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BUSINESS LAW NEWS

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BUSINESS LAW NEWS EDITORIAL TEAM

Executive Committee of the Business Law Section 2018–2019

BUSINESS LAW NEWS

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Executive Committee: Message from the Chair

Monique D. Jewett-Brewster

As we bid *adieu* to 2018, we can look forward to the many ways that the Business Law Section (BLS) will continue in its goal to improve the practice of California business law, for all of its members, as part of the California Lawyers Association (CLA). Each of the major methods in which the BLS engages in its constituency outreach—whether directed to the general public, the section's seasoned attorneys, or the BLS' NextGen lawyers—deserves its own detailed discussion, and the BLS' involvement with each of them.

In this issue, I will begin with a synopsis of the **Publications** outreach the BLS offers to the public and the bar. First, if you are reading these words, you must be aware of the *Business Law News* (or BLN), the quarterly, scholarly publication that informs its readers of important developments in the California business legal landscape. In just the past few volumes alone, BLN authors have addressed the enforcement of arbitration agreements in bankruptcies; explained the stock option tax rules business lawyers should know; discussed California marijuana licensing requirements; and provided practical guidance about the representation of nonprofit entities.

In addition to receiving the BLN, and its companion *Annual Review* summarizing the major developments in annual business, the BLS offers published specialized content generated by one or more of the section's fifteen standing committees. These "e-updates" (or e-Bulletins) are as varied and diverse in content as the standing committees that produce them.

For example, the BLS Corporations Committee and Insolvency Law Committee recently published respective e-Bulletins on case law updates ranging from the enforceability of forum-selected bylaws adopted by a Delaware corporation headquartered in California without stockholder approval, to the issue of whether a junior creditor may have a duty of inquiry where a senior creditor's collateral description in its financing statement could be interpreted as ambiguous. Also consider the e-Bulletins recently published by the Partnerships and LLCs Committee about the Ninth Circuit U.S. Court of Appeal's interpretation of "investment contracts" under federal securities laws, the Nonprofit Committee's announcements of free MCLE credit programs on topics ranging from fiscal sponsorship to live charity webinars offered by the California Department of Justice, and the AgriBusiness Committee's "Save the Date" reminders for its very well-received agriculture, water, and wine tours. As a reminder, to receive one or more of the BLS' standing committees' carefully curated eBulletin content, it is as simple as entering the following link into your internet browser to sign up: https://calawyers.org/Sections/Business-Law/Standing-Committees/Sign-Up-for-Standing-Committee-Email-Updates.

To truly stay on top of each standing committee's activities, click through the BLS' monthly e-News newsletter, delivered via email to each of our section's 8,000+ members. The e-News highlights events of broad interest to business lawyers, such as the University of San Francisco's January 2019 Symposium on cryptocurrency and blockchain for lawyers, co-sponsored by the BLS' Internet & Privacy Law and Consumer Financial Services Committee, and pro bono opportunities, such as contributing to the Camp Fire victims' legal needs. Also, watch for upcoming e-News announcements about the Advanced Directive Health and Wellness Program currently in planning, co-sponsored by the BLS' Health Law Committee, the Bet Tzedek Legal Aid Foundation, and Children's Hospital of Orange County, as well as the "10-Minute Mentor" practice guidance programming on which the BLS is collaborating with the California

Young Lawyers Program for the benefit of our newest counselors.

Finally, the BLS provides informative Opinion Reports, practice guides, and handbooks drafted by the section's standing committees specifically to provide guidance with the day-to-day issues business lawyers encounter in their practices. For instance, the BLS' Opinions Committee is nationally renowned for its Opinion Reports on various issues, including but not limited to Sample California Third-Party Legal Opinions for Venture Capital Financing Transactions. And to name only a few, the detailed Securities Law Guide and Handbook on Assignments for the Benefit of Creditors are currently being updated by the BLS' Corporations Committee and Insolvency Law Committee, respectively.

I promised a brief synopsis so I will end here. However, I would be remiss to close without reminding you that in addition to *availing* yourself of these special BLS membership publication benefits, you may also apply to *join* one of the BLS standing committees, including the BLN Editorial Board, to actively contribute to the Business Law Section's success in 2019. The standing committees are the heart-blood of the BLS, and work to accomplish our section's overall goal of providing high quality content of interest to business lawyers. Alternatively, you may wish to actively contribute, and market your expertise statewide, by serving as a volunteer author or editor for the BLN.

On that note, I hope you enjoy this Issue 1 of the 2019 BLN. I also hope that you look forward to the next issue of the BLN, where in addition to our authors providing more of the most cutting-edge articles on timely issues of business law, I will use my next address to cover some of the exciting and collaborative programming constituency outreach the BLS has planned for 2019. As always, please contact me at mjb@hopkinscarley.com, if you have any questions about the BLS' constituency outreach or how you can become involved in the BLS as part of the CLA—THE premier voluntary bar association for California's practitioners.

BLN Editorial Board: Letter from the Editor

Jeremy M. Evans

As Editor for Issue One, the first of 2019 for *Business Law News*, we are pleased to present some wonderful articles in this themed issue of entertainment, media, and sports law. Six industry professionals write on topics ranging from insurance and loss of value, employment law, litigation, contract drafting, negotiation, and licensing, including, specifics in film, television, music, and professional sports. All of our writers for this issue reside in the heart of the entertainment and sports industry, centered in Los Angeles, and more broadly in Southern California.

Starting off, we have Richard Giller, a partner with ReedSmith LLP in the Los Angeles office. His article discusses the importance of injury, draft, and free agency insurance to cover losses for high school, college, and professional athletes. A topic most people, let alone attorneys, do not have much knowledge.

Next we have Allen Secretov, an associate with Kinsella Weitzman Iser Kump & Aldisert LLP, in Santa Monica. He presents a terrific article, jointly written with Nick Milanes of the Upright Citizens Brigade Theatre, which has locations in Los Angeles and Manhattan, detailing how improv principles and exercises can benefit lawyers and law firms in surprising and immediately impactful ways.

Andrew Schauer, a solo practitioner based in the San Fernando Valley, has written a useful introduction to the ins and outs of esports, a growing industry that is beginning to challenge many traditional, "brick-and-mortar" sports for annual revenue.

Bill Colitre, Vice President & General Counsel at Music Reports, Inc., in Los Angeles, writes about the Music Modernization Act. He covers the basic impacts of the bill, as well as offering some interesting perspectives and anecdotal vignettes about how to construct and then shepherd legislation that can find enough consensus in a fractious industry like music to become law.

Adam Sloustcher, an Associate at Fisher & Phillips LLP, in San Diego, writes about professional sports franchise workplace investigations of harassment complaints.

Finally, this author, the founder and Managing Attorney at California Sports Lawyer®, representing entertainment, media, and sports clientele based in downtown Los Angeles, writes about how to draft and negotiate rights to be included in an over-the-top ("OTT") distribution deal for entertainment, media, and sports companies and interests.

We hope you enjoy this specially-themed issue.

Who Is Looking Out For Student-Athletes When Schools Purchase Disability Insurance For Them: A Case Study

Richard C. Giller

Richard is a partner in the Insurance Recovery practice group in the Southern California offices of Reed Smith, LLP, with over thirty-three years of experience crafting litigation strategies for complex insurance and commercial disputes. He has a significant breadth of experience in analyzing coverage and handling claims arising under permanent total disability and loss-of-value insurance coverages for athletes and teams. He can be reached at rgiller@reedsmith.com.

There is an emerging trend in college sports where schools use money received from the NCAA Student Assistance Fund to purchase permanent total disability (PTD) insurance policies, some of which include a loss-of-value rider, for high-profile student-athletes to help protect their future earnings. As an outspoken proponent of any student-athlete who is projected to be a top draft pick taking full advantage of school-purchased insurance, this author has become increasingly concerned about who is—and who should be—helping student-athletes understand the intricacies of disability insurance and navigate the inevitable hurdles insurance companies will construct if the athlete ever needs to file a claim for benefits.

Because the NCAA prohibits student-athletes from hiring a financial advisor or a sports agent while still in school, the question that arises is who is charged with looking out for the athlete and his or her best interests when it comes to disability insurance coverage and claims. Recent developments in a lawsuit filed in May 2018 by one such high-profile student-athlete have brought these concerns and questions into sharp focus. This article will examine these issues through the lens of that lawsuit.

Student-Athletes and Disability Insurance

Imagine being a twenty-year-old sophomore running back at a well-known football powerhouse and the reigning rushing leader in the Southeastern Conference. After your breakout sophomore season, everywhere you look pundits are predicting that you will be a first or second round NFL draft pick if you choose to leave school early after your junior season, so you can live out your dream of playing in the League and sign a multi-million dollar contract to play the game you love professionally. You are competing in spring practice when someone associated with your school's athletic department pulls you aside and suggests that, to protect against the adverse impact a significant injury might have on your future in the NFL, the school will pay the cost of buying a PTD insurance policy for you. How can you pass that up?

Like most twenty-year-olds, you have never purchased insurance before, you have never seen or read an insurance policy in your life, and you have no idea how your school is going to pay for your insurance policy. Before leaving home for college you were covered under your parent's health and auto insurance policies, and they took care of all the details for you. Unbeknownst to you, the school's offer to pay the premium for your disability policy involves using money the school received from the NCAA as part of what is known as the Student Assistance Fund (SAF). You probably had no idea that such a fund existed, and you most likely didn't care from where the school finds the money to pay for your policy.[1]

The SAF arose out of a settlement reached years ago in the *Jason White v. NCAA*[2] antitrust lawsuit, and, according to the NCAA's 2018 Division I Revenue Distribution Plan, the association meted out $66.3 million in SAF money to member institutions during the previous academic year. Under the NCAA SAF Guidelines, the fund is "intended to provide direct benefits to student-athletes or their families as determined by conference offices," including insurance policy premium payments.[3]

Outside the student-athlete setting, a person seeking to secure a disability insurance policy has the option of choosing the insurance broker he would like to work with. However, schools that exclusively work with the same broker again and again do not give the student-athlete the option to choose another broker even if they wanted to. You meet with the broker the school selects, and he helps you fill out an application for the insurance policy, which you sign, and that broker sends it off to someone else. You are told that the policy will pay you $1 million if you suffer an injury that precludes you from ever again playing the game that you love. Neither the school's insurance broker nor anyone at the school ever asks you to do anything else in connection with your insurance policy. Because of this, you reasonably assume that everything has been taken care of concerning the insurance policy, so you turn your attention back to preparing for your junior, and probably your last, college football season, feeling secure in the knowledge that there is a $1 million insurance policy in place protecting you against a career-ending injury.

During the annual spring football game against your teammates, you take a handoff from the quarterback, as you have thousands of times before. You run to the left, see a hole open up in front of you, cut up field, and run into a defensive lineman after a four-yard gain. The defender hits you as you have been hit thousands of times before, but this time you fall flat on your back, and, even though the hit was not a big collision, for some reason you can't move. Paramedics rush onto the field, and, when they reach you and ask what's wrong, you tell them that you can't feel your arms or legs, so they take all the necessary precautions, including placing you on a stretcher and carting you off the field.

That evening, while you are lying in your hospital bed, the school's insurance broker you had worked with weeks earlier calls your dad and leaves a voicemail message reassuring him that there is no need to worry about insurance coverage, because "everything [is] in force, so no issues are on that. I'm just calling to make sure he's all right." Unfortunately, as events later play out, there are a lot of issues with regard to collecting the $1 million PTD insurance policy, and the security you once thought you had no longer exists.

These are the facts underlying the allegations set out in *Rawleigh Williams III v. Underwriters at Lloyd's, London, et al.*, which is currently pending in the Circuit Court of Washington County, Arkansas.[4]

Here is a graphic depiction of the chronology of events surrounding the insurance policy, injury, and PTD claim of former University of Arkansas running back Rawleigh Williams, as alleged in his complaint:

DATE	EVENTS
March 10, 2017	At the schools urging, Williams purchases a $1 million PTD policy from Justin Boeving, the school's exclusive insurance broker.
March 13, 2017	Mr. Boeving assists Mr. Williams with completing the policy application, and Mr. Boeving submits the application to the wholesale insurance broker, International Specialty Insurance Inc. ("ISI").
April 10, 2017	According to the insurance company, Lloyd's, the premium payment of $6,440 was due (31 days after inception of the policy). The University of Arkansas was responsible for making the payment with the NCAA SAF funds, but the premium was not paid within that time frame.
April 29, 2017	Mr. Williams suffers a career-ending neck injury.
May 2, 2017	ISI issues Exclusion No. 3—six weeks after inception of the policy and three days after Mr. William's injury—purportedly excluding coverage for the very injury Williams suffered just days earlier. ISI would not send Exclusion No. 3 to Mr. Williams for another week.
May 4, 2017	The University of Arkansas pays the $6,440 policy premium for Mr. William's policy—six days after the accident and two months after the policy's inception.
May 8, 2017	Mr. Williams announces his retirement from football.
May 9, 2017	Mr. Boeving emails a copy of the policy to Mr. Williams, informing him that the policy had been issued with final wording the day before his retirement. This was the first time Mr. Williams was provided with the policy.
May 17, 2017	Mr. Williams files a claim with Lloyd's for the policy limits.
Sept. 22, 2017	Lloyd's denies Mr. William's claim, based solely on Exclusion No. 3. Lloyd's does not raise the termination or premium payment issues.
May 1, 2018	Mr. Williams files his insurance bad faith complaint in Arkansas state court. The matter is currently pending.

