SINGLE-ENTITY STATUS FOR THE LEAGUE AND WHOLESALE IMMUNITY FROM ANTITRUST SCRUTINY UNDER SECTION 1.

There was also concern for the welfare of fans—would the leagues, now free from antitrust restraints, impose high league-wide ticket prices; move all games to paid channels, charging high subscription prices (currently, most NFL games are on network television, because in order to license NFL rights in a bundle, the NFL takes advantage of the antitrust exemption afforded by the Sports Broadcasting Act, which only applies to network television); grant exclusive licenses in all areas (gaming, apparel, memorabilia), allowing vendors to raise prices because they would be the only game in town; and force taxpayers to subsidize new stadiums by artificially restricting the number and location of teams, thereby forcing cities to offer large incentives to attract or keep a team. Other industries kept close track of the case as well, because the structure of the leagues is analogous to many other types of joint ventures, and any ruling applicable to the leagues would also potentially impact such other joint ventures.

SUPREME COURT DECISION

After much dramatic speculation in the popular press by legal scholars and by those involved in the business of professional sports, the Supreme Court issued a unanimous opinion reversing the Seventh Circuit and holding that the NFL is not a "single entity" for antitrust purposes. Like the Seventh Circuit, the Supreme Court turned to *Copperweld* for its analysis, focusing on the distinction between concerted and independent action, emphasizing form over substance (e.g., whether the entities involved are legally separate entities is not dispositive), and stating that the "relevant inquiry is whether there is a 'contract, combination . . . or conspiracy' among 'separate economic actors pursuing separate economic interests, such that the agreement 'deprives the marketplace of independent centers of decision making.'"[21]

Justice John Paul Stevens, writing for the Supreme Court, reasoned that the NFL's actions are not independent but are concerted because "[e]ach of the teams is a substantial, independently owned, and independently managed business. Their general corporate actions are guided or determined by separate corporate consciousnesses and their objectives are not common," and further that the "teams compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel."[22] Importantly, the NFLP does not make licensing decisions, but, rather, the member teams vote to take action, and so the NFLP is "an instrumentality" of the teams.[23] Thus, although the teams have NFLP as a common promotional vehicle and have common interests in the NFL and football as a whole, and although cooperation among the teams is necessary in order to produce the product of "football," the same is true of all joint ventures that involve multiple sources of economic power cooperating to produce a product that none of them could produce alone.[24] The accepted antitrust analysis for joint ventures is rule of reason, which analysis focuses on whether the net effects of the action are pro- or anti-competitive (because section 1 only prohibits unreasonable restrictions on trade, not each and every restriction on trade).

THE SUPREME COURT MADE THE RIGHT CALL

Although the Supreme Court's decision in *American Needle* is unsatisfactory to antitrust law scholars because it does not provide a framework or any concrete guidance for "single entity" analysis going forward, in terms of the NFL (and by extension other similarly structured professional sports leagues), the Supreme Court decided correctly. Blanket "single entity" status for the NFL is clearly inappropriate, because the Dallas Cowboys and the New Orleans Saints, for example, cannot truly be said to have the same corporate consciousness and to be a single decision-making and economic power with respect to all of their activities just because they leave certain decisions regarding their collective activities to the NFL. The NFL is ultimately a joint venture among all of the independently owned and operated NFL teams, and as a joint venture, its various activities that are challenged under section 1 should be analyzed under rule-of-reason analysis. Admittedly, rule-of-reason analysis leads to very long and expensive lawsuits (because they tend to be discovery heavy and to require expert testimony); however, that is a cost of doing business for professional sports leagues that engage in a multitude of different collective activities with different levels of decision-making power by individual teams and other ever-changing variables.

IMPACT OF THE SUPREME COURT DECISION ON COLLECTIVE BARGAINING

The NFLPA regards the Supreme Court decision as a crisis averted and a victory in that they have maintained their leverage at the bargaining table (by retaining the option to decertify and bring an antitrust suit). In labor negotiations, the power is often skewed toward the employer, especially if, like the NFL, the employer is well capitalized to withstand prolonged work stoppages[25] and the employees fear losing working time, which is very true for football players because their careers are relatively short-lived. The NFL, on the other hand, seems unconcerned with the Supreme Court loss; NFL spokesman Greg Aiello has stated that the Supreme Court decision "doesn't change anything, it just puts it back where it was."[26]

The NFL collective bargaining agreement expired on March 3, 2011. Decertification was an unlikely option but became a reality when the required 30 percent of NFL players stated that they no longer wanted the NFLPA to represent them as their union through a petition filed to the National Labor Relations Board.[27] Subsequent to decertification, the players filed an antitrust suit against the NFL[28] and an action to enjoin the owners from imposing a lockout.[29] Decertification followed by an antitrust lawsuit was a last-resort strategy because it is very risky and costly. By decertifying their union, the players lose all benefits contained in the collective bargaining agreement (including pensions, insurance, and medical benefits). Also, an antitrust lawsuit is time-consuming (it can last for years) and costly for both sides, requiring extensive discovery and expert testimony. In 1989, the NFLPA decertified, and four players brought an antitrust suit, which was successful and resulted in a subsequent class action suit and ultimately a favorable settlement. The NFL, faced with treble damages for each plaintiff and the threat of unfavorable precedent, agreed to pro-player terms in the collective bargaining agreement, including free agency.[30]

It should be noted, however, that from 1999 to 2009, defendants won 221 out of 222 antitrust cases.[31] In other words, just because the players brought an antitrust suit against the NFL (which option was preserved by the Supreme Court's decision in *American Needle*) does not mean that it is a sure victory; it is merely the first step in a long and costly process, where a win is anything but guaranteed. *American Needle* did not put the players in a better position; it simply preserved the status quo.

As of the date this article was written, the NFL and NFLPA are embroiled in a legal battle. The two sides were unable to reach an agreement prior to the expiration of the Collective Bargaining Agreement, and so the NFLPA decertified as a union and NFL players filed an antitrust suit against the NFL "seeking a minimum of $707 million in damages, as well as an injunction to prevent the league from accepting more than $4 billion in television revenue during the lockout."[32] The NFL responded by instituting a lockout and took "an aggressive step towards disarming [the antitrust lawsuit] . . . [by filing] an unfair labor practice charge with the NLRB, arguing that the NFLPA's decertification is a sham and violates the union's duty to bargain in good faith,"[33] which charge is still pending with the NLRB. After Judge Susan Richard Nelson of the U.S. District Court for the District of Minnesota granted on order to end the lockout in late April,[34] the NFL appealed to the 8th U.S. Circuit Court of Appeals. The appellate court granted a temporary stay of Judge Susan Richard Nelson's order lifting the lockout,[35] and subsequently the same court decided to expedite the hearing on the N.F.L.'s appeal of the injunction that stopped the league's lockout to June 3.[36] The mediation talks that have been a failure up to this point are also set to resume on May 16, 2011.[37]

IMPACT OF SUPREME COURT DECISION ON MERCHANDISING AND OTHER SPHERES

Another anticipated effect of *American Needle* was that it would embolden other plaintiffs to bring antitrust suits against the NFL and other leagues for anticompetitive arrangements; for example, the NFL's exclusive license with Electronic Arts (the maker of the Madden NFL video game). So far, this has not come to fruition. After all, the Supreme Court did not rule that the NFL was doing anything illegal, but that its actions would be subject to scrutiny under rule of reason. The NFL seems confident that it will prevail in defending itself against American Needle's antitrust claims and, statistically, its chances are high because, as stated above, 221 out of the 222 antitrust cases in the last decade were decided for defendants.[38]

Justice Stevens' opinion in *American Needle* stated, "[f]ootball teams that need to cooperate are not trapped by antitrust law. The special characteristics of this industry may provide justification for many kinds of agreements . . . [and] for making a host of collective decisions."[39] Justice Stevens also quoted the Supreme Court's decision in *National Collegiate Athletic*

Ass'n v. Board of Regents[40]: "the 'interest in maintaining a competitive balance among athletic teams is legitimate and important' . . . [and is] unquestionably an interest that may well justify a variety of collective decisions made by the teams."[41] This dicta may be looked to by the lower court in conducting their rule-of-reason analysis; however, the Supreme Court did not provide any concrete guidance or framework for applying section 1 to sports leagues. Again, *American Needle* did not change the landscape, but, rather, it preserved the status quo and merely reversed the decision of an outlier circuit court. Jeff Pash, the NFL executive vice president of Labor and League counsel, has said, "as a practical matter, [the *American Needle* decision] means that we have to be prepared to litigate [antitrust] claims the way we have litigated them for 25 or 30 years [under Rule of Reason] . . . it is no uninterrupted string of victories, but we have a pretty good track record in these cases."[42]

CONCLUSION

American Needle is an ongoing story, because the case has yet to be reconsidered by the lower court to which it has been remanded. However, after much sound and fury following the Seventh Circuit decision and leading up to the Supreme Court decision, *American Needle* has had little, if any, practical impact on the business of professional sports. The decision has preserved the status quo, leaving the NFL and other sports leagues in the same position—having to defend themselves under the rule of reason in antitrust suits while being subject to the continued strategy of decertification and antitrust lawsuits during collective bargaining negotiations. ❖

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

Julie Albinsky is a corporate associate at Herrick, Feinstein LLP whose practice includes lending, sports law and general corporate and contract transactions. She can be reached at jalbinsky@herrick.com.

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37. Sean Leahy, *NFL mediation talks break until May 16; sides await judge's ruling*, www.usatoday.com (April 20, 2011).

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42. *See NFL's Jeff Pash on American Needle*, *supra* note 38.

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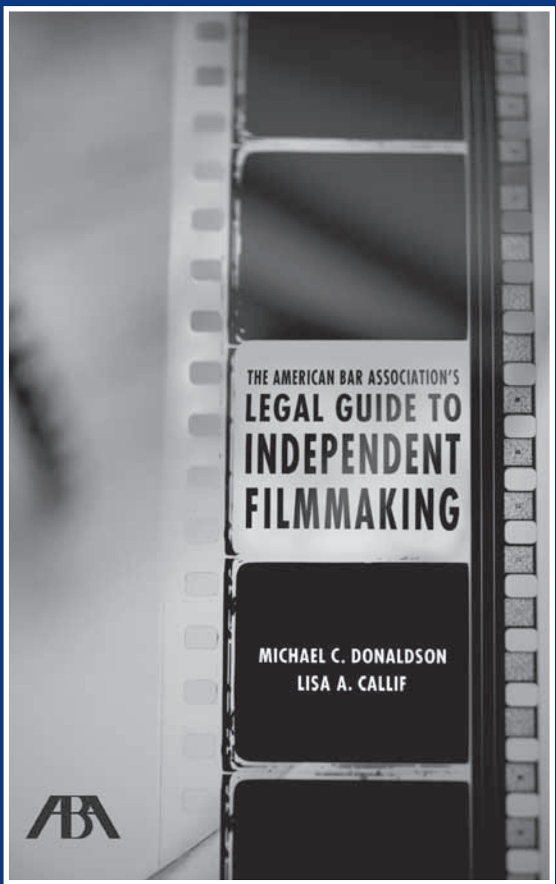

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F.B.T. v. Aftermath

Eminem Raps the Record Industry

BY EDWIN F. MCPHERSON

In typical modern recording agreements, an artist receives anywhere from 15 to 20 percent of the "Published Price to Dealers" ("PPD") for physical recordings (primarily compact discs) that are sold through "normal retail channels."[1] Previously, artist royalties were based on the "Suggested Retail List Price" ("SRLP"), with many deductions. However, with respect to music that is "licensed" to third parties, the artist typically has always received 50 percent of the net income that the label receives for that licensed music. There has been very little variance of these principles from recording agreement to recording agreement, or even from record label to record label.

For many years, these provisions remained virtually unchanged and unchallenged, and the labels paid the artists accordingly (though typically insufficiently). Since the advent of downloadable music, however, these provisions have been illuminated and have given music lawyers everywhere fodder for intense discussion. The main issue has been how to treat digital downloads; essentially, are they recordings sold through "normal retail channels" or are they licenses? The difference could be in excess of $2.00 per album. Quite obviously, for an A-list artist, the difference could be worth millions of dollars.

However, this discussion was just theoretical until the Ninth Circuit case of *F.B.T. Productions, LLC, et al. v. Aftermath Records, etc., et al.*,[2] in which the Ninth Circuit Court of Appeals held, as a matter of law, that digital downloads and mastertones are licenses, and that they are therefore subject to the 50 percent license fee rather than a much smaller percentage royalty.

F.B.T. Productions, LLC is a production company that is owned by Mark Bass, Jeff Bass, and their manager, Joel Martin. In 1995, F.B.T. signed an artist named Marshal B. Mathers III to an Exclusive Artist Recording Agreement. Mathers is professionally known as Eminem. According to Aftermath, F.B.T. was entirely unsuccessful in its attempts to market and package Eminem, with its first Eminem album selling only 30 copies.[3]

However, while F.B.T. was promoting Eminem across the country, a junior employee of Interscope Records saw his Los Angeles performance and brought a copy of his CD to Jimmy Iovine, the president of Interscope. Iovine gave the CD to Andre Young, who is professionally known as Dr. Dre. Dr. Dre, Interscope, and UMG Recordings, Inc. are co-owners of a record label called Aftermath Records. Dr. Dre loved the CD and immediately entered into a recording agreement on behalf of Aftermath with F.B.T. (the 1998 agreement), pursuant to which F.B.T. transferred the rights to Eminem's exclusive recording services to Aftermath.[4]

Eminem has since become a superstar and has sold tens of millions of records. F.B.T. has received millions of dollars in royalties, which they continue to receive today, based on Eminem's record sales.[5]

The 1998 agreement was based on a form contract that was drafted by A-list music attorney Peter Paterno.[6] Eminem's transactional attorney was another A-list music attorney, Gary Stiffelman.[7] In accordance with the *Records Sold* provision of the 1998 agreement, F.B.T. was to receive between 12 and 20 percent of the adjusted retail price of all "full price records sold in the United States . . . through normal retail channels." However, with respect to music that is *licensed*, the *Masters Licensed* provision of the agreement provided that "[n]otwithstanding the foregoing," F.B.T. was to receive 50 percent of Aftermath's net receipts "[o]n masters licensed by us . . . to others for their manufacture and sale of records or for any other uses."[8] During the negotiation of the agreement, the parties had no discussion about either the *Records Sold* provision or the *Masters Licensed* provision.[9]

The agreement defined "master" as a "recording of sound, without or with visual images, which is used or useful in the recording, production or manufacture of records." However, there was no definition in the agreement of the terms "licensed" or "normal retail channels."[10]

In 2000, F.B.T., Eminem, and Aftermath entered into an amendment to the 1998 agreement (which Aftermath describes as a "novation"), which created a "direct relationship between Aftermath and Eminem" and made F.B.T. a "passive income participant," no longer "furnishing the services of" Eminem. In accordance with the 2000 agreement, F.B.T. received 40 percent of every dollar payable to Eminem.[11] Although the royalty rate under the *Records Sold* provision was increased, the substance of both provisions was unchanged.[12]

Commencing in 2001, Aftermath's parent company, UMG, started distributing its recordings in digital formats as permanent downloads through numerous companies, including Apple's iTunes store, its agreement with which was concluded in 2002. In addition, commencing in 2003, UMG began entering into agreements with major cellular telephone network carriers to sell downloads as mastertones (popularly known as "ringtones").[13]

Commencing in approximately 2002, UMG amended its form agreements to include an express provision dealing with digital downloads. Under the new agreements, digital downloads were to be paid to the artists as traditional record sales, and not as licenses, even if the agreements with the providers were actually licenses. However, for existing recording agreements, UMG came up with a new royalty structure for permanent downloads and mastertones, and offered to amend those existing recording agreements accordingly. Neither Eminem nor F.B.T. agreed to such an amendment.[14]

In 2003, Eminem and Aftermath entered into a new recording agreement that terminated the 1998 agreement. Although the 2003 agreement increased certain royalty rates and made a number of other changes (including a sizable advance[15]), it incorporated the wording of the *Records Sold* and *Masters Licensed* provisions from the earlier agreement (without the express digital royalty structure).[16]

However, in 2004, the agreement was amended specifically to address permanent downloads, as follows: "Sales of Albums by way of permanent download shall be treated as [U.S. Normal Retail Channel] Net Sales for the purposes of escalations" (increases in royalty rates when the artist exceeds certain album target sales). There were no other modifications to the 2003 agreement.[17]

In 2006, F.B.T. and Eminem conducted a royalty audit and discovered, among other deficiencies, that Aftermath had been paying F.B.T. for permanent downloads and mastertones in accordance with the *Records Sold* provision in the agreement (12–20 percent). F.B.T. and Eminem believed that they should have been paid in accordance with the *Masters Licensed* provision. F.B.T. commenced litigation against Aftermath and its distributors shortly thereafter.[18]

UNDER THE NEW AGREEMENTS, DIGITAL DOWNLOADS WERE TO BE PAID TO THE ARTISTS AS TRADITIONAL RECORD SALES, AND NOT AS LICENSES, EVEN IF THE AGREEMENTS WITH THE PROVIDERS WERE ACTUALLY LICENSES.

During the litigation, all parties agreed that, traditionally, the only transactions that had triggered the *Masters Licensed* provision were with third parties that were using Eminem master recordings in those third parties' products; in other words, Eminem masters that were used in a third party's soundtrack or on a compilation album that included other artists' master recordings.[19] However, F.B.T. insisted that the provision was not limited to these pre-download uses.

F.B.T. therefore filed a motion for summary judgment to establish that the *Masters Licensed* provision was unambiguous and that permanent downloads and mastertones were subject to that provision, as a matter of law. Aftermath filed a cross-motion, arguing that the 2004 amendment made it clear that the parties intended that permanent downloads and mastertones were subject to the *Records Sold* provision.[20]

In order to determine whether or not the recording agreements were ambiguous, the district court provisionally reviewed the undisputed extrinsic evidence that was offered by both parties and concluded that both parties' interpretations were reasonable.[21] The court determined that summary judgment was only appropriate if the agreements were unambiguous, and that, because the agreements were "reasonably susceptible to more than one interpretation, they were not unambiguous." The court therefore denied both motions.[22]

In its ruling, the district court noted that there was evidence that would support a finding that at least some of the agreements between the defendants and the third-party permanent download providers were licenses. However, the court declined to rule as a matter of law that the agreements before it were in fact licenses.[23]

The case ultimately went to trial, which commenced on February 20, 2009. Evidence was presented by both sides of the parties' supposed intentions in connection with the negotiation of the *Records Sold* and the *Masters Licensed* provisions. After the close of evidence, Aftermath moved for judgment as a matter of law, which motion was denied by the court.[24]

The jury found in favor of Aftermath on Count I (breach of contract) and in favor of F.B.T. on Count II (misallocation of expenses between F.B.T. and Eminem). Thereafter, the district court found in favor of Aftermath on Count III (declaratory relief on download issue) and entered final judgment on all three counts.[25] The court then awarded Aftermath attorney fees in excess of $2.4 million, notwithstanding that F.B.T. prevailed on the second count.[26]

WHEN A COPYRIGHT OWNER TRANSFERS A COPY OF A WORK, RETAINS TITLE TO THAT WORK, LIMITS THE COPY'S USE, AND IS COMPENSATED PERIODICALLY BASED ON THE TRANSFEREE'S EXPLOITATION, THAT TRANSACTION IS A LICENSE.

