



# ST. JOHN'S UNIVERSITY

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## COLLEGE OF PROFESSIONAL STUDIES

# THE LEGAL APPRENTICE

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Dean Katia Passerini

### A NOTE FROM THE EDITOR

Professor Mary Noe

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**COLLEGE OF PROFESSIONAL STUDIES**

OFFICES OF ADMINISTRATION AND FACULTY  
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# **THE LEGAL APPRENTICE**

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## FOREWORD



The ability to write clearly and concisely is coveted in nearly all fields of human endeavor. Writing serves as a means of communicating ideas, motivating to action and conveying emotion. It is a learned skill, open to improvement and refinement over a lifetime. It requires the ability to learn from reading the writing of others, an openness to constructive criticism and, most of all, the willingness to work hard.

The Fifth Edition of *The Legal Apprentice* provides employers—and graduate schools—with positive proof that our student-authors excel in writing. A survey conducted by an online benefits and compensation information firm, PayScale, found that 44% of 63,924 managers believed that the skill new college graduates were most lacking was writing proficiency. (*These Are The Skills Bosses Say New College Grads Do Not Have* by Karstan Strauss published on [www.forbes.com](http://www.forbes.com), May 17, 2016). Reading is believing when it comes to the growing skills of our student-authors.

The articles in the Fifth Edition have been selected for publication in a blind review, not by their peers, but by an Advisory Board of faculty across the CPS curriculum. The student-authors have learned to appreciate that a fine writer's first draft is never his last. It is the continuous effort of these authors, under the supervision of Professor Mary Noe, that have caused their articles to now be published.

I take great pride in sending the Fifth Edition of *The Legal Apprentice* out into the world to shed light on the interesting topics covered and as an example to others.

A handwritten signature in dark ink that reads "Katia Passerini". The signature is written in a cursive, flowing style.

Katia Passerini  
Dean  
College of Professional Studies





## *A Note from the Editor*

College students and I share something in common, we are in search of how to write well. In this edition of *The Legal Apprentice*, Federal District Court Judge Deborah Batts, who has over one thousand published opinions on Westlaw provides us with her thoughts on writing. She explains that after she writes a draft, she returns to it later and tries to read it objectively “I asked myself if the order of my sentences and paragraphs helped people follow it or did it confuse them? Did I say actually what I had wanted to say? Did it say it the way that I wanted to say it?”

The student authors in this Fifth Edition have heeded the words of Judge Batts. They have submitted many drafts before they were able to accomplish the finished product. And I believe they have learned how much hard work is needed for writing to be good. As Judge Batts stated “When your work accomplishes what you wanted it to, you too will know it when you see it!”

I often tell my students that their writing is not measured by the number of pages but the quality of the content. My students and I need to embrace all the advice we can from experienced writers, such as Judge Batts. From an 1874 journalist, Mary Heaton Vorse advises us “The art of writing is the art of applying the seat of the pants to the seat of the chair. If you don’t start, you will never finish.”

*Mary Aoe*



# THE ART OF WRITING

JUDGE DEBORAH BATTS<sup>†</sup>

Writing is such a basic form of communication that we sometimes forget that it is also (or can be) an art. Poets, historians, authors of fiction, philosophy and humor know that they write so others can read, understand, think about, enjoy and appreciate their work.

Of course, all writing is not art, but all writing has a purpose. Its purpose could be as simple as making sure you get everything you need when you go shopping, whether in person or online. It could show someone how to use something, such as a manual for electronic appliances (really, they used to exist on paper). It could convey to your professor what you have learned in a course such as a final exam. Or it could express to someone how special he or she is to you (hopefully this type of writing would be art, or pretty close to it)!

Writing records your experiences, knowledge, observations, dreams and emotions that you want others to know when you cannot tell them in person, or you want them to remember when you are not there. It requires forethought, imagination, planning, organization and accuracy.

Writing has rules of grammar, syntax, punctuation and spelling (don't rely on Spell Check). How I write an essay differs significantly from how I write a speech or a judicial opinion. Different purposes require different styles.

In college, I learned that writing often needed my analysis of the subject matter and not just my quoting from books or articles about the subject. It helped greatly if I had taken the time to think about what I wanted to say and how I wanted to say it before I started the first draft. I would write a draft, or part of a draft, then leave it to do something else. Before returning to my draft I tried to remember what I had wanted to say when I had started to write.

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<sup>†</sup> Judge Batts is a Senior U.S. District Judge for the Southern District of New York. She received her J.D. from Harvard Law School, B.A. from Radcliffe College. She was awarded an honorary degree from the City University of New York School of Law. Judge Batts was appointed to the federal bench by President Clinton in 1994. Before taking the bench, Judge Batts served as an Assistant United States Attorney in the Southern District of New York and Associate Professor of Law at Fordham University School of Law.

When I read it again I tried to be objective about whether I had actually said what I had wanted. I asked myself if the order of my sentences and paragraphs helped people follow it or did it confuse them? Did I say actually what I had wanted to say? Did it say it the way I wanted to say it? Oh, yes, I also learned that many times writers require several drafts to get it right.

In discussing hard core pornography in his concurring opinion in Jacobellis v. Ohio, 378 U.S. 184 (1964), Supreme Court Justice Potter Stewart said “I know it when I see it.” Id. at 197 (Potter, J., concurring). That works for your writing as well. When your work accomplishes what you had wanted it to, you too will know it when you see it!

Again, all writing does not have to be art, but all writing has to communicate something to others. If as a writer you get across to others what you intended, you have succeeded.

