

ENTERTAINMENT AND SPORTS LAWYER

A PUBLICATION OF THE AMERICAN BAR ASSOCIATION FORUM ON THE ENTERTAINMENT & SPORTS INDUSTRIES

Chair's Column

Dear Forum Members,

Greetings from the Chair. I hope you all are safe and healthy and managing this new reality. In these challenging times where distance and disconnection are the solution, we search for ways to engage with each other and join together. The mission of the Forum is to provide educational programming and, more importantly, opportunities to network in person.



Peter J. Strand

While we cannot host in person gatherings for now, we remain committed to our mission to provide timely, engaging, and compelling continuing legal education programming and to bridge the gaps imposed by the edicts of social distancing.

To that end, we are retooling what was going to be a half-day CLE program at Marquette University Law School as a series of webinars which will address ethical issues in representing entertainment and sports clients; legal issues in the new music economy; and the legal and business aspects of producing a sports documentary.

We are also preparing a series of webinars that address legal issues triggered by the pandemic and the precautions we are taking to flatten the contagion curve.

Finally, we remain optimistic that we will be able to once again gather and interact in person. Our 42nd Annual CLE Conference will again be in Las Vegas at the Four Season Hotel. The conference dates are October 1–3, 2020. Registration will be available in April.

We are considering panels on social justice, discrimination, bias, and prejudice in entertainment and sports; brand licensing and product integration in films; data, technology, consumer and fan issues for sporting and entertainment events; monetizing music content for new technologies;

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Letter From the Editor

“*The Future is unwritten.*”

—Joe Strummer

Dear Forum Members,

Welcome to Issue 36:1 of the *Entertainment and Sports Lawyer*! This is the first publication of the New Year!

These are interesting times. The world is panic stricken over both the *corona-virus* and the US Presidential Elections. SXSW, Coachella and other festivals have either been cancelled or indefinitely postponed. Cities are restricting the number of individuals who may attend public gatherings such as concerts and sporting events. Pearl Jam postponed its tour plans. Even the next James Bond film, *No Time To Die*, moved its release date.

With this in mind, however, our Forum Members know that we are privileged to work in an industry that creates the infrastructure for people to be entertained and to escape the realities of their everyday lives. It is our responsibility to continue to maintain a sense of normalcy in the Entertainment and Sports Industries.

IN THIS ISSUE:

On March 9, 2020, 27 people, including the trainer of champion Maximum Security, were charged in what authorities described as a widespread international scheme to drug horses to make them race faster. This Issue opens with long time contributor, Professor John Wendt’s article “Third Time’s The Charm? The Horseracing Integrity Act of 2019”.

Two of our former Governing Committee Members, Jeff and Todd Brabec, provide a detailed update on the mechanics and issues of “Buying and Selling Music Catalogues”.

A new contributor, Richard Giller, shares his perspective on how “The Seemingly Never-Ending Case of *Todd McNair v. The NCAA* Provides a Rare Glimpse Into the Association’s Secretive Infractions Process.”

Returning author and current Governing Committee Member, Peter Dekom, shares an opus on his perspective of the “Ch Ch Ch Changes” and challenges of practicing entertainment law, focusing primarily on audio-visual content, in today’s society.

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name, image, and likeness rights for student athletes; fashion law issues; stalking and crises management; ethics, sports and entertainment general counsels, the annual entertainment and sports litigation update; and more.

In addition there will be great networking opportunities including a nightcap reception on Thursday night, a conference wide luncheon on Friday, the annual Ted Reid reception on Friday night, and, several offsite behind the scenes activities.

Michelle Wahl once again graces us with a much needed Litigation Update covering many recent cases.

Rounding out this issue are 9 articles written by law students who attended the Forum’s Annual Meeting, October 11-13, 2019 in Las Vegas. These articles summarize many of the panels, speakers, presenters and lessons covered. If you have any question as to whether you should attend the Forum’s Annual Meeting, a quick read of these articles will convince that this is an event you cannot afford to miss!

If you have any interest in writing for the Journal, or working with us as an editor, please let me know! We are actively seeking articles from authors for the Journal. I encourage anyone interested to reach out to me and submit articles. We welcome submissions from any and all authors, and are always seeking amazing articles. The Author Guidelines can be found at: http://www.americanbar.org/content/dam/aba/publications/entertainment_sports_lawyer/esl16authorguidelines.authcheckdam.pdf. The pending deadlines for article submissions are:

- Spring 2020 (anticipated May Publishing)
April 15, 2020
- Summer 2020 (anticipated July Publishing)
May 15, 2020
- Fall 2020 (Anticipated October Publishing)
August 15, 2020
- Winter 2020/21 (anticipated January Publishing)
November 15, 2020
- Spring 2021 (anticipated April Publishing)
February 15, 2021

Please, share with me your ideas for the Journal. ■

Best,

Brian A. Rosenblatt
Bryce Downey & Lenkov LLC
Editor-in-Chief, *Entertainment and Sports Lawyer*

This year we are adding a Midnight Madness CLE panel following the Thursday night. Earn the latest or earliest CLE credits ever.

I look forward to a swift return to normal and seeing you all in Vegas. ■

Peter J. Strand
Chair, ABA Forum on the Entertainment and Sports Industries

Third Time's The Charm?

The Horseracing Integrity Act of 2019

John T. Wendt

Horseracing in the United States may be in serious trouble. Thirty-four horses have died at the Santa Anita Racetrack. There have been calls to suspend racing or to ban horseracing all together.¹ The Los Angeles District Attorney has announced an investigation into the tragedies at Santa Anita² and there have already been petitions to ban racing from Santa Anita and throughout California.³ There have also been numerous cases where horses have been disqualified for doping violations. On top of it all, on September 13, 2019, the New York Times alleged that Justify, who won the Triple Crown in 2018, failed a drug test after the Santa Anita Derby, which would mean that the horse should have been banned from the Kentucky Derby and hence ineligible for the Triple Crown.⁴ Pat Forde, the sports columnist stated,

Go ahead and mark down 2019 as the beginning of the end for horse racing... North American horse racing has been a floating pharmacy of medication for decades, the vast majority of it tolerated at a much higher level than in Europe and other locales. Much of it (too much) has been legal to administer. Plenty of other drugs are covertly injected, ingested and topically applied. From cobra venom to cocaine, the sport has found a dizzying array of methods to try to make slow horses faster or injured horses able to run. Efforts have been made to change that, but a public suspicion that everything on four legs at a track has been doped is hard to shake. This is why the Justify news is such a big blow—not just the positive test to one of only two horses to win the Triple Crown in the last 40 years, but perhaps more so the way it was handled by the CHR [California Horse Racing Board].⁵

Reforms are needed for harmonization, safety, and integrity for the sport to survive. In the midst of this chaos comes the Horseracing Integrity Act (HIA), a rare, bipartisan bill in Congress sponsored by Representatives Andy Barr (R-KY) and Paul Tonko (D-NY), who are Co-chairs of the Congressional Horse Caucus. This is the third iteration of legislation that Barr and Tonko have proposed. Will the third time be the charm for passage?

Barr and Tonko originally introduced similar legislation in 2015 and 2017. While the 2015 HIA never made it to the Congressional subcommittee level, the 2017 HIA garnered 131 co-sponsors (81 Democrats and 50 Republicans) and did at least have hearings. Perhaps this bodes well for the future. Barr and Tonko learned from the previous two iterations and reintroduced a revised Horseracing Integrity Act of 2019 as HR1754 with a companion bill companion in the Senate (SB 1820) co-sponsored by Senator Kirsten

Gillibrand (D-N.Y.) and Martha McSally (R-Ariz.). At the time this article was being written, there was already 179 co-sponsors of the bill in the House.

WHAT'S IN THE HORSERACING INTEGRITY ACT OF 2019

The HIA would create the Horseracing Anti-Doping and Medication Control Authority (the Authority) as an “independent, private non-profit corporation with responsibility for developing and administering an anti-doping and medication control program.”⁶ Among other duties, the Authority would create a uniform set of anti-doping and medication control rules, and develop a list of permitted and prohibited substances.⁷ In effect, horse racing would then have one set of anti-doping and medication rules across all U.S. racing jurisdictions for the first time.

This is similar to the work done by the World Anti-Doping Agency (WADA) and U.S. Anti-Doping Agency (USADA). WADA was established in 1999 under an initiative of the International Olympic Committee to promote and coordinate the fight against doping in sports internationally. To harmonize anti-doping policies in all sports and all countries in the Olympic Movement, WADA developed the World Anti-Doping Code (the Code).⁸ The Code is the document that harmonizes anti-doping policies, rules, and regulations within sport organizations and public authorities around the world.⁹ On the national level, USADA is recognized as the official anti-doping organization for all US Olympic, Paralympic, Pan American and Parapan sports in the United States. USADA is a signatory to the Code.¹⁰

In fact, USADA has a major role in the make-up of the proposed Authority Board under the HIA. The bill proposes that USADA appoint a thirteen-member board composed of six individuals from USADA, the chief executive officer of USADA as chairman of the board, and six individuals who have demonstrated expertise in a variety of horse-racing areas including equine anti-doping, medication control regulation, and breeding of racehorses. There would also be at least one member with a degree in veterinary medicine, with either an expertise in equine veterinary practice with regard to race horses or in veterinary research in matters affecting race horses, and at least one member is to have expertise in riding covered horses as a jockey.¹¹ Finally, to avoid conflicts of interest, no members of the Authority Board will be allowed to have financial interests, industry governance, policymaking, consulting, vendor, or employment relationships within the pari-mutuel horse racing industry.¹²

OPPOSITION TO THE HIA OF 2019

Opponents to the HIA have two basic arguments. The first argument is that this bill would create a federal bureau

with no representatives from the industry and that regulation would be better left to the states. The second argument revolves around the administration of same day medication, notably Lasix. As Chris Wittstruck, a columnist for the United States Trotting Association put it, “Read the bill and it is clear that the true intent is to create a federal bureaucracy these same interests can influence and ban currently legal and beneficial medication.”¹³

The United States Trotting Association (USTA) opposes the HIA legislation arguing that “the proposed legislation would federalize horse racing and place it under the control of the Federal Trade Commission (FTC), adding an unnecessary layer of oversight to the current state-based system. It would create an unelected, national board that specifically prohibits current owners, trainers, drivers, and practicing veterinarians from serving on it.”¹⁴ The USTA also believes that the bill would also create unnecessary regulations, costs, and fees.

The National Horsemen’s Benevolent and Protective Association (HBPA) is also opposed to the HIA. Eric Hamelback, CEO of the HBPA, believes that the bill is more than misguided, it is wrongheaded and will add additional regulations, costs, and fees that would cause jobs to be lost. Regarding same day medication, especially Lasix, Hamelback said:

Banning race day Lasix will cause more equine deaths, and additional regulations will cause jobs to be lost... [In fact] [i]f Lasix is completely banned the number of fatalities on racetracks throughout the country will increase. While we are committed to finding answers that will prevent, reduce, and solve the occurrence of any fatality for our thoroughbred athletes, this bill is NOT the answer.¹⁵

Not surprisingly, the USTA echoed almost the same words as the HBPA saying that:

The legislation seeks to ban the use of a race-day, therapeutic medication called Lasix. Lasix is endorsed by veterinarians as the only known treatment for Exercise Induced Pulmonary Hemorrhage (EIPH), a disease that causes bleeding in the lungs of a racehorse. Both the American Association of Equine Practitioners and North American Association of Racetrack Veterinarians support the use of Lasix and oppose the legislation.¹⁶

And as USTA President Russell Williams said, “At a time in which the industry is focused on preventing deaths, this legislation will have the opposite effect, and more horses will die.”¹⁷

SUPPORTERS OF THE HIA OF 2019

The Jockey Club was established over 125 years ago. It is the breed registry for Thoroughbreds in North America and is “dedicated to the improvement of Thoroughbred breeding and racing, focusing on improvements to the integrity, health, and safety of the sport.”¹⁸ James L. Gagliano, President and Chief Operating Officer said:

For far too long, cheaters have been abusing the system and the horses are most often the ones to suffer... It is particularly disturbing that there is little out-of-competition drug testing in the United States. U.S. horse racing lags far behind international standards. It’s time we joined the rest of the world in putting in place the best measures to protect the health and safety of our equine athletes...A key to this change is the requirement of full transparency into the medical treatment, injuries, and health of all racehorses. Today, we can’t fully see what is going on with a horse because of differing state and track practices, antiquated practices, and purposeful deceit about what drugs are given to horses at what times.¹⁹

The Coalition for Horse Racing Integrity (CHRI) is a broad-based diverse group of owner and breeder associations, racetracks, racing organizations, and even animal welfare groups. Its members include The Jockey Club, The Kentucky Thoroughbred Association, The Kentucky Thoroughbred Owners & Breeders, The International Federation of Horseracing Authorities, Meadowlands Racetrack, Tioga Downs, Vernon Downs, The Breeders’ Cup, and The Humane Society Veterinary Medical Association, among others. Shawn Smeallie, Executive Director of the CHRI, directly addressed the major concerns of the opponents of the HIA stating:

The bill doesn’t create a new ‘Department of Horse Racing,’ but rather sets up an independent board with broad representation from the industry...We are currently operating under a patchwork quilt of state regulations with little consistency across jurisdictions. Inconsistent rules mean that the health of horses suffers, with injuries and deaths that could have been prevented.²⁰

Water Hay Oats Alliance (WHOA) is a group of “Owners, Breeders, Trainers, Jockeys, Equine Practitioners, Industry Professionals, Handicappers and Racing Fans who stand against the permissive use of performance enhancing drugs in American horse racing.”²¹ A March 14, 2019 WHOA press release stated, “It is obvious that after years of committee review and discussion, America’s racing industry cannot police itself by eliminating the proliferation of performance-enhancing drugs in our sport, nor does it possess the power to adequately punish the purveyors of these drugs.”²² WHOA also stated, “The appointment of an independent anti-doping program run by USADA will resolve the problem of widespread drug use in American racing and put U.S. racing jurisdictions in step with international standards.”²³

COMPARABLE HARMONIZATION EFFORTS?

The opposition to the HIA ignores the fact that we already have both national and international organizations that regulation anti-doping efforts—the WADA and the USADA—and there have not been major upheavals in the world of sport. To give a perspective in the United

States alone, USA Swimming, the national governing body for swimming in the United States has over 400,000 members.²⁴ Every athlete, coach, and support member is required to abide by the rules and regulations of the USADA and the WADA Code.²⁵ USA Track and Field has over 130,000 members.²⁶ Again, each and every athlete, coach, and support member is required to abide by the WADA Code and USADA rules and regulations.²⁷ There are uniform drugs policies and all the stakeholders abide by them.

On the international level, there is the World Anti-Doping Agency, of which USADA is a member. Some of the HIA critics argue that it is just too hard to harmonize thirty-eight different jurisdictions in the United States. Yet, in 1999, in response to a series of high-profile doping cases in the Tour de France, and track and field and swimming having damaged the credibility of sports, over 200 different nations, over 200 Olympic Committees, and 35 international sports federations came together to establish the WADA.²⁸

Many do not remember that, similar to the HIA, there was initial opposition to the WADA.²⁹ Yet, the advocates of a harmonized anti-doping approach knew that time was of the essence and a harmonized effort was necessary to save sport. David Howman, then Director of WADA said, “Values such as fair play; a respect for your opponent and the officials; healthy regard for the rules of sport; honesty over dishonesty; ethical behaviour (sic) from athletes – doing what is *right*. Ethics in sport help us distinguish what is right from what is wrong.”³⁰

THE LASIX DEBATE

The use of drugs in sports is just one of the ethical, legal, and medical issues in sport. All stakeholders in horseracing want a level playing field. The illegal use of drugs threatens that level playing field. However, there is a blurred line between therapeutic use of drugs versus performance enhancement drugs. There is a role for therapeutic medication for both human and equine athletes. This is at the heart of the debate for the use and administration of Lasix. Lasix or Salix belongs to a group of medicines called loop diuretics. In humans, Lasix is given to help treat fluid retention and swelling that is caused by congestive heart failure, liver disease, kidney disease, or other medical conditions. Lasix works by acting on the kidneys to increase the flow of urine and allows the salt to instead be passed in your urine.³¹

In horseracing, the issue becomes more contentious. It becomes a greater problem because the horse does not have a choice in its use. Both the American Veterinary Medical Association and the American Association of Equine Practitioners agree on a therapeutic policy that is “aimed at providing the best health care possible for the racehorses competing while ensuring the integrity of the sport.”³²

In horses, Lasix is used to reduce the effects of a respiratory condition called Exercise Induced Pulmonary Hemorrhage (EIPH), which is noted by bleeding that occurs from the lungs of horses during exercise and is often seen in racehorses. Some commentators note that most, if not all, racehorses may bleed at some time during their careers.³³ Horses can also lose up to 20 pounds of fluid on Lasix, making them lighter and a lot faster.³⁴

The opponents of the HIA argue that Lasix is administered for therapeutic use and can be administered on race day. Currently, in most jurisdictions in the United States, Lasix may usually be administered up to four hours pre-race.³⁵ According to the National Horsemen’s Benevolent and Protective Association (National HBPA) almost 1,000 stakeholders from the racing industry signed a public letter in support of protecting Lasix as a choice on race-day. The National HBPA quoted Steve Crist, retired Daily Racing Form Chairman, as saying the current system works well and should be maintained:

Lasix has proven to be an effective and benign therapeutic remedy for bleeding and is more humane than taking away a horse’s access to water. The current, well-regulated system of administration and disclosure works well for horses, horsemen and horseplayers alike. Criminalizing its use would be a huge step backwards for American racing and its customers.³⁶

Staci Hancock is the recipient of the 2019 Equine Advocate Award. She and her husband, Arthur Hancock III, own Stone Farm. Stone Farm has produced 161 Stakes Winners, 57 Graded Stakes Winners, 21 Grade 1 Winners, 3 Kentucky Derby Winners, 2 Preakness Winners, and 1 Belmont Winner. Hancock said, “Horses should train and race free from drugs that can mask injuries and lead to more serious injuries...We need one, nationwide rulebook that the whole industry can rely on for direction—and we believe the Horseracing Integrity Act is the best path forward.”³⁷ Hancock also stated, “We support International Federation of Horseracing Authorities rules [the international standard that prohibit(s) race-day Lasix]. We want to compete on the same level playing field as the rest of the world, and none of them allow race-day medication. We’re an outcast.”³⁸

On April 18, 2019, a coalition of thoroughbred racing organizations that represents over 85% of graded or listed stakes races announced plans to phase out the use of race-day medication. That coalition includes tracks owned by Churchill Downs, Inc., the Stronach Group (Pimlico, Laurel Park, Santa Anita), Del Mar, and Tampa Bay Downs. Under the new plan, starting in 2020, 2-year-old horses will not be allowed to be treated with Lasix within 24 hours of racing. Then, in 2021, that ban would apply to all horses listed at stakes races at coalition tracks. Because the coalition includes tracks where the Triple Crown is run, the 2021 Triple Crown would be run for the first time under the new medication rules.³⁹

Lost in the heated conversation is what the bill actually states. As Congressman Barr stated:

But again, we’re not proposing an anti-doping authority that would ban all medications, including all therapeutic medications, at all times. We’re just saying, let’s have uniform medication rules. Let’s have bright lines between permissible therapeutics and impermissible performance-enhancing drugs and doping. And let’s let the experts, a diverse cross-section of the industry, on what the rules should actually be.⁴⁰

And contrary to Steve Crist's assertion, the Authority does not have the power to impose criminal sanctions.⁴¹

CONCLUSION

Currently, horseracing in the United States has a fundamentally flawed system that creates problems. There are thirty-eight different racing jurisdictions, each with their own rules, regulations, testing protocols, and sanctions. The opportunity to cheat is easy. There is little to no uniform out-of-competition testing and no national investigative arm. The rules and regulations on medications are not in line with the International Federation of Horseracing Authorities, which makes it difficult for horses to race outside of the United States.

As the Jockey Club noted:

Racing's current state-by-state structure for rule promulgation, passage and enforcement makes it impossible for a level playing field to exist across the country and too easy for Thoroughbreds to be subject to the nefarious actions of cheaters who are trying to beat the systems in each state and stay a step ahead of regulators and laboratories. From every angle, racing is failing to regulate itself.⁴²

Industry groups and state commissions have promised reform for decades. Yet, the rule-making process is slow and nothing of substance has been achieved.

Opponents of the bill argue for the status quo. However, the status quo is not sustainable. It is dangerous for horses and jockeys. The American public is losing faith and confidence in racing. The Horseracing Integrity Act of 2019 addresses the problem. It creates an independent, private, non-profit, self-regulatory authority that is not part of the government and has industry representation. It will not be funded by taxpayers, but rather be funded entirely by the horse racing industry. It will create a harmonized set of nationwide rules that are clear and consistent. And it is gaining momentum. At the time that this article was being written, 167 members, more than a third of the House of Representatives have signed on as co-sponsors of the bill. Over 53,000 people have signed a petition from the Coalition for Horse Racing Integrity calling for passage of the bill and 135 of horseracing's leading trainers support the bill. The HIA is needed to protect the health and the welfare of the horses. And it may be the last best chance. ■

John T. Wendt is a Professor Emeritus in the Ethics and Business Law Department, Opus College of Business, University of St. Thomas. He is a member of the Court of Arbitration for Sport, Lausanne, Switzerland and the American Arbitration Association panel for Olympic sports disputes. He can be reached at jtwendt@stthomas.edu.

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Buying and Selling Music Catalogues

Jeff Brabec and Todd Brabec

A catalogue of old “standards” from the 1950’s and 60’s is up for sale.

A songwriter with an extensive “back catalogue” of hits wants to cash out.

A major music publisher wants to expand via acquisitions.

A motion picture studio needs to sell its music library to finance films.

A private equity fund sees an opportunity in music publishing.

TYPES OF ACQUISITION AGREEMENTS

Acquisitions in the music publishing area come in many shapes and sizes, and cover a large number of variations depending on what the seller wants or needs to sell, as well as what the potential buyer wants or is willing to acquire.

There are seven main types of acquisition transactions which can be categorized as follows:

1. Sale of publishing and copyright interests in an existing catalogue;
2. Sale of publishing and copyright interests in an existing catalogue without administration;
3. Sale of publishing and copyright interests in an existing catalogue where the seller also has active writer agreements with future commitments;
4. Sale of non-performance songwriter royalties (e.g., royalties from mechanical, synch, print, etc.);
5. Sale of songwriter performance royalties (e.g., ASCAP, BMI, SESAC, GMR, or other performance society royalties);
6. Sale of United States termination publishing rights; and
7. Sale of the actual legal entity or entities that own the music assets (as opposed to the buyer acquiring only the assets themselves).

There are pluses and minuses in each of the above acquisition types, many of which will affect the purchase price of the transaction. For example, if you are buying publishing rights from a writer who has a co-publishing agreement with another publisher which controls the administration of the compositions, that is, to many buyers, less attractive since you are acquiring a passive interest because you do not have the ability to license or the right to collect income directly from users or from collective rights management organizations. This same rationale is true if a publisher is buying songwriter royalties from a writer who is signed to another publisher who has administration rights to the compositions (although this will not affect the rights of the

buyer to collect the songwriter’s share of performance royalties from the performing rights organization if that is what is being sold). These are just two examples of many that may become considerations in the determination of a final purchase price and whether the potential buyer wants to go forward with the acquisition. It should be noted that there are some companies that prefer the acquisition to be one of a passive investment without the expense of administration but this is usually not the case.

Before getting into some of the ins and outs of buying and selling musical assets, it should be mentioned that acquisitions can come in many sizes. It might be for one composition, many compositions written by one writer, compositions written by many writers, a set catalogue where there is a defined group of existing compositions, the assets of a publishing company that has active writers signed to it where there are future rights and financial commitments, non-performance songwriter royalties only, songwriter performance royalties only, non-performance and performance writer royalties combined, passive investment vs. active investment with administration and control of the assets, etc. It should be mentioned that this article is focused on asset sales and not on sales of the legal entities owning the assets since, in the majority of cases, acquisitions involve the musical works that are owned by the legal entity and not the legal entity itself.

HOW IT STARTS AND WHAT ARE THE STEPS

It could be a meeting. It could be a phone call. It could be an email or a text. Regardless of how or why it happens, thousands of dollars, hundreds of thousands of dollars, millions of dollars, hundreds of millions of dollars, or over a billion dollars might be at stake for both the seller and the buyer of music publishing rights and related assets.

NON-DISCLOSURE AGREEMENTS

These agreements (referred to as “NDAs”) are many times the starting point of any major acquisition transaction. They are basically agreements that stipulate that the potential buyer will not disclose any substantive financial, business, or legal information about the assets for sale which are provided by the seller for review. There are limitations in these documents, such as non-application to information that is independently created by the buyer or the use of information that has been made public. There is, many times, a time limit to the confidentiality provisions, but this is purely negotiable.

It should be noted that, on occasion, due to the relationship of the parties or because the transaction does not involve large amounts of money, an NDA is not a part of the process. In the case of a potential buyer already co-owning or administering the rights being offered (such as acquiring the co-publisher’s share of copyrights that it

administers or the songwriter's share of income derived from compositions it controls), an NDA is not necessary since the potential buyer is in possession of all the information that it needs to value the transaction.

THE PROSPECTUS

The prospectus is the document that is prepared by the seller to give the potential buyer information about the assets being sold. Depending on the size of the catalogue being offered and the amount of information being provided, it can range from 5 to 10 pages to over 100. Included in the document, among other things, is information concerning the titles of the most important musical compositions, the names of songwriters represented, trade paper chart and synchronization activity, foreign subpublishing and administration agreements, active writers if there are ongoing agreements, joint venture arrangements, upcoming use commitments such as single or album releases, and, most importantly, the initial financial information as to the earnings of the catalogue usually on a year to year basis for at least 3 years.

THE PROCESS LETTER

In addition to the NDA, some sellers—although this is not that common other than in major acquisitions where there are multiple potential buyers—send what is known as a process letter, which dictates (or attempts to dictate) how the sale will proceed and will include many of the terms that the buyer wants the potential buyers to agree to before any intensive due diligence takes place. Included in this process letter may be:

- a. An initial non-binding purchase price that the buyer is prepared to pay and, if there is a range, the lowest value in the range;
- b. A description of how the buyer reached its valuation;
- c. Details as to how the acquisition is going to be financed;
- d. The scope of information that will be required by the buyer before it can make a final binding offer to acquire the assets;
- e. A list of approvals and any other conditions which are required in order to enter into a final binding acquisition agreement;
- f. Details concerning the identity, capital structure and ownership structure of the final buyer; and
- g. A list of the names, positions and contact details of the potential buyer's key contacts and due diligence personnel (both legal and financial) who will be investigating and evaluating the assets controlled by the acquisition.

In the event that this process letter approach is utilized and agreed to by the potential buyer, there usually is a second process letter issued to those potential buyers who have been accepted by the seller as approved buyers, after the due diligence has taken place which will set a specified date as to when a final binding offer must be submitted.

THE LETTER OF INTENT

The buyer's initial acquisition proposal is referred to as a letter of intent (or "LOI") or memorandum of understanding (or "MOU"). This document represents a brief overall proposal after the buyer has reviewed the preliminary information provided by the seller and is always subject to the comprehensive legal and financial due diligence investigations that take place once the parties agree to go forward. On occasion, these initial documents are signed by the seller and buyer to ensure that there is a commitment to go forward on an exclusive basis for a stated period of time to finalize the transaction at a stated purchase price subject, of course, to all of the legal and financial assumptions on which the agreed upon price being met.

These letters of interest are usually kept very short (e.g., 4 to 6 pages without exhibits) and contain only substantive terms such as:

- a. The purchase price including how and when it will be paid as well as any earn out bonus provisions or hold-back contingencies;
- b. Primary assumptions on which the offer is based (e.g., administration rights, term of the rights, effective date of royalty acquisition, no pending or threatened litigation, no unrecouped advances, full right and authority to enter into the agreement, etc.).

There is usually a proposed timetable for completion of the legal and financial due diligence (e.g., 4 weeks, 2 months, etc.) and an exclusivity provision whereby the seller agrees that it will not engage in negotiations with any other third party during the agreed upon exclusivity period.

And whether or not these LOIs or MOUs are eventually signed (they can be extensively negotiated), they do establish a firm groundwork establishing a real basis for going forward by the parties.

DUE DILIGENCE

Due Diligence is the term that describes the procedures and processes that the potential buyer utilizes in its investigation of the assets being acquired. Due diligence is usually split into two distinct separate, but inter-related aspects. One is financial due diligence and the other is legal due diligence. A brief explanation as well as some of the primary focuses of each follow:

Financial Due Diligence

One of the roles of those who are conducting the financial due diligence investigations of the assets being sold is to try to arrive at a sense of what are the sustainable earnings of a catalogue; that is, earnings that will likely continue at their current historical pace or even if diminishing, will not do so in dramatic fashion. Since many acquisitions base the purchase price on the average annual net retained earnings over a period of time, the financial due diligence team will look for any aberrations or one time cash infusion events which have influenced the earnings, but which will not (or likely will not) happen again in the future.

a) Analyzing Earnings

An essential part of the due diligence aspects of an acquisition is an analysis of past income as well as a projection of future income

b) Past Earnings

In reviewing the past earnings of the catalogue that you are buying, you have to separate the major sources of income (performance, synchronization, mechanical, print, other), both with respect to the United States (if a U.S. company) and all territories outside the United States. In addition, you have to have the knowledge as to what sources of income are decreasing in importance, increasing in importance, and staying steady since this factors into the buyer's view of what is sustainable and what is not. Such knowledge of industry trends is essential once the buyer begins its future income projections, since there is always a discussion as to what prior income should be discounted or reduced in any valuation. In recent years, performance and synchronization have been by far a publisher's primary sources of income with mechanicals coming in third.

c) Chart Activity Earnings

Compositions which attain high positions on the trade paper radio and streaming charts earn substantial royalties from the performing rights organizations in the United States, ASCAP, BMI, Global Music Rights, and SESAC. Once the chart activity period is over, however, the earnings for most compositions will drop. Recognizing this, those involved in the financial due diligence aspects of the transaction will reduce the past performance income from chart activity periods to a more sustainable level when including that type of income in their calculation of sustainable annual earnings.

d) Non-Re-Occurring One Time Income Events

Since one of the primary objectives of financial due diligence is to determine what past income is sustainable and received in the normal course of business, one time cash infusion events which may not re-occur in the future or that should have been paid in accounting periods prior to the periods that are being reviewed will be identified and either discounted in their entirety or reduced when making a determination as to what should be included in the seller's average annual income computation.

For example, there may have been a recovery from a judgment or settlement of a copyright infringement claim. There may be monies recovered from an audit of a record company with respect to past sales which should have been reported and received during a period prior to the base period being investigated. There might be receipt of monies from an industry settlement related to past conduct or a separate retroactive special distribution from the performing rights organizations which covered periods prior to those being considered in computing the test period monetary receipts. The above are just a few possible non-recurring situations or out of period earnings which may justify a total or partial deletion from the earnings of the period being investigated.

e) Performing Rights Organization Bonus Provisions

ASCAP and BMI both add bonus payments to compositions which have substantial activity. The primary examples of compositions that fit into this category are those with significant radio and streaming chart activity as singles (all genres), compositions with a past history of cumulative performances ("standards"), songs, themes, and scores in Nielsen highly rated television shows, among others. SESAC also has bonus provisions for certain categories of compositions. These bonus payments can, in many cases, double or triple the regular earnings for a composition. Since the buyer is trying to determine what the sustainable income from a composition is in future years, those in charge of the financial due diligence of the catalogue will usually discount or totally delete such chart activity bonus monies from its calculation of what should be included when determining the average annual income since these types of bonuses will not re-occur unless the composition once again has activity that qualifies for a bonus. The bonuses which apply to compositions which have a long history of substantive earnings and performances (e.g., "standards") will usually not be discounted since they are likely to continue in the future based on their past performance activity.

f) Review of Royalty Payments

There will, in concert with the legal due diligence personnel, be a review of the royalty provisions of the various songwriter and other agreements to make sure that all royalty participants were paid correctly as provided for in the terms of their contracts with the seller. This is not only done to uncover possible royalty audit claims, but also to make sure that the seller has not overstated its retained profit or net publisher's share of income. For example, if it is found that a writer who was supposed to be paid 75% of income received by the seller only received 70%, then the seller's retained profit would be based on 30% of income received rather than 25%, resulting in an overstatement of the seller's net publisher's share of income which would have to be adjusted downward to reflect the true figure.

g) Advances

Another area of inquiry will be whether the seller has received any recoupable advances during the period being reviewed which still remain unrecouped. The unrecouped portion of any advance cannot be treated as actual earnings and needs to be deducted not only from the calculation of net income, but from the purchase price as well since the payer of the advance will continue to recoup the advance from earnings due to the buyer after the closing date of the acquisition agreement.

Legal Due Diligence

As opposed to the financial due diligence team, the role of those conducting legal due diligence is to primarily focus on chain of title issues, copyright status especially with respect to older catalogues, terms of the underlying agreements with songwriters and other parties from which the seller received its rights, potential termination and/or reversion issues, key man or other restrictions on assignment of the assets,

current or potential claims, and future contractual commitments if there are ongoing active agreements, among other areas.

a) Analysis of Future Contractual Obligations

In the event that the acquisition is of a publishing company that has a number of active songwriters under contract, the legal due diligence team will summarize the terms of each agreement including what contract period each writer is in, how many option periods are left, what are the commitments that must be fulfilled to move to an option exercise and, most important, what advances are due each writer for the current contract period as well as any option periods.

b) Foreign Subpublishing and Administration Commitments

Since the seller, in many cases, has made contractual commitments with foreign subpublishers to represent the catalogue outside the United States, the buyer must take subject to those commitments. Legal due diligence will review all such agreements to determine when termination notices need to be sent to ensure that the buyer can select its own foreign representatives; many times, granting such rights to its affiliated companies if the buyer is a worldwide company. It should be noted that many older subpublishing agreements are for the life of the copyright and, in such cases, the buyer must take subject to those long-term commitments. As part of this investigation, the legal due diligence team will review the seller's songwriter and other royalty obligation agreements with respect to any restrictions on the type of fees that can be charged by subpublishers for their services, so that any new contractual commitments will conform with the terms of such agreements. This same exercise will occur if the seller has entered into administration agreements as well.

c) Termination and Reversion of Rights Issues

There will be an investigation of the status of any actual or potential United States termination rights issues (both 35 and 56 year terminations), so that the buyer will be aware of the dates when rights might be lost. The team will first review all notices which have been sent to determine their validity, but also chart the dates of potential future terminations. This is also important since the buyer may want to commence negotiations to acquire those rights where notices have actually been sent especially where the termination dates are somewhat imminent.

