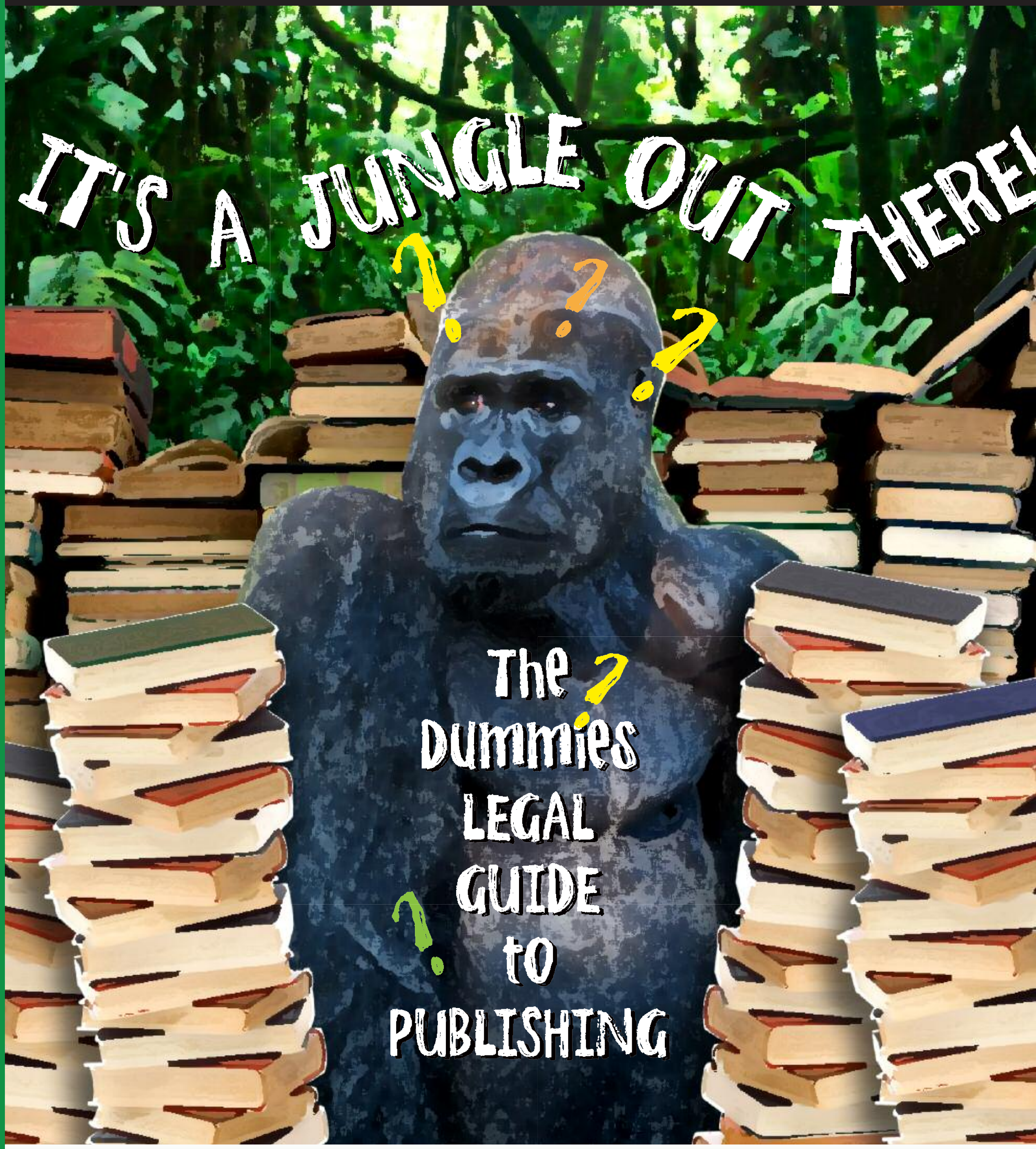
Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Spring/Summer 2015 — Volume 24 • No. 1



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TESLAW.ORG

The Texas Entertainment and Sports Law section of the State Bar of Texas is comprised of more than 950 Texas-licensed attorneys practicing in the areas of film, music, art, book publishing, and collegiate and professional sports. The TESLAW website at www.teslaw.org offers attorneys a chance to be listed with their focus area of practice in a publically searchable database. The TESLAW Journal is a recognized publication providing scholarly and insightful articles on the law and practice of entertainment and sports law. Join today to be part of a collegial organization growing the practice of entertainment and sports law in Texas; for new bar members, the first year's dues are free.

CHAIR'S REPORT

Dear TESLAW Members,

As we conclude the 2014-15 year, I want to thank the TESLAW membership for allowing me to serve as chair. My involvement with the section over the years has been both a personal and professional triumph. During 2014-15, TESLAW sponsored another successful Entertainment Law Institute CLE, a South by Southwest Mixer, now seen as a go-to-event, supported the non-profit Texas Accountants and Lawyers for the Arts through a financial contribution, and developed a new line of TESLAW T-Shirts! The 2015-16 TESLAW year kicks off at the State Bar Meeting in San Antonio, June 18-19, with a three-hour ethics CLE presentation.

TESLAW is only as strong as those contributing and leading the section, and I want to thank Sally Helppie and Amy Mitchell for their diligence as Officers, Victoria Helling for editing the TESLAW E-Newsletter, and Kevin Harrison and Mellissa Thrailkill for leading the T-Shirt development project. Lastly, I want to thank Mike Farris for serving as editor of the *Texas Entertainment and Sports Law Journal*, continuing its strong tradition as a leading sports and entertainment law publication, and welcome Joel Timmer as new editor. We look forward to Joel taking the Journal into the future.

Craig Crafton

EDITOR'S REPORT

Joel Timmer, Editor

I am pleased to take over as Editor of the Texas Entertainment and Sports Law Journal. I am grateful to those that have come before me—former editors Ronald Kaiser, Sylvester Jaime, Craig Crafton, and Mike Farris, and all those that have helped them over the years—for making the Journal what it is today. I plan to continue the fine tradition they have started of publishing high quality articles of interest to attorneys practicing entertainment and sports law in Texas. To that end, I encourage you to submit articles for publication in the Journal. In addition, if you are aware of an article or see one published elsewhere that you think would be of interest to the Journal's readers, please encourage the author to submit the article to the Journal, or let me know about the article so that I may reach out to the author.

We plan to keep the focus of the Journal on articles addressing current entertainment and sports law topics. At the same time, we are looking for ways to make the Journal even more useful and informative for its readers. For example, in this issue we have included an overview of the presentations from the most recent Entertainment Law Institute, along with information on how to access the presentations and course materials online if you weren't able to attend. We are currently brainstorming ideas for items to include in future issues. If you have any ideas, please let us know.

I want to thank associate editor Stephen Aguilar for all his hard work and assistance in getting this issue ready for publication. We would be happy to have additional assistance with the Journal. If you are interested in getting involved with publishing the Journal, please get in touch.

I hope you enjoy this issue!

CAVEAT

Articles appearing in the Journal are selected for content and subject matter. Readers should assure themselves that the material contained in the articles is current and applicable to their needs. Neither the Section nor the Journal Staff warrant the material to be accurate or current. Readers should verify statements and information before relying on them. If you become aware of inaccuracies, new legislation, or changes in the law as used, please contact the Journal Editor. The material appearing in the Journal is not a substitute for competent independent legal advice.

MEMBER PROFILE

How did you get interested/started in Entertainment Law?

Ricky Anderson

I was raised in a small town called Benton Harbor, Michigan, and grew up with a love for music. I listened to the radio, my friends and I were all about music and dancing, and I really had a passion for the entertainment industry. I wanted to learn how concerts were done, and I became involved in everything from giving away bumper stickers to get concert tickets and entering any dance contest that came near me, so I've always had that passion for the entertainment industry. I started as a young person interested in promoting concerts and being a businessman or entrepreneur. And that's exactly what I did in college: I promoted parties and concerts in my undergraduate years and later teenage years, and just kept the love for the entertainment industry.

What compelled you to study law so that you could become more involved in the legal side of that industry?

I got hired out of college by Goodyear Tire and Rubber Company. I worked in their industrial product area, and they put me over in the contract administration department. So I ended up working with some of the lawyers on the contracts that dealt with industrial products. And once you get around lawyers, there's something about getting that law bug, and I did! I worked for Goodyear for approximately four years, received a promotion, worked in the corporate office around more lawyers then, and I was bitten by the law bug at that point.

What was the first case or couple of cases that got you introduced in Entertainment Law?

I grew up with a kid, you'd know him as Sinbad, but his name is David Adkins. He's from that same little town that I'm from: Benton Harbor, Michigan. And he was really just getting his career off doing stand-up. He hired his whole family to work with him, and his family and my family (his mom and my mom), were best friends. And of course I wanted to promote shows and concerts, so our family relationship fell right in line with what I wanted to do. When I graduated from law school, I still had that concert promotion bug from my undergraduate years. I knew that I had to become an Attorney first, and then Sinbad's brother asked me to take a look at an entertainment agreement, and I was tapped into the entertainment industry.

And the rest was history after that?

Yes, I picked up bunch of other comedians after that, from Steve Harvey, Monique, Adele Givens, Rushion McDonald, Rickey Smiley, Earthquake, a laundry list of comedians, and a lot of musical talent as well then hired me to do some work with them. And so that was really the introduction to me representing Yolanda Adams, Mary Mary, Bishop Hezekiah Walker, and even going back to the days of working with Dwayne Wiggins of Tony! Toni! Toné!, and some of the other groups that were really in the mainstream at that time, to currently having a Grammy-Award winning artist last month out in Los Angeles, Erica Campbell of course winning two more Grammy Awards.

Could you describe for me the scope/type of work you do for these clients?

I prepare contracts and negotiate contracts with talent, and that's with everyone, be it from Steve Harvey to the Honorable Judge Mathis, and for some others I represent their production teams, such as Kathy Sapp, the Executive Producer for Judge Alex and Judge Faith. I negotiate their deals with the networks, and for some of my other clients, I do pretty much everything from a 360° perspective: I handle their literary properties; I do their merchandising, television, radio, film, all of it. And that's what's made the practice so much fun, it's because it's got so much diversity.

Back in the day, a lot of the talents were really one-dimensional, some maybe were two-dimensional, but now you got clients who do everything from promoting not only television or their music and films, but now merchandise from hats to shoes, cufflinks, belt buckles, outerwear, pajamas, skin care products, ladies' accessories, as it's just become much more robust when you look at the entertainment industry now. There are a lot of talents that are multi-talented, that are triple-threats. It's a wonderful world that we live in now, and technology is allowing us to do so much more. Technology is advancing by leaps and bounds; it's advancing as you and I are talking right now!

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Attorney Profile: Attorney Ricky Anderson

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What is the favorite part of your practice? I hear you saying that it's really the diversity of the different areas that your clients are involved in now that makes it so enjoyable to practice in this particular area.

The entertainment industry's diversity is awesome, and you now have so many other platforms for content exploitation. The digital element has made the world a better place, and it also allows you to reach other continents. You can not only be a nationally recognized talent, you can be an internationally recognized talent with television series, cable shows, music, film, literary properties and the ability to get on the Internet and promote and circulate something around the world with just the tap of your finger, which is absolutely amazing.

You mentioned some of your high profile clients; is there any particular case that you'd like to mention that would be of particular interest to the readership?

Although the first ten to twelve years of my practice I was a litigator, the last ten or twelve years I've been actually been transactional, so I've stepped away from a lot of that litigation personally, but as far as things on the cutting edge, I think that when you start looking at the "Blurred Lines" litigation, and some of the sampling that was once so largely an acceptable way to produce music by using some of the content that's been created by others, you just have to be really careful to make sure that you have the appropriate clearances (and that sort of thing) before you circulate music out into the world as your own content. Looking at the Robin Thicke and Marvin Gaye litigation, and I think there's another case out there with Jay-Z and a talent from back in the 70s [Jay-Z recently settled a case with Bruno Spoerri, a 79-year-old Swiss jazz musician, for use of a portion of Spoerri's 1978 song "On the Way"], it's just important that you recognize, respect and protect the assets of third-party creators. I think with what's being demonstrated with case law and this litigation that's out here: they're going to continue to allow these talents to protect those assets, and I think that's outstanding for artists to use their intellectual property to their advantage. It may have been created 40-50 years ago but it's still their intellectual property, and they've got the copyright and ownership interest for any exploitation. I think this is a new day where we've got to make sure that the clearances are provided prior to exploitation.

Do you have any advice for attorneys who want to practice Entertainment Law?

Embrace it! It's a fact that if you went to the U.S. Department of Commerce, they provide a monthly report of the Gross National Product (GNP) in the United States, and entertainment is absolutely nearly always in the top 10%. It's been as high as number two. And the thing about it, the two largest cities in this country recognize that, New York and Los Angeles. For those attorneys that practice in the secondary market, such as Houston, Texas, or Atlanta, or even Nashville, it's important we recognize the value of the entertainment industry. It's a very viable area of practice, and with technology really being your friend, you're able to really practice outside of living in L.A. or New York. And I'll tell any young lawyer, that if I had a nickel for every time someone told me that I could not practice [entertainment law] from the State of Texas, I'd have a pretty large jug of nickels! I've been here practicing for 23–24 years, and I'm proud to be a Texas attorney. I represent to you that there's a viable entertainment law industry in Texas, and the technology and digital space is allowing you to navigate it a lot easier than back in the good old days. I had to hit every meeting in person, and now you can participate and communicate via Go To Meetings, Skype, Face Time and other digital communications to reach talents and respond quickly. That's one of the key elements about being a good lawyer, you must have the ability to communicate with your clients timely. I would encourage young lawyers to give some consideration to the entertainment law area of practice. It's very much viable, it's alive, it's doing well, and will continue to do well in the future.

The New Book Publishing Landscape

By Mike Farris
Vincent Lopez Serafino Jenevein, P.C.

Mike Farris is a commercial litigator and entertainment attorney at Vincent Lopez Serafino Jenevein, P.C., in Dallas. In addition to his law practice, he is a published author and literary agent.

I have been an avid reader since I was a kid and grew up reading *The Hardy Boys*. Each year on my birthday, my mother would take me to the store, and I could pick out any two Hardy Boys books I wanted. I also got them for Christmas and, if I had earned a little money, would buy them for myself throughout the year. I also had a library card and every two weeks, one of my parents would take me to the library. I would check out ten or more books at a time, which had to be returned in two weeks, so I was forced to read a lot just to finish them all.

I also read lots and lots of comic books. Most grown-ups back in those days frowned on reading comic books, but at least kids who read comic books were reading. Who knew, then, what an industry it would grow into today? What I wouldn't give to have back that huge box of comic books that I sold at a garage sale.

When I was in about the 6th or 7th grade, I discovered David Westheimer's *Von Ryan's Express*, which was later made into a movie starring Frank Sinatra. I really loved that book, and I probably read it three or four times over the course of that particular school year. Since then, I have seen the movie several times, but I still like the book better. There is just something about reading the words and forming my own pictures in my head about what's happening on the page. There's also something to be said for the time commitment you have to make to spend with characters in a book rather than simply an hour and forty-five minutes sitting in a darkened theater. The time spent with a book creates a bond with those characters that you can't form at the movies. Usually. Unless it's *Star Wars* and you're a character from *The Big Bang Theory*.

