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Entertainment, Arts and Sports Law Journal

A publication of the Entertainment, Arts and Sports Law Section of the New York State Bar Association



Referral Strategies
That Create Fun
and Profit

A New Way to
Resolve Small-Value
Copyright Claims

NFTs, Blockchain
Technology, and Copyrights:
How the Future of the
Music Industry Will Be
Decentralized

Today's Celebrities
Are Blessed With
Revolting Fans

Paparazzi Photos
and Celebrity Uses
Within the Bounds of
Intellectual Property



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Entertainment, Arts and Sports Law Journal

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Publication of Articles

The *Journal* welcomes the submission of articles of timely interest to members of the Section. Articles should be submitted with biographical information via e-mail in Microsoft Word format. Please submit articles to:

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This *Journal* is published three times a year for members of the Entertainment, Arts and Sports Law Section of the New York State Bar Association. Members of the Section receive the *Journal* without charge. The views expressed in articles published in this *Journal* represent those of the authors only, and not necessarily the views of the Editor, the Entertainment, Arts and Sports Law Section or the New York State Bar Association.

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Remarks From the Chair

By Barry Werbin

With autumn leaves dropping, showing off their colors as they come to rest, nurturing the soil around them that springs back to life, I was reminded of what a long, strange trip it's been. (OK, so I took a little poetic license!)

It indeed has been strange. The first and second EASL Executive Committee meetings that I chaired—in person—in February and early March 2020, soon faded into the COVID-19 Zoom world, and our EC members haven't had the pleasure of seeing each other in person since then. I got COVID-19 in March 2020, thankfully recovered, and proceeded to work remotely with our dedicated EC members and committee co-chairs to keep EASL alive and well during a very challenging time.

My tenure as Chair will soon come to a close after our Annual Meeting on January 19, 2022. I want to take this opportunity to extend my sincere and grateful thanks to all of EASL's officers, committee co-chairs and our members, with a special shout-out to our invaluable and indefatigable Section liaison, Dana Alamia.

Thank you to the many speakers and program planners who gave their time to make our events over the past 22 months a success. You have helped us continue EASL's ongoing tradition of offering programs that appeal to a wide cross-section of our constituents, who practice and work in the entertainment, arts, and sports sectors that were all hit hard by COVID-19. The productivity of our committee co-chairs always amazes me. In just the last quarter of 2021, our agenda has included the annual Music Business Law Conference (occurring virtually over four Fridays), two "basics" programs on music industry litigation and podcasting, a program delving into film profit participations and contract breaches, and a theater program on COVID-19-era re-openings on Broadway and London's West End. That's all capped with the publica-

tion of this issue of the *EASL Journal*, thanks to our amazing editor Elissa Hecker.

With all of that going on, we are planning a terrific Annual Meeting, with two programs focusing on sports and student athletes' name, image, and likeness (NIL) compensation and associated rights, and non-fungible tokens (NFTs) in the arts, sports, and music fields (including ethics). Our annual Cowan Bresler Scholarship Competition is off to a good start as well, and two law school student winners will be announced at our Annual Meeting, each receiving a \$2,500 award.

EASL is in its own growth phase, as we continue to evolve to promote greater diversity and inclusiveness in both our programs and ranks. We need to grow our membership and find sponsors supportive of our programs, as our budget has suffered with declining revenues due to COVID-19, which continues to plague all NYSBA Sections.

I leave my post with a sense of grateful accomplishment thanks to the tireless efforts of all those mentioned above and the support of former EASL chairs. I look forward to continuing as a member of EASL's Executive Committee, back on the other side of the podium, and in the trenches with our great team. I wish everyone good health, success, and happy holidays as 2021 draws to a close and we renew again.

Best, Barry



NEW YORK STATE BAR ASSOCIATION

If you have written an article you would like considered for publication, or have an idea for one, please contact the Editor-in-Chief:

Elissa D. Hecker
Law Office of Elissa D. Hecker
eheckeresq@eheckeresq.com

Articles should be submitted in Word format (pdfs are NOT acceptable), along with biographical information.

REQUEST FOR ARTICLES



Editor's Note/Pro Bono Update

By Elissa D. Hecker

Please feel free to reach out to me with any questions or article ideas that you have at eheckeresq@eheckeresq.com.

Elissa



The deadline for the next issue is January 4, 2022.

DO PRO BONO! DO PRO BONO! DO PRO BONO! DO PRO BONO! DO PRO BONO!

Pro Bono Update

Clinic

On July 20th, the EASL and IP Sections held our second three-hour Virtual Pro Bono Clinic with the New York Foundation for the Arts (NYFA). Thank you to all of our wonderful volunteers, many of whom continued their attorney/client relationships outside the clinic.

David M. Adler, Adler Law Group
Ethan Bordman, Esq., Ethan Y. Bordman, PLLC
Adjckwc Browne, Browne Law
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Innes Smolansky, Law Office of Innes Smolansky
Rosemarie Tully, Rosemarie Tully, P.C.
Adam Weissman, Law Office of Adam Weissman
Robyn Williams, Devlin Law Firm

Programs

NYFA also reached out to the Pro Bono Committee about offering the webinars that we presented in 2020 and early 2021 to its partners in an upcoming Artist as Entrepreneur training program. The webinars include:

- Three Cases Every Artist Should Know . . . and Update
- Using Images of Others in Your Creative Work
- Copyrights and Coronavirus
- Contracts and Coronavirus

**Entertainment,
Arts and Sports
Law Section**

BLOG



The EASL Blog Provides a Forum and News Source on Issues of Interest

The EASL blog acts as an informational resource on topics of interest, including the latest Section programs and initiatives, as well as provides a forum for debate and discussion to anyone in the world with access to the Internet.

To view go to [NYSBAR.COM/BLOGS/EASL](https://nysbar.com/blogs/easl)

To submit a Blog entry, email Elissa D. Hecker at eheckeresq@eheckeresq.com

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We encourage EASL members to volunteer as pro bono attorneys and webinar speakers for other topics that are relevant to the creative communities. Please contact any of us if you are interested in doing so.

Elissa D. Hecker, eheckeresq@eheckeresq.com

Carol Steinberg, elizabethcjs@gmail.com or www.carolsteinbergesq.com

Louise Carron, louisecarron.esq@gmail.com



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& Sports Law Section**

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NYSBA Guidelines for Obtaining MCLE Credit for Writing

Under New York's Mandatory CLE Rule, MCLE credits may be earned for legal research-based writing, directed to an attorney audience. This might take the form of an article for a periodical, or work on a book. The applicable portion of the MCLE Rule, at Part 1500.22(h), states:

Credit may be earned for legal research-based writing upon application to the CLE Board, provided the activity (i) produced material published or to be published in the form of an article, chapter or book written, in whole or in substantial part, by the applicant, and (ii) contributed substantially to the continuing legal education of the applicant and other attorneys. Authorship of articles for general circulation, newspapers or magazines directed to a non-lawyer audience does not qualify for CLE credit. Allocation of credit of jointly authored publications should be divided between or among the joint authors to reflect the proportional effort devoted to the research and writing of the publication.

Further explanation of this portion of the rule is provided in the regulations and guidelines that pertain to the rule. At section 3.c.9 of those regulations and guidelines, one finds the specific criteria and procedure for earning credits for writing. In brief, they are as follows:

- The writing must be such that it contributes substantially to the continuing legal education of the author and other attorneys;
- it must be published or accepted for publication;
- it must have been written in whole or in substantial part by the applicant;
- one credit is given for each hour of research or writing, up to a maximum of 12 credits;

- a maximum of 12 credit hours may be earned for writing in any one reporting cycle;
- articles written for general circulation, newspapers and magazines directed at nonlawyer audiences do not qualify for credit;
- only writings published or accepted for publication after January 1, 1998 can be used to earn credits;
- credit (a maximum of 12) can be earned for updates and revisions of materials previously granted credit within any one reporting cycle;
- no credit can be earned for editing such writings;
- allocation of credit for jointly authored publications shall be divided between or among the joint authors to reflect the proportional effort devoted to the research or writing of the publication;
- only attorneys admitted more than 24 months may earn credits for writing.

In order to receive credit, the applicant must send a copy of the writing to the

New York State Continuing Legal Education Board
25 Beaver St, Fl 8
New York, NY 10004

A completed application should be sent with the materials (the application form can be downloaded from the Unified Court System's website at www.courts.state.ny.us/mcle.htm. Click on "Publication Credit Application" near the bottom of the page). After review of the application and materials, the board will notify the applicant by first-class mail of its decision and the number of credits earned.

NEW YORK STATE BAR ASSOCIATION

Looking for past issues?
Entertainment, Arts and Sports Law Journal



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Law Student Initiative Writing Contest

The Entertainment, Arts and Sports Law (EASL) Section of the New York State Bar Association offers an initiative giving law students a chance to publish articles both in the *EASL Journal* as well as on the EASL web site. The Initiative is designed to bridge the gap between students and the entertainment, arts and sports law communities and shed light on students' diverse perspectives in areas of practice of mutual interest to students and Section member practitioners.

Law school students who are interested in entertainment, art and/or sports law and who are members of the EASL Section are invited to submit articles. This Initiative is unique, as it grants students the opportunity to be *published and gain exposure* in these highly competitive areas of practice. The *EASL Journal* is among the profession's foremost law journals. Both it and the web site have wide national distribution.

Requirements

- **Eligibility:** Open to all full-time and part-time J.D. candidates who are EASL Section members. A law student wishing to submit an article to be considered for publication in the *EASL Journal* must first obtain a commitment from a practicing attorney (admitted five years or more, and preferably an EASL member) familiar with the topic to sponsor, supervise, or co-author the article. The role of sponsor, supervisor, or co-author shall be determined between the law student and practicing attorney, and must be acknowledged in the author's notes for the article. In the event the law student is unable to obtain such a commitment, he or she may reach out to Elissa D. Hecker, who will consider circulating the opportunity to the members of the EASL Executive Committee.
- **Form:** Include complete contact information; name, mailing address, law school, phone number and email address. There is no length requirement. Any notes must be in *Bluebook* endnote form. An author's blurb must also be included.
- **Deadline:** Submissions must be received by **January 4, 2022**.
- **Submissions:** Articles must be submitted via a Word email attachment to eheckeresq@eheckeresq.com.

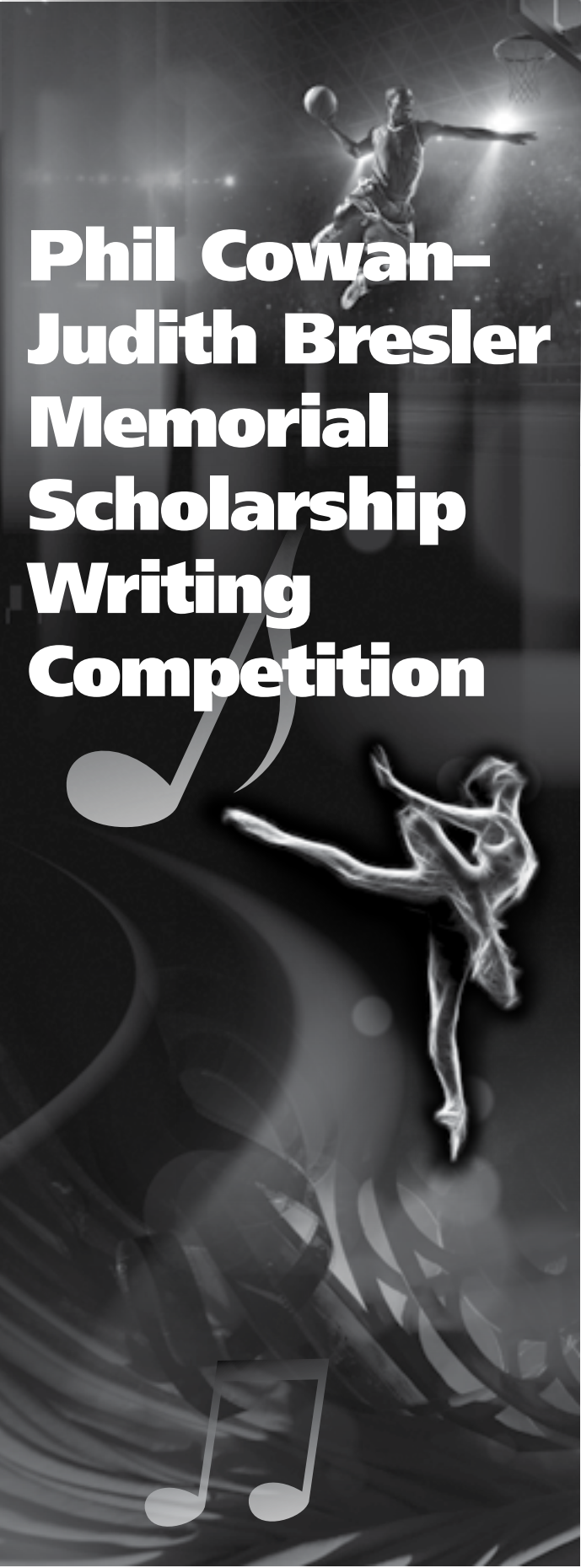
Topics

Each student may write on the subject matter of his/her choice, so long as it is unique to the entertainment, art and sports law fields.

Judging

Submissions will be judged on the basis of quality of writing, originality and thoroughness.

Winning submissions will be published in the *EASL Journal*. All winners will receive complimentary memberships to the EASL Section for the following year. In addition, the winning entrants will be featured in the *EASL Journal* and on our web site.



Phil Cowan- Judith Bresler Memorial Scholarship Writing Competition

Law students, take note of this publishing and scholarship opportunity: The Entertainment, Arts and Sports Law Section of the New York State Bar Association (EASL)'s Phil Cowan-Judith Bresler Memorial Scholarship, named after two esteemed former EASL chairs, offers *up to two awards of \$2,500 each on an annual basis* in Phil Cowan's and Judith Bresler's memories to law students who are committed to a practice concentrating in one or more areas of entertainment, art or sports law.

The Phil Cowan-Judith Bresler Memorial Scholarship has been in effect since 2005. It is awarded each year at EASL's Annual Meeting in January in New York City.

The Competition

Each Scholarship candidate must write an original paper on any legal issue of current interest in the area of entertainment, art or sports law.

The paper should be 12 to 15 pages in length (including *Bluebook* form endnotes), double-spaced and submitted in Microsoft Word format.

PAPERS LONGER THAN 15 PAGES TOTAL WILL NOT BE CONSIDERED. The cover page (not part of the page count) should contain the title of the paper, the student's name, school, class year, telephone number and email address. The first page of the actual paper should contain only the title at the top, immediately followed by the body of text. The name of the author or any other identifying information must not appear anywhere other than on the cover page.

All papers should be submitted to designated faculty members of each respective law school. Each designated faculty member shall forward all submissions to his/her/their Scholarship Committee Liaison. The Liaison, in turn, shall forward all papers received by him/her/they to the committee co-chairs for distribution. The committee will read the papers submitted and will select the scholarship recipient(s).

Eligibility

The competition is open to all students—both candidates and L.L.M. candidates—attending eligible law schools. “Eligible” law schools mean all accredited law schools within New York State, along with Rutgers University Law School and Seton Hall Law School in New Jersey, and up to 10 other accredited law schools throughout the country to be selected, at the Committee’s discretion, on a rotating basis.

Free Membership to EASL

All students submitting a paper for consideration, who are NYSBA members, will immediately and automatically be offered a free membership in EASL (with all the benefits of an EASL member) for a one-year period, commencing January 1st of the submission year of the paper.

Submission Deadline

January 8th: Law School Faculty liaison submits all papers she/he/they receive to the EASL Scholarship Committee, via email to Dana Alamia at dalamia@nysba.org, no later than January 8th.

The winner(s) will be announced, and the scholarship(s) awarded at EASLs January Annual Meeting.

Prerogatives of EASL Scholarship Committee

The Scholarship Committee is composed of the current chair of EASL and, on a rotating basis, former EASL Chairs who are still active in the Section, Section District Representatives, and any other interested member of the EASL Executive Committee. *Each winning paper will be published in the EASL Journal and will be made available to EASL members on the EASL website.*

The Scholarship Committee is willing to waive the right of first publication so that students may simultaneously submit their papers to law journals or other school publications. In addition, papers previously submitted and published in law journals or other school publications are also eligible for submission to the Scholarship Committee.

The Scholarship Committee reserves the right to submit all papers it receives to the *EASL Journal* for publication and the EASL website. The Scholarship Committee also reserves the right to award only one scholarship or no scholarship if it determines, in any given year that, respectively, only one paper, or no paper is sufficiently meritorious. All rights of dissemination of the papers by EASL are non-exclusive.

Payment of Monies

Payment of scholarship funds will be made by EASL directly to the law school of the winner(s), to be credited against the winner’s(’) account(s).

About the New York State Bar Association/EASL

The New York State Bar Association is the official statewide organization of lawyers in New York and the largest voluntary state bar association in the nation. Founded in 1876, NYSBA programs and activities have continuously served the public and improved the justice system for more than 140 years.

The more than 1,500 members of the Entertainment, Arts and Sports Law Section of the NYSBA represent varied interests, including headline stories, matters debated in Congress, and issues ruled upon by the courts today. The EASL Section provides substantive case law, forums for discussion, debate and information-sharing, pro bono opportunities, and access to unique resources including its popular publication, the *EASL Journal*.



Second Circuit Affirms Goldsmith Copyright Infringement Win, Rejects Warhol Foundation's Interpretation of the Supreme Court's Intervening *Google v. Oracle* Decision

By Joel L. Hecker

This is a post-script to the article entitled "Second Circuit Reverses Fair Use Decision—Holds Warhol Foundation Infringed Lynn Goldsmith's Photo as a Matter of Law" that appeared recently in the Entertainment, Arts and Sports Law Section Journal, Vol. 32, No. 21, 2021.

Following the decision by the Second Circuit, the Andy Warhol Foundation (AWF) filed a Petition for Panel Rehearing and Rehearing En Banc on the mistaken belief that the intervening U.S. Supreme Court decision in *Google LLC v. Oracle America, Inc.*¹ somehow required a different result. In order to consider the impact, if any, of the *Google* decision, the Second Circuit panel granted the petition for rehearing, but came to the same conclusion in an Amended Opinion dated August 24, 2021,² which incorporated its prior (now withdrawn) decision with an analysis of *Google*. The lack of any impact of the *Google* decision on the Second Circuit conclusion that AWF infringed Goldsmith's copyrighted photograph was summarized by the panel as follows:

AWF's argument that Google undermines our analysis rests on a misreading of both the Supreme Court's opinion and ours, misinterpreting opinions as adopting hard and fast categorical rules of fair use. To the contrary, both opinions recognize that determinations of fair use are highly contextual and fact specific, and are not easily reduced to rigid rules. As the Supreme Court put it, both the historical background of fair use and modern precedent 'make clear that the concept [of fair use] is flexible, that courts must apply it in light of the sometimes conflicting aims of copyright law, and that its applications may vary depending upon context.' (at 55).

The panel went on to hold that copyright law does not provide either side to any dispute with absolute trumps based on simplistic formulas. Instead, explained the panel, it requires a contextual balancing based upon principles that will lead to close calls in particular cases. The panel then concluded that, like the Supreme Court in *Google*, the Second Circuit panel did apply those well-established principles to the particular facts in the AWF-Goldsmith case, and concluded that AWF's fair use defense fails.



Endnotes

1. *Google LLC v. Oracle America, Inc.*, 141 S. St. 1183 (2021).
2. Docket No. 19-2420-cv, Amended August 24, 2021.