The Insurance Industry Practice of Trying to Minimize Payouts or Deny Outright Athlete Insurance Claims

As an insurance recovery lawyer who has represented policyholders for most of my career, I never cease to be amazed by the lengths to which some insurance companies will go to avoid paying valid claims while simultaneously forcing claimants to hire a lawyer and file a costly lawsuit. Then, after the policyholder files a complaint, insurers often try to ratchet up the litigation costs as another ploy to avoid paying. In short, insurance companies are nothing if not consistent in the many, varied, and constantly shifting hurdles they construct in an attempt to minimize their exposure. Unfortunately for Rawleigh Williams, his case is no different.

Lloyd's initially denied Mr. Williams' claim based solely on an exclusion that had been issued by the wholesale insurance broker (ISI) three days after Williams was injured.[5] In the *Williams* case, ISI has admitted that it issued Exclusion No. 3 "pursuant to authority given to [ISI] by Lloyds," and, as a result, ISI was acting on behalf of the insurance company and not on behalf of Mr. Williams. In fact, the only broker Mr. Williams ever dealt with was Justin Boeving, who, according to the complaint, held himself out as a leading provider of disability insurance for athletes. Mr. Williams most likely had no idea that another broker (ISI) was even involved in the transaction, let alone the identity of that unknown broker. When the absurdity of its original denial took hold, Lloyd's did what many insurers do—it moved the denial target to a potentially even more absurd position.

In September 2018, Lloyd's filed a motion to dismiss the complaint Mr. Williams had been forced to file and, in so doing, changed tack to argue that, because the University of Arkansas did not pay the policy premium on time, there had been a twenty-four-day gap in insurance coverage; a gap that coincidentally happened to include the day on which Mr. Williams severely injured his neck. Lloyd's had never before raised this gap in coverage as a basis upon which it was denying the claim, until it filed its motion to dismiss. Apparently, Mr. Williams was unaware of the fact that his school had not sent the $6,440 premium payment in on time, which created this claimed gap in coverage. Mr. Williams was never notified that the payment had not been timely paid, and he never received any type of cancellation notice.

At first blush, this purported gap in coverage might seem like a legitimate argument, that is, until one realizes it is based entirely on the specific wording of an insurance policy that Lloyd's had not finalized, and a copy of which Lloyd's had not provided to Mr. Williams until *ten days after* he sustained his career-ending neck injury. Under these arguments, Mr. Williams apparently needed to be clairvoyant to be aware of a termination provision in an insurance policy that he did not receive until nearly two months after the policy was purchased. The carrier's argument also requires Mr. Williams to have magically surmised that his school had not timely made the premium payment. On November 14, 2018, the Arkansas court denied the motion to dismiss filed by Lloyd's. Two weeks later, on November 28, 2018, Lloyd's filed a twenty-page answer, which included eleven affirmative defenses.

In addition to emphasizing the lengths to which some insurers are willing to go to avoid coverage, the *Williams* lawsuit also highlights other important issues peculiar to athlete insurance policies and claims. For example, the case highlights the need to have an impartial third party explain to student-athletes that securing a disability policy is not as simple and as easy as it may seem. The student-athlete also needs to appreciate the somewhat tangled web of persons and entities involved in procuring a disability insurance policy on his or her behalf, and how that web becomes even more knotted when their school agrees to pay the policy premium.

The Process of Procuring Athlete Disability Insurance Coverage

Because most athlete insurance policies are placed with the London market, two layers of insurance brokers are involved in obtaining a quote and procuring the policy. The student-athlete works with his or her school's athletic department, and someone there reaches out to a retail insurance broker. Mr. Boeving was the exclusive broker for Arkansas' student-athlete policies, and was acting as the legal representative for Mr. Williams. The retail insurance broker must work with a wholesale insurance broker, like ISI, who serves as the intermediary between Mr. Boeving and Lloyd's. Wholesale brokers generally act as the legal agent for Lloyd's. The wholesale broker then reaches out to its London connections to request a quote, bind coverage, and issue a policy. Finally, if the student-athlete's school is paying the policy premium, the

retail broker must also obtain permission for the purchase of the policy and coordinate with the school to ensure that the premium payment is acceptable and timely made.

When the curtain is pulled back on this cast of characters, one discovers that the only people a student-athlete normally knows about or deals with are someone at the school and the retail broker. The athlete generally has no idea that a wholesale broker is involved, and they usually don't even know (or care about) the identity of the insurance company issuing the policy. And yet, the identity and reputation of these unknown persons and entities can often mean the difference between receiving a payout under a policy and having a valid claim denied.[6]

Similarly, when a school offers to purchase a disability policy for a student-athlete to protect his future earnings, the athlete is justifiably entitled to believe that, just as he relied on his parents to pay his car insurance premiums, he could rely on the school and the retail broker to ensure that the premium payment was timely made. Unfortunately, Mr. Williams is now facing the possibility that he might not be able to collect the $1 million policy limits to which he is otherwise entitled, all because the school failed to timely pay the $6,440 premium and the retail broker failed to protect Mr. Williams' best interests by ensuring timely payment. In the alternative, Mr. Williams could win his lawsuit but net substantially less than the $1 million policy limits, because he has been forced to hire a lawyer and go to battle against the monolith, Lloyd's of London.

Student-athletes also need to be advised that, unlike the case with most other insurance policies, it is common practice in the disability and loss-of-value insurance industry for wholesale brokers, like ISI, to confirm coverage by issuing something called a "Conditional Binder." That binder is not the actual insurance policy, and it does not mean that an actual insurance policy has been issued or is in place, or that a form policy without non-standard exclusions will actually be issued. It also does not mean that the wording of the policy has been approved or finalized. The only thing that a Conditional Binder confirms is that, if the insurance company approves your policy application, coverage under the subsequently issued policy will begin on the date the binder was received.

Because of this practice, it is also not uncommon for some wholesale brokers to fail to provide the athlete with a copy of the policy for an inexplicable and extended period of time (sometimes for months) after the policy takes effect. It is unlikely that anyone ever explained the conditional or tentative nature of this process to Mr. Williams while he was involved with spring practice. Instead, Mr. Williams continued to play under the impression that his policy had been finalized and he had $1 million in disability coverage.

Observations and Recommendations

Regardless of how the *Williams* lawsuit ultimately plays itself out,[7] the underlying facts and circumstances of his case highlight a much broader and more troubling issue concerning who is, and who should be, looking out for the best interests of student-athletes when their school agrees to purchase a disability insurance policy on their behalf. The current landscape of the athlete disability insurance industry calls for having an impartial third party educate student-athletes about the intricacies of procuring disability insurance and help them navigate the process of filing a claim for benefits under the policy. Because NCAA Bylaws prohibit student-athletes from retaining a financial advisor, lawyer, or sports agent while still in school, the athletes are essentially precluded from seeking the advice of the very people who possess extensive experience in procuring disability insurance, to help them better understand the complex processes and the cast of characters involved. This needs to change.

To participate in collegiate athletics, student-athletes must vigilantly maintain their amateur status and strive to avoid engaging in any activities that might run afoul of NCAA rules and regulations. For example, NCAA Bylaw 12.1.2 details the ways in which a student-athlete might lose that status, including, among other things, by entering into an oral or written agreement with an agent.

According to Bylaw 12.02.1, an agent is someone who "represents … an individual for the purpose of marketing his or her athletics ability or reputation for financial gain; or seeks to obtain any type of financial gain or benefit from securing a prospective student-athlete's potential earnings as a professional athlete." The NCAA has also concluded that financial advisors qualify as "agents" under this definition, and, pursuant to Bylaw 12.3.1.2, student-athletes are precluded from accepting any benefits (including transportation) from an agent, financial advisor, or other person associated with such individuals.

So strict are these prohibitions that acceptance of the benefit alone is impermissible, regardless of the benefit's value or whether it is ever used. If the student-athlete accepts any benefits from a sports agent or financial advisor, it could render the athlete ineligible to play and result in a loss of their amateur status. Interestingly, however, according to NCAA Bylaw 12.3.2, it is acceptable for student-athletes to obtain advice from a lawyer concerning a proposed professional sports contract as long as that lawyer is not involved in representing the athlete in those negotiations.

In a recent NCAA presentation, the association pointed out that it is permissible, under that same Bylaw (12.3.2), for a financial advisor to also discuss the merits of a proposed contract with a student-athlete and to provide suggestions about the offer, provided there is no link between the financial advisor and the professional team offering the contract.[8] The only additional limitation is that the lawyer or financial advisor performing such tasks must be compensated at his or her normal rate for their services. However, if the student-athlete decides to seek advice from such professionals, it is unclear whether the school can use SAF money to pay the normal rates of a lawyer or a financial advisor retained to assist the student-athlete so that they might better understand the intricacies of disability insurance and the parties involved in the process.

Conclusion

The colloquialism, "someone needs to be the adult in the room," means that, when making a decision, there must be a person involved in the process with sufficient experience to make a calculated, rational decision based upon available data after weighing the pros and cons. It is unfair to assume that a seventeen-to-twenty-two year-old student-athlete has the experience to appreciate and understand the complexities and intricacies involved with athlete disability insurance policies. And yet, these disability policies are what some athletes depend on when a devastating injury occurs. As a result, someone needs to look out for student-athletes when their schools purchase disability insurance in their name; someone needs to act like the adult in the room by assuming the role of an impartial athlete representative in connection with the procurement of such policies and helping shepherd the athlete through the claims process.

The wholesale broker involved in the process has a pecuniary interest in the placement of the policy and normally has no contact with the student-athlete. The school representative involved in the process generally has very little experience analyzing or interpreting insurance policies, or the peculiar and sometimes arcane language contained in those policies, and, because of potential legal exposure, they are reticent to provide advice or counsel. Retail brokers deal directly with student-athletes, and, although they have a pecuniary interest in the placement of the policy, they usually have the best interests of the student-athlete at heart. However, where, as in the *Williams* case, the student-athlete has no say in the selection of the retail broker representing him, because there is some type of "exclusive" relationship between the broker and the school, the need for impartiality becomes crucial.

Recently, there has been a string of lawsuits filed by athletes seeking to collect on disability insurance policies, including the *Williams* case, and one of the lessons learned from those cases is that the NCAA and individual schools appear to have failed to perform sufficient due diligence regarding the reputation and litigation history of the retail and wholesale insurance brokers involved in the athlete disability insurance industry. In addition to giving student-athletes access to financial advisors or attorneys with experience with athlete insurance issues, another way to ensure that those athletes are treated fairly, both during the procurement process and the claims process under a disability insurance policy, is to make sure that only reputable and skilled insurance brokers and insurance companies are involved.

The NCAA has already determined that member institutions can use SAF money to pay the insurance premiums for student-athlete disability policies. The NCAA Bylaws also seem to allow student-athletes to consult with a financial advisor or an attorney to discuss the merits of a proposed contract with a student-athlete, which would presumably include an insurance contract, as long as two conditions are met: (1) there is no link between the financial advisor and the professional sports team offering the contract; and (2) the financial advisor or attorney is compensated for their time at their normal rate charged for such services.

It would appear that the best solution to the problem is for the school's athletic department (or the athletic

compliance office) to retain either a financial advisor or an attorney with sufficient experience and background in the athlete insurance industry to represent the interests of the athlete at all stages of the process. If a school can utilize SAF money received from the NCAA to pay for the premium, it should also be permissible for schools to use SAF money to pay the normal rates charged by a financial advisor or an attorney to serve as the "adult in the insurance room" to protect the student-athlete.

Endnotes

1 Student-athletes should probably be concerned with how their school pays for their insurance policy, because there may well be some unintended and unknown income tax consequences associated with a third party paying for a disability insurance policy where the student athlete is the policyholder.