# BALLOT SELFIES

ANDRES SANTAMARIA<sup>†</sup>

The right to free speech is an integral part of our Constitution and our way of life. Of course there are limits to this right, such as shouting “fire!” in a crowded theater, but laws that limit speech should be carefully evaluated and scrutinized. This paper will first summarize the case of *Silberberg, et al. v. Board of Elections of the State of New York, et al.*<sup>1</sup> Also I will present my survey of state laws that prohibit voters from taking pictures and sharing their marked ballots on social media, known as “ballot selfies.” This paper will also focus on the interaction between the individual’s First Amendment right to free speech and state laws that bar voters from revealing the content of their ballots by examining cases where such types of laws have been challenged.

## SILBERBERG

Thirteen days before the 2016 presidential election, plaintiffs Eve Silberberg, Jennifer Rebecca White, and Michael Emperor, brought a suit against the New York State Board of Elections and others, asking the courts to prohibit the enforcements of New York State Election Law.<sup>2</sup> This law prohibits voters in New York from taking pictures of their completed ballots and sharing them. The plaintiffs’ claim that this law violates their First Amendment right to free speech. The court concedes that taking selfies and sharing them on social media is “a potent form of speech presumptively entitled to First Amendment protections.”<sup>3</sup>

The plaintiffs have two arguments. First, the plaintiffs bring into question the usefulness and relevance of the New York law. The plaintiffs’ argument hinges on the fact that previously there were problems with voter intimidation and vote buying. These are no longer significant problems. They cite the reasoning in *Indiana Civil Liberties Union Found., Inc. v.*

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<sup>†</sup> Andres Santamaria graduated St. John’s University. He majored in Legal Studies. He currently attends Boston College Law School and received a 65% scholarship.

<sup>1</sup> *Silberberg v. Board of Elections of the State of New York*, 216 F.Supp.3d 411 (S.D.N.Y. 2016).

<sup>2</sup> New York State Elec. Law § 17-130(10).

<sup>3</sup> See *supra* note 1.

*Indiana Sec’y of State*,<sup>4</sup> and *Rideout v. Gardner*.<sup>5</sup> In these cases, similar laws that prevented individuals from taking pictures of their ballots and sharing them in the states of New Hampshire and Indiana were challenged. The courts in those cases sided with the plaintiffs and stated that “the historical record establishes that vote buying has not been a significant factor in elections in more than 100 years.”<sup>6</sup> Therefore, the courts held that the states did not have sufficient reason to claim that these laws were necessary to prevent vote buying and voter intimidation.

Second, the plaintiffs’ claim that the New York law violates their right to free speech based on the assumption that polling places are a form of public forums. Laws and regulations that limit free speech in a public forum are reviewed by the court with strict scrutiny, therefore the state would have to prove that the law is “narrowly tailored to serve compelling state interest.”<sup>7</sup>

The defendants argue against the notion that polling places are considered public forum, and therefore the courts’ review should be neutral and reasonable.<sup>8</sup>

The defendants also claim that the timing of the suit is problematic. If the injunction was granted just days before the election, defendants would be forced to retrain poll workers at fifty-eight different Boards of Elections. They also expressed concern that a last minute rule change would cause confusion and chaos at the polls and inhibit a smooth voting process.

The two issues before the court were whether voters in New York be allowed to take and share pictures of their marked presidential voting ballots and whether the New York State law preventing voters’ right to take pictures of their ballot infringe upon their right to free speech.

Plaintiffs’ request for a preliminary injunction was denied.

Although the court acknowledges that taking “selfies” is a powerful form of speech that is protected under the First Amendment, it recognizes the importance of having a law that prohibits selfies. The law is more than 100 years old,<sup>9</sup> and it was enacted to prevent voter intimidation. Before this law various groups such as political parties, churches, or unions, could

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<sup>4</sup> *Indiana Civil Liberties Union Found., Inc. v. Indiana Sec’y of State*, 229 F.Supp.3d 817 (S.D. Ind. 2015).

<sup>5</sup> *Rideout v. Gardner*, 838 F.3d 65, 69 (1st Cir. 2016).

<sup>6</sup> *Rideout v. Gardner*, 123 F. Supp. 3d 218, 233 (D.N.H. 2015).

<sup>7</sup> *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45, 103 S.Ct. 948 (1983).

<sup>8</sup> *Longo v. U.S. Postal Serv.*, 983 F.2d 9 (2<sup>nd</sup> Cir. 1992).

<sup>9</sup> New York Elec. Law § 17-130(10) was first enacted in 1890 as part of the Australian Ballot Movement, *Silberberg v. Board of Elections of New York*, --- F.Supp.3d ----2017 WL 4326539 (SDNY 2017).

police their members to ensure their voting was consistent with the group's position.

The plaintiffs' argument calling into question the usefulness of the law fails to account for the possibility that this law is the reason for the reduced number of incidents of voter intimidation and vote buying. Has the reasons for vote buying or voter intimidation disappeared? Furthermore, the cases cited by the plaintiffs in support of this claim differ significantly in that those cases were striking down laws that were recently enacted to specifically target "ballot selfies," unlike New York's one hundred year old law. The Supreme Court has ruled that where a law has existed a long time, it is difficult to provide empirical evidence of what would happen if the law was nullified.<sup>10</sup>

The court found the timing of the suit just thirteen days before the election a cause for potential chaos and confusion at the polls.

In analyzing whether to grant an injunction, the court must take into account the public consequences of granting an injunction.<sup>11</sup> In this case, the public's interest in having an organized election is imperative to our democratic process. The plaintiffs' interest in taking "ballot selfies" does not outweigh the public's interest in having an organized and smooth voting process.

The court rejected plaintiffs' claim that it should be reviewed under strict scrutiny because polling places are not considered public forums and noted that at the hearing the plaintiffs conceded that polling places are not generally considered a public forum. The court found the law to be a reasonable means of protecting the privacy of other voters and preventing voter intimidation.