About 40 years after reading *Von Ryan's Express* for the first time, I had the privilege of being able to briefly represent David Westheimer, shortly before he passed away in 2005. In one of our conversations, I told him how much I had loved *Von Ryan's Express*, and its sequel, *Von Ryan's Return*, as a boy, and that I still had fond memories of reading and re-reading them, and discussing them with friends who were just as taken with them as I was. Not long after that, I got a great surprise in the mail: a battered first edition of *Von Ryan's Express*, signed by the author. It's one of my greatest treasures.

I used to be afraid that books were quickly heading the way of the dinosaurs. I'm not as worried about that as I used to be, although the world of books and publishing is certainly different than it was when I was reading *The Hardy Boys* and *Von Ryan*. I do know, though, that books generally don't have the same place of importance in most lives that they once did. But time marches on, and with it come changes, for better or worse. The book publishing landscape of today is not the landscape of my youth, nor even of the youth of the late 1900s. Technology has brought changes across the board and perhaps has made as much impact on the world of publishing as anything since Gutenberg's printing press.

According to a report from the Association of American Publishers ("AAP") in June of 2014, the book publishing industry generated $27.01 billion in net revenue for the year 2013, which translates to the sale of 2.59 billion units during that time. The "trade" sector, which is comprised of general consumer fiction and non-fiction, made up a majority of both revenue and volume.

E-book sales hit a record high during that same year, although the growth slowed somewhat over the prior year, accounting for 30% of unit sales for the first half of 2013, which represented 14% of consumer spending on books.[1] That number was essentially flat from the prior year, but it represented a 43% increase over the year 2011. Just to give you an idea of how e-book sales have exploded, in 2008, when the AAP first started tracking e-book sales, roughly 10 million were sold. In 2012, that number shot up to 457 million.[2]

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The New Book Publishing Landscape

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A Pew Research project from earlier this year revealed that the percentage of American adults who read an e-book in 2013 rose to 28% from 23% the prior year, while the percentage of American adults who read a physical book was roughly 70%, up four percentage points after a minor dip the year before. Additionally, 42% of American adults own some kind of e-book reader, be it a Nook, Kindle, or iPad, and roughly 50% of Americans (of all ages) own such a device. In 2013, publishers' revenue from "Online Retail" (defined as either physical or digital products sold online) exceeded revenue from all brick-and-mortar sales outlets combined.

With those changes in the times and technology comes the inevitable in our modern society: litigation. And no litigation more significantly impacted the world of publishing and the distribution of books than the anti-trust lawsuit filed in 2012 by the Department of Justice against Apple, Inc. and five of the six largest publishers in the world. It is a cautionary tale of authors and agents and books and technology and publishers and retailers.

And consumers. Mustn't forget the consumers.

Ultimately, it is a tale of power.

A. The traditional publishing process and physical books

In the traditional world of publishing, the process starts with a writer – a solitary, anti-social person with little to no social skills[3] – isolated in a lonely room, banging out words on a word processor and hopefully stringing those words together in such a way that, someday, somebody will ultimately pay good money just to read them. For the vast majority of writers, that's a pipe dream, but who knows? Lightning does actually strike every now and then.

Once the manuscript is completed, writers then engage in a form of torture known as the query process, in which they send out letters to literary agents, pleading with them to just read what they have written, sure that the brilliance of their written words, alone, will convince an agent to find a place to get those words published.

Query letters run the gamut from the professional ("I am seeking representation for my 90,000 word medical thriller") to the threatening ("If I ever suspect that you have stolen my work I will call my Harvard-trained lawyer to see what my next step should be"[4]) to the grandiose ("When you see how great it is, put it on your schedule to market it; I would like at least \$800,000"[5]) to the downright pitiful ("I'm 34, having trouble finding work and am living with my parents"[6]).

Most agents say "no," but a few lucky manuscripts get accepted for agency representation. The agents then submit those manuscripts to acquisition editors at publishing houses, who also usually say no, but every now and then a second bolt of lightning strikes and a publishing contract is offered. A deal is struck whereby the publisher agrees to pay the author a royalty (usually somewhere between 7% and 15% of the list price, depending on whether it's softcover or hardcover), maybe even an advance, and the author agrees to pay the agent a commission, usually 15%. An editor is assigned to work with the author to get the manuscript in publishable form as a book and a release date is set, then the publisher prints, binds, and distributes the finished book. Publisher costs on print books include such things as author royalties, printing costs, distribution fees, and marketing costs. With a little luck, the publisher even commits to putting some marketing money and muscle behind the book, and it's off to the races.

B. E-books and changes in the traditional world

The process for e-books starts out pretty much the same way as the traditional world of physical books. However, e-books generally sell for much less than print books, and royalties are typically higher (generally 25% or more), because the associated costs are minimal – no printing and distribution or warehousing fees.

Publishers also usually have their own e-sales outlets for e-books in the form of their publisher websites, but they typically rely on outside retailers to take care of sales, just as they do with physical books. Another difference is that brick-and-mortar stores aren't needed to sell e-books, which are simply downloaded from various "e-retailers," such as Barnes & Noble and Amazon, that also sell physical books.

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Internet TV in a Post-*Aereo* World

By Tom Williams, Dustin Johnson, and Jason Bloom

Tom Williams is a Partner in the Fort Worth office of Haynes and Boone, LLP. Tom has handled cases across a broad spectrum of practice areas, including those involving claims of libel; invasion of privacy and other First Amendment issues; copyright and trademark infringement in addition to a wide variety of commercial, corporate and business issues.

Dustin Johnson is a Partner in the Richardson and Fort Worth offices of Haynes and Boone, LLP. Dustin's practice focuses on intellectual property transactional matters and strategic client counseling, with an emphasis in patent law.

Jason Bloom is a Partner in Dallas office of Haynes and Boone, LLP. Jason leads the Copyright Practice Group and handles intellectual property cases involving copyrights, trademarks, trade secrets, and patents and other complex business disputes. In light of this broad base of experience, Jason has represented clients in a variety of industries, including media, entertainment, software, telecommunications, energy, manufacturing, and real estate.

Note: This article was originally published in the February 2015 issue of the Tarrant County Bar Association *Bar Bulletin*. We are grateful to the TCBA for allowing us to republish the article.

Last June, the United States Supreme Court held that Aereo's system for transmitting over-the-air television broadcasts over the Internet violated copyright law, concluding, in a 6-3 decision, that Aereo both performed the television broadcasts at issue and did so "publicly."[1] Aereo has ceased operations and filed bankruptcy, but both policymakers and media companies have taken steps to respond to the market demand Aereo sought to fill.

In its opinion, the Court emphasized that Aereo's service was very similar to the cable television systems Congress sought to regulate in the 1976 Copyright Act, and accordingly found that Aereo's performances were public and unauthorized. The catch-22 for Aereo was that under current Federal Communications Commission regulations, both the Copyright Office and the Second Circuit determined that Aereo was not a cable system, and it was therefore ineligible to participate in the Copyright Act's compulsory license system. Since the Supreme Court ruling, two possible solutions to this problem have begun to take shape.

The first is market based. Media companies do not infringe by simply transmitting content they own or appropriately license. Because of this, for example, in October CBS introduced its own CBS All Access Internet-streaming service, which, for $5.99 per month, offers live CBS content (in certain markets) as well as on-demand access to "over 6,500" recent episodes and "classic TV hits." Similarly, HBO announced plans to launch a standalone, online streaming service in 2015, and while HBO has not publicized details of the proposed service, the announcement alone created a significant buzz about the future of traditional cable systems. And on January 5, 2015, Dish Network unveiled its new Sling Television product—an Internet-based streaming service which is untethered from Dish's traditional television service and packages together some of the more popular channels from its television service, including the Disney Channel, Food Network, CNN, and ESPN.

There are three significant challenges to this model. The first is price, and specifically whether consumers will be willing to swap one large cable bill for several smaller bills and fewer channels. Second, service providers looking to "bundle" multiple channels into a single streaming service must have content

1 *Am. Broad. Cos., Inc. v. Aereo, Inc.*, 134 S. Ct. 2498 (2014)

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Internet TV in a Post-*Aereo* World

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providers on board, an effort that has had limited success so far. Many content providers are torn between maintaining their lucrative relationships with traditional television providers and the fear of being left behind if—or when—the streaming television model takes over. Third, many of the traditional television providers are also Internet service providers, and in many locations may be the only Internet provider. These traditional service providers may be forced to raise their prices for Internet service if they begin losing significant television service market share to online rivals.

The second possible solution to the problem of an Internet broadcast being unable to avail itself of the Copyright Act's compulsory license system is policy based. On December 17, 2014, the FCC released a notice of proposed rulemaking to "modernize" its interpretation of the term multichannel video programming distributor ("MVPD") to make it technology-neutral. Under current regulations, MVPDs must sell both content-serving channels and the transmission path of those channels, that is, the cable or satellite medium actually used to deliver the video programming. The requirement that an MVPD sell the transmission path has been a stumbling block for online video providers because online video providers do not sell the broadband connection over which they transmit programming. Thus, such services could not be classified as MVPDs, as Aereo discovered. The proposed rulemaking could remove that requirement and has the potential to change the media landscape.

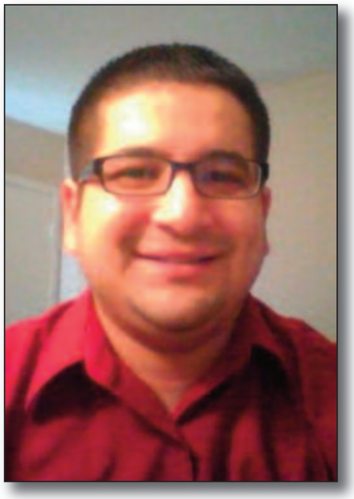
Allowing online video providers to be classified as MVPDs could give them many benefits, such as rights to the compulsory licensing scheme of the Copyright Act, and access to other programming on nondiscriminatory terms and conditions. However, it may also come with many of the regulatory burdens that cable and satellite systems currently bear. While some commentators believe this is the first step toward a la carte video service, others are less optimistic and are concerned about the possibility of increased regulation of Internet-based video. Still others point out that while the recent proposed rulemaking signals the FCC's interest in allowing online competition, it is still trying to fit a completely new product—streaming video service—into a framework that Congress and regulators designed decades ago for traditional over-the-air and coaxial cable video providers.

While the market solution moves forward, policy changes crawl. The FCC's proposed rulemaking merely opens the public comment period. Even if the proposed changes to the definition of MVPD are enacted, many questions remain, most importantly, how the Copyright Office, courts, and possibly even Congress might respond. While the *Aereo* decision lit a regulatory fire, online video providers still have far to go before they are ready for primetime.

Matthew Chiarizio, an associate in the Dallas office of Haynes and Boone, LLP, assisted in the preparation of this article.

The American (Idol) Dream or Nightmare?: Singing Competitions and the Rise to Fame

By Roland Rivera
The University of Texas School of Law
Music Law Seminar, Fall 2014
Professor Ed Fair



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"'If you were to ask me what I would be when I grow up when I was little, I [would have] been, like, I want to be famous.'"[1] Carrie Underwood's quote resonates with many entertainers, both the aspiring and the established. Another singing superstar elaborated on her early years of fame: "'[I am] all cried out about it, but my first four years, I hated my life; I almost quit a dozen times.'"[2] Kelly Clarkson's quote corroborates the age-old cliché that "not all that glitters is gold." The two singers rose to success in almost identical ways, yet their quotes provide an impeccable juxtaposition about their paths to stardom.

American Idol ("Idol") is one of the most successful television shows in history. As of 2014, it has completed thirteen seasons and for eight consecutive years, it was the number one television show in the United States.[3] Since 2002, the singing competition has launched the careers of numerous artists, taking singers from unknowns to household names within a matter of months.[4] Clarkson was "[t]he girl next door, the waitress turned superstar, the diamond in the rough finally breaking through . . . to become the greatest star of them all."[5] Roughly 23 million viewers watched the first Idol finale; Clarkson's "coronation became a national moment."[6] Underwood was the "quintessential farm girl; her introductory video featured shots of her feeding the horses, tending to her chores."[7] Thirty-million viewers watched Underwood win Season Four of *Idol*.[8] The nation watched as both young singers realized The American Dream.

Immediately after Season One of *Idol*, sharp criticism of the contestant agreements began to appear, proclaiming that the "unusually onerous contract" contained "the most restrictive terms imaginable."[9] Clarkson was forced to sing at events, notwithstanding her adamant opposition, and to perform in a motion picture even though she disliked the script. Despite a guaranteed recording contract and a multimillion nation-wide fan base, it seemed that the newfound fame was not worth being "owned" by 19 Entertainment, Inc. ("19"), the company behind the *Idol* empire.[10]

This article examines the agreements successful contestants must sign after participating on televised singing competitions, with an emphasis on *American Idol*. *Idol* "arguably initiated the explosion of reality television contest shows" in the early 2000's.[11] Other shows soon followed, such as *The Voice* and *The X Factor*. *Idol* contestants have achieved various levels of success through the years; since its creation, *Idol* has kept the talent of its participants as its top priority.[12]

19's contracts may have looked heavily slanted against the *Idol* contestants, particularly in the earlier years, but like the show, they too were a product of innovation. 19 utilizes 360 deals to launch the careers of successful *Idol* contestants, deals that allow 19 to participate in virtually all aspects of its contestants' early careers. Clarkson signed her deal in 2002—the same year that 360 deals entered the music business to address concerns with the changing industry. Thus, the early contestants' relatively unknown deals appeared onerous when compared to the traditional contract model. 360 deals are now a common industry practice, and both 19 and its artists have enjoyed remarkable success because of the 360 model. The music industry is undergoing another dynamic change, and 19 may have to reconsider its contestant contract structure to remain a dominant force in the music business.

Scope of the Article

In televised talent competitions there are two sets of underlying, but sometimes overlapping, contracts: the reality television participant contracts and the contracts governing the careers of the successful contestants, i.e., the winners and finalists. The

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The American (Idol) Dream or Nightmare?: Singing Competitions and the Rise to Fame
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unique characteristics of reality television and the extensive waivers of liability participants are required to sign are beyond the scope of this article.[13] This article provides an analysis of the contracts governing the musical careers of the successful contestants on televised singing competitions. Given its success of producing reputable musical stars, significant emphasis will be placed on *Idol* and its respective agreements, with occasional references to similar singing competitions.

