

PANEL III: The Current State of Sports and the Media

Moderator: Mark Conrad^{*}
Panelists: Laurie Basch[†]
David S. Denenberg[‡]
Jim Durham[§]
Jerome S. Ebenstein^{||}
Brett Goodman[#]

MS. COWARD:^{**} Hi. Welcome back.

I am very excited to present our next panel. The current state of sports and the media is clearly cutting-edge. Rapidly changing

^{*} Associate Professor of Legal and Ethical Studies, Fordham University Graduate and Undergraduate Schools of Business Administration. Publisher, *Sportslaw News.com*. Co-Editor, *Sports Lawyer's Association Newsletter*. B.A., City College of New York, 1978; M.S., Columbia University Graduate School of Journalism, 1982; J.D., New York Law School, 1981.

[†] Partner, Hall, Dickler, Kent, Goldstein & Wood, LLP, Feb. 2001–Dec. 2002. Currently serves as general counsel to an Internet marketing company and is a consultant to companies in the area of advertising and marketing law. Adjunct Associate Professor of Law, Fordham University School of Law, 1994–96. B.A., Trinity College, 1978; J.D., Fordham University School of Law, 1990.

[‡] Vice President of Legal & Business Affairs, NBA Entertainment. Counsel, NBA Entertainment. Associate, Paul, Hastings, Janofsky & Walker, LLP, 1991–95. B.A., *magna cum laude*, Colgate University, 1988; J.D., *cum laude*, Harvard Law School, 1991.

[§] Senior Vice President of Sponsorship and Affiliate Relations, MLB Advanced Media, LP. President, Law Firm Development Group. Founder, Law Firm Marketing Directors Institute, 1996. Creator, *Just Think . . . about Clients*TM CD-ROM. B.A., Harvard College, 1977; J.D. Emory University School of Law, 1983.

^{||} Assistant General Counsel, CBS Broadcasting. Attorney, Federal Trade Commission, 1967–72. B.A., Brooklyn College, 1963; J.D., Brooklyn Law School, 1966.

[#] Director of Business Affairs & Business Development, NBC Olympics. B.A., Princeton University, 1990; J.D., Columbia University Law School, 1995.

^{**} Nicole Coward, Co-Symposium Editor, Fordham Sports Law Forum, Fordham University School of Law. B.A., University of Virginia, 1999; J.D. expected, Fordham University School of Law, 2003.

technology means the media industry is constantly evolving. The sports industry must therefore respond accordingly.

In examining the different legal issues that arise in negotiating contracts between sports and media entities, our panelists represent a variety of viewpoints.

Our final moderator today is Professor Mark Conrad. I now leave it to Professor Conrad.

PROFESSOR CONRAD: Thank you very much.

This is the question for the last panel: Where do we even start on a subject as broad, all-encompassing, and subject to change as the issue of media and sports, media contracts and sports, and where do we look from here?

We have assembled a very impressive panel to lead us through some of the issues as they see them, dealing with their own expertise and their comments.

Without any further ado, I would like to start our discussion.

Mr. Durham?

MR. DURHAM: When I was first asked to talk about the web aspects of sports and how it works at Major League Baseball (MLB), I noted that this panel was entitled "The New Age in Sports."

On the web, it is the new age of sports in many ways. I might describe sports business on the web right now as the "Wild, Wild West" of business.

And, by the way, I should do the legal thing, and issue a disclaimer here. What I say today reflects my opinions, not the opinions of MLB. I have to live with what I say, but do not impute any of it to the league.

In this "Wild, Wild West" of sports there are many things going on that create interesting issues for lawyers. There are also many things going on out there that create great business opportunities.

I will spend a few minutes talking about the web space for sports generally, and then a few minutes talking about what we do at MLB.com,¹ and then discuss the resultant legal issues.

Let's start by noting that ESPN is now being wrapped by MSN on the screen.² That is not an insignificant development in online sports. One of the biggest and most successful brands in online sports is suddenly doing a deal with somebody even bigger, with broader reach; this has all kinds of implications for legal rights (and on line "traffic" and advertising opportunities). I cannot imagine the complexity of that deal. I also understand FIFA (*Federation Internationale de Football Association*) may have a Yahoo! deal,³ and that AOL and SportsLine did a deal with the National Football League (NFL).⁴ These deals, too, have broad legal ramifications.

When I talk about the "Wild, Wild West" of online sports, I am also thinking of the emergence of FOXsports.com,⁵ which seemed to start off essentially as a service to the Fox television networks; all of a sudden, they are hooked up with Lycos.⁶ The site appears in a Lycos wrapper.⁷

¹ <http://www.mlb.com> (n.d.).

² See Press Release, Microsoft, ESPN.com and MSN Team Up to Combine Best of Sports with Leading MSN Content and Services (Sept. 6, 2001) (describing the deal that makes ESPN the exclusive sports content provider for MSN Network), <http://www.microsoft.com/PressPass/press/2001/Sep01/09-06MSNESPENPR.asp>.

³ See Christopher Saunders, *Yahoo!, FIFA Sign United*, Internet.com, at <http://siliconvalley.internet.com/news/print.php/1005391> (Apr. 8, 2002); *Official Site of the 2002 FIFA World Cup*, at <http://fifaworldcup.yahoo.com> (last visited Mar. 25, 2003).

⁴ See Christopher Saunders, *NFL Inks Ad Deal with CBS, AOL*, Internet News, at <http://internetnews.com/IAR/article.php/799531> (July 11, 2001) (describing the \$325 million cross-promotional arrangement through which AOL will promote NFL Internet Network, Sportsline.com will produce NFL.com and individual teams' websites, and AOL and CBS will be granted limited use of the NFL brand and promotions in NFL content).

⁵ <http://foxsports.lycos.com/named/Index/Home> (n.d.).

⁶ See Colin C. Haley, *Terra Lycos, FOXSports.com to Team*, Internet News, at <http://www.internetnews.com/IAR/article.php/955011> (Jan. 15, 2002) (describing the estimated \$300 million deal making FOXSports.com the default sports website on the Lycos network).

⁷ See *id.*

And then obviously you have the Olympics and the web.⁸ There are people here much more qualified than I am to talk about that. Even in your handout book for this conference, there is a whole article on how web rights and the Olympics might come into conflict.⁹ That is an enormous issue, that streaming media is now available online has a tremendous impact on sports.¹⁰

We who also have video on MLB.com, must address issues like those the Olympics has with the Internet,¹¹ especially those related to the rights of broadcast partners.¹²

Yahoo! has an arrangement with the MLB Players Association for their website.¹³ CNN/SI¹⁴ principally supports its other related entities, as opposed to trying to be a major player as of now. Then there are the little niche players, as I call them, like Sandbox.¹⁵ You also have Global Sports, which takes a lot of sports retailers' merchandise and sells it online.¹⁶ They are sell hundreds of millions of dollars in sporting equipment.¹⁷ So there is just all

⁸ See, e.g., *Salt Lake 2002*, at <http://www.saltlake2002.com> (n.d.).

⁹ See Brandi Barnes Kellis, *A New Technology Question of Olympic Proportions: Should NBC's License to Broadcast the Games Include Internet Broadcasting Rights?*, 8 J. INTELL. PROP. L. 245 (2001).

¹⁰ See, e.g., *id.*

¹¹ MLB, *MLB.com Worldwide Webcasts*, at http://mlb.mlb.com/NASApp/mlb/mlb/video/mlb_worldwidewebcasts.jsp (last visited Mar. 20, 2003) ("For the FIRST TIME EVER, Fans Outside the U.S. & Japan Watched the 2002 Playoffs LIVE on MLB.com!"). See also Jim Hu, *Baseball Officials Plan Live Video Streaming*, CNet News, at <http://news.com.com/2100-1023-275123.html> (Oct. 30, 2001).

¹² Hu, *supra* note 11.

¹³ See *Major League Baseball Players Association*, at <http://www.bigleaguers.yahoo.com/mlbpa/history.html> (last visited Mar. 25, 2003) (showing that Bigleaguers.com is powered by Yahoo! Sports).

¹⁴ CNN/SI is the alliance between CNN and Sports Illustrated magazine. See *Sports Illustrated.com: A CNN Web Site*, at <http://sportsillustrated.cnn.com> (last visited Mar. 25, 2003).

¹⁵ Sandbox.com is an independent sports entity, primarily focusing on facilitating fantasy sports leagues and providing industry news. See *SandboxPlus: Worldwide Leader in Fantasy Sports Since 1995*, SandboxPlus, at <http://www.sandboxplus.com> (n.d.).

¹⁶ See Davide Dukceovich, *Global Sports: The E-Winner You've Never Heard of*, Forbes, at <http://www.forbes.com/2002/02/26/0226global.html> (Feb. 26, 2002) ("Global Sports . . . operates the Web sites of sports retailers Modell's, the Sports Authority and the Athletes Foot.").

¹⁷ *Id.* ("Global Sports . . . execs expect revenue to grow 95% to more than \$200 million this year and project pro-forma profit to increase to \$1.1 million. The company has practically no debt and a cash flow of \$107 million.").

2003]

CURRENT STATE OF SPORTS & THE MEDIA

457

kinds of stuff going on out there. And I certainly do not know about all of the many deals going on out there.

My title is Senior Vice President of Sponsorship and Affiliate Relations. Sponsorship is a fairly obvious business, but affiliate relations just means doing all kinds of other deals. I spend hours every week talking to wireless manufacturers and carriers, about ways in which we can do wireless content deals. We have Nextel as a major sponsor of our site.¹⁸ But in addition to wireless opportunities, there are myriad potential deals that could be done.

Each league has its own—quite different—Internet structure. You will learn more about how the National Basketball Association (NBA) does business later in this program today.¹⁹ The NFL put its rights out for bid.²⁰ The National Hockey League (NHL) has centralized rights.²¹ But do the individual clubs keep some of their own Internet rights, or are they part of the league? These are the types of issues that vary from league to league, and they are all issues of real importance. Now I want to shift to the MLB model, and what issues we face and how it has worked for us.

In 1999, all the MLB owners looked around and said, “We have thirty club web sites, most of which aren’t making any money. We don’t even know if we’re doing this Web thing well.”²² To many, it was more of a cost item. The uniform resource locator [URL], MLB.com, did not even belong to MLB.

¹⁸ See MLB, *MLB Wireless Presented by Nextel*, at http://mlb.mlb.com/NASApp/mlb/mlb/official_info/mlb_wireless.jsp (last visited Mar. 20, 2003).

¹⁹ See *NBA.com Terms of Use*, at <http://www.nba.com/news/termsfuse.html> (Mar. 25, 2003) (describing the NBA’s media structure in which NBA.com is owned by NBA Media Ventures, LLC).