#### *Editor's Note*

*In September 2017 in the same case, the plaintiffs requested a permanent injunction of New York Election Law. After a bench trial the Court found that even with a strict scrutiny review, the law survives because New York State has a compelling interest in assuring voters are not coerced nor are their votes for sale.<sup>12</sup>*

There are no federal laws that regulate ballot selfies, leaving the matter up to the states. Currently, eighteen states prohibit taking pictures of

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<sup>10</sup> *Burson v. Freeman*, 504 U.S. 191, 112 S.Ct. 1846 (1992).

<sup>11</sup> *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 19–20, 129 S.Ct. 365 (2008).

<sup>12</sup> See *supra* note 9.

ballots and sharing them on social media.<sup>13</sup> States where these statutes exist are: Alabama, Alaska, Colorado, Florida, Georgia, Illinois, Kansas, Massachusetts, Michigan, Mississippi, Nevada, New Jersey, New Mexico, New York, North Carolina, South Carolina, South Dakota, and Wisconsin.<sup>14</sup> Furthermore, there are 13 states where the law is unclear while 19 states (and Washington D.C.) allow voters to snap pictures of their ballots and share them.<sup>15</sup>

The reasons ballot selfies are banned vary according to the specific statute in each state. They can be separated into two groups: those that prohibit showing marked ballots and those that prohibit photography in polling places. Alabama,<sup>16</sup> Alaska,<sup>17</sup> Colorado,<sup>18</sup> Massachusetts,<sup>19</sup> Michigan,<sup>20</sup> New York,<sup>21</sup> South Dakota,<sup>22</sup> and Wisconsin<sup>23</sup> do not specifically make any mention of taking photos of ballots and sharing them on social media. However, it can be inferred that because the laws express ballots shall be “kept secret”<sup>24</sup> or that voters cannot “expose”<sup>25</sup> or “exhibit”<sup>26</sup> their marked ballots, ballot selfies would be prohibited and punishable.

Other states do not prohibit mandate voters to keep their ballots a secret, but prohibit photography at polling places. Florida’s statute states that “no person shall use photography....while such person is in a polling place and voting is taking place.”<sup>27</sup> Georgia’s statute says that “no photography is permitted in the polling room or voting area.”<sup>28</sup>

The distinction between the two categories is important because it affects whether the laws extend to absentee ballots. It can be reasonably assumed that states with a ban only on photography inside the voting area would not prosecute someone who shares a picture of their absentee ballot because the ballot would presumably be marked away from the polling

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<sup>13</sup> “Ballot Selfies: A Look at Where They Are Allowed or Not.” The Associated Press, Oct 23, 2016, <https://www.apnews.com/04c313da0672422ba28bb57c4e4a7ca0>.

<sup>14</sup> Id.

<sup>15</sup> Id.

<sup>16</sup> Ala. Code § 17-6-34.

<sup>17</sup> AS § 15.15.280.

<sup>18</sup> CRS § 1-13-712.

<sup>19</sup> M.G.L.A. 56 § 25.

<sup>20</sup> M.C.L.A. 168.738

<sup>21</sup> See *supra* note 9.

<sup>22</sup> SDCL § 12-18-27.

<sup>23</sup> WSA 12.13.

<sup>24</sup> Ala. Code § 17-6-34.

<sup>25</sup> MCLA. § 168.738.

<sup>26</sup> AS § 15.15.280.

<sup>27</sup> Fla. Stat. Ann. § 102.031.

<sup>28</sup> Ga. Code Ann. § 21-2-431.



area. Therefore, in states like Florida and Georgia, the law only bans photography inside polling stations and does not cover absentee ballots. Conversely, the laws in Alabama,<sup>29</sup> Alaska,<sup>30</sup> Michigan<sup>31</sup> and other states previously mentioned, the law which prohibits voters from showing their ballots after they are marked would include absentee ballots.

In cases where these laws have been challenged, the state argued that the laws are necessary in order to protect elections from vote-buying schemes. In *Rideout*, plaintiffs challenged New Hampshire Election Law on the grounds that it violated their right to free speech.<sup>32</sup> The original law passed in 1979 prohibited voters from letting their ballots be seen by others.<sup>33</sup> It was amended in 2014 to include a ban on taking photographs of marked ballots and posting them on social media.<sup>34</sup> The state argued that the law was necessary to combat vote-buying and voter intimidation. However, the court held that the state failed to provide any evidence of vote-buying or voter intimidation in recent history.<sup>35</sup>

The state of Indiana made the same argument in the case of *Indiana Civil Liberties Union Foundation, Inc. v. Indiana Secretary of State*, stating that the ban on taking pictures and sharing them on social media was intended to prevent vote buying and voter intimidation.<sup>36</sup>

The court held that the state failed to provide any evidence that established vote-buying, voter fraud, voter coercion, involuntary ballot disclosures, or an existing threat to the integrity of the elections.<sup>37</sup>

The decisions do not disqualify the argument that maintaining the integrity of elections and preventing vote buying and voter coercion are compelling state interests. However, courts have challenged the states to prove that the noted voter issues are actively prevented by these election laws. Furthermore, it can be argued that if these laws fail to include absentee ballots then a voter can simply choose to vote absentee and take a picture of their absentee ballot to avoid prosecution. In states where the statute does not include a ban on absentee ballot selfies, a state could not prove that the law was enacted to prevent vote buying because absentee ballots circumvent the law. Following this reasoning, the plaintiffs in these

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<sup>29</sup> Ala. Code § 17-6-34.

<sup>30</sup> AS § 15.15.28.

<sup>31</sup> MCLA § 168.738.

<sup>32</sup> See *supra* note 3 pg. 417.

<sup>33</sup> N.H. Rev. Stat. § 659:35.

