



ST. JOHN'S UNIVERSITY

COLLEGE OF PROFESSIONAL STUDIES

THE LEGAL APPRENTICE

FOREWORD

Dean Katia Passerini

A NOTE FROM THE EDITOR

Professor Mary Noe

"HEY JEANNE" ... AND OTHER THINGS NOT TO SAY IN PROFESSIONAL COMMUNICATIONS

Associate Dean Jeanne Ardan

BERNARD HELLDORFER: TEACHER, MENTOR, COACH AND FRIEND

Professor Mary Noe

ARTICLES

DID THE GRINCH STEAL THE CHRISTMAS PLAY?

Jennifer Hood

GAMBLING IN CYBERWORLD

Aaron Labeledz

YOUR CUP OF JOE MAY BE CONSIDERED ART

Patrick Pardo

TRAGEDY ON THE STATEN ISLAND FERRY

Michelle Bravo-Cano

ST. JOHN'S UNIVERSITY

THE LEGAL APPRENTICE

VOLUME 4

SPRING 2017

NUMBER 1

FOREWORD v
Dean Katia Passerini

A NOTE FROM THE EDITORvii
Professor Mary Noe

“HEY JEANNE”... AND OTHER THINGS NOT TO SAY IN
PROFESSIONAL COMMUNICATIONS 1
Associate Dean Jeanne Ardan

BERNARD HELLDORFER: TEACHER, MENTOR,
COACH AND FRIEND 7
Professor Mary Noe

ARTICLES

DID THE GRINCH STEAL THE CHRISTMAS PLAY? 11
Jennifer Hood

GAMBLING IN CYBERWORLD 21
Aaron Labeledz

YOUR CUP OF JOE MAY BE CONSIDERED ART 27
Patrick Pardo

TRAGEDY ON THE STATEN ISLAND FERRY 33
Michelle Bravo-Cano

ST. JOHN'S UNIVERSITY
COLLEGE OF PROFESSIONAL STUDIES

OFFICES OF ADMINISTRATION AND FACULTY
2016 – 2017

KATIA PASSERINI, PH.D.
DEAN

GLENN GERSTNER M.A.
ASSOCIATE ACADEMIC DEAN

* * *

ANTOINETTE COLLARINI SCHLOSSBERG, PH.D.
CHAIRPERSON
CRIMINAL JUSTICE, LEGAL STUDIES, HOMELAND SECURITY

JAMES CROFT, J.D.
DIRECTOR
LEGAL STUDIES
ASSISTANT EDITOR

MARY NOE, J.D.
PROFESSOR
EDITOR

THE LEGAL APPRENTICE

FACULTY ADVISORY BOARD

**JAMES CROFT, ASSISTANT PROFESSOR B.A., J. D.
ST. JOHN'S UNIVERSITY SCHOOL OF LAW**

**NEIL FEINSTEIN, ASSISTANT PROFESSOR B.A., M.S.
NEW YORK UNIVERSITY**

**JACK P. FRANZETTI, PROFESSOR B.A., M.A., PH.D.
ST. JOHN'S UNIVERSITY**

**CLAIRE O'DONOGHUE, ASSOCIATE PROFESSOR B.S., M.A.
ST. JOHN'S UNIVERSITY**

**MICHAEL RIZZO, ASSISTANT PROFESSOR B.A., M.B.A.
ST. JOHN'S UNIVERSITY**

FOREWORD



One of the great pleasures of being the new Dean of the College of Professional Studies is getting to know the members of the St. John's family: students, alumni, administrators, staff and faculty. It was not long after my first encounter with Professor Mary Noe, that she handed me three items and invited me to read them. What do you suppose they were? Those of you who know Professor Noe would guess correctly that they were the first three volumes of *The Legal Apprentice*. She

is proud of the writing accomplishment of the student authors. I now understand why because the topics are interesting and the writing clear and concise.

I have the honor as Dean to acknowledge the work of the student authors in the Fourth Edition of *The Legal Apprentice*. Each author has lived up to the proud tradition of excellence.

This publication begins and ends with the hard work of our students. The articles are selected for further editing and publication by a faculty blind review panel that includes professors in Legal Studies, English, Advertising and Journalism. Professor Noe then works with the selected authors and edits each article to ensure clarity and accuracy, including the addition of Editor's Notes to enhance understanding of the topic.

The hardcopy edition of this publication is a tangible manifestation of the excellence shown by our student authors. I know that it is prized by many more than a medal, plaque or trophy. The online edition ensures that the articles are also known to and read by others far beyond the St. John's community.

I close on a personal note of thanks to the so many who have warmly welcomed me as your Dean and with best wishes for many more years of excellence in writing.

A handwritten signature in dark ink, appearing to read 'Katia Passerini'. The signature is fluid and cursive.

Katia Passerini
Dean
College of Professional Studies

A Note from the Editor

This edition of *The Legal Apprentice* features another group of accomplished student authors and their works. Over the decades, students of St. John's University have demonstrated that they *can* become great writers. Here are just a few.

The late Governor Mario Cuomo, '53C, '56L, '75HON, wrote and delivered a keynote speech at the Democratic National Convention in 1984 that vaulted him onto the national scene. "This nation is more a tale of two cities than it is just a shining city on a hill" Governor Cuomo, who went on to author three books, had been a student editor of the *St. John's Law Review*.

Federal Judge P. Kevin Castel (SDNY), '72CPS, '75L, '04HON, has written over a thousand opinions published on Westlaw during his thirteen years on the bench. In a 2016 decision upholding the application of a 19th century law which had the effect of precluding selfie photos of a marked voting ballot, he stated "Indeed, the ubiquity and ease of smartphone technology plausibly increases the risk of one form of voter intimidation" Judge Castel had also been a student editor of the *St. John's Law Review*.

Nelson George, a 1979 graduate of St. John's University, is a columnist, journalist and filmmaker. He has been nominated twice for the National Book Critics Circle Award. "Often what you want you already have, just dig deeper."

We salute all of our writers from yesterday and today. Some wise words on writing from Benjamin Franklin were "Either write something worth reading or do something worth writing."

“HEY JEANNE” . . . AND OTHER THINGS NOT TO SAY IN PROFESSIONAL COMMUNICATIONS

JEANNE ARDAN*

As the Assistant Dean for Career Development at St. John’s University School of Law, I have the pleasure of speaking with employers on a regular basis. Typically, my conversations are very positive, with great feedback on what a great impression our students made. However, from time to time, I receive calls from employers alerting me to a situation where a student needs guidance on ensuring professionalism in future interactions.

For example, I once received a call from one of our alumni who was serving as a judicial law clerk to a federal judge. A federal judicial clerkship is a prestigious post-graduate attorney position. A law clerk works closely with the judge in chambers and in the courtroom, conducting research and contributing ideas, among other things. The judge’s law clerk also often interviews, hires and supervises law students to serve as judicial interns. The law clerk who called me was a recent graduate with a very easy-going and friendly personality. He interviewed one of our students and when the student emailed him to thank him for the interview, the student addressed the clerk by his first name and began the email with the word, “Hey.” Clearly, the student felt very comfortable with the law clerk after their friendly, easy-going meeting. Coupled with the law clerk’s youth, the student let his guard down and addressed the clerk too comfortably and informally. Fortunately for the student, the alumnus law clerk contacted me so I could guide the student in professional communications moving forward, and he hired the student for the internship nevertheless. However, since not all employers will act so understanding, it is important to avoid any professionalism pitfalls in your job search and in your employment.