The Ninth Circuit started by noting that it could review the denial of F.B.T.'s motion for summary judgment notwithstanding the subsequent jury trial, particularly when the lower court's ruling determined that an agreement was ambiguous. The court then reviewed California law, observing that, in California, "the language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity." Parol evidence is only considered when a contract is ambiguous.[27]

The court held first that the district court erred in determining that the recording agreement was ambiguous. Aftermath had argued on summary judgment that the *Records Sold* provision applied because permanent downloads and mastertones are "records" and that digital music providers are "normal retail channels" in the United States. However, the agreement provided that "notwithstanding" the *Records Sold* provision, F.B.T. was to receive a 50 percent royalty on "masters licensed by [Aftermath] . . . to others for their manufacture and sale of records for any other uses."[28]

The court noted that the parties' use of the word "notwithstanding" after the *Records Sold* provision "plainly indicates that even if a transaction arguably falls within the scope of the *Records Sold* provision, F.B.T. is to receive a 50 percent royalty if Aftermath licenses an Eminem master to a third party for 'any' use." The court then stated that, although the *Masters Licensed* provision is broad (because it applies to masters that are licensed to third parties for the manufacture of records "or for any other uses"), its breadth does not make it unclear or ambiguous.

The next step for the court in determining whether the *Masters Licensed* provision applied was to determine whether Aftermath licensed Eminem masters to third parties. Aftermath argued that the word "licensed" was never used "in a technical sense," and that, therefore, the ordinary sense of the word must control, which, according to Webster's, is simply "permission to act." The court ruled that, because Aftermath entered into agreements that permitted iTunes and others to "use its sound recordings to produce and sell permanent downloads and mastertones," the agreements therefore qualified as licenses.

The court went on to discuss various provisions of the Copyright Act and the Supreme Court's interpretations that illuminate the differences between a "sale" and a "license," which seem to focus on the temporary nature of a license, with title to the work remaining with the copyright owner. In fact, the court indicated that there is no question that, when a copyright owner transfers a copy of a work, retains title to that work, limits the copy's use, and is compensated periodically based on the transferee's exploitation, that transaction is a license.[29]

The court noted that, pursuant to the recording agreements, Aftermath owned the copyrights to the masters at issue in the case, and it did not "sell" anything to the download distributors, let alone title to the digital files, which remained with Aftermath. Aftermath reserved the right to regain possession of the files at any time and was paid based on the volume of downloads. The distributors were given permission to use the masters for specific purposes (to create and distribute permanent downloads and mastertones) in exchange for periodic payments based on the volume of downloads, without any transfer of title. Thus, according to the court, federal copyright law supports its conclusion that those transactions constitute licenses.[30]

Aftermath argued that the 2004 amendment clarified that the *Records Sold* provision sets a royalty rate for permanent downloads. However, the amendment states that albums sold as permanent downloads are to be counted "for purposes of escalations" under the *Records Sold* provision, and that "[e]xcept as modified herein, the Agreement shall be unaffected and remain in full force and effect."[31]

The court ruled that this provision merely means that the amount of permanent downloads sold is included in total sales of albums for purposes of determining the escalated royalty rate for nondigital albums sold. In other words, if there was an escalation of royalty rate from 16 to 18 percent when a million albums are sold, permanent downloads would be counted to get to that million. The provision, according to the court, does not state or even imply that the royalty rate for permanent downloads by third parties is determined by the *Records Sold* provision.[32]

Aftermath's expert witness testified that the *Masters Licensed* provision previously had been applied "only to compilation records and incorporation into movies, TV shows, and commercials." However, the court ruled that this evidence was immaterial because permanent downloads and mastertones only came into existence from 2001 to 2003. As a result, "previous" application did not matter, particularly because the agreement contemplated advances in technology, providing that Aftermath had the right to exploit the "masters in any and all forms of media now known and hereinafter developed."[33]

Aftermath's final argument was that, by the time F.B.T. renewed its agreement with Aftermath, permanent downloads and mastertones were already in existence, and F.B.T. never objected to the payment of royalties under the *Records Sold* provision until 2006, when F.B.T.'s auditor raised the issue.[34]

However, the court found that there was no evidence that F.B.T. knowingly acquiesced to the payment under that provision. Although F.B.T. had received statements that included royalties for permanent downloads and mastertones, it did not audit these statements until 2006, immediately after which F.B.T. raised the issue with Aftermath. Because F.B.T. had no obligation to audit the statements any earlier than it did, the court would not construe F.B.T.'s lack of objection prior to 2006 as acquiescence. The court then found that "the undisputed extrinsic evidence provisionally reviewed by the district court therefore did not support Aftermath's interpretation that the Records Sold provision applies."[35]

The court therefore ruled that "the agreements unambiguously provide that 'notwithstanding'" the *Records Sold* provision, Aftermath owed F.B.T. a 50 percent royalty under the *Masters Licensed* provision for licensing the Eminem masters to third parties for any use. The court found that, because the agreements were unambiguous and were not susceptible to Aftermath's interpretation, the district court improperly denied F.B.T.'s summary judgment motion. The court reversed the judgment and the attorney fees award in favor of Aftermath and remanded the case to the district court.[36]

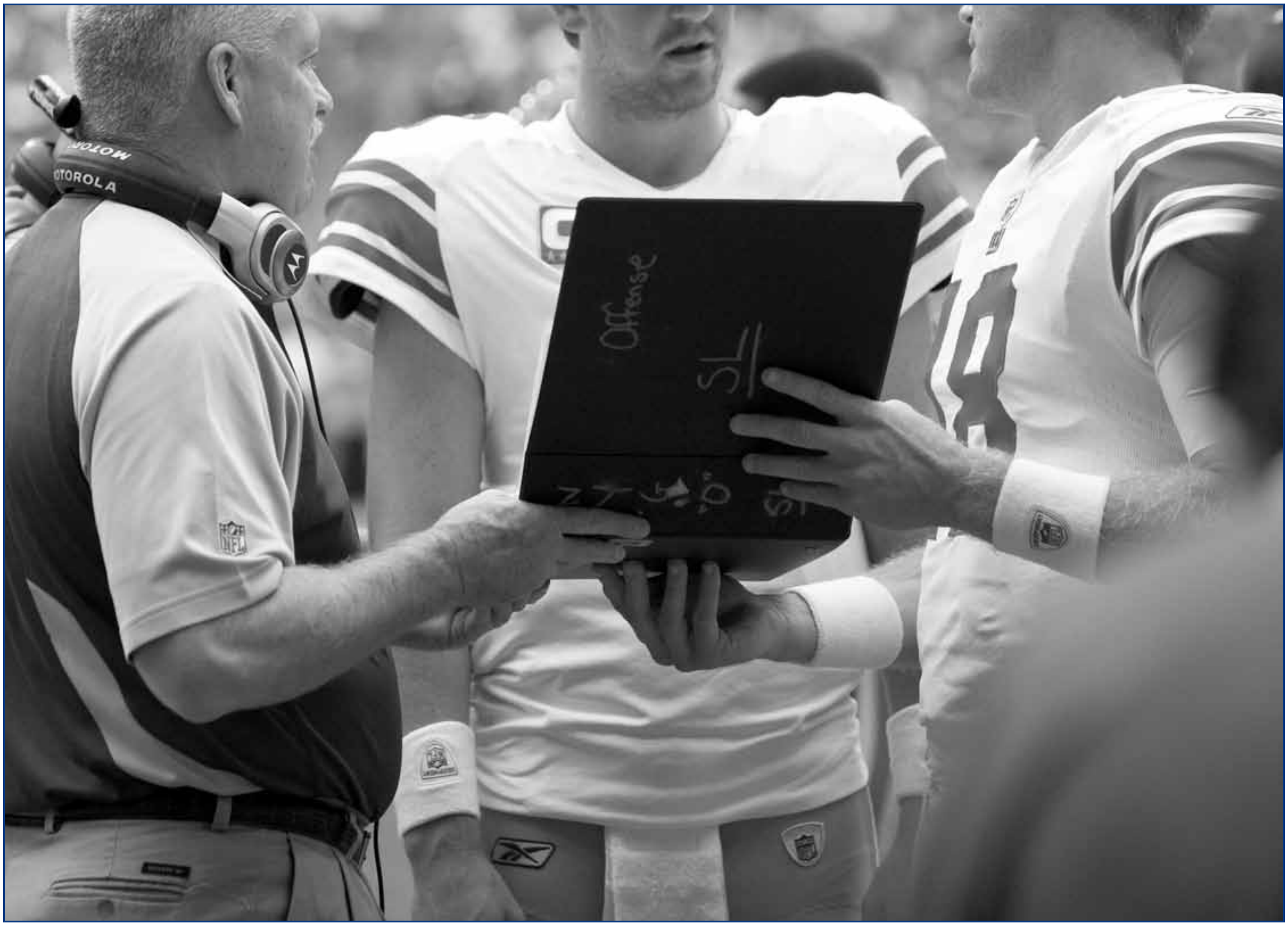
Aftermath has filed a Petition for Certiorari with the U.S. Supreme Court. It is difficult to predict whether the Supreme Court will grant the petition. Aftermath will have to argue that the case is of first impression and that the decision will affect other parties. At the same time, it (and other labels) will necessarily argue that this decision only applies to this particular case and these particular recording agreements.

However, this decision does not simply apply to these parties and to these agreements because many agreements by many artists with many labels have very similar if not identical language. The decision potentially applies to just about every label and just about every artist who has not let the statute of limitations run or who does not have an incontestability issue (unless, of course, he or she has already negotiated a side deal with his or her label for how to treat permanent downloads). Although this decision will not affect every artist, it is certainly much more far-reaching than just Eminem. ❖

Edwin F. McPherson is a partner at McPherson Rane LLP, a Century City–based entertainment litigation firm that specializes in the representation of recording artists.

ENDNOTES

1. Interview with Peter Paterno, Partner, King, Holmes, Paterno & Berliner.
2. 621 F.3d 958 (9th Cir. 2010). The full name of the case is *F.B.T. Productions, LLC; Em2M, LLC v. Aftermath Records, dba Aftermath Entertainment; Interscope Records; UMG Recording, Inc.; Ary, Inc.* Aftermath Records is a joint venture co-owned by UMG Recordings, Inc., Interscope Records, and ARY, Inc. (which is owned by Andre Young p/k/a Dr. Dre). UMG is an indirect subsidiary of Vivendi S.A., which is a publicly traded corporation. Interscope Records is an unincorporated division of UMG. Em2M, LLC is a limited liability corporation owned by Joel Martin.
3. Answering Brief at 16, F.B.T. Prods. v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010) (Nos. 09-55817, 09-56069).
4. Opening Brief at 8, F.B.T. Prods. v. Aftermath Records, 621 F.3d 958 (9th Cir. 2010) (Nos. 09-55817, 09-56069).
5. Answering Brief, *supra* note 3, at 16.
6. Opening Brief, *supra* note 4, at 10. According to F.B.T., the form agreement used had only "very slight (and not pertinent) modifications from standard recording agreements used throughout the industry," and the distinction between Records Sold and Masters Licensed, along with the absence of any provision expressly dealing with digital downloads, were "common to recording agreements at the time." *Id.* at 11, n.5.
7. Answering Brief, *supra* note 3, at 18.
8. F.B.T. Prods. v. Aftermath Records, 621 F.3d 958, 961 (9th Cir. 2010).
9. Answering Brief, *supra* note 3, at 17.
10. *F.B.T. Prods.*, 621 F.3d at 961–62.
11. Answering Brief, *supra* note 3, at 17.
12. Opening Brief, *supra* note 4, at 11.
13. *F.B.T. Prods.*, 621 F.3d at 962.
14. Opening Brief, *supra* note 4, at 15.
15. Answering Brief, *supra* note 3, at 18.
16. Opening Brief, *supra* note 4, at 11.
17. *F.B.T. Prods.*, 621 F.3d at 962.
18. *Id.*
19. Answering Brief, *supra* note 3, at 4.
20. *F.B.T. Prods.*, 621 F.3d at 962.
21. *Id.*
22. Opening Brief, *supra* note 4, at 18.
23. *Id.* at 18.
24. *F.B.T. Prods.*, 621 F.3d at 962.
25. Opening Brief, *supra* note 4.
26. *F.B.T. Prods.*, 621 F.3d at 962. Aftermath's primary focus on appeal was a procedural issue, which was ultimately rejected by the court. Aftermath argued that, because F.B.T. did not, as Aftermath did, make a motion for judgment as a matter of law ("JMOL") at the conclusion of the evidence, F.B.T. could not then argue that the jury's verdict should be disregarded and all evidence reviewed de novo. F.B.T. argued, and the court was persuaded, that because the issue was a pure legal one, and never should have gone to the jury, the court could review the case de novo. In fact, F.B.T.'s appellate counsel argued that F.B.T. was essentially appealing the denial of its summary judgment motion, which is always reviewed de novo. F.B.T. did file a Rule 59 motion for new trial, on the ground that the jury's decision was against the weight of the evidence. However, that motion was denied by the district court, and, in order to overturn that decision, F.B.T. would have to have demonstrated that there is an "absolute absence of evidence" to support the jury's verdict. Answering Brief, *supra* note 3, at 5 (citing Merrick v. Paul Revere Ins. Co., 500 F.3d 1007, 1013 (9th Cir. 2007)).
27. *F.B.T. Prods.*, 621 F.3d at 963 (citing Cal. Civ. Code § 1638).
28. *Id.* at 964.
29. *Id.* at 965 (citing Wall Data v. Los Angeles County Sheriff's Dep't, 447 F.3d 769, 785 (9th Cir. 2006); MAI Sys. Corp. v. Peak Computer, Inc., 991 F.2d 511 (9th Cir. 1993); United States v. Wise, 550 F.2d 1180, 1190–91 (9th Cir. 1977); Hampton v. Paramount Pictures Corp., 279 F.2d 100, 103 (9th Cir. 1960)).
30. *Id.* at 965.
31. *Id.* at 966.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 967.



Electronic Discovery in League Sports

Who Controls the Playbook?

BY YOAV M. GRIVER AND DANIEL B. GARRIE

The interdependent nature of team sports raises certain unique issues when it comes to preservation and production of electronic documents and information. This article explores and examines some of these electronic discovery ("e-discovery") issues that arise at the player, team, and league levels and provides practice tips that may be useful to any person or attorney facing the challenges of e-discovery compliance in the field of team sports. Ultimately, it is the responsibility of each of these entities to assess their needs based on their relationships and legal requirements, resources, and limitations, as well as the probability that the information in their possession will be requested. When a reasonable and standardized retention and destruction protocol is put in place, many liability issues can be reduced or eliminated.

INTRODUCTION

One important feature of professional sports is the interdependence between the player, the team, and the league.[1] Take, for example, the National Football League ("NFL"): Each player can only play football as part of a team, and no team can exist without players. Likewise, even though each team is a separate corporate entity unto itself,[2] NFL football is produced only when two teams face each other to play a football game.[3] Finally, a team's individual success necessarily depends on the success of the entire league. As one court recently put it, "it makes little difference if a team wins the Super Bowl if no one cares about the Super Bowl."[4] This interdependence helps make the NFL and other league sports wildly successful, but it has also created a number of unique legal issues. One such issue is the extent to which these interdependent entities are responsible for policing and preserving each other's documents[5] and information in response to a document demand or subpoena.

This issue is not academic. On the contrary, the question of who has legal control over which document has become increasingly important because of three related factors that are especially critical when considering e-discovery.

First, in this age of e-mail, Twitter, "smart" mobile phones, laptops, and iPads, the sheer amount of information and data created every day has exploded.[6] These digital devices have become an integral part of our daily lives in many ways, and every one of them is a potential source of information and evidence.[7] The multitude of devices and the interconnectivity of today's electronics give e-discovery the unique quality of being simultaneously difficult to destroy and easy to lose.

Second, to deal with this digital revolution, the rules governing legal discovery and information production have become more expansive.[8] In this regard, the Federal Rules of Civil Procedure governing all federal trial–level litigations were amended in 2006 (and again in 2008)[9] to establish and revise specific rules governing electronic evidence.[10] On the state level, similar rules have been adopted by most states, either expressly by promulgated rules or implicitly through court decisions.[11] Under these rules, from as early as when litigation may be reasonably anticipated, parties and third parties to litigation are required to preserve and potentially produce all electronically stored information ("ESI")—a term that is not expressly defined by the rules but that is designed to be broad enough to include any information that may be stored electronically.[12]

Third, courts are demonstrating an increasing willingness to police these legal rules and punish the destruction or failure to preserve and produce information with monetary and other sanctions.[13] For example, in the recent case *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities* ("*Pension Committee*"),[14] Judge Shira Scheindlin specifically noted she could find no "egregious examples of litigants purposefully destroying evidence."[15] Nevertheless, because the plaintiffs "failed to timely institute written litigation holds[16] and engaged in careless and indifferent collection efforts after the duty to preserve arose,"[17] Judge Scheindlin imposed adverse inference instructions and monetary fines against six of the plaintiffs for being "grossly negligent" in meeting their document discovery duties.[18] Seven other plaintiffs escaped with only monetary sanctions, for having acted negligently with regard to those duties.[19]

Demonstrably, the growth in technology, the litigation rules, and the general judicial belief that the quest for truth is best accomplished by full and complete disclosure of information have created something of a "perfect storm"—and you may suddenly find yourself subject to legal liability and hundreds of thousands of dollars of unanticipated legal costs for, usually, either electronic document production or sanctions for failure to preserve such documents.[20]

Sports are far from immune from the impact of e-discovery. This article considers this impact upon three specific sports-related relationships: (1) the relationship between player and agent, (2) the relationship between the team and its owners, and (3) the relationship between the individual teams and the league. At each level, e-discovery requirements create potential liabilities and conflicts that strain these necessary and interdependent relationships. This article examines each scenario in turn and then suggests some practice pointers that may help each party successfully manage or avoid these potential conflicts. This article, however, is not intended just for players, agents, team officials, and league personnel. Rather, this article uses a specific context—sports—to highlight practice insights we believe to be generally applicable to any person or attorney in any industry facing the challenges of e-discovery compliance.

THE PLAYER AND HIS AGENT

One of the key relationships in the world of sports impacted by e-discovery issues is the relationship between the professional athlete and his agent. At its most basic, "[a]n agent is the individual who is authorized by the [players association] to negotiate salaries over and above the minimum salary, and special covenants over and above the Basic Agreement provided on behalf of that player."[21] However, most agents do much more than negotiate salary—they also negotiate endorsements, make and approve investment and other business decisions, manage the player's public relations and public image, and are the player's trusted advisor and friend.[22] They are therefore privy to the great majority of documents that are associated with the player and, in some cases, even produce electronic information such as press releases, Twitter posts, and other online profiles.

In keeping with his or her important role, a sports agent owes a fiduciary duty of undivided loyalty to the player he or she represents.[23] Put simply, the agent must "step into the shoes" of the player and place the player's interests above his own.[24] This duty is so well known that it is often expressly acknowledged in the actual contract between player and agent. This language, from a representative NBA player–agent contract, is fairly typical:

> 2. Contract Services[.] Commencing on the date of this Agreement, the Agent agrees to represent the Player—to the extent requested by the Player—in conducting individual compensation negotiations for the performance of the Player's services as a professional basketball player with the Player's NBA club . . . After a contract with the Player's club is executed, the Agent agrees to continue to assist, advise and counsel the Player in enforcing his rights under that contract.
>
> *In performing these services the Agent is the NBPA's delegated representative and is acting in a fiduciary capacity on behalf of the Player.* In no event shall the Agent have the authority to bind or commit the Player in any manner without the express prior consent of the Player and in no event shall the Agent execute a player contract on behalf of the Player.[25]

What an agent or player may not fully realize is that the agent's fiduciary duty extends to the documents and information he or she keeps or processes on behalf of his or her clients,[26] and probably requires an agent to preserve documents related to potential or existing litigations involving both present and former clients.[27] As a result, an agent's failure to preserve that information, however unintentional, may expose the player to litigation sanctions and subject the agent to liability, including the imposition of enhanced or punitive damages, for breaching his fiduciary duty as agent to the player.[28] This can be especially problematic where agents fail to back up electronics properly or are not aware of the extent of their storage. Another pitfall arises with the multifaceted nature of e-discovery, where documents, for example, e-mail or Facebook messages, are not stored because they seem too mundane or inapplicable to warrant such treatment. However, it is important for the agent to remember that, while the player is an individual, he or she is often acting as a corporation and therefore has enhanced duties to preserve documents that may be reasonably or predictably relevant to future litigation.