<sup>34</sup> *Id.*

<sup>35</sup> See *supra* note 5 pg. 224.

<sup>36</sup> *Indiana Civil Liberties Union Foundation, Inc. v. Indiana Secretary of State*, 229 F.Supp.3d 817 (S.D. Ind. 2017).

<sup>37</sup> *Id.*

election law cases have a strong argument that the laws do in fact violate their right to free speech.

An additional key argument in the election law cases is that the courts' decisions have depended on whether polling places are considered public forums. In the case of *Silberberg*, the plaintiffs argued that the New York election law<sup>38</sup> should be examined using strict scrutiny.<sup>39</sup> However, the court maintained that the law should only be examined under a reasonable standard.<sup>40</sup> The court ruled that polling places are not public forums because the only speech that takes place at the polls is a voter's elective choice, and this has been historically carried out in secret.<sup>41</sup> Furthermore, defendants in the case admitted that polling places have not been generally considered public forums.<sup>42</sup> This is in contrast to the findings in *Rideout* where the court ruled that the public forum doctrine did not apply to New Hampshire's law "because disclosure [of the photograph] will generally take place far away from the polling place."<sup>43</sup>

Aside from contrasting rulings in this issue, why were the lawsuits brought against New Hampshire's and Indiana's ballot selfie statutes successful, while lawsuits against similar statutes in New York and Michigan were dismissed? The timing of these cases is an important factor that the courts have considered. In *Crookston v. Johnson*, the court states "timing is everything."<sup>44</sup> The court acknowledged that although Crookston's case brought interesting questions regarding the first amendment, he would have to wait until the election was over to argue his case.<sup>45</sup> The Sixth Circuit Court noted that with just ten days before the election, changing Michigan's laws and procedures would interfere with the election process, especially since he could have brought attention to the case long before.<sup>46</sup> Similarly, in *Silberberg*, the judge also referenced the timing of the suit brought by the plaintiff and reasoned that if a preliminary injunction was granted to prohibit the enforcement of the ballot selfie law, the election would undoubtedly disrupt the election.<sup>47</sup> The Board of Elections of the State of New York argued that the injunction would force thousands of poll workers to be retrained, and the law change would cause

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<sup>38</sup> See *supra* note 9.

<sup>39</sup> See *supra* note 1 pg. 415.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *supra* note 1 pg. 417.

<sup>44</sup> *Crookston v. Johnson*, 841 F.3d 396, 398 (6<sup>th</sup> Cir. 2016).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See *supra* note 1 pg. 419.

confusions and delays at polling sites.<sup>48</sup> Both of these cases were brought within weeks of the presidential election and both were dismissed, in part, for this reason. Meanwhile, defendants in the New Hampshire case failed to bring an argument for the timing of the lawsuit.<sup>49</sup> The Indiana case was brought almost a year before the election was set to take place.<sup>50</sup>

As the prevalence of social media continues to grow, it is unlikely that concerns regarding privacy and freedom of speech will disappear. It is expected that as the law attempts to keep up with technology, these lingering issues will continue. As these laws are tested in court, hopefully states will find the right balance between keeping the integrity of our elections and the voter's constitutional rights intact.

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<sup>48</sup> *Id.*

<sup>49</sup> *Rideout v. Gardner*, 838 F.3d 65 (1<sup>st</sup> Cir. 2016).

<sup>50</sup> *Indiana Civil Liberties Union Foundation, Inc. v. Indiana Secretary of State*, 229 F.Supp.3d 817 (S.D. Ind. 2015).



# BATTLE OF THE BOTS

OWEN CLIFFORD<sup>†</sup>

At one time the term “ticket scalper” referred to someone who would wait outside of a stadium on the day of an event and sell tickets at a profit to those in need. In today’s age, technology has advanced the method of scalping. The modern day scalper obtains tickets using “Bots.” Bots are software programs<sup>1</sup> that run automated tasks<sup>2</sup> over the Internet. A Bot can allow a single scalper to obtain thousands of tickets for resale just seconds after they become available. This puts the average consumer at an incredible disadvantage when buying tickets and forces them to pay a higher ticket price on a secondary market.<sup>3</sup>

The digital age scalper is capable of acquiring a higher volume of tickets, which allows larger profits months before an event rather than immediately before it. Luckily, people like Governor Cuomo and New York Attorney General Eric Shneiderman have identified the problem and taken steps to hold the people behind the “Bot” accountable.

Ken Lowson was one of the first people to use Bots to purchase and resell tickets. Lowson used the talents of a 17-year-old Bulgarian programmer to build the first Bot. His company Wiseguy<sup>4</sup> employed 30 people and made over \$25 million in profits from 2001- 2010. Over two million of those profits were from a single U-2 concert tour.

Although Bots are clearly profitable, it is unclear to most how they work. A Bot is simply a computer program that is able to fill out the information required in the primary ticketing websites dropdown prompt. The dropdown prompt asks for basic information such as your name, home address and billing information. It takes the average consumer approximately a minute to complete a ticket purchase. Bots however can

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<sup>†</sup> Owen Clifford is a senior in the College of Professional Studies, majoring in Legal Studies.

<sup>1</sup> A collection of instructions a human puts into a computer so the computer can continue to complete the task without a human.

<sup>2</sup> The computers continuation of the software program.

<sup>3</sup> A ticket selling market that does not have a direct relationship with the owner of venue or event. Scalpers use this market to sell tickets at a higher price.

<sup>4</sup> Wiseguy ticketing was a multimillion-dollar ticket scalping business that went on to become one history’s largest ticketing business cases.

complete a single purchase in milliseconds and thousands of purchases in just a matter of seconds.

