



Sports and



Entertainment Law Digest

Published by:
The Sports and Entertainment Law Society
of Hofstra Law School

Vol. 1, Issue 1
Spring 2005

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INTRODUCTION BY FACULTY ADVISOR

Dear Reader,

Welcome to the first volume of the Sports and Entertainment Law Digest.

The Sports and Entertainment Law Digest is an unofficial journal published by the Sports and Entertainment Law Society at Hofstra University School of Law. The Digest is a revival of the Copyright and Entertainment Law Digest that existed in the 1980's.

Although I serve as faculty advisor for this project, this Digest is completely ran by the students of Hofstra Law School. The Digest serves as a literary medium which focuses on legal issues that arise in sports, entertainment, and the arts. The topics addressed in the Digest vary from contractual matters, to those concerning intellectual property, as well as torts.

I am proud of the students that have taken the initiative to put this Digest together. I hope that students will continue to be interested in these areas of law as they present exciting and interesting issues. I also hope that this first edition will be the beginning a new tradition here at Hofstra.

Without further delay, I am proud and excited to introduce the student organized Sports and Entertainment Law Digest. We hope you enjoy.

Sincerely,



Leon Friedman
Professor, Hofstra University School of Law

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New York State and City Tax Incentive for Film

By: Vinca Liane Jarrett, Esq.

Hofstra University School of Law, Class of '88

Introduction

Independent and Hollywood film production has long been focused on shooting films where the best economic incentives exist. For decades, Hollywood has complained of "runaway" filmmaking, whereby U.S. productions have gone to foreign countries who offer tax incentives, often referred to as "soft money" within the industry, which discounts the overall cost of a film by reducing its total budget usually by a certain percentage off the top and frequently without the need to pay the money back, as producers must to more typical investors. The leader in these incentives has been Canada, but Europe has caught up with each country offering its own inducement and unique rules, and lately countries such as South Africa offering both a discounted currency and up to 65% in production funding available from a combination of government loans and soft money.

In the last five years, several U.S. states have established an array of tax inducements to compete with international soft money programs, including, but not limited to, New Mexico, Louisiana, Hawaii, Rhode Island, Pennsylvania and Illinois, understanding that the only way to keep American film production in the United States is to help finance the films. Currently in the lead of these incentives is the State of New York. With its passing of Chapter 53 Part P, S. 6060--B Section 1 on August 10, 2004, New York State now offers ten (10%) percent off state taxes under Articles nine-A and twenty-two to qualifying production companies or sole proprietors of a qualifying production company.¹ In addition, the New York State law authorizes cities with populations over a million to instate their own tax incentive limited to five (5%) percent.² The City of New York thereby added its own incentive on January 3, 2005 by amending Title 43 of the Rules of the City of New York to include a new Chapter 7, which grants an additional five (5%) percent tax credit for qualifying film productions to be applied against taxes incurred under sections 11-503(m)

¹ See Chapter 53 Part P, S. 6060--B Section 1 §24.

² See N.Y. Tax § 1310(f)(2005).

or 11-604.20 of the Administrative Code of the City of New York.³

Qualifying for the Tax Exemptions

To qualify for the full benefit (15%) of the production costs, a qualified production company must submit an application, be approved by the New York State Office for Motion Picture and Television Development and/or New York City Mayor's Office of Film, Theatre and Broadcasting, and be prepared to shoot the film within one-hundred and eighty (180) days of said approval.⁴ A qualified film production company is defined under the statute to include any "corporation, partnership, limited partnership, or other entity or individual which or who is principally engaged in the production of a qualified film and controls the qualified film during production."⁵ In other words, the production company need not be in the State of New York in order to qualify for the exemption, nor does all of the budget of a film need to be spent in New York. A qualified film is defined as any feature-length film, television film, or television pilot, and specifically exempts documentaries, reality television, sporting events, talk shows, commercials, music videos, and instructional programming.⁶

Approval of Tax Exemption

To get approval, at least seventy-five (75%) percent of the total qualified production costs for all of a qualified film's stage work must be incurred at a "qualified film production facility" in the State of New York.⁷ If qualifying for the New York City benefits as well, the qualified film production facility must be within New York City.⁸ Qualified film production facilities are sound stages in New York in which television shows and films are or are intended to be

³ See 43 R.C.N.Y. §7-01(b)(2005).

⁴ See 43 R.C.N.Y. §7-02(a)(2005).

⁵ See Chapter 53 Part P, S. 6060--B Section 1 §24(a)(6).

⁶ See Chapter 53 Part P, S. 6060--B Section 1 §24(a)(3).

⁷ See Chapter 53 Part P, S. 6060--B Section 1 §24(a)(2).

⁸ See 43 R.C.N.Y. §7-06(a)(7)(2005).

regularly produced, and which contain one sound stage or more of at least seven thousand (7,000) square feet.⁹ In addition, a film must spend at least three million (\$3,000,000) dollars at the qualified film production facility.¹⁰ Note, that the minimum time period in the production facility is only one day. For example, if your project needs only one day in a production facility for its film, you need only shoot that one day in order to qualify for the exemption, although realistically spending three million dollars for just one day's shooting is not likely, except for the largest Hollywood budgeted films. However, a production company may still qualify for a partial exemption if a project film's 75% of the stage work in New York and the expenditure is less than three million dollars.¹¹

Qualifying Budget

The tax credit cannot be applied to all budgeted items of a film. The new laws specifically exempt the cost of the production associated with story, script or scenario, and wages or salaries to above the line talent, such as writers, directors, producers and actors, although compensation and expense of extras may be deducted.¹² Further, qualified production costs are limited to those directly attributable to the use of tangible property and the production facility within the state of New York.¹³ This latter is consistent with other tax credits granted by states and foreign governments that are attempting to incentivise local production and stimulate the local economy.

Total Allocation of Credits

The State of New York has a total budget of twenty-five million (\$25,000,000) dollars per tax year allocated to the tax credits.¹⁴ The City of New York has an additional total budget of twelve point five million (\$12,500,000) dollars.¹⁵

⁹ See Chapter 53 Part P, S. 6060--B Section 1 §24(5).

¹⁰ See Chapter 53 Part P, S. 6060--B Section 1 §24(2).

¹¹ See Chapter 53 Part P, S. 6060--B Section 1 §24(a)(2).

¹² See Chapter 53 Part P, S. 6060--B Section 1 §24(b)(2).

¹³ See Chapter 53 Part P, S. 6060--B Section 1 §24(b)(1).

¹⁴ See N.Y. Tax §1310(7)(a)(2005).

¹⁵ See N.Y. Tax §1310(7)(b)(2005); 43 R.C.N.Y. §7-05(a).

This is set to expire in August 20, 2008, but renewal appears likely based on the current overall success of the program.

Sales Tax Exemption

In addition to the production credits, New York State offers a sales tax exemption for most below-the-line cost, applying to a wide range of services, including, but not limited to, film editing, props, assembling, sets, parts, tools, wardrobe, make-up and film processing.¹⁶ Production of a feature film or television film is considered a manufacturing activity under the law. Therefore, film and television productions are entitled to get a sales tax exemption on all production consumables and equipment, both rented and purchased, and other related services, covering most production and post-production services. The exemption also applies to services purchases for resale.¹⁷ Unlike the production tax rebate, it is not limited and applies to feature films, documentary films, shorts, television films, television commercials and the broad category of "similar productions".¹⁸ Additionally, two new bills, pending approval from the New York State Legislature seek to clarify and exempt the use of motor vehicles for transportation during production.¹⁹ While still waiting approval of the bills, transportation remains a taxable item, as does all food and hotel usage by a production company.

The sales tax exemption is not a rebate; instead upon proper application and certification to the New York Tax Department, film and television production companies are exempt from paying such taxes up front, which can be a significant savings. In order to receive the exemption, a producer registers as a vendor by completing New York Tax Form DTF-17 Application for Registration as a Sales Tax Vendor. The application usually takes five (5) business days to process, but it is recommended that one mail the application twenty (20) days before needed. Once processed, the approved producer receives a Certificate of Authority with a vendor identification number. Vendors who supply the producer with property or services that become a physical part of the production are

¹⁶ See N.Y. Tax §1115(a)(39).

¹⁷ See *Id.*

¹⁸ See *Id.*

¹⁹ See N.Y.S. Res. AO2952 (2005); N.Y.S. Res. S04739 (2005) (Both sponsored by Senator Morelle seeking amendment to the Tax Law §1115).

required to fill out a Form ST-120 Resale Certificate. Vendors that supply the producer with property or services consumed in production are required to fill out a Form ST-121 Exempt Use Certificate. These forms, if used, must have the producer's vendor identification number to receive the sales tax exemption.

Made in New York City Marketing Credit

In addition to the sales tax rebate and production credits, for film and television productions that complete 75% of their work in New York City, the City of New York also offers a credit to qualifying productions for outdoor media valued at 1% of New York City production costs to participating productions for co-branded advertising related to the "Made in NY" production.²⁰ This requires that the production brands itself a "Made in New York City" project in advertising. No legislative approval was required for this incentive, as it acts as a bartering or in-kind service benefit created by a Memorandum of Understanding setting out terms and conditions between the Mayor's Film Office and the New York City Marketing Development Corporation, which oversees the city's bus shelters, and allocates a share of advertising space on city buses and shelters to the film incentive. The marketing credit is not limited to qualifying productions, and has been applied to other film industry product and projects, including the promotion of local film festivals.

In conjunction with the marketing credit, a cultural benefit donation of point one (.1%) percent of production costs permits producers and talent associated with a production to make a cultural donation to a not-for-profit or non-profit cultural institution of their choice, which can result in favorable advertising and publicity in connection with the marketing credit. The donation is made in the name of talent or an executive associated with the project, and is intended to support the theatrical, film, writing, and other local arts institutions that nurture upcoming talent and strengthen the City's creative community.

Conclusions

While the program is still in its infancy, New York State and City have leaped ahead of its competition in instituting its incentives to bring

²⁰ See Generally Marketing Credit at http://www.nyc.gov/html/film/html/incentives/made_ny_incentive.shtml.

film and television production back into its economy. While it remains to be seen whether films with other than large Hollywood budgets will meaningfully qualify for the various incentives or be encouraged by the City and State, it is a clear step in the right direction to slow down runaway production to foreign countries that heretofore attracted U.S. film business away from U.S. shores. Combined with the recent passing of amendments to the Federal enacted American Jobs Creation Act of 2004²¹, §181 and §199 on October 24, 2004²², amending the Internal Revenue Code of 1986, US Code Title 26²³, which allows both production companies and investors to right off up to fifteen million (\$15,000,000) dollars in film production expenses from feature film and episodic television²⁴, all that remains is for various U.S. states to form co-production treaties or Memorandums of Understanding between each other to increase funding opportunities to enable independent film to be more competitive with international funding mechanisms.

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²¹ American Jobs Creation Act of 2004, PL 108-357 (2004).

²² The Amendments are set to expire on December 31, 2008.

²³ 26 U.S.C. §§ 181, 199 (2005).

²⁴ 26 U.S.C. §199(a)(2) (2005).

Zero-Sum Games: Labor Negotiations in Professional Sports

By: Jean-Jacques Blistein, Esq.

In the ultra-competitive world of professional sports, there is no bigger game than the collective bargaining process. Traditional theory dictates that there can only be one “winner” in the negotiating process, as both management and labor attempt to get the better of the other.²⁵ However, if there can be only one winner, the stakes of the “game” of negotiating become even higher. The repercussions of failing to reach an agreement can be catastrophic. The first true case study of a major professional sports league and its players association playing the “negotiating game” to a virtual tie is unfolding right at this moment in the NHL and NHLPA. The NHL cancelled its 2004-05 season on February 16th after failing to reach a collective bargaining agreement with the NHLPA, and after already losing over half of its games to a management lockout of the players.²⁶ Sports analysts and hockey commentators predict a devastating impact to the NHL, if and when the League returns, in terms of fan support, sponsorship dollars, and relevance in the sports world.²⁷ How did the situation get to such a point? What can be done to solve the unresolved issues between the NHL and NHLPA? With the NFL and NBA also currently in negotiations to extend their respective current collective bargaining agreements, what impact will the NHL situation have on other major professional sports leagues?

While most sports analysts cite finances and player contracts as the main causes of labor disputes in professional sports, practical experience often shows that there is a wider variety of issues in play.²⁸ One of the most common grievances that a party involved in labor negotiations is likely to voice is “past indiscretions” by the opposing party. Using the NHL as the case study, one can clearly see this issue at play. On the day the NHL cancelled the season, several owners expressed the view that a

mistake was made by reaching an accord with the NHLPA, ending a players’ strike during the 1994-95 season that did not truly solve the NHL’s problems. In fact, Boston Bruins owner Jeremy Jacobs stated he felt that it was that agreement (in 1995) that led the NHL to its current predicament.²⁹ The view expressed by Jacobs has little to do with finances, but is more accurately described as frustration with a decision made by the NHL and its Board of Governors more than five years ago. No negotiation or traditional mediation will be able to undo the decision in 1995, and those forums do not provide an atmosphere conducive to expressing such frustrations.

In a similar fashion, members of the NHLPA have expressed their displeasure with certain actions of management. Some of the most heated words have come from players that have participated in salary arbitration hearings. In 2001, New Jersey Devils forward Bobby Holik, a valued member of two championship teams, participated in his own salary arbitration hearing. During the hearing, Holik was surprised to hear the arguments the team made in opposition to any raise in salary.³⁰ Holik stated that the comments made during the hearing were the impetus for his departure from the Devils in 2003, and subsequent signing with the arch rival New York Rangers.³¹ Again, the reaction is to frustration, and in this case, actual hurt from the tactics of management as opposed to financial loss/gain.

Another common problem that is faced in labor negotiations is “position entrenchment.” The NHL made it clear to the NHLPA, and the public at large, that no deal would be reached unless it contained cost certainty.³² Keeping with traditional negotiating tactics, the NHLPA stated that no deal would be reached if it did contain cost certainty.³³ Both sides refused to deviate from those stated position, and the result was the

²⁵ IWAR, UNT, NEGOTIATING WITHOUT A LOSER. (Copenhagen Business School ed. 1999).

²⁶ SportsTicker, *NHL Lockout Log* at <http://sports.espn.go.com/espn/wire?section=nhl&id=1993336> (February 16, 2005).

²⁷ *Id.*

²⁸ See *Id.* (for an example of the “finances and player contacts” argument).

²⁹ *Id.*

³⁰ www.espn.com (March 10, 2001).

³¹ www.espn.com, (July 21, 2003).

³² Associated Press, *Season Really Hangs in the Balance* (“Cost certainty” is the NHL euphuism for a salary cap linked to league revenue), at <http://sports.espn.go.com/nhl/news/story?id=19992342> (February 16, 2005).

³³ *Id.*

cancellation of the season. Some professional sports leagues and player associations have used strategic techniques to force the party from its position, or facilitate last minute negotiations.³⁴ However, these tactics and the position entrenchment they represent keep the parties from addressing the root problems that led to the labor dispute in the first place, in favor of a new deal that is unlikely to solve any long-term issues.

Mistrust may also play a role in negotiations. The NHL hired former SEC Chairman Arthur Levitt to perform an examination of the League's finances. When the report was issued in February of 2004, the NHLPA dismissed the findings as incomplete and self-serving.³⁵ The NHL and NHLPA have not been able to agree on the financial status of the League, even in the face of the Levitt Report. The NHLPA has also declined to examine the NHL's financial statements itself, citing a belief that the NHL would not truthfully report revenues.³⁶ Practical experience also shows that, even in cases where a players' association may examine a league's financial information, the information may not be believed.

One final element of labor negotiations is ego. Ego may often be the cause of position entrenchment. However, even if it is not the cause, it usually accompanies position entrenchment. The reason for this is simple human nature: no one enjoys being told their position is wrong, flawed, or otherwise unsavory. The reaction is often a defensive one, leading to a breakdown in negotiations. Experience confirms that ego can often be the most devastating obstacle faced during negotiations.

The items detailed above (past indiscretions, position entrenchment, mistrust, ego) are often dismissed by the traditional model of negotiations. This is not entirely unexpected, as they are not concrete, quantifiable categories.

³⁴ The NHL set a deadline of October 1, 2004 to reach a new collective bargaining agreement or face the cancellation of the 2005 season. The NFL collective bargaining agreement calls for the last year of the agreement to be an "uncapped" year, thus providing motivation for the League to reach an extension with the NFLPA prior to that season. The NHL threatened to cancel the 2004-05 season if no deal was reached, and ultimately did cancel the season.

³⁵ Reuters, *Players' Union Disputes NHL Report Into Finances*, at <http://reuters.com> (February 13, 2004).

³⁶ *Id.*

Indeed, much like human nature, they are amorphous things. In fact, much of the literature regarding negotiating strategy ignores human nature entirely, instead choosing to focus on rational beings involved in civil negotiations.³⁷ This is a fundamentally flawed premise.

One alternative method of reaching an agreement that deserves exploration in sports is Transformative Mediation. This unique technique was developed by professors Joseph Folger and Baruch Bush in their book "The Promise of Mediation."³⁸ The United States Postal Service is currently using Transformative Mediation to resolve employee grievances.³⁹

In Transformative Mediation, the parties maintain control over the subject matter of the "conversation," with no topic being taboo.⁴⁰ This idea, that no topic is taboo, is different from traditional mediation and negotiation where the parties (with or without a third party mediator) will often limit the issues open for discussion.⁴¹ Limiting the areas of the labor dispute that can be explored will likely produce an agreement that has no hope of addressing the root problems; the long-term issues that tend to erode the labor-management relationship.

Additionally, the role of the mediator in the Transformative method is one of amplifier. As amplifier, the mediator seeks to highlight important points and positions made by each party, thus ensuring that those points and positions are heard by the opposing participant.⁴² This is extremely important, as parties to a negotiation often do not truly listen to their counterparts on the other side. Having the points and position highlighted allows the parties to comprehend and understand each other.

As stated above, no topic is taboo, which permits the expression of emotion and the discussion of other intangible concepts. This too

³⁷ IWAR, UNT, *NEGOTIATING WITHOUT A LOSER*. (Copenhagen Business School ed. 1999).

³⁸ ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* (Jassey-Bass Inc. ed., 1994).

³⁹ www.usps.gov (last visited on March 3, 2005).

⁴⁰ ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* (Jassey-Bass Inc. ed., 1994).

⁴¹ IWAR, UNT, *NEGOTIATING WITHOUT A LOSER*. (Copenhagen Business School ed. 1999).

⁴² ROBERT A. BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION* (Jassey-Bass Inc. ed., 1994).

is a key element during labor negotiations, as emotions tend to run high on both sides. Experience shows that shouting, cursing, even the throwing of objects are common occurrences during negotiations.

However, the most important aspect of the Transformative method with regard to the sports world is that the mediator plays virtually no role in reaching an accord. Instead, the mediator is there to assist the parties in communicating, or “having their conversation.”⁴³ Thus, any agreement that is reached is truly a creation of the parties. The importance of having the parties reach an agreement without any input from the outside cannot be underestimated. The agreement, complete with all its triumphs, faults, mistakes, etc., is solely the responsibility of the parties. They have no one else to blame but themselves.

The idea that the NHL cancellation of the 2004-05 season is a natural part of the bargaining process, and a legitimate tactic, is fundamentally flawed. Despite the claims of traditional negotiators that the tactic is effective, professional sports leagues cannot afford to disappear from the public consciousness for an entire season. The fickle nature of the public’s attention span, and the desire of sponsors to appeal to the largest portion of the population make the follow through on any threat to cancel the season a death sentence for the league.

Professional sports are an arena that is slow to adapt to new ideas. No where is this more true than the area of labor negotiations. Professional sports leagues and player groups continue to adhere to the traditional concept of zero-sum negotiating. However, as the NHL situation shows, the zero-sum games that leagues play can often backfire. It is time to consider alternative methods of reaching an agreement, because clearly the old ways are no longer effective. Transformative Mediation shows promise in allowing the parties to address old wounds while moving forward towards a new agreement. The best way to summarize the effects of the Transformative method is that the parties to a negotiation often do not accurately hear each other during the process, and they require assistance. That is the role of the mediator in Transformative Mediation: a communications assistant.

It is just as important to address the unresolved issues of the past as it is to have any eye on the future. Approximately 75% of any labor negotiation is spent allaying the fears of the

past, while only 25% is spent working on new language or concepts.⁴⁴ A forum must be created that allows the “injured” party to express those fears, without being told that it is inappropriate.

Only when the parties are able to balance the harsh financial realities of professional sports with the intangible aspects of human nature can true labor peace be achieved. Creating such a forum should be the goal of every league. This would require a fundamental shift in thinking: the labor-management relationship in sports is a partnership, not adversarial. It should not require such dramatic tactics, such as the NHL has chosen, to facilitate this change. It should simply be, as Bush and Folger believe, a conversation.

⁴³ *Id.*

⁴⁴ Based on the author’s experience.

Sampling in the Music Industry: In Favor or Against?

By: John Felder

Introduction

Sampling, a somewhat recent innovation, has become a leading force in a world of music many did not believe was possible. In this new world, old ideas are mixed with new ideas, thus creating a simplistic or at times, an intricate form of music that many can enjoy. Although "sampling" supports one of the underlying purposes of the Copyright Act, sampling without permission poses other problems. Such problems encompass stripping away exclusive rights that are created through statutory and common law. To combat the negative influences of sampling, the simple thing to do is to attain a license before borrowing from a copyrighted work.

Summary

Through various policy arguments, a concise explanation of sampling, a description of copyright infringement, and an analysis of arguments in favor and against the use of sampling without obtaining a license, this article supports the notion that sampling without permission should never be an option. Sampling without permission should not be allowed because creativity would be hampered by allowing artists of this world to quickly run towards the opportunity of misappropriating another copyright holder's work; because music production is an expensive venture and it is inequitable to allow samplers to sample without having to bear the costs incurred when the original work was created; and because sampling without permission would cause a copyright holder to be stripped of his or her economic rights.

Sampling in General

Definition of Sampling

Sampling is known as the "process that recording artists use to include previously recorded portions of another artist's work in a new recording"⁴⁵ or the "incorporation of

previously recorded works into new musical compositions."⁴⁶ The process of digital sampling involves "the conversion of analog sound waves into a digital code. The digital code that describes the sampled music...can then be reused, manipulated or combined with other digitalized or recorded sounds using a machine with digital data processing capabilities."⁴⁷ Most forms of digital sampling are made possible by using a machine called a "sampler" which is able to take any guitar sound, drum sound, voice, etc. and make a perfect digital duplication.⁴⁸ After the sound is taken, it is usually placed in a keyboard which would allow for editing and splicing.⁴⁹ After a "sampling artist modifies, truncates, repeat or splices the actual waveform of the sampled recording, the newly created sample which usually consists of one to twenty-five seconds of sound, is placed into another musical arrangement."⁵⁰ Today, the use of sampling is evident in the music we hear everyday.

History of Sampling

Digital sampling originated from the Jamaican art form, "dub." Dubbing was used by disc jockeys from Jamaica by blending a variety of previously recorded works and improvised lyrics over mixed recordings to create songs.⁵¹ The earliest introduction of this style of music was introduced to the United States in 1967, by a Jamaican disc jockey by the name of Kool DJ Herc.⁵² From 1970 to 1981, disc jockeys, while performing in clubs, experimented with the

⁴⁶ Brett I. Kaplicer, *Rap Music and De Minimis Copying: Applying the Ringgold and Sandoval Approach to Digital Samples*, 18 Cardozo Arts & Ent. L.J. 227, 228 (2000).

⁴⁷ *Jarvis v. A & M Records*, 827 F. Supp. 282, 286 (D. N.J. 1993).

⁴⁸ Donald Passman, *All You Need to Know About the Music Business* 253 (Simon and Schuster 1991) (1991).

⁴⁹ *Id.*

⁵⁰ Brandon G. Williams, *James Brown v. In-Frin-Jr: How Moral Rights Can Steal the Groove*, 17 Ariz. J. Int'l & Comp. L. 651, 652 (2000).

⁵¹ *Id.*

⁵² *Id.*

⁴⁵ Randy Kravis, *Does a Song By Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 Am. U.L. Rev. 231, 232 (1993).

blending and editing of a variety of previously recorded works.⁵³ In 1981, everything changed with the introduction of the MIDI synthesizer which allowed any artist the ability to sample and use sampled sounds in their music.⁵⁴ The first rap album that incorporated samples was "Rapper's Delight" by the Sugar Hill Gang.⁵⁵ Ever since the infusion of sampling into the world of music, the industry has never been the same.

Copyright Protection

To better understand the underlying debate that sampling has caused in the world of music and the legal field alike, we must first understand the copyright protection that is the umbrella of debates for and against sampling. Statutory law states that to be copyrightable, the work has to be original.⁵⁶ In general, musical works and sound recordings are the two components that are protected under the 1976 Copyright Act.⁵⁷ Copyright attaches to a musical work (music and lyrics) as soon as it is "fixed in a tangible medium of expression."⁵⁸ This medium may be one "now known or later developed."⁵⁹ If the work is a musical composition, it can be written down or played in a tape recorder to be considered a copyright.⁶⁰ The fixation is sufficient if the work "can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."⁶¹

Thus, copyright protection is also given for sound recordings, which are "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied."⁶² The work is protected when the components of the work are recorded into a tangible copy, such as a compact disc or cassette tape. Based on the requirement of the sound recording being "a series of musical sounds," many experts have

argued that merely two notes of a sound recording are not copyrightable.⁶³

Although, registration is important for filing suit and recovering statutory damages/attorney's fees, a work does not need to be registered to attain a copyright.⁶⁴ Nevertheless, if one is commercially exploiting a work, he or she should seek to get the work registered. One penalty for not registering with the Copyright Office is that a cause of action for copyright infringement to recover damages or prevent another from using your copyright, cannot be filed.⁶⁵ The landmark case of *Feist Publications v. Rural Telephone Service*,⁶⁶ also defined how a work could be protected by holding that an author must show a minimum amount or a minimum contribution of creativity to have copyright protection and must earn protection through some type of effort in creating the work.

Limitations on Exclusive Rights

After appropriately copyrighting a work, there are exclusive rights that flow from the copyright protection. These rights are limited when other issues come into play. Generally, the copyright owner of a musical composition has the right to reproduce, distribute, perform, and prepare derivative works from the protected work.⁶⁷ In terms of a sound recording, section 114 of the Copyright Act of 1976 limits section 106 as stated supra.⁶⁸ Under section 114, the owner can duplicate the recording by preparing a "derivative work in which the actual sounds fixed in the sound recording are rearranged, remixed, or altered in sequence or quality."⁶⁹ Basically, this section allows another to duplicate material that is already under copyright, if that individual plays the music on his or her own, piece by piece, instrument by instrument, voice by voice and as long as the individual has received permission from other necessary copyright holders to make such a duplication. Furthermore, section 114

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ Passman, *supra* note 4.

⁵⁷ 17 U.S.C. § 102(a)(2,7) (1990).

⁵⁸ 5 Nimmer on Copyright, § 24.01.

⁵⁹ 17 U.S.C. § 102(a) (1990).

⁶⁰ Passman, *supra* note 4.

⁶¹ 17 U.S.C. § 102(a).

⁶² 17 U.S.C. § 101 (1998).

⁶³ Kaplicer, *supra* note 2. (some courts believe that a short series of notes may be protected. Nevertheless, because the focus of this article is sampling, it is only necessary to give a brief overview of copyright protection.)

⁶⁴ Passman, *supra* note 4 at 254-255.

⁶⁵ 17 U.S.C. § 411(a) (1976).

⁶⁶ *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 349 (1991).

⁶⁷ 17 U.S.C. § 106 (1982).

⁶⁸ 17 U.S.C. § 114 (1978).

⁶⁹ *Id.*

prohibits mechanical duplication of a recording vis-à-vis making a cassette copy of a record.

Section 114 also prohibits the creation of a derivative work where the sounds are remixed or altered in sequence by electronically lifting a part of the copyright material and placing it into another song; ie. sampling. Derivative work is defined as a work "based upon one or more preexisting works, such as a ... musical arrangement, ... sound recording, ... or any other form in which a work may be recast, transformed, or adapted."⁷⁰ To have copyright protection for the derivative work, the sound recording must have originality. This originality can be achieved from the performer's unique contribution, the record producer's input, or both.⁷¹ To avoid mechanical reproduction of an original recording, a producer may hire musicians and vocalists to record the closest imitation of the copyrighted material.⁷² This human effort is considered an independent fixation which is allowed under section 114. As stated supra, if an artist would like to sample a portion of a copyrighted work, the artist is required to obtain a license for the sound recording and the composition itself so that he or she may not be liable for infringement.⁷³ The license can be purchased for a set fee in accordance with the Copyright Act.⁷⁴

Compulsory Licensing

Section 115 of the Copyright Act specifies the statutory requirements for compulsory licensing.⁷⁵ Under this section, once a license is given, the licensee is permitted to use the copyrighted work and re-create the song. The only restriction is that the licensee must not reproduce the actual sound recording and "shall not change the basic melody or fundamental character of the work."⁷⁶ The copyright owner is compensated through a licensee's payment of royalty fees at a statutory royalty rate.⁷⁷ Overall,

⁷⁰ 17 U.S.C. § 101.

⁷¹ H.R. Rep. No. 1476, (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5669.

⁷² *Id.*

⁷³ Peter Cuomo, *Legal Update: Claiming Infringement Over Three Notes is Not Preaching To The "Choir:" Newton v. Diamond and A Potential New Standard in Copyright Law*, 10 B.U. J. Sci. & Tech. L. 177 (2004).

⁷⁴ 17 U.S.C. § 115 (1982).

⁷⁵ *Id.*

⁷⁶ 17 U.S.C. § 115 (a)(2) (1982).

⁷⁷ 17 U.S.C. § 115 (c) (1982).

the compulsory licensing process is Congress' attempt to both "encourage and reward composers for creative and artistic work and maintain public access to such works."⁷⁸ If an individual copies from a copyrighted work without obtaining a license, the copyright owner may sue for copyright infringement.

Copyright Infringement

The ability to sue for copyright infringement is demonstrative of the fact that the copyright law rewards original expression.⁷⁹ Where the defendant's work copies plaintiff's work in detail, the ability to sue for infringement rewards plaintiff for his originality and penalizes defendant who has not added any originality to the copied work.⁸⁰

A valid claim of copyright infringement can exist, if the original work has valid copyright protection.⁸¹ Section 501(a) of the 1976 Copyright Act states that "anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 through section 122 or of the author as provided in section section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author...."⁸²

To sue for copyright infringement, any one of the copyright owner's exclusive rights has to be violated. One who creates a sampled work can violate such rights either in the musical work, the sound recording, or both.⁸³ The landmark case on copyright infringement of sampled works is *Grand Upright Music Ltd. v. Warner Bros.*

⁷⁸ Randy S. Kravis, *Does a Song By Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 Am. U.L. Rev. 231, 243 (Fall 1993).

⁷⁹ Nimmer on Copyright, Improper Appropriation, § 7.3 (2d ed. 2003).

⁸⁰ Nimmer on Copyright, Elements of Infringement, § 7.12 (2d ed. 2003). (It's neither necessary to copy in detail, nor is it necessary that the defendant has no original contribution. Both of these factors may be taken into account when assessing damages (or considering fair use), but neither are necessary to prove or recover for infringement.)

⁸¹ Passman, *supra* note 4 at 254-255..

⁸² 17 U.S.C. § 501(a) (2001).

⁸³ *See Grand Upright Music Ltd. v. Warner Bros. Records, Inc.* 780 F. Supp. 182 (S.D.N.Y. 1991).

*Records, Inc.*⁸⁴ In that case, Plaintiff alleged that Defendant used three words and a portion of music from Plaintiff's originally recorded and copyrighted work. The court stated explicitly,

Thou shalt not steal has been an admonition followed since the dawn of civilization. Unfortunately, in the modern world of business this admonition is not always followed. Indeed, the defendants in this action for copyright infringement would have this court believe that stealing is rampant in the music business and, for that reason, their conduct here should be excused. The conduct of the defendants herein, however, violates not only the Seventh Commandment, but also the copyright laws of this country.⁸⁵

After analysis and conclusion of factors such as whether Plaintiff was the true copyright owner, the court held that Defendant was guilty of intentional copyright infringement because Defendant used a sample of Plaintiff's original recording without permission. As a result, the court granted injunctive relief in favor of Plaintiff.

Generally, to prove infringement the plaintiff must show that he or she has registered the work infringed; that the defendant copied a protectible expression without authorization; and that the alleged infringing work is so similar to the plaintiff's work that an ordinary reasonable person would conclude that the defendant unlawfully appropriated the plaintiff's protectible expression by taking material of substance and value.⁸⁶

The Copyright Act of 1976 states in part, "no action for infringement ... shall be instituted until registration of the copyright claim has been made in accordance with this title."⁸⁷ If registration is proven, the next determination is whether the defendant copied from plaintiff's copyrighted work. Generally, to make such a determination, the plaintiff would have to show that defendant copied the work or at least had

access to the copyrighted work.⁸⁸ Nevertheless, in digital sampling cases, showing access to the copyrighted work is not necessary to prove since copying is not disputed.⁸⁹ Thus, the next step is to determine whether the alleged infringing work was similar enough to constitute the improper appropriation of plaintiff's work.⁹⁰ This step is one of the most analyzed issues in determining whether a sample can be deemed infringing. To make this determination, the court generally looks at the similarity of the defendant's work to the plaintiff's copyrighted work.⁹¹

In *Jarvis v. A&M Records*,⁹² the court specifically dealt with whether the sampled work was substantially similar to the original. In that case, Defendant released a song with a sample from Plaintiff's original work and was sued for copyright infringement for lack of a license to allow such use. Defendant sought summary judgment against Plaintiff's allegations. After establishing a prima facie case of Plaintiff's copyright ownership of the alleged infringed work and because there was no question as to whether the work was copied due to the fact that the work in question was a sample, the court focused on determining whether the copying amounted to an unlawful appropriation. To make this determination, the court decided that the appropriate test was "whether the accused work is so similar to the Plaintiff's work that an ordinary reasonable person would conclude that the Defendant unlawfully appropriated the Plaintiff's protectible expression by taking material of substance and value."⁹³ The court reasoned that a party may be held liable for infringement if he or she "appropriates a large section or a qualitatively important section of Plaintiff's work."⁹⁴ Thus, "the value of a work may be substantially diminished even when only a part of it is copied, if the part that is copied is of great qualitative importance to the work as a whole."⁹⁵ Overall, "the main question is whether the value of the original work is substantially

⁸⁴ *Id.*

⁸⁵ *Grand Upright Music Ltd.*, 780 F. Supp. at 183.

⁸⁶ *Jarvis*, 827 F. Supp. at 290.

⁸⁷ *City Merchandise Inc., v. Kings Overseas Corp.*, No. 99 CV10456, 2001 U.S. Dist. Lexis 3176 quoting § 411(a).

⁸⁸ *Jarvis*, 827 F. Supp. at 289.

⁸⁹ Rebecca Morris, *When Is A CD Factory Not Like A Dance Hall?: The Difficulty of Establishing Third-Party Liability for Infringing Digital Music Samples*, 18 *Cardozo Arts & Ent. L.J.* 257 (2000).

⁹⁰ *Jarvis*, 827 F. Supp. at 288.

⁹¹ *See Jarvis*, 827 F. Supp. 282.

⁹² *Id.*

⁹³ *Id.* at 290.

⁹⁴ *Id.*

⁹⁵ *Id.* at 291.

diminished by the copying."⁹⁶ After analysis of Defendant's alleged infringing work, the court was not clear on whether the copied portions from Plaintiff's song were significant enough to warrant a case of infringement. As a result, the court denied the Defendant summary judgment on Plaintiff's musical composition copyright claim. Generally, if all elements for copyright infringement are proven, a plaintiff may be awarded damages.

Damages and Remedies for a Prevailing Plaintiff

If a copyright owner is successful in proving his or her claim of copyright infringement, the owner may receive actual damages along with profits or statutory damages.⁹⁷ The Copyright Act allows for the plaintiff to elect the type of damages that will be assessed.⁹⁸ Allowing such damages enables a plaintiff to profit from the part of the work that was original to him or her.⁹⁹

Actual Damages

Actual damages are measured by the extent to which the market value of the copyrighted work at the time of infringement, has been injured or destroyed by such infringement.¹⁰⁰ Plaintiff has the burden of showing the "causal connection between the infringement of the defendant and some loss of anticipated revenue."¹⁰¹ Generally, to establish the infringer's profits, the copyright owner must present proof of the infringer's gross revenue.¹⁰² The infringer has the burden of proving any deductible expenses and profits.¹⁰³

Statutory Damages

As an alternative to actual damages, a plaintiff may elect to recover statutory damages.¹⁰⁴ The damages range from \$750 to \$30,000 for a single act of copyright infringement.¹⁰⁵ If the copyright owner proves that the infringement was committed willfully,

the court may award statutory damages of up to \$150,000.¹⁰⁶ If the court finds that the infringer did not willfully infringe, the court may reduce the award of statutory damages to a sum of not less than \$200.00.¹⁰⁷

Costs and Attorney's Fees

Costs and attorney's fees are determined by the court. The court may award a reasonable attorney fee to the prevailing party and excluding the United States or an officer of the United States, allow the recovery of full costs against any part.¹⁰⁸

Arguments in Favor and Against Sampling Without Permission

Sampling Supports the Purpose of the Copyright Act

There are various arguments that may be made in favor and against sampling without obtaining a license. Some proponents of sampling believe that the art of reusing existing music is original in and of itself.¹⁰⁹ Their arguments lie in the belief that "all artists borrow from past works and...even great composers such as Bach, Handel, and Vivaldi borrowed from preexisting works."¹¹⁰ Specifically, an argument in favor of sampling without a license, is that such use satisfies the purpose of the Copyright Act.

Among the many goals of the Copyright Act, to prohibit and prevent copyright infringement is one of the strongest. "The primary objective of the Act is to encourage the production of original, literary, artistic, and musical expression for the good of the public. The immediate effect is to stimulate artistic creativity for the general public good. The primary objective of copyright is not to reward the labor of authors, but to promote the Progress of Science and useful Arts. To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work."¹¹¹ "Copyright encourages

⁹⁶ *Id.*

⁹⁷ Cuomo, *supra* note 29.

⁹⁸ 17 U.S.C. § 504 (b) (1999).

⁹⁹ Nimmer on Copyright, Elements of Infringement, § 7.12

¹⁰⁰ *Jarvis*, 827 F. Supp. at 293.

¹⁰¹ *Id.*

¹⁰² 17 U.S.C. § 504 (b).

¹⁰³ *Id.*

¹⁰⁴ *See* 17 U.S.C. § 504 (c)(1) (1999).

¹⁰⁵ *Id.*

¹⁰⁶ *See* 17 U.S.C. § 504 (c)(2) (1999).

¹⁰⁷ *Id.*

¹⁰⁸ *See* 17 U.S.C. § 505 (1978).

¹⁰⁹ Kravis, *supra* note 1, at 257.

¹¹⁰ *Id.*

¹¹¹ John B. Koegel, *Bamboozlement: The Repeal of Copyright Registration Incentives*, 13 *Cardozo Arts & Ent. L.J.* 529 (1993) *citing* *Feist Publications*, 499 U.S. at 349-350.

the production of more good works; by not explicitly including quality incentive structure, copyright avoids regulating expression."¹¹²

With the purpose of the Copyright Act in mind, sampling provides a vehicle for the progress of arts. Allowing producers to copy by using a sample from the copyrighted work, allows that producer to build on what has already been created. The original recording sets the building block, while the newly recorded material created by sampled elements, creates a new sound and feeling. This "new music" benefits the public because it recycles music that has been lost for many years. Without sampling, there may be little progress in the world of music today. For example, rap music may not be so successful and pop, r&b, and rock songs may be harder to create due to lack of inspiration or influences from older works.

Sampling without Permission will Hamper Creativity

Despite the aforementioned argument in favor of sampling and its use without requiring permission, there are arguments that disfavor such theories. If sampling is allowed without permission from the copyright owner of the music in which the sample is appropriated, this would hamper creativity, promote a misappropriation of property, and strip a copyright owner of his or her economic right which stems from copyright ownership.

Sampling may support the new found laziness of some producers. Many producers have the goal of producing a "hot beat" without placing time and effort into its production. Sherrie Levine, a post-modern artist, stated that "humanity has exhausted all avenues of novelty and originality."¹¹³ Theorists such as Levine, promote the belief that music is a dying art. Thus, Levine's views are detrimental to the creation of a new world of music because it creates an excuse for producers to depend on samples in creating their next song. Requiring a license for a sample serves as a deterrent to many producers who do not have the funds or the desire to pay the required licensing fees. With this deterrent at hand, producers are forced to be creative by not relying on other musical works to produce their material.

The opposing argument to the fact that sampling without permission hampers creativity

¹¹² Neil B. Schaumann, *An Artist's Privilege*, 15 *Cardozo Arts & Ent. L.J.* 249 (1997).

¹¹³ Williams, *supra* note 6, at 653.

is that today's laws have allowed for works with samples to have copyright protection. Thus, the court has found some type of originality in sampling. Some proponents of sampling argue that sampled works could be considered independent creations which equates to its own originality, thus allowing for copyright protection.¹¹⁴ For example, when a producer decides to use a sample, there are times when it is done in a way that a layperson or even experts may not notice that a sample has been used in a work. In such a case, the work should be deemed creative and original because the sampler had to use his or her artistic abilities to manipulate the original work so as to not be noticed by laymen.

The argument against the notion that sampling can be considered original is that "artistic originality is not the same thing as the legal concept of originality in the Copyright Act."¹¹⁵ Artistic originality encompasses a free world where there are no restrictions, rules, or laws to abide by. The legal concept of originality protects, instills, and promotes one's creations. Thus, the Copyright Act, although promoting artistic originality, focuses on protecting that originality rather than rewarding non-originality. Therefore, musical works with samples should not be given copyright protection.

Misappropriation of Property Rights

Professor Nathaniel Shaler, in "The Harm of the Concept of Harm in Copyright," stated, "Intellectual property is, after all, the only absolute possession in the world The man who brings out of the nothingness some child of his thought has rights therein which cannot belong to any other sort of property The inventor of a book or other contrivance of thought holds his property, as a god holds it, by right of creation."¹¹⁶

Copyright is similar to real property law in that the author has the right to prevent the public from using his or her property.¹¹⁷ Like property,

¹¹⁴ Kravis, *supra* note 1, at 257.

¹¹⁵ *Id.*

¹¹⁶ John R. Kettle, *Dancing To The Beat Of A Different Drummer: Global Harmonization--The Need For Congress to Get In Step With A Full Public Performance Right for Sound Recordings*, 12 *Fordham Intell. Prop. Media & Ent. L.J.* 1041 (2002).

¹¹⁷ Matthew Africa, *The Misuse of Licensing Evidence in Fair Use Analysis: New Technologies, New Markets, and the Courts*, 88

music can be "stolen by unauthorized reproduction and distribution."¹¹⁸ Copyright, often called a "bundle of rights,"¹¹⁹ may be transferred or divided as the parties wish. Because copyright is property, if an individual takes a piece of that property, that individual should be penalized. For example, suppose that A owns a brick house that he has purchased. B comes along and takes away parts of A's home. The parts of the home that may have been taken may include the windows, the roof, the foundation, or blocks of bricks. A catches B in the act and sues him for theft. In court, B argues that he wanted to take from A's home to build his new home because he admired the authentic and antiquated parts of A's home. B argues further that his new home was going to be a new creation that has never been attempted in the world of real estate. Do you think A would win? Of course A would win. B's argument and conduct is absurd. So, if that is the case in the situation of real property, why is it not absurd for B to take A's musical property without permission? Because music is property, a sampler should be forced to ask permission and should be penalized if he or she uses the copyrighted work without permission.