For purposes of clarity, an elementary overview of reality television participant contracts will be provided. With the explosion of reality television programming, television networks and producers developed extensive, complex contracts and waivers to protect the producers from liability in virtually every conceivable situation.[14] A natural consequence of increasingly broad contracts is an intensification of unfair, one-sided terms against the contestants.[15] *Idol* producer Nigel Lythgoe described the thoroughness of the contract as an attempt to anticipate every possible angle due to the unpredictability of reality television entertainment.[16]

Competition shows often have exclusivity clauses for their participants.[17] *Idol* contestants are barred from singing anywhere other than on *Idol*–sanctioned activities while participating on the show.[18] *The X Factor* participants "had to wait until seven months after the show aired to perform in other contexts."[19] *Idol*'s Season Thirteen audition eligibility rules stated:

> If you advance in the competition, you will be required by the producer to fill out, sign and agree to all of the terms and conditions of additional forms, including a talent management contract, recording contract, music publishing contract, American Idol Live Tour agreement, on-line content agreement, and/or merchandising/endorsement contract.[20]

Much of the contestant agreement language may sound shocking to a lay reader, but most contestants understand and expect to "sign their lives away."[21] Justin Guarini recalled that *Idol*'s inaugural season's contestant agreement '"was standard fare for any sort of basic production and you more or less [signed] your life away, as you would with any other production.'"[22] When contestant agreements are published or leaked online, the ordinary reaction of the public is uproar over the skewed terms. Portions of *The Voice*'s contestant contracts were leaked online in early 2014; a cursory web search of "The Voice contract terms" revealed articles entitled, "'*The Voice*' Contracts Makes Contestants Sign Their Dignities Away" and "Exposing *The Voice*'s Humiliating Contracts."[23] These reviews analyzed *The Voice*'s reality television participation agreements rather than the musical contracts.

With the music and television productions being intrinsically intertwined in singing competition shows, there exists a conceptual difficulty in separating the two underlying sets of contracts. This article will take an in-depth look at the all-encompassing contracts surrounding the musical careers of the successful contestants, which are offered and signed at a later stage of the competition than the participant agreements.

19 Entertainment and the 360 Deal

Successful contestants on *Idol* enter into 360 deals with 19 Entertainment, Inc.[24] 19 is responsible for the production and development of *Idol*, and thus has the exclusive first right to sign the contestants to entertainment contracts.[25] "A 360 deal is a legal contract between a musical artist and one company, incorporating components of an artist's career that have traditionally been handled by separate contracts with different companies."[26] These agreements "reflect the positive trends in areas like concerts, merchandise and publishing as well as the downward trends in recorded music sales."[27]

One of the earliest 360 deals occurred in 2002 between singer Robbie Williams and EMI. *Rolling Stone* declared EMI's move "bold"; such a deal at that time would have caused an "eyebrow [to] be raised."[28] The same year that Williams's new record deal emerged in the music industry, *Idol* launched its inaugural season.[29] Creator Simon Fuller envisioned establishing a "talent show empire" much larger than the Spice Girls' empire he had previously built.[30] Fuller's vision to cross into multiple areas of pop culture led to the implementation of 19's own 360 deal. Thus, when Kelly Clarkson won Season One on September 4, 2002,[31] she also became one of the first artists to be signed to a 360 deal. The lack of prevalence of 360 deals at the time Clarkson

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Overview of Presentations from the 24th Annual Entertainment Law Institute (ELI): November 6-7, 2014 in Dallas

By Joel Timmer and Adam Litwin

Joel Timmer is an Associate Professor in the Film, Television, and Digital Media Department at Texas Christian University. He also practices entertainment and media law in the Dallas-Fort Worth area.

Adam Litwin is a co-founder of Litwin Law Group, PLLC and is admitted to practice law in both Texas and Florida. He currently focuses his practice on entertainment and business law, while having previously worked in the corporate finance section of the international law firm, Haynes and Boone, LLP. Mr. Litwin is also an actor, screenwriter and producer and is on the board of the Entertainment and Sports Law Section of the State Bar of Texas and is the legal chair for the Texas Association of Motion Media Professionals.

The Entertainment Law Institute is an annual two-day continuing legal education (CLE) seminar presented by the State Bar of Texas that explores various aspects of entertainment law, including film, television and music. It both serves to introduce the new entertainment practitioner to the practice area and informs the experienced practitioner of new and important legal and industry updates.

This article is not meant to provide a comprehensive overview of the presentations, but rather to provide an indication of the issues discussed by the presenters. If readers are interested in learning more about the presentations, they are available through TexasBarCLE at texasbarcle.com. The presentations are broken into four packages of presentations, with an additional package that collects the top-rated presentations from the ELI. The MCLE Numbers for the packages of presentations are 901309155 (top-rated), 901309156, 901309157, 901309158, and 901309159.

Note: Presenters have not verified the accuracy of these summaries.

Mike Farris discusses the new book publishing landscape

The New Book Publishing Landscape by Mike Farris

Mike Farris made a presentation on the new book publishing landscape, emphasizing the impact of ebooks. The paper that forms the basis of his presentation is featured in this issue of the Journal.

Art of Rock and Roll by Nels Jacobson

This presentation focused on some of the legal issues associated with the creation and commodification of concert posters. In some cases, posters can go beyond simply publicizing an upcoming concert and take on lives of their own as works of arts. Historically, little attention has been paid to the intellectual property rights among the parties involved in the creation and dissemination of concert posters. One such issue involves the right to control the creation and sale of such posters. Should this

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right be held by the band, the venue, the promoter, or the creator? In addition, other kinds of legal issues that commonly arise in relation to concert posters involve trademark, copyright, and the right of publicity. Jacobson provides examples of posters and cases dealing with these issues, and also discusses recent copyright cases dealing with fair use rights in unauthorized uses of photographs and artwork.

Music Licensing: Current Deal Structures and Revenue by Todd and Jeff Brabec

The presenters observe, "Music licensing in the digital/online space has been, from inception, in a continuing state of evolution as to what is actually licensable, who is entitled to negotiate and collect license fees, how royalties will be distributed once collected and what is the value of music in all of the new configurations and business models. The primary rights involved in these discussions are the mechanical right and the performance right (songwriters, composers and music publishers) and the sound recording performance right (recording artists and record companies)." The presentation covers music licensing for a wide range of uses, such as subscription services, television, movies, videogames, apps, and even interactive toys, ringtones, and e-cards.

Licensing songs for TV shows is covered in some detail. Film festival licenses were also discussed, including how a relatively low fee for festival use may be obtained by independent producers and students working with a limited budget. Step deals can be used which provide for additional fees for national distribution and certain levels of box office grosses. Thus, a low initial fee may be charged for film festivals, then another if there is national distribution, then another if the film grosses a certain amount, and so on. If the film turns out to be successful, the song earns the money that it would have had the full price been paid at the outset, while not preventing its use in the first place by being, at that time, prohibitively expensive.

Magical Mystery Law - A Look at Key Moments in the Beatles Litigation History by Stan Soocher

Professor Soocher shares some of his research findings for his upcoming book on litigation involving the Beatles. He discusses the many contexts in which Beatles litigation has taken place, from rights to memorabilia to child custody to the use of the Apple name. He also discusses the use of Beatles lyrics by judges in their opinions. Soocher goes into detail on the history of two cases involving the Beatles and copyright infringement: one involving the Beatles' *Come Together* and Chuck Berry's *You Can't Catch Me*, the other involving one of the most well-known copyright infringement cases, George Harrison's *My Sweet Lord* and the Chiffons' *He's So Fine*.

Music Publishing Administration and Sub-Publishing Agreements by Teri Nelson Carpenter

Administering publishing and the collection of royalties are some of the most complicated issues facing songwriters and publishers today. Many writers and artists do not have the time or background necessary to properly protect their intellectual property or to maximize its exploitation. Having an administrator or publisher look over these business aspects can free creative people from having to take care of these details, and put those responsibilities on a party that has the expertise and resources to properly exploit the work and the ability to enforce the rights of the copyright owner, both with regard to use of the copyright and the collection of royalties.

Administration of a copyright may involve only the collection and distribution of royalties and license fees, or may include all the same activities as a music publisher, such as registering the copyright, issuing licenses, and actively seeking exploitation of the work. One form of administration is a foreign sub-publishing agreement. The operation of these agreements, the key points in sub-publishing deals, and the methods in which foreign royalty streams are paid and distributed are also discussed. The contents of a good administration agreement (including a sub-publishing agreement) are covered, and the written materials include a sample Music Publishing Administration Agreement.

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The New Book Publishing Landscape

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C. The Wholesale Model

The way things traditionally worked for both physical books and e-books was that the publishers set a list price, then sold their books to retailers for a wholesale price that was typically a percentage of the list price. The retailers could then mark up the books as they chose, essentially determining their own profit margin.

The wholesale price was usually 50% off the list price for physical books, but then the publishers typically discounted that wholesale price by 20% for e-books because costs were less than for physical books and e-retailers couldn't justify higher retail prices. So, for example, a hardcover book that had a list price of $26.95 would have a wholesale price of $13.47 and an e-book wholesale price of $10.78. The math was easy, and the e-retailers simply had to decide how much profit they wanted to make from each sale.

D. The first eight hundred pound gorilla[7]

Since the early days of publishing, the industry in the United States has long been dominated by the major publishers located in New York City, much like the epicenter of the movie business is in Los Angeles. Although the number of publishers has varied over the years, shrinking with mergers, the godfathers of publishing in the relevant time frame were the heads of the Big Six (now Five)[8] publishing conglomerates: Hatchette Book Group, Inc. (formerly known as Warner Books, owned by Hachette Livre, the largest publishing company in France); HarperCollins Publishers, LLC (owned by News Corporation); Verlagsgruppe Georg von Holtzbrinck, d/b/a MacMillan (which includes St. Martin's Press and Henry Holt and Co.); Penguin Group (USA), Inc. (owned by Pearson, an international media company in the UK); Random House (owned by Bertelsman AG, a global media firm based in Germany); and Simon & Schuster, Inc. (owned by CBS Corporation).

In 2010, the Big Six garnered 60% of revenue from all print, or physical, books sold, and 85% from *The New York Times* bestsellers. They were also responsible for over 50% of all e-books sold in the United States. Collectively, they were the proverbial eight hundred pound gorilla in the world of book publishing.

For purposes of our cautionary tale, the key players for this particular eight hundred pound gorilla (represented by five of the Big Six) are:

- David Shanks – CEO of Penguin
- David Young – Chairman and CEO of Hatchette
- Brian Murray – CEO of HarperCollins
- Carolyn Reidy – President and CEO of Simon & Schuster
- John Sargent – CEO of Macmillan

E. Amazon: Another eight hundred pound gorilla[9]

First started in 1994 by Jeff Bezos in his garage in Bellevue, Washington, to sell and ship books, Amazon went public in 1997. In 2007, Amazon introduced the Kindle and opened up the world of e-books, which was the first step on the journey that led to 2012's anti-trust lawsuit. It has now grown into a behemoth that sells and ships almost everything, and even employs its own drones to ensure deliveries within 30 minutes.[10] In 2013, Amazon led the e-retailer market with 29% of market share, ahead of second place Barnes & Noble.[11]

By 2009, Amazon controlled 90% of the e-book market and was responsible for 80% of the Big Six's e-book sales. With control of the e-book market pretty well locked up, Amazon did the unthinkable, as far as the Big Six was concerned: In late 2008, it put in place a discount pricing strategy, selling new releases and bestsellers for the low, low price of $9.99.

As I noted above, the wholesale price at which publishers sold to e-retailers was typically 50% for physical books, with that price discounted another 20% for e-books. Doing the math,[12] a hardcover book that had a list price of $26.95 would have a wholesale price of $13.47 and an e-book wholesale price of $10.78. On the whole, Amazon's $9.99 price was quite often less than the wholesale price it paid for e-books. So why did Amazon price e-books so low? It was all about solidifying its hold on the market share. Other e-retailers had no choice but to follow suit or be totally locked out of the market.

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F. The three most important things in e-book sales: Pricing, Pricing, Pricing

The Big Six were, to put it mildly, unhappy with Amazon's pricing. You might think that it was no skin off their noses because they still commanded the same wholesale price from Amazon and the other e-retailers, and even stood to increase sales if the buying public could pay less for their books. But the Big Six were more concerned about the Big Picture.

Hardcover books were by far their most profitable product, even over mass market and trade paperback, and the Big Six feared that rock bottom prices for e-books would cut into sales of physical books. Carolyn Reidy of Simon & Schuster would later explain the concern in prepared remarks she delivered to her board of directors in late January 2010:

> You are probably asking why we have objected to the $9.99 price if we are not losing any money on the sales, and that's because we feel it will ultimately be destructive to our industry. We believe it is destructive to retailers – both the retailer of our physical books, because it creates such a large disparity between the pricing of physical and electronic books, and the eRetailer, because in order to compete any seller must also lose money on sales. We believe it is destructive to authors because it devalues intellectual property, assumes all books are "worth" the same amount, and doesn't differentiate between author, subject, content or timing. And we believe it is destructive to publishers because at the end of the day it takes control of our business away from us and creates the danger of disintermediation as authors, in order to preserve their income, decide they don't need publishers.

If the pricing domino fell, it could threaten the viability of brick-and-mortar stores, where their hardcover books were displayed and sold, and might even lower prices generally in the book business. In effect, they were worried that Amazon's low pricing would erode the value, in the public's collective mind, of books as a whole, on the theory that you get what you pay for.

Worse yet, the Big Six was already afraid of Amazon's increasing dominance in the book distribution business. With an 800 pound gorilla rapidly eating its way up to being a 1,000 pound gorilla, they worried that Amazon might even begin to compete with them by going after authors directly for the rights to their books – an idea known as "disintermediation," or, in layman's terms, removing the middleman and allowing direct access.[13]

Carolyn Reidy expanded on disintermediation in her prepared remarks to her board:

> But for me the biggest danger from the digital world is the threat of disintermediation. When we published Riding the Bullet, Matt Lauer on the Today Show asked me – what does Stephen King need S&S for? Couldn't he have published this electronically all by himself? Well, the answer back then was "Yes, he could, if he wanted to bother." And that's true today, too. So more than ever we need to prove our value to our authors on a continual basis. And we need to be alert to retailers who try and get between us and our authors – as it sometimes seems they are trying to do.

The Big Six knew that they had to do something about Amazon, and they had to do it fast. As David Young of Hatchette would later say, the Big Six had to defeat Amazon's pricing to prevent the "wretched $9.99 price point becoming a *de facto* standard."

The CEOs of the Big Six met on a fairly regular basis in 2009 to discuss various issues that faced them as publishers, but the discussions invariably rolled around to Amazon and its pricing. They considered various strategies to defang Amazon, including the elimination of the 20% discount on the wholesale price of e-books. That would mean Amazon would have to pay the same wholesale price for e-books that it did for physical books, often several dollars above the $9.99 price. Remarkably, Amazon seemed content to take that hit and maintain its pricing.

Another option discussed was a process called "windowing" of new releases. Under that practice, the Big Six would release physical copies of books at one time, but withhold or delay the release of e-book versions rather than release them simultaneously. In other words, they would create different "windows" of time for release. The goal was to get buyers to splurge for hardcover books without having to wait months for the release of the e-books.

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The Big Six's CEOs were in communication with each other along the way about windowing. For example, Hatchette's Young emailed Arnaud Nourry, Chairman and CEO of Hatchette's French parent company, in the fall of 2009 that "confidentially, Carolyn [Reidy, of Simon & Schuster] has told me that they are delaying the new Stephen King, with his full support, but will not be announcing this until after Labor Day." Aware that he was on shaky ethical ground, Young added that "it would be prudent for you to double delete this from your email files when you return to your office."