In addition to copyright law termination rights, there will be an investigation and report detailing all possible contractual termination rights which are included in the various songwriter and other agreements which allow the writer or other contracting party to terminate the seller's right in and to the compositions. Whether it is full reversion or partial reversion (e.g., the songwriter and co-publisher share only), all will be charted and analyzed.

d) Copyright Issues

A report will be prepared on the top earning compositions detailing any chain of title problems, as well as whether there are any public domain issues, not only in the United

States, but foreign territories as well. This is an exercise which is usually only needed when older copyrights are involved or where the songwriter is deceased.

PROJECTION OF FUTURE INCOME

As part of any acquisition transaction, the buyer will make an independent analysis whose purpose is to project future income which will be derived from the compositions since there has to be a sound financial basis for doing the acquisition, since the buyer is usually paying substantial sums of money upon the signing of the agreement with future installments in some and it will not see a complete financial return on the investment until years into the future.

It should be mentioned that the seller, in its prospectus of the catalogue, will provide positive information about the quality of the songwriters, chart activity, the potential of future hits, upcoming releases, pending possible or real commitments from television, motion picture, and video game producers as well as, in many cases, its own projections of future income. All of these must be checked independently since the prospectus, although offering valuable information, is also (and, many times, primarily) a sales tool to get the catalogue sold.

THE PURCHASE PRICE

A number of things go into the equation which results in the actual purchase price, as it is just not as simple as saying if a catalogue has averaged "\$_____" in net publisher income ("NPS") over the past 2 to 5 years, we will pay a multiple of 8, 10, 12, 15, etc. of that amount. "Net Publisher Share" is defined as gross royalty income received by the selling company, less all royalties payable to songwriters and other third parties.

PURCHASE PRICE MULTIPLES

The whole concept of multiples is many times a misnomer and often a simplistic view of looking at an acquisition since there are many factors that go into a buyer's decision to offer a certain price to buy a catalogue or come to a monetary valuation.

In most cases, a multiple is backed into only after there has been a determination of what the average annual net income is for a catalogue and a purchase price agreed to. For example, if a catalogue had an average annual NPS of \$1,000,000 and the purchase price paid was \$12,000,000, the seller will say that the catalogue was sold for a 12 multiple (i.e., $\$12,000,000 / \$1,000,000 = 12$). This type of analysis may be easy to understand and very tidy, but it is many times far from the realities that go behind how the buyer values the catalogue and arrives at a purchase price including the fact that certain compositions are valued more for their income and licensing sustainability than other compositions resulting in what is known as a "blended multiple". But again, it must be stressed that arriving at a final purchase price is not a simple number x NPS calculation.

U.S. TERMINATION RIGHTS

When acquiring U.S. termination rights, the focus is somewhat different than in a normal sale agreement, due to the

fact that the rights being bought are for the territory of the United States only and not for the world. Whether the effective termination is either 56 years from the date of the original copyright registration as provided for in Section 302 of the U.S. Copyright Act or 35 years from the date of the grant provided for in Section 203 of the same Act, the initial inquiry has to be a determination of whether the notice has fulfilled all the necessary requirements for an effective termination. It should be noted that the notice can be sent to the original and/or current music publisher (as successor-in-interest to the original publisher) as early as ten (10) years prior to the effective termination date. Under the law, only the current publisher is allowed to acquire the termination rights prior to the effective termination date. In the event that no agreement has been reached prior to such date, then the U.S. termination rights may be either retained by the writer (or heirs and/or estate, if deceased) or sold to a third party.

The prospective buyer's financial due diligence team will concentrate on U.S. income only to determine the value of the rights since territories outside the United States remain with the current publisher and its foreign subpublishers under the law.

BUYING AND SELLING SONGWRITER ROYALTIES

At one time, it was very uncommon for a songwriter, composer, or lyricist to sell their authorship royalties (referred to herein as "Songwriter Royalties"). These are the royalties that are received as a creator as opposed to those received as a music publisher. For example, if a musical work is commercially exploited and earns royalties (such as a synchronization fee for use of a composition in a motion picture or television series, or a mechanical royalty for a download of the composition via iTunes, etc.), the music publisher and the songwriter will each be entitled to 50% of the monies that are paid by the user.

In today's music industry, however, such sales have become more common both with respect to non-performance royalties (e.g., the writer's share of royalties due for synchronization, mechanical, and print licenses which are collected by the music publisher to whom the writer is signed), but also the writer's share of performance income distributed by the writer's performing rights organization such as ASCAP, BMI, SESAC and GMR).

With respect to the sale of songwriter non-performance income, an assignment of such rights from the writer and a letter of direction to the music publisher which controls the musical compositions to which the writer is selling his or her royalties will usually be sufficient to effectuate the transaction in addition to, of course, an asset purchase agreement.

When dealing with a sale of the writer's share of performance royalties, however, it must be mentioned that both ASCAP and BMI have specific forms that must be completed and regulations followed for the assignment to become effective. For example, in order for ASCAP to accept an irrevocable assignment of songwriter performance royalties, the assignor must have earned a minimum of \$25,000.00 in writer royalties over the past four distribution periods,

or one year, or at least \$125,000.00 in writer royalties from a performing rights organization over the last twenty distribution periods, or five years. If the writer does not meet the above minimum earnings threshold, the authorization will be revocable. It should be noted that there may be non-returnable processing fees that must be paid to the applicable performing rights organization for such a sale to be finalized. At ASCAP, the current fee is \$250.00. At BMI, a \$500.00 processing fee will be deducted from the first royalties payable under the assignment; \$250.00 if the entity to which the royalties are being assigned to is a corporation, LLC or trust solely owned by the writer.

The assignment should also be very clear as to the exact royalty stream that is being sold. For example, BMI's form has three categories:

- a. "My royalties earned from all works in my BMI catalogue on the date of this assignment or that may be entered into in my BMI catalogue afterwards;
- b. My royalties earned only from the works that are in my BMI catalogue on the date of this assignment but not my royalties earned by works that may be entered into my catalogue afterwards; and
- c. My royalties earned only by the works on the attached schedule."

Additionally, the assignment should be very specific as to the date that the transfer of ownership to the royalty stream will take effect, as such date should commence, if at all possible, at the start of a calendar quarter to accommodate the applicable performing rights organization regular royalty distribution dates (e.g., January 1, April 1, July 1, or October 1).

It is important to note that, for many years, the sale or assignment of writer royalties was very limited by the rules and policies of the U.S. performing rights organizations. In recent years though, many restrictions have been removed, making it easier for writers to accomplish these types of transactions. Nevertheless, it is essential for anyone involved in these types of transfers to be aware of the current policies and required documents needed to effectuate these types of sales and assignments.

CONCLUSION

Music use is at an all-time high both in the traditional media area as well as in the online/digital world. The proliferation of new types of platforms have created many new possibilities and opportunities for the exploitation of musical copyrights-and with those opportunities come increased value. Whether a buyer's interest stems from an investment opportunity, a desire to increase market share, or a realization that its ability to compete in a world of multinational communication conglomerates necessitates the acquisition of copyrights or additional copyrights, and whether the seller is motivated by a desire to monetarily capitalize on a valuable asset, or a need for a substantial cash infusion into a business or for estate planning purposes, the music publishing business represents an investment that rarely disappoints either the buyer or the seller. ■

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Note: Additional information as to the subject matter of this article can be found in the “Buying and Selling of Songs” chapter in “Music, Money And Success: The Insider’s Guide To Making Money in the Music Business”, 8th edition.

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The Seemingly Never-Ending Case of *Todd McNair v. The NCAA* Provides a Rare Glimpse into the Association's Secretive Infractions Process

Richard Giller

On November 13, 2019, former University of Southern California (USC) assistant football coach Todd McNair filed a 67-page appellate brief, as part of the latest appeal in this long-running legal saga arising out of McNair's 2011 lawsuit against the National Collegiate Athletic Association (NCAA).¹ The lawsuit arose out of the Reggie Bush inspired sanctions meted out by the NCAA in June 2010 against both McNair and USC. The whittled down defamation and declaratory relief lawsuit was tried before a jury in the spring of 2018.² Following a weeks-long trial, the jury returned a verdict on McNair's defamation claim in favor of the NCAA.³

After the jury verdict, the court trial on McNair's declaratory relief claim proceeded which resulted in the court finding in favor of McNair. The court ruled that California Business & Professions Code section 16600, which voids "every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind," invalidated the association's "show-cause" bylaws which allow the NCAA to prevent coaches, under certain circumstances, from getting a job with another school as a part of its disciplinary actions.⁴ Included among the 2010 sanctions issued by the NCAA's Committee on Infractions (COI), was a "show-cause" order against McNair, barring him from contact with recruits while working for USC or any other NCAA-member institution.⁵ That type of order renders a college coach essentially unemployable.

Three months after the McNair jury returned its defense verdict, the trial court granted McNair's motion for a new trial due to a potential conflict with the jury foreman.⁶ The NCAA has appealed both rulings and, as of the date of this article, the briefing in the latest appeal had not yet been completed.

As part of an earlier appellate battle, hundreds of internal NCAA emails, memos, and witness transcripts were made available to the public despite the association's best efforts to keep those documents from ever being made public. The release of those documents has allowed a rare glimpse into the secretive inner workings of the NCAA's COI as set out in its own private internal emails. This article will review the contents of those private documents and analyze both the evident bias disclosed in some of the released emails as well as the underpinnings of critical credibility decisions made by the COI in an apparent vacuum without reference to readily available court documents concerning the COI's "star" witness. The impact of the court's declaratory judgment ruling will be analyzed in a separate article.

The 2010 sanctions imposed on USC and McNair stemmed from findings made by the COI that former USC

Heisman Trophy winner Reggie Bush and his family had improperly received cash and other gifts from Lloyd Lake and Michael Michaels, two self-described "sports marketers" while Bush was still in college.⁷ The sanctions were among the harshest handed down by the NCAA in nearly a quarter of a century. USC's football program received a two-year postseason ban, lost 30 scholarships, and the school was forced to vacate 14 victories between December 2004 and the end of Bush's 2005 Heisman Trophy winning season, including its 2004 BCS Championship win.⁸ Bush was ultimately stripped of his Heisman Trophy and was forced to return the award.

A year after the NCAA sanctions were issued, McNair filed suit against the NCAA in Los Angeles Superior Court for libel, slander and other alleged offenses.⁹ Seventeen months later, the judge issued an order in that case finding that the NCAA had been "malicious" in its investigation of McNair and that certain NCAA emails reviewed by the court tended to "show ill will or hatred"¹⁰ by the association toward McNair. The judge noted that, in one such email, a COI liaison described McNair as "a lying morally bankrupt criminal" and a "hypocrite of the highest order."¹¹

For nearly a decade, USC administrators, former coaches, and the school's football fans have loudly complained that the punishment handed down by the NCAA was too severe and that the NCAA had not established a lack of "institutional control." These critics intimated, and in some instances directly accused, the COI of being prejudiced against the school and McNair, and that the NCAA had targeted USC because of its successful football program during the early 2000's and its refusal to cooperate in the investigation. The internal NCAA documents ordered public as part of the McNair case appear to confirm these concerns and criticisms.

One writer described the USC sanctions this way: "It's become an accepted fact among informed college football observers that the NCAA sanctions against USC were a travesty of justice, and the NCAA's refusal to revisit that travesty are a massive act of cowardice on the part of the organization."¹² In February 2014, former USC head coach Pete Carroll echoed these sentiments: "I thought (the NCAA's investigation into USC) was dealt with poorly and very irrationally and done with way too much emotion instead of facts. I sat in the meetings. I listened to the people talk. I listened to the venom that they had for our program.... They tried to make it out like it was something else. They made a terrible error."¹³

According to the NCAA, the severity of the sanctions leveled against USC were justified because the COI found

that the school lacked “institutional control,” which is “at the core of the worst of NCAA violations.”¹⁴ That finding was, in turn, based exclusively on a 2 minute and 23 second telephone call that took place between McNair and Lloyd Lake that at 1:34 a.m. on January 8, 2006. Indeed, much of McNair’s lawsuit against the NCAA revolved around the COI’s characterization (or mischaracterization), of that two-minute telephone call and the testimony of McNair and Lake about that call.

In the legal equivalent of a “He Said/He Said” dispute, the two participants on that short telephone call provided the COI with different and contradictory recollections about how the call took place and what was said during the 143 second call. This call and the COI’s interpretation of the testimony concerning the call was, according to the NCAA, the “linchpin”¹⁵ of the show-cause order it issued against McNair and the only basis for its “lack of institutional control” finding against USC. Thus, properly weighing the credibility of the only two participants on that call should have been of the utmost priority for the COI and its investigators. In fact, NCAA Bylaw 32.8.8.2 mandates that the COI was required to “base its finding on information presented to it that it determines to be credible, persuasive, and of a kind on which reasonably prudent persons rely in the conduct of serious affairs.”¹⁶

In response to McNair’s appeal, the COI responded to criticisms about the manner in which it assessed witness credibility by claiming that, the COI “did what fact finders are routinely required to do -- weigh conflicting testimony and draw inferences based in part on the credibility of the witnesses involved, their motives, and the plausibility of the different accounts of the events in question.”¹⁷ As discussed below, that position is not supported by the record.

According to a lengthy self-described email “rant” from a non-voting COI member involved in the USC hearings who, according to the NCAA’s own rules, was not allowed to participate in deliberations or influence the COI, McNair “should have all inferences negatively inferred against him.”¹⁸ That non-voting member went on to boldly proclaim that “credibility determinations are for this committee and this committee alone. As with all tribunals or fact finders, we need not say why we disbelieve him we only need to let the public, or whomever, know that we do disbelieve him.”¹⁹ As one pundit described this logic: “So basically [the non-voting member] is saying, we don’t have to prove that McNair is a liar, just consistently call him a liar and people will believe it.”²⁰

In another email, the NCAA’s coordinator of appeals whose role was limited to observing the proceedings without trying to influence them, compared the witness credibility issues in the COI’s investigation of USC to the 1995 Oklahoma City bombing where 168 people died.²¹ Emails from other voting COI members show that they were troubled with the finding that Lake, a convicted felon, was somehow more credible than McNair or the finding that the former USC coach was lying about the substance of the two-minute January 2006 phone call. For example, in one email, a COI member opined that he “did not think McNair had an adequate opportunity during his interviews

to discuss what happened in that call. The staff told him it occurred in 2005 not 2006 and it was generally a very confusing piece of questioning ... but on the record, I am not comfortable charging him with lying”²² about the telephone call. That COI member went on to concede that “on this record it is hard to find that [McNair] was ‘involved’ in anything.”²³

Despite these differing views as to the substance of the two-minute call, and the demonstrably false assertion by Lake that it was McNair who initiated the call in order to discuss to resolve any issues between Reggie Bush and Lake,²⁴ the COI relied almost exclusively on Lake’s testimony to conclude that USC knew about the Bush-Lake relationship. Beyond the cavalier attitude regarding witness credibility demonstrated in the previously secret internal NCAA emails, what may be even more disturbing is the complete failure by the NCAA to take into account several previous substantive findings by a number of judicial officers that Lake lacked credibility and had previously attempted to suborn perjury which is something that has not previously been reported by any news source to date.

The failure of the NCAA to consider the following critically important information concerning Lake’s credibility (discussed below) is shocking under any objective standard:

- A federal judge had previously concluded that Lake lacked credibility as a witness;
- A federal judge found that Lake had attempted to suborn perjury and concoct evidence in his federal drug prosecution;
- Allegations by the U.S. Attorney’s office that Lake went to great lengths to attempt to suborn perjury and manipulate and falsify evidence in a case; and
- The revocation by a federal judge of Lake’s release from prison because he had beaten his then live-in girlfriend so severely that he broke her left arm and caused numerous other injuries and this was the same woman who, according to the NCAA, “confirmed” Lake’s testimony about the two minute phone call.

In connection with a 2001 drug case involving Lake, federal judge John A. Houston of the United States District Court for the Southern District of California, denied Lake’s request for bail based, at least in part, on a finding that Lake “attempted to prepare and file false declarations with the court showing that [seized] money had come from a legitimate source.”²⁵ The finding that Lake attempted to falsify evidence and attempted to prepare and file false declarations (known as suborning perjury), seems to be information that the NCAA and the COI should have considered when assessing his credibility as a witness and it is something that should have been noted in the Infractions Report.

In a related federal criminal case filed in 2003 in the U.S. District Court in San Diego, the United States Attorney alleged several similar attempts by Lake to manipulate, falsify and/or concoct information:

- After law enforcement seized 100 pounds of marijuana, Lake telephoned his codefendant to discuss “finding someone who could offer a legitimate use” for certain drug paraphernalia evidence.²⁶
- Lake and a co-defendant “coordinated a false explanation about [Lake’s] involvement with the seized marijuana.”²⁷
- After law enforcement seized \$59,000 in cash, Lake and his co-defendant “coordinated obtaining a false affidavit or deposition from a third party to explain the source of the seized currency.”²⁸ Lake also “asked another person to falsely claim that he purchased jewelry” from Lake in order to explain the source of seized currency.²⁹

When the NCAA’s COI was trying to determine which witness was more credible, as between McNair and Lake, the NCAA should have considered Lake’s previous attempts to suborn perjury along with his efforts to otherwise fabricate and concoct evidence beneficial to his position.

Equally telling as the findings concerning Lake’s attempts to suborn perjury and falsify evidence are the filings submitting in and the findings made by Judge M. James Lorenz, sitting in the federal court in the Southern District of California in January 2006, when Judge Lorenz revoked Lake’s release from federal prison because of a domestic violence complaint (discussed below). During a release revocation hearing on January 31, 2006, Judge Lorenz concluded that Lake had violated a condition of his release by committing another crime while on supervised release and he also concluded that Lake’s testimony concerning the incident was not credible.³⁰

According to a petition filed in federal court in December 2005 requesting the issuance of a warrant for Lake’s arrest, Lake violated the terms of his supervised release from prison on his drug trafficking conviction “by committing domestic violence battery on November 26, 2005.”³¹ According to the petition, the senior probation officer involved in the case reviewed the Sheriff Department’s November 26, 2005 incident report and stated that Ms. Jones (described as Lake’s live-in girlfriend):

“indicated she was sleeping at [Lake’s] residence when she was suddenly awakened by [Lake] pulling her out of bed by her hair. She was then ‘dragged through the bedroom to the lower living area,’ struck on the head with a closed fist and kicked several times. Ms. Jones then reported being picked up by her hair and her face being thrown into a ‘slot machine’ in the residence. Mr. Lake continued to slap, punch and kick her for an unknown period. The victim [Ms. Jones] eventually broke free of the offender and took the keys to a vehicle that belonged to a friend of Mr. Lake’s. Mr. Lake chased the victim in another vehicle, but was unable to catch her.”³²

The Sheriff’s incident report indicated that Ms. Jones suffered a fractured left arm, a concussion, a knot on the back of her head the size of an egg, a swollen and bruised left eye, and numerous abrasions/bruises to both of her arms.³³ According to the petition, “Ms. Jones reported that there were two prior incidents of domestic violence in which Mr. Lake battered her, but neither incident was reported to law enforcement.”³⁴

During the revocation proceeding Judge Lorenz heard testimony from four witnesses, including Lake, and reviewed 15 photographs documenting the domestic violence at issue. In his subsequent order, Judge Lorenz specifically noted: “The Court does not find [Lake’s] testimony that he acted in self-defense to be credible....”³⁵ In other words, just over two weeks after the now infamous January 8, 2006 telephone call between McNair and Lake, a United States District Court Judge in an unrelated criminal proceeding, expressly found that the testimony of one of the participants on that 2+ minute telephone call was not credible and his testimony should be disregarded. Lake was ultimately sentenced to 12 months in prison for violating the terms of his release.³⁶

The NCAA COI based its finding that Lake’s recollections concerning the January 8, 2006 telephone call were more “credible” than McNair’s recollections in large part on the fact that Lake’s account was, according to the COI, “confirmed” by his former girlfriend. Putting aside the issue of whether Lake’s former girlfriend actually “confirmed” any part of Lake’s story, serious questions abound as to how the COI handled its assessment of the credibility of Lake’s former girlfriend. For example, shouldn’t the NCAA have considered whether, having previously been beaten by Lake to the point of suffering a broken arm, concussion, and multiple contusions during the same January 2006 time frame, Ms. Jones may have justifiably feared for her own safety and physical well-being if she contradicted Lake’s NCAA testimony when she was asked to testify about anything relating to the man who beat her? And shouldn’t the COI have analyzed and assessed whether that fear may have clouded her statements when she was interviewed by NCAA enforcement staff?

Despite these publicly available judicial records, it does not appear that the COI investigated the backgrounds of either Lake or Jones or discovered the filings or took the information into account in any way when the COI assessed the credibility of either Lake or his former girlfriend. Mind you, a non-voting member of the COI went outside the record and performed internet searches on McNair and shared with the voting members a false report that McNair had been convicted of crimes related to dog fighting, in an apparent attempt to smear McNair’s credibility as a witness. The non-voting member’s email rant included the following reference: “This is especially true when [USC] put into evidence a coke conviction [for another witness] (to make him look like a bad guy unworthy of belief) which is really no more relevant to veracity than McNair’s two prior cases of cruelty to animals.”³⁷ The most disturbing aspect of this reference concerning witness veracity (and putting aside

the comparison between a cocaine conviction versus allegations of animal cruelty which apparently did not result in a conviction), is that the COI never investigated, never discovered, and never discussed the judicial findings regarding Lake's lack of credibility as a witness and his attempts to falsify declarations, suborn perjury, and concoct evidence. Instead, a non-voting member of the COI focused on unsubstantiated accusations of "dog fighting" against McNair which a voting member noted was "not in the [COI's] record and which staff chose not to put in the record."³⁸

Instead of considering accusations outside the investigative record, the COI should have investigated, discovered and augmented the record with the judicial findings against Lake noted above. The COI should have also assessed and weighed the credibility of the information provided by Lake's former girlfriend during their investigation in light of the battery findings and the information contained in an earlier indictment filed against Lake in which the U.S. Attorney's office detailed Lake's repeated attempts to have others lie for him and his attempts to obtain false affidavits, false explanations, and false deposition testimony from others in order to avoid prosecution. Given the resources available to the NCAA and the more than four-year investigation it undertook, the COI should have uncovered this information, all of which seriously calls into question the veracity of the COI's star witness; information that it took this author little time to uncover.

In the email rant authored by the non-voting COI member noted above, the author described Lake this way: "we shy away from Lake as a witness to be relied upon ... [because] he has a record.... Lake is not the guy you want living next door to you, but that is not a reason to disbelieve him. In my current practice and in my prior life, I have relied on felons and the shady types because that is who gets into this [sic] scenarios. But the background does not make them a liar."³⁹ However, the prior findings by two federal judges who concluded that Lake lacked credibility as a witness and that he had previously attempted to falsify evidence and suborn perjury may make him a liar and, at the very least, those findings should have been considered by the COI. Among the other internal NCAA emails that minimize Lake's well-documented criminal past, one notes "Lake's inconsistencies re dates and details about events" but argues that inconsistencies should not "render his credibility 'shaky.'"⁴⁰ The information discussed above should have caused the COI significant pause when it determined that its star witness was somehow more credible than McNair with respect to the only piece of evidence the COI relied upon when making its "lack of institutional control" finding.

While the COI could have easily accessed the information discussed in this article, it does not appear that the Committee ever did or that it made any effort whatsoever to explore the information contained in the dockets of Lake's criminal cases. The NCAA certainly did not reference any of this information in connection with assessing Lake's credibility in the infractions report. The COI also paid short shrift to Lake's criminal background and the sum total of the COI's treatment of Lake's criminal history consists of the following sentences: (1) "In June 2005, while [Lake] was

incarcerated, [Bush] made telephone contact with [Lake's] then girlfriend ... and requested cash;"⁴¹ and (2) "[Lake] admitted to the NCAA staff that he had prior criminal convictions. Because of his troubled past, he realized that his credibility would be challenged."⁴² By using the watered-down colloquialism "troubled past" to describe Lake's extensive criminal history, the COI tried to downplay the severity of that history, the resulting judicial findings and the information about attempts to suborn perjury, falsify and concoct evidence and asking other witnesses to lie for him.

Based upon the information contained in the internal NCAA emails, coupled with a more complete picture of the credibility of the "star" witness against USC, it now appears that school administrators, former coaches and USC fans have a solid basis for loudly complaining that the NCAA and the COI may well have been biased against the school and its successful football program. ■

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ENDNOTES

1 *Todd McNair v. The National Collegiate Athletic Association* (*McNair v. NCAA*) California Court of Appeal, Second Appellate District, Case No. B295359, Docket, https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=2&doc_id=2277689&doc_no=B295359&request_token=NiIwLSikTk%2BWzBdSCjDVEJJQFw6USxTKiNOSz9RICAgCg%3D%3D

2 *McNair v. NCAA*, Appellant's Opening Brief in Case No. B2953.

3 *Id.*

4 *McNair v. NCAA*, Los Angeles Superior Court Case No. BC462891, "10/9/2018 Final Statement of Decision," issued by the Honorable Frederick C. Shaller: "The 'Show-Cause Order' provisions of the NCAA bylaws set forth in the 2009-2010 NCAA Manual at Paragraph 19.02.1 (Trial Exhibit 714.299) and retained in subsequent manuals including at Paragraph 19.02.3 of the 2017-2018 Manual (Trial Exhibit 723.241) are void in California as they

constitute an unlawful restraint on engaging in a lawful profession pursuant to Cal. Business and Professions Code §16600."

5 "University of Southern California Public Infractions Report," dated June 6, 2010 ("NCAA 6/6/10 Infractions Report") at Paragraphs 22-23, pp. 61-63. <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102369>

6 *McNair v. NCAA*, Case No. B2953, Appellant's Opening Brief.

7 NCAA 6/6/10 Infractions Report at p. 28.

8 <https://www.nytimes.com/2010/06/11/sports/ncaafootball/11usc.html>

9 *McNair v. NCAA*, Los Angeles Superior Court Case No. BC462891, Register of Actions, <http://www.lacourt.org/casesummary/ui/casesummary.aspx?casetype=familylaw#ROA>

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15 *McNair v. NCAA*, Case No. B2953, Respondent's Brief at p. 17.

16 <https://web3.ncaa.org/lstdbi/search/proposalView?id=867>

17 April 29, 2011 NCAA News Release, "APPEALS COMMITTEE UPHOLDS DECISION FOR UNIVERSITY OF SOUTHERN CALIFORNIA FORMER ASSISTANT COACH" <https://web3.ncaa.org/lstdbi/search/miCaseView/report?id=102509>

18 *McNair v. NCAA*, California Court of Appeal, Second Appellate District, Case No. B245475, "Appellant's Appendix, Pages previously lodged under seal. Filed publicly pursuant to February 6, 2015 Order," ("McNair's 2015 Appellate Appendix"), A0268 at p. 14 of 497.

19 *Id.*, A0367 at 45 of 497, NCAA Doc. No. 009237.

20 <https://www.foxsports.com/college-football/story/emails-show-ncaa-was-out-of-control-in-usc-case-032515>

21 McNair's 2015 Appellate Appendix, A0367 at 45 of 497, NCAA Doc. No. 009237.

22 *Id.*, A0503-504 at pp. 69-70 out of 497, NCAA Doc. Nos. 016708-09.

23 *Id.*

24 *McNair v. NCAA*, Case No. B2953, Respondent's Brief at pp. 13-14 ("Significantly, the NCAA Enforcement Staff had obtained McNair's phone records from USC as part of the investigation. Those records clearly showed that, contrary to what Lake had said, McNair had not called Lake in the early hours of January 8, 2006. Rather, the records clearly showed that Lake had called McNair.")

25 "Findings of Fact and Order of Detention" dated August 16, 2002, filed in the case of *United States of America v. Lloyd Lake*, bearing Case

No. 02CR1714-L, Document No. 91, at page 3, lines 13 to 15.

26 Indictment filed on December 23, 2003, in the case entitled *United States of America v. Lloyd Kenyatta Lake aka Tata, and Brandon Sanders*, bearing Case No. 03CR03504-L, Document No. 1, at page 3, lines 10 to 14.

27 *Id.* at page 3, line 15 to 18.

28 *Id.* at page 4, lines 1 to 6.

29 *Id.* at page 4, lines 7 to 10.

30 "Order re: Supervised Release Violation" filed on February 1, 2006 ("2/1/06 Release Violation Order"), in the case entitled *United States of America v. Lloyd Kenyatta Lake aka Tata, and Brandon Sanders*, bearing Case No. 03CR03504-L, Document No. 95.

31 "Petition for Warrant or Summons for Offender Under Supervision," filed by Senior U.S. Probation Officer, Constant T. Wilson, on December 16, 2005, in the case entitled *United States of America v. Lloyd Kenyatta Lake aka Tata, and Brandon Sanders*, bearing Case No. 03CR03504-L, Document No. 89, at pages 1-2.

32 *Id.* at page 2.

33 *Id.*

34 *Id.*

35 2/1/06 Release Violation Order, Case No. 03CR03504-L, Document No. 95, at pages 1-2.

36 *Id.*

37 McNair's 2015 Appellate Appendix, A0367 at p. 45 of 497, NCAA Doc. No. 009237.

38 *Id.* A0462 at p. 58 of 497, NCAA Doc. No. 009032.

39 *Id.* A0487 at p. 63 of 497, NCAA Doc. No. 016344.

40 *Id.* A0367 at p. 45 of 497, NCAA Doc. No. 009237.

41 NCAA 6/6/10 Infractions Report at p. 6, Sec. I. a. (11).

42 *Id.* at p. 7.

Ch Ch Ch Changes

Peter Dekom¹

J.J. ABRAMS

Director, upcoming “Star Wars: The Rise of Skywalker”

“For a long time, people have been saying the business is changing, but that’s undeniable now. It’s on.”

New York Times, June 20, 2019

For those of us who have lived through decades of changes and challenges in practicing entertainment law, nothing begins to approach the level of structural, social and economic change we face today. So, I thought I’d write down what I believe are the biggest challenges of practicing entertainment law, especially today, focusing primarily on audio-visual content:

GLOBALIZATION IS A BITCH!

ELIZABETH BANKS

Actress, director of upcoming *Charlie’s Angels*

“It’s interesting, because there’s a lot more work, but it’s a lot harder to make money on anything.”

New York Times, June 20, 2019

We are more dependent on international exploitation of our entertainment assets than ever before. Take away international revenues, even beyond the English-speaking world, and just about every segment of the U.S.-based entertainment industry would collapse. But with that incredible new source of revenues comes a litany of problems.

Not only are the production resources in other nations increasingly being deployed for their own local productions (or regional co-productions), but those old “quota” ratios are rearing their ugly heads again. Not to mention that we have real competition: K-Pop and Korean movies, for example, are fan favorites all over Asia these days... and spreading. Lots of this content is more popular than some of the best creative content from the United States.

Locally produced Chinese (PRC) movies are consistently outperforming American fare as well. And for revenue sharing content, the PRC quotas for allowing in international theatrical movies are severely limited: 34 films per year as of this writing with the proviso that at least 14 of those films be in either 3D or IMAX format. Then try exporting your Chinese-generated profits back to the United States! Donald Trump’s disfavor with Hollywood has also moved “entertainment content” issues to a very back burner in his trade negotiations. The censorship issues are, well, obvious. For China, hell-bent on repressing Western influence, controlling content and repelling powerful media conglomerates from gaining PRC distribution power, US-sourced films, television fare and streaming services are a particular anathema. Even NBA basketball when it steps into political commentary.

If money from ancillary rights was a driver, perhaps also the fuel that enables co-productions (note the United States has no co-production treaties), then anything that threatens the deep European pockets that write those checks also threatens indie productions across the board. Cord-cutting and multinational competition are definitely pushing European presale and co-production values lower. Mega-huge French Canal Plus has confirmed its plan to trim nearly 20% of its workforce in France where the pay TV group has been facing the continued decline of its subscriber base.²

“Canal Plus said in a press release that it met with the company’s social and economic committee to lay out its plan to cut up to 492 jobs through voluntary departures. It said it will be holding further discussions on July 15 and 16. In its statement, Canal Plus said it was struggling to cope with the ‘revolution’ going on in the TV industry, with the ‘global platforms, digital native and international [companies] which boast considerable financial muscles and are not under the same fiscal and regulatory constraints [as] the Canal Plus Group.”³

Europe offers us even more problems as well. With the U.K. poised for an even uglier Brexit, Ireland remains as the only English-speaking country in Europe. Might seem like slight change, but all those lovely European Union benefits (like nice TV license fees, access to co-productions, the ability to use any EU resident and quota compliance) we used to get by shooting in heavily tax-subsidy-incident England are slip-sliding away. Yet we hunger for European audiences (the largest still for US product) and increasingly for European subsidies.

The cost of making audio-visual productions – film, television, digital, long format, short format, music, multiple platform, etc. – has so escalated that we have become addicted to so-called “soft money,” government production incentives that literally absorb significant production costs. In the states (especially Georgia, New Mexico, Louisiana and New York) and overseas (everywhere!). We’re always looking for the next good deal. Problem is, these incentives keep changing, getting challenged, “adjusted and amended,” recalculated ... country by country. Are their crews sufficient and good? English-speaking? Production facilities? Comparable work ethic? Visas and local taxes? Costs to transport and house talent? Getting stuff in and out of customs? Local laws? Co-production potential (the U.S. has no co-production treaties, by the way). Need a local attorney too. Who’s good? Foreign Corrupt Practices Act issues? Bribery Act issues (UK)? Ramifications of moving money across international boundaries? U.S. taxes?

European Union laws, beyond the General Data Protection Regulation (GDPR), are threatening to move Europe into becoming a single digital market (sell digital rights in one market and you may in the future have sold digital rights to the entire EU). Under the guise of copyright

reform, the EU is redefining the notion of a “safe harbor” to internet service providers, making digital platforms responsible for copyright infringement, artist rights and fake news carried on those sites. “The overhaul contains two controversial provisions that will make online platforms liable for illegal uploading of copyright-protected content on their sites, as well as force Google, Facebook and other digital companies to pay publishers for press articles they post online.”⁴ The new rule was signed into law on April 17, 2019.

Privacy laws, sprouting up all over the world are picking up the log line in the GDPR as well. The California Consumer Privacy Act of 2018 was the seminal U.S. state statute in the space, several other states have followed and are following suit, and Congress is exploring national requirements. Opt-in requirements, the ability to erase your online footprint (to disappear), the notice for hacked sites and the crushing penalties for violation should put the fear of God into the hearts and minds of all entertainment practitioners whose clients access the web, particularly those who reach across international boundaries. Are you ready for ‘dis’?