Joel L. Hecker, principal of the Law Offices of Joel L. Hecker, practices in every aspect of photography and visual arts law, copyright, licensing, publishing, contracts, privacy rights, trademark and other intellectual property issues, as well as real estate and estate planning matters. He has acted as general counsel to the hundreds of professional photographers, stock photo agencies, graphic artists and other photography and content-related businesses he has represented nationwide and abroad. He also lectures and writes extensively on issues of concern to these industries. He is past chair and a member of the Copyright and Literary Property Committee of the New York City Bar Association, a longtime member and past Trustee of the Copyright Society of the U.S.A., and a member of the EASL Section. He has also been continually designated as a New York Super Lawyer. He can be reached at (917) 848-9373, at his website www.HeckerEsq.com, or via email: HeckerEsq@aol.com.

Referral Strategies That Create Fun and Profit

By Carol Schiro Greenwald

Referrals to clients you want from referrers who know, like, and trust you lead to the pot of gold at the end of a successful networking strategy. The strategy should be “the end product of a plan focused on meeting specific people who are able to introduce you to potential clients The purpose of referral-focused strategies is to identify and meet those people who can help you reach your goals.”¹ This article discusses how to build your own robust network, how the referral process should work, and how to track your referral activities.

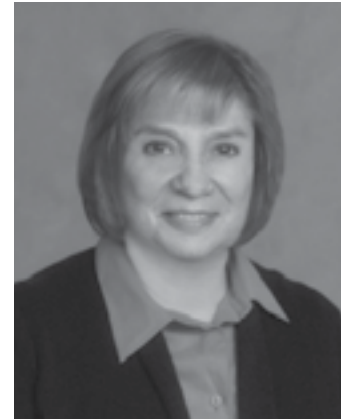
In today’s world, the only way to steer your own career and be career-independent is to have your own book of business, which provides options. Most lawyers say they get most new clients from client referrals or networking colleagues. However, considering a referral network only in terms of new work is too narrow a characterization. A robust referral network provides more than entrée to work opportunities. As with any networking relationship, referral relationships can also lead to:

- new colleagues and collaborators,
- knowledge—new areas or new twists to something you already know,
- providing a way for you to give back by making your own referrals to help people in your network, and
- friendships and activities unrelated to work.

Networking is the strategy attorneys use to create relationships that enhance your professional and personal lives. Your referral network is a subset of your total strategic networking plan. As with other networking strategies, you need to build relationships before asking someone else for a referral. You need to put in the effort to move a relationship from the initial handshake to a treasured, trust-based alliance. The relationship building process takes

time, often taking up to a year of genuine interactions.

As with any aspect of networking, creating referral relationships involves give and take. The best referrers live the mantra: “How can I help you? How can we create a mutually beneficial relationship?” As they listen and learn about you, they hear needs that they could address through introductions to members of their networks. While listening, their minds run through their networks, looking for the best introductions for you. Referrers who are most skillful at identifying appropriate introductions are called connectors, because they so willingly and effectively share their contacts with others. They rarely need to ask for business, as it comes to them naturally, because “what goes around, comes around.”²



Build Your Own Network

The kind of referrals you want to give or get will change as your career evolves. For example:

- Early in your career you begin to build out from your personal and school contacts, your summer job connections, mentors, and friends. Add people in your own work cohort, people doing what you want to do some day, and your bosses and thought leaders who you follow to help you grow your knowledge base.
- Mid-career, you want to look at your position, work, and clients and devise a strategy to get you where



you want to be in 10 years. Look at your contacts and add people doing what you want to do, at the level where you want to be, people who can help you get there, and clients who can affirm where you have been and help you move forward.

In one sense, everyone you meet, from the mail carrier to the millionaire next door, is a potential client or referral source, so it behooves you to be interested, courteous, and curious with everyone you meet. However, as a strategy, “everyone” is too vague. To be effective, efficient, and strategic, you need to focus, target, and prioritize. Strategic referral strategies “are built around and out of relationships you develop within your network, and through links with your contacts’ networks.”³ Grounding your referral-focused activities in a solid, goal-based strategy puts you in control of the way you spend your time and efforts.

The first strategic question you need to answer is: “For what do I specifically need the referral?” Introductions serve many purposes:

- client work,
- new business opportunities,
- visibility through collaborative marketing, such as speeches, articles, and events,
- resources that are useful for you and those in your referral sphere, and
- friendships and fun.

You should review your contacts list regularly to make sure that you have connections and relationships with people who are relevant to your goals. Look for a combination of strong and weak, or tangential, links. Strong links offer support and knowledge related to today. Tangential links are an avenue into tomorrow—new ideas, work focus, and knowledge. Often, weak links will provide the avenue for you to grow and change in your career.

Look to create a relatively large, heterogenous, and high-quality network. Potential contacts are everywhere. Make sure to include:

- interesting people you come in contact with at seminars, webinars, and networking group meetings,
- authors of interesting articles, and
- connections of people already in your network.

Make sure to include people from your past—clients with whom you used to work, colleagues and bosses from previous workplaces, and other professionals who worked with your clients. The list of contact sources is potentially unlimited.

Go Where They Go

Your networking activities should be directed at both present and future goals. Review the list of your networking groups. Some may no longer be relevant as a source of goal-related referrals. Think about adding groups that your clients and most important colleagues find useful and where they go for believable, pertinent information.

Sometimes you can become a full member of these groups, but more often you can join as an adjunct member—someone who offers useful services to the main membership. Join one or two of these groups and participate. For example:

- offer to put together a program in your area of expertise,
- sponsor part of a conference,
- contribute articles to member publications, and
- become a go-to referrer within the group.

Once you are a known, recognized member within these groups, the next step is to educate others as to your preferred client and the trigger points that suggest a need for your services.

How the Process Works

Alan Weiss, a well-known organizational consultant to major companies, says that eight qualities make a person referable:

- Trust. Do you live up to your promises and claims?
- Value. Do you demonstrably improve the client’s condition?
- Responsiveness. Are you accessible, and do you respond rapidly?
- Credibility. Does the client feel it’s impressive to be partnering with you?
- Reciprocity. Do you recommend people to the client where appropriate?
- Professionalism. Are you on time and on deadline?
- Innovation. Are you leading edge? State of the art?
- Reputation. Are you seen by others as being the best of the best?⁴

You need to make sure that your networking brand and activities show off these qualities.

A solid referrals strategy “is built on a foundation of strong relationships with people who understand what you do and are willing to help you move toward your goals.”⁵ Sometimes lawyers think that if they offer general descriptions of desirable clients, it will be easier to gen-



erate referrals. They are wrong. The more concrete your request, the more likely you are to get referrals.

The key to successful referrals is specificity. It is difficult to remember general asks. If you say you represent artists, it is hard to know to whom you should be introduced. It leaves it up to the referrer to think about who would be appropriate. Frankly, that is more work than most referrers want to do. However, if you say that you want to do more employment agreements for classical musicians interested in freelance work, it is easier for the referrer to remember what you want.

You need to explain to your audiences exactly who makes an ideal client for you: their characteristics and their needs. The best way to do this is by telling stories in which you resolve your perfect client's problem. Stories lend a concreteness and emotional color to target client definitions. By encouraging both an emotional and intellectual response in listeners, stories create a stronger imprint on the mind. They make it easier to remember your specifics.

The referral system is an informal one of favors requested and given. For referrers, any referral involves both art and strategy: art in the thinking behind the decision to make a specific introduction; strategy in the choice of referral requests to accept, and whom to ask to take a referral. When a referrer asks someone to share time, information, access or work with someone else, they are using up a "chit." The person who accepts the referral now holds that chit, which can be used for a future favor. Similarly, the person seeking the referral, when successfully referred,

uses up a chit with the referrer, and so it goes, around and around.

It is a collaborative process that requires trust among all involved. If the referred turns out to lack the appropriate or promised expertise or does not work well with the one to whom they were referred, the onus is on the referrer. A survey of non-attorney referral sources for attorneys found four behaviors that adversely impacted the success of a referral:

- Two aspects of unresponsiveness: a slow response or an unreturned phone call.
- Two aspects of "lawyering": arrogance and over-complicating a matter.⁶

Best Referral Process Behaviors

There are three main participants in any personal referral:

- the referrer who makes the introduction,
- the referred who asks for or indicates a need for this introduction, and
- the referred-to, an awkward designation for the person to whom the referrer wants to introduce the referred.

Each player has a separate set of preferred behaviors designed to make the process work smoothly and be a win-win for all involved. Communication among the players is

the key to a successful process. Effective communication involves two key behaviors: feedback and courtesy.

Feedback: Referrers dislike being blind-sided by anyone in the referral triangle. They want the referred to report back after they meet the referred-to; if engaged, how it went; when it is over, what happened. The referred, who sought the referral, needs to know if and when to use the referrer's name and needs to remember to keep the referrer in the loop as the process moves forward. The referred-to, if they decline the referral, needs to let the referrer know why it is inappropriate.

Courtesy: A thank you all around:

- from the referred to both the referral and referred-to at all stages of the process,
- from the referrer to the referred-to who takes the request,
- from the referred-to who benefits from the referral to the referrer.

Courtesy greases the process by keeping everyone involved current about the action and also provides information about how well it is working (or not) that can improve relationships going forward.

Tracking the Process

Without metrics, how can you know whether your efforts are as productive as they could be? Memory is a poor measurement tool; the longer you wait to record an interaction, the less likely it is going to be specific and factual. Instead, it is good practice to set up a tracking form that records referrals obtained and given. For each referral, note the following:

- the source of the referral—who from, with some context about the discussion, such as industry of the referrer and relationship of referred-to to the referrer,
- the referred-to—why they were chosen and how it worked,
- the nature of the request: information, introductions, possible work, new client, size of the matter, profitability, and usefulness of the information.

For firms, the data can be used to see where there are reciprocal relationships and where it is one-sided, where there is quantity without quality, and where there are the kinds of quality relationships to be encouraged. Solo practitioners can use tracking to measure quality and also to ensure that they give back to those who provide superior referrals for them.

Summary

Referrals, given and received, are a wonderful reward for the time and effort you put into getting and giving referrals. If you remember that it is as much about strategy as authenticity, you will be able to create a system that works for you.

Endnotes

1. Carol Schiro Greenwald, *Chapter 11: The Art of Giving and Getting Referrals*, Strategic Networking for Introverts, Extroverts and Everyone in Between, American Bar Association (2019), p. 153 ("Strategic Networking").
2. Gotham City Network Inc. mantra.
3. Strategic Networking, p. 158.
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Her book, *Build Your Practice the Logical Way—Maximize Your Client Relationships* (with Steven Skyles-Mulligan, American Bar Association, First Chair Press, 2012) provides a guide to creating a client-centric practice. The result is a firm differentiated from the competition by its client-centric culture, increasing their ability to attract and keep loyal clients.

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NFTs, Blockchain Technology, and Copyrights: How the Future of the Music Industry Will Be Decentralized

By Benjamin Kazenoff

I. Introduction

This article examines the copyright implications of non-fungible cryptographic tokens (NFTs) and how blockchain technology may fundamentally change the existing music industry paradigm. Although NFTs came into existence as early as 2015,¹ they gained significant mainstream attention in 2021 after media reports circulated of high-value digital collectible auctions.² Notably, this year brought us the world's first digital art auction at Christie's, where artist Beeple sold his work titled "The First 5000 Days" for \$69 million.³ The National Basketball Association (NBA) launched "NBA Topshots," a platform that sells officially licensed NBA digital collectibles.⁴ In the music industry, artists such as Kings of Leon and Grimes were some early mainstream adopters, releasing their own versions of digital collectible merchandise, such as albums and concert tickets.⁵

The demand for NFTs is continuing to surge and is showing no signs of slowing down, with the NFT market cap exceeding \$400 million as of March 4, 2021.⁶ The future seems to be bright for blockchain in the music industry, though with most nascent technologies, we are in legally uncharted waters. The NFT realm and world of digital assets is fraught with novel legal issues, posing challenges in nearly every field of law: intellectual property, finance, securities, tax, consumer protection, and data privacy, among others. We have yet to see how legacy businesses that operate in our traditional legal and financial frameworks will adapt or become obsolete in our new

blockchain world. In the coming decade, intellectual property and entertainment lawyers will need to craft proper protections for artists and intermediaries, and be fluent in the business of digital assets.⁷



This article provides an overview of the technology that underlies NFTs and the fundamentals of blockchain, for purposes of legal practice. It presents a variety of copyright issues facing rights holders due to the emergence of NFTs, problems with the NFT market, and existing legal remedies (or lack thereof). It also presents how blockchain technology can provide automated and trustworthy solutions to various aspects of the music industry, driven by consumers' new entertainment consumption habits and real-time demand. Specifically, proposed blockchain solutions will be discussed to address our flawed royalty payment systems, the orphan works problem, and bad-faith actors in the secondary ticket market. With respect to our current royalty system, this article contends that the current process of determining rates, largely conducted by the U.S. Copyright Royalty Board, is needlessly convoluted, fails to accurately capture the fair value of digital content, and is due for an upgrade.

II. NFT Overview: Blockchain Technology Fundamentals

The underlying computer science principles of blockchain are complex and in constant development. This article will cover the fundamentals of blockchain technology relevant to legal practice and how it interacts with our existing intellectual property framework.

Blockchain Technology: The Birth of Digital Scarcity

Blockchain technology enables us to transfer value directly and safely to one another, without going through third-party intermediaries.⁸ Third-party intermediaries, such as banks or credit-card companies, have historically functioned to secure, verify, and authenticate transactions.⁹ However, using clever computer science and cryptography principles, we now have a way to autonomously authenticate transactions without needing third-party intermediaries.¹⁰ This is achieved by processing transactions on a blockchain.¹¹

In its most simple terms, a blockchain is a tamper-resistant, cryptographically secure, distributed database of records.¹² It is useful to think of a blockchain as a globally accessible spreadsheet or ledger, maintained by volunteers worldwide via their computers (known as nodes), and not owned by any single entity.¹³ Thousands of nodes collaboratively process records onto a blockchain through a process called mining.¹⁴ Each new verified record (or block) that is mined to a blockchain must be linked to a preceding block in order to be verified, and this linking continues for every subsequent block that is added.¹⁵ “Linking blocks is achieved through ‘hashing,’ a process by which a grouping of digital data is converted into a single alphanumeric string, or ‘hash,’ serving as a unique identifier of the source of data.”¹⁶ Each subsequent block then must reference the preceding block’s unique hash in order to be verified, resulting in a digital signature of the source of data.¹⁷

By design, blockchains are successful stores of value because they are decentralized, publicly accessible, and encrypted.¹⁸ With respect to decentralization, data transmission occurs directly between nodes, instead of through a central server, to record, share, and synchronize transactions in their respective non-centralized electronic ledgers.¹⁹ Since records are distributed and maintained across thousands of nodes, they are censorship-resistant, transnational, and there is no central database that can be hacked.²⁰ With respect to public accessibility, every block is publicly recorded and visible, meaning that anyone can view records at any time because the records reside on a public network in perpetuity.²¹ The blocks do not reside within the confines of a single institution responsible for auditing transactions and keeping records.²² “Importantly, the blockchain is encrypted with heavy-duty encryption involving public and private keys (rather like the two-key system to access a safety deposit box) to maintain virtual security.”²³

Similar to how the internet revolutionized the transfer of information, blockchain is considered to be the “internet

of value.”²⁴ With the rise of the internet, any person could publish content or transfer information at no cost and without approval of a centralized body. With blockchain, people are capable of transferring value, such as money or digital assets, without needing clearance from a bank or paying a transaction fee. This core concept is referred to as data democratization, or the new Web 3.0.²⁵

Similar to the internet, blockchain technology is expected to permeate all aspects of society.²⁶ The digital scarcity principle solves efficiency issues for governance, tracking digital and physical assets, facilitating financial transactions, and much more.²⁷ This article will later address ways that blockchain technology permeates the music industry and where innovation is on the horizon.

A. Smart Contracts: Automated Terms and Conditions on the Blockchain

A “smart contract” is self-executable software code contained within each block on a chain that facilitates, verifies, or enforces the negotiation or performance of an agreement.²⁸ Essentially, it is the terminology used to describe terms and conditions that may be coded within each block.²⁹ Ethereum blockchain technology first integrated this self-executable code into its blockchain, automating the thought processes of business logic and contract law.³⁰ In March 2018, a Senate Joint Economic Committee report on cryptocurrency discussed:

While smart contracts might sound new, the concept is rooted in basic contract law. Usually, the judicial system adjudicates contractual disputes and enforces terms, but it is also common to have another arbitration method, especially for international transactions. With smart contracts, a program enforces the contract built into the code.³¹

With the ability to ascribe a variety of terms and conditions on a blockchain, “a smart-contract can be used to represent any fungible or non-fungible asset, including a song royalty payment, warehouse receipt, a bond, an invoice, a unit of currency, a futures contract, or a share of risk.”³² Smart contracts grant us the ability to digitize assets and lay the groundwork for the NFT marketplace.³³

B. Non-fungible Tokens: Certificates of Title on the Blockchain

An NFT is a representation of a unique digital asset, in serial number form, whose authenticity has been certified on a blockchain.³⁴ It is useful to conceptualize an NFT as a digital certificate of title that lives on a blockchain and proves ownership of an underlying asset.³⁵ Similar to how a physical deed functions with respect to real property, an NFT evidences ownership and grants the right to exercise control, transact, and exploit an asset, subject to the terms and conditions of its smart contract.³⁶ By definition, an NFT is “non-fungible” because it is a one-of-a-kind hash code.³⁷

NFTs are considered “tokens” because they can represent physical assets, like real property (a digital deed) or intellectual property.³⁸

Tokenization, especially within the music industry, is not a novel concept.³⁹ “In the 1990s, David Bowie created ‘Bowie Bonds,’ offering his fans a chance to share in the ownership of his intellectual property.”⁴⁰ Tokenization has the power to harness the relationship between artist and fan, unlocking revenue streams by creating and selling tokens to fans who believe in the artist’s creative work.⁴¹

C. NFT Platforms

A variety of NFT platforms recently emerged to facilitate NFT sales and accommodate the surging demand. Even though a bedrock principle of blockchain technology is decentralization, third-party intermediaries still thrive in this ecosystem and may be necessary to facilitate certain types of transactions.⁴² Some NFT platforms were developed by the owners of proprietary content that is sold on the platform, such as “NBA Topshots,” whereas other platforms do not own any of the underlying content and function as intermediaries to match buyers and sellers, such as “Superrare.co” or “OpenSea.io.”⁴³ Terms of use and due diligence procedures differ amongst platforms; some are more restrictive in granting access to the platform and carefully curate content, whereas others take a hands-off approach, are openly accessible, and limit their liability in connection with sales.⁴⁴

III. Intellectual Property Considerations, Security Risks and Enforcement Challenges in the NFT Market

The obligations of parties who create and transact NFTs “remain surprisingly ill-defined” or non-existent, which ultimately increases investment risk and hinders overall adoption.⁴⁵ However, there is nothing unique or specific about an NFT’s measure of exercising ownership or control over an underlying asset that is so fundamentally different from what already exists.⁴⁶ In light of this, and given the complexities and exponential development of the technology, novel issues will inevitably reach courts, and we will need to anticipate how rights will be allocated and what obligations should be enforced.

