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LETTER FROM THE EDITOR

Dear Reader,

Welcome to the Spring 2009 issue of the University of Denver Sports and Entertainment Law Journal. With this issue, we are excited to bring you insightful analysis and commentary focusing on a variety of legal topics within sports and entertainment law. Our goal is to provide compelling legal commentary on these industries, and with the hard work of our authors and editing staff, we are delighted to publish 6 articles presenting a variety of issues and perspectives.

Anti-trust issues in Major League Baseball, government regulation of media content, and performance enhancing drugs in professional sports are among the topics our authors address in this edition of the Sports and Entertainment Law Journal. Additionally, a fellow law student from the University of Denver has written a review of the 2009 South-by-Southwest music and film conference. The students, professors, and practitioners of law that produce this commentary offer a valuable resource to our legal community. With each of these articles, the authors provide engaging academic review of sports and entertainment law, and I would like to thank them all for their contributions to the Spring 2009 edition of the Journal!

Trey Douglass
Editor-in-Chief

MAJOR LEAGUE BASEBALL AND THE ANTITRUST RULES: WHERE ARE WE NOW???

Harvey Gilmore, LL.M, J.D.¹

INTRODUCTION

This essay will attempt to look into the history of professional baseball's antitrust exemption, which has forever been a source of controversy between players and owners. This essay will trace the genesis of the exemption, its evolution through the years, and come to the conclusion that the exemption will go on *ad infinitum*.

1) WHAT EXACTLY IS THE SHERMAN ANTITRUST ACT?

The Sherman Antitrust Act, 15 U.S.C.A. sec. 1 (as amended), is a federal statute first passed in 1890. The object of the statute was to level the playing field for all businesses, and oppose the prohibitive economic power concentrated in only a few large corporations at that time. The Act provides the following:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony...²

It is this statute that has provided a thorn in the side of professional baseball players for over a century. Why is this the case? Because the teams that employ the players are *exempt* from the provisions of the Sherman Act.

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² 15 U.S.C. § 1 (1890).

2) THE SUPREME COURT'S FIRST STATEMENT ON THE SUBJECT

The first definitive Supreme Court statement on the applicability of the antitrust laws to professional baseball was *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*.³ The suit arose as a result of animosity between the plaintiff and the American and National Leagues. The plaintiff, a Baltimore professional baseball team, was a member of a professional baseball league, the Federal League. This league was separate from the American and National Leagues. It brought suit against the American and National Leagues, alleging that the leagues made a deliberate attempt to destroy the Federal League by purchasing players and franchises of the Federal League in violation of the federal antitrust laws.⁴

The Supreme Court's opinion reversed the trial court's award of treble damages to the Baltimore Federal League franchise. The Court also summarized the nature of the business of organized baseball. Justice Holmes, speaking for a unanimous court, stated that the clubs were "in different cities and for the most part, in different states."⁵ Justice Holmes also noted that these teams played against one another in public exhibitions for money, with at least one of the teams having to cross state lines in order to compete in the exhibition. In other words, because professional baseball was set up in various cities, it was necessary for teams to travel from city to city (e.g., the Yankees traveling to Boston to play the Red Sox and vice versa) in order to play their games.

a) Why professional baseball is not considered interstate commerce

The court held that professional baseball was *not* within the scope of the antitrust laws

³ Fed. Baseball Club of Balt., Inc. v. Nat'l League of Prof'l Baseball Clubs, 259 U.S. 200 (1922).

⁴ *Id.* at 208.

⁵ *Id.*

and that the business of staging such exhibitions was purely a state affair.⁶

Additionally, the court found that “the fact that in order to give the exhibitions the Leagues must induce free persons to cross state lines and must arrange and pay for their doing so is not enough to change the character of the business.”⁷ The court analogized professional ballplayers to lawyers who had to argue cases out of state. “To repeat the illustrations of the court below, a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another state.”⁸ The court also found that interstate commerce was not implicated because team transportation was “a mere incident, not the essential thing. That to which is incident, the exhibition, although made for money would not be called trade of commerce in the commonly accepted use of those words.”⁹

3) CONGRESS’ CONTINUED ACQUIESCENCE

The next time the Supreme Court addressed the antitrust issue was in *Toolson v. New York Yankees*.¹⁰ In *Toolson*, the plaintiffs brought a challenge against the existing reserve clause in all ballplayer contracts. Specifically, George Toolson, a Yankees pitcher, refused to report to the New York Yankees’ Binghamton farm club.¹¹ As a result, Toolson was blacklisted, and prevented from playing for any other baseball organization.¹² Toolson sued, alleging that

⁶ *Id.* at 208-09.

⁷ *Id.* at 209.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Toolson v. N.Y. Yankees, Inc.*, 346 U.S. 356 (1953).

¹¹ *Toolson v. N.Y. Yankees, Inc.*, 101 F. Supp. 93, 93 (S.D. Cal. 1951), *cert. granted*, 345 U.S. 963 (1953).

¹² *Id.* at 94.

organized baseball violated the Sherman and Clayton Acts.¹³ Specifically, Toolson contended that organized baseball constituted commerce and that radio and television broadcasting as well as the state of interstate advertising constituted interstate commerce.¹⁴ Furthermore, he argued that the facts of his case were clearly distinguishable from *Federal Baseball* on the ground that professional baseball had become a more streamlined operation since *Federal Baseball* had been decided.¹⁵

In its per curiam opinion, the Supreme Court reaffirmed the proposition established by *Federal Baseball* that baseball was neither interstate commerce nor subject to the federal antitrust laws. The Court also pointed out that Congress had not acted since the *Federal Baseball* ruling, now more than 30 years old, to change the game's status. "Congress has had the ruling under consideration but has not seen fit to bring such businesses under these laws by legislation having prospective effect. The business has been thus left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation."¹⁶ The Court was careful, however, to point out that the antitrust exemption was limited specifically to baseball. "Without re-examination of the underlying issues, the judgments below are affirmed on the authority of *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs*, so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws."¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ H. Ward Classen, *Three Strikes and You're Out: An investigation of Professional Baseball's Antitrust Exemption*, 21 AKRON L. REV. 369, 379 (1988).

¹⁶ *Toolson*, 346 U.S. at 357.

¹⁷ *Id.* at 357-58.

However, unlike *Federal Baseball*, *Toolson* was not a unanimous opinion. Justice Burton, joined by Justice Reed, in dissent, was incredulous that professional baseball still retained its antitrust exempt status. He pointed out that the game had grown by leaps and bounds over the past 31 years, thanks to increased capital investments, advertising, and coast to coast broadcasting.¹⁸

Whatever may have been the situation when the *Federal Baseball* case was decided in 1922, I am not able to join today's decision which, in effect, announces that organized baseball, in 1953, still is not engaged in interstate trade or commerce. In the light of organized baseball's well known and widely distributed capital investments used in conducting competitions between teams constantly traveling between states, its receipts and expenditures of large sums transmitted between states, its numerous purchases of materials in interstate commerce, the attendance of at its local exhibitions of large audiences often traveling across state lines, its radio and television activities which expand its audiences beyond state lines, its sponsorship of interstate advertising, and its highly organized 'farm system' of minor league baseball clubs, coupled with restrictive contracts and understandings between individuals and among clubs or leagues playing for profit throughout the United States, and even in Canada, Mexico, or Cuba, it is a contradiction in terms to say that the defendants in the cases before us are not now engaged in interstate trade or commerce as those terms are used in the Constitution of the United States and the Sherman Act"¹⁹

4) THE "RESERVE" CLAUSE

Before free agency, the standard player's contract included a provision which allowed teams to retain players even if their contracts had expired. Once a player's contract expired, the team would put the player's name on a list of players who were off limits to other teams. Once the player was on his team's list, the team maintained the right of first refusal in determining whether the team wanted to sign the player to a new contract for the next season.

¹⁸ *Id.*

¹⁹ *Id.* at 357.

This was a one-way street because the player was not allowed to explore possibilities with other teams as long as he was on his original team's reserve list. This contractual provision was known, infamously, as the reserve clause.

a) The Antitrust Exemption and The Reserve Clause

The strongest player objection was that the reserve clause bound players to their teams in perpetuity, even if their contracts expired, they were forever precluded from freely offering their services to any team that might have been interested. This system bound a player to his team until he was traded or retired because the reserve clause was automatically renewed every year.

Baseball's employer - employee situation is *sui generis*. A player can sell his services to the club making the best offer only when he is a free agent - a status which he will have either when he is just breaking into baseball or when the club holding his contract has no further use for his services and is unable to sell him to any other club. In neither of these situations is his bargaining power likely to be great. At any other time, the player must accept the terms of the owner claiming his services or retire from the game. During the salary negotiations prior to the start of the season, the club is usually in the dominating position, and only if the player possesses such outstanding ability that the club would find it difficult to replace him, will he be able to force a satisfactory compromise. Otherwise, he must rely solely upon the owner's reluctance to sacrifice the investment represented by the athlete's original cost and present transfer value. In any event, the player cannot take advantage of the fact that there might be more generous club owners willing to make him a better offer. If his club is one of the less wealthy and less successful, he may go through his entire career without acquiring the fame or enumeration merited by his ability - and without ever sharing a World Series plum. If he is traded, he must work for his new team even though it may be in the hottest part of Texas. If he is with a good club which has a slightly better man at his position, but nevertheless can afford to retain him, he may warm the bench during the years when he should be developing - a misfortune which has ruined some potentially great players. In return for the player's placing his baseball fortune in the club's hands, the club promises only that it will pay him a stipulated salary for so much of the current season as it desires his services; on ten days' notice it can release him unconditionally and terminate its obligation to pay him a salary....Despite the vehemence of these criticisms, baseball's benevolent despotism enjoys a reign unhampered either by criminal prosecutions or by

revolts among its ‘slaves’.²⁰

b) Baseball’s competitive balance (or lack thereof)

In the days before free agency, the team owners’ favorite argument for the continuance of the reserve clause was that it was necessary to maintain the major leagues’ competitive balance. Here is how balanced major league baseball competition was in those days. In the 44 baseball seasons between 1921 and 1964, the New York Yankees won 29 American League Pennants,²¹ and 20 World Series Championships.²² They were (and still are) the only team to win five straight World Series Championships (1949-1953).²³ They were (and still are) the only team to go to five consecutive World Series (1949-1953; 1960-1964).²⁴ They were (and still are) the only team to win four consecutive World Series Championships (1936-1939).²⁵ They are also the only team to win the World Series with back-to-back sweeps (1927-1928; 1938-1939).²⁶ It would be another 60 years before a team would score consecutive World Series sweeps. The 1998-1999 Yankees (them again) would accomplish that feat.

In that same span, the St. Louis Browns, Washington Senators, Boston Red Sox, Chicago

²⁰ *Organized Baseball and the Law*, 46 YALE L.J. 1386, 1387-88 (1937).

²¹ THE BASEBALL ENCYCLOPEDIA 315-477, 2860-2903. (Jeanine Bucek et al. eds., MacMillan 10th ed. 1996). The Yankees won the American League Championship in 1921, 1922, 1923, 1926, 1927, 1928, 1932, 1936, 1937, 1938, 1939, 1941, 1942, 1943, 1947, 1949, 1950, 1951, 1952, 1953, 1955, 1956, 1957, 1958, 1960, 1961, 1962, 1963, and 1964.

²² *Id.* at 315-477, 2860-2903. The Yankees won the World Series in 1923, 1927, 1928, 1932, 1936, 1937, 1938, 1939, 1941, 1943, 1947, 1949, 1950, 1951, 1952, 1953, 1956, 1958, 1961 and 1962.

²³ *Id.* at 2888-2892.

²⁴ *Id.* at 2888-2892, 2899-2903.

²⁵ *Id.* at 2875-2878.

²⁶ *Id.* at 2866-2867, 2877-2878.

White Sox and Cleveland Indians won eight American League Pennants,²⁷ and two World Series Championships combined.²⁸ This is the competitive balance that owners fought long and hard to protect.

In that same time frame, Baseball Hall of Famer Ernie Banks was voted the Most Valuable Player in the National League for the 1958 and 1959 seasons.²⁹ His team, the Chicago Cubs, finished fifth in the 8-team National League both years.³⁰

Similarly, Baseball Hall of Famer Ralph Kiner led the National League in home runs in seven consecutive seasons.³¹ In the 8-team National League, his team, the Pittsburgh Pirates, finished dead last in three of those years, and next to last in two other seasons. During Kiner's 7-year run, the Pirates never finished higher than 4th place in the National League.³² In fact, Kiner "had approached Pirates' General Manager Branch Rickey about a raise after Kiner had hit 47 home runs the prior season. Rickey's response was: 'we could have finished last *without* you.'"³³

These are examples of two of the greatest players in the history of professional baseball who were forever doomed to playing their entire careers for teams whose collective abilities came nowhere near theirs. Another former player, former Yankee outfielder Bob Cerv once told

²⁷ *Id.* at 326-456, 2863-2898. The Browns won the American League Championship in 1944. The Senators won the American League Championship in 1924, 1925, and 1933. The Red Sox won the American League Championship in 1946. The Indians won the American League Championship in 1948 and 1954. The White Sox won the American League Championship in 1959.

²⁸ *Id.* at 2863, 2887. The Senators won the World Series in 1924; The Indians won the World Series in 1948.

²⁹ *Id.* at 19.

³⁰ *Id.* at 451, 455.

³¹ *Id.* at 1223.

³² *Id.* at 406, 410, 413, 418, 422, 426, 430.

³³ Joseph A. Kohm, Jr., *Baseball's Antitrust Exemption: It's Going, Going...Gone!*, 20 NOVA L. Rev. 1231, 1242 n.81 (1996).

this story about the one-sidedness of contract negotiations: “I went in a lot of times, and, hell, they’d have an attorney there. They’d have a business manager. They’d have a general manager. They’d have the president. And there you sat by yourself. If you’d gone in with an attorney, you wouldn’t of [sic] had a job. So it was kinda one-sided.”³⁴

5) THE START OF THE FIGHT FOR FREE AGENCY

In the employer-employee arena, baseball’s reserve clause was not challenged again until 1970. After the 1969 baseball season, Curt Flood was traded from the St. Louis Cardinals, a perennial National League power, to the Philadelphia Phillies, then the league doormat. Flood had been the starting center fielder on the Cardinals’ World Series winning teams in 1964,³⁵ (against the Yankees) and 1967 (against the Red Sox),³⁶ and their National League Championship team in 1968 (defeated by the Tigers in that year’s World Series).³⁷ Even though he had no desire to play for the Phillies, Flood had no choice since his 1969 contract contained the typical reserve clause found in all standard contracts. That in turn enabled Philadelphia, as assignee of the St. Louis contract, to invoke the reserve clause to force Flood to play during the following season (and at a salary cut, no less). Flood never signed a contract to play in Philadelphia and objected to the trade. Baseball Commissioner Bowie Kuhn rejected Flood’s claim and informed him that the assignment and reserve clauses in his player contract were valid and he would play in Philadelphia. Flood then brought suit against the Commissioner.³⁸

In his suit, Flood alleged that the reserve clause violated the Sherman Act, state antitrust

³⁴ JOHN TULLIAS, *I’D RATHER BE A YANKEE* 147 (MacMillan 1986).

³⁵ THE BASEBALL ENCYCLOPEDIA, *supra* note 21, at 2903.

³⁶ *Id.* at 2906.

³⁷ *Id.* at 2907.

³⁸ Flood v. Kuhn, 316 F. Supp. 271 (S.D.N.Y. 1970), *cert. granted*, 407 U.S. 258 (1972).

laws, and the 13th Amendment of the U.S. Constitution outlawing involuntary servitude. The District Court in New York rejected the antitrust claims, citing and reaffirming baseball's exemption status from antitrust law. Flood eventually took his claims to the Supreme Court.³⁹ The Supreme Court once again entertained the question of whether baseball is subject to antitrust legislation. After reviewing the case history, the Supreme Court again reaffirmed baseball's exempt status (by a 5-3 count), citing several reasons for doing so. The court cited that (1) Congress had never altered baseball's status as defined by *Federal Baseball*; (2) the *Toolson* decision showed Congress continued acquiescence to baseball's exempt status; (3) a reluctance to overrule *Federal Baseball* retroactively; and (4) a desire that any change would be provided by legislation rather than by court decree. Justice Douglas, in dissent, pointed out that the Court's construction of interstate commerce had expanded significantly since *Federal Baseball* and it was painfully obvious that professional baseball in 1972 was definitely engaging in interstate commerce.

Also dissenting, Justice Marshall, joined by Justice Brennan, pointed out that Congress has definitely not tacitly approved the *Federal Baseball* and *Toolson* cases. He reasoned that if it had, *all* of the major professional sports would have had antitrust protection. "Has Congress acquiesced in our decisions in *Federal Baseball* and *Toolson*? I think not. Had the Court been consistent and treated all sports in the same way baseball was treated, Congress might have become concerned enough to take action. But, the court was inconsistent, and baseball was isolated and distinguished from all other sports. In *Toolson* the court refused to act because

³⁹ Flood v. Kuhn, 407 U.S. 258 (1972).

Congress had been silent. But the court may have read too much into this legislative inaction.”⁴⁰

a) The Seitz Ruling and the Death of the Reserve Clause

At the end of the 1975 baseball season, the Major League Baseball Players Association (on behalf of pitchers Andy Messersmith and Dave McNally) filed a grievance against the team owners challenging the reserve clause. The matter was submitted to arbitration under the terms of the then existing collective bargaining agreement. In a stunning decision, arbitrator Peter Seitz resolved the problem of the reserve clause in the players’ favor. He ruled that once a player’s renewal year comes to an end, the player no longer has a contractual obligation to his team. In effect, since there is no longer a binding contract between the player and his team, he cannot be placed on his team’s reserve list. Consequently, a player was free to sign with whatever team he desired (*usually the highest bidder*). The Seitz decision was upheld on appeal.⁴¹

This proved to be a monumental victory for the players because they were given the same freedom of movement as any other employee. If a typical employee wants to get out of a given job situation, he could try to find another job that provides a higher salary, better working conditions, a change of scenery, etc. With a professional ballplayer, if he were in a bad work situation (losing team, not getting along with management, etc.), his only options were to endure the situation, or retire from the game. Now that the reserve system had been eliminated, players now had the freedom to pursue a job situation that gave them the maximum benefits (usually a much higher paycheck and the chance to go to the World Series with a contender).

⁴⁰ *Id.* at 292.

⁴¹ *Kansas City Royals Baseball Corp. v. Major League Baseball Players Ass’n*, 532 F.2d 615 (8th Cir. 1976).

b) The Economic Impact of the Current System

As mentioned previously, the Yankees' dominance from 1921-1964 flew in the face of the argument that the reserve clause was vital to maintaining the game's competitive balance. Since free agency now allows baseball players to offer his services to the highest bidder, baseball salaries have grown astronomically in the past 30 years.

Consequently, operating a baseball franchise has become a more expensive proposition. One of the sticking points that led to the 1994 work stoppage was that team owners alleged that the skyrocketing costs of baseball operations seriously threatened the continued viability of the game. The owners also alleged that the economic system as currently constructed undermined competitive balance (there's that argument again) because certain teams weren't on the same financial footing as certain others. In other words, the financial condition of certain "large market" teams (the Yankees, for example) was such that they could afford to pay top dollar to free agents, but certain "small market" teams (the Pirates and Royals, for example) could not compete either on the field or in the checkbook.

I see some logical flaws in that argument, however. The first logical flaw assumes that having the highest payroll or even being solvent guarantees a World Series win at the end of the season (more on that shortly). Another logical flaw is that a change in the game's economic structure does not necessarily guarantee that the lower echelon teams would have an equal chance of winning. The competitive balance argument also seems to suggest that a fairer economic system would give teams an equal chance of winning a championship.

There are 30 major league baseball teams as of the 2008 season. To carry the competitive balance argument to its logical conclusion, then each team should win the World

Series once every 30 years. However, the Yankees' 3 straight championships in 1998, 1999, and 2000 have already blasted that argument into oblivion, as have the multiple championships of the Florida Marlins (1997 and 2003) and the Boston Red Sox (2004 and 2007). If we are to have true competitive balance, then the Yankees should not win another World Series until the year 2030, the Marlins until 2033, and the Red Sox until 2037.

As to the financial argument, the so-called small market proponents conveniently forget to mention that the Yankees have been defeated in every postseason from 2001 through 2007 in spite of the fact that they had the highest payroll every single year.⁴²

<u>Year</u>	<u>Yankees' Payroll</u>	<u>Postseason Opponent</u>	<u>Opponent's Payroll</u>
2001*	\$112,287,143	Arizona Diamondbacks	\$85,247,999
2002	\$125,928,583	Anaheim Angels	\$61,721,667
2003*	\$152,749,814	Florida Marlins	\$48,750,000
2004	\$184,193,950	Boston Red Sox	\$127,298,500
2005	\$208,306,817	Anaheim Angels	\$97,725,322
2006	\$194,663,079	Detroit Tigers	\$82,612,866
2007	\$189,639,045	Cleveland Indians	\$61,673,267

* World Series Losses

If that isn't enough to poke a hole in the small market teams' alleged inability to put a competitive product on the field, here are three more items to consider:

1) The Diamondbacks, who beat the Yankees in the classic 2001 World Series, showed a net operating loss in their financial statements amounting to approximately \$44,358,000. The

⁴² USA Today Salaries Databases, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=9> (last visited May 20, 2009).

Milwaukee Brewers, who had a 68-94 record in 2001, finished with an operating profit in excess of \$9,000,000.⁴³

2) During the 2005 season, the Yankees, who had a total payroll of \$208,306,817,⁴⁴ almost missed the postseason for the first time since 1993. At this same time, the San Diego Padres (a .500 team, I might add), who had a total payroll of \$63,290,833, comfortably won the National League Western Division title with a record of 82-80.⁴⁵

3) The New York Mets, only one of three teams who had a payroll in excess of \$100 million in 2005 (the Yankees & Red Sox are the other two),⁴⁶ needed a late season surge to avoid a last place finish in the National League Eastern Division.⁴⁷

6) THE CONSTITUTION, THE ANTITRUST EXEMPTION AND FRANCHISE RELOCATION

While major league baseball took a hit on the reserve clause issue, its antitrust exemption was still solid in other areas. In 1965, the State of Wisconsin alleged that major league baseball violated Wisconsin antitrust law when the Braves moved from Milwaukee to Atlanta.⁴⁸ The state of Wisconsin claimed that major league baseball violated Wisconsin Statute sec. 133.01 when the owners approved the move. Section 133.01 stated: “Every contract or combination in

⁴³ 2001 Team-by-Team Revenues and Expenses Forecast, <http://www.usatoday.com/sports/baseball/stories/2001-12-05-focus-expenses.htm>.

⁴⁴ New York Yankees Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=9> (last visited May 20, 2009).

⁴⁵ San Diego Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=28> (last visited May 20, 2009).

⁴⁶ New York Yankees Yearly Payrolls, *supra* note 44; Boston Red Sox Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=3> (last visited May 20, 2009).

⁴⁷ New York Mets Yearly Payrolls, <http://content.usatoday.com/sports/baseball/salaries/teamresults.aspx?team=25> (last visited May 20, 2009).

⁴⁸ State v. Milwaukee Braves, Inc., 144 N.W.2d 1, 2 (Wis. 1966).

the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal.”⁴⁹

The Wisconsin trial court summarized the statute as follows: “Every combination intended to restrain or prevent competition in the supply or price of any article or commodity... or which shall in any manner control the price of any such article or commodity, fix the price thereof, limit or fix the amount or quantity thereof to be ... sold in this state ... is hereby declared an illegal restraint of trade.”⁵⁰

The state of Wisconsin alleged that the defendants acted in concert, and monopolized power over baseball. The state also alleged that major league baseball illegally terminated the playing of baseball in Milwaukee and illegally restrained and prevented various types of trade and commerce involved in baseball by moving out of Milwaukee.

In reviewing the trial court’s verdict favoring the state, the Wisconsin Supreme Court felt the dominant issue was whether the Supremacy Clause of the U.S. Constitution precluded the application of Wisconsin antitrust law. “The question to be decided under the commerce and supremacy clauses of the constitution of the United States is: ‘Does the presence and exercise of monopoly power arising out of the nature of the organization of baseball permit application of the state’s policy in this instance?’”⁵¹ The court provided a two-step analysis on the issue. First, the court reviewed if there had been a violation of Wisconsin antitrust law. The court did find such a violation. “The substantial injury to business activity within Wisconsin caused by the defendant’s exercise of their monopoly power is clear, and we assume, at this point, that a

⁴⁹ *Id.* at 9.

⁵⁰ *Id.*

⁵¹ *Id.* at 12.

violation of Wisconsin law has occurred if our law can be applied.”⁵² In addition, the court held that the activities of organized baseball were in fact interstate by their very nature. “It is evident that the activity of major league baseball, spread through eight states in the National League and nine states and the District of Columbia in the American League is interstate commerce. ... Not only are defendants engaged in interstate commerce which involves activity within Wisconsin, but enforcement of the antitrust provision of Wisconsin would directly affect defendants’ operations outside the state as well.”⁵³

The Wisconsin Supreme Court also recognized that federal case law had stood for the proposition that baseball was in fact exempt from the federal antitrust laws. It then held that the Wisconsin statute could not be applied because decisions by the United States Supreme Court and the silence of Congress after those judicial decisions controlled over a state statute via the Supremacy Clause of the U.S. Constitution. In this situation, the need for a national uniformity in the realm of interstate commerce would supersede a state’s application of its own antitrust laws. “The failure of Congress to regulate interstate commerce has generally been taken to signify a Congressional purpose to leave undisturbed the authority of the states to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them the authority to make regulations affecting those phases of it which, because of the need of national uniformity, demand that their regulation, if any, be prescribed by a single authority.”⁵⁴ The court went on to say: “We deem it unrealistic to interpret these decisions of the supreme court of the United States plus the silence of Congress as creating a mere vacuum in national

⁵² *Id.* at 11.

⁵³ *Id.* at 11.

⁵⁴ *Id.* at 15-16.

policy, leaving the states free to regulate the membership of the baseball leagues.”⁵⁵

As a result of the legislative inaction over the course of the 20th century, professional baseball has seen several franchise relocations:

Athletics: From Philadelphia to Kansas City after the 1954 season, then from Kansas City to Oakland after the 1967 season.

Braves: From Boston to Milwaukee after the 1952 season, then from Milwaukee to Atlanta after the 1965 season.

Orioles: From St. Louis (as the St. Louis Browns) to Baltimore (& renamed the Baltimore Orioles) after the 1953 season.

Brewers: From Seattle (as the Seattle Pilots) to Milwaukee (& renamed the Milwaukee Brewers) after the 1969 season.

Twins: From Washington (as the original Washington Senators) to Minnesota (& renamed the Minnesota Twins) after the 1960 season.

Rangers: From Washington (as the 2nd Washington Senators franchise) to Arlington, Texas (& renamed the Texas Rangers) after the 1971 season.

And, the most infamous of all:

Dodgers: From Brooklyn, NY to Los Angeles after the 1957 season.

Giants: From Manhattan, NY to San Francisco after the 1957 season.

a) Professional Football, Franchise Relocation, and the Antitrust Rules

An interesting contrast, however, shows how the federal antitrust laws have facilitated franchise movement in professional football. During the 1980 football season, the Oakland

⁵⁵ *Id.* at 17-18.

Raiders announced plans to relocate to Los Angeles, where they would play their home games in the Los Angeles Memorial Coliseum. The National Football League (NFL) attempted to prohibit the move by pointing to a provision in its by-laws that required approval of at least 75 percent of the other owners.

Raiders' owner Al Davis responded by suing the league on antitrust grounds.⁵⁶ The Raiders would eventually win the antitrust lawsuits against the league and would also win an eminent domain lawsuit against the City of Oakland.⁵⁷ While the Raiders were in the midst of all of this litigation, they twice embarrassed the league by winning the Super Bowl after the 1980 season (their next to last in Oakland), and after the 1983 season (their second in Los Angeles). Ironically, the Raiders would leave Los Angeles and return to Oakland after the 1994 season. As a result of the Raiders' victory on antitrust grounds, the NFL has seen six franchise relocations in less than 25 years.

Raiders: From Oakland to Los Angeles after the 1981 season, then from Los Angeles back to Oakland after the 1994 season.

Cardinals: From St. Louis to Phoenix after the 1987 season.

Titans: From Houston (as the Houston Oilers) to Tennessee (and renamed the Tennessee Titans) after the 1996 season.

Colts: From Baltimore to Indianapolis after the 1983 season.

Rams: From Los Angeles to St. Louis after the 1994 season.

⁵⁶ See *Los Angeles Memorial Coliseum Commission v. National Football League*, 72 F.2d 1381 (9th Cir. 1984); *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League (Raiders II)*, 791 F.2d 1356 (9th Cir. 1986).

⁵⁷ See *Oakland v. Oakland Raiders ("Raiders I")*, 32 Cal. 3d 60 (Cal. 1982).

7) THE INFAMOUS 1994 WORK STOPPAGE

Then came August 1994, the start of baseball's ultimate meltdown and subsequent nuclear winter. Players and management disagreed vehemently over player salary caps and free agency. Management argued that protecting their economic viability was an absolute must for the continued survival of the game. This would take the form of a revenue sharing plan that included a cap on player salaries. The players argued that baseball's antitrust exemption prevented them from getting equal protection under the law. When negotiations broke down and reached the impasse stage, the owners tried to impose their salary cap and revenue sharing plan unilaterally. The players then began a labor strike against the team owners. Thus, the remainder of the 1994 season and the start of the 1995 season were irretrievably lost. The cancellation of the 1994 World Series marked the first time in 90 years that there were no World Series games being played by the respective American and National League champions. The strike also marked the first time in a century that there were no games played on Labor Day Weekend. The acrimonious situation ended early in 1995 when a federal court issued an injunction to the owners to reinstate the terms of the expired collective bargaining agreement. Two days later, the players ended their strike.

In 1995, when players and owners finally approved a new collective bargaining agreement, they also put in an interesting clause in the contract. Article 27 of the collective bargaining agreement provided that the players and management would jointly lobby Congress to pass a law that would extend the antitrust laws to professional baseball. This provision looks very promising in that players and owners appear be willing to build on a new era of cooperation. However, its appeal is only cosmetic, and wholly unrealistic, in my opinion. Unfortunately,

most fans, myself included, are convinced that there will never be any true cooperation between players and owners. Usually, they can barely agree to agree, and I just cannot see any cooperative effort to lobby Congress to repeal the antitrust exemption, considering that the exemption has been a sore point between the two sides for decades.

8) WHERE DO WE GO FROM HERE?

As a result, the continued acrimony between players and owners left many fans (myself included) seeing both owners and players as greedy robber barons who could not care less about the average working person. These sentiments finally reached the ears of Congress, who finally attempted to address the antitrust situation after the 1994 debacle:

Since World War II, more than a dozen bills have been introduced to repeal baseball's antitrust exemption, but until 1994 none had made it out of committee. Some opposition has come from senators who are afraid their states will lose major league teams in franchise relocations. Other members of Congress who oppose lifting the exemption fear that the minor-league teams in their districts could suffer from the lawsuits that might result if players were not bound to an organization for six years. Without the financial backing of the big-league teams, many minor-league teams might fold.... [The 1994-95] baseball players' strike changed the climate in Congress, and in September [1994] Congress began hearings to examine the continuing viability of baseball's antitrust exemption. Testimony from both the owners' camp and the players' camp emphasized the illogic of continuing the exemption. Subcommittees in both chambers voted to recommend lifting the exemption by amending the Clayton Act to apply expressly to major league-baseball. However, after delaying tactics by opponents of the measures, neither bill [came] to a floor vote. A Senate committee again recommended partial repeal of the exemption in 1995, but the issue has [not come to] the Senate floor, [either].⁵⁸

a) The Curt Flood Act of 1998

In October 1998, Congress passed Public Law 105-297, commonly known as the Curt

⁵⁸ Larry C. Smith, *Beyond Peanuts and Cracker Jacks: The Implications of Lifting Baseball's Antitrust Exemption*, 67 U. COLO. L. REV. 113, 132-33 (1996).

Flood Act. This statute changed the antitrust rules for baseball players in one key respect: the statute places all baseball related labor relations under the federal antitrust laws. I believe if Curt Flood (who passed away in 1997) were alive to see the statute that bears his name, he would also see the statute as the final culmination of a baseball player's labor rights. Having said that, aside from this one major exception, baseball still has its antitrust exemption intact.

“It is the purpose of this legislation that major league baseball players are covered under the antitrust laws (i.e., that major league baseball players will have the same rights under the antitrust laws as do other professional athletes, e.g., football and basketball players), along with a provision that makes it clear that the passage of this Act does not change the application of the antitrust laws in any other context or with respect to any other person or entity.”⁵⁹

Eventually, the anti exemption fervor faded and now the situation is back to the status quo. Baseball still has its exemption and I seriously doubt that it will ever get yanked. As former Senator Slade Gorton (R - Wash) aptly pointed out, previous attempts at repealing the antitrust exemption failed, and future attempts will meet the same fate. “Why? Congressmen from big cities with rich teams - in some of the country's most populous states - would trample any threats to the exemption.”⁶⁰

Senator Gorton also expressed his doubt that the Supreme Court would ever step in to remedy the situation, especially since it has not in the past seventy years. “The court is almost certain not to reverse its own precedents in this respect. Legislation to strip baseball of its exemption has been proposed for decades without ever coming close to passage.”⁶¹

⁵⁹ Curt Flood Act of 1998, Pub. L. No. 105-297, 122 Stat. 2824 (1998) (codified as amended at 15 U.S.C. § 26b (2009)).

⁶⁰ Ron Judd, *Federal Muscle Won't Ground M's – Gorton Urges Cooperation of Corporations*, SEATTLE TIMES, Sept. 5, 1991, available at <http://community.seattletimes.nwsourc.com/archive/?date=19910905&slug=1303793>.

⁶¹ *Id.*

b) Is the exemption really a good thing?

As mentioned previously, there are those who believe that the repeal of baseball's antitrust exemption would lead to serious calamity. "First, baseball's exemption is necessary to support the minor league system. Baseball, unlike professional football and basketball which taps its talent from the college ranks, develops its players through the minor league system. The minor league system, next to player salaries, is the most expensive aspect of major league baseball operations. Without the subsidies from their major league affiliates, the minor league system would cease to exist and major league baseball would lose its major source of quality players."⁶²

The next major reason that is offered is that the antitrust exemption is necessary to keep teams from moving). In light of the examples of baseball franchise location I've previously mentioned, I find this reasoning to be flawed. Furthermore, it did not prevent the Dodgers from moving out of Brooklyn.

The second reason which makes it necessary to retain baseball's exemption is to control the movement of major league franchises. In support of this contention, the former president of the American League (Lee MacPhail), by way of analogy, describes how football franchises followed the lure of big money to new cities regardless of long-term repercussions. He concludes, as does this note, that the element which will bring an end to this situation is not a fundamental change in baseball's antitrust status, but rather a commitment by both the owners and the players to work together and make the requisite sacrifices necessary to keep the game strong.

⁶² *Id.*

While the above analysis is both relevant and interesting, nothing in that discussion will solve the recent problems in baseball. With the advent of collective bargaining under federal labor laws, the players and owners must, on their own, sit down at the bargaining table and resolve the issues which kept the umpires from shouting ‘play ball’ for more than seven months in 1994-95. Any hint by Congress to eliminate the antitrust exemption frustrates this reality.⁶³

I seriously take issue with the football analogy offered by former A.L. President MacPhail. We need look no further than to 1957 when Walter O’Malley (to this day the most hated man in Brooklyn’s history) moved the Dodgers out of Brooklyn and into Los Angeles. He did it exactly so he could get big money from the City of Los Angeles. He also did it *in spite of* the mere detail that the Dodgers were one of the most profitable teams of that era. Furthermore, the Dodgers were a perennial contender throughout the 1940’s and the 1950’s, having won 7 National League Championships and the 1955 World Series.⁶⁴

In that light, O’Malley (who was a tax attorney) was the last man to be pleading poverty. In my opinion, the antitrust exemption, in that situation, inflicted a major void from which Brooklyn has never fully recovered. And it never will. In addition, Walter O’Malley was also a key architect of the deal that sent the New York Giants from upper Manhattan to San Francisco, resulting in the New York metropolitan area losing two of its three teams.

⁶³ *Id.*

⁶⁴ THE BASEBALL ENCYCLOPEDIA, *supra* note 21, at 386, 409, 417, 429, 432, 440, 443, 2894. The Dodgers won the National League Championship in 1941, 1947, 1949, 1952, 1953, 1955 and 1956.

c) Is repeal of the exemption good for fans?

Truth be told, I think that fans are largely indifferent when it comes to the antitrust exemption. This is for a number of reasons. First, there is a perception that professional baseball has passed its prime as the so called “national pastime”. In recent years, professional football and professional basketball have grown considerably to provide fans with an alternative to pro baseball. While it is true that the three major sports play at different points of the calendar year, attendance records and television ratings would suggest that professional baseball is not in the consciousness of the average fan as it once had been. Why is that the case? Especially with basketball and football, the marketing strategy is geared towards the younger “Generation X” consumer and virtually ignores the older die-hard fan base.

Secondly, with the advent of free agency, players now change teams quite regularly. In this day and age, fan loyalties tend to lie more with the team than any individual player. So, regardless of who arrives and who leaves, most fans will tend to root for the hometown team, whether it wins the World Series or finishes dead last every year.

Finally, as mentioned previously, operating a baseball team is much more expensive in this day and age. Like any other business, the costs of running a baseball team are passed on to the fans. How can a team afford to pay its multimillion dollar contracts? By increasing ticket prices, the cost of parking, the cost of merchandising, and the cost of concessions. The fans ultimately pay those increased expenses. Thus, for the aforementioned reasons, I believe that baseball fans will be in the exact same position whether or not baseball’s antitrust exemption is repealed.

d) Does repeal of the exemption help the relationship between the players and owners?

Now that the players have eliminated the reserve system, and have contract negotiations subject to the antitrust laws, are relations between players and owners any less adversarial? One would hope so. However, despite the players' gains over the last 30 plus years, the relationship between the players and owners remain pretty contentious. Why is that the case even in October 2008? As many see it, it is unlikely that collective bargaining will somehow rid the game of its ills. Since 1972, baseball has seen eight work stoppages and a World Series cancellation. Over the last 36 years, we've seen that the relations between players and owners have been generally adversarial, and sometimes even acrimonious. How many times have both sides engaged in a high stakes game of chicken, trying to get the other side to blink? The players have stonewalled any and all attempts by management to discuss a salary cap, and the players have dragged their feet regarding a tougher drug policy that includes steroid testing.

The end result has usually been that both sides take a slash and burn approach to negotiating, and do not come anywhere near the bargaining table until the game has been seriously damaged. The strikes of 1981 and 1994, and losing the 1994 World Series are perfect examples. The consensus of the average person is that players and owners are multimillionaires who cannot find it within themselves to share their very lucrative business interests.

In that light, a lot of people would love nothing more than to see baseball's antitrust exemption go away for good. However, the realists, or perhaps, cynics among us realize that if the exemption finally is repealed, it won't be anytime soon (if ever). "[T]he possibility that major league baseball's antitrust exemption might last forever does not seem far fetched at all."⁶⁵

⁶⁵ Eric C. Scheible, *No Runs. No Hits. One Error: Eliminating Major League Baseball's Antitrust Exemption Will Not Save the Game*, 73 U. DET. MERCY L. REV. 73, 102 (1995).

e) How can one sympathize with either the players or management?

Thanks to the economics of the game today, the combatants in baseball's labor relations are multimillionaires (players) on one side and billionaires (owners) on the other side. To the average working person, it is very difficult to be sympathetic to players OR owners when they are negotiating \$100 million contracts. In the eyes of the average working person, baseball's labor relations are between the same two parties: the bad guys vs. the *other* bad guys, neither of whom will ever have to worry about where their next meal is coming from, or making their next mortgage payment, among other things.