*A Copyright Owner will be Stripped
of his or her Economic Rights*

Economic rights stem from the right to exploit and consent to the use of the copyrighted work. Specifically, there are two specific rights; the right to exploitation and consent. "The exploitation rights give the author exclusive rights to exploit the work for a profit. The consent rights give the author exclusive rights to consent to someone else exploiting the work."¹²⁰ To not allow copyright owners to receive monetary awards for their creations, artists, producers, musicians and the like, would have less incentive to create and pursue the music profession. These economic rights serve the purpose of the Copyright Act because it allows for an artist to have something to look forward to, to spend time in contributing to the

Calif. L. Rev. 1145 (2000).

¹¹⁸ Michael W. Carroll, *Whose Music Is It Anyway?: How We Came to View Musical Expression As A Form Of Property*, 72 U. Cin. L. Rev. 1405 (2004).

¹¹⁹ *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 546 (1985).

¹²⁰ Schaumann, *supra* note 69.

progression of music, and to possibly make a decent and sometimes profitable living. Additionally, because music production is an expensive venture, it is inequitable to allow samplers to sample without having to bear the costs incurred, as in, when the original work was created. Therefore, ensuring that samplers pay for licensing, allows the copyright owner the ability to recoup some of the costs spent in producing the original work.

The opposing argument would be that economic rights of the original copyright owner may be increased as a result of sampling. For example, in today's world we may hear a new song on the radio which encompasses samples from an older song. Because the older song is no longer in constant rotation on radio stations, many consumers may not have heard the older version from where the sample was derived. The sampled work would then either spark someone's interest in knowing more of how the song was created or serve as a reminder to those who remember the song from their past. This spark may cause a resurgence of a demand to hear the old song, which could then increase sales of the original work, thus serving as a benefit to the copyright holder of the original work. Overall, because the old and original song may be in demand, the copyright holder of the original song will have the opportunity to receive royalties from the new sales and radio play. Whereas, if the original work was never sampled, the copyright holder may not have ever received royalties due to the fact that the song has not been heard or sold for years. Contrary to this argument, it is more likely that a copyright holder will gain more of an income from a combination of requiring a licensing fee from the user of the sampled work and the possibility that individuals will buy the original work in which the sampled work was derived. Overall, requiring permission increases opportunities for a copyright holder's monetary gain.

Conclusion

After weighing both sides of the aforementioned arguments, it is more likely that the argument against sampling without permission would prevail. Sampling without permission should not be allowed because artists of this world would quickly run to the option of misappropriating another artist's work rather than taking the time to create an entirely new sound or to hone their creative skills. Likewise, it would be unfair to misappropriate another artist's work after that individual has placed so much time and

effort in creation of that work. The "sweat" that resulted from the creator's time and effort, should not go unnoticed and should therefore be at least rewarded monetarily. Overall, in order to have an effective system of copyright, there has to be limitations and protections that a copyright holder or artist must abide by. Without these

limitations and protections, the incentive to register or ensure that one's work is protected will dwindle, thus causing havoc and mayhem in a world of music which is complicated, in and of itself.

The Proper Scope of the Non-Statutory Labor Exemption: Why Clarett's Challenge to the NFL's Eligibility Rules Must be Denied

By: Alberto L. Camacho

Maurice Clarett. Ask about this young man now, and many will certainly begin by mentioning his less-than-stellar 4.82 and 4.72 times in the 40-yard dash at the NFL combine last month.¹²¹ Ask about this young man two years ago, and most would tell of a very promising young halfback, gifted with both size and speed, whom, as a true freshman, had just helped lead the Ohio State Buckeyes to their first national championship since 1968.¹²² However since that unforgettable January evening in Tempe, Arizona, Clarett has found himself in the national headlines for everything but his play on the football field. These have ranged from allegations of preferential treatment he received at Ohio State throughout his freshman campaign, to the false claim he allegedly made to police involving thousands of dollars worth of goods that were stolen from his borrowed car. Finally, there was his suspension from Ohio State for the 2003 season, leaving his future in football, at any level, up in limbo.

It was at that point when Clarett decided on something he had thought of as early as October of 2002 - fight the National Football League's long-standing eligibility rule regarding incoming players and enter the NFL Draft early.¹²³ Why not? Commentators across the country have said that it is only a matter of time until the so-called arbitrary rule, barring any player from entering the NFL who has not been out of high school for more than three full college seasons, was either successfully challenged or removed. Why not let the young men make their own decisions? They

¹²¹ Len Pasquarelli, *Clarett's 40 times: 4.72, 4.82*, ESPN Sports, February 28, 2005, at <http://abcnews.go.com/Sports/ESPNSports/story?id=539094>.

¹²² *In first OT national title game, Buckeyes prevail*, ESPN College Football, January 3, 2003, at <http://sports.espn.go.com/ncf/recap?gameId=230032390>.

¹²³ *NFL or bust?: A timeline of events for Maurice Clarett*, Pittsburgh Post-Gazette, September 24, 2003, at <http://www.postgazette.com/sports/collegeother/20030924timeline0924p9.asp>. In an October 16, 2002 article with ESPN the Magazine, Clarett admitted that he had thought about leaving college early for the NFL.

do so in every other major professional sports league...why not the NFL?¹²⁴

On May 24, 2004, the United States Court of Appeals for the Second Circuit answered these questions, at least legally, by reversing the district court's decision and denying Mr. Clarett's assertion that the eligibility rule amounted to no more than a group boycott and a concerted refusal to deal, a clear antitrust violation.¹²⁵ Now, as Mr. Clarett prepares for the reality of what these past two years may have cost him at the NFL draft, and as the Supreme Court of the United States considers whether or not to review the Second Circuit's decision¹²⁶, we will ponder a number of questions ourselves: Should the NFL in this case, as the Second Circuit decided, have the protection of the non-statutory labor exemption and be exempt from an antitrust claim? If not, could they and should they prevail anyhow? Finally, what will the Supreme Court do and what effect will their decision have, either way, on the National Football League?

¹²⁴ Rick Morrissey, *Clarett Has Right to Make Wrong Call*, Chi. Trib., Feb. 6, 2004, at C1.

¹²⁵ *Clarett v. Nat'l Football League*, 369 F.3d 124 (2nd Cir. 2004), *cert. denied*, No. 04-910, 2005 U.S. LEXIS 2979 (Apr. 4, 2005). Clarett's antitrust argument alleging a group boycott and a concerted refusal to deal in essence is saying that the NFL, as a group of 32 employers, have conspired together to restrain his ability to provide his services within the applicable job market. In antitrust terms, this is a clear per se violation of the Sherman Act (other per se violations include tying arrangements, vertical price-fixing, and horizontal control).

¹²⁶ Prior to the printing of this article, the Supreme Court rejected Clarett's writ of certiorari asking the court to reverse the Second Circuit's decision. *See*, *Clarett v. NFL*, No. 04-910, 2005 U.S. LEXIS 2979 (Apr. 4, 2005). This finding, however, has no effect on Clarett's current eligibility status for the upcoming 2005 draft.

Antitrust Law and the Non-statutory Labor Exemption

In order to properly analyze the Clarett decision, one must first understand the background involving antitrust law and the non-statutory labor exemption. Section 1 of the Sherman Act states that, “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹²⁷ This, however, if taken alone, would be in direct conflict with federal labor law policy, which not only allows, but encourages, the organization of labor unions and collective bargaining. “It has long been recognized that in order to accommodate the collective bargaining process, certain concerted activity among and between labor and employers must be held to be beyond the reach of the antitrust laws.”¹²⁸ Therefore, the courts have acknowledged two types of labor exemptions to these laws: 1) a statutory exemption, embodied in Section 6 of the Clayton Act and the Norris-LaGuardia Act, which exempts from antitrust scrutiny the organization and legitimate operation of labor unions acting in their own interests,¹²⁹ and 2) a non-statutory exemption, which excludes concerted activity (involving non-labor groups) that is intimately related to the bargaining process.¹³⁰

¹²⁷ 15 U.S.C.S. §1 (2005).

¹²⁸ *Id.* at 130.

¹²⁹ 15 U.S.C.S. § 17 (2005). Section 6 of the Clayton Act states that, “the labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor...organizations, instituted for the purposes of mutual help...or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.” 15 U.S.C.S. §52, also known as Section 20, also addressed the labor relationship. Following a narrow construction of Clayton by the courts, the Norris-LaGuardia Act of 1932, 29 U.S.C.S. §§101-115, was passed laying the groundwork for the National Labor Relations Act a few years later.

¹³⁰ *See*, United States v. Hutcheson, 312 U.S. 219 (1941); Allen Bradley Co. v. IBEW, 325 U.S. 797 (1945); Mine Workers v. Pennington, 381

In particular, the non-statutory exemption recognizes that some restraints on competition imposed through the bargaining process must be shielded from antitrust sanctions. This has been implied from “federal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board.”¹³¹ Therefore, when an antitrust court is asked to answer “important practical questions about how collective bargaining over wages, hours and working conditions is to proceed,” an exemption must exist to allow deference to the labor laws which specifically regulate this kind of behavior.¹³² This exemption has been extended into the realm of professional sports, where antitrust issues often arise due to the uniqueness of a multi-employer bargaining unit (team management) which collectively negotiate with the players’ labor union.¹³³

However, courts have found difficulty in enunciating exactly when the non-statutory labor exemption should apply. While the Supreme Court has addressed a number of issues involving the exemption, it has yet to clearly define the boundaries of such, particularly when involving issues outside of the product market, leading many courts to look elsewhere for guidance. Therefore, in the realm of professional sports, many courts have looked to the Eighth Circuit’s decision in *Mackey v. National Football League*.¹³⁴ In *Mackey*, the Eighth Circuit held that in order to avail oneself from antitrust

U.S. 657 (1965); *Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965); *Connell Constr. Co. v. Plumbers Local 100*, 421 U.S. 606 (1975). The non-statutory exemption is a doctrine drawn from a number of Supreme Court cases which allows an exemption from antitrust scrutiny for the bargaining process, including union/non-labor group agreements – in essence, they allowed the restraint of trade if it involved the labor, and not product, market and if the restraint did not affect those outside of the bargaining relationship. Therefore it expanded the statutory labor exemption to include the protection of the collective bargaining process as a whole.

¹³¹ *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996); *See also*, Claret, 369 F.3d at 130.

¹³² *Brown*, 518 U.S. at 241.

¹³³ Claret, 369 F.3d at 134-135.3

¹³⁴ *Mackey v. Nat’l Football League*, 543 F.2d 606 (8th Cir. 1976).

scrutiny and apply the non-statutory labor exemption, one must show that the issue in question: 1) primarily affects only the parties to the collective bargaining relationship, 2) concerns a mandatory subject of collective bargaining, and 3) is the product of bona fide arm's length bargaining.¹³⁵

In that case, the NFL was found to have unilaterally imposed the what was known as the "Rozelle Rule" upon the upstart NFL Players Association since the rule was created prior to the formation of the first collective bargaining agreement and was not the result of any arm's length negotiating (no quid pro quo found).¹³⁶ Other courts however, such as the Second Circuit, have interpreted the exemption more broadly, looking to the intent of the non-statutory exemption itself and including anything occurring within the collective bargaining process.¹³⁷ Under either analysis, the law and the facts dictate that the NFL's rule regarding draft eligibility must fall within the exemption.

Mackey

First, under *Mackey*, the National Football League should be entitled to a non-statutory labor exemption despite Judge Scheindlin's decision in the Southern District of New York.¹³⁸ Under that analysis, in order to fall under the exemption, the issue in question must, as previously discussed, primarily affect the parties to the collective bargaining relationship, concern a mandatory subject of collective bargaining, and be the product of bona fide, arm's length negotiating.¹³⁹ Here, the analysis involves the NFL's draft eligibility rules, which are found in the NFL's Bylaws and Constitution and not

¹³⁵ *Id.* at 614.

¹³⁶ *Id.* at 615-617.

¹³⁷ Claret, 369 F.3d at 133-136; *See also*, Caldwell v. Am. Basketball Ass'n, 66 F.3d 523 (2d Cir. 1995); Nat'l Basketball Ass'n v. Williams, 45 F.3d 684 (2d Cir. 1995); Wood v. Nat'l Basketball Ass'n, 809 F.2d 954 (2d Cir. 1987).

¹³⁸ Claret v. Nat'l Football League, 306 F.Supp.2d 379 (S.D.N.Y. 2004). In the lower court, Judge Scheindlin granted Mr. Claret's motion for summary judgment finding that 1) the NFL was not entitled to the non-statutory labor exemption under *Mackey*, and 2) Despite not finding a *per se* antitrust violation, the court nonetheless entered summary judgment under a "Rule of Reason" analysis.

¹³⁹ Mackey, 543 F.2d at 614.

expressly within the Collective Bargaining Agreement (CBA).¹⁴⁰ Therefore, the factual questions are: first, whether Maurice Claret, as a collegiate player, was a party in the collective bargaining relationship; second, whether the exclusion of a class of potential players to be taken in the draft is a mandatory subject of collective bargaining; and third, whether the draft eligibility rule, introduced following the 1925 draft but which has been amended as lately as 1992, was collectively bargained for despite not expressly appearing anywhere within the CBA.

Party to the Collective Bargaining Relationship

The district court argues that this prong of the *Mackey* analysis is not met since it affects "players, like Claret, who are complete strangers to the bargaining relationship."¹⁴¹ This, determination, however, goes against much, if not all, of the law in this field. You see, Claret, despite his current status outside the NFL, is a potential employee, who, like any potential employee, is subject to the terms of the collective bargaining agreement negotiated by those who were there before him.

For instance, in *Wood v. National Basketball Ass'n*, the Southern District of New York found that, "at the time an agreement is signed between the owners and the players' exclusive bargaining representative, all players within the bargaining unit and those who enter the bargaining unit during the life of the agreement are bound by its terms."¹⁴² Similarly, the D.C. Circuit found in *Zimmerman v. NFL*, that parties to the bargaining relationship, particularly in a professional sports league, include not only present, but "potential future players" who are bound by its terms.¹⁴³ Therefore, much like any potential applicant for a job, future employees like Claret must be bound by the terms of the CBA or else the purpose of collective bargaining may be circumvented.

Mandatory Term of Collective Bargaining

The district court also argues that the exclusion of all collegiate players from the NFL

¹⁴⁰ *See*, Claret, 369 F.3d at 127; Claret, 306 F. Supp.2d at 384-385.

¹⁴¹ Claret, 306 F. Supp.2d at 395.

¹⁴² Wood v. Nat'l Basketball Ass'n, 602 F.Supp. 525, 529 (S.D.N.Y. 1984).

¹⁴³ Zimmerman v. Nat'l Football League, 632 F.Supp. 398, 405-406 (D.D.C. 1986).

draft who are less than three full college seasons out of high school does not meet the *Mackey* test since it does not concern a mandatory term of collective bargaining.¹⁴⁴ According to the National Labor Relations Act, to “bargain collectively” refers to the meeting and conferring “with respect to wages, hours, and other terms and conditions of employment.”¹⁴⁵ As the court found in *Caldwell v. American Basketball Assoc.*, “a mandatory subject of bargaining pertinent in the instant matter is the circumstances under which an employer may discharge or refuse to hire an employee.”¹⁴⁶ While the facts in that case centered around the firing of the employee, it is clear that “other terms and conditions of employment” include both the hiring and firing of employees. Here, the eligibility rule does precisely one thing – it sets the conditions by which a team (the employer) can draft, or hire a player (employee). Therefore it is only rational that Claret’s potential hiring be viewed, by any court, as a mandatory subject of collective bargaining.

Bona Fide Arm’s Length Negotiations

Finally, and most importantly, the NFL’s eligibility rules were in fact collectively bargained in good faith between the National Football League Management Council (NFLMC) and the National Football League Players Association (NFLPA). Under Article XII of the NFL Bylaws, titled “Eligibility of Players,” clubs are generally prohibited from selecting college players who have not “first exhausted college eligibility, graduated from college, or been out of high school for five football seasons.” However, this is subject to the following provision: “If four seasons have not elapsed since the player discontinued high school, he is ineligible for selection, but may apply to the Commissioner for special eligibility.” This application for special eligibility will be accepted only from college players whom three full college seasons have elapsed since high school graduation.¹⁴⁷ The question then, and the focus of our analysis, is whether this provision was in fact properly bargained for, thereby allowing the NFL to utilize the protection of the non-statutory labor exemption.

The facts here are mainly undisputed. The eligibility rule, much like the “Rozelle Rule” from the *Mackey* case, was imposed prior to the first Collective Bargaining Agreement between the NFLMC and the NFLPA in 1968.¹⁴⁸ In fact, the rule was first seen following the 1925 draft, years before the National Labor Relations Act even passed, and decades before the NFLPA, the players’ officially recognized union, even formed.¹⁴⁹ It is undisputed then, that the district court was inevitably right when it said, “it seems quite clear that the first version of the [r]ule could not have arisen from the collective bargaining process.”¹⁵⁰ However, this cannot be the end of the analysis.

The *Mackey* case, upon which the district court and many legal commentators in this area rest their convictions, can be factually distinguished from the NFL’s eligibility rule. The case, which involved an antitrust suit by John Mackey and a number of NFL players against the NFL for its unilateral imposition of the “Rozelle Rule,” focused on the issue of whether or not the rule was actually bargained for in good faith for the purposes of providing the NFL with a non-statutory labor exemption.¹⁵¹ The rule itself, which forced any club signing a free agent to give the player’s previous team some compensation, was unilaterally imposed by Commissioner Rozelle under the NFL Constitution and Bylaws in 1963, five years prior to the first CBA with the NFLPA in 1968.¹⁵²

The Eighth Circuit, agreeing with the district court’s finding, held that the rule was not bargained for in good faith during arm’s length negotiations for a number of reasons: the rule remained unchanged since its unilateral imposition upon the players in 1963, the NFLPA had a weak bargaining position vis-à-vis the NFL, and there was no evidence of any quid pro quo negotiating, including any reference to the NFL Constitution or Bylaws anywhere within the

¹⁴⁴ Claret, 306 F. Supp.2d at 393-395.

¹⁴⁵ 29 U.S.C.S. §158(d) (2005).

¹⁴⁶ Caldwell, 66 F.3d at 529.

¹⁴⁷ Claret, 369 F.3d at 127-129. *See also*, Claret, 306 F. Supp.2d at 385-387.

¹⁴⁸ Claret, 306 F. Supp.2d. at 384.

¹⁴⁹ *Id.* at 385. The eligibility rule was first imposed following the 1925 NFL draft when an Illinois college football running back, and future NFL Hall of Famer, Harold “Red” Grange, left school early to sign a contract with the Chicago Bears. In comparison, the National Labor Relations Act was passed in 1935, and the NFLPA was first created in 1956. *See*, <http://www.nflpa.org>.

¹⁵⁰ *Id.* at 396.

¹⁵¹ *See*, Mackey, 543 F.2d at 609-623.

¹⁵² *Id.* at 609-610.

CBA.¹⁵³ In fact, the only evidence tying the “Rozelle Rule” to any good faith negotiations was: 1) a statement made by a bargaining representative of the players saying it was briefly discussed during negotiations and 2) what is known as the “zipper clause” in the CBA stating, “[t]his agreement represents a complete and final understanding on all bargainable subjects of negotiation among the parties during the term of this Agreement.”¹⁵⁴

Here, the circumstances are vastly different. The eligibility rule, although imposed prior to the recognition of the NFLPA, has been amended a number of times since, including just prior to the latest CBA negotiated in 1993. The 1992 amendment, which incorporated the Commissioner’s decision in 1990 to allow special eligibility to college players who had finished three football seasons,¹⁵⁵ was well-known to the NFLPA prior to the newest CBA the following season. In fact, on May 6, 1993, the NFL, in a letter signed by representatives of both the NFL and the NFLPA, provided the NFLPA with a copy of the amended Constitution and Bylaws, specifically stating that, “the attached documents are the presently existing provisions of the Constitution and Bylaws of the NFL referenced in Article IV, Section 2, of the Collective Bargaining Agreement.” Also during the negotiations themselves, Mr. Peter Ruocco, Senior Vice President of Labor Relations for the NFLMC stated that, “during the course of collective bargaining that led to the CBA, the challenged eligibility rule itself was the subject of collective bargaining.”¹⁵⁶

However, one does not have to take the word of Mr. Ruocco alone. The 1993 Collective Bargaining Agreement, which has been extended a number of times and remains in effect until the end of the 2007 season, has multiple references to the NFL Constitution and Bylaws, unlike the CBA of 1968 and 1970 in the *Mackey* case.¹⁵⁷ These references include the previously referred to Article IV, Section 2 concerning no suits against the NFL, Article IX, Section 1 relating to Non-Injury Grievances, and Article III, Section 1

pertaining to the scope of the agreement as a whole. In particular, Article III, Section 1 states:

This Agreement represents the complete understanding of the parties as to all subjects herein, and there will be no change in the terms and conditions of this Agreement with out mutual consent...The NFLPA and the NFLMC waive any rights to bargain with one another concerning any subject covered or not covered in this Agreement for the duration of this agreement, including the provisions of the NFL Constitution and Bylaws; provided, however, that if any proposed change in the NFL Constitution and Bylaws during the term of this Agreement could significantly affect the terms and conditions of employment of NFL Players, then the [NFLMC] will give the NFLPA notice of and negotiate the proposed change in good faith.¹⁵⁸

Therefore, unlike *Mackey*, the current CBA clearly incorporates the NFL Constitution and Bylaws. This, coupled with the fact that the NFLPA had direct knowledge of the amendments made to the Bylaws, including the eligibility rules themselves, show that the parties did indeed “bargain” for the acceptance of such changes. Furthermore, prior to the 1993 CBA, 62 out of 102 underclassman to declare for the draft, following the Commissioner’s change in 1990, were actually drafted by NFL teams from 1990-1992.¹⁵⁹ This shows that, not only did the NFLPA have implicit knowledge through the incorporation of the amended Constitution and Bylaws which contained the eligibility rules, but practical knowledge as well, as sixty-two of its newest members were present solely because of the amendment to the rules. As the Sixth Circuit found in *McCourt v. California Sports, Inc.*, “[t]

¹⁵⁸ *Id.*

¹⁵⁹ M.J. Duberstein, *Entering the Draft Early: A Risky Proposition*, NFLPA, August 2000, at http://www.nflpa.org/PDFs/Shared/Entering_the_Draft_Early.pdf. Mr. Duberstein prepared this report as the NFLPA Director of Research back in August of 2000 to show players the risk involved in entering the draft as an underclassman. The report, dating from the NFL rule change in 1990 up until 2000, indicates that 24% of the underclassman who declare end up going undrafted.

¹⁵³ *Id.* at 615-616.

¹⁵⁴ *Id.* at 613.

¹⁵⁵ Claret, 369 F.3d at 128.

¹⁵⁶ *Id.*

¹⁵⁷ *Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association 2002-2008*, NFLPA, February 2005, at <http://www.nflpa.org/Members/main.asp?subpage=CBA+Complete>

hat the position of one party on an issue prevailed unchanged does not mandate the conclusion that there was no collective bargaining over the issue.”¹⁶⁰

Finally, and possibly most importantly, the NFLPA can no longer be viewed as “weak vis-à-vis the NFL.” At the time of the *Mackey* decision, the NFLPA had only been recognized for eight years, and there was ample evidence that the NFL had an upper hand in much of the negotiations during both the 1968 and 1970 bargaining.¹⁶¹ As the court in *Zimmerman v. NFL* concluded, the NFLPA was at a much better bargaining position during the 1982 Collective Bargaining negotiations than it was during the time of *Mackey*.¹⁶² Evidence of this included the fact that the CBA was only reached after a fifty-seven day strike. Since that time, the players’ union has only become stronger. This includes the bargaining of the most current CBA involving extensive negotiations, as well as the use of powerful union tactics, such as striking again in 1987 and temporarily decertifying the union in 1989.¹⁶³

Post-Mackey Analysis

Therefore, the circumstances surrounding *Mackey* simply do not exist anymore and, given the evidence previously stated, the logical conclusion is that not only were the eligibility rules known to the NFLPA, but they were both considered and negotiated within the existing CBA. However, even if one were to find, as the district court found, that there is no evidence of any *quid pro quo* negotiations for the eligibility rules, many courts since, including the United

States Supreme Court, have made it clear that “bona-fide arm’s length bargaining” includes more than *quid pro quo* arrangements written into the collective bargaining agreement, but instead any negotiating within the collective bargaining process as a whole. In *Brown v. Pro Football, Inc.*, the Supreme Court expressly adopted this principle when it stated, “[o]ne cannot mean the principle literally -- that the exemption applies only to understandings embodied in a collective-bargaining agreement -- for the collective-bargaining process may take place before the making of any agreement or after an agreement has expired.”¹⁶⁴ Furthermore, As the Second Circuit noted:

Clarett would have us hold that by reaching this arrangement rather than fixing the eligibility rules in the text of the collective bargaining agreement or in failing to wrangle over the eligibility rules at the bargaining table, the NFL left itself open to antitrust liability. Such a holding, however, would completely contradict prior decisions recognizing that the labor law policies that warrant withholding antitrust scrutiny are not limited to protecting only terms contained in collective bargaining agreements.¹⁶⁵

Therefore, these policies must extend, “as far as is necessary to ensure the successful operation of the collective bargaining process,”¹⁶⁶ and “can occur outside of formal negotiations on a comprehensive agreement.”¹⁶⁷ As the court found in *Zimmerman*, the *Mackey* requirement is only that there be “bona-fide arm’s length bargaining,” and while a *quid pro quo* would certainly show strong evidence as to such, the only real question is whether there was good faith bargaining as to an issue, no matter how it may appear in the agreement. “It is not the Court’s function in the context of the labor exemption to evaluate the relative bargaining prowess and strategy of the parties, to determine who secured the better deal or whether there was adequate consideration exchanged.”¹⁶⁸

Consequently, being that the NFLPA was directly aware of the rule, was in a formidable

¹⁶⁰ *McCourt v. California Sports, Inc.*, 600 F.2d 1193, 1200 (6th Cir. 1979).

¹⁶¹ *See*, *Mackey*, 543 F.2d at 609-616.

¹⁶² *Zimmerman*, 632 F. Supp. at 406-407.

¹⁶³ NFLPA, February 2005, at <http://www.nflpa.org/AboutUs/main.asp?subPage=History>. In 1987, the NFLPA strike led to the league’s use of replacement players for more than half of the 1987 season before the union decided to fight the NFL in the courts. Following extensive litigation, the NFLPA temporarily decertified itself in 1989, removing the NFL’s non-statutory labor exemption and subjecting the league to antitrust scrutiny. As a result of these tactics, the league and the union finally agreed to a landmark CBA in 1993 which as been extended until the end of the 2007 season.

¹⁶⁴ *Brown*, 518 U.S. at 243.

¹⁶⁵ *Clarett*, 369 F.3d at 142; *See also*, *Brown*, 518 U.S. at 243-44; *Caldwell*, 66 F.3d at 528-529.

¹⁶⁶ *Clarett*, 369 F.3d at 142-143.

¹⁶⁷ *Zimmerman*, 632 F. Supp. at 407.

¹⁶⁸ *Id.* at 407-408.

bargaining position vis-à-vis the NFL, and that there was intensive, good faith bargaining for the entire CBA, including those provisions which incorporated the Constitution and the Bylaws, there should be no concern here, as there was in *Mackey* or in other cases where the non-statutory labor exemption was not applied, that this issue is not inherently labor in nature. The only logical conclusion, based upon the very intent of this country's labor law, is that precisely in cases such as this one, the non-statutory exemption must apply.¹⁶⁹

Conclusion

As to the pending writ of certiorari, it is certainly possible that the Supreme Court may take the case to clarify the exact boundaries of the non-statutory labor exemption. However, given that the results under these circumstances seem justified, under a strict *Mackey* interpretation or not, the Supreme Court will most likely deny the writ.¹⁷⁰ The collective bargaining process is inherently unique to the industry it involves, as well as the parties at the bargaining table, and any clarification of the limits of the non-statutory labor exemption, beyond its basis in the intent of our federal labor law policies may in fact cause more litigation than it would help prevent. Finally, as a policy matter, this rule, whether negotiated in good faith or not, has distinct advantages for both the potential players, the union, and the league as a whole, and should not be overturned due to, what very well may be, a drafting error.¹⁷¹ As to

Maurice Clarett, no matter where he may go next month in the NFL Draft, let his experience be an example to all young players that, no matter what the motivation of the NFL or the NFLPA, the eligibility rules do serve a purpose – to make the difficult decision of whether or not to stay in college an easy one, and ultimately, in this writer's opinion, the right one.

¹⁶⁹ If, however, the non-statutory labor exemption did not apply, the court would turn to antitrust law and a "Rule of Reason" analysis. While the court should not find a *per se* violation, it is likely that the eligibility rules would be found to have an "anticompetitive effect" upon the collegiate athlete creating an antitrust violation. *See*, *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

¹⁷⁰ Indeed, as earlier noted, the Supreme Court did reject the writ on April 4, 2005 without comment.

¹⁷¹ For an in-depth analysis of the policy reasons favoring the current NFL eligibility rules, *See*, *Talking Football in the Off-Season: Why the Clarett Decision is Good for Young Athletes*, CFIF, June 3, 2004, at http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/the_clarett_decision.htm. It is also important to note that the NFLPA has never

publicly opposed the eligibility rules. Dr. Myles Brand, the current NCAA president, also recently endorsed the NFL's rule, stating that the NBA should adopt a similar rule to help raise the graduation rate of student-athletes. *See*, *ESPN Town Hall Meeting* (ESPN television broadcast, March 16, 2005).

Smoke and Mirrors: The Illusion Created by Unconscionable Contracts in the Recording Contracts

By: Jeanise Frazier

Introduction

At a fundamental level, we accept during our first year of law school that in order for a contract to be effective and enforceable there must be: (1) an offer, (2) acceptance, and (3) consideration. We are trained to pay close attention to the language of the contract, as it is that language that will determine the duty owed by the parties involved. In doing so, we are subtly introduced to the weight of words in the legal profession. Specifically, how language is used to create an instrument that is binding to all parties involved.

The doctrine of unconscionability allows the courts to police explicitly against the contracts or clauses which they find to be unconscionable.¹⁷² This ultimately prevents a contract deemed unreasonable from being enforced. The great controversy lies in determining what constitutes unconscionability, which operates in the interstices to achieve particularized fairness.¹⁷³ Moreover, the governing rule (U.C.C. 2-302) does not define the term “unconscionability”. It is left to the courts, creating a cutting edge and developing a standard of law.

Over the past decade, the unconscionability doctrine has surfaced in many areas of law. The one that presents the biggest irony is that of the recording industry. A novice in the recording industry can be so excited about what the recording contract represents, often times resulting in nothing to sing about. This article will explore contractual interpretation in the area of unconscionability in recording contracts by thoroughly probing the various elements required to constitute a claim of unconscionability.

Unconscionability Defined

The doctrine of unconscionability permits a court to refuse to enforce a contract if it deems it is unfair. This doctrine was given teeth through several statutory regulations; the most recognized being the Uniform Commercial Code 2-302.

Uniform Commercial Code 2-302

¹⁷² Edward J. Murphy; Richard E. Speidel; Ian Ayres, *Studies In Contract Law*, 534 (6th Ed., Foundation Press 2003).

¹⁷³ *Id* at 535.

Section 2-302 of the Uniform Commercial Code (hereinafter U.C.C.) reads:

- (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose and effect to aid the court in making the determination.¹⁷⁴

Traditionally, equity courts recognized the defense of unconscionability in denying relief to plaintiffs who were guilty of unconscionable conduct.¹⁷⁵ Because barring relief was a matter of the chancellor’s discretion, equity never developed a clear set of rules for analyzing claims of unconscionability.¹⁷⁶ Additionally, in equity, unconscionability served as a remedial doctrine, limiting a party’s remedies without truly affecting its substantive legal rights.¹⁷⁷

As far back as 1889 an unconscionable bargain or contract was defined as one that “no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other”.¹⁷⁸ But it was only with the advent of U.C.C. 2-302, limited to transactions in goods, but extended by analogy to other types of transactions, that courts began in earnest to grapple with the ramifications of the unconscionability doctrine and to spell out specific content.¹⁷⁹

¹⁷⁴ U.C.C. at 2-302.

¹⁷⁵ 184 Ariz. 82, 88.

¹⁷⁶ *Id*.

¹⁷⁷ *Id*.

¹⁷⁸ 558 So. 2d 1039, 1044.

¹⁷⁹ Edward J. Murphy; Richard E. Speidel; Ian Ayres, *Studies In Contract Law*, 511 (5th Ed.,

The doctrine of unconscionability is not available as a basis for an affirmative recovery, but is intended as a means to avoid enforcement of a contract.¹⁸⁰ An unconscionable contract affronts the sense of decency and usually involves gross one-sidedness, lack of meaningful choice and susceptible clientele.¹⁸¹ A contract entered into by competent adults is binding without regard to anyone's opinion of its fairness; but where the circumstances indicate that one party did not, or could not, fully comprehend the meaning of the contract, then the court is free to use its own judgment to determine whether the contract terms are fair.¹⁸² Juries are not used in cases at equity, so unconscionability, being equitable in its origins, is decided by a judge.¹⁸³ The U.C.C. could have changed when it codified the doctrine, but [since a finding of unconscionability has such discretionary content] the drafters of the U.C.C. chose to keep it within the realm of the judge.¹⁸⁴

Restatement (Second) of Contracts §208

The unconscionability doctrine was further acknowledged in Section 208 of the Restatement (Second) of Contracts making it even more influential. The language of the Restatement is close to the U.C.C., which reads:

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.¹⁸⁵

The Restatement confirmed that the doctrine of unconscionability was becoming more widely accepted, making it easier to apply in the courts. And although it wasn't a solid definition, it did

Foundation Press 1997).

¹⁸⁰ 163 Misc. 2d 127, 136.

¹⁸¹ 565 F. Supp. 844, 892.

¹⁸² Marvin A. Chirelstein, *Concepts and Case Analysis in the Law of Contracts*, 81 (4th Ed., Foundation Press 2001).

¹⁸³ Brian A. Blum, *Contracts: Examples and Explanations* 13.11.2, 358 (Aspen Law & Business 2003).

¹⁸⁴ *Id.*

¹⁸⁵ Restatement (Second) of Contracts 208 (1979).

confirm that the doctrine was being taken seriously. The restatement further acknowledges that the court has the power to refuse enforcement of an unconscionable contract or to adjust the contract by removing or modifying the unconscionable provision.¹⁸⁶

Burden of Proof

To determine whether a contract or any clause of a contract is unconscionable (under the U.C.C.) is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect.¹⁸⁷ Claiming unconscionability requires some showing of an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party.¹⁸⁸ The ultimate conclusion of whether a provision is unconscionable is to be made in view of all of the circumstances.¹⁸⁹ To show that a provision is conscionable, the party seeking to uphold the provision must show that the provision bears some reasonable relationship to the risks and needs of the business.¹⁹⁰ The problem often faced by claimants attempting to prove unconscionability in a contract is the vagueness of the term. While the U.C.C. does not provide much guidance on what constitutes unconscionable bargaining, it states that the aim is to prevent oppression and unfair surprise, but not to disturb the allocation of risks because of superior bargaining power.¹⁹¹

The Adhesion Contract

Standard form contracts presented on a take-it-or-leave-it basis are often referred to as contracts of adhesion.¹⁹² At common law, contracts of adhesion have been presumptively enforceable.¹⁹³ One of the first definitions of the term adhesion contract came from Justice Tobriner in 1961, in which he indicated that the term signifies a standardized contract, which imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the

¹⁸⁶ Blum, *supra* n10, at 13.11.3, 358

¹⁸⁷ 565 F. Supp. 884, 893.

¹⁸⁸ *Id.* at 892.

¹⁸⁹ 367 F. 3d 1048, 1053.

¹⁹⁰ Murphy, *supra* n.1 at 542.

¹⁹¹ Blum, *supra* n10, at 13.11.4, 359.

¹⁹² Murphy, *supra* n. 15, at 546.

¹⁹³ *Id.*

contract or reject it.¹⁹⁴ These contracts are a familiar part of the modern legal landscape.¹⁹⁵ While not lacking in social advantages, they bear within them the clear danger of oppression and overreaching.¹⁹⁶ In the context of this tension, between the social advantage in the light of modern conditions on the one hand, and the danger of oppression on the other, that courts and legislatures have sometimes acted to prevent perceived abuses.¹⁹⁷ Social advantages can be monetarily, by status, or by title. Generally, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof.¹⁹⁸ The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him.¹⁹⁹ The second is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if it is unduly oppressive or unconscionable.²⁰⁰ The doctrine of unconscionability is one defense used for unfair adhesion contracts. In using the doctrine in relation to adhesion contracts in the recording industry, it is established that there is precedent from other areas of the law that have found unconscionable contracts unenforceable, so the same should be applied to recording contracts.

It is widely recognized that sometimes one of the parties is so dominant, and its attitude to those with whom it deals is so rapacious, that the give-and-take of the market is inadequate to control its self-serving conduct.²⁰¹ If there is any ambiguity or uncertainty in the terms, its harsh effect may be avoided by interpretation, the court may itself refuse enforcement on the basis of public policy, or it may use policing doctrines such as duress or unconscionability.²⁰²

The following elements of procedural and substantive unconscionability will be discussed below. There is a close cause-and-effect relationship between procedural and substantive unconscionability.²⁰³

Procedural Unconscionability

¹⁹⁴ 28 Cal. 3d 807, 817.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 819.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ Blum, *supra* n10 at 13.12, 365.

²⁰² *Id.*

²⁰³ Blum, *supra* n10 at 13.11.5, 360.

The concept of unconscionability was meant to counteract two generic forms of abuses, the coincidence of both forms being necessary to a finding of the concept's applicability.²⁰⁴ The first type of abuse relates to procedural deficiencies in the contract formation process, taking the form of either deception or a refusal to bargain over contract terms.²⁰⁵ The procedural element focuses on the bargaining behavior of the party alleged to have acted unconscionably.²⁰⁶ This is manifested by: (1) oppression, when an inequality of bargaining power results in no meaningful choice for the weaker party, or (2) surprise, which occurs when the supposedly agreed-upon terms are hidden in a prolix document.²⁰⁷

Procedural unconscionability serves two functions.²⁰⁸ First, it settles the conflict between the principle of freedom of contract and court intervention.²⁰⁹ The principle of freedom of contracts indicates that courts should not interfere with the free choice of the contracting parties because they have assented to the contract terms, but procedural unconscionability reveals that such assent never existed – each of the elements of procedural unconscionability indicates that there was no full, independent assent to the terms of the contract by both parties.²¹⁰ Second, in many cases the procedure involved in the contracting itself decides whether the agreement at issue is unconscionable; it can render a contract unconscionable that would not otherwise have been so, and it may even lead to a finding that a contract with one-sided terms is not unconscionable because the procedure involved was fair, reasonable, and open.²¹¹

This element does not apply to parties who are capable of making an informed choice.²¹² Restatement Second §208 expands on procedural unconscionability by noting that gross inequality of bargaining power may satisfy the requirement of unconscionability if combined with

²⁰⁴ See *Carboni v. Arrospide* 2 Cal. App. 4th 76, 82.

²⁰⁵ *Id.*

²⁰⁶ Blum, *supra* n10, at 13.11.4, 359.

²⁰⁷ See *Carboni*, 2 Cal. App. at 82.

²⁰⁸ Sinai Deutch, *Unfair Contracts*, 122 (Lexington Books 1977)

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Michael B. Kelly, *Contracts*, 260 (Aspen Law & Business 1997)

substantively unfair terms.²¹³ It is important to note that the general rule is that, although both elements are usually present in an unconscionable contract, they are not required to be present to an equal degree.²¹⁴

Substantive Unconscionability

This term refers to the substance of the transaction, the fairness of the terms of the bargain.²¹⁵ It corresponds most closely with the view that the courts should strike down any term that produces harsh results.²¹⁶ Substantive unconscionability focuses on the terms of the agreement and whether those terms are so one-sided as to shock the conscience.²¹⁷ Most commonly, those terms are harsh, unfair or duly favorable to one side of the parties.²¹⁸ The forms of substantive unfairness cannot be confined to a complete list because there are numerous types of unfair terms.²¹⁹ It is possible for these elements to be present even when the contract appears fair and reasonable from an objective standpoint.²²⁰ For example, substantive unconscionability exists when the weaker party did not desire the transaction but was unfairly persuaded to enter it.²²¹

Most commonly, a contract is substantively unconscionable when its terms are harsh, unfair, or unduly favorable to one of the parties.²²² Substantive unconscionability must be evaluated as of the time the contract was made.²²³

California Takes a Cutting Edge Approach

California Labor Law Code 2855(b) (1987)

California's Labor Code Section 2855, otherwise known as the "Seven Year Statute", limits the amount of time anyone can be held to a contract for personal services to a maximum of seven years.²²⁴ Recording artists are not the only

class of employees in the state of California who cannot take advantage of Labor Code 2855 and freely negotiate for better terms or seek new agreements after seven years.²²⁵ The following recording industry professionals are also excluded from the benefit of Labor Code 2855: songwriters, producers, musicians, and engineers.²²⁶ The Recording Artists Coalition (RAC) has been involved in attempts to combat this state statute (Creative Artists Initiative).

California Labor Law Section 2855(b) Enforcement of Contract to Render Personal Service states:

- (1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of Civil Procedure, specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).
- (2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.

In the event a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in

²¹³ Blum, supra n10 at 13.11.4, 359

²¹⁴ Id at 361.

²¹⁵ Kelly, supra n32 at 259.

²¹⁶ Id.

²¹⁷ Murphy, supra n1 at 556.

²¹⁸ Blum, supra n10 at 13.11.5, 361

²¹⁹ Deutch, supra n37 at 121

²²⁰ Blum, supra n10 at 13.11.5, 361.

²²¹ Id.

²²² Id.

²²³ See Carboni, 2 Cal. App. at 83.

²²⁴ California's "Seven Year Statute" – Repeal of § 2855(b) of the Labor Code <http://www.recordingartistscoalition.com/issues/7yearstatute.php> (accessed Feb. 2, 2005)

²²⁵ Id.

²²⁶ Testimony of Michael Greene, President & CEO, Grammy's on Exception to the Seven Year Statute <http://www.musicdish.com/mag/index.php3?id=4450> (accessed April 1, 2005)

an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.²²⁷

California Civil Code § 1670.5

Section 1670.5 reads:

- (a) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.
- (b) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination.²²⁸

It was under this section of the Civil Code that confirmed that unconscionability was ultimately a question for the court.²²⁹ The statute mandated the doctrine of unconscionability and the equitable doctrine of unconscionability set forth in the statute provided grounds for the revocation of any contract.²³⁰ The statute permits the court, upon finding a contract to be unconscionable, to refuse to enforce the contract or to enforce the remainder of the contract without the unconscionable clause.²³¹

Unconscionability in Recording Contract Terms

For years, recording artists and their representatives have recognized and vilified the antiquated, but universally used, standard

²²⁷ Cal. Lab. Code § 2855(b) (1987)

²²⁸ See Cal. Civ. Code § 1670.5.

²²⁹ See Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 851.

²³⁰ See Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1552.