²⁰ See, e.g., Clint Boulton, *NFL May Punt ESPN.com for a New Producer*, Internet News, at <http://www.internetnews.com/xSP/print.php/705141> (Mar. 5, 2001).

²¹ See Press Release, Microsoft, *MSN and NHL Power Play Is a Win for Hockey Fans Across North America* (Oct. 11, 2001), <http://www.microsoft.com/presspass/press/2001/oct01/10-11nhlpr.asp>; Jon Surmacz, *Major League Baseball is Online. How It Got There Is a Lesson in Cooperation and Conformity*, CIO MAG., Oct. 1, 2001 (featuring Rich Libero, NHL.com’s Vice President of Edit and Production, explaining that while the NHL allows individual teams to run their own sites, they do centralize production so as not to “run into consistency problems from site to site”), http://www.cio.com/archive/100101/uniform_content.html?printversion=yes.

²² See Surmacz, *supra* note 21.

The site was majorleaguebaseball.com, because there happens to be a law firm called Morgan, Lewis & Bockius whose website was MLB.com.²³ You cannot even accuse them of cybersquatting.²⁴ It was simply the name of their law firm, and they got there first.

So the owners put their heads together and say, “It would help if we had MLB.com . . .” There is a little legal issue, right?²⁵ And they happened to be represented by Morgan, Lewis.²⁶ I do not know what happened, but I am sure it was a very friendly negotiation. I can just hear the owners thinking: “If we get MLB.com, and we take all the club web sites and put them into this one entity, oh my God, it’ll be worth billions of dollars.” We are talking about 1999 right here. It truly would look like a billion dollar business then. And you have McKinsey²⁷ and other advisors saying this is what baseball should do.

So the baseball owners say, “Let’s do it.” A thirty-zip vote by the owners launched MLB Advanced Media, LLP (the official company name for MLB.com). I am told that this is the first

²³ See Bernhard Warner, *Where Will Baseball Go? And What Will It Do When It Gets There?*, Industry Standard, <http://www.thestandard.com/article/display/0,1151,13234,00.html> (Apr. 3, 2000) (In 1999, MLB.com did not exist as the official website of MLB, because the law firm Morgan, Lewis & Bockius had already obtained the rights to the domain name. MLB used the domain name majorleaguebaseball.com until it was able to purchase the MLB.com domain name from the firm.); Mark Conrad, *MLB Gets Web Rights in MLB.com: Domain Name Transferred From Prominent Law Firm*, Sports Law News, at <http://www.sportslawnews.com/archive/Articles%202000/mlbwebsite.htm> (Sept. 5, 2002).

²⁴ See *Franchisor Domain Names Protected Under New Law*, FRANCAST (Piper, Marbury, Rudnick & Wolfe, LLP), Dec. 1999 (explaining what “squatting” is and why it is harmful to franchisers), <http://www.piperrudnick.com/db30/cgi-bin/pubs/DecFrancast.pdf>; Conrad, *supra* note 23.

²⁵ See *Domain Name Clearing v. F.C.F.*, 16 Fed. Appx. 108 (4th Cir. 2001) (holding that it is unlawful to register a domain name in bad faith, such that an entity may not register a domain name unless it has some stake in it, such as a similar trademark or corporate name).

²⁶ See Conrad, *supra* note 23.

²⁷ See, e.g., Clinton Wilder, *Redefining Business: A New Game Plan*, Information Week, at <http://www.informationweek.com/832/rbbaseball.htm> (Apr. 9, 2001) (“To help set [MLB.com] up, baseball acted much like any large company developing a nascent Web strategy: It retained business consultants from McKinsey & Co., financial advisers from Morgan Stanley Dean Witter, and tech integrators from Scient Corp.”).

unanimous vote ever, but it had to look like such a no-brainer.²⁸ Amidst the dot.com boom, they may have been thinking: “We’ll give you a few million bucks and you give us back a \$100 million in a few weeks.” That might have been believable in October of 1999.

Major League Baseball Advanced Media (MLBAM) was actually formed in January 2000. We now have all thirty club sites rolled into MLB.com; MLBAM is, however, a separate entity from MLB Properties.²⁹ Our rights are granted through a rights agreement with baseball, but we are a separate operating company.³⁰

We have to make money for our investors, our owners, who are the club owners. As such, we have a real challenge, because right now it is a difficult sponsorship and advertising market in many ways. So we have to find a way to make this work.

It is all about this little equation: web traffic + content + products = revenue (profit). Traffic is the number of people coming to the site. Content and products are what you have to sell them when they get there. And, of course, you want to sell them in a way that results in profit. It is just a basic business model.

Let me just take you through quickly the revenue model.

Sponsorship and advertising—everybody knows about these. We do have some advantage, because we are not just selling sponsorship or ads based on the eyeballs. We are fortunate. As a sports league, we have valuable trademarks, and a game that

²⁸ See Surmacz, *supra* note 21. (“In an unprecedented show of cooperation, the owners voted 30-0 in favor of the plan for completely revamping the league’s Web properties. In doing so, they cast a yeas for competitive balance as teams would equally share in all of MLBAM’s net profits.”).

²⁹ See Wilder, *supra* note 27; Press Release, RealNetworks, MLB Advanced Media and RealNetworks Announce Exclusive, Three Year Agreement (Mar. 27, 2001) (“MLB Advanced Media L.P. (MLBAM) is the interactive media and internet company of Major League Baseball. MLBAM manages the official league site, www.MLB.com, and each of the 30 individual Club sites to create the most comprehensive Major League Baseball resource on the Internet.”), <http://www.realnetworks.com/company/press/releases/2001/mlb.html>.

³⁰ See Wilder, *supra* note 27 (noting that owners of teams in MLB “established a separate company, Major League Baseball Advanced Media LP, and recruited a real Web guy . . . to run it”).

companies want to be associated with. We have some assets to sell that not everyone has. But we also get great traffic. We get a couple of million people a day coming to our site, all season long, which is very strong. Last year, before ESPN joined forces with MSN,³¹ we were nearly up with them in traffic during the season—and they report on all sports. So we get great traffic.

Additionally, anybody who is a sponsor on our site is going to get some affinity with baseball. That is important to a lot of companies. So we sell sponsorship more than advertising.³² You cannot call me up and say, “I have \$20,000. I’d like to run a banner across MLB.com for the month of June.” That is not what we are selling. You have to have another zero or two behind it, with a product in a category in which we can give you some exclusivity.³³ That is how we distinguish sponsorship from advertising.

In addition to sponsorship and advertising, we get revenue from product and ticket sales. We sell all the merchandise online for baseball.³⁴ If you want a Mets cap or a Reds cap, you can go online right now, and in five minutes you can have an order in process. Online tickets sales are managed by us for all of the clubs.³⁵ And we have auctions of authentic merchandise.³⁶

³¹ See Press Release, ESPN, ESPN.com Generates Record 9.7 Million Unique Users in September; Site Registered Largest Lead Ever Among Sports Sites (Oct. 15, 2001) (describing ESPN.com’s growth following its deal with MSN), <http://advantage.msn.com/docs/newsletter/november/espn.htm>.

³² See MLB, *Official Sponsors*, at http://mlb.mlb.com/NASApp/mlb/mlb/official_info/mlb_official_sponsors.jsp (last visited Mar. 25, 2003); Ryan Naraine, *My Love-Hate Relationship with MLB.com*, At New York, at <http://www.atnewyork.com/news/article.php/785631> (June 15, 2001) (“MLBAM has already made the bold (and risky) decision to banish advertising from the site, concentrating instead on grandiose plans to make it the world’s largest baseball store. Sponsorship deals with big-name corporate clients are in the works and the streaming media add-ons are certainly money-making possibilities.”).

³³ See, e.g., Press Release, *supra* note 29 (announcing the deal that made RealNetworks “the exclusive platform for a broad range of MLBAM’s online services, including live audio webcasts of all MLB games, and a customizable, on-demand, archival, video highlight service”).

³⁴ See MLB, *MLB.com Shop: For All Things Baseball*, at <http://shop.mlb.com> (n.d.).

³⁵ See *id.*

³⁶ See *id.*

Subscription sales are another important revenue source—which I will go through rather quickly in the interest of staying on time. In the subscription category, many of you probably read that last year at about this time, we launched our game day audio.³⁷ With this service, you can listen to any baseball game on your computer, all season long, for ten bucks. We were trashed in the media as being greedy. To some sports writers, and a handful of fans, charging ten dollars for what used to be free was awful.³⁸ A number of articles were written about how horrible it was that baseball was charging people to listen to games on the Internet.

A hundred and twenty thousand people signed up for it through us, and a couple hundred thousand more subscribed through RealNetworks,³⁹ our partner on that project, and it did not take long for the outrage to subside. As it turns out, it is a pretty good business model, because I think we will probably have twice as many subscribers next year.

Another subscription product we have is Custom Cuts, which allows you to go in and create your own video highlights.⁴⁰

We have Baseball's Best, with which you can go back and listen to any one of sixty complete great baseball games. The fee for this is \$2.95 and you rent the game video for two days.⁴¹ I used it to go back and watch some great World Series games. It is unbelievable.

And then we have Highlights Direct,⁴² which will be delivered to subscribers every morning. You can give us a list of the players

³⁷ See Press Release, *supra* note 29.

³⁸ See, e.g., Daniel F. DeLong, *Fans Must Pay to Hear Baseball Webcasts*, News Factor Network, at <http://www.newsfactor.com/perl/story/8516.html> (Mar. 28, 2001) (“Perhaps the most interesting aspect of the deal is that it flies in the face of surveys that show a vast majority of Internet users do not want to pay for such content services.”).

³⁹ See Jennie Rose, *Streaming Media Steps Up to the Plate: Major League Baseball's Internet Ambitions*, New Architect, <http://www.newarchitectmag.com/documents/s=4088/new1013634731/> (Feb. 2002).

⁴⁰ See *id.*; MLB, *Custom Cuts*, at http://mlb.mlb.com/NASApp/mlb/mlb/video/mlb_custom_cuts.jsp (last visited Jan. 12, 2003).

⁴¹ See Rose, *supra* note 39; MLB, *Baseball's Best*, at http://www.mlb.com/NASApp/mlb/mlb/baseballs_best/mlb_bb_whatsnew.jsp (last visited Mar. 25, 2003).

⁴² See MLB, *Highlights Direct Post-Game Show*, at http://www.mlb.com/NASApp/mlb/mlb/video/mlb_highlights_direct_postgame.jsp?partnerId=ana-hp (last visited Mar. 25, 2003).

whose highlights you want to see, and it will come as an email each morning.