However, I find myself to be sympathetic to the players most of the time. Having read some of the accounts of how owners treated players in the days before free agency, I don't mind seeing today's owners paying for the "sins of the fathers", so to speak. In the days before free agency, many players had to get other jobs in the off-season in order to pay their bills. Here is another example of how management used the reserve system to their advantage at the player's expense.

In 1947, the Yankees were cruising toward the American League pennant, 12 games ahead of 2nd place Detroit with 2 weeks left in the regular season. At that point, Yankees' pitcher Allie Reynolds had won 19 games and was a virtual lock to win at least 20. The problem was, the Yankees didn't pitch him again until Game 2 of that year's World Series. The Yankees claimed that they needed Reynolds to be well rested for the upcoming World Series, but Reynolds knew better:

I was 19 and 8 in 1947 and there was still about two weeks to go before the World Series and you know I never started another game. See, they were great about keeping you from winning twenty because you could demand a lot more salary if you reached the magic number. I thought it was pretty chicken myself. Hell, they'd have a federal

investigation if they did that to a ballplayer today. They just said we're going to save you for the series and that was that. It comes under the heading of 'good business'.⁶⁶

In my opinion, this typifies the reserve system that players fought so hard to overturn, and also leaves me with an automatic presumption of guilt against the owners. Thus, I have no problem with players (even multimillionaires) getting as much as they can. Why? Because owners still tend to consider players to be expendable, depreciable assets with a limited useful life.

9) CONCLUSION

For the aforementioned reasons, it appears that professional baseball will maintain the status quo and its antitrust exemption. Frankly, if losing the 1994 World Series was not enough for Congress to repeal the exemption, then, unfortunately nothing will. This was also evident during the March 2005 Congressional hearings investigating steroid use in professional baseball. Several politicians started making noises about repealing the antitrust exemption if baseball did not clean up the game with a tougher anti-steroid policy.

While several members of Congress criticized the player's union for dragging its feet on the steroid issue, at that time there was still no steroid policy in place that had any teeth (of course, that was rectified to some extent in the current Collective Bargaining Agreement). And, its continued exemption gives professional baseball near immunity from the federal antitrust law. So, it would appear that the status quo remains intact.

⁶⁶ TULLIAS, *supra* note 34, at 183, 184.

GREAT EXPECTATIONS: CONTENT REGULATION IN FILM, RADIO, AND TELEVISION

*Alexandra Gil**

“I think it is important . . . to understand what the American people are actually upset about. The Superbowl incident and the debate it unleashed is not really about a bare breast. It is not whether our society can accept public displays of the human body. It can. What really upset people was the shock and amazement that such material would appear on *that* program at *that* time, without warning, and without any reasonable expectation that they would see such a thing. In other words, the debate is not best understood as one about what you can do or cannot do on radio or television. Rather, it is more about whether consumers can rely on reasonable expectations about the range of what they will see on a given program at a given time.”

--FCC Chairman Michael Powell, 2004¹

Context matters. Historically, the difference in treatment of radio and film can be seen as a difference in the expectations of audiences for radio and film. The most obvious difference between the two is venue. Filmgoers had to make a decision to go out to the movies, where they would sit in a dark theater with other movie patrons and view their chosen film. Radio listeners, on the other hand, could listen to a radio broadcast in the comfort of their own homes. While some chose to see the broadcast live, even the atmosphere of radio theaters was different from that of movie theaters. Instead of a dark and anonymous setting, radio theaters were well lit, allowing performers and audiences to see each other clearly. Discussing television, a 1959 publication by the National Association of Broadcasters (NAB) explains that “television’s relationship to the viewers is that between guest and host,” since the audience is allowing television into their homes.²

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¹ Michael Powell, Chairman, Fed. Comm’n Comm’n, Remarks at the National Association of Broadcasters Summit on Responsible Programming (Mar. 31, 2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-245663A1.pdf.

² THE TELEVISION CODE OF THE NAT’L ASS’N OF BROADCASTERS 1 (1959).

Although on the surface, film and television appear to be similar, they are in fact very different. Both are methods of conveying a story through moving pictures, but there the similarity ends. Film developed as purely a method of entertainment, while television followed radio as a “trustee of the public interest.” Film underwent few technological changes after the implementation of sound, while television has changed drastically since its inception. Perhaps most significantly, film has always been regulated by a private regulatory body, while television has always been regulated by the government.

Regulatory bodies for both film and television (at the time, radio) were established in 1934. The Communications Act of 1934 established the Federal Communications Commission (FCC) to oversee broadcasting.³ The Production Code Administration (PCA) was created in 1934 to enforce the Motion Picture Production Code of 1930 and avoid governmental control over the film industry.⁴ The PCA’s main function was to oversee the content of motion pictures, in response to a growing public outcry over the risqué nature of film, while the FCC’s main function was to manage the broadcast spectrum and prevent stations from simultaneously broadcasting at the same frequency as one another. The FCC’s initial charter explicitly disclaims any censorship function. Since radio and television broadcasters could have their broadcast licenses revoked by the government if they did not act in “the public interest,” there was no need for the FCC to have an explicit censorship function.

At the time of the PCA, censorship was not the taboo that it is today. Film was not entitled to first amendment protection greater than that given to “the theatre, the circus, and other

³ Communications Act of 1934, 47 U.S.C. § 151 (1934).

⁴ See generally RAYMOND MOLEY, THE HAYS OFFICE (1945).

spectacles.”⁵ Most states had censorship boards, as did many localities, and censors were not shy about using their power. Film producers had only a limited ability to guess what would displease censors and a more limited ability to please every censor with every movie. Early radio policy was created by engineers and thinkers, concerned more with the technical issues of the medium than any major social policy considerations. Film policy was not driven by social considerations either, though it was controlled primarily by movie producers whose livelihood depended on pleasing the public. Motion Picture Producers and Distributors of America (MPPDA) head Will Hays believed that movies had a special responsibility to the public “because entertainment and art are important influences in the life of a nation.”⁶ And yet, while the film industry was being censored on every front, radio was allowed the relative freedom of an industry thought by many to be on par with the press. President Franklin Roosevelt called radio “a great agent of public service” and encouraged the industry to “be maintained on an equality of freedom similar to that freedom that has been, and is, the keystone of the American press.”⁷ Many newspaper writers agreed, frequently speaking out against the censorship of radio.⁸

Another major difference between film and radio or television is the idea of a scarce resource. Even assuming that radio had existed purely for entertainment value, as courts assumed film did (despite the prevalence of newsreels), there was a fundamental difference between film and radio. While the number of films that could be produced was theoretically infinite, the number of potential radio broadcasts was finite. With only twenty-four hours in a broadcast day

⁵ *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915).

⁶ THE MOTION PICTURE PRODUCTION CODE (1930).

⁷ *Censorship Plan Denied By Farley*, N.Y. TIMES, Oct. 15, 1934, at 9.

⁸ See, e.g., *id.*; *Better Radio Urged, But Not Censorship*, N.Y. TIMES, May 24, 1934; *Ogden Reid Defies Radio Commission*, N.Y. TIMES, Jun. 18, 1934.

and a limited number of discrete frequencies on which to broadcast, it was actually possible to calculate the maximum number of broadcasts that could exist at any given time. Because radio was thus seen as a scarce resource, there was simultaneously a greater need and a greater reluctance to regulate its content. Instead of explicit content regulations like those promulgated by the PCA, the FCC contented itself with reminding broadcasters that use of the airwaves was a privilege not to be taken lightly. By holding broadcasters in high esteem and emphasizing that these broadcasts reached mixed audiences – men and women, adults and children, Republicans and Democrats, Catholics and Protestants, etc. – broadcasters were forced to take responsibility for the content of their programs.

Comparing the FCC to the PCA, it is first relevant to note that both were created to issue licenses to those wishing to present content. One was explicitly a censorship body, designed to preemptively censor that which state and local censors would find offensive; the other was explicitly not a censorship body, merely serving in an advisory capacity to remind its users that obscenity was not permissible under the law. In 1968, the MPPDA had become the Motion Picture Association of America (MPAA) and its new head, Jack Valenti, replaced the Production Code with the age-based ratings system that is still in place today.⁹ Mimicking Britain's method of film ratings, Valenti's new system addressed the concern that people wanted to have some reasonable expectation of what they would be seeing in a film. Unlike the Code, which guaranteed uniform content regulation, the ratings system allowed a diverse range of content, but always with a caveat to potential moviegoers about that content. While the movie industry was undergoing a shift towards less censorship and more free speech, the radio and television

⁹ See Jack Valenti, *How It All Began*, http://www.mpa.org/Ratings_HowItAllBegan.asp (last visited May 22, 2009).

industries were shifting in the opposite direction. Although the FCC continued to publicly decry censorship,¹⁰ its functions became more and more censorious, culminating in the 2001 Guidelines on Indecency, which provided a laundry list of inappropriate content that had been punished.¹¹

This article explores the historical differences between the regulation of film and radio/television and attempts to understand how those regulatory schemes influenced public perception of the two industries and shaped public expectation of content. Part I discusses the early history of radio regulation; Part II discusses the early history of film regulation; Part III compares the important figures in each industry; and Part IV addresses the role of audience expectations in shaping the regulatory scheme of each industry.

PART I. A HISTORY OF RADIO

The origins of radio can be traced back to Alexander Graham Bell and the invention of the telephone.¹² Although Guglielmo Marconi and others are credited with the invention of radio, it was Bell in 1876 who first realized the possibilities of broadcasting sounds to large audiences. Marconi was still only a toddler in 1878 when the New York Daily Graphic published an illustration entitled “Terrors of the Telephone.” The illustration featured a sweating disheveled

¹⁰ Many FCC commissioners have spoken out against perceived FCC censorship. *See, e.g.*, Rachele Chong, Commissioner, Fed Comm’n Comm’n, Remarks at California Broadcasters Association 1997 50th Solid Gold Convention (Jul. 28, 1997), *available at* <http://www.fcc.gov/Speeches/Chong/sprbc709.html> (“In my view, the FCC’s general public interest mandate is not a plenary authorization to conduct broad-ranging inquiries ultimately aimed at dictating program content.”).

¹¹ FED. COMM’N COMM’N, FILE NO. EB-00-IH-0089, INDUSTRY GUIDANCE ON THE COMMISSION’S CASE LAW INTERPRETING 18 U.S.C. §1464 AND ENFORCEMENT POLICIES REGARDING BROADCAST INDECENCY (2001), *available at* <http://www.fcc.gov/Bureaus/Enforcement/Orders/2001/fcc01090.pdf>.

¹² *See generally* ERIK BARNOUW, A TOWEL IN BABEL: A HISTORY OF BROADCASTING IN THE UNITED STATES, VOLUME I – TO 1933 (1966); HUGH R. SLOTTEN, RADIO AND TELEVISION REGULATION: BROADCAST TECHNOLOGY IN THE UNITED STATES, 1920-1960 7 (2000).

man speaking into a telephone, with groups of people in cities all around the world listening attentively to his words. Satirical British illustrator George Du Maurier expanded upon this idea in 1879 with an illustration featuring people watching a sporting event on a screen above their fireplace, with sound provided by the telephone. Yet despite the attention given to the many possibilities opened up by Bell's invention, few changes were made to the profitable point-to-point system of communications that telephones were most successful at. The existing system was too profitable for telephone companies to worry about innovation.

In fact, telephony remained nearly unchanged until Marconi's system of wireless telegraphy entered the market at the turn of the century. Marconi's wireless quickly found a home aboard ships, eager to capitalize on both the safety features of having a radio and the potential trade benefits created by such a communication system. After a 1909 maritime accident, in which a single wireless operator saved 1200 lives, Congress passed the 1910 Wireless Ship Act, requiring every ship with a capacity greater than fifty people to be equipped with a wireless communication system capable of transmitting messages across a distance greater than 100 miles.¹³ The Act also addressed an issue that had previously arisen, where wireless operators using Marconi's system refused to communicate with wireless operators using Lee De Forest's competing wireless system. Although most wireless operators made an exception for emergency situations, the new Act mandated that the competing wireless operators communicate with each other "as far as may be physically practicable."¹⁴ The Act also required a wireless operator to oversee communications day and night in case of emergency.¹⁵

¹³ Wireless Ship Act of 1910, ch. 379, §1, 36 Stat. 629 (1910) (amended 1934).

¹⁴ *Id.* §2.

¹⁵ *Id.* §1.

While other countries addressed the issue of wireless communication and maritime safety by assuming government control of radio, the United States took a different approach. Congress did not nationalize control of the airwaves, nor did they allow private ownership and control. Instead, limited regulations like the 1910 Wireless Ship Act were enacted to allow important naval and civilian shipping use of the airwaves.

Although it made wireless communications systems mandatory aboard ships, the 1910 Wireless Ship Act did not adequately address other safety concerns raised by amateur radio users, whose broadcasts frequently interfered with maritime communications. In fact, forcing all ships to carry wireless communication systems exacerbated interference problems. Since the broadcast spectrum is limited to a certain range and the government had not enacted a system of allocating that range, many users were attempting to communicate on the same frequencies at the same time, leading to interference. When two users attempted to use the same frequency simultaneously, it was possible that neither user would be heard at all. Some amateur radio users exploited this weakness in transmission to intentionally interfere with naval communication by deliberately sending fake distress calls.¹⁶

It was not until the sinking of the *Titanic* in 1912 that Congress properly addressed the importance of wireless communications. Although there had been a push to update the 1910 Wireless Ship Act to prevent amateur radio operators from interfering with regular naval operations, Congress was in no great rush to propose new legislation and had spent nearly two years deliberating over six different proposed laws. The sinking of the *Titanic* finally brought the many issues in wireless communication to the public's attention. The closest ship to respond to

¹⁶ SLOTTEN, *supra* note 12.

Titanic's distress calls was the *Carpathia*, nearly 60 miles away. It took the *Carpathia* four hours to cross the distance separating it from the *Titanic*, by which time the ship was lost. However, the *Californian*, only 10 or 15 miles away, never responded to the distress call because the wireless operator had already gone to bed for the night. Some reports also blamed interference from preventing *Titanic* from receiving iceberg warnings, once again placing the blame on amateur radio operators. Regardless of who was to blame, it was clear that something needed to be done.

Congress responded to the *Titanic* disaster by passing the Radio Act of 1912, which gave the Secretary of Commerce authority to distribute licenses to all would-be radio operators.¹⁷ The Act reserved certain radio frequencies for military and emergency use, while also providing that the military could commandeer all radio frequencies, public and private, in case of war or national emergency. In addition, the Act mandated that two wireless operators be present at all times aboard ships to avoid the problems of the *Californian*.¹⁸ In these ways, the Act attempted to control interference, but it was still not enough.

In addition to prompting new legislation of radio, the sinking of the *Titanic* introduced many to the possibility that Alexander Graham Bell had realized thirty years earlier – radio could be used to broadcast information to large audiences. During the three days it took for the *Carpathia* to reach New York with the passengers who had been rescued from the sinking *Titanic*, information on land was scarce. Few people knew who had survived, and the multitudes of amateur radio operators only increased confusion that ultimately led to the dissemination of false information. The New York Evening Sun ran with the headline “All Saved from Titanic After Collision,” and a story about the ship being towed to port, while the New York Times ran a

¹⁷ Radio Act of 1912, ch. 287, §2, 37 Stat. 302 (1912) (amended 1927).

¹⁸ *Id.* §4.

story about the ship sinking.¹⁹ In today's age of instantaneous information transfer, it is almost impossible to imagine this scenario where people simply did not know what had happened, whether the ship had sunk and whether there were any survivors. Although information was relayed from ship to ship over the wireless communication systems, the information reaching shore was not uniform. Marconi's wireless office in New York has largely been credited with providing the most complete and accurate information, including names of survivors.

Interference between various wireless operators only increased as people discovered the commercial value of broadcasting to wider audiences, rather than to discrete points. As early as 1916, Marconi competitor Lee De Forest engaged in regular broadcasts from Highbridge, New York, to an audience comprised mainly of amateur radio operators. In 1920, a Pittsburgh radio station owned by Westinghouse Electric and Manufacturing Company made history by broadcasting the presidential election returns to a large and very eager audience. A Marconi wireless operator working in New York when the *Titanic* went down, David Sarnoff was one of the first to see the potential commercial value of using radio to provide music and entertainment in addition to information. He became General Manager of the newly formed Radio Corporation of America (RCA), which combined the various radio patents held by Marconi, Westinghouse, and General Electric. In 1926, Sarnoff's vision of radio broadcasts, as expressed in his (possibly apocryphal) post-*Titanic* memo to Edward J. Nally, then vice-president of American Marconi, finally came to be. RCA formed the National Broadcasting Company (NBC), a chain of radio stations devoted to broadcasting both news and entertainment.

¹⁹ RICHARD PARTON HOWELLS, *THE MYTH OF THE TITANIC* 27 (1999).

Not long after the creation of NBC, Congress finally amended the thoroughly outdated Radio Act of 1912, replacing it with the Radio Act of 1927. Rather than continuing to place the responsibility of regulating radio on the Secretary of Commerce, the 1927 Act created a new organization, the Federal Radio Commission (FRC), whose sole purpose was to regulate the use of radio in the United States. The Act divided the country into five geographic zones, each to be separately regulated by its zone commissioner. The 1927 Act also clarified many of the points left ambiguous in the earlier 1912 law. FRC commissioners were empowered to issue licenses to individual broadcasters, oversee the various types of equipment used by broadcasters, and assign frequencies, power allotments, and broadcast hours to individual stations.²⁰ In addition, commissioners were enabled to make regulations that “will promote public convenience or interest or will serve public necessity”²¹ The new Act established the commission to oversee not just the quickly expanding area of broadcast radio, but also the maritime, military, and government radio uses that had been previously regulated under earlier radio laws.

Although Sarnoff had a vision of radio providing entertainment to the masses, broadcasting was still primarily used for the dissemination of information at the time the Radio Act of 1927 was passed. The Act made it clear that the broadcast spectrum was owned by the public, even if licenses were granted for individuals and firms to use specific frequencies. A license was both temporary and revocable. Radio stations were explicitly ordered not to issue false distress calls or interfere with ship distress signals. Such behavior could result in the revocation of a broadcast license. However, barring such egregiously wrong conduct, the

²⁰ Radio Act of 1927, ch. 169, §4, 44 Stat. 1162 (1927) (amended 1934).

²¹ *Id.* §4(f).

standard for obtaining a broadcast license was very broad – licenses were to be granted “if public convenience interest, or necessity will be served thereby....”²²

Notably, despite its power to deny and revoke licenses, Section 29 of the Act specifically disclaims the commission’s ability to censor content of radio broadcasts. “Nothing in this Act shall be understood or construed to give the licensing authority the power of censorship,” nor does the commission have the power to create rules “which shall interfere with the right of free speech by means of radio communications.”²³ At the same time, the section reminds broadcasters that just because the FRC cannot censor them does not mean they are free to say anything they want on the air. “No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communications.”²⁴ In stark contrast to the Supreme Court’s characterization of movies as “spectacles” on par with the circus,²⁵ Congress viewed radio as an extension of the press and a guardian of the public interest. While broadcasters are reminded to watch their language, there is no explicit check on their content.

In 1934, Congress consolidated the regulation of radio and telephony/telegraphy into one industry, creating the Federal Communications Commission (FCC). Keeping most of the statutory language of the 1927 Radio Act, the Communications Act of 1934 also absorbed language from the 1910 Mann-Elkins Act, which had granted power to regulate telephone/telegraph communication to the Interstate Commerce Commission (ICC). While the 1927 Radio Act was complicated enough, including in it the power to regulate both broadcast and

²² *Id.* §9.

²³ *Id.* §29.

²⁴ *Id.* Radio Act §29 (1927) (current version at 18 U.S.C. 1464 (1994)).

²⁵ *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915)..

communication radio, the decision to consolidate regulatory power in a single body was a logical one. As Alexander Graham Bell pointed out in 1876, there are really more similarities between telephonic/telegraphic communication and radio communication than there are differences. Since the FRC was already managing both broadcast radio and point-to-point communication, this expansion of its regulatory power was the next logical step.

Like the 1927 Act before it, the 1934 Communications Act retained the language that the FCC had no “power of censorship” or ability to “interfere with the right of free speech by means of radio communications.”²⁶ The 1934 Act also retained the caveat about “obscene, indecent, or profane language.”²⁷ Although the FCC had the power to issue and revoke broadcast licenses, it was explicitly not a censorship body. As Secretary of Commerce ten years earlier, then vested with the sole power to regulate radio, Herbert Hoover cautioned Congress, “We cannot allow any single person or group to place themselves in a position where they can censor the material which shall be broadcast to the public, nor do I believe that the government should ever be placed in a position of censoring this material.”²⁸

PART II. A HISTORY OF FILM

Debate over film censorship can be traced back to the beginning of film. Thomas Edison’s *The Kiss (1896)*, a twenty-second film depicting a man and a woman talking to each

²⁶ Communications Act, ch. 652, § 326, 48 Stat. 1091 (1934) (current version at 47 U.S.C. § 326 (2009)).

²⁷ Communications Act, ch. 652, § 326, 48 Stat. 1091 (1934) (current version at 18 U.S.C. § 1464 (2009)).

²⁸ *Hearings on H.R. 7357 Before the H. Comm. on the Merchant Marine and Fisheries*, 68th Cong., 1st Sess. 8 (1924).

other cheek to cheek for about eighteen seconds and then sharing a chaste kiss,²⁹ was met with hearty criticism for its then-risqué subject matter. Although the kiss itself was chaste, the camera's proximity to the two lovers was a good deal closer than that of the audience to a stage play, creating an uncomfortably voyeuristic experience for many who viewed kissing as strictly a private activity.

In 1915, the Supreme Court gave legitimacy to the censorship of film, writing in *Mutual Film Corporation v. Industrial Commission of Ohio* that films were in the same category as “the theatre, the circus, and all other shows and spectacles” which could be regulated under the police power without concern for freedom of expression.³⁰ The court further explained, “We immediately feel that the argument is wrong or strained which extend the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill-boards of our cities and towns....”³¹ After all, the court reasoned, the police power had successfully been exercised to regulate the exhibition of films in many states.³²

The legality of state censorship boards had previously been upheld without considering the potential free speech implications. Freedom of expression was not at issue in those cases, the court explains, because “the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded... as part of the press of the country or as organs of public opinion.”³³ Since the Ohio statute at issue in *Mutual*

²⁹ THE KISS (Edison Manufacturing Co. 1896). The original film can be found archived at Library of Congress American Memories Collection, <http://hdl.loc.gov/loc.mbrsmi/edmp.4038>.

³⁰ *Mut. Film Corp.*, 236 U.S. at 243.

³¹ *Id.*

³² *Id.* at 244.

³³ *Id.*

Film allows the exhibition of “such films as are in the judgment and discretion of the board of censors of a moral, educational or amusing and harmless character,” the court reasons that all the positive aspects of film will be retained while filtering out film’s potential to attract a prurient interest.³⁴ “They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil....”³⁵

Though the Supreme Court’s quick dismissal of films as potentially deserving of first amendment protection may seem harsh, it was in complete harmony with the many cases brought in state and federal courts at the time. Courts in many states upheld statutes that limited the rights of motion picture theater owners, requiring a license for their general operation and allowing a censorship board to review the content of films to be screened. In 1898, the Minnesota Supreme Court ruled: “In respect to theatrical exhibitions and amusements of similar character, a larger discretion on part of municipalities is recognized than in the case of ordinary trades and occupations, both because they are liable to degenerate into nuisances, and also because they require more police surveillance, and police service.”³⁶ In 1909, an Illinois court ruled constitutional a Chicago ordinance which stated that “the chief of police shall not issue a permit for the exhibition of any obscene or immoral picture or series of pictures, but that he shall issue a permit, without fee or charge, for all pictures which are not obscene or immoral.”³⁷ In 1912, the Minnesota Supreme Court extended its view of theaters as a potential nuisance to include motion picture theaters, allowing a small town to charge a \$200 annual fee for any who wished to obtain

³⁴ *Id.* at 240-42.

³⁵ *Id.* at 244.

³⁶ *City of Duluth v. Marsh*, 73 N.W. 962, 962 (Minn. 1898).

³⁷ *Block v. City of Chicago*, 87 N.E. 1011, 1013 (Ill. 1909).

a license to run a motion picture theater. “[E]xperience teaches that, where amusements are furnished for pecuniary profit, the tendency is to furnish that which will attract the greatest number rather than that which instructs or elevates,” the court stated. “It must therefore be classed among those pursuits which are liable to degenerate and menace the good order and morals of the people, and may therefore not only be licensed and regulated, but also prevented by a village council.”³⁸

In 1922, under increasing pressure from government and religious organizations, movie producers brought former Postmaster General Will Harrison Hays to Hollywood to head the newly formed Motion Picture Producers and Distributors of America (MPPDA). Lending credibility to the industry, Hays came out with the “Hays Formula,” a list of “Don’ts and Be Carefuls” for movie producers that accurately predicted which elements of a film state and local censors would find problematic. The original eleven “Don’ts” were: pointed profanity, licentious or suggestive nudity, illegal traffic of drugs, any inference of sex perversion, white slavery, miscegenation, sex hygiene and venereal diseases, actual childbirth, children’s sex organs, ridicule of the clergy, and willful offense to any nation, race or creed.³⁹

By 1930, the combination of new sound technology and desperate producers scrambling to bring in audiences despite the devastating stock market crash precipitated the need for an updated Hays Formula. Scandalous ads became commonplace, as movies promised to deliver “brilliant men, beautiful jazz babies, champagne baths, midnight revels, petting parties in the purple dawn.”⁴⁰ Earlier films, though frequently also thematically questionable, were more easily

³⁸ *Higgins v. Lacroix*, 137 N.W. 417, 419 (Minn. 1912).

³⁹ WILL HAYS, *THE MEMOIRS OF WILL H. HAYS* 434 (1955).

⁴⁰ *Movies & Morals*, *TIME*, Jul. 2, 1945.

dismissed because their lack of sound or color rendered them less lifelike. For example, an early MGM film, *Heart of a Painted Woman* (1915), is a love story about a prostitute who falls in love with a young millionaire who is on trial for killing another man with whom she had once been intimate. The addition of sound to already spicy plots proved to be the final straw for moviegoers. The Production Code of 1930, or Hays Code, provided a much more comprehensive list of what could and could not be shown onscreen.

Despite its thoroughness, the Hays Code lacked an enforcement mechanism. From 1930 until the Code was properly enforced in 1934, producers deliberately flouted the comprehensive yet unenforceable Code to create some of the most sin-filled movies in Hollywood history. This period is generally referred to as pre-Code because for five years, producers knew of and ignored the accepted norms and conventions in film production. Many are familiar with the sexual innuendo and suggestive films of Mae West, but even Jeanette MacDonald, who is best remembered today for her wholesome roles opposite Nelson Eddy, earned the nickname “Lingerie Queen,” for her many bedroom scenes. A 1931 review lists MacDonald’s “chief talent” as “an aptitude for undressing before the camera quickly and almost completely with becoming grace and without embarrassment.”⁴¹

Movie audiences became very familiar with bedroom scenes, bath scenes, and other excuses for actresses to be scantily clad. Pre-Code films were by and large more risqué in their depictions of women’s state of undress and the sanctity of marriage, though not every film went as far as *Call Her Savage* (1932), which featured nearly every Code violation imaginable, including, “marital infidelity, interracial marital infidelity, sadomasochistic whipping, erotic

⁴¹ *The New Pictures*, TIME, Jul. 6, 1931.

frolicking with a Great Dane, prurient exposure of female flesh, kept women, femme-on-femme catfights, a demented husband who tries to rape his wife, prostitution, gigolos, and a pair of mincing homosexual waiters.”⁴² Obviously, not every film provides as dramatic a departure from acceptable standards. *It Happened One Night* (1934) is also a pre-Code film, but its deviance from the Code is much more limited, much of it encompassed by Claudette Colbert’s character’s revelation: “I’ll stop a car and I won’t use my thumb!” Pulling up her skirt to reveal her leg, she proceeds to do just that.⁴³

Regardless of the degree to which producers chose to ignore the Hays Code, it quickly became clear that further change was needed in the film industry. “Thirty-six states pushed for greater censorship and regulation of films, Catholic organizations threatened to boycott the movies, and Hollywood’s effect on national morality was suddenly a hot topic for debate.”⁴⁴ Already hit hard by the decline in movie attendance caused by the early years of the Depression, producers could not risk a further attack on their revenue. In addition, the recently inaugurated Franklin Delano Roosevelt made it clear that government intervention in the film industry was not out of the question. Addressing the issue of Prohibition, for example, one of Roosevelt’s advisors wrote a letter to Will Hays, urging him to convince producers to tone down the onscreen drinking, lest the president be forced to intervene in the industry and tone it down himself.⁴⁵ Although the threat of Federal censorship is veiled and almost reluctant, it is there.

⁴² THOMAS DOHERTY, *PRE-CODE HOLLYWOOD: SEX, IMMORALITY, AND INSURRECTION IN AMERICAN CINEMA, 1930-1934* 104 (1999).

⁴³ *IT HAPPENED ONE NIGHT* (Columbia Pictures 1934).

⁴⁴ Alexandra Gil, *Here Come The Mounties!: Framing Rose Marie in 1930s Hollywood* 58 (Apr. 2005) (unpublished A.B. thesis, Duke University) (on file with Perkins Library, Duke University).

⁴⁵ *THE WILL HAYS PAPERS* (Douglas Gomery ed. 1988), reel 1.

In 1934, no longer able to ignore the looming threat of government intervention, Hollywood producers were forced to take action. On June 19, the Communications Act of 1934 officially became law, establishing Federal regulatory power over broadcast media – radio and television. With first amendment protection of film still nearly twenty years away,⁴⁶ the industry had to treat any threat of censorship as a legitimate threat. In July of 1934, the MPPDA created the Production Code Administration (PCA), an organization devoted to the enforcement of the Hays Code. Instead of merely providing guidance to filmmakers, as the MPPDA had since 1922, the new PCA issued a seal of approval to be displayed at the beginning of all Code-compliant films. Many theaters refused to exhibit films without the PCA seal of approval, which provided a serious incentive for producers to comply with the Code. In addition, the PCA was authorized to fine non-compliers up to \$25,000 for each Code violation.

Although unpopular now, the Hays Code was welcomed in 1934. Addressing the issues of potential Federal censorship as well as a growing national resentment with the salacious content of films, the Code was seen by many as a wonderful example of industry self-regulation. A retrospective article in 1945 said of the Hays Code, “Cinema’s self-regulation is a splendid example of how business can stay out of the government’s ‘paralyzing’ clutches.”⁴⁷

PART III. THE CAST OF CHARACTERS

Neither film nor radio/television would have become the powerful industry it is today without the driving force of remarkable visionaries. Each industry had its share of powerful men, yet there were two who stand apart from the rest. In film, it is Louis B. Mayer; in radio and

⁴⁶ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁴⁷ *Movies & Morals*, *supra* note 40.

television, David Sarnoff. Mayer's MGM would help to define the Golden Age of Hollywood, while Sarnoff's RCA and NBC continue to set the standard for radio and television. Both film and television also survived public outcry and national contempt, each through the help of a politician willing to bear the label of censor, regardless of its validity. In film, it was Will Hays; in television, Newton Minow. Hays, who was first brought to Hollywood in 1922, quickly became the industry's political liaison, while Minow became perhaps the most famous FCC Chairman in history with his 1961 speech declaring television to be a "vast wasteland."⁴⁸

Louis B. Mayer was a man who understood the importance of image. "Because of Mayer's gift for public relations and manipulation of images, little is certain about the early life of the boy called Lazar."⁴⁹ Born in Russia in 1885, Eliezer Meir was quick to change his name (and even his birthday) to reflect his adopted homeland. The newly anointed Louis B. Mayer, born on the fourth of July, was willing to alter any aspect of his past that could potentially help his future. Although the town of Saint John, New Brunswick, Canada lays claim to the Mayer clan, Mayer himself insisted he grew up on the Lower East Side. "Over the course of his career, Mayer gave different Russian towns as his birthplace; he also named various cities in the United States as the place in which he was raised."⁵⁰ Even now, more than fifty years after his death, few people are aware of Mayer's connection to Canada.

In fact, Mayer was so good at creating a new image for himself that even his own children did not know the truth about their father's life. "In most of Mayer's stories of his

⁴⁸ Newton Minow, Chairman, Fed. Comm'n Comm'n, Address to the 39th Annual Convention of the National Association of Broadcasters (May 9, 1961), in *EQUAL TIME: THE PRIVATE BROADCASTER AND THE PUBLIC INTEREST* 48, 52 (Lawrence Laurent ed., 1964).

⁴⁹ Gil, *supra* note 44, at 13.

⁵⁰ *Id.*

childhood, he quit school at an early age to assist his father” in the scrap metal business.⁵¹

According to one biographer, “Louie said he regretted quitting school when he was twelve. He should have quit when he was ten. That way everyone would not have had a head start on him.”⁵²

“Mayer’s daughter, Irene Mayer Selznick, tells an even grander story of her father, claiming that he founded the scrap metal business, ‘although because of his youth his father’s name was attached to it.’”⁵³ And yet, some more recent biographers have found that Mayer did not grow up in New York and leave school at a young age to help his father. Rather, he grew up in Saint John and graduated from the local high school before setting out for the United States. One biographer attributes Mayer’s success in recreating his past to “the usual moviemaker’s penchant for invention” and the fact that Mayer successfully convinced his daughters, “both of whom repeated the story ad infinitum, thus bamboozling successive chroniclers.”⁵⁴

“Over the span of his nearly fifty-year career in the movies, Louis B. Mayer defined Hollywood. Mayer helped to create the Academy of Motion Picture Arts and Sciences (AMPAS) in 1927, and the following year the Academy Awards that have become the Hollywood gold standard. In the 1930s Mayer was the highest paid executive in the world, working for Metro-Goldwyn-Mayer (MGM), which was the biggest motion picture production company in the world. Among the films Mayer produced in his time at MGM are *Ben Hur* (1925), *Tarzan the Ape Man* (1932), *The Wizard of Oz* (1939), *The Philadelphia Story* (1940), and *An American In Paris* (1951). Mayer’s resume boasts an impressive list of films that exemplified a time that has

⁵¹ *Id.* at 14.

⁵² DIANA ALTMAN, HOLLYWOOD EAST: LOUIS B. MAYER AND THE ORIGINS OF THE STUDIO SYSTEM 3 (1992).

⁵³ Gil, *supra* note 44, at 14 (quoting IRENE MAYER SELZNICK, A PRIVATE VIEW 4 (1983)).

⁵⁴ CHARLES HIGHAM, MERCHANT OF DREAMS: LOUIS B. MAYER, M.G.M., AND THE SECRET HOLLYWOOD 10 (1993).

come to be known as the Golden Age of Hollywood. Louis Mayer's long list of accomplishments is particularly impressive for a man who immigrated to the United States alone at the age of nineteen with little more than the clothes on his back."⁵⁵

Mayer's obsession with image carried over into all aspects of his life, including running MGM. "Mayer learned early on that the most important people to befriend were journalists."⁵⁶ Running his first theater in 1907, a converted burlesque theater in small Haverhill, Massachusetts known locally as "The Germ," Mayer immediately set about changing the public perception of his theater. "Plying local newspapermen with free tickets to shows and introductions to performers from the live acts" helped win the praise and admiration of the press.⁵⁷ But it was Mayer's determination to present "clean, wholesome, healthy amusement," billing the renamed Orpheum as "Haverhill's home of refined amusement" that caught the public's attention.⁵⁸

Mayer was no less thorough in creating a public persona for his stars than he was for himself. *How to Write for the "Movies,"* a 1915 guide to becoming a screenwriter, emphasized the importance of the happy ending: "The average 'movie' audience would much rather have the heroine and her lover live happily ever after. The tragic story, with its harrowing scenes, appeals to only the few who are morbidly inclined."⁵⁹ Having learned early on the value of wholesome entertainment and happy endings, Mayer strongly adhered to this advice. He famously said, "I will make only pictures that I won't be ashamed to have my children see."⁶⁰ "Mayer was also

⁵⁵ Gil, *supra* note 44, at 11.

⁵⁶ *Id.* at 15.

⁵⁷ *Id.* at 15-16.

⁵⁸ HIGHAM, *supra* note 54, at 16.

⁵⁹ LOUELLA PARSONS, HOW TO WRITE FOR THE "MOVIES" 102 (1915).

⁶⁰ THE READER'S COMPANION TO AMERICAN HISTORY 707 (Eric Foner & Arthur Garraty eds., 1991).

one of the first enforcers of a [morals] clause in actors' contracts and is said to have berated Mickey Rooney, a star in wholesome films, for his unwholesome conduct off screen. 'You're Andy Hardy!' he shouted, 'You're a symbol! Behave yourself!'"⁶¹

David Sarnoff's ability to create a lasting public image was no less than Louis Mayer's. Although neither man was associated with the 1962 film *The Man Who Shot Liberty Valance*, both benefited from the logic of the film's most famous line: "When the legend becomes fact, print the legend."⁶² It was not until very recently that anyone thought to question the facts about either of their lives. In Mayer's case, it is only in the last ten years that anyone has made the connection between the unabashed American patriot and his true childhood home in Canada. Sarnoff's tales, too, were unquestioned until very recently.

Sarnoff's childhood bears a striking resemblance to the childhood Mayer imagined for himself.⁶³ Born in Russia in 1891, Sarnoff's family immigrated to the United States when he was nine years old. Arriving in New York, Sarnoff was forced to work at a young age in order to support his family. As the story goes, Sarnoff began by selling Yiddish newspapers in the streets, acquiring his own newsstand by the age of ten. When Sarnoff was fifteen, he was forced to leave school and begin work fulltime, first as a messenger, then later as a telegraph operator for American Marconi. It was at American Marconi that Sarnoff would first rise to fame. As legend has it, Sarnoff was the wireless operator on duty when the news came in of the *Titanic* disaster. For years, Sarnoff would tell the tale of how he stayed at his post for 72 straight hours, reporting the names of the survivors as they came in. Regardless of the truth of this story, it helped catapult

⁶¹ Gil, *supra* note 44, at 22.

⁶² THE MAN WHO SHOT LIBERTY VALANCE (Paramount Pictures 1962).

⁶³ See generally KENNETH BILBY, THE GENERAL: DAVID SARNOFF AND THE RISE OF THE COMMUNICATIONS INDUSTRY (1986); EUGENE LYONS, DAVID SARNOFF: A BIOGRAPHY (1966).

Sarnoff into a position of authority at American Marconi, later the Radio Corporation of America (RCA).

Unlike Mayer, Sarnoff's vision for change was not through manipulation of content, but through mastery of technology. A *Time Magazine* retrospective article on Sarnoff explains, "when others would complain that his focus was more on technology than on programming, he said, 'Basically, we're the delivery boys.'"⁶⁴ Sarnoff expanded upon this idea in a 1955 article, *The Fabulous Future: America in 1980*. In that article, Sarnoff extolled the virtues of innovations yet to come and urged people to take control of their own destinies and make the most of new technologies. "[W]e can grovel in terror before the mighty forces of science and historic adjustment, even as savage man groveled before lightning and other natural phenomena. Or we can face those forces with courage, determination, and calm intelligence. We do have such a choice because we are not the passive objects but the active manipulators of those forces."⁶⁵ Sarnoff, who foresaw the day when people would have radios in their home, who created a national fervor around radio broadcasting, and who shepherded in the age of television, despite its potential to undermine his carefully created world of radio, was a man who never backed down from technological innovation. "The challenge of tomorrow fascinates me much more than the achievements of yesterday," Sarnoff said at the dedication of a Princeton research center that bears his name.⁶⁶ While Edward Nally, vice-president of American Marconi, was focused on

⁶⁴ Marcy Carsey & Tom Werner, *Time 100: David Sarnoff*, TIME, Dec. 7, 1998, available at <http://www.time.com/time/time100/builder/profile/sarnoff.html>.