A party's duty to preserve and produce information, including electronically stored information, during a legal dispute is extensive.[29] When party to litigation, it does not matter if the party from whom the document is requested does not actually possess a requested document or does not legally own the document—all that is required is "possession, custody, *or* control" of the requested information.[30] If any of these are satisfied, it is a requirement to preserve that information and then produce it upon request.[31] It is well settled that, where a principal–agent relationship exists, the principal (here, the player) "controls" any of his information that may be in the physical possession of his agent.[32] Thus, if the agent destroys information under his or her control, a court or arbitrator may choose to sanction the player for failing to "timely institute written litigation holds and engag[ing] in careless and indifferent collection efforts after the duty to preserve [arises]."[33] Therefore, even if the scope of e-discovery requests initially seem to extend beyond the purview of the agent, such as video of the player at a friend's event or Facebook messages on an account the agent has access to, the agent must be sure to keep control over any information he or she may have access to. While, in some cases of e-discovery, the information sought is available through a third party such as an Internet service provider or social networking service, the cost and burden of attaining this information—when the agent should have had the ESI—can be very high in litigations and complicate matters.

These extraneous costs may then be passed on to the agent. For example, the player may contend that the agent's conduct is tortious because the agent breached his or her fiduciary duty by failing to control and preserve the information on the player's behalf, thereby causing the player harm in the form of sanctions. Because of the agent's fiduciary duty, this tort is a malpractice claim that includes the possibility of punitive damages. Alternatively, if the relationship is defined by the above-cited contract, the player could bring a suit against the agent for breach of contract for violating the clause prohibiting the agent from "bind[ing] or commit[ting] the Player in any manner without the express prior consent of the Player."[34] The agent is thereby exposed to liability for his or her actions.

THE MULTITUDE OF DEVICES AND THE INTERCONNECTIVITY OF TODAY'S ELECTRONICS GIVE E-DISCOVERY THE UNIQUE QUALITY OF BEING SIMULTANEOUSLY DIFFICULT TO DESTROY AND EASY TO LOSE.

Agents cannot waive their fiduciary duty,[35] but there are certain actions they can take to lessen their exposure and help protect their clients. First, both the agent and the player should be aware that relevant documents and information in the agent's possession are potentially discoverable in any litigation involving the player.[36] Thus, it is prudent that players include their agents and former agents in any litigation hold. And even if the player neglects to do so, an agent should proactively impose a litigation hold once he or she becomes aware of a litigation or potential litigation involving the player.

Second, a best practice would be for the agent to proactively inform his or her clients in writing that the client's duty to preserve information as part of a legal dispute may extend to information in the agent's possession. The agent should then provide his or her clients with a copy of the agent's usual and customary document preservation and destruction policy.[37] For example, if the agent has a policy of destroying all e-mails older than six months, or destroying all information older than two years, besides tax return information, he or she should inform his or her clients of the policy, so there are no misunderstandings if litigation arises after destruction of information.[38]

Of course, the agent should strictly adhere to any information retention and destruction policy in the absence of a litigation hold. In developing a retention and destruction plan, it is important to consult a technology expert because e-discovery has the unique characteristic of being simultaneously difficult to destroy and easy to lose. Experts can ensure that information is being both stored and destroyed consistently so that liability does not later arise out of allegations of bad-faith destruction or unreasonable preservation efforts. They can also help the agent gauge what a reasonable retention plan would be under the circumstances. The expansion of electronic storage capabilities combined with certain circumstances that may indicate that the agent's client may need the information would likely increase the length of time and scope of documentation retention required to meet the reasonableness standard.

The failure to adopt or follow a reasonable retention and production policy can lead to a range of sanctions and liability. For example, under Federal Rule of Civil Procedure 37(b)(2)(A), the sanctions for failing to cooperate in discovery include, in addition to monetary penalties:

> (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.[39]

In sum, in light of the penalties and prejudices that could result from a failure to preserve information, an agent's document policies arguably constitute material information that must be shared with the player as part of the agent's fiduciary duty. Accordingly, an agent's best practice is to (i) adopt and follow a reasonable policy for retaining and destroying documents and information; (ii) inform his or her client in writing of that policy; (iii) adhere to that policy in the absence of a litigation hold; and (iv) upon being informed of potential litigation, or upon being served with a litigation hold, preserve potentially relevant documents and information.

By informing clients in advance of their document retention and destruction policies, agents fulfill their fiduciary duty to them and protect themselves in the event a player neglects to timely inform his agent of a legal dispute involving information reasonably in the agent's possession.[40] Equally, it is only once he has been specifically informed of the agent's policy that a player is in the best position to ensure that any documents or information in the agent's possession are preserved for legal discovery and are not inadvertently destroyed to the player's detriment.[41]

THE TEAM AND ITS OWNERS

Just as the player and agent should take e-discovery issues into account in managing their relationship, each team owner must take e-discovery issues into account in managing their relationship with the team. Here, each team owner has a duty to preserve and produce information when they receive a litigation hold from the team and its members. This was the holding of the recent case *City of Seattle v. Professional Basketball Club, L.L.C.*,[42] a case resulting from the relocation of the Seattle Supersonics from Seattle, Washington, to Oklahoma City, Oklahoma, where the team was renamed the Oklahoma City Thunder.[43]

During the litigation that formed the basis for this e-discovery dispute, plaintiff City of Seattle ("the City") alleged that it had the right to compel defendant Professional Basketball Club L.L.C ("PBC") to remain in Seattle during the term of its lease.[44] As part of discovery in the litigation, the City issued requests for e-discovery directed at the team and six of its eight team owner members.[45] PBC produced approximately 150,000 e-mails from two of the eight members, and then argued that searching and producing e-mails from the remaining six members would be either duplicative or "irrelevant."[46] The City responded by bringing a motion to compel production from the remaining six members.[47] Even while acknowledging that the information sought might not even be admissible as evidence at trial, the court agreed with the City and ordered the additional production:

> Because a [member] is an agent as determined by Oklahoma statute, the requisite principal-agent relationship exists to establish that PBC has the legal right to obtain documents upon demand from its members. Accordingly the City has met its burden in establishing that PBC has "possession, custody, or control" over the at-issue documents. . . .
>
> PBC argues that the substance of the emails—information regarding the formation of PBC and the Sonics' finances—is irrelevant or duplicative of discovery PBC already produced. But, as established above, [the owner members] of PBC are agents of the PBC. Thus, communications within PBC, as well as communication by PBC members with third parties, may be relevant to the underlying issues. Given the liberal discovery rules, the Court will not limit the City's inquiry on relevancy grounds.[48]

Any actual or prospective team owner or significant shareholder should be aware that his or her ownership responsibility may well include the expensive and disruptive duty of personally preserving and producing individual e-mails and information as part of team discovery. As with agents, team owners can significantly allay their costs by implementing a reasonable method of retention, production, and destruction. Because team owners manage a great deal more intersecting interests, they may be able to implement a method for grouping or destroying duplicate copies of documents immediately or avoiding the need to produce duplicates.

AGENTS CANNOT WAIVE THEIR FIDUCIARY DUTY, BUT THERE ARE CERTAIN ACTIONS THEY CAN TAKE TO LESSEN THEIR EXPOSURE AND HELP PROTECT THEIR CLIENTS.

It is noteworthy that the point at which a team's duty to produce information from its managers is the point at which an agency relationship exists between the team and its managers, which may be triggered by state statute.[49] For example, in Oklahoma, that duty applies to any team member who has the power "to manage and control the business and affairs of the limited liability company."[50] Because each of the eight members at issue owned enough stock to be entitled to a seat on the Sonics' Board of Directors, the *City of Seattle* court had little difficulty in holding each of them to be "managers" and "agents" to the team.[51]

While it is natural that the more people involved in the relationship, the more complex the solution, the team owner–team relationship can be protected by many of the same methods agents use for developing uniform standards. However, because there are more people interacting with one another rather than a direct loyal relationship, there are other challenges, including the quantity of information that duplicates, split loyalties among various team members, and split duties among various owners or shareholders. Where these conflict, uniformity and neutrality work best. For example, an outside provider of data preservation, production, and storage could remove the potential for bias and bad faith from the individual actors. It is also worth noting that many courts are requiring nonrequesting parties to pay or contribute to payment for production where their actions increased the cost of production.[52] It is therefore important to consider the cost of the methods used when deciding what format would be most beneficial, considering quantity of electronic data, duplicative nature of documents, and probability of needing to produce the documents. However, with the ever-decreasing cost of electronic space and increasing ability of nonhuman discovery methods, it seems likely that the quantity necessary to preserve will continue to rise. Still, the quantity of information multiplies rapidly with the addition of more individuals and more complex relationships, such as in the league–team relationship.

THE LEAGUE AND ITS TEAMS

As is the case with agent–player and player–team relationships, the relationship between a league and its individual franchises is fiduciary in nature as well and based on economic interdependence.[53] There may be situations where a league, in exercising its power to enforce the league rules, becomes responsible for preserving and producing information it receives from its member teams or players.[54]

That was the holding of the lower court in *National Football League Properties, Inc. v. Superior Court*,[55] in which the court found that the League may be responsible for producing information between the League office and any of its affiliated for-profit entities, even if such documents fall under the category of attorney-client communications.[56] In *National Football League Properties*, the Oakland Raiders, an NFL team that was the real party in interest, had filed a motion to compel disclosure of certain documents between the National Football League Properties ("NFLP," one of the NFL's for-profit organizations) and its attorneys that had been identified as privileged. The Raiders argued that due to the nature of the complex business relationship between the League and its individual clubs, the Raiders should be entitled to attorney-client communications that concerned League matters.

AN OUTSIDE PROVIDER OF DATA PRESERVATION, PRODUCTION, AND STORAGE COULD REMOVE THE POTENTIAL FOR BIAS AND BAD FAITH FROM THE INDIVIDUAL ACTORS.

In response, the NFL asserted attorney-client and work product privileges to disclosure of the documents in question. In deciding the issue, the court divided the documents into two categories: (1) documents that related to the NFL office and its attorneys that pertained solely to operation of the NFL, and (2) documents that pertained to communications between persons associated with the for-profit NFL entities and their attorneys. The court found that the Raiders were not entitled to documents in the first category but were entitled to documents in the second category. In explaining its decision, the court noted the broad powers vested in the NFL commissioner and the autonomy it permitted him to carry out his many duties, including investigations, disciplinary actions, and interpretation of the NFL's constitution and bylaws.[57] The court reasoned that the commissioner would not be able to carry out these functions if the individual teams had access to the commissioner's communications with League counsel.[58] However, at the same time, the court agreed that as a member club that held shareholder privileges, the request by the Raiders to examine attorney-client documents was not unreasonable. The court noted that the commissioner and the employees at the League office act as agents on behalf of the member clubs.[59] Furthermore, "the Commissioner and the League office are authorized representatives' of the member clubs" who "cannot claim to have a separate interest from the member clubs as they with [*sic*] the NFL itself."[60] Therefore, the court concluded that the Raiders are "entitled to discover communications between any person associated with the affiliated for-profit entities and/or legal office and counsel regarding the business of any affiliated for-profit entity."[61]

On appeal, the court overruled the trial court's decision, stating that the Raiders *as an NFL club* did not have a right to review the privileged documents.[62] However, the court left open the possibility that the Raiders' representative on the NFLP's board of directors might have the right to the documents had he requested them in his capacity as a director of the NFLP.[63] The court cited to California Corporations Code § 1602, which provides that "[e]very director shall have the absolute right at any reasonable time to inspect and copy all books, records and documents of every kind and to inspect the physical properties of the corporation of which such person is a director. . . ."[64] The court went on to explain that the director may have been entitled to examine corporate legal documents, but where the director sues in his capacity as a shareholder, rather than a director, the attorney-client and work product privileges are properly upheld by the corporation.[65]

Because the owner of each NFL team is responsible for appointing a director to the NFLP, the ruling in *National Football League Properties* may have lasting importance when it comes to discovery disputes between the League and the member teams. The ruling by the appeals court would seem to indicate that an individual team's representative to the NFLP may be able to sue in his own capacity, and in doing so, the scope of discovery may even extend to privileged documents between the League and its attorneys.

Another more recent example of the League's duty to preserve arose during the "NFL Spygate" scandal in 2007, in which Coach Bill Belichick and the New England Patriots were caught violating League rules by videotaping defensive plays called by other teams, including the New York Jets.[66] As part of the NFL's internal investigation of the scandal, the NFL demanded and obtained from the Patriots all copies of the tapes the Patriots had made of other teams' defensive calls over the seven years of videotaping activity, including 2002, 2004, and 2005, when the Patriots won Super Bowls. Whatever was on those tapes was enough for NFL Commissioner Roger Goodell to fine Coach Belichick $500,000, the maximum amount permitted by NFL rules, and dock the Patriots $250,000 and a first-round draft pick.[67] This was the first time a team had ever been penalized by losing its first-round pick.[68] After reviewing those tapes, however, the NFL destroyed them, thus preventing anyone else from ever being able to examine their contents to determine how large an improper advantage the Patriots had gained over their adversaries.[69]

The NFL's decision to first demand and then destroy the videotapes unquestionably raised the possibility of severe consequences for both the Patriots and the NFL. The "obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation."[70] Put differently, the "duty to preserve attache[s] at the time that litigation [is] reasonably anticipated."[71] Here, it is hard to argue that the NFL did not know that there would likely be litigation of some kind as a result of the Patriots' actions.

Indeed, less than two weeks after the NFL destroyed the tapes and related materials provided to it by the Patriots, a putative class action lawsuit was filed against Belichick and the New England Patriots on behalf of all New York Jets season ticket holders. That lawsuit, *Mayer v. Belichick*,[72] brought claims under the federal Racketeer Influenced and Corrupt Organizations Act, various New Jersey statutes forbidding racketeering activity, consumer fraud, deceptive acts and practices, and the common-law doctrines of fraud and tortuous interference with contractual relations, and requested $184 million in compensatory damages plus punitive damages on behalf of the plaintiff class.[73] The *Mayer* plaintiffs also included a direct contract claim against the NFL for destroying the videotapes.[74]

Luckily for the NFL, the New Jersey district court dismissed all claims, holding that ticketholders had no actionable claim against Belichick, the Patriots, or the NFL because, as long as they got to watch a football game, they suffered no injury, even if the quality or "honesty" of the game was less than anticipated. In other words, "Plaintiff [Mayer] got exactly that for which he paid"—he got to watch two NFL teams play a professional football game.[75]

Had the claims not been dismissed and the case gone to discovery and trial, the NFL would likely have been placed in an unwinnable situation. In demanding that the Patriots turn over the tapes, the NFL assumed responsibility for those tapes, including the duty to preserve evidence responsive to anticipated litigation. Even if the Patriots had turned over the tapes voluntarily to the NFL, the NFL likely would still have had an independent obligation to preserve those tapes if it reasonably anticipated litigation over the Patriots' actions. Moreover, because the NFL destroyed all copies of the tapes, and the tapes were so fundamental to any Spygate-related lawsuit, a judge would have had little choice but to sanction all the defendants for the "spoliation" of evidence, particularly if Commissioner Goodell's decision to destroy the tapes violated the NFL's written record retention policies or past practices.[76] One such sanction would be the imposition of an "adverse inference"[77]—an instruction to the jury that it may or should infer that the videotapes were destroyed because they contained evidence that would have proved they helped the Patriots win games, including their three Super Bowl victories.[78]

Another interesting discovery question arises based off of the interdependence of

UNLIKE AN AGENT WHO PRESERVES WITH A SPECIFIC CLIENT IN MIND, THE LEAGUE MUST BE COGNIZANT OF ALL THE INTERRELATED PLAYERS AND SITUATIONS THAT MAKE THEM A REASONABLE PROVIDER OF ELECTRONIC DOCUMENTATION.

sports leagues. It is in this situation where third-party production requests are most likely and therefore must be considered in the calculus of preservation methods. However, unlike an agent who preserves with a specific client in mind, the league must be cognizant of all the interrelated players and situations that make them a reasonable provider of electronic documentation. When these factors are considered in relation to the methods for creation, retention, production, and destruction, it may be that the information preserved requires limitations. If these limitations can be defined and other reasonable locations exist for the documents that the league is unwilling or unable to preserve, then it will be far less likely that they will be held liable for destroying documents inadvertently. This destruction will therefore be reasonable in the sense that the league should not be expected to hold these documents because there are other more reasonable sources. Of course, where the litigation concerns the league directly or involves parties related through the league, it would be within reasonable expectations for the league to preserve such documents.

CONCLUSION

The duty to preserve and produce documents and electronically stored information ("ESI") extends not only to documents and ESI in your possession and custody, but also to those under your control. This means that the documents and ESI in the possession of all your employees, agents, and similar entities also are subject to collection and preservation, and that you are likely to face monetary and nonmonetary penalties if you fail to take steps to hold and preserve these documents and information for production.

Beyond judicial sanctions, the failure to preserve documents may harm you and your business in other ways, including follow-on lawsuits and/or the triggering of possible state or federal investigations. For example, former Senator Arlen Specter—a long-time

Philadelphia Eagles fan—threatened the NFL with congressional hearings and the potential loss of its antitrust exemption because it destroyed the Spygate tapes.[79] Given the substantial time and resources professional athletes, agents, and leagues spend developing their respective businesses and brands, it would be a tragedy to watch them harmed or destroyed through the unknowing and unintentional destruction of ESI.

To avoid sanctions and liability, agents, teams, and league officials should address their needs based on the circumstances before them and what they would be expected to have in their possession. In all likelihood, agents, having the most intimate contact with the players, would be expected to have the most information with respect to the players that are their clients. On the other hand, teams and leagues are more likely to be approached for electronic information on interdependent entities under their control, with teams expected to maintain a wider breadth of information accessible for production. While the league has the least responsibility to maintain documents, their folly may also lead to a greater fall out because their information may be unique to the interactions within the league. As such, each agent, team, or league should consult with their IT departments and legal technologists for optimal control over their preservation and destruction standards. Doing so will allow them to avoid being overly accessible to production and thus open to prodding, or not accessible enough and thus liable for sanctions and breach of duty and/or contract. ❖

Yoav M. Griver is a litigation partner in the New York office of Zeichner Ellman & Krause LLP and is also an adjunct professor at NYU, where he teaches a course on sports law. He can be reached at ygriver@zeklaw.com. The thoughts expressed herein are his own and not those of his firm. Daniel B. Garrie is a managing member of FSRDG LLC, a legal risk management and consulting group. He has a B.A. and M.A. in computer science and frequently serves as an e-discovery neutral and court-appointed special master on e-discovery issues. He can be reached at dgarrie@fsrdg.com.

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ENDNOTES

1. *See generally* Nathaniel Grow, *There's No "I" in "League": Professional Sports Leagues and the Single Entity Defense* 105 Mich. L. Rev. 183 (2006) (discussing the interconnected relationship of sports teams and the leagues in which they operate).

2. For historical reasons, each NFL team club is a separate corporate entity. These individual clubs act collectively as the National Football League. *See, e.g.*, Brown v. Pro Football, Inc., 50 F.3d 1041, 1045 (D.C. Cir. 1995).