A. What Intellectual Property Rights Are Conveyed When Purchasing an NFT?

A common misconception about NFTs is that the purchase of an NFT conveys intellectual property rights in the underlying asset, enabling buyers to perform, display, or distribute the purchased work.⁴⁷ However, the rights conveyed depend entirely on what the terms and conditions are set forth in the NFT’s smart contract.⁴⁸ In most cases, the rights conveyed in an NFT purchase are mere ownership rights over the blockchain metadata.⁴⁹ Owning an NFT does not automatically grant ownership of the original work, similar to how owning a painting does not specifically grant the right to create copies or publicly display the work.⁵⁰ Ownership of an original work falls under

copyright ownership, which is vested in the original author.⁵¹ When an NFT is created (minted) and subsequently sold, the purchaser or collector will receive, as part of owning the NFT, a set of intellectual property rights from the creator that are pre-determined in its underlying smart contract.⁵² More often than not, the underlying smart contract only bestows a purchaser with rights that are no different from when a purchaser acquires a painting. However, the ability to customize the underlying smart contract of a work, coupled with the ability to own and trade scarce digital assets, is creating novel issues in copyright law. Is an NFT purchaser acquiring a mere digital copy of a work, or is it considered to be the original work itself? Additionally, is the process of minting a derivative work as an NFT considered to be transformative under traditional notions of fair use? Below is a discussion of emerging issues in the NFT space that implicate the doctrines of fair use and first sale.

1. Fair Use Doctrine Implications

The extent and scope of intellectual property rights have yet to be defined with respect to derivative works that are NFTs, and may be the subject of future litigation.⁵³ In March 2021, the blockchain company Injective Protocol purchased a \$95,000 Banksy artwork, burned it, and live-streamed it on Twitter.⁵⁴ It was all part of a process of “turning the work into an NFT, and attempting to validate an NFT’s ability to stand in for physical art assets.”⁵⁵

Under the fair use doctrine, codified under U.S.C. §§ 106 and 107, certain rights may be granted in creators to use the intellectual property of someone else in a transformative way.⁵⁶ The extent and nature of this transformative use is case specific and interpretations vary.⁵⁷ Circuits are split as to what standard of transformation is required in order for a work to violate a copyright under U.S.C. § 106(2). The Seventh Circuit held in *Lee v. A.R.T. Co.* that simply mounting an artistic work onto a tile for display is not transformative in a way that constitutes the preparation of a derivative work.⁵⁸ Judge Easterbrook opined that only when a pre-existing work is transformed, recast, or adapted in a way that results in an original work, a derivative work has been created.⁵⁹ However, the Ninth Circuit held in *Mirage Editions, Inc. v. Albuquerque A.R.T. Co.* that derivative works can be created through transformations not amounting to a wholly original work, so long as the change is essentially a new version of the work for a new market.⁶⁰

With respect to Injective Protocol’s derivative Banksy NFT, it may be easy for Injective Protocol to prove fair use, under either Seventh or Ninth Circuit theory, by showing that it transformed the Banksy work by burning, live-streaming, and minting the video file as an NFT. However, whether the act of minting the NFT *by itself*, or expressing an artwork as a video file instead of a static JPEG file constitutes transformative use, may be the subject of future litigation. Under the Seventh Circuit theory, the act of minting may not be considered transformative, in that

it does not sufficiently transform, recast, or adapt a work in a way that results in a new original work. The Ninth Circuit theory would arguably validate the act of minting as transformative, since the new version of the work is available and created for a new digital asset market. These are questions will require courts to grapple with how the transformative use test applies to NFTs.

2. First Sale Doctrine Implications

It is not clear whether the first sale concept applies to digital works in the NFT space.⁶¹ The first sale doctrine, codified at 17 U.S.C. § 109, provides that an individual who knowingly purchases a copy of a copyrighted work from the copyright holder receives the right to sell, display, or otherwise dispose of that particular copy, despite the interests of the copyright owner.⁶² The right to distribute ends once the owner has sold that particular copy.⁶³ As a result of the first-sale doctrine, the sale of an artwork from a private collection does not require that the seller obtain permission from the artist. This applies to albums, books, and any other physical memorabilia.

With respect to digital copies, the U.S. Copyright Office published an opinion in 2001 stating that a digital first-sale right could not exist due to the non-fungibility of digital works, which are inherently copies.⁶⁴ In 2013, the court in *Capitol Records LLC v. ReDigi Inc.* affirmed this notion, holding that since it was impossible to transfer a digital file without making a copy, that transfer would be subject to a copyright owner's reproduction right, as opposed to the distribution right limited by the first-sale doctrine.⁶⁵

This notion may be contested and subject to future litigation in the NFT space. Although blockchain technology enables the ability to create digital signatures and digital scarcity, the very act of minting a work onto a blockchain could be deemed a copy by courts and could render a digital first sale an impossibility. NFT creators, depending on terms and conditions of the underlying smart contract, may also have the ability to mint additional versions of the work at a future date, which courts may consider an act of digital copying, rather than treating new mints as actual non-fungible works.

The fact that an NFT has both a unique digital component and that it is connected to an asset, tangible or intangible, further complicates the analysis. Copyright law currently maintains that a work be tangible or physical in order to fall within the first-sale doctrine.⁶⁶ The difference made between tangibles and intangibles, as codified in the Copyright Act, may be due for an upgrade.

The general uncertainty surrounding NFTs and whether courts consider them to be non-fungible or simply digital copies could be problematic for both creators and purchasers of NFTs. It is within the realm of possibility that a court would uphold certain rights of the NFT creator in the event of a resale under 17 U.S.C. § 109, thereby negating some of the promised benefits of NFT ownership.⁶⁷

B. Security, Infringement and Enforcement Concerns in the NFT Market

1. Vulnerabilities in NFT Platforms and NFT Storage

Even though NFTs are safe and secure on a blockchain, an NFT purchaser can be easily prevented from accessing or viewing their purchase. A popular expression in the world of cryptocurrency and blockchain is “not your keys, not your coin,” which reminds holders of cryptocurrency that if their cryptocurrency holdings remain on an exchange, the exchange is the true custodian of the funds.⁶⁸ This holds true for owners of NFTs. A significant problem with the current NFT market is that the vast majority of NFT sales occur on NFT platforms, which remain de facto custodians of the actual NFT. “When purchasing an NFT, a buyer does not purchase an artwork, mp3 or even an image file—they are purchasing a unique cryptographic signature that, when decoded, references a piece of media located somewhere else on the Internet.”⁶⁹ That digital location could be on a regular website, in cloud storage, or on a large peer-to-peer file storage system, such as the InterPlanetary File System.⁷⁰ Oftentimes, that piece of media remains in the custody of the NFT platform on its internal server, and an NFT buyer must continuously revisit the NFT platform as a portal to view their purchase.⁷¹ This is extremely limiting for NFT purchasers, as they are bound to the NFT platforms, and their deficiencies, to engage with their digital assets.

As unregulated centralized intermediaries with significant funds flowing through them by unsophisticated investors, NFT platforms are also inherently vulnerable to cyberattacks, or may be operated by bad-faith actors themselves.⁷² NFT platforms are also subject to corporate liabilities and bankruptcy.⁷³ Reports have emerged of NFT art purchasers who were subsequently confronted with a “404 error” webpage when trying to view their recent purchases because the NFT platforms, where the files were hosted, were down.⁷⁴ Some NFT purchasers also tragically discovered that the NFTs they purchased (specifically the underlying JPEGs or video files) were removed by an NFT platform for copyright infringement, and vanished altogether.⁷⁵

An NFT purchaser's reliance on an unsecured, vulnerable, and centralized intermediary to engage with their purchase is an unfortunate reality of the current market. New enterprises are emerging to solve this NFT storage issue, such as Arweave, a type of decentralized storage system that claims to be a “collectively-owned hard drive that never forgets.”⁷⁶ This would enable NFT purchasers to transfer their acquisitions from an NFT platform to a more secure and accessible location of their choosing. In the meantime, NFT platforms remain the primary way for purchasers to engage with and experience their digital assets, despite their inherent vulnerabilities.

2. Infringement, Enforcement and Remedies on NFT Platforms

With respect to infringement claims and enforcement, every NFT platform operates under its own terms of use agreement.⁷⁷ While every term of use agreement contains take-down provisions pursuant to the Digital Millennium Copyright Act (DMCA), some platforms are more or less aggressive in policing user conduct.⁷⁸ For example, Super-rare.co has a provision in its terms of service that creates an obligation for an NFT seller to refund an NFT sale if it is later discovered that the NFT was infringing on an intellectual property rights holder.⁷⁹ However, the NFT platform Rarible makes it clear in its terms of service that users are assuming the risk with purchases and acknowledge that Rarible is not responsible for screening transactions or enforcing obligations against anonymous buyers and sellers, thereby limiting its liability for failed transactions.⁸⁰ Certain platforms are doing more than others to verify that users are actual owners of intellectual property that is being posted, and regulators are poised to step in to regulate these platforms under copyright, securities, anti-money laundering, and consumer protection laws.⁸¹ At the moment, the current market places the burden on rights holders to police infringement themselves.⁸² For owners of large intellectual property portfolios, this presents a major issue for enforcement, especially due to the proliferation of NFT platforms and the absence of internal automatic infringement detection systems that are present on platforms like YouTube or Spotify.⁸³

IV. Blockchain Technology's Potential To Revolutionize the Music Industry

The music industry is continuously undergoing dramatic periods of redesign, and blockchain technology is already transforming the space in significant ways by giving power back to creators.⁸⁴ NFTs are reshaping the way we view and structure music rights, distribution, royalty payments, merchandising, live events, and more.⁸⁵ Specifically, blockchain technology may usher in a new era of decentralized royalty payment systems, solve the orphaned works problem, and eradicate ticket scalpers and bad actors in secondary ticketing markets.

A. The Decentralized Royalty Model

In 2017, the music industry generated \$43 billion in revenue, but only 12% went to content artists.⁸⁶ In a comparable entertainment market, National Football League (NFL) players captured at least 47% of the revenue generated by the entire NFL, and NBA players captured between 49% and 51%.⁸⁷ While it could be argued that the bargaining position of athletes is inherently stronger than musicians in the current entertainment economy, the barrier to entry and selection process of each industry is not so fundamentally different to amount to a staggering difference of 35% in total captured revenue. Furthermore, songwriters also have minimal control over how their music is distributed and minimal visibility into who is streaming it.⁸⁸

Traditionally, publishing companies manage composition copyrights and record labels manage sound recordings.⁸⁹ In a typical music publishing contract, a songwriter assigns their copyright to the publisher, who then provides royalty distributions to the songwriter and keeps a portion as compensation for licensing the work and registering the song with performance and mechanical rights organizations.⁹⁰ A record label, as owner of sound recordings, typically serves to promote the song on radio airwaves and Digital Service Providers (DSPs), collect and distribute royalties, and provide an advance to the artist for recording costs.⁹¹

In this ecosystem, artists receive a small fraction of revenue after it is divided amongst other rights holders.⁹² The negotiated percentage of an artist royalty is based on the needs and leverage of the artist and record label or publisher. However, market royalty rates and statutory copyright license terms are determined by the U.S. Copyright Royalty Board (CRB).⁹³ The Copyright Royalty and Distribution Reform Act of 2004 (CRDRA) established the Copyright Royalty Judges program in the Library of Congress, where three judges, who are appointed every six years, determine and adjust royalty rates based on market economics.⁹⁴ The CRB has been criticized that its method of setting rates fails to reflect the value of content in our modern streaming economy.⁹⁵ There have been multiple appeals against royalty rates set by the CRB for being arbitrary and capricious, and failing to provide sufficient evidence for how it arrived at its determinations.⁹⁶ Tragically, while DSPs and publishers dedicate significant financial resources to litigating royalty rates and appealing CRB rulings, songwriters continue to be under-represented. Songwriters lack the organization and financial resources to advocate for themselves in this arena, and there are no incentives for the industry to make rights data and artist payouts public and accurate.⁹⁷ Even if songwriters achieve a higher statutory royalty rate, the centralized power-brokers in the industry can still maintain significant influence through control of various media outlets, DSPs, advertisers, and tour production companies, and serve as gatekeepers to financial rewards in other ways.

The current royalty payment model, largely determined by the CRDRA, fails to accurately capture the fair value of digital content, and our reliance on three judges to make discretionary decisions with respect to statutory rates is antiquated and inherently allows for human error. Blockchain technology can provide an automated and trustworthy solution to royalty payments, driven by consumers' new entertainment consumption habits and real-time demand.

Musicians are beginning to use blockchain technology as a vehicle to monetize their intellectual property and connect with fans, without any need for a record label, publisher, DSP, or other third-party intermediary. Grammy winner Imogen Heap, a well-known musician and blockchain advocate, utilized smart contract controls for buying licenses to download, stream, remix, and sync her songs from her

own website, controlling how she and her collaborators on the track were paid.⁹⁸ In another example, Grammy-winning producer Illmind released what he calls the “first ever NFT-backed sample loop/melody pack,” putting a collection of 10 “melody compositions” up for auction on the NFT platform Mintable.⁹⁹ The NFT is titled “Alorium” and contains an exclusive link to a file containing individual audio tracks of the compositions. It also comes with a “royalty-free guarantee” and a contract that gives the NFT owner rights to use the audio files for their own purpose.¹⁰⁰ As mentioned in the introduction, the band Kings of Leon also forged their presence in the NFT space by releasing an album and non-expiring concert tickets as NFTs.¹⁰¹

Importantly, to compete with DSPs, one of the first decentralized streaming platforms was launched in 2019, named Audius.¹⁰² The platform introduced a fully decentralized music streaming protocol that is live today and currently serves nearly 500,000 users every month.¹⁰³ Audius’ mission is “to give everyone the freedom to distribute, monetize, and stream any audio content by bringing parties together in an incentive-aligned way” and to decentralize control over royalty rate determination.¹⁰⁴ According to Audius’ white paper, the platform is comprised of five components:

- (1) [A]n efficient token economy powered by the Audius platform token (\$AUDIO), third-party stablecoins, and artist tokens,
- (2) a decentralized storage solution and ledger for sharing audio and metadata,
- (3) a unique track encryption scheme paired with a programmable mechanism to unlock user-specific proxy re-encryption keys for content,
- (4) a discovery protocol for users to efficiently query metadata, and
- (5) a decentralized governance protocol, whereby artists, node operators, and fans are individually and collectively enfranchised in decision making about protocol changes and upgrades.¹⁰⁵

Automated royalty payments, determined by the number of participants in the ecosystem or other parameters that can be voted on directly by artists, may be the answer in the near future. By implementing blockchain technology in creative ways, and rethinking royalty payments and monetizing streams, we can achieve more equitable compensation for artists and their creative labor.

B. Solving the Orphaned Works Problem

The orphan works problem has been a persistent concern for copyright-intensive industries reliant on licensing revenue.¹⁰⁶ An “orphaned work” is a copyrighted work whose owner is impossible to identify or contact.¹⁰⁷ The Copyright Office’s 2015 report about orphan works and mass digitization determined that the problem is widespread and affects a “broad cross-section of stakeholders, including members of the general public, archives, pub-

lishers, and filmmakers.”¹⁰⁸ There are several hundred million dollars in unclaimed royalties (colloquially known as “black box money”), because of this inability to trace a publisher or songwriter. This happens when DSPs cannot locate the rights holders to whom these royalties belong.¹⁰⁹ In February 2021, the Mechanical Licensing Collective (MLC) announced that it had received over \$424 million in accrued historical unmatched royalties from DSPs.¹¹⁰

The essential characteristics of blockchain technology—immutability, censorship-resistance, and assurance—can be utilized to secure and make available public records and provide data protection and transparency.¹¹¹ The ability to tokenize copyright interests as NFTs, including fractional interests, would prevent future lost works.¹¹² “NFTs could also streamline registration, remove barriers to the registration process, aid in proof of ownership, provide evidence of relevant dates, automate and facilitate chain-of-ownership (and other interests), and downstream licensing and other transfers.”¹¹³

Ultimately, blockchain technology and NFTs show substantial promise to offer viable answers to solve the orphan works concerns.

C. Eliminate Bad Actors in Secondary Ticketing Market

As Kings of Leon demonstrated with its NFT release, tickets to events can be represented as NFTs, as well as many other components of the events industry.¹¹⁴ Bookings are likely going to be automated and achieved through smart contracts that would execute payments automatically and instantly as soon as contractual obligations are met.¹¹⁵ For example, one could book a musician, digitally sign the contract, and put crypto funds into escrow on the blockchain. After the musician performs, the funds would be released, without the need for a bank or any kind of financial intermediary.¹¹⁶

Tickets on a blockchain would also solve a variety of issues in primary and secondary ticket markets. Yellowheart, the company that partnered with Kings of Leon to create its NFT products, aims to eradicate scalping and bad-faith actors in ticket resales.¹¹⁷ Yellowheart can determine the parameters for a concert’s tickets in a smart contract, containing all information about quantity of tickets available, point of sale and resale value, how many times the ticket can be resold, the age required for a purchaser, and ultimately where the revenue gets distributed.¹¹⁸ This automation provides flexibility and transparency with respect to the profit distribution process, an example being that a ticket can be programmed to cost \$50 on the primary market, a maximum of \$100 on a secondary market, and the initial \$50 sale could be split among artist, promoter, charity, and so on.

Blockchain technology has the power to simplify the ticket purchasing process and eliminates issues caused by bad-faith actors that deploy bots to instantaneously buy up all available tickets to an in-demand concert when they

become available. By using smart contracts and unique identifiers to moderate ticket sales, scalpers may become a thing of the past.

V. Conclusion

Similar to the internet, blockchain technology is expected to permeate all aspects of society.¹¹⁹ The digital scarcity principle solves efficiency issues for governance, tracking digital and physical assets, facilitating financial transactions, and much more.¹²⁰ With respect to the music industry, blockchain is poised to revolutionize the way we think about copyright ownership, fair use, royalty distributions, and how we physically engage with art. It also has the power to solve decades-long issues that have burdened and continue to stifle the entertainment industry. We have the ability to reducing influence of powerful gate-keeping intermediaries that monopolize artist revenues, and we have the technology to create higher-efficiency royalty distribution and copyright registration systems. Through deployment of blockchain technology, we can democratize and decentralize the music industry and move toward a more equitable ecosystem for creators and rights holders.

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[Kings of Leon] are actually dropping three types of tokens as part of a series called ‘NFT Yourself.’ . . . One type is a special album package, while a second type offers live show perks like front-row seats for life, and a third type is just for exclusive audiovisual art The smart contracts and intelligence within the tokens were developed by YellowHeart, a company that wants to use blockchain technology to bring value back to music and better direct-to-fan relationships.
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Records in a blockchain are stored sequentially in time in the form of blocks. Each block has a block header that includes, among other metadata, a hash. Hashing is the process by which a grouping of digital data is converted into a single “number” (an alphanumeric string), a hash. The hash serves as the unique identifier of the source data or a digital fingerprint of the source data that cannot be altered.
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Fungibility is a characteristic of an asset that determines whether or not items or quantities of the same

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Section 2.3 . . . Rarible Company reserves the right to terminate a User’s access to or use of any or all of the Offerings at any time, with or without notice, for violation of these Terms for any other reason, or based on the sole discretion of Rarible Company”). (Section 3.5 . . . All content on the Rarible Platform is created by Users. Rarible Company makes no representations or warranties as to the quality, origin, or ownership of any content found in the Offerings . . . Rarible Company shall not be liable for any losses, injuries, damages from the purchase, inability to purchase, display, or use of content.
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If mounting works a ‘transformation,’ then changing a painting’s frame or a photograph’s mat equally produces a derivative work . . . [i]f the Ninth Circuit [is] right about what counts as a derivative work, then the United States has established through the back door an extraordinarily broad version of authors’ moral rights, under which artists may block any modification of their works of which they disapprove.
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The Board acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, by issuing a final determination which unilaterally amended its royalty audit procedures without explanation. The amendment substantively changed the Board’s audit procedure, on which Music Choice relied at significant expense, by allowing parties to conduct additional internal audits beyond an external independent audit that was previously deemed the verification procedure. The amendment allowed copyright holders to conduct internal audits, where objectivity could be suspect).
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The Mechanical Licensing Collective ('MLC') has received a total of \$424,384,787 in accrued historical unmatched royalties from DSPs . . . Also known as 'black box' money, unmatched royalties are mechanical royalties that have yet to be distributed by streaming services because a composition's owners could not be determined. Under the landmark 2018 Music Modernization Act ('MMA'), the MLC has a responsibility to match and distribute these unmatched mechanical royalties to rights holders within two years. After that period, it has the option of distributing any remaining unmatched money to music publishers on a market share basis.
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Sports and Entertainment Immigration New NCAA Rules Are Afoot . . . It's Time To Let Those College Kids Pay Off Their Loans!