⁶⁵ David Sarnoff, *The Fabulous Future*, FORTUNE, Jan. 1955, reprinted in DAVID SARNOFF ET AL., THE FABULOUS FUTURE: AMERICA IN 1980 14 (1956).

⁶⁶ THE FABULOUS FUTURE: AMERICA IN 1980, *supra* note 65, at 12.

satisfying his existing customers, Sarnoff looked ahead to future technology and considered ways to acquire new customers.

Broadcasting quickly became a major industry, with Sarnoff at the helm. By 1928, young Sarnoff, who had spearheaded RCA's creation of a radio broadcasting network, became president of RCA. In creating the world of radio and television that would be defined by the National Broadcasting Company (NBC), Sarnoff was no less thorough in his crafting of images than Mayer was at MGM. In 1930, RCA moved to Rockefeller Center, which Sarnoff dubbed "Radio City." The moniker stuck, and Radio City Music Hall soon became the "it" venue for film premieres and radio events alike. Sarnoff also established the NBC Symphony Orchestra, conducted by Arturo Toscanini, allowing people to enjoy weekly performances by a world class orchestra in the comfort of their own homes.

Sarnoff successfully guided RCA and NBC through several massive shifts in technology, never once allowing either company to relinquish its spot at the top. Most notably, Sarnoff would see the company through the age of television. Although Philo Farnsworth is credited with inventing television, it was David Sarnoff who made the technology commercially viable. Sarnoff's team of engineers, headed by Vladimir Zworykin, worked around the clock to invent their own television technology. Yet after many years of patent litigation, Sarnoff finally conceded to Farnsworth and negotiated a cross-licensing agreement, breaking his rule that "RCA didn't pay royalties, it collected them."⁶⁷ RCA already dominated the market for manufacturing and selling record players, having acquired the Victor Talking Machine Company in 1929. With this licensing agreement, RCA was able to expand its market dominance of radio into a

⁶⁷ ALBERT ABRAMSON, ZWORYKIN: PIONEER OF TELEVISION x (1995).

dominance of television. Along with several other companies, RCA debuted its new television technology at the 1939 World's Fair. Although Farnsworth had publicly demonstrated his own television technology more than ten years earlier, it was Sarnoff, with RCA's already established manufacturing plants, who was able to produce television sets commercially. Commenting on the situation years later, Sarnoff remarked, "Competition brings out the best in products and the worst in men."⁶⁸

NBC began regular television broadcasts, along with its existing radio broadcasts, in the 1940s. But Sarnoff's clashes with technology were not yet over. In 1950, the Columbia Broadcasting System (CBS) introduced color television to the American public with great success. Although incompatible with existing black and white television sets, CBS's color broadcasts could be viewed in specified public places equipped with new color sets. In 1951, a *Time Magazine* cover story about Sarnoff exclaimed, "The public scored David Sarnoff's Radio Corp. of America with a lost round last year in the great color TV fight with Columbia Broadcasting System. Sarnoff did not stay down. Last week he showed the television industry a new tube that received clear, true color, and he showed the public that RCA's color system can do what CBS's can not: color programs broadcast by RCA can be received in black & white on present sets without any change. It looked as if radio's miracle man had not run out of miracles."⁶⁹ Once again, Sarnoff had triumphed over technology, helping RCA and NBC to remain at the top of the radio and television industries. During the reign of Sarnoff and Mayer, audiences knew that they could count on NBC to provide quality programming of cultural significance, just as they knew that MGM "means great movies."

⁶⁸ Carsey & Werner, *supra* note 64.

⁶⁹ *The General*, TIME, Jul. 23, 1951.

While Mayer and Sarnoff were fighting their battles for control over the business of film, radio, and television, others were left to negotiate the politics of industry regulation. For the film industry, this job fell to Will Harrison Hays, former Postmaster General, and head of the Motion Picture Producers and Distributors of America since 1922. After the Black Sox scandal in 1919, Major League Baseball had found public redemption through its appointment of Judge Kenesaw Mountain Landis as its commissioner in 1920. The film industry hoped to find that same salvation with the appointment of Hays, an Indiana lawyer and staunch Republican, in 1922.

When Hays entered the scene in 1922, Hollywood was experiencing major problems, both onscreen and off. Onscreen antics had led to calls for greater censorship of movies, aided in great part by the Supreme Court's 1915 opinion legitimizing censorship boards and equating films with "spectacles" like the circus, which could be regulated.⁷⁰ Off screen, Hollywood had other troubles.⁷¹ Experiencing unprecedented wealth and success, Hollywood stars lived a life of luxury. For many, that life included parties and drugs. Several actors and actresses died of overdoses, while others were arrested for possession of heroin and cocaine. But it was not until the case of Roscoe "Fatty" Arbuckle that Hollywood had finally crossed the line. Virginia Rappe, a young actress who attended a party hosted by Arbuckle, died, not of a drug overdose, but of a ruptured bladder. Immediately, there was national speculation that Arbuckle had caused her injuries during a sexual encounter between the two. Three highly sensationalized trials later, Arbuckle was finally acquitted of Rappe's rape and murder, but the damage had already been done, both to his career and to the film industry.

⁷⁰ *Mut. Film Corp. v. Indus. Comm'n of Ohio*, 236 U.S. 230, 243 (1915).

⁷¹ See, e.g., JOEL W. FINLER, *THE HOLLYWOOD STORY* 193 (1988); JAMES ROBERT PARISH, *THE HOLLYWOOD BOOK OF SCANDALS* (2004).

Hays had his work cut out for him from the start, brought to Hollywood to rehabilitate the film industry's reputation while also preventing government intervention in the industry.

Although early radio broadcasters sought government assistance in resolving their disputes, film pioneers were content to solve disputes among themselves, with frequent trips to federal court to litigate issues with patents and antitrust. Rather than allow government regulation of the industry, Hays adopted the Production Code of 1930 and introduced the Production Code Administration in 1934 to enforce the Code. Although commonly referred to as the Hays Code, Hays himself neither wrote nor enforced the Code. Rather, Hays provided the public face for a disgraced industry trying to regain the public's trust. A Paramount photographer famously staged a photo entitled "Thou Shalt Not," to show what the Hays Code would no longer allow onscreen.

Featuring a woman in a negligee smoking, with a gun in one hand and a glass in the other while she stands over a fallen policeman, the photo includes no fewer than ten forbidden images: the law defeated, the inside of a thigh, lace lingerie, a dead man, drugs, drinking, an exposed bosom, gambling, pointing a gun, and a tommy gun.⁷²

Hays came to Hollywood, not as a reformer, but as a "public-spirited" man determined not to see movies fall prey to the mistakes of reformers. "I was thinking of the parallel case of prohibition – which had by no means produced the era of national sobriety its proponents had contemplated," Hays explained in his 1955 memoir.⁷³ Looking at his own children, Hays knew that "motion pictures had become as strong an influence on our children and on countless adults, too, as the daily press."⁷⁴ With that in mind, he accepted the post as "czar" of Hollywood and

⁷² A.L. "WHITEY" SCHAFFER, THOU SHALT NOT (Paramount 1946), reproduced in William Friedman Fagelson, *Fighting Films: The Everyday Tactics of World War II Soldiers*, 40 CINEMA J. 94, 107 (2001).

⁷³ HAYS, *supra* note 39, at 324.

⁷⁴ *Id.* at 326.

began to overhaul not just public perception of the industry, but the industry itself. As Hays described it, “acting as missionary for the democratic concept of ‘home rule’ and self-regulation was only half my job, as I envisioned it. The other half was to educate the movie-going public.”⁷⁵ Movie audiences needed to know what they could expect to see at the movies. The Hays Code provided the framework for moviegoers to properly anticipate the films that awaited them at the theater. Although Joseph Breen was the man who actually enforced the Code from 1934 until 1954, Hays was the idealist who believed the industry was worth saving and worked hard to do just that. “I remembered plenty of experiences in politics and in the Post Office Department which had proved that folks are willing and able to work together for a good end, if they can see it. I was sure that there were appeals in the movies capable of uniting industry and public in a joint program for better motion pictures.”⁷⁶

Many years later, FCC Chairman Newton Minow fought a similar battle with the television industry. Like Hays, Minow was a longtime politician, though Minow’s loyalties lay with the Democratic party. In his first speech to the National Association of Broadcasters (NAB) in 1961, though most people only remember the phrase “vast wasteland” to describe television, Minow made some important points, sharing with Hays many sentiments about the necessity of change. As movie producers had hidden behind their box office receipts as evidence of the public’s enjoyment of their fare, so too had television producers hidden behind their ratings. “It is not enough to cater to the nation’s whims – you must also serve the nation’s needs,” Minow said in response to this argument.⁷⁷ “If parents, teachers and ministers conducted their

⁷⁵ *Id.* at 327.

⁷⁶ *Id.* at 328.

⁷⁷ Minow, *supra* note 48, at 55.

responsibilities by following the ratings, children would have a steady diet of ice cream, school holidays and no Sunday school.”⁷⁸

In the 1934 Communications Act, Congress decreed that broadcasters serve as trustees of the public airwaves and, as such, must act at all times in the public interest. Since 1934, the meaning of “public interest” has often been a subject of much debate. To the NAB, Minow explained, “I believe that the public interest is made up of many interests. There are many people in this great country, and you must serve all of us.”⁷⁹ He emphasized the distinction between popular interest and the public interest. Discussing the issue of ratings further, Minow asks, “What about adult programming and ratings? You know, newspaper publishers take popularity ratings too. The answers are pretty clear; it is almost always the comics, followed by the advice-to-the-lovelorn columns. But, ladies and gentlemen, the news is still on the front page of all newspapers, the editorials are not replaced by more comics, the newspapers have not become one long collection of advice to the lovelorn.”⁸⁰ And yet, Minow laments, broadcasters have felt the need to cater to the lowest common denominator, rather than using the powerful medium of television to uplift and educate.

Aside from the Congressional mandate set forth in the Communications Act, Minow also had an industry code of self-regulation to turn to. Although not nearly as well-remembered as the Hays Code, the NAB Code was actually in effect for a longer period of time, from 1928 until 1983, enforced by the Code Authority Board (CAB). Yet the CAB lacked the authority of the PCA, making the NAB Code ultimately a true voluntary code. Code-compliant television shows

⁷⁸ *Id.* at 54.

⁷⁹ *Id.* at 55.

⁸⁰ *Id.* at 54-55.

displayed a “Seal of Good Practice” similar to the PCA’s seal of approval, though this display was oddly placed at the end of the program. The television industry also enacted other voluntary attempts to regulate content, like the 1975 Family Viewing Hour, championed by the FCC, which allocated 8 to 9 p.m. (and, unofficially, 7 p.m. to 8 p.m.) as the primetime programming hours which would air family-friendly programming. Although quickly overturned by a Federal judge in a case brought by television writers whose shows had been moved out of the coveted 8 p.m. time slot,⁸¹ the policy remained in existence on an informal basis.

In his first speech to the NAB in 1961, Minow quoted text that the industry should use as guidance, its own Code. “These words are not mine. They are yours. They are taken literally from your own Television Code. They reflect the leadership and aspirations of your own great industry. I urge you to respect them as I do.... I urge you at this meeting and, after you leave, back home, at your stations and your networks, to strive ceaselessly to improve your product and to better serve your viewers, the American people.”⁸²

In 2001, the FCC released a Guidance Statement on Broadcast Indecency. After a laundry list of egregiously inappropriate content that had resulted in censure, Commissioner Susan Ness attached a separate statement, which included a section entitled, “Broadcasters Are Part of a National Community,” in which she encouraged broadcasters to engage in self-regulation. “It is not a violation of the First Amendment for broadcasters on their own to take responsibility for the programming they air, and to exercise that power in a manner that celebrates rather than debases humankind. It is time for broadcasters to consider reinstating a voluntary code of conduct.... As stewards of the airwaves, broadcasters play a vital leadership role in setting the

⁸¹ *Writers Guild of America, West, Inc. v. FCC*, 423 F. Supp. 1064 (C.D. Cal. 1976).

⁸² Minow, *supra* note 48, at 62.

cultural tone of our society. They can choose to raise the standard or to lower it. I hope that broadcasters will rise to the occasion by reaffirming the unique role of broadcasting as a family friendly medium. The public deserves no less.”⁸³

Fairly or unfairly, Newton Minow was but one of the many FCC Commissioners forced to deal with the label of censor. In a speech at Northwestern University School of Law, not long after his famed “vast wasteland” speech, Minow attempted to explain the tension between regulation and censorship. “The trouble, in my opinion, is that far too many licensees do not regard themselves as ‘trustees for the public.’ The frequency is regarded as ‘theirs,’ not the public’s; and the license is seen to be not one to operate in the public interest but rather to get the greatest financial return possible out of their investment. When the Commission, in discharging *its* public interest responsibilities, challenges such operations, the first, almost reflex reaction is the cry of ‘censorship.’”⁸⁴

PART IV. CONCLUSION

Between 1934 and today, the first amendment protections awarded to film versus television/radio changed dramatically. After 1952, film was finally afforded complete first amendment protection, while radio and television, having given up their role as an extension of the press in favor of one as purveyors of mass entertainment, were relegated to a second-class level of free speech protection.

⁸³ FED. COMM’N COMM’N, *supra* note 11.

⁸⁴ Newton Minow, Chairman, Fed. Comm’N Comm’n, Address to the Conference on Freedom and Responsibility in Broadcasting (Aug. 3, 1961), *in* EQUAL TIME, *supra* note 48, at 91-92.

“In 1952, the Supreme Court overturned its decision in *Mutual Film* and found that motion pictures were entitled to first amendment protection. In *Joseph Burstyn v. Wilson*, the Supreme Court reversed nearly forty years of precedent which had relegated motion pictures to the same category as ‘the theatre, the circus, and all other shows and spectacles’ which could be regulated under the police power without regard for freedom of expression.⁸⁵ In *Burstyn*, the court held that motion pictures were indeed entitled to first amendment protection, and that there could be no censorship of films on the grounds that censors felt them to be ‘sacrilegious’ since religions did not need state protection from views they found distasteful.⁸⁶ This decision allowed Roberto Rossellini’s *The Miracle (1948)*, the story of a pregnant peasant woman who believes herself to be the Virgin Mary, to be screened in New York over the objections of the New York State Board of Regents and the Catholic Church.”⁸⁷ With film finally entitled to full first amendment protection, the Hays Code lost its *raison d’etre*. Head censor Joseph Breen retired two years after the *Burstyn* decision, and the PCA slowly began its decline into irrelevance.

Meanwhile, as film was experiencing a surge of unexpected free speech protection, radio was losing its once sacred position as a member of the American press. In a 1947 Senate hearing to debate the government’s ability to regulate the content of radio broadcasts, Senator Edwin Johnson ridiculed the notion of equating radio to the press, calling it “as far-fetched as comparing an elephant to a flea.”⁸⁸ Other senators were equally critical, including Senator Wallace White, one of the principal architects of the 1927 Radio Act and the 1934

⁸⁵ *Mut. Film Corp. v. Indus. Comm’n of Ohio*, 236 U.S. 230, 243 (1915).

⁸⁶ *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952).

⁸⁷ Alexandra Gil, *Breaking the Studios: Antitrust and the Motion Picture Industry*, 3 N.Y.U. J.L. & LIBERTY 83, 120-21 (2008).

⁸⁸ Minow, *supra* note 84, at 89.

Communications Act.⁸⁹ Comparing radio to newspapers, White said, “there is a vast difference in principle between the absolute right of anyone who wants to go into the newspaper business and the necessarily limited right to operate a broadcasting station.... I do not accept in any degree that there is no difference between the power of Government with respect to newspapers and the power of Government with respect to radio communications.... If you [radio people] are placing your feet on that foundation, [you] are just indulging in dreams.”⁹⁰ This is a far cry from Roosevelt’s statement that “Radio broadcasting should be maintained on an equality of freedom similar to that freedom that has been, and is, the keystone of the American press.”⁹¹

Despite the particular content presented by film, television, or radio, the latter two media are still held to a higher standard than the former. In his 2004 speech to the NAB, FCC Chairman Michael Powell explained that “free spectrum has always been premised on your industry acting as a public trustee. People feel they have a right to demand higher standards from the industry and have different expectations about what they will see, as compared with the movie theater, a comedy club, HBO, or the Internet.”⁹² The expectations people have when they go to a movie theater are very different from the expectations they have when they turn on the television or radio. Each industry has dealt with those expectations differently, whether through government regulation or industry self-regulation, guidelines or censorship, and each industry has ultimately found itself in the same place it began. Movies are entitled to first amendment protection today, but are still treated as merely entertainment; radio and television, though used more for

⁸⁹ For more information on White, see Donald G. Godfrey & Louise M. Benjamin, *Radio Legislation's Quiet Backstage Neighbor: Wallace H. White, Jr.*, 10 J. RADIO STUD. 93 (2003).

⁹⁰ Minow, *supra* note 84, at 88-89.

⁹¹ *Censorship Plan Denied By Farley*, N.Y. TIMES, Oct. 15, 1934.

⁹² Powell, *supra* note 1.

entertainment today than anything else, will always be the guardians of the public interest. The regulatory regimes affecting film, radio, and television reflect the inherent differences in each industry, but also reflect the different expectations of the audiences for each medium. Although it is tempting to imagine a future in which these regulatory schemes remain static, as they have for decades, with the advent of the internet as a new medium for mass entertainment and dissemination of information, each industry will be forced to reassess its place in society and its ability to meet audience expectations.

“FROM RUSSIA” WITHOUT LOVE: CAN THE SHCHUKIN HEIRS RECOVER THEIR ANCESTOR’S ART COLLECTION?

*Jane Graham**

Abstract

Sergei Shchukin’s vast modern art collection was confiscated in 1917 by Lenin during the Soviet Nationalizations. Since then the Shchukin heirs have tried in courts around the world to recover “their” artwork, with the most recent development in London during the recent “From Russia” exhibit amid scandal in early 2008. The article first traces the Shchukin family’s legal attempts at reclaiming their property. Then the article examines the recently enacted British legislation, “Part 6 of the Tribunals, Courts, and Enforcement Act of 2007.” The article then compares the new British legislation with similar immunity-from-seizure legislation in the United States. The article then compares the case law of the United States and United Kingdom to demonstrate how the immunity from seizure laws have been interpreted differently. Finally, the article looks at the various options the Shchukin heirs have at recovery and or reparations, and forecasts whether or not they would be successful – or should be.

INTRODUCTION

“This is the biggest hold-up in art history," declared Andre-Marc Deloque-Fourcaud, as the Royal Academy unveiled the contents of “From Russia” in London in January 2008.¹

Deloque-Fourcaud is the grandson of Sergei Shchukin and heir to his vast modern painting collection from late nineteenth and early twentieth century Russia. Shchukin’s collection was confiscated by Lenin during nationalization in 1918. Of the 120 works in the “From Russia” exhibition, twenty-three works were once owned by Sergey Shchukin and thirteen were owned

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¹ *‘From Russia’ Art Claimants Want Compensation from Russia*, GOOGLE NEWS, Jan. 22, 2008, <http://afp.google.com/article/ALeqM5iti0qRrATD9xRlNm6uxbTq5ZjZwA>.

by Morozov, another Russian tsarist era collector.² Some notable works in the “From Russia” exhibit include *The Dance* by Henri Matisse, *The Dryad* by Pablo Picasso, *The Bath of the Horse* by Kuzma Petrov-Vodkin, *Manifesto of October 17th* by Ilya Repin, *Her Name was Vairaumati* by Paul Gauguin, and *Portrait of Doctor Rey* by Vincent Van Gogh.³ Deloque-Fourcaud, who currently lives in Paris, estimated his grandfather’s paintings were valued conservatively at \$3 billion ten years ago and claims the collection is worth at least twice that amount today.⁴

Deloque-Fourcaud questions the “extremely violent way in which these extraordinary collections, gathered over many years by our forefathers, were taken.” He argues there should be “an agreement made that reasonably compensates and pays a percentage of the material benefits that accrue from exploitation of the works.”⁵ However, before Deloque-Fourcaud could bring a claim on British soil in an attempt to recover these paintings, the United Kingdom passed a piece of legislation, which would bar such a claim.⁶ The “immunity from seizure” legislation, or Part 6 of the Tribunals, Courts and Enforcement Act of 2007, was due to be implemented in February 2008. By the urging of Culture Secretary James Purnell, the law was instituted on December 31,

² Mark Brown, *Russian Collectors' Heirs Want Compensation for Lost Art*, THE GUARDIAN, Jan. 22, 2008, www.guardian.co.uk/uk/2008/jan/22/art.artnewsn.

³ From Russia French and Russian Master Paintings 1870-1925 from Moscow and St. Petersburg, <http://www.royalacademy.org.uk/exhibitions/from-russia/about-the-exhibition/from-russia-french-and-russian-master-paintings-18701925-from-moscow-and-st-petersburg,550,AR.html> (last visited June 6, 2009).

⁴ *Russian Art Show Opens in the Capital Amid Ownership Row*, GULF TIMES, Jan. 23, 2008, available at http://www.gulfimes.com/site/topics/article.asp?cu_no=2&item_no=197375&version=1&template_id=38&parent_id=20

⁵ Brown, *supra* note 2.

⁶ *Russia approves UK art exhibition*, BBC – NEWS, Jan. 10, 2008, <http://news.bbc.co.uk/2/hi/entertainment/7180714.stm>.

2007, when the Russian authorities threatened to withdraw the “From Russia” exhibition at the Royal Academy.⁷

This article will trace the history of the Shchukin art collection, the circumstances under which it was nationalized, and the Shchukin family’s subsequent attempts at reclaiming their property. Then, this article will examine the language and legislative history of Part 6 of the Tribunals, Courts, and Enforcement Act of 2007, the political and legal context in which it was written, its interplay with United Nations and European Union cultural property laws, and its effect on cultural property restitution and reparations in the United Kingdom. Then, this paper will compare the British “immunity from seizure” legislation to similar statutes in the United States, including 22 U.S.C. § 2459 and the Foreign Sovereign Immunities Act. Recent case law involving cultural property claims in the United Kingdom and the United States will also be compared to demonstrate how “immunity from seizure” statutes have been interpreted by different courts. Finally, this article will look at various options the Deloque-Fourcaud family may exercise, and forecast whether or not they would be successful.

I. BACKGROUND OF THE “FROM RUSSIA” EXHIBITION

a. History of the Shchukin Collection

From the latter half of the 18th Century, the Shchukin were an established family in Moscow. Ivan Shchukin, the patriarch, was a successful businessman in the textile industry, and attained a net worth of 4 million gold rubles.⁸ When Ivan Shchukin married the daughter of Pyotr Konovich Botkin, a prominent tea merchant and avid patron of the arts, Shchukin was

⁷ *Id.* See also Mark Stephens, *A Common Thief Does Not Obtain Ownership of Stolen Goods, and it is no Different When the Thieves are the Bolsheviks*, THE ART NEWSPAPER, Jan. 31, 2008, <http://www.theartnewspaper.com/article.asp?id=7511>.

⁸ BEVERLY WHITNEY KEAN, ALL THE EMPTY PALACES: THE MERCHANT PATRONS OF MODERN ART IN PRE-REVOLUTIONARY RUSSIA 126 (1983).

introduced to arts and culture, and started collecting art.⁹ Ivan Shchukin had eleven children. Sergei was the third son of the family.¹⁰ Sergei loved to visit his uncle Mikhail Botkin in St. Petersburg to look at his paintings and sculptures. Sergei was shrewd and ambitious, and when he grew older, Sergei became the head of the family's business.¹¹ As a well-to-do textile businessman, Sergei Shchukin was part of a new merchant class, a bourgeoisie which could not identify with the Russian aristocracy as landed elite, but who were despised by the working class.

In 1897, Sergei Shchukin bought his first Monet painting, marking the beginning of a large art collection. Within twelve years Shchukin amassed a varied collection of Western Art, including twelve more Monet paintings, and an assortment of Pissarro, Sisley, Renoir, and Gauguin works. In 1893, Ivan bought his son Sergei the Trubetskoy Palace and presented it to him as the future site of the Shchukin collection.¹² For his collection, Sergei Shchukin bought major works by Matisse, Cezanne and Picasso. Shchukin loved Matisse's work so much that in 1909, he commissioned the artist to paint *Dance* and *Music* for two large decorative panels.¹³ These paintings hung on the staircase landing in the Trubetskoy Palace, alongside 36 other

⁹ *Id.* at 127.

¹⁰ *Id.* at 133.

¹¹ *Id.* at 134.

¹² *Id.* at 135.

¹³ Henri Matisse, <http://www.moodbook.com/history/modernism/henri-matisse-music-dance.html> (last visited June 6, 2009).

important Matisse's, fifty Picassos, sixteen Gauguins, four Van Goghs and a roomful of Cézannes.¹⁴

b. Political Backdrop of Russian Revolution of 1917 Era

With the 1914 outbreak of the First World War, there was a new upsurge of Slavic patriotism. This was a time where all Russian classes met in cathedrals, and as commentators at the time declared, “war was declared and all at once not a trace was left of the revolutionary movement.”¹⁵ This did not last for long. After the demoralizing defeat for Russia at the Battle of Tannenberg, the mood changed to bitterness, and class hatreds started seething again.¹⁶ By 1917, murmurs of revolution started. Shchukin heard that a friend, Lunacharsky, the son of a textile merchant, was jailed as an agitator. Shchukin decided that his wife and young daughter could not remain in Russia. With fake papers, Shchukin’s wife and daughter left for Weimar, Germany.¹⁷

On November 7, 1917, the Congress of Soviets convened in Petrograd. The next evening, Lenin declared, “we shall now proceed to construct the Socialist order.”¹⁸ Winter Palace was taken by the revolutionaries and members of the Kerensky cabinet were arrested and led into conference room by Red Guards. On December 1917, the nationalization of all industries was legalized. In January 1918, Shchukin was arrested. He was then taken to local headquarters for questioning, and was soon imprisoned. After a brief time, Shchukin was informed by a

¹⁴ *Id.* See also Wlademar Januszczak, *From Russia at the Royal Academy: The Russian Bear Courts Colourful Miss France in the Show of the Year So Far*, *Writes Waldemar Januszczak*, *TIMES* (London), Jan. 27, 2008, available at http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/visual_arts/article3241245.ece.

¹⁵ KEAN, *supra* note 8, at 126.

¹⁶ *Id.* at 245.

¹⁷ *Id.* at 253.

¹⁸ *Id.* at 254.

delegation that all his artistic works in private collections were to become property of the State and would be administered by the People's Commissariat for Enlightenment. The Trubetskoy Palace and Ivan Morozov's home were to become two museums of Modern Western Art and would be opened to the public.¹⁹ Ironically, a short time later Sergei Shchukin was offered the position of guide and curator for the new museum, and he promptly accepted. However, this offer was not a form of compensation but for service to the Soviet Culture.

Within months, the new Revolutionary Guard vastly changed the face of Russia. On June 28, 1918, all commercial enterprises of more than one million rubles were nationalized.²⁰ A Socialist Russia was becoming unlivable for Sergei Shchukin, a merchant of the tsarist era. One morning in August 1918, Sergei boarded a train at Bemsy Station, and left Russia, at the age of sixty-three.²¹ Sergei left for Weimar, and soon after settled in Paris. Shortly after leaving, the fate of Shchukin's art collection was sealed. On the door of the Trubetskoy Palace, a seal was placed, dated November 15th, 1918, which stated:

Since the Art Gallery of Sergey Ivanovich Shchukin is an exclusive collection of the great European masters, especially French, of the late nineteenth and early twentieth centuries, and since, because of great artistic value, it is of great national importance for the people's culture, the Council of People's Commissars have decreed that it shall count as the State property of the Russian Soviet Federated Socialist Republic and shall come under the administration of the People's Commissariat for Education.²²

¹⁹ *Id.* at 256.

²⁰ *Id.* at 260.

²¹ *Id.* at 261.

²² *Id.*

This was Decree Number 851 (Laws and Decrees of the Workers and Peasant's Government), and was signed by Lenin.²³ Declaring Shchukin's art collection of "great national importance for the people's culture," Shchukin's art collection was taken as state property.

Until the outbreak of World War II, Shchukin's collection remained at the Museum of Modern Western Art.²⁴ The paintings were hidden away for safekeeping during the war. When the war ended in 1945, the museum was not re-opened. Stalin's regime ordered the "purge of decadent modernism," and in 1948 the Museum of Modern Western Art was abolished by law.²⁵ The Shchukin collection was divided into two parts: one part was sent to the Pushkin Museum of Fine Arts in Moscow, and a larger portion was sent to the State Hermitage Museum, Russia's largest repository for art. However, the modern style of painting was taboo under Stalin's regime, and the paintings were not displayed in general view, but limited to foreign visitors, art scholars, and writers with a special interest.²⁶

c. Sergei Shchukin's Descendants' Numerous Lawsuits to Recover the Art Collection

The descendants of the Shchukin family have filed numerous lawsuits since the 1950's to recover their family's property. In 1953 Irina Shchukin, Sergei Shchukin's daughter, sued the Soviet government for possession of several of her father's original Picasso paintings, including *After the Ball*, *Young Woman*, *The Embrace*, and *Friendship* while they were displayed in Paris at the *Maison de la Pensee Francaise* exhibit.²⁷ The exhibition in Paris closed immediately. Irina

²³ *Id.*

²⁴ *Id.* at 289.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 289-90.

Shchukin ultimately lost her lawsuit. After this episode, the French government asked Madame Matisse to approach Irina Shchukin and make Shchukin promise that she would not try to institute another lawsuit if the paintings in question were displayed in Paris again.²⁸ Throughout the 1960's, Shchukin's paintings appeared in numerous exhibitions across the world, including Tokyo, Otterlo in the Netherlands, New York, and Washington D.C.²⁹

In the 1990's, the Shchukin descendants attempted legal action to gain a concession of the proceeds from the exhibits when they displayed at several museums. Since 1994, Deloque-Fourcaud has attempted legal action three times against Russian museum exhibitions in Paris, Rome and Los Angeles that featured artworks from their ancestors' collections.³⁰ In 1993, Irina Shchukina, filed a lawsuit in France over a loan of 21 works of art by the Hermitage Museum in St. Petersburg, Russia and the Pushkin for a Matisse exhibition at the Pompidou Centre.³¹ In 2000, Deloque-Fourcaud filed a lawsuit concerning a Matisse that was on loan from the Hermitage Museum for an exhibition in Rome.³² Both suits were unsuccessful.

However, the Shchukin family has not challenged every exhibit featuring their ancestor's artworks. For example, Irina Shchukin did not challenge an exhibition of art from Russia in Essen, Germany in 1993 that honored Shchukin and another prominent Russian collector whose

²⁸ *Id.* at 290.

²⁹ *Id.*

³⁰ John Varoli, *Russian Collectors' Heirs Seek Compensation for Artworks*, BLOOMBERG, Jan. 21, 2008, <http://www.bloomsber.com/apps/news?pid=20601088&sid=acsAhcnewUjA&refer=muse>.

³¹ Ruth Redmond-Cooper, *Disputed Title to Loaned Works of Art: The Shchukin Litigation*, 1 ART ANTIQUITY & L. 73, 73-74 (1996).

³² *Rome Court to Rule in Dispute over Russian Painting*, AGENCE FRANCE-PRESS, June 9, 2000.

art the new Russian government had also nationalized in 1918.³³ Additionally, Deloche-Fourcaud took no action when paintings formerly owned by his grandfather appeared at a 2001 exhibition of art from the Hermitage in Las Vegas. He said that this was due to lack of financial resources.³⁴

The most recent legal challenge was in 2003 against the Los Angeles County Museum of Art (LACMA). The LACMA exhibition "Old Masters, Impressionists, and Moderns: French Masterworks From the State Pushkin Museum, Moscow" which was due to open July 27, 2003, included twenty-five works that were originally in Sergei Shchukin's collection and nationalized by the Lenin regime. On July 15th, 2003, Deloche-Fourcaud filed suit against the museum. He claimed that Lenin's nationalization of that art was illegal. Therefore as an heir to his grandfather's estate, Deloche-Fourcaud had an ownership interest in, among other art in the permanent collection of the Pushkin, the twenty-five works which were originally in Sergei Shchukin's collection, known in the suit as the "Contested Objects". He asked LACMA to pay treble the proceeds that LACMA will earn if (1) the Contested Objects are included in the Exhibition; and (2) declare that the Contested Objects are not entitled to 2459(a) immunity from "seizure."³⁵ The United States of America and LACMA moved to dismiss the Complaint for failure to state a claim upon which relief may be granted, pursuant to 22 U.S.C. § 2459(b). The motion was made on the grounds that: 1) LACMA is immunized from this lawsuit; 2) Plaintiff's claims impermissibly interfere with United States foreign policy; 3) Plaintiff's claims are non-justiceable because they ask the court to adjudicate a political question; 4) Plaintiff's claims are

³³ David Galloway, *A Tribute to Moscow Visionaries*, INT'L HERALD TRIB., Aug. 7, 1993, at 7.

³⁴ Marilyn Henry, *Lenin's Spoils Given Pass by U.S. Officials; Exhibit Reopens Wounds for Heirs of Art Patron*, WASH. POST, Dec. 15, 2002, at A1.

³⁵ *Id.* at 272.

non-justiceable because they require the court to invalidate an Act of State by the Russian Government; and 5) Plaintiff inexcusably delayed in filing his lawsuit.³⁶ The U.S. District Court agreed with the United States and LACMA's arguments, and dismissed the suit with prejudice.³⁷ The District Court's ruling is notable because it demonstrates that courts are not willing to pay treble the proceeds that museums earn towards people who claim that the property is rightfully theirs, at least in the Ninth Circuit.

d. "From Russia" Controversy at the Royal Academy

In October of 2007, The State Hermitage Museum said they would loan more than 120 paintings by artists such as Cezanne, Gauguin, Matisse, Kandinsky and Malevich to the Royal Academy of Arts. This exhibition would be called "From Russia: French and Russian Master Paintings 1870-1925 From Moscow and St. Petersburg." However, they would only loan these paintings to the Royal Academy if the U.K. government guaranteed that the works could not be confiscated by local courts from a third party lawsuit.³⁸ Knowing that a large portion of the exhibit was from Sergei Shchukin's collection, the Russian authorities were concerned that the Shchukin family would try to claim the art in a British Court proceeding. Toby Sargent, the deputy head of news at the United Kingdom Department for Culture, Media, and Sport replied that the United Kingdom could not provide such a guarantee until they had checked the provenance of the works. He wrote a letter of assurance from the United Kingdom to the Russian

³⁶ *Id.* at 291.

³⁷ Konstantin Akinsha & Grigorij Kozlov, *Fighting for Their for Their Rights*, ARTNEWS, Apr. 2008, available at http://www.artnewsonline.com/issues/article.asp?art_id=2474.

³⁸ John Varoli & Farah Nayeri, *Hermitage Won't Send Art to London Without Guarantee* (Update1), BLOOMBERG, Oct. 24, 2007, <http://www.bloomberg.com/apps/news?pid=20601088&sid=aLpIvSHoUheU&refer=muse>.

government that stated, "under English law... the works of art loaned for exhibition will be immune from any process to enforce a judgment or arbitration award unless the state itself has waived this immunity. This immunity will extend to applications to seize or attach the property in question. The government will use its best endeavors in accordance with the law of England to ensure the safe return of all objects lent."³⁹ However, this was not strong enough to assure the Russian government. On December 19, the Russian authorities cancelled the loans.

In response, the Royal Academy appealed to the Department for Culture, Media, and Sport. Within days, the immunity from seizure legislation passed in Parliament. This new legislation would foreclose any claims from descendants from the Shchukin family for paintings from the "From Russia" exhibition. James Purnell, the United Kingdom Secretary of State for Culture, Media and Sport signed an order on December 30, 2007 in the middle of holiday recess, to bring the new legislation into force the following morning. In concert with the new anti-seizure legislation, the Royal Academy introduced new Due Diligence procedures to follow when borrowing art works which arose from a questionable provenance.⁴⁰ On January 9, 2008, the Russia Federal Agency for Culture and Cinematography gave its formal approval, and the 124 paintings were sent to London, from Dusseldorf. The paintings arrived at the Royal Academy on January 11, 2008.⁴¹

³⁹ *Id.*

⁴⁰ See Report Outlining the Royal Academy's Due Diligence Procedures for Works of Art and Cultural Objects on Loan From Abroad to Temporary Exhibitions, with particular reference to: 'From Russia: French and Russian Master Paintings 1870 – 1925 from Moscow and St. Petersburg,' <http://static.royalacademy.org.uk/files/ra-web-due-diligence-appendix-2-russia-231.doc> (last visited June 6, 2009).

⁴¹ Martin Bailey, *Brown and Putin Withdraw Their Patronage as Russian Loan Show Opens at the Royal Academy*, THE ART NEWSPAPER, Feb. 1, 2008.

Just eight days later, the Shchukin heirs started making noises about possible reparations for the lost artwork. Delocque-Fourcaud issued a statement saying he did not want restitution of the paintings, but that he should receive a percentage of the material benefits that accrue from the exploitation of the works, referring to loan fees and reproduction charges. The paintings were on exhibition until April 18, 2008. After a stream of failed legal claims since the 1950s, it is unclear if there are any methods available for the Shchukin heirs to pursue in order to recover at least some of the value from their ancestor's paintings. Throughout this paper, the Shchukin heirs' options for recovery and restitution will be discussed.

II. BRITISH "IMMUNITY FROM SEIZURE" ACT, RELATED LEGISLATION AND CASE LAW

a. Description of Immunity from Seizure Act

Passed in Parliament in December 2007, Part 6 of the Tribunals, Courts, and Enforcement Act of 2008 (Immunity from Seizure Act) set forth new rules for the protection of cultural objects on loan. According to this new legislation, an object protected under the definition of "protected object" may not be seized or forfeited under any enactment or rule of law.⁴² The statute has explicit conditions for what constitutes a "protected object." According to Part 6, 134 Protected objects, Section 2, the protected object must be: 1) kept outside the U.K; 2) not owned by a resident of the U.K; 3) its importation should not contravene a prohibition or restriction on the import of goods; and 4) brought for public display in a temporary exhibition at a public museum or gallery.⁴³ The museum or gallery must comply with certain requirements, such as

⁴² Tribunals, Courts, and Enforcement Act, 2007, c. 15, § 135 (1) (Eng.), *available at* http://www.uk-legislation.hmsso.gov.uk/acts/acts2007/ukpga_20070015_en_13.

⁴³ *Id.* at § 134 (2)(a-e).

satisfying a list of due diligence procedures to find the provenance of the object's ownership.⁴⁴ It must be approved by an "appropriate authority", which includes (a) the Secretary of State, in relation to an institution in England, (b) the Welsh Ministers, in relation to an institution in Wales, (c) the Scottish Ministers, in relation to an institution in Scotland, and (d) the Department for Culture, Art and Leisure, in relation to an institution in Northern Ireland.⁴⁵

The explanatory notes to Immunity from Seizure Act explain the statute's purpose and application. The statute provides "immunity from seizure to objects which have been lent to this country from overseas to be included in a temporary exhibition at a museum or gallery." Immunity will be given from any form of seizure ordered in civil or criminal proceedings, and from any seizure by law enforcement authorities. The immunity will apply provided that the import of the object in question complies with the law on the import of goods, and that the museum or gallery has published information about the object as required in regulations made by the Secretary of State.⁴⁶

There is one exception to the immunity from seizure rule in the statute. While an object is protected under this section it may not be seized or forfeited under any enactment or rule of law, unless: 1) the property is seized or forfeited by virtue of an order of the court in the United Kingdom, and 2) the United Kingdom court is required to make the order under, or under

⁴⁴ *Id.* at § 136 (2)(a-b). *See also* Report Outlining the Royal Academy's Due Diligence Procedures, *supra* note 40, (demonstrating the type of procedures a museum or gallery must follow to comply).

