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 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) 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

¹ See Chapter 53 Part P, S. 6060--B Section 1 §24.
³ See 43 R.C.N.Y. §7-06(a)(7)(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).
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.\footnote{See Chapter 53 Part P, S. 6060--B Section 1 §24(5).} In addition, a film must spend at least three million ($3,000,000) dollars at the qualified film production facility.\footnote{See Chapter 53 Part P, S. 6060--B Section 1 §24(2).} 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.\footnote{See Chapter 53 Part P, S. 6060--B Section 1 §24(a)(2).}

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.\footnote{See Chapter 53 Part P, S. 6060--B Section 1 §24(b)(2).} 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.\footnote{See Chapter 53 Part P, S. 6060--B Section 1 §24(b)(1).} 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.\footnote{See N.Y. Tax §1310(7)(a)(2005).} The City of New York has an additional total budget of twelve point five million ($12,500,000) dollars.\footnote{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.\footnote{See N.Y. Tax §1115(a)(39).} 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.\footnote{See Id.} 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".\footnote{See Id.} 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.\footnote{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).} 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...

\footnote{See N.Y. Tax §1115(a)(39).}
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. 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 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 2004, §181 and §199 on October 24, 2004, amending the Internal Revenue Code of 1986, US Code Title 26, 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 television, 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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22 The Amendments are set to expire on December 31, 2008.


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. 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. 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. 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. 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 lead the NHL to its current predicament. 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.

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. 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. 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 reach unless it contained cost certainty. Keeping with traditional negotiating tactics, the NHLPA stated that no deal would be reached if it did contain cost certainty. Both sides refused to deviate from those stated position, and the result was the

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27 Id.
28 See Id. (for an example of the “finances and player contacts” argument).
29 Id.
30 www.espn.com (March 10, 2001).
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.\textsuperscript{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.\textsuperscript{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 truthful report revenues.\textsuperscript{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.

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.\textsuperscript{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.”\textsuperscript{38} The United States Postal Service is currently using Transformative Mediation to resolve employee grievances.\textsuperscript{39}

In Transformative Mediation, the parties maintain control over the subject matter of the “conversation,” with no topic being taboo.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{34} The NLL 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.


\textsuperscript{36} Id.
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.” 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. 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.
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" or the "incorporation of previously recorded works into new musical compositions." 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." 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. After the sound is taken, it is usually placed in a keyboard which would allow for editing and splicing. 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. 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. 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. From 1970 to 1981, disc jockeys, while performing in clubs, experimented with the

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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).
46 Id.
49 Id.
51 Id.
52 Id.
blending and editing of a variety of previously recorded works. 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. The first rap album that incorporated samples was "Rapper's Delight" by the Sugar Hill Gang. 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. In general, musical works and sound recordings are the two components that are protected under the 1976 Copyright Act. Copyright attaches to a musical work (music and lyrics) as soon as it is "fixed in a tangible medium of expression." This medium may be one "now known or later developed." If the work is a musical composition, it can be written down or played in a tape recorder to be considered a copyright. 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." 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." 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.

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. 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. The landmark case of Feist Publications v. Rural Telephone Service, 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. In terms of a sound recording, section 114 of the Copyright Act of 1976 limits section 106 as stated supra. 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." 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

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53 Id.
54 Id.
55 Id.
56 Passman, supra note 4.
58 5 Nimmer on Copyright, § 24.01.
60 Passman, supra note 4.
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.
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." 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. To avoid mechanical reproduction of an original recording, a producer may hire musicians and vocalists to record the closest imitation of the copyrighted material. 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. The license can be purchased for a set fee in accordance with the Copyright Act.

Compulsory Licensing

Section 115 of the Copyright Act specifies the statutory requirements for compulsory licensing. 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." The copyright owner is compensated through a licensee's payment of royalty fees at a statutory royalty rate. Overall, 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." 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. 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.

A valid claim of copyright infringement can exist, if the original work has valid copyright protection. 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 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 ...."

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. The landmark case on copyright infringement of sampled works is Grand Upright Music Ltd. v. Warner Bros.

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72 Id.
75 Id.
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).
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.
Records, Inc. 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."

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. 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." 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. Nevertheless, in digital sampling cases, showing access to the copyrighted work is not necessary to prove since copying is not disputed. Thus, the next step is to determine whether the alleged infringing work was similar enough to constitute the improper appropriation of plaintiff's work. 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.

In Jarvis v. A&M Records, 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." 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." 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." Overall, "the main question is whether the value of the original work is substantially

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84 Id.
86 Jarvis, 827 F. Supp. at 290.
88 Jarvis, 827 F. Supp. at 289.
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
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 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,
music can be "stolen by unauthorized reproduction and distribution." Copyright, often called a "bundle of rights," 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." 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 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

120 Schaumann, supra note 69.
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 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?

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.
125 Claret 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, Claret 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

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

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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

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131 Brown v. Pro Football, Inc., 518 U.S. 231 (1996); See also, Clarett, 369 F.3d at 130.
132 Brown, 518 U.S. at 241.
133 Clarett, 369 F.3d at 134-135.3
scutiny 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.

