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The NFL's Quest to Be Treated Like General Motors Should Stop at the Supreme Court

BY MATTHEW BESTER

INTRODUCTION

The Origins of American Needle, Inc. v. National Football League

In a case argued in January of this year, the U.S. Supreme Court decided how the National Football League ("NFL") or its teams can be sued under the antitrust laws and under what conditions. This result could dramatically restrict not only the ability of team owners, players, and vendors to sue the league or its teams for antitrust violations, but it could also impact the antitrust liability of many other joint ventures.

CONTINUED ON PAGE 27

Negotiating a 360 Deal

Considerations on the Promises and Perils of a New Music Business Model

BY EDWARD PIERSON

It is seldom in a banquet hall full of lawyers that one can ever hear a pin drop. But the moment when a famous speaker at this year's Annual Meeting of the Forum on the Entertainment and Sports Industries in New York City told his audience of entertainment and sports lawyers that all new artists who signed to his label had to sign nonnegotiable 360-degree deals, one could hear a pin (and see many jaws) drop.

While the most-cited phrases spoken at the Annual Meeting included "competing with free," "job opening," "shaken not stirred," "Springsteen tickets," and "Rule 409, OMG," it was the phrase "360 deal" coupled with "nonnegotiable" that seemed to take this year's prize for follow-up discussion. The spirited panel discussion the next day on 360 deals further fueled that debate and fire.

CONTINUED ON PAGE 31

PROFILE

Music and Media Lawyer Linda Mensch

BY RIANA POSITANO

When asked about what her job entails, Linda Mensch answers without a moment's hesitation: "People sit in my office, and I help make their dreams come true."

Considered one of the go-to lawyers for arts and entertainment matters, Mensch has represented television broadcast and production companies, theatrical touring companies, entertainment-oriented software companies, recording companies, and performing artists such as Cheap Trick, the Ohio Players, and rapper Da Brat.

Mensch began her appreciation of the arts at a young age. Born in Bayside, New York, Mensch's father was a sometime songwriter on Broadway and ultimately became one of the first CPAs for the rock-and-roll industry, a job change that often exposed Mensch firsthand to a world largely unknown to peers and adults alike. The chances to snag free concert tickets, to go backstage at Todd Rundgren shows to deliver royalty checks, and to interview Johnny and Edgar Winter for her high school newspaper influenced Mensch's future professional choices. From those early experiences,

CONTINUED ON PAGE 36

ENTERTAINMENT AND SPORTS LAWYER

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ABA Forum on the Entertainment & Sports Industries
AMERICAN BAR ASSOCIATION

Message From the Chair

Dear Forum Member:

I hope you enjoy this edition of *Entertainment and Sports Lawyer*. It is one of the many benefits you receive as a member of our Forum. The Forum's Governing Committee has implemented many new benefits for our members over the coming year. The Forum now offers monthly CLE-approved webinars on specific issues related to the many entertainment and sports disciplines under the Forum's umbrella. Be sure to take a look at the schedule for those webinars in this edition. Also, starting this spring, each of the Forum's divisions will distribute by e-mail a quarterly update for all members on new business and legal developments in those various disciplines. The Forum will also increase its offerings of regional programs around the country. The first of its kind will be in Miami on April 22–24, 2010. Details regarding the Miami program are also in this edition.

We are especially excited to offer this year's Forum Annual Meeting in Las Vegas on October 7–9, 2010. It will occur at the top-rated Four Seasons Hotel. We are delighted to be able to offer meeting attendees the special room rate of $195 at the luxurious Four Seasons Hotel. In addition to the Forum's consistent, industry-leading programming, the 2010 Meeting's value, due to its lowered hotel rates and the budget-friendly location of Las Vegas, makes it a must-be-there event for our members.

Moreover, our membership committee developed incentives to significantly reduce the registration costs for the Las Vegas Annual Meeting for members who recruit new members to the Forum. Those incentives could cut registration costs by up to 40 percent! Please look for an upcoming announcement about those incentives.

These are only a few of the many benefits for Forum members. However, the best benefit is our membership; our Forum is fortunate to have many experienced and dedicated professionals who all support each other. The collegiality of our members and the opportunities for networking are hard to find in other similar organizations. Those of you who have attended our Annual Meeting in the past surely know this. For those of you who have not, we welcome you to this year's meeting to experience it for yourself. Meanwhile, we are always looking for better ways to serve our members. If you have any suggestions or comments, please feel free to contact me at kschroder@schroderfidlow.com or Teresa Ucok at tucok@staff.abanet.org.

Best wishes,
Kirk T. Schroder
Schroder Fidlow Titley & Davis, PLC
Forum Chair

Three Strikes and You're (Not Necessarily) Out

How Baseball's Erratic Approach to Conduct Violations Is Not in the Best Interests of the Game

BY MATTHEW A. FOOTE

"Everyone in society should be a role model, not only for their own self-respect, but for respect from others."

—Barry Bonds[1]

INTRODUCTION

It is nearly impossible to turn on any media outlet without hearing about the latest professional athlete's personal conduct indiscretion. The news is dominated by such headlines. Today's athletes, coaches, and other professional sports personnel live under perpetual scrutiny, and every misstep is instantaneously spread worldwide through the media. Thus, personal conduct violations are a growing and urgent concern in professional sports. For example, National Football League ("NFL") star quarterback Michael Vick was recently released from a sentence of nearly two years in federal prison on charges related to dog fighting and animal abuse.[2] Commissioner Roger Goodell was left with the decision on whether to impose additional sanctions against Vick upon his return. Goodell decided to reinstate Vick but conditioned his return on Vick's cooperation and good behavior, which eventually allowed Vick to return to the field with the Philadelphia Eagles after sitting out the first two games of the 2009 season.[3] Goodell has not shied away from issuing severe penalties for personal conduct, as Tank Johnson, Pacman Jones, and Chris Henry have all recently served significant suspensions for off-the-field indiscretions.[4] Other sports have suffered from the same concerns. In 2007, the National Basketball Association ("NBA") was rocked by a scandal involving referees gambling on and fixing games.[5] Also in 2007, National Hockey League ("NHL") player Mark Bell was suspended multiple games for a DUI accident that also cost him six months in jail.[6]

Lately, Major League Baseball ("MLB" or "Baseball") has had more than its share of conduct concerns. Hall-of-Fame-caliber players Alex "A-Rod" Rodriguez, Roger Clemens, Manny Ramirez, and Sammy Sosa have recently been under the national and public microscope for steroids. In 2007, Barry Bonds became the sport's new all-time home run king, and his record-setting season was followed by his federal indictment on perjury and obstruction of justice charges.[7] Bonds faces up to 30 years in prison on the charges, related to a grand jury investigation of steroids and Baseball.[8] Unfortunately, Bonds, A-Rod, Clemens, Ramirez, and Sosa are not alone amid the swirling controversy, as performance-enhancing drugs are clearly a widespread problem in Baseball. On December 13, 2007, former Senator George Mitchell released a scathing report ("Mitchell Report" or the "Report") indicating that use of performance-enhancing drugs permeates the sport.[9] However, performance-enhancing drug use is only one of several conduct-related concerns in Baseball, and such concerns are not a new phenomenon. As the longest-established and arguably most-revered organized professional sport in America, Baseball has a long history of assorted conduct violations by players, coaches, and other personnel.[10]

This article will first analyze some of Baseball's personal conduct violations and MLB's response to these issues. It also defines conduct by separating the various types of indiscretions into on-the-field and off-the-field conduct violations. The next section discusses the mechanisms by which teams and MLB attempt to regulate personnel conduct. Then some of the most common types of conduct violations—gambling, alcohol and drug use, and violence, respectively—will be discussed. Lastly, this article briefly speculates on the impact of the Mitchell Report and proposes solutions to Baseball's growing personal conduct problem.

This article also will discuss how Baseball's response to these situations, including various punishments and the establishment and increased power of the commissioner, illustrates its attitude toward the importance of the different types of conduct violations. The severity of Baseball's attack on certain types of conduct indicates Baseball's hierarchy of offenses, based on the degree to which the violations damage the integrity, or "best interests," of the game.[11] However, Baseball's erratic treatment of the different types of conduct violations also indicates a piecemeal approach, rather than a systemic assault on the larger problem of appalling conduct by its employees.

DEFINING "CONDUCT"

Conduct violations in Baseball can be classified into two broad categories: on-the-field conduct and off-the-field conduct. On-the-field conduct includes any violations that directly affect the outcome of games. While these transgressions may not literally take place on the field, they directly impact the game on the field. Examples of on-the-field conduct violations discussed in this article include gambling on Baseball, fixing games, performance-enhancing drug use, and on-the-field violence. Since these violations have a direct impact on the integrity of the game itself, they are generally met with the harshest penalties. Conversely, off-the-field conduct violations do not generally have a direct impact on the game itself, and thus are usually met with more leniency. Examples of such off-the-field violations discussed in this article include gambling on things other than Baseball, recreational drug and alcohol use, domestic violence, and other criminal conduct away from the baseball diamond. While unrelated to the outcome of games, Baseball still has an obligation to uniformly punish such indiscretions, as they can negatively affect the image of the national pastime.

Some egregious off-the-field conduct may arguably only be harmful to the offending player, and not directly to Baseball. However, Baseball is an entertainment industry marketed heavily to families. Thus, the image of the game is important, and illegal or immoral conduct can tarnish that image. Perhaps this is why the Uniform Player's Contract ("UPC") requires each player to

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"pledge himself to the American public," regarding his conduct.[12] Therefore, the national pastime should be untainted, and the league should punish severely any personnel who bring the pastime into disrepute. Historically, team owners, league presidents, and commissioners have taken the view that severe punishments are justified to protect their product. However, the Major League Baseball Players Association ("MLBPA") and various arbitrators have tended to protect players from any extreme punishment. They adhere to the idea that it is the job of the legal system to punish this type of behavior, and a player's ability to earn a living should not be limited by behavior that occurs away from the workplace.

Finally, it is important to note that the line between on-the-field and off-the-field conduct violations can sometimes be blurry. For example, a player's alcohol or recreational drug abuse can presumably affect his performance on the field.[13] Thus, a player's substance abuse off the field can have a direct impact on the outcome of the game. Additionally, suspensions, injuries and death, or criminal penalties related to off-the-field violations can deprive a team of the player's services, thus directly impacting the outcome of games. For example, while Vick's dog-fighting activities have nothing to do with the game of football, the Atlanta Falcons lost their star quarterback.[14] Nevertheless, the clear delineation between on-the-field and off-the-field conduct, as described above, is necessary to determine how best to discipline such violations.

REGULATION OF PERSONAL CONDUCT AND ENFORCEMENT

There are two ways that conduct violations in Baseball are regulated: by teams and by the league. Players and coaches whose behavior constitutes conduct violations generally face termination of their contracts by their teams, suspensions and fines by MLB, or a combination of all of these.

Team Regulation of Conduct: Major League Baseball's Uniform Player's Contract

MLB teams try to regulate players' conduct directly through provisions of the UPC. The UPC is negotiated by the MLBPA and MLB as part of Baseball's Collective Bargaining Agreement ("CBA"). The UPC endeavors to give teams the authority to terminate player contracts for violations of its provisions. UPC section 7(b) allows teams to "terminate [the] contract upon written notice to the Player" for violation of these provisions.[15] Individual player contracts can obviously deviate from this standard form, especially in the case of players with histories of past conduct problems. However, the termination clause is a standard provision in most MLB contracts.

The UPC includes several provisions that have been used by teams to police personal conduct. Among these provisions, the UPC obligates players to "conform to the highest standards of personal conduct, fair play and good sportsmanship."[16] Teams have often attempted to apply this broadly drafted provision to conduct violations not expressly listed in the UPC. For example, many different types of offenses could almost certainly fall under the "high standards of personal conduct" clause, including drug and alcohol abuse, DUIs, gambling, domestic violence, fighting, and weapons.

In addition, a player is required to "perform his services hereunder diligently and faithfully, to keep himself in first-class physical condition, and to obey the Club's training rules."[17] This provision has often been used to punish players for drug and alcohol violations, as such substance abuse clearly does not contribute to "first-class physical condition" and is obviously not a part of "the Club's training rules."[18]

The UPC also prohibits conduct of a less morally questionable, but equally actionable sort. Section 5(b) of the UPC contemplates players' participation in sports other than Baseball.[19] Understandably, teams wish to protect their investments so "sports [that] may impair [the player's] ability and skill as a baseball player" are banned under the contract.[20] Some examples are specifically enumerated, including "skiing, auto racing, motorcycle racing, sky diving, or in any game or exhibition of football, soccer, professional league basketball, [and] ice hockey," but the provision also includes the catch-all "other sport involving a substantial risk of personal injury."[21] The Yankees terminated third baseman Aaron Boone's contract in 2005 using this provision after Boone tore his anterior cruciate ligament playing pick-up basketball.[22] While Boone was clearly not playing "professional league basketball," as the contract expressly prohibits, he could not rationally argue that the pick-up game did not have a substantial risk of personal injury.[23] In 2002, the San Francisco Giants unsuccessfully sought similar relief from Jeff Kent's contract when Kent allegedly injured his wrist doing "wheelies" on his motorcycle on public roads.[24] While these may not be examples of behavior involving criminal or immoral conduct, teams are justified in demanding and utilizing these clauses that protect their investments.

MLB Regulation of Personal Conduct: The Major League Agreement and the Commissioner

In 1920, Baseball appointed ex-federal judge Kennesaw Mountain Landis as its first commissioner.[25] Initially, Landis was reluctant to take the job and did so only on the condition that the commissioner be given broad powers to discipline players in the "best interests of the game."[26] The "best interests of the game" clause has been widely used by Baseball's commissioners to regulate personal conduct. As current Commissioner Bud Selig said, "the intent of the best interests clause was to protect the integrity of and ensure public confidence in the game."[27] The commissioner's independent power is allocated by section 2 of Article II of the Major League Agreement ("MLA"), which lists the commissioner's duty to "investigate . . . any act, transaction, or practice charged, alleged, or suspected to be detrimental to the best interests of the national game of baseball."[28] Further, the commissioner should "determine, after investigation, what preventive, remedial, or punitive action is appropriate . . . and [ ] take such action either against Major Leagues, Major League Clubs or individuals."[29] Thus, the commissioner is in the unique position of fulfilling all three roles: he investigates the matter, decides guilt or innocence, and doles out punishment.[30]

However, the commissioner's power to discipline in the "best interests of the game" may be problematic. First, the nebulous standard does not allow MLB players and other personnel to clearly understand what type of behavior is intolerable. Since the disciplinary power is solely in the commissioner's discretion, one player may escape punishment while another player is disciplined for a substantially similar offense.[31] In addition, it is nearly impossible for one person to decide the best interests of Baseball.

For example, the commissioner is supposed to take actions "he deems appropriate to ensure competitive balance in baseball."[32] When the commissioner suspends a player for conduct violations, presumably to protect the best interests of the sport, this affects the sport's competitive balance by depriving the player's team of his services during the suspension. As a result of the suspension, the team could miss the playoffs or fail to advance in the playoffs.[33] This could affect the team's profitability and its winning tradition, which would affect its ability to sign free agents. In addition, the team may suffer image problems from the underlying conduct violation committed by the player. Thus, the commissioner's decision could have far-reaching consequences to the team and the sport's competitive balance.

The commissioner must weigh all of these competing concerns when determining whether the "best interests of the game" are better served by protecting Baseball's image at the expense of affecting the outcome of games. Surely no fan, player, coach, or league official wants a commissioner's decision to affect wins and losses in this manner. The other alternative—specifically listing all transgressions and their respective penalties—seems an equally impossible task, considering the wide array of human

TODAY'S ATHLETES, COACHES, AND OTHER PROFESSIONAL SPORTS PERSONNEL LIVE UNDER PERPETUAL SCRUTINY, AND EVERY MISSTEP IS INSTANTANEOUSLY SPREAD WORLDWIDE THROUGH THE MEDIA.

behavior.[34] For example, Commissioner Fay Vincent used the "best interests" clause to suspend Cincinnati Reds owner Marge Schott for one year in 1993 for using racial epithets about her players, personnel, and rivals in Baseball.[35] Schott reportedly called two of her players "million-dollar niggers" and used other racial slurs about Jewish and Japanese personnel.[36] Surely it is often easier to invoke the broad "best interests" clause than to try to create an exhaustive list of such offensive behavior.

Because he is theoretically biased only toward protecting the game—rather than any particular team, player, or league—the commissioner is entrusted with making such near-impossible decisions. Indeed, "the rationale behind granting the Commissioner the power to overrule the owners lies in a fundamental conflict of interest for the owners, whose financial incentives are not wholly attached to the success of MLB, but also to the success of their individual teams."[37] Despite the concerns mentioned above, the commissioner retains the power to unilaterally take action to protect the game. Further, the Supreme Court of the United States has upheld these broad powers, holding that it is solely in the discretion of the MLB commissioner to determine what is in the best interests of Baseball.[38]

GAMBLING

There are two distinct types of gambling that have commonly arisen as problems in Baseball: gambling on activities other than Baseball and gambling on the game itself. The consequences for the two types of gambling are drastically different. Players and managers who gamble on things like cards, horses, and other sports suffer image problems and, if their activities are illegal, possible suspensions for tarnishing Baseball's image. On the other hand, Baseball personnel who bet on the game of Baseball, particularly when their own teams are involved, corrupt the spirit of the sport. Since these types of gamblers have a direct influence over the outcome of games, the integrity of the game itself is at stake. After all, the allure of the product of Baseball is the competitive nature of the games. If the games are influenced by anything other than competitive spirit on both sides of the ball, the product is diminished and the fans suffer.[39] Thus, as Commissioner Vincent said, disciplinary action is necessary "in order to maintain a meaningful deterrent . . . [that] will protect baseball from the kind of threat represented by individuals who cannot deal with the temptations of gambling."[40]

Gambling Unrelated to Baseball

Outfielder Albert Belle admitted that, during the 1990s, he lost over $300,000 betting on sports other than Baseball.[41] Commissioner Selig decided that no action was necessary to protect the integrity of the game.[42] While such high-stakes legal gambling tends to perpetuate the negative image of athletes as overpaid and detached from the average fan, the image ramifications are generally overlooked by the league.[43] On the other hand, former Philadelphia Philly Lenny Dykstra received one year of Baseball probation in 1991 for losing $100,000 in an illegal poker operation in Mississippi.[44] Dykstra was criminally prosecuted, which probably contributed to Commissioner Vincent's view that action was needed to protect the image of the game.[45] In fact, Vincent said that he was "sending a message in the Dykstra case . . . and by stepping on something like that fast, we can keep the act from seriously contaminating baseball."[46] Despite the message Vincent purported to send, the Dykstra and Belle cases exemplify the relatively apathetic, and inconsistent, reaction to gambling that does not relate to Baseball. While a year of probation is a significant punishment, it pales in comparison to the sentences received by personnel who have crossed the line into gambling on Baseball.

Gambling on Baseball

Gambling on Baseball represents the ultimate taboo offense for game participants and often results in the sternest possible punishment. As mentioned, gambling by players and coaches directly involved in the game diminishes the integrity of the competition. Since the credibility of the competitive aspect of the game is shaken, the product also

becomes less marketable to fans. The most famous examples of such gambling in Baseball—indeed, perhaps the most famous conduct violations in the history of sports—are those of the Black Sox and Pete Rose. Both situations resulted in the ultimate punishment and brought much attention to the role and authority of Baseball's commissioner.

THE BLACK SOX: FIXING THE WORLD SERIES

In 1919, the Chicago White Sox were overwhelming favorites in the World Series against the Cincinnati Reds, but the Reds upset Chicago, five games to three, in the best-of-nine series.[47] An ex-major leaguer named Hal Chase, who had been in trouble several times during his playing career for allegedly throwing games, had approached several White Sox players on behalf of professional gamblers. The gamblers paid a total of $100,000 to eight players (who came to be known as the "Black Sox") to lose the World Series intentionally. These players included star pitcher Ed Cicotte, a 29-game winner, and the famed "Shoeless" Joe Jackson.[48] Eight players admitted before a grand jury to accepting money from gamblers to intentionally lose the series; all were criminally prosecuted and suspended from Baseball.[49] While "Shoeless" Joe maintained until his death that he never tanked a game, his acceptance of $20,000 from the gamblers sealed his fate with Baseball and led to the famed statement by a young fan outside the courtroom, who pleaded, "Say it ain't so, Joe."[50] Indeed, the heartbroken fans of a team who just lost the World Series suffered the ultimate indignity at the revelation that their heroes purposely lost.

The Black Sox scandal led Baseball owners to establish the position of commissioner, under which their two leagues would be united.[51] Commissioner Landis said even before the trial of the Black Sox players that "there is absolutely no chance of any of them [being allowed] to come back to Organized Baseball. They will remain outlaws!"[52] Indeed, the players remained banned for the rest of their lives, and remain ineligible for the Hall of Fame.[53] "Shoeless" Joe and the other Black Sox did not have the benefit of the player's union and labor agreement that helped later players, like Dykstra, avoid such severe sanctions.[54] Nevertheless, since their offense was so enormous, it is doubtful a player's union could have helped the Black Sox remain in the game.