⁴⁵ Tribunals, Courts, and Enforcement Act, c. 15, § 136 (5)(a-d).

⁴⁶ Tribunals, Courts and Enforcement Act, 2007, <http://www.opsi.gov.uk/ACTS/acts2007/en/07en15-j.htm> (last visited June 6, 2009).

provision giving effect to, a Community obligation or any international treaty.⁴⁷ While the definition and application of “[c]ommunity obligation” is unclear from the statute, the explanatory notes explain that this exception applies in situations where the United Kingdom must comply with its obligations under EU or international law.⁴⁸ The explanatory notes state that this exception would apply in a situation where a British court is asked to enforce an order for the seizure of an object made by the courts of another country to confiscate proceeds of crime.⁴⁹ It is important to note that the bill only precludes physical seizure of a tangible work. Under the bill, it is still possible to bring an action for damages against the museum or for restitution for unjust enrichment, conversion, or declaration of title.⁵⁰

b. Legislative and Legal Context in which Immunity from Seizure Legislation was Passed

News stories have given the appearance that James Purnell, pushed the anti-seizure legislation through in order to secure the exhibit because the Russian Government would not allow the “From Russia” exhibit into the United Kingdom. However, legislative history and debates in the House of Lords demonstrate that the Immunity from Seizure Bill was considered for several years before the “From Russia” controversy. Since 2005, anti-seizure legislation has been of concern for the British Parliament. With countries such as the United States, Germany, and France passing anti-seizure protection, the safeguard was becoming an international norm.

⁴⁷ Tribunals, Courts, and Enforcement Act, 2007, c. 15, § 135(1)(a-b).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ 687 PARL. DEB., H.L. (5th ser.) (2006) 784, available at <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61129-0006.htm>.

Once other countries passed this type of legislation, the United Kingdom started to become a less inviting host in the museum world. In one case, Romania withdrew two items from an exhibition at the Tate for fear of seizure.⁵¹ In fact, Russia, Romania, and Greece insisted they would not lend any works of art the United Kingdom unless anti-seizure legislation was passed.⁵² Taiwan had also refused to loan any items to the United Kingdom without the anti-seizure legislation safeguard.

British politicians thought the lack of anti-seizure legislation placed the United Kingdom at a competitive disadvantage in the museum business with other countries that have cultural exchange protection. As Lord Howarth of Newport noted in a House of Lords debate on November 29, 2006, “[t]he difficulties in organizing exhibitions are multiplying and the number of refusals of loans are multiplying.”⁵³ Lord Howarth then argued that there is public interest in having art exhibitions because London should retain its status as a great cultural center. He also said that these exhibitions promote a better international understanding. Thus, the anti-seizure legislation had been considered by the Parliament as a safeguard to Britain’s cultural wellbeing, well before the “From Russia” controversy.

Nevertheless, the Immunity from Seizure Act has not been without its critics. For example, during the November 2006 debate in the House of Lords, Lord Janner of Braunstone cited several problems with the bill.⁵⁴ First he argued that the Bill does not define which objects

⁵¹ DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, CONSULTATION PAPER ON ANTI-SEIZURE LEGISLATION 2 (2006).

⁵² *Id.*

⁵³ 687 PARL. DEB., H.L. (5th ser.) (2006) 782, *available at* <http://www.publications.parliament.uk/pa/ld200607/ldhansrd/text/61129-0006.htm>.

⁵⁴ *Id.* at 788.

are protected. They should be cultural objects. Next, Janner stated that the period of protection is not carefully thought through. There is nothing to ensure that items on loan are not brought into the United Kingdom on a semi-permanent basis. Items can be sold while they are on display in the United Kingdom.⁵⁵ He also argued that safeguards for the true owners of such property, who have been robbed of them, are totally insufficient. Furthermore, the Bill is incompatible with the United Kingdom's support for the principles laid down in the 1998 Washington Conference on Holocaust-Era Assets. He argued it overrides our existing law, policy and practice on illicitly traded works of art, and art stolen by the Nazis.⁵⁶ Mark Stephens, a British cultural property attorney, is even blunter in his criticism of the bill and the British government for passing the Immunity from Seizure Act. In a recent editorial in the *Art Newspaper* regarding the passing of the Immunity from Seizure Bill, Stephens wrote, "The actions of both the British government and the Royal Academy are morally reprehensible and put them both in fundamental breach of the domestic and international standards, to which they apparently only pay lip-service."⁵⁷ Stephens argues that Lenin's nationalization of private art collections amounts to the same thing as looting according to international standards. He posits that when the United Kingdom allows looted art into its museums, it is casting a blind eye to illegal activity and is thus partaking in illegal activity itself.⁵⁸

c. State immunity Act 1978

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ Stephens, *supra* note 7, at 188.

⁵⁸ *Id.*

Before the Immunity from Seizure Act passed, there were several pieces of domestic British legislation that covered immunity and cultural property. There was the State Immunity Act 1978. According to this act, a State would be immune from the jurisdiction of the courts of the United Kingdom except as provided in the exceptions of the act.⁵⁹ Under the first exception, a state is not immune to proceedings against it if it involved a commercial transaction performed in the United Kingdom, which was entered into by the State, or an obligation of the state by virtue of the contract. The statute defined a commercial transaction as: 1) any contract for the supply of goods or services; 2) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and 3) any other transaction or activity.⁶⁰ According to this statute, an art exhibit on loan to the United Kingdom owned by another country would fall within the definition of a commercial transaction. Therefore, it would not be immune from British courts.

The State Immunity Act of 1978 was limited. It only applied to property that was directly owned by the state. It did not apply to any entity distinct from the executive organs of the State's government.⁶¹ In this respect, the new Immunity from Seizure Act is more expansive, as it applies to both states and independent foreign owners. Whereas the State Immunity Act of 1978 applied only to foreign states, the text of the Immunity from Seizure Act sets forth conditions on "protected objects," without setting specifications for the ownership of the protected objects. Therefore, the new legislation bars independent foreign owners as well as state and government

⁵⁹ State Immunity Act, 1978, c. 33, § 1 (Eng.), *available at* http://www.opsi.gov.uk/RevisedStatutes/Acts/ukpga/1978/cukpga_19780033_en_1.

⁶⁰ *Id.* at § 3.

⁶¹ DEPARTMENT FOR CULTURE, MEDIA, AND SPORT, *supra* note 51, at 5.

entities from trying to seize cultural objects. If the Shchukin heirs established ownership to their art collection, they would not have been barred under the State Immunity Act of 1978 to bring a claim. Under the new legislation, their claim is barred if it does not fall within the exception.

d. Acts Concerning Cultural Property and Crime

There are also two current overlapping pieces of legislation concerning the dealing of stolen or looted cultural property. First, the Dealing in Cultural Objects Offences Act of 2003 makes it an offence to acquire, dispose of, import or export tainted cultural objects, or agree or arranging to do so; and for connected purposes.⁶² The penalty is up to seven years in prison or a fine.⁶³ The act defines a “cultural object” as an object of historical architectural or archeological interest. An object becomes a “tainted cultural object” under the statute if a person removes the object from a building or structure of historical, architectural or archaeological interest where the object has at any time formed part of the building or structure, or it is removed from a monument of such interest. There is also the Proceeds of Crime Act of 2002. This act is a general statute that penalizes people who possess or deal in “criminal property.” It gives extensive powers to confiscate stolen property.⁶⁴

Under these statutes, it might be possible to argue that a specific piece from Shchukin’s collection falls under the definition of a “tainted cultural object” Matisse’s panels *Dance* and *Music* were commissioned by Shchukin with the express purpose to be placed as decorative

⁶² Dealing In Cultural Objects (Offences) Act, 2003, c. 27 (Eng.), available at http://www.opsi.gov.uk/acts/acts2003/ukpga_20030027_en_1.

⁶³ State Immunity Act, 1978, c. 33, § 3 (Eng.).

⁶⁴ Norman Palmer, *Adrift on a Sea of Troubles: Cross-Border Art Loans and the Specter of Ulterior Title*, 38 VAND. J. TRANSNAT’L L. 947, 955 (2005).

panels on the staircase of the Trubetskoy Palace. The Trubetskoy Palace was a structure of historical interest, as it housed a large collection of paintings. Furthermore, it was turned into the Museum of Modern Western Art. One could argue that since the paintings were commissioned specifically as a part of the ornamental staircase in a mansion which became a museum, they should be classified as “cultural objects.” When the Matisse panels were removed from the Trubetskoy Palace, they were taken from a site of historical importance, and therefore became “tainted cultural objects” under this statute. However, even if this were true, this act would not help the Shchukin family. The Dealing in Cultural Objects Offences Act of 2003 has a criminal penalty and it is not a means for recovery of the object by the rightful owner.

e. British Common Law

In cases involving the restitution of nationalized property in United Kingdom case law, plaintiffs have had mixed results. Sovereign immunity covers claims arising from the expropriation by a state which is recognized under English law, where the property in question was at the time located in that state. The facts of the case *Princess Paley Olga v. Weisz and Others* are similar to the facts in the Shchukin heir’s situation.⁶⁵ In *Princess Paley Olga*, Princess Paley Olga’s movable items, including furniture, pictures, and objets d’art, were confiscated by revolutionaries during the Revolution of 1918. The revolutionaries became the rulers of the Soviet government, and nationalized the plaintiff’s property. The revolutionaries turned the plaintiff’s home, Paley Palace, into a museum. In 1924, the British Government recognized the

⁶⁵ *Princess Paley Olga v. Weisz*, (1929) 1 Eng. Rep. 718, 719 (K.B.). Princess Paley Olga was the widow of the Grand Duke Paul of Russia.

revolutionaries as the de jure government of Russia. In 1928 the Soviet Republic sold the plaintiff's objects to Weisz, the defendant, who brought the items to England.⁶⁶

Princess Paley Olga brought an action against the defendant to recover these items. The judge ruled that the plaintiff's items were the rightful property of the Russian state on several grounds.⁶⁷ First, the Paley Palace was turned into a museum. The court cited a Russian Decree of March 18, 1923, which stated, "Works of art, antiques, and articles of historical interest being in museums and depositories as forming part of the Museum Fund and being safeguarded by State means, are recognized to be State property."⁶⁸ Second, Decree No. 111 of the Council of People's Commissaries stated that the property of people "fleeing from Russia" would automatically be confiscated and become property of the Russian state.⁶⁹ The *Princess Paley Olga* precedent has been upheld in a more recent case.⁷⁰ In *Williams and Humbert v. W & H Trademarks*, the court held that the English courts recognize as valid foreign laws which operated lawfully to expropriate property within the jurisdiction of the foreign state and vested ownership in its nominees.⁷¹ In the Shchukin case, the Trubetskoy Palace, which housed the Shchukin Collection, was turned into the Museum of Modern Art. Like *Princess Paley Olga*, this set of facts would be protected under the Russian Decree of March 18, 1923. Also, the Shchukin family fled Russia. Like *Princess Paley Olga*, those "fleeing from Russia" would fall under

⁶⁶ *Id.* at 718.

⁶⁷ *Id.* at 723.

⁶⁸ *Id.* at 722.

⁶⁹ *Id.* at 723.

⁷⁰ See *Williams & Humbert Ltd. v. W&H Trade Marks Ltd.*, (1985) 1985 WL 310924; see also *Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (D.C.N.Y 1976).

⁷¹ See *Williams & Humbert*, (1985) 1985 WL 310924.

Decree No. 111. By the *Princess Paley Olga* court's logic, the items in the Trubetskoy Palace were rightfully property of the Russian state.

However, in *The Rose Mary*, a later case in Aden, a British Crown Colony located in present-day Southern Yemen, the court ruled that an expropriation without compensation violates international law.⁷² The Persian government nationalized the oil industry, but it did not compensate the companies for the property that was nationalized. Because the companies were not compensated, the court ruled that the oil in dispute was not lawfully expropriated, and was still the property of the oil company plaintiffs. Here, the art work was nationalized, but the Shchukin family was never compensated for the art. Sergei Shchukin's palace was transformed into the Museum of Modern Art, and Shchukin was given the title curator. However, this was not a form of compensation to Shchukin. He was asked to be the curator of this museum while under arrest. However, the Shchukin family was not compensated for the taking, so it was an unlawful expropriation. Therefore, under *The Rose Mary* case, one could argue that the art collection is still the Shchukin's property.

Furthermore, British courts have held that sovereign immunity does not apply if the act does not involve the exercise of a sovereign right or character.⁷³ Under British law, if the claim does not involve an act sovereign in character, the British court has the authority to both determine and enforce the right.⁷⁴ To determine whether an act has sovereign right or character, courts distinguish between penal actions and private actions. A penal action is brought for the

⁷² *Anglo Iranian Oil Co. v. Jaffrate*, 1953 WL 14223.

⁷³ *Mbasogo v. Logo Ltd.*, [2007] 2 WLR 1062 (appeal taken from Q.B.).

⁷⁴ *Huntington v. Attrill*, (1893) 1893 A.C. 150 (H.L.P.C.).

public good and community interest, and is thus sovereign in character. A private or civil action is brought to right a wrong which could have been committed in a private context, and is not sovereign in character. Here, the Hermitage Museum and Pushkin Museum, by virtue of the Russia Federal Agency for Culture and Cinematography, loaned the Shchukin collection to the Royal Academy in London. One might argue that disseminating cultural masterpieces is a goal of a nation. However, at its core, this act is one art museum loaning another art museum some paintings. Private museums exchange in contracts such as this on a regular basis. Thus, the act does not involve the exercise of a sovereign right or character. British courts would not be foreclosed upon hearing a claim involving this transaction.

There is also a recent trend in British common law to cite international principles on cultural property as binding. For example, a British court recently stated in the case *Government of the Islamic Republic of Iran v. The Barakat Galleries Limited*:

In 1970 the signatories to the UNESCO Convention on the means of prohibiting and preventing the illicit import, export and transfer of ownership of cultural property (ratified by the United Kingdom in 2002) recognized not only that it was incumbent on every State to protect the cultural property within its borders against the dangers of theft, clandestine excavation and illicit export, but also that it was essential for every State to become alive to the moral obligations to respect the cultural heritage of all nations and that the protection of cultural heritage could only be effective if organized both nationally and internationally among States working in close co-operation (recitals 3, 4 and 7).⁷⁵

In a future Shchukin litigation in the United Kingdom, the court could cite this UNESCO Convention to uphold the principle that cultural property should be protected against theft and illicit export. Since the Shchukin art collection was nationalized without compensation, it was an

⁷⁵ See *Iran v. Barakat Galleries Ltd.*, [2007] EWCA (Civ) 1374.

unlawful taking. If a court recognized that the property is still owned by Shchukin family, then Russia's export of it to Britain would be illicit.

As of today, no case has yet applied Part 6 of the Tribunals, Courts, and Enforcement Act. As the United Kingdom has become more sensitive to international organizations, it is arguable that a modern case examining the same question as *Princess Paley Olga* may cite to United Nations treaties and European Community conventions, and come to a favorable result for the Shchukin heirs.

IV. INTERNATIONAL LAWS GOVERNING CULTURAL PROPERTY

The British Anti-Seizure Act carves an exception for court orders where there is a European Community obligation or an international treaty. This section of the paper will examine European Community and international treaties to see if the Shchukins can bring a claim based on one of these international laws. First, we will address the United Kingdom's responsibilities as a member of the European Community. While Russia is not a member of the European Community, Deloque-Fourcaud is a citizen of France, a member of the European Community.⁷⁶ According to Article 1 of the European Convention of Human Rights, "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention."⁷⁷ Therefore, Deloque-Fourcaud could bring a suit according to this convention on this basis of his French citizenship.

When considering immunity issues, it is important to consider a person's right to a court. According to the European Convention on Human Rights, Section 1, Article 6, "In the

⁷⁶ Andre Marc Delocque-Fourcaud, <http://www.ichim.org/ichim05/jahia/Jahia/pid/704.html>.

⁷⁷ Convention for the Protection of Human Rights and Fundamental Freedoms § 1, art. 1, Nov. 4, 1950, 213 U.N.T.S. 222.

determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”⁷⁸ Property rights are part of one’s civil rights, so under this article, someone deprived of their property rights has a right to a fair hearing.

The European Convention on Human Rights also guarantees the right to the peaceful enjoyment of one’s possessions. According to Protocol 1, Article 1, “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”⁷⁹ However, this Protocol has a provision that protects a State’s sovereign right to control property within its borders. The protocol continues, “The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”⁸⁰ The British Legislature’s Consultation on Anti-Seizure Legislation addressed this issue. They argued that preventing a potential claimant from seeking a particular form of relief in this jurisdiction for a limited period of time strikes a fair balance between the rights of the claimant and the public interest.⁸¹ However, international law mandates that for there to be a legal taking of property, it must serve a purpose, not discriminate against certain individuals, and must be accompanied by just

⁷⁸ *Id.* at § 1, art. 1.

⁷⁹ *Id.* at pro.1, art. 1.

⁸⁰ *Id.*

⁸¹ DEPARTMENT FOR CULTURE, MEDIA AND SPORT, *supra* note 51.

compensation.⁸² In *Beyeler*, a recent European Court of Human Rights case, Italy acquired the plaintiff's painting at well below the market value. The European Court of Human Rights held that Italy was unjustly enriched by this act, and therefore Italy violated Protocol 1, Article 1.⁸³ In the Shchukin case, the Shchukin family was never compensated for the Russian state's expropriation of their art collection. According to the precedent set by *Beyeler*, Article 1, Protocol 1 was violated, and the Shchukin heirs are entitled to damages arising from unjust enrichment.

On the other hand, the European Community wants to promote intercultural exchange between its members. For example, according to Article 151(2) of the European Community Treaty, "action by the Community shall be aimed at encouraging cooperation between Member States and, if necessary, supporting and supplementing their action in non-commercial cultural exchange" including, *inter alia*, art loans to museums.⁸⁴ Additionally, one of the goals of the European Convention on Culture is for its signatories to "undertake to facilitate the circulation and exchange of cultural objects and take the necessary measures to grant access to cultural objects under their control."⁸⁵ It will be interesting to see how the European Court of Human Rights balances the competing interests for restoration to the rightful owners and the circulation of cultural objects.

⁸² Benjamin Pollock, *The Tenth Annual Frankel Lecture: Comment: Out of the Night and Fog: Permitting Litigation to Prompt an International Resolution of Nazi Looted Art Claims*, 43 HOUS. L. REV. 193 (2006).

⁸³ *Beyeler v. Italy*, 33 Eur. Ct. H.R. 52 (2001).

⁸⁴ Matthias Weller, *Immunity for Artworks on Loan? A Review of International Customary Law and Municipal Anti-Seizure Statutes in light of the Liechtenstein Litigation*, 38 VAND. J. TRANSNAT'L. L. 997, 1012 (2005).

⁸⁵ *Id.* at 1009.

The United Nations also has treaties and conventions applicable to this case. The main Convention is the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. Article 2 states:

1. The States Parties to this Convention recognize that the illicit import, export and transfer of ownership of cultural property is one of the main causes of the impoverishment of the cultural heritage of the countries of origin of such property and that international co-operation constitutes one of the most efficient means of protecting each country's cultural property against all the dangers resulting therefrom.
2. To this end, the States Parties undertake to oppose such practices with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.⁸⁶

The second part declares that states should help make the necessary reparations. Article 13 of the Convention is also applicable. It states:

The States Parties to this Convention also undertake, consistent with the laws of each State:

- a. To prevent by all appropriate means transfers of ownership of cultural property likely to promote the illicit import or export of such property;
- b. To ensure that their competent services co-operate in facilitating the earliest possible restitution of illicitly exported cultural property to its rightful owner;
- c. To admit actions for recovery of lost or stolen items of cultural property brought by or on behalf of the rightful owners.

The words of the UNESCO Convention are broad, and courts can interpret it in different ways. However, in a situation where artwork has been unlawfully expropriated, the victim could be helped under this convention to receive reparations. When applying international laws and treaties to the United Kingdom, it is a delicate balancing act of knowing when one is bound by the law.

⁸⁶ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property art. 2, Nov. 14, 1970, 823 U.N.T.S. 231.

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects also addresses the return of objects.⁸⁷ According to Chapter II – Restitution Of Stolen Cultural Objects, *Article 3*, (1) The possessor of a cultural object which has been stolen shall return it, and (2) for the purposes of this Convention, a cultural object which has been unlawfully excavated or lawfully excavated but unlawfully retained shall be considered stolen, when consistent with the law of the State where the excavation took place.⁸⁸ To succeed under Chapter II, the Shchukin heirs would have to prove that the cultural object was stolen. The heirs could argue that they were never compensated, and therefore, it was an unlawful expropriation. Since it was an unlawful expropriation, the Russian state retained it unlawfully. Under Article 3, when something is unlawfully retained, it is considered stolen. Once the Shchukin heirs have established Article 3, they could move to Article 4, which states: (1) The possessor of a stolen cultural object required to return it shall be entitled, at the time of its restitution, to payment of fair and reasonable compensation provided that the possessor neither knew nor ought reasonably to have known that the object was stolen and can prove that it exercised due diligence when acquiring the object. Thus, the Russian State would be entitled to compensation under the UNIDROIT Convention if the Shchukin heirs were successful with their restitution claim. Citing the aforementioned laws, the Shchukin heirs would have grounds for a claim based on European Community and International Law. If they were to succeed in such a claim, the exception from the British Anti-Seizure Act, and the art works could be seized.

⁸⁷ Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322, *available at* <http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-e.htm>.

⁸⁸ *Id.* at art. 3.

V. COMPARISON OF BRITISH LAW TO ANTI-SEIZURE LEGISLATION IN THE UNITED STATES

Anti-seizure legislation in the United Kingdom was just passed in January 2008, and there is no British case law that interprets the meaning of the statute. In contrast, the United States has a federal Anti-Seizure Bill originally passed in 1965, and the statute has been interpreted several times in case law. The “Immunity from Seizure Under Judicial Process of Cultural Objects Imported for Temporary Exhibition or Display”, 22 U.S.C. § 2459 (from here referred to as the Federal Anti-Seizure Bill), states that no court shall issue or enforce any judicial process, or enter any judgment, decree, or order, for the purpose or having the effect of depriving that institution or any carrier. The “cultural significance” of an object is determined by the President or his designee, and whether the temporary exhibition or display is of national interest, and notice of this is published in the Federal Register.⁸⁹

There are several distinctions between the United States Federal Anti-Seizure Bill and the United Kingdom’s Anti-Seizure Act. First, the United States’ bill has a requirement that the President or a representative determine whether the object is of cultural significance. The General Counsel of the United States Information Agency acts as the president’s designee.⁹⁰ According to Section Two of the Executive Order, the Director of the United States Information Agency, in carrying out this Order:

[S]hall consult with the Secretary of State with respect to the determination of national interest, and may consult with the Secretary of the Smithsonian Institution, the Director of the National Gallery of Art, and with such other officers and agencies of the

⁸⁹ 22 U.S.C. § 2459(a) (2000).

⁹⁰ Exec. Order No. 12,047, 3 C.F.R. 167 (1978), *amended in* Exec. Order No. 12,388, 3 C.F.R. 225 (1982), *available at* <http://www.archives.gov/federal-register/codification/executive-order/12047.html>.

Government as may be appropriate, with respect to the determination of cultural significance.

Thus, the United States law determines the “cultural significance” of an object by vesting the power in a certain individual, and listing sources that person may consult to make this determination. On the other hand, the British bill sets forth a number of specific factors an object must meet to be a “protected object.” In the British bill, the impetus is on the museums to follow the due diligence procedures set forth by the Secretary of State.⁹¹ It will be interesting to see in practice if this distinction will make a difference in the statute’s interpretation.

Another difference is the relative power each respective government has in a situation where a judicial proceeding arises. In the British case, the court follows an order through a Community (European) obligation or an international treaty.⁹² It seems like in the British legislation, the British court system is submissive to a larger international system, to which it must play a supporting role. In the American immunity from seizure legislation, on the other hand, the United States Attorney from the applicable district has the right to intervene as a party and upon request from an institution adversely affected, in any pending judicial proceeding.⁹³

In American cases concerning immunity for cultural property, The Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. § 1602, plays a major role.⁹⁴ The FSIA states in § 1604:

⁹¹ Tribunals, Courts and Enforcement Act, 2007, c. 15, § 134.

⁹² *Id.* at § 135(1).

⁹³ 22 U.S.C.S. § 2459(b) (LexisNexis 2008).

⁹⁴ Foreign Sovereign Immunities Act, 28 U.S.C.S. § 1602 (LexisNexis 2008).

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

The exceptions are where the state has waived their immunity, either explicitly or by implication, or in connection with a commercial activity of the foreign state elsewhere.

The Federal Anti-Seizure Bill has been tested in recent case law. Different circuits in the United States have interpreted the interaction of the FSIA and the Immunity from Seizure Act in different ways. The interpretation has yet to be tested in the Supreme Court. In 2000, the Southern District of Alabama ruled that the Federal Anti-Seizure Bill controls the FSIA in the case of cultural property. In 2000, the petitioners in *Magness* filed a writ of execution to recover assets from the Russian Federation, including the Golden Coronation Carriage, the Grand Piano of Empress Feodorov, and a miniature of Imperial Regalia by Faberge Jewels.⁹⁵ The court ruled the plaintiff's items were immune from execution because the Federal Anti-Seizure Bill bars it. The plaintiffs were not allowed to proceed with their suit in *Magness*.

On the other hand, a 2005 District Court for the District of Columbia case held the two doctrines were clear and not inconsistent.⁹⁶ In *Malewicz v. City of Amsterdam*, Kazimir Malewicz was a Russian modern artist. He visited Berlin in 1927, but had to return to Russia unexpectedly and entrusted the collection to four friends in Germany: Gustav von Riesen, Hugo Haring, Hans Richter and Dr. Alexander Dorner. When Dorner had to flee Nazi Germany, he entrusted paintings to Haring, one of the four original friends. W.J.H.B Sandberg director of Stedelijk

⁹⁵ *Magness v. Russian Fed'n*, 84 F. Supp. 2d 1357, 1358 (S.D. Ala. 2000).

⁹⁶ *Malewicz v. City of Amsterdam*, 362 F. Supp. 2d 298, 311 (D.D.C. 2005).

Museum in Amsterdam, approached Haring several times for paintings, but Haring always refused. After Haring died, Sandberg claimed Haring finally agreed to give paintings to the Amsterdam Museum. After the fall of the Iron Curtain, Malewicz's heirs tried to locate lost property and recover it. In 2003, fourteen pieces were exported to the Guggenheim Museum in New York City, arranged under the Mutual Educational and Cultural Exchange Program by the U.S. Department of State. Amsterdam requested that the State Department deem the artwork items of "cultural interest; and of national interest." The State Department granted the exhibit immunity from seizure under 22 U.S.C. § 2459. The Malewicz heirs filed an objection, but immunity was granted. Amsterdam is a "political subdivision" of the Netherlands, and it would be immune from jurisdiction under the FSIA unless it falls into an exception.⁹⁷

The *Malewicz* court made a distinction between the Foreign Sovereign Immunities Act and the Immunity from Seizure Act. According to the court, the doctrines are both clear and not inconsistent.⁹⁸ First, the court examined the application of 28 U.S.C. § 2459. The court explained that this statute is for physical custody or control of the item. The *Malewicz* court ruled that since the plaintiffs sued the City of Amsterdam for replevin, and not the Guggenheim Museum in the United States, this statute does not apply.⁹⁹ Furthermore, the court explained that the Foreign Sovereign Immunities Act does not apply because the court found it fit the commercial activity exception. Lending artworks to a museum was a commercial activity because a private actor could have done a similar action connected with "trade and traffic or

⁹⁷ *Id.* at 306.

⁹⁸ *Id.* at 311.

⁹⁹ *Id.* at 311-12.

commerce.”¹⁰⁰ The court ruled that the plaintiff’s suit could proceed. The court made a distinction between a plaintiff suing an American museum versus suing a foreign party. If a plaintiff sues a foreign party, then the Immunity from Seizure Act cannot apply because the foreign museum does not have physical custody or control of the artworks in question.¹⁰¹ In contrast, the *Magness* court said that the Immunity from Seizure statute does apply to a foreign party, the Russian Federation.

Deloque Fourcaud’s case in Los Angeles was from 2003, and the court cited the *Magness* case as one of the grounds for dismissal.¹⁰² The new precedent from *Malewicz* presents an opportunity for Deloque Fourcaud, but on certain conditions. First, the Shchukin heirs would have to sue the Hermitage or Pushkin Museum while the art was on display in the United States. Like in *Malewicz*, suing the foreign museum would circumvent the Immunity from Seizure statute because the plaintiffs are not seeking seizure in the United States. However, for the same reason, the Shchukin heirs would not be able to sue an American museum. Also, since there is a split in the circuits, it is advisable for the Shchukins to wait until the artwork is on exhibit somewhere within the District of Colombia, where *Malewicz* was decided.

Even if a Shchukin heir’s lawsuit navigated through the complications of the FSIA and the Immunity from Seizure act, it would have to deal with the obstacle of Act of State. Case law states that suits regarding nationalized personal property in foreign nations are barred because of

¹⁰⁰ Foreign Sovereign Immunities Act § 1602(a)(3).

¹⁰¹ *Malewicz*, 362 F. Supp. 2d at 311.

¹⁰² Notice of Motion And Motion of Defendant-in-Intervention United States For Order Dismissing the First Amended Complaint with Prejudice, Delocque-Fourcaud v. Los Angeles County Museum of Art, SK061 A.L.I.-A.B.A. 263, (No. CV 03-5027-T(CTx)).

the Act of State doctrine.¹⁰³ In *Day Gormley Leather Co. v. National City Bank of New York*, the plaintiffs could not recover money that was nationalized into Russian bank accounts. This was because the United States recognized the Russian government, and their nationalization destroyed any title to which the plaintiff says they have a claim.¹⁰⁴ The Act of State Doctrine was also applied in *Banco Nacional de Cuba v. Sabbatino*.¹⁰⁵ In *Sabbatino*, the Cuban Government expropriated property located in Cuba but owned principally by American nationals. The court held:

[T]he Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law.¹⁰⁶

The Act of State Doctrine depends upon the confluence of four factors: 1) the taking must be by a foreign sovereign government; 2) the taking must be within the territorial limitations of that government; 3) the foreign government must be extant and recognized by this country at the time of suit; and 4) the taking must not be violative of a treaty obligation.¹⁰⁷ According to *Sabbatino*, a foreign country's expropriation rights are held inviolable, regardless of their illegality in the international realm. Thus, even if the expropriation of the Shchukin art was illegal under international standards because the family was not compensated, the Shchukin's would probably have no redress under *Sabbatino*.

¹⁰³ *Day-Gormley Leather Co. v. Nat'l City Bank of N.Y.*, 8 F. Supp. 503 (S.D.N.Y. 1934). *See also* *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

¹⁰⁴ *See Day-Gormley*, 8 F. Supp. at 505-06.

¹⁰⁵ *Sabbatino*, 376 U.S. 398 (1964).

¹⁰⁶ *Id.* at 428.

¹⁰⁷ *Menzel v. List*, 267 N.Y.S.2d 804 (N.Y. App. Div. 1966).

Fortunately, the rigid *Sabbatino* rule has been weakened by successive case law. In *Menzel*, the court made a distinction between a foreign sovereign government and an organ of the government.¹⁰⁸ In *Menzel*, the plaintiff sought to recover a Chagall painting that she and her husband had left in her Brussels apartment in 1941 as she fled from the Nazis.¹⁰⁹ The court held that the painting was not seized by a foreign sovereign government, but rather the “The Centre for National Socialist Ideological and Educational Research,” an organ of the Nazi party. Since the “foreign sovereign government” requirement was not met, the Act of State doctrine did not apply.¹¹⁰ However, a later New York case dealing with the nationalization of artwork under the Soviet Government from 1923 distinguished the facts from *Menzel*.¹¹¹ According to *Stroganoff*, the appropriation of art under Decree No. 111 of March 5, 1921 was an official decree from the political organ. Therefore, the appropriation of art was an Act of State. It is hard to reconcile these two cases. It is bizarre to distinguish between an official act of the Nazi government and an official act of the Soviet government. Both were totalitarian regimes with government organs stretched deeply into the regulation of culture.

The Act of State doctrine also has several exceptions. The Supreme Court has recognized a commercial exception.¹¹² In *Dunhill*, the court concluded that “the commercial area the need for merchants to have their rights determined in courts” outweighs any injury to foreign

¹⁰⁸ *Id.* at 815.

¹⁰⁹ *Id.* at 806.

¹¹⁰ *See generally id.*

¹¹¹ *See Stroganoff-Scherbatoff v. Weldon*, 420 F. Supp. 18 (S.D.N.Y. 1976).

¹¹² *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976).

policy.¹¹³ The Cuban government's expropriation of cigar companies was seen as a commercial act, and therefore not subject to the Act of State doctrine. In *American International Group, Inc. v. Islamic Republic of Iran*, the court ruled that a failure to compensate for an expropriation as required by treaty "occurred in connection with a commercial activity of defendants" and therefore was not protected by the act of state doctrine.¹¹⁴ In a Michigan district court, the judge designed a "balancing test" for the commercial exception as applied to the Act of State doctrine. Judge Boyle stated that an analysis "requires a balancing of the policy-related factors presented by the circumstances of the particular case." In interpreting the commercial exception from the Foreign Sovereign Immunities Act, the *Malewicz* court held that lending artworks to a museum was a commercial activity because a private actor could have done a similar action connected with "trade and traffic or commerce."¹¹⁵ One could interpret "commercial activity" to mean the same in both the Foreign Sovereign Immunities Act and the Act of State exception. Therefore, lending artwork to another museum is commercial activity. Russia's loan of the Shchukin collection to other museums around the world constitutes commercial activity, and is not protected under the Act of State doctrine. If the Shchukins brought a suit against Russia or the Hermitage or Pushkin Museum in the United States, especially in the Second Circuit, they may succeed.

VI. SUMMARY OF SHCHUKIN HEIRS' CURRENT OPTIONS

¹¹³ *Id.* at 706.

¹¹⁴ *American Int'l Group, Inc. v. Islamic Republic of Iran*, 493 F. Supp. 522 (D.D.C. 1980).

¹¹⁵ Foreign Sovereign Immunities Act § 1602(a)(3).

First, under Protocol 6 of the Tribunals, Courts and Enforcement Act of 2007, it is still possible to bring an action for damages against the museum or for restitution for unjust enrichment, conversion, or declaration of title. Like the American Immunity from Seizure Act, all the British legislation prevents is the actual seizure of an artwork while it is in a gallery. If the Shchukin heirs simply want compensation, they should try this route, and will probably be successful. A recent case about Iranian antiquities in a London gallery described the law of conversion in Great Britain. To sue in conversion a claimant must show that he had either possession, or an immediate right to possession of the chattel at the time of the act in question. Either relationship with the chattel affords the necessary possessory title to sustain a claim for conversion. If either is shown, the claimant need not be the owner of the chattel in order to succeed in conversion. The owner can be liable in conversion to a person who had either possession or the immediate right of possession at the time of the owner's act.¹¹⁶ To be successful in a suit for conversion, all the Shchukin heirs need to do is prove that Sergei Shchukin was the rightful possessor at the time the expropriation occurred. They need to convince the court that it was an illegal taking because there was no compensation for the expropriation, regardless of whether there was a decree from the Soviet Government or not. They could sue either the Hermitage or Pushkin Museum, or the Royal Academy in London. Then, the heirs would be able to claim damages from the conversion. Based on European Court of Human Rights law, the Shchukin heirs could probably also succeed in a suit for unjust enrichment, and potentially claim damages.

¹¹⁶ See *Iran v. Bakarat Galleries*, [2007] EWCA (Civ) 1374.

If the Shchukin heirs wanted restitution of their ancestor's art collection, they could try several routes. In the United Kingdom, the Shchukin heirs could try to defeat the British Immunity from Seizure Act through Protocol 6's Community obligation or International treaty exception. If the Shchukin's could win a claim in the European Court of Human Rights or the International Court of Justice, the British Immunity from Seizure exception would apply, and the art could be restituted. Since Deloque-Fourcaud is a French citizen, his rights are protected in the European Community, regardless of the fact that the act in question transpired in Russia. He could assert his right under Protocol 1, Article 1 of the European Convention of Human Rights. Deloque-Fourcaud would first have to prove that Sergei Shchukin is the rightful possessor of the art and therefore he is the heir. He will have to show that Russia illegally expropriated the art because there was no compensation. The European Court of Human Rights recently was somewhat sympathetic to a plaintiff whose art was expropriated by Italy.¹¹⁷ This may be a successful option for Deloque-Fourcaud.

If the Shchukin heirs were successful in a European Court of Human Rights claim based on Protocol 1, Article 1, they could either recover the paintings or they could be compensated, but not both.¹¹⁸ A recent case held that compensation based on a Protocol 1 Article 1 claim is to "restore as far as possible the situation before the existing breach, and payment of compensation should be made in a lump sum to reflect an amount reasonably related to the value of the property taken in its current value."¹¹⁹ However, non-pecuniary damages are not recoverable

¹¹⁷ See *Beyeler v. Italy*, 33 Eur. Ct. H.R. 52 (2001).

¹¹⁸ See *The Former King of Greece v. Greece*, 36 Eur. Ct. H.R. 43 (2003).

¹¹⁹ *Id.*

under this precedent.¹²⁰ If the Shchukin artworks on tour generate gross amounts from prints, gift shop items, and other objects, this should be taken into account when calculating compensation reflecting the artwork's current value. However, the heirs would not be entitled to non-pecuniary damages.

The Shchukin heirs could also attempt a claim in the International Court of Justice based on UNESCO and UNIDROIT laws, specifically UNIDROIT Chapter II, Restitution of Stolen Cultural Objects, Article 3. Since Russia is a member of the United Nations, the suit could be directly against Russia or the Pushkin or Hermitage Museum. The obstacle will be in convincing the court that nationalizing artwork by a Soviet Decree constitutes "looting." The Shchukin heirs can show that Sergei Shchukin was never compensated for his collection. Under international law, this does constitute looting. If this claim were successful, then the artwork itself could be returned.

If the Shchukin collection were to go on exhibition in the United States, the Shchukin heirs would also have options. United States case law is most favorable in the District of Columbia under the *Malewicz* precedent. However, due to the American Immunity from Seizure Act, the Shchukin heirs would not be able to sue an American museum that had the artworks on exhibition. Instead, they would have to sue the Russian Federation, the Pushkin Museum, the Hermitage, or all three entities in a United States court. The Shchukin heirs could sue while the artwork was on exhibition. If they were successful, the artwork would be restituted to the family after the exhibition. However, to bring a suit based on a taking that was not fairly compensated in

¹²⁰ *Id.*

a United States jurisdiction, the heirs would have to have first “pursued and exhausted domestic remedies in the foreign state that is alleged to have caused the injury.”¹²¹ Thus, the Shchukin heirs need to try to sue in Russia before they can successfully sue in the United States.

In conclusion, the Shchukin heirs have a variety of options for restitution of their ancestor’s art collection. The Shchukin family has tried to recover restitution for their lost art since the 1950s. While the new British Immunity from Seizure legislation may seem bleak at first for recovery, there are still options available through European, International, and American routes. The international community is becoming more sympathetic to cases such as the Shchukins’. If the Shchukin heirs continue their pursuit, they will eventually be successful in the compensation and or return of their ancestor’s art.

Appendix

REPORT OUTLINING THE ROYAL ACADEMY’S DUE DILIGENCE PROCEDURES FOR WORKS OF ART AND CULTURAL OBJECTS ON LOAN FROM ABROAD TO TEMPORARY EXHIBITIONS, with particular reference to:

From Russia: French and Russian Master Paintings 1870 – 1925 from Moscow and St Petersburg

The exhibition consists of 124 paintings lent by the four great Russian State museums, The State Hermitage Museum and State Russian Museum in St Petersburg, and the Pushkin Museum of

¹²¹ *Millicom Int’l Cellular v. Republic of Costa Rica*, 995 F. Supp. 14, 23 (D.D.C. 1998); *see also Republic of Austria v. Altmann*, 541 U.S. 677, 714 (2004).