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). 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. 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. 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. Here, the analysis involves the NFL’s draft eligibility rules, which are found in the NFL’s Bylaws and Constitution and not expressly within the Collective Bargaining Agreement (CBA). Therefore, the factual questions are: first, whether Maurice Clarett, 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 Clarett, who are complete strangers to the bargaining relationship.” This determination, however, goes against much, if not all, of the law in this field. You see, Clarett, 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.” 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. Therefore, much like any potential applicant for a job, future employees like Clarett 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

135 Id. at 614.
136 Id. at 615-617.
137 Clarett, 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 Clarett v. Nat’l Football League, 306 F.Supp.2d 379 (S.D.N.Y. 2004). In the lower court, Judge Scheindlin granted Mr. Clarett’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.
140 See, Clarett, 369 F.3d at 127; Clarett, 306 F. Supp.2d at 384-385.
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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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 Clarett’s potential hiring be viewed, by any court, as a mandatory subject of collective bargaining.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{144} Clarett, 306 F. Supp.2d at 393-395.\textsuperscript{145} 29 U.S.C.S. §158(d) (2005).\textsuperscript{146} Caldwell, 66 F.3d at 529.\textsuperscript{147} Clarett, 369 F.3d at 127-129. See also, Clarett, 306 F. Supp.2d at 385-387.

\textsuperscript{148} Clarett, 306 F. Supp.2d. at 384.\textsuperscript{149} \textit{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.\textsuperscript{150} \textit{Id.} at 396.\textsuperscript{151} See, Mackey, 543 F.2d at 609-623.\textsuperscript{152} \textit{Id.} at 609-610.
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.”

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.”

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.”

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]

153 Id. at 615-616.
154 Id. at 613.
155 Clarett, 369 F.3d at 128.
156 Id.
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.
that the position of one party on an issue prevailed unchanged does not mandate the conclusion that there was no collective bargaining over the issue.”

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. As the court in Zimmerman v. NFL concluded, the NFLPA was at a much better bargaining position during the 1982 Collective Bargaining negotiations then it was during the time of Mackey. 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.

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.” 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.

Therefore, these policies must extend, “as far as is necessary to ensure the successful operation of the collective bargaining process,” and “can occur outside of formal negotiations on a comprehensive agreement.” 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.” Consequently, being that the NFLPA was directly aware of the rule, was in a formidable

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161 See, Mackey, 543 F.2d at 609-616.
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 was 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.
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 then 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.\(^ {171}\)

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\(^{169}\) 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 

173 Id at 535.
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. An unconscionable contract affronts the sense of decency and usually involves gross one-sidedness, lack of meaningful choice and susceptible clientele. 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. Juries are not used in cases at equity, so unconscionability, being equitable in its origins, is decided by a judge. 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. 

**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.

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 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.

**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. 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. The ultimate conclusion of whether a provision is unconscionable is to be made in view of all of the circumstances. 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. 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.

**The Adhesion Contract**

Standard form contracts presented on a take-it-or-leave-it basis are often referred to as contracts of adhesion. At common law, contracts of adhesion have been presumptively enforceable. 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

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180 163 Misc. 2d 127, 136.
184 Id.
185 Restatement (Second) of Contracts 208 (1979).
186 Blum, supra n10, at 13.11.3, 358
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. These contracts are a familiar part of the modern legal landscape. While not lacking in social advantages, they bear within them the clear danger of oppression and overreaching. 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. 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: 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. 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. 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. 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.

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.

Procedural Unconscionability

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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. 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. The procedural element focuses on the bargaining behavior of the party alleged to have acted unconscionably. 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.

Procedural unconscionability serves two functions. First, it settles the conflict between the principle of freedom of contract and court intervention. 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. 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.

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

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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. 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.

**Substantive Unconscionability**

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

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

**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. 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. The following recording industry professionals are also excluded from the benefit of Labor Code 2855: songwriters, producers, musicians, and engineers. 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

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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.
225 Id.
an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.\textsuperscript{227}

\textit{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.\textsuperscript{228}

It was under this section of the Civil Code that confirmed that unconscionability was ultimately a question for the court.\textsuperscript{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.\textsuperscript{230} The statute permits the court, upon finding a contract to be unconscionable, to refuse to enforced the contract or to enforce the remainder of the contract without the unconscionable clause.\textsuperscript{231}

\textbf{Unconscionability in Recording Contract Terms}

For years, recording artists and their representatives have recognized and vilified the antiquated, but universally used, standard recording agreement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{234} Free agency, within the music business, would give the artists control over their cases and guarantee competition and innovation in the recording industry.\textsuperscript{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).\textsuperscript{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’.”\textsuperscript{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.\textsuperscript{238} There are several clauses in the recording contract that have been the target for litigation claiming unconscionability; they include: (1) \textit{Term clause}, which indicates the duration of the contract.\textsuperscript{239} This part of the contract can prevent the artist from leaving the

\textsuperscript{227} Cal. Lab. Code § 2855(b) (1987)
\textsuperscript{228} See Cal. Civ. Code § 1670.5.
\textsuperscript{229} See Flores v. Transamerica HomeFirst, Inc., 93 Cal. App. 4th 846, 851.
\textsuperscript{231} See Flores, 93 Cal. App. at 848.
\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{237} Id.
\textsuperscript{238} Bill Holland, Performers Give Testimony Before Judges & Lawmakers, Billboard Magazine (Sept. 2001)
\textsuperscript{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. 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%. This is one area of the contract that receives the biggest complaint from recording artists; 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.