After conducting research on where you want to apply for a position, the next step will be to submit your application documents, which normally consist of a cover letter, a resume and perhaps a transcript, along with any other requested documents, such as a writing sample, reference list,

* Associate Dean for Career Development, St. John’s University School of Law.

personal statement and/or an employment application. The most important thing to remember here is accuracy. Your application documents are your first professional communication with an employer. Anything listed or mentioned in your documents must be truthful and accurate. This includes: G.P.A.; class rank (if applicable); honors; activities; dates, places and responsibilities of employment or volunteer experience; and anything else mentioned. Misrepresenting any information is beyond unprofessional; it is unethical and could subject you to potential school sanctions and/or other negative consequences. It is equally important to treat anything you submit as a writing sample as a professional communication. You must ensure that your writing sample is your best work and your own work. Writings cannot be plagiarized, which means copying or using someone else's words without giving credit.

Of course to ensure professionalism in your application documents, it is imperative that you use proper spelling, grammar and formatting. Make sure you are listing a professional email address in your materials. Your school email address or an email address with your first and last name works well, while a casual email address like BigJoe@ would not be deemed professional. Proofread your documents multiple times and ask another trusted person to proofread them for you, as it is always good to have a second set of eyes review your work. I strongly encourage you to work with the Career Services Office to ensure that your documents are in good shape and that they market your skills in the most effective way possible.

Once your application documents are in tip-top shape, you will hopefully get called in for an interview with an employer. Your ability to communicate effectively is being evaluated as soon as that interview invitation is made. If an employer calls you and gets your voicemail, it is imperative that they hear a professional greeting, not a casual greeting that you might use for friends. Once an employer leaves a message for you, either by phone or by email, it is important that you respond promptly. This holds true even if you already accepted an alternate position and are no longer able to interview. It is still important to give the courtesy of a response to the employer, thanking them for the opportunity and explaining that you accepted another offer in the interim. The employer will appreciate your professionalism in honoring your other commitment and in responding to them, and this will leave a good impression for future interactions with this employer.

If you are communicating with the employer by email to set up an interview, remember the law clerk/law student example I explained earlier. Always address a professional communication with Dear Mr., Ms., Judge,

etc. Remember that emailing is not texting. You should not write in all lowercase or all capitals, and you should never use short-hand (U instead of you; R instead of are) or emoticons (☺). You should not include an inspirational quote at the footer of your email when communicating professionally. Whether you are communicating with an employer by phone or email to schedule an interview, remember to be courteous and flexible.

The interview is your next opportunity to communicate professionally with an employer. Again, your professionalism is being evaluated from the outset. You must arrive on time. Ideally, you should arrive fifteen minutes early, not more. You should be courteous to everyone you come in contact with from the time you arrive at the parking lot or office grounds. You should be dressed appropriately in interview attire and clean shoes (ladies, make sure the heel is not too high), your hair should be neat and you should not wear showy jewelry or excessive cologne or perfume. You should not be carrying a large tote bag or cumbersome backpack. Instead, you should have a portfolio, computer case or other briefcase type bag, which contains extra copies of your application materials. When you walk into the interview room, be sure to be friendly and greet your interviewer with a firm (but not too strong) handshake. While it seems like this should not be necessary to say, I will nevertheless remind you that you should not be chewing gum and that your phone should be off and out of sight.

During the course of the interview, it is important that you keep the interviewer interested. An interview is a professional conversation about you! To ensure that you are prepared and can keep up your end of the conversation, it is important that you review your resume carefully and that you practice answers to common interview questions. The Career Services Office should be able to help you with this. This type of preparation also helps to alleviate any interview nervousness and helps you to communicate professionally.

When preparing for your interview, be sure you know and are able to talk about everything listed on your resume. For instance, if you list a job from several years ago and are asked about it, an appropriate answer is not, “Oh, that was so long ago, I don’t remember.” Similarly, if you list student groups, be sure you are able to talk about your participation in those groups. Give complete answers when responding to questions. Don’t assume that the interviewer is going to coax answers from you or ask follow up questions. Use every question as an opportunity to provide complete information and to sell yourself to the employer. Don’t give a laundry list of your attributes – “I am detail oriented, a strong writer and have a great work ethic.” Anyone can say this. Instead, make the

interviewer believe you have those attributes by giving specific examples of how you have demonstrated attention to detail, strong writing skills and a great work ethic. If an employer asks you to describe a weakness you have, discuss a professional area where you feel you need development (perhaps public speaking or technology) and show how you are working to overcome any shortcoming. Make sure you research the employer thoroughly so you can ask thoughtful questions and show your enthusiasm about the employer's work. Similarly, the employer will research you, so make sure your on-line/social media presence is professional in nature.

To present professionally in your interview, you should be energetic and enthusiastic, but composed. You should come across as confident, not arrogant or not very nervous. Maintain eye contact and be careful to control nervous mannerisms like fidgeting, tapping your foot or clicking a pen. Use proper vocabulary and be careful not to say "like," "um" or "you know." During your interview, you should not have your resume out or take notes. Your hands should be free, as this is a professional conversation. You are encouraged, however, to jot down relevant notes about your interview once you leave, so you remember everything you discussed. You can reference some of this information when writing a thank you letter (a typed professional correspondence) or a thank you email to the employer. This type of correspondence should be sent within 24 hours and must be error-free.

If all goes well and you get the internship or job, it is imperative that you continue exhibiting professionalism in the workplace. Arrive on time, attend work regularly, stay until you are no longer needed, respond promptly to supervisors and colleagues, use professional email practices, be proactive, keep your supervisors up to date on your projects, and be sure to tell someone if you mistake, while offering a proposed solution. Of course you should also always submit your best work product. This type of professional behavior will help to ensure positive reviews and advancement in your positions, as well as help to have your employer serve as a future reference for you when you are ready to move on to your next challenge.

I am hopeful that the guidelines that I have set forth here will be a strong foundation for you to develop professional habits in your career, and that you extend these habits to your academic life too. It is equally important to dress appropriately when you go to class, to address your professors and deans in a professional manner, to stay alert and participate in class, to hand in your best work and to treat your classmates with respect. You make an impression on everyone you meet and regularly presenting yourself this way will help you to develop a professional personal brand. Your brand is the way that people think of you when

someone mentions your name. Having a professional personal brand will follow you throughout your various endeavors and will no doubt help you to succeed. I wish you luck and I am confident that you will remember to communicate and behave professionally as you move through your academic and employment careers. I am also confident that if you enroll at St. John's School of Law one day, I will never receive anything but positive feedback from the employers who interact with you.

BERNARD HELLDORFER:
TEACHER, MENTOR, COACH AND FRIEND

MARY NOE*

*If you are planning for a year, sow rice;
if you are planning for a decade, plant trees;
if you are planning for a lifetime, educate people.*

Chinese Proverb

On August 4, 1955 at Bethany Deaconess Hospital, a local Brooklyn hospital that opened in 1902 to serve the Brooklyn German-American community, Lillian and Bernard Helldorfer welcomed a son, Bernard. Bernie's father had served as a Commander in the U.S. Coast Guard Reserve and was an insurance inspector. His mother worked for the New York Telephone Company in Brooklyn, then a part of Ma Bell. The family made their home in Glendale, Queens, a quintessential middle class neighborhood with tree-lined streets. They would have one more child, a daughter Susan.

Bernie attended St. Pancras Grammar School in Glendale and played Little League baseball. He attended Christ the King High School in Middle Village, Queens. In high school he was editor of the school newspaper, the school radio announcer, and played on the bowling team.

Bernie's role model was his father, a graduate of St. John's University. He followed his father's footsteps in attending St. John's University. At St. John's, he majored in accounting and worked throughout college. Mr. Lou Torio, his high school business law teacher sparked his interest in law. And after his undergraduate studies, he was on his way to St. John's University School of Law.

The same year he graduated law school, Bernie married the love of his life Linda Sturm. Bernie was hired as in-house counsel with Mobil Oil. Mobil had great plans for him and wanted him to relocate out of state. But, thankfully for the future of the St. John's Legal Studies program, Linda

* Mary Noe is a Professor of Legal Studies in the College of Professional Studies.

wanted to stay in Queens. Bernie left Mobil and began teaching at St. John's. At the same time he started his private law practice.