There is so much going on out there, and we at MLB.com are trying to be at the forefront. One other subscription product I will mention, because it goes to the “rights” issue, which gets you lawyers excited, is Condensed Games.⁴³ We have just announced that you can go online about an hour and a half after the game, and watch the essence of any game that was played that day in about fifteen or twenty minutes. You will only see the payoff pitches. You will see the third strike, you will see the hit, you will see a run, you will see an out, again, only the payoff pitches. And it is very well done. It is not fast motion. It is like you are watching a game. You might think that this might have raise some issues with broadcasts,⁴⁴ but we work very hard to ensure that everything we do not only promotes the game, but also gets more people to watch the game in person and on television.

Finally, what are the general legal issues that arise in the context of the sports web business? I will just tick through them, because they will all get discussed in greater detail by the rest of the panelists.

Clearly, in the Internet world, trademarks and intellectual property issues are pervasive, but that is true in all businesses. Everybody will say something about that in today’s program, but it is very important. We do not give anybody permission to use the MLB marks. We own the MLB mark in the Internet space,⁴⁵ and

⁴³ See MLB, *Condensed Games*, at http://mlb.mlb.com/NASApp/mlb/mlb/video/mlb_condensed_games.jsp (last visited Mar. 25, 2003).

⁴⁴ See Hu, *supra* note 11 (“Sports leagues have been reluctant to embrace the Internet, partly out of fear of jeopardizing lucrative television contracts. As a result, what baseball does with its online broadcasts will be watched carefully in the industry to determine if the computer has a place alongside the TV set.”); Kellis, *supra* note 21.

⁴⁵ See MLB, *Copyright*, at http://mlb.mlb.com/NASApp/mlb/mlb/homepage/mlb_homepage.jsp (last visited Mar. 25, 2003).

The following are trademarks or service marks of Major League Baseball entities and may be used only with permission of Major League Baseball Properties, Inc. or the relevant Major League Baseball entity: Major League, Major League Baseball, MLB, the silhouetted batter logo, World Series, National League, American League, Division Series, League Championship Series, All-Star Game, and the names, nicknames, logos, uniform designs, color

we are meticulous about not letting anybody pay us—even a lot of money—to be associated with the mark in any way that we do not want it used.

We also need to be sensitive to related rights holders.⁴⁶ The right of publicity is a constant issue that we have to address.⁴⁷ For example, on our screen we have a Continental pop-up box: “Who do you think is going to win the World Series? Presented by Continental,” and there is a picture of a news story on that page with Derek Jeter’s on it. Are we news or are we commercial? Does it look like he is endorsing Continental? I do not think so. I would argue that if you open the *New York Times* and see a Viagra ad and Joe Torres’ picture in a story on the same page, you would not assume that he is taking Viagra, but we get those arguments. And so there are rights of publicity issues related to almost everything we do.

Then there are potential sponsor conflict issues. If MLB has a sponsor in a certain category, we are not required to have the same sponsor, but we may decide to. We try to, because it tends to make sense in many cases, but as a separate company with separate rights,⁴⁸ we have to make sound business decisions so we could have Sun Microsystems as our technology partner, which we do,⁴⁹ and arguably IBM could be the official computer sponsor of MLB.⁵⁰ That is a legal possibility, but an unlikely outcome based on sponsor relations and some of the category protection sponsors get.

combinations, and slogans designating the Major League Baseball clubs and entities, and their respective mascots, events and exhibitions.

Id. See also MLB, *Website Terms of Use Agreement*, at http://www.mlb.com/NASApp/mlb/mlb/help/mlb_help_about_terms.jsp (last visited Mar. 25, 2003).

⁴⁶ See *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977) (holding that individuals maintain a right to publicity which allows them to control the use of their likeness for profit).

⁴⁷ See *id.*

⁴⁸ While MLB.com is the official site of MLB, it operates as a separate subsidiary. Surmacz, *supra* note 21. See also MLB, *supra* note 32 (listing all official sponsors of both MLB.com and Major League Baseball).

⁴⁹ See MLB, *supra* note 32.

⁵⁰ See *id.* (showing that in fact neither Sun Microsystems nor IBM is an official sponsor of MLB).

Then there are all the technology contracts that need to be negotiated and enforced, technology issues can be mission critical—mainly “up-time,” and “service-level” agreements. Performance is just a critical issue in the whole technology area, and we have to have good contracts for that.⁵¹

Exclusivity issues exist in all kinds of Internet sports deals. RealNetworks is the exclusive provider of our streaming.⁵² Everything that streams from our site must be streamed in Real. What if we provided video clips to somebody like ESPN, who streams in Windows? That is a very tough issue.

Risk management might be one of the biggest not-realized issues. In the Internet sports business there are lots of people we depend on whose businesses could fail in six months. Writing agreements that protect a company from a supplier’s business failure is an enormous challenge.⁵³

There are other legal issues. Sweepstakes compliance is a big issue.⁵⁴ Liability issues, even for auction sales, can be a challenge.⁵⁵ We have to comply with COPA, the Children’s Online Privacy Protection Act.⁵⁶ We cannot market, nor should we, to children under thirteen.⁵⁷ You just cannot try to sell them anything.

⁵¹ See Rick Sturm, *Service Level Agreements: Consequences for Non-Performance*, Next SLM, at <http://www.nextslm.org/sturm4.html> (last visited Mar. 20, 2003).

⁵² See Press Release, *supra* note 29.

⁵³ See Sturm, *supra* note 51 (“This article examines the ongoing challenge of establishing effective consequences for nonperformance in Service Level Agreements.”).

⁵⁴ See Cherly A. Falvey, *United States: Legal Compliance Issues Governing Online Sweepstakes*, MONDAQ BUS. BRIEFING, June 1, 2001.

⁵⁵ See MLB, *Website Terms of Use Agreement*, *supra* note 45, § 4.

⁵⁶ Children’s Online Privacy Protection Act of 1998, 15 U.S.C. §§ 6501–6505 (2000). The Children’s Online Privacy Protection Act, effective April 21, 2000, applies to the online collection of personal information from children under thirteen. Anyone operating a commercial web site or online service directed to children under thirteen that collects personal information and anyone operating a general audience web site who has actual knowledge that personal information is collected from children must comply with the act. *Id.* See also MLB, *Privacy Statement*, at http://mlb.mlb.com/NASApp/mlb/mlb/help/mlb_help_about_privacy.jsp (last visited Mar. 25, 2003).

⁵⁷ 15 U.S.C. § 6501.

2003]

CURRENT STATE OF SPORTS & THE MEDIA

465

And, ultimately, there are the good-old-fashioned issues of employee relations, labor, and deal structure for every venture we do.

So that is my picture of the web world of sports. It is an extremely complex world, deals going every which way, and I cannot imagine how many are in negotiation now. I suspect that the web will continue to be a very important part of sports.

PROFESSOR CONRAD: Thank you very much. You provided a good overview of a very difficult and fascinating area. I want to pass the baton now to Brett.

MR. GOODMAN:⁵⁸ Thanks.

It is a problem not going first at one of these things, because if you go first, you just say what you were going to say, but if you go after somebody like this, you realize what you have to say is not nearly as interesting as what was just said.

What I will do is briefly tell you the kinds of things that happened to me prior to and during the Salt Lake Games.

As Mark briefly mentioned, I wear a marketing and promotions hat as well, so it is always interesting to me to see how my colleagues perceive me. In Salt Lake City, a colleague came into my office in our broadcast center literally every morning. He would poke his head in and say, “So did we sue anybody, did we sue anybody?” You know, the irony of course is that—and I suspect that a lot of my in-house panelists would agree—we spend almost all of our time trying to resolve conflicts, not creating them. Conflict creation is a sap of energy and resources that no one wants to deal with—especially someone like me who wears more than one hat. The time I spend dealing with a conflict is just time spent away from, hopefully, deriving income or eyeballs from the NBC Olympics broadcast.

With that said, we got through the Salt Lake City Olympics without suing anybody, and, much more importantly, not having been sued, although, as you are about to see, it came close a couple of times.

⁵⁸ Mr. Goodman has declined Fordham Sports Law Forum’s offer to footnote his remarks.

Generally speaking, before the Games you just do a lot of talent negotiation, getting people to be broadcasters, negotiating fairly simple contracts.

We had 3,200 people in Salt Lake City. You have deals with dozens and dozens of vendors, and we have to make these people comfortable.

We need to feed these people, so you have a contract with the food guy. They might need a kitchen to make the food, so you have a contract with a kitchen guy. The only good thing about that aspect of the job is that NBC has had the Olympics since 1988, so these deals are effectively boilerplate contracts at this point, where you change some exhibits around and, hopefully, you just move on.

The more interesting things were as follows: I do not know how many of you saw the Olympics—hopefully all of you. When you watched, you saw Bob Costas sit in a rather expansive studio. These things are actually taken down, folded up into boxes, shipped to a warehouse and then brought to the new site and built back up again. We call them “JAWS,” which is “Just Add Water Studios.” They literally gut out the inside. So in Salt Lake, you saw Bob with a fireplace, which was not real, as you might have read, and you saw him with some other winter motif type things. In Athens, you will see different things.

The point is that we need a place to store this stuff. We had a set design company in California that kept this stuff for us. They worked on the Sydney project, and then they were supposed to continue to work on the Salt Lake City project, or at least that is what they said. They claimed that we had a deal. We claim, “No, we didn’t really have a deal for Salt Lake; you were holding our stuff until we figured out if we had a deal.” Well, you can sort of see where this is going.

We went in a different direction, with a new set design company. Then, we went to California and said, “We need our stuff,” and they said, “Oh, really?”

So in October, our set design guy came into my office in an unbelievable panic, because October is just about when he has to get to Salt Lake to build it up to be ready for February. We were

2003]

CURRENT STATE OF SPORTS & THE MEDIA

467

basically being held for ransom. Our set was in a warehouse behind lock and key in California, and these guys were not giving it to us. So Bob (Costas) was going to be in a parking lot on a single chair in the middle of Salt Lake doing the Olympics.

These are the kinds of things you deal with. Do you really want to go to court? Do you really want to bring a state law or a federal court action in California, which is going to generate publicity? What are your odds of winning? I thought they were pretty good considering the facts. But, can you imagine going into Dick Ebersol's (Chairman, NBC Sports and NBC Olympics) office and saying, "Well, it turns out that these studios are going to be locked up in litigation for six months?" when the Olympics are in four months?

So again, it is about conflict resolution. I got a letter from the attorney from the other side saying that the relationship we had created was a bailment. I recall knowing that word for a weekend in my preparation for the New York Bar, but not at all since then. Long story short, we resolved it and we got our stuff. But that is the kind of issue you have. You are not looking to sue anybody or get sued. You are looking to just resolve the problem as quickly as possible, and, hopefully, with little financial pain.