3. L.A. Mem'l Coliseum Comm'n v. NFL, 726 F.2d 1381, 1390 (9th Cir. 1984) (noting that the member clubs are separate business entities that compete with one another for players, coaches, and management personnel).

4. Am. Needle, Inc. v. NFL, 538 F.3d 736, 737 (7th Cir. 2008), *rev'd on other grounds*, 130 S. Ct. 2201 (2010).

5. Fed. R. Civ. P. 34(a) defines a document as including "'writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations.' In the electronic discovery world, a document also refers to a collection of pages representing an electronic file. E-mails, attachments, databases, word documents, spreadsheets, and graphic files are all examples of electronic documents." *Glossary of Terms*, Kroll Ontrack at 4, http://www.krollontrack.com/library/glossary_krollontrack-2008.pdfglossaryterms (last updated Oct. 1, 2008); *see also* Yancey v. Gen. Motors Corp., No. 4:05CV2079, 2006 WL 2045894, at *3 (N.D. Ohio July 20, 2006) (agreeing with the plaintiff that the term "documents" encompassed computer hardware, software, e-mails, and "computer forensics").

6. *See* David I.C. Thomson, Law School 2.0: Legal Education for a Digital Age (Mathew Bender, LexisNexis 2009) ("[T]he costs of storage have plummeted from $20,000 per gigabyte in 1990 to less than $1 per gigabyte today."). *See also* Michelle Kessler, *Days of Officially Drowning in Data Almost Upon Us*, USA Today (Mar. 5, 2007), http://www.usatoday.com/tech/news/2007-03-05-data_N.htm (discussing the disparity between the amount of data created and the storage space available).

7. *See, e.g.*, Peter Lyman & Hal R. Varian, *How Much Information? 2003* (Univ. of Cal. At Berkeley, Sch. Of Info. Mgmt, & Sys., 2003), http://www2.sims.berkeley.edu/research/projects/how-much-info-2003/printable_report.pdf (reporting that 0.01% of new information is stored in paper form; "we live in an increasingly digital world . . . less than 1% of business information is being created exclusively in paper form"); *see also* Romina Aducci, Pim Bilderbeek, Holly Brown et al., *The Hyperconnected Here They Come!: A Global Look at the Exploding "Culture of Connectivity" and Its Impact on the Enterprise* 6 (Nortel, IDC White Paper, May 2008), http://www.net-teks.com/pdf/Hyperconnected.pdf (discussing how "the tools and applications favored by hyperconnected people offer advantages when it comes to collaboration," but at the same time "increase the risk of . . . release of sensitive data" and the cost of legal discovery).

8. *See* The Pueblo of Laguna v. United States, 60 Fed. Cl. 133, 141–42 (Fed. Cl. 2004) (granting preservation order and setting procedure for producing e-documents); *In re* Vioxx Prods. Liab. Litig., No. MDL 1657, 2005 WL 756742, at *3 (E.D. La. Feb. 18, 2005) (explaining "preservation of evidence" requirements); MacNamara v. City of New York, No. 04 Civ. 9612 (KMK) (JCF), 2006 WL 3298911, at *16 (S.D.N.Y. Nov. 13, 2006) (ordering production of electronic information); Feather River Anesthesia Med. Grp., Inc. v. Fremont-Rideout Health Grp., No. C044559, 2004 WL 1468741, at *5 (Cal. Ct. App. June 30, 2004) (upholding sanctions where the defendant failed to adequately respond to document production requests).

9. For the text of the FRCP Amendments, *see Completed Rules Amendments*, USCourts.gov, http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/CompletedRules.aspx (last visited Feb. 22, 2011).

10. The Federal Rules of Civil Procedure ("FRCP") may be viewed at http://www.law.cornell.edu/rules/frcp. Electronic discovery is defined as "[t]he discovery [of[electronic documents and data including e-mail, web pages, word processing files, computer databases, and virtually anything that is stored on a computer. Technically, documents and data are 'electronic' if they exist in a medium that can only be read through the use of computers. Such media include cache memory, magnetic disks (such as computer hard drives or floppy disks), optical disks (such as DVDs or CDs), and magnetic tapes." *Glossary of Terms*, *supra* note 5; *see also* Flexsys Ams., LP v. Kuhmo Tire U.S.A., Inc., No. 1:05-CV-156, 2006 WL 3526794, at *3 (N.D. Ohio Dec. 6, 2006) (ordering production of electronic documents, citing the recent amendments to the Federal Rules of Civil Procedure).

11. *See, e.g.*, Bills v. Kennecott Corp., 108 F.R.D. 459, 461 (C.D. Utah 1985) (finding electronic information discoverable); Linnen v. A.H. Robins Co., No. 97-2307, 1999 WL 462015, at *6 (Mass. Super. June 16, 1999) (ruling that electronic discovery is no different than paper discovery); Rowe Entm't, Inc. v. The William Morris Agency, No. 98 Civ. 8272(RPP), 2002 WL 975713, at *10 (S.D.N.Y. May 9, 2002) (upholding discoverability of electronically stored Information).

12. The term "ESI" is not specifically defined in the Federal Rules of Civil Procedure. The closest the FRCP come to a definition is in Rule 34, which states that a party may seek the production of "data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding

party into a reasonably usable form." Fed. R. Civ. P. 26 and 34(a)(1)(A); *see also* Fed. R. Civ. P. 26(b) (explaining the general rules regarding discovery scope). For the requirement that ESI be preserved as early as the point in time when litigation may be reasonably anticipated, see, for example, *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003), which held that "[t]he obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation" (citing Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)). *See also* Green v. McClendon, 262 F.R.D. 284 (S.D.N.Y. 2009) (holding that defendant had a duty to preserve evidence stored electronically or risk monetary sanctions); Butler v. Kmart Corp., No. 2:05-CV-257PA, 2007 WL 2406982 (N.D. Miss. Aug. 20, 2007) (ordering defendant to produce ESI); Kleiner v. Burns, No. 00-2160-JWL, 2000 WL 1909470, at *5 (D. Kan. Dec. 15, 2000) (ordering parties to preserve potentially relevant electronic data); Paul Gupta, Dianna Szego & Jennifer Jacobs, *Determining When the Duty to Preserve Arises and Managing Compliance with Legal and Ethical E-Discovery Obligations*, *in* Electronic Discovery Guidance 2008: What Corporate and Outside Counsel Need to Know 217, 223–28 (Gary A. Adler ed., 2008) (discussing when the duty to preserve arises and managing compliance with the legal and ethical e-discovery obligations).

13. *See, e.g.*, *In re* Napster, Inc. Copyright Litig., 462 F. Supp. 2d 1060, 1077 (N.D. Cal. 2006) (issuing sanctions for failure to fulfill duty to preserve information); *see also* May v. Pilot Travel Ctrs. LLC, No. 2:05-cv-918, 2006 WL 3827511, at *8 (S.D. Ohio Dec. 28, 2006) (ordering sanctions for delayed production and possible spoliation of electronic documents); Sheppard v. River Valley Fitness One, 203 F.R.D. 56, 62 (D.N.H. 2001), *rev'd on other grounds*, Nos. 04-1831, 04-1861, 2005 WL 2178821 (1st Cir. Sept. 9, 2005), *withdrawn*, 428 F.3d 1 (2005) (sanctioning party for failure to produce electronic information that was previously produced for a separate case).

14. 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

15. *Id.* at 471. In *Pension Committee*, Judge Scheindlin harked back to her *Zubulake* decisions, and arguably established a bright-line rule that failing to follow the e-discovery duties laid out in those decisions will be considered "gross negligence," irrespective of willful conduct or bad faith, and therefore justifies the imposition of severe discovery sanctions upon the party violating those e-discovery duties. *Id. See also id.* at 461, 463–65, 467. *But cf.* Rimkus Consulting Grp., Inc. v. Cammarata, 688 F. Supp. 2d 598, 613, 615–17, 620 (S.D. Tex. 2010) (declining to adopt a bright-line rule regarding the duty to preserve information in favor of case-by-case analysis, and reincorporating bad faith conduct), *and* Orbit One Commc'ns, Inc. v. Numerex Corp., 271 F.R.D. 429, 2010 U.S. Dist. LEXIS 123633, at *34–37 (S.D.N.Y. 2010) (emphasizing the requirement that there must be evidence that lost documents are "at least minimally relevant" or deleted in bad faith).

16. A "legal hold" or "litigation hold" is "a communication issued as a result of current or anticipated litigation, audit, government investigation or other such matter that suspends the normal disposition or processing of records." *Glossary of Terms, supra* note 5, at 6 ("legal or litigation hold"). For other examples of cases where a party was sanctioned for failure to place a timely litigation hold, see *Tango Transp., LLC v. Transp. Int'l Pool, Inc.*, No. 5:08-CV-0559, 2009 WL 3254882, at *5–6 (W.D. La. Oct. 8, 2009); *KCH Servs., Inc. v. Vanaire, Inc.*, No. 05-777-C, 2009 WL 2216601, at *2 (W.D. Ky. July 22, 2009).

17. *Pension Committee*, 685 F. Supp. 2d at 463.

18. *Id.* at 463–65, 478–88, 496–97; *see also In re* NTL, Inc. Sec. Litig. v. Blumenthal, 244 F.R.D. 179, 201 (S.D.N.Y. 2007) (issuing sanctions for faulty litigation hold and discovery misconduct); 3M v. Tomar Elec., No. 05-756(MJD/AJB), 2006 WL 2670038, at *11–12 (D. Minn. Sept. 18, 2006) (same); Pinstripe Inc. v. Manpower, Inc., No. 07-CV-620-GKF-PJC, 2009 WL 2252131, at *43 (N.D. Okla. July 29, 2009) (ordering sanctions for litigation hold failure and funding of an e-discovery seminar on proper preservation); Acorn (New York Ass'n of Comm. Orgs. for Reform Now) v. County of Nassau, No. CV 05-2301(JFB)(WDW), 2009 WL 605859, at *6 (E.D.N.Y. Mar. 9, 2009) (awarding motion costs for failure to issue litigation hold); Cardenas v. Dorel Juvenile Grp., Inc., No. CV.A.04-2478-KVH-DJW, 2006 WL 1537394, at *7 (D. Kan. June 1, 2006) (awarding monetary sanctions for failure to produce documents in a timely manner).

19. *Pension Committee*, 685 F. Supp. 2d at 478, 488–97. *See also* United Med. Supply Co. Inc. v. United States, 77 Fed. Cl. 257, 276 (Fed. Cl. 2007) (sanctioning the plaintiff for failure to comply with preservation duties).

20. *See* McPeek v. Ashcroft, 202 F.R.D. 31, 33–35 (D.D.C. 2001) (weighing economic considerations in facilitating e-discovery).

21. *Go Pro Baseball Wise: Need an Agent?*, baseballwise.com, http://www.baseballwise.com/club/agents.html (last visited Feb. 12, 2011) (quoting Gene Orza, chief operation officer and former associate general counsel of the Major League Baseball Players Association (MLBPA)).

22. Peter A. Carfagna, Representing the Professional Athlete (West 2009).

23. *See* Paul T. Dee, *Ethical Aspects of Representing Professional Athletes*, 3 Marq. Sports L. J. 111, 117 (1992) (stating that the law of agency imposes duties on the agent to act for and on behalf of the player); Charles W. Ehrhardt & J. Mark Rodgers, *Tightening the Defense Against Offensive Sports Agents*, 16 Fla. St. U.L. Rev. 634, 639 (1988) (stating that the sports agent is a fiduciary); W. Jack Grosse & Eric Warren, *The Regulation, Control, and Protection of Athlete Agents*, 19 N. Ky. L. Rev. 49, 54–55 (1991) (asserting that a fiduciary duty is owed by all sports agents).

24. *See, e.g.*, Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542, 547 (E.D. Mich. 1984) (holding in a litigation between an NFL football player and his agent that the "relationship between a principal and agent is fiduciary in nature, and as such imposes a duty of loyalty, good faith, and fair and honest dealing on the agent"), *aff'd in part, remanded in part*, 767 F.2d 919 (6th Cir. 1985) (citing Anderson v. Griffith, 501 S.W.2d 695, 700 (Tex. Civ. App. 1973)). *See also generally* Scott R. Rosner, *Conflicts of Interest and the Shifting Paradigm of Athlete Representation*, 11 UCLA Ent. L. Rev. 193, 229 (2004) (explaining how it is the court's role to properly implement litigation holds and comply with preservation and the duties of the agent to the player, including loyalty and obedience); Samsung Elecs. Co., Ltd. v. Rambus, Inc., 2006 WL 2038417 (E.D. Va. July 18, 2006).

25. Marvin Jones Jr., *NBA Standard Player Agent Contract Legal Forms and Contracts*, Karemar (July 24, 2007, 2:09), http://www.karemar.com/blog/nba-standard-player-agent-contract-legal-forms-and-contracts (emphasis added). To represent a player in NBA negotiations, the agent must be duly certified by the NBA Players Association. *See 2005 NBA/NBPA Collective Bargaining Agreement, Article XXXVI: Players Agents*, Nat'l Basketball Players Ass'n: NBA Players United (Dec. 16, 2009), http://www.nbpa.org/sites/default/files/ARTICLE%20XXXVI.pdf.

26. *See* Meeks v. Parsons, No. 1:03-cv-6700-LJO-GSA, 2009 WL 3003718, at *4 (E.D. Cal. Sept. 18, 2009) ("A recipient of a document production request 'cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek that information reasonably available to him from his employees, agents, or others subject to his control.'") (quoting Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992)).

27. *See* Pacquiao v. Mayweather, No. 2:09-cv-2448-LRH-RJJ, 2010 WL 1439100, at *2 (D. Nev. Apr. 9, 2010) (ordering boxer De La Hoya and his agents and representatives to produce documents and information concerning the actions and statements of those agents and representatives).

28. *See, e.g*, Jordan F. Miller Corp. v. Mid-Continent Aircraft Serv., Inc., No. 97-5089, 1998 WL 68879, at *6 (10th Cir. Feb. 20, 1998) (affirming the district court's holding that plaintiff's failure to preserve evidence, coupled with resulting prejudice

to defendant, justified the imposition of sanctions). Notably, the various states have adopted different approaches to regulating sports agents, which in turn affects the liability that agents face if they violate their fiduciary duties to the players they represent. In California, for example, the 1997 Miller-Ayala Athlete Agents Act requires that agents who represent athletes file with the secretary of state. Cal. Bus. & Prof. Code § 18896 (West 1997). Among the requirements of the Act, agents must obtain liability insurance, or provide a bond, of at least $100,000 for security against claims arising out of the acts or omissions of the agent. *Id.* § 18897.97. Additionally, the regulations require that every agent maintain certain records for seven years. *Id.* § 18897.23.

29. *See, e.g.*, Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claims or defense. . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.").

30. *See, e.g.*, Kissinger v. Reporters Comm. for the Freedom of the Press, 445 U.S. 136, 164–65 n.6 (1980) ("Under Rule 34 of the Federal Rules of Civil Procedure, a party is required to produce requested documents if they are within his 'possession, custody, or control.' The same standard applies to subpoenas *duces tecum* issued under Rule 45. . . .").

31. *See, e.g.*, Fed. R. Civ. P. 34(a)(1)(A) (adopting "possession, custody, or control" as the test for the production of electronically stored information).

32. *See, e.g.*, Gray v. Faulkner, 148 F.R.D. 220, 223 (N.D. Ind. 1992) (holding that a party has a duty to seek information from those under its "control," including employees and agents); Thomas v. Hickman, No. 1:06-cv-00215-AWI-SMS, 2007 WL 4302974, at *14 (E.D. Cal. Dec. 6, 2007) (explaining that "'[c]ontrol' may be established by the existence of a principal-agent relationship").

33. *Pension Committee*, 685 F. Supp. 2d 456, 463 (S.D.N.Y. 2010).

34. Jones, *supra* note 25.

35. Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542, 549 (E.D. Mich. 1984), *aff'd in part, remanded in part*, 767 F.2d 919 (6th Cir. 1985).

36. *See, e.g.,* Williams, Cohen & Gray, Inc. v. CPS Grp., Inc., No. H-05-3718, 2006 WL 3316783, at *2 (S.D. Tex. Nov. 14, 2006) (ordering electronic production of documents); *In re* Honeywell Int'l, Inc. Sec. Litig., 230 F.R.D. 293, 303 (S.D.N.Y. Nov. 18, 2003) (same).

37. *See* Hynix Semiconductor, Inc. v. Rambus, Inc., 591 F. Supp. 2d 1038, 1065 (N.D. Cal. 2006) (holding that sanctions are not warranted for documents destroyed through a valid document retention policy); *In re* Old Banc One Shareholders Sec. Litig., No. 00 C 2100, 2005 WL 3372783, at *4 (N.D. Ill. Dec. 8, 2005) (holding sanctions are warranted for failure to adopt a comprehensive document retention policy). It should be noted that a document retention policy provides no protection if it is unreasonable in nature or instituted in bad faith; nor may it be followed in a situation where adherence to that policy is unreasonable or is taken in bad faith. *See, e.g.,* Stevenson v. Union Pac. R.R. Co., 354 F.3d 739, 741–48 (8th Cir. 2004) (affirming "sanction of adverse inference jury instruction against railroad for pre-litigation destruction, pursuant to its routine document retention policy, of tape-recorded radio communications between train crew and dispatchers on date of train's collision with vehicle; although railroad's document retention policy was not unreasonable or instituted in bad faith, it was unreasonable and bad faith to adhere to policy in light of knowledge of collision and relevance of tapes in any potential litigation. . . ."); Jordan v. Paccar, Inc., No. 95-3478, 1996 WL 528950, at *10 (6th Cir. Sept. 17, 1996) (noting that "a one week document retention policy for information relating to products liability litigation would obviously" be unreasonable).

38. *See In re Old Banc One*, 2005 WL 3372783, at *4 (holding "that Bank One breached its duty to preserve documents by failing to establish a comprehensive document retention policy and by failing to properly disseminate the policy to its employees"); *Argovitz*, 767 F.2d at 548 (noting that an agent's fiduciary duty includes the duty to disclose "all material facts within the agent's knowledge that might affect the principal's judgment"); David S. Caudill, *Revisiting the Ethics of Representing Professional Athletes: Agents, "Attorney-Agents," Full-Service Agencies, and the Dream Team Model*, 3 Va. Sports & Ent. L. J. 31, 37–40 (Fall 2003).

39. Fed. R. Civ. P. 37(b)(2)(A); *see also* Am. Friends of Yeshivat Ohr Yerushalayim, Inc. v. United States, No. 04-CV-1798 (CPS), 2009 WL 1617773, at *14 (E.D.N.Y. June 9, 2009) (discussing range of sanctions permitted under Rule 37); Metro. Opera Ass'n, Inc. v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union, 212 F.R.D. 178, 181–82 (S.D.N.Y. 2003) (entering judgment in favor of plaintiff as a discovery sanction).

40. *See Stevenson,* 354 F.3d at 748 (where party has followed its routine document retention policy, there "must be some indication of an intent to destroy the evidence for the purpose of obstructing or suppressing the truth" to impose the more severe discovery sanctions); Patterson v. Goodyear Tire & Rubber Co., No. 08-2060-EFM-DWB, 2009 WL 1107740, at *5–6 (D. Kan. Apr. 23, 2009) (denying sanction request citing party's routine deletion policy); Gippetti v. United Parcel Serv., Inc., No. C07-00812 RMW(HRI), 2008 WL 3264483, at *4–5 (N.D. Cal. Aug. 6, 2008) (denying spoliation claim finding destruction in accordance with retention policy); *In re Old Banc One*, 2005 WL 3372783, at *3 ("In order to meet its obligations, Bank One needed to create a comprehensive document retention policy to ensure that relevant documents were retained and needed to disseminate that policy to its employees.").