When Commissioner Landis banned the Black Sox, he had no explicit anti-gambling language on which to rely. The Black Sox were banned based simply on the "best interests of the game" power.[55] However, the Black Sox scandal provoked Baseball into investigating gambling more closely. As a result of these investigations, another gambling scandal involving the 1919 season surfaced. According to witnesses, Ty Cobb and Tris Speaker had agreed to fix a regular-season series so the Indians could collect the third-place finisher's share of the World Series bonus.[56] Per their agreement, Cobb and Speaker would be rewarded with a piece of those earnings, and they also gambled on the games they agreed to tank.[57] In those days, the commissioner did not appoint special prosecutors or ex-senators to investigate such allegations. Instead, despite evidence of their unusually heavy wagering on those games, Landis determined unilaterally that there was not enough evidence to determine that Cobb and Speaker had fixed games.[58] Nevertheless, these scandals led Landis to announce a new rule: "any player, manager, or owner who bet any money on a baseball game would automatically be suspended for a year, and anyone who bet on a game involving his own team would be banned from baseball for life."[59]

RULE 21: MODERN RULE NOT AVAILABLE TO LANDIS

Transgressions like those of the Black Sox, Cobb, and Speaker caused MLB to adopt Major League Rule 21, entitled "Misconduct."[60] Rule 21 lists various forms of prohibited conduct for MLB personnel, among which are provisions contemplating players intentionally not giving their best efforts to win games.[61] The rule provides that an MLB employee "shall be declared permanently ineligible" if he

> shall promise or agree to lose, or attempt to lose, or to fail to give his best efforts toward the winning of any baseball game . . . or . . . shall intentionally lose or attempt to lose, or intentionally fail to give his best efforts . . . or . . . shall solicit or attempt to induce any player or person connected with a Club to lose.[62]

In addition, a player is duty-bound to "inform his Major League President and the Commissioner . . . immediately of such solicitation" or else also be declared permanently ineligible.[63] Thus, even a player who does not agree to throw games can be permanently banned if he knows about such activity and fails to report it. Since Commissioner Landis did not have Rule 21 in his arsenal in the 1920s, he had to rely on the broad "best interests of the game" power. Rule 21 makes explicit a power that is implicit to the commissioner under the "best interests of Baseball" doctrine.

PETE ROSE: BETTING ON GAMES HE MANAGED

Ironically, the anti-gambling rule partially generated by Cobb's actions would be used against the man who, decades later, would break Cobb's all-time hits record. In 1989, Pete Rose admitted that his association with bookies while manager of the Cincinnati Reds violated the "best interests of baseball" rule.[64] Rose, who at the time was being investigated by the IRS for tax evasion, agreed to accept status as "permanently ineligible" to work in Baseball.[65] Part of the deal with Commissioner A. Bartlett Giamatti was that Rose would have the right to apply for reinstatement.[66] However, Commissioners Vincent and Selig, Giamatti's successors, have both clearly indicated that Rose should not expect reinstatement during their tenures.[67]

In the years following Rose's banishment, there was speculation that Rose's chances for reinstatement might be improved if he admitted to betting on Baseball. After all, MLB Rule 21(d)(1) expressly prohibits "Betting on Ball Games," but provides for only a one-year suspension for "any player, umpire, or . . . employee, who shall bet any sum whatsoever upon any baseball game in connection with which the better has no duty to perform."[68] So, if Rose had bet on games in which his team was not playing, he may have only been subject to a one-year suspension under Rule 21(d)(1). If Rose had come clean about such gambling, he may have received the benefit of some grace from the commissioner's office.

On the other hand, Rule 21(d)(2) provides that "any . . . employee, who shall bet any sum whatsoever upon any baseball game in connection with which the better has a

duty to perform, shall be declared permanently ineligible."[69] Since Rose denied for years that he had bet on Baseball, Commissioner Giamatti relied on the evidence turned up by his investigation. At the time of the Rose investigation, Giamatti announced in a press conference that he believed Rose had bet on Reds games, and therefore had stained and disgraced the game.[70] Apparently, Giamatti would have invoked Rule 21(d)(2) to declare Rose permanently ineligible even without Rose's acquiescence. Rose will presumably never be reinstated, as he later admitted to betting on Reds games that he managed.[71] In the interim, Rose spent 14 years denying that he bet on Baseball. He still says defiantly, "I'm sure that I'm supposed to act all sorry or sad or guilty now that I've accepted that I've done something wrong. But you see, I'm just not built that way."[72]

Indeed, even at the time of the Rose investigation, 14 years before Rose's admission to betting on Reds games, Giamatti understood the seriousness of Rose's transgressions. Giamatti "told sportscaster Howard Cosell, in a private phone call . . . that by banning Rose he was 'ridding baseball of a cancer.'"[73] The characterization of the previously beloved Rose as a "cancer" demonstrates the danger to the integrity of the game that gambling on Baseball represents. The implication is clear, and the rationale for Rule 21 is obvious: Conduct that inappropriately influences the outcome of games is a cancer on the game itself.

THE NATIONAL PASTIME SHOULD BE UNTAINTED, AND THE LEAGUE SHOULD PUNISH SEVERELY ANY PERSONNEL WHO BRING THE PASTIME INTO DISREPUTE.

This concept is arguably even more compelling for managers, who make many decisions that can directly determine wins and losses. While admitting to betting on Reds games, Rose still rationalizes his actions by claiming to have never bet on the Reds to lose. By Rose's reasoning, his bets gave him no more influence on those games than he would otherwise have had with simply a healthy competitive desire to win. Rose claims, "during the times I gambled as a manager, I never took an unfair advantage . . . I never bet more or less based on injuries or inside information. I never allowed my wagers to influence my baseball decisions. So in my mind, I wasn't corrupt."[74] Regardless, Rule 21 is clear that permanent ineligibility is the consequence for "bet[ting] any sum . . . upon any game in connection with which the better has a duty to perform."[75] In addition, Rose's story has changed several times since the initial investigation. The bright line of Rule 21(d)(2) makes the decision easier for the commissioner. The rule was intended to effectively deter anyone associated with the game from endangering its integrity in such a manner, and hopefully Rose's situation will continue to serve as an example to would-be gamblers.

It is important to note that Rose had less leverage than players because, as a manager, he was not a member of the MLBPA. Therefore, unlike Dykstra, Belle, and others, Rose was not eligible for arbitration for any punishment inflicted by the commissioner. In addition, Baseball's Hall of Fame changed its rules in 1991 to prohibit induction for anyone on Baseball's permanently ineligible list.[76] Hall of Fame president Edward Stack stated that the rule change was not aimed at Pete Rose.[77] Nevertheless, the rule change does illustrate another Pete Rose–Ty Cobb irony: Cobb is in the Hall of Fame despite having allegedly fixed games (and gambled on them) on the field as a player, while Rose is banished for betting on games, regardless of whether he actually intentionally influenced the games' results. As mentioned, nothing is likely to change. After Rose's admission to betting on Reds games, all speculation about the admission leading to grace from the commissioner's office was quelled, as Baseball spokesman Rich Levin said, "as far as we're concerned, nothing has changed."[78]

ALCOHOL AND DRUGS

Alcohol: Not Harmful to the Best Interests of the Game?

Baseball players have a long and checkered history of problems associated with recreational alcohol. Hall of Famer Mickey Mantle is reputed to have played drunk on numerous occasions, leaving many to wonder how improved Mantle's already staggering statistics could have been if not for his alcohol abuse.[79] Since the retirements of Mantle and former Yankees player and manager Billy Martin, "baseball fans now know how often Mickey Mantle and Billy Martin of the Yankees drank until late in the night following a game, even with another game facing them the next day."[80] Both Martin and Mantle died from their alcohol abuse, Martin in a DUI crash and Mantle from liver cancer.[81] Pitcher David Wells raised eyebrows and league concern when he claimed to have been "half-drunk" when he pitched a perfect game for the New York Yankees in 1998.[82]

In addition to Martin, numerous Baseball players and managers have had alcohol-related motor vehicle accidents. For example, in 1991 Lenny Dykstra—the same Dykstra involved in gambling scandals earlier that year—was convicted of drunk driving when he got into an accident where he injured himself and teammate Darren Daulton.[83] In that instance, Commissioner Vincent "decreed that Dykstra's own painful injury and the criminal fines levied on him were more than enough punishment for his dangerously illegal behavior, and thus Baseball would impose no further penalties."[84] At a 1993 spring training party, drunken Cleveland Indians player Tim Crews crashed his boat, killing himself and teammate Steve Olin, while seriously injuring another teammate Bobby Ojeda.[85] Obviously, there was no league action taken in that case, as the offending player was killed.

Yet, "no one is pushing the commissioner's office to institute random alcohol tests to check for hangovers that leave players unable to play at their best . . . if anyone did . . . it would immediately be vetoed by the league authorities, whose major advertisers are beer companies."[86]

One major difference between cocaine/marijuana and alcohol is illegality, "so the true rationale for a league policy that treats a player's indulgence in alcohol or tobacco is the felt need to protect the morality—or at least the moral image of the game."[87] Interestingly, however, MLB has taken no systemic action to specifically curb the abuse of alcohol by players despite the long list of alcohol-related offenses. Baseball tends to turn a blind eye to such criminal and harmful behavior, while severely punishing less dangerous activity like that of Rose. Baseball's response to misbehavior involving alcohol indicates that it is not the type of problem that any commissioner has determined affects the "best interests of the game."

Perhaps some believe that the market will deter players from engaging in activities that reduce their abilities to perform. After all, if a player consistently cannot perform up to expectations, he will not be rewarded with new contracts, regardless of the reason for his decline. There is ample evidence to show that alcohol impacts player performance. For example, the day after a night of moderate drinking, a man's growth hormone levels decrease by 42 percent on average as well as there being an average 25 percent decrease in testosterone.[88] This would absolutely decrease overall athletic performance.[89] Accordingly, some teams have begun taking action to deter alcohol use. In 2007, after drunken Cardinals pitcher Josh Hancock died in a car accident, the Cardinals, Yankees, and Mariners halted the practice of making beer available in the locker rooms.[90] This could signal a shift in Baseball's attitude toward alcohol abuse. Perhaps league officials have begun to recognize that substance abuse can cross the line from merely an image-related issue to one that can damage the game itself, especially regarding alcohol provided to players by MLB.

Recreational Drug Use: Best Interests of Baseball Affected

Baseball players have an even more infamous relationship with illegal recreational drugs than with alcohol, and MLB's response to drug offenses has been much more severe. Curiously, the league and teams have attempted to rigorously discipline drug offenders, even though their offenses are arguably much less dangerous than some of the criminal alcohol conduct, discussed above, that went unpunished. Perhaps this reflects a societal view that drugs are a more serious problem than alcohol, even if drugs are ostensibly only harmful to the drug user. Nevertheless, despite its efforts, Baseball often has been unable to adequately punish drug-offending players. Even when teams and Baseball have attempted to discipline such transgressions, union action and lenient arbitrators have knocked the teeth out of the punishments.

For example, in 1997, Anaheim Angel Tony Phillips was arrested for buying cocaine from an undercover agent.[91] The Angels tried to suspend Phillips, but arbitration precedents required conviction before a player could be suspended.[92] Michael Eisner, the head of Disney and corporate owner of the Angels, was especially sensitive to the family appeal of the national pastime.[93] Eisner strongly criticized Baseball arbitration precedents.[94] Eisner and Disney felt that "much faster and tougher action was required from baseball authorities to reassure fans that they were watching a game being played in a fully 'drug-free' zone."[95]

In 1984, Kansas City Royal Willie Wilson was suspended for the season by Commissioner Bowie Kuhn for being convicted of attempting to buy drugs.[96] The arbitrator in Wilson's case agreed that MLB could legitimately punish players for drug use to protect the "best interests of Baseball."[97] The arbitrator in that case articulated Baseball's view as to why severe punishments were necessary even for image-related conduct offenses. The arbitrator said, "because baseball players are highly skilled, well compensated, and constantly visible, they deserve and receive national attention . . . and their drug involvement . . . constitutes a serious and immediate threat to the business that is promoted as our national pastime."[98] Nevertheless, the arbitrator reduced Wilson's suspension to one month, seemingly in contradiction with his own statements about the threat drugs represent to the best interests of the game. The reduction of the suspension from a full season to a month implies that, in the arbitrator's view, drugs do not constitute quite the threat to the integrity of the sport as Baseball would argue.

The commissioner's power to punish drug offenders was similarly curtailed in the case of San Diego Padre Lamarr Hoyt. In 1986, Hoyt committed three separate drug offenses: He paid a fine for being caught with marijuana and illegal prescription drugs at the Mexican border; was sentenced to probation for possession of marijuana when stopped by San Diego police; and served 45 days in federal prison (as well as being sentenced to five years additional probation) for crossing the Mexican border with controlled substances.[99] The Padres terminated Hoyt's contract under the code of conduct clause, and Commissioner Peter Ueberroth suspended him for a year in the best interests of Baseball.[100] Despite acknowledging Baseball's interest in protecting its image, the arbitrator reinstated the contract and reduced the suspension to 60 days.[101] The arbitrator ruled that Baseball's policy was too inflexible, and that it had contributed to Hoyt's difficulties by not providing adequate drug abuse treatment for him.[102] Again, the arbitrator undermined Baseball's claim that drugs constituted a serious threat to the integrity of the game.

In 1984, Wilson's Kansas City teammate Vida Blue was convicted of possession of cocaine and sentenced to a prison term.[103] At the time of the incident, there was no official agreement between the MLBPA and MLB regarding drug-related incidents. Instead, Kuhn had promulgated "The Commissioner's Rules," which banned use, possession, or trafficking of illegal drugs and provided that in "serious cases," discipline might include "suspension or dismissal and termination of contract guarantees."[104] Kuhn suspended Blue for the remainder of the 1984 season and cited Blue's possession conviction, his repeated in-season drug offenses, his liaison role between players and dealers for cocaine transactions, and his exposure of a teenage bat boy to cocaine.[105] Kuhn would have imposed a lifetime ban, but refrained from doing so based on Blue's prison term and his cooperation with federal prosecutors.[106]

Even when Baseball is successful in severely punishing drug violators like Blue—and not curtailed by arbitrators—such offenses and their image consequences are constantly balanced against the players' ability to help the team win games. For example, in 1991, Atlanta Braves outfielder Otis Nixon was suspended for much of the season by Commissioner Vincent for testing positive for cocaine.[107] Despite the fact that Nixon had multiple prior cocaine incidents, his value on the field was too much for the Braves to resist, and the team re-signed him to a three-year deal.[108]

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In 1995, Darryl Strawberry was rewarded by the Yankees with a new contract, despite the fact that he was still serving his second suspension for drug violations.[109] Strawberry was only available to the Yankees because the San Francisco Giants had released him for violating the conduct clause in his contract when he failed a drug test.[110] Strawberry fought the release by the Giants, claiming that since he had already been suspended by the commissioner, his release constituted double jeopardy.[111] The case went to arbitrator George Nicolau, and the Giants agreed to pay $125,000 of Strawberry's next contract.[112] The consequence of Strawberry's many transgressions was a one-year deal with the Yankees for $850,000 and a $1.8 million option for the second year.[113] Strawberry's trouble with the law has continued beyond his playing career. Along with his 2001 sentence of 18 months in prison for violating his parole, his total scorecard of legal problems includes

> . . . three baseball suspensions, one paternity suit . . . two arrests for domestic abuse, one arrest for assault with a deadly weapon, three cocaine arrests, four unsuccessful rehabilitation center stays, one conviction for tax-evasion, one lawsuit for failing to pay legal fees . . . one arrest for driving under the influence of drugs, one two-year sentence for drugs and solicitation of prostitution, and five probation violations . . . Strawberry found himself millions of dollars in debt . . . and still not through binging on drugs. [He was also] diagnosed with signs of brain damage from years of cocaine use.[114]

Strawberry's drug problems even reached as far as the oval office. President Clinton was so disturbed by what Strawberry's story said about Baseball's ability to police its drug offenders, he sent his presidential drug adviser to meet with George Steinbrenner and other Baseball figures about adopting tougher drug policies.[115]

The treatments of Nixon and Strawberry are just two of the many examples illustrating that, despite what team owners may preach about preserving the game's image, on-the-field ability far outweighs conduct concerns. As long as a player maintains an exceptional ability to throw, hit, or catch a ball, he will always have a place in Baseball despite the damage he might inflict on the sport's image through off-the-field drug use. No case is more indicative of this concept than that of Steve Howe, the poster child of MLB and drugs.[116]

STEVE HOWE: POSTER CHILD FOR MLB DRUG POLICY GONE WRONG

Steve Howe's history with Baseball illustrates how conduct violations that merely tarnish Baseball's image are treated with far more leniency than other types of violations. Howe's case, like some of those mentioned above, also shows how powerless Baseball can be to punish some violations even when the commissioner desires such punishment. Howe's long history of drug suspensions from Baseball began in 1983, when Howe was suspended from the Dodgers for one month after failing a drug test.[117] Later that season, Howe was suspended for the playoffs, again for a failed drug test.[118] Howe tested positive again during the ensuing off-season, and was suspended for the entire 1984 season.[119] Howe was suspended a total of six times for drugs before being rewarded by the Yankees with an impressive contract for the 1992 season.[120]

After serving the last of these six suspensions, Howe applied for reinstatement with Baseball.[121] Though Commissioner Vincent believed that Howe deserved a lifetime ban, he decided to give Howe "yet another chance" to return to Baseball.[122] In order to prove that he was drug-free, Howe was required by the commissioner to spend a year in the minor leagues.[123] During this time, Howe was required to participate in regular drug testing, "possibly as often as every other day if necessary."[124] The commissioner also required that, in accordance with Howe's rehab doctor's advice, Howe "be immediately removed from Baseball in the event of a positive drug test."[125] Vincent subsequently and frequently referred to this as Howe's "last chance agreement."[126]

During the off-season prior to playing out his new contract with the Yankees, Howe was arrested on December 19, 1991, for attempting to purchase cocaine.[127] Howe was sentenced to three years' probation, a fine, and community service.[128] Vincent banned Howe from Baseball for life for "violat[ing] Baseball's drug policy,"[129] saying, "there is no place for illegal drug use in Baseball."[130]

Vincent argued that "any use, possession, or sale of illegal drugs would be subject to discipline that could be as stringent as permanent expulsion from the game, especially for those who, 'despite our efforts to treat and rehabilitate them,' continued to use illegal drugs."[131] Vincent decided it was in the "best interests" of Baseball to "extinguish [Howe's] opportunity to play" after he had "squandered" so many opportunities to prove he could comply.[132] Vincent said there was "simply no alternative," and that Baseball had "done all that [could] be done" for Howe because it was in Baseball's best interests to "show its membership and the public that persistent drug use . . . will not be tolerated. . . . Baseball's credibility is at stake."[133] Therefore, Howe received the first lifetime ban for drug use in the long history of Baseball.

Despite Baseball's seeming generosity, the MLBPA challenged the suspension and the issue was brought before arbitrator George Nicolau.[134] In November 1992, Nicolau issued a surprising decision: While he agreed that Baseball had an interest in keeping the workplace drug-free, Nicolau decided that Baseball had failed Howe by not implementing stringent testing to help Howe recover from his addiction.[135] The arbitrator decided that "neither the Commissioner or [sic] his Office be held blameless. Once Baseball assumed the responsibility for testing and for aftercare . . . it was under a duty to see that those conditions and restrictions were followed."[136] Nicolau reasoned that since "the Commissioner's medical adviser had cautioned against Howe's return unless he was tested every other day of the year," Baseball was under an obligation to Howe to provide such testing, without which Howe would not be given a "fair shot at success."[137] Nicolau even suggested that if Howe was provided with this "strategic safeguard" of "stringent, year-round testing . . . it is not at all likely . . . that the events of December 19 would have occurred."[138]

Adding insult to the commissioner's injury, Nicolau also played a semantic game with the commissioner. The arbitrator argued that the "last chance agreement" actually contemplated a failed urine test, and that Howe had not failed such a test.[139] Since Howe had been arrested for trying to possess cocaine, but had not failed a drug test, Nicolau argued that Howe had not technically squandered his last chance.[140] Nicolau said, "some precision is required here. What [Howe] assented to . . . was his immediate removal from Baseball 'in the event of a positive drug test.' That circumstance has never occurred at

any time since Howe's 1990 return to the game."[141] Surely Howe's transgression violated the spirit, if not the letter, of the agreement. Nevertheless, the arbitrator sided with Howe, ordering that Howe be reinstated and subjected to drug tests every other day for the rest of his Baseball career, any failure of which would "constitute just cause for his permanent removal from the game."[142] Nicolau asserted that "a penalty of this magnitude should serve as a clear warning that drug use will continue to be treated with severity."[143] Commissioner Vincent did not concur, calling it a "joke" that seven offenses were not enough, but that eight would be.[144]

It is important to note that Howe's total suspension of 119 days for his seventh offense cost him almost $2 million. Nevertheless, Howe was permitted to return to Baseball and cash in on amounts in excess of that lost income. Therefore, Howe's ability to throw a 95 m.p.h. fastball allowed him employment opportunities far beyond those that might be available to a common person with seven drug violations on his or her record. While it can be argued that Howe's position as a major leaguer placed him in an unusual limelight under which the common person would not normally find himself, it stands to reason that the common person would not have been coddled as Nicolau's orders allowed.

GAMBLING BY PLAYERS AND COACHES DIRECTLY INVOLVED IN THE GAME DIMINISHES THE INTEGRITY OF THE COMPETITION.