²³¹ See Flores, 93 Cal. App. at 848.

recording agreement.²³² Some surmise that the standard recording agreement, with all of its anti-artist provisions, arguably constitutes a restraint of trade under the laws of the United States.²³³ The terms of the contract are the paramount issue. California responded by enacting Labor Code 2855, which prohibits, under certain circumstances, entertainment industry personal service contracts longer than seven years.²³⁴ Free agency, within the music business, would give the artists control over their cases and guarantee competition and innovation in the recording industry.²³⁵ A major label (a company in the recording industry that commands a high percentage of the annual sales of records, and has their own distribution system) often signs artists for six to eight records (not years).²³⁶ Because labels commonly use a pre-determined standard contract in their dealings with new acts, there is a serious concern amongst artists and artist lawyers that the contract is substantively unconscionable. As noted entertainment attorney Don Engel stated, “Many recording contracts may be unenforceable because they are unconscionable as a matter of law, having been imposed on artists as ‘take it or leave it’ propositions, sometimes called [by scholars] ‘contracts of adhesion’.”²³⁷

Usually the terms and provisions of the standard recording contract are non-negotiable. Not surprisingly, artists are likely to feel trapped by the agreements leading to a legal challenge on the grounds that the contract is onerous and unconscionable.²³⁸ There are several clauses in the recording contract that have been the target for litigation claiming unconscionability; they include: (1) Term clause, which indicates the duration of the contract.²³⁹ This part of the contract can prevent the artist from leaving the

²³² Contractual Issues in Recording Contracts <http://www.recordingartistscoalition.com/issues/recordingcontracts.php> (assessed Feb. 2, 2005)

²³³ Id.

²³⁴ Id.

²³⁵ Id.

²³⁶ What’s a Record Deal All About?

<http://www.musicbizacademy.com/knab/articles/recorddeal.htm> (assessed Feb. 2, 2005) The Big Five include: Universal Music Group, EMI, BMG, Warner Music Group (AOL Time Warner), and Sony Music.

²³⁷ Id.

²³⁸ Bill Holland, Performers Give Testimony Before Judges & Lawmakers, Billboard Magazine (Sept. 2001)

²³⁹ Id.

label, thereby resulting in the artist being tied to one label for an indefinite amount of time; (2) Recoupment clause, which determines how much money the artist will make from the sales of the recording.²⁴⁰ This clause often requires that the label pay for the recording studio time and the promotion of the recording in exchange for sometimes 90% of the profit, with the artist getting 10% in royalties, and out of that 10%, all of the costs (advances, etc.) are recouped, while the label keeps its 90%.²⁴¹ This is one area of the contract that receives the biggest complaint from recording artists²⁴²; and (3) The Work for Hire Provision, which denies the creator of the work the ability to exercise term rights. This right is granted to all other copyright creators in similar circumstances, but contractually, the recording artist is denied their termination right.²⁴³

In the modern record business, one of the major five labels is likely to have control of your output.²⁴⁴ Those labels include: Vivendi Universal, Sony, Warner Music, BMG, or EMI.²⁴⁵ This control has been referred to as “indentured servitude” by artists and activists for recording artists.²⁴⁶ The terms of a recording contract can create an unfair playing field for artists. This stands to prevent the artist from owning their original music and hindering them financially.²⁴⁷ Not to mention it locks the artist into a relationship with the label that can last up to fifteen years or more. If an artist is unhappy with their label, often times they have no recourse available.

Headline Cases

Cases of unconscionability in contracts are prevalent in every genre of music. Over the last decade, the media presented cases of artists

²⁴⁰ Id.

²⁴¹ Bill Holland, Artists’ Lawyers Debate Contracts, *Billboard Magazine* (Sept. 2001)

²⁴² Accounting Practices, http://www.recordingartistscoalition.com/industry_practices.php#recoupment (assessed Feb. 2, 2005)

²⁴³ See Contractual Issues, supra n 48

²⁴⁴ Take it or Leave it, *Billboard Magazine* (Sept. 2001)

²⁴⁵ Id.

²⁴⁶ Chuck Phillips, Lawmakers Take Aim at Music Industry Contracts, *Billboard Magazine* (Aug. 2001)

²⁴⁷ Chuck Phillips, Record Label Chorus: High Risk, Low Margin, *Billboard Magazine* (May 2001)

fighting with record labels for more flexibility in their recording contracts. The artists below may be singing to different tunes (rock, rap, and country), but they all fought back against their record label and received much publicity in the process.

No “Love” for Universal Music Group

In 2000, a multi-million dollar lawsuit ensued by a major record label (Universal) against an artist, Courtney Love, for breach of contract, saying that she tried to terminate a seven year contract without delivering five recordings still owed to the company.²⁴⁸ Courtney Love is a well known rock singer in the band “Hole”.

Not long after the filing of the lawsuit for breach of contract, Love countered-sued, demanding an end to the industry wide practice of offering only long-term contracts.²⁴⁹ The timing of the lawsuit was critical, and caused the suit to get a lot of attention. This was primarily due to the fact that the state of California, during the time of the lawsuit, was holding hearings to discuss how artists’ contracts are drawn up.²⁵⁰ This landmark case was significant because Love was one of the first artists to file a lawsuit to have her music contract voided under the California Labor Law 2855.²⁵¹ The suit essentially focuses on three issues: the assignment clause (the part of the contract that landed Hole at Interscope); the contentions that industry contracts are impossible to fulfill; and the claim that the labels shouldn’t have the right to seek lost profits when an artist vacates a contract after seven years.²⁵² Love was trying to expose what she calls the “unconscionable and unlawful” business tactics of the major record labels.²⁵³

²⁴⁸ Laura M. Holson, Courtney Love May Be Close To Settlement, *NY Times* (Sept. 2002)

²⁴⁹ Id.

²⁵⁰ Id.

²⁵¹ Interview with Ken Freundlich, Entertainment Lawyer, <http://musicdish.com/mag/index.php3?id=4924> (assessed March 2, 2005)

²⁵² Courtney Love vs. the Music Biz, http://www.anybodylisten.com/home/Courtney_Love_vs.htm (assessed April 2, 2005)

²⁵³ Courtney Love Seeks to Rock Record Labels’ Contract Policy, http://homepage.smc.edu/sindell_steven/BL5_FOLDER/Currentevents/bl5.unconscionable.k.html (assessed April 3, 2005)

After more than two years of disagreement, Love and her label (Universal Music Group) reached a settlement. The outcome was viewed as a huge win for Love.²⁵⁴ The terms of the agreement included allowing Love to retain ownership of a group of unreleased recordings and the label waived the re-recording restriction for some of the previously released recordings.²⁵⁵

A “Krupt” Contract

In litigation started in 1998, an artist known to rap fans as “Krupt”, a member of the group “Tha Dogg Pound”, initiated litigation against his label (Interscope Records).²⁵⁶ In this case, the artist was suing the label for unpaid royalties, resulting from gaps in recordkeeping and ambiguities in the contract. During the course of the trial the terms of the contract were reviewed by the court. There was expert testimony presented by accountants and consultants, which the court used to determine if the terms of the executed contract were unconscionable at the time it was executed. The court in this case started its analysis with determining if the record contract was an adhesion contract.²⁵⁷ The court also indicated that recording contracts are lengthy and the provisions are not particularly conspicuous.²⁵⁸ The substantive element of unconscionability was satisfied because there was no showing of any particular need, on the part of the record label, to recover royalties by imposing a host of complex procedural thresholds at the time of the signing of the contract.²⁵⁹ Hence, the court found that the contract was one-sided and unconscionable.²⁶⁰

The “Chicks” Settle with Sony

The well-known country group, the “Dixie Chicks”, also entered the headlines with a lawsuit against their recording label (Sony Music) over their recording contract.²⁶¹ In the summer of

²⁵⁴ Courtney Love & UMG Settle Their Differences, <http://musicdish.com/mag/index.php3?id=6728> (assessed April 1, 2005)

²⁵⁵ Id.

²⁵⁶ See *Brown v. Death Row Records and Interscope Records*, 219 B.R. 373 (1998)

²⁵⁷ Id at 382.

²⁵⁸ Id at 383.

²⁵⁹ Id.

²⁶⁰ Id.

²⁶¹ Holson, supra n60

2001, the group attempted to get out of their contract with Sony, claiming shoddy accounting practices and underpayment of royalties were owed to the group.²⁶² The label claimed that the group owed them more albums pursuant to the recording contract, and there would be a substantial financial loss (\$100 million) if they did not deliver.²⁶³

Not long after the Sony filed that lawsuit, the Dixie Chicks counter-sued. The Chicks claimed that their contract was structured in such a way as to virtually enslave them, obligating the group to continue to record no matter how blatantly the label breaches its obligations.²⁶⁴ The dispute between the two parties continued for well over a year. Subsequently, the group participated in hearings before the California state legislators in Sacramento to address fairness in recording industry contracts.²⁶⁵

The case was eventually settled by the group and the label.²⁶⁶ Although a confidentiality agreement was in place, it has been reported that the settlement included a \$20 million advance, an increased royalty rate, and a new label (Open Wide Records) through Sony.²⁶⁷ In spite of the settlement, members of the group view the result as a “hollow victory”.²⁶⁸ Through their lawsuit, the group wanted changes to affect the entire recording industry.²⁶⁹

Conclusion

In conclusion, the recording industry attracts new artists to an unfair playing field by exchanging their dreams for words on paper. Meanwhile, recording artists continue to seek fair contracts, while unknowingly framing the definition and requirements of unconscionability. Consequently, artists’ have a better chance of entering the recording industry with a vision of being a star and leaving with nothing to sing about.

²⁶² Id.

²⁶³ Id.

²⁶⁴ Calif. Bill Seeks To Resolve Recording Industry Spat, http://onstagemag.com/ar/performance_calif_bill_seeks/ (assessed April 1, 2005)

²⁶⁵ Holson, supra n60

²⁶⁶ Id.

²⁶⁷ Dixie Chicks in Charge, http://www.usatoday.com/life/music/news/2002-08-26-chicks_x.htm (assessed April 1, 2005)

²⁶⁸ Id.

²⁶⁹ Id.

The Money Trap: Baseball Arbitration and the Rise of Player Salaries

By: John T. Ellis

Introduction

Over the last decade, the media has devoted a great deal of attention to the growing revenue imbalance in Major League Baseball. In his bestselling book *Moneyball*, Michael Lewis profiled how General Manager Billy Beane of the Oakland Athletics has repeatedly fielded a competitive baseball team despite the fact that his annual budget is amongst the lowest in the league.²⁷⁰ The United States Senate has deemed baseball's revenue gap significant enough to hold hearings on the issue.²⁷¹ The explosive growth of player salaries, through free agency and the arbitration process, now appears to be reasserting itself with even greater fury after two fiscally conservative years of minimal salary growth.²⁷²

Major League Baseball (MLB) is unique in that it "is one of the few endeavors where the employees negotiate a collective bargaining agreement, which establishes a minimum salary, yet leaves individual players free to contract with individual clubs at salaries in excess of the minimum guaranteed by the collective bargaining agreement."²⁷³ The arbitration process itself is not unique, however. Although MLB is one of relatively few private-sector industries to utilize binding interest arbitration²⁷⁴ as a means of resolving salary disputes, the interest arbitration

method used by MLB is widely used to resolve salary disputes in the public sector.²⁷⁵ Where public sector interest arbitrations were implemented to avoid labor strife, however, the advent of salary arbitration in baseball has actually increased labor controversy. A dispute over salary arbitration was a major cause of the infamous 1994 baseball strike that cancelled the World Series.²⁷⁶

Part I of this note discusses the arbitration provisions established by the current collective bargaining agreement ("the Agreement") between MLB and the Major League Baseball Players Association ("the MLBPA"). Part II of the note analyzes the effect that the arbitration process has had upon baseball salary growth. Part III addresses the difficulties that owners face when attempting to obtain judicial review of arbitration awards. The note concludes with some recommendations for enhancing the current arbitration system.

The Arbitration Process

Binding interest arbitration evolved in both baseball and the public sector during the same time period. Pennsylvania became the first state to allow binding interest arbitration for its police and firefighters in 1968 and New York followed with the enactment of the Taylor Law in 1974.²⁷⁷ Baseball players first gained the right to binding salary arbitration in the 1973 Basic Agreement between the MLB and the MLBPA.²⁷⁸ Free agency quickly followed as a result of the 1975 arbitration decision in the Messersmith-McNally Dispute.²⁷⁹ Although the arbitration process has

²⁷⁰ MICHAEL LEWIS, *MONEYBALL* 3-17 (2004).

²⁷¹ *Baseball's Revenue Gap: Pennant for Sale? Hearing Before the Subcomm. on Antitrust, Business Rights, and Competition of the Judiciary Committee, United States Senate*, 106th Cong. 15 (2000)

²⁷² Tom Verducci, *Is This Guy Worth \$33 Million?*, *SPORTS ILLUSTRATED*, Dec. 20, 2004, at 66.

²⁷³ Thomas J. Hopkins, *Arbitration: A Major League Effect on Players' Salaries*, 2 *SETON HALL J. SPORT. L.* 301, 307 (1992).

²⁷⁴ Interest arbitrations are convened by parties who have reached an impasse in collective bargaining in order to determine what the provisions of their new collective bargaining agreement should be. A grievance arbitration, on the other hand, is held to interpret the terms of an already existing collective bargaining agreement. FRANK ELKOURI AND EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 1348 (Alan Miles Ruben et al., eds., 6th ed. 2003).

²⁷⁵ *Id.* at 3.

²⁷⁶ Marc Chalpin, Comment, *It Ain't Over 'Til it's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball*, 60 *ALB. L. REV.* 205, 206 (1996).

²⁷⁷ RICHARD A. LESTER, *LABOR ARBITRATION IN STATE AND LOCAL GOVERNMENT: AN EXAMINATION OF EXPERIENCE IN EIGHT STATES AND NEW YORK CITY* 12, 143 (Princeton University 1984) (1984).

²⁷⁸ Chalpin, *supra* note 7, at 218.

²⁷⁹ *Id.* at 208-219 (The players received free agency as a result of a 61 page arbitration decision rendered by Peter Seitz in the Messersmith-McNally dispute. Messersmith and McNally were two pitchers who went to

since been refined, its basic procedural rules remain substantially unaltered.²⁸⁰

The Agreement allows for the salary of any player to be submitted to arbitration with the consent of both the player and the club.²⁸¹ Consent is not necessary, however, in the case of younger players with only three to six years of MLB service: "Any Club, or any Player with a total of three or more years of Major League Service... but with less than six years of Major League Service, may submit the issue of the Player's salary to final and binding arbitration."²⁸² The Agreement also allows salary arbitration for "super twos"—players with at least two but less than three years of major league service who have accumulated at least 86 days of service in the immediately preceding season and who rank in the top seventeen percent of players within that class in terms of total MLB service.²⁸³

The Agreement further lays out the precise procedural rules to be used in the arbitration process. Similarly to the salary arbitration statutes for public sector employees in New York and Pennsylvania, the Agreement provides for a three member arbitration panel. The members of the panel are chosen jointly by the parties each year.²⁸⁴ In the event that the parties are unable to agree on panel membership by January 1, the parties will alternately strike names from a list of professional arbitrators provided by the American Arbitration Association.²⁸⁵ The length of an arbitration hearing is limited, with each side receiving one hour for its initial presentation and one half hour for rebuttal and summation. The panel has the option to extend a hearing for good cause.²⁸⁶ Decisions must be rendered no

arbitration after the owners of their respective teams attempted to unilaterally invoke the reserve clauses in their contracts for the second straight year. The reserve clause, a fixture in MLB contracts since 1879, gave owners "the option of renewing a player's contract ad infinitum at a salary determined by the owner." The Seitz decision held that "the reserve clause merely gave the owners an additional option year, thus leaving Messersmith, now a free agent, to sign with another team."

²⁸⁰ See Hopkins, *supra* note 4, at 310-311.

²⁸¹ See Article VI, F of the 2003-2006 Basic Agreement.

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See Article VI, F(7) of the 2003-2006 Basic Agreement.

²⁸⁵ *Id.*

later than twenty-four hours after the close of the hearing.²⁸⁷

Major League Baseball utilizes a common form of interest arbitration known as final-offer arbitration. Final-offer arbitration leaves very little freedom to the arbitration panel.²⁸⁸ Prior to the hearing, each party exchanges salary figures for the coming season.²⁸⁹ Those figures are then submitted to the arbitration panel.²⁹⁰ The panel must select one of the two figures submitted.²⁹¹ It has no discretion to fashion an equitable figure on its own, and the submitted figures cannot be averaged.²⁹²

The Agreement mandates specific criteria for the arbitrators to consider when determining which of the submitted salaries to award:

The criteria will be the quality of the Player's contribution to his Club during the past season (including but not limited to his overall performance, special qualities of leadership and public appeal), the length and consistency of his career contribution, the record of the player's past compensation, comparative baseball salaries..., the existence of any physical or mental defects on the part of the Player, and the recent performance record of the Club including but not limited to its League standing and attendance as an indication of public acceptance....The arbitration panel shall, except for a Player with five or more years of Major League service, give particular attention, for comparative salary purposes, to the contracts of Players with Major League service not exceeding one annual service group above the Player's annual service group.²⁹³

²⁸⁶ See Article VI, F(9) of the 2003-2006 Basic Agreement.

²⁸⁷ See Article VI, F(5) of the 2003-2006 Basic Agreement.

²⁸⁸ Chalpin, *supra* note 7, at 220.

²⁸⁹ See Article VI, F(6) of the 2003-2006 Basic Agreement.

²⁹⁰ *Id.*

²⁹¹ Chalpin, *supra* note 7, at 220.

²⁹² *Id.*

²⁹³ See Article VI, F(12)(a) of the 2003-2006 Basic Agreement.

Of equal importance, the Agreement also restricts the arbitrators from considering certain factors, the most significant of which is "[t]he financial condition of the Player and the Club."²⁹⁴ In practice, comparability is the most significant standard for the arbitration panel. Comparability "establishes the market value of... labor by analyzing, among other things, the effects of inflation and cost of living increases on the compensation of comparable employees."²⁹⁵ The theory is that "employees who have similar responsibilities in similar communities should receive similar salaries."²⁹⁶ In the public sector, the reliance on comparability has led to generally conservative results; arbitrators will generally avoid changing the status quo by granting simple across-the-board percentage pay increases without changing established wage scales.²⁹⁷ In other words, public sector employees who have sought dramatic pay increases through the arbitration process have generally met with little success. This has certainly not been the case in major league baseball.

Arbitration Effects

Although baseball's final offer arbitration system severely restricts the arbitrator's ability to fashion an equitable solution, it is also structured to encourage moderation among the parties. The procedure is "designed to motivate each party to negotiate in good faith and genuinely attempt to compromise in order to create a final offer that an arbitrator will select as most reasonable."²⁹⁸ Because "each side knows that the arbitrator is unable to compromise... each side is wary of making unreasonable offers that increase the chance that its opponent will win at the hearing."²⁹⁹ Furthermore, the process of making final offers will often involve revealing previously concealed information that may assist

²⁹⁴ *Id.* at F(12)(b).

²⁹⁵ Arvid Anderson & Loren A. Krause, *Interest Arbitration: The Alternative to the Strike*, 56 *FORDHAM L. REV.* 153, 160 (1987).

²⁹⁶ Elissa M. Meth, *Final Offer Arbitration: A Model for Dispute Resolution in Domestic and International Disputes*, 10 *AM. REV. INT'L ARB.* 383, 405 (1999).

²⁹⁷ Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 *U. MICH. J.L. REFORM* 313, 333.

²⁹⁸ Meth, *supra* note 27, at 384-85.

²⁹⁹ *Id.* at 388.

parties in making settlement prior to the hearing.³⁰⁰

In practice, the MLB arbitration system has encouraged parties to settle their disputes prior to an arbitration hearing.³⁰¹ Because the arbitrator must select the salary figure offered by one of the parties, both "the club and the player have an incentive to submit an offer-and-demand closer to real market value than the number offered by the other side."³⁰² Ideally, the parties will realize that "they are below and above the real market value respectively, and therefore will come closer to the median figure on their own."³⁰³ The numbers seem to support this theory—of the 89 players who filed for arbitration in 2005, 86 settled their dispute prior to reaching a hearing.³⁰⁴

In terms of pure win-loss numbers, MLB owners appear to have an edge in cases that actually proceed to a hearing. Since arbitration began in 1974, owners have won 57% of the hearings, with a 265-198 overall record.³⁰⁵ In the 2005 round, owners won two out of the three hearings held.³⁰⁶ Win-loss numbers alone can be extremely misleading, however, because the owners' convincing margin of victory at the hearings has not led to cost savings for MLB clubs. In fact, even a "loss" at arbitration will entail a substantial increase in salary for a player and a corresponding increase in costs for a club.

Empirical evidence indicates that final offer arbitration has led to a tremendous explosion in player salaries over the last thirty years.³⁰⁷ Even when a player loses at arbitration, they still "win" a large salary increase. Although the owners won 12 of the 18 cases that went to arbitration in

³⁰⁰ *Id.* at 389.

³⁰¹ Stuart M. Reimer, Note, *Albert Pujols: Major League Baseball Salary Arbitration from a Unique Perspective*, 22 *CARDOZO ARTS & ENT. L.J.* 219, 221 (2004).

³⁰² *Id.* at 221.

³⁰³ *Id.* at 221-222.

³⁰⁴ See Ronald Blum, *Average Salary for Players in Arbitration Declines*,

<http://www.sports.yahoo.com/mlb/news?slug=ap-arbitrationstudy&prov=ap&type=lgns> (last visited Feb. 19, 2005); *Gagne, Berkman, Sheets Among Many Players Filing for Arbitration*, <http://www.sportsline.com/mlb/story/8099758> (last visited Jan. 14, 2005); *Salary Arbitration Filings*,

<http://cbs.sportsline.com/mlb/story/8114408> (last visited Feb. 5, 2005).

³⁰⁵ See Blum, *supra* note 35.

³⁰⁶ *Id.*

³⁰⁷ See Hopkins, *supra* note 4, at 309.

1993, "[t]he twelve players who lost received an average raise of 55%. By contrast, players who won increase their income by an average of 174%."³⁰⁸ Between 1974 and 1991, the average player salary increased by more than \$800,000.³⁰⁹ Even players who file for arbitration and settle their salary disputes prior to a hearing reap enormous benefits from the process. In 2005, the 89 players who filed for arbitration received, on average, a 123% salary increase despite the fact that 86 players settled prior to a hearing.³¹⁰ For example, Cincinnati outfielder Adam Dunn received a 934% pay hike as a result of his arbitration settlement, increasing his salary from \$445,000 to \$4.6 million.³¹¹

As might be expected, the rapid rise in player salaries, combined with the absence of a salary cap, has led to a significant differentiation in talent between large market teams and their smaller brethren. In his November 2000 testimony before the Senate Judiciary Committee, MLB Commissioner Bud Selig stated that rising salaries were creating a serious competitive imbalance in baseball:

In the past, clubs did not have equal revenues or payrolls, but small-market clubs had the ability to compete with large-market clubs because revenue disparities were less severe and small-market clubs had a much greater relative ability to afford top talent. Although small-market may have had to work harder than large-market clubs to generate revenue, there was no structural impediment that kept them from being competitive on the field.³¹²

As might be expected, the teams with higher payrolls reached the playoffs more often and generally enjoyed a much greater degree of playoff success.³¹³

Selig left no doubt that he considered salary arbitration part of the problem. As he testified before the Judiciary Committee, "the price for

³⁰⁸ Chalpin, *supra* note 7, at 206.

³⁰⁹ See Hopkins, *supra* note 4, at 309.

³¹⁰ See Blum, *supra* note 35.

³¹¹ *Id.*

³¹² *Baseball's Revenue Gap: Pennant for Sale? Hearing Before the Subcommittee on Antitrust, Business Rights, and Competition of the Judiciary Committee, United States Senate, 106th Cong. 15 (2000) (testimony of Allan H. "Bud" Selig, Commissioner of Major League Baseball).*

³¹³ *Id.*

that talent is set in salary arbitration and free agency by Clubs with vastly more revenue."³¹⁴ Because comparability plays such a large role in interest arbitration awards, "bidding awards for free agents will continue to skew the market and significantly affect the salary arbitration process."³¹⁵ In Selig's words, "A club with revenues approaching \$200 million may be willing to pay a player \$15 to \$17 million per year. A Club with \$40 million in revenue simply does not have that option."³¹⁶

Given the overwhelming importance of comparability in the arbitration process, it should not be surprising that the scale of the salary increases received through arbitration have generally reflected the degree of fiscal restraint (or lack thereof) exercised by clubs during the free agency process.³¹⁷ In 1976, the year after the landmark arbitration decision in the Messersmith-McNally dispute, the average player salary was \$51,500.³¹⁸ By 1994, that figure had risen to \$1,200,000.³¹⁹ The current record for spending during a single free agency period stands at \$1.2 billion, set during the winter of 2000-01. The spending during the current 2004-05 free agency period is approaching the same record level.³²⁰

Salary arbitration awards generally reflect the free-agency market during the corresponding period. When club owners have exercised a degree of fiscal restraint, arbitration awards have generally been conservative. In 1987 and 1988, for instance, arbitrators found that club owners had conspired to depress the salaries of the players who filed for free agency in 1985 and 1986. The owners and players later settled the collusion grievances of 1987 free agents.³²¹ Although illegal collusion is certainly not the answer to baseball's salary issues, the fiscal restraint exercised during that three-year period

³¹⁴ *Id.* at 26.

³¹⁵ Hopkins, *supra* note 4, at 323.

³¹⁶ *Baseball's Revenue Gap: Pennant for Sale? Hearing Before the Subcommittee on Antitrust, Business Rights, and Competition of the Judiciary Committee, United States Senate, 106th Cong. 26 (2000) (prepared statement of Allan H. "Bud" Selig, Commissioner of Major League Baseball).*

³¹⁷ Hopkins, *supra* note 4, at 316.

³¹⁸ Chalpin, *supra* note 7, at 219.

³¹⁹ *Id.*

³²⁰ Tom Haudricourt, *Swinging for Fences Might Burn Owners*, MILWAUKEE JOURNAL SENTINEL, Jan. 30, 2005, at C1.

³²¹ Hopkins, *supra* note 4, at 315.

seems to have been reflected in the corresponding arbitration awards—arbitration eligible players received only a 5.5% increase over the previous year in 1986, 7.8% in 1987, and 7.4% increase in 1988.³²² Between 1978 and 1985, players who opted for arbitration had previously received a combined average percentage salary increase of 106.2%.³²³

Judicial Review

From the owners' perspective, the catch-22 of the arbitration process is no doubt worsened by the fact that clubs have virtually no hope of vacating an arbitration award they may perceive as unreasonable. Once rendered, an arbitration award is extremely difficult to overturn.³²⁴ In *Steelworkers Trilogy*, the Supreme Court addressed three separate cases involving attempts by the United Steelworkers of America to enforce compulsory arbitration clauses arrived at through collective bargaining.³²⁵ The Court held that when parties have agreed to submit their disputes to arbitration, a court's discretion "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract."³²⁶ *Steelworkers Trilogy* also created a presumption of arbitrability for any dispute arising under the agreement.³²⁷ Finally, *Steelworkers Trilogy* established that "a mere ambiguity in the opinion accompanying an arbitrator's award, which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award. Arbitrators have no obligation to the courts to give their reasons for an award."³²⁸ Any question involving the interpretation of the collective bargaining agreement is to be left to the arbitrator.³²⁹

³²² *Id.* at 316.

³²³ *Id.* at 317.

³²⁴ Tracy Lipinski, Note, *Major League Baseball Player's Ass'n v. Garvey Narrows the Judicial Strike Zone of Arbitration Awards*, 36 AKRON L. REV. 325 (2003).

³²⁵ *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigating Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

³²⁶ *Am. Mfg. Co.*, 363 U.S. at 568.

³²⁷ *Warrior & Gulf Navigating Co.*, 363 U.S. at 583.

³²⁸ *Enterprise Wheel & Car Corp.*, 363 U.S. at 598.

The end result of *Steelworkers Trilogy* is that if a given dispute is arbitrable, the grounds for overturning the arbitrator's decision in that dispute are extremely limited.³³⁰ In fact, courts have established only four basis grounds for overturning an arbitration award.³³¹ An award may only be struck down if it contains errors of law, contains errors of fact, does not "draw its essence" from the collective bargaining agreement, or violates public policy.³³²

The Supreme Court most recently applied its judicial reluctance to overturn arbitration awards to the collective bargaining agreement between MLB and the Player's Association in 2001 with its decision in *Major League Baseball Players Ass'n v. Garvey*.³³³ The dispute arose after the MLBPA failed to pursue first baseman Steve Garvey's collusion grievance against the San Diego Padres.³³⁴ Garvey asserted that the club owed him \$3,000,000 because "the Padres offered to extend his contract for the 1988 and 1989 seasons and then withdrew the offer after they began colluding with other teams."³³⁵ The court held that:

Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement.... We recently reiterated that if an "arbitrator is even arguably construing or applying the contract and acting within the scope of his authority," the fact that "a court is convinced he committed serious error does not suffice to overturn his decision...." It is only when the arbitrator strays from interpretation and application of the agreement and effectively "dispenses his own brand of industrial justice" that his decision may be unenforceable.... When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's

³²⁹ *Id.* at 599. See also *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

³³⁰ Lipinski, *supra* note 55, at 331.

³³¹ *Id.* at 332.

³³² *Id.* at 332-339.

³³³ *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001). See also Lipinski, *supra* note 54, at 339-344.

³³⁴ *Garvey*, 532 U.S. at 506.

³³⁵ *Id.*

"improvident, even silly, factfinding" does not provide a basis for a reviewing court to refuse to enforce the award....³³⁶

Even a serious error will not justify overturning an arbitration decision, so long as the arbitrator is acting within his authority under the contract.³³⁷

Conclusion

Despite the best efforts of MLB owners, it appears that baseball salary arbitration is here to stay. The 1994 baseball strike, which prematurely ended the season and cancelled the World Series for the first time since 1904, inflicted so much damage to the reputation and revenues of MLB that it is unlikely to be repeated.³³⁸ For better or for worse, salary arbitration has become a sacred cow that the MLBPA is unlikely to ever give up.³³⁹ Baseball's best hope to avoid labor disputes in the future will thus be to modify the salary arbitration process in a way that would address the legitimate concerns of club owners while at the same time protecting the MLBPA's vested interest in the arbitration process.

First, and perhaps most importantly, baseball salary arbitrators should be required to render an opinion explaining the logic behind the arbitration award. Every systematic effort to study the effect of baseball's arbitration upon the arbitration process has been severely hampered by Section F(5) of the Agreement, which states that "[t]here shall be no opinion."³⁴⁰ As a result of this provision, players and owners have little or no ability to determine how an arbitrator reached his or her decision.³⁴¹ Also, it becomes virtually impossible to determine which criteria were considered most important by the arbitrator, or, for that matter, whether the arbitrators in fact follow the stipulated criteria at all. Even a short opinion would "allow researchers to compare, and test the criteria deemed controlling by the individual arbitrators. Such information would help both sides in evaluating their position in negotiations, particularly the prospects of an arbitration hearing."³⁴²

Another possible modification, although not as innocuous as simply requiring an opinion, would be to allow the arbitrators more discretion. Allowing arbitrators to fashion an equitable settlement will enable owners to enter the arbitration process secure in the knowledge that a victory will not necessarily be as costly to the club as a loss. The players' interests will still be protected because modifying the final-offer arbitration process will not deny players the opportunity to receive a substantial salary gain.³⁴³

Baseball's current salary arbitration rules have effectively become a trap for small market ball clubs. Players with three to six years of experience in the league can trigger the arbitration process without the club's consent, and thereby be assured of a substantial salary increase regardless of the outcome. If the club proceeds to an arbitration hearing, it must ensure that its final offer is high enough to be perceived as reasonable by an arbitrator. Any attempt to settle prior to the hearing will generally have the same result. If the club's salary offer does not approximate the player's desired salary, the player can reject the offer and go to a hearing. Either way, the player has received a substantial pay raise and the club faces increased costs. Club owners will have virtually no opportunity to appeal.

It should be noted that arbitration has had positive results for baseball. Before players gained the right to binding salary arbitration in the 1973 Basic Agreement, owners were virtual dictators in the collective bargaining process. The current arbitration system does not just remedy the bargaining inequity, however—it swings the pendulum too far in the opposite direction. With some minor changes to balance the current bargaining inequity, arbitration could prove a useful process to the owners and the players. The difficulty will be striking the balance.

³³⁶ *Id.* at 509.

³³⁷ *Id.* at 510.

³³⁸ Chalpin, *supra* note 7, at 223-224.

³³⁹ *Id.*, at 234.

³⁴⁰ See Article VI, F(5) of the 2003-2006 Basic Agreement.

³⁴¹ Hopkins, *supra* note 4, at 332.

³⁴² *Id.* at 333.

³⁴³ See *Id.*

Picture Perfect Piracy: The Motion Picture Industry's Legal and Legislative War against Internet Piracy

By: Dimilene G. LaCroix

An all too common question people often asked is, "What exactly is online piracy?"³⁴⁴ Piracy is stealing. It is the unlawful taking, copying, or use of copyrighted materials without the consent of the works' owner.³⁴⁵ In order to legally use a copyrighted work, one must obtain permission from the copyright owner, which usually involves compensation and licensing.³⁴⁶ Most online piracy takes place via peer-to-peer³⁴⁷ software, such as *Kazaa*, *Gnutella* and *Direct Connect*, which connect millions of computers to one another over the Internet.³⁴⁸ File-sharing software exploits the fact that music and movies are digitized, which makes storing, playing, and

transmitting such works over the Internet relatively effortless as e-mail.³⁴⁹

Internet piracy³⁵⁰ was initially developed into a highly-recognized social problem with the advent of the notorious *Napster*³⁵¹ litigation and subsequent music industry uproar concerning Internet music downloading.³⁵² Today, Internet pirates have targeted the motion picture industry because movies have become easier to copy and distribute online, primarily due to revolutionary advanced technology that are

³⁴⁴ See "What is Piracy?" at <http://www.respectcopyrights.org/content.html> (last visited Feb. 10, 2005).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ A peer-to-peer (or P2P) computer network is a network that relies on computing power at the edges of a connection rather than in the network itself. A pure peer-to-peer file transfer network does not have the notion of clients or servers, but only equal peer nodes that simultaneously function as both "clients" and "servers" to the other nodes on the network. This model of network arrangement differs from the client-server model where communication is usually to and from a central server. Example of a non peer-to-peer file transfer is an FTP server. One user uploads a file to the FTP server, then many others download it, with no need for the uploader and downloader to be connected at the same time. Some networks and channels, such as Napster, OpenNap, or IRC @find, use a client-server structure for some tasks (e.g. searching) and a peer-to-peer structure for others. Networks such as Gnutella or Freenet, use a peer-to-peer structure for all purposes and are sometimes referred to as true peer-to-peer networks, though Gnutella at least is greatly facilitated by directory servers which inform peers of the network addresses of other peers.

³⁴⁸ See Lev Grossman, *It's All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?* Time Magazine, Vol. 161 No. 18, ¶ 5-6 (May 5, 2003), available at <http://www.time.com/time/archive/preview/0,10987,1004761,00.html> (discussing the popularity and ease of the Internet piracy and its difficulty of being regulated).

³⁴⁹ *Id.*

³⁵⁰ "Piracy" is defined as "the unauthorized and illegal reproduction or distribution of materials protected by copyright, patent or trademark law." *Black's Law Dictionary*, 1169 (7th ed. 1999).

³⁵¹ *A&M Records, Inc. v. Napster, Inc.*, 114 F.Supp. 2d 896, 900 (2000) [hereinafter *Napster*]- A&M Records and seventeen other record companies filed a complaint for contributory and vicarious copyright infringement, and unfair competition against Napster, Inc., an Internet start-up that enabled users to download MP3 music files free of charge. The eighteen plaintiffs were collectively grouped into five (5) major recording companies: BMG, Sony, EMI, Universal, and Warner. Plaintiffs' complaint alleged that despite Napster's knowledge of its users' unauthorized reproduction and distribution of copyrighted music, Napster deliberately failed to prevent its copyright infringement from occurring. The court enjoined Napster from copying, downloading, uploading, transmitting, or distributing copyrighted sound recordings. Later, Napster requested the court to stay the Plaintiff's motion to dismiss in order to allow for additional discovery. The court granted Napster's request. Eventually, Napster's service was shut down by an RIAA lawsuit. Napster has since revived its business as a legal site, where users pay per song before downloading.

³⁵² *Id.*

able to decode the DVD's encryption³⁵³ protections.³⁵⁴ Unlike traditional piracy on videocassette, digital piracy makes it possible to fabricate an infinite number of pirated copies that are as pristine in quality as the original.³⁵⁵

Online motion picture piracy is defined as the "unauthorized use of copyrighted motion pictures on the Internet".³⁵⁶ United States copyright laws prohibit any sale, trade, lease, distribution, uploading for transmission, transmittal or publicly performed motion pictures online without the consent of the motion pictures' copyright owner.³⁵⁷ Although, online motion picture piracy is in its infant stage – as it recently celebrated its fifth anniversary – the current phenomenon has become an increasingly growing trend.³⁵⁸ In 2001, there were one million movies available per day worldwide, with about

³⁵³ "Encryption" is the coding or scrambling of information so that it can only be decoded and read by someone who has the correct decoding key. Encryption is used in secure Web sites as well as other mediums of data transfer. To decipher the message, the receiver of the encrypted data must have the proper decryption key. Decryption is the process of converting encrypted data back into its original form, so it can be understood. The Sharpened Glossary, *Definitions of Computer Terms*, (Apr. 17, 2005) available at <http://www.sharpened.net/glossary/definition.php?encryption>.

³⁵⁴ See Lee Gomes, *Web Piracy is Hitting Hollywood Sooner Than the Studios Thought*, Wall St. J, Jul 17, 2000, available at <http://interactive.wsj.com/public/current/articles/SB963785272872501396.htm> (copy on file with The Transnational Lawyer). (describing the technological advances that offer downloaded movies on DivX format due to a computer program called DeCSS. DivX is a video compression software that compresses video on the Internet without reducing the original video's visual quality. DeCSS is a program that breaks the encryption supposedly intended to prevent DVD files from being copied onto a PC).

³⁵⁵ See RespectCopyrights.org, *Optical Discs and Videocassette Piracy* (Mar. 17, 2005), available at <http://www.respectcopyrights.org/content.html>.

³⁵⁶ The Motion Picture Association of America [hereinafter "MPAA"], available at <http://www.mpa.org/anti-piracy/>.

³⁵⁷ Copyright Law of the United States, §501 Infringement of Copyright, and relevant portions of Title 17 of the United States Code available at <http://www.copyright.gov/title17/>.

³⁵⁸ Gomes, *supra* note 11 (emphasizing the speed in which Internet users are downloading movies online, analogous to the music downloading trend).

600,000 downloaded per day.³⁵⁹ Illegal movie downloading has increased 20% each year since, according to the Motion Picture Association³⁶⁰, which amounts to approximately \$1 billion in lost DVD sales and rental revenue loss sales in 2004.³⁶¹ Bo Andersen, president of the Video Software Dealers Association, reported at the 2004 Home Entertainment Retail Expo that displaced rentals alone cost the industry \$640,000 a day, or roughly \$30 a day per store.³⁶² Ever since the introduction of the DeCSS decryption source code, and DivX, a broadband compression program, piracy in the film industry has rampantly increased.³⁶³ Despite the many legal wins and landmark legislative efforts, Internet pirates seem shamelessly undeterred and adamant to continue their online bootlegging spree.³⁶⁴

In its brief lifespan, online motion picture piracy has exponentially evolved from an unsophisticated black market comprised of low-grade movies with inferior visual and audio quality.³⁶⁵ Today, the Internet has been taken captive by the cutting-edge quality of virtually flawless motion picture reproductions.³⁶⁶ The film industry pirates made an unbelievable leap from the Flintstones-age into the Jetsons-age in 2000.³⁶⁷ A typical videocassette

³⁵⁹ See Michael Bartlett, *Pirated Movies Abound on the Web*, Wash. Post (Aug. 1, 2001) available at <http://www.cdfreaks.com/news2.php?ID=2345> (detailing the growing popularity of illegal movie downloading on the Internet and how relatively simplistic the process is becoming due to advanced technology).

³⁶⁰ The Motion Picture Association is an international organization that represents the film industry's wide range of foreign activities falling in the diplomatic, economic, and political arenas and focuses primarily on anti-piracy efforts, available at <http://www.mpa.org/about/>.

³⁶¹ See Retailer Losses to Internet Piracy We Do the Math, (2004) available at <http://www.vsd.org/Resource.phx/vsda/government/positionstatements/piracy-youdothemath.htx>.

³⁶² See Paul Sweeting, *VSDA Figures Piracy Costs, Keep Media.com*, (Sep. 27, 2004) available at <http://www.keepmedia.com/pubs/VideoBusiness/2004/09/27/589453?extID=10032&oliID=213>.

³⁶³ *Id.*

³⁶⁴ *Id.*

³⁶⁵ Gomes, *supra* note 11.

³⁶⁶ *Id.*

³⁶⁷ See Jeanmarie Lovoi, *Competing Interests: Anti-Piracy Efforts Triumph Under TRIPs But New Copying Technology Undermines the Success*, 25 *Brook. J. Int'l L.* 445, 469-470 (1999) [hereinafter "Lovoi"] (explaining the drastic evolution of the motion picture piracy methods from analog to

bootlegging ring was able to duplicate about 400 pirated cassettes in a 10-hour period, while digital pirates possessing the latest equipment can produce thousands of perfect DVDs daily.³⁶⁸ Back in the days of analog³⁶⁹, illegal replicas were physically smuggled into the U.S. in the form of hard copy discs.³⁷⁰ Today's digital bootleg market exists almost entirely on the Internet; thus, it has become virtually impossible to regulate this illegal electronic activity.³⁷¹ The explosion of illegal downloading of movies was unexpected because, while music downloading on the MP3³⁷² technology was a particularly easy process rampant on the Internet during 1998-1999, downloading movies, on the other hand, always created a frustratingly large file.³⁷³ Due to its inconvenient transmission, the film industry did not make efforts to prevent Internet piracy with any sort of urgency, because it did not foresee the influx that would come to pass.³⁷⁴

digital).

³⁶⁸ Motion Picture Association of America available at <http://www.mpa.org/anti%2Dpiracy/>.

³⁶⁹ "Analog" is generally defined as "designating or of electronic, recordings, etc. in which the signal corresponds to a physical change, as sound to a groove in a phonograph record". Elizabeth R. Grosse, *Recording Industry Association of America v. Diamond Multimedia Systems, Inc.: The RIAA Could Not Stop The Rio – MP3 Files and The Audio Home Recording Act*, 34 U.S.F. L. Rev. 575, 577 n. 18 (2000) [hereinafter "Grosse"] (citing Webster's New World Dictionary 385 (3d. ed. 1994) (noting that examples of analog recordings include audio cassette tapes and video cassette tapes).

³⁷⁰ Lovoi, *supra* note 24, at 469-470 (describing the process from a less sophisticated analog to digital).

³⁷¹ *Id.* (quoting Jack Valenti, President of the Motion Picture Association of America as he reports the regulatory difficulties of digital movie piracy).

³⁷² MP3 is a popular digital audio encoding and [compression](#) format designed to greatly reduce the amount of data required to represent [audio](#), yet still sound like a faithful reproduction of the original uncompressed audio to most listeners. The name ordinarily refers to [MPEG-1](#) Audio Layer 3.

³⁷³ See Business Software Alliance, *Seventh Annual BSA Global Software Piracy Study* (June 2002), available at <http://www.bsa.org/resources/loader.cfm?url=/commnspot/security/getfile.cfm&pageid=19984&hitboxdone=yes> (reporting that over \$1,807,709 in retail software in revenue was lost to piracy in the year of 2001).