In the modern record business, one of the major five labels is likely to have control of your output. Those labels include: Vivendi Universal, Sony, Warner Music, BMG, or EMI. This control has been referred to as “indentured servitude” by artists and activists for recording artists. 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. 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 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. 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. 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. 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. 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. Love was trying to expose what she calls the “unconscionable and unlawful” business tactics of the major record labels.

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**Notes:**

240 Id.
241 Bill Holland, Artists’ Lawyers Debate Contracts, Billboard Magazine (Sept. 2001)
243 See Contractual Issues, supra n 48
244 Take it or Leave it, Billboard Magazine (Sept. 2001)
245 Id.
247 Chuck Phillips, Record Label Chorus: High Risk, Low Margin, Billboard Magazine (May 2001)
248 Laura M. Holson, Courtney Love May Be Close To Settlement, NY Times (Sept. 2002)
249 Id.
250 Id.
252 Courtney Love vs. the Music Biz, http://www.anybodylisten.com/home/Courtney_Love_vs.htm (assessed April 2, 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.\textsuperscript{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.\textsuperscript{255}

\textbf{A “Kurupt” Contract}

In litigation started in 1998, an artist known to rap fans as “Kurupt”, a member of the group “Tha Dogg Pound”, initiated litigation against his label (Interscope Records).\textsuperscript{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.\textsuperscript{257} The court also indicated that recording contracts are lengthy and the provisions are not particularly conspicuous.\textsuperscript{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.\textsuperscript{259} Hence, the court found that the contract was one-sided and unconscionable.\textsuperscript{260}

\textbf{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.\textsuperscript{261} In the summer of 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{265}

The case was eventually settled by the group and the label.\textsuperscript{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.\textsuperscript{267} In spite of the settlement, members of the group view the result as a “hollow victory”.\textsuperscript{268} Through their lawsuit, the group wanted changes to affect the entire recording industry.\textsuperscript{269}

\textbf{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.

\textsuperscript{254} Courtney Love & UMG Settle Their Differences, \url{http://musicdish.com/mag/index.php3?id=6728} (assessed April 1, 2005)
\textsuperscript{255} Id.
\textsuperscript{257} Id at 382.
\textsuperscript{258} Id at 383.
\textsuperscript{259} Id.
\textsuperscript{260} Id.
\textsuperscript{261} Holson, supra n60
\textsuperscript{262} Id.
\textsuperscript{263} Id.
\textsuperscript{264} Calif. Bill Seeks To Resolve Recording Industry Spat, \url{http://onstagemag.com/ar/performance_calif_bill_seeks/} (assessed April 1, 2005)
\textsuperscript{265} Holson, supra n60
\textsuperscript{266} Id.
\textsuperscript{267} Dixie Chicks in Charge, \url{http://www.usatoday.com/life/music/news/2002-08-26-chicks_x.htm} (assessed April 1, 2005)
\textsuperscript{268} Id.
\textsuperscript{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 held 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).
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).
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 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

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.
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."\textsuperscript{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."\textsuperscript{295} The theory is that "employees who have similar responsibilities in similar communities should receive similar salaries."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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."\textsuperscript{299} Furthermore, the process of making final offers will often involve revealing previously concealed information that may assist parties in making settlement prior to the hearing.\textsuperscript{300}

In practice, the MLB arbitration system has encouraged parties to settle their disputes prior to an arbitration hearing.\textsuperscript{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."\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{305} In the 2005 round, owners won two out of the three hearings held.\textsuperscript{306} Win-loss numbers alone can be extremely misleading, however, because the owners' convincing margin of victory at the hearings has not lead 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.\textsuperscript{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

\textsuperscript{294} Id. at F(12)(b).
\textsuperscript{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).
\textsuperscript{297} Martin H. Malin, Public Employees’ Right to Strike: Law and Experience, 26 U. MICH. J.L. REFORM 313, 333.
\textsuperscript{298} Meth, supra note 27, at 384-85.
\textsuperscript{299} Id. at 388.
\textsuperscript{300} Id. at 389.
\textsuperscript{302} Id. at 221.
\textsuperscript{303} Id. at 221-222.
\textsuperscript{305} See Blum, supra note 35.
\textsuperscript{306} Id.
\textsuperscript{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 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

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308 Chalpin, supra note 7, at 206.
309 See Hopkins, supra note 4, at 309.
310 See Blum, supra note 35.
311 Id.
313 Id.
314 Id. at 26.
315 Hopkins, supra note 4, at 323.
317 Hopkins, supra note 4, at 316.
318 Id.
319 Id.
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. Between 1978 and 1985, players who opted for arbitration had previously received a combined average percentage salary increase of 106.2%.322

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

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

322 Id. at 316.
323 Id. at 317.
327 Warrior & Gulf Navigating Co., 363 U.S. at 583.
328 Enterprise Wheel & Car Corp., 363 U.S. at 598.
329 Id. at 316. 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.
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.\footnote{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.\footnote{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.\footnote{338} For better or for worse, salary arbitration has become a sacred cow that the MLBPA is unlikely to ever give up.\footnote{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."\footnote{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.\footnote{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."\footnote{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.\footnote{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.