OFF-THE-FIELD DRUGS: CONCLUSION AND FUTURE IMPACT

Baseball's current recreational drug policy is rehabilitation-focused. It provides that "Baseball will attempt to treat and rehabilitate individuals with a drug problem."[145] However, the policy stresses that it will consider equally "the welfare of both the individual and the game."[146] In order to protect the best interests of the game, "Baseball will not hesitate to permanently remove from the game those players and personnel who, despite our efforts to treat and rehabilitate, refuse to accept responsibility for the problem and continue to use illegal drugs."[147]

Nevertheless, MLB consistently faces stiff challenges from the MLBPA any time it attempts to institute severe punishments to drug- and alcohol-abusing players. As shown in the cases above, arbitrators tend to support the players. One reason for this is that MLB represents one of the only employment options for players of that skill level. As George Nicolau said in the Steve Howe decision, "the Commissioner does not stand in the isolated position of an individual employer. He can bar the employment of a player at any level of the game regardless of the opinion or wishes of any one of a great number of potential employers. That is an awesome power."[148] One possible solution to the problem of too much "awesome power" in the hands of the commissioner is to motivate teams to terminate contracts based on conduct violations. The "free market verdict" argues that

> if the aim of sports drug policy is to secure a high quality of performance by players . . . the appropriate method is to have the players' contracts permit the team to release a drug-abusing player without having to pay his expected salary. Even in the absence of an explicit contract provision targeting drug use—which clubs are most likely to negotiate with a player when they already have reason to suspect such behavior, as in Nixon's case—the standard commitment by the player to "keep himself in first-class physical condition" can and should be interpreted in this fashion.[149]

Unfortunately, however, the above examples demonstrate that a player's ability to help the team win games will generally overcome any drug- or alcohol-related concerns about that player. Howe's ability to throw an accurate mid-90s fastball was obviously more important than what his drug violations did to the image of the Yankees or Baseball. The same is true with Strawberry's ability to hit home runs. This creates a dilemma because only the commissioner appears to care enough about the image of Baseball to police such conduct, but arbitrators dislike the nature of the commissioner's ability to preclude leaguewide employment for the offending player. Further, the UPC is negotiated between MLB and the MLBPA. The MLBPA would surely never allow provisions giving teams too much authority to terminate contracts, especially with the wealth of arbitrators' precedents supporting the players in such circumstances.

Alcohol and Recreational Drugs: Hybrid of Off-the-Field and On-the-Field Violations

As mentioned above in the section "Defining Conduct," some conduct that takes place off the field can directly affect the outcome of games. While alcohol and recreational drug use are classified here as off-the-field conduct, there is an argument to be made that such transgressions qualify as a type of hybrid violation. As mentioned, many have questioned how Mantle's career may have been even more successful if not for his alcohol abuse.[150] Similarly, it is open to speculation what heights highly talented individuals like Howe and Strawberry could have reached if not for their drug abuse. With our present-day advanced knowledge of the physiological effects of alcohol and drugs, it would be foolish to conclude categorically that such abuse does not in some way affect the outcome of games in which the abusing player performs. Without such abuse by these players, they may have been able to contribute to their teams winning more games. This illustrates that off-the-field alcohol and drug abuse could directly affect the outcome or integrity of the game. If the abuse reduces a player's ability to perform, the integrity of the game is affected because the product is worse for the fans and the outcome of the game could be influenced by the player's poor performance.[151]

On-the-Field Drug Violations: Performance-Enhancing Drugs

While there are isolated episodes of recreational drug use on the field, the larger concern about on-the-field drug

use relates to performance-enhancing drugs. The Mitchell Report produced startling revelations about the widespread use of steroids in Baseball, and could still instigate dramatic changes in MLB's approach to drug use in the game, particularly when the CBA is renegotiated after the current CBA expires in 2011.[152] Indeed, the Mitchell Report concluded that steroid use "has not been an isolated problem involving just a few players or a few clubs."[153] In fact, "each of the thirty clubs has had players who have been involved with performance enhancing substances at some time in their careers."[154] The impetus for the Mitchell investigation was "speculation . . . originally fueled by the testimony of players before a federal grand jury investigating" alleged performance-enhancing drugs supplied to players by a San Francisco company named BALCO.[155]

In 2002, Baseball implemented its first mandatory random drug testing of players.[156] The league tests for performance-enhancing drugs as well as recreational drugs, and as of 2005 the policy provides for "a 50-game suspension for a first positive test; a 100-game suspension for a second positive test, and a permanent suspension for a third positive test."[157] All of these suspensions are without pay.[158] The Mitchell Report concluded that Baseball's drug-testing program has been successful in that "detectable steroid use appears to have declined."[159] Nevertheless, the laundry list of current and former players who have reportedly tested positive for steroids, human growth hormone ("HGH"), or other performance-enhancing drugs is growing daily, and includes Manny Ramirez, Jose Guillen, Paul Byrd, Matt Williams, Rick Ankiel, Troy Glaus, Gary Matthews Jr., Mike Cameron, Ken Caminiti, Rafael Palmeiro, Sammy Sosa, and many others.[160] The news about Palmeiro, a potential Hall of Famer, was particularly galling after his adamant, finger-pointing denial while testifying before Congress.[161]

In addition to these positive tests, nearly 90 major leaguers were named in the Mitchell Report, including Barry Bonds, Andy Pettitte, and seven-time Cy Young Award winner Roger Clemens.[162] Alex Rodriquez, who many hoped would someday restore the integrity of the home run record from the Bonds' steroid taint, admitted in 2009 to using steroids.[163] According to the Mitchell Report, former MVP Caminiti once estimated that at least half of the major leaguers were using steroids.[164] Part of the ongoing problem is that players have shrewdly switched from steroids to HGH. The Mitchell Report recognized that "the use of human growth hormone has risen because, unlike steroids, it is not detectable through urine testing."[165] While HGH was added to the CBA as a banned substance in 2005, this is meaningless without the ability to test for it.[166]

For obvious reasons, this type of conduct transgression negatively impacts both the image and the integrity of the game. First, like other criminal activity discussed here, steroid use damages the image of the game because it is illegal.[167] As mentioned above, the integrity of the game is also in jeopardy whenever anything other than natural competitive spirit influences the outcome of games.[168] The Mitchell Report also mentioned concerns about steroid use that are analogous to concerns raised about players' associations with gamblers. The Report concluded that because of the illegality involved, players "can place themselves in a position of vulnerability to drug dealers who might use their access and knowledge of violations of law to their own advantage, through threats intended to affect the outcome of baseball games or otherwise."[169]

However, even if performance-enhancing drugs were legal, the game would still be harmed. Drugs like steroids and HGH give some players a chemically created advantage over other players, and thus their use is considered cheating. The image of the game is tarnished if its stars are viewed as cheaters. Notwithstanding the cheating concern, Baseball is tarnished by the image of its biggest stars shooting up drugs into their bodies with hypodermic needles.[170] Further, the appeal of sport is the competition to discover which athlete's natural athletic ability and hard work will prevail. The current era of Baseball has come to be known as the "Steroid Era," and there have been cries for records and statistics from this era to be marked with asterisks.[171] Indeed, the Mitchell Report states that "the widespread use of these substances raises questions about the validity of records and their comparability across different eras."[172]

It appears from his indictment and his inclusion in the Mitchell Report that Bonds' use of performance-enhancing drugs is now well-documented.[173] In fact, the indictment stated that "during the criminal investigation, evidence was obtained, including positive tests for the presence of anabolic steroids and other performance-enhancing substances, for Bonds."[174] The coming prosecution, and potential subsequent league action, will illustrate the seriousness with which Baseball views performance-enhancing drugs.

CONCLUSIONS TO DRAW FROM THE MITCHELL REPORT

It may still be too early to draw conclusions about the long-term effects that the Mitchell Report may have on Baseball. As mentioned, the Report's effect will be shown when the CBA is renegotiated in 2011. However, one thing is known: Baseball will not likely be able to punish players for steroid use that occurred prior to 2002. Amazingly, performance-enhancing drugs were never specifically prohibited before the 2002–2006 Collective Bargaining Agreement.[175] Indeed, A-Rod admitted to steroid use during this period and received no punishment.[176]

Therefore, even if Bonds used steroids while breaking the single-season home run record in 2001, Baseball would be hard-pressed to justify an asterisk next to Bonds' name in the record books for that record.[177] In addition, the indictment concerns testimony Bonds gave in 2003 about his alleged steroid use from 1999–2002, before the most recent CBA.[178] Bonds has never tested positive for steroids in league testing. Therefore, Baseball may be forced to punish Bonds by using the "best interests of the game" clause rather than any specific drug provisions. Considering Bonds' stature in the game, this will be a landmark decision for Commissioner Selig or his successors. Like Pete Rose, Bonds is considered one of the greatest to ever play the game. However, unlike Rose, Bonds' on-field accomplishments are also tainted, as any steroid use would surely have positively affected his performance. Bonds will be a sure Hall of Famer unless the commissioner takes action preventing his induction.

Currently still a free agent and effectively retired, Bonds faces image problems for 19 alleged occasions of lying under oath and "unlawfully, willfully, and knowingly . . . corruptly endeavor[ing] to influence, obstruct and impede the due administration of justice, by knowingly giving Grand Jury testimony that was intentionally evasive, false and misleading."[179] Thus, at the very least, Bonds' conduct will probably cost him

significant dollars as teams and sponsors have steered clear. Nevertheless, as teams have shown with repeat offenders like Howe and Strawberry, on-the-field ability generally trumps image problems. Although Bonds' days of hitting home runs are likely over, he could likely convince at least one team to overlook his tarnished image and the media circus he brings and take a chance that he could still produce. That is assuming, of course, that Bonds is not in prison.

Additionally, the Mitchell Report was met with some skepticism and generated criticism from players, MLBPA officials, and the media. First, some questioned Senator Mitchell's neutrality because he was hired by the commissioner to investigate, because he serves on the board of directors of the Boston Red Sox, and because his personal law firm was used to conduct the investigation.[180] Secondly, since this distrust contributed to the Mitchell investigation's being stonewalled by the players and the MLBPA, its findings included no player testimony. Further, the overwhelming majority of the Mitchell Report's evidence was supplied by two sources, both of whom were former employees of major league teams.[181] Some have argued that testimony from two disgruntled employees simply is not enough to publicly accuse such a high number of players.[182] Thus, many have dismissed the Report's findings as "unsubstantiated allegations."[183] Nevertheless,

STEVE HOWE'S ABILITY TO THROW AN ACCURATE MID-90S FASTBALL WAS OBVIOUSLY MORE IMPORTANT THAN WHAT HIS DRUG VIOLATIONS DID TO THE IMAGE OF THE YANKEES OR BASEBALL.

the fact that testimony and evidence provided by only two witnesses produced nearly 90 names cannot help but fuel speculation that the actual number of steroid users was even higher. Therefore, rather than the player names provided, the real importance of the Mitchell Report will be revealed by whether or not Baseball is "shocked into action" to aggressively address drug use.[184] Indeed, MLB's reaction to the Mitchell Report will show how important it considers the problem of on-the-field drug use. As of yet, there has been no significant action by Baseball in response to the Report.

"ZERO TOLERANCE" TO WHAT EFFECT?: THE CASE OF J. C. ROMERO

As with other types of conduct violations, Baseball's response to performance-enhancing drug violations can belie common sense. In 2008, Phillies pitcher J. C. Romero tested positive for a banned substance days before he was due to pitch in Game 5 of the World Series.[185] The hearing took place during the World Series and it was announced he would serve a 50-game suspension.[186] However, this was not the typical steroids case. Romero had purchased a supplement from a local General Nutrition Store ("GNC") that was supposed to be approved for use under Baseball's rules.[187] He personally checked the label, gave the product to his nutritionist, checked with his strength and conditioning coach, and then went for a second opinion from another nutritionist.[188] All sources claimed the supplement was approved. Furthermore, the MLBPA had previously released a memorandum that any supplements purchased over the counter at a GNC were approved.[189] However, the manufacturer of the supplement omitted a banned ingredient from the label.[190] Although Romero could not realistically have known, Baseball still found him negligent for not discovering the banned ingredient.[191]

This zero-tolerance policy seems ridiculous in Romero's case. "If I made a mistake, it was to put all my trust in my superiors, the people I thought knew what they were doing," Romero stated in May 2009.[192] Romero was misled by the manufacturers of the supplement who misrepresented the contents of their product. While strict penalties will presumably deter drug use, cases like Romero's demonstrate the need for fact-specific inquiries and punishments tailored to specific circumstances.

A 2006 incident involving Romero further exemplifies how erratic the process can be. Romero tested positive for high levels of hormones as a result of a fertility supplement his wife and he were taking.[193] The suit by Baseball was eventually dropped.[194] Oddly, Baseball found it fit to look at the circumstances and facts surrounding this violation but not the later violation involving the GNC supplement. These examples illustrate the need for consistent but common sense–based governance of conduct violations in Baseball.

VIOLENCE AND OTHER CRIMINAL CONDUCT

Off-the-Field Violence: Apparently Not Detrimental to "Best Interests"

Teams and leagues face a dilemma in punishing off-the-field criminal conduct for a number of reasons. On the one hand, teams and leagues clearly can suffer image problems when off-the-field player conduct inevitably ends up on television and in the newspaper. From this standpoint, teams and leagues are equally justified in punishing off-the-field and on-the-field conduct. After all, "the rationale for disciplining players who are violent during a game or contest is that they sully the image of the game, undermine its integrity, and pose a risk to others . . . [off-the-field violations] have precisely the same effects on the game."[195] By this logic, off-the-field criminal conduct should be treated no differently than on-the-field offenses.

On the other hand, the role of the legal system is to adjudicate and punish such crimes. Further punishing the offender in the workplace could constitute a form of double jeopardy to the player. In addition, perhaps it is inappropriate for Baseball to attempt to play a role in shaping the morals of society. Some would argue that teams and leagues should only be responsible for punishing behavior directly related to the game. Indeed, in one early case, a New York court ruled that the league could only

discipline a player in the performance of his duties, limiting Baseball's authority to the power to regulate the actual playing of the game on the field.[196] Thus, before there was a commissioner, this reasoning prevailed in Baseball. According to this argument, if a player is guilty of a crime and is punished by the legal system, he has paid his debt to society and should not be punished further. If the player is found not guilty, it does not seem appropriate for Baseball to discipline him. However, the league and team may still suffer significant image problems due to the player's behavior, and other employers can generally discipline or fire employees for criminal behavior.

There is also the issue of disparate treatment between athletes who commit criminal offenses and average citizens who commit similar offenses. On the one hand, athletes live under a microscope, and the average citizen may not have his or her DUI splashed across the newspaper's front page and television. On the other hand, professional athletes almost invariably benefit from more leniency and are generally able to return to their sports and earn new multimillion-dollar contracts despite their troublesome behavior.[197] Additionally, Baseball may not have the authority to limit a player's right to earn a living, especially regarding lengthy suspensions. After all, "the Commissioner is not an employer who has decided for himself that he will no longer retain an employee who is then free to go elsewhere in the same industry. The . . . imposition of . . . the Commissioner . . . can effectively prevent a player's employment by any one at any level of his chosen profession."[198]

Some argue that the very thing that fuels athletes' competitive fire on the field also makes them more prone to certain types of personal conduct transgressions. S.L. Price says, "all great athletes carry the seed of cruelty; it's their job and their passion to beat the other guy, undress his weaknesses, reveal him as a loser in public."[199] While such violent cruelty is reviled in most aspects of life, it is celebrated on the athletic field. Indeed, some of the behavior for which players are revered on the field would constitute criminal offenses if performed on the street. The pitcher who hurls a 98 m.p.h. projectile at or near another man's head is cheered, as is the base runner who barrels into and over the catcher on his way to home plate. These actions would constitute assault and battery outside the scope of the game. Obviously, most professional athletes have spent many years cultivating their competitive spirit and striving to be the absolute best at what they do. Thus, it may not be surprising that some of this "cruelty" would spill off the field into the athletes' personal lives.

Not only does the on-the-field behavior of players spread to their personal lives, but awe and reverence for the players appear in inappropriate off-the-field ways. Even athletes who run into trouble for their violent acts often receive preferential treatment. For example, Barry Bonds once faced a domestic violence charge from his ex-wife.[200] After the proceeding, the judge asked Bonds for an autograph.[201] No league action was taken against Bonds for this allegation. This is indicative of the lax attitude that Baseball has regarding violence against women by players.[202] Despite its marketing as family entertainment, Baseball's treatment of players and coaches who abuse women reveals its attitude toward such offenses. For example, no league action was taken against New York Mets manager Dallas Green when he said his method for coping with losses was to "just beat the hell out of my wife."[203] Clearly, off-the-field violence is considered not nearly as harmful to the game as some other offenses. This attitude defies logic. Some argue that

> players who use their physical prowess and celebrity status to commit crimes against vulnerable members of society damage the reputation of the game. It is a logical inference that a person who is violent at home will eventually be violent at work, posing a risk to other players or even fans. Whether a player chokes his coach at practice or his wife after practice, that player poses a real and true risk.[204]

Occasionally, however, MLB and its teams will take appropriate action against a player whose violent acts are adequately severe and public. Boston Red Sox player Wil Cordero was suspended for multiple games when he pled guilty to abusing his wife.[205] Cordero's case represents a rare occasion when Baseball's commissioner utilized the "best interests of Baseball" clause for this type of offense.[206] The Red Sox also took action against Cordero, placing him on "administrative leave" upon learning that a previous wife also had accused him of physical abuse.[207] Considering Baseball's general lack of action for such offenses, however, it is clear MLB does not consider off-the-field violence detrimental to the best interests of Baseball. Indeed, the MLBPA fought Cordero's suspension and successfully forced the Red Sox to play or trade him.[208]

On-the-Field Violence: Detrimental to "Best Interests"

Sanctioning players and other MLB personnel for on-the-field deviant conduct seems relatively clear. There appears to be little argument that such offenses violate the rules of the game, thus threatening the integrity and tarnishing the image of the game. For example, in 1965, Juan Marichal was suspended eight games and fined for hitting catcher John Roseboro in the head with a bat.[209] In 1995, New York Yankee Jack McDowell made an obscene gesture to fans at Yankee stadium, earning a fine from the Yankees and an order from the league to donate a "substantial amount" of game tickets to charity.[210] Pitcher Rob Dibble was suspended in 1991 for throwing a ball into the stands, and in 1992 for charging into a fight on the field.[211] Nobody argued in any of these cases that Baseball exceeded its authority in punishing the players in order to protect the image and integrity of the game.

Nevertheless, players do whatever they can to avoid punishment, even when the punishment seems justified. For example, the end of the 1996 season provided what Hall of Famer Joe Morgan called "the most despicable act by a baseball player, ever."[212] Baltimore Oriole Roberto Alomar spat in umpire John Hirshbeck's face while arguing a call.[213] Alomar was suspended five games in the "best interests of Baseball."[214] The suspension would have made Alomar unavailable for the first round of the playoffs. Despite general consensus that the act was worthy of suspension, Alomar and the MLBPA appealed the suspension. This allowed Alomar to delay the suspension until the beginning of the next season, a result that *Sports Illus-*

trated called "ludicrous, galling, appalling—choose your adjective!"[215] It is debatable whether the best interests of Baseball were served by allowing a star player to compete in the playoffs, while consequently removing the sting from his punishment.

CONCLUSION—SOME SUGGESTED SOLUTIONS

While the Mitchell Report only addresses steroid use, the process of the investigation and its recommendations are instructive on the more general issue of conduct violations. For example, the resistance by the MLBPA to the Mitchell Report demonstrates that any plan aimed at disciplining players will be extremely difficult to implement. The Mitchell Report laments that the MLBPA was "largely uncooperative," in that it rejected requests for documents and interviews with witnesses and MLBPA officers and discouraged players from cooperating with the investigation.[216] Indeed, nearly all players refused to meet with the Mitchell investigators.[217] While it is surprising that the MLBPA does not see the importance of drug testing to protect its members, its cooperation is necessary since federal law generally requires that discipline plans be collectively bargained.[218]

Nevertheless, aggressive action is required to stem the increase in conduct violations in Baseball. Baseball has, eventually, adopted appropriately stiff penalties for on-the-field conduct violations. As the Mitchell Report concludes, the harsh penalty for performance-enhancing drug use has helped curb the number of positive tests.[219] Similarly, Baseball's provisions addressing on-the-field gambling—Rule 21's automatic permanent ineligibility—provides a meaningful deterrent.[220] Baseball's approach to on-the-field violence also has been largely appropriate, although the loophole allowing players to manipulate the appeals system is regrettable.

AS THE MITCHELL REPORT SHOWS, BASEBALL KEPT ITS HEAD IN THE SAND ABOUT STEROID ABUSE FOR NEARLY TWO DECADES.

However, the penalties for off-the-field conduct violations should be similarly systemized and less reliant on the discretion of the commissioner. MLB must take a hard line with the MLBPA in demanding the adoption of automatic penalties for some of the more common violations discussed here. Many of these transgressions are presently at the commissioner's discretion. As mentioned, punishing players in the "best interests of Baseball" produces disparate results and invites dramatically reduced punishments from player-friendly arbitrators. Obviously, it would be impossible to expressly list all transgressions and their punishments in the CBA and the UPC. However, specifically listing the most common offenses, and their punishments, would make application of the rules and enforcement more clear.

Logically, these penalties should generally be less severe than for on-the-field conduct. The commissioner should retain the power to discipline in the best interests of baseball, for those offenses that are not expressly listed or that present extenuating circumstances. However, if gambling, drug and alcohol offenses, and criminal violence all had expressly listed automatic penalties, there would be fewer issues for the discretion of the commissioner. There would be fewer appeals and fewer opportunities for arbitrators to cut the legs out from under the commissioner because those penalties would be collectively bargained. While it will undoubtedly be difficult to get the MLBPA to agree, players would presumably appreciate that uniform, standard penalties would minimize the need for discretion by the commissioner in the "best interests of Baseball." The scandal generated by the Mitchell Report also may limit the MLBPA's ability, from a public relations standpoint, to object to a new disciplinary program.

One recommendation made by the Mitchell Report provides a potentially viable framework for Baseball to counteract the growing concern of conduct violations. First, the Mitchell Report recommends that Baseball form a "Department of Investigations."[221] While the Mitchell Report does not suggest the structure of this Department in great detail, it would be helpful if it were made up of former players and coaches, as well as MLB employees. Thus, investigations and disciplinary decisions—when discretion is needed—can be made with the utmost possible impartiality. The Department of Investigations team also should include a full-time steroid czar, with expertise in the science of drug testing and abuse. This would help Baseball stay ahead in the technological race between the production of performance-enhancing drugs and the ability to detect them, as well as prevent situations like the J. C. Romero incident. It is also important that the Department of Investigations be given the authority to investigate possible conduct violations that have not resulted in criminal investigations, but nevertheless may tarnish the image of the game.