³⁷⁴ *Id.*

There were several factors contributing to the fact that the film industry was isolated from piracy on the Internet. First, attempting to download a movie, even using the fastest broadband³⁷⁵ at that time, was a dreadfully tedious and time-consuming process that used to take almost 6 uninterrupted hours.³⁷⁶ A technology such as the MP3, which made pirating music files incredibly simple, did not exist for movie downloading for a long time.³⁷⁷ Secondly, broadband cable and Digital Subscriber Line (DSL) connections were unaffordable to many and were not available in all geographic regions.³⁷⁸ Thirdly, DVDs released to the home rental and sale market were not very susceptible to piracy due to the encryption protection feature and because decryption technology had yet to

³⁷⁵ "Broadband" is defined as "a transmission facility that has a bandwidth, or capacity, greater than a [telephone] line. Such a broadband facility may carry numerous voice, video and data channels simultaneously. The Cable Modem Information Network, *The Basics of Broadband*, available at <http://www.cable-modem.net/features/jun00/wpaper.html> (last visited Feb. 1, 2005) [hereinafter "Basics"].

³⁷⁶ See Sean Byne, *MPAA gives P2P movie statistics and upcoming risks with P2P*, (Nov. 2004), available at <http://www.cdfreaks.com/news2.php?ID=10856> (explaining that the download time for movies from the Fast Track (Kazaa) network has decreased to 3-6 hours. Therefore, MPAA is worried as to what may happen when Internet2 takes effect. *Id.* Internet2 is a high performance network for sharing information, which has the capabilities of transferring the equivalent of two full-length DVD-quality movies a quarter of the way around the Earth in less than one minute. See also Dan Bell, *I2 Hub Supercharged File Trading Network Appears on Internet2* (Apr 2004) available at <http://www.cdfreaks.com/news/9618>).

³⁷⁷ *Basics*, *supra* note 32.

³⁷⁸ See *Federal Communications Commission Daily Digest*, Vol. 19, No. 149, (Aug. 4, 2000), available at http://www.fcc.gov/Daily_Releases/Daily_Digest/2000/dd000804.html. (A study mandated by Congress inquiring whether "advanced telecommunications capability is being deployed to all Americans in a reasonable and fashionable manner". The results of the Commission's study identified the following groups as being particularly vulnerable of not having access to advanced services if deployment is left to market forces alone: (1) rural Americans, (2) particularly those outside of population centers; (3) inner city consumers; (4) low-income consumers; (5) minority consumers; (6) tribal areas; and, (7) consumers in U.S. territories).

be introduced to the masses.³⁷⁹ Lastly, the only form of motion picture piracy present at that time was a poorly videotaped bootleg of the film screen captured on a low quality video compact disc (VCD).³⁸⁰

The Internet pirates have since designed a calculated timetable in which to raid movies, which usually begins during the movies' debut in theatres and continues when the movies are released to the rental and sale markets.³⁸¹ The major motion picture studios usually distribute films sequentially in "windows," with each "window" referring to a distinct method of distribution and, as a result, each "window" referring to a distinct source of revenue.³⁸² The first "window" is usually the theatrical release, distribution, and exhibition.³⁸³ In the second "window," the films are distributed to airlines and hotels, then to the home market, then to pay cable and eventually, to free television broadcast.³⁸⁴

The Internet pirates have directly waged war against the motion picture industry and this is evidenced by the fact that the bootlegged movies that are introduced on the Internet persistently correspond with the theatrical release dates of legitimate

³⁷⁹ *Universal City Studios v. Reimerdes*, 111 F. Supp. 2d 294, 308 (D.N.Y. 2000) [hereinafter *Reimerdes*] (describing the Content Scramble System (CSS), which is an access control and copy prevention system for DVDs developed by the motion picture companies. CSS is an encryption-based system that requires the use of appropriately configured hardware such as a DVD player or a computer DVD drive to decrypt, unscramble and play back, but not copy, motion pictures on DVDs).

³⁸⁰ See Russil Wvong, *Video CD FAQ*, (Oct. 28, 2004) available at <http://www.geocities.com/Athens/Forum/2496/vcdfaq.html> (last visited Feb. 10, 2005) (listing frequently asked questions and differentiating the quality of Video CD from VHS).

³⁸¹ *Reimerdes*, *supra* note 36 at 309. (describing *Reimerdes*, which is a landmark case involving eight (8) major U.S. motion picture studios that distributed motion pictures on encryption-protected DVDs. The movie studios sued computer hackers for creating a program called DeCSS, which decoded the CSS protection on the plaintiff's DVDs and allowed the movies to be copied and played on the Internet. The courts ruled in favor of the studios and enjoined the hackers' illegal website. The *Reimerdes* case describes in detail the process in which motion picture studios distribute movies to the public and for profit).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

movies.³⁸⁵ A research study conducted by AT&T Labs entitled "*Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*" revealed that pirates are able to obtain movies prior to the theatrical release date because there are insiders who operate as "leaks" throughout the manufacturing and distribution process.³⁸⁶ The study reveals that prior to the official movie release, fresh (referring to before and during cinema release) and high quality copies are almost impossible to obtain, through an outsider attack.³⁸⁷

Prior to the introduction of DVDs, film studios released movies on videocassette³⁸⁸ for home viewing in "analog"³⁸⁹ format and this method has been utilized by studios since 1971.³⁹⁰ In 1997, the DVD was introduced to the market and was initially vulnerable to piracy because of its most appealing distinction from videocassettes: ability to copy digital files while preserving superior quality.³⁹¹ The advantages of the digital versus analog include the DVDs' improved visual and audio quality, larger data capacity, and greater durability.³⁹² Obviously, the

³⁸⁵ *Id.*

³⁸⁶ See Simon Byers, Lori Cranor, Dave Korman, Patrick McDaniel, and Eric Cronin, *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*, (2003) available at <http://www.research.att.com/~pdmcdan/drm03.pdf>.

³⁸⁷ *Id.*

³⁸⁸ See Mr. Media's FAQs, *Videocassettes and VCRs*, available at

http://www.laserline.com/mistermedia/faq_videotapes.htm (last visited Feb. 10, 2005) (explaining the exact inner workings and function of both a videocassette and VCR).

³⁸⁹ *Grosse*, *supra*, note 26.

³⁹⁰ See Biography of Charles Paulson Ginsburg, Engineer, *Inventor of the Video Cassette Recorder (VCR)* available at

<http://www.engology.com/eng5ginsburg.htm> (last visited Feb 10, 2005) (reporting that the first VCR was sold by Sony in 1971).

³⁹¹ See Mark S. Torpoco, *Mickey and the Mouse: The Motion Picture Industry and the Television Industry's Copyright Concerns on the Internet*, 5 *UCLA Ent. L. Rev.* 1, 4 (1997) (assessing the chief weakness of the DVD format. Because of the dramatic improvement in picture and sound quality when compared to videocassettes, DVD players have been rapidly adopted by the movie buying public).

³⁹² See DVD Demystified, *Home of the DVD FAQs* available at

<http://www.dvddemystified.com/dvdfaq.html#1.1>, (last visited Feb 10, 2005) (explaining eventual extinction of videocassette due to the introduction of DVDs).

enhanced quality of movies in digital form gave rise to risks that a virtually perfect copy – a copy that does not experience degradation in the copying process – could be produced at the click of a mouse and instantly circulated to limitless web users throughout the world over the Internet.³⁹³

With the quality of DVDs, the film industry recognized that it was only a matter of time before pirates invaded and launched a black market that uploaded and downloaded movies over the Internet.³⁹⁴ This new problem was twofold: (1) the unauthorized DVD copies that were leaked, prior to the official movie release, were of superior quality than the previous bootlegged videotape versions, and (2) the movie files available on peer-to-peer networks were easier and faster to download on a DVD rather than a CD.³⁹⁵ In 1996, as a defensive measure to the imminent piracy, the DVD inventors, Toshiba and Matsushita Electric Industrial Co., Ltd., designed the encryption code known as Content Scramble System (CSS).³⁹⁶ CSS was specifically designed to prevent copying DVDs.³⁹⁷ The DVD Copy Control Association, Inc. was formed for the sole purpose to regulate who may obtain a CSS licenses.³⁹⁸ However,

³⁹³ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 436 (2nd Cir. 2001) [hereinafter *Corley*] (discussing the threat digital movies faced upon the introduction of DVDs).

³⁹⁴ See Kevin Davis, *Comment, Fair Use on the Internet: A Fine Line Between Fair and Foul*, 34 *U.S.F. L. Rev.* 129, 131 (1999). “‘Downloading’ refers to the process of transferring information from the Internet or BBS [Bulletin Board Service] system to an Internet user’s personal computer. “‘Uploading’ refers to the process of transferring information from a user’s personal computer to the Internet or BBS system.”

³⁹⁵ *Id.*

³⁹⁶ *Reimerdes*, *supra* note 36, at 310. (CSS involves encrypting, according to an encryption algorithm, the digital sound and graphics files on a DVD that together constitute a motion picture. A CSS-protected DVD can be decrypted by an appropriate decryption algorithm that employs a series of keys stored on the DVD and the DVD player. Only players and drives containing the appropriate keys are able to decrypt DVD files and play movies stored on DVDs).

³⁹⁷ *Id.*

³⁹⁸ *DVD Copy Control Assn., Inc. v. Bunner*, 75 P.3d 1, 7 (Cal., 2003). Despite the efforts to safeguard the CSS technology, Jon Johansen, acquired the proprietary information --including the master keys and algorithms--by reverse engineering software created by a licensee, Xing Technology Corporation

the encryption code was quickly broken and free to anyone on the Internet.³⁹⁹

Movie Pirates Partied Like It Was 1999

Tales from the (de)crypt

In 1999, Jon Johansen (a.k.a. “DVD Jon”), a Norwegian teen computer hacker⁴⁰⁰, wrote a program called DeCSS that decrypts movies stored on DVD’s.⁴⁰¹ Johansen posted the DeCSS code on a website; thus enabling users to copy and distribute movies on the Internet.⁴⁰² Within months, the code was available on more than one hundred sites.⁴⁰³ At trial, Norwegian Prosecutors, advocating at the request of the Motion Picture Association of America (MPAA)⁴⁰⁴, claimed that Johansen acted illegally and that his DeCSS code established a simpler method in which to pirate DVDs online.⁴⁰⁵ Johansen argued that

(Xing).

³⁹⁹ *Id.*

⁴⁰⁰ “Hackers” is a digital-era term applied to those interested in breaking into computer systems with unauthorized access. The hacker community includes serious computer-science scholars conducting research, computer buffs hoping to expose imperfections in security systems, mischief-makers upsetting computer operations, and thieves, stealing copyrighted data. *Corley*, *supra* note 50, at 435 (discussing Eric C. Corley’s role as the publisher of a print magazine and administrator of a related web site, www.2600.com, geared towards “hackers”).

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 469 (2d Cir., 2001) (documenting Johansen’s intent to share the secret of decoding the DVD encryption online and remarking on the relatively slow spread of the DeCSS code on the Internet prior to Universal’s lawsuit).

⁴⁰⁴ The Motion Picture Association of America, Inc. [hereinafter “MPAA”] serves as the voice and advocate of the American motion picture, home video and television industries from its offices in Los Angeles and Washington, D.C. These members include Buena Vista Pictures Distribution, Metro-Goldwyn-Mayer Studios Inc., Paramount Pictures, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, Universal Studios, and Warner Bros. Entertainment, Inc.

⁴⁰⁵ See John Leyden, *DVD Jon Is Free - Official*, *The Register* (Jan. 7, 2003) [hereinafter *DVD Jon*] available at http://www.theregister.co.uk/2003/01/07/dvd_jon_is_free_official/ (discussing the Norwegian court ruling

he created DeCSS wholly for non-infringing purposes.⁴⁰⁶ Johansen's main intention was to enable users to re-play DVDs they'd already purchased and to bypass DVD scrambling codes which stopped users from playing DVDs on their Linux⁴⁰⁷ PCs. The court ruled in Johansen's favor and held there was not any evidence that either Johansen or others had used the decryption code unlawfully.⁴⁰⁸ Consequently, Johansen's decryption code remained available on the Internet, and his code is currently posted on approximately one million Internet websites for anyone to use.⁴⁰⁹

The presence of DeCSS on the website, www.2600.com⁴¹⁰, sparked a copyright infringement

on the charges filed by the Norwegian Economic Crime Unit against Jon Johansen for producing the DeCSS DVD decryption utility).

⁴⁰⁶ See Ann Harrison, *DVD hacker Johansen indicted in Norway*, The Register (Jan. 10, 2002) available at http://www.theregister.co.uk/2002/01/10/dvd_hacker_johansen_indicted/ (discussing Johansen's defense in which the hacker's father, a reverse engineer, asserts the data in dispute is the content of the DVD, and that his son broke the encryption and obtained access to the data on the disk. Since his son purchased the disk, the disk became his property and thus, the information on the disk was his as well).

⁴⁰⁷ "Linux" is an operating system, which is the basic set of programs and utilities that make a computer run. (Some other common operating systems are Unix, DOS, Microsoft Windows, Amiga, and Mac OS.) Linux was initially created in 1991 as a hobby by a young student, Linus Torvalds, at the University of Helsinki in Finland. Torvalds worked for three years on his creation and released the first Kernel version 1.0 in 1994. The latest Linux Kernel, 2.6.11, was released on March 2, 2005 and development continues. Linux is free software, distributed along with its [source code](#). Anyone who receives it is free to make changes and redistribute it. If users tweak a few lines of the source code, they must freely provide their modified source code to everyone they share it with. See *What is Linux?* available at <http://www.linux.org/> (last visited Apr. 1, 2005).

⁴⁰⁸ *DVD Jon*, *supra* note 62.

⁴⁰⁹ *Id.*

⁴¹⁰ "2600" has special significance to the hacker community. It is the hertz frequency ("a unit of frequency of a periodic process equal to one cycle per second," Webster's Third New International Dictionary 1061 (1993)) of a signal that some hackers formerly used to explore the entire telephone system from "operator mode," which was triggered by the transmission of a 2600 hertz tone across a telephone line, or to place telephone calls without incurring long-distance toll charges, (One such user reportedly

lawsuit initiated by eight major United States motion picture studios, as an effort to enjoin Eric C. Corley, the website's administrator, from making a copy of the decryption program available on his site.⁴¹¹ The number "2600" has special significance in the hacker community because it is the hertz⁴¹² frequency signal that some hackers formerly used to explore the entire telephone system from "operator mode," and to place telephone calls without incurring long-distance toll charges.⁴¹³ A bizarre lawsuit reports that one of the hackers discovered that the sound of a toy whistle from a box of Cap'n Crunch cereal matched the telephone company's 2600 hertz tone perfectly.⁴¹⁴

Corley's site, www.2600.com, was merely one of hundreds of web sites that posted DeCSS in late 1999.⁴¹⁵ After an abundance of cease-and-desist letters were sent to scores of website operators, many operators blatantly refused to remove DeCSS.⁴¹⁶ Because their efforts have proved fruitless, the film studios filed suit against Corley and his company, 2600 Enterprises, Inc.⁴¹⁷ Corley's site had a huge following in the hacker world and he had been catering to pirate enthusiasts since 1984 with his print magazine, 2600 Magazine.⁴¹⁸

As a bona fide online pirate, Corley unsurprisingly stayed true to form, because his defense was nearly identical to Johansen's (a.k.a. DVD Jon).⁴¹⁹ Both argued that the DeCSS software was intended to provide a means in which to copy DVDs purely for personal use on Linux.⁴²⁰ Corley cited the Fair Use Doctrine of the U.S. Copyright Act

discovered that the sound of a toy whistle from a box of Cap'n Crunch cereal matched the telephone company's 2600 hertz tone perfectly. (*United States v. Brady*, 820 F. Supp. 1346, 1355 & n.18 (D. Utah 1993)).

⁴¹¹ *Corley*, *supra* note 50, at 440. (discussing how the focus of Corley's publications is on the susceptibility of computer security systems, and how to manipulate that vulnerability in order to crack into the security systems. Examples of Corley's articles explain how to steal an Internet domain name and how to hack into the computer systems at Federal Express).

⁴¹² Hertz is "a unit of frequency of a periodic process equal to one cycle per second," *Webster's Third New International Dictionary* 1061 (1993).

⁴¹³ *Corley*, *supra* note 50, at 436.

⁴¹⁴ *United States v. Brady*, 820 F. Supp. 1346, 1355 & n.18 (D. Utah 1993).

⁴¹⁵ *Corley*, *supra* note 50, at 436.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ *Id.*

⁴¹⁹ *Id.*

⁴²⁰ *Id.*

in his defense, and insisted that he was constitutionally entitled to post and use the DeCSS decryption code.⁴²¹ Corley argued that although the quality of a pirated movie was substantially better than one on VHS tape, “it was not as perfect as a legitimate DVD bought from the store”.⁴²² The court disagreed and held that the quality of the pirated copy did not provide any basis for a claim of unconstitutional limitation of fair use.⁴²³

Neither Corley nor Johansen ever made an attempt to inform the owners of the copyrighted material.⁴²⁴ Based on the lack of good faith on their part, the Court reasoned that posting DeCSS online failed to fall under any of the exceptions of the Copyright Act or the Digital Millennium Copyright Act (“DMCA”),⁴²⁵ including reverse engineering, encryption research, security testing, or fair use.⁴²⁶ Corley’s site, and many of the other hacker-oriented sites, posted the decryption code with the sheer intent to share it with other fellow hackers.⁴²⁷ The Court of Appeals for the Second Circuit granted the studios’ request for an injunction because DeCSS strips DVDs of any copyright protection.⁴²⁸ Without an injunction against pirates such as Corley, the film studios would be forced to surrender to piracy, and over \$3 billion in profits.⁴²⁹

The studios went on to win other lawsuits such as, *Universal City Studios, Inc. v. Reimerdes*⁴³⁰, where Shawn Reimerdes, the owner and administrator for the web site, www.dvd-copy.com, posted DeCSS decryption code on his hacker-oriented site, www.dvdcopy.com. In *Paramount Pictures Corp. v.*

*321 Studios*⁴³¹, a company that manufactured and sold DVD copying software, such as DVD X Copy⁴³², SmartRipper, CladDVD was enjoined from manufacturing, distributing, or otherwise trafficking in any type of DVD circumvention software. Despite these legal victories, the major film studios still faced an uphill battle, as there were still a vast amount of sites that posted DeCSS and enabled piracy.⁴³³ In truth, these courtroom feats were quickly trounced by the staggering amount of profits lost to illegal DVD downloading.⁴³⁴ Pirates struck back with a mighty blow amounting to approximately \$11 billion worldwide and more than \$2.9 billion in the United States.⁴³⁵

Movie Studios Are Sleepless In the Matrix

In 1999 DivX debuted, which is a program that compresses video files and simplifies movie downloading over the Internet.⁴³⁶ The popularity of DivX immediately exploded, largely because this new technology dramatically reduced the size of the movie file, in addition to the amount of downloading time.⁴³⁷ DivX not only allowed a DVD to fit on a single CD

⁴³¹ [Paramount Pictures Corp. v. 321 Studios, 2004 U.S. Dist. LEXIS 3306 \(D.N.Y., 2004\) \[hereinafter 321 Studios\]](#) (explaining that 321 Studios was enjoined from selling software specifically designed to decrypt a DVD protection. (See also, [321 Studios v. MGM Studios, Inc., 307 F. Supp. 2d 1085 \(D. Cal., 2004\)](#)).

⁴³² *Id.* (321 Studios manufactured and sold to the public DVD X Copy Platinum, DVD X Copy Gold, DVD X Copy Xpress, DVD Copy Plus, SmartRipper, CladDVD, or DeCSS).

⁴³³ See Lev Grossman, *It's All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?* Time Magazine, Vol. 161 No. 18 (May 5, 2003), available at <http://www.time.com/time/archive/preview/0,10987,1004761,00.html> (discussing the futility of the lawsuits and legislation combating online piracy).

⁴³⁴ See H.R. REP. 106-216, 106th Cong., 1st Sess. (1999) (Notwithstanding [penalties for copyright infringement] copyright piracy of intellectual property flourishes, assisted in large part by today's world of advanced technologies. For example, industry groups estimate that counterfeiting and piracy of computer software cost the affected copyright holders more than \$ 11 billion last year).

⁴³⁵ *Id.*

⁴³⁶ See The Official Website of DivX Video, at <http://www.divx.com/> (last visited Feb. 12, 2005).

⁴³⁷ *Id.*

⁴²¹ *Id.*

⁴²² *Corley, supra* note 50, at 459.

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ Digital Millennium Copyright Act of 1998 – legislation passed on [May 14, 1998](#) by a unanimous vote in the U.S. Senate and signed by President Clinton on October 28, 1998, which criminalizes production and dissemination of technology that can circumvent measures taken to protect copyright, not merely infringement of copyright itself, and heightens the penalties for copyright infringement on the Internet. The DMCA amended Title 17 of the U.S. Code to extend the reach of copyright, while limiting the liability of Internet Service Providers (ISPs) from copyright infringement by their users.

⁴²⁶ *Corley, supra* note 50, at 459.

⁴²⁷ *Id.*

⁴²⁸ *Id.*

⁴²⁹ *Id.*

⁴³⁰ *Reimerdes, supra* note 36, at 215 (discussing defendants who also provided the decryption code for DeCSS on his site to share with online hackers).

but also reproduced a pirated movie file within 2 hours.⁴³⁸ With DeCSS already posted worldwide on the Internet, an undeniable marriage transpired upon the introduction of DivX, which fit as perfect as an eye-patch on a pirate.⁴³⁹

Regardless of the fact that the major studios were able to obtain injunctions against certain pirating perpetrators, even during the trial against Corley, the pirate community still managed to thumb their noses up at the movie executives.⁴⁴⁰ The plaintiff studios brought in a computer expert, Michael Shamos,⁴⁴¹ to demonstrate how to use DeCSS to decrypt a DVD with DivX technology.⁴⁴² The movie “*Sleepless in Seattle*” was the test subject.⁴⁴³ Shamos connected his computer to a university local area network (LAN) line.⁴⁴⁴ He decoded the *Sleepless* file using DeCSS and compressed it into DivX format. He then started to chat online with an anonymous e-pirate and swapped the DivX version of *Sleepless* for a pirated version of the movie “*The Matrix*.”⁴⁴⁵ To add further insult to injury, Shamos shared *Matrix* with others connected on his 100 megabit LAN line and transferred *Matrix* in under two minutes.⁴⁴⁶

The irony of the Corley courtroom demonstration was that it was more entertaining than some of the

⁴³⁸ *Reimerdes*, supra note 36, at 310. (illustrating how DivX has since enhanced its capabilities; thus, making it possible to copy a movie online in less than an hour).

⁴³⁹ *Corley*, supra note 50, at 430. See also *Hollywood Seeks End to Internet Movie Piracy*, available at <http://www.howstuffworks.com/news-item104.htm>, (discussing the events that occurred in the case against *Corley*).

⁴⁴⁰ *Id.* (emphasizing the fact legal victories pale in comparison to the speed of the piracy technology).

⁴⁴¹ *Id.* (detailing how Michael Shamos, a computer science professor at Carnegie Mellon University, explained how he and his assistant used the DeCSS program to crack the protective code on a DVD and trade the movie online for another pirated movie).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ *Id.*

⁴⁴⁶ *Corley*, supra note 50, at 438. (quoting Michael Shamos, a computer science professor at Carnegie Mellon University who testified at the Corley trial, “There are over 1 million Internet hosts in the .edu domain, indicating educational institutions. Most large universities maintain 10 megabit LANs. It is therefore [a] conservative estimate that at least 1 million university students and faculty around the world presently have the capability to transfer and share DivX files of feature-length movies in less than 20 minutes”).

movies that the industry is fighting hard to protect.⁴⁴⁷ DeCSS and DivX, and a host of other programs⁴⁴⁸, have revolutionized the way web users pirate movies.⁴⁴⁹ No amount of litigation and courtroom presentations will eliminate Internet piracy.⁴⁵⁰ The film industry will have to adapt to this new era of piracy and implement bold strategies in which to profit from this untamable breed of bootleggers.⁴⁵¹ While the pirates partied online with enhanced technologies, the movie industry wept, with over \$5.4 billion profits lost in 2004 in the United States alone.⁴⁵²

Pirates versus Politicians Law

The Copyright Act

The Copyright Act of 1976 regulates the copyright of motion pictures.⁴⁵³ A copyright gives the owner the exclusive right to reproduce, distribute, perform, display, or license his work. Its main function is to balance freedom of expression with technological advancement.⁴⁵⁴ The Copyright Act provides a legal shield for movies, as with all “original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”⁴⁵⁵

⁴⁴⁷ *Id.*

⁴⁴⁸ DVD Copy Solution, DVD Decrypter, Smart Ripper are a few examples of video compression technologies specifically designed to reproduce DVDs.

⁴⁴⁹ *Corley*, supra note 50, at 438.

⁴⁵⁰ See Lev Grossman, *It's All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?* Time Magazine, Vol. 161 No. 18 (May 5, 2003), available at <http://www.time.com/time/archive/preview/0,10987,1004761,00.html>.

⁴⁵¹ *Id.*

⁴⁵² See Scarlet Pruitt, *MPAA: Movie Piracy Is the New Plague: More and more web users are illegally downloading movies, study reveals*. PC World.com (Jul 09, 2004) available at <http://www.pcworld.com/news/article/0,aid,116842,0,0.asp>.

⁴⁵³ [17 U.S.C.S. § 102](#) (amended Dec. 1, 1990).

⁴⁵⁴ *Id.*

⁴⁵⁵ *Id.* (Works of authorship include the following categories: (1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial,

The copyright protections are immediately set in motion once any original works, as prescribed in the Copyright Act, are actually created and fixed in a tangible form.⁴⁵⁶

The policy rationale stems from the fact that artistic people have a need to create and receive reasonable compensation, without having to deal with the hassle of consumer abuse and exploitation.⁴⁵⁷ The Copyright Act encourages reasonable earnings for the time and money invested in a project and helps guard against pilferage, chiseling, and outright theft.⁴⁵⁸ Without such protections, artists would be discouraged from creating for fear of copyright infringement.⁴⁵⁹ Constitutionally, copyright laws protect the creative process, the absence of which would thwart the progress of creativity and deprive society of the arts and sciences.⁴⁶⁰

In an effort to promote creativity of original works and offer them to society, authors are granted five exclusive rights: 1) reproduction, 2) adaptation, 3) distribution, 4) performance, and 5) display.⁴⁶¹ The Copyright Act empowers authors to take legal action against perpetrators deemed to have violated the author's entitled exclusivity.⁴⁶² Remedies extend from injunctive relief to pecuniary and criminal punishments.⁴⁶³ Though the Copyright Act serves to

graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works).

⁴⁵⁶ See *What is a Copyright* (Jun. 1, 2003) available at <http://www.whatiscopyright.org/>.

⁴⁵⁷ [5-27 Nimmer on Copyright § 27.01](#) (illustrating that the computer field is filled with "original works of authorship" and these works take many forms: source code, object code, highly specialized commercial programs customized for individual users, mass-market off-the-shelf software available on diskette or CD-ROM, shareware available for downloading from electronic bulletin board services, and so on).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

⁴⁶¹ *Id.*

⁴⁶² [17 U.S.C.S. § 502](#) (outlining the remedies in which authors are owed, including: (a) temporary and final injunctions as it may deem reasonable to prevent or restrain infringement of a copyright, and (b) injunction may be served anywhere in the United States on the person enjoined).

⁴⁶³ [17 U.S.C.S. § 506](#) (outlining the Criminal offenses that constitute as criminal infringement: any person who infringes a copyright willfully either (1) for purposes of commercial advantage or private financial gain, or

balance society's public interests with the artist's private interests, it is, to a large extent, limited.⁴⁶⁴

Hence, the rights of the artists are often constrained and sometimes fall in a gray area.⁴⁶⁵ Legal defenses such as fair use, first sale, and duration of rights limit the copyright privileges for artists; therefore, the only remedy U.S. court systems provide requires them to sift through the ambiguous doctrines to review each case on a discretionary basis.⁴⁶⁶

Fair Use Doctrine

Copyright owners are granted the rights to reproduce their original works as well as to authorize others to reproduce such works.⁴⁶⁷ However, this right is subject to certain limitations under the Copyright Act.⁴⁶⁸ The doctrine of "fair use" is one of the most highly-disputed limitations, as its significance has evolved through a substantial number of court decisions.⁴⁶⁹

There are a variety of purposes for which the reproduction of a particular work may be considered "fair," such as criticism, comment, news reporting, teaching, scholarship, and research.⁴⁷⁰ To determine whether or not a particular use is "fair", there are four factors to evaluate: 1) purpose and character, (*i.e.*, commercial versus nonprofit, educational); 2) nature of use; 3) amount and substantiality of the copyrighted work as a whole; and 4) effect upon the potential market for or value of the copyrighted work.⁴⁷¹ There is no bright line rule when implementing the Fair Use Doctrine; instead it is extremely fact-intensive.⁴⁷²

Regardless of the enumerated factors in Section 107 of the Copyright Act, the "Fair Use" Doctrine

(2) by the reproduction or distribution, including by electronic means, which have a total retail value of more than \$1,000, shall be punished as provided under section 2319 of Title 18, United States Code. For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement).

⁴⁶⁴ [17 U.S.C.S. § 102](#) (enumerating the limitations of the Copyright Act).

⁴⁶⁵ [5-27 Nimmer on Copyright § 27.01](#)

⁴⁶⁶ 17 U.S.C.S. § 107 (outlining the elements of Fair Use).

⁴⁶⁷ [17 U.S.C.S. § 102](#) (amended Dec. 1, 1990).

⁴⁶⁸ [17 U.S.C.S. §§ 107-108](#) (amended Dec. 1, 1990).

⁴⁶⁹ *Id.*

⁴⁷⁰ *Id.*

⁴⁷¹ While none of the four factors is conclusive, the fourth factor is customarily viewed with the most significance.

⁴⁷² 17 U.S.C.S. §107 (amended Dec. 1, 1990).

consistently remains ambiguous.⁴⁷³ “Fair use” is merely a guideline for the courts to follow when weighing distinct facts on a case-by-case basis. As a rule, “fair use” is a mixed question of law and fact.⁴⁷⁴

Contributory and Vicarious Copyright Liability

The doctrine of contributory infringement holds someone other than the infringer liable for copyright infringement, usually the Internet Service Provider (ISP).⁴⁷⁵ Contributory copyright infringement occurs when the defendant, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”⁴⁷⁶ In the context of movie piracy, the film studios must not only show ownership of a valid copyright and unlawful copying, but must also show that the service provider: 1) had knowledge of the infringing activity and 2) materially contributed to the infringing conduct.⁴⁷⁷

Vicarious liability is another method of holding someone liable for copyright infringement even when the accused did not actually commit the infringement.⁴⁷⁸ There are two elements that determine whether a defendant is liable under the theory of vicarious liability, if defendant: 1) has the right and ability to control the infringer's acts, and 2) receives a direct financial benefit from the infringement.⁴⁷⁹ Unlike contributory infringement, knowledge is not a requisite factor of vicarious liability. Rather, while vicarious liability originated from the agency doctrine of *respondeat superior*,⁴⁸⁰ courts have held that “even in the absence of an employer-employee relationship, one may be vicariously liable if he has the right and ability to supervise the infringing activity, and also has a direct financial interest in such activities.”⁴⁸¹ The plaintiff, film studios, are only required to prove that the defendant has “the right and ability to supervise the

⁴⁷³ [Harper & Row, Publishers, Inc. v. Nation Enterprises](#), 471 U.S. 539, 560-561 (1985).

⁴⁷⁴ [Pacific & Southern Co. v. Duncan](#), 744 F.2d 1490, 1495, n. 8 (CA11 1984).

⁴⁷⁵ [Gershwin Publishing Corp. v. Columbia Artists Management, Inc.](#), 443 F.2d 1159, 1161-1162 (2d Cir. 1971).

⁴⁷⁶ *Id.*

⁴⁷⁷ *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.*

⁴⁸⁰ *M. Witmark & Sons v. Calloway*, 22 F.2d 412, 414 (E.D.Tenn. 1927).

⁴⁸¹ *Shapiro, Bernstein & Co. v. H.L. Green Co.*, 316 F. 2d 304, 306 (2d Cir. 1963).

infringing activity and also has a direct financial interest in such activities.”⁴⁸²

Legislation and Litigation

The Digital Millennium Copyright Act (DMCA)

In essence, the DMCA outlaws the manufacture, sale, or distribution of code-cracking devices used to illegally copy software.⁴⁸³ The DMCA was designed to implement the treaties signed in December 1996 at the World Intellectual Property Organization (WIPO) Geneva conference. DMCA has two anti-circumvention sections.⁴⁸⁴ The first section states that “no person shall circumvent a technological measure that controls access to a work protected under this title.”⁴⁸⁵ DMCA firmly prohibits a web user from attempting to hack into an encrypted system to steal protected information without permission from the copyright owner.⁴⁸⁶ Secondly, DMCA cracks down on the actual devices and mediums pirates use to circumvent protected copyrighted work.⁴⁸⁷ Furthermore, the second section significantly reduces liability of Internet service providers (“ISP”) for copyright infringement.⁴⁸⁸ ISPs are free of liability for simply transmitting information over the Internet,

⁴⁸² *Id.*

⁴⁸³ See The UCLA Online Institute for Cyberspace Law and Policy, *The Digital Millennium Copyright Act*, available at <http://www.gseis.ucla.edu/iclp/dmca1.htm> (last visited Feb. 2, 2005) (describing the DMCA exemptions that permit the cracking of copyright protection devices, but only to conduct encryption research, assess product interoperability, and test computer security systems; provides exemptions for nonprofit libraries, archives, and educational institutions under certain circumstances; requires that “webcasters” pay licensing fees to record companies).

⁴⁸⁴ See Myron Hecht, *Reconciling Software Technology and Anti-circumvention Provisions in the Digital Millennium Copyright Act*, UCLA J.L. & Tech. 3 (2004) available at http://www.lawtechjournal.com/articles/2004/03_040907_hecht.pdf.

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ See, Robert Sloss and Darrell Fruth, *Five Years Under the DMCA: Examining the Ongoing Conflict Between Access and Protection*, (2003) available at <http://www.abanet.org/litigation/committee/intellectu al/jan04outline.pdf>.

⁴⁸⁸ *Id.*

on the condition that ISPs remove infringing material from users' web sites.⁴⁸⁹

To illustrate the two DMCA provisions in application, the following must be considered: 1) the act of using DeCSS to crack an encryption code on a DVD violates the first section, and 2) the dissemination and posting of the code on certain websites and other file sharing medium, for profit, violates the second section.⁴⁹⁰ First-time offenders will be held in violation of the Federal Copyright Act and will face DMCA's firm penalties that include a fine of up to \$500,000 USD, or a jail sentence of up to five years, or both.⁴⁹¹

DMCA's Broad Language May Inhibits Fair Use, Free Speech and Research

DMCA critics believe that consumers, who legally purchase copyrighted works, have the right to make content accessible on more than one device and make copies for their personal use.⁴⁹² Free speech advocates are concerned that DMCA could theoretically limit access to the public domain, and thus inhibit the constitutional right of free speech. Essentially, the common fear is that DMCA's broad language will inhibit fair use. For example, the world of academia fears that the broad language of DMCA will restrict research.

*Saving Professor Felten
(Felten v. RIAA)*

In 1999, Edward W. Felten, a Princeton University computer-science professor, won a contest for through the Secure Digital Music Initiative, by

⁴⁸⁹ *Id.*

⁴⁹⁰ To avoid liability, the online service provider: (1) may not have knowledge of the infringing material; (2) may not receive financial benefit directly from the infringing material; and (3) must expeditiously remove the infringing material, or prohibit access to it.

⁴⁹¹ [17 U.S.C.S. § 1204](#) (outlining the DMCA Criminal offenses and penalties: (a) Any person who violates section 1201 or 1202 willfully and for purposes of commercial advantage or private financial gain--(1) shall be fined not more than \$ 500,000 or imprisoned for not more than 5 years, or both, for the first offense; and (2) shall be fined not more than \$ 1,000,000 or imprisoned for not more than 10 years, or both, for any subsequent offense).

⁴⁹² See Joanna Glasner, *Critics Weigh in on Copyright Act*, Wired News (Dec. 21, 2002) available at <http://www.wired.com/news/print/0,1294,56963,00,ht ml>.

cracking four digital-music copy-protection formats, called watermarks.⁴⁹³ For research purposes, Felten published a paper to explain how his team had cracked the code.⁴⁹⁴ In April, 2000, the Recording Industry of America Association (RIAA) threatened that they would file suit and charge him with violating the Digital Millennium Copyright Act if Felten published his research findings.⁴⁹⁵ The RIAA accused Felten of publishing and disseminating copy-protection circumvention technologies, which are illegal violations of DMCA that carry sentences of up to 25 years in prison.⁴⁹⁶ In response, Felten sued the RIAA claiming that the threat was an effort to restrict free speech.⁴⁹⁷ However, the RIAA decided not to pursue the claim and Felten had successfully published his paper.⁴⁹⁸ The moral of this story: legislation should not restrict constitutional rights of fair use.⁴⁹⁹

Felton's legal battle with the RIAA is a prime example of how the DMCA legislation could go astray.⁵⁰⁰ The film industry's legislative campaign inspired more activism among several digital rights advocacy organizations, such as the Consumer Electronics Association (CEA), Consumer Electronics Retailers Coalition (CERC), and the Electronic Frontier Foundation (EFF).⁵⁰¹ These anti-DMCA groups expressed their opposing arguments and proposed changes to the law.⁵⁰² The EFF argues that the language of DMCA has the potential to chill free expression and scientific Research.⁵⁰³

*Free Dmitry!
(U.S. v. Sklyarov)*

⁴⁹³ See Patricia O'Connell, A "Speed Bump" vs. Music Copying: Master Cryptographer-and Code Cracker-Edward Felten Says Technology Isn't the Answer to Digital Copyright Violations., Business Week Online (Jan. 9, 2002) available at http://www.businessweek.com/bwdaily/dnflash/jan2002/nf2002019_7170.htm.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.*

⁵⁰⁰ See Joanna Glasner, *Critics Weigh in on Copyright Act*, Wired News (Dec. 21, 2002) available at <http://www.wired.com/news/print/0,1294,56963,00,ht ml>.

⁵⁰¹ See Matthew A. Verga, "Super-DMCA" Statutes: Putting Hollywood in Charge of Internet Business. 4 Wake Forest Intell. Prop. L. J. 104. (May, 2004).

⁵⁰² *Id.*

⁵⁰³ *Id.*

Dmitry Sklyarov, a Russian [computer programmer](#), created “The Advanced eBook Processor,” a program that cracks the encryption protection on Adobe’s eBook format, converting it to Adobe PDF format.⁵⁰⁴ On [July 16, 2001](#)⁵⁰⁵, after giving a presentation at the Def Con hacker conference in Las Vegas, the FBI arrested and indicted Sklyarov for “distributing a product designed to circumvent [copyright](#) protection measures.”⁵⁰⁶

The U.S. Department of Justice alleged that both Sklyarov, and his employer, ElcomSoft Co. Ltd., conspired for “commercial advantage and private financial gain.”⁵⁰⁷ Sklyarov argued that his software enables fair use.⁵⁰⁸ The program enables the blind to use his software’s text-to-speech feature, which Adobe’s own commercial eBook software was unable to do.⁵⁰⁹ Therefore, Sklyarov software was created with the intent to be a piracy tool.⁵¹⁰ Under the terms of [DMCA](#), Sklyarov was facing a five-year prison term and a US\$500,000 dollar fine.⁵¹¹ On [August 6, 2001](#), Sklyarov was released on a US\$50,000 bail and was not allowed to leave [Northern California](#).⁵¹² The charges against Sklyarov were later dropped in exchange for his testimony.⁵¹³ Sklyarov was finally allowed to return to [Russia](#) on [December 13, 2001](#), however; he is currently under the surveillance of the U.S. Department of Justice.⁵¹⁴ A case against ElcomSoft is still pending.⁵¹⁵

The *U.S. v. Sklyarov*⁵¹⁶ case is the first prosecution under DMCA that has civil liberties organizations criticizing it as being unduly restrictive. Because this legislation makes current hardware and

software illegal, its restrictive language may negatively affect the progress of computer security research.⁵¹⁷ DMCA bans any device that enables circumvention of technical protection systems or access control measures. However, scientists, librarians and cryptographers⁵¹⁸ maintain that circumvention of technical protection measures is necessary in order to make fair use, do scientific research, and enjoy many kinds of ordinary, legal uses of DVDs.⁵¹⁹ Sklyarov argued that the DMCA is unconstitutionally vague and violates the First Amendment rights of third parties to engage in fair use.⁵²⁰

⁵⁰⁴ See [Robert Lemos](#), *Russian crypto expert arrested at Def Con* (Jul. 17, 2001), available at http://news.com.com/Russian+crypto+expert+arrested+at+Def+Con/2100-1001_3-270082.html.

⁵⁰⁵ The day after Sklyarov’s arrest, several web sites and mailing lists were started to organize protests against his arrest, many of them under the slogan “Free Dmitry” or “Free Sklyarov.”

⁵⁰⁶ See [Robert Lemos](#), *Russian crypto expert arrested at Def Con* (Jul. 17, 2001) available at http://news.com.com/Russian+crypto+expert+arrested+at+Def+Con/2100-1001_3-270082.html.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.*

⁵⁰⁹ *Id.*

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.*

⁵¹³ *Id.*

⁵¹⁴ *Id.*

⁵¹⁵ *Id.*

⁵¹⁶ See also [United States v. Elcom Ltd.](#), 203 F. Supp. 2d 1111 (D. Cal., 2002).

⁵¹⁷ *Id.*

⁵¹⁸ Cryptographers are experts in Cryptography, which is traditionally, the study of converting [information](#) from its normal, comprehensible form into an incomprehensible format, rendering it unreadable without secret knowledge — the art of [encryption](#). The study of how to circumvent the use of cryptography is called [cryptanalysis](#), or code breaking. Cryptography and cryptanalysis are sometimes grouped together under the umbrella term cryptology, encompassing the entire subject.

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

The DMCA is Supersized

(Super-DMCA Statutes)

Several states⁵²¹ have enacted versions of a “model” law that imposes harsh criminal and civil damage penalties for activities considered to be online “theft.” The model law provisions are pending in several other states and threaten to become a national, harsher alternative to copyright law.⁵²² The Home Recording Rights Coalition (HRRRC), the Consumer Electronics Association (CEA), library associations, and several others, have criticized pending proposals as overly broad, injurious to law-abiding consumers, and threatening to the development and marketing of entirely legitimate products.⁵²³ Essentially, any device utilized on a home network may be considered to be inconsistent with the consumer’s rights purchased by the consumer, is at risk of violating this law.⁵²⁴ The oppressive civil and criminal penalties are such that no business or individual could afford to risk a controversy, even if they are confident of the lawful nature of their own devices and conduct.⁵²⁵

As a response to the opposition’s criticisms, the MPA, in conjunction with the Broadband & Internet Security Task Force, is currently lobbying for a new legislation that will supposedly narrow the language of the Super-DMCA statutes.⁵²⁶ The Draft Model Communications Security Legislation was recently modified to include the new phrase “intent to defraud” in the statute’s criminal offense provision. However, the proposal is devoid of any language that attempts to define “intent to defraud” clearly.⁵²⁷

No Electronic Theft (NET) Act

It is a common belief that the NET Act was implemented to seal a “loophole” that existed in the

criminal law.⁵²⁸ The “LaMacchia⁵²⁹ loophole” is named after the federal district court case involving David LaMacchia, an MIT student who operated a bulletin board, which encouraged users to trade copyrighted software programs.⁵³⁰ Because LaMacchia did not profit financially from his efforts, and criminal copyright charges required that the infringer have such a profit motive, the prosecutors charged LaMacchia with the crime of wire fraud instead of copyright infringement.⁵³¹ However, the Massachusetts Federal District Court dismissed the charges against LaMacchia and held that the charges were indeed criminal copyright penalties, which could not be imposed on infringers lacking the requisite profit motive.⁵³²

Prior to its enactment in 1997, infringers who deliberately circulated pirated software online were not held criminally liable, unless they profited financially from their mischief.⁵³³ Since countless hackers simply enjoy the thrill of stealing and sharing pirated material and did not particularly care to profit from their windfalls, there was no law in place that could hold these e-pirates accountable for their copyright infringement—that is before the NET Act was passed.⁵³⁴ The term “financial gain” was modified to represent, “receipt, or expectation of receipt, of anything of value, including the receipt of other copyrighted works.”⁵³⁵ At last, online hackers could face up to \$2,500 in criminal fines and six years imprisonment, determined by the degree of their crimes.⁵³⁶

Piracy Deterrence and Education Act of 2004

As the most recent legislation, with respect to movie piracy, the Piracy Deterrence and Education Act establishes a federal felony for the unauthorized recording of motion pictures in movie

⁵²¹ Arkansas, Delaware, Florida, Illinois, Maryland, Michigan, Pennsylvania, Virginia, Wyoming have passed a version of the Super-DMCA statute. Colorado, Georgia, Massachusetts, New York, Oregon, South Carolina, Tennessee, and Texas have proposed but have yet to pass the Super-DMCA statute.