By Michael Cataliotti

In this edition of Sports and Entertainment Immigration, we will be looking at amateur/collegiate athletes and their ability to earn revenue from their names, images, and likenesses in light of the Supreme Court's opinion and the National Collegiate Athletic Association's (NCAA) interim decision.

College Athletes: Unpaid, Underappreciated, but Finally Able to Capitalize on Their Achievements . . . So Long As They Are American

As per the NCAA's website, "Nearly half a million college athletes make up the 19,886 teams that send more than 57,661 participants to compete each year in the NCAA's 90 championships in 25 sports across three divisions." So, what does that mean in terms of dollars and cents? "The total athletics revenue reported among all NCAA athletics departments in 2019 was \$18.9 billion."¹ College sports is big business.

One might assume that student-athletes must be financially stable. However, they have not been. They were not to be paid. More to the point, those athletes who make up the driving force for this multi-billion-dollar enterprise are not permitted to receive salaries or com-

penensation for their work. More painful, "a 2019 study conducted by the National College Players Association found that 86 percent of college athletes live below the federal poverty line."² This is apparently because they are students and/or amateurs.

At least the designation of "amateur" is slowly, but steadily, being diminished through various efforts, bringing us to some recent developments: (1) the Supreme Court telling the NCAA to give it up with the "amateur" nonsense and (2) the NCAA adopting an "interim rule" allowing athletes to profit off of their names, images, and likenesses (NILs), through endorsement deals. These are huge for what has clearly been an inequitable relationship. Unfortunately, however, the developments still leave out a significant number of individuals, like immigrants.



SCOTUS Dunks on the NCAA! Boom Shaka Laka!

On June 21, 2021, Justice Gorsuch wrote for a *unanimous* Court, that:

Colleges and universities across the country have leveraged sports to bring in revenue, attract attention, boost enrollment, and raise money from alumni. That profitable enterprise relies on “amateur” student-athletes who compete under horizontal restraints that restrict how the schools may compensate them for their play. The National Collegiate Athletic Association (NCAA) issues and enforces these rules, which restrict compensation for student-athletes in various ways. These rules depress compensation for at least some student-athletes below what a competitive market would yield.³

The underlying procedural facts are relatively simple: Student-athletes sued the NCAA, arguing that the NCAA operates in violation of U.S. antitrust laws by stifling competition and suppressing wages. The NCAA argued that those student-athletes are merely amateurs and students who do not operate at a professional level, and therefore cannot be deemed to be entitled to various antitrust or employment considerations. The district court found that while some of the NCAA’s restrictive practices were within the realm of reasonableness, others—specifically, “education-related benefits”—were not. The Ninth Circuit affirmed the district court’s injunction, “holding that the district court ‘struck the right balance in crafting a remedy that both prevents anti-competitive harm to Student-Athletes while serving the procompetitive purpose of preserving the popularity of college sports.’”⁴ The student-athletes accepted the Ninth Circuit’s affirmation, but, unfortunately for them, the NCAA did not, and so, it appealed.

Clearly perturbed by the NCAA’s ask of “the Court to find that all of its existing restraints on athlete compensation survive antitrust scrutiny,” Justice Gorsuch continued to write that “[t]he Court considers only the subset of NCAA rules restricting education-related benefits that the district court enjoined [. . .] based on the uncontested premise that the NCAA enjoys monopsony control in the relevant market—such that it is capable of depressing wages below competitive levels for student-athletes and thereby restricting the quantity of student-athlete labor.”⁵ The Supreme Court held: “The district court’s injunction is consistent with established anti-trust principles.”⁶

It was not only Justice Gorsuch who was offended by the NCAA’s ask, though:

In a blistering concurring opinion, Justice Brett Kavanaugh added that the sports traditions near and dear to alumni and others “cannot justify the NCAA’s deci-

sion to build a massive money-raising enterprise on the backs of student athletes who are not fairly compensated. Nowhere else in America can businesses get away with agreeing not to pay their workers a fair market rate,” he said, adding: “The NCAA is not above the law.”⁷

As per the reportage of NPR:

“This is a victory for students,” declared Oliver Luck, a former top NCAA official, a former NFL player and the father of three former college athletes. “The substantive decision in this case would allow a university or conference to provide benefits that cannot be capped by the NCAA as long as they are tethered to education.”

He thinks that the rules for what can and cannot be offered are likely to be institutional. “If you’re a star gymnast and you’re 17 years old and choosing between three different schools, those schools theoretically could offer you all sorts of academically related benefits,” said Luck. “A year abroad, internships. They could pay for your law school or medical school if you decided to.”⁸

Well, that is a fantastic plus for student-athletes.

Some, however, feel that this could be detrimental to various programs that are lesser-funded and, as such, will be disenfranchised from making those types of offers to prospective student-athletes. On the immigration side of things, this could get a bit dicey, but likely will not be problematic unless those education-related benefits were considered income for which the international student-athlete did not have authorization to receive. Student-athletes across the board, most likely, can benefit from the Supreme Court’s unanimous decision.

Did Somebody Say . . . Endorsements?

Although the Supreme Court decision likely affords all student-athletes opportunities to benefit from a more equitable playing field with respect to benefits that can be tied to the student-athlete’s education, California’s and other states’ laws, as well as the NCAA’s rules changes, however, would benefit some, but not all. “A mixture of new state laws and NCAA rules changes that went into effect on July 1 have provided athletes with varying degrees of new protections and opportunities to make money by selling their name, image and likeness (NIL) rights.”⁹

That sounds good, right? It is, but, as per another ESPN article,

[t]he new laws, [. . .] provide a framework for domestic college athletes to make

money from things like endorsements, autographs or hosting camps. However, international student-athletes, **which account for about 12% of Division I athletes, according to the NCAA's latest report**, remain in a legal no man's land, thanks to a caveat within the visa program that prevents anyone on an F (or student) visa from earning a substantial income while studying in the U.S.¹⁰

Moreover, "While F1 visas allow for international students to work on campus, as well as other limited forms of income with prior approval from immigration officials, any revenue from NIL would not appear to fit under those narrow guidelines."¹¹

Although this may not seem like it would impact many student-athletes, particularly as "international students represent less than 1% of Division I college football players, according to the NCAA's most recent report through the 2018-19 school year, other Division I sports have a far higher proportion of players participating on F visas—including more than 60% of tennis players, 37% of men's soccer players and 32% of women's golfers—and the number of international student-athletes has increased from 9.8% in 2014 to 12.4% in 2019."¹²

That is a significant number, and only increasing. This would both impact those international student-athletes and the colleges and universities that are expanding their recruiting methods and energies to look to non-domestic talent: What would they be allowed to offer? What would they be allowed to do to entice an Australian or South African rugby player, or a Spanish tennis player, to come and compete for their Division I, II, or III schools?

This could get very messy, very quickly, and there is no definitive path to resolve the issue at this time. As per ESPN:

For clarity on the issue, ESPN reached out to the U.S. Department of State, which referred the question to the U.S. Citizenship and Immigration Services, which then deferred to Immigration and Customs Enforcement (ICE) for all issues regarding study visas. ESPN shared a half-dozen questions with ICE in reference to NIL legislation and was told simply that ICE's "student and exchange visitor program is currently evaluating new developments in Florida law as they pertain to college athletes with F visas," according to a statement from public affairs director Jonathan Moor.

[. . .]

The bureaucratic runaround is emblematic of a process that has unfolded in fits and starts with individual state legislatures, the federal government and the NCAA all working on different versions of NIL legislation with varying degrees of success, leaving many athletic departments in a state of limbo on how to move forward.¹³

This is an area in which anyone working with international athletes, universities, colleges, athletic programs, agents, or the like, should keep watch.

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12. *Id.*
13. *Id.*

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Resolution Alley

A New Way to Resolve Small-Value Copyright Claims

Resolution Alley is a column about the use of alternative dispute resolution in the entertainment, arts, sports, and other related industries.

By Theo Cheng



In a legal system like ours that values access to the courts and, with limited exceptions, does not permit a prevailing litigant to recover attorney's fees from the losing party, one of the most challenging aspects of using the court system to litigate copyright disputes, where the dollar value of the dispute in question is low, is how to do so expeditiously and cost-effectively. The challenge arises because the relative costs involved in litigating and ultimately successfully prosecuting or defending a small-value copyright claim can be enormously expensive, especially in terms of the legal fees and costs.

Moreover, federal courts generally have exclusive jurisdiction over copyright claims, and, thus, a state's small claims court, for example, is not an available forum. As a result, many creators and small businesses will be unable to afford either prosecuting or defending such claims. In particular, visual artists, songwriters, authors, and other smaller creators are severely impacted by the high cost of federal litigation because the individual value of their

works or transactions is frequently too low to warrant the expense of litigation, and most attorneys will not even consider taking on these small-value cases. Indeed, even though the Copyright Act does provide for recovery of reasonable attorney's fees to a prevailing party, unlike other statutory fee-shifting provisions, the recovery is not guaranteed and lies within the discretion of the court.¹

Consequently, small-value copyright claims typically remain unchallenged, leading many creators to feel disenfranchised by the current legal system. Moreover, with courts backlogged due to the pandemic, the expenditure of time and investment of emotional capital in a protracted litigation are



yet additional costs with which to contend. Conducting the overall cost-benefit analysis of having a court resolve a lawsuit over small-value copyright claims has always been a knotty problem in our legal system.

Recently, after many failed attempts, the U.S. Congress addressed this problem, and a new law was enacted. On Dec. 27, 2020, the Copyright Alternative in Small Claims Enforcement Act of 2019 (the CASE Act) was signed into law.² The statute establishes a new three-member tribunal called the Copyright Claims Board (CCB) within the U.S. Copyright Office to handle small dollar-value copyright claims. Under the statute, the CCB will begin operating within one year of the date it was enacted on Dec. 27, 2021. There is also a provision allowing for a six-month extension of that date to account for delays associated with the pandemic or other significant reasons. Thus, at the latest, the CCB should begin operating by late June of 2022.

The full-time members of the tribunal—referred to as Copyright Claims Officers (CCOs)—are appointed by the Librarian of Congress after consultation with the Register of Copyrights. Each CCO must be an attorney with at least seven years of legal experience. Two of them must have “substantial experience in the evaluation, litigation, or adjudication of copyright infringement claims,” and, as between them, they must “have represented or presided over a diversity of copyright interests, including those of both owners and users of copyrighted works.” The third CCO must “have substantial familiarity with copyright law and experience in the field of alternative dispute resolution, including the resolution of litigation matters through that method of resolution.” The statute also provides for the hiring of Copyright Claims Attorneys to assist the members of the tribunal.

On July 20, 2021, the Copyright Office announced the appointment of the three CCOs: David Carson, Monica P. McCabe, and Brad R. Newberg. Carson was the general counsel of the Copyright Office from 1997 to 2012 and then worked at the International Federation of the Phonographic Industry before joining the U.S. Patent & Trademark Office as director of the Copyright Policy Team within the agency’s Office of Policy and International Affairs. McCabe was a partner in, and chair of, the Intellectual Property Practice at Phillips Nizer LLP, focusing on copyrights, trademarks, and entertainment law and representing a broad range of businesses, arts and entertainment talent, and non-profit entities. Her clients included actors, musical performers, authors, publishers, illustrators, and photographers. She also served as a mediator on the International Trademark Association’s Panel of Neutrals, the U.S. District Court for the Southern District of New York, and the New York Supreme Court’s Commercial Division in Manhattan and Suffolk counties. Newberg was a partner at McGuireWoods LLP, where he focused on intellectual property litigation and counseling, with a special emphasis on copyrights, trademarks, domain names, trade secrets, dilution, and unfair competition. He ap-

peared as lead counsel on approximately 100 trademark and copyright cases and represented clients before many different federal trial and appellate courts, the Copyright Royalty Board, the Trademark Trial and Appeal Board, and the Copyright Arbitration Royalty Panel.

CCB proceedings are intended to be streamlined and function much like an arbitration proceeding. The CCB may hold case management conferences with the parties, afford an opportunity for limited discovery (typically, only the production of relevant information and documents, written interrogatories, and written requests for admission), and receive evidence through written submissions or live hearings. The statute also generally affords the CCB flexibility in ensuring that the parties receive some measure of due process in this forum.

Ultimately, the CCB issues a written final determination containing factual findings based upon a preponderance of the evidence and circumscribed and bound by judicial precedent. When there is conflicting judicial precedent, the CASE Act specifies that the CCB must follow the law of the jurisdiction where the action could have been brought if filed in a federal district court. Alternatively, if the action could have been filed in more than one jurisdiction, the CCB would follow the law of the jurisdiction that it “determines has the most significant ties to the parties and conduct at issue.”

After the CCB issues its final determination, a party has 30 days in which to request reconsideration if it can identify “a clear error of law or fact material to the outcome, or a technical mistake.” The CCB can either deny the request or issue an amended final determination. If the CCB denies the reconsideration request, the aggrieved party may, within 30 days, seek a review of the final determination by the Register of Copyrights, limited to whether the CCB abused its discretion in denying reconsideration of the determination. The Register can either deny the request for review or remand the proceeding to the CCB for reconsideration of the issues specified in the remand and for the issuance of an amended final determination. With the exception of a procedure thereafter for confirming, vacating, or modifying the CCB’s determination in federal district court (much like for an arbitration award), there are no further merits-based appeals or reviews of the CCB’s determination.

The CCB is designed to hear three main types of claims, along with defenses and associated counterclaims. Those three types are: (1) a claim for copyright infringement brought by the owner of a copyrighted work; (2) a claim for a declaration of non-infringement of a copyrighted work; and (3) a claim challenging a Digital Millennium Copyright Act (DMCA) takedown notice (or counternotice) on the ground that it contains some misrepresentation. The jurisdiction of the CCB not only includes affirmative claims brought by owners of copyright-

ed works, but also defenses to allegations of infringement and claims brought by users of copyrighted works.

Commencement of an action before the CCB will be accompanied by a filing fee to be set by the Copyright Office. Although the statute provides that the filing fee be at least \$100, it is capped at the cost of filing a claim in a federal district court. There are also other notable differences between proceeding before the CCB and pursuing federal court litigation. First, the CASE Act does not require owners of copyrighted works to bring their claims before the CCB. To the contrary, they retain the option to sue in federal court, if they so desire. They may also pursue negotiation, mediation, arbitration, or any other form of dispute resolution. They can even decide to take no action at all and let the alleged transgression remain unchallenged.

Second, the statute does not require respondents to defend themselves before the CCB. Rather, they may opt out of the proceeding within 60 days of receiving notice of the proceeding, thereby dismissing it without prejudice and terminating the jurisdiction of the CCB. There is also a special provision allowing libraries and archives to preemptively opt out of this process. If the parties go forward before the CCB, however, they will forgo the right to be heard before a federal court and the right to a jury trial.

Although the opt-out right might seem to render the CASE Act superfluous, the statute also contains several provisions designed to incentivize and encourage respondents to participate in a CCB proceeding. For example, in federal court, a successful plaintiff may be awarded up to \$150,000 in statutory damages per work infringed. The CASE Act, however, limits that amount to a maximum of \$15,000. The statute also limits the total amount of damages that can be awarded in each case to no more than \$30,000, as compared to federal court, where there is no limit under the Copyright Act. By providing for a cap on damages, a CCB proceeding affords respondents with a measure of predictability, as compared to the amount of exposure it might face in a court litigation.

Moreover, participating in a CCB proceeding will undoubtedly be less costly than a federal court case, principally because the process itself is akin to an arbitration proceeding. In fact, it is so streamlined that there may even be no need to retain an attorney. For example, unlike in federal court, in-person appearances would not be necessary and discovery is limited. The formal rules of evidence also do not typically apply. The cap on damages again also helps make that phase of the dispute much more manageable.

Finally, the CASE Act also includes several safeguards to prevent against frivolous lawsuits and trolling that do not exist in the federal courts. The CCB not only has the authority to dismiss frivolous claims, but also to award attorney's fees of up to \$5,000 (or more in extraordinary

circumstances); prohibit the bad-faith actor from filing a case for one year; and dismiss all pending cases filed by the bad-faith actor. In addition, the statute allows the Copyright Office to issue regulations preventing any one person or entity from bringing a certain number of cases within a year—a restriction that does not ostensibly exist in federal court. Furthermore, because the CCB process is optional, each time a respondent opts out, the owner loses the non-refundable filing fee, thereby providing respondents with some leverage against a litigious plaintiff or attorney. The damages caps under the statute also serve as a disincentive to litigants who might consider making threats of large, unpredictable copyright damages awards in an effort to drive disputes toward a settlement.

Essentially, the CCB proceeding is a small claims arbitration process for lower-value copyright claims. As a form of alternative dispute resolution, it embraces the expeditious and cost-effective hallmarks of arbitration processes, while also providing for subject matter experts in the copyright field and ensuring a solid measure of fairness and due process. Although it remains to be seen how the CCB will actually operate in practice, practitioners should generally welcome the advent of this new forum for resolving small-value copyright claims in the face of the delays and expense currently being experienced through the court system.

Endnotes

1. See 17 U.S.C. § 505.
2. For a helpful and informative post on the new statute, see Terrica Carrington and Keith Kupferschmid, *CASE Act Signed Into Law: What This Means*, Copyright Alliance (Jan. 7, 2021), <https://copyrightalliance.org/case-act-signed-into-law/>. The ensuing discussion excludes the possibility of class action copyright claims, each of which may have a small value, but, in the aggregate, may wield significant leverage in a litigation. Indeed, the statute itself provides that the newly established proceeding has no impact on pending class actions, and a party may opt out of the proceeding if it receives notices of a pending class action "arising out of the same transaction or occurrence" as the instant proceeding.

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Say Goodbye to Back-End Deals

By Neville L. Johnson and Douglas L. Johnson

“The only constant in life is change,” opined the Greek philosopher Heraclitus. No business embodies this maxim quite like the movie business, which is currently in the throes of hammering out new prevailing formulas for compensating talent in the age of digital streaming. Starting with Netflix, then Amazon, and the other major studios now following, the end of “back-end” deals has arrived. In other words, as a general rule, talent can no longer expect to share in the profits of productions. In the new paradigm, pioneered by Netflix, a film’s talent (*e.g.*, its actors, writers, producers, and directors) will be paid their flat compensation, and perhaps some contingent “kickers” triggered by certain favorable outcomes (such as nominations or awards garnered, and if the movie is exhibited successfully theatrically). However, the prevailing theme now is to “get it upfront.” This methodology is non-negotiable; it is “take it or leave it.”