Thousands of different IP addresses<sup>5</sup> and servers<sup>6</sup> are used in order to make the primary ticket-selling site<sup>7</sup> believe there are many consumers. Both can be leased monthly for very little cost. For example, at the height of Lowsons' scalping operation an average of just \$700 a month was spent on server and IP rentals. These addresses are sometimes spread nationwide.

A number of credit card numbers are also used to avoid the website viewing the purchase as bought by a bot. The numbers used are often from disposable debit cards.<sup>8</sup> However in larger Bot operations, credit cards are often given by ticket brokers,<sup>9</sup> who plan on buying blocks of tickets<sup>10</sup> from the controller of the Bot. The credit card information is simply added to the Bots' auto-fill software like the information in the dropdown prompt.

However, these components alone do not make for a profitable Bot operation. Hours of research are done prior to purchasing a large number of tickets "margins over 1000% of face value."<sup>11</sup> Knowledge of stadiums' seating arrangements is also needed in order to make the largest profit. When the research is complete, the ticket and seating desired is simply entered into the Bot.

Preventative measures have been put into place by primary ticket selling websites such as Ticketmaster. Captcha<sup>12</sup> is the term used for the box of random fuzzy letters that question if the applicant is human. Bot operators quickly found a way past this using Optical Character Recognition or OCR. OCR is "a type of machine vision software, in which the Bot is trained to see, recognize, and input the characters as a human does."<sup>13</sup>

Another anti-Bot measure taken was "paperless ticketing." This form of ticketing requires the consumer to present the credit card used for the purchase on the day of the event. Once again, Bot operators found a loophole. They simply retrieved consumers' credit card information from their wholesalers prior to purchase. In fact, paperless ticketing made the

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<sup>5</sup> Internet Protocol address is a numerical label assigned to each device connected to a computer network that uses the IP for communication.

<sup>6</sup> Servers are a computer or program that manage access to centralized resource or service in a network.

<sup>7</sup> Organizations that contract directly with venues and promoters to sell tickets on their behalf.

<sup>8</sup> Debit card that is bought in a store and has no name associated to it.

<sup>9</sup> Individuals or organizations that resell tickets through a web based service.

<sup>10</sup> Tickets purchased in bulk at a lower price.

<sup>11</sup> Schneiderman, Eric, "Obstructed View: What's Blocking New Yorkers from getting Tickets" pg. 5 [https://ag.ny.gov/pdfs/Ticket\\_Sales\\_Report.pdf](https://ag.ny.gov/pdfs/Ticket_Sales_Report.pdf).

<sup>12</sup> A type of "challenge-response" test used to verify if the user is human or Bot.

<sup>13</sup> Koebler, Jason. "The Man Who Broke Ticketmaster." *Motherboard*, 10 Feb. 2017.

Bot process much simpler. Lawson's company Wiseguy "used its Bot to buy paperless tickets directly on fans' credit cards."<sup>14</sup> Doing so eliminated the need to acquire a number of credit cards. The Bot was then able to directly charge the consumer for the face value of the ticket, as well as the profit being sought.

It is clear that past anti-Bot measures not only failed, but also facilitated the ticket buying process for Bot operations. Technology combating technology appeared to be a dead end. Another route needed to be pursued.

New York Attorney General Eric Schneiderman said, "The secondary ticket market is really like the Wild West." Schneiderman launched an investigation on Bot-use in 2009. He released a report in January 2016 titled "Obstructed View."<sup>15</sup> His report outlined recommended consequences for those who utilize Bots to unfairly purchase tickets.

"Impose criminal penalties for Bot use. Given that ticket resellers are making considered business decisions when they deploy Bots to acquire massive amounts of tickets near-instantaneously, the prospect of criminal prosecution may have a deterrent effect on this conduct."<sup>16</sup>

The Attorney General's most notable recommendation was to make Bot-use a criminal offense. It is clear that past measures such as Captcha and paperless ticketing have been circumnavigated by Bot users. Perhaps a criminal sentence is the route needed in order to intimidate those behind the Bot.

In 2010, prior to Shneiderman's findings, ticket-Bots had become illegal in the State of New York. "It shall be unlawful for any person, firm, corporation or other entity to utilize ticket purchasing software to purchase tickets."<sup>17</sup> However those who violated this law were only subjected to penalties and forfeiture of profits. Knowing how profitable Bot operations are, capital punishment seemed to have been more of a nuisance for violators rather than an answer. "The fines vary now. But we're talking about thousands of dollars' worth of fines for people who can make millions of dollars."<sup>18</sup>

Schneiderman also recommended holding secondary ticket selling websites such as Stubhub<sup>19</sup> accountable. He proposed, "Ticket resale platforms are in the best position to ensure that their broker customers

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<sup>14</sup> *Id.*

<sup>15</sup> See *supra* note 11.

<sup>16</sup> *Id.* pg. 38.

<sup>17</sup> N.Y. Arts & Cult. Aff. Law § 25.24 (2010).

<sup>18</sup> "NY's new plan to stop ticket machines that "steal the show" June 30, 2016  
<https://www.cbsnews.com/news/ny-ticket-bots-illegal-scalpers-could-face-jail-time>.

<sup>19</sup> A leading website in secondary ticket sales.

follow the law.”<sup>20</sup> Accountability in the secondary market would ideally leave Bot-operators without a market to sell their tickets in.

The Attorney General has reached settlements with five companies<sup>21</sup> after his release of *Obstructed View*. The settlement involved five ticket broker companies who “illegally purchased and resold hundreds of thousands of tickets to New York events since 2011.”<sup>22</sup> The companies had to pay a combined \$4.19 million to the State of New York. The settlement also required “that that the companies and their principals maintain proper ticket reseller licenses to resell tickets to New York events, abstain from using Bots.”