Professor Helldorfer liked the combination of teaching and practicing law. Teaching provided him with an opportunity to instruct and mentor students interested in the law. Professor Helldorfer always enjoyed hearing from his former students who reported to him on the positive impact he had on their lives and careers. One of his former students, Gary Dunn, now a student at the University of Virginia Law School, remembers Professor Helldorfer's inspirational words, "A ship in harbor is safe — but that is not what ships are built for."

In 2000 Professor Helldorfer secured external accreditation Association for the Legal Studies Program from the American Bar. In recognition of the high esteem in which those at other academic institutions held Professor Helldorfer, he was elected President of the American Association for Paralegal Education. In addition to his teaching responsibilities, Professor Helldorfer served as Chairperson, Legal Studies Director, University Personnel Committee delegate and Curriculum and Education Committee Chair.

One of his most significant achievements at St. John's was the creation of the St. John's Mock Trial team. Because of his endless devotion to the team, including weekends and travel, it was an award-winning enterprise. Professors Oscar Holt and Kareem Vessup guided the team along with Professor Helldorfer. According to Professor Holt, "twenty-five years ago, with the generous support and approval of the Administration of the University and the Office of the Provost, Professor Bernard Helldorfer founded the St. John's University Intercollegiate Mock Trial Team. Over the years, Professor Helldorfer has coached over 200 students, to develop the skills of a successful professional person including critical thinking, self-confidence, thinking on your feet and effective oral advocacy."

Professor Holt continues that "as a result of the countless hours Coach Helldorfer has devoted to the team. . . , mock trial students have gone on to become distinguished attorneys, accomplished business executives, well-known public officials and educators. . . ." Here, according to Professor Holt, is the record he amassed and the legacy he left:

"Twenty-one of the twenty-four years, the team successfully competed regionally to earn a bid to the national tournament of the American Mock Trial Association. Nationally, of the approximately 600 teams from over 350 Universities and Colleges, the St. John's Team defeated Universities such as Harvard, Princeton, Georgetown, Fordham and Columbia. In fact, because of Coach Helldorfer's tireless commitment and dedication to the

program, in past years it has earned numerous trophies and awards; been honored by the New York State Senate in Albany; the Chamber of the New York City Council; and one year it fell one point short of being crowned the National Champion.

I have watched in awe and amazement as students from this University have represented St. John's with such distinction and pride. The legacy and this program would not be what it is, or has been, if not for Professor Helldorfer. His strength and unique commitment has left an indelible mark on our program and on me personally. I am so proud to have been his partner. I am more proud to count him as a friend. I know that Professor Kareem Vessup, who has coached equally with us during the past 15 years, shares the same feelings."

In 1996, Professor Helldorfer was chosen as one of the Torchbearers of the U.S. Olympic Committee Flame. He had been nominated by a member of the Mock Trial Team.

He had a strong commitment to his community, his family and his faith. Bernie was a fourth degree Knight of Columbus, a Knight of the Equestrian Order of the Holy Sepulchre of Jerusalem, and was given a Papal honor of being made a knight of the order of St. Gregory the Great.

He was a member of the Board of Trustees at his alma mater, Christ the King High School and was an active member of his parish of Our Lady of Hope, participating as a Eucharistic Minister, Pre-Cana presenter, Holy Name Society member, trustee, counter, and member of their Senior Goal Group. He and Linda were two of the original members of the Relay For Life of Middle Village of the American Cancer Society.



In his “spare time,” Bernie and Linda loved traveling out West to their home in Montana. He and Linda bought some land, then a modular home, then more land, until they owned over forty acres. After classes were over, Bernie, Linda and Smokey, the dog they adopted from a Montana shelter in 2000, left to spend their summers in Montana. The summer of 2015 was the last trip to Montana for Bernie, Linda and their new dog, Patch. Bernie’s desktop computer scrolled pictures of Montana. Linda said “We planned to spend half the year out there when we retired, but sadly he never got the chance to retire. He absolutely loved Montana. He enjoyed just being on his land and looking at the mountains.”

We will miss this gentle giant of the St. John’s community. It is our collective responsibility to ensure that what he built within our University community stands the test of time.

DID THE GRINCH STEAL THE CHRISTMAS PLAY?

JENNIFER HOOD*

As a young child and throughout my high school career I participated in plays or skits. I never once thought about the possible benefits I was reaping from my performances. It was just something that I knew I had to do. The thought never once crossed my mind that maybe, just maybe, while I was twirling about on stage or reciting a line from some script, that I frankly could care less about, I was actually learning. Could it be that this fun activity is actually learning in disguise? The way I was taught my lines was to recite notecards over and over until the words became a natural reflex.

If I had previously read a court case about preventing a school Christmas play, there is no doubt in my mind that I would have laughed so hard I would barely be able to choke out the words “Are they serious?” To me, a play was just a play. There was no hidden motive to plant a seed in the minds of my audience, hoping that one day that little seed would take root in their minds. When I was on stage, I just wanted to make a few people in the crowd laugh and maybe get a pat on the back from my father. If I did that, I was successful. Now after reading this court case, I face the reality that my version of school plays is not universal.

In the case, *Freedom from Religion Foundation v. Concord Community Schools*,¹ the presentation of a “Christmas Spectacular” by a public school, threatens to shut down the show because the plaintiff argues that it appears to advance Christianity.

This paper will delve into the law, and first summarize the case *Freedom from Religion Foundation v. Concord Community Schools*; second, review the research results of the overall benefits that art programs have on its participants; and finally give my opinion on the use of religion in our public school systems.

*Jennifer Hood is a Legal Studies Major at St. John’s Univeristy College of Professional Studies.

¹ 148 F.Supp.3d 727, (N.D. Ind. 2005).

CASE SUMMARY

During the month of December 2014 the defendant, Concord High School, performed their annual Christmas Spectacular. Every year since 1970, the show has contained multiple passages from the Bible and has closed with the presentation of a living nativity scene in which students dress up in costumes as biblical figures of the Christian faith. The school planned to perform the exact same show in 2015 until the plaintiff, a student and his father, along with the Freedom from Religion Foundation, claimed that the show violated the Establishment Clause.² Plaintiff claimed that the show was pushing students towards Christianity, rather than just educating them on the subject. Plaintiff filed a request for a preliminary injunction, which would stop the 2015 show from presenting the living nativity scene and Bible verses until the court could reach a decision.

The defendants, in order to prevent a preliminary injunction, drafted a different version for the 2015 show. This draft indicated that the school intended to make two changes; first, omit the Bible readings; and second, add songs celebrating two other religious holidays, Chanukah and Kwanzaa.

Editor's Note: The Court granted an injunction but only as to that part of the show that performed the living nativity scene.

The judge found that this “proposed 2015” version of the show was still likely to violate the Establishment Clause, and therefore, issued the preliminary injunction. The school had already agreed to take the Bible verses out of the show, so the injunction only prohibited the future versions use of a living nativity scene.

With the new restrictions, Defendant drafted a new version of the show.

This show was renamed “Spirit of the Season” rather than “Christmas Spectacular.” The new show would add the cultural significance of the three holidays; Christmas, Chanukah, and Kwanzaa. It started with nearly twenty group and solo performances, all of which were deemed secular by the court. After a short intermission, the show resumed with an introductory reading and musical performances about Chanukah, which lasted about four minutes. Next was an introduction and musical performances related to the holiday of Kwanzaa. This segment of the show

² “Congress shall make no law respecting an establishment of religion....” U.S. Const. amend I, cl. 1.

also lasted for nearly four minutes. The next and final segment of the show was about Christianity.