To be fair, these new deals are great for “turkeys”—shows that do not make back their costs of production. Indeed, the general rule is that fewer than 5% of motion picture and television productions ultimately “earn out” by going into profit, which may provide some consolation for those wishing for and not getting back-end deals. It is the runaway successes that will suffer—and the very nature of subscription streaming obfuscates what counts as success. Customers are granted access to a platform’s entire library of content for a fixed periodic fee, with no way to reliably attribute which customers join or remain specifically to consume a particular program, rendering the traditional notion of “recoupment” largely an artifice. Additionally, streaming platforms frequently refuse to reveal their proprietary consumption data (such as the numbers of viewers of a program, who those viewers are, and where they are watching from), leaving talent with little in the way of meaningful metrics to determine a program’s popularity. For those that do not “make their numbers,” sure, it is a good deal. Then again, who knows what are the real numbers?

All of the above is occurring against a backdrop of diminished theatrical exhibition, hastened by the COVID-19 crisis, with some prognosticators predicting that we will come out the other side of the pandemic with a mere 10% of theaters in the United States continuing to operate as compared to what we presently have. Streaming has ushered in a deluge of “day and date” releases, placing films in theaters and on streaming platforms simultaneously—and that is when there is a theatrical release at all. Given the proliferation of streaming outlets and the concomitant increase in productions to satisfy their user bases, industry professionals now expect these types of deals to become the norm, as the studios have long wished to end or significantly curtail back-end compensation, with COVID-19 providing the scapegoat.



This brings us to the recent dispute between Scarlett Johansson and Walt Disney Pictures over her latest (and likely last) Marvel movie, *Black Widow*. Johansson signed a deal with Marvel in 2017 that required *Black Widow* to be distributed across at least 1,500 screens, and according to Disney, it ultimately landed on over 30,000 worldwide. However, at the same time when *Black Widow* was debuting in movie theaters, it was also made available for streaming (for a premium fee) on the Disney+ streaming platform. This, according to Johansson’s attorneys, eviscerated her expectations of a traditional “windowed” release, whereby a period of theatrical exclusivity eventually gives way to exploitation of a film on secondary distribution channels.

Given that the purpose of windowing is to drive customers to movie theaters and maximize a film’s box office numbers (from which Johansson likely draws the majority of her contingent compensation), the conversion of *Black Widow* from a traditional windowed release to a “day and date” release was seen as a purposeful undermining of Johansson’s reasonable expectations for the benefit of growing the Disney+ customer base. Marvel had failed to successfully renegotiate Johansson’s contract to account for its revised distribution plans, instead electing to rely on the deal’s lack of an express obligation to window the film’s release. Stories of such hard-nosed tactics, while common in the film industry overall, are particularly surprising between parties of such high industry stature, and seem to auger a new dynamic more befitting of the technology industry than the motion picture industry (to the extent one can still find the line between the two).

Indeed, as recently outlined by Eriq Gardner of *The Hollywood Reporter*, Disney’s jettisoning of any sense of comity in its defense of Johansson’s claims makes clear that talent lawyers can no longer rely on industry norms being respected without express articulation.¹ In a pre-COVID world, Johansson would hardly need to spell out that “it was well understood by the parties and Disney that a ‘theatrical release’ referred to an *exclusive release* in theaters for

an extended period of time that was roughly 90-120 days.” Yet, times have indeed changed.

When Johansson’s agreement was brokered in 2017, the notion of a nonexclusive theatrical release for a Marvel film—which regularly gross 10 figures at the international box office—was simply inconceivable. Talent contracts were frequently silent on windowing specifically because the fact and details thereof were relegated to the studio’s distribution agreements with theater chains. Indeed, *Black Widow* is Johansson’s sixth film in the Marvel Cinematic Universe, the previous five of which all received traditional windowed releases. Under California law, the terms of a contract may be explained or supplemented by custom and practice within a relevant industry, as well as the contracting parties’ prior dealings.² Given that Marvel’s chief counsel allegedly represented to Johansson’s team that *Black Widow* “would be widely theatrically released like our other pictures,” it would have been reasonable to expect a sixth exclusive theatrical windowing. The question is when a reasonable expectation becomes a legal mandate—a timely test of the limits of the implied covenant of good faith and fair dealing.

How does Johansson’s argument play in real terms for other profit participants? Hers is an innovative argument, but it is up against the realities of motion picture distribution in these unprecedented times and the business judgment of distributors navigating the same. The studios have traditionally retained the right to do as they will when it comes to windowing (and many other aspects of distribution) unless specific practices are expressly prohibited. Given that windowing for home video is no longer a primary concern for the industry, having been significantly diminished (if not outright demolished) by streaming and other video-on-demand services, the economic argument for implying such obligations is becoming less tenable with time. Combine this with the general notion that talent does not like suing employers and we may not see many copycat lawsuits.³

There is one other very interesting aspect to Johansson’s lawsuit, as she sued Disney for interference with contract rather than Marvel for breach of contract. Disney is the parent company of Marvel and not a signatory to Johansson’s deal, making it fairly obvious that it was sued in Marvel’s place to avoid mandatory arbitration thereunder. It is common wisdom in the entertainment industry that the court system provides a “better shake” for talent than arbitration, which is virtually universally conducted by providers seen as “in the pocket” of the studios (as they rely heavily on the repeat business of institutional defendants).⁴

The foregoing should not be seen as a universal indictment of neutrals in the entertainment industry, however, as not even the studios’ preferred arbitration providers can always turn a blind eye to egregious misconduct. In February of 2019, for example, a JAMS arbitrator hit Twentieth Century Fox with a penalty of nearly \$179 million for its “reprehensible conduct” in defrauding various profit participants

on the “Bones” television series. However, Twentieth Century Fox was able to have nearly \$129 million of the award stricken in Los Angeles Superior Court on the basis that the arbitrator had granted it under the guise of punitive damages, and because the parties’ contracts included a waiver of punitive damages as an available remedy, the arbitrator had exceeded his authority.⁵

For better or worse, the law was on Twentieth Century Fox’s side. Parties can choose to waive the availability of punitive damages in a future dispute by contract so long as the provision doing so is not substantively unconscionable—a contextual determination that relies heavily on public policy considerations.⁶ The same is true for waiving consequential damages, although a defendant’s failure to timely raise the relevant contract provision may result, entertainingly enough, in a waiver of the waiver.⁷

Clearly, it is more imperative than ever for transactional lawyers to pay close attention to the provisions their clients are agreeing to, as many age-old assumptions are being challenged in this new era of dealmaking where nothing can be taken for granted. Even where the right to contingent compensation is provided, the method by which it is calculated and each party’s latitude to undertake actions impacting such calculation are arguably more important than the right itself. If studios are free to fudge the numbers, limit their liability for doing so, and muzzle profit participants’ grievances through mandatory private arbitration, a talent contract may prove to be worth less than the paper on which it is printed. As 19th century French critic, journalist, and novelist Jean-Baptiste Alphonse Karr famously quipped, “the more things change, the more they stay the same.”

Endnotes

1. Eriq Gardner, *How the ‘Black Widow’ Battle Could Break the Mold on Hollywood Dealmaking*, *The Hollywood Reporter*, (Aug. 25, 2021), <https://www.hollywoodreporter.com/business/business-news/how-black-widow-battle-could-change-long-standing-industry-customs-1235002215/>.
2. See Cal. Civ. Proc. Code § 1856(c); *Howard Entm’t, Inc. v. Kudrow*, 208 Cal. App. 4th 1102, 1114 (2012).
3. In September, Johansson and Disney settled the breach of contract lawsuit, which terms were not disclosed.
4. See Nessim and Goldman, *Mandatory Arbitration Provisions Involving Talent and Studios and Proposed Areas for Improvement*, 22 UCLA Ent. L. Rev. 333 (2015).
5. *Wark Entm’t v. Twentieth Century Fox Film Corp.*, 2019 Cal. Super. LEXIS 3179, *16-17 (Cal. Super. Ct. June 3, 2019).
6. *Lange v. Monster Energy Company*, 46 Cal. App. 5th 436, 448 (2020) (holding that in an action for wrongful termination in violation of public policy, “a waiver of punitive damages as a remedy for all non-statutory claims . . . is substantively unconscionable regardless of its mutuality”).
7. *J.C. Gury Co. v. Nippon Carbide Indus. (USA) Inc.*, 152 Cal. App. 4th 1300, 1305-06 (2007).

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Today's Celebrities Are Blessed With Revolting Fans

By Amber Melville-Brown

In Mel Brooks' 1981 film *History of the World, Part 1*, a count urgently communicates to the King: "I've come on the most urgent business. It is said that the people are revolting." "You said it, they stink on ice!"¹ responds His—not so majestic—Majesty. The "freeing" of singer Britney Spears aided by the #FreeBritney movement² is just one example in the recent history of brand protection and reputation restoration that today the people are equally as revolting, but they are revolting to the reputational advantage of the A-list royalty that they serve.

A reputation is a prized possession that should be painstakingly preserved and protected. How we are seen by others impacts how we are talked about by them, dealt with by others down the line, and in turn even how we are able to and do interact on a professional and personal level. We attorneys build, enhance, and preserve our reputations through consistently high-quality advice and service. In doing so, we are able to ensure that the "word of mouth" reliance, which helps our practice—whether it be in reports in professional directories, recommendations from satisfied clients or referrals from opponents and third parties—will be honeyed words dripped from smiling lips, not poisonous barbs through the gritted teeth of unhappy detractors.

For those on a different rung of the celebrity ladder than attorneys—stars of the silver screen, stage, and stadium—feedback from their fans is just as valuable. Indeed, a slew of recent examples suggests that when idols appear to have feet of clay, their fan bases will often turn the other cheek, continue to genuflect, hand them a reputational pass, and press on with their vocal idolatry to ensure that the subjects of their homage remain firmly atop their pedestals.

Civilian or Celebrity

While we attorneys may face the wrath of an uncivil opponent or a social media slur by an unhappy client, celebrities can face a reputational reckoning that is much greater, as theirs are generally much more visible with the glare of the media spotlight upon them. If a "civilian" (as Elizabeth Hurley terms us mere mortals³) were pursued relentlessly through the Hollywood Hills by an unknown individual, we would term it unlawful harassment⁴ and seek the assistance of the authorities to prohibit the conduct. Yet, when the umbrella-toting celebrity Britney Spears saw red and lashed out at the car of the camera-toting paparazzi in 2006, the images were beamed around the world.⁵

Similarly, while many facing criminal charges may be tried in court, those in the public eye are often also tried in the court of public opinion—it is largely inescapable that their activities will make front-page news. That is the downside. However, on the upside, while a fall from grace—alleged or otherwise—by any one of us may require significant rehabilitation to mend our broken reputation, the fall of a superstar may well be cushioned by the support of a loyal fan base.



Pop prince Michael Jackson retained his entourage of faithful fans despite being accused of child sexual abuse in 1993.⁶ Ten years later, he was charged with multiple counts of child sexual abuse—and received a not guilty verdict in 2005.⁷ More than a decade later in 2019, "*Is it still OK to listen to Michael Jackson?*" posed a headline in the British newspaper,⁸ *The Guardian*, in an article about Jackson and the four-hour documentary, *Leaving Neverland*, about the allegations. According to the fans queuing up outside the *Thriller Live* stage show in London the day after the broadcast, the answer was an emphatic "yes."

Back to the present, R&B singer R. Kelly was facing a reputational malfunction with criminal charges of sexual exploitation of a child, bribery, racketeering and sex trafficking. Despite his categorical denials, a jury found him guilty on 12 counts on September 27th, and still, many of his fans had wanted to spend their own money to help him post bail.⁹

On the one hand therefore, celebrities are bound to attract more attention than we under-the-radar, out-of-the-media-spotlight, law-abiding, law-upholding attorneys. They attract more attention than John or Jane Doe even if they are engaged in similar questionable or unlawful activities as their celebrity counterparts. While regular folk have to struggle largely on their own—atorneys, friends, and family aside—to remedy a damaged reputation, many celebrities maintain an entourage of advisers to keep a global brand squeaky clean and in good working order—and to polish it up and add an injection of good publicity oil should that reputation seize up or fail. It is becoming clear that if celebrities are also fortunate enough to have a fan base to love, adore, and



support them, they could do worse than to have those fans on the payroll, too. Fans are playing an increasingly visible, vocal, and vital role in the lives of their heroes, quite prepared to revolt should their idols need them. So, while they may bemoan the invasiveness of the paparazzi, the intrusion of the media, and the inquisitiveness of the public at times, celebrities may also rejoice that they do not face the world alone.

Fans—the Wind Beneath Our Wings

Taylor Swift is a good example. This high-flying Swift has harnessed the power of her fan base of Swifties¹⁰ to bolster not an ailing, but a sky-high reputation. The fans of singer-songwriter and social media pro Swift are birds of a feather who will flock together for their icon. They have recently shown their love and loyalty by supporting her decision to re-record her back catalog as she seeks to escape from earlier career decisions and regain artistic and financial control.¹¹ Greater love hath no fan apparently, than they who will buy the re-recorded albums of their idol, to help her make a very important point.

Taylor Swift is perhaps one of those few names seemingly too big to fail, and her viability is certainly not hindered by being supported by a fan base who have the inside track on their hero—or at least who feel that they do as she invites them to private listening events (even “stalking” them to do so!),¹² sending them gifts, and engaging on social media.¹³

Those who live their professional lives on social media—as are many of those engaged in entertainment, the arts, and sports—have a difficult balance to achieve, needing at once to provide direct access—or what appears to be direct access—to their private, as well as professional, lives through pics on Instagram, or antics on Tik-Tok, or story-telling via their artistic works to help form the bonds of (albeit largely fake) friendships and thereby enhancing their reputations (not to mention their bank balances). Yet, they need to do so while not opening the door too freely to their private lives, inviting unnecessary scrutiny, or losing control of the narrative and the means by which to direct, and then preserve, their reputations.

Celebrities do not necessarily ride their wave of fandom in a Machiavellian manner, but they can use their reputational advantage, vocal support, and respect, adoration, and passion of a powerful lobby group who can vote with their fingers on social media. Swift has tended to her flock of fans like a swan, gloriously calm on the surface while paddling hard to achieve her ends. However hard she is working at not looking as though she is working at it, one thing is sure: with fans such as hers, it perhaps matters little if she has enemies.

Britney’s Revolting Fans

Britney Spears¹⁴ may have significantly fewer Instagram followers than Swift,¹⁵ but in facing greater controversy, she has equally been able to rely on a faithful following. Spears has had more than her fair share of rep-

utational crises, but since her rather public meltdown, she had been relatively quiet on the controversy barometer—and some of her dedicated fans had noticed. Launching their #FreeBritney movement in April 2019,¹⁶ a battalion of the Britney Army, as her fan base is nicknamed, has not only supported, but actively sought the end of their pop princess's incarceration in what they have estimated to be a nightmarish tower of conservancy.

Spears has for the last 13 years been the subject of a court-approved conservatorship¹⁷ petitioned for and managed by her father. A conservatorship—usually temporary at the outset—is intended to protect individuals who cannot manage their own affairs. However, hers continued in place for more than a decade—during which time she continued to generate millions of dollars through her music and entertainment, managed to maintain the adoration of millions of fans, yet Spears was prevented from managing her business, her financial, and—she argues—some deeply personal affairs.¹⁸ As a reputation attorney, what interests this author more than what was going on inside the circus tent of the conservancy was what was happening outside, and how it was not just the talent herself, but the audience who may have brought the whole unwanted structure tumbling down.

Spears's father, Jamie Spears, stepped down from his role as conservator in 2019, citing health reasons.¹⁹ Until then, for its subject, the still waters of the conservancy largely ran quiet, but that their idol was apparently suffering in silence had not escaped her loyal fans. Despite her apparent acceptance of the situation, an increasingly vocal group of fans was convinced that she was effectively being held in the shackles of a conservancy against her will, and also against her better interests. Thus, the #Free-Britney movement was born.

This very public showing of support may have had a significant impact; it may have spurred her on to finally disclose how she felt about the ongoing situation in an impassioned plea to the court.²⁰ It may also have given her the courage to seek to remove her father as conservator²¹ and may even have played a part in her father's own decision to file a surprise motion in September, asking the court to consider whether the conservatorship is still required.²²

Spears would not be the world-renowned pop star and celebrity that she is today without her own hard work, a large amount of talent to entertain, and a good-sized dollop of good fortune. That added to her early wholesome appeal and her later sassy performances, which combination led to the evolution of a global brand and a worldwide reputation as an A-list performer appealing to and adored by millions of fans.

The revolutionary Britney Army is an important force for Spears, dedicated to freeing their Colonel in Chief. That may be by a form of social media espionage, seeking out hidden clues in her posts, engaging in counter-

intelligence with their own messaging on social media, or sending up flares to the wider world, such that the mainstream media were trained on the story as it unfolded. Without such an army of support, it is arguable that no one could sensibly and confidently take action if and when one decided to draw the battle lines and launch an operation of self-preservation.

The Power of the People

Meanwhile, actor Johnny Depp has drawn battle lines with his former wife Amber Heard, and has been seeking to scramble out of the reputational trench into which he fell, ironically, while seeking to restore his reputation. Having been called a “wife-beater” by the British tabloid *The Sun*, he sued the newspaper in the English court over its publication of allegations of physical abuse against Heard.²³ Such highly defamatory allegations are enough to make a zero out of a hero, but not with his die-hard fans. Even after he lost the case, with the ruling allowing the newspaper to refer to Depp as a “wife-beater”²⁴ with impunity, they did not leave their man behind. Shouts of “We love you Johnny” had greeted the star as he pushed through their supportive throng on day one of the trial at the Royal Courts of Justice.²⁵ Although the London libel court accepted that Depp *had* assaulted Heard on a dozen occasions,²⁶ it was Heard, the tabloid's key witness, who was met with boos and shouts of “Liar!” as she left the court three weeks later, ostensibly fully vindicated.²⁷

The English court ruling notwithstanding, Depp's fans' hearts will continue to beat for their heart-throb and they are as keen as he to see him raised to his former state of glory. Their battle-cry for the reinstatement of Depp's reputation has been heard in battles raging on many fronts: at the time of writing, a petition on change.org²⁸ had been signed more than 150,000 times in support of the actor;²⁹ fluttering like virtual colors at a joust, Justice for Johnny “twibbons” are available on Twitter,³⁰ and one can, of course, also always purchase the T-shirt.³¹ Importantly, however, Depp's fans will have been heartened to learn of his recent very palpable hit as the Virginia court dismissed Heard's motion to strike out his case against her in respect of an article she penned in the *Washington Post*.³² It is no doubt his hope that a wished-for success in a U.S. court will trump defeat in the U.K. court, and he has just secured himself an important victory in a key skirmish along the way.