Fine Arts and the Tretyakov Gallery in Moscow. The exhibition, entitled *Bonjour Russland*, opened on 18 September 2007 at the Museum Kunst Palast, Düsseldorf. Following its closure on 6 January 2008, it will be presented at the Royal Academy from 26 January to 18 April 2008.

The 127 paintings included therein consist of works made between c.1870 and c.1925 by Russian and French artists. The works have entered the State collections either through acquisition or donation prior to 1917, through seizure shortly after the 1917 Revolution, or through acquisition from various sources after 1917.

The four Russian museums are directly funded by the Russian Federal State and are subject to the direct authority of the Russian Federal Ministry of Culture. All works in their collections are therefore understood to be the property of the State.

Given the course of Russian history in the 20th century, due diligence concerning the provenance of all works included in the exhibition has been undertaken, in accordance with the Royal Academy's established procedures: verification of the provenance of paintings by Russian artists and those French artists not included in the Shchukin and Morozov collections, and scrutiny of the provenance of paintings originally acquired by Sergei Shchukin and Ivan Morozov.

In the case of all non-Shchukin and Morozov paintings, provenance information provided by the four museums was crosschecked with their collections' catalogues and other books, including the German language edition of the catalogue, published in September 2007, which accompanied the presentation of the exhibition in Düsseldorf. Careful interrogation was also undertaken of our Russian colleagues, of British scholars with knowledge and experience in the field of Russian art and history at the turn of the 19th century and the opening decades of the 20th century, and of curators of recent exhibitions that had been either wholly or in part devoted to the arts of Russia, for example, *Russia!*, mounted by the Guggenheim Museum in New York and Bilbao in 2006, and *Modernism: Designing a New World*, shown at the Victoria & Albert Museum, London, also in 2006. No information emerged that suggested that any painting had a problematic provenance and hence would be at risk from a claim from a third party.

The provenance of the French paintings originally acquired by Sergei Shchukin and Ivan Morozov was carefully reconstructed through published and unpublished documentation. A complete record for each painting from date of acquisition to final deposition in 1948 with either the State Hermitage Museum or the Pushkin Museum of Fine Arts was undertaken.

REPORT OUTLINING THE ROYAL ACADEMY'S DUE DILIGENCE PROCEDURES FOR WORKS OF ART AND CULTURAL OBJECTS ON LOAN FROM ABROAD TO TEMPORARY EXHIBITIONS

The Royal Academy's due diligence procedures conform to the national and international standards as laid out in the following:

- Statement of Principles issued by the National Museum Directors Conference on “spoliation of works of art during the Holocaust and World War II period” in 1998;
- *Combating Illicit Trade: Due Diligence Guidelines for Museums, Libraries and Archives on collecting and borrowing Cultural Material* (DCMS, October 2005);
- The UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property;
- The ICOM Code of Ethics;
- SPECTRUM: UK Documentation Standard for Museums.

The Royal Academy’s due diligence procedures are outlined below:

- Provenance details of all objects proposed for inclusion in an exhibition are requested from the lender. The loan form includes sections specifically requesting information regarding provenance, the legitimate title of the current owner and their legal authority to lend the object;
- The exhibition curator is contractually required to undertake full provenance checks, which may necessarily go beyond the information provided by the lender. These include consideration of provenances between 1933 and 1945 and any other information which might suggest possible irregularity of acquisition and current title of ownership. In addition, checks are run on the provenance, ethical status and proof of import into/export out of a particular country of cultural objects in accordance with the UNESCO 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Cultural Property;
- In cases where the owner is unable to supply all necessary information, the curator contacts the Art Loss Register where appropriate, and/or consults with scholars and fellow curators;
- All records of due diligence checks are retained; they are deemed confidential and kept on file prior to being deposited with the Royal Academy Archive;
- The Royal Academy’s standard “loans-in” agreement as published in its official loan form requires the lender to confirm that their acquisition of the object was legitimate and that their legal ownership of the work was exclusive. In addition, it is now normal practice for most institutional – and some private - lenders to require their own loan agreement or conditions of loan documentation to serve as the official agreement between lender and borrower. In all cases such agreements are scrutinised to ensure that all issues covering provenance and legitimate ownership have been addressed and that they conform to national and international standards.
- Work on due diligence is assigned to the exhibition curator(s) and the exhibition

organiser(s), who are required to work within the due diligence guidelines (see above) and, where appropriate, to consult scholars and curators in the relevant field, and the Art Loss Register. Responsibility for overseeing due diligence procedures lies with the Exhibitions Secretary.

The Royal Academy does not proceed with a loan should any information surrounding its provenance prove to be inconclusive.

OPPORTUNISM, UNCERTAINTY, AND RELATIONAL CONTRACTING – ANTITRUST IN THE FILM INDUSTRY

*Ryan M. Riegg**

In 1938, the Department of Justice (“DOJ”) brought charges against the eight major Hollywood movie Studios for violating the Sherman antitrust act.¹ According to the DOJ, the Studios were a cartel engaged in a practice of bid-rigging, where movies would go exclusively to those theaters that the Studios controlled in order to eliminate the small, independent theaters and exhibitors that they did not. The allegation was that Studios controlled theaters through a variety of implicit and explicit agreements that involved the establishment of either 1) long-term, or multi-transaction, contracts, whereby Studios would “force” a given theater to take movies it did not want in order to get the movies that it did want or 2) vertically integrative contracts, whereby the Studio owned an interest in the theater. By the end of the litigation, known as *Paramount*, in 1948, three new legal rules governed the industry: (i) no direct or indirect intervention in admission price setting by producers and distributors; (ii) no licensing negotiations except on “theater-by-theater, movie-by-movie” basis; and (iii) no vertical integration between the Studios and exhibitors.²

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¹ *United States v. Paramount Pictures*, 334 U.S. 131, 140 (1948).

² While *Paramount* itself was a Federal case, these rules stated here are in fact a function of a variety of judicial decrees, consent decrees, state statutes, and state and Federal common law that emerged during and out of the litigation. However, this interpretation of the body of law, emerging out of *Paramount*, as establishing these three legal rules is widely accepted. See ARTHUR S. DE VANY, *HOLLYWOOD ECONOMICS* (2004); Kraig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 *HOFSTRA L. REV.* 505 (1992); F. Andrew Hanssen, *The Block Booking of Films Reexamined*, 43 *J.L. & ECON.* 395 (2000).

In the period prior to *Paramount* (1915-1938), movie budgets were fairly small and “blockbusters” (i.e. movies with huge budgets) were relatively rare. Even then, the budget for a “blockbuster” sized movie was a fraction of what it is now. In today’s dollars, a big-budget movie in 1938 would have cost less than \$10 million – less than a one-twentieth of what some blockbusters cost to produce now.

The period immediately after *Paramount* marked the beginning of the type of truly blockbuster-sized budgets. Specifically, the 1950’s saw the beginning of the “historical epic”, huge-budget productions based on historical events that the Studios produced despite declining demand for movies.³ The movies continued to be produced until *Cleopatra* (1963), whose \$300 million production cost (adjusted for inflation), nearly bankrupted its Studio when it became the most expensive box-office flop of all time.⁴ The brief period that followed, frequently referred to as “New Hollywood” (1964-1970), was characterized by minimal domestic movie production – particularly by the Studios – and lowest reported box-office revenues of all time.⁵ Consequently, the market became dominated by independently produced movies and movies imported from Europe. The Studios, facing ever-dwindling revenues, began to decline rapidly and two collapsed.⁶ In short, the Studios seemed to be in danger of disappearing. And then something odd happened. Even though the demand for movies was the lowest it had ever been, a man named Stanley Durwood (the founder of AMC) started building giant multiplexes. A few years

³ KRISTIN THOMPSON & DAVID BORDWELL, *FILM HISTORY*, 373-405 (1994).

⁴ Christopher Null, *Cleopatra (1963)*, *FILMCRTIC.COM* (2001), [http://www.filmcritic.com/misc/emporium.nsf/reviews/Cleopatra-\(1963\)](http://www.filmcritic.com/misc/emporium.nsf/reviews/Cleopatra-(1963)); *See also* GERALD MAST & BRUCE F. KAWIN, *A SHORT HISTORY OF THE MOVIES* 287 (7th ed., Allyn & Bacon 1999).

⁵ THOMPSON & BORDWELL, *supra* note 3.

⁶ *Id.*

later, Studios, suddenly bolstered by financing from large diversified corporations such as Seagrams, started producing movies with huge budgets again – movies that became known in the industry as “blockbusters”.

Film historians frequently attribute the comeback of the Studios to, what they presume to be, the inherent high profitability of blockbusters. From this perspective, the creation of the multiplex, and the later creation of the blockbuster, were two happy coincidences, which, when combined, provided a new viewing experience for the public that they could not get from TV and increased the industry’s revenues.⁷

This paper advances the theory that neither the exponential increase in movie budgets, nor the creation of the multiplex, was a coincidence. Rather, this paper will argue that the production of blockbusters and the multiplexes were both consequences of the rules established under *Paramount*. Specifically, this paper will assert that, by effectively blocking all traditional contractual means of dealing with the extreme uncertainty inherent in the Film industry, the creation of blockbusters and multiplexes became the means by which Studios and Major Exhibitors (MEs) were able to survive. In short, the continuous production of multiplexes and blockbusters between the Studios and MEs generated what can be understood as a “relational contract” between the two that protected their interests and ensured the survival of both.

In order to support these claims, this paper will establish 1) that production of blockbusters by Studios is irrational from a traditional economic perspective based on a risk-reward model of production costs and revenues, 2) the extreme uncertainty of the film produces substantial risks of opportunism for Studios by exhibitors, 3) the *Paramount* rules effectively

⁷ *Id.* See also MAST & KAWIN, *supra* note 4.

eliminated the ability of the Studios and exhibitors to constrain that risk of opportunism through traditional “spot” contracts. Consequently, this paper will argue that by building extraordinarily expensive multiplexes that are designed – almost exclusively – for the exhibition of Blockbusters, the MEs provide Studios an assurance that they will not behave opportunistically by placing themselves in a position of extreme financial vulnerability and dependence on the Studios. Specifically, by placing themselves in a position of financial vulnerability towards the Studios, the MEs provide a guarantee that they will not, essentially, steal from the Studios by underreporting their film receipts. Studios, in turn, continue to produce blockbusters in order to maintain this relational contract. In other words, the value of the blockbuster is more than a product of production costs and ticket revenues – the real value of the blockbuster for Studios lays in its ability to constrain exhibitor-opportunism, lower monitoring costs, and allow efficient contracting over film distribution rights to occur between the Studios and the MEs. Consequently, because the purpose of the blockbuster and multiplex is not to constrain opportunism in a single transaction, but throughout the ongoing relationship itself, the “contract” established between the Studios and MEs is relational in nature.

I. THE ECONOMICS OF THE FILM INDUSTRY

Hollywood is an industry driven by its hits. On average, less than five percent of films produced a year account for more than 80% of the Industry’s total annual revenue and the revenue produced by a single hit makes the revenue from most other movies meaningless in comparison.⁸

⁸ DE VANY, *supra* note 2, at 207. *See also id.* 207-66.

When it comes to knowing whether a particular movie will be a hit or a flop before it is released, as the screenwriter William Goldman once famously said; “Nobody knows anything.” In other words, there appears to be no magic formula that has been developed by film executives for determining which types of movies will become hits and which will become flops. Or, at least if there is, it certainly is not in the hands of any Studio; every Studio has produced its fair share of bombs and passed on producing movies that later turned out to be giant hits. In short, every movie is its own unique product and cannot meaningfully be compared to any other movie. Thus, when it comes to predicting the future performance of any *individual* movie, the Film industry is a world of uncertainty.

As will be discussed in greater depth, the degree and type of uncertainty involved in the Film industry increases the probability of exhibitor opportunism and creates a central contracting problem in the formation of distribution contracts. As will be demonstrated, blockbusters provide Studios and MEs a mechanism for eliminating this problem. However, before that assertion can be proven, many of the traditional explanations for why Studios produce blockbusters must first be dispelled.

II. THE PUZZLE OF THE BLOCKBUSTER

While the future of any individual or specific movie may always be highly uncertain, this uncertainty does not extend to groups of movies or to the movie industry as a whole.

Subsequently, Studios can reduce their significant financial risks by increasing the number of movies they invest in. In short, if we imagine that the movie-market is similar to the stock market, in that both deal with goods whose futures are impossible to predict *individually*, fewer movies means more “unsystematic” risk for Studios.

Given this, many scholars have asked why the Studios produce so many more big-budget movies (i.e. blockbusters) than mid- or low-budget films when doing so means producing fewer movies total and thus increases risk in an already high-risk industry.⁹ In other words, considering that 1) no one knows in advance whether a movie will be a hit and 2) a big-budget flop can bankrupt a Studio, it would seem to make sense for each Studio to try and make as many smaller-budget movies as possible instead of tying the majority of their resources up in a handful of blockbusters.

One ostensible explanation for this behavior is that, by packing a prospective movie with stars, expensive special effects, or a large advertising budget, Studios are able to increase the chances that a given movie will become a hit. However, numerous empirical studies into movie revenues have demonstrated that, in fact, having a large budget does not determine whether a movie will ultimately become the type of hit which dominates the industry.¹⁰

Consequently, as extensive empirical evidence indicates, mid- and low-budget movies are just as likely to become “hits” as blockbusters.¹¹ For instance, the first Star Wars movie, which became one of the largest grossing movies of all time, only cost 11 million to produce (a relatively modest sum even by 1970’s standards). The same story applies to Jaws (7 million) the

⁹ See *id.* See also S. Abraham Ravid, *Film Production in the Digital Age*, in A CONCISE HANDBOOK OF MOVIE INDUSTRY ECONOMICS 32 (Charles C. Moul ed., 2005); Harold L. Vogel, *Movie Industry Accounting*, in *supra*, at 59; Charles C. Moul & Steven M. Shugan, *Theatrical Release and Launching of Motion Pictures*, in *supra*, at 80; Jehoshua Eliashberg, *The Film Exhibition Business: Critical Issues, Practice and Research*, in *supra*, at 138.

¹⁰ “You get a similar pattern if you slice up movies according to their production cost. If you group movies into low-, medium- and high-budget categories you still get a Pareto distribution of revenues in each category with the same tail weight. The minimum and average revenues change a bit, but the highest revenues do not. In each category, the average revenue is not the typical outcome; there is no typical outcome because they diverge over all possibilities. The variance of revenue outcomes is [figuratively] infinite in every budget category” DE VANY, *supra* note 2, at 263. Also, “[b]udgets, screens and stars lift the least revenue a film might earn, but have little effect on the most revenue it might earn. In other words, they place a prop under the revenue a film might earn, but do not have much influence on whether it will be a [hit] or not.” *Id.* 69; see also *id.* at 70-98, 208-210.

¹¹ *Id.*

Exorcist and many of the biggest hits of all time. In short, a big-budget has little effect on whether a movie becomes the type of hit that dominates the industry.¹²

A second traditional explanation for producing blockbusters is that, because these movies typically have higher opening weekends, the production of big budget movies is rational as it helps guarantee a certain minimum level of revenue for the Studios who produce them. However, while this explanation would have a great deal of merit in almost any other industry, it disintegrates when tested against the extreme economics of the movie industry.

Unlike most industries – where increasing the minimum revenue a product could expect to make would matter a great deal – the movie industry is a “winner-takes all” industry where 80% of the industry’s total revenue is generated by less than 5% of its product. Thus, hits are so critical to a Studio’s success that the possibility of a movie being a hit dwarfs the assurance of minimal initial revenue in economic significance. Simply put, by dedicating its limited resources towards the production of blockbusters, a Studio will produce fewer movies and, consequently, reduce its number of potential hits. When this opportunity cost is factored in, the higher minimum revenues that a Studio stands to gain from the production of blockbusters becomes

¹² *Id.*

irrelevant. In short, when a single hit can make half-a-billion dollars at the box-office, the only thing that matters is a Studio's chances of having one.¹³

Moreover, even if blockbusters have a higher degree of minimum revenue than lower budget movies – Studios should choose to produce mid- and low-budget movies to blockbusters due to the latter's higher downside risk. In the film industry, not only do hits exist – so do bombs. While blockbusters may, on average, make a higher degree of minimum revenue than low-budget movies – fewer movies still means higher unsystematic risk for Studios. Even if a Studio is somehow “risk averse,” the choice to produce blockbusters instead of low- or mid-budget movies should still be contrary to the Studio's preference structure. To wit, every Studio is likely to make a string of two bombs over a long enough period of time. And just as “nobody knows” in advance what will be a hit, no one knows which movies will end up becoming bombs either. Given this, if a Studio only produces small movies that cost, say, \$10 million each, having two flops in a row isn't likely to be problematic as the total loss to the Studio would be relatively small. However, if a Studio only produces blockbusters, which cost \$150 million each, two

¹³ To illustrate, imagine that Studio A and Studio B represent the entirety of the movie industry. This year, both Studio A and B have \$50 to make movies. Studio A only makes blockbusters. Blockbusters cost \$2 to make, but always make \$3 at the box office. Thus, Studio A makes 25 movies, from which it is guaranteed to make at least \$75, or a \$25 profit.

In comparison, Studio B only makes low-budget “indie” movies, which only cost \$1 to make, but are also only guaranteed to make \$1 at the box office. Thus, Studio B makes 50 movies, from which it is guaranteed to make at least \$50—or no profit at all. However, five percent of movies are hits; i.e. there is a .05 chance of any given movie being a hit. Thus, it can be expected that on average, 5% of the 75 movies produced by Studio A and B, 3.75 movies total, will be hits. Therefore, each hit will make approximately \$130 on average.

When the revenue from these hits are calculated in, Studio A's decision to only make blockbusters turns out to be a terrible idea. Each movie, regardless of its budget, has the same chance of being hit. However, Studio B has made twice as many movies as Studio A. Thus, Studio B will generally have more hits than Studio A. The expected revenue of Studio A can be calculated as follows: for each blockbuster that Studio A makes there is a 95% chance that it will make \$3 and a 5% chance that it will make \$130. Putting these together, the expected revenue from a single blockbuster is $.95 \times 3 + .05 \times 130 = \9.35 per blockbuster. Studio A has made 25 blockbusters so their total expected revenue is \$233.75. Studio A's total costs are \$50 so their total expected profit is \$183.75.

On the other hand, the expected value of an indie film is $.95 \times 1 + .05 \times 130 = \7.45 per indie. Studio B has made 50 indies, so their total expected revenue is \$372.50, and their expected profits are \$322.50—in short, their expected profit is nearly 76% higher than Studio A's.

This shows that, from expected profit perspective, producing indies is a vastly more profitable strategy on average—even when the minimum revenues from blockbusters are three times that of indie movies.

bombs in a row could easily lead to bankruptcy. And, indeed, Studios such as RCA and UA are excellent historical examples of Studios that bankrupted when several of their blockbusters bombed at the box office. In short, in a world in which bombs exist – incidentally, in greater frequency than hits¹⁴ – reducing the number of movies in order to generate higher minimum returns would always seem to be a bad idea.

Given these facts, the rational choice for most Studios would be to dedicate their resources towards the production of mid- and low-budget movies, instead of blockbusters, in order to increase the likelihood of having a hit and reduce the risk of having a bomb. However, this is the exact opposite of what actually happens. Hollywood produces far more blockbusters than what would seem to be economically sensible. Why does this occur? Most scholars have previously assumed that it is just irrationality on the part of studios.¹⁵ However, there may be a third possible explanation for why Studios produce so many blockbusters that may be deduced by looking at who these blockbusters benefit most directly.

III. THE MAJOR EXHIBITORS

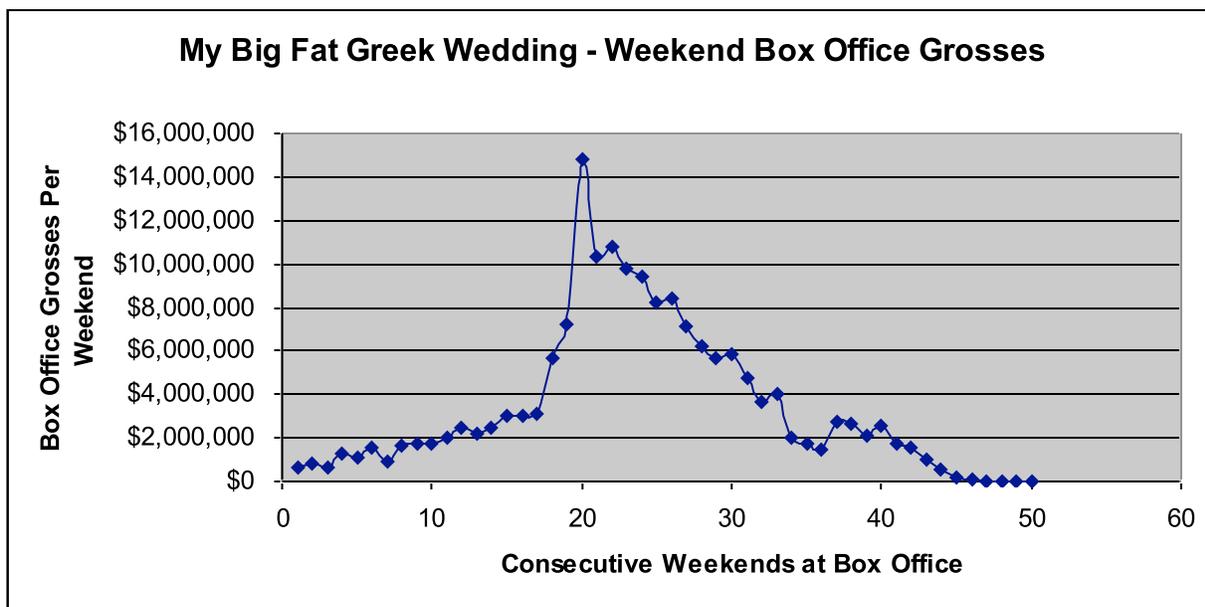
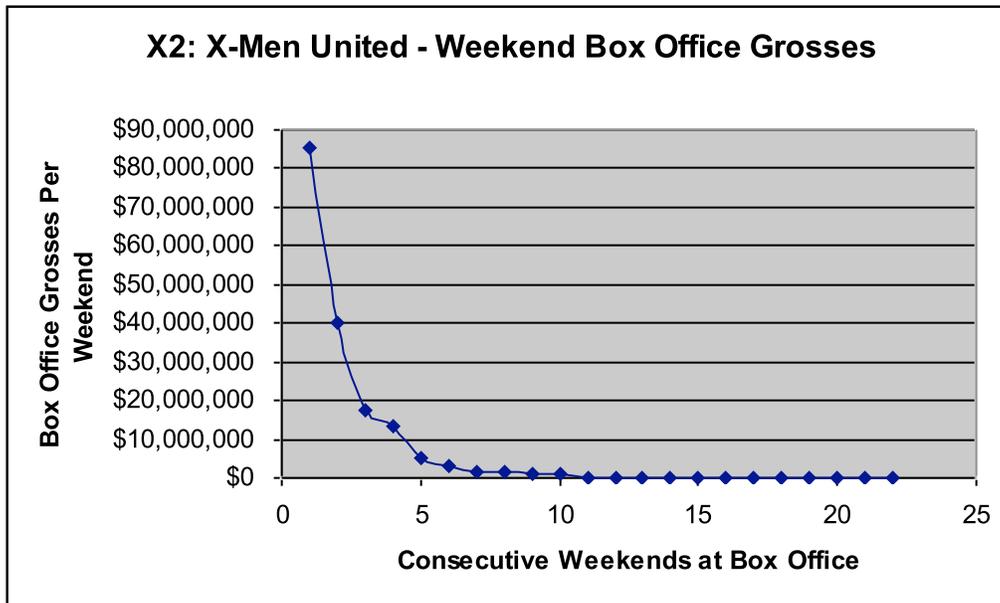
From the perspective of the Studio, a hit is a hit – regardless of whether it is a low-budget movie or a blockbuster. From a revenue perspective, the only difference between a blockbuster that becomes a hit, and a low- or mid-budget movie that becomes a hit, is that blockbusters start off with initially high grosses, while mid- and low-budget movies must grow over time.¹⁶ The graphs below provide an illustration by comparing two movies that were released within a year

¹⁴ “78 percent of movies lose money.” DE VANY, *supra* note 2, at 214; *see generally*, HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS (2d ed. 1990).

¹⁵ *Id.*

¹⁶ DE VANY, *supra* note 2, at 7-63, 123-138.

of each other and had relatively similar domestic box office grosses: *X2: X-Men United*¹⁷ and *My Big Fat Greek Wedding*.¹⁸



¹⁷ Box Office/Business for X2, <http://www.imdb.com/title/tt0290334/business> (last visited May 22, 2009).

¹⁸ Box Office/Business for My Big Fat Greek Wedding, <http://www.imdb.com/title/tt0259446/business> (last visited May 22, 2009).

With a \$110 million production budget, *X2* is the typical blockbuster. Its highest weekend box office gross is on opening weekend with grosses falling substantially afterwards until, by the 25th week, the movie “plays out” and is removed from the theaters. On the other hand, *My Big Fat Greek Wedding*, with a production budget of less than \$5 million, grows over time and does not play out until its 50th consecutive week.

Regardless of which type of revenue curve is followed, the total domestic box-office from either type of hit is relatively the same.¹⁹ Specifically, *X2* grossed approximately \$215 million domestically and *My Big Fat Greek Wedding* grossed approximately \$240 million domestically. In other words, a hit is a hit regardless of how it becomes one. Given this, from the perspective of the Studio, it should matter relatively little that the majority of a blockbuster’s gains are made early during the first five weeks of its run and that a mid- or low-budget movie makes its gains later on. Considering the short, frequently 6-week,²⁰ life-spans of most movies, any value to the Studio from the time-value of money from having a blockbuster-hit is likely to be overshadowed by the higher profits from having low-budget-hit, which – due to the differences in cost – generate far higher per-dollar returns on investment.²¹

However, that isn’t to say that producing blockbusters over low-budget movies does not generate direct economic benefits, it does, but instead of benefiting the Studio, the production of blockbusters would appear to most directly benefit a specific class of exhibitors who specialize

¹⁹ DE VANY, *supra* note 2, at 7-63, 123-138..

²⁰ *Id.*

²¹ For instance, even though the *Polar Express* and the *Blair Witch Project* were both hits with relatively similar worldwide grosses, *Blair Witch*’s return on investment is nearly 5000 times greater than that of the *Polar Express*. The *Polar Express* (2004), <http://www.boxofficemojo.com/movies/?page=main&id=polarexpress.htm> (last visited May 17, 2009); The *Blair Witch Project* (1999), <http://www.boxofficemojo.com/movies/?page=main&id=blairwitchproject.htm> (last visited May 17, 2009).

in showing these movies during their initial run. Specifically, the most direct beneficiary from the production of blockbusters are the MEs.

Unlike independent exhibitors, who typically own only one or two small theaters at most, the giant-IMAX-&-THX-surround-sound-stadium-style theaters of the MEs are designed for blockbusters and the large crowds they attract. Because the independent exhibitors would not have the capacity to hold the opening weekend crowds for big-budget blockbusters, they would be unable to bid as highly for them. Therefore, by shifting their production mix away from making more numerous smaller budget movies to the big-budget blockbuster for the last several decades, the Studios have pushed independent exhibitors out of the market. Thus, the MEs have gained a great deal from the further production of blockbusters by the Studios.

In order to fully explain the degree to which MEs benefit from the production of blockbusters, it is necessary to explain a few key characteristics of the exhibition market. First, most exhibitors do not make most of their money from ticket-sales. Rather, most exhibitors rely on concession-sales as their primary source of revenue. Exhibitors have an interest in booking movies that attract large crowds, as larger crowds means higher concession sales, but they are not dependant on ticket-sales, per se, as a vital source of revenue.

Second, *Paramount* limits exclusive licensing by Studios to theaters for the first six weeks of a movie's run.²² However, most non-hits do not last much longer than six-weeks.

Because movies become hits based on word-of-mouth, it takes time for a movie to reveal itself as

²² While no bright-line limitation on exclusive licensing exists within Federal common law, state statutes do provide such explicit limitations on exclusive licensing. Section 203-7 of the Pennsylvania Feature Motion Picture Fair Business Practices Law states: "No license agreement shall be entered into between distributor and exhibitor to grant an exclusive first-run or an exclusive multiple first-run for more than 42 days without provision to expand the run to second run or subsequent run theaters." 73 PA. CONS. STAT. § 203-7 (1999). Such statutes were unchallenged until November of 1999, when the 3rd Circuit declared the statute in violation of Federal copyright law. *Orson, Inc. v. Miramax Film Corp.*, 1999 WL 243617 (3rd Cir. 2000). The effect of this "loosening" of *Paramount's* rules will be discussed further in the Conclusion.

a hit. As most industry analysts point out, movies reveal themselves as hits in weeks five and eight by either growing in size or maintaining demand. Blockbusters reveal themselves as hits by maintaining a high-level of demand commensurate with their first few opening weeks. Low-budget movies reveal themselves as hits by growing over time.²³

Consequently, when it comes to blockbusters, MEs are relatively unconstrained in being able to force independent exhibitors from the market. For instance, a given Major Exhibitor (ME) could, as they frequently do, offer 100% of ticket revenue to a Studio in exchange for exclusive licensing for a movie during its first five weeks as the exhibitor will still be able to run a profit from concession-sales. The ME will be willing to do this for a blockbuster since the ME can be relatively assured that, until word-of-mouth about the movie gets out, the blockbuster will have relatively high demand for those five weeks. In short, there is no real downside risk facing the ME. In week five, when the exclusive license expires, the blockbuster will either demonstrate itself as a hit, by maintaining a relatively high level of demand, or as a proverbial “dud” by having its demand begin to rapidly decline. If the blockbuster reveals itself as a potential hit, no other exhibitor is likely to be willing to bid for it as, considering that most MEs have designed their theaters to be large enough to accommodate the typical blockbuster’s opening weekend, demand is likely to have already been fully met. Consequently, independent exhibitors will only stand to receive those blockbusters that turn out to be duds.

While *Paramount’s* allowance of exclusive licenses to be granted for a movie’s first six-weeks creates a substantial opportunity for MEs to force independent exhibitors from the market in regards to blockbusters, it does not provide this same opportunity in regards to mid- and low-

²³ See generally DE VANY, *supra* note 2, at 7-63, 123-38.

budget movies. Because mid- and low-budget movies grow over time, it would matter little if an ME received an exclusive license to show a low-budget movie during its first six-weeks as that is when the movie's potential revenue is likely to be lowest.

Thus, while MEs are relatively unconstrained in their ability to use the bidding process to push their competition out of the market when it comes to blockbusters, mid- and low-budget movies are unlikely to provide them the same opportunity. As stated previously, only the MEs have theaters capable of accommodating the high demand that accompanies a blockbuster's opening weekend. Thus, until recently (for reasons that will be dealt with in the Conclusion), the fact that the Studios produced so many blockbusters greatly benefited the MEs and allowed them to push out the vast majority of independent exhibitors from the market.²⁴ However, these theaters also cost a great deal to build. Had the Studios instead decided to produce low-budget movies, then the MEs would have been the ones pushed out of business. In short, when the MEs started building the large multiplexes that have come to dominate the industry, they were placing themselves in a position of extreme vulnerability. Especially considering that, as pointed out earlier in this article's discussion of the economics of the film industry, in terms of gross revenue generated, it would appear to make more sense for Studios to make mid- and low-budget movies and never make blockbusters. Thus, the question that must be asked is what benefit does producing blockbusters provide the Studios?

²⁴ Vivien Kellerman, *Fade Out: Independent Cinemas Declining*, N.Y. TIMES, Dec. 29, 1991, at 12LI; *see also*, Kraig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 530-35 (1992).

IV. OPPORTUNISM AND UNCERTAINTY

While the precise definition of uncertainty is an issue of debate, most economists separate the ideas of uncertainty and risk based on the degree to which mathematical probabilities can be assigned to a given situation:

"By 'uncertain' knowledge, let me explain, I do not mean merely to distinguish what is known for certain from what is only probable. The game of roulette is not subject, in this sense, to uncertainty.... The sense in which I am using the term is that in which the prospect of a European war is uncertain, or the price of copper and the rate of interest twenty years hence...About these matters there is no scientific basis on which to form any calculable probability whatever. We simply do not know." –J.M. Keynes²⁵

As a construct, uncertainty is typically separated into issues of volatility and ambiguity. Volatility refers to the rate and unpredictability of change in the environmental state over time. Ambiguity refers to barriers to the accurate perception of conditions and events. Ambiguity differs fundamentally from volatility in that the latter is resolved over time once a change occurs (i.e. volatility creates uncertainty about what will occur but not about what has occurred), whereas the former presents non-trivial issues of measurement that are not resolved simply by the passage of time.²⁶

Uncertainty is important to understand due to its relationship with opportunism. In his seminal work "Market and Hierarchies" (1975), Oliver Williamson first applied the word "opportunism" to its specialized context in Transaction Cost Economics ("TCE"). In that work, Williamson states that: "Opportunism extends the conventional assumption that economic agents are guided by considerations of self-interest to make allowance for *strategic* behavior. This

²⁵ J.M. Keynes, *The General Theory of Employment*, 51 Q.J. ECON. 209, 213-14 (1937).

²⁶ Stephen J. Carson et al., *Uncertainty, Opportunism and Governance: The Effects of Volatility and Ambiguity on Formal and Relational Contracting*, 49 ACAD. MGMT. J. 1058, 1058-69 (2006).

involves self-interest seeking with guile and has profound implications for choosing between alternative contractual relationships.”²⁷ Opportunism can thus be defined as encompassing a range of behaviors, including non-cooperative strategic bargaining, shirking, and failing to honor obligations or share information.²⁸

As Williamson points out, opportunism is driven by a number of specific factors, chief among these being transaction specific assets and, more importantly for the purposes of this paper, uncertainty.²⁹

According to Williamson, volatility increases opportunism primarily by requiring renegotiation of current agreements to avoid maladaptation to the external environment.³⁰ Renegotiations among parties prone to opportunism bring an inherent degree of confrontation and non-cooperative bargaining and a greater incentive for non-cooperative behavior. Parties invested in specific assets prior to renegotiations are at a disadvantage due to their desire to maintain the relationship and are thus vulnerable to more extensive opportunism.³¹

In comparison, ambiguity in the perception of partner behavior reduces sanctions against opportunistic behavior on an expected basis since some opportunism will not be perceived and sanctioned, resulting in weaker disincentives against opportunism. In short, the presence of

²⁷ OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* 234, 255 (1975).

²⁸ *Id.*; see also Carson et al., *supra* note 26.

²⁹ While specific assets play an essential role in generating opportunism, in the interests of clarity and concision, I have decided to avoid addressing the issue of specific assets here. Suffice to say that movies become specific assets once shown by an exhibitor. At that point, the cost for distributors to take away the movie and go through the contracting process with another exhibitor is unlikely, as the cost of doing so would be extremely high. Simply put, most movies don't play for very long, the contracting process takes time as movie contracts are created on a screen-specific basis, and how a movie performs in a given theater can have as much to do with the properties of the theater, including the demographics of specific neighborhood that the theater is in, as it does with the movie itself.

³⁰ WILLIAMSON, *supra* note 27.

³¹ Carson et al., *supra* note 26.

ambiguity gives noncooperative actors the ability to shirk, cheat, or otherwise engage in opportunism without being caught.³²

While ambiguity and volatility can serve as useful constructs in demonstrating how different situations of uncertainty can lead to different types of opportunism, from a deeper, or more general, economic perspective; uncertainty is uncertainty is uncertainty – and uncertainty is simply an issue of time and information costs.³³ Simply put, as time and information costs increase, risk transforms into uncertainty as the cost of assigning probabilities becomes prohibitively high. Thus, so long as actors to an exchange are unable to obtain relevant information to produce a rational choice about a set of future events, then they will operate under uncertainty and, as Williamson and other TCE and Bounded Rationality theorists have demonstrated, opportunism will increase as a result.

Assuming that Williamson's model is accurate, and that opportunism can be attributed to the presence of uncertainty and, therefore, information costs, then it is logical to presume that formal contracting methods for constraining opportunism do so by lowering the cost of essential information (i.e. information that is critical for the assignment of meaningful probabilities) for the party at risk of exploitation.³⁴ For instance, vertical integration, the focus of Williamson's groundbreaking work, reduces information costs by lowering the barriers to information between firms by placing them into a single integrated structure. Similarly, contingent contracting delays finalizing terms into the future when the cost of obtaining essential information for finalizing

³² *Id.*

³³ See in general, G.L.S. SHACKLE, *DECISION, ORDER AND TIME IN HUMAN AFFAIRS* (1961).

³⁴ And, in fact, in the context of most TCE literature, the lowering of information costs is the central purpose of all contracting. Similarly, Williamson's major assertion in *Markets and Hierarchies* is that the desire to reduce uncertainty is the primary cause behind the creation of the firm.

those terms has dropped. Both of these options promote efficient exchange, as both operate to decrease uncertainty and, thus, reduce opportunism.

Unlike formal contracting, which involves discrete, self-contained, or “spot” exchanges and can be seen as reducing opportunism by decreasing information costs, relational contracting emphasizes the embeddedness of individual transactions within a larger system of economic and social interactions which create safeguards against opportunism by generating externalities that “spillover” from one exchange to another.³⁵ Under a relational contracting model, exchanges are therefore purposefully left incomplete, thereby transforming what would be a series of discrete transactions into a “repeat-player” relationship that is frequently indefinite, or infinite, in length. So long as future gains from this relationship are greater than the gains either party could expect from acting opportunistically in the present, then potential noncooperators will have an incentive to act cooperatively and not “defect”.

From the perspective of Transaction Cost Economics (“TCE”), the question of which approach is more efficient is simply a question of relative cost. As this paper asserts, when formal contracting cannot produce efficient results because the cost of obtaining essential information is prohibitively high, then relational contracting can act as an effective transactional substitute. As will be demonstrated, when rational individuals are unable to access essential information, then they simply will not engage in formal contracting as a means of exchange. From a behavioral economic perspective, this can be attributed to the phenomenon of “ambiguity aversion”. However, from a TCE perspective, the preference for relational contracting over

³⁵ Carson et al., *supra* note 26, 1058-61; *see generally*, Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978).

formal contracting in the face of uncertainty can be seen as a rational response to the danger of opportunism. George Akerlof's work on the used-car market is illustrative.³⁶

In his study, "The Market for Lemons," Akerlof points out that because the cost of information about a used car's quality is prohibitively high for buyers, they will only be willing to pay, at most, the average price for a used car in the formal market. Consequently, sellers of high-quality cars will cease to offer their cars through the formal market, the average will drop, buyers will discount further and the market will cycle downwards further and further as more and more individuals drop out of the market over time.³⁷ While Akerlof's analysis focuses on information asymmetry, i.e. the degree of difference in information, it is also a study of uncertainty, albeit unilateral in nature, in that buyers are faced with a high degree of both ambiguity and volatility when purchasing a used-car on the formal market and that they incorporate the effects of this uncertainty in determining what they are willing to pay.

Individuals faced with uncertainty in an exchange must rationally discount for the possibility of opportunism; in the case of used-cars, buyers will discount for the possibility that the car will turn out to be a "lemon". The degree of discounting involved depends heavily on the degree of uncertainty involved in the exchange. Simply put, the less assured an individual can be of a good's quality, the less the individual is likely be willing to pay for that good. The question of how assured an individual can be of a good's quality is, ultimately, a question of uncertainty. Goods with a high-degree of variance in terms of value (i.e. goods which are volatile) and resistant to inspection by prospective buyers (i.e. goods which are ambiguous), such as used cars,

³⁶ George Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

³⁷ *Id.*

must be discounted more than goods which are not. This is because the degree of uncertainty is greater and, thus, so is the possibility of opportunism.