2 White v. NCAA, No. 06-999, Docket No. 72, 3 (C.D. Cal. Sept. 20, 2006).

3 Of the $66.3 million in SAF money distributed in 2017-2018, approximately one-quarter of the money covered "Health and Safety Expenses," which included payments to secure disability insurance for student-athletes, and that component was second only to the 48% spent on educational expenses. The remaining SAF expenditures were divided between personal and family expenses (14%), academic enhancements (6%), and unused funds (6%). Several years ago, when the annual SAF distributions totaled $51 million, the SEC received $3.8 million to be distributed among the fourteen schools, and that amount was second only to the amount received by the Big Ten Conference. *See* NCAA 2018 Division I Revenue Distribution Plan, https://www.ncaa.org/sites/default/files/2018DIFIN_DivisionI_RevenueDistributionPlan_20180508.pdf.

4 Rawleigh Williams, III v. Underwriters at Lloyd's London, No. 2018-1225-1 (Ark. Cir. May 1, 2018).

5 Exclusion No. 3, which is dated May 2, 2017, expressly states that it "is effective March 10, 2017"; the inception date of the policy. This confirmation is interesting in light of the arguments staked out by Lloyd's in its motion to dismiss, because Lloyd's contends that the policy terminated on April 10, 2017, and it was not reinstated until May 4, 2017. If that is true, then why did ISI make the May 2, 2017, exclusion effective back to the original inception date for a policy that, according to Lloyd's, was not even in effect at the time the never-before-seen exclusion was drafted and signed?

6 *See* Richard C. Giller, *Lessons From 4 Recent Athlete Insurance Lawsuits*, Sports Law360, Insurance Law360, Insurance UK Law360, May 10, 2018.

7 This author is hopeful that the case will end positively for Mr. Williams.

8 It is unclear whether the link between a school and an "exclusive" retail insurance broker might violate NCAA Bylaw 12.3.2.

The Upright Citizens Brigade's Guide To Improv In Litigation

Allen Secretov and Nick Milanes

Allen Secretov is an attorney at Kinsella Weitzman Iser Kump & Aldisert, LLP. His practice focuses on litigating high-profile entertainment and intellectual property matters.

(Nick Milanes not pictured)

Though our work is rarely a laughing matter, attorneys can learn a lot from improv comedians. There is zero room for ego in comedy: every choice an improviser makes on stage must support the success of the whole team. Learn how the nation's top improv school, UCB, builds unbreakable teams, and how its methods can be applied to your legal practice.

During an improv show at the legendary Upright Citizens Brigade Theatre, a team of anywhere from two to ten comedians performs a series of completely made-up-on-the-spot scenes inspired by a one-word suggestion or an onstage interview with an audience member. Suppose an interviewee mentions their Aunt Frida. One improviser might then initiate a scene with an impersonation of that aunt. It's up to their scene partner to embody a character to match—and the antics heighten from there.

At every level, improvisers must accept and support what their teammates give them. Did Aunt Frida (the initiator) just ask her nephew what he wants for his birthday? The scene partner, hearing this, might then play the nephew. Did Aunt Frida come out of the gate rudely lecturing a customer service worker? The scene partner might respond by standing gloomily behind a counter. Later, team members might trade places within scenes, using context and dialogue cues developed over the hour as a guide by which to play.

The improvisers must listen to each other's signals and suggestions in order to make choices, and every choice is made to support the whole team's success. Effective participation requires sensing what the whole team understands to be funny, and acting accordingly. Seeing an opportunity to swap oneself into a scene, and knowing when to let the scene play out fully instead, requires a humble awareness of your strengths and what you are able to contribute, trust in your teammates, and an emphasis on elevating the team's success over your own personal desire for, or fear of, the spotlight.

The first time I watched professional improv, I was floored. When it works, it's like watching magic for the first time—really funny, imaginative magic. And it occurred to me that improv could do more for litigators than provide some laughs after a long-running case is closed. So, I reached out to Nick Milanes of the Upright Citizens Brigade to learn more, and quickly realized there are endless parallels between the skills used in legal practice and improv comedy.

Like members of an improv team, an attorney must make every choice in service of the team's (and the client's) success. It is rare that a case is staffed with fewer than two attorneys, plus at least one paralegal and/or legal secretary, especially at big law firms. Therefore, remembering that you are all on the same team is crucial. Each team member has a unique role, and sometimes team members may feel detached from the big picture outcome you are striving to achieve. Accounting for this might mean seeking clarification from senior attorneys about where you and your teammates fit in on a project, or reaching out to other teammates directly to find collaboration opportunities. And this kind of teamwork doesn't just ensure that everyone benefits from one another's strengths—it also keeps you motivated (and less confused).

Below, we highlight three distinct improv concepts that are highly transferable to your legal practice. And, in order to make applying these concepts as easy as

possible, we have paired them with fun exercises ideally done in groups of open and growth-minded individuals.

Yes, and

Improv Concept: "Yes, and …" is the foundational concept of improv. It is about supporting a scene partner's idea, or meeting them halfway on their sentiment. When Aunt Frida comes onstage and says, "Help me string up these Christmas lights, honey," her scene partner responds with, "Yes, Aunt Frida—and I'll hang the mistletoe, too." Here, the scene partner accepts the initiator's premise with a clear "Yes," and adds to the scene by introducing the mistletoe. Simply saying "No" would deny both improvisers any additional material to work with or develop the story—and would likely cause animosity between the two that would hamper collaboration. "Yes, and" is a straightforward and deceptively powerful concept that ensures improv scenes maintain their forward momentum.

Application to Legal Practice: In everyday interactions and work situations, consciously applying "Yes, and …" when meeting people, including coworkers and clients, means hearing what they are telling you, accepting it, and supporting them. This allows conversations to flow more easily and helps build rapport.

The concept can be expanded to apply in other, non-literal ways as well. For example, to the extent they have any control over which assignments they work on, associate attorneys should develop the habit of saying "Yes" when considering assignments that are outside their comfort zones and expertise, as well as positions on firm committees, volunteer organizations, or any number of opportunities. The benefits from this mentality are significant: you expand your practice area, gain leadership experience, become an essential member of your firm's legal team, and become known as reliable. This is critical for an associate attorney's success.

In general, you should also think of "And" as going the extra step and showing that you are willing to grow into new areas in which you may be unfamiliar. For example, when working on a legal research assignment, answering the specific question that is being asked is the first priority. But, in doing the research, you will often find sub-issues that need addressing, issues that the assigning attorney may not have been aware of. At minimum, flag these for further review, and offer to expand on them if requested.

Applying "Yes, and …" to all that you do will help develop an instinct of knowing when you could do just a bit more than what was asked for—whether it be editing, cite-checking, or drafting, or quite simply providing emotional, motivational support to your colleagues. This extra bit of effort will set you apart from your peers, give you more experience, and help get the desired work product closer towards completion.

Exercise – "Yes, and ..." Conversations

Pair up with another person and try to plan an event such as a party, or create an idea for a business. For each topic, progress in three rounds. In the first round, both parties respond to one another's suggestions with "No," and suggest what they would prefer instead. In the second round, parties respond with "Yes, but …" And in the third round, parties respond with "Yes, and …" After each round, discuss the ideas that you came up with and the mood of the participants. "No" conversations have obvious frustrations; "Yes, but …" conversations feel harder; "Yes, and …" conversations are smooth and pleasant. The exercise demonstrates how applying "Yes, and …" can affect your relationships with people, especially ones who you want to be open and truthful with you, such as clients and colleagues.

Keep an eye out for gifts

Improv Concept: A "gift" is anything that one person says or does in a scene that provides their partner with the raw material needed to organically build something special. Gifts provide specific details about the circumstances of the scene, the relationship between scene partners, or the personality of either partner. For example, consider a scene that begins with the scene partner telling Aunt Frida, "You really pull off that fur coat; another solid find from the Salvation Army." This one statement is filled with gifts for Aunt Frida to play with. Why choose a fur coat? Is it winter time? Is this for a costume or a special occasion? Is Aunt Frida a habitual bargain shopper? What other interesting items have they

found in the past, or will they find in the future of the scene? A good scene partner finds opportunities to give such gifts and graciously accepts them when they are offered to them.

Application to Legal Practice: See the "gifts" that show up in conversations with your coworkers, clients, or opposing counsel, and connect on these conversational "gifts" in order to form a deeper relationship—or simply to just have a better conversation. Receiving the "gifts" signals to the other person that you are really listening.

See the "gifts" in opposing counsel's arguments, those subtle misstatements and mischaracterizations of law or fact that you can pounce on in your response. While they perhaps may not be individually dispositive, if you bring to the court's attention these misstatements throughout a case, your credibility with the court will continue to increase while the opposing party may be seen as untrustworthy and misleading.

And, on a literal note, give "gifts" to your coworkers, whether it be mentorship, advice, time, friendship, or feedback. There are countless opportunities to give gifts in a scene, and, similarly, in a relationship.

Exercise—One Word Story

Gather a group and go from one person to the next telling a story one word at a time. No planning ahead is possible, so really focus on listening to each person and up until the very last word before your turn. Continue until the story reaches a satisfying conclusion. Improv scenes often fall apart when someone decides what they are going to do or say before their partner has finished expressing their thought. Acting based on assumptions can be equally damaging for lawyers. Better to listen fully, whether it's to follow unexpected details and stories volunteered by your own client, or to catch important information from an adverse witness or deponent.

Be a reliable risk-taker

Improv Concept: Improv can be a nerve-wracking experience, especially in the hours, minutes, and moments before a show begins. Excuses are made, and sometimes you just don't feel like going on stage. And even once the show has begun, those nerves may linger, and you may feel compelled to keep yourself out of the game, letting Aunt Frida take the risks and do the work. Instead, improvisers must get in the scene without a plan in mind. Be the reliable risk-taker who grabs the opportunities that are given and acts knowing that there is potential for failure. For improvisers, being a reliable team member, dragging yourself to every practice and show, and forcing yourself play the game is a necessity for your own personal growth and the development of the team.

Application to Legal Practice: Getting reps in, developing the business, and learning from your mistakes all require showing up. Show up to the office when you don't want to, to the lunch presentations you think will be boring, to your desk to start on that assignment you've been putting off, and to the conferences, mixers, and other networking events that you fear will make you feel awkward. Each of these acts builds your discipline, makes you reliable in the eyes of your peers, and ensures that if there are any opportunities out there, you will be present to take them.

Similarly, accept assignments—like taking or defending depositions, arguing in court, or taking the first stab at a dispositive motion—before you feel ready. This is typically the best way to learn, even though you will make mistakes. You will eventually always have to do something for the first time, and hopefully you will have already proven yourself to be an invaluable member of the team at your firm, so that others will be happy to help you. This will be uncomfortable, but if you have taken the time to cultivate a collaborative team mentality at your firm, you will quickly find support from your team members.

On a more practical note, when you receive an assignment you have never done before, such as a complex motion for summary judgment, do not begin by diving into the deep end and spending hours researching the various minutia of the law. First, learn the facts of your case and dedicate thirty minutes or so to outlining your thoughts based on what you know. After you have a general sense of the direction you would like to take, begin filling in the blanks by finding factual support and legal authorities to support your positions.

Exercise—Premise Lawyer

Have each member of a group write down an affirmative statement on a slip of paper, such as "Basketball is the best sport," and place it into a basket. For an added twist, make the subject something indefensible, ridiculous, or weird (but not offensive), like "people are more polite on Twitter than in person." The first participant randomly chooses a slip from the basket and must give a passionate closing statement on the subject. This fun exercise trains the ability of getting to the core story of your case, quickly assessing what the "jury" can connect to on something otherwise reprehensible or insane, and is a low-stakes practice in public speaking.

In closing, these are just a few examples of the many ways improv can help professional teams. Improv has also been used to help organizations meet specialized goals, such as improving storytelling skills, creativity, problem solving, conflict resolution, and more.

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What's in a Game?

By Andrew Schauer

Andy is Owner & Principal of Law Office of Andrew Schauer. In addition to gaming and lawyering, Andrew is a baseball fanatic and stat-head who also enjoys golfing, skiing, and bicycling. He shares his life and his hobbies with his wife and their son. You connect with him on his website: http://aschaueresq.com.