As the defendant in the Virginia proceedings, Heard had sought to rely, *inter alia*, on legal arguments of collateral estoppel and comity. With collateral estoppel, parties and their privies in one action are precluded from litigating any issue of fact that was actually litigated and essential to a valid and final personal judgment in the first action.³³ However, in this case, the court found that there was no requisite privity for collateral estoppel to apply. While in the English case, “The Sun's interests were based on whether the statements *the newspaper* published

were false . . . ,” in the American case, “Defendant’s interests relate to whether the statements *she* published were false.”³⁴ The court continued: “Although the claims are similar in the sense they both relate to claims of abuse by Plaintiff, the statements being defended in the UK case are inherently different than the statements published by Defendant.”³⁵

As for comity, the court was having none of it. Comity allows for the recognition of legislative, executive, and judicial acts of a foreign jurisdiction.³⁶ However, the court noted that “Virginia courts should not recognize a foreign decree . . . which is contrary to the morals or public policy of this State” or that would “prejudice [Virginia’s] own rights or the rights of its citizens.” Citing the “starkly different” libel laws in Virginia and England and noting “England’s overreaching suppression of free speech during the eighteenth century,” the court dismissed Heard’s motion to strike out Depp’s claim. She concluded that “upholding English libel judgments in the United States would create the chilling effect and could create a dangerous precedent. Accordingly, this Court is unpersuaded by Defendant’s argument.”³⁷

However, back in the court of public opinion, not everything has ruled in Depp’s favor. First, despite the boundless support of his fans, Depp argues that he is being boycotted in Hollywood.³⁸ To further their “Justice for Johnny” campaign,³⁹ many “Deppeheads”⁴⁰ have sought to reinstate him on his former Hollywood throne, while knocking his former wife firmly off her perch by engaging in a concerted lobbying effort to have Heard removed from her role in *Acquaman 2*. Yet his “soldiers,” as Depp has called them, have not won this battle. In a podcast with Hero Nation, Peter Safran, the film’s producer, explained why: “I don’t think we’re ever going to react, to, honestly, pure fan pressure. You gotta do what’s best for the movie.”^{41,42}

Doing what is best for Spears vis-à-vis the conservatorship is ultimately for the court to decide. Her fan base is not comprised of friends possessing insider knowledge of her fears about her personal and professional life or her hopes for her future; they are not her legal advisers entrusted with her instructions or equipped to advise her; and the Britney Army is not a judicial authority empowered to assess the evidence, apply the law, and decide the ultimate outcome for the conservatorship. That said, her fans have been a tsunami of support, with their high-profile campaign achieving such hurricane force that it swept up and carried their idol right to the doors of the court-

room, quite possibly buoying her up and empowering her to take affirmative action. What is more, it generated such a storm of publicity that it was impossible to ignore. Her fans may not have long to wait to see the possible impact of their work, as her father was suspended as her conservator on September 29th. John Zabel, a certified public accountant, has been appointed as a temporary conservator of Spears’s estate until the hearing scheduled for November 12th. The judge indicated that she will then likely terminate the conservatorship.⁴³

That is the power of the people. This is what influencers look like, when they influence real lives, for the good. They are disrupting a status quo unacceptable to them and their heroine. This is what can be achieved by a revolutionary force of supporters. “The people are revolting” came the cry during the French revolution, and the unpopular celebrity of the day, Marie Antoinette, quite lost her head over it. Spears, on the other hand, may have been saved by the mob, and her reputation, far from taking a tumble, has seemingly been enhanced by her action in seeking to take control of a traumatizing situation, and by being so loved by her followers that they would unstintingly seek to save her.

Spears’s reputation is also enhanced by her expressions of thanks to her fans. In some of her earlier court papers, the singer referred to being “appreciative of her fans’ support.”⁴⁴ Via Twitter, the songstress sent a message to her fan base that she felt “GRATITUDE and BLESSED,” offering, “Thank you to my fans who are supporting me . . . You have no idea what it means to me be (sic) supported by such awesome fans!!!”⁴⁵ Whether the conservatorship is ultimately ended, we should all have a fan base as supportive, active, vocal, and loyal.

Thus, the moral of the tale is that the power of an empowering fan base such as Spears’s may open otherwise locked doors; that persistent supporters are prepared to tell their hero’s story as Depp’s fans do, in the hope that it will change the narrative; and that flocks of fans can serve as the wind beneath the wings of a successful songbird, as in Swift’s case.

Let us then conclude by combining our main characters in today’s show. If our reputation is our most valuable asset, then if we “Work b**ch,”⁴⁶ we may build up a fan or client base to see us through regardless, and “Stronger.”⁴⁷ If we face a Nightmare on Elm Street⁴⁸ (or Fleet Street),⁴⁹ having an entourage of Fantastic Beats fighting for justice for or with us, can help us out of any Dark (reputational) Shadows.⁵⁰ Even if we have a great Reputation,⁵¹ by



adopting the Swift way, any one of us—celebrity or civilian, prince or pauper, royalty or attorney—can suffer the ruffling of our reputational feathers, and Fearless,⁵² just “shake it off.”⁵³

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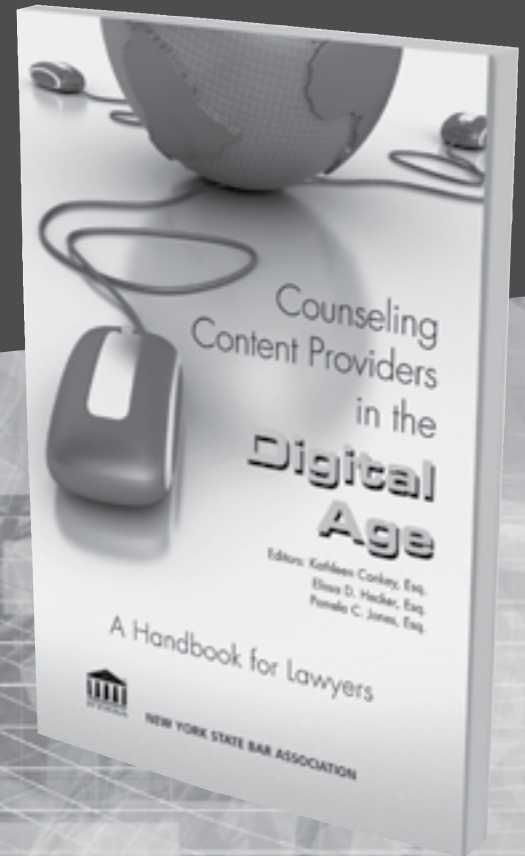
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Michael B. Jordan and the Importance of Culture in Trademarks

By Merlyne Jean-Louis



In June 2021, actor Michael B. Jordan found himself in hot water after the public discovered that he and his business partners tried to gain trademark protection for the word J'OUVERT. They were to use the term as the name for a new rum brand. It caused controversy in the Caribbean community.

Some may be asking, "What does the trademark registration process look like?" while many may be asking, "What does J'OUVERT mean and what does it have to do with the Caribbean?" Do not fret! As a person who is of Caribbean descent, who speaks French and Creole (the languages relevant to this story), and who is a trademark attorney, I can answer those questions while providing cultural context.

What Are the Trademark Basics?

A trademark or service mark¹ is anything that distinguishes one's good or services from that of another. To be clear, anything (including a word, logo, sound, color, or smell) can serve as a trademark. In essence, a trademark is a source identifier. Under the Lanham Act,² which is the primary federal statute that governs trademarks and service marks in the United States, a party must follow cer-

tain procedures in order to qualify for federal trademark protection.

What Happens During the Trademark Registration Process?

Application

To register a trademark on the Principal Register³ of the U.S. Patent and Trademark Office (USPTO), one must file a trademark application. Depending on the information an applicant wishes to provide, one would either file a Trademark Electronic Application System (TEAS) Plus or a TEAS Standard application.⁴ The application must contain certain information, including the following:

- information about the applicant
- the trademark (usually a word mark or design mark)
- the classes of goods and services with which the applicant desires to use the trademark in association,⁵ and
- the filing basis of the trademark.

Basis

For applicants who are domiciled in the United States, there are two filing bases under which a trademark application can be submitted.⁶ First, there is the use in commerce basis (also called Section 1(a) basis). If an applicant files this type of application, it is attesting that at the time when the application is filed, it was using the trademark in commerce⁷ in association with the goods and services listed in the application. A Section 1(a) applicant would have to provide proof, which is called specimen, that it is currently using the trademark in commerce.⁸

Second, there is the intent-to-use basis (also called Section 1(b) basis). Under this basis, at the time when the application is filed, the applicant is attesting that it has a bona fide intention to use the trademark in commerce in association with the goods and services listed in the application in the near future.

Office Action or Examiner's Amendment

After an application is filed, the applicant may receive an office action, which is a letter from an examining attorney (EA) at the USPTO stating the reasons as to why the applicant's application may not be able to proceed.⁹ An applicant has six months to respond to an office action. Sometimes the office action is issued due to a minor issue (i.e., a disclaimer is required for a certain word in the mark because it is descriptive of the goods and services in the application).¹⁰ However, sometimes an office action is issued because of a substantive issue (i.e., the applicant's mark is likely to be confused with a mark that has already been registered¹¹) that requires an attorney to conduct legal research and write a legal memorandum.

In order to expedite the application process, sometimes if an EA finds an issue, they will issue something called an examiner's amendment. This is where the EA would contact the applicant, or the applicant's attorney, directly via phone or email to resolve the issue. Then, instead of issuing an office action, the EA would go into the applicant's file and create an examiner's amendment, which states the application will be amended in a particular way.¹²

Publication

If the applicant does not receive an office action, is able to overcome an office action, or is issued examiner's amendment, the application will move on to the next step in the application process, which is publication. For 30 days, the applicant's trademark will be published in the USPTO's Trademark Official Gazette. During this publication phase, anyone in the world can oppose the trademark. This is important, because one of the responsibilities associated with trademark registration is that registrants must enforce their trademarks to make sure that no other party uses a similar mark in a manner that could cause a likelihood of confusion. Any party who believes that the ultimate registration of a trademark would harm its trademark rights can oppose a trademark application.¹³

Registration or Notice of Allowance

If there is no opposition to the trademark, the application will proceed in the registration process. The next step depends on the basis of the application. If an applicant filed under the Section 1(a) basis, the application would proceed to registration. The applicant will ultimately have its trademark registered on the Principal Register,¹⁴ receive a registration certificate, and be granted the rights that come with federal trademark registration.



If an applicant filed under the Section 1(b) basis, the application would be issued a Notice of Allowance. Initially, the applicant has six months to use the trademark in commerce in association with the goods or services listed in its application and provide to the USPTO a specimen to prove that it is doing so. However, if the applicant is not able to provide the specimen at the end of the six-month period because it has not started using the trademark in commerce in association with the goods and services listed in the application, it can extend the time needed to submit the specimen¹⁵ every six months for up to three years after the date when the Notice of Allowance was issued by filing an extension for each six-month term. Once the specimen is provided to the USPTO with a Statement of Use, the applicant will proceed to registration (like the Section 1(a) applicant).

What Happened With the J'OUVERT Application?

Filing of a Section 1(b) Application for J'OUVERT

On Sept. 25, 2020, Michael B. Jordan's business partner Louis Ryan Shaffer filed a Section 1(b) application to use the trademark J'OUVERT in association with "alcoholic beverages, except beer; distilled spirits; rum-based beverages; and rum."¹⁶ These goods are classified under Trademark International Class 30. Thus, as of the date of filing the application, Shaffer had a bona fide intention to use J'OUVERT in commerce in association with alcohol in the near future.

The application also included the following additional statement related to transliteration:

The non-Latin characters in the mark ["J'OUVERT"] transliterate to day break and this means morning in English.

Issuance of Examiner's Amendment Related to Translation

On Feb. 26, 2021, the EA issued an examiner's amendment. The EA found no substantive issues with the application. However, after communicating with Shaffer, the attorney amended the application and added the following statement to the record:

The wording "J'OUVERT" has no meaning in a foreign language.

As a result, the aforementioned transliteration was deleted from the application.

Publication and Issuance of Notice of Allowance

On April 6, 2021, the trademark was published in the Trademark Official Gazette. Thus, within 30 days of the publication date, any party who believed it would have been harmed by the registration of the mark could have filed a notice of opposition (or extension of time) with the Trademark Trial and Appeal Board.

On June 1, 2021, because there was no opposition, the application was issued a Notice of Allowance. Thus, Shaffer had until Dec. 1, 2021 to file a Statement of Use or a Request for Extension of Time to file a Statement of Use.

Announcement on Instagram

On June 19, 2021, Lori Harvey (Jordan's romantic partner) congratulated Jordan on the impending launch of the J'OUVERT rum brand via an Instagram story.

What Were the Controversies Surrounding This Application?

As soon as the general public became aware of Jordan's association with the J'OUVERT application, several controversies brewed.

Controversy 1: Accusations of Cultural Appropriation Due to the Use of the Term J'OUVERT

Some people of Caribbean descent were upset and accused Jordan of cultural appropriation for naming the alcohol brand J'OUVERT, because the term has historical significance to many in the Caribbean diaspora and Jordan is not Caribbean.

J'ouvert (or jouvay) is a large street party held annually as part of carnival celebrations across the Caribbean and the diaspora. Some popular carnivals include the Trinidad and Tobago Carnival, Toronto's Caribana, and New York's West Indian/Labor Day Carnival. On actual carnival day (i.e., Mardi Gras for the Trinidad and Tobago Carnival), many participants dress up in elaborate costumes or "play mas."¹⁷

J'ouvert takes place before the carnival parade. It is directly linked to the canboulay emancipation celebrations in Trinidad, where former slaves (who could not participate in the French colonizers' masquerades) injected African folklore into their own celebrations.¹⁸

Rapper Nicki Minaj weighed in on this controversy, stating in an Instagram post that she was "sure [Michael B. Jordan] didn't intentionally do anything he thought Caribbean [people] would find offensive," but "[n]ow that [he was] aware, [he should] change the name and continue to flourish and prosper."¹⁹

Controversy 2: J'OUVERT Has No Meaning in a Foreign Language

There was also controversy due to the meaning of the term J'OUVERT. As stated above, the initial application stated that it meant day break/morning. After the examiner's amendment, the application stated that J'OUVERT had no meaning in a foreign language.

I initially thought that J'OUVERT was a French mistranslation of JOU OUVÈ, the Antillean Creole term meaning "dawn" or "daybreak," into JOUR OUVERT. Before dawn is the time at which J'ouvert celebrations are normally held.

Technically, the term J'OUVERT does not have a meaning. In French, even if one was to take the literal words of "day" and "open" and although not grammatically correct, it would be "JOUR OUVRE." OUVERT is the past participle of the word open.

In Creole, JOU OUVÈ literally means "the day is open." For these reasons, I likened J'OUVERT to be a fanciful mark, because the terms JOUR and OUVERT are combined to create a new word.

I discussed this with several trademark attorneys on a Facebook forum. One attorney showed me a dictionary related to a language called Trinidadian Creole.²⁰ The entry for "J'ouvert" defined the term to mean "day open." Another attorney stated that J'OUVERT could be deemed to be a slang word. Due to this information, I concluded that the initial application was correct and that the examiner's amendment was incorrect.

However, many would not know that the initial application stated that the term translated into day break/morning. Thus, the backlash made it appear as if Jordan and his business partners stated that the term had no meaning in a foreign language, when in fact it did.

Controversy 3: Belief That One Could Not Use the Term J'OUVERT

There is a misconception that if one trademarks a word, that party has complete control over the use of the word. In essence, some people confuse ownership of a trademark as ownership of the actual word itself.

Jordan's use of the word J'OUVERT in association with rum will not prevent use of the term J'OUVERT by others as it has always been used. However, some believed that this was not the case.

How Did Jordan Respond to the Controversies?

On June 23, 2021, Jordan posted an Instagram story apologizing and stating that he and his partners never intended to “offend or hurt a culture ([they] love and respect) & hoped to celebrate & shine a positive light on.”²¹ They ultimately decided to change the brand’s name and will presumably abandon the J’OUVERT application.

What Are Your Thoughts on the Controversies?

Important lesson: just because you can do something does not mean that you should do it. As we can see here, news about Jordan’s connection to the J’OUVERT application was not made public until it was granted a Notice of Allowance. Jordan and his business partners could absolutely have continued using the term in association with rum. However, it was a good idea for them to rebrand, because it showed that Jordan and his team actually listened to the feedback they received from the Caribbean community. Their future brand may fare well because of this.

What Should Trademark Attorneys Do When Advising Clients Regarding the Registration of Foreign Words?

Trademark attorneys must take into account the potential response/backlash of the public when it comes to their clients’ trademark usage of terms that have a meaning in a foreign language.²² First, you should ask your client what terms mean in the foreign language. Second, conduct your own research to determine if the term is culturally significant. Third, if you cannot make this determination, keeping confidentiality obligations in mind, consult with a legal colleague or friend. In the end, trademark attorneys should help their clients to consider cultural importance when it comes to the trademark process.

Endnotes

1. “Trademark” is for goods and “Servicemark” is for services. As the application and registration processes are identical for both, and as applicants often apply for goods and services concurrently, this article will use “trademark” to represent both trademarks and servicemarks.
2. Trademark Act of 1946, 15 U.S.C. §§ 1051 *et seq.*
3. Registration on the Principal Register gives a trademark registrant certain rights, including the right to sue for trademark infringement. This is not the case for a trademark that is registered on the Supplemental Register. *See* Trademark Manual of Examining Procedure (TMEP) § 801.02(a). The TMEP is an excellent resource for all issues related to trademarks.
4. To file an initial trademark application and to see the differences between the TEAS Plus and TEAS Standard applications, visit <https://www.uspto.gov/trademarks/apply/initial-application-forms>.
5. For a complete list of the 45 classes under which any good or service can be classified, visit <https://www.uspto.gov/trademarks/trademark-updates-and-announcements/nice-agreement-current-edition-version-general-remarks>.
6. For more information about filing basis, visit <https://www.uspto.gov/trademarks/apply/basis>.
7. The power of the federal government to register trademarks comes from commerce clause of the Constitution. TMEP § 901.01; 15 U.S.C.

§ 1127. To see the what the USPTO considers to be use in commerce, see TMEP § 900 and § 901.01.

8. For example, if an application is selling items of clothing, the applicant will have to provide an acceptable specimen like a tag containing a trademark or a website where the trademark is prominent and customers have the ability to place the clothing in a shopping cart.
9. For more information about office actions, visit [uspto.gov/trademarks/maintain/responding-office-actions](https://www.uspto.gov/trademarks/maintain/responding-office-actions).
10. Descriptive marks fall on the lower end of what is commonly known as the “spectrum of distinctiveness.” For more information about distinctiveness, *see* TMEP § 1209.01.
11. Likelihood of confusion is one of the most common issues in office actions. *See* TMEP § 1207.01.
12. For more information about Examiner’s Amendments, *see* TMEP § 707.
13. This includes those who have common law/state trademark rights.
14. This article assumes that the hypothetical applicant is seeking registration on the Principal Register.
15. An applicant must provide the specimen in what is called a Statement of Use.
16. Information submitted during the trademark process is public. I used the Trademark Electronic Search System (TESS) to find the J’OUVERT application (Serial No. 90210764). *See* tess2.uspto.gov. From there, I went to the Trademark Status Document Retrieval (TSDR) to look at the entire trademark prosecution history. *See* tsdr.uspto.gov.
17. Thomas, Jeffrey. *The Changing Role of the Steel Band in Trinidad and Tobago: Panorama and the Carnival Tradition*, Studies in Popular Culture, vol. 9, no. 2, 1986, pp. 96-108. *JSTOR*, www.jstor.org/stable/23412941.
18. Alleyne-Dettmers, Patricia Tamara, *Political Dramas in the Jour Overt Parade in Trinidad Carnival*, Caribbean Studies, vol. 28, no. 2, 1995, pp. 326-338. *JSTOR*, www.jstor.org/stable/25613310. Accessed Sept. 5, 2021.
19. Williams, Keishel. *Michael B. Jordan is apologizing after fans, Nicki Minaj call out his new rum for Caribbean appropriation — here’s what the sacred ritual of ‘J’ouvert’ is all about*, [businessinsider.com/nicki-minaj-weighs-in-on-michael-b-jordan-appropriation-controversy-2021-6](https://www.businessinsider.com/nicki-minaj-weighs-in-on-michael-b-jordan-appropriation-controversy-2021-6).
20. “jour ouvert, j’ouvert.” In *Dictionary of the English/Creole of Trinidad & Tobago: On Historical Principles*, edited by Winer Lise, 1-990. McGill-Queen’s University Press, 2008, <http://www.jstor.org/stable/j.cttq491v.7>.
21. Williams, Keishel. *Michael B. Jordan is apologizing after fans, Nicki Minaj call out his new rum for Caribbean appropriation — here’s what the sacred ritual of ‘J’ouvert’ is all about*, [businessinsider.com/nicki-minaj-weighs-in-on-michael-b-jordan-appropriation-controversy-2021-6](https://www.businessinsider.com/nicki-minaj-weighs-in-on-michael-b-jordan-appropriation-controversy-2021-6).
22. There was no attorney of record on the J’OUVERT application.