On December 9, 2009, the *Wall Street Journal* reported:

> Simon & Schuster is delaying by four months the electronic-book editions of about 35 leading titles coming out early next year, taking a dramatic stand against the cut-rate $9.99 pricing of e-book best sellers. A second publisher, Lagardere SCA's Hachette Book Group, said it has similar plans in the works.[14]

The article quoted David Young as saying, "We're doing this to preserve our industry. I can't sit back and watch years of building authors sold off at bargain-basement prices. It's about the future of the business."

The New York Times published its own story that suggested the windowing effort was broader than just Simon & Schuster and Hatchette, and named HarperCollins and Macmillan as also being involved to some degree. Macmillan was actually only windowing a few titles at the time, but announced in December that it would begin delaying all of its e-books for 90 days. Ironically, John Sargent, its CEO, didn't like the practice, even though he had committed Macmillan to it – at least temporarily.

On December 14, 2009, *New York Times* bestselling novelist Lisa Scottoline emailed Sargent:

> . . . I understand the wish to delay the pub of an e-book to preserve hardcover sales, but if I ruled the publishing world, I'd flip the whole thing and embrace e-books. I'd pub the e-book at the same time as the hardcover and pray to God they both sell like crazy.

Sargent replied:

> I couldn't agree more. Windowing is entirely stupid. The only reason to do it is for the short term impact. Said another way, Amazon promised their Kindle buyers two things: $9.99 and most of the books on the *Times* list. Well, looks like they will not be able to keep both promises.

Amazon's response was a pithy statement on its website that said:

> Authors get the most publicity at launch and need to strike while the iron is hot. If readers can't get their preferred format at that moment, they may buy a different book or just not buy a book at all.

By the end of the year, the only two of the Big Six that had not announced a windowing policy were Penguin and Random House. All of the Big Six, however, realized that windowing was not the real solution to their problem. Some of them even recognized that windowing was creating another problem: piracy. As Carolyn Reidy reported to her board:

> And of course there is the danger of electronic versions being copied and distributed across the internet – which is the reason why all eBooks currently have DRM[15] and are not lendable or shareable – which frustrates consumers, but until we can figure out the piracy question, will not change.

The Big Six would also come to realize that the Amazon statement was, in fact, correct: a study by Penguin showed that customers simply didn't buy those books that had been windowed. It was a case of cutting off their noses to spite their faces.

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G. Yet another eight hundred pound gorilla arrives on the scene[16]

As of 2009, Apple, Inc. had devices available in the marketplace upon which customers could read e-books, but it didn't have its own e-reading software, so owners of its devices had to get that software from third parties. What it did have on the launching pad, though, was the iPad. Recognizing that the trade book market was a multi-billion dollar pond, and that Amazon was the biggest fish in that pond, but also clued in to the notion that content owners, such as the Big Six, did not have warm and fuzzy feelings toward Amazon, Apple found itself poised to dive in full force. Not only would the iPad provide e-reading software, it would also have the capability to display illustrations and photographs in color, as well as provide audio and video, and have a touchscreen. What more could a reader want?

Well, a reader would want access to all the current new releases from major publishers, such as the Big Six.

Under the leadership of Eddy Cue, Senior V.P. of Internet Software and Services, by November of 2009, Apple had compiled an internal outlook for audio and e-book opportunities, and it had also learned from analyst reports that $12.99 was an almost ideal price point for e-books. That was certainly more profitable than Amazon's $9.99, but as long as the lower figure was out there in the marketplace, it would make it difficult to compete at the more "ideal" number.

But $12.99 was just the kind of number to attract an alliance from the Big Six. The one thing that Apple lacked, but desperately wanted before launching the iPad, was an e-bookstore to go live along with the device. It planned to demonstrate the iPad in January of 2010 and to ship devices to stores in April of that year. That left it roughly two months to negotiate and execute agreements with the Big Six for content to sell through its e-bookstore.

In December, Cue's team from Apple contacted the CEOs of the Big Six to set up a series of meetings to discuss something "extremely confidential." That set off a flurry of phone calls between execs of the Big Six, who anticipated that the meetings would involve some exciting new device from Apple. Meeting with the Big Six one at a time, Cue was prepared to buy books on the wholesale model and sell them at prices up to $14.99. The one caveat, though, was that Cue would not commit to launching Apple's e-bookstore unless all of the Big Six signed on.

The meetings turned out to be as educational for Cue as they were for the Big Six. For his part, Cue learned that the current wholesale prices for most e-books were in the $13-15 dollar range. For Apple to make a go of it even at $11.99–14.99, the publishers would have to lower their wholesale prices. Unlike Amazon, which pretty much already had the market locked up and could afford to take a loss, Apple was not prepared to follow suit. Apple also told the publishers that it was against windowing, because Apple believed the process alienated customers.

Against this backdrop, Hatchette, and later HarperCollins, proposed an agency model to Apple, as opposed to a wholesale model, for distributing e-books. Cue rejected the notion initially, but changed his mind a few days later and developed his own proposal to make to the Big Six. Under Apple's proposed agency model, which was similar to the way Apple sold apps through its App Store, the publishers would set the e-book sales price themselves, and then pay Apple, as the "agent," a 30% commission. It appeared to be a win-win proposition, because it would allow the publishers to control pricing, but it would also ensure that Apple would make a profit.

There were two possible hitches in the concept, both of which Apple addressed up front in an effort to head off problems later. The first was Apple's concern that the publishers would set the retail prices too high and alienate buyers. Its proposed solution was to suggest pricing tiers with caps.

The second hitch was that Amazon would still be selling e-books at $9.99, which would put Apple at a competitive disadvantage. To deal with that, the other component of its proposal was a requirement that the Big Six move all of their e-retailers, including Amazon, to the same agency model. That would prevent Apple from being put at a disadvantage, but Cue felt that it would also appeal to the publishers because it would fix their problem with Amazon. If Amazon did not go along with it, the publishers could cut them off, and Apple would step into the void and pick up the sales slack.

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Because Hatchette and HarperCollins had previously suggested an agency model, Cue figured that they would most likely agree to his proposal, or at least some form of it. He also believed that Penguin's CEO, David Shanks, would go along with the others, so he put those three on the back burner and focused his initial efforts on Simon & Schuster, Macmillan, and Random House. He particularly wanted Random House, the largest publisher, on board.

And so, after his meetings in December, Cue sent term sheets to all of the Big Six, with the same terms:

- For hardcover books retailing for less than $35, the publisher could set an e-price of its choice up to $12.99.
- For any book with a retail price more than $35, the price cap would be $14.99.
- For mass-market or trade paperbacks, the price would be capped at $9.99.
- A 30% commission for the e-retailer.
- All e-retailers would have to adopt this agency model.

On January 10, 2010, Apple added another wrinkle, in the form of a "most favored nations" ("MFN") requirement. This was its way of forcing the Big Six to adopt the agency model for all of its e-retailers without making that an explicit requirement. Under this MFN requirement, Apple essentially took away the publishers' discretion on pricing. Unless the Big Six converted all of their e-retailers to a similar agency model, Apple could still sell their e-books at the lowest prices offered by any of their competitors. Having added the MFN to its proposal, Apple then dropped the specific requirement that all e-retailers had to adopt the model because, as Cue was later reported to have said, "any decent MFN forces the [agency] model."[17]

On January 11, Apple sent a draft of its proposed distribution agreement to each of the Big Six, which included the MFN, price tiers, the 30% commission, and a commitment to prohibit windowing. Although some minor terms were changed during negotiations by the various publishers, the material terms were the same for all of them.

The main deal points were:

- **MFN**: The proposed MFN read:

> If, for any particular New Release in hardcover format, the then-current Customer Price at any time is or becomes higher than a customer price offered by any other reseller ('Other Customer Price'), the Publisher shall designate a new, lower Customer Price to meet such Other Customer Price.

Financially, the wholesale model was more profitable for publishers because the publisher typically received 50% of the *list* price, while under the agency model, it received 70% of the *retail* price. For example, if the hardcover list price was $26, the wholesale price would be $13 and the publisher's take would also be $13. However, if the e-book retail price was $12.99, the publisher's take would be $9.10. Obviously, then, it didn't make sense for any of the publishers to adopt Apple's agency model unless there was some long term benefit. The goal, of course, was to act in concert to force Amazon to increase its e-book prices, which is what the MFN assured that they would have to do.

- **30% commission:**

There were some efforts among the publishers to get Apple to reduce its commission to 20%, but Apple hung tough at 30%.

- **Price tier:**

The draft agreement capped e-book prices at $12.99 for New Release hardcovers priced retail at $30 or under, and $14.99 for those priced above $30, with incremental increases allowable for each $5 increase in the retail price. For non-New Releases, the price was capped at $9.99. Through a series of negotiations, those caps were changed, albeit not significantly. The retail price triggers were slightly reduced for the $12.99 (retail between $25.01 and $27.50) and $14.99 tiers (retail between $27.51 and

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$30), but *New York Times* bestsellers were carved out for those tiers at the originally proposed list prices. Although there was still some push-back from the publishers, those tiers were ultimately adopted in the final agreements.

As of January 16, 2010, no publisher had yet executed a distribution agreement, and Apple's launch date was just eleven days away. It set a deadline for the publishers of January 21, but allowed them a little extra time. By January 26, all but Random House had executed an agreement.

H. Amazon reacts to the agency model[18]

Most of what transpired between Apple and the publishers took place in secret, but word managed to leak out anyway. On January 18, 2010, the *Wall Street Journal* ran an article entitled "Publisher in Talks With Apple Over Tablet,"[19] which reported that HarperCollins was in negotiations with Apple and was "expected to set the prices of the e-books . . . with Apple taking a percentage of sales." It also said:

> The HarperCollins negotiations with Apple represent a direct challenge to Amazon, which dominates the fast-growing e-book market but which could face significant competition from an Apple tablet.

A day later, *Publishers Lunch* also reported on the negotiations between the Big Six and Apple. By the evening of January 19, Madeline McIntosh, Chief Operating Officer of Random House, told her former colleague Laura Porco, VP of Kindle Content at Amazon, that it looked like the other five publishers in the Big Six, except Random House, were negotiating agency agreements with Apple and that Random House was being pressured to do likewise.

In response, Amazon went on the offensive and did exactly what the publishers feared: they appealed directly to authors; i.e., disintermediation.[20] On January 20, it announced to authors and other e-book publishers that, for e-books sold on Amazon at a list price between $2.99 and $9.99, they could receive a 70% royalty. At that point, typical royalties for e-books were 25% so, for instance, on an e-book selling through one of the Big Six at a price tier cap of $12.99, an author would receive $3.24 per book. However, at 70% of a book selling for $9.99, the author would receive a royalty of $6.99 – and would quite possibly sell more books.

The publishers responded by demanding that Amazon move to an agency model. As HarperCollins put it, in a less-than-veiled e-mail threat to Amazon:

> . . . If I could get your support to this kind of agency model in principle, I have less need to support other partners who wish to enter the ebook business. As I mentioned we haven't made any decisions yet about how we will sell ebooks to consumers yet, but decision time is approaching.

The communication ended with a more direct threat: If Amazon didn't move to an agency model, HarperCollins would delay all of its e-books for six months; i.e., windowing.

Perhaps HarperCollins can be forgiven for its ham-handed tactics, but it had been subjected to similar tactics, itself – from Apple. It was the last of the five publishers to sign an agency agreement, and Eddy Cue called on Apple founder and icon Steve Jobs to close the deal. On January 23, Jobs had emailed James Murdoch of News Corp, HarperCollins's parent, and said:

> Analysts estimate that Amazon has sold slightly more than one million Kindles in 18+ months (Amazon has never said). We will sell more of our new devices than all of the Kindles ever sold during the first few weeks they are on sale. If you stick with just Amazon, B&N, Sony, etc., you will likely be sitting on the sideline of the mainstream ebook revolution.

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In response to concerns from Murdoch, Jobs concluded on January 24 that HarperCollins had only these choices:

1. Throw in with Apple and see if we can make a go of this to create a real mainstream ebooks market at $12.99 and $14.99.
2. Keep going with Amazon at $9.99. You will make a bit more money in the short term, but in the medium term Amazon will tell you they will be paying you 70% of $9.99. They have shareholders too.
3. Hold back your books from Amazon. Without a way for customers to buy your ebooks, they will steal them. This will be the start of piracy and once started there will be no stopping it. Trust me, I've seen this happen with my own eyes.

On January 26, HarperCollins became the fifth, and final, publisher to sign with Apple.

The next day, Apple launched its iPad and iBookstore. Following the launch, the *Wall Street Journal*'s Walt Mossberg asked Jobs why people would pay $14.99 to purchase an e-book that was selling at Amazon for $9.99. Jobs responded "That won't be the case. . . . The prices will be the same," and explained that "publishers will actually withhold their [e]books from Amazon . . . because they are not happy with the price."

Simon & Schuster General Counsel emailed company CEO Carolyn Reidy on January 29 about the Jobs quote and said: "I cannot believe that Jobs made the statement below. Incredibly stupid."

I. A free-for-all of eight hundred pound gorillas[21]

John Sargent, CEO of Macmillan, was the first publisher to meet with Amazon after the Apple launch and the execution of the distribution agreements. By all reports, he didn't expect things to go swimmingly with Amazon, but he at least had the decency to deliver the news in person that his company had, in fact, signed a deal with Apple. As he wrote in a January 28 email to a colleague who asked what he thought of the iPad:

> It made my life hell for the last three weeks. But it gave us the chance to change the entire business model for digital books. Am on my way to Seattle to get my ass kicked by Amazon. The device rocks.

In Seattle, Sargent presented Amazon with an ultimatum: Switch to the agency model or Macmillan would withhold e-book versions of its New Releases from Amazon for seven months.[22] In response, Amazon removed the "buy" buttons on its site for both e-book and print versions of all Macmillan books. It seemed like a tantalizingly diabolical move: Customers could view the titles on Amazon's site but simply couldn't buy them.

Sargent responded on January 30 by posting an open letter to Macmillan's authors, illustrators, and literary agents in *Publishers Marketplace.*[23] His letter said:

> This past Thursday I met with Amazon in Seattle. I gave them our proposal for new terms of sale for e books under the agency model which will become effective in early March. In addition, I told them they could stay with their old terms of sale, but that this would involve extensive and deep windowing of titles. By the time I arrived back in New York late yesterday afternoon they informed me that they were taking all our books off the Kindle site, and off Amazon. The books will continue to be available on Amazon.com through third parties.
>
> I regret that we have reached this impasse. Amazon has been a valuable customer for a long time, and it is my great hope that they will continue to be in the very near future. They have been a great innovator in our industry, and I suspect they will continue to be for decades to come.