⁵²² See Matthew A. Verga, “Super-DMCA” Statutes: Putting Hollywood in Charge of Internet Business. 4 Wake Forest Intell. Prop. L. J. 104. (May, 2004).

⁵²³ *Id.*

⁵²⁴ *Id.*

⁵²⁵ *Id.*

⁵²⁶ *Id.*

⁵²⁷ *Id.*

⁵²⁸ See, Shelley M. Liberto, *Congress Patches a Loophole with the Anti-Piracy “Net Act,”* (1998) available at <http://www.libertolaw.com/7-98.html>.

⁵²⁹ *United States v. LaMacchia*, 871 F. Supp. 535, 545 (D. Mass., 1994).

⁵³⁰ See, David Stoll, *A Comment on ‘Net Copyright,’* (1998) available at

http://stlr.stanford.edu/STLR/Events/copyright/content_s_f.htm.

⁵³¹ *Id.*

⁵³² *Id.*

⁵³³ *Id.*

⁵³⁴ *Id.*

⁵³⁵ See H.R. REP. 105-339, 106th Cong. 1st Sess. (1997).

⁵³⁶ *Id.*

theatres.⁵³⁷ The passage of this legislation also updated the “No Electronic Theft” Act (“NET”), in order to “better enable the Justice Department to prosecute” those criminals who pirate an enormous amount of movies (and music), and make illegal profits by “pre-releasing” bootlegs for millions online.⁵³⁸

The Piracy Deterrence and Education Act provided “law enforcement the necessary tools to go after the heart of film piracy: illegal recording of movies and the online theft of films on peer-to-peer networks or on similar technologies.”⁵³⁹ Without such legislative remedies, film piracy may cause a disastrous shock to the film industry and threaten the livelihoods of hundreds of workers employed by the industry.⁵⁴⁰

*Inducing Infringement of Copyrights Act of 2004
(INDUCE Act)*

A controversial legislation, that is currently pending is the Inducing Infringement of Copyright Act of 2004.⁵⁴¹ If it passes, this legislation would hold technology companies liable for enabling copyright infringements whether or not there is intent to do so.⁵⁴² The Induce bill would allow a copyright holder to sue a manufacturer based on the technology if the product is merely capable of being used to engage in copyright infringement.⁵⁴³ The Induce Act would create a new doctrine of “intentional inducement of infringement” whose meaning is deliberately different from vicarious or contributory infringement.⁵⁴⁴ Therefore, the defenses under vicarious or contributory infringement would not apply if one is accused of inducing infringement.⁵⁴⁵

⁵³⁷ See Rich Taylor, “MPAA Commends US House of Representatives on Passage of Piracy Deterrence and Education Act of 2004,” (Sep. 28, 2004) available at <http://www.mpa.org/MPAAPress/>.

⁵³⁸ *Id.*

⁵³⁹ *Id.* (quoting Dan Glickman, President and CEO of the Motion Picture Association of America).

⁵⁴⁰ *Id.*

⁵⁴¹ See Tony Kontzer, “Illegal Movie Downloads Are Growing, Hollywood Says,” InformationWeek.com, (Jul 9, 2004) available at <http://www.informationweek.com/story/showArticle.jhtml?articleID=22104704>.

⁵⁴² *Id.*

⁵⁴³ *The Inducing Infringement of Copyrights Act of 2004 (Formerly known as the INDUCE Act)*, Public Knowledge, available at <http://www.publicknowledge.org/issues/s2560>.

⁵⁴⁴ *Id.*

⁵⁴⁵ *Id.*

The effectiveness of this legislation is questionable because it would make a manufacturer or distributor of technologies or services liable if its products are used to infringe, regardless of the defendants’ intent, reasonable knowledge, or amount of control over the infringer.⁵⁴⁶ In effect, the bill poses to overrule the *Sony Corp v. Universal City Studios* case, as well as the *MGM Studios, Inc. v. Grokster, Ltd.*⁵⁴⁷ case, which is a pending US Supreme Court case.⁵⁴⁸ A diverse group of public interest organizations, consumer groups, libraries, and high tech firms, such as Intel, Yahoo! and Microsoft, have filed amicus curiae⁵⁴⁹ briefs in support of the peer-to-peer companies as an effort to oppose this bill.⁵⁵⁰

*Return of the Betamax
(Sony Corp. v. Universal Studios)*

The Induce bill would overturn the clear standard established twenty years ago in the *Sony Corp. v. Universal Studios* (“Betamax”) decision.⁵⁵¹ Sony developed Betamax, a video tape recording format.⁵⁵² Universal sued Sony, alleging that because Sony manufactured a device that could potentially be used for copyright infringement, it was thus liable for any infringement that did occur.⁵⁵³ The Supreme Court ruled in favor of Sony and held that noncommercial home use recording was considered fair use and that access to free public information is a First Amendment public interest served by this use.⁵⁵⁴

⁵⁴⁶ *Id.*

⁵⁴⁷ The plaintiffs, MGM Studios, Inc., appealed the partially favorable holding for Grokster, Ltd. and in December 2004 the Supreme Court granted certiorari.

⁵⁴⁸ *The Inducing Infringement of Copyrights Act of 2004 (Formerly known as the INDUCE Act)*, Public Knowledge, available at <http://www.publicknowledge.org/issues/s2560>.

⁵⁴⁹ Amicus curiae is Latin for “friend of the court,” a party or an organization interested in an issue files a brief or participates in the argument in a case in which that party or organization is not one of the litigants. Usually the court must give permission for the brief to be filed and arguments may only be made with the agreement of the party the amicus curiae is supporting, and that argument comes out of the time allowed for that party’s presentation to the court.

⁵⁵⁰ *Id.*

⁵⁵¹ *Id.*

⁵⁵² *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 420 (1984).

⁵⁵³ *Id.*

⁵⁵⁴ *Id.*

*Applicability of Betamax in the 21st century:
(MGM Studios, Inc. v. Grokster, Ltd.)*

The *MGM Studios v. Grokster, Ltd.*⁵⁵⁵ case is frequently characterized as the reexamination of the issues in the *Sony Corp v. Universal City* case.⁵⁵⁶ A consortium of twenty-eight of the largest entertainment companies (led by MGM studios) brought this lawsuit against the makers of the Grokster, Morpheus, and Kazaa software products, aiming to set a precedent to use against other technology companies (peer-to-peer and otherwise).⁵⁵⁷ MGM wants makers of peer-to-peer technology held liable for their users' copyright infringements.⁵⁵⁸ The Ninth Circuit Court of Appeals issued a partial ruling supporting Grokster in 2004.⁵⁵⁹ Software companies fear that a ruling against Grokster could stifle innovation.⁵⁶⁰

On March 29, 2005, during the [oral arguments](#) of *MGM Studios, Inc. v. Grokster, Ltd.* before the Supreme Court, the justices probed the lawyer for the RIAA and MPAA with questions about the potential impact of a ruling in their favor against small inventors -- the "guy in the garage" as Justice David Souter phrased it.⁵⁶¹ Justice Stephen Breyer also probed MGM's attorney about whether lawyers who advise technologists -- for example, the inventor of the next iPod -- could give any assurance at all to their clients under MGM's rule that he would not be sued at some point down the road for copyright infringement.⁵⁶² Justice Scalia was also skeptical of the plaintiffs' arguments, questioning whether their proposed "primary use" test made any sense, given that the balance of lawful versus unlawful uses of technology are constantly changing.⁵⁶³ The Court's ultimate decision is anticipated by the end of the

⁵⁵⁵ *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (2003).

⁵⁵⁶ *The Inducing Infringement of Copyrights Act of 2004 (Formerly known as the INDUCE Act)*, Public Knowledge, available at <http://www.publicknowledge.org/issues/s2560>.

⁵⁵⁷ *MGM Studios, Inc. v. Grokster, Ltd.*, 259 F. Supp. 2d 1029, 1031 (2003).

⁵⁵⁸ *Id.*

⁵⁵⁹ *Id.*

⁵⁶⁰ *Id.*

⁵⁶¹ See Harlan Yu, [MGM v. Grokster: Breaking Down the Oral Arguments](#), (Mar. 31, 2005) available at <http://www.cs.princeton.edu/courses/archive/spring05/cos491/writing/index.php?p=250>.

⁵⁶² *Id.*

⁵⁶³ *Id.*

session in June, 2005, which will prove to be the most important intellectual property case in decades.⁵⁶⁴

Solutions

Big Brother Approach Is Not the Way

As online user privacy shrinks, ascertaining the identity of those who download, copy, and distribute copyrighted software may become easier to achieve.⁵⁶⁵ In 1999, Intel attempted to launch a Pentium III chip, which was programmed to recognize individual users.⁵⁶⁶ Intel claimed that the chip was purely a security measure.⁵⁶⁷ Naturally the public rejected the prospect of personal computers with "LoJack."⁵⁶⁸ This "Big Brother" approach is an awfully scary notion because people truly hold dear an intrinsic, basic right ("life, liberty and the pursuit of happiness").⁵⁶⁹ In order to secure these rights, people are empowered to halt any "Big Brother" attempts and "have a right to change or abolish" government.⁵⁷⁰

Freedom of speech is the liberty to freely say what one pleases, as well as the related liberty to hear what others have stated.⁵⁷¹ Recently, it has been commonly understood as encompassing all types of expression, including the freedom to create and distribute movies, pictures, songs, dances, and all

⁵⁶⁴ See Grant Gross, *MGM v. Grokster: Innovation on Trial*, (Mar 30, 2005) available at <http://macworld.co.uk/news/index.cfm?NewsID=11188>.

⁵⁶⁵ See Kevin Davis, *Fair Use on the Internet: A Fine Line Between Fair and Foul*, [34 U.S.F.L. Rev. 129, 130](#) (1999).

⁵⁶⁶ *Id.* (See also Charles Piller, "Security Flaw in Intel Chip, Magazine Says" Los Angeles Times, February 24, 1999, at C3). (See also Ephraim Schwartz & Dan Briody, *Intel's Pentium Security Woes Continue* (Mar. 10, 1999) available at <http://www.infoworld.com/cgi-bin/displayStory.pl?990310.wcpsn.htm>).

⁵⁶⁷ *Id.*

⁵⁶⁸ Conspiracy theorists speculate, however, that there's an irrefutable possibility that the chip was launched with the capability to activate a default switch without the user's knowledge.

⁵⁶⁹ See *The Declaration of Independence*, available at http://en.wikipedia.org/wiki/United_States_Declaration_of_Independence.

⁵⁷⁰ *Id.*

⁵⁷¹ See Jonathan Wallace and Mark Mangan, *The Internet Censorship FAQ*, (1996) available at <http://www.spectacle.org/freespch/faq.html#1>.

other forms of expressive communication.⁵⁷² Freedom on the Internet is a greatly regarded entitlement that the public is in no hurry to relinquish.⁵⁷³

The Internet is probably the only communication medium left in existence that does not answer to the government.⁵⁷⁴ For that reason, regulating the Internet would be surpassingly different from government-regulated radio and television because the two are controlled by the “scarcity” doctrine.⁵⁷⁵ The “scarcity” theory holds that government censorship of content is justified by the government’s role in assigning broadcast frequencies on a scarce spectrum.⁵⁷⁶ The Internet is not a “scarce” resource and anyone can attach a computer to it without asking the government’s permission.⁵⁷⁷ Nor is it a government-licensed common carrier similar to the phone company.⁵⁷⁸ Furthermore, the fact that the internet is not owned by the U.S. government, or any government, makes it difficult to implement regulations of this nature.⁵⁷⁹ Thus, the nearly absolute freedom the Internet provides, along with its decentralization, are the factors that make it such a double-edged sword.⁵⁸⁰

Because of the lack of regulation, web users deeply value both the “freedom of speech” and “freedom of expression” that the Internet fosters.⁵⁸¹ People share such a high regard for their freedom that

⁵⁷² *Id.*

⁵⁷³ *Id.*

⁵⁷⁴ *Id.*

⁵⁷⁵ *Id.*

⁵⁷⁶ *Id.*

⁵⁷⁷ *Id.*

⁵⁷⁸ *Id.*

⁵⁷⁹ No one actually owns the Internet, and no single person or organization controls the Internet in its entirety. More of a concept than an actual tangible entity, the Internet relies on a physical infrastructure that connects [networks](#) to other networks. There are many organizations, corporations, governments, schools, private citizens and service providers that all own pieces of the infrastructure, but there is no one body that owns it all. There are, however, organizations that oversee and standardize what happens on the Internet and assign [IP addresses](#) and [domain names](#), such as the National Science Foundation, the [Internet Engineering Task Force](#), [ICANN](#), [InterNIC](#) and the [Internet Architecture Board](#).

⁵⁸⁰ *Id.*

⁵⁸¹ Electronic Privacy Information Center, *Free Speech: First Amendment Law and Technology*, (Apr 8, 2002) available at http://www.epic.org/free_speech/#FirstAmendment.

many argue that contents on the Internet should not be regulated because it would be a flagrant violation of their First Amendment rights.⁵⁸² Of course, the people continue to fight the “Big Brother” powers, as the public opinion cries for their fundamental rights to remain intensely guarded.⁵⁸³

Guilt Falls Upon Deaf Ears

The MPAA has implemented an extensive consumer awareness campaign to educate the public about existing copyright laws, the illegalities of movie piracy, and the consequences if the authorities discovered their participation in illegal movie trafficking.⁵⁸⁴ College and university campuses house the largest number of culprits; therefore, it makes sense that the MPAA is working with over 120 college administrators to encourage self-enforcement of campus codes of conduct for Internet and downloading usage.⁵⁸⁵ However, colleges and universities liken themselves as “bastions of privacy and free speech, not copyright police,”⁵⁸⁶ therefore; it is highly unlikely that this approach will effectuate a positive change in the pirating behavior among college students.⁵⁸⁷

The MPAA is also offering \$500 rewards to theatre employees who assist in capturing pirates using video cameras to record first-run screenings.⁵⁸⁸ Again, this strategy seems to be micromanaging the enormous piracy problem and completely missing the ball.⁵⁸⁹ Sure, a few pirates may have been apprehended due to this scheme, but the film industry is sluggishly wasting time with tiny shrubs, while the entire forest is busy downloading.⁵⁹⁰

The film industry’s awareness movement also sets out to illustrate the impact piracy has upon jobs and the economy.⁵⁹¹ The MPA reports that piracy

⁵⁸² *Id.*

⁵⁸³ *Id.*

⁵⁸⁴ See “*So What’s It To Me?*” available at <http://www.respectcopyrights.org/content.html>.

⁵⁸⁵ *Id.*

⁵⁸⁶ See Lev Grossman, *It’s All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?* Time Magazine, Vol. 161 No. 18 (May 5, 2003), available at <http://www.time.com/time/archive/preview/0,10987,1004761.00.html>.

⁵⁸⁷ *Id.*

⁵⁸⁸ *Id.*

⁵⁸⁹ *Id.*

⁵⁹⁰ *Id.*

⁵⁹¹ See “*So What’s It To Me?*” Respect Your Rights.org available at <http://www.respectcopyrights.org/content.html>.

negatively affects every rung on the ladder, including the studios that invest in the film, the distributors, the retailers and foreign and local filmmakers.⁵⁹² Their objective is to educate users that piracy is not a victim-less crime.⁵⁹³ The public's perception is that movie stars and film studios make enough money and this is largely why evoking guilt does not work.⁵⁹⁴

While the guilt trip about union workers losing their jobs may not invoke as much empathy as the industry had hoped, public service announcements (PSAs), on the other hand may, at the very least, shed light on the issue.⁵⁹⁵ PSAs are one of the most effective strategies because they are able to call attention to the problem—especially if the public speaker is a popular entertainer that the viewer may relate to, emulate, or admire.⁵⁹⁶ Inciting fear into the psyche of the movie pirates, as opposed to guilt, possibly will be more beneficial to the film industry's deterrence campaign, *i.e.* running in-theatre advertisements warning of the criminal and financial penalties, which is now a federal felony crime, is a cunning approach.⁵⁹⁷

A Game of Cops and Robbers – Close, But No Cigar

Internationally, in 2003, the MPAA seized over 52 million illegal films in over 31,000 raids based on over 65,000 investigations around the world. Despite those recent efforts, more needs to be done.⁵⁹⁸ The MPAA has made public suggestions to Congress and has urged the increase of funding to the FBI's cyber division and forensic labs utilized by law enforcement agencies and recommends the recruitment and training of tech-savvy agents dedicated to investigating intellectual property theft.⁵⁹⁹ Digital

⁵⁹² See Rich Taylor, MPAA Commends U.S. House of Representatives on Passage of Piracy and Education Act of 2004, (Sep. 28, 2004) available at <http://www.mpaapress.org/MPAAPress/>.

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ See Phuong Yokotis, "MPAA's Malcolm Testifies to Growth of International Piracy, Pirate Activities Supported By Organized Crime and Terrorist Groups" (Sep. 23, 2004) at <http://www.mpaapress.org/MPAAPress/> (last visited on February 8, 2005).

⁵⁹⁶ *Id.*

⁵⁹⁷ *Id.*

⁵⁹⁸ See Phuong Yokotis, "MPAA's Malcolm Testifies to Growth of International Piracy, Pirate Activities Supported By Organized Crime and Terrorist Groups" (September 23, 2004) at <http://www.mpaapress.org/MPAAPress/> (last visited on February 8, 2005).

⁵⁹⁹ *Id.*

piracy has driven an international movement, with Congress equipping federal law enforcement agencies to "send a strong message to other nations that it recognizes the importance of intellectual property and that it addresses the theft of intellectual property with the same rigor that it addresses other types of serious crimes."⁶⁰⁰ Ensuring adequate resources to the Commerce Department and the State Department, in order to help both departments continue engaging in high-level advocacy and diplomacy with foreign countries may be a productive measure in addressing piracy.⁶⁰¹

It is obvious how advocacy and diplomacy have the potential to improve international relations and create a valuable dialogue on a global level. However, it is far less apparent how capturing organized underground pirate groups is an effective measure in the larger scheme of things. In terms of the financial bottom line, it is neither feasible nor wise to put forth energy chasing bad guys. It makes great headlines in the press but it barely makes a noticeable dent in regaining the profits lost, which is the real issue of online movie piracy.⁶⁰²

The Film Industry Can't Sue the Piracy Problem Away

Recently, on November 16, 2004, Hollywood film studios⁶⁰³ announced the plan to file suit against individual movie file-swappers. This legal strategy is reminiscent of the fears the film industry is currently experiencing.⁶⁰⁴ The film industry is determined to avoid the same fate as the music industry⁶⁰⁵, which has lost up to 15% of the legitimate music sales to the pirated bootlegging market.⁶⁰⁶ Therefore, movie

⁶⁰⁰ *Id.* (quoting John G. Malcolm, Motion Picture Association of America Senior Vice President & Director of Worldwide Anti-Piracy Operations).

⁶⁰¹ *Id.*

⁶⁰² *Id.*

⁶⁰³ MPAA member film studios include, Buena Vista Pictures Distribution, Metro-Goldwyn-Mayer Studios, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox, Universal City Studios and Warner Bros. Entertainment.

⁶⁰⁴ See Declan McCullagh, "Movie-swappers: Lawsuits on the Way," Silicon.com (Nov. 5, 2004) available at <http://management.silicon.com/government/0.39024677.39125640.00.htm>.

⁶⁰⁵ See Tim Burt, "Pirates – The Sequel," The Financial Times Limited, December 28, 2004, Edition 1, pg. 10.

⁶⁰⁶ Commercial Piracy Report 2004, International Federation of Phonogram and Videogram Producers (IFPI), available at <http://www.ifpi.org/site->

executives have called in the lawyers and are working on improving encryption of new high-definition DVDs.⁶⁰⁷ While the film industry has gained backing from politicians and legislators, progressives such as Public Knowledge, an advocacy group based in Washington, D.C., predicted that litigation would not curb movie piracy.⁶⁰⁸

A major problem with studios suing individuals is that: it doesn't make them popular with their consumers.⁶⁰⁹ These major motion picture studios are viewed as the eight-hundred-pound guerrilla that's bullying all of the harmless downloaders.⁶¹⁰ The film industry has been fighting a major Public Relations battle, with respect to damage control and managing the public backlash. "Simply bringing lawsuits against individual infringers will not solve the problem on peer-to-peer networks".⁶¹¹ For all intents and purposes, the film industry must structure "new business models that treat the low cost, ubiquity and speed of the Internet as an opportunity, not a threat."⁶¹²

content/library/piracy2004.pdf.

⁶⁰⁷ See Tim Burt, "Pirates – The Sequel," The Financial Times Limited, December 28, 2004, Edition 1, pg. 10.

⁶⁰⁸ *Id.*

⁶⁰⁹ See Lev Grossman, *It's All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?* Time Magazine, Vol. 161 No. 18 (May 5, 2003), available at <http://www.time.com/time/archive/preview/0,10987,1004761,00.html>.

⁶¹⁰ *Id.*

⁶¹¹ *Id.*

⁶¹² *Id.*

Evolution, Flexibility, Collaboration

Aggressive Technology

The film industry needs "to be re-engineered."⁶¹³ First and foremost: film industry executives need to evolve some claws.⁶¹⁴ Some companies have taken the initiative to fight fire with fire; for instance, by hiring professional counterhackers.⁶¹⁵ Overpeer, a Manhattan-based company that specializes in electronic countermeasures, such as "spoofing," releases dummy versions of popular copyrighted material onto file-sharing networks.⁶¹⁶ To the typical Kazaa user, these dummy versions resemble genuine files, but upon downloading them, they're unplayable.⁶¹⁷ Movie studios have also implemented staff screenings that appoint ushers to wear night-vision goggles and to be vigilant for pirates with camcorders.⁶¹⁸

Implementing watermarks on the newly released DVDs and creating a more resilient encryption code are strategies that are in the works.⁶¹⁹ In response to such measures, it is fair to raise the question, if DVD Jon, a teenager, was able to decrypt the protections on the first encryption versions, who's to say someone won't be able to come around and do it again?⁶²⁰ Industry experts believe piracy will rise with the increased sophistication of technology.⁶²¹

⁶¹³ *Id.* (quoting John Rose, an e-commerce ace from consulting firm) EMI hired him as a consultant after laying off 1,800 employees (20% of EMI's staff), which helped absorb the impact when sales fell 10% in 2002 — and created an executive position, Global Head of Anti-piracy).

⁶¹⁴ See Tim Burt, "Pirates – The Sequel," The Financial Times Limited, December 28, 2004, Edition 1, pg. 10.

⁶¹⁵ *Id.*

⁶¹⁶ *Id.*

⁶¹⁷ *Id.*

⁶¹⁸ *Id.*

⁶¹⁹ See Tony Kontzer, "Illegal Movie Downloads Are Growing, Hollywood Says," Information Week.Com, (Jul 9, 2004) available at <http://www.informationweek.com/story/showArticle.jsp?articleID=22104704>.

⁶²⁰ See Lev Grossman, *It's All Free! Music! Movies! TV shows! Millions of people download them every day. Is digital piracy killing the entertainment industry?*, Time.com, (Apr. 29, 2003) (discussing the popularity and ease of the Internet piracy and its difficulty of being regulated).

⁶²¹ MIT Communication Forum, *Movies in the Digital Age* (Apr. 8, 2004) available at <http://web.mit.edu/comm-forum/forums/valenti.html> (quoting Jack Valenti, President of the Motion

Preventing Leaked Copies During Distribution Process

The prevention of leaks is paramount in preventing unauthorized reproduction of fresh, high quality copies of movies. Leaked copies are of particular concern to the movie industry because they make it possible for illegal copies of movies to be reproduced widely before a theatrical release. A study by AT&T Labs has found that seventy-seven percent of all popular movies being illegally traded over the Internet initially came from people who work within the movie industry.⁶²² The report found numerous weak links where security is lax throughout the motion picture production-distribution pipeline. In particular, it cited such weak spots as audio and visual editing rooms, outside effects houses and outsourced postproduction.

The study suggests a three-step process for short-term, medium-term, and long-term mitigation.⁶²³ In the short-term, the movie industry should treat movie content in the same way the Federal Bureau of Investigation (FBI) treats sensitive intelligence and evidence.⁶²⁴ The FBI establishes a chain of custody for sensitive artifacts, to track where the artifact is at all times, as well as who is responsible for it. Policy must be developed that clearly delineates the process by which content is obtained or accessed, who is authorized to view or access it, how failures in the process are reported.

The implementation of a trusted device that addresses leakage resulting from critic or awards judge content distribution would help mitigate as medium-term mitigation.⁶²⁵ A trusted content player would be available in either a digital or analog format. This device would have a battery-backed internal clock and when a user (e.g., critic) wants to use the device, she must enter a time-specific key to unlock the content. The content is stored on the device in an encrypted format. The one-time passwords provide access to a decryption key to the player internally, but not to the user. Hence, the code is only useful for that particular playing. The

Picture Association of America).

⁶²² See Paul Sweeing, *Study: Insiders main source of movie piracy*, (Sep. 22, 2003), available at <http://www.keepmedia.com/pubs/VideoBusiness/2003/09/22/278073?extID=10026>.

⁶²³ See Simon Byers, Lori Cranor, Dave Korman, Patrick McDaniel, and Eric Cronin, *Analysis of Security Vulnerabilities in the Movie Production and Distribution Process*, (2003) available at <http://www.research.att.com/~pdmcdan/drm03.pdf>.

⁶²⁴ *Id.*

⁶²⁵ *Id.*

advantage of this approach, is that not only could the user be identified in the event of leakage, but she would not have deniability (i.e. the watermark would expose the exact player, user, and time).

The long-term mitigation of leakage involves authentication procedures and watermarking that make it possible to precisely identify the source of an insider leak.⁶²⁶ Registering all individuals who are authorized to view content, and imposing overt watermarks that are easily detectable and can resist removal are feasible efforts that will mitigate leakage within the production and distribution process. Insiders who are identified as the source of a leak can be fired from their jobs or have their contracts terminated, in addition to being subjected to legal action and possibly criminal prosecution.

Synchronized Distribution and Global Movie Releases

The piracy problem also lies within the film industry's distribution model.⁶²⁷ Movies are not released in all countries (territories) simultaneously for two major reasons.⁶²⁸ The first reason is promotion. The actors can't be everywhere at the same time, and without the actors appearing at the premiere, the movie receives less publicity, and therefore less advertising and less profits.⁶²⁹ The second reason is that many distribution companies and cinema chains in territories outside the U.S. observe the financial statistics of a movie in its domestic (i.e. the US) box office before deciding whether to spend the expense to distribute it for their screens in their territory.⁶³⁰

The problem with the current distribution model is that globalization has made the world smaller. International movie fans are well aware of which movies are released in the U.S. because the media makes such a fuss over it.⁶³¹ And yet, despite the publicity, many fans abroad are forced to wait an average of six months before the movie is released in

⁶²⁶ *Id.*

⁶²⁷ See Edward Deak, *Technological Change, Convergence, and the Strategic Struggle for Dominance in the Entertainment Industry*, (Mar. 6, 2003) available at <http://www.edwarddeak.com/entertainment303.htm>.

⁶²⁸ British Screen Advisory Council, *BSAC Briefing Paper – Potential Changes to the Established Release Patterns for Films*, (Oct. 14, 1999) available at <http://www.bsac.uk.com/reports/briefingnoteforwindo ws.pdf>.

⁶²⁹ *Id.*

⁶³⁰ *Id.*

⁶³¹ *Id.*

their territory. In many instances this can mean the U.S. (region 1) DVD is available *before* it's released theatrically in other territories. Even if this doesn't happen, the U.S. DVD is, most of the time, available well before any other region.⁶³²

People don't like to wait. Some territories have to wait a period of four weeks to six months. The industry is simply not meeting the public's demand for fresh and high quality films in a quick enough pace.⁶³³ However, the underground bootlegging rings around the world are capitalizing on the gaps of international theatrical releases that currently exist.⁶³⁴ If the film industry changes the currently outdated distribution model to speed up the theatrical release dates, Internet piracy would decrease dramatically.⁶³⁵ To illustrate this point, *Matrix Revolutions* recently premiered simultaneously around the world; thus, giving the film pirates no time to make illegal copies.⁶³⁶ The simultaneous, world-wide film release was probably a logistical nightmare, but it was quite successful in combating piracy.⁶³⁷ On the first day, *Matrix Revolutions* grossed over \$43.1 million in the box office, due to the unprecedented international debut in over 18,000 theatres.⁶³⁸

There has long been talk of distributors looking into satellite distribution to cinemas, in order to avoid the costs of creating expensive film projection reels and also to eliminate the risks of people intercepting and stealing copies before release.⁶³⁹ This is a method that would also make synchronized launches far easier.⁶⁴⁰ This, along with releasing DVDs at the same time in all of the territories would significantly reduce, though never totally eliminate, film piracy.⁶⁴¹

⁶³² *Id.*

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ *Id.*

⁶³⁶ See Anthony Breznican, *Matrix Revolutions collects \$24.3 million in first day*, (Nov. 6, 2003) available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/news/archive/2003/11/06/entertainment1947EST0837.DTL>.

⁶³⁷ *Id.*

⁶³⁸ *Id.*

⁶³⁹ See J. Eric Smith, *Film studio to distribute film via satellite: Aims to make tech splash but also combat piracy*, (Oct. 12, 2004) available at <http://www.geek.com/news/geeknews/2004Oct/gee20041012027354.htm>.

⁶⁴⁰ *Id.*

⁶⁴¹ *Id.*

Conclusion

Based on the lack of progress, it is evident that tactics such as "Big Brother" regulations, excessive litigation, and insignificant legislations are futile. It is important for the motion picture industry to construct copyright laws that impose penalties, which it has been doing; but more importantly, the film industry must not overly depend on the law because it is an extremely "slippery and subjective" vehicle.

Acceptance should be the first course of action because it will keep the film industry focused on the reality of movie piracy and away from the irrational belief of eradicating it. Upon fully acknowledging its presence and social influence, the motion picture executives should alter their view of the Internet and open themselves up to a world of possibility, similar to how it adapted to the introduction of the VCR and videocassettes to the home market in the 1970s.

This is a perfect time to seize the chance to grow with the intense digital movie market demands; rather than falling victim to them. Currently, legislation is a tortoise, while untamed piracy is the hare. However, if the politicians stay the course, legislation will catch up. In the meantime, the film industry should focus on 1) flexibility in order to acclimate itself to the bold new digital world, 2) innovation of new security technology, and 3) collaboration among the international bodies to improve the distribution model and to close the gap of theatrical releases.

Moreover, the movie industry should band with the recording, video game, and other entertainment industries that are currently going through the same growing pains. Collective efforts will help the industry cope with this revolutionary form of piracy and evolve with the constantly changing environment that exists online.⁶⁴²

⁶⁴² *Id.*

Bargaining on Ice: A Case Study on the 2004-2005 NHL Lockout

By Melissa Holtzer

Introduction

Some industry analysts claim that the National Hockey League (NHL) can not survive unless players are willing to accept massive salary cuts.⁶⁴³ However, the National Hockey League Players' Association (NHLPA) claims that the NHL's December 14, 2004 counter-proposal misuses data and asserts misleading conclusions.⁶⁴⁴ Each group accuses the other of disseminating false or misleading information about the collective bargaining process on their respective websites. The Players' Association has even accused the League of failing to negotiate in good faith.⁶⁴⁵ With such public accusations being made, it is no wonder that negotiations have failed to produce a mutually acceptable result. Although many believe that the financial implications of accepting either party's proposal is preventing the parties from reaching an agreement, the root of the problem may be in the instability of the relationship between the League and the Players' Association. This note will provide an in-depth study of the negotiations between the League and the Players' Association, a comparison of the NHL lockout to the 1994-1995 Major League Baseball strike, and an overview of the bargaining strategies implemented in sports-related labor disputes lead to a breakdown in negotiations.

The Current NHL Lockout: A Timeline of Events

The Collective Bargaining Agreement (CBA) between the NHL owners and the NHLPA expired at midnight on September 15, 2004.⁶⁴⁶ Earlier that day, NHL Commissioner Gary Bettman announced that all thirty of the league's teams will lock out their players upon the expiration of the CBA.⁶⁴⁷ On December 9, 2004, the NHLPA presented the owners with a

proposal that included a 24 percent pay reduction on all contracts.⁶⁴⁸ The proposal also provided for future salary restraints, a payroll tax on owners that is triggered at the \$45 million threshold, and a revenue redistribution plan that transfers money "from the high-revenue clubs to the low-revenue clubs."⁶⁴⁹

The NHL countered this offer with a proposal that included a salary cap and weighted salary rollbacks.⁶⁵⁰ This counter-proposal was rejected by the NHLPA.⁶⁵¹ Meetings that took place throughout the middle and end of January 2005 appeared to produce no results.⁶⁵² However, on February 2, 2005, the NHL presented the NHLPA with a new proposal. This proposal introduced a new profit-sharing program, but it still included a salary cap.⁶⁵³ It also contained a three-year maximum on contract length.⁶⁵⁴

To most players, this proposal was unacceptable. One player representative felt that "It's almost as though this offer is designed to ensure that players don't actually give it serious consideration."⁶⁵⁵ On February 16, 2005 the NHL cancelled the remainder of the 2004-2005 season after the players and the owners were unable to agree on a salary cap.⁶⁵⁶ Due to this cancellation, the NHL is the first professional

⁶⁴⁷ Id, <http://sports.espn.go.com/nhl/feature/story?page=nhlcb>
[ba](http://sports.espn.go.com/nhl/feature/story?page=nhlcb).

⁶⁴⁸ Id, <http://sports.espn.go.com/nhl/feature/story?page=nhlcb>
[ba](http://sports.espn.go.com/nhl/feature/story?page=nhlcb).

⁶⁴⁹ "National Hockey League Players' Association: NHLPA Offers Major Proposal,"

<http://nhlpa.com/Content/Feature.asp?contentId=3398>, Thursday September 9, 2004.

⁶⁵⁰ "ESPN.com: NHL Lockout," supra, note 4.

⁶⁵¹ "ESPN.com: NHL Lockout," supra, note 4.

⁶⁵² "ESPN.com: NHL Lockout," supra, note 4.

⁶⁵³ "NHL Presents Collective Bargaining Proposal; Unprecedented Profit-Sharing Element Included," http://www.nhlcbnews.com/news/proposal_release020205.html, February 2, 2005.

⁶⁵⁴ Scott Burnside, "It's All Up to Gary and Bob," <http://sports.espn.go.com/nhl/columns/story?id=1982815>, February 2, 2005.

⁶⁵⁵ Id, <http://sports.espn.go.com/nhl/columns/story?id=1982815>.

⁶⁵⁶ "CNN.com-NHL Cancel Remainder of Season," <http://edition.cnn.com/2005/SPORT/02/16/nhl.season/index.html>, February 16, 2005.

⁶⁴³ "What Industry Analysts Are Saying," <http://www.nhlcbnews.com/reaction/analystquotes.html>.

⁶⁴⁴ "NHLPA Rejects Salary Cap," <http://nhlpa.com/MediaReleases/ReleaseDetails.asp?mediaReleaseDisplayId={31EEDDDA-A9BB-437B-A0BE-E1969D07A652}>.

⁶⁴⁵ "Bill Daly on Bargaining in Good Faith," http://www.nhlcbnews.com/news/good_faith112304.html.

⁶⁴⁶ "ESPN.com: NHL Lockout," <http://sports.espn.go.com/nhl/feature/story?page=nhlcb>
[ba](http://sports.espn.go.com/nhl/feature/story?page=nhlcb).

sports league to lose an entire season because of a labor dispute.⁶⁵⁷ However, this is not the first time that a labor dispute caused a serious disruption to professional sports.

Major League Baseball: The 1994-1995 Strike

In 1994, the owners of Major League Baseball (MLB) agreed to a revenue sharing plan in which clubs in smaller markets would receive a share of the profits of larger-market teams.⁶⁵⁸ However, this plan depended on the players' acceptance of a salary-cap plan.⁶⁵⁹ The players' union rejected this plan, arguing that a salary cap allows owners to pay players less than what they're worth.⁶⁶⁰ Both sides refused to yield from their positions, and a strike ensued on August 12, 1994.⁶⁶¹ In October of 1994, President Clinton appointed William Utery to mediate the dispute between the players and the owners.⁶⁶² Mr. Utery supervised negotiations between the parties.⁶⁶³ During these negotiations proposals and counter-proposals were introduced by both parties. The main dispute between the parties was the use of a "luxury tax" imposed on teams whose payroll exceeded a certain amount.⁶⁶⁴ When the parties failed to reach an agreement over the amount of the "luxury tax" or the payroll amount that would trigger the imposition of the tax, the owners declared that the negotiations were at a standstill and that they would be introducing a salary cap as originally planned.⁶⁶⁵ The strike did not end until United States District Court Judge Sonia Sotomayor granted an injunction that forced owners to restore players to the terms of the collective bargaining agreement that had expired on January 1, 1990.⁶⁶⁶ The players then reported for spring training

⁶⁵⁷ Id,

<http://edition.cnn.com/2005/SPORT/02/16/nhl.season/index.html>.

⁶⁵⁸ James R. Devine, "The Legacy of Albert Spalding, the Holdouts of Ty Cobb, Joe DiMaggio and Sandy Kofax/Don Drysdale, and the 1994-1995 Strike: Baseball's Labor Disputes are as Linear as the Game," 31 Akron L. Rev. 1, 59 (1997).

⁶⁵⁹ Devine, Id, note 16 at 59.

⁶⁶⁰ Devine, Id, note 16 at 60.

⁶⁶¹ Devine, Id, note 16 at 60-61.

⁶⁶² Devine, Id, note 16 at 65.

⁶⁶³ Devine, Id, note 16 at 66.

⁶⁶⁴ Devine, Id, note 16 at 66.

⁶⁶⁵ Devine, Id, note 16 at 67.

⁶⁶⁶ Marc Chalpin, "It Aint Over 'Til It's Over: The Century Long Conflict Between the Owners and the Players in Major League Baseball," 60 Alb. L. Rev. 205, 227 (1996).

and played their season, modified to include 144 games, to its conclusion.⁶⁶⁷

The MLB Owners' Arguments vs. NHL Owners Arguments

The NHL owners in the 2004-2005 lockout and the MLB owners in the 1994-1995 place different values on their players. The MLB owners argued that they did not need the players.⁶⁶⁸ Many owners insisted that fans would still attend games if replacement players were found.⁶⁶⁹ However, during the baseball strike, polls indicated that 51% of fans would not attend games if replacement players were used. Despite these results, the MLB owners voted 26-2 to authorize the use of replacement players on March 30, 1995.⁶⁷⁰ Many NHL owners see the situation differently. The chairman of the Edmonton Oilers, Cal Nichols, has referred to a successful collective bargaining agreement between the owners and the players as the "fourth leg" necessary to hold up the chair (a metaphor for the Oilers franchise).⁶⁷¹ The NHL owners differ from the MLB owners in that they view the players as necessary and irreplaceable, and are therefore committed to continuing a relationship with them.

MLB owners also argued that "the players were being petty, greedy and ungrateful."⁶⁷² They claimed that the players refused to bargain, and that the owners were trying to "preserve baseball."⁶⁷³ The NHL owners are now making similar claims about their players. Chicago Blackhawks owner Bill Wertz told the Chicago Tribune: "The players keep wanting more and more. Pretty soon they'll want the key to my door."⁶⁷⁴ Despite believing that a relationship with the players is necessary, they view the players as trying to destroy their business.⁶⁷⁵ Owners claim that they are losing money "in perpetuity."⁶⁷⁶

⁶⁶⁷ Chalpin, Id at 227.

⁶⁶⁸ Devine, supra, note 16 at 61.

⁶⁶⁹ Devine, Id, note 16 at 61.

⁶⁷⁰ Devine, Id, note 16 at 61.

⁶⁷¹ "CBA News: What Club Owners/Executives are Saying,"

<http://nhlcbnews.com/reaction/ownerquotes.html>

⁶⁷² Devine, supra note 16 at 62.

⁶⁷³ Devine, Id note 16 at 62.

⁶⁷⁴ "CBA News: What Club Owners/Executives are Saying,"

<http://nhlcbnews.com/reaction/ownerquotes.html>

⁶⁷⁵ "CBA News: What Club Owners/Executives are Saying," Id note 32.

⁶⁷⁶ Eugene Melnyk, Owner of the Ottawa Senators, "CBA News: What Club Owners/Executives are Saying," Id note 32.

Lessons to Learn From These Disputes:

Both parties to the MLB strike and the NHL's lockout engaged in adversarial negotiation. In adversarial negotiation, the parties focus on "maximizing victory," and view themselves as competing for the same scarce resources.⁶⁷⁷ When bargaining in an adversary system, the parties assume that there are a fixed amount of resources being split up and that if they don't get them, their adversaries will.⁶⁷⁸ The parties view the conflict as a contest that has a winner and a loser.⁶⁷⁹ This competitive mindset may be effective when there is only one issue, but this type of bargaining structure will not lead to a resolution when there are several issues on the negotiation table.⁶⁸⁰ In the case of the MLB and the NHL, the scarce resource they are competing for is money: the owners want to preserve profits by imposing a salary cap, the players want to maximize their earning capabilities.

Although the negotiations between the League and the Players' Association seem to be focused on money, there are other issues involved. For example, the players have frequently told the media that the owners do not recognize the players' worth.⁶⁸¹ This is a problem that may not be resolved by simply offering a higher salary cap. Indeed, an adversarial bargaining approach can lead to a breakdown in negotiations because the parties will fail to address "differences in values that could broaden the range of possible solutions."⁶⁸² Instead, the parties make assumptions about the "motives and intentions" of the other party. These assumptions present a psychological barrier towards resolving the conflict.⁶⁸³

Another reason why adversarial bargaining may not be effective is because negotiation discussions lead to "competitive reactive dynamics" as opposed

to "creative proactive dynamics."⁶⁸⁴ As a result, a party may be so committed to a particular result that they may refuse to accept offers that may be equally beneficial.⁶⁸⁵ The League and the Players' Association may have had trouble agreeing on a salary cap because they were so committed to their salary ideals that they were unwilling to consider the merits of the limit proposed by the other party. During the talks between the League and the Players' Association that immediately followed the cancellation of the 2004-2005 season, the League proposed a salary cap of \$42.5 million, while the Players' Association insisted on a soft cap of \$49 million that teams could exceed by ten percent twice during the term of the six-year deal.⁶⁸⁶ Despite the fact that the sides were only \$6.5 million apart, they still failed to come to an agreement.⁶⁸⁷ This indicates not only that the parties are stubbornly committed to achieving certain results, but they are also devaluing each other's offers and compromises merely because they are coming from the other party.⁶⁸⁸

Perhaps an approach that focused on problem-solving, rather than an adversarial approach, would have helped resolve this dispute. When using a problem-solving oriented approach, the negotiators focus on the parties' actual, rather than hypothetical, needs.⁶⁸⁹ In addition to considering the financial needs of the party and the legal issues at hand, the negotiator must also consider issues like the psychological needs of the parties, and how a solution will affect the party's relationship with others.⁶⁹⁰ For example, the Players' Association and the NHL need to consider that once a resolution is reached, they will have to continue to work together. Any bad feelings that develop during negotiations can harm this working relationship. Therefore, it is in each party's best interest to deal with each other fairly, and in good faith.⁶⁹¹

Focusing on actual, rather than assumed, needs allows parties to come up with a wide range of solutions.⁶⁹² Instead of considering the financial gap between the Players' Association and the NHL proposals, the different interests involved (the need

⁶⁷⁷ Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," 31 UCLA L. Rev. 754, 764-765 (1984).