Merlyne Jean-Louis is the founder of Jean-Louis Law (jllaw.net), a virtual business and entertainment law firm that helps creatives and entrepreneurs (including content creators, influencers, and podcasters) with their contract, trademark, copyright, and business structure issues. She is also a legal commentator who has spoken about copyright law as it relates to choreography and social media on CBS, Bloomberg, and The Verge. She is also the founder of the Gambit Academy for Lawyers (gambitlawyers.com), an educational platform that helps attorneys successfully and confidently build their own virtual law firms.

Let EASL Entertain You: Build Your Entertainment Law Knowledge While Catching Up On Your Watchlist

By Ethan Bordman



While the pandemic kept us locked in our homes, the one thing that helped many of us stay busy (and sane) was entertainment. We were still able to conduct business at home, thanks to virtual meetings, email, and cell phones—but many of us found that without the commute to work or in-person meetings, we had more time to get caught up on the movies and television shows on our watchlists.

During this time, I set out to build my entertainment law knowledge—while reducing my own vast watchlist—by focusing on films where the story highlighted legal issues in entertainment, arts, or sports, or addressed the business side of those areas. As attorneys, we are well aware that stories about the field of law are not always realistically told. However, many of the films or TV shows

listed here, especially documentaries, can still provide insightful and educational information, particularly for law students who have an interest in EASL content.

In case you are wondering whether I personally have watched everything on this list, the answer is yes; and on that note, I want to thank the EASL members who helped me build these recommendations by contributing their own film and TV picks.¹

I wish everyone good health and look forward to seeing EASL members in person at live events sometime soon. In the meantime, I hope this list keeps you well entertained!

Movies and TV Shows About Movies and TV Shows

Documentaries

- *Casting By* (2012)—Chronicles the history of casting directors. Focuses on casting director Marion Dougherty, who cast films such as *Midnight Cowboy*, *Escape from Alcatraz*, and *Lethal Weapon*. Discusses how she cast Jon Voight, Dustin Hoffman, Gene Hackman, Robert Duvall, and Jean Stapleton early in their careers. Addresses issues in film credits and contracts.
- *A Classy Broad: Marcia's Adventures in Hollywood* (2016)—Tells the story of Marcia Nasatir, who in 1974 became the first female vice-president at a major film studio. During her career she worked on films such as *One Flew Over the Cuckoo's Nest*, *Rocky*, and *Apocalypse Now*.
- *Cleanflix* (2009)—Describes the legal battle between companies that would buy DVDs of films and edit out adult scenes, profanity, and graphic violence, then resell the discs. The Directors Guild of America filed suit claiming violation of copyright.
- *His Way* (2011)—Biography of manager and producer Jerry Weintraub. During his career he managed Elvis Presley, John Denver, and Frank Sinatra. He also produced films such as *Nashville*, *The Karate Kid* series, and *Ocean's 11, 12, and 13*.
- *This Film Is Not Yet Rated* (2006)—A history of the Motion Picture Association of America, how films receive their designated rating and how the ratings appeals process works. The film addresses and contains scenes on how violence, profanity, and adult situations are rated.
- *The Kid Stays in the Picture* (1994)—Biography of producer Robert Evans, who worked on productions such as *Chinatown*, *Rosemary's Baby*, and *The Godfather*.
- *Other People's Footage: Copyright and Fair Use* (2016)—Interviews with attorneys exploring fair use in motion pictures. Includes illustrative examples that use film/news footage, art, and music from artists without permission or payment. Discusses a variety of legal situations that filmmakers encounter during production and how the *Documentary Filmmaker's Statement of Best Practices in Fair Use* changed filmmaking.
- *United We Fan* (2018)—Explores the campaigns of save-our-show television by fans from letter writing to social media. Discusses how TV shows have been "saved" from cancellation by fans and how many shows went on to broadcast for several seasons, winning numerous awards.

Features

- *Bowfinger* (1999)—Satirical comedy where Steve Martin plays a director making a movie with a movie star without the star knowing he is in the film. Addresses contract issues in entertainment, with humor.
- *Entourage* (2004-2011) TV series. Comedy-drama on the life of an actor navigating his career through Hollywood with the help of his best friends and agent. Addresses several legal issues in areas such as contracts and copyright.
- *Entourage* (2015)—Feature film presenting the conclusion to the TV series. Addresses contract and legal issues in production.
- *The Last Tycoon* (1976)—Based on F. Scott Fitzgerald's last book. Robert DeNiro plays a producer in the 1930s, during the golden age of Hollywood. Addresses contractual issues with screenwriters and how the industry began to change with the creation of the Writers Guild of America.
- *The Last Tycoon* (2016-17)—TV series based on the book and movie. Addresses contract issues in entertainment.
- *The Late Shift* (1996)—Based on the book, *The Late Shift: Letterman, Leno and the Network Battle of the Night*. The story chronicles the behind-the-scenes competition between Jay Leno and David Letterman as they vie to become the new host of *The Tonight Show* after Johnny Carson's retirement. Addresses contract issues in entertainment.
- *Life with Mikey* (1993)—Comedy featuring Michael J. Fox as a former child actor turned talent agent, who only represents children. Addresses legal issues with minors in entertainment.
- *The Player* (1992)—Robert Altman's satire of Hollywood. Tim Robbins plays an executive being stalked by a screenwriter whose script he declined. Robbins takes matters into his own hands. Explores the business production side of film making.



What's Copyright Got to Do With It? Movies About the Music Business

Documentaries

- *20 Feet From Stardom* (2013)—Follows the careers of professional backup singers, including some

who have gone on to have successful solo careers. Addresses issues in music law such as contracts, royalties, and artists receiving credit for their performances. Winner of the 2014 Academy Award for Best Documentary Film.

- *Atlantic Records: The House That Ahmet Built* (2007)—Chronicles the life of Ahmet Ertegun, the founder of Atlantic Records. The label worked with musicians such as Bobby Darin, Otis Redding, The Rolling Stones, Led Zeppelin, and Crosby, Stills & Nash.
- *Band vs. Brand* (2019)—Examines intellectual property rights in music such as logos, merchandising rights, publishing, and the ownership of a band's name. It also addresses tribute bands and whether a group can, or should, use a band's name if the musicians are not all the original members. Explores the notion of having "two versions of the same band."
- *The Boy Band Con: The Lou Pearlman Story* (2019)—Biography about music manager Lou Pearlman, who created groups such as the Backstreet Boys, NSYNC, and O-Town. Discusses the lawsuits filed by the bands regarding their contracts.
- *Clive Davis: The Soundtrack of Our Lives* (2017)—Explores the life of music attorney and executive Clive Davis, focusing on his beginnings as an attorney and contract issues in music. Davis worked at or co-founded record labels including Columbia, Arista, and J Records, which represented artists such as Janis Joplin, Bruce Springsteen, Whitney Houston, Alicia Keys, and The Grateful Dead.
- *Copyright Criminals* (2009)—Examines the debate of creative and commercial value of sampling music with artistic expression and copyright law.
- *Supermensch: The Legend of Shep Gordon* (2014)—Chronicles the career of music manager Shep Gordon, whose clients included Alice Cooper, Blondie, Teddy Pendergrass, and Pink Floyd.

Features

- *Bohemian Rhapsody* (2018)—Biographical drama about the band Queen. Addresses royalties and contract issues in music.
- *Beyond The Lights* (2014)—Follows the career of a modern pop singer. A scene in the film shows the importance of contract law in entertainment.
- *Straight Outta Compton* (2015)—History of rap group NWA. Addresses the group's contract disputes and free speech issues of their lyrics.
- *That Thing You Do!* (1996)—The story of the rise and breakup of a fictional one hit wonder 1960s pop band. Addresses the contract issues in music law.

- *Why Do Fools Fall in Love* (1998)—Feature film about the fight for the estate and music royalties of singer Frankie Lymon, who performed the popular 1956 song "Why Do Fools Fall In Love." After his death, each of his three former wives battled for his estate, claiming they were the rightful widow. Explores issues in contract law, royalties, and wills and estates.

Show Me the Movies: Examining the Business of Sports

Features

- *Any Given Sunday* (1999)—Oliver Stone's feature film about a fictional NFL team. Addresses contract issues involving players and teams.
- *Draft Day* (2014)—Features Kevin Costner as the manager of an NFL team. Examines the business as well as contract issues that arise on the day of the NFL draft.
- *Jerry Maguire* (1996)—The life of a sports agent, played by Tom Cruise, as he starts his own company after having an epiphany. Addresses contract issues in sports.

The Movie Must Go On: Movies About the Theater

Documentaries

- *Show Business: The Road To Broadway* (2007)—A behind-the-scenes look at the production of *Wicked*, *Taboo*, *Caroline or Change*, and *Avenue Q*. Follows the shows from pre-production through opening. Three of these four musicals were nominated for Best Musical at the Tony Awards—and one of them won.

Features

- *Birdman* (2014)—A former superhero actor, played by Michael Keaton, attempts to revive his career by writing, directing, and starring in a Broadway production. Addresses contract issues in theater. Winner of the 1995 Academy Award for Best Picture.
- *Cradle Will Rock* (1999)—Accounts the production of a musical drama at the height of the depression, funded by the Federal Theatre Project. Facing pressure from the federal government, during the investigation by the House Committee on Un-American Activities, funding is pulled from the Federal Theatre Project, ending the production. The cast, director Orson Wells, and producer John Houseman act to hold a performance in a shuttered theater. Addresses labor, union, and contract issues in theater.
- *The Producers* (1967, remade in 2005)—Mel Brooks's satire about producing a Broadway musical with the intention of making it a flop. Gives a humorous take on business issues in Broadway productions. Win-

ner of the 1969 Academy Award for Best Original Screenplay.

- *SMASH!* TV series (2012-2013)—Depicts the production of a musical. The series received the 2012 Emmy Award for Outstanding Choreography.

Ready to Watch: Movies About Fashion

Documentaries

- *The September Issue* (2009)—A behind the scenes look as Anna Wintour, *Vogue's* editor-in-chief, prepares for the magazine's September 2007 issue—the "bible" of fashion for the coming year.
- *Valentino: The Last Emperor* (2008)—Accounts the career of clothing designer Valentino Garavani. Explores areas including contracts and the business side of fashion.

Features

- *The Devil Wears Prada* (2006)—Comedy-drama about a recent college graduate who becomes the assistant to the editor-in-chief of a fictional fashion magazine.
- *Just Shoot Me* (1997—2003)—TV comedy about a fictional fashion magazine.

Featured Exhibition: Movies About the Arts

Documentaries

- *The \$50 Million Art Swindle* (2019)—Story of art dealer Michel Cohen, who was accused of fraudulent activity. His alleged crimes included selling the same paintings to several collectors, receiving the funds, and failing to deliver the painting; and receiving paintings on consignment from galleries, which he then sold without returning the proceeds to the art gallery.
- *Art & Craft* (2014)—Follows the life of Mark Landis, one of the most successful art forgers. Landis donated forged paintings, often the same print, to more than 40 museums. As he donated all his paintings, he never faced legal action. Discusses the registry process of paintings at galleries.
- *Art of the Heist: The Lady in Gold* (2006)—Chronicles the organized looting of art by the Nazis during World War II. Discusses Maria Altmann's legal attempt to recover a painting by artist Gustav Klimt of her aunt, known as the *Lady in Gold*, which was held by the Austrian government. The film includes interviews with Altmann's attorney examining the legal process of this case, leading to the U.S. Supreme Court decision,² followed by arbitration court in Austria. Addresses issues in art restitution law, international law, and wills and estates. The feature

film *The Woman in Gold*, discussed below, is based on Altmann's story.

- *The Art of the Steal* (2009)—Chronicles the dispute between the will of Dr. Albert Barnes, who left an art collection valued at more than \$25 billion, and the State of Pennsylvania and City of Philadelphia. Barnes's will strictly stated that his collection was to be used primarily for the teaching of art; it could not be moved from his home gallery and was not intended for public viewing. The State of Pennsylvania and City of Philadelphia took legal action to seize the collection to capitalize on its value as a major tourist attraction. The documentary touches on contract law, property law, and wills and estates.
- *Driven to Abstraction* (2019)—The story of the Knoedler Gallery, one of the oldest galleries in the world, which sold over 40 fraudulent paintings. Addresses contract and criminal law issues in art. Features interviews with EASL member Irina Tarsis.
- *A Genuine Forger* (2016)—Follows the life of Guy Ribes, who for more than 30 years passed off forged paintings as originals created by artists, including Picasso and Matisse.
- *Made You Look: A True Story About Fake Art* (2020)—Chronicles the largest art fraud in American history that caused the closing of the Knoedler Gallery, which was in business for 165 years. The gallery sold \$80 million in forged paintings to its clients. Explores contract and criminal law issues in art.
- *Who the #&% Is Jackson Pollack?* (2006)—The story of Teri Horton, who bought a painting at a thrift shop for \$5. She later learned it may have been painted by Jackson Pollack and valued at more than \$50 million. The film details her attempt to have the painting authenticated. Discusses issues in art law.

Features

- *Woman in Gold* (2015)—Chronicles the life of Maria Altmann, whose family's art collection was stolen by the Nazis in the 1940's. The film details her attempts to recover a portrait of her aunt, *The Lady in Gold*, known as the Mona Lisa of Austria, which was housed in an Austrian government museum. The case was brought before the U.S. Supreme Court in *Republic of Austria v. Altmann*³ and then went to arbitration in Austria. Explores issues in art restitution law, international law, and wills and estates. The story is featured in the documentary *Art of the Heist*, discussed above.
- *The Monuments Men* (2014)—As World War II comes to an end, an art conservationist convinces President Roosevelt of the importance of preserving artistic treasures. The army creates a unit nicknamed the "Monuments Men," consisting of art historians,



curators, and museum directors to work with Allied troops to return art to its rightful owners. Based on the life of George Stout, who led the Monuments, Fine Arts, and Archives section of the U.S. military to reclaim art taken by the Nazis. Examines issues in art restitution and international law.

Express Yourself: Movies About Free Speech in Entertainment

Documentaries

- *Can We Take A Joke?* (2015)—Examines First Amendment issues in stand-up comedy. Discusses Lenny Bruce's comedy, his several arrests, and trials for obscenity charges based on his humor.
- *Sellebrity* (2012)—Documentary on the celebrity photography industry. Explores free speech issues in journalism and entertainment.

Features

- *Deliberate Intent* (2000)—Based on the book *Deliberate Intent: A Lawyer Tells the True Story of Murder by the Book*. Television film about the case of *Rice v. Paladin Enterprises, Inc.*,⁴ in which an individual followed the steps of the book *Hit Man: A Technical Manual for Independent Contractors*, which tells how to commit a professional assassination. After a family was murdered by someone who followed the steps in the book, the victim's family filed suit against the publisher.⁵ The publisher responded that the book was for fantasy and entertainment purposes.⁶ The plaintiff argued that the book was not protected by the First Amendment, as the publisher conceded that the book was written to assist contract murderers.⁷ Attorneys for the case stated this was "the first time in American history that a book publisher had been held financially liable for a crime committed by a reader."⁸

- *The People v. Larry Flynt* (1996)—Chronicles the life of Larry Flynt and examines the U.S. Supreme Court case of *Hustler Magazine v. Falwell*,⁹ which addressed the right of public figures to be the subject of caricature, parody, or satire without legal redress.
- *The Post* (2017)—Recounts the story of the attempt by *The Washington Post* and *The New York Times* to publish The Pentagon Papers, a set of classified documents regarding the United States' involvement in Vietnam. Details the U.S. Supreme Court's decision in *New York Times Company v. United States*,¹⁰ which allowed the newspapers the right to publish the information.

Endnotes

1. Please feel free to contact me at ethan@ethanbordman.com with any additional suggestions, which I will add to a future list.
2. *Republic of Austria v. Altmann*, 541 U.S. 677 (2004).
3. *Id.*
4. 940 F. Supp. 836 (D. Md. 1996).
5. Savage, David G., *Publisher of 'Hit Man' Manual Agrees to Settle Suit Over Triple Slaying*, Los Angeles Times, May 22, 1999, <https://www.latimes.com/archives/la-xpm-1999-may-22-mn-39761-story.html>.
6. *Id.*
7. *Id.*
8. *Id.*
9. 485 U.S. 46 (1988).
10. 403 U.S. 713 (1971).

Ethan Bordman is an entertainment attorney and film finance consultant (www.ethanbordman.com) who represents directors, producers, screenwriters, and actors. In addition to his law degree and M.B.A., he holds an LL.M. in Entertainment Law from the University of Westminster in London, England and an LL.M. in International Sports Law from Anglia University in Cambridge, England. He serves as co-chair of the Motion Pictures Committee and Vice-Chair for the EASL Section.

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Paparazzi Photos and Celebrity Uses Within the Bounds of Intellectual Property

By Michael P. Goodyear



Normally, paparazzi are the ones taking photos of celebrities; but, in a recent case in the U.S. District Court for the Southern District of New York, *O'Neil v. Ratajkowski*, celebrity model and actress Emily Ratajkowski flips the narrative, taking a paparazzo's photo of her, slightly modifying it, and posting it to her Instagram account as an Instagram Story.¹ These facts highlight the often-

counterintuitive interaction between the right of publicity and copyright in photos. While the right of publicity typically does not give celebrities rights to photos of them

taken by paparazzi and copyright law frequently prohibits it, *O'Neil* provides important insights into when celebrities may be able to use paparazzi photos of themselves.

A Limited Right of Publicity

The right of publicity is a legal doctrine that gives individuals control over the commercial exploitation of their identity.² This right has been used to prevent companies from using individuals' names, images, or likenesses without their permission. In New York, the right of publicity was written into law following the 1902 case of *Roberson v. Rochester Folding Box Co.*, in which plaintiff Abigail Roberson sued the defendant for knowingly using her image on thousands of advertisements for flour without her permission, but had no right to recover under the law at the time.³ In a more recent example, Katherine Heigl sued drug store

chain Duane Reade—under the same New York right of publicity statute that emerged after *Roberson*—for using a paparazzi photo of her leaving one of their stores in an advertisement.⁴ Unlike copyright law, the right of publicity is based on state law, and therefore the right varies on a state-by-state basis and is not even recognized in several.⁵

Despite the seemingly broad nature of this right to control the use of one's image or likeness, it is unanimously limited to commercial uses. For example, the New York right of publicity statute says that "[a]ny person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained . . . may maintain an equitable action . . . against the person."⁶ This gave Heigl a valid claim against Duane Reade for including her image in advertising, and would have allowed *Roberson* to recover against the Rochester Folding Box Co. for using her image in advertising materials, had the law been recognized in New York at the time. However, while the right of publicity controls the use of one's image in advertising and the like, it does not affect other uses. Generally, right of publicity claims have been directed toward advertising or endorsements, either in the form of traditional advertising, like in *Heigl* and *Roberson*, or against online media, such as the inclusion of images of and references to Kim Kardashian on a fashion company's websites and social media pages.⁷ Although paparazzi photos are not advertising, paparazzi profit off of their images of celebrities, and therefore these photos would appear to potentially fall within the confines of the right.