To illustrate this point, imagine that that a “good” used-car is worth \$1001 dollars and a lemon is worth \$1. The incentive for a dealer to act opportunistically by misrepresenting a lemon as a good car is \$1000, because the degree of variance is \$1000. If the degree of variance is lower, i.e. \$1 dollar for lemons and \$2 for good used-cars, then the incentive to the dealer to act opportunistically is significantly smaller as the dealer will stand to gain less from an act of misrepresentation.

In this example, the increase in product variance increases volatility. Consequently, the incentive for opportunism is also increased. However, increasing ambiguity can also increase the incentive for opportunism. For instance, if it were extremely costly for buyers to detect misrepresentation ex post, then a further increase in the incentive for a seller to behave opportunistically would be the result.

While Akerlof’s study is frequently cited as a study of markets “racing to the bottom,” it can also be seen as a study of how uncertainty affects transactional choices. To wit, even though high-quality used-cars are pushed out of the formal market, those cars still get “sold” – albeit to relatives and friends or handed down to children. The exchange of goods still takes place – all that has changed is the means of contracting. In short, what has changed is that used-cars end up being allocated through relational, rather than formal, contracts. The reason for this shift can be understood as a function of the degree to which each type of contract requires the elimination of uncertainty in order to prevent opportunism, weighed against the cost of eliminating that uncertainty. In other words, if the cost of eliminating uncertainty is high, because the cost of

essential information is high, then formal contracts will be less efficient than relational contracts in effecting transactions.

In sum, before a discrete, formal exchange can take place, parties to an exchange will need a certain level of information in order to protect against opportunism. Formal contracting mechanisms designed to reduce opportunism can therefore be seen as lowering the cost of information in order to promote discrete exchange. However, when information costs cannot be lowered efficiently – i.e. when uncertainty cannot be reduced – relational contracting can be used as a substitute for formal contracts. Relational contracts do not require the same degree of information to be held by the parties to an exchange, because no exchange is discrete. Thus, under a relational contract, the danger of opportunism is decreased, since neither party will wish to jeopardize their future gains by acting uncooperatively, regardless of the relative presence of uncertainty.

The relative gains and weakness of each contractual model, and their relationship to opportunism and uncertainty, are important to understand, as they will together provide the conceptual center of this paper's explanation for presence of blockbusters in the Film industry.

V. UNCERTAINTY AND OPPORTUNISM IN THE FILM INDUSTRY

Much like buying and selling a used-car on a “car-by-car” basis, when it comes to contracting between Studios and exhibitors on a “theater by theater” basis, a high-level of uncertainty is involved that cannot be reduced except at great cost. There are three primary factors which generate this uncertainty: 1) the extreme degree of variance between movies that are “hits” and those that are not, in that movies can make anywhere between \$30 to \$600 million

at the box-office,³⁸ and movie performance can differ vastly depending on the market where the film is being shown; 2) less than five percent of movies become hits, but the box-office revenue from those hits dwarfs the revenue generated by non-hits;³⁹ and 3) the fact that, as the screenwriter William Goldman put it, “nobody knows anything” about what makes a movie a hit or a bomb.⁴⁰ Together, these factors produce both volatility and ambiguity, making formal contracting highly inefficient when compared to relational contracting as a means of exchange.

The high degree of variance between movies produces volatility. Volatility makes it costly, if not impossible, for Studios to engage in the creation of upfront pricing mechanisms on a movie-by-movie basis. Prior to a movie being shown, exhibitors will discount the value of the movie according to the degree of volatility in the market as they will be likely to assume either the worst or most likely possible outcome in regards to the future of that movie. To wit, if there is a 95% chance a movie won't be a hit, then exhibitors will be unlikely to wish to pay much more than the average known revenue for non-hits to obtain the rights to show a prospective movie. However, because of the extreme degree of variance between non-hits and hits, the resulting reservation price of exhibitors is likely to fall well below the average per-movie revenue of the Film industry as a whole. Consequently, if Studios can contract contingently instead, i.e. determine the “price” of a movie once the movie has revealed itself as either a hit or a non-hit, then that result will be preferable for Studios as, on average, the price that Studios receive from exhibitors will be closer to the industry's per movie average (which is relatively high) rather than

³⁸ Lowest box-office gross of all time: “Zyzzyx” at \$30. Dade Hayes, “Zyzzyx” *Earns Lowest All-time Box Office*, VARIETY, Jan. 3, 2007, <http://www.variety.com/article/VR1117956635.html?categoryid=13&cs=1>. Highest domestic gross of all time: TITANIC at 600 million (or 800 million when adjusted for inflation). Titanic, <http://www.boxofficemojo.com/movies/?id=titanic.htm> (last visited May 19, 2009).

³⁹ DE VANY, *supra* note 2, at 207.

⁴⁰ WILLIAM GOLDMAN, ADVENTURES IN THE SCREEN TRADE 39 (1983).

just the per movie average for non-hits (which is extremely low). In short, a Studio will receive a far higher price for the movies it produces if it waits until information about that movie has been revealed to the exhibitor, as the exhibitor will no longer have to discount against the possibility of receiving a “lemon.”

Thus, contingent contracting is the most common method that firms in volatile markets cope with issues of extreme variance through formal contracting. Potentially, vertical integration could also be used. However, vertical integration was barred under Paramount. Thus, contingent contracting would seem to be the rational, or perhaps only, choice for Studios wishing to maximize their profits.

However, even though contingent contracting would be heavily preferable to contracting with an upfront price due to volatility, the exhibition of movies not only involves volatility, it also involves ambiguity, which would appear to make contingent contracting on a formal basis extremely costly for Studios. Because “nobody knows anything” about whether a movie will be a hit or not, and the performance variance between movies is so extreme – both in terms of geographic markets and in general – once a movie has been given to an exhibitor, Studios face substantial ambiguity both in regards to that exhibitor’s behavior and in regards to the film’s performance. Consequently, the risks of opportunism when distribution contracts are formed on a contingent basis are substantially increased. Specifically, exhibitors pay out on their reported receipts, but retain their true receipts. Thus, a substantial incentive exists for exhibitors to act opportunistically and claim, for instance, that a hit movie only performed averagely or that it bombed.

The cost of detecting for this misrepresentation is likely to be extremely high as 95% of all movies do not turn out to be hits, nobody knows what makes a hit or a bomb in the first place, and the possible range of performance could be anywhere between 30 dollars and 600 million dollars. Absent the possibility of vertical integration between Studios and exhibitors, Studios would conceivably have to send an agent to every single screening, at every single theater, for every movie it had distributed, in order to verify theater grosses and prevent this type of opportunistic behavior from occurring – a costly endeavor by any stretch of the imagination.⁴¹

Given this problem of essential information costs, contingent contracts enforced by formal mechanisms are likely to be costly for Studios. Thus, whether a better relational contract can be formed between Studios and exhibitors is a question of what possible mechanisms exist and their relative costs.

VI. PROTECTING AGAINST OPPORTUNISM

All contracts require a means of enforcement to prevent wasted reliance and opportunistic behavior. However, in order for a contract to be enforced by the State, evidence of opportunism must first be observable by the courts according to a given legal standard. Given this, a central contracting problem of the exhibitor-distributor relationship lies in the fact that, because “nobody

⁴¹ One could claim that a Studio could find out that a movie is a hit and detect for opportunism at a given theater by comparing the movie’s performance to its performance at other theaters. However, since every theater has an incentive to act opportunistically—inter-theater comparisons are unlikely to work. Moreover, significant performance variations exist not only on a movie-by-movie basis, but also on a theater-by-theater and market-by-market basis, which, again, prevents inter-theater comparison. To illustrate, it is easy to imagine that *The Passion of the Christ*, or *Fahrenheit 9/11*, both of which were huge hits, would vary considerably in performance depending on whether theater was in a Liberal or Christian-Conservative district. Politics is just one factor that can lead to a high-degree of variation between movies. Family movies obviously do better in districts with more families. Additionally, measures of affluence can have a significant effect on how successful a movie will be at a given theater, as can age, gender, ethnic-makeup, etc. None of these factors are trivial, but it is impossible to know exactly which one will emerge as the dominant factor for any given movie in any given theater. Put another way, because so many factors can have a significant effect on how a movie performs in any given theater, the range of possibilities falls outside of what can be ascertained by Studios at any type of reasonable cost. Thus, uncertainty is generated.

knows anything” about a movie’s potential for success, opportunistic behavior by exhibitors is resistant to observation. Nowhere is this fact better exemplified than in the issue of box-office revenues.

Box office revenues can be directly observed by the exhibitor, but not by the Studio. The theater pays the Studio based on its represented receipts, but retains revenue from its true receipts. Thus, every time a movie is shown in a theater, an opportunity exists for exhibitors to misrepresent their receipts and keep the surplus for themselves. In short, steal from the Studio distributing the film. Monitoring for this type of behavior is costly for Studios, as a film’s performance can vary wildly from theater to theater and a movie’s success is always highly uncertain.⁴² In other words, because every film is a unique product, and Studios therefore lack any historical background about how a film should perform in any given theater, they cannot simply “eyeball” the incoming receipts regarding a movie’s performance to determine whether a theater is underreporting a specific film’s revenue. Courts are no better at being able to observe this behavior since, in order for Courts to be able to take action against an exhibitor for breach of contract or fraud, the Studio must first be able to discover the breach in the first place and then bring sufficient evidence to Court to gain a ruling in their favor. In short, so long as monitoring costs are high for distributors then they are also likely to be high for any third parties who could enforce the transaction (i.e. the Courts). Consequently, in order for Studios and Exhibitors to create *formal* contracts that can be enforced by the State, Studios must develop methods for lowering their monitoring costs over exhibitors to a point at which such enforcement becomes feasible. In short, Studios must lower essential information costs.

⁴² See previous note.

Prior to *Paramount*, one method Studios had for lowering their monitoring costs was through the purchase of ownership interests in theaters. While this was not a complete solution, it did reduce the monitoring costs on Studios as it lowered the barriers to information regarding a theater's true receipts by merging two firms, with otherwise contrary incentives, into a single integrated structure. Consequently, by becoming co-owners in theaters, monitoring became feasible for Studios and, thus, so did enforcement of their contracts through the courts. However, due to the "no vertical integration" rule under *Paramount*, the Studios were barred from being able to purchase ownership interests in theaters and, thus, limited in the type of agreements they could form.

That said, not all agreements require the degree of monitoring typically involved with direct enforcement by the State. When behavior is not easily observable to third parties, parties to an exchange may devise methods to prevent opportunism that does not require the same level of monitoring that a contract relying exclusively on enforcement by the State would. In short, in the absence of easily observable opportunistic behavior, parties must devise methods by which their contracts are able to enforce themselves.

As noted by a number of scholars, there are a number of ways that contracts can be enforced without relying on third-party observation or enforcement. Some involve formal mechanisms (i.e. upfront pricing), which allow for discrete transactions to take place. Some involve relational mechanisms, whereby the means of enforcement spans several transactions at once. However, as addressed previously, in order to be efficient, all formal contracting mechanisms require a degree of certainty be created, while the informational requirements involved with relational contracts are likely to be considerably lower. Consequently, as will be

demonstrated, because the distribution of movies involves ambiguity and volatility, formal mechanisms are unlikely to be efficient when weighed against the limitations established by *Paramount*.

Formal Contracting

Under a formal contracting model, one common method that buyers and sellers use in other industries ensure contractual reliance without relying on the State is by pricing the risk of non-performance into their exchange – which effectively removes the problems of monitoring future performance through the payment of an upfront fee. In other words, the costs of monitoring are reduced because compensation is no longer contingent on a series of unobservable future events. In short, upfront pricing removes the issues created by ambiguity. However, upfront pricing cannot reduce issues of volatility. Thus, when it comes to forming a contract for any individual movie, the potential success for any one movie is always so wide-ranging that upfront pricing either becomes highly inefficient, or extremely costly, for Studios and thus unlikely to occur.⁴³

As stated previously, if Studios can contract contingently instead of relying on an ex ante pricing model, i.e. determine the “price” of a movie once the movie has revealed itself as either a hit or a non-hit, then that result will be preferable for Studios as, on average, the price that Studios receive from exhibitors will be closer to the industry’s per movie average (relatively

⁴³ To illustrate this point, imagine that Hollywood produces 52 movies. The non-hits earn between \$140 and \$150 per movie. 95% of all movies (50 movies total) fall into that range. Thus, the two remaining movies each make \$9,000 and \$20,000 respectively—representing the remaining 80% of the industry’s revenue. If we add the revenue for these two hits to the non-hits, then the average revenue of the film industry is \$697 per movie. However, if a Studio attempts to charge \$697 for a given movie, no exhibitor is likely to be willing to purchase it, as there is a 95% chance that the movie will make one-fifth of that amount. Conversely, if the Studio has the option of contracting contingently instead, it would be irrational for Studios to sell a movie for between \$140 and \$150, when the opportunity cost from giving up a potential hit is ten-times that amount; i.e. $(\$20,000 \times .05) + (\$9,000 \times .05) = \$1450$. In short, non-contingent fees would be extremely costly for Studios to employ on the type of a movie-by-movie basis required under *Paramount*.

high) rather than just the per movie average for non-hits (relatively low). Thus, Studios have a great deal to gain from avoiding upfront pricing.

Put another way, even assuming an up-front pricing model were possible; i.e. a potential bargaining zone exists and the costs of negotiating that zone are not prohibitively high; it would still be unlikely that Studios would choose to engage in up-front pricing contracts unless they had no other option. Specifically, it would be unlikely that Studios would wish to enter into such a contract, as doing so would entail the Studio sacrificing most of the potential gains generated by any hit it sells to an exhibitor. A substantial problem for Studios, since hits drive the industry and being able to capture the revenue from a hit is, thus, worth a great deal. In short, at best, Studios would only engage in upfront pricing as a last resort.

The problem with upfront pricing for a single movie is the same problem of formal contracting in the Film industry generally that will continually emerge throughout this paper: while formal contracts can operate under either ambiguity or volatility, they cannot operate efficiently under both – and *Paramount* prevents the reduction of either.

To wit, one either has to know what's going to happen or what did happen, before discrete exchange is possible. Put another way, a rational actor wouldn't give their house key to a complete stranger before leaving to go to work. A rational actor would not do that as the actor has no way of knowing either what the stranger will do in the future (volatility) and it may be quite some time before the actor is able to discover what the stranger did do after that actor left for work (ambiguity). In short, discrete exchange under uncertainty involves trust and rational actors don't trust anyone. Consequently, discrete exchanges do not take place unless there is a presence of one type of information or another that can serve as the basis of the contract. The

problem is that *Paramount*'s restrictions create transactional costs preventing Studios from inexpensively decreasing either form of uncertainty through transactional means. Specifically, when movies can only be sold on a "movie-by-movie" basis, variance (and, thus, volatility) cannot be reduced inexpensively through transactional means. Similarly, when vertical integration is barred, ambiguity cannot be reduced inexpensively through transactional means. Consequently, as will be demonstrated through out this paper, formal contracting cannot provide efficient mechanisms for preventing opportunism.

Relational Contracting:

In deciding whether to act opportunistically, a rational actor will weigh her potential costs (i.e. the magnitude of the penalty if caught, combined with probability of detection), against her potential gains. If the potential gains outweigh the potential costs, then the actor will act opportunistically and "defect". If the converse is true, then the actor will not act opportunistically and cooperation will occur.

Given this, a second common constraint on opportunistic behavior that does not rely on third-party observation is "simple reputation". As a constraint, simple reputation is established when two parties are engaged in a repeat-player relationship, whereby the ability of either party to engage in future dealings with the other is dependant on their present good behavior. Given this, simple reputation will constrain opportunistic behavior in a given transaction, where the value of future transactions put at risk outweighs the possible benefits gained from acting opportunistically in the present. In short, if a future transaction with Party B is worth \$10 to Party A, then Party A will not steal \$5 from Party B in the present if doing so means Party B will not continue to do business with Party A in the future. Thus, so long as parties can form valuable

long-term relationships, whereby each can threaten not to do business with the other in the future, contracts can enforce themselves with far lower monitoring costs than those contracts that depend on enforcement by the State.

The ability of simple reputation to constrain opportunism is primarily a function of raising the potential penalty involved with defection. Simply put, by lengthening the relationship to encompass a larger (though, in the previous example, finite) number of transactions, simple reputation increases the potential cost of acting opportunistically. Simple reputation is, therefore, a relational constraint as the means of enforcement spills-over from one transaction into another. However, simple reputation is not just a synonym for relational contracting, but is, rather, just one of many types of relational mechanisms that can be included as part of a larger relational contract.

While all relational contracts operate under a similar premise of connecting more than one transaction as a means of preventing opportunism, most go further than simple reputation in constraining opportunism by increasing the degree of embeddedness between individuals and spillover between transactions. For instance, most simple relational contracts increase the costs of defection by both increasing the number of transactions involved to an infinite or indefinite quantity and by leaving every transaction in the present relatively incomplete. In cases of bilateral uncertainty, increasing the number of transactions to an infinite or indefinite quantity has the effect of eliminating the “Nash Equilibrium” problem involved with simple reputation.⁴⁴

⁴⁴ Simply put, the Nash Equilibrium problem is that, if the number of transactions is known to the parties, then each party will rationally wish to defect before the other in a case of bilateral uncertainty as to the other’s potential behavior (i.e. neither knows what the other will do). Consequently, because each transaction is dependant on the transaction occurring before it, the point of defection will cycle downwards to the point where no cooperation is possible. See, in general, John Nash, *Equilibrium points in n-person games*, 36(1) PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES: 48. (1950); see also John Nash, *Non-Cooperative Games*, 54(2) THE ANNALS OF MATHEMATICS 286 (1951).

However, taken against the decision-making model presented in this article, which is only concerned with opportunism and uncertainty from the unilateral perspective of a potential defector, the effect of increasing the number of transactions involved to infinite or indefinite number can be more easily understood as simply raising the magnitude of the potential penalty past what it would be if the number of transactions were known or finite in amount.⁴⁵

Leaving contracts relatively incomplete also has the effect increasing the potential cost of opportunism by increasing the magnitude of the potential penalty involved with defection. By transferring a portion of the cooperative surplus created in a present transaction into future transactions, the potential loss from defection is increased on both parties. Simply put, when present contracts are left incomplete, and their gains are never fully realized, part of the cooperative surplus is transferred into the future transactions making defection that much more difficult.⁴⁶

As alluded to previously, regardless of whether the relational mechanism is simple reputation, incomplete contract formation, or increasing the number of transactions to an infinite or indefinite quantity – all primarily deter opportunism by increasing the magnitude of the penalty involved with defection. None of the aforementioned mechanisms increase the cost of opportunism by directly increasing the probability of detection. The reason for this is simply that,

⁴⁵ While, mathematically, the loss facing a potential opportunist should theoretically be infinite (since the number of potentially lost transactions is infinite), when time and “bounded rationality” are taken into account, the expected loss will be finite for most individuals. Simply put, the further into the future the loss is, the more it will be discounted. Consequently, boundedly-rational individuals will simply cease to take into account potential losses occurring in the future past a certain point. Thus, all economic actors will assign some finite value to the loss, even when number of lost future transactions is infinite.

⁴⁶ For instance, suppose X and Y are engaged in a repeat-relationship, in which they have the option of completely contracting. However, the cost of completely contracting each transaction is \$2. They leave their contract incomplete. They have to spend less on transaction costs, so the cost of each transaction is \$1. The gains from each transaction are \$2. So long as the relationship continues, there will be a cooperative surplus of \$1 from every transaction. If the relationship ends, then they will have to complete their transactions ex post, in which case, the cooperative surplus will be reduced to \$0 if not a negative quantity.

while formal contracting mechanisms are heavily reliant on reducing uncertainty by lowering the cost of essential information – such as information regarding the presence of opportunistic behavior – relational mechanisms increase the magnitude of the potential penalty in order to be effective. Thus, relational contracts are likely to be more efficient than formal contracts when, for instance, the cost of increasing the rate of detection is high.

There are a number of relational mechanisms that individuals can use to prevent opportunism. However, all operate to increase the magnitude of the penalty involved with breach as a mode of deterrence. For instance, one commonly cited relational mechanism involves increasing the degree of “connectivity” (i.e. the degree of spillover) between transactions; i.e. not just increasing the number of transactions, but their relative connection to each other. Such a mechanism increases the costs of defection in the same manner that forming incomplete contracts does – by simply transferring a portion of the cooperative surplus from a present transaction into other transactions and into the relationship itself. Other mechanisms involve increasing the degree of connectivity (i.e. the degree of embeddedness) between the parties themselves, which deters opportunism in the same way that increasing the number of transactions involved does; but instead of losing out on future transactions, the potential penalty is the loss of the interpersonal relationships.

Much like formal contractual mechanisms, most relational mechanisms can be stacked on top of one another or linked together in order to prevent opportunism. It is possible, for instance, to increase the degree of embeddedness between individuals on top of establishing a simple relational contract. Additionally, many may also be used in tandem with formal mechanisms,

such as contingent contracting, or on top of formal contracts (as, in fact, most are) in order to further deter potential opportunism.

However, much like formal mechanisms, relational contracting mechanisms have costs and limitations. Simple constraints, i.e. simple relational contracts and simple reputation, are inexpensive to establish. They're also flexible, due to the lack of contractual completeness involved in each transaction, and therefore can accommodate change relatively easily. In contrast, increasing embeddedness between individuals can be difficult and costly (e.g. simply because I want to prevent another individual from possibly exploiting me does not mean I want to be that individual's best friend). Given that these mechanisms have costs, the efficiency of any given relational contract depends heavily on the degree of opportunism being deterred.

As stated previously, the greater the degree of variance involved in an industry, the greater the incentive for exhibitors to act opportunistically. Given this, the extreme variance between movies in the film industry generates powerful incentives for exhibitors to act opportunistically that cannot be eliminated by simple reputation or simple relational contracting. Consequently, simple relational constraints (i.e. simple reputation or simple relational contracts) are unlikely to significantly deter opportunism by exhibitors.

To illustrate, imagine that the film industry is composed of a single Studio and 52 exhibitors. Each year the Studio produces 52 movies – one for each exhibitor – 50 non-hits, which make 146 dollars each, one bomb, which makes \$1 and one hit that makes \$29,001. Whichever exhibitor receives the hit therefore has a \$29,000 incentive to act opportunistically and claim that the movie was a bomb. The penalty for acting opportunistically is never being able to do business with the Studio again in the future. Moreover, for the sake of argument, we

will assume that probability of detection is a 100%, even though, as discussed previously, it is unlikely to be that high.

Regardless of the high probability of detection and potentially “infinite” loss, the exhibitor with the hit is still likely to decide to behave opportunistically and keep the revenue for himself. The reason for this decision is that the average expected revenue for an exhibitor is only \$697 per year $[(50 \text{ movies} \times \$146)/52 + (\$1 + \$2901)/52 = \$697 \text{ per exhibitor per year}]$. At that rate, it will take the exhibitor 41 years to make \$29,000. Therefore, it seems likely that exhibitor with the hit will act opportunistically regardless of the threat of losing the Studio’s business. In short, the incentive to act opportunistically is simply too high when the degree of variance between movies is so extreme.⁴⁷

Obviously, there is a chance that the exhibitor may not act defect. A wide number of factors could be added to either increase or decrease the likelihood of opportunism. However, as an illustration, the point here is that greater the degree of variance, the greater the likelihood of opportunism and, thus, in an industry with variance as extreme as the Film industry’s – the danger of opportunism is substantial.

The incentive created by the industry’s extreme variance between movie revenues is only one reason for the danger of opportunism is substantial. Additionally, the threat of withholding all future movies may not always be credible and, thus, may not provide an adequate restraint on exhibitor opportunism. Approximately 24 states require a “movie-by-movie” open bidding process.⁴⁸ Given these statutes, it is unclear whether a Studio could even deprive an

⁴⁷ Granted, one could argue that such an incentive only exists in regards to hit movies, but since hits constitute 80% of the industry’s revenue, being deprived of that revenue on a continual basis would be extremely problematic for Studios.

⁴⁸ See Kraig G. Fox, *Paramount Revisited: The Resurgence of Vertical Integration in the Motion Picture Industry*, 21 HOFSTRA L. REV. 505, 532-33 (1992).

opportunistic exhibitor from access to its movies in these states. Simply put, if an exhibitor places a bid for a movie that is higher than any other exhibitor's, and the Studio denies the exhibitor that movie because of previous opportunism, the exhibitor could retaliate by claiming violation of the state's bidding laws (if not antitrust violations). Subsequently, the Studio could face having to pay fines to the state, damages to the exhibitor, and possible injunction(s). Thus, the costs involved with retaliation are likely to be high. In particular, the possibility of an injunction preventing the movie's release until the end of a prospective trial would be devastating on Studios considering the importance of release dates (e.g. a preliminary injunction on a Christmas movie that delays its release until Spring) and the specific investments Studios make in their movies through pre-release advertising.

Further, even if the threat were credible, the decision to withhold ALL of its future movies (i.e. terminate the relationship) may generate significant costs for a Studio considering the degree of ambiguity involved in the Studio-exhibitor relationship. Conceivably, considering the high degree of variance between movies, the threat to withhold a finite number of future movies would be unlikely to deter an exhibitor with, for instance, a hit from acting opportunistically and keeping the revenue. Thus, a Studio detecting opportunism by an exhibitor would need to terminate its relationship with that exhibitor and withhold *all* future movies to constrain such behavior. However, if the Studio makes a mistake – i.e. the exhibitor in question did not behave opportunistically – and withholds all of its future movies as a result, it will have no method for realizing this mistake and will be depriving itself of potentially valuable future revenue. Moreover, since Studios face a great deal of ambiguity in regards to any given movie's performance, this issue of mistaken-opportunism is particularly problematic as it will be difficult

to detect when a movie, say, performs badly in a given theater due to the demographics of the surrounding market, and when an exhibitor is stealing.

Given these issues, it would appear that stronger relational mechanisms for constraining opportunism would be required that would, at the same time, be relatively adjustable and not involve complete termination of the relationship in order to be credible. As will be demonstrated, the blockbuster and the multiplex provide such a constraint.

VII. THE BLOCKBUSTER AND THE MULTIPLEX

As stated previously, because only MEs have the theaters and multiplexes large enough to accommodate the typical blockbuster's opening weekend, MEs have received a tremendous benefit from Studios who, by shifting their production mix from mid- and low-budget movies to blockbusters, have created the opportunity for MEs to successfully force independent exhibitors from the market. However, by building these large multiplexes, the MEs have also placed themselves in a position of vulnerability where, if Studios were to cease producing blockbusters, the MEs would be forced out of business. This phenomenon would seem, at first, all the more perplexing since, in terms of box-office grosses, it would appear irrational for Studios to produce blockbusters at all.

Under a relational contracting model, the behavior of both parties can be explained. Specifically, the combination of multiplexes and blockbusters can be viewed as a relational mechanism that Studios and MEs use to prevent potential opportunism. The result is efficient as, without it, exchange (i.e. the distribution and licensing of movies) would otherwise be unlikely to occur as frequently.

As previously discussed, uncertainty gives rise to opportunism and the Film industry is a highly uncertain industry. Thus, the danger of opportunism is equally as high. Specifically, the high degree of variance between movies creates the possibility of substantial gains for exhibitors that act opportunistically. Moreover, the high degree of variance between movies, combined with the facts that every movie is its own unique product and “nobody knows” which movies will be hits, reduces the probability of detection facing potentially opportunistic exhibitors. Consequently, exhibitors have both a high positive incentive to act opportunistically (i.e. large potential gains) combined with a low probability of detection. In short, the high degree of uncertainty, created by the unique economics of the Film industry, gives rise to a significant risk of opportunism.

Prior to Paramount, Studios could constrain potentially opportunistic exhibitors through formal contracting mechanisms designed to reduce uncertainty. Studios could increase the probability of detecting exhibitor opportunism through vertical integration; i.e. by combining two firms into a single integrated structure, Studios could lower their observation costs and increase their ability to detect opportunistic behavior. Additionally, Studios could reduce the degree of variance involved in their transactions (i.e. volatility) through formal contracting by simply bundling movies together into a group – a practice known as “block-booking” – which would then be licensed to exhibitors for a simple upfront fee. By bundling movies together, variance was reduced, upfront pricing became possible, and thus the risk of opportunism decreased.

However, after Paramount, both types of practices were banned. Thus, opportunism reemerged as a central problem in the ability of Studios and exhibitors to form efficient

contracts. If uncertainty could not be efficiently reduced, then exhibitors would be likely to behave opportunistically and exchange would become unlikely to take place. Thus, Studios and exhibitors needed to find a way to constrain potential opportunism directly by either increasing 1) the likelihood of detection, or 2) the magnitude of the potential penalty, facing opportunistic exhibitors.

As previously discussed, there is little that can be done by Studios to increase the probability of detection, except at great cost (i.e. sending an agent to every showing at every theater for every movie distributed). Therefore, in order for a constraint to be efficient, it must increase the magnitude of the penalty involved with being caught.

Increasing the potential penalty through formal means, i.e. by using liquidated damages, is unlikely to produce efficient results due to, again, the high degree of uncertainty involved with contracting on a movie-by-movie basis, which prevents formal contracting mechanisms from being effective. Specifically, the high degree of variance between films produces the same type of problems of volatility and variance previously addressed in this article's discussion of formal up-front pricing mechanisms. Simply put, because neither party knows, *ex ante*, what a film is going to be worth, each will have such substantially different reservation points that bargaining will be extremely costly – if not impossible.⁴⁹

⁴⁹ To illustrate, imagine that there are 52 movies produced in a year; 51 non-hits making \$145 each and 1 hit that makes \$29,000; for 52 exhibitors, where each exhibitor gets one movie. Subsequently, the average yearly revenue per exhibitor is \$697. Conceivably, to prevent the exhibitor with the hit from breaching, liquidated damages will have to be set many, many times above the yearly per movie average. However, setting damages at this level creates the risk of moral hazard, whereby Studios will have an incentive to accuse every exhibitor of breach. However, to reduce this danger, damages would conceivably have to be set either near the per-movie average, or the average for non-hits. At which point the exhibitor with the hit from would cease being constrained from acting opportunistically. Loosely put, placing damages anywhere near the average doesn't add very much as exhibitors with non-hits probably weren't going to breach their contracts for the meager gain of \$145 anyway, but putting damages much higher than that creates a substantial risk of moral hazard that exhibitors would unlikely be willing to accept.

Most, if not all, relational mechanisms for deterring opportunism operate by increasing the magnitude of the penalty involved with being caught rather than by increasing the probability of detection. Thus, relational mechanisms are relatively unhindered by the presence of uncertainty and high information costs in deterring opportunism. However, as demonstrated in the previous section, simple relational constraints, including simple relational contracts and simple reputation, are unlikely to deter opportunistic behavior when the incentive on exhibitors to act opportunistically is so high and the probability of detection is so low. In short, merely threatening not to provide any movies in the future is unlikely to be sufficient to effectively deter opportunistic behavior by exhibitors. Thus, in order for exchange to take place, a stronger relational mechanism is necessary. However, because of the issue of ambiguity surrounding exhibitor behavior, and the problem of mistaken-opportunism, this mechanism cannot involve terminating the entire relationship. In short, the mechanism must somehow both be credible and scalable at the same time.

Blockbusters and multiplexes provided Studios and the MEs such a mechanism. By building multiplexes, which are uniquely suited for the exhibition of blockbusters, MEs place themselves in a position of unique dependence on Studios. In short, MEs purposefully increase the magnitude of the potential penalty involved with acting opportunistically so as to permit an otherwise efficient exchange to take place. Or, loosely stated, MEs signal their trustworthiness by building multiplexes and, by thus saddling themselves with large amounts of debt, increasing their dependency on the Studios.

Further, blockbusters produce a substantial benefit to MEs by as, due to the unique shape of the typical blockbuster's revenue curve, MEs have been able to push independent exhibitors

from the market through the bidding process and exclusive licensing. Consequently, MEs will not wish to jeopardize receiving this benefit from Studios by acting opportunistically.

Additionally, the blockbuster allows for corrections to occur in cases of mistaken-opportunism, as the Studio does not have to completely terminate the relationship in order to punish possible opportunists – all that needs to be withheld are *blockbusters*. Thus, the Studios will be able to correct for mistaken-opportunism far more easily than they would under a simple relational contract by either withholding blockbusters directly or by simply shifting their production-mix towards smaller budget movies.

In terms of means of constraint, by withholding only blockbusters instead of ALL its movies, the Studio is less likely to face adverse legal consequences as the choice to only withhold *some* movies is less likely to be observable by outside authorities. Moreover, since punished MEs would still have an interest in continuing to receive mid- and low-budget movies from a Studio, those MEs would be less likely to file suit and jeopardize that, albeit partial, relationship. In short, the blockbuster not only provides Studios a powerful threat that can be used to constrain ME behavior, it is also a threat that can be administered at a relatively low-cost.

The constraint that blockbusters provide is relational as it constrains opportunism by exhibitors not only over the course of a single transaction, but throughout relationship itself. In other words, the constraint established by blockbusters and multiplexes prevents opportunism from occurring not just in a single specific transaction between a given Studio and a given ME, but acts as a deterrent in every transaction and spans the entire relationship.

VIII. CONCLUSION: THE PRESENT AND THE UNRAVELING OF PARAMOUNT

In the late 90's, a so-called "indie revolution" began to sweep the film industry. Declarants of this revolution believed that American audiences had suddenly changed and no longer were content to watch blockbusters. In supporting this assertion, these individuals pointed to two key facts. First, small budget, low-concept (i.e. "character-driven") movies began making hundreds of millions at the box-office. For instance, *American Beauty* (1999), a low-budget (\$15 million) movie about a suburban family and the weird kid next door, made \$130 million to become one of the highest grossing films of the year.⁵⁰ Second, all the Studios were pouring money into the development of "indie-wings". Consequently, proponents of the indie revolution asserted that the tastes of American audiences had suddenly and dramatically changed and that the Studios were scrambling to meet this new demand.

At first glance, these explanations would appear plausible, except that the development of indie-wings by the major Studios had begun almost half-a-decade earlier when Sony established Sony Picture Classics (1992), Miramax and Dimension were bought by Disney (1993), and Fox established Fox Searchlight (1994).⁵¹ Nor, was the success of low-budget movies anything new either. In fact, if one were to make a list of the top-10 highest grossing films (adjusted for inflation) since 1977, and eliminated those movies made after the Studios began first investing in indie-wings (i.e. those movies produced after 1992), mid- and low-budget movies dominate the list.⁵²

Under the model presented here, the real cause behind the Studios' investment in indies was that, beginning in the late 80's, the DOJ had started to significantly relax its restrictions on

⁵⁰ *American Beauty*, <http://www.boxofficemojo.com/movies/?id=americanbeauty.htm> (last visited May 19, 2009).

⁵¹ Internet Movie Database: www.imdb.com.

⁵² Inflation-adjusted Top 20 Movies Released Since 1977, <http://www.the-numbers.com/movies/records/> (last visited May 19, 2009).

the major studios. Specifically, the DOJ had begun to allow some of the Studios to begin purchasing theaters en masse.⁵³ By March of 1992, the second largest movie chain in America was owned by Matsushita, the parent company of distributor Universal; the sixth largest circuit was owned by Paramount and Warner Brothers; the seventh was owned by Columbia's parent, Sony; and the tenth was owned by Paramount.⁵⁴

No longer being barred from the exhibition market, the Studios faced less potential gains from preserving the Studio-ME relationship. As a result, the Studios began to spend less on the production of blockbusters and more on the production of mid- and low-budget movies, which, for the reasons addressed in Part II, provide far more box-office revenue. The supposed “indie revolution” of the late-90’s was the subsequent, and predictable, result of this shift. In short, American tastes had not been transformed overnight – all that had changed was the legal environment.

Having become heavily reliant on Studios for the production of blockbusters by building multiplexes, the MEs suffered a great deal by this change in the market. Subsequently, the Studio-ME relationship fell apart and, by late-2001, only one (AMC) of the 10 largest MEs in North America had not declared bankruptcy and maintained available financing.⁵⁵

Under the model presented here, *Paramount* gave birth to the blockbuster-multiplex relationship, and when its restrictions were relaxed, that relationship became inefficient. Without

⁵³ Michael Stremfel, *Movie Studios Direct More than \$ 1 Billion into Theater Chains*, L.A. BUS. J., Sep. 19, 1988, at 1. During this period, four of the major studios Matsushita (parent company of Universal), Paramount, Sony, and Warner Brothers made significant entries into the exhibition business; see also STANDARD & POOR’S, INDUSTRY SURVEYS—LEISURE TIME BASIC ANALYSIS, 24 (1992).

⁵⁴ *Id.*

⁵⁵ Katie Hollar, *AMC Watches as Top Theater Chain Regal Declares Bankruptcy*, available at <http://kansascity.bizjournals.com/kansascity/stories/2001/10/08/daily63.html>.

Paramount's ban on vertical integration, Studios would have simply reduced ambiguity in the market by integrating with exhibitors. Similarly, without Paramount's ban on "block-booking", the Studios would have simply bundled movies together in order to reduce volatility (i.e. variance) and established upfront pricing. As mechanisms for constraining opportunism, both of these options would have been less costly for Studios than the production of movies with \$100 million budgets. However, when Paramount was in full force, the production of blockbusters became the Studios' only feasible option.

SHOULD THE GOVERNMENT FLEX ITS MUSCLES AND REGULATE STEROIDS IN BASEBALL? WEAKNESSES IN THE PUBLIC HEALTH ARGUMENT

*Connor Williams*¹

Abstract

The government's response to steroid abuse has been simultaneously hyperbolic and inadequate. The legislative and executive branches have attempted to address the problem of abuse of performance-enhancing drugs by adolescents by focusing their venom primarily on A) steroids, and B) baseball players. I argue that this artificially narrows the larger public health conversation that we *should* be having as a society if, in fact, we determine that adolescent steroid abuse is a problem worth addressing.

There are several flaws in the government's line of thinking in addressing this issue: 1) it has overstated the problem of adolescent steroid abuse, 2) it has overstated the dangers of steroid abuse, 3) it has overstated the link between athletes' behavior and the choices made by adolescents, 4) it has understated other causes of this behavior by teen-agers, and 5) the government has actually set the stage for other potentially dangerous choices involving performance-enhancing substances by deregulating their path to the marketplace.

While other scholarship has focused on Congress' statutory response to steroids and other performance-enhancing drugs, I focused more on the rhetoric used by both the legislative and executive branches when castigating professional athletes (mainly baseball players) for their indiscretions. Scientific research has pointed to uncovered a variety of driving factors behind the use of steroids and other performance-enhancing substances among non-professional athletes, but, to my knowledge, no one has linked this to the deficiencies in the government's rhetoric, or used this data to advance a public policy argument urging a new, broader approach to addressing the issue that isn't so dependant on making an example out of professional athletes.

"I think it is critical to convey to the youth who desire to excel in sports that steroids are not the answer, that steroids are not necessary in order to excel in any athletic event and that success is achieved through hard work, dedication and perseverance." – Curt Schilling, former Major League Baseball pitcher²

¹ Stanford Law School, Candidate for J.D., 2010. The author would like to thank Prof. Henry T. Greely for his guidance and encouragement.

² *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Government Reform, 109th Cong. 230 (2005)* [hereinafter *MLB Steroid Hearings*] (statement of Curt Schilling), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_house_hearings&docid=f:23038.pdf.