That’s what’s happening in nations where “free speech” has few limitations. While you cannot sell Nazi memorabilia online in Europe, generally across the West, the counter to the press for privacy regulation and responsibility for disseminating fake news is countered by that “free speech” value (or more, like our First Amendment). Those values are tempered in other parts of the world, even ostensible democracies like India and Singapore.

Murders by Hindus against local Muslims based on fake news gone viral made India particularly sensitive to the impact of too much free speech. Look back at their pre-election planning back in early April of 2019:

As India, the world’s largest democracy, gears up for a gigantic general electoral process, global social media companies are putting their own houses in order. The election runs in seven phases from April 11 through May 19, with results known on May 23.

Approximately 900 million Indians, many of whom are constantly exposed to social media via their phones, are eligible to vote in the elections. Facebook counts approximately 300 million subscribers in India, making the country its largest single market.

On Monday [April 1, 2019], Facebook removed hundreds of pages associated with the opposition Indian National Congress party and the ruling Bharatiya Janata Party for “coordinated inauthentic behavior.” With ongoing tensions between India and neighboring Pakistan, the company removed 103 Facebook and Instagram pages with links to the Pakistan military.

The specter of fake news is all too real in India and, in a bid to curb this, on Tuesday, WhatsApp launched ‘Checkpoint Tipline’ where users can report suspicious material. The company will confirm whether the shared information is verified or not.

Earlier, on March 20 [2019], the Social Media Platforms and Internet And Mobile Association of India, which includes representatives of Facebook, WhatsApp, Twitter, Google, ShareChat, TikTok and others, presented a voluntary code of ethics to Indian election commissioners. The code consists of several steps to prevent abuse, and to maintain a transparent flow of information to the Election Commission.

The Election Commission has an exhaustive model conduct code that all political parties are expected to adhere to, beginning with “No party or candidate shall indulge in any activity which may aggravate existing differences or create mutual hatred or causing tension between castes and communities, religious or linguistic.”⁵

Another regional democracy, aghast at both its own issues and the ugly example of “fake news” roiling through the United States, decided to crush that movement with swift legislation, virtually certain to become law.

The Singapore government has introduced legislation to combat the spread of misinformation online. The proposed law puts responsibility on media and social media platforms, requires online corrections, and threatens to take away profits of repeat offenders.

The Protection from Online Falsehoods and Manipulation Bill was introduced by the Ministry of Law and put to parliament on Monday. Given the government’s solid majority it could become law in a matter of weeks.

The government says that the bill targets falsehoods, not opinions and criticisms, satire or parody. Corrections will be the primary response to a harmful online falsehood that is actively spreading, and that corrections will usually require the facts to be put up alongside the falsehood, so that the facts can travel together with the falsehood.⁶

How do we protect bona fide candidates from amazing computer-generated audio and visual content that literally and very credibly has them saying things they never said? Where does the First Amendment fit into this mix? But we are a global industry, selling audio-visual content everywhere we can. They have their own rules that may even apply when the content emanates here but drifts “over there” across a ubiquitous Web.

The implications for American companies crossing international boundaries is not just the massive uptick in complex, detailed and exceptionally expensive (both as to compliance and fines) impact of new laws and regulations. The financial realities overseas are equally in flux. To make bad matters much “badder” and adding to the complication, the entertainment-related financial picture from overseas is also undergoing other rapid changes. The foreign territorial sales marketplace (discussed below – in *Rescinding the*

Indies), for example, was already bad and is just getting worse.

As hungry as Hollywood may be for subsidy money, it is positively ravenous for international investment capital. On August 18, 2017, when Chinese President Xi Jinping gave the order, China put the kibosh on exporting PRC investment capital into overseas real estate and entertainment ventures. The squeal of brakes was heard across the U.S. entertainment industry, from “independents” hall all the way up to the loss of a billion dollar off-balance-sheet investment fund for Paramount Pictures.

Already slowing before the announcement, PRC money that was not already outside of China just plain stopped. Lots of schemes and dreams exist to get that tap turned on again. Nuffin’! Trade war didn’t help either. China announced stricter censorship rules, and many U.S. film and television conglomerates fear the possibility of a total closing of the Chinese marketplace to U.S. product. China’s done it before – with South Korea – so it is certainly not out of the question.

Chinese film officials have told some local buyers to steer clear of U.S. movies. One Chinese distributor says he was advised by various platforms not to submit U.S. titles for consideration, while another has heard through unofficial channels that private companies can no longer import U.S. content. American actors working in the Middle Kingdom say their careers have nosedived without explanation.

Industry insiders stress that there is nothing in writing – no officially published decree – putting a freeze on U.S. content. The Chinese government tends to exercise such controls internally and unofficially, which allows it to publicly deny the existence of any restrictions and to make exceptions when it suits them. Three years ago, when China blocked South Korean films, pop bands and other cultural exports out of anger over Seoul’s decision to deploy U.S.-made missiles, it took six months before Beijing publicly acknowledged the policy.⁷

Even if a trade agreement is consummated, the tensions between the two powers will continue. South Korea is small and local; the U.S. is the enemy.

How about Middle Eastern money? The March 8, 2019 The Washington Post:

A bid by a Hollywood power player to return a \$400 million investment to the Saudi Arabian government after an outcry over the murder of Saudi journalist Jamal Khashoggi has been fulfilled, a person with knowledge of the talks told The Washington Post. The person spoke on the condition of anonymity because of the matter’s sensitivity.

Endeavor, the Hollywood talent agency and content company, had accepted the money last spring from Saudi Arabia’s Public Investment Fund after, Ari

Emanuel, the company’s co-chief executive, became enamored with the idea that Saudi Crown Prince Mohammed bin Salman was on the path to reform. The capital was quickly spent as Endeavor looked to pay down debt on a host of corporate acquisitions, which in recent years have included mixed martial arts and professional bull riding leagues.⁸

Ouch! Endeavor’s alternative – going public – is discussed later.

II. RESCINDING THE INDIES.

JORDAN HOROWITZ

Producer, *La La Land*, *Fast Color*

“I don’t feel particularly optimistic about the traditional theatrical experience, especially for independent films.”
NY Times, June 20, 2019

With about 4,000 new English-speaking feature-length independent motion pictures still being produced annually, you’d guess that that world is robust and lucrative. Guess again. Under 1% of that batch ever find anything close to a genuine release anyway, and most of that product finds its way onto the small screen, digital or otherwise. Well-structured documentaries are doing better than in recent years, although competition for distribution is still horribly competitive, but dramatic fare is struggling. It’s so hard to compete with studio blockbusters with nine figure budgets and marketing commitments that can exceed nine figures worldwide, often based on powerful pre-identified intellectual property. That is not indie world.

With a few exceptions – *my category of six*, where sharing the experience with an audience has value or where an older audience still make the trek: truly spell-binding horror films, fall-on-the-floor hard comedies, faith-based/“patriotic” specialty releases, films that made a splash overseas, biopics on high-profile musicians (effectively concert films with a storyline) and films targeting kids (especially animated) – the U.S. theatrical market (release in movie theaters) is all-but-closed to indies, particularly those with modest to lower budgets. A senior studio executive friend of mine added one more possible exception: films about women targeting women over 25. “They like to go out with their girlfriends once and a while,” he noted.

When a quirky film slips through and surprises all of us – and it does happen once in a blue moon – filmmakers often erroneously assume that the door has opened for their dream project. *Exceptionally* rare exceptions do not create new rules. While hot preexisting IP rules (built-in audience), and most indie producers/writers don’t have the money to option those titles, especially when they are bidding against gigantic deep pockets.

As Hollywood studios up their production budgets, with concomitant increases in marketing spends, the ability of “festival favorite” independent features to penetrate the U.S. theatrical marketplace has all but vaporized, as was the case for this May 24, 2019, wide release:

Despite film festival raves and endorsements from celebrities like Ryan Reynolds, Taylor Swift and Mindy Kaling, Annapurna's "Booksmart" wasn't able to earn high marks during its opening weekend. Olivia Wilde's coming-of-age comedy sputtered with \$6.9 million, a disappointing start for a movie that debuted in over 2,500 theaters across North America.

The raunchy R-rated movie is a stark reminder that even glowing word of mouth and strong reviews aren't always enough when punching up against big-budget blockbusters. "Booksmart" is one of a handful of indie hopefuls trying to cut through and find an audience amid a crowded summer slate. Will its underwhelming ticket sales signal trouble for other film festival favorites coming down the pike?⁹

Everything about making and releasing an independent theatrical film has gotten exceptionally challenging.

While soft money has absorbed some of the financial pain of film and television production, the fall in demand for indies internationally is not good news for lawyers whose bread and butter is based on these films. This is also particularly challenging to filmmakers who have typically relied heavily on international territorial presales to provide production capital (usually discounted by banks relying on completion bonds). International buyers increasingly add the demand for a wide theatrical release in the United States as a precondition to payment, but U.S. distributors have learned that smaller films cannot compete against the mega-productions from Hollywood majors. The scoundrel: marketing and distribution costs for a domestic theatrical opening have skyrocketed. U.S. theatrical deals for indie films have become as rare as hens' teeth. Some films, however, are either so inexpensive or have such an obvious international cachet that they can avoid this U.S. release mandate.

Where an indie still needs that U.S. theatrical release (remember those international buyer conditions), it is often required to put up all releasing costs to open their film – \$15 million and up for a release on at least 1,500 screens – without getting a dime in the way of an advance against their production costs. Many of the distributors who are open to indies also require an advance of six figures against the ultimate distribution fee and often require that all the ancillary exploitation flow through their deal as well.

What you say, at least in this digital world we don't have to strike old-world prints; think of the savings! Sorry, it could actually cost more! When a distributor books a screen for a theatrical movie, where the projector is digital (they almost all are these days), the distributor must pay either the theater owner or the financier of the digital projector a set fee, called a virtual print fee. It may depend on the nature of the equipment (3D/IMAX vs regular formats), the size of the theater and/or the number of weeks of the run. It ain't cheap! It used to be to cover the amortization cost to buy those cool projectors, until recouped, but you just know those fees are not only never going away, they are like to increase.

So now the risk to the indie is not just the cost of making the movie but the significant cost to release that film theatrically in the U.S. marketplace. Majors and their specialty labels seldom pick up indie films anymore, but if a film has already opened well overseas, particularly in English-speaking markets, they are more open to picking up that proven content.

As the theatrical distribution pickups for U.S. independent films dwindle, likewise those who have traditionally provided so-called "P&A funding" (literally "prints and advertising," but today a general reference to theatrical releasing costs, usually within the United States) have left the marketplace or made the cost of such funding so high as to be prohibitive. This has sent filmmakers scrambling in desperation, and many have simply relinquished their hopes for a U.S. theatrical release.

Even assuming you can get over the above U.S. release requirement, in the past five years, the "average" pre-sales from the foreign market for films that are not heavily skewed to a U.S. audience (e.g., a baseball or American football themed movie) have fallen from 60% of an average budget (capped on really big films) to 40%... and falling. The strong dollar along with international instability (Brexit, too much national debt, too much competition, etc.), coupled with bigger companies (like Lionsgate and STX) absorbing capacity, have tightened purses everywhere.

There's still plenty of activity in pick-ups and production supported by domestic streaming services, but audience consumption of feature films (original and aftermarket) from a successful streaming service generally caps out at about 30% of total content watched. The continuity of *series* (characters and storylines), the added plus of binge viewing, tends to drive most of that other 70%. Live sports are an area that viewers enjoy as well and is increasing finding its way into the streaming universe. And exactly what is a "movie" anyway?

As you can tell from the battle between traditional "big-screen" filmmakers and streamer-Netflix – evidenced in the Oscar squabble over *Roma* – the opportunities for indies has so narrowed that there is a push to allow a film with a token theatrical release that is intended primarily for the small screen to be accorded the same respect and treatment as a film specifically produced for a mainstream theatrical release. The writing is on the wall, and if "quality" productions are to have a shot against escapist Hollywood blockbusters, this seems to be inevitable.

But there's one more ugly reality that has frightened indie filmmakers with "quality" on their minds: theatrical releases from digital streamers are tanking on par with all other indies... even festival darlings and award-winners.

Five months after strutting out of the Sundance Film Festival with a bag full of splashy acquisitions, Amazon Studios has been thrown off balance by a box office losing streak and the departure of one of its top executives [marketing and distribution chief, Bob Berney].

One of its highest profile Sundance buys, Mindy Kaling's "Late Night," has proven to be a painful

failure. It has earned only \$11.3 million in North America, where it's been playing on over 2,000 screens for the past two weeks. That's a poor result given that Amazon plunked down a hefty \$13 million for domestic rights to the picture. What's worse, the marketing budget on "Late Night" topped out at \$33 million. Rival studios project that Amazon could lose roughly \$40 million on the comedy's theatrical run.¹⁰

By October of 2019, Amazon scaled back its announced plans for the theatrical release of higher-profile productions ultimately aimed at its streaming service. For example, "[i]n May, Amazon Studios announced that ['The Aeronauts'] would play exclusively on IMAX screens for a one-week engagement before 'a full theatrical run.'"¹¹

However, "[t]wo months later, Amazon scrapped the IMAX engagement and shrank the theatrical release. Under the new plan, 'The Aeronauts' would have a two-week run in a small number of [U.S.] theaters before becoming available for streaming on Amazon Prime Video...."¹² The film community, particularly the director (Tom Harper), were disappointed, but the cost of a U.S. theatrical release was prohibitive and the risks simply not worth the cost, no matter how well the film had been received on the festival circuit or adored by the critics. After all, the value to Amazon, as well as the other major streaming services, was a unique and early availability on their proprietary SVOD platforms. Netflix, which had financed some high-profile filmmakers with powerful contractual requirements, faced another side of this struggle between early SVOD availability and theater owners most covetous of their theatrical window exclusivity.

Netflix's highly-touted *The Irishman* hit a wall with the biggest exhibitors in the United States balking at anything less than a full 90 US theatrical window. Netflix offered 42 days. The big boys said, "no," and the streamer was relegated to a much smaller release in the fall of 2019. Watching from the background, Apple released a list of his high-budget features in September of 2019, all of which were slated for a full 90-day theatrical release before exhibition on Apple's digital platform. Did that cut the legs out from the Netflix battle to combine a shorter theatrical release with quick availability to its subscribers? There's a push-pull problem: exhibitors need more productions for their screens, but they do not want shorter theatrical windows in the U.S. Where are new movies that audiences are willing to buy tickets for going to come from?

Our largest exhibitor, AMC Entertainment with 8,380 screens, is resurrecting a program it has tried in the past: a special structure aimed at supporting smaller quality films in search of a theatrical release.

The program, dubbed AMC Artisan Films, will seek to boost certain movies that might have trouble gaining traction as moviegoers increasingly choose well-known brands, such as Marvel Studios and Pixar, over midbudget dramas, comedies and quirky independent fare. The dominance of movies such as "Avengers: Endgame" has made it tough for critically acclaimed

pictures such as "Booksmart" and "Late Night" to get oxygen at the local multiplex, according to box office analysts.

"[W]e aim to expose more moviegoers to specialized films and increase their theatrical success," Elizabeth Frank, AMC's head of worldwide programming and chief content officer, said in a statement.. The company did not immediately provide details on how many of AMC's locations would be participating in the new program....

According to AMC's announcement, a movie that gets the AMC Artisan Films seal is "an artist-driven, thought-provoking movie that advances the art of filmmaking."

The company will promote such pictures in part by keeping them in theaters longer and by seeking to give them earlier runs in limited release, Frank said.¹³

These programs have not worked well in the past, but perhaps times have changed.

Smaller studios (entities with both production and distribution arms), holding out hope for many indie filmmakers, have not fared well in recent years either. In early July of this year, *The Wrap* suggested that STX Entertainment was on the block, looking for a buyer, although company executives denied the story.

The independent studio STX Entertainment is looking to merge, raise capital or find a buyer following a string of box office disappointments and the scuttling of a planned [Hong Kong] IPO last fall, *TheWrap* has learned...

This year, the studio has suffered one disappointment after another at the box office, with one notable exception: In January, STX released the \$108 million-grossing domestic hit "The Upside," a release by The Weinstein Company [defunct for other reasons] successor Lantern Entertainment for which STX collected a distribution fee and some back-end profit.

STX's most recent release, "Poms," grossed \$13.6 million at the box office in May in a distribution deal with producer eOne. STX took on the cost of prints and marketing. Another spring release, "Best of Enemies" starring Taraji P. Henson and Sam Rockwell, took in just \$10.2 million on a \$10 million production budget.

But the most painful misstep came with a May [2019] release of star-studded animated feature "UglyDolls," which cost roughly \$95 million between production and marketing spend and brand tie-ins and brought in only \$26.4 million worldwide. The studio had hoped for a hit that would become a franchise based on the popular children's toys.

...

The studio's financial difficulties are one in the latest in a string of indie studios to struggle or fade from view in the last few years — including Open Road, The Weinstein Company, Relativity and Annapurna — as Hollywood has become dominated by superhero franchises and a wave of major studio consolidation.¹⁴

Surprise, surprise! The STX film, “Hustlers,” a sexy crime drama opening in early September of 2019, generated almost \$100 million in U.S. box office gross receipts. Definitely, an *exception*, and probably enough to keep STX's doors open at least another year. Luck for one indie. Yet, every part of the U.S. theatrical motion picture is challenged. Not just indies.

Even the greenlighting of those Hollywood blockbusters has changed. Making a move based on the presence of a movie star has been replaced by hot titles and subject matter recognized by the general public as well as the presence of a very, very few hot directors. The era of “first dollar gross” actors has pretty much been relegated to the history books. With the new mindset of younger audiences, used to hyper-accelerating change, their “what and who is cool next” perspective has decimated the movie star system. “Star” actors who survive tend to eschew the leading man/women cachet of old in favor of becoming character actors creating a *new-next* persona in each film they pursue.

Without independent films, however, there is simply not enough product to fill the over 40,000 screens in the United States. Experts suggest that we are 15,000 screens too many. Given the high production costs, the number of super-high-production value films is of necessity limited, so theater owners have been having a terrible time, saved only by one record-breaking blockbuster — *Avengers: Endgame*.

AMC Entertainment as the world's biggest exhibitor, felt the burn from a series of flop films and underperforming blockbuster hopefuls during its most recent [first] quarter. The company's revenues fell 13.2% to \$1.2 billion, while the company suffered an adjusted loss of \$1.21 per share. It also recorded a net loss of \$130.2 million.

...

The movie business was in a funk for the first three months of 2019. AMC wasn't the only chain to see its fortunes fade. U.S. movie admissions slid 14.9% in the first quarter to 265.6 million and box office receipts plunged 16.3% to \$2.39 billion. AMC did manage to outperform the industry — its domestic attendance per screen only declined 10.1% in the first quarter of 2019.¹⁵

Strange. The exhibition business needs films, there are lots of screens available virtually any time of the year, but with all the entertainment alternatives, indie films still underperform to the point of near extinction. But wannabe

filmmakers are out there, shaking the trees for production financing.

Even some of those expensive, effects-laden Hollywood franchises seem to be unable to impress a jaded audience with too many entertainment alternatives. The less-than-expected performance this May of this year of Warner Bros' *Godzilla: King of the Monsters* (opening at disappointing \$49 million domestically — almost half of 2014's *Godzilla* [\$93 million] and behind even 2017's *Kong: Skull Island* [\$61 million]) followed immediately, in June, with Fox/Disney's *X-Men: Dark Phoenix* (the worst opening for an X-Men franchise), Sony's *Men in Black: International* (opening at slightly above half the U.S. box office of prior MIB films) and Universal/Illumination's *Secret Life of Pets 2* (generating 15% less than the original) not to mention the October Disney sequel, *Maleficent: Mistress of Evil*, opening at more than a third less than the original, remind us that success is anything but consistently automatic even for those mega-budgets studio films.

Are consumers experiencing “franchise fatigue,” as some pundits suggest? Then along comes a blockbuster opening, a \$185 million Fourth of July U.S./Canadian box office — *Spider-Man: Far from Home* — suggesting that there might be more to these audience shifts than a simple “franchise fatigue” explanation. Perhaps, because it was uniformly viewed by critics and audiences alike as a high-quality film and was a necessary part of the continuing saga of the Marvel Universe. Audiences are still willing to go... “if”... and that's the question. If it's hard for major studios, it's ever so much harder for indies, but wannabe filmmakers are out there, shaking the trees for production financing.

And that leads to another dreaded plague in indie-land. Too many lawyers — who are in the “everybody does it” school — also seem to forget that raising passive equity money to finance film production and/or distribution is usually subject to federal securities and state Blue Sky laws and regulations. There is no entertainment industry exception. And filmmakers continue to have a “my film is an obvious success” mentality that has them telling investors all kinds of “facts” that fly in the face of contemporary statistical realities. Will lawyers involved in such financing efforts find themselves as the guarantors of success to the relevant investors? Bankruptcy may not be available to those who are accused of skirting these statutes and regulations. I'm skipping over that “felony” thang, because enforcement at that level is generally relegated to extreme abusers. But raising passive equity by hyping a nascent film project in an obviously down market for indies has never been this legally risky.

So, what happens today to indie filmmakers here in the United States. For very low budget productions, the ability to show content via one or more online services at least gets a filmmaker a shot at building credibility. But the online world seems to have genuine mass-audience slots for a very few filmmakers — well-established superstar creators and those who have weathered the film festival circuit and come out with accolades. Maybe not even those creatives. What really generates values in the new streaming world: *series*. A word that is the new focus of just about everyone in Hollywood these days.

“Reality” and semi-scripted series – docuseries, competitions, talk shows, voyeuristic celebrity showcases, variety programming, eSports, etc. – have lost some of their cachet from too many years of oversupply, relegating the most of programming that does get produced to the bigger program suppliers and well-established creator/executive producers. Budgets get bigger as competition increases, and newbies are often forced into tiny participations for their original ideas as the big boyz and girlz eat most of the pie. With luck and time, some of these newbies rise into the system.

The hot commodity: scripted series. There were an estimated 487 scripted series (cable, satellite, terrestrial, digitally transmitted) in the U.S. market last year; a projected 520 for calendar 2019. This is way, way above the 140 series that the U.S. audience consumed thirty years ago, and since the population has not grown proportionately, except for the biggest such productions, the average revenue per series today has plunged proportionately. The crowded aftermarket also has contracted the value of that “long tail” everyone continues to discuss. Traditional 22-26-episode order patterns have dropped to 13 or fewer for an entire cycle, a challenge to talent pay levels. Fewer and lower paychecks for most...

That said, some of the numbers paid to produce scripted series seem a whole more like feature numbers. Let’s hear it for the bell curve and the fact that premium product in the sweet spot has never been hotter. We were all shocked with the initial season (2013) of the Netflix hit, *House of Cards*, commanded a whopping \$3.9 million per episode produced. A massive premium above the cost of production replaced the potential for upside. Netflix has since dropped their upside structure – now mostly fixed fee premium bonuses based on series that go beyond the first cycle – and there is no percentage upside accorded on any of their productions.

But that dramatic \$3.9 million soon became dwarfed when extremely high-production value series, like HBO’s *Game of Thrones*, cost \$9-\$10 million an episode to make in the first year, with rumors of individual episodes costing as much as \$20 million in subsequent cycles. Whew! For A-titles at the tip of the bell curve, the sky seems to be the limit. Hot TV creators were offered tens of millions of dollars to take their talents into the digital streaming world, leaving behind their old-world telecasters.

Indie filmmakers take note: if you morph your passion for making two-hour movies for theatrical release, a business that is all but gone, into a storyline that can continue, perhaps for years, you just might soar. Learning to write bibles (summaries of characters, scene, continuous story vectors with outlines of five or six episodic storylines) and the pilot teleplay are the “next-gen” skills that writers need to embrace. Hint!

Writers writing originals for theatrical films, not based on preexisting hot intellectual property that they own or control, need to know that their two-hour screenplays are little more than writing samples. Why? Without preexisting name recognition, especially in the United States, the extra marketing cost to create that awareness, always a risk anyway, is often in the tens of millions of dollars over the tens of millions already needed to open a film in the U.S. that already

has that awareness. Majors can spend \$30 to \$80 million (or more) toward a single U.S. theatrical release. Television/digital programmers don’t have those marketing costs, so they are a more open to such content (they just need some “names” – actors and/or a hot director to vindicate their choice). There is also another path.

Turn it into a book, place that book into the market and pray (prey?). Example: picture *Fifty Shades of Grey* as an original script seeking a studio production deal. No shot! Zip! Nada! Rejection city! Self-published as the very successful first book of a trilogy, studios were tripping all over themselves for the film rights. To date, that trilogy has sold over 125 million books worldwide. English author, E. L. (Erika) James, a former studio manager’s assistant at the National Film and Television School (Beaconsfield), sold those film rights, with real upside, for a fortune.

As we shall see in my section on Consolidation below, increasingly, the definition of percentage upside for television production is vaporizing, particularly as streaming services do not want to report viewership or be forced to track exploitation revenues. In feature distribution, “net profits” have become an illusory waste of paper. Replaced by more meaningful definitions of “breakeven” often embellished with box office bonuses as advances against percentage upside, it still remains that except for that short list – *my category of six* types of films listed above – the probability of significant upside from a theatrical film appears to be relegated almost exclusively to the majors and their specialty labels.

Bottom line: the places where talent can expect to make huge salaries and upside may still exist, but those opportunities are rare and far between. For most of us in this industry, we are going to work twice as hard to make half as much on the rest. The individual units of production have multiplied, but the audience has not. So, while aggregate earnings across the entire spectrum may have gone up, it is spread across a vastly greater pool of content. There are still big winners, but under the law of averages most of us will make content for less, a factor that only will be multiplied by my next section.

IV. CONSOLIDATION.

JASON BLUM

Producer, *Get Out*, *Whiplash*

“I’ve never felt the nervous energy in Hollywood that I’ve felt over the last 12 months, and it increases every day. There’s an uncertainty about the future, because the change is happening in an incredibly dramatic way... I make a show for Apple. They sell a million more phones — how are you ever going to connect those two things? With Amazon and Apple, they don’t ever have to be just in a profitable business on movies and TV shows. That’s crazy! And it makes people go nuts, because people have worked so hard to put a business model around content, and now they’re competing with people who don’t need to make that profit.”

New York Times, June 20, 2019

The future seems to belong to those who control the most content. Netcasters like Netflix, Amazon and Hulu have staggering values, easily competing with old-world content monoliths. With wide-spread 5G mobile access just around the corner, the ability to view elegant, rich media content, delivered with almost no latency at download speeds that *start* at 10 times 4G speeds, being able to provide massive of “whatever I want, when and wherever I want it” has become a corporate goal for major media players around the world. Younger eyes – Y and Z generation – have no issues with a small, smart phone screen... older viewers, it’s a push! Tablet-size?

Here are the numbers behind the trend:

U.S. consumers are expected to spend a combined \$26 billion on music and video subscription services this year, according to new estimates from the Consumer Technology Association. That’s up from \$20.4 billion in 2018, and nearly twice the amount spent on such services in 2017.

Propelled by the continued success of Apple Music and Spotify, domestic music streaming revenue alone is expected to reach \$8.4 billion this year. This represents a 33% growth over 2018 results.

Revenue from paid video streaming services on the other hand is expected to be up 25% year-over-year, to the tune of \$17.7 billion for 2019. The Consumer Technology Association credits live TV services with some of the momentum for paid video streaming.¹⁶

And that’s the goldmine the biggest players have their eyes focused on.

But is there a limit? Consumers are being charged left and right for online/mobile subscription fees while some streamers have managed to bury those fees with bundled packages (internet carriers/mobile providers, Web-retailer/streamer Amazon, etc.). Cable is/was expensive, but is the aggregation of cord-cutting alternatives turning out to be even pricier? Add an expected recession, and will the cord cutters start paring their selections to just a few “vital” services? Those with the most “best” content? Will AVOD (advertiser-supported video on demand streaming) grow? Or will advertiser skepticism and more reflective metrics create further credibility, and hence revenue, challenges there too?

We all sense that the numbers on the wall for traditional pay television are not particularly encouraging; many such services have added digital subscription services (OTT, over-the-top) as insurance policies.

Subscriptions to traditional pay TV remained flat at 65 percent, says [accounting/consulting giant] Deloitte [in the survey noted below], which changed the way it asked about pay TV, so the 2017 data is not directly comparable to 2018’s.

Many households (43 percent) have both pay TV and

a streaming subscription. More than half (52 percent) of Generation X consumers (ages 36-52) do.¹⁷

Let’s start with the big picture:

Last year, half of Americans aged 22 to 45 watched zero hours of cable TV. And almost 35 million households have quit cable in the past decade.

All these people are moving to streaming services like Netflix (NFLX). Today, more than half of American households subscribe to a streaming service.

The media calls this ‘cord cutting.’

This trend is far more disruptive than most people understand. The downfall of cable is releasing billions in stock market wealth.

Combined, America’s five biggest cable companies are worth over \$750 billion. And most investors assume Netflix will claim the bulk of profits that cable leaves behind.

So far, they’ve been right. Have you seen Netflix’s stock price? Holy cow. It has rocketed 8,300% since 2009, leaving even Amazon in the dust:

But don’t let its past success fool you.

Because Netflix is not the future of TV. Let me say that one more time... *Netflix is not the future of TV.*¹⁸

But for now, let’s talk about Netflix’s biggest problem

Netflix changed *how* we watch TV, but it didn’t really change *what* we watch...

Netflix has achieved its incredible growth by taking *distribution* away from cable companies. Instead of watching *The Office* on cable, people now watch *The Office* on Netflix.

This edge isn’t sustainable.

In a world where you can watch practically anything whenever you want, dominance in distribution is very fragile.

Because the internet has opened up a whole world of choice, featuring great *exclusive* content is now far more important than anything else.

...

Netflix management knows content is king. The company spent \$12 billion developing original shows last year. It released 88% more original programming in 2018 than it did the previous year.

And spending on original shows and movies is expected to hit \$15 billion this year.

It now invests more in content than any other American TV network.

To fund its new shows, Netflix is borrowing huge sums of debt. It currently owes creditors \$10.4 billion, which is 59% more than it owed this time last year.¹⁹

You mean make or break content like HBO's *Game of Thrones*? Or like that massive accumulation of content that Disney controls that will soon be Netflix worst nightmare? We know. Traditional television is fading fast. Content consumption patterns are changing almost as fast as the weather. Through all of this, Netflix continues to borrow heavily, debt predicated on continued growth. But what happens when a market gets saturated – not very many households left to sell – or new competition puts pressure on pricing and choice? See some serious issues down the road for Netflix? Exactly how fast is all this going to happen anyway? Faster than most think.

For the biggest streamers, the handwriting is already on the wall, well-before the much-touted streaming wars kick in full bore. Amazon and Netflix may have already maximized their penetration of the U.S. market. After losing 126 thousand U.S. subscribers in the second quarter of 2019, Netflix stock took a nasty hit as it reported (on October 8, 2019) a 30% decline in year-to-year net income.²⁰ Both companies have announced that their business plans will increasingly focus outside of the United States. Indeed, a third quarter increase in Netflix subscribers, which still fell below expectations, was heavily based on international growth.

How would Netflix take advantage of this perhaps momentary uptick... before all the other large competing services went live?

Netflix, burning boatloads of cash with a projected \$15 billion content budget for 2019, is adding to its debt load once again.

On Monday (Oct. 21), Netflix announced plans to offer approximately \$2.0 billion aggregate principal amount of junk bonds, in both U.S. dollar and euro denominations....

As of Sept. 30, Netflix reported \$12.43 billion in debt, up from \$10.36 billion at the end of 2018. The latest proposed debt offering would be the eighth time in the last five years that Netflix is raising \$1 billion or more through debt. The streaming giant last raised \$2.2 billion in junk bonds in April 2019.²¹

That's the on-balance sheet debt. Will the financial markets continue to be so open in the future... after the competition arrives? Time will tell.

That's streaming land. How about pay-TV? Forgetaboutit!

Traditional pay-TV subscriptions do continue to trend downward. Last year, the major pay-TV providers lost about 2.9 million subscribers, after accounting for about 640,000 new subscribers to streamed live TV services such as Sling TV and DirecTV Now, according to Leichtman Research Group. Overall 89.1 million subscribe to pay TV, down from 92 million in 2017, the research firm says.²²

But it's not just the major pay services that are suffering; it's a macro-trend. And entertainment conglomerates are more than acutely aware of these changes, as I will illustrate in greater detail later.

As we have seen, most recent reports illustrate how "cord-cutting" is just accelerating across the board, and clever repackaging into fewer available networks ("skinny bundles") isn't stemming the hemorrhaging.

The pace of cord cutting is continuing to accelerate this year, according to a new Convergence Research Group report, with 4.56 million TV households opting to ditch pay TV. By the end of the year, 34% of U.S. households won't have a traditional TV subscription, according to the research company's latest "Battle for the American Couch Potato" report.

In the report, Convergence estimated that the pay TV industry will see a 5% decline in pay TV subscribers in 2019. That's up from 4% in 2018, when an estimated 4.01 million U.S. subscribers ditched their TV service. Based on the top 66 online video services, the number of streaming subscribers will actually surpass the number of traditional pay TV subscribers this year (households can subscribe to both).

Attempts to convert cord cutters to skinny bundle subscribers won't pay off for the industry, Convergence predicted. "With ARPU [average revenue per user] half the traditional TV average, lackluster margins, programming gaps and technical issues, live multichannel OTT provides little counter to category killers Netflix & Amazon that sell at lower price points and essentially without advertising," the report outlined. "We believe a number of OTT plays, including large and niche, will fail due to insufficient subscriber traction, cost, and competition."

Altogether, online video services are poised to bring in \$22 billion in 2019, up from \$16.3 billion in 2018, according to the report. Last year, that revenue already grew by 37%. However, even with this growth, traditional pay TV is still expected to bring in more than 3 times as much money per household, and more than 4 times as much across the entire industry, as much as over-the-top video.²³

Desperation is driving some providers to attempt to stem their losses by increasing the prices of even their cheapest

skinny bundles, which in turn drives away potential subscribers.

The price for the cheapest DirecTV Now bundle went from \$35 to \$40 last summer, and the telco phased out virtually all of its promotional pricing, which allowed some wireless subscribers to stream DirecTV Now for as little as \$10 per month.

The latter already contributed to significant defections over the holiday quarter. Over the past two quarters, AT&T lost a total of 350,000 DirecTV Now subscribers. It's likely that the service will see additional cancellations from price-sensitive customers in the coming months: AT&T further increased the price of the cheapest DirecTV Now bundle to \$50 per month in April.