⁶⁷⁸ Menkel-Meadow, *Id* note 35 at 765.

⁶⁷⁹ Christopher J. Fisher, "The 1994-1995 Baseball Strike: A Case Study in Myopic Subconscious Macrocosmic Response to Conflict," 6 Seton Hall J. Sports L. 367, 373 (1996).

⁶⁸⁰ Menkel-Meadow, *supra* note 35 at 771.

⁶⁸¹ "NHL Cancels Season," <http://nhlpa.com/Content/Feature.asp?contentId=3428>, February 16, 2005.

⁶⁸² Menkel-Meadow, *supra* note 35 at 793.

⁶⁸³ Myer J. Sankary, Esq., *Negotiating Strategies for Lawyers, Solo and Small Firm Practitioners Committee Newsletter*, (American Bar Association; Tort, Trial & Insurance Practice Committee), Winter 2004 at 6.

⁶⁸⁴ Menkel-Meadow, *supra* note 35 at 778.

⁶⁸⁵ Menkel-Meadow, *id*, note 35 at 778.

⁶⁸⁶ "CNN.com: Late Talks Fail to Save the NHL Season," <http://edition.cnn.com/2005/SPORT/02/20/ice.dispute/index.html>, February 20, 2005.

⁶⁸⁷ "CNN.com: Late Talks Fail to Save the NHL Season."

⁶⁸⁸ Myer J. Sankary, Esq., *supra*, note 41 at 6.

⁶⁸⁹ Menkel-Meadow, *supra*, note 35 at 801.

⁶⁹⁰ Menkel-Meadow, *id* note 35 at 802.

⁶⁹¹ Menkel-Meadow, *id* note 35 at 802.

⁶⁹² Menkel-Meadow, *id* note 35 at 808.

for the players' salaries to reflect their value and the owners' need to make profits, rather than incur losses) should be evaluated. For example, a recent proposal by the NHL included a provision on profit-sharing, which would allow the Players' Association to evenly split all revenues incurred over a negotiated level with the League.⁶⁹³ A profit-sharing proposal seems to be a compromise that reflects the needs of both parties: It allows the players to reap the benefits of bringing fans out to games without causing the owners to incur financial losses. It is also a way of expanding the resources available by considering not just the League's current budget, but future profits as well.⁶⁹⁴ However, the Players' Association had rejected this plan because it contained an unacceptable salary cap.⁶⁹⁵ By rejecting a proposal that is promising, but not ideal, the Players' Association is illustrating how an adversarial perspective can prevent negotiations from producing successful results.

If the Players' Association and the NHL are to have a continuing relationship with each other, they must focus on "healing" the conflict as opposed to just resolving it.⁶⁹⁶ Healing a conflict occurs when "the parties...come to a resolution in a way that each of them feels that the others were cognizant of their interests, approached the challenge with honesty and integrity, and had an opportunity to be heard."⁶⁹⁷ A problem is resolved when "parties get to the point in a negotiation that they are able to finally come to a resolution."⁶⁹⁸ However, even if a problem is resolved, the parties may not feel as though the conflict is "really gone."⁶⁹⁹ In order to completely purge themselves of the potential for future disputes, the parties to a conflict need to heal their conflict. If the parties attempt to heal their relationship by recognizing each other's interests as opposed to their positions, they can efficiently resolve future disputes.⁷⁰⁰ Even if the Players' Association and the NHL fail to reach an agreement using this approach, the animosity between the parties will be reduced because they have been "forthright, honest, open, and have listened to each other."⁷⁰¹

⁶⁹³ "Urgent,"

<http://sports.espn.go.com/espn/wire?section=nhl&id=1991234>, February 14, 2005.

⁶⁹⁴ "Toward Another View of Legal Negotiation," 31 UCLA L. Rev. at 809.

⁶⁹⁵ "Urgent."

⁶⁹⁶ Fisher, *supra* note 36. at 386.

⁶⁹⁷ Fisher, *id* note 36 at 386.

⁶⁹⁸ Fisher, *id* note 36 at 386.

⁶⁹⁹ Fisher, *id* note 36 at 386.

⁷⁰⁰ Fisher, *id* note 36 at 386.

⁷⁰¹ Fisher, *id* note 36 at 386.

Some analysts have argued that the MLB strike in 1994 was not a result of the imposition of a salary cap, but rather it came about because of a habit of failing to deal with conflict effectively.⁷⁰² The same can be said for the NHL lockout. Instead of citing the expiration of the current collective bargaining agreement as the cause of the lockout, the parties need to consider their failure to rectify the problems with the old agreement. The owners report that a majority of the clubs have been losing money since the beginning of the current collective bargaining agreement's term.⁷⁰³ If the owners knew that major changes to the collective bargaining agreement would have to be made upon expiration, why didn't they begin to brainstorm possible solutions sooner? Surely they must have known that the Players' Association would not agree to a salary cap. Furthermore, instead of emphasizing the players' alleged greed by focusing on the large percentage of hockey revenues that are being used for players' salaries,⁷⁰⁴ why not focus on the factors that led these massive salaries to get paid out in the first place? Focusing on the chain of events that preceded the expiration of the collective bargaining agreement would yield better results in negotiation than focusing on the disagreement between the parties that followed it.

Conclusion

Although the 2004-2005 NHL lockout marks the first time an entire season has been lost by a professional sports league as a result of a labor dispute, the story behind the lockout is not new. Major League Baseball and the Major League Baseball Players' Association experienced similar breakdowns in negotiations. In the MLB strike, the negotiations failed because the parties engaged in adversarial bargaining as opposed to adopting a problem-solving, or healing, strategy. The MLB and the players could not resolve their problems, and the strike ended only after a court order was issued. Unless the NHL and the NHLPA are willing to consider each other's interests and focus on handling conflicts effectively, they will not be able to develop a collective bargaining agreement that is both economically sound and amenable to both sides.

⁷⁰² Fisher, *id* note 36 at 372.

⁷⁰³ "League Economics,"

<http://www.nhlcbanews.com/economics.html>.

⁷⁰⁴ "The Current CBA,"

<http://www.nhlcbanews.com/current.html>.

To Share or Not to Share: The Conflict in the NFL between the Haves and the Have-Nots

By: Alyssa E. Litman

Introduction

In an era where professional sports players earn millions of dollars each year to play a game they love, the question becomes: how do teams afford such expensive payrolls? The answer, in part, is revenue sharing. The National Basketball Association utilizes it, as does the Major League Baseball Association. The National Football League relies on it to determine a large portion of players' salaries. During the 2004-2005 season, the NFL grossed \$5.2 billion, \$3 billion of which is to be shared among the 32 franchises.⁷⁰⁵ However, the NFL players' union wishes to increase the sources of revenue added to the pool to determine players' salaries, and this has created tensions among various team owners and the league. More than a handful of owners are troubled by the possible expansion of the revenue pool because it would diminish competition among the teams. Currently, there is a large disparity between high-revenue teams, such as the Washington Redskins, and those whose revenues are significantly lower, such as the Indianapolis Colts. These tensions are causing a delay in the renegotiation of the NFL collective bargaining agreement (CBA) due to expire in 2007. In light of the 1987 strike over players' rights and the recent NHL labor agreement dispute and canceling of the 2004-2005 professional hockey season, some are worried the issue of revenue sharing could create similar problems for the NFL in the next few years.

Over the years, the NFL has been no stranger to anti-trust lawsuits over the years, which raises another concern. If the revenue sharing pool was increased would it be a violation of the Sherman Act? The current CBA is binding upon all teams and players and could thus be considered a contract within the meaning of the Sherman Act.⁷⁰⁶ In order to determine if the possible expansion of the revenue pool is illegal under the antitrust laws, several issues must be

⁷⁰⁵ Mark Maske and Thomas Heath, *NFL's Economic Model Shows Signs of Strain*, Wash. Post, Jan. 8, 2005, at A01. "Every NFL owner starts the year on a level playing field, with nearly \$100 million from NFL broadcast rights, national NFL scholarships with companies such as Gatorade, and a redistributed portion of ticket sales."

⁷⁰⁶ See *U.S. v. National Football League*, 116 F. Supp. 319, 321 (E.D. Pa.1953) *citing* *Associated Press v. U.S.*, 326 U.S. 1, 8, 65 S. Ct. 1416, 89 L. Ed. 2013 (1945).

examined: 1) Do the proposed changes to the 1993 CBA constitute a restraint of trade? 2) Are the 32 teams in competition with each other, and is the NFL suppressing this competition? 3) What is the relevant market with regards to the NFL? 4) Most importantly, is the league able to exert monopoly power by controlling prices and suppressing competition? Assuming most of these questions can be answered in the affirmative, the potential expansion of the revenue pool will not only affect relations between the teams and the players' union, but could also have wide reaching legal ramifications for the NFL and other professional sports.

The NFL: A League of Independent Business

The first step in determining if the NFL's revenue sharing agreement changes would be a violation of antitrust laws is to evaluate the structure of the league. Although in prior cases the NFL has contended it is a single entity, courts have ruled that it is neither akin to a partnership nor a joint venture. Specifically, the Court of Appeals for the Ninth Circuit held that the NFL had a limited identity separate from the individual teams, and that it is a "not-for-profit association."⁷⁰⁷ It is run by Commissioner Paul Tagliabue, with its headquarters in New York City and handles matters from creating the season's schedule to resolving disputes among the teams. The Ninth Circuit in *Los Angeles Memorial Coliseum v. the National Football League* went so far as to characterize the NFL as a cartel.⁷⁰⁸ Antitrust law has traditionally held that cartels fall under the scope of the Sherman Act, and since the NFL is neither a single entity nor a joint venture, it would fall within the language of Section 1.⁷⁰⁹

⁷⁰⁷ *Los Angeles Memorial Coliseum v. NFL*, 726 F.2d 1381, 1389 (9th Cir. 1983).

⁷⁰⁸ *Ibid.* Thomas Morgan has defined a cartel as group of competitors who conspire to raise prices above those that would prevail in competition. Cartels usually face several problems, including determining the group's objectives, cheating by parties to the cartel and assigning production within the cartel. See *Cases and Materials on Modern Antitrust Law and Its Origins* 64 (American Casebook Series, West Group 2d ed. 2001)

⁷⁰⁹ See Sherman Act § 1, 26 Stat. 209 (1890). "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign

If the NFL is not a single entity the next step is to examine where the individual teams fall within the structure of the league. California courts have concluded that the teams are actually “separate business entities whose products have an independent value.”⁷¹⁰ They are all independently owned by the entrepreneurs who have come to be household names in the professional sports world, from Wayne Huizenga to Jerry Jones. Each franchise is run according to varying management techniques. Each team, in essence, is much like an individual corporation or partnership, with assets, shareholders and a management scheme. As New England Patriots owner Robert Kraft recently said, “[w]hether you are a small market or a large market, you have to manage the business like any other industry.”⁷¹¹ What Kraft is saying and what other NFL owners have argued is that each team is a self-sufficient business that looks out for the benefit of the league as a whole. Thus, if the NFL is indeed a mere association and the teams are individual entities, then Section 1 of the Sherman Act applies. As the Ninth Circuit held in *LA Coliseum*, the NFL is not a single entity but instead composed of independent and competitive teams, which falls under the scope of the Sherman Act.⁷¹²

NFL Revenue Sharing Agreement: A Restraint On Trade

Justice Brandeis once wrote that with regards to potential Section 1 Sherman Act violations “[t]he true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.”⁷¹³ NFL Commissioner Tagliabue and the players union would argue against the idea that the revenue sharing agreement under the 1993 CBA is a restraint because they believe it attempts to create equilibrium among all the teams. On the other hand, owners, such as Jerry Jones, would protest that the current system reduces incentives for entrepreneurial owners and deters teams from trying to make a profit and is thus a

nations, is hereby declared to be illegal...”

⁷¹⁰ *LA Coliseum*, 726 F.2d at 1389, *citing* 519 F. Supp. 581, 584 (1981). The district court in this case held that the evidence was sufficient to warrant a rule of reason scrutiny under Section 1 of the Sherman Act.

⁷¹¹ Maske, Wash. Post, at A01. Kraft also said that the individual franchises learn to make money on their own and lessen their dependency on the league’s wealth.

⁷¹² *LA Coliseum*, 726 F.2d at 1389.

⁷¹³ *Board of Trade of City of Chicago v. U.S.*, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683, (1918).

restraint on trade.⁷¹⁴ Furthermore, it is not enough that a contract or combination is merely a restraint of trade. As Justice White said in *Standard Oil of New Jersey v. U.S.*, the restraint must be unreasonable and “to merely declare all contracts or combinations in restraint of trade would undermine the purpose of the Sherman Act and it would be destructive of all rights to contract or agree or combine in any respect whatever.”⁷¹⁵ Then, the question becomes: is the proposed revenue sharing agreement unreasonable?

Rule of Reason Analysis:

Is the Revenue Sharing Agreement Unreasonable?

Justice Brandeis said that the circumstances surrounding the restraint must be examined in order to determine reasonableness, focusing specifically on what the situation was like before and after the agreement.⁷¹⁶ The 1993 CBA defines what is included in the defined gross revenue (DGR), which is used to calculate the revenue pool from which the players’ salaries are derived. DGR includes ticket receipts during pre, regular and post season games, as well as various other proceeds including “Copyright Royalty Tribunal and extended marker payments from the sale, license or other conveyance” of the right to broadcast games on radio and television.⁷¹⁷ Excluded from DGR are revenues derived from concessions, parking, local advertising and promotion, magazine advertising, local sponsorship agreements, stadium clubs and luxury box income.⁷¹⁸ The NFL players union, led by Gene Upshaw, wants to take some of the above exclusions listed and include them in the

⁷¹⁴ Maske, Wash. Post, at A01.

⁷¹⁵ *Standard Oil of New Jersey v. U.S.*, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Justice White first enumerated the rule of reason in this case in order to make a distinction between unreasonable and reasonable restraints of trade.

⁷¹⁶ *See Board of Trade of City of Chicago*, 246 U.S. at 238. “The court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.”

⁷¹⁷ NFL Collective Bargaining Agreement 1993-2003, Amended June 6, 1996, Article XXV, Section 1.

⁷¹⁸ NFL Collective Bargaining Agreement 1993-2003, Amended June 6, 1996, Article XXV, Section 1(a)(3)(ii).—This provision is nearly identical to Article 19.1 of the NFL Constitution— *See Oakland Raiders v. NFL*, 2005 WL 428920, 31 (Cal. App. 2 Dist. 2005).

DGR. According to Brandeis' analysis for determining if a restraint of trade is illegal, there would be a distinct difference between the revenue sharing agreement currently in place and what the changes will do to the arrangement. Stadium operations by 1985 provided the third largest revenue source after ticket sales and broadcasting rights.⁷¹⁹ Nearly \$2 billion in revenue generated in the 2004-2005 season is not shared equally among the teams and excluded from the DGR.⁷²⁰ Thus, the proposed expansion of sources of revenue under the revenue sharing agreement to include some of these stadium rights could take away millions of dollars from some of the teams. The three largest sources of revenue for the individual franchises will go to the general player pool, and teams such as the Washington Redskins and the Dallas Cowboys will lose a large portion of their profits.

*The League:
Suppressing Competition among Teams for Revenue*

Moreover, restraints on trade either have the effect of suppressing competition or preventing new competitors from entering the industry. This certainly would not be the first time the NFL is accused of restraining trade. In 1983, the Mid South Grizzlies sued the NFL because they refused to grant the Grizzlies a football franchise.⁷²¹ In a similar suit, the NFL was alleged to have prevented a corporation from purchasing one of the league's franchises in the late 1990s in violation of Section 1 of the Sherman Act.⁷²² The revenue sharing agreement deals with competition between individual teams and not the NFL and outside competition, but competition nonetheless. As the court held in *LA Coliseum*, the individual team owners are "distributors of the NFL product, each with its own territorial division."⁷²³ If they each have their own division and their own sphere of influence, in addition to being independently owned, all 32 teams are in direct competition with each other. The proposed expansion of the revenue pool to include not just ticket sales and TV broadcast rights, but also money from luxury suites, stadium naming rights and local endorsements,

⁷¹⁹ *New Orleans Louisiana Saints v. Commissioner*, 1997 WL 287656 (U.S. Tax Ct. June 2, 1997).

⁷²⁰ Maske, Wash. Post, at A01.

⁷²¹ *See Mid South Grizzlies v. NFL*, 720 F.2d 772 (3d Cir. 1983) where the Third Circuit held the NFL violated Section 4 of the Clayton Act, and the Grizzlies also complained the revenue sharing agreement caused injury to their business.

⁷²² *See Murray v. NFL*, 1998 WL 205596 (E.D. Pa 1998).

⁷²³ *LA Coliseum*, 726 F.2d at 1389.

will discourage any of the teams from competing with each other. The NFL will control basically all sources of revenue and take away the entrepreneurial nature of the league. As Kraft said, "[i]f we don't maintain our entrepreneurial spirit, then our league will die."⁷²⁴ Clearly, commingling all revenue funds and splitting everything equally will deter some of the franchises from trying to gain an edge or make a profit since ultimately, in the end they will all be on an equal footing.

Exerting Monopoly Power Over The League

Another issue arises when examining the potential liability of the NFL if the current revenue sharing agreement is altered: Do the league's actions constitute a monopoly? Section 2 of the Sherman Act covers both monopolies and attempts to monopolize.⁷²⁵ In evaluating the scope of this section, the courts have held that "[m]onopoly power is the power to control prices or exclude competition."⁷²⁶ The NFL conceded in *Murray v. NFL* in 1998 that by definition they have a monopoly.⁷²⁷ So the first question is: What is the relevant market? A determination of the relevant market is the key to analyzing if an organization or a group does in fact have monopoly power and consequently, the ability to control prices or suppress competition.⁷²⁸ As the court said in *U.S. v. E.I. DuPont*, the most important consideration about what is the relevant market is "that the commodities reasonably interchangeable by consumers for the same purposes make up that 'part of trade or commerce' monopolization of which may be illegal."⁷²⁹ In some antitrust cases throughout the years, the relevant market has been one single commodity or a group of commodities that act as substitutes for one another when there are price changes or fluctuations in quality. Several district courts have held that the relevant market for the NFL is nationwide.⁷³⁰ Football is broadcast all across the country with the 32 teams located in different parts of the U.S., from the southern tip of Florida to the northern section of

⁷²⁴ Maske, Wash. Post, at A01.

⁷²⁵ *See Sherman Act* § 2, 26 Stat. 209 (1890). "Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."

⁷²⁶ *U.S. v. E.I. Du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956).

⁷²⁷ *See Murray*, 1998 WL 205596 at 10.

⁷²⁸ *E.I Du Pont*, 351 U.S. at 392.

⁷²⁹ *Ibid.*

⁷³⁰ *See Murray*, 1998 WL 205596 at 9 and *AFL v. NFL*, 205 F. Supp. 60 (D. Md. 1962).

Washington State. The revenue pool affects players in almost every state. One team is interchangeable with another in the sense that they have the same goal and purpose: to provide a structure for a profitable professional football league. Whether a player is a member of the New York Giants or the Oakland Raiders, he is still in the NFL, subject to the same rules and the same restrictions. Thus, in a sense, each team is interchangeable, which makes the relevant market the entire country. The idea of cross elasticity of demand is also crucial in determining the relevant market.⁷³¹ Generally, cross elasticity of demand deals with the “responsiveness of the sales of one product to prices changes of the other.”⁷³² When applied to the present case, if a slight decrease in players’ salaries for one team leads to players wanting to switch teams then a high cross elasticity of demand exists. This indicates that the teams are part of the same market and in competition with each other. What happens with regards to prices, or in this case, salaries, for players on one team can affect the other teams and the relationship between the two. This is definitely true of the NFL and most other professional sports leagues. Moreover, if ticket prices for one team’s games increase then the prices for other teams’ games will rise. Essentially, what happens to one team financially impacts the other franchises.

Controlling Prices through Revenue Sharing and the 1993 CBA

Thus, the relevant market is the entire country, and the potential for monopoly power exists. The next question to tackle is: Does the NFL control prices? First, it puts a cap on players’ salaries based in part on the revenue pool. In the early 1990s, the NFL would give 66% of ticket sales to the home team and 34% to visiting teams. This was amended to 60/40 in the late 1990s.⁷³³ The NFL constitution and the 1993 CBA have provisions that also place certain restriction on players’ salaries.⁷³⁴ The players are an

⁷³¹ E.I Du Pont, 351 U.S. at 394.

⁷³² *Ibid.*

⁷³³ See Stephen T. Easton and Duane Rockerbie, *Revenue Sharing, Conjectures and Scare Talent in a Sports League Model*, Economic Inquiry, Oct. 2002. The 60/40 arrangement the NFL has is the “traditional revenue sharing” system, which is the simplest form of revenue sharing. The MLB, for example, in 1996 adopted a straight pool plan. This requires each club to contribute 39% of its net local revenue to a central pool, which is divided evenly among all the member clubs.

⁷³⁴ NFL Collective Bargaining Agreement 1993-2003, Amended June 6, 1996, Article XXIV. See *The Trading Game: NFL Free Agency, The Salary Cap*,

integral part of this system because without players there is no league, and there is no professional football. Additionally, every team is required to give their ticket sales and broadcasting rights’ revenues to the league for the revenue pool. Each team must share their gross receipts with the other teams, unless the NFL grants a waiver of this requirement.⁷³⁵ The control over revenues and players salaries is what courts would conclude is the control of prices.

Preventing Competition through Revenue Sharing

The argument can be clearly articulated that the NFL controls prices. What about the notion that it excludes competition? Is there competition among the individual teams? They compete to get the best players and coaches.⁷³⁶ Coaches are constantly switching from team to team. Take for example, Bill Parcells, kindly nicknamed the “Tuna”, who has gone from coaching the New York Giants, the New York Jets and the New England Patriots, and currently, is the head coach of the Dallas Cowboys. The market for players is even more competitive. Every year there is a draft that allows teams to recruit the best talent from top colleges around the country. Teams often will trade draft picks in order to get higher picks or veteran players from other teams. And as soon as a player becomes a free agent, if the team management and coaches still believe he has a few good years left, teams will bid against each other to persuade the player that their offer is the best. Not only are these teams trying to recruit a football squad that will win them the National Championship, but they are trying to make a profit and run a business.

State and municipal governments have entered the stadium facility business in the last number of years as a result of the competition to “secure and retain professional sports teams.”⁷³⁷ They have offered the teams benefits and inducements to come to their city. For example, local governments have assisted in the construction, renovation or expansion of stadiums, such as the new stadium for the Philadelphia Eagles built two years ago. Such endeavors were funded by the public sector in order to keep teams from relocating to different cities because professional sports teams are a source of revenue and publicity for the cities in which they

and a Proposal for Greater Trading Flexibility, 11 Sports Law J. 257 at 262 (2004). The salary cap is determined by the DGR of the NFL for each year, and it cannot exceed 70% or go below 56% of the DGR. In 2002, each team had a cap of \$71.5 million, which is 64% of the DGR.

⁷³⁵ See Oakland Raiders, 2005 WL 428920 at 31.

⁷³⁶ AFL, 205 F. Supp. at 61.

⁷³⁷ NO Louisiana Saints, 1997 WL 287656.

reside. Since such stadium revenues are not currently included in the DGR, teams were able to make a profit through these methods. If these revenues are added to the general pool, the incentives for state and local governments to continue their financial support of the NFL teams might diminish. Taking away the remaining stadium revenues will reduce competition. Additionally, if the teams can no longer keep some of their revenue that was previously excluded from the DGR, they will not compete as fiercely as they do currently. Shifting money from high revenue teams to low revenue teams will suppress competition and destroy the entrepreneurial nature of the league.⁷³⁸

In theory, one possible solution for teams completely dissatisfied with the proposed revenue sharing agreement would be to leave the league. In practice, this is not feasible since the NFL dominates the market and it would be virtually impossible to be successful without the backing and support of the league.

Conclusion

Essentially, the proposed changes that the current revenue sharing agreement may foster are what the Sherman Act and antitrust laws were meant to prevent: an environment where competition is suppressed and the NFL has a monopoly over all the teams within the professional football league. What the NFL players' union wishes to do would constitute a restraint on trade, as well as a monopoly. Since the relevant market includes the entire country, the potential for monopoly power is clearly present. The NFL already controls prices and by including certain stadium revenues in the DGR, it would increase its control to a point that might be illegal. Consequently, this shift in revenue from teams like the Washington Redskins to teams like the Green Bay Packers would decrease the revenue disparity among the teams, but at the cost of reducing competition among the individual teams and discouraging state and local governments from perpetuating their involvement in the business. What Upshaw and the NFL players' union have proposed may not just concern some of the team owners, but also the courts.

⁷³⁸ Maske, Wash. Post, at A01.

Transformative Value that is not Reasonably Perceivable: Appropriation Art and the Struggle to Find its Place in the Fair Use Doctrine

By: Inna Nicole Furman

Introduction

Crammed with objects of the post-modern era.⁷³⁹ Over-stimulation to technology, mass media, and mass-production results in neglect to the very madness that surrounds people and their environment. Common placed objects become in danger of being increasingly assimilated and overlooked. Artists today are employing appropriation⁷⁴⁰ as an effective means to intensify the significance of these obscure objects in our culture and on our psyche. Perhaps artist's biggest attraction to these apparently benign objects is their *not-value-neutral* quality. Through copyright law, our legal system has effectively chilled a complete genre of this modern culture.

History and the human genius reveals to shelter multiplicity of appropriating behavior. Crafters, artists and even the common public shares in the inclination to imitate great inspirational works or encountered imagery that connects intimately with them as an observer. Such appropriation does not separate the great from the fake. Rather, the *transformative* factor of the borrowed elements illuminates one's skill as a craftsman. Professor Zechariah Chafee Jr. elucidates that, "The world goes ahead because each of us builds on the work of our predecessors. 'A dwarf standing on the shoulders of a giant can see farther than the giant himself.'" ⁷⁴¹

⁷³⁹ The expression refers to objects that only came into existence during the twentieth century and have become predominant and commonly encountered in people's daily lives. These objects range from: electronics, like the ipod, laptops, and pocket pc; home appliances, like the vacuum, toaster, and the George Foreman Grill; supermarket objects like potato chips, detergents, coke bottles, shopping bags; to signature brands, like Chanel, Burberry, Calvin Klein, Guess, Nike.

⁷⁴⁰ When referring to the word appropriation itself, the term denotes the act of taking possession without permission. The act of appropriation historically has been the imitation of another's work for the purposes of learning techniques and process the original work underwent. Artists have been known to borrow elements of work they admired or found to be the source of their inspiration.

⁷⁴¹ Zechariah Chafee Jr., *Reflections on the Law of Copyrights*, 45 COLUM. L. REV. 503, 511 (1945).

Appropriation art is the use or incorporation of borrowed elements to form a new art work.⁷⁴² Though resources vary widely – encompass materials, objects, images, techniques, forms and styles – the one major characteristic found in commonly borrowed elements of appropriation art is their *visual appeal* or *association*, which 'traditional art material'⁷⁴³ often lacks. In striving for visual appeal, artists commonly utilize familiar images in order to encourage the public to identify with the artwork or to explore the borrowed material's symbolism. Sources for an appropriation artist are typically: (a) works of other artists, including their ideas and styles; (b) everyday objects and materials such as coke bottles and detergents; (c) popular culture images such as celebrities, advertisements and kitch; (d) archives of family or historical photographs; (e) traditional material drawn from other cultures; (f) and other areas of human interest and knowledge such as music, science, and technology.⁷⁴⁴ Appropriation artists work with a borrowed image particularly to "explore, exploit, expose, expand, celebrate, revise, challenge and critique their visual qualities and/or the meanings, values or ideas associated with them."⁷⁴⁵

Since the purpose of appropriation is to create new meaning some degree of variation needs to be maintained, whether it is dramatic or subtle. Artists use various methods to distinguish their appropriated work from the original; an artist can use different media, technique, or material to reproduce or reinterpret the image. Reinterpretation of the borrowed image can also involve the artist's personal style, added new details, or tactful omissions.⁷⁴⁶

⁷⁴² In literary works, the term appropriation has recently come to refer to the process of quoting work of another artist, but creating a different work with a new perspective. Likewise 'Appropriation art' has been used to describe artworks with such form of quotation.

⁷⁴³ I use the term 'traditional art material' to refer to objects found and represented in nature, for example, landscapes or human form, in a classical sense.

⁷⁴⁴ See *Borrowed Elements In Art*, at <http://www.vceart.com/explore/ideas/page.2.html#> (n.d.) Borrowed elements of a work can be used alone or together with borrowed elements of other artworks. Appropriated material can also be used in conjunction with traditional elements of fine art.

⁷⁴⁵ *Id.*

⁷⁴⁶ See *Borrowed Elements In Art*, *supra* note 6.

Everyday objects are a common source of use for artists; such objects are chosen for their familiarity, meaning, function or value.⁷⁴⁷ However, since appropriation art is known for transforming such objects, an artist would typically alter the appearance of an image or item by placing it into a different context in order to foster a distinctive relationship with the viewer. This prompts the observer to look at the object's value and functionality differently.⁷⁴⁸ A conscious effort exists to put the popular culture and the everyday into an artwork or have it become the artwork itself. Through this practice, an artist seeks to bridge the gap between art and the everyday⁷⁴⁹ in order to challenge or expand the traditional notion of art.⁷⁵⁰

Unfortunately, because appropriation art is not legally recognized, it tends to be treated as nothing more than manipulation of existing images, forms, and style, which ultimately stifles the value of the original and the legal rights of copyright holder. *Campbell v. Acuff-Rose Music, Inc.* was a breakthrough case for parodic work,⁷⁵¹ but proved faintly valuable to allegoric works.⁷⁵² The Supreme Court in *Campbell* abandoned the rigid interpretation of the fair use doctrine by emphasizing the work's "transformative value" in allowing copyright protection for commercial parodies.⁷⁵³ Nevertheless, by explicitly proclaiming parody as a legally recognized form of expression, the Supreme Court has cast a shadow on the legal recognition of appropriation art.⁷⁵⁴ Further, the transformative value

⁷⁴⁷ Pop art, specifically, borrows from everyday life and popular culture, presenting objects or icons in a way that forms a new association, perspective, or values in the observer.

⁷⁴⁸ Examples of art achieved through this process is "Taipan" by Ricky Swallow, a commemorative model, discontinued line (1999), and "Clothing Exchange" by DAMP (1997).

⁷⁴⁹ An artist may seek to expose cultural biases, stereotypes, issues of national identity and etc. through popular images.

⁷⁵⁰ The use of peculiar medias can often expand the notion of art. For example, Andy Warhol created an art piece using copper substance and pouring urine on canvas.

⁷⁵¹ A parody can be a musical, literary, or visual work that deliberately copies another work in a comic or satirical way.

⁷⁵² Allegoric work is another word for appropriation art. It includes works that use symbols to express a deeper, often moral, social, political or spiritual meaning.

⁷⁵³ See *Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 579 (1994)

⁷⁵⁴ See *id.* at 580-81.

test established in *Campbell* requires *reasonable perception* of critique or comment, which further detracts the success of appropriation art.⁷⁵⁵

The first section of this essay, "Tending Toward Appropriation", will introduce the post-modern rise of appropriation art, focusing on what had promulgated such allegorical art and how appropriation has played a significant role in history and today's culture. The next section titled "The Legal Framework and The Reality of Copyright Law" will examine the legal scheme of copyright law, focusing on the issue of moral rights and parody's place in the fair use doctrine. The "Evolving Case law on Parody and Fair Use" will examine decisions in the Circuit Courts prior to *Campbell*. A subsequent analysis of Supreme Court's decision in *Campbell* will illustrate the effect the decision had on parody and the consequences it presents for appropriation artists. Finally, the last section titled "Appropriation in the Context of Campbell" will turn its focus back upon appropriation art, discussing Campbell's failure to distinct between parody and appropriation art, artistic style, and whether there is promise for appropriation art in copyright law.

Tending Toward Appropriation

The Rising Need for Appropriation Art

Everyday, each of us is being bombarded with mass-market imagery through advertisements, television, celebrities, or trademark symbols. We encounter these inducing images on the streets of our cities and within our homes. For example, advertisements today do not simply announce the product, but seduce the consumer to desire it. This new environment has significantly influenced the way we look at the world and the way we see ourselves in it. A wave of artists is emerging, who are responding to this changing culture.

The modern era no longer experiences nature and the classical arts the same way it did before; it now thrives on the age of the machine, mass production, and mass media. Where prior, Claude Monet and Thomas Cole strove to accurately represent nature, while Michelangelo and De Vinci conveyed the beauty and complexity of human body, today a growing focus is on semiotics⁷⁵⁶ and raw form. Popularity of mass-media and advertisement has led artists to represent soup cans and coke bottles as

⁷⁵⁵ See *id.* at 582.

⁷⁵⁶ The term semiotics is used in the text to refer to the examination of various signs and symbols, particularly symbols that represent popular cultural, and how they relate to things or ideas they refer to or express.

readily as flowered vases and fruit bowls. The “Mona Lisa” is now found displaying a mustache or a Louis Vuitton bag. Perhaps in isolation such works may appear strange, it has now become our environment; “the referent in post modern art is no longer ‘nature,’ but the closed system of fabricated signs that make up our environment.”⁷⁵⁷ The age of the semiotics has become our ‘new nature.’

Whether in shock or awe, artists and writers have responded to the allure of this ‘plastic culture,’ implanting their first seeds in an unused territory. Perhaps the charm and fascination came because it was an unexplored landmark in the arts and our culture. Or, maybe, it was the ability to recycle art and the “ready-made” into new art forms that made appropriation art so attractive and liberating. Has man’s artistic freedom become suffocated, thus causing appropriation art to be viewed as a breath of fresh air in an exploited environment?

Sherrie Levine, who challenged originality by photographing photographs, stated that man has already “placed his token on every stone. Every work, every image is leased and mortgaged. We know that a picture is but a space in which a variety of images, none of them original, blend and clash.”⁷⁵⁸ Similarly, professor Williajeanne F. McLean argues that we have already exhausted artistic styles and imagery.⁷⁵⁹ It has become more difficult for artists to invent original artwork without infringing on the old.⁷⁶⁰ He propositions a theoretical limit on the amount of creative combinations possible and asserts that the most unique subject matter has already been thought of.⁷⁶¹

The market also suggests that there are inherent limits on production. The first to enter a new territory or implement a new style profit, while followers experience the reality of market’s limitations. For example, during the seventeenth century, when the Dutch landscape artists developed a style that allowed for greater production, the mass-development of landscapes and still-life paintings caused prices and demand to fall drastically.⁷⁶² The

⁷⁵⁷ John Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 COLUM. VLA J.L. & ARTS 103, 111 (1989).

⁷⁵⁸ Naomi Abe Voegtli, *Rethinking Derivative Rights*, 63 BROOK L. REV. 1213, 1222 (1997) (quoting Magazine of the Wardsworth Athenaeum 7 (Spring 1987)).

⁷⁵⁹ See Williajeanne F. McLean, *All’s Not Fair in Art and War: A Look at the Fair Use Defense After Rogers v. Koon*, 59 BROOK L. REV. 373, 383 (1993).

⁷⁶⁰ *Id.*

⁷⁶¹ *See id.*

⁷⁶² Martha Buskirk, *Commodification as Censor: Copyrights and Fair Use*, OCTOBER 60, at 97 (1992).

“great age of faking” grew popular during the nineteenth century and was later replaced with the science of authentication and ornament-free design, partly due to the changing style and training reflected in the inherent limits of forgery art.⁷⁶³ Hitherto, this era of authenticity has dominated the art world.⁷⁶⁴

Perhaps it is the misperception that art has to be authentic and original that has stifled our openness to appropriation art. Public psyche conceptualizes art as the implementation of outmoded techniques instigated by our ancestors. However, a ‘reversion of the arts’ is in the works. Formalism of the modern arts is being rejected for popular imagery and symbols of the contemporary era. Although unclear whether due to inherent limits of “authentic” productions, Post-modern art has attempted to defy the notion of authenticity. A new approach surfaced: art that is about art itself.

The Great Plagiarist

Although it is a well-recognized assertion that great artistic creation does not arise in a vacuum, people overlook the fact that creators of great works have been guilty of plagiarism. The intellect needs substance and accordingly seeks its inspiration from other noble works, whether it is art, literature, or music.⁷⁶⁵ Appropriation, or more boldly plagiarism, is a vital part of the creative process in the fine arts.⁷⁶⁶ William Shakespeare has been known to have taken

⁷⁶³ *Id.* at 97-98.

⁷⁶⁴ *See id.* at 98-99.

⁷⁶⁵ *See Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569, 575 (1994) (Statement of Justice Story) (explaining that true novelty and originality is faint) (“Every book in literature, science and art, borrows and must necessarily borrow, and use much which was well known and used before.”).

⁷⁶⁶ *See generally* ALEXANDER LINDEY, PLAGIARISM AND ORIGINALITY 62-230 (1952) (examplifying famous works, created prior to mid-twentieth century, which committed plagiarism). *See also, e.g.*, Judith Gaines, *Of Copyrights and Copycats; The Famous Have Often Plagiarized-And Been Cheered For It*, BOSTON GLOBE, NOV. 27, 1988, at A21. Esteemed people have plagiarized phrases that have become famous in American history. Winston Churchill’s “an iron curtain” was taken from a Nazi propagandist Joseph Goebbels. Abraham Lincoln’s source for the phrase, “the government of the people, by the people, for the people, shall not perish from the earth” was taken from Theodore Parker. *Id.* It has been suggested that John F. Kennedy’s “ask not what your country can do for you; ask what you can do for your country” was taken from Richard Shenkman. *Id.*

phrases from other sources.⁷⁶⁷ Christopher Marlow stole from Shakespeare and Ben Johnson stole from both Marlow and Shakespeare.⁷⁶⁸ Parts of Herman Melville's *Benito Cereno* were plagiarized from an unfamiliar writer, Amasa Delano.⁷⁶⁹ Artists like Marcel Duchamp turned ready-made commercial goods and popular imagery into new and unconventional art.⁷⁷⁰ Andy Warhol's 're-use and recycle' pop symbols of familiar images, such as the Campbell's soup can and the Brillo box, became familiar works of appropriation. Jasper Johns's inspiration came from Duchamp; abstracted popular imagery of flags, numbers, and targets set the standards for American art.

A journalist of the *Boston Globe* summarizes the history of plagiarism as "Good writers borrow; great writers steal."⁷⁷¹ She argues that, "[T]he plagiarist may be the person who spots the germ of an idea lying in some obscure cranny, picks it up, dusts it off, and makes it into something memorable. Or he may copy an idea exactly but put it in a context that gives it new meaning."⁷⁷² This history of plagiarism radiates a truth: great works can transcend the limitations of the title appropriation. The use of imitation or copying, in itself, does not devalue one's work – the derivative can supersede the greatness of its parent when talent is applied. Good appropriation art is like a great work of Shakespeare; if the skill that goes into copying and transforming the image is exceptional – giving the work new refined perspective, public praise and recognition – the appropriation ceases to be solely characterized as such and becomes an extraordinary piece of fine art.

⁷⁶⁷ James Boyle, *The Search for an Author: Shakespeare and the Framers*, 37 AM. U. L. REV. 625 (1988). The author elucidates the surprise in the scholarly community when discovering that Shakespeare committed a sin called plagiarism. *Id.* at 628. "Surely a great artist would not have stopped to copy the works of his *inferiors*?" *Id.* (emphasis added). He argues that historical records show fifty-six claimants whose work Shakespeare is alleged to have adapted. There was also a visible lack of correspondence between Shakespeare's life and the work he produced. *Id.*

⁷⁶⁸ *Id.*

⁷⁶⁹ Voegtli, *supra* note 20, at 1215.

⁷⁷⁰ His most popular work is "L.H.O.O.Q.P", a painting featuring a copy of "Mona Lisa" with a mustache. *Id.* at 1214. A basic manufactured porcelain urinal was signed and titled by Duchamp as the "Fountain" (1917). A bicycle wheel mounted on a stool was titled "Roue de Bicyclette."

⁷⁷¹ Gaines, *supra* note 28 (quoting T.S. Eliot)

⁷⁷² *Id.*

The Legal Framework and the Reality of Copyright Law

Exclusive Rights of the Copyright Holder

Although recycling of our ancestor's wisdom appears intuitive, this adaptive conduct has been the source of legal tension.⁷⁷³ Despite copyright's attempt to balance intellectual property and free expression, appropriation art has not yet become the subject of legal protection. The Constitution provides that "Congress shall have power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."⁷⁷⁴ Copyrights law grants proprietary interests and exclusive property rights to authors of the original work. The protection granted is a limited monopoly over one's own work, which is intended to promote creativity and encourage creation by providing owners with economic incentives.⁷⁷⁵ Section 106 of the 1976 Copyright Act details six exclusive rights granted to copyrights owners, four of which apply to visual work:⁷⁷⁶ the right to reproduce one's work, the right to create derivative works based on the original, the right to make copies and the right to display the work publicly.⁷⁷⁷ Granting owner the right to financially profit from the original creates the greatest negative impact on appropriation artists, particularly the right to reproduce and prepare derivative works.

Since creative progress would be stifled if owners had complete monopoly over their works,

⁷⁷³ See *Campbell*, 510 U.S. at 575 (statement of Lord Elleborough) ("[W]hile I shall think myself bound to secure every man in the enjoyment of his copyright, one must not put manacles upon science.").

⁷⁷⁴ U.S. CONST. art. I, § 8, cl. 1 & cl. 8. Utilitarian justification seeks to provide incentives to creators in order to benefit the greater good of society. Argument is made that if incentives are lacking, people equipped with talent will be less inclined to waste time, money and energy simply for the sake of creation.

⁷⁷⁵ See *Sony Corp. of Am. v. Univ. City Studios*, 464 U.S. 417, 450 (1984) ("The purpose of copyrights is to create incentives for creative effort."). Due to the economic focus, infringement upon the copyrights owner is partly assessed by the harm caused to the owner's market and potential profits. See *id.* at 450-51. In *Sony*, the Court stated that noncommercial derivative works do not present the same economic danger to copyrights owners; therefore "the copyrighted work need not be prohibited in order to protect the author's incentive to create." *Id.* at 450.

⁷⁷⁶ 17 U.S.C. §106 (2005).

⁷⁷⁷ *Id.*

copyright law attempts to balance the availability of creative resources with the rights and interests of the original copyright owner. Copyrights never extend to the idea of the work, but only to its expression. In order to infringe on the rights of the copyright holder the essential element must be proved: the derivative work⁷⁷⁸ must bear substantial similarity to the original.⁷⁷⁹ It quickly becomes apparent that appropriation artists stand a great chance loosing in copyright holder's infringement action, since appropriated work often bears a significant resemblance to its original.