\footnote{336}Id. at 509.  
\footnote{337}Id. at 510.  
\footnote{338}Chalpin, supra note 7, at 223-224.  
\footnote{339}Id., at 234.  
\footnote{340}See Article VI, F(5) of the 2003-2006 Basic Agreement.  
\footnote{341}Hopkins, supra note 4, at 332.  
\footnote{342}Id. at 333.  
\footnote{343}See Id.
An all too common question people often asked is, “What exactly is online piracy?” Piracy is stealing. It is the unlawful taking, copying, or use of copyrighted materials without the consent of the works’ owner. In order to legally use a copyrighted work, one must obtain permission from the copyright owner, which usually involves compensation and licensing. Most online piracy takes place via peer-to-peer software, such as Kazaa, Gnutella and Direct Connect, which connect millions of computers to one another over the Internet. 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.

Internet piracy was initially developed into a highly-recognized social problem with the advent of the notorious Napster litigation and subsequent music industry uproar concerning Internet music downloading. 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

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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.
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 encryption\textsuperscript{353} protections.\textsuperscript{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.\textsuperscript{355}

Online motion picture piracy is defined as the “unauthorized use of copyrighted motion pictures on the Internet”.\textsuperscript{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.\textsuperscript{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.\textsuperscript{358} In 2001, there were one million movies available per day worldwide, with about 600,000 downloaded per day.\textsuperscript{359} Illegal movie downloading has increased 20% each year since, according to the Motion Picture Association\textsuperscript{360}, which amounts to approximately $1 billion in lost DVD sales and rental revenue loss sales in 2004.\textsuperscript{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.\textsuperscript{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.\textsuperscript{363} Despite the many legal wins and landmark legislative efforts, Internet pirates seem shamelessly undeterred and adamant to continue their online bootlegging spree.\textsuperscript{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.\textsuperscript{365} Today, the Internet has been taken captive by the cutting-edge quality of virtually flawless motion picture reproductions.\textsuperscript{366} The film industry pirates made an unbelievable leap from the Flintstones-age into the Jetsons-age in 2000.\textsuperscript{367} A typical videocassette

\begin{itemize}
\item[\textsuperscript{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.
\item[\textsuperscript{354}] See Lee Gomes, \textit{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/SB96378527872501396.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).
\item[\textsuperscript{356}] The Motion Picture Association of America [hereinafter “MPAA”], available at http://www.mpaa.org/anti-piracy/.
\item[\textsuperscript{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/.
\item[\textsuperscript{358}] Gomes, supra note 11 (emphasizing the speed in which Internet users are downloading movies online, analogous to the music downloading trend).
\end{itemize}
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

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

368 Motion Picture Association of America available at http://www.mpaa.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=/comm onspot/security/getfile.cfm&pageid=19984&hitboxdo ne=yes (reporting that over $1,807,709 in retail software in revenue was lost to piracy in the year of 2001).
374 Id.

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.cablemodem.net/features/jun00/wpaper.html (last visited Feb. 1, 2005) [hereinafter “Basics”].
376 See Sean Bynes, 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/200/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.\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{382} The first “window” is usually the theatrical release, distribution, and exhibition.\textsuperscript{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.\textsuperscript{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 movies.\textsuperscript{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.\textsuperscript{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.\textsuperscript{387}

Prior to the introduction of DVDs, film studios released movies on videotapes\textsuperscript{388} for home viewing in “analog”\textsuperscript{389} format and this method has been utilized by studios since 1971.\textsuperscript{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.\textsuperscript{391} The advantages of the digital versus analog include the DVDs improved visual and audio quality, larger data capacity, and greater durability.\textsuperscript{392} Obviously, the

\textsuperscript{379} Universal City Studios v. Reimerdes, 111 F. Supp. 2d 294, 308 (D.N.Y. 2000) [hereinafter \textit{Reimerdes}] (describing the Content Scramble System (CSS), which is an access control and copy prevention system for DVDs developed by the motion picture studios. 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).


\textsuperscript{381} \textit{Reimerdes}, supra note 30 at 309. (describing \textit{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 \textit{Reimerdes} case describes in detail the process in which motion picture studios distribute movies to the public and for profit).

\textsuperscript{382} Id.

\textsuperscript{383} Id.

\textsuperscript{384} Id.

\textsuperscript{385} Id.


\textsuperscript{387} Id.

\textsuperscript{388} See Mr. Media’s FAQs, \textit{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).

\textsuperscript{389} Grosse, supra, note 26.


\textsuperscript{391} See Mark S. Torpoco, \textit{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).

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.399

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 recognized that it was only a matter of time before DVDs).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, 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 DVDs.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

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.
available at http://www.theregister.co.uk/2003/01/07/dvd_jon_is_free_official/ (discussing the Norwegian court ruling

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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 (Xing).
he created DeCSS wholly for non-infringing purposes. 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 Linux 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. 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.

The presence of DeCSS on the website, www.2600.com, sparked a copyright infringement 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. The number “2600” has special significance in the hacker community because it is the hertz 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. 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.

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). Both argued that the DeCSS software was intended to provide a means in which to copy DVDs purely for personal use on Linux. 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)).

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).

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 purchased the disk, the disk became his property and that his son broke the encryption and obtained access to the data on the disk. Since his son asserts the data in dispute is the content of the DVD, Corley’s site, www.2600.com, was merely one of hundreds of web sites that posted DeCSS in late 1999. After an abundance of cease-and-desist letters were sent to scores of website operators, many operators blatantly refused to remove DeCSS. Because their efforts have proved fruitless, the film studios filed suit against Corley and his company, 2600 Enterprises, Inc. 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.