...

[Even] new entrants [like Hulu and YouTube TV] may not be immune to defections as the prices for these so-called skinny bundles are getting fatter across the board. Sports-focused fuboTV announced a \$10 price hike in March, and Hulu and YouTube TV both raised their prices by \$5 over the past couple of months.

These massive pay TV defections are increasingly impacting the media industry at large. Discovery reported a 4% decline in subscribers to its cable networks for Q1, despite the addition to online TV bundles.

[Research firm, BTIG, LLC's analyst Richard] Greenfield expects that cord cutting will also "negatively impact broadcast and cable network programmer retrans/affiliate revenues" in the current quarter. And he doesn't expect online TV bundles to make up for those losses, despite the fact that programmers get paid more per online subscriber since "churn is dramatically higher" for online bundles.²⁴

The ship is sinking, and moving the leaks around isn't going to reverse the obvious. Awash in mega-debt and frustrated with the contracting numbers, AT&T (which acquired WarnerMedia), is actively considering selling its DirecTV unit. Legacy television delivery systems are dying fast.

The trends are even more pronounced, particularly as you look at millennials and Gen-Z: "For example, 70% of Gen Z households had a streaming subscription, closely followed by millennials at 68% and Gen X at 64%. About 70% of Gen Z and millennials stream movies compared with 60% of Gen X viewers on a weekly basis. Some 96% 'MilleXZials' multitask while watching TV."²⁵

When you mix in the general population, the streaming numbers are less pronounced.

Parks Associates' OTT video research finds household spending on subscription OTT video services

has held steady for three years, averaging just under \$8 per month since 2016. Given the growing adoption of OTT video services over the past three years, these figures suggest that adoption of multiple services or expensive services by some consumers is offset by a larger base of consumers who either subscribe to one or two relatively inexpensive services, including 30 percent of consumers who do not spend any money on OTT video services.²⁶

For those households with streaming services, they average a much larger \$38 per month, which is growing fast.

Thus, it is clear that television as a medium is rapidly migrating into "all digital," mostly as a subscription-fee-supported format (streaming video on demand, SVOD) with some AVOD and hybrid subscription/advertising platforms in the mix. AVOD is sneaking up on the industry with some surprising numbers. Streaming service Hulu is an A/SVOD hybrid, but "the majority of Hulu subscribers are on the \$5.99-per-month ad-supported plan, which is half the price of the \$11.99 no-commercials version."²⁷ Is this a reflection of increasing consumer price-sensitivity?

Deloitte examined these Web-delivered-content trends in its latest and 12th annual Digital Media Trends survey released on March 19, 2019, which polled 2,003 American digital consumers from December of last year through February of 2019. 69 percent of those surveyed subscribed to at least one SVOD service (up from 55 percent last year), with the average such consumer subscribing to three.

Even as more consumers subscribe to video delivered over the internet, nearly half (47 percent) of those surveyed say they are experiencing subscription fatigue....

There's now more than 300 streaming services to choose from – up from 200-plus a year ago – and consumers may be feeling overwhelmed, says Kevin Westcott, Deloitte's vice chairman for U.S. telecom, media and entertainment.

"Well over half (of consumers) say they are frustrated when shows they like disappear or are no longer on a streaming service and that they have to have multiple subscriptions to get what they want," he said. "So there is a little bit of subscription fatigue."

Those consumer sentiments could concern a marketplace that's bracing for the arrival of two major players later this year – a Disney+ subscription service with Disney, Pixar, Lucasfilm and Marvel movies and original TV series, and an AT&T offering with HBO [to be available online solely through Warner's nascent streaming service] and other Time Warner content – and an NBCUniversal subscription service [Peacock] in early 2020.

Also growing: subscriptions to streaming music services such as Spotify and Apple Music (41 percent, up from 26 percent a year ago), and video game services

including Xbox Live and PlayStation Plus (30 percent vs. 26 percent last year).

These consumer behaviors could lead streaming providers to develop “the next generation of the home entertainment platform,” Westcott said. Such services would have covered original content, but also “a broad swath of entertainment options inclusive of music and games,” he said. “It may not be their own content, but they have to have that available to try to keep me under their umbrella.”²⁸

Streaming is big business and getting bigger, \$2.1 billion a month here in the United States. These numbers are great motivators. Fatigue or not, there is a rush among entertainment conglomerates, with the cash and credit to engage in the race, to aggregate as much content under one roof as possible. They believe that this is the way to ensure that as consumers ultimately pick and choose which services to keep and which to cut, these massive content providers will be on that “must subscribe” list.

But then why is CBS, which has its eyes on its former owner Viacom, offering Lionsgate \$5 billion for that minor’s Starz pay television channels? Until that offer, Lionsgate’s stock had plunged 40% in a single year, analysts saying it failed to replace aging motion picture and television franchises. Without Starz, what is Lionsgate anyway? It is an offer that’s simply too good to ignore, but what exactly would Lionsgate do that substantial sum? If they couldn’t manage to create value for the rest of the company, what would their business plan be going forward without their greatest asset? Yet Lionsgate is still contemplating spinning off Starz... to someone.

For CBS? It’s content, library fare and original series. And content, even from an old-world pay service, can easily migrate to a full-digital only stream. Lionsgate countered at \$5.5 billion, and the deal slid from view. Permanently? Rumors of a possible Lionsgate/MGM merger began to surface. Who knows? CBS then turned its attention to acquiring its former parent, Viacom, which owns Paramount, Nickelodeon, the MTV Networks to name just a few of its assets. CBS is hungry. It’s main network (broadcast and its streaming component) plus Showtime (pay television) just aren’t enough to compete with the rising streaming behemoths.

Will Comcast’s Peacock (NBC) streaming service, launching in April 2020, be able to aggregate enough content to be competitive?

[NBCUniversal CEO Steve] Burke said the company would not discuss promotion and marketing plans for Peacock until closer to its launch, but he did say Peacock’s April launch will use the 2020 Summer Olympics as a promotional “afterburner.” Asked about the low pricing and aggressive jockeying for position by upcoming streaming services, such as Disney+, Burke said he wasn’t shocked. “It’s not too surprising to me. You got the three biggest media companies, Disney, Time Warner and NBCUniversal, all launching

streaming platforms. And a lot of people are being very, very aggressive about it, and I would anticipate that to happen until at some point there will be an inevitable slowing down and shakeout, and the market will get a little bit more rational,” he said. “You want to be aggressive to get in there and make sure that your service is one of the consumer’s handful of favorite services.”

He reiterated that Peacock would offer a mix of original fare, exclusive content acquisitions and library product and that NBCUniversal would keep selling movies into the premium window instead of “taking all of our movies off of premium platforms like HBO or Sky.” He added: “We are not doing the same strategy that Netflix and people chasing Netflix have adopted.” Given a focus on the existing pay TV ecosystem, the ability to leverage Comcast’s 55 million customer relationships and an advertising VOD model, he reiterated: “We are going to get to cruising altitude much more quickly than a subscription service.”²⁹

So.... Time will tell who the winner and losers are, but consumers are getting new ways to receive content. Too much choice? Too expensive?

There are future trends suggesting that consumer demand for content is likely to escalate as 5G mobile services come online and as Uber, Lyft and driverless cars give passengers even more time to consume content. The volume of such content offers opportunity, but that same volume suggests that the revenue margins will only get thinner. Some are predicting that the chopping up of a consumer day, clearly referring to changing commuting patterns, will give rise to greater demand for short-form audio-visual content, mostly intended for small-screen smart phones. Certainly, Jeffrey Katzenberg’s and Meg Whitman’s billion-dollar Quibi is being built on that assumption. One way or another, the world of content control seems increasingly divided between buyer/aggregators and exit strategy sellers. Existential.

That little mobile-viewing trend just might not be so little, and 5G is going to accelerate the transition. Quibi announced a subscriber tie-in with T-Mobile; Disney+ has a parallel agreement with Verizon. AT&T’s owns HBO Max, so the combinations are obvious.

In the United States, adults will spend an average of 3 hours and 43 minutes each day on their smartphones, feature phones and tablets this year, eight more minutes than they’ll spend watching TV, according to a forecast released [June 5, 2019] by research firm eMarketer.

The change has been years in the making, as smartphones have become nearly ubiquitous and the ways people use their devices have shifted. Phones now let you do more than steal quick glances at social media, and streaming shows and movies on the smaller, portable screens has become commonplace.

“There is far more content today than there was even a couple of years ago,” said Monica Peart, a senior forecasting director at eMarketer, referring to the growth of streaming platforms such as Netflix and Hulu. “All of this is driving the need or desire to be on the smartphone.”

The gap between the amount of time spent on mobile devices and TV has narrowed dramatically over time. Last year, American adults spent nine minutes more watching TV than looking at their phones and tablets, eMarketer said. But TV watching used to be more dominant; just five years ago, adults spent two hours more watching TV than using mobile devices, the firm said.

The forecast follows other reports, including one by Nielsen, that indicate audiences are spending less time with traditional television. In the third quarter of 2018, Nielsen said, American adults on average spent 4 hours and 14 minutes each day on live or time-shifted TV, 11 minutes less than a year earlier. Time spent on apps and the web on smartphones and tablets in the third quarter was 3 hours and 14 minutes, 17 minutes more than a year earlier, Nielsen said.³⁰

Which content will benefit most from the migration to this small screen? Too much content? Confusing to consumers? Overwhelming? A big shakeout? Time will tell.

While this article has focused mostly on audio-visual content, there are lessons to be learned from our neighbors in the music business. Just as digital delivery is altering the film and television industry in a huge way, changing the landscape on access to audiences and slowly replacing older models, the Napsterization of the music industry moved the big bucks for major artists to live performances – hmmm, sort of like the domination of the theatrical world (especially in the U.S.) by high-production value/”must see” motion pictures; the rest have found “new TV” – and almost totally replaced physical compact discs with downloads and increasingly rapidly by streaming services.

From a “moribund and falling” music business model two plus decades ago, the transitional growth in digital delivery has been monumental in recent years. “The global recorded music market grew by 9.7% in 2018, the fourth consecutive year of growth,” to \$19.1 billion, according the latest annual report from the International Federation of the Phonographic Industry (IFPI).³¹

“Streaming revenue grew by 34.0% and accounted for almost half (47%) of global revenue, powered by a 32.9% increase in paid subscription streaming, according to the report. There were 255 million users of paid streaming services at the end of 2018, accounting for 37% of total recorded music revenue. Growth in streaming more than offset a 10.1% decline in physical revenue and a 21.2% decline in download revenue.”³² Indeed, 2019 saw the return of music-related industrywide gross revenues back to 2009 numbers, the last time the industry had truly dominating revenues. Will the motion picture sector experience the same rise and fall?

In this mad rush, what has happened to the indie film business seems to be sending a message to the entire industry: unless you are small with a powerful, oversized content reach, “small” is getting crushed by “big and getting monolithic.” Smaller players are being squeezed, and “indies” in all aspects of the industry are getting the message. Even in the personalized public relations corner, consolidation is taking place:

Entertainment agencies PMK-BNC and Rogers & Cowan are joining forces, bringing together a client roster of more than 500 actors, musicians, producers, directors, content creators and athletes.

“This is a game changing and transformative moment for our agency, and a move that will create significant value and tremendous opportunities for our company and clients around the world,” said Mark Owens, CEO of Rogers & Cowan.³³

Bigger. More. Hitting monoliths and new consolidation efforts with new combinations and strategies. Winners. Losers.

Ah... it is clear that glomming on to content, volumes and volumes of it, is increasingly viewed by the behemoth entertainment conglomerates as their only path to survival. Owners of digital systems are be equally aware that having lots of branded content could well be the key to keeping consumers on their networks. And so it is and has been for a while.

Comcast bought NBC/Universal including all of its basic networks. AT&T bought DirecTV and then Time Warner (now WarnerMedia, which includes Turner, CNN and HBO). And then there’s the voracious Disney: In 1996, Disney bought Capital Cities/ABC for \$19 billion, in 2006 Disney acquired Pixar for a combined stock and cash value of \$7.4 billion, in 2009 it picked up Marvel for \$4.3 billion (in 2013, \$100 million more to buy out distribution rights to a few Marvel titles held by Paramount), buying Lucasfilm in 2012 for \$4.06 billion, but the piece de resistance, 21st Century Fox (minus the Fox lot and some broadcast assets retained by the Murdoch family and their shareholders), was acquired by Disney for a whopping \$71.3 billion.

The driving force behind such massive acquisitions? CEOs watched nothing entertainment companies grow so fast that their values equaled or exceeded the values attributed to entire major studios. Streaming and the extreme values that both Amazon and Netflix generated in a very short period of time. From its founding in 1997, Netflix has grown into the largest streaming service in the world, about 150 million subscribers worldwide as of this writing.

Netflix — whose name has practically achieved verb status — was the fastest-growing brand from 2018-19 among American companies, according to a new study by Brand Finance, a global brand-valuation consulting firm.

The streamer's estimated brand value more than doubled over the past year, growing 105%, to \$21.2 billion, per the study. Brand Finance calculates values of brands using "royalty relief" methodology, which involves estimating the likely future revenue that are attributable to a brand by calculating a royalty rate that would be charged for its use.³⁴

The very word, "Netflix," send quivers of fear and anger through the bodies of big-company CEOs in the entertainment industry. Time Warner, Disney, Comcast, and AT&T CEO's were no exceptions. Obviously. They were playing catch-up, and they clearly did not like dealing from so far behind.

There's a lot of competition brewing, and many believe that has Netflix maxed out, at least in the U.S. market. The PwC Global Entertainment & Media Outlook 2019–2023 (released June 5, 2019) said it simply:

Netflix appears to be nearing its peak subscriber point in the U.S....The first-mover advantage in streaming video that Netflix has capitalized on to date continues to be eroded, as the industry begins to fragment, with more and more companies entering the market, from pay-TV heavyweights to specialized, niche players.³⁵

The recent acceleration of major corporate mergers and acquisitions in the entertainment space seemed to be focused on building streaming competition. The dollars involved were staggering.

After the Fox acquisition in March of this year, which required approval from governments all over the world, Disney controlled a full 27% of the U.S.-based theatrical motion picture industry, picked up a greater ownership share of Hulu (in May, it subsequently closed a deal with Comcast to buy the rest) and began a push to create a new streaming service able to compete with Netflix.

In the course of its negotiations to acquire Fox, facing competition from Comcast, Disney was forced to up its bid by \$20 billion, and that extra cost literally pushed Disney to justify that extra sum by generating extra revenue fast – not really possible – or by slashing costs every way it could. In March, when the acquisition closed, it announced an immediate cut of Fox/Disney employees from top to bottom of an initial 4,000 employees, with experts predicting at another 3,000 would be let go in the near term. Disney issued a "layoff" warning on May 15, 2019. Layoffs trickled on throughout the balance of the year.

With the two most profitable motion picture franchises in history, *Avatar* and the recent *Avengers: Endgame*, ownership of Hulu, you'd think Disney is just killing it:

Conventional wisdom may hold that the Walt Disney Co. has been firing on all cylinders, with its \$71.3 billion partial merger with 21st Century Fox closed, streaming service Disney+ on pace to launch Nov. 12 and *Avengers: Endgame* rewriting the record books. But there are signs that a perfect storm of (gasp!) mediocrity for the \$240 billion conglomerate may

be on the way thanks to digital investments and the film calendar — at least for the short term. The third quarter earnings were less than expected, at least less than Wall Street expected. Even as Disney faced the cost of building its streaming business, the reduction was attributed mostly to disappointing theme park admissions.

Disney CFO Christine McCarthy disclosed May 8 that the creation of Disney+ and ramp-up of ESPN+ will dent operating income to the tune of about \$460 million in the current quarter alone. The company intends on spending about \$2.5 billion on original and licensed content for Disney+ in fiscal 2020, rising annually to \$4.5 billion in fiscal 2024. Peak operating losses for the upcoming streamer are expected from 2020 to 2022 before it hits profitability in 2024. Oh, and its \$400 million investment in Vice Media is essentially worthless.

These digital expenditures will occur as Disney services its debt load, which swelled to \$57 billion post-Fox, and as its TV business suffers from 2 percent annual cord-cutting (operating income at Disney Media Networks fell 3 percent in fiscal 2018). Plus, CEO Bob Iger [completed a purchase of the remaining non-Disney stake in Hulu, which required] Disney to shell out about \$5 billion to purchase Comcast's one-third stake in that streamer.

"The costs are definitely making their way to the financial statements," says Moody's lead analyst Neil Begley. "I'd say Disney is entering a high-scale investment cycle, and they'll eventually feel a hangover." And Disney may also have to contend with a (relatively!) soft 2020 film slate, with *Avatar 2* pushed a year to Dec. 17, 2021, while the next *Star Wars* movie won't debut until Dec. 16, 2022.³⁶

Are you listening, entertainment bar?! How do studios respond to such pressures in their deal-making?

Here's another little tidbit apparently under consideration, how Disney may well deploy its new and massive leverage against competitive program suppliers with their Hulu streaming service: "Most shows in the future will originate from Disney-owned studios, but where another studio wants to sell a show to the service, Hulu will ask that a Disney shop (like ABC Studios or 20th Century Fox Television) come on as co-producer, ensuring long-term profit sharing."³⁷

And then there's the combined WarnerMedia AT&T debt of \$170 billion generating somewhere around \$6.7 billion a year in interest payments alone. It's no secret that this new conglomerate is putting together its own massive layoff and cost-cutting plans. Turner, CNN and HBO, part of the WarnerMedia group, have already offered buyouts to long-standing employees willing to leave their companies early. Having passed global judicial and administrative reviews with little resistance, these combinations are here to stay.

Even with a very successful final season of *Game of Thrones* (WB/HBO), the post-merger world of AT&T/WarnerMedia did not begin with numbers that made anyone feel good, well beyond the massive debt noted above. With all the expect red ink, all that debt, AT&T needed to ramp up its cash flow. In March of 2019,

AT&T [began] overhauling its DirecTV Now pricing and packaging strategy — including hiking prices for existing customers by \$10 across the board — a move that could lead to more subscriber losses for the company’s flagging pay-TV business.

At the same time, AT&T [announced that it] is launching two new DirecTV Now packages: Plus, at \$50 per month for up to 46 channels; and Max, \$70 per month for up to 59 channels. Both include AT&T-owned HBO, HBO Family and HBO Latino along with networks from WarnerMedia (Turner), NBCUniversal, Disney and Fox, and exclude channels from A+E Networks, AMC Networks, Discovery and Viacom.³⁸

The old DirecTV packages were no longer available to new subscribers. A little over a month later, the initial results were in.

AT&T missed on the top-line with first quarter 2019 sales coming in under Wall Street targets. DirecTV continued to bleed subscribers — including a net decline of 83,000 DirecTV Now customers — partially offset by 3.3% revenue growth at WarnerMedia although sales in the media segment were lighter than analysts expected.

The telco’s revenue for Q1 of 2019 was \$44.83 billion, with net income of \$4.10 billion (down 12% from \$4.7 billion in the year-ago period). Adjusted earnings per diluted share were 86 cents. Wall Street analysts’ consensus estimates were revenue of \$45.1 billion and EPS of 86 cents.

WarnerMedia revenue of \$8.38 billion was up 3.3% year over year, below analyst estimates of \$8.45 billion. Each division reporting operating income gains. Warner Bros. operating income was up 42.8% on theatrical revenue gains of 12.7% (largely from “Aquaman” carryover); Turner was up 7.0%; and HBO grew 6.0% year over year.

HBO revenue declined in the 7% in first quarter, to \$1.5 billion, which was related to its ongoing carriage dispute with Dish Network since November 2018, according to AT&T. Turner revenue was down 0.4% in Q1, to \$3.4 billion; Turner ad revenue dropped 6% in Q1, which AT&T said was primarily due to the shift of NCAA Final Four games (which occurred in Q2). Warner Bros. revenue was \$3.5 billion, up 8.6% year over year.

AT&T noted that the “Game of Thrones” season 8 premiere broke HBO’s viewership records — and the show drove record subscribers to HBO Now — and that DC Entertainment’s ‘Shazam!’ has already grossed more than \$300 million worldwide.

Meanwhile, the AT&T Entertainment Group lost a whopping 544,000 net subscribers for DirecTV and U-verse TV, to stand at 22.4 million at quarter’s end (down 2.4% sequentially). It dropped 83,000 DirecTV Now subs, declining 5.2% in the period to 1.5 million over-the-top customers, as AT&T ended promotional pricing and hiked rates for OTT subscribers....

Revenue in the Entertainment Group (which includes AT&T’s broadband and legacy wireline businesses) dropped 0.9%, to \$11.33 billion, while operating income increased 12.9% to \$1.48 billion.

The company’s key Mobility wireless segment generated revenue of \$17.57 million (up 1.2% year over year), with a 4.5% decline in equipment sales offset by higher service revenue. Wall Street had pegged \$17.65 billion in Q1 revenue for the segment. AT&T reported 80,000 postpaid phone net adds vs. 49,000 postpaid net adds in the year-ago quarter.³⁹

Ouch! DirecTV also battled CBS over carriage, and that network went dark for a while at the end of July and beginning of August 2019. As noted above, AT&T is now thinking about selling off its underperforming DirecTV unit. In the meantime, in mid-October, AT&T increased its monthly charge for AT&T Now/DirecTV by \$15.

Some said it was a tech/telco giant trying to compete in a non-linear story-telling world, an uncomfortable marriage at best. AT&T engineers and data-driven MBAs are making pricing, strategic and business decisions for WarnerMedia that already are generating eye-rolls and wincing from their entertainment underlings. Would that mean that the Fox-Disney merger had a better chance, since Disney was well-established in the original content space? What would the WarnerMedia streaming universe — conveniently labeled “HBO Max” — look like, and how would it generate enough content to compete with Netflix and Disney+? Shuffling continued: AT&T also moved some pieces on the board. In anticipation of HBO Max, DirecTV Now streaming will be called AT&T TV Now (unless it is sold off!!!), as the parent company is experimenting with a skinny live TV bundle over broadband that they may label AT&T TV. Or are rumors true that, as reported above, AT&T is contemplating selling off DirecTV to reduce their massive debt? Is there a master plan? A clear articulable strategy?

Whatever the underlying story, the sheer dollars at risk put huge pressures on these new media structure at levels never experienced before in the entertainment industry. The industry has created new, mega-powerful combinations that seem able to dictate massive competitive changes imposed on an already-terrified Hollywood. With a hint of desperation to “make it work” at all costs. The business today bears

little or no resemblance to what it looked like just three years ago.

You can bet that Disney and WarnerMedia have already started looking very carefully at reducing what they pay to produce content – are you reading this, lawyers? – pay for people who do not generate more than their cost and the spend on overhead. It isn't going to be pretty, and it presents an opportunity, in a field of fewer networks and studios, for every such company in entertainment to pay less to providers and talent. It's all about the big boyz now. Even as Congress moves to level the playing field to favor consumers in some arenas, like reversing the F.C.C.'s elimination of "net neutrality" requirements – which reversal allows carriers to prioritize online transmission of content or delivery ("discriminate" or "play favorites" might be better descriptions) – pro-business-crony Donald Trump has promised to veto that effort.

Feeling the pressure yet, everybody? Consolidation, merger fever and new business growth, has also redefined the talent agency business. In the spring of 2019, as agents and the Writers Guild of America (WGA) battled over the greatest profit center for all the larger agencies – a percent of the aggregate budgets/license fees paid to such agencies as "packaging commissions" plus direct content ownership – television networks and program suppliers were grinning in the hopes of getting rid of those fees entirely. Let the agents go back to the 10% of talent and rights fees that they gave up in order to get the vastly higher packaging commissions. Laughing harder because everyone was already feeling the downward pressure on talent and rights fees and payments.

It was an old story, at least as far as Hollywood was concerned. Back in the 1960s, under the John F. Kennedy administration, MCA/Universal found itself in a similar bind: an agency with a massive production capacity. "In the midst of the grand jury's [antitrust] investigation, MCA purchased Universal Pictures and its parent company, Decca Records. The government immediately went to court, seeking to block MCA's takeover of the corporation. However, after lengthy negotiations between attorneys for the Justice Department's Antitrust Division and MCA, a consent decree was issued and the case was considered closed. The litigation forced MCA to choose whether it wished to be either a talent agency or a production company. Considering that its production efforts yielded nearly ten times more money than the talent agency, the decision was an easy one: MCA dissolved its talent agency."⁴⁰

Relying on revenues from personal service income, money tied to the very personal relationship between agents (who are notorious job-hoppers) and individual talent, was not a business plan that Wall Street investors and fund managers found reliable. Celebrity and fame were hardly permanent, particularly in an era of changing values. Packaging entire television series and directly owning the content itself – asset-based structures – were the stuff financiers understood.

The larger and most powerful agencies had engaged in heavily-leveraged mergers and acquisitions, and the debt levels required a growth-directed business strategy. These agencies *needed* investors now! Some agencies carried *billions* of dollars of debt. If payment deadlines passed without

extension, if interest rates climbed, they faced ruin. Loyalty to individual creative talent, starting with writers, was clearly no longer the driver of the "agency" business, perhaps now a misnomer.

Amidst all of this industry reconfiguration, larger talent agencies have taken on private equity partners, diversified into parallel businesses, are as much content producers and distributors, corporate consultants with marketing and data-metrics groups, etc., etc. To create liquidity, respond to their existing investor demands for higher-level rates of return and manage large tranches of debt with approaching payback dates, there has been a pressure to turn service-driven agencies into asset play.

On May 23, 2019, Endeavor Group Holdings, Inc. (the parent of the old-world William Morris and Endeavor legacy talent agencies/later WME) filed an S-1 (intention to file a public offering) with the Securities and Exchange Commission. Did underwriters Goldman Sachs, KKR, J.P. Morgan, Morgan Stanley and Deutsche Bank Securities think this was a good time for an initial public offering on the New York Stock Exchange or did Endeavor feel pressure from its lenders? What is Endeavor anyway? A talent agency or a lot more?

"There are no other publicly traded companies like this," says Matt Kennedy, senior IPO market strategist for Renaissance Capital. Kennedy points to the company's lack of free cash flow and a high debt-to-earnings ratio as potential red flags for investors.

Endeavor is composed of a disparate set of assets — from Professional Bull Riders to the Miss Universe pageant to the Miami Open tennis tournament to the Frieze art fair franchise — which don't offer a lot of natural synergies to generate economies of scale. In its IPO pitch, Endeavor emphasizes WME's role as a wellspring for relationships with stars such as Dwayne Johnson, who can work across the Endeavor "platform" to launch live event businesses, secure endorsement deals and licensing and merchandising pacts, as well as launch a YouTube channel and a production venture, all while WME helps him land top movie and TV roles.

...

The financial figures disclosed in the company's prospectus filed May 23 with the Securities and Exchange Commission show that Endeavor is burdened by heavy debt, steady losses in some units, negative cash flow and big capital needs for start-up efforts such as Endeavor Content and Endeavor Streaming.

After a spree of more than 20 acquisitions since 2012, Endeavor has more than doubled in size and now has 7,000 employees in 20 countries.

There are questions about the long-term health of the company's single biggest driver of earnings, the mixed

martial arts giant UFC.... And WME, the agency that's central to Endeavor's strategy of leveraging its access to top-tier talent, is in the thick of a nasty fight with the Writers Guild of America that threatens a key source of income: TV series packaging fees [charging a percentage of the budget of production plus a hefty piece of the upside; the Guild forced writers to fire their agents who would not accept a new code eschewing packaging fees in April of 2019]. The sudden loss of WME's writer clients in April, amid the industry-wide dispute, underscores the volatility of the talent representation business.⁴¹

That talent agency war with the Writer's Guild would seem challenging to say the least. Is it surprising that the offering was postponed until after the WGA's fractious elections in September of 2019? But after the Writers Guild reelected its incumbent leadership, signaling no change in that labor organization's stand against packaging commissions, Endeavor elected to resume its IPO, attempting to raise \$620 million on a valuation of \$18 billion. The offering price had been reduced by 15% but hope lingered. Then, on September 26, 2019, after Peloton faced awkward results with its attempt at an initial public offering, Endeavor CEO Ari Emanuel and his financial partners read the tea leaves and pulled their IPO off the market. Would the IPO return? Would Endeavor have to sell off assets to meet its debt obligations? Would a satisfactory resolution of the WGA impasse rekindle the offering?

The working relationship between agencies (represented by the Association of Talent Agents – ATA) and the WGA had been governed for 43 years by a negotiated Artists' Managers Basic Agreement. When that agreement expired, the Guild set about trying to force the agencies to restore their primary loyalty to the creative individuals behind everything Hollywood does. They demanded a new code of conduct from agencies. Packaging commissions and the ability to fund, operate and own production companies was, in the eyes of the WGA, an unsustainable conflict of interest. To the agencies, not being able to engage in this lucrative aspect of the entertainment industry represented an inability to attract and hold traditional investors, now desperately needed to support these huge new agency-based combinations.

Litigation between the Guild and ATA-member agencies intensified. Challenging traditional statutory and judicial antitrust exemptions accorded labor unions, agency giants WME, CAA and UTA claimed that the WGA had stepped outside of that exemption and was exerting unprotected market manipulation.

As of this writing, WGA has forced their members to fire their agents and attempted to allow lawyers and personal managers to negotiate for writers without licensed talent agents in the mix. But under an obviously archaic law, California forbids entertainment employment deals from being secured, or even negotiated, by anyone other than licensed talent agents... even by fully-licensed lawyers. While New York's restrictions are less draconian (but woe to the NY lawyer who sends a client to California to work without

an agent in the mix), the ATA announced to the world that they would inform the California Labor Commissioner (or its NY counterpart) as to lawyers and managers who were violating the law. Aside from being able to issue "cease and desist" letters, the California Labor Commissioner has let it be known that where there were such employment transactions, such unlicensed representatives were not entitled to be paid. Ugly! More disruptions seared through the entertainment universe.

The industry also found other material consumer patterns changing. Competition? Apples, oranges and video games? According to the April 11, 2019 *Variety*:

In a study of 94 countries, Eurodata estimated that average daily TV viewing time in 2018 was down only one minute from the previous year, although that number varied significantly from territory to territory – in the U.S. it decreased nine minutes, whereas in parts of Asia the number grew.

According to Eurodata Worldwide vice president [Frédéric] Vaulpré, "If we put this into perspective by looking at how these figures change over the long term, in the most recent years, viewing times around the world are down slightly, but are still at a comparable level to the early 2000s. The American continent and Europe have broadly exceeded the global average since the beginning of the 1990s. Over the last 25 years, daily viewing time has been stable in North America and has even increased in South America and in Europe. TV is in good health and is also benefitting from new consumer practices."⁴²

Nevertheless, there are little hints in those numbers. Nine minutes less in the U.S.? What does that really mean? Netflix sees the real competition for eyeballs only in part from other television programmers... but also from the massive growth of online video gaming. Gamers now average in their mid-30s and are 45% female. Netflix's January 17, 2019 shareholders' report is remarkably candid, making a special reference to the changing competitive landscape: "In the U.S., we earn around 10 percent of television screen time and less than that of mobile screen time," the report states, noting "a very broad set of competitors."⁴³ Then comes the line, "We compete with (and lose to) *Fortnite* more than HBO."⁴⁴

According to *Deadline*, which cites Nielsen estimates, *Fortnite*, a free-to-play game with in-game purchases, generated the most annual revenue of any game in history, \$2.4 billion in 2018.

...

Video games, in summation, shouldn't be written off. Do you know what the most lucrative piece of entertainment of all time happens to be? It's not a movie or a TV show. It's a video game, *Grand Theft Auto V*, which last April had **sold more than 90 million**

units (roughly \$6 billion). Now, gaming sales and movie ticket sales aren't exactly comparable statistics, but it's still an impressive number that is routinely lost in this conversation."⁴⁵

Nine minutes... and falling. Does streaming fit into the gaming universe? Of course!

Google has been testing a new app subscription bundle that gives users access to premium apps for one monthly price. Google Play Pass, as the subscription offering is being called, promises users "all play, no interruptions"

Google Play Pass, at is it being tested right now, costs \$4.99 per month, and promises access to "hundreds of premium apps and games without ads, download fees or in-app purchases."

There seems to be a heavy emphasis on games, with some of the titles shown on screenshots including "Marvel Pinball," "Stardew Valley," "Monument Valley," "Threes," "Star Wars: Kotor" and "Ticket to Ride," as well as kids games like "Elmo Loves 123s."⁴⁶

But competition battles are not just among and between entertainment conglomerates, governments and consumers. There are other forces seeking to redefine entertainment creative relationships from the ground up. Unions and trade associations, long used to some level of statutory and/or judicial relief from antitrust laws may not be happy with governmental agencies deciding to take another look at an industry that Donald Trump appears to hold in particular disdain. Try this little battle on for size:

The Justice Department has warned the Academy of Motion Picture Arts and Sciences that its potential rule changes limiting the eligibility of Netflix and other streaming services for the Oscars could raise antitrust concerns and violate competition law.

According to a letter obtained by *Variety*, the chief of the DOJ's Antitrust Division, Makan Delrahim, wrote to AMPAS CEO Dawn Hudson on March 21 to express concerns that the new rules would be written "in a way that tends to suppress competition."

"In the event that the Academy — an association that includes multiple competitors in its membership — establishes certain eligibility requirements for the Oscars that eliminate competition without pro-competitive justification, such conduct may raise antitrust concerns," Delrahim wrote.

The letter came in response to reports that Steven Spielberg, an Academy board member, was planning to push for rules changes to Oscars eligibility, restricting movies that debut on Netflix and other streaming services around the same time that they show in theaters.⁴⁷

But even as some biggies are being questioned, the potential of other biggies rising and dominating looms large. Opportunities or another set of gatekeepers?

Indeed, said the agents and lawyers generating income representing talent and rights holders, there's at least one more player who could change everything. One of the biggest companies on earth Apple! Perhaps?! On March 25, 2019, Apple CEO Tim Cook mounted the presentation stage and, after introducing a new Apple credit card format, proceeds to tout Apple's new streaming service. But what followed looked a whole lot like a standard "here's what next season will look like" that the major broadcast networks had been doing for decades. The industry was underwhelmed; you could hear the sigh from executives at Netflix, Amazon, Disney and AT&T.