41. *See* De VosTarlton v. Lee, No. 07-CV-804 (JBW), 2008 WL 2946010, at *1 (E.D.N.Y. July 29, 2008) (holding that documents in the possession of a party's accountant are "deemed within that party's control for purposes of Rule 34 discovery"); Tarlton v. Cumberland Cnty. Corr. Facility, 192 F.R.D. 165, 170 (D.N.J.2000) (holding that the "client is charged with knowledge of what documents it possesses").

42. No. C07-1620MJP, 2008 WL 539809 (W.D. Wash. Feb. 25, 2008).

43. *See id.* at *2 (holding that a principal–agent relationship existed between a manager of a team and the Professional Basketball Club and therefore the Professional Basketball Club can collect documents from its respective teams).

44. *Id.* at *3.

45. *Id.* at *1.

46. *Id.*

47. *Id.*

48. *Id.* at *2–3.

49. *Id.*

50. *Id.* at *2 (citing Okla. Stat. Ann. tit. 18, § 2016 (West 2008)).

51. *Id.* (noting that the Operating Agreement required that team members hold 10 million units).

52. Dahl v. Bain Capital Partners LLC, 655 F. Supp. 2d 146 (D. Mass. 2009) (holding that the parties must pay for production but submit their data in native form rather than consider metadata requests); Takeda Pharm. Co. Ltd. v. Teva Pharms. U.S.A., Inc., 2010 WL 2640492 (D.D.E. 2010) (finding that the data were not reasonably accessible so the parties would split the costs).

53. *See, e.g.*, Lisa J. Tobin-Rubio, *Eminent Domain and the Commerce Clause Defense: City of Oakland v. Oakland Raiders*, 41 U. Miami L. Rev. 1185 (1987); Kenneth L. Shropshire, *Opportunistic Sports Franchise Relocations: Can Punitive Damages in Actions Based upon Contract Strike a Balance?*, 22 Loy. L.A .L. Rev. 569 (1989); *see also* Machaac v. Pozzo, 81 Cal. App. 2d 278, 285 (Cal. Dist. Ct. App. 1947) (arguing that the relationship between two parties in business together creates a fiduciary duty between the members and the overall business).

54. *See* Prof'l Hockey Corp. v. World Hockey Ass'n, 191 Cal. Rptr. 773, 777 (Cal. Ct. App. 1983) (noting, in reviewing the World Hockey Association league–franchise relationship, the duties the directors and trustees owed included fiduciary duties of diligence, loyalty, and good faith in addition to the duties that the league owes to the individual teams).

55. 75 Cal. Rptr. 2d 893 (Cal. Ct. App. 1998)

(Order of the Superior Court, Santa Clara County, No. CV756194).

56. *See id.* at 896.

57. *See id.* (recognizing the importance of an independent commissioner by the federal courts); *see also* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527 (7th Cir. 1978) (baseball); *see also* David Sirotkin, *Disciplining the Disciplinary Systems in Professional Sports: An Attempt to Fix the Arbitrary and Overreaching Disciplinary Powers of Sports Commissioners*, 11 Cardozo J. Conflict Resol. 289, 290 (2009).

58. *Nat'l Football League Props.*, 75 Cal. Rptr. 2d at 896.

59. *Id.* Sports commissioners generally have a broad mandate to look after the "best interests of the league." In recent years, commissioners have been more active in enforcing discipline for player conduct. *See generally* Robert I. Lockwood, *The Best Interests of the League: Referee Betting Scandal Brings Commissioner Authority and Collective Bargaining Band to the Frontcourt in the NBA*, 15 Sports Law. J. 137, 165 n.217 (2008). This has been especially true in the NFL, where Commissioner Goodell has been very public in enforcing discipline. *See* Jarrett Bell, *NFL Will Confront Discipline Issue, Unveil New Policy Within Days*, USA Today (Apr. 9, 2007), http://www.usatoday.com/sports/football/nfl/2007-04-09-conduct-policy_N.htm; Barry Wilner, *Goodell Gets Tough, Protects NFL Brand*, Wash. Post (Apr. 10, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/04/10/AR2007041001191.html.

60. *Nat'l Football League Props.*, 75 Cal. Rptr. 2d at 896–97.

61. *See id.* at 897; Lau v. DSI Enters. Inc., 477 N.Y.S.2d 151, 152 (N.Y. App. Div. 1984) (finding that directors have a right to inspect corporate documents); *see also* Millard v. Newmark & Co., 266 N.Y.S.2d. 254, 258 (N.Y. App. Div. 1966) (holding that limited partners have "a right of full and free access to information contained in the partnership books, and of all things affecting the partnership . . ."); N.Y. P'ship Law § 99(1)(a) (McKinney 2008).

62. *Nat'l Football League Props.*, 75 Cal. Rptr. 2d at 899.

63. The court explained that Mr. LoCasale (the Raiders' representative with the NFLP) "is clearly not asserting his own *right as a director* of NFLP to inspect corporate documents. Instead, he is speaking as a representative of the Raiders, on behalf of discovery sought by the Raiders club in its capacity as a shareholder of NFLP.") *Id.*

64. Cal. Corp. Code § 1602 (West 2011).

65. *Nat'l Football League Props.*, 75 Cal. Rptr. 2d at 899 (citing Hoiles v. Superior Court, 204 Cal. Rptr. 111, 116 (Cal. Ct. App. 1984)).

66. *NFL Owners Meetings: Kraft Apologizes for Spygate Scandal*, Street & Smith's Sports Bus. Daily (Apr. 2, 2008), http://www.sportsbusinessdaily.com/article/119713.

67. *See Specter: NFL Must Explain Destruction of Patriots Cheating Tapes*, Providence J. (Feb. 1, 2008, 11:56 AM), http://www.projo.com/patriots/content/projo_20080201_specter.7cdbf722.html.

68. *See id.*

69. *Id.*

70. Zubulake v. UBS Warburg LLC, 220 F.R.D. 212, 216 (S.D.N.Y. 2003) (quoting Fujitsu Ltd. v. Fed. Express Corp., 247 F.3d 423, 436 (2d Cir. 2001)).

71. *Id.* at 217.

72. No. 07-4671 (GEB), 2009 WL 792088 (D.N.J. Mar. 23, 2009), *aff'd*, 605 F.3d 223 (3d Cir. 2010).

73. *Id.* at *3–4.

74. *Id.*

75. *Id.* at *2.

76. For other examples of cases where parties were sanctioned, see *Peschel v. City of Missoula*, 664 F. Supp. 2d 1137 (D. Mont. 2009), and *Bright v. United Corp.*, No. 2007/80, 2008 WL 2971769 (V.I. July 22, 2008).

77. *Bright*, 2008 WL 2971769, at *9 (imposing spoliation inference for the failure to preserve digital surveillance video).

78. *See, e.g.*, Reilly v. NatWest Markets Grp., Inc., 181 F.3d 253 (2d Cir. 1999) (applying adverse inference against party who willfully failed to participate in discovery); Morano v. Westchester Paving & Sealing Corp., 7 A.D.3d 495 (N.Y. App. Div. 2004) (same); *see also* Beers v. General Motors Corp., No. 97-CV-482, 1999 WL 325378 (N.D.N.Y. May 17, 1999) (dismissing complaint for negligent spoliation); Squitieri v. City of New York, 248 A.D.2d 201 (N.Y. App. Div. 1998) (same).

79. *See* Greg Bishop, *Specter Calls Patriots' Spying Wider Than Stated*, N.Y. Times (May 15, 2008), http://www.nytimes.com/2008/05/15/sports/football/15nfl.html?ref=spygate.3.

Restrictions by EU Member States on the Exclusive Grant of Broadcast Rights on Pay-TV Upheld

BY ANDREAS ZAGKLIS AND HEINER KAHLERT

In three eagerly anticipated judgments rendered on February 17, 2011 (cases T-385/07, T-55/08, and T-68/08), the General Court of the European Union ("the Court") held that a member state of the European Union ("EU") may, in certain circumstances, prohibit the exclusive broadcast of all International Federation of Association Football ("FIFA") World Cup and Union of European Football Association ("UEFA") Championship matches on pay television. This article provides a summary of the factual background and the court's reasoning, as well as a brief analysis of possible effects for the sports–television rights market.

THE DISPUTE BETWEEN FIFA/UEFA AND THE EUROPEAN COMMISSION

The underlying facts of the cases ruled upon by the court can be summarized as follows.

In its article 3a(1), European Directive 89/552/EEC (as amended by Directive 97/36/EC) concerning the pursuit of television broadcasting activities ("the Directive") provides that

> [e]ach Member State may take measures in accordance with Community law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events via live coverage or deferred coverage on free television. If it does so, the Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society.

Based on that article, in 2000 the United Kingdom of Great Britain and Northern Ireland ("UK") adopted a list of events that were of "major importance to the UK society" and were, therefore, in general to be covered live on free television. This list included, inter alia, *all* matches of the FIFA World Cup ("FIFA WC") and of the UEFA European Football Championship ("UEFA EFC"). In May and June 2004, the Flemish and French Communities in Belgium followed by also adopting a list that included all matches of these two football events.

In line with the Directive, the UK and the Kingdom of Belgium notified the European Commission of the above measures in order for the European Commission to decide upon their compatibility with EU law. In June and October 2007, respectively, the European Commission decided that these measures were compatible with EU law.

In October 2007 and February 2008, respectively, FIFA and UEFA challenged the decisions of the European Commission before the court.

THE ARGUMENTS OF FIFA AND UEFA

Both FIFA and UEFA argued before the court that the matches of the FIFA WC and the UEFA EFC needed to be divided into two categories. One category would be the so-called prime or gala matches, comprising the opening match, the semifinals, the final, and the matches involving the national team of the country in question. All other matches would fall within the "non-prime" or "non-gala" category. FIFA explicitly confirmed that it considered the inclusion of the prime FIFA WC matches in the list for events that need to be broadcast live in free television to be in compliance with EU law. UEFA appeared to share this view for gala UEFA EFC matches.

However, both associations argued that the Commission's appraisal of the inclusion of non-prime matches in the UK and Belgian lists contravened EU law on several points. FIFA and UEFA submitted that the Commission only provided brief and very general remarks with respect to the event's significance for the general public and had thus violated its obligation to provide a statement of specific reasons justifying its decision to approve the inclusion of all FIFA WC and UEFA EFC matches. Furthermore, FIFA and UEFA submitted that this inclusion of non-prime matches constituted an infringement of their right to property and violated EU Treaty provisions on competition, the freedom of services, and the freedom of establishment. In addition, the football associations argued that the Directive had been violated because non-gala matches are not of major importance for society, as required by article 3a(1) of the Directive.

THE DECISIONS DELIVERED BY THE GENERAL COURT OF THE EUROPEAN UNION

In addressing the distinction between prime and non-prime matches, which was the basis for most of the legal arguments submitted by FIFA and UEFA, the court's reasoning is founded on the assumption that the FIFA WC and the UEFA EFC "may reasonably be regarded as a single event rather than as a series of individual events divided into 'prime' matches and 'non-prime' matches." In the court's view, "it is well known that, in the FIFA WC, the participation of the teams in 'prime' matches, such as matches involving the relevant national team, may depend on the results of 'non-prime' matches, which determine the fate of those teams. Thus, 'non-prime' matches determine the opponents of the relevant national team in the subsequent stages of the competition. In addition, the results of 'non-prime' matches may even determine whether or not that national team advances to the subsequent stage of the competition."

As regards the (lack of a) statement of specific reasons for which the FIFA WC and the UEFA EFC could *in toto* qualify as of major importance for the UK and Belgian societies, the court held that the European Commission was not obliged to give detailed reasons for its appraisal of the events' inclusion on the lists. In the court's view, this is due to recital 18 of the Directive's preamble, which names these events as examples of events of major importance for society. According to the court, this mention obviated the need for any detailed explanation by the Commission, which could instead restrict itself to very general remarks on the significance of these events for the general public. Although the court admitted that there was no indication whether recital 18 referred to *all* FIFA WC and UEFA EFC matches or just to prime matches, it still did not follow the associations' argument that specific reasons should have been provided at least for the inclusion of non-prime matches on the list. Because the court found the FIFA WC and the UEFA EFC to be "single events," it concluded that the general remarks on the events' significance also captured the non-gala matches.

With respect to the alleged violation of FIFA's and UEFA's property rights, the court acknowledged that their property right was indeed affected by the inclusion of the FIFA WC and the UEFA EFC on the list. However, the court emphasized that the principle of protection of the fundamental right to property under EU law is not absolute but must be viewed in relation to its social function. Hence, the right to property can be restricted in favor of objectives in the public interest—which, in the case at hand, was the right to information—as long as the restriction is not inappropriate. Referring to its earlier conclusion that the FIFA WC and the UEFA EFC may be regarded as single events, the court held that the Commission did not err in finding that inclusion of all matches was indeed appropriate. Furthermore, the court underlined that while the price for the exploitation of the broadcasting rights to these events might be affected by the measures taken by the UK and Belgium, the commercial value of these rights was not wholly destroyed. This is because, in the court's opinion, FIFA and UEFA were not obliged "to sell [these broadcasting rights] on whatever conditions [they] could obtain" and because they were "protected against collusive and abusive practices by Community and national competition law."

Likewise, with regard to the alleged violation of the freedom of services and the freedom of establishment, the court held that said freedoms were in fact restricted, but that such restriction was justified in view of the public's right to information and that the restriction was not disproportionate. The same line of argument was followed by the court regarding the alleged breach of the EU competition rules.

Most importantly, the court dismissed FIFA's and UEFA's argument that the inclusion of non-gala matches on the list violated article 3a(1) of the Directive because these matches were, according to the associations, not of major importance to UK and Belgian societies. The court started by stating that the Directive leaves the member states considerable discretion when adopting a list of events they consider to be of major importance to their society. Therefore, according to the court, one would have to submit specific factors showing that the non-prime matches are not of major importance for the society of the relevant member state in order to call into question a finding by the Commission that the inclusion of the entire FIFA WC and/or UEFA EFC is compatible with EU law. The court found that FIFA and UEFA had not succeeded in doing so and that the argument that certain non-prime games are not of major importance (even if this was indeed the case) is not conclusive. It held that not *all* non-prime matches must necessarily be of major importance—rather, it is sufficient that it cannot be specified at the time the list is drawn up or the broadcasting rights are acquired which non-prime matches are in fact of major importance. Hence, the court concluded that the inclusion of *all* matches of the FIFA WC and the UEFA EFC on the list was not arbitrary but within the limits of the member states' discretion.

Therefore, the court found the Commission's appraisal of the UK and Belgian lists to be in accordance with EU law. However, the court expressly stated that a number of different approaches concerning the inclusion of FIFA WC and the UEFA EFC may be equally compatible with the Directive, e.g., an inclusion of prime or gala matches only.

ANALYSIS

At this point, FIFA and UEFA have not yet publicly disclosed whether they intend to appeal the above-mentioned decisions before the European Court of Justice.

That said, the court's decisions establish three important principles:

- the EU member states have broad discretion when adopting a list of "events of major importance for the society";
- it is within each EU member state's discretion to require (without giving detailed reasons) that *all* FIFA WC and UEFA EFC matches be broadcast live on free television, unless (i) specific factors show that certain matches are not of major importance for the society of the relevant member state, *and* (ii) it can be determined in advance which matches fall under this category; and
- other approaches than the one taken by the UK and Belgium might also be compatible with EU law and shall be decided in view of the circumstances in each EU member state.

The policy adopted by the European Commission and the support received by the first instance court clearly emphasize that, while FIFA and UEFA certainly have a right to commercially exploit the FIFA WC and the UEFA EFC, commercialization of sports should have its limits within the EU. Not allowing football aficionados free access to the live broadcast of such major events can be as socially important as requiring state intervention in certain EU member states.

However, the decisions leave room for interpretation and controversy as to their repercussions on other events, be it in football or other sports. Although the court (rightly) acknowledged the discretion of the member states, it did not elaborate on any specific criteria for ascertaining whether an event is in fact of major importance for a certain society. On the other hand, the court did not reject the criteria utilized by the European Commission. According to the Commission, reliable indicators of the importance of events for a society are

- a special general resonance within the member state, and not simply a significance to those who ordinarily follow the sport or activity concerned;
- a generally recognized, distinct cultural importance for the population in the member state, in particular as a catalyst of cultural identity;
- involvement of the national team in the event concerned in the context of a competition or tournament of international importance; and
- the fact that the event has traditionally been broadcast on free television and has commanded large television audiences.

Based on these criteria, a certain sports event might be of major importance for some societies but not for others. For example, while the Epsom Derby is of major importance for the UK society, it is certainly not for the German society. Therefore, not only are member states—thanks to their wide discretion—entitled to take different approaches when adopting their lists (as expressly acknowledged by the court), but they may even be *forced* to do so with regard to certain events. In fact, the current lists differ significantly between member states. For instance, while Germany's list includes only the Olympic Games and certain football matches, Finland's list is much broader, including (inter alia) the (International Ice Hockey Federation–organized) men's Ice Hockey World Championship and the International Association of Athletic Federations' World Championships in Athletics.

Furthermore, the qualification as an event of major importance may change should a certain sport or sports event become increasingly popular in a society. This process, however, will likely take more than just a few years in order for a "distinct cultural importance" to evolve. In any event, the reaction of EU member states to the decisions is now anticipated with great interest, especially to see if some will use the decisions as a tool to expand their lists of events of major importance, in particular those countries that have so far not included non-prime matches of the FIFA WC and/or the UEFA EFC (such as Austria, Denmark, Germany, and Italy). ❖

Andreas Zagklis and Heiner Kahlert practice arbitration and sports law at Martens Lawyers in Munich, Germany. They can be reached at a.zagklis@martens-lawyers.com and h.kahlert@martens-lawyers.com, respectively.

ivi TV

New Media Revolutionary or Copyright Infringer?

BY SCOTT HERVEY AND MATT MASSARI

ivi, Inc. is either an Internet television revolutionary or just another soon-to-be-defunct Internet copyright pirate. The Seattle-based start-up is taking on broadcast television networks, television distributors, motion picture studios, television stations, and others that own or create copyrighted programming in order to find out. In a declaratory relief suit filed by ivi in the U.S. District Court for the Western District of Washington in late September 2010, ivi claims that the Copyright Act specifically allows others to retransmit broadcasters' signals as long as they pay the fees to the broadcasters as spelled out in the Copyright Act. ivi named ABC, CBS, CW Broadcasting, Disney, Fisher Communications, Fox Television, Major League Baseball, NBC Universal, Twentieth Century Fox, WGBH Educational Foundation, and WNET.org in the lawsuit.

A group of 24 broadcasters and the Office of the Commissioner of Baseball, for their parts, filed a copyright infringement lawsuit against ivi in the U.S. District Court for the Southern District of New York just over a week after ivi filed its suit in Seattle. In their lawsuit, the broadcasters claim that "[t]here are no 'copyright technicalities' that allow defendants to steal plaintiffs' broadcast signals and copyrighted programming and to fence that valuable intellectual property via the Internet" and that "ivi's Internet TV streaming service is not a 'cable system' under, or otherwise eligible for, the compulsory license set forth in Section 111 of the Copyright Act" as ivi claims.[1] After the Washington court dismissed ivi's action as an impermissible anticipatory filing, plaintiffs moved for a preliminary injunction against ivi in the New York action.