OVERVIEW

Major League Baseball (MLB), an American professional sports organization uniquely obsessed with its own history and traditions, is also perhaps the most accurate microcosm of the changed nature of sports in the modern era. To wit: In 1961, Roger Maris broke Babe Ruth's single-season home run record with 61. Forty years later, Barry Bonds shattered the record (which had since been upped to 70 by Mark McGwire in 1998) by hitting 73 home runs during the 2001 season, and baseball once again had an asterisk crisis. But the similarities ended there: Where Maris' feat garnered intense debate because he had a longer season than the Babe (162 games to 154),³ the validity of Bonds' achievement has been debated because of his alleged use of designer steroids, human growth hormone (hGH), and other performance enhancing substances.⁴

The debate over performance enhancing drugs is not unique to baseball, although the game's struggles with the issue have perhaps garnered the most public – and political – attention. Hand-wringing over the use of such substances in all sports is not infrequently couched in “save the children” rhetoric. That is, leagues have an obligation to strictly police themselves for steroid abusers because the use of such substances is A) cheating, and thus setting a bad example for children, or B) a medically risky decision, and thus setting a bad example for children.

This article will focus on the strengths and weaknesses of the government's focus on this issue: Just how serious are the health risks posed by performance enhancing drugs? How strong are the links between youth behavior and pro steroid use? What, if any, are acceptable

³ Allan Barra, *The Myth of Maris' Asterisk*, SALON, Oct. 3, 2001, <http://archive.salon.com/news/sports/col/barra/2001/10/03/asterisk/index.html>.

⁴ *Book Details Bonds' Massive Steroid Use*, NBC SPORTS, Mar. 8, 2006, <http://nbcsports.msnbc.com/id/11713044/site/21683474/>.

enhancements and health risks? How should we best protect the health of adolescents?

This paper argues that the government's response has been simultaneously overly alarmist and woefully inadequate. By focusing disproportionately on steroid use in baseball, Congress and former President George W. Bush have artificially narrowed the conversation, largely ignoring larger other performance enhancing substances (and techniques), and misreading the motivations behind adolescent supplement use. Properly framed, the issue at hand must be integrated into a larger public health discussion about social aesthetics and body image issues.

I. FRAMING THE GOVERNMENT'S ARGUMENT

If Mark McGwire can be credited with rejuvenating interest in baseball following the players' strike with his back-and-forth battle with Sammy Sosa for the single-season home run record in 1998, then he must also shoulder the blame for igniting the controversy over performance enhancing supplements. In the middle of the epic chase for Maris' record, it was discovered that McGwire had been ingesting Androstenedione (andro), a supplement then available over the counter that reportedly helped raise natural testosterone levels and build lean muscle mass. McGwire also admitted to using creatine, but most of the focus turned to the other supplement, which was legal under baseball's rules, but had been banned by the National Football League (NFL) and the Olympics.⁵

McGwire set the record, and, according to vendors, andro became the hot new supplement for the general public.⁶ The newly minted home run king stopped taking andro in 1999, stating

⁵ *Legal in Baseball: McGwire Uses Nutritional Supplement Banned in NFL*, CNN.SI.COM, Aug. 22, 1998, http://sportsillustrated.cnn.com/baseball/mlb/news/1998/08/22/mcgwire_supplement/.

⁶ "The last time I saw publicity like this was when Viagra hit the market," says Len Moskovits, CEO of MET-Rx Engineered Nutrition. Bruce Horovitz, *Sales of Nutritional Supplement Out of the Ballpark*, USA TODAY, Aug. 27, 1998, at 1B.

that he did not want children following his lead.⁷ But the episode, and others that would follow, left lingering questions in the minds of the general public and policymakers alike, and the issue became framed as a public health debate based on athletes' status as role models.

Within the last five years, government officials have frequently relied on “protect the children” rhetoric when publicly chastising sports leagues to beef up their penalties for steroid use. Following the explosion of the Bay Area Laboratory Co-operative (BALCO) scandal in late 2003,⁸ President Bush, former part-owner of the Texas Rangers, thrust the issue into the national policy spotlight during his 2004 State of the Union Address:

To help children make right choices, they need good examples. Athletics play such an important role in our society, but, unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message -- that there are shortcuts to accomplishment, and that performance is more important than character. So tonight I call on team owners, union representatives, coaches, and players to take the lead, to send the right signal, to get tough, and to get rid of steroids now.⁹

Bush reiterated this stance at a press conference held March 4, 2005, once again highlighting the role-model argument as his main reason for curbing steroid use in sports:

I do appreciate the public concern about the use of steroids in sports, whether it be baseball or anywhere else, because I understand that when a professional athlete uses steroids, it sends terrible signals to youngsters. There's -- we've had some stories in my own state, one of the newspapers there pointed out that they thought there was steroid use in high schools as a result of -- in order to make sure these kids, at least in the kid's mind, could be a better

⁷ Ronald Blum, *Baseball Bans Steroidlike Substance Andro*, ASSOCIATED PRESS, June 25, 2004, available at http://www.thehomerunguys.com/AP_Articles/Baseball_bans_steroidlike_substance.htm.

⁸ Federal and local agents raided BALCO's offices in September 2003, and less than six months later, the organization – whose clients included Barry Bonds – faced indictments on 42 criminal counts, including distributing illegal steroids. See Adrian Wilairat, *Faster, Higher, Stronger? Federal Efforts to Criminalize Anabolic Steroids and Steroid Precursors*, 8 J. HEALTH CARE L. & POL'Y 377, 385 (2005).

⁹ President George W. Bush, Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004), available at <http://www.gpoaccess.gov/sou/index.html> (follow “January 20, 2004” hyperlink).

athlete. It's a bad signal. It's not right.¹⁰

The President's statements send three clear signals to frame the debate: steroid use is the most important piece of the performance enhancement discussion, steroid use is cheating (the "bad signal"), and steroid use is "dangerous." As a result, their use should be banned.

Congress quickly followed President Bush's lead in both action and rhetoric, building on its checkered history of regulating performance enhancing substance use in the United States. While the off-label use of steroids had been prohibited since 1938,¹¹ Congress identified 27 anabolic steroids as Schedule III controlled substances¹² in the Anabolic Steroid Control Act of 1990. The act, passed in the wake of the death of former football star and steroid user Lyle Alzado, and the steroid-marked 1988 Olympic Games, subjected violators to criminal penalties. It did not regulate steroid precursors, such as andro.¹³

In the early part of this decade, Congress had a renewed focus on performance enhancing drugs. In October 2003, the Senate, led by Orrin Hatch and Joseph Biden, began moving to add steroid precursors to the list of regulated substances.¹⁴ In March of the following year, the Senate Committee on Commerce, Science & Transportation held hearings entitled "Steroid Use in

¹⁰ President George W. Bush, The President's News Conference (Mar. 16, 2005), *available at* <http://www.gpoaccess.gov/wcomp/v41no11.html> (follow "News conference, March 16" hyperlink).

¹¹ U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEY'S MANUAL: CIVIL RESOURCE MANUAL 19 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title4/civ00019.htm.

¹² The Drug Enforcement Agency has a five-tiered system to classify all federally regulated substances. Schedule V substances are considered to have the least potential for abuse, and have currently accepted medical use, while on the other end of the spectrum, Schedule I substances have no accepted medical use and a high potential for abuse. Schedule III substances, including steroids, have accepted medical uses and have potential for abuse (although less than Schedule I or II substances) Abuse of Schedule III substances "may lead to moderate or low physical dependence or high psychological dependence [sic]." *See* Controlled Substances Act, 21 U.S.C. § 812 (1970), *available at* <http://www.usdoj.gov/dea/pubs/csa.html>.

¹³ Wilairat, *supra* note 8, at 388-89.

¹⁴ *Id.* at 390.

Professional and Amateur Sports,” which included testimony from MLB Commissioner Allan “Bud” Selig and Donald Fehr, head of the MLB Players’ Association.¹⁵ Following the hearings, Committee Chairman John McCain introduced a resolution calling for MLB to adopt a “legitimate drug-testing policy.”¹⁶ McCain addressed the issue of steroids as cheating, and added, “But more worrisome still is the poor example set by professional athletes in the eyes of the kids who idolize them and are led by their example.”¹⁷

In October 2004, Congress passed the Anabolic Steroid Control Act of 2004, amending its earlier legislation to add 60 substances under the Schedule III classification, and equated andro with anabolic steroids. Tellingly, the act linked this increased regulation to increased education efforts among young athletes: \$15 million per year was set aside to teach children the dangers of steroids.¹⁸ In a press release accompanying the passage of the bill, Sen. Biden, one of the bill’s co-authors, called steroid use by young Americans “a serious health issue,” and unequivocally labeled users as cheaters:

If kids think that all of the best athletes are “on the juice,” what does that teach them? I think it teaches them that they should use steroids or steroid precursors to get ahead and win the game; that cheating is OK. This offends me to my core. The United States is the ultimate meritocracy and it is absolutely un-American to take a performance-enhancing

¹⁵ *Steroid Use in Professional and Amateur Sports: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 108th Cong. (2004), available at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=2dfb109a-bfdd-4fb2-aecb-a9e46eae22f7.

¹⁶ MLB instituted its first steroid testing program as part of its 2002 collective bargaining agreement, but this program was widely viewed as little more than a publicity stunt in response to negative headlines. Steroid tests were administered only during the season, and players had warning beforehand. Additionally, players were not tested for andro or amphetamines, and the penalties were comparatively light. See Joseph M. Saka, *Back to the Game: How Congress Can Help Sports Leagues Shift the Focus From Steroids to Sports*, 23 J. CONTEMP. HEALTH L. & POL’Y 341, 350-51 (2007).

¹⁷ Press Release, Senate Comm. on Commerce, Sci. & Transp., McCain Demands Action by Major League Baseball On Steroid Testing (Apr. 8, 2004), available at http://commerce.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_Id=e4ecd297-8eee-4971-9d35-8fd8590fba63.

¹⁸ Wilairat, *supra* note 8, at 390.

drug to get an unfair competitive advantage.¹⁹

In March of the following year, the House Committee on Oversight and Government Reform staged now-infamous hearings that included testimony from McGwire and fellow MLB players Sammy Sosa, Rafael Palmeiro, Curt Schilling, Frank Thomas, and Jose Canseco. Ranking Minority Member Henry Waxman noted the real reason for holding the hearings in his opening statement:

Steroids are a drug problem that affects not only elite athletes, but also the neighborhood kids who idolize them...There is an absolute correlation between the culture of steroids in high schools and the culture of steroids in major league clubhouses. Kids get the message when it appears that it's okay for professional athletes to use steroids.²⁰

Six months later, steroid use in baseball was the subject of another round of hearings held by the Senate Committee on Commerce, Science & Transportation. In his opening statement, Sen. Jim Bunning once again adopted “role-model” rhetoric as justification for the proceedings, noting concern “about steroids – and not just from how they affect the integrity of the game and the way they distort statistics and demean records. But...about the grave health affects of these drugs – and the message they send to our youth who see players as heroes and want to emulate them.”²¹

Both the House and the Senate increased the public pressure by introducing legislation designed to hold MLB to stricter testing and enforcement policies, modeled after the

¹⁹ Press Release, Senator Joseph Biden, Congress Cracks Down on Steroid Use, Biden-Hatch Bill That Bans Designer Steroids Goes To President (Oct. 10, 2004), *available at* http://biden.senate.gov/press/press_releases/release/?id=03692407-270b-497b-96d8-fdcc0a6b43ea.

²⁰ *MLB Steroid Hearings*, *supra* note 2, at 9 (statement of Rep. Henry Waxman).

²¹ *S. 1114, The Clean Sports Act of 2005, and S. 1334, The Professional Sports Integrity and Accountability Act: Hearing Before the S. Comm. on Commerce, Science & Transportation*, 109th Cong. (2005) (statement by Sen. Jim Bunning), *available at* http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Testimony&Hearing_ID=a7060137-dae4-4589-baa9-9e9ed66c8b53&Witness_ID=359ed7c0-b4f1-46a5-93f3-375c11a68460.

International Olympic Committee (IOC) system.²² MLB, already in the middle of its previous collective bargaining agreement, adopted stiff new penalties for failed drug tests – including a lifetime ban for the third failed steroids test – and implemented testing for amphetamines for the first time. The move was lauded by members of Congress who had been pursuing the issue, and stalled any further Congressional intervention.²³

The release of the Mitchell Report, the conclusion of a 20-month investigation into steroids in baseball led by former Sen. George Mitchell, prompted the most recent round of Congressional hearings on the topic. Interestingly, the Mitchell Report adopted the public health rationale favored by President Bush and Congress, noting, “If Major League Baseball players send a message that the illegal use of performance enhancing drugs is acceptable, more young athletes will use these substances as they emulate these prominent figures.”²⁴ Commissioner Selig echoed these sentiments in a statement prepared for the House Committee on Oversight and Government Reform:

As Commissioner, I recognize that Baseball is a social institution with important responsibilities, particularly as they relate to young people...Our athletes, prospective ballplayers and our youth must come to understand that the use of performance enhancing substances is illegal, it is cheating, it does long term damage to an athlete’s health, and it puts at risk an athlete’s reputation and integrity.²⁵

Over the last five years, MLB has drawn intense scrutiny from critical lawmakers – but its

²² The IOC’s policies, which have been endorsed by representatives of more than 80 governments, include a two-year ban for the first offense involving performance enhancing drugs, and a lifetime ban for the second. For a more in-depth analysis of the IOC’s policies, *see Saka, supra* note 16, at 353-54.

²³ Jack Curry, *Baseball Backs Stiffer Penalties for Steroid Use*, N.Y. TIMES, Nov. 16, 2005, at A1.

²⁴ GEORGE MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 15 (2007) [hereinafter Mitchell Report].

²⁵ *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008) (statement of Allan H. Selig, Commissioner, Major League Baseball), <http://oversight.house.gov/documents/20080115114736.pdf>.

failure to regulate the behavior of its employees was treated less as a safety issue for the players, and more as a public health issue writ large. In short, baseball has been tasked with cleaning its own house for very symbolic reasons: To regulate steroids is to send the right message to children.

But is this a valid argument? In order to answer this question, it is necessary to first determine the health effects of steroids; then to explore how many youths are actually using steroids (and why); and finally to consider why President Bush and Congress have drawn a bright line at steroid use – and what they have overlooked in the process.

II. THE HEALTH RISKS OF STEROIDS

The human body (both male and female) naturally produces the hormone testosterone, the primary male sex hormone, which impacts metabolism, protein production, and muscle growth.²⁶ Testosterone, in synthetic form, is also the primary active ingredient in most steroids. These synthetic substances are typically injected or transmitted orally or through a patch or ointment, and they work by binding with testosterone receptors in muscle cells and ultimately stimulating increased protein production, which in turn leads to increased lean muscle mass.²⁷

Steroids are typically androgenic and anabolic substances. If a substance is referred to as “androgenic,” it results in the production of increased masculine characteristics. If a substance is “anabolic,” it shifts the process by which the body converts simple substances into more complex compounds.²⁸ The human body has a balance between anabolic processes (the

²⁶ Wilairat, *supra* note 8, at 379.

²⁷ WILL CARROLL, *THE JUICE* 47 (Ivan R. Dee ed., Viking Adult 2005).

²⁸ *Id.* at 10.

production processes), and catabolic processes (which break down complex compounds). In short, some steroids shift the ledger and allow the body to build more muscle by increasing production and repair rates for muscle cells, and effectively reversing the catabolic effect that breaks them down.²⁹

Ultimately, steroids cannot create more lean muscle mass on their own. Their use must be coupled with a weight-lifting training regimen in order to realize results. In effect, steroids allow users to train harder than nonusers by decreasing recovery time between workouts: Whereas a nonuser must alternate muscle groups, a steroid user will have an increased ability to exercise the same muscle groups over and over again, building them faster.³⁰

Steroids have been associated with a laundry list of negative side effects, both physical and psychological, ranging from mundane to serious. Physical side effects can include hair loss, acne, gynecomastia (breast enlargement) in men, excessive body hair in females, liver damage, and cardiovascular disease. Additional risks can be posed by the sharing of needles in steroid transmission. Psychological side effects include aggressive behavior (so-called “Roid Rage”) and depression. In some cases, suicide has been linked to steroid use.³¹

Steroids appear to pose certain serious health risks for younger users. Physically, early steroid use can lead to the halting of bone growth, resulting in permanently reduced stature.³² More troublingly, adolescents already face greater hormonal instability during puberty (suicide is the third leading cause of death among 15-24 year olds), and the use of steroids can “potentially

²⁹ Hector Del Cid, *Winning at All Costs: Can Major League Baseball's New Drug Policy Deter Kids From Steroids and Maintain the Integrity of the Game?*, 14 SPORTS LAW J. 169, 176 (2007).

³⁰ *Id.*

³¹ *MLB Steroid Hearings*, *supra* note 2, at 46 (statement of Rep. Elijah E. Cummings).

³² *Id.* at 128 (statement of Dr. Nora D. Volkow, Director, National Institute on Drug Abuse, National Institute of Health).

exacerbate the usual degree of expected psychological turmoil normally observed during adolescence.”³³ Taylor Hooton, a high school baseball player from Texas, hanged himself in 2003 – an event attributed to withdrawal from steroid use. A year later, his family began the Taylor Hooton Foundation, an organization “dedicated to fighting the abuse of steroids and other performance enhancing drugs among America’s youth.” The Foundation web site includes a number of cautionary tales involving teenagers and twentysomethings using steroids.³⁴

The negative effects of steroid use and abuse should not be understated, but they should carry important caveats. First, as Dr. Elliot J. Pellman, Medical Advisor to Commissioner Selig noted in his testimony before the House Committee on Government Reform in 2005, there has been a “serious lack of scientific studies in this area.”³⁵ Despite the increased attention paid to the topic, there is a distinct lack of long term studies conclusively linking steroids to the aforementioned side effects.³⁶

Further, steroid use is an inherently difficult area of study based on the secrecy of the behavior in question, and the variables in behavior among users.³⁷ What seems like an important point in assessing steroid use, however, is often lost in the shouting: The negative effects of steroids appear to be linked to dosage rates.³⁸

In his testimony before the House Committee on Government Reform, Dr. Kirk Brower

³³ *Id.* at 147 (statement of Dr. Kirk J. Brower, Associate Professor of Psychiatry, University of Michigan Medical School, and Executive Director, Chelsea Arbor Addiction Treatment Center).

³⁴ The Taylor Hooton Foundation, Steroid Stories, http://www.taylorhooton.org/steroid_stories (last visited May 7, 2008).

³⁵ *MLB Steroid Hearings*, *supra* note 2, at 163 (statement of Dr. Elliot J. Pellman, Medical Advisor to Major League Baseball).

³⁶ CHARLES E. YESALIS & VIRGINIA S. COWART, *THE STEROIDS GAME* 52 (Human Kinetics 1998).

³⁷ CARROLL, *supra* note 27, at 61.

³⁸ *See MLB Steroid Hearings*, *supra* note 2, at 147-48 (statement of Dr. Kirk J. Brower).

noted “the importance of dose when making comparisons to patterns of illicit [steroid] use.” Most (although not all) studies involving higher doses of steroids resulted in the experience of “severe, adverse psychiatric effects” for some individuals, while some lower-dose studies reported less aggressive behavior, and others reported no psychiatric effects. Additionally, there are recent reports that low doses of steroids can actually have an antidepressant effect. Ultimately, Brower concluded that, based on the studies, “there is general consensus that [steroids] are psychoactive drugs that can contribute to and cause psychiatric effects.”³⁹

Steroid users typically consume between 10 and 100 times the recommended therapeutic dosage, while “high-dosage” studies only examined levels 5-6 times higher than recommended therapeutic dosage – which may mean that hardcore steroid abusers will face even greater adverse psychiatric effects than those found in the studies, indicating a larger health risk.⁴⁰ Conversely, however, these studies also suggest that lower dose steroid use might not necessarily be subject to the negative side effects typically ascribed to their abuse at higher levels.

III. WHO IS USING STEROIDS?

It is a common sentiment that levels of steroid use in baseball reached “problem” status, although, perhaps unsurprisingly, there has been no commonly-agreed-upon number estimating steroid usage rates in MLB. Jose Canseco, a former MVP and steroid user who published a sensational paean to steroids entitled “Juiced: Wild Times, Rampant ‘Roids, Smash Hits, and How Baseball Got Big,” has estimated that 85 percent of major league baseball players use steroids. The late Ken Caminiti, another former MVP and steroid user, placed that number closer

³⁹ *Id.* at 148.

⁴⁰ *Id.*

to 50 percent.⁴¹ In lieu of hard data, visual cues are often referenced when detailing the extent of the problem: Barry Bonds' transformation from an agile leadoff hitter to a hulking, 230-pound masher is often cited as representative of steroids' transformative effects. The Bonds situation is an extreme example – as former MLB pitcher Kenny Rogers was quoted in Sports Illustrated: “Now you’ve got 5’7” guys built like weightlifters taking that down-and-away pitch and hitting it out to the opposite field. No one thinks it’s unusual because it happens all the time.”⁴²

Official testing numbers place steroid use at somewhere over 5 percent of the league. In 2002, the MLB players' union agreed institute random drug testing following the 2003 season if more than 5 percent of the tests came back positive. The dubious threshold was reached, and random steroid testing began in 2004.⁴³ Evidence indicates that between 10-15 percent of steroid tests among minor league baseball players returned positive during this time as well.⁴⁴ Commissioner Selig announced that the number of positive tests among major leaguers fell below 2 percent in 2004, but the tests from this era are thought to wildly underestimate the problem because they only took place during the season, meaning that a player could still follow a steroid regimen in the off-season (the preferred time), and test clean.⁴⁵

Officially, as of May 2008, 22 players have received suspensions for violating drug tests since the 2005 season, although not all as a result of positive steroid tests. Twelve players were suspended in 2005, three the following year (after penalties had been sharply increased), and

⁴¹ Frank Litsky, *Ken Caminiti, M.V.P. in National League, Dies at 41*, N.Y. TIMES, Oct. 12, 2004, available at <http://www.nytimes.com/2004/10/12/sports/baseball/12caminiti.html>.

⁴² Tom Verducci, *Totally Juiced*, SPORTS ILLUSTRATED, June 3, 2002, available at http://sportsillustrated.cnn.com/si_online/flashbacks/2002/year_in_review/steroids/.

⁴³ Saka, *supra* note 16, at 350-51.

⁴⁴ Verducci, *supra* note 42.

⁴⁵ *MLB Steroid Hearings*, *supra* note 2, at 34 (memo of Democratic Staff of H. Comm. on Government Reform).

seven in 2007.⁴⁶ Ultimately, it is clear that even with beefed up testing standards, the issue extends far beyond those who have been suspended. The Mitchell Report contains a laundry list of instances involving players and steroids, and is by no means exhaustive. The report concludes that the new testing regime “appears to have reduced the use of detectable steroids but by itself has not removed the cloud of suspicion over the game.”⁴⁷

Determining the scope of steroid use among adolescents has been similarly problematic, although estimates show a consistent uptick in use among high school students at the beginning of this decade. The Monitoring the Future study, conducted at the University of Michigan, surveys roughly 50,000 high-schoolers each year regarding, among other topics, drug use, including steroids. The trend in annual use since 1991 is as follows:

Trend in Annual Prevalence of Steroid Use Among 8th, 10th, and 12th Graders (in Percent)⁴⁸

	‘91	‘92	‘93	‘94	‘95	‘96	‘97	‘98	‘99	‘00	‘01	‘02	‘03	‘04	‘05	‘06	‘07
8 th	1.0	1.1	0.9	1.2	1.0	0.9	1.0	1.2	1.7	1.7	1.6	1.5	1.4	1.1	1.1	0.9	0.8
10 th	1.1	1.1	1.0	1.1	1.2	1.2	1.2	1.2	1.7	2.2	2.1	2.2	1.7	1.5	1.3	1.2	1.1
12 th	1.4	1.1	1.2	1.3	1.5	1.4	1.4	1.7	1.8	1.7	2.4	2.5	2.1	2.5	1.5	1.8	1.4

The Centers for Disease Control and Prevention (CDC) conducts the Youth Risk Behavior Surveillance System (YRBSS), the study relied upon in a memorandum prepared by Democratic staff in advance of the 2005 baseball hearings. The YRBSS notes a similar trend in steroid use over the past 15 years. As the memo notes, reported use of illegal steroids rose from 2.2 percent

⁴⁶ Baseball-Almanac.com, Steroid Suspensions, http://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited May 10, 2008).

⁴⁷ Mitchell Report, *supra* note 24, at SR-4.

⁴⁸ NAT’L INST. ON DRUG ABUSE, MONITORING THE FUTURE: OVERVIEW OF KEY FINDINGS 2007 54 (2007) [hereinafter MTF Overview], available at <http://monitoringthefuture.org/pubs/monographs/overview2007.pdf>.

of high school students in 1993, to 3.7 percent in 1999, to 6.1 percent in 2003.⁴⁹ Interestingly, at the time of the hearings, statistics provided by the YRBSS indicate that steroid use among high school students had already begun to drop closer to 1999 levels:

Percent of Students Reporting Lifetime Steroid Use, 2001–2005⁵⁰

	2001	2003	2005
9th grade	5.8	7.1	4.8
10th grade	4.9	6.1	3.9
11th grade	4.3	5.6	3.7
12th grade	4.3	4.9	3.3
Total	5.0	6.1	4.0

Like most other statistics involving steroids, it is difficult to accurately estimate a total number of adolescent users, but the percentages provide a useful yardstick: according to the Monitoring the Future study, steroid use among 12th graders peaked in 2004 at 2.5 percent, which translates to roughly 79,000 high school seniors that year.⁵¹ It has been estimated that a total of more than 500,000 high school students have used steroids.⁵²

IV. WHY THE GOVERNMENT’S ARGUMENT FAILS – AND WHAT IT SHOULD BE SAYING INSTEAD

The case against baseball’s negligence on the steroids issue is a powerful one. The sport has lagged behind both its domestic and international counterparts in testing, and anecdotal

⁴⁹ *MLB Steroid Hearings*, *supra* note 2, at 28 (memo of Democratic Staff of H. Comm. on Government Reform).

⁵⁰ Office of National Drug Control Policy, Drug Facts: Steroids, <http://www.whitehousedrugpolicy.gov/drugfact/steroids/index.html#extentofuse> (last visited May 10, 2008).

⁵¹ *MLB Steroid Hearings*, *supra* note 2, at 132 (statement of Dr. Nora D. Volkow).

⁵² *Id.* at 28 (memo of Democratic Staff of H. Comm. on Government Reform).

evidence helps to confirm that a culture of performance enhancing drugs has taken root. Similarly, available data indicates that steroid use spiked among adolescents during baseball's drug heyday. Finally, even accounting for exaggeration, there is little debate about the potential for major health risks associated with steroid abuse at high dosage levels. The decisions by President Bush and Congress to publicly chastise MLB (and, to a lesser degree, other professional sports leagues) can be viewed as congruent with the Supreme Court's holding in *Vernonia School District v. Acton* that deterring drug use among adolescents is a compelling government interest, specifically because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."⁵³ However, the scope of the statements made by President Bush and members of Congress was at once both far too under inclusive and over inclusive to effectively regulate the public health issue.

a. What Really Drives Youth Behavior?

One frequently cited statistic in the baseball steroid debate is the fact that sales of andro skyrocketed 500 percent in the wake of the revelation that Mark McGwire had been ingesting it during his quest to break the home run record.⁵⁴ It is generally taken as a given that the behavior of star athletes impacts the behavior of impressionable teenagers – but does this really explain the bump in steroid use among adolescents?

The fact that the studies conducted by the CDC and the University of Michigan were not confined to high-school athletes (much less baseball players alone), makes it difficult to attribute

⁵³ "Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs." *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995).

⁵⁴ Horovitz, *supra* note 6, at1B.

increased steroid use solely to sports. The results more likely indicate that steroid use rates are indicative of a larger social aesthetic trend favoring a muscled physique. One influential study found that 35 percent of adolescent steroid users did not participate in high school sports, and 27 percent of those surveyed gave a desire to improve their physical appearance as their main reason for use. The most commonly cited reason for steroid use was to improve athletic performance, but this was not a majority answer – 47 percent of respondents felt this way.⁵⁵ While steroid use among adolescents is a predominantly male activity, it is believed that steroid use for improved physical appearance might actually be more prevalent in females, perhaps attributing to steroid use in as much as two-thirds of the cases involving high school girls.⁵⁶

Several studies have found that negative body image issues were closely associated with adolescent steroid use, suggesting that the behavior is driven by something other than a “follow the role model” mentality. Project EAT (Eating Among Teens), a five-year longitudinal study of middle- and high-school students, collected data in 1999 and 2004, and found two variables that were significant predictors of steroid use: both involved “ideal” body size and weight-control issues.⁵⁷ Interestingly, the study did not find an association between “weight-related sports participation” and steroid use among boys, although this result differs from a past study.⁵⁸

The story of Taylor Hooton, the young baseball player who took his own life, actually appears to fit these findings. Hooton was told by a varsity coach that he needed to get bigger, but when asked by a friend why he was using steroids, Hooton responded, “I’m not doing it for

⁵⁵ YESALIS & COWART, *supra* note 36, at 8-10.

⁵⁶ Ellen Crean, *Steroids: Not Just a Guy Thing*, CBS NEWS, Apr. 27, 2005, <http://www.cbsnews.com/stories/2005/04/27/earlyshow/health/main691201.shtml>.

⁵⁷ Patricia vandenBerg et al., *Steroid Use Among Adolescents: Longitudinal Findings From Project EAT*, 119 PEDIATRICS 476, 481 (2007).

⁵⁸ *Id.* at 485.

baseball. I'm doing it for myself." Hooton's parents later learned from his psychiatrist that he suffered from low self-esteem.⁵⁹

A smaller recent study involving weight-lifting males found that steroid use "was associated with body-image pathology." Specifically, users were more likely to exhibit "muscle dysmorphia," as known as "reverse anorexia nervosa," a preoccupation with increasing mass. Its authors suggested: "If body-image disorders – which are potentially treatable with pharmacological and cognitive behavior therapies – help to cause or perpetuate heavy [steroid] use or dependence, it would seem important to focus treatment and prevention resources primarily on that group."⁶⁰

The same study found that a "strong endorsement of conventional male roles" (males must be tough, etc.) may be associated with steroid use.⁶¹ Adolescents who have negative body-image issues and adhere to more traditional gender roles may in fact be more likely to see professional athletes as idols, and their growth in size due to steroids or other supplements may in fact reinforce adolescents' negative issues, but this amounts to a fundamentally different relationship between athletes and adolescents than has been discussed by Congress and President Bush – it has little to do with signaling approval for perceived cheating. The findings of these studies indicate a more pervasive problem among teenagers – and the discussion should extend more broadly outside of both steroids and sports in order to rectify this issue.

Adult steroid users appear to fall into the same patterns. Elite athletes form only a fraction

⁵⁹ The Taylor Hooton Foundation, An Athlete's Dangerous Experiment, <http://www.taylorhooton.org/node/107> (last visited May 10, 2008).

⁶⁰ Gen Kanayama et al., *Body Image and Attitudes Toward Male Roles in Anabolic-Androgenic Steroid Users*, 163 AM. J. PSYCHIATRY 697, 699-700 (2006).

⁶¹ *Id.* at 700-01.

of the adult steroid-using population.⁶² One study of 1,955 American male steroid users found that enhanced physical appearance was a highly-rated motivator for use, along with increased muscle mass and strength. Other important motivators included “increased confidence, decreased fat, improved mood and attraction of sexual partners.” Recreational sports and weightlifting were rarely listed as motives for steroid use, and professional bodybuilding and sports were the least motivating factors.⁶³ This alignment of motivations among the different age groups further suggests that steroid prevention efforts should be widened past sports programs.

Baseball has been targeted due to its relatively lax steroid policies, but the sport appears to be a particularly odd fit to advance the public health argument. While baseball players have grown over the past two decades (the average weight of an MLB All-Star has jumped at least 12 pounds since 1991),⁶⁴ the sport is not particularly known for impressive physiques or displays of inordinate toughness. Football, for example, seems more apt to fit with traditional notions of male behavior, and to increasingly require chiseled musculature – it might attract, both as players and fans, those who are already susceptible to steroid use, and might be a more effective starting point for the public health conversation.⁶⁵

Further, the relative influence of professional baseball appears to be trending in the wrong direction. MLB television ratings have declined in recent years, indicating a waning influence in an increasingly crowded marketplace. For example, the 1995 World Series earned a 19.5 rating,

⁶² Jason Cohen et al., *A League of Their Own: Demographics, Motivations and Patterns of Use of 1,955 Male Adult Non-Medical Anabolic Steroid Users in the United States*, 4 J. INT’L SOC’Y SPORTS NUTRITION 12 (2007), available at <http://www.pubmedcentral.nih.gov/picrender.fcgi?artid=2131752&blobtype=pdf>.

⁶³ *Id.*

⁶⁴ Verducci, *supra* note 42.

⁶⁵ A Michigan State study conducted in 1985, 1989, and 1993 found that self-reported steroid use among college athletes was highest among football players. YESALIS & COWART, *supra* note 36, at 9-10.

while the 2007 World Series earned just a 10.6 rating.⁶⁶ By comparison, the two NFL conference championship games earned ratings of 31.7 and 27.4, respectively.⁶⁷ Baseball simply no longer unilaterally captures the American imagination, and its heroes share an increasingly crowded spotlight.

The aesthetic trend toward a more muscled appearance extends far beyond the realm of sports – teen idols in the entertainment world reflect (and drive) the new aesthetic, and some have even been linked to steroids. In January 2008, an Albany-based investigation into steroid trafficking linked music stars Mary J. Blige, 50 Cent, Timbaland, and Wyclef Jean, as well as author/producer Tyler Perry to shipments of hGH and steroids.⁶⁸ Both 50 Cent and Timbaland appeared on *Forbes*' 2007 list of richest hip-hop artists,⁶⁹ and Perry's movies have grossed more than \$300 million at the box office.⁷⁰

Adolescent steroid use appears to have retreated to 1991 levels⁷¹ – perhaps it should not be considered a public health epidemic on its own, but rather should be integrated into a larger social discussion about health, aesthetics, and perhaps even celebrity. Currently, the National Institute on Drug Abuse (NIDA) runs two intervention programs, one for male athletes, and the other for female athletes. Both involve messaging from coaches and peers to set a positive

⁶⁶ Baseball-Almanac.com, World Series Television Ratings, <http://www.baseball-almanac.com/ws/wstv.shtml> (last visited May 13, 2008).

⁶⁷ Michael Hiestand, *NFL Playoffs Get Boffo Ratings*, USA TODAY, Jan. 21, 2008, available at http://www.usatoday.com/sports/football/nfl/2008-01-21-tv-ratings_N.htm.

⁶⁸ Brendan J. Lyons, *Steroids Beyond Sports*, ALBANY TIMES UNION, Jan. 13, 2008, available at <http://timesunion.com/AspStories/story.asp?storyID=654817>.

⁶⁹ Lea Goldman with Jake Paine, *Hip-Hop Cash Kings*, FORBES, Aug. 16, 2007, available at http://www.forbes.com/home/business/2007/08/15/hip-hop-millionaires-biz-cx_lg_0816hiphop.html.

⁷⁰ Box Office Mojo, Tyler Perry, <http://www.boxofficemojo.com/people/chart/?id=tylerperry.htm> (last visited July 11, 2009).

⁷¹ MTF Overview, *supra* note 48, at 54.

example and distribute information. There are clearly students at risk who are outside the world of high school athletics, and they should be incorporated into the discussion about the health risks of steroids.⁷² Staunching the tide of the trend toward a more muscled appearance as aesthetically desirable – no matter the risks – should not be left to sports (particularly baseball) alone.

b. What are the Risks We Can Tolerate? What are the Benefits We Can Accept?

As noted above, steroid abuse – and withdrawal – can lead to serious physical and psychological side effects that can be particularly harmful to adolescents. But are steroids really the proper place to draw the line on enhancement supplements – or even enhancements of any sort? Put another way: Are the public health concerns or the performance benefits (or both) great enough to single out steroids in the enhancement conversation?

Steroids are typically branded as a desperate resort of cheaters, but it is unclear how their effects translate to athletic performance – particularly in a game with a skill set like baseball that is less reliant on brute strength than a sport like bodybuilding.⁷³ To the extent that some baseball players appeared to benefit from steroids and steroid precursors, can the results be traced back specifically to the illicit supplements while eliminating factors such as improved training regimens, cocktails of other, legal substances, natural ability, and others? Ironically, recent research into the effects of steroid precursors – including andro, the cause of all the furor in 1998 – found that such substances generally do not have the ergogenic effects claimed by

⁷² National Institute on Drug Abuse, Anabolic Steroid Abuse, <http://steroidabuse.org/> (last visited May 13, 2008).

⁷³ CARROLL, *supra* note 27, at 62.

manufacturers: they do not increase muscle mass, and they do not increase strength.⁷⁴

Detractors can easily point to the health risks associated with steroids and steroid precursors as reason enough to ban them – indeed, the above mentioned research concluded that precursors share much the same “potential for serious side effects” as steroids themselves.⁷⁵ But what if the health risks of steroids and precursors were minimized? Nonexistent? As Dr. Brower noted in his testimony, some studies of low-dose use of steroids did not show negative psychiatric effects, and there have been some recent “encouraging findings” regarding the use of steroids as antidepressants.⁷⁶

What if steroid use was merely regulated instead of banned? Users are thought to typically administer between 10 and 100 times the recommended therapeutic dosage, thus exacerbating negative side effects.⁷⁷ The arguments for regulating steroids mirror those for regulating other drugs: it would cut down on health risks of dirty needles, dosage rates could decline to safer levels, and players could become better educated about the interactions of steroids with other drugs and supplements, thereby reducing the risk of adverse reactions. Steroid withdrawal has its own set of health complications, but if use was at lower levels, and out in the open, players might be less likely to suffer from extreme depression associated with withdrawal, and more likely to seek psychiatric help if they do. If the health risks of steroids were minimized and managed, undercutting their “dangerous” stigma, would their use still send a “bad signal” to children?

Of course, there are other plausible arguments for banning steroids, and the purpose of this

⁷⁴ Michael E. Powers, *The Safety and Efficacy of Anabolic Steroid Precursors: What is the Scientific Evidence?*, 37 J. ATHLETIC TRAINING 300, 304 (2002), available at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?tool=pmcentrez&artid=164360>.

⁷⁵ *Id.* at 300.

⁷⁶ *MLB Steroid Hearings*, *supra* note 2, at 148 (statement of Dr. Kirk J. Brower).

⁷⁷ *Id.*

paper is not to advocate for their inclusion in the modern sports landscape. But steroid use in sports does seem to be an arbitrary starting point for a public health discussion, in part because sports offer a near daily reminder that we are prepared to accept – even lionize – physically risky behavior, even while denouncing steroid use for its negative health effects. Hundreds of players go onto the disabled list each year in MLB,⁷⁸ and the hole in the public health argument against steroids gets even wider in violent activities like football, boxing, and mixed martial arts, one of the fastest growing sports in the country.⁷⁹ One study conducted by the NFL Players’ Association found that 61 percent of players sustained concussions during their careers,⁸⁰ and a later study linked concussions to depression among former players.⁸¹ Young football players are not immune: since 1997, at least 50 high school football players have been killed or have suffered “serious head injuries” on the field.⁸² Clearly, there is a certain amount of risk we are willing to allow modern athletes (including young athletes) to take – risk that, in some cases appears to lead to consequences at least as serious as those associated with steroid abuse.

In many cases, we celebrate athletes’ triumphs over these risks, and immortalize those who compete with the least regard for their own personal health – those who would “win at all costs.” In 2004, months after testifying before Congress about the need to show young athletes that

⁷⁸ In fact, this number has been climbing – the number of players on the disabled list rises 32 percent from 1992 to 2001, and the average stint per injury rose 55 percent. If these increased injuries could be definitively linked to steroid use, they could provide a powerful health argument from a very different angle. See *The Correlation Between Steroids & Injuries in Baseball*, <http://thesteroidera.blogspot.com/2006/08/correlation-between-steroids-injuries.html> (last visited May 12, 2008).

⁷⁹ Sergio Ibarra, *CBS Puts Mixed Martial Arts in Prime Time*, TV WEEK, Feb. 28, 2008, available at http://www.tvweek.com/news/2008/02/cbs_puts_mixed_martial_arts_in.php.