Lastly, Baseball should attempt to minimize the market forces that keep highly talented, but troubled, players like Steve Howe and Darryl Strawberry in multimillion-dollar contracts despite their multiple conduct violations. MLB should discipline teams that fail to enforce conduct clauses. Baseball could do this by fining teams, taking away draft picks, or, even more extreme, forcing them to forfeit games as college teams are made to do when they have players who break eligibility rules. Baseball also should refuse to approve new contracts for players with, for example, three conduct violation strikes against them. League penalties that make it uncomfortable to keep or sign such players will create an additional deterrent for the deviant behavior.

As the Mitchell Report shows, Baseball kept its head in the sand about steroid abuse for nearly two decades. Despite the fact that Commissioner Ueberroth warned in 1985 that performance-enhancing drugs would

damage the integrity of the game, Baseball did not "push hard" for testing until 2002.[222] If Baseball had addressed the drug problem sooner, there would not have been a need for the Mitchell Report. On a larger scale, if Baseball were to implement a uniform, systemic program for violations, inappropriate player conduct could be better enforced and prevented. ❖

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The author wishes to thank Professor Robert E. Shepherd, in fond memory, and John M. Theobald for his comments and research assistance.

ENDNOTES

1. Alex Long, *The Deteriorating Face of American Sports*, Waltonian, Sept. 12, 2007, *available at* http://media.www.waltonian.com/media/storage/paper752/news/2007/09/12/Sports/The-Deteriorating.Face.Of.American.Sports-2964154.shtml.

2. *Michael Vick Released From Federal Prison in Kansas*, Mar. 25, 2009, http://www.foxnews.com/story/0,2933,510500,00.html; Vick Sentencing Minutes, http://assets.espn.go.com/media/pdf/071210/vicksentencing.pdf (last visited Dec. 12, 2007); Lester Munson, *Tough Sentence Reflects Judge's Displeasure With Vick*, Dec. 11, 2007, http://sports.espn.go.com/nfl/columns/story?id=3148826. Vick pled guilty to similar charges in Virginia state court. *Vick Pleads Guilty to Dogfighting Charge*, Nov. 25, 2008, http://www.nytimes.com/2008/11/26/sports/football/26vick.html.

3. *Vick Eligible to Play in Third Week*, Sept. 4, 2009, http://sports.espn.go.com/nfl/news/story?id=4442627.

4. *Commissioner Won't Reduce Jones' Season-long Ban*, Nov. 7, 2007, http://sports.espn.go.com/nfl/news/story?id=3097764.

5. Pablo S. Torre & Caitlin Moscatello, *Life on and Off the Road*, Sports Illust., Nov. 5, 2007, *available at* 2007 WLNR 21384846.

6. *Leafs F Bell Cleared by Substance Abuse Doctors, Will Start 15-Game Suspension*, Oct. 2, 2007, http://sports.espn.go.com/nhl/news/story?id=3046952.

7. Barry M. Bloom, *Bonds Indicted on Federal Charges*, Nov. 16, 2007, http://mlb.mlb.com/news/article.jsp?ymd=20071115&content_id=2301117&vkey=news_mlb&fext=.jsp&c_id=mlb [hereinafter "Bonds Indicted"].

8. *Id.*

9. George J. Mitchell, DLA Piper US LLC, 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 (Dec. 13, 2007), http://assets.espn.go.com/media/pdf/071213/mitchell_report.pdf [hereinafter "Mitchell Report"].

10. *Articles Show "Base Ball" Was Played in 1823*, http://static.espn.go.com/mlb/news/2001/0708/1223744.html (last visited June 30, 2009).

11. *See* discussion, *infra*, "MLB Regulation of Conduct: The Major League Agreement and the Commissioner's 'Best Interests of the Game' Power."

12. Basic Agreement Between the American League of Professional Baseball Clubs and the National League of Professional Baseball Clubs and Major League Baseball Players Association, Uniform Player's Contract, 591 PLI/Pat 385, 395 (2000) [hereinafter "UPC"].

13. *See* discussion, *infra*, "Alcohol and Drugs."

14. In Vick's absence in 2007, the Falcons went 4-12 and lost their head coach. Mark Bradley, *End Falcons' Cursed Season*, Atlanta J. Const., Dec. 16, 2007, *available at* http://www.ajc.com/blogs/content/shared-blogs/ajc/sportscolumns/entries/2007/12/16/end_falcons_cur.html.

15. UPC, *supra* note 12.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. Tyler Kepner, *With the Yankees Behind Him, Boone Looks Forward*, Pitt. Post-Gazette, Mar. 13, 2005, at C11, *available at* 2005 WLNR 3898497.

23. *Id.*

24. *Kent Says He's OK; Sabean Blows Fuse*, San Diego Union-Trib., Apr. 4, 2002, at D8, *available at* 2002 WLNR 13954528.

25. Kenesaw Mountain Landis Bio Page, http://www.baseballhalloffame.org/hofers/detail.jsp?playerId=492574 (last visited June 30, 2009).

26. Sean Bukowski, *Flag on the Play: 25 to Life for the Offense of Murder*, 3 Vand. J. Ent. L. & Prac. 106, 109–10 (2001).

27. Bud Selig, *One of Baseball's Enduring Myths: "The All-Powerful Commissioner" Never Was an Accurate Portrayal*, Sporting News, Mar. 14, 1994, at 8.

28. Major League Agreement, art. II, § 2(b), (c) (2003).

29. *Id.* at § 2(c).

30. *See* recommendation for a separate "Department of Investigations," *infra*, "Conclusion—Some Suggested Solutions."

31. Bukowski, *supra* note 26, at 112. *See* discussion *infra*, "Team Regulation of Conduct: The Uniform Player's Contract" (comparing the treatment of Lenny Dykstra with that of Albert Belle); *see also* discussion *infra* "MLB Regulation of Conduct: The Major League Agreement and the Commisioner's 'Best Interests of the Game' Power" (comparing the treatment of the Black Sox with that of Ty Cobb and Tris Speaker).

32. Bukowski, *supra* note 26, at 110.

33. This ominous scenario occurred in the 2007 NBA playoffs. The Suns' Amare Stoudamire and Boris Diaw were suspended for one game each for leaving the bench during an altercation. There was a clear NBA rule outlining the punishment for that specific offense. Nevertheless, the Suns complained that the rule had been inconsistently enforced. The Suns were without two key players in the next crucial playoff game. The team lost the game and the series, and many felt that NBA Commissioner David Stern cost them the series. Gene Wojciechowski, *For Shame! Series Merited Better Than Early Fadeaway*, May 19, 2007, http://sports.espn.go.com/espn/columns/story?columnist=wojciechowski_gene&id=2875736&sportCat=nba.

34. However, expressly listing some of the most common offenses would clarify matters. *See* recommendations, *infra*, "Conclusion—Some Suggested Solutions."

35. Craig F. Arcella, *Major League Baseball's Disempowered Commissioner: Judicial Ramifications of the 1994 Restructuring*, 97 Colum. L. Rev. 2420, 2447 (1997).

36. *Marge Schott Suspended, Fined for Racial Slurs*, Jet, Feb. 22, 1993, *available at* http://findarticles.com/p/articles/mi_m1355/is_n17_v83/ai_13459219.

37. Arcella, *supra* note 35, at 2424. Ironically, however, current Commissioner Bud Selig has been criticized for the same potential conflict of interest. Selig was the principal owner of the Milwaukee Brewers when he took the reigns as commissioner. Selig eventually sold his majority interest in the Brewers to his daughter. It is debatable whether this sale within the commissioner's own family eliminated the conflict of interest. Therefore, the commissioner's neutrality may not always be beyond question.

38. Milwaukee Am. Ass'n v. Landis, 49 F.2d 298 (N.D. Ill. 1931). *See also* Charles O. Finley & Co. v. Kuhn, 569 F.2d 527, 538 (7th Cir. 1978) (upholding Commissioner Bowie Kuhn's right to determine the best interests of baseball).

39. Hence the outrage over the gambling scandal involving NBA referee Tim Donaghy and the widespread feeling that the game itself had lost credibility. It is debatable whether corrupt referees who gamble on games they officiate are more or less reprehensible than players and coaches who throw games. *See* Bill Ordine, *Sports, Wagering: For Bettor or Worse*, Balt. Sun, Oct. 30, 2007, at 1C, *available at* 2007 WLNR 21364839 (showing that by calling just a few more fouls, an official can have enormous influence over the outcome of certain types of wagers).

40. Paul C. Weiler, Leveling the Playing Field: How the Law Can Make Sports Better for Fans 61 (2000).

41. *Id.* at 58.

42. *Id.*

43. For example, high-profile athletes like the NBA's Michael Jordan and Charles Barkley have felt the heat of intense media and fan glare for their high-stakes gambling habits but have never been officially reprimanded for their behavior. *See* Greg Couch, *Gambling Its Credibility; Advertising Dollars from Casinos May Be Hard to Resist, but After a Referee Betting Scandal, the NBA Should Be Trying . . .*, Chi. Sun-Times, Nov. 9, 2007, at 93, *available at* 2007 WLNR 22142083.

44. Weiler, supra note 40, at 58.

45. Commissioners usually use the "best interests of the game" provision to protect Baseball's image. Major League Agreement, art. I, § 2(b) (2005).

46. 1 Martin J. Greenberg & James T. Gray, Sports Law Practice 508 (1998).

47. Arcella, *supra* note 35, at 2421.

48. Cicotte had an added incentive to get back at Baseball, and his team, while earning an extra buck. Cicotte had a bonus provision in his contract that kicked in when he won 30 games. After earning his 29th victory, White Sox owner Charles Comiskey ordered the White Sox manager to bench Cicotte to avoid paying the bonus. Weiler, *supra* note 40, at 38. "Shoeless" Joe got his nickname because he once played a game in his stockings after disposing of some uncomfortable spikes. *See* "Shoeless" Joe Jackson Official Website Fast Facts, http://www.shoelessjoejackson.com/about/facts.html (last visited June 30, 2009). "Shoeless" Joe's 1919 World Series statistics seem to support his claim that he did not try to lose: Jackson batted .375 and committed zero errors in the field. "Shoeless" Joe Jackson Official Website Biography, http://www.shoelessjoejackson.com/about/biography.html (last visited June 30, 2009).

49. Weiler, *supra* note 40, at 38.

50. *Id.* Interestingly, a treasure trove of documents about the Black Sox was auctioned off in 2007. *Chicago History Museum Wins Auction of Black Sox Papers*, Dec. 14, 2007, http://archives.chicagotribune.com/2007/dec/14/local/chi-blacksox-papers_webdec14. While some hoped the auction might reveal previously unknown facts about the Black Sox—and perhaps even clear Jackson's name—no such revelations have thus far come to light.

51. Bukowski, *supra* note 26, at 109–10; Landis, *supra* note 25.

52. Weiler, *supra* note 40, at 38.

53. Baseball Hall of Fame, Frequently Asked Questions, http://web.baseballhalloffame.org/hofers/faq.jsp#jackson (last visited June 30, 2007). Due to his quirky nickname, his amazing talent and statistics, and what some see as his unfair banishment from baseball, "Shoeless" Joe has become a mythical figure ingrained in American culture. Indeed, Jackson's redemption has been fictionalized both on the page and on the big screen. *See generally* W.P. Kinsella, Shoeless Joe (1982); Field of Dreams (Columbia Pictures 1989).

54. Weiler, *supra* note 40, at 58.

55. *See* Bukowski, *supra* note 26, at 109–10 and accompanying text.

56. Weiler, *supra* note 40, at 38.

57. *Id.*

58. *Id.*

59. Greenberg & Gray, *supra* note 46, at 472 (citing MLB Rule 21).

60. *Id.* (citing MLB Rule 21(a)).

61. *Id.*

62. *Id.*

63. *Id.* (citing MLB Rule 21(a)).

64. Weiler, *supra* note 40, at 34.

65. Rose pled guilty to evading taxes on more than $400,000 in unreported revenue, and went to jail. *Id.*

66. *Id.*

67. *Id.* at 35.

68. Greenberg & Gray, *supra* note 46, at 472 (citing MLB Rule 21(d)(1)).

69. *Id.* (citing MLB Rule 21(d)(2)).

70. Weiler, *supra* note 40, at 34–35.

71. Mike Dodd, *Recognizing "I'm 14 Years Late," Rose Admits He Bet on Baseball*, Jan. 5, 2004, http://www.usatoday.com/sports/baseball/2004-01-05-rose_x.htm.

72. *Id.*

73. Weiler, *supra* note 40, at 34–35.

74. Dodd, *supra* note 71.

75. Greenberg & Gray, *supra* note 46, at 472 (citing MLB Rule 21(d)(2)).

76. Murray Chass, *Board Says Rose Is Ineligible for Hall of Fame*, N.Y. Times, Feb. 5, 1991, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D0CE4DB163EF936A35751C0A967958260&sec=&spon=&pagewanted=print.

77. *Id.*

78. Dodd, *supra* note 71.

79. *See* Eric Neel, *Bonds or Mantle: Who Is the Greater Disappointment?* Aug. 13, 2007, http://sports.espn.go.com/espn/page2/story?page=neel/070809 (arguing that Mantle's use of a substance that diminished his enormous ability is more disappointing for a baseball fan than Bonds' alleged use of performance-enhancing drugs).

80. Weiler, *supra* note 40, at 81.

81. *Id.*

82. David Wells & Chris Kreski, Perfect I'm Not: Boomer on Beer, Brawls, Backaches, and Baseball (2003).

83. Weiler, *supra* note 40, at 86.

84. *Id.*

85. *Id.* at 85.

86. Weiler, *supra* note 40, at 81.

87. *Id.* at 83. *See* discussion of recreational drug use, *infra*, "Recreational Drug Use: Best Interests of Baseball Affected."

88. *Alcohol and Bodybuilding: Do They Mix?* http://www.teenbodybuilding.com/bigalcohol.htm (last visited June 30, 2009).

89. *Id.*

90. Jim Street, *Mariners Review Alcohol Policy*, May 9, 2007, http://seattle.mariners.mlb.com/news/article.jsp?ymd=20070509&content_id=1955014&vkey=news_sea&fext=.jsp&c_id=sea.

91. Weiler, *supra* note 40, at 88.

92. *Id.*

93. Ironically, only two months after making his irate comments about Phillips and the evil of drugs in sports, Eisner signed ABC's *Home Improvement* star, Tim Allen, to the highest-paying contract in television history at $1.25 million an episode, or about $30 million a season. No mention was made to the media of the fact that Allen had once served 28 months in prison for trafficking in cocaine. Apparently, Eisner's moral outrage applied only to Disney's baseball team but did not extend to the rest of its corporate entities. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* at 64.

97. *Id.*

98. *Id.*

99. Major League Baseball Players Ass'n v. Comm'r of Major League Baseball, Grievance 92-7, Panel Dec. 94, 548 PLI/Pat 539, 551 (1999) (Nicolau, Arb.) [hereinafter "Howe Decision"].

100. *Id.* at 551–52.

101. *Id.*

102. *Id.*

103. *Id.* at 544–47 (discussing Wilson/Martin, Panel Dec. 54, Bloch 1984).

104. *Id.*

105. *Id.*

106. *Id.* at 548–49.

107. Weiler, *supra* note 40, at 82.

108. *Id.*

109. David Lennon, *The Strawberry Signing: Strange but True, Straw's a Yankee*, Newsday, June 20, 1995, at A62, *available at* 1995 WLNR 517081. Strawberry's other transgressions, besides drug violations, before signing his Yankees contract included the following: allegedly breaking his wife's nose in 1986; arrest for assaulting his wife with a deadly weapon in 1990; alcohol and drug rehab in 1990 and 1994; significant jail time for conviction on tax evasion in 1995; and a court order to pay over $300,000 in delinquent spousal and child support payments. *Id.*

110. Greenberg & Gray, *supra* note 46, at 508. Strawberry would not have been available to the Giants if the Dodgers had not released him because of his indictment for tax evasion. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Michael T. Flannery, *Affairs of the Heart*, 10 Vill. Sports & Ent. L.J. 211, 271 (2003).

115. *Drug Policy Takes a Hit*, Milwaukee J. Sentinel, June 29, 1995, at 4C.

116. Similarly, Miami Dolphins running back Ricky Williams has earned the moniker of "poster child of the NFL and drugs." In 2007, Williams returned from his fourth suspension for positive drug tests. *See Reinstated Ricky Williams Rejoins Dolphins*

Starting Monday, Nov. 16, 2007, http://sports.espn.go.com/nfl/news/story?id=3111806 (last visited June 30, 2009).

117. Weiler, *supra* note 40, at 59.

118. *Id.*

119. *Id.*

120. *Id.*

121. Howe Decision, *supra* note 99, at 562.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at 585.

127. Weiler, *supra* note 40, at 59.

128. *Id.*

129. Howe Decision, *supra* note 99, at 541–42 (citing Exhibit 4, Commissioner Vincent's letter to Steve Howe).

130. Weiler, *supra* note 40, at 61.

131. *Id.*

132. *Id.* at 60.

133. Howe Decision, *supra* note 99, at 578.

134. *See generally* Howe Decision, *supra* note 99.

135. *Id.*

136. *Id.* at 581.

137. Weiler, *supra* note 40, at 61.

138. Howe Decision, *supra* note 99, at 587–88.

139. *Id.* at 585.

140. *Id.*

141. *Id.*

142. Weiler, *supra* note 40, at 61.

143. Howe Decision, *supra* note 99, at 592–93.

144. Weiler, *supra* note 40, at 61.

145. Howe Decision, *supra* note 99, at 544–47.

146. *Id.*

147. *Id.* The drug policy also provides for scaled automatic suspensions for positive tests. Random, mandatory drug testing was implemented in 2002. *See* discussion, *infra*, "On-the-Field Drug Violations: Performance-Enhancing Drugs."

148. Howe Decision, *supra* note 99, at 589.

149. Weiler, *supra* note 40, at 82.

150. *See* Neel, *supra* note 79 and accompanying text.

151. Additionally, suspensions and criminal sanctions can deprive teams of the players' services, also affecting the teams' ability to win games. *See* Vick discussion, *supra*, "Introduction."

152. Donald Fehr, MLBPA chief and staunch opponent of drug testing, recently resigned and left a "mixed legacy." *Fehr Leaving Mixed Legacy*, June 23, 2009, http://www.chicagotribune.com/sports/chi-23-fehr-jun23,0,4909260.story. Performance-enhancing drug use spiraled out of control during Fehr's watch, and the next CBA negotiations could bring drastic changes without his involvement.

153. Mitchell Report, *supra* note 9, at SR-1.

154. *Id.*

155. Barry M. Bloom, *Selig Announces Steroid Investigation*, Mar. 30, 2006, http://mlb.mlb.com/news/article.jsp?ymd=20060330&content_id=1374385&vkey=news_mlb&fext=.jsp&c_id=mlb.

156. Drug Policy in Baseball Timeline, http://mlb.mlb.com/mlb/news/drug_policy.jsp?content=timeline (last visited June 30, 2009).

157. *See* Major League Baseball's Joint Drug Prevention and Treatment Program § 6(E) (2006); Major League Baseball's Joint Drug Prevention and Treatment Program § 6(E) (2005).

158. *Id.*

159. Mitchell Report, *supra* note 9, at SR-1.

160. *See* Steroids Suspensions, http://www.baseball-almanac.com/legendary/steroids_baseball.shtml (last visited June 30, 2009); *see also* Rick Morrissey, *Truth Be Known, Roping Honest MLB Doper Tough*, Chi. Trib., Nov. 11, 2007, *available at* 2007 WLNR 22293296. HGH has become a drug of choice because, thus far, it is undetectable by testing. Mitchell Report, *supra* note 9, at SR-2.

161. *Restoring Faith in America's Pastime: Evaluating Major League Baseball's Efforts to Eradicate Steroid Use: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 307 (2005) (testimony of Rafael Palmeiro), *available at* http://ftp.resource.org/gpo.gov/hearings/109h/23038.pdf; *see also* David Mayo, *Liar, Liar, Grace Under Fire*, Grand Rapids Press, Oct. 9, 2007, at D5, *available at* 2007 WLNR 19846605.

162. Mitchell Report, *supra* note 9, at 169.

163. *A-Rod Admits Taking PEDs During Three-Year Period*, http://sports.espn.go.com/mlb/news/story?id=3894847 (last visited June 30, 2009) ["*A-Rod*"].

164. Mitchell Report, *supra* note 9, at SR-2.

165. *Id.* at SR-1.

166. *Id* at SR-13.

167. *Id.* at SR-10. Anabolic steroids are . . . controlled substances under the federal Controlled Substances Act . . . it is illegal to use or possess steroids or steroid precursors without a valid physician's prescription. Violations . . . carry penalties similar to those applicable to the illegal use or possession of narcotics. Human growth hormone is a prescription medication. It is illegal to issue a prescription for human growth hormone except for very limited purposes. Human growth hormone never has been approved . . . to improve athletic performance. Issuing a prescription for human growth hormone for any of these unauthorized purposes is a violation of federal law.

168. *See* discussion, *supra*, "Defining Types of Conduct."

169. Mitchell Report, *supra* note 9, at 4.

170. *Id.* at 171 ("McNamee injected Clemens in the buttocks four to six times with testosterone.").

171. The complexity of this issue can be illustrated by examining the case of Barry Bonds. Assuming for the moment that Bonds used steroids, the question then becomes: How many of Bonds' home runs were accomplished through the use of steroids? Could steroids help Bonds make solid contact with the baseball? Do steroids even benefit Bonds at all, considering that the Mitchell Report implies that a great number of pitchers used performance-enhancing drugs as well? If the pitchers and Bonds were both on steroids, then that essentially puts Bonds in the same position as Henry Aaron—assuming that neither Aaron nor the pitchers used performance-enhancing drugs. Perhaps Bonds would not even still be playing in his 40s without the help of steroids, so none of Bonds' home runs should be counted after the age at which he would have retired without steroids. Of course, that age would be pure conjecture. The only clear aspect of the asterisk issue appears to be that it is nearly impossible to quantify how much steroids may have contributed to Bonds' success. Confusion is further muddled by the fact that Bonds has never actually tested positive for steroids, despite his affiliation with steroid-provider BALCO, his indictment, and his inclusion in the Mitchell Report.