For background, ivi launched a service in September 2010 that retransmits live television broadcasts over the Internet from New York, Los Angeles, Chicago, and Seattle affiliates of ABC, CBS, NBC, Fox, The CW, and PBS. In order to receive the live television streams, ivi Internet users download an ivi TV player onto their computers, provide their credit card information, and are promised a one-month free trial before having to pay $4.99 a month. The downloadable player is available to PC, Mac, and Linux end users. Currently, the ivi TV player is only available for laptops and desktops, but ivi claimed on its Web site that it was "working hard on ports for mobile phones, PDAs, gaming consoles, television sets, and set-top boxes, just to name a few," and also that it "will be adding new [television] markets soon."[2]

What you watch on ivi TV are original, live, over-the-air television broadcasts from a variety of local television stations. By contrast, archived TV providers such as Hulu and YouTube offer a searchable library of previously aired TV and clips that can be viewed only after they are broadcast. The issue is that ivi streams the broadcast television station's programming without the consent of the affected stations or owners of the copyright in the content. The copyright owners and broadcasters claim ivi's unauthorized and unlicensed Internet retransmissions constitute copyright infringement.

ivi claims that it is entitled to a compulsory license to transmit plaintiffs' programming pursuant to section 111 of the Copyright Act. This statute allows "cable systems" in compliance with the rules and regulations of the Federal Communications Commission ("FCC") to transmit plaintiffs' programming as long as they make payments to the Copyright Office as determined by the statute. Section 111(c)(1) of the Copyright Act provides that, subject to certain conditions:

> secondary transmissions to the public by a cable system of a performance or display of a work embodied in a primary transmission made by a broadcast station licensed by the Federal Communications Commission or by an appropriate governmental authority of Canada or Mexico shall be subject to statutory licensing upon compliance with [record keeping and royalty fee requirements] where the carriage of signals comprising the secondary transmission is permissible under the rules, regulations, or authorizations of the Federal Communications Commission.[3]

The statute later defines "cable system" as

> a facility, located in any State, territory, trust territory, or possession of the United States, that in whole or in part receives signals transmitted or programs broadcast by one or more television broadcast stations licensed by the Federal Communications Commission, and makes secondary transmissions of such signals or programs by wires, cables, microwave, or other communications channels to subscribing members of the public who pay for such service. For purposes of determining the royalty fee under subsection (d)(1), two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered as one system.[4]

ivi argues that it fits within the statutory definition of a cable system under the Copyright Act. Further, while acknowledging that ivi does not comply with the "rules, regulations, or authorizations" of the FCC, ivi claims that its transmissions are "permissible" under these rules because they occur over the Internet, which the FCC does not regulate. As the court stated, "[i]n other words, defendants argue that ivi is a cable system for purposes of the Copyright Act, and thus may take advantage of the compulsory license, but that it is not a cable system for purposes of the Communications Act, and thus it need not comply with the requirements of that Act and the rules of the FCC promulgated thereunder."

In order to ultimately prevail, ivi must persuade the court that it is a cable system under section 111 and subject to the same compulsory license scheme applied to traditional cable and satellite systems. The history of the treatment of cable television under the current and 1909 Copyrights Acts sheds some light on these issues.

Cable television, in its early days, involved the capture by the cable operator of broadcast signals and the retransmission of these signals over wires to cable subscribers. The question quickly arose whether cable systems' retransmission of copyrighted broadcasts constituted "performances" of the copyrighted works and therefore infringed the holders' exclusive rights. In 1974, the U.S. Supreme Court, reasoning that the role of cable operators was closer to the passive role of a viewer than to the active role of performer, held that there were no performances.[5] The effect of the decision was to allow cable operators to profit from the systematic retransmission of copyrighted works free of liability for infringement.

Congress ultimately rejected this view and adopted a compulsory licensing scheme aimed at the cable industry in the 1976 Copyright Act. The cable compulsory license applies now to traditional cable systems, private cable systems, and wireless distribution technologies.[6] A separate satellite compulsory license applies to home satellite dishes and direct broadcast satellite technologies.[7] Together, these two compulsory licenses provide the legal framework under which all currently existing multichannel video programming distribution technologies carry local and distant broadcast channels. It appears that ivi is taking the position that it is subject to the same compulsory licensing schemes.

The fact that ivi's particular technology was not specifically contemplated by Congress when enacting the 1976 Act will not end the court's inquiry of whether it qualifies as a cable system. The court also will look to prior case law, which encourages a commonsense approach considering the practical consequences of suggested statutory interpretations.[8] In *Infinity Broadcasting*, Media Dial-Up retransmitted radio broadcasts in remote cities via telephone to its customers, who paid a fee for access. Even though Media Dial-Up met all of the factors that would entitle it to be classified as a "passive carrier" and enjoy the safe harbor of 17 U.S.C. § 111(a)(3), the court refused such a finding, stating that "in an era of rapid technological change[,] possibilities for the capture and retransmission of copyrighted material over the Internet . . . are enormous."[9] The court stated that classifying Media Dial-Up as a passive carrier "would threaten considerable mischief."[10]

IN ORDER TO ULTIMATELY PREVAIL, IVI MUST PERSUADE THE COURT THAT IT IS A CABLE SYSTEM UNDER SECTION 111 AND SUBJECT TO THE SAME COMPULSORY LICENSE SCHEME APPLIED TO TRADITIONAL CABLE AND SATELLITE SYSTEMS.

On February 22, 2011, the Southern District of New York preliminarily enjoined ivi from streaming television broadcasts to paying subscribers through the Internet, holding that ivi is not a "cable system" under section 111 of the Copyright Act and does not qualify for a compulsory license to perform copyrighted content. The court outright rejected ivi's interpretation of section 111. First, the court held that the legislative history suggests Congress understood a cable system to be a localized transmission service, not an Internet distributor. Second, the court relied on statements of the Copyright Office, which has repeatedly rejected the notion that Internet retransmission services qualify for section 111 licensing, and has issued several public statements that only FCC-regulated entities may be construed as cable systems. Finally, the court held that ivi failed to show that it satisfied the textual definition of a "cable system" under section 111, because ivi does not own any transmission "facilities" and technically does not "make" the transmissions distributed by an Internet service provider. The court granted the preliminary injunction, finding that "[a]s it is extraordinarily unlikely that ivi will ultimately be deemed a cable system under Section 111, plaintiffs have demonstrated a likelihood of success on the merits of their copyright claim. They also have demonstrated irreparable harm, that the balance of hardships tip in their favor, and that the public interest will not be disserved by an injunction."[11]

Some might argue that broadcasters and content owners should embrace this new media technology. The new distribution medium increases viewership and potentially allows broadcasters to charge higher advertising fees. On the flip side, the loss of control over the distribution of copyrighted content preempts copyright owners' opportunities to independently deliver or license their content over new media. For example, many of the major sports leagues have been working on their own delivery of online and mobile streaming of their sports content. As another example, the National Football League has maintained a blackout policy that states that a home game cannot be televised locally if it is not sold out 72 hours prior to its start time. With the aid of ivi TV, Oakland Raiders fans experiencing a blackout might now be able to watch their team's home games broadcast to out-of-market television stations.

Section 111 addresses primary transmission, made available to the public at large—free broadcast television. Should ivi somehow persuade the court that it is a "cable system" under section 111 of the Copyright Act, content owners, particularly sports leagues, can prevent ivi from streaming live sports events by moving the primary transmission of these events to cable. With the ability to pay higher rights fees, the migration of sports content to cable is already well underway. An adverse decision in *ivi* will only make it harder for broadcasters to attract future sports content. ❖

Scott Hervey is a shareholder and Matt Massari is an associate at Weintraub Genshlea Chediak Law Corporation. Weintraub lawyers maintain a blog dedicated to current intellectual property issues at www.theiplawblog.com.

ENDNOTES

1. Complaint ¶ 7, WPIX, Inc. v. ivi, Inc., 2010 WL 3840502 (S.D.N.Y. Sept. 28, 2010) (No. 10-7415).
2. *Frequently Asked Questions*, Ivi TV, http://www.ivi.tv/faq (last visited Apr. 6, 2011).
3. 17 U.S.C. § 111(c)(1).
4. *Id.* § 111(f)(3).
5. *See* Teleprompter Corp. v. Columbia Broad. Sys., Inc., 415 U.S. 394, 408–09 (1974).
6. 17 U.S.C. § 111(f).
7. *Id.* § 119.
8. *See* Infinity Broad. Corp. v. Wayne Kirkwood d/b/a Media Dial-Up, 63 F. Supp. 2d 420 (1999).
9. *Id.* at 426.
10. *Id.*
11. *See* WPIX, Inc. v. ivi, Inc., 2011 WL 607111, at 22.

BOOK REVIEW

Legal Guide to Independent Filmmaking, by Michael C. Donaldson and Lisa A. Callif

REVIEWED BY DANIEL M. SATORIUS

Independent film is clawing its way out of a morass. In the last 10 years, its good films were overwhelmed by an unprecedented output of weak product made possible by promiscuous new money and cheap production technology. And now, despite inexpensive access to worldwide distribution, the picture is bleak. There is virtually no financing and (not coincidently) the revenue models look dismal. What's an industry to do?

One answer is good management. Good business practices lead to better choice of projects, elimination of costly mistakes and inefficiencies, and conserving scarce resources for marketing and distribution. Maybe what's missing is the romance of making a good business plan, the sexiness of properly managing accounts, and the heroic and violent execution of a great distribution plan.

What is needed are experienced voices to tutor the field of independent filmmakers in good business practices. Enter Michael C. Donaldson and Lisa A. Callif with their new book, *Legal Guide to Independent Filmmaking*.

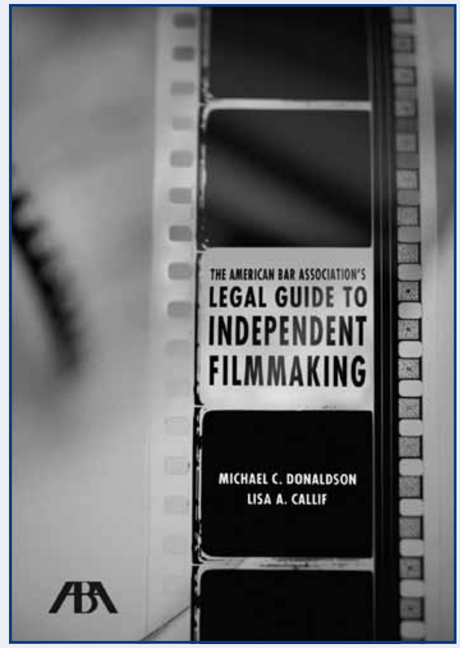
In the spirit of open source, Donaldson and Callif disclose the essentials independent producers and production teams need to maneuver their way through the principal legal issues involved in every stage of a film's life: from the idea development stage through to financing, production, and delivery, up to the final stage of distribution.

This book is for the independent filmmaker team. The authors walk them through the transactions and the legal issues in each phase of making a film with enthusiasm, good spirit, and great skill. The book is easy to read, friendly, and accessible. It enables filmmakers to understand the important legal issues and be better consumers of legal services. The book comes with a CD containing 19 useful form agreements, releases, schedules, etc. in MS Word format.

In fairness, let's disclose that this book is published by the ABA's Forum on the Entertainment and Sports Industries, the same outfit that publishes this periodical. Hopefully, we will see more books from the Forum written by authors of Donaldson's and Callif's stature: authors with authoritative command of the material and devotion to servicing their field.

The Sundance Film Festival class of 2011 is an indication that the industry is turning itself around. Creative yet accessible storytelling and the willingness to match stories to audiences seem to be back. Hopefully, it is a matter of winnowing the herd and making room for new talent and our independent masters so they can find the resources to make their films. Good business practices and good legal advice are essential to supporting great new works that can compete in this new digital age. Donaldson and Callif's book provides filmmakers with that much needed support. ❖

Daniel M. Satorius' firm Satorius Law Firm, PC focuses on transactions, intellectual property, and financing principally in the entertainment business and includes clients such as Academy Award, Emmy Award, Independent Spirit Award, and Peabody Award winning independent producers, writers, and broadcasters in the film and television industry. He also produces independent films. He can be reached at dan@satoriuslawfirm.com.



Legal Guide to Independent Filmmaking

By Michael C. Donaldson and Lisa A. Callif

2010 • 220 pages + CD-ROM
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"This invaluable and detailed guide is such a perennial resource, you'll want to thank the book for not charging you by the hour."

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not typical" safe harbor; and second, there are the "material connections" provisions, in which the FTC illustrates the well-settled principle that unexpected connections between advertisers and endorsers must now be clearly disclosed. The Guides also clarify that the application of the rules is not limited to traditional media, but also applies to new media, including blogs and social networking sites.

TESTIMONIALS FROM ENDORSERS MUST BE TRUTHFUL, AS "RESULTS NOT TYPICAL" DISCLAIMERS ARE NO LONGER PERMITTED

For years, advertisers were at liberty to use an endorser or consumer testimonial to report fairly miraculous results. Among others, there were many fabulous weight-loss claims apparently derived from foods, exercise equipment, and beverages. Many of the claims were accompanied by disclaimer language that, under the 1980 version of the Guides, permitted an advertiser to present testimonials describing unusual results as long as the advertiser included a disclaimer, such as "results not typical" or "results may vary." Under the revised Guides, however, the FTC has set forth its perspective regarding how consumers interpret such disclaimer language and has concluded that consumers likely interpret such testimonials as representative of the results that can generally be expected with a given product or service. In order to make such claims, the FTC requires that an advertiser possess and rely upon adequate evidence to substantiate any claims. Additionally, the substantiation has to exist at the time the claims are made, not at some later date. This means that the advertiser cannot use an endorser to say something about its product unless the advertiser has competent and reliable evidence to support what the endorser is saying. This also means that an endorser needs to be truthful about his or her experience and the experience of average people using the product.

FOR YEARS, ADVERTISERS WERE AT LIBERTY TO USE AN ENDORSER OR CONSUMER TESTIMONIAL TO REPORT FAIRLY MIRACULOUS RESULTS.

If the advertiser does not have appropriate substantiation demonstrating that the endorser's experience is representative, then the advertisement must contain a clear and conspicuous disclosure setting forth the generally expected performance in the circumstances that are depicted. Of course, the generally expected performance also must be supported with adequate substantiation. In the past, an advertiser frequently made some statement indicating that the results of individuals might vary, but all too often, the advertiser used a celebrity or athlete to suggest that something ordinary was actually extraordinary. Under the revised Guides, an advertiser truly has but two choices: either possess adequate substantiation to make the claim or clearly and conspicuously disclose what the expected results will be under the circumstances reflected in the advertisement.

To illustrate this principle, the FTC provides many examples. One example provides a particularly clear indication of the need for a disclosure. The FTC cites the example of an advertisement for heat pumps in which three individuals describe their heating bills as having decreased by $100, $125, and $150, respectively. The advertiser cannot substantiate this number as representative because only 20 percent of consumers will save $100 or more. As consumers will interpret these savings as representative, a disclosure of "Results not typical" or "These testimonials are based on the experiences of a few people and you are not likely to have similar results" would be insufficient to prevent such an advertisement from being deceptive. The advertisement could be remedied, however, by clearly and conspicuously disclosing generally expected savings—e.g., "the average homeowner saves $35 per month" or "the typical family saves $50 per month during cold months and $20 per month in warm months"—if these claims can be substantiated by the advertiser.

The FTC acknowledges that there may be cases where a "strong disclaimer of typicality could be effective in the context of a particular advertisement"—for example, if an advertiser possesses "reliable empirical testing demonstrating that the net impression of its advertisement with such a disclaimer is non-deceptive [to consumers]. . . ." This would seem to be the exception, however, rather than the rule.

REQUIRED DISCLOSURE OF "MATERIAL CONNECTIONS"—APPLICATIONS IN NEW MEDIA

The revised Guides retain the FTC's long-standing position that "material connections" between advertisers and endorsers—ones that consumers would not expect—must be fully disclosed. Such connections may involve payments, free products, or any other benefit that might "materially affect the weight or credibility of the endorsement." What the revised Guides provide, however, are new examples demonstrating the potential application of this rule, including circumstances involving social networking sites and blogs.

Of course, there are instances in which no disclosure is required, and the Guides illustrate such scenarios. For example, in a situation in which a celebrity endorses a particular food product in a commercial and the endorsement properly reflects the celebrity's honest, subjective opinion about the product, there is no need to disclose the connection. Regardless of the compensation paid for the endorsement, the advertiser would not need to disclose it, as a consumer would expect the celebrity to be compensated under these circumstances.

Change the venue in which the celebrity is offering his or her opinion, however, and the FTC may reach a different conclusion. If a celebrity is compensated to tout a product on a television talk show, then a clear and conspicuous disclosure indicating that he or she is a paid spokesperson would be required, as the consumer would not anticipate the star was compensated in that instance, and the information might affect the weight a consumer gives to the endorsement. Interestingly, the FTC makes clear that a disclaimer would also be needed if the celebrity touted the product on a social networking site.

The rule has implications for bloggers and other content producers in cyberspace as well. Take, for example, an athlete who maintains a blog for reviews of exercise equipment. A manufacturer provides free new exercise equipment to the athlete on the grounds that the athlete blogger writes a critique. The fact of this relationship would need to be disclosed, as the blogger's relationship to the advertiser is not inherently obvious, and readers are unlikely to know that bloggers may receive free product samples in exchange for their product reviews.

Interestingly, the rule also appears to place some obligation on the sponsoring party to counsel the blogger under these circumstances—specifically, the advertiser "should advise him at the time it provides the [product] that this connection should be disclosed, and it should have procedures in place to try to monitor his postings for compliance." Under the revised Guides, advertisers are also obligated to monitor paid bloggers' Web sites to ensure that any statements made about their products are true and substantiated. Advertisers must "take steps necessary to halt the continued publication of deceptive representations when they are discovered." Both the blogger and the advertiser may be liable for any misleading or unsubstantiated statements made in a paid endorsement.

As the Guides make clear, endorsers should carefully review their remarks about products they are paid to endorse, regardless of their celebrity status, and regardless of whether the remarks appear in conventional advertising or in new media, such as a social networking site or blog. The rules are not meant to be a trap for the unwary but a method for consumers to fairly assess and evaluate their purchasing decisions. ❖

Pamela M. Deese is a partner in the Intellectual Property Practice of Arent Fox LLP in Washington, D.C. She can be reached at deese.pamela@arentfox.com. Henry Huffnagle contributed to the preparation of this article.

FORUM LEADERSHIP **CALL FOR NOMINATIONS**

The ABA Forum on the Entertainment and Sports Industries is seeking to fill the position of Forum chair-elect for a two-year term. The Forum chair-elect will then become chair of the Forum for an additional two-year term. The Forum is also seeking to fill two positions on the Forum's governing committee for a three-year term. Currently, Robert Rosenbloum of Greenberg Traurig and Cynthia Sanchez of the U.S. Copyright Office occupy these two positions and can be considered for re-election. Service of both the Forum chair-elect and governing committee members will commence after the October 2011 Forum Annual Meeting.

If you would like to recommend someone to serve as Forum chair-elect and/or as a governing committee member, please send the name and contact information of the nominee to Teresa Ucok at Teresa.Ucok@americanbar.org no later than 5:00 pm, PST on June 1, 2011. Based on the nominations received, the Forum's nominations committee, which includes Marcelino Ford-Livene, Dara Gelbtuch, Leonard Glickman, Christine Lepera, Neeta Ragoowansi, Henry Root, Judy Tint, Victoria Traube, and Kirk Schroder, Nominations Committee chair, will make recommendations to the Forum regarding filling those positions. Thank you.

CONTINUED FROM PAGE 1

attend GRAMMY Week events, including the GRAMMY Telecast. And, the competition is co-sponsored by the American Bar Association Forum on the Entertainment and Sports Industries.

The writing competition is one of the three major elements of the GRAMMY Foundation® ELI. The other elements are a seminar series held at leading law schools around the nation, and the ELI luncheon, which is held during GRAMMY Week and attended by 500 of the most prominent entertainment attorneys in the country. The luncheon, attended by music attorneys, executives, and law students, is a singular event for the entertainment business community during GRAMMY Week and is held in honor of the ELI writing competition winners.