412 Id.

413 Id.

414 Id.

415 Id.

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. 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.” 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.

Neither Corley nor Johansen ever made an attempt to inform the owners of the copyrighted material. 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”), including reverse engineering, encryption research, security testing, or fair use. 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. The Court of Appeals for the Second Circuit granted the studios’ request for an injunction because DeCSS strips DVDs of any copyright protection. Without an injunction against pirates such as Corley, the film studios would be forced to surrender to piracy, and over $3 billion in profits.


In 1999 DivX debuted, which is a program that compresses video files and simplifies movie downloading over the Internet. 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. DivX not only allowed a DVD to fit on a single CD

321 Studios, a company that manufactured and sold DVD copying software, such as DVD X Copy, 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. In truth, these courtroom feats were quickly trounced by the staggering amount of profits lost to illegal DVD downloading. Pirates struck back with a mighty blow amounting to approximately $1 billion worldwide and more than $2.9 billion in the United States.

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but also reproduced a pirated movie file within 2 hours.338 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 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

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
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).


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).


469 Id.

470 Id.

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

consistently remains ambiguous. “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.

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). Contributory copyright infringement occurs when the defendant, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another.”

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.

Vicarious liability is another method of holding someone liable for copyright infringement even when the accused did not actually commit the infringement. 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.

Unlike contributory infringement, knowledge is not a requisite factor of vicarious liability. Rather, while vicarious liability originated from the agency doctrine of respondeat superior, 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 control the infringer's acts, and also has a direct financial interest in such activities.”

The plaintiff, film studios, are only required to prove that the defendant has “the right and ability to supervise the infringing activity and also has a direct financial interest in such activities.”

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. 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. The first section states that “no person shall circumvent a technological measure that controls access to a work protected under this title.” DMCA firmly prohibits a web user from attempting to hack into an encrypted system to steal protected information without permission from the copyright owner. Secondly, DMCA cracks down on the actual devices and mediums pirates use to circumvent protected copyrighted work.

Furthermore, the second section significantly reduces liability of Internet service providers (“ISP”) for copyright infringement. ISPs are free of liability for simply transmitting information over the Internet.

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474 Pacific & Southern Co. v. Duncan, 744 F.2d 1490, 1495, n. 8 (CA11 1984).
476 Id.
477 Id.
478 Id.
479 Id.
480 M. Witmark & Sons v. Calloway, 22 F.2d 412, 414 (E.D.Tenn. 1927).
482 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 Id.
485 Id.
486 Id.
488 Id.
on the condition that ISPs remove infringing material from users' web sites.\textsuperscript{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.\textsuperscript{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.\textsuperscript{491}

\textit{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.\textsuperscript{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.

\textit{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 cracking four digital-music copy-protection formats, called watermarks.\textsuperscript{493} For research purposes, Felten published a paper to explain how his team had cracked the code.\textsuperscript{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.\textsuperscript{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.\textsuperscript{496} In response, Felton sued the RIAA claiming that the threat was an effort to restrict free speech.\textsuperscript{497} However, the RIAA decided not to pursue the claim and Felten had successfully published his paper.\textsuperscript{498} The moral of this story: legislation should not restrict constitutional rights of fair use.\textsuperscript{499}

Felton's legal battle with the RIAA is a prime example of how the DMCA legislation could go astray.\textsuperscript{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).\textsuperscript{501} These anti-DMCA groups expressed their opposing arguments and proposed changes to the law.\textsuperscript{502} The EFF argues that the language of DMCA has the potential to chill free expression and scientific Research.\textsuperscript{503}

\textit{Free Dmitry! (U.S. v. Sklyarov)}


\textsuperscript{494} Id.

\textsuperscript{495} Id.

\textsuperscript{496} Id.

\textsuperscript{497} Id.

\textsuperscript{498} Id.

\textsuperscript{499} Id.


\textsuperscript{502} Id.

\textsuperscript{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. On July 16, 2001, 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.”

The U.S. Department of Justice alleged that both Sklyarov, and his employer, ElcomSoft Co. Ltd., conspired for “commercial advantage and private financial gain.” Sklyarov argued that his software enables fair use. 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. Therefore, Sklyarov software was created with the intent to be a piracy tool. Under the terms of DMCA, Sklyarov was facing a five-year prison term and a US$500,000 dollar fine. On August 6, 2001, Sklyarov was released on a US$50,000 bail and was not allowed to leave Northern California. The charges against Sklyarov were later dropped in exchange for his testimony. 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. A case against ElcomSoft is still pending.

The U.S. v. Sklyarov 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. DMCA bans any device that enables circumvention of technical protection systems or access control measures. However, scientists, librarians and cryptographers 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. Sklyarov argued that the DMCA is unconstitutionally vague and violates the First Amendment rights of third parties to engage in fair use.

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."
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 states\(^{521}\) 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 (HRRC), 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 “LaMacchia”\(^{529}\) 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.


\(^{523}\) Id.

\(^{524}\) Id.

\(^{525}\) Id.

\(^{526}\) Id.

\(^{527}\) Id.


\(^{531}\) Id.

\(^{532}\) Id.

\(^{533}\) Id.

\(^{534}\) Id.