Schneiderman found that one of the companies involved in the settlement, *Prestige Entertainment*, was responsible for one of the country’s largest Bot operations. It found that the company used multiple Bots, several IP addresses, and thousands of credit cards linked to their own Ticketmaster account. The company’s resources allowed them to purchase over 1,000 tickets in a single transaction to U2’s 2014 Madison Square Garden concert in under a minute.<sup>23</sup>

Componica LLC was another company involved in the settlement. Componica developed software libraries for the ticket Bots. These libraries contained software<sup>24</sup> that allowed Bots to bypass the Captcha security system. The settlement only required the company to discontinue its development of security by-passing software.

Following Shneidermans’ release of his report and the resulting settlements, Governor Andrew M. Cuomo signed legislation combating Bot-use.<sup>25</sup> The new legislation expanded the definition of “ticket purchasing software to include the wide variety of systems used to quickly amass tickets before the general public can access them.”<sup>26</sup> It also established that the use or interest of “ticket Bots” is punishable as a class A misdemeanor. This criminal penalty is also applicable to those who knowingly resold Bot-bought tickets. In New York, a class A misdemeanor is punishable with one year imprisonment.<sup>27</sup> Additionally, a violator will be

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<sup>20</sup> See *supra* note 11 pg. 20.

<sup>21</sup> Attorney General Eric T. Schniederman web page. “Prestige Entertainment-\$3,350,000, Concert Specials- \$480,000, Presidential Tickets- \$125,000, BMC Capital \$95,000, Top Star Tickets- \$85,000, FanFetch \$55, 000; <https://ag.ny.gov/press-release/ag-schneiderman-announces-419-million-settlements-six-companies-illegally-purchased>.

<sup>22</sup> Today, Venues. “BOTS Fines Announced in New York.” *Venues Today*, May 16, 2017, <http://www.venuesnow.com/news/detail/bots-fines-announced-in-new-york>.

<sup>23</sup> *Id.*

<sup>24</sup> Based in Iowa, the company developed software such as Optical Character Recognition.

<sup>25</sup> N.Y. ART & CULT AFF § 25.24.

<sup>26</sup> N.Y. AC § 25.24.

<sup>27</sup> N.Y. Penal Law § 70.15.



subject to the already existing civil penalties. The law requires those found guilty to pay a maximum of \$1500 for each violation committed and to forfeit all profits made.

New York acted as a trailblazer in criminal punishment for those who illegally acquired and sold tickets. President Obama made Governor Cuomo's statute a nationwide law in December of 2016. The Better Online Ticket Sales (BOTS) Act made the "use of software to purchase tickets to events" illegal on the federal level.<sup>28</sup> This act also gave state governments the power to bring civil suits to federal courts on behalf of its residents. Additionally "the law gave the Federal Trade Commission the power to intervene in civil cases as well"<sup>29</sup>

It is clear that Bots are a major problem in the ticket industry. However, Bots are not the only obstacle the consumer faces when trying to purchase tickets. The New York Attorney General found that on average, "only 46% of tickets are reserved for the public. The remaining 54% of tickets are distributed between 2 groups: Holds (16%) and pre-sales (38%)."<sup>30</sup> "Holds" are tickets that are withheld for people like agents, venues, promoters and sponsors. Pre-sale tickets are mainly given to some credit card holders<sup>31</sup> and fan clubs. Less than half of ticket availability is left for the consumer.

The average consumer starts off with both hands tied behind their back. On one side are the "industry elites" who have a plentiful 54% of tickets reserved for them. On the other side are computer programs that have the ability to take the remaining tickets in seconds. Hopefully, for the consumers' sake, the new State and Federal Laws that punish Bot use as a criminal offence will be effective. The cleverness possessed by those who operate Bots cannot be underestimated. Previous anti-Bot measures have either been circumnavigated or used in the Bot-operators favor. We can only hope that the fear of imprisonment will be enough to discourage those in the ticket industry from using Bots.

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<sup>28</sup> 15 U.S.C.A § 45c.

<sup>29</sup> Steele, Billy. "Obama Signs Ticket-Bot Ban into Law." *Engadget*, 15 Dec. 2016, <https://www.engadget.com/2016/12/15/president-obama-signs-ticket-bot-bill-into-law>.

<sup>30</sup> See *supra* note 11 pg. 12.

<sup>31</sup> Credit card company's such as Master Card offer incentives that involve tickets.



# DISNEY'S RIGHTS TO MICKEY MOUSE

ASHLEY LUCIEN<sup>†</sup>

The Disney Corporation is probably the best known company for children's movies and characters all over the world. In your lifetime, you have come across something that is owned by Disney, whether it be the parks, the television network, games, movies, or its characters.

Most people are unaware that the story lines of Disney movies did not originate with Disney.

Whenever a new innovative work is established, the author legally owns the rights to that creative work. The United States instituted copyright laws<sup>1</sup> to make sure that all authors or innovators were able to gain ownership of their product. The owners are able to duplicate and distribute their works to everyone. Each work is given a copyright which provides a period of time for that creation to be owned exclusively by the author. Once the copyright expires the product transfers into the public domain where anyone is able to buy the rights to the work, duplicate and distribute it for their own profit.

While Disney has added their own artistic touch to each of the movies that they have produced, most if not all of the stories were conceived by others and in the public domain for production corporations like Disney to buy the rights.

Walt Disney and every CEO since his passing made sure that the rights to every Disney movie and character were owned by them and no other company can use them or profit from them.

Disney has had numerous lawsuits involving violation of Federal Copyright Laws with other production companies that have attempted to use their character or movies.

Until 1976 the average copyright term was 28 years with a possible renewal term of another 28 years. Since then Disney has been influential in Congress's decision to extend Copyright terms. According to the United States Constitution,<sup>2</sup> Congress has the power to limit the length of time that

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<sup>1</sup> 17 USCA §101 et seq.