* * *

Information technologies and the Internet have been game-changing forces within the music industry. Virtually any conversation on this topic will include words and phrases such as "Napster," "iTunes," "going viral," "digital rights management," "streaming," "peer-to-peer downloads," and "piracy." Notably, such a discussion would primarily pertain to the customer end of the music supply chain, the portion that includes the activities of marketing, distribution, and retailing just prior to the moment of consumption. This segment has witnessed fundamental changes since the mid- to late nineties,[1] resulting in the evolution of the relationship between music fans and record labels and a major shift in bargaining power among players in the industry as people have adopted new ways of finding, sharing, purchasing,[2] and listening to music.

At the same time, the forces of digitization also loom large at the opposite end of the supply chain—where music is created—and are continuing the assault on traditional business models. However, this second front has received far less attention from experts despite its potential as the origin of some of the most transformational changes yet endured by the music industry: the end of the monopoly skilled musicians currently enjoy over the creation of music and the release of massive quantities of music with few or no reserved copyrights.

OPENSOURCING, CROWDSOURCING, AND COMPUSOURCING, OH-MY!

Just as, for better or worse, technology has made it easier for consumers to obtain music, it is also making it easier for musicians to create music. Musicians are able to set up professional-quality recording studios in their homes while commercial studios are closing and sound engineers are hard-pressed to find employment.[3] Sophisticated music and audio production software like industry-standard Avid's Pro Tools that was once prohibitively expensive and complicated for most musicians can now be purchased for $599 and run on a standard personal computer.[4] Digital sound libraries and component plug-ins that are several gigabytes in size can now fit easily on inexpensive hard drives and replace thousands of dollars' worth of hardware synthesizers, samplers, sequencers, mixers, and physical instruments. Even the human voice can be filtered and sanitized of imperfections by software like Antares' Auto-Tune, a tool that was cutting-edge when Cher used it in her 1998 song, "Believe," but is now used routinely by both amateur and GRAMMY Award–winning singers.[5] This expanding computer music software market has grown from $140 million in 1999 to about $425 million in 2008.[6] Empowered by new tools that boost their productivity, more musicians (and nonmusicians) are creating more music than ever before.[7]

Opensourcing

In 1998, several prominent leaders in the software industry met in Silicon Valley and coined the term "opensource" to refer to a philosophy of transparency, collaboration, innovation, and "free software" among computer programmers.[8] Musicians participate in opensourcing by offering lyrics, music tracks, sound samples, and entire songs under an artistic license like Creative Commons ("CC") that allows musicians to explicitly and automatically give certain rights to licensees (i.e., anyone who accesses their work) while reserving certain other rights to themselves.[9] These licenses have been upheld by courts.[10] Musicians post their creations on Web sites like Opsound.org that encourage people to "download, share, remix, and reimagine."[11] Artists like Rivers Cuomo of Weezer, The Roots, John Legend, Yo Yo Ma, and Nine Inch Nails have uploaded stems (e.g., vocal, drum, and guitar tracks) under CC licenses from which others can create new music.[12]

Perhaps more significant than the free sharing of simple audio files (e.g., MP3s) is the sharing of the underlying session files generated by different production software. Session files expose the individual notes of melodies and chords, parameters defining instrument properties and special effects, tempo settings, and the sequence of tracks. With these files and the software that supports them, a user can replace a Steinway D grand piano with a Yamaha C7 in a score with a few mouse clicks.[13] Some of the best software available for this sort of music development work is itself opensource, and available free.[14]

Creative Commons estimates that there were approximately 350 million CC licensed works in 2009, up from 4.7 million in 2004.[15] This number will continue to increase, and more individuals (with varying degrees of musical ability) will embrace the opensource philosophy by sampling, remixing, and modifying countless Nth generation derivative works and uploading them back on the Web, where they will, no doubt, be fruitful and multiply.

Crowdsourcing

Crowdsourcing is the strategy of utilizing the relatively inexpensive labor of a large group of people to accomplish tasks traditionally completed by a much smaller group of more specialized individuals (typically employees).[16] In recent years, the Internet has dramatically increased the power of people to collaborate and communicate in a decentralized way, resulting in a slew of crowdsourcing projects, many of which have been promoted as contests.[17] Even the U.S. government took notice of the potential of crowdsourcing when Congress passed the America COMPETES Reauthorization Act of 2010, which empowers federal agencies to "carry out a program to award prizes competitively to stimulate innovation."[18]

Music production is well-suited for a crowdsourcing model.[19] First, music has a very broad appeal, so the number of people interested in creating it is enormous. Second, an individual song is only a couple of minutes long, so even those with limited experience consider themselves up to the challenge. Third, as discussed previously, the opensource movement has made music building blocks and construction tools inexpensive and accessible. Finally, music is easily stored in digital form, allowing it to be shared across the Internet.

Many organizations have emerged to foster crowdsourced music, and perhaps the most popular is Indaba Music.[20] Indabamusic.com is a Web site that facilitates over 600,000 music collaboration projects among over 525,000 members in over 170 countries.[21] Another example is Aviary's Music Creator, an online application offering over 110,000 songs licensed under CC for both commercial and noncommercial use.[22] Aviary allows users to choose instruments and compose melodies, and the tool automatically tracks which works are derivatives of others.[23]

Crowdsourcing applies the power of social networking to creating music. The television program *American Idol* utilizes the wisdom of the crowd to produce new music celebrities,[24] but another paradigm shift will occur when enough people discover that the crowd can simply create its own music too.

Compusourcing

Perhaps the most disruptive development coming to the music industry is computer-generated music. As computing capability increases, few endeavors have remained immune from the steady replacement of brain power with processing power, and music development is no different. Soon, no human intervention, even for creative decision making, will be required in order for computers to compose a piece of music.

A substantial portion of the required technology already exists, and it is rapidly improving. For example, Zenph Sound Innovations is a company using the "power of computer engineering to understand exactly what musicians do as they play."[25] Zenph has developed software that can translate existing recordings (even scratchy, old mono ones) into software representations of the nuanced gestures of the musician that can then be "played" on specially designed robotic instruments.[26] In a nationally televised concert with famous violinist Joshua Bell, Zenph's robotic piano played the part of Sergei Rachmaninoff.[27] Sony Classical and RCA have recorded and released three CDs with Zenph featuring "re-performances" of three famous deceased artists.[28] Zenph is now developing the technology for other instruments and the human voice.[29] Ultimately, the Zenph technology could be used to dissect performances and extract their "artistic DNA," which could then be applied to new music, thus imitating a musician's *style*.[30]

The software that musicians use to produce music is becoming more user-friendly and is providing features that substitute for a user's lack of skill. This allows relative novices to create professional-sounding menu-driven music by selecting options from a program menu and adjusting parameters on a digital control panel. Ujam is an online application that allows users to sing or hum a tune directly into their PC's microphone.[31] It then analyzes the melody and produces complex harmonies, drum tracks, bass lines, and more.[32] Users can apply different sound effects and change chords, and the application will predict if changing individual notes will have positive or negative effects on the music.[33] Yamaha has developed another software application called Vocaloid that is amazingly adept at synthesizing singing from typed words and melody.[34] As software becomes more sophisticated, it is easy to imagine that it will continue to take on more and more of the technical and creative control of music production.

Indeed, many programs today are capable of generating music without any human musician's expertise, only a human audience's expertise. Software like DarwinTunes and Evolectronica utilize a programming strategy called genetic algorithms, and they begin by generating samples of music formed from strings of nearly random notes.[35] Obviously, this initial "generation" does not sound much like music. Next, hundreds or thousands of listeners across the Internet rate the music samples, and those that the audience likes most are allowed to "reproduce" with each other.[36] This process involves taking parts from one popular song, combining them with another, and then adding a small amount of random mutation.[37] The resulting "offspring" are typically a bit better-sounding than their parents were. The software releases this next generation of music, and the listener-feedback process repeats. Eventually, some rather remarkable music evolves.[38] The same process, or one involving different technology, like neural networks, can be used to develop prose, poetry, and lyrics.[39]

Other programs can "learn" what subtle characteristics make some music preferable to others for specific individuals. Pandora's Music Genome Project is a good example.[40] By identifying nearly 400 attributes associated with a song such as melody, harmony, instrumentation, rhythm, vocals, and lyrics, Pandora can respond to user feedback and adjust its delivery of music so that it streams only the sort of music a listener will like.[41] Though Pandora does not create music, the technology underlying its filtering and selection software could be applied to accelerate the rate at which computer-generated music improves in quality.[42]

The culmination of these technologies will be systems that are capable of generating music on demand without any human intervention, other than an initial request for music. This will result in the greatest act of disintermediation so far experienced by the music industry: No longer will skilled musicians be the exclusive source of music. Furthermore, although outsourcing and crowdsourcing may vastly increase the amount of music available with few or no reserved copyrights, compusourcing will produce large amounts of music that may not be copyrightable at all.

To be eligible for copyright, a work must be both original and fixed in a tangible medium of expression.[43] Works may be fixed directly by the author or with the aid of a machine or device.[44] Original musical works created by a human author are clearly protected by copyright,[45] and the threshold for originality required for a work to be copyrightable is so low that even a work created solely by a computer likely exceeds it.[46] However, the U.S. Constitution affords copyrights only to authors,[47] and it seems unlikely that under current copyright law a computer could be considered an "author." There is substantial evidence that authors must be human beings to be eligible for protections under the Copyright Act.[48] The duration of a copyright is defined as "the life of the author and 70 years after the author's death."[49] In the legislative history for the Copyright Act, Congress also refers to the life and death of a work's author as well as the author's sex.[50] In 1979, the final report issued by the National Commission on New Technological Uses of Copyrighted Works ("CONTU") also suggested that human intervention was required for a work to be copyrightable.[51] However, no court cases have yet definitively accepted or rejected the possibility that a computer could be an author, and modern commentators are split on the issue.[52] Some have noted the enormous practical complexities of allocating copyrights among possible owners, including software developers, software users, and the software itself.[53] This issue is made more complex by the marvels of outsourcing and crowdsourcing, which multiply and obfuscate these entities enormously. Others have observed that the incentive-based purpose for copyright protections, "[t]o promote the Progress of Science and useful Arts," is inapplicable to computer-generated works because computers require no incentive to create.[54]

THE THRESHOLD FOR ORIGINALITY REQUIRED FOR A WORK TO BE COPYRIGHTABLE IS SO LOW THAT EVEN A WORK CREATED SOLELY BY A COMPUTER LIKELY EXCEEDS IT.

Given the previous reasoning, it seems likely that music created solely by computers will fall outside the scope of intellectual property law.[55] Ultimately though, the allocation of copyrights should be of less concern to existing human musicians than the fact that computers will be able to dramatically outproduce them. Given the massive oversupply of music that full-scale democratization will bring, the average value of any one work will rapidly approach zero.

THE "NATURAL TALENT" CERTIFICATION MARK

It seems that if there is not already too much music, there soon will be, and most of it will cost almost nothing to create and be available to consumers for free. Absent scarcity or production cost, very few business models, including pay-per-use,[56] subscription,[57] ad-supported,[58] or "freemium,"[59] can be profitable. Therefore, the only solution is to reintroduce scarcity and barriers to entry through differentiation. Musicians creating copyrighted works for profit must differentiate their music from the excess of free and uncopyrightable material and convince consumers that the distinction is worth a price premium. Ironically, it may be an instance of one of the lesser-known forms of intellectual property that is best-suited to provide this differentiation: a "Natural Talent" certification mark.[60]

The Natural Talent certification mark is envisioned as a way to appeal to a consumer's desire for *authenticity*.[61] The premium consumers place on authenticity is evident in the prices of original artwork, ethnic food, travel souvenirs, and even brokerage advice.[62] Even sports performances augmented by steroids and growth hormones are disdained because they are perceived as artificial. The demand for authenticity has grown since the industrial revolution and has intensified now that technology can so effectively simulate it.[63] Producers in other industries have recognized this fact and many certification marks have been used to differentiate otherwise commodity products by virtue of their "mode of manufacture," be they handmade,[64] handcrafted,[65] produced by people possessing a specific trait,[66] or produced by people adhering to a specific standard.[67] The Natural Talent certification mark would certify music as having been produced substantially through the practiced skills of one or more human beings without the use of corrective technology or technology that substitutes for human creativity, originality, or talent. For the Natural Talent mark to remain effective, it must be administered by a central organization capable of enforcing the standard required by the certification, and it must be available for use by anyone who meets the standard.[68]

There is already evidence that both music fans and the musicians they admire are ready for a Natural Talent certification mark. Lip-syncing was one of the first forms of technology-assisted cheating, and stars like Ashlee Simpson, Britney Spears, Madonna, Milli Vanilli, and even little Lin Miaoke, the nine-year-old girl who lip-synced "Ode to the Motherland" at the opening ceremony of the 2008 Beijing Olympics, have felt the scorn of fans for their having faked it.[69] Under attack now are Auto-Tune and its brethren of performance-fixing tools that eliminate any trace of authenticity. In 2002, Allison Moorer released the CD entitled *Miss Fortune* with a label that read, "Absolutely no vocal tuning or pitch correction was used in the making of this record."[70] Other artists have also pledged never to use pitch-correction in their works.[71] At the 51st Annual GRAMMY Awards in 2009, the band Death Cab for Cutie wore blue ribbons to raise awareness of "Auto-Tune abuse."[72] Also in 2009, the rapper Jay-Z released the song "Death of Auto-Tune," calling on other rappers to return to the "raw basics," while Christina Aguilera has been seen wearing a T-shirt with the slogan "Auto-Tune is for pussies."[73] Blogs and forums are brimming with scathing comments from listeners about the overuse of Auto-Tune in the industry.[74]

Most music fans like to believe that the musicians they pay to hear can actually play their instruments and sing with their real voices. People respect talent and hard work. No one likes to be made a fool of, and technology like Auto-Tune makes consumers feel that musicians and record labels are trying to trick them. Today, technology in the music industry mainly corrects pitch and timing problems. However, as computer-generated music becomes more common, entire songs—lyrics, vocals, instrumentals, and all—will be produced and released upon a public who will not be able to tell the difference between music created with authentic human talent and works synthesized by machine.

The universal appeal of music is attributable to more than just the sound that fills our ears. Consumers also value intangibles such as the emotional connection they have with a musician's backstory—her personal history, hopes, fears, and experiences with fame and adversity. Though these factors cannot be automated through opensourcing, crowdsourcing, or compusourcing, it will become virtually impossible for all but the very tiny fraction of uber-famous musicians to compete with the flood of free, artificially produced music to garner the attention necessary to make these intangibles relevant to their success. Musicians, labels, and distributors could use the Natural Talent certification mark on Web sites, CDs, and promotional material, and as selection criteria in music streaming services. This would allow consumers to discover and connect with musicians that offer authenticity in their music. Musicians with natural talent could then stand a chance to earn economic rewards from their copyrights because they agree to "keep it real." ❖

William Jacobson is currently a 2L at Charlotte School of Law focusing on intellectual property and entertainment law. He can be reached at jacobsonw@students.charlottelaw.edu.

ENDNOTES

1. Two events during this time—the publication of the MP3 file format standard in 1993 and the release of the Napster peer-to-peer file downloading system in 1999—were clearly pivotal in bringing about the shake-up in the music industry.

2. Of course, one of the most challenging developments for labels and musicians alike has been that so many people have dispensed with the act of purchasing altogether in favor of illegal downloading.

3. Nathan Olivarez-Giles, *Studios Left Out of the Mix; Inexpensive Software Shifts Music-Recording to the Home*, L.A. Times, Oct. 13, 2009, at B1.

4. Morgan Brennan, *Recording Studios at Home*, Newsweek, Oct. 27, 2008, *available at* http://www.newsweek.com/2008/10/17/recording-studios-at-home.html; *Pro Tools 9 Software*, Avid, http://shop.avid.com/store/product.do?product=307036370313696 (last visited Dec. 22, 2010).

5. Sasha Frere-Jones, *The Gerbil's Revenge; Auto-Tune Corrects a Singer's Pitch*, New Yorker, June 9, 2008, at 128.

6. National Association of Music Merchants, NAMM Global Report 5, 28 (Ken Wilson ed., 2009).

7. Neil McCormick, *Is There Too Much Music?*, Daily Telegraph, Apr. 9, 2009, at 33 (arguing that the sheer volume of music being released on Internet sites like YouTube, MySpace, iTunes, and Spotify by amateurs and professionals alike is overwhelming consumers).

8. *History of the Open Source Initiative*, Open Source Initiative, http://opensource.org/history (last visited Dec. 4, 2010).

9. *About the Licenses*, Creative Commons, http://creativecommons.org/about/licenses/ (last visited Dec. 23, 2010) (describing the four types of CC licenses: Attribution, ShareAlike, NonCommercial, and NoDerivatives).

10. *See* Jacobsen v. Katzer, 535 F.3d 1373, 1381–82 (Fed. Cir. 2008) (holding that open source licenses are enforceable under copyright rather than contract law).

11. *Free Love, Free Music*, Opsound, http://opsound.org/index.php (last visited Dec. 23, 2010). Jamendo is another popular site for open source music released under CC license. Jamendo, http://www.jamendo.com/en/about (last visited Dec. 23, 2010).

12. Jason Feehan & Randy Chertkow, *Q&A: Eric Steuer*, Electronic Musician, Nov. 1, 2009, at 40 (interviewing Eric Steuer, the creative director at Creative Commons); Jon Pareles, *Music Ripe to Remix*, N.Y. Times, Mar. 10, 2008, at E1 (stating that Trent Renzor of Nine Inch Nails has "encouraged listeners to remix, 'mutilate or destroy' the Nine Inch Nails catalog, even providing some separate instrumental parts. Now, with [new album] 'Ghosts,' he's virtually inviting other people's voices.").

13. *See, e.g.*, *Reason Pianos*, Propellerhead, http://www.propellerheads.se/products/refills/rpi (last visited Dec. 4, 2010) (Propellerhead "hyper-samples" well-known pianos and sells a bundle of 104 piano patches for about $100).

14. *All-Time Top Downloads*, SourceForge, http://sourceforge.net/top/topalltime.php?type=downloads (last visited Dec. 24, 2010) (stating that the open source software application Audacity, which provides many sophisticated features for music creation, is the tenth most downloaded program from its servers with over 74 million downloads).

15. *History*, Creative Commons, http://creativecommons.org/about/history (last visited Dec. 30, 2010).

16. *See* Jon Swartz, *Online Talent Scouts Pay Off; Companies Use "Crowdsourcing" to Find Cheap Help, Expertise*, USA Today, Apr. 1, 2010, at 6A.

17. Brian Morrissey, *Brands' Mass Appeal*, Adweek, May 31, 2010, *available at* http://www.adweek.com/aw/content_display/news/digital/e3if3584cb6d538b8e11437b1dcf8866519 (describing crowdsourcing projects such as Netflix's $1 million prize for improving movie recommendations and Pillsbury's $10,000 to the person who developed the best ad for its crescent rolls).

18. America COMPETES Reauthorization Act of 2010, H.R. 5116, 111th Cong. § 105 (2010).

19. *See* Eliot Van Buskirk, *Finally, the On-Demand, Online Garage Band Gets Real*, Wired, Apr. 30, 2007, *available at* http://www.wired.com/entertainment/music/commentary/listeningpost/2007/04/listeningpost_0430 (stating that "the combination of social networking and web-based audio tools . . . will do for music creation what technology has already done for music consumption: remove barriers of time, space and scarcity").