\(^{536}\) Id.
theatres. 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

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

538 Id.
539 Id. (quoting Dan Glickman, President and CEO of the Motion Picture Association of America).
540 Id.
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.
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.
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 session in June, 2005, which will prove to be the most important intellecutal 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

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.
558 Id.
559 Id.
560 Id.
562 Id.
563 Id.
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.
570 Id.
other forms of expressive communication.\textsuperscript{572} Freedom on the Internet is a greatly regarded entitlement that the public is in no hurry to relinquish.\textsuperscript{573}

The Internet is probably the only communication medium left in existence that does not answer to the government.\textsuperscript{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.\textsuperscript{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.\textsuperscript{576} The Internet is not a “scarce” resource and anyone can attach a computer to it without asking the government's permission.\textsuperscript{577} Nor is it a government-licensed common carrier similar to the phone company.\textsuperscript{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.\textsuperscript{579} Thus, the nearly absolute freedom the Internet provides, along with its decentralization, are the factors that make it such a double-edged sword.\textsuperscript{580}

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

\textsuperscript{572} Id.
\textsuperscript{573} Id.
\textsuperscript{574} Id.
\textsuperscript{575} Id.
\textsuperscript{576} Id.
\textsuperscript{577} Id.
\textsuperscript{578} Id.
\textsuperscript{579} Id.
\textsuperscript{580} Id.

many argue that contents on the Internet should not be regulated because it would be a flagrant violation of their First Amendment rights.\textsuperscript{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.\textsuperscript{583}

\textbf{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.\textsuperscript{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.\textsuperscript{585} However, colleges and universities liken themselves as “bastions of privacy and free speech, not copyright police,”\textsuperscript{586} therefore; it is highly unlikely that this approach will effectuate a positive change in the pirating behavior among college students.\textsuperscript{587}

The MPAA is also offering $500 rewards to theatre employees who assist in capturing pirates using video cameras to record first-run screenings.\textsuperscript{588} Again, this strategy seems to be micromanaging the enormous piracy problem and completely missing the ball.\textsuperscript{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.\textsuperscript{590}

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

\textsuperscript{582} Id.
\textsuperscript{583} Id.
\textsuperscript{584} See “So What’s It To Me?” available at http://www.respectcopyrights.org/content.html.
\textsuperscript{585} Id.
\textsuperscript{587} Id.
\textsuperscript{588} Id.
\textsuperscript{589} Id.
\textsuperscript{590} Id.
\textsuperscript{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 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

593 Id.
594 Id.
596 Id.
597 Id.
599 Id.
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.
77,39125640,00.htm.
executives have called in the lawyers and are working on improving encryption of new high-definition DVDs. 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.

A major problem with studios suing individuals is that: it doesn’t make them popular with their consumers. These major motion picture studios are viewed as the eight-hundred-pound guerrilla that’s bullying all of the harmless downloaders. 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”. 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.”

Evolution, Flexibility, Collaboration

Aggressive Technology

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

Implementing watermarks on the newly released DVDs and creating a more resilient encryption code are strategies that are in the works. 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? Industry experts believe piracy will rise with the increased sophistication of technology.

608 Id.
610 Id.
611 Id.
612 Id.
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).
615 Id.
616 Id.
617 Id.
618 Id.
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. 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. 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. 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. 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 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. 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. Movies are not released in all countries (territories) simultaneously for two major reasons. 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. 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.

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. And yet, despite the publicity, many fans abroad are forced to wait an average of six months before the movie is released in

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625 Id.
626 Id.
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

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

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632 Id.
633 Id.
634 Id.
635 Id.
637 Id.
638 Id.
640 Id.
641 Id.
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. However, the National Hockey League Players’ Association (NHLPA) claims that the NHL’s December 14, 2004 counter-proposal misuses data and asserts misleading conclusions. 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. 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. 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. On December 9, 2004, the NHLPA presented the owners with a proposal that included a 24 percent pay reduction on all contracts. 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.”

The NHL countered this offer with a proposal that included a salary cap and weighted salary rollbacks. This counter-proposal was rejected by the NHLPA. Meetings that took place throughout the middle and end of January 2005 appeared to produce no results. 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. It also contained a three-year maximum on contract length.

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.” 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. Due to this cancellation, the NHL is the first professional
sports league to lose an entire season because of a labor dispute. 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. However, this plan depended on the players’ acceptance of a salary-cap plan. The players’ union rejected this plan, arguing that a salary cap allows owners to pay players less than what they’re worth. Both sides refused to yield from their positions, and a strike ensued on August 12, 1994. In October of 1994, President Clinton appointed William Usery to mediate the dispute between the players and the owners. Mr. Usery supervised negotiations between the parties. 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. 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. 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. The players then reported for spring training and played their season, modified to include 144 games, to its conclusion.

**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. Many owners insisted that fans would still attend games if replacement players were found. 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. 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). 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.” They claimed that the players refused to bargain, and that the owners were trying to “preserve baseball.” 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.” Despite believing that a relationship with the players is necessary, they view the players as trying to destroy their business. Owners claim that they are losing money “in perpetuity.”

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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 67.
666 Chalpin, Id at 227.
667 Devine, supra, note 16 at 61.
668 Devine, Id, note 16 at 61.
669 Devine, Id, note 16 at 61.
670 Devine, Id, note 16 at 61.
672 Devine, supra note 16 at 62.
673 Devine, Id note 16 at 62.
675 “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 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 procreative 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

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\(^{678}\) Menkel-Meadow, id note 35 at 765.