<sup>2</sup> U.S. Const. Art. I, § 8, cl. 8.

authors or inventors have exclusive rights to their creations or discoveries. This was enacted by our founding fathers in order for projects within the arts and sciences to be shared, to learn from and then eventually add our own imaginative touches. The debate is whether it is constitutional to have a company like Disney own the rights to multiple projects as long as legally possible or must there be a strict time limit in order for others to benefit.

In 1928, Walt Disney produced his first widely known animated movie titled “Steamboat Willie.” This movie was originally a parody of Buster Keaton’s “Steamboat Bill.”<sup>3</sup> The 1909 copyright law amended existing copyright law<sup>4</sup> to a 28 year period and a possible renewal for another 28 years. At the time, it was difficult for Congress to allow the expansion because they wanted to balance the public’s interest and the rights of the author. It was deemed that in expanding the term it would provide the author or inventor of any project a sufficient financial return for their composition.

After seeing the success of the first animated movie, Walt Disney decided to produce a number of classic animated movies including “Snow White and the Seven Dwarfs” originated from the Brothers Grimm folktale, “Sleeping Beauty” was adapted from a Charles Perrault folktale of the same name and “The Jungle Book” inspired by Rudyard Kipling’s book of the same name. Disney did not release the movie Jungle Book until the Kipling copyright expired. “Peter Pan” came from a character created by J.M. Barrie.

“Steamboat Willie” was released in 1928. According to the existing copyright laws it should have returned to the public domain in 1956. With a 28 year extension then the copyright would expire in 1984. All of the Disney movies that were released around that time were due to expire also.

The copyright law changed for the second time in 1976 with the Revision of the U.S. Copyright Act.<sup>5</sup> The amendment was made for two reasons. First, there were new technological discoveries which were unclear if they violated copyright laws. The second reason was that the United States Congress recognized the need to address international copyright laws. The new law was the life of the author and a renewal period of fifty year.<sup>6</sup>

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<sup>3</sup> Commentary: The Creative Commons, 65 Mont. L. Rev. 1, Winter 2004.

<sup>4</sup> Copyright Act of 1909, Pub. L. 60-349, 35 Stat. 1075 (Mar. 4, 1909; *repealed* Jan. 1, 1978).

<sup>5</sup> Pub. L. No. 94-553, 90 Stat. 2541 (1976) (codified as amended in scattered sections of 17 U.S.C.).

<sup>6</sup> *Id.*

A year later Disney released two new films titled “The Rescuers” and “The Fox and the Hound.” Now Disney movies were protected under the new law.<sup>7</sup>

On October 7, 1998, the Senate established the Sonny Bono Copyright Term Extension Act or the Mickey Mouse Protection Act.<sup>8</sup> This new law prolonged the protection from the author’s life plus fifty years to the author’s life plus seventy years. This law would apply to any work created on or after January 1, 1978. The law stretched Disney’s “Steamboat Willie” copyright protection to 2023.<sup>9</sup> Now many of the Disney movies and characters are protected for decades without the fear of being bought by others.

There have been many arguments which state that the abuse of Copyright extension terms are contrary to the Constitution as written by our founding fathers. The Supreme Court has stated that “The Congress in the exercise of the patent power may not overreach the restraints imposed by the stated constitutional purpose.”<sup>10</sup> They also have affirmed that “Copyright laws, patent laws, by the constitutional command must promote the progress of the sciences and useful arts.” A 1909 report from the Senate Committee on Patents indicated that Copyright law is not solely for the benefit of the author but for the benefit of the public. Congress must consider whether the legislation must encourage the producer and become of value to the public. Furthermore, they must contemplate how much the monopoly will be detrimental to the public.

Although I am content with what Disney has done with its characters and storylines, I believe there must be an opportunity for others to benefit from these great concepts. I do not believe that Disney must let go of all the content that they currently own, but should release those that they will never use in the future to the public domain. Other production companies will be given the legal capacity to create their own artistic visions with already exceptional stories. This leads to further growth in literature, entertainment, economy, and the cinematic arts. This would be difficult for Disney since the company was built on Disney movies and characters. I believe that the numerous individuals that were behind the ingenious

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<sup>7</sup> Id.

<sup>8</sup> Pub. L. No. 105-298, 112 Stat. 2827 (1998).

<sup>9</sup> Arlene Langvardt, Kyle Langvardt, *Unwise or unconstitutional: The Copyright Term Extension Act, the Eldred Decision, and the Freezing of the Public Domain for Private Benefit*, Minnesota Intellectual Property Review, Vol. 5, Issue 2, Article 2, (2004), <https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1396&context=mjlst>.

<sup>10</sup> Derek Khanna, *Guarding Against Abuse: The Costs of Excessively Long Copyright Terms*, 23 Comm Law. Conspetus 52 (2014). <https://scholarship.law.edu/commlaw/vol23/iss1/4>.

process when making these movies are equipped to produce new movies or find others works to make their own.

With this in mind, leading to 2023 the main discussion will be whether another extension will lead to a production of more art and literature or if the profits will go to Disney and other big production companies that have valuable properties like Mickey Mouse or other characters and movies.

## NAZI OWNED PROPERTY

YASSMINE ECH-CHAHID<sup>†</sup>

The world witnessed atrocious crimes against humanity during the holocaust, especially against Jewish peoples. In addition to rampant anti-Semitism, physical violence, and ethnic cleansing, German Jewish citizens faced extensive financial exploitation at the hand of the Nazi state. This included buying property and valuable art owned by German Jews at a fraction of the cost when Jewish citizens were forced to flee Germany in order to save their lives. They were put through long torturous processes by corrupt German state officials, rendering them penniless. Any property left behind became state property.