Also, it was brought to my attention a few months before Salt Lake that we had a number of foreign employees from various countries, mostly engineers and operations people, and a couple of researcher types, who we were hoping would work for us. I am not sure how this happened, but the folks at NBC who were supposed to deal with the paperwork to get those people approved by our government had not done so, and there was a great underestimation of what this process was.

Even before September 11th, we were told this was going to be a problem. The government did not like what happened in Atlanta, where a lot of people sort of got in illegally—not with any malice, but the forms were not quite right. So they wanted to do it right this time.

And then, after September 11th, you can only imagine. Regardless of where someone was from, this process took four times as long and was much more complicated. In November, we

had about thirty-six individuals—with start dates as early as December—who did not have the proper paperwork, and their applications had not even been filed. It was just a mess.

If any of you, in private practice or otherwise, have dealt with the federal government, you know what I mean. You might have well-intentioned bureaucrats or you might not, but even the best-intentioned bureaucrat is going to take a long time to resolve something like this. The good news is we used Paul, Hastings from Atlanta, and they were just fantastic.

But again, I had to deal with the guy in charge of our engineering group and the guy in charge of our operations group, who had been led to believe that they would have their regular crews from England and France and wherever else, as they do at every Olympics. They were realizing, with only about a month and a half before they had to go, that these people might not be allowed into the country. We were able to get through that, but with a lot of pain, and in that case a significant legal bill. I will not even begin to tell you the process. Immigration is just a nightmare.

Then, once we were in Utah, we had a broadcast center where roughly half of our people actually resided. It was where the studio shows were produced. It was where our offices were. We had compounds at each of the venues.

At some of the venues, like Alpine skiing or figure skating, we did everything there. We edited the shows there. People actually reported there for work in the morning, stayed all day and left at night. So everything had to be provided for them there. We needed kitchens, we needed office trailers—the whole operation was in a parking lot at the venue.

I was told about nine days before the Olympics were going to begin, and only about two days before we were going to get these venues up and running, that the Utah State Fire Marshals Commission, had formed a loose coalition to work with the Organizing Committee to handle health and safety issues. They told us nine days before the Games that none of our mobile kitchens in these parking lots were compliant with the code, but they would not tell us which section of the code we were violating.

2003]

CURRENT STATE OF SPORTS & THE MEDIA

469

They said, "We know a violation when we see it." We said, "You have to produce the code. We have to understand what the code says." So they gave us a two-volume thing that was over 1,000 pages, and it basically turned out that we did not have the right covers over the grills.

This sounds kind of funny, but it was actually an issue of incredible significance. If you cannot have mobile kitchens, you cannot serve food. You have the food that you were ready to serve, but now you cannot serve that food, because you cannot use the grill, so you need new food. It is a health issue at some point. I mean, these people work from eight o'clock in the morning until midnight or later every day.

The lesson here is to have good local counsel, which is to say, have local counsel who is well connected and knows everybody. In Salt Lake City, that is possible. It is also possible to have that person happen to be a good lawyer.

I went to this huge meeting with about forty fire marshals, the operations guy from NBC, our kitchen guy, and our local counsel. I knew we were in good shape when the local counsel walked in and said hello to half the fire marshals, because he knew them from living there.

We solved the problem because we realized quickly that we were not going to be very successful in court by trying to enjoin local fire marshals claiming there was a safety concern with our kitchens nine days before the Olympics. We had no legal option whatsoever. We determined that about five minutes into the meeting, and then we sort of figured it out with a lot of other parties in the room with us. These are the kind of things that come up, none of the stuff I studied in law school. No surprise.

The last thing I will mention is actually still a pending matter. I said that we have not been sued yet. I would like to think we are going to avoid this one, too.

The Utah Division of Wildlife Resources called me as we were packing up to go home. They said people had been calling and complaining that they had seen shots on the air that looked like they were taken from a helicopter, with wildlife running beneath. "You are not supposed to send a helicopter up in Utah to run

470 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* [Vol. 13: 453

endangered wildlife ragged and potentially harm them. We need to see your tapes.”

I am not denigrating the reason for the call. It was a perfectly appropriate phone call. But, we did not even know if this footage was taken in Utah. It could have been file footage taken twenty years ago in Colorado. You get the drift.

None of this is really “big picture” interesting issue stuff, but I find that these tiny little legal issues takes up most of my time. They are the issues that you are not really supposed to know anything about, but I suppose you are supposed to recognize the issues, assess the vulnerability, and just search for the quickest solution so that people can go back to, in my case, producing a television show.

The one thing I have not mentioned is, perhaps, something you thought I might, which is the rights contract. The good news is that we have the Olympics through 2008. The rights deal was negotiated in the mid-1990s. It is done, and that is it. We need to read it and know what it says, but, at least for the short-term future, we will not need to negotiate the actual contract.

We also have, obviously, extensive dealings with legal and other people at the United States Olympic Committee (USOC) and International Olympic Committee (IOC), but by this point, we all know what the contract says and go about our business without a lot of difficulty interpreting those documents. So that is actually not something that takes up a lot of my time.

PROFESSOR CONRAD: Thank you very much. Your presentation brought out the importance of a lot of nuts-and-bolts issues. The Olympics are very much like a production, and a lot of production issues are very much related to scheduling, staging, food, and things like that, which often have to be in the contract, so it is very practical material. By the way, I do teach bailments to a couple of classes, if you wish to come in.

MR. GOODMAN: I could have used you.

PROFESSOR CONRAD: I would be happy to have you.

Now we turn to Jerome.

2003]

CURRENT STATE OF SPORTS & THE MEDIA

471

MR. EBENSTEIN: I think it was very appropriate for Fordham to schedule this Sports and the Media Symposium in March, because it fits in very appropriately with our programming for this month of March Madness.⁵⁹ That is what is on the air right now on CBS,⁶⁰ and it is very appropriate for sports and the media. Sports and the media together is madness, it's in March, and here we are.

Listening to the other two panelists, I have been there before and will be there again—well, maybe not as far as Brett is concerned, because we are through with the Olympics. But we had three Winter Olympics,⁶¹ and, quite frankly, a Winter Olympics in Salt Lake City is a grounder, staying with the sports metaphor. Our Olympics were in France,⁶² Norway,⁶³ and Japan.⁶⁴ We had to deal with logistics that were much worse than just a two-hour time zone difference. Try a twelve-hour time zone difference.

We went to set up a studio that was right in the middle of a local temple in Japan.⁶⁵ They did not appreciate having cameras and equipment on the premises. We had to work out arrangements, in a foreign language, in a foreign country, and the issues were significant. Also significant were tax issues. We managed to resolve a tax issue and save the company \$40 million.

⁵⁹ See Jeff Merron, *How March Went Mad: The Phenomenal Rise of the NCAA Men's Basketball Tournament*, Sports Jones, at <http://sportsjones.com/sj/176.shtml> (Aug. 24, 2001) (explaining how March Madness became the unofficial name of the NCAA Basketball Tournament).

⁶⁰ CBS, *2002 NCAA Tournament Schedule*, CBS Sportline, at http://cbs.sportsline.com/u/ce/feature/0,1518,2196883_55,00.html (last visited Mar. 25, 2003).

⁶¹ CBS broadcast the Winter Olympics in 1992, 1994, and 1998. See Kevin Downey, *Buyers: NBC Will Make Its Olympic #s: Viewership Should Top 1998 Nagano Winter Games*, Media Life, at http://209.61.190.23/news2002/feb02/feb04/2_tues/news1tuesday.Html (Feb. 5, 2002).

⁶² The 1992 Winter Olympics were held in Albertville, France. See CBS, *History: 1992 Winter Olympics (XVI)*, CBS Sportsline, at <http://old.sportsline.com/u/olympics/2002/history/yby/1992.htm> (last visited Mar. 25, 2003).

⁶³ The 1994 Winter Olympics were held in Lillehammer, Norway. See CBS, *History: 1994 Winter Olympics (XVII)*, CBS Sportsline, at <http://old.sportsline.com/u/olympics/2002/history/yby/1994.htm> (last visited Mar. 25, 2003).

⁶⁴ The 1998 Winter Olympics were held in Nagano, Japan. See CBS, *History: 1998 Winter Olympics (XVIII)*, CBS Sportsline, at <http://old.sportsline.com/u/olympics/2002/history/yby/1998.htm> (last visited Mar. 25, 2003).

⁶⁵ See Jennifer Fray, *Temple Opens 1,400 Years of Tradition to Visitors*, WASH. POST, Feb. 4, 1998, at C4.

Then we get to the Internet issue that we heard about from Jim. Our Internet issue goes back to one of the prime issues that we have now with March Madness. CBS has licensed from the National Collegiate Athletic Association (NCAA) the exclusive rights to the NCAA Division I Basketball Tournament.⁶⁶

One of the rights that we have is Internet rights.⁶⁷ No one else can have any of those games on television, or in any manner or form of television, including the Internet.⁶⁸ However, occasionally—and this has happened in the past—the signals from one of our games gets intercepted, because it happens to go through the air unencrypted. Encrypted, for those who may not know, means scrambled, so that anyone who happens to catch the signal off a satellite cannot exhibit it on their television.

The signal was recorded and sent to various Internet sites, and people were able to watch the game on the Internet. Such use of the game's signal is unauthorized, and at the same time the game was being broadcast on the network. We managed to find out how it was done and managed to stop that. Exclusivity is one of the prime issues that we deal with in all contracts.⁶⁹

One of the March Madness issues that I will be dealing with as the tournament continues, is the fact that this is a nationally televised event. We have over 200 television station affiliates broadcasting coverage throughout the country.⁷⁰ Our agreements with these affiliates say that they have the exclusive right to have

⁶⁶ See George Stahl, *CBS Keeps March Madness: Network Extends NCAA Tourney Rights Until 2014*, Armchair QB, at http://www.armchairqb.com/cbs_ncaa_tourney.html (last visited Mar. 20, 2003); Viacom, *CBS Television: The Facts*, at <http://www.viacom.com/prodbyunit1.tin?ixBusUnit=5000018> (last visited Jan. 11, 2003).

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See generally Hu, *supra* note 11. (“Sports leagues have been reluctant to embrace the Internet, partly out of fear of jeopardizing lucrative [exclusive] television contracts.”); Kellis, *supra* note 9 (discussing conflicts surrounding the potential of web cybercasts to undercut exclusive television coverage of the Olympics).