The Christianity segment experienced a number of changes from previous versions. Because of the injunction, there was no Bible readings and the living nativity scene was no longer “living.” Students were replaced with mannequins, and the stable had no angels or shepherds in it. This version began with an introduction that explained how Christmas relates to our country’s history, in an attempt to make the show more secular. After several Christmas-related musical performances, “Joy to the World” played while the audience exited the auditorium. In total, this segment of the show lasted twenty-two minutes. Therefore, the actual performed version bore little resemblance to the presentations in the past.

Editor’s Note: The plaintiffs’ request for injunctive relief was one part of their request to the court. After the show, Plaintiffs requested a permanent injunction on future shows as well as a final determination that the 2014 and 2015 show violated the Establishment Clause and therefore the Plaintiffs requested monetarily compensation.

In regards to the “2014 version,” Plaintiffs state that the 2014 show violates the Establishment Clause, that this violation is not moot, and seeks to be awarded attorney’s fees plus \$1 per performance. The school, however, claimed that the court can do nothing about the 2014 show because it is a moot point, meaning that it happened in the past and is now of no meaning or relevance.

After viewing the 2015 show, the plaintiff, along with two new plaintiffs, alleged that all three versions of the show, the “2014 version,” the “proposed 2015 version,” and the “2015 performed version,” violated the Establishment Clause. Therefore, Plaintiffs amended their complaint to add all three versions of the show and asked the court to stop all future versions of the show.³ In the revised complaint, Plaintiffs sought a permanent injunction, which would keep the school from presenting any of the previous versions in the future, and award attorney fees.

The issue before the court in relation to the 2014 show is whether this show is moot and therefore need not be decided.

The court decided that in order to prove mootness, or lack thereof, both parties would need to submit supplemental briefings, which are papers that state a legal argument. The court reasoning was based on the idea that

³ A complaint is the first document filed with the court by a party claiming legal rights against another party.

cases can become moot if the bad behavior, in this case the non-secular nature of the show, comes to an end on its own. The judge also considers that in order for the Plaintiffs to be awarded financial damages on the 2014 action, the problem “must exist at the beginning of the litigation and throughout its existence.”⁴ It is hard to determine whether the fact that the show changed because of the injunction can be considered “coming to an end on its own.”⁵ Therefore, more information was needed.

The second and final issue before this court is whether the show performed in 2015 violated the Establishment Clause.

The Court found the 2015 show did not violate the Establishment Clause because it satisfied all three prongs of the Lemon Test.⁶ This is a test created by the Supreme Court to decide matters relating to the Establishment Clause. The three prongs state that the show must not “(i) lack a legitimate secular purpose, (ii) have the primary effect of advancing or inhibiting religion, or (iii) foster an excessive entanglement with religion.” Note that if the show violates even one of the three prong, it is in violation of the Establishment Clause.

The first prong of the Lemon test was satisfied because the school added performances regarding two new religions, Chanukah and Kwanzaa. Even though the segment on Christianity was significantly longer than the other two holidays, the judge explained that it is much easier to find music relating to Christmas. Therefore, a reasonable person could see this as a product of availability of music, rather than the favoring of Christianity.

The performed show also satisfied the second prong of the Lemon test because the school changed the religious theme of the show. The first being the lack of any religious texts. Second, the environment was purely secular. The third change was the show no longer had the living nativity scene. The new nativity scene used mannequins and was on stage for a much shorter period of time, therefore it did not coerce any actors towards the Christian religion.

The third and final prong of the Lemon test was satisfied because the sole purpose of the show was to give students in the arts experience performing in front of live audiences. The music and visual aspects of the show were selected only to challenge the students and attract the audience, not to promote any particular religion.

⁴ *Arizonians for Official, English v. Arizona*, 520 U.S. 43, (1997).

⁵ *Friends of the Earth, Inc. v. Laidlaw Inc.*, 528 U.S. 167 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1983).

⁶ *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

RESEARCH

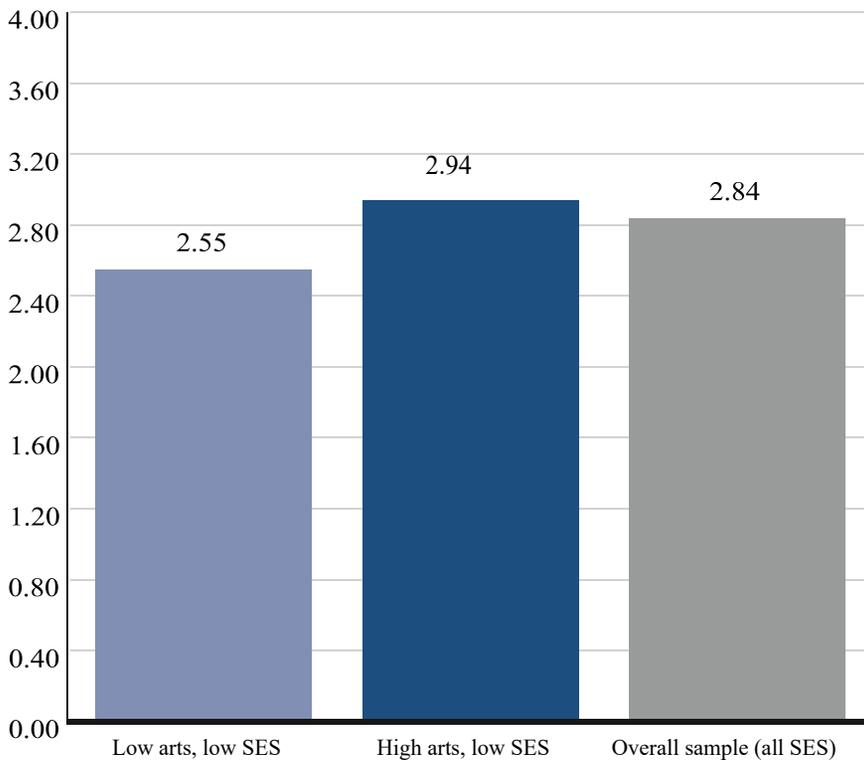
The former President of the United States, Barack Obama once said “The future belongs to young people with an education and the imagination to create.”⁷ In recent years, the media has been flooded with instances of schools cutting their fine arts programs due to losses in funding. Results from studies like *The Arts and Achievement in At-Risk Youth: Findings from Four Longitudinal Studies*,⁸ a meta-analysis consisting of four independent studies, demonstrate that all students, especially those from low socioeconomic status (low-SES), who participate in the arts are more likely to achieve higher in many aspects of life, including academics, future careers, and community involvement.

Throughout history, underprivileged children of low-SES have been out-performed in the classroom time and time again, by students of high-SES. This study, released by the National Endowment for the Arts and conducted by the U.S. Department of Education and the Department of Labor, demonstrates that involvement in the arts may be able to close that gap. It was found that students of low-SES and high arts involvement are more likely to score higher on science and writing tests, take AP or advanced math courses, graduate high school, and excel in college than low-SES students without exposure to the arts. Not only do these students perform higher in certain academic areas, but they are also more likely to attain a higher GPA. As demonstrated in the following chart, in 2005, students of low-SES and high arts participation out-performed both low-SES, low arts students and the overall sample of students from all SES backgrounds.

⁷ <http://www.performingartsconvention.org/advocacy/id=28> (last visited 1/13/2017).

⁸ <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf> (last visited 1/13/17).

Table 1: Mean GPA of High School Students (2005)



Results from *National Longitudinal Survey of Youth 1997*, a study conducted by the U.S. Department of Labor.⁹

Low-SES, high arts students also continue to achieve higher after high school. They often set lofty goals for themselves in their college career and future occupation. These students were more likely to enroll in a Bachelor's Degree Program and choose a major that was considered to be "professional."¹⁰ While in college low-SES, high arts students were over three times more likely to earn "mostly A's" than those low-SES, low arts students. After the completion of their degree, 50 percent of low-SES, high

⁹ <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf> (last visited 1/13/2017).