The German government is responsible for the losses incurred by American citizens whose German Jewish ancestor's properties were stolen.

Today American citizens can sue the Federal Republic of Germany to recover the full value of their ancestor's lost property. The cases are difficult to win in United States courts for several reasons. The U.S. courts, in order to preserve international relations with Germany, find that it is best to allow the German government to reach a resolution via mediation with the aggrieved parties. The Terezin Declaration<sup>1</sup> and Washington Conference Principles on Nazi Confiscated Art<sup>2</sup> were international conferences held to take steps to create systems that give families of German Jewish victims of the holocaust a fair opportunity to reclaim their lost properties, religious property, stolen art, etc. In order to further the efforts for restitution according to the policies discussed in those conferences, the Holocaust Expropriated Art Recovery (HEAR) Act of 2016 was created. This Act requires mediation rather than litigation. Therefore, American citizens are forced to seek alternative resolutions with foreign entities, which are sometimes known to be ineffective, inefficient, and inconvenient.

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<sup>1</sup> World Jewish Restitution Organization, "Terezin Declaration"  
<https://wjro.org.il/our-work/international-declarations-resolutions/terezin-declaration>.

<sup>2</sup> U.S. Dep't. of State, Washington Conference on Principles on Nazi Confiscated Art, Dec.3, 1998, <https://www.state.gov/p/eur/rt/hlcst/270431.htm>.

This is apparent in *Schubarth v. The Federal Republic of Germany*.<sup>3</sup> The plaintiff applied to a German state agency responsible for the restitution of properties stolen during World War II, called Bodenverwertungs-und-verwaltungs GmbH (“BVVG”). Her application was pending for nineteen years and then she was awarded a fraction of the property’s worth.

In a recent ongoing case, *Philipp v. The Federal Republic of Germany*<sup>4</sup> the plaintiffs first went to an Advisory Commission in Germany in order to reclaim valuable art, called the Welfenschatz, which was bought from the plaintiffs’ ancestors as a result of Nazi persecution. “The Welfenschatz is comprised of 82 medieval reliquary and devotional objects, dating primarily from the 11th to 15th century, that were originally housed in the Braunschweiger Dom (Brunswick Cathedral) in Germany.”<sup>5</sup> Three Jewish German owned art dealer firms, J. &S. Goldschmidt, I. Rosenbaum, and Z.M. Hackenbroch, known as the consortium, bought the collection on October 5, 1929. The consortium sold 40 out of the 82 pieces to different museums and exhibits in the United States and Europe. On June 14, 1935, the remaining 42 pieces of the Welfenschatz were sold by the consortium to Germany for \$1.7 million, which was thirty five percent of its actual value. Hermann Goering, a Nazi who arranged the transaction, presented the treasures as a gift to Adolf Hitler on his birthday. The Welfenschatz’s value is now estimated at approximately \$227 million. The Advisory Commission determined that the transaction of 1.7 million was fair and did not recommend the State of Germany return the art. Even if the value was greater, the Advisory Commission could only recommend a resolution and had no real power to enforce their decisions. These systems, while conceived in good faith, make it more difficult for families of victims of the Holocaust to receive proper restitution.

Another obstacle in United States courts is jurisdiction. The Foreign Sovereign Immunities Act (“FSIA”)<sup>6</sup> gives foreign states immunity from lawsuits in a United States courts. However there are some exceptions. The difficulty many people encounter lies in applying an exception to their case, which would allow them to sue for their lost property without having their suit immediately dismissed. In *Schubarth*,<sup>7</sup> the plaintiff, a U.S. citizen was unable to sue the Federal Republic of Germany for the full fair market value of her German property because the court did not have jurisdiction

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<sup>3</sup> *Schubarth v The Federal Republic of Germany*, 2016 WL 7156463 (D.C. Circ. 2016).

<sup>4</sup> *Philipp v. Federal Republic of Germany*, 248 F.Supp.3d 59, (D.D.C. 2017).

<sup>5</sup> Id.

<sup>6</sup> Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. § 1602-1611 (1976).

<sup>7</sup> See *supra*, note 3.



over the defendant, the Federal Republic of Germany. She was unable to prove one of the exceptions, that is, that they were engaged in ongoing commercial activity, which would have qualified as an exception to the Foreign Sovereign Immunities Act.

*Philipp*<sup>8</sup> dealt with a similar matter except the judge did not dismiss the case.

In the case of *Simon v. Republic of Hungary* the court determined that cases “involving confiscations of property that themselves constitute the commission of genocide. . .may proceed under the FSIA’s expropriation exception.”<sup>9</sup>

In *Philipp*, the plaintiffs’ claim is that Nazi Germany used their growing government to monitor Jewish owned businesses and were able to negatively effect their business operations. The court found some of the plaintiffs’ claims were successful under the FSIA exception.

The restitution of stolen properties to the rightful families is not only a matter of paying them back for the atrocities committed during the Holocaust, but a chance to restore justice in the world. Without systems in place which allow Holocaust victims to reclaim what they lost during World War II, we promote suffering on behalf of the marginalized and promote genocide, in that we continue to allow the perpetrators of these injustices to profit from the suffering of their victims. In *Schubarth*, the plaintiff is recognized as the rightful owner of the expropriated property in Germany, which she inherited, however the German government did not act in good faith to offer her the full fair market value. The United States court then granted the defendant’s motion to dismiss the case when she brought suit against them in America, allowing Germany to profit off of the injustices against Jewish people sustained during the Holocaust. Had the court dismissed in *Philipp* as in *Schubarth*, the state of Germany would have been able to take further advantage of properties obtained by means of genocide against German Jews.

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<sup>8</sup> See *supra*, note 4.

<sup>9</sup> *Simon v. Republic of Hungary*, 812 F.3d 127 (D.C. Cir. 2016).