How underwhelming? Netflix was widely expected to face a tough competitor in Apple's new Apple TV+ video streaming service. Finally! A competitor with really deep pockets. But instead of Netflix stock taking a hit on the announcement, the script was flipped: Netflix closed up 1.45% while Apple stock was down 1.2% at the end of the day.⁴⁸

By the time Apple made its next product announcement — iPhone 11 — in early September of 2019, it was pretty clear that the expected streaming service would be offering less than expected: "Apple set monthly prices for its TV+ video-streaming service and Arcade videogame-streaming service at \$4.99, largely undercutting rivals. TV+ comes free for a year with the purchase of a new iPhone, iPad or Mac, a perk that could get more people to buy a new device or upgrade. Apple can afford to discount the services because of the profits it earns on hardware and its distribution edge over competitors, with more than 1.4 billion devices in use world-wide."⁴⁹ They had promised a handy financial spending analysis tool, but that seemed delayed.

Are we having fun yet? Litigators perk up your ears. All of this consolidation may have received federal regulatory approval, but it does not vitiate private antitrust violations and the massive complexity that mergers have created for the acquiring companies. While the new behemoths might be able to mitigate the damage in new agreements with talent and rights holders going forward, these melded entities have to deal with upside agreements inherent in content deals they have now acquired. There are so many new inter-related entities, so many allocations and pricing decisions that are always questionable. No one really believes that "arm's length" pitch. The "Chinese wall" is made of see-through paper.

First, we all need to laugh at any of these new combined studios when they use the word "precedent," always the argument of a weak mind in stagnant times. For example, the day the 21st Century Fox/Disney deal closed, March 20, 2019, *all* Fox and Disney precedents died. Totally new company with a totally new structure. Still, Disney has announced all over the entertainment trades that they are placing all their high-profile content on their new streaming

services, with less than subtle hints that they will be able to do this at below market rates.

Two years ago, Disney withdrew all of its Disney/Marvel shows from Netflix. Netflix also let Disney know that they were no longer interested in any Disney content, anyway. A complete break? Not exactly. It seemed that way... until you really look: The “Walt Disney Co. parted ways with Netflix Inc. in a public declaration of war. The owner of ‘Star Wars,’ Marvel and Pixar movies would stop licensing films to the world’s most popular paid online TV network. Instead, Disney planned to keep them for its own streaming services.

“Yet the media giant left out a key detail: Under their current deal, every movie released between January 2016 and December 2018 — including epics such as ‘Black Panther’ — will be back on Netflix starting around 2026, people familiar with the matter said... Similar issues confront other media titans such as NBCUniversal and AT&T Inc., the owner of HBO and Warner Bros. Netflix, which has about 150 million subscribers worldwide, has some of their most-popular shows locked up for years.”⁵⁰

But the handwriting is on the wall in large lettering, and clearly Disney and its competitor-brethren streaming services are not about to continue to let their product enhance Netflix for long. In October, Disney announced that it would not accept advertising for Netflix on most of its owned channels. Ugly got uglier. Big companies feeding their own new or newly acquired services are absolutely going to use their best content to drive up the values of those nascent services. Not Netflix!

Folks who made deals with upside at Fox now are stuck in the Disney universe, and Disney participants are going to watch Disney build a network, probably by placing their work into a Disney streaming network at below market and alienating the other buyers by becoming their competitor. So, Disney can also claim that there are no other buyers for their controlled content.

Why do I think Disney will be dumping its best content into their streaming service at below what that content might otherwise generate in an open bidding? Their fee structure says it all. As Netflix upped its “basic” monthly subscription plan effective in May of 2019, to \$8.99, the “standard” plan (adding an additional device and HD) to \$12.99 and its “premium” plan (four devices and ultra-HD) to \$15.99 and Warner suggesting its HBO/Cinemax-driven SVOD service (probably going into a beta test in the fourth quarter of 2019 and fully online in the first quarter of 2020) would be between \$15-17/month, Disney was looking to begin with an exceptionally low price that should attract consumers. Even as Disney was bundling its Disney+ with Hulu and ESPN Plus for \$12.99/month, it still undercut both Netflix and HBO Max.

With pressure on Disney to justify its \$20 billion *increase* from their initial offer to acquire Fox (to \$71.3 billion), cost controls – from layoffs to cutting content-related expenditures – are the order of the day from both Wall Street and senior management. You can be pretty sure that they are not going to account to upside participants in a way that would reflect full market pricing for content placed on a start-up streaming service.

Disney is acutely aware of the issue. They know they will face challenges to their valuation of content from one division to another. So they have decided to “fix” their approach to upside, mirroring the Netflix practice of paying fixed per episode bonus sums for series that make it into a second or greater cycle but dumping any pretense of percentage upside. Many Beverly Hills mansions were financed with the percentage upside from hit television shows, but the handwriting is on the wall: the gravy boat is dead in a world of multiple silos of exploitation and open and endless streaming.

“The trade-off is that Disney would control all licensing of the series to local TV stations, cable networks, streaming services and foreign broadcasters, essentially buying out whatever share of profits are generated by those sources.

The new deal structure, the contours of which were reported by Deadline in July, is already getting push-back from agents and lawyers representing talent who believe it will substantially reduce income for creators whose shows became hits. Producers, who can get checks for their involvement in a project years after its initial run, are also skeptical.

“They didn’t punish Lucille Ball when ‘I Love Lucy’ was a massive hit 20 years after it was canceled,” said Propagate Content Chairman Ben Silverman, who has an ownership stake in “The Office,” which he developed the U.S. version of for NBC.⁵¹

Consolidation equals fewer, bigger conglomerates and less competition, even as a few new players enter the field.

And then there’s the short-content Quibi SVOD service from Jeff Katzenberg and Meg Whitman, noted above, that nobody seems to understand. Mostly small screen smart phone fare. Well-funded, with investments including from Warner Bros., Viacom, NBCUniversal, Sony and both U.K.’s BBC and ITV, Quibi is being sold as content for those “on the go.” But what would it look like, and how would it compete with the other streaming services? Scheduled to go live as 5G cell phones are rolling out, Quibi is betting on segmented series (two to four hours presented in ten or fewer minute bits) and mirrors Hulu in offering a variable pricing structure.

According to Katzenberg, the service will have two pricing tiers at launch on April 6, 2020. The first will cost \$4.99 with one pre-roll ad before each video segment — a 10-second ad if the video is less than 5 minutes and a 15-second ad for 5-10 minute videos. The ad-free option will cost \$7.99. Whitman also said they expect to have approximately 7,000 pieces of content available within the first year.

Quibi will pay [top content creators their] cost [of production] plus 20% up to \$6 million an hour.

In terms of ownership, two versions of each series will exist. The first will be the Quibi version divided into

segments, which will be owned exclusively by Quibi for seven years. At the same time, the creator of the project will edit together a full-length version with no segmentation. After two years, the creator will fully own the full-length version and can sell it globally.⁵²

Sounds very pricey for a start-up, but if the programming is good enough... A big maybe, even as their first effort in generating ad support seemed positive.

In mid-October of 2019, the company reported that they had booked \$150 million in ad sales towards their first year of operation, their entire first year ad inventory. “Advertisers that have committed ad spending to Quibi include Google, Procter & Gamble, PepsiCo, Walmart, Progressive and AB InBev, according to the company.”⁵³ A-list talent, creators and performers, were apparently drinking the Kool-Aid and signing on to produce content in droves. With all these streaming services, however, most experts are focusing on Disney+ as the likely winner in the SVOD race.

“Disney+ will launch in the U.S. on Nov. 12, 2019, and will be priced at \$6.99 per month, the company announced... The subscription VOD service represents Disney’s next major foray into the video-streaming wars. By pricing it well below Netflix, the Mouse House is betting it can rapidly drive up Disney+ customer base with a mélange of content that appeals to multiple demographics, including movies and TV shows from its Marvel, Lucasfilm’s Star Wars, Pixar and Disney brands.”⁵⁴ Obvious, yes. Subtle, no. Unlike the opposite result when Apple made its streaming announcement (Apple shares down, Netflix up), Wall Street rewarded the Mouse House the day after the above announcement with a stock rise of 11.5%, dropping Netflix shares by 4.5%. And that was *before* they acquired all of Hulu in May of 2019, a service that accelerates Disney’s digital streaming capacity.

Want a concrete example of how premium Fox/Disney product is driving Disney+? Love *The Simpsons*, the longest running scripted television series in U.S. history? Starting on November 12, 2019, all 30 seasons will *stream exclusively* on Disney+. Seasons 31 and 32 are already ordered; by the time season 32 ends, there will be a total of 713 episodes.

In its first year, Disney Plus will offer 10 original films and 25 original series, including three “Avengers” spinoffs... along with nearly all the “Star Wars” movies, the entire Pixar library and family-focused movies and shows from its Fox library like “The Sound of Music” and “Malcolm in the Middle.”

Disney said it intended to roll out the streaming service in Europe and Asia starting next year. It expects subscribers to total 60 million to 90 million by 2024... “We are all-in,” [Disney CEO Bob Iger said as he announced his plans].⁵⁵

While Disney touted an investment in original productions for the channel of \$1 billion in fiscal 2020, the content-devouring new channel would need to feast on Disney’s vast library at start-up-justified pricing. Represent

anyone having upside in a Fox or Disney product?

Smell the opportunity... and the risks? Does the back-end now involve puts, fixed payments against a percentage upside – box office bonuses in film and fixed sums as more series cycles are produced against points for TV. Litigators start your engines, from the fees one operating division of affiliate pays another – no matter what the contract appears to waive – to the allocations of revenues between commonly-controlled companies... to potential antitrust violations.

V. CONCLUSION.

If you aren’t shaking in your shoes, you should reread the above. Add to this quagmire the impact of bankruptcies past – from MGM to The Weinstein Company – to the bankruptcies that will inevitably ripple through the entire industry. Rights and income lost, as post-Chapter 11 libraries are now bought and sold like baseball trading cards.

Think of what cheap interest rates, a massive corporate tax cut and a voracious appetite for exclusive content have done to Hollywood. Do you think these massive shifts of corporate assets could have taken place in any other economic environment? And what do you think a recession will do to the best laid plans of mice and men?

One more factor facing entertainment conglomerates: with limits on immigration – once the main source for population growth in the United States – there also aren’t that many new Americans born every year to replace those that have died. Based on birthrates, we’re beginning to see signs of contraction, a clear trend in Japan and Western Europe. How does that translate into our industry? “Netflix badly undershot its subscriber forecasts for the second quarter of 2019 — posting its first net U.S. customer decline since 2011 while growth slowed considerably overseas. The company added 2.7 million subs worldwide, almost half as many as the 5 million it had projected....With the big miss, Netflix shares took a predictable hit, opening down 10% on [July 18, 2019].”⁵⁶ Netflix is depending on that competitive and highly regulated overseas growth while facing massive new competition in the United States. Not pretty. Saturated markets. Ouch!

Notice how I mostly skipped over social media? Oh, a little on privacy and a touch of “fake news” regulation, but the *phenomenon* of social media is now old news. While issues still abound, Europe and Asia will beat up Facebook, Twitter, Google, etc., etc. Don’t worry about it. But practicing law in this brave new world requires much more than complicated statutory and compliance. Pretty much everything has changed.

Now is not the time to use those same-old, same-old forms. Most forms are going to need a ground up redo. It is also not the time to take your last deal and up it by 10% on your next; deals are likewise going to require a ground-up revaluation, from cash upfront to upside or the very necessary substitutes we need going forward.

Entertainment lawyers, unite. Change is upon us. Change like we have never seen before. Hyper-accelerating change. Prepare! One more time: Equally, now is the time to laugh, and laugh hard, when some studio or network business affairs executive utters a word that needs to be banned from the entertainment industry forever: PRECEDENT. ■

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Art Law 101: Consignment Agreements

Thursday, May 7, 2020 | 1:00 pm to 2:30 pm Eastern – 90 minutes



This webinar is the first in a series of introductory webinars designed to examine the basics of art law. These introductory webinars will discuss various legal issues and developments that impact the art industry from the perspective of artists, dealers, collectors, galleries, auction houses, and museums.

This webinar will provide an overview of the issues applicable to art consignments, including issues of agency, security interests, fiduciary duties, and warranties. We will examine the intricate issues involving consignments between artist to gallery/dealer, gallery/dealer to gallery/dealer, collector to gallery/dealer, collector/artists to other vendors and digital venues. Through the examination of these relationships, we will present practical tips for negotiating these issues on behalf of your clients and drafting effective art consignment agreements.

Lead Facilitator



LeAnn Shelton,
General Counsel,
Rockwell Group, New York, NY

Speakers



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Michelle M. Wahl, Nicole O'Toole, Penny Driver, Alexa Tipton, Kyle E. Simmons, Esq., and Robert Reategui

DISPUTE OVER “STAIRWAY TO HEAVEN” RESOLVED IN LED ZEPPELIN’S FAVOR

It has been a year since the Ninth Circuit tossed the 2016 jury verdict finding Led Zeppelin’s “Stairway to Heaven” was not substantially similar and did not infringe upon Spirit’s song, “Taurus,” citing erroneous and prejudicial jury instructions and misleading the jury on key copyright laws.

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

The Ninth Circuit held that the District Court Judge failed to advise jurors that a combination of notes or scale may qualify for copyright protection, even when those individual elements alone may not, and erroneously advised that copyright does not protect short sequences of notes or chromatic scales. In its’ opinion, the Ninth Circuit held that the jury was improperly instructed about unprotectable musical elements and originality in the music space and recognized that while a single note may not be copyrightable, an arrangement of a limited number of notes can garner copyright protection. For these reasons, the Ninth Circuit held a new trial was warranted and further opined that during retrial, the District Court should revisit the issue of whether an inverse ratio jury instruction is merited. Application of the inverse ratio jury instruction would lower the standard to establish similarity between the two songs, to the extent defendant had access to the work purportedly copied.

The U.S. Copyright Office agreed with the District Court’s dismissal noting that “expressions that are standard, stock or common to a particular subject matter or medium are not protectable under copyright law.” In other words, although selection and arrangement might be protectable, “chromatic scales can never be independently protectable under copyright law.” According to the U.S. Copyright Office, only virtually identical copies of selection and arrangement would be prohibited, and given that “Stairway

to Heaven” and “Taurus” are not virtually identical, there can be no actionable copyright infringement. In light of that, the U.S. Copyright Office stated that the District Court’s jury verdict finding no copyright infringement and dismissing the suit should be affirmed.

Following amicus briefs filed in the Ninth Circuit by the Recording Industry Association of America and the National Music Publishers Association, 123 artists, the Nashville Songwriters Association International, the Songwriters of North America, and other organizations, joined the fight and also filed an amicus brief claiming they had a “significant interest” in this case’s outcome. These parties argued a ruling against Led Zeppelin would severely hamper artists’ creativity and promote excessive and unwarranted litigation. It was also argued that once you filtered out the generic elements of the two compositions, two entirely different songs remained. Additionally, these parties argue “although facts and elements in the public domain, as well as commonplace elements, if arranged in an original manner, may qualify for (thin) copyright protection, the component parts themselves do not become protected by copyright by virtue of their combination into a larger whole.” In other words, a ruling against Led Zeppelin would instill fear in all artists that works utilizing “descending chromatic scales, arpeggios or short sequences of three notes, or any elements in the public domain, could form the basis of an infringement action.”

Similarly, the U.S. government/Department of Justice agreed and filed its amicus brief providing that “the United States has an interest in the proper interpretation of the copyright laws, which foster innovation and creative expression by protecting the rights of authors to profit from their original works while simultaneously allowing the creation and dissemination of new works.” The U.S. government went on to state that the “United States has a particular interest in this case because it concerns the legal effect of depositing a complete copy of a work with the Copyright Office, an agency of the federal government, as well as the standard for originality applied by the Copyright Office in examining and registering copyrighted works.”

Stay tuned as we watch how this suit unfolds and the impact the ruling makes on artists and the music business.

DOES TAYLOR SWIFT NEED TO CALM DOWN?

Ten-time Grammy winning artist, Taylor Swift, has been making headlines, just ahead of the release of her upcoming seventh album, *Lover!*, for her feud with Music Biz 2018 Harry Chapin Memorial Humanitarian Award recipient and talent manager, Scott Samuel “Scooter” Braun. Braun is credited for discovering Justin Bieber on YouTube back in

2006, but the bad blood between Swift and Braun has to do with the master recordings for Swift's first six albums.

A "master recording" is the original recording of a song or album (as opposed to the composition itself). Typically, records labels own the master recordings to their artists' music, and then pay out a percentage of the sales to the artists, as well as to the other collaborators on the works, such as the musicians, back-up vocalists, producers, and arrangers.

Swift first signed with Big Machine Records in 2004 after founder Scott Borchetta discovered Swift singing at the Blue Bird Café in Nashville, TN. Borchetta convinced Swift to sign with him for the release of her first single, *Tim McGraw*, in 2005, even though he had no reputation or financial backing at the time. Big Machine Records offered to publish, manage, and merchandise Swift's first album in return for the ownership of her master recordings, which is not unusual for new talent in the industry. In fact, many of the biggest artists in the world to this day do not own their own master recordings.

As Swift's fame grew along with her bargaining power, owning her own masters became much more important to her, but, according to Borchetta, they could not come to an agreement as to ownership terms. After twelve years and six albums together, Borchetta put Big Machine on the market in October 2018 and Swift and Borchetta parted ways just one month later when Swift signed a new deal with Republic Records. An important clause in her contract with Republic was that Swift would own the master recordings for all of the albums produced under the label. So, while Swift will own all of the masters on her upcoming album *Lover!*, and any subsequently produced albums with Republic, Big Machine still has complete ownership of the master recordings for Swift's first six albums. According to Borchetta, all Swift had to do was stay.

On June 29, 2019, over seven months after Borchetta had originally put it on the market, it was announced that Big Machine Records' catalog was valued at \$300 million, largely due to its ownership of Swift's six albums, entered into a merger/acquisition with Scooter Braun and his company, Ithaca Holdings. Following the announcement, Swift immediately shared via Tumblr that she had teardrops on her guitar because her masters now being controlled by Ithaca's chairman, Scooter Braun. Thus ensued a battle of the artists.

While artists like Halsey and Katy Perry came swiftly to Taylor's defense and emphasized the importance of artists owning their art, others, such as Justin Bieber and Demi Lovato, stuck by Braun's side. So who is right? There are two clear and valid legal arguments here. In defense of Swift, many believe an artist should have the legal rights to the songs she creates. Swift had much more control over her music when she was still with Big Machine (including when she removed her music from Spotify for three years), and now Swift is worrisome what will happen to her years of hard work if her music is in the hands of somebody she distrusts. Swift, of course, is not the first artist to try to buy back her masters. In fact, some artists, including Rihanna and Jay-Z, have been successful in doing so. In defense of

Borchetta, he donated years of his life and risked hundreds of thousands of dollars from investors into helping create Swift's career. Under simple principles of contract law, ownership of Swift's master recordings seemed like a fair and equitable bargained-for exchange.

To date, Taylor Swift has not filed suit against either Big Machine or Scooter Braun. However, she would not be the first artist to do so – artists from Bruce Springsteen to Todd Rundgren know this battle all too well. On July 27, 1976, Springsteen filed a lawsuit against Laurel Canyon, Ltd., owned by his manager Mike Appel, over ownership of Springsteen's work. The suit eventually settled in 1977 after Appel and Springsteen agreed, to the tune of \$1,000,000, that they were never getting back together. At first glance, it seems that Swift would not have a cause of action, as she willingly entered into an industry standard contract with Big Machine, and knowingly walked away from her rights to own her masters when she signed with Republic last November. However, Swift has proven to be pretty fearless, so who is to say what she will do next.

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DJ KHALID V. BILLBOARD

Introduction

In May 2019, the Billboard charts took four extra days to name the number one pick of the week for the Billboard 200 album chart. Tyler the Creator and DJ Khaled were battling head to head for the number one spot. Molanphy, Chris. "DJ Khaled vs. Billboard May Be a Breaking Point in the Merch-Bundle Chart Wars." *Vulture*, *Vulture*, 14 June 2019. Billboard bases its picks on how well the album sells and in the 21st century, album sales have changed from how many units are sold off the shelves in stores to number of times the album is digitally downloaded and/or streamed. *Id.* In this instance, merch bundles contributed to the number of digital downloads and streams. *Id.* Each of these artists had their own merch bundles: Tyler the Creator merch bundle was the combination of purchasing lawn signs, stickers, and/or T-shirts that came with digital downloads of his latest project *Igor*; and DJ Khaled merch bundle was the combination of purchasing a Khaled-branded energy drink with a download of his latest project *Father of Asahd*. *Id.*

Four days later, Billboard decided that Tyler the Creator was number one for the Billboard 200 album chart. *Id.* According to Page Six, Billboard agreed to count downloads from Khaled's energy drink merch bundle and later backtracked and disqualified his entire sales arguing "anomalies" in his figures. *Id.* Khaled's lawyers sent a letter to Silvio Pietroluongo, SVP of charts and data development at Billboard. *Id.* DJ Khaled appealed Billboard's decision but it was to no avail. Now, Khaled wants to pursue a lawsuit against Billboard alleging the organization unfairly

disqualified his album sales, which cost him the number one spot on the Billboard chart. *Id.*

Merch Bundles

Merch bundles are packaged deals where artists sell their album alongside merchandise, such as concert tickets, energy drinks, lawn signs, and t-shirts to boost sales. This idea was first introduced by Prince over ten years ago. He bundled his album, *Musicology*, with tickets to his 2004 concert. “Later that year, *Billboard* announced a new bundled-album rule: Any such offer had to give the consumer a way to opt into the album, an indication of intent to actually consume the disc.” Maduakolam, Emmanuel. “DJ Khaled’s Energy Drinks Album Bundle Sales Were Disqualified Towards Billboard 200.” *HYPEBEAST*, *HYPEBEAST*, 10 June 2019. *Billboard* made it clear that albums offered as part of a bundle only count towards the sale once the buyer opts-in and redeems it. *Id.*

Many artists bundle their album with merchandise to “(1) replace income that used to come from selling music, and (2) boost chart position.” Leight, Elias. “Album-Merch Bundles Don’t Make Much Money, But Rappers Like Them Anyway.” *Rolling Stone*, 21 Jan. 2019. Artists do what it takes to raise the value of each transaction, so why not sell merchandise with your album so you can make \$40 for the album and merchandise instead of \$10 just for the album. *Id.* “In a streaming-centric landscape, physical sales and album downloads have perversely taken on more weight. *Billboard* requires 1,250 subscription streams to yield the equivalent of one sale — a fan with a Spotify subscription needs to listen to A Boogie wit da Hoodie’s new album more than 60 times during release week to achieve the same impact as one purchase.” *Id.* These merch bundles provide artists the opportunity to increase their revenue and sell albums simultaneously.

This is not the first dispute over merch bundle album sales and topping the *Billboard* charts. You may remember Nicki Minaj going on Queen Radio expressing her displeasure with Travis Scott being named number one when she dropped her *Queen* album and Scott dropped *Astroworld*. Levy, Lauren. “We’re Living through the Merch Bundle Wars.” *The FADER*, *The FADER*, 18 June 2019. Travis Scott’s merch bundle included key chains, hats, and concert tickets with a download of *Astroworld*. Nicki Minaj’s merch bundle was announced on Queen Radio and included the Queen Priority Pass (e.g., for \$10, the same price of a single album, it granted access to upcoming exclusive merch, priority entry into future concerts, and, most importantly, a digital download of *Queen*). *Id.*

Merch bundles make more sense for the consumer, especially when the artist is offering concert tickets and a digital download. Leight, Elias. “Album-Merch Bundles Don’t Make Much Money, But Rappers Like Them Anyway.” *Rolling Stone*, 21 Jan. 2019. It could be a win-win for both the artist and the consumer if the artist gets the number one spot on the *Billboard* chart and the consumer not only has the digital download but also gets to see the artist in concert. *Id.* *Billboard* allowing these merch bundles into consideration for the number one spot on the album chart

has been under scrutiny for years with *Billboard* revising the rules of merch bundling as each new circumstance arises. *Billboard* has plans to revise the current merch bundle policy and release it in 2020. Team, Page Six. “DJ Khaled Planning Monster Lawsuit against *Billboard* Chart.” *Page Six*, *Page Six*, 10 June 2019.

Being Number One is still really important not just to the labels, but to the artists themselves,” says Larry Miller, Director of the Music Business Program at NYU Steinhardt. DJ Khaled partnered with Shop.com to sell his merch bundles of purchasing energy drinks with download of *Father of Asahd*. Leight, Elias. “Album-Merch Bundles Don’t Make Much Money, But Rappers Like Them Anyway.” *Rolling Stone*, 21 Jan. 2019. Shop.com corporate parent is Market America. HypeBeast reported that Market America made attempts to encourage mass purchases and gave the incentive of ‘material and organizational benefits’ to their members according to Deanna Brown, president of the *Billboard*-Hollywood Reporter Media Group. Maduakolam, Emmanuel. “DJ Khaled’s Energy Drinks Album Bundle Sales Were Disqualified Towards *Billboard* 200.” *HYPEBEAST*, *HYPEBEAST*, 10 June 2019.

DJ Khaled and his team tried to appeal the number two spot on the *Billboard* 200 album chart but it was to no avail. Team, Page Six. “DJ Khaled Planning Monster Lawsuit against *Billboard* Chart.” *Page Six*, *Page Six*, 10 June 2019. *Billboard* did not even budge on their stance and *Father of Asahd* remained number two in the charts. *Id.* DJ Khaled took his frustrations to social media where there was conversations of him and Tyler the Creator having “beef.” *Id.* As of now DJ Khaled denies any allegations of having “beef” with Tyler the Creator and says his issue is with his label not fighting harder for him to have the number one spot and with *Billboard* for going back on their word. *Id.*

Conclusion

Being that the current policy of merch bundles is under construction, DJ Khaled would most likely not win against *Billboard* if he pursued a lawsuit against them. It is noted that the corporate parent who provided the Khaled-branded energy drinks were encouraging mass purchases in order for the album to go number one. This does not fall within the guidelines of the policy set out by *Billboard* and therefore their reasoning to disqualify Khaled’s album sales is justified.

THE WAR ON ISPS CONTINUES

The music industry has long fought the battle to stop unauthorized downloading of music, which initially focused on the Napsters and Aimsters of the world who were offering peer-to-peer file sharing platforms. The level of unauthorized copying increased so dramatically that the industry had no other viable option but to file claims against individual infringers in hopes that others would take notice, appreciate the risk and stop infringing, too. Twenty years later and the industry is still fighting the good fight. However, the focus no longer lies with the individual user, but rather, the Internet Service Providers (ISPs) who provide Internet

connectivity, and thus, opportunity to infringe, to their respective users.

The move to focusing on ISPs began when BMG sued Cox Communications in 2014. At that time, Cox had millions of subscribers, who according to BMG, were making unauthorized copies of musical works using Cox's services. More importantly, and most detrimental to Cox, BMG argued that Cox failed to police, let alone stop, the infringing activities. Without hesitation, Cox argued the Digital Millennium Copyright Act's ("DMCA") safe harbor provision, which can shield ISPs if they show they took the necessary and appropriate steps to protect against repeat offenders.

The case was tried in December 2015, with the jury finding in favor of BMG. In reaching its decision, the jury concluded that subscribers used Cox's service to infringe copyrighted works and that Cox was liable as a contributory infringer for the acts of its subscribers. BMG was awarded \$25 million in damages.

Following BMG, other industry players have brought cases against ISPs alleging both contributory and vicarious liability for copyright infringement by the ISP's subscribers. Already, cases are set for trial against Grande Communications and Charter Communications in 2020. In fact, several other record labels have filed suit against Cox based on alleged copyright infringement of their own copyrights, which may be tried as early as December 2019. Will one of these suits be the first to establish vicarious liability against the ISP? Thus far, cases against ISPs have prevailed only on the theory of contributory infringement. To establish vicarious liability, the labels must show the ISP has the ability and right to actually supervise the infringing activity of its users and that the ISP has a direct financial interest in the infringing activity. The latter is certainly no simple task and will be difficult facts to plead, since a user is a user, regardless of infringing activities and according to the ISPs, is charged the same subscription fee. Feeling its odds were fairly good, Charter Communications moved to dismiss the vicarious infringement claims filed against it by Warner Bros. The Judge, on the other hand, felt otherwise. Instead, the Judge held that the labels adequately alleged Charter Communications had a direct financial interest in the infringing activities of its subscribers, simply by showing Charter Communications failed to stop or take action in response to the notices of infringement and that inaction was a draw to current and prospective subscribers to purchase and use Charter Communications' services to pirate the label's copyrighted works. Additionally, the labels argued that Charter Communications had the ability to terminate internet access, which sufficed to show Charter Communications had the right and ability to supervise infringement by its subscribers. Charter Communications has since objected to the denial of its motion to dismiss, which is now subject to district court review. Although the labels have obtained notable victories in this realm, whether they will be able to continue those wins against the ISPs and hold the ISPs themselves liable for subscriber infringement, is yet to be seen.

THE COST OF FREE AIRTIME: WHY TERRESTRIAL RADIO CAN NO LONGER BE EXEMPTED FROM PERFORMANCE ROYALTIES

Terrestrial radio has long been exempted from paying performance royalties due to the longstanding argument from broadcasters that performers and labels benefit from the free promotion of their music during radio airplay. Under current legislation, terrestrial radio is not required to pay performance royalties to the performing artist nor sound recording copyright owners, however, broadcasters are still required to pay royalties to the songwriters, composers, and publishers. Broadcasters argue that radio airtime increases album sales because listeners will buy the music that they hear on the radio leading to compensation for performers and record labels. While the argument that radio airplay increases music sales has held up in the past, "streaming services now comprise seventy-five percent of recorded music revenue and have become the primary sources of tastemaking and music discovery in the industry." (Larry Miller, *Terrestrial Radio Ducks Music Modernization Act, But Still Must Face the Music*, Billboard (Oct. 5, 2018), <https://www.billboard.com/articles/news/politics/8478501/terrestrial-radio-music-modernization-act-essay>). For example, "In My Feelings" by Drake, received eighty percent of chart points from streaming during its debut week, and after ten weeks was no longer No. 1, but saw three times the amount of radio airplay it received when it debuted. *Id.* Although radio may have extended the life of the song, radio airtime did not provide its initial popularity. Based on this finding, along with record sales falling eighteen percent since 2000, broadcasters can no longer free ride based on the argument that airplay leads to an increase in record sales. (Miranda Bullard, Note, *An International Perspective: Why the United States Should Provide a Public Performance Right for Non-Digital Audio Transmissions*, 30 TEMPLE INT'L & COMP. L. J. 225, 249 (2019)). Instead of purchasing albums, it is more common for individuals to stream their favorite music through services such as Spotify and Apple Music. What is most alarming about terrestrial radio's exception is that internet, satellite and cable radio are all required to pay performance royalties even though these mediums can apply the same argument that terrestrial uses to abstain from paying performance royalties. Although terrestrial radio provides exposure for artists, this does not excuse the radio from using their work without paying. Terrestrial radio benefits directly from the use of their music by gaining listeners based on the songs that they choose to play. Allowing radio to exist as the only medium that does not pay performers is an injustice to the artists who bring in revenue for broadcasters.

With the passage of the Music Modernization Act in 2018, artists expected that this draconian practice would end; however, due to the National Association of Broadcaster's extensive lobbying, compensation for terrestrial radio was excluded from the Act. This omission negatively affects musicians on an international scale. The United States is one of four countries that does not compensate performers

for airplay, alongside North Korea, Iran, and China. Since the U.S. does not provide full performance rights for artists, U.S. musicians do not receive royalties when their music is played on foreign radio stations. The U.S. is a net exporter of recorded music with many countries importing between 20-50% of American music. *Id.* This exemption for radio stations results in losses of as much as \$100 million annually for United States musicians and labels while injuring the U.S. economy and limiting international growth of a profitable industry. (*Public Performance Right for Sound Recordings*, FUTURE OF MUSIC COALITION (Mar. 5, 2018), <https://futureofmusic.org/article/fact-sheet/public-performance-right-sound-recordings>).

Not only does this negatively impact American artists, broadcasters' exemption from performance royalties hurts U.S. consumers as well. The government is in effect subsidizing terrestrial radio by allowing broadcasters to refrain from compensating performers, and penalizing streaming and other services by requiring them to pay performance rights. Streaming allows consumers to choose exactly what songs they want to listen to and create curated playlists according to their individual music taste, making this service an arguably better alternative to radio. Even satellite radio is required to pay performance rights despite this medium providing a similar service to terrestrial radio, but includes the added benefits of national coverage and a wider range of stations. The government is making it more costly for new services to operate while these services have the potential to bring greater benefit to consumers than traditional radio. Thus, these alternate mediums lose out on their chance to grow and become sustainable when the government forces them to pay higher royalties than their competition. It is counterintuitive that webcasters are required to pay a public performance royalty to songwriters and performers, while terrestrial radio is not. If these technological advancements are quashed by the government, performers and consumers will fail to benefit from emerging technologies while older revenue streams for artists collapse.

As a solution to this problem, artists and record labels have formed private agreements with broadcasting organizations. Under these deals, broadcasting companies agree to pay for over-the-air performance of masters in exchange for a reduced rate on digital performances. In 2013, Clear Channel announced several private deals with independent record labels including Big Machine Label Group and Warner Music Group, one of the largest record labels. *Id.* Although these agreements are a step in the right direction for artists, they still do not provide a solution for the millions of dollars musicians are losing in foreign performance royalties.

Because artists receive revenue through streaming and satellite radio, they will focus their efforts on maintaining listeners through these mediums instead of terrestrial radio. While this, along with private agreements with broadcasting companies may provide a domestic solution, an artist will continue to lose out on foreign performance compensation. Therefore, by excluding a requirement for terrestrial radio performance royalties, the Music Modernization Act has failed to fully protect performers' rights domestically and abroad.

DOWNTOWN MUSIC PUBLISHING LLC, ET AL. V. PELOTON INTERACTIVE, INC.

Court Docket, *Downtown Music Publishing LLC, et al. v. Peloton Interactive, Inc.*, No. 1:19-cv-02426-DLC, (S.D.N.Y. Mar. 19, 2019) (Bloomberg Law).

Peloton, the defendant in this case, is a company that sells stationary bikes and treadmills that allow users to participate in instructor-led video workouts while competing against other class participants and viewing performance metrics. Peloton sells subscriptions for its video content library to consumers who have purchased a bike or treadmill and those who have not. A component of these instructor led classes is music. Instructors choose music for their classes by creating playlists of songs and speaking over the music during class to provide real-time coaching. Downtown Music Publishing, along with several other music publishing companies who join as plaintiffs, allege that Peloton "used more than 2,000 musical works owned or administered by Plaintiffs over a period of years in the videos that it makes available to its hundreds of thousands of customers without a synchronization (or 'sync') license for a single one of those songs." Plaintiffs seek to enjoin Peloton's ongoing infringement of copyrighted musical works that are owned or administered by Plaintiffs and to recover statutory damages resulting from this infringement. Plaintiffs further allege that although Peloton is reported to have a value close to \$8 billion, only 0.3% of Peloton's total revenue is used to pay rightsholders for the music that has driven Peloton's success. Peloton denies these allegations.