¹⁰ Majors defined as "professional" according to the U.S. Bureau of Labor Statistics (found on <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf>): accounting, finance, management, education, nursing, allied health, social sciences, biological sciences, arts (last visited 12/5/2017).

arts students sought out professional careers, compared to low-SES, low arts, which were only 21 percent.¹¹

The benefits of being involved in art do not stop at academics. These students were more likely to take an interest and/or engage in areas of public concern. Seventy-three percent of low-SES, high arts students admitted to having read a newspaper at least once a week, compared to 66 percent of the overall sample of students from all SES backgrounds and 44 percent of low-SES, low arts students. Low-SES, high arts students were also more likely than all other groups tested (low-SES, low arts and the overall sample) to participate in activities that benefit others, such as student government (16%), service clubs (19%), and volunteering (47%). The students who participated in the arts were more likely to fulfill their civic duties, such as participating in local, state, and national political elections. Low-SES, high arts students were more likely to voice their opinions by registering to vote, voting in local and national elections, and participate in a political campaign.

This report is one of many that offers support to President Obama's statement. From this data we can see a clear correlation between participation in the arts and the production of prolific members of society. This is revealed through low-SES, high arts student's enhanced abilities to excel in many aspects of life.

OPINION

I agree with the court's decision that 2015 show does not violate the Establishment Clause. However, I do not agree with the court's decision about the 2014 version and the version that was actually performed in 2015.

At first glance, I can see how a person would think the 2015 show violated the Establishment Clause. The simple fact that the segment on Christianity lasted more than five times longer than the segments of Chanukah and Kwanzaa, would make anyone believe that the show is skewed towards Christianity. At first even I was convinced the school had no chance of winning this case. However, after reading the judge's reasoning, there is now no doubt in my mind that the court made the correct decision. I had an "aha moment" when I read the following "Granted, the show still included more Christmas songs than Chanukah or Kwanzaa songs, perhaps emphasizing the Christmas holiday somewhat more than the other[s]. . . The greater number of Christmas songs. . . would easily be perceived by a reasonable observer as reflecting the greater extent to which

¹¹ <https://www.arts.gov/sites/default/files/Arts-At-Risk-Youth.pdf> (last visited 12/5/2017).

those songs have permeated into the secular culture.” This quote opened my eyes to a whole new objective way of thinking. I am a Christian. I want Christmas songs to mean something to the person who is singing them. I want the singer to think of how much Christ did for him or her and feel an overwhelming sense of gratitude, but that is not the reality for a large number of people who celebrate Christmas. To many, Christmas is just a day off of work or a warm, early morning in which they are greeted with presents. It is not about Christ at all. Then we look at the other two holidays, Chanukah and Kwanzaa. Does the majority of people know a single song linked to either of these holidays? Collectively, when we think of December, we think of Christmas and snow. We start to hum songs like “Silent Night” or “Joy to the World,” not because they are about Christ and we feel reverence for him, but because we want to feel “the Christmas Spirit.” There’s something about Christmas that makes nearly every person, even Ebenezer Scrooge, crack a smile. That is why this play is secular. The audience most likely perceived the entire production as either educational or secular-themed because Christmas is no longer seen as a holiday about Christ. It is celebrated by many non-Christians across the globe as the holiday of presents. In my opinion, the court got this part of the decision right.

The court’s decision of mootness, however, is not one with which I can agree. An issue becomes moot when it comes to an end on its own, without any force from the court. It would be like my mother making me peanut butter and jelly for years. Then, I finally tell her that I hate jelly, and from then on, she makes me peanut butter and honey sandwiches, which I love. Then I decide to sue her for all those years that she made me peanut butter and jelly. The point of the law is to correct an action that is wrong. In the case of my peanut butter and jelly, and the other versions of the show, the action has already been corrected. The school fixed its religious theme on Christianity when it implemented the 2015 “actually performed version.” In my eyes, the 2014 version and the proposed 2015 version are nothing more than a moot issue, those prior years’ peanut butter and jelly sandwich.

CONCLUSION

The Establishment Clause was created to protect U.S. Citizens from government coercion of religion, not from education. That is the case here. Though the performances from 1970 to 2014 are likely to have violated the Establishment Clause, I believe they are moot. As for the version that was actually presented in 2015, not only is it unlikely that the audience members felt like the school was forcing them to choose a religion under

duress, but the show was deemed completely secular. This is because the masses no longer associate Christ with Christmas, which in my mind is sad, but it is to the benefit of the defendant. As far as I am concerned, the production in 2015 was completely educational in nature. Twenty-somethings across the nation know that today's education often comes with a five-figure price tag, but admission to "Spirit of the Season" was free. So, perhaps I should consider viewing more law-related arts performances, such as *CSI: Miami* or *Law and Order: SVU*, in my pursuit of becoming a lawyer.

GAMBLING IN CYBERWORLD

AARON LABEDZ*

Since the Middle Ages gambling has been portrayed as one of the major vices of society. Historically, most gambling practices have had to hide behind closed doors to try and avoid the eye of law enforcement. Though recently this stigma has changed and a slightly more lenient climate has come about.

Since gambling on Indian reservations became legal in the 1970's, it has become the leading source of revenue for impoverished reservations across the country. This made gambling more available to the public as most people were living within a few hours drive to a casino. These changes allowed gambling to become less taboo and more mainstream. This broader acceptance allowed online gambling to flourish when the internet became more popular.

Online gambling is one of the newer ways to start a gambling business and for customers to gamble. Just as Amazon has taken a large cut out of brick-and-mortar stores' profits, casinos are concerned that these online sites would cause a large decrease in traffic into their establishments. The traditional gambling industry lobbied the U.S. Congress which resulted in the Unlawful Gambling and Enforcement Act, which prohibited most forms of online games that allowed wagering across state lines.

This paper summarizes a court case of online gambling, reviews New York State information on Native American casinos and gives my opinion on the Native American casinos.

CASE SUMMARY

Interactive is a not-for-profit company that provides online gambling and internet-based games to customers around the world. In 2006, the U.S. Congress passed a law, the Unlawful Gambling Enforcement Act,¹ which prohibited most forms of online gambling and incorporates federal and state gambling laws. The law is enforced by the Federal Trade Commission (FTC). The law made it illegal to use credit cards and other forms of

* Aaron Labeledz is a sophomore at St. John's University College of Professional Studies. His double major is Legal Studies and Criminal Justice.

¹ 31 U.S.C. § 5361.

electronic payment for the purpose of gambling and enforces those state gambling laws that prohibit gambling. Internet gaming is illegal if it crosses into states that have their own regulations on online gambling.

Editor's Note: The district court dismissed all Interactive claims. This summary represents the appellate court's opinion on appeal.

In the case *Interactive v. FTC*² the plaintiff, Interactive challenged the wording of the law, Unlawful Gambling Enforcement Act, stating it was too vague and therefore unconstitutional. Specifically Interactive refers to vague phrases such as “unlawful internet gambling” and “online gambling and internet gaming.”

Editor's Note: Interactive argues that it is impossible to determine what state an internet gambler may be located in and if the gambling is crossing state lines where gambling is illegal. The appellate court rejected this argument stating that Interactive would violate the Act by accepting an electronic bet from any person in a state where gambling is illegal.

Interactive also claimed that people who gamble have the constitutional right to privacy, meaning that anonymous online gambling should be allowed.

Editor's Note: The court found that Interactive cannot raise the claims of their potential gambling clients.

The first issue on appeal was whether the Unlawful Internet Gambling Enforcement Act of 2006³ wording “unlawful internet gambling” was too vague as it is used in the Act, and second whether the Act violated the individual gambler's first amendment right to privacy.

The Court found the Act was not vague and Interactive could not bring potential gambler's claim of a right to privacy.