Statutory Doctrine of Fair Use

Although copyrights law has been increasingly softened to further artistic creation, appropriation art has not yet experienced the fruits of this movement.⁷⁸⁰ Affirmative defense of fair use provides a spark of optimism to appropriation art.⁷⁸¹ The doctrine of fair use allows a reasonable and limited use of a

⁷⁷⁸ Nimmer states that, "A derivative work consists of a contribution of original material to a pre-existing work so as to recast, transform or adapt the pre-existing work. This would include a new version of a work in the public domain, and abridgment, adaption, arrangement, dramatization, or translation." Melville B. Nimmer & David Nimmer, 1 NIMMER ON COPYRIGHT 13.03[A] (2004) (footnotes omitted)

⁷⁷⁹ Having substantial similarity to the original means that the derivative work possessed minimum contribution. *See id.* Added elements like a new rhythm, new title, change in medium, scale or size are too minimal to warrant legal recognition. *See id.* In determining substantial similarity one must ask whether the similarity relates to a substantial portion of plaintiff's work. *Id.* at 13.03(A)(e)(2). Further, the jury can also find substantial similarity if what is taken is qualitatively important. *Id.*

Alternatively, if a fair use defense is instigated successfully more than a substantial similarity is required for infringement. *See Campbell*, 510 U.S. at 588-589 (permitting parodist to copy the "heart" of the original because it is precisely the heart at which parody takes aim). *See also Nimmer, supra*, note 40, at 13.05(D) In some circumstances verbatim copying is permitted. Nimmer provides time-shifting of television programs, reverse engineering, reproduction for judicial proceeding and incidental reproduction as examples of permitted copying. *See also id.* at n. 440 which states that "*Sony Corp.* teaches us that the copying of an entire work does not preclude fair use *per se.*"

⁷⁸⁰ The fundamental reason appears to be the basic confusion of what appropriation art is.

⁷⁸¹ 17 U.S.C. §107 (2005)

copyrighted work without the author's permission in cases where the literal terms of the Copyright Act prohibit them.⁷⁸² The fair use doctrine was thought to be specifically "necessary to fulfill copyrights very purpose, 'to promote the Progress of Science and useful Arts.'" ⁷⁸³ It allowed courts to "avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which the law is designed to foster."⁷⁸⁴

Further, Section 107 contains an aperture for allowing appropriation art under its protection. Because fair use remained a judge-made doctrine prior to the passage of the 1976 Copyright Act,⁷⁸⁵ Section 107 is drafted broadly, purporting guidelines rather than a directive.⁷⁸⁶ The preamble to Section 107 explicitly states that fair use was intended for works of criticism, comment, news reporting, teaching, scholarship, or research. Purposes not explicitly stated are also covered by the fair use doctrine. Although appropriation art falls neatly within the first two purposes – criticism and comment – the court will not find fair use, unless it satisfies the four statutory factors: purpose and character of use, nature of the copyrighted work, the substantiality of the work used, and the economic effect on the copyrighted work. Supreme Court has noted that even if copying work falls within the preamble, the result merely tilts towards a finding of fair use; other factors still need to be satisfied.⁷⁸⁷

Similarly, the four statutory conditions provided by Section 107 are also not exclusive and may not be treated in isolation.⁷⁸⁸ Thus, no one factor has

⁷⁸² BLACK'S LAW DICTIONARY 617 (7th ed. 1999).

⁷⁸³ *Campbell*, 510 U.S. at 575.

⁷⁸⁴ *Id.* at 577 (quoting *Stewart v. Abend*, 495 U.S. 270, 236 (1990); Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Co., 621 F.2d 57 (2d Cir. 1980).

⁷⁸⁵ *Campbell*, 510 U.S. at 576. In *Folsom v. Marsh*, 9 F. Cas. 342 (CCD Mass. 1841), Justice Story determined fairness of copying by balancing the nature of the work, amount of material copied, and the economic detriment to the original work. *Id.*

⁷⁸⁶ Congress intended section 107 "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common-law tradition of fair use adjudication." H.R. REP. NO. 94-1476, at 66 (1976); S. REP. NO. 94-473, at 62 (1975).

⁷⁸⁷ *See Harper & Row, Publ.g. Inc. v. Nation Enter.*, 471 U.S. 539, 561 (1985) ("The fact that an article arguably is 'news' and therefore a productive use is simply one factor in a fair use analysis.")

⁷⁸⁸ *Id.* ("The text employs the terms 'including' and 'such as' in the preamble paragraph to indicate [their] 'illustrative and not limitative' function."). *See also*

greater weight or significance over another and the factors presented are merely explicit examples, “not an exhaustive enumeration.”⁷⁸⁹ The Supreme Court elucidated that “All [factors] are to be explored, and the results weighted together, in light of the purposes of copyright.”⁷⁹⁰ The Court has made it clear that it will not employ bright line rules to determine fair use;⁷⁹¹ the doctrine calls for a case-by-case analysis, granting judges discretion to balance the factors.⁷⁹²

Moral Rights of the Copyright Holder

Beyond the dilemma already present – profiting by appropriation of another’s artwork – there exists a conflict between the moral rights of the original artist and another’s right or freedom to comment or expand creatively by appropriation. The doctrine of Moral Right allows the court ability to prevent the use of the authors work when section 106A of the Copyrights Act is violated.⁷⁹³ Predicament specifically arises in section 106A(3)(A), which gives the author of a visual work the right to “prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor or reputation,” thus effectively ensuring appropriation art to come under violation of this section.⁷⁹⁴ The words of the statute allow the author to use this monopoly against critics, such as parodists or appropriationists, to suppress works and chill their speech. Accordingly, commentators have argued that Moral Right appear to clearly conflict with First Amendment right to freedom of speech and expression. The courts on the other hand, have not

New Era Publ’n Int’l. ApS v. Henry Holt & Co., 873 F.2d 576, 588 (2d Cir. 1989) (Oakes, Chief Judge, concurring)(“I emphasize non-exclusive”) (Treatise cited).

⁷⁸⁹ Nimmer, *supra* note 40, at [A].

⁷⁹⁰ Campbell, 510 U.S. at 578.

⁷⁹¹ *Id.* at 577.

⁷⁹² See Nimmer, *supra*, note 40, at [A].

⁷⁹³ Explicit protection of moral rights of attribution and integrity came recently with Congress’ enactment of the Visual Artists Rights Act of 1990 (VARA) on July 1, 1991; VARA was prompted by United States recent membership in the Berne Convention on moral right. Prior to VARA protection, federal copyright law offered minimal and indirect protection to maintaining the integrity of authors work. Plaintiff’s often sought relief through other state doctrines, such as invasion of privacy, defamation, unfair competition. The Lanham Act provisions were stretched to protect artist’s moral rights despite explicit federal law. See Gilliam v. American Broadcasting Co., 538 F.2d 14, 24 (2d Cir. 1976).

⁷⁹⁴ 17 U.S.C.S § 106A (2005)

found this conflict significant and have uniformly rejected First Amendment defenses in copyrights cases.⁷⁹⁵ The Supreme Court has stated that it sees no conflict between these rights, mainly, because First Amendment protections are already embodied in the Copyright Act.⁷⁹⁶

The Copyright Act does provide a degree of First Amendment protection, partly by allowing the idea immersed in a work to become copied, while preserving the author’s expression from exploitation. More importantly, section 106(A) explicitly states that it is *subject* to section 107, the Fair Use Doctrine. “In copyrights law, fair use itself is thought to represent the compromise, the ‘breathing space’ between copyright monopoly and First Amendment free expression interest.”⁷⁹⁷ Thus, in theory, a parodic work can withstand a moral rights attack through an affirmative defense of fair use.

Professor Geri J. Yonover argues that although *Campbell* rejected the presumption of fair use in parodic works, such a presumption should exist in the moral rights setting in order to properly balance interests served by copyrights law.⁷⁹⁸ Thus, in order to strike this balance, difficult cases would be resolved in favor of the parodist, since the author typically has a monopoly in this arena. He also proposes that affirmative defense of fair use in context of section 106A should allow the burden to shift upon the author to show that a parodist infringed upon their moral rights. Like defamation cases, where plaintiff bears the burden of proof, the author alleging violation of his right of integrity has similar interest and is in a better position to demonstrate infringement. For example, factors like the negative effect upon the work’s commercial market or damage to ones reputation are presumably uncovered by the author, serving the basis for his suit; consequently, no

⁷⁹⁵ See Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc., 600 F.2d 1184, 1188 (5th Cir. 1979) (“First Amendment is not a license to trammel on legally recognized rights in intellectual property.”); Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 758 (9th Cir. 1978), *cert. denied sub nom* (explaining that the artist’s idea was not what was being suppressed; rather, it was the copying of Disney’s protected expression).

⁷⁹⁶ Harper & Row, 471 U.S. at 560.

⁷⁹⁷ Geri J. Yonover, *Artistic Parody: The Precarious Balance: Moral Rights, Parody, And Fair Use*, 14 Cardozo Arts & Ent. L.J. 79, 120 (1996).

⁷⁹⁸ See *id.* at 122-23. Three interests are served in copyrights law: the protection of author’s personal and proprietary rights, the protection of artistic freedom to create new transformative works, and protection of societies interests in fostering science and creative works of art. *Id.* at 121.

additional burden is imposed.⁷⁹⁹ Professor Yonover argues that flexibility of section 107 allows for this development by permitting courts to “free[ly] tailor the fair use doctrine to the particular case.”⁸⁰⁰

The issue of moral rights in parodic works has received limited attention, *Campbell* case being one example. A legitimate argument can be made that section 106A should be subject to a fair use defense. In showing the use is fair under section 106A, the court would hold in favor of the parodist; allowing societies interests and artistic freedoms to outweigh authors right of integrity in cases of fair use. Congress, however, has questioned the effectiveness of a fair use claim under section 106A mainly due to the limited scope of work the section covers, i.e. visual art work only. But, if appropriation art were to come under fair use protection it would re-enforce the fair use doctrine as the balancing force between the original author and the enduring societal motivation to encourage creativity in the arts, and strengthen the force of section 107 in 106A, since appropriation art mainly manifests itself in visual works.

Unfortunately, appropriation artists are easy preys for moral rights suits, since appropriation art has not been recognized as a transformative artwork in copyright law. Equipped with no carved defense for appropriation art, artists like Koons, who have substantially copied an image, have just subjected themselves to a 106A violation by intentionally modifying and distorting the authors work. Appropriation artist’s only option to escape liability is to argue that author’s work was not of a “recognized stature,”⁸⁰¹ and even if it was, the derivative work was not prejudicial to the author’s honor and reputation. Unlike parodies, which are most effective when done with works that are well known and easily recognized, appropriation artists commonly choose familiar but non-esteemed images. Works like Koons’ “String of Puppies” thus stand a good chance arguing that the author’s work was not of a recognized stature.

However, appropriation works that do use well-recognized esteemed images, like the Mona Lisa,

⁷⁹⁹ See *id* at 120.

⁸⁰⁰ See *id* at 117.

⁸⁰¹ The term “recognized stature” is not defined by statute. Courts have largely adopted two test to determine stature: “(1) that the visual art in question has ‘stature,’ i.e., is viewed as meritorious, and (2) that this stature is recognized by art experts, other members of the artistic community, or by some cross-section of society.” [Martin v. City of Indianapolis, 192 F.3d 608, 612 \(7th Cir. 1999\)](#) (citing [Carter v. Helmsley-Spear, Inc., 861 F. Supp. 303, 325 \(S.D.N.Y. 1994\)](#)). This determination is often made using expert testimony. *Id.*

bear a substantial hardship of proving that the author’s integrity was not damaged. Although Congress allows the use of expert testimony to show whether the use in fact adversely affected the honor and reputation of the artist,⁸⁰² legislative history reveals that “while no per se rule exists, modification of a work of recognized stature will generally establish harm to honor or reputation.”⁸⁰³

Yonover uses a hypothetical of Leonardo v. Duchamp to illustrate how the battle would unfold in a moral rights suit, with Leonardo bringing a suit in late 1990’s against Duchamp for moral rights violation by portraying the Mona Lisa with a mustache. Although Yonover argues that Duchamp’s Mona Lisa, “L.H.O.O.Q.” is a parody, assume that the court fails to find L.H.O.O.Q. fair use. The appropriated work of Duchamp will most likely not succeed in the litigation, because the legislature holds a ‘quasi-presumption’ of harm to Leonardo’s reputation; L.H.O.O.Q. would quickly be in violation of section 106A(3)(A) of the Copyright Act.

Therefore, while appropriation artists can avoid moral rights suits when borrowing elements form “thin” works, they lack a defense when appropriating works of a recognized stature. Since appropriation artists commonly borrow everyday objects or familiar images rather than pieces of fine art, the biggest problem they face is a suit for infringing upon the exclusive rights of the copyright holder. Consequentially, recognition of appropriation art as fair use is vital to the fertility of post-modern art.

Evolving Case law on Parody and Fair Use

Application of the Fair Use Doctrine to a Parody – Pre-Campbell

After the Supreme Court decision in *Campbell v. Acuff-Rose Music, Inc.*, the recognition of parodies as critical works under Section 107, capable of fulfilling the statutory requirements of fair use, provides a greater probability that appropriation art will be recognized as warranting fair use protection in the future. Circuit and lower court cases preceding *Campbell* have found the fair use defense to be applicable to parodies.⁸⁰⁴ However, it was not until

⁸⁰² H.R. Rep. No. 514, 101st Cong., at 16 (1990), reprinted in 1990 U.S.C.C.A.N. 6915, 6919.

⁸⁰³ H.R. Rep. No. 101-514, at 14.

⁸⁰⁴ See, e.g., *Fisher v. Dees*, 794 F.2d 432, 440 (9th Cir. 1986) (“When Sunny Gets Blue,” a parody of “when Sunny Gets Blue,” was decided as fair use); *Elmer Music, Inc. V. Nat’l Broad. Co.*, 623 F.2d 252 (2d Cir. 1980) (“I Love Sodom,” a “Saturday Night Live” parody of “I Love New York” was decided as fair use).

Campbell that a parody was confirmed to have an obvious claim to the fair use defense. The Court in *Campbell* announced that it lines up with other courts that have recognized legal protection for parodies when it held that parody is fair use within the meaning of Section 107.⁸⁰⁵

Prior to *Campbell*, the Second and the Ninth Circuit had competing views about what kind of parody would be allowed fair use protections. Second Circuit held a broadminded view, while the Ninth Circuit was more moderate. However, both Circuits balanced out by the time *Campbell* was decided.

The Ninth Circuit in *Benny v. Lowe's, Inc.*⁸⁰⁶ first rejected the fair use defense for works of parody, burlesque, and satire. The court enjoined the broadcast of comedian Jack Benny's "Autolight," a burlesque of "Gas Light," holding that the fair use defense was not applicable to parody or burlesque works.⁸⁰⁷ Hence, the court followed the substantial similarity test carved out for derivative works.⁸⁰⁸ Since the television burlesque clearly retained substantial similarity to the copyrighted work, the court reasoned it was an infringement on the original.⁸⁰⁹ The case went up to Supreme Court but did not produce a precedent because an equally divided court affirmed it.

The Ninth Circuit changed its outlook in *Walt Disney v. Air Pirates* and criticized their decision in *Benny* as unjustified.⁸¹⁰ The court admittedly stated that it "necessarily disagree[d] with [Benny] dictum that a parody is treated no differently than any other taking."⁸¹¹ The Ninth Circuit did however preserve *Benny* in cases of near-verbatim copying.⁸¹² In the absence of near-verbatim copying, the court implemented the "recall or conjure up" test, allowing fair use if the parodist did not take a greater amount than necessary to "recall or conjure up" the object of the parody.⁸¹³

⁸⁰⁵ 510 U.S. at 579.

⁸⁰⁶ *Benny v. Lowe's, Inc.*, 239 F.2d 532 (9th Cir. 1956), *aff'd* by an equally divided court, 356 U.S. 43 (1958).

⁸⁰⁷ *Id.* at 537.

⁸⁰⁸ *Id.*

⁸⁰⁹ *Id.*

⁸¹⁰ *See* *Walt Disney Prod. v. Air Pirates*, 581 F.2d 751, 757 (1978)

⁸¹¹ *Id.*

⁸¹² *See id.*

⁸¹³ *Id.* In *Walt Disney*, defendant argued that, "the humorous effect of parody is best achieved when at first glance the material appears convincingly to be the original, upon closer examination is discovered to be quite something else." *Id.* at 758. The court responded, stating that the convenience of having the

The "recall or conjure up" test used in *Walt Disney* was adopted from an earlier Second Circuit case, *Berlin v. E.C. Publications, Inc.* There, the Second Circuit found defendant's publication of 25 song-parodies fair use.⁸¹⁴ The court reasoned:

Parody and satire are deserving of substantial freedom—both as entertainment and as a form of social and literary criticism...*At the very least*, where as here, it is clear that parody has neither the intent nor the effect of fulfilling the demand for the original, and where the parodist does not appropriate a great amount of the original work than is necessary to 'recall or conjure up' the object of his satire, a finding of infringement would be improper.⁸¹⁵

Although both Circuits held a similar standard after the decision in *Walt Disney*, the Second Circuit went further in *Elsmere Music, Inc. v. National Broadcasting*. The District Court in *Elsmere Music* held that the song "I Love Sodom," a parody of "I Love New York," performed on a television show "Saturday Night Live," was fair use.⁸¹⁶ The court reasoned that the parody was not in competition with plaintiff's work and thus had not affected the original's value or substituted the demand for it.⁸¹⁷ Given the nature of use, the court allowed parody and satire to have a more extensive use of the original than mere fictional or dramatic work.⁸¹⁸ The court also suggested an object of the parody need not be the copyrighted work itself; rather the parodist may "use the original as a known element of modern culture and contribute something new for humorous effect or commentary." The Second Circuit not only affirmed the district court, but also set the notion of "conjuring up" the original as a *floor*, rather than a ceiling.⁸¹⁹ The court stated that "'conjure up' came into the copyright law *not as a limitation* on how much of an original may be used... A parody is entitled at least to 'conjure up' the original."⁸²⁰

"best parody" was not permissible, given that copyrights owner's interest are involved. *Id.*

⁸¹⁴ *Berlin v. E. C. Publ'n, Inc.*, 329 F. 2d 541, 545 (2d Cir. 1964).

⁸¹⁵ *Id.* (emphasis added).

⁸¹⁶ *Elmese Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd*, 623 F. 2d 252 (2d Cir. 1980)

⁸¹⁷ 482 F. Supp. at 747.

⁸¹⁸ *Id.* at 745.

⁸¹⁹ 623 F.2d at 253.

⁸²⁰ *Id.* (emphasis added).

This decision in *Elsmere Music* arguably would have planted the first seeds for appropriation art to come under fair use protection, particularly because the court allowed the taking of copyrighted work in order to criticize something else. The court focused on whether parody or critique existed in the work in question, rather than whether it was a parody or critique of the work copied.

A year later, the Second Circuit in *MCA, Inc. v. Wilson* retracted from its holding in *Elsmere Music* and restricting its range.⁸²¹ The court made clear that although the copyrighted work need not be the sole object of the parody and may reflect on life in general, the copyrighted work must *at least in part* be the object of the parody.⁸²² The court held against the parodist, stating, “we are not prepared to hold that a commercial composer can plagiarize a competitor’s copyrighted song, substitute dirty lyrics of his own, perform it for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society.”⁸²³

The Second Circuit did however keep intact the understanding that the “conjure up” test did not go far enough. The Ninth Circuit finally agreed in *Fisher v. Dees*. The court in *Fisher* stated that requiring parodists to copy only the amount necessary to evoke initial recognition is overly constraining.⁸²⁴ The Ninth Circuit allowed an artist to use an amount greater than strictly necessary to conjure up the original and still be entitled to a fair use defense.⁸²⁵ Thus at the time of *Campbell*, both the Ninth and the Second Circuits adhered to a rule that extended the “conjure up” test to include something more than necessary to recognize the original, but was less than wholesale plagiarism.

Courts focus on commercial use of derivative work presented another hurdle for parody and appropriation art. The Ninth Circuit’s decision in *Universal City Studios, Inc. v. Sony Corp. of America*, interpreted structure of Section 107 too

narrowly. The decision implicated the success of an infringement claim solely based on a derivative work’s existence in the commercial market. Focusing on the productive nature of copyrighted material, the court labeled fair use as the “productive use doctrine.”⁸²⁶ The court held that reproduction for intrinsic purposes was not fair use, in the face of other jurisdictions coming to allow fair use in cases of personal use.⁸²⁷ The court reasoned that to authorize personal use would not only distort the fair use doctrine, but also the economic incentives served by the copyright scheme.⁸²⁸ The Ninth Circuit in *Sony*, by classifying the work as “productive,” carried the risk of future misreadings that the fair use doctrine is to be applicable only for socially useful purposes.⁸²⁹

The Supreme Court, in reversing *Sony*, stated that the fair use doctrine is not that “rigidly circumscribed.” The Court ultimately held that home time-shifting is fair use and the Ninth Circuit erred in construing the statute to bar such conduct. The court, however, did acknowledge that “productive” and “non productive” use may be applied for balancing, although it shall *not* have a determinative impact on the outcome. The *Sony* opinion made clear that the derivative work’s commercial purpose was not a determinative factor against finding fair use. However, the Supreme Court’s opinion in *Harper & Row, Publishers, Inc. v. Nation Enterprises* proved to dilute this maxim, moving back toward the Ninth Circuits decision in *Sony*. Focusing on the commercial disadvantage of the copyrights owner, the Court held against fair use. *Nation*’s publication was found by the court to have the intent of superseding the commercial value of petitioner’s right to first publication.⁸³⁰ The court stated that, “The crux of the profit/nonprofit distinction is not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.”⁸³¹ *Harper & Row*’s inquiry took account not only harm to the original, but also harm to the market

⁸²¹ See *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (2d Cir. 1981)(holding “Boggie Woogie Bugle Boy,” a parody of “Cunnilingus Champion of Company C” not fair use). See also *Warner Bros., Inc. v. Am. Broad. Co. Inc.*, 654 F.2d 204, 211 (1981) (“while the defense might be applicable to those isolated instances in which a nearly identical line from the plaintiffs’ script, or express reference to one of the plaintiff’s characters was made, we question whether the defense could be used to shield an entire work that is substantially similar to and in competition with the copyrighted work.”).

⁸²² *Id.*

⁸²³ *Id.*

⁸²⁴ *Fisher v. Dees*, 794 F.2d 432, 438 (9th Cir. 1986).

⁸²⁵ *Id.* at 439.

⁸²⁶ *Id.* at 970.

⁸²⁷ *Id.*

⁸²⁸ *Id.*

⁸²⁹ Today, Supreme Court insists on using the phrase “transformative use,” rather than “productive use.”

⁸³⁰ *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985). In *Harper & Row*, President Ford gave petitioner exclusive rights to his unpublished 7,500 word excerpts. *Id.* at 542-543. Petitioner signed a licensing agreement with Time Magazine so that Time can publish the excerpts. *Id.* at 543. *Nation Magazine* got a hold of the excerpts and published 300-400 words in quotes in a 2,250-word article. *Id.*

⁸³¹ *Id.* at 562.

of its derivative works.⁸³² Because Nation published only five percent of the copyrighted excerpt, the courts ruling indicated that the commercial nature of Nations publication played a big factor in the decision.

The Supreme Court focused too strictly on the economic profits the copyright owner stood to gain from having a monopoly on the work. As a result, derivative works stood in jeopardy of infringement simply because they lacked the copyright owner's permission. Although *Sony* and *Harper & Row* did not deal with artistic or critical works, the cases had a negative effect on parodies since the majority of parodic works bore commercial characteristics. It was not until *Campbell* decided eight years later that this scheme began to change.

Epoch of Campbell v. Acuff-Rose Music, Inc.

In *Campbell*, Acuff-Rose Music, Inc., the copyright holder of Roy Orbison's rock ballad, "Oh, Pretty Woman," filed a suit against a rap music group named 2 Live Crew for releasing an album titled "As Clean As They Wanna Be," which featured a parody of "Oh, Pretty Women."⁸³³ The parody song, titled "Pretty Woman," was done in a rap genre, starting out with the original lyrics but "quickly degenerat[ing] into a play on words, substituting predictable lyrics with shocking ones."⁸³⁴ The song joined reference and ridicule to comment on the ugly reality of street life, sex, and paternal responsibility, which the sentimental feel of the original had ignored.⁸³⁵ 2 Live Crew pitched the parody rap song to Acuff-Rose Music prior to releasing their album, offering payment of a fee for the use of the song. Acuff-Rose Music refused to license 2 Live Crew the right to use the song. 2 Live Crew recorded the album without Acuff-Rose Music's permission.⁸³⁶ This suit followed.

The District Court found 2 Live Crew's song a fair use, however, the Court of Appeals for the Sixth Circuit reversed. The Sixth Circuit reasoned that the District court failed to put enough emphasis on the commercial nature of the parody and the economic detriment the parody will have on the original. It held that it was the "blatantly commercial purpose [which] prevent[ed] this parody from being a fair use."⁸³⁷ The Supreme Court's reversal signified a fall in the importance of commercial intent of a derivative work.

⁸³² *Id.* at 568.

⁸³³ 510 U.S. at 573.

⁸³⁴ *Id.* at 582 (quoting *Acuff-Rose Music v. Campbell*, 745 F. Supp. 1150, 1155 (M.D. Tenn. 1991)).

⁸³⁵ *See Id.* at 583.

⁸³⁶ *Id.* at 572.

⁸³⁷ *Id.* at 1439.

Clarifying its decision in *Sony* and *Harper & Row*, the court stated that *Sony* stood for the proposition that a determination of commercial or educational character of the work is "not conclusive," while *Harper & Row* held that commercial use was "a separate factor tend[ing] to weigh against a finding of fair use ... [b]ut that [was] all."⁸³⁸

In determining whether the first factor was satisfied, the presumption against commercial use was finally defeated. The court made clear that educational use *does not* work to ones advantage anymore than commercial use works to exclude a work from a fair use defense.⁸³⁹ The court sided with Justice Brennan's dissent in *Harper & Rows*; it reasoned that since creative works are generally conducted for profit in this country, the commercial presumption "would swallow nearly all of the illustrative use[s] listed in the preamble paragraph of §107," since such works "are generally conducted for profit in this country."⁸⁴⁰ Additionally, "being denied permission to use the original work [did] not weigh against a finding of fair use."⁸⁴¹

Putting aside its indecisiveness in *Benny*, the court unanimously held parody as having "an *obvious* claim to transformative value."⁸⁴² The Court provided the first factor with a test for judging parodic works. The test asked, "whether a parodic character may *reasonably be perceived*."⁸⁴³ The phrase "reasonably perceived" meant that the court would not involve itself in determining whether a parody is in good or bad taste.⁸⁴⁴ The court however did cater to *creative or artistic works* in general, by phrasing the issue in deciding the first factor to be, "whether and to what extent the new work is '*transformative*.'"⁸⁴⁵ Embracing Justice Story's formulation, the court explicated that the inquiry should determine "whether the new work merely 'supersede[s] the objects' of the original creation, or instead adds something new, with a further purpose or a different character, altering the first with new expression, meaning or message."⁸⁴⁶ The degree of transformation would mediate against the significance of other factors like commercial use.⁸⁴⁷

The opinion in *Campbell* was sensitive to appreciating parodies and saw such works to be the source behind the fair use doctrine. The Court stated

⁸³⁸ *Id.* at 585. (emphasis added).

⁸³⁹ *Id.* at 584.

⁸⁴⁰ *Id.*

⁸⁴¹ *Id.* at 585 (emphasis added).

⁸⁴² *Id.* at 579 (emphasis added).

⁸⁴³ *Id.* at 582 (emphasis added).

⁸⁴⁴ *Id.*

⁸⁴⁵ *Id.* at 579 (emphasis added).

⁸⁴⁶ *Id.*

⁸⁴⁷ *Id.*

that, “such works ... lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright.”⁸⁴⁸ Focusing on public benefit, the Court recognized that a parody has *social value* by “shedding light on an earlier work” through recognition or creation of new meaning, while “in the process, creating a new one.”⁸⁴⁹ In light of this purpose the Court set the floor for a parody, making it clear that work simply composed of smoke and mirrors will not be protected by fair use. The Court explained that if:

[T]he commentary has no critical bearing on the substance or style of the original and the infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another’s work diminishes accordingly, and other factors, like the extent of its commerciality, looms larger.⁸⁵⁰

Analyzing the substantiality of the original song used by 2 Live Crew, both the first and fourth factor had bearing on the analysis. *Campbell* confirmed that the parodic character of the derivative work was the determinative feature in deciding how much of the original song was allowed to be copied.⁸⁵¹ Because the parody went to the “heart” of the original and derived its force from “the tension between a known original and its parodic twin,” it was allowed greater freedom of imitation.⁸⁵² The Court went beyond extending the “conjure up” test and held that copying the “heart” of the original or its “most distinctive or memorable features” was *not* excessive in the context of parodies.⁸⁵³

Normally a derivative work that was composed largely of the copyrighted material stood to supersede and fill the demand for the original. The court in *Campbell* was skeptical that parodic work would present a similar danger, since “the parody and the original usually serve *different* market functions.”⁸⁵⁴ *Campbell* validated this important distinction by stating that, “there is no protectable derivative market for criticism.”⁸⁵⁵ Realizing that a copyright holder would unlikely make a mockery of their own work, *Campbell* shifted the focus to distinguishing derivative works that are “biting criticisms” that

⁸⁴⁸ *Id.*

⁸⁴⁹ *Id.*

⁸⁵⁰ *Id.* at 580.

⁸⁵¹ *See id.* at 586-587.

⁸⁵² *Id.* at 588.

⁸⁵³ *Id.*

⁸⁵⁴ *Id.* at 591 (emphasis added).

⁸⁵⁵ *Id.* at 592. The case on remand was never published.

merely suppress the demand for the original from works that infringe on owner’s copyright and profits.⁸⁵⁶ The court unfortunately never made a decision on this fourth factor largely because 2 Live Crew’s song was not only a parody, but was also composed of rap music. The rap component of the parody affected the original’s derivative market and the case was remanded to gather further evidence.⁸⁵⁷

Although the Court in *Campbell* made a fair use defense more accessible to artistic or creative works, appropriation art still did not meet the standard to come under Section 107’s protection. *Campbell* held that if transformative use was not reasonably perceived, or if transformative use did not reflect partly on the original, factors like commercial use would be weighed against the derivative work, specifically when the work consisted of substantial copying.⁸⁵⁸ Although the court held that market harm could not be inferred from pure parodic work, mere duplication for commercial purposes still held the “presumption” of market harm under *Sony*.⁸⁵⁹ In order to clearly understand why appropriation art stood little to gain from *Campbell*’s holding, it is important to understand the fundamental problem appropriation art faces in copyright law: parody and appropriation art is being confused as a single form of expression.

Appropriation Art in the Context of *Campbell v. Acuff-Rose Music, Inc.*

Parody vs. Appropriation Art

Parody and appropriation art parallel each other in that they both function to comment or criticize. However, while seeking a similar end, they use different means to achieve it. A parody needs to “mimic the original to make its point,” because it is the original which parody uses as its object of analysis and comedic mockery.⁸⁶⁰ Thus it is logical that *Campbell* requires “the heart of any parodist’s claim ... [to use] some element of a prior author’s composition to create a new one that, at least in part, comments on that author’s work.”⁸⁶¹ Further, a work of a recognized stature is often used because a parody requires the audience to understand what exactly is being parodied. Parody’s use of a popular icon favors courts finding fair use. Conversely, appropriation art commonly copies a more discrete source and attempts to erase all signature of the

⁸⁵⁶ *Id.*

⁸⁵⁷ *See id.* at 592-593.

⁸⁵⁸ *See id.* at 580, n.24.

⁸⁵⁹ *See id.* at 591.

⁸⁶⁰ *Id.* at 580-581.

⁸⁶¹ *Id.* at 580.

author; thus failing to comment, at least in part, upon the original.

Unlike a parody, appropriation art does not usually criticize or comment on the object that it copies. Rather, it uses the copied element not for its literal meaning, but for (a) what the object implicitly or obscurely stands for or represents in our culture; (b) what effect the object has upon our psyche or in general; or (c) for the way its meaning furthers a different one that the artwork intends to express. “[W]hereas parody is a degraded version, dependent almost entirely on its source for its significance, appropriation is, by design, the conceptual equal of its source. Appropriation transcends parody because it is a well-grounded and conscious attack on traditional notions of originality and authorship in art.”⁸⁶²

A parody is more palpable and in your face, whereas appropriation is restrained. Further, since parody’s use of distortion and comic effect makes it detectable to an ordinary observer, *Campbell*’s requirement that parodic character be “reasonably perceived” tailors to the notion of a parody. By contrast, appropriation art uses more subtle techniques, such as, placement, coloration and mood setting. Allegory is employed in appropriation to communicate a serious and important message who’s depth lies in its subtlety. The message is often insinuating and may be directed towards a selective audience. Composition of the piece may be so carefully planned so that only slight suggestions point to its intended message.⁸⁶³

The most problematic and least sympathetic aspect of appropriation art is its virtually verbatim copying of the original. Allegorical art requires that

⁸⁶² See Carlin, *supra* note 19, at 129 n. 106.

⁸⁶³ See KAREN LUCIC, CHARLES SHEELER AND THE CULT OF THE MACHINE (1991). In Charles Sheeler’s works, his message often went unnoticed or was merely questioned to the actuality of its existence. Charles Sheeler was the first American artist to embrace the iconography of the machine. Although his work did not feature copyrighted material, he serves as a good example of an artist whose art carried a secondary message that was scarcely discernable. Sheeler was first thought to celebrate the age of the machine, while later critics viewed the murkiness of Sheeler’s art as questioning the predominance of machine in our society. Sheeler used idiosyncratic and oblique angle, to obscure object’s functionality. For example, “New York, Park Row Building” is a photograph of skyscrapers. Ironically, the skyscraper that gets the most light possesses only one window at the bottom of the shaft. The photograph explores the troubling implications of the urban environment and evolving displacement of the need for human light.

the entire image be used in the new artwork. “Replication of the idea of an everyday signifier alone is insufficient since the expression and idea of the symbol have become inseparable.”⁸⁶⁴ In copyright law, however, *Campbell* only permits for copying the original’s central features. Although this allows parodists greater freedom to use more of the original than allowed prior, it creates a significant problem for appropriation art. The difficulty is further magnified, because four fair use factors are co-dependent of one another. Substantial use acts not only as a third factor, it also holds its force in determining factors one and four.

It becomes apparent that the Supreme Court in *Campbell* tailored their opinion to provide protection only to a parody. Appropriation art has attempted to place itself in a glove that it does not fit into. Rather than designing a different standard for judging appropriation art, the Court paired allegorical expression with parody. Consequently, appropriation artists have become misconstrued as bad faith copyists and frauds. The problem is most apparent in *Rogers v. Koons*.

Finding Originality and Transformative Value in Appropriation

An important case in appropriation art surfaced prior to *Campbell*. Though the Second Circuit tended to be more sensitive to artistic expression, appropriation art was an unfamiliar form of artistic expression in copyright law. The Second Circuit did not hesitate in rejecting the fair use defense in *Rogers v. Koons*.

Koons was a recognizable artist and sculptor who came upon Rogers copyrighted photograph of “Puppies” in a tourist-like card shop.⁸⁶⁵ Koons believed the image to be common placed and familiar. He described the image to be “part of the mass culture-- ‘resting in the collective subconsciousness of people regardless of whether the card had actually ever been seen by such people.’”⁸⁶⁶ Koons used Rogers’ picture for his sculpture titled “String of Puppies.” Rogers filed an infringement

⁸⁶⁴ Roxana Badin, Comment, *An Appropriate(d) Place in Transformative Value: Appropriation Art’s Exclusion from Campbell v. Acuff-Rose Music, Inc.*, 60 BROOK. L. REV. 1653, 1669 (1995).

⁸⁶⁵ *Rogers v. Koons*, 960 F.2d 301, 304-05 (1992). Koons work sold for high prices, some over \$100,000. Some praised him to be a “modern Michelangelo.” *Id.* at 504.

⁸⁶⁶ *Id.* at 505. The card had resemblance to other pictures of people holding animals that Koons collected.

suit upon seeing Koons' sculpture in the *Los Angeles Times*.⁸⁶⁷

Koons attempted to shield his work under fair use by alleging that the "String of Puppies" was a parody of the original. The Second Circuit disagreed, deciding all the factors of fair use against Koons. The court held that not only did the appropriation not successfully meet the standards of a parody; *it was not a parody at all*.⁸⁶⁸ The court stated that, "it was not really the parody flag that appellants [was] sailing under, but rather the flag of piracy."⁸⁶⁹ Circumstances of the case dictated that Koons acted in bad faith by exploiting the original for profit making motives.⁸⁷⁰ More importantly, the sculpture copied the essence of the original to a far greater extent than necessary. The court determined that it must not only inquire into the harm presented to the original, but also its derivative market. Since the court assessed the sculpture to be more or less a copy of the original in a different medium, it found that Koons' work infringed on the original's derivative market. In sum, the Second Circuit saw the case as nothing more than "high-priced art."⁸⁷¹

The Second Circuit in *Koons* appeared to acknowledge that "String of Puppies" positioned itself in the post-modern movement of saturated mass-media and mass-production. However, the court failed to make any mention of the sculpture's allegorical quality in its legal opinion; it held its analysis in the confines of a parody. Once parodic effect was not found, the court did not attempt to explore the possibility that the sculpture could be analyzed in terms of two preambles in Section 107, criticism and comment. Rather the court stated that because the sculpture was not a parody, examining the other four factors was not necessary under this heightened standard.⁸⁷² Reading *Rogers* in light of *Campbell*, the Second Circuit failed to realize characteristics in Koons' "String of Puppies" that may possibly mitigate in favor of fair use.

For example, *Campbell* reasoned that parodic works do not compete in the same market as the

original or its derivative, largely because the original artists will unlikely criticize their own work.

Similarly, appropriation art commonly undertakes a serious critique of qualities inherent in the original, even though the artist does not have the original as the object of its criticism. As a result, an author will probably not be attracted to license his copyrights to allegoric works. An argument can be made that the copyright holder stands to profit more from a parody than appropriation art, since it is easier for an author to make fun of his work than to withstand a serious criticism, which allegoric work offers. Nevertheless in *Rogers*, the Second Circuit held that such work infringed not only on the market of the original, but also its derivative work. Yet, the "Sting of Puppies" did not pose harm to the market of the original, since Koons' sculpture was a commissioned, limited edition work.⁸⁷³

Furthermore, one commentator suggests that the sculpture was not substantially similar to the original. While the postcard was a black and white photo with a couple holding a thread of puppies and smiling, Koons' work was "fabricated from polychrome and wood, is larger than life-size" sculpture featuring a couple with "clown faces painted in garish colors with daisies in their hair," holding eight "gigantic blue puppies sporting bulbous noses." The commentator concluded that the, "String of Puppies is far from an exact replica of the underlying photograph...Gone is the 'charming' and cuddly warmth of Rogers photograph, and in its place is a garish, perhaps horrifying, perhaps hilarious."⁸⁷⁴

"String of Puppies" sculpture was never meant to be a parody, but it was appropriation art. Koons took a photo of an image that would not normally be considered art by the artistic community and transformed it, through sculpting media, into the art realm. By forcing an image, which every-day-folk consider "pretty" or "cute," into an artistic medium, the sculpture stood to express what constitutes the 'art of the mediocre.' The commentator notes, that it was precisely those "charming" features that the sculpture attempted to distort.⁸⁷⁵

Its important to emphasize that appropriation art does not purport to improve the original. Rather,

⁸⁶⁷ *Id.* at 305.

⁸⁶⁸ *See id.* at 310 ("[E]ven given that 'String of Puppies' is a satirical critique of our materialistic society, it is difficult to discern any parody of the photograph 'Puppies' itself.").

⁸⁶⁹ *Id.* at 311.

⁸⁷⁰ *Id.* The court found Koon actions of tearing off the copyrighted mark before sending it to Italian artisans as militating against fair use because the act was perceived by the court to be in bad faith. *Id.* at 309.

⁸⁷¹ *See id.* at 312.

⁸⁷² *See* 960 F.2d at 311. The court went ahead with the analysis anyway.

⁸⁷³ In addition, Koons did not take advantage of making postcard reproductions.

⁸⁷⁴ Lynne A. Greenberg, *The Art of Appropriation: Puppies, Piracy, and Post-Modernism*, 11 *CARDOZO ART & ENT. L. J.* 1, 26-27 (1992). Tentatively, "[i]t is not ... the idea of a couple with eight small puppies seated on a bench that is protected, but rather Rogers expression of this idea ... placement, ... particular light ... expression of the subject...that makes it original and copyrightable." *Id.*

⁸⁷⁵ *See id.* at 27.

appropriation art attempts to *transform* an image, not into something better, but into something *else*. For example, a common technique in appropriation art is to take something that is not a work of art *per se* (but does express or represent a predominant idea in our society) and put it into an artistic framework. Here, you are not necessarily making the new work better; your main goal is to move the image out of context into an unfamiliar place. Duchamp's "Fountain" is a good example. A urinal is a urinal is a urinal. Displaying a urinal in a gallery does not make that particular urinal any better or more improved than another one. The *goal* of the "Fountain" was to show transformative value.

Similarly, Rogers photograph, "Puppies," was a good professional photograph for its assortment and aligned well with public psyche. The picture, however, was not a fine artwork; not because it was not good enough, but simply because that was not what it was. Koons, by transforming it into a sculptured artwork, did not intend necessarily to make it better. The goal was to make something *different* out of it. The sculpture no longer featured cute ordinary string of puppies with their owners; rather, a new mood emerged. A well-photographed image, which appeared familiar, was placed it into a different context, where the image no longer felt easy on the eye, but out of its context. Koons' attempt to turn the image into art *allowed* the artist to achieve his intended goal: to transform it into a *new* expression.

The Insignificance of Artistic Style in Copyright Law

The Second Circuit decision in *Rogers* signified another oversight in the copyright law: the lack of artistic style in determining derivative work's transformative value. Evidence of this oversight is best displayed in two cases dealing with the issue of originality in a derivative work: *Alva Studios, Inc. v. Winninger* and *North Coast Industries v. Jason Maxwell*.

In *Alva Studios*, the Second Circuit upheld copyright protection for a reduced scale reproduction of the famous copyrighted sculpture, Rodin's "Hand of Good."⁸⁷⁶ Although the derivative work was the verbatim copy of the original, the court reasoned that because reducing the sculpture to such exactitude required great skill and originality, the plaintiff had a valid copyright to the work.⁸⁷⁷ Nimmer suggests that if this were not a well-esteemed sculpture, it would have fell below court recognition.⁸⁷⁸

⁸⁷⁶ *Alva Studios, Inc. v. Winninger*, 177 F. Supp. 265, 267 (2d Cir. 1959).

⁸⁷⁷ *Id.*

⁸⁷⁸ *See* Nimmer, *supra* note 40, §3.03 at (C)(2).

A Ninth Circuit decision in *North Coast Industries* involved the issue of whether Style 7114, which was inspired by Mondrian's designs in the Yves St. Laurent's cloth collection, was copyrightable.⁸⁷⁹ Style 7114 was in the exact style of Mondrian painting, but had a different placement of geometric shapes.⁸⁸⁰ The Ninth Circuit, reversing district courts decision, concluded that it was copyrightable.⁸⁸¹ The court reasoned that if we would accept the changes made to Style 7114 as trivial, "we would be forced to conclude that Mondrian's creativity with geometric shapes ended with his first painting, and that he went on to paint the same painting a thousand times."⁸⁸²

Both *Alva Studios* and *North Coast Industries* suggest that artistic style plays no factor in copyright law when determining the degree of originality and transformation the new work encompasses. Communal understanding in the artistic community is not aligned with copyright law. A trademark style adopts its own value in a given work. Artist's style bears great importance in the artistic community to one's success and admiration. Martha Buskirk elucidates:

[T]he value of the individual work of art is dependent on the name of the artist connected with it; and through the importance of the artist's name is based on the quality associated with his or her previous work, once the artist's name becomes a label given to an oeuvre it can acquire an increasingly abstract value unto itself. Similarly, as traditional notion of artistic skill are replaced by artistic styles based on a more conceptual working method, the successful artist establishes his or her sole right to a particular style or method – a "trademark" style – and other who attempt to use the same means are dismissed as mere imitators.⁸⁸³

If copyright law were to recognize artistic style in its framework, an artist's trademark technique

⁸⁷⁹ *N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1033 (9th Cir. 1992).