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> It is those decades that concern me now, as I am sure they concern you. In the ink-on-paper world we sell books to retailers far and wide on a business model that provides a level playing field, and allows all retailers the possibility of selling books profitably. Looking to the future and to a growing digital business, we need to establish the same sort of business model, one that encourages new devices and new stores. One that encourages healthy competition. One that is stable and rational. It also needs to insure that intellectual property can be widely available digitally at a price that is both fair to the consumer and allows those who create it and publish it to be fairly compensated.
>
> Under the agency model, we will sell the digital editions of our books to consumers through our retailers. Our retailers will act as our agents and will take a 30% commission (the standard split today for many digital media businesses). The price will be set for each book individually. Our plan is to price the digital edition of most adult trade books in a price range from $14.99 to $5.99. At first release, concurrent with a hardcover, most titles will be priced between $14.99 and $12.99. E books will almost always appear day and date with the physical edition. Pricing will be dynamic over time.
>
> The agency model would allow Amazon to make more money selling our books, not less. We would make less money in our dealings with Amazon under the new model. Our disagreement is not about short-term profitability but rather about the long-term viability and stability of the digital book market.
>
> Amazon and Macmillan both want a healthy and vibrant future for books. We clearly do not agree on how to get there. Meanwhile, the action they chose to take last night clearly defines the importance they attribute to their view. We hold our view equally strongly. I hope you agree with us.
>
> You are a vast and wonderful crew. It is impossible to reach you all in the very limited timeframe we are working under, so I have sent this message in unorthodox form. I hope it reaches you all, and quickly. Monday morning I will fully brief all of our editors, and they will be able to answer your questions. I hope to speak to many of you over the coming days.

Sargent realized he had helped create a controversy, emailing Penguin's John Makinson: "I have stepped into a shitstorm." Steve Jobs, on the other hand, seemed to relish his role, emailing Eddy Cue that "We have definitely helped stir things up in the publishing world."

In this battle of the 800 pound gorillas, Amazon blinked first. Recognizing that it wasn't contending just with Macmillan, but with five of the Big Six, and under intense criticism from customers and publishers, compounded by a dip in its stock price, Amazon buckled. On January 31, it issued a public statement to customers on its website that said:

> Macmillan, one of the 'big six' publishers, has clearly communicated to us that, regardless of our viewpoint, they are committed to switching to an agency model and charging $12.99 to $14.99 for e-book versions of bestsellers and most hardcover releases.
>
> We have expressed our strong disagreement and the seriousness of our disagreement by temporarily ceasing the sale of all Macmillan titles. We want you to know that ultimately, however, we will have to capitulate and accept Macmillan's terms because Macmillan has a monopoly over their own titles, and we will want to offer them to you even at prices we believe are needlessly high for e-books. Amazon customers will at that point decide for themselves whether they believe it's reasonable to pay $14.99 for a bestselling e-book. We don't believe that all of the major publishers will take the same route as Macmillan. And we know for sure that many independent presses and self-published authors will see this as an opportunity to provide attractively priced e-books as an alternative.

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> Kindle is a business for Amazon, and it is also a mission. We never expected it to be easy.
>
> Thank you for being a customer.[24]

Notwithstanding Amazon's backdown from Macmillan, the other publishers worried how Amazon might react to them. On February 11, Carolyn Reidy wrote to Les Moonves, President and CEO of CBS Corporation, Simon & Schuster's parent company, and told him that "I believe within a few weeks Amazon will try and punish us in some way." She added:

> Amazon did come to terms with Macmillan on an agency approach, it appears, and in fact stated publicly that it would have to give in to Macmillan's demands for higher prices because of Macmillan's monopoly on its titles (of course we call it copyright). Their settlement with Macmillan was very quick and we believe it was because of the backlash on their actions was so strong and negative.

While Amazon did send a complaint letter to the Federal Trade Commission[25] about the conduct of Apple and the publishers, it nevertheless negotiated an agency agreement with Macmillan. One by one, Amazon then executed agency agreements with the other of the publishers, with Penguin being the last to sign, on June 2. All of the agreements had similar terms, but different termination dates, ranging from eighteen months to three years. The idea on termination dates was to ease the potential of future collective action by the publishers by having each agreement reach its expiration date at different times. The agreements also contained a "model parity" clause that permitted Amazon to return to the wholesale model if any of the publishers agreed to such an arrangement with any other e-retailer.

J. Up, up, and away

As expected, after signing agency agreements with Apple, the publishers almost immediately raised their e-book prices to at or near the tier caps. Within two weeks, the average price increase for e-books from the five publishers was 14.2% for New Releases, 42.7% for *New York Times* bestsellers, and 18.6% across the board. Interestingly, some hardcover prices were also raised, a move that bumped those books into the next higher price tier for e-books. Professor Richard Gilbert[26] prepared the following chart for the Department of Justice to show increases just on Amazon, alone.[27]

Amazon Weighted Average Price Increases

Publisher	All eBooks	New Releases	NYT Bestsellers	Backlist
Hachette	33.0%	14.1%	37.9%	37.5%
HarperCollins	13.6%	12.5%	44.0%	15.2%
Macmillan	11.6%	14.0%	-	11.2%
Penguin	18.3%	19.5%	43.6%	17.6%
Simon & Schuster	18.0%	15.1%	28.7%	19.8%
Defendant Publishers	18.6%	14.2%	42.7%	19.6%
Random House	0.01%	1.9%	0.2%	0.3%
Non-Majors	-0.2%	-0.9%	1.1%	0.1%

It's probably not surprising that sales took a dip after the prices were raised. According to Judge Cote's Opinion and Order signed on July 10, 2013, in the anti-trust litigation, the publishers who went to the agency model in April of 2010 suffered a 12.9% decrease in number of units sold in a two-week period after entering into the agreements, and another report showed a 14.5% decrease relative to Random House, which had not yet shifted to the agency model.

Ah, yes, Random House. In early 2011, it finally converted to an agency model, raised its prices, and then saw an almost immediate drop in e-book sales. Interestingly, prior to joining the party, Amazon continued to sell Random House's New Releases and *New York Times* bestsellers at $9.99 and, during that period, Random House's sales increased, as did its market share.

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K. More big gorillas

On April 11, 2012, the biggest gorilla of all, the United States of America, filed suit in the United States District Court for the Southern District of New York against Apple, Hatchette, HarperCollins, Macmillan, Penguin, and Simon & Schuster, alleging that Apple had conspired with the publisher defendants to limit e-book price competition, in violation of the Sherman Act, and it sought equitable relief under 15 U.S.C. §4 and injunctive relief under 15 U.S.C. §1.

A group of smaller gorillas[28] filed a similar suit in the Western District of Texas, Austin Division, against Apple, Penguin, Macmillan, and Simon & Schuster. That action, filed "as *Parens Patriae*[29] on Behalf of Consumers," was later consolidated with the action in New York, to be presided over by U.S. District Judge Denise Cote.

In the action filed in New York, the government also named as co-conspirators "[v]arious persons, who are known and unknown to Plaintiff, and not named as defendants in this action, including senior executives of the Publisher Defendants and Apple . . . ."[30] John Sargent of Macmillan apparently took offense because, that same day, he sent another letter to "authors, illustrators and agents" protesting his innocence. He noted that Macmillan had been in settlement discussions with the government for months, but had decided not to settle because the "terms the DOJ demanded were too onerous."

He also stated:

> When Macmillan changed to the agency model we did so knowing we would make less money on our e-book business. We made the change to support an open and competitive market for the future, and it worked. We still believe in that future and we still believe the agency model is the only way to get there.
>
> It is also hard to settle a lawsuit when you know you have done no wrong. The government's charge is that Macmillan's CEO colluded with others in changing to the agency model. I am Macmillan's CEO and I made the decision to move Macmillan to the agency model. After days of thought and worry, I made the decision on January 22nd, 2010 a little after 4:00 AM, on an exercise bike in my basement. It remains the loneliest decision I have ever made, and I see no reason to go back on it now.[31]

John Makinson, Penguin's chairman, also issued a statement, which said, in part:

> A responsible company does not choose a path of litigation with US Government agencies without carefully weighing the implications of that course of action. Nonetheless, countless hours discussing this issue with colleagues here at Penguin, as well as with our parent company, Pearson plc, have not led any of us to the view that we should settle this matter. Indeed, alone among the publishers party to the investigations that resulted in today's announcements, we have held no settlement discussions with the DOJ or the states.
>
> We have held strongly to this view for two, and only two, reasons. The first is that we have done nothing wrong. The decisions that we took, many them of them costly and difficult, were taken by Penguin alone.
>
> ***
>
> The second, and equally powerful, reason for our decision to place this matter in the hands of a court is that we believed then, as we do now, that the agency model is the one that offers consumers the prospect of an open and competitive market for e-books. We understood that the shift to agency would be very costly to Penguin and its shareholders in the short-term, but we reasoned that the prevention of a monopoly in the supply of e-books had to be in the best interests, not just of Penguin, but of consumers, authors and booksellers as well.
>
> We are of course in the business of making money for our shareholders, but our purpose as a company is to make entertaining and intelligent books for readers of all ages and tastes. We shall not achieve either of those

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> objectives in the absence of competition or choice. The decision we took in January 2010 to move Penguin's e-book business to agency pricing has been vindicated by the very rapid subsequent growth in the volume of e-books sold by agency publishers, and by the benefit to consumers of the steep decline in the price of e-book readers that has resulted from this open competition.
>
> Any other decision would have been a disservice in the long term to our staff and our shareholders, but also to the writers, booklovers, retailers and agents whom we serve.

Notwithstanding such bold words from Penguin's and Macmillan's CEOs, over the course of the next several months, the government settled with the various publisher defendants. Hatchette, HarperCollins, and Simon & Schuster went first, consenting to the entry of a final judgment against them on September 16, 2012. Under the terms of the judgment, the publishers were required to terminate their pre-lawsuit agreements with Apple and to notify any other e-retailer with whom they had contracts that restricted the e-retailer's ability to set their own prices or contained a "Price MFN"[32] that those contracts could be terminated on 30 days' notice. The settling publishers were also required to notify the Justice Department, on at least 60 days' notice, of any new joint venture or business arrangement involving the sale, development, or promotion of e-books in the United States.

Additionally, the publishers were prohibited, for a period of two years, from restricting, or entering into any agreement that restricts, any e-retailer from setting its own prices for e-books, or "to offer price discounts or any other form of promotions to encourage customers to Purchase one or more E-books . . . ." They were also prohibited from entering into any agreement with any e-retailer that contained a Price MFN; from retaliating against any other e-retailer or e-publisher for engaging in the conduct that the judgment defendants were prohibited from engaging in; or from entering into any agreement or arrangement to fix or set retail or wholesale prices of e-books or any terms of their sale.

Lastly, the publishers were prohibited from communicating, directly or indirectly, with any other e-book publisher about business plans or strategies, including wholesale or retail pricing strategies, or terms of any of their agreements with book retailers (regardless of format) or their authors. They were also required to designate an "Antitrust Compliance Officer" responsible for ensuring compliance with the judgment and reporting to the Department of Justice, and to permit compliance inspections by the DOJ upon reasonable notice.

Penguin fell next, with the entry of a similar final judgment against it on May 17, 2013. Macmillan held out the longest but, on August 12, 2013, it consented to a final judgment on essentially the same terms as those entered against the other publisher defendants.

That left only Apple to go to trial.

L. Gorillas in the courtroom

A bench trial on liability was held before Judge Denise Cote from June 3 to June 20, 2013. Judge Cote delivered her 160-page Opinion and Order on July 10, 2013, stating right off the bat that "[t]his Opinion explains how and why the prices for many electronic books, or 'e-books,' rose significantly in the United States in April 2010."

She also noted in her Summary of Findings:

> The Plaintiffs[33] have shown that the Publisher Defendants conspired with each other to eliminate retail price competition in order to raise e-book prices, and that Apple played a central role in facilitating and executing that conspiracy. Without Apple's orchestration of this conspiracy, it would not have succeeded as it did in the Spring of 2010.

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Applying the law to the facts, Judge Cote found:

> The Plaintiffs have shown through compelling evidence that Apple violated Section 1 of the Sherman Act by conspiring with the Publisher Defendants to eliminate retail price competition and to raise e-book prices. There is overwhelming evidence that the Publisher Defendants joined with each other in a horizontal price-fixing conspiracy.[34]

Judge Cote based her ruling of a conspiracy on, among other facts, Steve Jobs's admissions[35] and the "web of telephone calls among the Publisher Defendants' CEOs surrounding each turning point in the presentation and execution of the Agreements." Judge Cote also cited very strong circumstantial evidence, including:

- Each of the publishers shared the identical goal to raise e-book prices from $9.99 to protect their print books.
- Within days of each other, the publishers demanded that Amazon adopt the agency model.
- The agency model protected Apple from price competition.
- Each agreement precipitated the rise in prices to the price caps almost simultaneously.
- The move to the agency model was against all of the publishers' "near-term financial interests," yet they all did it anyway.
- All of the publishers "acted in identical ways even though each was also afraid of retaliation by Amazon."

Apple argued that its conduct involved its own independent business interests and could legitimately be interpreted as having been "consistent with independent, unilateral action." Judge Cote disagreed, noting that the evidence established that Apple "made a conscious commitment to join a scheme with the Publisher Defendants to raise the price of e-books. . . Apple did not and could not have acted independently to achieve the results it achieved here."[36] Judge Cote noted that even though all of the individual terms or clauses were inherently legal, "that does not make it lawful for a company to use those business practices to effect an unreasonable restraint of trade."[37]

Apple next contended that it didn't have any evil intent – that it never intended to conspire to raise prices of e-books. In fact, Apple pointed out, it was the publishers that actually raised those prices, and not Apple, and that all Apple did was to introduce a new device with innovative software. However, Judge Cote noted that from the start, Apple appealed to the publishers' desire to raise prices and to "create a mechanism and environment that enabled them to act together in a matter of weeks to eliminate all retail price competition for their e-books."[38]

Apple then asserted that, but for its actions, the publishers would have "windowed," or delayed, their e-books. Judge Cote shot down that argument, as well, noting that there was no evidence that "windowing would have become widespread, long-lasting, or effective," and that "there was never any threat (before Apple encouraged one) to withhold all e-books." Judge Cote concluded that "it is ironic for Apple to claim credit for the end to windowing when it was Apple that encouraged the Publisher Defendants to present Amazon with a blanket threat of windowing for a seven month period."[39]

On September 5, 2013, Judge Cote entered "Plaintiff United States' Final Judgment and Plaintiff States' Order Entering Permanent Injunction," which contained similar terms to the prior judgments with the publisher defendants, and prohibited Apple from discriminating against e-book applications and from entering contracts with publishers that prevent e-retailers from discounting. She also appointed an external compliance monitor to review and evaluate Apple's compliance with the judgment.

M. Gorillas reach a settlement

After entry of the final judgment on liability and remedy, the issue of damages against Apple remained to be tried. In the interim, Apple appealed both the finding of liability and the appointment of a compliance monitor. Macmillan and Simon & Schuster also appealed, contending that the provisions of the judgment that restricted Apple from entering into contracts that restrict discounting, but which would expire at six-month intervals for each of the publisher defendants, beginning two years after the entry of judgment, effectively amended their consent judgments, which imposed earlier termination dates.

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A settlement was recently announced that is contingent upon the outcome of Apple's appeal from Judge Cote's ruling on liability. According to media reports, under the settlement, Apple could pay as much as $450 million, but that amount could be reduced, or eliminated, depending upon what happens with Apple's appeal.

Apple issued this statement on July 16, 2014, to announce the settlement:

> Apple did not conspire to fix ebook pricing, and we will continue to fight those allegations on appeal. We did nothing wrong and we believe a fair assessment of the facts will show it. The iBooks Store has been good for consumers and the publishing industry as a whole, from well-known authors to first-time novelists. As we wait for the court to hear our appeal, we have agreed to a settlement which is contingent upon the outcome of the appeal. If we are vindicated by the appeals court, no settlement will be paid.
>
> Now all we have to do is wait.