The Court reasoned that the plaintiff cannot contend that the rights of their users were violated, because “Interactive lacks any real relationship with its gamers.” The users themselves would have to claim their right to privacy was violated.

The Court determined that the Act's wording was not too vague. A person with “ordinary intelligence” could understand what “unlawful

² *Interactive v. FTC*, 580 F.3d 113, (3rd Cir. 2008).

³ 31 U.S.C. §5361.

internet gambling” is the way it is used in the Unlawful Gambling Enforcement Act.

RESEARCH

Gambling on Indian reservations began with a 1976 court ruling which permitted Indian reservations around the country an exemptions from all local and state gambling prohibition regulations. Without any oversight, casinos and gambling operations flourished on tribal-owned land, until concerns of mismanagement caused the federal government to pass a new law in 1988 that allowed some regulation over gambling.

Editor’s Note: In 1988 Congress enacted the The Indian Gaming Regulatory Act (IGRA).⁴

Gaming was divided into three classes ranging from bingo games to slot machines, with federal, state, and tribal authorities each allowed to regulate one class of games.

Editor’s Note: The first class are “social games played solely for prizes of minimal value or traditional forms of Indian gaming engaged in as part of, or in connection with, tribal ceremonies or celebrations.” The second class is bingo type games. These two classes are exclusively governed by the Indian tribes. The third class, cards, roulette, slot machines are governed by IGRA.

In New York State there are three Native American tribes recognized: the Oneida Nation, Mohawk Tribe, and Seneca Nation.⁵ These tribes have signed agreements with New York that allow them to operate casinos as long as the gaming operations follow the rules established by New York. These rules contain provisions to make games fair for all players. The state ensures that all machines are in working order, that casinos are not corrupted by business deals with vendors, and that casinos follow proper accounting procedures. New York also places state employees, known as gaming supervisors, in all casinos 24/7 in case of issues or customer complaints at casinos. All employees of casinos have to be approved by the New York Board of Gaming Operations and undergo a background check

⁴ 25 U.S.C. § 2701.

⁵ https://gaming.ny.gov/gaming/indian_dig1.php (last visited 1/10/2017).

and fingerprinting by law enforcement. These regulations set by New York State are fully funded through fees paid by the Indian reservations.

OPINION

I believe gambling should be limited to Indian reservations only so that tribes have a steady source of income to provide services for their residents.

The poverty rate among residents of Native American reservations reached 72% in 2011, with an unemployment rate of 48%.⁶ The jobs that do exist come overwhelmingly from gaming operations and government programs. If states continue to allow casinos to open on non-reservation land, there will no longer be a reason for patrons to travel long distances to go to Indian-operated casinos. In the 19th and 20th centuries Native Americans were forcibly relocated to reservations in desolate, inhospitable places. Casinos tend to be the only attractions in these areas, so with casinos opening in places closer to major population centers there is no longer a draw to get people to come to reservations. Without the traffic and revenue from gaming operations, tribes will be unable to provide police, fire, and safety net programs to their residents. The jobs lost from the decline of customers in casinos would also prove devastating to areas with already sky-high unemployment rates.

Due to the U.S. government's policies from centuries ago, Native Americans overwhelmingly live in areas that have few economic opportunities. Over the past forty years since gambling on Indian reservations has been allowed, casinos have provided a large tax base and employment opportunity for the people living on the reservations. To allow wealthy developers and business people to build casinos outside of reservations would be fatal to these tribal-run casinos. The economic effect of the loss of these businesses on reservations would be devastating and exacerbate the already third-world conditions of most reservations. After centuries of poor treatment by the United States, the government owes Native Americans limits on expansion of gaming operations outside of reservations so that the economic lifeblood for millions of Native Americans can stay pumping.

CONCLUSION

Interactive, an online gambling company, challenged the government's ability to pass laws that effect online gambling. These protests were found to be without merit and the judge dismissed them.

⁶ <http://indianyouth.org/american-indian-life/poverty-cycle>.

Although online gambling has been somewhat inhibited, onsite gambling can have some benefits.

Gambling on Indian reservations has helped improve the lives of those living on the reservations, providing jobs and a tax base to fund reservation services. By expanding the availability of casinos and gambling off reservations, Native Americans will be left without an economic niche to help them fund their reservations. Because of this, gambling should be allowed only on reservations in order to protect the tribe-owned businesses operating on reservations.

YOUR CUP OF JOE MAY BE CONSIDERED ART

PATRICK PARDO*

Copyright law has always been up for great debate in recent years due to the progression of technology. When one party uses an exact copy of another's creation, then the original artist must give permission and/or pay the original owner to use their work. This is the basic idea of many copyright laws. However, what happens when one party creates a work that is only similar to copyright-protected work? This paper will provide a summary about an interesting copyright case, *Hayuk v. Starbucks*,¹ research on other copyright cases, and my opinion about the decision in the Hayuk case.

CASE SUMMARY

The Plaintiff is an internationally known artist by the name of Maya Hayuk. The defendants in the case are Starbucks Corporation, the coffee distributor and 72and Sunny Partners, LLC, an advertising company.

There are five works of the plaintiff that are at the center of this litigation: Hands Across the Universe, The Universe, The Universe II, Sexy Gazebo, and Kites # 1. The plaintiff registered all of these paintings with the United States Copyright Office.

In each painting, bright rays containing different colors that differ in thickness gesture away from a couple of concentrated points. The rays increase in thickness as they move farther away from the two concentrated points and later cross to create a knitted diamond shape in the center of the work. Numerous amounts of colors are used, which include orange, yellow, cyan, and magenta as being the main colors used with small amounts of green, red, ultramarine, black, red violet, and black-violet.

The two main paintings in this case are Sexy Gazebo and Kite #1. Sexy Gazebo is a painting on three surfaces of a four-sided figure with four concentrated points from which multicolored rays are extended outward in

* Patrick Pardo is a sophomore at St. John's University College of Professional Studies. His major is Legal Studies.

¹ *Hayuk, v. Starbucks Corp. and 72and Sunny Partners, LLC.*, 157 F.Supp.3d 285, S.D.N.Y. (2016).

numerous directions. Kite #1 is a painting with a multi-colored diamond shape in its center that is made up by a wave of vertical, horizontal and diagonal lines.

Defendant 72and Sunny was developing an advertising and media campaign for their client, Starbucks, for their Frappuccino campaign. The Frappuccino prints in the campaign consists of one or more Frappuccino cups with a green straw and colored lines protruding from the straw that intersect at indifferent angles in a triangular figure whose base faces upward. Colors used in the design include blue, yellow, red, green, magenta, and purple. Furthermore, there are ten to fifteen second videos used in the campaign that depict an animation where two Frappuccino chalk outlines merge together. Then, overlapping colored rays fill the outline, which later spills out to depict a triangular shape made up of rays extending from the straw in a crude triangular shape. The artwork portrayed in the Frappuccino ad and Hayuk works may be seen as similar because both use similar colors as well as intersecting lines at irregular angles.

The issue for the court to decide was whether the artwork presented in the Starbucks Frappuccino ad is so similar to Maya Hayuk's works as to violate her copyright.

The Court decided Starbucks Corporation and 72and Sunny Partners art on the cup did not copy Hayuk's copyrighted works.

The court relied on the United States Supreme Court case *Feist Publications v. Rural Tel. Serv. Co., Inc.*, 499 U.S 340 (1991) to support their decision. First, the plaintiff must display ownership of a valid copyright and prove that there was a copy of the basic material of the primary work. Then the plaintiff must display evidence that the defendant's copied their work and the copied work is illegal because a "substantial similarity" is present between the defendant's work and the protectable elements of the works of the plaintiff.