172. Mitchell Report, *supra* note 9, at 4.

173. *Id.* at 113.

174. *Bonds Indicted*, *supra* note 7.

175. Drug Policy in Baseball Timeline, *supra* note 156. The illegal use of prescription drugs has been prohibited in Baseball since 1971. *See* Notice No. 12, Memorandum from Major League Baseball Office of the Commissioner to Administrative Officials of Major and Minor League Ball Clubs Re: Drug Education and Prevention Program, ¶ 9 (Apr. 5, 1971) ("Baseball must insist its personnel comply with the federal and state drug laws. It is your obligation to be familiar with these drug laws."). However, punishing players named in the Mitchell Report for offenses prior to 2002 would require proof of illegality, and no players named have been punished. Additionally, the Mitchell Report recommended that the commissioner forgo disciplining players for past offenses revealed in the report. Mitchell Report, *supra* note 9, at SR-33.

176. *A-Rod*, *supra* note 163.

177. In 2007, Bonds broke the all-time home run record. Since he has never tested positive for steroids, those calling for an asterisk next to his name will be disappointed even if hard evidence surfaces of steroid use by Bonds prior to 2002.

178. *Bonds Indicted*, *supra* note 7.

179. *Id.*

180. Howard Bryant, *Friction and Fractures Erode Faith in Mitchell's Investigation*, Dec. 11, 2007, http://sports.espn.go.com/mlb/news/story?id=3142651 ("neither Mitchell nor Selig anticipated the degree to which [these] relationships . . . affected the confidence level of team executives . . . who view those relationships as conflicts of interest that should have disqualified Mitchell"). Only Mitchell's conflict of interest, not his personal credibility, has been challenged. The former judge and senator is widely respected as a knowledgeable baseball man with integrity. *Id.* Mitchell was even twice nearly nominated by President Clinton to the U.S. Supreme Court. *See* Jeffrey Toobin, The Nine: Inside the Secret World of the Supreme Court 64, 74–76 (2007).

181. The two former employees are former Mets clubhouse employee Kirk Radomski and former Yankees trainer Brian McNamee. *See generally* Mitchell Report, *supra* note 9.

182. Bryant, *supra* note 180 (discussing tactics used by Mitchell to pressure team employees into cooperating with the investigation).

183. *Orioles Issue Statement in Response to Mitchell Report*, Dec. 16, 2007, http://sports.espn.go.com/mlb/news/story?id=3156785.

184. Mitchell Report, *supra* note 9, at SR-9.

185. *Suspended Romero "Didn't Cheat,"* Jan. 6, 2009, http://sports.espn.go.com/mlb/news/story?id=3812334.

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *J.C. Romero Plunges Back In*, May 19, 2009, http://www.philly.com/inquirer/sports/20090519_J_C__Romero_plunges_back_in.html.

193. *Suspended Romero "Didn't Cheat,"* *supra*

note 185.

194. *Id.*

195. Carrie A. Moser, *Penalties, Fouls, and Errors: Professional Athletes and Violence Against Women*, 11 Sports Law J. 69, 81 (2004).

196. Am. League Baseball Club of New York v. Johnson, 109 Misc. 138, 179 N.Y.S. 498 (1919).

197. *See* Nixon, Howe, and Strawberry discussions, *supra*, "Alcohol and Drugs."

198. Howe Decision, *supra* note 99, at 554–56.

199. S.L. Price, *A Clean Start*, Sports Illust., Jan. 28, 2002, at 62.

200. Michael O'Hear, *Blue Collar Crimes/White Collar Criminals: Sentencing Elite Athletes Who Commit Violent Crimes*, 12 Marq. Sports L.J. 427, 433 (2001).

201. *Id.*

202. The list of athletes who have gotten in trouble for acts of violence against women is staggering. For example, NBA star Jason Kidd was arrested in 2001 for hitting his wife Joumanna. Joumanna called 911 and reported that Kidd had "popped [her] right in the mouth." When officers arrived at the home, she said, "Don't worry about me. This is minor compared with what I normally go through." Moser, *supra* note 195, at 73. Kidd had previously been arrested for a drunken assault on a woman and cited for a hit-and-run motor vehicle accident. Kidd suffered no punishment from the NBA. Another notorious example is Mike Tyson, who served 6 years of a 10-year sentence for rape. Tyson v. State, 619 N.E.2d 276 (Ind. App. 2d Dist. 1993). Previously, Tyson had been charged with battery against a woman in a nightclub, accused of beating his first wife, and faced at least five civil suits for abuse of women. Moser, *supra* note 195, at 76. Tyson said, "I like to hurt women when I make love to them . . . I like to hear them scream with pain, to see them bleed . . . it gives me pleasure." William Nack, *Sports' Dirty Secret*, Sports Illust., July 31, 1995, at 66. Tyson's first fight after prison earned him $40 million, and he has earned over $100 million in the ring since the rape sentence. *See* Thom Jones, *Like Mike*, Details Mag., Nov. 2002, at 122. Rather than being a pariah in society, like many convicted rapists, Tyson has flourished because of his athletic ability. In one of the most extreme examples of such offenses, NFL player Rae Carruth was convicted of murdering a woman pregnant with his baby. Bukowski, *supra* note 26, at 110–11. Carruth's contract was terminated, but no further league action was necessary as Carruth currently serves a life sentence in prison. *Id.*

203. William Oscar Johnson, *A National Scourge*, Sports Illust., June 27, 1994, at 92. Other high-profile sports personalities have expressed similarly flippant remarks with impunity. Penn State football coach Joe Paterno said, "I'm going to go home and beat my wife," and NBA star Charles Barkley said, "this is a game that, if you lose, you go home and beat your wife and kids." *Id.*

204. Moser, *supra* note 195, at 81.

205. Paul Doyle, *Cordero Silent but Crowd Isn't*, Hartford Courant, May 20, 1998, at C5.

206. Moser, *supra* note 195, at 82.

207. Greenberg & Gray, *supra* note 46, at 509, n.336.

208. *Id.*

209. Weiler, *supra* note 40, at 13–14. Marichal also had to pay $7,500 to settle Roseboro's tort suit. *Id.*

210. *McDowell's Actions Cost Him a Donation*, USA Today, July 21, 1995, at 3C.

211. Greenberg & Gray, *supra* note 46, at 508.

212. Weiler, *supra* note 40, at 10–11.

213. *Id.*

214. *Id.*

215. *Id.* Luckily, Baseball has not suffered through an on-the-field incident like Mike Tyson's famous biting of Evander Holyfield's ear, or like Latrell Sprewell of the NBA attempting to choke his coach to death. *See* Julian Rubinstein, *The Rehabilitation of Latrell Sprewell*, June 21, 1999, http://www.salon.com/news/feature/1999/06/21/sprewell/print.html.

216. Mitchell Report, *supra* note 9, at SR-7.

217. *Id.* The Mitchell Report even uncovered evidence that Gene Orza, the head of the MLBPA, notified players of upcoming drug tests. *Id.* at 282.

218. *Id.* at SR-13 n.8.

219. *Id.* at SR-2. The Mitchell Report chronicles how MLBPA objection to drug testing caused a delay in implementation of nearly 20 years. *Id.* at SR-13.

220. *See* discussion, *supra*, "Rule 21: Permanent Ineligibility for Fixing Games."

221. Mitchell Report, *supra* note 9, at 287.

222. *Id.* at 13, 307.

The Pirate Party and Copyright Liberalists

BY SPIRE ARSOV

If the removal of copyrights was once something that only lurked with Internet pirates, today it has an entirely new and much broader audience. Internet piracy has gained lots of attention, as evidenced by the public's interest in "The Pirate Bay" trial. In April 2009,[1] the founders of a Swedish peer-to-peer sharing Web site, The Pirate Bay, were sentenced to one year in jail and approximately $4.5 million in damages.[2] The defendants were supported by the Pirate Party, a Swedish political party. In fact, Rickard Falkvinge, the leader of this group, called the trial a "gross injustice" in a BBC news report.[3]

The Pirate Party's membership increased following the Pirate Bay trial. Falkvinge began the Pirate Party Web site on January 1, 2006.[4] The site contained a petition to limit intellectual property and protect privacy. Within a matter of days, the Web site got millions of hits and its membership grew. On February 10, 2006, the party was registered in Sweden.[5] In February 2006, the core principles were voted upon, and the "Pirate Party Declaration of Principles 3.0" was formed.[6] The present version 3.2 of the principles holds the same core beliefs of "the need for protection of citizens' rights, the will to free our culture, and the insight that patents and private monopolies are damaging to society."[7]

Although its views may appear extreme, the Pirate Party's core beliefs stem from the free software movement of the 1980s in the United States. In 1983, Richard Stallman announced the first completely free operating system for computers—the "GNU Is Not Unix" operating system ("GNU"). Stallman quit his job at MIT as a software developer and dedicated himself to this project. Today's popular free operating software, LINUX,[8] developed from GNU. In October 1985, Stallman also formed the Free Software Foundation, which promotes free software and documentation. Stallman helped author the "GNU General Public License" ("GNU GPL"),[9] and most of the free software today is published through this.[10] The main goal is to allow people to build on the work of others to potentially increase developments and make ideas available for public use.

Following in the footsteps of Stallman and the Free Software Foundation, Creative Commons ("CC") was founded in 2001. "Creative Commons is a nonprofit corporation dedicated to helping people share and build upon the work of others, consistent with the rules of copyright."[11] It released its first set of free licensing in 2001, which quickly gained popularity. CC licensing, unlike the GNU GPL, has an application outside the world of computers and software. Licensing under CC can be done for scientific research, arts, and more. In 2008, an estimated 130 million CC licenses were in use.[12] This demonstrates that individuals and organizations may want the option to license their work using a free and efficient licensing system. CC license users include the official Web site of the White House (www.whitehouse.gov), MIT OpenCourseWare (www.ocw.mit.edu), and a famous music group, Nine Inch Nails.[13] Nine Inch Nails released its last two albums under a CC license, including its 2008 album "The Slip," which can be downloaded for free from its Web site.[14]

Following these events, the Pirate Party started in Sweden in 2006. It has grown into an international movement across more than 35 countries and three continents. While the bulk of this movement is in Europe, it has spread to Argentina, Canada, the United States, Asia, Russia, Ukraine, and South Africa. This may be the first political party that works on a global level. The Swedish pirates already have one seat in the European Parliament of the European Union, and they represent the third largest political party in Sweden based on membership. German pirates achieved 2 percent in the last parliamentary elections and 2.08 percent in French local elections.[15]

The copyright liberalist movement has spread far, beginning with the GNU project to the Pirate Party today. What once just appeared a desire for free software has spread into almost every facet of copyright. Pirates today want freedom to share copyrighted material over the Internet, abolishment of patent systems, and greater privacy. However, what remains to be answered are the following: (1) How extreme is this position? and (2) Should economic benefits and individual property rights be sacrificed for what some might consider legalized thievery?

There are no easy answers to these questions. Perhaps society would benefit from "sharing" technology and art, but at what cost? At what point does sharing violate the rights of individuals and undermine their efforts? This is a topic ripe for discussion. If nothing else, these pirates brought the matter to the public eye, sparking debates on the issue around the globe. ❖

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4. Pirate Party, History, www.piratpartiet.se/historia (translation from Google Translate).
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7. *Id.*
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9. Free Software Foundation, About Free Software Foundation, www.fsf.org/about.
10. GNU Project, General Public Licenses, www.gnu.org/licenses/licenses.html.
11. Creative Commons, About CC, http://creativecommons.org/about.
12. Creative Commons, History, http://creativecommons.org/about/history.
13. Creative Commons, Who Uses CC?, http://creativecommons.org/about/who-uses-cc.
14. Nine Inch Nails, The Slip, http://theslip.nin.com/.
15. Pirate Party International, http://www.pp-international.net/.

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Is This Legal Alchemy?

When a Copy of Another's Work May Become Transformative for Fair Use Purposes

BY ANDREW BERGER

Predicting a fair use outcome in copyright litigation is not for the faint of heart. There are no bright-line rules; instead, the statute calls for case-by-case analysis, directing courts to weigh four illustrative and nonexclusive factors.[1]

But, there is one guidepost that parties often overlook when attempting to determine if the defense of fair use applies to a claim of copyright infringement. When a new work makes "transformative" use of the original work, a court will almost always find the use fair.[2] The transformative standard asks "whether the new work merely supersedes the objects of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning or message. . . ."[3]

A NEW PURPOSE IS ENOUGH

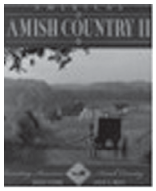
But what does "altering the first" work mean? Does the new work have to physically change the old or simply copy it for a new purpose? A number of recent cases, including *Kelly v. Arriba Soft Corp.*,[4] *Bill Graham Archives v. Dorling Kindersley Ltd.*,[5] and *Blanch v. Koons*,[6] indicate that copying the old work for a new purpose is enough if two other criteria are also present. Understanding the criteria necessary to create a transformative copy may be useful to parties facing a fair use issue.

ARRIBA: A NEW TECHNOLOGICAL PURPOSE

In *Kelly v. Arriba Soft Corp.*, the defendant's search engine contained some 2 million thumbnail versions of photos that the defendant had copied, posted, and made available for viewing on its site.[7] Thirty-five of those thumbnails were Kelly's photos that Arriba had copied and posted without permission. (Two of plaintiff's thumbnails appear below.) The district court granted the defendant summary judgment, finding that Arriba's use of the plaintiff's images was fair.[8]

The district court held that Arriba's search engine was transformative because it served a new function and made a new use of the photographs. The plaintiff's photographs were intended to be "artistic" and "aesthetic." In contrast, the defendant's search engine was "functional" and "comprehensive," designed "to catalogue and improve access to images on the Internet."[9] The district court also noted with approval that the search engine did not exploit the plaintiff's photographs "in any special way," but instead reproduced them as part of Arriba's "indiscriminate method of gathering images."[10]

The Ninth Circuit affirmed, adding that "Arriba was neither using Kelly's images to promote its site nor trying to profit by selling Kelly's images."[11]



KINDERSLEY: A NEW CREATIVE PURPOSE

In *Bill Graham Archives v. Dorling Kindersley Ltd.*,[12] the defendant also made a new, nonexploitive use of an inconsequential amount of original authorship. There, the defendant copied without authorization a few Grateful Dead concert posters, reduced them in size, combined them into a collage of text and images, and used them on seven pages of its 480-page biography of the band.[13]

The Second Circuit affirmed the district court's fair use finding. The circuit court noted that, although the band used the posters for artistic expression and promotion, defendant employed them for a new purpose. The court stated that the defendant used the posters as "historical artifacts" to enhance the book's biographic information about the Grateful Dead and to provide a "visual context" for the book's text.[14] Further, defendant ensured that the posters were not exploited "for commercial gain" in "advertising" or "to promote the sale of the book."[15] In addition, the posters constituted a tiny portion of the book.[16]

KOONS: A NEW SATIRICAL PURPOSE

Blanch v. Koons[17] also involves a creative reproduction of the plaintiff's copyrighted work. The plaintiff's photograph depicts a woman's lower legs and feet wearing sandals resting on a man's lap. The legs and feet appear at close range and dominate the photo.[18] Plaintiff testified that she wanted her photograph to "show some sort of erotic sense."[19] Jeff Koons, a self-styled appropriation artist, borrowed the plaintiff's image to further his purpose of commenting on "commercial images . . . in our consumer culture."[20] He copied the legs and feet from the photograph, changed their color, and inverted their orientation so they point vertically downward. He then incorporated them into a collage with three other pairs of women's feet and legs all dangling over images of food and landscapes.[21]

The Second Circuit, finding fair use, affirmed the dismissal of the plaintiff's infringement action.[22] The appellate court stated that Koons did much more than find a new way to exploit the creative virtues of the plaintiff's image.[23] Instead, Koons made a transformative use of that image by employing it for a new purpose "as fodder for his commentary on the social and aesthetic consequences of mass media" and "to satirize life as it appears when seen through the prism of slick fashion photography."[24] The court concluded, "[w]hen, as here, the copyrighted work is used as 'raw material' in the furtherance of distinct creative or communicative objectives, the use is transformative."[25] (Blanch's photo and Koons' collage are below; the legs and feet Koons

borrowed from the photo are the second pair from the left in the collage.)

SOME CONCLUSIONS

These cases indicate that old wine in new bottles is not fair use. Instead, the reproduction must do more than repackage the original. It must instead serve a new technological purpose as in *Arriba* or a new creative function as in *Kindersley* or *Koons*. Further, the reproduction must minimize the expressive elements in the original work rather than exploit or seek to profit from the elements. Thus, Arriba never offered Kelly's images for sale or sought to use them to advertise its site. Similarly, Kindersley never attempted to use the posters for commercial gain; and Koons employed the plaintiff's photograph simply as raw material. Finally, these three cases demonstrate that the amount of original authorship that is copied in the reproduction must be insignificant.

In sum, these cases may help predict a fair use outcome when a party seeks to reproduce original authorship in a new work. ❖

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ENDNOTES

1. 17 U.S.C. § 107 sets forth four factors that are "to be considered" in determining fair use.
2. *Warner Bros. Entm't, Inc. v. RDR Books*, 575 F. Supp. 2d 513 (S.D.N.Y. 2008), and *Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc.*, 955 F. Supp. 260, 268 (S.D.N.Y. 1997), are the only two cases the author has been able to find that rejected fair use despite the transformative nature of defendant's work. But in *Warner Bros.*, the court was careful to note that the defendant's work (a reference guide to the *Harry Potter* books) was not "consistently transformative" because it failed to "'minimize the expressive value' of the original expression." *Warner Bros.*, 575 F. Supp. 2d at 49, 62. Further, the Second Circuit on appeal in *Castle Rock* held that "[a]ny transformative purpose possessed by . . . [defendant's work, a trivia book about the *Seinfeld* television comedy series] to be slight to non-existent." Castle Rock Entm't, Inc. v. Carol Publ'g Group, Inc., 150 F.3d 132, 142 (2d Cir. 1998).
3. Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569, 579 (1994).
4. 77 F. Supp. 2d 1116 (C.D. Cal. 1999), *aff'd in part and rev'd in part*, 336 F.3d 811 (9th Cir. 2003).
5. 448 F.3d 605 (2d Cir. 2006).
6. 467 F.3d 244 (2d Cir. 2006).
7. 77 F. Supp. 2d at 1118.
8. *Id.* at 1121.
9. *Id.* at 1119.
10. *Id.*
11. Kelly v. Arriba Soft Corp., 336 F.3d 811, 818 (9th Cir. 2003).
12. 448 F.3d 605 (2d Cir. 2006).
13. *Id.* at 607.
14. *Id.* at 609.
15. *Id.* at 612.
16. *Id.* at 611.
17. 467 F.3d 244 (2d Cir. 2006).
18. *Id.* at 248.
19. *Id.* at 252.
20. *Id.* at 248.
21. *Id.*
22. *Id.* at 259.
23. *Id.* at 252.
24. *Id.* at 253, 255.
25. *Id.* at 253.

The Rise of Social Media

What Professional Teams and Clubs Should Consider

BY IRWIN A. KISHNER AND BROOKE E. CRESCENTI

A recent study found that 73 percent of Americans regularly use social media,[1] such as popular networking sites Facebook, LinkedIn, and Twitter. How many of those Americans are sports fans? Likely a significant percentage. Leagues, teams, and players are all beginning to consider and address such social media platforms—some with trepidation and others with enthusiasm. In this article, we will explore the ways in which sports teams can simultaneously reap the benefits of, and protect against the potential risks inherent in, social media and social networking.

There is no doubt that sports have a significant presence in the social media world. According to Twitter, three of the top 10 most-discussed individuals on Twitter in 2009 were professional athletes: Kobe Bryant, Tiger Woods, and Alex Rodriguez. Sports teams (Los Angeles Lakers, Cleveland Cavaliers, Chelsea Football Club, New York Yankees, and Liverpool Football Club) comprised five of the top 10 most-discussed sports topics. The New York Yankees were the first Major League Baseball ("MLB") club to reach 1 million "fans" on Facebook. Shaquille O'Neal has approximately 2.6 million Twitter "followers" and is the most-followed athlete on Twitter. The National Basketball Association ("NBA") is the most-followed professional sports league, with approximately 1.7 million followers, and the Orlando Magic is the most-followed professional sports team, with approximately 940,000 followers on Twitter. This recent explosion of social media technology in the sports arena presents both opportunities and concerns for professional sports teams and leagues.

Most professional sports leagues have developed social media policies for their athletes and other employees, including coaches and officials. For example, the National Football League's ("NFL") latest Twitter policy states that players, coaches, and other "inside" personnel are prohibited from "tweeting" (sending electronic messages of 140 characters or less to those following the individual on Twitter), either directly or through a third party acting on such individual's behalf, during the period beginning 90 minutes before the applicable game time and ending after all post-game media interviews have been concluded. Accredited media personnel are warned not to use social media to approximate any type of "play-by-play" updates, and game officials are strictly forbidden from using any social media in a professional capacity. This version of the policy was updated in response to several incidents involving player tweets described below.