N. What authors have to say

Here's what some prominent authors have had to say about the fight between the gorillas:

Michael Connelly, *New York Times* bestselling author of *The Lincoln Lawyer*:

> I'm in a bit of an awkward position because this has pitted my publisher against the retailer that far and away sells more of my books than any other. I don't want to bite the hand that feeds me, and both of these hands feed me. . . . I hope the government will be just as vigilant in guarding this amazing, creative and important industry from being monopolized by one entity. Amazon spreads my work far and wide. You can't beat that. I'm very grateful. But I don't want a world where there are no bookstores or other venues for discovering my work or the work of any other writers.

Scott Turow, *New York Times* bestselling author of *Presumed Innocent* and president of the Authors Guild:

> Today's low Kindle book prices will last only as long as it takes Amazon to re-establish its monopoly. It is hard to believe that the Justice Department has somehow persuaded itself that this solution fosters competition or is good for readers in the long run.

Barry Eisler, *New York Times* bestselling author of the John Rain series:

> Look, you can build a business by forcing your choices on consumers (commonly known as monopoly rents), or you can build one by figuring out what consumers would prefer — and giving it to them. Consumers like buying books online and they like digital books. You can argue that all such consumers are evil or that they're morons, but they like what they like, and innovative companies will try to serve them. That's what's going on here, and legacy players would do better to compete than to complain. They might still lose, but competing would at least be more dignified.

Joe Konrath, self-published author of the Jack Daniels mystery series, who was named in 2011 as one of "5 eBook Authors to Watch" by *mediabistro.com*:

> If someone is going to dominate me, I'd prefer the dominator who can make me more cash. That said, the whole 'What will happen when Amazon controls the world and creates robots that suck human blood' argument is silly. The Big 6 have been sucking my blood for a decade. We're supposed to fear what Amazon might do, while ignoring the teeth in our necks right now?

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ENDNOTES

1 http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/59194-signs-of-stability.html; that apparent disparity is attributable to the fact that e-book prices are significantly lower than the prices of physical books.

2 I'll leave it up to the math majors to figure out the percentage increase that represents; I was a political science major.

3 Q: How can you tell an extroverted writer?
A: He looks at *your* shoes when he talks to you.

4 These are excerpts from actual query letters that I have received. This one threatening to sic a Harvard-trained lawyer on me still brings me nearly to tears.

5 So would I.

6 I have often wondered if this one actually came from *Seinfeld* character George Costanza.

7 Q: Where does an 800 pound gorilla sleep?
A: Anywhere it wants.

8 Random House and Penguin have now combined, reducing six to five.

9 Q: What do you call an 800 pound gorilla?
A: Anything he wants to be called.

10 http://www.amazon.com/b?node=8037720011

11 http://www.publishersweekly.com/pw/by-topic/digital/retailing/article/59194-signs-of-stability.html

12 Who knew there would be so much math?

13 Who can forget "The Soldier in White" in Joseph Heller's classic *Catch-22*. In the hospital, wrapped in bandages from head to foot, clear fluids from a jar dripped into him via a tube, while another tube drained clear fluids from him into another jar. Changing the jars was easy: When one was full and the other was empty, Nurse Cramer simply uncoupled the jars from their respective tubes and reconnected them to each other. As an artillery captain in the hospital, with whom the book's hero, Yossarian, played chess, put it: "Why can't they hook the two jars up to each other and eliminate the middleman? What the hell do they need him for?" *Catch-22* at Chapter 17.

14 "Two Major Publishers to Hold Back E-Books," Jeffrey A. Trachtenberg, *Wall Street Journal*.

15 "DRM" refers to "Digital Rights Management," which is a technology to prevent copying of digital content.

16 Q: If an 800 pound gorilla comes into a room, where does it sit?
A: Anywhere it likes.

17 This language appeared in an email from Pete Alcom, one of Cue's colleagues at Apple, but at trial, Cue denied having said it.

18 In summary: not well.

19 http://online.wsj.com/news/articles/SB10001424052748704541004575011092145509872

20 See anecdote above about Heller's "Soldier in White."

21 Q: What do you do when an 800 pound gorilla asks you to dance?
A: Run.

22 Seven months was the term in the Apple agreement for which titles were designated "new releases."

23 http://www.publishersmarketplace.com/lunch/macmillan_30jan10.html

24 http://www.amazon.com/forum/kindle/Tx2MEGQWTNGIMHV?_encoding=UTF8&cdForum=Fx1D7SY3BVSESG&displayType=tagsDetail&ref_=cm_cd_tfp_ef_tft_tp

25 Cue ominous music here.

26 Professor Emeritus of Economics at Berkeley University.

27 http://www.mediabistro.com/galleycat/doj-charts-agency-model-price-increases_b70460

28 The states of Texas, Connecticut, Alaska, Arizona, Colorado, Illinois, Iowa, Maryland, Missouri, Ohio, South Dakota, Tennessee, Vermont, and West Virginia, and the Commonwealths of Pennsylvania and Puerto Rico.

29 Defined by *Nolo's Plain-English Law Dictionary* as: "Latin for 'parent of his or her country.' The power of the state to act as guardian for those who are unable to care for themselves, such as children or disabled individuals."

30 See ¶22 if the Complaint.

31 The facts established, however, a multitude of communication between Sargent and the other publisher defendants during the relevant time period. I'm not sure how many of those phone calls, if any, took place while Sargent was on his exercise bike.

32 "Price MFN" is defined as a term in an agreement with an e-retailer under which the retail or wholesale price, or any discounts, or the revenue share or commission that the publisher receives, depends on the price or discounts on the prices, or the revenue share or commission received, of any other e-retailer.

33 Remember that the Texas action, brought by various states (and later joined by even more), was consolidated with the New York action; hence the plural reference to Plaintiffs.

34 Judge Cote, at page 107 of her Opinion and Order, wrote: "Generally speaking, price-fixing agreements or agreements to divide markets that are horizontal in nature – meaning that the parties to the agreement are 'competitors at the same level of market structure,' *Anderson News, L.L.C. v. American Media, Inc.*, 680 F.3d 162, 182 (2d Cir. 2012) (citation omitted) – are *per se* unlawful.

35 Those admissions included his answer to the *Wall Street Journal*'s Walt Mossberg, as well as statements included in his biography *Steve Jobs*, by Walter Isaacson. On page 503-504, Isaacson quotes Jobs as saying: "Amazon screwed it up. It paid the wholesale price for some books, but started selling them below cost at $9.99 . . . So we told the publishers, 'We'll go to the agency model, where you set the price, and we get our 30%, and yes, the customer pays a little more, but that's what you want anyway.'"

36 Pages 129-130 of Opinion and Order.

37 Page 132 of Opinion and Order.

38 Pages 135-136 of Opinion and Order.

39 Pages 141-142 of Opinion and Order.

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won combined with the extraordinary publicity she immediately received led to sharp criticism of 19's contracts.[32] Now, 360 deals are a common industry practice,[33] but criticism over talent competition contracts remains.

The 19 deal encompasses up to eight separate agreements, including a recording contract, merchandising/endorsement contract, touring contract, music publishing contract, management contract, an online content contract, and an *American Idol* attraction agreement.[34] To handle the various aspects of *Idol* and its contestants' careers, 19 implemented six separate business divisions: 19 Recordings, 19 Merchandise, 19 Management, 19 Publishing, 19 Touring, and 19 Television.[35] The company website lists several former *Idol* contestants under the current rosters of the recording, merchandise, and management branches.[36]

The initial step in the *Idol* process is the auditions, where *Idol* hopefuls must sign the standard reality television agreements described above. Once the show narrows the contestant pool to a specified number of semifinalists, entertainment law firms compete for the opportunity to represent the performers in their 360 contract negotiations with 19.[37] Each firm makes an approximately thirty minute presentation to the contestants, who then collectively vote on one firm to provide their legal representation.[38] *The Voice* also employs lawyers during the negotiation process. Season Five winner Tessanne Chin told the Jamaica Observer, '"[We] had lawyers hired by Universal and I also had my lawyer to look over the contract. [It is] not as bad as somebody walking in off the street and getting a deal—[it is] better than that."'[39]

Attorneys have described the contestants and parents as "scared" and "unsophisticated," particularly when dealing with the substantial consequences involved.[40] Season One contestant Carmen Rasmusen remembered the group's lawyer and show's producers ensured that the contestants understood the contracts' significance.[41] This entire legal process, from the firms' auditions to the signing of the contracts, takes approximately one week; the negotiations with 19 occur within a two-day span.[42] The completed 360 deal provides guaranteed contracts with 19's branches for only the winner of the competition; 19 retains the discretionary option to exercise the various deals with the remaining signatories.[43] *Idol* semifinalists sign their 360 deal before they learn of their ultimate fate in the competition. *The Voice* contestants signed their deals '"before everything started . . . [e]ven before the blind [auditions]."'[44] *The X Factor* required its live show finalists to sign an additional contract with a seven-year right-of-first-refusal production clause on activities of the top contestants.[45]

The Record Deal[46]

The opportunity to land a lucrative recording deal is perhaps the biggest attraction for contestants. *Idol* provided Season One winner Kelly Clarkson with a $1 million record deal with 19 Recordings; *The Voice* offered its winners a $100,000 recording contract with Universal Republic.[47] *The X Factor* provided its Season One champion Melanie Amaro with a $5 million record deal with Sony Music.[48] *Idol* and *The X Factor* reduced the contract amounts for subsequent seasons, with a $250,000 recording deal awarded to *Idol*'s Season Ten winner Scotty McCreery and a $1 million deal awarded to *The X Factor*'s Season Three winners Alex and Sierra.[49]

Basic Terms and Recording Obligations

Under Season Ten's Recording Agreement, there are two principal contract periods: the First Contract Period, which commenced on the date the contract was signed and expired three months after the season finale; and the subsequent Contract Periods, which last the longer of thirteen months or eight months after the USA release of the Recording Commitment Album ("album") for the Contract Period.[50] With the exception of McCreery's agreement, 19 Recordings had six irrevocable options to extend the contract beyond the First Contract Period.[51] For McCreery winning the competition, 19 was deemed to have exercised their option for the Second Contract Period."[52]

During the First Contract Period—when the artist was a contestant on the show, 19 had an option to require the artist to record up to two tracks per week for digital downloads and use for sponsorship and advertising; for each week this option was exercised, the artist received a $1,000 advance.[53] 19 could have also required the recording of three additional tracks for use in

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advertising and sponsorship during this period for which the artist received an additional advance of $1,000 per track.[54] The songs to be recorded were selected by 19 and the advances were recouped from the royalty paid to the artist.[55]

If the option for the Second and any subsequent Contract Periods were exercised, the artist was required to deliver one album of not less than twelve nor more than twenty-five different tracks, totaling no fewer than forty-five minutes of playing time.[56] If 19's primary licensee began to use something other than an album as its primary product "(e.g., ten (10) singles or two (2) EPs in a Contract Period)," then the new primary product would have constituted an "album."[57] The album for the Second Contract Period was to be completed within three months, while the albums for any subsequent Contract Periods were to be finished within six months.[58]

Advances and Royalties

The advances paid to the artists during the Second Contract Period (the first album) were as follows: for McCreery, $125,000 at the commencement of the Second Contract Period, and $125,000 when the album was delivered to 19; for the runner-up, $87,000 at the commencement of the Second Contract Period, and $87,500 when the album was delivered; for artists that placed third or lower, $50,000 at the commencement of the Second Contract Period, and $50,000 when the album was delivered.[59]

For the remaining Contract Periods (second to sixth albums), the advances were determined based on the artist's share of royalty earnings from records sold at full price of the prior album during the twelve months after the prior album's release date. The advance for the second and third album were thirty percent of the artist's share of royalties, which increased to forty percent for the fourth, fifth, and sixth album.[60] These advances were subject to minimum and maximum figures that increased with each subsequent album.[61] When an artist reached the fourth album, there no longer existed a differentiation in advance amount based on the artist's finishing place in the competition.[62] A sixth album was subject to a minimum advance of $300,000 and maximum of $800,000.

Royalty provisions in recording agreements are nuanced and complex, as they determine the amount an artist ultimately gets paid; the royalty provision for Season Ten's Agreement stretched over six pages.[63] The following is a brief summary of the provision. The Basic USA royalty rate was based on normal retail channels in the USA.[64] The rate was determined by the Contract Period and finishing place in the competition, shown in the table below.[65]

Contract Period	Winner	Runner-up	Third-Fifth Place	Sixth and Below
1st-3rd	16%	15.5%	15%	14%
4th-5th	16.5%	16%	15.5%	14.5%
6th-7th	17%	16.5%	16.%	15%

The Basic USA royalty rate for each Contract Period could have increased by either one-half or one percentage point depending on the amount of records sold at full price through normal retail channels and electronic sales in the form of permanent downloads.[66] The rate increased at the 500,000 and 1,000,000 unit marks.[67] The agreement contained typical royalty reductions for foreign sales, mid- and budget-price records, new technology records, etc.[68]

The Recording Agreement prohibited 19 from granting third party sync licenses of the audio material for use in television commercials "for political or religious causes or alcoholic beverages, tobacco products, firearms, feminine hygiene products,

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lotteries, or gambling; or a motion picture which is pornographic" without the artist's prior approval.[69] 19 also needed the artist's prior approval to the release of any record from any album which was to be sold as a so-called "premium;" and to release or exploit any "live" performances of the artist's records; subject to the merchandising and touring agreements, respectively.[70] McCreery and his Season Ten colleagues retained some control over 19's recording decisions.

After being informed of the 19 Recording contract details, one experienced music agent was '"shocked that they give them that much money.'"[71] The agent noted that "[a] respectable recording contract for a new artist . . . would include an advance of $100,000 to $150,000, [but] the 'Idol' contract potentially binds the artist to the show's producers for up to seven years, roughly twice as long as a typical first contract."[72] This observation of the exceptionally long recording term is correct. Clarkson won the competition in 2002, and has since released six studio albums.[73] Underwood's win occurred in 2005, and she has released four studio albums.[74] Both stars are still subject to a 19 Recording agreement.[75]

Season Eleven's Contract Modification

For Season Eleven, 19 modified the recording agreement for the runners-up of *Idol*. The modification added another signing option for 19, a so-called "Developmental Period," which paid out smaller advances in exchange for less music.[76] During the Developmental Period, if 19 asked runner-up Jessica Sanchez to record as few as four songs, she would have received a $30,000 advance; if asked to record between four to ten songs, Sanchez would have received a $60,000 advance.[77] The record company still retained an option to record an album with Sanchez, in which case she would have received the $175,000 advance similar to previous runners-up of *Idol*.[78]

The change in 19's contracts reflects the evolving consumer market in the music industry, as sales have shifted from albums toward digital sales and streaming. This trend has caused even established artists to struggle selling complete albums. The top selling album in the United States for 2013 was Justin Timberlake's *The 20/20 Experience*, which sold 2.43 million copies.[79] This was the lowest total for a top selling album since SoundScan began tracking sales in 1991.[80] The decline in album sales is best demonstrated by comparing Timberlake's 2013 album sales to the success of Timberlake's 'NSYNC in 2000. 'NSYNC's *No Strings Attached* album sold 2.42 million units during its debut week alone—a record that still stands.[81]

On the other hand, the top selling digital song in the United States for 2013 was Robin Thicke's *Blurred Line*s, which sold 6.5 million units.[82] Over 1.26 billion digital singles were sold in 2013,[83] which accounted for over seventy-five percent of all music-related transactions.[84] The modification of the *Idol* contract allows 19 to adapt to the changing music industry by providing an opportunity to concentrate on recording or releasing only individual tracks.