As a former competitive player in the gaming community, my goal in this article is to advise attorneys who represent or want to represent competitive gamers or companies in the emerging esports field to elevate those competitors and their platforms to legitimacy and mainstream relevance through great contracts, branding deals, sponsorships, endorsements, and intellectual property law. This article will take the reader through the history of esports, the current status of the industry, and where it is headed to better understand how to best represent the gaming client.[1]

It's a high-stakes world with tens of millions of dollars at stake: Teams compete at the highest level for their shot at winning the world championship, which will be viewed by millions worldwide. An appearance in the championship game also guarantees a healthy seven-figure bonus on top of their seven-figure advertising and endorsement contracts. The individual players have big-ticket endorsement deals of their own, with sponsors giving players their branded training gear and (in some cases) even entire home training setups to use while the cameras are rolling and the audience is watching.

All that is just the backdrop to most business and legal professionals working in pro sports. However, that same landscape can be found in a new world: professional gaming. The world is so new that even basic terms are still evolving, but this article will use the term "pro gaming" throughout as a catchall for the industry, entities, and people whose main revenue streams come from some combination of esports or streaming (much more on those below). When parents used to ask their kids if they planned on growing up to be a "Pro Gamer" they'd be rolling their eyes, but now those kids are rolling in the dough: One gamer named Richard Tyler "Ninja" Blevins is rumored to earn between a half million and a million dollars per *month,* and, in September 2018, he was on the cover of *ESPN The Magazine*.[2] That choice makes all the sense in the world to ESPN, if for no other reason than teams and players from the "traditional" major sports are some of the primary drivers behind competitive gaming's explosive audience growth. Michael Jordan, Kevin Durant, the New York Yankees, the St. Louis Cardinals, and a large and growing number of NBA teams all either wholly or partially own pro gaming organizations. Athletes can also increasingly be seen in pro gamers' videos, or even hosting their own (the Minnesota Twins' Trevor May being one of the most visible examples).

Because of the large and growing number of similarities between pro sports and pro gaming, it can be tempting for representatives of those people or companies making the jump from the former to the latter to treat deals in the pro gaming world exactly as they would any other pro sports contract or negotiation. However, there are some key differences—especially around the margins and in the "soft factors"—that may seem completely foreign to a sports agent in an esports world, but which are hugely important to finding and fostering successful partnerships and helping your clients truly succeed at building their brand (and their audience) in that pro gaming world. We'll start by defining some basic terms and concepts.

I. ESPORTS BASICS

TEAMS. The pro gaming concept of a "Team" is similar to what it is in pro sports: There's a wealthy owner at the top of the organizational chart, and usually some staff underneath them roughly equivalent to a front office. Beyond that, though, some differences start to crop up: Almost all the top teams compete across multiple different video games. For example, the team Echo Fox has "sub-teams" that compete in "League of

Legends," "Call of Duty," and so on. This isn't totally unheard of in the Big Five North American sports—Mike Ilitch with Detroit's Red Wings/Tigers, Jerry Reinsdorf with Chicago's Bulls/White Sox, etc.—but the lack of any "National Video Game League," combined with the relatively cheap cost of entry compared with major sports teams, means that competitive gaming teams (colloquially "Orgs") often have players across many games, sometimes a dozen or more. Most games warrant hiring their own specialized front-office-type command center, a coaching staff, and (of course) players. To again use Echo Fox as an example, Rick Fox is the primary owner. As mentioned above, one game his team plays is called "League of Legends." Echo Fox has a General Manager in charge of the League of Legends staff and team—Jake Fyfe—who played a large role in acquiring their head coach—Thomas "Thinkcard" Slotkin—along with the actively-rostered players and the numerous additional players in their development system. Echo Fox have another separate but similar GM/coach/player setup for the game "Call of Duty," another for fighting games, and so on.

LEAGUES. Although there isn't a "National Video Game League," the developers of two of the most successful games played at the pro level—"Overwatch" creator Blizzard and "League of Legends" creator Riot Games—have stepped in to fill that role as it pertains to their respective games. A large part of this is purely from necessity: who else beside a game's developer could effect the sorts of rule changes that traditional sports leagues typically handle? But another major driving force behind the developers' involvement is their earnest desire to make a highly entertaining, watchable product with robust brand goodwill built on delivering a consistently top-shelf experience for both viewers and the general gaming public.

PLAYERS. Of course, in the traditional sports realm those rule changes usually happen with the approval of (if not in collaboration with) the players' unions. To say unions in esports are in their infancy would be aging them substantially—"prenatal" is more like it—but it seems like they could be poised for a major growth spurt. "Counterstrike" players just recently founded their own Players' Association, and could be certified as a full collective bargaining entity at any time. Riot Games have put up their own money toward founding a similar association, and are paying a well-regarded attorney to represent it. There are loud and persistent rumors of such associations banding together across all the games played at the pro level, but for the time being developers effectively have sole purview and control over all the league rules, from minimum player contracts to franchise fees and admittance of new organizations. Overall, esports are trending more toward the traditional sports' models of league governance and so on, but it's anyone's guess as to how far esports goes in that direction from this point on.

II. STREAMING BASICS

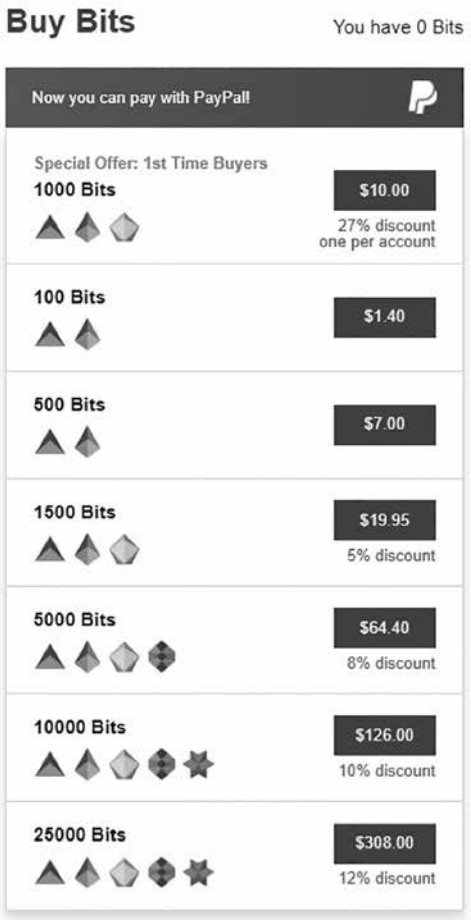
STREAMING. As mentioned above, esports are only half the picture. Streaming—the other half of the equation—refers to a certain type of social media posting, where gamers use a service like Twitch or YouTube to stream video of themselves playing a game in real-time.[3] Usually, it looks like a picture-in-picture TV screen, with the video game (shown from the player's point-of-view) as the main video and the player's face shown in a smaller frame.[4]

TWITCH.[5] There are a few different streaming platforms but—since Twitch commands the streaming content creation market by several measures and creates revenue in some truly unorthodox ways—this article will focus on the successful Amazon subsidiary. When a visitor first lands on the Twitch home page, they see a number of popular and/or promoted "channels" that are currently live. Visitors may either browse around by game title or look for certain streamers directly. The latter is becoming increasingly common as more and more athletes and other celebrities take up streaming, but the main way to ensure maximum visibility is to be live a lot. As far as the bottom line is concerned, the main

thing to know is that, to utilize Twitch's most robust earning features, a streamer must first meet some of the platform's criteria (e.g., streaming a certain number of days per week/month and averaging a certain number of viewers) to earn its "Affiliate" status. Streamers can then fulfill additional criteria to be elevated to the next (and currently highest) status level, called "Partner." Partners tend to have much more bargaining leverage than Affiliates, but the two basic revenue streams—from donations or through various sponsorships/ads/endorsements—work basically the same at either level.

DONATIONS. Calling "Donations" a primary revenue stream may sound almost funny at first blush—imagine an NFL franchise allowing its fans to pay whatever they wanted (including nothing) to stream *their* games—but gamers have turned this traditional non-profit concept into an explosive cottage industry. Even a first-time streamer can post a third-party link to, for example, PayPal or Patreon, on his channel and hope to receive some wayward disposal income. Once a streamer reaches Twitch's Affiliate level, though, they gain access to Twitch's two baked-in donation models: Subscriptions and "Bits." Subscriptions are what they sound like: A viewer may choose to subscribe to one individual streamer for $4.99, $9.99, or $24.99 per month. When a viewer buys a subscription while the stream is live, a banner image and message appears superimposed over the stream, usually something featuring the viewer's name and some default message of thanks from the streamer. There are other, more tangible benefits that can differ from channel to channel, like custom "emotes" (little pictures viewers can send in the channel's chatroom to other people watching the stream) or the promise of fewer ads. One other important note on subscriptions: Because Amazon is Twitch's parent company, anyone with an Amazon Prime subscription may also subscribe (at the $4.99 rate) to one streamer of their choice at no additional cost to themselves.

"Bits," however, are a little more complicated. Bits are Twitch's proprietary currency that can be bought in different packaged amounts (a hundred Bits cost $1.40; five hundred cost $7.00) all the way up to 25,000 Bits for $308.00).[6]



The main way Bits are used is to "cheer." Viewers on a given stream may "cheer" for the streamer during a live broadcast by clicking an icon in the channel's chatroom and choosing from a number of different little animated pictures. It's almost exactly like using smiley faces or emojis in a text message, except these "special" animated pictures each cost a certain number of Bits. All of the "cheering" emotes will show up in the chatroom, and some more expensive ones may be superimposed over the stream itself (in that case, usually along with the donor's username and some generic message of thanks from the streamer).

It all sounds a bit complicated, but under the hood it's basically just a dressed-up gift card system: Every 100 Bits a viewer spends cheering for a streamer results in $1.00 going to that streamer. While an athlete client would fire you on the spot if you suggested a deal that came with no guaranteed money and was contingent on his fans just giving them money, the system so far has been working astoundingly well for Twitch. In the ten-month period after Twitch debuted the cheering system, viewers spent nearly $14 million on Bits.

In April of 2018, Twitch began allowing streamers and other third parties to create other ways for viewers to spend their Bits. These third-party "plug-ins" (as Twitch calls them) allow viewers to spend their Bits doing everything from betting on the outcome of the game the streamer is playing to playing Rock Paper Scissors against one another, but the lack of news about its adoption rate suggests cheering is still the preferred way for viewers to donate to their favorite streamers.

III. SPONSORSHIPS

The final major revenue source that *all* types of pro gamers can avail themselves of is also the one that probably feels most familiar for many readers: endorsement deals. While the basic principles underpinning all endorsement contractsare basically the same, there are a few key things to know regarding the background and current status of gaming endorsement deals. Certain brands were quick to sign pro gamers to endorsement deals—Gatorade's G-FUEL is perhaps *the* standout in that way—and those longstanding advertisers (including a great many smaller or more niche brands) are heavily reinvesting into sponsorships to keep Coca Cola and other competitors at bay and to ensure that they can keep their high-profile spots on the most popular gamers' streams and social media. But the explosive growth of the pro gaming audience—especially within the last two years or so—has whipped many interested companies (often with only tenuous connections to the gaming world) into an ad-buying frenzy. The exact dollar figures may not be available, but even a casual observer can put two and two together: Energy drinks and other niche brands have enough cash on hand to keep their existing exclusive deals in place at a time when Samsung is running ads on national television featuring Ninja and other pro gamers.[7]

There is no recent publicly-available data about the exact financial terms, but the general feeling is that pro gamers are well on their way to surpassing pro athletes'[8] endorsement deals (if they haven't already). It's not hard to see why: advertisers are notoriously covetous of the eighteen- to thirty-four-year-old demographic (particularly males), and it seemed like they were heading for a crisis point, with millennial men losing interest in televised sports to the tune of seven percent year-over-year. Twitch and other streaming services, though, have gone from essentially inventing an entirely new medium in 2012 (which still drew roughly 134 million viewers) to a juggernaut that will reach an estimated audience of 380 million this year.[9] 71 percent of this audience is male, and the average age is 26; in other words, it's the exact market advertisers have been dying to access since time immemorial.

The game developers themselves are also using the platform to great marketing effect, and are beginning to work more and more with pro sports in new and compelling ways. "Fortnite"[10]—which is consistently the most-streamed game on Twitch—is also immensely popular among athletes, especially in the NFL and MLB. "Fortnite" is technically free to players; it costs nothing to create an account or to download the game. Once the client is installed and ready, new players can jump right into a match. There is only one basic style of gameplay: Up to 100 human players skydive down into a large terrain featuring different areas (e.g., a logging camp, a recycling center, a town-like area with a number of different buildings, etc.) each spaced out by large grassy fields. Players have to scavenge weapons and building materials from these different areas. The players can use the materials to make ramps and walls and traps of their own, with the goal being to eliminate all the other players and be the last person standing.