20. Eric Steuer, *Group Effort*, Wired, July 2009, at 60 (describing the top 10 sites for participating in "virtual jam sessions" including Indaba Music, SoundCloud, JamGlue, and WeMix).

21. *See The Colbert Report: Dan Zaccagnino* (Comedy Central television broadcast Feb. 2, 2009), *available at* http://www.colbertnation.com/the-colbert-report-videos/217342/february-02-2009/dan-zaccagnino (interview with Dan Zaccagnino, co-CEO and founder of Indaba Music); Max Willens, *With Relaunch, Indaba Goes Major*, We All Make Music, Aug. 30, 2010, http://weallmakemusic.com/with-relaunch-indaba-goes-major. *See also* Eliot Van Buskirk, *Top 5 Songs: Wired.com's Crowdsourced Music Experiment Rocks*, Wired, June 11, 2010, http://www.wired.com/epicenter/2010/06/top-5-songs-wired-crowdsourced-music-experiment (providing examples of five crowdsourced songs from a recent competition facilitated by Indaba Music).

22. *See Free Online Music Creator*, Aviary.com, http://www.aviary.com/tools/music-creator (last visited Dec. 31, 2010); *Aviary Launches Music Creator*, Aviary.com, http://www.aviary.com/blog/posts/online-music-creator (last visited Dec. 31, 2010).

23. *Frequently Asked Questions*, Aviary.com, http://www.aviary.com/faq (last visited Dec. 31, 2010).

24. Chris Satullo, *Crowdsourcing: Idea Power from the People*, Phila. Inquirer, Sept. 14, 2008, at A03.

25. *Company*, Zenph,http://www.zenph.com/company.html (last visited Dec. 4, 2010).

26. *Technology*, Zenph, http://www.zenph.com/technology.html (last visited Dec. 5, 2010).

27. Man and machine played the second movement of Grieg's Sonata No. 3 for violin and piano. *See* Justin Davidson, *Bionic Overload; Can Machine-made Music Sing Without a Composer?*, N.Y. Mag., Feb. 8, 2010; Vivien Schweitzer, *A Little Get-Together for Stage and Television*, N.Y. Times, Jan. 23, 2010, at C3.

28. *See* Blair Jackson, *Art Tatum*, Mix, Sept. 1, 2008, at 56; *Shop*, Zenph, http://www.zenph.com/shop.html (last visited Dec. 5, 2010). The three artists are jazz pianist Art Tatum and classical pianists Glenn Gould and Sergei Rachmaninoff.

29. Jackson, *supra* note 28.

30. *Technology*, *supra* note 26.

31. Amy Dusto, *Be a Stay-at-Home Rock Star, If Ujam*, Discovery News, Dec. 29, 2010, http://news.discovery.com/tech/be-a-stay-at-home-rock-star-if-ujam.html.

32. Jon Stokes, *An App That Jams with You*, Wired, Jan. 2011, at 91.

33. *Ujam Video Channel*, YouTube, http://www.youtube.com/ujamvideo (last visited Dec. 30, 2010) (containing access to the video "UJAM Trailer December 2010," which demonstrates the capabilities of the application).

34. *See Vocaloid Demos*, ZeroG, http://www.zero-g.co.uk/index.cfm?Articleid=802 (last visited Dec. 30, 2010) (providing several songs sung by three different, shockingly realistic computer-generated voices: Miriam, Leon, and Lola).

35. *See* Jo Marchant, *Sci Foo: Evolution of Music and a Dancing Cockatoo*, New Sci., Aug. 2, 2010, http://www.newscientist.com/blogs/

culturelab/2010/08/the-experimental-evolution-of-music-and-snowball-the-dancing-cockatoo.html; DarwinTunes, http://darwintunes.org (last visited Dec. 30, 2010); *Evolution + Electronica =*, Evolectronica, http://evolectronica.com/about (last visited Dec. 30, 2010).

36. Marchant, *supra* note 35.

37. *Id.* Mutations might substitute one instrument with another; change a chord, a note, or the tempo or volume; or swap two tracks sequentially.

38. *See* 600 *Generations*, DarwinTunes, http://darwintunes.org/600-generations (last visited Dec. 30, 2010) (providing a sound clip of music evolved after 600 generations).

39. *See, e.g.*, Tal Vigderson, *Note*, *Hamlet II: The Sequel? The Rights of Authors vs. Computer-Generated "Read-Alike" Works*, 28 Loy. L.A. L. Rev. 401, 402–03 (1994) (describing an example of computer-generated prose).

40. *See About Pandora*, Pandora, http://www.pandora.com/corporate/ (last visited Dec. 30, 2010).

41. *Id.*

42. A software-based audience could listen to music played at a million times the normal rate and issue an *American Idol*-style criticism in a microsecond. Only after receiving high praise from the software audience would computer-generated music be judged suitable for a human one.

43. 17 U.S.C. § 102(a) (2010).

44. *Id.*

45. *Id.* § 102(a)(2) (stating that one of the categories of works of authorship is "musical works, including any accompanying words").

46. *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 345 (1991) ("To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice."); *see also* Pamela Samuelson, *The Future of Software Protection: Allocating Ownership Rights in Computer-Generated Works*, 47 U. Pitt. L. Rev. 1185, 1199 (1986) (arguing that computer-generated works could meet the originality bar).

47. U.S. Const. art. I, § 8, cl. 8.

48. The exception being the express allowance by statute that employers are considered to be authors of "works made for hire." 17 U.S.C. § 201(b).

49. 17 U.S.C § 302(a) (2010) (for works created on or after January 1, 1978).

50. H.R. Rep. No. 94-1476, at 120 (1976) ("If each of the authors prepared his or her contribution. . . ."); *id.* at 137 ("Computing the term from the author's death. . . .").

51. Nat'l Comm'n on New Technological Uses of Copyrighted Works, Final Report 45 (1979), *available at* http://digital-law-online.info/CONTU/contu1.html ("The eligibility of any work for protection by copyright depends not upon the device or devices used in its creation, but rather upon the presence of at least minimal human creative effort at the time the work is produced.").

52. *See* 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 5.01[A] (Matthew Bender 2010) (stating that in light of the creation of entire novels and books of poetry by computers, "rivers of ink are spilt" in the secondary literature on whether computers can be considered authors for copyright purposes); Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 Harv. L. Rev. 977, 1058 (1993).

53. *See* Ralph D. Clifford, *Intellectual Property in the Era of the Creative Computer Program: Will the True Creator Please Stand Up?*, 71 Tul. L. Rev. 1675, 1685–86 (1997) (noting that granting a computer authorship rights would imply granting computers the right to transfer copyrights and sue for infringement, as well as Due Process rights under the Fifth and Fourteenth Amendments).

54. Miller, *supra* note 52, at 1066 (citing U.S. Const. art. I, § 8, cl. 8).

55. Clifford, *supra* note 53, at 1702.

56. *See, e.g., iTunes*, Apple, http://www.apple.com/itunes (last visited Dec. 12, 2010); *MP3 Downloads*, Amazon.com, http://www.amazon.com/MP3-Music-Download/b/ref=sa_menu_dmusic2?ie=UTF8&node=163856011 (last visited Dec. 12, 2010). Users pay around $1.00 per song to download the MP3.

57. *See, e.g.,* Rdio, http://www.rdio.com (last visited Dec. 10, 2010). Users pay $5.00 (for desktop) or $10.00 (for phone) per month for unlimited access.

58. *See, e.g.*, Pandora, http://www.pandora.com/ (last visited Dec. 30, 2010). Users get free access to music streaming, but as with radio, users cannot choose specific songs, only stations. Users hear advertisements between every few songs unless they upgrade to a subscription model.

59. *See, e.g.*, Neal Pollack, *The Celestial Jukebox*, Wired, Jan. 2011, at 74, 78; Spotify, http://www.spotify.com/int/new-user (last visited Dec. 30, 2010). Users get free, unlimited access to music streaming from a desktop but pay extra to save music or access music from a phone. Spotify is very popular in Europe but is not yet available in the United States due to resistance from record labels.

60. Lanham Act, 15 U.S.C. § 1127 (2010) (A certification mark refers to a type of mark used by a person other than its owner "to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.").

61. James H. Gilmore & B. Joseph Pine II, Authenticity: What Consumers Really Want 1–5 (2007) (arguing that increasingly "authenticity has overtaken quality as the prevailing purchasing criterion, just as quality overtook cost, and cost overtook availability").

62. Kent Grayson & Radan Martinec, *Consumer Perceptions of Iconicity and Indexicality and Their Influence on Assessments of Authentic Market Offerings*, 31 J. Consumer Res. 296 (2004).

63. *Id. See also* Shuling Liao & Yu-Yi Ma, *Conceptualizing Consumer Need for Product Authenticity*, 4 Int'l J. Bus. & Info. 89, 90 (2009).

64. *See, e.g.*, Federal TM Reg. No. 3669000 (for the mark "Get Tyed" certifying handmade neckties, bowties, and wrist cuffs).

65. *See, e.g.*, Federal TM Ser. No. 77942599 (for the mark "Herban Roots" certifying handcrafted herbal aromatherapy products).

66. *See, e.g.*, Federal TM Ser. No. 77343573 (for the mark "Service Disabled Veteran Owned Small Business SDVOSB CVE" certifying a business owned by a service-disabled veteran).

67. *See, e.g.*, Federal TM Ser. No. 85151048 (for the mark "Certified Organic by California Certified Organic Farmers" certifying that "goods were organically grown, processed and produced in accordance with the California Organic Food Act of 1978, amended 1982, and that the grower, processor or producer practices a program of long term ecological soil management and in the case of meat and poultry, practices a program of stress reduction and good nutrition to maximize animal health").

68. Lanham Act, 15 U.S.C. § 1064 (2010). An organization such as the Songwriters Guild of America, the National Academy of Recording Arts & Sciences, the GRAMMY Foundation, or the Recording Industry Association of America could oversee the Natural Talent certification so long as it does not engage "in the production or marketing of any goods or services to which the certification mark is applied."

69. Greg Kot, *Little Mic Lies: Everyone Does It; Why Nearly All the Stars Use Recordings at Major Events*, Chi. Trib. Feb. 5, 2009, at C1; Meghan Daum, Editorial, *Meghan Daum; From the Mouths of Babes*, L.A. Times, Aug. 16, 2008, at A21.

70. Maureen Ryan, *What, No Pitch Correction?; Raising a Flag on Vocal Effects*, Chi. Trib., Apr. 27, 2003, at C14.

71. Michael McCall, *ProTools*, Nashville Scene, June 10, 2004, http://www.nashvillescene.com/nashville/pro-tools/Content?oid=1190101 (stating that Martina McBride, Vince Gill, and Trisha Yearwood have pledged not to use pitch-correction technology).

72. James Montgomery, *Death Cab for Cutie Raise Awareness About Auto-Tune Abuse*, MTV News, Feb. 10, 2009, http://www.mtv.com/news/articles/1604710/20090210/death_cab_for_cutie.jhtml.

73. Alex Needham, *Front: Pitch Perfect but Lacking Soul?*, Guardian, Aug. 23, 2010, at 3.

74. *See, e.g.*, *Auto-Tune in* Glee *Songs*, Glee, http://www.gleeforum.com/index.php?showtopic=1600 (last visited Jan. 2, 2011) (a poll and comments on this *Glee* fan Web site show a majority of unfavorable opinions of the use of Auto-Tune on the show).

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and varied career, marked by one constant: change.

Vardavas' willingness to embrace life's unpredictability developed as a child growing up with the Baltimore Orioles, as the team evolved from a division doormat into a true powerhouse in the late '60s and early '70s. Their rise, like Vardavas', was not without setbacks: "When I was 13, Dave McNally, a left-handed pitcher, won his first 15 decisions of the 1969 season, and as it happens, he had also won his last two decisions of 1968, so he had 17 consecutive victories. He took the mound on my 13th birthday and gave up a pinch-hit grand-slam home run to Rich Reese of the Minnesota Twins and managed to lose his first decision of 1969. I cried for 30 minutes. I hope part of that was hormones."

Her love of baseball endured. With dreams of becoming commissioner of Major League Baseball ("MLB"), she attended Yale University, and soon became one of the first two trainees hired into the MLB's Executive Development Program. Working with MLB's labor division, the Baseball Player Relations Committee, Vardavas performed a guaranteed salary risk analysis for all the major league clubs. Just a year later, she became the American League's Manager of Waivers and Player Records, overseeing contract signings and roster transactions such as waiver requests, assignments, and disabled list placements. Soon she enrolled in Fordham Law School, training in baseball by day and law by night before earning her Juris Doctorate in 1985.

One of very few women working at a high level in baseball, Vardavas caught one of her first big breaks when, impressed by her work, then-MLB Commissioner Peter Ueberroth created a second assistant general counsel position for her when she graduated. Of Ueberroth's support, Vardavas recalls: "It launched my legal career in a way I'll always be grateful for and I feel I've benefited from for the whole 25 years I've been practicing." After passing the New York bar exam, she joined the Commissioner's Office legal department, working on sponsorship, television, and licensing agreements for the league and advising individual clubs on player transactions and other matters. After several years in the Commissioner's Office, Vardavas was ready for a change, and her next move would prove just as fortuitous.

At Yale, Vardavas wrote her senior essay on the Black Sox scandal and its relation to the creation of the Office of the Commissioner of Baseball. Her senior essay advisor was Yale's president and, later, commissioner of baseball: Bart Giamatti (father of Hollywood actors Paul and Marcus Giamatti). As Vardavas contemplated her next move in 1989, she consulted her mentor, who was then serving as president of the National League. True to form, Giamatti advised her with his signature blend of wisdom and wit, urging her to: "Go, leave! You're too young to suffer for this place." He then connected her with his Yale classmate Donald Dell, the founder of ProServ, a seminal sports management company that had started out representing Dell's Davis Cup teammates Arthur Ashe and Stan Smith, and then branched out into basketball, football, golf, cycling, and other sports. Vardavas impressed Dell, joined ProServ in 1989, and was soon overseeing the contracting process for ProServ's athlete and event clientele and dealing with issues relating to endorsement, sponsorship, and television rights. With hard work and dedication, she would later rise to the level of vice president for Legal and Business Affairs. Vardavas found herself handling some unique properties, including the national merchandise licensing rights for Nelson Mandela's first U.S. tour following his release from prison.

Vardavas recalls resolving a particularly memorable problem for former pro football quarterback Boomer Esiason. A college acquaintance of Esiason proposed opening a sports bar called "Boomer's" near their alma mater, the University of Maryland. Despite Esiason's objections to using his name on a sports bar, the plans forged ahead. Though ProServ had obtained a federal trademark registration on his name, Esiason understandably wanted to avoid litigation. Vardavas soon found a creative solution, recalling in typical self-deprecatory fashion: "The guy had ignored our cease and desist letter, basically called us up and told us to go to hell, though in somewhat ruder language. I needed a strategy. But here's the thing: Once or twice a year, I get a really good idea, and on this occasion the light bulb went on and it dawned on me that in Maryland, as in many other states, in order to hold a liquor license you have to show that you are a person of good character. So I wrote a letter to the Prince George's County liquor authority." The letter described the adversarial situation, suggesting that perhaps an applicant who would trade on the name of a local celebrity despite the celebrity's objections might not rise to the level of good character required by law. A hearing was scheduled, and literally in the lobby of the hearing room the parties settled. The bar was renamed Baby Boomers, and by agreement sports-related decor was to be severely restricted. The bar closed less than a year later. "I don't enjoy telling you that the bar went out of business," Vardavas explained, "but it's wrong for someone to be allowed to open a sports bar with a famous person's name on it in the city where that person began to earn his first major fame, contrary to that person's wishes. And I'm very proud of the work my team at ProServ and I did to prevent that from happening and also to prevent it from happening in a relatively quick, efficient, and painless way for our client."

After eight years with ProServ, opportunity knocked once again, this time in the form of a sports marketing counsel position at Nike. With a new job came new challenges, including having to live west of the Potomac River for the first time in her life. Nevertheless, in 1997, Vardavas moved to Portland, Oregon, to join Nike, a place she describes as "one of the best places, if not the best place in the world[,] to do sports marketing." As assistant general counsel, Vardavas initially dealt with endorsements and sponsorships, negotiating and drafting agreements with many of Nike's highest-profile athletes and properties in baseball, golf, tennis, basketball, track and field, and cycling. For more than 10 years, she also oversaw product safety and compliance issues for Nike's apparel, footwear, and equipment product divisions, as well as Nike's licensees and subsidiary brands, including Converse, Umbro, and Hurley. "I've spent years working on the actual physical attributes of the product as a product safety and compliance lawyer here, so I've spent a lot of time actually in factories watching products be made, talking to designers and developers, learning about the risks, the hazards, the pitfalls, and the processes that we can improve to make products better, and being exposed to a huge body of law relating to regulation and best practices in product safety, mechanical safety, and chemical safety."

On the product safety side, Vardavas is especially proud of the global cross-functional team that she built and its high level of efficiency and responsiveness continuing years after her departure from the product safety work. Vardavas' crack team brought together Nike professionals from all over the world and across a wide array of disciplines, including risk management, product integrity, product development, and even chemists working on product safety issues. Together, Vardavas and her product safety team were able to address significant issues arising in manufacturing and shipping, as well as major regulatory challenges, quickly and effectively. Thus, when Congress enacted the Consumer Products Safety Improvement Act (the "CPSIA") in 2008, leading to massive documentation and compliance requirements for a company of Nike's size, Vardavas and her team were ready. Within a matter of months, they set up a transparent, robust Web-based system to facilitate documentation of compliance with all product safety laws enforced by the Consumer Products Safety Commission. Certificates of compliance as well as information regarding when, where, how, and with whom testing was performed can now be uploaded and downloaded in one simple, convenient system, greatly reducing costs across the board.

In May 2009, Vardavas began working with Nike's unparalleled trademarks portfolio. In her role as assistant general counsel for Brand Communications, Advertising, and Intellectual Property, Vardavas has been responsible for hundreds of trademark registrations across most of the world's countries. Given the crucial role that Nike's trademarks play in its marketing and branding efforts (the company considers its NIKE® and Swoosh® design trademarks to be among its most valuable assets, according to its 1996 10K report), Vardavas' role is essential to the company's success. The sheer volume of trademarks, along with the endless complex and contentious legal issues they inevitably raise, would give most attorneys pause, even ones as seasoned as Vardavas, but, again, she thrives on challenge. Consequently, she takes particular pride in her trademark work, especially with regard to resolving potential trademark conflicts. Though confidentiality prevents her from sharing details, Vardavas believes that her approach to recurring issues fostered a relatively peaceful "coexistence with other entities that have similar trademarks while protecting the essentials of our value."

Reflecting on her time with Nike, Vardavas says, "I'll never be glad to have left Nike, but I'll always be glad that I worked here and I'll never be sorry for any bit of the work that I did here. Everything that I've ever done has qualified me for whatever the hell the next thing turned out to be, and now it's just my job to find it." Her career trajectory certainly embodies this theme. With each job, she gained valuable experiences, developed essential skills, and left a sizable and lasting impact. While accepting that it is now time to move on from Nike, Vardavas savored her time there. She also recognizes the value of her willingness to step into the unknown: "You know, it was hard to pick up and move so far away from pretty much everyone I know and anywhere I've ever lived, but it was the best thing I ever did." ❖

Matthew Kimmel is a third-year student in the JD/MBA program at Boston College, focused on sports and entertainment issues. He can be reached at kimmelm@bc.edu.

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Forum Assistant
SUZETTE EIGHTS
312.988.5580
312.988.5677 (f)
suzette.eights@americanbar.org

Entertainment and Sports Lawyer Staff Editor
MELISSA LADWIG
312.988.5458
312.988.6081 (f)
melissa.ladwig@americanbar.org

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