Yet even so, there is a significant carve-out to the right of publicity, which is the newsworthiness exception. This is generally recognized in either a state's statute or case law and allows the use of an individual's image or likeness, even in a seemingly commercial manner, for a matter of public interest, including those "concerning political happenings, social trends or any [other] subject of public interest"⁸ because "such dissemination or publication is not deemed strictly for the purpose of advertising or trade within the meaning of the . . . statute."⁹ Works of arts, such as paparazzi photos, "fall outside the prohibitions of the privacy statute under the newsworthy and public concerns exceptions."¹⁰ Derivative profits from the sale of artwork does not diminish the protection afforded by the newsworthy exception.¹¹ This broad exception leaves celebrities, perhaps unexpectedly, with little control over the use of paparazzi photos of them.

No Right to Use a Photo of Oneself

Even more shocking for celebrities may be the fact that they generally do not even have the right to use paparazzi's photo of them. Copyright law, which protects creative works, grants a broader set of rights than the right of publicity, but only to the creator of a work and not the subject. Copyright law protects creative works that are sufficiently original.¹² The standard for being copyright-

able is fairly low, but a copyright cannot exist where "the creative spark is utterly lacking or so trivial as to be virtually nonexistent."¹³ Almost any photograph is sufficiently original, provided that there is some originality in "rendition . . . timing . . . [or] creation of the subject."¹⁴ Courts have generally found paparazzi photographs original based on their "myriad creative choices, including, for example, their lighting, angle, and focus."¹⁵

Under the Copyright Act, an author of a copyrighted work is granted a set of exclusive rights, including the right to copy a work, create derivative works from it, and display the work.¹⁶ These rights are exclusive to the copyright owner alone, even if someone else is the subject of the work. Counterintuitively, the subject of a copyrighted photo may be found liable for copying or displaying a photo of themselves. Therefore, even if a celebrity, such as Kim Kardashian, has her photo taken, she cannot repost that photo without the copyright owner's permission.¹⁷

Despite this clear rule under copyright law, celebrities have frequently posted paparazzi photos on their social media accounts without permission. Such social media posts have led to numerous lawsuits by copyright owners against celebrities, such as Gigi Hadid, Kim Kardashian, Justin Bieber, and Katy Perry.¹⁸

When Is a Use Fair?

Not all uses of a copyrighted work are *per se* infringement. The Copyright Act has several exceptions to the exclusive rights of copyright owners, the most significant of which is fair use.¹⁹ Under the fair use doctrine, an individual can safely use a copyrighted work for purposes "such as criticism, comments, news reporting, teaching (including multiple copies for classroom use), scholarship, or research."²⁰ Fair use is determined by holistically evaluating four factors stipulated in the Copyright Act: (1) the purpose and character of the use; (2) the nature of the work; (3) the amount and substantiality of the portion used; and (4) market harm.²¹ While Hadid, Kardashian, and other celebrities just reposted the paparazzi photos of themselves with no additions or modifications, fair use may have allowed certain types of posts if they had provided "new expression, meaning, or message" to the original copyrighted work.²²

This question was at the heart of the dispute in *O'Neil v. Ratajkowski*. Robert O'Neil is a paparazzi photographer who takes "candid" shots of celebrities, who are unaware of him taking the photo.²³ O'Neil took nine photos of Emily Ratajkowski, a professional model and actress, outside of a flower shop in Manhattan.²⁴ The photos depict Ratajkowski with the bouquet of flowers she had purchased covering her face, supposedly to hide from the paparazzi.²⁵ After O'Neil uploaded one of the photos to his online agency, Ratajkowski posted the photo as an Instagram Story on her Instagram account.²⁶ In this story, the only modification Ratajkowski made was adding the words "mood



forever” at the bottom of the photo.²⁷ In response to the release of the story, O’Neil sued Ratajkowski for copyright infringement.²⁸

After determining that O’Neil had a valid copyright, the court then addressed the question of whether Ratajkowski’s post qualified as a fair use of O’Neil’s copyrighted photo.²⁹ The court addressed all four factors under the fair use test in turn. First, the court considered three subfactors under purpose and character of the work: transformative use, commerciality, and bad faith. Courts have often held that the use of a copyrighted photograph to comment on the image, rather than merely use it to illustrate an article or post, is transformative.³⁰ The question, then, was whether inserting “mood forever” at the bottom of the photo was enough to comment on it and make the use transformative. Ratajkowski contended that the words “ma[de] commentary and criticism of [Ratajkowski’s] perspective of abusive, aggressive, and harassing practice of paparazzi constantly following her, even when buying flowers for a friend.”³¹ However, there was a genuine issue of material fact as to whether the Instagram story merely showed Ratajkowski, or whether it commented on her “attempt to hide from the encroaching eyes of the paparazzi,” so the question was deferred to trial.³²

The other two subfactors under the first factor were of minimal consequence. While there was a link to Ratajkowski’s commercial store and she had generated income from her Instagram stories, she posted the copyrighted photo in a non-sponsored story that would have only had a minimal impact on the value of her Instagram account.³³ Therefore, the court gave it little weight, and if the use was found to be transformative, the weight given to commerciality would have been even less.³⁴ Similarly, while there was no evidence of bad faith on the part of Ratajkowski, if the use was otherwise fair, “lack of permission is beside the point.”³⁵

The court also found the second and third factors to be of minimal importance, even though both weighed in favor of O’Neil. While the photograph was techni-

cally creative, it was “essentially factual in nature” and was published, so the second factor only leaned slightly against a finding of fair use.³⁶ The third factor also leaned slightly against a finding of fair use, as Ratajkowski used the vast majority, if not the entire photo, but she posted it as an Instagram story, so it was only available for 24 hours rather than in perpetuity.³⁷

Finally, the court considered whether Ratajkowski’s use would harm or usurp the market for the copyrighted photo. The court noted that there is a “close linkage” between transformative use and the fourth factor, because “the more the copying is done to achieve a purpose that differs from the purpose of the original, the less likely it is that the copy will serve as a satisfactory substitute for the original.”³⁸ The relevant market in this case was licensing photographs from paparazzi to individuals.³⁹ Ratajkowski contended that no such market existed for this photo, as her face was covered and O’Neil had not made any income from licensing it.⁴⁰ However, as Ratajkowski failed to demonstrate this, material issues of fact remained to decide on the outcome of the fourth factor, which would need to be taken up at trial.⁴¹ As both the transformative use and market harm factors had been pushed to trial, the court was not able to make a final determination on fair use at the summary judgment stage.⁴²

Lessons from O’Neil

While the final outcome of *O’Neil* remains to be seen at trial, the decision on the motions for summary judgment provides important takeaways for how not just celebrities, but all individuals, can use someone else’s copyrighted photo of them. As a baseline point, it is critical to remember that photos are almost always copyrightable, as they meet the low threshold of required originality.⁴³ While photographed individuals do not generally have a right to use the photos of them without a separate agreement or license, fair use provides the main route for how they may be able to use them.

O'Neil sets forth several significant fair use considerations for prospective users and attorneys to remember in similar contexts:

- A use of a copyrighted photo must involve a different purpose than the original rather than merely depict the subject.⁴⁴
- Transformative use is often driven by commenting on or criticizing a work.⁴⁵
- Short, arbitrary or unclear phrases added to a copyrighted work, even if intended as commentary, may not be transformative enough to qualify as a fair use.
- A reuse of a photo along with commentary about how that paparazzi photo makes the subject feel can qualify as a transformative use.
- Although the factors are weighed holistically, transformative use and market harm are generally the most important factors in the fair use determination.⁴⁶
- Whether the copyrighted photo is posted to a profit-generating account is inconsequential.⁴⁷

While the right of publicity and copyright law have generally given paparazzi control of celebrities' photos instead of celebrities themselves, O'Neil reminds us that the fair use doctrine allows a range of potential uses that give celebrities at least some say in the narratives surrounding their photos.

Endnotes

1. No. 19 Civ. 9769, at 2-3 (S.D.N.Y. Sept. 28, 2021).
2. J. Thomas McCarthy & Roger E. Schechter, 1 Rights of Publicity and Privacy § 1:3 (2d ed. 2021).
3. 171 N.Y. 538, 542-43 (1902); see also Lawrence Edward Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait, or Picture for Advertising or Trade Purposes Without Prior Written Consent: History and Scope in New York*, 48 Alb. L. Rev. 1, 11-14 (1983) (explaining the origins of New York's right of publicity law).
4. Complaint, *Heigl v. Duane Reade, Inc.*, No. 14-cv-02502 (S.D.N.Y. Apr. 9, 2014).
5. See *Statutes & Interactive Map*, Right of Publicity, <https://rightofpublicity.com/statutes> (last visited Sept. 29, 2021).
6. N.Y. Civ. Rights Law § 51 (emphasis added).
7. Complaint, *Kimsaprincess, Inc. v. Misguided USA Finance Inc.*, No. 19-cv-01258, ¶¶ 24-39 (C.D. Cal. Feb. 20, 2019).
8. *Messenger ex rel. Messenger v. Gruner + Jahr Printing & Pub.*, 727 N.E.2d 549, 552 (N.Y. 2000).
9. *Foster v. Svenson*, 128 A.D.3d 150, 156 (N.Y. App. Div. 2015).
10. *Id.* at 158.
11. *Id.* at 160.
12. 17 U.S.C. § 102.
13. *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345, 359 (1991).
14. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 450, 452-55 (S.D.N.Y. 2005).
15. See, e.g., *Sands v. CBS Interactive Inc.*, No. 18 Civ. 7345, 2019 WL 1447014, at *4 (S.D.N.Y. Mar. 13, 2019).
16. 17 U.S.C. § 106.
17. However, Kardashian would not necessarily be liable for copyright infringement if she shared the photo, as that would involve linking or embedding that courts have generally held, under the server test, to not be an infringing display. See *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146, 1159-63 (9th Cir. 2007) (affirming the server test). But see *Goldman v. Breitbart News Network, LLC*, 302 F. Supp. 3d 585, 595 (S.D.N.Y. 2018) (rejecting the server test).
18. See, e.g., *Xclusive-Lee, Inc. v. Hadid*, No. 19-CV-520, 2019 WL 3281013 (E.D.N.Y. July 18, 2019); Complaint, *Xposure Photos (UK) Ltd. v. Kardashian*, No. 17-cv-3088 (C.D. Cal. Apr. 25, 2017); Complaint, *Barbera v. Justin Bieber Brands, LLC*, No. 19-cv-09532 (S.D.N.Y. Oct. 16, 2019). Complaint, *BackGrid USA, Inc. v. Hudson*, No. 19-cv-0939 (C.D. Cal. Oct. 29, 2019).
19. 17 U.S.C. § 107.
20. *Id.*
21. *Id.*
22. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994).
23. *O'Neil v. Ratajkowski*, No. 19 Civ. 9769, at 2 (S.D.N.Y. Sept. 28, 2021).
24. *Id.* at 1-2.
25. *Id.* at 2.
26. *Id.* at 2-3.
27. *Id.* at 3.
28. *Id.*
29. *Id.* at 4-8.
30. *Id.* at 14; see also *Ferdman v. CBS Interactive, Inc.*, 342 F. Supp. 3d 515, 534-35 (S.D.N.Y. 2018); *Barcroft Media, Ltd. v. Coed Media Grp., LLC*, 297 F. Supp. 3d 339, 352 (S.D.N.Y. 2017); *Monge v. Maya Mags., Inc.*, 688 F.3d 1164, 1174-76 (9th Cir. 2012).
31. *O'Neil*, No. 19 Civ. 9769, at 14.
32. *Id.*
33. *Id.* at 16.
34. *Id.*
35. *Id.* at 17 (quoting *Wright v. Warner Books, Inc.*, 953 F.2d 731, 737 (2d Cir. 1991)).
36. *Id.* at 18.
37. *Id.* at 19-20.
38. *Id.* at 21 (quoting Authors Guild, 804 F.3d at 223).
39. *Id.*
40. *Id.* at 22.
41. *Id.*
42. *Id.*
43. *Mannion*, 377 F. Supp. 2d at 452-55.
44. *O'Neil*, No. 19 Civ. 9769, at 14; see also *Barcroft*, 297 F. Supp. 3d at 352 ("Display of a copyrighted image or video may be transformative where the use serves to illustrate criticism, commentary, or a news story about that work." (emphasis in original)).
45. *Id.* at 14; see also *Swatch Grp. Mgmt. Servs. Ltd. v. Bloomberg L.P.*, 756 F.3d 73, 84 (2d Cir. 2014) ("Courts often find . . . [the reproduction of unaltered copyrighted works] transformative by emphasizing the altered purpose or context of the work, as evidenced by the surrounding commentary or criticism.").
46. See Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978-2019*, 10 N.Y.U. J. Intell. Prop. & Ent. L. 1, 33 (2020) (explaining the academic and judicial debate about whether transformative use or the fourth factor is the most important in the fair use analysis).
47. *O'Neil*, No. 19 Civ. 9769, at 16.

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A Charlie Brown Christmas, the Vince Guaraldi Trio, and the National Recording Registry

By David Krell



CBS premiered *A Charlie Brown Christmas* on Dec. 9, 1965 with a story emphasizing humanity over superficiality during the holiday season. It revolved around Charlie Brown trying to find the holiday's meaning amongst fancy decorations, shiny ornaments, and Christmas glitter.

Our hero thrusts himself into the thankless position of directing a Christmas play. Attempts to inspire the cast and invoke the holiday's spirit are met with disapproval and disrespect. Lucy's cynicism is particularly striking: "Look, Charlie. Let's face it. We all know that Christmas is a big commercial racket. It's run by a big Eastern syndicate, you know."

Charlie Brown and Linus buy a Christmas tree to set the tone and mood for the play. Amidst the aluminum trees, there is a small, sickly one. "This little green one here seems to need a home," observes Charlie Brown.

Although the tree is weak and the needles are sparse, he buys it. Of course, the kids see the tree as a symbol of Charlie Brown's shortcomings, put him down, and laugh at him. "I guess I really don't know what Christmas is all about," he says. "Isn't there anyone who knows what Christmas is all about?"

Linus explains the story of Christmas quite profoundly by quoting the New Testament; hope and good will are emphasized. "That's what Christmas is all about, Charlie Brown," concludes the thumb-sucking, blanket-clutching boy. With newfound inspiration, Charlie Brown takes the tree home, smiling all the way to the music of "O Christmas Tree." He remembers the speech while looking at the brightest star and vows not to let commercialism ruin his Christmas.

When Charlie takes an ornament from Snoopy's abundantly decorated doghouse—which won first prize in a lights and display contest—and places it on the tree, despair returns. The ornament is too heavy for the tree and he fears that he killed it.

Unbeknownst to the well-intentioned lad, the kids follow him home. Linus uses his blanket as support for the tree's base. "Maybe it just needs a little love," he suggests.

The gang uses Snoopy's ornaments and decorations to enhance the tree. Needless to say, Charlie Brown is more than pleasantly surprised at his friends' efforts as they shout, "Merry Christmas, Charlie Brown!" Appropriately, "Hark! The Herald Angels Sing!" is sung as the credits roll.

Jazz music performed by the Vince Guaraldi Trio complements the story's significance. It is instantly identifiable to Christmas popular culture aficionados and *A Charlie Brown Christmas* won both an Emmy and a Peabody. The soundtrack album for *A Charlie Brown Christmas* also earned a permanent place in America's cultural legacy in 2012, when it was added to the National Recording Registry.

The National Recording Registry

Preserving the country's audio heritage is imperative for future generations to study the evolution of music and other sound recordings. The National Recording Preservation Act of 2000 created the National Recording Registry and the National Recording Preservation Board. It is the responsibility of the Librarian of Congress to:

- (1) establish the National Recording Registry for the purpose of maintaining and preserving sound recordings that are culturally, historically, or aesthetically significant;
- (2) establish criteria and procedures under which sound recordings may be included in the Registry, except that no sound recording shall be eligible for such inclusion until ten years after its creation;
- (3) establish procedures for general public recommendations to the National Recording Preservation Board (established under this Act) regarding the inclusion of sound recordings in the Registry; and
- (4) determine which sound recordings meet the established criteria and select them for inclusion, up to a maximum of 25 sound recordings or groups of sound recordings each year.

Conclusion

Jazz certainly has a place in the heart of its patrons, and anyone who ever listened to John Coltrane, visited the Village Vanguard, or watched the documentary *Jazz on a Summer's Day* can understand the specificity and passion about the genre. In 1965, Vince Guaraldi's group and *A Charlie Brown Christmas* introduced jazz to millions of children. What has become a holiday standard on television has an invaluable cultural heritage beyond an uplifting story about kindness. With the soundtrack's addition to the National Recording Registry, we acknowledge the unique contribution that *A Charlie Brown Christmas* has made to the country's roster of popular culture.

David Krell is the chair of the Elysian Fields Chapter in Northern New Jersey and Spring Training Research Committee for the Society for American Baseball Research. He wrote *1962: Baseball and America in the Time of JFK* and *Our Bums: The Brooklyn Dodgers in History, Memory and Popular Culture*. SABR twice granted him Honorable Mention for the Ron Gabriel Award. Additionally, Krell edited the anthologies *The New York Mets in Popular Culture* and *The New York Yankees in Popular Culture*. He often contributes to SABR's Games Project, Biography Project, and Ballparks Project in addition to speaking at SABR conferences and the Cooperstown Symposium on Baseball and American Culture. Krell is a member of the New York bar.



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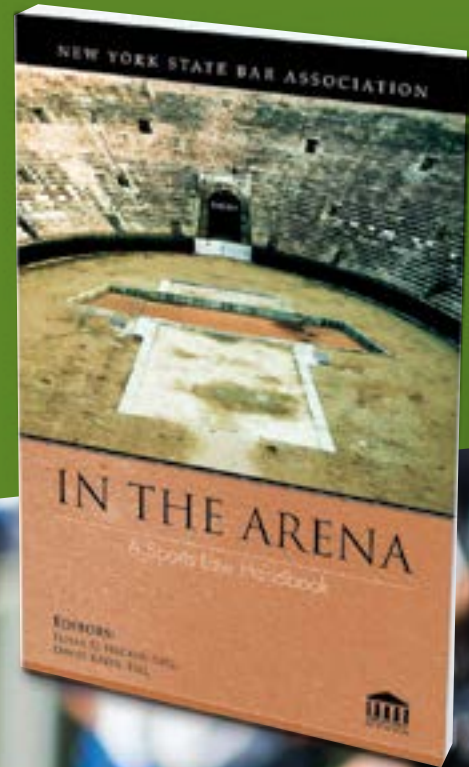


In The Arena: A Sports Law Handbook

Editors

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As the world of professional athletics has become more competitive and the issues more complex, so has the need for more reliable representation in the field of sports law. Written by dozens of sports law attorneys and medical professionals, *In the Arena: A Sports Law Handbook* is a reflection of the multiple issues that face athletes and the attorneys who represent them. Included in this book are chapters on representing professional athletes, NCAA enforcement, advertising, sponsorship, intellectual property rights, doping, concussion-related issues, Title IX and dozens of useful appendices.

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