⁸⁸⁰ *Id.*

⁸⁸¹ *Id.* at 1035.

⁸⁸² *Id.*

⁸⁸³ Buskirk, *supra* note 24, at 106-07. Under Buskirk's analysis if a court was to decide these two cases with greater sensitivity to the originality of style, Style 7114 would most likely be found to be a mere imitation. The miniature sculpture of "Hand of God" however may still hold its force, given the amount of skill involved in its making.

could arguably be used in *Campbell's* "transformative value" test. If that was to occur, the "String of Puppies" texture and stylistic changes, if distinctive enough, would assist in determining the works transformative value. Thus, a sensible standard for judging appropriation art in the context of Section 107 could be reached, by allowing artistic style to be factored into the transformative value analysis.

Conclusion

Arguably, because of *Campbell's* emphasis and broad characterization of "transformative value," *Campbell* opens a small door to other creative works. Appropriation art, even in today's framework, may in certain circumstances be granted fair use protection.⁸⁸⁴ For example, assume Koons, rather than making a realistic sculpture called "String of Puppies," made an *abstract* sculpture called "Juxtaposition of Puppies." The sculpture now has edgy corners coming from different angles (similar to Picasso's cubism) with some clear suggestions to Rogers photographic image. The sculpture also sets a solemn and peculiar mood. Comparatively, "Juxtaposition of Puppies" has a greater degree of variation from the original and its "String of Puppies" twin. In addition, it has a more distinctive look and style. If an infringement suit is brought on behalf of Rogers, "Juxtaposition of Puppies" stands a more promising chance of meeting *Campbell's* requirements. A jury can now find its transformative value "reasonably foreseeable," since it no longer looks like a copy of the original in a different medium. An ordinary observer can recognize the sculptures transformative nature. The sculpture will also unlikely effect the market of the original in any significant way, because it is a limited edition and its eerie character deters licensing of copyrights to this form of derivative art.

Though *Campbell* limited its analysis to parody's, thus shining out appropriation art, its opinion did add several characteristics to the fair use doctrine in favor of creative and artistic work. Transformative value standard now provides room for other non-parodic creative works to fulfill the first factor of Section 107. Further, the Court's recognition and emphasis that a parody serves an important public function by criticizing or shedding new meaning on the original through humor or mockery, provides appropriation art with some hope that its social value will soon be legally recognized.

⁸⁸⁴ Assuming that transformative value test does not only in cases of parody.

When Age Matters: The Need for Courts to Apply Individual Assessments in Response to the Age Limitations Placed on Learning Disabled Student Athletes

By: Andrew Plotkin

Imagine a young man who stands six feet four inches tall and weighs 280 pounds. He has waited his entire life to play his senior year of high school football. Now imagine you have to tell him he can't fulfill his dream because he was born five days past an age deadline. Jarrett is a football player at Spring Valley High School who has been identified as having a learning disability. As his senior year in high school approaches, Jarrett looks forward to utilizing his years of playing experience and his mature physical build to help his team have a successful season. He can run a 40 yard dash in 5.3 seconds. Jarrett hopes to use his quickness and large frame to dominate his opponents with tough blocking, quick cutting, and fast running. While he might not be the best player in the conference or even on his team, every young player such as Jarrett wants to impress the collegiate scouts during their senior year in the hopes of playing college football after high school.

Due to his academic performance, Jarrett's teachers recommended retention in the first and sixth grade.⁸⁸⁵ In the eighth grade Jarrett was diagnosed with learning disabilities relative to math and language.⁸⁸⁶ In order to accommodate Jarrett's learning disability an individualized education plan (hereafter "IEP") was created specifically to meet his individual needs which followed him throughout his academic career.⁸⁸⁷

Jarrett has been playing football for Spring Valley High School for the past three seasons. Before his senior year the executive director of the West Virginia Secondary School Activities Commission (hereafter "WVSSAC") ruled that Jarrett was ineligible to participate in any high school athletics during his senior year based on West Virginia Code of Statute Regulation 127-2-4.1. This regulation provided that "a student who becomes 19 ... before August 1st [of the following academic school year] shall be ineligible for interscholastic competition."⁸⁸⁸

Jarrett celebrated his 19th birthday on July 27th, five days before the age regulation cut-off

date set forth in the West Virginia Code. The principal of Jarrett's high school submitted written inquiry to the WVSSAC in order to determine if Jarrett was eligible to participate in interscholastic competition during his senior year.⁸⁸⁹ The Executive Director of the WVSSAC ruled that Jarrett was ineligible to participate in any athletic activity for the high school during his senior year based upon his turning 19 years of age before the August 1st cut off date.⁸⁹⁰ Jarrett contends that failing to provide a reasonable modification to the nineteen-year-old age limit is a violation of his rights under federal legislation specifically the Rehabilitation Act of 1973,⁸⁹¹ and Title II of the Americans with Disabilities Act (ADA).⁸⁹²

Jarrett is an example of one student's battle against a school district that has discriminated against a student based upon his or her learning disability. There are many students similar to Jarrett who have been prohibited from representing their school in competitive athletic competition. Such students have been prohibited based upon their failure to meet the age limitation which is the result of the negative impact their learning disability has had on their academic progress. Similarly to how public schools are required to provide an education to students free of discrimination, if a public school provides its students with after school activities, the school is prohibited from discriminatorily denying access to certain students based on their disabilities.⁸⁹³

Courts have not ruled consistently on whether the Rehabilitation Act and the Americans with Disabilities Act protect students with learning disabilities from discriminatory age restrictions. Students believe that they are affected by these age restrictions solely because of their learning disabilities. Students who bring actions against the school districts do not ask the courts to strike down the mandatory age provisions, but rather to provide the students with a waiver of age limitation; an alteration which the students see as a reasonable

⁸⁸⁵ *Baisden v. W. Va. Secondary Schs. Activities Comm'n*, 211 W. Va. 725, 729 (2002).

⁸⁸⁶ *Id.*

⁸⁸⁷ *Id.*

⁸⁸⁸ W. Va. Code St. R. § 127-2-4 (2005).

⁸⁸⁹ *Baisden*, 211 W. Va. at 729.

⁸⁹⁰ *Id.*

⁸⁹¹ 29 U.S.C. §§ 701-796 (2005).

⁸⁹² 42 U.S.C. § 12131 (2005).

⁸⁹³ 29 U.S.C. § 794 (2005).

modification to the code. The students desire schools to reasonably modify the athletic code by waiving the age restriction in their particular circumstance. Students with learning disabilities bring these actions claiming that the age limitation is unlawfully discriminatory if not waived. The limitation is discriminatory if the sole reason that the student is unable to meet the age requirement directly relates to the student being held back academically due to lack of academic progress based on a learning disability.

Courts in the Sixth and Eighth circuits have held that learning disabled students, have not been subject to discrimination based upon their disability, when they are denied a waiver of the age provision. These courts have found that the denial of the student's eligibility is based solely on the student being 19 years of age. The courts have concluded that the waiver of the age modification is not reasonable in these circumstances.⁸⁹⁴ As a basis for denying modification to the code, these courts have held that a waiver of the age limit would fundamentally alter the structure of the athletic program.⁸⁹⁵

Other courts which have found similarly to the Eighth and Sixth Circuit have been reluctant to make individual student assessments when determining if the waiver of the age restriction constitutes a reasonable modification to the code. The Court in *Sandison v Michigan High School Athletic Association* and *Pottgen v Missouri State High School Association* have held that an age restriction is not in violation of § 504 of the Rehabilitation Act or Title II of the ADA. These courts have applied the Act's general requirements narrowly and applied the strict language blindly across the board.⁸⁹⁶ Courts which apply this narrow and general application are failing to take the important next step of providing each student athlete with an individual assessment. Such an assessment is necessary to determine if a modification to the rule could be reasonable in the student's individual situation. Individual circumstances which could be valuable to consider are (1) the physical size of the student; (2) the reason the student has not met the 19 year old age limitation; (3) the number of days which the student is over the age limitation;

(4) the effect which the learning disability has had on the student's social progress; and (5) any other circumstances which the court might deem significant.

Conversely, courts in other circuits have provided each student with an individual inquiry when analyzing their Rehabilitation Act and ADA claims. These courts have found that when the student has turned 19 before the documented cut off date, their restriction on participation is based solely on their learning disability, and in effect the waiver of the age limitation constitutes a reasonable modification under the Rehabilitation Act. These courts, by providing individual analyses of each student's circumstances on a case-by-case basis, can more justly reach their determination of *if* the waiver of an age limitation would be a reasonable modification and *if* it violated any of the policy implications of the restriction.⁸⁹⁷

This note will discuss the need for courts to go beyond plain statutory interpretation and making general across the board applications. It will also discuss the need for courts to make additional inquiries of individual assessments when deciding Rehabilitation Act and ADA violations by school districts towards disabled student athletes. Some 19 year old students are correctly denied athletic eligibility in their senior year. A denial is appropriate when providing an age modification would violate the policy behind the limitation, and therefore, would be unreasonable under the circumstances. Conversely, individual assessments would allow those few 19 year old athletes who would not violate any of the policy reasons behind the age limitation the opportunity to participate in athletics after being granted a reasonable modification to the athletic code. If the age limitation rule can be modified without impeding the essential purposes of the rule and the athletic activity, then the rule is not essential to the nature of the program or activity and should be modified to accommodate the learning disabled athlete.⁸⁹⁸

⁸⁹⁴ See *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026, 1034 (6th Cir. 1995); see also *Pottgen v. Mo. State High Sch. Ass'n*, 40 F.3d 926, 930 (8th Cir. 1994).

⁸⁹⁵ *Sandison*, 64 F.3d at 1036.

⁸⁹⁶ *Pottgen*, 40 F.3d at 932 (Arnold, C.J., dissenting).

⁸⁹⁷ *Id.*; see also *Baisden*, 211 W. Va. 725, 736.

⁸⁹⁸ See *Pottgen*, 40 F.3d at 932-33.

Section 504 of the Rehabilitation Act of 1973

It is frequently argued that placing an age based limitation on a student who is held back academically due to a learning disability is in violation of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. Under § 504 of the Rehabilitation Act, “No otherwise qualified individual with a disability in the United States ... shall solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁹⁹ To establish a cause of action under the Rehabilitation Act, the Plaintiff must prove: (1) he has a disability as defined by the act; (2) he is “otherwise qualified” to participate in interscholastic high school athletics as regulated by the applicable athletic association code, or that he may be “otherwise qualified” via “reasonable accommodations;” (3) he is being excluded from participating in interscholastic high school athletics solely because of his disability; and (4) the applicable athletic association receives federal financial assistance.⁹⁰⁰

Once the applicant establishes that they have a disability defined by the act and therefore are protected under it, the next step is to establish that the student is otherwise qualified to participate or may become otherwise qualified to participate if provided a reasonable accommodation.⁹⁰¹ An “otherwise qualified individual” has been defined by the Supreme Court as “one who is able to meet all of a program’s requirements in spite of his handicap.”⁹⁰² Later courts have determined that this definition sets the standard too high and the threshold for finding a violation of § 504 at an almost unreachable level.⁹⁰³ In response to this conclusion, a disabled individual is “otherwise qualified” to participate in a program if, with “reasonable accommodation,” the individual can meet the “necessary” requirements of the program.⁹⁰⁴ Since students who bring age eligibility actions will not be otherwise qualified

because they can not meet the age eligibility requirement in spite of their disability, the court must determine if the student can become an otherwise qualified individual through reasonable accommodations.⁹⁰⁵

An institution is not required to lower its standards or make substantial modifications in order to accommodate a learning disabled person.⁹⁰⁶ Accommodations are not reasonable if they impose “undue financial and administrative burdens” or if they require a “fundamental alteration in the nature of the program.”⁹⁰⁷ In determining whether a waiver of the age limit constitutes a reasonable accommodation it is imperative for the court to look at the policy reasons behind the age limitations. The reasons for implementing an age limitation in high school athletics is four fold; (1) an age limit helps reduce the competitive advantage flowing to teams using older athletes; (2) it protects younger athletes from harm; (3) discourages student athletes from delaying their education to gain athletic maturity; (4) and prevents over-zealous coaches from engaging in repeated red-shirting to gain a competitive advantage.⁹⁰⁸

It is at this phase in the analysis where courts have been divided in their method of reasoning. There is no consensus to whether the waiver of an age limitation is a reasonable accommodation. Some courts choose to apply the language of the athletic code stringently while others choose to interpret and base their conclusions on individual assessment. Courts in the Eighth and Sixth Circuits have deemed that age limitations are an essential eligibility standard and the waiver of such a standard would constitute a fundamental alteration in the athletic program.⁹⁰⁹ Courts in other circuits have ruled that a cases-by-case individual assessment of circumstances surrounding the student’s ineligibility is more appropriate. These courts have held that it is imperative to look at each individual learning disabled athlete and analyze their individual situation in light of the policy implications of the age limitation. This allows the court to make a

⁸⁹⁹ 29 U.S.C. § 794(a) (2005).

⁹⁰⁰ *Id.*

⁹⁰¹ *Id.*

⁹⁰² *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979).

⁹⁰³ *Brennan v. Stewart*, 834 F.2d 1248, 1261 (5th Cir. 1988).

⁹⁰⁴ *Doherty v. S. Coll. of Optometry*, 862 F.2d 570, 574 (6th Cir. 1988).

⁹⁰⁵ *Johnson v. Fla. High Sch. Activities Ass’n. Inc.*, 899 F. Supp. 579, 584 (M.D. Fla. 1995); *see Sch. Bd. of Nassau County v. Arline*, 480 U.S. 273, 287 (1987).

⁹⁰⁶ *Davis*, 442 U.S. at 413.

⁹⁰⁷ *Arline*, 480 U.S. at 287.

⁹⁰⁸ *Pottgen v. Mo. State High Sch. Ass’n*, 40 F.3d 926, 929.

⁹⁰⁹ *See id.* at 931; *see also Sandison v. Mich. High Sch. Athletic Ass’n*, 64 F.3d 1026, 1034-35.

more enlightened and just determination whether the modification would be reasonable and if it would cause a fundamental alteration to the program based on the individual situation of each student athlete. It also allows the court to consider the policy justification for the age limitation as it bears on each athlete personally.

The first two policy reasons of reducing the competitive advantage flowing to teams using older athletes and protecting younger athletes from the harm of being hurt by larger, more physically mature athletes speak to the fairness and safety of both the learning disabled student and to other competitors on the field. The intent of these policy implications is an attempt to keep larger more mature athletes off the field in order to protect the safety of younger and less skilled, immature opponents. These concerns would be valid when the athletes are participating in contact sports such as football, lacrosse, or hockey. While it is practical that having a 15 year old competing against a 19 year old on a football field will cause concern to parents, administration, and all people who wish to promote fair competition, it is not always be the case that an unfair advantage will exist.⁹¹⁰ A court might consider “. . . five factors [which] weigh in deciding whether an athlete posed an unfair competitive advantage due to age: (1) chronological age; (2) physical maturity; (3) athletic experience; (4) athletic skill level; and (5) mental ability to process sports strategy.⁹¹¹

It is clear from the facts of cases such as Jarrett’s that the final two policy explanations, discouraging athletes from delaying their education to gain athletic maturity and preventing repeated red-shirting to gain competitive advantages, are moot to students with learning disabilities who bring discrimination actions against school districts. Students which these two policy reasons are directed at are students who function on a normal academic level and are held back academically and/or athletically in order to take advantage of the heightened level of competition their maturity will provide them. The policy concern is to eliminate students from participating in delaying their education solely to gain athletic maturity. Students which bring Rehabilitation Act violation suits have probably not come before a court

⁹¹⁰ *See id.* (holding that where a student participates in a non contact sport such as track or cross country, the policy implications speaking to possibility of injury and safety are minimized due to the nature of the activity).

⁹¹¹ *Sandison*, 64 F.3d at 1035.

having delayed their education to gain athletic maturity, but rather their education has been delayed in order to accommodate the student’s learning disability. Therefore the first two policy reasons for the age limitation are what the court must focus on in determining if an age waiver is a reasonable accommodation.

The third condition necessary to establish a cause of action under the Rehabilitation Act is that the student must be found to have been excluded from athletic participation solely because of his or her disability.⁹¹² Few courts have provided a working definition for “solely because of disability.” The Supreme Court has found that a deaf woman was not denied admittance to a nursing school solely based upon her disability. In *Southeastern Community College v. Davis*, the school rejected the plaintiff’s application for entrance into a nursing program based on the applicant’s inability to safely perform registered nurse’s duties in situations where lip-reading was impossible such as when physicians and other nurses wearing surgical masks.⁹¹³ A person’s exclusion from programs of this type is justified where the applicant is excluded due to their inability to participate in a capable manner or inability to perform required operations of the desired activity.⁹¹⁴ Where disability gets in the way of capability, it can be said that exclusion is not based on a disability. A 19 year old student finds himself in this situation because he was held back academically, and then later classified as learning disabled. Yet, the same student will run into the counter argument from the school district, that the age restriction is being placed on them solely based on age and not disability. Consistently, courts have reasoned that the age limitation disqualifies not only the 19 year old learning disabled student, but also the 19 year old non-learning disabled student.⁹¹⁵

Title II of the Americans with Disabilities Act

Title II of the Americans with Disabilities Act provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs or activities of a public entity, or be subjected to discrimination

⁹¹² 29 U.S.C. § 794 (2005).

⁹¹³ *See Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397.

⁹¹⁴ *See e.g., id.*; *Doherty v. S. Coll. of Optometry*, 862 F.2d 570.

⁹¹⁵ *Sandison*, 64 F.3d at 1034.

by any such entity.”⁹¹⁶ By analyzing the statutory scheme of Title II of the ADA, it is evident that Congress intended it to be consistent with § 504 of the Rehabilitation Act.⁹¹⁷ Therefore, the enforcement, remedies, procedures, and rights under Title II are the same as under § 504.⁹¹⁸

Under Title II of the ADA there are three necessary stages of analysis. The first is for the court to determine if the age limitation is an essential requirement of the program.⁹¹⁹ Second, the court must decide if the student is a qualified individual under the ADA.⁹²⁰ While § 504 does not define a qualified individual with a disability and leaves that for the courts interpretation, the ADA explicitly defines a qualified individual as “an individual who, with or without reasonable modifications to rules, policies, or practices ... meets essential eligibility requirements for the ... participation in programs or activities provided by a public entity.”⁹²¹ Finally, the court must consider if the student meets the eligibility requirement with or without modification.⁹²² In order to determine the status of the student and the age limitation under these three analytical stages the court must answer the question if the waiving of the age requirement constitutes a “fundamental alteration” to the purposes of the rule.⁹²³

To determine if a waiver of the age limitation constitutes a fundamental alteration the court must look at the policy implications of the age limitation rule and compare them to the individual case.⁹²⁴ This individual case assessment is the same type of analysis which is desired under section 504 of the Rehabilitation Act. The policy reasons for the age limitation are: 1) to promote safety through the regulation of the size and strength of the players on the field; and 2) to ensure fairness by preventing coaches from redshirting or holding back their players in order to create a physical and mental edge against the opponent through fielding more mature and developed athletes.⁹²⁵ The court

⁹¹⁶ 42 U.S.C. § 12132 (2005).

⁹¹⁷ *Pottgen v. Mo. State High Sch. Ass’n*, 40 F.3d 926, 930.

⁹¹⁸ 42 U.S.C. § 12133 (2005), *construed in Pottgen*, 40 F.3d at 930

⁹¹⁹ *Pottgen*, 40 F.3d at 930.

⁹²⁰ *Id.*

⁹²¹ 42 U.S.C. § 12131(2) (2005).

⁹²² *Pottgen*, 40 F.3d at 930-31.

⁹²³ *Johnson v. Fla. High Sch. Activities Ass’n, Inc.*, 899 F. Supp. 579, 584.

⁹²⁴ *Id.*

⁹²⁵ *Id.*

should make an assessment based on the individual student athlete in question, and determine if a waiver of the age requirement in the instant case would be in direct violation of the policies the age requirement is designed to protect.⁹²⁶ If by waiving the age limitation and providing the 19 year old student the ability to play would be a danger to other athletes on the field or would encourage coaches or students to delay their education in order to gain athletic maturity, the age limitation should not be waived.

Social effects of participating in school sports on students with learning disabilities

The need for individual, case-by-case analysis by the court is necessary in situations such as Jarrett’s, due to the sensitive nature of the subject matter, a learning disabled child. Going through school labeled as a learning disabled student can be extremely damaging to a child’s self-esteem. A child who is left back a grade due to learning disabilities might experience teasing from other students, embarrassing questions from other children as to why they are repeating a grade, and the possibility of losing friends caused by not proceeding forward to more advanced classes with their peers. These factors often contribute to a student having a negative self image and harboring thoughts that they are not as smart or important as other students their age. On the other hand, even though a student may feel inferior, their self esteem might be able to excel and breed self-confidence on the athletics field.

One instance when a student with a learning disability might feel similar to other students is during after school athletic activities because they are not placed in an inferior position due to their learning disability. One reason that a school district might implement an after school athletic curriculum is in order to provide students with an opportunity to develop skills which can not be learned as easily in the classroom. Participation in athletic activity provides a child with the opportunity to develop leadership skills, the concept of fair play, the ability to participate in a team effort, and the chance to build confidence through a significant personal triumph or victory. Denying a learning disabled child the opportunity to participate in after school athletics based on an across the board application of an athletic code would be against the aforementioned policy, under which the

⁹²⁶ *Id.*

athletics curriculum was implemented in the first place.

During a student's athletic career, their senior year of eligibility is their most coveted. During their senior year season athletes benefit from physical and mental maturity, the ability to feel comfortable on the field, and the chance to have other students and coaches rely on their individual skills which could be invaluable to their mental and emotional development. If the student is only a few days too old, is that a good enough reason to take away the one opportunity for that student to feel good about his abilities or the chance to have a confidence lifting personal accomplishment? While the athletic associations have every right to strictly enforce their age eligibility rule, courts should use the vague language of the Rehabilitation Act and ADA, to provide students with a fair process. Courts need to determine if a modification to the code would be reasonable, by looking at its effect on the athletic program for each individual. When a modification to the code would not fundamentally alter the program being modified and is therefore reasonable because it does not violate the policy behind the age limitation, these students should be provided the opportunity to participate in what could be a life altering activity.

Baisden v. West Virginia

The story of Jarrett is not a hypothetical but, rather the true story of one learning disabled student from West Virginia. Jarrett was denied waiver of the age limitation and in effect was not allowed to participate in school athletics during his senior year of high school. While the court ultimately denied a waiver of the age limitation in his case, the court did justifiably provide him with an individual assessment analysis and did not apply the statutory language strictly across the board. As you remember, Jarrett was held back in two grades early in his educational career in order for him to gain mental maturity in response to his math and reading learning disabilities. He was never red-shirted to gain an additional year of athletic maturity or eligibility. The court determined that he was not an otherwise qualified individual based on his inability to meet the age requirement. The court also held that a waiver of the age requirement in Jarrett's case would undermine the policy reasons behind the age limitation and therefore not be a reasonable modification. Due to Jarrett's height and weight, and the chance that he would be competing against athletes five years

younger than himself, the court held that a waiver of the age limitation was not reasonable in this instance as it would compromise the safety of the younger, less experienced athletes.⁹²⁷

Without looking at the circumstances surrounding each individual case the courts are providing a great disservice to high school students with learning disabilities who repeated a grade. If Jarrett was born only five days later he would have the same physical build but would have no eligibility problem. Although the court held that a modification in Jarrett's situation would not be a reasonable one, the individual assessment he was provided showed that by allowing his presence on the football field the court would be violating the policy implications of the age limitation and a waiver of such limitation would constitute a fundamental alteration to the program. It seems only fair and appropriate that the courts should focus on the effect that modification of the requirement for the individual in question would have on the nature of the program and not apply a strict application of the statutory language.⁹²⁸ The use of individual assessments is the only way a fair and just result can be reached.

⁹²⁷ Baisden v. W. Va. Secondary Sch. Activities Comm'n, 211 W. Va. 725, 737.

⁹²⁸ Pottgen v. Mo. State High Sch. Ass'n, 40 F.3d 926, 934.

Golf and Torts: A Good Walk Spoiled

By: Matthew K. Mady

The word has been omnipresent on golf courses since the game's inception, and every golfer has heard it at one time or another. Golfers smile when it comes from five holes away, grimace when it comes from their own mouth, and run for cover when it is directed at them. Screaming the word "FORE" has become synonymous with a poor shot, whether it is from a scratch player⁹²⁹ or a weekend warrior⁹³⁰. Wayward shots can not only inflict pain physically, they can also hit hard in the wallet. With the meteoric rise in the popularity of golf and the ever increasing rate of lawsuits in the country, it was inevitable that the two would meet.

Lawsuits arising from the golf course are usually directed at either one or both of two parties. Course owners are targeted for either failing to provide a safe environment within which to play or for failing to provide sufficient warning of the hazards of playing golf on their premises. Golfers are targeted for their failure to hit their desired target or, sometimes maybe hitting it too well. Most people think that the most dangerous part of golf is hitting one's ball too close to an alligator infested lake. Unfortunately, being struck by a ball on a golf course is an all too common occurrence and lawsuits arising out of such incidents are an entity which courts are forced address at an ever increasing rate. This note will begin with the less the least common of the two types of suits; those against the course owners.

Golf Course Liability

To understand the liability faced by a golf course owner, one has to look no further than the basics of tort and property law, including the various classifications of people who enter onto another's land. Everyone who enters a golf course is classified as an invitee.⁹³¹

⁹²⁹ Reference to an excellent golfer who generally shoots par for a course.

⁹³⁰ Reference to a poor golfer who generally only plays on weekends and shoots well over par for a course.

⁹³¹ Michael Flynn, *The Sign Said, "Beware of Duffers"-The Liability of Golf Course Operators for Failing to Post Warning Signs*, 12 Seton Hall J. Sport L. 1, 3 (2002).

An invitee is defined as a person who has an express or implied invitation to enter or use another's premises.⁹³² Under basic tort law, the occupier has a duty to inspect the premises and warn the invitee of dangerous conditions.⁹³³ By paying a fee to play or practice on the course, the customer essentially becomes an invitee, as explained above, and is owed a duty from the "inviter" to be kept safe and abreast of all possible safety concerns.

A good example of this duty was illustrated in *Cornell v. Langland*, in which the court imposed damages upon the owners of a golf course for mislabeling their score cards.⁹³⁴ In *Cornell*, the plaintiff, a golfer playing on the course, was stuck by a golf ball while on the 8th green of the Old Orchard Country Club. The scorecard measured the hole at three hundred fifteen yards, but it was actually only two hundred thirty two yards. In a personal injury suit against the course, plaintiff was awarded a monetary award that was subsequently upheld by the appellate court. After reviewing the evidence, the court reasoned that the course's actions were negligent because it knew the distance was incorrect on the scorecard (the club manager admitted to this fact), yet still refused to change the scorecard, not wanting to incur the extra costs associated with printing new ones.⁹³⁵ This created a risk in that golfers expected to be playing a hole that was longer than what it in fact was. This problem would lead golfers to choose a club to hit the ball three hundred fifteen yards when the hole was only two hundred thirty, thus increasing the risk that the ball would land past the green where other golfers waited to play the next hole. The course's willful disregard of the safety risk posed by this misrepresentation was the reasoning behind the monetary award to the plaintiff.

Another demonstration of golf course liability is seen in *Sullivan-Coughlin v. Palos Country Club, Inc.*⁹³⁶ As plaintiff was exiting Palos Country Club from behind the 9th green

⁹³² Black's Law Dictionary (8th ed. 2004).

⁹³³ *Id.*

⁹³⁴ *Cornell v. Langland*, 440 N.E.2d 985 (Ill. App. Ct. 1982).

⁹³⁵ *Id.*

⁹³⁶ *Sullivan-Coughlin v. Palos Country Club, Inc.*, 812 N.E.2d 496 (Ill. App. Ct. 2004).

after she finished her round of golf, she was hit in the head with a golf ball, which caused her to fall out of her golf cart and sustain further injuries. She brought a lawsuit against the golf club, claiming that the design of the course was negligent. The court examined the fundamentals of tort law in order to reach a conclusion. The court held that generally, a landowner will not be held liable for an injury caused on the land that is known or obvious.⁹³⁷ The court did note that an exception to this general rule exists; a landowner should anticipate injury when there is reason to suspect that an invitee could become distracted in the midst of a dangerous situation.⁹³⁸ Applying these rules to *Sullivan-Coughlin*, it is easy to understand why the court ruled the way it did. Plaintiff was forced to exit the course from behind the 9th green, a precarious situation since any wayward approach shots to the green had the potential of hitting people. The course's failure to post a sign warning golfers of wayward shots was the crux of plaintiff's argument and the main reason for finding of negligence against the country club. Plaintiff was in a situation where she could be easily distracted as she was leaving the course. This imposed a burden on the defendant to provide some type of warning as not every golfer is capable of sticking a ball ten feet from the pin⁹³⁹.

Being struck by a ball on a course does not automatically render the proprietor of the course liable for any injuries sustained by a potential plaintiff. A prime example of this is *American Golf Corp. v. Superior Court*.⁹⁴⁰ In *American Golf*, plaintiff was playing the 13th hole at Lakewood Country Club, when his playing partner hooked his shot, striking a yardage marker. The ball ricocheted off the yardage marker and struck plaintiff in the eye. The resulting injury led to the filing of a lawsuit against the owners of the country club. In its decision, the court took a different approach and adopted the assumption of the risk principles inherent in tort law. In discussing the reasoning behind its holding, the court observed that participants in an active sport are governed by the primary assumption of the risk doctrine, thus creating a situation in which a defendant owes no duty of care to protect a plaintiff from the various

risks inherent in a sport.⁹⁴¹ More simply put, the court basically held that proprietors of a golf course do not have to protect their customers from risks which are generally associated with playing golf. To further prove the point, the court explains the game of golf, noting that it is a sport in which people are hitting a ball at a very high rate of speed. The nature of the game creates the very common situation in which a ball will not necessarily travel its intended direction, regardless of the skill level of the participant.⁹⁴² Golf is a sport where dangers lurk around every dogleg⁹⁴³; therefore, courts must take this inherent risk into consideration when deciding liability cases concerning the owners of golf courses.

Lemovitz v. Pine Ridge Realty Corp. was another win for golf course proprietors, perhaps even more influential than *American*.⁹⁴⁴ *Lemovitz* addressed the possible inherent dangers in the design of golf courses.⁹⁴⁵ The plaintiff in *Lemovitz* was walking on the 3rd fairway of the Old Orchard Beach Country Club, when he was stuck by a ball that originated from the 4th tee box, located only about one hundred fifty feet from the plaintiff's position. Plaintiff sued the owners of the course, asserting they were negligent in placing the 4th tee box in close proximity to the 3rd fairway. In its analysis, the court made an important distinction; the question presented is not whether the defendant's injuries were foreseeable, but whether the design of the course was so negligent that it subjected plaintiff to an unreasonable risk of harm.⁹⁴⁶ The court relied heavily on expert opinions and an analysis of the industry standards associated with golf course design in reaching its decision. The court applied the reasoning of *Campion v. Chicago Landscape Co.*⁹⁴⁷, which held that a plaintiff

⁹⁴¹ *Id.* at 688.

⁹⁴² *Id.* at 689.

⁹⁴³ Relates to the design of a golf hole, in that the first part of the hole goes straight, while the second part either bends to the left or to the right.

⁹⁴⁴ *Lemovitz v. Pine Ridge Realty Corp.*, 887 F. Supp. 16, (D. Me. 1995).

⁹⁴⁵ See also; *Noe v. Park Country Club*, 495 N.Y.S.2d 234 (N.Y. App. Div. 1985); *Baker v. Thibodaux*, 470 So. 2d 245 (La. 1985).

⁹⁴⁶ *Lemovitz*, 887 F. Supp. at 19.

⁹⁴⁷ *Campion v. Chicago Landscape Co.*, 14 N.E.2d 879 (Ill. App. Ct. 1938); (*Campion*, while an older case, is the prevailing precedent for golf course proprietor liability cases because of its holding that golfers assume the risk of playing the sport, unless the owners of the course

⁹³⁷ *Id.* at 500.

⁹³⁸ *Id.*

⁹³⁹ Refers to the ability of a golfer to hit their ball relatively close to their intended target.

⁹⁴⁰ *American Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683 (Cal. Ct. App. 2000).

assumes the risk of playing on any course which is designed within the parameters established by industry standards. *Lemovitz*, along with the *Campion* decision, are important because both enable golf course proprietors to avoid liability arising from injuries sustained by their invitees, so long as they adhere to the industry standards of golf course design and architecture.

The various cases on the liability of golf course owners help to establish a test to determine the liability of them. Golf course proprietors, for the most part, will be liable for injuries sustained by their customers if the course creates an inherently dangerous situation which exceed those normally associated with the average round of golf. Liability will attach by recklessly assigning the wrong yardage measurements to a hole, placing a congregation area or exit in a direct line with oncoming shots, or by just failing to properly give customers some type of duffer⁹⁴⁸ alert. It is critical to recognize that not every injured golfer or participant will automatically be granted recovery against the owner of a course. There still must be a showing that the owner's negligence was the proximate cause of the victim's injuries. There must be some type of omission or affirmative act attributable to the course which can be causally linked to the injuries sustained by a plaintiff. While this may appear to be a high burden, it is nothing compared to that which must be overcome to make a successful claim against a fellow golfer. Reaching that burden can be harder than the tee shot on the 17th at Sawgrass⁹⁴⁹.

Golfer Liability

When determining the liability of a golfer who is playing a round, there are two situations which commonly arise and must be analyzed; the first being when the golfer is playing in the same group as the victim, and the second occurring when the golfer and victim are playing in different groups. The standard of care that the golfer owes a player in his own group is slightly different than that owed to another golfer somewhere else on the course. The burden upon

are so negligent that they create an inherent danger above those usually found in playing a round of golf).

⁹⁴⁸ Duffer is a common term used to describe a very poor golfer.

⁹⁴⁹ 17th hole at Sawgrass is a famous Par 3 in which the green is completely surrounded by water.

a golfer to warn those not in his group is higher than having to warn the people playing with him.

The prime example of a case where one golfer is not liable to a fellow golfer in the same group is *Gray v. Giroux*.⁹⁵⁰ In *Gray*, plaintiff was playing in a foursome with her husband, defendant and his wife. When the group reached the 9th hole, defendant and plaintiff's husband hit their balls into the left rough. Defendant reached his ball first, while plaintiff and her husband were searching for his ball, some thirty-five yards ahead of defendant. During the course of their search, defendant hit his ball, striking plaintiff in the head and causing the injuries which gave rise to the lawsuit. In its analysis, the court stressed the importance of the precedent established by *Gauvin v. Clark*,⁹⁵¹ in which the court held that a participant in an athletic event can be liable to another participant only when his or her actions amount to a willful, wanton or reckless disregard for the safety of the other participant.⁹⁵² Since the plaintiff and her husband were standing in the rough, a position that was not in the intended path of defendant's shot, and the defendant testified that he did not see the plaintiff prior to hitting his ball; the court reasoned that there was no evidence of willful, wanton or reckless conduct.⁹⁵³ The holding in *Gray* established the test of liability of golfers in the same group. Even if a fellow partner fails to yell "fore", he will still not be liable for hitting a golfing partner unless he sees the individual in his intended shot path and hits the ball irrespective of the fact that the person lies directly in front of him.

A traditional example of how the *Gray* standard has been applied to golfing tort cases was evident in *Allen v. Pinewood Country Club*.⁹⁵⁴ In *Allen*, defendant missed the fairway and ended up somewhere in the left rough. Plaintiff was some two hundred yards ahead of defendant, having actually managed to hit the fairway. Defendant, stuck behind some trees, decided to try to hit a fade (make the ball travel to the right) in order to reach the green, as plaintiff was standing in the fairway. Defendant saw plaintiff standing in the fairway, but still hit the ball in his direction, intending to stay far enough away so as to avoid hitting him.

⁹⁵⁰ *Gray v. Giroux*, 730 N.E.2d 338 (Mass. App. Ct. 2000).

⁹⁵¹ *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989).

⁹⁵² *Gray*, 730 N.E.2d at 340.

⁹⁵³ *Id* at 341.

⁹⁵⁴ *Allen v. Pinewood Country Club, Inc.*, 292 So.2d 786 (La. 1974).

Unfortunately for the defendant, and perhaps even more for the plaintiff, the defendant's ball missed its intended target and struck plaintiff in the face. Through testimony gathered by the court, it was ascertained that the defendant had in fact yelled "fore" before the ball hit plaintiff. Unfortunately, the warning was so close in proximity with the ball actually striking the plaintiff that it essentially served no other purpose than to prompt plaintiff to turn into the oncoming ball.⁹⁵⁵ The court reasoned that since defendant knew plaintiff was in his shot line, he owed a duty to the plaintiff to provide him with some type of reasonable advance warning to give him enough time to get out of harm's way.⁹⁵⁶ Since defendant failed to give the plaintiff sufficient warning, the court found defendant liable and awarded damages to the plaintiff.⁹⁵⁷ Even though *Allen* predates *Gray*, it stands to reinforce the rules set forth in *Gray* pertaining to foursomes and any injuries caused to a fellow golfer. A player who knowingly, and subsequently recklessly, hits a ball while another golfer is in between the player and the target can be found liable for any resulting injuries. *Allen* did provide an "out" for golfers however. If sufficient and reasonable warning is provided, it may relieve any potential liability that could arise from injuries sustained as a result of the shot.

The previously discussed cases involved a single golfer's liability to injuries sustained within the playing group. Frequently however, injuries are caused and sustained by two different groups on the course, thus creating a completely different situation than the cases previously examined. *Bartlett v. Chebuhar* is a prime example which demonstrates this difference.⁹⁵⁸ In *Bartlett*, defendant was playing the 9th hole while plaintiff was on the 3rd green. Defendant, on his approach to the 9th green, hit his ball to the right and towards the 3rd green. While on the 3rd green, plaintiff was struck by defendant's ball after it hit a mound and ricocheted towards his face. Plaintiff sustained injuries and in the resulting lawsuit, defendant argued that plaintiff was not in his intended target area, or anywhere between, so he owed no duty to the plaintiff whatsoever. The court disagreed and held that defendant's duty extends beyond the intended path of the ball.⁹⁵⁹ The court adopted a more

case by case approach in which the direction that a golfer has a tendency to hit the ball would be crucial to the analysis. As the court put it, the analysis must be based on defendant's "zone of danger", or the area in which a golfer would have a propensity to mistakenly hit their ball to.⁹⁶⁰ In *Bartlett*, the court discovered through evidence that the defendant had a propensity to shank the ball off to the right, thus creating a dangerous zone for people anywhere to the right of the defendant. Using this evidence along with the "zone of danger" test, the court held that the defendant did in fact have a duty to warn the plaintiff of the oncoming shot.

As opposed to *Allen*, *Bartlett* established that a defendant owes a duty to warn others even if they may not be in the direct line of the intended shot. If a golfer knows he has a propensity to hit the ball to the right, he may be liable for any damages that occur as a result of a shot going in that direction if he failed to appropriately warn those in his "zone of danger". The crux behind this reasoning is that people golfing together have greater awareness of one another's tendencies, but others have no knowledge of a stranger's golfing propensities. Also of importance is that players in a group are supposed to stand behind the individual hitting until the shot is finished. Thus, if a person is hit while wandering ahead of his group, he himself would be in violation of one of the most basic rules of golf. The courts' holdings here reflect the basic rules and consistencies of the game. What the courts are trying to stress is that when a person plays in a foursome, they are more aware of what they are getting themselves into, as opposed to the random person walking down the 13th fairway only to have their day ruined by a rogue Titleist⁹⁶¹.

A clear demonstration of when a golfer would be liable for hitting a player in another group is seen in *Campbell v. Picceri*.⁹⁶² In *Campbell*, plaintiff was playing the 9th hole when she hit her ball astray causing it to land in the rough approximately one-hundred feet in front of the tee box on the adjacent hole. As plaintiff was searching for her ball, defendant commenced teeing-off, hooking his ball towards the plaintiff and hitting her in the face. Plaintiff's suit alleged that defendant was reckless in his conduct by teeing off at the time that he did, and by failing to

⁹⁵⁵ *Id.*

⁹⁵⁶ *Id.* at 790.

⁹⁵⁷ *Id.*

⁹⁵⁸ *Bartlett v. Chebuhar*, 479 N.W.2d 321 (Iowa 1992).

⁹⁵⁹ *Id.* at 322.

⁹⁶⁰ *Id.* at 323; *See also*; *Boozer v. Arizona Country Club*, 434 P.2d 630 (Ariz. 1992).

⁹⁶¹ Common brand of golf balls used by golfers.

⁹⁶² *Campbell v. Picceri*, 1996 W.L. 378264 (Mass. 1996).

observe the plaintiff just to the left of the tee box.⁹⁶³ Defendant argued that the court must adopt the standard established in *Gauvin*⁹⁶⁴ and subsequently reinforced by *Gray*⁹⁶⁵, insisting that plaintiff could only recover upon a showing that defendant's conduct was willful, wanton, or reckless.⁹⁶⁶ The court agreed with the defendant and applied this very test. In determining whether or not the defendant demonstrated willful, wanton, or reckless conduct, the court devised a two step process. First, the plaintiff must show that the defendant knowingly disregarded an unreasonable risk, and second, that the risk, when viewed prospectively, contained a high degree of probability that substantial harm would result.⁹⁶⁷ The court, using this test along with the facts elicited during the trial, granted summary judgment in defendant's favor. The court reasoned that there was no evidence which could support plaintiff's claim that the defendant saw her, since the plaintiff even admitted that she could not see the defendant. A critical factor in the court's decision is the fact that teeing off on a hole is not considered a dangerous activity with a high risk of harm.

The difference between *Campbell* and *Bartlett*, becomes apparent when the two cases are juxtaposed. When a player mistakenly hits a ball in the general direction of a green, there is a high probability that an injury will occur, since it can be expected that people will be occupying the green.⁹⁶⁸ The injury in *Campbell* occurred in an area where there was no expectation of finding a golfer, so the defendant could not have anticipated a high degree of risk associated with mistakenly hitting his ball in that direction.⁹⁶⁹

Conclusion

Like many aspects of the law, golf course torts liability is not easily defined. Each court has its own theories and expectations when deciding the potential liability arising from injuries sustained on the course. Whether it's deciding if a golf course owner should be liable for failing to post a warning sign or a golfer be

held accountable for not yelling "fore", each court differs in its approach. Some courts examine the specific facts of every case, while others focus more on the generalized laws applicable to every torts case involving sports. The one constant is that there are no constants, except of course, the fact you may want to wear a hard hat and keep a lawyer handy the next time you're playing on your local course.

⁹⁶³ *Id.* at 1.

⁹⁶⁴ *Gauvin v. Clark*, 537 N.E.2d 94.

⁹⁶⁵ *Gray v. Giroux*, 730 N.E.2d 338.

⁹⁶⁶ *See e.g.*; *Gauvin*, 537 N.E.2d 94; *Gray*, 730 N.E.2d 338.

⁹⁶⁷ *Id.* at 2; *See also*; *Manning v. Nobile*, 411 Mass. 382 (Mass. 1991).

⁹⁶⁸ *Bartlett*, 479 N.W.2d 321.

⁹⁶⁹ *Campbell*, 1996 W.L. 378264.