⁷⁰ See Viacom, *supra* note 66 (“CBS Television is an integrated business comprised of the CBS Television Network of over 200 owned-and-affiliated stations reaching virtually every television home in the United States.”).

these basketball games in their television markets, and no one else can show these games in their markets.⁷¹

However, there are other television stations in every market and they would like to broadcast highlights of the game, which may be okay if you can find a fair use exception to the copyright law,⁷² or maybe even a First Amendment exception to allow for a news broadcast.⁷³ And we acknowledge that. However, we ask that all broadcasters do not broadcast highlights of our game while we are still on the air. That would just conflict with our rights, for which we have paid significant dollars.⁷⁴

This morning as I came into the office, there was an e-mail for me from our sports management department saying that a certain station was broadcasting highlights of the game while our affiliate

⁷¹ See, e.g., Dan Caesar, *DirecTV Clients Suffer Upset in NCAA Tournament Coverage*, ST. LOUIS POST-DISPATCH, Mar. 22, 2001, at D2 (“CBS requires that games it’s showing locally [(on its affiliate stations)] be blacked out on DirecTV in that market. Those customers are supposed to watch CBS for the telecast.”).

⁷² 17 U.S.C. §107 (2000). The fair use exception to copyright protection provides in part: “the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” *Id.* Factors for determining whether a use falls under this exception include—

- (1) the purpose and character of the use, including whether the use is for commercial purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Id.

⁷³ See Leslie Ann Reis, *The Rodney King Beating—Beyond Fair Use: A Broadcaster’s Right to Air Copyrighted Videotape As Part of a Newscast*, 13 J. MARSHALL J. COMPUTER & INFO. L. 269 (1995) (discussing this conflict and whether there is a “First Amendment Exception” related to a broadcaster’s right to air “socially important material”). While Reis does not address the issue of news broadcasts containing highlights of sporting events, it is arguable that such footage qualifies as “socially important” so as to warrant the First Amendment Exception.

⁷⁴ See Caesar, *supra* note 71 (noting that CBS insisted that DirecTV not show a 2001 NCAA Championship Tournament game in a market where the rights to broadcast that game were licensed to a CBS affiliate); Richard Sandomir, *The True Madness Concerns the Money*, N.Y. TIMES, Mar. 29, 2002, at D4 (discussing the \$6 billion exclusive eleven-year agreement between CBS and the NCAA, which began in September 2002 and will end in 2013). See also generally Hu, *supra* note 11; Kellis, *supra* note 9 (discussing potential rights conflicts between television broadcasts and Internet streaming).

in the market was still on the air. My job this morning was to contact that station and say, "Please don't do it again. You are violating our rights." The station was also violating the rights of the NCAA, which has licensed us the rights. This is the basic exclusivity question that will get into every contract and every negotiation.⁷⁵

I alluded very briefly to the fact that it is important to us because we have this relationship with our affiliates and they have exclusivity.⁷⁶

For those of you who do not understand the difference between local television stations and television networks, CBS is a television network and an owner of individual television stations.⁷⁷ Most people from New York think of CBS as Channel 2, as if that is the be-all and the end-all of CBS.⁷⁸ We own television stations in fifteen different cities, and we have agreements with over 200 television stations in other cities licensing from us the rights to broadcast our programs.⁷⁹ They pay us for this. Not only do they get programming, but they get to sell local commercials in these programs that we supply to them.⁸⁰

We not only are very concerned about other people utilizing these rights because it violates this contract right that we have with our affiliates, but also because it affects the manner in which we

⁷⁵ See Caesar, *supra* note 71; Hu, *supra* note 11; Kellis, *supra* note 9 (discussing potential rights conflicts between television broadcasts and Internet streaming).

⁷⁶ See, e.g., Caesar, *supra* note 71.

⁷⁷ See Viacom, *supra* note 66.

⁷⁸ CBS 2, *Inside CBS 2*, at <http://cbsnewyork.com/about> (n.d.) ("CBS 2 is the flagship station of the CBS Television Network and is owned and operated by the Viacom Television Stations group. In addition to CBS 2, Viacom Television Stations own and operate CBS television stations in Los Angeles, Chicago, Philadelphia, Boston, Baltimore, Miami, San Francisco, Salt Lake City, Denver, Minneapolis, Green Bay, Detroit, Austin, Dallas and Pittsburgh."); CBS, *Local CBS Affiliates*, CBS News, at <http://www.cbsnews.com/stories/2002/07/31/utility/main517034.shtml> (last visited Mar. 25, 2003).

⁷⁹ See CBS, *Local CBS Affiliates*, *supra* note 78.

⁸⁰ CBS affiliates pay the network for the right to air its programs and commercials. Such programming also includes commercial slots that affiliates sell to local advertisers. See, e.g., Richard Sandomir, *Digital Cable May be Next for the NFL*, N.Y. TIMES, Sept. 24, 2002, at D5 ("Another concern for the networks is how to make sure their local commercials are seen on the digital cable games, which would siphon viewers from broadcast TV.").

can sell advertising. We tell an advertiser, "If you buy a spot in our broadcast, you will get exclusive coverage in these markets."⁸¹ However, if people are watching excerpts on other television stations, they are not watching our affiliated stations, and therefore the value of our commercials decreases. So it is an economic issue, and an advertising issue as well.

There is another issue that we deal with when we license rights, and that is the degree to which we can allow signage in the various venues where we have sporting events.⁸²

You have probably seen every sporting event with signs all over the place. To a certain extent, nothing can be done about that. They are paid for by the event, under an agreement with the event sponsors, and those relationships have to stay in place.⁸³

However, some signs or signage are put up just because the event is going to be broadcast.⁸⁴ Problems arise when we sell a commercial to an advertiser, when we tell them that they are going to be the exclusive advertiser for soft drinks, for automobiles, financial services, or whatever it may be. The advertiser turns on their television and sees a sign at the side of a basketball court for a competing product. That is a problem for us with the advertiser.

⁸¹ The exclusive rights to broadcast a program greatly enhance the value of advertising during that program on the network's affiliates. Thus, the value of the advertising can be adversely affected by competing broadcasts of the same event or program or by the failure of the network to protect these rights. See David Bauder, *Firm Tries Flexible TV Scheduling*, CHI. SUN-TIMES, Dec. 29, 1997, at 34 (discussing the resistance of affiliates to technology that allows subscribers to watch programs at their leisure, as it consequently infringes on their exclusive rights to broadcast network programming and sell commercial time to advertisers).

⁸² Some signage may be in place at a sporting venue pursuant to a contract with the sports franchise or facility owner, and these advertisements may compete, and hence conflict, with broadcast network advertisers and sponsors.

⁸³ See, e.g., Denver Broncos, *Corporate Partnership: Stadium Signage*, at <http://www.denverbroncos.com/offthefield/signage.php3> (last visited Mar. 20, 2003) (indicating in photographs that Budweiser, AT&T Broadband, and Trice Jewelers have already purchased stadium signage in the new Denver Broncos stadium and encouraging other corporations to do the same).

⁸⁴ See, e.g., Hal Bock, *Milking an Expensive Cash Cow*, L.A. TIMES, Sept. 11, 1994, at C3 ("It's no accident that every time CBS or USA shows a player serving [(in the U.S. Open)], the word 'Heineken' is peeking over their shoulder, plastered on the back wall.").

It is also a problem for us because when we have advertising on television and it is paid for, the Federal Communications Commission (FCC) requires that we disclose that.⁸⁵ So we have two problems with signage: (1) we have a conflict with our advertisers, and (2) we have to have a notice on the program saying that commercial consideration was paid for by a particular advertiser.⁸⁶ Once you see advertising on your screen, the assumption is that it is paid for; and, if it is not paid for, there has got to be a reason why it is there.

So those are issues that we have to deal with all the time with licensors of sports programs. The issues continue, because we have a lot of different production issues, some of which Brett was referring to.

When we have license agreements for sporting events, very often the licensor will say, "We want production done in a certain way, we want commercials scheduled in a certain way or we want only certain advertisers included in the broadcast."⁸⁷ We have to be very careful as to how we handle all of this.

These are issues that we deal with up-front with the licensing organization, the advertisers and our production facilities. We deal with these issues because certain sports associations, such as the NBA⁸⁸ or MLB,⁸⁹ have relationships with various commercial entities that are "The Official Sponsor," and we have to be very careful with our advertising to make sure that we do not conflict with official sponsors.

⁸⁵ 47 U.S.C. § 317(a)(1) (2000).

⁸⁶ *Id.*

⁸⁷ *See, e.g.,* Michelle Hiskey, 'C' or 'DC' Close as You Get to Coke, ATLANTA J.-CONST., Apr. 14, 2002, at 11D ("At almost all other major sports events, sponsors' banners and advertisements jockey for fans' attention . . . [But at the Masters, n]ot only are there no signs or big hospitality areas[;] the [tournament] does not even mention sponsors (which include [Coke,] IBM[,] and Citigroup) in the spectator or media guides [and on] . . . CBS coverage, the companies share only four minutes an hour for ads.").

⁸⁸ *See, e.g.,* Scott Leith, *Coca-Cola Outbid for NFL Deal; Pepsi Snares \$160 Million Sponsorship*, ATLANTA J.-CONST., Mar. 29, 2002, at 1H (noting in a graphic that Coca-Cola (Sprite) is the official soft drink sponsor of the NBA).

⁸⁹ MLB, *supra* note 32 (listing the fifteen "Official Sponsors of Major League Baseball").

2003]

CURRENT STATE OF SPORTS & THE MEDIA

477

In connection with the tournament that we are running now, the NCAA is very sensitive with respect to gambling or anything that appears to be gambling in commercials or advertisements.⁹⁰ We are responsible for every commercial we put on the air to make sure there is no hint of any sort of gambling.⁹¹ Very often, these can be close questions. But we have to make sure that we honor our obligations to the licensor with respect to the type of commercials that we can broadcast during the event.

Finally, one of the elite events that we broadcast with a commercial restriction is the Masters Golf Tournament.⁹² We can only run commercials for three advertisers.⁹³ It is a very restrictive situation, but we have been doing it for many, many years and it works out fine.

PROFESSOR CONRAD: Thank you very much, Jerome. We do have two other speakers. We will move on to David.

MR. DENENBERG:⁹⁴ Most of the people in my office complain that they can hear me all the way down the hall, so I am not sure I need this microphone; but I will use it.

I am just going to give a brief overview of the NBA's television arrangements with a wide variety of national and local television deals, talk a little bit, for those practitioners out there, about some practical drafting issues and then talk a little bit about some of the new developments that I think have taken hold in the industry.

First, in terms of our national television arrangements, unlike, for example, the NFL, where everything is national, we have national and local deals.