\(^{680}\) Menkel-Meadow, supra note 35 at 771.


\(^{682}\) Menkel-Meadow, supra note 35 at 793.


\(^{684}\) Menkel-Meadow, supra note 35 at 778.

\(^{685}\) Menkel-Meadow, id, note 35 at 778.


\(^{687}\) “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 41 at 6.

\(^{690}\) 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. 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. However, the Players’ Association had rejected this plan because it contained an unacceptable salary cap. 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. 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.” A problem is resolved when “parties get to the point in a negotiation that they are able to finally come to a resolution.” However, even if a problem is resolved, the parties may not feel as though the conflict is “really gone.” In order to completely purge themselves of the potential for future disputes, the parties to a conflict 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. 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, 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.

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. 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. 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, 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.

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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.
702 Fisher, id note 36 at 372.
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 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 Section 1.709

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.”


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.”

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.”

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.

**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.” 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 deters teams from trying to make a profit and is thus a restraint on trade. 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.” 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. 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. Excluded from DGR are revenues derived from concessions, parking, local advertising and promotion, magazine advertising, local sponsorship agreements, stadium clubs and luxury box income. The NFL players union, led by Gene Upshaw, wants to take some of the above exclusions listed and include them in the

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708 *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.

709 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.

710 *LA Coliseum*, 726 F.2d at 1389.

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. Nearly $2 billion in revenue generated in the 2004-2005 season is not shared equally among the teams and excluded from the DGR. 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. 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. 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.” 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, 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.”

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. In evaluating the scope of this section, the courts have held that “[m]onopoly power is the power to control prices or exclude competition.” The NFL conceded in Murray v. NFL in 1998 that by definition they have a monopoly.

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. 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.” 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. 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

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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.
723 LA Coliseum, 726 F.2d at 1389.
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.”
728 E.I Du Pont, 351 U.S. at 392.
729 Ibid.
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. Generally, cross elasticity of demand deals with the “responsiveness of the sales of one product to prices changes of the other.” 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. The NFL constitution and the 1993 CBA have provisions that also place certain restriction on players’ salaries. The players are an 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. 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. 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.” 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

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, 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. 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 appropriation 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 form 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.”

Appropriation art is the use or incorporation of borrowed elements to form a new art work. 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’ 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 detersants; (c) popular culture images such as celebrities, advertisements and kitch; (d) archives of family or historical photographs; (e) traditional material drawn form other cultures; (f) and other areas of human interest and knowledge such as music, science, and technology. 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.”

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 form 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.

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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.


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

An artist may seek to expose cultural biases, stereotypes, issues of national identity and etc. through popular images. 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. A parody can be a musical, literary, or visual work that deliberately copies another work in a comic or satirical way.

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.

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 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 semiotics and raw form. Popularity of mass-media and advertisement has led artists to represent soup cans and coke bottles as

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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 Allegorric work is another word for appropriation art. It includes works that use symbols to express a deeper, often moral, social, political or spiritual meaning.
754 See id. at 580-81.
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.”

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.”

Similarly, professor Williajeanne F. McLean argues that we have already exhausted artistic styles and imagery. It has become more difficult for artists to invent original artwork without infringing on the old. 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.

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. The “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. Hitherto, this era of authenticity has dominated the art world.

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. Appropriation, or more boldly plagiarism, is a vital part of the creative process in the fine arts. William Shakespeare has been known to have taken


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


760 Id.

761 See id.

phrases from other sources. Christopher Marlow stole from Shakespeare and Ben Johnson stole from both Marlow and Shakespeare. Parts of Herman Melville’s Benito Cereno were plagiarized from an unfamiliar writer, Amasa Delano. Artists like Marcel Duchamp turned ready-made commercial goods and popular imagery into new and unconventional art. 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 Ducham; abstracted popular imagery set the standards for American art.

A journalist of the Boston Globe summarizes the history of plagiarism as “Good writers borrow; great writers steal.” 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.” 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.

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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 215. 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.

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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. 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.” 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. Section 106 of the 1976 Copyright Act details six exclusive rights granted to copyrights owners, four of which apply to visual works: the right to reproduce ones work, the right to create derivative works based on the original, the right to make copies and the right to display the work publicly. 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,
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 work must bear substantial similarity to the original. 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. Affirmative defense of fair use provides a spark of optimism to appropriation art. The doctrine of fair use allows a reasonable and limited use of a copyrighted work without the author’s permission in cases where the literal terms of the Copyright Act prohibit them. The fair use doctrine was thought to be specifically “necessary to fulfill copyrights very purpose, ‘to promote the Progress of Science and useful Arts.’” 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.”

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, Section 107 is drafted broadly, purporting guidelines rather then a directive. 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. Similarly, the four statutory conditions provided by Section 107 are also not exclusive and may not be treated in isolation. Thus, no one factor has

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 then 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 sates 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.

greater weight or significance over another and the factors presented are merely explicit examples, “not an exhaustive enumeration.” The Supreme Court elucidated that “All [factors] are to be explored, and the results weighted together, in light of the purposes of copyright.” The Court has made it clear that it will not employ bright line rules to determine fair use; the doctrine calls for a case-by-case analysis, granting judges discretion to balance the factors.