The Annual *American Idol* Live Tour

Although the recording advances have been reduced in recent years, the *American Idol* Live Tour provides an additional opportunity for the artists to exploit their talents for commercial success. The top ten contestants from the previous season are obligated to participate in the annual summer-long *Idol* Live Tour.[85] The 2014 tour had forty-one shows scheduled across the United States, all within a two-month window.[86] The concert format provided each audience with a thirty-song, approximately two-hour performance, often held at small- to mid-size venues.[87] Contestants received roughly $1,000 per concert, as well as a share in the merchandise revenue.[88]

Considering the popularity of the *Idol* series, one might expect a larger payout for the contestants. Upon further review, the amount seems reasonable for the not-so-long-ago unknown singer. Typically, "[a] newer artist . . . can collect a fee of $250 to $1,500 per show, while a band with a fan base strong enough to sell one thousand tickets may demand at least $5,000 to $10,000 per show."[89] Whether looking at each artist individually or at the entire group as one "band," the payouts for each concert are favorable to the ex-*Idols*. By the tour's end, the average earning for each participant has consistently equaled upwards of $100,000.[90] The Season Five tour was one of the biggest of the 2006 summer, beating tours of established superstars such as Madonna.[91]

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The *Idol* tour differs significantly from traditional tours, where young unknown artists open for established musicians in order to develop their image, fan base, and to publicize an upcoming album release.[92] The *Idol* tour is catered to the "*Idol* faithful, focusing on cover tunes and group numbers."[93] Season One contestant RJ Helton described the tour as "insane" due to the swarms of fans that followed the tour buses.[94] "'It was just crazy, the fans that we had and the money that we were making. All of those things none of us had ever dreamed about or even thought about or thought was even possible.'"[95] Season Five contestant Ace Young remembered instances of fans attempting to run onstage and sneaking into tour buses.[96]

The tour can test the physical and mental toughness of the young artists. Each year contestants describe the long hours, homesickness, and uncertainty of the future as constantly weighing on contestants' minds and bodies; the typical workday consists of twelve nonstop hours with meet-and-greets, performances, and press interviews.[97] Season Two's Kimberly Locke asserted, "'If you [do not] have the work ethic, then you [cannot] do life on the road. [It is] very hard.'"[98]

Jess Meuse and C.J. Harris, 2014 Tour participants, balanced the pros and cons of the "rite of passage" every *Idol* finalist must experience.[99] The schedule was taxing and production subpar, but the tour offered an opportunity to show gratitude to the show's fans who watched and voted for their favorite artists throughout the season.[100] The participants acknowledged that the tour provided a "springboard for the next phase of their careers" while allowing the artists to maintain an already loyal fan base.[101]

The next phase of the artists' careers is a major concern while on tour. With the exception of the winner and runner-up of the competition, who spend most of their free time working on their upcoming debut albums, the contestants are in a "limbo period" with respect to their careers.[102] The tour thus acts as an audition for a roster spot for one of 19's several branches, as well as for other potential record labels and management firms; the last day of the tour serves as 19's deadline to exercise its management option in the contestant agreements.[103]

The Management Deal

Perhaps the most controversial aspect of the 360 deal, 19 has the option to manage the careers of ex-*Idols* for a three year period—a typical duration for a management agreement.[104] Based on performances during the previous *Idol* season and summer tour, 19 typically exercises the option on two to four contestants each year.[105] The lives of these contestants become a "whirlwind" as the managers feverishly attempt to secure record deals, endorsements, and marketing before the new *Idol* season begins.[106] The management agreement has been described an "onerous" when analyzed alongside 19's additional contracts;[107] 19 receives a typical fifteen percent management fee apart from the remaining revenue streams under the 360 deal.[108]

The need for a proficient, zealous manager is paramount as the artist-manager relationship is one of the most important relationships in the music industry. Entertainment attorney Gary Fine described the management deal encompassed within 19's 360 deal:

> The artist needs someone fighting for them with regard to certain career decisions. The cozy relationship between 19 Management Ltd. and 19 Recordings Ltd. would create serious conflicts, and almost certainly remove any real ability for 19 Management to support tough decisions on behalf of their artists if the sister record company is opposed to them.[109]

This relationship between the 19 branches has led to the well-known criticisms of the contestants being under 19's control. One entertainment journalist criticized the management agreement as serving a "one-sided purpose" of promoting the *Idol* brand as opposed to developing the artist, concluding, "[that is] not management, [that is] ownership and there is a distinct difference in the roles of an owner and a manager."[110] This is a typical concern for 360 management deals related to talent competitions. "Someone 'in the business'" stated that he wished his favorite *Voice* contestant would fail to win the competition in order to retain artistic freedom, rather than having the network "own" the contestant.[111]

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Season 2 runner-up Clay Aiken was perhaps the first former contestant to sever his relationship with 19.[112] Aiken hired prominent entertainment attorney Jess L. Rosen to relieve him from his contractual obligations under the "octopus-tentacled" management contract.[113] Rosen obtained the release of Aiken from his 19 contract and was able to prevent Aiken from having to appear in all *Idol*-related events.[114] The failed business relationship left both sides with a feeling of resentment; Aiken has continuously "slammed" *Idol*'s tactics, and *Idol* staff members once gave Aiken the "cold shoulder" when Aiken unexpectedly showed up on the *Idol* set.[115] Rosen was later hired by Season Four contestant Mario Vazquez; many *Idol* followers believed the hiring was for Vazquez "to be released from the grip of 19 Entertainment."[119]

Kelly Clarkson's Experience with 19 Management

19 immediately thrust Kelly Clarkson into post-*Idol* controversy after winning the inaugural season.[117] One week after the competition, Clarkson was scheduled to sing the national anthem at a September 11 commemoration in Washington, D.C. Critics characterized the upcoming appearance as a promotional ploy, and Clarkson described the performance as a "bad idea" and requested to withdraw.[118] One Fox executive also expressed concern and hoped Clarkson would ultimately forego the performance.[120] Unfortunately for Clarkson, 19 insisted that she sing at the commemoration.[121]

Another of Clarkson's earlier post-*Idol* endeavors, a motion picture entitled *From Justin to Kelly*, was "killed by critics and then totally ignored by audiences."[122] Clarkson was obligated to perform in the film despite her dissatisfaction with the script. Clarkson told *Time* magazine, '"I knew when I read the script it was going to be real, real bad, but when I won, I signed that piece of paper and I could not get out of it. Two words: contractually obligated."'[123] Clarkson parted ways with 19 Management at the earliest possible moment.

When asked in a 2012 interview about her time after *Idol*, Clarkson candidly admitted that she contemplated quitting singing altogether.[124] On her relationship with 19 Management, Clarkson confessed:

> [I am] going to be completely honest—I had no one looking out for me. They were looking out for the show, and it was horrible. I was [nineteen] years old. I was smart enough to know that it [was not] about me, but that [did not] make it any easier. . . . [I am] all cried out about it, but my first four years, I hated my life; I almost quit a dozen times.[125]

Taking into account that virtually all *Idols* leave 19 Management[126] and the only *Idols* currently under the branch are recent contestants from 2012-2014,[127] Clarkson's assessment of 19 Management could remain true. It should be noted that three *Idol* alums left 19 Management to sign with the affiliated XIX Entertainment owned by *Idol* creator Simon Fuller.[128]

The Merchandising and Endorsement Deals

The management agreement may be onerous and unfavorable for the contestants, but 19 does provide abundant opportunities for contestants to earn substantial income. Season Ten's Merchandising Agreement spanned a period of three years, and 19 retained an option to extend the agreement for two additional years.[129] The agreement commenced for McCreery after winning the season finale, but 19 had a ninety-day window to exercise the agreement with the remaining contestants.[130] The services contestants agreed to render included:

> [T]o perform for the recording or filming of radio, television, cinema, or other forms of Advertising; to attend photo shoots at no expense to [the contestant]; when requested by [19], to distribute and publicly display information about Advertising, Merchandising, Publishing, Endorsements, or Sponsorships to [contestant's] Facebook, Twitter, and/or other applicable social networking accounts; to attend at no expense to [contestant] promotional events, conferences, conventions, tradeshows, 'meet and greet' sessions, and other sponsor-related activities; and to otherwise comply with all the terms and conditions of all Third Party Agreements.[131]

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For rendering these services, McCreery received a $50,000 advance, and the runner-up received a $40,000 advance.[132] They both received sixty percent of the net receipts during the initial three-year term. If 19 had exercised the additional two-year option, the contestant would have received a $200,000 advance and seventy percent of the net receipts.[133] The contestants also received considerable approval rights on the use of photographs, distribution of merchandise, and their participation in third party agreements.[134] 19 agreed to obtain the contestant's written approval for advertising in third party agreements related to political issues; religious issues; immoral activities; personal hygiene products; prescription drugs; tobacco and alcohol products; firearms; and products that would require the contestant to exclusively use that product.[135] Contrary to the widely held belief among critics, 19 did not have "complete control" over the artists signed to the Merchandise Agreement.

The *American Idol* Attraction Agreement also provides significant income opportunities for the contestants. Season Eleven winner Phillip Phillips earned $200,000 for his work at the *American Idol* Experience at Disney World, while the other finalists earned $50,000 for their appearances.[136] Season Eight winner Kris Allen was paid $100,000 to "turn to a camera and shout, 'I'm going to Disney World' after winning the competition and to visit the park;" and another $100,000 to film dialogue and singing segments for use in the attraction.[137]

Idol's Proven Track Record

Idol contestants have enjoyed both musical and financial success. In 2013, Underwood earned $31 million, largely due to a platinum album, touring, and endorsement deals; she has earned over $83 million over the past five years.[138] Clarkson earned over $7 million, while Phillips and Adam Lambert each earned $5 million.[139] Twenty-year-old McCreery grossed $3 million, and seldom-remembered Taylor Hicks earned $2.5 million.[140]

Much of the *Idol* alums' 2013 earnings came from live performances. A significant amount of Clarkson's earnings were attributable to her grossing approximately $250,000 per show.[141] Both Underwood and Phillips performed approximately 100 shows during Forbes's scoring period.[142] Chris Daughtry performed more than eighty live shows, grossing over $100,000 per show.[143] McCreery both opened for country superstar Brad Paisley's tour and launched a solo tour during Forbes's calculation period.[144]

In addition to commercial success, several former *Idols* have received critical-acclaim within the music industry. Some of Clarkson's most notable accomplishments include selling over twenty million albums worldwide,[145] winning three Grammys, and reaching number one on various *Billboard* charts over ninety times.[146] Underwood is also a multi-platinum selling artist and has won over thirty-nine music awards across several platforms, including the Grammys, *Billboard* Music Awards, and Academy of Country Music Awards.[147] Having sold over 15 million units in the United States from four studio albums, Underwood was the "best-selling album artist of the past ten years."[148] Clarkson and Underwood have been labeled "the show's two supernova-sized breakouts."[149]

The door to success has opened for more than just the winners of *Idol*. Season Five fourth place finisher Chris Daughtry has sold over fifty million digital downloads worldwide and is the possessor of the fastest-selling debut rock album in SoundScan history.[150] Season Eight runner-up Adam Lambert has enjoyed one of the more popular post-*Idol* careers.[151] His 2012 debut album outsold new releases by both Rihanna and Lady Gaga, and Lambert's sophomore album hit number one on the *Billboard* charts.[152] Bo Bice, David Archuleta, and Kellie Pickler are also non-winners who have achieved respectable success as artists.[153]

The same cannot be said for *The Voice*. Season Six champion Josh Kaufman was thrust into a Broadway show as opposed to the recording studio.[154] The move marked the first time that *The Voice* winner did not release a debut album after competing on the show.[155] Industry experts believe the decision was based on the lackluster performances of previous winners' debut albums; despite having completed seven seasons and garnering impressive television numbers, *The Voice* has yet to produce a bona-fide star.[156] The lack of star-producing success and the recent music industry trends may force Universal to continue exploring Broadway and other entertainment routes for upcoming winners of *The Voice*.[157]

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Conclusion

19's 360 deals with *Idol* contestants are not as oppressive as the widely-circulated rumors insist. Much of the negative stigma surrounding the contracts can be attributed to 19 utilizing one of the first 360 deals in music history in 2002. This same phenomenon can account for early contestants' extreme disappointment while under 19's management; such a deal was relatively unknown at the time.

19's 360 deal is certainly not friendly to a developing artist. The recording contract term can become excessively long and 19 may seem like it is in complete control of the artists' careers, particularly in the years immediately following the *Idol* season. Recent *Idol* alums spend countless hours touring and promoting the *Idol* brand, all while sharing the revenue with 19 under multiple agreements. When all of 19's revenue streams are combined under the 360 deal, "recent winners must turn over about half of their income—before paying any remaining agents, managers and attorneys, not to mention Uncle Sam," back to 19 Entertainment.[158]

These issues are not unique to 19's 360 deal. Any 360 record deal incentivizes labels to increase the duration of the term because of the increased revenue streams.[159] New artists almost always lack the bargaining power necessary to negotiate for artist-friendly provisions regardless of the contract model used by labels.[160] These provisions of a 360 deal do not necessarily need to be perceived as anti-artist. A 360 deal with an increased recording term can be beneficial "if it increases the company's interest in cultivating the artist's overall career . . . 'The artist becomes a brand, owned and operated by the label, and in theory this gives the company a long-term perspective and interest in nurturing that artist's career.'"[161] *Idol* creator Simon Fuller envisioned building such a brand for the show's contestants, which has come to fruition with several *Idol* alums.

There is no guarantee that making the final rounds, or even winning the competition, will lead to superstardom. Max Dawson, a Northwestern University professor who teaches a course on reality television, opines that '"the successes that people like Kelly Clarkson and Carrie Underwood have had are the flukes'" when contrasted with the list of ex-*Idols* who have been dropped by record labels.[162] Clarkson and Underwood may be the only bona-fide superstars, but many *Idol* alums have enjoyed successful careers and proven themselves as respected mainstream musicians. Adam Lambert, Scotty McCreery, and Phillip Phillips are recent alums to have established such careers.

Becoming a finalist on *Idol* presents a tremendous amount of financial opportunity for contestants. An *Idol* finalist's '"payday for a year of very hard work comes to something like $1 million. . . . The top four all do Disney World commercials; [that is] one of the biggest paydays. They also get money for albums and shooting the Ford commercials.'"[163] The *Idol* Live Tour traditionally earns participants upwards of $100,000.[164]

Many *Idol* alums think the busy schedule, onerous management contract, and constant *Idol* promotion are small prices to pay for the "golden ticket" to the fast-track to success. Taylor Hicks expressed his thanks to *Idol* for changing his life.[165] Jordin Sparks thanked *Idol* for kick-starting her career with a fan base that money cannot buy.[166] Scotty McCreery was asked whether the large percentage of earnings allocated back to 19 was a point of contention.[167] He replied, "'[It is] depressing . . . but [I am] still making a good amount. . . . [I am] not in any way complaining . . . . [I am] doing a lot better than I was a few summers ago, living off the coin jar in my truck.'"[168] That is The American Dream.