⁹⁰ NCAA, DIVISION I GENERAL CHAMPIONSHIP INFORMATION 3 (2001) ("Advertising policies of the NCAA are designed to exclude . . . those advertisements that do not appear to be in the best interests of higher education, [including express prohibition of advertisements] . . . promoting gambling."), http://www.ncaa.org/library/handbooks/general/2001/d1_general_info.pdf.

⁹¹ *Id.*

⁹² *See Hiskey, supra* note 87.

⁹³ *See id.*

⁹⁴ Mr. Denenberg has declined Fordham Sports Law Forum's offer to footnote his remarks.

With respect to nationals, our current national partners, as probably most of you know, are NBC and Turner. But we just went through about six weeks of negotiations and came up with new long-term television agreements where our new cable partners are going to be ESPN and Turner and ABC is going to pick up the over-the-air package.

As part of those arrangements, we also formed a joint venture with AOL Time Warner where we are going to be launching a new national sports network in the fall—at least that is the plan—so they will do about four games a week in addition to the package that we negotiated with ABC, ESPN, and Turner.

We also have a package of out-of-market games on digital cable and on direct broadcast satellite via DirecTV. It is called our “NBA League Pass Package.” That is for all of the out-of-market games that you cannot get in your local market. So if you are that transplanted Knicks fan living in California and cannot otherwise get MSG out there, get your satellite dish, sign up for League Pass, and that is how you can still see the Knicks. You know, that is probably not too much fun this year.

We also launched, for the first time a couple of years ago, our first live, twenty-four-hour network, called NBA TV. It is on digital cable and on DirecTV. We are in about 10 million homes. We program the day parts with classic games and some of our other programming that we produce at our studio. At night, for the first time, we have gotten into live television, so we do a live studio show at night where we are basically doing highlights of the games, live look-ins, almost like an NBA-only “SportsCenter.”

Talk about learning issues on the fly. This was the first time for us doing live TV. We had Ananada Lewis, who is an MTV host, hosting one of our shows, and she kind of let the “F-word” slip out. I get paged, but what am I going to do? What is done is done. But I think that is when I started to investigate that five-second-delay button and the beep.

Anyway, as I said, unlike the NFL, we also allow our teams to do local deals. So in each team’s seventy-five-mile market, it can do a local deal. Almost every one of our teams does a local over-the-air deal in addition to a cable deal. On the over-the-air side, it

is almost always done as what we call a time buy, which is where the team buys the air time on the network and then sells the advertising itself and produces its games. On the cable side, the more traditional paradigm is the rights fee model. It depends where you live—a lot of our teams are with the various Fox sports networks, but they are broadcasting their games in their local area. Also some of our teams do pay-per-view deals. Some do in-market satellite deals. It is sort of all over the board.

And not to get overly complicated, but outside that seventy-five-mile area—when the regional sports network wants to go outside the team's immediate area, they actually have to license that from us. We deem that a League opportunity. So, for example, when MSG wants to go out to Rochester, New York, that is something that they license from us.

One of the things we do at the league office is review every single local television agreement that comes in. So obviously, we spot issues from time to time. There are a couple quick things I will mention.

It is important, especially for the practitioners out there, to identify the channel in the contract. That sounds obvious, but one of our teams, and also a baseball team a few years ago, did not do that. They had a contract with one of the major regional sports networks that also happened to have an overflow channel, so when the team's record slipped during the middle of the year, the network shifted all the games to the overflow channel, and they obviously were not seen by nearly as many people. This was a major issue for the teams that could have been dealt with very easily, if it had been dealt with in advance.

Similar to that issue, it is important that you identify the format, especially for a lot of our teams who are doing over-the-air contracts. Stations are sold all of the time. It is important, if you want to be on a sports-station or a sports-and-entertainment station, that you state that.

We had a situation last year where three of our teams were on what they thought were sports-and-entertainment stations. These stations were sold to Spanish-language networks. Some of them

are in litigation right now. But they were all scrambling to find new homes to serve their English-speaking population.

Also, in terms of rights, it is very important that you specify the exact rights that you are granting, especially in this era of the emerging technologies, such as the Internet, and whatever else is next. You want to hold back, obviously, whatever you can. The network, on the other hand, is trying to get everything and the kitchen sink.

I mentioned Spanish language before. That is an area where if you do not want to grant exclusive rights, you can keep that back. What a lot of our teams have done, in addition to their over-the-air package of English language, is to serve their Spanish-language audience by doing separate Spanish-language deals.

Jerry mentioned exclusivity. That is a word the networks love and leagues hate. I try to avoid it at all costs. To me, it is kind of a meaningless word. It makes you a guarantor of the fact that there will not be another game in that market. We try to deal with it by saying what we are granting, and then, what we will not do. That is, again, just another small hint.

One last thing in terms of drafting—and I deal with this a lot, because I am on the entertainment side—is consciousness of music issues. I am always conscious of music issues, which a lot of people sort of ignore. As I said, in the over-the-air context, when teams are doing time buys, they are typically responsible for all clearances, whether talent, music, or whatever. It is very difficult for a team to secure what we call a music public performance license, which is needed to publicly perform any music on-air.

But every network has them, so what we counsel our teams to do is just piggyback on the networks' licenses. It is no skin off the back of the networks, because they are already paying a flat fee based on revenues. It is a simple way to get the issue resolved without having to go out and get direct licenses from ASCAP or BMI or the publishers themselves.

Finally, I have some quick comments on future or new developments:

Rights fees—who knows where they are going! We are obviously very happy with the deal we just did in a very difficult

2003]

CURRENT STATE OF SPORTS & THE MEDIA

481

economy and a difficult ad market. I think those factors will obviously govern assessment of future rights negotiations—the economy, the advertising market, and ratings.

Ratings are, obviously, in a downward trend for all programming these days. Fortunately for us, our ratings are up this year. I am sure it has nothing to do with the return of one particular player, but we will take it how we can get it. We have always done very well in the coveted eighteen to thirty-five-year-old demographic that the advertisers really want to reach. So that has helped us, even in the previous years where ratings have been declining.

Another interesting development that has been in the news a lot, especially in this area, is teams trying to start their own networks. Obviously, the most recent example of this is the YES Network. In about two weeks, they are going to launch, and they had a very short period of time to do it. They have now negotiated deals with almost all of the cable operators, very good deals at a very nice premium. So they seem to be happy. I am sure some cable subscribers out there probably are not that happy, but I guess it remains to be seen whether that deal will get done.

This is not actually a new phenomenon. We have had a team, our Portland Trailblazers, which have for the last ten-plus years done their own distribution. They have had their own network negotiating directly with the cable systems. There is a lot more work and potential risk involved, but as I think YES proved, it can also be a lot more rewarding at the end of the day.

Another issue that a lot of our teams are facing, and teams in the other sports that do local deals, especially in the over-the-air context, is that there has been a proliferation of national networks. Now that you have the UPN Network and the WB, there is a lot less appetite, or there is a lot less scheduling availability, for teams to find local over-the-air carriers.

Jerry talked about the local stations. Many of these local stations now have commitments to take this prime-time programming, which conflicts with their ability to carry live sports programming. So our teams are left to deal only with the independents, and there are not that many stations in the market

that can take the programming. This leaves teams with a lot less leverage than they have had in the past.

Another interesting development is the Internet and where that is going. I do not think we are at the point yet where the Internet is going to supplant television, but everyone is experimenting out there.

We did a live cybercast last year that we were happy with. The quality probably was not nearly as good as the current television is, but it is obviously something that we cannot ignore and is going to only increase.

I guess the last thing I will mention is a deal that NBC did recently. I do not know the exact details of it, but I think it is very interesting and it may provide a model for future rights negotiations, especially with some of the smaller leagues. It is reported that they have a unique partnership with the Arena Football League, where there are no rights involved, but they get certain revenues, such that if a team is sold past a certain threshold, they get a percentage of that. I think, with some of the spiraling rights fees, you may see more creative ways of doing deals like that.

PROFESSOR CONRAD: Thank you. Now we will hear from Laurie.

MS. BASCH: Good afternoon.

I come to this panel from the standpoint of a lawyer who is primarily involved in the area of advertising law. I work with various advertisers, advertising agencies, and marketing companies, and I help them to resolve the legal issues and legal problems that come up in their businesses.

Like sports law, a lot of the legal issues that arise in advertising law are a by-product of the type of deals that are done. In listening to the other panelists today, I have heard references to exclusivity, sponsorships, web deals, ownership rights, and licenses. These are all concepts and transactions that come up in the area of advertising law and with which the advertising law practitioner must be familiar. I think it is important to stress that knowledge of the law and these legal concepts is only one criteria for providing quality services to your client. In working with an advertiser or an

advertising agency, your client's priority is often to get the deal done. Accordingly, as their lawyer, your job is not just to understand the law and precedent but you must also understand your client's business and their business objectives, and then figure out how to apply the law so that the transaction that your client is contemplating can be structured in way that is most beneficial to their interests. Your client is looking to you for solutions.

One area in which the advertising lawyer plays an important role is in helping clients to structure and negotiate deals to use celebrity talent in their advertising and marketing campaigns. Celebrity talent can mean athletes. It can also mean film or television stars, comedians or models. In all cases, the legal issues are going to be pretty much the same.

In any deal, it is important to understand what the parties are trying to get out of the transaction. If an advertiser decides to use celebrity talent, they are going to be paying a lot more for that person's services than they would for a non-celebrity. So why do they do it?

One of the reasons for using celebrity talent is the recognition factor.⁹⁵ Advertisers are competing for the same consumers and the same consumer dollars. So one important function of an advertisement is to be noticed; advertisers need to distinguish their ads from the rest of the pack. If an advertiser uses a celebrity who is well known, who has credibility and who is well liked, then the ad has a better chance of being noticed.⁹⁶

Advertisers sometimes want the celebrity to be more than just a familiar face. Sometimes the advertiser wants the celebrity to contribute creatively to the advertisement. The celebrity becomes part of the creative team. In that case, the commercial may be built around the particular talent of that celebrity, such as an actor that is famous for portraying a particular character, or a musician who writes or performs music for the advertisement. The ad can be built around the athlete's performance or can feature a comedian's

⁹⁵ See Paul Gough, *Celebrities Drive Recognition of Ads*, Media Daily News, at http://www.iagr.net/news_101602.jsp (Oct. 16, 2002) (noting that the use of recognizable and likable celebrities improves consumers' abilities to recall advertisements).

⁹⁶ See *id.*

act.⁹⁷ I will show a clip in a few minutes of an advertising campaign that relied on the very special comedic talents of a particular actor. The decision to use that actor contributed to the uniqueness and ultimate success of the campaign.