Editor's Note: The "substantial similarity" threshold is outlined in the case Streetwise Maps, Inc. v. VanDam, Inc., 159 F.3d 739, 747 (2d Cir. 1998). The question is whether "an average lay observer would . . . recognize the alleged copy as having been appropriated from the copyrighted work."

In the present case, the plaintiff never claimed that any works from the Frappuccino campaign is an exact copy of all or any portion of her works. Instead, the plaintiff asserted the Frappuccino works are substantially similar in their whole appearance, that is colors and lines to the Hayuk Works.

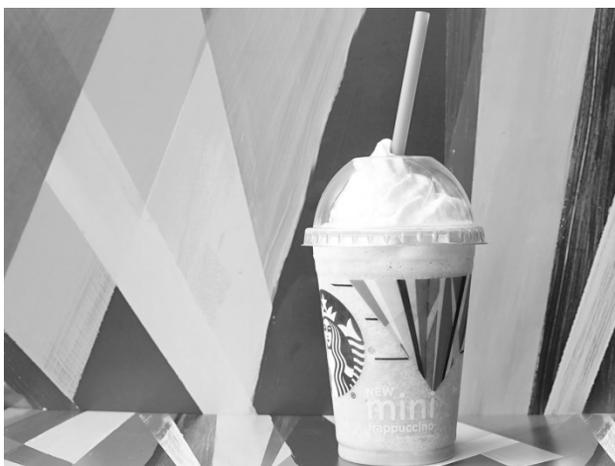
The Court then uses the “ordinary observer test.” to determine copyright infringement. Would “an ordinary observer, unless he set out to detect the disparities (between the works), be disposed to overlook them and regard (the) aesthetic appeal as the same.” The answer was “no.” The Court examined whether the non-copyrightable elements are largely similar.

Editor’s Note: The Court notes that the use of traditional colors and shapes is not protectable. However, creativity of the artist in the originality of combining traditional colors and shapes may culminate in the “total concept and feel” which is a protectable design. (Peter F. Gaito Architecture, LLC v. Simone Development Corp., 602 F.3d 572nd Cir. 2010).

If after a visual inspection of both of the works, the court decides that “the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or that no reasonable jury, properly instructed, could find that the two works are substantially similar,” the court is able to dismiss a copyright infringement complaint. The Court stated Maya Hauyk’s works are standard geometric figures, such as circles, lines, and rays. These elementary designs are not protectable.

Furthermore, when “a given idea is inseparably tied to a particular expression” copyright safeguard to the creation or idea may be turned down “in order to avoid conferring a monopoly on the idea to which it inseparably is tied.”² None of the works in the Frappuccino ads included patterns in a work like “The Universe” work by Hayuk, which combines lines and rounding shapes. None of the Frappuccino ads includes a representation of a central quadrilaterals formed by crossing rays and lines displayed within Kites #1. Furthermore, in the plaintiff’s work “Sexy Gazebo,” physical angles are combined with colored rays and lines to represent a “total look and feel” of a diamond shape interchanging in an inexact manner, none of these qualities are displayed in the Frappuccino ads.

² *Mannion v. Coors Brewing Co.*, 377 F.Supp.2d 444, (S.D.N.Y. 2005).



It is concluded that the accusations brought forward by the plaintiff involve basic elementary material such as geometric shapes that in no way can be protected by copyright law so there can be no copyright monopoly conferred.

RESEARCH

My research is based on an article which contains the copyright law along with many examples of different types of copyright infringement.³ The article gives an example of an artist that found his artwork being used on the set of a new blockbuster movie. Columbia Pictures, the studio producing the movie, did not seek copyright permission to use the artist's work and stated that the way they used the work constituted what is known as "fair use."

Editor's Note: The "Freedom and Innovation Revitalizing United States Entrepreneurship Act of 2007" (FAIR USE Act) gives non-owners of copyrighted material the right to copy material for a limited and "transformative" purpose, such as teaching, commentary, criticize, or parody. This limited use is not in violation of the owner's copyright.

In Steinberg v. Columbia Pictures Industries⁴ the plaintiff Saul Steinberg, an artist claims Columbia took his illustration without permission for purposes of advertising their movie. Defendants claimed fair use based on parody. The court found that the defendant's advertisement did not satirize

³ Parody and the Fair Use Defense to Copyright Infringement: Appropriate Purpose and Object of Humor, Lisa Moloff Kaplan, 26 Ariz. St. L.J. 857 (Fall 1994).

⁴ 663 F. Supp. 706, (SDNY 1987).

the plaintiff's work and therefore he infringed on the artist's copyrighted work.

The main purpose behind complex copyright laws is to reduce the conflicts between free expression rights of creativity and copying. However, sometimes, copyright law can either be the knight in shining armor or the blistering tornado that disassembles everything we know.

Heather J. Meeker, an attorney specializing in intellectual property, views that an overly narrow definition of fair use threatens content, because it prevents criticism and commentary on what has gone on before.⁵ Meeker is also a supporter of artists being allowed to borrow images in order to create new artwork providing that the original artist is compensated.

Marlin H. Smith, writing an article in the Duke Law Journal, asserts that any altered works of art can be used in order to make new works for parodic purposes. Smith is an advocate against the prohibition of parody works.⁶

One exemplary case regarding visual copyright law is that of *Rogers v. Koons*.⁷ In November 1988, Sonnabend Gallery in New York presented an exhibit of Koons' work. The visual art concerning this case is that of the wooden sculpture called "String of Puppies." The sculpture was based off of a copyrighted picture notecard Koons bought in 1986 that depicts a California couple holding eight German Shepard puppies in a row between the man and woman. Once Koons saw the notecard he sent it to artisans in Italy and told them to craft four identical sculptures emphasizing that the animals need to resemble puppies just like in the notecard. The photographer of the notecard, Rogers, licensed it to Museum Graphics, who then produced the notecards. Once Rogers was alerted about the sculpture in New York, he filed suit alleging copyright infringement.

Editor's Note: Koons asserted the parody exception to copyright infringement. He claimed his work was to ridicule Rogers' notecard in a somewhat comedic way.

The court rejected Koons' argument because 'String of Puppies' is so similar to the notecard that an average person could see the obvious similarities.

⁵ <https://www.omm.com/professionals/heather-j-meeker> (last visited 1/12/17).

⁶ The Limits of Copyright: Property, Parody, and the Public Domain. Marlin H. Smith 42 Duke L.J. 1233 (1993).

⁷ 960 F.2d 301, (2d Cir. 1991).

OPINION

I agree with the decision in *Hayuk v. Starbucks* because, according to copyright law, if after a visual inspection of both artistic works, the court deems that “the similarity between two works concerns only non-copyrightable elements of the plaintiff’s work, or that a reasonable jury, properly instructed, could find that the two works are substantially similar,” that court is able to dismiss a copyright infringement complaint. The plaintiff never claimed that any works from the Frappuccino campaign is an exact copy of all or any portion of her work. Instead, the plaintiff argued the Frappuccino works are substantially similar in their “whole appearance” to the Hayuk Works.

I also agree with the plaintiff’s statement claiming that her work and the artwork displayed in the Starbucks campaign looks substantially similar. Both are displays of artwork that utilize many of the same colors that make up thin triangles that intersect in irregular ways.

Although both pieces of artwork do resemble each other, neither are exact copies of one another. In order for the plaintiff, Maya Hayuk, to receive any compensation in the suit, the artwork would have to be an almost exact copy of her work which it is not.

The result of this case is that Starbucks was not liable to Maya Hayuk for using aspects such as the same colors or shapes as seen in Hayuk’s works. These basic shapes and colors cannot be protected by a copyright.

CONCLUSION

The case of *Hayuk v. Starbucks* was very important in determining whether an artist should receive credit or compensation if another party creates a work that is substantially similar to their own. Within this particular case, the artwork used in the Starbucks Frappuccino advertisement looked similar. The court’s ruling in favor of Starbucks has set a future precedent that although two artistic works may look similar, as long as no copyright-protected elements were used in the non-original work, the original artist does not receive any compensation.