In September 2009, a Washington Redskins rookie took to Twitter to criticize Redskins fans, expressing anger at the lack of support shown by the fans at a recent game. Jets receiver David Clowney was benched by coach Rex Ryan for tweeting his thoughts on his playing time, and San Diego cornerback Antonio Cromartie was fined $2,500 by the team for tweeting his opinion that the "nasty" food in training camp might be the reason for the lack of a Super Bowl victory. Running back Larry Johnson was actually fired from the Kansas City Chiefs as a result of tweets criticizing his coach. These examples beg the question as to whether teams would agree that the cliché "there's no such thing as bad publicity" applies to them in the social networking world.

The NBA and the U.S. Open have similar social networking policies to the NFL. Under NBA rules, players, coaches, and team personnel are prohibited from using cell phones and other handheld devices during games (including timeouts and halftime) and for 45 minutes before and after each game. The NBA policy also states that individual NBA teams may adopt their own supplemental rules with regard to practices, team meetings, and other team events. Certain NBA clubs have done so, essentially placing social networking restrictions on all "team time."[2] The Tennis Integrity Unit ("TIU"), a division of the International Tennis Federation, banned on-court and locker room tweets at the U.S. Open and warned players not to use social media at any time in such a way as to disseminate any "inside information" that might alter the outcome of any match.[3] The restrictions applied not only to players, but also to coaches, agents, tournament staff, and even family members. Andy Roddick, who frequently tweets, immediately tweeted his response to the TIU restrictions: ". . . lame. . . ."[4] MLB, on the other hand, has so far embraced social media. Although MLB has taken efforts to prevent members of the media from disseminating reports that could be seen as "real-time" game coverage,[5] it has not yet adopted a formal policy with respect to players and other personnel, and in fact promotes player and "insider" tweeting on its Web site, offering links to active tweeters and bloggers from each MLB club. Similarly, the National Hockey League ("NHL") is a decidedly "self-regulatory" league and has not adopted any formal social media policies to date.[6]

With leagues prescribing the minimum standard (or providing no guidelines at all), individual member teams and clubs should consider what supplemental protections should be put in place as to their players and other employees. Teams and clubs must recognize that the image and brand equity of a team can be drastically affected in an instant, given the reach of social networking platforms. Previously, if an athlete were to criticize his team or his coach, it might be seen in the local television market and printed in newspapers with a mostly local circulation. Now, with Twitter and Facebook, one critical statement can be broadcast globally. Therefore, the rise of social media—while it offers many benefits and opportunities to teams, as we discuss later in this article—must be considered with a critical eye.

Private organizations, teams, and clubs have the right to restrict what their players do and say on social networking platforms through contract. Though players and personnel may have a knee-jerk reaction of "you can't tell me what I can and can't say on my own time," teams can do just that. First Amendment protections only apply when a restriction on speech is being imposed by a governmental agency, not a private organization.[7] Therefore, by virtue of player and employment contracts or at-will employment (in compliance with applicable federal and state antidiscrimination laws), teams and clubs may impose additional

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restrictions on their employees when it comes to social media and even prohibit certain types of statements about the team, its management and ownership, its performance, and the like. To that end, when crafting social media policies and provisions, teams and clubs should make all players and key personnel (and perhaps all personnel) sign on to "antidisparagement" provisions, agreeing that they will not put the team, its coaches, its management, its ownership, its sponsors, or even its fans in a bad light on any social media platform. In addition, teams should consider appropriate supplemental "blackout" periods (i.e., certain periods of time before, during, and after games; in-season—as opposed to off-season—restrictions; team meetings and practices; and so forth) and punishments when the policy is not adhered to (e.g., imposition of monetary fines, community service requirements, and traditional breach-of-contract remedies, including termination of employment in appropriate cases).

In monitoring and enforcing their social media policies, teams and clubs will have to determine the level of resources to be devoted to "policing" the social media networks. Certain violations may be so egregious as to be made publicly known almost instantly—for example, Andy Roddick's response to the TIU hit the mainstream media that same day, given Roddick's popularity and massive Twitter following. However, less visible players and personnel may be able to defy team policies more easily if they are not regularly monitored. As a general matter, teams must weigh the benefits of having their star players communicate directly with fans and keeping them engaged against the inherent risks of the unpredictable "open mic" nature of sites like Facebook and Twitter. There will undoubtedly be a tension between the best interests of the organization and the message the organization is sending when attempting to restrict its employees—a message that is being sent not only to players and personnel, but also to fans, who often denounce teams for lack of transparency or efforts to stifle criticism.[8]

On the flip side, it is obvious that social media appears to be a force to be reckoned with when it comes to marketing, sponsorship opportunities, and connecting with a fan base. Used properly, teams could derive tremendous benefit. Sponsors are increasingly eschewing traditional media advertising, such as television, radio, and print, for interactive and viral media campaigns that reach consumers online. Pepsi, a Super Bowl advertising mainstay for over 20 years, announced in late 2009 that it would not run any advertisements during the 2010 Super Bowl XLIV, instead opting for an interactive online media campaign focused on community service. A Pepsi spokesperson explained that the brand was seeking a "two-way dialogue" with its consumers[9]—an opportunity that social media platforms are tailor-made to provide. In the down economy, sponsors are negotiating lower sponsorship rates with teams than in years past and even abandoning sponsorship relationships entirely. However, if teams offer sponsorship opportunities that tap into the new social media market, offering more meaningful, direct interaction with the teams' fan base, sponsors may be more receptive to entering into partnerships, perhaps even for multiyear terms. Further, although the economy at some point will be revived, it is likely that sponsors will continue to be receptive to social media partnerships. Social media marketing opportunities offer the benefit of being relatively low cost in comparison to traditional billboard or television advertising, while tapping into a larger geographical market.[10]

Sponsored contest marketing lends itself particularly well to online media (but teams must be cognizant of, and in compliance with, any federal, state, or local laws and regulations regarding games of chance and wagering). As noted above, all teams and clubs should enact policies to restrict players and personnel from disparaging such teams' and clubs' sponsors, giving sponsors comfort that their brands will be protected.

TEAMS AND CLUBS MUST RECOGNIZE THAT THE IMAGE AND BRAND EQUITY OF A TEAM CAN BE DRASTICALLY AFFECTED IN AN INSTANT, GIVEN THE REACH OF SOCIAL NETWORKING PLATFORMS.

However, teams and sponsors could potentially go even further by leveraging individual players' social media activities in conjunction with the sponsorship relationship. For example, the official luxury auto retailer of the Dallas Cowboys might agree, as part of its sponsorship package, to run a car giveaway promoted on the Cowboys' traditional media channels (e.g., Cowboys' Web site, game day programs, and so forth). However, imagine the greater visibility that the contest would receive if Tony Romo were to tweet about it or post the contest information on his Facebook page.[11]

Beyond sponsorship activities, social media platforms offer teams the opportunity to connect and interact with their fans in a very real way. While almost all professional teams have their own Web sites, those sites typically offer a "monologue" from the team—e.g., information is posted and changed periodically and will be seen by those users actively opting to visit the Web site at any particular time. Many teams will use e-mail marketing to drive fans to the Web site, but again, the team is talking "at" the e-mail recipient.

Conversely, social media give teams the opportunity to directly interact with fans, potential fans, and even those who may never have sought out the team in the first place. Every time a tweet is sent or a Facebook page is updated, connected users can receive the message in real time, whether at a computer or on a mobile network, such as through a cell phone or other Internet-enabled portable device. Not only that, they can directly respond to whatever message is being sent their way—fans are no longer observers; they are participants. Therefore, instead of a monologue, teams using social

media are creating a dialogue. Whenever a new message is posted on Facebook and Twitter for the popular teams, users immediately begin to post replies and create sub-conversations with other users. The setup of social networking sites is such that even if a particular user is not connected to the team as a "friend" or "follower," chances are that he or she has a friend or follows someone that is connected to the team and will see all the postings on his or her pages. As such, teams have an opportunity to reach individuals that may never think to actively log on to the team's Web site but may be intrigued by something they see on someone else's page.

There will always be a concern that opening a team-sponsored dialogue with fans will result in negative commentary and postings. However, fans will appreciate an officially branded community in which to connect with other fans and foster team loyalty, as evidenced by the many "unofficial" fan clubs that pop up all over the Internet. Also, as discussed above, fans are cognizant of efforts to squelch open dialogue and criticism and will likely embrace any team-sponsored forum in which to sound off. Teams also can create a greater buzz than ever before by sending real-time updates on players, statistics, ticket sales, and even weather conditions at the stadium or arena on game day. They also can increase awareness of the team's charitable activities, premium offerings at the stadium or arena, and official fan clubs.

Despite the popularity of social networking sites,[12] there has been relatively little reported litigation with respect to social media activities, with only a handful of published judicial opinions relating to Twitter and Facebook (and none in a sports context). However, Twitter has not been completely free from legal trouble. In June 2009, St. Louis Cardinals manager Tony La Russa settled a lawsuit against Twitter out of court after having sued the social networking site for trademark infringement, cybersquatting, and misappropriation of name and likeness in response to a tweet that went out in April 2009 from an individual claiming to be La Russa, stating, "Lost 2 out of 3, but we made it out of Chicago without one drunk driving incident or dead pitcher."[13] The site also posted a message on the account page stating, "Hey There! Tony La Russa is using Twitter."[14] The Twitter identity was not in fact created by La Russa and he had no connection to it whatsoever. La Russa has been criticized in the media for taking legal action against Twitter for what was likely a prank by an anonymous Twitter user. (Twitter has an impersonation policy, stating that the only impersonation accounts permissible are parody accounts, i.e., accounts that reasonable persons would be able to identify as a joke.) Any nonparody impersonation accounts are subject to removal by Twitter.

With the rapid growth of social media platforms and the new types of content uploaded and traded each day, it is likely that the social media world and the legal world will begin to collide in a more significant way—a player may contest his termination for an inappropriate tweet, leagues and member clubs may clash with conflicting social media policies, a team employee may argue that his social media content is his copyrighted work, impersonators will be sued for defamation and misappropriation as in La Russa's case, and so forth. As such, social media use and content raise potential issues of copyright and trademark ownership and infringement, defamation, misappropriation, and employment, privacy, and contract law—all of which will have bearing on social media in the sports context. However, harnessed properly, social media can offer teams unprecedented opportunities to reach fans, potential fans, and sponsors, and teams should be encouraged to embrace the future of communication. Team counsel can be invaluable in assisting teams in structuring social media guidelines and strategies to ensure that teams are getting the maximum value from social networking while protecting their organizations' interests in an evolving and somewhat unpredictable online landscape. ❖

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ENDNOTES

1. Pat Coyle, *Teams Active in Social Media Build a Strategic Advantage*, Sports Bus. J., Jan. 4–10, 2010.
2. Marc Stein, *NBA Social Media Guidelines Out*, ESPN.com, Sept. 30, 2009.
3. Signs posted by the TIU in the players' lounges, locker rooms, and referee's office stated, "Certain sensitive information concerning your match or other matches and/or players should be avoided. Depending on the information sent out this could be determined as the passing of 'inside information.'" "Inside information" was defined as "information about the likely participation or likely performance of a player in an event or concerning the weather, court conditions, status, outcome or any other aspect of an event which is known by a Covered Person and is not information in the public domain." Associated Press, *Roddick Calls U.S. Open Twitter Warning "Lame,"* Nbcsports.msnbc.com, Aug. 28, 2009.
4. *Id.*
5. Eric Fisher, *MLB Imposes Restrictions for Online Content*, Sports Bus. J., Feb. 25, 2008.
6. Kimberly Maul, *Sports Entities Must Adapt a New Game Plan to Reach Fans*, PR Wk., Oct. 12, 2009, at 20. The director of social media marketing and strategy for the NHL has explained that the culture of the NHL is such that players would not opt for player-centric online activities in the locker room, as opposed to fostering a team environment, so the league has left any social media regulation to the discretion of its individual clubs.
7. Hudgens v. NLRB, 424 U.S. 507, 513 (1976); Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 114 (1973).
8. When an athlete posts on a third-party Web site, is he or she posting as, say, Chad Ocho Cinco of the Cincinnati Bengals, or as Chad Ocho Cinco, an individual? Even teams that impose more restrictive social media policies than their respective leagues typically limit the restrictions to times when their athletes and employees are engaging in team activities or are on team property. It appears that most teams resort to more traditional punishments, such as fines, when their athletes make social media statements detrimental (or deemed detrimental) to the team on their "own time."
9. Frank Washkuch, *Pepsi Abandons Super Bowl in Favor of CRM*, DMNews, Jan. 4, 2010.
10. Facebook's official "Press Room" reported that as of Jan. 27, 2010, about 70 percent of its users are outside of the United States.
11. Such activities, of course, would have to be squared with any personal sponsorships that players have negotiated for themselves. However, this type of integrated marketing is something that teams should think about in negotiating player contracts and potentially harnessing individual talent to increase teams' attractiveness to sponsors.
12. Facebook's official "Press Room" reported that, as of Jan. 27, 2010, it had more than 350 million active users.
13. *Tony La Russa Settles Lawsuit Against Twitter Out of Court*, Sports Bus. Daily, June 8, 2009.
14. *Id.*

The NFL's Quest to Be Treated Like General Motors Should Stop at the Supreme Court

CONTINUED FROM PAGE 1

What started as a straightforward and uncomplicated dispute (as uncomplicated as antitrust cases can be) among the NFL, the teams, and one of its vendors has developed into what has been overstated by sport-journalism as "Armageddon."[1]

The case will hinge on whether the Supreme Court views the NFL and its teams like two divisions of General Motors ("GM"), where one owner guides corporate activities and no competition cognizable under the antitrust laws exists, or as a joint venture, where the NFL and the teams cooperate for certain things but remain competitors for others. As explained below, the league and its teams are not the sports equivalent of GM.

IN *COPPERWELD*, THE SUPREME COURT FINALLY PUT TO REST THE INTRA-ENTERPRISE CONSPIRACY DOCTRINE AND HELD THAT AN AGREEMENT BETWEEN A CORPORATE PARENT AND ITS WHOLLY OWNED SUBSIDIARY COULD NOT BE FOUND TO RESTRAIN TRADE UNDER SECTION 1.

The organizational structure of the league and its teams will figure prominently in the Supreme Court's decision. Throughout their history, NFL teams have been owned and managed individually. Each team has separate profits and losses, sets its own ticket prices, and hires and fires players and coaches independently.[2] In the early 1960s, the NFL created NFL Properties ("NFLP") as a central repository from which to develop, market, license, and enforce the individual team-owned intellectual property ("IP"), as well as to promote the league and the teams.[3] In 1982, 26 of the then-28 NFL teams created the NFL Trust to jointly market individual team and league IP.[4] NFLP would become the exclusive licensee of these marks and funnel licensing revenue back to the Trust for distribution to the teams. But the teams did not pledge all of their licensing rights to the Trust. The teams could still (a) use the IP in local advertising, (b) authorize third parties to use the IP in third-party advertising in local sections of the team's home game programs and the team's publications, and (c) use the IP in the team's own publications.[5] Further, the teams did not pool the revenue from these activities or from merchandise sales at local team-owned stores.[6]

Before 2000, NFLP licensed the teams' IP for headwear to several different companies, including American Needle, Inc. ("ANI").[7] But in 2000, the teams authorized NFLP to solicit from vendors an exclusive headwear license.[8] Reebok International Ltd. won the license and held an exclusive headwear license for ten years.[9] As a result, ANI lost its license and sued NFLP, the NFL, and the individual teams (collectively, "the league defendants"), as well as Reebok, charging that the exclusive arrangement violated section 1 of the Sherman Act.[10] ANI claimed that the exclusive license was a horizontal agreement among the NFL teams and the league to restrain trade.[11]

The district court held that despite limited discovery on the issue, it was undeniably true that the league defendants acted as a single entity when licensing their IP. The teams pledged their IP to NFLP, which sold, enforced, and gathered nearly all the revenue from the teams' IP.[12] Judge Moran wrote that there was no "sudden joining of independent sources of economic power," and, as a result, there was no section 1 violation inherent in the NFL's licensing practices.[13]

ANI appealed to the Seventh Circuit,[14] where it claimed, among other things, that the district court misconstrued prior Supreme Court holdings when it ruled that the defendants acted as a single entity.[15] The court of appeals acknowledged that the single-entity issue lacked a "definitive opinion" but nonetheless held for the defendants.[16]

Seeing the chance to reduce future antitrust liability under section 1 of the Sherman Act, the NFL took the "unusual step"[17] of joining ANI in asking the Supreme Court to review the Seventh Circuit's holding.[18] Before the Supreme Court, ANI argued that because the teams are separately owned and controlled, they cannot be found to be one economic entity for purposes of section 1.[19] In response, the league defendants argued that this highly "interdependent"[20] joint venture should be considered a single entity, at least for core venture functions. The NFL argued that core functions are broadly defined as the production, marketing, and sale of their joint product—NFL football.[21] Should the Court accept the league defendants' claim that these core venture functions are protected, it would reduce the NFL's—and, indeed, many other joint ventures'—exposure to lawsuits on section 1 grounds.

The Legal Standard to Find a Single Entity

The decisions by the Supreme Court in *Copperweld Corp. v. Independence Tube Corp.*[22] and *Texaco, Inc. v. Dagher*[23] will play an integral role in deciding the single-entity issue. In *Copperweld*, the Supreme Court finally put to rest the intra-enterprise conspiracy doctrine and held that an agreement between a corporate parent and its wholly owned subsidiary could not be found to restrain trade under section 1. The Court found section 1 inapplicable because "the ultimate interests of the subsidiary and the parent [were] identical, so the parent and the subsidiary must be viewed as a single economic unit."[24] Adhering to the intra-enterprise conspiracy doctrine placed form over substance and ignored the reality in corporate governance that a corporate parent and its subsidiary (even if managed by separate staffs) "are not unlike a multiple team of horses drawing a vehicle under the control of a single driver."[25] The defendants "share[d] a common purpose,"

and the parent could "assert full control" over the subsidiary at any time.[26] Further, the purposes underlying section 1 were not violated because a parent and subsidiary are not sufficiently different economic actors, such that their joining (or joint action) does not join previously separate "sources of economic power."[27] As the Court made clear, this does not mean that employees of a corporation cannot have different views or different economic interests under one umbrella. Rather, courts must take a broad look at whether the entities accused of conspiring to restrain trade "suddenly bring together economic power that was previously separate."[28]

In 2006, *Dagher* extended *Copperweld*'s holding to the pricing practices of fully integrated joint ventures. There, the Supreme Court found the joint venture to be a single entity under section 1 in the context of a claim that members of a joint venture to market and sell gasoline in the western United States had engaged in *per se* price fixing.[29] When they formed the venture, the participants decided to keep the names of the gasoline stations as they were before the formation of the venture. But their retail operations would be merged in every other respect: It was managed by the one team, it pooled its profits, and it shared risks for losses.[30] The Federal Trade Commission had approved its formation under section 7 of the Clayton Act[31] and even ordered appropriate divestitures.[32] This was, for all intents and purposes, a merger of the companies' retail operations.

As a result, when the plaintiffs (a class of gasoline station owners who competed with the joint venture's stations) filed suit alleging the companies *per se* violated section 1, the Supreme Court took just over a month between oral argument and issuing its decision to soundly reject the plaintiffs' claim under *Copperweld* and its progeny.[33] The Court did not find a *per se* violation because the venture had integrated all of its operations and there was no contention that the venture partners still competed outside of the venture.[34] Writing for the Court, Justice Thomas quoted Judge Fernandez's dissent in the Ninth Circuit opinion, "[n]othing more radical is afoot than the fact that an entity, which now owns all of the production, transportation, research, storage, sales and distribution facilities for engaging in the gasoline business, also prices its own products."[35]

In the current litigation, the question the Supreme Court must answer is whether actions by the NFL and its teams "deprive the marketplace of independent centers of decisionmaking."[36] That is, if they are a collection of entities with sufficiently independent ownership and economic interests, then they cannot meet the single-entity test under *Copperweld*, and restraints among the venture's members must be judged according to section 1. If, as the NFL argued, these nominally divergent interests under *Dagher* are integrated sufficiently for purposes of the creation of their joint product—a football season leading to a championship—that the competition between them is not cognizable under the antitrust laws, then their conduct will fall outside the scope of section 1.

THE NFL JOINT VENTURE LIKELY IS NOT A SINGLE ENTITY IMMUNE FROM LIABILITY UNDER SECTION 1

Courts Have Struggled With the Correct Analytical Framework When Deciding the Single-Entity Question

As stated above, the NFL argues that the proper functional criterion to determine if the NFL is a single entity is whether it is integrated when engaging in actions related to its core activities—producing and promoting NFL football. Previous courts to consider this question have found that even with substantial integration, sports leagues are not a single entity. For instance, in *Fraser v. Major League Soccer, L.L.C.*, the level of integration was far more pervasive than it is in the NFL.[37] A single group of investors owned all the teams (including their IP rights), managed all the ticket sales, organized the game schedule, negotiated broadcast rights, paid the referees, and assigned players to each team and negotiated their salaries.[38] Significantly, nine of the 12 teams were operated by what the league called "operator/investors." The operator/investors exclusively managed the teams, paid and hired team staff and coaches, and licensed local broadcast rights. The players brought a section 1 claim alleging the league and its operator/investors agreed not to compete for players' services.[39]

In *Fraser*, the First Circuit did not fully resolve the single-entity question because it held for the defendants on other grounds; it clearly struggled with the proper analytical framework in which to decide the single-entity question.[40] Even where the economic interests were integrated substantially, the First Circuit could not hold that the league was a single entity for two reasons.[41] First, relying on *Copperweld*, it found diverse entrepreneurial interests that go "well beyond the ordinary company."[42] The limited independence the operator/investors could exercise meant that the league and its teams did not operate with the "complete unity of interest" that *Copperweld* requires.[43] Rather, the league and its owners functioned as a "hybrid arrangement" between a single entity and a joint venture.[44] Second, the operator/investors were not "servants" of the league and, in fact, they controlled it.[45] Beyond a "classic single enterprise [as in *Copperweld*] it is difficult to find an easy stopping point or even decide on the proper functional criteria" for deciding which attributes should be considered in a single-entity analysis in a joint venture setting.[46]

THE QUESTION THE SUPREME COURT MUST ANSWER IS WHETHER ACTIONS BY THE NFL AND ITS TEAMS "DEPRIVE THE MARKETPLACE OF INDEPENDENT CENTERS OF DECISIONMAKING."