Peloton maintains that it has sought and obtained licenses from "all the 'major' record labels and many independent labels." Additionally, Peloton contends that it has sought and obtained licenses and is paying "all the 'major' publishers, many independent publishers, and the performing rights organizations representing all the songwriters and publishers whose music Peloton streams." Defendant admits that "it does not currently have catalog-wide synchronization license agreements with any of Plaintiffs, but it avers that it has limited-use license agreements with some of the Plaintiffs." The issue that arises in this case is that traditional sync licenses are ill-suited for the service that Peloton provides. Specifically, traditional sync licenses are issued individually per composition in advance of exhibition of the content. Because Peloton's instructors plan their classes days and sometimes only hours in advance, a catalog-based reproduction rights clearance works better for their services. Peloton claims that it has worked proactively and collaboratively with the music publishing industry to develop a licensing structure to address this issue.

Peloton counterclaims that because of "the anticompetitive and tortious conduct of the Counterclaim Defendant, National Music Publishers' Association, Inc.," (NMPA) it has been unable to negotiate with music publishers regarding the licensing of their music. Peloton claims that NMPA and the Coordinating Publishers have violated Section 1 of the Sherman Act which makes illegal a contract, combination or conspiracy in restraint of trade. (15 U.S.C. §1). Additionally, Peloton counterclaims tortious interference

with prospective business relations in violation of New York State Law, specifically against NMPA.

Peloton entered into negotiations with NMPA after NMPA, in an April 9, 2018 letter, announced its intention to collectively negotiate a licensing arrangement on behalf of an untold number of its member companies and accused Peloton of infringing uses of works owned at least in part by other unnamed NMPA members. Peloton alleges that NMPA threatened Peloton that if it did not engage with NMPA, it would turn many in the music publishing industry against Peloton. A point of disagreement between the two organizations was that NMPA insisted Peloton compensate all NMPA's member publishers that they had not previously entered into agreements with, regardless of whether Peloton would use these songs controlled by every NMPA member publisher. Additionally, NMPA demanded that Peloton deal only through NMPA instead of the individual member publishers and Peloton felt "it had no choice but to accede" to NMPA given its refusal to identify the publishers it claimed to represent in negotiations. Peloton alleges that NMPA did not negotiate in good faith and deliberately obfuscated to member publishers the substance of its discussions with Peloton, specifically by misrepresenting Peloton's positions during the negotiations and further, by telling its members that Peloton withdrew from negotiations and that it was unwilling to further engage. Peloton claims that NMPA ceased negotiations and refused Peloton's offer in late 2018 to travel to meet with NMPA in person at its offices in Washington, D.C. Further, in early 2019, after Peloton reached out to pursue licenses directly with several music publishers, they also suddenly ceased communications with Peloton. This was instigated by NMPA, according to Peloton.

NMPA as a Vehicle of Collusion

Peloton argues that as horizontal competitors, the coordinating publishers have joined together to take advantage of the collective weight they exert in the industry at the instigation of NMPA. NMPA represents nearly the entire United States music publishing industry. The Coordinating Publishers, initiated by NMPA, have engaged in collective negotiations of license terms and exchanged information with each other about these negotiations, including competitively sensitive information. Peloton alleges that NMPA has organized separate "backroom" meetings involving the Coordinating Publishers in furtherance of their collusion, in which music publishers with whom Peloton had existing licenses were excluded under NMPA's direction.

Peloton then entered into negotiations with the Harry Fox Agency (HFA), a rights-management agency that provides music publishing licensing and rights administration services. HFA agreed to (1) assist Peloton with identifying musical works and to provide U.S. publisher information and ownership shares associated with the identified musical works; and to (2) assist Peloton with identifying musical works that have been licensed 100% under direct worldwide synchronization licensing agreements between Peloton and numerous publishers on a catalog-wide basis in connection with Peloton's platform. Suddenly, HFA ceased

communication with Peloton. The President of HFA stated that HFA was under "a ton of pressure not just from D.C. but also from New York" to stop working with Peloton. Peloton asserts that this means both NMPA and other members of the publishing industry affiliated with NMPA were pressuring HFA to cease negotiations with Peloton.

Peloton claims it is in the Coordinating Publisher's best interest to negotiate with Peloton. However, when negotiating through NMPA, the Coordinating Publishers share a common understanding that they will refrain from competing with each other for access to the copyrights they control, thus they seek to enjoy supracompetitive prices for their licenses. Therefore, through collusion, NMPA and the Coordinating Publishers are acting as a cartel "such that (i) any collectively negotiated payments amount to a form of price fixing between horizontal competitors, and (ii) their concerted refusal to deal with Peloton amounts to a group boycott."

Peloton cites *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.* to distinguish this case from previously upheld collective licensing agreements. The Supreme Court has permitted collective licensing through ASCAP and BMI to survive antitrust challenge, while subject to consent decree protections for licensees, only because their licenses claimed to provide "unplanned, rapid, and indemnified access" to the works in those collectives' repertoires (*Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 20 (1979)). However, this case is distinguishable because NMPA does not offer indemnified access to the collectively negotiated copyrights since the licensees must still secure reproduction rights from any other co-owners of those works and NMPA's collective acts are not subject to regulatory safeguards provided by the ASCAP and BMI consent decrees.

The competitive harm that Peloton alleges is that music users are forced to pay supracompetitive prices for licenses to the collectively negotiated copyrights or are foreclosed from the licensing process altogether. Because of the NMPA and Coordinating Publisher's unlawful agreements, the following effects have occurred: price competition for the collectively negotiated copyrights has been restrained, suppressed, and/or eliminated in the United States; prices for the collectively negotiated copyrights have been fixed, raised, maintained, and stabilized at artificially high, non-competitive levels throughout the United States; and Peloton has been deprived of the benefits of free and open competition.

In regard to NMPA's tortious interference with prospective business relations, Peloton urges that NMPA acted with the purpose of harming Peloton and as a direct and proximate result of NMPA's wrongful conduct, music publishers ceased negotiations with Peloton. Peloton will suffer irreparable injury and loss of business and property thus, Peloton is asking this court to permanently enjoin NMPA from its tortious conduct.

Although Peloton did not obtain licenses for the music that it used in its classes, it seems that NMPA has made it nearly impossible for Peloton to obtain these licenses. It is possible that with the passage of the Music Modernization

Act and the creation of a public database that includes information to link sound recordings with their underlying musical works, the issues outlined by Peloton will be relieved. However, it will be impossible to obtain licenses for the use of sound recordings after their musical works have been identified if the music publishers refuse to negotiate with Peloton. The results of this case have the potential to greatly impact music publishers. No matter the outcome, Peloton, and companies that offer similar services, will have to work alongside music publishers in order to develop a comprehensive licensing structure to avoid similar suits in the future.

IS DIRECTV'S NFL SUNDAY TICKET IN VIOLATION OF §2 OF THE SHERMAN ACT?

The U.S. Court of Appeals for the Ninth Circuit overturned the District Court, holding that the plaintiffs can move forward with their case to determine whether Direct TV's package to watch National Football League (NFL) games are in violation of the Sherman Antitrust Act.

Antitrust laws are designed to encourage competition amongst businesses. The notion is that with competition the consumer will get a better price. The concern with antitrust laws comes when businesses that were supposed to compete against one another instead conspire with one another to increase profit shares.

The issue paramount to this case is in fact an antitrust problem with the Sunday Ticket and, with the NFL combining the broadcasting of games into bundled deals with NBC, CBS, Fox and ESPN. These actions preclude individual NFL teams from competing with one another in the broadcasting of games to out-of-town markets. (Michael McCann, Why DirecTV's NFL Sunday Ticket Might Be Illegal Under Antitrust Law, on (August 14, 2019) at (<https://www.si.com/nfl/2019/08/14/nfl-sunday-ticket-directv-antitrust-violation-lawsuit>)). The NFL bylaws forbids its teams from competing over broadcast rights especially in other team's home territories. "Home territories are defined as a 75-mile radius around a city where an NFL team plays, thus the NFL gives each team a de facto monopoly of the broadcasting rights for that area." (Michael McCann at 2-3.).

The Sports Broadcast Act of 1961 (SBA) expressed that the NFL and its teams, along with the NBA, MLB and NHL and their respective teams, enjoy a limited exemption from Section 1 of the Sherman Act. Under the exemption, Section 1 does not apply when a league negotiates a national TV contract with a network that provides "sponsored telecasting" of games. In other words, selling the rights to CBS, NBC and ABC was acceptable under the SBA.

On the contrary, the SBA does not permit the NFL from selling the rights to channels that require the consumer to subscribe and pay a fee are not exempt from Antitrust Liability. (*In Re: National Football League's "Sunday Ticket" Antitrust Litig.*, F.3D, NO. 17-56119, 2019 WL 3788253 (9th Cir. Aug. 16, 2019)). And herein lies the first problem for the NFL because it would appear on its face that the NFL has restricted its teams from competing.

The second issue is two Supreme Court cases that serve as precedent for this matter. The first is, *American Needle*

Inc. v. National Football League, 560 US 183 (2010), where the Supreme Court held that each NFL team is a substantial, independently owned, and independently managed business, whose objectives are not common. The Court also reasoned that while the actions of NFL as a whole are not as easily classified as concerted activity, its decisions about licensing are a concerted activity and, thus, are covered by Section 1 of the Sherman Act.

The second U.S. Supreme Court case is *Nat'l Collegiate Athletic Ass'n v. Bd. Of Regents of Univ. of Oklahoma*, 468 U.S. 85, (1984) (NCAA). The Court concluded that the NCAA violated antitrust laws by restricting telecasts of games. The court added that the restraint on the broadcasting of games unlawfully prevented schools from the freedom to compete in broadcasting.

This case could lead to further prosperity of each team with the broadcasting of games. It also has the potential for consumers to see their favorite teams play even when not in the same locale. Luckily for the NFL, the DirecTV deal ends in 2021, which could make this case moot. NFL could also abolish the bylaw forbidding teams from competing in other team's home territories as a solution that would eliminate the conspiracy to limit competition in the broadcasting of games.

SPORTS FUEL: PURELY DESCRIPTIVE OR TRADEMARK INFRINGEMENT

SportFuel, a sports nutrition and wellness consulting firm who serves professional and amateur sports teams and their athletes, filed a trademark application for their company name in 2013. In 2015, the SportFuel mark registered for goods and services related to dietary supplements and sports drinks enhanced with vitamins.

In 2016, Gatorade adopted the slogan, "Gatorade The Sports Fuel Company" and sought to register the slogan as a trademark with the USPTO. The USPTO advised that the phrase is merely descriptive of its products. As a result, Gatorade disclaimed exclusive use of "The Sports Fuel Company" as part of this registration. (Robert Channick, Gatorade prevails in trademark lawsuit over 'Sports Fuel' name, Chicago Tribune, last accessed on (October 20, 2019) at (<https://www.chicagotribune.com/business/ct-biz-gatorade-trademark-lawsuit-sports-fuel-20180618-story.html>)).

SportFuel filed suit against Gatorade and its parent company, PepsiCo, in August 2016, alleging, among other claims, trademark infringement. SportFuel also alleged that Gatorade was fully aware of the SportFuel company and intentionally copied and marketed the offerings for the sale of supplements, sports drinks and other products. (Channick at 4.).

"Trademark infringement is the unauthorized use of a trademark or service mark on or in connection with goods and/or services in a manner that is likely to cause confusion, deception, or mistake about the source of the goods and/or services." (USPTO, About Trademark Infringement, last accessed on (October 20, 2019) at (<https://www.uspto.gov/page/about-trademark-infringement>)). To prevail, the plaintiff has to prove that the infringement has in fact caused confusion in the marketplace.

Gatorade, on the other hand, offered an affirmative defense, citing the Lanham Act's defense of fair use. The Lanham Act, also known as the Trademark Act of 1946, federalized the common law's trademark protections. It also established affirmative defenses such as fair use. (*SportFuel, Inc. v. PepsiCo., Inc.*, No. 18-3010 (7th Cir. Aug. 2, 2019)). Essentially, the fair use doctrine is that no one person or company should be able to appropriate over language that is descriptive in nature. (*Packman v. Chicago Tribune Co.*, 267 F.3d 628, 639 (7th Cir. 2001)). To prevail on the defense, PepsiCo and Gatorade had to establish that (1) they did not use the term as a trademark, (2) the mark was actually descriptive of their good and services, and (3) they used the mark in good faith only to describe their products (*Sorenson v. WD-40 Co.*, 792 F.3d 712, 722 (7th Cir. 2015)). This case would be decided on elements two and three.

Gatorade established by the facts that the term "Sports Fuel" simply describes its new product line. Moreover, Gatorade had disclaimed exclusive rights to the phrase "The Sports Fuel Company" and in terms of marketing materials G-bot design mark was prominent where the "The Sports Fuel Company" verbiage appeared more so as a subtitle or caption. (*SportFuel, Inc. v. PepsiCo., Inc.* at 6-12.)

SportFuel also alleged that because Gatorade knew of SportFuel as a company and had attempted to trademark the term "Sports Fuel" that Gatorade was acting in bad faith. The court held that Gatorade disclaimed any exclusivity to the term and that the use of terms was done merely to describe the products that Gatorade provides. The court did not agree with SportFuel and summary judgment was granted to Gatorade.

This case is important because it shows that so long as trademarked terms are used in a descriptive manner and that it is done in good faith the courts will likely allow for its use.

NIRVANA'S SMILEY FACE TAKES ON MARC JACOBS

Nirvana, an iconic band from the 90s, is often associated with the infamous "smiley face" logo. Last November, Marc Jacobs released the "Redux Grunge" collection, which included a \$115 t-shirt dubbed the "Bootleg Redux Grunge." Michelle Kaminsky, *Nirvana Sues for Copyright Infringement Over Marc Jacobs' Grunge Redux Collection*, Forbes (Dec. 31, 2018), <https://www.forbes.com/sites/michellefabio/2018/12/31/nirvana-sues-for-copyright-infringement-over-marc-jacobs-grunge-redux-collection/#34b3b39b24e2>. This "grunge" collection also featured a sweatshirt and socks which used the smiley face logo. TMZ, *Nirvana Sues Marc Jacobs ... YOU JACKED OUR FAMOUS SMILEY!!!*, (Dec. 28, 2018), <https://www.tMZ.com/2018/12/28/nirvana-sues-marc-jacobs-stealing-grunge-smiley-face-design/>. The Marc Jacobs version of the trademark used an "M" and "J" instead of Xs for the eyes, and it reads "HEAVEN" instead of "Nirvana" with a similar font. Bonnie Stiernberg, *Nirvana Sues Marc Jacobs Over Smiley Face Design*, Billboard (Dec. 29, 2018), <https://www.billboard.com/articles/news/8491738/>

nirvana-sues-marc-jacobs-over-smiley-face-design.

In the complaint, Nirvana, LLC attached its design and logo, which was created by Kurt Cobain in 1991 and registered for copyright protection in 1993. *Nirvana LLC v. Marc Jacobs International, LLC, et al.*, No. 2-18-cv-10743, at 3 (C.D. Cal.), <https://www.digitalmusicnews.com/wp-content/uploads/2011/07/Nirvana-LLC-v-Marc-Jacobs.pdf>. Nirvana, LLC sought various forms of relief for several claims, including copyright infringement, and false designation of origin under the Lanham Act. *Id.* at 9-12. Marc Jacobs' lawyers answered with a motion to dismiss on March 8, 2019 arguing that: (1) Nirvana, L.L.C. is not the legitimate owner of the copyright registration, (2) Kurt Cobain was the creator and that it was unclear if Cobain transferred ownership of the copyright to the band, and (3) the brand did not copy copyrightable aspects of the logo. Matthew Strauss, *Marc Jacobs Responds to Nirvana Smiley Face Logo Lawsuit, Requests Dismissal*, Pitchfork (Mar. 11, 2019), <https://pitchfork.com/news/marc-jacobs-responds-to-nirvana-smiley-face-logo-lawsuit-requests-dismissal/>. The case is ongoing, but Marc Jacobs continues to sell a Bootleg Grunge t-shirt and sweatshirt in their collection.

MEAT LOAF WOULD DO ANYTHING FOR LOVE (EVEN SETTLE)

Michael Lee Aday (formerly Marvin Lee Aday), best known by his stage name Meat Loaf, was recently involved in a copyright lawsuit. In a 1993 interview with *Rolling Stone*, Aday recalled being called "Meat Loaf" when he was 10 years old growing up in Dallas, Texas. Chris Mundy, *Interview: Meat Loaf, The man who saw paradise by the dashboard light is back with 'Bat out of Hell II,'* Rolling Stone (November 25, 1993), <https://www.rollingstone.com/music/music-features/interview-meat-loaf-92910/>. There have been several theories involving the origin of the name "Meat Loaf," ranging from a childhood dare involving getting his head run over by a car, to being ridiculed by a Levi's advertisement for his larger weight. Portable Press, *How Meat Loaf Got His Name*, (March 23, 2017), <https://www.portablepress.com/blog/2017/03/how-meat-loaf-got-his-name/>.

Aday is not shy when it comes to litigation. See *Aday v. Sony Music Entm't, Inc.*, 1997 U.S. Dist. LEXIS 14545 (S.D.N.Y. Sep. 24, 1997). In fact, according to Aday himself, he "had 45 lawsuits totaling \$80 million thrown at [him]." Lynn Barber, *Interview: Bat man*, The Guardian (Dec. 6, 2003), <https://www.theguardian.com/theobserver/2003/dec/07/features.magazine67>. One of the more famous lawsuits involved Aday suing songwriter Jim Steinman ("Steinman"), who wrote various songs on both "Bat out of Hell" and "Bat Out of Hell II: Back Into Hell," over trademark rights to "Bat Out of Hell," claiming that Steinman wrongfully registered the phrase as his trademark in 1995. Billboard, *Meat Loaf Sues Over 'Bat Out of Hell,'* (June 5, 2006), <https://www.billboard.com/articles/news/58228/meat-loaf-sues-over-bat-out-of-hell>.

In fact, Steinman wrote and produced most of "Bat Out of Hell II," and is also responsible for its lead single "I'd Do Anything For Love (But I Won't Do That)." Karen

Kidd, *Meat Loaf accused of stealing song*, Northern California Record (Oct. 11, 2017), <https://norcalrecord.com/stories/511242142-meat-loaf-accused-of-stealing-song>. In 2017, both Aday and Steinman were accused of stealing the tune of “I’d Do Anything For Love” from a song written by Jon Dunmore Sinclair and Mike Molina called “[I’d do] Anything for You.” *Id.* Enclosed Music LLC, who represents both Sinclair and Molina, filed a copyright infringement lawsuit against both Steinman and Meat Loaf seeking unspecified damages, including combined statutory damages of at least \$180,000 per infringement. *See* Bonnie Eslinger, *Meat Loaf Stole ‘I’d Do Anything for Love’ Song, Suit Says*, Law360 (Oct. 5, 2017), available at <https://www.law360.com/articles/971686/attachments/0>.

The suit concluded this year when the Central District of California issued an order dismissing the action without prejudice. *Enclosed Music LLC v. Steinman*, 2019 U.S. Dist. LEXIS 30541 (C.D. Cal. Feb. 26, 2019). The settlement was reached in August. Both parties filed a stipulation on July 24, 2019. Dustin W. Osborne, *Bat Out of Court: Meat Loaf Settles Copyright Lawsuit Over ‘I’d Do Anything For Love,’* Sports and Entertainment Law Insider (Aug. 5, 2019), <https://sportslawinsider.com/bat-out-of-court-meat-loaf-settles-copyright-lawsuit-over-id-do-anything-for-love/>.

ROC NATION PARTNERS WITH THE NFL

On August 14, 2019, the owner of Roc Nation, Shawn “Jay-Z” Carter, entered into a multiyear partnership with the NFL to amplify NFL live game experiences and revamp the NFL’s social justice initiative, “Inspire Change.” Carmichael, Rodney. “Opinion: Jay-Z Can’t Roc With The NFL Unless Kaepernick Gets A Seat At The Table.” *NPR*, *NPR*, 22 Aug. 2019. The NFL started Inspire Change in 2017 with the Players Coalition and the focus of the nonprofit was the following: education and economic advantages, community relations, and criminal justice reform. Nfl. “Jay-Z’s Roc Nation Entering Partnership with NFL.” *NFL.com*, National Football League, 14 Aug. 2019. The nonprofit was created following Colin Kaepernick’s protest in 2016 which brought visibility to social and racial injustice in America. Jones, Bomani. “Jay-Z Goes to the NFL.” *The Undefeated*, *The Undefeated*, 15 Aug. 2019. Kaepernick saw black and brown men and women being beaten and killed by the police at a rapid rate and chose to take a stance against these injustices by kneeling where he knew the cameras would be—on the football field. This moment in history sparked a movement across the globe—as you may know many (Eric Reed, Megan Rapinoe, just to name a few) have taken a knee during the national anthem to show their solidarity.

Not long after this, the NFL black-balled Colin Kaepernick, and although unemployed by the NFL, Kaepernick founded his nonprofit, “The Know Your Rights Campaign” and completed his philanthropy work of donating one million dollars in \$100,000 increments to several organizations in need. The NFL felt the backlash of its decision when many viewers chose not to watch Sunday and Monday night football and entertainers such as Cardi B and Rihanna refuse to perform at the Super Bowl, all in solidarity with

Kaepernick. Hill, Jemele. “Jay-Z Helped the NFL Banish Colin Kaepernick.” *The Atlantic*, Atlantic Media Company, 15 Aug. 2019. Therefore, in 2019, the NFL partnered with Jay-Z to ensure entertainment for events, including the Super Bowl halftime show, would have diverse acts. The NFL believed this would also diversify their audience and increase viewing. This partnership seems to come out of left being that Jay-Z wore Kaepernick’s jersey on *Saturday Night Live* and in his song “Apeshit”, he rapped these lyrics: “Once I said no to the Super Bowl: You need me, I don’t need you. Every night we in the end zone. Tell the NFL we in stadiums too.” Hill, Jemele. “Jay-Z Helped the NFL Banish Colin Kaepernick.” *The Atlantic*, Atlantic Media Company, 15 Aug. 2019. This is a reference to his concerts with Beyoncé where they sell out Soldier Field and other stadiums. Thus, the question remains, why is Jay-Z in business with an organization he does not agree with? Let me enlighten you of the NFL’s reasoning: “...his perspective is going to drive us.” Nfl. “Jay-Z’s Roc Nation Entering Partnership with NFL.” *NFL.com*, National Football League, 14 Aug. 2019.

Jay-Z partnered with the NFL to amplify the social justice initiative “Inspire Change.” “Jay-Z and Roc Nation will help augment the NFL’s social justice initiatives by developing content and spaces where players can speak about the issues that concern them,” according to Jemele Hill in her article “Jay-Z Helped the NFL Banish Colin Kaepernick.” As you may know, once Harry Belafonte pointed out Jay-Z’s lack of social responsibility, Jay-Z committed to pushing for criminal justice reform. Jay-Z has produced documentaries for both Trayvon Martin and Kalief Browder. Carmichael, Rodney. “Opinion: Jay-Z Can’t Roc with The NFL Unless Kaepernick Gets A Seat At The Table.” *NPR*, *NPR*, 22 Aug. 2019. The Trayvon Martin docu-series was presented on BET on cable television in a six-part series, and Kalief Browder’s story was told as a series on Netflix. Trayvon Martin was a young, black boy killed by a neighborhood watch vigilante. Kalief Browder was also a young boy who was wrongful convicted of a robbery he did not commit. He spent years on Rikers Island, in solitary confinement, and when he was released, he committed suicide not long after. Jay-Z also bankrolled the legal defenses for both Meek Mill’s probation case and 21 Savage’s immigration case. Carmichael, Rodney. “Opinion: Jay-Z Can’t Roc With The NFL Unless Kaepernick Gets A Seat At The Table.” *NPR*, *NPR*, 22 Aug. 2019. Also, in 2019, Jay-Z and Meek Mill launched a prison reform organization, REFORM. Jay-Z seems to check all the qualifications for someone to take on the task of revamping the Inspire Change social initiative, but who is benefiting from this partnership? As Bomani Jones said in their article “Jay-Z goes to the NFL, “...who’s getting paid and what justice is being amplified?”

September 5th was the kick-off event for the Inspire Change campaign. The NFL and Roc Nation spearheaded a free in concert in Grant Park in Chicago with Meek Mill, Meghan Trainor, and Rhapsody. Cowen, William. “Meek Mill, Rhapsody, Meghan Trainor Announced as Inaugural Inspire Change Advocates for 2019 NFL Season (UPDATE).” *Complex*, *Complex*, 4 Sept. 2019. These three

have been named advocates of the Inspire Change initiative. Rhapsody is said to be hosting Inspire Change Mentoring sessions in Chicago with organizations such as BFF Family Services and Crushers Club. The mentorship program will include mentoring by representatives from Roc Nation, the NFL Chicago community leaders, and others. Cowen, William. “Meek Mill, Rapsody, Meghan Trainor Announced as Inaugural Inspire Change Advocates for 2019 NFL Season (UPDATE).” Complex, Complex, 4 Sept. 2019. Roc Nation will release Songs of the Season to benefit Inspire Change, which will be available on all streaming platforms. There will also be an Inspire Change apparel line designed by music artists participating in Inspire Change. The proceeds from the apparel will support organizations dedicated to education and economic empowerment, community relations, and criminal justice reform. Cowen, William. “Meek Mill, Rapsody, Meghan Trainor Announced as Inaugural Inspire Change Advocates for 2019 NFL Season (UPDATE).” Complex, Complex, 4 Sept. 2019. ■

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A Law Student's Perspective

Is Blockchain the New Internet for Sports and Entertainment?

Kevin Chung

While the terms “blockchain” and “cryptocurrency” are commonly used today, regardless of context, it can certainly be difficult for those like me who are not subject-matter experts to fully grasp the significance and potential of the new blockchain technology. To help Forum members’ understanding and to discuss the application in the entertainment industry, the 2019 ABA Forum on Entertainment and Sports Industries Annual Meeting invited a group of blockchain specialists and lawyers to lead the *Is Blockchain the New Internet for Sports and Entertainment?* panel session. This article will summarize the session, define and describe the new technology, and discuss both its merits and flaws.

The session was led by facilitator Caren Yeaman, an SVP, General Counsel and Secretary of Fanatics, Inc., and speakers Amy Caiazza, Andrew Hinkes, and Adi Sideman. Ms. Caiazza is a securities, blockchain, and fin-tech associate at Wilson, Sonsini, Goodrich, and Rosati, who advises clients on regulatory transactional matters involving securities and commodities laws, investment platforms, cryptocurrencies, and other crypto-assets. Importantly, she was a part of a team that helped qualify the first two Reg-A token offerings. Mr. Hinkes is a counsel for Carlton Fields who advises blockchain, fin-tech, and financial services clients in corporate matters including regulatory compliance and capital formation. He is also a general counsel and co-founder of Athena Blockchain and an adjunct professor at New York University Stern School of Business and NYU School of Law. In 2017, a blockchain news site, CoinDesk, named him one of the most influential people in blockchain. Mr. Sideman is an entrepreneur in participatory media and digital currency who founded YouNow, which proved to be a global social network with more than 45 million users. At YouNow, he introduced a digital currency, Props, for a two-sided market in which the audience buys currencies and content creators earn it. Previously, he founded an interactive marketing firm, Oddcast, and co-founded KSolo, the first online karaoke service. He was named as one of 2015’s top 100 most influential and inspiring people in NYC tech by Business Insider. Before the discussion, the panelists emphasized that they were expressing their own opinions and not representing the perspective of their respective organizations.

WHAT IS BLOCKCHAIN TECHNOLOGY?

In a very general sense, one panelist described blockchain technology as a “fancy” Excel spreadsheet shared among many individuals. It creates a unique method for a group of people to agree on the same set of records and track all modification of it. By following a certain set of rules, someone in the network can enjoy additional features of it and

fully reap benefits of the new technology. First, once new data is added to a record, it should be made as difficult as possible to remove or modify it. Technical means must be deployed to assure that records will not be altered in the future, at least not easily. One of the common misunderstandings about blockchain is that it is an immutable, indestructible, or perfect system. This is simply not true, but “attacking” a network may be financially infeasible or unreasonable. Any given network can be attacked for political or financial reasons, although it is difficult to learn the precise motivation of the attackers. It is more difficult and expensive to overwrite records on older and larger systems because the level of difficulty largely depends on the number of nodes on a given network, and more established systems tend to have more nodes. It takes nation-state level finance to attack extremely large networks like Bitcoin or Ethereum.¹ On the other hand, a smaller and younger network is much cheaper to overwrite. Thus, if one is creating software using blockchain, it is better to use a bigger, older, and more established network and infrastructure for security reasons.

Second, no central recordkeeping source or server should exist in the network. Instead, the all-important duty must be shared by multiple entities that do not trust each other. Because they are skeptical of others, they will require proof whenever someone adds a new record. In other words, blockchain utilizes consensus mechanism. To add a record or to allow a transaction to occur, all the computers collaboratively keeping the record in the network must agree to do so or “achieve consensus.” This decentralized and trustless nature of the system is a key characteristic of blockchain technology that brings both its benefits and vulnerabilities.

BENEFITS AND POTENTIAL OF BLOCKCHAIN TECHNOLOGY

If one desires to make a financial, administrative, or political transaction, she would usually need to go through a central intermediary entity. To send money to someone else, for example, one must work with a bank, and to participate in the political process, one must vote through a government entity in charge. In a perfect world where these central authorities, such as governments, banks, courts, or corporations are always just, trustworthy, reliable, and efficient, blockchain may not provide much value. But in this world, where that is simply not the case, the fact that a blockchain system does not require a central authority to make such transactions and does not lose any credibility in the process can be extremely beneficial. Such “democratization” of the system can help achieve a lack of censorship and increased fairness and security. It can also potentially eliminate millions of dollars “wasted” on regulations and paid to necessary intermediaries for transactions today. For

example, consider all the risks and complications involved in wire transfer through a bank. It can take days for the transaction to go through, banks may deny or reverse the transaction for a regulatory purpose, a bank clerk may even simply enter wrong information by accident. On top of that, banks will likely charge a substantial amount of fees for their service. Blockchain can potentially get rid of intermediaries like banks in the process while salvaging the high level of security that those institutions traditionally provided and incurring less or no fees to the users.

In the same manner, blockchain can importantly provide means to prove one's identity without relying on one's government. In order to prove who we are, we often need government-issued documents like birth certificates or driver's licenses to legally identify ourselves to gain access to many of the services that society provides. But how about, for instance, people fleeing from countries of crisis, such as Syria, where the government is neither trustworthy nor functional? Even if those people successfully escape, they will have no credit outside of the country. No one would trust their government-issued identifications. Therefore, the idea of self-sovereign identity—having no need to resort to government-issued documents—is incredibly powerful. People on the blockchain network would be able to use other types of trusted information already on file to self-identify. It is a prime example of blockchain technology's capacity to benefit humanity in general. Applying the same benefit to commerce, a blockchain system can ensure not only the identity of one's trading partners, but also prove ownership and authenticity of a physical asset, such as rare and collectible goods (e.g., rare and expensive wine or collector's trading cards) and intellectual properties. It can boost one's confidence in commerce without referring to intermediary sources.

VULNERABILITIES OF BLOCKCHAIN TECHNOLOGY

A blockchain network, nevertheless, is certainly not a perfect system, and it has its flaws. While a blockchain system may be decentralized, it is not completely permission-less. One may still need permission from a consortium or consensus from a governing group before using his token to purchase an asset, for example. Also, because of decentralization, the new system may create a new issue while solving existing ones. Let's imagine a ridesharing Uber-like company with a blockchain system in place with no central management. Its drivers may be happier since no central entity takes a percentage off of their earnings and their payment becomes more transparent. The company may enjoy a higher profit from reduced management and employment cost. It may create a more efficient company in general. However, it is unclear whether this company would provide a better service for customers than the current company. Users may also prefer having a central intermediary that takes full legal responsibility in times of accident or legal conflict. It illustrates that some parties may have a relatively weaker incentive to use a service with the blockchain system.

Blockchain has its own security concerns as well. While it certainly enjoys heightened security and cannot be easily

attacked by an outsider, it is still vulnerable to real-life theft. The technology relies on complicated math called cryptography, which essentially allows one to convert her asset into data. On a very basic level, one needs her "public key" to identify herself within the system. It can be publicly known among members of the network and is used like an individual's address or name within the system. A "private key" is needed for authentication and encryption and to verify any transaction, and while it can be used to mathematically derive a corresponding public key, it is extremely difficult to reverse-engineer it from a public key. Because of the difficulty, the owner of a private key is recognized by the system as the true owner of a particular record.² A user's private key should, therefore, be kept private because once she loses it, she cannot be the owner of the record anymore. On the flip side, if a thief can gain access to others' private keys, she can use them to verify any transaction in the system involving the original owner. A thief would be able to send all tokens in the stolen account to herself, verify that transaction with a stolen private key, and leave the original owner with nothing. It is difficult to digitally hack into the system and obtain others' private keys; it is easy to snatch a piece of paper on a desk with one's private key written on it. No matter how secure the system is, this type of security risk will likely always exist.

There are also legal complications and concerns involving blockchain. Perhaps stating the obvious, a business using a decentralized network still needs to comply with relevant existing law and regulation. Depending on the use of technology, a business may even need to get authorization from an appropriate state authority first. (e.g., online sports betting website or casino) Again, blockchain is not necessarily a permission-less system. Moreover, there is an inevitable gap between cutting-edge technology such as blockchain and existing regulations; the law is always playing catch up. As a result, legal uncertainties are surrounding the field which adds to the vulnerability of the system.

For instance, even a simple token can be legally characterized as property, fund, security, or commodity depending on circumstance and perspective, although most are considered as securities by the SEC. These are often tokenized security of a corporation, such as common stock or real estate that are usually only available to accredited investors. They must be offered in compliance with the Securities Act because "companies that offer or sell securities to US investors must comply with the securities laws, irrespective of the industry they operate in or the labels they place on the investment products they offer."³ On the other hand, there are some consumer tokens such as Bitcoin, Ethereum, Turnkey, and Quarters that are categorized as non-securities by the SEC. They are either sufficiently decentralized or stablecoins that do not appreciate or depreciate over time. The characterization can have significant effects since different laws, regulations, or tax rules may apply to different categories, i.e., if a token is considered as a security, one has to register as a securities broker or dealer to effect a transaction. Despite the importance, it is difficult to predict how the SEC would characterize a particular token. When lawyers cannot provide legal advice to their clients with full

confidence, no one is pleased. It should also be kept in mind that such legal uncertainty only increases for more complex services using blockchain technology.