Celebrity talent may be used by an advertiser to help build or establish a brand. Advertisers often try to communicate an image about their brand. For example, they might want to say that the brand is hip, young, conservative, trustworthy, or sexy. By choosing a celebrity who conveys certain qualities, or an image that is compatible with the image the advertiser wants to project, the advertiser hopes to benefit from the association.⁹⁸

And yet another reason that an advertiser might enter into a celebrity deal is to reach a particular market segment. You see that in the area of event marketing or sponsorships, where an advertiser might decide to sponsor a NASCAR race or a NASCAR driver,⁹⁹ or World Cup Soccer,¹⁰⁰ or a particular band, or an artist. The idea is that through that sponsorship the advertiser will be communicating directly to the audience that watches or attends that event.

We have talked about some of the reasons why advertisers use celebrity talent. Now what is in it for the celebrity?

⁹⁷ See, e.g., Darren Rovell, *MJ Remains a Sought-After Endorsement Prize*, ESPN, at <http://espn.go.com/nba/s/2002/1231/1485032.html> (Dec. 31, 2002) (discussing a series of Gatorade commercials in which the thirty-nine-year-old Michael Jordan plays one-on-one basketball against younger versions of himself).

⁹⁸ See, e.g., Tim Jones, *Star Turns Sterling Image into a Multimedia Powerhouse*, CHI. TRIB., July 18, 1999, at 1 (discussing the rise of Oprah Winfrey's image and marketability and linking her success to positive public perception of her attributes); Rovell, *supra* note 99 (noting that with Jordan's final retirement pending, advertisers are seeking the services of other stars like Derek Jeter, Donovan McNabb, and Roy Jones, Jr., "who best represent Michael's style," to pitch Jordan-brand products).

⁹⁹ See, e.g., Dale Jr. Central, *2001 Season Sponsors*, at <http://www.dalejr.net/sponsors> (last visited Mar. 20, 2003) (noting that Budweiser, the "Official Beer of NASCAR," Remington; Pennzoil's "The Outlaw;" and Snap-On are sponsors of NASCAR driver Dale Earnhardt, Jr.).

¹⁰⁰ Soccer Game Night, *A-B to Sponsor World Cup TV*, at <http://www.soccergamenight.com/business/2002/0228bud.htm> (Feb. 28, 2002) ("Anheuser-Busch has signed a two year agreement with Major League Soccer that makes the company and its brands a Gold Level television sponsor of the 2002 World Cup and the 2003 Women's World Cup.").

Celebrities are often very discriminating about the advertisements in which they will appear. For example, actors have to be concerned about their image—how they are perceived by the public. They often will not promote a product unless it complements or enhances their image. Some celebrities will not advertise particular products. Some celebrities will not do advertising at all.

An endorsement is a particular category of advertisement and involves special legal considerations.¹⁰¹ In an endorsement, the celebrity is stating or implying through her actions that he or she has actual experience with the product and likes it.¹⁰² The *FTC Guides Concerning the Use of Endorsements and Testimonials in Advertisements* require that an endorsement reflect the honest opinions, findings, beliefs, or experience of the endorser.¹⁰³ If a celebrity is hired by an advertiser to endorse a product, she may be required to use that product publicly (not just in the commercial).¹⁰⁴ So an athlete, for example, will not be willing to endorse a sports related product unless she really likes and uses the product.

But, of course, the main reason why celebrities do advertisements is because of the money. Celebrity advertising deals can be very lucrative.¹⁰⁵

The deals can be structured in a number of ways. Perhaps the most common structure is a straight fee arrangement. There can be an up-front fee that is set off against residuals that are earned for television or radio commercials. There are also deals in which the celebrity gets a percentage of product sales. This percentage

¹⁰¹ FTC Guides Concerning the Use of Endorsements and Testimonials in Advertisements, 16 C.F.R. § 255.0(b) (2002) (defining an endorsement as any “advertising message . . . which message consumers are likely to believe reflects the opinions, beliefs, findings, or experience of a party other than the sponsoring advertiser”).

¹⁰² See *id.* § 255.1(c).

¹⁰³ *Id.* § 255.

¹⁰⁴ *Id.* § 255.1(c) (requiring that the endorser be a bona fide user at the time the endorsement was given).

¹⁰⁵ Chris Isadore, *Tiger Burning Too Bright?*, CNN Money, at <http://money.cnn.com/2001/06/15/companies/tiger> (June 15, 2001) (citing a Burns Sports and Celebrities Survey which estimated that Tiger Woods and Michael Jordan would each earn approximately \$54 million and \$35 million, respectively, in endorsements in 2001).

structure ties the celebrity's compensation to the success of the product, presumably, with the idea that there is a correlation between the success of the product and the services provided by the celebrity. You see this type of structure more commonly in the infomercial arena. In some deals, celebrities have ownership rights in the company.

When an advertiser decides to do a campaign using a celebrity, and before negotiations start, they have to decide what services they want the celebrity to provide. Will the celebrity perform in television and radio commercials? Will he or she make public appearances as the spokesperson for the brand? Does the advertiser want a celebrity who will endorse the product? Or will it be some combination of these roles?

If the celebrity is going to perform in television and radio commercials, then the contract will most likely be subject to the rules of the Screen Actors Guild (SAG) or the American Federation of Television and Radio Artists (AFTRA).¹⁰⁶ The advertising lawyer has to know the Codes and the special rules that apply. The SAG Commercials Code, for example, establishes requirements for minimum fees, residual payments, overtime, and exclusivity, to name a few.¹⁰⁷

If the advertiser wants to feature the celebrity in print media, then the negotiations will include the type of media to be included (national magazines and newspapers, point of purchase materials, billboards, direct mail, to name a few), the time period of allowed use, the number of photo shoots that the celebrity must attend, clothing, and of course, the fee.

¹⁰⁶ The Screen Actors Guild [SAG] and the American Federation of Television and Radio Artists [AFTRA] are the primary unions bargaining in the interests of broadcast and radio talent. See Press Release, SAG, Statement by AFL-CIO President John J. Sweeney on the Proposed Consolidation Plan of the Screen Actors Guild and the American Federation of Television and Radio Artists, Feb. 26, 2003, <http://www.sag.org/pr/pressreleases/pr-la030226.html>; SAG, *Screen Actors Guild*, at <http://www.sag.org/> (n.d.); AFTRA, *AFTRA: American Federation of Television & Radio Artists*, at <http://www.aftra.com> (n.d.).

¹⁰⁷ See SAG, *supra* note 106.

The advertiser might want the celebrity to be a spokesperson for the company or the brand.¹⁰⁸ In that case, in addition to performing or appearing in print media, the celebrity might be making personal appearances. In the case of an actor, the celebrity might be asked to perform, or to do a meet and greet. He might be asked to make a speech or presentation. The advertiser might want to use the celebrity as an incentive for performance by the sales force. For example, there could be a competition among the sales force and the winner of the competition gets to play a round of golf with the celebrity. If the advertiser is in the food or beverage industry, perhaps the celebrity will be asked to participate in a cooking demonstration, or to pour beer at a corporate event. The celebrity might be asked to do interviews or to attend charitable events or do public service announcements. All of these services will be discussed in the negotiations and, if agreed to, will be specified in the contract.

And, of course, the celebrity could be asked to endorse the advertiser's product. In that case, in addition to performing or appearing in print ads, the celebrity presents himself or herself as a "satisfied customer" that actually uses the product.¹⁰⁹ Endorsements can be express statements that the celebrity makes about the product, or they can be implied through the celebrity's actual use of the product. Celebrity endorsements are scrutinized by the FTC.¹¹⁰ The rules require that an advertiser can use an endorsement of a celebrity only as long as it has reason to believe that the endorser continues to subscribe to the views presented in the advertisement.¹¹¹ In addition, where the advertisement represents that the endorser uses the endorsed product, then the endorser must have been a bona fide user of it at the time the

¹⁰⁸ See generally George Lazarus, *Businesses Give Jordan's Return a Wholehearted Endorsement*, CHI. TRIB., Mar. 24, 1995, at 2 ("A survey as recent as last September by Opinion Research showed that [Michael] Jordan ranked No. 2 to Oprah Winfrey as the favorite celebrity spokesperson. Jordan was followed by Rush Limbaugh, Candice Bergen and Bill Cosby.").

¹⁰⁹ See FTC Guides Concerning the Use of Endorsements and Testimonials in Advertisements, 16 C.F.R. § 255.1(b) (2002).

¹¹⁰ See *id.* § 255.

¹¹¹ See *id.* § 255.1(b).

endorsement was given.¹¹² Additionally, the advertiser must continue to run the advertisement only so long as he has good reason to believe that the endorser remains a bona fide user of the product.¹¹³ To comply with this rule, among other things, the advertiser's contract with the celebrity might state that the celebrity has to use the advertiser's skis, wear their basketball sneakers, use their hair products or their makeup, or wear their clothes.¹¹⁴ In addition, the advertiser will ask the celebrity to sign an affidavit attesting to the fact that he or she really does use the product and all statements that he or she makes about the product are true and represent their honest opinion about it.

The celebrity contract will need to specify all services to be provided and all rights granted by the celebrity. In addition, the contract will specify that the advertiser has the right to use the celebrity's name and likeness for commercial purposes. This right—called a right of publicity—should be as broad as possible if you represent the advertiser. If the advertiser wants to use the celebrity's name or photograph on the product, on the packaging, or in advertising—or if the advertiser wants to mention the association between the celebrity and the company, these rights must be granted in the contract.¹¹⁵

Now, as an illustration of some of the points that I have been talking about, I brought along a series of commercials that were produced for Titleist. The advertisements were created by the advertising agency Arnold Communications. The purpose of the campaign was to introduce a new golf ball—the Titleist NXT—

¹¹² See *id.* § 255.1(c).

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ Permission is necessary, as individuals have the right to restrict the use of their likeness or persona for profit. See *Zacchini v. Scripps-Howard Broad.*, 433 U.S. 562 (1977) (holding that individuals maintain a right to publicity which allows them to control the use of their likeness for profit); *Wendt v. Host Int'l*, 125 F.3d 806 (9th Cir. 1997) (providing celebrities with a cause of action where the use of automated robots bearing their likenesses at airport bars gave the false impression that they had endorsed these establishments and explaining why a celebrity's likeness cannot be appropriated in advertising without the celebrity's consent); *Newton v. Thomason*, 22 F.3d 1455, 1462 (9th Cir. 1994) (providing an eight factor test to determine whether a celebrity's likeness has been improperly appropriated thus creating public confusion as to the celebrity's involvement with a product).

which was to be marketed as a technologically advanced ball that will improve your distance game. The advertiser wanted to reach a younger audience and so they wanted the commercials to have a funny and irreverent type of feeling. The agency came up with the concept of building a series of commercials and print advertisements around a character who is a golf course designer. The character is a sort of golf purist who is personally and professionally outraged by his observations that technological advances in the golf industry—such as the NXT golf ball—were contributing to the demise of the game of golf by making the game far too easy. His solution is to wage a campaign to “save the game of golf” in which he attempts to incite golf course designers to design impossibly hard courses and attempts to raise the consciousness of golfers to the imminent danger caused by these technological advances.