Before the current litigation, the Seventh Circuit confronted the question of whether a sports league and its teams were a single entity when the Chicago Bulls and its television network sued the National Basketball Association ("NBA") over na-

tional broadcast rights.[47] The Chicago Bulls wanted to televise more games than permitted by the league's national broadcast contract.[48] The Bulls alleged the NBA's restriction on the number of nationally televised games restrained trade under section 1. Even though the majority of the court conceded that they had characteristics of both a single entity and a joint venture subject to section 1, it held that the league and its teams were a single entity for this purpose because it produced a single product (basketball games) for which cooperation is essential.[49]

As in *Fraser*, the Seventh Circuit's struggle to find a guiding principle was apparent. On one hand, the NBA and its teams were 30 separately owned entities, each with independent incentives to improve themselves and, by extension, the product of professional basketball.[50] It also held that "the NBA has no existence independent of sports. . . . [O]nly it can make 'NBA Basketball' games."[51] But it conceded that to the players "teams are distinct," and "the league looks more like a group of firms acting as a monopsony."[52] On remand, the court ordered the district court to be mindful that applying *Copperweld* to sports leagues does not yield "one 'right' characterization" and that sports leagues should be evaluated under *Copperweld* not only "one league at a time—[but] perhaps one facet of a league at a time."[53] The closest it got to holding that restrictions on broadcasts may not run afoul of section 1 was to say that it was possible that the NBA was a single entity for purposes of selling broadcast rights but not when competing for players.[54]

Put another way, it appears that the Bulls court found that where the individual teams competed with other members of the venture (or with entities completely outside of the venture), the NBA would not be a single entity. Where the league integrated its operations such that no member of the venture competed outside of it, it would be considered a single entity incapable of a section 1 conspiracy.

Courts Have Been Reluctant to Accept the NFL's Single-Entity Argument

Turning to the single-entity argument as applied to the NFL, several courts have addressed this question as parts of larger cases, and the outcome has been the same: The NFL and its teams have not been held to be a single entity.[55] In *Los Angeles Memorial Coliseum Commission v. National Football League* ("*Raiders*"),[56] the Ninth Circuit did not find the NFL and its teams to be a single entity when the league attempted to block a move by one of its teams.[57] The NFL invoked its exclusive territory restriction when Al Davis, owner of the Oakland Raiders, wanted to move his team from Oakland to Los Angeles. In rejecting the single-entity argument, the Ninth Circuit did not find the NFL and its teams a single entity because they competed in several ways.[58] The Ninth Circuit held that while the teams pool much of their revenue, they do not share profits and losses, a fact that is "attributable to independent management policies" regarding hiring players and coaches, ticket prices, and concessions.[59] Further, teams close to each other compete for fans in places like Washington and Baltimore.[60] The exclusive territorial restrictions imposed by the NFL also restricted competition by stadium owners competing for NFL tenants.[61]

Citing *Raiders*, the First Circuit also failed to find a single entity in *Sullivan v. National Football League*.[62] The owner of the New England Patriots wished to offer shares of stock to the public in an effort to reduce the team's debt. The league attempted to block the move by invoking its rule against transferring ownership interests in any member teams without a three-quarters approval by the other members.[63] As in *ANI*, the NFL argued that its rule on ownership transfer was immune under section 1 because the league operated as a single entity under *Copperweld*.[64] The court rejected the NFL's argument that as a matter of law it is a single entity because teams competed with other teams for ownership interests and permitting the league's restriction would compromise the entire process by which competition for club ownership occurs.[65] Further, the league and teams "pursue diverse interests" for things such as fan support, players, coaches, and ticket sales.[66]

Likewise, the Second Circuit in *North American Soccer League v. National Football League*[67] described the NFL's single-entity argument as a "loophole that would permit league members to escape antitrust liability for any restraint," even if the anticompetitive effects of the restraint outweighed their benefits.[68] There, an NFL team owner wanted to purchase an interest in a professional soccer team. The NFL argued it was a single entity when it attempted to enforce its rule forbidding NFL team owners from owning a team in another professional sport.[69] The court did not agree, citing the fact that the teams were separately owned, had separate capital expenditures, and did not pool their local broadcast revenues. In short, the financial condition of one team did not rise and fall with that of the others.[70]

Contrary to the holding in the current litigation, the above cases demonstrate that teams have diverse ownership and economic interests that preclude a finding that they operate as a single entity. It is undisputed that the teams are owned and managed separately; they do not pool all of their revenue or share all of their profits. They compete with each other for such things as players, coaches and staff, and stadium leases.[71] These hallmarks of a less-than-fully-integrated joint venture, though, were given short shrift in the Seventh Circuit.[72] In *ANI*, the Seventh Circuit's opinion rests on the notion that the product produced by the joint venture is NFL football games.[73] Therefore, it is impossible for any single team to produce NFL football, and thus any joint action related to the broad interest in promoting that product could not violate section 1.[74] Further, the Seventh Circuit concluded that the NFL was a single entity by pointing out that even though it was conceivable that teams could act on separate economic interests when licensing their IP, "those interests do not necessarily keep the teams from functioning as a single entity."[75]

This effectively flipped the standard for finding a single entity on its head. Instead of following *Copperweld*'s instruction that diversity of economic interests suffices to defeat a single entity, sports leagues could earn single-entity status by showing that as long as any core functions are integrated, they could defeat a section 1 claim.

The NFL's broad argument before the Supreme Court would mean that any challenged restraint could be classified as a core venture activity under *Dagher* and thus escape section 1 liability. It would encompass nearly any activity (other than if the NFL went into a completely unrelated business such as building parking garages) that is in any way related to the production and promotion of NFL football. As the league describes it, its single-entity argument would mean that the pricing and many other decisions about anything related to the production and promotion of NFL football to be *per se* legal. The league could impose

rules for nearly any activity, including setting leaguewide uniform salaries for coaches and controlling all aspects of licensing, marketing, and ticket sales.

But *Dagher* should be of limited help to the league defendants. In *Dagher*, although the partners pledged all of their assets into the venture, managed it jointly, and shared its profits, the Court only found that the pricing policies of the venture were not *per se* illegal (there was no rule-of-reason claim before the Court in the case). On those facts, it was easy for the Supreme Court to extend the holding of *Copperweld* to a fully integrated joint venture. Functionally, they were very similar. By contrast, the NFL and its teams are situated very differently.

THREE POSSIBLE OUTCOMES AT THE SUPREME COURT

The Supreme Court could decide the *ANI* case in at least three ways. First, it could side with the NFL and accept the league defendants' argument that it is a single entity for any purpose that relates to the production and promotion of NFL football. As discussed above, that overlooks areas of vibrant competition among the teams. A second possible outcome is to treat the NFL as a single entity when considering restraints on activities that are more integrated, but not for restraints on activities that are less integrated. This outcome would extend *Dagher*'s narrow holding from one where the Court held that pricing practices of a tightly integrated joint venture were not *per se* illegal to one where a court would use the *Dagher* factors of integration to determine whether a given facet of the league's operations was unified. This tracks the Seventh Circuit's earlier suggestion in the Bulls case to decide the section 1 treatment for sports leagues one facet of the league at a time. Competition for certain activities, such as players, coaches, and stadium leases, however, would remain subject to section 1 scrutiny because the league defendants are not integrated in these areas. The result would mean that for some purposes, a highly integrated sports league would earn protection from scrutiny under section 1, even where many assets of the venture members were still owned separately. It could mean a flood of litigation over whether a facet of any joint venture's operations is sufficiently integrated.

The best result, given the limited discovery, would be a holding that the league is not a single entity. The remanded case would determine if the licensing restraint violates section 1 under the rule of reason.[76] This analysis would properly scrutinize the level of integration between the league and its teams on the single-entity question, and ultimately test the league defendants' restraint. There are likely some efficiency gains under a central licensing scheme, such as pooling licensing sales efforts, reducing transaction costs on the sale of leaguewide licenses, and lower enforcement costs. Selling leaguewide licenses through one entity also eliminates free riding of the more popular teams by the less popular teams.[77] But these welfare enhancements would have to be measured against the reduction in competition between the teams for their headwear licenses. It does not appear that the district court employed any such analysis. Rather, it incorrectly accepted the league defendants' efficiency-enhancing arguments at face value.[78]

CONCLUSION

As it did in *Copperweld* and *Dagher*, the Supreme Court should consider the structure and conduct of the league defendants. A reasonable reading of *Copperweld* provides the factors upon which the Court should decide whether a fully integrated single entity exists here. Holding for the league defendants on the grounds they advocate would expand *Dagher*'s narrow holding and lower the standard by which joint ventures must integrate to qualify as a single entity. The league's argument for single-entity treatment under section 1 should be rejected. ❖

Matthew Bester is a trial attorney in the U.S. Department of Justice, Antitrust Division. The views expressed are not purported to reflect the views of the U.S. Department of Justice. The author played no role in any of the Department of Justice's briefs filed in this matter. *The author would like to thank Mark Merva, Bill Jones, and Ben Matelson for their helpful comments.*

ENDNOTES

1. Lester Munson, Antitrust Case Could Be Armageddon, ESPN.com (July 17, 2009), http://sports.espn.go.com/espn/columns/story?columnist=munson_lester&id=4336261.
2. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737, 741 (7th Cir. 2008).
3. *Id.* at 737.
4. The Oakland Raiders and Miami Dolphins contracted directly with NFLP instead of joining the Trust. The Dallas Cowboys and its affiliates filed a complaint objecting to the NFLP's exclusive licensing of Cowboys' marks. *See, e.g.*, Complaint, Dallas Cowboys Football Club, Ltd. v. Nat'l Football League Trust, No. 95 Civ. 9426 (S.D.N.Y. 1995).
5. William J. Hoffman, Comment, *Dallas' Head Cowboy Emerges Victorious in a Licensing Showdown with the NFL*, 7 Seton Hall J. Sport L. 255, 266 (1997).
6. Brief of Petitioner American Needle, Inc. at 3, Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (Sept. 18, 2009) [hereinafter "ANI Brief"].
7. *Id.*
8. *Id.*
9. *Id.*
10. 15 U.S.C. § 1.
11. Am. Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941 (N.D. Ill. 2007).
12. *Id.* at 943–44.
13. *Id.* at 943.
14. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736, 737 (7th Cir. 2008).
15. *Id.* at 741.
16. *Id.*
17. Petition for a Writ of Certiorari by NFL Respondents at 4, Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (Jan. 21, 2009).
18. The question presented for Supreme Court review, according to ANI, is whether "an agreement of the 32 teams of the National Football League not to compete with each other or a jointly selected monopoly licensee in the licensing of their individually owned intellectual property" violates section 1 of the Sherman Act. ANI Brief, *supra* note 6, at i.
19. *Id.* at 16.
20. Brief of Respondent National Football League at 24, Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (Nov. 17, 2009) [hereinafter "NFL Brief"].
21. *Id.* at 15.
22. 467 U.S. 752 (1984).
23. 126 S. Ct. 1276 (2006).
24. *Copperweld*, 467 U.S. at 772, n.18.
25. *Id.* at 771.
26. *Id.* at 771–72.
27. *Id.* at 771.
28. *Id.* at 769.
29. Texaco, Inc. v. Dagher, 126 S. Ct. 1276, 1278 (2006).
30. *Id.*
31. 15 U.S.C. § 18.
32. *Dagher*, 126 S. Ct. at 1279.
33. *Id.* at 1280.
34. *Id.*
35. *Id.* at 1281 (quoting Dagher v. Saudi Refining, Inc., 369 F.3d 1108, 1127 (9th Cir. 2004)).
36. Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 762 (1984).
37. 284 F.3d 47, 59 (1st Cir. 2002).
38. *Id.* at 53. By contrast, the NFL players and coaches have asserted that competition for their services will be affected by a ruling that the NFL is a single entity. *See, e.g.*, Amicus Brief of the National Football League Coaches Association in Support of Petitioner, Am. Needle, Inc. v. Nat'l Football League, No. 08-661 (Sept. 25, 2009).
39. *Fraser*, 284 F.3d at 54–55.
40. *Id.* at 59. The *Fraser* plaintiffs failed to show a proper relevant market. *Id.*
41. *Id.* at 58.

42. *Id.* at 57.
43. *Id.* at 58.
44. *Id.*
45. *Id.* at 57.
46. *Id.* at 59.
47. Chicago Prof'l Sports Ltd. P'shp v. Nat'l Basketball Ass'n, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*").
48. *Id.* at 595.
49. *Id.* at 603.
50. *Id.* at 597–98.
51. *Id.* at 599. It held that a league with one team would be akin to "one hand clapping."
52. *Id.* A monopsony occurs where one supplier has the ability to control prices or output.
53. *Id.* at 600. In dicta, the court alluded to the Supreme Court's difficulty in finding the NFL a single entity for purposes of negotiating labor contracts. *Id.* at 599 (citing Brown v. Pro Football, Inc., 518 U.S. 231 (1996)).
54. *Id.*
55. The NFL first argued it and its teams operated as a single entity in *Radovich v. National Football League*, 352 U.S. 445 (1957), where the Court declined to extend the section 1 exemption to professional football acquired by professional baseball in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), and *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953).
56. 726 F.2d 1381 (9th Cir. 1984) ("*Raiders*").
57. Even though *Raiders* pre-dated *Copperweld*, its holding has been cited approvingly since then. *See*, *e.g.*, Fraser v. Major League Soccer, L.L.C., 284 F.3d 47, 56 & n.3 (1st Cir. 2002). The restraint at issue here was voted on by the teams and implemented through NFLP.
58. Rule 4.1 in Article IV of the NFL Constitution read, "the city in which [a] club is located and for which it holds a franchise and plays its home games . . . includes the surrounding territory to the extent of 75 miles in every direction from the exterior corporate limits of the city." *Raiders*, 726 F.2d 1381.
59. *Id.* at 1390.
60. *Id.* at 1393.
61. *Id.* at 1395 (citing Smith v. Pro Football, Inc., 593 F.2d 1173, 1185 (D.C. Cir. 1978)).
62. 34 F.3d 1091 (1st Cir. 1994).
63. The owner of the New England Patriots wished to offer shares of stock to reduce his debt. After the league commissioner announced his opposition to the plan, it was never voted on and ultimately the team was sold. The owner claimed that the league and its members violated section 1 by forcing him to sell for less than what he would have gotten otherwise. *Id.* at 1095–96.
64. *Id.* at 1099.
65. *Id.*
66. *Id.* at 1098 (citing Mid South Grizzlies v. Nat'l Football League, 720 F.2d 772 (3d Cir. 1983)).
67. 670 F.2d 1249, 1257 (2d Cir. 1982).
68. *Id.* at 1257.
69. *Id.* at 1254.
70. *Id.* at 1252. The court found that the purpose of the rule was not only to protect the NFL as a league from competing with another professional sports league, but also to protect individual teams from competition from professional soccer's individual teams. *Id.* at 1257.
71. The oft-cited dissent by then-Justice Rehnquist from denial of certiorari in *North American Soccer League v. National Football League* incorrectly minimizes these important areas of intraleague competition. Nat'l Football League v. N. Am. Soccer League, 459 U.S. 1074 (1982).
72. *Compare* Texaco, Inc. v. Dagher, 126 S. Ct. 1276, 1278–79 (2006).
73. Am. Needle, Inc. v. Nat'l Football League, 538 F.3d 736 (7th Cir. 2008).
74. *Id.* "NFL teams are best described as a single source of economic power when promoting NFL football." *Id.* at 744.
75. *Id.* at 743.
76. *Raiders*, 726 F.2d 1381, 1395 (9th Cir. 1984). The rule of reason requires balancing the harms and benefits to competition and determining if the benefits can be achieved by less restrictive means. *Id.* It is important to note that the court on remand would not weigh the competitive effects of the pledging to and unification of licensing of the NFL teams' IP into NFLP—that was not challenged—but rather the exclusivity awarded to Reebok.
77. Major League Baseball Props., Inc. v. Salvino, Inc., 542 F.3d 290, 337, 340 (2d Cir. 2008) (Sotomayor, J., concurring). Then-Judge Sotomayor took no position on whether Salvino could have satisfied the rule of reason when analyzing this restraint because she agreed with the majority that summary judgment was awarded properly to the defendant where the plaintiff failed to show anticompetitive effects in the relevant market. *Id.* at 341.
78. Am. Needle, Inc. v. New Orleans Louisiana Saints, 496 F. Supp. 2d 941, 944 (N.D. Ill. 2007).

Negotiating a 360 Deal

CONTINUED FROM PAGE 1

Using the phrase "nonnegotiable" in a room of transaction lawyers is much like saying "fire" to a crowded room of firemen. It is a bit like waiving a raw ribeye steak in a vegetarian's face, serving vegan fare to a cattle ranchers' convention, or talking "no-knock search" to a libertarian. Particularly with entertainment and sports lawyers, negotiation pays the rent and college tuitions, can make you partner, and pumps blood into the veins.

While one needs to see and consider the exact language of a proposed 360 deal, as well as the position and intent of the client, generally the notion that a long-term exclusive agreement, such as a so-called 360 deal, is "nonnegotiable" is hard for transactional lawyers to understand or accept. Historically, it has been some transactional lawyers' view that the more willing a party is to negotiate their proposed agreement, the better that party will act and behave during the term of the agreement and thereafter. Conversely, contracts that tend to be nonnegotiable, needing to be signed at the day or hour of presentation or on a "take it or leave it" basis, tend to end in tears or at an appellate court level.

A commitment of one's exclusive recording services is a serious duty and obligation notwithstanding the label's cry that such rights are worth less and less in an era of declining music sales. When the other components of the so-called 360 deal are added to the mix—music publishing rights/income, merchandising and endorsements rights/income, and touring income—it becomes more than a substantial bundle of rights; it becomes the sole livelihood for the artists who make the music for what may be the duration of their career. In lawyer terms, it may be viewed as something equivalent to "20 percent of your gross salary and/or income as a lawyer or law partner, from whatever source until the day you retire."

The 360 deal itself (even without the "nonnegotiable" part) remains a concept of substantial debate, broad application, and evolution. The so-called 360 deal exists in many variations. Some companies profess to have or require it and really don't. Other companies never use the phrase yet effectively acquire 360 or expanded rights in their agreements. In some cases, what is labeled as a 360 deal is an "old school" contract configuration of management, recording, and publishing agreements that effectively allowed the label/manager/publisher to share in all income sources of the artist. Such agreements were common beginning in the 1960s and have been viewed in recent years by some as a type of 360 deal. There's also a new school variety of a 360 deal, which generally does not include the management function but does provide the label or party signing the artist participation in multiple revenue streams of the artist's career. Be it old school, new school, or something in between, a 360 deal is one that involves a substantial commitment on the part of the artist and

one that requires careful review, consideration, and negotiation.

The description of 360 deals in Wikipedia is not a bad one and worthy of citing for this discussion (http://en.wikipedia.org/wiki/360_deal):

> In the music industry, a 360 deal is a business relationship between an artist and a music industry company. The company agrees to provide financial support for the artist, including direct advances as well as funds for marketing, promotion and touring, as an investment to the artist's lucrative potential. The artist agrees to give the company a percentage of all of their interests, including sales of recorded music, live performances and any other income.
>
> 360 deals have been made by traditional record companies, as in Robbie Williams's pioneering deal with EMI in 2007. They have also been made between artists and promoters, for example Madonna signed a 360 deal with Live Nation in 2007, as did Jay-Z in 2008.
>
> The business arrangement is an alternative to the traditional recording contract. During the first decade of the 21st century, revenues from recorded music fell dramatically and the profit margins traditionally associated with the record industry disappeared. The 360 deal reflects the fact that much of a musician's income now comes from sources other than recorded music, such as live performance and merchandise.

It is certainly understandable for a record company to seek such a deal today in light of the substantial declines the industry has seen in the sales of recorded music since 2000, coupled with the substantial investments made to try and launch an artist's career and the low rate of success in succeeding on such investments. A requirement today that a label, promoter, or investor participate in multiple streams of artist revenue is, in and of itself, not unexpected. But such a deal being "nonnegotiable" is.

"But we're not in the growth era of recorded music sales, as we once were in those glory days," the pre-360-deal advocates will argue. It's a high-investment cost, low rate of success, labor-intensive business in which sales are declining every year. The anti-360 advocates will argue the advances, resources, and ability to deliver success and results are also diminished in the downsized recorded music companies of today and in an age when the pie for all musicians may be smaller; thus, it is unfair for the labels to now demand a greater share, especially in activities where they may offer little expertise or resources. Whatever one's current position on the 360 concept is, several truths emerge. These deals are being discussed, proposed, and required in an increasing number of situations; the deals vary quite dramatically; and the scope of the commitment in such deals (being more than a traditional record deal) requires real consideration and, in almost all cases, real negotiation.

An argument in favor of such a deal includes a client who needs or wants the money or needs the substantial investment and keen marketing being offered and coupled with entitlement to additional sources of revenue. We are no longer in the era when an artist's announcement of "someone wants to sign me to a record deal" was cause for celebration in a time when the channels of distribution required the distribution muscle of a major label, and their resources to record, master, press, ship, promote a record, make the video, get it on MTV, subsidize the tour, and get the single on the radio, while also paying the artist an elephant dollar advance. The record deal of today is less likely to do all of the above in a business and age of reduced expectations. The advance may be more modest, the artist can and usually must be the one to do much of the heavy lifting, and the response to the record-deal news can now be closer to: "Why do it and why lose control of the project?"