Before diving in, though, almost everyone spends at least a few minutes customizing their avatar, which is tied to each player's individual account. That's how the publisher, Epic Games, makes its money: Players may (and do, to the tune of $1 billion in the game's first ten months)[11] spend real-world money to buy customization options that make their avatars more expressive in-game. Such options include outfits or animations (such as cheering or dances). These options have had a noticeable impact on pop culture already: The Colts celebrated Andrew Luck's first touchdown this season with a reference to the game, and the Houston Astros' outfielders convened to do a dance from the game each time they won. Since Epic Games launched NFL uniforms as an in-game clothing option, MLB's "Fortnite" fans have been clamoring for their league to be represented, too.

IV. CONCLUSION

With the proverbial gold rush now on in the world of pro gaming, players and leagues and everyone else

are jumping in head-first with extremely sparse data. In some cases, investors are getting involved without even looking at any return-on-investment analysis of any sort. Relying on intangible factors, though, has predictably not been a flawless system. One such high profile disaster is still unfolding: Numerous wealthy and high-profile investors decided they wanted to elevate the game "H1Z1"—a game very similar to "Fortnite" but with a zombie theme—into the same rarified air as other, similar, successful games. In less than a year, though, the operation (which included a new purpose-built stage for massive competitions) has gone belly-up in spite of having Stratton Sclavos and other high-profile backers from outside the video gaming world bankrolling the endeavor.[12] Although the dust is still settling, this author hypothesizes that the latter factor was the most critical in the "H1Z1" fiasco: The gaming audience is particularly sensitive to at least certain types of "astroturfing," and no "outside" investor ever really burned with a true passion for the game or the community. That is to say: Watching the pros embody the love of the game is why the fans have always tuned in to watch, whether that game is played in a stadium or an arcade. What's in a game? Whatever we put into it.

Editor's note: For attorneys, know the differences between the teams, the gamers, the leagues, and how they are valued and, therefore, protected. Streaming live on Twitch is completely different than streaming content on Amazon or Netflix, and benefiting from donations in gaming means something more than collecting donations in any other setting, which implicates non-profit issues. In the end, esports are growing and here to stay, and those practicing in the area should know the differences before entering an attorney-client engagement.

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The Architecture of Compromise: Constructing the Music Modernization Act

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> *[T]he field of music licensing is a highly complex architecture supported in part by relationships, split rights, side agreements and historical antiquities that are inextricably woven into current business models. Therefore, for any legislation to benefit and foster the industry, it must take these realities into account.*[1]

The Music Modernization Act ("MMA"),[2] signed into law October 11, 2018, is the most extensive revision of the Copyright Act[3] since the Digital Millennium Copyright Act ("DMCA"), almost exactly twenty years earlier.[4] Every industry probably considers itself complex in its nuances, but the Copyright Office, when describing the § 115 Reform Act of 2006 ("SIRA") to the House Judiciary Committee, suggested that "the sheer number and complexity" of issues in music licensing "render a holistic solution improbable, if not impossible."[5] SIRA's attempt at a relatively narrow solution had failed to attract consensus among rights owners in the music industry (performing artists and composers, music publishers and record labels, digital music services, etc.) on how to address certain problems, and what resulted twelve years later was an omnibus approach carefully constructed to balance at least some of the needs and interests of virtually all constituencies in the music business. This article provides an overview of how this grand compromise came together.

The Lead-Up to Introduction of the Music Modernization Act Bill

There was a traumatic paradigm shift in the recorded music business between 1995 and 2015, from the manufacturing and selling of "sound carriers" (primarily CDs, in 1995 revenue terms) to the licensing of online services that stream music to consumers (primarily on a subscription, on-demand streaming basis, in 2015 revenue terms).[6] As the recorded music industry has evolved, every constituency in the business has been affected in one way or another, and despite the broad sweep of the MMA, rights owners and rights users will continuously be forced to adapt to an ever-changing landscape as technology drives business model innovation faster than legislators can respond.[7] Nevertheless, occasionally the tectonic stress of compounded technology and business innovations is released in a seismic event, and the stakeholders must do their best to achieve what gains they can while the ground is moving.

Hardly a legislative session has gone by since 1998 when there were not multiple music-related bills in play. During the first half of the 115th Congress alone, a panoply of bills made the rounds on Capitol Hill, each generally seeking to address one or a small set of issues and being promoted by a specific constituency.[8] As the business of subscription on-demand streaming began to emerge as the obvious engine of future recorded music revenue, however, the most significant challenges to the efficient growth of that business came to the fore of industry concerns.

One of the biggest challenges was that sound recordings tend to be singly owned, and the vast majority of sound recordings (including their separate rights of reproduction, distribution, and performance) can be licensed from a relatively small and organized group of licensors. Musical compositions, in contrast, tend to be owned in fractional shares by multiple parties (e.g., composers, lyricists, and/or their respective music publishers), totaling tens of thousands

more distinct licensors. Moreover, such licensors tend to vary by rights type, including music publishing administrators for mechanical rights and performing rights societies for public performance rights, compounding the fragmentation. And while in many countries mechanical[9] and performance rights in compositions are managed by one or, at most, a few collective management organizations, no such collective exists to manage mechanical rights in the United States. Further, there is no database that contains perfectly complete and accurate records of every composition ever written, because thousands are written every day, and there is an active secondary market for those with established value.[10]

Further compounding the difficulty of identifying, locating, and obtaining licenses to the fragmentary shares of the songs embodied in recordings has been the urgency to do so in extraordinarily high volume. To make the marketing case that consumers should subscribe to the "jukebox in the sky," digital music provider services ("DMPs") felt compelled to offer virtually every single sound recording in existence. This encouraged the services to compete with each other in an arms race involving ever larger claimed catalogs of available music, involving tens of millions of tracks.[11] Yet consumption data across these services suggested that millions of those recordings are never played by any subscribers, and that 99% of all listening is driven by just 10% of the recordings on the average DMP.[12] Despite the existence of commercially available databases containing tens of millions of sound recordings matched to musical compositions[13] and the compulsory mechanical license available under § 115 of the U.S. Copyright Act,[14] some services were accused of using sound recordings embodying unlicensed compositions.[15] For roughly ten years, this practice went unanswered by rights owners. Then, between approximately 2014[16] and the very end of 2017,[17] musical composition owners brought a variety of cases for violations of their mechanical reproduction and distribution rights, and the cases rapidly ratcheted from a few involving relatively small, individual rights owners[18] to massive class actions involving complex settlements in the tens of millions of dollars.[19] This was understood to be the primary impetus for what became a major legislative effort culminating in the MMA.[20]

In early 2017, the National Music Publishers Association ("NMPA") and songwriter representatives began to discuss a solution, eventually bringing in the Digital Media Association ("DiMA").[21] On October 5, 2017, David Israelite, President and CEO of the NMPA, appeared at the Production Music Conference in Los Angeles and began to publicly make the case for a new approach to mechanical licensing for on-demand streaming.[22] By December 21, 2017, with contributions from the Association of Composers, Authors, and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI"), the National Songwriters Association International ("NSAI"), and the Songwriters of North America ("SONA"), various constituencies in the music industry were able to come together and introduce a bill[23] through the offices of Congressman Doug Collins (R-Ga) around principles underlying a core of four goals:[24]

1) Reforming § 115 to end the filing of so-called "bulk" Notices of Intent to Obtain a Compulsory License on the Copyright Office, creating a Mechanical Licensing Collective ("MLC") to administer a single-notice blanket license, and mandating the creation of a transparent and publicly accessible database housing song ownership information;

2) Changing the standard by which the Copyright Royalty Judges determine royalty rates for the compulsory mechanical license from the so-called "801(b)" standard to a so-called "Willing Buyer/Willing Seller" standard;

3) Ending the practice of assigning all cases interpreting the ASCAP and BMI Consent Decrees ("Rate Court Proceedings") to designated judges in the U.S. District Court for the Southern District of New York and replacing it with a "wheel" system that ensures that each Rate Court Proceeding will be assigned to a different judge; and

4) Repealing § 114(i) of the Copyright Act, which prevents judges in rate court proceedings from considering evidence of sound recording performance rates that might affect the judges' valuation of the arguably analogous performance rates for musical compositions.

A less publicized, but critically important provision of the MMA, as the statute became named, was a limitation of DMPs' liability for past infringement, which would now be limited to the statutory royalty rate for any actions not brought prior to January 1, 2018.[25] Considering the potentially staggering impact of statutory copyright infringement damages, this limitation provided an enormous incentive for the DMPs to come to and remain at the bargaining table.

Neither the rights owners nor DiMA included this aspect of the bill in their public statements. Nevertheless, given the background of lawsuits motivating the DSPs, limitation of liability was clearly a core aspect of the quid pro quo of the architecture of the legislation. Only one independent music publisher, Wixen Music Publishing, Inc., reacted by filing a preemptive lawsuit, which it did just under the wire on December 29, 2017.[26]

As explored below, during 2018 the principles underlying the core set of goals were refined and joined into an omnibus bill including the CLASSICS Act[27] bill and the AMP Act[28] bill, weathering criticism and outright challenges along the way to eventual passage on October 11, 2018.

The Bill's Progress

While the bill's organizing principles (and the liability limitation provision) were eventually incorporated into the statute as enacted, from the day of its introduction the bill had to struggle through a gauntlet of interested-party challenges. How each challenge was surmounted varied according to the particular players and their interests.

On December 21, 2017, the Songwriters Guild of America, Inc. ("SGA")[29] lodged the first complaint. Noting that the SGA had been provided a draft copy of the bill only the day before its introduction in Congress, the SGA argued primarily that the proposed MLC did not provide for sufficient songwriter governance, saying,

> enactment of the proposed bill as currently constituted would … represent … the very first time in history that any Government [sic] has acted to sanction the creation of a music copyright licensing and royalty collective over which creators themselves would not share at least equally in governance. That is a concept we cannot support.[30]

The SGA went on to criticize the bill further:

> There are many other problems too numerous to detail in this short letter, but they include serious fairness, transparency and practical issues related to the proposed processes of setting up the licensing collective, the distributing of unidentified monies on a market share basis and the need to better protect music creator economic rights in that context, the vague nature of any optout [sic] mechanisms, the granting of relief from statutory damages liability to prior willful infringers, the scope of the musical composition database (including songwriter/composer information), the provisions concerning shortfall and other funding aspects of the collective, the absence of direct distribution of royalties by the collective to songwriters and composers, the vague nature of the audit activities to be optionally conducted by the collective, and the complications in that and other regards raised by obvious conflicts of interest issues.[31]

It is unclear whether any of these secondary issues were ever substantively addressed with the SGA, but the organization's primary concern was answered when the bill was eventually modified to alter the structure of the board of directors of the proposed Music Licensing Collective ("MLC"). Subsequent drafts of the bill expanded the MLC's board of directors from ten seats (with eight publisher seats and two songwriter seats) to fourteen (with a split of ten to four).[32] In addition, an important committee of the MLC in charge of overseeing the distribution of unmatched royalties was altered to provide for an even number of publisher and songwriter seats; songwriters would now hold five of ten seats, rather than four.[33] The SGA was also promised the "full support" of "the U.S. music publishing community" for its efforts to enact the Copyright Alternative Small-Claims Enforcement Act of 2017 as part of the bargain for SGA's support of the MMA,[34] although as of this writing there has been no movement on that bill since it was introduced on October 4, 2017.[35] Nevertheless, these changes persuaded SGA to drop their opposition and endorse the MMA.[36]

In addition, the support of a far more powerful potential adversary of the MMA was sought early on. The National Association of Broadcasters ("NAB") is a sophisticated lobby whose members contribute the largest share of music publisher revenues annually through their payment of royalties for musical compositions publicly performed on terrestrial radio and television broadcasts. Rights owner constituencies often find themselves taking positions in opposition to the NAB's positions, especially with respect to royalty rates. Moreover, the NAB is formidable politically, since it is important to elected officials in every single congressional district—the NAB's constituents operate the broadcast media that is critical to winning elections—whereas rights owners' strongest congressional districts tend to be in Los Angeles, Nashville, and New York City, where the major recording and publishing companies are headquartered.