The agency needed a special actor to play the role of the golf course designer—someone who could create a truly funny and memorable character. They hired the actor John Cleese, of Monty Python fame, to create the wacky character of Ian MacAllister, the golf course designer.¹¹⁶ While the original concept had great potential, there is no doubt that the success of the final commercials were very much influenced by the creative talent and input of John Cleese.

[THE COMMERCIALS ARE SHOWN]¹¹⁷

PROFESSOR CONRAD: Let us take questions now.

QUESTIONER: I am wondering about the Steve Garvey situation, where he is currently being sued because of his endorsement of a health product and the scripting of the way that he answered questions.¹¹⁸

¹¹⁶ In 1969, John Cleese co-created *Monty Python's Flying Circus* (BBC television broadcast, 1969–74). He also worked on other films in the series, including *MONTY PYTHON AND THE HOLY GRAIL* (Columbia/TriStar 1975). See ABC News, *Corporate Bio: John Cleese*, ABC News, at http://abc.abcnews.go.com/primetime/wednesday930/bios/john_cleese.html (last visited Jan. 17, 2003).

¹¹⁷ See Titleist, *Media Center: TV Ads*, at <http://www.titleist.com/mediacenter/default.asp> (last visited March 26, 2003).

¹¹⁸ Fed. Trade Comm'n v. Garvey, No. 00-CV-9358, 2002 WL 31744639 (C.D. Cal. Nov. 25, 2002) (The FTC alleged that Garvey made obviously false and misleading

MS. BASCH: For those of you who are unfamiliar with this case, baseball legend Steve Garvey was sued by the FTC for allegedly making false and deceptive advertising claims as a paid endorser for a weight loss dietary supplement called the Enforma System.¹¹⁹ The advertising and infomercials represented that by using the product you could lose weight without diet or exercise. Garvey was a co-host in infomercials for the Enforma System and made certain statements about the product.¹²⁰

The FTC initially sued Enforma Natural, the company that markets the products, and certain principals of the company for false and deceptive advertising and settled the claims for \$10 million that was to be used for consumer redress.¹²¹ Apparently not completely satisfied with that result, the commission then filed a second lawsuit against the producers, scriptwriters, and the two co-hosts of the programs, including Garvey and his management company.¹²² In terms of celebrity endorsements, this case is important because the commission is taking the position that Garvey, as an endorser for this product, had an obligation to substantiate the claims he made.¹²³ This is a higher standard than would normally apply to an endorser who is not an expert on the subject. It is closer to the standard that the FTC applies to an expert endorser. A consumer endorser (not an expert) is expected to have used the product and to truthfully state their opinion about it. "I tried it, I liked it, it worked." An expert endorser, on the other hand, is held to a much higher standard and is expected to have conducted an independent evaluation of whether the claims he or she makes are true if those claims are within that expert's field of expertise. Here, the FTC is alleging that Garvey was more than just a paid spokesman, and that he should have known that the

statements as an expert endorser of a weight loss product.); *Celebrity Justice: Steve Garvey*, Warner Brothers, at <http://celebrityjustice.warnerbros.com/news/02/11/07b.html> (Nov. 6, 2002).

¹¹⁹ *Garvey*, 2002 WL 31744639, at *3–*4.

¹²⁰ *Garvey*, 2002 WL 31744639, at *2.

¹²¹ See, David Rosenzweig, *Los Angeles Garvey Is Accused of False Claims*, L.A. TIMES, March 6, 2002, at B3.

¹²² *Garvey*, 2002 WL 31744639, at *3–*4 (Garvey appeared in infomercials and made several radio and television appearances to promote Enforma Systems, a weight loss product.).

¹²³ See *id.*

2003]

CURRENT STATE OF SPORTS & THE MEDIA

491

claims he made about the product were false and therefore he should be liable for making those false claims.¹²⁴ The case is currently being litigated and will be carefully watched by people in the industry.¹²⁵

PROFESSOR CONRAD: Any other questions?

QUESTIONER: I have a question on choice of law issues when dealing with foreign vendors.

MR. DENENBERG: From the NBA's perspective, we actually do our own international distributions. We are entering into contracts with foreign broadcasters in 200-plus countries. We make it very simple, we use New York law.

We have had issues before with breach of contract, and we do not want to be, obviously, in some foreign jurisdiction. We are licensing a lot of countries that I have never even heard of, and we do not want to be in a situation where we are going into a court where we do not know the rules. You can call it a standard contract, or a kind of "take it or leave it," but that is the way we deal with that issue primarily.

MR. DURHAM: The question is: How important are choice of law and jurisdiction issues?

Obviously, during the first phone call, we will say that New York law will govern the agreement, and we typically stick with that (but depending on the leverage, that could change). When we are doing a deal, for instance, with a sponsor that gives us a lot of value-in-kind (VIK),¹²⁶ if they insist on Georgia law, as long as I am relatively comfortable that it is more or less the same as New

¹²⁴ See *id.* at *1.

¹²⁵ In October 2002, the United States District Court for the Central District of California dismissed charges brought by the FTC against Steve Garvey. Fed. Trade Comm'n v. Garvey, No. 00-CV-9358, 2002 WL 31961462 (C.D. Cal. Oct. 31, 2002) (holding, among other things, that Garvey had acted as a consumer endorser, not a paid endorser, and that the FTC had failed to prove that Garvey had actively participated in Enforma's fraudulent marketing scheme). In January 2003, the FTC announced its intention to appeal that decision. See Andrew Longstreth, *Federal Trade Commission v. Garvey et al.*, AM. LAW., Jan. 2003, at 45.

¹²⁶ Ethan Green, *Negotiating Value-in-Kind*, Red Mandarin, at http://www.redmandarin.com/tip17_10.htm (Oct. 17, 2002) ("Value-in-kind, otherwise known as VIK, is the term used to refer to products or services that are sometimes provided by sponsors to properties as part of sponsorship contracts.").

York law for the principles that might arise, that is fine. But the one thing I will not do, just to make the distinction, is agree that the other party's jurisdiction will be the jurisdiction in which a suit is heard. There is a choice-of-law provision separate from the jurisdiction provision.¹²⁷ I will typically insist on New York as the jurisdiction, because I would much rather not be in court in their hometown.

QUESTIONER: My question is for Laurie. I have noticed a couple of commercials recently where there is a celebrity endorser who actually seems to be playing a character from a program. For example, Jason Alexander does these commercials, I think for KFC,¹²⁸ where it seems to me that Jason is not really the endorser—it is George, the character from *Seinfeld*.¹²⁹ I wonder if for those type of commercials you are dealing with the actor, or if you have to deal with the owner of the show.

MS. BASCH: It is a good question. It is a big issue that comes up not infrequently. It involves the question of ownership in a character. I am going to give a very basic response to the question in general, and not specifically about the KFC commercial.

In this situation, the first question is whether the actor is really playing himself or whether he is playing a character that is separate and distinct from himself.¹³⁰ If he is playing a character, there is a question of who owns the character.¹³¹ Characters are subject to copyright protection.¹³² That question might be addressed by looking at the provisions in the contract between the actor and the television studio that produced the television show in which the character first appeared. Of course sometimes, as in the case of

¹²⁷ BLACK'S LAW DICTIONARY 241 (6th ed. 1990) (defining "choice of law" as "the question presented in determining what law should govern"). "Jurisdiction" is defined as "the power of a court to decide a matter." *Id.* at 853.

¹²⁸ Gough, *supra* note 95 ("Former *Seinfeld* star Jason Alexander's turn for KFC helped the chicken restaurant chain to greater success than it had in other ads.").

¹²⁹ *Seinfeld* (NBC television broadcast, July 1989–May 1998).

¹³⁰ See Angela D. Cook, *Should the Right of Publicity Be Extended to Actors in the Characters Which They Portray*, 9 DEPAUL-LCA J. ART & ENT. L. & POL'Y 309 (1999); Peter K. Yu, *Fictional Persona Test: Copyright Preemption in Human Audiovisual Characters*, 20 CARDOZO L. REV. 355 (1998).

¹³¹ See Cook, *supra* note 130; Yu, *supra* note 130.

¹³² See Cook, *supra* note 130; Yu, *supra* note 130.

Jason Alexander, the actor may be so identified with the particular character that it becomes difficult to separate the actor, his persona, particular characteristics, and style, from the character.¹³³ What makes up the character? Is it the dialogue that is written by the writers? Or is it the mannerisms that the actor brings to the role?

From a practical standpoint, and assuming I represent the advertiser or the advertising agency, if it appears that the role the actor will play in the commercial is similar to the television show or movie, I might start by asking the actor's agent what rights the actor has in the character and also, whether there are any restrictions that the studio placed on the actor with respect to his right to appear in commercials. Again, that might be spelled out in the actor's contract with the studio, or there might be a separate agreement regarding the actor's right to exploit the character in commercials. If there is still some ambiguity about those rights, we would probably want to seek permission or a waiver from the television studio before going forward with the project. This is a very general response to a complicated issue.

QUESTIONER: This is a question for David. How do you go about enforcing and protecting your IP rights, especially with the Internet now? I figure at some point the expense is not going to be worth the benefits.

MR. DENENBERG: Well that is exactly right. We actually have someone full-time on staff who is doing nothing but surfing the Internet and looking for that kind of stuff.

It turns out you are right. The stuff is all over the place. On the one hand, we are sort of in the forefront of vigorously enforcing our intellectual property rights.

But, as you said, at a certain point it comes down to a cost/benefit analysis. If it is one fan starting a fan site using the Spurs' marks, which is something we faced this week, and it is one guy in his basement setting up his website, it is not really worth our time to send a cease-and-desist letter and follow up. At a certain point, as long as they are not stealing one of our domain

¹³³ See Cook, *supra* note 130; Yu, *supra* note 130.

494

FORDHAM INTELL. PROP. MEDIA & ENT. L.J. [Vol. 13: 453

names or something like that, we kind of pick and choose our battles.

If it is the big boys, we are certainly going to go after them because, like I said, we are very vigorous about that. That is one of the hardest things for me, because I want to go after everyone. Sometimes you have just got to let the little ones go.

PROFESSOR CONRAD: Thank you.

I want to thank our panelists for a great panel—very illustrative, very enlightening.