TRAGEDY ON THE STATEN ISLAND FERRY

MICHELLE BRAVO-CANO*

Imagine yourself standing on a dock, watching the water splash playfully against the pier. Looking towards the river, you see the ferry making the turn to dock into the pier to unload its current passengers and load new passengers. As the ferry comes closer, you see some of the passengers on the port side looking towards the pier. However, you notice that the ferry continues toward the dock at full speed. By the time you realize what is happening, it is too late. The ferry crashes into the pier, twisting the metal around its bow and crushing the concrete pier.

It is this horrifying image that was a harsh reality to the passengers and crew of the Staten Island ferry on October 15, 2003. Shortly after, the ferry pilot Assistant Capt. Richard J. Smith attempted suicide. One of the passengers, Mr. James McMillan, was left a quadriplegic after having debris fall on him.

This paper will discuss the case of *McMillan v. the State of New York*,¹ and whether his injuries and horrific experience constitutes an award in excess of \$20 million, research on the use of robotics to help paralyzed victims and my opinion on the court decision.

CASE SUMMARY

Mr. McMillan, the plaintiff, was injured in the October 15, 2003 ferry crash and as a result became a quadriplegic. The ferry was owned and operated by the defendant, New York City.

The plaintiff sued the defendant, New York City for their negligence in the operation of the ferry along with a request for money damages due to pain and suffering. In that case, the City was found negligent in their operating of the ferry and the plaintiff was awarded for “. . .past and future damages.”

As a result of the plaintiff’s injury, the plaintiff required 24-hour nursing care in order to bathe, eat, use the bathroom, and other functions of

* Michelle Bravo-Cano is a sophomore at St. John’s University College of Professional Studies. Her major is Legal Studies.

¹ *McMillan v. The City Of New York*, WL 4287573 (EDNY 2008).

his daily life. However, there were periods of time when the plaintiff did not receive adequate nursing care and he developed additional medical conditions such as bedsores and urinary infections.

When the plaintiff was treated at Mt. Sinai Hospital for these newly developed conditions, one of the doctors responsible for his healthcare decided to use a form of catheterization known as “intermittent catheterization.” Other medical professionals who are more experienced in urology had a differing opinion on the use of this catheterization.

The District Court ruled in favor of the plaintiff and awarded him money for his medical expenses and pain and suffering.

The issues before the Court were first, was the plaintiff’s pain and suffering from his quadriplegia condition proportionate to the amount the plaintiff is requesting; and second, did one of the medical professionals responsible for the plaintiff’s care contribute to the plaintiff’s pain and suffering?

The court ruled in favor of the plaintiff and concluded however, that the amount awarded by the jury \$22,945,168 was excessive. The court awarded a total of \$18,278,000.00.

Editor’s Note: The law in this case is governed by General Maritime Law. The jurors determined the award of damages to be \$22,945,168.00. However, this was only advisory and the Judge would ultimately decide the damages to be awarded in this case pursuant to Federal Rules of Civil Procedure 38(e).

Although the plaintiff had indeed suffered greatly as a consequence of his paralysis, the amount he wanted from the case was found to be too excessive for the projected time of his lifespan and for the calculated costs of medical and nurse’s aid he would require until he died.

The costs that were awarded to the plaintiff were based on previous cases such as *Brown v. City of New York*, 275 A.D.2d 726 (2d Dep’t 2000) and *Driscoll v. New York City Transit Authority*, 262 A.D.2d 271, (2d Dep’t 1999). In both these cases, the plaintiffs were injured and were quadriplegics. They received half of what Mr. McMillan was seeking. However, according to the judge presiding over this case, Judge Jack B. Weinstein, prior cases were considered and none of them had a direct impact on the case.

The district court determined that the plaintiff would not need the intermittent catheterization the medical expert Dr. Salzman determined because those procedures were only best if the plaintiff were a paraplegic and not quadriplegic. That procedure would be best for paraplegics because

they could put the catheter on and off by themselves whenever they would need to. For quadriplegics, on the other hand, if they were to use intermittent catheterization, the patient's nurse would have to conduct the procedure during certain intervals throughout the day. This form of catheterization would not be optimal for this specific case because, as stated by the judge, it would interfere with the plaintiff's active lifestyle.

Based on previous cases and their findings, the amount the plaintiff was seeking was too excessive since it was beyond what he would need to cover his medical costs, (including the nurse's 24-hour aid) and projected costs for the plaintiff's life expectancy.

RESEARCH

In 2014, a paralyzed teenager through the use of a robotic leg kicked off the World Cup by literally kicking the ceremonial soccer ball to begin the games.² This had been achieved through rigorous studies conducted by Dr. Miguel Nicolelis and his team. His research consists of having his patients "visualize" they are moving using virtual reality in order to prepare their minds for the robotic legs that are intended to move their limbs. Now some paralyzed individuals are able to walk with the help of robotics and virtual reality. Dr. Miguel Nicolelis, Neuroscience Professor at Duke University,³ lead the "Walk Again Project." Patients participating in this project have reportedly ". . .regained some sensation and function. . ."⁴ and are even able to control some muscles that were previously totally paralyzed. This improvement is as a result of their visualization of movement with virtual reality. However, even with the aid of some robotic legs, patients are still unable to fully support their own weight.

OPINION

Mr. McMillan, although a quadriplegic, does not deserve over 20 million dollars for his medical costs and pain and suffering.

The Staten Island ferry crash of 2003 was a horrific incident in itself. The crash resulted in ten deaths and many injuries of passengers. The deceased were found to either be missing limbs, decapitated, or sliced into two.⁵ For Mr. McMillan, his injuries as a result of the ferry crash would be complicated with other ailments such as urinary infections.

² <https://www.youtube.com/watch?v=TcAvtglo9Jg> (last visited 1/12/2017).

³ <http://bme.duke.edu/faculty/miguel-nicolelis> (last visited 11/28/2016).

⁴ <http://www.npr.org/sections/health-shots/2016/08/11/489524505/robot-like-machines-helped-people-with-spinal-injuries-regain-function> (last visited 11/28/2016).

⁵ <http://www.nytimes.com/2003/10/16/nyregion/the-ferry-crash-overview-10-die-as-staten-island-ferry-slams-into-pier.html> (last visited 11/28/2016).

Despite all of this, I ultimately agree with the judge's decision to award Mr. McMillan only half of what he was requesting. The judge asserted that, although the plaintiff's counsel made great arguments, the amount that was being requested was just too much money. Neither the judge nor I could stress this enough. Moreover, the cases that were considered⁶ had very similar plaintiffs who were awarded 10 million dollars in pain and suffering and projected medical costs.

Also there was the fact the plaintiff went on a vacation after New York City was found liable. It was on this vacation the plaintiff suffered a burn from very hot water. Realistically, one can do whatever they want with their money. However, consider that to pay the judgment the state must recover the money from the taxpayers. Therefore, essentially New York taxpayers paid for the plaintiff's vacation in Florida. Personally, I am offended and do not want to pay for anyone else's vacation.

Additionally, the exorbitant amount originally awarded would have well exceeded what he needed to pay for his projected medical costs until his death.

Therefore, the court's decision to reduce the judgment to a more reasonable amount is "necessary and proper."

CONCLUSION

In this particular case, the courts acknowledged the excessive amounts the plaintiff requested and appropriately modified it. This case was perhaps a clear example of abuse of the system in order to capitalize on a brutal accident. It was arguably an insult to the legal system and an insult to the memory of those who had died so tragically that fateful day.

⁶ *Brown v. City of New York*, 275 A.D.2d 726, (2d Dep't 2000) and *Driscoll v. New York City Transit Authority*, 262 A.D.2d 271, (2d Dep't 1999).