Even at this early stage, the CLASSICS Act bill[37] was already being discussed as a potential companion to the MMA. The bill aimed to create new federal rights in sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings"). NAB spokesperson Dennis Wharton expressed "serious concerns about … provisions of the bill that may unjustifiably increase costs for many music licensees, including local radio and TV broadcasters, who otherwise receive no benefit from the legislation."[38] Wary of the NAB's potential to stymie rights-owner-sponsored legislation, the proponents of the CLASSICS Act bill were careful to reassure the NAB that the bill was drafted to apply solely to the use of pre-1972 recordings in *digital audio transmissions*,[39] calming concerns about the application of new royalty obligations to broadcasters' major revenue centers in terrestrial transmissions.[40] The NAB was further reassured later in the year with the Senate Judiciary Committee's passage of its version of the bill,[41] which, in relation to the public performance amendments included in the MMA itself, ensured "enhanced congressional oversight of the DOJ's announced review of the ASCAP and BMI consent decrees" and that "any action to terminate [those] decrees must be preceded by Congressional action to ensure that songwriters, licensees, and consumers will not be harmed."[42] Thus reassured, the NAB issued a press release noting its strong support for the bill.[43]

On January 8, 2018 ,the scope of the legislative effort officially expanded, and with it the range of interested stakeholders. In a joint press release of that date issued by the NMPA and the Recording Industry Association of America ("RIAA"), the Recording Academy, and the American Association of Independent Music ("A2IM"), the suite of three bills that would eventually become the enacted law were selected from among the various music-focused bills in the 115th Congress and presented as a package for the first time.[44] In addition to the MMA, the endorsed package now included the CLASSICS Act bill[45] and the AMP Act bill,[46] as well as support for a uniform market-based rate standard to be applied in the setting of sound recording performance rates for, among others, satellite radio[47] (of which there is currently only one provider in the United States: Sirius XM Radio, Inc. ("SiriusXM")). These additions threaded a needle by drawing in a variety of sound recording stakeholders without provoking potential opponents more than could be addressed through later compromise.

Specifically, the inclusion of the CLASSICS bill in the suite of bills was applauded by sound recording owners because it would mandate, for the first time under federal law, royalty payments for the owners of, and artists who contributed to, pre-1972 recordings. An artifact unique to U.S. copyright law, sound recordings fixed prior to that date had not previously been afforded any federal copyright protection. Instead, such recordings were dependent on available state law protections, which varied widely by jurisdiction.[48] The debate over the extent of such protections and whether royalties should be due for the public performance of those sound recordings had been the source of litigation among owners of such recordings and Sirius XM,[49] on the one hand, and Pandora Media Inc. ("Pandora"),[50] on the other hand. The pre-1972 recordings contributed roughly 10% of annual sound recording performances in the U.S. annually, and the lack of resolution of this matter was a major concern for sound recording owners for a number of years.[51] As noted above, however, the CLASSICS Act bill was drafted to apply only to performances of sound recordings via digital audio transmission, thereby avoiding the massive opposition that would predictably flow from the NAB if terrestrial radio or television broadcasts of pre-1972 recordings had been included, as had been a feature of the Fair Play, Fair Pay Act of 2017, which never progressed to passage.[52] The addition of the CLASSICS Act bill to the suite of bills that would eventually become the MMA therefore guaranteed the support of the powerful Recording Industry Association of America ("RIAA"), which generally supports the strengthening of protections for sound recordings, as the RIAA represents the so-called "Three Major Labels," as well as record labels generally, while taking care to avoid the ire of the NAB.

Another recording industry group, the American Association of Independent Music ("A2IM"), had concerns about the Music Modernization Act, although it ultimately chose to support the omnibus bill. The A2IM's membership consists substantially of independent record labels,[53] which often have commercial interests in publishing rights through affiliated music publishing companies. The A2IM expressed concern that "independent publishers and labels are not represented, and songwriters feel unrepresented," as well as concern with "the issue of black box monies and how they are divided."[54] The A2IM was also concerned that the bill did not go far enough, noting "the fact that terrestrial radio pays nothing for the use of recorded music" and "the lack of platform parity provisions—Sirius XM's sweetheart deal compared to other streaming services and other anomalous

rates [for sound recording performance royalties]."[55] On balance, however, the A2IM found that "with the CLASSICS and AMP acts," "the MMA is consequential because all sides of the recorded music industry along with the tech companies are working together, setting aside longstanding differences to produce a positive incremental change," and thus the A2IM lent its support to the bill.[56]

The addition of the AMP Act bill[57] resulted in even broader support for the MMA, without alienating existing supporters or constituencies that had remained neutral. The Recording Academy, which operates the GRAMMY Awards, the GRAMMY Museum, and the MusiCares Foundation, describes itself as "the world's leading society of music professionals."[58] Since the Digital Performance Rights in Sound Recordings Act of 1995 ("DRPA"), the proceeds from digital audio transmissions of sound recordings have been payable by statute according to a specific formula: 50% to the owner of the sound recording copyright, 45% to the artist featured on the recording, and 5% to the AFM and SAG-AFTRA Intellectual Property Rights Distribution Fund for equal division between unionized non-featured vocalists and musicians.[59] If a producer, mixer, or engineer ("Producer") had a contractual agreement with an artist to receive a share of the artist's sound recording performance royalties, the Producer was left with little alternative but to seek subsequent payment from the featured artist. However, on occasion Producers had sought direct payment from SoundExchange, Inc. ("SoundExchange") via a so-called "letter of direction," which is a letter directing a rights administrator to update its records and direct all or a portion of a royalty stream to a specific payee. The AMP Act bill aimed to codify the letter of direction process by amending § 114 of the Copyright Act to direct "a nonprofit collective designated by the Copyright Royalty Judges to distribute receipts from the licensing of transmissions of sound recordings" (i.e., SoundExchange)[60] to adopt a policy for the acceptance of letters of direction to pay such parties directly.[61] A less well known feature of the AMP Act bill went further, allowing such payments even when the Producer of a recording made prior to November 1, 1995, could not present or procure a letter of direction from the applicable featured artist.[62] Because SoundExchange is permitted to deduct the costs of the additional work inherent in the administration of a letter of direction prior to distribution,[63] the payment of such royalties was an unqualified win for all parties, and was enthusiastically supported by the Recording Academy on behalf of its Producer members.[64] Moreover, many Producers are powerful, multi-faceted music professionals and, in addition, may be owners of sound recordings, owners and/or composers of musical compositions, music publishers, managers, and both featured and non-featured performers on both pre- and post-1972 recordings. This constituency, therefore, is aligned with essentially every rights-owner or creator constituency, and they all tended to support the bill through a variety of organizations of which they were members.[65]

Denouement

As 2017 wore on, the MMA endured still further critiques and challenges beyond the scope of this article. Such critiques included that of plaintiffs' lawyer Henry Gradstein, who was concerned that digital music providers were being let off too easily by the liability limitation features of the MMA and that "it would be unconscionable [for the MLC] to redistribute unclaimed royalties to non-owners of the unmatched songs, especially based on market share, which could result in an unearned windfall to major music publishers like Sony, Universal, Warner or BMG, who are the least likely to own unmatched songs."[66]

Other challenges came from various parties such as Senator Ted Cruz[67] and private equity firm Blackstone, which owns the Harry Fox Agency, a mechanical licensing agency. They argued for competition in the market for mechanical license administration, as opposed to a monopoly by the Mechanical Licensing Collective.[68] SiriusXM weathered severe criticism and the threat of an artist and songwriter boycott of its parent company, Liberty Media, as it pursued last-minute amendments.[69] Against all of these headwinds, however, the core compromise between the NMPA and DiMA, together with the buttressing of CLASSICS and AMP Act supporters, proved strong enough to win out, resulting in the most significant change to the Copyright Act in twenty years.

Endnotes

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3 The Copyright Act of the United States, 17 U.S.C. § 101 *et seq*. (hereafter, the "Copyright Act").

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6 Bill Colitre, *Streaming Revenue*, L.A. Law. (May 2017).

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8 *See, e.g.,* Transparency in Music Licensing and Ownership Act, H.R. 3350, 115th Cong. (1st Sess. 2017) which would instruct the Register of Copyrights to create and maintain a database of licensing information for musical works and sound recordings while limiting the remedies for infringement open to rights owners who failed to provide such information; Compensating Legacy Artists for Their Songs, Service and Important Contributions to Society (CLASSICS) Act, H.R. 3301, 115th Cong. (1st Sess. 2017) which would create a new Chapter 14 to the Copyright Act to grant a digital public performance right for pre-1972 sound recordings without fully federalizing pre-1972 recordings as the Fair Play, Fair Pay Act would have; the Fair Play, Fair Pay Act, H.R. 1836, 115th Cong. (1st Sess. 2017), which would create a full public performance right for sound recordings including pre-1972 sound recordings, and incorporate elements of the AMP Act; the Allocation for Music Producers (AMP) Act, H.R. 881, 115th Cong. (1st Sess. 2017) which would explicitly authorize an existing policy allowing the direct payment of a portion of statutory sound recordings performance royalties to qualifying record producers, engineers, and mixers where so directed by a featured artist otherwise entitled to such royalties, to name but a few that bear on the topics ultimately adopted in the MMA.

9 *See* Todd Larson, *Don't Believe the Hype: Spotify is Right to Challenge Mechanical License Demands for Interactive Streaming*, BNA's Patent, Trademark & Copyright Journal (Oct. 20, 2017), https://www.weil.com/~/media/files/pdfs/2017/dont-believe-the-hype-spotify-is-right-to-challenge-mechanical-license-demands-for-interactive-streaming.pdf (surveying the substantial evidence against the generally held understanding that mechanical rights are implicated by on-demand streaming).

10 Consider the practical difficulty such a goal entails: tens of thousands of new songs are written and uploaded to the digital music services every day, most by non-professional songwriters who nevertheless have the ability to directly access the mass market through digital distributors, but no legal obligation to register their works under prevailing global copyright principles.

11 As but one example, MediaNet, one of the very first on-demand subscription streaming platforms, consistently advertised its catalog size on its website, growing from five million tracks in 2009, to eleven million in 2011, to twenty-two million in 2013, to thirty-two million in 2015, to forty million in 2015, and sixty million in 2017. *See* www.medianet.com, Internet Archive, https://archive.org: https://web.archive.org/web/20090805041510/http://www.mndigital.com/; https://web.archive.org/web/20110828065339/http://www.mndigital.com/; https://web.archive.org/web/20130807125717/http://www.mndigital.com/; https://web.archive.org/web/20150909072737/http://www.mndigital.com/; https://web.archive.org/web/20170809001502/http://www.mndigital.com/.

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The Dos and Don'ts of Workplace Investigations for Sports Industry Employers

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In this day and age, it is imperative that employers in the sports industry understand how to conduct adequate investigations of workplace-related incidents. Conducting these investigations is required by law, and may decrease the value of lawsuits or prevent them altogether. Below is a list of dos and don'ts for you to keep in mind when conducting workplace investigations:

Dos:

Act Promptly

How soon an investigation must start depends on the circumstances, but the best practice is to conduct a prompt investigation.[1] Courts have become more stringent about the timing surrounding workplace investigations. One court held that an employer's response was prompt where it began its investigation on the day the complaint was made and three days after learning of the alleged harassment.[2] Another court held the opposite where the employer did not investigate until one month after the victim submitted her complaint, due to a slow bureaucratic complaint process.[3] Courts also make clear that employers must not wait to investigate until it determines whether the complaint is valid.[4] To be safe, employers should initiate investigations as soon as reasonably practicable following receipt of a workplace-related complaint.