But is that dream starting to fade? *Idol,* one of the most successful shows in television history, has continuously declined in viewership in recent years.[169] The Fox Network admitted "the glory days of *American Idol* are behind it," as the show that once finished second only to the Super Bowl in single-event viewing with 33.7 million viewers drew only in the single-digit millions for the 2014 Season.[170] The television aspect of *Idol*, which was beyond the scope of this article, will undoubtedly be the most significant factor in determining *Idol*'s future.

From the musical perspective, Season Eleven's contract modification provides insight into adjusting to the changes arising in the consumer market. One industry expert expressed that he would not be surprised if *Idol* implemented a similar change in

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the winners' contracts.[171] The music industry is constantly changing with new technology, and for a show that has consistently placed its contestants above all else,[172] one can expect 19 Entertainment to continue launching successful careers—possibly by conceiving another innovative format—just as was *Idol* in 2002.

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Is that Fair (Use)? Third-Party Trademarks in Songs and Media by Tamera Bennett

Bennett covered the requirements for nominative fair use of trademarks, which is what allows us in the U.S. to have comparative advertising, parody and noncommercial use of trademarks. The three requirements are that the product or service in question must be one not readily identifiable without use of the trademark; only so much of the trademark may be used as is reasonably necessary to identify the product or service; and the user must do nothing that would, in conjunction with the trademark, suggest sponsorship or endorsement by the trademark holder.

These standards may differ when moving from a descriptive or commercial use of a trademark into a creative use. Creative uses are protected as free speech under the First Amendment, requiring courts to balance the rights of the trademark holder and the First Amendment rights of the creative work. In such a situation, courts typically consider two factors: whether the use of another's trademark has artistic relevance, and if so, is it deliberately misleading as to the source or content of the work.

Bennett also discusses cases involving the use of trademarks in titles of creative works, in movies, in songs, and in video games, showing that some uses of third-party trademarks in these creative works may be permissible without securing permission from the trademark holder, particularly if such use does not result in consumer confusion about the source of the creative work.

The Manager as the New Label: The Expanding Role of Artist Managers by Craig Barker and Peter Schwartz

The presenters observe, "Personal managers in the music industry have long coordinated all aspects of the careers of artists. What is relatively new in the industry is the frequency with which managers are not just managing the artist's relationship with the label, publisher, and booking agent; managers are now becoming the artist's label, publisher, and booking agent. The explosion of the DIY industry, made possible by the democratization of the internet, has shifted the balance of power from labels to managers – not completely, of course, but unmistakably so for many artists."

The roles of a DIY manager can include interacting with a distributor/aggregator; hiring and supervising independent publicity, radio promotion, and retail promotion; involvement with royalty accounting and payment vendor; artist development; and coordinating touring with album release. These used to be discrete roles, with the manager overseeing all these relationships. Issues regarding fiduciary duty and conflicts of interest for managers representing artists were also addressed. A drafting checklist for setting up deals between managers and artists is included in the materials.

Other changes in the music business were also discussed, such as live performances often providing more revenues than record sales, changes in the relationship between artists and fans due to social media, and the trend of concert venues shifting more of the marketing responsibilities for concerts to artists.

Trolling to Combat Online Infringement? Ethical Issues in Copyright Litigation by Claude Ducloux, Mitch Stoltz and Evan Stone

Evan Stone discusses a special subpoena provision in the Digital Millennium Copyright Act (DMCA) that enables a copyright holder to obtain the identity of an alleged online copyright infringer simply by filing a proposed subpoena and supporting documentation with the Clerk of any United States District Court, then serving the subpoena upon the Internet service provider that is providing Internet service to the alleged infringer. Included in the written materials is an example of a preferred subpoena form, a sample of an infringement notice that complies with the notice and takedown provisions of the DMCA, and a declaration stating that the information obtained pursuant to the subpoena will only be used for purposes of protecting the copyrights that were infringed.

Mitchell Stoltz discusses copyright trolling, which refers to an entity whose business revolves around the systematic legal enforcement of copyrights in which it has acquired a limited ownership interest. One example of such a business model involves

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three simple steps: (1) recruiting content owners, principally newspapers; (2) identifying plausible cases of copyright infringement, such as the reposting of newspaper articles on blogs; (3) acquiring a partial assignment of copyright tailored precisely to the infringement in step two. It was noted that steps one and two can easily be reversed and that for one company, this model generated significant profits from a string of quick settlements. In one view, the essence of trolling is that the plaintiff is more focused on the business of litigation than on selling a product or service, or licensing their IP to third parties to sell a product or service.

Issues and problems with the DMCA special subpoena provision and copyright trolling were discussed, as well as some potential alternatives to addressing these issues.

Getting Real with Reality Television by Robert Darwell

This presentation focused on agreements for reality television programs. The fact that reality shows are referred to as "unscripted" and professional actors are not being utilized (except as hosts in some cases) does not mean that there will be fewer agreements to negotiate. In fact, some reality shows raise a gamut of legal concerns and involve numerous contracts. The type of show that is contemplated determines the agreements needed.

Some of the types of agreements needed for reality shows include host and judge agreements, which tend to be the most negotiated agreements. Contestant and participant agreements, on the other hand, typically involve little negotiation, often being offered on a "take it or leave it" basis. The presentation included a discussion of many common provisions of on-screen talent agreements. Also covered were basic deal terms found in production services agreements for the producers of reality programs. The written course materials include several sample agreements for reality television programs.

Annual Roundup of Entertainment Law Rulings by Stan Soocher

Professor Soocher provided his annual roundup of entertainment law rulings. One of the rulings covered involved a management company obtaining a preliminary injunction to prevent a teen singer previously represented by the company from using the stage name "Sharvé." After gaining notice singing at the NBA All-Star Game, teen singer Kaylah Baker entered into an exclusive representation agreement with Visionworld Entertainment, who helped develop a signature wholesome image for Kaylah and promoted her as Sharvé. After a dispute between Kaylah's parents and Visionworld over how to promote Sharvé on social media, the parents sent a contract termination notice and continued to promote Sharvé on their own, using a much more risqué image for the teen singer. Visionworld filed a trademark suit. In granting Visionworld an injunction, the court noted that the contract between Visionworld and the Bakers was silent on the issue of ownership of any intellectual property created during the relationship and that Visionworld came up with the name and was the first to use it in commerce.

Mike Tolleson presents Stan Soocher with the Texas Star Award

Another case involved The Commodores and a band member's rights in the band's name once that member leaves the band. The general principle is that a founding member of a band who leaves the band loses his or her rights in the name, while founding members who stay in the band retain the rights to the name. However, the former member is generally permitted to identify themselves as being "formerly of" the band.

Some of the other cases covered involve the validity of a television network's shutting down of fan-developed Facebook and Twitter accounts for a TV series on the network, whether a book publishing agreement from before the era of e-books included e-book rights for the publisher, and whether attributes and character traits of Sherlock Holmes and Dr. Watson added to their characters in stories that are still protected by copyright revived the expired copyrights on the characters from stories in the public domain.

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Legal Implications of User-Generated Content by Robert Latham

User-generated content (UGC) on sites like YouTube, Facebook, Twitter, and Instagram can raise a host of potentially thorny legal questions concerning intellectual property rights, defamation, and privacy rights. Service providers are granted some protection from liability for copyright infringement arising from UGC posted on their services by a safe harbor, for which the eligibility requirements are discussed. There is no obligation for service providers to monitor their sites for infringing content. However, if service providers know about or learn about *specific* infringing content, they have to be proactive.

Otherwise, the burden is on the copyright owner seek out and identify infringing material, then notify the service provider of its presence on the site. The contents of a proper notification of infringing material from a copyright owner to a service provider are covered, as well as the process that occurs once notice is given to the provider. The presentation also offers some practical tips for website operators and copyright holders on how to deal with the legal issues associated with UGC.

"Twibel," or libel cases resulting from comments made on Twitter were also discussed, illustrating how traditional defamation law is being applied to social media.

Managing Your Online Content and Website by Carl Butzer and Shannon Zmud Teicher

Online privacy was a focus of the presentation, it being noted that the U.S. does not have comprehensive laws for online privacy or data security. California leads the states in online privacy laws. A number of California laws in this area were discussed, including the recently passed "eraser button law" which mandates that websites allow minors (residents under 18 years old) to remove information they post online.

Copyright issues were also a focus, including a copyright infringement claim by CBS against ABC over the 2012 ABC reality show, *The Glass House*, which was about a group of strangers who live together in a house, are cut off from the outside world, and compete with each other over a number of weeks until one person remains. CBS claimed this was similar to its show, *Big Brother*, which has aired since 2000. In denying CBS' request for a preliminary injunction, the court noted that some copying had occurred, but observed that CBS could not obtain copyright protection for "a voyeuristic reality show involving a group of 12 to 14 participants who compete for a grand prize while being subjected to round-the-clock observation while locked in a soundstage designed to give the appearance of a house."[1]

The Singular Circumstances of Garcia v. Google: What Happened? And What Happens Next? by Neil Rosini

This presentation focuses on an unusual case in which an actress who appeared in a film claimed to own the copyright in her performance. In a 2014 decision, the Ninth Circuit agreed with the actress and granted a preliminary injunction barring performance of the film on YouTube, which had made the film available for viewing.

The actress was Cindy Lee Garcia, who answered a casting call for a low-budget amateur film with the working title, "Desert Warrior." The producer told her it was an adventure film set in ancient Arabia. She worked for three-and-a-half days and was paid $500. She saw her performance after the film was uploaded to YouTube. The film, however, was an "anti-Islamic film" entitled "Innocence of the Muslims." Garcia claims that her dialogue had been partially dubbed over to make it appear she was asking, "Is your Mohammed a child molester?" After the film aired on Egyptian television, a fatwa was issued and Garcia began receiving death threats.

Garcia applied for a temporary restraining order against Google and the film's producers seeking removal of the film on the basis that its posting infringed her independent copyright interest in her performance. In finding that Garcia may own the copyright

1 *CBS Broad. Inc. v. American Broad. Co., Inc.*, No. CV 12-04073 GAF-JEM (C.D. Cal June 21, 2012).

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in her performance, the court found that this situation did not fit the requirements of a work for hire. The court also found this was not a joint work, with the producer and the actress being joint owners of the copyright (which would have allowed the producer to exhibit the film). The written materials and presentation focus on the court's analysis of the copyright issue as well as the potential consequences of the decision for actors, filmmakers, and online hosts if not modified in further proceedings.

Current Trends in Film and Television Finance by Sally Helppie and Hal Sadoff

Covered in this presentation and its accompanying written materials are current trends relating to private placement memoranda; studio co-productions and co-financing (including single picture deals, slate deals, and participation interests); independent production, finance, and distribution agreements; crowdfunding and project websites; co-branding, tie-ins, and product placement and integration; state, local, and county incentives; pre-sales and gap financing/projections; non-profits and sponsorships; new media companies; high net worth individuals; and distributor financing.

The panel discussed the significant amount of financing for independent films coming from high net worth individuals. One way to structure financing deals with these individuals that can eliminate the need to comply with securities regulations is to make the individual an "active" participant in the production rather than a passive investor. "Active" doesn't have to mean that the investors are always on set and in the back office. Instead, giving the investor some rights of participation and control over areas like casting and budgeting may suffice.

Another topic of discussion was the growing importance of video on demand (VOD) revenues for independent filmmakers, particularly given the difficulty of obtaining theatrical distribution. Obtaining a certain level of talent in a film can provide a floor value for domestic VOD rights. VOD can be low risk and generate substantial revenue over time, even representing the main source of revenue for some films.

Guilds and Unions in a Right-to-Work State by Sally Helppie

Guilds have rules and requirements for their members, which typically include the requirement that members work only for companies that have signed a collective bargaining agreement or minimum basic agreement with the guild. For SAG/AFTRA, this is known as "Global Rule One." Guild Basic Agreements, which are usually based on the budget of a project, determine the minimums to which union members are entitled for working on that project, and all persons in "covered categories" for that employer will be governed by the agreement. In effect, it is each position that determines coverage, and those working in the covered positions are entitled to the benefits of the agreement's working conditions. This is true whether or not the individuals hired for a covered job are union or guild members, which explains why both union and non-union members can work alongside each other on a production.

Guilds cannot force non-signatory production companies to hire only guild members, but a guild can prevent or discourage their members from working for production companies that are not signatories to the collective bargaining agreement. To avoid this, a guild member may opt to choose Financial-Core ("Fi-Cor") status, which means the person is a dues-paying non-member of the guild, though the dues he or she pays are lower than those for members. Fi-Cor allows a SAG/AFTRA actor to take a job on a nonunion production without violating the obligations owed to his or her guild, although those on Fi-Cor status are not entitled to some of the other benefits of guild membership.

Under Texas law, employment cannot be denied based on union membership or non-membership. Provisions in an employment contract requiring workers to be or not be part of a union are void and unenforceable in Texas. Employers should not inquire into guild or union membership in making hiring decisions.

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Wrangling the Crowd: Legal Issues with Non-Equity and Equity Funding via the Internet by Roberto "R.C." Rondero de Mosier and Kirk T. Schroder

This presentation focused on issues relating to equity crowdfunding (as opposed to rewards-based or donation-based crowdfunding). Title III of the Jumpstart Our Business Startups Act ("JOBS Act") is designed to extend crowdfunding into the world of investment financing by allowing businesses to solicit equity securities to an unlimited number of purchasers over the Internet, so long as the actual investors meet minimum qualifications set forth in the Act and in SEC regulations. The Act, intended to allow investments in securities with fewer regulatory hurdles, appears to be a boon for small businesses seeking capital. However, at the time of the presentation, the SEC had yet to promulgate rules for Title III of the JOBS Act to allow private placement participation by non-accredited investors through regulated crowdfunding platforms. The written materials cover many issues relating to Title III of the JOBS Act.

With the delay in the implementation of Title III, Texas and some other states have taken matters into their own hands, crafting rules that will allow in-state companies to solicit and raise money from a much broader cohort of in-state investors. The Texas State Securities Board has published its set of proposed rules for equity crowdfunding. When passed, the regulations would allow Texas companies to raise up to $1 million a year from virtually any Texan, not just those with enough wealth to qualify as accredited investors. Most existing crowdfunding portals are open only to accredited investors, which represent less than 2% of the U.S. population. The Texas approach would strip away many of the SEC's reporting requirements, as well as the costs associated with them. Details of the proposed Texas rules were discussed in the presentation. It was noted, however, that once the Federal rules are introduced, these Texas rules could be pre-empted.

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All submissions to the TESLAW Journal are considered. Articles should be practical and scholarly to an audience of Texas lawyers practicing sports or entertainment law. As general guidelines, articles should be no more than twenty-five typewritten, double-spaced, 8 ½" x 11" pages, including any endnotes; however, longer articles will be considered. Endnotes must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form. Please submit articles via e-mail in word or similar format to **timmer.law.office@att.net** or email this address to discuss potential topics.

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