USING THE PHRASE "NONNEGOTIABLE" IN A ROOM OF TRANSACTION LAWYERS IS MUCH LIKE SAYING "FIRE" TO A CROWDED ROOM OF FIREMEN.

But there may be compelling reasons to want the record deal. First, in some deals it is and will be the big dollars (millions in some cases), and the decision may be made largely by tax lawyers, business planners, and actuarial tables. There are other artists who absolutely need the substantial resources provided by the label or party offering the 360 deal. To the extent that the need for dollars or the deal takes the artist and his/her lawyer to the next step, the next question may be: "If I want and need such a record deal, can the '360' part be bifurcated, or can the deal be '270,' '180,' '90,' or less, and can the participation in these other rights be passive and not active?" (with a possible goal that the decisions and control over whether there will be a publishing or merchandising deal, and with whom and on what terms, will be the artist's).

Circumstances motivating or justifying the 360 deal are wildly diverse, and this needs to be considered in framing and negotiating such a deal. A company willing to pay millions in advances may have absolute justification to demand participation in all entertainment revenue sources for many years to recoup the advance and compensate them for the risks associated with the investment. However, a company investing $10,000 or $100,000 in a new artist's first record may have less justification in sharing in nonrecord income streams for years after the investment.

At present, we are at a time when the 360 deal, in all its variations, is more commonplace and will be seen by an increasing number of labels as a necessity and will be viewed by some artists as the (increasingly elusive) opportunity to succeed in their music career with their new music business partner. For others, the 360 deal is seen as

overreaching and giving away too much for too little to the label in terms of control and income participation.

In hindsight and upon reflection, this author believes the speaker's comments on 360 deals were well-intentioned and reflected a "let's focus on making music and records rather than negotiating contracts" sentiment, a thought that more than one music fan has had looking at the ninth red-lined version of a contract for an artist who has yet to sell a record. The speaker's approach seeks to avoid raised voices and phones slammed down over a half a point sales escalation on a fifth optional record for sales over 1 million when there will be no fifth record with sales over 1 million. It also may reflect that well-intentioned concept (which, with the right parties, can work): A fair first draft of a reasonable agreement should not require heavy negotiation and the delays and costs that such a process entails.

In reality, this author's subsequent review of the speaker's label's 360 deal (called a "multiple-rights agreement") is a record contract, music publishing agreement, and management agreement rolled into a single agreement without claiming rights or control over merchandising, endorsements, or touring (though clearly participating in the same via the management relationship and commission). What was actually refreshing about the speaker's recording agreement was its split of net income between artist and label, which could be substantially more lucrative to the artist than a traditional royalty structure. It was a "360 deal" that, but for the revenue split versus traditional artist record royalty, was more old school (more akin the 1970s' Mike Appel–Bruce Springsteen agreements and relationship than the "new school" Live Nation model discussed below). While the terms of this deal (really three deals) are more equitable than many other current so-called 360-degree deals, deals that involve long-term commitments in regard to management functions, publishing, and recording rights cannot—as a matter of course, should not—be considered nonnegotiable. So what exactly constitutes a 360 deal? The Live Nation deal with Madonna, U2, Shakira, Jay-Z, and other established artists is substantially different in structure, economics, and operation than the WMG deal with Paramour, Universal's deal with the Pussycat Dolls, or a small independent label's multiple-rights agreement with its new artist. The offerors of 360 deals come in all shapes and sizes, and the exact offer from one may be far more or less compelling than from another party. How fair, unfair, encompassing, good, or bad they are depends to a substantial degree upon who the label is, who the artist is, how much is being invested, and what level of success the artist has achieved or can achieve without the deal.

Yet, all may be called "360 deals." However, the terms, language, scope, and impact of these deals are quite different, and there is not currently, and may never be, a "standard" 360 deal as the scope and variables are too vast. In the music business, the devil is always in the details and, in some cases, as Tom Waits once said, "the large print giveth and the small print taketh away"—and one needs to actually see and really read the exact provisions of what may be billed as the 360 deal. But whatever its context and scope, to the extent it is exclusive and long term (as music recording agreements are), it is an agreement that should be negotiable.

There are many varieties and permutations to a series of contracts that one may refer to as 360 deals, or sometimes referred to as all-rights deals. Three of the more common models being offered and discussed are defined here and described as follows: (1) the old school model, (2) the record deal (or tour + deal if the offeror is Live Nation or a company like it) + participation model, and (3) the record (tour) deal + active control and participation model.

The trio of deals for management, records, and music publishing has been a common business model for decades and has effectively allowed the company to participate in streams of income other than sales of recorded music by virtue of acquisition of music publishing rights and by a management commission on additional revenue sources that would almost always include live performance, merchandising, and endorsement income. It was this arrangement of agreements that Bruce Springsteen signed in March 1972, in contracts signed on the hood of a car of a dimly lit parking lot. Under such agreements, Mike Appel and his company Laurel Canyon—as the Boss's new manager, label, and publisher—shared in many revenue streams other than recorded music income until a settlement to subsequent litigation involving those contracts was reached in 1977. In other situations, before the coining of the phrase "360 deal," labels acquired music publishing rights by provisions within the recording agreement, or in other cases owned the name of the group with the right to hire and fire those who performed in it.

From a company's perspective, it may accomplish what a 360 deal sets out to do by allowing the company to participate in other revenue streams of the artist. From the artist's perspective, it is often viewed as a heavy commitment raising issues as to how an artist manager with fiduciary duties can advocate for his or her artist with the label and publisher they also own. In California, there also may be added exposure for the company if the artist seeks to invoke remedies under section 1700 of the California Labor Code, should the manager seek to procure employment and is not licensed in California as an agent. The advantage to the record company, and disadvantage to the artist, in such arrangements is that in the event the publisher or label is not doing its job, fails to pay, or breaches the agreement, it is highly unlikely the manager will yell, threaten, sue, or even call.

The record deal with participation may have a similar economic impact on company and artist and, in fact, some such deals tie the definition of the nonrecord income for which the label will participate on the same defined basis as the manager shares in such revenue streams. In such deals, the keys are (1) what the revenue sources are, (2) what costs will come off the top in calculating the participation, and (3) for how long the participation continues. For the artist, the benefits of such an arrangement (as contrasted with the old school model) are that the artist could still retain an independent, exclusive, and personal manager who could be his/her advocate, and the artist could control his/her other business activities in terms, for example, of deciding what merchandising company to use or whether to sign a publishing deal or not and under what terms and conditions.

If such a deal involves millions or tens of millions of dollars (as the well-publicized Live Nation deals with superstars have), the evaluation by the artist may rely heavily upon calculators,

CPAs, and tax codes, with each party also negotiating in regard to risk factors of future entertainment values that are impossible to know and that neither can control. While only a calculator and a crystal ball will tell you if a $50M advance against an exclusive tour obligation + 20 percent of an artist's entertainment income for 10 years is a good or bad deal, a good entertainment lawyer will have much to refine and negotiate in such an arrangement.

The record deal + active control with participation model potentially hands over more, most, or all rights the artist initially controls in his/her recorded music, songs, image, and career and via acquisition of music publishing, merchandising, endorsement, and fan club rights. With this model, the artist may also give up name and likeness rights and ongoing participation in touring income in a deal that's not just about income participation; it's also about the control of some or most of the key rights in an artist's career.

In practice to date, many of the highly publicized 360 deals have not included within their scope all rights on either an active or passive basis. In many cases, artist representatives are able to exclude music publishing from the deal or, if there is a deal with the affiliated music publishing company, it is negotiated as a separate and arm's-length transaction, with its own terms, advance structure, and royalty autonomy.

From the artist's perspective, an initial review of a 360 deal should consider the following: the proposed deal's impact on (1) income, (2) control of rights, (3) limitation on future opportunities, and (4) impact on the normal checks and balances an artist may have to ensure he/she is being accounted to properly.

Income: A bad 360 deal could result in an artist's paying out more income from nonrecord activities than the label ever invested in the record side, could prevent the artist from going on tour because of the label's participation, and could have the artist paying a percentage of tour and merchandising income years after the record deal had ended.

Control: Creative control over the artist's name, likeness, and music may be assigned and could be compromised under a 360 deal. If assignment of merchandising or publishing rights to the label's affiliated merchandise company or publishing is required, does the artist have the same approvals in respect of bad t-shirts and offensive commercials?

Future opportunities: There are a limited number of rights an artist has to retain, assign, and license in addition to his/her recorded music rights, and a 360 deal may seek to glob onto some or all of them and thereby put all the eggs into one basket. In recent decades one of the great future opportunities new recording artists have had and have been able to take advantage of was a post-record publishing deal where the advances tended to be high, the splits tight, and the reversions sooner. An assignment of publishing rights as part of a 360 deal closes that door. Also, with a different label and publisher, if the label lost its zest for the artist, there was always the opportunity and potential for the publisher to step up to the plate and keep the artist's career supported.

Checks and balances: It can be advantageous for an artist to have some diversification in the assignees and licensors of his/her rights. What if the company goes bankrupt, resorts to creative accounting, or waits until a subpoena to render the royalty statements? Also, such diversification may create a check on the record label by the music publisher in regard to mechanical royalties and also on the ever-increasing lump payment settlements or blanket license payment. If the same backroom accounts for record sales, music publishing income, and merchandising income under a 360 deal, where are the check, balance, diversification, and protection for the artist?

Keep in mind: (1) We are in an age of declining recorded music sales with an increasing number of companies insisting on 360 or something more than a record deal; (2) Your client may need and want to have the resources of a major company behind him/her in his/her career, and (3) As once sung and said well, you can't always get what you want.

Here are additional issues and considerations that need to be reviewed and negotiated in a 360-deal offer:

What other rights, in addition to recorded music rights, are being included? Is it music publishing, live performance, merchandising, fan clubs, endorsement, or more or less? Can one or more of these sources of income be excluded from the scope? In the past, artist representatives have been able to exclude from the scope of the 360 deal a substantial income source, such as music publishing, making the impact of the deal much less onerous on an artist.

Another essential question that must be raised and answered is whether the nonrecorded music involvement of the label is active or passive. Using music publishing as an example, if a label requires that music publishing be part of a "360-degree deal" with their artist, is the label (or its affiliated music publishing company) acquiring ownership or copublishing ownership of the copyrights to the songs? Or, is the label asking that a percentage of the music publishing income the artist receives be paid to the label? Giving up control of one's merchandising or music publishing is a much greater commitment than agreeing to passive participation of income an artist might receive from those activities.

Equally important is determining the duration of the contract. When other rights and income streams are impacted, the delivery requirements and option provisions of the contract become ever more crucial as the "what happens when my label does not consider the masters to my new LP to be commercially satisfactory?" question takes on even more importance when touring, publishing, and merchandising activities are also impacted. When and how do the exclusivity provisions of the recording agreement expire, and do any of the nonrecorded music revenue streams continue thereafter and, if so, how and for how long?

If other rights or income streams are being acquired, are additional advances being paid, and if they are being paid, are they being paid in separate non-cross-collateralized accounts? If a label paid a $1M recording music advance, a $500,000 publishing advance, and a $100,000 merchandise advance and the record was never released, but the songwriting and touring activities resulted in $1M in publishing income and $1M in merchandise income, how does the income flow, and can the label seek to recoup its recording advance from the other income?

Royalties under 360 deals can be calculated in very different ways. Some deals pay traditional (percentage of retail or wholesale) record royalties and (if publishing

rights are being acquired) traditional publishing deal splits (e.g., 75/25 in the artist's favor in a typical copublishing agreement). Other deals create a partnership-type agreement split of earnings (such as a 50-50 split of net income). Amounts the artist would receive from these very different models would depend upon the exact language of the agreement, including what revenue sources were separated or cross-collateralized and the actual costs in calculating net income being split, as opposed to deals with more traditional artist royalties for products sold.

If the 360 deal includes a participation in live performance income, the substantial to massive costs of touring require a detailed calculation of a label's participation in such tour income. In many touring situations, the artist loses money on the road, and a label's participation in gross revenues in a tour would add insult to injury for the artist. In some 360-deal scenarios, labels agree to accept a tour income participation that is calculated in the same or a similar manner as that of the artist's manager and, however calculated, the label's participation in touring should not be based upon tour gross without cost deductions, unless the intent is that only the label should make money on the tour.

IN THE MUSIC BUSINESS, THE DEVIL IS ALWAYS IN THE DETAILS.

Also, a 360 deal that includes active participation in both recorded music and music publishing has added risks to the artist if the publishing administrator is not granting licenses on an "arm's-length basis," and the differing royalty provisions of a record deal and a music publishing deal may encourage license transactions that also might shortchange the artist/songwriter. Again, a multiple-rights deal that provides 10 or 25 percent of the publishing income to be assigned to a label is a substantial obligation. However, a multiple-rights deal that provides 50 percent of the copyrights and publishers' share of income and 100 percent of the administration assigned to the label (or label's affiliated publishing company) relinquishes ownership and control of an artist's copyrights and, hence, is a greater commitment with higher risk and has greater potential downside for the artist.

These questions are but the tip of the iceberg in the potentially treacherous but increasingly common waters of the 360 deal. Is it the right or the necessary deal for your artist? Only a thousand questions and considerations can answer that question. Even if the answer is that it is necessary and may be right, those devils in the details need to be read, flushed out, and negotiated to meet the specifics of the label, artist, recordings, and career at issue.

While many labels hope their various versions of the 360 deal are the new deals for the new times, seen as a new partnership between artists and their music company and the standard deal for all new artists going forward, many questions and concerns for the artist remain. With an increasing number of artists who see a decreasing necessity to give away exclusive recording rights to third parties, a large number of independent labels who will still work with artists without such a 360 deal, and a substantial number of existing artists who didn't sign such a deal when they secured their record contract, will the handful of initially successful 360-deal artists embrace or revolt against their label's accountant seeking their 10 or 20 percent of the proceeds of the door and sale of a t-shirt far removed from the record deal when all the other acts on the bill retain 100 percent?

It remains to be seen how the 360 deal will work and how artists will react when records stop selling; earnings continue for touring, merchandise, and endorsements; and the letters of direction for payment remain in force. Entertainment attorney Alan Grubman once told U2 manager Paul McGinnis (as told by McGinnis in his speech at Midem, 2008), "God forbid that one of these acts in a 360 deal has success. The next thing that will happen is the manager gets fired and the lawyer gets sued for malpractice." We now have acts signed to 360 deals that have succeeded and will have more in the near future.

The 360 deals are big and complex deals presented in challenging times on an ever-increasing basis and require a review of the opportunities and options, the details and dangers, and the promises and perils. For some artists, such a deal would be just what they needed: the chance to partner with a company in perilous times, an important and increasingly elusive chance to swing for the bleachers in the big (though getting smaller and burning for some time) stadium of music sales success. For some other artists, it's a moment in the darkness on the edge of town, where, with a few strokes of the pen, all is given away to a party that soon will not respect their art, which is lost in perpetuity, throughout the universe in all media hereinafter devised.

In the end, most deals will be somewhere in between and come down to the artist, the company, the terms and language of the contract, and the negotiation thereof. The work of entertainment lawyers in the music business is getting more challenging, complicated, and interesting, and the 360 deal is but one example of this. May the discussion and consideration continue, may people still value and pay for music, and may the negotiations begin. If you try sometimes, you get what you need. ❖

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she learned that her professional life could somehow involve and meld with the arts.

Still, Mensch did not plan to attend law school. Rather, she initially aspired to obtain a PhD in literature. First having studied the subject at Kirkland College, Mensch then took courses at Cambridge, Heidelberg, and the University of Salzburg. Her varied experiences, though, made her realize that she was "much less academic and intellectual than [she] pretended to be," as she herself admits. The more she became acquainted with the academic world, the less interesting it seemed to her. Looking for a new path, Mensch decided to try her hand at law, enrolling at New York University ("NYU").

During her years at NYU, Mensch discovered that she enjoyed being with people more than she did working with legal theory. Instead of the legal issue, it was "the relationship with a client [that] capture[d] [her] attention." It was this realization that led Mensch to the NYU Job Board one day, where she found an ad for The Bottom Line, a music venue in New York's Greenwich Village. Sandy Fox, a New York attorney, was looking for a law clerk at the firm he had started with Stan Snadowsky, one of the owners of The Bottom Line. Mensch got the job, and while her classmates were at the library studying, she was at The Bottom Line, shadowing Stan and his partner Allan Pepper, and learning how to make deals. She described what they did as "an amazing way to make a living."

Fighting, at first, the ever-tempting allure of the entertainment law industry, Mensch found a job clerking part-time at the ACLU for its Women's Rights Project, which placed her under now-Justice Ruth Bader Ginsburg. Last July, when Mensch was granted admission and sworn into the Supreme Court Bar, she was fortunate enough to meet Justice Ginsburg again, a woman whom Mensch calls "very kind and gentle." It was at this summer meeting that Mensch—a self-proclaimed one of Justice Ginsburg's "failures" for not having pursued a career in civil rights law—remembered a photo taken of the duo during Mensch's time at the ACLU. As Mensch jokingly put it, she is the "only lawyer who has come before [Justice Ginsburg]" who does not want to use such a photo to "advance [her] client relations" or "show it as an endorsement."

Eventually, Mensch moved to Chicago, Illinois, and began working with an entertainment lawyer who represented music groups at the inception of their careers in Chicago in the 1940s and '50s. Richard Shelton, who is regarded as one of the founders of the field of music law, was "delighted" to send Mensch on errands to see rock bands. As Mensch noted with gusto, "I was having conversations with people who became historical figures," an experience that was highly useful, given the next step in her career.

MENSCH HAS CARVED OUT A NICHE FOR HERSELF IN MELDING THE ARTS, THE LAW, AND GIVING BACK TO THE COMMUNITY.

It was from this springboard with the music industry in Chicago that Mensch became involved with the National Academy of Recording Arts & Sciences ("NARAS"). Robin McBride, who was with then-Mercury Records, expressed an interest in having a lawyer on the NARAS Board. Since Mensch's boss, Dick Shelton, was not interested, she was tapped for the position. Thus began a multi-decade partnership between Mensch and NARAS, which continues today.

First brought on as an associate member of NARAS, Mensch later helped produce a blues record, and this accomplishment gave her the credentials to partake in NARAS voting. Later, she was the first woman named president of the Chicago chapter of NARAS, in part, as she put it, to "keep the peace" among a "fractious group of guys who argued all the time." In the 1980s and '90s, she served as a national trustee and a national vice president of NARAS and was involved with launching MusiCares. It was this latter project, especially, that touched a chord with Mensch, who had seen firsthand the ill effects that touring had on musician clients of hers. It was her belief, shared by many of her colleagues on the board, that NARAS had to give back to the music community somehow. They thought it was unfortunate that the industry, unlike the Actors Guild, did not have a strong system in place to assist artists with human service issues, such as medical and financial care. Today, Mensch remains involved with MusiCares, and A Safe Haven Foundation, where she continues to assist the programs with fundraising and activities.

It is not only through MusiCares that Mensch has given back to the arts community. Coinciding with the start of her activities with NARAS, Mensch became involved with Lawyers for the Creative Arts ("LCA"), of which she is now president and on which First Lady Michelle Obama once also served. LCA is an Illinois-based group that provides pro bono legal assistance to clients in the arts who cannot afford market-rate legal services. In the words of Mensch, LCA is "a way to create an environment for artists, not just musicians" and that the organization is a rewarding way for lawyers to volunteer their time and service. Moreover, working with LCA is a chance for Mensch to inform young people about "being important members of the creative community," giving them opportunities to contribute. Still, she warns attorneys of the fine line that is presented by an LCA-like organization: It is a good way to begin acquiring a client base, but "you don't want to train artists that they can get legal services for free."

While it is clear that Mensch has carved out a niche for herself in melding the arts, the law, and giving back to the community, she is also amenable to venturing into non-law-related terrain. When asked about a favorite project she

has undertaken, Mensch shared that in the last decade, she was given the opportunity, through her work with China Online, to helm the entertainment division of a media-Internet company. As Mensch noted, "How do you say no to that?" For three years, Mensch traveled the world in a "blur," developing media distribution networks in China while putting together strategic alliances with international content owners, such as the BBC, Bertelsmann, China Central Television ("CCTV"), the NFL, and the NBA. Although she left the project five years ago, her experiences in China remain with her, and Mensch still frequently travels there, where she continues to develop working relationships with the Chinese media.

Following those three years of globetrotting, Mensch was "relieved to go back to the law" and is now involved with Linda S. Mensch, P.C. In this office, Mensch, who now works with start-ups as well as artists, has established a grouping of relevant practices offered to potential clients in the arts. These include entertainment law, Internet and digital rights management, intellectual property, and contracts. Moreover, while Mensch is no longer involved with the music industry to the same degree she was at the beginning of her career, her firm still handles copyright retrieval issues and assists in the collecting of royalties for the estates of many artists.

In addition to the above, Mensch is a member of the International Association of Entertainment Lawyers and is a founding member of the Chicago chapter of Women in Film, which is an organization that supports women in the entertainment industry. To add to her already busy schedule, Mensch has taught an entertainment law class at Columbia College in Chicago and has gone abroad to teach at Southern Cross University Law School in Australia.

While involved with numerous professional undertakings, Mensch simultaneously has a vibrant collection of activities that she enjoys in her free time. An avid theatergoer, Mensch imparted that she also loves skiing, traveling, and art viewing. Of course, Mensch, who was en route to a showcase of ten hip-hop artists following our conversation, still takes pleasure in seeing and hearing music, noting that she is not yet old enough "to have to wear earplugs."

What does she dislike most about the industry? She hates "chasing people who haven't paid [her]" but acknowledges that this is not specific to entertainment law and is a "necessary evil."

Given Mensch's varied and exciting career, one has to wonder what drove her to do what she does. Her answer, and suggestion for a life well-lived, "Follow your passion," or at least "marry your passion to an area that you want to engage in so you don't feel, at some point, that you made the wrong choice." ❖

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