Strategically Choose Your Investigator

One of the most, if not the most, important decisions is to select an appropriate investigator. Regardless of whether the investigator is an in-house employee (e.g., human resources, in-house counsel) or a third party (e.g., outside counsel), the individual should have zero conflicts of interest with or bias towards the complainant or the accused.[5] It is also imperative that the investigator is not under the supervision of the alleged harasser. Choose someone who understands how to investigate, knows the law, can effectively communicate, and, if necessary, can confidently testify about the investigation.[6]

Conduct Thorough Interviews

Create a written list of witnesses to interview and begin the interviews promptly. Begin with the complainant, and focus on limiting and clarifying the specific allegations being made. Then, go over the details of each alleged incident, asking what was said, who witnessed what, under what circumstances did this occur, what the accused said, what the complainant said, what the witnesses said, and whether any documents were exchanged. Proceed with interviewing the accused and all identified witnesses to see if the details are corroborated. It may also be necessary to interview other known victims of the alleged harasser;[7] otherwise, liability may result under causes of action for "Failure to Investigate" and "Failure to Take Prompt Remedial Action."[8] For each person interviewed, the investigator should determine whether: (1) their testimony is believable on its face and makes sense, (2) their demeanor indicates they are lying, (3) a motive for

lying exists, (4) other witnesses' testimony or physical evidence corroborates their testimony, and (5) their testimony indicates that the accused has a history of similar behavior. The investigator must not instruct any witness not to talk to opposing counsel.[9]

Document Everything

Documentation is critical. The investigator should take notes during and after interviews. If notes need to be cleaned up, the investigator should do so promptly. There should be notes made that explain the context or reasons for other notes. Also, if an individual on the original witness interview list will not be interviewed, document why. Keep all notes, and any written statements, in an investigation file labelled "Confidential," and save physical and electronic copies. Once an investigation is complete, follow up with the complainant and accused to explain the results of the investigation and what corrective actions, if any, are being taken. Document these interactions. Finally, expect that all notes will be projected on a large screen and become the subject of future litigation.[10]

Reach an Unbiased Determination and Prepare the Report

The investigator acts in the capacity of a fact finder, not as part of the employer's HR, management, or legal teams. He or she must reach a neutral, unbiased conclusion upon completion of the investigation. Any and all conclusions and reasoning should be contained in a final written report. The report should be carefully and thoughtfully prepared, and treated as discoverable evidence. Use objective, clear, and non-judgmental language when writing the report. Do not simply say a witness "was clearly lying." Instead, say "the witness's allegations were not substantiated by any other witness and are inconsistent with the written documents; the witness made several statements that I determined were not true or accurate." Finally, if appropriate, include a summary of any and all recommended actions or actions taken by the employer as a result of the investigation.

Don'ts:

Disclose Privileged Information

Employers often obtain advice and direction from counsel before, during, and after investigations. Sometimes, the same attorneys who serve as the investigators are also retained as defense counsel in litigation. This leads to questions and confusion about the applicability and scope of the attorney-client privilege and work product doctrine. The following is a summary of applicable California case law to clear up this confusion.

In *Wellpoint Health Networks, Inc. v. Superior Court*, an employee complained of discrimination and retaliation while still employed.[11] A law firm was hired to investigate the claims. The investigation included various interviews and even correspondence with the employee, which stated that the charges had been "taken seriously" but that his claims were unsupported by the investigation. Thereafter, the employment ended (ostensibly because of a layoff), and a suit was filed.[12] The investigation materials were sought in discovery, both from the employer and directly from the attorney (who was now defending the litigation). The employer and their counsel objected, and motions to compel were brought. The trial court ordered the communications produced, on the basis that the lawyer had been acting in a "non-attorney" capacity, and that therefore privilege did not apply.[13] The employer appealed. Although the appellate court overturned, it did not disagree with the basic premise of the trial court:

> The courts in [prior] cases recognized that even though an attorney is hired to conduct business affairs, he or she may be called on to give legal advice during the course of the representation, and documents related to those communications should be protected notwithstanding the original purpose of employing the attorney. The trial court should not have given McCombs carte blanche access to Lafayette's investigative file, but should have based its ruling on the subject matter of each document.[14]

Wellpoint was followed, and narrowed, by *Kaiser Foundation Hospitals v. Superior Court*.[15] There, "Kaiser performed a prelitigation in-house investigation through a nonlawyer human resources specialist and then produced its entire investigation file in discovery, only claiming attorney-client or work product protection of certain specified documents consisting of attorney-client communications."[16] The court held that

> where a defendant has produced its files and disclosed the substance of its internal investigation conducted by non-lawyer employees, and only seeks to protect specified discrete communications which those employees had with their attorneys, disclosure of such privileged communications is simply not essential for a thorough examination of the adequacy of the investigation or a fair adjudication of the action.[17]

Then came *City of Petaluma v. Superior Court (Waters)*.[18] *Waters* involved an employee who resigned from the City of Petaluma after filing an initial harassment and discrimination complaint with the EEOC.[19] The City Attorney retained outside counsel to investigate the employee's claims. The retention agreement between the City and outside counsel stated that outside counsel would "interview witnesses, collect and review pertinent information, and report to [the City] on that information." It also stated, "[a]s attorneys, we will use our employment law and investigation expertise to assist you in determining the issues to be investigated and conduct impartial fact-finding," and that the investigation would be subject to the attorney-client privilege.[20] The agreement specifically provided that outside counsel would not render legal advice.[21]

In the lawsuit that followed, the City sought to withhold the investigation based on the attorney-client privilege and the work-product doctrine. The superior court granted the employee's motion to compel, finding that the information sought was not privileged, because the retention agreement specifically stated that outside counsel would not provide legal advice. The court also concluded that any applicable privilege had been waived, because the City had put the investigation at issue by asserting an avoidable consequences defense.[22]

The court of appeal reversed, holding that an investigation report prepared by outside counsel need not contain legal advice to protect the report from having to be produced in litigation, so long as the lawyer provided "legal services … in anticipation of litigation."[23] In so holding, the appellate court disagreed with the superior court's finding that the investigation report was not privileged because the retention agreement stated that the attorney investigator would not provide legal advice.[24] The court found that in assessing whether a communication is privileged, the initial focus of the inquiry is on the dominant purpose of the relationship between the attorney and client, not the purpose served by the individual communication.[25] The court noted that the statute defining "client" for purposes of the attorney-client privilege and work product doctrine refers to a person who retains a lawyer for securing "legal service or advice."[26] Accordingly, the court held, "[t]he plain terms of the statute support the conclusion that an attorney-client relationship may exist when an attorney provides a legal service without also providing advice. The rendering of legal advice is not required for the privilege to apply."[27] Since the dominant purpose of outside counsel's relationship with the City was to provide "professional legal services" in "anticipation of litigation" that the City Attorney could then use as a basis to provide legal advice to the City, the City had established a claim of privilege and work product protection.[28]

Based on the foregoing, employers should keep a separate file containing communications and notes of counsel and label it "Privileged." These records should be kept separate from general personnel or other random desk files, and not mixed with the actual investigation file. Also, random employees should not be given access to them. Finally, the file should be kept out of the purview of key decision makers, to avoid an argument that their reliance on the information waives attorney-client or work product protections.

Promise Confidentiality

Confidentiality should be examined from two perspectives: the investigator's and the employees'. Generally, the investigator (internal or external) cannot keep the complaint confidential. Employers should therefore only promise limited confidentiality—by saying, for example, "the information will be known only by those who 'need to know.'" The investigator should not promise complete confidentiality, because it may be necessary to disclose information obtained during the investigation to complete the investigation and/or take appropriate action.

Whether employers can tell employees not to talk about the investigation is a complex issue. Although managers should be told not to disclose information relating to the investigation, courts have held it is

inappropriate for employers to require employees to keep information secret, since employees have the right to openly discuss their work conditions.[29] Limited exceptions to this general rule exist. Employers should consult with counsel before attempting to require confidentiality.

Engage in Retaliatory Conduct

Before an investigation begins, employers often take immediate action to ease tensions in the workplace (e.g., leaves of absences for the complainant and/or accused, transferring the alleged harasser, etc.). Before doing so, employers should consult with counsel. The proximity in time between a protected action and an allegedly retaliatory employment decision is a factor courts will consider when determining the causal link element of retaliation claims.[30] Personnel decisions made on a whim following receipt of a complaint can therefore be a recipe for a lawsuit and construed as retaliatory.

Endnotes

1 Cal. Gov. Code § 2940(j)(1).

2 Swenson v. Potter, 271 F.3d 1184 (9th Cir. 2001).

3 Bradley v. Dep't of Corr. & Rehab., 158 Cal. App. 4th 1612 (2008).

4 Hope v. Cal. Youth Auth., 134 Cal. App. 4th 577 (2005).

5 Nazir v. United Airlines, 178 Cal. App. 4th 243, 325 (2009) (investigator so biased against the complainant that the court held the investigation "can itself be evidence of pretext").

6 Silva v. Lucky Stores, Inc., 65 Cal. App. 4th 256, 272 (1998) (investigator "had been trained by in-house counsel on how to conduct an investigation").

7 Heyne v. Caruso, 69 F.3d 1475, 1480-81 (9th Cir. 1995) (court determined that probative value of the testimony of other victims of the same harasser outweighed any alleged unfair prejudice and held that because of the "inherent difficulty of proving a state of mind" of the harasser, corroborative "me too" testimony of other victims made it more likely that the perpetrator viewed female workers as sexual objects).

8 Fuller v. City of Oakland, 47 F.3d 1522 (9th Cir. 1995) (employer's investigation criticized because there was no effort to seek corroboration from co-workers and others); *Nazir*, 178 Cal. App. 4th at 280 (deeply-biased investigator's failure to interview several directly relevant witnesses to counter accusations that had been made against the complainants "evidences pretext").

9 Cal. Rules Prof'l. Conduct r. 5-310

10 *See* Kaiser Found. Hosps. v. Sup. Ct. (Smee), 66 Cal. App. 4th 1217, 1228 (1998) (any nonprivileged investigation documents must be produced where adequacy of investigation at issue).

11 Wellpoint Health Networks, Inc. v. Sup. Ct., 59 Cal. App. 4th 110 (1997).

12 *Id.* at 115-16.

13 *Id.* at 116-17.

14 *Id.* at 122.

15 *Kaiser*, 66 Cal. App. 4th at 1217.

16 *Id.* at 1227.

17 *Id.*

18 City of Petaluma v. Sup. Ct., 248 Cal. App. 4th 1023 (2016).

19 *Id.* at 1029.

20 *Id.*

21 *Id.*

22 *Id.* at 1030-31.

23 *Id.* at 1028.

24 *Id.* at 1033-34.

25 *Id.* at 1035.

26 *Id.* at 1032.

27 *Id.* at 1034.

28 *Id.* at 1034-36. The court also found that the City did not waive privilege by asserting an avoidable consequences defense because the investigation was conducted after Waters left her employment. *Id.* at 1036-37. The court did not address whether assertion of the avoidable consequences doctrine as an affirmative defense to a complaint brought by a current employee could result in a waiver of applicable privileges.

29 N.L.R.B. General Counsel Memorandum No. 15-04 (Mar. 18, 2015) ("[E]mployees have a Section 7 right to discuss their terms and conditions of employment with their co-workers and/or the public.").

30 Jordan v. Clark, 847 F.2d 1368, 1376 (9th Cir. 1988); Morgan v. Regents of Univ. of Calif., 88 Cal. App. 4th 52, 69 (2000).

Distribution Deals: License, Monetize, Repeat

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As a general matter, content creators would like to sell rights to distribute their content to multiple parties on multiple platforms, so as to increase revenue from various sales and transactions. On the other side of the negotiation table, licensees, distributors, and the like ("distributors") would prefer to own, license, or control more content for a lesser price, with an opt-out when the content is no longer selling (e.g., fewer eyes viewing content). These principles hold true for both live sports and entertainment content.

The balance between creator and distributor is decided in the negotiation, and the result is a distribution deal. Before we break down the essential elements of a distribution deal for entertainment, media, and sports content, we need to answer two questions: First, what is a distribution right? Second, what is a distribution deal?

Distribution Right

17 U.S. Code § 106, Exclusive rights in copyrighted works, provides that:

> The owner of copyright under this title has the exclusive rights to do and to authorize any of the following:
>
> (1) to reproduce the copyrighted work in copies or phonorecords;
>
> (2) to prepare derivative works based upon the copyrighted work;
>
> **(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending** [bold emphasis added];
>
> (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;
>
> (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
>
> (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.[1]

In addition to the rights with respect to reproduction, derivative works, performance, display, and digital audio transmissions (e.g., digital music distribution) specifically listed in § 106, the distribution right is an exclusive benefit of copyright owners. Content like sports broadcasts, television shows, films, and other types of media and entertainment is copyrightable, and, therefore, its owners have the exclusive distribution right of that content. Where there is an exclusive distribution right, the content must be licensed to be distributed (e.g., watched) legally. The distribution right therefore finds its strength in its ability to be monetized by contract.