CONCLUSION

Blockchain technology is in its infancy just like the internet was in 1995. With our understanding of the internet back then, we could not understand or foresee the development of services such as Amazon, Facebook, or Google. It is the same with blockchain and cryptocurrency is only the tip of an iceberg. Blockchain has the potential to be viewed in retrospect as a foundational aspect of commerce and an additional, but essential layer of the internet. Because it is so early in the development, we should not quickly jump to the incorrect conclusion solely based on shortcomings of cryptocurrencies. It is equally erroneous, however, to idolize the technology as an answer to all questions. Lawyers, judges,

and legislators should stay up-to-date on the technology and create adequate legal guidelines and gatekeeping process to allow society as a whole to fully exploit the benefit of blockchain and to cultivate a safe legal environment for its development. ■

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A Law Student's Perspective

The Intersection of Cannabis/CBD and the Entertainment and Sports Industries

Kevin Chung

Use or possession of cannabis is still federally illegal for any purpose under the Controlled Substances Act (CSA), Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970. It is classified as a Schedule 1 drug along with heroin, ecstasy, and LSD.¹ On the other hand, the medical use of cannabis is legalized in 33 states, and 11 of them also legalized recreational use.² Because of the existing tension between federal and state law, there is a large gray area in the law that can baffle industry professionals and their lawyers alike. To help Forum members' understanding, the 2019 American Bar Association's Forum on the Entertainment and Sports Industries Annual Meeting arranged a panel session on the legal issues in the rapidly growing cannabis industry.

The discussion was led by Alicia Ashcraft, Andy Mendelsohn, and Christophe Sabec. Ms. Ashcraft is co-founder and the managing partner at Ashcraft & Barr, whose practice encompasses complex commercial transactions, mergers and acquisitions, corporate governance, administrative law, and regulatory compliance. She has expertise in highly regulated industries, such as gaming, liquor, transportation, and cannabis. Since 2013, she mostly focused her practice on representing marijuana businesses through all phases of operation. Mr. Mendelsohn is a music manager at Full Stop Management, home to notable names in the music industry, such as Bon Jovi, Travis Scott, Zane Lowe, John Mayer, and Harry Styles. He is most famous for being a longtime day-to-day manager for Grammy-winning band Kings of Leon. Mr. Sabec is a counsel in the entertainment and cannabis law practice groups at Fox Rothschild, with decades of experience providing legal advice to global entertainment and cannabis businesses. Specifically, he advises cannabis cultivators and licensees on investment transactions, due diligence requests, trademark law, property law, and regulatory issues. Before the discussion, panelists emphasized that they were expressing their own opinions and not representing the perspective of their respective organizations.

DEFINITION AND LEGAL TREATMENT

Cannabis as a drug, also known as marijuana, and hemp are two different strains of the same species of a cannabis plant called *Cannabis sativa*. The plant contains many different types of chemical compounds called cannabinoid. Cannabidiol (CBD) and tetrahydrocannabinol (THC) are two of the primary cannabinoids in both marijuana and hemp. Although they are substances that affect the human body in a very distinct way, CBD and THC have very similar chemical makeup, which makes legal regulation of them difficult. THC is a psychoactive compound that produces

the effects like euphoria and anxiety that gets one "high" or "stoned", while CBD does not appear to have any psychotropic effects. Both CBD and THC can be extracted from either marijuana or hemp, but it is more cost-efficient for manufacturers or producers to extract CBD from hemp and THC from marijuana.

Under the CSA, marijuana is a Schedule 1 drug, which means that there is a high potential for abuse, the potential to create severe dependence, no currently accepted medical use in treatment in the US, and a lack of accepted safety for use under medical supervision.³ A penalty for the violation can range from misdemeanor for simple possession to serious felony for manufacture, distribution, or possession with intent to distribute. Conversely, hemp and hemp-derived CBD were removed from the CSA schedule by the crucial 2018 US Farm Bill and are now legal, but only if they are produced following strict requirements. To be characterized as non-psychoactive or industrial hemp, a plant must be bred to have less than 0.3% THC. Marijuana, on the other hand, can have up to 30% THC.⁴

US Farm Bills are packages of federal legislation that affect everything from crop subsidies and insurance to farmer training programs. The 2014 Bill opened the door to hemp cultivation and CBD production by permitting states to start agricultural hemp pilot programs.⁵ The 2018 Bill reached further, as it legalized the production of hemp as an agricultural commodity, removed it from the list of controlled substances, and included it as a covered commodity for crop insurance. Federal law is certainly moving towards recognizing hemp and hemp-derived CBD's legitimacy. However, hemp growers and producers are not yet as free as when they are cultivating other kinds of crops: their states must have proposed a regulatory plan to and be approved by the Secretary of US Department of Agriculture to license and regulate hemp production, they need to obtain a license from such states to produce, and they need to strictly meet the aforementioned 0.3% THC requirement.⁶

Contrary to the recent trend in federal law, the US Food and Drug Administration was not moved by the Farm Bills and is taking more of a conservative stance. The FDA has not permitted hemp and CBD as an additive to a consumable, saying there are not enough science-based studies to show that they are safe as dietary supplements.⁷ It is somewhat ironic, since research in this area is heavily lacking because of the federal prohibition of cannabis. The FDA's non-approval means that businesses manufacturing and selling CBD consumables technically run a risk of getting shut down for selling non-FDA approved products, although there have only been warning letters so far.

BANKING ISSUE IN THE CANNABIS INDUSTRY

The legal uncertainty surrounding the industry led to a serious banking problem for cannabis businesses. Because of the federal illegality of cannabis and the interstate nature of banking business, banks can lose their charter and FTIC insurance if they allow cannabis businesses to have accounts. To avoid the risk, banks are proactively searching for and shutting down cannabis-related accounts. A cannabis business can use state-chartered banks or credit unions as alternatives, but they usually only offer a limited number of cannabis accounts. They are also highly regulated and very expensive to open; a fee for these accounts can be up to an astounding \$1,750 per month.⁸ To avoid such an excessive fee, one can try to run her cannabis business without a bank account. Many sizeable cannabis companies are still unbanked and cash-only. There is an obvious risk with that strategy. According to one of the panelists, a cannabis company in Malibu lost \$1.2 million worth of cash in a recent California wildfire. Fortunately, Congress is aware of such issues, and the Secure and Fair Enforcement (SAFE) Banking Act of 2019 passed the House of Representatives and is now in Senate with bipartisan support. If it passes, it will create a safe harbor for banks, and cannabis-related legitimate business or service providers will be legally allowed to have bank accounts, at least in states where consumption of cannabis is legalized.⁹

LEGAL ISSUES FOR ADVISORS, ENDORSERS, AND SPONSORS

Despite the gray area in law and banking, the cannabis market is undoubtedly a market with rapid growth and increasing marketing needs. Thus, it is easy to find lawyers and public political figures sitting on boards of cannabis companies or getting involved in the industry as advisors or lobbyists. In addition, endorsement and sponsorship deals are being offered to celebrities and athletes; some even founded their own cannabis companies to be in the business more directly.¹⁰ Today, even non-celebrities are signing the deals if more personalized stories can be created from their endorsement, i.e., a cancer survivor can tell a powerful narrative about how she benefitted from cannabis use during her treatment. However, every cannabis advocate needs to exercise caution because, again, cannabis is still federally illegal and a CSA violation can result in huge penalties. Under federal law, whoever “aids, abets, counsels, commands, induces or procures” a federal law violation is punishable as a principal.¹¹ Federal authorities might one day decide to enforce the law more strictly. Not only that, there is an issue of public perception since not everyone is rooting for cannabis legalization. It is important to keep in mind that signing the deal can do more harm than good for certain celebrities and public figures.

STATE AND LOCAL-LEVEL MARKETING AND ADVERTISING REQUIREMENTS

Each state, including ones in which the use of cannabis is legal, has its list of marketing and advertising rules that cannabis companies and their marketers need to follow. In

Nevada, for instance, a marketer needs to get regulators’ approval for her marketing campaign, and must place disclaimers on billboards and advertisements in magazines.¹² Additionally, gaming licensees cannot have cannabis advertisements on their premises and a new regulation prohibits cannabis establishment from opening within 1,500 feet from non-restrictive gaming resorts, except for the existing ones that are grandfathered in. In California, a marketing campaign cannot target an area with more than a 30% underage population, and a particular premise cannot have both cannabis and liquor licenses at the same time.

Because each state and the local district may have its own rules, there are some seemingly wrong regulatory instructions as well. For example, one of the panelists talked about a company that cleverly designed a t-shirt that said, “What happens in Vegas, stays in your system for 30 days.” The Las Vegas local municipality rejected the proposal, saying it violated someone else’s trademark. It was a strange decision, considering that the municipality did not have a standing on the issue because it was certainly not its trademark that was violated. Yet, it is difficult for cannabis companies to fight back against these “wrong” regulatory decisions because these government agencies are the ones that the companies have to constantly work with as long as they are in the business. Unless it is a life-and-death matter, parties usually are forced to move on.

CONSIDERATIONS FOR ENDORSEMENTS AND SPONSORSHIPS

Well-informed lawyers can surely lessen the risk for their clients in signing endorsement and sponsorship deals. First of all, one needs to check the licenses of cannabis brand partners and ensure that they are compliant with existing state laws and regulations. Attaching their licenses as exhibits on endorsement contracts is a recommended practice. Second, a lawyer must pay close attention to ensure the enforceability of such contracts using choice-of-law provisions. If possible, one must choose a jurisdiction, such as Nevada, that recognizes the enforceability of cannabis-related contracts. It is a good practice to include a provision in the contract that says, notwithstanding federal illegality, parties have intended to be bound by the contract and will not make the claim of unenforceability based on federal illegality. It is also recommended to include a clause that says a drastic change in federal or state regulation or law can be a basis for termination. Third, depending on the level of a sponsor’s involvement in the business, an endorsement deal could also trigger a background investigation for any person getting more than a certain percentage of revenue in return. Lawyers must ask if their celebrity or public figure clients are okay with this, especially if they have something in their background that can hurt their public image when disclosed. Lastly, there can be industry-specific limitations or restrictions affecting endorsers. For instance, the National Basketball Association has not yet allowed medical marijuana as an approved substance for its athletes, so it would not be the best idea for an NBA player to publicly endorse such products.

CONCLUSION

Cannabis can certainly be a difficult market to enter because of the federal illegality of the substance, various and diverse state regulations, and lingering negative public perceptions. Therefore, lawyers play especially important roles in the industry. They must be well-educated in the area to guide their cannabis business or public figure clients through numerous obstacles that the industry presents. With experienced lawyers' advice, this new and exciting market full of promising ideas and opportunities will only grow in the future, barring a sudden shift in the legal landscape. ■

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A Law Student's Prospective Digital Roundtable

Bakita Hill

Digital platforms have taken over the film and television, video gaming, and music industries. The amount of money U.S. consumers spend on video and music subscription services has nearly doubled since 2017.¹ In 2018, U.S. consumers spent \$20.4 billion on video and music subscriptions.² This year, an expected \$26 billion will be spent on video and music subscription services by U.S. consumers. This rapid increase in subscribers has not allowed much time to establish a proper precedent for issues that arise within this digital age. Video and music streaming are global by definition. Since the streaming world is developing so rapidly, it is the perfect time for attorneys who represent artists to reinvent the film and television, video gaming, and music industries. Video and music streaming subscriptions will continue to be growing industries, and it is important to know how streaming subscriptions operate for the consumer and for the companies who create the content that is being streamed.

DIGITAL SUBSCRIPTIONS

Television

Cable TV has become less popular than ever before. In 2018, half of Americans ages 22 to 45 watched zero hours of cable TV. Almost 35 million households in America have quit cable in the past decade.³ This is due to the fact that most people are moving to streaming services, such as Netflix. Netflix has an estimated 59 million subscribers in the U.S. alone and continues to grow its subscribers about 10% each year.⁴ The days where consumers go to the movies, rent a DVD, and watch live TV have been taken over by Netflix. Now, content is available instantly to any device, in almost any location.⁵

Today, original content stands out to consumers. In 2018, Netflix spent \$13 billion on content, which was 85% original shows. The creation of Netflix originals has led Netflix to become a direct competitor to traditional cable television. For example, *Bird Box* is a Netflix original that was viewed by over 40 million subscribers in its first weekend. Other Netflix originals have also had an outstanding number of viewers, such as *House of Cards*, *Stranger Things*, *Luke Cage*, and *Black Mirror*.⁶ Netflix will continue to make a push for original content, which will allow it to stay ahead over other television streaming services. Netflix has planned to spend about \$6 billion on buying, funding, and licensing new original shows. In this digital age, Netflix has changed how U.S. consumers watch TV. However, Netflix is not the only popular television streaming service.

Another television streaming service that has become popular in this digital age is Hulu. In 2018, Hulu had an estimated 25 million paid subscribers. Hulu strategically

lowered its most popular plan from \$7.99 to \$5.99 per month a week after Netflix raised the amount of its most popular monthly package to \$12.99 per month.⁷ Based on the fact that Hulu is much more affordable, it would be no surprise if Hulu surpassed the number of subscribers that Netflix has. Hulu also gives its subscribers the option of adding Spotify to their package at a discounted rate. Similar to Netflix, Hulu has begun releasing its own original content. Moreover, Hulu has become a pillar of Disney's strategy to be a heavy hitter in the streaming world.⁸ Therefore, Hulu could surpass Netflix's popularity in the coming years, but both digital platforms will continue to be top television streaming services.

The way consumers watch TV has completely evolved, largely due to this new digital era. Television streaming services will continue to become more popular and dominant, which is demonstrated by the rapid increase in subscriptions. The best thing attorneys who work in this industry can do now is prepare for the continuous change of the industry. Now is the time to become familiar with the rapid change of the television and film industry, and there is no time to rely on previous deals and standard forms.

Video Games

Technological evolution is common in the gaming space. Over the past 8 years, gaming has been transitioning slowly from a package goods business to the digital distribution model. About 80% of gaming sales is moving towards the digital format. In the 80s and 90s, gaming was mostly available via a disc or cartridge that needed to be inserted in a PC or game console. Today, those methods of gaming have been consumed by digital and mobile gaming. Mobile games have become very popular with game developers, because mobile games are played on less capable devices and do not require as much work as non-mobile games. Further, mobile games are cheaper to develop and easier to build than older models of games.

Today, gaming as a service has become more popular. Gaming as a service can be broken up into two parts. The first part is the rise of post-sale monetization. Post-sale monetization is monetizing the game after the customer has already purchased the game. The most common form of this is the free to play model, where consumers can get the game for free. However, once the consumer has downloaded the game, they can purchase extra items, such as shields for their warrior or access to new levels. This is a good way to draw consumers in, while continuously adding value to the game. The second part is gaming subscription services and streaming. Gaming companies are meeting consumers where they are in this digital era, which is streaming. In 2017, it was reported that more people subscribed to video gaming

streams over television streams on Netflix and Hulu combined.⁹ Twitch dominates live streaming of video games, which is owned by Amazon. On average, Twitch sees 15 million daily active users.¹⁰ The record for Twitch's viewers tuning in at the same time is more than 2 million viewers. That record beats the livestreams of Super Bowl 51.¹¹

The video gaming world has welcomed new technologies and has been able to evolve without drastically affecting business models. In the gaming space, there is less of a concern about piracy than the television, film, and music industries. One of the reasons for that is original gaming devices were the mold, so gaming companies had the ability to require consumers to purchase a gaming system before they could actually purchase games. The gaming companies controlled the operating system and could make sure consumers were not accessing things that were not properly licensed. Which is very different from the television, film, and music industries, because the content producers often do not own the device consumers are using to watch or listen to that content. The content producer and the device the content is viewed on is two completely separate companies and those creating the devices in which the content is being watched or listened do not care to figure out licensing issues. The video gaming world carefully made sure that capabilities to reduce piracy was built into the gaming system itself. Digital rights management built into gaming systems allowed the video gaming industry to avoid piracy, unlike the television, film, and music industries. Overall, the gaming industry was the most prepared for the digital age we live in today.

Music

The music industry has experienced many changes, which is demonstrated through the use and popularity of compact disc, vinyl, cassette tapes, music downloads and record players. The music business is no longer a sales business. Before the music business was all about selling units, whether that be downloads or physical copies. After 2015, selling units became a thing of the past, because streaming took the lead. Music downloads are now 8% of the market and physical sales is about 9% of the market. We are now in a streaming world, and there is no going back. Today, global revenues in the music industry has gone back up to where they were in 2002 during the compact disc era.

In 2017, the Recording Industry Association of America stated that, at 8.7 billion the recorded music industry has taken a decade to return back to the same overall revenues as 2008. In 2002, compact disc made up 95% of the recording industry's revenue. Today, the sale of physical compact discs is less popular due to music streaming. For the first half of 2019, revenues from streaming music grew 26% to \$4.3 billion.¹² Three components contribute to music streaming revenue.¹³ The first is subscription on-demand, such as Spotify, Apple Music, and TIDAL. Subscription on-demand also includes limited catalogs, such as Amazon Prime and Pandora.¹⁴ The second component is

noninteractive digital radio services including those revenues distributed by Sound Exchange, such as Pandora, SiriusXM, and other Internet radios. The third component is ad-supported on-demand streaming services, such as YouTube, Vevo, and ad supported Spotify.

Spotify and Apple Music are two of the biggest music streaming platforms. Today, More than 100 million users worldwide pay for Spotify Premium.¹⁵ Apple Music has about 50 million paid users worldwide. Both of these music streaming services has added podcast to its list of services. The addition of podcasts has contributed to the increase in subscribers. However, Apple Music has advantages over Spotify. Apple Music comes pre-installed on iPhones and there are about 900 million iPhones in use around the world. Also, Verizon has promotions that include free Apple Music subscriptions with certain cell phone service plans. Spotify also has similar promotions, but not with Verizon, who is the largest United States phone carrier.¹⁶ Both music streaming services are direct competitors of one another, but they are not the only way consumers are listening to music.

YouTube is the largest platform for music in the world, with 80% of listening happening on YouTube. However, listening on YouTube does not bring in much money because it is ad-supported. YouTube comprised one-third of the estimated 1.2 trillion streams that occurred in 2018, but only 8% of revenues.¹⁷ It takes 1.5 billion streams to have a platinum record. In the sound recording market, 4 million streams are worth \$4,500. There is a need to adjust the metrics for what is considered successful. In today's model, artists are competing for consumer attention and are not selling music anymore. This is because everyone already has access to the content by being a subscriber. Content is being released at a much faster rate than before the digital age. In the past, artists would release content and get paid for it within 2-3 months. Unlike the past, artists typically wait 2 years to receive payment for their content now. Overall, the basic rules of the music industry have drastically changed.

CONCLUSION

The domination of digital streaming in the film and television, video gaming, and music industries has changed many precedents from earlier years. There is no surprise that digital streaming has become more popular, because consumers want to listen and watch content whenever and wherever. The practitioners in the film and television, video gaming, and music industries need to work together in order to navigate through this new digital age and continue to develop standards within these industries. Streaming in the film and television, video gaming, and music industries has made content easier to distribute to consumers worldwide. In the future, streaming services will have to continue to compete with one another in order to be the number one streaming service within the industry. Artists will continue to have to gain and maintain attention from consumers. It will be difficult to keep up with the changes, but practitioners will have to adjust and learn the new models of the industry. ■

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A Law Student's Perspective

Ethical Considerations in Representing Talent

Victoria Nguyen

Sports and entertainment lawyers face unique ethical issues given their high-profile clients and cases. In this article, I will provide insights drawn from the experiences of the panelists with respect to ethical issues they face and their considerations in representing talent. The panel at the American Bar Association's Forum on the Entertainment and Sports Industries 2019 Annual Meeting featured David Lisko, Associate at Holland & Knight as lead facilitator; Christian Dennie, Partner for Barlow Garsek & Simon and General Counsel for RG Sports; Layth Gafoor, Managing Partner for Lucentem Sports & Entertainment Law; and Chris Vlahos, Partner for Ritholz Levy Fields.

PROBLEMS REPRESENTING MINORS AND LESS SOPHISTICATED PEOPLE

The North American sports market is valued at about \$73.46 billion,¹ and a chunk of that money is paid to spry young athletes. "There is no other industry in the entire world where you have more money involved and less sophisticated people involved," Lisko said. "Normally when you're talking about tons of money, you're talking about very sophisticated parties. If I'm representing a client in a very big deal, typically it's a corporation versus a corporation, which involves lawyers and executives who are very sophisticated. Here, you're talking about 20-year-olds making \$20 million who didn't go to college, might not have graduated high school, and don't have sophisticated backgrounds, parents, and mentors; it's a different animal altogether."

The NCAA recently announced it will allow its student-athletes to profit "from the use of their name, image, and likeness in a manner consistent with the collegiate model."² The change opens the door for more young people to seek representation. Sports and entertainment lawyers can find themselves representing minors, which presents challenges. "Your duties escalate tremendously when you're dealing with an unsophisticated party," Lisko said. "If you're dealing with a 20-year-old NBA player, he typically has no idea what norms are, what to expect, how to enforce contracts, what a lawsuit is like. If he's not dealing with a lawyer, he's in trouble. If he's not dealing with a really good lawyer, he's in big trouble. The lawyer has to be a master of whatever he's doing, so he can explain it to the athlete in a way that makes sense to him and at the same time negotiate at a high level with the opposing side." As an example, Lisko compared Nike and Zion Williams, a 19-year-old who the New Orleans Pelicans selected first overall in the 2019 NBA Draft. "Zion Williams is a young guy with no training, no education for this kind of stuff, no sophistication," Lisko said. "Nike is uber sophisticated. If you're representing Zion, you have to be as sophisticated as the other side

or else you will lose in negotiating the contract." History has shown that young, unsophisticated people are vulnerable and can be susceptible to trusting the wrong people and being taken advantage of. It is incumbent on agents who represent young athletes to educate them and do a better job communicating with him. It takes patience, especially when there are other people involved with different agendas.

Dealing with minors usually means dealing with their parents or guardians. This dynamic can complicate matters if the parents are not very informed, yet very involved. Dennie had a young client for whom he prepared a trust, and the parents asked him to change all of the legalese to normal language so they could understand it. Of course, he had to use legalese for the purposes of court interpretation. In Vlahos' experience, this type of relationship can be cumbersome. "It creates an inefficiency issue and dynamics where the parents want to do things based on their perception of where the kid should be as opposed to what the kid needs, and the parents are the ones paying for it," he said. Vlahos represented a manager in a case against the parents of a minor and the parents prolonged the litigation for five years because "they could not admit they were wrong and it disrupted the career of the kid." The solution here, according to Vlahos, is for agents to create expectations and boundaries as to the specific service they are and are not providing for the minor and his parents at the outset of engagement. Gafoor echoed that sentiment of proactivity: "You do yourself a lot of favors if in your engagement letter you frame the context of the relationship before it is consummated."

BETTER FOR ATHLETE: AGENT WHO IS OR IS NOT A LAWYER?

When it comes to hiring an agent, one factor that an athlete must consider is whether he wants one who is a lawyer. Most agents are not lawyers, which has its advantages if you believe the best agent is the one who can get deals for his clients. Agents who are not lawyers are not governed by state bars and ethics rules, so they can get away with much more than lawyers can and thereby have an upper hand in getting deals for their clients. Lisko, who is both a lawyer and a certified NFL agent, said certification only matters for team contracts, which lawyers and non-lawyers alike can easily navigate because they are form contracts that are typically negotiated by unions like the NFLPA. However, team contracts account for a small percentage of an agent's income because he earns roughly 1.5 to 3 percent of a client's team contract. Agents rely more heavily on marketing contracts, which can involve the negotiation of every term of a deal. For that reason, Lisko believes athletes and entertainers would be better served hiring agents who are lawyers. "When it comes to legal work like negotiating a

contract, it's always better to have a lawyer," he said. "When you're negotiating these big deals, you should have an eye toward litigation because at the end of the day, a piece of paper is just a piece of paper. It's not worth anything if it can't be enforced. While you don't need to be a lawyer to understand a deal or money flowing, being a lawyer is a great asset when it comes to how you see enforcement. It's very unfortunate for any high-profile athlete or entertainer to hire an agent who's not a lawyer."

Earlier this year, the NCAA amended its certification process for agents representing basketball players so that the agents no longer need to have a bachelor's degree.³ Instead, agents who do not have a bachelor's degree only need to be in good standing with the NBAPA.⁴ The rule reversal came in response to criticism from NBA "super agent" Rich Paul, who argued that the requirement of a bachelor's degree systematically excludes people who "come from a world where college is unrealistic."⁵ Lisko thinks the NCAA made the wrong call. "If you can't muster the ability to get a college degree nowadays when you can do it on the internet in two years if you wanted to, you have no business representing anybody in any kind of negotiation considering lawyers have to go through four years of college to get a law degree and then pass the bar exam," he said. "I recommend athletes hire a lawyer in good standing with the bar as their agent as opposed to someone who has no training like that."

The recommendation comes in spite of the "major" disadvantages Lisko believes lawyers face compared to agents who are not lawyers. Depending on their clientele, agents may be governed by rules of states, leagues, and collegiate institutions. In addition to those rules, agents who are lawyers are also governed by state bars and ethics rules, including the ABA Model Rules of Professional Conduct. It is imperative that lawyers follow all the rules they are subject to because if they do not, they could face discipline by the bar and potentially be disbarred. The stakes are not nearly as high for non-lawyer agents, who can get away with breaking rules. "They don't get caught. That's the problem," Lisko said. "The state of Florida has strict agent laws and I follow every single law to the letter of the law because I don't want to get in trouble and lose my law license. But those rules have never been enforced, ever. The worst rule is the one that isn't enforced because good people follow the rules and the bad people don't, and they get an enormous competitive advantage by not following the rules. The chances of them getting caught and punished are very, very slim. That's different for lawyers because the rules are enforced. You can file a bar complaint yourself. Judges enforce rules. The bar enforces rules. For lawyers, there are consequences for not following the rules, but seemingly for agents, there are not a lot of consequences for not following rules."

AGENT INVOLVEMENT AND BOUNDARIES

Drew Rosenhaus, the agent for free-agent wide receiver Antonio Brown, has both a large social media following and a penchant for taking to Twitter to comment on his clients. Rosenhaus tweeted⁶ about Brown after he was released by the New England Patriots in September and was seen

attending a legal deposition with Brown a few days later.⁷ "It seems like Rosenhaus is intertwined in the legal situations and multiple lawsuits Antonio Brown is facing at the moment," Lisko said, sounding troubled. Dennie also expressed disapproval of Rosenhaus' conduct from an ethical standpoint. "When lawyers handle their cases through Twitter and other forms of social media, it strikes me more as a marketing stunt for themselves and not in the best interest of their clients." Unlike Rosenhaus, who has shared pictures of himself attending parties thrown by clients, Dennie and Gafoor explicitly tell their clients they will not attend parties with them. Gafoor said, "Normally I have a 10 o'clock cutoff time. There's an appropriate time where you're working on behalf of your client and it might extend beyond that. It's my own personal rule to help me feel detached enough that if something were to happen, I'm not a witness to these particular issues." Gafoor only goes to events, launches, red carpets and the like if his attendance is required for business purposes. "Other than that, have fun. If anything goes sideways, we have a pretty robust crisis management practice, you can always call us but I don't want to be there as a witness to whatever took place." ■

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ENDNOTES

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A Law Student's Perspective

Ethics Considerations in Representing Talent

Ashley Gugino

Ethics has long been acknowledged in the world of law. Every lawyer knows that being a member of the legal profession means behaving in the utmost ethical of ways. As the legal profession has evolved over the years, so has the concept of professional ethics.¹ The American Bar Association (“ABA”) most recently revised its ethical code in the “Model Rules of Professional Conduct” in 1983.² Although the legal ethical code dates back further than entertainment and sports law does, ethics are still a major concern in both fields.

Entertainment and sports attorneys undertake the responsibility of providing legal and representative services to clients, and in doing so, these professionals assume certain ethical responsibilities and duties that attorneys in other areas of the law do not.³ In order to elicit first-hand knowledge about what these ethical responsibilities and duties encompass, the ABA invited a group of entertainment and sports attorneys to openly discuss the ever-evolving topic.⁴ David Lisko, Associate at Holland & Knight, facilitated the discussion about the unique ethical considerations entertainment and sports attorneys face in today’s world. In joining the discussion, attorneys Christian Dennie, Chris Vlahos, and Layth Gafoor offer their personal experiences as a guiding hand for their fellow attorneys.

SOCIAL MEDIA AND THE DYNAMIC CHALLENGES IT POSES FOR TODAY’S ATTORNEYS

As our society enters into a new era where technology quite literally is at the fingertips of every person, new ethical concerns inevitably continue to arise. Before social media, people were unable to receive play-by-plays of other people’s lives. However, social media has drastically changed the world. In fact, social media is now the feeding frenzy for all those who wish to keep up-to-date on their favorite stars and sports players.

Communications consultants, Greentarget, released a study in 2010 explaining how in-house counsels are using social media.⁵ The study states:

While the more traditional marketing channels for law firm credentialing continue to dominate—publishing articles in trade journals, speaking at industry conferences, and being quoted in the press—in-house attorneys now are using new media platforms to deepen their professional networks; to obtain their legal, business, and industry news and information; and to enrich their social and personal lives.⁶

Christian Dennie, Partner at Barlow Garsek & Simon and General Counsel at RG Sports, confirmed this by noting that, as social media has continued to grow over the years, many attorneys in the industry have attempted to try their cases through different social media outlets.⁷ Dennie also stated that in doing so, these attorneys are actually acting in their own personal interests.⁸ In other words, when attorneys in the industry take their cases before the millions of viewing eyes on social media, these attorneys are actually attempting to gain more business instead of doing what is best for their clients.⁹ While it is sometimes appropriate to release public statements on a client’s behalf, Dennie warned against consistently doing so out of fear of harming the client in the long run.¹⁰

In an attempt to offer a piece of advice in an ever-changing technological society, Dennie encouraged attorneys in the industry to caution their clients about what they post on social media, as once something is put out on the internet, it stays there forever.¹¹ Moreover, Dennie recommended that attorneys continuously press the issue to their clients that the lawyer should be the person making public announcements—even if such announcements are made through the likes of social media.¹² While clients will be tempted to take matters into their own hands, it is the lawyer’s responsibility to ensure that clients are not being bated into something that could potentially cause them harm in the future.¹³

While Dennie’s advice focused on assuring that clients leave public statements up to their attorneys, Layth Gafoor, Partner at Lucentem Sports & Entertainment Law, alluded to three distinct disadvantages to being a lawyer in the entertainment and sports industry.¹⁴ First, attorneys in this industry face unique challenges that arise from different technological and environmental issues which result from the tremendous amount of time that it actually takes for ethical rules to fully develop and consolidate.¹⁵ Second, attorneys—essentially attorneys in all areas of the law—now act as peripheral players in the forefront of technology.¹⁶ Lastly, attorneys’ clients in the entertainment and sports industry are typically young; whereas, the attorneys themselves are often times of an older generation.¹⁷ This unique dynamic poses a specific challenge: younger generations rely on utilizing social media and other technology outlets to communicate with the people in their environment, but older generations still rely on more formal styles of communication.¹⁸ Not only that, but the age gap also makes it hard for the attorney and the client to relate to each other.¹⁹

Moreover, Gafoor described how the laws in the entertainment and sports field are inherently distinct from other areas, as the industry is constantly evolving. In fact, it is the

unfortunate truth that there are no foundational laws that govern the industry.²⁰ Thus, providing advice to clients is sometimes quite a galling task.²¹

ETHICAL ISSUES INDUSTRY ATTORNEYS FACE TODAY

Chris Vlahos, Partner and litigation attorney at Ritholz Levy Fields, offered his perspective on what he believes the most high-blood, pressing issues for ethics are in today's entertainment industry.²² Vlahos started off by pronouncing that from a national-centric view, the music industry has been rapidly growing, which has led to its incredible success.²³ In part, this success is due to society's ability to stream music online instead of making physical purchases, such as CD's.²⁴ However, the law in the industry is still stuck in the same model of lackadaisical, if not complete, lack of preparation for changing times.²⁵

Furthermore, the concept of "conflict of interest" is not something that is as commonly adhered to in the entertainment and sports industry as it is in other industries.²⁶ As such, Vlahos stated that, from a litigation perspective, transactional attorneys often times represent multiple clients from one group, but only act in the best interest of the client who will best monetize at the end of a break-up.²⁷ More importantly, even if there is a provision in the agreement that acknowledges a potential conflict of interest, attorneys are still bound by the duty of loyalty.²⁸ While recognizing in the contract that there is a potential conflict of interest, such a provision is not a get out of jail free card.²⁹ Provisions like this, among other things, make litigating in the music industry quite difficult.³⁰ Vlahos boiled the issues that litigation attorneys, like himself, face on a day-to-day basis down to improper advice at the outset of the contract.³¹

ISSUES THE INDUSTRY PRESENTS IN SOLICITING CLIENTS

Dennie began the discussion about the concerns surrounding the solicitation of clients by jokingly saying that he never goes to the nightclubs with his clients in Miami, but now he is in Las Vegas, so it is a different story.³² With all jokes aside, Dennie told the Forum that there is a fine line to walk with clients, and sometimes attorneys face issues when they do not know where that line is drawn.³³ Business managers will begin to solicit sports talent from very young ages, and while this solicitation is permissible for managers, it is not the same story for attorneys.³⁴ For an attorney, it comes down to who is making the initial contact: the attorney or the client.³⁵ Dennie, therefore, advises attorneys to be mindful of knowing where the limitations exist and not crossing any lines.³⁶

Gafoor echoed Dennie's thoughts, and recommended that attorneys in this industry maintain a strictly professional relationship with all clients, no matter who the client may be.³⁷ In balancing this professional relationship with clients, Gafoor explained that it is also vitally important to draw upon clients' experiences to learn how to best handle and best serve each individual client.³⁸ While being proactive in soliciting legal advice to clients, it is also crucial to remember to identify the client before giving any legal

advice.³⁹ This is especially true when providing clients with legal advice over the phone.⁴⁰ Although it is imperative to give clients the best legal advice as possible, it is even more important to maintain attorney-client privilege and to be aware of any conflicts of interest.⁴¹

Moreover, Vlahos proffered his perspective of soliciting clients from the litigation standpoint. He stated that if attorneys are in situations where they are hanging out with potential clients to try to solicit business, then they are in the wrong place.⁴² Although obtaining high profile clients can sometimes be no easy feat, acquiring such clients is really a result of the hard work an attorney puts in and the relationships that attorney has built with people other than the potential client.⁴³

Once an attorney has secured a client, Vlahos notes that it is important to only provide clients with the utmost honest advice from the very beginning, particularly in respects to any conflicts of interest.⁴⁴ While this is true for any attorney, this is notably true for litigation attorneys because they must always weigh the cost-benefit of the issues at hand.⁴⁵ At the end of the day, Vlahos advised attorneys to provide their clients with the best work product possible and to ensure that the clients are being kept up-to-date with their cases.⁴⁶ This, Vlahos explains, will help attorneys avoid knee-jerk reactions from clients, and will keep clients happy.⁴⁷

CONCLUSION

Although the entertainment and sports industry presents a unique set of ethical challenges for attorneys, these challenges are not so broad or vague that they cannot be overcome. While the laws that the entertainment and sports industry encompass continue to evolve, it is crucial for attorneys to remain ethical in all circumstances. Notwithstanding the high profile clients this industry offers, attorneys must do their part to be mindful of the changing ethical concerns and remember that the client's best interest always comes first. ■

ENDNOTES

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A Law Student's Perspective

Sports and Entertainment General Counsels

Bakita Hill

The United States sports and entertainment industries are the largest in the world. These industries in the United States represent a third of the global sports and entertainment industry, which is \$717 billion. This includes motion pictures, television programs and commercials, streaming content, music and audio recordings, broadcast, radio, book publishing, video games, and ancillary services and products.¹ The U.S. industry is expected to reach more than \$825 billion by 2023. This increase will come with many issues, so general counsel within the sports and entertainment industries have plenty to look forward to and learn.² In this article, I will discuss the experiences of the panelist with respect to being general counsel. I will also discuss recent trends of general counsels, factors that affect the selection of outside counsel, and the use of outside counsel. The panel at the American Bar Association's Forum on the Entertainment and Sports Industries 2019 Annual Meeting consisted of Benjamin Lipman, Vice President of Legal Affairs and General Counsel for Las Vegas Review Journal as lead facilitator; Tanja Olano, General Counsel and Vice President of the Los Angeles Organizing Committee for the 2028 Olympic and Paralympic Games; Pamela Parker, Senior Vice President of Business Affairs at Sony Pictures Television; and Kelvin Smith, Executive Commissioner and General Counsel for the Big 12 Athletic Conference.