**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. 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. 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 found this conflict significant and have uniformly rejected First Amendment defenses in copyrights cases. 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.

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 though to represent the compromise, the ‘breathing space’ between copyright monopoly and First Amendment free expression interest.” 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. 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

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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).
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.
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. 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.”

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,” 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 images, like the Mona Lisa, 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, 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.”

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. Consequently, 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. However, it was not until

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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.
804 See, e.g., Fisher v. Dees, 794 F.2d 432, 440 (9th Cir. 1986) ("When Sony Sniffs Glue,” a parody of “when Sunny Gets Blue,” was decided as fair use); Elmere 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 admitted 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

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 then 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

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

“best parody” was not permissible, given that copyrights owners’ interest are involved. Id.
815 Id. (emphasis added).
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. 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. 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.”

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*, stating that requiring parodists to copy only the amount necessary to evoke initial recognition is overly constraining. The court held that reproduction for commercial gain, and then escape liability by calling the end result a parody or satire on the mores of society. The court allowed an artist to use an amount greater then strictly necessary to conjure up the original and still be entitled to a fair use defense. This 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 then 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.” 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. 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. 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.

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. 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.” *Harper & Row*’s inquiry took account not only harm to the original, but also harm to the market.

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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 plaintiff’s 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. Accuff-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 named 2 Live Crew for releasing an album titled “As Pretty Woman,” filed a suit against a rap music group copyright holder of Roy Orbison’s rock ballad, “Oh, Pretty Woman,” was not until *Campbell* decided eight years later that this scheme began to change.

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 Woman.”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. 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.”

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 periodic 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 catered 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 ‘supersed[e] 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

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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.
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:

[The 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 supersedee 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 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.


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

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.
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. “Whereas 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.”

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.

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.” 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 then 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. 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.” Koons used Rogers’ picture for his sculpture titled “String of Puppies.” Rogers filed an infringement

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*.

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. The court stated that, “it was not really the parody flag that appellants [was] sailing under, but rather the flag of piracy.”

Circumstances of the case dictated that Koons acted in bad faith by exploiting the original for profit making motives. More importantly, the sculpture copied the essence of the original to a far greater extent then 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.”

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. 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 then 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 “String of Puppies” did not pose harm to the market of the original, since Koons’ sculpture was a commissioned, limited edition work.

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.”

“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.

It is important to emphasize that appropriation art does not purport to improve the original. Rather,

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867 *Id.* at 305.

868 *See id.* at 310 (“[E]ven given that ‘String of Puppies’ is a satirical critique of out 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 expresses or represents 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 God.” 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. Nimmer suggests that if this were not a well-esteemed sculpture, it would have fell below court recognition.

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. Style 7114 was in the exact style of Mondrian painting, but had a different placement of geometric shapes. The Ninth Circuit, reversing district courts decision, concluded that it was copyrightable. 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.”

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.

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If copyright law were to recognize artistic style in its framework, an artist’s trademark technique

877 Id.
878 See Nimmer, supra note 40, §3.03 at (C)(2).
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. For example, assume Koons, rather then making a realistic sculpture called “String of Puppies,” made an abstract sculpture called “Juxtaposition of Puppies.” The sculpture now has edgy corners coming form 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.

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884 Assuming that transformative value test does not only in cases of parody.
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. In the eighth grade Jarrett was diagnosed with learning disabilities relative to math and language. In order 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. 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.”

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. 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. 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, and Title II of the Americans with Disabilities Act (ADA).

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.

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

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886 Id.
887 Id.
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. 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.

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. 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 as 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.

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.

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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; and (4) 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

900 Id.
901 Id.
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).
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 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. 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.”

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 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. 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. 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. 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.

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.

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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.
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 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 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

917 Pottgen v. Mo. State High Sch. Ass’n, 40 F.3d 926, 930.
919 Pottgen, 40 F.3d 926, 930.
920 Id.
922 Id.
923 Id.
924 Id.
925 Id.
926 Id.
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 then 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.

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928 Pottgen v. Mo. State High Sch. Ass’n, 40 F.3d 926, 934.
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 player or a weekend warrior. 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. An invitee is defined as a person who has an express or implied invitation to enter or use another’s premises. Under basic tort law, the occupier has a duty to inspect the premises and warn the invitee of dangerous conditions. 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. In Cornell, the plaintiff, a golfer playing on the course, was struck 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. 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. As plaintiff was exiting Palos Country Club from behind the 9th green

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.
933 Id.
935 Id.
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 struck 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

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937 Id. at 500.
938 Id.
939 Refers to the ability of a golfer to hit their ball relatively close to their intended target.
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.
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
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 duffer 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 Sawgrass.

**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 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. 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 where 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, 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. 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. 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. 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.

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952 Gray, 730 N.E.2d at 340.
953 Id at 341.
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. 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.

Since defendant failed to give the plaintiff sufficient warning, the court found defendant liable and awarded damages to the plaintiff. 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. 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. 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. 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 Titleist.

A clear demonstration of when a golfer would be liable for hitting a player in another group is seen in Campbell v. Picceri. 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

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955 Id.
956 Id. at 790.
957 Id.
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.
observe the plaintiff just to the left of the tee box. 963 Defendant argued that the court must adopt the standard established in Gauvin964 and subsequently reinforced by Gray965, 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

963 *Id* at 1.
964 Gauvin v. Clark, 537 N.E.2d 94.
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.