Distribution Deal

Jonathan Perelman, Head of Digital Ventures at ICM Partners, once said, "[C]ontent is king, but distribution is queen and she wears the pants. It's not nearly enough to create a good piece of content. You have to understand how content spreads across the web."[2] That quote is the quintessential reason why content must have a great distribution partner, either through a traditional or an over-the-top model. In the article, "How Movie

Distribution Works," the author[3] provides the following insight to give context to Perelman's quote:

> It has been said that making a movie is not nearly as difficult as getting it distributed. Because of the enormous amount of cost in money and time involved in distributing a movie, a distributor must feel confident that they can make a sufficient return on their investment. Having the backing of a major studio or a well-known director or star can greatly improve the chances of securing a good distribution deal. Independent filmmakers often use film festivals as an opportunity to get the attention of distributors. Once a distributor is interested in a film, the two parties arrive at a distribution agreement based on one of two financial models:
>
> - Leasing
> - Profit sharing

Under the leasing model, there is generally payment of a flat fee. Under the profit-sharing model, the distributor will get a percentage of revenues (10-50%) that is determined by an agreed-upon accounting model. In the movie business, some major studios have their own or preferred distributors. The benefit of an outside distributor is shared cost and, of course, the ability to focus on making content versus distributing content.[4]

Interestingly, on the traditional media side (think news services), creators have broadcasted and distributed content through distributors they own. The internet and YouTube have also helped with their distribution model, if they have been willing to adapt and change. In sports, leagues, conferences, or teams have used outside distributors because it has proven to be very expensive to license (and, therefore, for owners to cash in) when licensing the rights for a period of time. However, recently, some sports teams have thought to become their own distributors.[5] In the entertainment realm, on the other hand, companies have fought at the negotiation table to buy each other to own and control the information distribution highways.[6]

Once the parties have agreed upon the content to be distributed, the method(s) of distribution, and the financial model of distribution, further negotiation and drafting of applicable terms and conditions will follow. Some of the provisions likely to be seen in a distribution deal include:

- terms and conditions of sale;
- term for which the contract is in effect;
- marketing rights [i.e., using trademarks in social media and messaging approvals];
- trademark licensing;
- geographical territory covered by the agreement;
- performance [e.g., definition determined by the parties as to obligations and delivery of content];
- reporting [i.e., including accounting and payment]; and
- circumstances under which the contract may be terminated.[7]

This list is not exhaustive, and distribution deals vary by industry and need. However, below we will dive in deeper into the essential and most common provisions.

Introducing the Parties and the Reason for the Deal

Laying out who the parties are, specifically the parties to the deal, and listing their parent or applicable subsidiary company is important to show who is making the decisions, and, more importantly, who has the authority to contract. The reason for the deal is really as simple as stating what the agreement is and then proceeding to lay out the terms and conditions. For example, labeling an agreement a "Distribution Agreement" would suffice, as long as the terms and conditions are unambiguous.

Linear/Traditional Cable Options/Local Broadcasts

Does the deal include linear or traditional broadcasts (think your grandfather's television with no place or timeshifting options, e.g., saving or viewing your favorite shows whenever)? If the deal does, make sure the relevant option is included. If not, make sure it is specifically excluded. Will some content be blacked out or blocked in certain areas and at certain times? Will local broadcast stations be able to run the content? Do not be ambiguous. Be specific.

Domestic, Worldwide, and Distribution Technology Used

What is the geographic area for the deal? One state, the United States, Europe, the world, the universe, etc.? Similarly, if the deal includes one specific type of platform, make sure that the deal specifically includes or excludes advancements in technology. When going for a broad approach in selling content to a distributor, a commonly-used provision is "all technology now know or later developed."

All Games or Seasons

Sometimes dealmakers will want only one season, or two, three, or other specific number of seasons. In sports, the term of a license is generally three to five years in length, or, possibly, only for certain games (e.g., *Thursday Night Football* via Amazon Prime). It all depends on economic projections of the deal and whether any significant advancements in technology, rights, and rules are expected. If not, the deal is usually longer, to ensure longevity and consistency.

Venue, Law of Contract, and Arbitration

These terms and provisions are often left out or neglected by the unseasoned attorney. Think about this: if your client were to sue or get sued, it would be nice to have home court advantage, right? Well, on-the-field contests and off-the-field disputes and litigation work the same way. It is better to have a home field advantage (knowing where the battle will be) to measure possible expectations and results. Make sure the venue, law, and arbitration or other dispute resolution clauses, and breach/litigation clauses are included and that the client specifically knows what and where they are before signing. Specifically, do not use Vermont law if your client is based in California unless there is some reason and legitimacy for doing so.

On the distributor side, arbitration can be a great way to institute a high threshold to initiating a dispute by having high costs of entry (e.g., arbitrator fees). Furthermore, arbitration is also private, possibly less expensive compared to a lengthy trial, and faster than traditional litigation. Arbitration can also be applied to all disputes, and can be binding on the parties. A court of law can also issue a judgment based on an arbitration decision, and an arbitrator's decision is rarely vacated unless for fraud and other serious issues.[8]

Length

Deals in entertainment, media, and sports are sometimes driven by games or seasons, but they are also based on years of control. Depending on how the deal is structured, the parties can do more than one deal with multiple distributors and platforms in a set time period versus being limited to one distributor. Generally, again, the rights holder or creator will want to hold rights, so that it can sell those rights to other buyers to bring in more revenue and exposure, while the licensee or distributor will want to control more content.

OTT/AVOD/SVOD/FVOD Options[9]

OTT stands for over-the-top. It means the distribution method is over the top of linear or a traditional cable box and DTC, or direct-to-the-consumer. Think Spectrum, Cox, and AT&T versus Netflix, Amazon, or Hulu. Or as described above, linear or traditional distribution is your grandfather's television with no place or timeshifting options, e.g., saving or viewing your favorite shows whenever. OTT/DTC offer viewing options that make it easier for the consumer to consume content. Interestingly, the distinction between traditional or linear and OTT/DTC distribution has blurred because the same aforementioned companies often purchase, license, or utilize both OTT and linear options to reach consumers and expand company profits.

AVOD stands for advertising video on demand. SVOD stands for subscription video on demand. FVOD stands for free video on demand, or free television. AVOD is content that is generally free to watch, but you have to endure the commercials or placement advertisements. SVOD is Netflix, Amazon, and Hulu. VUDU, the Walmart-owned method of streaming distribution, is a mixture, since no subscription (yearly or monthly payment) is required—call it a TVOD (television on demand) model, if you will, but each movie or television show is available for purchase, and sometimes programs are AVOD (free) if you watch the advertisements. FVOD is free-to-watch content, but it includes commercials.

Now that the definitions are out of the way, make sure the deal you are negotiating includes or excludes certain rights to those distribution models. A deal can also restrict the timing of when certain models come into play. For example, the content must be strictly

SVOD for six months before AVOD becomes available. This ensures certain financial models projected in a deal and makes content exclusive. That is why we see the movie *Top Gun* playing on TNT and Netflix, but not in the movie theaters or as paid content.

Streaming and Internet

Yes, there is a difference between streaming rights and internet rights. Streaming is done through a platform and application (app) such as Netflix, Hulu, Amazon, or YouTube TV. Internet television, however, is something accessed through an internet browser (think Google Chrome, Internet Explorer, or Fire Fox), without the help of a platform or application. Whether your deal includes or excludes these rights should be specifically addressed.

Exclusivity

Is your deal exclusive or not? Generally, a distributor will want exclusivity for the rights purchased. If you want or do not want exclusivity, make sure it is included or excluded. Be specific. No ambiguous terms here.

Playback/Replay Rights

The idea here is that content generally becomes more accessible, and therefore less expensive, over time. See the *Top Gun* example above. For example, a movie is exclusive when it hits the theaters, but becomes readily available on free cable television as the content ages. Sports are similar, in that you can generally find a clip (and, sometimes, full games) either on the internet or YouTube after they are played. That being said, you can limit exposure by limiting playback and/or replay rights depending on the content.

Multi-platforms and Providers

When AT&T and Time Warner merged, they had on their minds multi-platform use and technology. Mobile phones, computers, televisions, etc. When a content owner wants to sell/license, it should consider how, where, why, and to whom the content is sold, so that it knows what rights are retained, or not included. Again, content owners licensing to other distributors can be advantageous. Think about where content is best broadcast, distributed, and viewed. Maybe that is everywhere, maybe not. Technology also plays a role here, and an appropriate provision might provide or include "all technology now known or later developed" when going for a broad approach in selling content to a distributor. Nevertheless, a content owner might want less expansive language, so that it is able to resell rights down the road, as technology becomes obsolete.

The foregoing discussion provides only some general guiding principles. No deal should be thought about in a vacuum. Compare deals, compare relationships, and work out what deal is best for the client.

Holdback Rights

Are any rights held back? A licensor/content owner would be wise to hold back some rights it wants to sell, resell, or create to sell. However, maybe the purpose is just to get the content out and project that higher revenues will result from follow-up content after the project has generated audience interest. For example, a studio or professional sports team might want to hold back mobile phone rights in a television distribution deal.

Social Media

Facebook Watch, IGTV (Instagram Television), Snap Chat, and Twitter all have viewing options, and often host television series and sports matches. Does your deal retain or sell these rights? Does your client receive money if the rights are sold to a distributor, but resold by that distributor to a social media platform? Do not leave money or rights (essentially the same thing) on the table. Again, be specific.

Triggering Events/Conditions

If a certain amount of viewership or advertisements is sold, can the licensor receive additional compensation (perhaps a percentage of the distributor's revenues). If something happens, do certain rights revert, or are certain rights opened up to the distributor? A condition could be as simple as the receipt of (or failure to generate) a specified level of revenue or the passage of a specified amount of time.

Theatrical Rights[10]

When dealing with movie making and distribution, remember that not all films are distributed equally. Namely, some have theatrical windows and some do not. How long is the window? How many theaters? How many screens in each of those theaters?

New Partners[11]

Sometimes relationships do not work out. Dealmakers should consider contingency plans and new partners when things go wrong or a deal cannot be made. These types of contingencies can be acquired through exclusive or non-exclusive negotiating windows, rights of first refusal, and more. Remember to hope for the best, but prepare for the worst.

Rights[12]

What about literary rights (books), ebooks (online/applications), radio, television, film, etc.? Think about how the content might grow or be adapted (e.g., the exclusive right to create derivative works). Make sure your deal includes or excludes specific terms and conditions regarding the actual rights being licensed.

Ancillary Rights

With DVD and CD sales declining significantly, the exclusive rights provided by § 106 of the copyright code revolve around streaming and downloading.[13] Imagine the underlying copyright and what, conceivably, the owner could do to reproduce, create derivative works from, perform, or display their content. As described in more detail above, the deal should include or exclude specific rights and ways of distribution. If the deal is just for *Sunday Night Football* broadcasts or movie theaters, it should state that in detail. Do not neglect home sales, but they are not currently a focus in distribution deals.

Trademarks/Intellectual Property

Especially when it comes to content, trademark law marches in lockstep with copyright. Specifically, trademarks that are the logos of studios, sports leagues, or media companies are practically inseparable from the content they sell. If copyrightable content is being licensed or sold, its trademarks must also be considered and licensed, generally through a limited license. There is also a need for a clause that states that the intellectual property of the parties is owned by the individual parties and is not being sold as part of the deal. Be clear, be concise, and make sure the deal states what the parties understand and want. There is also a practical side to all of this: a distribution deal is only as good as the marks it is licensed to market.

Marketing

Related to the trademarks, marketing will set the parameters of when and where content can be marketed and how it must be portrayed. The idea here is that content owners would like to control the message and branding. Therefore, a proper agreement will include a marketing clause setting the terms and conditions for such use.

Performance, Reporting & Termination

In many agreements, performance is a requirement, because one or both parties will need to do something as part of their contractual obligations. Those obligations may lead to reporting back on progress. Where progress or certain goals are not met, it may be cause for breach and termination of the contract, depending on how the parties drafted those terms and conditions. The effect of termination should also be included, so that the parties know when breach and termination occurs and what the consequences may be. It puts the parties on notice, and could prevent breach by way of consequential fear.

Credits

In film and television, credits are important, because they show involvement and serve as part of the digital resume for all artists and content producers; they are the transportable currency that industry professionals carry with them to land their next gig. Certain credits for producers are so important that they are only given by outside entities, like the Producers Guild of America.[14] Credits—how are they given, when they are given, etc.—should be spelled out clearly in the original talent contracts that may have an effect on a distribution deal, specifically remedies.

Remedies

Sometimes the parties want to limit remedies in equity because, for example, when a movie is released or sports broadcast completed, it would be difficult if not impossible (or very expensive) to recall that movie or content. Class actions are often limited, and arbitration, as discussed above, is preferred and is often required before a lawsuit can be filed. Think about exposure, resources, and, again, hope for the best, but prepare the worst.

In closing, the above is not exhaustive regarding what should be included in a distribution agreement. It

is just a slice of what could be included, based on the client's needs. The entertainment, media, and sports industries have specific terms and uses in their deals, and those customs should be addressed. In all deals, especially in the movie, news, and sports spaces, there are no guarantees of performance, and any contract should reflect and state that specifically. However, a good distribution deal (or more) will help a client license, monetize, and repeat the sale of content.

Endnotes

1 17 U.S.C. § 106.

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