⁸⁰ *NFL Concussion Rate is 61%*, CBC SPORTS, May 16, 2001, <http://www.cbc.ca/sports/story/2001/05/16/nfl-concussions010516.html>.

⁸¹ Alan Schwarz, *Concussions Tied to Depression in Ex-N.F.L. Players*, N.Y. TIMES, May 31, 2007, available at <http://www.nytimes.com/2007/05/31/sports/football/31concussions.html>.

⁸² Alan Schwarz, *Silence on Concussions Raises Risks of Injury*, N.Y. TIMES, Sept. 15, 2007, available at <http://www.nytimes.com/2007/09/15/sports/football/15concussions.html>.

steroids were not necessary for success in sports, Curt Schilling pitched the Boston Red Sox to victory in Game Six of the American League Championship Series and Game Two of the World Series despite the fact that his right ankle was so damaged that his sock became soaked in blood during each game. Team doctors performed a special surgery to allow him to pitch,⁸³ and Schilling also relied on Marcaine, an anesthetic to combat the soreness. Schilling had employed cortisone earlier in the season for an ankle injury as well.⁸⁴ His performance in the postseason that year was so celebrated that his bloody sock from the World Series was enshrined in the Hall of Fame.⁸⁵

Of course, painkillers and surgeries are viewed as acceptable parts of the game – but are they any more “natural” than steroids? Does their prevalence send “dangerous” signals to young athletes as well? Sports – particularly professional sports – naturally foster a “win at all costs” mentality, and science will undoubtedly continue to help push the boundaries of what constitutes an acceptable enhancement. As of 2003, roughly one in nine major league pitchers had received “Tommy John” surgery, which reconstructs the ulnar collateral ligament (UCL) in the elbow. Prior to the development of this procedure, tearing the UCL meant the end of a pitcher’s career – but now, the surgery actually unlocks higher performance for some pitchers, increasing their velocity. One reliever who had the surgery done joked, “I recommend it to everybody... regardless what your ligament looks like.”⁸⁶ In a similar vein, a number of athletes, including former MLB pitcher Greg Maddux, have opted for LASIK laser eye surgery, which can enhance

⁸³ *Hall Enshrines Schilling’s Bloody Sock*, NBC SPORTS, Feb. 11, 2005, <http://nbcsports.msnbc.com/id/6948862/>.

⁸⁴ Bob Hohler, *Schilling’s Ankle Troubling*, BOSTON GLOBE, Oct. 10, 2004, available at http://www.boston.com/sports/baseball/redsox/articles/2004/10/10/schillings_ankle_troubling/.

⁸⁵ *Hall Enshrines Schilling’s Bloody Sock*, *supra* note 83.

⁸⁶ Mike Dodd, *Tommy John Surgery: Pitcher’s Best Friend*, USA TODAY, July 28, 2003, available at http://www.usatoday.com/sports/baseball/2003-07-28-cover-tommy-john_x.htm.

vision to levels better than 20/20 “natural” vision, and others, including McGwire, have used contact lenses to achieve the same effect.⁸⁷

The easy-to-draw line here is that these procedures and devices are merely correcting deficiencies, while steroid use allows an athlete to supercharge his performance capabilities – and the two send very different signals to young athletes. However, the definition of what actually constitutes a “deficiency” is not always easy to determine – does short stature count? Relatively low testosterone levels?⁸⁸ Should the discussion of steroid use then revolve around intent? Does it matter that MLB pitcher Andy Pettitte injected himself twice with hGH in 2004 because he wanted to recover more quickly from an injury, or should attempts at rapid rehabilitation be seen as an example of “enhanced performance”?⁸⁹ Regulating performance enhancing drugs based on intent is probably not a feasible solution, but the prevalence of enhancements other than steroids (and the fact that technology will most likely lead to *more* available surgical enhancements) prevents us from drawing a bright line defining what constitutes “cheating” as a disruption of the “level playing field.”

As the Pettitte story and the rest of the Mitchell Report both demonstrate, enhancements in baseball need not take the form of surgery or steroids: there are a host of other performance enhancing supplements being employed by athletes to gain an edge on the competition. Many of these substances are viewed as acceptable, some are not, but all have taken a backseat to steroids

⁸⁷ William Saletan, *The Beam in Your Eye*, SLATE, Apr. 18, 2005, available at <http://www.slate.com/id/2116858>.

⁸⁸ For a discussion on the difficulties of determining “fair” competition, see Henry T. Greely, *Disabilities, Enhancements, and the Meanings of Sports*, 15 STAN. L. & POL’Y REV. 99 (2004).

⁸⁹ Pettitte volunteered the information on his use to the House Committee on Government Reform and Oversight, and Rep. Waxman, in thanking him for his honesty, called Pettitte a “role model on and off the field.” See *The Mitchell Report: The Illegal Use of Steroids in Major League Baseball, Day 2: Hearing before the H. Comm. on Oversight and Government Reform*, 110th Cong. 4 (2008) (statement of Rep. Henry Waxman, Chairman, H. Comm. on Oversight and Government Reform), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:43333.pdf.

in the discussion about sports and public health. One study released by the Blue Cross and Blue Shield Administration in 2003 determined that 1.1 million adolescents between 12 and 17 have used performance enhancing supplements⁹⁰ – more than double the estimates of adolescents who have used steroids. Should we be focusing more on other pharmaceutical enhancements?

On one end of the spectrum are substances such as vitamins and caffeine – substances found to be almost generally nonoffensive, even if they do provide some performance benefits. Vitamins are the most widely used supplement among some athletic circles. Results are mixed as to their effects, but some research has indicated that very high doses of B vitamins might increase fine motor control.⁹¹

Caffeine has been linked to increased mental alertness and endurance capabilities, but some investigations have also possibly linked caffeine ingestion to coronary artery disease, arrhythmias, high cholesterol, and even birth defects. Further, children are “more susceptible than adults” to the effects of caffeine.⁹² But unlike steroids, it is simply a performance enhancement that we have accepted – and the universality of its benefits (it is difficult to picture banning caffeine from the boardroom) undoubtedly plays a factor here. In considering both vitamins and caffeine, it must be noted that even high doses of everyday substances can provide a performance edge (or perhaps a health risk).

On the other end of the spectrum are substances like amphetamines and hGH. Amphetamines in particular offer an interesting study in contrast. MLB banned amphetamine use

⁹⁰ Blue Cross/Blue Shield Says 1.1 Million Teens Have Performance Enhancing Sports Supplements and Drugs (31 October 2003), http://www.supplementquality.com/news/ephedra_teens_BCBS.html.

⁹¹ Melvin H. Williams, *Dietary Supplements and Sports Performance: Introduction and Vitamins* 1 J. INT’L SOCIETY SPORTS NUTRITION 1, 2, available at <http://www.jissn.com/content/1/2/1>.

⁹² B.H. Jacobsen & F.A. Kulling, *Health and Ergogenic Effects of Caffeine*, 23 BRIT. J. SPORTS MED. 34, 35 (1989).

in 2005,⁹³ a move that was overshadowed by the steroids discussion. But, in many ways, amphetamine use seems a more natural starting point for the public health discussion than steroids: amphetamines have been a part of the game for decades,⁹⁴ and recent use has been reportedly high. One survey conducted in 2005 found that 87 percent of major leaguers think amphetamines are used in MLB, and 35 percent think more than half the league is using such substances.⁹⁵

Amphetamines have been shown to improve reaction time and increase muscle strength and endurance, but have also been linked to serious health risks such as heatstroke, cardiac arrest, and hypertension.⁹⁶ Perhaps the most interesting aspect of the amphetamines issue is that incidence rates among adolescents have been much higher than steroid use. Consider the following statistics:

Trend in Annual Prevalence of Amphetamine Use (Not Under Doctor’s Orders) Among 8th, 10th, and 12th Graders (in Percent)⁹⁷

	‘91	‘92	‘93	‘94	‘95	‘96	‘97	‘98	‘99	‘00	‘01	‘02	‘03	‘04	‘05	‘06	‘07
8 th	6.2	6.5	7.2	7.9	8.7	9.1	8.1	7.2	6.9	6.5	6.7	5.5	5.5	4.9	4.9	4.7	4.2
10 th	8.2	8.2	9.6	10.2	11.9	12.4	12.1	10.7	10.4	11.1	11.7	10.7	9.0	8.5	7.8	7.9	8.0
12 th	8.2	7.1	8.4	9.4	9.3	9.5	10.2	10.1	10.2	10.5	10.9	11.1	9.9	10.0	8.6	8.1	7.5

Under Congress’ role-model reasoning, amphetamine use should have been a more troubling issue than perhaps even steroids. Like steroids, amphetamines provide extra

⁹³ Carlos Frias, *Baseball and Amphetamines*, PALM BEACH POST, Apr. 2, 2006, available at palmbeachpost.com/sports/content/sports/epaper/2006/04/02/PBP_AMPHET_0402.html.

⁹⁴ *Id.*

⁹⁵ Bob Hohler, *Baseball Slow to Act on Use of ‘Speed’*, BOSTON GLOBE, Apr. 17, 2005, available at boston.com/sports/baseball/articles/2005/04/17/baseball_slow_to_act_on_use_of_speed/.

⁹⁶ L Avois et al., *Central Nervous System Stimulants and Sport Practice*, 40 BRIT. J. SPORTS MED. 16, 17 (2006).

⁹⁷ MTF Overview, *supra* note 48, at 52.

performance benefits at the risk of serious side effects – but far more adolescents are engaging in this behavior than are using steroids, indicating a larger, relatively unconsidered, public health issue.

Human growth hormone has become an attractive performance enhancer for its supposed steroid-like effects, and for the fact that testing for high levels of hGH is relatively undeveloped.⁹⁸ Like steroids, hGH has trickled down to high-schoolers: it has been estimated that 5 percent of high school males use or have used hGH.⁹⁹ The positive effects of hGH are in dispute, but many non-athletes have turned to this supplement for its supposed anti-aging qualities and aesthetic benefits, despite risks of diabetes, joint swelling, and higher blood pressure, among others.¹⁰⁰ In 2004, hGH sales totaled \$622 million.¹⁰¹ More recently, it has been touted by Sylvester Stallone, who admitted using hGH to improve his physique prior to filming the latest “Rambo” movie.¹⁰² Again, as with steroids, centering the public health discussion on sports does not appear to be the most effective means to combat a behavior that appears to be a reflection of a larger social trend.¹⁰³

There also exists a vast middle ground of widely used supplements, even though both

⁹⁸ Del Cid, *supra* note 29, at 181.

⁹⁹ M Saugy et al., *Human Growth Hormone Doping in Sport*, 40 BRIT. J. SPORTS MED. (Supp. 1) i35-i39 (2006).

¹⁰⁰ Again, it should be noted that off-label use of hGH is prohibited under the Federal Food, Drug, and Cosmetic Act (FDCA), and, like anabolic steroids, is considered a Schedule III controlled substance. U.S. DEP’T OF JUSTICE, *supra* note 11.

¹⁰¹ *Downside of Human Growth Hormone*, CBS NEWS, Mar. 30, 2006, <http://www.cbsnews.com/stories/2006/03/30/health/1458464.shtml>.

¹⁰² *Sylvester Stallone Says He Used Human Growth Hormone to Get Buff for New 'Rambo' Movie*, FOX NEWS, Jan. 25, 2008, <http://www.foxnews.com/story/0,2933,325767,00.html>.

¹⁰³ Congress has not yet added hGH to the list of Schedule III substances, but there are bills in both houses that would do so. See Adrienne Kroepsch, *Oversight Hearing Centers on Illegal Drug Use in Major League Baseball*, CONGRESSIONAL QUARTERLY, Jan. 14, 2008, available at <http://www.cqpolitics.com/wmspage.cfm?parm1=1&docID=news-000002655046>.

benefits and risks of such use are unclear. Ironically, this vast gray area was created by Congress with the passage of the Dietary Supplement Health and Education Act of 1994 (DSHEA), which virtually freed products classified as “dietary supplements” from federal regulation.¹⁰⁴ The DSHEA defined such substances as follows:

(1) a product (other than tobacco) intended to supplement the diet that bears or contains one or more of the following dietary ingredients: (A) a vitamin; (B) a mineral; (C) an herb or other botanical; (D) an amino acid; (E) a dietary substance for use by man to supplement the diet by increasing the total dietary intake; or (F) a concentrate, metabolite, constituent, extract, or combination of any ingredient described in clause (A), (B), (C), (D), or (E).¹⁰⁵

The laissez-faire approach of the DSHEA to “dietary supplements” allows such substances to enter the marketplace with no advance testing – unlike substances defined as “drugs,” which are required to pass three stages of testing before the Food and Drug Administration (FDA) will allow them on the market.¹⁰⁶ Under the DSHEA, the FDA can regulate manufacturers’ claims about their products, and can remove products from the market if they are mislabeled, but the burden of proof rests not on the manufacturer but on the FDA, resulting in reduced consumer protection.¹⁰⁷

On the positive side, the DSHEA has allowed increased use of vitamins and amino acids – substances we typically regard as “healthy.” But the DSHEA’s attempt to draw a line between “drugs” and “supplements” appears to make little sense with regard to sport regulation and the public health debate. In essence, the government has authorized tacit approval of “supplements,” which in the past has allowed questionable substances like andro and ephedra to become

¹⁰⁴ Jeffrey A. Crossman, *Mark McGwire Does It, So Why Can't I? High School Student Use of Dietary Supplements and the Failure of DSHEA*, 28 CAP. U. L. REV. 617, 635-36 (2000).

¹⁰⁵ 21 U.S.C. § 321(ff) (2009).

¹⁰⁶ Del Cid, *supra* note 29, at 183.

¹⁰⁷ Crossman, *supra* note 104, at 636-37.

available to users of all ages.¹⁰⁸

Ephedra, an herbal weight-loss supplement, was linked to the death of former Baltimore Orioles pitcher Steve Bechler.¹⁰⁹ The FDA has attempted to ban it, a move that resulted in ongoing legal wrangling.¹¹⁰ Use of products containing ephedra has been – not surprisingly, given the fact that it has been available over the counter – much higher than steroid use among young athletes, with 26 percent of girls, and 12 of boys reporting use in one 2002 survey.¹¹¹

As discussed earlier, andro was later included as a Schedule III substance by Congress, even while dehydroepiandrosterone (DHEA), another steroid precursor, was exempted.¹¹² While attempting to draw a bright line at “cheating” and “health risks,” Congress has both created the climate that allowed supplement use to flourish, and sent mixed signals about what types of supplements – and in what context – are acceptable.¹¹³

Creatine is one such “dietary supplement” that has been largely unregulated. It is produced naturally by the liver, pancreas, and kidneys, and has been found in some cases to increase lean body mass and increase strength, particularly in short bursts, although it should be noted that many athletes (nearly 30 percent) have not found creatine to be beneficial. Creatine has quickly gained popularity among young athletes, with one study determining that 44 percent of high

¹⁰⁸ Del Cid, *supra* note 29, at 183.

¹⁰⁹ *Bechler's Parents Says [sic] Ephedra Ban Will Save Lives*, USA TODAY, Dec. 30, 2003, available at http://www.usatoday.com/sports/baseball/al/orioles/2003-12-30-ephedra-bechlers_x.htm.

¹¹⁰ Ronald V. Baker, *10th Circuit Restores FDA Ban on Ephedra*, FINDLAW, Aug. 28, 2006, http://news.lp.findlaw.com/andrews/pl/pha/20060828/20060828_neutraceutical.html.

¹¹¹ Ryan Calfee & Paul Fadale, *Popular Ergogenic Drugs and Supplements in Young Athletes*, 117 PEDIATRICS e577, e586 (2006).

¹¹² Wilairat, *supra* note 8, at 393.

¹¹³ In an ultimate irony, one investigation found that a supplement actually contained testosterone, a banned anabolic steroid. See Calfee & Fadale, *supra* note 111, at e584.

school seniors have used creatine, and that some users were as young as sixth grade.¹¹⁴ Clearly, such behavior is acceptable in a way that steroid use is not. However, creatine use has been associated with such negative side effects as gastrointestinal distress, nausea, and seizures,¹¹⁵ and neither the short- nor long-term safety of the supplement is known,¹¹⁶ in part because such information is not required under the current DSHEA guidelines.

Athletes, adolescent and professional alike, routinely engage in activities that place their health at risk and enhance their performance – either as part of the sports themselves, or as part of their training regimens. Some of these activities are deemed acceptable (or even lauded) while others are not –viewing steroid use in the larger context of sports behavior reveals just how difficult (and perhaps, ultimately, meaningless) it is to draw the line at banning their use without fully considering and weighing the effects and risks of other supplements and enhancement procedures. The current structure of the DSHEA does not allow for this consideration with regard to dietary supplements, and in fact makes holding an exhaustive public health debate nearly impossible.

CONCLUSION

As a result of public pressuring by both President George W. Bush and Congress, MLB tightened its policy on performance enhancing substances, and there was copious amounts of media coverage about the dangers and downsides of steroid use. Perhaps tangentially, then, the public health argument advanced by both the president and members of Congress can be viewed

¹¹⁴ *Id.* at e585.

¹¹⁵ Marc D. Silver, *Use of Ergogenic Aids by Athletes*, 9 J. AM. ACAD. ORTHOPAEDIC SURGEONS, 61, 67 (2001).

¹¹⁶ See Jason J. Koch, *Performance-Enhancing Substances and Their Use Among Adolescent Athletes*, 23 PEDIATRICS IN REV., 310-17 (2002).

as something of a success: after all, adolescent steroid use has retreated in recent years, and baseball's image appears to be improving as well.

But whatever success can be attributed to increased government attention (and the answer to that is not clear), it appears to be in spite of the actual reasoning advanced by both President Bush and members of Congress – a fact that bodes poorly for future episodes of the enhancement debate. A relatively small number of adolescents have experimented with steroids, especially when compared to other illicit substances like amphetamines, or legal but unregulated supplements like creatine. Decreased steroid abuse among adolescents is a positive development from a public health perspective, but if the government is truly interested in championing the “protect the children” cause, it must broaden the focus to include dietary supplements and other forms of enhancement in order to be logically consistent.

There is evidence that Congress may finally be shifting its attention to other substances. In February 2008, the House Committee on Oversight and Government Reform held hearings investigating the risks and benefits of hGH, vitamin B-12, and other substances.¹¹⁷ In order to fully dedicate itself to the public health argument, Congress must consider overhauling the DSHEA to more actively regulate supplements. As it stands now, the government is straddling a meaningless line by focusing its efforts on regulating steroids while simultaneously allowing potentially dangerous substances onto the market.

Second, the government has fundamentally misunderstood the scope of the public health issue at hand by repeatedly couching it in athletic terms. The government's proposed solutions depend too much on increased steroid testing as an effective deterrent among potential young

¹¹⁷ *Myths and Facts about Human Growth Hormone, B-12, and Other Substances: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. (2008), available at <http://oversight.house.gov/documents/20080229180438.pdf>.

users. This assumes a high level of confidence in testing procedures that may not be warranted.¹¹⁸ Further, many adolescents who are using steroids and other substances are not athletes, and are doing so for aesthetic – not competitive – reasons. When compared to other drug abuse among adolescents, steroids do not appear to constitute a public health crisis. However, to the extent that such use (especially when viewed in conjunction with use rates of other supplements like creatine) is symptomatic of larger social issues involving body image and adolescent insecurities, it should be dealt with in the context of a larger social discussion.

The “role model” rhetoric that has been employed by politicians in the past does not sum up the relationship between athletes, adolescents, and steroids. It is true that impressionable children may see in the well-defined physiques of modern athletes a temptation to turn to steroids. But peak physical conditioning has been and will continue to be an unavoidable byproduct of athletics,¹¹⁹ regardless of steroid use. Additionally, today’s adolescents are bombarded with youthful and highly muscled ideas of beauty from all angles, including actors and musicians: To the extent that young athletes and nonathletes alike are using steroids, there has been a failure to educate them about the risks involved, a failure to crack down on availability of such substances, and, on a more fundamental level, a failure to promote positive messages about health and beauty.¹²⁰

¹¹⁸ Interestingly, Congress has adopted a much more congenial tone with the NFL on the steroids issue, based in large part on the strength of its testing policy – even though the true effects of the policy are unclear. *See Steroid Use in Sports, Part II: Examining the National Football League’s Policy on Anabolic Steroids and Related Substances: Hearing Before the H. Comm. on Government Reform, 109th Cong. 15 (2005)* (statement of Rep. Henry Waxman), available at <http://oversight.house.gov/story.asp?ID=836>.

¹¹⁹ Ironically, this actually appears to be less true for baseball than for other professional sports.

¹²⁰ Although the House Committee’s hearing on hGH and B-12 was largely focused on athletics, Rep. Darrell Issa sought to expand the issue, stating: “It appears as though there is, unfortunately, a tendency for the good-looking body on the runway to be part of both steroids and human growth hormone; and, up until now, we really haven’t, as a committee, attacked that.” *Myths and Facts about Human Growth Hormone, B-12, and Other Substances: Hearing Before the H. Comm. on Oversight and Government Reform, supra* note 117, at 46.

If the real issue at hand, then, is the use of potentially unhealthy substances for aesthetic reasons, perhaps Congress should pull back from regulating steroid use in baseball as a solution, and instead focus on extending performance enhancing drug education programs to athletes and nonathletes alike. Certainly, the public should be aware of potential health risks posed by steroids, hGH, and other performance enhancing substances. However, education for the public does not necessarily entail regulation for professional sports: Clearly, the sports world (both players and fans alike) is comfortable with a fairly high degree of both health risks and performance enhancement. The issue of enhancement will undoubtedly continue to arise, as athletes search for a new edge and science rises to the challenge to provide them with it. Unlike now, new enhancement substances (both drugs and supplements alike) should be accompanied by clear statements regarding benefits and risks so athletes of all ages can make informed decisions. However, absent a convincing correlation between professional and adolescent behavior – or a different compelling argument for government intervention – perhaps the task of determining what is an acceptable enhancement (and what is not an acceptable health risk) should be left to the professional sports league and its players.

SOUTH BY SOUTHWEST 2009 CLE CONFERENCE – WHERE TRENDY ENTERTAINMENT MEETS TRENDS IN ENTERTAINMENT LAW

*Paul Tigan**

INTRODUCTION

On a late Thursday evening, a collection of young horn players, dressed in vibrantly painted vintage band uniforms (you could still smell the spray paint), stand on Austin's Sixth Street, blaring classic rock hits in surprisingly complex arrangements. They stand in the middle of a closed-off intersection because all of the doors and windows from the various venues are open to the street, and raucous sounds pour out of each establishment onto a street party of thousands. Somehow the middle of an otherwise busy intersection is the easiest place for passersby to hear the band. The music festival parades down Sixth Street and beyond, block after block after block. The sounds are a deafening, brilliant cacophony of modern musical expression.

South by Southwest, the premier convention and festival for music industry professionals, goes by a number of names. On paper, online, and on all the posters plastered around Austin, Texas, it is known as SXSW. Austinites simply call it "South-by," as if the last two syllables are worth as much as the thousands of bands who come and go every year without making a splash during the four-day music event.

For the music industry professional, SXSW is more than the thousands of up-and-coming musical acts trying to catch a break; it is more than the dozens of panel discussions regarding the current state of the music industry; it is more than the trade show featuring music and media

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oriented businesses; more than the Flatstock poster show, the vintage guitar swap, the showcases, the parties, and the hype. The sum of all these parts does not begin to tell the whole story.

Not to say that all the music is worth listening to, of course. Most of the musicians that come to SXSW are searching for someone to find them. The convention draws music professionals to the city by day, and the musicians try to woo them at night. For those with the stamina to endure it, SXSW is the perfect mix of the revolution and the establishment attempting to co-opt one another for their own goals.

This conference note provides a broad overview of the different legal education panels offered at the SXSW conference on February 20-21, 2009. The attorneys at the Minneapolis-based law firm Lommen Abdo organized the continuing legal education panels, and the Grammy Foundation sponsored the legal education program as well. And while the content of the legal panels was well worth the price of admission, it is important to keep in mind that a ticket to SXSW is a ticket to something much more vast and compelling than a mere legal conference.

PANEL #1 - COPYRIGHT ROYALTY BOARD: WHAT HAPPENS IN DC DOESN'T STAY IN DC

The Continuing Legal Education portion of SXSW Music started out with a contentious issue in the world of entertainment copyright law: how royalties for performances on Internet radio stations are collected and distributed. The moderator of the panel, Jay Rosenthal, stated the Copyright Royalty Board (“CRB”), is “the most important government body you’ve never heard of.” The CRB published their final ruling on royalty payments for copyrights of audio

recordings on January 26, 2009, and the decision of this board was fresh on the minds of the panel members.¹

Joining Mr. Rosenthal, General Counsel for the National Music Publishers Association, was John Potter, Executive Director of the Digital Media Association (“DiMA”), Daryl Friedman, Vice President, Advocacy & Government Relations for the National Academy of Recording Arts & Sciences, and Ken Freundlich, a Los Angeles attorney who currently represents Royalty Logic, Inc. The panel took an open forum approach to the questions presented by the Royalty Board’s recent decision.

As the CRB stated in their published decision, Section 115 of the Copyright Act empowers this panel to set various royalty rates.² Despite the 100-year history of the act, the January 26, 2009 rule “marks only the second time that a governmental body other than the Congress is establishing the royalty rates to be paid for reproductions of musical works by copyright users.”³ Considering the novelty of the event, the panel had a lot to share about the CRB’s choices and their possible impacts on artists, songwriters, and broadcasters.

One of the main issues at hand was not the actual royalty amounts, but how organizations like SoundExchange collect and distribute those royalties for artists and songwriters. Depending on the medium (i.e., non-interactive online broadcasts, satellite radio, ringtones, etc.), there are different royalty amounts and different organizations that collect data, license performances, and distribute collected royalty payments to copyright holders. By the end of the panel, it was clear

¹ See Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. 4,510 (Jan. 26, 2009) (to be codified at 37 C.F.R. pt. 385).

² See 17 U.S.C. § 115(c)(3)(C)-(D).

³ Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, 74 Fed. Reg. at 4,512 (Jan. 26, 2009).

that the question left unanswered in the CRB's decision was the politics behind it. While the various organizations represented on the panel lobbied members of Congress in different ways, no one was ready to admit who actually controls the agenda in Washington when it comes to these questions - though there is no shortage of attempts at influence.

PANEL #2 - ARE INTERNATIONAL DEALS THE ANSWER TO AMERICAN ARTISTS' PROBLEM?

The second panel took a more practical approach, discussing the advantages and disadvantages of taking a music product outside of U.S. borders. As Bob Donnelly, partner at Lommen Abdo, noted in his introduction, the 20 percent drop in hard record sales in the last year makes overseas markets more and more attractive to labels and musicians. However, the decision to go abroad means answering a number of questions regarding the mechanics of international deals.

At the outset, Mr. Donnelly noted a basic choice: sign one worldwide deal that covers the bases in all foreign jurisdictions, or ink a separate deal in each jurisdiction, depending on how much exposure the artist expects to receive in each jurisdiction from touring and the like. Mr. Donnelly described the factors that go into making that decision, such as the relative strength of a label in some countries as opposed to others. Taking these factors into account, the other panel members, Joe Salvo, Global General Counsel of Hit Entertainment and former attorney for Sony, Arista, and Sony BMG; and Chris Taylor, founder of the Taylor Mitsopoulos Klein Oballa law firm and Last Gang Entertainment, joined in to discuss the various facets of international deals.

The panelists continually reminded the audience that a lawyer for an artist signing overseas deals needs to know what he or she is getting into. In short, many of the norms for U.S.

contracts do not exist overseas or are defined in completely different terms (like Purchase Price to Dealer (PPD) deals for records sales, as opposed to a percentage of cost deal familiar in the United States). The panelists also talked about the different parts of the world and where more reliable deals are likely - United Kingdom/Europe, Japan, North America, and Australia/New Zealand. South America, China, and Africa, meanwhile, are rather uncharted and the “BRIC” nations - Brazil, Russia, India, and China remain high in piracy and notoriously difficult to collect on contracts.

For the big names and intrepid artists who plan on serious exposure overseas, there is a growing interest in international-level “360 Deals” - contract agreements between artists and labels that extend beyond the traditional x-number of albums and include contractual provisions between the artist and label for all profits related to the artist - merchandising, touring, etc. This was the first of many mentions of the 360 Deal, showing its new-found popularity among the professionals at the conference.

PANEL #3 - THE EVOLVING LANDSCAPE OF MUSIC PUBLISHING: SAME AS IT NEVER WAS

The third panel discussed new and growing trends in the publishing and licensing side of the music industry. According to moderator Ed Pierson, Adjunct Professor at Southwestern Law School and former General Counsel of Warner/Chappell Music, the advent of the Internet and other transformative technologies means the continuing transformation of the music publishing industry. Brothers Todd and Jeff Brabec, authors of the book *Music Money, and Success: the Insider's Guide to Making Money in the Music Industry*, gave a very entertaining and informative

look at all the ways that people are using music publishing agreements to squeeze every cent possible out of a great (or not so great) piece of music.

The Brabec brothers noted some of the emerging major players in the music publishing industry. A great example, video game publishing, was a particularly poignant example considering Metallica's rumored appearance at SXSW to release a Metallica-branded version of Guitar Hero (a justified rumor, as it happens). As video games become more and more complex, licensing and publishing deals for soundtracks have become as profitable as motion pictures. Another unique example is the sounds recordings included in many greeting cards, a relatively recent phenomenon. Combine these newer uses with traditional media outlets such as movies, television shows, commercials, and other mechanical uses (CDs, tapes, DVDs, etc.) and it becomes clear that thinking big, and marketing well, can pay dividends in the end for artists and labels alike.

PANEL #4 - RECORDING AGREEMENT PROVISIONS THAT DIDN'T EXIST IN 2000

Picking up where the Music Publishing panel left off, Lynn Morrow, attorney at Adams and Reese LLP; David Lessof, Vice President of business Affairs at New West Records; and Paul Bezilla, an attorney at Lommen Abdo, addressed a handful of contract provisions common in recording contracts today that did not exist in the year 2000. Building on a common theme at the conference, it was clear that declining hard copy record sales (75 million units in 2006, 63 million units in 2007, 45 million units in 2008) have forced artists and labels alike to look at new income streams. This shift in focus, however, has added to the spirit of animosity and competition between the various players at the music industry table.

The first new provision the panel addressed was the recording agreement's delivery requirement. Typically, an artist has to surrender the master recordings to the label and those recordings become the property of the label. In the past, this has meant physical tapes. However, most recording is now completely digital. This means that the delivery requirement could be a hard drive with data in a particular format and backup tapes. Other possible demands in a record contract include engineering notes, instrument and microphone placement diagrams, mixer diagrams, and effect processing information.

A second new provision addresses the online presence of an artist, including the official website, myspace.com page, merchandise sold online, and other provisions. This is clearly a new phenomenon in the music industry that has no pre-Internet corollary. In the minds of some industry analysts, the label's management of an artist's web presence and sharing in the financial profit of that venture was the first step towards the 360 Deal. However, the panelists noted that what has most often arisen out of these agreements is more of a partnership. Website management can be a hassle for artists, and labels end up having more resources to do the job effectively. However, this effectiveness also provides the label to access and input on a number of areas of the artists' income streams - merchandising, tour dates, and general branding strategy.

The third provision, digital royalty agreements, closely follows behind the artist's web presence. The panelists agreed that original contract provisions greatly undervalued the importance of digital royalties in the overall picture of an artist's worth. To address this discrepancy, most new deals attempt to reach parity with physical sales so neither party, the artist nor the label, is benefiting disproportionately. Additionally, the panelists noted that there are different contract provisions for digital sales for recordings made before and after the year 2000.

Perhaps all of this was just preliminary to the discussion of the 360 Deal, which took up the remainder of the panel's time. According to one panelist, the 360 Deal is either a "land grab" or the greatest thing that ever happened to the labels. Others say that the 360 Deal is an implicit admission by the labels that they dropped the ball on the digital transition and are now trying to recoup losses from mismanaging contracts over the last decade of transition in the music industry. No matter your perspective on the 360 Deal, it is clear from the panelists' discussion that it is here to stay.

The 360 Deal is the label's claim on a more valuable stake in the overall worth of an artist the label develops from the ground up. Essentially, if a label takes an unknown artist and develops them into an international superstar, they want a cut of the profits that come from the investment and development of that artist. This often shows itself in contract provisions that give a label a percentage of all touring profits, merchandise sales, other appearances, and areas that, at least in the past, had been the realm of the artist alone. From the panelists' experience, the question most artists are facing is whether to fight the provisions outright or just get the label to lower the overall cut they take.

PANEL #5 - AN INTELLECTUAL PROPERTY CHECK-UP OF MUSIC PRODUCTS AND SERVICES

This panel attempted to categorize the many ways musicians, songwriters, and inventors (many artists, it turns out, are all three) capitalize on the various creations of their minds. This panel was something of a group presentation by Dave McClaughry from the Detroit office of Harness, Dickey & Pierce; Tim Matson of Lommen Abdo; and Lara Pierson, an attorney in Lake Tahoe. The three went through a whole series of different kinds of intellectual property that

artists can hold, using well-known (and not-so-well-known) examples from the music industry to illustrate the examples.

A piece of intellectual property can fall into five categories, each with specific legal requirements to establish each one. Artists can have a right of publicity - the “persona” or likeness of an individual; copyrights; trademarks (including service marks, dress rights (think KISS costumes)); patents; and trade secrets.

An artist can exercise these rights through a number of goods and services. Discussion from the panel included some novel, but real, examples: board games, athletic equipment, action figures/bobbleheads, particular musical instrument designs, set lists from concerts, furniture, restaurants, and cross-marketing deals. Some of the most entertaining examples included the Dale Earnhardt/Dave Matthews Band die-cast race car, the numerous patents filed by Eddie Van Halen and other especially elaborate performers, and the Jimmy Buffet Margaritaville Blender - a device that encompassed a surprising number of IP questions.

In short, the lesson for the established artist is to conduct an audit with an IP specialist to find out what angles on capitalization and intellectual property rights an artist may be missing.

PANEL #6 - MUSIC ACROSS MULTI-MEDIA PLATFORMS

“90 percent of revenue used to come from CD sales. As the digital frontier expands, managing multiple revenue streams will be the business of the business.” Henry Root, an attorney in Santa Monica, California, moderated this panel, along with Ned Hearn, an attorney in Los Angeles and author of *The Musician’s Guide to Copyright* (1978) and *The Musician’s Business and Legal Guide* (8th ed. 2007), and Jonathan Haft, Senior Vice President of Business

and Legal Affairs for Hollywood Records and Lyric Street Records (Disney Music Group's pop and country labels).

Expanding on this idea of multiple revenue streams, the members of the panel tackled all different kinds of digital music services and what each has in store for labels and artists. It certainly pays to know the different models available at the current moment, whether it is download services such as iTunes, Amazon.com, or Wal-Mart. On the streaming side of content delivery, well-known names like Napster and Rhapsody continue to find themselves with new content providers like Last.fm and other social networking sites like myspace.com. Another area building steam is wireless providers like Nokia's "It Comes with Music" campaign and the fallout of the Royalty Board's decision to peg ringtone royalties at 24 cents per download, which made sense when ringtones were \$2.99, but makes them less viable for content providers when they are now charging only 99 cents.

Clearly the heart of the business model is changing. Mr. Haft, from Disney, remarked that larger labels like Disney have a whole host of cross-branding opportunities for their artists (movies, websites, television shows), as well as the capital to incubate their own content-delivery systems like online streaming services and cell phone content delivery. However, there are many services that have come and gone, and so labels and artists must keep up to date on what start-ups are offering and making sure SoundExchange and other royalty organizations are properly representing the artists and labels.

PANEL #7 - MUSIC LITIGATION AND DECISIONS

Prof. Stan Soocher of the University of Colorado - Denver and Editor in Chief of *Entertainment Law & Finance*, and Christine Lopera from Mitchell Silberberg & Knupp LLP in New York provided an update on recent case law developments affecting the music industry. The following is a brief list of cases they reviewed and some important holdings.

In *Allman v. UMG Recordings*, the court found that a contract provision limiting royalty collections to a three-year limitation was reasonable.⁴ In *Reinhardt v. Wal-Mart Stores Inc.*, the court found that the Ramones' lead songwriter, Reinhardt, was entitled to reimbursement for digital sales of the audio recordings.⁵ *Sybersound Records Inc. v. UAV Corp.* addressed exclusivity of licenses for karaoke recordings.⁶ *Recht v. Metro Goldwyn Mayer Studio Inc.* is a case addressing change of venue motions for copyright infringement acts.⁷ This decision moved the case from the District Court of Wisconsin to the Central District of California.

In *Lahera v. The Walt Disney Co.*, the district court dismissed a copyright infringement action against the Walt Disney Company for allegedly using the phrase "dancing with the stars" from the plaintiff's song "Rosana" as the title the popular reality television show.⁸ The court found the following: "[t]here is no evidence that Defendants heard 'Rosana' nor is there evidence that Defendants had a reasonable opportunity to hear 'Rosana.' Lahera: (1) wrote the song while housed in a federal prison; and (2) does not provide evidence that the song was publicly released."

⁴ 530 F. Supp. 2d 602 (S.D.N.Y. 2008).

⁵ 547 F. Supp. 2d 346 (S.D.N.Y. 2008).

⁶ 517 F.3d 1137 (9th Cir. 2008).

⁷ 08-cv-250-slc (D. Wisc. 2008).

⁸ 08-11677 (E.D. Mich. 2008).

For more on these decisions and other affecting the music industry, the panelist recommend subscribing to the periodical *Entertainment Law & Finance*.

PANEL #8 - THE INDUSTRY'S FUTURE AND THE MAJOR LABEL LAWYER'S ROLE

The final session of the SXSW Music legal conference was a round table discussion featuring Ken Abdo of Lommen, Abdo, P.C.; Julie Swindler, Executive Vice President, Business Affairs and General Counsel for Sony Music Entertainment; Rand Hoffman, Head of Business and Legal Affairs for Interscope Geffen A&M Records; and Lisa Margolis, Senior Vice President, Business & Legal Affairs in the Music Division at Warner Bros. Pictures.

This panel acted as something of a recap of the issues of the entire conference, with these exceptionally experienced panelists offering insiders' insight into the current state of the music industry from the major label perspective. The panelists discussed a number of topics, including the building momentum for congressional recognition of a public performance right for terrestrial broadcasts, the usefulness of the 360 Deal, the foundational aspect of artist development as the heart of the music label business, and the different ways labels are trying to capitalize in the digital marketplace.

Looking to the future of the record industry, the panelists discussed where they thought the business might be in 5 years. All agreed that artist development would sit at the heart of the business, but discussed other avenues to complement this traditional role. More 360 Deals would mean greater emphasis by the labels to do branding and sponsorship of artists across many media platforms. Labels will attempt to skip brick and mortar or online record stores and instead

engage in direct-to-consumer marketing and sales. Labels will engage in more “manufacturing” of artists to address particular demographic markets (i.e. Pussycat Dolls, etc.).

The uncharted territories of music marketing, however, will likely remain problematic. These include geographic regions rampant with digital piracy (Brazil, Russia, India, China), and areas of little exposure, such as Africa. Finally, keeping one step ahead of the technology by capitalizing on developments before piracy undercuts possibilities, will remain at the forefront of labels striving for long-term financial stability.

CONCLUSION

As mentioned in the introduction to this review, South by Southwest is much, much more than what goes on in the CLE conference room, or the convention center as a whole. The overall experience of SXSW gives attendees a renewed sense of not only the current issues in the music industry, but also the entrepreneurial energy of the history of music. Walking the streets of Austin for a few short days, one’s mind cannot help but wonder what the Beatles looked like when they carried their own gear around Liverpool, England. When two thousand and more no-name bands gather in one place, greatness cannot help but lurk somewhere nearby. The question is whether or not you will be the one to find it.