ROLES OF GENERAL COUNSEL

Today, there is a heavy demand on organizations, so having a general counsel work for an organization is much more popular than relying on third-party law firms for legal services.³ The law firm or lawyer who fills the position of general counsel must address issues reactively, by giving a legal prospective to the organization.⁴ Duties of a general counsel include reviewing contracts, handling litigation, negotiating deals, compliance with rules and regulations, and analyzing corporate transactions. Law firms and lawyers who serve as general counsel of a organization must promote a culture that maintains a high level of ethical behavior. Even though the evolution of general counsel is complex, it is a positive development for lawyers and organizations.

There is no one size fits all approach to being a general counsel for a sports or music organization. There are many factors that contribute to the many different roles of general counsel, such as how big the legal department is, how big the entity is, where the future of the entity is going, and also how much the entity depends on outside counsel for different subject matters. As general counsel for a sports or music organization, you are expected to play many different roles. The role that the general counsel plays at a smaller organization, like the Big 12 Athletic Conference,

is broad. For example, Kelvin Smith handles employment, insurance, taxation, transactional, and litigation issues that could arise at his smaller organization.⁵ At a small non-profit organization, the general counsel role requires an even boarder skill set. This is true for startup companies that begin with a small number of employees and continues to grow the organization to a larger number of employees. For example, Tanja Olano often had to play the Human Resource role when the Los Angeles Organizing Committee was just a startup organization. She also plays the role of an intellectual property lawyer for the organization.⁶ On the other hand, the roles are very different for a person who works not as general counsel, but as a business operations employee. For example, Pamela Parker's biggest responsibility is to negotiate deals for Sony.⁷ A company as big as Sony has many different departments, so there are other people to rely on who can answer questions about specific issues that arise. To be general counsel for a music or sports organization means being able to maneuver throughout various issues while working with other people to resolve issues.

OUTSIDE COUNSEL

Even with a general counsel, an organization will routinely hire outside counsel for specific matters.⁸ Today, the trend for many companies is to start out with a larger number of outside counsel and as the time goes on, lessen that amount of outside counsel. One reason to lessen the number of outside counsel is because it can be difficult bringing all the outside counsel up to speed on a particular issue. The general counsel is responsible for updating outside counsel and ensuring that the outside counsel is aware of the operations of the organization. It can be a lot of work to educate each outside counsel, so lessening the number of outside counsel is justifiable. The general counsel working on things day to day will make important connections on things that the outside counsel will not see, because outside counsel does not live and breathe the organization the same way that the general counsel does each day.

Another reason to lessen the number of outside counsel is because the company is big enough to have its own legal department that includes different areas of law. For example, Sony rarely uses outside counsel, because they employ lawyers who have knowledge in a certain area of the law. However, outside counsel is needed when a big company is doing a deal in a different country or a different state. For instance, if Sony wanted to become familiar with the laws and regulations of a different country or state, it would approach local outside counsel who are familiar with the local laws and regulations of that particular country or state. Outside counsel could present a conflict of interest, because they could be working with another organization.

A conflict of interest is most present in the studio side of a music or television and film organization where outside counsel is also working for a competitor.

Some organizations such as, the Big 12 Athletic Conference, will primarily only use one outside counsel. Utilizing one outside counsel makes it easy for general counsel, because they will always know who to ask when they have questions or concerns about an issue that they are unfamiliar with. Working with one outside counsel helps limit time spent on explaining a certain aspect of the organization to outside counsel, because outside counsel will already be familiar with the organization. Smaller organizations should utilize this one stop shop method more often in order to avoid the issues that go along with having multiple outside counsels.

SELECTION OF OUTSIDE COUNSEL

There are many different factors that affect the selection of a law firm or a lawyer to be hired as outside counsel. One factor is expertise of the local laws. If an organization has an issue in a foreign location and is in need of an expert on that location's laws, then it is in the organization's best interest to hire an expert who knows the local laws as it pertains to the issue that arises. Another factor is relationships within the industry. General counsel is likely to ask another lawyer who they respect to be outside counsel for a particular issue. The reputation of a law firm or lawyer certainly helps to make and maintain relationships within the industry, which leads to gaining more trust within the industry. Another factor is public scrutiny. The things that potential outside counsel law firms and lawyers do relative to the world are important. For example, a private non-profit organization cannot disassociate itself from the community where it is located. The taxpayers and the citizens of that community will always be interested in what the organization is doing for the community, so public scrutiny is an important factor to consider when deciding which law firm or lawyer represents the organization as outside counsel. Public scrutiny is a factor for organizations that are not non-profit as well. A company that is in Hollywood encounters a lot of public scrutiny, so things like who the organization hires or how much the organization will pay that person is constantly a topic for discussion of the public.

Diversity is another factor that affects the selection of a certain law firm or lawyer to be hired as outside counsel. Today, it is more important for organizations to hire talent that have diverse experiences and backgrounds, so the organization is not only a small segment of the population. An organization like Sony must be aware of the diversity within the company in order to ensure that the content that is being released reaches the maximum number of viewers. No one factor is more important than another when deciding who to hire as outside counsel.

LIKES AND DISLIKES

There are many things that general counsel like and dislike about working with outside counsel. One thing general counsel likes and appreciates is when outside counsel understands the ins and outs of the organization well. The

understanding of the organization by the outside counsel is critical to ensure issues are resolved properly. If the outside counsel understands the organization's business then they can anticipate issues that might arise for the organization. Time will not be wasted on explaining every aspect of the organization to outside counsel if the outside counsel is already knowledgeable on the aspects of the organization. A good way for outside counsel to anticipate issues is staying proactive by staying up to date on news that has an effect on that particular organization.

Good communication is another thing that general counsels like to maintain with their outside counsel. Members of general counsel do not like poor communication between them and the outside counsel. It is important for the outside counsel to be transparent with general counsel. It is ineffective for outside counsel to send a bill to the general counsel, while the general counsel is unaware of who was working on the matter or how the matter was resolved. Outside counsel should maintain a constant line of communication with general counsel in order for the general counsel to stay prepared for problems they might see in the future.

Members of general counsels do not like to ask outside counsel to conduct research or resolve an issue and receive information that is too complex. If the information is too complex, then the general counsel will have to do extra research to understand the complexity. Outside counsel should remember that they are hired as the experts, so when they need to explain or clarify something to general counsel it is important to give that information in a way that even non-lawyers would understand. In other words, general counsels do not want to do extra work on work that they asked outside counsel to complete. Even though there are some likes and dislikes of outside counsel, it is important for general counsels to provide their organizations with expertise, so valuable outside counsel should be a top priority for the general counsels when they seek outside help.

CONCLUSION

The role of general counsel is not clear cut and generally requires a broad skill set. The role of general counsel requires a sound judgment with the organization as the main importance. General counsel responsibilities will continue to become more complex and reliance on outside counsel is inevitable. Through the likes and dislikes, outside counsel will be important to certain organizations that do not have multiple departments. A good general counsel can provide advice that conforms within the big picture of an organization.⁹ General counsels are so valuable to an organization and the demand for general counsels will increase in the future. ■

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A Law Student's Perspective

A Fireside Chat with Seth Krauss

Ashley Gugino

INTRODUCTION

Seth Krauss has been serving as the Chief Legal Officer of Endeavor Group Holdings, Inc. since June 2014. Additionally, Krauss served as the Executive Vice President and Chief Legal Officer of Take-Two Interactive Software from 2007 to 2014, and as the Executive Vice President of Legal Counsel at Morgan Stanley from 2004 to 2007. In 1992, Krauss received his undergraduate degree from Duke University. After deciding that he wanted a break from the east coast, Krauss attended the University of Washington School of Law, where he earned his Juris Doctorate in 1995.

KRAUSS'S START IN THE INDUSTRY

Krauss—who is the son of the late Tony-winning Broadway producer Marvin Krauss—was born with show business in his blood.¹ However, he had never planned on having a career in the entertainment business.² In fact, Krauss stated that he “loved theater and [he] loved the art,” but that he “ran from it professionally.”³ During Krauss's three years in law school, he served as a Trustee on the Board of Duke University, a Director on the Board for the Legal Services Organization, a Director for the Center for Family Representation, a Board member for the Advisors for the Asian American Bar Association of New York, and a Board member for the MacDella Cooper Foundation.⁴ After Krauss earned his Juris Doctorate from Washington University School of Law in St. Louis, Missouri, he spent a dedicated eight years in the District Attorney's office in Manhattan, New York as an Assistant District Attorney and Senior Investigative Counsel.⁵

During his time at the Manhattan DA's office, Krauss was responsible for heading multifaceted, long-term investigations into violations of accounting, banking, securities, and taxation laws and regulations.⁶ But that was not all. He also worked closely with United States Federal and State regulators and law enforcement agencies, as well as various international regulators and agencies.⁷ However, while he worked as an Assistant District Attorney and Senior Investigative Counsel, Krauss most notably prosecuted the Enron case—a well-known scandal in which Enron Corporation's “collapse affected thousands of employees and shook Wall Street to its core.”⁸ Moreover, he was a key player in the investigation of the role of Chase and Citibank in the 2008 financial collapse.⁹

After his time at the Manhattan DA's office came to a close, Krauss moved on to Wall Street, where he worked his way up the ladder as an ardent attorney for Morgan Stanley.¹⁰ While at Morgan Stanley, Krauss enjoyed his vigorous responsibilities of coordinating all of the significant regulatory and law enforcement matters in the United States, while

serving as one of Morgan Stanley's senior liaisons to its regulators.¹¹

After three devoted years at Morgan Stanley, serving as the company's Vice President of Legal Counsel, Krauss once again decided the time had come for him to move on to a new area of law. As such, he decided to take a job with video game developer Take-Two Interactive Software.¹² Take-Two Interactive is most known for its holding of labels for Rockstar Games and 2K.¹³ During his nearly-eight years at Take-Two Interactive, Krauss developed a deep passion for gaming and he described Take-Two Interactive's creators as “some of the world's greatest artists.”¹⁴ At the close of his time as Take-Two Interactive's Executive Vice President and Chief Legal Officer, he was offered a job at Endeavor Group Holdings—a “massive entertainment and sports company on the agency side.”¹⁵

Endeavor initially merged with William Morris Agency and IMG to become the formerly known WME-IMG. At Endeavor, Krauss oversees a multitude of areas. Namely, he oversees the global legal function, government relations, risk management and physical security, while also managing a department of professionals located at different offices around the world.¹⁶ In addition to his duties at Endeavor, he serves as a member of the executive team that is responsible for managing the day-to-day affairs of the company.¹⁷

A TYPICAL DAY IN THE LIFE OF SETH KRAUSS

As Endeavor's Chief Legal Officer, Krauss hit the ground running.¹⁸ He manages a legal team consisting of close to 200 lawyers around the world.¹⁹ He describes his job, jumping from deal to deal, as being “asked to change the tires on a moving car.”²⁰ No matter how busy his job keeps him, Krauss does not let anything slow him down. In fact, he spends an average of three weeks every month on the road and away from his home and family in Manhattan, New York.²¹

A typical month consists of Krauss spending at least one week in Los Angeles, as well as at least one week in London.²² Endeavor not only manages offices in nearly 40 countries, but it also holds live events in nearly 100 countries, as well as holding active rights events in nearly 165 countries.²³ As a result, Krauss travels for work more often than not—traveling both for his internal attorneys and internal clients, as well as for external deals and external clients.²⁴

Although he spends the majority of every month on the road, Krauss has learned how to adapt and balance his work-life with his home-life over the years.²⁵ In explaining his typical day, Krauss stated, “My average day is 365 days divided by 365, and the result is that there's no average

day because you never know what you're going to wake up to."²⁶ In spite of his ever-changing day-to-day responsibilities, Krauss trusts his staff do to the job that he hired them to do. He enthusiastically described his role at Endeavor as having "not a lot of predictability, but a lot of challenge."²⁷

KRAUSS'S WORDS OF WISDOM FOR YOUNG LAWYERS

During the Fireside Chat, Krauss proffered some advice for young lawyers, who may just be starting their careers in this industry. Krauss started off by noting that "all experienced lawyers know that you spend more time at work awake than anywhere else," and thus it is imperative for young lawyers to find a job in a field that they enjoy.²⁸ He stressed the critical importance of looking forward to your job, *every single day*.²⁹ While explaining that he understands the struggles of working hard, Krauss said, "You make the most of the opportunities that you have."³⁰

In Krauss's wise words, he advises young lawyers to control the things that they can control: be on time, be prepared, be thoughtful, have a positive attitude, and do not sweat the other things.³¹ It is crucial to grasp the concept that "you can't worry about how someone else feels about you. You can only worry about how *you* act, what you can do, and what you can control."³² He then advised that if young lawyers can focus on these things, and find the areas of law in which they are most passionate about, then they will be in a great position and be able to go on to lead great legal careers.³³ ■

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A Law Student's Perspective

Motion Picture and Television Profit Participations

Ashley Gugino

INTRODUCTION

The American Bar Association (“ABA”) invited Steven Sills of Green Hasson Janks to facilitate a panel of four experts to discuss the Motion Picture and Television Audit and Litigation Process at the 2019 ABA Forum on the Entertainment and Sports Industries Annual Meeting in Las Vegas, Nevada. The four panelists that discussed profit participations in great detail are Ron Nessim of Bird, Marella, Boxer, Wolpert, Nessim, Drooms, Lincenberg, & Rhov; Ilan Haimoff of Green Hasson Janks; Bob Getman of Jackoway Austen Tyerman Wertheimer Mandelbaum Morris Bernstein Trattner & Klein; and Teena Munroe, Entertainment Vice President of Participations at Lions Gate Films.

The entertainment industry is notorious for complex contracts, which are often times paradoxically “signed, sealed, and delivered” with nothing more than a handshake and inadequate documentation.¹ It is imperative for attorneys to pay close attention to the amount of money a production studio or company allocates to its participants. In working with a client’s best interests in mind, lawyers on both sides of the deal must continue to be mindful and patient during the audit process to ensure that the respective audit is nothing short of successful.

WHAT ARE PROFIT PARTICIPATION RIGHTS?

Profit participation rights are contractual participations in a company with which an investor participates in both the losses and the profits of the company.² The owner of the profit participation right is not a shareholder of the company, nor is the owner of the profit participation right entitled to any membership rights of the company.³ In other words, someone who owns a profit participation right in a motion picture or television company has no voting rights within the company and cannot attend any membership meetings.⁴

Under traditional deals, studios or production companies were seeking to make a profit off of different motion pictures and television series.⁵ For motion pictures, the studio or production company would produce a movie and then hope to have a big box office hit.⁶ For television series, the process was essentially the same as it was for motion pictures: in order for studios or production companies to make a profit, this typically meant producing between 65 to 100 television episodes or more, if possible.⁷ In both instances, companies would then sell the production to a paid cable window, home video companies, basic cable, regular television companies, as well as video cassettes and DVD production companies.⁸

However, as technology has progressed, the world of profiting off such productions has changed.⁹ Once online

streaming came along, the motion picture and television business transformed drastically.¹⁰ Thus, profit participation has evolved into a complex topic that is seemingly the subject of many legal disputes between companies and the people to whom the companies are supposed to be paying participations.¹¹ As a result, it is vital for attorneys in the industry to understand every step in the contract, audit, and payout process.

DECIDING WHEN TO AUDIT AND THE PROCESS THAT FOLLOWS

Often times, the only way to determine if there has been an accounting discrepancy in the reporting of net profits is to audit the film or television production company’s books.¹² The word “audit” can sometimes be confusing.¹³ However, it is important to know that “audit” is a contractual term.¹⁴ Thus, performing an audit is actually performing a forensic accounting service to clients.¹⁵ When conducting an audit, lawyers are acting as historians by focusing on what happened several years ago, rather than what is happening right now.¹⁶

The audit process roots back to the audit provision that is within the contract between the client—mainly profit participants—and the production studio or company.¹⁷ The audit process begins with the concept of tolling.¹⁸ The concept of tolling is making sure that the auditing provision in the agreement is deeply analyzed because there are specific rules written in the contracts which outline when a production studio or company needs to be notified that an audit is going to take place.¹⁹ These timeline rules, or rather limitations, can serve as important indicators of beginning the audit process because, for example, if a client is eight years into a contract and talks with their lawyer about starting an audit, often times nothing can be done.²⁰ This is because agreements typically state that if the client does not notify the company within a two year period after signing the contract, then the client loses the right to audit.²¹

Accordingly, it is imperative for attorneys in this industry to counsel their clients to look at audit statements and provisions in the early stages after accepting the contract.²² If an audit can be conducted, it is vital to send a notice of the audit to the production company as soon as possible.²³ The notification is sent to a cue and then the waiting process begins.²⁴ Importantly, attorneys should be mindful of how long the audit process takes, and thus they should remain patient when dealing with their clients and others.²⁵

While the audit notification is waiting in cue, attorneys are advised to reach out to other profit participants involved in the same deal as their client.²⁶ This allows the audit process to be conducted all at once, rather than having

individual audits sporadically pop up.²⁷ From this point, the audit itself is only a couple of months away.²⁸ In the meantime, attorneys begin preparing for the audit and making sure that the disclosure statement is signed by the client, the audit firm, and the company being audited.²⁹ Once it comes time to do the audit, the waiting game is far from over.³⁰ Audits themselves can take anywhere from six months to over a year and a half because audits are long, complex, and difficult processes to get through.³¹

After the audit is complete, the attorney will issue a report to the client.³² This report includes a variety of claims, most typically containing the errors that the company agrees to correct, any contractual interpretational issues, and any equitable fairness claims which are included in the event that the report goes to litigation.³³ After this report is issued to the client, an initial settlement meeting will take place.³⁴ If the client and the production company cannot reach a mutual solution during the settlement meeting, then the claim will proceed to litigation.³⁵

ELEMENTS OF A SUCCESSFUL, EFFICIENT, AND SMOOTH AUDIT FROM THE PRODUCTION COMPANY'S PERSPECTIVE

The key element of a successful, efficient, and smooth audit is, not surprisingly, communication.³⁶ Communication is everything, especially in today's world where communicating effectively often times proves to be a challenge.³⁷ Moreover, communicating effectively tends to be harder today because there are now a multitude of ways in which people can communicate with each other.³⁸

Most of the agreements between profit participants and production studios and companies are boilerplate agreements.³⁹ This means that all of the agreements are essentially the exact same and, thus, there is little to no room for negotiation.⁴⁰ Once a notification of an audit gets sent to the cue, companies, such as Lions Gate Films, focus on remaining transparent because they are the entity that provides everything necessary for the audit to proceed.⁴¹ By acting with complete transparency throughout the entirety of the audit process, companies are able to avoid auditors writing scope limitations, which are problematic if the matter ends up in litigation or arbitration, as the doors to discovery are then permitted to fly wide open.⁴²

Munroe advises her fellow attorneys to give the audit firm what they want because this will allow the audit process to run smoothly for all parties involved.⁴³ Moreover, reaching a successful audit means having an audit that reaches its conclusion without the parties having to go to arbitration or litigation.⁴⁴ However, Sills cautions all lawyers that not all production companies are as honest and transparent throughout the audit process as Lions Gate Films is.⁴⁵ Therefore, another key element for all parties involved in an audit process is to remain patient; indeed, patience is a virtue.

Errors will always arise in the audit process—mistakes are inevitable. Munroe notes that nine times out of ten, some type of error will come up during an audit.⁴⁶ However, this is no reason to panic.⁴⁷ If the production studio or company is able to recognize when errors emerge as a result

of an audit, it is best to acknowledge them, admit them, fix them, and move on.⁴⁸

Moreover, the relationship between the audit firm and the company being audited is of fundamental importance.⁴⁹ Such a relationship sets the tone between the audit firm's client and the production studio or company.⁵⁰ Neither party wants to deal with someone who is hostile, rude, and non-cooperative.⁵¹ If such an attitude does exist, the atmosphere shifts to one that is filled with a great deal of tension. This concern is why Munroe recommends every party involved in the audit act with due diligence and always attempt to tackle any potential issues with sound reasonableness in mind.⁵² These suggestions will help ensure that the audit process is successful, efficient, and smooth.

CONCLUSION

While owners of profit participations often receive the return that they are setting out to get, it is important to keep in mind how complicated this area of the industry actually is. This article barely scratched the surface of this complex legal topic. However, there are a number of takeaways for profit participants, attorneys, and production studios and companies alike. First, if a person is considering becoming a profit participant, it is crucial for that person to first obtain an attorney. A lawyer in this field will be able to assist the profit participant in every step along the way, making sure that the agreement between the parties is fair.

Moreover, a profit participant is well-advised to be extremely mindful of timelines that are set out in the agreements. If a timeline is missed, then the profit participant will be wholly unable to bring an audit against the contracting party. While attorneys are sympathetic to these types of situations, there is unfortunately nothing that the law firm will be able to do in such cases. Additionally, the profit participant, the attorney, and the contracting studio or company are all guided to encompassing a great deal of patience when enduring the audit process, as audits can last much longer than any party would like.

Subsequently, it is also of essential importance for the studio or company that is being audited to act honestly, justly, and fairly. In doing so, the studio or company will not only be seen as complying with the audit firm, but they will also permit the audit process to run smoothly. Although mistakes will inevitably be uncovered, taking responsibility, fixing the mistake, and moving on will help guarantee that the audit is successful. This is the goal for every party involved. ■

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A Law Student's Perspective From The Forum's Annual Meeting

Sports Gambling

Victoria Nguyen

Now that every state has the power to authorize and regulate sports betting, where do we go from here? In this article, I will provide insights drawn from the panelists at the 2019 American Bar Association's Forum on the Entertainment and Sports Industries Annual Meeting on issues arising from legalized sports betting. The panel featured both Woodie Dixon, General Counsel and SVP of Business Affairs for the Pac-12 Conference and Aalok Sharma, Associate at Stinson LLP as lead facilitators; A.G. Burnett, Partner for McDonald Carano and Former Chairman of the Nevada Gaming Control Board; Matthew Holt, President of U.S. Integrity; and Jennifer Roberts, Associate Director of the International Center of Gaming Regulation.

BACKGROUND

In 1992, the Professional and Amateur Sports Protection Act (PASPA) made it illegal for state and local governments "to sponsor, operate, advertise, promote, license, or authorize" competitive sporting events.¹ To get around that, people resorted to offshore bookmaking, where an estimated \$150 billion is wagered on sports every year.² In May 2018, the U.S. Supreme Court ruled in favor of New Jersey in *Murphy v. NCAA*,³ effectively quashing PASPA and legalizing sports betting. From a regulator's perspective, Burnett monitored the case closely knowing that if PASPA was overturned, it would open the floodgates for states to legalize and regulate sports betting. Sports betting is now legal in 13 states and counting, with stark differences in state regulations. Holt expected states to follow Nevada's "successful" framework, but instead the regulations have proved to be "very individualized" and "all over the place." For example, Tennessee opted to go mobile-only, while New York deals exclusively with brick-and-mortar locations.

Roberts noted how quickly sports betting is spreading compared to other forms of gambling, such as the modern lottery, which was first legalized in New Hampshire in 1964. It recently made its way to Mississippi, leaving five states without lotteries. Given that it also took decades for land-based casino gambling to spread, the progress sports betting has made in a matter of months is astounding. With more states getting involved, more money is being wagered legally across the country. Holt noted that the revenue projections for known handle in April 2018 was in the ballpark of \$12-14 billion, and that figure materialized into about \$30 billion. The earlier forecasts of known handle rising to hundreds of billions of dollars in five years may be reached by next year. "How fast operators got up was amazing," Holt said, adding that from the time PASPA got repealed to the

time people could place bets was faster than anybody could have anticipated.

FEDERAL INTERVENTION

In the jurisdictions where sports betting is legal, it is state-regulated. Former Republican presidential nominee Mitt Romney and Senate Democratic Leader Charles Schumer of New York are working on a sports gambling bill that would provide federal regulation of betting.⁴ That may not be a welcome change. Sports betting in Nevada started off "pretty much unregulated," according to Roberts. People entered the market by simply paying a license fee and before long, organized crime ran the casinos. "It wasn't until a threat of federal intervention into our casinos when we really put forth a robust system to get the crime out of our system," Roberts said. "That's why we have such strong regulations in gambling and replicated strong regulation in sports betting." Roberts, who teaches at the Boyd School of Law at UNLV, said when regulators come to her class, she always asks them if they would like to see a federal framework for sports betting. Not one person has ever answered affirmatively to that question. Roberts said that in an ideal world, the benefits of federal regulation would be the sharing of information and ability to undertake enforcement measures that can be tracked across several operators nationwide. However, by creating a new framework where there are already existing structures in place through gambling regulator systems, the federal government would be needlessly duplicating efforts. It would also then be compelled to create an agency that is responsible for monitoring sports betting integrity, which has the potential to lead to the federal government regulating sports integrity and other facets of the industry. "It's a slippery slope," Roberts said.

Burnett agrees that federal intervention in sports betting regulation is unnecessary as long as states have strong measures of regulation and compliance. The former regulator said Nevada has traditionally been opposed to any federal intervention due to concerns that a federal mechanism will "probably be bigger, more cumbersome, maybe carry more taxes along with it, won't be as organized, and won't have the expertise" that the state has developed over time. Similarly, Holt said that each state has different reasons for legalizing sports wagering from a business standpoint, but generally speaking, states are motivated by the prospect of generating tax revenue, creating jobs, and supporting the local economy. Since every state has a very different picture of how to use sports betting to create jobs, a federal framework would "slow everything down for everybody and certainly isn't going to hit all the needs of every constituent involved."

INTEGRITY OF SPORT

Sports betting goes hand in hand with concerns over maintaining the integrity of sport. History is stained with numerous sports betting scandals, and with the legalization of sports wagering on a national scale, it is doubtful that we have seen the last of these problems. Just last month, members of a Chicago mob purported that they wanted to fix college basketball game.⁵ Sports betting allows for the compromise of sports integrity in a myriad of ways, including team officials releasing inside information without consent, match-fixing, and fraudulent activity in sports books. Holt pointed to the fact that all the pre-match odds in the United States are still moved by human beings as opposed to machines that have risk-management algorithms. “We know human beings do things they’re not supposed to do,” he said.

Holt is concerned that regulated sports betting will lead to more issues with respect to integrity of sport because it provides young men and women with more opportunities to get into trouble. “If we look at all the situations where there have been prosecutable integrity issues in sports in the past 20 years: Northwestern, San Diego, Tim Donaghy, Toledo. In every single situation, the perpetrator was paid \$2,000 or less,” Holt said. Now, an underage student athlete can easily get a friend to make a bet for him at a casino. “Regulated sports betting also means more opportunities for potential issues to pop up. They’re not million-dollar great Ponzi scheme sports-betting issues. They’re kids who make poor choices getting jammed up walking into places where they can legally place wagers now,” Holt said, adding that it will take a lot of cooperation from the regulator, the league, and the operator’s side to moderate integrity.

Roberts concedes that while regulating sports wagering may increase visibility and some risk, it is still the lesser of two evils. “It’s always the illegal unregulated markets that create the biggest harm because that’s where it’s easy to filter untaxed money through a system,” she said. In a regulated market, people set up accounts to make wagers and they are under surveillance, so regulators can track wagers, compare them, and align movement with other regulated markets. By monitoring these activities, it is possible to track suspicious activity and uncover scandals. On the other hand, unregulated markets operate untaxed and without oversight. Roberts added: “Transparency is key to help monitor integrity because people are going to bet on sports whether it’s legal or not.”

Burnett believes that integrity is of the utmost importance for Nevada’s Gaming Control Board, which regulates 3,000 licensees throughout the state. “Integrity is all we have,” he said. “If someone pulls a machine and they’re cheated and that makes the Wall Street Journal, we have an issue. There are 400 people at the Gaming Control Board dedicated to make sure that doesn’t happen. We regulate from top to bottom to ensure you’re safe right now in whatever you’re doing.” Nevada ensures that its sports books are trained not to take a bet from a player, referee, or official, and if they are caught doing that, they will face the proverbial “death penalty.” Burnett said, “They will lose their gaming license.”

E-SPORTS

The emerging field of e-sports has already proven it is not immune to integrity issues. An NBA 2K team recently removed a player for providing inside information to someone who he knew was betting on NBA 2K league games.⁶ However, that is not the only problem so far with e-sports as it relates to sports betting. Nevada allows wagering on e-sports, but it has not taken off as much as operators hoped it would, given how popular e-sports is globally. “It’s damn hard to understand it, but you can’t ignore the numbers,” Burnett said. The reason e-sports betting has not taken off may have something to do with the age of the people in that sphere. Holt said the average e-sports participant is 15-16 years old. “They can’t buy drinks. They don’t buy food. They are not able to gamble. In fact, they are a liability on the gambling floor.” So even though the participation numbers continue to skyrocket, wagering is not taking off, especially in states that are heavily casino-based because they are not able to monetize the players. How will the two markets converge? “If casinos and operators can’t monetize the audience, they’re not going to want to take bets on it,” Holt said. “Everyone sees the massive participation numbers and say, ‘millions upon millions upon millions of people are playing this game, but they’re all 15 years old and they don’t have any money that we can monetize.’ It is a tricky challenge.” While the future of e-sports betting hangs in the balance, Burnett is optimistic that regulated e-sports betting may lead to more e-sports tournaments in a given state.

OTHER CONCERNS

There are other issues in sports gambling that worry the panelists. For starters, challenges will arise from the conversion of the illegal sports betting market to a legal regulated market. More people gravitate to unregulated sports wagering than regulated sports betting because they do not have to pay taxes or worry about regulation. It is more convenient because they do not have to walk into a casino to place offshore bets. Roberts said the biggest risk is tackling the robust illegal market first to get people to shift to the legal regulated market. She alluded to studies in the UK that examined the effect of forcing people to obtain a license to gamble using skins (digital cosmetic items used for in-game play). Most people did not get licensed because it is so much easier to operate in an offshore site to facilitate that activity. Roberts said regulators and law enforcement must monitor the situation and try to get a handle on it.

Roberts also said that she would like to see the federal government amend the Wire Act. The Wire Act was a series of laws passed in the 1960s to target organized crime. Its sister laws were passed in the 1970s and targeted organized illegal gambling, mainly horse racing. Roberts called the Wire Act “antiquated” because it does not allow for any interstate activities among legal jurisdictions, so it is prohibitive to the industry in terms of managing risk and sharing information.

Another concern in the sports betting sphere centers on social-media threats and player safety. Earlier this year, an avid sports bettor was charged in federal court with making

racist threats against dozens of professional and collegiate athletes over social media.⁷ Roberts said it is important for law enforcement to send a message that this behavior is unacceptable. Sharma offered the NFL Players Association as another example because it voices its concerns “pretty regularly” over people on the internet threatening to harm players or their families over costly in-game errors. Dixon admitted that the Pac-12 sees an uptick in voice messages over the weekend. “You can tell in their voice that the person lost money,” he said. “Before we used to get calls that an official sucks, but now there are more threatening calls based on people having lost money.” One of the unintended consequences of more people gambling is there are more bettors losing money and becoming angry, which creates more tension and anxiety overall. ■

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3 *Murphy v. NCAA*, 138 S. Ct. 1461, 200 L. Ed. 2d 854 (2018).

4 Jim Myers & Tony Batt, *U.S. Senator Mitt Romney Confirms Alliance On Federal Sports Betting Bill*, GAMBLINGCOMPLIANCE (Sept. 11, 2019), https://gamblingcompliance.com/premium-content/insights_analysis/us-senator-mitt-romney-confirms-alliance-federal-sports-betting.

5 *Feds: Mob bullies spoke of plot to fix college hoops game*, THE ASSOC. PRESS (Oct. 3, 2019), <https://apnews.com/14e9c88622af434db0b3cae3156c735d>.

6 Philip Conneller, *NBA 2K League Esports Team Kicks Out Player Over Insider Information Betting Scandal*, CASINO.ORG (Sept. 13, 2019), <https://www.casino.org/news/nba-2k-league-esports-team-kicks-out-player-over-insider-information-betting-scandal>.

7 *Former Babson Student Charged With Sending Athletes Death Threats After Gambling Losses*, CBS BOSTON (May 29, 2019), <https://boston.cbslocal.com/2019/05/29/babson-student-addison-choi-death-threats-gambling/>.